

## **Mitchell N. Berman**

The University of Pennsylvania Carey Law School  
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### **ACADEMIC APPOINTMENTS**

**The University of Pennsylvania**, Philadelphia, PA  
Leon Meltzer Professor of Law, July 2014-present  
Professor of Philosophy (nonvoting), July 2014-present  
Professor of Legal Studies and Business Ethics (nonvoting), Wharton, July 2016-present  
Co-Director, Institute for Law & Philosophy  
A. Leo Levin Award for Excellence in an Introductory Course, 2022  
Harvey Levin Memorial Award for Teaching Excellence, 2019

**The University of Texas at Austin School of Law**, Austin, TX  
Richard Dale Endowed Chair in Law, Sept. 2008-June 2014  
Bernard J. Ward Centennial Professor, Aug. 2002-Aug. 2008  
Assistant Professor, Aug. 1998-July 2002  
Texas Exes Teaching Excellence Award, 2008  
Co-Director, Law and Philosophy Program

**The University of Texas at Austin Dept. of Philosophy**, Austin, TX  
Professor (nonvoting), 2009-2014

### **Shorter term**

**Center for Human Values, Princeton University**, Laurance S. Rockefeller Fellow, September 2017-June 2018

**The Hebrew University**, Jerusalem, Israel. Visiting Professor, June 2012.

**The University of Chicago Law School**, Chicago, IL. Visiting Professor, Jan.- June 2003

**Institute of Global Law, University College London**. Visiting Professor, May-June 2002

**University of Michigan Law School**, Ann Arbor, MI. Visiting Professor, Sept. 1997-May 1998

### **EDUCATION**

**The University of Michigan**, M.A. in Political Science, Aug. 1994

**The University of Michigan Law School**, J.D. *magna cum laude*, Dec. 1993  
Order of the Coif; Prize for most outstanding first-year performance; Articles Editor,  
*Michigan Law Review*

Harvard University, A.B. *magna cum laude* in Government, June 1988

## **PUBLICATIONS**

### **Book**

THE JURISPRUDENCE OF SPORT: SPORTS AND GAMES AS LEGAL SYSTEMS (West 2021) (with Richard D. Friedman)

### **Substantial articles and book chapters**

*Blameworthiness, Desert, and Luck*, \_\_ NOÛS \_\_ (forthcoming 2023).

*Dworkin vs. Hart Revisited: The Challenge of Non-Lexical Determination*, 42 OXFORD J. LEG. STUD. 548 (2022).

*Negligence and Culpability: Reflections on Alexander and Ferzan*, 16 CRIM. L. PHIL. 455 (2022).

*Principles of Proportionate Punishment: Comments on John Deigh, From Psychology to Morality: Essays in Ethical Naturalism*, 104 PHIL. & PHENOM. RES. 784 (2022).

*Keeping Our Distinctions Straight: A Response to Originalism: Standard and Procedure*, 135 HARV. L. REV. F. 133 (2022).

*Bostock was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67 (2021) (with Guha Krishnamurthi).

*Proportionality, Constraint, and Culpability*, 15 CRIM. L. PHIL. 373 (2021).

*Constitutional Law*, in JOHN TASIIOULAS ED., THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 271 (Cambridge 2020).

*Sport as a Thick, Cluster Concept*, in THOMAS HURKA ED., GAMES, SPORTS, AND PLAY: PHILOSOPHICAL ESSAYS 99 (Oxford 2019).

*Of Law and Other Artificial Normative Systems*, in DAVID PLUNKETT, SCOTT SHAPIRO & KEVIN TOH EDS., DIMENSIONS OF NORMATIVITY 137 (Oxford 2019).

*For Legal Principles*, in HEIDI HURD ED., MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER 241 (Cambridge 2019).

*Kennedy's Legacy: A Principled Justice*, 46 HASTINGS CON. L. Q. 311 (2018) (with David Peters).

*Our Principled Constitution*, 166 U. PA. L. REV. 1325 (2018).

*The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783 (2017).

*Modest Retributivism*, in KIM FERZAN & STEPHEN MORSE EDS., LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL MOORE 35 (Oxford 2016).

*La doctrina colombiana de la conexidad como regla constitucional de decisión*, in JORGE LUIS FABRA ZAMORA & LEONARDO GARCÍA JARAMILLO EDS., FILOSOFÍA DEL DERECHO CONSTITUCIONAL: CUESTIONES FUNDAMENTALES 367 (UNAM 2015) (“The Colombian Doctrine of Connexity as a Constitutional Decision Rule”).

*Judge Posner’s Simple Law*, 113 MICH. L. REV. 777 (2015).

*Conditional Spending and the Conditional Offer Puzzle*, in FRITZ ALLHOFF & MARK HALL EDS., THE AFFORDABLE CARE ACT DECISION: PHILOSOPHICAL AND LEGAL IMPLICATIONS 257 (Routledge 2014).

*On What Distinguishes New Originalism From Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545 (2013) (Symposium issue) (with Kevin Toh).

*Pluralistic Non-originalism and the Combinability Problem*, 91 TEX. L. REV. 1739 (2013) (Symposium issue) (with Kevin Toh).

*Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283 (2013).

*Sprints, Sports, and Suits*, 40 J. PHIL. SPORT 163 (2013).

*Rehabilitating Retributivism*, 32 LAW & PHIL. 83 (2013) (Symposium issue).

*Alexander’s Genius*, 12 APA NEWSLETTER PHIL. LAW 1 (2012).

*Attempts, in Language and in Law*, 6 JERUSALEM REV. LEG. STUD. 1 (2012) (Symposium issue).

*The Justification of Punishment*, in ANDREI MARMOR ED., THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 141 (Routledge 2012).

*Constitutional Interpretation: Non-originalism*, 6 PHIL. COMPASS 408 (2011).

*Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural Born Citizen Clause*, in GRANT HUSCROFT & BRADLEY W. MILLER EDS., THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY 246 (Cambridge 2011).

*On Interpretivism and Formalism in Sports Officiating: From General to Particular Jurisprudence*, 38 J. PHIL. SPORT 177 (2011) (Symposium issue).

*Replay*, 99 CAL. L. REV. 1683 (2011).

- “Let ‘em Play”*: A Study in the Jurisprudence of Sport, 99 GEO. L.J. 1325 (2011).
- Blackmail*, in JOHN DEIGH & DAVID DOLINKO EDS., THE OXFORD HANDBOOK OF THE PHILOSOPHY OF CRIMINAL LAW (Oxford 2011).
- Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027 (2011) (with Ian P. Farrell).
- Two Kinds of Retributivism*, in R.A. DUFF & STUART GREEN EDS., THE PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 433 (Oxford 2011).
- Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39 (2010) (translated into Spanish as *Construcciones constitucionales y reglas constitucionales de decisión: reflexiones sobre el cincelado del espacio de implementación*, 38 ISONOMÍA 105 (2013)).
- Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law*, in MATTHEW D. ADLER & KENNETH E. HIMMA EDS., THE U.S. CONSTITUTION AND THE RULE OF RECOGNITION 269 (Oxford 2009).
- Originalism is Bunk*, 84 NYU L. REV. 1 (2009).
- Punishment and Justification*, 118 ETHICS 258 (2008) (translated into Spanish as *Castigo y Justificación*, 12 REVISTA ARGENTINA DE TEORÍA JURÍDICA 1 (2008)) (reprinted in DAVID DOLINKO ED., THE THEORETICAL AND PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW (Ashgate 2014)).
- On the Moral Structure of White Collar Crime*, 5 OHIO ST. J. CRIM. L. 301 (2007) (solicited book review).
- Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383 (2007) (abridged and reproduced as chapter 8 in IT IS A CONSTITUTION WE ARE EXPOUNDING: COLLECTED WRITINGS ON INTERPRETING OUR FOUNDING DOCUMENT (2009)).
- Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 220 (2006), [www.harvardlawreview.org/forum/issues/119/mar06/berman.pdf](http://www.harvardlawreview.org/forum/issues/119/mar06/berman.pdf) (solicited contribution).
- Reply–Meta-blackmail and the Evidentiary Theory: Still Taking Motives Seriously*, 94 GEO. L.J. 787 (2006).
- Lesser Evils and Justification: A Less Close Look*, 24 LAW & PHIL. 681 (2005).
- Managing Gerrymandering*, 83 TEX. L. REV. 781 (2005).
- Guillen and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV.

1487 (2004).

*Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

*Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1 (2003) (selected as best paper in jurisprudence for the 2002 Stanford/Yale Junior Faculty Forum).

*Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459 (2003) (with Lynn A. Baker) (Symposium issue).

*Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at “the Greater Includes the Lesser,”* 55 VAND. L. REV. 693 (2002).

*The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45 (2002).

*Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001).

*State Accountability for Violations of Intellectual Property Rights: How To “Fix” Florida Prepaid (and How Not To)*, 79 TEX. L. REV. 1037 (2001) (with R. Anthony Reese and Ernest A. Young).

*The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795 (1998).

*Regulating Violence on Television*, 89 NW. U. L. REV. 1487 (1995) (with Harry T. Edwards).

Note, *Removal and the Eleventh Amendment: The Case for District Court Remand Discretion To Avoid a Bifurcated Suit*, 92 MICH. L. REV. 683 (1993) (named best student contribution to the *Michigan Law Review*, vol. 92).

### **Short responses and reviews**

Review of Leo Zaibert, *Rethinking Punishment*, NOTRE DAME PHILOSOPHICAL REVIEW, Nov. 4, 2018.

*Promoting Values: A Comment on Catalyzing Fans*, 6 HARV. J. SPORTS & ENT. L. 179 (2015).

*Some Skepticism About Skepticism: A Comment on Katz*, 163 U. PA. L. REV. ONLINE 345 (2015).

*Abuse of Property Right Without Political Foundations: A Reply to Katz*, 124 YALE L.J. F. 42 (2014). <http://yalelawjournal.org/forum/abuse-of-property-right-without-political-foundations-a-response-to-katz>.

*Symposium: Supreme Court Review—Symposium Foreword*, 44 TULSA L. REV. 467 (2009)  
(invited guest editor).

### **Popular or non-scholarly**

*Will Justices be Consistent in their Convictions?*, Philadelphia Inquirer, Jan. 11, 2016

*Hasn't Kesen Hu Suffered Enough?*, Austin American-Statesman, Feb. 21, 2010.

*After Further Review: The NFL's Instant Replay System Doesn't Work. Here's How To Fix It*,  
Slate.com, Dec. 22, 2009.

*Brief for Appellee Charles Soechting In Support of Appellants*, LULAC v. Perry, 126 S. Ct. 2594  
(2006), available at 2006 WL 53998 (with Robert M. Long).

*Democracies Young and Old Need Restraint*, Dallas Morning News, May 20, 2005.

*Putting Fairness on the Map: The high court has a chance to ease flagrant partisan  
gerrymandering*, L.A. Times, May 28, 2004.

*Brief of Amici Curiae Law Professors in Support of Respondents*, Pierce County v. Guillen, 537  
U.S. 129 (2003), available at 2002 WL 1964091 (with Lynn A. Baker)

### **SIGNIFICANT INSTITUTIONAL SERVICE**

#### *Penn*

Member, Dean Search Committee, 2022-23  
Chair, Academic Appointments Committee, 2020-21  
Tri-Chair, University Faculty Grievance Commission, 2019-22  
Chair, Tenure & Promotions Committee, 2018-19  
Member, Appointments Committee: 2016-17  
University Faculty Senate Executive Committee: 2015-17  
University Steering Committee: 2016-17

#### *Texas*

Coordinator, Lectures and Colloquia: 2006-07  
Chair, Harrington Fellows Search Committee: 2006-07  
Member, Dean Search Committee: 2006  
Chair, Emerging Scholars Program: 2004-05  
Chair, Ad hoc Committee on Intellectual Life: 2003-04  
Chair, Long-range Planning Committee: 2001-02  
Member, Budget Committee: 2000-01  
Chair, Lateral Appointments Subcommittee: 2007-08, 2008-09, 2011-12  
Chair, Entry-level Appointments Subcommittee: 2004-05  
Member, Appointments Committee: 1999-2000, 2003-04

Faculty Co-Advisor, *Texas Law Review*: 2008-2014

## **MEMBERSHIPS**

Co-Editor, *Legal Theory* (vol. 23 to present)  
Editorial Board, *Legal Theory* (vol. 7 to vol. 22)  
Editorial Board, *Law and Philosophy* (vol. 29 to present)  
Editorial Board, *Criminal Law and Philosophy* (vol. 1 to present)  
Editorial Board, *Journal of the Philosophy of Sport* (vol. 40 to present)  
Editorial Board, *Fair Play: Journal of Philosophy, Ethics, and Law of Sport* (vol. 1 to present)  
District of Columbia Bar

## **REFEERING**

*American Philosophical Quarterly, Analysis, Australasian Journal of Philosophy, Cambridge University Press, Columbia Law Review, Criminal Law and Philosophy, Ethics, Harvard Law Review, Inquiry, Journal of Ethics and Social Policy, Journal of Legal Studies, Journal of the Philosophy of Sport, Journal of Value Inquiry, Law and Philosophy, Legal Theory, Mind, Oxford Journal of Legal Studies, Oxford University Press, Pacific Philosophical Quarterly, Philosophical Studies, Social Theory and Practice, Stanford Law Review, Utilitas, Yale Law Journal*

## **LEGAL EMPLOYMENT**

Associate, Jenner & Block, Washington, D.C. Sept. 1995-June 1997  
Specialized in appellate litigation and telecommunications; served as special assistant to Chief Policy Counsel, MCI Corporation.

Law Clerk to Hon. J. Dickson Phillips, Jr., Senior Circuit Judge, U.S. Court of Appeals for the Fourth Circuit, Chapel Hill, N.C. August 1994-August 1995

Research Assistant to Hon. Harry T. Edwards, Chief Judge, U.S. Court of Appeals for the D.C. Circuit, Washington, D.C. Summer 1994

Summer Associate, Covington & Burling, Washington, D.C. Summer 1993

Summer Associate, Jenner & Block, Washington, D.C. Summer 1992

Law Clerk, La Raza Centro Legal, San Francisco, CA. Summer 1991

## **PERSONAL**

Married to Ingrid Johansen; children: Charlie, Isaac, and Solvej