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"The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School Sponsored Activities"

UC Davis Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 141

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This article critically evaluates the way that federal courts adjudicate student free speech claims arising out of school sponsored activities. In doing so, it challenges conventional orthodoxy in several ways. First, it rejects the often stated truism that student free speech rights at school are less rigorously protected than the rights of speakers outside the school environment. In fact, under current authority, students at public school often have greater free speech rights than adults in other areas of public life. Second, it contest the way that most federal courts interpret and apply Hazelwood v. Kuhlmeier, the controlling Supreme Court decision in this area, by arguing that school sponsored activities should not be characterized as a nonpublic forum in which viewpoint discriminatory regulations are prohibited. The article also suggests that a key factor in the Hazelwood analysis - whether the expressive activity at issue bears the imprimatur of the school - is largely irrelevant to the free speech analysis in these cases.

As an alternative to the current morass of inconsistent decisions and incoherent analysis in this area, I argue that school sponsored activities should be characterized as a nonforum - a new free speech category developed in the article. The nonforum category covers government property or activities that should not be subject to judicial review under the free speech clause. As a working definition of the category, nonforums involve intrinsically and pervasively expressive government property and activities where the burden of complying with free speech requirements would unreasonably interfere with the activity's purpose or the use to which the property was being put. They also involve government functions which, for separation of powers and federalism reasons, should not be subject to intrusive judicial review under the free speech clause.

"The Need to Resurrect the Present Sense Impression Hearsay Exception: A Relapse in Hearsay Policy"

Howard Law Journal, Forthcoming
UC Davis Legal Studies Research Paper No. 140

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This article deals with the present sense impression hearsay exception, codified in Federal Rule of Evidence 803(1). The article demonstrates that the courts have severely cramped the scope of Rule 803(1) by adding restrictive judicial glosses to the statute. The article argues that for the most part, these glosses are unsound. The article calls on the courts to abandon these restrictions and construe Rule 803(1) far more liberally in the future. As the article explains, the dispute over the scope of Rule 803(1) raises fundamental questions about the direction of hearsay policy.

The early common-law courts were obsessed with the prevention of perjury. Consequently, they chose to render interested persons incompetent as witnesses; the courts feared that the witness's interest in the outcome of the case would lead the witness to succumb to the temptation to commit perjury. Likewise, the courts fixated on the prevention of perjury in formulating hearsay law. On the one hand, they eagerly accepted hearsay statements such as excited utterances where the declarant was excited and presumably sincere. On the other hand, absent an assurance of sincerity, the courts were hesitant to admit testimony about out-of-court statements. In particular, at common law the vast majority of jurisdictions excluded present sense impressions even though the circumstances eliminated any serious doubts about the quality of the declarant's memory.

As the years passed, though, legal psychologists mounted a sharp critique of common-law hearsay policy. Their research demonstrated that the same emotions which assured sincerity often distorted memory and perception. They also found that the fallibility of memory is probably

the most common cause of testimonial error. Given these findings, psychologists challenged the routine admission of excited utterances and urged the courts to be more receptive to present sense impressions whose timing moots concerns about memory.

The drafters of the Federal Rules of Evidence were sympathetic with the critics of common-law hearsay policy. In their Note accompanying Rule 803(1), they approvingly cited many of the critics of that policy. More to the point, although the present sense impression doctrine was a distinct minority view at common law, the drafters not only adopted that exception but made it the very first exception enumerated in Rule 803. Thus, the enactment of the Rules in 1975 could and should have marked a turning point in hearsay policy.

However, as Part II of this article demonstrates, since the Rules' enactment many courts have relapsed to the common-law obsession with the prevention of perjury. Immediately after the enactment of the Rules, under Rule 803(2) on excited utterances and 803(5) governing past recollection recorded, the courts admitted statements despite significant questions about the declarant's memory. More recently, the courts have added six restrictive glosses to the scope of Rule 803(1). Most of these glosses have no grounding in the statutory text, and they are largely driven by the courts' endeavor to eliminate any risk that the declarant spoke insincerely.

The thesis of this article is that the courts should reverse this trend by abandoning most of these restrictions. Part III of the article critically evaluates all six of the glosses and concludes that only one can withstand scrutiny. This part contends that the other five both misread the statute and represent bad hearsay policy.

"Rural Families"

Sloan Work and Family Encyclopedia, Forthcoming
UC Davis Legal Studies Research Paper No. 138

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This essay, an entry for the on-line Sloan Work and Family Encyclopedia, provides an overview of work-family challenges in the context of rural America. Among the issues addressed are lack of economic diversification and opportunity; deficits in human capital; the dearth of childcare, transportation and other services that facilitate employment; and the deeply entrenched character of gender roles in rural societies. The entry discusses not only concerns related to rural socioeconomic disadvantage, but also those arising from the distances that separate rural residents from work, educational opportunities, and services.

The essay notes that rural families are sometimes disserved by policies and regulations that reflect urban agendas and may be unworkable for rural residents, in the context of rural economies. It suggests the need for more systematic, national sampling and a case-comparative approach to location-based studies. Such data collection and analysis would permit generalization across rural places, while also enhancing our understanding of the variety among such communities.

"The Difference Place Makes/The Place Difference Makes: Latina/os in the Rural South"

UC Davis Legal Studies Research Paper No. 139

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Rural communities in the South are among the most impoverished areas in the nation, having struggled economically for over a century. Lack of opportunity has made out-migration and

population loss perennial problems for the region. Some of these rural communities are now in the midst of great change, however. Significant numbers of Latina/os, a population commonly associated with "gateway" cities and states in the West and Southwest, are immigrating to the rural South.

This article calls attention to the effects of the Latina/o influx on the rural South and begins to address how rural places in the South construct the Latina/o experience differently than the urban locales with which their presence has typically been associated. In turn, it considers how the Latina/o in-migration is changing rural host communities. While the impact of this recent wave of immigration is ongoing, studies suggest that Latina/os are revitalizing the South economically, while also influencing rural communities demographically, socially, and culturally. Many of the deep-rooted economic and social problems associated with the region nevertheless persist. Just as rural sociologists, demographers, and economists are considering the effects of immigration on the rural South, this phenomenon also deserves the attention of legal scholars.

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