Jurisdiction Profile: Model Penal Code

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1. THE SENTENCING COMMISSION

Q. What year was the commission established? Has the commission essentially retained its original form or has it changed substantially or been abolished?

The Model Penal Code: Sentencing ["Code"] was finalized in May 2017. It was drafted by The American Law Institute and is a formal set of recommendations on criminal sentencing in U.S. jurisdictions. The full Code consists of both model black letter legal language and extensive commentary and notes by the draft authors.

The Code recommends that each American jurisdiction creates a permanent sentencing commission as an essential feature of its criminal justice system. Under the Code, each jurisdiction must tailor a commission to local needs, available resources, and specific governmental structures.[1] A commission's form, therefore, may adapt to a jurisdiction's changing characteristics.

Q. Membership: who appoints them, for what terms, with what required qualifications?

The Code offers illustrations of two alternative commission membership structures because "no one formula for a commission's composition has proven superior to all others in past decades of experience." The first alternative, with fewer members, is based loosely on the Minnesota commission, while the second more closely resembles the North Carolina and Ohio commissions.[2]

Both structures have key features in common: sentencing commissions should contain a "critical mass of experienced judges from the trial and appellate benches." They should also have other members representing the "sectors of the criminal justice system most intimately concerned with sentencing law and policy, as well as from the public at large."[3] Commission members should serve staggered terms. In most jurisdictions, the chair should be one of the commission members from the judiciary.[4]

Q. Is the commission an independent agency, or is it located in or hosted by some other state agency?

Commissions should be independent state agencies located within *any* branch of the state government. Regardless of agency location, it is key that these agencies be "independent, nonpartisan, broadly representative of the criminal-justice system and the public, and have a strong contingent of members from the state courts."[5]

Q. How many staff does the commission have? Are they dedicated to the commission, or shared with another agency?

Each commission should have adequate, dedicated personnel to carry out its core statutory functions, including an executive director who takes ultimate responsibility for the commission's activities. A commission should also have a research director and research associates who can collect and analyze relevant data.[6]

Q. What is the commission's current statutory mandate?

Permanent non-partisan sentencing commissions should play a role in developing guidelines and crafting sentencing policy in collaboration with judiciaries.[7]

Commissions have initial and ongoing duties. The initial responsibility of each commission is to use a period of time (in the example, two years) to promulgate sentencing guidelines and to develop a correctional-population forecasting model. Commissions must also recommend a community corrections strategy. These tasks entail doing a great deal of research on sentencing issues within the jurisdiction, and the research efforts should culminate in a final, publicly available report.[8]

Ongoing commission duties include updating sentencing guidelines as well as taking steps to implement them and monitor their use. Commissions must investigate and attempt to remedy any inequities across population groups that they observe in sentencing. Commissions should also study the desirability of regulating charging discretion among prosecutors, the plea bargaining discretion among parties, prison-release discretion, and sanctioning discretion for violations of sentence conditions.[9]

Commissions must collect and maintain salient sentencing data and make full use of available data and research from other agencies. One use of this data should be to make accurate correctional population projections that account for fiscal, resource, and demographic (e.g. racial) impacts of sentencing. This includes making projections each time proposed legislation may change an aspect of sentencing. In addition, commissions should remain informed about the practices of other commissions and guidelines systems.[10]

Every ten years, Commissions must perform an omnibus review of the entire sentencing system that will provide an assessment of the laws and guidelines over time. This review should also focus on the adequacy of correctional resources, on areas in which data and research are lacking, and on comparison with other similar jurisdictions over time. Finally, it should contain recommendations to the legislature for future action.[11]

There are also certain Commission duties that are merely encouraged; legislatures may opt to task commissions with these. To that end, commissions may offer recommendations on changes in legislation or criminal procedure, conduct or participate in original research to test the effectiveness of sentences imposed/served, or research the subsequent histories of offenders who have completed sentences of various types and the effect of those sentences upon offenders, victims, and their families and communities.[12]

Q. Do statutes and/or guidelines identify management of prison and jail resources as a goal?

Commissions should "ensure that adequate resources are available for carrying out sentences imposed and that rational priorities are established for the use of those resources."[13] Commissions must also prepare correctional population projections once a year and whenever new guidelines or laws affecting sentencing are proposed.[14] Guidelines developed by commissions must operate within existing, funded correctional resources.[15] In addition, community corrections strategies must be evaluated for their impact on correctional resources.[16] The ten-year omnibus review performed by each commission should contain an assessment of the correctional resources available over time and should recommend means to address shortfalls or to better utilize resources.[17] Finally, commissions may have a hand in promulgating guidelines for what should happen if overcrowding does occur in prisons, jails, probation, or post-release supervision programs.[18]

Q. Are sentencing practices studied by means of annual or other regular data sets? If so, are those data sets made available to outside researchers?

Commissions should gather ongoing data in order to study sentencing practices within the state and to monitor the operation of sentencing guidelines. All commission reports must be published and data gathered by commissions ought to be public information.[19]

2. THE GUIDELINES

Q. When were the guidelines first implemented?

The Code was finalized in May 2017.

Q. In recent years, have they been modified at least once a year?

Proposed amendments to the guidelines should be made as needed in the judgment of each commission, but no more than once a year. New or amended guidelines should apply to offenses committed after the effective date of the changes.[20]

Q. Do the commission's recommended initial or modified guidelines require affirmative legislative approval, or do they take effect subject to legislative override?

Both models of legislative interaction with new or amended guidelines are acceptable under the Code. The drafters note that "successful state guideline systems have grown up under both legislative override and adoption frameworks. Strong arguments can be advanced in favor of either approach."[21]

Q. Do the sentencing guidelines only apply to felonies, or are some misdemeanors and other lesser offenses also covered? Are some felonies excluded (e.g., those subject to life and/or death penalty)?

Sentencing guidelines should be for both felonies and misdemeanors. The drafters of the Code acknowledge that "most states have formulated guidelines for felonies alone," but that a "growing number of systems" have guidelines for both. The policy choice to recommend inclusion of misdemeanors in the guidelines rests in part on the fact that large numbers of misdemeanor convictions occur in all American jurisdictions and that the harshest penalties for misdemeanors can sometimes be more severe than for low-grade felonies. "A comprehensive approach to fairness, effectiveness, and the efficient use of resources in sentencing law should accordingly reach misdemeanors as well as felonies."[22]

Q. Is a grid used? Are there multiple grids? How many severity levels does the grid contain?

Under the Code, there is room for "wide latitude" in the expression of the ideas contained within guidelines. The drafters comment that "the two-dimensional grid carries certain advantages that a commission should consider. Most guidelines grids are simple to use. A grid also displays at a single glance numerous policy choices of critical importance to the system as a whole." However, the commentary goes on to state that a key drawback of grid systems is that they generally emphasize only two key variables in sentencing: criminal history, and the severity of the crime.[23]

According to Code commentary, in many U.S. jurisdictions, a simple two-dimensional grid that weighs crime severity and criminal history is used to determine presumptive sentences; but this is certainly not the only possible way to calculate a sentence. Even within grid systems, there are often "extra-grid" factors that influence penalties. Furthermore, commissions must consider what role criminal history should play in calculating sentence; there is no specific position on whether or how much criminal history should influence sentencing, although principles of restraint are set out for commissions to consider.[24]

Q. How is the presumptive sentence determined?

The Code advocates proportionality in sentencing derived from the commission's collective view on appropriate sanctions in typical cases. Commissions should "fashion presumptive sentences to address ordinary cases within defined categories."[25] Furthermore "presumptive sentences may be expressed as a single penalty, a range of penalties, alternative penalties, or a combination of penalties."[26] All factors relevant to the purposes of sentencing listed in the Code may be considered by sentencing commissions in crafting presumptive sentences.[27]

Commissions are also encouraged to utilize reliable risk and needs assessments in sentencing. This type of assessment may, for example, allow a person who would otherwise face a presumptive prison term to serve a community based sentence; under the Code this would not be considered a departure from the presumptive sentence.[28]

Q. Is the choice among types of sentences regulated by a "disposition" or other prison in/out line? Are "out" sentences accompanied by suspended execution of prison or suspended imposition of sentence? By definitive preclusion or prison for those cases?

The Code does not require jurisdictions to utilize sentencing grids, therefore it does not provide guidance on the use of disposition lines. However, guidelines should address the use of both incarceration and community-based sentences.[29] Suspended-execution prison sentences are discouraged, and there is no provision for suspended imposition of sentence; however, even without suspension, prison is an allowed sanction for violation of the conditions of probation.[30] In other words, all community-based sentences are free-standing and not part of a prison sentence.

Q. Are there border boxes or other categories permitting multiple sentence types?

The Code does not require jurisdictions to utilize sentencing grids, therefore it does not provide guidance on the use of border boxes. However, guidelines may express presumptive sentences in the form of alternative penalties (in lieu of a single penalty, or range of penalties).[31]

Q. Are the guidelines purely advisory, or are they legally binding?

The Code recommends legally binding, "presumptive" guidelines as the best choice for sentencing systems. Advisory guidelines are considered the second-best alternative, strongly preferable to having no guidelines system in place. Thus there is alternative language, replacing "presumptive" with "recommended" in key provisions to accommodate states that have or wish to implement advisory guidelines.[32]

3. DEPARTURES AND SIMILAR ADJUSTMENTS TO GENERALLY-RECOMMENDED SENTENCES

Q. What is the overall/general standard for departure?

For jurisdictions with presumptive sentencing guidelines, "in sentencing an individual offender, sentencing courts may depart from the presumptive sentences set forth in the guidelines, or from other presumptive provisions of the guidelines, when substantial circumstances establish that the presumptive sentence or provision will not best effectuate [the overall goals of sentencing]."[33] However "a sentencing court may not base a departure on a mere disagreement with a presumptive sentence as applied to an ordinary case."[34]

For jurisdictions with advisory sentencing guidelines, the court must "give full consideration" to the applicable guidelines and must "consult the guidelines as useful benchmarks" when sentencing. However, the guidelines do not carry force of law and departure is at the discretion of the sentencing judge.[35]

Q. Are there lists of aggravating and mitigating circumstances permitting departure? If so, are such lists non-exclusive? Is there a list of prohibited factors?

Guidelines should "include nonexclusive lists of aggravating and mitigating factors that may be used as grounds for departure from presumptive sentences in individual cases."[36]

Guidelines may not give weight to "an offender's race, ethnicity, gender, sexual orientation or identity, national origin, religion or creed, and political affiliation or belief," with some exceptions.[37] In addition, guidelines may not consider criminal conduct other than the current offense, the offender's prior convictions and juvenile adjudications (as included in a criminal history), or criminal conduct admitted by the offender at sentencing.[38]

Finally, guidelines should provide that departures "may not be based on any factor necessarily comprehended in the elements of the offenses of which the offender has been convicted, and no finding of fact may be used more than once as a ground for departure or extraordinary departure."[39]

Q. Do the guidelines expressly address mitigations based on a guilty plea, acceptance of responsibility, and/or providing assistance to law enforcement?

"The commission may include provisions in the guidelines that address whether, under what circumstances, and to what extent, a plea agreement or sentence agreement by the parties may supply an independent basis for a departure sentence or an extraordinary-departure sentence."[40] In addition, "the commission may include presumptive provisions in the guidelines to assist the courts in their consideration of evidence of an offender's substantial assistance to the government in a criminal investigation or prosecution."[41]

Q. Are there limits on the degree of durational (length-of-custody) departure?

A durational departure that yields a sentence more than double the maximum (top-of-range) recommended sentence is considered an "extraordinary departure," and should only be undertaken where "extraordinary and compelling circumstances demonstrate in an individual case that a sentence in conformity with [the maximum] would be unreasonable in light of [the goals of sentencing]."[42] Note also that there are many circumstances in which the court may depart below even statutory mandatory minimums to create a less severe sentence.

Q. Are there limits on the availability of dispositional departure (executed-prison vs. stayed sentence)?

There is no limit to the availability of dispositional departure under the Code.

4. PRISON RELEASE DISCRETION

Q. Does the jurisdiction utilize parole release discretion or has it been abolished for all or most offenders?

The Code recommends abolition of discretionary parole release. One of the key rationales for the drafters' stance is that sentencing discretion should be entrusted to the judiciary instead of to other actors in the system, such as traditional parole boards -- "judges should be the decisionmakers with the greatest share of power to determine criminal sentences."[43]

Q. Does the state have a "truth in sentencing" law, limiting the extent of early release?

The Code contains no "truth in sentencing" provision; thus all prisoners have the same potential for early release based on good time earned. In addition, there is no "life without parole" sentence available, and the drafters recommend systems that grant meaningful consideration of release for life-sentenced offenders.[44]

Q. Do recommended and imposed sentences under the guidelines set the minimum time to serve in prison, the maximum, both the minimum and maximum, a target/recommended/expected prison duration, or some other combination of these parameters?

For incarceration sentences, guidelines must "specify a length of term or a range of sentence lengths."[45] Court sentences of imprisonment are maximum terms,[46] and courts are not required to impose a minimum term for any offense (whether or not it is an offense covered by the guidelines).[47] However, a court's maximum term implies a minimum term, equal to the time the offender will serve if he or she earns all available good-conduct and program-participation credits.

Q. Is the period of post-prison supervision independent of any unserved prison term?

Any period of post-prison supervision is imposed independently of the length of the prison term, served or unserved.[48]

Q. What good-time credits do prisoners earn? Is program participation considered?

Prisoners should automatically be credited with some percentage (recommended to be 15%) of time off of their full terms of imprisonment. This credit can be revoked for misconduct, but only upon a finding by the preponderance of evidence that the prisoner has committed a criminal offense or a serious institutional rule violation; the amount of credit revoked should be proportional to the violation. Prisoners should receive additional credits (also recommended to be 15% of their full terms) for satisfactory participation in institutional programming.[49]

Q. Are prisoners subject to exceptional, "second-look" releasing mechanisms?

Judicial modification of long-term prison sentences is available to prisoners who have served 15 years of any sentence and have applied for review. Consideration for judicial release can reoccur every ten years thereafter. Prisoners are given advance notice of their ability to apply, allowed assistance (which may be provided by non-lawyers) in assembling an application, and may be appointed counsel at the hearing if indigent. Victims and prosecutorial authorities involved are also given advance notice. These cases are heard by a judge or a panel of judges who utilize a specialized set of guidelines drafted by the sentencing commission. These decisions are seen as "resentencing in light of present circumstances" and the inquiry should rest on whether the purposes of sentencing are better served by modification or by completion of the initial sentence.[50] Under a separate provision, judicial modification of long-term sentences due to age, infirmity, family emergencies, or "other compelling reasons" may occur after a hearing process regardless of time served.[51]

5. RELATIONSHIP TO CRIMINAL LAWS

Q. Did the guidelines replace some or all previous statutory maxima?

The Code recommends crimes be divided into at least 5 grades of felonies and 2 grades of misdemeanors, each with a suggested maximum term.[52]

Q. Are guidelines built on top of (i.e., equal to or more severe than) any remaining mandatory minima, or are they set independently and over-ridden whenever a mandatory applies?

Guidelines must not reflect or incorporate the terms of statutory mandatory-penalty provisions; instead, commissions must create penalties independently.[53]

Q. Are some "mandatory" minima subject to case-specific "departure" or other exception?

There are many ways to depart from mandatory minimum sentences. These include:

- Judicial authority to render an extraordinary departure sentence that falls below the mandatory penalty when the circumstances of an individual case would make that penalty unreasonable in light of the purposes of sentencing.[54]
- Judicial authority to deviate from a mandatory penalty when an offender poses an unusually low risk of recidivism according to an actuarial risk assessment.[55]
- Judicial authority to defer adjudication for an offense that carries a mandatory penalty that would not serve the purposes of sentencing.[56]
- Judicial authority to approve negotiated "restorative justice" sentences that supersede a penalty.[57]
- Judicial authority to deviate from an otherwise applicable mandatory penalty when sentencing juveniles in adult court.[58]
- Judicial authority, on motion from the government, to deviate from a mandatory penalty for substantial assistance in investigating or prosecuting another person's crime or criminal case.[59]
- Appellate court authority to modify a sentence imposed under a mandatory penalty that is disproportionately severe.[60]

- "Second-look" sentence modification authority discussed in § 4F above, allowing judicial resentencing of prisoners regardless of mandatory minimum penalties that were imposed.[61] In addition, correctional authority to release prisoners due to overcrowding can supersede mandatory minimum penalties that were imposed.[62]

6. CRIMINAL HISTORY SCORING

Q. What are the major components of the criminal history score?

Each sentencing commission must decide whether criminal history should be included as "a factor in determination of [...] sentences, as grounds for departures from presumptive sentences, or in other provisions of the guidelines."[63] The drafters have intentionally given commissions discretion as how criminal history is used within the guidelines.[64]

While the Code does not suggest any particular score components, there are several that would meet with disapproval. The drafters direct that commissions shall explain and justify any use of criminal history in the guidelines with reference to the purposes in § 1.02(2) [purposes of sentencing and the sentencing system]." The Code recommends that jurisdictions employing criminal history provisions carefully monitor their effects, especially with regard to disproportionate racial/ethnic impact."[65] It also limits the use of juvenile adjudications.[66]

Q. Does the jurisdiction utilize "decay"/washout rules, that is, do old convictions count less or drop out? Which older convictions decay, when, and how?

Commissions must "fix clear limitations periods after which offenders' prior convictions and juvenile adjudications should not be taken into account to enhance sentence. The limitation periods may vary depending upon the current and prior offenses, but shall not exceed [a specified number of] years."[67] The precise duration of the limitation period should be decided in each individual jurisdiction, and may be shorter than ten years; but the drafters of the Code advise that criminal history "should in no case reach back more than 10 years."[68] The drafters also advocate a "sliding scale" approach in which the weight of past crimes decreases over time, even before those crimes completely "wash out."[69]

Q. Do the Guidelines include any other significant limitations on how criminal history can be used (e.g., limits on eligibility for high-history categories; adjustments for older offenders)?

The Code recommends limited, if any, use of juvenile adjudications in calculating criminal history. While whether to include a juvenile record is considered a matter of discretion for each commission, commissions must create "procedural safeguards" around their use. In particular, commissions should take into account that "juvenile court processes in some states are significantly less protective" than their counterparts in adult court. When using juvenile adjudications as part of a criminal history analysis, commissions should also recognize that youth may affect an offender's blameworthiness for a past crime. Therefore, under any guidelines, "the offender's age at the time of the adjudicated conduct shall be a mitigating factor, to be assigned greater weight for younger ages."[70]

The drafters also caution that criminal history is not necessarily a good metric for blameworthiness (as offenders have already been punished for their past crimes), or for assessing risk (as criminal history may over-predict risk).[71]

7. MULTIPLE CURRENT OFFENSES

Q. Are consecutive sentences limited? If so, how (e.g. prohibited, permissive, or mandatory in certain cases; limits on total duration; use of a multiple-counts enhancement formula)?

There is a general presumption in favor of concurrent sentences. However, Commissions may create presumptions in favor of consecutive sentencing for a selected category of cases. Departure from these presumptions requires an adequate written explanation. In cases that do not trigger presumptive consecutive sentencing, there is a "heavy presumption" that the total length of consecutive sentences will not exceed double the maximum term for the most serious offense among the current convictions; a more-than-double sentence is considered an extraordinary departure, requiring a finding of extraordinary and compelling circumstances.[72]

Q. In consecutive sentencing, how is the offender's criminal history taken into account?

The Code does not directly address the issue of how the offender's criminal history is taken into account when sentencing for multiple offenses.

8. ENFORCEMENT MECHANISMS (LOCATION ON THE "ADVISORY"-TO-"MANDATORY" CONTINUUM)

Q. Are recommended sentences enforced by prosecution and defense sentence appeals?

An appeal from a sentence may be taken by any party on the grounds that it is "unlawful, was imposed in an unlawful manner, is too severe or too lenient, or is otherwise inappropriate in light of [the goals of sentencing];" appeal is of right for either party "on the same terms as a first appeal from a criminal conviction."[73]

In a presumptive guidelines system, appellate courts should exercise de novo review of allegedly unlawful sentences or sentencing practices, and of decisions to make extraordinary departures.[74] They should have the authority to reverse, remand, or modify sentences, including mandatory sentences, that are disproportionately severe.[75] The court must uphold decisions to depart from sentencing guidelines, and decisions as to degree of departure, unless they lack a substantial basis in the record. They must also uphold sentences within the guidelines unless the failure to depart was "clearly unreasonable and an abuse of discretion" in light of the goals of sentencing.[76]

In an advisory guidelines system, appellate courts generally have the same standard of review. However, these courts must uphold decisions to depart from sentencing guidelines, including extraordinary departures, unless they are unreasonable in light of the purposes of sentencing.[77]

Q. Are other enforcement methods used (e.g., required reasons for departure; published judge-specific departure rates; narrow permitted sentencing alternatives and/or ranges)?

Whenever a sentence represents a departure or an extraordinary departure from the guidelines, "the court shall provide an explanation of its reasons on the record, including an explanation of the degree of the departure or extraordinary departure."[78] This type of explanation is meant to serve a number of purposes, including to facilitate appellate review.[79] Therefore, an explanation is required even in advisory guidelines systems.[80]

Q. Are some deviations from the guidelines not deemed departures?

There are some circumstances under which deviation from the guidelines is not considered a departure. For example, "unusually low-risk" offenders may be able to receive a community-based sentence or a shorter prison term than indicated in statute or guidelines as a matter of judicial discretion.[81]

Q. Do some deviations require especially strong justification? Or minimal justification?

No sentencing recommendation, rule, standard, or other guideline provision promulgated by the commission itself (and not enacted into law) can carry legal authority greater than "presumptive" authority. While there is more than one definition of the term "presumptive," the drafters of the Code envision a system in which judges have discretion to depart from the guidelines based on aggravating or mitigating factors, but also in which extraordinary departures (i.e. major deviations from binding rules or standards) are held to a higher level of appellate scrutiny.[82]

ENDNOTES

[1] Model Penal Code: Sentencing § 8.01 cmt. (a) (Am. Law Inst., 2017).
[2] § 8.02 cmt. (a).
[3] *Id*. cmt. (b).
[4] *Id.* cmt. (c)-(d).
[5] § 8.01 cmt. (c). There is much variation across the sentencing commissions in terms of location in government, and the reporter's note observes that this variation has made "no obvious difference in commissions' effectiveness within their respective states." State constitutional law (especially with regard to separation of powers) must play a role in the determination of where a commission is located. *See id*. reporter's note (c).
[6] § 8.03 cmt. (a)-(c).
[7] § 8.01 cmt. (b), (f) – (g).
[8] §§ 8.04 cmt. (b) – (d), (g), 8.06.
[9] § 8.05(2) – (3), (5) – (6).
[10] *Id*. at (3); § 8.07.
[11] § 8.09.
[12] § 8.05 at (4).
[13] § 1.02(2)(b)(iv). The authors of the MPC express concern about the lack of correctional resource management and the growth of correctional populations in many states. There is emphasis within the code on the use of correctional-population forecasting models as a means of visualizing the cause-and-effect relationship between various sentencing policies and the utilization of prison beds and other resources. *Id.* cmt. (l).
[14] §§ 8.05(2)(b), 8.07.
[15] § 9.02(9).
[16] § 8.06(2)(d).
[17] § 8.09(1)(b).
[18] § 11.04(1.2).
[19] § 8.05 cmt. (g) (notes that "data gathered by sentencing commissions is public information" and that it should be released to the press, members of the public, academic researchers, etc. However, it cautions that attention should be paid to how information about judges' individual case decisions is reported. For example, judges who use proper discretion should not be labelled as "noncompliant" with the guidelines).
[20] § 9.10(2).
[21] *Id.* cmt. (b).
[22] § 9.02 cmt. (a).
[23] *Id*. cmt. (c).
[24] §§ 9.06(1), 9.06 cmt. (b). See further discussion under "Criminal History Scoring," *infra*.
[25] § 9.04(2)
[26] *Id*. at (3).
[27] § 9.05(1). *See also* § 1.02(2) ("The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are: (a) in decisions affecting the sentencing of individual offenders: (i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders; (ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i); and (iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (a)(ii); (b) in matters affecting the administration of the sentencing system: (i) to preserve judicial discretion to individualize sentences within a framework of law; (ii) to produce sentences that are uniform in their reasoned pursuit of the purposes in subsection (a); (iii) to eliminate inequities in sentencing across population groups; (iv) to encourage the use of intermediate sanctions; (v) to ensure that adequate resources are available for carrying out sentences imposed and that rational priorities are established for the use of those resources; (vi) to ensure that all criminal sanctions are administered in a humane fashion and that incarcerated offenders are provided reasonable benefits of subsistence, personal safety, medical and mental-health care, and opportunities to rehabilitate themselves; (vii) to promote research on sentencing policy and practices, including assessments of the effectiveness of criminal sanctions as measured against their purposes, and the effects of criminal sanctions upon families and communities; and (viii) to increase the transparency of the sentencing and corrections system, its accountability to the public, and the legitimacy of its operations as perceived by all affected communities.").
[28] § 9.08(3).

[29] § 9.02(6).
[30] §§ 6.02(2), 6.15(3)(e). In lieu of suspended imposition of sentence (deferred sentencing), courts have two pre-conviction options: deferred prosecution (§ 6.03), and deferred adjudication (§ 6.04).
[31] § 9.04(3).
[32] § 9.02 cmt. (b); *see also* § 1.02(2) cmt. (p) ("Recognizing that adoption of a presumptive guidelines system will not be feasible in all jurisdictions, the revised Code seeks to assist states that elect to use an advisory system, and help them design the best system possible.").
[33] Model Penal Code: Sentencing § 10.01(2) (Am. Law Inst., 2017).
[34] § 10.01(2)(b).
[35] § 10.01 cmt. (i).
[36] § 9.04(4).
[37] § 9.05(2)(a). However, § 9.05(4) notes that personal characteristics that indicate "hardship, deprivation, vulnerability, or handicap" may be taken into account, "but only as grounds to reduce the severity of sentences […]." Gender may be considered for the limited purposes such as risk assessment or determining treatment needs. *Id*. at (b). An offender's financial circumstances may also be considered when determining economic sanctions. *Id*. at (c).
[38] § 9.05(2)(b). This section "bars consideration at sentencing of alleged criminal offenses that have never been charged, that have been charged but dismissed (perhaps as part of a plea agreement), or that have been charged and tried resulting in acquittals." *Id.* cmt. (e).
[39] § 9.05(3).
[40] § 9.05(5).
[41] *Id*. at (6).
[42] § 10.01(3).
[43] §§ 6.11(10), 6.11 cmt. (n). Additional reasons include concerns about the inability for parole boards to deliver proportional sentences or to meet the utilitarian goal of evaluating rehabilitation; procedural deficits in the paroling process; concerns about board susceptibility to political pressure; and real-world flaws in the rationale that boards control prison population growth. *Id*. cmt. (a).
[44] §§ 6.11(1), 6.11 cmt. (k)(2).
[45] § 9.04(3)(a).
[46] § 6.11(6).
[47] § 6.11(8).
[48] § 6.13(5).
[49] § 11.01.
[50] § 11.02.
[51] § 11.03.
[52] §§ 6.01(1), (4), 6.11(6), (7).
[53] § 9.03(6). Note that the MPC disapproves of mandatory penalties, and "where mandatory penalties exist alongside sentencing guidelines, they frequently introduce punishments that are disproportionate, not subject to the exercise of judicial discretion, and cut free from the prioritization of the use of correctional resources build into the guidelines schemes." *Id*. cmt. (f).
[54] § 10.01(3)(b).
[55] § 9.08(3).
[56] § 6.04(3).
[57] § 6.16(3)(b).
[58] § 6.14(f).
[59] § 10.09(2).
[60] § 10.10(5)(b).
[61] §§ 11.02, 11.03.
[62] § 11.04.
[63] Model Penal Code: Sentencing § 9.06(1) (Am. Law Inst., 2017).
[64] § 9.06 cmt. (b). The MPC "does not require or encourage to build into guidelines the consideration of offender's criminal histories, but it does require the commission to "consider" whether and in what circumstances it is desirable to do so."
[65] §§ 9.06(4) cmt. (f).
[66] §§ 9.06(2), cmt. (d).
[67] § 9.06(3).
[68] § 9.06 cmt. (e).
[69] *Id.*, § 9.06(3).
[70] §§ 9.06(2), cmt. (d).
[71] § 9.06(1).
[72] Model Penal Code: Sentencing §§ 9.07, 10.01(3) (Am. Law Inst., 2017).
[73] Model Penal Code: Sentencing § 10.10(2) (Am. Law Inst., 2017).
[74] *Id*. at (5)(a), (e).
[75] *Id*. at (5)(b). This is referred to as a "subconstitutional" form of review in that it is based on statutory authority to review sentences that does not require the harshness of a sentence to rise to the level at which it would be constitutionally impermissible (e.g. cruel and unusual). *See also id*., § 1.02(2)(a)(i), stating that proportionality is defined relative to "the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders."
[76] § 10.10(5)(d).
[77] *Id*. at cmt. (j) (alternative language for § 10.10 in advisory systems).
[78] § 10.01(4).
[79] *Id.* at cmt. (e). The code offers a number of reasons why explaining a departure is important. First, "it pushes sentencing judges to engage in the disciplining process of justification." In other words, it forces judges to consider their reasoning when crafting a sentence. Second, it "serves the goal of communication of each judge's reasoning process to other judges." Third, it is "an absolute prerequisite of meaningful appellate review of departure decisions." In the drafter's view, "without a statement of the sentencing court's findings of fact and legal analysis in selecting punishment in a given case, the appeals process is unmoored." Finally, it "is intended to enhance the legitimacy of the sentencing process in the eyes of the offender, the victim, and the public."
[80] §§ 10.01 (2), 10.01 cmt. (i).
[81] Richard S. Frase, *Just Sentencing* at 46 (2013), *citing* Model Penal Code:Sentencing § 6B.09(3) (Am. Law Inst., Tentative Draft No. 2, 2011) (currently designated as § 9.08(3)).
[82] §§ 9.02(7) and 9.02 cmt (g); *see also* §§ 10.01 and 10.10(5). Note that under § 10.10 any *heavily* presumptive or binding sentencing rule (such as a rule about extraordinary departure) that will lead to greater appellate scrutiny must be created by the legislature or the courts, and not by the sentencing commission.