

1-2003

## Retribution for Rats: Cooperation, Punishment, and Atonement

Michael A. Simons

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### Recommended Citation

Michael A. Simons, Retribution for Rats: Cooperation, Punishment, and Atonement, 56 *Vanderbilt Law Review* 1 (2019)

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# VANDERBILT LAW REVIEW

VOLUME 56

JANUARY 2003

NUMBER 1

## Retribution for Rats: Cooperation, Punishment, and Atonement

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## INTRODUCTION

To mobsters, he is a “rat”; to drug dealers, a “snitch.” To school children, he is a “tattletale”; to corporate executives, a “whistle-blower.” To cops, he is an “informant”; to prosecutors, a “cooperator.” By whatever name he is known, the person who betrays his associates to the authorities is almost universally reviled. In movies, on television, in literature, the cooperator embodies all that society holds in contempt: he is disloyal, deceitful, greedy, selfish, and weak.

The cooperator, though, has long been a mainstay of our criminal justice system. For centuries, criminal defendants have received leniency in return for testimony incriminating accomplices and associates. Cooperation has flourished because the participants in the process (primarily prosecutors and cooperators) reap tremendous benefits. Prosecutors want what only cooperators can offer: inside information about criminal organizations. And cooperators want what only prosecutors can offer: leniency, or at least a recommendation for leniency.<sup>1</sup>

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1. By “cooperation,” I mean the process by which a defendant (or a target of an investigation) agrees to plead guilty and become a “cooperator.” In return for the cooperator’s agreement to provide the prosecution with information and testimony, the prosecution agrees to leniency, which typically takes the form of reduced charges, an agreed-upon sentence, or a recommendation for leniency at the time of sentencing. *See infra* notes 61-92 and accompanying text. “Cooperation,” as I have defined it, does not include the widespread law enforcement practice of using informants to gather information. Like a cooperator, an informant is often involved in the illegal activity himself and provides law enforcement with information about his accomplices. Unlike a cooperator, however, an informant typically does not plead guilty and is compensated not in leniency, but in cash. *See generally* MALACHI L. HARNEY & JOHN C. CROSS, *THE INFORMER IN LAW ENFORCEMENT* 3-30 (2d ed. 1968) (discussing the general history and role of the informer in criminal investigations and prosecutions).

As an aside, I refer to cooperators throughout this Article as “he” because the vast majority of criminal defendants and cooperators are male. In federal court, approximately eighty-five percent of criminal defendants are male, as are approximately eighty-five percent of cooperators. *See* U.S. SENTENCING COMM’N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 15 tbl.5, available at [www.ussc.gov/ANNRPT/2000/SBTOC00.htm](http://www.ussc.gov/ANNRPT/2000/SBTOC00.htm) [hereinafter 2000 SOURCEBOOK]; U.S. SENTENCING COMM’N, 1994 ANNUAL REPORT 42 tbl.14; U.S. SENTENCING COMM’N, SUBSTANTIAL ASSISTANCE STAFF WORKING GROUP, FEDERAL COURT PRACTICES: SENTENCING REDUCTIONS

Cooperation has never been more prevalent than it is today.<sup>2</sup> And as cooperation has increased, so too have its critics.<sup>3</sup> Not surprisingly, the typical academic view of cooperation is consistent with the cultural view of cooperators: cooperation is almost always seen as an evil—a necessary evil, no doubt, but an evil nonetheless.<sup>4</sup>

As a result, cooperation is usually discussed in terms that are starkly utilitarian. The cooperator is given leniency not because he deserves it, but because leniency is a necessary part of the prosecutor's "bargain with the devil." In the language of the marketplace, leniency is the price that a prosecutor must pay to purchase the cooperator's information and services. A criminal's cooperation is valuable—it is worth buying—because the prosecutor can use it to convict other criminals, who are often more culpable or more dangerous than the cooperator. From the prosecutor's perspective, paying the cooperator in leniency is a worthwhile investment because the benefit to the prosecutor (and, by extension, to society) in increased convictions outweighs the cost to the prosecutor (and, by extension, to society) in leniency.

While intuitively appealing and largely accurate, this utilitarian view of cooperation is incomplete. It is true that most participants in the cooperation process—cooperators, prosecutors, law

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BASED ON DEFENDANT'S SUBSTANTIAL ASSISTANCE TO THE GOVERNMENT app. F tbl.2 (1997) [hereinafter SUBSTANTIAL ASSISTANCE].

2. See *infra* notes 54-60 and accompanying text.

3. See, e.g., 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 (1993) (arguing that cooperation adversely affects cooperators by forcing them to engage in amoral behavior); George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1 (2001) (arguing that cooperator testimony poses an unacceptably high risk of perjury); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105 (1994) (arguing that prosecutorial discretion over cooperation departures undercuts the goals of the Federal Sentencing Guidelines); Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1858 (1995) (detailing one example of "the inequitable results associated with the substantial assistance exception"); Patti Saris, *Below the Radar Screen: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027 (1997) (examining sentencing disparities created in part by differing prosecutorial policies regarding cooperation); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 211-12 (1993) (criticizing cooperation for causing paradoxical disproportionalities in sentences); Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563 (1999) (summarizing problems associated with the excessive use of cooperation).

4. See, e.g., Frank O. Bowman III, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 46 (1999) (describing cooperation as an example of prosecutors "using unsavory methods in pursuit of laudable ends"); Harris, *supra* note 3; Weinstein, *supra* note 3; Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1 (1992) (examining the impact of cooperation on the criminal process).

enforcement officers, defense counsel, and judges—view cooperation in utilitarian terms. Yet cooperation also contains hidden, but important, retributive components.

The retributive aspects of cooperation manifest themselves in two ways. First, for many cooperators, cooperation itself is punishment. At a minimum, the cooperator is alienated from the defendants against whom he cooperates. Typically, a cooperator will cooperate against his accomplices in a shared criminal enterprise. Thus, he must turn against—betray, if you will—the very people with whom he may be closest. More broadly, the “common disdain” in which cooperators are held<sup>5</sup> often means that the cooperator is ostracized not only from his accomplices, but also from other communities that may be important to him. Thus, cooperation can be viewed as *extra* punishment—i.e., punishment that is not inflicted on a defendant who merely pleads guilty without cooperating. The cooperator who suffers this extra punishment, then, may deserve less traditional punishment than a similarly situated noncooperating defendant.

Second, for some cooperators, cooperation can be a vehicle through which the defendant experiences atonement. While it is no doubt true that most defendants who cooperate do so (at least initially) for selfish reasons, there is an occasional defendant for whom the decision to cooperate is motivated by a genuine desire to make amends for wrongdoing. Cooperation gives this defendant an opportunity to undergo a process of expiation—remorse, apology, reparation, and punishment—that can lead to true atonement. More significantly, even for those defendants who start cooperating for purely selfish reasons, cooperation can become (voluntarily or not) a means of expiation. Whether the cooperator desires it or not, the cooperation process forces a cooperator to express remorse and to make reparation, if not directly to his victim, then to society. So even for the selfish cooperator, cooperation can bring a defendant towards atonement. Thus, to the extent that expiation lessens a defendant’s “just desert” (and I will argue that it does), a cooperator may deserve a lesser sentence than a noncooperator—and for reasons wholly unrelated to the return on the prosecution’s leniency investment. Moreover, this conception of cooperation as atonement speaks not only to the cooperator’s desert, but also to the utilitarian question of how much punishment is needed to prevent the cooperator from

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5. Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 78 (1995); see also GEORGE P. FLETCHER, *LOYALTY* 8 (1993) (noting that “[s]ome of the strongest moral epithets in the English language are reserved for the weak who cannot meet the threshold of loyalty”); JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: ENFORCEMENT IN DEMOCRATIC SOCIETY* 126 (Macmillan Coll. Publ’g Co. 3d ed. 1994) (1966) (discussing stigmatization of informants).

reoffending. In other words, the cooperator who has experienced atonement not only will deserve less punishment, but he will also need less punishment.

It is not my aim to argue that cooperators deserve more leniency than they currently receive.<sup>6</sup> Nor is it necessarily my aim to defend the current prevalence of cooperation, which is a direct by-product of the rigidity and severity of the Federal Sentencing Guidelines.<sup>7</sup> Instead, my argument is for a reconceptualization of cooperation—a recognition that cooperation involves more than a utilitarian calculus that weighs the social benefits of additional crime fighting against the social costs of undeserved leniency. Cooperation also involves punishment and expiation. In its ideal form, cooperation can result in true atonement and ultimate reconciliation. And even in its less-than-ideal form, cooperation can be an important step in facilitating an offender's atonement—a process that is essential to repairing the harm done by the offender and restoring the offender to society.

This reconceptualization of cooperation does not reject the typical utilitarian model. Indeed, a utilitarian cost-benefit analysis explains much of what happens in cooperation. But punishment and atonement—while secondary dynamics—are nevertheless important, and not just for understanding the theoretical underpinnings of the cooperation system. These nonutilitarian aspects of cooperation have important implications for how prosecutors should evaluate and use cooperators, as well as for how judges should sentence cooperators.

This Article will present these alternative conceptions of cooperation and explore their practical implications. Part I will provide an overview of the cooperation system, focusing particularly on how it works under the Federal Sentencing Guidelines. Part II will summarize the standard utilitarian model of cooperation. Part III will explore the concept of cooperation as punishment. It will argue that the extralegal punishment inherent in cooperation lessens the cooperator's desert so that at least some of the sentencing leniency received by the cooperator is "deserved" in a retributive sense. Part IV will explore the concept of cooperation as atonement. In particular, it will examine an atonement model of punishment developed by

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6. Indeed, punishment is an essential part of the atonement model. See *infra* notes 176-78, 202 and accompanying text. Because expiation is incomplete without punishment, cooperation without punishment cannot be atonement. See *infra* notes 176-78, 202.

7. I have argued elsewhere for increased cooperation, but only as a response to the unnecessarily harsh drug sentences currently mandated by federal law. See Michael A. Simons, *Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921 (2002).

Stephen Garvey<sup>8</sup> and will apply that model both to the ideal cooperator and to the selfish cooperator. That part will argue that atonement is a worthwhile goal in itself (for both retributive and utilitarian reasons) and one that is facilitated by cooperation. Finally, Part V will explore the practical implications—both for prosecutors and for judges—of this reconceptualization of cooperation.

## I. THE COOPERATION SYSTEM: AN OVERVIEW

Although our current cooperation system has a distinctly modern feel,<sup>9</sup> the practice has existed in one form or another for centuries.<sup>10</sup> Cooperation has its roots in the ancient common law doctrine of approvement, whereby a defendant who confessed, testified against his accomplices, and secured their convictions would receive a pardon.<sup>11</sup> Eventually, the power to decide which witnesses should be permitted to testify for the state shifted to the prosecutor,<sup>12</sup> and by the nineteenth century the practice of prosecutors negotiating with defendants for testimony had become commonplace.<sup>13</sup> Since then, cooperation has remained a mainstay of our criminal justice system.<sup>14</sup>

8. Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1810-29 (1999).

9. The cooperation system took its current form only after the rise of determinate sentencing and the creation of the Federal Sentencing Guidelines in the 1980s. See *infra* notes 19-60 and accompanying text.

10. See Harris, *supra* note 3, at 13-16 (discussing the history of cooperation); Hughes, *supra* note 4, at 7-8 (same).

11. See Harris, *supra* note 3, at 13, 13 n.74 (citing 2 SIR MATTHEW HALE, THE HISTORY OF PLEAS OF THE CROWN 280 (Sollem Emlyn ed., 1736); BLACKSTONE'S COMMENTARIES BOOK 4 (Lewis ed., 1897)). The most obvious problem with approvement was that the approver's right to a pardon depended upon his success in obtaining convictions. If the approver's testimony failed to result in his accomplices' convictions (or, even if the approver's testimony varied in its repetition of details), the approver was executed. See Harris, *supra* note 3, at 13-14. The resulting temptations to commit perjury were overwhelming and led to approvement's abandonment by the seventeenth century. See *id.*; Rex v. Rudd, 98 Eng. Rep. 1114, 1116-17 (1775). Approvement was replaced by an "equitable" system in which the defendant who turned "king's evidence" or "state's evidence" had an "equitable right," though not a "legal right," to request a pardon. See Harris, *supra* note 3, at 13-14; *Rudd*, 98 Eng. Rep. at 1116.

12. See *United States v. Ford* ("The Whiskey Cases"), 99 U.S. 594, 603 (1878) (noting that "it is regarded as the province of the public prosecutor and not of the court to determine whether or not an accomplice, who is willing to criminate himself and his associates in guilt, shall be called and examined for the State"); Harris, *supra* note 3, at 14-15, 15 n.84 (citing *Commonwealth v. Knapp*, 27 Mass. (10 Pick.) 477, 493 (1830)).

13. See *The Whiskey Cases*, 99 U.S. at 603-05. Writing in 1878, the Supreme Court described a practice that sounds remarkably similar to current practice:

[I]n order to acquire the information necessary to determine the question, the public prosecutor will grant the accomplice an interview, with the understanding that any communications he may make to the prosecutor will be strictly confidential. Interviews for the purpose mentioned are for mutual explanation, and do not absolutely commit either party; but if the accomplice is subsequently called and examined, he is equally entitled to a recommendation for executive clemency. Promise

Today, cooperation is more popular than ever. In federal court,<sup>15</sup> almost one out of five defendants cooperates.<sup>16</sup> Many more offer their services but are rebuffed by prosecutors.<sup>17</sup> The twin engines driving this massive cooperation machinery are the Federal Sentencing Guidelines and mandatory minimum sentences. And to understand cooperation today, it is necessary to understand how the Guidelines and mandatory minimums have changed sentencing.

### A. *The Federal Sentencing Guidelines and the “Substantial Assistance” Departure*

Congress inaugurated the Guidelines era with the Sentencing Reform Act of 1984, which eliminated parole, created the United States Sentencing Commission, and gave the Commission its

of pardon is never given in such an interview, nor any inducement held out beyond what the before-mentioned usage and practice of the courts allow.

Prosecutors in such a case should explain to the accomplice that he is not obliged to criminate himself, and inform him just what he may reasonably expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of his associates. When he fulfils those conditions he is equitably entitled to a pardon, and the prosecutor, and the court if need be, when fully informed of the facts, will join in such a recommendation.

*Id.* at 603-04; *see also* Hughes, *supra* note 4, at 8 (noting that *The Whiskey Cases* discuss a “familiar procedure” in “surprisingly modern terms”).

14. *See, e.g.*, United States v. Vida, 370 F.2d 759, 767 (6th Cir. 1966) (rejecting a ban on cooperating witnesses as “a rule heretofore unknown in the jurisprudence of criminal prosecutions”); United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987) (stating that “[n]o practice is more ingrained in our criminal justice system”); Harris, *supra* note 3, at 18 (noting that cooperation agreements “have become commonplace in modern criminal prosecutions”).

15. Although cooperation exists in every state, its use can vary greatly. *See, e.g.*, Gould, *supra* note 3, at 836 (noting that cooperation is less common in New York state courts than in federal courts). In some states, a defendant may not be convicted based upon the uncorroborated testimony of an accomplice. *See* Christine J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 790-91, 791 nn.40-41 (listing sixteen states, including New York, that have established a corroboration rule by legislation and one that has established it judicially); *see also* John C. Jeffries, Jr. & Honorable John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1104-08 (1995) (arguing that the “different approach to accomplice testimony in state court makes sense . . . when considered in the context of the prototypical state prosecution, which focuses on a discrete, isolated criminal act”). My analysis will focus on cooperation in the federal system for several reasons: the federal system operates nationwide, cooperation is generally more prevalent in the federal system than in state systems, critiques of cooperation have focused on the federal system, and, not insignificantly, my experience with cooperation has been almost entirely in the federal system.

16. *See* 2000 SOURCEBOOK, *supra* note 1, 51 fig.G (illustrating the percentages of offenders receiving each type of departure in federal courts); *see also infra* notes 54-60 and accompanying text.

17. *See* Weinstein, *supra* note 3, at 563-64; *infra* note 60.



marching orders.<sup>18</sup> Two years later, Congress continued its sentencing reform with the Anti-Drug Abuse Act of 1986, which created harsh mandatory sentences for many narcotics offenses.<sup>19</sup> In 1987, the Commission's Sentencing Guidelines went into effect,<sup>20</sup> and the practice of criminal law in federal court has never been the same.

Before the Guidelines took effect in 1987, federal judges usually had wide, almost unfettered discretion in sentencing defendants.<sup>21</sup> Most federal crimes provided (and still provide) only a maximum sentence. For example, the legislatively proscribed penalty for bribing a public official is imprisonment for "not more than fifteen years";<sup>22</sup> the penalty for armed bank robbery is imprisonment for "not more than twenty-five years";<sup>23</sup> and the penalty for kidnapping is imprisonment for "any term of years or for life."<sup>24</sup> Moreover, in deciding whether to sentence a defendant to the minimum (including a suspended sentence),<sup>25</sup> the maximum, or something in between, pre-Guidelines judges were not constrained in what factors they could consider and the weight to give those factors.<sup>26</sup> Thus, while the

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18. See Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-59, 3561-66, 3571-74, 3581-86 (2000); 28 U.S.C. §§ 991-98 (2000)); see also Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993) (chronicling the legislative history of the Federal Sentencing Guidelines).

19. See Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. § 841(b) (2000)).

20. See Stith & Koh, *supra* note 18, at 228.

21. See generally MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 3-11 (1972) (describing the "almost wholly unchecked and sweeping powers" given to sentencing judges under pre-Guidelines law; KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9-29 (1998) (discussing the history of federal criminal sentencing before the advent of the Sentencing Guidelines); Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion: Koon's Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines*, 79 B.U. L. REV. 493, 506-08 (1999) (describing the "[o]ld law discretionary sentencing," which "gave federal judges unreviewable and, within the statutory maximum, standardless power to choose the punishment in a given case").

22. 18 U.S.C. § 201(b)(1) (2000).

23. § 2113(d).

24. § 1201(a). Although a few federal criminal statutes provide minimum as well as maximum sentences, few of those statutes predate the Guidelines era. In any event, the resulting range is typically extremely broad. For example, the authorized prison sentence for distributing five hundred grams of cocaine ranges from a minimum of five years to a maximum of forty years. 21 U.S.C. § 841(b)(1)(B) (2000).

25. Before the Guidelines took effect, judges generally had the authority to suspend any sentence, replacing it with a probationary term. See Weinstein, *supra* note 3, at 572 n.30 (citing 18 U.S.C. § 3651 (1982), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. 11, 212(a)(2), 98 Stat. 1987 (effective Nov. 1, 1987)).

26. See *Williams v. New York*, 337 U.S. 241, 247 (1949) (noting that the sentencing judge could consider "the fullest information possible concerning the defendant's life and characteristics"). The disparities that resulted from this unfettered discretion were the heart of

seriousness of the offense was typically an important factor in setting a sentence, judges were also free to consider (or not to consider) the defendant's criminal history, age, education, employment, family background, family responsibilities, charitable works, health, history of substance abuse, behavior at trial, assistance to the authorities, remorse, or any other factor that the judge considered relevant.<sup>27</sup>

The Sentencing Guidelines have changed all that. Sentences are now determined by reference to a grid that establishes over 250 separate sentencing ranges.<sup>28</sup> A defendant's sentencing range is determined by combining a mathematical score for the seriousness of the offense with a mathematical score for the defendant's criminal history. Judicial discretion is severely restrained.<sup>29</sup> The Guidelines enumerate,<sup>30</sup> sometimes in minute detail, those factors that determine the seriousness of the offense (such as the amount of money stolen, the extent of the physical injury inflicted, or the quantity of drugs distributed) and those factors that determine the blameworthiness of the offender (such as the defendant's role in the offense or abuse of a position of trust). Many other factors that often played a central role

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Judge Frankel's influential criticism of pre-Guidelines sentencing. *See generally* FRANKEL, *supra* note 21. Eliminating those disparities was the major justifying purpose of the Sentencing Guidelines. *See* STITH & CABRANES, *supra* note 21, at 104 (asserting that "[r]eduction of 'unwarranted sentencing disparities' was a—probably *the*—goal of the Sentencing Reform Act of 1984").

27. *See* STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 88-92, 102-05 (1988) (explaining how judges considered an offender's criminal record and life history); FRANKEL, *supra* note 21, at 7-8, 18-25 (discussing broad judicial discretion in sentencing and providing examples of this discretion); *see, e.g.*, *United States v. Hernandez*, 617 F. Supp. 83, 85 (S.D.N.Y. 1985) (noting that a codefendant was given leniency because of his age (twenty-five), remorse, and drug addiction); *United States v. Bergman*, 416 F. Supp. 496, 501 (S.D.N.Y. 1976) (considering the defendant's lack of criminal history, his age, health, employment, and charitable works).

28. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2002), available at [www.ussc.gov/2002guid/tahcon02\\_2.htm](http://www.ussc.gov/2002guid/tahcon02_2.htm) [hereinafter 2002 GUIDELINES]. For a good introduction to how the Guidelines work, *see* 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, 690-704 (1996). *See also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 6-31 (1988) (describing how the Guidelines work and the compromises that the Sentencing Commission made during the drafting process).

29. As Frank Bowman has opined: "The whole point of the guidelines was to hem in district courts with a set of rules created by the Commission and enforced by the courts of appeals." Frank O. Bowman III, *Places in the Heartland: Departure Jurisprudence After Koon*, 9 FED. SENTENCING REP. 19, 19 (1996); *see also* STITH & CABRANES, *supra* note 21, at 78-103 (criticizing the Guidelines for restricting judicial discretion).

30. By 2002, the Guidelines had grown to over four hundred pages of guidelines, policy statements, and commentary. *See* 2002 GUIDELINES, *supra* note 28.

in pre-Guidelines sentencing—including most individual offender characteristics—now have no effect on the mathematical calculation.<sup>31</sup>

The resulting sentencing ranges are significantly narrower than under pre-Guidelines law.<sup>32</sup> For example, the pre-Guidelines defendant who paid a \$10,000 bribe to a judge faced a sentence between 0 and 180 months;<sup>33</sup> under the Guidelines, the same defendant now faces a sentencing range of 27 to 33 months.<sup>34</sup> An armed bank robbery committed before the Guidelines could have resulted in any sentence between 0 and 300 months;<sup>35</sup> the comparable Guidelines sentencing range is 70 to 87 months.<sup>36</sup> A pre-Guidelines defendant who kidnapped (but did not harm) a victim faced a sentence of zero to life;<sup>37</sup> the Guidelines sentencing range for that crime is 97 to 121 months.<sup>38</sup>

Not only are the Guidelines sentencing ranges narrower, the minimum sentences are—on average—more severe than pre-Guidelines sentences. For some offenses, this increased severity has

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31. The Guidelines provide that age, education and vocational skills, mental and emotional conditions, physical condition, employment record, family ties and responsibilities, military, civic, charitable, and public service, and prior good works are “not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.” 2002 GUIDELINES, *supra* note 28, §§ 5H1.1-1.6, 5H1.11, introductory cmt. Judges may still consider those factors in deciding what sentence to impose within the relatively narrow Guidelines sentencing range. In addition, sentencing judges may rely on those factors to depart from the Guidelines sentencing range when such factors are present “to an exceptional degree.” *See Koon v. United States*, 518 U.S. 81, 96 (1996). Other factors, including drug or alcohol dependence, lack of guidance as a youth, and economic hardship, are never appropriate grounds for departure from the Guidelines sentencing range. *See id.* at 93; 2002 GUIDELINES, *supra* note 28, §§ 5H1.4, 5H1.12, 5K2.12.

32. The Sentencing Reform Act of 1984, which created the Sentencing Commission, mandated that the maximum of any sentencing range not exceed the minimum by more than twenty-five percent or six months, whichever is greater. *See* 28 U.S.C. § 994(b)(2) (2000); 2002 GUIDELINES, *supra* note 28, ch. 1, pt. A(4)(h).

33. *See* 18 U.S.C. § 201(b)(1) (2000) (providing a sentence of “not more than fifteen years” imprisonment for bribery of public officials and witnesses).

34. This sentence is based on a Guidelines offense level of eighteen, which results from a base offense level of ten for public bribery and an eight-level enhancement for a bribe involving a payment to a “high-level decisionmaking” official, such as a judge. *See* 2002 GUIDELINES, *supra* note 28, § 2C1.1, ch. 5, pt. A.

35. *See* 18 U.S.C. § 2113(d) (2000) (providing a sentence of “not more than twenty-five years” imprisonment for a bank robbery that “puts in jeopardy the life of any person by the use of a dangerous weapon”).

36. This sentence is based on a Guidelines offense level of twenty-seven, which results from a base offense level of twenty for robbery, plus a two-level enhancement for robbing a bank and a five-level enhancement for “brandishing” a gun. *See* 2002 GUIDELINES, *supra* note 28, § 2B3.1, ch. 5, pt. A.

37. *See* 18 U.S.C. § 1201(a) (2000).

38. This sentence is based on a Guidelines offense level of thirty, which results from a base offense level of twenty-four for kidnapping, plus a six-level enhancement for demanding a ransom. *See* 2002 GUIDELINES, *supra* note 28, § 2A4.1, ch. 5, pt. A.

resulted from policy choices made by the Sentencing Commission.<sup>39</sup> For other offenses, the increased severity has resulted from congressional enactments—particularly mandatory minimum sentences for narcotics and firearm offenses—that have been incorporated into the Guidelines.<sup>40</sup> The net result has been a significant increase in sentence severity. In the first decade of Guidelines sentencing, federal prison terms more than doubled.<sup>41</sup>

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39. For example, the Commission made a conscious choice to increase sentence severity for white-collar offenses. See Breyer, *supra* note 28, at 20-21 (discussing the Commission's "decision to increase the severity of punishment for white-collar crime" by requiring imprisonment "for many white-collar offenders, including tax, insider trading, and antitrust offenders, who previously would have likely received only probation"); 2002 GUIDELINES, *supra* note 28, ch. 1, pt. A(3) (noting the Commission's conclusion that economic crime in the pre-Guidelines era had been "punished less severely than other apparently equivalent behavior"); U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 18 (1987) [hereinafter SUPPLEMENTARY REPORT]. The Commission also chose to increase sentences for some violent crimes. See *id.* at 19; STITH & CABRANES, *supra* note 21, at 60-61.

40. See 21 U.S.C. § 841(b) (2000) (setting sentences for narcotics offenses); 18 U.S.C. § 924(c) & (e) (2000) (setting minimum sentences for firearm offenses). Although Congress had enacted occasional mandatory sentences throughout its history, the modern era of mandatory minimums began in 1984, the same year that Congress created the Sentencing Commission. See U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 8 (1991) ("Beginning in 1984, and every two years thereafter, Congress enacted an array of mandatory minimum penalties specifically targeted at drugs and violent crime."). The most significant mandatory minimums were created by the Anti-Drug Abuse Act of 1986, which provided minimum prison terms of five years and ten years for offenses involving certain quantities of drugs. See Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. § 841(b) (2000)); Barbara Meierhofer, *The Severity of Drug Sentences: A Result of Purpose or Chance?*, 12 FED. SENTENCING REP. 34, 34-35 (1999). The Sentencing Commission then used those congressionally mandated sentences as the framework for *all* drug sentences—increasing or decreasing the sentencing range as the quantity of drugs increased or decreased. See Meierhofer at 35; 2002 GUIDELINES, *supra* note 28, § 2D1.1(c) (setting forth different base offense levels for various drug quantities). Because drug offenses account for over forty percent of all federal sentences, see 2000 SOURCEBOOK, *supra* note 1, at 12 tbl.3, the drug mandatory minimums and their attendant guidelines have markedly increased overall sentence severity. See Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 FED. SENTENCING REP. 12, 14, 17 (1999) (concluding that the average prison time expected to be served by federal drug offenders sentenced in 1992 was almost three times longer than it had been for federal drug offenders sentenced in 1984).

41. See WILLIAM J. SABOL & JOHN MCGREADY, BUREAU OF JUSTICE STATISTICS, TIME SERVED IN PRISON BY FEDERAL OFFENDERS, 1986-1997 1 (1999) ("Overall, time to be served increased from 21 months, on average, for those entering Federal prison during 1986 to 47 months for those entering during 1997."), available at [www.ojp.usdoj.gov/bjs/pub/pdf/tsppo97.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/tsppo97.pdf); Hofer & Semisch, *supra* note 40, at 17 (stating that "federal offenders sentenced in 1998 will spend about twice as long in prison, on average, as did offenders sentenced in 1984"). Although the Guidelines (and statutory minimums reflected in the Guidelines) may not be responsible for all of this increased severity, a 1999 study by Sentencing Commission staff found a significant correlation between increased sentences for particular crimes and corresponding changes in the Guidelines, leading the researchers to conclude that the Guidelines "are a primary, if not the primary, cause" of the increased severity. Hofer & Semisch, *supra* note 40, at 18. Incarceration

Although judges are permitted to “depart” from the narrow ranges set by the Guidelines, that authority is severely limited. As explained by the Supreme Court in *Koon v. United States*,<sup>42</sup> sentencing judges may depart from Guidelines sentencing ranges in three situations. First, a departure may be appropriate if the judge finds “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”<sup>43</sup> The Commission has expressed its view that such departures will be “highly infrequent” because the Guidelines, in the Commission’s view, already take into account the relevant sentencing factors.<sup>44</sup> Second, a departure may be appropriate if the judge finds a sentencing factor that the Commission has deemed “not ordinarily relevant” that is “present to an exceptional degree.”<sup>45</sup> Again, in the Commission’s view, such cases will be “extremely rare.”<sup>46</sup> Finally, the sentencing judge may depart if the Guidelines specifically encourage such a departure.<sup>47</sup> Most “encouraged” departures are upward departures.<sup>48</sup> Of the “encouraged” downward departures, only one is invoked with any regularity: the departure for “substantial assistance”—the cooperator’s departure.<sup>49</sup>

Section 5K1.1 of the Guidelines provides that a judge “may depart” from the Guidelines sentencing range “[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.”<sup>50</sup> A cooperating defendant may also receive

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rates have also increased under the Guidelines, as fewer and fewer defendants are sentenced to probationary terms. See *id.* at 13-15; STITH & CABRANES, *supra* note 21, at 62-63.

42. 518 U.S. 81, 109 (1996).

43. 18 U.S.C. § 3553(b) (2000); 2002 GUIDELINES, *supra* note 28, ch. 1, pt. A(4)(b); see also *Koon*, 518 U.S. at 92.

44. 2002 GUIDELINES, *supra* note 28, ch. 1, pt. A(4)(b) (2000); see also *Koon*, 518 U.S. at 96.

45. 2002 GUIDELINES, *supra* note 28, § 5K2.0 (2000); *Koon*, 518 U.S. at 96.

46. 2002 GUIDELINES, *supra* note 28, § 5K2.0, cmt. (2000).

47. See *Koon*, 518 U.S. at 96.

48. See, e.g., 2002 GUIDELINES, *supra* note 28, § 5K2.1 (encouraging upward departures for offenses involving death); § 5K2.2 (physical injury); § 5K2.3 (psychological injury); § 5K2.4 (abduction or unlawful restraint); § 5K2.5 (property damage or loss); § 5K2.6 (weapons and dangerous instrumentalities); § 5K2.7 (disruption of government function); § 5K2.8 (extreme conduct); § 5K2.14 (offenses that “significantly endangered” public welfare); § 5K2.17 (high-capacity, semiautomatic firearms); § 5K2.18 (violent street gangs); § 5K2.21 (dismissed and uncharged conduct). Notwithstanding the number of these encouraged departures, upward departures are imposed in less than one percent of all Guidelines sentences. See 2000 SOURCEBOOK, *supra* note 1, 51 fig.G (illustrating the percentages of offenders receiving each type of departure in federal courts).

49. See 2002 GUIDELINES, *supra* note 28, § 5K1.1.

50. *Id.* The “substantial assistance” departure was created in response to a congressional directive in the Sentencing Reform Act of 1984:

a sentence below any statutorily mandated minimum.<sup>51</sup> Significantly, once the prosecution files a substantial assistance motion, the ultimate sentence becomes purely discretionary—the extent of the departure is neither constrained by the Guidelines nor reviewable on appeal.<sup>52</sup>

In a Guidelines system characterized by rigid rules, severe sentences, and sharply limited judicial discretion, cooperation departures are a striking exception. For many defendants, the lure of the cooperation departure is irresistible—it is usually the only

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The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

28 U.S.C. § 994(n) (2000). Although Congress did not direct the Sentencing Commission to condition substantial assistance departures on a government motion, Congress had imposed the government motion requirement in the analogous provision that allows cooperators to receive sentences below the statutory minimum. See 18 U.S.C. § 3553(e) (2000).

51. See § 3553(e); 2002 GUIDELINES, *supra* note 28, § 5K1.1, cmt. n.1; 28 U.S.C. § 994(n). While a court may depart from the Guidelines sentencing range for a variety of reasons, see *supra* notes 42-49 and accompanying text, “substantial assistance” is one of only two justifications for imposing a sentence below a statutorily mandated minimum. The other is the “safety valve” enacted by Congress in 1994, which permits a modest sentence reduction for the least culpable narcotics offenders. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 18 U.S.C. § 3553(f) (2000)).

52. See, e.g., *United States v. Khalil*, 132 F.3d 897, 898 (3d Cir. 1997) (holding that an appellate court lacks jurisdiction to review the extent of a substantial assistance departure). The Guidelines provide a list of factors that the sentencing court may consider in evaluating the defendant's cooperation:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant's assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; (5) the timeliness of the defendant's assistance.

2002 GUIDELINES, *supra* note 28, § 5K1.1. Although this list is not exhaustive and sentencing judges are encouraged to consider “variable relevant factors,” *id.* § 5K1.1, cmt. background, most courts have held that the 5K1.1 departure must be based on the defendant's cooperation and not on other mitigating factors. See, e.g., *United States v. Mariano*, 983 F.2d 1150, 1156 & n.6 (1st Cir. 1993) (“As a basis for departing [under § 5K1.1], a court may consider mitigating factors only to the extent that they can fairly be said to touch upon the degree, efficacy, timeliness, and circumstances of a defendant's cooperation.”). Nevertheless, as one federal district judge has observed, the latitude afforded sentencing judges to reduce a sentence based upon “variable relevant factors,” gives judges the ability “to import a wide range of mitigating circumstances into the departure calculus.” Bruce M. Seyla & John C. Massaro, *The Illustrative Role of Substantial Assistance Departures in Combating Ultra-Uniformity*, 35 B.C. L. REV. 799, 819 (1994) (noting that, for example, a defendant's “family circumstances” might affect the court's evaluation of the danger that cooperation posed to the defendant or his family).

significant sentencing factor over which they have any control, and it is often their only hope for a significantly reduced sentence.<sup>53</sup>

Not surprisingly, the Sentencing Guidelines have ushered in dramatic increases in cooperation.<sup>54</sup> Although no statistics exist on cooperation before the Guidelines, statistics from the early days of the Guidelines provide some indication of pre-Guidelines practice.<sup>55</sup> In 1989, the first year for which the Sentencing Commission kept statistics on cooperation, 3.5% of defendants sentenced under the Guidelines received substantial assistance departures.<sup>56</sup> It is likely that cooperation was even less frequent before 1989.<sup>57</sup> Since 1994, however, approximately 20% of all federal defendants have received cooperation departures.<sup>58</sup> In narcotics cases, cooperation levels exceed 30%.<sup>59</sup> Many more defendants offer to cooperate in an effort to earn the coveted departure.<sup>60</sup>

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53. See Weinstein, *supra* note 3, at 577. The other sentencing factor over which defendants have control is the modest two-point or three-point reduction in offense level they can earn by "accepting responsibility" for their criminal conduct (usually by pleading guilty). See 2002 GUIDELINES, *supra* note 28, § 3E1.1; Weinstein, *supra* note 3, at 575 (describing the acceptance of responsibility reduction as "all too minor" for many defendants).

54. For a detailed discussion of cooperation rates under the Sentencing Guidelines, see Simons, *supra* note 7, at 935-38.

55. See Weinstein, *supra* note 3, at 563 n.2.

56. See U.S. SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 39 fig.G (1996), available at [www.ussc.gov/annrpt/1996/sourcbk.htm](http://www.ussc.gov/annrpt/1996/sourcbk.htm) [hereinafter 1996 SOURCEBOOK].

57. By 1989, the Guidelines had already been in effect for a full year. Moreover, the harsh mandatory minimum sentences for narcotics offenses established by the Anti-Drug Abuse Act of 1986 had already been in effect for two full years. See Pub L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. §§ 841-848 (2000)). In 1989, substantial assistance was the *only* way to avoid those mandatory minimum sentences. See *supra* note 51.

58. See 1996 SOURCEBOOK, *supra* note 56, at 39 fig.G; 2000 SOURCEBOOK, *supra* note 1, at 51 fig.G. Cooperation departures grew rapidly in the first five years of the Guidelines: from 3.5% in 1989, to 7.5% in 1990, 11.9% in 1991, 15.1% in 1992, 16.9% in 1993, and 19.5% in 1994. See 1996 SOURCEBOOK, *supra* note 56, at 39 fig.G. From 1995 through 1999, cooperation departures remained at or near 19%. See Simons, *supra* note 7, at 937 fig.1 (illustrating changing cooperation rates). In 2000, cooperation departures declined slightly, to just under 18%. *Id.*

59. From 1996 through 2000, cooperation departures were granted in thirty-one percent of narcotics trafficking cases prosecuted in federal court. See Simons, *supra* note 7, at 941 n.96.

60. For example, in one study the Sentencing Commission reviewed sixty-four randomly selected conspiracy prosecutions from 1992 in which at least one defendant cooperated. See LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK 9, 26 exh.5 (1998). Of the 264 defendants in those cases for which information was available, 158 (or 67.5%) provided some kind of assistance to the government, though only 61 (or 38.6%) received substantial assistance departures. *Id.*; see also Weinstein, *supra* note 3, at 563, 592 (noting that many defendants offer to cooperate but fail to close the deal and that "[d]espite all the disincentive and risks, defendants flock to proffer sessions"). My experience as a federal prosecutor was similar. For example, in one racketeering case I prosecuted, seven of the eight defendants either cooperated or offered to cooperate. This level of cooperation (or would-be-cooperation) was not unusual in multidefendant cases. See SUBSTANTIAL ASSISTANCE, *supra* note

### B. Cooperation Under the Guidelines

The cooperation process usually begins with a series of meetings involving the prosecutor, the agents involved in the case, the defense attorney, and the would-be cooperator.<sup>61</sup> These debriefing sessions—sometimes called “proffer sessions”<sup>62</sup>—serve dual purposes. First, if the defendant has not yet decided to cooperate, the prosecutor may attempt to persuade the defendant that the evidence against him is overwhelming and that cooperating is his only option.<sup>63</sup> Second, if the defendant decides he wants to cooperate, he must convince the prosecutor that he has valuable information or services to offer—in other words, that he can provide “substantial assistance.” The defendant typically provides his information to the prosecutor pursuant to a limited use immunity agreement called a “queen-for-a-day” agreement.<sup>64</sup> The prosecutor and the law enforcement agents

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1, at 48 (reporting that in one large U.S. Attorney’s office “it was not unusual for *all* the defendants in a drug conspiracy to cooperate and receive a departure” (emphasis added)).

61. From the defendant’s perspective, the process begins even sooner—when the defense lawyer educates the defendant about the Sentencing Guidelines and advises the defendant about his options, including cooperation. See Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917, 929 (1999) (“Competent defense lawyers must discuss the option of cooperation with clients early on in the representation.”). For an insightful discussion of the ethical and professional issues facing defense lawyers in this context, see Richman, *supra* note 5.

62. See John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 *J.L. & POL’Y* 423, 447-450 (1997) (describing proffer sessions); Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 *HASTINGS L.J.* 1381, 1401-06 (1996) (offering a federal judge’s advice on how to conduct proffer sessions); Yaroshefsky, *supra* note 61, at 952-62 (discussing various ways in which prosecutors conduct proffer sessions).

63. See Ronald S. Safer & Matthew C. Crowl, *Substantial Assistance Departures: Valuable Tool or Dangerous Weapon?*, 12 *FED. SENTENCING REP.* 41, 42 (1999).

64. The typical “queen-for-a-day” agreement provides the defendant with very limited use immunity, and even that immunity will be waived if the defendant later testifies in a way that is inconsistent with his statements in the proffer session. See *United States v. Mezzanatto*, 513 U.S. 196, 198, 210 (1995) (approving use of proffer statements to impeach defendant’s testimony); Richard B. Zabel & James J. Benjamin, *Are “Queen for a Day” Pacts Courtesans?*, *N.Y. L.J.*, June 13, 2001, at 1 (noting that proffer agreements have traditionally allowed prosecutors to use the proffer statement to impeach the defendant’s testimony and develop leads). Some agreements also provide that the prosecution may use the defendant’s proffer statements if the defense presents at trial *any* evidence or argument inconsistent with the proffer statements (even if the defendant does not testify). See *id.* Courts have been split, however, on whether such provisions are appropriate. Compare *United States v. Krichich*, 159 F.3d 1020, 1025-26 (7th Cir. 1998) (allowing the introduction of the defendant’s proffer statements when defendant’s cross-examination of a government witness took a position contradictory to the proffer statements), with *United States v. Duffy*, 133 F. Supp. 2d 213, 215-16, 218 (E.D.N.Y. 2001) (invalidating that provision of a standard proffer agreement and expressing doubt as to whether the Second Circuit and the Supreme Court will reach the same result as the Seventh Circuit in *Krichich*).



may debrief the defendant many times in an effort to evaluate the defendant and his information.<sup>65</sup> During these debriefings, the prosecutor will demand detailed information not only about the facts at issue, but also about any aspect of the cooperator's life that could be used to impeach him (from past criminal conduct, to noncriminal "bad acts" that reflect a bad character for veracity, to any biases the cooperator may have against the targets of his cooperation).<sup>66</sup>

In evaluating the ultimate utility of the defendant's cooperation, the prosecutor will look to several factors, such as the number of other people who can be prosecuted based on the defendant's information, the seriousness of the crimes committed by those other people, and whether the defendant's information is cumulative of other evidence that the prosecution already has or can obtain.<sup>67</sup> The prosecutor must also evaluate whether the defendant is being truthful and whether the defendant will make a compelling witness.<sup>68</sup> The prosecutor will then weigh the value of the defendant's cooperation against the defendant's own culpability—the seriousness of the defendant's wrongdoing.<sup>69</sup> Both as a matter of criminal justice policy and prosecutorial tactics, prosecutors generally avoid using cooperators who are more culpable than the people against whom they are cooperating.<sup>70</sup>

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65. See *United States v. Ming He*, 94 F.3d 782, 788 (2d Cir. 1996) ("A crucial part of the process by which a cooperating witness gives information and assistance to the government and is in turn promised a reward at sentencing is the debriefing session. The usefulness to the prosecutor of the defendant's cooperation in debriefing usually determines whether the government will make a § 5K1.1 motion."); Yaroshefsky, *supra* note 61, at 930 ("Typically, there are a number of debriefing sessions prior to the government making a decision that the defendant should be signed up for a cooperation agreement.")

66. See Gleeson, *supra* note 62, at 448-49 ("The prosecutor also uses proffer sessions to determine what 'baggage' a witness will bring to the witness stand at trial. Because future cross-examinations of the witness will not be limited to the crimes under investigation, the prosecutor needs to know about all of the criminal activity in the witness's past, whether or not the government is aware of it."). This information about the cooperator's background is important not only to help the prosecutor evaluate the cooperator's credibility and culpability, but also because, if the cooperator testifies, any information that may be used to impeach him must be disclosed to the defense. See *United States v. Giglio*, 405 U.S. 150, 153-55 (1972).

67. See SUBSTANTIAL ASSISTANCE, *supra* note 1, at 30-32; Hughes, *supra* note 4, at 13-15.

68. See generally Yaroshefsky, *supra* note 61, *passim* (reporting ways in which prosecutors attempt to discern whether cooperators are being truthful).

69. See SUBSTANTIAL ASSISTANCE, *supra* note 1, at 30-32; Hughes, *supra* note 4, at 13-15.

70. Criticism of cooperation under the Guidelines has often focused on the so-called cooperation paradox—the anomaly created when the more culpable member of a conspiracy cooperates and receives a lesser sentence than less culpable members of the conspiracy who may have less information to give and therefore cannot cooperate. See, e.g., Schulhofer, *supra* note 3, at 212 ("Minor players, peripherally involved and with little knowledge or responsibility, have little to offer and thus can wind up with far more severe sentences than the boss."); Weinstein, *supra* note 3, at 611-12. The available empirical data, however, indicate that the "cooperation paradox" is a problem in theory, but not in practice. See SUBSTANTIAL ASSISTANCE, *supra* note 1,

If the prosecutor agrees that the defendant should be “signed up” as a cooperator, the parties will execute a written agreement. The agreement typically will impose two obligations on the defendant. First, the defendant will agree to plead guilty. In some districts, a cooperator is required to plead guilty not only to the criminal conduct for which he was arrested, but also to any other serious criminal conduct that is revealed during the proffer sessions, even conduct completely unrelated to the crimes that led to the cooperator’s arrest and even conduct for which the government’s only proof is the cooperator’s proffer.<sup>71</sup> Second, the defendant will agree to cooperate, which generally entails providing the government with all requested information, testifying whenever requested, and doing so truthfully.<sup>72</sup> The prosecution, in turn, will agree to bring the defendant’s cooperation to the attention of the court through a section 5K1.1 motion *if*: (1) the defendant complies with his obligations under the agreement (including testifying truthfully), and (2) the prosecution determines that the defendant’s assistance was “substantial.”<sup>73</sup> In some districts, the cooperation agreement will also include provisions

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at 73-108 (describing a detailed study of cooperation in sixty-four randomly selected conspiracies, many of them narcotics conspiracies); MAXFIELD & KRAMER, *supra* note 60, at 13 (“The oft-cited ‘truth’ that drug conspiracy members at the top of the organization are more likely to secure reduced sentences due to substantial assistance than those lower in the criminal organization is not supported by these exploratory data.”). These data are consistent with my experience as a prosecutor and with common sense. See Trott, *supra* note 62, at 1392 (Among four “[g]eneral [r]ules of [t]humb for the [c]areful [p]rosecutor” in dealing with cooperators, the first is “[m]ake agreements with ‘little fish’ to get ‘big fish’”).

71. In these districts, would-be cooperators must disclose all of their criminal conduct throughout their life during the proffer sessions. The subsequent plea to this additional criminal conduct may significantly increase the cooperators’ sentencing exposure. See Gleeson, *supra* note 62, at 449 & n.109. For example, if cooperator who is arrested for narcotics trafficking is required, as part of his cooperation agreement, to plead guilty to a homicide that was revealed only in proffer sessions, he could see his Guidelines sentence (before the cooperation departure) increase from ten years to life. See *id.*; Yaroshefsky, *supra* note 61, at 928-29. Not all districts, however, follow this practice. See Gleeson, *supra* note 62, at 449 n.110.

72. See John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797, 1829-30 (2001); Ann C. Rowland, *Effective Use of Informant and Accomplice Witnesses*, 50 S.C. L. REV. 679, 685-86 (1999) (listing factors prosecutors should consider in drafting plea agreements with cooperators). The defendant will also typically be required to waive certain rights, including the right to appeal his sentence. See Douglass, *supra*, at 1830.

73. See, e.g., *United States v. Ming He*, 94 F.3d 782, 786 (2d Cir. 1996) (describing the terms of a cooperation agreement); *United States v. Tejada*, 773 F. Supp. 622, 624 (S.D.N.Y. 1991) (summarizing a “standard” cooperation agreement); *United States v. Alli-Balogun*, Nos. 96 Civ. 5949 (JFK), 93 Cr. 230 (JFK), 1998 WL 42570, at \*5 (S.D.N.Y. Feb. 4, 1998) (noting that the defendant’s principle obligations under a cooperation agreement were to “provide truthful information at all times, provide documents and information as requested by the Government, testify if necessary, and not commit any additional crimes”).

about the extent of the sentencing reduction or the prosecution's recommendation.<sup>74</sup>

The cooperator will then plead guilty and begin cooperating. For some cooperators, not much else will be required. Because federal prosecutors may obtain warrants and indictments based on hearsay,<sup>75</sup> additional prosecutions may be commenced without the cooperator's direct involvement. Moreover, because most federal prosecutions result in guilty pleas,<sup>76</sup> the cooperator may never be required to testify.<sup>77</sup> For many cooperators, however, signing the agreement is only the beginning of a lengthy process that starts with numerous debriefing sessions, extends to intensive witness preparation, and culminates in public testimony.<sup>78</sup>

The cooperator typically will not be sentenced, however, until his cooperation is complete. Prosecutors postpone the cooperator's sentencing for two reasons. First, by delaying the sentencing benefit (and by delaying the prosecution's determination of whether the cooperator's assistance has been "substantial"), the prosecution

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74. See Safer & Crowl, *supra* note 63, at 43. A 1997 Sentencing Commission survey found that approximately one-third of all districts do not make any specific sentence recommendation for cooperators, while the other two-thirds make use of binding sentence agreements under Federal Rule of Criminal Procedure 11(e)(1)(C) or recommended sentence agreements under Federal Rule of Criminal Procedure 11(e)(1)(B). See SUBSTANTIAL ASSISTANCE, *supra* note 1, at 33-34. Even in those districts where the prosecution does not make a specific sentencing recommendation, such as the Southern District of New York where I practiced, the prosecutor's description of the defendant's cooperation typically carries significant weight at sentencing. See, e.g., Ming He, 94 F.3d at 786-87 (providing the cooperator a mere five percent sentence reduction after the prosecution "disparaged" the cooperator's assistance).

75. See *Costello v. United States*, 350 U.S. 359, 363 (1956) (approving indictment based solely on hearsay testimony); *United States v. Williams*, 224 F.3d 530, 532 (6th Cir. 2000) (approving search warrant based on hearsay).

76. In 2000, over ninety-five percent of all federal prosecutions were resolved by guilty plea. See 2000 SOURCEBOOK, *supra* note 1, at 20 fig.C.

77. See Gleeson, *supra* note 62, at 451 (noting that a cooperator may never even be "debriefed" following the execution of the agreement "[i]f the other targets of the investigation all plead guilty").

78. The debriefing sessions and preparation sessions will typically cover the same ground as the proffer sessions—though in far more detail. One former federal prosecutor (now a federal judge) has described this "process of eliciting details and preparing testimony" as "laborious (and sometimes excruciatingly boring)." See *id.* Often, the most laborious part of the process is not eliciting the details about the criminal activity of others, but rather eliciting the details about the cooperator's own criminal activity, especially criminal activity unrelated to the events under investigation. See *id.* at 449-50. While cooperators will usually readily admit at least some of their criminality, "the temptation to minimize it is strong." See *id.* at 448. It is essential for the prosecutor to elicit this information, however, as the cooperator's criminal background will ordinarily account for a substantial portion of the cooperator's direct testimony and an even more substantial portion of the cooperator's cross-examination. See *id.* at 448-49.

maintains maximum leverage over the defendant.<sup>79</sup> Second, the cooperator who has not yet received his sentencing benefit may make a more compelling witness. The cooperator can truthfully testify that he does not know whether his sentence will be reduced or how much it will be reduced; he just knows that he has to “tell the truth” and the rest is up to the judge.<sup>80</sup>

Whether assistance will be considered “substantial” varies from district to district and even from prosecutor to prosecutor.<sup>81</sup> At a minimum, the cooperator must provide the government with information about the criminal activity of others. The mere providing of “intelligence,” however, usually will not amount to substantial assistance.<sup>82</sup> More often, the cooperator will be required to testify—or

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79. See Douglass, *supra* note 72, at 1830 n.142 (noting that delaying sentencing “creates maximum control over the cooperating witness”); Rowland, *supra* note 72, at 686 (instructing prosecutors to not commit to substantial assistance departure “until the witness has fulfilled his agreement to cooperate fully”). This leverage is significant, because the prosecution retains almost complete discretion to determine whether the cooperator’s assistance is “substantial.” See *Wade v. United States*, 504 U.S. 181, 185-86 (1992) (holding that the prosecution’s refusal to make a substantial assistance motion for a cooperator is reviewable only if it is “based on an unconstitutional motive” or is “not rationally related to any legitimate Government end”).

80. See Jeffries & Gleeson, *supra* note 15, at 1122; Richman, *supra* note 5, at 97.

81. See MAXFIELD & KRAMER, *supra* note 60, at 26 ex.5 (describing the different types of cooperation engaged in by a sample of sixty-one cooperators). It is difficult to generalize about the circumstances in which assistance is considered “substantial” because practices vary—sometimes significantly—among the ninety-four United States Attorney’s Offices. See SUBSTANTIAL ASSISTANCE, *supra* note 1, at 42-52 (describing varying cooperation practices in eight districts); Lee, *supra* note 3, at 125-28 (summarizing prosecutors’ differing departure policies in the Central District of Illinois and the District of Columbia); Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 588-91 (1998) (noting prosecutors’ differing views of substantial assistance departures in the District of Massachusetts and the District of Connecticut); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 555-56 (1992) (comparing 5K1.1 practices in three U.S. Attorney’s Offices and concluding that one office had “the tightest policy with respect to what is required” for a cooperation departure, while a second office had “a rather liberal definition of who and what qualify” for the departure, and a third office had “virtually no standard for determining what qualifies” for the departure). Generalizations are also complicated by the practice of prosecutors in some districts of seeking substantial assistance departures for “sympathetic” defendants whose assistance may not actually have been “substantial.” See Nagel & Schulhofer, *supra*, at 524 (noting that prosecutors in one district “indicated that the more sympathetic the defendant, the lower the standard for what qualifies as substantial assistance”).

82. See Nagel & Schulhofer, *supra* note 81, at 541 (noting that in one district defendants were expected to provide “more than just intelligence” to qualify for a substantial assistance departure). *But see* SUBSTANTIAL ASSISTANCE, *supra* note 1, at 57 (noting that in two out of eight districts surveyed “participants reported that providing truthful information to the government (irrespective of the results) might generate a substantial assistance motion by the government”).

at least to agree to testify—about the information he is disclosing.<sup>83</sup> Cooperators can also provide the government with tangible evidence.<sup>84</sup> In the most involved cases, cooperators will actively participate in covert operations, for example by “wearing a wire” to record conversations with criminal associates.<sup>85</sup> Moreover, whether a cooperator’s assistance is considered “substantial” will often turn on whether the cooperation yields concrete results.<sup>86</sup>

Cooperators’ targets also vary. Traditionally, and most commonly, cooperators provide information about and testify against their accomplices. As cooperation has expanded under the Sentencing Guidelines, however, the targets of the cooperation are often farther and farther removed from the cooperator. Many cooperators now assist the authorities in prosecuting criminal activity unrelated to the offense for which the cooperator was arrested, including criminal activity in which the cooperator was not involved.

The most extreme example of this disconnect between a cooperator and his targets is a new species of cooperation called “third-party cooperation.”<sup>87</sup> In third-party cooperation, the substantial assistance is provided not by the defendant seeking the sentencing reduction, but rather by a third party who wants to help the defendant. Third-party cooperation is most often used by narcotics defendants who are incarcerated and therefore unable to actively assist the authorities.<sup>88</sup> Although third-party cooperation has been

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83. See, e.g., SUBSTANTIAL ASSISTANCE, *supra* note 1, at 20 (noting that in another district defendants “minimally were expected to provide *specific* information relating to the instant offense or to another case *and* agree to testify before the grand jury or at trial”).

84. See MAXFIELD & KRAMER, *supra* note 60, at 10.

85. See *id.* at 27 n.3.

86. See SUBSTANTIAL ASSISTANCE, *supra* note 1, at 57. Who actually decides whether a cooperator’s assistance is substantial varies from district to district. Although the substantial assistance motion invariably originates with the line prosecutor, the motion must be approved by a supervisor. In some districts, one supervisor’s approval is enough. In others, two supervisors or even a standing “committee” must approve substantial assistance motions. In still others, only the United States Attorney may approve a substantial assistance motion. See *id.* at 29.

87. See G. Adam Schweickert, III, *Third-Party Cooperation: A Welcome Addition to Substantial Assistance Departure Jurisprudence*, 30 CONN. L. REV. 1445, 1449 (1998). Although third-party cooperation—which is also referred to as “surrogate cooperation”—may not have been created by the Guidelines, the formal requirements for substantial assistance departures have made third-party cooperation both more visible and more popular. See Michael S. Ross, *Cooperation with Federal Authorities: Operating on the Outer Limits*, CRIM. JUST., Summer 1997, at 4, 61 (“The notion that a defendant could benefit by someone else’s cooperation is almost radical. But extreme as it is, it has been practiced for many years, though not openly debated.”)

88. See Robert G. Morvillo & Robert J. Anello, *Cooperation: The Pitfalls and Obligations for Defense Attorneys*, N.Y. L.J., Dec. 5, 2000, at 3, 4.

controversial,<sup>89</sup> prosecutors have cautiously embraced it,<sup>90</sup> and courts have generally gone along.<sup>91</sup>

In the end, the sentencing reduction that cooperators receive is significant: on average, cooperators receive a fifty percent reduction of their sentences.<sup>92</sup>

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89. Most notably, several defense lawyers have been prosecuted for their roles in lying about third-party cooperation arrangements. Robert Fierer, an Atlanta defense attorney, pleaded guilty in 1997 to obstruction of justice in connection with a scheme in which, for a fee, he paired defendants seeking substantial assistance departures with informants possessing valuable information, and then encouraged the defendants and informants to lie about the nature of their relationship. See Schweickert, *supra* note 87, at 1445, 1461-63. Harvey Baum, a Manhattan defense attorney, pleaded guilty in 1999 to obstruction of justice for misleading the government about the relationship between his client and the would-be surrogate cooperator. See *United States v. Baum*, 32 F. Supp. 2d 642, 643 (S.D.N.Y. 1999); *In re Baum*, 691 N.Y.S.2d 455, 455 (1999). Not surprisingly, given defendants' powerful incentives to cooperate, such abuses are not limited to third-party cooperation. For example, Pat Stiso, another New York City defense attorney, pleaded guilty in 1998 to obstruction of justice after helping his incarcerated client's associates set up a phony heroin mill in the hope that his client could then expose the mill and receive a substantial assistance departure. See Greg B. Smith, *Lawyer Led Heroin Hoax for Deal: Feds*, N.Y. DAILY NEWS, Aug. 4, 1998, at 18; *Today's News*, N.Y. L.J., Aug. 13, 1998, at 1.

90. See *United States v. Baum*, 32 F. Supp. 2d. at 644 (describing the policy of one U.S. Attorney's Office not to agree to third-party cooperation unless: "(1) the third party is a close relative or a friend of the defendant who is not providing the cooperation for money, and (2) the defendant has some personal knowledge of the investigated conduct so that he or she can personally assist in the investigation"); Stanley J. Okula, Jr., *Third-Party Cooperation: Proceed with Caution*, CRIM. JUST., SUMMER 1997, at 5, 6-8 (federal prosecutor discussing reasons why prosecutors should be wary of third-party cooperation). Few statistics exist about the prevalence of third-party cooperation, although its use appears to be modest. A nationwide survey conducted by one U.S. Attorney's Office in 1994 revealed eleven cases in which courts had imposed a reduced sentence based on third-party cooperation, and three other cases in which prosecutors had requested the reduced sentence. See *United States v. Doe*, 870 F. Supp. 702, 704 n.2 (E.D. Va. 1994); see also Morvillo & Anello, *supra* note 88, at 4 n.8 (citing the testimony of an Assistant U.S. Attorney that his office had entered into third-party cooperation agreements on a "handful of occasions, somewhere fewer than 10 times," during 1996 and 1997).

91. See *United States v. Abercrombie*, 59 F. Supp. 2d 585, 590 (S.D. W. Va. 1999) (holding that "a defendant may receive the benefit of a . . . [s]ection 5K1.1 motion due to assistance rendered in part by third persons"); *United States v. Bush*, 896 F. Supp. 424, 427-28 (E.D. Pa. 1995) (holding that a defendant may benefit from third-party cooperation if the defendant "played a material role" in securing the surrogate's assistance); *Doe*, 870 F. Supp. at 708 (holding that a substantial assistance departure may be based on third-party cooperation if "(1) the defendant plays some role in instigating, requesting, providing, or directing the assistance; (2) the government would not have received the assistance but for the defendant's participation; (3) the assistance is rendered gratuitously; and (4) the court finds that no other circumstances weigh against rewarding the assistance").

92. The Sentencing Commission began reporting the average extent of cooperation departures in 1997. Each year since then, the average sentence reduction for a cooperator has been approximately fifty percent. See 2000 SOURCEBOOK, *supra* note 1, at 61 tbl.30; U.S. SENTENCING COMM'N, 1999 SOURCEBOOK OF SENTENCING STATISTICS 61-62 tbl.30, available at [www.ussc.gov/ANNRPT/1999/Sbtoc99.htm](http://www.ussc.gov/ANNRPT/1999/Sbtoc99.htm); U.S. SENTENCING COMM'N, 1998 SOURCEBOOK OF SENTENCING STATISTICS 61 tbl.30, available at [www.ussc.gov/ANNRPT/1998/SBTOC98.HTM](http://www.ussc.gov/ANNRPT/1998/SBTOC98.HTM); U.S. SENTENCING COMM'N, 1997 SOURCEBOOK OF SENTENCING STATISTICS 61 tbl.30, available at [www.ussc.gov/annrpt/1997/SBTOC97.HTM](http://www.ussc.gov/annrpt/1997/SBTOC97.HTM).

## II. THE UTILITARIAN MODEL OF COOPERATION

The cost-benefit analysis that underlies the utilitarian model of cooperation is as simple as it is compelling. The “cost” is the leniency given the cooperator; the “benefit” is the additional crime fighting produced by the cooperation. Prosecutors should use cooperators when the benefit outweighs the cost, and judges should reward cooperators with sufficient leniency to ensure that prosecutors can continue to engage in these socially beneficial transactions.

This utilitarian understanding of cooperation is pervasive.<sup>93</sup> Most notably, it has been implicitly adopted as Department of Justice policy. As Graham Hughes has observed, the *Principles of Federal Prosecution*, which govern federal prosecutors’ charging and plea decisions, “recognize in very general terms the propriety of permitting the prosecutor to make a utilitarian calculation” in deciding whom to use as a cooperator.<sup>94</sup> For example, in discussing nonprosecution agreements—the most extreme form of prosecutorial leniency for cooperators—the *Principles of Federal Prosecution* instruct prosecutors to balance “the cost of foregoing prosecution against the potential benefit of the person’s cooperation” to determine whether “the cooperation sought appears necessary to the public interest.”<sup>95</sup> Hughes explains this utilitarian approach as follows:

Under these principles a prosecutor has a duty to neutralize the largest number of units possible of culpability and dangerousness expressed in behavior that the criminal code prohibits. As to each potential defendant, the prosecutor must make a difficult calculation to measure the moral weight of the culpability, including the harm done, and the future danger to the public. When she can gather no more evidence without inducements, the prosecutor then decides whether to proceed and prosecute those suspects against whom the already produced evidence makes a case or whether to extend leniency or full immunity to some suspects in order to procure testimony against

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93. Interestingly, there is little, if any, legislative history reflecting Congress’s understanding of the purpose of the “substantial assistance” provisions in 18 U.S.C. § 3553(e) (2000) and 28 U.S.C. § 994(n) (2000). See Weinstein, *supra* note 3, at 573 n.34 (explaining that the statutes fostering cooperation were passed with no debate and that the legislative history is silent as to the rationale for the “substantial assistance” provisions).

94. Hughes, *supra* note 4, at 14. First promulgated in 1980 and amended regularly thereafter, the *Principles of Prosecution* set forth general guidelines “intended to promote the reasoned exercise of prosecutorial discretion.” See U.S. DEP’T OF JUSTICE, *Principles of Federal Prosecution*, in U.S. ATTORNEYS’ MANUAL § 9-27.110 (1997).

95. See *Principles of Federal Prosecution*, *supra* note 94, § 9-27.600(B)(3). The provision governing section 5K1.1 cooperation agreements provides similar (though less detailed) guidance, instructing prosecutors to consider “the nature and value of the cooperation offered and whether the same benefit can be obtained without having to make the charge or sentence concession that would be involved in a plea agreement.” *Id.* § 9-27.420(B)(1).

other, more dangerous suspects against whom existing evidence is flimsy or nonexistent.<sup>96</sup>

The utilitarian approach also permeates the ways that prosecutors talk about cooperation. For example, Frank Bowman, a former federal prosecutor and former Special Counsel to the Sentencing Commission, has described the principle behind the substantial assistance departure as follows:

Section 5K1.1 differs in a crucial respect from virtually every other guideline. It was designed, not to ensure that criminals are punished for what they truly did or to achieve sentencing equity among similarly situated offenders, but as a tool to fight crime. . . . [I]ts consciously utilitarian justification is that society is willing to pay the price of giving sentence reductions to morally undeserving cooperators in exchange for the benefit of an increased likelihood of apprehending and convicting criminals who might not otherwise be caught.<sup>97</sup>

The prosecutor's utilitarian approach to cooperation has been recognized and implicitly approved by the Supreme Court. In *Wade v. United States*,<sup>98</sup> in upholding section 5K1.1's government motion requirement, the Court noted that the government may refuse to move for a substantial assistance departure simply based on "its rational assessment of the cost and benefit that would flow from moving."<sup>99</sup>

Perhaps the most fully developed utilitarian model of cooperation was developed by Ian Weinstein.<sup>100</sup> In Weinstein's explicitly economic analysis, the Guidelines have created a "market" for cooperation. Defendants are the "suppliers"; their "commodity" is their cooperation. Prosecutors are the "buyers"; their currency is 5K1.1 departure motions.<sup>101</sup>

According to this utilitarian model, cooperation is problematic in several ways. First, and most obviously, because the cooperator's

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96. Hughes, *supra* note 4, at 14.

97. Frank O. Bowman III, *Defending Substantial Assistance: An Old Prosecutor's Meditation on Singleton, Sealed Case, and the Maxfield-Kramer Report*, 12 FED. SENTENCING REP. 45, 47-48 (1999); see also Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1117 (2001) ("Substantial assistance departures exist based on the hardheaded utilitarian calculation that offering sentence reductions in return for testimony is sometimes necessary to detect and successfully prosecute certain crimes."); Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENTENCING REP. 292, 292-94 (1996) (providing a former federal prosecutor's thoughts on the "necessary evil" of cooperators).

98. 504 U.S. 181, 187 (1992).

99. *Id.*

100. See Weinstein, *supra* note 3, at 569-600.

101. See *id.*; see also *United States v. Bush*, 896 F. Supp. 424, 427 (E.D. Pa. 1995) (stating that "there exists a ready market for substantial assistance, even if the parties don't trade in dollars"); Hughes, *supra* note 4, at 15 (stating that "[t]he thrifty prosecutor will buy cooperation at the lowest price"); Schweickert, *supra* note 87, at 1468 (arguing that substantial assistance departures are "based upon the fundamentals of capitalist theory").



sentencing discount is undeserved, the resulting sentence offends the retributive premise of punishment. Although retributivism's philosophical foundations may be the subject of some disagreement,<sup>102</sup> the basic "just deserts" principle of retributivism is simple. Andrew von Hirsch<sup>103</sup> calls it the "principle of proportionality: [S]entences should be proportionate in their severity to the seriousness of the criminal conduct."<sup>104</sup> Undeserved leniency—what von Hirsch calls "[d]isproportionate leniency"<sup>105</sup>—thus offends retributivism's core premise of proportionality.

Criminal law theorists, of course, still debate the relative merits of retributivism and utilitarianism.<sup>106</sup> Nevertheless, "just deserts" has become so deeply embedded in American sentencing that making "the punishment fit the crime" has become a cliché.<sup>107</sup> And although the Sentencing Commission famously refused to adopt one or

102. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 17-18 (3d ed. 2001) (describing different variations of retributive theory); Kent Greenawalt, *Punishment*, in ENCYCLOPEDIA OF CRIME & JUSTICE 1284-85 (Joshua Dressler ed., 2d ed. 2002) (same).

103. Von Hirsch's influential book *Doing Justice: The Choice of Punishments* (1976) is generally credited with "launching the 'just deserts' movement" into mainstream penological theory. Garvey, *supra* note 8, at 1840 n.165; see also Martin R. Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 784 (1976) ("New respect is being paid to retribution as a central factor in just and coherent punishment systems."); Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1512 (2000) (crediting Andrew von Hirsch's *Doing Justice: The Choice of Punishments* with gaining "a wide audience for neo-retributive criminal justice philosophy"). Von Hirsch's book also spurred a sentencing guidelines movement. See Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 33 & n.40 (2000).

104. See Andrew von Hirsch & Andrew Ashworth, *Introduction to Desert*, in PRINCIPLED SENTENCING 181, 182 (Andrew von Hirsch & Andrew Ashworth eds., 1992); see also VON HIRSCH, *supra* note 103, at 66-76. In von Hirsch's view, the "seriousness" of a criminal act includes both "the harm done (or risked) by the act and . . . the degree of the actor's culpability." VON HIRSCH, *supra* note 103, at 69.

105. See von Hirsch & Ashworth, *supra* note 104, at 198.

106. See generally Herbert Morris, *Concluding Remarks: The Future of Punishment*, 46 UCLA L. REV. 1927, 1930 (1999) (discussing the "apparently intractable differences" between retributive and utilitarian theorists). Compare MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW *passim* (1997) (defending retributivism), with David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623 *passim* (1992) (criticizing retributive theory). Even retributivism's harshest critics, however, recognize retributive theory's "ascendancy" in the past three decades. See Dolinko, *supra*, at 1623 ("It is widely acknowledged that retributivism, once treated as an irrational vestige of benighted times, has enjoyed in recent years so vigorous a revival that it can fairly be regarded today as the leading philosophical justification of the institution of criminal punishment.")

107. See Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873, 1880 (1999) ("Kant's theory has been so influential that a colloquial expression of it, that the punishment should 'fit' the crime, is a commonplace for anybody who has ever witnessed a prosecutor's sentencing allocution or seen one depicted on television.")

the other theory of punishment,<sup>108</sup> it did explicitly adopt a version of proportionality as a key component of the Sentencing Guidelines. Under the Guidelines' version of proportionality—often called “uniformity”—defendants who commit similar offenses (and who have similar criminal histories) should receive similar sentences.<sup>109</sup> Sentencing discounts for cooperators, by definition, offend this commitment to uniformity.<sup>110</sup>

Under the utilitarian model, cooperation discounts also offend the traditional utilitarian justifications for punishment.<sup>111</sup> While society may benefit from the additional crime fighting produced by the cooperator, that benefit may be offset by a decreased level of general deterrence. It is true that cooperation in general may deter some future crime by destabilizing criminal conspiracies even before any of the conspirators begins cooperating.<sup>112</sup> But it is entirely possible that this destabilizing effect is outweighed by the counterdeterrent message of cooperation discounts: You can escape serious punishment for your crime so long as you have someone to rat on.<sup>113</sup> This counterdeterrent effect may be exacerbated by the likelihood that prosecutors overvalue cooperation's direct effects (additional arrests and convictions) and undervalue cooperation's indirect effects (less general

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108. See SUPPLEMENTARY REPORT, *supra* note 39, at 16 (discussing purposes of sentencing—“just deserts” and “crime control”—and explaining the Commission's refusal “to choose between them or to accord one primacy over the other” in drafting the Sentencing Guidelines); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 437-50 (1992) (criticizing the Sentencing Commission for creating and encouraging a purposeless sentencing system).

109. “Uniformity” and “proportionality” were two of the three “objectives” that the Sentencing Commission ascribed to Congress in enacting the Sentencing Reform Act: “Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.” 2002 GUIDELINES, *supra* note 28, ch. 1, pt. A(3) (explaining that the third objective was “honesty in sentencing”).

110. See, e.g., 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, 341-44 (2000); Weinstein, *supra* note 3, at 611-17.

111. See DRESSLER, *supra* note 102, at 15 (describing the goals of utilitarianism as general deterrence, specific deterrence (including incapacitation and intimidation), and rehabilitation); Greenawalt, *supra* note 102, at 1286-88 (describing the utilitarian justifications of punishment as general deterrence, norm reinforcement, individual deterrence, incapacitation, reform, vengeance, and victim restoration).

112. See Richman, *supra* note 97, at 293 (“The lure of deep sentencing discounts may even destabilize a criminal conspiracy before the government initiates a formal prosecution; such is the information-forcing power of the Prisoner's Dilemma.”).

113. See *id.* (“One must wonder at the damage done to the force of our laws, however, when murderers ‘walk’ because they were fortunate enough to have others to ‘rat’ on.”).

deterrence).<sup>114</sup> Similarly, under the utilitarian model of cooperation, the individual cooperator may receive a sentence that is insufficient to prevent him from committing future crimes—whether by specifically deterring him, incapacitating him, or rehabilitating him.<sup>115</sup>

These criticisms of cooperation flow directly from the standard utilitarian model. And while the criticisms have some validity,<sup>116</sup> they tend to be overstated, in part because the utilitarian model presents an incomplete picture of cooperation. The more complex conception of cooperation posits that the cooperator receives a sentencing discount not simply as payment for providing the government with a crime-fighting benefit, but also because he deserves it (at least in part). When cooperation discounts are viewed in this light, many of the problems noted above dissipate if not disappear.

### III. COOPERATION AS PUNISHMENT: OSTRACISM AND ALIENATION

The social meaning of cooperation is best captured by the words used to describe cooperators, with “rat” being perhaps the most evocative.<sup>117</sup> As one court has noted, with some understatement: “Many view a cooperating witness as a betrayer or informer; unquestionably, such a person is not generally held in high regard.”<sup>118</sup> Other commentators have been more blunt, noting, for example, that

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114. See Weinstein, *supra* note 3, at 565 (“The current market for snitches cannot optimize the use of cooperation because these decision-makers internalize the benefits and externalize (and so largely ignore) the costs.”).

115. See Richman, *supra* note 97, at 292.

116. An additional criticism of cooperation—and one beyond the scope of this Article—is that cooperation encourages perjury. See generally Yaroshefsky, *supra* note 61 (examining, through interviews with former prosecutors, the extent to which cooperators lie and the ability of prosecutors to detect those lies). There is no doubt that an incentive to cooperate is also a temptation to lie. Under the current Guidelines system, a defendant’s incentives to cooperate are so great that the temptation to lie (or to embellish) may be irresistible. This criticism, powerful though it is, is not unique to the utilitarian view of cooperation. Under any theory of cooperation, cooperator perjury will remain a risk—and one that can be avoided only by skeptical prosecutors who are willing to take the time and make the effort to rigorously corroborate their cooperators. See *id.* at 934-40 (discussing “insufficient corroboration” as a major reason for prosecutors’ false beliefs in cooperator truthfulness); Trott, *supra* note 62, at 1405-09 (discussing ways in which prosecutors can test cooperators’ stories).

117. See CHRISTINE AMMER, COOL CATS, TOP DOGS, AND OTHER BEASTLY EXPRESSIONS 136-38 (1999) (“[R]ats are hated and feared, and calling someone a *rat* has been an insult for centuries. At best you are calling the person a scoundrel, and at worst, a deserter, an informer, or simply a despicable individual.”); SKOLNICK, *supra* note 5, at 126 (“In our culture, as is evidenced by the children’s terms *tattletale* and *snitch* as well as by the underworld’s *fink* and *stoolie*, informants are objects of contempt and derision.”).

118. United States v. Ming He, 94 F.3d 782, 785 (2d Cir. 1996).

cooperators are generally viewed with “aversion and nauseous disdain.”<sup>119</sup>

This disdain for cooperators is deeply embedded in our culture. In the playground, our children learn that no one likes a tattletale. In school, they learn that Benedict Arnold was despised for his treason. In church, they learn that Judas’s treachery led to Jesus’s death. And these lessons are continually reinforced by portrayals of the snitch and the rat in movies, in literature, and in popular culture.<sup>120</sup>

Much of our antipathy for the cooperator is rooted in his disloyalty. Loyalty is a virtue. Indeed, George Fletcher has argued that loyalty—tempered with what he calls “impartial morality”—is one of the primary virtues by which we live our lives.<sup>121</sup> The cooperator, almost by definition, is disloyal. The cooperator’s targets, in many cases, are the very people with whom he is closest.<sup>122</sup> By “signing up” with the prosecution, the cooperator betrays those people, and, as Fletcher has argued, “[b]etrayal . . . is one of the basic sins of our civilization.”<sup>123</sup>

Fletcher’s core examples of betrayal—adultery, idolatry, and treason—no doubt differ from cooperation. After all, the cooperator does not betray a devoted lover, a benevolent god, or a beloved

119. Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1093 (1951). More recently, Dan Richman (a former federal prosecutor) and Ian Weinstein (a former federal defender) have each noted the “disdain” reserved for cooperating witnesses. See Richman, *supra* note 5, at 69 n.\*, 79-84; Weinstein, *supra* note 3, at 563 n.\*, 621-24.

120. See Richman, *supra* note 5, at 83-84. Although Jimmy Cagney never said, “You dirty rat,” see JAMES CAGNEY, *CAGNEY BY CAGNEY* 74 (1976), the continuing resonance of that fictional line is a telling testament to public aversion to informers. In Liam O’Flaherty’s novel, *The Informer*, which became an Academy Award-winning film by John Ford, the title character betrays a comrade for a twenty-pound reward and instantly becomes, both in his own mind and in his community, an “outcast.” LIAM O’FLAHERTY, *THE INFORMER* 22 (Harcourt Brace Jovanovich 1980) (1925); see also Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631, 635 (1984) (comparing the title character in the film version of *The Informer* to “the arch-betrayer Judas”).

121. GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 151-75 (1993); see also Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 534 (1986) (arguing that the “general disapproval of informers” has a moral basis).

122. As Dan Richman has noted, “the defendant with personal knowledge of the misdeeds of someone else will generally—though not invariably—have obtained it by virtue of having a relationship of trust with that person . . . [and] [h]e can be expected to have some loyalty to the ‘target’ against whom he can cooperate.” See Richman, *supra* note 5, at 78.

123. FLETCHER, *supra* note 121, at 10. Fletcher notes:

The worst epithets are reserved for the sin of betrayal. Worse than murder, worse than incest, betrayal of country invites universal scorn. Betrayal of a lover is regarded by many as an irremediable breach. For the religious, betrayal of God is the supreme vice. The specific forms of betrayal—adultery, treason, and idolatry—all reek with evil.

*Id.* at 41.

country. Instead, the cooperator switches his loyalties from a group of criminals to the state. Where, one might ask, is the sin in that?<sup>124</sup>

The answer lies in the cooperator's motives. The typical cooperator does not betray his associates out of an altruistic desire to fight crime. The typical cooperator is motivated primarily, if not entirely, by a desire to help himself.<sup>125</sup> In this respect, the cooperator is unlike a normal witness who may come forward with evidence out of a sense of civic obligation. Nor is the cooperator like a witness whose testimony might "betray" the target but whose motives are not selfish. A betrayal that is not motivated by self-interest simply does not carry the same stigma as the "sin" condemned by Fletcher. So, for example, when a witness turns in a family member not for personal gain but rather out of a sense of civic obligation, the act is likely to be seen as heroic (or tragic), but not evil.<sup>126</sup>

The cooperator, on the other hand, is more like Benedict Arnold, betraying his country for the promise of £20,000,<sup>127</sup> or like Judas, betraying his Messiah for thirty silver pieces.<sup>128</sup> That the cooperator is paid in leniency rather than money does not change the moral calculus. It is his selfishness—his willingness to betray others

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124. Indeed, Fletcher recognizes that one of the situations in which "impartial morality" should prevail is when loyalty becomes "complicity in a crime." *Id.* at 170-71.

125. See Richman, *supra* note 5, at 82 ("The assumption that defendants' reasons for cooperating are exclusively selfish seems reasonable enough . . ."); Weinstein, *supra* note 3, at 624 (The cooperator "is motivated by a desire for a personal benefit, not some greater good.").

126. The arrest of the Unabomber, Theodore Kaczynski, on information provided by his brother David comes to mind. See Stephen J. Dubner, "I Don't Want to Live Long. I Would Rather Get the Death Penalty than Spend the Rest of My Life in Prison," *TIME*, Oct. 18, 1999, at 44 (noting that "[a]fter Ted's arrest, David was instantly lauded as a sort of moral superhero for sacrificing his beloved if troubled brother"); *Lawyers Group Honors Brother of Unabomber*, *TIMES-PICAYUNE* (New Orleans), Nov. 7, 1999, at A21 (reporting that the New York State Bar Association awarded David Kaczynski its highest justice award for a nonlawyer). Fletcher cites the example of the film *Music Box*, in which the protagonist eventually decides to turn in her father for Nazi atrocities. See FLETCHER, *supra* note 121, at 152-53.

127. See CLARE BRANDT, *THE MAN IN THE MIRROR: A LIFE OF BENEDICT ARNOLD* 195, 208 (1994). Because Arnold's plot to deliver West Point to the British failed, he was ultimately paid only £6,000. See *id.* at 230. One history book argues that Arnold's infamy is rooted not simply in his "transfer of allegiance to the British side—for other Patriots chose to become loyalists," but rather in his willingness to betray the American war effort for personal gain. JAMES A. HENRETTA ET AL., *AMERICA'S HISTORY* 197 (4th ed. 2000). "His treachery was not that of a principled man but that of a selfish one, and he never lived that down." *Id.*

128. See *Matthew* 26:14-16. Even the "tattletale" is defined by selfishness. In teaching our children about tattling, we hope that they learn to distinguish between tattling simply to get someone else in trouble ("Daddy, Johnny stuck his tongue out at me.") and "telling on" someone to prevent a greater harm ("Daddy, Johnny is lighting the curtains on fire."). See Jack B. Weinstein, *The Informer: Hero or Villain? Ethical and Legal Problems*, N.Y. L.J., Nov. 8, 1982, at 1, 4 (criticizing the "failure to make distinctions between a toady tattling about somebody who throws a spitball and a responsible citizen alerting the authorities about the existence of a dangerous member of the community").

for personal gain—that accounts for the disdain in which he is held,<sup>129</sup> even if the disdainers recognize that society benefits from his efforts.<sup>130</sup>

The common contempt for rats carries significant practical consequences for the cooperator.<sup>131</sup> Most obviously, the cooperator is ostracized from his criminal cohorts. Organized criminal groups—such as gangs or the Mafia—are often viewed as “families,”<sup>132</sup> and even less organized groups usually comprise close friends.<sup>133</sup> For the cooperator excluded from the group, the separation can be painful. More concretely, the cooperator loses whatever benefits (legitimate or illegitimate) that membership in the group carried. Most ominously, the cooperator and his family may be exposed to physical retaliation by former associates.<sup>134</sup>

The cooperator’s ostracism may also extend well beyond his immediate associates. At a minimum, the cooperator will be ostracized from the broader community of criminals that he may encounter, both in and out of prison. In prison, the cooperator will be exposed to the continual threat of physical retaliation, even from prisoners

129. Weinstein, *supra* note 3, at 624; Weinstein, *supra* note 128, at 1, 4 (suggesting that the answer to the title question—*The Informer: Hero or Villain?*—lies in the informer’s motives). Dan Richman has argued that antipathy for the cooperator stems as much from the betrayal itself as from its selfish motivation. See Richman, *supra* note 5, at 83-84. While I agree with Richman that our culture values “loyalty for its own sake,” *id.* at 84, even Fletcher concedes that loyalty must sometimes yield to the ethic of “impartial morality.” FLETCHER, *supra* note 121, at 164-65. In evaluating a particular actor’s resolution of the “quandary” presented when loyalty conflicts with impartial morality, it is hard not to look primarily to the actor’s motives.

130. See Richman, *supra* note 5, at 80-81 (“A utilitarian calculus would applaud, or at least encourage, the snitch, regardless of his motivations or personal allegiances.”).

131. See *Lame v. United States Dep’t of Justice*, 654 F.2d 917, 926 (3d Cir. 1981) (noting that cooperators are subject to “criticism, public harassment, social ostracism, [and] even physical injury”); Richman, *supra* note 5, at 72 (noting that snitches “face economic or physical retaliation and social ostracism”).

132. See, e.g., Frank E. Harper, *To Kill the Messenger: The Deflection of Responsibility Through Scapegoating (A Socio-Legal Analysis of Parental Responsibility Laws and the Urban Gang Family)*, 8 HARV. BLACKLETTER J. 41, 49 (1991) (“For many gang members their gang membership serves those purposes perceived to be inherent to a ‘normally’ functioning family.”).

133. See Richman, *supra* note 5, at 78-79.

134. See *id.* at 79; MICHAEL H. GRAHAM, WITNESS INTIMIDATION 3-7 (1985). In their book, BLACK MASS: THE IRISH MOB, THE FBI, AND A DEVIL’S DEAL (2000), Dick Lehr and Gerard O’Neill not only describe the murder of an underworld cooperator, but also report a mobster’s wiretapped rant against “rats.” *Id.* After comparing rats (unfavorably) to rapists and child molesters, the mobster recounts in profane and gruesome detail his preferred method for dismembering a rat. *Id.* Cases in which defendants killed or threatened to kill cooperators are legion and are not limited to organized crime defendants. See, e.g., *United States v. Dhinsa*, 243 F.3d 635, 643-46 (2d Cir. 2001) (describing the murder and attempted murder of cooperating witnesses).

completely unconnected with the cooperator.<sup>135</sup> Outside of prison, the cooperator may find himself excluded from the community through which he earned his illicit livelihood.

Indeed, the collective aversion to rats runs so deep that the cooperator will likely find himself ostracized even from law-abiding communities to which he belongs.<sup>136</sup> Economically, the cooperator may find himself excluded from (or not trusted in) his business community.<sup>137</sup> Socially, the cooperator may find himself an outcast in his neighborhood or in his ethnic or religious community, particularly communities with a history of official persecution.<sup>138</sup> The Irish, for example, have long harbored a particular hatred for informers.<sup>139</sup> For orthodox Jews, the aversion to informants has become a religious prescription against testifying against other Jews.<sup>140</sup> Ironically, police officers, with their "blue wall of silence,"<sup>141</sup> may be the most hostile to

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135. See *United States v. Vaulin*, 132 F.3d 898, 900 (3d Cir. 1997) (noting the "prison code that requires inmates to be antagonistic to any inmate who cooperates with the Government in criminal prosecutions").

136. See, e.g., Richman, *supra* note 5, at 79-80 (discussing the "social cost of cooperating").

137. See *id.* at 79; see also KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 172 (1985) (noting "the sanctions of the marketplace that often follow a person's providing incriminating information against business associates"); Stanley S. Arkin, *Moral Issues and the Cooperating Witness*, N.Y. L.J., June 9, 1994, at 3, 7 ("Any businessman/informer must consider whether he will be able to continue to pursue his trade once he fulfills his role as informant.").

138. See HARNEY & CROSS, *supra* note 1, at 4 ("Many Americans of today have a sort of atavistic hatred of the informer derived from a grandfather who evaded the 'Black and Tans' in Ireland or the Kaiser's conscriptors in Germany. Today, of course, there is another generation of newly arrived Americans who have a more recent and poignant recollection of the distress occasioned by an informer against them.").

139. As Billy Bulger, long-time president of the Massachusetts State Senate and brother of the notorious gangster Whitey Bulger, once described the ethic of heavily Irish South Boston: "[W]e loathed informers. It wasn't a conspiratorial thing—our folklore bled with the names of informers who had sold out their brethren to hangmen and worse in the lands of our ancestors." WILLIAM M. BULGER, *WHILE THE MUSIC LASTS: MY LIFE IN POLITICS* 4 (1996); see also Richman, *supra* note 5, at 84 ("The treatment of [the title character] in *The Informer* only begins to convey the hatred that those of Irish ancestry have for his ilk.").

140. See Joel Cohen, *Informers: Does American Law Violate the Talmud's Precepts?*, N.Y. L.J., Nov. 29, 1991, at 1, 4 n.5 (quoting, among other authorities, one rabbinical interpretation of the Talmud: "It is then clear from Jewish legal rulings that according to Jewish law it is forbidden to be an informer and that informers are permitted to be executed, and that they are punished in hell and have no share in the world to come."); see also Richman, *supra* note 5, at 84 n.58 (citing cases in which Jewish witnesses refusing to testify in criminal proceedings have (unsuccessfully) tried to rely on the Talmudic prohibition against testifying against another Jew); Weinstein, *supra* note 128, at 1 (noting that "informing was something an orthodox Jew would not do," based in part on "Jewish law indicating the disdain and horror in which Jews had held informers over the centuries, going back to Roman times").

141. See, e.g., Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237 (1998) (describing the "blue wall of silence" as "an unwritten code in many departments which prohibits

cooperators.<sup>142</sup> Some cooperators may find themselves rejected even by their own families.<sup>143</sup>

Finally, the cooperator may find himself not only alienated from his community, but also ill at ease with himself. As Keri Gould has suggested, a system that coerces defendants into engaging in conduct that is “at odds with their own moral code,” may leave cooperators (both literally and figuratively) “demoralized.”<sup>144</sup>

The extent of the hardship imposed by cooperation will, of course, vary from defendant to defendant. Most obviously, the defendant whose cooperation creates a significant risk of retaliation will suffer more than the defendant whose cooperation is relatively riskless. More subtly but just as significantly, the defendant who cooperates against his close friends, is ostracized from his community,<sup>145</sup> and loses his livelihood will suffer more than the defendant who cooperates against strangers and whose “betrayal” goes unnoticed by his community.

It might be tempting in this context to discount the hardship suffered by a cooperator who is excluded from a criminal gang or from a group of friends engaged in some illicit enterprise. Undoubtedly, the cooperator’s exclusion from that group leaves society in a better position. But the cooperator’s suffering may be acute nevertheless. In my experiences with cooperators in street-level narcotics cases, their inability to go back to the “corner” on which they hung out oftentimes left them feeling as if they had nothing to go back to at all. The very narrowness of their world and its horizons left them particularly susceptible to the hardships of being labeled a “rat.”

The collateral hardships imposed by cooperation effectively impose extra punishment on the cooperating defendant—punishment over and above that suffered by defendants who do not cooperate. The

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disclosing perjury or other misconduct by fellow officers, or even testifying truthfully if the facts would implicate the conduct of a fellow officer”).

142. See HARNEY & CROSS, *supra* note 1, at 64-65; Ricbman, *supra* note 5, at 80 n.44 (noting that police officers’ general disdain for snitches “may reflect their antipathy for cooperators from within their ranks”).

143. See *United States v. Baker*, 4 F.3d 622, 624 (8th Cir. 1993) (stating that the defendant who had cooperated was subject to “ ‘ostracism’ and ‘suspicion’ within her extended family”); *United States v. Vento*, 700 F. Supp. 823, 825 (E.D. Pa. 1988) (stating that the defendant’s “cooperation had led to his being completely ostracized by his family”).

144. Gould, *supra* note 3, at 873; see also Weinstein, *supra* note 3, at 624 (questioning “the moral lesson we teach individual cooperators”).

145. By “community,” I mean more than just geographic communities. I mean any community—geographic, commercial, ethnic, religious, familial, or whatever—to which the cooperator belongs and cares about. See, e.g., *United States v. Miles*, ACM 32236, 1997 CCA LEXIS 127, at \*3 (A.F. Ct. Crim. App. Apr. 8, 1997) (describing a witness as being “ostracized from the ham radio community for being a ‘rat’”).



theorist may object that “punishment” only includes those sanctions specifically imposed by the state as a result of a criminal conviction. Henry Hart, for example, argued that the hardships imposed on a convicted defendant “take their character as punishment from the condemnation which precedes them [i.e., the conviction] and serves as the warrant for their infliction.”<sup>146</sup> While the cooperator’s ostracism may not be imposed by the state, it certainly flows in part from the “condemnation” inherent in the cooperator’s conviction. Moreover, the cooperator’s extralegal punishment differs from that suffered by other defendants because the cooperator is ostracized not simply for his criminal conduct but also (indeed, primarily) for his subsequent decision to become a rat.<sup>147</sup>

More importantly, theory aside, sentencing judges have long considered the “collateral consequences” of a criminal conviction and sentence when imposing sentence.<sup>148</sup> Thus, even if such collateral consequences are not technically “punishment,” they have traditionally been treated as mitigating factors that lessen the amount of punishment that must be imposed by the state to give the defendant his “just deserts.”<sup>149</sup> And because cooperation often imposes significant

146. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 405 (1958). Joshua Dressler has summed up the conventional definition of “punishment” as follows:

Criminal law scholars have generally concluded . . . that *D* may be said to suffer “punishment” when, but only when, an agent of the Government, pursuant to authority granted to the agent by virtue of *D*’s criminal conviction, intentionally inflicts pain on *D* or otherwise causes *D* to suffer some consequence that is ordinarily considered to be unpleasant. . . . [P]enalties imposed outside the criminal justice system, such as disbarment of a lawyer by the licensing authority or the actions of a lynch mob, although painful or unpleasant, do not constitute “punishment.”

DRESSLER, *supra* note 102, at 12 (citation omitted).

147. Indeed, while the state does not impose the social ostracism suffered by the rat, it certainly does impose the often irresistible pressures to cooperate.

148. Jeffrie Murphy has defended consideration of such collateral consequences from a theoretical perspective:

We normally expect the proper amount of suffering to be administered by the state through legal punishment. However, if there is reason to believe that the individual has already experienced a significant amount of relevant suffering through nonlegal channels, it is not unreasonable to suggest that the suffering he experience at the hands of the state be reduced to that degree—perhaps eliminated entirely in those cases where we are inclined to say “he has suffered enough.”

Jeffrie G. Murphy, *Repentance, Punishment, and Mercy*, in *REPENTANCE: A COMPARATIVE PERSPECTIVE* 143, 157 (Amitai Etzioni & David E. Carney eds., 1997).

149. In their influential study of pre-Guidelines sentencing of white-collar offenders, Wheeler, Mann, and Sarat found numerous judges who believed that defendants who have suffered collateral consequences—such as loss of a job, revocation of a license, or diminishment of status in the community—deserve less additional punishment. See *WHEELER ET AL.*, *supra* note 27, at 144-51. With the advent of the Sentencing Guidelines, the appropriateness of “collateral consequences” as grounds for downward departure has been frequently litigated. See, e.g., *Koon v. United States*, 518 U.S. 81, 89 (1996) (reviewing district court’s downward departure on

collateral consequences, many cooperators simply deserve less additional punishment.<sup>150</sup>

#### IV. COOPERATION AS ATONEMENT: REMORSE AND EXPIATION

Ostracism notwithstanding, cooperation's effects on the cooperator are not all negative. Indeed, one of the clearest shortcomings of the utilitarian model is that it ignores the ways in which cooperation itself helps the cooperator. For many cooperators, ostracism from criminal communities will be accompanied by reconciliation with law-abiding communities. For example, the cooperator who is ostracized both from his gang and from gang life in general may ultimately reconcile with his family, his church, or other law-abiding segments of his community. This reconciliation is part of the second part of the reconceptualization of cooperation: cooperation as atonement.

##### A. *The Theory of Atonement*

Stephen Garvey has articulated a theory of criminal punishment based on a model of atonement.<sup>151</sup> Garvey's argument is that, in an ideal community, punishment would not be imposed simply because the offender "deserved" it or simply to prevent future crime. Rather, punishment would be one part of a process by which the

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grounds that defendants were "particularly likely to be targets of abuse in prison" and were likely to "lose their positions as police officers" and "be disqualified from prospective employment in the field of law enforcement"). Under the peculiar structure of the Sentencing Guidelines, much of the litigation surrounds whether the collateral consequences are sufficiently unusual to remove the particular case from the "heartland" of the offense. *See id.* at 113 (approving, on the particular facts in that case, the departure for abuse in prison, but not the departure for loss of employment opportunities); *United States v. Drew*, 131 F.3d 1269, 1270 (8th Cir. 1997) (holding that "the Guidelines do not forbid the use of career loss or disqualification as a departure factor"). There is little disagreement, however, that such collateral consequences are appropriate mitigating sentencing factors, to the extent that sentencing judges have discretion with the Guidelines. *See, e.g., United States v. Aguilar*, 994 F.2d 609 (9th Cir. 1993) (O'Scannlain, J., concurring) (approving, in principle, a downward departure based on the additional punishment defendant would suffer from the burden and humiliation of later public proceedings, but remanding for further factual findings), *opinion withdrawn*, 11 F.3d 124 (9th Cir. 1993), *on rehearing en banc*, 21 F.3d 1475 (9th Cir. 1994) (reversing conviction), *aff'd in part and rev'd in part on other grounds*, 515 U.S. 593 (1995) (reinstating conviction), *on remand*, 80 F.3d 329 (9th Cir. 1996) (remanding to district court for further proceedings without addressing the sentencing issue).

150. I do not contend that the ostracism suffered by a cooperator is necessarily bad. Indeed, the ostracism suffered by the cooperator, while unpleasant for the cooperator, may often bring a net social benefit. In particular, ostracism from criminal communities will diminish the cooperator's opportunities and temptations to engage in criminal conduct.

151. *See Garvey, supra note 8, passim.*

offender atones for his wrongs and is reconciled with his community.<sup>152</sup> Garvey's theory is explicitly idealized and admittedly abstract. But, as Garvey suggests, it carries "lessons for many of our institutions and practices of punishment"<sup>153</sup>—including the use and sentencing of cooperators.

Garvey's theory also draws on theological understandings of atonement.<sup>154</sup> Atonement has obvious religious resonance, and our fullest and most forceful explanations of atonement have come from theologians.<sup>155</sup> While Garvey's approach is secular, he embraces atonement's religious roots.<sup>156</sup> Garvey simply shifts the focus from a reconciliation with God to a reconciliation with community.<sup>157</sup>

Under Garvey's model, atonement has two basic stages: expiation (the process by which the wrongdoer atones for his wrong) and reconciliation (the process by which the victim forgives the wrongdoer and completes the wrongdoer's reconciliation with the community).<sup>158</sup> Expiation itself has four steps: repentance, apology, reparation, and penance.<sup>159</sup>

*Repentance*—The first step toward atonement is for the wrongdoer to repent, to feel remorse for his wrongdoing.<sup>160</sup> As Jeffrie Murphy has explained it:

152. *See id.* at 1804-06. Garvey describes his atonement model as neither retributive nor utilitarian—atonement is an end in itself. *Id.* Nevertheless, the theory incorporates aspects of both retributivism and utilitarianism. *Id.* From the retributive perspective, the defendant who has atoned for his wrongs deserves less punishment. *Id.* From the utilitarian perspective, the defendant who has atoned is less likely to offend again. *Id.*

153. *Id.* at 1804.

154. *See id.* at 1806-10.

155. Garvey cites the work of St. Paul, St. Abailard, St. Anselm, St. Thomas Aquinas, and John Calvin. *See id.* at 1808-09. For a detailed comparison of Garvey's theory of atonement with atonement in Jewish thought and tradition, see Samuel J. Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 *FORDHAM URB. L.J.* 1677 (2000). The approach that other religious traditions take to atonement (or to its close cousin repentance), is explored in a series of essays in *REPENTANCE: A COMPARATIVE PERSPECTIVE*, *supra* note 148. *See* Mahmoud Ayoub, *Repentance in the Islamic Tradition*, in *REPENTANCE: A COMPARATIVE PERSPECTIVE*, *supra* note 148, at 96-121; Guy L. Beck, *Fire in the Ātman: Repentance in Hinduism*, in *REPENTANCE: A COMPARATIVE PERSPECTIVE*, *supra* note 148, at 76-95; Malcolm David Eckel, *A Buddhist Approach to Repentance*, in *REPENTANCE: A COMPARATIVE PERSPECTIVE*, *supra* note 148, at 122-42.

156. *See* Garvey, *supra* note 8, at 1802.

157. *Id.*

158. *Id.* at 1804.

159. *Id.* In his division of atonement into expiation and reconciliation, Garvey follows the moral philosopher and Christian theologian Richard Swinburne. RICHARD SWINBURNE, *RESPONSIBILITY AND ATONEMENT* 81 (1989) ("For perfect removal of guilt, then, the wrongdoer must make atonement for his wrong act, and the victim must forgive him.").

160. Garvey, *supra* note 8, at 1814-15.

Repentance is the remorseful acceptance of responsibility for one's wrongful and harmful actions, the repudiation of the aspects of one's character that generated the actions, the resolve to do one's best to extirpate those aspects of one's character, and the resolve to atone or make amends for the [wrong and] harm that one has done.<sup>161</sup>

Remorse begins—but does not end—with a felt sense of guilt.<sup>162</sup> In an ideal community, the wrongdoer will identify with the victim, and the pain inflicted on the victim will, in the wrongdoer, become the self-directed anger that is guilt. Remorse takes guilt one step further. Where guilt is passive and self-centered, remorse is active and other-centered.<sup>163</sup> The remorseful (as opposed to the merely guilty) wrongdoer will seek to atone for his wrong.<sup>164</sup>

*Apology*—Apology makes the wrongdoer's remorse public in a way that is both ritualistic and substantive. Apology is “the wrongdoer's public expression of his repentance, whereby he openly acknowledges his wrongdoing and simultaneously disowns it.”<sup>165</sup> Unlike an excuse, an apology does not deny responsibility for the wrong. It acknowledges the wrong but disavows the wrongdoer.<sup>166</sup>

*Reparation*—Reparation involves repairing the material harm done to the victim through restitution or compensation.<sup>167</sup> Garvey separates the consequences of an offense into the “material harm” done to the victim and the “moral wrong” done to him.<sup>168</sup> Reparation is designed, quite practically, to repair the material harm.<sup>169</sup> Reparation does not, however, rectify the offender's moral wrong.<sup>170</sup> For that, he must undergo penance.<sup>171</sup>

161. *Id.* (quoting Murphy, *supra* note 148, at 147) (interpolation in original).

162. *Id.* at 1814.

163. *Id.* at 1816.

164. *See id.* at 1822-23; Levine, *supra* note 155, at 1683.

165. Garvey, *supra* note 8, at 1815.

166. *See id.* at 1816; Levine, *supra* note 155, at 1685-86.

167. Garvey, *supra* note 8, at 1816.

168. *Id.*

169. *Id.* at 1818.

170. *Id.*

171. *See id.* at 1816-18; Levine, *supra* note 155, at 1688. For a similar division of “material harm” and “moral wrong” in the context of a retributive theory, see R.A. Duff, *In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasekara*, 24 MELB. U. L. REV. 411, 413 (2000). Duff argues that punishment “should be justified as an exercise in moral communication which aims to bring offenders to face up to and repent their crimes, to reform themselves, and to make appropriate reparation to and seek reconciliation with those whom they wronged.” *Id.* at 412. Duff distinguishes between “material reparation” (which may not always be possible or needed) and “moral reparation” (which is always required for reconciliation). *Id.* at 413. In Duff's view, “apology” is so “[c]entral to such moral reparation . . . [that] the punishment the offender is required to undertake can be seen in part as a symbolic public apology that he is required to make.” *Id.*

*Penance*—Penance is “self-imposed hardship or suffering” that repairs the moral harm the wrongdoer has inflicted on the victim.<sup>172</sup> As a form of punishment, penance is critical to Garvey’s theory because it is the logical and moral conclusion of the process that begins with the wrongdoer’s feelings of guilt.<sup>173</sup> Crime does not only inflict material harm on the victim, it also inflicts a moral harm by degrading, demeaning, diminishing, and dishonoring the victim.<sup>174</sup> Punishment also sends a message: one of “condemnation, censure, and vindication.”<sup>175</sup> As Garvey explains it, “Punishment is thus our way of censuring or condemning the wrongdoer’s wrong, of annulling the false message he implicitly conveys through his wrongdoing, and of vindicating the moral value and standing of his victim.”<sup>176</sup> In the ideal community, the remorseful offender who identifies with his victim “will experience anger and resentment toward himself, just as his victim feels resentment and anger toward him.”<sup>177</sup> Thus, “just as his victim’s moral worth cannot be restored unless the wrongdoer is punished, so too the wrongdoer cannot restore his own moral standing unless he submits to punishment.”<sup>178</sup>

The second stage of Garvey’s theory of atonement involves reconciliation: the process by which the victim forgives the wrongdoer (after the wrongdoer has undergone expiation).<sup>179</sup> The ensuing reconciliation between wrongdoer and victim completes the wrongdoer’s reconciliation with the community and signals the victim’s awareness that the debt owed to him by the wrongdoer—both the material debt and the moral debt—has been repaid.<sup>180</sup>

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172. Garvey, *supra* note 8, at 1819.

173. *See id.*

174. *Id.* at 1821.

175. *Id.* at 1820.

176. *Id.* at 1821.

177. *Id.* at 1822.

178. *Id.* at 1823; *see also* Levine, *supra* note 155, at 1689. This view of punishment as necessary for atonement has roots in, among other traditions, Jewish law. As Sam Levine has pointed out, one of the functions of capital punishment in the Biblical justice system “was to provide a means for the offender to atone for the capital offense.” Samuel J. Levine, *Capital Punishment in Jewish Law and Its Application to the American Legal System: A Conceptual Overview*, 29 ST. MARY’S L.J. 1037, 1042 (1998). Indeed, in the Jewish system a death sentence included a “mandatory” confession to facilitate the offender’s repentance and atonement. *See id.* at 1043 n.22.

179. *See* Garvey, *supra* note 8, at 1829.

180. *See id.* at 1827-28; Levine, *supra* note 155, at 1691-92. Garvey contrasts his theory with four other theories of punishment: utilitarianism, retributivism, restorativism, and libertarianism. *See* Garvey, *supra* note 8, at 1830-46. Both utilitarianism and retributivism give us, in Garvey’s view, “punishment without atonement”—utilitarianism because it “cares little about community and the role of punishment in sustaining community,” *id.* at 1830-31 (arguing that “[t]raditional utilitarianism is a good philosophy of punishment, but only for a ‘community’

How does all this work in practice? In an ideal world, a wrongdoer would feel remorse, publicly apologize to his victim, compensate the victim for any material harm, and submit to such punishment as is necessary to vindicate the moral wrong inflicted on the victim. Upon completion of this expiation, the victim would forgive the wrongdoer, who would then be fully reconciled with and reintegrated into society.

Perhaps the most pressing practical question is *how much* punishment is required for an effective penance. As Garvey outlines it, three principles underlie the atonement model's answer to this question. First, like retributivism, atonement requires that the "penance assigned to the wrongdoer" be "proportional to the offender's wrongdoing and culpability."<sup>181</sup> Second, because "penance is directed at the wrong the offender has done, not the harm he has caused," punishment under the atonement model, unlike some retributive models, "keeps the harm caused separate from the wrong done."<sup>182</sup> The resulting punishment under the atonement model will be less than

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of strangers"), and retributivism because it typically does not account for the ways in which punishment enables the wrongdoer "to atone for his crime and regain *his* moral standing in the community," *id.* at 1837. He argues that "[r]etributivism's focus on justifying the basic claim that wrongdoers deserve punishment in proportion to their wrongdoing—a claim made from the point of view of the victim and of third parties—has blinded it to the fact that punishment also enables wrongdoers to atone for their wrongs—a claim made from the wrongdoer's point of view." *Id.* at 1839. Restorativism and libertarianism, on the other hand, are criticized for giving us "atonement without punishment." *Id.* at 1840. According to Garvey, "the 'overall purpose' of restorative justice [or restorativism] 'is the restoration into safe communities of victims and offenders who have resolved their conflicts' " through such processes as victim-offender mediation, restitution, and community-based sanctions. *Id.* at 1842-43 (quoting Daniel W. Van Ness, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L.F. 251, 258 (1993)). Imprisonment is used only as a "last resort" to incapacitate the dangerous. *Id.* at 1844 (quoting JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 101-04 (1990)). Libertarianism proposes a minimalist approach that views crimes as little more than torts and the criminal law as little more than a means to "redress harm through compensation." See Garvey, *supra* note 8, at 1844-45; Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977), reprinted in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 349, 354-60 (Randy E. Barnett & John Hagel III eds., 1977). According to Garvey, both restorativism and libertarianism fall short of atonement because they ignore the role of "punishment as moral condemnation." See Garvey, *supra* note 8, at 1840-46.

181. Garvey, *supra* note 8, at 1824.

182. *Id.* at 1825 (citing GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 6.6.5, at 482-83 (1978), as an example). Michael Moore has made a similar argument, albeit with slightly different terminology: "It does matter to our overall desert *what* we do, as well as the culpability with which we do it, and a penal system should reflect this dependence of desert on the independent moral significance of wrongdoing [i.e., harm] in the amounts of punishment it metes out." Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 240 (1994).

under retributive models, because the penance will not include any “surcharge” for the harm the offender has caused.<sup>183</sup>

Third, and for my purposes most important, the atonement model explains (where retributivism often does not) why a remorseful defendant should receive a lesser sentence than a remorseless defendant.<sup>184</sup> Because retributivism justifies punishment by “look[ing] backward” at the offender’s culpable choice to commit a crime,<sup>185</sup> it does not typically consider repentance to be a mitigating sentencing factor.<sup>186</sup> Judges, juries, and the general public, however, typically do.<sup>187</sup>

The importance of a defendant’s remorse in capital sentencing is well documented. Most, if not all, death penalty jurisdictions allow defendants to argue—and juries to find—remorse as a mitigating factor.<sup>188</sup> Prosecutors and capital defense lawyers generally recognize remorse’s important mitigating effect.<sup>189</sup> And empirical studies of

183. See Garvey, *supra* note 8, at 1825-26.

184. *Id.* at 1824.

185. DRESSLER, *supra* note 102, at 16; see also Stephen P. Garvey, “As the Gentle Rain from Heaven”: *Merey in Capital Sentencing*, 81 CORNELL L. REV. 989, 1012 (1996) (“[R]etributivism is deontological and backward-looking. In contrast to forward-looking consequentialist approaches that justify punishment in the name of what might be, retributivism justifies punishment in the name of what has been. Punishment strictly predicated on moral desert is blind to the future.”). *But see* John Finnis, *Retribution: Punishment’s Formative Aim*, 44 AM. J. JURIS. 91, 97 (1999) (refusing to “concede that retribution is ‘purely backward-looking,’ as is so often said”).

186. Garvey, *supra* note 8, at 1824. Jeffrie Murphy attempts to account for repentance in a retributive theory by distinguishing between what he calls “grievance retributivism” (of the sort advocated by Herbert Morris) and “character retributivism” (of the sort advocated by Michael Moore). See Murphy, *supra* note 148, at 149. According to Murphy, “grievance retributivism” posits that “punishment is deserved for responsible wrongful acts” and “the wrongfulness of conduct at one time will not be affected by repentance at a later time.” *Id.* Under “character retributivism,” on the other hand, which posits that “one’s deserts are a function not merely of one’s wrongful acts, but also of the ultimate state of one’s character,” repentance “might well play a crucial role; for a repentant person seems to reveal a better character than an unrepentant person.” *Id.* at 149-51.

187. See, e.g., Garvey, *supra* note 8, at 1824 (noting “the law’s well-established ‘discount’ for repentance”).

188. See, e.g., *Weeks v. Angelone*, 528 U.S. 225, 245 (2000) (noting the “unusually persuasive mitigating evidence” offered by the defendant, including “his extreme remorse”); *People v. McIntosh*, 662 N.Y.S.2d 214, 218 n.3 (Duchess Co. Ct. 1997) (noting that a capital defendant may present evidence of remorse as a mitigating factor in the sentencing proceeding); see also Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1604-05 & nn.20-21 (1998) (citing cases from fifteen other jurisdictions).

189. See Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1558 & n.1 (1998) (noting that a “study of prosecutors’ closing arguments in favor of a death sentence concluded that ‘whenever possible, prosecutors emphasized the defendant’s apparent lack of remorse’”) (quoting Mark Costanzo & Julie Peterson, *Attorney Persuasion in the Capital Penalty Phase: A Content Analysis of Closing Arguments*, J. SOC. ISSUES, Summer 1994, at 125, 137); Eisenberg et al., *supra* note 188, at 1606 & n.25 (“It is . . . important that the client, where appropriate, express

juror's attitudes have confirmed that a capital defendant's perceived remorse (or lack of remorse) is often a significant sentencing factor.<sup>190</sup>

While much of our empirical evidence about sentencing factors comes from capital cases, the available data about noncapital sentencing also suggests that sentencing judges view remorse as a mitigating factor. In their influential study of pre-Guidelines sentencing of white-collar defendants, Wheeler, Mann, and Sarat found that "it is important for many judges that defendants recognize the gravity of their offense, accept the blame for their misdeeds, and express remorse or contrition for them."<sup>191</sup> Under the Guidelines, remorse has been codified as a mitigating factor under the rubric of "acceptance of responsibility."<sup>192</sup> If remorse is present "to an

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remorse, both for the victim and the victim's family.") (citing Dennis N. Balske, *New Strategies for the Defense of Capital Cases*, 13 AKRON L. REV. 331, 356 (1979)); Phyllis Brown, *Testimony of "Mitigating Circumstances:" What Purpose Does It Serve?*, FED. LAW., Sept. 1997, at 5, 5 ("Common wisdom is that a show of remorse may result in mitigation.").

190. One statistical study conducted interviews of over 150 jurors from forty-one capital juries in South Carolina, including jurors from each of the state's capital cases between 1986 and mid-1993. See Eisenberg et al., *supra* note 188, at 1600-01. The authors concluded that the defendant's perceived remorse (or lack of remorse) was a significant factor in jurors' sentencing decisions, so long as the jurors did not think the crime was especially "vicious." *Id.* A smaller study of California jurors reached similar conclusions. See Sundby, *supra* note 189.

191. See WHEELER ET AL., *supra* note 27, at 115-18 (recounting interviews with several federal judges who indicated the importance of remorse and contrition as a sentencing consideration, and not just in white-collar cases); see also *Scott v. United States*, 419 F.2d 264, 282 (D.C. Cir. 1969) (Leventhal, J., concurring) ("There is a natural, and I believe sound, disposition to adjust sanctions when an offender admits his responsibility. . . . I dare say that many judges, possibly the over-whelming majority, respond in this way . . ."); *United States v. Torres*, No. 84 CR 583, 1987 U.S. Dist. LEXIS 6968, at \*4 (N.D. Ill. July 24, 1987) ("Remorse is of course a factor to be taken into account in the sentencing process . . ."); Austin Sarat, *Remorse, Responsibility, and Criminal Punishment: An Analysis of Popular Culture, in THE PASSIONS OF LAW* 168 (Susan Bandes ed., 1999) ("Traditionally, law has encouraged remorse by rewarding it.").

192. See 2002 GUIDELINES, *supra* note 28, § 3E1.1. Section 3E1.1 provides for a two- or three-level reduction in the defendant's offense level, which usually reduces a defendant's sentencing range by approximately thirty percent. See *id.* Section 3E1.1 does not address remorse per se. See *id.* Instead, it directs judges to focus on the defendant's actions (e.g., truthfully admitting the offending conduct, pleading guilty, and voluntarily making restitution or assisting in recovery of the "fruits and instrumentalities" of the offense). *Id.* This conduct, however, is exactly the conduct expected of a remorseful defendant. In any event, several circuits have "specifically held that a moral element is implicit in acceptance of responsibility and is satisfied by the defendant's expression of contrition and remorse." *United States v. Fagan*, 162 F.3d 1280, 1284-85 (10th Cir. 1998) (citing cases holding "that a moral element is implicit in acceptance of responsibility and is satisfied by the defendant's expression of contrition and remorse"); see also 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, 1525-26 & nn.72-77 (1997) (noting, with some disapproval, that "virtually all [courts that] have pronounced on the matter seem to endorse the notion that section 3E1.1 inquiry is fundamentally about remorse or contrition").



exceptional degree," an even larger sentence reduction is permitted under the Guidelines.<sup>193</sup>

Traditional punishment theory provides some explanation for this common conception of remorse as a sentencing mitigator. From a utilitarian perspective, remorse may have predictive value. The contrite defendant, "having made his first step on the way to rehabilitation," may be less dangerous and less likely to re-offend.<sup>194</sup> This utilitarian view, however, tells only part of the story of remorse. For one, reducing a sentence because a particular defendant is remorseful will often flatly contradict the more common utilitarian aim of general deterrence. More fundamentally, as Jeffrie Murphy has argued, repentance surely means more than just "a resolution not to commit wrong again."<sup>195</sup> Remorse is an independent virtue. It represents a changing of the self, a disassociation from the blameworthy self, that transforms the defendant into someone who is not just less dangerous, but who is "better."<sup>196</sup>

Regardless of the theoretical justifications for viewing remorse as mitigation, the idea has undeniable popular resonance. As Austin Sarat has observed, popular culture "gives a central role to accepting responsibility and expressing remorse in representations of crime and punishment."<sup>197</sup> As one example, Sarat points to the film *Dead Man Walking*, which, he argues, dramatically and effectively reaffirms the centrality of remorse in our judgment of the wrongdoer's character and, by extension, his desert.<sup>198</sup> Similar treatments of remorse in popular culture abound.<sup>199</sup>

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193. See, e.g., *Fagan*, 162 F.3d at 1284-85.

194. Eisenberg et al., *supra* note 188, at 1606; see also *Scott*, 419 F.2d at 282 (Leventhal, J., concurring) (stating that remorse is a mitigating factor because the remorseful defendant "has the stuff that portends future improvement"); Murphy, *supra* note 148, at 148-49 ("[I]t seems obvious that repentant people are less likely to commit crimes again than are those criminals who are unrepentant. Indeed, one might even suggest that controlling crime by provoking repentance is just another way of describing the idea of special deterrence.").

195. Murphy, *supra* note 148, at 148-49 (criticizing the utilitarian view of repentance as "hasty and superficial").

196. See Murphy, *supra* note 148, at 157 ("The repentant person has a better character than the unrepentant person, and thus the repentant person . . . simply deserves less punishment than the unrepentant person."); Sarat, *supra* note 191, at 170 (stating that "remorse involves a change of heart, an alteration of character"). In *United States v. Ming He*, 94 F.3d 782 (2d Cir. 1996), the Second Circuit court of appeals implicitly recognized that remorse is about more than just crime prevention. In discussing the sentencing of cooperators, the court noted that "a sentencing court is particularly well-positioned—because of its experience—to evaluate the moral worthiness, contrition, and rehabilitation of a defendant." *Id.* at 788.

197. See Sarat, *supra* note 191, at 171.

198. In Sarat's probative analysis, the central dramatic tension of *Dead Man Walking* involves the efforts of the film's protagonist, Sister Helen Prejean, to get a death row inmate, Matthew Poncelet, to accept responsibility for his part in a brutal double murder. See *id.* at 172-

Garvey's theory of atonement is admittedly and explicitly ideal—both in its notion of community and in its expectations of wrongdoers and victims.<sup>200</sup> But even assuming (as we no doubt should) that most communities, most wrongdoers, and most victims are less than ideal, atonement is still a worthwhile process.<sup>201</sup> Applying the atonement model to cooperators shows how.

### *B. Atonement and the Ideal Cooperator*

In an ideal world, a cooperator would experience atonement by voluntarily and wholeheartedly going through the four stages of expiation. Even more ideally, the cooperator's motive would be pure: he would endure expiation not to lessen his sentence, but to atone for his wrong and to reconcile with society.

The ideal cooperator would come to cooperation having already experienced the first stage of expiation—remorse for his wrong. While this remorse would be largely internal, it would be reflected in the decision to cooperate and, more importantly, in the decision and desire to turn away from crime. The second stage of expiation—apology—would be a more external process reflected formally in the cooperator's guilty plea and informally, but perhaps more importantly, in a direct communication of heartfelt remorse to the victim. The third stage of expiation—restitution—would at least entail direct monetary compensation to the victim for any pecuniary losses. For crimes without an identifiable victim and for crimes where the harm is nonmonetary, the cooperator's restitution will necessarily be more indirect. That compensation obviously can take the form of traditional community service. For the cooperator, it can also take the form of cooperation: a community service in itself.

To complete the expiation, the cooperator must undergo the final stage—punishment. In some respects, cooperation is its own punishment because of the social ostracism and reduced opportunities

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83. Poncelet eventually does accept responsibility and becomes genuinely remorseful on the eve of his execution, which sets the stage for the ultimate question posed by the film: Having committed a brutal murder and then repented, does Poncelet "deserve" to be executed? *Id.*

199. *See id.* at 171 ("Popular culture representations of crime and punishment often are centrally tales of responsibility and remorse.").

200. *See Garvey, supra* note 8, at 1846-47.

201. Garvey argues that forcing offenders through the process of atonement serves the valid purpose of "moral education." Thus, the "morally ignorant" offender is taught to appreciate the full extent of his wrongful conduct, while the "morally defiant" offender is at least taught how members of a community should "respond to one another when they've wronged one another." *See id.* at 1847-51.

that typically accompany it.<sup>202</sup> And though this ostracism may be significant punishment for many cooperators, it will not by itself satisfy the fourth stage of expiation, particularly because the end result of cooperation (and its attendant ostracism) may be an ultimate benefit to the cooperator (reconciliation with law-abiding communities). Thus, to complete his expiation, the cooperator must suffer additional punishment. This punishment need not be as severe as the punishment imposed on the noncooperator, in recognition of the extent to which cooperation is its own punishment and in recognition of the cooperator's remorse. But to complete the process of expiation, the cooperator must suffer—indeed, the ideal cooperator should demand—additional punishment.

Having completed the process of expiation, ideally the cooperator will be forgiven by victim and by society, and not only because the cooperator has helped bring other wrongdoers to justice but also, more importantly, because he has completed the process of expiation: he is remorseful, he has apologized, he has done what he can to pay back the victim and society, and he has suffered punishment.

### *C. Atonement and the Selfish Cooperator*

The ideal cooperator is, of course, just that: ideal. Most cooperators decide to cooperate only to get a lesser sentence. Remorse and the desire to atone for wrongs done rarely plays a significant part in a cooperator's initial decision to cooperate. What, then, is the point of the atonement model of cooperation?

Most importantly, the cooperator who begins cooperating for purely selfish reasons may, at some point in the process, begin to experience something like atonement. The cooperation process—particularly the intensive debriefings and the indirect positive reinforcement the cooperator receives for “coming clean”—may stir feelings of remorse that a simple guilty plea does not. Moreover, few cooperators want to see themselves as “rats.” So it is inevitable that many cooperators, as they seek to justify betraying their friends, tell themselves that they are doing something worthwhile, that they are helping society, that they are becoming one of the “good guys.”<sup>203</sup> By

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202. See *supra* notes 117-49 and accompanying text.

203. Of course, there are some cooperators who very obviously go through the cooperation process reluctantly and with great resentment. There are other cooperators who feel strong resentment but successfully mask it to enhance their chances for a sentence reduction. Nevertheless, at least in my experience, it was quite common for cooperators to come to identify with the prosecution and to see themselves as part of the prosecution “team,” especially when the

the end of the cooperation process, these cooperators may not be just enduring a process that looks like atonement; they may actually believe that they are making amends for their wrongdoing.

Even for the resolutely selfish cooperator, the cooperation process simulates true atonement. Whether he feels remorse or not, the selfish cooperator must be willing to turn his back on his criminal associates and, by extension, on his own criminal livelihood. Whether he feels like apologizing or not, the selfish cooperator must plead guilty publicly and, if he testifies, must publicly recount his misdeeds in excruciating detail. Whether he feels like making restitution or not, the cooperator necessarily “gives back” to society by helping to bring other wrongdoers to justice. While this restitution may be indirect (and, for crimes of violence, woefully incomplete), for many federal crimes there is no identifiable victim—the only harm is to society.<sup>204</sup> For the cooperator whose victim is “the community,” cooperation is one of the most direct forms of restitution possible, particularly since the cooperation will often be against offenders who are operating in the same community as the one harmed by the cooperator. And, of course, whether he feels like being punished or not, the cooperator is punished.

For the resolutely selfish cooperator, the cooperation process can accomplish more than just simulated expiation. It can serve as a means for teaching the cooperator how he *should* react to his wrongdoing. Garvey refers to this as “moral education,”<sup>205</sup> a term that may conjure up uncomfortable images of nineteenth-century penitentiaries.<sup>206</sup> But prosecutors routinely engage in this kind of “education.” Part of preparing a cooperator to testify involves ensuring that the cooperator is willing and able to accept responsibility for his wrongdoing. Prosecutors generally do this for tactical, not moral,

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cooperation process was extensive. Given the psychological pressures inherent in that process—particularly the enormous power that the prosecutor holds over the cooperator’s fate—this kind of “Stockholm Syndrome” is not surprising. It is also, in my view, enormously positive.

204. The most obvious examples of such “victimless” crimes are those in which the victim is the federal government: counterfeiting, tax evasion, public benefits fraud, obstruction of justice, and espionage. But even more significantly, most narcotics offenses are committed without an identifiable victim other than “the community.”

205. See Garvey, *supra* note 8, at 1847-48 (citing R.A. DUFF, TRIALS AND PUNISHMENTS (1986) and Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984), as the “best recent statements” of the moral education theory of punishment).

206. See David J. Rothman, *Perfecting the Prison*, in THE OXFORD HISTORY OF THE PRISON 101-16 (Norvall Morris & David J. Rothman eds., 1995) (describing the rise of the penitentiary from 1820 to 1840 and the efforts of prison reformers to transform prisoners into law-abiding citizens). “The shared assumption was that since the convict was not innately depraved but had failed to be trained to obedience by family, church, school, or community, he could be redeemed by the well-ordered routine of the prison.” *Id.* at 117; see also Garvey, *supra* note 8, at 1848.

reasons: an unrepentant cooperator makes an unsympathetic witness. But in urging cooperators to accept responsibility for their wrongdoing, prosecutors can indirectly push those cooperators toward atonement.

In religious terms, the selfish cooperator may not experience true contrition, but he at least experiences attrition—that sorrow which is “motivated merely by fear.”<sup>207</sup> The atonement model, as Garvey explains, hopes for true contrition, but “settles, more realistically, for attrition.” Thus, while we would prefer truly repentant cooperators, we settle for selfish cooperators who nevertheless endure expiation and, in the process, learn that society *expects* them to be contrite and repentant. And even if the cooperator’s remorse is completely faked, faked remorse at least shows that the cooperator is “aware of the community’s censure and seeks to make amends.”<sup>208</sup>

#### V. COOPERATION AS PUNISHMENT AND ATONEMENT: PRACTICAL IMPLICATIONS

Viewing cooperation as punishment and atonement makes things look different. Most obviously, the cooperator’s sentencing discount appears more deserved. But this reconceptualization of cooperation is concerned with more than just making cooperation discounts look less distasteful. It also has practical implications for how prosecutors use cooperators and how judges sentence them.

##### A. Using Cooperators

Prosecutors exercise significant discretion over the cooperation process. Prosecutors decide which defendants get “signed up,” the charges to which they plead, how they are used, and whether their assistance will be considered “substantial.”<sup>209</sup> Prosecutors typically—

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207. See THOMAS N. TENTLER, SIN AND CONFESSION ON THE EVE OF THE REFORMATION 250 (1977), cited in Garvey, *supra* note 8, at 1850.

208. Amitai Etzioni, *Introduction* to REPENTANCE: A COMPARATIVE PERSPECTIVE, *supra* note 148, at 1, 10 (“The advantage of false remorse stands out when one compares it to brazen displays of unremorseful self-righteousness.”); see also Garvey, *supra* note 8, at 1850 (“Faked remorse is better than nothing. Indeed, doing the right thing, even for the wrong reason, can sometimes lead to doing the right thing for the right reason.”).

209. Prosecutors can also exercise significant influence over the ultimate sentence, even absent a formal agreement on the extent of the cooperation departure. See *supra* note 74. In some districts, the extent of the substantial assistance departure will be part of the cooperation agreement. *Id.* In other districts, the prosecution will make a specific recommendation, which is usually given great weight. *Id.* And even in those districts in which prosecutors do not

and quite appropriately—make these decisions by using a utilitarian cost-benefit analysis.<sup>210</sup> The benefit the cooperator brings (whether it be more arrests, more convictions, more certain convictions, or lengthier sentences) is weighed against the cost (reduced punishment for the cooperator). But prosecutors also can—and should—consider cooperation’s broader implications in making those decisions. In many respects these broader implications are retributive: the cooperator who has suffered and the cooperator who has sought atonement deserve less punishment. But there is also a utilitarian aspect to this reconceptualization: The cooperator who has experienced atonement will not only be a “better” person, he will also be a more law-abiding person.

### 1. The Scope of Cooperation

If cooperation is its own punishment, then a substantial part of the pain inflicted by cooperating comes from betraying one’s friends. The cooperator who betrays his closest friends will suffer far more ostracism and alienation than a cooperator who rats on mere acquaintances. The suffering is even less for a cooperator who rats on his rivals. Prosecutors, therefore, should prefer cooperators who cooperate against their accomplices, especially when a cooperator’s accomplices are his friends.

It may seem counterintuitive to say that prosecutors should place more value on a cooperator whose disloyalty is more pronounced. If loyalty is a virtue, then the cooperator who betrays his close friends is the least virtuous of all. But it is this very disloyalty, and the personal sacrifice it entails, that defines the character of the cooperation. First, the more betrayal involved in the cooperation, the more the cooperator will suffer attendant alienation and ostracism. Second, the more difficult the cooperation, the more significant the cooperator’s decision becomes. The cooperator who is willing to turn his back on his friends will have made a greater commitment to turning his back on his wrongdoing. The pain from that betrayal helps prepare the way for the cooperator’s expiation.<sup>211</sup>

Of course, cooperators who testify against acquaintances and rivals may still suffer ostracism and alienation, and their decision to

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recommend a specific sentence for cooperators, prosecutors can still significantly influence the ultimate sentence by writing a “strong” or “weak” substantial assistance motion. *Id.*

210. Indeed, Department of Justice guidelines implicitly encourage this utilitarian approach. See *supra* notes 94-96 and accompanying text.

211. The cooperator who cooperates against his close friends is also less likely to commit perjury—to base his cooperation on false accusations—than the cooperator who cooperates against acquaintances or rivals.

cooperate will still open themselves to the expiation process. But prosecutors should be more skeptical of such cooperators (and not just because they are more likely to lie). Because their decision to cooperate involves less sacrifice and less commitment, their sentencing discount will be less deserved, and their cooperation experience will look less like expiation.

In many ways, prosecutors already favor cooperators for whom the decision to cooperate is more difficult, though usually for utilitarian reasons. The cooperator who turns on his accomplices—particularly when those accomplices are his friends—usually makes a more reliable and credible witness. At a minimum, he has less incentive to lie than the cooperator who turns on mere acquaintances or rivals. Perhaps the prototypical example of the cooperator with no connection to his target is the jailhouse snitch who testifies about a cellmate's "confession." Prosecutors are—or at least should be—extremely skeptical of jailhouse snitches, most obviously because the snitch's story is so easily fabricated.<sup>212</sup> Considering punishment and atonement as part of cooperation provides prosecutors with additional reasons to avoid such witnesses.

This broader view of cooperation also gives prosecutors powerful reason to avoid third-party cooperation. When the work of cooperating is done not by the cooperator but by a surrogate, the cooperator may avoid suffering any of the alienation and ostracism that can lessen his desert. Even more importantly, the cooperator will not endure the expiation process. He may plead guilty, and he may be punished, but he will not be forced to endure the excruciatingly minute examination of his wrongdoing that accompanies debriefing sessions, he will not make the detailed public apology that comes with testifying, and he will not do the work that is his reparation.

## 2. The Scope of the Guilty Plea

The guilty plea is the cooperator's formal acceptance of responsibility—one part of his apology and an important stage in his expiation. To make that apology complete, to make his acceptance one

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212. Some of the worst examples of erroneous convictions based on cooperator testimony have come from jailhouse snitches. See, e.g., *Dodd v. Oklahoma*, 993 P.2d 778, 783-84 (Okla. Crim. App. 2000) (observing that courts "should be exceedingly leery of jailhouse informants," and adopting special disclosure rules and cautionary instructions for such witnesses); James S. Liebman, *The Overproduction of Death*, 100 COLUM L. REV. 2030 (2000) (noting several cases in which jailhouse snitches were used to secure faulty convictions); Trott, *supra* note 62, at 1383-84 (discussing the case of "Mad Dog" Pruett, a jailhouse snitch who, having won his freedom by falsely accusing another prisoner of murder, then went on a robbery spree that left four people dead).

of full responsibility, the cooperator should be required to plead guilty to *all* of his wrongdoing. Thus, the cooperator who is arrested for selling one kilogram of cocaine to an undercover officer should be required to plead guilty to a charge that encompasses all of the drug dealing he has done. The cooperator who is arrested for robbing a bank should be required to plead guilty not only to the bank robbery, but also to the muggings and auto thefts he has committed. The cooperator who is arrested in an antitrust investigation should also be required to plead guilty to his unrelated personal income tax evasion.

In many cases, the additional charges will not significantly change the cooperator's sentencing exposure, particularly when the additional crimes are minor or similar to the primary crime. But in some cases, the additional exposure will be significant—for example, the cooperator arrested for midlevel drug dealing who must also plead guilty to a murder.<sup>213</sup> Some United States Attorney's Offices already require cooperators to plead guilty to all of their criminal conduct, but others do not.<sup>214</sup>

For atonement to be complete, the cooperator must *fully* accept responsibility for his wrongdoing. For the guilty plea to serve as a formal apology, the cooperator must apologize for *all* his wrongdoing and accept the consequences of that wrongdoing. For the punishment to complete the expiation process, the cooperator must be punished for *all* his wrongdoing.

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213. See *supra* note 71 and accompanying text.

214. See Gleeson, *supra* note 62, at 449 n.110. Judge Gleeson notes:

[The] practice of obtaining a full proffer of all prior crimes prevails in many districts, including the Eastern and Southern Districts of New York, but is not universal. For example, some United States Attorney's offices will enter into cooperation agreements that do not cover prior crimes of violence. A proffer session leading up to such an agreement will therefore be limited—employing a “don't ask, don't tell” approach to violent crimes.

*Id.* One way to implement this “don't ask, don't tell” approach is to give cooperators use immunity for incriminating information disclosed pursuant to the cooperation agreement—a common practice in some districts. See, e.g., *United States v. Baird*, 218 F.3d 221, 225, 231 (3d Cir. 2000). Indeed, the Guidelines specifically contemplate that prosecutors may grant such immunity to cooperators:

Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guidelines range, except to the extent provided in the agreement.

2002 GUIDELINES, *supra* note 28, § 1B1.8(a).



### 3. Mechanisms of Remorse and Apology

The cooperator's expressions of remorse and apology need not be limited to his court appearances. Ideally, the cooperator could apologize directly to the victim. Our criminal justice system, for all its recent focus on victims' rights, still provides little opportunity for wrongdoers to apologize to their victims. Although some courts have ordered defendants to apologize,<sup>215</sup> those apologies have tended to be forced and public, not voluntary and personal.<sup>216</sup>

A few courts and jurisdictions, however, have begun employing rituals that do not *force* a wrongdoer to apologize, but rather give him the opportunity to apologize. Often grouped under the rubric of "restorative justice,"<sup>217</sup> the most common of these rituals is victim-offender mediation. The basic purpose of victim-offender mediation is to give victims and offenders a forum to communicate with each other. Typically, the communication is facilitated by volunteer mediators, and the participants will discuss the effects of crime on their lives and express their concerns and feelings.<sup>218</sup> Victims thus are given a chance to tell the defendant—outside of the public and highly charged sentencing hearing—how the crime affected their lives. And defendants are given a chance to deliver a genuine apology, one that expresses the defendant's understanding of the pain his crime caused the victim.<sup>219</sup>

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215. See Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 791-94 (1998) (describing various court-ordered apology rituals).

216. Because they are forced, such rituals are often viewed more as shaming penalties than as apologies. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 634 (1996); Garvey, *supra* note 8, at 1816.

217. For general descriptions of the restorative justice movement, see John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH 25 (Michael Tonry ed., 1999); DANIEL VAN NESS & KAREN HEETDERKS STRONG, *RESTORING JUSTICE* (1997). For a good, concise discussion of restorative justice in practice, see Leena Kurki, *Incorporating Restorative and Community Justice into American Sentencing and Corrections*, SENTENCING & CORRECTIONS, (Dep't of Justice Sept. 1999), available at [www.ncjrs.org/pdffiles1/nij/175723.pdf](http://www.ncjrs.org/pdffiles1/nij/175723.pdf).

218. See Kurki, *supra* note 217, at 4; see generally MARK UMBREIT, *VICTIM MEETS THE OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION* (1994).

219. Most restorative justice programs view victim-offender mediation, and other similar rituals, as substitutes for punishment. See HOWARD ZEHR, *CHANGING LENSES* 209-10 (1990) ("If there is room for punishment as a restorative approach, its place would not be central."); Garvey, *supra* note 8, at 1843 ("Put bluntly, restoratists really don't much care for punishment."). Perhaps as a result, restorative justice rituals are used most often for juvenile crimes and minor property offenses. See Garvey, *supra* note 8, at 1840 n.166; Kurki, *supra* note 217, at 9. In the atonement model, however, restorative justice rituals would not replace punishment, which would remain the fourth stage of the expiation process. See Garvey, *supra* note 8, at 1842-44. Rather, the rituals would facilitate the apology, the second stage of the process. See *id.* at 1844

It would be quite simple for prosecutors to make participation in victim-offender mediation a condition of the cooperator's agreement. Even absent a formal program, prosecutors could work with community groups to set up ad hoc mediations. And even for crimes without identifiable victims (such as most narcotics offenses and offenses against the treasury), representative members of the community could explain to the cooperator their views of his offense and the effect it has on their community.

It is, I realize, quite another matter to convince prosecutors that victim-offender mediation would be a good idea for cooperators. Most prosecutors I know would react with horror at the thought of putting a cooperator in a roomful of victims and allowing the cooperator to apologize for his crimes. Think of the "3500 material" that could be generated by such a session.<sup>220</sup> One solution, of course, would be to delay any victim mediation until after the cooperator has completed his testimony. This solution, though, is less than ideal. Apology is the second stage of the expiation process precisely because it should immediately follow the offender's remorse. Having come to an understanding of the wrongfulness of his conduct, the offender should want to make—and the victim is entitled to expect—a prompt apology.

Prosecutors should not fear opening up cooperators to this process. While mediation could create some tactical disadvantages for prosecutors,<sup>221</sup> these disadvantages are likely to be outweighed by the tactical advantages. The mediation—and the sincere apology that should result from it—can only make the cooperator a better witness. The cooperator who truly accepts responsibility and empathizes with his victims will be a more sympathetic witness. He will also be a more

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("[R]estorativism longs for atonement without punishment, but punishment—tragically—is for us an inescapable part of atonement.")

220. The Jencks Act generally requires the prosecution to produce to the defendant any witness statements that are in writing and adopted by the witness, or that reflect a "substantially verbatim recital" of an oral statement by the witness. See 18 U.S.C. § 3500 (2000). Most prosecutors routinely make every effort to minimize the creation of such statements. See, e.g., John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797, 1836 & n.172 (2001) (noting that "[p]rosecutors are trained to avoid 'creating Jencks material'" and that "it is common for prosecutors to spend dozens of pretrial hours with cooperating witnesses without creating one word of discoverable material"). Even if the mediation were conducted in a way that did not create any written record, oral statements made by the cooperator—particularly those in which the cooperator admitted his own wrongdoing—could still be discoverable as exculpatory impeachment evidence. See *Giglio v. United States*, 405 U.S. 150, 153-55 (1972).

221. In addition to the extra "3500 material" that could be created, an emotionally charged mediation could cause a cooperator to say something that is false or inconsistent with his other testimony. See 18 U.S.C. § 3500 (2000) (requiring witnesses' written statements to be turned over to the defense). Moreover, the process may lead the defendants against whom the cooperator is cooperating to obtain advance notice of the prosecution's evidence.

effective witness because he is likely to be less defensive about his wrongdoing. By enthusiastically embracing the expiation process, the cooperator can disavow his wrongdoing and distance himself from it.<sup>222</sup> With that distance established, cooperators are more often able to testify about their own wrongdoing in a way that is candid, compelling, and credible.<sup>223</sup> And, trial tactics aside, the empathetic and truly apologetic cooperator is much closer to atonement, a worthwhile goal in itself.

#### 4. Mechanisms of Reparation

Nearly all federal defendants who inflict a monetary harm are ordered to pay restitution,<sup>224</sup> and cooperators are no different. But many cooperators—particularly those involved in drug trafficking or crimes of violence—inflict harm that is not monetary. And many of the cooperators who inflict a monetary harm lack both the money to pay restitution and the ability to earn that money in the future.

For most cooperators, the most effective form of reparation is the cooperation itself. By assisting in the prosecution of other offenders, cooperators can give back to society. Indeed, many cooperators can give back to the very victims and community that they harmed, by cooperating against their accomplices or against other wrongdoers operating in the same community.

There is an additional avenue of reparation for cooperators that is often overlooked: community service. Most often used as a supplement to probation for white-collar offenders, community service has been criticized as a sanction because it does not adequately express society's condemnation.<sup>225</sup> But under the atonement model, community service would not have to carry the weight of punishment (punishment will come separately). Instead, community service would

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222. See Garvey, *supra* note 8, at 1816 (“[A]n apology is the self’s way of *accepting* responsibility for its wrongdoing but at the same time disavowing the wrong. An apology distances and disassociates the true self from the guilt-tainted self.”).

223. Some of the most effective cooperators I have encountered were former substance abusers who had embraced the “twelve-step” program popularized by such organizations as Alcoholics Anonymous and Narcotics Anonymous. See *generally* ALCOHOLICS ANONYMOUS, TWELVE STEPS AND TWELVE TRADITIONS (1996). These witnesses were effective precisely because they had experienced a process that looked very much like expiation: they had accepted responsibility for their wrongs, they had apologized to those they had wronged, and they had sought to make amends for their wrongs. That process—and the distance it created from their former selves—allowed them to be open and candid about *all* of their wrongdoing, which immeasurably enhanced their credibility with the jury.

224. See 18 U.S.C. § 3663A(a)(1), (c)(1) (2000) (making restitution mandatory for, among other offenses, crimes of violence, drug crimes, and offenses against property).

225. See Kahan, *supra* note 216, at 625-30.

be part of the cooperator's reparation—a concrete, hands-on way he can give back to his community.<sup>226</sup>

### *B. Sentencing Cooperators*

That cooperation can include punishment and atonement does not necessarily mean that cooperators as a whole should be punished less. It does suggest, however, that some cooperators should be punished less than other cooperators. In particular, those cooperators who have suffered as a result of their cooperation should be punished less than those cooperators for whom the cooperation has been easy. And, those cooperators who have moved toward atonement by experiencing expiation should be punished less than cooperators who have not. The task falls as much on prosecutors as on judges. Judges must be prepared to give credit at sentencing for collateral suffering and for expiation. But prosecutors, who are in a much better position to understand the cooperator's situation, should include an evaluation of the cooperator's collateral suffering and expiation in the substantial assistance motion.

Considering a cooperator's collateral suffering does not require much change in practice. Indeed, the Guidelines already direct sentencing judges to consider the "risk of injury" faced by a cooperator and his family.<sup>227</sup> But to fully evaluate the cooperator's desert, the court should consider not just physical danger,<sup>228</sup> but all the ostracism, alienation, and attendant suffering that can flow from cooperation. The Guidelines do not specifically provide for the consideration of such suffering,<sup>229</sup> but sentencing judges could consider it in two ways. First, the judge could consider collateral suffering not in determining the extent of the departure (i.e., the number of levels to depart), but where within the range to sentence the cooperator, a decision that is almost

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226. In this respect, community service fits neatly with victim-offender mediation. When victim-offender mediation is used as a substitute for punishment, the end product of the mediation is often a "restitution agreement." Kurki, *supra* note 217, at 4. Because the primary purpose of victim-offender mediation is not monetary restitution (indeed, "the agreement is often seen as secondary to emotional healing and growth," *id.*), such reparations as community service are common. See BRAITHWAITE & PETTIT, *supra* note 180, at 104 (praising community service's "reprobative effect" on the wrongdoer and "reintegrative effect" on the victim).

227. See 2002 GUIDELINES, *supra* note 28, § 5K1.1(a)(4) (allowing courts to consider "any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance").

228. Indeed, the Guidelines' directive that courts consider danger and risk of injury was likely motivated by considerations of utility, not desert. A cooperator who exposes himself and his family to danger needs more incentive to cooperate and thus a larger sentencing reduction.

229. See *supra* note 52 and accompanying text.

wholly within the judge's discretion.<sup>230</sup> Second, the judge could consider cooperation's collateral consequences in evaluating the cooperation itself.<sup>231</sup> Because cooperators who are cooperating against close friends often make better witnesses,<sup>232</sup> their assistance will have been, in the language of the Guidelines, more "significan[t] and useful[ ]."<sup>233</sup>

Considering a cooperator's expiation may require a more significant shift in focus but is still possible under the existing Guidelines. One barrier might appear to be the Guidelines themselves, which direct that "[t]he sentencing reduction for assistance to authorities shall be considered independently from any reduction for acceptance of responsibility."<sup>234</sup> As the Commission explains it:

Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.<sup>235</sup>

The solution here is similar to the solution regarding a cooperator's collateral suffering. At a minimum, the sentencing court could consider the cooperator's expiation in deciding where within the (departed to) range to sentence the cooperator. More fundamentally, the court could consider the cooperator's expiation not simply as evidence of his acceptance of responsibility, but as central to the "significance and usefulness" of the cooperation. The cooperator who experiences expiation has not just "accepted responsibility" within the (rather minimal) requirements of the Guidelines.<sup>236</sup> He has expressed

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230. This approach might seem limiting because the judge's discretion is constrained by the relatively narrow sentencing ranges. Yet, the approach could be quite effective in practice. Although the reasons for a substantial assistance departure are reviewable on appeal, the *extent* of the departure is effectively unreviewable. *See, e.g.,* United States v. Khalil, 132 F.3d 897, 898 (3d Cir. 1997) (holding that an appellate court lacks jurisdiction to review the district court's discretionary downward departure from applicable sentencing guidelines). Thus, so long as the judge says that the collateral suffering will be considered only in deciding where within the range to sentence the cooperator, the ultimate sentence will be insulated from appeal. *See id.* Indeed, most of the judges whom I saw sentence cooperators in the Southern District of New York simply departed downward to a particular sentence instead of departing downward a certain number of offense levels and then sentencing the cooperator within a new range.

231. 2002 GUIDELINES, *supra* note 28, § 5K1.1(a)(3).

232. *See supra* note 212 and accompanying text.

233. 2002 GUIDELINES, *supra* note 28, § 5K1.1(a)(1).

234. *Id.* § 5K1.1, cmt. n.2.

235. *Id.*

236. *See* 2002 GUIDELINES, *supra* note 28, § 3E1.1. Although a guilty plea does not automatically entitle a defendant to an acceptance of responsibility reduction, most defendants who plead guilty and do not lie in the process receive the reduction. *See* O'Hear, *supra* note 192, at 1534-42 (discussing a study indicating that, at least in one district, section 3E1.1 operates "as

remorse, apologized, and made reparations; and he has done so in the context of cooperating. His expiation is not simply an internal conversion, it is an integral part of his “substantial assistance.” The closer a cooperator comes to true contrition, the more sincerely he makes his apology, and the more he is motivated to make reparations, the better cooperator he will be. In the language of section 5K1.1, the closer the cooperator comes to atonement, the more “truthful” and “reliable” he will be, and the more “significan[t] and useful[]” his cooperation will be.<sup>237</sup>

One obstacle to considering atonement is that it can be difficult to judge the genuineness of a wrongdoer’s remorse. This obstacle, though, is not insurmountable. Remorse, though it can be easy to fake, is routinely considered by judges and by capital juries in imposing sentences.<sup>238</sup> And the judge sentencing a cooperator (along with the prosecutor recommending the sentence) will be in a much better position to evaluate the extent of a cooperator’s expiation than the judge or jury who sentences a typical defendant—even a capital defendant. For example, as important as remorse can be in capital sentencing, juries often base their evaluation of the defendant’s remorse on little more than the defendant’s testimony during the penalty proceeding. Indeed, in most cases, jurors reach conclusions about the defendant’s remorse simply by judging his appearance during the trial.<sup>239</sup> And in noncapital cases, judges often evaluate a defendant’s remorse or lack of remorse based on minimal evidence (such as statements to the probation officer or a statement at sentencing) that is often filtered through the defendant’s attorney. The cooperator, by contrast, has been through a process that is designed both to make him remorseful and to expose him if he is not. Lengthy debriefing sessions, intensive witness preparation, and public trial testimony (including cross-examination) all provide a window into the cooperator’s remorse and contrition.<sup>240</sup> Prosecutors (and, by extension, sentencing judges)<sup>241</sup> are thus in a much better position to evaluate the genuineness of the cooperator’s expiation.

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a more-or-less automatic plea discount,” and arguing that many other districts follow a similar practice).

237. 2002 GUIDELINES, *supra* note 28, § 5K1.1.

238. See *supra* notes 188-90 and accompanying text.

239. See Sundby, *supra* note 189, at 1561-62 (“Above all else . . . the defendant’s demeanor and behavior during the actual trial shaped the jurors’ perceptions of the defendant’s remorse.”)

240. Participation in victim-offender mediation might also provide useful information about a cooperator’s contrition.

241. Prosecutors are usually in a much better position than the sentencing judge to make this judgment because many cooperators do not testify at trial and those who do are often sentenced by a judge other than the one who presided at that trial.

It bears repeating that the atonement model's focus on remorse and expiation does not mean that the cooperator should not be punished. Punishment is an essential part of the atonement process; without it, expiation cannot be complete, and atonement is not possible.<sup>242</sup> But, the atonement model may suggest that some cooperators should be punished less. If a cooperator has undergone expiation, if he has moved toward atonement, not only has his cooperation been more useful, but his moral culpability has been lessened and his debt to society at least partially paid.

#### CONCLUSION

It has not been my aim to paint an overly rosy picture of cooperation. Indeed, I have touched only indirectly on what is probably the most significant problem with cooperation: cooperator perjury.<sup>243</sup> Yet, while the punishment and atonement aspects of cooperation may say little about how to combat cooperator perjury, they do address some of the other problems typically attributed to cooperation. For one, a standard criticism of cooperation is that it introduces unwarranted disparity into "a sentencing regime that values uniform sentencing above all else."<sup>244</sup> This reconceptualization, however, suggests that at least some of the cooperator's sentencing discount may be deserved—both because cooperation is its own punishment and because atonement lessens the cooperator's desert. Moreover, the benefits to society from cooperation may exceed the standard crime-fighting benefits. While cooperation remains primarily a crime-fighting tool, it can also serve the individual cooperator, the victim, and society. When the cooperation process serves as expiation, the cooperator is moved closer to atonement—an ephemeral goal, no doubt, but one worth the effort.

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242. See *supra* notes 176-78, 202 and accompanying text.

243. See *supra* notes 116, 211.

244. Weinstein, *supra* note 3, at 564.

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# Contractual Choice of Law and the Prudential Foundations of Appellate Review

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56 Vand. L. Rev. 57 (2003)

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*Within the past decade, professional organizations interested in making the law better suited to commercial transactions have begun to advocate the proposition that contracting parties should have almost unlimited power to choose the law to govern their relationship. The new choice-of-law framework resulting from these reform efforts will provide parties with an expanded menu of legal regimes from which to choose when drafting their contract and, in turn, will lead to a more frequent use of choice-of-law clauses. Indeed, some have even suggested that omitting such a clause may soon become malpractice for the commercial lawyer. Given both the trend toward permitting unlimited contractual choice of law and the growing popularity of these clauses, it is worth pausing to examine how the judicial system might appropriately respond. In particular, this Article addresses a problem that has thus far been overlooked by both courts and commentators. That problem involves the gains and losses of appellate review of trial court rulings on the law of another state or nation. What, exactly, does judicial review of unsettled questions of foreign law accomplish? What is its price? These questions are of both considerable theoretical interest and immense practical importance. Their resolution calls for an inquiry into the allocation of judicial authority and in its production of outcomes in the real world. The purpose of this Article is to provide an answer to these and other questions. This Article suggests an approach to judicial review that will improve the operation of appellate courts while appropriately distributing authority among all levels of the judiciary.*