The Mercy of Judges As An Expression of Natural Law

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The realm of federal sentencing has become (among other things) a fascinating social experiment. There, judges are constrained by “advisory” sentencing guidelines,\(^1\) which are very specific about what an appropriate sentence might be.\(^2\) Because sentences within the guidelines are less likely to be successfully appealed,\(^3\) there is a strong incentive for sentencing judges (who do not like to be reversed on appeal), to sentence within the guideline range.

Given this strong incentive for judges to stay within the guidelines, we have seen two surprising things happening in federal sentencing. First, judges sentence outside of the guideline range more than one-third of the

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\(^1\) United States v. Booker, 543 U.S. 220 (2005). Prior to the *Booker* decision, these guidelines were mandatory, and judges were subject to even greater restrictions as they exercised discretion in sentencing individual defendants.

\(^2\) The United States sentencing guidelines (“U.S.S.G.”) a complex and huge body of work, now comprising two volumes, updated yearly by the sentencing commission.

\(^3\) The decision of several United States Circuit Courts of Appeal to consider within-guideline sentences reasonable was upheld by the United States Supreme Court in *Rita v. United States*, 127 S. Ct. 2456 (2007), though that decision made clear that the Circuit Courts were free to either use the presumption or reject it. Id. At the time *Rita* was decided, the D.C. Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Seventh Circuit, Eighth Circuit, and Tenth Circuits had such a presumption, while the First, Second, Third, and Eleventh Circuits had declined to use such a presumption. Id. at 2462. In March, 2008, the Ninth Circuit decided *en banc* not to utilize this presumption. *United States v. Carty*, 2008 WL 763770 (Ninth Circuit, March 24, 2008).
time.\textsuperscript{4} Second, when they do abandon the sentencing guidelines, they do so by going below the recommendation about 96\% of the time, while going above the guidelines only 4\% of the time.\textsuperscript{5}

It is the second of these observations that is the basis of this article. Obviously, federal judges overwhelmingly reject the guidelines because they view them as too harsh as they sentence an individual defendant. Where does this tendency towards mercy come from? My thesis here is that this is an example of natural law—that the impulse towards mercy is “inscribed on the hearts” (as Aquinas might say)\textsuperscript{6} of those judges who must stand in judgment of living, complex people who come and stand before them, awaiting a sentence.

The claim that this impulse to mercy is an expression of natural law is consistent with aspects of the classical view of natural law as articulated by St. Thomas Aquinas (who believed that natural law worked through the reasoning of individuals), and also in keeping with the more modern uses of

\begin{itemize}
  \item[4] Supra, Section II(C)(2).
  \item[5] United States Sentencing Commission, Final Quarterly Data Report, Fiscal Year 2006, 1, table 1. The Sentencing Commission data show that there were 70,187 total cases sentenced, of which 43,307 were sentenced within the guideline range (61.7\%). Of the remainder, 26,880 were sentenced outside of the guideline range, of which only 1,129 were sentenced above the guideline range, with the remainder (25,751) sentenced below the range. As discussed in section II(C)(2), supra, the majority of these below-guideline sentences were on the recommendation of the government, but even controlling for this group, the ratio of below-to-above guideline sentences is about 7 to 1.
\end{itemize}
the natural law ideal by American social critics (who used natural law to
critique statutory law and legal power structures). In the end, however, my
argument diverges from both by looking at observable facts within society
and law and seeking a glimpse of the divine among the men and women
working in that realm, rather than starting from perceived revelation of
God’s will to critique a statute or doctrine. It also offers the surprising view
of federal judges as social critics and actively subverting a clearly stated
Congressional imperative.

In so doing, I am attempting to expand the way we think of natural
law, even within the Christian legal community. That community has shown
great interest in natural law in the past several years, often through an
analysis of the early Christian thinkers. As one commentator has noted,
“We are in the midst of a great revival of interest in natural law. Much this
thinking is traced in on degree or another to the thought of St. Thomas
Aquinas.” Section II below will quantify and discuss the mercy of judges
under the sentencing guidelines, while Section III will briefly describe the
idea of natural law as articulated by Aquinas, which is necessary if my
observation is to be placed within this larger discussion of natural law. I will

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7 John Goyette, Mark S. Latkovic, and Richard C. Myers, eds., St. Thomas Aquinas &
then hold up the idea of mercy by judges to the Thomistic understanding of natural law.

Section IV will then develop the history of how natural law concepts have been used in the United States. While Aquinas’s classical view often sought to use natural law as a way to bolster the moral authority of the laws written by mortals, Americans from the time of independence have used natural law more often as a way to attack those laws or social constructs they believe contradict the natural order. From the ringing claim of “self-evident” truths in the Declaration of Independence through the Christian critique of slavery, Martin Luther King’s Letter from Birmingham Jail, and into more recent attacks on the legality of abortion, our uses of natural law are generally subversive of the power structures we oppose. The mercy of judges under the guidelines is in keeping with these other American movements, though significant differences (such as the subversive use of governmental, rather than outsider, power) must be noted.

Finally, Part V will argue that the mercy impulse not only exists, but that it inevitably will subvert sentencing guidelines because mercy, as a natural law impulse, is inexorable.
II. Mercy and Sentencing under the Federal Guidelines

A. The Structure of Federal Sentencing

In 1984, Congress passed the Sentencing Reform Act,\(^8\) which fundamentally changed the federal system of criminal law. Among the changes were the elimination of parole, the drastic reduction of “good time” credit for prison inmates, and the establishment of sentencing guidelines, which were to direct judges in sentencing individual defendants.\(^9\) The principle virtue of the sentencing guidelines was to be that they would eliminate disparity between judges in sentencing—that is, the sentence one judge gave would be roughly equivalent to what another judge would give for the same type of crime.

The guideline system that Congress created was simple in its structure but bafflingly complex in its real-life operation. On the surface, the guidelines are based around a simple two-axis grid, with one axis measuring the seriousness of the offense on a scale of 1-43, and the other axis measuring the defendant’s prior criminal history, on a scale of I-VI. The guideline sentence is expressed as a narrow range (ie, 39-46 months) at the point where the offense level and criminal history intersect. It does seem

\(^8\) For a good history of this period see Kate Stith and Jose A. Cabranes, Fear of Judging: Sentencing Guidelines in Federal Courts 43-77 (1998).

\(^9\) Id.
simple—a judge need only to determine the offense score and the criminal history, then look up the sentencing range on the handy grid conveniently printed on the inside cover of every guideline manual. But, as usual, the devil is in the details.

The primary complexity is determining the offense level. For example, it is often murky just what the defendant will be sentenced for, as the guidelines allow a judge to punish a defendant not only for what he was convicted of, but of “relevant conduct”—other illegal conduct which the judge only need find occurred by a preponderance of the evidence. In fact, “relevant conduct” can even include acts for which the defendant was expressly acquitted by a jury; that is, the relevant conduct standard is so broad that a person receiving a not guilty verdict for specified conduct can then be sentenced to prison for that conduct (provided they were found guilty of at least one other count).10

Once relevant conduct is considered, the complexity only increases. Calculating a defendant’s offense level next involves adding (or, rarely) subtracting points for specific instances of conduct. For example, a defendant convicted (or not, under the doctrine of relevant conduct) of

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10 Notably, this breadth of “real-offense” sentencing is a feature which is “out of step” with state sentencing systems. Robert Weisberg & Marc L. Miller, Sentencing Lessons, 58 Stanford Law Review 1, 18 (2005).
stealing government property may receive a base offense level of 6.\textsuperscript{11}

Beyond those six points, however, a multitude of point-level enhancements must be considered. He could get additional points, for example, depending on the value of what he stole,\textsuperscript{12} the number of victims,\textsuperscript{13} whether the defendant was in the business of selling stolen goods,\textsuperscript{14} if the theft was from a cemetery,\textsuperscript{15} if the theft involved “device-making equipment,”\textsuperscript{16} and whether or not the scheme created a reckless risk of death or serious injury,\textsuperscript{17} among other variables.\textsuperscript{18} Each of these enhancements, of course, require an additional finding of fact by the sentencing judge.\textsuperscript{19} The computation of the criminal history score is only somewhat simpler, and raises contested issues of its own, such as what might constitute a prior conviction.\textsuperscript{20}

\textsuperscript{17} United States Sentencing Guideline 2B1.1(b)(13) (2008).
\textsuperscript{18} The relevant guideline actually contains 16 categories of variables. United States Sentencing Guideline 2B1.1(b) (2008).
\textsuperscript{19} This fact-finding was the root of the problem addressed in United States v. Booker, 543 U.S. 220 (2005). In short, the Supreme Court found that these fact findings were a violation of the Sixth Amendment right to a trial by jury. The remedy was not to require jury findings of facts which enhance sentencing (the remedy preferred by four members of the Court), but to make the sentencing guidelines advisory rather than mandatory.
\textsuperscript{20} This issue is dealt with in the equally confusing United States Sentencing Guideline 4A1.2 (2008), which has over 25 sub-parts.
This “hyper-complexity” results largely from the impact of so many considerations being in play. For our purposes, what this means is that all this complexity is built on specificity—that is, specific factors that may or may not be important to the sentencing judge. In other words, what the judge thinks (or intuits) is much less important within this formal scheme than the vast math problem that sentencing has become. The end result is very often going to be something that is largely directed by the mechanizations of the guidelines, not the principles of the judge.

This is true even after the Supreme Court held that the guidelines were to be advisory rather than mandatory in *United States v. Booker*. In short, the Supreme Court found in *Booker* that judicial fact findings which enhance a sentence were a violation of the Sixth Amendment right to a trial by jury. The remedy was not to require jury findings of facts which enhance sentencing (the remedy preferred by four members of the Court), but to make the sentencing guidelines advisory rather than mandatory. However,

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22 The district court judge is not the first one to calculate a guideline range. In every case, the judge will receive a report from a probation officer which describes that officer’s view of how the guidelines should be calculated and accounts for any objections that may have been made by the parties. United States Rule of Crim. Proc. 32.
23 543 U.S. 220 (2005)
even after the *Booker* decision, all of the disincentives to straying from the guideline range which are discussed in the next section\(^\text{24}\) remained in place.

It is the guidelines’ odd combination of specificity and supposed uniformity, which survived *Booker*, that makes federal sentencing such ripe ground on which to look for natural law impulses. We would expect that strong, principled men and women who become District Court Judges would chafe at these seemingly objective restrictions,\(^\text{25}\) and their reaction to that discomfort should tell us the nature of what may be “written on their hearts.” Do they allow their sense of what is right to overwhelm the directives of those restrictions-- do they break from the leash? As we will see, the answer is yes, despite significant incentives to stay within the lines.

**B. The Disincentives to variance**

The leash is still strong. Though the guidelines have been “advisory” since 2005 (rather than mandatory),\(^\text{26}\) there remain in the system three important disincentives to straying from the prescribed ranges.

\(^\text{24}\) Supra, Section II(B).

\(^\text{25}\) The conversion of judges into payroll clerks is inconsistent with their role. Federal District Court judges are chosen for their ability to discern, but then their powers of discernment are tightly cabined by the mandates of the guidelines, which effectively turn judges into jurors, in that they are expected to determine the facts and then stand aside and let the guidelines operate.

1. Avoiding reversal

The first of these disincentives is the fact that judges universally dislike being reversed by an appellate court. Being reversed, of course, means more work for the district judge—she is going to have to do over what she has already done. Moreover, she is being very publicly taken to task for being wrong, in a public opinion by the Court of Appeals which will identify the district court by name and go into great detail as to why the district judge’s analysis was wrong.

In sentencing, one way to avoid being reversed for a sentencing decision is to stay within the guideline range. Most of the Courts of Appeal presume that a within-guideline sentence is reasonable, and the Supreme Court has expressly approved this presumption. Thus, it is entirely within a district court judge’s personal interest to sentencing within the guideline range once the hard work of calculating that range is done. Staying within a guideline range is going to save a judge time, embarrassment, and aggravation.

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27 Supra, note 3.
28 Note, too, that the complexity of the guideline system gives a judge plenty of chances to manipulate fact findings to get to a preferred result without varying from a guideline range. For example, if a judge really wants to give someone probation, she could simply manipulate the fact findings rather than varying downward later. For example, she could discount the amount of the loss so that the range includes probation, instead of properly computing the range and then varying from it. The fact that this maneuver is possible and would not show up in the statistics on variances only makes it more remarkable that so many variances are made.
2. Public tracking of sentences

Second, Congress has expressly directed that the Sentencing Commission keep track of the rate at which each district court judge strays from the guidelines, a command which has survived the switch to advisory guidelines. This requirement was a part of the “Feeney Amendment,” a comprehensive group of reforms passed in 2003 with the express purpose of creating even more uniformity in federal sentencing. Thus, a judge has no way to hide an unusual number of variances from the guidelines, and may be subjected to public ridicule or criticism for their supposed harshness or laxity. At the very least, a judge knows that she will not be able to fly under the radar in her sentencing practices, particularly in closely-watched areas such as drug crimes (especially if the adjustment is towards leniency).

3. The risk of inviting greater restrictions

Finally, straying from the guidelines often might be an invitation to meddle with sentencing in an even more severe form than the original mandatory guidelines. As Kevin Reitz put it, “If we assume federal judges are politically astute, they know full well that Congress is watching the post-Booker sentencing system like a hawk, and they also know what issues

30 Admittedly, ridicule means less to a judge with life tenure than it might to an elected state judge.
Congress cares most about.”31 This would mean that judges would be well advised not to vary much in those areas of criminal law in which Congress has shown the most interest, such as drug trafficking. To do so might invite a new and more severe round of mandatory minimums, for example, which would curtail the discretion of judges more than the guidelines ever did. This would be particularly true if the variances were downward, showing an apparent leniency which is never politically popular.

As to each of these three factors, it can be said that the strongest disincentives would be to downward variances in drug trafficking cases. This makes all the more remarkable the bare fact that the largest number of out-of-guideline sentences, by far, are those with downward adjustments in drug cases.32 In other words, judges show mercy the most where their personal interests are most at risk. There is something very unusual going on when people act so broadly against their own interests.

C. Variances for Mercy

The disincentives to varying from the guidelines are easy to understand. However, they have not deterred judges from disregarding the

32 Supra, Section II(C)(2).
guidelines in fairly surprising ways. Consistently, under both the mandatory
and (post-Booker) advisory guideline systems, judges have varied
downward, towards mercy, much more than they have varied upwards,
towards greater retribution. As set out above, they risk a very personal
cost for varying in either direction, making it even more significant that their
variances are so strongly skewed towards mercy.

One true benefit of the guideline system in federal sentencing has
been the collection of data. The sentencing commission is charged with
keeping and publishing reports on what sentencing judges do, and the
commission has been fairly diligent in fulfilling this duty. One set of data
that the commission has been especially faithful about keeping is that related
to out-of-guideline sentences, and it is there that we shall look for evidence
of natural law impulses at work.

1. The federal docket

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33 Supra, Section II(C)(2).
34 Supra, Section II(B).
35 Data sets are regularly promulgated at the Commission’s web site, http://ussc.gov.
The phenomena of judges showing mercy has come about in the context of a federal system that is distinct from state sentencing systems in a few important ways.

For example, the federal system is distinct in being quite sparing in the use of non-prison sentences—fines, community service, and probation, for example. Nearly all federal offenders receive some incarceration as part of their sentence, as only about 8% of them get probation. For those who do get a term of imprisonment, the federal system usually expresses sentences in months rather than years, which allows for a more precise calculation of variances. The most common offense is drug trafficking, which constitutes nearly 35% of the federal criminal-side caseload.

The most striking thing about the federal criminal docket in recent years has been its incredible growth. In 1991, federal courts sentenced 33,419 defendants. By 2008, that number had more than doubled, to 72,865. As the sentencing commission itself has noted, this growth has occurred even as “the characteristics of those offenders have been

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39 Id.
remarkably stable.”\textsuperscript{40} Moreover, this growth has occurred at a time when crime itself was flat or decreasing.\textsuperscript{41} Thus, the increase in criminal cases within federal courts seems tied neither to a change in the nature of the criminals or a jump in crime.\textsuperscript{42}

2. The tendency towards mercy

So, what do we see when we look at out-of-guideline sentences? While there is some regional variation, the results are very similar across the country: Judges in the federal system sentence below the relevant guideline range much more often than they sentence above the guideline range.

To use the most reliable and recent data, I have limited my consideration to reports compiled by the United States Sentencing Commission which measure sentences given after the guidelines went from mandatory to advisory in 2005.\textsuperscript{43} Prior to that change, courts could only go outside a guideline range by employing a “departure” that is specifically approved by the sentencing guidelines in an extraordinary circumstance.\textsuperscript{44} After the change, courts could go outside of the guidelines even when no

\textsuperscript{40} Id., p. 12.
\textsuperscript{41} These rates are reflected in FBI data available at http://www.fbi.gov/ucr/ucr.htm.
\textsuperscript{42} Rather, it would seem that the increase has more to do with the federalizing of crimes that formerly would have been handled by the states, and because investigators are steering many more drug crimes to federal rather than state courts. Rachel Barkow, Our Federal System of Sentencing, 58 Stanford L. Rev. 119, 120 (2005).
\textsuperscript{43} United States v. Booker, 543 U.S. 220 (2005).
\textsuperscript{44} United States Sentencing Guidelines § 5(K) (2008).
“departure” applied, and these out-of-guideline sentences are called variances. For the statistics used here, I have combined the out-of-guideline sentences referred to as departures and variances, because both are subject to the disincentives I described in the prior section, and both can be seen as an expression of mercy.

One more caveat before we continue. Most of the out-of-guideline sentences that are below the guideline range are the result of a government recommendation that the defendant be given a break, as a reward for having helped the government by providing information or testimony that can be used against other targets. These “cooperating defendants” are rewarded through a mechanism, included in the sentencing guidelines themselves, which expressly allows for a downward departure where the government makes a motion allowing the judge to do so. Because these downward departures are not wholly within the discretion of the court (because the government motion is a necessary precondition), I have left them out of my calculation of out-of-guideline sentences.

So here’s what it comes down to: Since the Booker decision in 2005, there have been 204,830 individual sentences handed down in federal

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45 An argument could be made that variances put judges at more risk than departures, because departures are at least expressly authorized in the guidelines. However, to some degree, the same disincentives will apply to both.

courts. Of those, 125,537 were within the guidelines. Thus, about 61% of those sentences were within the guidelines, and 39% (or 79,293) were outside of the guidelines. It is this latter group, of course, that I am interested in.

Of those 79,293 sentences outside of the guidelines, 76,075 (95.9% of the total) were below the guidelines, and only 3,218 (4.1%) were above the guidelines. These are striking numbers—there is simply no balance between the two sides.

They are striking even when we control for those downward departures motion for by the government. Taking those 50,927 sentences involving a government motion for leniency out of the mix (as discussed above), we are left with a total of 28,366 out-of-guideline range sentences. Of those, we have 25,148 sentences below the range, making up 88.7% of the total, with only 11.3% going the other way. That’s right—even throwing out the majority of below-guideline sentences because of the role of the prosecutor, we are still left with a surprisingly uneven ratio.

In other words, in a system which provides disincentives for going outside of the guidelines, judges take that risk to move towards mercy nearly 47 United States Sentencing Commission, Preliminary Post-Kimbrough/Gall Data Report, Table 1 (December, 2008)(available at http://ussc.gov).

48 Id.
49 Id.
50 Id.
nine times more often than they take the same (or a lesser) risk to impose a harsher punishment. Because of the large numbers we are discussing, this is not a statistical anomaly or curiosity; it is a surprising and broad-based phenomena at the heart of American justice.

The phenomena is most apparent, too, where the disincentives are strongest\(^{51}\) and where we expect it the least—in drug sentences. In cases under the primary sentencing guideline for drug trafficking,\(^{52}\) we find that federal judges went above the guidelines only 116 times in 18,658 cases\(^{53}\)—that is, 0.6% of the time. In contrast, sentencing judges went below the guidelines (again leaving out those cases involving a government motion) a total of 2,577 times,\(^{54}\) or in nearly 14% of the cases. In other words, there were well over 20 below-guideline sentences for every above-guideline sentence, even with the especially strong disincentives against running outside the lines in this area.

In a judiciary which was largely appointed by tough-on-crime Republican presidents, it must mean \textit{something} that they so disproportionately choose to show mercy over retribution when they venture outside of the sentencing guidelines. To understand what that might be,

\(^{51}\) Supra, § II(B).
\(^{52}\) U.S. Sentencing Guideline 2D1.1.
\(^{54}\) Id.
though, we must investigate a strand of thought much more ancient and eternal than the sentencing guidelines, narcotics, or even the United States itself.

III. St. Thomas Aquinas and the Idea of Natural Law

A. Aquinas and the Types of Law

So sentencing judges are showing mercy, to the detriment of their own personal interests. So what? What can that tell us about natural law, philosophy, or God? The answers, as with nearly any examination of natural law, must begin with Thomas Aquinas.

Thomas Aquinas was a thirteenth-century Dominican monk, who was an amazingly prolific writer. His masterwork, the *Summa Theologica*, when translated into English runs about 3,000 pages, and this is just one of his many significant writings. It is indisputable that Aquinas has had a profound influence on how those who came later thought about the law and God.

Aquinas, though the most influential writer on natural law, was not the first. The *Summa* itself expressly reflects the teachings of both Plato

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56 Id. Whether meant ironically or not, “Summa” is latin for “summary.”
and Aristotle.57 Though Aristotle was a pagan and Aquinas a Christian monk, Aquinas was clearly impressed by Aristotle’s thoughts, and refers to him alone58 with the honorific title of “The Philosopher.”59 Aquinas, then, carefully synthesized Greek philosophy and Christian theology, offering something deeper than either standing alone.

In discussing the relationship between God and law, Aquinas actually describes no less than four primary types of law. First there is eternal law, which is the means God uses to govern the universe. Though a bit of this type of law may be discovered by humans, most of it is understood by God alone.60 Eternal law might be best understood as the whole of God’s knowledge, of which we know very little.

The second type of law is natural law, which is that part of the eternal law which humans can comprehend, if only through intuition.61 Aquinas offers as examples of natural law the “structural tendencies” of human nature, which would include the desire to live, the desire to preserve the...

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57 The ancient Greeks, despite the lack of a monotheistic religion, In Rhetoric, Aristotle seems to recognize a “true justice” that is higher than the written law. Aristotle, On Rhetoric 110 (George A. Kennedy trans., Oxford University Press (1991).
58 In considering other sources of Aquinas’ thought, David Novak has also convincingly argued that Maimonides (a 12th-century rabbi and philosopher) was a profound influence on Aquinas, and shaped his ideas on things such as the relationship between a divine law and nature. David Novak, Maimonides and Aquinas on Natural Law, in St. Thomas Aquinas and the Natural Law Tradition 43 (John Goyette, Mark S. Latkovic, and Richard C. Myers, eds., 2004).
60 Summa Theologica, I-II, Q. 91 and Q 93, A.1-6.
61 Summa Theologica, 1-2.93.4-6.
species, and the desire to use reason. Aquinas broadly describes such common human traits as a part of the natural law. In other words, natural law is that fraction of his own law that God puts inside of us, to be revealed through instinct and reasoning.

Aquinas’s third type of law is the divine law, which is that part of God’s eternal law that we may not know innately, but which is revealed to us through the Bible and the Church. Aquinas discusses the divine law as having two parts, the Old Law, that which was revealed before the coming of Christ, and the New Law, which contains all which was revealed by God through Christ and to others after Jesus’s appearance on earth. To Aquinas, the difference in humanity before and after Christ is akin to the difference between a child and an adult, and he borrows from the Apostle Paul an analogy that “compares the state of man under the Old Law to that of a child ‘under a pedagogue,’ but the state under the New Law, to that of a full grown man, who is ‘no longer under a pedagogue.’”

The final type of law is human law, which is what we lawyers usually just call “the law”—that is, the normative statutes and ordinances which

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62 Summa Theologica, 1-2.94.2.
63 Summa Theologica, ST I-II, Q. 91, A.5.
64 Summa Theologica, 1-2.98-105.
65 Summa Theologica, 1-2.106.1.
66 Gal. 3:24-25.
regulate life and govern civil society. To Aquinas this human law, at its best, derives from the natural law (the part of God’s law that we are capable of understanding) in the sense that it is an expression of seeking good and shunning evil. We might expect Aquinas to claim that human law derives from the divine law (the scriptures) in much the way some claim that American law derives from the Ten Commandments, but Aquinas does not assign divine law that role, at least not directly. Rather, Aquinas teaches that the human law is directing the society to order, not to supernatural good, and that divine law should not be imposed on non-believers. However, Aquinas cautions that while human law may not embody divine law (an outcome that might lead to forced conversions), it should not violate divine law, either.

To Aquinas, all of these types of law are, one way or another, God’s law. That is, he sees God’s eternal law as encompassing everything, beyond what we have the ability to understand. It is this eternal law that both finds its way into the scriptures (as the divine law) and which is ingrained in us by

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68 Summa Theologica, 1-2.91.3.
69 Roy Moore, So Help Me God, pp. 44-45 (2005). Moore, who as Chief Justice of the Alabama Supreme Court erected a large Ten Commandments monument at the courthouse, explained as a basis for his action that “… I eventually came to understand how the Ten Commandments are not only a personal guide to living, but the moral foundation of our nation’s law and justice system.”). I have previously argued that this is an improper reading, and that the Ten Commandments and the Bill of Rights are actually in tension with one another. Mark Osler, Aseret Had’Varim in Tension: The Ten Commandments and the Bill of Rights, 49 Journal of Church and State 683 (2007).
70 J. Bdziszewski, Written on The Heart, The Case For Natural Law 63 (1997).
God, forming the basis of our intuitions. The human law is an indirect reflection of this eternal law, filtered through the natural law that is our conscience, and should be crafted so as not to violate the divine law.  

B. Applying Aquinas’s Construct to Sentencing

For modern sentencing and the tendency towards mercy to fit the Thomistic model, four elements must show themselves: First, the guidelines must be seen as human laws; second, the sentencing judge must be able to express natural law independent of that human law; third, there must be a possible conflict between the human and natural law; and fourth, the tendency towards mercy must be a possible cause of that conflict.

Fortunately, Aquinas describes each of these in the Summa Theologica, and I will address each in turn below.

1. The sentencing guidelines as human (or positive) law

As described in Section II above, in 1987 Congress imposed mandatory guidelines on federal judges, primarily to create uniformity in sentencing—that is, to eliminate the role of mercy, which created gross disparities between courts and cases in terms of the sentences actually served.

71 The conflicts between this idea of divine law and a pluralistic democracy, of course, are troubling.
by those convicted of similar crimes.72 Within the Thomistic scheme, the guidelines clearly are an expression of human law. Specifically, the guidelines (even after they became advisory in 200573) serve as normative laws which restrict action through imposing penalty and risk for those judges who vary from the confines of the law.

Aquinas defined “law” as a general concept broadly enough to encompass even these coercive, but advisory, guidelines: “Law is a standard of measurement for behavior, fostering certain actions and deterring from others.”74 More particularly, Aquinas described the human law as including the law of the state,75 and, strikingly, describes precisely the process that gave us the guidelines: “Laws can also be formulated at leisure from accumulated experience….”76 The sentencing guidelines, of course, were formulated at leisure (over the course of three years before implementation) through the use of accumulated experience (as the guideline ranges themselves were based on the average sentences revealed through a survey

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75 Summa Theologica, I-II, Q. 95, A. 4.
76 Summa Theologica, I-II, Q. 95, A. 1.
Thus, even the post-*Booker* advisory guidelines are properly seen as “standard[s] of measurement for behavior, fostering certain actions and deterring from others,” which fit easily in the definition of human law.

2. Judging as an expression of intuition apart from the written law

Aquinas writes of the human law primarily as the written law, not as the legal *process* which includes the actions of many individuals who can change, ignore, interpret, or enhance the written law in each individual case. The arresting officer, for example, has power beyond that of the written law—- the discretion to not pursue the matter. The prosecutor, in turn, has the discretion to turn down the case. The judge, finally, has discretion in sentencing to punish harshly or show mercy.

These two realms of the law, the formal written law and the much more informal actions of those within the justice system, were extensively analyzed in the 1920’s by the Legal Realist school, centered primarily at Columbia and Yale Law Schools. As Oliver Wendell Holmes described it, the Realists embraced this dichotomy of the law by turning common perception upside down, in saying that “the life of the law has not been

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logic; it has been experience.” As the Legal Realists well knew, their analysis raised issues of legal philosophy, and they were attacked as positivists by Lon Fuller. To the realists, the logic of the written law is trumped in real importance by the experiences of those mere mortals pulling the levers of justice, and the Realists’ analysis has pushed subsequent generations to at least see beyond the written word of the law and examine process—wonderful, measurable, observable process.

These two parts of the law, the written statute and the process of adjudication, interact in a collision which throws light on how Aquinas’s conceptions of human law and natural law can conflict in a moment that shows each to be real, human, and (perhaps most profoundly) measurable. In many situations there is a wonderful opportunity to glimpse natural law at play, but it is only in the realm of judicial discretion that the employment of mercy is readily measured.

3. The conflict between human and natural law

Aquinas does not argue that the human law is always reflective of the natural law—to do so would assume that legislators are infallible, and this is an untenable argument. Rather, Aquinas allows that some human laws may

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78 Oliver Wendell Holmes, The Common Law, 1 (1923).
79 Lon L. Fuller, The Law in Quest of Itself (1940).
80 The United States Sentencing Commission retains thorough records, many of which can be accessed at http://ussc.gov. Declinations by prosecutors are much harder to measure, and no uniform process is followed.
be unjust, raising a conflict between the human law and the natural law which resides within the intuition of people, including judges:

Now in human affairs something is called just by virtue of its being right (rectum) according to the rule of reason. But it is clear from what was said above…, the first rule of reason is the law of nature. Hence, every humanly made law has the character of law to the extent that it stems from the law of nature. On the other hand, if a humanly made law conflicts with the natural law, then it is no longer law, but the corruption of law.\textsuperscript{81}

[emphasis added]

The corruption of law, then, comes when the human law does not reflect the natural law. Further, Aquinas recognizes that laws can both be unjust in whole, or in relation only to a particular case, where it creates injustice: “Even rightly enacted laws can fall short in particular cases, and decree something opposed to natural justice.”\textsuperscript{82} Taking these two together, we have Aquinas describing a conflict between natural and human law in either of the situations in which a judge might reject the guidelines—because the guidelines as a whole are too harsh, or because the particular circumstances of the defendant or case make them too harsh in a specific instance. In either event, the judge’s intuition that the guideline is too harsh

\textsuperscript{81} Summa Theologica, I-II, Q. 90, A. 2 (Freddoso translation)

\textsuperscript{82} Summa Theologica I-II , Q. 60, A. 5.
is the natural law instinct of mercy, in the context of a given case and against a supposedly objective standard, the guideline itself.

Notably, it would seem that Aquinas not only sees the possibility of a conflict between human law and natural law, but that where there is a conflict the very validity of the written law is challenged—it can be seen as not being a law at all. In the context of the guidelines, this idea seems a good fit, as when a guideline is rejected by a judge, it loses the force of law in a very concrete way.

4. The natural tendency to mercy may cause the conflict between human and natural law

Finally, for the Thomistic model to apply, the tendency to mercy causing the conflict must be a legitimate expression of natural law; that is, it must fit Aquinas’s view of the type of “dispositional properties” which are inscribed within individuals and which are revealed as intuitions. Fortunately, Aquinas addressed this directly, saying that the virtuous tendency of a judge is biased in favor of the defendant: “…when we judge men, it is their good or harm, honor or dishonor, that is at stake. So we must be biased towards judging well of them unless there is clear evidence to the

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Aquinas, in making this point, quotes Augustine for the proposition that “A law that is not just seems to be no law at all.” Summa Theologica, I-II, Q. 96, A. 4.

contrary.” Thus, mercy by judges can be seen as a dispositional property which is consistent, at least at times, with Aquinas’ view of natural law.

In whole, then, the phenomena of sentencing judges rejecting the sentencing guidelines on the side of mercy is consistent with Aquinas’s view of the human and natural law. As set out in the next section, this phenomena is also consistent in some respects with the American tradition of natural law as the basis for subversion of the written law, even within a democratic society.

IV. Natural Law in American Political Thought

Of course, it would be naïve to simply import Aquinas’s ideas into 21st-century America as anything more than an analytical tool. Aquinas’s

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86 Aquinas did not conclude that the mercy of judges was the result of natural law intuitions based on data generated by what judges say they are doing, and I do not here, either. However, I do rely on data here, up to a point. It is fair to look at the broad data set described in Section II, supra, and say that something is going on which is best described as mercy relative to the guidelines, given the overwhelming nature of that trend.
87 In calling the mercy of judges an expression of natural law that conflicts with the human law, I acknowledge that the judge confronts something the guideline writers don’t—a living, breathing person who stands before that judge, awaiting her fate. This distinction, though, does not make the judge’s reaction any less an expression of natural law. Rather, the presence of the person helps explain how it is that the sense of mercy works. That is, the mercy impulse that lays latent within a judge comes out when confronted with an individual; it is the entry into the equation of a person with a name and history which triggers the operation of natural law. This is consistent with the way Aquinas talks about natural law, as the human law is necessarily general and the natural law, written within individuals, has a highly individual aspect in addition to its universality.
thoughts on natural law were influential, but other ideas eclipsed Aquinas’s over time as the world changed. As Lloyd Weinreb observed, “The history of natural law does not end in the thirteenth century.”88 One post-Aquinas development which deeply affected political philosophy was a profound and fundamental change in the nature of government in Europe, as feudalism was replaced with nationalism as a central governmental structure. As medieval Christianity (particularly in the Holy Roman Empire) ceded political control over to national states in the centuries between Aquinas and Jefferson, the need and desire to link theology and secular law waned.89 Nationhood grew more important, and with the Reformation the link between state and a unified church became less important or even impossible.

Philosophy changed as the structure of government changed. In keeping with the new political realities of their times, Hobbes, Locke, and Rousseau were focused on the relationship between the individual and the state,90 and did not worry much about the role of God in that relationship. In time, Kant “accomplished the full transformation of natural law from an

89 Id., at 67.
90 Id.
ontological to a deontological theory,” as Weinreb describes it.91 As political theories of the enlightenment developed, the idea that God (even indirectly) was the author of law was not so much rejected as simply ignored as attention turned to the social contract between the government and the governed, and away from covenants between God and His people.92

This shift away from Aquinas’s theology would have been reassuring to those who feared tyranny, as any legal system which ties moral theology and law tightly together may have a weakness towards oppression.93 By breaking (or ignoring) the tie between God and the law, the new political theorists at least implicitly rejected the claim of a ruler that he held divine authority.

Fear of tyranny, of course, is part of what defined the motivations of those who framed America’s legal system. Thus, we would expect to find few traces of natural law in the legal history of this country. However, there is a strong strand of natural law thinking within some of the central legal battles in the United States over the past two centuries. Intriguingly, the

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91 Id., at 90.
92 For example, in The Social Contract, Rousseau begins his argument by attacking almost every natural basis for a political community, including family, might, and conquest, but simply ignores natural law or the plan of God as a basis for community. Id. at 83.
93 Anthony Lisska has argued that the more modern thinkers like Rawls and Dworkin have been motivated in part by this concern with the dangers of entangling law and morality. Anthony J. Lisska, Aquinas’s Theory of Natural Law: An Analytic Reconstruction 250 (2002).
strand of natural law theory which emerged in this nation is of a particularly American flavor. Instead of giving over to law and the government any sense that there is divine intercession, Americans more often use natural law subversively—that is, we attack the positive law and legal structures with the natural law, asserting (as Aquinas allowed) that “Law may be unjust… by being contrary to the common good.” 94 Over and again, we see the sense of God’s broad imprimatur behind the passion and poetry of those who have attacked American law from the outside.

Moreover, it is these battles between natural law outsiders and the positive law that have in large part defined us from the beginning: It is this dynamic which plays out in the Declaration of Independence, the battle against slavery, Martin Luther King, Jr.’s struggle for civil rights, and most recently the fervent debate over abortion.

A. The Declaration of Independence

Though some might imagine the founding fathers to have been fundamentalist Christians, in fact they represented a wide range of post-enlightenment Christian belief with a particularly strong deist element, 95 and

95 Garry Wills goes so far as to say that the “chief founders” were all deists. Garry Wills, Head and Heart: American Christianities 153 (2007). Others contend that while Jefferson, Franklin, Adams, Madison and Washington did not seem to see Jesus as divine, many of the framers saw God as taking an active role in the world’s events.
this variety reflected the population of the colonies. Moreover, these leaders emerged at a time (1750-90) when Christianity was in decline, with only 17% of the population regularly attending church.

Nonetheless, the Declaration of Independence crafted by the Deist Thomas Jefferson contained perhaps the most powerful and inspired marriage of outsider populism and natural law in the history of British colonialism: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”

This stirring declaration is even more moving when one considers that the revolution was (at the surface, anyways) largely about tax policy, a subject which is normally far down the list of theological concerns. It could be that Jefferson included the incendiary language of natural law solely because of the effect it would have on the reader, but if so that still reflects his studied view of exactly what it was that would motivate his compatriots.

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97 Garry Wills, Head and Heart: American Christianities 7 (2007).
98 As Steven D. Smith has pointed out, the Articles of Confederation also acknowledged a higher power in recognizing “the Great Governor of the world.” Steven D. Smith, Our Agnostic Constitution, 83 N.Y.U. L. Rev. 120, 125 (2008).
99 The Declaration of Independence para. 2 (U.S. 1776).
Importantly, the signers of the Declaration were in a very different position at that moment than they would be in a few years—at the time of the Declaration, they were still outsiders seeking revolutionary change. From this posture, the Declaration of Independence is remarkable for the concision and clarity with which it describes natural law as a challenge to the positive law—which at that time would have been the British law of the perceived oppressors. Just the first half of the sentence from the Declaration quoted above contains three ideas which continue to serve as the foundation of natural law as expressed by populist outsiders: (1) That there are certain inalienable rights; (2) that we are granted these rights by the Creator; and (3) that these truths are “self-evident,” and can be revealed through reason. In this sentence fragment, Jefferson was able to bring into unity the idea of God, human rights, and the state. Notably, he did so only by placing God in opposition to the state (and the positive law of the state). In other words, Jefferson’s expression of natural law works its magic not in the hands of the government, but in the hands of the those who unsheathe the sword or pen against the state. This not only served as a template for revolution against the British, but for the many outsiders who then would fight against and remake the very nation Jefferson and his compatriots created.

100 The Declaration of Independence para. 2 (U.S. 1776).
Not surprisingly, once the colonists won the revolution and got down to the serious business of creating a nation-state, they left this conception of natural law as a tool of revolution behind. The Constitution does not mention God at all. Moreover, the text of the Constitution bars any religious test for holding office, and the First Amendment in turn guaranteed freedom of religion.

Edward Corwin wrote that “The Reformation superseded an infallible Pope with an infallible Bible; the American Revolution replaced the sway of a king with that of a document.” Corwin is right—the Bible for Protestants takes the place of the Pope as an authority, and in the same way the Constitution is given the place of King in America. Beyond those transitions, though, is one that crosses over between the two: That with the Godless Constitution we pushed theistic natural law to the margins, and handed the tools of Aquinas to successive waves of outsiders with a passion to change elements of a Godless governmental structure as embodied in the Constitution. In the few years between Jefferson’s declaration and Madison’s Constitution, the framers moved from outsiders to insiders, while the passionate critiques of the faithful moved in the opposite direction.

101 Garry Wills, Head and Heart: American Christianities 223 (2007).
102 U.S. Constitution, art. VI, sec. 3.
103 U.S. Constitution, amend. I.
B. The Struggle Against Slavery

Within the Constitution itself lay the seeds of the first great conflict between those viewing the Constitution as positive law and outsiders who employed theistic natural law as a weapon with which to batter the Constitutional ramparts. Not surprisingly, both sides in the debate over slavery relied on the foundational documents of the nations, as one claimed the spirit of the American Revolution and the other the importance of the Constitutional moment. Here again we see a divide laid bare between the ideals expressed in the outsider’s Declaration of Independence (which beautifully asserted that “all men are created equal.”) and the subsequent Constitution of the new insiders (which in turn institutionalized the fact of slavery through the three-fifth’s compromise). Slavery’s opponents stood on the stirring natural-law images of the Declaration, as a prominent abolitionist did in concluded that the Declaration “is quite sufficient” in describing the rights or powers of man. On the other hand, the bare fact that slavery was accommodated in the Constitution was relied upon by

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105 The Declaration of Independence para. 2 (U.S. 1776).
106 U.S. Constitution, Art. 1, Sec. 2, Par. 3 (repealed). The three-fifths compromise between northern and southern representatives to the Philadelphia Convention set out that slaves would count as three-fifths of a person in apportioning the members of the United States House of Representatives.
107 William Hosmer, The Higher Law in its Relations to Civil Government; With Particular Reference to Slavery and the Fugitive Slave Law 46 (Derby & Miller, 1852)
supporters of that institution. Perhaps most importantly, when Chief
Justice Taney declared in the Dred Scott decision that African-Americans
(free or slave) were not citizens of the United States, he rested that
conclusion on the fact that “there are two clauses in the Constitution which
point directly and specifically to the negro as a separate class of persons, and
show clearly that they were not regarded as a portion of the people or
citizens of the Government then formed.”

While the supporters of slavery certainly relied upon the Bible and its
many uncritical references to slavery, the more stirring natural-law
argument (at least to northerners) lay in the natural law view that was
repulsed by American slavery in the mid-19th century. Entire
denominations, including the Presbyterians, the Methodists, and the Baptists,
split up into Northern and Southern factions over the issue of slavery,
illustrating the faith aspect at the core of the dispute as Northern brethren

108 Certainly, defenders of slavery also relied on the Bible in arguing their position,
109 Dred Scott v. Sandford, 60 U.S. 393 (1856).
110 Id. at 411.
111 As Edwin Gaustad has observed, the Bible is “not an antislavery tract,” leading
Southern planters to view slavery as an institution sanctioned by the Bible. Edwin S.
Gaustand, Neither King Nor Prelate 131 (1993).
112 Many anti-slavery arguments were not founded in religion, but still retained the idea
that slavery was fundamentally and universally wrong. They were more inclined to
describe slavery as “unjust,” as Henry David Thoreau did in his 1849 essay On Civil
Disobedience: “Unjust laws exist; shall we be content to obey them, or shall we
endeavor to amend them, and obey them until we have succeeded, or shall we transgress
them all at once?” Available online at http://www.transcendentalists.com/civil_disobedience.htm, last checked Nov. 7, 2008.
113 Garry Wills, Head and Heart: American Christianities 307-311 (2007).
began to more publicly rebuke the Southern arms of their churches for accommodating slavery.\footnote{114}

At the emotional core of the anti-slavery movement, of course, was one woman’s very popular novel which leaned heavily on natural law themes. When Harriet Beecher Stowe, author of 1852’s \emph{Uncle Tom’s Cabin}, met Abraham Lincoln in 1862, he called her “the little woman who wrote the book that started this great war.”\footnote{115} While Lincoln certainly overstated the case, Stowe’s role in creating emotional opposition to slavery is undeniable.\footnote{116} The appeal of Stowe’s work for the abolitionists was not only its narrative form, but its religious sub-text, as the book “retold the Christ story with Uncle Tom in the role of Christ.”\footnote{117} Though it may have had a largely secular audience, \emph{Uncle Tom’s Cabin} was not a secular novel, and largely communicated its message through natural law arguments that would appeal to those outside any particular sect.

\footnote{114}{Id.}
\footnote{115}{Joan Hedrick, Harriet Beecher Stowe: A Life, introduction, p. vii (1994).}
\footnote{116}{While Stowe’s work is the best known, many women novelists, both North and South, addressed the religious and cultural issues around slavery. \textit{See} Anne Lewis Osler, That Damned Mob (1995)(unpublished Ph. D. dissertation, University of Wisconsin-Madison)(on file with author).}
\footnote{117}{Id. at 245.}
For example, *Uncle Tom’s Cabin* contained a particularly compelling natural-law critique of slavery\textsuperscript{118} that struck broadly at the South. The book illustrated the way in which slave families were torn apart as they were sold off,\textsuperscript{119} a fact which ran against many northerners’ sense of what God intended for families. One of Stowe’s fellow abolitionists, Henry Stanton, complained bitterly of this harm in the form of a more conventional argument, asserting that that a slave’s “domestic and social rights are entirely disregarded, in the eye of the law, as if the Deity had never instituted the endearing relations of husband and wife, parent and child, brother and sister.”\textsuperscript{120}

In perhaps a deeper way, of course, freedom was seen as a natural-law right in the eyes of the freed slaves themselves. They were the ultimate outsiders, and many saw the hand of God in their liberation. One graphic moment captures this natural-law understanding of outsider victory quite

\textsuperscript{118} As a teacher and the well-read daughter of a minister and sister of a prominent theologian (Henry Ward Beecher), her work reflects the fact that Stowe was not ignorant of theology and philosophy. It probably was not by chance that one of the heroes of the book, a Canadian transplant to Louisiana, is named “Augustine St. Clair.” Harriett Beecher Stowe, *Uncle Tom’s Cabin* 221 (Charles E. Merrill Publishing, 1969)

\textsuperscript{119} E.g., Id. at 177-178. In the scene describe there, a slave-owner buys a woman’s children but leaves her behind, as she cries in despair. Stowe describes one of the children “pushed from the block toward his new master, but stopped for one moment, and looked back, when his poor old mother, trembling in every limb, held out her shaking hands to him.”

perfectly: After Jefferson Davis fled Richmond, Lincoln himself walked into the city, accompanied only by ten sailors. Freed blacks came out of the slave quarters to greet the black Union soldiers who preceded Lincoln, and then were surprised to find the President himself walking down the road. The emotion of the moment was deeply religious, and of a whole with the freed slave’s sense of what was natural and right. An old woman came into the street to simply touch the president and shouted “I know I am free, for I have seen Father Abraham and felt him.”

In that scene, Lincoln is more symbol than man—a symbol of freedom, emancipation made real, walking down the street despite all apparent danger. That freed slave’s joy echoes nothing so much as the Declaration of Independence itself, which also was woven with a distinctly American DNA— a double helix of liberation and the natural rights of man as a very real thing that can be touched, held, and possessed.

C. The Civil Rights Movement

The end of slavery, of course, did not complete the job of racial reconciliation in America, or anything close. A century after the end of the

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121 Garry Wills, Head and Heart: American Christianities 325 (2007).
122 The religious power of this moment, in which slaves are freed, turns on its head Nietzsche’s description of the Jewish/Christian tradition as a slave morality. Friedrich Nietzsche, Genealogy of Morals I, 7 (1887).
123 Garry Wills describes the scene as “an overflow of religious emotion.” Garry Wills, Head and Heart: American Christianities 325 (2007).
124 Id. at 326.
civil war and emancipation, the promises of the Fourteenth Amendment\textsuperscript{125} had yet to be fulfilled. Even after the 1954 decision in \textit{Brown v. Board of Education}\textsuperscript{126} promised an end to the doctrine of “separate but equal,” the facts of race in America remained separate and unequal.

In the fight to attain civil rights for blacks, it was a coalition of primarily religious people who stood at the forefront. Malcolm X and Martin Luther King, Jr. disagreed about Christianity\textsuperscript{127} but certainly both believed that equality was a natural law, reflecting God’s will that color not bar a man or woman from life, liberty, or the pursuit of happiness\textsuperscript{128}.

The breadth of this natural law belief, which stood as an outsider challenge to the South’s positive law, was reflected in the reaction to Martin Luther King, Jr.’s call to march on Selma in 1965, after an initial march was

\textsuperscript{125} Section I of the Fourteenth Amendment promises citizenship to all who are born in the United States, bars states from abridging the privileges and immunities of any citizen, and assures both due process and equal protection of the laws to all citizens.

\textsuperscript{126} 347 U.S. 483 (1954).

\textsuperscript{127} Though King clearly disagreed with Malcolm X’s acceptance of violence, King did have a certain admiration for him. Noting that Malcolm X had turned away from crime, King wrote that “It was a testimony to Malcolm’s personal depth and integrity that he could not become an underworld czar, but turned again and again to religion for meaning and destiny.” The Autobiography of Martin Luther King, Jr., p. 267 (ed. by Clayborne Carson)(1998).

\textsuperscript{128} For Malcolm X, his major religious epiphany came with the oneness of brotherhood he experienced during the Hajj, or pilgrimage to Mecca. Alex Haley, The Autobiography of Malcolm X, pp. 325-348 (1965).
broken up. Those who traveled to Selma included ministers, rabbis, priests, and nuns, as well as black leaders who drew inspiration from a Hindu, Mahatma Ghandi. Despite the religious differences among this group, a common truth, a religious truth, united them as they fought powerful insiders and eventually changed law and society.

The clearest and most compelling description of the natural law theory behind the civil rights movement is contained in Martin Luther King Jr.’s Letter from Birmingham Jail, some two years before the events in Selma. The letter was prompted by a public letter by eight Alabama clergymen which referred to King as an “outsider,” and urged Birmingham’s black residents to refrain from protesting in the streets.

In his now-famous response, King accepted the mantle of “outsider,” but explained “I am in Birmingham because injustice is here.” He defined that injustice, an injustice of the written law which enshrined racial segregation, in natural law terms:

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130 Garry Wills, Head and Heart: American Christianities 467 (2007).
131 Id.
132 This public letter is available on-line at “http://www.stanford.edu/group/King//frequentdocs/clergy.pdf” (last checked on November 7, 2008).
133 The Autobiography of Martin Luther King, Jr., p. 188 (ed. by Clayborne Carson)(1998).
134 Id. at 171.
How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas: an unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust.135

It is hard to imagine a stronger statement, coming from the outsider perspective of a jail cell, embodying the idea of natural law. In the context of this article, what may be most shocking is that the same impulse seems to be in the hearts of those tasked with jailing men like King—criminal judges themselves.

D. The Abortion Debate

Since the decision in Roe v. Wade136 in 1973, a dedicated and largely religious group has ferociously opposed that decision and the legal abortions it protects.137 The contemporary attack on the legality of abortion in the United States strikes out at several levels. Some of these attacks describe themselves as positivist—that is, that the law of the United States,

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135 Id. at 193.
137 Contrary to one common view, Roe did not allow states to legalize abortion. Rather, it mandated that states legalize at least first and second trimester abortions, based on privacy rights provided by the Constitution. Thus, the decision in Roe, if undone, would not make abortion illegal but rather allow states to choose whether it would be legal or not. Were Roe to be overturned, we could expect the principles of religious and natural law pro-life activists to then direct them to seek to have abortion made illegal in the states.
properly read, leaves to the states the decision of whether or not to allow abortion—that is, the positive law does not protect abortion, and thus there should be no protection for abortion from limitations imposed by the democratic process.\(^\text{138}\) In fact, this view has been articulated by Supreme Court Justice Antonin Scalia.\(^\text{139}\)

However, Scalia may be talking over the heads of most of those engaged in the debate. The most public advocates for restrictions on abortion are very public in making a natural law and often explicitly religious pro-life argument. The signs of pro-life demonstrators often project the simplest (and crudest) of natural law suppositions. For example,

\(^{138}\) Other sophisticated arguments against abortion also eschew a religious or natural law basis (though the writers may also oppose abortion for religious reasons). For example, in his argument against legal abortion, Francis Beckwith begins by asserting that support for abortion rests on moral relativism, and then rejects the very idea of moral relativism. He then proceeds to argue that a fetus is a person, relying on science rather than faith, and finally comes to the conclusion that abortion is therefore murder, as the fetus is fully human.

Beckwith seems to be very intentional in avoiding natural law arguments in making his case. This may be just good tactics; after all, there is no requirement that a citizen present all his bases for a conclusion in making a public argument, and in the broader political discourse an argument free of religious overtones is more likely to change the minds of non-believers. Francis J. Beckwith, Defending Life: A Moral and Legal Case Against Abortion Choice (Cambridge University Press 2007).

one billboard erected by St. Ludmila’s Catholic Church in Cedar Rapids, Iowa reads simply “God is pro-life; are you?”

The question around which the abortion debate really turns is whether or not the fetus is a “person.” This is a central question because the answer will almost necessarily determine an outcome to the abortion question for people of any belief. For example, if one concludes that the fetus is a person, then abortion is nothing less than the killing of an innocent person, something that nearly everyone would condemn regardless of religious belief. On the other hand, if one believes that the fetus is not a person, abortion can be seen as nothing more than surgery, the cutting away of an unwanted or damaged body part. Therefore, it is on the issue of personhood that the populists most often apply their most obviously religious or natural law arguments. For example, one biblical passage often quoted by pro-life advocates is “You knit me together in my mother’s womb.”

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141 Albeit, one with the potential, not yet realized, to become a human life.

142 Psalms 139:14.
revelation. To those who share that understanding of the meaning of the Bible, this is powerful stuff—enough to motivate daily protests at abortion providers, and the kind of passion that opponents often find baffling.

Baffling or not, what those protesters represent is one of the latest waves of American outsider use of natural law, a strand that reaches back to the Declaration of Independence that those same pro-life scholars and activists often quote.¹⁴³

From the dawn of the Revolution to the present day, it is this outsider use of natural law rhetoric that has stoked the fires of our most incendiary political debates—the bare argument that the law of our nation is contrary to the law that God has written on the hearts of men. Whether or not we agree with any one manifestation of this broad assertion that natural law exists, it is hard to deny the power of natural law in American political discourse.

V. The Danger of Insider Natural Law Within a Democracy

In the preceding sections, we have seen the near-universality with which federal judges show mercy when they choose to go outside of the sentencing guidelines,¹⁴⁴ the way in which this mercy fits Aquinas’

¹⁴⁴ Supra, Section II.
description of natural law,\textsuperscript{145} and how this is generally consistent with the way Americans have traditionally used natural law to subvert the written law.\textsuperscript{146} All of this is both intriguing and reassuring to those who hew to natural law theories. However, the way natural law may be manifesting itself through sentencing judges also has troubling implications within a democracy.

Throughout American history, natural law has been used by outsiders to the political process. As outsiders, a group of men relied on natural law in crafting the Declaration of Independence; not long after, many of the same men avoided reference to natural law as they wrote the Constitution. In the former instance, they were outsiders; in the latter they were insiders.\textsuperscript{147} Coming later, the abolitionists,\textsuperscript{148} the civil rights marchers,\textsuperscript{149} and pro-life activists all fought for their causes by using the language of natural law to oppose the written law from an outsider perspective.

There are two points of distinction between these other groups and the sentencing judges examined in Section II. First, unlike the other groups discussed, they do not explicitly use the language of natural law. This distinction is understandable, as they work within the thoroughly secular

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{145} Supra, Section III.
\item \textsuperscript{146} Supra, Section IV.
\item \textsuperscript{147} Supra, Section IV(A).
\item \textsuperscript{148} Supra, Section IV(B).
\item \textsuperscript{149} Supra, Section IV(C).
\end{itemize}
\end{footnotesize}
world of public law. This does not mean that what they are exhibiting is not natural law, of course, since we can exhibit aspects of natural law without describing it as such. If a man rushes at me with a knife I may counter-attack in the interest of self-preservation, without articulating (or even thinking) that what I am doing is an act driven by the natural law.\textsuperscript{150}

The second distinction is more important. Put simply, unlike those others in the American tradition, the sentencing judges are by no stretch of the imagination to be considered “outsiders.” In fact, they might be considered the ultimate insiders, given that they enjoy the benefits of government employment, high status, and the ultimate power of life tenure. They are such insiders, that only for the gravest wrongs can they be forced out of office.

This second distinction, that judges are insiders rather than outsiders, is at the heart of the problem with their tendency towards mercy. Within a democracy that respects the right to free speech, there is a very positive dynamic that comes with a group of outsiders critiquing the written law through the use of natural law. Such outsiders challenge the written law through free speech, and this leads to a vigorous debate within the larger

\textsuperscript{150} In the same way, it may be that some of those who act in the name of natural law might be wrong—that is, they may be attributing to the natural law what really are their own political or personal desires.
society. These debates over core principles are America at its best, as we address our most difficult questions through an exchange of ideas, of philosophy even. King’s Letter from a Birmingham Jail is a wonderful example of this. King was responding through free speech to the principles espoused by an oppressive majority. Because it was an outsider-insider exchange, the dialectic was open and public, which led to changes in principle among some members of the public. In the end, the democratic process reflected this shift in attitudes as people were convinced by King and his fellow travelers. The written law *changed*, and responded in part to the ideas that King, the outsider, had presented to the public.\footnote{151 It would be overly simplistic to conclude, of course, that the King letter alone changed the written law, and that is not my contention. In a broader sense, though, the public debate about civil rights did have that affect.}

This dialectic, a key feature of open democracy, does not operate when those subverting the written law are *insiders*. That’s because an insider does not have to convince anyone else to change their attitudes—they can simply use their power within society to act on their natural law impulses, without filtering it through a messy and public debate. The sentencing judges perfectly exemplify this, in that they are able to show mercy in the most direct of ways entirely through their own authority.

Without this public dialogue, the battle between natural law and the
written law, the insider and the outsider, much is lost. No attitudes are changed or even challenged. Instead, the undermining of the written law is not through the open channels of democracy, where ideas like mercy and its value can be debated, but simply through the silent hand of the powerful.¹⁵² In terms of process, at least, we have left the admirable world of King and entered a darker place more often inhabited by tyrants for whom the written law is ignored in favor of personal belief or urge (even if that belief or urge is a natural law impulse, such as self-preservation).

There is an even deeper danger, as well. As described above, the insider use of natural law does not create public debate and change, because the actor does not need to appeal to the democratic process to create change. Worse, the argument can (and should) be made that the merciful natural-law subversion of the written law by insider judges actually retards systemic change—change in the written law—by blunting the impact of the underlying wrong which offends natural law in the first place. In this context, specifically, it may be that the public would normally be outraged (through their own sense of mercy) at the length of sentences that would be imposed by judges under the guidelines. However, if the judges subvert the

¹⁵² Daniel Freed warned that this subversion was afoot over 17 years ago, and observed that this subversion is inevitable when discretion is limited by guidelines. Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 Yale L.J. 1681, 1683 (1992).
written law and sentence beneath the guidelines, this action prevents such outrage and the resulting public and democratic debate over principles.

This blunting of outrage is particularly important since so many changes in criminal law result from anecdotes—the public’s reaction to a single case. For example, the especially harsh sentencing guidelines for crack cocaine were implemented based on a single case: the overdose of Boston Celtics draftee Len Bias in 1986.\textsuperscript{153}

So, judges subvert the written law and democratic processes by showing mercy. Is that any different or damaging because it is driven by natural law impulses? After all, the same process leading to a lesser sentence could happen if the judge was taking bribes. That is, the subversion would be the same if the action results from an evil motive as from natural law, right?

Well, no. An evil motive such as bribe-seeking greed is distinct from the broad impulse towards mercy because the natural law impulse is nearly universal while bribe-taking is much more rare. When we look at the system of criminal law as a whole, we see relatively few (if any) bribes which explain a downward adjustment. The general trend to mercy, though, is striking in its extraordinary breadth. It is something different—deeper, more

\textsuperscript{153} Nancy Morawetz, \textit{Rethinking Drug Inadmissibility}, 50 William and Mary L. Rev. 163, 172 (2008).
meaningful, and ultimately perhaps, more dangerous to the system of ordered liberty that is undermined by the subversion of insiders.

So, if the mercy impulse leads to *bad* results in a guideline system of sentencing with negative sanctions for stepping outside the lines, what are we to do?

The obvious, and best, answer is to get rid of the written law, the guidelines themselves. Doing so will only return the system to a discretionary system which existed in federal courts before 1987, and which still exists in many states, including Texas. Judges will judge, certainly, and consider the individual before them, but when they do show mercy it will not conflict with the written law and undermine open debate over proper sentences. Judges are more likely to be open and honest in describing what they are doing in such a regime.

Because the law involves both written law and people who are vessels for natural law impulses, it is impossible to use the former to forever limit the latter, because the natural law impulse will not be denied. While I am applying this idea specifically to the sentencing guidelines, the general point is much more ancient. In fact, Aquinas himself recognized this duality of the law, sited both in the written law and the persons running the machinery of justice. Specifically, Aquinas referred to a judge as “justice personified”
and recognized the authority of the judge as coequal to the written law: “A judge’s judgment is like a particular law passed for a particular case, and enjoys similar coercive power; so a judge must have the public authority entitling him to such coercion.”\(^\text{154}\)

I say nothing more than Aquinas, within the context of sentencing guidelines. In other words, the way to solve the dilemma caused by the mercy impulse in sentencing is not to try to bar it by operation of the law. What the statistics in Section II show, more than anything, is that a strong natural law impulse will not be denied. When we erect barriers to it, we only create failure, as the inexorable force of what is written on the heart meets an obstacle easily and quietly moved by a powerful insider. Only by recognizing the mercy impulse and removing the obstacle the sentencing guidelines have become will we really get to truth in sentencing.