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The Interdisciplinary Undergraduate Law Journal

An Excerpt

The Loss of Judgment in Judicial Discretion

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MISSION STATEMENT:

The Interdisciplinary Undergraduate Law Journal (IULJ) was born out of the desire to foster undergraduate scholarship in the field of law in the liberal arts. For decades, a number of well-known universities have published journals of this type. The IULJ stands alone among these journals, however, for its unique approach to the study of law. In keeping with the more general aims of the Department of Law, Jurisprudence, and Social Thought, the mission of the IULJ is to bring the best traditions of the contemporary humanities to bear on the most difficult and urgent juridical problems of our time.

With the saturation of everyday life by modern science and technology, the increasingly global and unequal flow of culture, capital, commodities and populations across nation-state boundaries, the transformation and even crisis of the basic concepts of modern law and politics, the worldwide recognition of human rights and the dismaying consistency of human rights abuses, and the constant depiction of law in diverse traditions of popular culture, literature, and film, we are faced with a host of new, troubling, and intriguing questions about law that cannot be fully posed, much less answered, within the narrow horizons of conventional legal training and/or the traditional social sciences.

As students of law and the humanities, it is our responsibility to pose these questions and to strive to answer them with the nuance, clarity, probity, and rigor that are the marks of the very best of the liberal arts tradition.

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Editor's Note

With great pleasure, I present the first issue of the Amherst College Interdisciplinary Undergraduate Law Journal. A year in the making, this issue has been an educational experience for each of us involved in its development and implementation.

Today's difficult, juridical questions require an approach that goes beyond the scope of traditional legal training and scholarship. The IULJ seeks to fulfill the goal of the Amherst College Department of Law, Jurisprudence, and Social Thought in bringing a unique multi-disciplinary approach to answering these complex multi-faceted societal issues. We hope to publish articles that focus on a variety of areas, including history, philosophy, ethics, the law, popular culture, literature, and film, to more fully address these modern juridical problems.

I would like to offer my many thanks to all those who helped in the process of starting and producing this journal. I would like to thank: the Editorial Board for their tireless work in sending out the many calls for papers to colleges and universities across the globe and for reviewing, evaluating, and editing submissions; our advisor, Professor Adam Sitze, for his help in shaping the ideas I had in mind when starting this publication and for offering encouragement and guidance along the way to make this journal what it now is and will become; Professor Austin Sarat for his guidance and wisdom in the formulation and operation of the journal; Megan Estes, the department coordinator, for her help with countless essential administrative tasks; Professor Nasser Hussain, the Department Chair, for allowing the journal the opportunity to be associated with the LJST department; and finally all those that contributed articles to this issue.

We hope you enjoy the issue and find it informative.

Sincerely,

Adam Shniderman

Editor-in-Chief/Founder

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David Lang
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Abstract:

Criminal sentencing reform over the last sixty years has looked to actualize a preexisting idea of justice. However, I suggest that the reforms are actually in accordance with an idea of order and security, rather than justice. The requirement of a standard of punishment and reasonable justification shows that we no longer accept the notion of independent judicial discretion. Looking at the movement that led up to the Sentencing Reform Act of 1984 and its subsequent history in the Supreme Court in the *Apprendi*, *Blakely* and *Booker* cases, I argue that sentencing reform illustrates a divorce between justice and judgment in modern law.

"*Remember especially that you cannot be the judge of anyone. For there can be no judge of a criminal on earth until the judge knows that he, too, is a criminal, exactly the same as the one who stands before him, and that he is perhaps the most guilty of all for the crime of the one standing before him*."
-Father Zosima, *The Brothers Karamazov*

In 1949, the Supreme Court ruled in *Williams v. New York,* 337 U.S. 241(1949), that judges have the right to determine sentences based on facts from a pre-sentencing report which have not been admitted in open court.[223] The case concerns a man convicted of first-degree murder. After being instructed by the judge that if they do not propose a punishment he will be forced to give a mandatory death sentence, the jury recommends life imprisonment. The judge, having considered information from the defendant's previous criminal record, which was part of

[223] A jury in a New York state court found Williams guilty of murder in the first degree. The jury recommended he be sentenced to life imprisonment; however, the trial judge imposed a sentence of death. In justifying his imposition of a death sentence, the judge discussed, in open court, that in light of additional information obtained through the court's 'Probation Department, and through other sources.' This additional information was pursuant to 482 of New York Criminal Code which provides:

> 'Before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, phychiatric (sic) or physical examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant.' 337 U.S. 241, 243

the pre-sentencing report, condemns the defendant to death. Williams appealed the ruling because the judge based his sentence on information in a report that was not presented during the trial and which he was not allowed to question. The Supreme Court rejected the appeal and upheld the right of judges to use a pre-sentencing report in fashioning a judgment.

In 2000, the Supreme Court revisited the issue of independent judicial fact-finding and ruled, in accordance with the Due Process Clause of the Fourteenth Amendment, that judges cannot consider "sentencing factors" that have not been proven to jury beyond a reasonable doubt.[224] Because this recent ruling also struck down the Federal Sentencing Guidelines, it is considered a victory for judicial discretion. However, beginning with the 1949 *Williams* decision and looking at the subsequent events leading up to the implementation of the Guidelines, as well as the rulings in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), *Blakely v. Washington,* 542 U.S. 296 (2004), and *United States v. Booker* 543 U.S. 220 (2005), I will argue that an already existent 'loss of judgment' has intensified over the last fifty years through sentencing reform.

The 1949 ruling in *Williams* upheld the right of judges to judge based on prior information not available during trial. The Supreme Court thereby affirmed a system of individualized justice. Justice Black, delivering the opinion of the court, declares:

> Highly relevant—if not essential—to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. Modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information…[225]

He adds that "the belief no longer prevails that every offense in like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."[226] Justice

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[224] *Apprendi v. New Jersey*, 530 U.S. 466, 467-8 (2000).

[225] *Williams,* 337 U.S. at 246.

[226] *Williams,* 337 U.S. at 247.

Black asserts the exceptionality of judges. The judge is different from the jury, which need only recommend a sentence, if they so choose. The judge requires information in order to form a truthful sentence. A judge weighs crime against criminal and tailors a punishment that fits the criminal, not merely the crime. His privilege compels an exclusive, elevated viewpoint. The judges' burden of responsibility is to sit in judgment. Black considers this the "grave responsibility" of judgment.[227] Ideally, the judge will craft an "enlightened and just sentence."[228]Attempts to undermine the eminent role of the judge also undermine the distribution of individualized justice. Justice Black and the Court uphold the right of the pre-sentencing report as a tool that allows the judge to, potentially, hand down a just, individualized sentence.

Justice Black also acknowledges that the ideal application of justice is inconsistent. Nonetheless, he implicitly considers judgment, even with its inherent risks, more valuable than a system of law that reduces the judge to an institutional figurehead. In arguing the judge ought to have full discretion in capital punishment cases he admits,

> Leaving a sentencing judge free to avail himself of out-of-court information in making such a fateful choice of sentences does secure to him a broad discretionary power, one susceptible to abuse. But, in considering whether a rigid constitutional barrier should be created, it must be remembered that there is possibility of abuse wherever a judge must choose between life imprisonment and death. And it is conceded that no federal constitutional objection would have been possible if the judge here had sentenced appellant to death because appellant's trial manner impressed the judge that appellant was a bad risk for society, or if the judge had sentenced him to death giving no reason at all.[229]

The risk endemic to judgment is that a judge will abuse his unassailable right to judge. Instead of amalgamating crime with criminal and crafting a sentence born out of justice, he might instead be guided by personal motives and biases. The question for Justice Black is whether this danger,

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[227] *Williams,* 337 U.S. at 251.

[228] *Williams,* 337 U.S. at 251.

[229] *Williams,* 337 U.S. at 251.

which has and will generate injustices, is enough to limit the sentencing authority of judges. He concludes that abuses of power, no matter what rules restrict the discretion of the judge, will always threaten judgment. The "awesome power" [230] of the judge is, nevertheless, not challengeable by the constitution or any other government body. Black is a strict constitutionalist and he believes that the judge is afforded absolute liberty to interpret the law. Regardless of the apparent arbitrariness of a sentence, as long as the defendant has received a fair trial and no *clear* abuse of judicial discretion is found, then the reasoning of the judge is unconditional and unquestionable.[231]

Justice Black's opinion in *Williams* reflects a view of judgment that slowly wanes over the next fifty years – that judgment is a risky proposition that cannot be guided by laws or rules that might de-individualize it. The judge is considered an elevated actor who wields an awesome responsibility. The pivotal point in Black's ruling is that even if the judge had "no reason at all" for his sentence, it remains unconditionally valid. The loss in judgment is the doubt of criminals, judges, and politicians that judges can judge according to an unknowable, unconditional standard. This doubt is not novel; what is distinctly modern is that the doubts, exacerbated by the death of God and the loss of an absolute standard, demand new justifications for the asperity of punishment. Average men, unable to put forth their own will, require judges to have strong, faith-forming resolve, but judges are not capable of playing the role asked of them. In the absence of believable judicial wills, these isolated, atomized men deprived of God seek an ultimately utilitarian sense of law that *incidentally* precludes the possibility of judgment. Thus,

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[230] *Williams,* 337 U.S. at 252.

[231] It is important to note that although *Williams v. New York* sweepingly establishes judicial discretion, the Court also admits that sentencing is constrained by "limits fixed by law." There are still statutes that assign mandatory ranges for sentences. However, these ranges are widely defined compared to the later limitations of the Federal Sentencing Guidelines.

once the reasons for questioning punishment *outweigh* the faith in judges' ability to justify sentences, judgment vanishes.

The onset of the modern loss of judicial discretion in criminal sentencing is the move away from allowing judges to determine their own reasons for sentencing to the desire to make the justification for punishment secure, knowable and equal. Justice Black hints at this future understanding of judgment in his defense of individualized justice; "retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."[232] By establishing rehabilitation as the true aim of justice, Black seeks a standard of judgment. He adds "a strong motivating force for the changes has been the belief that, by careful study of the lives and personalities of convicted offenders, many could be less severely punished and restored sooner to complete freedom and useful citizenship."[233] Justice Black clings to an antiquated conception of judgment that acknowledges the agency of the judge, while also understanding the desperate need to justify punishment. He sees through the muslin veil of judicial mysticism, yet maintains the privilege of unfettered judicial discretion. He justifies his ruling on pre-sentencing reports by envisioning rehabilitation as the standard of judgment. This concept, taken to its extreme, results in the creation of guidelines and empirical rules that deny judges his/her authoritative position. Against Black's intentions, the judge becomes a humble bureaucrat whose function is to help rehabilitate criminals. While Black acknowledges this growing movement of law toward knowable standards, he also believes that judges are more than merely social scientists repairing clocks and plotting the futures of prospective law-abiding citizens. For him, the judge weighs various

[232] *Williams,* 337 U.S. at 248.

[233] *Williams,* 337 U.S. at 249.

justifications of punishment against the criminal and, *somehow*, gives an "enlightened and just sentence."

Justice Frankfurter exhibits a great faith in judicial discretion. The finest example of this faith can be found in *Rochin v. California* 342 U.S. 165 (1952). On July 1, 1949, three Los Angeles police officers, having received a tip that Rochin was selling narcotics, entered his apartment without a search warrant. They found Rochin sitting near two 'capsules'. When the police inquired as to the ownership of the capsules, Rochin swallowed them. After a struggle, the police forcibly took Rochin to a hospital and had his stomach pumped---causing him to vomit up two morphine capsules. At trial, Rochin was found guilty based on the evidence extracted from his stomach, but the Supreme Court overturned his conviction citing, the Fourteenth Amendment Due Process Clause. Justice Frankfurter, delivering the opinion of the court, outlined how the constitutional right of due process and made admitting the forcibly obtained evidence illegal. Frankfurter recognizes that Due Process is difficult to define, but notes that "the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss."[234] He adds, "When the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges." Frankfurter opposes exact, strict laws that preclude judges from adapting to their time and to the specific case, and emphasizes the responsibility of the judge to judge who follows more than the text of the law.[235]

Frankfurter's understanding of judicial discretion leads him to create a unique standard of judgment destined to be questioned and ridiculed:

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[234] *Rochin* 342 U.S. at 169.

[235] *Rochin*, 342 U.S. at 165.

> Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. *This is conduct that shocks the conscience*. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.[236]

He also adds that to support the officers "would be to afford brutality the cloak of law."[237] Justice Frankfurter first considers that the Fourteenth Amendment and Due Process clearly make the seizure of the morphine capsules unconstitutional. However, he also recognizes that the law can be interpreted differently in different times by different judges. In this case, he defends his ruling not through the vagaries of Due Process. Instead, with astonishing candor, he cites his own reaction to the case as a standard of judgment, overturning the conviction because of "conduct that shocks the conscience." Justice Frankfurter implicitly establishes *his* conscience as the standard of justice. In *Justice as Translation*, James Boyd White writes, "The persuasive power of his opinion depends entirely upon the persuasive power of his exemplification."[238]

Frankfurter believes that the standard of judgment does not lie in fixed legal rules or knowable justifications. The justification is knowable only to him insofar as only he feels the shock of his conscience. White maintains that

> …in these paragraphs there is an assertion of the power of the moral, aesthetic, and civilized actor over the language and categories of the law. This is itself a performance and exemplification of the ground upon which his decision ultimately rests, namely, his own capacity to judge well. The world created by this opinion is a world of morals, manners, civilization, relations, decency, fairness, and, by implication, of the reverse of these. Reasoning in the usual sense of the

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[236] *Rochin*, 342 U.S. at 172.

[237] *Rochin*, 342 U.S. at 173.

[238] James Boyd White. *Justice as Translation: An Essay in Cultural and Legal Criticism* (University of Chicago Press: Chicago, 1990)

> term—but by no means its only sense—is missing from this opinion. He speaks as if the issue were aesthetic: in the bulk of the opinion he demonstrates his capacities for making the judgment required; he then reports the judgment he has made; he then expands upon that judgment by making others, which are related to the primary one. By all of this, he means to define the Constitution in a certain way, and to hold it out—with its judiciary—for veneration and respect.[239]

Frankfurter's opinion in *Rochin* reflects his view of the world of judgment. The law does not reduce the judge to irrelevancy, for the judge is an "aesthetic" actor, who crafts a sentence from his own capacity to judge. Frankfurter rejects the mores of his time and embraces an idea of judgment that elevates him above others. He does not state reasons that can be debated or allow his judgment to be the subject of popular consumption. Instead, acting as an example of aesthetic judgment, he holds out his words "for veneration and respect." Ultimately, the only faith in judicial discretion that exists is the faith that men like Frankfurter are worthy of reverence.

In contrast, Justice Black's concurrence rejects the Fourteenth Amendment argument and instead relies upon the Fifth Amendment. The Fifth Amendment holds that "No person…shall be compelled in any criminal case to be a witness against himself." Black claims that "a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him…"[240] Black succinctly and clearly explains the justification for his ruling, then writes at length against the "nebulous standards" of Justice Frankfurter. He questions whether Frankfurter isn't exploiting the Due Process Clause in order to grant judges the power to invalidate any law with which they personally disagree. Black believes law should be certain and stated in "absolute and unqualified language." He discounts that the gloss of language requires judicial interpretation, condemns the "evanescent standards of the majority's philosophy" and questions to what extent the "accordion-like qualities of this

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[239] White, 109.

[240] *Rochin*, 342 U.S. at 175.

philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights."[241] Justice Black worries about the imposing authority that judges might abuse. He thinks law should be clearly defined and justified. Black is a strict constitutionalist and his opinion in *Williams v. New York* supported judicial discretion within certain limits---although a judge may impose sentences with "no reason at all," he ought to provide reasons that accord unambiguously with the constitution.

Justice Black's conflict with the precise the role of judicial discretion indicates a growing concern with the justification of punishment. The justification for why we punish is an old philosophical question. Eventually, the longing for justification and the yearning for knowability usurp belief in judiciary discretion. Judges and their consciences can no longer work out standards of judgment; instead, they must be rule-bound and scientific. The hopeless desire for a standard of judgment that is objective and knowable signals the onset of the modern loss of judgment. Judge Ullman, a Federal District judge cited by Black in *Williams*, considers four possible standards by which a judge ought to judge:

> 1st The protection of society against wrongdoers
> 2nd The Punishment—or, much better—the discipline of the wrongdoer
> 3rd The reformation and rehabilitation of the wrongdoer
> 4th The deterrence of others from the commission of like offenses[242]

These justifications replace the judicial insight so important to Frankfurter and his ilk. Ideally, a judge considers these, and possibly other, justifications for punishment, with a sentence emerging from his deliberations and the degree of importance he ascribes to particular justifications. For example, a judge is concerned with protecting society is more likely to look at the probability of recidivism. If he is concerned with rehabilitation, the crime is secondary to

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[241] *Rochin*, 342 U.S. at 177.

[242] *Williams*, 337 U.S. at 248 n.11.

what the judge considers an appropriate length of time for the criminal to be rehabilitated. If deterrence is the primary sentencing factor, punishments will likely be more severe. These reasons for a judgment, according to thinkers like Frankfurter, are not the essence of judgment. However, in the years following *Williams* they come to be more important than nebulous standards such as conscience. *Williams v. New York* shows that concerns about the rationale of judges are already present and coming to replace faith in judicial discretion.

The questioning of the standard by which judges judge increases through the fifties, sixties, and seventies, culminating in the 1984 Sentencing Reform Act (SRA). The problem of the justification of punishment is the same as the question of how judges should judge. This is the most basic question at the heart of all law and constitutes the essence of the loss of judgment. The key difference during this time period is that the question of justification leads to *overwhelming* doubts about the ability of judges to administer justice. These doubts are eventually manifested in the Federal Sentencing Guidelines, which remove the responsibility of judgment from the judge and 'solve' the problem of why we punish.

In 1972, Judge Marvin E. Frankel wrote *Criminal Sentences: Law without Order,* which explicitly critiques the loss of judgment and foreshadows the Federal Sentencing guidelines.[243] Frankel is a veteran judge outraged by the failings of modern legal procedure, and particularly horrified by the radically disparate sentences handed out for the same crimes by different judges. For him, the abuse of judicial discretion is the greatest single injustice in our legal system. White quotes James V. Bennett, the former Director of the Federal Bureau of Prisons, on some of the unjust trials he regularly deals with:

> Take, for instance, the cases of two men we received last spring. The first man had been convicted of cashing a check for $58.40. He was out of work at the time

[243] Marvin E. Frankel. *Criminal Sentences: Law without Order*, (Toronto: Doubleday Canada Ltd., 1972)

> of his offense, and when his wife became ill and he needed money for rent, food, and doctor bills, he became the victim of temptation. He had no prior criminal record. The other man cashed a check for $35.20. He was also out of work and his wife had left him for another man. His prior record consisted of a drunk charge and a nonsupport charge. Our examination of these two cases indicated no significant differences for sentencing purposes. But they appeared before different judges and the first man received 15 years in prison and the second man 30 days…In one of our institutions a middle-aged credit union treasurer is serving 117 days for embezzling $24,000 in order to cover his gambling debts. On the other hand, another middle-aged embezzler with a fine past record and a fine family is serving 20 years, with 5 years probation to follow…[244]

Frankel leads us to believe that these examples are common. Judges do not have clear standards from which they can derive sentences. Most statutes only declare a maximum sentence. For example, rape is punishable by death or any prison term greater than one year.[245] Depending on the judge a rapist could spend a year in jail, a lifetime or be executed. The "splatter of varied sentences, with the unexplained variations left to be seen as random or worse, nourishes the view that there is no justice in the law."[246] This "splatter" of justice and the wide range of options that judges can entertain are precisely what *Williams* supports by refusing to limit judicial discretion. Frankfurter too, advocates a "splatter," although, he relates it to the temperament of his conscience. The SRA is a response to judges judging too disproportionately. The Guidelines do not signal the death of individualized justice; the loss of justice occurred beforehand and the Guidelines are a poisonous remedy. Frankel's book identifies and clarifies the sources of this problem of judicial discretion and suggests how sentencing ought to be reordered.

Frankel frames the problem around a legal order that gives unlimited power to judges and does not regard the sentencing process as an orderable element of law. He says that "[t]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are

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[244] Frankel, 21-22.

[245] Frankel, 33.

[246] Frankel, 44

terrifying and intolerable for a society that professes devotion to the rule of law."[247] Frankel contends that legal theory has dealt primarily with everything besides the sentencing process, and that almost no one bothers to contemplate questions at the heart of law. For example, Frankel asks, how are judges selected? Often, judges are politically chosen regardless of their qualifications. In most cases, they are former lawyers who have little experience in criminal trials and were never taught about judgment in law school.[248] Frankel posits the basis of our legal system as *Nullum crimen, nulla poena, sine lege* (There is neither crime nor punishment without law)[249]. The notion that *crimen* exist only as they are defined by law is not at issue. Instead, Frankel argues that *poena* must also be defined by law. Punishment, and thus sentencing, should harmonize with law in order for it be just. There should be rules that tell judges how to judge. Frankel rejects the arguments for individualized justice because of the preponderance of cases where justice is clearly not being fulfilled. When a poor man writes a bad check to buy medicine for his sick wife and receives a fifteen year sentence, and another man commits the same crime under less mitigating circumstances and receives a month, we know that the bond between justice and judges has been severed.

The result of boundless discretion "is a wild array of sentencing judgments without any semblance of the consistency demanded by the ideal of equal justice."[250] For whatever reason, judges lose the ability to judge. Frankel does not see this as solely the fault of judges, but thinks that the development of law over thousands of years has led to a point where we can now forge a

[247] Frankel, 13.

[248] Frankel, 16.

[249] Frankel, 20.

[250] Frankel, 7.

system in which sentencing responsibility is not solely rooted in the will of the judge.[251] It is the responsibility of lawmakers, with judges, to institute the reforms that will bring law into the twentieth century. Individualized sentencing is not as critical to justice as "as equality, objectivity, and consistency in the law."[252] This perspective allows him to assert that what we require now is more law in order to ground the capricious sentencing elements of our criminal sentencing system.

However, in order to ground sentencing in an austere legal order, we must first define the purposes and justifications for punishment. Again, the judges are not to blame for this lack. It is our "our Congress and state legislatures [that] have failed even to study and resolve the most basic of the questions affecting criminal penalties, the question of justification and purpose."[253] The result is that judges "wander in the deserts of uncharted discretion," handing out grossly unequal sentences[254] The justification for punishment is the decisive issue because it gives judges a standard with which to judge. Frankel believes that in establishing justifications we can bring judgment back from the brink of whimsical arrogance and satisfy both clauses of *Nullum crimen, nulla poena, sine lege.* The traditional justifications of law have never been codified in order to remedy this crisis. Like Judge Ullman in Black's *Williams* opinion, Frankel cites four standards of judgment: retribution, deterrence, incapacitation, and rehabilitation.[255] He is not a philosopher and thus not concerned with the inherent value of any single justification. Legislators need to assume the role of philosophers and declare which factors have the greatest

[251] Frankel, 8.

[252] Frankel, 10.

[253] Frankel, 13.

[254] Frankel, 14.

[255] Frankel, 92.

value. It is clear that "divergent opinions on the purposes of punishment will lead to divergent decisions as to the appropriate sentence."[256] If a judge uses retribution as his standard then his sentence will be different from a judge whose standard is rehabilitation. In Frankel's mind, the faith that judges have a standard by which to judge, or that they can determine one, has been shaken to its foundations. In order to restore a sense of equality and justice to sentencing it is necessary to define our basic conception of law. To do this we need to justify punishment. Until we make this part of law knowable and believable, there is no hope for a stable, reliable legal system.

However, since no single justification *is* commonly accepted and promoted, the faith that judges can do their jobs gradually diminishes. The black and white requirements of justice are not met and judges fade into the weak uncertain grey that marks seemingly arbitrary sentences. Judge Frankel derides the power of judicial discretion. The loss of faith in judges is experienced not only at an academic level; judges, politicians, lawyers, and criminals all doubt sentencing procedure.[257] Frankel is one example among a growing multitude of the dissatisfied. Judge Learned Hand, considered by Frankel to be the greatest judge of his time, asks what exactly distinguishes him from those he judges: "Here I am, an old man in a long nightgown making muffled noises at people who may be no worse than I am."[258] Judges question their own privileged position. Politicians question the political inclinations of judges and critique them for being both too lenient and too severe. Criminals insolently question and disrespect the court,

[256] Frankel, 107.

[257] Frankel, 112.

[258] Frankel, 16.

showing open disdain for a charade that purports to be fair and equal.[259] All these factors together perpetuate the loss of judgment.

Common sense begs the question: Why can't judges judge in such a way that their justification will be accepted? Why can't a judge say that his verdict was based on rehabilitation, retribution or deterrence and thus satisfy him/herself and others? Judge Frankel describes the findings of a committee headed by Judge Learned Hand on the competency of judges:

> Hand and a committee acknowledged the " 'incompetency of certain types of judges to impose sentence.' It spoke of judges 'not temperamentally equipped' to learn this task acceptably, of judges who compensate for their own inadequacies by 'the practice of imposing severe sentences', of judges 'who crusade against certain crimes which they feel disposed to stamp out by drastic sentences'."[260]

There is no consensus that judges are good at judging. Unlike Justice Frankfurter, who could hold out a judgment for "veneration and respect," most judges do not inspire greatness. When judges impose a sentence but do not give a rationale, as is usually the case, the defendant can either accept the rightness of the sentence or question the judge's decision. In an age where everything is questioned and considered knowable and reasonable, the absence of justification is fatally conspicuous. Frankel writes that judges "know that an unexplained decision does not flaunt its possible fallacies."[261] A mysterious lack of explanation protects judges in individual cases and the short term, but over time they become subject to criticisms of caprice. Judges lose the metaphysical standard of judgment and are forced to create standards of their own. Not every conscience is as powerfully convincing as Frankfurter's. Consequently, judges' inability to assume the role of God and justify punishment leads to doubts over their legitimacy. This in turn

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[259] Frankel, 86.

[260] Frankel, 45.

[261] Frankel, 42.

intensifies the problem because judges become self-conscious of the rightness of their conscience. Unable to judge, doubted from all sides, judges require the Guidelines as a crutch.

Two traditional understandings of the origin of the SRA and the general lack of belief in judges holds that either their political and racial biases were the major factors behind the implementation of the Guidelines, or that their leniency forced lawmakers to structure the sentencing process. However, these interpretations confuse cause and effect. The cause of the loss of judgment is that judges are doubted because they can neither justify punishment nor inspire faith in their ability. Politically motivated sentences confirm the impotence of judicial discretion and testify to the sobering reality that judges have no insight into justice. The leniency of judges also confuses cause and effect. Law-makers become gradually more irritated by examples of excessive judicial mercy. They think that judges are not tough enough on criminals.[262] Judges are too lenient for the same reason they are too harsh: they no longer believe in their ability to justify judgments. Both harsh and lenient sentences stem from an inability to judge. Unable to come up with reasons for why *they* judge, judges fall back on political biases and mercy. On the other hand, judges consider themselves paragons of a political principle that needs enforcement (such as deterrence of drug related crimes or an opposition to draft dodgers[263]). They judge too severely based on their biases. Both judicial abuses are cited as justifications for the SRA. However, the severity and leniency of judges are symptoms of the loss of judgment that *contribute* to the creation of the Guidelines (and thus, the continuance of the loss of judgment).

Judge Frankel, in order to combat the injustice of unfettered judicial discretion, proposes, among other reforms, the creation of guidelines to make sentencing legally certain and a

[262] Frankel, 51.

[263] Frankel, 100.

commission that would study and perfect the guidelines. He exemplifies the critique of judicial discretion and the desire to make judgment a calculable quantity. He writes:

> This partial remedy I propose is a kind of detailed profile or checklist of factors that would include, wherever possible, some form of numerical or other objective grading. Still being crude and cursory, I suggest that 'gravity of offense' could be graded along a scale of perhaps 1 to 5. Other factors could be handled in the same way. The overall result would be a score—or, possibly, an individual profile of sentencing elements—that would make it feasible to follow the sentencer's estimates, criticize them, and compare the sentence in the given case with others.[264]

Frankel is describing, in an admittedly abbreviated and partial form, the Federal Sentencing Guidelines that would be enacted 12 years later. His other major contribution, what he considers his most important, is the idea of a sentencing commission. He recommends that,

> The proposed commission would be a permanent agency responsible for (1) the study of sentencing, correction, and parole; (2) the formulation of laws and rules to which the studies pointed; and (3) *the actual enactment of rules*, subject to traditional checks by Congress and the courts.[265]

The commission formed under the SRA of 1984 is similarly constructed. Frankel is an important figure because of the insight he provides into the motivations behind the Guidelines. It is interesting to note, however, that Frankel is generally in favor of more lenient sentences and his primary objection to judicial discretion is its excessively harsh sentences.[266] Ironically, the actual enactment of the Guidelines comes about when tough-on-crime Republican senators banded together to get the bill passed. Nonetheless, those who view judicial discretion as too severe and those who condemn excessive leniency are concerned with the same problems: Judges have no clear, consistent standard of judgment. The Guidelines are a compromise insofar as they make

[264] Frankel, 114.

[265] Frankel, 79.

[266] Frankel, 114.

justice more equal, appeasing liberals like Judge Frankel, and set strict standards for punishment, satisfying the demands of senators like Strom Thurmond who call for tougher punishments.

The SRA was a direct response to this widespread belief amongst politicians, lawmakers, and academics that judges had lost the ability to judge. At the time "some scholars maintained that there were too many disparities based upon race and socioeconomic status. Other scholars said there was just no rhyme or reason to sentencing." Additionally, " 'Tough judges threw the book at too many while the 'soft' judges let too many off easy."[267] Robert Howell, in discussing the origin of the guidelines, writes,

> By the 1970s, 'there was a broad and rising level of concern in the congress…regarding the pervasive, serious problems of sentencing disparity'. In 1984, after evaluating the sentencing system, 'Congress concluded that the entire system was outmoded and in need of reform'.[268]

Congress concluded, under pressure from politicians running on platforms that were tough on crime, that the current system was prejudiced strongly towards clemency. Law had ceased serving the people and was ineffectual on a practical level. Congress enacted the SRA in response. The diagnosis differed, but the prescription was the same: guidelines are needed because "similarly situated offenders should be treated alike."[269]

The Sentencing Reform Act of 1984 created the Federal Sentencing Guidelines and fulfilled the hopes of Judge Frankel and many others by making judgment rule-bound and equal. The two main provisions of the act "abolish parole and make the Sentencing Commission's guidelines binding upon the courts." Although "trial judges have some discretion as to depart

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[267] Timothy Lynch. "One Cheer For *United States v Booker*."*Cato Supreme Court Review*. Ed. Mark K. Moller. (Washington, D.C.: Cato Institute, 2005), 215-234.

[268] Robert Howell. "Sentencing Reform Lessons: From the Sentencing Reform Act of 1984 to the Feeney Amendment," *The Journal of Criminal Law and Criminology*, 94, (2004): 1069-1104.

[269] Lynch 218.

upward or downward from the guidelines' sentencing range, the trial judge must state his reasons on the record and his departure is subject to appellate review."[270] "Guidelines" is a misnomer---the legislation legally requires judges to adhere to sentencing rules, and if he wishes. Most importantly, if a judge wishes to depart from them, he must justify his reasons. The requirement that punishment be justified according to a knowable standard is the loss of judgment embodied by the SRA.

The SRA itself established justifications for punishment, abolished indeterminate sentencing, created a Sentencing Commission, authorized appellate review of sentences departing from the guidelines, and created a determinate sentencing structure. To greater and lesser degrees all of these reforms would be struck down in 2004, by the *Booker* ruling. The first reform of the sentencing guidelines, the establishment of the purpose of punishment, is immensely important. The Guidelines asserted the following goals: retribution, education, deterrence, and incapacitation. Notably absent is rehabilitation, which was blamed for extreme clemency by the tough-on-crime Congressmen who enacted the Guidelines. The other four justifications are made calculable in order to ease the difficulty of judging. The Guidelines, by establishing sentencing guidelines for federal judges, codify the justifications. Judge Frankel asked for a system of law where the sentencing process accords with rules and law; the Federal Guidelines create precisely this system. Taking into account numerous other considerations such as the nature of the offense, the criminal's prior record, public views of the gravity of the offense, and aggravating or mitigating factors, they established a code of determinate sentences. These guidelines were, assuredly, far from perfect. However, they soothed the wounded consciences of judges who had to sort through these various standards independently. The other

[270] Lynch 218.

reforms, appellate review, a Sentencing Commission, and the abolishment of indeterminate sentencing all serve the same purpose: they limit judicial discretion in an effort to make justice equal and knowable.

The SRA is the next step downward in the loss of judgment. Because there is no absolute standard by which judges judge, people doubt the authority of judges and, unable to create new justifications for punishment, replaced judges with the Guidelines. The idea behind the Guidelines is that, since we can't establish a standard of judgment and achieve justice, we might as well get something practical out of the legal system. By making law into a series of rules and procedures, the Guidelines maximize the efficiency of law and help to eliminate some of the injustices that Marvin E. Frankel observed. However, in abandoning an idea of law that comes out of the "arbitrary" insight of judges, the Guidelines close out the possibility of justice. Justice Frankfurter's standard of conscience would be rejected through appellate review. The certain, scientific, rule-bound sentencing statutes of the Guidelines outweigh the faith in judges and their ability to justify punishment. Fewer judges are willing to risk making judgments that go against the Guidelines. Thus, the SRA deepens the loss of judgment by valuing the utilitarian approach to law over the ostensibly arbitrary authority of judges.

While the Federal Sentencing Guidelines establish justifications for punishment and seemingly resolve the doubts that plagued the justice system, they were unpopular from their inception to their demise. The actuality of ordered rules presiding over justice is disconcerting. The loss of judgment, which this new reality manifests, only really occurs when we value rules above the insight of judges. This first comes about under the SRA. The standard of judgment is lost, necessitating a new one that requires neither judges nor judgment. The depths of the loss of judgment arise when judges are no longer required to judge and it becomes apparent that true

judgment is barely possible. This awareness that justice is being supplanted is evidenced in the reactions against the SRA. The Guidelines are ultimately unsatisfying because they only deepen the problem they sought to rectify. Their palliative effects are marginal compared with the feeling of loss they intensify. In making judgment into a knowable quantity, rather than reinvigorating faith in justice, they visibly represent the loss of judgment.

The three Supreme Court rulings, *Apprendi v. New Jersey, Blakely v. Washington,* and *United States v. Booker*, are traditionally considered to support ideas of individualized justice and judicial discretion. However, although the landmark cases reverse most of the restrictions of the SRA, they are not motivated by a desire to restore judicial discretion. Rather, they seek to establish the Fifth Amendment Due Process clause and Sixth Amendment right to a jury. Their effect is not to tourniquet the rapidly fading faith in judgment; instead, the Court further questions judicial discretion even while tearing down sentencing limitations. Indeed, most critiques of the SRA situate firmly within the loss of judgment.[271] Calls that the Guidelines still result in disparate sentences echo the original voices that called for the Guidelines. *Apprendi, Blakely*, and *Booker*, like all apparent critiques of the Guidelines, are actually stiffly rooted in an idea of justice as rule-bound and scientific.

Apprendi v New Jersey declares that judges cannot sentence defendants to terms of imprisonment greater than the statutory maximum by using sentencing factors unknown to the jury.[272] A "sentencing factor", originally established in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), is a fact that, while not found by the jury to be proved beyond a reasonable doubt, is nevertheless considered by the judge in handing down his sentence.[273] In *Apprendi*, the petitioner

[271] Howell, 1070.

[272] *Apprendi,* 530 U.S. at 466-7.

[273] *McMillan,* 477 U.S. at 85-6

fired several shots into the home of a black family and later claimed a racial motive for the crime.[274] Under New Jersey state law, he was charged for second-degree possession of a firearm for an unlawful purpose, which carries a prison term of 5-10 years. The count against Apprendi did not include the state's hate crime statute, which could have increased his sentence. However, after a guilty plea, the prosecution asked for an enhancement of the maximum punishment. The court, citing a preponderance of evidence that the crime was racially motivated, sentenced Apprendi to twelve years imprisonment *on the firearm count*. The appeals court and the State Supreme Court both affirmed the ruling. They justified the sentence by referencing *McMillan* and the difference between a "sentencing factor" and an "element of the crime."[275] A sentencing factor, such as racist motivation, is considerable only by the judge and does not pertain to the crime itself--- consequently, the jury does not have to prove it beyond a reasonable doubt. Such sentencing factors constitute many parts of the Federal Sentencing Guidelines.[276] The Supreme Court reversed the decision of the lower courts, holding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt277." The Court cites the Fifth Amendment's Due Process clause and the Sixth Amendment's right for defendants to have any fact, other than a prior conviction, be taken into account by the jury.

The significance of *Apprendi* is not only that it clears the way for *Blakely, Booker* and the partial abandonment of the Federal Sentencing Guidelines; *Apprendi* also simultaneously upholds the principles of determinate sentencing while opening up possibilities for indeterminate

[274] *Apprendi*, 530 U.S. at 466.

[275] *Apprendi*, 530 U.S. at 467.

[276] *Apprendi*, 530 U.S. at 560.

[277] *Apprendi*, 530 U.S. at 490-491.

sentencing. Against the intentions of the judges, it lays the foundation for a reinvigoration of judicial discretion. Delivering the majority opinion, Justice Stevens quotes Oliver Wendell Holmes, Jr., who observed that "the law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict pains in order that its threats may continue to be believed."[278] Justice Stevens assumes that the justification for punishment is clear and founds his ruling on this assumption. He writes that,

> New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label 'sentencing enhancement' to describe the latter surely does not provide a principled basis for treating them differently.[279]

The distinction between 'sentencing factors' and 'elements of the crime' is empty. If we view law as an ordered system that strives toward justifiable ends through lawful means, then no factors should be excluded from the legal procedure. To leave factors to the judge is to grant him unwarranted discretion. Instead, every element of the crime should be presented before the court and, as a substitute for mandatory guidelines only statutes are necessary for sentencing. The question of justification is implicitly considered irrelevant. According to Stevens, law satisfactorily justifies punishment and all the factors of a crime ought to also come under the domain of legal science. The capacity of judges to justify is the relic of an obsolete, archaic conception of law.

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[278] *Apprendi*, 530 U.S. at 476.

[279] *Apprendi*, 530 U.S. at 476.

Justice Stevens cites the judicial procedure during our nation's founding as precedent. He quotes J. Archibald from 1862, who contends that criminal proceedings must be submitted to a jury after being initiated by an indictment containing

> All the facts and circumstances which constitute the offence, …stated with such certainty and precision, that the defendant…may be enabled to determine the species of offence accordingly…and *that there may be no doubt as to the judgment which should be given*, if the defendant be convicted. (emphasis added)[280]

Stevens also quotes Justice Blackstone, a widely renowned Federal judge, who writes, " the court *must pronounce that judgment, which the law hath annexed to the crime*'."[281] Punishment must be intrinsically linked with crime. This contrasts with Justice Black in *Williams*, who supported judgment that individualizes and joins together criminal and crime. To make the penalty knowable for a crime before the criminal is known is to discount the relevance of the actual crime. Crime becomes an abstract concept and is elevated above actual crimes and criminals.

Justice O'Connor, dissenting in *Apprendi*, perceptively notes that the 'sentencing factors', and how they relate to upward and downward departures, are "in the eye of the beholder."[282] Steven's decision rests on a doubt in the privilege of judges to behold. Sentencing factors also rely on the unknowable identity of the judge---for example, his reaction to a hate crime determines the judgment. O'Connor, although she dissents in *Apprendi*, has more faith in the ability of judges to assess sentencing factors. Stevens contests even a marginal amount of judicial discretion, asking that everything be brought before the logical, ordered, mechanical eye of the modern courtroom and not the blind eye of justice. The judge is stripped of the right to see his own insight, his own conscience, in a judgment.

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[280] *Apprendi*, 530 U.S. at 478.

[281] *Apprendi*, 530 U.S. at 479.

[282] *Apprendi*, 530 U.S. at 542-3.

The rulings are mixed in terms of intention and effects: on the one hand, those who support *Apprendi* are unconcerned with judicial discretion and only doubt the ramifications of the Guidelines on the jury and a "fair" trial. Justice Scalia, in a concurring opinion, argues that elevating the authority of statutes above sentencing factors is the "fairest" treatment for a criminal.[283] On the other hand, the dissenters also promote determinate sentencing. Justices Breyer and O'Connor are anxious over the implications of *Apprendi,* which they think could lead to the dissolution of the Guidelines. Ironically, the dissenters who support the Guidelines actually have more faith in judges. For O'Connor and Breyer, judges can be trusted with the ability to "behold" and determine whether a factor should result in a departure. Determinate sentencing is a part of the legal system and indeterminate sentencing is a relic of a less advanced moment in jurisprudence.

Blakely v. Washington concerns the same principle that decided *Apprendi*, jury rights, but extends the repercussions of the ruling to Washington's Sentencing Reform Act.[284] Ralph Howard Blakely was originally charged with the first degree kidnapping of his wife. In a plea agreement, he consented to profess his guilt in order to receive a second-degree kidnapping charge involving domestic violence and the use of a firearm. Washington's sentencing guidelines dictated a punishment of forty-nine to fifty-three months, but after the judge privately heard the exceptional details of the crime from Blakely's wife, he cited "deliberate cruelty" and imposed a ninety-month sentence. The Supreme Court, in accord with *Apprendi*, overruled the sentence based on the constitutional right of defendants to have a jury verify whether all elements of a crime are beyond a reasonable doubt. The distinction between *Apprendi* and *Blakely* is that, in Blakely sentencing guidelines are called into question. Since the guidelines called for and

[283] *Apprendi*, 530 U.S. at 498.

[284] *Blakely*, 542 U.S. at 296.

allowed the judge to enhance a sentence due to factors such as "deliberate cruelty", they were declared essentially unconstitutional. However, *Blakely* was unclear as to whether or not this ruling was applicable to all guidelines and created mass confusion among lawyers, judges and criminals.

The Supreme Court reviewed *United States v. Booker,* 543 US 220 (2005), to clarify the ramifications of *Apprendi* and *Blakely* on the Guidelines. Freddie Booker was convicted of possession of 92.5 grams of crack cocaine. The Federal Sentencing Guidelines imposed a term of between 210 and 262 months. In a post-trial sentencing procedure the judge found a preponderance of evidence that Booker possessed an additional 566 grams and that had also obstructed justice;[285] consequently, the judge enhanced the sentence to 360 months. Again, the Supreme Court ruled in the main holding that the fact-finding of the judge, which corresponded only to a preponderance of evidence and not the "reasonable doubt standard," was unconstitutional.

Booker distinguishes itself from *Apprendi* and *Blakely* in the puzzling remedial holding. *Booker* was decided by the same 5-4 majority that ruled in *Apprendi* and *Blakely*. The intersection between the remedial and the substantive ruling, however, contains only Justice Ruth Bader Ginsburg. This peculiar situation meant "the faction that discerned no constitutional violation in the first instance declared the appropriate remedy for that violation."[286] The dissenting judges from the main ruling sought to maintain some aspects of the Guidelines that would otherwise be completely struck down. The remedial ruling invalidated two provisions of the SRA, essentially vitiating the mandatory nature of the Guidelines. Justice Breyer, authoring the remedial opinion, considers what Congress would have done had it been aware of the

[285] *Booker*, 543 US at 220-2.

[286] Lynch, 225.

unconstitutionality of the Guidelines.[287] He concludes that the Guidelines ought to become advisory in order to preserve a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.[288]

He also establishes the standard of "reasonableness" by which appellate courts can rule. "Reasonableness" means that sentences can be reviewed not because they depart from the Guidelines, but because they are not "reasonable." The remedial ruling safeguards the connection between crime and punishment that Judge Frankel craved. The "uniformity" of sentencing does not degenerate into a system of indeterminate, disparate judgment. Finally, Breyer also asks that Congress consider legislative action as a response to *Booker*, thereby placing the burden back on lawmakers. We are left in the same position we were in before 1984, except the Guidelines exist in an advisory form and there is a new nebulous standard that will require clarification.

On the one hand, the *Booker* ruling seemingly makes little difference for judicial discretion. Judges must merely consider all "sentencing factors" to be "elements of the crime," and therefore allow the juries to determine them beyond a reasonable doubt. However, many of the factors that judges consider will never be presented in court simply because of procedural constraints and the greater burden of proof required of juries. Moreover, there is a risk that sentencing will return to a fixed system where statutes come to play the role of guidelines. Legislatures have not yet responded to *Booker* but "Attorney General Alberto Gonzales has made it clear that the Bush administration is anxious to curb judicial discretion by establishing a broad array of mandatory minimum sentences and restoring the mandatory nature of the Federal

[287] *Booker*, 543 US at 246.

[288] *Booker*, 543 US at 246.

Sentencing Guidelines."289 The implications of *Booker* are not that there is a greater respect for judicial authority---on the contrary, the Supreme Court ruling reflects an unswerving faith in determinate sentences, which perpetuate the loss of judgment.

The rulings on criminal sentencing that begin with *Apprendi* and culminate in *Booker* do not indicate that the view of judges has changed since the implementation of the Guidelines. In 1984, judges were doubted due to an increasing loss of judgment. Without an absolute standard of judgment and with the "grave responsibility" of judging that *Williams v. New York* instills, judges were torn apart by a lack of faith. This lack of belief in judges, which extends to criminals, lawyers, politicians and the judges themselves, resulted in the implementation of the SRA. The Guidelines substitute judicial discretion and the mysteriously vague idea of 'justice' with knowable, certain rules. These rules heal some of the wounds in sentencing. Judges, who had lost the ability to judge, no longer toss out disparate sentences for similar crimes. However, the Guidelines also preclude the possibility that a judge might have an actual insight into justice like Justice Frankfurter. A scientific conception of law comes to replace justice and the aesthetic process of judgment. The Guidelines require judges to serve a role in sentencing, not to create sentences. The new foundation for law, determinate sentencing, remains untouched. Unlike the ruling in *Williams*, a case that encouraged indeterminate, individual judgment, the *Apprendi*, *Blakely* and *Booker* rulings upheld determinate sentencing *despite* striking down the Guidelines. Although judges have greater discretion without the Guidelines, the view of judgment remains unchanged. In all likelihood, new guidelines and statutes will replace the SRA and the loss of judgment will deepen.

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[289] Lynch, 233.