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UC DAVIS SCHOOL OF LAW

■ **"Posner, Blackstone, and Prior Restraints on Speech"**

BYU Law Review, Forthcoming

UC Davis Legal Studies Research Paper No. 417

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Judge Richard Posner recently asserted that the original understanding of the free speech clause of the First Amendment was to prohibit "censorship" – meaning prior restraints – but not subsequent punishments. Posner was following in the footsteps of many other eminent jurists including Justice Holmes, Joseph Story, James Wilson, and ultimately William Blackstone's Commentaries on the Laws of England.

The problem is, this claim is simply wrong. Firstly, it misquotes Blackstone. Blackstone said that the liberty of the press meant only freedom from prior restraints; he never discussed speech. When one does examine the Speech Clause, it becomes quite clear that its protections cannot be limited to freedom for prior restraints. Most importantly, this is because during the Framing era, when speech meant in-person, oral communication, no system of prior restraints on speech was remotely possible or ever envisioned. So, if the Speech Clause only bans prior

restraints, it bans nothing. A broader reading of the Speech Clause is also supported by its (admittedly sketchy) history, and by an examination of the political theory underlying the American Revolution. Indeed, not only is the Speech Clause not limited to banning prior restraints, a close examination of the historical evidence strongly suggests – though this issue cannot be definitively resolved – that a substantial portion of the Framing generation probably read the Press Clause more broadly.

What lessons can be learned from this? The first is a need for great caution in “translating” Framing era understandings into modern times, with our very different technological and cultural context. Second, when seeking “original understandings” of the Constitution, it is important to be aware that sometimes, no consensus existed. Indeed, the Framers may have given no consideration at all to specific issues. This indicates limits on the usefulness of the entire Originalist enterprise.

"The Mistake of Law Defense and an Unconstitutional Provision of the Model Penal Code"

93 North Carolina Law Review 139 (2014)

UC Davis Legal Studies Research Paper No. 412

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At common law, a defendant's mistaken belief about the law was no defense, even if that mistake resulted from reasonable reliance on governmental advice. Thus, if a prosecutor or police officer erroneously advised that certain conduct was legal, the government was free to prosecute anyone following that advice. In the mid-1950s, two separate legal doctrines altered the common-law rule. First, the American Law Institute's Model Penal Code included a mistake of law defense; a version of this defense was adopted in many states. A few years later, the Supreme Court held that the Constitution prohibited conviction in those circumstances; the Court cited neither the Model Penal Code nor related criminal jurisprudence, instead relying solely on due process principles. Now, in many states, two distinct mistake of law defenses cover the same situation, one based on the Constitution and another based on the Model Penal Code. However, while the Model Penal Code defense never applies when the constitutional defense does not, in many cases the Model Penal Code allows conviction when the Constitution granted the defense based on oral advice by government actors, but the Model Penal Code, as enacted in several states, allows the defense only for written advice. Similarly, the Supreme Court has granted the defense for strict liability crimes, but some statutes deny the defense in such cases. There is never a reason for a defendant to raise the statutory defense; the constitutional defense is better or at least as good in all cases. But many courts and lawyers do not recognize that there are two defenses, one offering less coverage than the other. As a result, many defendants are convicted after their claims are rejected under a statute when they might have been acquitted had they raised the argument directly under the Constitution. Ironically, then, a law intended to protect people from government deception has itself become a source of government deception. This is unjust. Courts, counsel, legislatures, and the American Law Institute should reconcile the defenses, and ensure that cases are decided based on applicable law rather than because of lawyers' or judges' mistakes about the law.

"Administering Section 2 of the VRA After *Shelby County*"

Columbia Law Review, vol. 115 Forthcoming

UC Davis Legal Studies Research Paper No. 372

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Until the Supreme Court put an end to it in *Shelby County v. Holder*, Section 5 of the Voting Rights Act was widely regarded as an effective, low-cost tool for blocking potentially discriminatory changes to election laws and administrative practices. The provision the Supreme Court left standing, Section 2, is generally seen as expensive, cumbersome and almost wholly ineffective at blocking changes before they take effect. This paper argues that the courts, in partnership with the Department of Justice, could reform Section 2 so that it fills much of the gap left by the Supreme Court's evisceration of Section 5. The proposed reformation of Section 2 rests on two insights: first, that national survey data often contains as much or more information than precinct-level vote margins about the core factual matters in Section 2 cases; second, that the courts have authority to create rebuttable presumptions to regularize Section 2 adjudication. Section 2 cases currently turn on costly, case-specific estimates of voter preferences generated from precinct-level vote totals and demographic information. Judicial decisions provide little guidance about how future cases — each relying on data from a different set of elections — are likely to be resolved. By creating evidentiary presumptions whose application in any given case would be determined using national survey data and a common statistical model, the courts could greatly reduce the cost and uncertainty of Section 2 litigation. This approach would also end the dependence of vote-dilution claims on often-unreliable

techniques of ecological inference, and would make coalitional claims brought jointly by two or more minority groups much easier to litigate.

"Egg Freezing, Stratified Reproduction and the Logic of Not"

Journal of Law & Biosciences, Feb. 8, 2015

UC Davis Legal Studies Research Paper No. 418

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This commentary examines social and political implications of social egg freezing in a market that is stratified, globalized, and part of a larger bioeconomy. John Robertson's article and public discourse prompted by Facebook and Apple's 'corporate egg freezing' benefits provide touchstones for interrogating social and industry practices that embrace making reproductive capacity marketable. Supply of the cells and bodies necessary for assisted reproductive technology use depends on market thinking and structural inequality. What the industry produces are carefully calibrated social-political distances between participants in egg freezing and banking, as well as 'third party reproduction.'

"Microbial Forensics: The Biggest Thing Since DNA?"

Criminal Law Bulletin (Forthcoming)

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We live in a microbial cloud. Our bodies are home to between two and six pounds of microbial life-cells that do not share our DNA but replicate and live on our skin and hair, in our colons, between our toes, and in our mouths. Although some microbes are pathogenic, most are benign; and many are beneficial. For instance, the microbes in our colons are essential to proper digestion. We now realize that bacteria aid in the development of the immune system, fight off pathogens, and regulate our metabolism. Understandably, scientists are paying increasing attention to the human microbiome.

The growing appreciation of human microbiome is already having a profound effect on the practice of medicine. By way of example, physicians are now using fecal transplants to "infect" a patient with healthy intestinal bacteria to treat microbe-related diseases.

The new insights into the microbial cloud also have forensic implications. As this article explains, microbial analysis can potentially be employed in:

- tracing infections to a source;
- more broadly, making personal identifications;
- improving estimates of post-mortem interval;
- identifying types of body fluids; and
- soil mapping.

Some Spanish and American courts have already admitted expert testimony based on microbial forensic techniques. However, it is far too early to proclaim that the recognition of the importance of the human microbiome is the second coming of DNA. Yet, it is virtually inevitable that in the future litigators will encounter such testimony in court. The purpose of this article is two-fold. First, the article will help generally familiarize members of the American legal profession with the new field of microbial forensics. Secondly, we hope that that familiarity will stimulate a discussion of the question whether any of the foreseeable applications of microbial forensics have sufficient empirical validation to satisfy Daubert and produce admissible evidence.

"The Perils of Family Law Localism"

48 UC Davis Law Review 623 (2014)

UC Davis Legal Studies Research Paper No. 413

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The notion that family law is inherently a matter for the states, not the federal government, has been invoked frequently in recent decades. The argument proved to be rhetorically, if not legally, powerful in the litigation challenging Section 3 of the Defense of Marriage Act. Section 3, some argued, was an impermissible federal intrusion into an area of law reserved exclusively to the States.

This Article builds upon the literature examining family law localism by considering how the narrative affects the doctrine of family law. First, I consider how the narrative of family law localism facilitates greater reliance on morality in the area of family law. Second, I examine how it serves to justify application of a more deferential form of review in family law cases. In so doing, this Article contributes to the ongoing conversation about “family law exceptionalism.”

""Shouting Fire in a Theater': The Life and Times of Constitutional Law's Most Enduring Analogy"

UC Davis Legal Studies Research Paper No. 415

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In 1919, Justice Oliver Wendell Holmes introduced the specter of a man falsely shouting fire in a theater into First Amendment law. Nearly one hundred years later, this analogy remains the most enduring analogy in constitutional law. It has been relied on in hundreds of constitutional cases and it has permeated popular discourse on the scope of individual rights.

This Essay examines the both the origins and the later life of Holmes's theater analogy. Part One is a detective story, seeking to solve the mystery of how Holmes came up with this particular example. This story takes us to the forgotten world of the late nineteenth and early twentieth centuries, when false shouts of fire in theaters were a pervasive problem that killed hundreds of people both in the United States and Great Britain. The person who shouted “fire” in a crowded theater was a recognizable stock villain of popular culture, condemned in newspapers, magazines and books from coast to coast. The analogy, lifted by Holmes from a federal prosecutor in Cleveland, was rooted in this larger world of popular culture. Understanding this world also answers another question: Why do lawyers and non-lawyers alike refer to “shouting fire in a crowded theater” rather than “falsely shouting fire in a theater and causing a panic,” which is what Holmes actually wrote? Along the way, we will encounter a real detective and even a mustachioed villain.

Part Two is based on an empirical study of the 278 subsequent judicial opinions that employ the theater analogy. In lower courts, opinions that invoke the analogy, not surprisingly, typically reject free speech claims, but opinions that paraphrase Holmes are, counter-intuitively, more receptive to free speech claims than opinions that quote Holmes precisely.

The Essay concludes by noting that the theater analogy has largely lost its capacity to frighten in the visceral way that Holmes's audience would have understood it. Although it persists in constitutional law, it has become rarified and largely abstract, perhaps contributing in some small way to the general libertarian trend of modern First Amendment law.

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