

**Professor Mark Osler
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Education

J.D. Yale Law School (1990)
Senior Editor, Yale Law Journal
Coker Fellow

B.A. College of William and Mary (1985)

Professional Experience

Professor of Law, Baylor University School of Law (2000 – present, tenured 2006). Courses taught include Evidence, Appeals and Habeas, Criminal Practice, Juvenile Justice, Oral Advocacy, Practice Court, Professional Responsibility, Sentencing, and White Collar Crime. Won *Spears v. United States* in U.S. Supreme Court as lead counsel (2009), and was quoted by Justice Stevens in *United States v. Booker* (2005). Testified as a sentencing expert before U.S. House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (2009) and the U.S. Sentencing Commission (2004). Collaborated in teaching with faculty from Baylor's schools of business, philosophy, religion, social work, and theater. Portrayed as "Prof. Joe Fisher" in Samuel Goldwyn film "American Violet."

Assistant United States Attorney, United States Department of Justice, Detroit, Michigan (1995-2000). Coordinated investigations and prosecuted major felonies, including those involving bank robberies, counterfeiting and domestic support of terrorism.

Associate, Dykema Gossett, Detroit, Michigan (1991-1995).
Clerk, U.S. District Court Judge Jan E. DuBois, E.D. Pa. (1990-1991).

Publications

Blog

Editor, Law School Innovation Blog, with Douglas Berman (Ohio State), Anupam Chander (UC-Davis), and Gene Koo (Harvard). Our blog was honored as one of the 100 best Web sites by lawyers, for lawyers, as chosen by the editors of the *ABA Journal*.

Book

Jesus On Death Row: The Trial of Jesus and American Capital Punishment (Abingdon Press, February, 2009). My book describes the several steps of Christ as a criminal defendant, from investigation to execution, with analogies to the modern criminal justice system and a critique of the death penalty.

Articles and Essays

After the Implosion: Guidelines for a New Era (forthcoming) Ohio State Journal of Criminal Law (Spring 2010). Arguing that the sentencing guidelines are fundamentally flawed, this piece describes a better “trailing-edge” system that would be based primarily on the sentences that judges actually impose.

Buyer’s Remorse: Nobody Loves Booker (forthcoming) Federal Sentencing Reporter (December 2009). This essay surveys the disappointment of all constituencies with the 5-year results of the Supreme Court’s seminal decision in *Booker*.

Seeking Justice Below the Guidelines: Sentencing as an Expression of Natural Law (forthcoming), Georgetown Journal of Law and Public Policy (Winter 2009). This article critiques the federal sentencing guidelines as subject to constant subversion by judges as a natural law impulse towards mercy.

Banishment and Intensive Parenting as Sentencing Alternatives for Defendant Parents (forthcoming), *Federal Sentencing Reporter* (Summer 2009). Describing two possible alternatives to incarceration, this article argues for a stronger focus on the role of parenting in sentencing.

Policy, Uniformity, Discretion, and Congress's Sentencing Acid Trip, 2009 *BYU Law Review* 293 (April, 2009). A thorough critique of the policy basis for the Federal Sentencing Guidelines, followed by suggestions for reform.

Death to These Guidelines, and a Clean Sheet of Paper, 21 *Federal Sentencing Reporter* 7 (October, 2008). Urging a re-writing of the sentencing guidelines, this article attacks the pointlessness of the statutory goals of the present system.

Susan Glaspell Goes To Law School, 4 *Texas Theater Journal* #1, 43 (2008) (with Dr. DeAnna Toten Beard). This article describes a collaborative teaching technique using drama in teaching law.

Aseret Had'varim in Tension: The Ten Commandments and the Bill of Rights, 49 *Journal of Church and State* 683 (2007). By closely analyzing the interaction between the Ten Commandments and the Bill of Rights, this article questions the supposition that the Ten Commandments are a basis of American law.

More Than Numbers: A Proposal For Rational Drug Sentences, 19 *Federal Sentencing Reporter* 326 (2007). With specific suggestions for the revision of the narcotics statutes and sentencing guidelines, this article describes a solution to the problems created by over-reliance on the weight of narcotics as a proxy for culpability of the defendant possessing those narcotics.

Crazy Eyes: The Discernment of Competence by a Federal Magistrate Judge, 67 Louisiana Law Review 751 (2007) (With Hon. Jeffrey Manske). This article examines the gut-instinct decisions magistrate judges make when considering referral of a defendant for a custodial competency evaluation, and suggests systemic training to guide this process.

Christ, Christians, and Capital Punishment, 59 Baylor Law Rev. 1 (2007). Here, the trial of Christ is analyzed as a death penalty process raising many of the same problems faced under American law. A version of this article was included in **Morality, Justice, and the Law: The Continuing Debate** (Prometheus Press, M. Katherine B. Darmer & Robert M. Baird, eds, 2007), which also included articles by Ronald Dworkin, Oliver Wendell Holmes, and Cass Sunstein.

Ball in a Cup: The Case for Stability and Patience, 18 Federal Sentencing Reporter 164 (2006). This essay analyzes and critiques the process of establishing federal sentencing policy and evaluates alternatives to that process.

This Changes Everything: A Call for a Directive, Goal-Oriented Principle to Guide the Discretion of Federal Prosecutors, 39 Valparaiso Law Review 625 (2005). This article suggests that the Attorney General announce a unifying principle to guide the exercise of prosecutorial discretion.

The Lawyer's Humble Walk, 32 Pepperdine Law Review 483 (2005). This article reflects on a panel discussion which I moderated at Pepperdine's inaugural conference for its institute of Law, Religion and Ethics. The panel was composed of three prominent attorneys, including Kenneth Starr.

Indirect Harms and Proportionality: The Upside-Down World of Federal Sentencing, 74 Univ. of Mississippi Law Journal 1, (2005).

Starting with a comparison of the relative values assigned certain crimes under the Federal Sentencing Guidelines (such as possession of crack being punished more harshly than the theft of \$6,000,000), this article substantiates the thesis that the Sentencing Guidelines reflect a focus on the indirect effects of crime rather than the underlying offenses themselves.

The *Blakely* Problem and the 3x Solution, 16 Federal Sentencing Reporter 344 (June 2004). This detailed description of a legislative response to an important Supreme Court decision was solicited to be published in a special issue devoted to the most urgent issue in criminal law. It was cited in the State of Washington's brief seeking rehearing from the U. S. Supreme Court in *Blakely v. Washington*.

Uniformity and the Death of Traditional Sentencing Goals in the Age of Feeney, 16:4 Federal Sentencing Reporter 253 (2004). A detailed proposal for reinvigorating the federal Sentencing Guidelines in the wake of the Feeney Amendment. This article was quoted by Justice Stevens in the landmark sentencing case of *United States v. Booker*.

Unashamed and Unafraid, in **The Baptist and Christian Character of Baylor** (2003). This book chapter presents a way of preserving both intellectual vigor and a Christian identity for Baylor by focusing on hiring some outstanding Christian scholars while remaining open to the hiring of those of other faiths and traditions.

Must Have Got Lost: Traditional Sentencing Goals, The False Trail of Uniformity of Process, and the Way Back Home, 54 South Carolina Law Review 649 (2003). Examines the structural flaws of the federal sentencing guidelines, and suggests broad reforms focused on the re-introduction of traditional sentencing goals into the federal sentencing scheme.

Capone and bin Laden: The Failure of Government At the Cusp of War and Crime, 55 Baylor L. Rev. 603 (2003). Argues that United States law and government create a gap between those agencies fighting wars and those fighting crime, and that entry into this gap poses particular dangers to rights.

Criminal Procedure, 34 Texas Tech Law Review 649 (2003) (with Brian Serr). A survey of case opinions issued by the federal Fifth Circuit Court of Appeals.

Two Preachers, A Trial Lawyer and Aristotle, 29 (Number 2) Religion and Education 78 (2002). A reflective analysis of an Oral Advocacy course taught at Baylor Law School.

Criminal Procedure, 33 Texas Tech Law Review 811(2002) (with Brian Serr). A survey of case opinions issued by the federal Fifth Circuit Court of Appeals.

The Calculation of Criminal History by AUSAs and Defendants: A Study of Inefficiency in the Eastern District of Michigan, 13:6 Federal Sentencing Reporter (2001) (with Hon. Avern Cohn). An insider analysis of practical problems plaguing criminal history calculation.

Editor' s Observations, Volume 13:6, Federal Sentencing Reporter (2001) (with Douglas Berman). A scholarly overview of criminal history issues addressed in publication for which the author served as Guest Editor.

Shock Incarceration: Hard Realities and Real Possibilities, Volume LV, Federal Probation (1991). Critiques the expectations for boot camp prisons, and suggests more realistic expectations for these facilities.

Recent Pro Bono Federal Appellate Cases

United States v. Gregory Horn, 6th Cir. (ongoing), counsel for amici National Association of Federal Defenders and National Association of Criminal Defense Lawyers.

United States v. Spears II, U.S. Supreme Court (January 21, 2009), lead counsel for Steven Spears. Certiorari granted and *per curiam* opinion issued granting Spears a reversal of the opinion below, over the opposition of the Solicitor General. Opinion reported at 129 S.Ct. 840 (2009). Opinion held that sentencing judges could “categorically” reject the 100-1 ratio between powder and crack cocaine in the federal sentencing guidelines.

Kimbrough v. United States, U.S. Supreme Court (2007), briefed on behalf of amicus, the National Association of Federal Defenders.

United States v. Spears, U.S. Supreme Court (2007), counsel of record. Petition was granted and decision below was vacated and remanded pursuant to Kimbrrough.

United States v. Castillo, 2d Cir. (2006), briefed and argued (May 31, 2006) on behalf of amici the A.C.L.U. and several sentencing experts.

United States v. Starks, 9th Cir. (2006), briefed and argued (June 13, 2006) on behalf of amici the A.C.L.U. and several sentencing experts.

United States v. Spears, 8th Cir. (2006), briefed and argued (June 14, 2006) on behalf of amici the A.C.L.U. and several sentencing experts.

United States v. Ricks, 3d Cir. (2006), briefed on behalf of amici the A.C.L.U. and several sentencing experts.

Presentations and Appearances

Criminal Practice Seminar, "Prosecutorial Misconduct," San Antonio, Texas, November 19, 2009.

Lecture, "Jesus Christ, Defendant," Travis County Women Lawyer's Association, Austin, Texas, November 18, 2009.

Solo Lecture sponsored by NAACP, "Crackheads, Senators, Money, and Power," Harvard Law School, November 16, 2009.

Criminal Practice Seminar, "Prosecutorial Misconduct," Austin, Texas, November 5, 2009.

Dramatic Reading, role of Trenchard in David Mamet's "The Voysey Inheritance," Hankamer School of Business's Dale P. Jones Business Ethics Forum, November 3, 2009.

Lecture, "Jesus Christ, Defendant," First Presbyterian Church, Waco, Texas, October 18, 2009.

Sole Presenter, Dyer Ethics Workshop, Baylor School of Social Work, September 29, 2009.

Panel discussion, "Professionalism," Dallas Bar Association, September 1, 2009.

Interview, "The Sotomayer Nomination," KWBU-FM, July 15, 2009.

Reading and Lecture, "Jesus on Death Row," Bookpeople, Austin, Texas, June 16, 2009.

Lecture, "Jesus on Death Row," First United Methodist Church, Austin, Texas, June 14, 2009.

Congressional Testimony, “Juvenile Life Without Parole,” House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, June 12, 2009.

Lecture, “Jesus on Death Row,” Lakeshore Baptist Church, Waco, Texas, May 27, 2009.

Criminal Practice Seminar, “Sentencing Update” and “Prosecutorial Misconduct,” Waco, Texas, May 22, 2009.

Lecture, “Religion and the Death Penalty,” Center for American and International Law, Plano, Texas, May 12, 2009.

On-air interview, CBS Affilliate KWTX-TV News, Jesus on Death Row, April 13, 2009.

On-air interview, CBS Affilliate KWTX-TV News, *The Stanford Investigation*, March 1, 2009.

Criminal Practice Lecture, “*Spears and Beyond*,” McLennan County Bar Association, February 20, 2009.

Criminal Practice Seminar, “Criminal Practice in Federal Court,” El Paso, Texas, February 12, 2009.

Waco Tribune-Herald, *Carried by a Loving Mob*, January 24, 2009.

Criminal Practice Lecture, “Data-driven Plea Negotiation,” McLennan County Bar Association, December 20, 2008 (with Dr. Blaine McCormick).

Federalist Society Debate (v. Prof. Brian Serr), “Is Guantanamo Defensible?” Waco, Texas, November 19, 2008.

Criminal Practice Seminar, “Sentencing Post-Booker, Gall and Kimbrough,” San Antonio, Texas, November 19, 2008.

Panelist, Alpha Phi Alpha political forum: The Obama presidency, Waco, Texas, November 12, 2008.

Guest Editorial, *An American Moment*, Waco Tribune-Herald, November 8, 2008.

On-air interview, CBS Affiliate KWTX-TV News, *Sentencing of Margaret Mills*, November 2, 2008.

Criminal Practice Seminar, "Defending Criminal Cases," Midland, Texas, October 23, 2008

Annual Professionalism Lecture, Campbell University Law School, October 15, 2008.

Student/Faculty Lecture, *Art and Ethics*, Regent University School of Law, October 14, 2008.

Live on-air interview, CBS Affiliate KWTX-TV News, *Congress Challenges DC Law*, September 17, 2008.

Annual Constitution Day Lecture, McLennan Community College, September, 2008.

Criminal Practice Seminar, "Defending 1325 & 1326 Cases," Del Rio, Texas, July, 2008.

Criminal Practice Seminar, "Sentencing Update," Austin, Texas, April, 2008.

Criminal Practice Seminar, "Crack Retroactivity," Waco, Texas, April, 2008
On-air interview, CBS Affiliate KWTX-TV News, *Second Amendment and Guns*, March 18, 2008.

Guest Editorial, *Crack Cocaine Sentencing Injustice*, Waco Tribune Herald, March 16, 2008 (with counterpoint from Attorney General Michael Mukasey).

Chapman School of Law Prosecutorial LLM Program, "A Death Penalty Perspective," March, 2008.

Higher Law conference, Pepperdine University School of Law, February, 2008 (moderated panel including Dallas Willard, David Novak, and Connie Rosari).

Faculty Workshop, Northern Kentucky University Chase School of Law, "Ethics, Art, and Principles," February, 2008.

Celebration of a New Baptist Covenant, "Engaging the Criminal Justice System," January, 2008.

Criminal Practice Seminar, "Sex, Drugs, and Guns," El Paso, Texas, January, 2008.

Criminal Practice Seminar, "Sentencing Update," Austin, Texas, November, 2007.

Criminal Practice Seminar, "Sentencing Update," El Paso, Texas, October, 2007.

On-air interview, CBS Affiliate KWTX-TV News, *Lethal Injection Controversy*, October 3, 2007.

National Federal Defender Sentencing Workshop, "Issues in *Kimbrough*," Los Angeles, California, September, 2007 (with Frank Bowman, Michael O'Hear, and Hon. Nancy Gertner).

Criminal Practice Seminar, "Ethical Withdrawal," San Antonio, Texas, May, 2007.

ABC Television's "Good Morning America," interviewed for *Roberson Indictment*, April 1, 2007.

Criminal Practice Seminar, "Ethical Withdrawal," Midland, Texas, March, 2007.

Criminal Practice Seminar, "Ethical Withdrawal," Del Rio, Texas, February, 2007.

League of Women Voters, "Habeas Corpus Today," Waco, Texas, November 2006.

National Public Radio's "Morning Edition," interviewed for *Crack Cocaine Sentencing Rules Hit 20*, October 27, 2006.

Criminal Practice Seminar, "Detention Hearing Issues," Alpine, Texas, October 2006.

Bi-Annual Meeting, Association of Religiously Affiliated Law Schools (organizer), March, 2006.

El Paso Federal Training Seminar, Legislative Challenges, El Paso, Texas, January, 2006.

Federal Panel Project, Avoiding Detention Hearing Debacles, Waco & San Antonio, November, 2005.

West Texas Fall Seminar, Federal Sentencing After Booker, Odessa, Texas, October, 2005.

Baylor Regent's Retreat, Perspectives on Faith and Learning, July, 2005.

Guerra on the Frontero Conference, Post-Blakely Trainwrecks, Del Rio, Texas, June 2005.

Texas Center For the Judiciary Criminal Judges Conference, Real-Time Search and Seizure, Plano, Texas, May 2005.

Texas General Practice Institute, Federal Sentencing After U.S. v. Booker, April, 2005.

Wiley Lecture, Issues in Presidential Appointments, Texas A & M, February, 2005.

Valparaiso Law School Symposium, Shifting Powers in the Federal Courts (With Erwin Chemerinsky and Hon. Tim A. Baker), February, 2005.

Expert Testimony Before U.S. Sentencing Commission, Blakely and the Federal Sentencing Guidelines, (With Frank Bowman, David Yellen, and James Felman), November, 2004.

J.W. Dawson Institute for Church-State Studies, Nine Moralities: The Furman Opinions and the Remaking of the Death Penalty, March, 2004.

Pepperdine Institute on Law, Religion and Ethics Inaugural Conference, Can the Ordinary Practice of Law be a Religious Calling? (With Ken Starr, Mark Hepler, and Tracy Dalton), February, 2004.

Greater Waco Chamber of Commerce, From Al Capone to Arthur Anderson: The Essential Nature of Criminal Organizations, September, 2003.

Quoted as expert in newspapers in over 500 media sources, including the Washington Post, the International Herald-Tribune, The Guardian (U.K.), the Dallas Morning News, the Los Angeles Times, and the Chicago Tribune.

Professional Activities

Executive Director, Association of Religiously Affiliated Law Schools

Coached 2003 NACDL national champion mock trial team.

Coached 2006 SMU Mock Trial Tournament champion.

Elected by students as commencement speaker.

Chairman, Baylor University Civil Rights Committee

Yale Law School Sentencing Project, 2000 and 2001.

Panel Attorney, U.S. Dist. Court for the Western District of Texas (2001-3).

Member, Baylor Law School hiring, admissions and curriculum committees.

Sole paper presenter from law school at university-wide colloquy, 2003.

Member: State Bar of Michigan
Supreme Court of the United States
Bar of the Western District of Texas
Bar of the U.S. First Circuit Court of Appeals
Bar of the U.S. Second Circuit Court of Appeals
Bar of the U.S. Third Circuit Court of Appeals
Bar of the U.S. Fifth Circuit Court of Appeals
Bar of the U.S. Eighth Circuit Court of Appeals
Bar of the U.S. Ninth Circuit Court of Appeals