

## **Mitchell N. Berman**

The University of Pennsylvania School of Law  
3501 Sansom Street • Philadelphia, PA 19104  
mitchberman@law.upenn.edu  
215/746-4576 (tel); 215/573-2025 (fax)

### **ACADEMIC APPOINTMENTS**

**The University of Pennsylvania School of Law**, Philadelphia, PA  
Leon Meltzer Professor of Law, July 2014-present  
Co-Director, Institute for Law & Philosophy

**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

Courses taught: criminal law, constitutional law, philosophy of criminal law, colloquium in constitutional and legal theory, originalism and its critics, the jurisprudence of sport

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

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

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

#### **Shorter term**

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

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

### **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  
National Merit Scholar

## **PUBLICATIONS: Articles and book chapters, by field**

### **Constitutional law and theory**

*Judge Posner's Simple Law*, 113 MICH. L. REV. \_\_ (forthcoming 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) (co-authored with Kevin Toh).

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

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

*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).

*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).

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

*Originalism is Bunk*, 84 NYU L. REV. 1 (2009).

*Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383 (2007) (excerpted 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).

*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).

*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) (co-authored 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).

*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) (co-authored with R. Anthony Reese and Ernest A. Young).

*Regulating Violence on Television*, 89 NW. U. L. REV. 1487 (1995) (co-authored 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).

### **Criminal law and theory**

*Modest Retributivism*, in KIM FERZAN & STEPHEN MORSE EDs., *LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL MOORE* (Oxford 2015) (forthcoming).

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

*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).

*Introduction: Punishment and Culpability*, 9 OHIO ST. J. CRIM. L. 441 (2012) (invited guest editor for symposium).

*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) (co-authored with Ian P. Farrell).

*Two Kinds of Retributivism*, in R.A. DUFF & STUART GREEN EDS., THE PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 433 (Oxford 2011).

*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).

*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).

*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).

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

### **Jurisprudence (and philosophy) of sport**

*Promoting Values: A Comment on Catalyzing Fans*, 6 Harv. J. Sports & Ent. L. \_\_ (forthcoming 2015).

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

*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).

### **Other legal theory**

*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>.

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

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

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

*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)

### **INVITED PRESENTATIONS AND WORKSHOPS**

Panelist, Competing Methods of Constitutional Interpretation, Yale Federalist Society, Yale Law School, Oct. 9, 2014.

Commentator, Panel on Law and Language, APA Pacific Division, San Diego, CA, April 18, 2014.

Commentator and Discussant, New Voices in Criminal Theory, Conference co-sponsored by the Illinois, Minnesota, and Rutgers Programs in Law and Philosophy, Death Valley, CA, March 14-15, 2014.

Commentator and Discussant, Fifth Annual Originalism Works in Progress Conference, Originalism Center, University of San Diego, Feb. 21-22, 2014.

Panelist, Textualism and Constitutional Interpretation, Federalist Society National Convention,

- Washington, DC, Nov. 15, 2013.
- “Modest Retributivism,” Conference on Moral and Political Justifications of Criminal Law, Berkeley Law School, Oct. 4-5, 2013.
- Discussant, The Current State of Originalism, Federalist Society and Liberty Fund, Boston, MA, August 2-3, 2013.
- Discussant, Roundtable in Honor of Michael Moore, University of Illinois Program in Law and Philosophy, Chicago, IL, July 18, 2013.
- Panelist, Fisher v. University of Texas, Annual Conference of the Asian Pacific Interest Section of the State Bar of Texas, Austin, TX, April 6, 2013.
- “On What Distinguishes New Originalism from Old: A Jurisprudential Take,” Fordham Law Review Symposium on the New Originalism, Fordham University School of Law, March 1-2, 2013.
- Discussant, Roundtable on Complicity, University of San Diego Institute of Law and Philosophy, Feb. 22-23, 2013.
- “Non-Originalism, Pluralism, and the Combinability Problem,” Texas Law Review Symposium on Constitutional Foundations, University of Texas School of Law, Feb. 14-15, 2013.
- “Sprints, Sports, and Suits,” Annual Meeting of the International Association for Philosophy of Sport, Porto, Portugal, Sept. 14, 2012.
- “From Intersexuality to Affirmative Action,” Annual Meeting of the International Association for Philosophy of Sport, Porto, Portugal, Sept. 13, 2012.
- “Conditional Spending After the Health Care Decision,” DePaul University School of Law, Sept. 6, 2012; University of Michigan Law School, Oct. 10, 2012, FSU College of Law, Oct. 25, 2012; University of Chicago Legal Theory Workshop, Nov. 13, 2012; Duke University School of Law, Nov. 16, 2012.
- “Attempts, in Language and in Law,” Symposium on Gideon Yaffe, *Attempts*, Hebrew University Faculty of Law, June 15, 2012.
- “Blackmail,” Criminal Law Workshop, Hebrew University Faculty of Law, Jerusalem, June 13, 2012.
- “Rehabilitating Retributivism,” Symposium on Victor Tadros, *The Ends of Harm*, Rutgers Institute of Law and Philosophy, March 30-31, 2012; Law and Philosophy Workshop, Hebrew University Faculty of Law, Jerusalem, June 6, 2012.
- Organizer and Discussant, Roundtable on the Jurisprudence of Sport, University of San Diego Institute of Law and Philosophy, Feb. 24-25, 2012.

Discussant, Conference on *Actio Libera in Causa*, University of Pennsylvania Institute of Law & Philosophy, Dec. 8-9, 2011.

Discussant, Workshop on Gideon Yaffe's *Attempts*, USC Gould School of Law, Oct. 28, 2011.

Keynote Address, "The Colombian Doctrine of 'Connexity' as a Constitutional Decision Rule," 3<sup>rd</sup> International Congress of the Philosophy of Law, Ethics, and Politics, Universidad Libre, Bogota, Colombia, Aug. 26, 2011.

"Why is it Harder to Reverse an On-Field Call in Football than To Convict a Man of Murder? Musings on the Jurisprudence of Sport," Texas Exes Alumni College, June 23, 2011.

Discussant, Roundtable on Principles in Ethics and Law, University of San Diego Institute of Law and Philosophy, March 11-12, 2011.

"Replay," George Washington University Law School, Nov. 17, 2011; The University of Tulsa College of Law, Feb. 25, 2011.

"Constitutional Interpretation: Non-originalism," Legal Theory Workshop, UCLA School of Law, Nov. 4, 2010.

"Let 'em Play," Annual Meeting of the International Association for Philosophy of Sport, Rome, Italy, Sept. 16, 2010.

Discussant, Roundtable on the Umpire/Judge Analogy, Law and Society Association Annual Meeting, Chicago, IL, May 27, 2010.

"Slack: A Manifesto," McMaster University Philosophy Dept., Hamilton, ON, April 1, 2010; 2010 Analytic Legal Philosophy Conference, NYU Law School, April 16, 2010.

Panelist, UT-USC Conference on Measuring the Rule of Law, University of Texas School of Law, March 27, 2010.

Panelist, Constitutional Interpretation and Constitutional Construction, AALS 2010 Annual Meeting, New Orleans, LA, Jan. 9, 2010.

Commentator and discussant, A Celebration of Alexander, Ferzan & Morse, *Crime and Culpability: A Theory of Criminal Law*, sponsored by the University of Illinois Institute of Law and Philosophy, Chicago, IL, May 11, 2009.

Commentator and discussant, Fourth Roughly Annual Constitutional Theory Conference, USC Law School, April 3-4, 2009.

"Desert-Constrained Pluralistic Consequentialism: Triumph and Challenges," GALA Workshop, U.C. Berkeley School of Law, Feb. 26, 2009.

“Reflective Equilibrium and Constitutional Method: The Case of John McCain and the Natural Born Citizen Clause,” Vanderbilt Law School, Feb. 10, 2009.

Commentator, Book Panel: *Dan Farber & Suzanna Sherry, Judgment Calls: Principle and Politics in Constitutional Law*, Vanderbilt Law School, Oct. 24, 2008.

Discussant and paper presenter, Conference on Originalism, The University of Western Ontario, London, Ontario, Oct. 17-18, 2008.

Discussant and paper presenter, Roundtable on the Oxford Handbook of the Philosophy of Criminal Law, sponsored by the University of Illinois Institute of Law and Philosophy, Chicago, IL, Sept. 5-6, 2008.

Referee and commentator, Stanford-Yale Junior Faculty Forum, Yale Law School, June 20-21, 2008.

Discussant and paper presenter, Conference on the U.S. Constitution and the Rule of Recognition, University of Pennsylvania Law School, May 2-3, 2008.

Discussant, Roundtable on Blame and Responsibility, University of San Diego Law School, Jan. 25-26, 2008.

Member of U.S. Delegation, International Conference on New Theoretical System of Criminal Law, China University of Political Science and Law, Beijing, October 27-29, 2007.

Discussant, Conclave of Law and Philosophy Institutes, Boerne, TX, March, 2007.

Commentator, Book Celebration: *Kermit Roosevelt III, The Myth of Judicial Activism*, University of Pennsylvania Law School, Dec. 5, 2006.

“Originalism is Bunk,” University of Pennsylvania Law School, Dec. 4, 2006; University of San Diego Law School, Feb. 9, 2007; University of Georgia Law School, Sept. 28, 2007; Columbia University Law School, Sept. 25, 2008.

Discussant, Conference on Law, Liberty and Morality, sponsored by the Liberty Fund, San Diego, CA. October 6-7, 2006.

“Punishment and Justification,” University of Michigan School of Law, March 14, 2006; Second Annual International Congress on Philosophy of Law, UNAM, March 28-31, 2006; Columbia University Legal Theory Workshop, Nov. 2006.

Participant, Annual Conference on Analytic Legal Philosophy, School of Law, University of Texas at Austin, April, 2007.

Discussant and co-organizer, Second Annual Roundtable on Conceptual Issues in Constitutional Law, University of San Diego Law School, Nov. 2005.



“The Follies of Originalism,” Memorial Student Center Wiley Lecture Series, Texas A&M University, Sept. 19, 2005.

Discussant and co-organizer, Roundtable on Conceptual Issues in Constitutional Law, University of Texas at Austin, May 2004.

Discussant and presenter, Second Roughly Annual Constitutional Theory Conference, NYU Law School, Oct. 22-23, 2004.

Discussant, Conference on Justification and Excuse, Rutgers Institute of Law and Philosophy, May 25-26, 2004.

Discussant, Roundtable on Criminal Responsibility, University of San Diego, Institute of Law and Philosophy, March 19-20, 2004.

Discussant, First Annual Constitutional Theory Conference, Vanderbilt Law School, April 18-19, 2003.

“Constitutional Decision Rules,” University of Oklahoma College of Law, March 11, 2004; University of Chicago Law School, April 17, 2003; Northwestern University Law School, April 9, 2003.

Discussant, Roundtable on Responsibility, University of Illinois, Urbana-Champaign, Institute of Law and Philosophy, December 6-7, 2002.

“Justification and Excuse in the Criminal Law,” Stanford/Yale Junior Faculty Forum, Yale Law School, June 1, 2002.

Discussant and paper presenter, “The Future of the Spending Power,” Conference on “Congressional Power in the Shadow of the Rehnquist Court,” Indiana University School of Law, February 1-2, 2002.

“Commercial Speech and the Unconstitutional Conditions Doctrine,” University of San Diego School of Law, October 29, 2001.

Discussant, Roundtable on Hate Crime Legislation, University of San Diego Institute of Law and Philosophy, March 2-3, 2001.

“Justification and Excuse: On Moral Reasoning and the Criminal Law,” Oxford-UT Conference on Jurisprudence, Worcester College, Oxford, July 30, 2000.

Expert witness, “Remarks on Bias-Motivated Sentencing Enhancements,” Committee on Judicial Affairs, Texas House of Representatives, April 6, 2000.

## **SIGNIFICANT INSTITUTIONAL SERVICE**

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**

Editorial Board, *Legal Theory* (vol. 7 to present)  
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, Australasian Journal of Philosophy, Cambridge University Press, Criminal Law and Philosophy, Ethics, Harvard Law Review, Journal of Ethics and Social Policy, Journal of the Philosophy of Sport, Law and Philosophy, Legal Theory, Mind, Oxford University Press, Pacific Philosophical Quarterly, Philosophical Studies, Social Theory and Practice, 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