

# Ohio's Sentencing Law Good Intentions, but . . .

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“How do we articulate how much is too much.”



“Ridiculous. . . . And we eventually bailed.”



# Where we are going?

- Ancient History—Indeterminate sentencing
- SB2—Goals of truth in sentencing, fairness, and proportionality
- *Foster*—the worst of both worlds
- Attempted *Foster* fixes
- How do get fairness and proportionality?



# Pleistocene Epoch

- Mostly indeterminate sentencing
- Judges set range
- Parole Board decided when to release
- Problems:
  - Parole Board releases slowed
  - Sentences had to be calculated



# Senate Bill 2, Goals

- “Truth in sentencing”
- Fairness & Proportionality
- Limit long sentences to the most culpable and most dangerous



# Senate Bill 2, Tools

- Findings and reasons required for non-minimum, maximum, and consecutive sentences
- Vigorous appellate review for substance and proportionality
- Determinate sentences
- Bad time, postrelease control



# Senate Bill 2 mostly worked

- The inmate population decreased despite mostly magic word review
- Little substantive review
- No effective proportionality review
- Bad time unconstitutional
- Postrelease control is still a mess





# Appellate review—Magical thinking



- “[T]he sentencing judge could have satisfied her duty under R.C. 2929.12 with nothing more than a rote recitation that she had considered the applicable age factor of R.C. 2929.12(B)(1).”

*State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000).

# *Blakely v. Washington*



- Any fact needed to increase a sentence is an “element”
- Elements must be admitted to or proven to a jury beyond a reasonable doubt

# Element v. Sentencing Factors

## **Murder—Elements**

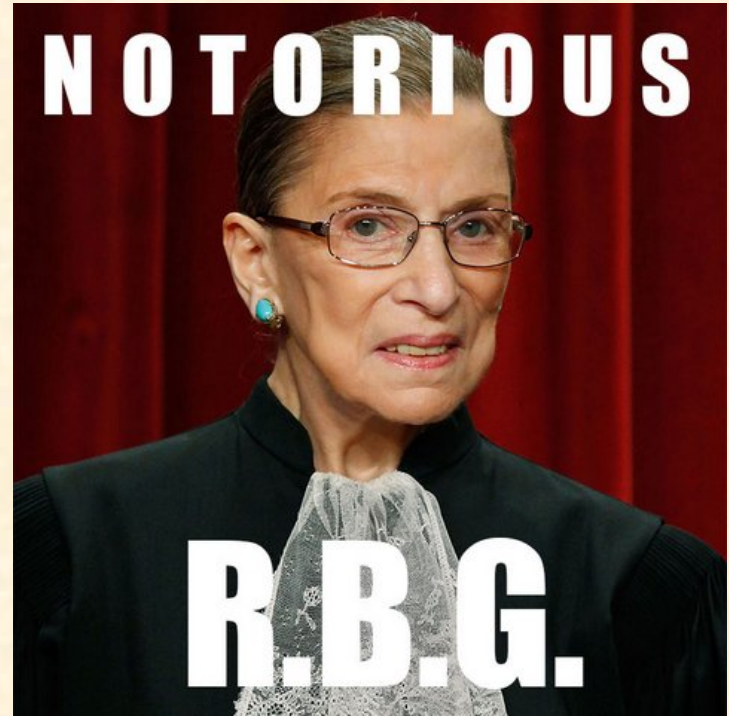
- Purposefully
- Cause
- The death
- Of a human being
- 15-year prison term

## **Murder—Sentencing factors**

- Cause
- The death
- Of a human being
- 15-year term if purposeful
- 10-year term if reckless
- 5-year term if negligent
- Not a crime if justified

# *Booker, a switch in time . . .*

- The dissenters chose the remedy
- “Severed” fact-finding requirement
- In federal system, mostly downward requirements but. . .



# *Foster: Severance in Ohio*

- In Ohio, downward limits preserved, upward limits barred
- “Unfettered” sentencing discretion
- Nothing protects fairness and proportionality



# *Foster*: Results

- A slew of defendants get resentenced
- New sentences skyrocket
- Prisons flooded with new prisoners
- No proportionality or fairness review



# *Oregon v. Ice*

- Can have findings for consecutive sentence
- Ohio Supreme Court creates unique rule of statutory construction, holds that old limits not reinstated



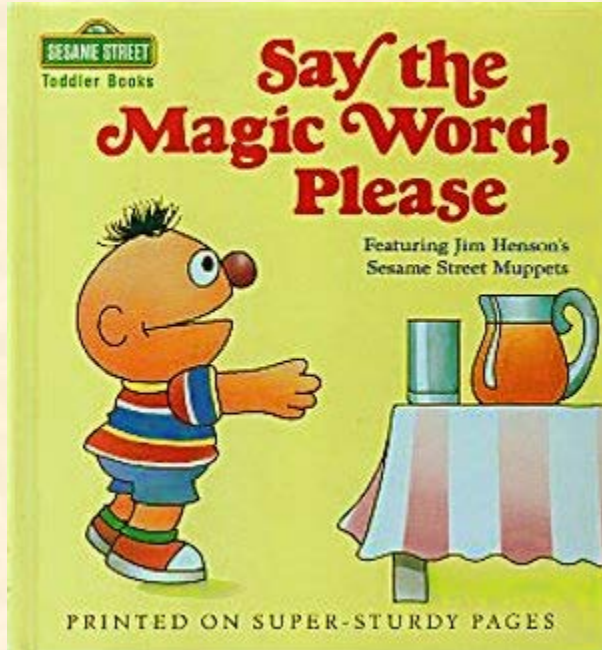
# Partial *Foster* Fixes/SB2 Changes

- HB 86, others
- Transitional Control, Intensive Prison Program, Earned Credit
- Broadened judicial release
- Restrictions on prison for some F-4's & F-5's
- Most F-3's limited to 3 years
- Felony theft level increased from \$500 to \$1,000
- But. . . F-1 increased to 11 years





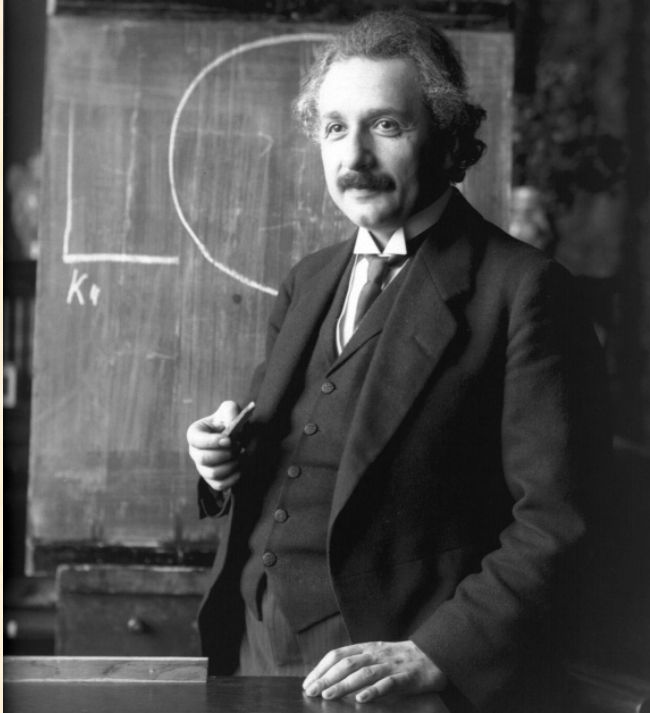
# Foster fixes—Magical thinking



- Consecutive sentence findings restored, but no reasons required
- Magic words review only
- No substantive review, even of unreasonable, arbitrary, and capricious sentences\*

\**But see State v. Marcum*, Ohio Sup.Ct. Nos. 2014-1985 and 2014-2122

# What next?



We cannot solve  
our problems with  
the same thinking  
we used when we  
created them.

Albert Einstein - [www.quoteikon.com](http://www.quoteikon.com)

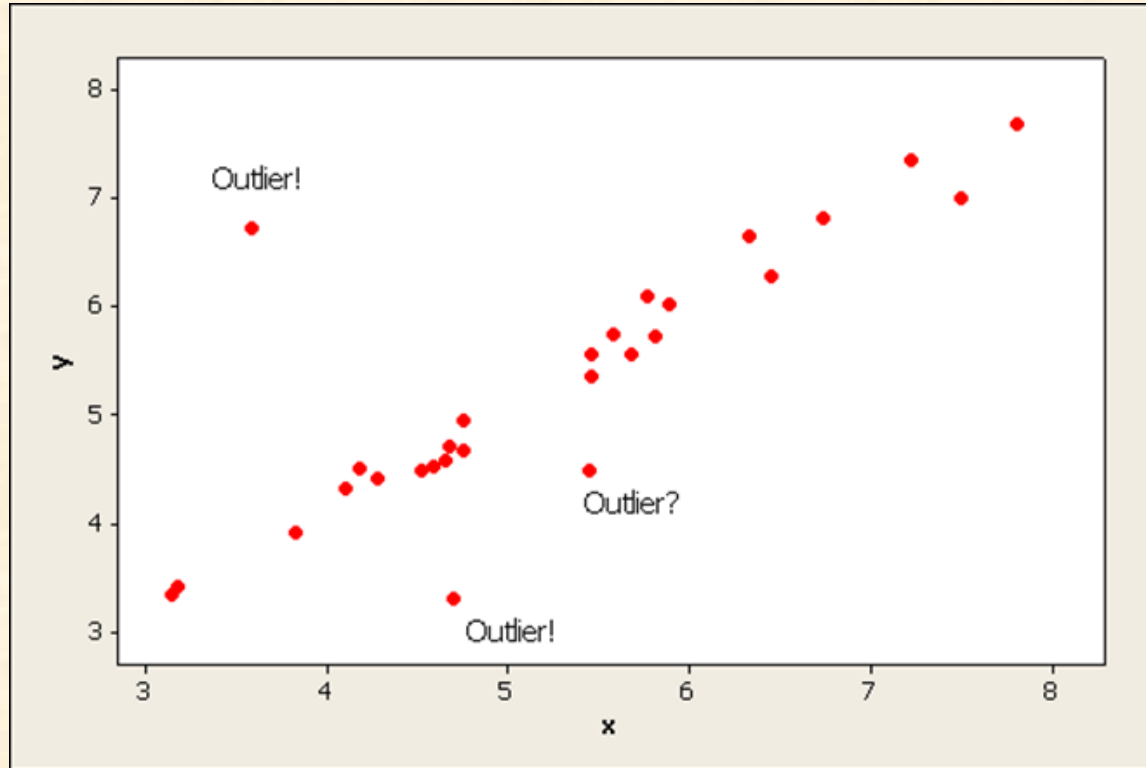
# Where do we go from here?

## Fairness and Proportionality

- Similar acts by similar defendants should lead to similar sentences
  - across the state, and
  - down the hall.

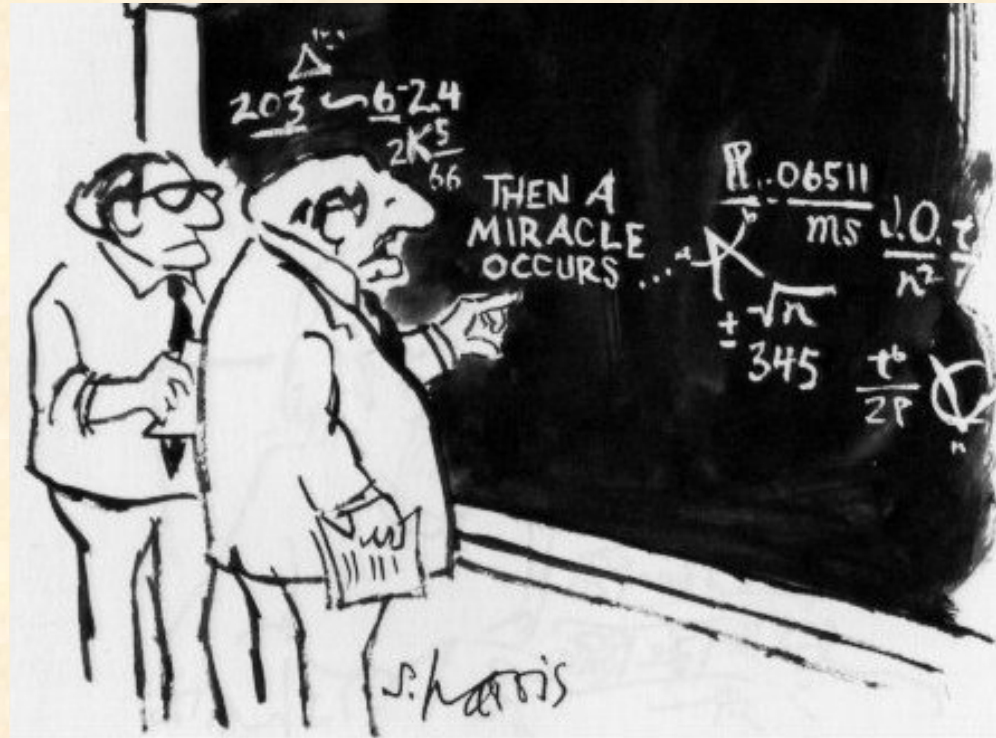


# Need to end outlier sentences



# What could work?

- Parole eligibility with presumption for parole
- Show-your-work sentences with substantive review
- Sentence reversed if the record and stated reasons don't support it
- Open to creative ideas



"I think you should be more explicit here in step two."

# Known unknowns

- Judges need better data
- Lawyers have to do a better job at sentencing
- Statewide sentencing data should be gathered
- Open to creative ideas



# Goal: Fair & Proportional Sentences

- Similar acts by
- Similar defendants
- Similar sentences
- Everywhere in Ohio



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