RECENT CASES

CRIMINAL LAW — SENTENCING GUIDELINES — NINTH CIRCUIT HOLDS THAT TRAFFIC CITATION IS NOT AN "INTERVENING ARREST" UNDER SECTION 4A1.2(A)(2) OF THE GUIDELINES. — *United States v. Leal-Felix*, 665 F.3d 1037 (9th Cir. 2011) (en banc).

The question of what degree of custody constitutes an "arrest" has proven problematic in various areas of law, from federal constitutional law to sentencing.[1] This challenge is particularly salient with regard to traffic citations, which on the one hand do entail a brief detention, but on the other hand rarely result in a statement that the driver is "under arrest" or in a trip to the police station. Recently, in *United States v. Leal-Felix*,[2] the Ninth Circuit held en banc that a defendant's traffic citations were not "arrests" for purposes of calculating his criminal history under section 4A1.2(a)(2) of the Sentencing Guidelines. Although the Ninth Circuit's holding creates a circuit split,[3] the majority's reasoning exemplifies the common law methodological approach that best furthers the purpose of the Guidelines. This approach also allows courts to address two potential policy concerns stemming from the Guidelines: first, it avoids the unwanted result of punishing with equal severity criminals with unlike culpability; and second, it mitigates overstatement of minorities' criminal histories, which may be inflated due to traffic citations resulting from racial profiling.

On April 20, 2009, Israel Leal-Felix, a previously deported Mexican citizen, was charged with illegally reentering the United States.[4] Leal-Felix entered into a binding plea agreement, under which in exchange for a guilty plea, the government would recommend that he be sentenced at the lower end of the applicable Sentencing Guidelines range at a total offense level of nine.[5] Both parties waived their rights to

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[1] *See, e.g.*, Whren v. United States, 517 U.S. 806, 808 (1996) (analyzing whether a traffic stop is a "seizure" and must be reasonable); United States v. Morgan, 354 F.3d 621, 623–24 (7th Cir. 2003) (considering whether a traffic citation is an arrest under the Sentencing Guidelines).

[2] 665 F.3d 1037 (9th Cir. 2011) (en banc).

[3] *See Morgan*, 354 F.3d at 624 (holding that a traffic citation constituted an arrest).

[4] *Leal-Felix*, 665 F.3d at 1039.

[5] *Id.* The Guidelines recommend sentencing ranges based on two factors: the "offense level," or seriousness of the violation(s) currently at issue, and the defendant's "criminal history," as calculated via criminal history points assigned to past crimes based on offense levels. *See* U.S. SENTENCING GUIDELINES MANUAL § 5A (2011). Under federal law, aliens who illegally reenter the United States after removal or deportation subsequent to conviction(s) for certain crimes receive enhanced sentences, with greater enhancements depending on the seriousness of the past conviction(s). *See* 8 U.S.C. § 1326 (1996). Leal-Felix had previously been deported to Mexico in February 2005, after pleading guilty to an aggravated felony charge for firearm possession by a convicted felon. United States v. Leal-Felix, 625 F.3d 1148, 1149 (9th Cir. 2010). The illegal reentry has a base offense level of eight under the Guidelines, U.S. SENTENCING GUIDELINES

appeal the sentence so long as the district court imposed a sentence in accordance with the plea agreement, but Leal-Felix reserved the right to appeal the calculation of his criminal history.[6] As of June 8, 2009, when Leal-Felix entered his plea of guilty pursuant to the plea agreement, his criminal history included two citations for driving with a suspended license, received on November 17 and November 19, 1998.[7] The court sentenced him for both citations on January 19, 2000, and he received "concurrent sentences of 36 months' probation on the condition that he serve 180 days in county jail."[8] The presentence investigation report (PSR) thus calculated that Leal-Felix had fourteen criminal history points, including four points from the two traffic violations,[9] and was therefore in criminal history category VI.[10]

At his sentencing hearing, Leal-Felix argued that, under Guidelines section 4A1.2(a)(2),[11] the second violation should not count in his criminal history because both violations had been sentenced on the same day and because the first violation had resulted in only a citation, not an arrest.[12] The district court disagreed and held that a traffic citation constituted an arrest, meaning that the first citation was "an intervening arrest."[13] Using this interpretation, the court calculated that Leal-Felix had thirteen criminal history points, which still placed him in criminal history category VI, and accordingly sentenced him to twenty-one months (the low end of the Guidelines range for category VI).[14]

MANUAL § 2L1.2(a), with a possible offense level increase of another sixteen levels when the defendant was previously removed for a firearms offense, *id.* § 2L1.2(b). The binding plea agreement thus reduced Leal-Felix's offense level to only nine, leaving his recommended sentencing range dependent on the calculation of his criminal history.

[6] *Leal-Felix*, 665 F.3d at 1039.

[7] *Id.*

[8] *Id.*

[9] Each violation incurred two points based on the length of the sentence that had been imposed with regard to the citation — that is, 180 days in jail, or 90 days for each citation. Under Guidelines section 4A1.1, prior sentences of imprisonment of at least sixty days but not more than thirteen months result in an addition of two points to the defendant's criminal history.

[10] *Leal-Felix*, 665 F.3d at 1039.

[11] Section 4A1.2(a)(2) of the Guidelines provides:

> If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day.

U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(2).

[12] *Leal-Felix*, 665 F.3d at 1039.

[13] *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(2) (2011)) (internal quotation marks omitted).

[14] *Id.*

On appeal, a divided panel of the Ninth Circuit affirmed the district court.[15] Writing for the panel, Judge Goodwin[16] cited the Seventh Circuit case *United States v. Morgan*,[17] which held that treating traffic stops as arrests under section 4A1.2(a)(2) comported with the Guidelines and "federal parlance" under *Whren v. United States*.[18] Judge Goodwin succinctly concluded that the district court had correctly calculated Leal-Felix's criminal history.[19] Judge Bennett dissented. He argued that the plain meaning of the word "arrest" unambiguously does not include traffic citations.[20] Alternatively, he posited that even if the word "arrest" has "potential ambiguity,"[21] then "the policies, purposes and overall scheme of the Guidelines require 'arrest' to be interpreted as not including 'citation' . . . especially . . . in light of the Rule of Lenity."[22] Leal-Felix submitted a petition for rehearing en banc, which the Circuit granted.[23]

The Ninth Circuit vacated and remanded the case for resentencing. Writing for the court, Judge Smith[24] held that the mere issuance of a citation, even if considered an arrest under state law, does not suffice to constitute an "arrest" under section 4A1.2(a)(2).[25] Applying the "normal rules of statutory interpretation,"[26] Judge Smith first emphasized that the common use of the word "arrest" indicates "custody" or "imprisonment."[27] Judge Smith declined to follow the holding in *Morgan* because the Seventh Circuit relied on misreadings of *Whren* and *Atwater v. Lago Vista*,[28] and because other Supreme Court precedent supported distinguishing an arrest from a citation.[29] Judge Smith argued that the Guidelines as a whole also suggest that citations are not arrests, given that the stated purpose of the criminal history score is to approximate the "seriousness of the defendant's criminal history and the danger that the defendant presents to the public,"[30] neither of

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[15] United States v. Leal-Felix, 625 F.3d 1148, 1149 (9th Cir. 2010).
[16] Judge Goodwin was joined by Judge Rawlinson.
[17] 354 F.3d 621 (7th Cir. 2003).
[18] 517 U.S. 806 (1996); *see also Leal-Felix*, 625 F.3d at 1150 (quoting *Morgan*, 354 F.3d at 624).
[19] *Id.* at 1151.
[20] *Id.* at 1155 (Bennett, J., dissenting).
[21] *Id.* at 1159.
[22] *Id.* at 1162.
[23] United States v. Leal-Felix, 641 F.3d 1141 (9th Cir. 2011).
[24] Judge Smith was joined by Judges Schroeder, William Fletcher, Paez, Smith, Jr., and Ikuta.
[25] *Leal-Felix*, 665 F.3d at 1040, 1044.
[26] *Id.* at 1040.
[27] *Id.* at 1041 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 121 (unabridged ed. 1993)) (internal quotation mark omitted).
[28] 532 U.S. 318 (2001); *see also Leal-Felix*, 665 F.3d at 1042.
[29] *Leal-Felix*, 665 F.3d at 1043 (citing Knowles v. Iowa, 525 U.S. 113, 114 (1998); Berkemer v. McCarty, 468 U.S. 420, 442 (1984)).
[30] *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 cmt. 3 (2011)).

which seems to be implicated in a traffic citation.[31] Moreover, sentences imposed for driving with a suspended license are generally excluded from criminal history calculations, which seems to indicate the "relatively minor" character of such offenses.[32] He further noted that to interpret "arrest" as including citations would functionally equate being arrested with being charged, removing the possibility of any situation in which there would not be an intervening arrest and rendering superfluous the last two sentences of section 4A1.2(a)(2).[33] He underscored the availability of an upward departure from the Guidelines' recommended range in cases in which the criminal history score underrepresents the danger of the defendant or the seriousness of his crimes.[34] Finally, he argued alternatively that the term "arrest" was at least ambiguous, meaning that the rule of lenity would weigh in favor of distinguishing citations from arrests.[35]

Judge McKeown[36] concurred in the opinion, but wrote separately to highlight that "the most compelling reason" for distinguishing an arrest from a citation was simply that the "common understanding of the term arrest does not include . . . a traffic violation."[37] Although most traffic stops do involve a "brief period of detention" while the police officer checks the driver's license and registration, Judge McKeown argued that the average person would not consider himself to be in "custody" during this "brief, embarrassing moment."[38]

Judge Rawlinson dissented.[39] She posited that given the precedent for "routinely eschew[ing] constitutional protection for various aspects of the sentencing process,"[40] for example, by allowing sentencing courts to consider acquitted[41] and uncharged[42] conduct, the definition of arrest for the purposes of calculating criminal history is broader than the definition of arrest used in deciding whether a constitutional violation occurred.[43] She argued that the Supreme Court precedent discussed by the majority to support a distinction between an arrest and a citation all concerned whether Fourth, Fifth, or Sixth Amendment violations occurred. She further noted that the Seventh Circuit's holding in *Morgan* "comport[ed] more closely with the permissibly

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[31] *Id.*
[32] *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c)(1)).
[33] *Id*. at 1043–44.
[34] *Id.* at 1044 (citing U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(a)(1)).
[35] *Id.*
[36] Judge McKeown was joined by Chief Judge Kozinski and Judges Graber and Wardlaw.
[37] *Leal-Felix*, 665 F.3d at 1044 (McKeown, J., concurring).
[38] *Id.* at 1046.
[39] *Id.* (Rawlinson, J., dissenting).
[40] *Id.*
[41] *Id.* (citing United States v. Mercado, 474 F.3d 654, 656–57 (9th Cir. 2007)).
[42] *Id.* (citing United States v. Barragan-Espinoza, 350 F.3d 978, 983 (9th Cir. 2003)).
[43] *Id.*

broad scope of sentencing considerations than [did] the [Ninth Circuit's] restrictive definition."[44] She cautioned against elevating the form of an arrest (that is, formal booking or stating someone is "under arrest") over its substance.[45] Lastly, she criticized the majority opinion not only for creating an "unnecessary circuit split," but also for "[t]reating a traffic citation as a non-event[, which] seriously undermines the recidivism consideration of the guidelines."[46]

The majority's reasoning exemplifies the interpretive approach that courts should take with respect to the Guidelines and opens up the possibility of considering policy factors that are important subtexts to the case. When the Guidelines first took effect in 1988 to address the perceived problem of disparate, indeterminate sentencing,[47] the U.S. Sentencing Commission used terms that were new to traditional criminal law vocabulary without defining them within the Guidelines' text.[48] A vast body of legal scholarship, grappling with the question of how judges ought to interpret the Guidelines, thus developed.[49] The majority and minority positions in this debate can best be described in terms of two paradigms of interpretation: the common law versus the civil code approach.[50] The civil code approach treats the meaning of

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[44] *Id.*

[45] *Id.* at 1047–48.

[46] *Id.* at 1048.

[47] *See, e.g.*, Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 572–74 (2005) (describing the pre-Guidelines perceived problem of unruly sentencing by judges who lacked training in sentencing, faced no appellate review of their sentencing decisions, and rarely wrote reasoned explanations of their sentencing decisions).

[48] *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 51–57 (1998).

[49] *See generally, e.g.*, *id.*; Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523 (2007) [hereinafter Gertner, *Omnipotence*]. The question of how to interpret the Guidelines has been an especially open interpretive debate since 2005 in light of the Supreme Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), which rendered the once-mandatory Guidelines advisory and seemingly restored judicial power with respect to the sentencing calculus. *See* Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 705–07 (2010) [hereinafter Gertner, *A Short History*] ("One might argue that *Booker* . . . invites . . . judges . . . to participate in a multilayered discussion about federal sentencing, a discussion that had been largely squelched in an era of Guideline diktats." *Id.* at 707.).

[50] It is worth keeping in mind that this is a highly simplified distinction. *See, e.g.*, JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (2d ed. 1985), *reprinted in* JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 3 (2d ed. 1994) ("[T]here is no such thing as the civil law system [or] the common law system." (emphasis omitted)); Robert Christensen, *Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court*, 6 UCLA J. INT'L L. & FOREIGN AFF. 391, 400 (2002) (positing that the distinctions between the civil and common law traditions have become "less apparent" today); Mark R. Conrad, *Interpreting Hong Kong's Basic Law: A Case for*

an undefined term — a statutory gap or ambiguity — as having already been decided by the legislature. Under this approach, the Guidelines are a "*comprehensive* body of rules, policies, and principles,"[51] and the judge simply needs to look to the text and reason by analogy from other relevant provisions to find the "correct" answer.[52] The common law approach, conversely, focuses on the broader body of judicial precedents as the "comprehensive body" that judges should reference in reading undefined terms.[53] This approach gives the judiciary the discretion to consider relevant case law, canons of construction, and policy considerations when filling a gap in the Guidelines' express provisions.[54] Yet despite the fact that the Guidelines explicitly state that they are designed to leave certain terms open for future interpretation,[55] signaling the appropriateness of the common law approach, courts have instead generally read the Guidelines as though they are akin to a complete civil code.[56]

Cases, 23 UCLA PAC. BASIN L.J. 1, 28 (2005) ("At the outset, it is important to recognize the limits of the labels 'common law' and 'civil law.' These terms usefully identify features shared by families of legal systems, but they also mask a great deal of variety within those families.").

[51] William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1218 (2001) (emphasis added) (discussing civil law systems).

[52] *Id.* ("Gaps in the code are filled in by a process civilians call the equity of the statute: judges reason by analogy from the most pertinent provision and its policy to supply the answer in the *casus omissus*, the unprovided-for case.").

[53] *Id.*

[54] *See id.* (describing how gaps in the common law are filled "by a process of reasoning by analogy, figuring out how a new problem is akin to, and different from, prior judicial determinations"); *see also* Conrad, *supra* note 50, at 3 (explaining that in contrast to the civil law tradition, which typically vests interpretive authority with the legislature, the common law tradition "emphatically" places that power in the judiciary (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)) (internal quotation marks omitted)); Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 SUP. CT. ECON. REV. 21, 45 (2007) ("Yet it is the common law tradition that is considered 'judge centered,' providing greater discretionary power to the judiciary.").

[55] *See* S. REP. NO. 98-225, at 52 (1983) ("The purpose of the . . . guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences."); *see also* Gertner, *A Short History*, *supra* note 49, at 704 ("The Guidelines' Introduction acknowledges that they are not comprehensive but rather have gaps intended to be filled in by judges' power to depart.").

[56] *See, e.g.*, Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 261, 267 (2009) ("Judges who had overwhelmingly opposed the Guidelines . . . suddenly became wholly 'passive' in their sentencing decisionmaking. . . . In part, judges slavishly followed the Guidelines because of a civil code–oriented ideology of sentencing reform created by the Sentencing Reform Act and the Guidelines — an ideology that endures today. Judges believed that experts promulgated the comprehensive Guidelines based on empirical data, and that any gaps in the Guidelines' coverage were best filled by the Commission." (footnotes omitted)). In fact, perhaps the now-extant circuit split is in fact a result of this methodological confusion concerning how to interpret the Guidelines. This effect seems possible, especially considering the fact that the Seventh Circuit decided *Morgan* two years before *Booker* brought judicial discretion back into sentencing and invited critical evaluation of the Guidelines in the way common law courts have scrutinized legislation. Although *Morgan* at least nominally considered the purposes of the Guidelines and federal case law in concluding that "arrest" was not ambiguous, it may still have elements of a more re-

However, the Ninth Circuit in *Leal-Felix* took a common law approach in interpreting the meaning of "intervening arrest" within a broader context.[57] The majority rightly identified the meaning of "arrest" as ambiguous, given that neither the Commission nor the Guidelines define the term.[58] The court then sought to fill that gap using a variety of common law sources: relevant precedent,[59] common understanding,[60] the underlying purposes of sentencing and the Guidelines,[61] and canons of construction such as the canon against superfluous language[62] and the rule of lenity.[63] The court found that nothing in the common understanding or the purposes of punishment justified reading "arrest" to include a traffic citation, and that in any case, the rule of lenity weighed in favor of the defendant. The majority's approach outlines a proper method that fully embraces judges' discretion in sentencing and ultimately leads to an appropriate, proportional sentence reflecting the real threat of the individual defendant. Furthermore, by explicitly laying out its reasoning, the majority opinion contributes to the common law of sentencing, demonstrating that robust appellate review of sentencing can aid in promoting judicial discretion.[64]

The dissent, in contrast, is considerably less "common law" than the majority in terms of the breadth and degree of its interpretive approach. For example, the dissent's decision not to apply *Berkemer v. McCarthy*,[65] *Knowles v. Iowa*,[66] and other federal constitutional law cases indicates more of a civil code approach than a common law approach to interpretation. Relying on such cases seems particularly apt in *Leal-Felix*, given both that Guidelines section 4A1.2 specifically addresses recidivism and that the wide range of Fourth, Fifth, and Sixth

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strictive, civil code–based approach to reading section 4A1.2, as indicated by its sparse treatment of the issue and its reluctance to consider the (possibly absurd) results of a purportedly unambiguous definition. *Cf.* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 892–93 (2003) (describing the "absurd-results" canon as one that may not be favored where a legislature may want to "reserve to itself the authority to correct . . . statutes.").

[57] *Cf.* Gertner, *Omnipotence*, *supra* note 49, at 532 ("Common law judges never assumed that words . . . could be applied without interpretation, [and] an understanding of the context.").

[58] *See Leal-Felix*, 665 F.3d at 1040, 1043.

[59] *See id.* at 1042–43.

[60] *See id.* at 1041–42.

[61] *See id.* at 1043.

[62] *See id.* at 1043–44.

[63] *See id.* at 1044.

[64] *See* Gertner, *supra* note 56, at 279 ("Efforts to develop a common law of sentencing at both levels will be mutually reinforcing. As lower courts begin to apply alternative sentencing frameworks to individual cases, post-*Booker* appellate review will begin to have more content. In turn, meaningful appellate review will help guide lower courts to make future sentencing decisions."); *cf.* Gertner, *A Short History*, *supra* note 49, at 697 (explaining how without appellate review, no common law of sentencing could develop).

[65] 468 U.S. 420, 442 (1984).

[66] 525 U.S. 113, 114 (1998).

Amendment cases applied by the majority helps elucidate the seriousness of a given violation and/or the danger posed by a violator.[67] Additionally, the majority's recognition of other common law tools, such as the rule of lenity, more fully exemplifies the common law approach than does the dissent.[68]

Under the common law interpretive approach, the Ninth Circuit could also have considered two policy concerns underlying this case. First, the court could have noted that the *Morgan* interpretation would result in criminals with unlike culpability or violence in their criminal histories being punished with equal severity. Two traffic stops not separated by an arrest would garner a defendant four criminal history points — enough to push him or her into a higher criminal history category and foreclose the possibility of the "safety valve" of a mandatory minimum.[69] The blame lies in part with the Guidelines' structure for assigning points, which depends on the length of the sentence received for a prior violation, and is thus not directly connected to the seriousness or dangerousness of the crime at issue.[70] In Leal-Felix's case, the combination of this structural problem in the Guidelines with the Seventh Circuit's preferred reading would have meant that Leal-Felix could have received the same number of criminal history points for his two traffic citations as another defendant who committed an aggravated assault and robbery that resulted in a single sentence of several

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[67] *See* Atwater v. Lago Vista, 532 U.S. 318 (2001); Knowles, 525 U.S. 113; Whren v. United States, 517 U.S. 806 (1996); Berkemer, 468 U.S. 420.

[68] However, presumably *Morgan* did not mention the rule of lenity because the Seventh Circuit found that "arrest" was not ambiguous. *See* United States v. Morgan, 354 F.3d 621, 624 (7th Cir. 2003). It is possible that the dissent in *Leal-Felix* similarly declined to recognize the rule of lenity because it thought the meaning of "arrest" was sufficiently clear, blocking the rule's application, particularly in light of *Morgan*.

[69] Guidelines section 5C1.2, known as the federal "safety valve," is a provision that allows some first-time drug offenders to receive sentences below the mandatory minimum. However, in order to qualify, an individual may not have more than a single criminal history point. Under the *Morgan* interpretation, individuals receiving two closely related traffic citations would be ineligible more often; under the *Leal-Felix* interpretation, defendants who receive two separate traffic citations with concurrent sentences would not necessarily be ineligible for the safety valve program. *See* Jim Ballidis, *How Could Recent California Court Decision on Traffic Stops Influence Sentencing?*, HG.ORG (Jan. 4, 2012), http://www.hg.org/article.asp?id=24503.

[70] *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2011). This section adds: "(a) . . . 3 points for each prior sentence of imprisonment exceeding one year and one month[,] (b) . . . 2 points for each prior sentence . . . of at least sixty days[, and] (c) . . . 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection." Section 4A1.1(d) adds two points "if the defendant committed the instant offense" while under probation, on parole or supervised release, in prison, on work release, or while escaped from prison. Only section 4A.1.1(e) takes into account the violence of a prior crime, and this is only by adding one point for each prior sentence resulting from conviction of a violent crime that did not receive any points under (a), (b), or (c) because the sentence was counted as a single sentence. *See also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 27–28 (1988).

years.[71] This outcome would introduce a new form of sentencing disparity at odds with the Guidelines' purpose by treating two offenders with different levels of culpability and dangerousness in an unjustifiably similar manner.[72] Given the recognized structural problems with the Guidelines,[73] courts could appropriately take this undesirable hypothetical outcome into consideration in a common law approach,[74] allowing judges to respond flexibly to concerns related to parity and the purposes of punishment.

Second, a common law approach also allows judges to consider and respond to the racial justice concerns that arise in the context of sentencing, where a criminal history may be inflated due to racial profiling. Numerous scholars have discussed the "Driving While Black/Brown" phenomenon — that is, the race-based suspicion of black and Latino motorists and the resulting pretextual traffic stops.[75] This problem can lead to inflated numbers of traffic citations in the criminal histories of minority drivers, which when taken into account in sentencing calculations can significantly skew a given driver's sen-

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[71] Aggravated assault and robbery have base offense levels of fourteen and twenty, respectively, under the Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 2A2.2(a); *id.* § 2B3.1(a). Starting from a baseline criminal history of zero, this scenario results in recommended sentencing ranges of fifteen to twenty-one months for the assault and thirty-three to forty-one months for the robbery. *See id.* ch. 5, pt. A, sentencing tbl. If his sentences were combined into a single sentence of, for example, thirty-five months' imprisonment, this hypothetical defendant would receive three criminal history points under Guidelines section 4A1.1(a) for the combined sentence, plus one additional point for the additional crime of violence (either the aggravated assault or the robbery) included under the single sentence under Guidelines section 4A1.1(e), resulting in a total of four criminal history points.

[72] *Cf.* United States v. Leviner, 31 F. Supp. 2d 23, 33 (D. Mass. 1998) ("To treat this man as if he were only a point on a grid, the intersection of an offense score of seventeen and a criminal history of Category V, would do violence to the purposes of the Sentencing Guidelines.").

[73] *See* Linda Drazga Maxfield, *Prior Dangerous Criminal Behavior and Sentencing Under the Federal Sentencing Guidelines*, 87 IOWA L. REV. 669, 677 (2002).

[74] Indeed, since *Booker*, the Supreme Court now "identifies a singular concern on appeal in each [sentencing] departure case: reasonableness." Mary Kreiner Ramirez, *Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing*, 57 DRAKE L. REV. 591, 606–07 (2009) (citing Kimbrough v. United States, 128 S. Ct. 558, 576 (2007); Gall v. United States, 128 S. Ct. 586, 600 (2007); Rita v. United States, 127 S. Ct. 2456, 2462–63 (2007)). It is reasonable to (a) recognize that the Guidelines would attach very serious consequences to cursorily accepting *Morgan*'s contention that an arrest includes a citation and thus (b) decline to follow it. Rejecting interpretations that would treat unlike criminals similarly may also comport with the absurdity canon. Whether construed as a policy consideration or a canon of construction, however, this particular factor can be considered under only the common law approach. *See* Sunstein & Vermeuele, *supra* note 56, at 892–93. *But see, e.g.*, Jaskolski v. Daniels, 427 F.3d 456, 462 (7th Cir. 2005) (demonstrating the limitations of the absurdity doctrine in the criminal context).

[75] *See, e.g.*, Washington v. Lambert, 98 F.3d 1181, 1188 (9th Cir. 1996) (noting the problem of racial profiling in traffic stops and "a moving violation that many African-Americans know as D.W.B." (quoting Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, THE NEW YORKER, Oct. 23, 1995, at 59)); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999); Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717 (1999).

tence.[76] Given that traffic convictions raise racial profiling concerns, particularly with respect to traffic arrests and stops, it is all the more important that judges interpret this provision of the Guidelines carefully, with a view to the purposes of sentencing.[77] The Ninth Circuit's decision in the case of Leal-Felix, a Mexican citizen, avoids compounding such problems. Although this consideration is not within the four corners of the opinion, it is worth noting that *Leal-Felix* relies on *Whren*[78] and *Atwater*,[79] which together meant that officers could not only stop a driver based on his or her race, but then also had the discretion to arrest that person for even a minor traffic violation. Given that both cases raised troubling implications with regard to racial profiling,[80] *Leal-Felix* helps to mitigate some of the worst instances, where racial profiling may carry ripple effects into federal sentencing.[81] The Ninth Circuit could have explicitly recognized that its holding avoided perpetuating a rule of law that would likely contribute to problematic and unjustified racial disparity in calculating criminal histories. Doing so could have also signaled a generally important point: that there are consequences of discretion-authorizing opinions like *Whren* and *Atwater*, and that judges have perhaps underestimated how much they may need to react to and mitigate indirect, second-order collateral consequences elsewhere within federal criminal law.

Policy concerns, such as the one explored above, and the importance of general judicial flexibility in carrying out the purposes of punishment, bespeak a common law interpretive approach to the Guidelines. *Leal-Felix* is a welcome move in that direction.

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[76] *See* Harris, *supra* note 75, at 304–05 (discussing how "Driving While Black" explains in part why blacks receive longer sentences than whites for the same crimes); *cf. Leviner*, 31 F. Supp. 2d at 33–34 (departing downward from the recommended Guidelines range because defendant's record of minor offenses stemmed from racial profiling and overstated his culpability).

[77] *Cf. Leviner*, 31 F. Supp. 2d at 33.

[78] *Whren*, which involved a Fourth Amendment challenge to possible profiling in routine traffic stops, held that traffic stops motivated by the racial prejudices of individual police officers do not violate the search and seizure clause, at least where there are other reasons for the stop. *See* Whren v. United States, 517 U.S. 806, 808–13 (1996).

[79] In 2001, *Atwater* essentially extended *Whren*'s sanctioning of race-based traffic stops when it held that the Fourth Amendment did not forbid a warrantless arrest for a minor criminal offense like a traffic violation. *See* Atwater v. Lago Vista, 532 U.S. 318, 354–55 (2001).

[80] *See* Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 171 n.29; Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1067–68 (2010); Sakura Mizuno, *Justice is Blind, Deaf, Dumb, and Dumber:* Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)*, 43 S. TEX. L. REV. 805, 825–29 (2002) (discussing how *Atwater* will likely result in more "[u]nnecessary [m]inor-[o]ffense [a]rrests [b]ased on [r]acial [p]rofiling," *id.* at 825).

[81] A similar point could be made generally with regard to sentencing of aliens in illegal reentry cases — that is, that *Leal-Felix* avoids compounding an already overenhanced sentence for illegal reentry. *Cf.* Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases Are Unjust and Unjustified (And Unreasonable Too)*, 51 B.C. L. REV. 719 (2010).