The Use of Sentencing Data and the Importance of Getting it Right

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INTRODUCTION

Adult felony sentencing is one of the most serious responsibilities of government. Philosophies on sentencing have changed through the decades, from Three Strikes You're Out in California in the early '90s, to Truth in Sentencing in the late '90s and early 2000s, to today's era of criminal justice reform efforts. Regardless of the philosophy, each philosophy and the subsequent law was based on some type of data collection. Legislators at the time thought the data was accurate and comprehensive, but it has long been missed by such policymakers that sentencing data cannot be accurate and comprehensive because it is often missing an important piece—the victims.

This article will explore why sentencing data cannot be accurate and comprehensive. Additionally, if the data is not accurate and complete, the data and sentencing platform proposed by the Ohio Supreme Court's Sentencing Commission in 2019 is destined to be manipulated and ultimately will misinform the public.[1] It is imperative that when data is given to the public and relied upon by lawmakers, it shows a comprehensive picture for every single criminal case and the sentence pronounced.

I. MISINFORMATION IS DANGEROUS

The Misinformation Effect is "the way that false or misleading information distorts a person's understanding of a topic or event, even if they have a factual understanding of the topic or event."[2]

The rise of the internet and social media has proven to be both a blessing and a burden to society. While society has never been more connected nationally and globally, allowing individuals to create communities where it was once impossible, social media and mainstream media has also allowed for misleading or even flat-out false news to be pushed as the truth. This, in turn, hurts the fabric of an informed

[1] Since this article was written, the Ohio Sentencing Data Platform has been paused for reasons independent of this article.

[2] Helen Lee Bouygues, *The Misinformation Effect and the Psychology Behind Fake News*, REBOOT (May 13, 2022), https://reboot-foundation.org/misinformation-effect/ [https://perma.cc/Q593-FUJD].

citizenry. This "fake news" has the ability to overpower the truth, skewing what the majority believes regardless of the truth.

On social media, falsehoods and misinformation almost always dominate and outpace the truth on reaching the wider audience.[3] Even if the falsehoods are not outright nefarious lies but instead a misrepresentation or partial picture of what occurred, they can send social media into a frenzy.

The 2019 Covington Catholic incident is the perfect encapsulation of this misinformation phenomena that plagues social media. It also demonstrates why the phenomena is so dangerous. Initially, a short video clip was characterized by the news and social media users to portray a high school boy wearing a "Make America Great Again" hat confronting a Native American elder. The high school boy was described as "smug" and much worse as this initial short video clip made rounds on the internet. Many viewers and news sources disavowed the high schooler's behavior as an encapsulation of the many issues in America.[4]

However, when the full and accurate clip of the interaction was released, it actually demonstrated that the high school boy and his classmates were not the aggressors, but instead, the Native American elder came up to them.[5] And while some in the media and on social media platforms took back their critical comments of the high schoolers, there were still some that doubled down on the original narrative of the teen as the aggressor.[6] As a result of the "half-story" published by numerous media groups, media outlets also published that the high school boy involved sued several news sources for defamation and settled several of the lawsuits with newsgroups like CNN, The Washington Post, and NBC news.[7] This is just one

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[3]   Robinson Meyer, *The Grim Conclusions of the Largest-Ever Study of Fake New*s, THE ATLANTIC (Mar. 8, 2018), https://www.theatlantic.com/technology/archive/2018/03/largest-study-ever-fake-news-mit-twitter/555104/ [https://perma.cc/5XMW-DS74].

[4]   Isaac Stanley-Becker & Kristine Phillips, *Trump Slams Media Over Portrayal of Confrontation Between Catholic Students and Tribal Elder*, WASH. POST (Jan. 22, 2019), https://www.washingtonpost.com/nation/2019/01/22/trump-slams-media-over-portrayal-confrontation-between-catholic-students-tribal-elder [https://perma.cc/8VF4-RU3Q].

[5]   Robby Soave, *A Year Ago, the Media Mangled the Covington Catholic Story. What Happened Next Was Even Worse*, REASON (Jan. 21, 2020), https://reason.com/2020/01/21/covington-catholic-media-nick-sandmann-lincoln-memorial/ [https://perma.cc/DB4W-XP5V].

[6]   Laura Wagner, *Don't Doubt What You Saw with Your Own Eyes*, DEADSPIN (Jan. 21, 2019), https://deadspin.com/dont-doubt-what-you-saw-with-your-own-eyes-1831931203 [https://perma.cc/ZA6B-QWJP].

[7] *See* Reuters, *Covington Catholic student sues the Washington Post for defamation*, THE GUARDIAN (Feb. 20, 2019) https://www.theguardian.com/media/2019/feb/20/nicholas-sandmann-washington-post-lawsuit-defamation [https://perma.cc/GT44-27WN]; Ebony Bowden, *Washington Post settles $250M suit with Covington teen Nick Sandmann*, The N.Y. Post (July 24, 2020) https://nypost.com/2020/07/24/washington-post-settles-250m-suit-with-covington-teen-nick-sandmann/ [https://perma.cc/84W5-2WZY]; Carol Zimmermann, *CNN settles lawsuit with Covington Catholic student from viral video*, NAT'L CATH. REP. (Jan. 8, 2020)

example of how incomplete information—only a portion of a filmed interaction—turned into a viral misinformation fest. Misinformation has allowed people to misrepresent situations and facts to serve their own agendas, regardless of whether additional context is available.[8]

Another notable incident was the 2014 Rolling Stone story titled "A Rape on Campus." This article purported to detail a brutal gang rape that occurred at a University of Virginia fraternity.[9] While disturbing, outlets like The Washington Post started to poke holes in the reporting and the story.[10] Eventually, the story was revoked and the author of it apologized, while the Columbia Graduate School of Journalism declared that the story failed to engage the most basic journalistic practices.[11] The impacts of such misinformation were widespread. UVA suspended the fraternity in question, though it was eventually reinstated after the Charlottesville police cleared it of any wrongdoing.[12] As a consequence of their article, Rolling Stone had to pay $1.65 million to the fraternity over the fabricated story.[13] Yet, beyond the fraternity, the story has been used to doubt other instances of sexual assault, especially during the onset of the #MeToo movement.[14]

Now, imagine if these "stories" had been published by a government agency or entity ordained to seek justice and truth, like the Ohio Supreme Court. The integrity

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https://www.ncronline.org/news/cnn-settles-lawsuit-covington-catholic-student-viral-video [https://perma.cc/44CY-CH4R].

[8]   *See also* Mike Wendling, *No, Damar Hamlin was Not Replaced by a Body Double*, BBC NEWS (Jan. 25, 2023), https://www.bbc.com/news/world-us-canada-64404824 [https://perma.cc/FX3U-EXT3]. (Damar Hamlin, a NFL player for the Buffalo Bills, was subject to multiple conspiracies that he was dead and replaced by a body double following a serious cardiac incident during the 2022-23 NFL season. To some, Hamlin's almost tragic death also allowed them to support conspiracies about the COVID-19 vaccine and the "Died Suddenly" movement.).

[9]   Ravi Somaiya, *Rolling Stone Article on Rape University of Virginia Failed All Basics, Report Says*, N.Y. TIMES (Apr. 5, 2015), https://www.nytimes.com/2015/04/06/business/media/rolling-stone-retracts-article-on-rape-at-university-of-virginia.html [https://perma.cc/3XM7-CXAL].

[10]   Hanna Rosin, *The Washington Post Inches Closer to Calling the UVA Gang Rape Story a Fabrication*, SLATE (Dec. 10, 2014), https://www.slate.com/blogs/xx_factor/2014/12/10/rolling_stone_sabrina_rubin_erdely_the_washington_post_inches_closer_to.html [https://perma.cc./2WSV-85NP].

[11]   Somaiya, *supra* note 7.

[12]   T. Rees Shapiro, *Police Clear U-Va. Fraternity, Say Rape Did Not Happen There*, WASH. POST (Jan. 12, 2015), https://www.washingtonpost.com/local/education/phi-kappa-psi-fraternity-reinstated-at-university-of-virginia/2015/01/12/1b6ddd50-9a69-11e4-96cc-e858eba91ced_story.html [https://perma.cc/V8Q5-36BR].

[13]   Sydney Ember, *Rolling Stone to Pay $1.65 Million to Fraternity Over Discredited Rape Story*, N.Y. TIMES (June 13, 2017), https://www.nytimes.com/2017/06/13/business/media/rape-uva-rolling-stone-frat.html [https://perma.cc/NU32-AUWQ].

[14]   Lucia Graves, *Five Years On, the Lessons from the Rolling Stone Rape Story*, THE GUARDIAN (Dec. 29, 2019), https://www.theguardian.com/society/2019/dec/29/rolling-stone-rape-story-uva-five-years [https://perma.cc/2MEB-FV7N].

of the Court and the criminal justice system would be forever tarnished by these misrepresentations and misinformation. As government leaders and shapers of laws and policies, we simply cannot allow for one of the most serious responsibilities of the government—adult felony sentencing—to be based on incomplete information or misinformation.

Information is false or misleading if it lacks integrity in both accuracy and comprehensiveness.

II. THE OHIO SENTENCING DATA PLATFORM AND ITS IMPOSSIBLE TASK

In 2019, then-Chief Justice of the Ohio Supreme Court Maureen O'Connor requested that the Ohio Criminal Sentencing Commission begin the process of adopting a uniform sentencing system to be used by felony courts in Ohio. According to its website, the Commission's mission "[was] to establish standardized, common data essential for identifying relationships and trends common to all felony courts in Ohio."[15] This resulted in the generation of a packet of forms for courts to use across the State and also served as the impetus for the creation of the Ohio Sentencing Data Platform (OSDP).

As acknowledged by the Sentencing Commission, "[t]he package of felony sentencing documents is the first step to begin standardized, aggregate felony sentencing data collection in Ohio."[16] The Commission further acknowledged that "the proposed sentencing entry will provide consistency in the way the judges impose sentences and will establish specific data points."[17] The Commission further stressed that the "long range vision-[was a] *comprehensive* database."[18] In support of its "long range vision," the Commission further wrote "[t]he public must be informed so they can have faith in our justice system. They must be able to see equal justice for all, believe what they see, and be able to see injustice when it occurs. The way to demonstrate and then monitor equal justice is in facts and figures, in metrics and transparency."[19] But therein lies the OSDP's impossible task in 2019—creating the truly comprehensive database it advocates for.

It is also widely believed, by some criminal justice stakeholders, that one of the end goals of some of those involved with the OSDP project is to use the data to promote uniform felony sentencing in Ohio and eliminate judicial discretion in adult felony sentencing.[20] It is hard to deny such a belief when the Commission's own

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[15]   Ohio Criminal Sentencing Commission, Sentencing Database: Background & Path Forward, 1, 1 (2021).

[16]   *Id*.

[17] *Id.*
[18] *Id.*
[19] *Id*.

[20]   Letter from Ohio Prosecuting Att'y's Ass'n Executive Director Louis Tobin to OCSC Director Sarah Andrews (June 6, 2022).

document writes "the proposed sentencing entry will provide consistency in the way judges impose sentences[.]"[21]

III. SENTENCING DATA COLLECTION IS NOT A NEW CONCEPT

As a prosecutor, I love data. I use it in my office to set policy, to budget, to study and understand juries, and to make plea offers. I have the ability to generate the data myself from our case management system or I can ask the Clerk of Courts for publicly available data as well. I look at data relevant to Delaware County because that is the community I serve. I care about using data to protect and to serve the citizens of Delaware County for whom I work. And so, to point to where judges in our state do not have access or the ability to examine their own internal sentencing data, the ODSP sentencing database would be an excellent tool for judges. Judges should be able to look at their own historical data when making sentencing decisions.

But the goals of creating the ODSP do not stop at simply providing a historical view of sentencing for judges. Two additional goals include making this sentencing data widely accessible to the public and being the foundation for criminal justice reform through uniform felony sentencing. The Commission wrote that a "unified data system . . . would serve as an intelligent and productive umbrella over many initiatives including bail reform, pretrial detention, access to justice, fair and impartial treatment at trial, and sentencing reform."[22]

The collection of sentencing data is not a new concept. It has been done in various countries, including the United States Federal Government. However, an overarching theme is clear: When sentencing data is collected and made publicly available, the data is missing key pieces for various reasons. Therefore, incomplete data should not be used to draw conclusions to set policy or legislative changes.

In 2001, a group of scholars set out to independently analyze the data collected by the U.S. Sentencing Commission as it pertained to corporate criminal sentences.[23] The authors noted that the data was "incomplete and non-representative" of the actual cases.[24] Further, the data failed to note or explain important variables including the harm that was caused.[25] Similar to the ODSP, the U.S. Sentencing Commission touted a "comprehensive, computerized data collection system which forms the basis for its clearinghouse of federal sentencing information[.]"[26] The

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[21]   *Id.*

[22]   *Id.*

[23] Cindy R. Alexander et. al, *Evaluating Data on Corporate Sentencing: How Reliable Are the U.S. Sentencing Commission's Data?*, UNIV. OF S. CAL. L. SCH. RSCH. PAPER SERIES, 5 (2001).

[24]   *Id*. at Abstract.

[25]   *Id*.

[26]   *Id*. at 2.

authors cautioned that this incomplete data, while having some research value to the Commission, raises concerns about the data "drawing inappropriate conclusions about sentencing trends."[27]

The ODSP also published a list of other states that collected and analyzed crime data, and only two states at that time—Florida and California—made crime data publicly available. A handful of other states had passed legislation to do so, but the data had not yet been released. Several states collected the information but shared it only with criminal justice partners like law enforcement agencies or other prosecutors.[28]

Important to all of the goals of the OSDP is that the data gathered in the sentencing database be accurate and comprehensive. If the data does not have that integrity of accuracy and comprehensiveness, it should not be relied upon. Capturing comprehensive data on adult felony sentencing is simply impossible, and any article, website, news report, or data platform that purports to provide the complete story of any given case in the criminal justice system will do nothing but further misinformation.

IV. THE OHIO SENTENCING DATA PLATFORM AND ITS IMPOSSIBLE TASK

The OSDP has been given an impossible task. In 2021, a fact sheet issued by the Sentencing Data Commission wrote:

> The public must be informed so they can have faith in our justice system. They must be able to see equal justice for all, believe what they see, and be able to see injustice when it occurs. The way to demonstrate and then monitor equal justice is in facts and figures, in metrics and transparency.[29]

This all sounds well and good, but it is an impossible task.

Criminal prosecution and justice in a courtroom have many different aspects, including humans who do not fall into "facts and figures and metrics." The data collected in the uniform sentencing entry can only show certain pieces of the puzzle. The boxes checked will be missing context and facts from each individual case. The data will not be able to capture the victim who came to court, traumatized and scared. The data will not show a defendant who accepted responsibility and made a

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[27]   *Id.* at 4.

[28]   Ohio Criminal Sentencing Commission, Examples of Statewide Criminal Justice Data Repositories(2020),
https://www.supremecourt.ohio.gov/Boards/Sentencing/committees/uniformSentEntry/RepositoryExamplesFAQ.pdf [https://perma.cc/VUU6-RH64].

[29]   Ohio Criminal Sentencing Commission, Sentencing Database: Background & Path Forward, at 1.

statement demonstrating genuine remorse. But these are both statutory requirements for judges to consider before pronouncing sentence.[30]

The easiest example to give is a Victim Impact Statement. In a criminal prosecution, the victim of the crime has a right to give an impact statement to the court. This legal right allows a victim to submit a statement in writing, or to make an oral statement in court.[31] There are even provisions for probation officers to reach out to victims to gather an impact statement prior to sentencing.[32] Judges who pronounce sentences are legally required to consider the victim impact when arriving at a sentence for a particular defendant.[33]

However, the law has also been crafted to protect Victim Impact Statements from the public eye. Victim Impact Statements are not public records and are legally required to be kept confidential by the parties.[34] One can easily understand the importance of protecting from the public eye this highly impactful, raw, and often painful statement made by victims: The protection is needed to continue to respect the privacy of victims and to encourage raw, truthful statements so that judges understand the impact of a defendant's actions on the person who was actually harmed.

And herein lies one of the biggest problems with the sentencing data platform that cannot be overcome: the role of a victim in sentencing. A Victim Impact Statement, a protected and shielded part of a criminal sentence, cannot be quantified into a data set. The mother who came to every hearing and every day of a trial and wept over the senseless murder of her daughter, and then delivers a powerful Victim Impact Statement will never be able to be quantified, and neither will the actual impact on a judge pronouncing sentence. Did the impact statement persuade the judge to sentence the defendant to life without parole? A data platform, with simple boxes to check by a user, can never give a complete and comprehensive picture of a criminal sentence because a checked box will not have the context or even know the content of a victim impact statement that was given to the court before sentencing.

Another aspect of criminal sentencing that cannot be captured by the sentencing data platform is plea negotiations. According to a research summary prepared in 2011 for the Bureau of Justice Assistance, 90–95% of criminal cases are resolved through plea negotiations at the federal level.[35] A negotiated plea is a non-trial

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[30]   *See* OHIO REV. CODE ANN. §§ 2930.13, 2930.14, 2929.12(E)(5).

[31]   OHIO REV. CODE ANN. § 2930.16.

[32]   *Id*. § 2930.16(B).

[33]   *Id*. § 2930.14(B).

[34]   *Id*. §§ 2930.14(A), 2947.051(C).

[35]   LINDSEY DEVERS, U.S. DEP'T OF JUST., PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY (2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf [https://perma.cc/6QVE-5M7U].

resolution to the criminal charges contained in the indictment. Often, the negotiation begins with the prosecution offering in certain cases to lessen a defendant's exposure at sentencing by dismissing or amending certain counts in an indictment. Plea negotiations can also involve the prosecution recommending a certain sentence to the trial court. In return, the prosecution does not have to go to trial and the case is resolved with a "for sure" conviction.

Plea negotiations are required to be stated on the record in open court.[36] What this translates to is a prosecutor puts the negotiations on the record, and the defendant agrees to those negotiations. What is not typically contained in a prosecutor's statement about negotiations is the "why" behind plea negotiations. Sometimes the why may be obvious, for example, the sentence will be the same regardless of the number of felonies the defendant committed because the offenses all merge. Or, in the case of a juvenile being tried as an adult, a four-year agreed upon prison sentence with the prosecutor is much more palatable than a possible maximum sentence of 30 years. The latter is not something that can be captured by the sentencing data platform.

Likewise, the aspect of plea negotiations and the input of victims in the sentencing process cannot be captured by the sentencing data platform. For example, consider a young child who was sexually assaulted by her next-door neighbor. The case is strong against the defendant as the defendant admitted to facts that corroborate the young child's story. When the prosecutor first met with the young victim and her family, the trauma and pain by all involved was abundant. But now, several months and maybe even a year later, the case is set for trial. The victim's parents plead with the prosecutor not to put their daughter on the stand—she is in such a better place and has begun to heal. The prosecutor knows trial will be brutal and the court process may re-engage or increase the trauma for the child. So, the prosecutor makes an offer, a non-trial resolution for those simple reasons: to spare a child victim. That "why" is not something that can be quantified in a data set. Perhaps a generic box could be checked—"potential trauma to victim"—but that still does not capture the why. And, without the why, the data compiled for this particular case would be incomplete and not comprehensive.

Victims, defendants, and plea negotiations are just a few important pieces of the puzzle to understanding why a particular sentence in a case was imposed. But the practice of criminal justice is not a factory line. It is not one-size-fits-all. Each case has its own set of unique facts and humans involved. Without all of these pieces of information, the ODSP can only present part of the sentencing data. And, if only part of the information is presented then the puzzle presented is false and misleading. False and misleading information, including only partial information, lacks integrity if touted as accurate and comprehensive.

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[36]   Ohio R. Crim. P. 11(F).

CONCLUSION

I have yet to see a publicly available sentencing database that accurately and comprehensively gives context to a criminal case and sentence. Raw data simply cannot capture the human aspect of adult felony cases, including victims and defendants who appear personally before a judge. Without that human context for each case, misinformation is all that can and will result if sentencing data is publicly available. As ministers of justice, we will all be doing a disservice to the institution we serve, the criminal justice system, if we allow misinformation to influence public opinion and policy.