JUDICIAL PERSPECTIVES ON THE FEDERAL SENTENCING GUIDELINES AND THE GOALS OF SENTENCING: DEBUNKING THE MYTHS

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I. INTRODUCTION

With the adoption of the 1984 Sentencing Reform Act,[1] Congress ushered in a new era of federal sentencing policy. For some, the prospect of sentencing reform was viewed as a means of eliminating unwarranted disparity among sentences, long perceived as a problem within the federal system.[2] For others, however, the creation of a sentencing commission tasked with the authority of developing and ratifying guidelines that would shape sentencing policy amounted to an attack upon the traditional independence enjoyed by sentencing judges.[3] Judges, in fact, have been among the most outspoken critics of the federal sentencing guidelines, arguing that the guidelines have become overly complicated and far too rigid in application.[4]

The difficulty, however, is that it is hard to gauge the judges' actual reactions to the guidelines with respect to their fulfillment of the principles and purposes of sentencing. Myth takes root where facts are absent. It has long been rumored that federal judges detest the sentencing guidelines. That proposition has never been tested in any rigorous fashion, however, and appears to be the product of anecdotal tales. As in any large constituency, those who shout the loudest garner the most attention. It is often difficult to

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1. 18 U.S.C. § 3551 (2000).

2. The Senate report explained: "A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity. The bill requires the judge, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing." S. REP. NO. 98-225, at 52 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235.

3. See Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary? Why Congress' Fear of Judicial Sentencing Discretion May Undermine a Generation of Reform*, THE CHAMPION, June 27, 2003; *NACDL Applauds Judicial Conference Statement on Sentencing Discretion*, THE CHAMPION, Nov. 27, 2003.

4. *See generally* PLANNING FOR THE FUTURE: RESULTS OF A 1992 FEDERAL JUDICIAL CENTER SURVEY OF UNITED STATES JUDGES, 7 FED. SENTENCING REP. 15 (1994).

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assess whether the vocal minority represents the majority of judicial opinion. Consequently, the best way to determine judicial sentiment with respect to the guidelines is to ask the judges themselves. Their opinions are important, as the judiciary stands on the front lines of the guidelines' enforcement. The judges also have experience in witnessing the effect of the guidelines on the people upon whom they pronounce sentence. Without an appropriate "buy in" by judges, the guideline sentencing system can never be implemented fully.

As a consequence, this Article presents the results of a survey undertaken to determine whether the judiciary believes the federal sentencing guidelines have met the goals and purposes of sentencing. Rather than articulating sentencing aims ourselves, we instead elected to use those that Congress has already established. In 18 U.S.C. § 3553[5] and 28 U.S.C. § 994,[6] Congress laid out the principle aims of sentencing. In constructing this survey for the Sentencing Commission, our goal was to determine how well the judges themselves believed the guidelines fulfilled Congress's goals in enacting sentencing reform.

Criminal sentences in the federal courts are governed by two interrelated sets of principles: the statutory purposes of the sentencing and the statutory directives Congress has given to the United States Sentencing Commission ("Commission"). Congress added each set of principles to the U.S. Criminal Code in 1984 as part of an effort to rationalize the process of criminal sentencing.[7] A first set of goals appears in Title 18 of the U.S. Code and cites four purposes of punishment—generally labeled as just punishment, deterrence, incapacitation, and rehabilitation.[8] The Sentencing Reform Act adds additional goals under Title 28 to ensure certain, fair, and flexible sentences, as well as an admonition to avoid sentencing disparity.[9]

Congress expresses these goals concisely and then challenges the Commission to certify that the guideline structure is addressing them. In evaluating this challenge, researchers and policy analysts can draw from multiple research strategies to examine the levels of guideline goal attainment. One of these approaches—the one highlighted in the analysis of this report—surveys stakeholders in the sentencing system and documents their views concerning the guidelines' attainment of the sentencing goals. Subjective survey data not only reflect the status of the guidelines from the perspectives of the respondents, they also illuminate the normative operative climate within which judges, prosecutors, probation officers, and defense attorneys perform their interrelated criminal justice duties.

In this Article, the level of achievement for the federal sentencing goals is examined from the personal perspectives of those who actually impose

5. 18 U.S.C. § 3553 (2000).
6. 28 U.S.C. § 994 (2000).
7. *See* 18 U.S.C. § 3552(a)(2)(A) (2000).
8. *See id.* § 3553 (a)(2)(A).
9. *Id.*

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guideline sentences—federal district judges. The purpose of this Article is three-fold: (1) to document current judicial assessments of guideline sentencing goal achievements; (2) to compare current assessments with corresponding sentencing goal achievement assessments prior to the federal guidelines; and (3) to place judicial assessments into the context of the larger sentencing system with its contrasting player roles.

Part II introduces the legislative sources of the statutory sentencing goals. Part III describes the empirical sources used in the comparisons, highlighting the Commission's recent federal judge survey[10] and documenting several prior sentencing surveys conducted over the past two decades. Parts IV and V use the response data from the Commission's district court judge survey to identify the judges' relative ranking of federal sentencing goal achievement, both overall and for common offense types.

Part VI's analysis compares recent goal achievement data with corresponding data from prior surveys, documenting trends in sentencing goal perceptions over time. Continuing the pre- and post-guideline comparison, the analysis in Part VII contrasts the judges' overall evaluations of the current sentencing system with evaluations collected before the guidelines. Part VIII finishes the analysis with information on perceived levels of sentencing goal achievement through the eyes of other sentencing stakeholders—namely prosecutors, defense attorneys, and probation officers. The concluding section summarizes the current status of sentencing goal attainment under the federal guidelines and suggests future directions for Commission action to measure and improve goal achievement.

II. THE DUAL SOURCES OF FEDERAL SENTENCING GOALS

The legislative history of the Comprehensive Crime Control Act of 1984,[11] which establishes the Sentencing Commission and articulates the goals of sentencing, provides the framework under which sentencing schemes are determined. That history, which recounts the problem of disparity and cites the failure of the so-called rehabilitative model of sentencing, lays out the Committee's basic goals in undertaking sentencing reform.[12] Those aims include:

> First, sentencing legislation should contain a comprehensive and consistent statement of the Federal law of sentencing, setting forth the purposes to be served by the sentencing system. . . . Second, it should assure that sentences are fair both to the offender and to society. . . . Third, it should assure that the offender, the Federal per-

10. A summary of the survey results can be found in MICHAEL EDMUND O'NEILL, SURVEYING ARTICLE III JUDGES' PERSPECTIVES ON THE FEDERAL SENTENCING GUIDELINES, 15 FED. SENTENCING REP. 215 (2003).

11. 18 U.S.C. § 1 (2000).

12. S. REP. NO. 98-225, at 39 (1983), *reprinted in* 1984 U.S.C.C.A.N 3182, 3222.

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> sonnel charged with implementing the sentence, and the general public are certain about the sentence and the reasons for it. . . . Fourth, it should assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case. . . . Fifth, it should assure that each stage of the sentencing and corrections process . . . is geared toward the same goals for the offender and for society.[13]

Relying upon this basic framework, Congress went on to further clarify and articulate the basic goals and purposes of the federal sentencing system. As a consequence, 18 U.S.C. § 3553 of the U.S. Code incorporates four purposes of punishment that serve as the basis for every criminal sentence administered within the federal criminal justice system.[14] In Congress's view, punishment should:

> [R]*eflect the seriousness* of the offense . . . *promote respect for the law* . . . *provide just punishment* for the offense . . . *afford adequate deterrence* to criminal conduct . . . *protect the public* from further crimes of the defendant . . . provide the defendant with needed *educational or vocational training, medical care, or other correctional treatment* in the most effective manner . . . .[15]

These principles, which do not always dovetail perfectly, are generally known as just punishment, deterrence, incapacitation, and rehabilitation, respectively. A second set of sentencing goals grows directly from the Sentencing Reform Act of 1984.[16] To ensure that the statutory purposes of sentencing are applied uniformly throughout the federal system, Congress established the Commission and charged it with the task of measuring and monitoring the effectiveness of the federal criminal justice system in meeting the statutory purposes of sentencing.[17] With the goal of standardizing the sentencing process, Congress instructed the Commission to establish policies that:

> [P]rovide *certainty* and *fairness* in meeting the purposes of sentencing, *avoiding unwarranted disparities* among defendants with similar records who have been found guilty of similar criminal conduct while *maintaining sufficient flexibility* to permit individualized sen-

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13. *Id.*
14. 18 U.S.C. § 3553(a)(2)(A) (2000).
15. *Id.* § 3553(a)(2)(A)-(D) (emphasis added).
16. Comprehensive Crime Control Act of 1984, ch. 2, Pub. L. No. 98-473, 98 Stat. 1837, 1987 (1984).
17. The Commission's purposes are to establish policies that "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of Title 18, United States Code"; and to "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of Title 18, United States Code." 28 U.S.C. § 991(b)(1)(A), (b)(2) (2000).

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> tences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.[18]

In sum, the statutory purposes of sentencing are meant to codify the four basic rationales for punishment, and the directives to the Commission are meant to ensure that those purposes of sentencing are applied in an effective and consistent manner.[19]

III. METHODOLOGY

In 2001, the Commission fielded a survey focusing on the statutory goals of the Sentencing Reform Act and the statutory purposes of sentencing.[20] All active Article III judges were mailed anonymous questionnaires in January of 2002.[21] Despite an anthrax scare that disrupted mail services and caused some recipients to question mail sent from the Commission's Washington D.C. postal facility,[22] the 51.8% response rate for the district court judges is similar to comparable surveys. Considering the fact that the survey was administered anonymously—without an individualized respondent—the response rate is better than average.

The Commission's survey asked district court judges to assess what proportion of their caseload met each of the sentencing goals. The responses were reported on a six-point scale, with "1" indicating that "few" cases met the goal and with "6" indicating that "almost all" cases met the goal. In the analysis here, the two most positive responses—"5" and "6"—are combined to represent the proportion of the judges who believed that the guideline goal had a high level of achievement.

The interpretation of information collected from opinion surveys requires a standard of comparison. For this analysis of the sentencing goals in the federal guideline system, we compare our results to earlier judicial sur-

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18. *Id.* § 991(b)(1)(B) (emphasis added).

19. The Sentencing Reform Act also required the Commission to establish policies that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." *Id.* § 991(b)(1)(C). With these companion mandates in Title 18 and Title 28, Congress expressed its desire that the Commission apply the statutory purposes of sentencing in light of "advancement in knowledge of human behavior" and in such a manner so as to avoid the "unwarranted sentencing disparit[y]." *See id.* § 991(b)(1)(B)-(C).

20. For a description of the survey methodology and the wording of the questions, see U.S. SENTENCING COMM'N, SURVEY OF ARTICLE THREE JUDGES ON THE FEDERAL SENTENCING GUIDELINES (2003), *available at* http://www.ussc.gov/judsurv/judsurv.htm. A discussion of the survey results can also be found in O'NEILL, *supra* note 10.

21. We chose to exclude from the survey the Justices of the Supreme Court as well as the judges of the United States Court of Appeals for the Federal Circuit. These Article III judiciary members were not surveyed primarily because they are not regularly involved in either the sentencing process itself or the appellate review of sentences. Similarly, we did not survey retired Article III judges. Although we sent surveys to court of appeals judges, we chose not to analyze their responses for this article.

22. *See* Manny Fernandez & Monte Reel, *Tests Show No Anthrax at Postal Facility; Federal Reserve Mail Also Scrutinized, Officials Say*, WASH. POST, Jan. 16, 2003, at B1 (reporting on the reopening of a Northeast Washington, D.C. mail facility 24 hours after an anthrax contamination was feared).

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veys on the goals of sentencing. One source of information involves prior surveys of judges that covered sentencing goal issues. Some of these surveys preceded implementation of the guidelines, and in fact were commissioned by the U.S. Department of Justice ("DOJ") during the years while the feasibility of federal sentencing guidelines was being debated. Examples of survey research conducted prior to the Sentencing Reform Act appear on the top portion of Appendix A.

Additionally, several surveys conducted since the guidelines were adopted address, usually only in part, the goals of sentencing. Some projects involved only a few respondents, while others involved nationwide data collection. Examples of survey research conducted after guideline implementation appear on the bottom portion of Appendix A. The availability of current and past survey findings permits a retrospective evaluation of changes in judicial opinions occurring simultaneously with the advent of the federal sentencing guidelines. Using survey data collected over the past twenty years, current judicial opinions about the goals of sentencing can be compared to opinions from the pre-guideline system and from earlier implementation stages of the guideline system.

A disadvantage of comparing across independently collected survey data is the non-uniform nature of the data. The surveys use different methodologies, formats, questions, and response categories. Thus, rather than providing definitive comparisons, the analysis provides suggestive trends and hypotheses. Under this caveat, the analysis here does not purport to resolve issues and make absolute judgments. Instead, the analysis documents apparent patterns and trends, illuminating future research directions that may address remaining open questions. The hope is that the Commission will repeat this survey at least every decade in order to maintain a clear picture of the judges' attitudes toward the guidelines.

IV. DISTRICT JUDGES' PERCEPTIONS OF SENTENCING GOAL ACHIEVEMENT

The first step in the analysis ranks the sentencing goals in terms of the percentage of judges who report high achievement.[23] The resulting ordered listing of judicial responses reveals the perceived relative success of sentencing goal attainment. Within this empirical framework, the judges' top rankings demonstrate their assessments of where the guidelines are best meeting their legislative goals.

A. Examining the Survey Results

Appendix B displays the relative high achievement goal rankings as revealed by the district court judge respondents. Depending upon the specific goal examined, the Commission's survey demonstrates a wide variance in

23. For purposes of this analysis, we include only the responses from district court judges.

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the judges' perceptions of achievement. At the top of the list, with 61.5% responding positively, is the goal of deterrence. Almost two out of three district court judges reported that most of their sentences achieved this goal. Based on these data, the district court judges believe that the guideline system is putting its greatest energy into discouraging offenders from committing future crimes. Of course, it is unclear as to whether this involves general deterrence, specific deterrence, or incapacitation. Doubtless, many judges understand that imprisoning an offender for a long period of time will result in significant incapacitation effects; whether that necessarily translates into general deterrence, however, is less clear.

Next, in descending ranked order (and all clustered closely between 55% and 52%), are the goals of certainty, protection of the public, avoidance of unwarranted disparities, and punishment reflecting offense seriousness. Just over half of district court judges reported that most of their sentences achieved these particular sentencing goals. Most judges perceived that the guidelines successfully provided convicted offenders with a sentence that accurately specified actual time to be served, and, in doing so, protected the public from future crimes that these offenders would otherwise commit (55.0% and 54.8%, respectively).

The district court judges' relatively high rankings of the goal of avoiding unwarranted disparities—fourth among the set of goals—highlights the priority the guidelines place on this sentencing objective, at least from the perspective of the district court judges. The high ranking for the goal of avoiding unwarranted disparity is particularly salient, as this goal was a central motivation for the shift to structured sentencing under the Sentencing Reform Act.[24] Appendix B shows that over half (52.8%) of the responding judges reported that the guidelines avoided unwarranted disparities for most of their cases. This finding is particularly interesting because evidence suggests that while disparity has decreased, regional disparity remains an issue. Similarly, studies recently conducted showing widely diverging departure rates among the various districts[25] further indicate that disparity may be a continuing problem. While it is likely difficult (and perhaps unwise) to eliminate *all* disparity, certainly the judges' perception is that the guidelines have eradicated *much* of the disparity that previously existed.

With respect to whether the guidelines' sentences reflect the gravity of the offense, almost the same proportion of district court judges (52.4%) reported that most of their sentences imposed under the guidelines reflected the seriousness of the offense. While, at first blush, this may seem surprising, given that judges are frequently heard to criticize the guidelines' appar-

24. *See* THE SENTENCING COMMISSION AND ITS CRITICS: CONGRESSIONAL OVERSIGHT, 2 FED. SENTENCING REP. 210 (1990).

25. U.S. SENTENCING COMM'N, REPORT TO CONGRESS, DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES (2003), *available at* http://www.ussc.gov/departrpt03/departrpt03.pdf.

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ent harshness, this finding can be interpreted to mean that the guidelines' sentences may occasionally *overstate* the offense's seriousness.

Appendix B uses a dashed line to indicate a distinct empirical gap between the sentencing goals where more than 50% of judges reported high achievement and that sentencing goals where fewer than 50% of judges reported high achievement. Four sentencing goals—just punishment, fairness, rehabilitation, and flexibility—are in the lower half of the ranking distribution. These four lower-achieving goals have only a small proportion of judges reporting that most of their cases achieve these goals. Roughly one-third of the judges reported that most of their sentences achieved the goals of just punishment and fairness. Even fewer judges—roughly 25%—stated that most of their cases achieved the goals of rehabilitation and flexibility. Projecting from these achievement rankings of the district court judges, the conclusion is that district court judges perceive that these four goals are not adequately addressed by the guideline sentencing structure.

Appendix B also demonstrates that the general goals of sentencing under the 18 U.S.C. § 3553(a)(2) guidelines are somewhat more likely to receive positive judge responses than the guideline sentencing goals under 28 U.S.C. § 991(b)(1)(B). Interestingly, both sets of goals have ratings distributed throughout the observed scale. The high end of the judge response range is 61.5% (for deterrence) and the low end is 24.4% (for flexibility). Neither the general sentencing goals of Title 18 nor the guideline sentencing goals of Title 28 are clustered disproportionately in the higher or lower parts of the distribution. Three of the five Title 18 general sentencing goals are above Appendix B's dotted line, as are two of the four Title 28 guideline sentencing goals. However, the absolute magnitude of the judges' responses indicates that the goal ratings for the general purposes of sentencing are more positive. For the Title 18 general purpose goals, an average 46.7% (median=52.4%) of district court judges reported that most of their cases achieved a sentencing goal. For the Title 28 guideline sentencing goals, a somewhat lower average of 41.1% (median=42.6%) reported that most of their cases achieved a goal.

There is one additional goal covered by the Commission's survey: to promote respect for the law. Using a different survey format, the district court judges were asked whether the guidelines had affected respect for the law, either among federal offenders, crime victims, or the general public. Roughly half of the judges[26] believed that the guidelines had any impact on respect for the law. Among only those judges reporting that the guidelines had changed respect for the law, the majority believed the change was increased respect (72.1% reported an increase in respect in the general public, 78.1% reported an increase in respect in crime victims, and 60.5% reported an increase in respect in federal offenders). This may come as a surprise to

26. Slightly more than half of district court judges believed respect for the law had changed for federal offenders (54.9%) and crime victims (51.2%), with a slightly smaller 47.3% seeing any change in respect for the law among the general public.

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guideline critics who believe that the federal sentencing scheme has undermined confidence in the criminal justice system. It appears that a fair proportion of the judges believed that the guidelines did affect respect for the law, and of that proportion, most believed that the guidelines increased overall respect for the law.

B. Summarizing the Results of the Judicial Survey

In summary, the 2001 survey results show a wide range in the levels of perceived goal achievement: a spread of almost 40 percentage points (from 61.5% for deterrence, to 24.4% for flexibility). While achievement at the 25% level is disappointingly lower than desired, the question remains whether levels of 50% or 60% are adequately high. The survey results themselves do not provide the context to evaluate whether any of the judges believe these perceived achievement levels are "good enough."[27] The remainder of this report looks at the survey findings in more detail and introduces a historical perspective to the evaluation framework.

V. GUIDELINE GOAL ACHIEVEMENT AND OFFENSE TYPE

The devil truly is in the details. The evidence adduced in this survey suggests that the judges' attitudes tend to be quite offense-specific with respect to serving the statutorily articulated purposes of sentencing. Indeed, the overall goal achievement rankings presented above mask variation in judicial opinions that is correlated with specific offense types. Thus, Appendix C shows the district court judges' goal achievement rankings by selected offense types. Two conclusions may be drawn from this data.

First, as in Appendix B, a dashed line divides the goals into two groupings. The five goals appearing above the dotted line in Appendix C are the same five goals above the dotted line in Appendix B: deterrence, certainty, protection of the public, avoidance of unwarranted disparity, and reflection of offense seriousness. However, the ordering of these goals within offense type varies considerably. For three offense types—fraud, theft, and robbery—avoidance of unwarranted disparity has the highest positive judicial achievement ratings, with the goal of certainty having the second highest ranking. For firearms offenses, the judges rank highest achievement of the goal of protecting the public, while achievement of the goal of deterrence has the highest rank for drug trafficking offenses. Also consistent with Appendix B, the four lowest ranking goals are also the lowest ranking goals for each of the five offense types, although again their ordering varies by of-

27. This analysis reports empirical conclusions based on the rankings of the district court judges. No normative element is assumed. The judges' responses indicate their opinions about which goals are being achieved most often, and do not indicate which goals they believe are most important to achieve. A later part of the Article discusses normative issues underlying goal achievement.

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fense type. Unsurprisingly, rehabilitation is the lowest ranked goal for all offense types except drug trafficking.

Appendix C also illustrates that the overall level of sentencing goal achievement is not congruous among the offense types. Judges are more likely to see goal achievement for some offense types than for others. The bottom lines in Appendix C display the mean and median percent of judges who reported that most of their cases met a sentencing goal. The offense types of firearms and robbery were the most likely to have judges report goal achievement. The average percent of judges saying most of their cases met a sentencing goal is 45.3% for firearms and 45.8% for robbery; the median percents for these offense types were even higher at 54.0% and 50.1%, respectively.

In sharp contrast are the substantially lower levels of perceived goal achievement for the offenses of fraud and theft. The average percent of judges saying that most of their cases met a sentencing goal was only 34.8% for fraud offenses and 36.0% for theft offenses. The median values were similar, at 32.7% and 36.3%, respectively. The survey-wide similarity in responses for fraud and theft offenses has been previously noted,[28] and the markedly lower levels of perceived goal attainment for these offenses are troublesome. The low ratings of goal achievement for fraud and theft may be grounded in the majority's opinion (56.6% and 63.1% respectively) that the sentence lengths for these offenses were less than appropriate.[29] The Commission's subsequent amendments to Section 2B1.1[30] may have addressed some of the concerns underlying the judges' low goal achievement responses for fraud and theft offenses.

VI. TIME TRENDS IN PERCEIVED GOAL ACHIEVEMENT

The earlier Appendix B data from the Commission's 2001 survey arrays district court judge responses into a hierarchy of goal achievement. This array cannot answer important policy questions, most notably whether goal achievement under the guidelines is as good as—or perhaps better than—goal achievement prior to the adoption of the guidelines. To study whether the federal sentencing guidelines have affected sentencing goal attainment, information about sentencing goal achievement *prior* to the guidelines is necessary.

28. U.S. SENTENCING COMM'N, *supra* note 20, at II-4, 5, 11, 12, 17, 19.

29. *Id.* at II-5.

30. The guideline amendment for Section B1.1 (Theft, Embezzlement, Theft of Stolen Property, Property Destruction, and Offenses involving Fraud or Deceit) became effective November 1, 2001, only weeks before the survey.

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A. Trends for the Sentencing Goals Under Title 18

The most comparable pre-guideline data on goal attainment is available from the Federal Sentencing Guidelines Project, sponsored by the DOJ's Office for Improvements in the Administration of Justice, Federal Justice Research Program, in the 1980s. One of the questions in the DOJ survey asked federal judges to report on the level of sentencing goal achievement for five sentencing goals: general deterrence, specific deterrence, protection of the public, rehabilitation and just punishment.[31] Each goal was rated on a five point scale, and the survey findings reported the percentage of judges who believed that each goal was achieved "extremely well," "very well," or "somewhat."

Appendix D reprints the data from the 1981 survey. More than three-fourths (77%) of federal judges believed that the goal of specific deterrence had high achievement. The goals of general deterrence (65%) and protecting the public (69%) had similar levels of perceived achievement, with approximately two-thirds of judges reporting high achievement. Fewer judges (32%) believed that the goal of rehabilitation was met.

Appendix D also draws a comparison between the goal achievement ordering of the 1981[32] survey data and 2001 survey data. For both surveys, the judges reported the highest levels of goal achievement for deterrence and protection of the public, although deterrence was ranked first (average=71%) in the 1981 survey and protection of the public was ranked first (82.2%) in the 2001 survey. Also in both surveys, the judges ranked just punishment third in terms of goal achievement, with the goal of rehabilitation having a distant lowest achievement level. With the implementation of the guidelines, the data in Appendix D indicate that there are gains in achievement for the goal of protecting the public, moving from second place in 1981 to first place in 2001.

The data also provide some evidence regarding overall improved levels of goal achievement following implementation of the guidelines. Appendix D reports these findings,[33] using realigned classification of 2001 data[34] to make it as comparable to the 1981 definitions as possible.

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31. U.S. DEP'T OF JUSTICE, FEDERAL SENTENCING: TOWARD A MORE EXPLICIT POLICY OF CRIMINAL SANCTIONS (1981); U.S. DEP'T OF JUSTICE, SENTENCING GOALS AND THEIR APPLICATION IN FEDERAL COURTS (1980). The 1981 survey list of general sentencing goals differs from the 2001 survey list in several respects. First, the 1981 survey does not separately question respondents about the sentencing goal of "reflect[ing] the seriousness of the offense," as appears in 18 U.S.C. § 3553(a)(2)(A). Second, in the 1981 data the goal of deterrence was separated into the components of "general" and "specific," while the Commission's 2001 survey only cited a goal of "deterrence," as appearing in 18 U.S.C. § 3553(a)(2)(B).

32. For the 1981 data, averaging specific deterrence (77%) and general deterrence (65%) results in combined deterrence of 71%.

33. To permit this comparison, the data from the 2001 survey is reconfigured to report high goal achievement as a response in the top three of the six response categories. This is necessary because the published data for the 1981 survey categorizes "achievement" as the sum of responses in three of the scale's five response categories: "extremely well," "very well," and "somewhat." In 2001, the survey questions asked judges to rank the frequency of goal achievement on a six point scale. The response

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For each goal, the change over time in the judges' ratings is positive. The percent of judges reporting higher achievement was greater in 2001 than in 1981. The percentages increased roughly seven to thirteen percentage points, with the largest improvements in the categories of protection of the public and rehabilitation.

The trends identified across these two surveys must be interpreted with caution. The surveys' questions have different wording and response options, and thus are not directly comparable. However, both tap the same underlying dimensions—judges' perceptions about the degree to which sentencing goals are obtained. The absolute percentage figures cannot be strictly compared, but the relative trends support the interpretation that under the guidelines, judges perceive higher levels of sentencing goal achievement, at least for the four goals compared here. The data do not suggest, however, that it is the guidelines system which caused this improvement in goal achievement. The adoption of a guidelines system is only one possible explanation, no more supported at this point than any alternative explanation.

B. Trends for the Sentencing Goals Under Title 28

Of the four sentencing goals cited in the Title 28 statute, only two can be addressed with historical data: avoiding unwarranted disparities and fairness. Data addressing possible trends since implementation of the guidelines appear in the two subparts below.

1. Disparity

Although the sentencing goal of avoiding unwarranted disparity first appeared legislatively in the Sentencing Reform Act, the debate over the magnitude of disparity in federal sentencing raged prior to the Act's passage. In fact, the DOJ's survey in 1981 contained several questions asking judges to assess the presence of disparity. The survey results indicate that just under half of the judges (48.9%) reported that unwarranted sentencing disparity occurred "some of the time" in the federal court system as a whole. A large majority held a more positive view: 39.9% of the judges reported that unwarranted sentencing disparity occurred only "every once in

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aggregation of 2001 data that is most similar to the 1981 aggregation involves the top three of the six 2001 response categories. This procedure is still uneven, as the three-out-of-six grouping for the 2001 data represents a smaller share of the scale than the three-out-of-five grouping for the 1981 data. However, using the three-out-of-six grouping for the 2001 data, any goal achievement improvement observed over the two decades will likely underestimate the real differences, making the observed differences merely a lower bound of actual change. The actual improvement in goal achievement will likely be even greater than represented by the data in Appendix D.

34. Consequently, all the 2001 statistics in Appendix D are greater than their corresponding statistics in Appendix B. This is because Appendix B reports the percent of judges responding in the top *two* of the six response categories, while Appendix D data on 2001 presents the percent of judges responding in the top *three* of the six response categories.

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a while" or "never or virtually never." The remaining 11.2% of judges reported that unwarranted disparity occurred "most of the time" or "all of the time or virtually all of the time."[35] These perceptions of frequency, however, hide the true concerns of the judiciary. Regardless of how frequently the judges believed that unwarranted sentencing disparity occurred in the system, one out of every three judges (35.0%) cited the magnitude of the problem as "very serious" or "serious." Only one in four judges (26.0%) reported unwarranted sentencing disparity in the federal system as "a small problem" or "no problem at all."[36]

The Commission's 1991 survey measured judicial opinion during a later period of guideline transition and indicates that judges were almost equally split on the impact of the guidelines on pre-guideline disparity: 31.8% reported that the guidelines increased disparity, 36.2% reported that the guidelines decreased disparity, and 32.0% said that the guidelines had no impact on disparity.[37]

In the 2001 survey, a specific question asked federal district court judges how often the guidelines avoided unwarranted sentencing disparity for similar offenders convicted of similar conduct. On a four-point scale, more than a third (36.9%) of district court judges reported that the guidelines "almost always" avoided unwarranted disparity. An additional 32.1% reported that the guidelines "often" avoided such disparity.[38] Therefore, the comparison shows that in 1981, about a quarter of judges (26.0%) reported that frequency of disparity was small or nonexistent, while in 2001 a larger 36.9% reported that the guidelines "almost always" avoided disparity. The questions were worded differently, but imply that perhaps judges were less likely to see unwarranted disparity in 2001.[39]

On a related disparity topic, judges in the 1991 Commission survey identified sources of unwarranted disparity. These sources included: adjustments for role in the offense, Section 5K1.1 substantial assistance motions by the prosecutor, plea agreements, prosecutor's charging decisions, and mandatory minimum provisions. The frequency data in Appendix E

35. JOHN BARTOLOMEO, U.S. DEP'T OF JUSTICE, JUDICIAL REACTIONS TO SENTENCING GUIDELINES 21 tbl.3 (1981). Percentages cited here are adjusted to exclude non-responses reported in the original table.

36. *Id.* at 23 tbl.5.

37. U.S. SENTENCING COMM'N, NATIONAL SURVEY OF JUDGES AND COURT PRACTITIONERS (1991) [hereinafter NATIONAL SURVEY]. The survey includes original tabulations by the authors.

38. U.S. SENTENCING COMM'N, *supra* note 20, at B-9. On the other extreme, only 5.6% reported that the guidelines "rarely" avoided disparity. These are welcome positive responses on the issue of avoiding disparity for similar offenders with similar offenses. However, the survey responses regarding disparity across sentencing circuits, sentencing districts, and sentencing judges were relatively less positive: only 26.1%, 28.3%, and 30.9%, respectively, believed that these sentencing factors "almost always" avoided unwarranted sentencing disparity.

39. Another question in the Commission's 2001 survey further supports a theory of decreasing perceived disparity by the judges over time. In asking how frequently the judges believed that the guidelines avoided unwarranted disparity, slightly more than half of judges reported that disparity was avoided for most of their cases, regardless of offense type. *See* U.S. SENTENCING COMM'N, *supra* note 20, at B-4.

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show that 38.9% of judges cited mandatory minimums as the cause of unwarranted disparity in "all or many" cases, followed by 25.1% of judges citing the prosecutor's charging decisions and 21.9% citing plea agreements. Responses are made to each source separately, so that the percentages for each separate source sum to 100%.

2. Fairness

Professors Alschuler and Schulhofer reported survey data in 1989 regarding fairness of guideline sentences for three offense types: drug offenses, bank robbery offenses, and white collar crime.[40] A majority of the respondents reported that drug sentences were not appropriate, with 70.5% citing sentences as too severe. A small majority of respondents reported that bank robbery and white collar crime offenses received appropriate sentences (57.7% and 56.0%, respectively). For those reporting that the sentences for these two offenses were not appropriate, the majority opinion was that both bank robbery sentences and white collar crime sentences were too lenient (91.0% and 63.6% of judges, respectively).

In 1996, a Federal Judicial Center ("FJC") survey[41] asked judges to rate, on a five point scale, the fairness of different guideline sentences. On the scale, a "1" indicated "too lenient" and a "5" indicated "too harsh." All fairness responses clustered around the scale's "3" midpoint, with the average ratings ranging from 2.7 to 3.6. The most distinctive response was 3.6 for drug trafficking, indicating that judges believed that drug trafficking sentences tended to be too harsh. Those on the "lenient" side of the scale were larceny (average=2.8), fraud, and robbery (each with average=2.7).[42]

In the 2001 data, fairness is highly associated with offense type. For robbery and weapons trafficking, judges were most likely (roughly 42% for each offense type) to report that most of the caseload for these offenses met the fairness goal. However, for drug trafficking offenses, only 24.2% of judges reported that the goal of fairness was obtained. For the offenses of fraud and larceny, the most frequent response (37.7% and 45.9%, respectively) cited that fairness was achieved only some of the time.[43] Consistent with some of the 1996 findings of the FJC study, the 2001 Commission survey also discovered that the largest response category of judges believed that drug trafficking sentences were longer than appropriate, and that larceny and fraud offenses were shorter than appropriate. For robbery cases, however, there was less judicial consensus: approximately 40% of judges said that the sentences were shorter than appropriate while another 40%

40. Albert W. Alschuler & Stephen J. Schulhofer, *Judicial Impressions of the Sentencing Guidelines*, 2 FED. SENTENCING REP. 94, 94 (1989).

41. MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, FEDERAL JUDICIAL CTR., THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY (1997).

42. *Id.* at 112.

43. U. S. SENTENCING COMM'N, *supra* note 20, at B-5.

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noted that robbery sentences were sometimes shorter and sometimes longer than appropriate.[44]

Fairness, of course, is a difficult notion to capture—indeed, it is almost necessarily subjective. It is reasonable to assume that one judge's notion of fairness might not necessarily dovetail perfectly with that of another judge. Certainly, what a judge deems to be fair will be a culmination of that individual judge's training and experience at the bar and on the bench. In a particular district, for example, the legal community may consider a small amount of illicit drugs—even something as serious as crack or heroin—to be of little consequence, while in another district, even small amounts may be seen as legitimately worthy of prosecution. Individual states have considerable variety in the levels of punishment for certain sorts of offenses. It should come as no surprise then, that judges—whose backgrounds are influenced by the jurisdictions in which they practice—would carry those same intuitions to the bench. This practical reality is one major reason that regional disparity will be difficult to erase.

VII. Overall Assessment of Sentencing

The preceding discussion covering detailed data on achievement of specific sentencing goals begs the larger question: How favorably do judges perceive the sentencing process as a whole? Judicial survey data that evaluate the sentencing process itself would provide an important subjective measure of satisfaction with global sentencing system goal attainment. Fortunately, roughly comparable questions regarding sentencing system evaluation are available for the 1981 survey and the Commission's 2001 survey. The data for this comparison appear in Appendix I.

The DOJ conducted its 1981[45] survey years prior to the passage of the Sentencing Reform Act. The questionnaire asked federal judges to rate the then-current sentencing decision-making process on a five point scale. A total of 39.8% of the 254 federal judge respondents rated the 1981 sentence decision-making process as better than "adequate," 36.2% rated it as "adequate," and 24.0% rated it as less than "adequate."[46] In summary, judge opinions were favorable toward the pre-guideline sentencing process.

The 1981 survey was conducted in a policy environment where judges were highly resistant to the guidelines concept.[47] Even when expressing preferences for the survey's most open proposed guideline alternative (vol-

44. *Id.* at B-1.

45. BARTOLOMEO, *supra* note 35.

46. *Id.* at 19. Percentages cited here are adjusted to exclude non-responses reported in the original table.

47. For examples that document judicial dissatisfaction during and following the Commission's creation of the guidelines' structure, see REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, ch.7, *reprinted in* 2 FED. SENTENCING REP. 233-35 (1990); Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1719-20 (1992).

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untary guidelines with wide sentencing ranges), 43.5% of judges still reported that they would be less than "moderately" satisfied and 29.3% reported that they would be only "moderately" satisfied.[48] The judicial aversion to guidelines was so strongly expressed in the survey that the report suggests that "judges feel there is something onerous about the very concept of guidelines."[49]

In the Commission's 2001 survey, judges rated the guidelines in terms of the relative proportion of their caseload that met the statutory goals of sentencing. A total of 38.4% reported that a high percentage of their cases met the sentencing goals, while 38.6% reported that some of their cases meet the goals, and 22.9% said that few of their cases met the goals of sentencing. The underlying concept of this question might be generally construed as asking judges to rate "guidelines achievement for the sentencing decision-making process." As such, the underlying question is structurally similar to the earlier-described question in the DOJ's 1981 survey (before the guidelines' adoption) that asked judges to rate the then-current sentencing decision-making process.

Comparing the general response distributions of these two surveys, taken twenty years apart, the data in Appendix I are surprisingly similar. In both instances of sentencing system evaluations, roughly 40% of the judges gave more positive (i.e., "higher") rankings and roughly 25% of judges gave less positive (i.e., "lower") rankings.

VIII. CONTRASTING PERCEPTIONS OF OTHER SENTENCING STAKEHOLDERS

There are multiple stakeholders in the criminal justice system, ranging from the judges to the victims. Along with the 1981 DOJ survey's collection of information from federal judges, the survey also collected perceptions on sentencing goal achievement from several other major system stakeholders: prosecutors, defense attorneys, and probation officers.[50] The analysis below shows that perceptions often varied among these sentencing stakeholders. To understand how the sentencing goals were being perceived, it is necessary to take a panoramic view of the opinions of all stakeholders in the sentencing process.

A. Sentencing Role and Sentencing Goals under Title 18

It is logical that the differing perspectives emanating from the varying roles in the criminal justice system would result in a myriad of opinions

48. BARTOLOMEO, *supra* note 35, at 24. Percentages cited here are adjusted to exclude non-responses reported in the original table.

49. *Id.* at 7.

50. The survey also collected data from the general public. These results are not included in the tables due to their tangential relevance to the discussion. In general, the public makes only minor distinctions among the sentencing goals included in the 1981 survey.

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pertaining to sentencing goal achievement. Appendix F presents goal achievement data from the 1981 survey as reported by judges, prosecutors, defense attorneys, and probation officers. The data support the expectation of differing perceptions, but provide additional insights as well.

The first finding is that for prosecutors, defense attorneys, and probation officers, the greatest number of respondents reported that the goal of protecting the public had high achievement. This is in contrast to judges, who gave their highest achievement response to specific deterrence. Except for this flip-flop of first and second place, the four stakeholders in the sentencing system agreed[51] on rankings of the remaining goals: general deterrence, just punishment, and rehabilitation.

Appendix F also suggests that one's role in the sentencing process impacts perceptions of goal achievement. Prosecutors were, comparatively, the least likely to report goal achievement for all five goals in Appendix E. This lowered achievement perspective can be seen in their average achievement percentage: the average of the prosecutors' goal achievement statistics is 43%.[52] This is substantially lower than for the other stakeholders, where the achievement statistic rounds to 59% for judges and probation officers, and 50% for defense attorneys. These averages reflect the very high percentage of judges attributing goal achievement to specific deterrence (77%), the high percentage of defense attorneys and probation officers attributing high achievement to protecting the public (76% and 79%, respectively), and the very low percentage of prosecutors attributing high achievement to rehabilitation (11%).

A counterpoint to the discussion above addresses the normative beliefs about which goals are the most important in sentencing. The foregoing survey responses reflect the perceptions of goal achievement reported by the differing sentencing stakeholders, but these responses do not indicate which goals were viewed to be the most important in sentencing. The data in Appendix G address this topic, displaying the goals which the various sentencing stakeholders believed should be most highly emphasized.

In terms of the importance given to each sentencing goal, two patterns emerge in Appendix G. First, judge and prosecutor responses provided the same relative ranking of the goals. The highest percentage of judges and prosecutors named the goal of general deterrence as "extremely" or "very" important, followed by specific deterrence, protecting the public, rehabilitation, and just punishment. Although these ordered rankings were the same for judges and prosecutors, the absolute percent values distinguish the two groups. This finding highlights the second pattern: for each goal, a higher percentage of prosecutors gave the goal an "extremely" or "very" impor-

51. The sole exception was the defense attorneys, who ranked just punishment achievement ahead of general deterrence.

52. The goal achievement statistics for prosecutors are 61% for protecting the public, 52% for specific deterrence, 51% for general deterrence, 40% for just punishment, and 11% for rehabilitation. The average of these goal achievement statistics is 43%.

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tance rating, and usually by a substantial margin. For example, consider the goal of general deterrence—the goal with the highest percent of each group reporting high importance. A total of 91% of prosecutors reported that general deterrence had high importance, compared to 65% of judges—a difference of almost thirty percentage points. For the goals of specific deterrence, protection of the public, and just punishment, the percentage statistics for prosecutors is at least twenty percentage points higher than the statistics for judges. The conclusion from this data is that although judges and prosecutors have similar normative structures regarding sentencing goals, prosecutors have a higher internal consensus on the relative importance of the sentencing goals. This result comes as no surprise. Prosecutors work within a hierarchal system to bring offenders to justice. Their outlook on sentencing is likely to be far more consistent than among Article III district court judges, who act with relative independence and who must consider the needs of both prosecutors and criminal defendants.

Appendix G illustrates that defense attorneys and probation officers have different normative structures for sentencing goals, both different from each other and from the congruent rankings of the judges and prosecutors. Approximately two-thirds (63%) of defense attorneys agreed that both specific deterrence and rehabilitation were highly important sentencing goals. The highest ranking of rehabilitation among defense attorneys is unique. The other stakeholders placed rehabilitation much lower—in fourth or fifth place—in terms of goal importance. The emphasis that defense attorneys placed upon rehabilitation is consistent with their role as advocates for the offender.

In contrast, probation officers cited specific deterrence as the goal with highest importance, followed very closely by protection of the public and general deterrence. The top ranking of these three goals for probation officers reflects the same top ranking for judges and prosecutors, except that the relative position of these goals among the probation officers is completely different.

The conclusions drawn from the data in Appendix F and Appendix G relate to the sentencing goals of deterrence, protection of the public, just punishment, and rehabilitation. The data suggest that among the four sentencing stakeholders, judges and probation officers have the most positive assessments of goal attainment, while prosecutors have the lowest assessments of goal attainment. Specific deterrence and protecting the public have the greatest proportion of sentencing stakeholders reporting high achievement, with just punishment and rehabilitation having the smallest proportion of sentencing stakeholders reporting high achievement. Finally, the normative rankings of the sentencing goals do not match the achievement rankings, implying that the goals seen as most important are not those with the highest perceived achievement levels. Specifically, while the greatest proportions of both judges and prosecutors (65% and 91%, respectively) cited that general deterrence had a higher importance, greater proportions of

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judges and prosecutors reported higher achievement levels for specific deterrence and protecting the public.

There is no attempt to argue that the priorities or rankings of 1981 represent the perceptions of judges, prosecutors, defense attorneys, or probation officers today. However, there is every reason to believe that differences still exist today in perceptions among these sentencing stakeholders. Depending on the audience surveyed, it is assumed that not only will those who participate in the sentencing process see differing levels of goal achievement, but they will determine these achievement levels from philosophical perspectives that differently value the relative importance of each sentencing goal.

B. The Role of Sentencing and Sentencing Goals under Title 28

It is useful to examine the results of the earlier survey and to compare, where possible, the findings of that survey with those of the most recent judicial survey. It is still possible to examine those results in light of Congress's articulated purposes of sentencing to determine how—and whether—judicial attitudes have transformed in the interim.

1. Unwarranted Sentencing Disparity

When the Commission conducted the survey in 1991 for its evaluation study, judges were less likely to see disparity as a sentencing problem than were the other sentencing stakeholders. Appendix H indicates that 40.5% of judges reported that unwarranted disparity occurred only "every once in a while" or "never or virtually never," compared to a much lower percent of prosecutors and defense attorneys (9.4% and 11.6%, respectively).[53] Also, judges perceived that disparity was a less serious problem: 34.1% of judges reported that disparity was a serious or very serious problem, compared to 67.0% of prosecutors and 59.0% of defense attorneys.[54]

2. Fairness

The 1996 FJC survey of federal judges and chief probation officers covered the sentencing goal of fairness. The survey asked the respondents to rate the fairness of selected guidelines on a scale of "1" to "5," where "1" meant "too lenient" and "5" meant "too harsh." By implication, a "3" response would indicate the maximum level of achievement for the fairness goal. The survey report lists the average fairness responses by guideline and

53. BARTOLOMEO, *supra* note 35, at 21. Percentages cited here are adjusted to exclude non-responses reported in the original table.

54. *Id.* at 22. Percentages cited here are adjusted to exclude non-responses reported in the original table.

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indicates that judges and probation officers shared similar fairness assessments.

Overall, the range of the average ratings is narrow. No average is below 2.5 or above 3.7. The top of the range for both the judges and chief probation officers is drug trafficking (§ 2D1.1), with a judge average of 3.6 and a probation officer average of 3.7. Drug trafficking in protected locations (§ 2D1.2) also has high averages, 3.5 and 3.4 for judges and chief probation officers, respectively. Judges also have an average for simple drug possession (§ 2D2.1) cases of 3.6. On the rating scale, responses higher than 3 indicate perceived sentencing harshness. In general, based on this 1996 survey, both judges and chief probation officers believe that federal drug cases, relative to cases sentenced under the other guidelines, have unfairly long sentences.[55]

At the lowest end of each scale for both judges and chief probation officers are larceny (§ 2B1.1), fraud (§ 2F1.1), and tax (§ 2T1.1) offenses.[56] Also tied for the lowest average score are the judges' responses for robbery (§ 2B3.1), counterfeiting (§ 2B5.1), and alien smuggling (§ 2L1.1). Such scores indicate that the judges and chief probation officers believed that sentences for these offenses were relatively lenient under the guidelines system. For judges in particular, however, the absolute difference of these averages at 2.8—just 0.2 points below the fairness goal of 3.0 on this survey's evaluation scale—strongly cautions that the judges' responses may not identify a statistically significant perception of unfairness.

Nonetheless, the fact that the judges and chief probation officers have averages below the center of the scale does suggest some dissatisfaction with fairness under the guidelines in 1991. Additional information from the survey hints at reasons for these lower leniency ratings for fraud and larceny offenses. There was an apparent widely held perception in 1996 that the "loss tables" did not work to punish offenders appropriately. Based on responses to the FJC's survey, approximately two-thirds (66.5%) of judges and three-fourths (73.5%) of chief probation officers objected to the punishment appropriateness of then-current loss tables. Of those objecting, judges most frequently cited objections of inappropriately low incremental punishment associated with large loss values, followed by objections to inappropriately high sentencing emphasis placed on loss values. Of the chief probation officers objecting, the majority cited the low incremental punishment associated with large loss values.[57]

55. JOHNSON & GILBERT, *supra* note 41, at 19 tbl.13.

56. *Id.* These offenses had an average response of 2.8 for the judges, and 2.5 for the probation officers.

57. *Id.* at 78 tbl.7c.

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IX. SETTING A DIRECTION FOR THE COMMISSION

The district court judges' perceptions of sentencing goal achievement reflect relatively positive appraisals of the guidelines system. For the sentencing goals under Title 18—just punishment, deterrence, incapacitation, and rehabilitation—evidence suggests that the judges' may have more positive perceptions of goal achievement now than they had prior to the guidelines in 1981. These results may come as surprise to those who believe that judges abhor the guidelines.

The goals of the Sentencing Reform Act under Title 28—certainty, fairness, avoiding unwarranted disparity, and flexibility—add a new dimension to the evaluation of sentencing goal achievement. The district court judges reported high achievement for the goal of certainty and the avoidance of unwarranted disparities. This finding is particularly significant in light of Congress's stated aim of eliminating untoward disparity. Similarly, the goal of increasing sentencing certainty, also deemed important by Congress, seems to have been attained. However, the judges were quite negative about achievement of the goals of fairness and flexibility. Judicial concerns regarding the fairness of the system cannot be lightly dismissed. Even if the guidelines have attained other important goals, their efficacy may be undermined if they are viewed as unfair by those who must impose them. It is likely that judges will find ways to make them fair (at least in their assessment). Such attempts may serve to bring back many of the sentencing inconsistencies that plagued the pre-guidelines era.

Tellingly, these results highlight the apparent incompatibility of goals within the structured sentencing system. It may be extremely difficult to maximize achievement of two conflicting objectives such as, for example, certainty and flexibility. Given this conflict, sentencing systems probably cannot simultaneously achieve goals that presuppose inconsistent levels of sentence severity. In such instances of goal conflict, either one goal will be achieved to a substantially greater degree than the other, or both goals will have only middling achievement. Such a circumstance could explain why judges bestow certainty and protection of the public with higher achievement rankings, while the contrasting goal of rehabilitation sinks to the lowest rank. This possibility also suggests that a low ranking of one or several goals may not be cause for corrective action when its apparent failure is the artifact of a priority given to a contrasting goal. The low perceived achievement levels for the goals of rehabilitation and flexibility are possibly explained by this theory. When the goals themselves are inconsistent, it ought to come as no surprise that trade-offs must be made.

The low goal achievement rating for rehabilitation must be presently put aside due to the antithetical nature of attainment among rehabilitation and the other sentencing goals. In fact, the literature has suggested that rehabilitation is unique in that it is not meant to be a goal for *all* sentences. Instead,

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the goal of rehabilitation applies only to sentences of incarceration.[58] Moreover, the guidelines system itself is not designed to deal with rehabilitation. In enacting the Sentencing Reform Act, Congress expressly eschewed the notion that greater attention should be paid to rehabilitative efforts.[59] In the end, such efforts must come from Congress, the Department of Justice, and the general legal community. For the most part, rehabilitation programs reside well beyond the Commission's realm. That is not to say that the Commission has no role in effectuating this congressionally adopted goal of sentencing. After all, although the Sentencing Reform Act plainly shifted away from a rehabilitative model,[60] rehabilitation of the offender nevertheless remains a statutorily expressed goal of sentencing. Perhaps at some point, by means of re-structuring supervised release, the Commission will again take up the cause of rehabilitation.

The crucial challenges remaining for the Commission are the perceived low achievement rates for two other sentencing goals. Low percentages of district court judges believed the goals of just punishment (37.0%) and fairness (32.3%) were met for most of their cases, according to the 2001 Commission survey. The findings can be parsed to expose some intervening impacts by offense type, but a full explanation remains elusive. For the just punishment goal, the 37.0% attainment statistic reflects the even lower goal achievement attributed to drug trafficking: only 25.5% of district court judges believed the goal of just punishment was met for drug trafficking offenders. This is, however, only a partial explanation because the offense type with the highest achievement for just punishment is the 42.5% statistic for robbery offenses. An understanding of the low just punishment goal achievement is even further muddled by the survey's results for the "just desserts" philosophy. The text of 18 U.S.C. § 3553(a)(2)(A), states the goals of punishment reflecting the seriousness of the offense, just punishment, and increasing respect for the law. Yet, the survey data show that more than half (52.4%) of district court judges believed that most of their cases met the goal of reflecting the seriousness of the offense, while 37.0% believed that most of their cases meet the goal of just punishment. This apparent inconsistency requires further inquiry.

For the fairness goal, the 32.3% attainment statistic reflects the even lower goal achievement attributed to drug trafficking (only 22.4%). However, because none of the other offense types had more than 45% of district court judges—i.e., always fewer than half—believing that the goal of fair-

58. Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting the Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 398 (1991).

59. The legislative history to the Act explains that: "In the federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. . . . Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting." S. REP. NO. 98-225, at 38 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221.

60. Indeed, the Senate Report on the Comprehensive Crime Act expressly observes that efforts to adopt a rehabilitative model have failed, and that the new legislation is designed to reject that model and to return to a more punitive system. 1984 U.S.C.C.A.N. 3221-22.

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ness was met in most of their cases, this is not a full explanation. Further, the low fairness goal results oddly appear to conflict with the much more positive (52.8%) results for the goal of avoiding unwarranted disparity. The only clues from the analysis are the consistent perceptions that the sentences of drug trafficking offenders were too harsh and the sentences of fraud and larceny offenders were too lenient, at least at the time of the 2001 survey. Clearly an investigation to identify the definite causes of low fairness ratings is necessary.

Important considerations underlying the interpretation of guideline attainment levels from subjective survey data involve the nature of the population surveyed. Two elements of the target survey population are particularly salient for the analyses here. The first target survey population issue involves the fluid nature of the judicial population. This is evidenced by the suggested decline in judicial opposition to the guidelines concept. The generally positive survey findings imply that district court judges' antipathy toward the guidelines is perhaps not nearly as high as some commentators historically have suggested.[61] Some leveling of hostility is likely due to the passage of time, as judges have had more than a decade to work with the guidelines and understand their nuances. Major policy initiatives such as the Sentencing Reform Act bring expected opposition as stakeholders fear change in policy priorities and loss of established practices.[62] While this opposition plays a continuing important role in the review of policy decisions to ensure program integrity, its fervor reduces as the new policy becomes the norm. Judges, like all people, tend to resist change. However, as the judges became increasingly familiar with the guidelines, and how to apply them, their resistance to the guidelines likely is weakened.

Perhaps nowhere is this relationship between the passage of time and the acceptance of new policies more evident than in the response differences observed between newer and more experienced district court judges. One question on the Commission's 2001 survey asked the judges to indicate whether they had sentenced cases under "Old Law," prior to the guidelines. Comparing responses for judges with and without Old Law experience, the newer judges were more likely to be positive about the goals of sentencing. While true for all the goals discussed in the analysis, it is strikingly true for the goal of certainty[63] and notable for the goals of fairness and flexibility.[64] While experience with Old Law is correlated with these results, it is still

61. *See generally* KATE STITH & JOSE CABRANES, FEAR OF JUDGING (1998).

62. Terance D. Miethe & Charles A. Moore, *Officials' Reactions to Sentencing Guidelines*, 25 J. RES. CRIME & DELINQ. 170, 185-86 (1988).

63. The percent of guideline-era-only judges reporting that most of their cases meet the goal of certainty is approximately twenty percentage points higher than that of judges who had sentenced under Old Law. U.S. SENTENCING COMM'N, *supra* note 20. The survey includes original tabulations by the authors.

64. The percents of guideline-era-only judges reporting that most of their cases meet the goals of fairness and flexibility are approximately eight and six percentage points, respectively, higher than that of judges who had sentenced under Old Law. U.S. SENTENCING COMM'N, *supra* note 20. The survey includes original tabulations by the authors.

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logical to assume that it is the Old Law experience itself that makes judges more critical of guideline achievement. Other factors, such as the judge's age, share this same correlation. By definition, judges with Old Law experience are likely older than judges who have sentenced solely under the guidelines. But if it is experience with Old Law that reduces endorsements of sentencing goal achievement, this implies *ceteris paribus* that over time the ratings of goal achievement will improve, at least somewhat, as the Old Law judges retire from the bench.[65] Just as fewer and fewer Old Law prisoners who were sentenced prior to the guidelines remain behind bars, there are ever-waning numbers of federal judges who sat on the bench prior to the guidelines' adoption. Indeed, many prosecutors and defense attorneys, not to mention judges, have practiced exclusively under the guidelines system. It remains for lively debate whether the departure of retiring, pre-guideline judges will provide judicial surveys with a more, or less, accurate measure of perceived sentencing goal attainment under the guidelines.

A second survey target population issue underscores the importance of incorporating all perspectives when analyzing goal attainment levels. A major feature of this sentencing goal analysis is the strong correlation observed between the stakeholder role in the sentencing process—judge, prosecutor, defense attorney, or probation officer—and the perceptions of goal achievement. Compared to the other stakeholders, judges generally reported the highest levels of achievement, while prosecutors reported the lowest levels of achievement. If this is in fact the truth, and if only judicial opinions are solicited, the analysis of how well the guidelines meet the congressionally mandated sentencing goals will be biased. The fact that different stakeholders perceive different levels of achievement reflect both their differing roles during the sentencing process and their differing consensus on the importance attached to the pursuit of specific goals. Stakeholders who prioritize the goals of protection of the public and general deterrence will pursue more lengthy sentences, while stakeholders who prioritize just punishment and rehabilitation will pursue shorter sentences.[66]

Clearly, then, the perceptions of how well sentencing goals are met may well depend on the audience queried. This is highlighted conspicuously in the data of Appendix G: judges were greater than four times more likely than prosecutors and more than three times more likely than defense attorneys to report only minimal unwarranted sentencing disparity in 1981. Further, they were approximately only half as likely to see disparity as a serious problem. It is an open empirical question whether perception differences exist today, and if so, what magnitude those differences have. But until the

65. The more positive perspective of guideline-only judges carries over to beliefs about the guideline system as a whole. In rating the overall achievement of the guidelines in furthering the purposes of sentencing, guideline-only judges specified higher achievement (43.3%) compared to Old Law judges (35.3%). U.S. SENTENCING COMM'N, *supra* note 20. The survey includes original tabulations by the authors.

66. Margaret Marcus Hale, The Influence of Sentencing Goals on Judicial Decision-Making 91 (1984) (unpublished Ph.D. dissertation, Johns Hopkins University) (on file with author).

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relationship between stakeholder roles and perceptions is understood, it must be assumed that there are multiple subjective "truths" underlying the level of guideline goal achievement, with those truths resting at distinct locations along the measurement scale of achievement. The resulting action is to design surveys which perceive sentencing goal attainment as representing as many different stakeholder categories as possible.

Some final observations are necessary to bring to a close this stage of the sentencing goal analysis. First, the comparison data used in the analysis spring from different survey instruments. Observed differences can suggest only possible trends and serve as input in the design of further investigations. Closely related is a second observation that refutes any assumption that the federal sentencing guidelines are the sole cause of any real differences in goal achievement measures taken prior to, and subsequent to, the enactment of the Sentencing Reform Act. Over the past twenty years, a myriad of criminal justice factors have changed, some specifically related to guideline implementation and others related to non-guideline social, economic, or policy events. Nothing reported in this analysis can be used to attribute the findings solely to the presence of the guidelines.

Finally, the assumption underlying this research postulates that documenting stakeholder perceptions of sentencing goal achievement provides true insight into the criminal justice system's performance. The validity of this assumption becomes unambiguously evident based upon the policy implications revealed during analysis and is further enhanced when the survey provides comparative data for all stakeholders' perceptions. Survey research is not the only type of analysis that can, or should, be used to investigate the performance success of federal sentencing procedures. In fact, the information gathered from survey research can itself strengthen and inform complementary analyses using micro data or administrative empirical data files. Survey findings on stakeholder perceptions provide the rich backdrop against which policy performance issues can be evaluated. It is hoped that this survey will be repeated in the future in order to track the attitudes of judges toward the sentencing guidelines over time, enabling policy makers to continually assess the attitudes of those in the field tasked with making the sentencing determination.

X. CONCLUSION

Although the federal sentencing guidelines have often been targeted for criticism, it is interesting to see that those on the forefront of sentencing—the judges—largely appear to have accepted their existence and to embrace them as being beneficial in many areas. Myth often contains a kernel of truth, however, and such is the case here. The guideline system, as with any human endeavor, remains imperfect, and—in the judges' view—does not give full effect to the principles Congress articulated to guide sentencing determinations. Nevertheless, contrary to received wisdom, the judges seem to believe that the guidelines have done much to eliminate untoward dispar-

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ity in sentencing and to provide greater certainty to all those involved in the criminal justice system. The first question in any analysis of the guidelines system is to determine whether it has improved upon the situation that previously existed. The judges seem to have answered that question with a qualified "yes." At minimum, the judges appear to believe that the guidelines have actually accomplished some of the more important goals Congress set out for the guidelines to achieve.

The survey has proven to be a useful, albeit imperfect, tool by which to gauge judicial attitudes toward the sentencing guidelines. It is vital, if Congress is to see its sentencing policy pronouncements take effect, for the judges to *believe* in the guidelines system. After all, if the judges do not believe that the guidelines are fundamentally just and accurately represent congressional intent, it will be difficult—if not impossible—to maintain respect for federal sentencing and to ensure that federal criminal defendants (regardless of where they may be situated) will be treated similarly. In many respects, this guarantee of similar treatment is the great, if not yet fully realized, purpose behind the federal sentencing guidelines' creation. Hopefully, the survey data will be used to further refine the guidelines, to inform judicial opinion, and to encourage the academic debate that is an ongoing and important part of the process of ensuring fairness in the criminal justice system.

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APPENDIX A PROJECTS THAT INCLUDE SENTENCING GOAL TOPICS
Pre-Guideline Survey Data
U.S. DEP'T OF JUSTICE, THE PUBLIC IMAGE OF COURTS: HIGHLIGHTS OF A NATIONAL SURVEY OF THE GENERAL PUBLIC, JUDGES, LAWYERS, AND COMMUNITY LEADERS. (1978).
U.S. DEP'T OF JUSTICE, SENTENCING GOALS AND THEIR APPLICATION IN FEDERAL COURTS (1980).
JOHN BARTOLOMEO, JUDICIAL REACTIONS TO SENTENCING GUIDELINES (1981).
JOHN BARTOLOMEO, KEVIN CLANCY, DAVID RICHARDSON, & PAUL BERGER, SENTENCING DECISION-MAKING: THE LOGIC OF SENTENCE DECISIONS AND THE EXTENT OF SOURCES OF SENTENCING DISPARITY (1981).
U.S. DEP'T OF JUSTICE, FEDERAL SENTENCING: TOWARD A MORE EXPLICIT POLICY OF CRIMINAL SANCTIONS (1981).
Margaret Marcus Hale, The Influence of Sentencing Goals on Judicial Decision-Making 91 (1984) (unpublished Ph.D. dissertation, Johns Hopkins University).
Post-Guideline Survey Data
Terance D. Miethe & Charles A. Moore, *Officials' Reactions to Sentencing Guidelines*, 25 J. RES. CRIME & DELINQ. 170 (1988).
Albert W. Alschuler & Stephen J. Schulhofer, *Judicial Impressions of the Sentencing Guidelines*, 2 FED. SENTENCING REP. 94 (1989).
FEDERAL COURTS STUDY COMMITTEE, *Chapter 7—Sentencing*, *in* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *reprinted in* 2 FED. SENTENCING REP. (1990).
U.S. SENTENCING COMM'N, *Judges and Practitioners General Impressions of the Guidelines*, *in* 1 THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING (1991); U.S. SENTENCING COMM'N, *Preliminary Sentencing Commission Survey Results: Additional Views from the Field*, *in* MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).
FEDERAL JUDICIAL CENTER, PLANNING FOR THE FUTURE: RESULTS OF A 1992 FEDERAL JUDICIAL CENTER SURVEY OF UNITED STATES JUDGES (1994).
MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY (1997).
U.S. SENTENCING COMM'N, SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES (2003), *available at* http://www.ussc.gov/ju dsurv/judsurv. htm.
Michael Edmund O'Neill, *Surveying Article III Judges' Perspectives on the Federal Sentencing Guidelines*, 15 FED. SENTENCING REP. 215 (2003)

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APPENDIX B
ORDERED LIST OF DISTRICT COURT JUDGES' PERCEPTIONS OF SENTENCING GOAL ACHIEVEMENT

Majority Opinion of Goal Attainment	Sentencing Goals 18 U.S.C. § 3553(a)(2)	Percent*	Guideline Goals 28 U.S.C. § 991(b)(1)(B)
	Deterrence	61.5	
		55.0	Certainty
	Protection of Public	54.8	
		52.8	Avoid Disparities
	Reflect Seriousness	52.4	
	Just Punishment	37.0	
		32.3	Fairness
	Rehabilitation	27.7	
		24.4	Flexibility

*Using a six-point scale from "1" ("few") to "6" ("almost all"), the percent of federal district court judges responding "5" or "6" for how often their guideline sentences meet the sentencing goal.

Source: U.S. SENTENCING COMM'N, *supra* note 20, at B-1 to -6.

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APPENDIX C
DISTRICT COURT JUDGES' RELATIVE RANKINGS OF GOAL ACHIEVEMENT BY OFFENSE TYPE

Rank	Drug Trafficking		Firearms		Fraud		Theft		Robbery	
	Goal	%*	Goal	%*	Goal	%*	Goal	%*	Goal	%*
1	Deterrence	67.5	Protect Public	61.0	Unwarranted Disparity	49.9	Unwarranted Disparity	51.0	Unwarranted Disparity	57.9
2	Protect Public	67.1	Certainty	56.8	Certainty	47.0	Certainty	48.6	Certainty	57.0
3	Certainty	54.3	Unwarranted Disparity	55.3	Deterrence	38.8	Deterrence	39.4	Reflect Seriousness	53.7
4	Unwarranted Disparity	46.0	Deterrence	54.1	Protect Public	35.1	Protect Public	36.7	Deterrence	51.2
5	Reflect Seriousness	41.8	Reflect Seriousness	54.0	Reflect Seriousness	32.7	Reflect Seriousness	36.3	Protect Public	50.1
6	Rehabilitation	28.9	Just Punishment	39.4	Fairness	30.0	Fairness	32.1	Fairness	44.1
7	Just Punishment	25.5	Fairness	37.2	Just Punishment	28.9	Just Punishment	30.4	Just Punishment	42.5
8	Fairness	22.4	Flexibility	26.3	Flexibility	26.3	Flexibility	26.8	Flexibility	31.0
9	Flexibility	16.5	Rehabilitation	24.0	Rehabilitation	24.3	Rehabilitation	23.0	Rehabilitation	24.7
MEAN		41.1		45.3		34.8		36.0		45.8
MEDIAN		41.8		54.0		32.7		36.3		50.1

*Using a six-point scale from "1" ("few") to "6" ("almost all"), the percent of federal district court judges responding "5" or "6" for how often their guideline sentences meet the goal.

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APPENDIX D
JUDGES' RATING OF GOAL ACHIEVEMENT

	1980 Survey			2001 Survey	
	Rank	Percent*		Rank	Percent**
Specific Deterrence	1***	(71%)	77	2	79.8
General Deterrence			65		
Protecting the Public	2	69		1	82.2
Just Punishment	3	54		3	61.6
Rehabilitation	4	32		4	45.2

*Percent of judges reporting that the goal is achieved "extremely well," "very well," or "somewhat" on a five-point response scale. FEDERAL SENTENCING: TOWARD A MORE EXPLICIT POLICY OF CRIMINAL SANCTIONS, *supra* note 31, at 31; SENTENCING GOALS AND THEIR APPLICATION IN FEDERAL COURTS, *supra* note 31, at III-8; U.S. SENTENCING COMM'N, *supra* note 20, at B-2, -3, -6.

**Using a six-point scale from "1" ("few") to "6" ("almost all"), the percent of federal district court judges responding "4," "5," or "6" for how often their guideline sentences meet the sentencing goal. *Id.*

***The deterrence rank of "1" is based on the average (71%) of 77% for specific deterrence and 65% for general deterrence. *Id.*

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APPENDIX E*
JUDGES' OPINIONS ON SOURCES OF UNWARRANTED GUIDELINE SENTENCING DISPARITY

Factors Cited As Source of Unwarranted Sentencing Disparity	Total	All/Many Cases (%)	Some Cases (%)	Few/No Cases (%)
		Percent	Percent	Percent
Adjustments for Role in Offense	100.0	6.6	25.3	68.1
Substantial Assistance Motions	100.0	18.4	31.7	49.9
Plea Agreements	100.0	21.9	38.1	40.0
Prosecutor Charging Decisions	100.0	25.1	42.0	32.9
Mandatory Minimums	100.0	38.9	38.1	23.0

*NATIONAL SURVEY, *supra* note 37. The survey includes original tabulations by the authors.

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APPENDIX F
RATING OF GOAL ACHIEVEMENT OF CRIMINAL JUSTICE SYSTEM

	Judges		Prosecutors		Defense Attorneys		Probation Officers	
	Rank	Percent*	Rank	Percent*	Rank	Percent*	Rank	Percent*
Protecting the Public	2	69	1	61	1	76	1	79
Specific Deterrence	1	77	2	52	2	60	2	63
General Deterrence	3	65	3	51	4	40	3	56
Just Punishment	4	54	4	40	3	49	4.5	49
Rehabilitation	5	32	5	11	5	27	4.5	49

*Percent of column respondents who reported that the goal is achieved "extremely well," "very well," or "somewhat" on a five-point response scale. FEDERAL SENTENCING: TOWARD A MORE EXPLICIT POLICY OF CRIMINAL SANCTIONS, *supra* note 31, at 31; SENTENCING GOALS AND THEIR APPLICATION IN FEDERAL COURTS *supra* note 31, at III-8.

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APPENDIX G
RATING OF IMPORTANCE OF SENTENCING GOAL

	Judges		Prosecutors		Defense Attorneys		Probation Officers	
	Rank	Percent*	Rank	Percent*	Rank	Percent*	Rank	Percent*
Protecting the Public	3	51	3	71	3	48	2	73
Specific Deterrence	2	62	2	84	1.5	63	1	75
General Deterrence	1	65	1	91	4	46	3	72
Just Punishment	5	23	5	45	5	24	5	40
Rehabilitation	4	49	4	53	1.5	63	4	68

*Percent of column respondents who reported that the goal is "extremely important" or "very important" on a five-point response scale. SENTENCING GOALS AND THEIR APPLICATION IN FEDERAL COURTS, *supra* note 31, at III-6.

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APPENDIX H
PERCEPTIONS OF FREQUENCY AND SERIOUSNESS OF UNWARRANTED SENTENCING DISPARITY

Respondent Type	Reporting Low Level of Unwarranted Disparity*	Reporting Unwarranted Disparity as a Serious Problem**
	Percent	Percent
Judges	39.9	34.1
Prosecutors	9.4	67.0
Defense Attorneys	11.6	59.0

*Percent of given respondent group reporting that, in the federal court system as a whole, unwarranted sentence disparity occurred "every once in a while" or "never/virtually never" on a five-point response scale. BARTOLOMEO, *supra* note 35, at 21 tbl.3, 22 tbl.4.

**Percent of given respondent group reporting that, for the criminal justice system, unwarranted disparity was "a very serious problem" or "a serious problem" on a five-point response scale. BARTOLOMEO, *supra* note 35, at 21 tbl.3, 22 tbl.4.

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APPENDIX I*
EVALUATIONS OF CURRENT SENTENCE DECISION-MAKING PROCESS

	1981 Survey Evaluation of Then-Current Sentence Decision-Making Process	2001 Survey Evaluation of Guideline & Statutory Sentencing Goals
	Percent	Percent
Total	**100.0**	**100.0**
More Positive	39.8	38.4
Middle	36.2	38.6
Less Positive	24.0	22.9

*BARTOLOMEO, *supra* note 35, at 19; U.S. SENTENCING COMM'N, *supra* note 20, at 24.

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