

IN MEMORIAM: DAN MARKEL

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The editors of the Florida State University Law Review respectfully dedicate this issue to Professor Dan Markel, who graciously gave his time, passion, and wisdom to the Law Review, to the Florida State University College of Law, and to countless others.

LOSING FRIENDS

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I promise you this essay is about Dan Markel. It's painful, still, to talk or to write about him. This is a memorial, a remembrance—so I'll tell you how I remember Dan. I don't know how, exactly, to explain his impact on my life. But it's prototypical, I think, of the impact he had on the lives of many of the people who encountered him, so I'm going to try and back my way into it.

All my life I've wanted to be a professor. An academic, a scholar—someone who contributes to the world of ideas. To follow in the footsteps of my childhood idols—Bohr, Einstein, Newton, Descartes, Plato (I suppose that, of late, we should add Hart, Hand, and Posner to that list). Originally, I planned to earn a Ph.D. in philosophy. As a philosophy major at the University of Texas, it seemed the natural next step to find my way into the academic life. I had a romantic—probably overly rosy and idealized—vision of the academic life. I saw myself attending conferences and dinner parties with lively discussions of the work of thought; sitting in an office, lit warmly by table lamps and surrounded by books, chin in hand, contemplating and staring with portent into the foreground; wearing tweed jackets; writing something meaningful—a book, perhaps. I went to law school after a conversation with my father on the front porch of my college apartment. Beers in hand, Dad told me what his research had revealed about the job prospects for philosophy Ph.D.s. He suggested law school. I had no idea that I'd be any good at it. I didn't want to

* Associate Professor, Florida State University College of Law. For whatever it's worth, this is for Ben and Lincoln. I'm grateful to my FSU Law colleagues, and especially to Jeannie Wanzek, for holding me up in recent months.

spend a lifetime looking for work and doing whatever would pay the bills in the meantime. So I went to law school.

I'm still not sure why, but I applied to only a couple of law schools, one of which was Texas—it's where my father went to medical school (he was a big Texas partisan); and of course, because I was (1) a current University of Texas student, (2) a Texas resident, and (3) a legacy, it made perfect practical sense. I thought I'd get in even though I'd only become serious about my work in the later years of college. I didn't apply to many other places—Baylor accepted me; SMU, and a couple others. Tulane, as I recall. On a lark, I applied to Harvard Law School, but I made only a halfhearted effort on the essay and was waitlisted. Harvard, of course, is where Danny went to school. College, law school—he was the very model of a modern Harvard person (except for his years in Cambridge earning a master's—Cambridge is where Newton held the Lucasian Professorship in Mathematics, which Stephen Hawking now holds). Danny was, by the time I was admitted to law school in 2000, already a Harvard legend—editor of the *The Crimson*, editor of the *Harvard Law Review*—doing things I didn't remotely have the imagination to imagine. I suppose if I'd applied to Stanford or Columbia, I might've been accepted and ended up with a better résumé for the legal academic job market. Life, as you all know, is composed of thousands of contingencies; we can never know what might've happened if we'd decided this or that thing some other way. I started law school at Texas in 2001. At that point, I didn't know how much of a problem it was that I hadn't tried harder to get into Harvard or Yale. After the first semester, I discovered I was good at law school (there was some logic to it, and some philosophy in it) and proceeded to find an energy I'd never known. I talked to professors and discovered, to my delight, that they'd also gone to law school and, so, perhaps I might be able to enter academia, after all. Of course, if one doesn't graduate from Harvard or Yale, it's an exercise in ice skating uphill. But by God, I was going to do everything in my power to make it happen. So I did everything—law review, research assistantships, as many good grades as I could earn—all with my eyes toward becoming a law professor. Someday.

Those law school years involved a great deal of planning and projection—I always tried to make choices that would leave open all options that might be useful on the academic path. Clerking for a federal judge seemed like the best option—Danny, after all, had clerked right out of law school for Judge Mike Hawkins on the Ninth Circuit. So I took a job as a law clerk for Judge Royce Lamberth in Washington, D.C. I wrote my first real law review article that year. Writing it reminded me of my larger goal; and trying to get it published reminded me how hard it would be. That year, I began reading

PrawfsBlawg and discovered Dan; he was, of course, one of the progenitors of legal academic blogging. I sent him an e-mail that year, asking for advice on how to make a respectable run at legal academia. He must have received a couple hundred e-mails each week—everyone reading this knows that by 2005 (when I was clerking and pestering him) he had something like a billion friends and was already on the path I wanted to walk. He responded. I can't find the e-mail—at that time, I was using some free e-mail service to which I no longer have access. Contingencies. I'd go back and print out that e-mail if I could. It would be several years before we communicated again. What I remember, though, is how patient he was—he took the time to think about my particular qualifications, my particular circumstances, my particular goals. And he advised me well: “Get an appellate clerkship and write something else.” I did as he advised, clerking for Judge Tim Dyk of the Federal Circuit. I corresponded briefly with Dan during that year. He said he was proud of me.

By the time I left D.C. in 2006, Dan had finished his first year as a professor at the Florida State University College of Law. He'd published seven law review articles, including in the *Minnesota Law Review* and the *Vanderbilt Law Review*; and he'd worked on several manuscripts that would, in 2007, be published in similarly prestigious journals. Additionally, he'd started laying the intellectual foundation for his book. I was intimidated, daunted, but determined to try and follow his lead.

After my clerkships, I joined a law firm in Dallas and published a second law review article. After a while, several people contacted me about the possibility of a fellowship on the University of Texas School of Law faculty (in what was then called the “Emerging Scholars Program”). I was excited and scared—it was my alma mater; and it was hard to think about calling my own professors by their first names. I asked Dan what he'd do; he said a fellowship could only help, given my non-traditional résumé. I was always worried about that damned, non-traditional résumé. I packed up and moved back to Austin. That was the summer of 2008. Dan said, as I recall his e-mail, “You're on your way.” (I wish I had those e-mails). I was a regular *Prawfs* reader by this point, and there was something about that blog—there still is, I suppose; you could feel Dan in there, in between the lines, almost like he was in the room with you. Maybe it was in the way he wrote or the way he shared personal things. I'm not sure. But as I finally began the journey I'd prepared for and hoped for after so many years, I felt like Dan and I were already colleagues—perhaps even friends—though we'd never met. This was one of his special gifts—he could make you feel that way.

After the fellowship, I took my first full-time teaching position at the University of Toledo College of Law. Dan (by e-mail) was thrilled

that I'd landed anywhere at all (don't forget my non-traditional résumé). Much of the credit goes to the wonderful people on the Texas Law faculty who supported me through the process. But Dan was there, too, sending occasional notes of encouragement and answering several relatively panicked e-mails during the weekend of the hiring conference (ironically, although I was back in D.C., I didn't feel at all comfortable—they don't call it the "meet market" for nothing). Dan was going up for tenure at this point, and of course, his was perhaps the easiest tenure case in the history of FSU. It was his style to remember details about people he barely knew—like me—and to find time to stay in touch. He was always positive; and his commitment to his relationships—even these quasi-relationships—amazed me. Toledo was nice—wonderful people and a very nice way to start an academic career. I wrote; I submitted articles to law reviews; I pestered Dan with questions about that process (especially about how to get good placements). Around this time, *Prawfs* began hosting an annual "angsting thread" for law professors subjecting themselves to the law review submission process. I read this religiously; though I'm not sure how much it helped (I am sure that it created an angsty echo-chamber effect). It helped with the angst, and it felt like a community. Dan brought us together, and he didn't discriminate according to résumé, school, or placement record. He was an equal opportunity friend.

The academic life in Toledo turned out to be a bit different from what I'd envisioned. Toledo was colder than any place I'd ever lived, and while my colleagues were kind and friendly, the faculty was small and everyone was busy. I didn't know whether it was the place or my internal vision of academic life that was slightly off, but I needed to make a change. Once again, Dan was there; he helped me catch the attention of FSU Law's appointments committee. After what I'm certain was a significant and very Dan-like effort to advocate on my behalf—he would never talk about it with me, but I'm sure Dan spoke on my behalf in faculty meetings, colleagues' offices, the hallways, and so forth while my FSU application was pending—I was hired as an assistant professor at FSU Law, whose faculty is well-known for its scholarly bent. I was thrilled. This was the kind of place I'd always envisioned. And much warmer, with beaches. I am only here because of Dan Markel. Had he not responded to my e-mail—and that's really all it was, I just sent him an e-mail that said something like "do you think I'd have a chance of getting an interview at FSU?"—I have no idea what would have happened or where I would be. Dan, of course, always responded to e-mails; he always helped when he could. And even as I remain convinced that our life paths are radically contingent and determined by an enormous number of factors, any one of which, if tweaked, could dramatically alter

the outcome; I am also convinced that there's no possible world in which Dan wouldn't have done what he did for me. That's the kind of thing he did for his friends. I'll never have the chance to repay him.

That, then, is how I came to be Dan's colleague. In the short two years in which I had that honor, I learned two important lessons from Dan that I want to share.

First, by the time I joined the FSU Law faculty, Dan was one of the more famous law professors in the country. There was his path-breaking blog, his brilliant work on criminal punishment, his appearance at what had to have been a record number of conferences, and his continuous contributions to the media. I worked constantly to try to emulate him: I shut myself up in my new FSU office and wrote, and wrote, and wrote. I came up for air to attend workshops and faculty meetings; and I worked hard to improve my teaching. I can't say how many more hours I worked per week than at the law firm. To be tenured on a faculty like this and to eventually become prominent would require sacrifice, I rationalized. I didn't go to my daughters' preschool to have lunch with them or to pick them up early to go to the park—they stayed all the hours the preschool was open, and I stayed in my office each day until the very last minute past which I knew I couldn't make it to the school by closing time. I still prided myself on being a good, involved father—my daughters and I did every kid-related thing in Tallahassee over the course of the first several months on *weekend* days.

But then I noticed that Dan handled things differently. Our kids went to the same school, and I saw him there from time to time, dropping off or picking up his sons. In fact, the first time I met Dan in person was when, on my house-hunting visit to Tallahassee after I'd accepted the faculty position, I went to that very school to meet the staff and to try and get my daughters admitted. He was there in the middle of the day, in his running gear after some hot summer jogging. He was standing in the parking lot when I pulled in; and it took me a minute to realize it was him. He was there to have lunch with his kids, which parents were always welcome to do at that school. The teachers told me that he came at least once per week and frequently more often than that, sharing spaghetti and meatballs, tacos, or whatever the kids were having; passing plastic dishes around; playing with them. He read stories to the kids; he visited on days when they were scheduled to learn about Jewish holidays and shared his faith with them. He wasn't there just for his sons—he gave to all of the children in various ways; he was a regular fixture, almost like a part-time staff member. I realized that Dan had figured out some secret to balancing work and life; to being a professor and a father at the same time. I'm still not sure I've figured out that secret. He didn't tell me what it was—he just modeled it for anyone who

cared to notice; that, I think, is one important lesson of Dan's life. Dan was a role model for me in a number of ways: he taught me much about being a professor, a scholar, and a friend; but he taught me even more about how to be a whole person. I don't quite have it down—my daughters have moved to a new school and parents aren't allowed to come just anytime—but I'm still working on it, following his example. He was the best father I've ever known.

Second, Dan taught me about friendship and empathy. We both went through personal crises of sorts while we were on the faculty together—him first, then me. I won't say much about the circumstances, but I will say this: in the midst of what I know was incredible pain and stress, Dan walked over to my office every few days, without my having to call for him, just to talk about it. He shared his experiences in the hope that they might help me. They did. I didn't have a chance to tell him how much it meant—I was in a new place, going through something that rips people apart. There was a sense of falling, of the ground caving in from under my feet. Having someone who knew what it was like, and who was willing to listen and to share advice ranging from the emotional to the practical, made it possible for me to continue working, to make it through in one piece. The lesson is this: relationships matter; friendships matter—they matter more than publications, more than laurels and named professorships, and more than intellectual contributions or our impact on the larger world. Our lives gain their importance from the bonds we share with other people, I think. Dan took relationships seriously. He committed to them and nurtured them. He shared freely of himself, even the painful things. He had the gift of real empathy, and that was one of the ways in which he made a difference in the lives of others, including mine. Dan made enormous contributions to the world of ideas and to the community of legal scholars; he made a name for himself and made an impact on the world in a way that most people don't. But what he taught me was intensely personal: pain is easier to bear when shared, and a little empathy goes a long way. I felt like I wasn't alone. Dan taught me the lesson that now drives me: to make your life mean something, it needs to mean something to someone else. Of course, that sounds trite—we brush sentiments like this aside all of the time in the name of reason and truth—but it's still true.

Life is a series of contingencies—we can't know what would have happened had we decided this or that some other way. The crucial thing to remember is that whatever you currently like about your life is the result of an impossibly complex constellation of factors; each decision, in part, is a product of the last. To try and unravel them to say "this was, because I did that" or "had that not happened, I wouldn't be here" is a fool's errand. The accumulation of my deci-

sions—all of my planning and work—led me here. It led me to FSU; it led me to my fiancé; it led me to my work and to my calling. I cannot regret any of it, much as I might like to have had some things happen differently. Any tiny change could alter everything—like a pebble cascading down a mountain that eventually causes a landslide. If I could go back and save Danny, somehow, I would—he was the kind of which the world has too few. The world needs people like Dan. I miss him terribly, and I always will. I'll ask myself whether I'm writing a problem paper or a puzzle paper; I'll always play exuberantly with my daughters every chance I get; I'll help people who are going through things that I've gone through; and I'll always be grateful for the bits of luck that I've had here and there. Especially the luck of having known Dan, in his prime, while he was everyone's friend. Even mine.

