existing sentencing practices in each state and classified states by their *primary* sentencing structure.\(^9\) BJA researchers distinguished 4 major forms of sentencing: (1) determinate; (2) indeterminate; (3) voluntary/advisory guidelines; and (4) presumptive guidelines. Each form of sentencing is defined below:

- **Determinate:** A fixed sentence is imposed by the judiciary. An inmate may earn good time or earned time credit to reduce the fixed sentence. There is no possibility of discretionary release by an administrative agency (e.g., parole board).

- **Indeterminate:** A maximum sentence (or both a minimum and maximum sentence) is imposed by the judiciary. An inmate may earn good time or earned time credit to reduce the imposed sentence. An inmate may be released by an administrative agency (e.g., parole board).

- **Voluntary/Advisory Guidelines:** A system of judicial guidelines is implemented to guide judicial decisionmaking. Guideline recommended sentences are not mandatory. Judges are generally required to submit reasons for departures, but departure sentences are not subject to appellate sentence review. Voluntary guidelines typically describe past judicial sentencing practice.

- **Presumptive Guidelines:** A system of presumptive guidelines is implemented and sentencing judges are expected to sentence within recommended sentencing ranges. The appropriate sentencing range is a function of offender criminal history and offense seriousness. Judges are required to submit reasons for guideline departures and departures are generally subject to appellate sentence review.

Since sentencing structure categories are not mutually exclusive, the BJA report classified each state according to its *primary* sentencing structure. If a state implemented elements of both determinate and indeterminate sentencing, for example, the sentencing structure that affected the greatest proportion of inmates was deemed the primary sentencing structure.

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Similarly, if a state implemented either voluntary/advisory or presumptive guidelines, the
guideline structure superseded other characteristics of the system (i.e., determinate,
indeterminate). The BJA revealed the following about sentencing practice nationwide:

- Fifty states and the District of Columbia have enacted mandatory minimum
  sentences (most commonly for repeat/habitual offenders and for crimes
  committed while possessing a deadly weapon).
- Five states operate determinate sentencing systems.
- Six states have implemented voluntary/advisory sentencing guidelines.
- Ten states have implemented presumptive sentencing guidelines.

Although the remaining thirty states were classified as predominantly indeterminate, nine of
these states also reported elements of a determinate structure. Eighteen states (primarily those
with sentencing guidelines) have created a sentencing commission.

3.4 Structured Sentencing: The Maryland Experience. The centerpiece of sentencing
reform in Maryland is the voluntary/advisory guidelines system that has been in place statewide
for approximately 15 years. The concept of judicial sentencing guidelines was introduced in the
late 1970s by the judiciary in response to judicial perceptions of unwarranted sentencing
disparity. A judicial Committee on Sentencing was formed by the Court of Appeals and a host
of alternative sentencing systems were studied (e.g., determinate sentencing, mandatory
sentencing, sentencing councils). In April 1979, the Committee approved a system of voluntary
sentencing guidelines for use in circuit courts only. In determining the appropriate sentence

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range, the guidelines were designed to take both offender and offense characteristics into account.\textsuperscript{13}

The National Institute of Justice (NIJ) sponsored the implementation and evaluation of a system of voluntary guidelines in four Maryland counties (Baltimore City, Harford, Montgomery, and Prince George's counties). A major objective of the NIJ sponsorship was to test the viability of a single system of guidelines that crossed rural, suburban, and urban boundaries. Although the guidelines were initially intended to be based on analysis of data collected on past sentencing practices (i.e., descriptive guidelines), missing data problems largely invalidated the analyses. A more normative approach was therefore adopted by the judicial board responsible for guidelines development. The board relied, for example, on the analysis of hypothetical cases as well as on policy input from criminal justice system actors (e.g., prosecutors, defense attorneys, parole board, etc.).\textsuperscript{14}

Mandatory minimum sentences are another form of structured sentencing reforms in Maryland. Mandatory minimum penalties have been enacted to apply to certain handgun and drug distribution offenses as well as to repeat, violent offenders. A comprehensive list of legislatively mandated criminal penalties is contained in Appendix A. The Commission's review and recommendation related to mandatory minimum sentences is contained in Recommendation 7.

3.5 Existing Sentencing Guidelines in Maryland. The existing Maryland guidelines are displayed in three separate matrices, one for person offenses, one for property offenses, and one

\textsuperscript{13}Levin, 1984: 174-175.

for drug offenses (see Appendix B). The sentence recommendation is determined by the intersection of a defendant's criminal history score and offense seriousness score on each two-variable matrix. Sentence recommendations are wide, sometimes encompassing a range of 10 or more years. The average width of the recommended ranges on the person matrix, for example, is 8.85 years. The average width of the range for property offenses is 4.05 years and for drug offenses is 2.22 years.\textsuperscript{15} \textsuperscript{16}

Maryland's existing guidelines were developed to eliminate inappropriate sentence disparities. Having statewide sentencing guidelines before them, it was expected that judges would be more likely to impose sentences in proportion to increased prior record and increased offense severity, both seen as appropriate legal factors related to differences in sentencing.

Specific goals of the sentencing guidelines as originally promulgated include:

- Increased equity in sentencing, i.e., the reduction of unwarranted variation between similar cases and defendants, while retaining judicial discretion to individualize sentences;
- Articulation of an explicit sentencing policy while providing a regular basis for policy review and change;
- Providing information for new or rotating judges;
- Promotion of increased visibility and understanding of the sentencing process.\textsuperscript{17}

The original goals of the voluntary guidelines system are still in place today.\textsuperscript{18}


\textsuperscript{16} The guidelines apply to circuit court convictions only. Prayers for jury trials and appeals from District courts are excluded.

\textsuperscript{17} Levin, 1984: 175.

3.5.1 Commission Consideration of the Extension of Sentencing Guidelines to the District Court. The Commission considered the desirability and feasibility of extending the use of presumptive or voluntary guidelines into the District Court. Among the perceived potential benefits were increased uniformity, particularly in sentences for offenses over which the district courts and circuit courts exercise concurrent jurisdiction; greater predictability with respect to anticipated jail and prison bedspace requirements; and control over the utilization of corrections options dispositions to avoid exhaustion of resources by inclusion of persons who properly could be sentenced to less intensive sanctions.\(^{19}\)

Balanced against the possible benefits were the serious problems created by adding another layer of paperwork and disputes over the proper allocation of points, etc. to a court system already burdened by a huge volume of cases. The District Court judges expressed significant concern about their ability to effectively utilize sentencing guidelines within existing resources and time constraints, pointing out that most of the sentencing in that court was accomplished without the aid of pre-sentence investigations and therefore without the assistance of a probation officer to provide the necessary information and to complete a sentencing guidelines form. Moreover, the District Court judges pointed out that in a substantial number of cases, the commissioner routinely obtains criminal history information from a computer source and places that information under seal in the file. In all other cases, unless a pre-sentence investigation is requested the criminal history information ordinarily must be provided by the prosecutor. In some areas of the state the prosecutor does not routinely provide this information.

\(^{19}\)Professor Michael Tonry strongly recommends the integration of Correctional Options programs into sentencing guidelines to avoid "net-widening" that can diminish or destroy the effectiveness of correctional options programs. See Tonry, (May, 1997).
because, they contend, the volume of cases exceeds their administrative capability to obtain this information through a computer search.

After careful study the Commission concluded that the use of sentencing guidelines should not be mandated in the District Court at this time, but that as the statewide Correctional Options Program being recommended by the Commission is established (See Chapter 4), and as the criminal jurisdiction of the District Court continues to expand, the question should be revisited to determine whether a simplified guidelines system could be developed for effective and non-burdensome use in that court.

3.6 Judicial Compliance with Sentencing Guidelines. In order for a system of sentencing guidelines to reduce sentencing disparity, the judiciary must comply with the guidelines in the majority of cases. The guidelines were therefore drafted with the expectation that two-thirds of the sentences would fall within the recommended sentencing ranges. It was recognized at the outset that as sentencing practices changed, the sentencing guidelines would change. That is, whenever actual sentences disagreed with the guideline sentence recommendations in more than 33% of the cases, the guidelines were to be revised.20

The sentencing guidelines manual instructs judges to sentence within the recommended guideline range, absent "compelling" circumstances to depart. If judges choose to depart from the sentencing guidelines, the sentencing guidelines manual requires a written reason for departure, indicating “specifically why the sentence actually imposed is more appropriate, reasonable, or equitable than a sentence within the guidelines.”21 In practice, however, the

20 Attempts to revise the guidelines in 1993, however, met strong opposition from the public and the proposed revisions were suspended. The existing sentencing guidelines have not been revised since 1987, except to classify offenses.

judiciary generally neglects to provide a meaningful written explanation for departure. In approximately 75% of the departure sentences over a ten-year period, the departure reason had not been documented. Departure reasons captured in the Administrative Office of the Court (AOC) database tend to be vague. Examples of common departure reasons include, for example, "recommendation of office of the State's Attorney" or "recommendation of Division of Parole and Probation" or "plea bargain" without further reason.

Judicial compliance to the voluntary sentencing guidelines was first examined as part of the National Institute of Justice (NIJ) evaluation of the implementation of guidelines in four test jurisdictions in Maryland. The NIJ evaluation revealed that during a "test" year for the offense of burglary, guidelines worksheets were completed for 70% of the burglary convictions. Sixty-eight percent (68%) of the sentenced burglary cases fell within the recommended guidelines range. When judges departed from the guidelines, they were most likely to sentence below the recommended range.

Subsequent analyses have examined judicial compliance to the guidelines throughout the state of Maryland and for all crime categories. Generally speaking, judicial compliance with the guidelines is low. Although the judicial board expected a compliance rate of approximately two-thirds or 67%, the average compliance rate over the last 10 years is roughly 55% (see Table 1). When judges depart from the guidelines, they are much more likely to sentence below the guidelines than above the guidelines. This persistent pattern of mitigation is evident across time.

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22 Carrow, 1984:170.

23 Carrow, 1984:170.

24 The sample consists of N=80,607 individuals convicted of single counts in Maryland circuit courts between January, 1987 and September, 1996 (for whom a sentencing guidelines worksheet was completed).
guidelines than above the guidelines. This persistent pattern of mitigation is evident across time, across jurisdictions, and across crime categories. Low compliance rates are particularly notable given the wide range of many of the matrix cells.

Compliance varies by crime category as shown in Table 1. Judges are most likely to comply with the guidelines for property offenses and least likely to comply with the guidelines for drug offenses. Regardless of crime category, however, when judges depart from the guidelines they usually sentence below the recommended range. The percentage of cases where judges exceed the recommended range is relatively constant across crime categories (roughly 8%).

<table>
<thead>
<tr>
<th></th>
<th>Consistent with Guidelines</th>
<th>Below Guidelines</th>
<th>Above Guidelines</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Offenses</td>
<td>44,048 (54.6%)</td>
<td>30,283 (37.6%)</td>
<td>6,276 (7.8%)</td>
</tr>
<tr>
<td>Person Offenses</td>
<td>12,694 (57.2%)</td>
<td>7,748 (34.9%)</td>
<td>1,741 (7.8%)</td>
</tr>
<tr>
<td>Drug Offenses</td>
<td>20,666 (49.2%)</td>
<td>18,132 (43.2%)</td>
<td>3,171 (7.6%)</td>
</tr>
<tr>
<td>Property Offenses</td>
<td>10,687 (65.0%)</td>
<td>4,403 (26.8%)</td>
<td>1,364 (8.3%)</td>
</tr>
</tbody>
</table>

The Commission considered the effect of plea bargains on the judicial compliance rate, and noted that concessions given a defendant as part of a plea bargain may be moving many cases below the guidelines recommendation. The Commission concluded that plea bargained sentences should ordinarily fall within the guidelines, but that it would be appropriate to grant to
the defendant a one point reduction in the offender score for the entry of a guilty plea (see Recommendation 5a).

3.7 Impact of Sentencing Guidelines on Sentencing Disparity. Structured sentencing schemes such as voluntary or presumptive guidelines are explicitly crafted to take into account legal characteristics pertinent to the sentencing outcome (e.g., prior record, offense seriousness). Sentencing disparity that springs from such legal characteristics is considered warranted disparity. *Unwarranted* sentencing disparity arises when extralegal factors, such as race, class, or gender influence the sentence outcome.

While discussion of sentencing disparity tends to focus on individual level characteristics of the offense or the offender, sentencing disparity may also emerge at the court, county, or city level within a particular state. Courts located in rural jurisdictions, for example, may adopt more punitive sentencing practices than courts located in urban jurisdictions. Informal sentencing practices (e.g., the "going rate") spring from differences in local crime rates and court volume, as well as from local culture and values.

Research on the effect of sentencing guidelines (particularly voluntary sentencing guidelines) on unwarranted sentencing disparity is sparse. Several state sentencing commissions (Minnesota, Washington, and Oregon) examined the impact of *presumptive* sentencing guidelines on unwarranted disparity with regard to race and gender. By and large, the implementation of presumptive sentencing guidelines appeared to reduce, although not eliminate sentencing disparity.

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26 Tonry (1993:168) summarizes the findings of the Minnesota sentencing commission as follows: "The Minnesota commission's three-year evaluation concluded that racial differences in sentencing declined under guidelines; nonetheless, minority defendants were likelier than whites to be imprisoned when the presumptive
Research assessing the impact of voluntary sentencing guidelines on unwarranted disparity is even less common.\textsuperscript{27} The national evidence that is available suggests that voluntary sentencing guidelines do not appear to substantially reduce sentencing disparity. Commentators speculate that it is the voluntary nature of the guidelines which seems to limit their effectiveness.\textsuperscript{28}

\textit{Commission Research.} Research conducted for the Commission examined the relative influence of legal and extralegal factors on sentence outcome during the last 10 years with special emphasis placed on the effect of race/ethnicity on sentence outcome (see Appendix C). Since sentencing guidelines are expected to focus attention exclusively on legal factors (e.g., criminal history of the offender and severity of the offense), extralegal factors such as race/ethnicity or gender would not be expected to influence the sentence outcome. The Commission also explored geographical sentencing disparity at the county level in Maryland.

The research relied exclusively on data extracted from sentencing guidelines worksheets completed by court clerks at each circuit court. Measures of legal and case processing factors included a summary measure of a defendant's criminal history (i.e., offender score), a summary sentence prescribed non-state imprisonment, minority defendants received longer sentences than similarly categorized whites, and men received longer prison sentences than similarly categorized women. Similar findings emerged in Washington and Oregon. Despite a reduction in racial disparity in Washington, white defendants appeared to be more likely to benefit from the use of mitigating provisions (e.g., for first-time offenders). In Oregon, "whites were slightly less likely than minority defendants to receive upward dispositional departures, slightly more likely to receive downward dispositional departures, and much more likely to benefit from an 'optional probation' alternatives program." (Tonry, 1993:169).


measure of the seriousness of the offense (i.e., offense score), mode of disposition (e.g., plea agreement or trial), and circuit court. Extralegal factors included race/ethnicity, gender, and age.

It is important to note that the range of legal and extralegal factors available by way of the sentencing guidelines worksheets was limited. To the extent that relevant factors have been excluded (e.g., education, employment history, socio-economic status) or inadequately measured (e.g., offense seriousness), the effects of the included variables may be biased.

The research revealed that offense seriousness and prior record were the most powerful predictors of sentence outcome, as expected. However, after statistically adjusting for the influence of legal factors, extralegal factors (in particular race/ethnicity) was found to influence the incarceration decision. For example, the predicted probability of incarceration for White individuals equaled 0.56, while the predicted probability of incarceration for Nonwhite individuals (Black, Hispanic, and individuals classified as Other Race) equaled 0.65.

Sentence outcomes (e.g., incarceration rate and imposed sentence length) for select, violent offenses were also examined at the county level to assess sentence variation by county (see Appendix D). The Commission found some evidence of geographical sentencing disparity.

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29 The research also examined whether the effect of extralegal factors on sentence outcome varied by crime category (i.e., person, drug, property). While the effect of race/ethnicity was similar across crime categories for the incarceration decision, its effect on sentence length varied by crime category. Race/ethnicity did not appear to influence sentence length for person and property crimes. However, it did appear to influence sentence length for drug crimes.

30 A comparison of unwarranted sentencing disparity in Maryland before and after the implementation of the sentencing guidelines revealed that while the guidelines appeared to reduce unwarranted sentencing disparity, it was not eliminated (Griffin, 1994).

31 The logistic regression function was used to calculate the predicted probability of incarceration. The predicted probability of incarceration refers to a hypothetical individual characterized by average levels of all explanatory variables included in the model except race/ethnicity. See King, G (1989) Unifying Political Methodology: The Likelihood Theory of Statistical Inference. Cambridge: Cambridge University Press, 104-105.
(particularly when sentence outcomes in Baltimore City were compared to sentence outcomes in more rural counties). The Commission did not reach a consensus as to whether such disparity should be considered warranted or unwarranted disparity given the concern for local values and traditions.

In summary, the results of the research on sentencing disparity in Maryland suggest that while legal factors such as a defendant's criminal history and the seriousness of the offense have the most powerful influence on sentence outcome, extralegal factors appear to play a lesser role in determining the sentence outcome. Given the limited range of extralegal factors available in the data, it is not possible to conclusively identify the extralegal factors that influence the sentence outcome. For example, the observed effect of race/ethnicity on sentence outcome may proxy in part for the effect of excluded variables such as employment or socio-economic status on sentence outcome (to the extent that they are correlated with each other and to sentence outcome). Nevertheless, the research suggests that the sentence outcome is not simply a function of legal factors and that the adoption of sentencing guidelines has not entirely eliminated the consideration of extralegal factors.

3.8 Commission Survey of Public Perceptions. The Survey Research Center at the University of Maryland conducted a telephone interview for the Commission of adult Maryland residents selected at random (see Appendix E). The purpose of the survey was to measure citizens' attitudes and perceptions of a number of crime and criminal justice system related issues.32

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32 The survey questioned respondents about the following issues: (1) crime rates; (2) the causes of crime; (3) effective responses to crime; (4) effectiveness of criminal justice system components (police, courts, sentencing, corrections); (5) the viability of correctional options programs; and (6) corrections and sentencing policy changes.
With regard to citizen perceptions of judicial sentencing practice, the survey revealed the following:

- More than one-half of the citizens surveyed believe that judicial leniency is a major cause of crime.
- Almost two-thirds of the respondents ranked Maryland's courts as either "good" or "fair."
- Nearly two-thirds of the citizens surveyed believe that rich people are treated better than poor people in court.
- Nearly 60% of the respondents believe that judges should maintain some judicial discretion in sentencing nonviolent offenders (as opposed to the law dictating the sentence).
- Less than one-half of the respondents believe that judges should maintain some discretion in sentencing violent offenders (as opposed to the law dictating the sentence).

In summary, citizens seem to express interest in limiting judicial discretion, particularly in the sentencing of violent offenders. Judicial leniency is perceived by slightly over one-half of the respondents to be a major cause of crime. Nearly two-thirds of the respondents also believe that rich people receive better treatment in court than poor people (a perception related to sentencing disparity).

It should be noted, however, that citizens perceptions do not necessarily mirror reality. For example, while approximately 66% of Maryland citizens surveyed believe that violent crime rates have increased in the last 5 years, the violent crime rate per 100,000 residents has actually decreased by 7.2% in Maryland. Similarly, while almost 60% of Maryland residents believe that violent offenders are sent to prison "half the time or less," the incarceration rate for serious, violent offenses\(^{33}\) ranged from 85% for robbery to 100% for murder.

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\(^{33}\) Serious, violent offenses include: (1) murder -- 1st or 2nd degree; (2) rape -- 1st or 2nd degree; (3) robbery (with or without a deadly weapon); and (4) assault with the intent to maim, murder, rape, or rob.
3.9 Commission Recommendations Regarding Judicial Sentencing

3.9.1 Statement of the Problem. The charge of the Commission on Criminal Sentencing Policy was to recommend judicial sentencing policy guided by the following primary objectives: (1) Reduce unwarranted sentencing disparity in sentences for offenders who have committed similar offenses and have similar criminal histories; and (2) Preserve meaningful judicial discretion in the imposition of sentences and sufficient flexibility to permit individualized sentences.

To that end, the Commission studied structured sentencing reforms in other states (particularly states that have implemented presumptive sentencing guidelines). The Commission heard testimony from experts in the field of sentencing and collected information on other state guidelines systems. The Commission also examined the impact of the existing voluntary sentencing guidelines on judicial sentencing in Maryland (i.e., judicial compliance and sentencing disparity). A subcommittee on Sentencing Guidelines Development was created to scrutinize components of the existing guidelines (e.g., measures of offense seriousness and criminal history).

A major goal of the existing sentencing guidelines is to "promote increased equity in sentencing" by reducing unwarranted sentencing disparity. Despite the stated objectives, however, Commission research raised questions about the effectiveness of the existing guidelines in reducing unwarranted sentencing disparity. Low judicial compliance is the most obvious indicator of the ineffectiveness of the existing guidelines system. Judicial compliance to the existing guidelines over the last 10 years averages 55%. While low compliance in and of itself may render the guidelines ineffective in reducing unwarranted sentencing disparity, additional