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Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home

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MUST HAVE GOT LOST: TRADITIONAL SENTENCING GOALS, THE FALSE TRAIL OF UNIFORMITY AND PROCESS, AND THE WAY BACK HOME

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I. INTRODUCTION

In the book of Genesis, God is forthright in sentencing:

> Then to Adam He said, "Because you have listened to the voice of your wife, and have eaten from the tree about which I commanded you, saying, 'you shall not eat from it'; Cursed is the ground because of you; In toil you shall eat of it all the days of your life. Both thorns and thistles it shall grow for you; and you will eat the plants of the field; By the sweat of your face you will eat bread, till you return to the ground, because from it you were taken; For you are dust, and to dust you shall return."[1]

And so Adam and Eve were cast out of Eden. The sentence described in Genesis is all about outcome. It primarily speaks to retribution, but could be

1. *Genesis* 3:17-19 (New American Standard). Eve received an equally harsh sentence, that of painful childbirth. *Genesis* 3:16.

read as also addressing the remaining three traditional goals of sentencing: deterrence, incapacitation, and rehabilitation.[2]

Through the centuries, and certainly through the course of most of American history, sentencing has focused on individual outcomes and these traditional goals.[3] However, the historic focus on individual outcomes, carved by judges looking to the future of the individual and society, has been lost within the federal criminal law. The traditional goals have been eclipsed by two inter-connected and powerful forces: first, the broad purpose of making sentences uniform as embodied in the Federal Sentencing Guidelines,[4] and second, the trend toward packing other social goals into the process of sentencing, diluting the role of the traditional, individual outcome goals. Most prominent among these process changes has been the shift of fact-finding from trial to sentencing and the increasing role given to victims.

These changes have largely been driven by the Federal Sentencing Guidelines, which were imposed in 1987.[5] While federal law and the Guidelines themselves continue to profess that they serve the individual outcome goals of incapacitation, retribution, rehabilitation, and deterrence,[6] these same Guidelines have specifically undermined sentencing judges' ability to achieve these goals. In short, the Guidelines' emphasis on superficial uniformity and social goals embedded in the process of sentencing has had an unsettling effect: The judge's job of crafting a sentence for the defendant before her has largely been replaced by the task of conducting a sentencing as rigidly directed by the book before her.[7]

The result of the eclipse of the traditional goals in favor of process[8] and uniformity is that federal sentencing now diverges not only from our long history of judicial discretion in sentencing, but from the core interests of the United States Constitution and American law in at least three ways: First, these

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2. Patricia M. Wald, *Why Focus on Women Offenders?*, 16 CRIM. JUST. 10, 11 (Spring 2001) (listing traditional goals of sentencing).

3. *See generally* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9-22 (1998) (describing the role of goals of punishment and rehabilitation in American history).

4. U.S. SENTENCING GUIDELINES MANUAL § 1A3 (2001).

5. *Id.* § 1A2.

6. 18 U.S.C. § 3553(a)(2); U.S. SENTENCING GUIDELINES MANUAL § 1A (2001).

7. *See* STITH & CABRANES, *supra* note 3, at 84 ("The sentencing proceeding itself has been recast from a discretionary into a formal adjudicatory process, in which the court makes findings of fact that translate into sentencing requirements under the Guidelines."). While many have decried the loss of discretion by sentencing judges, most powerfully Stith and Cabranes, this change has not yet been thoroughly analyzed with a sustained focus on outcome and process goals.

8. In this Article, "process" refers to the mechanism set out by the Guidelines to determine a sentence. This is much different than, and often in tension with, Due Process as required in the United States Constitution, and the two should not be confused. While Due Process protects individual rights, the process required by the Guidelines seeks to impose uniformity between sentences, a project that necessarily sets aside the individual consideration essential to Due Process.

core interests direct justice to look more often to individual outcomes, rather than to group equities or efficiency through process as an end in itself.[9] Most recently, the importance of individualized consideration has been strongly expressed within the field of sentencing in death penalty cases, while the Guidelines head in the opposite direction. Second, fact-finding was historically a function of trial, and its shift to sentencing has resulted in an unsettling loss of rights. Third, the admirable goal of giving the victim a role in prosecution has undercut the traditional maxim that the prosecutor has no client but justice.

Sentencing judges' subversion of the Guidelines[10] may be a result of the conflict between these core interests and the Guidelines—the judges are being loyal to legal values inculcated through a life in the law, rather than to the Guidelines and the different set of value-laden goals they further.

The purpose of this Article is not simply to document the loss of sentencing's traditional goals under the Guidelines' rigid format for arriving at a sentence (that task has been done quite well by others),[11] but to add to the existing discussion. Specifically, I hope to describe how the Guidelines, under the rubric of uniformity, have not just ignored, but have actively prevented consideration of the traditional goals. Further, this Article will show how, together with (and as a part of) the machinery of uniformity, the emergence of fact-finding as a goal of sentencing has run over and killed the traditional goals.[12] This is so because under the Guidelines these factors are assured an active and often determinative role in the sentencing process, an active role now denied the traditional goals.[13] Finally, this Article offers specific reforms of the Federal Sentencing Guidelines which would allow the traditional goals

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9. *See infra* Part III.A.

10. Ten years ago, Prof. Daniel Freed observed that, because of such subversion, an "underground level of sentencing seems to be displacing the first, visible level." Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1683 (1992); *see also* STITH & CABRANES, *supra* note 3, at 5 ("Ironically, however, disparity—different sentences for defendants whose crimes and criminal histories seem similar—may be as great under the Guidelines as it was under the discretionary system it replaced.").

11. *See generally* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21 (2000); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413 (1992); Daniel J. Freed & Marc Miller, *Taking "Purposes" Seriously: The Neglected Requirement of Guideline Sentencing*, 3 FED. SENT. REP. 295 (1991) (introducing an issue devoted to the purposes of sentencing).

12. Of course, the shift of fact-finding to sentencing is largely driven by the Guidelines' quest for uniformity. Uniformity requires the creation of categories of similar defendants, which in turn requires that sentencing bring out the facts needed to sort the defendants.

13. This Article addresses the growth of fact-finding and victim participation in sentencing as process goals, but there are others. For example, as thoroughly addressed by Doug Berman, the Guidelines' requirement that certain factors be outside the "heartland" of cases for a departure to be appropriate creates a process to be fulfilled by the judge, with no relation to the goals the Guidelines are supposed to promote. Berman, *supra* note 11, at 66-69; *see also* Michael Goldsmith & Marcus Porter, *Lake Wobegon and the U.S. Sentencing Guidelines: The Problem of Disparate Departures*, 69 GEO. WASH. L. REV. 57, 88-89 (2000).

a more vigorous role in the life of federal criminal law, within the context of the Guideline system which is already in place.

Part II of this Article will describe the ways in which the traditional goals have been lost and may be further lost in the future. First, it will address the ways in which uniformity was enforced with the imposition of the Guidelines in 1987 by describing the rigid structural process put in place, the limitations placed on consideration of personal characteristics, and the elimination of parole. Second, it will examine in detail the already-expanded role of fact-finding in sentencing. Finally, it will look to what may be a future threat to the traditional goals, embodied in the still-evolving call for victim participation in sentencing.

Part III will examine the impact of these changes on the Sentencing Commission, the sentencing judge, and the prosecutor, as each works within a system which increasingly is focused on process goals and adrift from the traditional outcome goals of retribution, deterrence, rehabilitation, and incapacitation.

Part IV assesses the costs of these changes on the system as a whole and the disparity between goals expressed elsewhere in the law and those now promoted in federal sentencing. Finally, three changes are suggested: that the traditional goals be favored under the Guidelines as the express basis for limited departures from the ordinary Guideline range, that the current relevant conduct rule be displaced in favor of a possible upward departure based on the need for incapacitation, and that defendants be allowed to move for a downward departure where they have cooperated with the government, on the basis of a decreased need for retribution. By inserting the traditional goals into those areas where the Guidelines are most actively used, we can come closer to an honest, fair system which recognizes the ability of the judge to do more than follow and manipulate a complex and methodical process divorced from their own best instincts.

II. HOW WE GOT LOST

The year 1987 was revolutionary in federal sentencing. The first Sentencing Manual was issued, which simultaneously proclaimed and destroyed the traditional sentencing goals of retribution, deterrence, rehabilitation, and incapacitation. These goals were simply not included in the structure of the Guidelines and were replaced by a methodical process of arithmetic calculations and rules which furthered, more than anything, the goal of efficiency by encouraging pleas and shifting fact-finding from trial to the sentencing hearing.

A. Uniformity and the Sentencing Guidelines

1. Pledging (False) Allegiance to the Traditional Outcome Goals

The Federal Statute governing "imposition of a sentence," 18 U.S.C. § 3553(a), directs that

> [t]he court, in determining the particular sentence to be imposed, shall consider . . .
> (2) the need for the sentence imposed–
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. . . .[14]

In order, these goals[15] are usually described as retribution, deterrence,[16] incapacitation, and rehabilitation.[17] However, each can fairly be described as an individual outcome goal of sentencing—that is, one which will be fulfilled as to the defendant only by the sentence which is imposed. For example, incapacitation is achieved by the person actually serving a sentence of ten years in prison, that being the outcome of the sentencing process.

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14. 18 U.S.C. § 3553(a) (2000).

15. The goals of sentencing as traditionally expressed prior to the advent of the Sentencing Guidelines sometimes also included "denunciation," which has been defined as using the sentence "as a symbol of distinctively criminal 'guilt,' as an affirmation and re-enforcement of moral standards, and as reassurance to the law abiding." MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 106 (1973). Elements of denunciation appear to be intermingled with the goal of retribution in 18 U.S.C. § 3553(a)(2)(A). Denunciation would seem to be a process goal, in that it is achieved simply by the process of issuing a sentence, rather than by service of the sentence.

16. At times, the goal set out in 18 U.S.C. § 3553(a)(2)(C) will be described as specific deterrence rather than incapacitation. *E.g.*, United States v. Burgos, 276 F.3d 1284, 1288 (11th Cir. 2001) ("First, in enacting 18 U.S.C. § 3553(a)(2) (2000), Congress codified four sentencing objectives courts must take into account in fashioning a sentence: punishment, general deterrence, specific deterrence, and rehabilitation."). This construction seems inaccurate, as true specific deterrence would extend beyond the period of incapacitation to any subsequent period in which the defendant is otherwise free to commit crimes but for the fear of the punishment she has already experienced. In other words, specific deterrence is distinct from incapacitation in that it is not limited to that period in which the defendant is incapacitated.

17. Some commentators have claimed that Congress removed the goal of rehabilitation in passing the Sentencing Reform Act. MILLER, *supra* note 11, at 434. However, the plain language of the statute contains this "corrective" goal. *See* 18 U.S.C. § 3553(a)(2)(D) (2000).

In turn, the Guidelines refer to these four basic goals of sentencing on the very first page, below the section heading *The Statutory Mission*: "The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation."[18]

These same goals are again referred to in the introduction to the Guidelines' section on criminal history: "The Comprehensive Crime Control Act sets forth four purposes of sentencing. (*See* 18 U.S.C. § 3553(a)(2).)"[19]

However, this pledge of allegiance to the mandate of history was lost in a very large mix. The Sentencing Commission took on a long list of stated mandates, most of which had nothing to do with the traditional outcome goals.

Consider a list of just the most obviously stated of those policy directives:

- To reduce disparities through greater "uniformity."[20]
- To limit the effects of age, education, vocational skills, mental condition, physical condition, employment record, family relationships and community ties on sentencing.[21]
- To achieve "truth in sentencing" by eliminating parole.[22]
- To somehow merge real offense and charge offense sentencing practices.[23]
- To enhance efficiency by encouraging plea agreements.[24]
- To achieve "proportionality" between different criminal acts.[25]
- To reflect "advancement in knowledge of human behavior as it relates to the criminal justice process."[26]
- To take into account current prison capacity.[27]

The first three of these mandates reflect different facets of the same objective—the reduction of disparities and achievement of greater uniformity. While sharing this common genesis, each has played a major role in developing a system which actively prevents judges from pursuing the traditional

18. U.S. SENTENCING GUIDELINES MANUAL § 1(A) (2001).

19. *Id.* § 4A1.1 introductory cmt.

20. *Id.* § 1A3; 28 U.S.C. § 991(b)(1)(B).

21. 28 U.S.C. § 994(d) (2000).

22. U.S. SENTENCING GUIDELINES MANUAL § 1A3 (2001).

23. *Id.* § 1A4(a). Real offense sentencing considers the actions of the defendant, regardless of what he is charged by the government. Charge offense sentencing limits its consideration to what is described in the indictment or information. The Sentencing Guidelines contain elements of both. *Id.*

24. *Id.* § 1A4(c).

25. *Id.* § 1A3.

26. 28 U.S.C. § 991(b)(1)(C) (2000).

27. 28 U.S.C. § 994(g) (2000) (directing Commission to take into account the capacity of the prison system). As § 994(g) is an example, some of these policy directives were explicitly set forth in the statute, which gave primary direction to the Sentencing Commission. *Id.*

sentencing goals, as discussed below. Notably, at least a few of these mandates (which are not related to uniformity) have been actively ignored by the Sentencing Commission, especially at the development stage of the Guidelines. For example, the directive that the Guidelines reflect advancements in psychology was flatly ignored.[28] Similarly, prison capacity has had to follow the effects of the Guidelines (and mandatory minimums) rather than vice versa, resulting in the building of additional capacity as sentences have grown longer.[29]

2. *The Mandate of Uniformity and the Death of Discretion*

As opposed to creating a system to allow judges to evaluate these traditional goals, the language of section 1A of the Guidelines makes it clear that it is the Guidelines themselves that should encompass these goals[30]—that the *Guidelines* will direct sentencing judges to specific outcomes which punish, deter, incapacitate, and rehabilitate, rather than the judge doing so based on her own perceptions.[31] In other words, it is the formulaic operation of the Guideline calculation which will achieve the traditional outcome goals. However, the Sentencing Guidelines which emerged fail at this task.[32]

And how could the Guidelines *not* fail? The bare fact damning this task to failure was that the Guidelines were expressly developed to eliminate the very discretion which allowed these individual goals to be achieved in distinct cases—discretion which was seen as fostering disparities in sentencing.[33] But, of course, the ability of the sentencing judge in the pre-Guidelines regime to take into account the individual characteristics of the defendant was precisely

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28. One compelling critique of this process is that it failed to consider factors other than "prior federal sentencing decisions and theory that came primarily from economics," to the exclusion of psychological theory. R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 742 (2001).

29. Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 72 & n.53 (1993).

30. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A (2001). At section 1B1.1, the Guidelines instruct judges on how to determine a sentence, but at no point do the Guidelines instruct a consideration of the traditional sentencing goals, other than as they might implicitly be incorporated into the Guidelines themselves. *Id.* § 1B1.1.

31. The statute creating the Sentencing Commission also claims that a "purpose" of the Commission in creating the Guidelines is to "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code." 28 U.S.C. § 991(b)(1)(a) (2000).

32. In his seminal article on the purposes of sentencing under the Guidelines, Marc Miller noted that the Guidelines project was unique in trying to take the traditional goals out of the hands of the judges and push them into rules controlling the judges, and he suggested that "[t]his absence of prior models for integrating sentencing purposes into actual systems suggests the difficulty of the exercise. It raises questions about whether such an integration is possible and whether such a difficult effort is likely to be worthwhile." MILLER, *supra* note 11, at 479-80.

33. *See* STITH & CABRANES, *supra* note 3, at 104.

what created the "disparities" which led to the imposition of the Guidelines. It is no surprise that the reaction to these disparities (the Guidelines) swept away the ability to achieve the goals which motivated judges to give those disparate sentences in the first place. Perhaps what should be surprising is that the Guidelines even purport to further those goals they had made obsolete.

Giving way to this quandary, the Sentencing Commission purposefully punted away these traditional goals in drafting the initial Guidelines. Rather, they expressly decided not to base the sentencing grid on any one or all of the traditional factors and decided instead to codify what the "typical, or average, actual past practice" was in the federal system for each crime.[34] Other options were present—for example, the Commission could have decided which crimes deserved longer sentences because rehabilitation was less likely or retribution more deserved. By simply replicating past patterns, the Commission passed on this most basic opportunity to make the traditional goals mean something in the modern era. Thus, no underlying principle other than uniformity was the functional basis for the Guidelines as written.

3. *The Creation of the Uniformity Machine*

Demanding that sentences be made more uniform from one case to the next[35] did the most damage to the pursuit of the traditional purposes of sentencing. Of course, uniformity of sentences works directly in opposition to the traditional individual outcome goals. In forcing sentences to be more uniform, the Guidelines strike directly at the ability of the sentencing judge to consider the traditional goals. Those goals, especially rehabilitation, require an examination of individual factors in each case—a project in direct tension with the goal of uniformity.

Under the Guidelines that were established, uniformity was achieved primarily by creating a mechanistic mathematical formula using certain facts about the case.[36] This directs the sentencing judge to determine whether certain factors are present, calculate the defendant's criminal history, and pick a sentence from a narrow range described in a 258-box grid with two axes—one reflecting the facts of the offense (the offense score), the other based on the criminal history of the defendant.[37] The only escape from these narrow ranges is via a "departure," which is allowable only when the defendant cooperates with the government or some factor in the case was "not adequately taken into consideration by the Sentencing Commission in formulating the

34. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 17 (1988). Justice Breyer was a member of the Commission which originally drafted the Guidelines.

35. U.S. SENTENCING GUIDELINES MANUAL § 1A3 (2001).

36. *See id.* § 1B1.1.

37. *See id.* § 5A.

guidelines . . . ."[38] The Guidelines, in mandating the formulaic calculation of a sentence on the grid, excluded the traditional goals of sentencing from those arcane calculations. While the thick-as-your-wrist Guideline Manual specifically directs sentencing judges to make thousands of determinations on discrete points, *not once* does it direct that a specific decision leading to the applicable guideline range on the 258-box grid should or must turn on the consideration of one or all of the traditional goals of sentencing.

4. The Limitations on Considering Personal Characteristics

Not only do the Guidelines ignore the traditional goals of sentencing, in some ways they actively prevent the traditional goals from being considered. Tied to the goal of more uniform sentences is the mandate that the Guidelines limit consideration of personal characteristics such as age, education, vocational skills, mental condition, physical condition, employment record, and family and community ties, and the directive that wealth be barred from consideration.[39] However, these same factors constitute much of what informs a judge's decision to, for example, seek rehabilitation in a given case. After all, if a defendant has vocational skills and strong family ties, it will be more likely that she can be rehabilitated if tethered to work and family.

Consistent with the statutory mandate, under the Guidelines, the factors of age,[40] education,[41] vocational skills,[42] mental condition,[43] physical condition,[44] employment record,[45] and family and community ties[46] are deemed "not ordinarily relevant"[47] in determining whether a sentence may be outside the very restrictive range[48] described in the Guidelines. Even after the Supreme Court's decision in *Koon v. United States*,[49] these personal characteristics are only considered "if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines."[50] Were the traditional outcome goals to be honored,[51] these factors

38. *Id.* § 5K2.0 (quoting 18 U.S.C. § 3553 (b) (2000)).
39. 28 U.S.C. § 994(d) (2000).
40. U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2001).
41. *Id.* § 5H1.2.
42. *Id.*
43. *Id.* § 5H1.3.
44. *Id.* § 5H1.4.
45. *Id.* § 5H1.5.
46. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2001).
47. *Id.*
48. By law, the top end of such a range can only be 25% higher than the bottom end. 28 U.S.C. § 994(b)(2) (2000).
49. 518 U.S. 81, 113 (1996).
50. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2001).
51. Intriguingly, in the wake of the Guidelines and *Koon*, the goals of sentencing have been described as simply "uniformity" and "fairness." Deborah E. Dezelan, Case Comment, *Departures from the Federal Sentencing Guidelines after* Koon v. United States*: More*

would be useful in cases not cast as "unusual."[52] For example, were incapacitation truly to remain a factor, an examination of education and vocational skills should be a consideration. A man or woman with no employment prospects or an unstable emotional condition is more likely to return to crime, and thus could be a stronger candidate for incapacitation. Similarly, someone with skills and education (or the willingness to get them while in prison) is more likely to be rehabilitated in prison and is a candidate for an earlier, successful release.

The Guidelines are even stricter in limiting consideration of wealth: The factor of socioeconomic status is barred from consideration "in the determination of a sentence."[53] This immovable barrier prevents the court from pursuing the goal of retribution by more harshly punishing those who have benefited most from the society they violated or, conversely, less harshly punishing those who have benefited little from society.[54] While the goal of limiting discretion as to certain facts about the defendant may achieve a reduction in bias by judges, it also effectively guts their ability to honestly evaluate the potential for retribution, deterrence, rehabilitation, and incapacitation in individual defendants.

5. *The Elimination of Parole*

The final nail in the coffin for the traditional outcome goals was the Guidelines' elimination of parole in the federal system.[55] This single act badly damaged the vitality of the traditional outcome goals—as it eliminated the player best positioned to evaluate and effectuate those goals, the Parole Commission.

Prior to the advent of the Guidelines era, the percentage of the sentence that would actually be served was controlled by the Parole Commission, an executive branch agency. The sentencing judge would issue a sentence,[56] but the Parole Commission would determine the release date and the conditions of

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Discretion, Less Discretion, 72 NOTRE DAME L. REV. 1679, 1683 (1997).

52. Under the present rule, counsel and commentators are spending their time trying to define and redefine "ordinary" and "extraordinary." For example, some have argued that a female inmate who has children is not "ordinary," and thus a departure may be appropriate, despite the large proportion of female inmates who have children. *See* Myrna S. Raeder, *Remember the Family: Seven Myths About Single Parenting Departures*, 13 FED. SENT. REP. 251, 251-52 (2001).

53. U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2001).

54. Of course, this restriction also prevents a judge from giving a defendant a break simply because the defendant is wealthy. It is doubtful that a judge would expressly base a departure downward on the fact that a defendant is well-off, though this practice could be pursued by misdirection with or without the Guidelines.

55. 18 U.S.C. §§ 4201-4218 (repealed 1987).

56. Knowing that the parole board could modify the sentence, some judges tried to anticipate parole when crafting sentences, a factor which probably created disparities. Freed, *supra* note 10, at 1688.

release.[57] The parole board was able to adjust a sentence to fit the traditional goals based not only on the crime committed and the defendant's criminal history, but on behavior during incarceration.[58] Obviously, the parole board was well situated to review these outcome goals since part of the intended outcome had already occurred. For example, rehabilitation could be evaluated based on accomplishments toward that goal. With the Guidelines, this tool for achieving outcome goals was gone.[59] Were the Guidelines again to accommodate consideration of the traditional individual outcome factors, the evaluation of those factors would be solely in the hands of the sentencing judges and the appellate court which reviews them. Regardless of whether the Guidelines are amended as suggested below, the elimination of parole is unlikely to be reversed,[60] and any future individual consideration of retribution, deterrence, rehabilitation, and incapacitation in sentencing is likely to be based only on foresight, rather than hindsight.

B. Good-bye Trial, Hello Sentence Hearing: Fact-Finding Becomes a Process Goal of Sentencing

Much has been made of the increasing importance under the Federal Sentencing Guidelines of section 5K1.1,[61] which allows for a departure from the Guidelines "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person . . . ."[62] However, section 5K1.1 is only part of a larger trend under the Guidelines. As described below, incentives are provided throughout the Guidelines for the parties to bring out facts at sentencing.[63]

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57. Frank O. Bowman, III, *Fear of Law: Thoughts on* Fear of Judging *and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 302 (2000).

58. 18 U.S.C. § 4206 (repealed 1987).

59. The Guidelines did not alter the existence of "good time" credit in the prison, though such credit was limited to 15% of time served. 18 U.S.C. § 3624(b) (2000). *See also* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 176-77 & n.51 (1991) (comparing guideline to pre-guideline sentences).

60. United States v. Bogle, 693 F. Supp. 1102, 1111 (S.D. Fla. 1988) ("To abolish the Guideline system and yet find that the elimination of parole was severable would be to exacerbate the very problem of disparity in sentencing that Congress sought to remedy by the Act.").

61. *See, e.g.*, *The American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1503 (2001) [hereinafter *Trial Lawyers Proposal*] (proposing changes to section 5K1.1 that could provide greater fairness in the system).

62. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2001).

63. Of course, the ability to bring out facts at sentencing is not new. For example, even the ability to increase a sentence based on conduct for which a defendant has been acquitted (in some cases, on the basis of evidence brought out at sentencing but not at trial) predates the Guidelines. *See* Barry L. Johnson, *If At First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153, 195-96 (1996). What is new is the provision of expressly stated incentives to the defendant to bring forth facts. This incentive

This goal of bringing out the truth has now been established through practice as a practical goal of sentencing which is entirely fulfilled (or fails) prior to the issuance of the sentence itself and is embedded not in that sentence, but in the *process* leading up to the sentencing. In many cases, the process of fact-finding—through departures under section 5K1.1, adjustments for acceptance of responsibility, application of the "safety valve" provision in drug cases, and the use of relevant conduct against the defendant—has more of an effect on the sentence than any other factor. In particular, the emergence of this process goal has further obscured the traditional individual outcome goals the Guidelines supposedly promote, perhaps delivering the death blow to those fundamental ideals of criminal law that the traditional goals embody.

The emerging importance of fact-finding at sentencing is in part a function of the fact that so many cases are now resolved by plea rather than trial, deferring to the sentencing phase questions that would, in the past, have been determined by evidence at trial. For example, in the year 2000, 95.5% of convicted federal defendants pled guilty and avoided trial.[64] Anyone doubting the significance of the movement of evidence presentation to sentencing and the complexity of the issues related to the movement in both state and federal systems should be convinced by the tumult[65] surrounding the United States Supreme Court's decision in *Apprendi v. United States*.[66] There, the Supreme Court held that New Jersey's law shifting the ability to enhance a sentence above statutory maximums to the sentencing judge was unconstitutional.[67] The problem identified by the Supreme Court in the New Jersey system is a symptom of the same problem explored here: the departure from tradition in shifting fact-finding to sentencing, which unfortunately also marks a departure from the goals and protections offered by the old system.

1. Section 5K1.1 as the 900-Pound Gorilla of Sentencing

Section 5K1.1 is fairly unusual within the Sentencing Guidelines because it offers the Court (and, through negotiation in some cases, the parties) the

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is made more appealing to defendants as the Guidelines have eliminated other possible ways of reducing sentences, including appeals to the traditional sentencing goals, such as an argument that rehabilitation is possible because of vocational skills. *See id.*

64. U.S. Sentencing Comm'n, Federal Sentencing Statistics by State, District & Circuit (2000), *Mode of Conviction by Primary Offense Category*, http://www.ussc.gov/JUDPACK/JP2000.htm.

65. *See, e.g.*, Stephanos Bibos, *How* Apprendi *Affects Institutional Allocations of Power*, 87 IOWA L. REV. 465 (2002) (exploring the impact of *Apprendi* on the allocation of power in the criminal justice system).

66. 530 U.S. 466 (2000).

67. *Id.* at 497.

nearly unique[68] ability to obtain a downward departure[69] below not only the guideline range, but below a statutory mandatory minimum sentence.[70]

The significance of the downward departure for cooperation would be hard to underestimate. As even federal prosecutors will admit, it is rare for a multi-defendant federal case to be free of government witnesses who are not enjoying either a break on their own sentence or a grant of immunity.[71] Nationwide,[72] such departures are granted in about nineteen percent of all cases with a criminal conviction and constitute no less than *seventy percent* of all departures.[73] However, this is just a fraction of the cases impacted by section 5K1.1. Making these numbers even more significant is the fact that less than half of those defendants who provide assistance to the government receive a departure for their efforts.[74]

These numbers reflect what prosecutors and defense attorneys know by experience: that section 5K1.1 departures are very often the most important part of the case in determining the ultimate sentence,[75] certainly more important than the traditional goals.[76]

Of course, there is a reason behind this most important incentive in the entire Guidelines system: Such cooperation can make criminal prosecutions more efficient, in part, by inducing more defendants to plead guilty (once a co-

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68. The only other provision allowing a departure below statutory mandatory minimums is Guideline section 5C1.2 (in conjunction with 18 U.S.C. § 3553(f) (2000)) often referred to as the "safety valve" provision in narcotics cases. As discussed below, this section also requires the defendant to provide facts honestly. U.S. SENTENCING GUIDELINES MANUAL § 5C1.2(a)(5) (2001).

69. Though section 5K1.1 speaks generally only of "departures," it is unlikely that any judge would give an upward departure where the government has certified the defendant's substantial assistance. *Id.* § 5K1.1.

70. *See* 18 U.S.C. § 3553(e) (2000); 28 U.S.C. § 994(n) (2000).

71. George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 1 (2000).

72. Notably, the rates of departure under section 5K1.1 vary widely from district to district, even within the same geographic region. For example, in 1995, the District of Connecticut granted departures in less than 10% of all such cases, while in the Eastern District of Pennsylvania, a departure was made under section 5K1.1 in 42% of eligible cases. STITH & CABRANES, *supra* note 3, at 117.

73. *Trial Lawyers Proposal*, *supra* note 61, at 1503-04.

74. *Trial Lawyers Proposal*, *supra* note 61, at 1504.

75. The incentive to cooperate is especially strong in narcotics cases. Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 928 (1999). This is no doubt true in part because of the strict mandatory minimum sentences under federal law. For example, distribution of only five grams of crack cocaine brings a mandatory minimum sentence of five years. 21 U.S.C. § 841(b)(1)(B)(iii) (2000).

76. The fading significance of the traditional goals is reflected in the rarity of cases in which those goals shape the extent of a departure under section 5K1.1. One such case is *United States v. Casiano*, 923 F. Supp. 684, 688 (E.D. Pa. 1996), *aff'd*, 113 F.3d 420 (3d Cir. 1997), where the trial judge expressly cited the goals of "punishment, rehabilitation, deterrence, and the protection of society" as reasons for not departing further, as the defendant had urged.

defendant has rolled over on them).[77] However, this is not an unmitigated good: Providing a uniquely strong incentive to defendants to provide information on others can be, unfortunately, as much of an incentive to dishonest information as it is to honest information. This is especially true when there is a mandatory minimum and the only way around that floor is to provide information to the government.[78]

One commentator, having spoken to federal prosecutors at length about the use of cooperating defendants hopeful to get a downward departure under section 5K1.1, concluded that this strong motivation to provide information, true or untrue, was one reason that the use of unreliable cooperator testimony was a problem warranting "further study and reform."[79] Another commentator has concluded that "[t]he probative value of any potentially coerced testimony is suspect; courts have recognized the power of emotional coercion as well as physical intimidation."[80] At one point, a panel of the Tenth Circuit, before being overturned en banc, even ruled that the government's recommendation for a break under section 5K1.1 in return for testimony was a violation of the federal gratuity statute,[81] a decision which, despite its reversal, had "quick and widespread aftershocks."[82]

Given the near-unanimity of these critiques, it is fair to say that the policy reason behind section 5K1.1 (to encourage defendants to cooperate with the government in investigations) may be seen as a double-edged sword, encouraging both honest and dishonest information.[83] This ambivalent accomplishment is even more frightening in context: The process goal of bringing forth cooperator information now is far more important than the traditional outcome goals. For example, while the hope for retribution has been

77. Korin K. Ewing, Note, *Establishing an Equal Playing Field for Criminal Defendants in the Aftermath of* United States v. Singleton, 49 DUKE L.J. 1371, 1397 (2000).

78. The problem in many cases is not that the defendants lie to hide their own involvement, but lie to give the prosecutors what the defendant thinks the prosecutor wants. Yaroshefsky, *supra* note 75, at 952-53. This is exacerbated by the Guidelines' requirement that the cooperation be of "substantial assistance" to the government. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2001). Thus, since the information must be helpful to the government, defendants may succumb to the temptation to create evidence that would meet this level.

79. Yaroshefsky, *supra* note 75, at 921.

80. Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect For the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835, 871 (1993).

81. United States v. Singleton, 144 F.3d 1343, 1355 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999), *cert. denied*, 527 U.S. 1024 (1999).

82. Ewing, *supra* note 77, at 1375.

83. Of course, dishonest information should not be rewarded with a departure. However, the Guidelines oddly do not prevent a downward departure when the defendant has provided wrong information, noting only that "truthfulness, completeness, and reliability" are factors that a judge may consider in deciding upon the degree of departure to be given. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1(a)(2) (2001).

emasculated as a consideration at sentencing,[84] the pursuit of cooperator testimony has been put in a unique position: It now represents the golden key which removes the shackles of both the Guidelines and mandatory minimum sentences.

Sadly, the goal of encouraging cooperation has not only arisen to take the place of the traditional goals of sentencing in determining what a sentence will be, but has now come in direct conflict with the primary outcome goal established by the guidelines themselves—uniformity. Rates of departure under section 5K1.1 between even neighboring districts vary by as much as over 100%,[85] thus introducing back into the system the very disparities the Guidelines were meant to address.[86] In the end, the traditional goals have been replaced by new priorities, uniformity and fact-finding, which cannot even get along with one another.

Furthermore, section 5K1.1 is not the only problematic part of the Guidelines' regime which promotes fact-finding at the expense of the traditional goals. As described below, the goal of fact-finding by the defendant is propagated in the rules regulating the probation interview as well as through other parts of the Guidelines.

2. *The Problem of Truth at the Probation Interview*

In nearly all federal cases, the probation officer interviews the defendant as part of her preparations to write a presentence report for the sentencing judge.[87] The defendant has the right to have counsel present at this interview, but counsel's presence is not mandatory.[88] At that interview, the defendant must divulge all prior convictions and arrests[89] and may be pressed to discuss the facts of the case at issue. The penalties for failing to tell the truth or give

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84. Primarily, the ability to consider rehabilitation is limited by the sentencing grid itself and the bar on considering factors such as vocational training at sentencing. *See* discussion *supra* Part II.

85. For example, in 1996, New Hampshire had an average departure rate of 43%, while it's neighbor, Maine, had a rate of 19% with the same number of prosecutions. Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 603 (1999). Similarly, federal judges in Massachusetts departed under section 5K1.1 in 25.6% of the eligible cases, while in Rhode Island, next door, such departures were made in only 4.6% of similar cases. *Id.* at 603-04.

86. These disparities may be explained in part by distinctions between federal circuits, which encompass several states and often develop divergent precedents on sentencing issues. One writer, having extensively researched the practices of federal judges in Connecticut (part of the Second Circuit) and Massachusetts (part of the First Circuit), concluded that the disparity between those districts may have something to do with "the First Circuit's distaste for sentences outside the Guidelines range." Lisa L. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 631 (1998).

87. FED. R. CRIM. P. 32(b).

88. FED. R. CRIM. P. 32(b)(2).

89. Christopher P. Yates & Louise E. Herrick, *Going on Record: The Perils of Discussing Criminal History During the Presentence Interview*, 13 FED. SENT. REP. 330, 330 (2001).

complete information can be grave and can include an enhancement for obstruction of justice.[90]

Again, the Guidelines, through the obstruction of justice enhancement, express an overriding interest in the defendant conveying facts, this time at the probation interview. Again, the interest appears to be that of efficiency: if the defendant ponies up the facts, the probation officer does not have to chase them down elsewhere. This goal of truth-telling, like that directed at cooperating defendants, has its problems.

As one federal public defender has described it, the requirement that the defendant reveal full and complete truth may not be as simple as it appears on its face. In his experience, client recollections of criminal history are "not nearly as reliable as one might assume given that, on the complicated subject of criminal history, even the most well-intentioned clients are remarkably poor historians."[91] He notes pragmatically that a defendant may simply not realize that he was convicted of a crime if, for example, it resulted from a family fight with a brother and resulted in "no real consequences following his court date."[92] This defender's story makes the point that the goal of truth-telling by the defendant may endanger justice even when the defendant is neither a cooperating witness nor convicted by the testimony of a cooperating witness receiving a section 5K1.1 departure. Thus, the shift of fact-finding from trial to sentencing has changed even those parts of the sentencing process which are generally unseen.

3. *The Odd Requirement of Truth in the Federal "Safety Valve"*

Guideline section 5C1.2, commonly referred to as the "safety valve" provision, in conjunction with section 2D1.1(b)(6), provides two substantial benefits to some defendants in narcotics trafficking cases: First, his offense score is lowered by two points.[93] Second, and often more importantly, the requirement of a mandatory minimum sentence is removed.[94] In order to receive these benefits, each of the following must be true:

> (1) the defendant does not have more than [one] criminal history point . . . ;
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

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90. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2001)).

91. Daniel W. Stiller, *Chapter Four Surprises and a Defender's Longest Drive*, 13 FED. SENT. REP. 323, 324 (2001).

92. *Id.*

93. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(6) (2001).

94. *Id.* § 5C1.2(a); 18 U.S.C. § 3553(f) (2000).

(3) the offense did not result in death or serious bodily injury to any person;
(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense . . . ; and
(5) *not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan*, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.[95]

The first four of these requirements are straightforward—society does not want to give a break to those with extensive criminal histories,[96] who were violent and/or caused physical harm,[97] or who played a leadership role in the offense.[98] However, the requirement that the defendant provide information to the government does not fit the same mold of excluding those whose crime should bar a break from mandatory sentencing. Rather, it promotes the same goal as section 5K1.1: to encourage defendants to provide information to the government as part of the sentencing process.

The "safety valve" was not a part of the Guidelines until it was created by the Violent Crime Control and Law Enforcement Act of 1994.[99] It is generally accepted that this step was taken as a reaction to widespread criticism of the mandatory minimum sentences in drug cases.[100] However, with the break provided to the defendant, something had to be demanded from that defendant, and that something was the truth. Thus, as a new route around the restrictive mandatory minimums was created, the safety valve provision joined the only other section allowing such an escape from the minimums, section 5K1.1, in demanding that this break only be given where the defendant has provided information in his possession. Clearly, the process goal of truth-telling established with the inception of the Guidelines in 1987 was furthered by the Sentencing Commission with this amendment in 1994.

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95. U.S. SENTENCING GUIDELINES MANUAL § 5C1.2(a)(1)-(5) (2001) (emphasis added).
96. *See id.* § 5C1.2(a)(1).
97. *See id.* § 5C1.2(a)(2)-(3).
98. *See id.* § 5C1.2(a)(4).
99. 18 U.S.C. § 3553(f) (2000).
100. Celesta A. Albonetti, *The Effects of the "Safety Valve" Amendment on Length of Imprisonment for Cocaine Trafficking/Manufacturing Offenders: Mitigating the Effects of Mandatory Minimum Penalties and Offender's Ethnicity*, 87 IOWA L. REV. 401, 406 (2002).

4. *The Truth Requirement for "Acceptance of Responsibility"*

Section 3E1.1 of the Sentencing Guidelines provides two levels of downward adjustment for "acceptance of responsiblity": a two-point reduction when the defendant "clearly demonstrates acceptance of responsibility for his offense,"[101] and an additional one-point reduction when the offense level is at least sixteen and the defendant provides "complete information to the government concerning his own involvement in the offense,"[102] or "timely" notifies the government of his intent to plead guilty.[103]

Oddly, as the application notes to section 3E1.1 reflect, this decrease is intended to be a reward for pleading guilty, not for giving information: "This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse."[104] From an efficiency perspective, this makes sense—the court system is obviously made more efficient if trials are avoided by guilty pleas,[105] allowing each judge to handle more cases.[106] So, why not simply describe the downward adjustment as applying when the defendant has timely pled guilty? Justice Breyer, a member of the original sentencing commission, succinctly recalled why that commission did not provide such a simple directive:

> The Commission's data reveals that a defendant who pleads guilty will typically receive a sentence reduced by thirty to forty percent. A Guideline system that reflects actual past practice should provide such a reduction. Yet, to explicitly write a reduction into the Guidelines based on a guilty plea is to explicitly tell a defendant that a guilty plea means a lower sentence and that insistence upon a jury trial means a higher sentence.[107]

Rather than make clear that the waiver of a constitutional right will be rewarded and exercise of that right will be punished, Breyer states that the Commission decided to avoid the issue and leave the definition of acceptance

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101. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2001).

102. *Id.* § 3E1.1(b)(1).

103. *Id.* § 3E1.1(b)(2).

104. *Id.* § 3E1.1, cmt. n.2. An exception is made when a defendant goes to trial to preserve an issue which does not relate to factual guilt, such as to challenge a statute. *Id.*

105. *See* Matthew Richardson, *Specific Crime vs. Criminal Ways: Criminal Conduct and Responsibility in Rule 3E1.1*, 54 VAND. L. REV. 205, 206 (2001).

106. As noted earlier, this project has apparently been successful, as now fewer than five percent of criminal defendants go to trial. U.S. Sentencing Comm'n, Federal Sentencing Statistics by State, District & Circuit, (2000), *Mode of Conviction by Primary Offense Category*, http://www.ussc.gov/JUDPACK/JP2000.htm.

107. Breyer, *supra* note 34, at 28.

of responsibility "vague."[108] However, to practitioners the meaning is not vague. In nearly all cases, acceptance of responsibility equals a guilty plea.[109] In those few cases when this equation does not hold, it is usually when the defendant pleads guilty and then is denied the adjustment because he continues some false assertion.[110] Obviously, the Guidelines are playing hide-the-ball in directing an automatic trial penalty.[111]

What is interesting in the context of this Article is the form the Guideline writers use. While the true meaning of the section is buried in the application notes, the Guideline provision sets out that the reward is provided for the acceptance of responsibility (an affirmative statement of truth) and, additionally, for providing information to the government. As with section 5C1.2, described above, when the Guidelines want to extract some price, it does so in the form of demanding information from the defendant as part of the sentencing process, further establishing the importance of the process goal of truth. Again, this goal is pursued not only at the expense of the traditional goals, which suffer in comparison, but also at the expense of two core values of justice: the honest expression of the bases for a given sentence and the right of the defendant not to be a witness against himself.[112]

5. *The "Relevant Conduct" Incentive to Bring Out Facts at Sentencing*

Another compromise wrought by the Guideline authors was between "real offense" and "charge offense" sentencing.[113] Real offense sentencing bases the sentence on "the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted."[114] In contrast, charge offense sentencing bases the sentence only "upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted."[115]

The result of this compromise is embodied in Guideline section 1B1.3, which allows the defendant to be sentenced for "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant,"[116] even when the defendant was not charged

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108. *Id.* at 29.

109. *See* Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1510 (1997).

110. *Id.* (citing United States v. Echevarria, 33 F.3d 175 (2d Cir. 1994)).

111. *See id.* at 1553-54.

112. U.S. CONST. amend. V.

113. U.S. SENTENCING GUIDELINES MANUAL § 1A4(a) (2001).

114. *Id.*

115. *Id.*

116. *Id.* § 1B1.3(a)(1)(A).

with that conduct, or when the defendant has been acquitted of such conduct.[117] For example, a defendant who pleads guilty to distributing 2.5 grams of heroin may be sentenced for over one kilogram of heroin—400 times as much—based solely on evidence presented to the judge at sentencing[118] (provided that the resulting sentence is not above the statutory cap).[119] As in pre-Guideline cases,[120] the presentation of this evidence is not subject to the rules of evidence,[121] meaning that hearsay, for example, is allowed. Further, rather than carrying the burden of proving facts beyond a reasonable doubt, the government must only prove at sentencing that purported facts are more likely true than not.[122] The cumulative result, at least in some circuits, is that a sentence can be greatly increased, beyond what was pled guilty to or proven at trial, based on nothing more than unsubstantiated hearsay contained in the presentence report presented to the judge.[123]

The ability of a court to rely on such evidence to show relevant conduct and greatly change a sentence without departing from the Guidelines has been subjected to withering criticism. One critique asserts that the ability to consider facts broadly at sentencing comes from a time before the Guidelines, when rehabilitation was an active goal and there was no appeal of sentences,[124] meaning that a broad scope would often play to the benefit of the defendant, not the government. The (pre-Guidelines) 1949 Supreme Court opinion in *Williams v. New York*, which approved broad consideration of facts at sentencing,[125] was premised on the need for such information to craft a rehabilitative sentence.[126] The obfuscation of rehabilitation (along with the

117. United States v. Watts, 519 U.S. 148, 157 (1997).

118. United States v. Cooper, 274 F.3d 230, 236 (5th Cir. 2001).

119. Apprendi v. New Jersey, 530 U.S. 466, 481 (2000).

120. *See* Williams v. New York, 337 U.S. 241, 247 (1949).

121. FED. R. EVID. 1101(d)(3) (stating that the rules do not apply at sentencing).

122. This was true both before the Guidelines, *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986), and after, *Almendarez-Torres v. United States*, 523 U.S. 224, 247-48 (1998) (citing *Watts*, 519 U.S. at 156-57).

123. *See, e.g.*, United States v. Atkins, 250 F.3d 1203, 1212-14 (8th Cir. 2001) ("the court may consider criminal activity for which the defendant has not been prosecuted"); United States v. Riley, 142 F.3d 1254, 1258 (11th Cir. 1998) (finding that the district court may consider any reliable information at sentencing); United States v. McLymont, No. 94-5042, No. 94-5043, 1995 U.S. App. LEXIS 22682, at *12-13 (4th Cir. Aug. 3, 1995) (per curiam) (noting that a court is not precluded from relying on hearsay in sentencing); United States v. Ponce, 917 F.2d 846, 847-49 (5th Cir. 1990) (finding that a sentencing court may base its sentence on undisputed findings in defendant's presentence report). *But see* United States v. Corral, 172 F.3d 714, 716-17 (9th Cir. 1999) (vacating sentence where district court relied on hearsay quoted in the presentence reports).

124. Freed, *supra* note 10, at 1712-13.

125. 337 U.S. 241, 247 (1949).

126. *See* Federal Rules of Evidence Committee of the American College of Trial Lawyers, *The Law of Evidence in Federal Sentencing Proceedings*, 177 F.R.D. 513, 523 (1998).

other traditional goals of sentencing) with the coming of the Guidelines, some argue, makes the relevant conduct rule archaic.[127]

A second critique argues that the rule announced by the Supreme Court in *Apprendi v. New Jersey*[128] (requiring a jury finding beyond a reasonable doubt as to key facts) should apply not only to factual determinations that raise the statutory maximum, but also to those that merely raise the *guideline* range for an offense—meaning that if the government wants to use what is now considered relevant conduct to increase a sentence under the Guidelines, it must prove those facts to a jury beyond a reasonable doubt.[129]

Finally, as Dan Freed has pointed out, this doctrine "allows a prosecutor to increase an offender's sentence more easily by *dropping* charges than by bringing them."[130] That is, by deferring evidence of that act to sentencing, a prosecutor will enjoy a much lower burden of proof, the ability to use hearsay, freedom from the rules of evidence, and, if she plays her cards right and the probation officer includes her information in his report, the possibility of getting the higher sentence imposed while placing *no* evidence before the judge at all. This perverse incentive, according to Freed, leads to a reduction of "visibility and candor in sentencing."[131] Further, he argues that the varying practices between districts in approaching relevant conduct undermines even the Guidelines' stated purpose of uniformity.[132]

This chorus of criticism is one I now join. In addition to all that others have accurately observed, the relevant conduct provision furthers the corrosive effect of promoting fact-gathering as a function of sentencing rather than trial. As Freed notes, the current relevant conduct rule has created strong incentives for the prosecutor to dodge trial and instead bring facts at sentencing.[133] There are judicial incentives too. Because the relevant conduct rule tends to make criminal justice more efficient (at least in terms of time spent per case), it may be attractive to time-pressed judges. The cost of this efficiency though, in the long view, is high—it further saturates the court with sentencing process and obscures the traditional individual outcome goals of sentencing.

Ironically, as the sentencing process becomes more important relative to trials, the more it loses its true purpose of actually doing something to the offender that will exact a cost or change something in the future. In becoming a captive of such a self-fulfilling *process* at the precise time they should be evaluating the defendant and the *outcome*, judges (and the system of criminal

127. Freed, *supra* note 10, at 1712-13.

128. 530 U.S. 466, 490 (2000).

129. Freya Russell, Casenote, *Limiting the Use of Acquitted and Uncharged Conduct at Sentencing:* Apprendi v. New Jersey *and Its Effect on the Relevant Conduct Provision of the United States Sentencing Guidelines*, 89 CAL. L. REV. 1199, 1224 (2001).

130. Freed, *supra* note 10, at 1714.

131. *Id.*

132. *Id.* at 1715.

133. *Id.* at 1714.

justice they serve) lose the ability to affirmatively change the lives of individuals and communities.

C. Into the Future: Victims' Rights as a Goal of Sentencing

As described above, fact-gathering and truth-telling have become a goal of sentencing in subtle ways—as a continuation of past practice despite new realities, as part of compromises, and as a handy tool where some "price" needed to be extracted. Through this evolutionary development, fact-gathering and truth-telling have come to dominate the process of sentencing and have become a goal in themselves. Standing in stark contrast to this subtle evolution of great importance is the recently proclaimed goal that victims should be made a part of the sentencing process.

Like the emerging goal of truth-telling, creating a role for victim rights is a process goal, as it is fulfilled prior to the sentence being issued. However, the campaign to incorporate victim participation into the sentencing process has not been subtle; rather, it has been proposed and promoted with great fanfare.[134] While fact-gathering has been pursued for a variety of reasons, most of them more practical than ideological, advocates for allowing a role for victims in the sentencing process are motivated by a single principle—victims should have a voice in the proceedings, as their value is at least equal to that of the defendant.[135]

It is hard to deny the political appeal of granting advantages to those who have been victimized by criminals. Commonly, calls for greater participation by victims in sentencing include the arguments that crime victims are often victimized a second time by the justice system[136] and that the judicial system overwhelmingly favors the defendant over the victim.[137] These arguments have been heard. It has been predicted that the next amendment to the United States Constitution will be a Victim's Rights Amendment,[138] and in a previous attempt

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134. Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 479-80.

135. A statement by the Law Enforcement Alliance of America in support of the Constitutional amendment claimed that "[a] federal constitutional change is necessary because if defendant's rights are guaranteed under the Constitution and victims' rights are only specified in statutes, the right of the accused will always prevail—victims will always be seen by our justice system as second class- citizens [sic]." *The Victims' Rights Amendment: Hearing on H.R. J. Res. 64 Before the House Comm. on the Constitution*, 106th Cong. 39-41 (2000) (statement of Christine Long, Member of the Board of Directors and Chairperson of Victims' Rights Committee, Law Enforcement Alliance of America, Inc.), *quoted in* Rachel King, *Why a Victims' Rights Constitutional Amendment Is a Bad Idea: Practical Experiences from Crime Victims*, 68 U. CIN. L. REV. 357, 361-62 (2000).

136. *See* Kathleen Kalaher, Note, *The Proposed Victim's Rights Amendment: Taking a Bite Out of Crime or a Dog With No Teeth?*, 22 SETON HALL LEGIS. J. 317, 317-18 (1997).

137. *See* Katie Long, Note, *Community Input at Sentencing: Victim's Right or Victim's Revenge?*, 75 B.U. L. REV. 187, 190-91 (1995).

138. Cassell, *supra* note 134, at 479-80.

at passage, this amendment won the support of President Clinton[139] and some measure of bipartisan support in Congress.[140]

The proposed Amendment would grant crime victims the right to receive notice of hearings, to attend those hearings, and both to speak and present written statements at pretrial detention hearings, pleas, and sentencing.[141] Already on the books in the federal system is the codification of the Victim's Rights and Restitution Act of 1990,[142] which directs government employees to accord crime victims the following rights:

> (1) The right to be treated with fairness and with respect . . . .
> (2) The right to be reasonably protected from the accused offender.
> (3) The right to be notified of court proceedings.
> (4) The right to be present at all public court proceedings related to the offense [with exceptions] . . . .
> (5) The right to confer with attorney for the Government in the case.[143]

Clearly, these proposed and actual laws[144] attempt to affect the process of sentencing. Significantly, they give everyone more to do in the course of the sentencing process at the expense of a focus on the outcome.

For example, the federal prosecutor is now directed by law to provide notification of plea hearings, trials, and sentencings to victims.[145] This seems simple until one ponders the scope of this task. For example, a mail-order fraud could affect thousands of victims. The seemingly simple act by the prosecutor or member of the staff of notifying those victims is time previously spent doing something else.

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139. *Id.* at 479; Robert P. Mosteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY'S L.J. 1053, 1053 (1998).

140. Cassell, *supra* note 134, at 479.

141. S.J. Res. 65, 104th Cong. § 1 (1996). The proposed amendment specifically provides:

> Victims of crimes of violence and other crimes that Congress and the States may define by law . . . shall have the rights to notice of and not to be excluded from all public proceedings relating to the crime; to be heard if present and to submit a statement at a public pre-trial or trial proceeding to determine a release from custody, an acceptance of a negotiated plea, or a sentence . . . . *Id.*

142. 42 U.S.C. § 10606 (2000).

143. *Id.* § 10606(b). Notably, the statute expressly states that it "does not create a cause of action" for any person. *Id.* § 10606(c).

144. Some states have laws analogous to 42 U.S.C. § 10606. For example, Texas offers the same right to notification and attendance. TEX. CODE CRIM. PROC. ANN. art. 56.02 (Vernon 2003).

145. 42 U.S.C. § 10606(b)(3).

The legal requirement that the victim be able to "confer" with the prosecutor[146] raises a new danger, as well: that the victim will become the "client" of the prosecutor, undercutting the ideal of public prosecution in the United States, in which the prosecutor traditionally is viewed as representing the cause of justice rather than any one individual.[147] While having the prosecutor stand in the shoes of the victim may further the traditional individual outcome goal of retribution,[148] it is hard to see how such a standpoint of advocacy would serve any other goal.

Having to consult with the victim in the course of negotiating an outcome, at any rate, would distract the prosecutor from pursuing the traditional outcome goals.[149] The proposed amendment would also further load the plate of the sentencing judge, who must incorporate the victim into the sentencing hearing, either in person or through the submission of a victim impact statement. This serves as a distraction from the traditional outcome goals in two ways: First, it requires more process for the court to administer rather than attending to the individual importance of the outcome. More importantly, it introduces a third voice into the discussion of a constructive sentence—a third voice which, because of its victimhood, can be compelling and even heartwrenching, but which more often than not will have no interest in the traditional goals other than retribution.

Thus, despite its principled basis in sad historical fact, the victim's rights movement further imperils the traditional goals of sentencing in that it tends, by its nature, to serve only the goal of retribution. Thus, a greater role for victims would exacerbate a trend decried by judges and academics alike, many of whom already feel that the federal sentencing regime has become overly focused on retribution with the collapse of rehabilitation as a central focus of sentencing.[150]

Because the current federal statute has no teeth (lacking any cause of action for a violation),[151] and the Constitutional Amendment is still unrealized, the role of victims' participation in federal cases has yet to be fully developed.

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146. *Id.* § 10606(b)(5).

147. Alice Koskela, Comment, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 179 (1997).

148. Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 212 (1988).

149. Of course, the success of the prosecution may sometimes rest on the prosecutor ignoring the victim. For example, the victim may want to confront the defendant with facts prior to trial, when that would not be in the best interests of the government's case. Lynne Henderson, *Revisiting Victim's Rights*, 1999 UTAH L. REV. 383, 423.

150. *See* STITH & CABRANES, *supra* note 3, at 29-37.

151. *See* 42 U.S.C. § 10606(c).

III. COMMISSIONERS, JUDGES, AND PROSECUTORS IN THE MODERN ERA

Like the powerless Queen of England addressing Parliament, the traditional goals of retribution, deterrence, rehabilitation, and incapacitation in federal sentencing have only a vestigal role, leaving behind only the thin wisp of an empty claim that they are the true goals of the Guidelines.[152] In their place is a stern commitment to superficial uniformity,[153] a quiet fealty to the cause of efficiency through the avoidance of trial and the shift of truth-finding to sentencing, and the toothless promise that victims can be a part of the sentencing process.

However, to fully understand the current state of federal sentencing, we also must understand the goals that the Guidelines set out for each participant in the criminal justice system. Sentencing commissioners, judges, and prosecutors have each been given a job to do by the current sentencing regime, and in each case, that job has little to do with the larger cause of justice.

A. Stasis and the Goals Assigned the Sentencing Commission

In short, the Sentencing Commission is beholden to their own creation. At first, in creating the Guidelines, the Commission worked with coarse, bold strokes, often with broad compromises designed to avoid conflict between the commissioners.[154] For example, instead of basing the guidelines on either retribution or deterrence, the Commission elected to codify the broad sentencing trends that already existed rather than pursue an articulable philosophy or sentencing goal.[155] They created, prior to the inception of the Guidelines era in 1987, the giant book with which federal practitioners are now familiar, replete with thousands of instructions.[156] This first Guidelines Manual was over 200 pages long and established the 258-box sentencing grid which remains at the heart of federal sentencing.[157] This tome sent the message that judges were no longer important, at least in their ancient role as the arbiters rather than the calculators of justice.[158]

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152. U.S. SENTENCING GUIDELINES MANUAL § 1A (2001).

153. The project of creating uniformity has been undermined by continuing disparities between state and federal sentences for the same crime. For example, federal prison time for drug and gun offenses is an average of three times longer than those served in state systems. Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 731-32 (2002).

154. *See* Breyer, *supra* note 34, at 15.

155. *See id.* at 16-18.

156. The complexity of these rules is shown by the fact that even after fifteen years, "issues of first impression involving application of the Guidelines continue to be presented . . . ." Stacey M. Studnicki, *Annual Sixth Circuit Survey: Federal Sentencing Guidelines*, 2002 L. REV. MICH. ST. U. DET. C.L. 573, 601, *available at* WL 2002 LRMSUDCL 573.

157. U.S. SENTENCING GUIDELINES MANUAL (1987).

158. *See* Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 101 (1999).

With the mammoth sculpture now in place, the Commission's subsequent role was simply to refine the image presented. In the words of Justice Breyer, "[T]he system is 'evolutionary'—the Commission issues Guidelines, gathers data from actual practice, analyzes the data, and revises the Guidelines over time."[159]

This process of slow evolution is exactly what has occurred. In fact, due to political problems, this evolution may have been even slower than the original Commission expected.[160] Most years, the Commission will adjust the penalties for certain crimes; for example, the Commission may toughen up the penalties for the narcotic viewed as the "next big threat."[161]

What has not occurred is any revolutionary change, such as a revisiting of the compromises in the founding document of the Guidelines regime, an incorporation of common law sentencing principles,[162] or a thorough simplification of the sentencing grid.[163] The very mass of the Guidelines Manual, it seems, is a brake on such revolutionary reforms and continues to define the role and the goals of the Sentencing Commission, much more than the original mandates given the Commission by Congress.[164] Realistically, if change is to occur, it must be within the process already directed by the Guidelines: determine the appropriate Guideline,[165] make adjustments,[166] group multiple counts,[167] determine criminal history,[168] find the Guideline range,[169] and consider departures.[170] I have kept this in mind in drafting my own proposals.[171]

B. The Goals Assigned to Judges Under the Guidelines

While some point out that federal judges have retained the ability to exercise discretion within the 25% ranges allowed within the sentencing grid,[172]

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159. Breyer, *supra* note 34, at 8.

160. The failure to appoint commissioners to the Commission in the mid-1990's slowed down activity considerably. William H. Rhenquist, *The 1998 Year-End Report of the Federal Judiciary*, 11 FED. SENTENCING REP. 134, 134-35 (1998).

161. For example, in 2001, the Commission increased the penalties relating to ecstasy, pursuant to an express mandate from Congress. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, highlights 2001 amend. (2001).

162. Freed, *supra* note 10, at 1750.

163. *Id.* at 1751.

164. *See supra* Part II.

165. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)-(b) (2001).

166. *Id.* § 1B1.1(c), (e).

167. *Id.* § 1B1.1(d).

168. *Id.* § 1B1.1(f).

169. *Id.* § 1B1.1(g).

170. *Id.* § 1B1.1(i).

171. *See infra* Part IV.

172. Berman, *supra* note 158, at 102.

the judges themselves seem to see this as a small consolation.[173] In 1993, nearly half of the federal judges had seen enough and wanted to "scrap" the Guidelines altogether. In 1997, three-fourths of the federal trial judges felt that such mandatory guidelines were "unnecessary."[174] One district judge reported that in four years on the bench, he had "yet to meet a district court judge who was ready to admit that he or she had anything good to say about the Guidelines."[175]

Such hostility is no doubt attributable to the goals assigned to judges in the Guideline regime. Limited in their ability to structure a sentence, they are left with other directives by the Guidelines. Primarily, judges are to follow the formulaic process set out in section 1B1.1. Secondarily, as described above, they are the tool by which other process goals are achieved, such as the shift of truth-finding to sentencing, another goal embedded in process.[176]

The problem is that federal district judges are not suited, by qualification or temperament, to be process-minders. First, they generally are chosen for their positions after a successful career that likely involved a great deal of discretionary power—as a law firm partner, a federal prosecutor, a defense attorney, or a state court judge, for example.[177] In these prior roles, they have honed their ability to size up people, to make decisions based on a complex set of factors, and to lead based on principle. Few, if any, come from the occupations which would more perfectly prepare them for plodding through the Guideline sentencing process—that of tax preparer or writer of situation comedies, perhaps, where the simple ability to follow a formula is paramount. Is it surprising, then, that they chafe under the Guidelines, which direct them to follow a process rather than craft an outcome?

Second, judges are trained in the law, a discipline which ingrains beliefs that are contrary to the rote following of a formula. When that education does focus on a system of strict rules, such as the tax code, very often the focus of their learning is on finding advantageous exceptions to the rules therein. And, of course, they have been specifically trained to consider the subtle complexities of seeking retribution, deterrence, rehabilitation, and incapacitation in sentencing, for even today, textbooks identify these as the goals of sentencing.[178] So, again, is it surprising that judges reject the role of number-cruncher assigned them by the Guidelines?

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173. In fact, over 200 federal trial judges found the Guidelines to be unconstitutional before that issue was resolved to the contrary by the Supreme Court in *United States v. Mistretta*, 488 U.S. 361 (1989). U.S. SENTENCING COMM'N ANNUAL REPORT (1989).

174. STITH & CABRANES, *supra* note 3, at 5.

175. Stewart Dalzell, *One Cheer For the Guidelines*, 40 VILL. L. REV. 317, 320 (1995).

176. *See supra* Part II.

177. The biographies of federal judges accessible on the Federal Judicial Center's web site confirm this assertion, http://www.fjc.gov.

178. WAYNE R. LAFAVE, MODERN CRIMINAL LAW 19 (3d ed. 2001).

C. *The Troubling Goals Given to Prosecutors and Agents*

By giving prosecutors the sole authority to move for a downward departure under section 5K1.1, increasing the importance of charge pleading and allowing the prosecutor to control what relevant conduct is put before the court, the Guidelines have shifted power from judges to prosecutors[179] (and, in turn, to the law-enforcement agents who exercise discretion prior to and in partnership with the prosecutors). Starting from the premise that the prosecution team has been given more power by the Guidelines, the goals the Guidelines establish for prosecutors and agents deserve examination.

Certainly, it is impossible to have a single answer to this question. Prosecutors and agents have a wide variety of central motivating philosophies. Some believe in crime-control and will focus their efforts on arresting those "key men" without whom criminal networks do not work.[180] Others seek simply to enforce the criminal code, prosecuting evenly any who are brought to them. However, some are probably after "low-hanging fruit"—wanting to get the longest sentence[181] with the least effort.[182] While I do not claim that most law enforcement officials have this view, at least some do want to lock up as many criminals as possible for as long as possible.[183] It is in respect to this last group that the incentives offered by the Guidelines are most relevant.

The classic example of such low-hanging fruit is the street seller of just over five grams[184]of crack cocaine.[185] Even with no criminal history whatsoever, the Guidelines[186] (and the statutory minimum)[187] will result in a

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179. *See supra* Part II.

180. For example, the key man in a fencing ring might be the one who finances the purchases of stolen goods and launders the proceeds. Incapacitating this person will more likely disable the fencing ring than arresting the person at the counter.

181. It is beyond dispute that the Guidelines, on their face, establish a normative ordering of the importance of crimes. The starkest example of this is the sentencing grid itself. U.S. SENTENCING GUIDELINES MANUAL § 5A (2001).

182. I make no pretense of knowing what proportion of prosecutors or agents can be described this way. However, for some agents and prosecutors, low-hanging fruit must be very attractive. Those cases move faster, meaning that one person can process more cases, a factor which may be rewarded in pay and advancement. More subtle effects are at work, too; for example, press releases are often issued after a sentencing that lists the prosecutor, agent, and certainly a description of the sentence. Also, length of sentence is a simple, quantitative way to judge a prosecutor's or agent's success.

183. Curtis R. Blakely & Vic W. Bumphus, *American Criminal Justice Philosophy: What's Old—What's New?*, FED. PROBATION, June 1999, at 62-64; Marcia Chambers, *Unwelcome Blurring of Boundaries*, NAT'L L.J., Sept. 30, 1991, at 17 (discussing training of agents in sentencing in order to control apprehension and punishment of officers); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 537-39 (2001).

184. As a point of reference, a packet of coffee sweetener is one gram.

185. The Sentencing Guidelines, like the controlling statute, refer to crack as "cocaine base." *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2001); 21 U.S.C. § 841.

186. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(7).

187. The statutory minimum is five years. 21 U.S.C. § 841(b)(1)(B)(iii) (2000).

sentence of sixty-three to seventy-eight months after trial.[188] And how hard is it to catch this street-level seller? It is pretty quick work, actually—the entire case may easily be made by an agent walking up to the defendant on the street and buying the crack.[189] Other times, agents will make a series of small purchases until they get to the sentencing threshold.[190] At any rate, the street purchase of five grams of crack is a quick and easy case which produces a higher sentence than one in which a similar defendant with no criminal history sells 450 grams of powder cocaine,[191] pimps his own child as a nine-year-old prostitute,[192] kills someone in a voluntary manslaughter,[193] dumps a truckload of toxic waste knowing it will harm people,[194] or steals $6 million.[195]

Obviously, it takes a lot more effort to catch and prosecute the perpetrators of these other crimes than to make a simple buy from the street seller of crack. But as the Guidelines are currently constituted,[196] the length of sentence creates the incentive to go after that street-level seller rather than another offender.

Even within the realm of the war on drugs, these incentives are counterproductive. For example, until converted at the street level, crack is just powder cocaine. When cut with baking powder, the 450 grams of powder, which resulted in a lesser sentence, is actually going to hit the street as at least a kilogram (1,000 grams) of crack cocaine. In many cases, the way to stop crack from reaching the streets would be to create incentives for the government to get the cocaine before it is made into crack—precisely the reverse of the incentives offered by the Guidelines. While the best approach to crime control would be to have the Guidelines provide an incentive to get the

188. The offense level under section 2D1.1(c)(7) is twenty-six, and the criminal history category with no offenses is I, resulting in a range of sixty-three to seventy-eight months. U.S. SENTENCING GUIDELINES MANUAL § 5A (2001).

189. The elements of distribution of narcotics are simple: The defendant must distribute to another what he knows to be narcotics. 21 U.S.C. § 841(a)(1). A single transaction can easily show these elements within the span of a few moments.

190. Robert L. Steinback, *Sentencing Rules Distort Logic of Court System*, MIAMI HERALD, July 16, 1993, at 1B (describing how an undercover agent made seven purchases to reach a fifty gram threshold).

191. Fifty-one to sixty-three months, at an offense level of twenty-four and a criminal history of I. U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(c)(8), 5A (2001).

192. Fifty-seven to seventy-one months, at an offense level of twenty-five and a criminal history of I. *Id.* §§ 2G1.1(a)(1), (b)(2)(A), (b)(3)(A), 5A.

193. Fifty-seven to seventy-one months, at an offense level of twenty-five and a criminal history of I. *Id.* §§ 2A1.3(a), 5A (2001).

194. Fifty-one to sixty-three months, at an offense level of twenty-four and a criminal history of I. *Id.* §§ 2Q1.1(a), 5A.

195. Fifty-one to sixty-three months, at an offense level of twenty-four and a criminal history of I. *Id.* §§ 2B1.1(a), (b)(1)(J), 5A.

196. Proposed changes to the Guidelines are outlined on the Sentencing Commission web site, http://www.ussc.gov/guidelin.htm.

key man, they instead provide an incentive to incapacitate the guy who is most easily replaced.[197]

Nor is crack the only example of such low-hanging fruit. The Guideline ranges for relatively small amounts of methamphetamine[198] and for a felon in possession of a firearm[199] similarly offer the same combination: Little effort by law enforcement to make a case and a high penalty create an incentive to incapacitate someone regardless of whether this will deter future crime. Those convicted of these offenses are most likely at the bottom of a chain of criminality, if part of one at all.

By abandoning the traditional goals of sentencing and instead creating a directive to judges regarding each and every sentence, we have invited the forces of politics to create perverse goals of sentencing for those given the most power—prosecutors and agents. The result, for the time being at least, is a regime in which those who distribute small amounts of drugs or who possess a firearm, and thereby pose a *threat* to hurt others, receive higher sentences than those who *have* hurt others, whether by selling a child into prostitution, by killing someone in a dispute, by poisoning our water, or by stealing millions of dollars from the public.

IV. THE WAY BACK HOME

Few have risen to defend the Federal Sentencing Guidelines, and even those who have come to its defense have acknowledged the problems that lurk within the manual.[200] However, it should be defended in some respects. Most

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197. The crack trade is a business. Within that business, powder cocaine is usually converted to crack on stoves by people at the bottom rungs of the organization. A fair analogy is to a neighborhood bagel store which is part of a national chain. Walk into that shop and you will see relatively low-paid employees making and selling the bagels. That is, they convert the dough shipped to the store in bulk into the end product, bagels. Look closely and you will see that the business is structured such that these low-paid workers can be easily replaced in the inevitable event the store suffers high turnover. The instructions to make the bagels are posted on the wall, the process is kept simple, and jobs are specialized to limit the amount of skill needed. If you wanted to close down that bagel shop, it would be futile to address the problem by arresting the counter help and bagel makers because the shop is structured for them to be easily replaced. Rather, one would have to incapacitate the key men and women in the chain—those who controlled logistics, financing, or management through specialized skills not so easily replaced.

198. For example, distribution of five grams of methamphetamine (actual weight) results in the same sentence as distribution of five grams of crack. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(7) (2001).

199. Similarly, the simple possession of three handguns by a person previously convicted of two minor narcotics distributions would result in the same sentence as distribution of five grams of crack. *See id.* § 2K2.1.

200. *See generally* Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679 (turning back criticism of the Guidelines, but acknowledging some problems with the current system); Thomas N. Whiteside, *The Reality of Federal Sentencing: Beyond the Criticism*, 91 NW. U. L. REV. 1574 (1997) (same).

importantly, it does provide a generally fair baseline for judges, especially new judges, to use in coming up with a sentence. As one relatively new district judge reflected, "[u]nder the guidelines the SRA ordains, I find myself in the familiar world of applying readily ascertainable law in carrying out what is unquestionably my most solemn duty."[201] To its credit, this baseline is national, rather than based in the culture of a locality.

A. The Costs of Abandoning Our Traditional Goals

There have been significant costs incurred by abandoning the sentencing goals of retribution, deterrence, rehabilitation, and incapacitation, in favor of the new goals of uniformity and process-following. As described above, we now have a largely reactive Sentencing Commission laden with its own creation,[202] angry judges willing to subvert the guidelines,[203] prosecutors and agents handed an often-bizarre and counter-productive set of incentives to fight crime,[204] and a generation of defendants and victims who did not benefit from the accumulated wisdom of the traditional goals.

How far astray are we? Pretty far, both in pursuing efficiency through the shift of fact-finding to sentencing (at the expense of the traditional goals) and by favoring the goal of uniformity to the detriment of individual consideration.

Part II described at length the many ways in which the sentencing scheme now in place provides incentives for fact-finding to occur within the sentencing process—through a defendant's cooperation with the government, admissions made to get the benefit of the "safety valve" provision, and admission of responsibility, and through the government's relevant conduct. In each case, these choices seem to be made in the interests of the efficiency of the criminal justice system—by increasing the number of pleas and decreasing the number of trials. Given that this has been accomplished at the cost of the individual consideration and attendant attention to the traditional sentencing goals formerly given each case (to say nothing of the individual rights lost when facts are proven at the lower standard before the judge, rather than beyond a reasonable doubt before the jury), we have to ask ourselves—is it worth it? Maybe it is not. After all, we are abandoning principles of sentencing that stretch beyond the founding of our Republic and which provided the context for the Constitution's rules relating to criminal law. As the Supreme Court has said:

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even

201. Dalzell, *supra* note 175, at 323.
202. *See supra* Part III.A.
203. *See supra* Part III.B.
204. *See supra* Part III.C.

> unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.[205]

Of course, those men did not choose to remove from the hands of judges their ability to look to the future in each individual case and consider an outcome in the form of a sentence that would serve society's goals. Inefficient though it may be, they allowed that process, and the goals it served, to stand. It is only now that the focus on individual outcomes has been subsumed by the need for efficiency.

Perhaps even more than the drive for efficiency, the workings of the Guidelines are motivated by a desire to convert individually-considered defendants into a more uniform group of sentences. In other words, defendants are transformed from people into statistics, as members of the class of people with somewhat similar crimes.[206]

Notably, at the same time that the idea of the Guidelines was coming to fruition (with its strict limits on the consideration of particularized circumstances of the defendant), the United States Supreme Court ruled that sentencers in death penalty cases must be allowed to consider "particularized mitigating factors."[207] In fact, in the same year the Guidelines came into place (1987), the Supreme Court precisely held that mandatory sentences were unconstitutional in the death penalty context, as they did not allow for individualized consideration of the defendant and her background.[208] Thus, we were moving in both directions at the same time in sentencing—towards particularized consideration in death penalty cases and away from particularized consideration in other federal cases.[209]

The effects of this transition from a focus on individual outcomes to number-crunching can be seen in courtrooms—as a defendant is being

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205. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983).

206. In fact, this was the conclusion of some of the more eloquent district court decisions finding the Sentencing Guidelines to be unconstitutional prior to the issue being settled to the contrary by the Supreme Court. *See, e.g.*, United States v. Alafriz, 690 F. Supp. 1303, 1309-11 (S.D.N.Y. 1988) ("Under the Guidelines, however, the due process clause is violated because each defendant is considered only as a member of a class . . . ."); United States v. Brittman, 687 F. Supp. 1324, 1354-57 (E.D. Ark. 1988) (holding that the Guidelines violate Separation of Powers by removing a sphere of judicial discretion and a defendant's due process right to individualized sentencing); United States v. Frank, 682 F. Supp. 815, 817-19 (W.D. Pa. 1988) (holding that the Sentencing Guideline procedures do not adequately protect a defendant's due process rights).

207. Jurek v. Texas, 428 U.S. 262, 272 (1976). The principle that individualized consideration was of primary importance in death penalty sentencing was firmly established in *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) and *Jurek*, 428 U.S. at 271-72.

208. Sumner v. Shuman, 483 U.S. 66, 77-78 (1987).

209. Some might say this trend is simply because death penalty cases are more important. That does not address the fact that we express polar opposite values in death and non-death cases: consistent view would simply be that *less* individualized consideration is warranted in non-death penalty cases.

sentenced, the judge often is looking down at the Guidelines Manual or a bench memo on the applicable range, rather than into the eyes of the man or woman whose fate is being announced. Perhaps it is these averted eyes which provide the most damning evidence of the effects of foregoing the traditional outcome goals, as assessed by a judge who sits before the defendant, person to person.

B. A New Path

We need to put the traditional goals back in the hands of the sentencing judges, where they will be vital and relevant. This can be done while addressing the continuing problems of relevant conduct and the government's lock on the ability to recommend a departure under Guideline section 5K1.1 for cooperation with the government. In short, three steps should be taken: (1) the Guideline sections relating to departures should be rewritten to allow limited departures where tied explicitly to facts supporting the fulfillment of at least two of the traditional goals of sentencing; (2) the relevant conduct provision[210] should be scrapped and replaced with a provision allowing an upward departure to achieve necessary incapacitation, when tied to facts proven at trial or sentencing beyond a reasonable doubt; and (3) section 5K1.1 should be amended so that, even in the absence of a government recommendation for a downward departure, the defense can move for such a departure when the defendant has cooperated with the government in such a way that the need for retribution is lessened. In this way, by building the traditional goals into the actual decisions made by the sentencing court, they will be restored to an active role in the law.

1. Allowing Limited Departures to Fulfill the Traditional Goals

The Guidelines not only fail to encourage departures based on the goals of retribution, deterrence, rehabilitation, and incapacitation, but they also affirmatively hamper the consideration of these traditional goals.[211] As Doug Berman has suggested, the traditional goals of sentencing, already described as "Factors to be considered in imposing a sentence" by the codification of the Sentencing Reform Act,[212] should be described in the Guidelines as "relevant" when considering a downward or upward departure.[213]

This would not require a drastic reworking of the Guidelines. Rather, only a few simple changes would be necessary. First, a new provision should be added to section 5H stating that "facts used by the court to determine the need for retribution, deterrence, rehabilitation, or incapacitation may be relevant in determining whether a sentence should be outside the applicable guideline

210. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2001).
211. *See supra* Part II.A.2.
212. 18 U.S.C. § 3553(a) (2000).
213. *See* Berman, *supra* note 11, at 107.

range, unless otherwise barred by these guidelines." In keeping with this, sections 5H1.1-1.6 (covering age, educational and vocational skills, mental and emotional conditions, physical condition, employment record, and family and community ties) should be amended so as to state that such factors "are relevant in determining whether a sentence should be outside the guideline range if used to determine the need for retribution, deterrence, rehabilitation, or incapacitation."[214]

These changes would allow judges once again to incorporate the individual outcome goals into sentencing. To do so would allow judges to be explicit about their reasons for sentencing, honor their experience and training,[215] and reduce the degree of subversion of the guidelines that judges currently engage in to effect those traditional goals.[216]

On a more fundamental level, these changes would bring the traditional goals closer to the importance given to the process goal of fact-gathering, especially as expressed in Guideline section 5K1.1.[217] By allowing some of the evidence and argument to return to a focus on retribution, deterrence, rehabilitation, and incapacitation, the present focus on process in sentencing, including that introduced by the ascendance of fact-gathering and victim participation, would be muted by the increased importance of those traditional goals.

Of course, one criticism of these changes will be that they will return to the system of disparities, which caused the outcry for the Guidelines in the first place. One response to this charge is simply to point to the literature which shows that disparities have continued to plague the system even after the advent of the Guidelines.[218] In fact, studies and commentators appear to be unanimous on this point.[219] The disparities persist, including those based on race and

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214. Consideration of race, sex, national origin, creed and religion should continue to be barred from consideration. U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2001). However, it may be worthwhile to consider allowing judges to consider wealth in some cases to exact greater retribution from those who gained the most from our society. *See supra* Part II.A.4.

215. *See supra* Part III.B.

216. *See* Berman, *supra* note 11, at 104.

217. However, it would not allow for full equality with section 5K1.1, as the departure provisions for the traditional goals would not allow for a departure below a mandatory minimum.

218. Some have also suggested that the claim of interjudge disparities prior to the Guidelines was overstated. Ahmed E. Taha, *The Equilibrium Effect of Legal Rule Changes: Are the Federal Sentencing Guidelines Being Circumvented?*, 21 INT'L REV. L. & ECON. 251, 252-53 (2001).

219. *See generally* Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992*, 31 LAW & SOC'Y REV. 789, 790 (1997) (noting that the federal guidelines reduce judicial discretion, but do not restrict prosecutorial discretion); Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 336-65 (1996) (finding that the disparity in sentences results in part from differences in jurisprudence among the various federal circuits); Joseph S. Hall, *Rule 11(e)(1)(C) and the Sentencing Guidelines: Bargaining Outside the Heartland?*, 87 IOWA L. REV. 587, 590 (2002) (arguing that current plea bargaining practice

ethnicity, according to a study of 14,189 defendants convicted of drug offenses.[220] These persistent disparities in the face of facially neutral Guidelines show the truth of Dan Freed's assertion that a "second, underground level of sentencing seems to be displacing the first, visible level."[221]

This underground level of sentencing is properly called the subversion of the Guidelines. That is, judges are able to subvert the intent of the Guidelines by manipulating those areas where some discretion is retained: in judging relevant conduct and in accepting or rejecting motions for departure,[222] especially those under section 5K1.1. Though some may be doing so out of racial prejudice, far more are likely doing it in the interests of those traditional goals of sentencing that they learned in law school: retribution, deterrence, rehabilitation, and incapacitation.[223] Thus, the effects of the suggestions outlined here will be two-fold. First, they will allow the honest expression of departures that truly support traditional goals for valid reasons, precluding the need to hide subversive impulses under other terms. This will have the positive effect of driving these judgments back aboveground, where they will open to public view and analysis. Truth in sentencing, in this small way, can become a reality.

Second, those who sentence out of racial animus or other improper purpose will lose (through the changes to section 5K1.1 and relevant conduct) the ability to hide these motives under those particular rocks. It is hard to believe that, given the law's requirement that the basis for departure be articulated,[224] such a judge would risk having the improper motive revealed. Even the slightest reduction in such motivation is a victory for justice, and the simple act of exposing those motives to the light will have that effect.[225]

Finally, in answer to those critics who would see these changes as the undoing of the Guidelines, the departures, to achieve the traditional goals, need not be unlimited. Because it is only the threat of excessively large departures

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controlled by prosecutors with judicial oversight results in sentencing disparities).

220. Albonetti, *supra* note 219, at 806.

221. Freed, *supra* note 10, at 1683.

222. To compound the mayhem, the circuit courts of appeal vary widely in the amount of discretion they allow for such departures. *See* Goldsmith & Porter, *supra* note 13, at 73-76.

223. Berman, *supra* note 11, at 104.

> As noted before, though the existing jurisprudence has developed and formal decisions have been rendered without significant consideration of sentencing purposes, underlying concerns and judgments about culpability, crime control, and the traditional purposes of punishment seem to be influencing departure rulings and outcomes. But such normative considerations remain unarticulated and undeveloped because they are currently buried under the cover of descriptive deliberation or entirely hidden through the process of guidelines circumvention.

Id. (footnote omitted).

224. 18 U.S.C. § 3553(c) (2000).

225. Although there will still be ways to hide improper motives, there just will be fewer of them, and they will be more obvious.

that truly pose a threat of creating serious disparities,[226] a brake on such departures could be created limiting them to an effective range of half of the bottom of the original guideline and twice the top—that is, by effectively multiplying the 25% range of discretion already granted without need for a departure under the Sentencing Guidelines.[227] For example, a crime for which the effective range is 120-150 months could be expanded to 60-300 months should a departure based on retribution, deterrence, rehabilitation, or incapacitation be substantiated. Of course, another brake on such departures will be statutory mandatory minimums (with all the problems and benefits they entail).[228] Providing more assurance that we will not return to those supposedly "bad old days" are the facts that, unlike the period before the Guidelines, appellate review is now available for all aspects of sentencing,[229] and parole, perhaps the largest factor making the old system indeterminate, is now extinct.[230]

While it is short of the overthrow of the Guidelines some seek,[231] this single reform, even with limits in place, could make federal sentencing more rational and honest, and perhaps most importantly, could return to judges the ability to do what their careers have prepared them for—to make decisions with foresight to the future of the defendant and society, rather than the attention to process and code-reading demanded of them today.

2. *The Abandonment of Relevant Conduct*

The current rule for treating relevant conduct[232] has come under fire from many for allowing the drastic alteration of a sentence from that charged, based on the thinnest hearsay evidence included in a pre-sentence report, which is neither considered by a jury nor held to a standard higher than preponderance of the evidence.[233] As discussed here, it has also corroded the sentencing process by providing an incentive to the prosecutor to shift fact-gathering to sentencing

226. Berman, *supra* note 11, at 97.

227. U.S. SENTENCING GUIDELINES MANUAL § 5A (2001).

228. The benefits of mandatory minimums (including the ability of Congress to mandate sentences in areas seen as most important) have received little comment relative to the deluge of complaints about their effects. *E.g.*, Lowenthal, *supra* note 29, at 121 ("Although these provisions undoubtedly increase both the percentage of persons sentenced to prison and the duration of their confinement, there is no guarantee that they in fact separate out the worst offenders.").

229. 18 U.S.C.§ 3742(a) (1994).

230. *See supra* Part II.A.5.

231. *E.g.*, Shari L. Kaufman, *The Federal Sentencing Guidelines: A Formulaic and Impersonal Approach to Dispensing Justice*, NEV. LAWYER, Sept. 1999, at 18 (noting serious flaws in the Sentencing Guidelines).

232. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2001).

233. *See supra* Part II.B.5.

rather than trial, which has the larger effect of making sentencing process-oriented rather than outcome-oriented.[234]

Prior to the Guidelines, judges were not limited in the information they could consider in coming to a sentence anywhere beneath the statutory cap.[235] The relevant conduct rules of the Guidelines were an attempt to incorporate this existing power into the scheme.[236] The suggestions for compromise between this interest and the critics have often been complex. For example, Judge Edward Becker of the Third Circuit has suggested that when such evidence will be used, a bench conference should be held where the proposed evidence is compared to an "unfairness index."[237]

Instead, we should get rid of relevant conduct as described in section 1B1.3 and allow a modified charge offense system. The sentence would be based on the charged offense only, but a departure (limited as described above) would be available based on the need for incapacitation *if* the need for such incapacitation was based on other acts shown to the sentencing judge beyond a reasonable doubt by the government.[238] Thus, the compromise between the free consideration of evidence by the court and a focus on the charge would endure, with an increased level of protection provided to defendants, and the incentive to the government to defer fact-finding to sentencing would be removed. Just as importantly, it would return to the fore the individual outcome goal of incapacitation, which is now largely buried under the increasingly complex process of sentencing.

3. *Allowing for a Defense Motion for a Downward Departure for Cooperation with the Government*

Understandably, defendants and courts alike have been frustrated by the exclusive control the Guidelines give prosecutors over motions for a downward departure for cooperation with the government.[239] Currently, such a downward departure can only be made "[u]pon motion of the government stating that the defendant has provided substantial assistance" to the government.[240] Again, this is a problem that can be resolved by incorporating the traditional goals of sentencing into the active life of the Guidelines.

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234. *Id.*

235. *See* Williams v. New York, 337 U.S. 241 (1949).

236. *See* Freed, *supra* note 10, at 1712-15.

237. Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses be Applied?*, 151 F.R.D. 153, 156 (1993).

238. The increased burden on the government would likely solve the problem of hearsay at sentencing—the higher burden would insure the use of stronger evidence, if judges are to be fair.

239. *See* Karen Bjorkman, Note, *Who's The Judge? The Eighth Circuit's Struggle with Sentencing Guidelines and the Section 5K1.1 Departure*, 18 WM. MITCHELL L. REV. 731, 732-33 (1992).

240. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2001).

Without deleting the current text of section 5K1.1, a new paragraph could allow a cooperating defendant to move for a downward departure based on a decreased need for retribution (given his cooperation with the government), regardless of whether the government believed such assistance was "substantial."

As with the other suggestions, this would give the traditional goals an active role within the portions of the Guidelines that most often are the focus of sentencing. At long last, section 1A of the Guidelines—acknowledging that these same Guidelines are to "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation,"[241]—will finally mean something.

V. CONCLUSION

From the first judgments, the goals of sentencing have been purposeful—to change the conduct of the individual offender and to protect society. However, in the realm of federal criminal law, we have buried this primal need under layers of process and a devotion to the evasive goal of uniformity.

To return these traditional goals of sentencing—retribution, deterrence, rehabilitation, and incapacitation—to the fore, they must be worked into the Guidelines at the points where those Guidelines are most vigorously and publicly debated, massaged, and manipulated. By incorporating them as the basis of departures, especially in the realm of relevant conduct and 5K1.1 departures, they will be thrust into those most hotly disputed battlegrounds. Perhaps most importantly, this will again give judges permission to look up from the Guidelines Manual and the complex process that sentencing has become, and actually *see* the defendant—perhaps as a threat, perhaps with hope, perhaps even with that ancient flourish, "For you are dust, [a]nd to dust you shall return."[242]

241. *Id.* § 1A1.

242. *Genesis* 3:19 (New American Standard).