

DAN MARKEL
FSU College of Law
425 West Jefferson Street
Tallahassee, Florida 32301
850-644-3831 (w)
202.276.8200 (c)
Markel@post.harvard.edu
www.danmarkel.com (homepage)
<http://prawfs.com> (blog)

EMPLOYMENT

2009- **D’Alemberte Professor, Florida State University College of Law**

2005-2009 **Assistant Professor, FSU College of Law**

- Scholar-in-Residence, Center on the Administration of Criminal Law, NYU Law (2011)
- Courses Taught: Criminal Law, Criminal Procedure: Adjudication; Sentencing Law and Policy; Tort Theory and Punitive Damages
- Recipient of Searle Fellowship for Research Leave (Spring 2011)
- Recipient of FSU FYAP Research Fellowship (2006) (university-wide competitive academic grant)
- Present or Past FSU Service: Appointments; Faculty Enrichment; Admissions; Student Affairs; Academic Waiver; Graduate Policy (University);
- Member, Executive Committee of AALS Section on Criminal Justice
- Visiting Professor, IDC-Herzliya (2011); Bar-Ilan (May 2009); U-Miami (Fall 2006)

EDUCATION

Harvard Law School, J.D., 2000-01.

- Graduated with honors
- Editor, Harvard Law Review (Volumes 112-13)
- Olin Fellow, Harvard Law School
- Resident tutor in law and government, Lowell House, Harvard College

University of Cambridge, M.Phil., 1997.

- Graduated with high honors in political thought and intellectual history
- Cambridge Overseas Trust Scholar; Emmanuel College Research Scholar; Pechet Scholar
- Thesis: The Biblical Criticism of Thomas Hobbes’s *Leviathan* (Prof. Quentin Skinner, supervisor)

The Hebrew University of Jerusalem, Visiting Graduate Fellow, 1996.

- Harvard University Visiting Fellowship
- Dorot Foundation Fellowship

Harvard College, A.B., 1995.

- Graduated Phi Beta Kappa and Magna Cum Laude in Government
- John Harvard Scholarship for Highest Academic Distinction

- Allston Burr Senior Tutor Prize, Lowell House
- Rosovsky Fellow, Center for Middle East Studies
- Undergraduate Fellow, Center for International Affairs

SCHOLARSHIP

Book

1. [PRIVILEGE OR PUNISH? CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES](#) (Oxford 2009) (with Jennifer M. Collins and Ethan J. Leib) (PDF available on SSRN)
 - *Reviews in the Yale Law Journal* by Professors Alafair Burke, Alice Ristroph, & Melissa Murray
 - *Reviews in the New Criminal Law Review* by Professors Doug Berman, Naomi Cahn, & Jack Chin

Articles, Essays and Book Chapters (with links to SSRN)

21. *Beyond Experience: Getting Retributive Justice Right*, 99 CAL. L. REV. __ (April 2011) (with Chad Flanders and David Gray).
20. [What Might Retributive Justice Be?](#), a chapter in *Retributivism: Essays on Theory and Policy* (edited volume, under contract with Oxford University Press, forthcoming 2011).
19. [Overcoming Tradeoffs in the Taxation of Punitive Damages](#), 88 WASH U. L. REV. __ (forthcoming 2011).
18. [Taxing Punitive Damages](#), 96 VA. L. REV. 1295-1360 (2010) (with Gregg D. Polsky).
17. [Bentham on Stilts? The Bare Relevance of Subjectivity to Retributive Justice](#), 98 CAL. L. REV. 907-988 (2010) (with Chad Flanders).
16. [Rethinking Criminal Law and Family Status](#), 119 YALE L.J. 1864-1903 (2010) (with Ethan J. Leib and Jennifer M. Collins).
15. [Punitive Damages and Private Ordering Fetishism: A Reply to Professors Krauss and Owen](#), 158 U. PA. L. REV. PENNUMBRA 283-304 (2010).
14. [\(When\) Should Family Status Matter in the Criminal Justice System?](#), 13 NEW CRIM. L. REV. 151-75 (2010) (with Ethan J. Leib and Jennifer M. Collins).
13. [Executing Retributivism: Panetti and the Future of the Eighth Amendment](#), 103 NORTHWESTERN U. L. REV. 1163-1222 (2009).
12. [How Should Punitive Damages Work?](#), 157 U. PA. L. REV. 1383-1484 (2009).
11. [Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction](#), 94 CORNELL L. REV. 239-340 (2009).
10. [Voluntarism, Vulnerability, and Criminal Law: A Reply to Professors Hills and O'Hear](#), 88 B.U. L. REV. 1449 (2008) (with Ethan J. Leib and Jennifer M. Collins).

9. [*Punishing Family Status*](#), 88 B.U. L. REV. 1327-1423 (2008) (with Ethan J. Leib and Jennifer M. Collins).
8. [*Criminal Justice and the Challenge of Family Ties*](#), 2007 U. ILL. L. REV. 1147-1228 (with Jennifer M. Collins and Ethan J. Leib).
7. [*Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*](#), 85 TEX. L. REV. 1385-1412 (2007).
6. [*Connectedness and Its Discontents: The Difficulties of Federalism and Criminal Law*](#), 4 OHIO ST. J. CRIM. L. 573-85 (2007) (peer-reviewed); a previous version appeared in 155 U. PA. L. REV. P. 38 (2006).
5. [*State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*](#), 40 HARVARD CR-CL L. REV. 407-480 (2005).
4. [*Against Mercy*](#), 88 MINN. L. REV. 1421-1480 (2004).
3. [*Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*](#), 54 VANDERBILT L. REV. 2157-2242 (2001).
 - Cited in *United States v. Gementera*, 379 F. 3d 596 (9th Cir. 2004), and LAFAVE, SUBSTANTIVE CRIMINAL LAW
2. [*Can Intellectual Property Law Regulate Behavior? A “Modest Proposal” for Weakening Unclean Hands*](#), 113 HARV. L. REV. 1503-20 (2000).
 - Cited, *inter alia*, in NIMMER ON COPYRIGHT
1. [*The Justice of Amnesty? Towards A Theory of Retributivism in Recovering States*](#), 49 U. TORONTO L.J. 389-445 (1999) (peer-reviewed journal).
 - Cited, *inter alia*, by Justice Albie Sachs of the South African Constitutional Court

Short Essays and Reviews

5. *A Judge for Justice*, 43 ARIZ. ST. L. J. (forthcoming 2011) (invited celebration essay).
4. [*May Minors Be Retributively Punished after Panetti \(and Graham\)?*](#), 23 FEDERAL SENTENCING REPORTER 62-66 (2010) (invited symposium essay)
3. [*Retributive Damages as Intermediate Public Sanctions: A Synopsis*](#), THE LEGAL WORKSHOP (2009).
2. Review Essay, [*Ethics and Authority in International Law*](#), 10 EUROPEAN J. INT’L L. 200 (1999) (peer-reviewed journal).
1. Recent Case, [*United States v. DeZarn*](#), 112 HARV. L. REV. 1783 (1999).

SOME WORKS IN PROGRESS (OR ANTICIPATED...)

Books

RETHINKING RETRIBUTION

Over the last ten years, and across approximately ten law review articles, I've been writing about punishment theory and its implications for an array of policy choices. This book will try to revise and restate the core account of retributive theory at the heart of those works and to do so in a way that can connect not only to students and teachers of law and philosophy, but also beyond. The book would aim at three substantial interventions. First, it replies to the trenchant objections against retributivism found in recent welfare economics literature. Second, it illuminates the often obscured role of ex ante decision-making to retributivist thinking. Third, by highlighting that role, the paper explains how to reduce (at least in part) the degree of separation between proponents of retribution and deterrence in policy terms.

FIXING PUNITIVE DAMAGES

This book will try to coherently tie together a handful of articles on civil damages I've published or will soon be submitting for publication.

LUCK OR LAW? THE UNEASY CONSTITUTIONAL CASE AGAINST INDETERMINATE SENTENCING

In the majority of states, indeterminate sentencing schemes prevail, under which the decision for whether a person serves one year or a life in prison for a crime is left to the unfettered discretion of a judge. Since the Supreme Court decided *Booker* and rendered the federal sentencing guidelines "effectively advisory," many state courts have read *Booker* to lend an imprimatur upon their indeterminate sentencing schemes. Thus, in a majority of jurisdictions, virtually no restraints upon judicial and/or executive discretion exist to ensure that similarly situated offenders convicted of similar criminal conduct will, within the same sovereign jurisdiction, receive punishments that are roughly similar to each other.

This project examines the case for, and the implications of, a finding that indeterminate sentencing schemes are impermissible under the federal Constitution. Looking at the history of the Framing Period and selected areas of the Supreme Court's jurisprudence over the last forty years, this work explicates the constitutional restraints on arbitrary and/or discriminatory distributions of penalties, and finds little persuasive basis for the continued survival of indeterminate sentencing schemes. To the extent the Supreme Court is reluctant, as a matter of institutional competence, to make that finding explicit, the project explores whether and how legislators at the federal and state levels can shoulder their co-equal burden of implementing the Constitution's commitment to restraining the random, arbitrary, or discriminatory imposition of punishment.

Articles and Essays

Punishing Entities (Civilly) (drafting)

Building upon the pluralistic extra-compensatory damages regime defended in earlier articles, this piece addresses some remaining policy and legal questions associated with punitive damages against entities.

Pride and Punishment (drafting)

The piece examines the relationship between a state's putative duty to punish and a citizen's putative duty to obey the law.

Retributive Justice in Criminal Procedure (conceptualizing)

The tropes of retributive justice norms are thought to dominate various doctrines of substantive criminal law. This article looks at a cluster of doctrines associated with a defendant's procedural rights at adjudication and examines which of those doctrines are consistent with the animating ideals of retributive justice and which ones are not. The article then explains whether the desert-deviating doctrines are otherwise justifiable, and, if so, on what grounds.

Time and Punishment (procrastinating)

This paper examines the normative conundra associated with how the passage of time affects the institutional imposition and distribution of punishment in criminal law and procedure. Specifically, I explore what principles have been articulated by courts and other political actors to justify temporal limits on criminal responsibility such as those found in statutes of limitations; determinations of offender competence pre-, during, and post-adjudication; the effects of intervening changes in the law and related issues of retroactivity; and choices regarding consecutive and concurrent sentencing. I am chiefly interested in explaining what the time constraints are in the context of criminal law, and whether they endure bare scrutiny.

OTHER PUBLICATIONS

15. Op-ed, [Damages Control](#), NY Times, July 1, 2010 (with Gregg D. Polsky).
14. [The Duty to Rescue and the Registry for Caregivers](#), NY Times Freakonomics Blog, July 17, 2009 (with Ethan J. Leib & Jennifer M. Collins).
13. [Sentencing Discounts for Parents?](#) New York Times Freakonomics Blog, July 15, 2009 (with Ethan J. Leib & Jennifer M. Collins).
12. [When the Fugitive is a Family Member](#), New York Times Freakonomics Blog, July 13, 2009 (with Ethan J. Leib & Jennifer M. Collins).
11. ["Family Values" and the Law](#), New York Times Freakonomics Blog, July 9, 2009 (with Ethan J. Leib & Jennifer M. Collins).
10. Review, [The Indispensable Berman on Booker](#), Prawfs.com, June 26, 2006
 - Cited as persuasive authority in [United States v. Kandirakis](#), 441 F.Supp.2d 282 (D.Mass. 2006)
9. Essay, [Redemption-Based Clemency for Stanley "Tookie" Williams: The Right Action for the Wrong Reason](#), Findlaw and CNN.com, December 9, 2005.
8. Essay, [Innocents Lost](#), Slate, November 29, 2005.
 - Also appeared in Dallas Morning News, December 4, 2005.
7. Review, [Summers' Hailstorm](#), The Jerusalem Post, September 8, 2005.
6. Review, [A Woman of Valor](#), The Jerusalem Post, March 18, 2005.
5. Review, [The Dying Art of Advocacy](#), The Jerusalem Post, January 23, 2005.
4. Editorial, [Humiliation is simply wrong](#), USA Today, September 1, 2004.
3. Essay, [Dirty Shame: The Ninth Circuit's dangerous endorsement of shaming punishments](#), The New Republic, August 17, 2004.
2. Op-ed, [Granting Patents Can Foster Crime](#), Nat'l L. J. Sept. 25, 2000
1. Review, [The Impertinence of Being Earnest](#), The Globe and Mail, Oct. 2, 1999.

SELECTED PRESENTATIONS

A Few Questions For Retributivists (and their friends)

Prawfsfest!-ASU, December 2010

NYC Criminal Law Theory Colloquium, NYU-BLS, March 2011

University of Virginia School of Law, April 2011
Yale Law School, April 2011

Punishing Entities (Civilly)

Law & Society, Chicago, May 2010
Prawfsfest!, Brooklyn Law School, July 2010

Taxing Punitive Damages

Florida State University College of Law, August 2009
Canadian Law and Economics Association, September 2009
Prawfsfest!, Southwestern Law School, December 2009

Privilege or Punish: Criminal Justice and the Challenge of Family Ties

Roundtable at Law & Society, May 2009

- with Alice Ristroph, Melissa Murray, Naomi Cahn, Don Braman, and Tommy Crocker
Roundtable at Southeastern Association of Law Schools, August 2010
- with Meredith Harbach, Richard Myers, Elizabeth MacDowell, Emily Sack

Statutory Penalties and Copyright Litigation, February 2009

- Podcast Roundtable with UCLA Professor Douglas Lichtman; Charles Nesson; Catherine Sharkey; and Thomas Colby

Should Retributivists Care About the Subjective Experience of Punishment?

Presentation at Law & Society, May 2009
Presentation at FSU-Prawfsfest!, May 2009
Presentation at FSU College of Law, June 2009
Presentation at Michigan State University College of Law, November 2009
Presentation at UNC-Chapel Hill School of Law, November 2009
Presentation at McGeorge Pacific Law School, December 2009

Punitive Damages and Complex Litigation

Presentation at University of Miami-Prawfsfest!, December 2008

Executing Retributivism

Presentation at Amherst College, October 2008
Presentation at FSU College of Law, August 2008

How Should Punitive Damages Work?

Presentation at FSU College of Law, May 2008
Presentation at Prawfsfest! at Hofstra, July 2008
Presentation at Southeastern Ass'n of Law Schools, August 2008
Presentation at Marquette Law School, September 2008
Presentation at Canadian Law and Economics Association, September 2008
Presentation at Brooklyn Law School, November 2008
Presentation at SMU-Dedman School of Law, December 2008
Presentation at University of Houston Law Center, February 2009

Understanding Retribution and Recidivism

Criminal Law and Philosophy Symposium, Rutgers University, May 2008

Punishing Family Status

Presentation at FSU College of Law's Criminal Law Working Group, October 2007
Presentation at Loyola Law School Prawfsfest!, December 2007
Presentation at Hofstra Faculty Workshop, March 2008
Presentation at U. Arizona Faculty Workshop, March 2008

Retributive Justice in Criminal Procedure

Presentation at Southeastern Association of Law Schools, August 2007

Retributive Damages

Presentation at PrawfsBlawg-UMiami Young Scholars Workshop, December 2006
Presentation at Tel-Aviv University Faculty of Law, June 2007
Presentation at Bar-Ilan University Faculty of Law, June 2007
Presentation at University of Haifa Faculty of Law, June 2007
Presentation at Law and Society, July 2007
Presentation at FSU College of Law's Criminal Law Working Group, October 2007
Presentation at Loyola Law School, Los Angeles, October 2007
Presentation at University of St. Thomas, Minneapolis, October 2007
Presentation at St. John's University School of Law, March 2008
Presentation at Cardozo Young Law and Philosophy Scholars, May 2008

Wrong Turns on the Road to Alternative Sanctions

Presentation at William and Mary School of Law, November 2006

Criminal Justice and the Challenge of Family Ties

Presentation at Washington University School of Law Faculty Colloquium, February 2006
Presentation at Law and Society Conference (with Jennifer Collins), July 2006
Presentation at University of Miami School of Law Faculty Workshop, October 2006
Presentation at Osgoode Hall Law School (York University) Faculty Workshop, October 2006
Presentation at Boston College School of Law Faculty Workshop, October 2006
Presentation at University of Maryland School of Law Faculty Workshop, November 2006

Luck or Law? The Constitutional Case Against Indeterminate Sentencing

Presentation at FSU College of Law Faculty Colloquium, June 2006
Presentation at Southeastern Association of Law Schools, July 2006
Presentation at Junior CrimProf Gathering, George Washington University Law School, July 2005

Commuting Death Row: A Retributivist Defense

Presentation at 2004 Law & Society Conference with Jonathan Simon (Boalt); Austin Sarat (Amherst); and Nasser Hussain (Amherst), May 2004.

Mercy: Private Virtue, Public Vice?

Presentation at UC-Berkeley Law Faculty Workshop, January 2004.
Presentation at the University of Chicago conference on "Doing Justice to Mercy: Problems and Prospects in Criminal Justice," April 12-13, 2002.
Presentation at the Senior Fellows Symposium, The Shalem Center in Jerusalem, March 2002.

What's Wrong with the Welfarist Critique of Retribution?

Presentation at the Law and Philosophy Society, Harvard Law School, May 2001.

Tracking the Future: Emerging Legal Issues in Wireless Technology

Presentation with Eric Saltzman at the Internet Law Institute of the National Association of Attorneys General, April 2001.

Are Shaming Punishments Beautifully Retributive?

Presentation at the Berkman Center Legal Theory Workshop, Harvard Law School, Feb. 2001.

SELECTED MEDIA APPEARANCES

26. Alexa Tsoulis-Reay, [*Is Incest a Two-Way Street?*](#), Slate, Dec. 10, 2010.
25. Marcia Coyle, [*On Punitive Damages, A New Stance Ahead*](#), Nat'l Law Journal, Nov. 1, 2010.
24. Dan Engber, [*If a Siamese Twin Commits Murder, Does His Brother Get Punished, Too?*](#), Slate, Jan 5, 2010.
23. Amir Efrati, [*Judges Show Leniency to Military Veterans, Stirring Debate*](#), Wall St. Journal Law Blog, Dec. 31, 2009.
22. Clyde Haberman, [*Is 150 Years Appropriate, or Just Silly?*](#), New York Times, July 3, 2009.
21. Ashby Jones, [*Go Directly to . . . Authorship? More on Judge Urbina's Odd Sentence*](#), Wall St. Journal Law Blog, June 12, 2009.
20. Clyde Haberman, [*Imparting Some Shame to Those Who Trade in Greed*](#), New York Times, January 27, 2009.
19. Jon Marcus, [*Obama Exploits Academe to Staff His White House*](#), Times Higher Education, Jan. 22, 2009.
18. Joe Lawlor, [*What's a Parent to Do? Escaped Convict Case Raises Questions*](#), The Flint Journal, June 11, 2008.
17. Shame and the Law, [*Weekday on NPR \(audiofile\)*](#), February 20, 2008.
16. John Faherty, [*Offenders' mugs posted to deter DUI*](#), Arizona Republic, Dec. 3, 2007
15. Pallovi Gogoi, [*Shaming and Shoplifting at Walmart*](#), BusinessWeek, July 25, 2007.
14. Joana Dalila Santos, [*Humilhacoés*](#), Sabado (Portugal newsweekly), June 28, 2007.
13. Reymer Kluver, Schandlaufen vorm Supermarkt Wie US-Richter Straftater an den Pranger stellen, Sueddeutsche Zeitung (Germany), May 16, 2007, page 3.
12. The Anthony Mazzealli Show, CBS Radio, May 8, 2007.
11. Irina Peris, [*Alternative Sanctions*](#), BBC Russia, October 27, 2006.
10. Erica Grieder, [*Ingenious Punishments: Their Object All Sublime*](#), The Economist, October 12, 2006.
9. Howard Bashman, [*The Battle over the Soul of Law Professor Blogs*](#), The Legal Intelligencer, May 8, 2006
8. Jeremy Hay, [*Williams' Fate in Governor's Hands*](#), The Press-Democrat, December 4, 2005.
7. Adam Liptak, [*After 24 Years on Death Row, Clemency is Killer's Final Appeal*](#), New York Times, A1, December 2, 2005.
6. Darren Everson, [*No More Horsing Around*](#), Slate, September 8, 2005.
5. Jeff Stryker, [*Using Shame As Punishment: Have sex, get infamous*](#), The San Francisco Chronicle, Sunday, March 13, 2005.
4. Interview with Heidi Collins, American Morning, CNN, October 6, 2004.
3. Interview with Bax & O'Brien, WAQY Radio, Springfield, MA, September 15, 2004.
2. Jane Eisner, [*Bring back the stigma that made misbehaving a no-no*](#), The Philadelphia Inquirer, March 21, 2004.
1. Richard Louv, [*Welcome to the Era of the Global Pillory*](#), The San-Diego Union-Tribune, September 29, 2002.

PROFESSIONAL MEMBERSHIPS AND RECENT SERVICE

Founder and Editor-in-Chief, Prawfs.com (group law professor blog with ~3500 page-views/weekday)

- Selected by the ABA Journal as one of the top 100 law blogs three years running

Organizer

- Prawfsfest! Early Works in Progress Conference: 2006 (UMiami); 2007 (Loyola LA); 2008 (Hofstra); 2008 (UMiami); 2009 (FSU); 2009 (Southwestern); 2010 (Brooklyn); 2010 (ASU)

Co-Organizer

- NYC Criminal Law Theory Colloquium (meets monthly in 2011 at NYU and BLS)
- Criminal Justice and the Constitution in 2020, ACS-FSU (around 20 participants and 4 panels) (TLH 2010)
- CrimProf Shadow Conference, 2011 Law and Society (around 40 participants and 10 panels) (SF 2011)
- CrimProf Shadow Conference, 2010 Law and Society (around 50 participants and 12 panels) (Chicago 2010)
- New Voices in Criminal Law, 2009 Law and Society (around 30 participants and 8 panels) (Denver 2009)

Referee, Legal Theory

Referee, Oxford University Press

Referee, Law and Philosophy

Referee, Punishment & Society

Referee, Studies in Law, Politics & Society

Referee, Cambridge University Press

Referee, Law, Culture & the Humanities

Member of the Bar in the United States Court of Appeals for the Ninth Circuit; District Court of the District of Columbia; and District of Columbia Bar Association.

Co-Chair/Committee Member, Harvard Law School 5th Year and 10th Year Reunion Class Gift Committee

Board Member, Shomrei Torah, Tallahassee, FL

Interviewer, Schools Committee of Harvard College Alumni Association

PRIOR POSITIONS

2002-2005 Associate, Kellogg, Huber, Hansen, Todd, Evans, & Figel, Washington D.C.

- Criminal defense matters including:
 - *United States v. Gementera*, 379 F. 3d 596 (9th Cir. 2004)
 - Amicus counsel of record for law professors seeking rehearing of case permitting a shaming punishment
 - *United States v. Gordon* (9th Cir. 2004)
 - Briefed and argued cause in bank fraud and false statements case; secured remand for re-sentencing
 - *United States v. Gewin, et al.* (D.D.C. 2004)
 - Lead briefing responsibilities for over 400 pages during complex conspiracy, wire fraud, and securities fraud trial
- Appellate Litigation
 - Briefed various cases at cert. and merits stages in U.S. Supreme Court

- 2001-02** **Research Fellow, Berkman Center for Internet & Society, Harvard Law School**
- 2001-02** **Law Clerk, Judge Michael D. Hawkins, U.S. Court of Appeals for the Ninth Circuit**
- 1997-2001** **Teaching Fellow, Harvard University Faculty of Arts and Sciences**
- Taught philosophy of law; political theory; theism and moral reasoning
 - Senior Thesis Advisor, Government Department, Harvard College
 - Recipient of Bok Prize for Teaching Excellence, Harvard College
- 1999** **Summer Associate, Mayer, Brown & Platt, Washington, D.C.**
- Drafted cert. petition for *United States v. Jones*, 178 F.3d 479 (7th Cir. 1999) (challenging federal arson statute); cert. granted, decision reversed 9-0, *see Jones v. United States*, 120 S. Ct. 1904 (2000)
- 1995-96** **Legislative Aide, Dr. Naomi Chazan, M.K., Deputy Speaker, Israeli Knesset**