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PARTICULAR AMENABILITY TO PROBATION AND THE *TROG* FACTORS: REWARDING WEALTH AND SUBSERVIENCE IN MINNESOTA CRIMINAL SENTENCING

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ABSTRACT

"Particular amenability to probation" and the use of the *Trog* factors should be significantly reformed and restricted as grounds for allowing a defendant to avoid prison in criminal sentencing.[1] In practice, "particular amenability to probation" is a backdoor for courts and prosecutors to consider otherwise impermissible factors, such as: socio-economic status, privilege, wealth, education, cultural beliefs, and political beliefs. As a result, defendants who have access to wealth, privilege, and prior social success are more likely to avoid prison under the law as it stands.

To be clear, this is not an exploration of implicit bias at work in the field of criminal sentencing. To the contrary, this article explores problematic fragments of the law itself that explicitly allows judges and prosecutors to make sentencing decisions favoring wealth, privilege, and social status.[2] Worse yet, the law under consideration grants practitioners the inverse power to more severely punish defendants based on cultural, philosophical, and socio-economic factors under the aegis of the law. A judge or lawyer exercising their discretion based on these factors can arguably do so in "good faith." The license granted by the law to use these factors is inherently problematic and merits reconsideration.

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[1] *Trog* factors are named for the leading case in Minnesota, *State v. Trog*, 323 N.W. 2d 28 (Minn. 1982), which recognized a common law right for a court to depart from the Sentencing Guidelines and listed several factors to inform such a departure.

[2] The exclusion of defense attorneys is purposeful because of their duty to pursue their client's best interest. Where judges and prosecutors should be wary in the application of the law presented, defense attorneys face different obligations.

This article focuses on Minnesota law as means of illustration. Particularly, the Minnesota Supreme Court's decision in *State v. Trog* established a common law authority that—particularly in light of recent events—should be set aside. Particular amenability to probation and the *Trog* factors permit courts to make sentencing determinations on otherwise impermissible factors, such as socio-economic status. The courts should abandon use of these factors in the interest of fairness and consistency.

I. JUDICIAL DEVELOPMENT OF "PARTICULAR AMENABILITY TO PROBATION"

Minnesota criminal sentencing is governed by the Minnesota Sentencing Guidelines.[3] Through the Guidelines are advisory, if a sentencing court fails to identify and articulate "substantial and compelling circumstances" supporting a departure from the guidelines, the sentence is illegal and subject to reversal.[4] The Guidelines recognize two types of departure: durational and dispositional. A durational departure is a sentence that carries either a lengthier sentence (upward or aggravated departure) or shorter sentence (downward or mitigated departure).[5] "A dispositional departure places the offender in a different setting than that called for by the presumptive guidelines sentence."[6] Most often, the court either sends a defendant to prison despite a presumptive stayed sentence (aggravated) or pronounces a stayed sentence despite a presumptive prison term (mitigated).[7] These types of departures are separate and distinct decisions by a court, requiring separate and individual bases for each departure. "Offense-related" factors may support either a durational or dispositional departure, but "offender-related" factors relate only to dispositional departures.[8]

Since their inception, the Guidelines explicitly barred certain facts from being considered in any departure. In the first set of guidelines, the Commission barred race, sex, employment factors, social factors (like education, marital status, length and circumstances of residence), and the

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[3] MINN. SENT'G GUIDELINES AND COMMENT. (MINN. SENT'G GUIDELINES COMM'N 2019).

[4] MINN. R. CRIM. P. 27.03, subd. 4(C); MINN. SENT'G GUIDELINES AND COMMENT. § 2.D.1.c (2019); MINN. STAT. § 244.10, subd. 2.; Williams v. State, 361 N.W.2d 840, 844 (Minn. 1985).

[5] MINN. SENT'G GUIDELINES AND COMMENT. § 1.B.5.b.(2019).

[6] State v. Solberg, 882 N.W.2d 618, 623 (Minn. 2016).

[7] MINN. SENT'G GUIDELINES AND COMMENT. § 1.B.5.a. (2019).

[8] State v. Behl, 573 N.W.2d 711, 713 (Minn. Ct. App. 1998); State v. Walker, 913 N.W.2d 463, 468 (Minn. Ct. App. 2018).

exercise of constitutional rights from being used as factors to support a departure.[9] Those factors remain unchanged in 2019.[10]

However, for any factors that may be present, those circumstances must be "substantial and compelling."[11] Substantial and compelling circumstances are "those circumstances that make the facts of a particular case different from a typical case," or "atypical."[12] Their existence is a threshold issue for departure.[13] The Guidelines provide a non-exclusive list of aggravating and mitigating factors that can constitute substantial and compelling circumstances that may justify a departure.[14] In terms of a downward departure, the Guidelines recognize factors like: victim was an aggressor; passive role, coercion, or duress; lacking substantial capacity for judgment due to physical or mental impairment other than intoxication; alternative placement for a defendant with serious and persistent mental illness; and reasonable evidence a chemically dependent offender can and will respond to a treatment program.[15] However, second to last on the list is the subject of inquiry. Under Section 2.D.3.a(7), the Guidelines state that downward departure may be merited if:

> The offender is particularly amenable to probation. This factor may, but need not, be supported by the fact that the offender is particularly amenable to a relevant program of individualized treatment in a probationary setting.[16]

Arguably, the language "particularly amenable to probation" is the broadest—and arguably ambiguous—factor on the list. It also happens to be a fairly recent addition.

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[9] MINN. SENT'G GUIDELINES AND COMMENT. § 2.D.1 (MINN. SENT'G GUIDELINES COMM'N 1980).

[10] MINN. SENT'G GUIDELINES AND COMMENT. § 2.D.2 (2019).

[11] MINN. SENT'G GUIDELINES AND COMMENT. § 2.D. (1980); MINN. SENT'G GUIDELINES § 2.D.1 (2019).

[12] State v. Peake, 366 N.W.2d 299, 301 (Minn. 1985); Walker, 913 N.W.2d at 468.

[13] State v. Curtiss, 353 N.W.2d 262, 263 (Minn. Ct. App. 1984).

[14] MINN. SENT'G GUIDELINES AND COMMENT. § 2.D.3.a (2019).

[15] *Id.*

[16] *Id.* at § 2.D.3.a(7) (2019).

The "particularly amenable" factor was added in August 2015.[17] The original 1980 list contained four mitigation factors, which included: victim was an aggressor; minor or passive role or committed under coercion or duress; lack of substantial capacity due to mental or physical impairment; and any other substantial grounds not amounting to a defense.[18] Two other factors were added prior to 2015. In August 1989, the Commission added a technical factor noting a departure is merited if prior convictions were sentenced in either less than three or in one hearings, depending on their severity.[19] In August 2003, the Commission added a sixth factor regarding alternative placements for serious and persistent mental illness[20] Being only the third addition in 35 years to the mitigating factors list, the August 2015 amendment suggests the Commission was responding to some new impetus.[21]

More accurately, the impetus was the Minnesota Supreme Court's application of *Trog* and its progeny in a remarkable split decision, *State v. Soto.*[22] Where *Trog* broadened a court's basis for dispositional departure by recognizing several factors which a court may consider, *Soto* set a boundary on the application of those factors. However, in doing so, the Minnesota Supreme Court— almost unnoticeably— revived a more difficult and troubling truth about Minnesota sentencing under the *Trog* factors.

A. State v. Trog

State v. Trog is a remarkably concise opinion.[23] The issue was straightforward: did the district court err by staying a defendant's presumed prison sentence?[24] Handed down on August 17, 1982, the Minnesota Supreme Court, sitting *en banc*, not only found the district court did *not* err, but it endorsed the factors used by the district court to arrive at its sentence.[25]

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[17] ADOPTED AMENDMENTS TO THE SENT'G GUIDELINES AND COMMENT. § 2.D (MINN. SENT'G GUIDELINES COMM'N 2015).

[18] MINN. SENT'G GUIDELINES AND COMMENT. § 2.D.2 (1980).

[19] MINN. SENT'G GUIDELINES AND COMMENT. § 2.D.2 (1989).

[20] MINN. SENT'G GUIDELINES AND COMMENT. § 2.D.2 (2003).

[21] That impetus was *State v. Trog* and its progeny. 323 N.W.2d 28 (Minn. 1982) (en banc).

[22] 855 N.W.2d 303 (Minn. 2014).

[23] Trog, 323 N.W.2d (Covering just over three pages, including headnotes).

[24] *Id.* at 29.

[25] *Id.* at 29. The en banc notation merits notice. The Minnesota Court of Appeals would be founded over a year later in November 1983. As both the court of highest authority and an error-correcting court at the time, the Minnesota

The defendant Rick Trog was a "young man," though the Court never notes his actual age.[26] The State of Minnesota charged Mr. Trog with several offenses that occurred during a single behavioral incident.[27] Mr. Trog pleaded guilty to one count of "burglary with assault" in exchange for all other charges being dropped. [28]

At sentencing, Mr. Trog presented a compelling case. The Court summarized the presentence report as stating:

> [D]efendant apparently has been an "outstanding citizen." He had no prior involvement with the police, even as a juvenile, had done well in school and had an excellent work record. The report also showed that defendant, who had been intoxicated at the time of the incident, had cooperated with police and had been shaken by the incident and was extremely contrite.[29]

The Court further noted several witnesses gave statements on defendant's behalf and quoted supportive testimony by the defendant's father and a St. Paul police officer, who had known the defendant since Mr. Trog's childhood.[30] The Court highlighted:

> . . .[D]efendant's attorney, pointing to defendant's prior record of law-abiding behavior, his remorse, his cooperation and his respectful attitude, the strong support shown him by family and friends and the fact that a stayed sentence would keep defendant under continuing supervision over a longer period, made a strong plea for probation.[31]

Obviously, this is one of those opinions the reader can see the outcome coming before making it to the end of the fact section. But the surprise does not come with the Court's outcome, but in what it endorses in getting there.

Supreme Court's decision to decide the matter en banc demonstrates the Court purposefully made a new statement of substantive law here.

[26] *Id.* at 30.
[27] *Id.* at 29.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 30.
[31] *Id.*

The *Trog* court began its legal analysis by recognizing its own recent precedent, *State v. Wright*, regarding downward dispositional departures. ". . . [J]ust as a defendant's particular unamenability to probation will justify departure in the form of an execution of a presumptively stayed sentence, a defendant's particular amenability to individualized treatment in a probationary setting will justify departure in the form of a stay of execution of a presumptively executed sentence."[32] In *Wright*, unlike *Trog*, the Court affirmed a trial court departure from a prison sentence based almost exclusively on the question of the appropriate treatment setting. In *Wright*, the trial court's basis for a dispositional departure was:

> . . .the opinion of the psychiatrist and the [probation] agent who prepared the presentence investigation report, [who] concluded that there was a strong reason for believing that defendant would be victimized in prison and that both defendant and society would be better off if defendant were sent to the workhouse for a short time, then given treatment, and then supervised on probation for the remainder of the 20 years.[33]

The Court affirmed the sentence and downward dispositional departure. Interestingly, the Supreme Court acknowledged that none of the Sentencing Guidelines' listed mitigating factors (then-year-old) were present.[34] The Court justified its decision because the Guidelines factors were non-exclusive.[35] In short, *State v. Wright* established a common-law mitigating sentencing factor: particular amenability to probation by showing amenability to individualized treatment.

The *Trog* court dramatically expanded *Wright*'s narrow common-law mitigation factor and did so in a jarringly perfunctory manner. *Trog* held:

> Numerous factors, including the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant

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[32] *Id.* at 31 (citing State v. Wright, 310 N.W.2d 461 (Minn. 1981)).
[33] Wright, 310 N.W.2d at 462–63.
[34] *Id.* at 462.
[35] *Id.*

> to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting. All these factors were present in this case and justify the dispositional departure.
>
> The only issue in this case is whether the dispositional departure was justified. Believing that it was justified, we affirm.[36]

In two sentences, the Minnesota Supreme Court endorsed an entire new list of facts that could be used to support the common-law mitigating factor of amenability to probation. A list of facts and a mitigating factor that would not be recognized by the Minnesota Sentencing Guidelines Commission for another twenty-three years. In practice, these facts have been collectively referred to as the "*Trog* factors." *Trog* also severed the common-law mitigation factors that a district court can consider from the concept of amenability to individualized *treatment*; that is the Court saw the *Trog* factors as an additional basis for finding particular amenability to probation.[37] As will be explored later but worth mentioning here, the Minnesota Supreme Court's endorsement of the *Trog* factors injected socio-economic factors (explicitly rejected by the Guidelines Commission) into the court's sentencing analysis. While the *Trog* factors may appear to be a reasonable expansion allowing consideration of the "whole person,"[38] this more expansive approach also served as a wolf in sheep's clothing.

B. State v. King

The following year, the Minnesota Supreme Court addressed a practical tension between the *Trog* factors and the impermissible use of social or financial factors to support a dispositional departure in *State v. King*.[39] Like *Trog*, *King* is a terse opinion. The Court addressed a challenge to a district court's downward dispositional departure for a defendant who had

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[36] State v. Trog, 323 N.W.2d at 31.

[37] *See* State v. Bertsch, 707 N.W.2d 660, 668 (Minn. 2006); State v. King, 337 N.W.2d 674, 675-76 (Minn. 1983).

[38] *See* State v. Heywood, 338 N.W.2d 243, 244 (Minn. 1983) ("However, when justifying only a *dispositional* departure, the trial court can focus more on the defendant as an individual and on whether the presumptive sentence would be best for him and for society.").

[39] 337 N.W.2d 674 (Minn. 1983).

been convicted of aggravated robbery but had no other criminal history.[40] The presumed sentence was a year and a day in prison.[41]

Instead, the trial court sentenced the defendant to a stay of execution for a period of ten years, spend ten months in jail, pay restitution, and participate in a treatment program.[42] The motivation of the defendant to take an arguably harsher sentence over an execution of sentence was his desire to maintain his employment on release, help pay bills, and keep his family together.[43] On review, the Supreme Court held:

> While it is true that social and financial factors may not be directly considered as reasons for departure, occasionally they bear indirectly on a determination such as whether a defendant is particularly suitable to treatment in a probationary setting. That is the case here.[44]

The Court affirmed the departure.[45]

An apologist could claim the *King* rule is just grounded in reality. A person's access to treatment or programming *is* impacted by social and economic status. Wealth means you have your pick of treatment facilities; poverty means you're stuck with whatever the government approves for funding through your chemical health assessment. Or, in the case of King, working and keeping your family together is a motivation to be successful in treatment. A cynic could claim the *King* rule is simply a backdoor for the court to make judgments based on factors that society has recognized have a potentially discriminatory effect. For example, why should socio-economic factors matter? Place of birth, family, and familial wealth are all factors a defendant cannot choose. Admittedly, the concern of this article is, "What if the cynic is right—even if only in one case?"

C. State v. Soto

On October 22, 2014, the Minnesota Supreme Court brought the *Trog* factors to the forefront in a split decision, *State v. Soto.*[46] Writing for

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[40] *Id.*
[41] *Id.* at 675.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 675-6.
[45] State v. King, 337 N.W.2d 674, 676 (Minn. 1983).
[46] 855 N.W.2d 303 (Minn. 2014).

the majority, Justice Lillehaug noted the case was one of those "rare cases" where the district court is found to have abused its discretion at sentencing.[47] Specifically, the majority found that the district court had correctly identified facts meeting the *Trog* factors, but held: "a few of the factors that we have recognized as potentially relevant might suggest that Soto could be amenable to probation. But those factors, individually and collectively, provide very little support for the further conclusion that Soto had any *particular* amenability to probation relative to other defendants" (emphasis in the original).[48] Combined with a finding that the district court had not demonstrated that amenability to outpatient treatment rose to the level of particular amenability, the *Soto* court's focus on the term "*particular*" emphasizes the boundary it was now articulating. In its review of the *Trog* factors in the case, the Minnesota Supreme Court made a new boundary in applying those factors. The mere possibility of success in treatment is not sufficient to depart, but more a showing of certainty or likelihood.

The facts of *Soto* were particularly chilling. Jose Soto had been convicted of first degree criminal sexual assault.[49] Mr. Soto and another had been charged with holding down a victim and taking turns to penetrate her anally.[50] Mr. Soto then told the other man to leave and proceeded to orally and vaginally rape his victim for two hours, while choking, slapping, and physically injuring her.[51] Mr. Soto chose to plead guilty rather than face trial.

In exchange for the State dropping its pursuit of an aggravated sentence, Mr. Soto offered a plea of guilt falling somewhere between an *Alford* plea and a *Norgaard* plea, claiming insufficient memory due to his intoxication during the incident.[52] There was no agreement as to the sentence. At the sentencing, the court received a presentence investigation report recommending prison, but it also noted that Mr. Soto "appears to be an appropriate candidate for participation in the outpatient Sexual Abuse Treatment program."[53] The report also provided an excerpt of the defendant's version of the incident, stating:

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[47] *Id.* at 305.
[48] *Id.* at 310-12.
[49] *Id.* at 306.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 307.

> I had consensual sex with a female who was cheating on her boyfriend and to get out of it she said I raped her! I am not a violent person and do feel as [if] the woman I had sex with is a liar and a coward and I do not deserve to be in jail for something I didn't do![54]

However, at the hearing, Mr. Soto apologized to his victim.[55] The Minnesota Supreme Court summarized the district court's findings as follows:

> According to the district court, the "sole reason" for departing from the presumptive disposition was Soto's "amenability to probation." A significant factor in the district court's conclusion that Soto was amenable to probation was the statement in the Upper Mississippi Mental Health Center's diagnostic assessment that Soto was an "appropriate candidate" for its outpatient treatment program. Telling Soto that he would have an opportunity to correct his behavior, the district court emphasized that Soto was "only 37 years of age," that he did not have many serious crimes in his record, and that it was "primarily alcohol that night [that] was the problem." The district court also remarked that Soto's attitude in court was "largely . . . respectful" and that "this particular type of event seems largely out of character." Finally, the district court noted that Soto "seem[ed] to have some family support" and that focusing on his 10-year-old son might motivate him to correct his behavior. The district court did not say anything about Soto's culpability in sexually assaulting M.F. or whether putting Soto on supervised probation would protect public safety.[56]

The Court then considered each of the factors in its legal analysis to determine whether a dispositional departure was merited under the facts presented. Importantly, most of the factors cited by the district court were *Trog* factors.

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[54] *Id.* at 306.
[55] *Id.* at 307.
[56] *Id.*

The Court began by emphasizing that the basis for the district court's departure—amenability to probation—was not listed as a mitigating factor under the Sentencing Guidelines, but again noted that the Guidelines' factors were "non-exclusive."[57] As a result, the Court turned to the language of its common-law precedent in *Trog* and *Wright*.[58] The majority opinion emphasized that the standard for review is *particular* amenability to probation, not merely amenability.[59] It then turned to consider the mitigating factors under two implicit prongs: (1) particular amenability to an individualized treatment program[60] and (2) particular amenability under the *Trog* factors.[61] Ultimately, the Court did not fault the district court for recognizing and applying the mitigating factors in sentencing. Instead, the Court found that the district abused its discretion because the factors only established, at best, amenability to probation and not particular amenability. The Court vacated the sentence and remanded for further proceedings.

In its consideration of the *Trog* factors, the *Soto* court specifically dealt with Mr. Soto's status as a father.[62] The lower appellate court rejected this fact as inappropriate for consideration because it was a prohibited "social or economic factor" under the Guidelines.[63] The Supreme Court rejected this analysis, favoring its qualification under *State v. King.* "The courts of appeals' holding, again, is inconsistent with our recognition that facts that cannot themselves justify a departure *can be relevant to determining whether a defendant is particularly amenable to probation*" (emphasis added).[64] So the *Soto* court not only revisited the use of *Trog* factors in sentencing, but it also reinforced their common-law precedent that the Guidelines' otherwise prohibited social and economic factors could be used to support the mitigating factor of particular amenability to probation—even though such mitigating factor was not recognized by the Guidelines. In short, the Court reinvigorated the apparent conflict between the *Trog* factors and the explicitly prohibited factors under the Guidelines.

The *Soto* dissent registers a meaningful criticism regarding the majority's reasoning about a new threshold question. Justice Page wrote the

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[57] *Id.* at 308.
[58] State v. Soto, 855 N.W.2d 303, 308 (Minn. 2014).
[59] *Id.*
[60] *Id.* at 309-10.
[61] *Id.* at 310-12.
[62] *Id.* at 312.
[63] *Id.*
[64] *Id.*

dissent, joined by Chief Justice Gildea and Justice Anderson, and highlighted that the trial court made no error in applying the *Trog* factors and considering amenability to treatment.[65] The dissent accuses the majority of simply disagreeing over the outcome and wishing to substitute its own judgment.[66] Given that the majority hinged its legal analysis on the term "particularly" and framed the issue as a threshold question—the dissent's criticism is poignant. The trial court found the *Trog* factor evidence was good enough to merit a departure; the Supreme Court majority simply disagreed. More importantly, the dissent shows the entire court had no issue with the *Trog* factors or how they were individually applied.

Overall, the *Soto* decision combined the holdings of *Wright, Trog, King,* and its progeny into a single framework of analysis. A district court can dispositionally depart from a presumed prison sentence if there are factors showing a defendant's *particular* amenability to probation. Particular amenability could be established if a court found one of two complementary bases: either a defendant was particularly amenable to individualized treatment in the community or the *Trog* factors demonstrated substantial and compelling reasons to depart.

In turn, the *Soto* decision posed four issues to the Minnesota Sentencing Guidelines Commission. One, the common-law mitigating factor of "particular amenability to probation" remained unrecognized by the Sentencing Guidelines, despite its obvious use at the district court level. Two, the Court endorsed its own use of the *Trog* factors—also unrecognized by the Guidelines—to support a mitigating dispositional departure. Three, the Supreme Court endorsed the use of otherwise impermissible factors under the Guidelines (social and economic circumstances) to justify application of this common-law mitigation factor. And four, the Court had now reversed a district court's decision for misapplying these factors. More succinctly, the Minnesota Supreme Court had developed an entirely independent jurisprudence around its own mitigating factor for dispositional departures—and now, a district court had been found to abuse its discretion based on that jurisprudence. While only advisory, the Guidelines serve a practical purpose in telling judges where they can tread confidently in sentencing; where caution and careful explanation is necessary; and where they should absolutely not venture. As

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[65] *Id.* at 315-16.
[66] *Id.*

Soto demonstrated, there was an area of sentencing where the Guidelines simply failed to offer guidance.

II. 2015 SENTENCING GUIDELINES AMENDMENTS

The Minnesota Sentencing Guidelines Commission diligently responded to the *Soto* case at the first opportunity it had: the 2015 Amendments to the Guidelines. In light of *Soto*, the Commission added both a new mitigating factor and a corresponding comment. It formally adopted the "particularly amenable to probation" factor, noting that it may, but not necessarily, include particularly amenable to "individualized treatment in a probationary setting."[67] The corresponding comment, Section 2.D.303, embodies three rules of law from Minnesota Supreme Court precedent.[68] First, it reiterates that any reasons for departure must be substantial and compelling. Second, it embraces the *King* holding, as expressed through *Soto*, stating: "while social or economic factors cannot justify a departure, such facts may be relevant to determining whether a defendant is particularly amenable to probation." [69] Third, the comment endorses the *Trog* factors as grounds to support a departure. Neither the factor nor the comment have been changed in subsequent amendments.

The Guidelines now match Minnesota Supreme Court precedent. By doing so, the Guidelines Commission adopted an inherent tension posed by the *Trog* factors, the *King* rule, and the Guidelines' express prohibition from considering social or economic factors. It also adopted the broad, ambiguous nature of the *Trog* factors. The combination of these two issues may not be concerning on its face. But when we see how widely "particular amenability" is used by the courts as a basis for departure, one wonders if this basis for departure is not so restrictive as held in *Soto.*

III. PARTICULAR AMENABILITY TO PROBATION: 2016 TO 2018

From 2016 to 2018, Minnesota courts used "particularly amenable to probation" with considerable regularity in justifying dispositional departures. In those three years, Minnesota courts granted 6,316 dispositional departures. Of those departures, 4,150 (just under 66%) listed "particular amenability to probation" as a factor supporting the departure. This rate implies two things: one, the district courts were perfectly comfortable using

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[67] ADOPTED AMENDMENTS TO THE SENT'G GUIDELINES AND COMMENTARY § 2.D (MINN. SENT'G GUIDELINES COMM'N 2015).

[68] MINNESOTA SENT'G GUIDELINES AND COMMENT. § 2.D.303 cmt. (2019).

[69] *See* Soto*,* 855 N.W.2d at 312.

particular amenability as a basis for departure and had been using it well before the Guidelines' adoption, and two, particular amenability is a broad and flexible concept on the ground. These implications are also supported by the rate of downward dispositional departures in total. From 2016 to 2018, Minnesota courts displayed a stable and consistent departure rate. In 2016, Minnesota courts departed dispositionally in 35.9% from all presumptive prison commit sentences.[70] In 2017, 34.0%[71]; and in 2018, 35.8%.[72] In combination, this means over these three years approximately 22 or 23 out of every 100 felons facing a presumptive prison commitment received a downward dispositional departure based on "particular amenability to probation." A missing piece of data is how often the *Trog* factors are used by the courts, leaving it unknown which *Soto* prong (individualized treatment or *Trog* factors) a sentencing court is relying upon for its decision. Regardless, the particular amenability to probation factor supporting downward dispositional departures is a widely used tool by Minnesota courts.

IV. PRACTICAL IMPACTS OF PARTICULAR AMENABILITY AND *TROG* FACTORS

A. Wealth and Privilege

The problem with "particular amenability" and the *Trog* factors is the myriad of ways these factors reward wealth, privilege, and moral/philosophical "buy-in." Though no Minnesota court would explicitly cite to such in good conscience while sentencing, wealth and privilege touches most of the *Trog* factors and amenability to probation generally. Please pardon the anecdotal nature of the argument, but the use of broad caricatures here will hopefully conjure up plausible archetypes that resonate with most criminal law practitioner's experience. Rather than individually exploring how each amenability or *Trog* factor can be impacted, it is somewhat easier to consider how aspects of wealth and privilege impact multiple factors at the same time. It is also worthwhile to define the terms "wealth" and "privilege" as they are used here.

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[70] MINN. SENT'G GUIDELINES COMM'N, SENT'G PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY OFFENDERS 60 (2017).

[71] MINN. SENT'G GUIDELINES COMM'N, SENT'G PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY OFFENDERS 63 (2018).

[72] MINN. SENT'G GUIDELINES COMM'N, SENT'G PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY OFFENDERS 68 (2019).

In both cases, "wealth" and "privilege" are used broadly. "Wealth" refers to the relative abundance of a person's financial resources that can be tapped in times of crisis. This can mean any number of possible resources that could be converted to cash or payment for services, high incomes, or access to generational wealth. For example, a defendant may not have a large amount of cash reserves to spend, but she may own property, large luxury goods (such as a high-end car or boat), trust funds, or even a strong credit rating. Property or goods may serve as collateral to access loans or may be quickly liquidated for significant cash payouts. A strong credit rating will increase the likelihood of obtaining loans, payment plans, and more favorable borrowing terms. In turn, "privilege" refers to general socio-economic benefits tied to greater wealth, but also to stable social and family environments. Access to good schools, a diversity of employment options, safe and healthy communities. . .all increase the likelihood that a person will have greater social mobility and tools to weather a life crisis. "Privilege" may also refer to the underlying social skills and cultural literacy. The economic term "class" is helpful because it recognizes the social connections and identities often associated with various strata of wealth. The compounding effect of generational wealth cannot be understated either. For younger offenders, the power of the *Trog* factors is most often unlocked not through their own wealth, but through the wealth and privilege provided by their family. Whether personal or familial, access to resources and the ability to obtain significant cash funds within days, if not weeks, has practical ramifications that increase the likelihood of demonstrating a "particular amenability to probation."

As a caveat, I do not suggest persons of a particular class will act or behave in a particular manner based on their social-economic status. However, wealth and privilege tend to correlate with other social goods: better schools, safer neighborhoods, better healthcare, access to higher quality foods, etc. These social goods in turn have collateral effects that impact behavior, social customs, interpersonal communication, and social mobility. The combination of access to resources and certain social competencies will impact how a defendant may be able to use the *Trog* factors to his or her benefit. Conversely, defendants who do not have the same resources, social skills, or cultural competencies may find the *Trog* factors of limited value.

To start, wealth has the simple benefit of increasing a defendant's access to treatment. Impoverished defendants seeking treatment are bound by the limits and rules of government funding, minimal health insurance, and

availability. In contrast, wealthy defendants are more likely to have their pick of treatments – so long as they are willing to pay out of pocket. Greater wealth means greater choice which means greater likelihood of accessing treatment services. It also increases the speed with which treatment can begin. If you can pay out of pocket, you are not stuck waiting for funding approval.

Wealth also improves the likelihood of demonstrating "amenability to probation" by enabling defendants to avoid pretrial detention. Obviously, greater wealth means a greater likelihood of paying any monetary pretrial bail. So, rather than being held in a county jail pending trial, a defendant can use that limited period of time to: establish a foothold in a treatment program, secure employment that will not be impacted should he be convicted, preemptively engage in therapy or anger management, demonstrate a sustained period of sobriety, etc. A defendant in the community can establish months of independent engagement in prosocial activities, court compliance, treatment, and reform in the community – precisely what the judge wants to see in a defendant on probation in the community. In contrast, a detained defendant cannot build a record of pretrial reform in the community. Whereas detained defendant must overcome the doubt that any progress or services completed while incarcerated will "hold up" when the defendant returns to the community with all its freedoms and temptations.

Not to mention, wealth can impact quality of services. An alcoholic treatment center with perks like outdoor yoga, guided meditation, talk therapy, and designer-coffee fueled support groups is probably a much more enjoyable experience than a revolving-door treatment center housed in an old urban school with off-white concrete block walls that focuses on triage and worksheets. Wealth not only increases the choice a defendant has in treatment but increases access to higher quality treatment programs. In turn, a defendant's access to premiere treatment programs turns into a selling point to a judge under the *Wright* rule. Amenability to probation does not mean you can buy your way out of prison with a ticket to a premiere treatment center; but, those who have access to wealth are far more likely to obtain resources necessary to pitch a successful downward departure argument based on treatment. Again, the issue is not so much that approximately six of every hundred defendants presumed to go to prison upon conviction receive a departure; the issue is whether those six are consistently wealthier. Or more bluntly, should even one out of 100 be granted a departure because private wealth gave them access to resources to receive one?

Generational wealth and privilege also have the benefit of inoculating a defendant or their families from complete disruption in

moments of crisis. A defendant who has access to wealth through family has greater ease in the day-to-day challenges of meeting treatment expectations, and if necessary, meeting other demands like a job or family. Take transportation for example. Say a defendant has parents who have a modest savings and are committed to helping their child. The defendant owns a vehicle which breaks down four weeks into treatment. Parents step in, purchase defendant a cheap, but working vehicle to replace it. Defendant retains all the benefits of private transportation: flexibility in schedule, faster travel from point A to point B, and the ability to store items (like a work uniform or food) in the car, increasing accessibility and reducing the possibility of theft. This, in turn, makes it more likely the defendant can maintain a job in addition to treatment, travel to necessary medical or probation appointments at will, and run errands as needed (like picking up medication). In contrast, consider a defendant in the same position with no access to family wealth. Her car breaks down and she does not have the money to replace it. Hiring Uber, Lyft, or taxis is similarly cost-prohibitive. So, she turns to public bus transportation. Suddenly, her twenty-minute drive to work now takes an hour bus ride (assuming the job site is accessible by bus at all). Assuming that does not result in loss of employment due to time constraints, that transportation time now eliminates possibility for other tasks. This increases the risk of more issues, such as less time for grocery shopping, less time for cooking and exercise, exposure to more diseases in public, and exposure to the elements while waiting for transport. In turn, these pressures may make the cost of attending treatment untenable in the financial crisis. The crisis caused by the loss of a vehicle is only one example. More disruptive crises, such as loss of a job, a medical crisis, loss of housing, or subsequent arrest, could also derail success in a treatment program. However, access to family resources help to mitigate the impact of these crises and allow the defendant to continue focusing on pursuing treatment. This is also why "family support" is included in the *Trog* factors. A defendant's access to family resources helps defendants manage small crises that, managed alone, might derail a defendant's pro-social activities. In this way, generational wealth actually supports a defendant on multiple "amenability to probation" factors.

The other problem is that poverty correlates with a host of social problems that would impact multiple factors in gauging amenability to probation. Ongoing work in sociology continues to explore how poverty is a

multidimensional challenge that exposes people to correlated adversities.[73] As one author reports: "The research indicates the ubiquity of violence, health problems, and chaos in the childhoods, homes, schools, and neighborhoods of the poor."[74] In one Minnesota study, University of Minnesota legal scholar Richard Frase observed that social disadvantage, crime, and law enforcement reinforced one another, causing a cyclical pattern of incarceration and disadvantage that disproportionately impacted black Minnesotans.[75] Whatever might cause this correlation, an impoverished defendant will likely face challenges on other supportive factors for "particular amenability to probation" for treatment or under the *Trog* factors. In the opposite, wealth, privilege, or intergenerational access to either provides integral resources necessary to support amenability to probation in the community. Sadly, this may indicate that "amenability to probation" protects the status quo; wealth helps keep one out of prison and avoids the economic harm of incarceration while poverty deprives one of social advantages to establish "amenability" but deepens one's poverty by the economic harm caused by a prison sentence. Sufficed to say, a defendant's "particular amenability to probation" under the law may be more a virtue of their wealth and privilege rather than a personal commitment to self-reform or rehabilitation.

Correction of this problem can go in two directions. One, particular "amenability to probation" is severely restricted to those cases that were so directly tied to chemical use or mental health issues that a defendant's culpability for his conduct is significantly reduced. Or two, Minnesota courts should drop the "particular" requirement from *Soto* and more expansively permit treatment in lieu of prison. Either direction reduces the impact of wealth in accessing and succeeding in treatment.

B. Attitude in Court and Cooperation

Another problematic *Trog* factor is attitude in court. Remorse has been explicitly endorsed by the Minnesota Supreme Court under the

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[73] Matthew Desmond & Bruce Western, *Poverty in America: New Directions and Debates,* 44.1 ANN. REV. OF SOCIO. 305–18 (2018).

[74] *Id.* at 308.

[75] Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?,* 38 CRIME AND JUST.: A REVIEW OF RESEARCH 201-80, 263 (2009) (arguing that the Sentencing Guidelines' focus on prior criminal history had a major effect in creating racially disparate rates of incarceration).

amended Guidelines. "A primary justification for considering remorse in sentencing is that a defendant's remorse bears on his or her ability to be rehabilitated."[76] Generally, the courts have endorsed not only remorse- but cooperation.[77] The court has also found a level of defensiveness that may interfere with treatment does not support a departure.[78] Again, this seems like a common sense rule on its face, but recent events merit reconsideration.

Endorsement of remorse and cooperation with the court (and possibly law enforcement) arguably rewards defendants for demonstrating a *moral* disposition that acknowledges wrongdoing and possible willingness to change. Remorse, by its nature, reflects a recognition of harm caused and acknowledgement of suffering in others. There is a sense of guilt for one's actions.[79] This disposition lends itself to a willingness for reform. Therefore, remorse is one of the ways a defendant can express a desire to make use of treatment rather than prison.

Underlying remorse and cooperation, however, is an acceptance of the court's authority. A defendant implicitly says: "I have done wrong and you have a right to act upon me." Quite plainly, the courts have the power under *Trog* to reward those who are going along quietly. This should give any student of criminal law pause. It's no secret that the American criminal justice system has come under significant scrutiny in the last decade. Watershed moments like Michelle Alexander's *The New Jim Crow*, Ferguson and Black Lives Matter, the deaths of numerous Black men at the hands of police (most recently, the death of George Floyd) have taken hold in the public's consciousness.[80] The growth of "system-critical" think tanks, advocacy groups, and non-profits (i.e., the Innocence Project, the Bail Project or "Freedom Fund") have raised serious and sustained criticisms to the United States' criminal justice system. Not surprisingly, these criticisms have

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[76] State v. Solberg, 882 N.W.2d 618, 625 (Minn. 2016); State v. Hickman, 666 N.W.2d 729, 732 (Minn. Ct. App. 2003) ("An offender's remorse is a relevant factor in assessing his amenability to a probation that does not include treatment.").

[77] State v. Donnay, 600 N.W.2d 471, 474 (Minn. Ct. App. 1999).

[78] State v. Bertsch, 707 N.W.2d 660, 663 (Minn. 2006).

[79] In contrast, regret is more self-centered. It is a desire to have not committed an act for its consequences upon yourself, rather than on how it impacted others. A regretful defendant agonizes over her choices due to the pain of consequences; a remorseful defendant agonizes over her choices for the pain she has caused others through her actions.

[80] In my personal experience, the *voir dire* process has changed noticeably in the last five years. Potential jurors are more consistently expressing doubt, distrust, and reluctance to set aside cynicism for police, prosecutors, or the greater justice system.

reached the ears of defendants who see a system at work upon them for nefarious purposes (if they did not already).

This worldview inherently undercuts a person's willingness to express remorse to or cooperate with the courts. If you see your arrest and charging as the symptom of systemic racism, disparate police practices, and imbalanced power dynamics, you are unlikely to accept, much more submit yourself, to the authority of the courts. Without commenting on the substance of these criticisms, it is reasonable to expect that some defendants will genuinely question the actions and procedures of the criminal justice system in the process. While a court would presumably not punish a defendant for such, the withholding of a benefit under the law still causes a detrimental impact. To cut to the quick, if a defendant openly questions the actions of law enforcement, state prosecution, or the court at all stages based on these larger criticisms, would the court extend the benefit of these cooperation and attitude *Trog* factors? The nature of attitude and cooperation factors are a carrot to promote calm proceedings, nondisruptive conduct, and defendant acquiescence. Granted, there is a range of conduct that a defendant could use to voice their challenges, but there are bound to be more excited presentations than others. Similar to the arguments below, this issue bears similarities to issues around cultural competency. Should courts discourage such protests by withholding favorable consideration under the *Trog* factors of cooperation and attitude? I suggest not. Courts have considerable discretion to control a courtroom and address problematic behaviors.[81] But trying to quell protests in the courtroom by withholding favorable consideration in sentencing is an exercise in cultural dominance. In engaging in such behavior, a judge is now using sentencing as means of control rather than a reflection of criminal conduct.

I posit that the *Trog* factors of cooperation and attitude are overly broad and misguided measures of amenability to probation. The thrust of these factors is to acknowledge a cognitive or moral acceptance of guilt and a willingness to change. But using attitude and cooperation in court wrongly places a defendant's relationship with the court as the measure of commitment. Rather, the courts should look to more meaningful demonstrations of remorse. Authentic displays of victim-centered

[81] State v. Richards, 495 N.W.2d 187, 197 (Minn. 1992), (. . ."the trial court has broad discretion in dealing with 'disruptive, contumacious, stubbornly defiant defendants * * * *. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations.'" (quoting Illinois v. Allen*,* 397 U.S. 337, 343 (1970)).

consciousness of guilt, independent and unsolicited acts of community service, and a demonstrated commitment to "clean living," such as a lack of new offenses, documented sobriety, and pro-social activities better express genuine reform than polite behavior in court. Placing an emphasis on a defendant's relationship to the court also takes away focus on a victim – be it an individual or society – and potentially discourages legitimate criticism of the criminal justice process. And frankly, it is not much a measure of remorse at all. In my practice, I have seen plenty of defendants try to work the judge over with obsequious platitudes, only to turn back to their victim and speak of them in the vilest and most degrading of terms.[82] There are simply too many intervening factors and motivations that could separate a defendant's courtroom conduct (or misconduct) from his remorse or lack thereof. Therefore, the *Trog* factors of attitude and cooperation should be discarded because they do little to demonstrate genuine remorse and simply serve as an incentive to discourage courtroom disruption.

In addition, differences in cultural background and personality may influence a judge's perception of cooperation and attitude. Research indicates that the perception of emotions face barriers when communicated across cultural lines.[83] Conflict and tension can increase in cross-cultural communication.[84] Modern business scholars recognize a need for cultural intelligence and multiculturalism for better conflict management.[85] Similarly, judges may face some difficulty identifying a defendant's emotional expression if they are communicating across cultural lines. Therefore, a judge and defendant may miscommunicate, even if there is a genuine attempt by a defendant to convey cooperation or agreement. Compound those issues with personality disorders, possible chemical addiction, and otherwise general mistrust, a defendant's presentation in court may not always accurately reflect their better judgment. But these limitations do not necessarily mean a defendant is recalcitrant or unamenable to probation either. Courtroom interactions face all the complexity and nuance as every human relationship.

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[82] I submit that most prosecutors can attest to the illuminating content of recorded jail calls.

[83] Hillary Anger Elfenbein & Nalini Ambady, *Universals and Cultural Differences in Recognizing Emotions*, 12 CURRENT DIRECTIONS IN PSYCHOL. SCI. 159-64 (2003).

[84] P. CHRISTOPHER EARLEY & SOON ANG, CULTURAL INTELLIGENCE: INDIVIDUAL INTERACTIONS ACROSS CULTURES, (2003).

[85] Gabriela Gonçalves, Marta Reis, Cátia Sousa, Joana Fonseca dos Santos, Alejandro Orgambídez-Ramos, & Peter Scott, *Cultural Intelligence and Conflict Management Styles,* 24 INT'L J. OF ORGANIZATIONAL ANALYSIS 725–-42 (2016).

Some are more volatile, some are more subdued, and some folks just do not play well together. Consequently, the *Trog* factors of cooperation and attitude in court are such variable, subjective factors that they should bear little weight on judging a person's "amenability to probation."

Ultimately, particular amenability to probation may be a practical and just means to appropriately address serious crimes that are a radical exception to an otherwise law-abiding life. Additionally, those crimes may be the culmination of tragic choices brought on by the sheer burden of poverty, chemical dependency, and social inequality. However, the law's current state regarding "amenability to probation" and the *Trog* factors invite consideration of factors that are unfair, otherwise prohibited, or irrelevant to the ultimate goal. Significantly, particular amenability to probation is more likely a product of socio-economic factors that have no relation to criminal conduct. Similarly, most of the *Trog* factors are social factors that bear little insight into a defendant's commitment to reform. Worse yet, some of the *Trog* factors may discourage legitimate and genuine expressions of protest, discontent, or attempts at self-advocacy. Likewise, these factors may be limited because of individual cultural or personality differences. In the big picture, particular amenability to probation and the *Trog* factors introduce too many impermissible or immeasurable factors into a sentencing judgment to be considered consistent or fair. The use of the *Trog* factors should be limited to age, prior record (or lack thereof), and concrete acts of remorse.

C. A Note on Discretion

Discretion is a double-edged sword. In one direction, it allows practitioners to rise above the letter of the law and deliver justice in exceptional cases -- be it leniency or greater severity. In the other direction, it is the entry point into which an individual practitioner's own bias (implicit or explicit), undisclosed beliefs, or personal values can impact legal outcomes. Regarding the *Trog* factors specifically, discretion also allows for a wide variation in their application and weight. Absent individual review on appeal, there is little anyone can do to track, quantify, or review judicial use of the *Trog* factors. Consequently, there is little the public can do to review the bench's use of "particular amenability to probation." We must simply trust that *Trog* factors will be used appropriately and any gross misuse will be corrected by appellate review.

However, discretion can also be the means by which the bench acts as a collective whole. In which case, I would invite the courts and prosecutors to consider the reflections made here and consider foregoing or severely

restrict the use of the *Trog* factors and "particular amenability to probation" as grounds for dispositional departures. This approach is supported by common law precedent. ". . .[A] district court always has discretion to impose a presumptive prison sentence *even if* the *Trog* factors support a probationary sentence."[86] If the Sentencing Guidelines Commission and the Minnesota Supreme Court are unwilling to revisit particular "amenability to probation" and the *Trog* factors, the district court has the means to act on their own accord. And for the criticisms raised above, I ask district court judges to consider them in their own sentencing decisions going forward.

D. Why Take Away a Tool?

Advocates seeking to reduce the use of incarceration as a means of punishment will rightfully point out that elimination of these factors take away legal tools that allow a court to find non-prison consequences for defendants. This is true. But the criticism here is not to suggest that more people should be in prison. It is a question of whether particular "amenability to probation" provides a wider backdoor for some to avoid prison, while others find that door narrowed by socio-economic factors outside their control. Whether the bar to go to prison is raised or lowered, the concern here is how the courts determine exceptions to that bar, no matter where it falls. If there are fewer means of avoiding prison based on socio-economic factors, outcomes will be more consistent and equitable. By tying a prison sentence more directly to conduct (rather than wealth, privilege, family, or politeness), efforts to reduce incarceration for certain crimes will also be applied more equitably (and arguably have greater impact). So, while the elimination of sentencing factors may impact rates of departure, they do not take away from prison-reduction advocates' greater criticisms regarding incarceration.

CONCLUSION

In the end, I offer that the particular "amenability to probation" factor and *Trog* factors should be revisited and severely restricted or limited. It opens the door to socio-economic factors that fall outside of a defendant's control and could create patently unfair results. Whether through Guidelines' amendment, common-law reconsideration, or a grassroots reformed practice by the district court bench, equal and fair treatment under Minnesota

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[86] Wells v. State, 839 N.W.2d 775, 781 (Minn. Ct. App. 2013), *review denied* (Minn. Feb. 18, 2014), citing State v. Olson*,* 765 N.W.2d 662, 663 (Minn. Ct. App. 2009); *see,* State v. Walker, 913 N.W.2d 463, 468 (Minn. Ct. App. 2018).

sentencing law would be well-served by rewriting particular amenability to probation and the *Trog* factors.