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ARTICLES

SENTENCING CONSISTENCY:

BASIC PRINCIPLES INSTEAD OF
NUMERICAL GRIDS:

THE OHIO PLAN

Burt W. Griffin† and Lewis R. Katz‡

INTRODUCTION

In the 1980’s and 1990’s, public concern about violent crime and the growing costs of imprisoning convicted offenders generated sentencing reform in many jurisdictions. Most reform legislation adopted systems based upon numerical grids. In Ohio, however, the same considerations led to a sentencing statute utilizing conceptual principles rather than numerical formulae. Drawing upon experiences in Ohio and other jurisdictions, the Ohio Plan is a unique approach to fostering fairer, more consistent, and less costly ways of sentencing felony offenders.

This article describes Ohio’s distinctive system and suggests that sentencing guidance based upon basic sentencing principles rather than numerical formulae deserves serious attention. In so doing, the article examines Ohio’s system of general legislative and appellate guidance, explains how it came about, illustrates how the legislative guidance is being enforced and elaborated by appellate courts, explores some of the weaknesses of the Ohio system, and indicates how greater consistency and predictability in sentencing might be fostered under such a system. The article suggests that a system of general legislative guidance coupled with strong appellate review can achieve consistency in sentencing, control costs, and incorporate new knowl-

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edge about human behavior and sentencing alternatives in a manner that is less political and more open to an objective balancing of societal needs than occurs under numerical guideline systems.

I. ESSENCE OF THE OHIO PLAN

Ohio’s new law arose from the work of a sentencing commission. Unlike the United States Sentencing Commission and other similar commissions, the Ohio Criminal Sentencing Commission did not attempt to control judicial discretion through a grid system based upon numerical values assigned to the most common offender actions and characteristics. Nor did the Ohio Plan decrease the sentencing power of the judiciary by lodging it in an independent policy making commission. Rather Ohio’s new statute transferred power over the length of prison sentences from the parole board to the judiciary and did so without increasing the power of prosecutors and presentence report writers.

The Ohio Plan is based upon legislation that gives general policy guidance to judges but allows judges considerable power to determine the precise application of that policy guidance. Ohio’s system attempts to blend

- sentencing considerations like those enumerated in the Model Penal Code of the 1960’s;

- the idea of legislative presumptions for and against imprisonment recommended by the 20th Century Fund in 1976.


3 See Dale G. Parent, Structuring Criminal Sentences: The Evolution of Minnesota’s Sentencing Guidelines 163 (Daniel S. Freed ed., 1988). Under numerical guideline systems, the negotiated plea and the report writer’s rendition of the sentencing information control the judge’s decision as to the length of a prison sentence unless an evidentiary hearing is conducted by the sentencing judge so that the numerical values that flow from the plea and the report can be overridden. One study of the Minnesota numerical guideline system concluded that “prosecutors had an incentive to build criminal history points so that future sentences would be more severe if the offender was convicted of a new crime.” Id.


the requirement that judges justify departures from
the general legislative presumptions;\(^6\) and

- basic guiding principles enforced and developed by
strong appellate review of sentencing as exist in the
criminal justice systems of British Commonwealth
countries.\(^7\)

Ohio has combined these features into a system of determinate
sentencing. The result is a sentencing statute that eliminates the
power of the parole board to reduce prison sentences without court approval\(^8\) and transfers that power to judges subject to restraining
statutory principles.

Unlike numerical guidelines systems, which consign control over
sentencing policy to non-judicial sentencing commissions, under the
Ohio system, general concepts are prescribed by statute, but the de-
tails of sentencing policy evolve from an interplay of sentencing deci-
sions by trial and appellate judges. The capstone of the Ohio Plan is
appellate review. Much as tort and contract policies have evolved
through the common law and by statute, appellate court decisions ap-
prove or reject the application by trial judges of legislative standards
and, in that way, delineate the precise contours of the legislatively
defined general policy.

After six years, Ohio is well on its way to developing judicially
defined sentencing policies arising from appellate decisions that pro-
vide guidance for trial courts on the critical issues of whether to im-
prison and on the length of sentence. Early evaluation of the Ohio
system indicates that this system, as was intended, is reducing both
sentencing disparity\(^9\) and prison crowding.\(^10\)

\(^7\) See ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE (3rd ed. 2000) (de-
scribing the British and some Scandinavian sentencing systems); PAUL NADIN-DAVIS, SEN-
TENCING IN CANADA (The Carswell Company Limited, 1982); D.A. THOMAS, PRINCIPLES OF
SENTENCING (Sir Leon Radzinowicz ed., 2nd ed. 1979) (describing the British system of sen-
tencing); cf. OHIO REV. CODE ANN. § 2953.08 (West 1997 & Supp. 2002).
\(^8\) See BURT W. GRIFFIN & LEWIS R. KATZ, Overview X: Reduced Role of the Parole
Board, in OHIO FELONY SENTENCING LAW 14 (2001) ("under Senate Bill 2, the Parole Board
exercises much less control than previously over how long an offender stays in prison.").
1, 2001):

Our review of cases indicates that De Amiches’ conduct, while atro-
cious, does not qualify among the worst forms of the offense of rape. If
courts do not apply some standard to the abstract “worst form” analysis,
the statute will provide no guidance and thus serve no purpose. Although
our analysis of sentencing in rape cases since reforms were enacted con-
tinues to show inexplicable variations, we must attempt strides toward
consistency rather than abandoning any effort to effect the purposes of
those reforms.

II. THE OHIO PLAN FOR CONTROLLING FELONY SENTENCING DISCRETION

The Ohio system of felony sentencing has nine essential components:  

1. Legislative guidance for imposing the minimum allowable prison sentence for a single offense, the maximum sentence, and consecutive prison sentences.  

2. Legislative provision for a range of non-prison sanctions including fines, commitments to various kinds of residential facilities, electronic monitoring, community service, and various levels of probation supervision.  

3. Definite prison sentences for five levels of felonies:  
   a. First degree felonies—between three and ten years possible prison;  
   b. Second degree felonies—between two and eight years possible prison;

In disputing appellant's argument that his sentence is not consistent with sentences imposed for similar crimes, the prosecution finds itself in the curious position of arguing that causing death while speeding when sober is more egregious than the crime of causing death while speeding when intoxicated. The prosecution cites the following cases in support of their position that appellant's sentence was consistent with sentences imposed for similar crimes committed by similar offenders.


To comply with the requirement in RC 2929.11(B) that a sentence must be “consistent with sentences imposed for similar crimes committed by similar offenders” and to determine what minimum sentence would be necessary to protect the public and would not be disproportionate to the seriousness of the offender's conduct or his danger to the public, the Court has reviewed a list of sentences in 79 rape cases sentenced in Cuyahoga County since 1995...These all involve victims under 13 years of age.

10 See FRITZ RAUSCHENBERG, EVALUATION OF SENATE BILL 2 (Staff report to Ohio Criminal Sentencing Commission) (Sept. 19, 2001). Between the years ending June 30, 1996 and the six-month period prior to December 31, 2000, the overall rate of felony imprisonments in Ohio fell from 41.9% to 37.6%. This was caused most particularly by substantial declines in the imprisonment rates for drug and theft offenses, as would be expected from the guidance under Ohio’s new felony sentencing law.


The starting point for all felony sentencing under the Ohio Plan is a statement of overriding purposes and principles. Ohio Revised Code § 2929.11(A) provides:

The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime,
rehabilitating the offender, and making restitution to the vic-
tim of the offense, the public or both.20

At first glance, the overriding purposes of public protection and
punishment established in O.R.C. § 2929.11(A) do not seem substan-
tially different from the sentencing objectives contained in many sen-
tencing codes. The statement of purposes in Section 2929.11(A) is
different, however, in that it operates to impose real control over judi-
cial decision-making. Under prior Ohio law, the overriding purposes
now identified in § 2929.11(A), to protect the public and to punish the
offender, were only two of several factors that a sentencing court was
to “consider” when determining the minimum terms of imprisonment
under an indefinite sentence.21 Since the objectives mentioned under
prior law were merely to be “considered,” they did not bind the
judge’s sentencing decision.

The effect under the new law of establishing “public protection”
and “punishment” as overriding purposes of sentencing but not limit-
ing them to “considerations” is that every sentence must now be as-

20 § 2929.11(A) (West 1997). Notably, Ohio law does not list incapacitation, deterrence,
or rehabilitation as purposes of sentencing. Indeed, the Sentencing Commission considered
them to be merely means of achieving the overriding purposes of sentencing – punishment and
public protection. It differs from the view of the U.S. Sentencing Commission which viewed
“deterrence, incapacitation, just punishment, and rehabilitation” as purposes to be achieved by
“punishment.” See THOMAS W. HUTCHINSON ET AL., FEDERAL SENTENCING LAW AND PRACTICE 1 (2001). The Ohio Sentencing Commission also added to those traditional considerations
a fourth means of achieving the overriding purposes – the payment of restitution to the victim
and/or the public. This reflected not only the importance of the victims’ rights movement but
also the growing use in Ohio of community service as a sanction for crime.

21 See OHIO REV. CODE § 2929(A) (repealed 1995) (factors included: (1) protection of the
public; (2) the nature and circumstances of the offense; (3) impact upon the victim; (4) the
offender; and (5) the offender’s need for “correctional or rehabilitative treatment.” This amalgam
was merely a laundry list of factors which provided no hierarchy of importance, and therefore
no guidance and certainly no limitation upon the discretion of a sentencing judge. Although
each of these factors may be found somewhere in new § 2929, they are now subsidiary to the
two overriding purposes.).

22 See §§ 2953.08(A)(4) and 2953.08(B)(2).
tion. However, these traditional objectives are not seen under the Ohio Plan as overriding purposes. Rather, they are listed in O.R.C. § 2929.11(A) as considerations—indicating that incapacitation, deterrence, and rehabilitation are merely the means of achieving the overriding purpose of public protection. Both specific and general deterrent principles are included in Ohio's concept of public protection. Thus, public protection involves both preventing the offender from committing other crimes and sending a message to the community to deter others from committing crimes.\textsuperscript{23}

\textit{b. Overriding Purpose—Punishment}

In highlighting punishment as an overriding purpose of felony sentencing, the Ohio statute has added a purpose not previously acknowledged in Ohio, often debated by scholars, and considered by some as archaic. The punishment directive is, in fact, consistent with current thought and public sentiment.\textsuperscript{24} When commenting on this issue, the Ohio Criminal Sentencing Commission noted that the emphasis on punishment is designed to keep the focus on the harm caused to the victim or society.\textsuperscript{25} Consequently, it sends a message that there is always a cost for committing (and being apprehended and convicted of) a crime. The sentence imposed in each case should exact that cost. By insisting upon payment of that cost for commission of the crime, the Ohio Plan, however, in no way indicates that imprisonment is necessarily the appropriate cost that must be exacted.

2. Basic Guiding Principles

If the statute contained only over-riding purposes of punishment and public protection, draconian results would follow. To prevent such results, the remainder of the statute guides and limits how those purposes may be achieved. The most basic guidance—which applies to all sentences—is found in O.R.C. § 2929.11(B). That section provides:

A sentence imposed for a felony shall be \textit{reasonably calculated} to achieve the overriding purposes \ldots commensurate

\textsuperscript{23} The new law continues an Ohio tradition that has used sentencing for purposes of general deterrence by "sending a message" to the public. \textit{See}, e.g., State v. Burge, 611 N.E.2d 866 (Ohio Ct. App. 1992) (stating that the trial court's statement that the severe sentence was intended to "send a message" to other potential offenders neither invalidated the sentence nor amounted to an abuse of discretion).

\textsuperscript{24} \textit{See} JAMES M. BURNS AND JOSEPH S. MATTINA, SENTENCING 226 (1978); HUTCHINSON ET AL., supra note 20, at 1.

\textsuperscript{25} OHIO CRIMINAL SENTENCING COMMISSION, supra note 1, at 9.
with the seriousness\textsuperscript{26} of the offender's conduct and its impact on the victim, and consistent with sentences imposed for similar crimes\textsuperscript{27} committed by similar offenders.

\textit{a. Guiding Principle—Reasonableness}

The first basic guiding principle is that a "sentence . . . shall be reasonably calculated to achieve the two overriding purposes of felony sentencing."\textsuperscript{28} By relating reasonableness to the overriding purposes of sentencing in the same section, the statute focuses attention on the likely effectiveness of a sanction and its cost. A sentence may be unreasonable because it is too lenient to achieve the overriding purposes or unreasonable because it is too harsh and unnecessary to achieve those purposes.\textsuperscript{29}

The requirement of reasonableness allows the law to grow with increased knowledge about offender characteristics, rehabilitation techniques, and improved sentencing technology. For example, as advances occur in understanding substance abuse and in the treatment or technology for preventing substance abuse, the ready imposition of prison sanctions may become unreasonable as means to punish substance abuse and to protect the public from substance abusers. Similarly community based treatments for the mentally ill who commit crimes and even for some sex offenders may render unreasonable a lengthy (or even any prison sentence at all) if the necessary treatment programs and the needed supervision are available and better provided in a combination of community control sanctions than by a prison sentence.

Greater understanding of the relationship of age to recidivism is also accommodated under the standard of reasonableness. Under most numerical guideline systems, the accumulation of convictions over a lifetime increases the length of an expected sentence even

\textsuperscript{26} § 2929.11(B) (emphasis added). “Seriousness” includes the consideration of moral culpability, thus linking punishment both to the injury suffered by the victim and the culpability of the offender. See Ohio Rev. Code Ann. § 2929.12 (B)-(C) (West 1997) (amended 2002).

\textsuperscript{27} § 2929.11(B) (emphasis added). See Griffin & Katz, supra note 8, at text 4.26 (observing “similar crimes” brings into focus the actual conduct of the offender, not simply the statutory offense. The statute, thus, provides for “real offense” sentencing.); see, e.g., State v. Wiles, 571 N.E.2d 97 (Ohio 1991), vacated on other grounds by 663 N.E.2d 326 (Ohio 1996) (holding that the extreme violence employed in carrying out the crime supported the conclusion that the death penalty should be imposed); State v. Blake, No. 17355, 1999 WL 375576 (Ohio Ct. App. June 11, 1999) (noting that the trial court concluded that when “a defendant commits a second degree felony, R.C. 2929.13(D) presumes that a prison term is needed.”); State v. Rose, No. CA96-11-106, 1997 WL 570695, at *1 (Ohio Ct. App. Sep. 15, 1997) (examining Ohio’s new felony sentencing procedure).

\textsuperscript{28} § 2929.11(A).

\textsuperscript{29} See Ohio Rev. Code Ann. § 2929.13(A) (West 1997) (amended 2002) (providing that a sentence “shall not impose an unnecessary burden on state or local governmental resources”).
though experience and research indicate that nearly all offenders reach a burnout phase in their criminal careers. The reasonableness standard allows lawyers to argue judges to conclude that, despite, a past record of crime, a lengthy prison sentence is unnecessary because of the offender's age or other changed conditions.

b. Guiding Principles—Proportionality

The second basic sentencing principle requires that the sentence be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim."31

That language adopts the British "just desserts" approach to punishment, focusing on the loss or harm to the victim and insisting that the community exact a price which the offender must pay for the commission of an offense. Again, it is important to note that the price does not always include incarceration, certainly not imprisonment in a state institution. Yet what this principle demands is that a penalty be levied so that the appropriate message of condemnation is conveyed to the offender and the community.

The term "commensurate with" speaks to the concept of proportionality. Proportionality establishes both a floor and a ceiling on punishment. Just as a sentence that is too lenient would demean the seriousness of the offender's conduct and, thus, not be commensurate with it, so too, a sentence that is too harsh would not be commensurate with the seriousness of the offender's conduct and its impact on the victim.32

30 See, e.g., NEAL SHOVER, AGING CRIMINALS (1985) (exploring the later lives of men who had been arrested earlier for ordinary property crimes); JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE 126-47 (1985) (discussing the impact of age on criminal behavior); Travis Hirschi & Michael Gottfredson, Age and the Explanation of Crime, 89 AM. J. OF SOC. 3:552-84 (1983) (stating that the age distribution of crime changes over a broad range of social conditions, therefore the use of age distribution is not justified by available evidence); Thorstein Sellin, Maturing Out of Crime: Recidivism and Maturation, 4 NAT'L PROBATION AND PAROLE ASS’N J. 3 (1971) (examining the impact of aging on young criminals); see also SHELDON & ELEANOR GLUECK, JUVENILE DELINQUENTS GROWN UP (1940) (reporting results of a study of one thousand male juvenile delinquents where the results were a decrease in the number of men who continued in delinquency over time).

31 § 2929.11(B).


[Appellant was sentenced to six years in prison for causing the death of two people while committing the misdemeanor traffic offense of speeding. Appellant cites to two cases in which drivers caused the deaths of others while speeding. The combined jail sentence for these defendants was eighteen months. Appellant also cites to cases in which people were killed as a result of drivers committing misdemeanor traffic offenses while intoxicated. In one case, a defendant served less than a year for the death of one person. In two of the cases, the defendants each caused the death of one person. Each defendant received a two-year prison sen-
How Ohio courts have addressed the issue of proportionality is illustrated by two cases dealing with crimes involving motor vehicle accidents, *State v. Mays* and *State v. O’Linn*, one case involving forgeries and thefts, *State v. Boland*, and another, *State v. Colegrove*, involving sexual misconduct.

In *Mays*, the appellate court reduced a sentence in an aggravated vehicular homicide case from ten years, the maximum allowable for that crime, to four years. The appellate court relied on the statutory language in Ohio Revised Code § 2929.14(C) which reserves maximum sentences for "the worst forms of the offense." Mays had intentionally nudged the victim with his automobile in a way that unexpectedly caused death. The appellate court believed that the defendant's conduct was not the worst form of the offense and was mitigated because Mays had immediately sought help for the victim, had surrendered to the authorities, and had confessed to the offense. The court of appeals said: "His actions... did not reflect an utter lack of concern for [the victim] or otherwise demonstrate a perversity of character that would justify imposition of the maximum sentence." In short, ten years was not proportionate to the seriousness of the offender's conduct.

*O’Linn* was a case involving, not a traffic death, but non-fatal bodily injuries. For two offenses of aggravated vehicular assault (fourth degree felonies under the code at that time) each carrying a possible maximum sentence of 18 months, the court of appeals reduced a 30 month sentence to 12 months. The appellate court said 30 months was "disproportionate to the seriousness of appellant's conduct and the danger he poses to the public. Although the injuries sustained by the victims... were serious, they were not so exceptional or severe that they warranted increased punishment." It ruled that these were not the worst forms of aggravated vehicular assault and, thus, reversed both a maximum sentence and consecutive sentences.

... One defendant was sentenced to a total of four years in prison. The other defendant received a total sentence of eight years, or, two years consecutive for each of the four deaths. Accordingly, we clearly and convincingly find that appellant's sentence is not supported by the record and is contrary to law as it fails to achieve one of the two overriding purposes of felony sentencing, that is, consistency with sentences imposed in similar crimes committed by similar offenders.
In *Boland*, the appellate court reversed consecutive sentences equaling five years imposed on a secretary for a number of forgeries causing a $50,000 loss to her employer. The defendant had no prior criminal record. She pled guilty to four forgery counts and one count of theft by deception. The maximum sentence for any one offense was one year. If all of the losses had been charged in a single count of theft, the maximum sentence would have been 18 months. A five year sentence for a single count of theft would have been possible only if the loss was $100,000 or more. The appellate court said:

While appellant’s conduct might have been reprehensible, the
record, as it now stands does not justify imposing both
maximum and consecutive sentences. Consecutive sentences
are reserved for the worst offenses and/or the worst offend-
ers. There is simply nothing before this court to indicate ap-
pellant’s crimes were so great or unusual that no single
prison term would adequately reflect the seriousness of the
conduct.

Finally, *State v. Colegrove* is an example of how the concept of
proportionality has been used by an appellate court to give guidance by comparing penalties for different statutory offenses involving similar misconduct. Colegrove masturbated in front of two girls and was convicted of two counts of kidnapping and two counts of disseminating matter harmful to a juvenile. The trial court sentenced the defendant to consecutive prison sentences totaling sixteen and a half years. The court of appeals reversed on procedural grounds. In so doing, however, it expressed unmistakably its belief that the trial court’s sentence was disproportionate when compared to statutory penalties for similar but statutorily different misconduct. The appellate court observed:

If defendant had sought to lure the two children into his
vehicle and solicited them to engage in sexual activity with
him, as the police and prosecution suggested at times in this
case, he would have faced four first-degree *misdemeanor*
convictions. For these convictions, he would have faced a to-
tal maximum consecutive sentence of *two years*’ imprisonment for the crimes of child enticement . . . and importuning.

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39 *Boland*, 768 N.E.2d at 1250.
41 *Boland*, 768 N.E.2d at 1258.
43 *Id.* at 304.
Instead, because defendant failed to lure the children into his car and because he masturbated but failed to solicit them to engage in sex with him, he was convicted of two felonies and a third misdemeanor. By luring them not into his car but only twenty-four feet to be next to his car, he committed the much more serious felony of “kidnapping,” which supported specifications to raise his maximum potential sentence from six months to eight years to life. By masturbating rather than soliciting them to engage in sexual activity with him, he was convicted of both disseminating matter harmful to juveniles and public indecency, which combination raised his maximum potential sentence from six months to eighteen months plus an additional month for the extra charge.

We upheld defendant’s convictions for kidnapping and disseminating by applying the statutes quite literally, but recognize that the circumstances may be properly taken into account at sentencing. Compare In Re M.D., in which the Supreme Court did the opposite in a juvenile case by negating the underlying offense itself, rather than tempering the resulting sentence; the Supreme Court reversed this court’s holding that “playing doctor” literally constituted complicity to commit rape. Our conclusion here is consistent with both the substantive and sentencing requirements of the Revised Code. The felony sentencing statutes were amended to require trial courts to systemically consider sentencing—and to encourage greater proportionality and consistency of punishment.

c. Guiding Principles—Consistency

Ohio Revised Code § 2929.11(B) also requires that the sentence should be “consistent with sentences imposed for similar crimes committed by similar offenders.” The Ohio Plan seeks “consistency” of sentences but not uniformity. Both “consistency” and “uniformity” attempt to assure proportionality in sentencing, but “consistency” accepts a wider divergence in outcomes and greater judicial discretion in the weighing of relevant factors.

The requirement of consistency addresses the concept of proportionality by directing the court to consider sentences imposed upon different offenders in the same case or on offenders in other similar cases. The consistency concept gives legal relevance to the sentences

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44 Id. at 314 (emphasis in original) (citation omitted).
45 § 2929.11(B) (West 1997).
of other judges. It adopts the premise that an overwhelming majority of judges sentence similarly, that a relatively small minority sentence outside of the mainstream, and that sentences outside of the mainstream of judicial practice are inappropriate.

This prescription of consistency is the Ohio Plan’s alternative to retrospective research used by numerical guidelines systems to generate sentencing standards based on sentencing practices that existed at the time the guidelines were created. In Ohio, both judges and lawyers have been slow to grapple with the problem of developing evidence of inconsistency. The early cases simply addressed differences in sentences among co-defendants. Later, comparison was made of sentences in different but similar cases; however, the comparison was made, initially, not at the trial court level, but by appellate counsel’s directing the appellate court’s attention to other cases.

The question of the sentencing judge’s obligation to assure consistency before imposing sentence was not considered until the Ohio Plan had been in effect for six years. Then, in State v. Lyons, an appellate panel, considering whether a trial judge’s sentence met the statutory standard of consistency, said: “[I]t is the trial court’s responsibility to insure that it has appropriate information before imposing sentence . . . .” The sentencing judge had imposed a six year prison sentence in a felonious assault case calling for a presumed sentence of two years. The judge did not explain how the offender’s conduct was so serious as to justify that difference.

The obvious consequence of the Lyons decision is that Ohio’s trial judges together with prosecutors, criminal defense attorneys, and the state-wide judiciary must maintain accessible records which enable discovery not only of the actual sentences of other judges but also of the essential factors which affected the sentences. Judges

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46 See State v. Stern, 738 N.E.2d 76 (Ohio Ct. App. 2000) (concluding that the imposition of harsher sentence upon defendant than on a co-defendant was justified); State v. Krocker, No. 76965, 2000 WL 1281257 (Ohio Ct. App. Sept. 7, 2000) (holding one defendant to be more culpable and thus warranting a longer sentence than the other defendant); State v. Hook, No. 9-97-21, 1997 WL 445814 (Ohio Ct. App. Aug. 6, 1997) (ruling that different sentences imposed on two defendants was justified by their actions and past records).


49 Id.
have expressed concerns as to where the data will come from.\textsuperscript{50} To facilitate that process, the Ohio Criminal Sentencing Commission has begun a pilot project to computerize sentencing data on a statewide basis.\textsuperscript{51}

The Ohio approach and numerical guideline systems may ultimately produce similar results, but they do so in quite different ways. Under numerical guideline systems, a non-judicial commission defines the sentencing mainstream, and the sentencing judge must justify a departure. Under the Ohio Plan, counsel and the sentencing judge attempt to identify the mainstream; and the appellate courts determine whether the identification has been correct. Thus, under the Ohio Plan the details of sentencing policy are formulated entirely within the judicial system.

The Ohio Plan, by asking judges to be consistent rather than confining them to a predetermined system of numerical weights, may be especially adaptable to judicial creativity. Changes in sentencing sanctions such as those that occurred in the 1980s when electronic monitoring, community service, drug testing, residential treatment, and other alternatives to prison worked their way into the sentencing...


The defense did not, however, provide data to demonstrate that the sentence was inconsistent with other sentences for similar crimes by similar offenders. Nor did the prosecutor supply adequate data on this question, although the prosecutor did advise the trial judge what would be consistent with her previous sentences. I am not aware of any database or record of sentences imposed that systematically arranges comparative information on similar offenses by similar offenders in Ohio. . .

. . . .

I would add there is an additional problem in each appellate court independently developing its own database. An appellate court is most likely to stumble when it undertakes its own research without giving any opportunity to parties to challenge its conclusions. Moreover, it is inefficient to have each appellate court in Ohio separately develop a computer program for such a project. Currently, funding is too minimal for public defenders, prosecutors, and each court to perform this research independently.

Any database that is developed, furthermore, must provide universal access . . . . How would a solo practitioner defend against such a lengthy list? What resources are available and economically feasible for opposing counsel to insure that relevant cases were not omitted and that all the cases cited were similar? Because of the large numbers of similar offenses likely, especially in a busy court such as Cuyahoga County Common Pleas, a computer program with relevant factors designed by a neutral source is essential. Then both sides, along with the court, would have a reliable body of data they could rely upon.

Until that data is available and accessible, appellate courts will be able to address the principle of consistency only to a very limited degree.

\textsuperscript{51} The authors are, themselves, participants in the committee recruited by the Ohio Criminal Sentencing Commission to carry out the pilot project.
armory are easily accommodated by a system that does not feel confined to numerical computations. The concept of consistency acknowledges that different kinds of sanctions can have similar punitive and protective impacts. It recognizes that enormous differences may exist in fact situations and offender characteristics even though the statutory offenses and criminal records of the offenders are the same.

By favoring similarity in sentencing outcomes rather than uniformity, the Ohio approach resembles that adopted by British and Canadian courts. While favoring a uniform analytic process, the model in Commonwealth jurisdictions requires only similarity not uniformity in outcomes.

An example of how the consistency in outcome standard adjusts to different fact patterns for the same statutory offense can be illustrated by the crime of unarmed robbery. Ohio Revised Code § 2911.02(A)(3) makes it a felony of the third degree, punishable by probation or by a prison sentence of between one and five years, for an offender to commit theft and “[u]se or threaten the immediate use of force against another.” Within that single definition of robbery coexist thefts that vary from shoplifting where the thief struggles with a guard, to a purse snatching accompanied by a slight tug, to a theft in which substantial force is used or serious threats are made to wrest property from a victim. These three manifestations of the same statutory offense are not the same, and, under the Ohio Plan, they can properly warrant different sanctions.

The use of a consistency standard ensures that sentences should be similar, insofar as the factors weighed by the sentencing court are similar. Similarity and consistency can accommodate such differences in outcome as six months on electronic monitoring, three months in a halfway house, or thirty days in a jail or prison for offenders who engage in similar conduct but have different personal characteristics. If, however, significantly different factors exist in the conduct constituting the offense or in the personal characteristics of the offender, dissimilar sentences should be expected.

Consider, for example, the need to treat a mentally retarded or mentally ill offender differently from an offender not so afflicted in order to reflect differences in culpability or correctional needs. Under a system that requires only consistency in outcomes, the 40 year old, mentally ill offender who robs a bank by use of a threatening note may be treated differently from the 25 year old person of ordinary

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52 See ASHWORTH, supra note 7, at 40, 63, 345; NADIN-DAVIS, supra note 7, at 6-12.
mental health who does the same thing to gain money to supply a
drug habit, even though both have the same criminal records.\textsuperscript{53}

Similarly a drug user who has never been given an opportunity
for drug treatment may need to be sanctioned differently from one
who has been given the opportunity and failed, even though their
criminal records are the same. And a drug user who has failed at non-
residential treatment may need to be sentenced differently from one
who has failed at residential treatment. The concept of consistency
affords flexibility in accommodating those considerations that a pre-
ference for uniformity may prevent.

The issue of consistency arises most vividly with respect to the
length of prison sentences. The issue of consistency in lengths of
prison sentences was successfully litigated in \textit{State v. Williams}.\textsuperscript{54} Williams, who had never previously served a prison term, appealed
consecutive three year sentences imposed for two counts of aggra-
vated vehicular homicide. He argued that the sentence was contrary
to law because it was not \textquote {"consistent with sentences imposed for
similar crimes committed by similar offenders."}\textsuperscript{55} The court of ap-
peals held that the sentence was not supported by the record and was
contrary to law \textquote {as it fails to achieve one of the two overriding pur-
poses of felony sentencing, that is, consistency with sentences im-
posed in similar crimes committed by similar offenders.}\textsuperscript{56} The court
based its conclusion upon the following:

We have thoroughly reviewed the cases cited by both
parties in this case. Paying special attention to the cases cited
from this jurisdiction, we conclude that appellant's sentence
is not consistent with sentences imposed for similar crimes.
Once again, appellant was sentenced to six years in prison for
causing the death of two people while committing the mis-
demeanor traffic offense of speeding. Appellant cites to two
cases in which drivers caused the deaths of others while
speeding. The combined jail sentence for these defendants
was eighteen months. Appellant also cites to cases in which
people were killed as a result of drivers committing misde-
meanor traffic offenses while intoxicated. In one case, a de-
fendant served less than a year for the death of one person.

is not required between co-defendants even if both have significant criminal records); \textit{State v. Clark}, No. 79386, 2002 WL 22044, at *4 (Ohio Ct. App. Jan. 3, 2002) (observing that sentences
should be consistent for similar crimes, but co-defendants need not receive similar sentences).

\textsuperscript{54} Nos. L-00-1027, L-00-1028, 2000 WL 1752889 (Ohio Ct. App. Nov. 30, 2000), \textit{aff'd},

\textsuperscript{55} \textit{Id.} at *4 (quoting \textit{OHIO REV. CODE ANN.} § 2929 11(B)).

\textsuperscript{56} \textit{Id.} at *7.
In two of the cases, the defendants each caused the death of one person. Each defendant received a two year prison sentence. Two of the cases appellant cites to involved defendants who each caused the deaths of four people. One defendant was sentenced to a total of four years in prison. The other defendant received a total sentence of eight years, or, two years consecutive for each of the four deaths.  

Another case raising the issue of consistency because of the length of a prison sentence was State v. DeAmiches. DeAmiches was sentenced for multiple sexual offenses against two minors under the age of 13 and for the use of minors in nudity oriented material. He was sentenced to consecutive terms of 46 to 54 years in prison (one of the rapes having occurred prior to the Ohio Plan). The court of appeals reversed the consecutive sentences after comparing it to three cases in which defendants were sentenced to 14 years for multiple sexual offenses committed against minors, and one in which a defendant was sentenced to 19 years. The court said:

While we understand and in some cases might even share a judge's distaste for certain types of offenses, statutory sentencing guidelines are intended to reduce just such judge-specific sentencing variations so that offenders can expect a consistent range of sentences for similar conduct. If we do not apply the sentencing statutes to curb idiosyncratic sentencing decisions, the legislation has lost its purpose.

State v. Troyer is an example of how a sentencing judge can make comparisons of similar cases to arrive at a sentence that meets the consistency standard. In Troyer, a forty-six year old defendant pleaded guilty to numerous counts of forcible rape of a boy under thirteen years of age. The judge could have selected minimum sentences of between three and 162 \( \frac{1}{2} \) years under a modifiable life sentence. The prosecutor supplied the court with a list of seventy-nine prior sentences for the same statutory offense. Based on an analysis

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57 Id.
59 Ohio law was amended subsequent to the adoption of the Ohio Plan to make non-life indefinite sentences possible under current law. See OHIO REV. CODE ANN. § 2971.03 (West 1997) (stating a sexually violent offense with a sexually violent predator specification carries a 2 years to life sentence range).
60 DeAmiches, 2001 WL 210020, at *11.
61 Id.
63 Id. at *1.
64 Id.
65 Id. at *7.
of those cases and statutory guidance, the court imposed a sentence of 20 1/2 years to life. The sentence was not appealed.

d. Guiding Principles—Conservation of public resources

Under the Ohio plan, § 2929.13(A) circumscribes all sentences by an additional principle: "The sentence shall not impose an unnecessary burden on state or local governmental resources."

This is supplemented by the further requirement that if probation is possible, community service and fines should be considered as a first option. These provisions set forth a conservation of public resources principle which is subsumed within the reasonableness principle stated in § 2929.11(B). The conservation of resources principle reflects the mandate of the legislature that the new sentencing legislation should "balance the needs of criminal sentencing and the available correctional resources."66

The conservation of resources principle was apparent in State v. Youngblood.67 There an appellate court reversed consecutive prison sentences totaling more than 11 years imposed by a trial judge for a series of forgeries. Although the defendant had a prior criminal record, the most time that he had previously served in prison was 18 months. The appellate court observed: "Certainly, continued criminal behavior would warrant heightened sentencing when his previous sentences obviously had little or no deterrent effect.... [W]hile increased punishment is reasonable, the graduation here is steep and should have been explained...."68 Additionally, "the judge failed to state adequate reasons supporting the findings relevant to consecutive sentencing, particularly those relating to severity and proportionality."

On remand, the sentencing judge imposed sentences totaling four and one-half years.70 The statement that the "graduation here is steep" referred to the seeming lack of necessity to use 11 years in prison to protect the public.71 The appellate court, without telling the sentencing judge specifically what sentence to impose, forced that judge to engage in a thought process that will guide the judge not only

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68 Id. at *4.
69 Id. at *5.
71 In Canada and England, a similar form of appellate guidance—under a concept called the "jump effect"—has long limited the sentences of trial judges. See NADIN-DAVIS, supra note 7, at 81-83; THOMAS, supra note 7, at 204-05.
in Youngblood’s situation but with respect to other offenders who might come before the judge for repetitive criminal conduct.

3. Guiding Principles—Prohibitions

The Ohio Plan not only requires that certain principles be applied, but also prohibits the application of other principles. Section 2929.11(C) in the Ohio Plan provides: “A court . . . shall not base the sentence upon the race, ethnic background, gender,72 or religion of the offender.” Although the statement is, perhaps, a shibboleth, under Ohio’s statute the prohibition is being policed and enforced. The consideration of racial discrimination became important in two cases arising in one Ohio county. There, sentencing judges record their reasoning, in part, on work-sheets. In one case, the judge entered a comment “Male-Black.”73 The appellate court, without finding actual discrimination, admonished the judge when the issue first arose.74 In a subsequent case where the sentencing judge wrote “female-black” on the work-sheet,75 the appellate court—also not finding discrimina-

72 In the drafting process for the Ohio Plan, this restriction was a subject for discussion. Would a sentence that takes into consideration a defendant-mother's childcare obligations be a sentence that is based upon gender? If the decision is based upon the role of the defendant as, in fact, the primary caregiver, then the consideration would not be one of gender but would be one of function and should be extended to any primary care-giver-father, grandparent, aunt, or uncle. But, if the consideration is based solely or principally on the fact of motherhood without evidence as to the real caregiving role of the defendant, the distinction would be based upon gender and would violate the law. Nor would a decision to spare an offender from incarceration because of pregnancy be one of gender, even though only applicable to females. The primary consideration would not be gender but the welfare of the child and, perhaps, public expense.


74 Id. at *3; The trial court wrote Howard's race and gender on its sentencing worksheet. We are perplexed as to what, if any, purpose these factors served in the trial court's sentencing determinations. R.C. 2929.11(C) clearly states that “[a] court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.” We can see no reason for the notation on the sentencing worksheet. But because the record does not clearly and convincingly demonstrate that gender and race were considerations in Howard's sentence, we are constrained from doing more than admonishing the court that even the notation of race and gender in the "Comments" section of the sentencing worksheet creates an unfavorable impression.

75 State v. Kershaw, 724 N.E.2d 1176, 1178-79 (Ohio Ct. App. 1999); This court does not agree that the notation of race and gender on the felony sentencing worksheet is appropriate in fulfilling any record-keeping requirements of R.C. 2953.21(A)(5), which have not yet been implemented and apply only to postconviction proceedings. The felony sentencing worksheet is intended to be a documentation of the trial court's reasoning in imposing the sentence that it selects, and not to be a reference point for future statistical analysis of sentencing disparity . . .
tion—announced that in the future it would treat such notations as evidence of discrimination. The practice has stopped.

Of course, discouraging the making of racial comments in entries reflecting a judge's reasoning does not preclude discrimination. Forbidding the entry can, in fact, foster concealment of racial bias. Forbidding the notation does, however, re-emphasize to the sentencing judge that such considerations should not enter into a judge's thought processes and may serve subtly to deter such thinking.

B. Controlling the Decision to Imprison

The basic purposes and fundamental principles of felony sentencing set forth in § 2929.11 are both implemented and further defined by Ohio Revised Code §§ 2929.13 and 2929.14. Those sections deal with the sentencing judge's power to impose prison and non-prison sentences and the lengths of prison sentences. Section 2929.13(B) expresses a preference that non-prison sentences be imposed on lower level felons (fourth and fifth degree felonies) unless certain factors set forth in § 2929.13(B)(1) exist. Non-prison punishment may include local incarceration and other residential sanctions, such as workhouses, half-way houses, and residential treatment centers. Section 2929.13(D) expresses a presumption that prison will be imposed for first and second degree felonies unless the sen-

Therefore, we reiterate that the practice of including race and gender on the worksheet is inappropriate, but we reject Kershaw's claim of reversible error in this case. A possible, but now clearly disapproved, reason for the notation existed up to the date of the Howard decision. But for sentences imposed after that date, we will agree with Judge Doan's separate concurrence that follows.

76 Id.
77 The statutory language in OHIO REV. CODE ANN. § 2929(13)(B)(2) (West 1997) (amended 2002) is as follows:

(a) If the court makes a finding described in division (B)(1) . . . and if the court . . . finds that a prison term is consistent with the purposes and principles of sentencing set forth in section 2929.11 . . . and finds that the offender is not amenable to an available community control sanction, the court shall impose a prison term upon the offender. . . .

(b) If the court does not make a finding described in division (B)(1) and if the court . . . finds that a community control sanction . . . is consistent with the purposes and principles of sentencing set forth in section 2929.11 . . . the court shall impose a community control sanction . . . upon the offender.

Those factors are set forth in RC 2929.13(B)(1) and include sex offenses, offenses involving attempts to cause or causing physical harm, breaches of public or professional trust, organized criminal activity, offenses where a firearm is possessed, and offenders who have been previously imprisoned or commit the offense while on bond or probation.

78 See OHIO REV. CODE ANN. § 2929.16 (West 1997 & Supp. 2002) (addressing residential sanctions); § 2929.17 (addressing non-residential sanctions); § 2929.18 (addressing final sanctions and restitution).
The guidance in these sections is further circumscribed not only by the overriding purposes and principles set forth in § 2929.11 but also by a list of factors in § 2929.12, which relate to seriousness and recidivism. Adherence to the policy preferences in those sections are policed by requirements in § 2929.19(B)(2) that the sentencing judge must set forth reasons for overriding the preferences in § 2929.13 for and against prison. Thus a framework for control of sentencing discretion is built upon a statutory structuring of a judge's reasoning process. It does so, however, without the use of numerical values for offenses and offender characteristics. The statutory framework instructs the sentencing judge on the reasoning process that must be utilized in order to depart from the presumptions for and against prison.

§ 2929.13(D) (West 1997) (amended 2002):

[F]or a felony of the first or second degree . . . it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 . . . Notwithstanding the presumption . . . the sentencing court may impose a community control sanction . . . instead of a prison term . . . if it makes both of the following findings:

1. A community control sanction . . . would adequately punish the offender and protect the public from future crime because the applicable factors under section 2929.12 . . . indicating a lesser likelihood of recidivism outweigh the applicable factors . . . indicating a greater likelihood of recidivism . . .

2. A community control sanction would not demean the seriousness of the offense because, one or more of the factors under section 2929.12 . . . that indicate that the offender’s conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors . . . that indicate that the offender’s conduct was more serious than conduct normally constituting the offense.


If the court is to make such a finding, that finding must be something which will be susceptible to a meaningful review by an appellate court. A finding, we believe, implies a factual finding which would encompass the operative facts upon which that finding is based.

On this point, we note that the factors set forth in R.C. 2929.12 structure the trial court’s discretion when the trial court is determining what would be the most effective way to comply with the purposes and principles of sentencing under R.C. 2929.11. Thus, the findings required by R.C. 2929.14(B) and (C) and 2929.19(B)(2)(d) can be made in relation to these factors.

While this section of the statute, R.C. 2929.12, is too lengthy to quote in its entirety herein, we note that it provides set factors to consider when determining whether the offender's conduct is more or less serious than conduct normally constituting the offense, and whether the offender is or is not likely to commit future crimes.

C. Controlling the Length of a Prison Sentence

A similar approach to structuring the sentencing judge’s reasoning process is created under the Ohio Plan when giving guidance for the length of a prison sentence. The statute creates a presumption that a first prison sentence will be the shortest prison sentence in the range of sentences for the offense. The provision adds specificity to the requirement in RC 2929.13(B) that a sentence “shall not place an unnecessary burden on . . . governmental resources.” Note that a first prison sentence is not the same as a first felony conviction. The pre-

R.C. 2929.14(C) provides that a trial court has discretion in a sentencing hearing to impose the maximum prison sentence authorized by statute for an offense under consideration when the offender committed the worst form of the offense, or where the offender poses the greatest likelihood of committing future crimes.

However, such discretion is not unbridled; the discretion vested with the trial court in a sentencing hearing is confined by certain statutory requirements . . . Specifically, the trial court must consider factors listed in R.C. 2929.12(B), (C), (D) and (E).

R.C. 2929.12(B) requires the trial court to consider whether the offender’s conduct is more serious than conduct normally constituting the offense. R.C. 2929.12(C) requires the trial court to consider whether mitigating factors exist to support a conclusion that the offender’s conduct is less serious than conduct normally constituting the offense. R.C. 2929.12(D) and (E) require the trial court to consider the likelihood of the offender’s recidivism. Once a trial court decides to impose the maximum prison sentence allotted for an offense, the trial court must give its reasons for selecting the sentence. R.C. 2929.19(B)(2)(d).


Accordingly, when a trial court imposes the maximum sentence authorized for an offense by R.C. 2929.14(A) on an offender, the court is required to make findings that the offender meets one or more of the criteria set forth in R.C. 2929.14(C), and to give its reasons for imposing the maximum sentence.

R.C. 2929.19(B)(2)(d)’s requirement that a trial court give reasons for selecting consecutive sentences goes beyond the requirement to make a finding that the offender meets one of the criteria listed in R.C. 2929.14(C). Rather, the “reasons” requirement of R.C. 2929.19(B)(2)(d) mandates that a trial court provide an explanation to support its findings regarding the R.C. 2929.14(C) criteria.

The federal guideline sentencing system also requires justification for departures from prescribed specific sentences. See Hutchinson, supra note 20, at 7 (2001 ed. 2001). However, the federal system prescribes specific prison sentences, while the Ohio system gives principles for the sentencing judge to determine whether to imprison or impose community control sanctions and provides principles for determining specific prison sentences, i.e., more than the minimum sentences, maximum sentences, and consecutive sentences.


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[¶] If the offender previously has not served a prison term, the court shall impose the shortest prison term authorized for the offense . . . unless the court finds on the record that the shortest prison term will demean the seriousness of the offenders conduct or will not adequately protect the public from future crime by the offender or others.
sentencing consistency presupposes that a first prison sentenced has a strong shock effect and may be adequate to impact the offender's future conduct. The presumption in favor of the shortest prison sentence may be overcome if the sentencing judge finds on the record that the shortest prison sentence "will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime."  

In *State v. Cole*, the court of appeals agreed that a two year minimum sentence for felonious assault would demean the seriousness of the offender's conduct where the defendant, in a racially motivated incident, had beaten a black college student on the head with an axe handle and caused serious injuries. In *State v. Clark*, the court of appeals upheld a six year, first prison sentence on the mother of a seven month old child for felonious assault upon the child. And, reflecting the unlikelihood that six months in prison would deter the defendant the appellate court, in *State v. Hawley*, affirmed a one year maximum prison sentence for theft even though the offender had never previously been imprisoned. Hawley had a lengthy misdemeanor record and committed the offense, a fifth degree felony of theft, six days after being given probation for a misdemeanor assault. On the other hand, in *State v. Sheppard*, a prison sentence that exceeded the one year minimum for attempted aggravated arson was reversed where the offender, a college student, had started a fire in a trash can in an academic building. The appellate court did not believe that one year in prison would demean the seriousness of the offender's conduct, nor did it believe a greater sentence was necessary to protect the public.

Just as there is a presumption that more than the minimum prison sentence is unnecessary for most offenders who have not previously been imprisoned, § 2929.14(C) under the Ohio Plan establishes a presumption that the longest prison sentence should be reserved for the

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In his second assignment of error, McNeal asserts that the trial court erred by imposing a sentence of more than the minimum period of incarceration for the two offenses. We agree. Pursuant to R.C. 2929.14(B), a trial court must impose the minimum term of incarceration on an offender who has not previously served a prison term, unless it finds on the record that the minimum term would demean the seriousness of the offense or not adequately protect the public from future crime. In the case at bar, the court made neither finding.


86 *Id.* at *2.*


88 *Id.* at 413.
worst offenders. The guidance against maximum sentences may be overcome by a finding by the sentencing judge that the defendant committed the "worst forms of the offense," or "pose[s] the greatest likelihood of committing future crime," or is a major drug or repeat violent offender. The court must make the finding and set forth its supporting reasons for the finding. Numerous examples are now found in Ohio case law concerning the applicability of the worst offense and worst offender restriction. For example, where the offender has an especially lengthy criminal record, including multiple prison terms, maximum sentences are approved. Also, where the offender's conduct is especially egregious a maximum sentence is appropriate even if the offender has had no prior criminal record. But maximum sentences are reversed where the offender has had no prior record and is remorseful, the defendant has had a drug relapse and is amenable

89 OHIO REV. CODE ANN. § 2929.14(C) (West 1997 (amended 2002) ("the court . . . may impose the longest prison term authorized for the offense . . . only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crime, upon certain major drug offenders . . . and upon certain repeat violent offenders.").

90 Id.

91 Id.

92 Id.

93 See State v. Gentile, No. 75572, 2000 WL 10580, at *4 (Ohio Ct. App. Jan. 6, 2000) ("[A]lthough the court stated many reasons for imposing the maximum sentence, neither its journal entry nor its statements at the sentencing hearing identified any of the four criteria set forth under R.C. 2929.14(C) to warrant such a sentence. As a result we must remand for resentencing."); see also State v. Edmonson, 715 N.E.2d 131, 134 (Ohio 1999) (stating the sentencing court must give "its reasons for selecting the sentence imposed") (emphasis omitted) (quoting OHIO REV. CODE § 2929.19(B)(2)); State v. Gonzalez, 2001 WL 259186, at *10 (Ohio Ct. App. Mar. 15, 2001) ("Reasons' should mean the court's basis for its 'findings.' The failure to provide such information is reversible error requiring resentencing.") (citations omitted).


95 See, e.g., State v. Guthrie, No. 2-01-25, 2001 WL 1635132 (Ohio Ct. App. Dec. 20, 2001) (affirming an eight year sentence for felonious assault upon a father who burned his three month old child to punish her for being fussy); State v. Berry, No. 78187, 2001 WL 705647 (Ohio Ct. App. June 14, 2001) (affirming five year maximum sentence for sexual battery imposed on a minister who engaged in sexual conduct with a teenage member of his congregation and showed no remorse); State v. Stribling, No 74715, 1998 WL 855598 (Ohio Ct. App. Dec. 10, 1998) (holding that an eight year sentence for felonious assault imposed upon mother, with no prior criminal record, had punished her eight year old son by requiring him to stand on tip toes with hands outstretched while her boyfriend beat the boy with belt and who declined to give medical attention or food to the boy); State v. Richmond, No. C-970518, 1998 WL 107653 (Ohio Ct. App. Mar. 13, 1998) (affirming five year sentence upon a mother for child endangerment where she stood by as her boyfriend caused the death of her mentally retarded and physically handicapped child by placing the child in a bathtub full of scalding water and failing to seek medical help for (twelve hours).

to treatment,

Finally, there is a presumption in favor of concurrent sentences,

unless the sentencing judge finds on the record that: (1) consecutive sentences are necessary to protect the public or punish the offender; (2) that consecutive sentences are not disproportionate both to the seriousness of the offender's conduct and the danger the defendant poses to the public; and (3) that certain specific factors pertain to the defendant or the defendant's conduct. Those factors are committing a new offense while under a criminal justice sanction, inadequacy of a maximum sentence for one offense in reflecting seriousness of the criminal conduct, and the offender's criminal history of such magnitude as to demonstrate that a single maximum sentence will not adequately protect the public. Of course all of these restrictions are further controlled by the previously discussed reasonableness, proportionality, consistency, non-discrimination, and conservation of resources principles set forth in §§ 2929.11(B) and 2929.13(A).

Most importantly, as with the decision to imprison or grant probation, § 2929.19(B)(2) requires the judge to explain how the statutorily required finding was arrived at if a first time prison sentence exceeds the minimum, or if maximum or consecutive sentences are im-

98 State v. Howard, No. C-971049, 1998 WL 597651 (Ohio Ct. App. Sept. 11, 1998) (imposing maximum one year prison sentence not appropriate for offender with no prior criminal record who failed to provide child support, the primary objective of the criminal law in such offenses being to assure financial support to the victim).
[T]he court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any one of the following:

(a) The offender committed the multiple offenses while the offender was awaiting trial or sentencing, was under a [community control sanction] . . . or was under post-release control for a prior offense.
(b) The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct.
(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.
101 § 2929.14(E)(4)(a).
102 § 2929.14(E)(4)(b).
103 § 2929.14(E)(4)(c).
posed. The judge can not simply mouth the words of the statute, and the record must support the findings and reasoning process.

Consecutive sentences have generated the greatest volume of appellate litigation with respect to sentencing. The most frequently imposed, longest, and thus most frequently contested consecutive sentences have been for physical or sexual assaults. For example, in State v. Connors, the Court of Appeals approved consecutive sentences totaling eleven years imposed upon a defendant who, as part of a group of twenty five, attacked two African-American young men. A fourteen year consecutive sentence was upheld in State v. McCoy where the defendant, with baseball bats and metal pipes and accompanied by his brother and father, beat two newlyweds as they were leaving for their honeymoon because the bride’s sister would not talk to the defendant. Consecutive sentences totaling twenty years were also upheld in State v. O’Hara and State v. Pennington. In


   The fact that a court has made the required findings under R.C. 2929.14(E)(4), however, does not automatically render consecutive prison terms proper under the felony sentencing law. We must construe R.C. 2929.14(E)(4) together with R.C. 2929.19(B)(2)(c), which requires the sentencing court to “make a finding that gives its reasons for selecting the sentence imposed . . . [i]f it imposes consecutive sentences under section 2929.14 of the Revised Code.” . . . The requirement that a court give its reasons for selecting consecutive sentences goes above and beyond the requirement that a court make the findings required by R.C. 2929.14(E)(4).

See also State v. Finch, 723 N.E.2d 147, 151 (Ohio Ct. App. 1998) (Deshler, J., dissenting):

   It should be obvious that, by merely stating in blanket fashion a general compliance with multifaceted statutes, no specific reason is provided. The state ignores the clear and specific command of the statute as the sentencing entry and, in the instant case, provides no reason as to the basis for consecutive sentences. Perhaps there was ample reason for imposing consecutive sentences in this case. However, the state’s continued reliance on Fincher, which I view as wrongfully decided and not in accord with other courts of appeals on the subject, should not allow us to continue on a course of decision making that fails to give full consideration to the literal wording of the statutes.


   [W]hile recitation of the court’s findings is a necessary component of felony sentencing in the state of Ohio, it has been held that merely reciting or tracking the statutory language in R.C. 2929.14 is not sufficient to comply with the mandate set forth in R.C. 2929.19(B)(2)(c) to provide a reason for the consecutive sentence.

106 See GRIFFIN & KATZ, supra note 8, at App. A.


O'Hara the defendant forced his way into the victim's van in a parking lot, threatened her life, drove her to the side of a freeway, and performed cunnilingus on her. He was convicted of rape and kidnapping. O'Hara had 22 prior felony convictions and was on parole at the time of these offenses. In Pennington, the defendant was convicted of two counts of rape and one count of kidnapping. Pennington had lured a woman into his car after she had an argument with her boyfriend in a bar. Pennington forced her at knife-point to have fellatio and intercourse with him. Pennington also had a substantial criminal record.

In extraordinary cases, some consecutive sentences have been so long as to constitute life without parole; however, most such offenses have been reversed for failure of the sentencing judge to make the statutorily required explanations. Where such sentences have been affirmed, the defendants have tended to be pedophiles who have failed in treatment or others who have engaged in organized violent activity.

D. Factors to Be Considered in Exercising Sentencing Discretion

Although under the Ohio Plan, the statutory guidance on imprisonment and length of the prison sentence leaves substantial latitude for judicial discretion, that discretion is further channeled by Ohio Revised Code § 2929.12. Section 2929.12 gives guidance on judicial weighing of factors related to seriousness and recidivism. It does so, however, without the use of numbers. Rather, in § 2929.12(B), (C), (D), (E), the Ohio Plan lists factors that the judge must consider in

111 O'Hara, 2001 WL 725410 at *1.
112 Pennington, 2001 WL 1352648.
113 See GRIFFIN & KATZ, supra note 8, at T 7.17, App. A (providing a collection of cases illustrating the above point).
determining relative seriousness of misconduct and likely recidivism. The list is non-exclusive, and judges may consider any other relevant factor. The seriousness and recidivism factors are relevant to determining the appropriate punishment to meet the overriding purposes of punishment, punishing the offender and protecting the public from future crime.

For example, § 2929.12(B) provides in part:

The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(1) The physical or mental injury suffered by the victim of the offense . . . was exacerbated because of the physical or mental condition or age of the victim.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

Section 2929.12(C) enumerates factors that may make conduct less serious than conduct “normally” constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong provocation.
(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

Section 2929.12(D) lists factors that show an increased likelihood of recidivism:

(1) At the time of committing the offense, the offender was [on bond, probation, or parole].

(2) The offender was previously adjudicated a delinquent child . . . or has a history of criminal conduct.

(3) The offender has not been rehabilitated to a satisfactory degree . . . or . . . has not responded favorably to sanctions previously imposed for criminal conduct.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuse to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

Finally, § 2929.12(E) lists factors that show a decreased likelihood of recidivism:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.
(5) The offender shows genuine remorse for the offense.

Appellate courts in Ohio have deemed those statutory factors of seriousness and recidivism important to deciding upon the appropriate sentence. In reversing a maximum prison sentence for an Aggravated Robbery, one appellate court stated: "[W]hen the factors of R.C. 2929.12 are expressly considered, the language used in R.C. 2929.14(C) pertaining to the 'worst forms of the offense' or those 'who pose the greatest likelihood of committing future crime' is susceptible of definition."\(^{116}\)

Another court instructed the trial court even further in reversing a maximum sentence for Involuntary Manslaughter:

>[A] trial court making the sentencing determination must list those factors set forth in R.C. 2929.12(B), (C), (D) and (E) that are present in the case under review. After making such a list, the trial court must explain how an analysis and a weighing of those factors support an imposition of the maximum prison sentence as allowed under R.C. 2929.14(C). Without such an analysis, an appellate court is unable to determine whether the trial court . . . fulfilled its obligation to consider those factors specified in R.C. 2929.12 (B), (C), (D) and (E).\(^{117}\)

III. PRINCIPLES AND DIALOG INSTEAD OF NUMBERS AS THE VEHICLE FOR ESTABLISHING SENTENCING POLICY

At the heart of the Ohio Plan for creating consistency among judges and conserving correctional resources, is a legislatively created dialog among appellate judges, trial judges, and counsel that occurs in the sentencing process and in the process of judicial review. As one Ohio lawyer has noted,\(^{118}\) under the new Ohio felony sentencing statute, lawyers and judges are required to speak a new language. The new language includes whether a sentence will "demean the seriousness of the offender's conduct," is "consistent with sentences imposed on similar offenders who commit similar offenses," is "reasonably calculated to achieve the overriding purposes of felony sentencing," and will place an "unnecessary burden on governmental resources."

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\(^{118}\) Jon Richardson, a criminal defense lawyer and participant on the Ohio Criminal Sentencing Commission in drafting the Ohio Plan, statements at a Continuing Legal Education Training Session sponsored by Professional Education Systems, Inc. in Toledo, Ohio on November 30, 2001.
It also involves the language of whether the offender has committed "the worst form of the offense" or has "the greatest likelihood of committing future" and whether the offender's conduct is more or less serious than "conduct normally constituting the offense." The factors of seriousness and recidivism subsumed in § 2929.12 add to the new language.

A dialog involving these considerations and issues is required because Ohio Revised Code § 2929.19(B)(2) obliges the court both to justify in statutory language and to give reasons supporting a decision to depart from the sentencing preferences established in §§ 2929.13 and 2929.14. In addition, Ohio Revised Code § 2953.08 requires the record to support the judge's decision and authorizes the appellate courts to reduce, increase, or reverse and remand sentences which do not comply with the statutory criteria.

An example of how this dialog has occurred is found in State v. Iacona. Audrey Iacona was a 16 year old who experienced an unwanted pregnancy. She concealed the pregnancy from her unsupportive family, delivered the child unattended in the basement of her parent's home, and allowed the child to die. She was convicted of involuntary manslaughter.

Under the Ohio sentencing statute, involuntary manslaughter is a first degree felony, carrying a presumption of prison pursuant to Ohio Revised Code § 2929.13(D), and a possible maximum prison term of ten years. Since Ms. Iacona had never previously been imprisoned, § 2929.14(B) of the Code required that the minimum prison sentence of three years be imposed unless the court found "on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others."

Not surprisingly, Iacona's case was the subject of extensive media attention and aroused strong, conflicting feelings in the local community. The trial judge originally imposed an eight year prison sentence, explaining:

[Defendant] was sixteen years of age when she became pregnant, and an eight year sentence would be one-half of your lifetime up to her pregnancy, and that may very well seem excessive to her family, but when you balance that against the fact that this baby is not alive because of [Defendant's] acts, there are thousands of couples in this state, and thou-

sands of couples in this country who would have adopted that child, and would have felt proud and privileged to do so.\footnote{State v. Iacona, Case No. CA 2891-M, 2000 WL 277911, at *25 (Ohio Ct. App. March 15, 2000), aff'd, 752 N.E.2d 937 (Ohio 2001).}

Obviously, the judge did not use the new language required under the Ohio Plan. The court of appeals reversed and remanded for resentencing, saying that "[t]he record of sentencing in this case does not confirm that the trial court considered whether the minimum statutory prison term would demean the seriousness of the Defendant's conduct or inadequately protect the public from future crime."\footnote{Id.}

On remand, a different judge was assigned to the re-sentencing. The prosecutor continued to ask for an eight year prison sentence. Defense counsel filed a 34 page sentencing memorandum which quoted extensively from the Ohio sentencing statute, provided case law interpreting the statute, documented sentences in Ohio in similar cases where non-prison sentences were imposed, and cited to a nation-wide study, \textit{Mothers Who Kill Their Children}, which concluded that probation without jail was the most common sentence in cases of neo-naticide and that the median of all sentences studied was 2.5 years in prison.\footnote{State v. Iacona, No. 97-CR-0171, 2002 WL 208073 (Ohio Ct. Com. Pl. Feb. 11, 2002) (quoting CHERYL L. MEYER & MICHELLE OBERMAN ET AL., \textit{MOTHERS WHO KILL THEIR CHILDREN} (2001)).}

On re-sentencing, the new judge found that a minimum prison sentence would adequately protect the public and would not demean the seriousness of the offender's conduct. Taking into consideration that the defendant had already served two years in the Medina County jail, the judge sentenced Ms. Iacona to five years of probation, the first 90 days involving electronic home detention, with further requirements of community service and continued psychological counseling.

To overcome the statutory presumption of prison for the felony of involuntary manslaughter, Ohio Revised Code § 2929.14(D) required the judge to find that the factors indicating lesser likelihood of recidivism outweighed those indicating greater likelihood, and that the factors showing that the offense was less serious outweighed those showing the offender's conduct to be more serious than those normally constituting the offense. At the re-sentencing hearing, the judge explained his decision in this way:
There are specific laws that govern sentencing. When
any defendant is convicted of a crime, there are specific stat-
utes that guide a court in determining the appropriate sen-
tence. I am going to talk about that now.

...The law requires that there are two things that [de-
fense counsel and his client] have to persuade me about in
order [not to imprison the defendant]. The first one deals
with recidivism. The second one again deals with the seri-
ousness of this particular offense in light of other crimes of
this nature.

...I am convinced that Audrey Iacona doesn’t pose a
risk as a recidivist. Was the offense committed while the de-
fendant was on bail, probation, or parole? The answer is no.
Did she have a history of criminal conduct. Mr. Holman [the
prosecutor] argues yes, but she has no history of criminal
conduct. Has she indicated remorse? Yes, I think she indi-
cated remorse today... Is this offense one that is likely to
recur? I think not. All the factors relating to recidivism point
to something less than a prison sanction.

...The court must balance the statutory factors and those
showing the crime was more serious against those factors that
show the crime was less serious than others involving invol-
untary manslaughter... When you list some of them they
don’t make any sense in this case. Did the victim induce the
offense? That's clearly no the case here. Did the offender
act under strong provocation. That didn’t occur here either.
Did the offender cause harm to persons or property? Again, I
don’t believe that’s applicable here because every involun-
tary manslaughter has that.

Are there substantial grounds to mitigate the offender’s
conduct and are there relevant factors indicating that this
crime was less serious? I have to [say] to both of these yes,
there are... First the court considers the age of the defen-
dant at the time of the commission of the offense. It was
four and a half years ago. You were 17 years of age when
this began in juvenile court. The age of the defendant is
something that the court believes is substantial grounds to
mitigate your conduct in this case. Second, I reviewed reports [of psychologists]. . . . Dr. Kathleen Stafford’s psychological evaluation shows, frankly, a self-absorbed, narcissistic teenager with a total lack of insight. You cared about you. Also, you had a troubled family relationship. You had a difficulty with your family and your family had difficulty with their own relationships . . . It seems they were not angels either. The problems within this family, I think, exacerbated the crime. That is a factor that I considered in mitigation. . . .

. . . Dr. Stafford's report indicated to me that . . .: “Audrey Iacona has made progress in assuming responsibility for these offenses, is focusing on the consequences of her actions. As a result of confinement in jail for two years, she has been forced to confront her own actions, to conform her behavior to the rules of a structured setting, and to display respect for authority figures and for the women with whom she lives.” According to Ms. Stafford, she also has “recognized genuine shame and remorse and has begun to consider her obligation to give something back to somebody else.”

The contrast between the explanation by the first judge and that of the second judge in sentencing Ms. Iacona is apparent. Disregarding the statutorily required analysis, the first judge decided—without explanation and without discussion of alternatives—that a sentence longer than the presumed minimum was proper. But focusing on statutory sentencing criteria led the second judge to examine not only whether a longer than minimum prison sentence was necessary but also whether any further incarceration was necessary. Without putting numerical values on any of the relevant factors, sentencing concepts enabled the sentencing judge to explain his sentence as one that was shaped by law, facts, and reason. As the re-sentencing judge explained to one of the authors, the principles and guidance enunciated in the Ohio Plan allowed him both to find an appropriate outcome and to explain the sentence in a manner that minimized public controversy.

124 Id. at *2-*6.
125 Discussion between Judge Christopher J. Collier, Medina County, Ohio Court of Common Pleas and Judge Burt W. Griffin in January, 2002.
The prosecutor decided not to appeal\(^\text{126}\) the re-sentencing in *Lacona*. The dialog that the Ohio Plan fostered in *Lacona* was only between the trial lawyers and the sentencing judge. In that case, the new language that the Plan requires had value only at the sentencing hearing and for greater public understanding of the sentence. However, where a sentence is appealed, the judge’s sentence and the lawyers’ argument create a dialog with the appellate court. Even if the sentence does not change on re-sentencing, the dialog does, and the law is enhanced.

For instance, the law grew and was enhanced in *State v. Hess*.\(^\text{127}\) In *Hess*, the appellate court reversed a maximum sentence for another involuntary manslaughter of a child. The appellate court found that the sentencing judge had not adequately addressed the factors of seriousness and recidivism set forth in Revised Code § 2929.12. On re-sentencing, the same judge wrote a 14 page opinion, with extensive references to the statutory factors, explaining the reasons for a maximum sentence. The court of appeals affirmed.\(^\text{128}\) The sentencing judge detailed the factors of recidivism and seriousness that caused a maximum sentence to be imposed.

The defendant had beat the six year old son of his girl friend on the head during an intoxicated bout of playful wrestling. The child died partly because of delay in securing medical attention. The trial court said: "'Killing someone during an alcoholic binge does not weigh heavily in the defendant’s favor . . . Had the defendant simply passed out drunk and allowed a dangerous condition to occur, the case might be different. He did not. . . . This is unquestionably the worst form of the offense.'"\(^\text{129}\)

The court of appeals agreed, especially noting that the defendant’s continued drinking while on bond was relevant to the likelihood of recidivism. The defendant had three prior convictions for driving while intoxicated and was convicted a fourth time while on bond in the involuntary manslaughter case. This final result in *Hess* and the reasoning of the judges conveys a clear message: an unprovoked injury caused by an intoxicated offender who does not end his abuse of alcohol increases rather than decreases the seriousness of an offender’s conduct and the likelihood that he will commit future

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\(^{126}\) Under the Ohio Plan, prosecutorial appeals have been extremely rare - less than 10 out of more than 500 sentencing appeals in the first six years of the plan. See Griffin & Katz, supra note 8, at App. A.


\(^{129}\) Id. at *3 (quoting the trial court).
crime. Thus, the case law begins to illustrate a factor of seriousness not mentioned in the statute and to elaborate upon a factor of recidivism\(^{130}\) that is mentioned in the statute.

IV. THE EVOLUTION OF SENTENCING PRINCIPLES THROUGH APPELLATE REVIEW UNDER THE OHIO PLAN

In Ohio, prior to enactment of the Ohio Plan, the discretion granted to sentencing judges was virtually immune from meaningful appellate review. Investing a court with such broad discretion free from meaningful oversight was once referred to as a “national scandal” by Justice Potter Stewart. Just before his appointment to the United States Supreme Court, Justice Stewart commented on this system of unreviewable discretionary sentencing: “It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should . . . so neglect[] this most important dimension of fundamental justice.”\(^{131}\)

The absence of appellate review of sentencing can be best explained as an historical anomaly. When the United States won its independence, no system for appellate review of criminal sentences existed. Much of the criminal law of the new nation had been carried over from English practice.\(^{132}\) Under English law at the time, review of felony sentences by appellate courts did not exist and would have served little purpose: the sentencing judge had little discretion for felonies. For some felonies, judges could fine, imprison, or impose corporal punishment,\(^{133}\) but sentences of death or transportation to the penal colonies were mandatory in many cases.\(^{134}\) In such situations,

\(^{131}\) Shepard v. United States, 257 F.2d 293, 294 (6th Cir. 1958).
The criminal justice systems of England and the United States trace their origins to a common legal tradition, and thus share many common features, such as the law of evidence, the jury, and much of the substantive law. Fundamental differences exist in post-trial procedures, however, particularly in relation to the sentencing of convicted offenders. The reasons for these differences are not hard to find. The American jurisdictions have borrowed most heavily from England in those areas of the criminal process where the framework was established in England before the late eighteenth century, but the structure of the modern English sentencing system did not begin to emerge until the mid-nineteenth century, long after the United States was established and the development of a distinct American legal tradition was under way.
\(^{133}\) These were quickly administered, offering little opportunity for appellate review. However, even sentences of incarceration seldom exceeded two years, and most were six months or less. See 1 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, THE MOVEMENT FOR REFORM 1750-1833 160 (1948).
\(^{134}\) See ARTHUR W. CAMPBELL, LAW OF SENTENCING 4-5 (1991):
the sentencing judge could only delay imposition of the statutory sentence and recommend clemency to the Crown.\textsuperscript{135} In the nineteenth and twentieth centuries both the United States and England limited the death penalty and granted sentencing greater discretion to trial-level judges. Along with the grant of broad discretion, England developed a system for appellate review of sentences.\textsuperscript{136}

In the United States, however, nearly all states adopted systems of indeterminate sentences by the beginning of the 20th Century. Ohio was a pioneer in indeterminate sentencing, enacting its first statute giving good time reductions in 1856\textsuperscript{137} and urging indeterminate sentencing by 1869.\textsuperscript{138} The American states were fascinated by the possibility that prisons could rehabilitate, that prison managers could—like doctors—cure the patient, and that prison experts could determine when an offender was rehabilitated. Control over the actual length of sentence was, therefore, ceded to parole boards, the presumed experts on rehabilitation. The trial judge’s sentence therefore had little bearing on the term that an offender would serve if imprisoned, as the parole board made such determination within limits set by the legislature.

In 1974, Ohio adopted the Model Penal Code's approach to sentencing.\textsuperscript{139} All prison sentences were indefinite sentences. Ohio judges could choose from a range of minimum sentences, but the parole board still had the authority both to retain the offender for a longer period and to release at an earlier date.\textsuperscript{140} Ohio judges gained authority to grant definite prison sentences for the first time in 1983, but only for low level, non-violent felonies with respect to offenders who had no record of violence.\textsuperscript{141} For such fourth degree felonies,
judges could impose a prison sentence of six months, one year, or 18 months. For non-violent third degree felonies, judges could imprison for six months, a year, 18 months, or two years. In all instances, offenders could earn a one-third good time reduction.\textsuperscript{142}

By the 1990’s, when the Ohio Criminal Sentencing Commission began to consider sentencing reform, times had changed. The expertise of the parole board in effecting or determining rehabilitation was not even claimed by its members as the Sentencing Commission engaged in its deliberations. The primary focus of parole decision-making had become equalizing disparate prison sentences of sentencing judges. As a result, the Ohio Sentencing Commission, like many others in the 1980’s and 90’s, decided to remove from the parole board most of its power to modify sentences, to create a system of truth in sentencing, and to establish enforceable criteria for determining the appropriate sentence. Under such circumstances, the Sentencing Commission concluded that appellate review of sentences was the appropriate method for policing this increased power of the sentencing judge.\textsuperscript{143}

At the outset, the concepts articulated in the Ohio Plan were seen by many judges as “nebulous”\textsuperscript{144} or simply as “magic words.”\textsuperscript{145} Certainly there is a lack of precision in such terms as “reasonably calculated to achieve the . . . overriding purposes of felony sentencing,”\textsuperscript{146} “commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim,”\textsuperscript{147} “not disproportionate to the seriousness of the offender’s conduct and to the danger

\textsuperscript{142} Id.

\textsuperscript{143} OHIO CRIMINAL SENTENCING COMMISSION, supra note 1, at 49.


As for whether the maximum sentence was appropriate, the court noted in its sentencing worksheet that Beasley had committed the “worst form” of the offense. We recognize the difficulty of reviewing the “nebulous concept of the ‘worst’ form of [an] offense,” and we are aware that there is a presumption against the imposition of maximum terms.

\textsuperscript{145} See State v. Fincher, No. 97APA03-352, 1997 WL 638410, at *6 (Ohio Ct. App. Oct. 14, 1997) (“We do not interpret R.C. 2929.14(B) and (C) to require talismanic words from the sentencing court. As an aid to appellate review, the better practice may be for the trial court to state in its entry its findings and the reasons for imposing the maximum sentence.”); see also State v. Blondheim, No. C.A. 18594, 1998 WL 281917, at *4 (Ohio Ct. App. May 27, 1998) (citations omitted):

Although the trial court did not explicitly recite the “magic words” set forth in R.C. 2929.14(B), we hold that R.C. 2929.14(B) does not require such “talismanic” words. The trial court’s comments and the record support a conclusion that the trial court found that a sentence of two years would demean the seriousness of Blondheim’s crime.

\textsuperscript{146} OHIO REV. CODE ANN. § 2929.11(B) (West 1997).

\textsuperscript{147} Id.
the offender poses to the public,"\textsuperscript{148} and "an unnecessary burden" on governmental resources."\textsuperscript{149} The terms "the worst forms of the offense" or "pose the greatest likelihood of committing future crimes"\textsuperscript{150} gain meaning only as specific cases are decided. Similarly, whether a sentence would "demean the seriousness of the offender's conduct or . . . not adequately protect the public from future crime"\textsuperscript{151} can be determined only in relation to specific fact situations.

The framers of the statute understood that the terms lacked specificity. However, the terms seemed no less precise than terms such as "reasonable care," "unconscionable," "failure to act in good faith," or "unreasonable restraint of trade" found in other areas of law. Indeed, for nearly a century, judges in British Commonwealth countries had been governed by sentencing concepts similar or identical to those in Ohio's new statute. Those judges have not found the terms unworkable.\textsuperscript{152} The expectation of the Ohio Plan was that appellate review would provide content to such terms just as it had to the common law and as the Commonwealth courts have done in sentencing. The disparaging comment that the statute requires the incantation of "magic words" misses the point that those words (actually, findings) ensure that the sentencing judge engages in the analytic process contemplated by the statute in arriving at a consistent and legally appropriate sentence.

In the initial months of the Ohio Plan, many trial judges either ignored the statutory language—as in the \textit{Lacona} case—or assumed that if they simply intoned the language as if it were a talisman they were in compliance. The Ohio Supreme Court, however, in \textit{State v. Edmonson},\textsuperscript{153} unmistakably declared that the language of the statute was not to be ignored, that it should not be considered perfunctory, and that a sentencing judge's decision must reflect that sentences subject to particular code sections were, in deed, based upon the statutory concepts.\textsuperscript{154}

In \textit{Edmonson}, the Ohio Supreme Court reviewed a maximum prison sentence. The offender had not previously been imprisoned. The trial judge had imposed a ten year prison sentence for Aggravated Robbery, explaining: "I find you to be a very dangerous offender and

\textsuperscript{149} OHIO REV. CODE ANN. § 2929.13(A) (West 1997) (amended 2002).
\textsuperscript{150} OHIO REV. CODE ANN. § 2929.14(C) (West 1997) (amended 2002).
\textsuperscript{151} OHIO REV. CODE ANN. § 2929.14(B) (West 1997) (amended 2002).
\textsuperscript{152} See ASHWORTH, supra note 7; MARY DAUNTON-FEAR, SENTENCING IN SOUTH AUSTRALIA (1980); NADIN-DAVIS, supra note 7; THOMAS, supra note 7.
\textsuperscript{153} 715 N.E.2d 131 (Ohio 1999), appeal filed, 730 N.E.2d 384 (Ohio 2000).
\textsuperscript{154} Id. at 135.
you to commit a crime again [sic]. This was a terrible incident with a person who has [sic] a gun, robbing people.\textsuperscript{155}

The sentencing court did not say that the statutory minimum prison sentence of three years would "demean the seriousness of the offender's conduct or not protect the public from future crime" as required by O.R.C. 2929.14(B), nor did the court justify a maximum sentence of ten years by saying that Edmonson had committed one of the "worst forms of the offense" or that he posed "the greatest likelihood of committing future crime" as provided by O.R.C. 2929.14(C). As a result, the Ohio Supreme Court found the trial judge's explanation of the sentence to be unacceptable. It said:

\begin{quote}
[T]he General Assembly approached felony sentencing by mandating a record reflecting that judges considered certain factors and presumptions to confirm that the court's decision-making process included all of the statutorily required sentencing considerations.
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\ldots\text{With this record, there is no confirmation that the court first considered imposing the minimum three-year sentence and then decided to depart from the statutorily mandated minimum based on one or both of the permitted reasons.}
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\ldots\text{[For a maximum sentence,] R.C. 2929.19(B)(2)(d) requires a trial court to "make a finding that gives its reasons for selecting the sentence imposed" \ldots and requires \ldots "reasons for imposing the maximum prison term."\textsuperscript{156}}
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By insisting that trial judges must honor the statutory requirements that they make findings and give reasons in certain circumstances, the Ohio Supreme Court in \textit{Edmonson} and in a subsequent case, \textit{State v. Jones},\textsuperscript{157} in effect delegated to the lower courts the obligation, in the first instance, to interpret the substantive concepts under the Plan. In the first six years of appellate litigation under the Ohio Plan, the Ohio Supreme Court has considered only matters of power

\begin{footnotes}
\item[155] Id. at 134 (alteration in original).
\item[156] Id. at 134-35 (emphasis omitted).
\item[157] 754 N.E.2d 1252 (Ohio 2001).
\end{footnotes}
and procedure. It has left to the appellate courts and trial judges the task of adding substance to the statutory guidance.

The appellate courts were not quick to provide such guidance. Although they insisted that the sentencing judge explain the sentence

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158 See State ex rel. Lemmon v. Ohio Adult Parole Authority, 677 N.E.2d 347, 349 (Ohio 1997) (stating that the Ohio Plan is not retroactive) ("[T]he refusal of the General Assembly to retroactively apply the differing provisions of Am.Sub.S.B. No. 2 to persons convicted and sentenced before July 1, 1996 did not violate their rights to equal protection and due process under the Fourteenth Amendment to the United States Constitution."); State v. Rush, 697 N.E.2d 634, 637 (Ohio 1998) (illustrating the same point) ("[T]he original language expressed the General Assembly’s intent that the provisions of S.B. 2 be applied only to crimes committed on or after its effective date."); Edmonson, 715 N.E.2d, at 135 (1999) (construction of Ohio REV. CODE § 2929.19(B)(2)) ("R.C. 2929.19(B)(2)(d) requires a trial court to ‘make a finding that gives its reasons for selecting the sentence imposed’ if the sentence is for one offense and is the maximum term allowed for that offense," and "requires a trial court to set forth its "reasons for imposing the maximum prison term") (emphasis added.); State v. Jones, 754 N.E.2d (Ohio 2001) (illustrating the same point); see also State ex rel. Bray v. Russell, 729 N.E.2d 359, 362 (Ohio 2000) (discussing the power of parole board to impose bad time):

If a prisoner’s stated prison term is extended under this section, the time by which it is so extended shall be referred to as “bad time.”

... Other sections in R.C. 2967.11 set forth the procedures to be followed to determine whether a “violation,” a crime, has been committed. In short, R.C. 2967.11(C), (D), and (E) enable the executive branch to prosecute an inmate for a crime, to determine whether a crime has been committed, and to impose a sentence for that crime. This is no less than the executive branch’s acting as judge, prosecutor, and jury. R.C. 2967.11 intrudes well beyond the defined role of the executive’s branch as set forth in our Constitution.

see also Woods v. Telb, 733 N.E.2d 1103, 1112 (Ohio 2000) (discussing the power of parole board to revoke post-release control):

The General Assembly clearly intended for releasees such as petitioner to be returned to prison for violations of post-release control and then later returned to post-release control for the remainder of the post-release control period. Once that sanction has been used to the maximum extent, it is no longer available to be used as a post-release control sanction.

State v. Arnett, 724 N.E.2d 793, 804 (Ohio 2000) (trial court may consider religious values in determining seriousness):

[W]hen a sentencing judge acknowledges that he or she has consulted a religious text during his or her deliberations and quotes a portion of that text on the record in the sentencing proceeding, such conduct is not per se impermissible and does not violate the offender’s right to due process, when the judge adheres to the sentencing procedures outlined in the Revised Code and when the judge’s religious references do not impair the fundamental fairness of the sentencing proceeding.

159 Since Ohio has a two tiered appellate system (the Supreme Court and twelve appellate districts), the Ohio Supreme Court can avoid rendering substantial guidance on sentencing principles. In jurisdictions where only one appellate level exists, the highest court sets both procedural and substantive sentencing policy. The substantive guidance typically is given in the form of articulating approved principles of sentencing and identifying the proper range of penalty for an offense involving certain conduct by an offender of a particular type. Thus, in England, the Court of Appeals (Criminal Division) exercises the powers of a unitary supreme court in criminal matters and has provided both substantive and procedural guidance in sentencing matters. See THOMAS, supra note 7, at 3-8, 395-399. Similarly, the highest courts in Canadian provinces give guidance for both substantive and procedural sentencing policy. See also NADIN-DAVIS, supra note 7, at 3-12, 561-567; CLAYTON C. RUBY, SENTENCING 381-87 (2nd ed. 1980).
in those instances required by the statute, many appellate judges continued to believe that the standard of review under prior law—"abuse of discretion"—still applied under the new law. The abuse of discretion standard did not allow for the kind of review of sentences which the legislature envisioned. Indeed, it retarded the development of a common law of sentencing in the state. If such a standard were used, the guidance attempted by the new statute would not only be "nebulous," it would be subject to the virtually unassailable whim of whatever trial level judge was applying it.

The statute itself contributed to the misconception that abuse of discretion remained the standard of review; for § 2929.12(A) provided: "[A] court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles set forth in section 2929.11 of the Revised Code."

Although the section went on to say that the discretion was to be guided by the seriousness and recidivism factors identified in § 2929.12, the section failed to state—perhaps because it seemed obvious to those who drafted the Ohio Plan—that §§ 2929.13 (guidance on whether to imprison), 2929.14 (guidance on length of a prison sentence), and 2929.11, itself, were limitations on the sentencing judge's discretion.

In addition, it was easy to overlook the fact that the language in § 2929.12(A) was not a general grant of discretion but only a grant to exercise discretion with respect to the effectiveness of a sentence in complying with the statutory guidance in those sections not mentioned. Thus, it was only when a choice of sanctions was available to the judge within the statutory limitations that the Ohio Plan contemplated that the judge could exercise discretion. And, even then, that discretion was limited by the principles of proportionality, reasonableness, consistency, and cost set forth in sections 2929.11(B) and 2929.13(A). Ultimately the statute was amended to specify that the sentencing judge's discretion was limited by sections 2929.13 and 2929.14 and that the standard of appellate review was no longer "abuse of discretion." Unfortunately, in the initial years many judges did not want to relinquish the old ways.

Although abuse of discretion is no longer the standard of appellate review, the old ways retain some relevance. Before the effective date of the Ohio Plan, a criminal sentence could be appealed either as

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160 Griffin & Katz, supra note 8, at AC 2929.12 - I.
161 Ohio Rev. Code Ann. § 2953.08(G)(2) (West 1997 & Supp. 2001). Unfortunately in stating that "abuse of discretion" was no longer the standard of review, the General Assembly did not state what was to be the standard of review, leaving that to the judiciary to decide.
an abuse of discretion or as contrary to law.\footnote{See State v. Persons, 1999 WL 253527, at *5 (Ohio Ct. App. May 26, 1999) ("[W]e would note that trial courts have historically enjoyed broad discretion in sentences so long as the sentence imposed is within the statutory prescribed limits.").} A de novo standard of review was applied in the past when a sentence was challenged as contrary to law.\footnote{See, e.g., State v. Carroll, 662 N.E.2d 65 (Ohio Ct. App. 1995).} De novo meant that the court of appeals made its own judgment as to whether the sentence imposed was permissible.

As a substitute for de novo and abuse of discretion review, the Ohio Plan provides specific guidance for the exercise of judicial judgment. The sentencing act channels the exercise of judgment through statutory guidelines, in the form of purposes, principles, presumptions, and factors determining the seriousness of the offense and the likelihood of an offender committing further crimes. The failure to follow the step-by-step standards for determining whether or not to imprison or impose community control sanctions, as well as the length of the sentence and the determination whether sentences should be served concurrently or consecutively, constitutes imposing a sentence that is contrary to law and requires reversal.\footnote{State v. Johnson, No. 01CA5, 2002 WL 1291945, at *3 (Ohio Ct. App. May 23, 2002): The Ohio General Assembly did not explicitly define the phrase "contrary to law" in R.C. 2953.08(A)(4) and the Ohio Supreme Court has not addressed the issue. Various appellate districts have considered the issue, but none have attempted to conclusively define the contours of an appeal under this portion of the statute. It is clear, however, that if a court fails to follow the proper statutory procedure for felony sentencing, or fails to make the required findings to impose a particular sentence, that sentence will be deemed to be "contrary to law."}

The sentencing judge’s decision on whether a sentence is “consistent” with other sentences, would “demean the seriousness of the offender’s conduct,” will not “adequately protect the public from future crime,” is not “disproportionate to the seriousness of the offender’s conduct or the offender’s danger to the public”, does or does not “place an unnecessary burden on . . . governmental resources,” or is “necessary to protect the public or punish the offender” is not inherently more valid than the judgment of three appellate judges or seven supreme court judges. If a trial judge can not persuasively explain to appellate or supreme court judges why the trial judge’s decision on those issues should prevail, that decision should not prevail in the face of other judges who have the benefit of greater detachment and longer time for reflection and who have been invested with the authority to establish public policy on a district-wide or state-wide basis.

Although abuse of discretion is out and de novo review still has relevance under the Ohio Plan, the standard for review of sentencing decisions has been complicated by the fact that Ohio Revised Code §
2953.08(G)(2) requires the reviewing court before reversing or modifying a sentence to “clearly and convincingly” find one of the following:

(a) That the record does not support the sentence;

(b) That the sentence included a prison term [contrary to the requirements of § 2929.13(B)(2) of the statute];

(c) That the sentence did not include a prison term [contrary to the requirements of § 2929.13(D) of the statute];

(d) That the sentence is otherwise contrary to law.\textsuperscript{165}

Clear and convincing has been defined as:

[T]hat measure of degree of proof which is more than a mere “preponderance of the evidence,” but not to the extent of such certainty as is required “beyond a reasonable doubt” in [proving guilt in] criminal cases, and which will produce in the mind of the trier of facts a “firm belief or conviction as to the facts sought to be established.”\textsuperscript{166}

As that definition reveals, “clear and convincing” is primarily a standard used by judges in examining the persuasive quality of evidence and for reviewing the evidence that supports a determination of fact. Under the Ohio Plan, it is uniquely prescribed as a standard in reviewing matters of fact, procedure, and substantive interpretation of law.

Under the clear and convincing standard for appellate review, the party seeking to overturn a sentence must persuade the court of appeals by clear and convincing evidence that the trial court erred when sentencing the defendant, or when granting judicial release. Thus, the challenging party must point to evidence in the record which clearly and convincingly demonstrates that the sentencing judge improperly applied a legislative standard, erred as to a finding of fact, or failed to adhere to a mandated procedure. One court of appeals succinctly noted the change:

[T]he legislature’s imposition of [sentencing] standards amounts to a statutory definition of abuse of discretion and

\textsuperscript{165} § 2953.08(G)(2).

transformed our review into a factual analysis of the following four questions:

(1) Did the trial court consider the factors?

(2) Did the trial court make the required findings?

(3) Is there substantial evidence in the record to support those findings?

(4) Is the trial court's ultimate conclusion clearly erroneous?\(^{167}\)

The court might have added "is the sentence compatible with the overriding purposes and principles of sentencing?" In *State v. Persons*,\(^{168}\) the Fourth District Court of Appeals again recognized that the new standard on appeal "is somewhat different from the 'abuse of discretion' standard applied prior to passage of Am.Sub.S.B. No. 2":

[W]e would note that trial courts have historically enjoyed broad discretion in sentencing so long as the sentence imposed is within the statutorily prescribed limits. . . . The same is generally true even under the new sentencing guidelines provided, however, that the appropriate statutory procedures are followed and the correct statutory factors are properly weighed.\(^{169}\)

V. USING THE NEW STANDARD FOR APPELLATE REVIEW AND THE STATUTORY GUIDANCE

As sentencing judges have been held to their obligations to make findings reflecting factors of seriousness and recidivism embodied in § 2929.12 of the new statute, to observe the guidance in §§ 2929.13 and 2929.14, and to justify their sentences in terms of the overriding purposes set forth in § 2929.11, both appellate courts and trial judges have begun to impart usable content to the statutory terms which at first seemed nebulous.


\(^{168}\) No. 98CA19, 1999 WL 253527, at *5 n.3 (Ohio Ct. App. Apr. 26, 1999).

\(^{169}\) *Id.* See also *State v. Holsinger*, No. 97CA605, 1998 WL 820035, at *2 (Ohio Ct. App. Nov. 20, 1998) (citations omitted) ("[A] trial court's discretion is no longer virtually unlimited. Rather, Senate Bill 2 imposes statutory factors that trial courts must consider prior to imposing a sentence.").
Let us then examine how some of these concepts have evolved through the appellate process.

A. Whether an Offender is "Amenable to an Available Community Control Sanction"

Section 2929.13(B)(2)(a) of The Ohio Plan provides for consideration of whether the offender is "amenable to an available community control sanction" in deciding to impose a prison sentence on a low level (fourth or fifth degree) felon. Under the statute, "community control sanction" is the term used for all non-prison sentences including fines, community service, electronic detention, residential treatment, half-way house confinement, and even local jail sentences.  

The appellate courts have considered the phrase "amenable to an available community control sanction" in State v. Brewer,171 State v. Kawaguchi,172 and State v. Wilson.173 The word "amenable" has a dictionary definition of "liable to be brought to account or judgment; liable to the legal authority; answerable . . . capable of submission." But the dictionary definition does not prescribe how amenability is to be determined by the sentencing judge. That is a matter for judicial construction. The appellate courts in Brewer and Kawaguchi vacated prison sentences, in part, for the sentencing judge's failure to apply the term properly.175

In Brewer the appellate court said:

[T]he analysis of whether an offender is amenable to community control usually requires that the trial court "have

\[170\] OHIO REV. CODE ANN. § 2929.01(F) (West 1997) (amended 2002) ("[C]ommunity control sanction' means a sanction that is not a prison term and that is described in section 2929.15, 2929.16, 2929.17, or 2929.18 of the Revised Code.").

\[171\] No. C-000148, 2000 WL 1732335 (Ohio Ct. App. Nov. 24, 2000) (holding that the trial court failed to make requisite findings as per whether the accused was amenable to community control).


\[174\] WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1986).

\[175\] Brewer, No. C-000148, 2000 WL 1732325, at *3; Kawaguchi, 739 N.E.2d at 400-01.
some evidence that some available local sanctions have been tried and failed . . . The determination of nonamenability may not require the judge to exhaust the available local remedies, but it should oblige the judge to make a reasonable effort to secure compliance through local sanctions. In effect, the court is asked to ratchet up in reasonable increments the available local sanctions until experience with the offender reveals that the offender will not respond."

The term was further examined in Kawaguchi:

[C]onsistent with the basic objective of S.B. 2 in conserving prison resources, before imposing a prison sentence the court must conclude that the offender is not amenable to an available community control sanction. The basis for concluding that an offender is not amenable to an available community control sanction is the offender's behavior. This determination obliges the court to have evidence that the offender will not cooperate with local sanctions and that they will be ineffective in controlling the offender's behavior.

In Wilson, the sentence was reversed because the trial court failed to explain why it concluded that the offender was not amenable to community control. The trial court said:

The court takes assault on a peace officer very seriously. I was willing to accept the change of plea that was negotiated . . . contingent upon the officer's consenting to that, and I did take into consideration the mitigating facts in this case by allowing you to plead to an attempt which lowers this to a felony of the 5th degree. However, it is fundamental disrespect for authority to be involved, especially pushing and shoving somebody who is already in uniform. It is my finding that you are not amenable to community control sanctions.

But the appellate court found that statement to be inadequate, stating:

The trial court merely stated its findings in the record without giving reasons for them. We find no reasons given by the

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176 2000 WL 1732335 at *3 (quoting BURT GRIFFIN & LEWIS KATZ, OHIO FELONY SENTENCING LAW § 6.16 (1999)).
177 Kawaguchi, 739 N.E.2d at 400 (citing BURT GRIFFIN & LEWIS KATZ, OHIO FELONY SENTENCING LAW 462 (1999)).
178 Wilson, 2000 WL 1222024, at *1.
trial court as to why the defendant in this case was not ame-
nable to community control sanction.\footnote{Id. at *3.}

Although the fact that Wilson had disrespected a police officer by
pushing him shows a lack of amenability to a police officer’s order,
the trial court had not explained why confinement in a local jail, half-
way house, or at home under electronic monitoring would not ade-
quately punish the offender and deter Wilson, and why he was not
amenable to such sanctions.

Thus, appellate decisions create further legal principles in the law
of amenability to community control—the need for a trial court to
examine the offender’s behavior, to have evidence that local sanctions
will be unavailing, to make a reasonable effort to use local sanctions,
and to explain the reasons for its conclusion that local sanctions will
be inadequate.\footnote{In conformity with those principles, the General Assembly further amended the Ohio Statute to provide in OHIO REV. CODE ANN. § 2929.13(E)(2) that, if an offender under community control violated that control solely by the use of illegal drugs, the sentencing court was obliged to afford the offender a reasonable opportunity at drug treatment before imposing a prison sanction.}

**B. Whether a Minimum Prison Sentence Will “Demean the
Seriousness of the Offender’s Conduct or Not Adequately Protect the
Public from Future Crime”**

The Ohio Plan provides that the first prison sentence for an of-
fender should be the minimum prison sentence authorized by statute
for the particular offense unless the minimum sentence will “demean
the seriousness of the offender’s conduct or not adequately protect the
meaning is being provided to those concepts through appellate re-
view.

In *Sheppard*, the sentencing judge imposed a five year prison
sentence—the maximum allowed for the offense—upon an offender
who had not previously been imprisoned and for whom a one year
prison sentence was required unless the judge made the necessary
statutory findings. The judge made such findings. The offense had
been plea bargained from Aggravated Arson to Attempted Aggra-
vated Arson.\footnote{705 N.E.2d 411 (Ohio Ct. App. 1997).}
The defendant had set a fire in a trash can in an academic building at the University of Cincinnati. The primary damage caused was by smoke. No lives were threatened. The reason for the fire, according to the defendant, was to ward off a man who was pursuing him for sexual favors. The appellate court found no evidence that the fire was set because of prejudice or that further fire setting was likely. That court further found that no evidence supported the conclusion that a minimum one year prison sentence would demean the seriousness of the offender's conduct. The court emphasized the minor nature of the damage caused by the fire.

The lesser damage in comparison to most arsons, the likelihood that the offender did not expect to cause substantial harm, and the provocative role of the person pursuing the offender were matters cognizable under the factors listed in Ohio Revised Code Sections 2929.12(C)(2), (C)(3), and (C)(4). The appellate court's opinion served to place these factors in the context of an offender's actual conduct.

In Blake, a different appellate court upheld a three year prison sentence imposed on an offender who had not previously been offender and who pleaded guilty to robbery (reducing the offense from aggravated robbery). Robbery carried a minimum prison sentence of two years. Aggravated Robbery carried a three year minimum. In upholding a sentence greater than the minimum for the plea bargained offense, the appellate court recited the facts that it considered important—facts that demonstrated that the offender had committed three crimes: Aggravated Robbery, Felonious Assault, and Attempted Assault on a Peace Officer. The facts relied on by the appellate court were that the defendant had hit a female friend, dragged her around to the side of a building, threatened to kill her, "snatched" off a necklace and bracelet, and pulled a gun on a security guard who attempted to intervene. If the defendant had been convicted of the charged crime of Aggravated Robbery with a firearm, he would have received a mandatory minimum prison sentence of three years because of the firearm, and an additional three years subject to the rebuttable presumption under Ohio Revised Code Section 2929.13(D) because the crime was Aggravated Robbery.

The appellate court ruled:

186 Id. at 413.
187 Id.
188 1999 WL 375576, at *1.
189 Id.
We find no error in the trial court's reliance on Blake's alleged use of a firearm. Even though the firearm specification was dropped and the aggravated robbery charge was reduced to robbery, the charges were reduced or dismissed for a purpose, i.e., to obtain a guilty plea and avoid a trial. The dismissal did not change the underlying facts of the crime, which the trial court was entitled to consider.\textsuperscript{190}

\textit{Eichner} is a case from still another Ohio appellate district where a prison sentence exceeding the minimum was approved for an offender who had not previously been imprisoned. The 19 year old offender had pleaded guilty to corruption of a 14 year old girl. The sentencing judge imposed a 15 month prison sentence where the minimum prison sentence would have been six months.\textsuperscript{191}

Without detailing the facts involved, the appellate court gave greatest attention to the defendant's conduct both before and after the offense:

\begin{quote}
[A]ppellant's attitude toward the offense and a lack of responsibility regarding this behavior . . . the [sentencing] court entertained grave concerns about whether appellant understood his responsibility for the offense, particularly where appellant reoffended while under sanctions for another crime.\textsuperscript{192}
\end{quote}

It was undoubtedly apparent that the sentencing court regarded the 15 month prison sentence as a warning to the defendant, since that court granted a release from prison after approximately six and a half months in prison—preserving a possibility of return to prison for the balance of the term.\textsuperscript{193}

From \textit{Sheppard}, \textit{Blake}, and \textit{Eichner}, three principles emerge from or are reaffirmed that relate to whether more than a minimum prison sentence should be imposed upon one who has not previously

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\item[\textsuperscript{190}] \textit{Id.} at *2.
\item[\textsuperscript{192}] \textit{Id.} at *6.
\item[\textsuperscript{193}] The sentencing court may have desired to maintain its own control over the defendant after release from prison rather than relinquishing control to the parole board. If the court had imposed a minimum sentence of six months, the defendant would have been under parole board supervision for five years with a risk of return to prison for only three months. \textit{Ohio Rev. Code Ann.} § 2967.28(B)(1), (F)(3) (West 1997 & Supp. 2002). By granting early release from prison after a longer sentence, the court retained authority to supervise him for five years and to return him to prison for the balance of the sentence. \textit{Ohio Rev. Code Ann.} § 2929.20(I) (West 1997) (amended 2002). Upon release from prison there after, parole supervision would last for five years, and the parole board could return the offender to prison for seven and a half months. This greater control through judicial release may also explain why the defendant appealed the 15-month sentence even when receiving a much earlier release.
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been imprisoned. First, that a sentencing court may consider the real facts of the case even though plea bargaining may have removed those facts from the formal charge.\textsuperscript{194} Second, that actual damage or injury, potential harm to others, and the motive of the offender are important factors of seriousness.\textsuperscript{195} Third, that, in determining the likelihood of recidivism and the need for a meaningful deterrent sanction, a court is justified in giving substantial weight to an offender’s conduct both at the time of the sentencing hearing and in the period between arrest for the offense and the sentencing.\textsuperscript{196}

C. Whether the Offender Has Committed One of the “Worst Forms of the Offense” or Poses the “Greatest Likelihood of Committing Future Crime”

Section 2929.14(C) under the Ohio Plan reserves the maximum sentence for a single offense for “offenders who have committed the worst forms of the offense” and for “offenders who pose the greatest likelihood of committing future crimes.” Again, one can not dispute that “worst forms of the offense” and “greatest likelihood of committing future crimes” are imprecise concepts. Courts have been largely unable to generalize further about these concepts, finding it easier to identify factors that do not make conduct the worst form of an offense or an offender to have the greatest likelihood of committing future crime. Unless seriousness or recidivism factors identified in § 2929.12 are present, maximum sentences have not been upheld.\textsuperscript{197}

The closest that any court has come to refining the term “greatest likelihood of committing future crimes” is the observation by the appeals court, in \textit{State v. Howard}\textsuperscript{198} that when the legislature “used the superlative form of ‘great’ to describe the likelihood of recidivism necessary to impose the maximum sentence . . . [it] obviously reflects the legislature’s intention to limit maximum prison terms to the most incorrigible offenders.”\textsuperscript{199} One example of such incorrigibility oc-

\textsuperscript{194} See GRIFFIN & KATZ, supra note 8, at 502 (providing examples of sentencing “based on a judge’s perception of the true facts” even though at odds with the facts of a plea bargain).

\textsuperscript{195} See OHIO REV. CODE ANN. § 2929.12(B), (C) (West 1997) (amended 2002).

\textsuperscript{196} Attitude at the sentencing hearing may be considered to be lack of remorse under § 2929.12(D)(5). The other factors of post-offense conduct are not expressly mentioned in § 2929.12(D) and, thus, become factors or principles identified through case law.

\textsuperscript{197} See GRIFFIN & KATZ, supra note 8, at 627, 643 (collecting cases).

\textsuperscript{198} 1998 WL 597651, at *4 (Ohio Ct. App. Sept. 11, 1998). In Howard the defendant: [Had] no criminal history. He was employed at the time of the sentencing hearing. He alleged that he wanted to support his children and that he had failed to do so only because of an injury. We conclude that the evidence is insufficient to support the trial court’s finding that Howard possesses the greatest likelihood of committing future crimes.

\textsuperscript{199} Id.
occurred in *State v. Ronau*200 where a maximum five year prison sentence was upheld for three offenses: third degree burglary, escape, and failure to appear after release on recognizance. Ronau had staked out a house, killed the family dog when it barked, stole jewelry, broke electronic equipment, and fled to New Mexico where he stole a Winnebago. Even though apparently a first offender, the sentencing court concluded that Ronau "would do whatever is necessary . . . . to accomplish his goals."201

It has been unusual, however, for first offenders or even those with prior records who have not been previously imprisoned to receive a maximum prison sentence.202 Although the appellate courts have been loathe to define who does have the greatest likelihood of committing future crime, factors that do not justify a maximum prison sentence have been identified. A lengthy criminal record alone does not necessarily indicate the greatest likelihood of future crime.203 Nor does failure to appear at a sentencing hearing204 or drug addiction, if the offender is genuinely pursuing treatment.205

201 Id.
202 See, e.g., *State v. De Amiches*, No. 77609, 2001 WL 210020, at *11 (Ohio Ct. App. March 1, 2001) (holding that the imposition of the maximum prison sentence improper because the sentencing judge failed to first consider imposing the minimum sentence); see also, *Griffin & Katz, supra* note 8, at 618, App. A (collecting cases).
In the instant case, the trial court did not state on the record whether or not it believed that the appellant committed the "worst form" of drug possession. It is clear from the record that the appellant does not qualify as either a major drug offender or repeat violent offender as those terms are defined in R.C. 2929.14(D)(2) and (3). The trial court did indicate that the appellant had a lengthy criminal record, but this is not the same as stating on the record that the appellant had the greatest likelihood of committing future crimes. Therefore, we are constrained by the language of the sentencing statute to conclude that the trial court did not sufficiently state on the record its reasons for imposing the maximum sentence on the appellant.

We also stress that the court explained that it had based its sentence, in part, on the fact that Stone had originally failed to appear at his scheduled sentencing hearing . . . . Based on this court's holding in *State v. Johnson*—that the current sentencing guidelines do not permit a court to enhance a sentence as a punishment for a defendant's failure to appear for sentencing—we conclude that the court erred by basing its sentence on Stone's failure to appear at his original sentencing hearing.

Green challenges further the court's finding that he refused to acknowledge a pattern of drug abuse, or that he refused treatment for that abuse. In this regard, Green points to the fact that he pleaded guilty to the possession of cocaine and agreed to the terms of his community control requiring him to undergo drug testing. . . . We do note, however, that
When dealing with the "worst forms" of the offense, appellate courts have similarly found it easier to state what the term does not include, than what it does include. The courts agree that the statute is written "to include multiple forms of any particular offense" and that if a seriousness factor listed in § 2929.12 is an element of the offense the mere presence of the factor in the case may not be considered to increase the seriousness of the offense; the factor must exist in an aggravated form.

Green's attorney, in speaking on behalf of his client before the revocation hearing, stated that Green had admitted to him that drug abuse had been a problem since the time he was twelve years old, a period of six years. Green's attorney stated, "It's pretty clear, Judge, I believe that he does have a drug problem. He has a--and he was pretty open to me about that."

We hold however, that the record does not support the findings that he was on probation at the time of the original offense, or that he has failed to acknowledge a pattern of drug abuse or refused treatment. Given the trial court's failure to make an express finding that Green posed the "greatest" risk of recidivism, and because two of the "recidivism likely" factors that were checked are not supported by the record, we conclude that the sentence is contrary to law.


In our view, a trial court may not properly base a finding that a defendant has committed the worst form of the offense, for purposes of Ohio Revised Code 2929.14 (C), upon facts and circumstances that do not comprise a part of the conduct involved in the charged offense. Here, the offense with which McDaniel was charged did not include any beatings that he may have inflicted upon April Buell. Perhaps he should have been charged with an offense that included the beatings. Of course, if he had been so charged, the State would have borne the burden of proof thereof, beyond a reasonable doubt.

We hasten to distinguish the case before us from a case in which facts and circumstances comprising the offense are elaborated upon in a pre-sentence investigation report, or otherwise, at sentencing. If, for example, there were evidence before the trial court, at sentencing, that April Buell had not wanted to ingest drugs, but that McDaniel had strongly encouraged her to do so, based upon his position as her host, that would be a fact, merely elaborative of the offense as charged, that the trial court could properly take into consideration in determining whether McDaniel's Involuntary Manslaughter offense was the worst form of that offense. However, where facts or circumstances are unrelated to the offense as charged, even if they could have been made a part of the charge, they are not part of the offense for the purpose of determining whether the charged offense, of which the defendant has been convicted, or to which he has pled guilty, is the worst form of the offense.

In *State v. Hess*, the court of appeals discussed how to find the worst forms of involuntary manslaughter:

In the prior appeal, we commented favorably upon the trial court’s analysis of the most important exacerbating factors and held that the trial court is not precluded from examining the victim’s age when considering the seriousness of the offense concerning children. We pointed out that the trial court, when considering a sentence in an offense concerning children, like endangering children, may properly consider whether an offender’s conduct is more serious than conduct normally constituting that offense based on the fact that the victim is a six-year-old child. We also held that a trial court is not precluded from examining the physical injuries causing death when considering the seriousness of offenses concerning a victim’s death, even though the death is a factor in all cases involving involuntary manslaughter. The court may properly consider the seriousness of the events based on the extent and magnitude of bodily trauma and injuries leading to the victim’s death. We further held that the trial court may consider the relationship between the victim and the offender as a factor in cases involving endangering children and the position of the dependency or vulnerability that the child had in relationship with the offender.

In *State v. Mays*, the court of appeals reversed a finding that defendant’s conduct constituted one of the worst forms of aggravated vehicular homicide. The court observed:

In past cases, this court has grappled with the somewhat vague concept of what constitutes the “worst form” of an offense. And while the concept is difficult to define in concrete terms, we hold that Mays’s conduct in the case at bar did not constitute the worst form of aggravated vehicular homicide. Though the evidence certainly indicates that Mays exercised extremely poor judgment in carrying out his wish to “mess with” Boumer, there is no indication that he harbored any malice toward the victim. Instead, the record indicates that

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In the instant case, the trial court specifically stated at the sentencing hearing that appellant’s conduct constituted the worst forms of the offenses. In making this determination, the trial court looked at the full extent of appellant’s conduct throughout the morning of January 8, 1999. The trial court refused to view each charged offense in a vacuum, isolated from appellant’s other actions. This was not error.

209 *Id.* at *2.
Mays's conduct started as a reckless, poorly conceived prank and ended in tragedy. And while we in no way wish to minimize the loss of a human life or to condone Mays's actions, this is not the type of conduct for which the legislature has reserved the maximum sentence. . . . [A]lthough he admittedly thought of his own interests before seeking help for Boumer, Mays did take steps to ensure that emergency personnel were notified promptly. His actions therefore did not reflect an utter lack of concern for Boumer or otherwise demonstrate a perversity of character that would justify the imposition of the maximum sentence. Further, there is no indication that the victim suffered for a prolonged period of time before he died or suffered to a greater degree than any other victim of a vehicular homicide. Finally, Mays surrendered to authorities and confessed to the crimes. Under these circumstances, we cannot say that Mays committed the worst form of the offense within the meaning of Ohio Revised Code 2929.14(C). We therefore hold that the trial court erred in imposing the maximum term for that offense.211

The appellate court, in effect, noted that factors of mitigation under § 2929.12 existed. For instance, the offender did not expect to cause physical harm to the decedent.212 Furthermore, the offender's conduct after the offense supported that conclusion and mitigated the seriousness of his conduct constituting the offense.213 Finally, no factors existed which made the conduct more serious than conduct ordinarily constituting the offense.

Once more, from an analysis of decisions and facts in individual cases, principles begin to emerge for determining the worst forms of the offense:

- A court should be guided by seriousness factors in the statute and relevant unlisted factors.

- Since the superlative used in § 2929.14(C) relative to seriousness connotes multiple kinds of egregious conduct, the court need not conjecture some penultimate form of an offense that cannot be surpassed in

211 Id. at 449.
212 OHIO REV. CODE ANN. § 2929.12(C)(3) (West 1997) (amended 2002) (directing the sentencing court to consider that the offender did not expect to cause physical harm in deciding the seriousness of the offense).
213 § 2929.12(C)(4) (directing the sentencing court to consider in determining the seriousness of the crime whether there are "substantial grounds to mitigate" even if those grounds do not "constitute a defense").
seriousness in order to conclude that the standard of "worst forms" has been met.

- The defendant’s intentions and his conduct after an offense to mitigate an injury or to aid law enforcement are relevant.

- Where substantial factors of mitigation exist, they should be given weight so that the maximum sentence is not imposed.

VI. DEVELOPING "THE LAW OF SENTENCING" UNDER THE OHIO PLAN

We are accustomed to thinking of law as descending in a hierarchical flow from legislation to Supreme Court decisions to appellate court decisions and ultimately to application at the trial court level. Of course, the common law did not develop that way. It began with customary concepts of justice that were given linguistic form through judicial action and from commentators like Blackstone, who played vital roles in identifying common law principles.

Under the Ohio Plan legislation is important in prescribing basic principles and objectives of felony sentencing, but sentencing decisions of trial judges may often be as important as those of judges at the appellate level in determining the proper application of sentencing principles. Section 2953.08(G)(1) of the Ohio Revised Code specifies that if a sentencing court fails to make findings required under the Ohio Plan, the appellate court "shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings." The Ohio Supreme Court, in State v. Jones,\(^\text{214}\) underscored the importance of a full trial court explanation of its sentence by directing an appellate court to remand to the trial court for both findings and reasons before imposing its own judgment of the proper sentence. Most recently, the Eighth District Court of Appeals, in State v. Lyons,\(^\text{215}\) has extend that philosophy to determining whether a sentence is consistent with sentences in similar cases even though, where consistency is an issue, the statute does not require the court to express either findings or reasons. The Lyons court doubted the consistency of the sentencing judge’s actions with similar cases

\(^{214}\) 754 N.E.2d 1252 (Ohio 2001).
and remanded to the sentencing court for a further hearing to establish a record on the issue.216

The consistency principle, itself, gives primacy to sentencing court decisions. By requiring sentences to be consistent with those imposed for similar offenses on offenders with similar characteristics, the Ohio statute assumes that the overwhelming number of judges sentence in a way that, as required by § 2929.11(B) is “reasonably calculated to achieve the overriding purposes of felony sentencing” and is “commensurate with the seriousness of the offender’s conduct and its impact on the victim.” Thus, a consensus that can be discerned from the actual practices of trial level judges is evidence of the law of sentencing under the Ohio Plan.

That deference to trial court judgments reflects a widely held view that many judges who sentence offenders on a nearly daily basis may have a better sense of proportionality, reasonableness, and effectiveness in sentencing than do many appellate court judges, especially those who have not had great experience in the practice of criminal law.217 Respect for the insights of sentencing judges is already seen in Ohio’s appellate opinions on sentencing which quote extensively with approval the analysis of the sentencing judge.218 Such trial court analyses become part of the available body of sentencing law. Where sentences are not appealed but the sentencing judge’s analysis is published, those opinions also help set legal standards.219

The most comprehensive way to ascertain a consensus of sentencing opinions is to collect and report them systematically. In England, Professor David A. Thomas annually updates a four volume digest of sentencing decisions that are organized by type of offense.220 In Australia and Scotland, computerized data bases on sentencing practices have been developed.221 The Ohio Criminal Sentencing Commission has recently undertaken a similar effort of computerization for use in implementing the consistency principle under the Ohio Plan, but the implementation is still far off.

216 Id. at *5.
217 See ASHWORTH, supra note 7, at 133 (noting this view among British judges).
220 See CRIMINAL APPEAL REPORTS: SENTENCING and CURRENT SENTENCING PRACTICE (David A. Thomas, ed.).
221 See ASHWORTH, supra note 7, at 356.
A. Minimization of Political Controversy: A Strength of the Ohio Plan

An unexpected strength of the Ohio Plan has been that, in the drafting process, it did not become captive to one interest group, it was adopted without significant political opposition, and as weaknesses have become apparent, the Sentencing Commission has been able to secure modifications in the Plan with relative ease. Because the statute limits itself to nearly unassailable concepts—that the overriding purposes should be public protection and punishment, that sentences should be reasonable, proportionate, and consistent with other sentences, that sentences should not place an unnecessary burden on governmental resources, that first time prison sentences should be the minimum authorized sentence unless the minimum will not achieve the overriding purposes of sentencing, that maximum sentences should be reserved for the worst offenses and offenders, that judges should make findings and explain their sentences when they depart from the general guidance, and that appellate courts should have real powers of review—the Ohio Plan was enacted in 1995 substantially as recommended by the Sentencing Commission.

Although appellate judges complained about the increasing work load that appellate review would engender, the legislature was only mildly impressed with that argument. In addition, it provided a fund of money to hire additional judges, if necessary. The fund has never been used.

Probation officers objected that the term “community control” was substituted for “probation.” The arguments on each side were purely semantic. The term “community control sanction” prevailed. Ultimately, the term probation was retained as a community control option.

Prosecutors had two concerns: first, that no limit be placed on the total sentence which might be imposed through consecutive sentences, and second, that a presumption not be adopted in favor of non prison sentences for low level felonies. The prosecutors prevailed in their desire not to limit the length of consecutive sentences. Opponents urged abandonment of the term “probation” because it sounded too much like leniency when, in fact, many local sanctions like half-way house residence, local jail time, community service, electronic home detention, intensive probation supervision, and lengthy probation periods can have substantial punitive impact.

Some judges had urged abandonment of the term “probation” because it sounded too much like leniency when, in fact, many local sanctions like half-way house residence, local jail time, community service, electronic home detention, intensive probation supervision, and lengthy probation periods can have substantial punitive impact.
A cumbersome compromise was reached on the prosecutors’ objection to a presumption of local sanctions for low level felonies. The guidance for such felonies was drafted to contain in § 2929.13(B)(2)(a) a prescription that if certain listed factors of seriousness existed, if the Court determined that the offender was not amenable to an available community control sanction, and if prison was consistent with the overriding purposes of felony sentencing provided in § 2929.11, then prison must be imposed. If one of the listed factors of seriousness did not exist, § 2929.13(B)(2)(b) required non-prison sanctions if such sanctions were consistent with § 2929.11.

In practice, this complicated section has come to be treated as a presumption in favor non-prison sanctions for fourth and fifth degree felonies, since most low level felonies do not contain the seriousness factors which would override the preference for non-prison sanctions. When such a factor does exist, other considerations such as the usefulness of local drug treatment, mental health attention, participation in a local education program, or employment often make local sanctions less expensive and more suitable than a prison sentence to preventing crime and punishing the offender.

As deficiencies in the statute have been noted, they have been easily corrected by using the same kind of general concepts as originally employed. For example, § 2929.13(E)(2) originally contained a preference for drug treatment if an offender under local supervision for a drug offense was determined to use illegal drugs while under that supervision. The section was later amended to extend this preference to all offenders under local supervision. The critical statutory language is:

If an offender . . . violates the conditions of a community control sanction . . . solely by reason of producing positive results on a drug test, the court . . . shall not order that the offender be imprisoned unless the court determines on the record either of the following:

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223 Ohio Revised Code § 2929.13(B)(1) listed the factors of seriousness contained in Ohio Revised Code § 2929.12(B) plus the commission of the offense while on bond, probation, or parole or the defendant’s having previously been imprisoned.

224 A far simpler approach, reaching a similar result, might have been to provide that a presumption of community control existed for designated low level felonies unless the sentencing court found that the factors showing a greater degree of seriousness pursuant to Ohio Revised Code § 2929.12(B) demonstrated that a combination of community control sanctions would demean the seriousness of the offender’s conduct or that the factors showing a greater likelihood of recidivism pursuant to Ohio Revised Code § 2929.12(D) demonstrated that a combination of community control sanctions would not adequately protect the public from future crime.
(a) The offender has been ordered ... to participate in a drug treatment program ... and the offender continued to use illegal drugs after a reasonable period of participation in the program.

(b) The imprisonment of the offender for the violation is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code.\textsuperscript{225}

Thus, a clear prohibition of imprisonment for drug usage is hedged by a failure at drug treatment after a "reasonable period of participation" in a drug treatment program or inconsistency with the basic principles of felony sentencing. The statute communicates a policy preference for drug treatment, but leaves the details of application to judicial decisions on a case-by-case basis. In this way, political confrontation is avoided. The battle between punishment and treatment for drug users is confined to the court room. The general language of § 2929.13(E)(2) allows sentencing practices with respect to drug users to change, subject to appellate review, as research, education, experience, and resources increase our understanding of and ability to address drug usage.

The little political controversy that has attended modifications in the Ohio Plan may be compared to the intensity of controversy that sometimes accompanies changes in numerical guideline systems. In the pioneer jurisdiction for numerical guidelines—Minnesota—a study of interactions within the Minnesota Sentencing Guidelines Commission concluded that the ability of the Commission to reach a consensus and to adapt to new considerations diminished after the initial guidelines were enacted.\textsuperscript{226} Interest groups represented on the Minnesota Commission tended to harden their positions and lose their desire to compromise once the overall sentencing scheme was adopted. In Ohio, similar attitudes have been seen in the years subsequent to 1996; however, the continued preference to allow specific disputes to be resolved in the judicial process under statements of general policy preference has permitted the Commission to continue to take policy initiatives with respect to the sentencing of drug users.\textsuperscript{227}

\textsuperscript{225} \textit{OHIO REV. CODE ANN.} § 2929.13(E)(2) (West 1997) (amended 2002).

\textsuperscript{226} \textit{See} \textit{PARENT, supra} note 3, at 215-218.

\textsuperscript{227} In 2000, § 2950.041 of the Ohio Revised Code was amended on recommendation of the Ohio Criminal Sentencing Commission to permit greater flexibility and opportunities for both alcohol and drug abusers to avoid conviction by successful completion of a substance abuse treatment program.
B. Deficiencies and Disappointments

The developing body of case law under the Ohio Plan gives cause to be optimistic that a system for controlling judicial discretion, limiting inappropriate imprisonment, protecting the public, and achieving equity among offenders can be built upon general statutory principles and traditional practices of using case law to further refine those principles. Nonetheless the Ohio system is not without deficiencies.

The most notable deficiencies have been in the following areas:

1. Failure of the Plan to require judges to give reasons when imposing more than the minimum prison sentence for those who have not previously been imprisoned.

2. Failure of the Plan and appellate courts to give more specific guidance for lengthy consecutive sentences.

3. Use of an evidentiary standard to govern appellate review of procedural and substantive issues.

4. Inability of lawyers to grasp quickly the new tools provided under the Plan for shaping sentencing decisions.

5. Failure of some judges to apply the new standards.

6. Failure of legal academia to address issues and opportunities under the Plan.

VII. IMPROVING THE OHIO PLAN

A. Need for Judicial Reasons When Imposing More Than a Minimum Prison Sentences on Offenders Who Have Not Previously Been Imprisoned

Section 2929.19(B)(2) requires judges to give reasons as well as to make findings of law when imprisoning a fourth or fifth degree felony offender, not imprisoning a first or second degree felony offender, imposing a maximum sentence for a single offense, and imposing consecutive sentences. The criteria for those decisions are prescribed in §§ 2929.13(B), 2929.13(D), 2929.14(C), and
2929.14(E)(4). Section 2929.14(B) establishes criteria for exceeding the minimum prison sentence for offenders who have not been previously imprisoned, but § 2929.19(B) has omitted a requirement that the judge justify or explain a decision to exceed the minimum prison sentence when § 2929.14(B) applies. Such a requirement should be added to § 2929.19(B)(2).

The omission resulted either from an oversight by the Sentencing Commission, or from a desire by the Commission not to arouse opposition from judges who might resist the burdens that the new sentencing scheme imposed on them. Yet the growth of legal principles, the promotion of proportionality and consistency in sentencing, and effective judicial review of how the statutory guidance is being applied depend upon an understanding of a judge’s reasons for departing from the policy preferences in the statute. A requirement of reasons before a judge imposes more than the minimum prison sentence on an offender who has not previously been imprisoned gives greater assurance that the judge will engage seriously in the analysis which § 2929.14(B) mandates. Indeed, a trial judge’s decision to exceed the minimum prison sentence for an offender who has not previously been imprisoned may be more effectively preserved if the judge explains why the legal conclusion was reached rather than if the judge only intones that a minimum prison sentence will “demean the seriousness of the offender’s conduct” or not “adequately protect the public from future crime.” A reviewing court, not perceiving how the sentencing judge’s decision was reached, may simply substitute its own judgment as to the need for the particular sentence based on its own assessment of the evidence which shows seriousness and likely recidivism.

B. Need for Statutory Guidance for Lengthy Consecutive Sentences

Section 2929.14(E)(4) requires the sentencing judge to find that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and his danger to the public, and § 2929.19(B)(2)(c) obliges the judge to explain how that conclusion was reached. Because the statute places no limit on the length of consecutive sentences, differences in sentencing philosophies can create great disparities in sentencing. Sentences in excess of 10 years—the maximum for a single first degree felony—serve only two purposes: to incapacitate the offender and to send a message to the public and to other offenders. Rehabilitation, except through the aging process, can not be the function of such sentences.

One can not easily divine how long a sentence needs to be in order to protect the public from an offender who is not likely to be re-
habilitated through correctional procedures, in order to deter others, and in order to make a fair statement about seriousness. In one case, State v. Arnett, the sentencing judge sought guidance from the Bible in determining to impose a prison sentence of 51 years for 10 counts of rape and one count of pandering obscenity committed upon a five year old girl. When appealing the sentence, defense counsel raised constitutional issues involving the First Amendment to the U.S. Constitution and said that the sentencing judge had not made the findings required by §§ 2929.14(E)(3) and 2929.19(B)(2)(c). Although arguing constitutional and procedural issues, defense counsel failed to address and neither the Ohio Supreme Court nor the Court of Appeals considered the substantive aspects of the proportionality and conservation of resources requirements under the Ohio Plan.

The supreme and appellate court opinions do not indicate Arnett's age, but a fifty-one year sentence must be considered a life sentence. Other Ohio courts have imposed prison sentences of seventy-five years, seventy years, fifty-four years, forty-eight years, forty-five years to life, and forth-three years eleven months. For each of those sentences, because the sentence for practical purposes is a life sentence, courts need a framework of analysis which enables the court to compare the seriousness of the offense to other serious offenses, including certain homicides, forcible child rapes, and

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228 724 N.E.2d 793 (Ohio 2000).
229 Id. at 796.
230 The Ohio Supreme Court mentioned that the procedural issues were before it but did not decide them. Id. At the court of appeals level, defendant also argued that the sentencing court had not made the findings required by § 2929.14(E)(4); however, he did not address the substantive issue of whether the sentence was, in fact, disproportionate to the seriousness of defendant's conduct. The appellate court did not discuss either the claim that proper findings had not been made or whether the total sentence was disproportionate to the seriousness of Arnett's conduct and his danger to the public. State v. Arnett, Nos. C-980172 & C-980173, 1999 WL 65632 (Ohio Ct. App. Feb. 5, 1999), rev'd, 724 N.E.2d 793 (Ohio 2000).
rapes by offenders previously convicted of rape—offenses which in Ohio also carry life sentences.

The differences between 75 years and 45 years or between 45 years and 10 years are so great that a rational basis should be articulated in order to justify such differences. Otherwise, the differences are based simply on the different value judgments of the different sentencing judges—not flattering to a system that is to be based on the rule of law rather than on the rule of men and women.

Curiously, the Ohio Plan attempts to provide a rational basis for lengthy sentences with respect to repeat violent offenses by offenders who have previously been imprisoned for violence. For instance, § 2929.14(D)(2) provides guidance for possibly extending a sentence 10 years beyond the maximum of a single offense if an offender has been imprisoned for injuring someone in a first or second degree felony and injures someone again in a felony of that seriousness.

Regrettably, the Ohio Plan does not give such guidance for consecutive sentences which may exceed 10 or 20 years. Absent more specific statutory guidance, it becomes the task of trial and appellate courts in Ohio to utilize the principles of proportionality, conservation of resources, and consistency with other sentences to fashion criteria which can guide judges when considering such lengthy consecutive sentences. It is the task of the appellate courts to insist that trial judges engage in a proportionality analysis and ensure that their sentences are consistent with the sentences meted out to other offenders.

But statutory guidance is possible. Principles could be established for justifying sentences over 20 years by utilizing the same approach the Ohio Plan employs to constrain imposition of more than minimum sentences on offenders who have not been to prison. Such provisions might be that when a judge sentences an offender to more than 20 years in prison the court should explain:

1. why the public would not be adequately protected and the offender adequately punished by a shorter sentence and

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241 Judges also need a frame of reference to assess whether public protection requires a sentence which confines the offender for life.
2. why the sentence was consistent with sentences imposed on similar offenders who have committed similar crimes.\textsuperscript{242}

In that way, the judge would be obliged to justify the precise number of years imposed and to have evidence of the sentencing practices of other judges before imposing so long a sentence. In effect, the rule would also require an explanation of why the sentence was not "an unnecessary burden on . . . governmental resources" as mandated by § 2929.13(A) in the Ohio Plan. It would be a rare 20 year old who needed to be imprisoned beyond age 40 and a rare 40 year old who could not be adequately punished (and the public adequately protected) if released from prison with continued supervision after age 60.

A second statutory safeguard against disparate and unnecessarily lengthy sentences could be provided by creating a mechanism for reviewing definite sentences\textsuperscript{243} of more than 10 years\textsuperscript{244} after the offender reaches age 50. The parole board might be granted authority to recommend to the trial court the early release of such offenders if it concluded that the offender was no longer a danger to society. The trial court might then decide whether it agreed with such conclusion and whether an early release would demean the seriousness of the offender's conduct.

Comparable authority is already granted to the parole board and the trial court with respect to certain sex offenders sentenced to modifiable life terms.\textsuperscript{245} The decision of the trial judge to approve a release recommended by the parole board could be made subject to appellate review under provisions presently existing in the Ohio Plan.

Problems posed by incarcerating offenders beyond the period when they are likely to be a danger to the community do not involve simply issues of disparity in sentencing. The costs of incarcerating prisoners serving such long sentences increases as the prisoners age, as the care of elderly prisoners is extraordinarily expensive.\textsuperscript{246} One

\textsuperscript{242} In light of the decision in \textit{State v. Lyons}, No. 8020, 2002 WL 1454061, at *5 (Ohio Ct. App. July 3, 2002) (holding that a trial court was required to insure that the sentence if imposed upon the defendant was consistent with sentences imposed for similar crimes by similar offenders), appellate courts may be moving to demand such explanations and evidence from sentencing judges.

\textsuperscript{243} Under the Ohio Plan, all offenses except murder, aggravated murder, and certain sex offenses against children or sex offenses committed by certain violent sex offenders are subject to indefinite sentences.

\textsuperscript{244} The ten-year length of sentence is selected because, on sentences between five and ten years, the trial court already has authority under the Ohio Plan to reduce the sentence on petition of the offender. \textit{See} OHIO REV. CODE ANN. § 2929.20 (West 1997) (amended 2002).

\textsuperscript{245} \textit{See} OHIO REV. CODE ANN. § 2971.05 (West 1997).

\textsuperscript{246} \textit{See} http://www.apbonline.com-cjsystem-behind_bars-oldprisoners-riskcost0412.html
must consider whether it is wise to allocate prison resources for individuals who no longer represent a threat to public safety.

C. Standard of Appellate Review

In an effort to replace the “abuse of discretion” standard, § 2953.08(G)(2) under the Ohio Plan adopts a unique standard of appellate review: whether the sentence clearly and convincingly is not supported by the record, did not follow the specified statutory guidance or is contrary to law. A clear and convincing standard is traditional and reasonable when reviewing evidence and findings of fact. There, deference to the trial judge who sees the witnesses and the defendant and who hears the testimony is appropriate. It is also workable when dealing with procedural questions.

The clear and convincing standard, however, is inappropriate when applied to questions of law. The trial judge’s determination of the law is not entitled to deference. Issues of law are matters to be decided through the appellate process. They involve interpretations of statutory language. On such issues the supreme court and the appellate courts are the superior authorities. Consequently, on matters of statutory interpretation the appellate courts should engage in de novo review, not hesitating to substitute their judgment for that of the trial court on matters of law. These issues are not unlike the procedure for reviewing a trial court’s finding that a police officer had probable cause to make a warrantless search or reasonable suspicion to conduct a Terry stop. For instance, in Ornelas v. United States, Chief Justice Rehnquist held for the Court that de novo review on appeal was appropriate when reviewing a trial court’s finding on such matters. The Court said, “Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify the legal principles.”

(last visited Summer, 2001) (As prison systems grow, some are metamorphosing into old-age homes providing sophisticated elder care and medical services. Prison nurses routinely attend to patients in their 80’s and 90’s, operating dialysis machines, emptying bedpans and helping inmates brush their teeth and get dressed. Some correction authorities have been forced to build custom facilities for prisoners who have gone blind, deaf or mute. In Louisiana, Warden Burt Cain keeps watch over 5,100 inmates at Angola prison, 88% of whom will never leave. Cain said the practice is a waste of space, lives and tax dollars.).


Id. at 697; see also State v. Baker, 693 N.E.2d 1131, 1134 (Ohio Ct. App. 1997) (citations omitted):

When reviewing a trial court’s decision on a motion to suppress, an appellate court accepts the trial court’s factual findings, relies upon the trial court’s ability to assess the credibility of witnesses, and independently determines, without deference to the trial court, whether the trial court has applied the correct legal standard.
The Court's reasoning in *Ornelas* is applicable to non-constitutional issues such as interpretation of statutory language. Under the Ohio Plan it is especially relevant to the statutory provisions which give guidance for imprisonment and the length of a prison sentence. For example, § 2929.14(C) reserves maximum sentences for defendants who commit the "worst forms of the offense" or

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State v. Searls, 693 N.E.2d 1184, 1186 (Ohio Ct. App. 1997) ("The court of appeals is bound to accept factual determinations of the trial court made during the suppression hearing so long as they are supported by competent and credible evidence. Then, however, we proceed to review [the] trial court's application of law to those facts de novo.").

249 This is the standard of review adopted in federal court under the Federal Sentencing Guidelines on questions of law. See *Hutchinson* et al., *supra* note 20, § 11.2, at 1613 ("Although 18 U.S.C. does not specify a standard of review for a sentence allegedly imposed in violation of law, because such an appeal involves a question of law, the appellate courts have applied a de novo standard."). However, the federal system has run into difficulty in determining the standard of review that should apply to mixed questions of law and fact:

- Many courts have routinely applied a clearly erroneous standard of review to issues that are not simply factual in nature, often without carefully considering the meaning of the "due deference" language and the applicable legislative history. Such cases frequently involve interpretation or application of chapter 3 guidelines, including § 3B1.1 (aggravating role), § 3B1.2 (mitigating role), § 3C1.1 (wilfully obstructing or impeding proceedings), and § 3E1.1 (acceptance of responsibility). The effect of these decisions is to insulate from meaningful appellate review questions that are legal or partly legal in nature. Courts should more carefully distinguish between factual questions, to which a clearly erroneous standard is appropriate, and interpretations or applications of guidelines to those facts, which are more legal in nature.


Against this background, we consider the standard of review. . . . Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal. . . . The Act altered this scheme in favor of a limited appellate jurisdiction to review federal sentences. Among other things, it allows a defendant to appeal an upward departure and the Government to appeal a downward one.

That much is clear. Less clear is the standard of review on appeal. The Government advocates de novo review, saying that, like the Guidelines themselves, appellate review of sentencing, and in particular of departure decisions, was intended to reduce unjustified disparities in sentencing. In its view, de novo review of departure decisions is necessary "to protect against unwarranted disparities arising from the differing sentencing approaches of individual district judges." . . .

We agree that Congress was concerned about sentencing disparities, but we are just as convinced that Congress did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions. Indeed, the text of § 3742 manifests an intent that district courts retain much of their traditional sentencing discretion. . . . The deference that is due depends on the nature of the question presented. The district court may be owed no deference, for instance, when the claim on appeal is that it made some sort of mathematical error in applying the Guidelines; under these circumstances, the appellate court will be in as good a position to consider the question as the district court was in the first instance.
present "the greatest likelihood of committing future crimes."\(^\text{250}\) If a trial court’s interpretation of those standards is to stand unless proven incorrect based on a clear and convincing standard, a state-wide understanding of the meaning of those terms would never develop. Such an approach would allow multiple reasonable interpretations to prevail and retard the development of a law of sentencing. Multiple interpretations contribute neither to clarity, certainty, nor consistency. Indeed, the standard, if applied to interpretations of law, is incompatible with the requirement in § 2929.11(B) that a sentence should be "consistent with sentences imposed for similar crimes committed by similar offenders."

Fortunately, most Ohio appellate courts do not seem to have allowed the "clear and convincing" standard to have constrained them when deciding whether a sentence is contrary to law. Yet there seems not to have been widespread recognition that strong appellate review is a key component in the Ohio Plan’s removal of power over sentence lengths from the parole board and the transfer of that power to the judiciary. Unless appellate courts exercise their power to determine the proper application of statutory guidance, sentencing disparities risk creating pressures either to convey power over the length of prison sentences to a rule-making body, such as the sentencing commissions that exist in numerical guideline jurisdictions, or to return it to the parole board.\(^\text{251}\) Use it or lose it may be the watchword.\(^\text{252}\)

### D. Failure of Lawyers to Grasp the New Standards

Lawyers also seem to have been slow to recognize the importance of having vested the trial and appellate courts with powers formerly exercised by the parole board. Although the Ohio Plan has created a new language in which sentencing factors must be discussed and issues raised, some experienced criminal lawyers have continued to speak in the old sentencing language. Even though appellate courts have made it clear that "abuse of discretion" is not the standard of appellate review, defense lawyers continue to frame their appeals in those terms.\(^\text{253}\) It is the rare case, such as Iacona or Williams, where


\(^{251}\) One source of pressure may be from the Ohio Department of Rehabilitation and Correction as unnecessarily lengthy sentences hold an increasingly older population in prison.

\(^{252}\) Cf. D.A. Thomas, Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience, 20 ALA. L. REV. 193, 225 (1968) ("[A] court exercising appellate jurisdiction over sentences can develop a meaningful case law of sentencing, provided that it is prepared to take a sufficiently broad view of its functions and discard the normal approach of an appellate court in seeking only errors or abuses.").

lawyers have searched for sentences in comparative cases or have produced evidence bearing upon sentencing alternatives, their costs, and possible effectiveness. Not infrequently, even where a presumed prison sentence requires the court to find that the factors of lesser seriousness outweigh the factors of greater seriousness in order for a defendant not to be imprisoned, some defense lawyers have continued to urge mercy because of a sick relative or a disappointed mother—factors that have no relevance to the judge’s decision—and say nothing about the comparative seriousness of the offender’s conduct.

Some of the continued adherence to the old ways reflects ignorance. Some of it reflects skepticism that the statute prescribed enforceable standards. Some of it reflects the costs of defense. Most criminal defendants in Ohio courts are indigent, represented either by public defenders or by assigned counsel who are paid only a few hundred dollars for their services. Under the old law, where sentencing was confined to the sound discretion of the judge, the mother’s plea for mercy was often the best that a lawyer could hope for. The sentence was largely determined by the plea bargain and the judge’s predisposition. Sentencing hearings revolved around the emotions of the defendant and his or her family, the emotions of the victim, and the value structure of the judge. Hearings were relatively brief, and a basis for appeal was all but non-existent.

Under the new law, a well presented case at sentencing will always involve a focus on the numerous statutory criteria, a discussion of sentencing alternatives and their costs, and sometimes the examination of witnesses and references to sentencing decisions in other cases. Proper preparation for the sentencing hearing can be as time consuming as inquiry into the facts of the case and the plea bargaining process. These matters involve time and money that assigned

While certainly not exhaustively detailed, the judge’s remarks demonstrate his consideration of the facts underlying his conclusion that appellant committed the “worst form” of felonious assault and was likely to reoffend in the future. Accordingly, we cannot say that the trial judge abused its discretion in its analysis of the statutory requirements of R.C. 2929.12 et seq.


256 For example, in Cuyahoga, Ohio’s most populous county, Court rules provide that 33% of all indigent cases shall be assigned to the public defender (and the rest to private counsel). CUYAHOGA COUNTY C.P. GEM R. 33(I). Fees in cases other than murder and aggravated murder range from a maximum of $500.00 for the lowest level of felony to $1,000.00 for the highest level and $3,000.00 for rape of a child under age 13. Id. at 33 (II)(B).
counsel in indigent cases have not been accustomed to assume. Even public defenders—who are often overburdened with cases—may find themselves unable to take advantage of the opportunities that the new sentencing law offers.

On appeal, the propriety of the sentence is the only issue that a defendant who has pleaded guilty may have. Frequently, where a defendant has gone to trial, it is the best issue. Since the issues related to proportionality, costs, and consistency are relatively new issues for appellate courts, appellate counsel become pioneers, arguing new concepts and having little precedent upon which to rely. It is difficult and costly to undertake the analysis that such issues require, and few criminal trial lawyers are equipped by temperament, training, or affluence to pursue the appellate process.

No statutory solution exists for improved lawyering. Education at both the law school and continuing legal education levels are important. Both prosecutors’ and public defenders’ offices could help by developing model sentencing memoranda and maintaining data bases on sentencing practices.

E. Failure of Some Judges to Apply the New Standards

Some judges were hostile at the outset to the new sentencing scheme. Most were confused. There was scant recognition that the parole board had been fully deprived of power to alter the judge’s sentence. Although pleased that they were not subject to numerical guidelines, trial judges were not enthusiastic about a sentencing structure that introduced a new language and saddled their discretion with appellate oversight.

In the first six years of the Ohio Plan, by far the most sentences were reversed for failure of the sentencing judge to make required findings or set forth reasons for the sentence. The new statute had

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257 See, e.g., State v. Iacona, 752 N.E. 2d 937 (Ohio 2001), affg No. CA-2891-M, 2000 WL 277911 (Ohio Ct. App. Mar. 15, 2000) (affirming all of defendant’s convictions but remanding for resentencing because the trial court issued more than the minimum sentence without the proper findings on the record).


[T]he trial court wholly failed to make the appropriate findings for imposing consecutive sentences, and it failed to provide its reasons for imposing those terms. . . . While Levy’s criminal record and past conduct may have provided reasons for imposing consecutive sentences, we cannot say that the trial court fulfilled its statutory duty when it failed to state its findings and to give reasons for the findings.


While the trial court’s remarks might readily support one or both of the findings in R.C. 2929.14(B), the trial court did not specify either of those reasons as supporting its deviation from the minimum sentence of one
many sections, and it was difficult for judges to grasp or retain the relevant details. For many judges who resisted the new approach, a reaction to a procedural reversal was to reimpose the same sentence and to recite the statutory language as if they were meaningless shibboleths without relating the facts of the case to the statutory language. Not a few cases have been reversed a second time, after resentencing, indicating a continued lack of understanding of the statutory requirement by some trial judges.

Additionally, not all of the appellate courts were quick to recognize that the rules on appeal for a sentencing had changed drastically. At first, many courts of appeals continued to apply the old “abuse of discretion” standard. Once most of the courts understood the new standard, many began to carefully scrutinize the trial courts’ sentences for compliance with the new statute. One court of appeals explained that:

[T]he Ohio Supreme Court articulated the difference between making a finding on the record and giving reasons for imposing a certain sentence. The Court indicated that “finds on the record” merely means that a trial court must specify which statutorily sanctioned ground it has relied upon in deciding to impose a particular sentence, i.e. that the offender committed the worst form of the offense. However, when a statute further requires the court to provide its reasons for imposing a sentence, as in the case of a maximum term, the court must make the applicable findings, and then provide a factual explanation setting forth the basis of those findings.
Other appellate courts exhorted sentencing courts to provide an adequate record for review by setting forth the reasons for its findings.\textsuperscript{264}

As Ohio has gained experience with the new sentencing scheme, it has become clear that appellate courts should substitute their judgment for the trial court only after the sentencing judge has consciously failed to observe the statutory obligation to make required findings and give reasons. As a result, in 2000 the General Assembly amended the appellate review section of the Ohio Code to provide:

If the sentencing court . . . failed to state the required findings on the record, the [appellate court] . . . shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.\textsuperscript{265}

At almost the same time, the Ohio Supreme Court mandated that procedure as a matter of good appellate practice.\textsuperscript{266} The reluctance of appellate courts to make substantive pronouncements before the trial court has fully explained its reasoning is not unique to Ohio. British courts have also been reticent in that respect.\textsuperscript{267} But the most meaningful appellate guidance comes when appellate courts order specific

In the instant case the record indicates that the trial court properly considered all relevant statutes and made the required findings necessary to impose the maximum sentence. The sentencing hearing transcript reveals that the trial judge determined that Appellant had caused physical harm to the victim, and that the victim suffered serious physical harm (i.e., death) as a result of the offense. Further, the trial judge found that Appellant demonstrated a pattern of medication abuse related to the offense, and that Appellant had refused treatment for this abuse. The trial court also found that throughout the trial, Appellant showed no remorse for the offense. The court then found that Appellant had not led a law-abiding life, as he had a substantial misdemeanor record. The court noted that these circumstances would likely recur in light of Appellant’s self-medicating, his failure to assume responsibility for the crime, and his long history of prescription drug usage.

The trial court, explaining its reasoning, went into detail about Appellant’s abuse of prescription medications and use of medication at the time of the accident, his conduct in operating his vehicle, his striking and killing the victim, the motorist who forced Appellant to pull over as Appellant left the scene and continued operating his vehicle after striking the victim, and Appellant’s lack of remorse for the tragic series of events.

\textsuperscript{264}See, e.g., State v. Gonzalez, No. 77338, 2001 WL 259186, at *10 (Ohio Ct. App. Mar. 15, 2001) (citations omitted) ("Reasons" should mean the trial court’s basis for its "findings." The failure to provide such information is reversible error requiring resentencing. . . . Without the reasoning for the sentence in the record, it is difficult to confirm whether the trial court heeded the General Assembly’s policy meant to curtail maximum and consecutive sentences.").

\textsuperscript{265}Ohio REV. CODE ANN. § 2953.08(G)(1) (West 1997 & Supp. 2002).

\textsuperscript{266}State v. Jones, 754 N.E.2d 1252, 1260-61 (Ohio 2001).

\textsuperscript{267}See ASHWORTH, supra note 7, at 28-34; THOMAS, supra note 7, at 3-4 (citing Woodman (1909) 2 Cr. App. R. 67).
sentences to be imposed, and recently British appellate courts have begun to issue "guideline cases" intended to specify ranges to be used in future cases with respect to specific kinds of criminal misconduct.

Ohio and other American courts might benefit from examining the practice of appellate review of sentencing as it now exists in Australia, Canada, and England. A number of treatises dealing with these jurisdictions are available.

F. Failure of Legal Academia to Explore the Ohio Plan

Despite more than a thousand readily available appellate opinions rendered under the Ohio Plan and despite extensive sociological research on substance abuse, sex offender treatment, and recidivism in general, no Ohio law professor or student has undertaken and published research in scholarly or professional journals on matters cognizable under Ohio’s new sentencing statute. Yet, the Plan offers an abundance of opportunities for research and writing. The issues of proportionality, conservation of resources, and consistency need scholarship which will enable those broad concepts to be refined.

Neither lawyers nor judges have the time to undertake such research. The sophistication of legal scholars may be what is needed to add content to the nebulous concepts that have been decried by some.

Why have legal scholars so far ignored this new opportunity? Probably, it is habit. Although few would deny that, in most cases, sentencing is the most important part of the criminal justice process once charges have been preferred, sentencing has not been a traditional field of legal scholarship. More often it has been the domain of criminologists, sociologists, and psychologists.

What would be the issues for research by legal academicians? In addition to examining proportionality, consistency, effectiveness of alternative sanctions, and costs with respect to each of the statutory offenses and the various offender types, legal scholars could consider issues related to the quality of proof at sentencing hearings, procedural rights at such hearings, the burdens of proof and persuasion.

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269 See ASHWORTH, supra note 7, at 30-31.
270 See, e.g., PRINCIPLES OF SENTENCING by DAVID A THOMAS (1979), SENTENCING IN CANADA by PAUL NADIN-DAVIS (1982), and SENTENCING AND CRIMINAL JUSTICE by ANDREW ASHWORTH (3rd ed. 2000) are among the best. An exchange of visits with authorities in those countries and even participation in judicial education programs in those countries might be available.
271 See GRIFFIN & KATZ, supra note 8, at App. A (collecting cases).
272 The U.S. Supreme Court’s decision in Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that the Constitution requires that any fact that increases the penalty for a crime beyond
standards of appellate review, bonding rights and procedures needed to preserve appellate rights, and ethics and professionalism in sentencing matters.

Legal scholars, like judges, also need to look at other legal cultures. Not only do the British Commonwealth countries have a long history of judge made law in the sentencing field, but continental countries may better achieve consistency in sentencing and conservation of resources through three judge sentencing panels in both minor and major cases. Of course, the effectiveness and allocations of power in jurisdictions using numerical guideline systems need to be examined and compared to other systems, including Ohio’s.

Our hope is that this article can inspire some to undertake the task.

CONCLUSION

The Ohio Plan has been the law in Ohio for just six years. Conclusions drawn from Ohio’s experience are necessarily preliminary. The Ohio Plan offers a clear alternative to numerical grid systems for sentencing. Unlike numerical grids, the Ohio Plan transfers major policy making power over sentencing to judges and retains greater judicial discretion. It is guided discretion, however, since the sentencing statute identifies factors for determining seriousness and the likelihood of recidivism as well as establishing presumptions for and against imprisonment and providing guidance on the length of sentences. Unlike numerical guideline systems, the Ohio Plan stresses uniformity of approach rather than uniformity of outcome. The administrative mechanism for assuring uniformity of approach and consistency in outcomes is the appellate process, not a guidelines commission.

Achieving consistency under the Ohio Plan will not be a quick fix. It will take time to develop meaningful standards which can be applied state-wide. However, the goal seems more achievable today than it did prior to the effective date of the Plan. Of great importance, the development of standards is occurring through a judicial process in which lawyers and judges work toward consistency in outcomes by means of case by case analysis rather than through researchers and guideline writers who are removed from the day-to-day process of the criminal law.

Development of standards seems to be occurring in stages. The first stage has been refinement of the sentencing process. The Ohio
Supreme Court has said that requirements of findings and reasons in applying the statutory guidance must be strictly adhered to. It has said that appellate courts should reserve their judgment on outcomes until the sentencing judge has clearly relinquished the opportunity to make findings and give reasons. Recognizing that compliance with statutory guidance will no longer be presumed from a silent record, appellate courts have begun to place the burden of showing consistency on the sentencing judge and inconsistency on the party attacking the sentence.

Considerations relevant to determining proportionality are beginning to evolve: comparisons to sentences for other statutory offenses, the offender’s record of criminal misbehavior, past sentences imposed on the offender for similar conduct, sentences imposed by other judges for similar misconduct, sentences imposed on co-defendants, the severity of the victim’s loss, and the intent of the offender are all being identified as relevant to proportionality.

In short, a law of sentencing based on statutorily prescribed principles and judicial decisions is slowly taking shape in Ohio. This judicially defined approach to sentencing policy—based in large part on the model of Commonwealth countries—needs to be compared to the numerical guidelines approach. The strengths and weaknesses of each need to be assessed as the unending process of sentencing reform proceeds.