

2021

Sentencing by Ambush: An Insider's Perspective on Plea Bargaining Reform

Justice Michael P. Donnelly

Follow this and additional works at: <https://ideaexchange.uakron.edu/akronlawreview>

 Part of the [Criminal Law Commons](#)

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Recommended Citation

Donnelly, Justice Michael P. (2021) "Sentencing by Ambush: An Insider's Perspective on Plea Bargaining Reform," *Akron Law Review*. Vol. 54 : Iss. 2 , Article 1.

Available at: <https://ideaexchange.uakron.edu/akronlawreview/vol54/iss2/1>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAKron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAKron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

**SENTENCING BY AMBUSH: AN INSIDER’S PERSPECTIVE
ON PLEA BARGAINING REFORM**

*Justice Michael P. Donnelly**

I.	Introduction	223
II.	Criminal Case Basics.....	224
III.	A Plea Bargain is an Agreement	225
	A. How I Became a Student of the Plea Negotiation Process.....	226
	B. A Plea Bargain and Its Pitfalls	227
	C. Off-the-Record Discussions.....	228
IV.	Sentencing by Ambush.....	230
	A. <i>State v. Davis</i>	230
	B. <i>State v. Gwynne</i>	231
V.	Ending Sentencing by Ambush	233

I. INTRODUCTION

Would you ever enter into a contract when you had no idea what benefit you would receive?¹ Would you ever enter into a contract without knowing the terms to which you were obligating yourself? Would you ever enter into a contract when you would not know the answer to these questions until after you had bound yourself to the other side? Such questions may provoke a smile and your own question: “who would ever do that?” The answer, regrettably, is that criminal defendants do it every single day.

* Justice Michael P. Donnelly has served on the Supreme Court of Ohio since 2019. Previously he served for fourteen years in Cuyahoga County Court of Common Pleas as a trial court judge. Special thanks to Cheryl Hannan, Rebecca Rabb, Bob Burpee, and Christine Einloth.

1. An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. *Contract*, BLACK’S LAW DICTIONARY (9th ed. 2009).

In courtrooms across Ohio,² criminal defendants, with the counselled advice of their attorneys, enter negotiated plea agreements to resolve the criminal cases brought against them. A fortunate few are fully aware of the consequences upon entering the agreement—because the judge in their case is amenable to accepting on the record what is known as an “agreed sentence,” where the parties are permitted after an arms-length negotiation to determine the penalty. Another set of defendants will learn from their attorney in private discussions what the judge is inclined to do regarding their sentence. Such a discussion will usually take place after the prosecutor and defense counsel have met with the judge off-the-record in his or her chambers. These defendants, however, must rely on their counsels’ word that the judge will not renege on this inducement at their sentencing hearing. Finally, a significant percentage of criminal defendants enter plea agreements in which they have no idea what sentence they might receive or what sentence the prosecutor intends to advocate for at the sentencing hearing. This group of defendants is most susceptible to a nefarious phenomenon that occurs all too often in our criminal system, something I call *sentencing by ambush*. Before we explore that term, let’s review some basic criminal procedure.

II. CRIMINAL CASE BASICS

A criminal case begins with an alleged criminal act and a subsequent investigation. In the majority of criminal cases, the state assesses what it believes the truth might be and presents charges to a grand jury. If the grand jury determines that there is probable cause that a crime has been committed, it will return a *true bill*, and indict the person suspected of committing the offense. This person is now known as the defendant. The defendant will be arraigned, at which time he or she has an opportunity to enter an initial plea to the charged offenses.

When a defendant enters a plea of not guilty, the case is randomly assigned to a trial court judge, who is charged with ensuring that the process of resolution is conducted fairly, meaning in accordance with applicable rules of evidence and procedure. In every case, from the most minor infraction to the most serious felony, the judge starts the process by setting a firm trial date. Trial date certainty is the fuel that drives the entire criminal justice system. It forces both sides in a criminal dispute to begin preparing their case, which includes exchanging discovery: information

2. Plea bargains occur on a daily basis across the nation. Because I am writing from my viewpoint as an Ohio judge, I will focus on what I know about Ohio’s criminal practices and procedure.

and factual evidence surrounding the charges. This process generally takes place privately through correspondence and discussions between the adversaries outside the presence of the trial court judge, who typically only gets involved in discovery when a dispute between the parties arises.

At this point, the judge is operating under the assumption that the state is prepared to prove the truth of its allegations beyond a reasonable doubt. The defendant has a constitutional right to require the state to prove its case in a trial, where a fact-finder (jury or judge) determines whether he or she is guilty beyond a reasonable doubt. As the trial date draws near, and both sides process the information developed through discovery, the parties are better able to assess the strengths and weaknesses of the case. The prosecution and defense develop a better grasp of the facts which led to the charges, the potential defenses, and the potential consequences associated with a conviction. The parties engage in a cost-benefit analysis to determine if a plea agreement is a more preferable solution to facing the unknowns of a trial. Usually, defendants prefer to avoid the uncertainty of a trial. Approximately 95% of state court criminal cases and 97% of federal criminal cases do not proceed to trial;³ instead, they are disposed of by negotiated plea bargains.

III. A PLEA BARGAIN IS AN AGREEMENT

A plea bargain is a “negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty or no contest to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usually a more lenient sentence or a dismissal of the other charges.”⁴ Dictionary definitions invariably paint an incomplete picture. Framing the value of a plea agreement exclusively in terms of the cost and benefit to the defendant distracts from the advantages that accrue to the government.

In reality, a negotiated plea agreement is like any other negotiated agreement. The parties exchange various risks and rights, including evaluating vulnerabilities, to arrive at a mutually satisfactory arrangement.⁵ The benefits of a plea bargain to a criminal defendant have

3. Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 717 (2006); *United States v. Booker*, 543 U.S. 220, 289 (2005) (Stevens, J., dissenting).

4. *Plea Bargain*, BLACK’S LAW DICTIONARY (11th ed. 2019).

5. *Mabry v. Johnson*, 467 U.S. 504, 508 (1984) (“[B]ecause each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange.”).

been described as “obvious—his [or her] exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated.”⁶ In addition to a lesser sentence, “[t]he defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial.”⁷ In exchange, the defendant forgoes fundamental constitutional rights, such as the right to trial by jury, the right to a speedy and public trial, the right to confront adverse witnesses, the presumption of innocence, and the right to be convicted by proof beyond a reasonable doubt.⁸

Negotiated plea agreements offer substantial advantages to the government and at a much lesser cost. When the government enters a plea agreement, “it receives immediate and tangible benefits,” most notably a “promptly imposed punishment without the expenditure of prosecutorial resources.”⁹ Chief Justice Warren Burger famously noted that “[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”¹⁰ Further, “the defendant’s agreement to plead to [a] crime tends to ensure some satisfaction of the public’s interest in the prosecution of crime and confirms that the prosecutor’s charges have a basis in fact.”¹¹ In exchange for an efficient, secure, and satisfying conviction, the government surrenders little more than the opportunity to punish the defendant to the absolute maximum permitted by law.

A. *How I Became a Student of the Plea Negotiation Process*

I first began to consider the mechanics and ethics of the plea negotiation process 15 years ago during my first term as a judge at the Cuyahoga County Court of Common Pleas (that’s what Ohio calls its trial courts) in Cleveland, Ohio. Even though I had been exposed to plea negotiation years earlier as an assistant county prosecutor, I never actually questioned whether aspects of the plea negotiation process were inherently unfair and unjustly coercive.

6. *Brady v. United States*, 397 U.S. 742, 752 (1970).

7. *Blackledge v. Allison*, 431 U.S. 63, 71 (1977).

8. *See State v. Soto*, 158 Ohio St.3d 44, 2019-Ohio-4430, 139 N.E.3d 889, ¶ 50 (Donnelly, J. dissenting); *Duncan v. Louisiana*, 391 U.S. 145, 157–58 (1968); *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *In re Winship*, 397 U.S. 358, 363 (1970).

9. *Town of Newton v. Rumery*, 480 U.S. 386, 393 n.3 (1987) (citing *Brady*, 397 U.S. at 752).

10. *Santobello v. New York*, 404 U.S. 257, 260 (1971).

11. *Newton*, 480 U.S. at 393 n.3.

As a new judge, a role that I firmly believe must be a neutral party in our adversarial justice system, I began to view the plea negotiation process in an entirely new light. I quickly realized that most of the cases on my criminal docket would not be resolved at trial. Instead, the bulk of my time would be spent overseeing plea negotiations between the prosecution and criminal defense lawyers, conducting plea hearings, and sentencing individuals who had entered into plea agreements.

The plea negotiation process caught the attention of the popular podcast *Serial*,¹² which received many accolades for its investigation of the criminal justice system in Cuyahoga County during the years 2016–2017. The reporting exposed the systemic pressure that induces defendants away from a trial while highlighting the enormous power wielded by the prosecutor in the plea negotiation process. This power springs from the prosecutor’s ability to decide which and how many crimes to charge, obviously dependent on the particular facts of the case. A prosecutor retains broad discretion and is able to assert serious charges carrying significant amounts of prison time or to charge the defendant with lesser criminal offenses—based on the same facts.

To highlight this discretion, consider a case involving a defendant who steals food from a local supermarket. While in the act, he is spotted by store security officers and begins to flee with the item in hand. When officers catch up to him, he forcefully resists apprehension, fortunately without inflicting serious injuries. The prosecutor could charge misdemeanor theft along with disorderly conduct or charge the defendant with a much more serious count of felony robbery. If the case is proven beyond a reasonable doubt, the defendant could face *only* probation (for a misdemeanor offense) or many years in prison (for a felony offense)—based on the same facts, depending on the discretion exercised by the prosecutor.

B. *A Plea Bargain and Its Pitfalls*

Every day, defendants charged with crimes stand next to their attorneys in a trial court after having reached a tentative plea agreement with the state. At these hearings, the judge asks the prosecutor to state all terms of the proposed plea agreement.¹³ The judge then carefully explains all the important rights that the defendant, who remains presumptively innocent, will be waiving by entering the contractual agreement with the

12. *Season Three*, SERIAL PODCAST (2018), <https://serialpodcast.org/> [<https://perma.cc/YV9Z-ENHA>].

13. OHIO R. CRIM. P. 11(F).

state. As the neutral arbiter in our adversarial system, the judge is obliged to determine whether the defendant is entering the proposed agreement knowingly, intelligently, and voluntarily before accepting the plea.

Judges invariably ask the defendant: “Has anyone made any threats, promises, or representations to you about the sentence you will receive if you enter this agreement” or something similar to that. If the judge is not amenable to accepting agreed sentences, the answer to this question will be “no,” even if in fact an off-the-record representation about sentencing has been made by the judge. In courtrooms with judges who refuse to discuss sentencing, however, attorneys are often forced to provide their clients with an educated estimate about the expected sentence, with the caveat that nothing is guaranteed. Even though this defies the common understanding that the defendant is receiving a negotiated benefit, attorneys tell their clients: “That’s just the way it is.”

This article is an attempt to explain why “the way it is” needs to change. In my article *Truth or Consequences: Making the Case for Transparency and Reform in the Plea Negotiation Process*,¹⁴ I explained that our criminal justice system has a systemic flaw that contributes to disparate sentencing from courtroom to courtroom. That flaw is that the particular sentencing tendencies of the judge in the case are often more important than the facts and law.

Ohio’s trial court judges are imbued by the Ohio legislature with enormous power to sentence defendants to prison and decide whether a proposed plea agreement is acceptable. An inherent weakness in this system is that this discretion is usually unburdened by governing principles or standards. Until this issue is fully addressed, prosecutors and defense lawyers will continue to arduously navigate among the hundreds of trial court judges in the state, each of whom possesses their own philosophy concerning their role in the plea negotiation process. Compounding this systemic weakness is the lack of meaningful review of sentences by the appellate courts that could provide a valuable check on the trial court’s authority.

C. *Off-the-Record Discussions*

You might think negotiated plea agreements, the most common method of resolving disputes in Ohio’s criminal justice system, would be governed by well-established principles, guidelines, and standards that promote uniformity, proportionality, and meaningful appellate review.

14. Justice Michael P. Donnelly, Commentary, *Truth or Consequences: Making the Case for Transparency and Reform in the Plea Negotiation Process*, 17 OHIO ST. J. CRIM. L. 423 (2020).

They aren't. The sad reality is that their absence means that trial court judges throughout the state determine criminal sentences according to their own proclivities. Some judges are transparent, providing reasonable expectations to attorneys and their clients. Many others, however, are not; they categorically refuse to discuss sentencing, considering it a subject within their unique authority to be exercised at a later time solely by themselves.

A number of years ago, a group of law student externs from Ohio's Attorney General's Office were observing my courtroom, eager for a behind-the-scenes look at our criminal justice system. After they watched me handle several plea and sentencing hearings in the courtroom, I explained to them a significant difference regarding my approach to plea agreements from that of most other judges. I explained that, early in my first term as judge, I had concluded that judges and attorneys should not negotiate off the record in chambers. I arrived, after much contemplation, at the belief that no one in the plea negotiation process, including the judge, should ever say anything off the record that they would not repeat verbatim in open court on the record. Accordingly, I had made a conscious decision to hold all plea discussions on the record in open court.

On that particular morning, an experienced public defender was about to go on record to enter a change of plea for his client. I asked him, for the benefit of the students, how many times in his career he had advised his client to say "no" when a judge asked the inevitable question: "Has anyone made a representation to you about what sentence you would receive if you enter this plea agreement?" Without hesitation, he answered that he always advised his clients to say "no," even when he had provided them with assurances regarding sentencing that he had received from the judge in a backroom discussion. I still remember the students' wide-eyed reactions—amazed at the candor of our discussion and pleased to be privy to "inside baseball" concerning an unwritten rule that no one was supposed to talk about or even acknowledge.

Before the students left, I asked them to consider whether a fair system of criminal justice would expect defendants to enter into a negotiated plea agreement without knowing what benefit they were receiving as part of the plea bargain. I told them one of the biggest threats to public confidence in the criminal justice system stemmed from off-the-record sentencing representations, whether from a judge in chambers or a defense attorney's informed speculation.

IV. SENTENCING BY AMBUSH

A. *State v. Davis*

The concept of sentencing by ambush first became apparent to me while reviewing an appellate case in 2018—*State v. Davis*.¹⁵ Davis had been indicted on numerous counts of drug trafficking.¹⁶ The prosecutor and Davis's attorney had negotiated a proposed plea agreement which would provide each side with a global resolution of all six cases against Davis.¹⁷ The state had agreed to dismiss several charges, ostensibly significantly reducing the number of years that Davis would spend in prison.

At the first plea hearing, the trial court explained that it had a policy against discussing sentencing related to plea agreements.¹⁸ Even after the dismissal of many counts, a trial court retains enormous discretion, either to show leniency (with a minimum sentence of 3 years) or severity (with a maximum sentence of 39 years)—irrespective of what the parties had agreed to.¹⁹ Davis was told this on the record and the matter was continued, to give him time to consider the agreement.²⁰ At the next plea hearing, Davis stood before the court and was asked whether he was aware of all the rights he was giving up if he chose to enter the plea agreement.²¹ He then engaged in the following customary, time-worn plea colloquy.

The Court: All right. Now, two more questions, then we can take your plea. Have any threats been made to you to change your plea?

Defendant: No, your Honor.

The Court: Have there been any promises made to you to get you to change your plea?

Defendant: No, your Honor.²²

15. *State v. Davis*, 8th Dist. Cuyahoga No. 104574, 2018-Ohio-1147.

16. *Id.* at ¶ 3.

17. *Id.*

18. *Id.*

19. *See id.*

20. *Id.*

21. This isn't in the court's written decision, but is required pursuant to OHIO R. CRIM. P. 11(C)(2)(c).

22. *Davis*, 2018-Ohio-1147, ¶ 6.

With that, the court accepted the plea and, without ordering a pre-sentence report, proceeded immediately to sentencing.²³ Davis, when provided an opportunity to speak, expressed his remorse, and stated that he accepted responsibility and was prepared to accept the consequences for his criminal acts.²⁴ The trial court sentenced Davis to 22 years in prison.²⁵ Upon hearing his fate, Davis asked to withdraw his plea.²⁶ He emphatically stated that his attorney had told him that he would not get more than three years if he chose to enter the plea agreement.²⁷ Davis's attorney conceded that he had told Davis that the prosecutors had presented the deal to him as carrying a "potential" minimum sentence of three years; he insisted that he had not made any promises to Davis.²⁸ Because Davis had answered the fateful question about promises in the negative, the trial court refused to allow him to withdraw his plea.²⁹

I explained the details of this case many times on the campaign trail in 2018. It is a perfect example of how things can go awry in a nontransparent justice system. I have no sympathy or pity regarding the actions that led to Davis being in front of a trial court. Perhaps there was no better way to protect the public from him than with the lengthy prison sentence he received. Even so, he deserved better treatment, including fair disclosure and transparency. He did not deserve to be ambushed. Over the many occasions I discussed this case with the public, not one person on the campaign trail ever disagreed with me about that.

*B. State v. Gwynne*³⁰

In November 2018, I was fortunate to win a seat on the Supreme Court of Ohio. Serendipitously, among the first cases I reviewed was one involving sentencing by ambush.

A 55-year-old woman named Susan Gwynne had been charged with numerous felony property crimes in Delaware County.³¹ She apparently had dressed in scrubs to avoid detection while she entered various nursing

23. *Id.* at ¶ 7–8.

24. *Id.* at ¶ 8.

25. *Id.* at ¶ 9.

26. *Id.*

27. *Id.*

28. *Id.* at ¶ 9.

29. *Id.*

30. *State v. Gwynne*, 158 Ohio St.3d 279, 2019-Ohio-4761, 141 N.E.3d 169.

31. *Id.* at ¶ 4.

home facilities for the purpose of stealing property from residents.³² Her criminal activity took place over eight years.³³ The police identified 46 victims from at least 12 separate facilities.³⁴

Defense counsel negotiated a plea agreement in which Gwynne agreed to plead to numerous felony and misdemeanor counts, including burglary and theft.³⁵ According to her attorney, he attempted to negotiate an agreed sentence of three to four years, but the state was seeking a sentence in the range of 10 to 15 years.³⁶ At the change of plea hearing, the trial court thoroughly discussed the multitude of outcomes that Gwynne faced, from lenient to severe, based on the number of counts and the judge's discretion.³⁷ The trial court stated on several occasions "if I [] send you to prison," implying that a community-controlled sanction (i.e., probation) was a possible outcome.³⁸ At the plea hearing, the state was silent regarding its position on Gwynne's sentence.³⁹

Once the plea had been accepted, the court ordered a pre-sentence report and set a date for a sentencing hearing.⁴⁰ The state submitted a memorandum that "inexplicably recommended two wildly divergent sentences: [either] a 42-year sentence ('the minimum prison term on each felony conviction, all served consecutive[ly] to each other') or two years (... 'the minimum sentences on each felony, to be served concurrently')." ⁴¹ Defense counsel advocated for community control or, if a prison term was imposed, that the sentences be imposed concurrently.⁴² The defense also indicated that Gwynne would pay restitution.⁴³

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.⁴⁴ The

32. *Id.* at ¶ 3. *See* State v. Gwynne, 5th Dist. Delaware No. 16 CAA 12 0056, 2017-Ohio-7570, at ¶ 2, *rev'd*, 2019-Ohio-4761, 158 Ohio St. 3d 279, 141 N.E.3d 169.

33. State v. Gwynne, 2019-Ohio-4761, ¶ 3.

34. *Id.*

35. *Id.* at ¶ 5.

36. *Id.* at ¶ 80 (Donnelly, J., dissenting).

37. Brief of Appellant at 5, State v. Gwynne, 158 Ohio St.3d 279, 2019-Ohio-4761, 141 N.E.3d 169.

38. *Gwynne*, 2019-Ohio-4761, ¶ 78 (Donnelly, J., dissenting).

39. *Id.* at ¶ 9.

40. *See* Brief of Appellant, *supra* note 37, at 5.

41. *Gwynne*, 2019-Ohio-4761, ¶ 80 (Donnelly, J., dissenting).

42. *Id.*

43. *Id.* at ¶ 5.

44. *Id.* at ¶ 81 (Donnelly, J., dissenting).

trial court imposed a 65-year sentence—23 years more than the prosecution had sought; this sentence is longer than many murderers and rapists receive.⁴⁵ In a deeply divided decision, our court could not even agree on whether Ohio’s appellate courts are empowered to review Gwynne’s sentence.⁴⁶ Ultimately, we remanded the case to the appellate court for it to consider an issue that had not been appealed to us.⁴⁷ Though we afforded a glimmer of relief to Gwynne, we provided little if any guidance to the lower courts.

This case caused me to ponder when the dynamics of our criminal justice system began to allow a resolution like this one. When did it become acceptable (in a supposedly fair and just legal system) for a defendant, who enters into a plea agreement with a reasonable expectation of receiving some kind of benefit in return for pleading guilty, to receive no indication as to what position the state will take at sentencing? When did it become acceptable for a judge to tell a defendant, I might give you probation (meaning: no time in prison), and then sentence her to 65 years in prison? Ohio’s laws and Rules of Criminal Procedure do not allow trial by ambush. So why do we allow it at sentencing? Is it any wonder that large segments of our society describe our criminal justice system as broken?

V. ENDING SENTENCING BY AMBUSH

When I first began my legal career (nearly 30 years ago), the Ohio Rules of Criminal Procedure did not permit open discovery in criminal cases. Thus, as a young assistant prosecutor, I was not required to provide copies of vital pieces of information for defense counsel to view with their own eyes. I had access to police reports, witness statements, and photos, among other evidence, but I was not required to release any of it to the defendant. Instead, I could tell defense counsel about the information I believed they were entitled to. Counsel would take copious notes, forced to trust that I was providing them with all the information they needed to effectively represent their client. This remained the manner of conducting discovery when I became a trial court judge in 2005. In my early years as a new judge, it was very common to hear exasperated defense counsel claim that they were learning information for the first time on the eve, sometimes in the midst, of a trial. Finally, albeit belatedly, as a response

45. *Id.* at ¶¶ 5, 81 (Donnelly, J., dissenting).

46. *Id.* at ¶ 87 (Donnelly, J., dissenting).

47. *Id.* at ¶¶ 18–20.

to pressure from the defense bar and intense media coverage, the shackles that permitted *trial by ambush* were eradicated with the implementation of open discovery in 2010.⁴⁸

Now is the time to address another form of ambush that continues to this day. Not long after I first identified the problem of sentencing by ambush in *Truth or Consequences*, I discussed the issue with two experienced attorneys, one from the prosecutor's office and the other from the defense bar. Both individuals recognized sentencing by ambush as a chronic problem that will persist as long as Ohio trial court judges retain as much discretion as they have. According to Neal B. Kauder and Brian J. Ostrom, Ohio judges have nearly unfettered discretion in sentencing, with few if any guardrails to restrain judicial power or provide meaningful review of such discretion.⁴⁹

The best solution to obviate the unfairness of sentencing by ambush would be for the General Assembly to enact a complete data driven overhaul of our present antiquated statutory scheme along with reasonable sentencing guidelines and ranges to rein in judicial discretion. This would prevent defendants entering plea agreements from facing vastly different outcomes based on the judge to whom they are randomly, but not inconsequentially, assigned. Recall that Davis was faced with a sentencing range of 3 to 39 years (and received a 22-year sentence) and that Gwynne was faced with a sentencing range of probation and the 65-year sentence she received. Also recall that neither of them expected to be sentenced as severely as they ultimately were.

Additionally, a serious discussion about the role of judges in the plea negotiation process is long overdue. We should consider whether rules should be developed to guide the exercise of this enormous power retained by our judges to either accept or reject proposed plea agreements. A judge is in the best position to assess whether the terms of the agreement are based on an arm's length negotiation. As neutral participants, judges are also in the best position to assess whether the defendant is entering the plea agreement knowingly, intelligently, and voluntarily. But a defendant cannot knowingly, intelligently, and voluntarily submit to a sentence unless he or she has a reasonable idea about what the sentence will be.

We also need to question why some judges in our system accept agreed sentences and others do not. The prosecutor and defense counsel, generally speaking, are in the best position to assess the strengths and

48. See OHIO R. CRIM. P. 16 staff notes (amending the rule in 2010 to, among other things, accelerate "the timing of the exchange of materials").

49. NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 20 (2008).

weaknesses of their case, including the procedural hurdles and aggravating or mitigating factors involved. If, in the proper exercise of their roles, these adversaries arrive at an agreed-upon penalty, which the judge later deems unacceptable, principles of transparency and fairness dictate that the judge state on the record the reasons why he or she is rejecting the proposed agreement. The proffered explanations would allow appellate courts to provide meaningful review to how the trial court exercised its discretion in the sentencing process.

Trial courts should also operate as a check on the discretionary power of the prosecutor to ensure that plea agreements are negotiated at arm's length and to prevent agreements that are unduly punitive or lenient. In cases where such an appearance may exist, a trial court should require the prosecutor and defense counsel to state on the record the rationale supporting the plea agreement. The concomitant enhanced transparency will increase public confidence that the parties and the court are properly evaluating cases to reach resolutions that are legitimate, fact-based, and consistently reasonable.

As previously noted, years ago I asked a group of law students to consider whether a fair system of criminal justice should expect defendants to enter into a negotiated plea agreement without knowing what benefit they were receiving as part of the plea bargain. It should be clear that I believe the answer to this question must be a resounding "no." To ensure a fair playing field, trial courts should not accept a plea agreement until they have made an inquiry on the record as to what position the state intends to advocate at a future sentencing hearing.

Finally, Ohio should continue its efforts to establish once and for all a statewide sentencing database that would collect relevant data about every negotiated plea agreement and every criminal sentence issued in the state. This reform would provide decision-makers (judges, prosecutors, defense counsel, and legislators) with information that is essential to ensure that better decisions are made regarding the most serious issue of incarcerating individuals. As a result of having such information, criminal sentences will also be more uniform and proportional to the conduct at issue and less subject to implicit bias, and appellate courts will be in a better position to correct unfair or excessive sentences.

A dozen or so years ago, our state adopted open discovery to eliminate the unfair practice of trial by ambush. Today the time is ripe to eradicate sentencing by ambush.