DAN MARKEL'S QUEST FOR A GENTLER, RICHER RETRIBUTIVISM

WAYNE A. LOGAN*

ABSTRACT

When I was in graduate school studying criminology in the mid-1980s, I was privileged to take a seminar with Professor Graeme Newman. A gifted teacher, Graeme seemed to be a provocateur, unabashedly espousing electric shock and corporal punishment as more humane and effective methods of punishment than imprisonment.[1] *Perhaps even more shocking (so to speak) was Graeme's advocacy of retributivism, which in polite academic circles was dismissed as a vengeful and primitive justification for punishment.*[2]

Three decades later, I joined the Florida State Law faculty, and became a colleague of Dan Markel, another avowed retributivist. By this time, the academy had come to understand retributivism in a fuller, more nuanced, and sophisticated way—a view that would continue to take shape in coming years, in considerable part due to Dan's prolific work on the subject.

Here, in my contribution to this festschrift to Dan, I'll focus on several of his many contributions to the refinement of retributivism and his ambition for its broader application to sentencing.

I. DAN'S CONTRIBUTIONS

A. Retributivism's Revival

For much of the twentieth century, an amalgam of punishment theories and justifications dominated American sentencing and corrections.[3] In main part, however, consequentialist justifications of

*. Steven M. Goldstein Professor, Florida State University College of Law.

1. *See generally* GRAEME NEWMAN, JUST AND PAINFUL: THE CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS (1st ed. 1983). Now Emeritus at SUNY-Albany, Professor Newman has had a distinguished career, publishing multiple other books, including several novels, and articles. *See* Graeme Newman, *Curriculum Vitae*, (last visited Sep. 29, 2024), https://www.albany.edu/sites/default/files/resumes/Newman%20CV.pdf [https://perma.cc/LY53-LUTM].

2. *See infra* notes 18, 34-38 and accompanying text.

3. For a fuller discussion of this evolution, see WAYNE A. LOGAN & MICHAEL O'HEAR, SENTENCING LAW, POLICY, AND PRACTICE 79-93 (Found. Press 2022).

rehabilitation and crime prevention dominated. The keystone of the paradigm was the indeterminate sentence, the termination point of which was based on a "back-end" decision by authorities whether an inmate was "cured."[4] The apotheosis of the approach came in 1962 with the publication of the American Law Institute's *Model Penal Code*, which regarded retribution only as a limiting principle (a "safeguard"), and made clear its fealty to the consequentialist goals of rehabilitation and deterrence:

> Section 1.02. Purposes; Principles of Construction.
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> (2) The general purposes of the provisions governing the sentencing and treatment of offenders are:
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> (a) to prevent the commission of offenses;
> (b) to promote the correction and rehabilitation of offenders;
> (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;
> (e) to differentiate among offenders with a view to a just individualization in their treatment;
> . . .
> (g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders.[5]

In 1967, a blue-ribbon commission assembled by the Johnson Administration after civil disturbances published *The Challenge of Crime in a Free Society*, forcefully backing the view that social and economic problems were the root causes of crime and that governments must take steps to ameliorate them.[6] In 1968, 72% of respondents to a Harris

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4. FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION 81-83 (1982) (discussing the rise of rehabilitation).

5. MODEL PENAL CODE § 1.02(2) (1962). *See also* Norval Morris, *Sentencing Under the Model Penal Code: Balancing the Concerns*, 19 RUTGERS L.J. 811, 814-15 n.12 (1988) (noting that the Comment "specifically rejects as a valid reason for imprisonment that the person 'deserves' punishment for the bad deed committed" (citing MODEL PENAL CODE § 7.01 cmt. 3, at 227 (1985))). The 1985 commentary explained that the Code was "based on the premise that 'desert' alone is not a sufficient justification for punishment." MODEL PENAL CODE AND COMMENTARIES, Introduction to Art. 6 and 7, at 16 (1985); *see also* MODEL PENAL CODE AND COMMENTARIES § 1.02 cmt. 3, at 21 (1985) (stating that the Code was focused on crime prevention, "leaving no room for dispositions motivated merely by vindictive or retributive considerations").

For a revisionist account of the thinking of Columbia Law School Professor Herbert Wechsler, Reporter of the Model Penal Code, who while a "dedicated utilitarian," nonetheless heeded retributive concerns to some extent in the Code (in particular the perceived need to placate the public's need for punitiveness), see Anders Walker, *American Oresteia: Herbert Wechsler, The Model Penal Code, and the Uses of Revenge*, 2009 WIS. L. REV. 1017.

6 PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967). The report stated that:

> [The Commission] has no doubt whatever that the most significant action that can be taken against crime is action designed to eliminate slums and ghettos, to improve education, to provide jobs, to make sure that every American is given the opportunities and the freedoms that will enable him to assume his responsibilities. We will not have dealt effectively with crime until we have alleviated the conditions that stimulate it. To speak of controlling crime only in terms of the work of the police, the courts

poll declared that the prison system's primary purpose should be rehabilitation.[7]

Starting in the 1970s, however, a major shift in punishment theory and practice occurred. Amid a sharp rise in violent crime (principally in the late 1960s), and ongoing political turmoil and civil unrest, a "get tough" mentality came to dominate the nation's corrections zeitgeist. The shift was motivated by individuals on both ends of the political spectrum. On the right, politicians like President Richard Nixon and academics such as political scientist James Q. Wilson, lambasted what they saw as judges' lenient sentences and pushed for more certain and punitive treatment of criminal offenders.[8] On the left, politicians such Senator Edward Kennedy (D-Mass.) were concerned that judicial discretion and indeterminacy in release decisions were plagued by racial and class discrimination.[9] A progressive group, the American Friends Service Committee, a Quaker organization figuring centrally in creation of the nation's first penitentiaries in Pennsylvania, issued an influential report denouncing the "ideal of rehabilitation,"[10] stating that it was "theoretically faulty, systematically discriminatory in administration, and inconsistent with some of our most basic concepts of justice."[11] The "two-hundred-year-old experiment ha[d] failed," the report declared.[12] One year later, federal judge Marvin Frankel published *Criminal Sentences: Law without Order*, a wide ranging condemnation

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> and correctional apparatus, is to refuse to face the fact that widespread crime implies a widespread failure by society as a whole.

Id. at 15. *See also* Sanford Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 978-79 (1999) (outlining the peak of the rehabilitative model in the late 1960s).

7. FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION 8 (1982).

8. For more in-depth chronicles of the shift, see, for example, PETER K. ENNS, INCARCERATION NATION: HOW THE UNITED STATES BECAME THE MOST PUNITIVE DEMOCRACY IN THE WORLD (2016); TED GEST, CRIME AND POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER (2001); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015).

9. Edward M. Kennedy, *Sentencing Reform—An Evolutionary Process*, 3 F. SENT. R. 271, 271 (1991). *See generally* Katherine Beckett & Theodore Sasson, *The Origins of The Current Conservative Discourse on Law and Order*, DEFENDING JUST., 2005, at 44, 50, http://www.publiceye.org/defendingjustice/pdfs/chapters/toughcrime.pdf [https://perma.cc/P45F-S8NU] (observing that beginning in the late 1960s conservative politicians "worked . . . to alter popular perceptions of crime . . . and to promote policies that involve 'getting tough' and 'cracking down,' " and documenting how Democrats jumped on "the law-and-order bandwagon").

10. AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971).

11. *Id.* at 12.

12. *Id.* at v. The report added that the open-ended sentencing necessitated by the rehabilitation model was a method for "keep[ing] the powerless in line" and the termed the uncertainties of parole decisions as "one of the most painful aspects of prison life." *Id.* at 28, 93.

of then-dominant discretionary and individualized judicial practices resulting in disparate and arbitrary sentences.[13]

Adding fuel to the smoldering pyre of rehabilitation, sociologist Robert Martinson published his highly influential 1974 article *What Works—Questions and Answers about Prison Reform*,[14] a meta-study of research on prison correctional programs, which concluded that "[w]ith few and isolated exceptions, the rehabilitative efforts [reportedly used in prisons] have had no appreciable effect on recidivism."[15] Other critics expressed concern over the perceived coerciveness of rehabilitation: that treatment occurred with or without consent and that physical and psychological/emotional abuses were being falsely legitimized as "treatment."[16]

The shift in thinking was swift—in Francis Allen's words, "precipitous."[17] Whereas in 1972 Justice Thurgood Marshall confidently deemed retributivism moribund,[18] in the mid-1970s it rose to

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13. *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1972) (condemning "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.").

14. *See* Robert Martinson, *What Works?—Questions and Answers about Prison Reform*, 35 PUB. INT. 22 (1974).

15. *Id.* at 25. The article's conclusion was less absolute, for instance finding some value in parole supervision. *Cf.* DOUGLAS LIPTON, ROBERT MARTINSON, & JUDITH WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 628 (1975). Five years after his article, Martinson published what many consider a recantation. *See* Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 244 (1979).

16. Concerns were also raised that rehabilitative interventions could be overly intrusive into the defendant's autonomy and the private spaces of their minds—a perspective chillingly reflected in the popular 1971 film *A Clockwork Orange*.

17. FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 10 (1981) ("[T]he rehabilitative ideal has declined in the United States; the decline has been substantial, and it has been precipitous."). *See also, e.g.*, Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 552 (1978) (saying of the unquestioning acceptance of the ideas underlying indeterminate sentencing "[t]hat I and many other academics adhered in large part to this reformative viewpoint only a decade or so ago seems almost incredible to most of us today").

18. *See* Furman v. Georgia, 408 U.S. 238, 343 (1972) (Marshall, J., concurring) (footnote omitted) ("Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance."); *see also* Williams v. New York, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."); OLIVER WENDELL HOLMES, THE COMMON LAW 45 (1881) (regarding retribution as "only vengeance in disguise"); Austin MacCormick, *The Prison's Role in Crime Prevention*, 41 J. CRIM. L. & CRIMINOLOGY 36, 40 (1951) ("Punishment as retribution belongs to a penal philosophy that is archaic and discredited by history. Our leading penologists, if prisons were to be operated as instruments of retributive punishment, would refuse to accept appointments to administer them."); Ledger Wood, *Responsibility and Punishment*, 28 J. CRIM. L. & CRIM. 630, 636 (1938) (stating that retributive theory "is a form of retaliation, and as such, is morally indefensible").

dominance.[19] In 1976, Professor Andrew von Hirsch published a book having particular impact: *Doing Justice: The Choice of Punishments*, advocating "just deserts" for convicted individuals.[20] Proclaiming that rehabilitation "produced unexpected abhorrent consequences and numerous unpredicted side effects that were less humane or liberal than its proponents had anticipated,"[21] von Hirsh urged that sentences be based on the harm caused by the criminal act and the culpability of the offender,[22] a position echoed by others.[23]

Although the sensibilities of just deserts dated back to at least the nineteenth century writings of Kant[24] and Hegel,[25] the model, or some form of it,[26] suited the times.[27] States and the federal government from the late 1970s onward eagerly enacted a broad array of tougher sentencing policies and practices, including cessation of parole, enactment of lengthy recidivist enhancements, and increases in sentences more generally (e.g., life without possibility of parole).[28] More recently,

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19. As Russel Christopher notes, dispute exists over when precisely the revitalization of retributivism occurred. *See* Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 846 n.6 (2002) (dating the revival as "early 1970s," but noting that the catalyst might be as early as 1968 with the publication of Herbert Morris's article *Persons and Punishment* in *The Monist*).

20. ANDREW VON HIRSH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

21. *Id.* at xxxvii.

22. *Id. See also* ANDREW von HIRSCH & NILS JAREBORG, GAUGING CRIMINAL HARM: A LIVING-STANDARD ANALYSIS, IN PRINCIPLED SENTENCING 220, 220 (Andrew von Hirsch & Andrew Ashworth eds., 1992) (advocating that a sentence be based on "two dimensions: harm and culpability. Harm refers to the injury done or risked by the act; culpability, to the factors of intent, motive, and circumstance that determine the extent to which the offender should be held accountable for the act.").

23. *See, e.g.,* JOHN KLEINIG, PUNISHMENT AND DESERT 65-72 (1973); RICHARD SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT (1979); Joel Feinberg, *Justice and Personal Desert*, *in* DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 55 (1970).

24. *See generally* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS 99-103 (John Ladd trans., The Bobbs-Merrill Co. 1965) (1797). *See also* IMMANUEL KANT, THE PHILOSOPHY OF LAW 195 (Augustus M. Kelley 1887) (W. Hastie, trans) ("The Penal Law is a Categorical Imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the due measure of it.").

25. *See generally* G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 100-01 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821). *See also* Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349, 375 ("Hegel proclaims that without focusing on the offense and the 'injured universal,' punishment would be nothing more than personal revenge.").

26. *See* Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 432 (1992) (noting that "[j]ust desert . . . is a broad label that captures a range of views").

27. *See, e.g.,* Martin R. Gardner, *The Renaissance of Retribution: An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 784 (footnote omitted) (noting that "retribution is suddenly being seen by thinkers of all political persuasions as perhaps the strongest ground, after all, upon which to base a system of punishment").

28. *See* MICHAEL TONRY, SENTENCING FRAGMENTS PENAL REFORM IN AMERICA, 1975-2025, at 73-91 (2016).

"limiting" retributivism, also called "modified just deserts"[29] or the twin of just deserts,[30] which regards desert as an absolute limit on sentencing severity,[31] played a foundational role in the American Law Institute's revised *Model Penal Code: Sentencing*, adopted in 2017.[32]

In short, although seemingly moribund as of the late 1960s, retributivism quickly rose to dominance in late twentieth century America and has figured centrally in penal theory and justification since.[33] The rise has not been without its critics. As a philosophical matter, retributivism has been condemned as vengeful and retaliatory,[34] motivated by bloodlust reminiscent of late nineteenth century English philosopher James Fitzjames Stephen's assertion that "[t]he criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite,"[35] and that it is "morally right to hate criminals."[36] At the same time, retributivism has been thought marred by a "certain moral smugness, a self-satisfied belief . . . that what we are doing is no regrettable though necessary evil but instead a positive good: respecting persons, doing justice, and generally living up to the

29. Jacob Bronsther, *The Limits of Retributivism*, 24 NEW CRIM. L. REV. 301, 302 (2021).

30. *See* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 60, 77-79 (1974); NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 182-87, 196-202 (1982).

31. While allowing that sentences imposed be influenced by utilitarian goals within the limits set by desert. *See* MODEL PENAL CODE: SENT'G § 1.02(2)(a)(i) (2023) (requiring "sentences in all cases" to be "within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders" and urging consideration of utilitarian sentencing goals only within the bounds of retributive desert). *See also* MORRIS, MADNESS, *supra* note 30, at 161 ("To the limiting retributivist, desert sets the outer limits, upper and lower, of punishment."); *id.* at 149 ("Desert justifies and limits eligibility for punishment; desert and utility combine to distribute punishments. The fine-tuning of sentencing, its distribution, is the result of a balance between social protection by deterrent and incapacitative (or social control) punishment, on one side of the scales, against the minimization of suffering by a parsimonious application of punishment on the other.").

32. MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note at 24 (Am. L. Inst., Proposed Final Draft 2017).

33. *See, e.g.*, David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1623 (1992) (footnote omitted) ("It is widely acknowledged that retributivism, once treated as an irrational vestige of benighted times, has enjoyed in recent years so vigorous a revival . . ."); R.A. Duff, *In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasekara*, 24 MELB. U. L. REV. 411, 411 (2000) ("A striking feature of penal philosophising during the last thirty years has been the revival of retributivism.").

34. *See, e.g.*, JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 2-5 (1990) (regarding retribution is an "unscientific indulgence of emotions of revenge"); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1892 (1991) ("Retributive punishment thus is both an emotional expression of disgust and an exacting of commensurate revenge that is meant to satisfy moral notions about just deserts.").

35. JAMES F. STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99 (London, MacMillan 1983) (1863). *See* JAMES F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 149 (R. J. White ed., Cambridge Univ. Press 1967) (1873) ("[T]he feeling of hatred and the desire of vengeance . . . are important elements of human nature which ought in such cases to be satisfied in a regular public and legal manner.").

36. JAMES FITZJAMES STEPHEN, 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (MacMillan 1883).

most high-minded and Kantian ethical demands."[37] To Professor James Q. Whitman, "[i]n practice, the choice for retributivism in America is turning out to be the choice . . . for degradation."[38]

Critics have also considered retributivism a key driver of the nation's unprecedented penal severity, noting that its reemergence in the late 1970s coincided with massive increases in prison and jail populations.[39] Some of these same critics, however, have questioned the causal role of retributivism. James Whitman, for instance, for instance, noted that the "maelstrom of American harshness" might not be attributable to retributivism, properly understood, but that retributivists nevertheless "played a role": "[O]ne fears that [members of the public] hear are the words 'blame,' and 'condemnation,' and that when they hear those words they succumb to the urge toward vengeance . . . . The problem, once again, is that the public is not very good at understanding all the subtle stuff."[40] Commenting on the nation's turn to penal harshness, Professor Michael Tonry wrote in 1997 that "[w]e live in a repressive era when punishment policies that would be unthinkable in other times and places are not only commonplace but also are enthusiastically supported by public officials, policy intellectuals, and much of the general public."[41]

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37. Dolinko, *supra* note 33, at 1625. Representative of the view, see, for example, Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 221 (1973), reprinted in PUNISHMENT: A PHILOSOPHY & PUBLIC AFFAIRS READER 3, 7 (A. John Simmons et al. eds., 1995) ("I believe that retributivism can be formulated in such a way that it is the only morally defensible theory of punishment."). *See also, e.g.*, Lawrence H. Davis, *They Deserve to Suffer*, 32 ANALYSIS 136 (1972).

38. James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 107 (2003).

39. *See, e.g.*, Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 17 (2003) (mass incarceration has "been justified, and sometimes exacerbated by, legislation that abandons the goal of rehabilitation and embraces the principle of retribution"); Ekow N. Yankah, *Punishing Them All: How Criminal Justice Should Account for Mass Incarceration*, 97 RES PHILOSOPHICA 185, 188-89 (2020) (arguing that unwinding mass incarceration requires turning away from the idea of desert); Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77, 79 (2013) (objecting to the "deleterious effects of reliance on desert as the linchpin of punishment policy").

40. Whitman, *Plea Against*, *supra* note 38, at 87, 89, 93. *See also* Alice Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727, 742 (2009) (footnote omitted):

> [T]he renewed attention to desert in Anglo-American sentencing theory coincided with the explosion of the United States prison population and the imposition of increasingly severe sentences. Correlation is not causation, of course, and desert theorists take pains to explain why they are not to blame for the more severe sentences. But the coincidence of the resurgence in desert theory with the rapid increase in sentence severity does suggest that, at the very least, desert has failed as a limiting principle.

41. Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1752 (1999).

B. Dan's Contributions

In the late 1990s, Dan was among the cadre of thinkers driving a new phase of the "retributivist revival,"[42] one pushing back on common misunderstandings of retributivism and broadening and deepening its intellectual foundations. While still a student at Harvard Law School,[43] Dan authored a piece, published in the *University of Toronto Law Journal*, marking his initial venture into the field.[44] Dan argued that punishment should be understood within the larger landscape of political obligations, a premise that he would expand on later in his career. He described and defended what he called the "confrontational conception of retributive justice,"[45] which he later rephrased as the Confrontational Conception of Retribution (CCR), which he developed and applied until his death.[46]

After law school, when serving as a Berkman Fellow at Harvard, Dan published his second article—*Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, in the *Vanderbilt Law Review*.[47] In hindsight, the article highlighted several characteristics marking Dan's later scholarship.

First, it demonstrated Dan's determination to clarify, and to a degree reconstruct, retributivism. In the article's introduction, Dan wrote that by the end of the article, "I hope to have encouraged critics of retribution to join the retributivist camp. But I also hope to have disturbed the settled views of those who may already self-identify as retributivists."[48] Over the ensuing eighty-four pages of the article, Dan identified and expounded upon on what he saw as the proper

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42. *See* Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 87 (2010). *See also* Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1835 (1999) ("[R]etribution has lately received renewed respect."); R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUST. 1, 1-2 (1996) ("Penal theory in the 1970s was marked by a retributivist revival, in reaction against the consequentialist orthodoxies that had dominated penal thought in the postwar period.").

43. The earliest JLR Westlaw mention I could find of Dan was a 1999 book review authored by Professor David Wilkins in which Dan was thanked for his research and editorial assistance. *See* David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924 (1999) (reviewing PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (1999)). Dan's CV, however, mentions his authorship of an anonymous law school case note. *See Criminal Law—Perjury—Sixth Circuit Sustains Perjury Conviction for Answer to Question with Mistaken Premise,* United States v. DeZarn*, 157 F.3d 142 (6th Cir. 1998)*, 112 HARV. L. REV. 1783 (1999).

44. *See* Dan Markel, *The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States*, 49 U. TORONTO L.J. 389, 429 (1999) (explaining why punishment should be understood within the broader landscape of political obligations).

45. *Id.* at 421-45.

46. *See infra* note 66 and accompanying text.

47. Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001) [hereinafter *Beautifully Retributive*].

48. *Id.* at 2164.

parameters of retributivism and how and why his understandings did not support then-popular shaming sanctions (e.g., requiring an individual to publicly wear a sandwich board proclaiming his conviction).

Second, in *Beautifully Retributive*, Dan displayed his willingness to take on intellectual interlocutors, including those far more senior and established than he. In the piece, Dan had Professor James Q. Whitman of Yale Law School in his crosshairs. Dan disagreed with his characterization of shaming punishments as "beautifully retributive," calling Whitman's conception "entirely inconsistent with retributivism."[49] He criticized what he saw as Whitman's stilted understanding of retributivism (less directly, he criticized University of Arizona Professor Toni Massaro and Yale Law's Dan Kahan for what he saw as their flawed views).[50] Acknowledging the critiques of what might be called the "strong" version of retributivism, predicated strictly upon desert,[51] Dan demonstrated why retribution, when properly understood, "is actually hostile toward shaming punishments."[52]

In the article's last part, Dan argued that retributivism, especially CCR, misaligned with shaming. This was because the denunciatory aspect of shaming allows—indeed condones—the public's role in punishment, rather than having the state be the exclusive agent (as CCR would have it): "[S]haming punishments, by invoking the aid of the crowd, challenge the idea that it is only the state that may play a role in the practice of enacting retribution. To the extent this is true, this change in the punishing agent's identity effects a radically dangerous departure from retribution."[53] To Dan, retribution "is less interested in expressing condemnation to the world and more interested in communicating the message of opprobrium to the offender,"[54] regardless of any "external social ends it might serve, that is, as worthwhile in itself."[55]

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49. *Id.* at 2163-64.

50. *Id.* at 2180-82. In a later piece, when Dan was still pre-tenure at Florida State, he at length critiqued Kahan, this time for the reasoning behind his disavowal of his prior endorsement of shaming sanctions. *See* Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385 (2007) (critiquing Dan M. Kahan, *What's* Really *Wrong with Shaming Sanctions*, 84 Tex. L. Rev. 2075 (2006)). Although by no means of the same academic stature as the others, I too was the target of Dan's critical gaze, just before we became colleagues at FSU Law. *See* Dan Markel, *Connectedness and Its Discontents*, 155 U. PA. L. REV. PENNUMBRA 38 (2006) (responding to Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257 (2005)).

51. *See* Markel, *Beautifully Retributive*, supra note 47 at 2160 (characterizing the camp as being viewed as "having an insatiable psychological drive to exact revenge on behalf of victims or to express disgust at the wrong for the sake of communal solidarity") (footnote omitted).

52. *Id.* at 2179.

53. *Id.* at 2216.

54. *Id.* at 2189.

55. *Id.* at 2193. *See also id.* at 2195 (footnote omitted) ("[E]ffective communication to the offender is of fundamental importance to the practice of retribution. The practice of

Next came *Against Mercy*, written when Dan was an associate at a D.C. law firm and published in 2004 by the *Minnesota Law Review*,[56] addressed whether and how retributivism is consistent with the exercise of mercy in the criminal legal system. The article again highlighted Dan's gadfly tendencies, arguing against standard retributivist critiques of mercy,[57] and making the case that mercy, through the lens of CCR, is justified under some circumstances.[58]

Dan's next piece was *Death Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, published in 2005 when he was an assistant professor at FSU Law. This time he argued, again against the grain of commonly conceived retributivism, that Governor George Ryan's wholesale emptying of the Illinois death row was retributively justified.[59] To Dan, the commutations were not only permitted as a retributive matter,[60] but were required, and that CCR demanded mitigation of the harshening in criminal sentences overall and abolition of the death penalty in particular.[61] In advancing his claims, Dan was at pains to correct what he saw as

> the cramped interpretation of retributive justice that prevails in legal and scholarly discourse. Countless cases in the Supreme Court equate retributivism with revenge or the desire to make criminals suffer or both. Equally dispiriting, various commentators reflexively embrace this view, especially when trying to characterize their retributivist interlocutors. This, I argue, is far too shallow and misleading an account of the meaning of retributive justice.[62]

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retribution would not be intelligible, for example, if the offender could not understand the message that the state was sending."); *id.* at 2197 ("The offender, then, must understand that he is experiencing retribution even if he does not accept the reasons for it.").

56. Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004).

57. *See, e.g.*, *id.* at 1472 (challenging common retributivist aversion for taking account of post-sentence events, stating that "it would be consistent with retributivism for the *legislature* to authorize executive consideration of postconviction good behavior for a reduction in the severity of certain punishments . . . . [P]ostconviction actions are susceptible to analyses of desert, and therefore are compatible with retributivism.").

58. *Id.* at 1479-80.

59. Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 Harv. C.R.-C.L. L. Rev. 407 (2005).

60. *See, e.g.*, *id.* at 463 (noting that "the concern for accuracy in distribution of punishment is fundamentally a retributivist concern").

61. Dan was not the first retributivist to criticize the death penalty. For earlier critiques see, for example, John P. Conrad, *The Retributivist's Case Against Capital Punishment*, *in* THE DEATH PENALTY: A DEBATE 17 (Ernest van den Haag & John P. Conrad eds., 1983) (criticizing capital punishment from a retributivist perspective); David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1 (1998); Robert A. Pugsley, *A Retributivist Argument Against Capital Punishment*, 9 HOFSTRA L. REV. 1501 (1981).

62. Markel, *supra* note 59, at 410-11 (footnotes omitted).

During his too-brief career, Dan wrote several other retribution-related articles, including concerning punitive damages,[63] and whether and how hedonics/subjectivity bears on retributive justice.[64] Just before his death, he wrote an expansive piece on what he saw as the relationship between retributivism and the demands of democratic citizenship, commissioned in the inaugural issue of the *Virginia Journal of Criminal Law,*[65] and commented upon by several fellow legal academics (to which Dan replied).[66]

Before concluding, I want to briefly discuss two other articles displaying Dan's determination to clarify what he saw as the mistakenly harsh understandings of retributivism, and the need for a more capacious, and less punitive, retributive theory and justice. Both articles use as their centerpiece the Supreme Court's 2007 decision in *Panetti v. Quarterman*,[67] which held that the Eighth Amendment prohibited execution of a death row inmate suffering from "gross delusions" stemming from "extreme psychosis."[68] The Eighth Amendment would be violated, the five-justice majority reasoned, because the execution of an inmate who cannot comprehend the reasons for his execution offends moral values and "serves no retributive purpose."[69]

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63. *See* Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239 (2009).

64. *See* Dan Markel et al., *Beyond Experience: Getting Retributive Justice Right*, 99 CAL. L. REV. 605 (2011); Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CAL. L. REV. 907 (2010).

65. *See* Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1 (2012). In doing so, Dan took on what Antony Duff called one of the central "pitfalls for retributivism": the need to explore and establish its "essential political grounding." R.A. Duff, *Retrieving Retributivism*, *in* RETRIBUTIVISM: ESSAYS OF THEORY AND POLICY 3, 5-6 (Mark D. White ed., 2011). Duff wrote that "If we are ambitious, we might hope to articulate the one true political theory and to draw from it the one true theory of punishment." *Id*. At the time of his death, Dan was engaged in doing just that.

66. *See* Dan Markel, *Making Punishment Safe for Democracy: A Reply to Professors Bowers, Cahill & Duff*, 1 VA. J. CRIM. L. 205 (2012). In 2011, Dan also published a book chapter explaining CCR and defending its role as a core aspect of "condemnatory communicative state action directed at the offender." Dan Markel, *What Might Retributive Justice Be? An Argument for the Confrontational Conception of Retributivism, in* RETRIBUTIVISM: ESSAYS OF THEORY AND POLICY 49, 49 (Mark D. White ed., 2011).

67. 551 U.S. 930 (2007).

68. *Id*. at 933, 936. Previously, in *Ford v. Wainwright*, the Court held that the Eighth Amendment prohibited execution of an inmate who, post-sentencing, suffered from "pervasive delusion[s]" associated with "[p]aranoid [s]chizophrenia." 477 U.S. 399, 402-03 (1986). The Court

> seriously question[ed] the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation.

Id. at 409 (internal citations omitted).

69. *Panetti*, 551 U.S. at 958.

Elaborating on the question of whether retribution is served by executing an insane death row inmate, the Court emphasized the communicative purpose of punishment, channeling Dan's views that

> it might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed. The potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question, however, if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.[70]

According to *Panetti*, whether execution is constitutionally permissible turns on whether an inmate's "concept of reality" is "so impair[ed]" that he cannot grasp the "meaning and purpose" of the execution or the "link between [his] crime and its punishment."[71] Mental illness must render a condemned inmate unable to "reach a rational understanding of the reason for [his] execution."[72]

Applying this reasoning, the Court found that Panetti's mere awareness of the state's articulated basis for executing him was insufficient. The Court's concern was that his understanding of the state's reason—that it wished to stop Panetti's preaching—was not tethered to the actual reasons for executing him.[73] The Court reversed and remanded the case, directing the trial court to adopt procedures to assess whether Panetti's mental illness prevented him from comprehending the meaning and purpose of his death sentence.[74]

In the first of the two articles, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*,[75] Dan unpacked and critiqued the Court's retributive rationale. He objected to the Court's pronouncement that retributivism requires that the desires of the "community as a whole" be satisfied.[76] To Dan, "what makes a justification of punishment retributive in nature is its ability to be explained and appreciated for the intrinsic value in the punishment of the offender for the offense, without reference to be contingent benefits that the public might (or might not) enjoy."[77] Dan noted, however, that the Court also

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70. *Id*. at 958-59.

71. *Id*. at 958, 960.

72. *Id*. at 958.

73. *Id*. at 955.

74. *Id*. at 962.

75. Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163 (2009).

76. *Id*. at 1173.

77. *Id*. at 1176 (footnote omitted).

focused on the defendant—that s/he "recognize at last the gravity of his crime"[78]—a focus with which Dan agreed as being substantially consistent with retributivism.[79]

Dan then took the Court to task for its varied understandings of retribution in recent years, reasoning that all would have allowed Panetti's execution to procced.[80] Dan thereafter expounded on how and why retributive punishment is properly understood as a form of "justified communicative state action," as distinct from, *inter alia*, revenge.[81]

In the last two parts of the article Dan pushed down on the throttle. After emphasizing that the arbitrariness and potential error inhering in the capital system are inconsistent with retributivism,[82] Dan argued that the Court's new-found communicative conception of retributivism was inconsistent with the death penalty full stop. This was because death forecloses any opportunity to see the norms animating retributive justice manifest in the person's behavior and outlook. After execution, a condemned individual cannot conduct himself in a manner that affirms notions of moral responsibility or equal liberty under law.[83]

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78. *Panetti*, 551 U.S. at 958.

79. Markel, *supra* note 75, at 1177. Dan's caveat:

> A better way of framing the goal discussed by the Court is to understand that the goal of state retribution is not to achieve the defendant's self-awareness of his guilt, but rather to create the conditions under which the defendant can come to develop self-awareness of his wrongdoing and respond appropriately. This understanding makes punishment's value noncontingent but still internally intelligible and retributive in nature. But in order to assess the nature and implications of the Court's retributivist reasoning, we need to examine why we should care if the defendant recognizes the gravity of the crime he committed. Justice Kennedy's opinion in *Panetti* makes clear that, under the Constitution, we must care about what the punishment means to the offender. But the Court's reasoning here is opaque because it fails to explain what the connection is between the defendant's recognition of the gravity of the crime and the retributive punishment imposed in response to that crime.

Id. at 1178 (emphasis omitted) (footnotes omitted).

80. *Id*. at 1181.

81. *Id*. at 1182-92.

82. *Id*. at 1192-94.

83. *Id*. at 1195 (footnote omitted). *See also id*. at 1207 (emphasis omitted) (footnote omitted):

> [Execution methods do not] operate as a sufficiently communicative mode of punishment because such methods provide no opportunity in the here and now for the defendant to respond to the communicative experience of punishment—defined as the death penalty in this case. If there's no opportunity to respond meaningfully, then the punishment serves only the expressive purposes of the state or the public in promoting opportunities for social denunciation, vengeance-minimization, or some other contingent goal such as general deterrence. To use Kant's famous words, one would be using the offender merely as a means to an end.

In backing a bilateral communication between the condemned and the state, Dan had intellectual forbears. *See*, *e.g.*, R.A. DUFF, TRIALS AND PUNISHMENTS 8 (1986) (identifying need that the criminal justice system be "one to which the defendant is meant to respond, and in which she is called to participate, as a rational moral agent"); Herbert Morris, *A*

Thereafter, Dan argued that the death penalty was unjustified in communicative terms because it is "immodest."[84] This is because its finality precludes any governmental expression of contrition to the executed party, which might be in order because of the inherent risk of executing innocents.

In the article's conclusion, Dan argued that *Panetti*'s reliance on communicative retributivism signaled the demise of the Court's "penal agnosticism."[85] The Court's commitment to negative retributivism, Dan reasoned, obliges more searching proportionality review of not only capital cases, but also non-capital cases: all sentences must be "'reasonably proportionate' to the offender's offense and culpability, instead of being merely not 'grossly disproportionate.' "[86]

In the second piece, *May Minors Be Retributively Punished after* Panetti *(and* Graham*)?*, published in the *Federal Sentencing Reporter*,[87] Dan picked up where he left off, canvassing the Court's Eighth Amendment decisions to make the case for retributive limits on punishment. In *May Minors*, he added to the mix *Graham v. Florida,*[88] decided after *Panetti,* where the Court held that individuals under age eighteen cannot be sentenced to life-without-parole (LWOP) based on a conviction for a non-homicide crime.

In *Graham*, the Court adopted a more demanding Eighth Amendment proportionality test in such cases, compared to the undemanding test applied to adults.[89] Noting juveniles' lesser maturity and cognitive capacity (compared to adults), the Court held that a life-without-parole sentence for a non-homicide offense was justified by neither retribution nor deterrence.[90] Nor was incapacitation justified: "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make

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Paternalistic Theory of Punishment, 18 AM. PHIL. Q. 263, 264 (1981) (advocating that punishment carry a communicative component which "convey[s] to the wrongdoer . . . that the deprivation is imposed because of wrongdoing"). *See generally* Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1266-67 (2005) (discussing retributive theorists who endorsed "[c]ommunicative" theories). On the difference between expressivist and communicative goals of punishment, *see* Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 26 nn.65 & 66 (2012) (explaining that expressivist account is mainly concerned with expressing to the public disdain for the offender/her offense, whereas a communicative account is concerned with the relationship between the offender and the polity).

84. Markel, *supra* note 75, at 1198.

85. *Id.* at 1213.

86. *Id.* at 1221.

87. *See generally* Dan Markel, *May Minors Be Retributively Punished after* Panetti *(and* Graham*)?*, 23 FED. SENT. REP. 62 (2010).

88. Graham v. Florida, 560 U.S. 48 (2010).

89. *See, e.g.*, Ewing v. California, 538 U.S. 11, 11-12 (2003).

90. *Graham*, 560 U.S. at 71-72.

that judgment questionable."[91] Finally, rehabilitation was not served because life-without-parole "forswears altogether the rehabilitative ideal."[92] Ultimately, the Court categorically prohibited LWOP from being imposed on minors convicted of non-homicidal offenses.[93]

To Dan, although *Graham* made no mention of *Panetti*, "the outcome in *Graham* cohere[d] startlingly well with the reasoning in *Panetti.*"[94] Even though "the Court still seems unaware of them," the "connections are present . . ."[95] The connections, Dan reasoned, are that minors such as Graham are not fit interlocutors for the state's communicative message of condemnation for the same reasons that the Court found that the Eighth Amendment bars imposition of LWOP—immaturity.[96] The "deeper principle embodied in *Panetti* should apply to all offenders who were juveniles during the life cycle of the crime and shield them from any retributive condemnatory punishment."[97]

II. CONCLUSION AND REFLECTIONS

Despite having his career tragically cut short, Dan Markel had a major scholarly impact.[98] He published in several areas, but it is fair to say that his influence was greatest in penal theory, regarding retributivism in particular. To Dan, retributivism was not a vindictively moralistic creed simplistically demanding draconian punishment, but rather was a complex and nuanced theory, holding promise of a more circumscribed and humane punishment regime. Dan dedicated himself to holding others to account for what he saw as their inaccurate understanding of retributivism, especially when deployed in support of harshly punitive policies (e.g., shaming punishments, the death penalty).

Dan's scholarship, however, was not simply corrective; it was highly creative and ambitious, even though it was not always persuasive.[99]

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91. *Id.* at 72-73.

92. *Id.* at 74.

93. *Id.* at 82. The Court added that "[a] State need not guarantee the offender eventual release, but if it imposes a sentence of life, it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Id.* at 75.

94. Markel, *supra* note 87, at 62.

95. *Id.* Dan, who in print as in life was not lacking in chutzpah, reasoned that the *Panetti* Court "itself seemed not to fully or rationally understand that its rationale for the new requirement could not be limited simply to the death penalty context." *Id.* at 64; *see also id.* at 63-64 (the *Panetti* Court's holding "was derived (perhaps unwittingly) . . . through an embrace of a justification of punishment that I have called communicative retributivism").

96. *Id.* at 87.

97. *Id.* at 64.

98. Dan's scholarly impact, it should be emphasized, was not limited to print. He had a genuinely masterful talent—a penchant, really—for facilitating personal connections among scholars, young and old, which has had a lasting impact on the careers of multiple legal academics.

99. See, for example, David Gray's critique of Dan's retribution-based opposition to the death penalty, in particular the persuasiveness of "Confrontational Conception of

But in advancing his claims Dan always left his readers with plentiful food for thought. And in a world where such sustenance is rare, that is surely a very significant accomplishment for any law professor.

Retributivism." David Gray, *Retributivism, Confrontation, and the Death Penalty: Some Skepticism about Dan Markel's Skepticism*, 51 TEX. TECH. L. REV. 1, 4 (2018). One might also contest Dan's effort to apply *Pannetti* and *Graham* beyond their contexts, as discussed in the text. Dan, however, would have been heartened to read the Court's more recent decision in *Madison v. Alabama*, 586 U.S. 265 (2019), decided some five years after his murder. In *Madison*, which involved an Eighth Amendment claim by a death row inmate with dementia, the Court reiterated its communicative retributivist rationale, stating that "*Panetti* reasoned that execution has no retributive value when a prisoner cannot appreciate the meaning of the community's judgment." *Id.* at 276. *See also id*. at 278-79 (stating that "an execution lacks retributive purpose when a mentally ill prisoner cannot understand the societal judgment underlying his sentence"). The Court added that "a person who can no longer remember a crime may yet recognize the retributive message society intended to convey with a death sentence." *Id.* at 276-77. Ultimately, the Court remanded the case to the lower court for determination of whether Madison had the "rational understanding" of why the state sought to execute him, as required by *Panetti*. *Id.* at 283.