DAN MARKEL IN COURT

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ABSTRACT

Dan Markel was a criminal law theorist, one of the preeminent thinkers of his generation.[1] *He asked big questions about deep principles of justice without undue concern for whether his conclusions and insights were practical, politically viable, or likely to be persuasive to five justices of the Supreme Court. At the same time, a striking characteristic of his career was his ongoing interest in criminal law in practice, in courtrooms, and in appellate opinions. Put another way, in addition to being a distinguished scholar, he was a hell of a lawyer.*

One indication of his lawyering mindset was, at least based on his citations and references to friends, that two of the articles he admired most were quite practically-minded. One favorite was Dean Michael Cahill's Retributive Justice in the Real World,[2] *which sought to explain the practical, contemporary utility of retributivism, a principle of justice to which Dan (and Dean Cahill) subscribed, but which has not to date been written into law as the exclusive measure of judicial legitimacy. Another was Professor Cass Sunstein's Incompletely Theorized Agreements,*[3] *an article which explained why often it was not merely sensible but desirable for decisionmakers who agreed on an outcome not to worry about the precise grounds for that outcome. In a jury trial, for example, if six jurors wished to vote not guilty because did not believe the prosecution's witnesses who testified that the defendant committed an assault, while six others desired to acquit because while they did credit that testimony, they concluded that the facts testified to established self-defense, it might well be that there is no strong reason to*

*. Edward L. Barrett Jr. Chair and Martin Luther King Jr. Professor of Law, UC Davis School of Law. Although Dan and I were never co-authors, one treasured measure of our interlocutorship and friendship is that Westlaw shows 10 articles written by Dan where he cites and/or acknowledges me, and 9 written by me where I cite and/or acknowledge him. I also thank David Frederick and William S. Harris for sharing recollections of practicing law with Dan.

1. Much of Dan's work is available online on SSRN: https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=342089 [https://perma.cc/RWJ4-JAC4].

2. Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815 (2007) (cited in, *e.g.*, Dan Markel, *Making Punishment Safe for Democracy: A Reply to Professors Bowers, Cahill & Duff*, 1 VA. J. CRIM. L. 205, 223 n.63 (2012)).

3. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 (1995) ("Participants in legal controversies try to produce incompletely theorized agreements on particular outcomes. They agree on the result and on relatively narrow or low-level explanations for it.") (alteration in original) (footnote omitted) (cited in, *e.g.*, 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, 1405 n.102 (2007)).

deny the jurors the right to vote "not guilty" until they can come to agreement on the reasons.[4]

This is a sketch of Dan Markel's legal work in connection with courts. It addresses his own legal career, before and after becoming a professor, as well as the impact of his scholarship on courts.

I. DAN MARKEL THE LAWYER

Dan graduated from Harvard Law School in 2001, and then clerked for Judge Michael Daly Hawkins on the Ninth Circuit. In 2002, Dan joined the elite litigation firm now named Kellogg, Hansen, Todd, Figel & Frederick in Washington, D.C. Dan was involved in high-stakes matters from the beginning.

One significant case involved the question of whether states could deny their subordinate municipalities and agencies the right to provide internet services to the public, leaving such services to the private market. His client, Southwestern Bell Telephone, argued in the U.S. Supreme Court that a Missouri law prohibiting the provision of such services was valid, and that an Eighth Circuit opinion to the contrary was erroneous.[5] Of course, in a case of this magnitude, it is hardly surprising that Dan was but one of several lawyers arguing for his side. Nevertheless, it is significant that a junior associate—if Dan ever was such a thing—was on the briefing at all. In the Supreme Court, Dan's client won. The Supreme Court explained:

> Section 101(a) of the Telecommunications Act of 1996, 110 Stat. 70, 47 U.S.C. § 253, authorizes preemption of state and local laws and regulations expressly or effectively "prohibiting the ability of any entity" to provide telecommunications services. The question is whether the class of entities includes the State's own subdivisions, so as to

4. A notable example of pop culture support for Professor Sunstein's point was the Miller Lite Beer ad campaign, where athletes and other celebrities engaged in mock-arguments about whether the wonderful quality of the product arose from the fact that it "tastes great" or is "less filling." Chris Chafin, *Miller Lite*, *1982 09 16, First Lite Beer Bowling Tournament,* YouTube (May 17, 2011), https://www.youtube.com/watch?v=J6SBtg9VQ9M [https://perma.cc/UP59-6Y6D].

5. Brief of Petitioner, Sept. 8, 2003, Nixon v. Missouri Mun. League, 541 U.S. 125 (2004) (Nos. 02-1238, 02-1386, 02-1405), 2003 WL 22087487 at *10; Reply Brief of Petitioner, Nixon v. Missouri Mun. League, 541 U.S. 125 (2004) (Nos. 02-1238, 02-1386, 02-1405), 2003 WL 22873091 at *1.

> affect the power of States and localities to restrict their own (or their political inferiors') delivery of such services. We hold it does not.[6]

While Supreme Court litigation is undoubtedly challenging and interesting,[7] Dan's heart was elsewhere.

Dan and Kellogg partner David Frederick were co-counsel, pro bono, to Jonathan Gordon, a Merrill Lynch financial consultant convicted of federal fraud and conspiracy charges in connection with check-kiting of accounts owned by Stan Lee Media. Pulling no punches, Dan's reply brief began: "Jonathan Gordon was wrongly convicted."[8] Their briefing argued that the evidence was insufficient to sustain the guilty verdict, and that the sentence was unconstitutional because the court, rather than a jury, found facts necessary to impose certain sentencing enhancements.[9]

The brief has the ring of sincerity; although arguments that the evidence is insufficient to sustain a criminal conviction are very difficult to win, the authors of the brief really seemed convinced that the evidence of guilt was unsatisfactory. Nevertheless, the Ninth Circuit rejected the argument, but remanded for resentencing, agreeing that under the then-developing law of the right to jury trials, a defendant could not receive an enhanced sentence without jury findings.[10] The U.S. Bureau of Prisons website indicates that their client was released the day the 9th Circuit's mandate issued, suggesting that the argument for a lower sentence was accepted.

The work that was most prophetic of Dan's future was his amicus brief in *United States v. Gementera*,[11] also a widely publicized case.[12] In *Gementera*, U.S. District Judge Vaughn Walker sentenced a young person, convicted of stealing mail, to stand outside a post office wearing a sign stating "I stole mail. This is my punishment." A majority of the Ninth Circuit upheld the punishment on appeal. The opinion drew upon legal scholarship regarding shaming punishments, pro and con,

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6. Nixon v. Missouri Mun. League, 541 U.S. 125, 128-29 (2004).

7. Indeed, the question of municipal broadband remains controversial. *See, e.g.,* T. Randolph Beard, PhD et al., *The Law and Economics of Municipal Broadband*, 73 FED. COMM. L.J. 1, 3 (2020); John T. Cobb, *Broad-Banned: The FCC's Preemption of State Limits on Municipal Broadband and the Clear Statement Rule*, 68 EMORY L.J. 407 (2018).

8. *See* Reply Brief of Defendant-Appellant, United States v. Gordon, 117 Fed. Appx. 501 (9th Cir. 2004) (Nos. 03-50383, 03-50388), 2004 WL 1762982, at *1.

9. *See id*. at *2-19.

10. United States v. Gordon, 117 F. App'x 501, 503 (9th Cir. 2004).

11. 379 F.3d 596 (9th Cir. 2004), *cert denied*, 546 U.S. 1031 (2005).

12. *See Thief to Wear 'I Stole Mail' Sign*, BBC NEWS (Nov. 28, 2005), http://news.bbc.co.uk/1/hi/world/americas/4479996.stm#:~:text=BBC%20NEWS%20%7C%20Americas%20%7C%20Thief%20to,wear%20'I%20stole%20mail'%20sign&text=The%20top%20US%20court%20has,Gementera's%20appeal%20without%20any%20comment [https://perma.cc/M42R-MQ5T]; *see also Supreme Court Oks Mail Thief's Penalty*, THE SPOKESMAN-REVIEW (Nov. 29, 2005), https://www.spokesman.com/stories/2005/nov/29/supreme-court-oks-mail-thiefs-penalty/ [https://perma.cc/38XW-FNYQ].

from a variety of scholars. The majority's conclusion: "While the district court's sandwich board condition was somewhat crude, and by itself could entail risk of social withdrawal and stigmatization, it was coupled with more socially useful provisions, including lecturing at a high school and writing apologies, that might loosely be understood to promote the offender's social reintegration."[13]

Judge Hawkins dissented, contending that shaming punishments were both unauthorized by the Sentencing Reform Act and bad policy. The dissent cited Dan's work:

> One scholar has defined a "shaming" punishment as "marked by two features: first, there is an attempt to debase, degrade, or humiliate the offender; and second, the degradation occurs before the public eye, often but not always with the aid of the public." Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 Vand. L.Rev. 2157, 2178 (Nov.2001). This condition—requiring Gementera to wear a sandwich board outside a public post office declaring his crime—clearly qualifies as a "shaming" punishment.[14]

Notably, Judge Hawkins cited a paper Dan published the very year he graduated from law school; typically a published paper would have been started at least a year before, suggesting that Dan wrote this as a student. Dan's publication record reflects this remarkable maturity; in addition to a note[15] and a case comment,[16] published during his time on the *Harvard Law Review*, in 1999 he published a paper in the *University of Toronto Law Journal*,[17] and a book review essay in the *European Journal of International Law*.[18] The 1999 publications may well have been written in whole or part when Dan was a 1L, but in addition to innate brilliance, he had the advantage of a pre-law-school fellowship at Cambridge to cultivate his scholarly abilities.

After the panel affirmance, Dan entered the *Gementera* case. He organized and drafted an amicus brief of law professors in support of a petition for rehearing or reconsideration en banc.[19] The brief reflected Dan's view that shaming punishments were cruel and dehumanizing, as set out in his *Vanderbilt Law Review* article. The article

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13. Gementera, 379 F.3d at 606.

14. *Id*. at 611 n.1 (Hawkins J., dissenting).

15. Dan Markel, *Can Intellectual Property Law Regulate Behavior? A "Modest Proposal" for Weakening Unclean Hands*, 113 HARV. L. REV. 1503 (2000).

16. Dan Markel, *Criminal Law–Perjury–Sixth Circuit Sustains Perjury Conviction for Answer to Question with Mistaken Premise. – US v. Dezarn, 157 F.3d 1041 (6th Cir. 1998).*, 112 HARV. L. REV. 1783 (1999).

17. Dan Markel, *The Justice of Amnesty? Towards A Theory of Retributivism in Recovering States*, 49 U. TORONTO L.J. 389 (1999).

18. Dan Markel, *Ethics and Authority in International Law*, 10 EUROPEAN J. INT'L L. 200 (1999).

19. Brief for Law Professors as Amici Curiae Supporting Appellant, United States v. Shawn Gementera, 379 F.3d 596 (9th Cir. 2004) (No. 03-10103).

and his brief illustrate one of Dan's most significant characteristics: His remarkable gifts of friendship, collaboration, and connection. His article thanks a wide range of illustrious scholars, his teachers at Harvard and others:

> I am grateful to Matej Accetto, David Barron, Michael Blake, Richard Epstein, Charles Fried, Bryan Garsten, Jim Von Der Heydt, Rob Howse, Duncan Kennedy, Avery Kolers, Jennifer Llewellyn, Frank Michelman, Martha Minow, Herb Morris, Martha Nussbaum, Richard Parker, Eric Posner, Matt Price, David Rosenberg, Joe Singer, Carol Steiker, Bill Stuntz, Lloyd Weinreb, Jim Whitman, David Wilkins, and Jonathan Zittrain.[20]

Similarly, his brief was joined by his future colleagues and, to use a term he favored, "interlocutors." He assembled an "Amicus Brief Steering Committee" consisting of Erwin Chemerinsky, Gabriel J. Chin, Wayne A. Logan, and Toni M. Massaro, and in addition represented law professors Barbara A. Babcock, Robert M. Bloom, Joshua Dressler, John Flym, Stephen P. Garvey, Thomas C. Grey, Virginia E. Hench, Stephen Henderson, Joseph Kennedy, Jeffrey L. Kirchmeier, Andre Moenssens, Anne Moreno, Herbert Morris, Andy Taslitz, Robert Weisberg, and James Q. Whitman.[21]The Ninth Circuit, unfortunately, was not persuaded to grant rehearing or en banc review. Mr. Gementera's counsel filed a certiorari petition citing Dan's work,[22] which was likewise unsuccessful.

After affirmance, Judge Walker declined to change the condition, concluding that the punishment would not be unduly psychologically damaging.[23] In 2006, Dan reported on *PrawfsBlawg* that Mr. Gementera was sent to prison for stealing mail again, noting "those who have been pushing the specific deterrence angle regarding shaming punishments are going to have a tougher time pushing their case in the public sphere now that the most famous recent shaming punishment has appeared to have had no effect whatsoever on the offender."[24]

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20. Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2157, n.a1 (Nov. 2001).

21. Brief for Law Professors, *supra* note 19, at i-ii.

22. Gementera v. United States, 2005 WL 1991666, *petition for cert. filed*, 2005 WL 1991666 (No. 05-227 at *vii) (Aug. 11, 2005).

23. United States v. Shawn Gementera, No. 01-454 VRW, 2006 BL 23057 (N.D. Cal. Feb. 15, 2006).

24. Dan Markel, *Gementera Goes to Prison*, PRAWFSBLAWG, (May 25, 2006, 2:15 PM), https://prawfsblawg.blogs.com/prawfsblawg/2006/05/gementera_goes_.html [https://perma.cc/6YHH-YCEY].

David Frederick, a Kellogg partner who worked with Dan, recently offered the following recollection of his service as a full-time practicing lawyer:

> We all remember Dan as a brilliant, confident, somewhat strong-willed presence. My recollection of the *Gordon* case is that Dan handled it without much substantive input by me. He was a self-starter in so many respects, which is why academia was a comfortable perch for him. He is remembered at the firm with fondness and we still feel the tragedy of his passing.[25]

After joining the faculty of Florida State University School of Law in 2005, much of Dan's work was dedicated to traditional scholarly work. However, Dan continued his involvement in court cases.

Dan was involved in litigation regarding his adopted home state of Florida. The Florida legislature enacted controlled substance provisions explicitly making knowledge of the substance a defense, rather than the element of an offense.[26] Such a statute is remarkable. As a brief Dan joined arguing that the law was unconstitutional argued, "the legislature's removal of the element of *mens rea* from . . . Florida Criminal Law is not only an atavistic throwback to the barbarism of the Dark Ages, it is repugnant to the civilized common law as understood by American lawyers in 1776 and the nation's founders in 1787."[27] It meant, for example, that a UPS delivery person who delivered a sealed box containing cocaine would bear responsibility for proving she did not know the contents, on pain of up to life imprisonment. Unsurprisingly, people charged with the offense contended it was unconstitutional.

A U.S. District Court held the statute invalid,[28] but the Eleventh Circuit rejected the argument of Dan and his fellow amici, holding that, because the question was raised on collateral review, the conviction could be set aside only if it was contrary to clearly established law, a standard which, the court held, had not been met.[29] The Supreme Court denied certiorari,[30] apparently leaving the brief's fundamental question open: Can legislatures dispense with mens rea in serious cases involving wholly innocent conduct? Fortunately, the problem remains rare.

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25. Email from David C. Frederick dated July 17, 2024.

26. State v. Washington, 114 So. 3d 182, 184 (Fla. Dist. Ct. App. 2012). *See generally* Richard Sanders, *The Knowledge Element in Drug Cases: Some Final Thoughts on* Shelton *and* Adkins, FLA. BAR J., July/Aug. 2014, at 40.

27. Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Appellee at 31, Secretary, Florida Department of Corrections v. Mackle Vincent Shelton, 691 F.3d 1348 (Oct. 31, 2011) (No. 11-13515-G).

28. Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289 (M.D. Fla. 2011), *rev'd*, 691 F.3d 1348 (11th Cir. 2012), *cert. denied*, 569 U.S. 923 (2013).

29. *Shelton*, 691 F.3d at 1354-55.

30. *Shelton*, 569 U.S. 923 (2013).

Dan was part of a significant amicus brief in *United States v. Rodriguez*, which involved a provision of the Armed Criminal Career Act imposing enhanced penalties for certain crimes on those who had previously been convicted of a "serious drug offense," which was defined as one in which a term of imprisonment of 10 years or more was authorized by law.[31] The question was whether the 10-year sentence was measured by the base penalty, or whether it could also be met by applicable sentence enhancements. Dan joined an amicus brief which also cited his work and the work of his FSU colleague:

> A number of criminal law scholars have recently discussed the extraordinary legal complications presented by the diversity of State recidivism laws. *See* Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. Pa. L. Rev. 257 (2005); Dan Markel, *Connectedness and Its Discontents: The Difficulties of Federalism and Criminal Law*, 4 Ohio St. J. Crim. L. 573 (2007).[32]

A majority of the Court disagreed with the position of the law professors, holding that the enhanced penalty could be triggered by a prior sentence which exceeded 10 years only because of an enhancement.[33]

In 2014, he was one of a group of law professors who filed an amicus brief in *Yates v. United States*, a case presenting the following question:

> Whether the anti-shredding provision of Sarbanes-Oxley, 18 U.S.C. § 1519, which criminally prohibits the knowing concealment, alteration, or destruction of "any record, document, or tangible object" with the intent to impede a federal investigation, applies to a fisherman who throws undersized grouper into the ocean to avoid sanction under civil fishing regulations.[34]

A divided Court agreed with the professors, holding that a fish was not a tangible object within the meaning of the law.[35]

Dan did not live to see the outcome in *Yates*. Had he done so, given his interest in fairness and equality, he might have asked what the difference between the two cases was—10 years could mean "10 years," and fish are tangible objects, in the sense that they are objects, which are tangible. Perhaps the explanation was that while the underlying ambiguity was indistinguishable, in each case the ox that was gored was very different. Alternatively, perhaps the difference was time. *Rodriguez* was decided in 2007, but by the middle of the next decade, the Court's attitude seemed different. The Supreme Court held a related

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31. Brief for Professors of Criminal Law as Amici Curiae Supporting Respondent, United States of America v. Rodriquez, 553 U.S. 377 (2008) (No. 06-1646). 2007 WL 4351586.

32. *Id*. at *13.

33. United States v. Rodriquez, 553 U.S. 377, 381 (2008).

34. Brief for Eighteen Criminal Law Professors as Amici Curiae Supporting Petitioner, Yates v. United States, 574 U.S. 528 (2015) (No. 13-7451) 2014 WL 3101373 at *I.

35. Yates v. United States, 574 U.S. 528 (2015).

provision of ACCA unconstitutionally vague,[36] and, as in *Yates*, arguably had a more skeptical view of ambiguous provisions imposing draconian sentences.

II. DAN MARKEL'S SCHOLARSHIP IN COURT

In a number of areas, courts and litigants used Dan's work. His scholarship in the areas of sentencing and family status was particularly widely cited.

A. Capital Punishment and Sentencing.

Dan was a dedicated opponent of the death penalty, and often argued for limitations on punishment. In an important, widely-cited 2005 work, he explained why he believed that former Illinois Governor George Ryan was justified in commuting the capital sentences of entire death row population of his state.[37] Dan believed in a particular form of retribution as the justification for punishment:

> [T]he Confrontational Conception of Retribution, or CCR, does not rely on moral desert as the rationale for its justification. Rather, it is fidelity to three other principles that have broader acceptance as specifically, though not necessarily only, political ideals: first, moral accountability for unlawful actions; second, equal liberty under law; and third, democratic self-defense.[38]

The death penalty, under this framework was unjustified:

> By inflicting death on an offender, one violates the intent requirement of the CCR because one necessarily forecloses the opportunity to see the norms of retribution effectuated in the person's behavior during and after the confrontational encounter. After the execution, the offender cannot conduct himself in a manner that affirms notions of moral responsibility or equal liberty under law; in other words, he is precluded from participating in the goods animating retributive justice.[39]

Dan's principled contention was brought to the Supreme Court in a death penalty case involving the question of the procedures applicable to determination of whether a defendant was too insane to be executed.

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36. Johnson v. United States, 576 U.S. 591 (2015). *See generally* Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1137 (2016); Joel S. Johnson, *Vagueness and Federal-State Relations*, 90 U. CHI. L. REV. 1565 (2023); Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65 (2006).

37. 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).

38. *Id*. at 426-27.

39. *Id*. at 460-61 (footnotes omitted).

The defendant in *Panetti v. Quarterman* drew on Dan's work in their merits briefing:

> [E]xecuting an inmate who does not understand the reason for his suffering subverts the death penalty's retributive force:
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> > By grounding retribution's worth upon the criminal's awareness of the state's desire to repudiate his illegitimate claims, we are also able to give greater currency to the idea that punishment is a communicative practice, not merely an expressive one. Thus, effective communication to the offender is of fundamental importance to the practice of retribution. The practice of retribution would not be intelligible, for example, if the offender could not understand the message that the state was sending.
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> Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2195 (2001) (footnotes omitted). In short, the condemned inmate must be able to understand that he is experiencing retribution - that his execution is remuneration to society for the wrongdoing he has committed. An inmate who lacks the ability to rationally perceive this connection is not a "punishable person" for the purpose of retribution.[40]

A divided Supreme Court embraced Dan's reasoning: Petitioner's submission is that he suffers from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced. This argument, we hold, should have been considered."[41]

Dan's work anticipated the future direction of the Court's jurisprudence. He argued, for example, that if the death penalty for juveniles was unwarranted, under the logic of *Panetti*, so too was a life sentence.

> [T]he Court has created a set of rules prohibiting capital punishment against particular crimes—such as rape—and against particular classes of offenders—such as those who at the time of the crime were juveniles or mentally retarded. These rules create a problematic set of distinctions. It certainly makes sense to exclude from punishment those who were mentally incompetent or were incapable of exercising mature moral reasoning because of age. However, there is no plausible basis for suggesting that someone who is mentally impaired enough to be spared execution should not also be spared from spending the rest of

40. Reply Brief for Petitioner at 17-18, Panetti v. Quarterman, 551 U.S. 930 (2007) (No. 06-6407) 2007 WL 1090396.

41. Panetti, 551 U.S. at 960. As of 2024, the case remains ongoing; the latest decision in the case was that Mr. Panetti "lacks a rational understanding of the connection between his offense and his sentence of death and that his execution would therefore violate the Eighth Amendment's prohibition on cruel and unusual punishment." Panetti v. Lumpkin, No. A-04-CA-042-RP, 2023 WL 6348877, at 1 (W.D. Tex. Sept. 27, 2023).

> his life in a cage. The severity of the punishment is not the problem; it's the fact of punishment. The same illogic applies to juvenile offenders.[42]

Ultimately, Dan argued that juveniles could not be retributively punished at all:

> [J]uveniles are widely regarded to lack the same competence as adults because their personalities are still substantially in formation, they are more vulnerable to peer pressure and negative influences, and they exhibit a lack of maturity and responsibility that disproportionately results in reckless behavior. . . . [T]he competence of a juvenile to be a fit interlocutor for the state's retributive punishment no more exists in the context of noncapital punishment than it does in the context of the death penalty.[43]

The Supreme Court has not adopted Dan's position *in toto*. However, in part because of the reasons he articulated, the Court prohibited mandatory sentences of life without parole for juveniles in *Miller v. Alabama*.[44] In *Montgomery v. Louisiana*,[45] the Court made that holding retroactive.

Dan was not cited in the briefing or opinions in *Miller* and *Montgomery*, and of course many other scholars and advocates had participated in the research, litigation, and discourse which led to those decisions. However, courts do not always cite articles which influence their decision making.[46] Influence may be indirect, such as by affecting lawyers (or judicial clerks) who in turn influence courts.[47] There is no

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42. Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1217 (2009) (footnotes omitted).

43. Dan Markel, *May Minors Be Retributively Punished After* Panetti *(And* Graham*)?*, 23 FED. SENT'G R. 62, 64, 2010 WL 6681099.

44. 567 U.S. 460, 470, 489 (2012).

45. Montgomery v. Louisiana, 577 U.S. 190, 213 (2016).

46. Without necessarily implying any impropriety, a number of scholars suggest that the Supreme Court was influenced by scholarship it did not cite. *See, e.g.,* Joëlle Anne Moreno, *Flagrant Police Abuse: Why Black Lives (Also) Matter to the Fourth Amendment*, 21 BERKELEY J. CRIM. L. 36, 40-41 n.18 (2016) ("[M]uch of what seemed new in [Herring v. United States, 555 U.S. 135 (2009)] actually appeared 16 years earlier in a prescient but uncited law review article written by Professors Thomas and Pollack.") (citing George C. Thomas III & Barry S. Pollack, *Balancing the Fourth Amendment Scales: The Bad Faith "Exception" to Exclusionary Rule Limitations*, 45 HASTINGS L.J. 21, 41-42 (1993)); Paul Ohm, *The Many Revolutions of* Carpenter, 32 HARV. J.L. & TECH. 357, 408 (2019) (writing of Carpenter v. United States, 585 U.S. 296 (2018) and noting "many of the majority's arguments echo themes found in uncited articles"); Ofer Raban, *The Supreme Court's Endorsement of A Politicized Judiciary: A Philosophical Critique*, 8 J. L. SOC'Y 114, 117 (2007) (discussing Republican Party of Minn. v. White, 536 U.S. 765 (2002), and noting "[t]he majority opinion's principal arguments, including their very structure, appear to have been lifted from an unmentioned 1987 law review article.").

47. As one practitioner explained:

> Whether or not they cite them, practicing attorneys surely use law reviews to brush up on current developments or to structure arguments. . . . Judges use law reviews, though they may have cite-worthy influence only in rare cases. Likely, judges are influenced by law reviews where an article has been used by a litigant, with or without citation, to structure an argument. Judges' clerks, like practitioners, may use

question that Dan's humane and rigorous views provided support for a critical line of punishment jurisprudence.

Dan's work continues to contribute to the discussion. His scholarship was invoked in a recent California death penalty case in a context to which he might well have been sympathetic:

> If, as the Court concluded in *Panetti*, the communicative purpose of retribution is not served by executing offenders who do not rationally understand the gravity of their offenses, then that purpose is also not served by executing offenders who *already* understand the gravity of the offenses for which they are being punished. *See* Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U.L. REV. 1163, 1177-1178 (2009).
>
> Even being strapped to a gurney in the death chamber cannot guarantee, for those who have never had such an epiphany, that they will, while being executed, finally recognize the gravity of their offenses -- [sic] rather than dying in a state of defiance, or denial, or unreflective, abject animal fear.
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> An offender who is executed learns nothing from the experience. He is dead. The lesson is wasted.[48]

A New Jersey litigant, likewise, drew upon Dan's scholarship in support of a contention that a 70-year sentence without eligibility for parole for 58 years was excessive.[49] When he was 24, the defendant

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> law reviews (in secret, we might surmise) to learn doctrine that was not covered in school.
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> . . .
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> Legislators, their counsels, and their committee staffs use law reviews as they develop the law through legislation.

James W. Harper, *Why Student-Run Law Reviews?*, 82 MINN. L. REV. 1261, 1278 (1998) (footnotes omitted). *See also* Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 78 (2015) (while thoughtfully questioning the utility of much legal scholarship, observing that "legal scholarship can and does have an impact without any citation at all."). *But see* Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1331 (2002) ("It is, of course, possible that a significant number of the approximately 40,000 uncited articles [in the study] were read by someone apart from the author's own immediate family, research assistants, and tenure committee. But it seems unlikely that articles that leave no ripple in legal scholarship are having a substantial influence in the world outside it.").

48. Appellant's Second Supplemental Brief, People v. Steskal, 485 P.3d 1 (Cal. 2021) (No. S122611) 2016 WL 3895167, at *56–57. While the California Supreme Court affirmed the conviction and death sentence, *Steskal*, 485 P.3d 1, 38, Governor Gavin Newsom imposed a moratorium on carrying out death sentences in 2019. Cal. Exec. Order N-09-19 (Mar. 13, 2019).

49. State v. Cuff, No. A-1451-20, 2022 WL 963829, at *1, *3 (N.J. Super. Ct. App. Div. Mar. 31, 2022), *cert. denied*, 283 A.3d 150 (N.J. 2022).

committed a series of kidnappings and robberies in which no victim was physically injured or killed.[50] He argued:

> At its core, retribution as a theory of punishment rests on the ideal that punishment must be proportioned to the offense. *See* Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U.L. REV. 843, 860 (2002) ("It is morally fitting that an offender should suffer in proportion to her desert or culpable wrongdoing."). Criminal punishment as retribution for a wrong is supposed to be distinct from revenge, at least in part due to proportionality: "retribution limits punishment to that which is in proportion to the wrongdoing, whereas revenge is limitless in principle." 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, 437-438 (2005).[51]

Under the circumstances, the court upheld the sentence. The defendant's timing may have represented bad luck. The sentence under consideration had been imposed in January, 2020. Based on a new law passed by the New Jersey legislature, all sentencings as of October 19, 2020 were subject to a new mitigating factor, namely, that the crime was committed by a person under the age of 26.[52]

Dan was one of several scholars prominently featured in a remarkable 2006 decision of Judge William Young of the District of Massachusetts, who tried to make sense of the Supreme Court's holding in *United States v. Booker*.[53] That decision, *United States v. Kandirakis*,[54] was honored by *The Green Bag* board of editors as a piece of exemplary legal writing for the year.[55] The well-known Catch-22 of *Booker* was that the Court held that the Sentencing Guidelines were unconstitutional as a mandatory sentencing structure, because they denied the right to a jury trial on essential findings, but were not void, because they could be treated as advisory.[56] This holding was the basis for Dan's successful claim of sentencing error in the *Gordon* case.[57]

Quoting a friend of Dan's, Doug Berman, the opinion began: "What is overlooked in post-*Booker* discussions is the fact that, for seventeen

50. *Id*. at *1-3; State v. Cuff, 217 A.3d 129, 138 (N.J. 2019) ("Defendant also contends that his ninety-year aggregate sentence constituted excessive punishment for crimes in which no victim was killed or injured.").

51. Brief on behalf of Defendant-Appellant, State v. Cuff, No. A-001451-20 (N.J. Super. Ct. App. Div. Mar. 31, 2022) 2021 WL 11957830, at *45–46.

52. State v. Rivera, 265 A.3d 134, 144 (N.J. 2021).

53. 543 U.S. 220 (2005).

54. 441 F. Supp. 2d 282 (D. Mass. 2006).

55. THE GREEN BAG ALMANAC OF USEFUL AND ENTERTAINING TIDBITS FOR LAWYERS & READER OF GOOD LEGAL WRITING FROM THE PAST YEAR 359 (Ross E. Davies ed. 2007) http://www.greenbag.org/almanacs/GB/excerpts/almanac_2007_excerpts.pdf [https://perma.cc/UDU4-GBL2].

56. Booker, 543 U.S. at 258–59; *See also, e.g.,* Chavez-Meza v. United States, 585 U.S. 109, 112 (2018).

57. *See* United States v. Gordon, 117 F. App'x 501, 503-04 (9th Cir. 2004).

years, federal courts had been sentencing offenders unconstitutionally."[58] Judge Young offered a furious critique of one feature of the Guidelines, namely that the sentence be based largely not on the offense of conviction, but on what, in the sentencing court's view, really happened in the world:

> That our laws routinely require a defendant's sentence to be based upon what a judge believes an offender "really" did, as opposed to the actual crime of which he was convicted by the jury, is nothing less than offensive—let alone unconstitutional . . . . In truth, "real conduct" sentencing as embodied in the Guidelines, is simply punishment for acts not constitutionally proven. [59]

For this proposition, Judge Young relied on the scathing words of Dan on *PrawfsBlawg*:

> [W]hat makes the *Booker* remedy fundamentally untenable is that it continues to provide safe harbor for the imaginative fantasies of what really occurred under the rubric of real conduct . . . . For what is real conduct in a regime in which the Founders sought the use of juries except conduct that has either been admitted to or been included in the indictment and proved to be 'real' beyond a reasonable doubt by a jury of one's peers?[60]

As this case makes clear, Dan's contribution to the legal profession must be recognized to include his blog, *PrawfsBlawg* as well. In addition to adding to the conversation, his posts, and those of others, have been used in court papers and court opinions.[61]

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58. *Kandirakis*, 441 F. Supp. 2d at 282 (quoting Douglas Berman, Remarks at Harvard Black Letter Law Association (Apr. 4, 2006)). Ironically, in the 1980s, many courts had held the Sentencing Guidelines unconstitutional on separation of powers grounds. *E.g.,* United States v. Elliott, 684 F. Supp. 1535, 1542 (D. Colo. 1988) ("[T]hose portions of the Sentencing Reform Act of 1984, as amended by the Sentencing Act of 1987, which establish the United States Sentencing Commission and the Guidelines promulgated by that Commission are unconstitutional because they violate the separation of powers doctrine and deny the defendant due process of law."). The Supreme Court rejected this view in *Mistretta v. United States*, 488 U.S. 361 (1989).

59. *Kandirakis*, 441 F. Supp. 2d at 302-03.

60. *Id*. at 303 nn.42-43 (quoting Dan Markel, *The Indispensable Berman on Booker*, June 26, 2006, PrawfsBlawg, at https://prawfsblawg.blogs.com/prawfsblawg/2006/06/the_indispensab.html [https://perma.cc/NQT3-KF7F]).

61. A cert. petition, for example, cited Dan's take on a Supreme Court case limiting the right of defendants to get post-conviction DNA testing—he hoped that the particular facts might lead to different outcomes in more compelling cases. *See* Petitioner's Reply Brief, Wisconsin v. Swyers, No. 09-334, 2009 WL 3495467, at *12 (citing Dan Markel, *DA's Office v. Osborne: Bad Facts Make Tough Cases*, Prawfsblawg (June 19, 2009) https://prawfsblawg.blogs.com/prawfsblawg/2009/06/das-office-v-osborne-bad-facts-make-tough-cases.html [https://perma.cc/P4C6-7H64]), *cert. denied sub nom.* Heimermann v. McCaughtry, 558 U.S. 992 (2009).

While many other scholars contributed to PrawfsBlawg using their own creativity and effort, Dan is still entitled to credit for creating a forum which has assisted decisionmakers. *See, e.g.,* Thomas v. Adams, 55 F. Supp. 3d 552, 570 (D.N.J. 2014) (citing R. Desiree L. Grace, *Supervisory Liability Post* Iqbal: *A "Misnomer" Indeed*, 42 SETON HALL L. REV. 317, 327–28 and n. 82 (2012) "("Some commentators [concluded] that supervisory liability is

Similarly, an op-ed he wrote in the *New York Times* with co-author and friend Eric Miller[62] was cited in a successful petition to the Washington Supreme Court. The defendant, charged with but not convicted of DUI, argued that the imposition of pretrial urinalysis was unjustified.[63] Based on the state constitution, a divided Washington Supreme Court agreed.[64]

Another aspect of punishment which fascinated Dan was punitive damages in nominally "civil" cases.[65] His scholarship on the nature and function of punitive damages was drawn on by litigants in the Supreme Court,[66] the Ninth Circuit,[67] and by the Staff of the Joint Committee on Taxation.[68]

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dead") (citing Howard Wasserman, Iqbal III*: The Death of Supervisory Liability*, PrawfsBlawg (May 19, 2009)" https://prawfsblawg.blogs.com/prawfsblawg/2009/05/iqbal-iii-the-death-of-supervisory-liability.html [https://perma.cc/LZF8-9VZA]), *aff'd sub nom.* Thomas v. Christie, 655 F. App'x 82 (3d Cir. 2016); Romero v. Tran, 33 Vet. App. 252, 258 n.45 (2021) (citing, inter alia, Carissa Byrne Hessick, *A Bit of History on the Presumption of Regularity*, PrawfsBlawg (Jan. 14, 2019), https://prawfsblawg.blogs.com/prawfsblawg/2019/01/a-bit-of-history-on-the-presumption-of-regularity.html [https://perma.cc/ELV3-B2VH]).

62. Dan Markel & Eric Miller, *Bowling, As Bail Condition*, N.Y. TIMES, (July 13, 2012) https://www.nytimes.com/2012/07/14/opinion/not-yet-tried-but-sentenced-to-red-lobster.html?smid=pl-share [https://perma.cc/5VJX-3BPA] (arguing against "the abuse of bail and other pretrial release powers for punitive and rehabilitative purposes").

63. Petitioners' Opening Brief, Blomstrom v. Tripp at 39 n.3, 402 P.3d 831 (Wash. 2017) (No. 91642-0), 2016 WL 9178931, at *39 n.3 (quoting extensively from the op-ed).

64. Blomstrom v. Tripp, 402 P.3d 831, 847 (Wash. 2017) ("We therefore hold that the superior court erred in failing to grant the petitioners' applications for statutory writs and in failing to find that the pretrial urinalysis testing violated article I, section 7 of the Washington Constitution.").

65. *See* Dan Markel, *Retributive Damages: A Theory of Punitive Damages As Intermediate Sanction*, 94 CORNELL L. REV. 239 (2009); Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383 (2009); Dan Markel, *Punitive Damages and Private Ordering Fetishism*, 158 U. PA. L. REV. PENNUMBRA 283 (2010); Dan Markel, *Overcoming Tradeoffs in the Taxation of Punitive Damages*, 88 WASH. U.L. REV. 609 (2011); Gregg D. Polsky & Dan Markel, *Taxing Punitive Damages*, 96 VA. L. REV. 1295 (2010); Gregg D. Polsky & Dan Markel, *Reply: Revisiting the Taxation of Punitive Damages*, 97 VA. L. REV. IN BRIEF 73 (2011).

66. Brief for Respondents, Stryker Corp. v. Zimmer, Inc., No. 14-1520, 2016 WL 183802, at *55–56 (2016) (citing Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383, 1437 (2009) ("clear-and-convincing standard is 'consistent with the view that retributive damages are an intermediate sanction that warrant an intermediate evidentiary standard of proof' ")). The Supreme Court decision was *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 110 (2016).

67. John Doe's Revised Answering Brief on the Merits, Ingenuity13 LLC v. Doe at 42, 651 F. App'x 716 (9th Cir. 2016) (No. 13-55859), 2014 WL 1668952, at *42 ("A more difficult question on review is what to make of the 'punitive multiplier' portion of the award to Doe. Is it punitive damages of the sort often awarded in civil cases? 'Aggravated' or 'deterrent' damages? . . . *See* Markel, D., *How Should Punitive Damages Work*, 157 U. PA. L. REV. 1383, 1424-35 (2009).").

68. In a proposal to deny tax deductibility for punitive damages paid by corporations, the Joint Committee cited Dan's work. *See* STAFF OF THE JOINT COMM. ON TAX'N, 112TH CONG., DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2013 BUDGET PROPOSAL: PART XII - OTHER REVENUE CHANGES AND LOOPHOLE CLOSERS (Comm. Print 2012), 2012 WL 2849637, at *41 ("Still others suggest that rather than change Federal tax policy with respect to punitive damages, revising jury instructions to educate

B. Family Status

Dan had a particular interest in the connection between family status and the criminal legal system. With his friends and co-authors Jennifer Collins and Ethan Leib, he explored the legal effects of family ties in a pair of articles[69] which were expanded into a book.[70] The book, in turn, was in the subject of two law review symposia.[71]

In a federal prosecution in the Eastern District of New York, Senior Judge Jack Weinstein was asked to impose an unusual condition on Gambino crime family boss Nicholas Corozzo:

> In the sentencing of this sixty-nine year old captain and killer for the mafia, the government requests that severe conditions be imposed by the court on his imprisonment and supervised release, limiting his right to interact with: 1) relatives who were or are criminals; and 2) members or associates of organized crime families.[72]

Judge Weinstein declined to do so, noting that "[f]amily relationships are essential for rehabilitation."[73] Among the authorities cited was Dan's *Illinois Law Review* article: "In the context of corrections, we cannot ignore that the family can play a central role in facilitating successful prisoner reentry, one of the most important, if often overlooked, functions of our penal system."[74] Other litigants have drawn on

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juries as to the after-tax cost of punitive damage awards would be a more appropriate approach." (citing Polsky & Markel, *supra* note 65, at 1299)).

69. *See* Jennifer M. Collins, Ethan J. Leib & Dan Markel, *Punishing Family Status*, 88 B.U. L. REV. 1327 (2008); Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147 (2007).

70. *See* DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES (1st ed. 2009).

71. *See* Dan Markel, Ethan J. Leib & Jennifer M. Collins, *Rethinking Criminal Law and Family Status*, 119 YALE L.J. 1864 (2010); Jennifer M. Collins, Ethan J. Leib & Dan Markel, *(When) Should Family Status Matter in the Criminal Justice System?*, 13 NEW CRIM. L. REV. 151 (2010).

72. United States v. Corozzo, 256 F.R.D. 398, 399 (E.D.N.Y. 2009). The Court was interpreting the following statute:

> The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in [specified racketeering and controlled substance statutes] . . . may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

Id. at 400-01 (alteration in original) (quoting 18 U.S.C. § 3582(d) (2006)).

73. *Id.* at 402.

74. *Corozzo*, 256 F.R.D. at 402-03 (quoting *Criminal Justice and the Challenge of Family Ties*, *supra* note 69, at 1216–17).

this scholarship to illuminate the connection between family and justice.[75]

In 2024 in *State v. Burris,* the Kansas Supreme Court cited Dan's work in a case holding that spouses have duties of care toward each other.[76] The defendant was convicted of murder after a jury found she failed to provide sufficient food, water and medication to her spouse, who suffered dementia and ultimately died of pneumonia and emaciation. The court rejected her appeal: "Burris tries to claim she had no duty to care for her spouse because there was 'no evidence in this case that [Burris] accepted legal responsibility for Michael's care.' But our common law makes clear that she accepted legal responsibility for Michael's care the moment they were married."[77] Among other authorities—mostly not from Kansas—the court relied on Dan's statement that a "spousal relationship is a 'paradigmatic example[ ] of status relationships in which one owes a duty to rescue sufficient to trigger criminal responsibility.' "[78]

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75. In a certiorari petition raising the significant issue of the right to counsel in precharge plea negotiations, a litigant explained the importance of counsel in assisting a client to achieve the goals of a plea:

> [D]efense counsel are better positioned than prosecutors to elicit information from their clients that may be critical to reaching an acceptable deal. . . . Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1166-67. In *amici's* experience, defense counsel are instrumental in identifying, prioritizing, and effectively communicating their client's particular interests.

Brief of Amici Curiae Former Judges and Prosecutors in Support of Petitioner at 13-14, Turner v. United States, 139 S. Ct. 2740 (2019) (mem.) (No. 18-106), 2018 WL 4043383, at *13–14 (citations omitted). The Court denied certiorari. Turner v. United States, 885 F.3d 949 (6th Cir. 2018) (en banc), *cert. denied*, 139 S. Ct. 2740 (2019) (mem.).

This question will not quietly slink away; as a leading treatise contends, "the law should be otherwise." Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Right to Counsel during Plea Bargaining*, 5 CRIM. PROC. § 21.3(a) (4th ed.); *see also* Russell D. Covey, *Toward a More Comprehensive Plea Bargaining Regulatory Regime*, 101 Or. L. Rev. 257, 286 (2023) (arguing for regulating the timing of plea negotiations); Wayne A. Logan, *The Case for Greater Transparency in Sixth Amendment Right to Pretrial Counsel Warnings*, 52 Tex. Tech L. Rev. 23 (2019).

In another recent case, a litigant explained the nature of joint plea agreements: " 'Package' deals often involve codefendants who are loved ones and family members. *See* Dan Markel et al, *Criminal Justice and the Challenge of Family Ties*, 1007 [sic] U. III. L. Rev. 1147, 1166 (2007). With such deals, a defendant can negotiate leniency not for himself but for another." Appellant's Opening Brief at 40, State v. Mills, 29 Wash. App. 2d 1006 (2023) (No. 56309-6-II), 2022 WL 20273998, at *40. The court held that the particular "package deal" was acceptable. State v. Mills, 29 Wash. App. 2d 1006 (2023), *cert. denied*, 547 P.3d 894 (Wash. 2024).

76. State v. Burris, 544 P.3d 841 (Kan. 2024).

77. *Id.* at 845, 847, 849.

78. *Id.* at 850 (quoting *Punishing Family Status*, *supra* note 69, at 1335-36). The court noted that the defendant "repeatedly turned down all offers of help from family and social workers." *Id.* at 851.

CONCLUSION

Technically, Dan's service as a law professor spanned less than 10 years; he was appointed in 2005, and his life was taken in 2014. In that time, he was remarkably productive, as a scholar, as a commentator on the work of his colleagues, as a litigator, as a public intellectual, and as a gatherer of scholars in his PrawfsFest and CrimFest conferences as well as other symposia. His short decade of work was but a fraction of what he was capable of; he had much more in mind. His CV informed readers of the following projects:

* * *

LUCK OR LAW: IS INDETERMINATE SENTENCING UNCONSTITUTIONAL?

In the majority of states, indeterminate or discretionary sentencing schemes prevail, under which there are virtually no restraints upon judicial and/or executive discretion 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 uneasy case for, and the implications of, a finding that such 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 random, 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 punishment.

- The current plan is to have this book emerge after two companion articles are published, one having to do with the constitutional right and the second having to do with the constitutional remedy; the book will include some more work related to the conceptual, normative and policy issues involved.

RETHINKING RETRIBUTION

Over the last dozen years or so, and across approximately a dozen 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 decisionmaking to retributivist thinking. Third, by highlighting that role,

the book will explain how to reduce (at least in part) the degree of separation between proponents of retributive justice 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.[79]

* * *

As Shakespeare told it, Mark Antony's eulogy for Julius Caesar opined: "The evil that men do lives after them; The good is oft interrèd with their bones." The dream of honorable scholars is that their words on library shelves and internet servers will survive them and be of some possible use to the future. In Dan's case, notwithstanding that he was taken far too early, his wisdom, distilled into written form through hard work, will be a gift to thinkers in the areas he cared about for many years to come. This is his blessing to the law: Because of him, the law will be more reasonable, fair, humane, and just.

79. Dan Markel CV at 4-5 (https://tedandgiselle.com/markel/MarkelCV2013July.pdf [https://perma.cc/QR39-GEXK]).