

sometimes no wider than Interstate 85. Plaintiffs claimed that the primary reason these districts were drawn was to elect blacks to Congress and that they there-

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Indeed, just 16 years earlier, in *United Jewish Organizations of Williamsburg Inc. v. Carey*, 430 U.S. 144, 179 (1977), the court had rejected a similar challenge in Brooklyn because the creation of a majority-black district there did not "minimize...white voting strength."



A Matter of Perception

Shaw creates racial double standards. For example, white plaintiffs need not suffer an injury to sue. Living

to how to implement *Shaw*. Previous efforts to do this have failed, and I seriously doubt the court has any real guidance to offer. Finally, the court can do the honorable thing: recognize the failure of its ignoble experiment and put *Shaw* to sleep.

May it rest in peace. ☐

CIVIL LIBERTIES *By Harvey A. Silverglate*

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Synergy of 'Race Profiling' and Federal Guidelines

ABOSTON FEDERAL district judge's reliance on common experience bolstered by scholarly studies and popular literature resulted in a reduced sentence for an African-American defendant who was, in all probability, the victim of "race profiling" that produced an extensive but minor criminal history. The first-of-its-kind sentencing decision has provoked an appeal by U.S. Attorney Donald Stern. *U.S. v. Leviner* is wending its way to the 1st U.S. Circuit Court of Appeals.

It was just a matter of time before the issue of the impact of widespread race profiling in the enforcement of motor vehicle laws on sentences meted out under the federal Sentencing Guidelines came to a head. The guidelines were enacted to reduce federal sentencing disparities, and the mechanism for doing so was to replace judicial discretion with rigid formulas. Federal sentences are now calculated on a numeric grid, taking into account the defendant's criminal history, individual characteristics and life circumstances count for relatively little.

U.S. District Judge Nancy Gertner, however, spotted a serious problem when she proceeded to sentence Mr.

Leviner this past December, three days before Christmas. (Fair and full disclosure: Judge Gertner and I were law partners for 16 years before she ascended to the bench.) It is widely reported and, among people in the criminal justice system, well-known, albeit less frequently acknowledged, that young black and Hispanic males are statistically far more likely than whites to be stopped by police cruisers for suspected traffic offenses, or for no apparent reason at all. As we reported last June in this space, a state Superior Court judge, after conducting exhaustive hearings, concluded that troopers stopped black drivers 4.85 times more frequently than whites on the New Jersey Turnpike, leading to a conclusion of selective enforcement for the "driving while black" offense.

Reform That Needs Reform

Judge Gertner realized that the middle-aged black man before her for sentencing for a first-offense charge of being a felon in possession of a firearm had a history of years of convictions and jail sentences, largely for minor motor vehicle violations (driving with a suspended license, for the most part). Judge Gertner concluded that not only was Mr. Leviner stopped more frequently than a white man in his position, but he also was sentenced to jail terms where a white likely

would have escaped incarceration.

The judge concluded that Mr. Leviner would face a long federal sentence if the guidelines were rigidly applied. "By counting the imprisonment that the defendant has received for the prior offenses," wrote Judge Gertner, "the [federal] system effectively replicates disparities in sentencing in the state system." This would, she noted with irony, utterly defeat the purpose of the guidelines to achieve uniformity in sentencing.

The judge noted that while Mr. Leviner, now 33, had an extensive history of motor vehicle violations and a few minor drug offenses, he had an entirely nonviolent history except for an assault offense at age 17. But because of his history of motor vehicle convictions and sentences, this, the first serious offense in his adult life, was rendered much more serious for sentencing purposes.

Over the objections of the prosecutor, Judge Gertner imposed a sentence of 30 months' incarceration at a penal facility equipped to deal with Mr. Leviner's obvious drug problem and mental issues, followed by supervised release of three years with a requirement that he undergo mental health and drug counseling. As viewed by the government, Mr. Leviner had received an unwarranted Christmas gift that undermined the guidelines' goal of elimination of sentencing dispari-

ties among defendants, and a notice of appeal followed. To Judge Gertner, following the literal commands of the guidelines "would create a new form of disparity, treating offenders that are completely different in a like way."

The case poses, at the highest level of analysis, the disturbing question of whether the 14th Amendment's promise of equality before the law means that everyone must stand or fall on the basis of numbers placed on a sentencing grid or whether the realities of racial disparities in law enforcement, and the impact they have on the raw data that go into the calculations, have to be taken into account. Judge Gertner noted that the guidelines contain a provision that seems to envision this kind of problem. She based her decision on her conclusion that the way in which Mr. Leviner's criminal history was accumulated overrepresented the "seriousness of his criminal history or the likelihood that the defendant will commit further crimes." ☐

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▶ Is a privacy waiver acceptable if it's coerced?

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