

The Principled Leadership of Middle Management: Stephen F. Williams’s Liberal Critique of *Marks*

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Most law students spend their first year—or sometimes much longer—struggling to discern legal rules from judicial opinions. That is true even for relatively straightforward opinions. When they encounter splintered opinions—especially cases where no opinion commands a majority—the exercise becomes more difficult even for the most seasoned lawyer.

The U.S. Supreme Court, in an effort to add coherence to these not-infrequent instances of judicial disarray, created a rule to guide this process. The so-called *Marks* rule instructs courts, including the Supreme Court itself, to honor horizontal and vertical *stare decisis* even in the face of splintered decisions by discerning what proposition, if appropriately narrowed, *would* have commanded a majority.¹ It is a hypothetical exercise and a controversial one. Legal scholar Richard Re has recently recommended that we cast it aside entirely, a position I embrace below.²

In this Essay, I will walk through a recent controversy involving *Marks* as tribute to one of the masters of the judicial craft, Stephen F. Williams. Although not my area of scholarly expertise³—nor was it his, for that matter—I will explain Judge Williams’s deep commitment to individual liberty, especially when criminal defendants faced terms of incarceration that the law arguably did not support. Judge Williams knew the law and understood the arts and sciences of judging. He knew that that science imposed limits on the exercise of his own arbitrary will. But he knew too that law’s frequent indeterminacy—even and especially when the Supreme Court was the source of that indeterminacy—meant that he had to exercise his own judgment, even if that judgment ran counter to those of some or many Justices of the Supreme Court.

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1. *Marks v. United States*, 430 U.S. 188, 193 (1977).

2. Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942, 1945 (2019).

3. For more comprehensive treatments of sentencing reform, including on the question of crack-powder disparities, see Carol S. Steiker, *Lessons from Two Failures: Sentencing for Cocaine and Child Pornography Under the Federal Sentencing Guidelines in the United States*, 76 L. & CONTEMP. PROBS. 1 (2013).

The Principled Leadership of Middle Management

To demonstrate these principles, I will describe the path of specific cases in the Supreme Court and D.C. Circuit on the question of what sentencing relief, if any, defendants should receive after the U.S. Sentencing Commission modified sentences associated with the possession and distribution of crack cocaine. The story begins with a splintered Supreme Court decision, *Freeman v. United States*.⁴ *Freeman* tried to determine whether prisoners incarcerated for sentences later adjusted downward could qualify for reductions if they entered prison via plea agreement.⁵ Tried, it should be said, but failed, forcing that burden on lower courts, which dutifully attempted to discern a common basis of three opinions in the *Freeman* scrum to muster the majority that the Supreme Court itself could not do. In *Epps v. United States*, the D.C. Circuit rejected that consensus and denied the Supreme Court the benefit that the Justices themselves could not obtain.⁶ Five years later, the Supreme Court raised the white flag, adopting the *Epps* view in *Hughes v. United States*, this time with six votes.⁷

This romp through sentencing reform in the 2010s will not break any new ground, but it does reinforce two ideas that need reinforcement. First, it provides a helpful illustration of the poverty of *Marks*, a legal doctrine that, in Richard Re's words, "is wrong, root and stem."⁸ Second, it points to the extraordinary burden that crack-powder disparities place on the human lives of those that rationally entered into plea agreements to avoid draconian sentences only to see the reductions of sentencing guidelines rendered unavailable to them. How many years of incarceration were needlessly and cruelly imposed on our fellow citizens because of the incoherence of *Freeman*?

Finally, perhaps most importantly, this Essay will pay tribute to my friend and mentor, Stephen F. Williams. This is not a personal tribute.⁹ Instead, I want to explain and defend how Judge Williams viewed his own role within our legal system. He often jokingly referred to his role as an appellate judge as "middle management": he had to review the decisions of trial courts and agencies but was himself subject to the big bosses at the Supreme Court. But there was a principled, steely resolve behind that humor. He was not bound to follow the Supreme Court out of ceremonial deference or an exaggerated sense of hierarchy. He was bound because that was the law. And when the Supreme Court failed in its fundamental

4. 564 U.S. 522 (2011) (plurality opinion).

5. *Id.* at 525.

6. 707 F.3d 337, 350 (D.C. Cir. 2013).

7. 138 S. Ct. 1765 (2018).

8. Re, *supra* note 2, at 1945.

9. I write more about that influence in Peter Conti-Brown, *Remembering Judge Stephen F. Williams*, REG. REV. (Aug. 18, 2020), <https://www.theregreview.org/2020/08/18/conti-brown-remembering-judge-stephen-f-williams/> [https://perma.cc/49JQ-S7US].

task of saying what the law is, that decisional burden fell to his willing hands.

So it was that Judge Williams launched an effort to open the prison doors just a bit, consistent with statute, regulation, and legal reason. To understand that, we must get to the problem the *Freeman* Court thought it was solving but, in fact, only made worse.

I. The *Freeman* Problem

In 1986, Congress passed the Anti-Drug Abuse Act, which established a 100:1 ratio in the differences between penalties associated with powder cocaine and crack cocaine.¹⁰ The disparity, which endured for twenty years, is a shocking instance of systemic racism, given how the sentencing disparities affected white and black communities differently and had no justification in the relative differences in potency of the two drugs.¹¹

In 2007, the U.S. Sentencing Commission revised its guidelines to slightly less than 18:1.¹² Congress also wrote that ratio into law in the Fair Sentencing Act of 2010.¹³ Henceforth, the disparity between the two drugs, better justified by differences in potency, would be substantially less draconian.

On its face, whatever the prospective benefits of that reduction, the masses of people incarcerated on the old standard would be with little hope of relief. Fortunately, Congress provided a narrow exception to the general rule that criminal sentences are final on delivery. The exception is linked explicitly to sentencing guidelines: “in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered” by the Sentencing Commission, the court may reduce the original sentence.¹⁴ For cases in which a sentencing court reaches its conclusions by using the advisory guidelines, the discretion to reduce the sentence is clear. But such cases are a slim minority: only two percent of accused defendants proceed to trial. Fully

10. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207 (amended 2010).

11. See, e.g., Deborah J. Vagins & Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, ACLU (Oct. 2006), <https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law> [<https://perma.cc/N6E9-4PTW>].

12. UNITED STATES SENTENCING COMMISSION: SUPPLEMENT TO THE 2010 GUIDELINES MANUAL 16-17, 43 (2010) (effective Nov. 1, 2007). All ratios are expressed by reference to “marihuana,” with 1 gram of cocaine as the equivalent of 200 grams of marihuana and 1 gram of cocaine base—crack—as 3,571 grams.

13. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372 (2010).

14. 18 U.S.C. § 3582(c)(2) (2018).

The Principled Leadership of Middle Management

ninety percent enter plea agreements instead.¹⁵ Are those people eligible for sentence reductions, too?

That was the question that the Supreme Court faced in *Freeman v. United States*. The case generated three opinions. Four Justices joined an opinion by Justice Kennedy that would have held that “the district court has authority to entertain [sentencing reductions] when sentences are imposed in light of the Guidelines, even if the defendant enters into [a plea agreement].”¹⁶ The logic here is obvious: there is no peculiar statutory meaning to the phrase “based on.”¹⁷ And these ninety percent of plea agreements often occur in the shadow of the Guidelines: the Guidelines provide the basis for negotiation.

The four-Justice dissent, led by Chief Justice Roberts, didn’t see it that way. In their view, a “sentence imposed under a . . . plea agreement is based on the agreement, not the Sentencing Guidelines,” a logic that applies even if “the agreement could be said to ‘use’ or ‘employ’ a Guidelines range in arriving at the particular sentence specified in the agreement.”¹⁸

Justice Sotomayor concurred with the plurality opinion in the judgment, but only barely.¹⁹ She agreed with the dissent on the first proposition: “the term of imprisonment imposed by a district court pursuant to [a plea agreement] is ‘based on’ the agreement itself, not on the judge’s calculation of the Sentencing Guidelines.”²⁰ That said, when the plea agreement “expressly uses a Guidelines sentencing range,” it can be said to be “based on” that range.²¹ Justice Sotomayor’s opinion did not thoroughly explain how both things could be true—how a plea agreement’s sentence could both be based on the Guidelines and based on itself—except to ask questions about the state of negotiations in the plea agreement itself. The other eight Justices criticized the apparatus that this kind of inquiry would create, but ultimately, all that emerged from the rubble of *Freeman* was clarity for Mr. Freeman himself: because Justice Sotomayor agreed that Mr. Freeman’s plea agreement was explicitly based on the Guidelines, five Justices permitted the district court to reduce his sentence.

II. *Freeman* and *Marks* in the D.C. Circuit

15. *Trials Are Rare in the Federal Criminal Justice System, and When They Happen, Most End in Convictions*, PEW RES. CTR. (June 10, 2019), https://www.pewresearch.org/ft_19-06-11_trialsandguiltypleas-featuredimage/ [<https://perma.cc/DDH9-25VF>].

16. *Freeman v. United States*, 564 U.S. 522, 530 (2011) (plurality opinion).

17. *See* 18 U.S.C. § 3582(c)(2) (2018).

18. *Freeman*, 564 U.S. at 544 (Roberts, C.J., dissenting).

19. *Id.* at 534 (Sotomayor, J., concurring in the judgment).

20. *Id.*

21. *Id.*

Giving guidance to appellate courts—and to the Supreme Court itself, through *stare decisis*—in the face of a splintered opinion is not a new problem. The Supreme Court has attempted to answer that challenge via the *Marks* rule, named for the Supreme Court case that expounded it: “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds”²²

Seems plausible enough. If there is a rule of decision that five Justices embrace, even if they would go this way or that on other important questions, then there should be no formal difference between an opinion signed by five Justices and principles embraced by five Justices writing separately.

But in practice, the most important of these legal controversies—those very controversies that create the splintered opinions at the Supreme Court—are not going to be so easily nested. *Freeman* provides the example, although nearly every such opinion presents its own interpretive challenges that lay bare the rule’s weaknesses. Although five Justices agreed that the district court could hear Mr. Freeman’s request for a reduction in his sentence, eight Justices viewed Justice Sotomayor’s Schrodinger’s cat opinion—wherein sentences are simultaneously based on and not based on the Guidelines—as “arbitrary”²³ and adverse to the very purposes of Congress’s efforts at sentencing reform. In other words, as Richard Re argued, “Bizarrely, the Court’s least popular view became law”²⁴

Except, as Re noted, in the D.C. Circuit.²⁵ In a joint opinion in *Epps*, authored by Judge Williams and Judge Rogers, the D.C. Circuit—the first court to depart from the Sotomayor standard in applying *Freeman*—carefully and thoroughly reviewed both the splintered opinion and, importantly, the D.C. Circuit’s and the Supreme Court’s own *Marks* jurisprudence.²⁶ In *King v. Palmer*, Judge Silberman wrote—and Judge Williams joined—an *en banc* opinion on the meaning of a statute interpreting a fee-shifting provision for the prevailing party in certain disputes.²⁷ The opinion also offered this critical view of *Marks*, an opinion

22. *Marks v. United States*, 430 U.S. 188 (1977) (internal quotation marks omitted).

23. *Freeman*, 564 U.S. at 534 (plurality opinion) (“This straightforward analysis would avoid making arbitrary distinctions between similar defendants based on the terms of their plea agreements.”); *id.* at 544 (Roberts, C.J., dissenting) (“In that respect I agree with the plurality that the approach of the concurrence to determining when a Rule 11(c)(1)(C) sentence may be reduced is arbitrary and unworkable.”).

24. Re, *supra* note 2, at 1944; see also *Freeman*, 564 U.S. at 532-34 (plurality opinion); *id.* at 551-64 (Roberts, C.J., dissenting).

25. Re, *supra* note 2, at 1945-46.

26. *United States v. Epps*, 707 F.3d 337 (D.C. Cir. 2013).

27. 950 F.2d 771 (D.C. Cir. 1991).

that becomes “problematic” when, as in that instance, the Supreme Court splintered on the ultimate result.²⁸ “If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law.”²⁹

Such analytical underlapping is the outcome of the opinions in *Freeman*. Justice Sotomayor’s opinion in that case was not a “logical subset” of the plurality opinion, as D.C. Circuit law required.³⁰ There are cases where Justice Sotomayor would keep in prison those who the plurality would set free, and vice versa.³¹ Given that reality, *Freeman* offered no controlling authority, only persuasive authority. The Court deemed the plurality opinion the more compelling and sent Mr. Epps back to the district court for the possibility of sentence reduction.³²

III. The *Hughes* Resolution

Five years later, after the Ninth Circuit adopted the D.C. Circuit’s reasoning in *Epps*, the Court took up the question of both the basic incoherence of the *Marks* rule and the merits question in *Freeman* and *Epps*.³³ Much of the oral argument and the questions presented focused on the problems of *Marks* more generally, but the ultimate decision did not. It was easier, it seemed, to just answer the question directly. The Court concluded that “[i]n the typical sentencing case there will be no question that the defendant’s Guidelines range was a basis for his sentence,”³⁴ including when reached by plea agreement: “[a] sentence imposed pursuant to a [plea] agreement is no exception to the general rule”³⁵ The only exception is when “the Guidelines range was not ‘a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement.’”³⁶ Even Justice Sotomayor, who “continue[d] to believe that [her] *Freeman* concurrence set[] forth the most convincing interpretation” of the statute, recognized that the consequences of that opinion “have done little to foster” the “foundational principles” of “integrity and legitimacy of our criminal justice system.”³⁷ She, along with four other colleagues, joined Justice Kennedy’s opinion, which essentially restated the position reached in *Freeman* five years before. Trial courts, once and for all, had the discretion to modify sentences, even if defendants

28. *Id.* at 782.

29. *Id.*

30. *See id.* at 781.

31. For an example of this, see Judge Williams’s opinion in *United States v. Duvall*, 705 F.3d 479, 487-88 (D.C. Cir. 2013).

32. *United States v. Epps*, 707 F.3d 337, 353 (D.C. Cir. 2013).

33. *Hughes v. United States*, 138 S. Ct. 1765 (2018).

34. *Id.* at 1775.

35. *Id.* at 1776 (citations omitted).

36. *Id.*

37. *Id.* at 1779 (Sotomayor, J., concurring).

agreed to them in a plea agreement, in the event of modifications to the Sentencing Guidelines.

IV. The Problem with *Marks*, the Tragedy of *Freeman*

Thinking through the intersection of sentencing reform, plea agreements, and how to make sense of a divided Supreme Court does not shed new light into these old issues. But it does illustrate, importantly, how high the stakes are when the Supreme Court fails to muster a majority, and how little comfort *Marks* offers in that event. On the first point, someone could measure the sheer quantity of prison years that the *Freeman* misadventure imposed on the people of the United States, despite the fact that every relevant policymaking body had already concluded that the sentencing disparities required substantial revision. And for what? Even though the Court corrected this error, the cost is tremendous.

More tenuously, this story invites, perhaps, more skepticism toward our cultic approach to judicial personalities. *Marks* protects an individual Justice from the responsibility of consensus and provides an incentive to put forward idiosyncratic views of the law that no other Justice accepts. Doing so can increase a Justice's profile, particularly with any group that shares the idiosyncratic view. And the downside risk is minimal, since the lower courts under *Marks* are still bound by some ethereal notion that amongst the disarray there is a rule of law that commands precedential obedience.

“It is time,” Re wrote of *Marks*,

to step back and think about whether the *Marks* rule ever made sense in the first place. After doing so, the solution becomes apparent: courts should adhere to the normal majority rule for precedent formation in all cases. When the Justices do not express majority agreement, there is no logical or inevitable basis for inferring majority approval for any particular rule of decision.³⁸

The misadventures of *Freeman* and the boldness of the D.C. Circuit to cast aside a concurring opinion that seemed to fit so obviously within the parameters of *Marks* suggest Re's superior path to judicial decision-making. But whereas Re looks to the “cheapest precedent creator”³⁹ as the fundamental justification for imposing the duty of clarity on the Court, I see the added potential benefit for much less personalization of the judiciary—for the betterment of society. If splintering a majority opinion no longer permits a single Justice to control the shape of the law in such idiosyncratic ways, the Court will speak much more clearly as an

38. Re, *supra* note 2, at 1945-46.

39. *Id.* at 1969 (citing GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 250 (1970)).

The Principled Leadership of Middle Management

institution, rather than through its increasingly celebrity-status prone individual members. Of the many reforms to the overweening power of the Supreme Court,⁴⁰ we can safely list the elimination of *Marks* low in its power and relevance. But it is, I would argue, part of the same problem.

V. The Mischief of Middle Management

This Essay is a substantive tribute to the craft of Judge Williams and his approach to his status as a “middle manager” who nonetheless placed importance emphasis on his independent judgment. Let me conclude on a slightly more personal note. Although I am not a scholar of criminal law, legal theory, the Supreme Court, or any of the issues discussed in this Essay, I find myself thinking about *Freeman* and *Epps* all the time. I was the law clerk tasked with working with Judge Williams on *Epps* and learned profound lessons about the role of the judge—whether or not in “middle management”—from watching Judge Williams at work, during my clerkship, and for the decade since. I have not (and would not) betray any confidences in discussing these cases. It is sufficient to note that Judge Williams’s profound commitment to individual and societal liberty was never on stronger display than when he encountered the fate of criminal defendants. His deft (mis)treatment of *Marks* taught me to approach the organs of our government with the same kind of citizens’ skeptical respect, a skepticism and respect vital to the functioning of our government. That he was bound by vertical *stare decisis* was very important to Judge Williams. He honored the rule of law and celebrated the important traditions in our system that enshrined it. He also had no trouble seeing where the fissures of those decision rules created profound injustice and what role he must play as a middle-management appellate judge in correcting them. His navigation of *Epps* was not motivated reasoning. It was the craft of judicial decision-making at its finest. I will conclude with his own words on this subject, from the concurring opinion in *Duvall* that launched his broadside against both *Freeman* and *Marks*.

I do not believe United States courts should close the door on a man’s chance at release from prison on the basis of a framework (1) that eight out of nine justices of the Supreme Court have squarely rejected, and (2) that depends on the talismanic presence of special words in a plea agreement. Until *Freeman*, parties to [plea] agreements had no special reason to include these words, so their inclusion is completely random in relation to Congress’s purposes in enacting [sentencing reform].⁴¹

40. See, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L. J. 148 (2019).

41. *United States v. Duvall*, 705 F.3d 479, 485 (D.C. Cir. 2013).

“The peculiarity of keeping prison doors closed on such a basis,” he concluded, “justifies exercising our discretion to consider the question the parties appear to take for granted: whether Justice Sotomayor’s opinion is indeed binding upon us.”⁴² He didn’t have that vehicle in *Duval*; he did in *Epps*. Given how explicitly the Ninth Circuit relied on *Epps* to justify its own similar decision, it is not unreasonable to think that Judge Williams’s deftness in the judicial craft and commitments to individual liberty led directly to the result in *Hughes*. In the great legacy he leaves behind to his family, his clerks, the D.C. Circuit, and the law, those commitments to craft and principle are central.

42. *Id.*