The Guardrails Are Off
Why Judicial Discretion in Ohio Criminal Sentencing Has Careened Out of Control and How Data Analytics Can Bring It Back on Course

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ACKNOWLEDGEMENTS

This essay was written primarily for law students and new lawyers just now entering the profession with the purpose of providing them with an early understanding of how the machinery of Ohio's nontransparent criminal justice system operates in reality. It is my hope that it will be helpful in providing this new generation of lawyers with a roadmap for fixing accepted practices and processes which in my opinion directly contribute to disparate treatment of individual citizens and at the same time serve as ineffective policy measures that ultimately threaten the public's confidence in Ohio courts.

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INTRODUCTION

Public confidence in the criminal justice system is its lifeblood. In order for there to be public confidence in criminal sentences, the public must be able to believe that a criminal sentence issued by a judge will be fair, consistent, and proportional to the crime involved in accordance with the rule of law. Public confidence is threatened when a large portion of our citizens believe that sentencing outcomes are not so much determined by the rule of law as by the individual proclivities of the judge who is randomly assigned to preside over a case. The stark reality of sentencing in Ohio includes the strong possibility that two judges would impose two different sentences for the same crime. This difference can encompass the vast range between probation and life imprisonment. This article will attempt to describe the systemic flaws which exist within the present system that allow such profound

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disparities. This article will furthermore argue that the solution for reform lies in moving Ohio toward a data driven criminal justice system, which will, in turn, increase transparency and restore public confidence in the system.

Our criminal justice system exists to accomplish the single goal of impartially resolving the disputes that inevitably occur in society.[1] Every single criminal case, no matter how serious or mundane the subject matter, follows the same basic pattern: an accusation by the government and a denial of that accusation by the accused. In our democracy, judges oversee the adversarial process that resolves these disputes.

The special flexibility used by judges to exercise their authority is labeled "judicial discretion."[2] In Ohio, the two areas where the exercise of this discretion are most profound occur in the judge's oversight of the plea negotiation process and in their formulation of criminal sentences in accordance with sentencing laws. In a system that values having checks and balances on power, mechanisms that determine whether discretion is exercised properly or improperly are essential. Likewise, mechanisms need to exist to correct discretion when it is abused.[3] By understanding "relevant information" as data, a database which contains the multiple variables behind every negotiated plea agreement and criminal sentence may provide the first concrete step towards accountability for judicial decisions. Based on my experience as a trial court judge in Ohio, I endorse the creation of a central, accessible database of plea negotiations and criminal sentencing records to inform judicial discretion and create a transparent, data driven standard of discretion.

The Merriam Webster Dictionary defines the word "discretion" as "the power of free decision or latitude of choice within certain legal bounds."[4] I can recall as a young trial court judge being included on an email list along with fellow trial court judges throughout the state. The primary purpose of the list was to discuss various bills making their way through the legislature. From time to time, members would discuss bills proposing a new mandatory prison sentence upon conviction for certain crimes. Legislation like this almost always provoked the same response from my colleagues on the email list. Many would exclaim "This is terrible policy! They are taking away my discretion!"

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[1] See Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) (The government's "obligation to govern impartially is as compelling as its obligation to govern at all; and [its] interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done" in service of "the twofold aim of which is that guilt shall not escape or innocence suffer").

[2] See Krupp v. Poor, 24 Ohio St.2d 123, 127, 265 N.E.2d 268 (1970), quoting State v. Winne, 21 N.J. Super. 180, 206, 91 A.2d 65 (N.J. Super. Ct. Law Div. 1952); Apprendi v. New Jersey, 530 U.S. 466, 479-482, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

[3] See State v. Beasley, 2018-Ohio-16, 152 Ohio St.3d 470, 97 N.E.3d 474, at ¶ 12 (abuse of discretion defined "as conduct that is unreasonable, arbitrary or unconscionable").

[4] Definition of Discretion, Merriam-Webster, (Aug. 29, 2023) https://www.merriam-webster.com/dictionary/discretion [https://perma.cc/MJX4-85GL]. See also Cook v. City of Bella Villa, 582 F.3d 840, 857 (8th Cir. 2009) (defining judicial discretion as "the realm of reasoned decisions within which a judge decides questions not expressly controlled by fixed rules of law.").

I would often register my agreement with the criticism—after all, as a judge I firmly believed our role as jurists was to make decisions within the ranges of discretion provided in our state laws. As any seasoned trial court judge will explain, every criminal case is unique in some respects. Each case involves facts that could arguably be aggravating (e.g. the seriousness of the harm inflicted by the offender, a pattern of serious criminal conduct); on the other hand there are usually facts that could be considered mitigating (e.g. genuine remorse demonstrated by the offender and a willingness to make amends for the transgression, the unlikelihood of the offense repeating itself in the future, and the lack of past criminal behavior by the offender).[5] Discretion allows trial court judges to properly weigh these competing factors in order to fashion a just outcome for the case before them. This discretion is fundamental to the process of administering genuine justice.

The Fourteenth Amendment's equal protection clause mandates the state to govern impartially and not to draw distinctions between individuals based on differences that are irrelevant to a legitimate government objective.[6] Ohio judges, who are called upon to oversee the plea negotiation process and to formulate criminal felony sentences, are reminded of their obligation to carry out this solemn mandate and treat all those who appear before them consistent with Ohio Revised Code 2929.11 which articulates the overall purposes of felony sentencing in Ohio. This includes punishing the offender, protecting the community against future offenses, and rehabilitating the offender using the least amount of our limited public resources to accomplish these goals.[7] The law also clearly mandates that similar offenders are to be given similar sentences regardless of irrelevant factors like the color of their skin or their socioeconomic place in society.[8] Ideally, judges exercise discretion to compare "apples to apples" and distinguish "apples from oranges" in resolving the wide variety of disputes brought to them.

In the past we have permitted judges, admittedly humans vulnerable to normal human frailties, to simply try to do their best to apply a consistent and proportional exercise of discretion. But these common frailties, such as the strong emotions of anger or pity, implicit and explicit bias, and self-consciousness (especially as it relates to public scrutiny), can produce inconsistent decisions. We know that to consistently and fairly impose sentences, judges need information concerning both their own past sentences and those issued in similar circumstances by their

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[5] OHIO REV. CODE ANN. § 2929.12 (LexisNexis 2023) (setting out the factors judges should consider when imposing sentences for felony offenses).

[6] See WillowBrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) ("[T]he purpose of the equal protection clause of the Fourteen Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination.").

[7] OHIO REV. CODE ANN. § 2929.11.

[8] Id. § 2929.11(B) (LexisNexis) (requiring felony sentences to be "consistent with sentences imposed for similar crimes by similar offenders.").

colleagues on the bench. With the emergence of advanced data-collection and data-compilation capabilities, such information is near at hand.

In an increasingly data-driven society which calls upon decision makers in all walks of life to make decisions with the most relevant information available, we now know the status quo in the criminal justice system is unacceptable. Judges who are wary of data collection should realize that the proverbial genie is now out of the bottle. Sophisticated data mining and analytics are coming to their courts whether they like it or not and the decisions that they have made without scrutiny in the past will soon be under a microscope to an extent they never could have imagined. This means that if judges value, as they should, their ability to properly exercise discretion and treat similarly situated offenders with similar sentences on a consistent basis, they should embrace data collection as a tool which will enhance their ability to treat defendants more fairly and consistently.

I. THE ABUSE OF DISCRETION

A. *Overseeing the Plea Negotiation Process*

Unlike their federal counterparts who are strictly prohibited from engaging in the plea negotiation process between the government and the accused, state court judges in Ohio can and often will involve themselves in the negotiation process. [9] One would expect that judges who exercise their discretion to either accept or reject proposed plea agreements would turn to objective, well-defined criteria to guide them in deciding whether a proposed plea agreement is appropriate. That type of guidance simply does not exist in Ohio. The courts of appeals in Ohio have repeatedly stated that the trial court enjoys wide discretion to decide whether to accept a plea agreement.[10] Indeed, a defendant has no absolute right to have a guilty plea accepted.[11]

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[9] Compare Fed. R. Crim. P. 11(c)(1) (prohibiting federal judges from participating in discussions leading to a plea agreement), with Ohio Crim.R. 11(F) (merely requiring that any "underlying agreement upon which the plea is based shall be stated on the record in open court" and placing no limitations on judicial participation), and State v. Byrd, 63 Ohio St.2d 288, 293-294, 407 N.E.2d 1384 (1980) (discouraging judicial participation in plea bargains but holding "that such participation [does not] per se render[] a plea invalid under the Ohio and United States Constitutions.").

[10] See, e.g., Akron v. Ragsdale, 61 Ohio App.2d 107, 109, 399 N.E.2d 119 (9th Dist. 1978) ("[W]e believe the final judgment on whether a plea bargain shall be accepted must rest with the trial judge."); State v. Mucci, 7th Dist. No. 02 JE 13, 150 Ohio App.3d 493, 2002-Ohio-6896, 782 N.E.2d 133, ¶ 21 (citations omitted) ("[T[he trial court has the discretion to accept or reject a plea agreement.").

[11] Santobello v. New York, 404 U.S. 257, 261–262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) (citations omitted) ("There is, of course, no absolute right to have a guilty plea accepted. A court may reject a plea in exercise of sound judicial discretion."); Lafler v. Cooper, 566 U.S. 156, 168, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012) [quoting Missouri v. Frye, 566 U.S. 134, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012)] ("[D]efendants have no right to be offered a plea . . . nor a federal right that the judge accept it.").

We tell the public that the judge, as a neutral and impartial actor in the adversarial process, is there to simply ensure that any proposed plea bargain is being entered knowingly and voluntarily by the accused with full awareness of the possible penalties they are facing at sentencing and the constitutional rights they are giving up in exchange for their admission of guilt.[12] As every practitioner in Ohio is aware, however, this is not what takes place in reality. As a direct result of not having any objective criteria to govern judicial discretion, Ohio's nearly 400 separately elected trial court judges are free to develop their own philosophies regarding their discretionary power, which can and often do vary widely from courtroom to courtroom. The absence of any form of "guardrail" or check on this discretion produces different sentencing outcomes based solely upon the individual proclivities of the judge. Every criminal practitioner is additionally aware that in order to effectively advocate for their client, they must first attempt to assess the individual philosophy of the judge who is assigned to their case and tailor their advocacy accordingly. The dynamics of judicial engagement in the negotiation process, which most often results in an eventual plea agreement, quite often escape any form of scrutiny either from the press, the public, or any reviewing court. The reason for this is that the specifics of these discussions most often take place in off-the-record conversations between the judge, the prosecutor, and the defense attorney, usually in the judge's chambers.[13]

I began to question the ethics of off-the-record discussions shortly after I became a trial court judge in 2005. After experiencing what I have described as a career-changing epiphany, I arrived at the conclusion that no party, including the judge, should ever say anything in off-the-record discussions that they would not repeat verbatim in open court.[14] From that point forward, all my discussions concerning plea resolutions took place on the record in the courtroom where everyone involved in the case, including the defendant and the victim, could listen to the specifics. Since that time in my career, I have not heard one convincing argument that a judge who engages in the negotiation process should do otherwise.

As the neutral participant in the adversarial process, someone who our current U.S. Supreme Court Chief Justice John Roberts has stated is there to simply "call the balls and strikes,"[15] I viewed my job in the plea negotiation process as making sure that any proposed plea agreement had been produced through arm's-length

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[12] State v. Dangler, 162 Ohio St.3d 1, 2020-Ohio-2765, 164 N.E.3d 286, ¶ 10 (pleas must be made knowingly, voluntarily, and intelligently).

[13] Under the current rules only the underlying agreement itself to be placed on the record, and then only in felony cases. Ohio Crim.R. 11(F).

[14] Donnelly, Truth or Consequences: Making the Case for Transparency & Reform in the Plea Negotiation Process, 17 Ohio St. J. Crim. L. 423, 429 (2020).

[15] Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States: Hearing Before the S. Comm. On the Judiciary, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.).

negotiations and that any inducements or promises were memorialized prior to accepting the plea. Accordingly, if parties presented me with a proposed agreed-upon sentence, I was always open to such a proposed resolution. This made sense to me because, as in any negotiation, both adversaries were seeking some form of benefit. The government was seeking resolution and some level of accountability for the criminal conduct it believed had occurred and the defendant was most often seeking some degree of leniency in the resulting sentencing outcome.

Not all my colleagues shared this philosophy. Some of my colleagues made it clear to the litigants that they were not amenable to accepting any proposed agreed-upon sentences. The parties were free to present their sentencing recommendations at the appropriate time, however, the judge made it clear at the plea hearing that the court was not bound to follow any recommendations. In fact, some of my former colleagues on the trial court would not discuss the topic of sentencing at all until the actual sentencing hearing.

Over my 14 years on the trial court, through discussions with fellow jurists, practitioners and reading many appellate decisions focusing on plea negotiations, I observed at least three different philosophies that operate within the Ohio system regarding a judge's discretion over the plea negotiation process. I have attempted to encapsulate them below:

Judicial Philosophy #1	**Judicial Philosophy #2**	**Judicial Philosophy #3**
• Judge welcomes discussions regarding sentencing • Judge will accept negotiated plea agreements which are negotiated at arm's length including agreed upon sentences or sentencing ranges. • Judge will not sentence more severely than a sentence requested by the state even if he/she has the discretion to do so.	• Judge will permit off the record discussions regarding sentencing. Judge may or may not represent what sentencing consequences will be prior to accepting the plea. • Judge will not accept agreed sentences. • Judge will listen to sentence recommendations but will not be bound. Judge retains the right to sentence more severely than a sentence requested by the state.	• Judge will not discuss the topic of sentencing at all. • Whatever plea arrangement is negotiated by the parties is solely between them and if the sentence does not involve mandatory prison time the sentencing consequences are solely up to the judge. • Sentencing consequences will be revealed at the sentencing hearing. A defendant may or may not receive a benefit from the plea agreement they decided to enter into beforehand. • Judge's sentencing discretion is unrestricted by recommendations by the parties. Judge retains the right to sentence more severely than a sentence requested by the state.

Not every judge fits squarely into one of the above-described philosophical camps. Because our present system lacks any objective criteria governing the plea negotiation process, a judge's perspective can change from case to case. This lack of objective criteria is a major systemic flaw that directly produces drastically disparate

sentencing outcomes. Until we as a profession agree to address this fact, a disparity of outcomes will continue to occur every day throughout Ohio's courtrooms.

Additionally, the opacity that obscures judicial oversight in the plea negotiation process provides fertile ground for other types of injustice. In 2021, I wrote a dissent in the case of Ohio v. Dunlap, a case which did not garner enough votes from my colleagues on the Ohio Supreme Court to be accepted for review. [16] If what Mr. Dunlap alleges occurred is true, he was led to believe by off record discussions with his attorney that he was virtually assured a sentencing outcome of community control sanctions (what Ohio sentencing laws label as probation).[17] The attorney stated that in exchange for entering a plea to a felony drug charge, Dunlap's jail time would not exceed 60 days, if there was any jail time at all. Dunlap assented to the plea agreement and, based on his attorney's advice, answered in the negative when asked by the judge as to whether anyone made any promises or representations regarding the sentencing outcome. Dunlap's negative answer is what I have often described as "the most repeated lie" in Ohio courtrooms at plea hearings. It is also potentially the most harmful, as in Dunlap's case, because once his plea was entered, the court proceeded to immediately sentence him to eight years in prison rather than his imagined worst-case scenario of 60 days in jail.

Whether the sentence Dunlap eventually received was appropriate for the criminal conduct at issue is, in my opinion, immaterial. If Dunlap's claims are true, he did not deserve to receive the sentence in the manner he did – essentially by being ambushed at his sentencing hearing. Despite his assertion that he had evidence of misleading attorney advice, Dunlap's post sentence request to vacate his plea fell on deaf ears and the trial court denied his request without a hearing.[18] Unfortunately, claims like Dunlap's occur all too frequently in Ohio as a direct result of courts permitting off record discussion to take place during the plea negotiation process.

II. DISCRETION IN FORMULATING CRIMINAL SENTENCES

Ohio law directs all trial court judges to impose similar criminal sentences for similarly situated defendants.[19] Without any accessible data to keep track of their own sentences and sentences imposed by other judges, trial court judges are severely limited in their ability to carry out this mandate. Until this major flaw is corrected, Ohio's present sentencing scheme will remain unintentionally, but undisputedly, primed to produce widely disparate outcomes.

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[16] Ohio v. Dunlap, 161 Ohio St.3d 1416, 2021-Ohio-181, 161 N.E.2d 704.

[17] Id. at ¶ 2.

[18] Id. at ¶ 3.

[19] OHIO REV. CODE ANN. § 2929.11(B).

It is well settled law that a trial court judge has no inherent power to create the sentences it imposes on criminal defendants.[20] All sentencing ranges are set by the legislature. Trial court judges, who upon election swear an oath to follow the law of Ohio, must respect this limitation on their discretionary power.[21] To illustrate this point, you may ask any seasoned Ohio trial court judge whether they have ever during their career sentenced a defendant to prison on a single felony of the fifth degree which is the lowest, usually nonviolent, felony offense in our criminal code. The judge will undoubtedly answer in the affirmative even though current Ohio law presents certain legal presumptions that favor a prison term for high-level felonies, usually violent crimes, and a presumption in favor of community control sanctions for lower level, usually nonviolent, crimes.[22] Judges in Ohio are free to follow or completely disregard these presumptions at their own discretion.[23] If you ask the judge in a fifth degree single felony case if they have ever imposed a prison sentence of ten years or more after considering all the facts and circumstances of the case, they would undoubtedly smile at the absurdity and refer you to the narrow sentencing range (between a six-month minimum and a one year maximum) imposed by the state legislature.[24]

The problem with Ohio's present sentencing scheme is that a judge is very rarely provided with such a limited range of discretion. The Ohio legislature has empowered the 88 elected county prosecutors to charge a criminal defendant with a multitude of different felony charges that can be reasonably supported by the facts of any given criminal case. Depending on what charges are left on the table before the sentencing judge as a result of a trial or, more likely, a negotiated plea agreement, the ranges of sentences available to the trial court judge can grow to staggering proportions.

One need to look no further than the highly publicized case Ohio v. Gwynne.[25] This was one of the first cases I was called upon to review as a newly elected justice on the Supreme Court of Ohio in 2019. Ms. Susan Gwynne was a 55-year-old woman who was charged with numerous felony-related crimes in Delaware

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[20] State v. Anderson, 143 Ohio St.3d 173, 2015-Ohio-2089, 35 N.E.3d 512, ¶ 10 (citations omitted).

[21] Id. at ¶ 10 ("[J]udges are duty-bound to apply sentencing laws as they are written."); Colegrove v. Burns, 175 Ohio St. 437, 438, 195 N.E.2d 811 (1964) ("Crimes are statutory, as are the penalties therefor, and the only sentence which a trial court may impose is that provided for by statute.").

[22] OHIO REV. CODE ANN. § 2929.13.

[23] Given the breadth of discretion that Ohio trial judges wield, it is no surprise that such presumptions barely register as speed bumps along the road to imposing prison terms.

[24] OHIO REV. CODE ANN. § 2929.14(A)(5).

[25] State v. Gwynne, 158 Ohio St.3d 279, 2019-Ohio-4761, 141 N.E.3d 169.

County.[26] She apparently dressed in scrubs to avoid detection while she entered various nursing homes facilities for the purpose of stealing property from the senior citizens in residence. Her criminal activity resulted in the police identifying 46 victims from at least 12 separate facilities.[27]

Defense counsel negotiated a plea agreement in which Gwynne agreed to plea to numerous felony and misdemeanor counts, including burglary and theft.[28] According to her attorney, he attempted to negotiate a sentence of three to four years while the state sought a sentence in the range of 10 to 15 years. At the change of plea hearing, the trial court thoroughly discussed the multitude of outcomes that Gwynne faced, from the lenient to the severe, based on the number of counts and the judge's discretion. During this discussion, the trial court repeatedly used the phrase "if I send you to prison," thus implying that a community control sanction was a possible outcome.[29] Meanwhile, the state kept silent regarding its position on Gwynne's sentence at the plea hearing.

Once the plea had been accepted, the court ordered a presentence report and set a date for a sentencing hearing. The state proceeded to submit a memorandum that inexplicably recommended two wildly divergent sentences: either a 42-year sentence, "the minimum prison term on each felony conviction, all served consecutively to each other" or two years, "the minimum sentence on each felony, to be served concurrently."[30] Defense counsel advocated for community control, or, if a prison term was imposed, for the sentences to be imposed concurrently. The defense also indicated that Gwynne would pay restitution.

Gwynne arrived at her sentencing hearing not knowing whether she would receive probation and be released that day or whether she would receive a sentence so lengthy that she was likely to die in prison. The trial court imposed a 65-year sentence – 23 years more than the prosecution had sought.[31] The sentence was longer than many murderers and rapists have received. In a deeply divided decision, the Supreme Court of Ohio could not even agree on whether Ohio's appellate courts are empowered to review Gwynn's sentence.[32] Ultimately, we remanded the case to the

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[26] Id. at ¶ 4.

[27] Id. at ¶ 3.

[28] Id. at ¶ 5.

[29] Id. at ¶ 78 (Donnelly, J., dissenting).

[30] Id. at ¶ 80.

[31] Id. at ¶ 81.

[32] Compare id. at ¶ 17-18 (concluding the appellate court could not review Gwynne's sentences under O.R.C. § 2929.11 and § 2929.1, but the appellate court could review the sentences for compliance with R.C. 2929.14(C)(4)) with id. at ¶ 26 (Kennedy. J., concurring in judgment only) (asserting that review of Gwynne's consecutive sentences was not properly before the court).

appellate court for it to consider an issue that had not been appealed to us.[33] Though we afforded a glimmer of relief to Gwynne at the time, we provided little if any guidance to the lower courts. Unsurprisingly, the lack of guidance provided in the initial Gwynne opinion led to the Ohio Supreme Court accepting the case for a second time.[34] By the time this occurred I had spoken out publicly about the case as being evidence of an overall flawed sentencing scheme without proper checks and balances,[35] so I recused myself and was replaced by the Honorable Mary Jane Trapp from Ohio's Eleventh District Court of Appeals. In December of 2022, a four-to-three majority of the court held that Ohio's sentencing laws did in fact empower appellate courts to review allegations of improper consecutive sentences that were not supported by the record.[36] In a cruel twist of fate for Ms. Gwynne however, the ruling would not survive long. In January 2023, a new configuration of the court voted to reconsider the ruling and in October 2023 reversed course and issued a plurality decision that sadly affirmed the trial court's original sentence.[37] For the time being, Ms. Gwynne's fate seems to have been sealed, and all prison sentences in Ohio, whether concurrent or consecutive, can fall anywhere in the immense range the Ohio legislature has authorized and appear to be insulated from any meaningful appellate review. Unless the legislature responds to this reality, widely disparate and excessive prison sentences will continue to be the rule in Ohio rather than the exception.

Some individuals may misinterpret my criticism of the Gwynne sentence as directly critical of the individual trial court judge who imposed it. Let me be clear: it isn't. Judges exercise their discretionary power within the guardrails provided to them by the legislature. In my opinion, no person should be provided with a range of discretionary power where at a single sentencing hearing on any given day their duty is to decide between a range of probation and 100 years of prison. A sentencing scheme which allows this to happen is fertile ground for implicit bias to take root and grow to massive proportions. A trial court judge solely focusing on providing justice to the vulnerable elderly victims in the Gwynne case, the sentimental value of property which was stolen from them and the emotional toll and understandable anger from the victims' families can easily provoke the fully retributive sentence that was expressed in the 65 years that the trial court judge imposed. The trial court judge had no other information before him which would provide him with the ability to view the case from a larger perspective of how similarly situated defendants have been sentenced in the past both by him and his colleagues throughout the state. This

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[33] Id. at ¶ 19-20.

[34] State v. Gwynne, 2022-Ohio-4607 (No. 2021-1033).

[35] Michael P. Donnelly, Sentencing by Ambush: An Insider's Perspective on Plea Bargaining Reform, 54 Akron L. Rev 223, 231-33 (2021).

[36] State v. Gwynne, --- Ohio St.3d ---, 2022-Ohio-4607, --- N.E.3d ---.

[37] State v. Gwynne, --- Ohio St.3d ---, 2023-Ohio-3851, --- N.E.3d ---.

information would have acted as a guardrail against an understandable inclination to unleash the punishment that eventually took place.

Moreover, the collection of data would allow policy makers to decide upon reasonable ranges for specific criminal transgressions based on empirical evidence of what exactly is necessary to satisfy the policy goals reflected in Ohio law, including public safety, proportional consequence of punishment, rehabilitation, and deterrence.[38] Until this is accomplished, both interested journalists and academics will continue to find and report the statistical evidence that show the present sentencing scheme is vulnerable to widely disparate outcomes of either bafflingly excessive lenience or equally horrifying punishment. Meanwhile, this current sentencing scheme will continue to sow seeds of mistrust within a large percentage of the public.

Take for instance a viral episode of two sentencing hearings that took place in August 2021 in separate Cuyahoga County courtrooms.[39] A white female defendant who was convicted of stealing approximately a quarter of a million dollars over time while employed as a village clerk received probation.[40] In just less than 24 hours from that sentencing hearing, a different judge sentenced a black woman who had stolen approximately 40 thousand dollars from a school system in Cuyahoga County to an 18-month prison sentence.[41] The main difference between the two cases which appeared to involve similar facts was the white defendant's ability to pay full restitution.[42] The news account of these two sentences sparked outrage, not only locally, but throughout the country as an example of racial and economic injustice.[43]

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[38] OHIO REV. CODE ANN. § 2929.11 (LexisNexis 2023).

[39] See Sonia M. Gipson Rankin, ESSAY: What's (Race in) the Law Got to Do With It: Incorporating Race in Legal Curriculum, 54 Conn. L. Rev. 923, 945 (2022).

[40] See State v. Bosworth, Cuyahoga C.P. No. CR-20-654857 (Aug. 2, 2021); see also Cory Shaffer, Former Chagrin Falls village clerk who stole $250K over 20 years spared jail time, CLEVELAND.COM (Aug. 5, 2021, 11:09 a.m.), https://www.cleveland.com/court-justice/2021/08/former-chagrin-falls-village-clerk-who-embezzled-250k-spared-jail-time.html.

[41] See State v. Hopkins, Cuyahoga C.P. No. CR-20-650491 (Aug.3, 2021); see also Cory Shaffer, Former Maple Heights High School secretary sentenced to prison for stealing $40K from school, CLEVELAND.COM (Aug. 4, 2021, 1:58 p.m.), https://www.cleveland.com/court-justice/2021/08/former-maple-heights-high-school-secretary-sentenced-to-prison-for-stealing-40k-from-school.html.

[42] See Cory Shaffer, White woman who stole $250K gets probation, while Black woman who stole $40K goes to jail. Disparate sentences spark calls for reform, CLEVELAND.COM (Aug. 9, 2021, 1:07 a.m.), https://www.cleveland.com/court-justice/2021/08/cuyahoga-county-judges-disparate-sentences-for-white-black-women-who-stole-public-money-sharpens-calls-for-statewide-sentencing-database.html.

[43] See, e.g., Disparate Sentences in Ohio Court Raise Questions of Racial Injustice, EQUAL JUST. INITIATIVE (Aug. 13, 2021), https://eji.org/news/disparate-sentences-in-ohio-court-raise-questions-of-racial-injustice/.

The account remained the lead story on local online news for numerous days as it was being tweeted and retweeted throughout social media.

It should cause alarm for every Ohio citizen that there are no guardrails on trial courts' discretion and no checks or balances in appellate review which could curb excessively disproportionate sentences under Ohio's current sentencing scheme. The Supreme Court of Ohio has consistently responded to cases requesting meaningful appellate review of excessive sentences by, in my opinion, gutting any perceived authority in these courts to amend unreasonable sentences.[44] Until this is corrected, sentencing outcomes will depend on the metaphorical roulette wheel spun for a defendant when a judge is assigned to their case at their first court appearance.[45]

III. THE POWER OF DATA

Treating like cases alike has been one of the central tenets of justice since the time of Aristotle.[46] Conversely, if you are going to treat someone differently than you have treated other similarly situated individuals in the past, then you should be required to articulate a valid reason to demonstrate that your decision is not arbitrary.

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[44] See State v. Gwynne, 158 Ohio St.3d 279, 2019-Ohio-4761, 141 N.E. 169, ¶ 17-20 (lead opinion) (concluding that R.C. 2953.08(G)(2) does not permit appellate courts to use R.C. 2929.11 and 2929.12 when reviewing a criminal defendant's consecutive sentences); but see id. at ¶ 63-73 (Donnelly, J., dissenting) (asserting that the statutory framework governing appellate review of felony-sentences permits review of sentences contrary to law); State v. Jones, 163 Ohio St.3d 242, 249 (Ojio 2020) (clarifying that O.R.C. 2953,08(G)(2)(a) and (b) do not allow appellate courts to vacate sentences based on a lack of sufficient evidence to support the trial court's findings under R.C. 2929.11 and 2929.12); but see id., at 256 (Donnelly, J., dissenting) (interpreting the statutory provisions as permitting appellate courts to review the facts supporting the legal justifications for sentences); State v. Toles, 166 Ohio St.3d 397405 (Ohio 2021) (Donnelly, J., dissenting) (criticizing as "absurd" the results for appellate review flowing from recent Ohio Supreme Court jurisprudence).

[45] During my fourteen years on the trial bench, I regularly presided over the roulette table, otherwise known as the court's arraignment room. This was the room where the criminally accused made their initial appearance and would learn which judge was randomly assigned to oversee their case. From time to time, you would hear an audible groan or observe a visible grimace from attorneys in the room if the names of certain judges with reputations for consistently imposing more severe sentences than other judges were called. An example of this reaction was recently captured in news footage which can be observed here: go.osu.edu/ChzW. The significance of this example has nothing to do with the identity of the particular judge involved (whose name has been muted), and everything to do with the fact that this type of inconsistency in sentencing has existed for time immemorial and it is now time for the profession to address it.

[46] See Aristotle, Nicomachean Ethics bk. V., 95–96 (Robert C. Barlett & Susan D. Collins, eds. & trans., 2011) (sets out formula giving rise to this maxim). See also Robert E. Goodin, Treating Likes Alike, Intergenerationally and Internationally, 32-Policy Sciences, 189, 189-206 (1999) (describing Aristotle's "time-honored formula" of justice as "treating like cases alike and dissimilar cases differently, proportionally to their differences"); Catharine A. MacKinnon, Toward a Renewed Equal Rights Amendment: Now More Than Ever, 37 Harv. J. L. & Gender 569, 570–71 (2014) (criticizing the use of Aristotelian equality in U.S. law as leading to inequitable results); Vacco v. Quill, 521 U.S. 793, 799, 117 S.Ct. 2293, 138 L.Ed.2d 834 (citations omitted) ("[The Equal Protection Clause] embodies a general rule that States must treat like cases alike . . . .").

In the past, this principle has been treated in our courts as an aspirational ideal rather than a strictly adhered-to goal. It can seem impossible to achieve in a vast system of endless disputes officiated by a large cast of fallible people. Fortunately, advances in technology and data collection have demonstrated that we can now work toward this goal of system-wide fairness with more precision beyond anything we could have imagined when I began my legal career 30 years ago. Shortly after I joined others in Ohio to advocate for the creation of a centralized criminal sentencing database, I met a prominent criminal defense attorney named Diane Menashe who had independently arrived at the same conclusions I had about the power of data. She provided me with a sentencing anecdote that struck my mind as both a perfect diagnosis of Ohio's present sentencing scheme and a prescription for its illness.

In 2017, Ms. Menashe represented a 34-year-old woman who had been indicted in Franklin County Ohio on numerous felony charges including involuntary manslaughter.[47] Diane's client was a heroin addict who had shared a lethal dose of the drug with another woman and had fled the crime scene after attempts to save the woman were unsuccessful. Ms. Menashe was able to persuade the assistant prosecutors in charge of the case to dismiss some of the numerous charges in exchange for her client's admission to the remaining charges. However, despite efforts to arrive at an agreed sentence to present to the judge presiding over the case, the State was unwilling to agree to such a proposal.

The judge assigned to the case had a reputation for fairness and a willingness to listen to the arguments of both sides at sentencing. Ms. Menashe felt confident she could present enough mitigating facts about her client's background, her acceptance of responsibility and genuine remorse about her actions to persuade the court to exercise some leniency in formulating the appropriate sentence in accordance with the overall purposes of felony sentencing outlined in Ohio Revised Code 2929.11 and 2929.12.

As the sentencing date approached, Ms. Menashe learned that the state intended to advocate for a sentence of 13 years in prison. Intuitively, she felt that such a sentence was exceptionally more severe than other similar cases had been treated in the same courthouse. She needed evidence for her intuition, but nothing was on hand for her to present to the judge. That is when she did something extraordinary: she dedicated herself to researching Franklin County public records – hours and effort beyond what the average defense attorney can typically devote to a single case – to search for examples of similarly situated defendants. The result was a sentencing memorandum the likes of which I had never seen in 14 years of conducting sentencing hearings in Ohio. She was able to locate nine separate cases of defendants who had appeared before other Franklin County judges convicted of similar charges with similar underlying facts. Amazingly she was able to track down the sentencing recommendations made by the prosecutor in charge of the case. Many of the cases

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[47] State v. Mays, Franklin C.P. No. 17-CR-3138 (June 16, 2017).

were prosecuted by the same assistant prosecutors she would face at the upcoming sentencing hearing.

When Ms. Menashe's client's sentencing hearing went forward, the State, as expected, advocated for a term of 13 years, well within the court's statutory discretion. Diane directed the court's attention to the evidence attached to her sentencing memorandum which demonstrated similar offenders receiving prison sentences as low as two years, but not exceeding five years. She further reminded the judge of his duty to follow the mandate of Ohio Revised Code 2929.11(B) and impose a sentence consistent with sentences for similar crimes committed by similar offenders. The judge stated on the record that he could not ignore this evidence and sentenced Ms. Menashe client within the range for which she was advocating.[48]

A little over a year after Ms. Menashe first shared this enlightening anecdote, I found myself perusing a daily news digest I receive from the Supreme Court containing headlines for cases throughout the state. One headline from the Columbus Dispatch caught my attention. It was a story of a man from Grandview Heights charged with involuntary manslaughter in Franklin County after supplying a fatal dose of heroin and then fleeing the crime scene.[49] The sentence he received did not amount to years in prison, but, rather, community control sanctions, Ohio's version of probation. I forwarded the link to Diane with a subject line, "sentencing is all over the board." The outcome came as no surprise to Diane whose client unfortunately could never have contemplated such a fortunate result. This was not Diane's first rodeo in Ohio's imperfect criminal sentencing system. Her efforts to recommend a data-driven system, however, make her a trailblazer, demonstrating how a criminal sentencing database would benefit every legal professional working in Ohio.

IV. RESISTANCE TO CHANGE

Throughout my career as a judge, I have been fortunate to observe and, in some cases, participate in numerous concerted efforts to help advance the justice system in order to make it more transparent and equitable for everyone. Each of these efforts were initially met with resistance by some of the stakeholders in the system who, at the time, were satisfied with the status quo. When I began my career as an Assistant County prosecutor in 1992, Ohio did not have what we now refer to as "open

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[48] Kathleen Maloney, Striving toward Justice with Data, Court News Ohio (August 2022), https://www.courtnewsohio.gov/inDepth/2020/August/default.asp#.X0_1vFVKgdV (last accessed Aug, 29, 2023) [https://perma.cc/AWR7-Q8RV.

[49] Dean Narciso, Columbus man gets community control for providing fentanyl that killed 17-year-old, Columbus Dispatch (Aug. 13, 2020, 12:19 p.m.), https://www.dispatch.com/story/news/local/2020/08/13/columbus-man-gets-community-control-for-providing-fentanyl-that-killed-17-year-old/42207999/https://perma.cc/QQ38-RKWQ.

discovery" in criminal proceedings.[50] This meant that for cases I was assigned to prosecute, I was not required to provide defense counsel with copies of police reports, written witness statements, and other information in my case file during any of the pretrial hearings that ultimately led up to the defendant's trial date. Instead, consistent with the custom at that time, I would read the information contained in those materials to defense counsel at pretrial conferences, and they would simultaneously take copious handwritten notes that they would rely upon in order to make important decisions on how they would advocate for their client. Defense counsel would have to trust that I was providing them with all the information which was vital to this most essential function of the criminal defense bar.

This nontransparent discovery process was still the status quo when I assumed a seat as a trial court judge on the common pleas bench in 2005.[51] I can recall quite clearly that it was not uncommon during my early years on the trial court to hear complaints from defense attorneys that they were receiving vital information shortly before the trial began or worse, after the trial was well underway. In January of 2010, a chorus of advocates—mostly from the defense bar and from the media—raised enough awareness of the problem that the Supreme Court of Ohio finally amended the rule governing pretrial discovery, requiring that the state turn over copies of such documents.[52] And just like that, I observed defense attorneys' frequent claims of ambush before trial largely disappeared.

The opponents of open discovery back then raised arguments that seemed very powerful at the time, but in retrospect can be seen as solely being based upon fear and misunderstanding. Those opposing open discovery feared that it would result in a mass intimidation by defendants of victims which would handicap prosecutors in their pursuit of holding the guilty accountable.[53]

When examining the present-day arguments opposing the call for a data-driven criminal justice system, I can clearly see the parallels from the arguments raised at that earlier time. For instance, just earlier this year I was invited to speak to students at my alma mater, the Cleveland State College of Law, to attempt to persuade these soon to be new lawyers that providing judges with relevant criminal-sentencing data would facilitate fairer and more just sentencing decisions. I sensed in talking to these

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[50] See Ohio Crim.R. 16 as adopted effective July 1, 1973; State ex rel. Steckman v. Jackson, 70 Ohio St.3d 420, 428, 639 N.E.2d 83 (1994) (Ohio Crim.R. 16 "does not provide for what is often called 'full,' 'complete' or 'open file' discovery").

[51] The originally adopted version of Ohio Crim.R. 16 remained in effect from 1973 until 2010.

[52] Peter Krouse, Ohio Supreme Court says criminal defense lawyers, prosecutors, must share evidence, CLEVELAND.COM (Jan. 1, 2010), https://www.cleveland.com/metro/2009/12/ohio_supreme_court_says_crimin.html [https://perma.cc/S8Q3-HGPY.

[53] Mark Gillispie, Prosecutor Bill Mason rejects open discovery rule, Cleveland.com (Nov. 19, 2008), https://www.cleveland.com/metro/2008/11/prosecutor_bill_mason_rejects.html; Regina Brett, Prosecutor Bill Mason's concern about protecting witness identities is a phone issue, CLEVELAND.COM (Nov. 23, 2008), https://www.cleveland.com/brett/blog/2008/11/regina_brett_prosecutor_bill_m.html [https://perma.cc/SAD6-7UQE].

students—who had been raised during an era in which they had far more information at their fingertips than I had had at that age—that this was not a very difficult idea to sell.

Interestingly, I had a conversation with their professor a few weeks after my presentation, and I was glad to learn that they had heard from an opposing voice. A former colleague of mine from the trial court was called upon to address the class regarding sentencing. The judge was aware that I had appeared weeks before and indicated that he disagreed with my arguments in favor of data collection. According to the professor, the judge drew a picture of a football goal post on the drawing board within the classroom. This was designed to metaphorically represent a judge's judicial discretion in imposing a prison sentence on a serious felony of the first degree. On the left goal post, he placed the number 3 to represent the minimum number of years he could impose as a prison term, and on the right goal post he placed the number 11 to represent the most severe prison sentence. He told the students that this is what the law allowed and as long as he "kicked the ball" between the poles, the law said that he was good, end of story. He then added his opinion that what I was advocating for was that all judges should impose the minimum. I wish I had been present there to correct him about my argument, because I would have told him that simply was not the case. He was free to exercise his discretion to impose a prison sentence anywhere within those parameters, just as before, but if the data revealed that both he and his colleagues had treated similarly situated defendants with a three-year sentence, he simply had to explain to the public a reason why he might deviate from that standard to a harsher sentence.

As just one stakeholder in this profession, I believe it's our solemn obligation to weigh the merits of any call for reform, as well as all the opposing arguments. If academics wish to test the underlying suppositions of this article that Ohio criminal sentences currently lack consistency and proportionality and do not efficiently achieve the overall purposes of criminal sentencing, a database exists to prove this hypothesis. The Ohio Department of Corrections is currently sitting on a gold mine of collected sentencing data, which can be examined for study by any member of the public. In fact, we could determine right now the frequency in which all judges make a subjective call on whether to impose concurrent sentences, where the sentences run parallel to each count and are deemed complete whenever the most severe sentence has been completed. Or conversely, run sentences consecutively, stacking one on top of each other. Further, our policymakers in the legislature could answer very important questions that they should be asking as to how efficient the current sentencing scheme is achieving the policy goals of providing public safety, rehabilitation for offenders, and lowering and reducing levels of criminal recidivism.

Ohio's criminal justice system lacks critical guardrails on judicial discretion and other discretionary decisions being made throughout the entire system. Until this critical problem is addressed public confidence in the justice system will continue to suffer. The lack of confidence threatens the very fabric of the free and orderly society we all desire. To address these systemic flaws, it is critical that every stakeholder within the system agree to sit down at the table and begin the discussion

of how we implement a data driven criminal justice system that each and every Ohio citizen deserves.