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High Schools and the First Amendment: The Eighth Circuit Leaves Students' Rights at the Schoolhouse Gate

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Notes

High Schools and the First Amendment: The Eighth Circuit Leaves Students' Rights at the Schoolhouse Gate

Henerey v. City of St. Charles[1]

I. INTRODUCTION

Many remember their teenage years as the most tumultuous time in their lives. Teenagers straddle that fine line between childhood and adulthood, at times putting both feet on one side of the line, only to jump to the other side on another day. As parents, lawmakers, and scholars struggle to figure out just how much adult responsibility teens should be allowed, teens continue to push for new freedoms. All this maneuvering often results in conflict, especially in secondary schools, where the struggle is perhaps the most pronounced.

One focus of the conflict occurring in schools has been whether the First Amendment covers students once they enter the educational setting. The issue is tricky; students would like to be given the full range of free speech protection, but students are still learning how to conduct themselves within society's confines and are probably not responsible enough to handle such rights. However, in order to teach students responsibility, schools must give students room to experiment with free speech rights. On the other hand, students must learn about more than their civil rights during school hours; thus administrators must have enough control over student speech to ensure that one student's speech does not interfere with another student's academic studies. It is therefore untenable to protect all aspects of speech by students in school while maintaining order and a productive learning environment. The question courts face is where to draw the line.

In *Henerey v. City of St. Charles*, the United States Court of Appeals for the Eighth Circuit drew the line in favor of school administrators, holding that administrators can punish a student for distributing condoms as part of an election campaign without violating the student's First Amendment rights.[2] In so holding, the Eighth Circuit has effectively eliminated whatever experimental breathing room students previously had to responsibly explore their free speech rights. Instead, the court has given school administrators almost unfettered discretion to determine what students can and cannot say within the educational setting.

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1. 200 F.3d 1128 (8th Cir. 1999).
2. *Id.* at 1136.

II. FACTS AND HOLDING

Adam Henerey, a high school sophomore and candidate for junior class president, was disqualified from a student council election by Dr. Jerry Cook, the principal of St. Charles High School in St. Louis County, Missouri, for handing out condoms in the school's hallways as part of his campaign without obtaining prior approval from the school administration.[3] As a prerequisite to candidacy, students running for office were required to meet with student council adviser Mary Stodden and sign a contract agreeing to obey all school rules.[4] Prior to the election, Stodden and a student council member informed Henerey that all campaign materials required pre-approval from the school's administration.[5]

On the morning of the election, Henerey handed out in the school hallway approximately eleven condoms, attached to stickers bearing Henerey's campaign slogan, "Adam Henerey, The Safe Choice."[6] While Henerey did receive administrative approval for his slogan, he had not obtained administrative approval for his condom distribution.[7] A student complained to Stodden about Henerey's condom distribution while Stodden was counting the ballots, and Stodden then brought the complaint to Cook's attention.[8] Cook disqualified Henerey for disobeying the school board's rule requiring students to obtain approval from the principal or assistant principal prior to distributing materials.[9]

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3. *Id.* at 1131.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* The rule, "*ADVERTISING IN THE SCHOOLS* (Board Policy KJ-R)," reads in pertinent part:

> 1. *Places*
> The distribution of such items may take place in a location approved by principal of the school.
> . . . .
> 3. *Approval*
> The approval must be obtained the previous day or earlier from the principal or assistant principal. (For materials not readily classifiable or approvable more than one school day should be allowed.) The approved articles will bear the official stamp of the school, "Approved for Distribution or Posting[.]"
> . . . .
> 5. *Unacceptable Items*
> Hate literature which attacks ethnic, religious or racial groups, other irresponsible publications aimed at encouraging hostility and violence; pornography, obscenity and materials unsuitable for distribution in the schools is unacceptable as well as:
> a. Materials judged libelous to specific individuals in or out of school[.]
> b. Materials designed for commercial purposes—to advertise or promote

When the votes were later tallied, Henerey had received a majority of the votes for junior class president.[10]

In response to his disqualification, Henerey filed a Section 1983[11] lawsuit seeking damages from the school district for violating his First Amendment free speech rights.[12] The district court granted the school district's motion for summary judgment based upon its findings that the school district's rule restricting the types of election materials that could be distributed on school premises was constitutional, the election was a school-sponsored activity and not a public forum, and Cook's decision to disqualify Henerey for his rule violation was "reasonably related to the school's legitimate pedagogical concerns."[13] The Eighth Circuit reviewed the grant of summary judgment de novo.[14]

A three-judge panel of the Eighth Circuit affirmed the district court 2-1,[15] finding that the student council election was conducted within the context of a nonpublic forum because there was no evidence that the school intended to relinquish its control over the election and designate it a forum for public expression.[16] The court further found that the election was a school-sponsored activity and part of the school's curriculum, so the school district's decision to disqualify Henerey only had to be reasonably related to legitimate pedagogical

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a product or service for sale or rent.

c. Materials which are designed to solicit funds unless approved by the superintendent or his assistant[.]

d. Materials the principal is convinced would materially disrupt class work or involve substantial disorder or invasion of the rights of others.

6. *Acceptable Materials*

All materials not proscribed in "Unacceptable items."

Id. at 1133-34.

10. *Id.* at 1131.

11. 42 U.S.C. § 1983 (1994). The act grants citizens the right to file a civil action against the government in response to a perceived deprivation of their rights. The pertinent part of the act reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

12. *See* Henerey v. City of St. Charles, 200 F.3d 1128, 1131 (8th Cir. 1999).

13. *Id.*

14. *Id.*

15. Chief Judge Roger L. Wollman and the Honorable Richard S. Arnold voted to affirm. The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa, sitting by designation, dissented.

16. *See Henerey*, 200 F.3d at 1133.

concerns.[17] The court then concluded that the rule requiring prior approval of election materials was not unconstitutional on its face, and held that Cook's decision to disqualify Henerey for breaking the rule was a reasonable response to Henerey's noncompliance.[18]

III. LEGAL BACKGROUND

A. Differences Between Student Speech and General Speech

Debate over how to balance the constitutional rights of public school students against the authority of school officials to control conduct within the schools has continued for decades.[19] While it is clear that students are entitled to at least some First Amendment protection while in school,[20] this protection is not coextensive with the rights of a student whose acts of expression occur outside the educational arena.[21]

First, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[22] However, the extent to which students maintain these rights depends in significant part on the time, place, and manner

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17. *Id.*

18. *Id.* at 1135.

19. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988) (holding that students' First Amendment rights were not violated when the school principal removed two pages from the student newspaper because he thought the articles on the pages invaded the privacy of those interviewed); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 676 (1986) (holding that student's election speech, which was considered lewd by school officials, was not protected by the First Amendment and the school district was authorized in punishing the student for that speech); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (holding that regulation prohibiting wearing armbands to school in protest of the Vietnam War was an unconstitutional denial of students' free expression rights); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that public school students may not be compelled to salute the flag); Bartels v. Iowa, 262 U.S. 404, 409 (1923) (holding that the Fourteenth Amendment Due Process Clause prevents states from prohibiting teaching foreign languages to students); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (same).

20. *See Tinker*, 393 U.S. at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

21. *See Bethel*, 478 U.S. at 682. *Compare, e.g.*, Hinze v. Super. Ct. of Marin County, 174 Cal. Rptr. 403 (Ct. App. 1981) (holding that a public school student who refused to remove a button that said "Fuck the Draft" could be disciplined), *with* Cohen v. California, 403 U.S. 15 (1971) (holding that an individual had a First Amendment right to wear a jacket that said "Fuck the Draft" on the back of it in the county courthouse).

22. *Tinker*, 393 U.S. at 506; *see also Hazelwood*, 484 U.S. at 266; *Bethel*, 478 U.S. at 680; Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718, 724 (8th Cir. 1998).

of the expression. Where the expression constitutes a "nondisruptive, passive expression of a political viewpoint,"[23] students have the right to engage in such conduct at school.[24] *Tinker v. Des Moines Independent Community School District*,[25] the case that set the standard for court review of alleged violations of students' First Amendment rights, is a perfect example of this type of speech.

In *Tinker*, a number of students wore black armbands to school as a protest against the Vietnam War in direct violation of an administration policy that the wearing of armbands in school would result in suspension until the student returned to school without the armband.[26] The students were therefore suspended and then sued the school district under Section 1983,[27] alleging a violation of their constitutional rights.[28] The United States Supreme Court, holding for the students, acknowledged the inherent conflict between the First Amendment rights of students and the need for rules within schools.[29] Here, however, the students were merely engaging in "a silent, passive expression of opinion,"[30] which the Court categorized as "pure speech"—a "direct, primary" First Amendment right.[31] The Court then set forth strict standards for school officials to meet before limits on student expression are justified:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.[32]

Thus, after *Tinker*, students' First Amendment rights while in school were protected so long as their conduct did not materially disrupt classwork or involve substantial disorder or invasion of the rights of others.[33]

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23. *Bethel*, 478 U.S. at 680.

24. *See Tinker*, 393 U.S. at 512-13 ("A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions . . . .").

25. 393 U.S. 503 (1969).

26. *Id.* at 504.

27. 42 U.S.C. § 1983 (1994).

28. *See Tinker*, 393 U.S. at 504.

29. *Id.* at 507.

30. *Id.* at 508.

31. *Id.*

32. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (1966)).

33. *Id.* at 513.

B. *Applying* Tinker*: The Concept of the Public Forum*

Courts must analyze allegations of First Amendment violations "in light of the special characteristics of the school environment."[34] The more closely speech is associated with the classroom or a school-sponsored event or activity, the more authority courts have given school administrators in regulating it.[35] There are at least three reasons why administrators have additional authority over curricular speech: (1) so that they can ensure that students learn the lessons the activity is supposed to teach, (2) so that the speech is appropriate for the level of maturity of those it is communicated to, and (3) so that the speaker's views are not mistakenly attributed to the school.[36] Courts, including the United States Supreme Court, have distinguished between the passive, non-disruptive political statement made by the students wearing armbands in *Tinker* and student speech or conduct occurring under the supervision of school officials.[37]

Activities that are supervised by faculty members and designed to teach certain skills to students fall into the latter category, whether or not those activities occur in a traditional classroom setting.[38] Examples include school-sponsored publications and theatrical productions.[39] Such activities differ from the situation in *Tinker* because students, parents, and other members of the public might reasonably believe that those activities carry the "imprimatur of the school."[40] In these circumstances, "a school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school."[41] When speech conflicts with the school's educational philosophy, a school is allowed to censor and/or discipline the speaker in order to dissociate itself from the speech.[42] The school loses this ability, however, if the speech occurs in a public forum—at which point the student speaker has the same rights as if the speech were occurring outside on a street corner.[43]

Traditionally, a public forum is one that "time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and

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34. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

35. *See Hazelwood*, 484 U.S. at 271; *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

36. *See Hazelwood*, 484 U.S. at 271.

37. *See id.*; *see also Bethel*, 478 U.S. at 685.

38. *See Hazelwood*, 484 U.S. at 271.

39. *Id.*

40. *Id.*

41. *Id.* at 266 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)).

42. *Id.* at 266-67.

43. *Id.* at 267.

discussing public questions."[44] Obvious examples of public forums include streets,[45] parks,[46] sidewalks,[47] and city council meetings with public comment periods.[48] In the school setting, a public forum is deemed to exist only when school authorities have, through their policy or practice, opened the school's facilities for indiscriminate use by the public or some segment thereof, such as student groups.[49]

Where school officials allow facilities to be used for limited discourse—where facilities are opened to particular groups for particular purposes—they do not create a public forum.[50] Thus, in *Hazelwood School District v. Kuhlmeier*,[51] the Supreme Court found that the school's student newspaper did not qualify as a public forum.[52] The Court found that there was no clear intent to open the newspaper to indiscriminate use by the public because the newspaper was published as part of a class in which students received grades and academic credit, the journalism teacher exercised control over the newspaper by selecting its editors and advising student writers, and each issue was reviewed by the school's principal prior to publication.[53] The students pointed to the newspaper's published Statement of Policy, which claimed all First Amendment

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44. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939); *see* Int'l Soc'y for Krishna Consciousness, Inc. v. N.J. Sports & Exposition Auth., 691 F.2d 155 (3d Cir. 1982).

45. *See Hague*, 307 U.S. at 515.

46. *Id.*

47. *Id.*

48. *See* Kindt v. Santa Monica Rent Control Bd., 67 F.3d 266, 269 (9th Cir. 1995); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) ("[P]ublic property which the state has opened for use by the public as a place for expressive activity" is governed by same standards as traditional public forum.).

49. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988); *Perry*, 460 U.S. at 46-47; Widmar v. Vincent, 454 U.S. 263, 267-68 (1981); *see also* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (holding that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse").

50. *See Hazelwood*, 484 U.S. at 267; Ralph D. Mawdsley & Alice L. Mawdsley, *Free Expression in Public Schools: A Trend Toward Greater Control Over Students*, 48 EDUC. LAW REP. 305, 306 (1989).

51. 484 U.S. 260 (1988).

52. *Id.* at 270.

53. *Id.* at 269-70. Nonschool-sponsored student publications are given greater constitutional protection. School officials cannot regulate the content of such publications, though they can impose reasonable time, place, and manner restrictions on their distribution and can halt their distribution if the materials substantially disrupt the educational process (the *Tinker* standard). *See* Martha M. McCarthy, *Post-*Hazelwood *Developments: A Threat to Free Inquiry in Public Schools*, 81 EDUC. LAW REP. 685, 694 (1993).

rights for the students;[54] the students' control over the contents of the newspaper; and a school board policy purporting not to restrict student expression[55] as evidence of the school's intent to open the newspaper to public use. The Court found, however, that these reasons were insufficient to show that the school, through its policy and practice toward the newspaper, had created a forum for use beyond its intended purpose as a supervised learning experience for journalism students.[56]

When speech occurs under school supervision in a nonpublic forum (*Hazelwood*), as opposed to when a student's personal expression occurs on school premises (*Tinker*), a school is allowed to exercise greater control over student speech.[57] Schools can restrict speech occurring in a curricular setting that would be constitutional if it occurred in a non-academic setting.[58] Under these circumstances, where speech occurs within the confines of a nonpublic forum, school officials can regulate speech "so long as their actions are reasonably related to legitimate pedagogical concerns."[59]

C. *Applying* Tinker*: Defining Regulable Conduct*

Legitimate pedagogical concerns are those a school takes into account to ensure that students learn and are not exposed to material inappropriate to their maturity level.[60] A school may therefore censor not only speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students,"[61] but also speech that is, *inter alia*, grammatically incorrect, poorly written, inadequately researched, biased, prejudiced, vulgar, profane, or suitable only for a more mature audience.[62] It is up to the school board to determine what speech is inappropriate in the classroom or at a school assembly.[63] A school may take into consideration the emotional maturity level of the intended audience in determining whether to allow student speech on potentially sensitive topics; speech that might be seen as advocating the use of drugs or alcohol, or

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54. *See Hazelwood*, 484 U.S. at 269. The policy, published once a year, stated "Spectrum, as a student-press publication, accepts all rights implied by the First Amendment." *Id.*

55. *Id.* Board Policy 348.51 stated in part that "school sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism." *Id.*

56. *Id.* at 269-70.

57. *Id.* at 271.

58. *Id.* at 271-72.

59. *Id.* at 273.

60. *Id.* at 271.

61. *Id.* (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 509 (1969)).

62. *Id.*

63. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

irresponsible sex; or speech that might associate the school with a non-neutral political position.[64]

In *Bethel School District No. 403 v. Fraser*,[65] the Supreme Court held that it did not violate the First Amendment for a high school to discipline a student who made a speech containing sexual innuendo at an official school assembly attended by six hundred students.[66] The Court cited the school's interest in teaching students the "fundamental values" necessary to maintain a democratic society, including the sensibilities of other students when engaging in public discourse.[67] The Court concluded that in a high school, in front of a captive audience where many in attendance "were only fourteen years old and on the threshold of awareness of human sexuality,"[68] it was appropriate for the administration to prohibit a student from exposing other students to sexually explicit, indecent, lewd, vulgar, or offensive speech.[69]

It is unnecessary for a school board to define with more clarity what makes speech indecent, lewd, vulgar, offensive, or the like.[70] A school board rule or guideline prohibiting such speech is not unconstitutional for vagueness or overbreadth.[71] Courts have held that schools need the authority to determine what speech violates school standards because of a school's responsibility to promote decency and civility among its students and because what speech takes place in school is significant to the future of not only the school but also its students.[72] However, the discretion accorded to school officials in deciding what

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64. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988).

65. 478 U.S. 675 (1986).

66. *Id.* at 685. The student's speech in support of a candidate for student government stated:

> "I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be."

Id. at 687.

67. *Id.* at 681.

68. *Id.* at 683.

69. *Id.* at 684.

70. *See* Bystrom v. Fridley High Sch., Indep. Sch. Dist. No. 14, 822 F.2d 747, 752 (8th Cir. 1987).

71. *Id.*

72. *Id.* at 753 (citing Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring), *cert. denied*, 444 U.S. 1081 (1980)).

speech is violative of school standards is not entirely limitless; courts have the final responsibility to ensure that "robust rhetoric . . . is not suppressed by prudish failures to distinguish the vigorous from the vulgar."[73]

School districts therefore have wide latitude in determining what speech is appropriate in the educational setting.[74] A school is concerned not only with ensuring that student speech is appropriate for its intended audience, but also for ensuring that controversial student speech is not impliedly given the imprimatur of the school.[75] Thus, "[i]t is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d],' as to require judicial intervention to protect students' constitutional rights."[76]

IV. INSTANT DECISION

A. The Majority Opinion

In *Henerey*, the Eighth Circuit found that because a high school student council election is not a public forum and is a school-sponsored curricular activity, the decision to disqualify Henerey based on his unauthorized distribution of condoms was reasonably related to legitimate pedagogical concerns and, as such, did not violate the First Amendment.[77]

The court first reasoned that because the constitutional rights of public school students are not automatically equal to those of adults,[78] it was necessary to analyze the alleged violations of students' First Amendment rights "in light of the special characteristics of the school environment."[79] Relying on *Hazelwood*, the court determined that in the educational setting, it should give schools the most authority to exercise control over speech when the speech occurs during a school-sponsored activity that is not also a public forum.[80] The court first concluded that the student council election was not a public forum because the school district did not open the campaign to the public and only allowed enrolled students who signed an agreement stating that they would obey

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73. *Id.*

74. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) ("[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.").

75. *Id.* at 271-72; *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684-85 (1986).

76. *Hazelwood*, 484 U.S. at 273 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

77. *See* Henerey v. City of St. Charles, 200 F.3d 1128, 1132-36 (8th Cir. 1999).

78. *Id.* at 1132 (citing *Bethel*, 478 U.S. at 682).

79. *Id.* (quoting *Hazelwood*, 484 U.S. at 266).

80. *Id.*

school rules to take part in the election.[81] Second, the court determined that the election was also a school-sponsored activity because it was supervised by a school administrator and was "curricular" in that it was conducted as a way to teach candidates leadership skills and to expose the rest of the student body to the democratic process.[82] As such, the court followed *Hazelwood* and ruled that the district's decision was proper so long as it was reasonably related to legitimate pedagogical concerns.[83]

To determine whether the principal's decision to disqualify Henerey was reasonable, the court examined the school board rule. The rule required students to obtain approval from the principal or assistant principal by the day before advertising material was to be distributed. The rule also contained a list of unacceptable items that included "materials unsuitable for distribution in the schools" and "[m]aterials the principal [believed] would materially disrupt class work or involve substantial disorder or invasion of the rights of others."[84] Even though other students handed out candy and gum without prior approval and were not disciplined, the court concluded that enforcement of the rule against Henerey was not based upon the content of his speech because the administration had tacitly approved the longstanding practice of handing out candy and gum.[85] The court then reasoned that even though the rule constituted a prior restraint on speech, as the Supreme Court established in *Hazelwood*, prior restraints within secondary schools are not per se unconstitutional.[86] Finally, the court concluded that the rule was not unconstitutionally vague because it furthered the legitimate interests of public schools; furthered the community interest in promoting respect for authority and traditional social, moral, and political values; and allowed the principal a reasonable time period in which to evaluate materials.[87] Therefore, the court concluded that the principal's decision to disqualify Henerey for failing to comply with the rule was reasonable because

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81. *Id.* at 1133.

82. *Id.*

83. *Id.*

84. *Id.* at 1134.

85. *Id.*

86. *Id.* A prior restraint is a government action that prevents speech from being spoken or published. The general principle is that the state should not subject expression to prepublication censorship. *See* Jeffery A. Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV 439 (1987). The chief purpose of the guarantee of free speech and freedom of the press is to prevent previous restraints upon publication. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931). Except in exceptional cases, the government therefore may not censor speech before it is published, but the speech may subject the speaker to liability after publication if such speech is not constitutionally protected. *See id.* at 713-16.

87. *See* Henerey v. City of St. Charles, 200 F.3d 1128, 1135 (8th Cir. 1999).

enforcement against Henerey was not content-based, the rule was not unconstitutional per se, and the rule was not unconstitutionally vague.[88]

The court additionally concluded that, even if enforcement of the rule against Henerey were based on the content of his speech and not on his violation of school rules, the school district's decision to disqualify Henerey would still have been logically related to legitimate pedagogical concerns and would therefore not have constituted a violation of Henerey's First Amendment rights.[89] The court reasoned, following *Hazelwood*, that condom distribution could signify the school's approval or encouragement of teenage sexual activity because it happened during a school-sponsored election, thus carrying with it the imprimatur of the school.[90] The court additionally reasoned that condom distribution during the school-sponsored election could disrupt decorum and create an environment where learning might be impeded.[91] Also, school districts have an interest in divorcing school-related activities from controversial and sensitive topics, and thus have an interest in disciplining those whose actions might embroil a school-related activity in controversy.[92] The court concluded that the First Amendment rights of Henerey were not infringed to such an extent that it required judicial intervention on Henerey's behalf because the principal's decision to disqualify Henerey had a valid educational purpose.[93]

B. The Dissent

Judge Charles R. Wolle disagreed with the majority's analysis of the school board rule and the reasoning the principal gave for Henerey's disqualification. He concluded that genuine issues of material fact existed such that a jury could have decided in Henerey's favor had the case survived the district court's summary judgment motion and proceeded to trial.[94]

Judge Wolle reasoned that the school district's rule requiring prior approval of items to be distributed in the school may not have given students adequate notice because gum and candy were allowed to be distributed without prior approval.[95] Additionally, Judge Wolle argued that the rule may have also failed to provide sufficient notice to Henerey that he could be disqualified for handing out unapproved materials.[96]

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88. *Id.* at 1134-35.
89. *Id.* at 1135-36.
90. *Id.* at 1135.
91. *Id.*
92. *Id.* at 1136.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*

Judge Wolle also believed that there was enough evidence for reasonable jurors to find that enforcement of the rule against Henerey was based solely on the content of Henerey's speech and to find that disqualification was a disproportionate punishment for Henerey's failure to receive prior approval.[97] Finally, Judge Wolle explicitly disagreed with the majority's conclusion that safe sex among high school students was a topic controversial enough to allow administrators to prevent its introduction in the school election context.[98] As such, Judge Wolle would have allowed Henerey's claim to survive summary judgment.[99]

V. COMMENT

Since *Tinker*, courts have progressively narrowed the extent to which students are entitled to the protections of the First Amendment while in school. *Henerey* follows that trend. The Eighth Circuit, in applying the standard set forth in *Hazelwood*, has—intentionally or otherwise—managed to circumscribe student speech even further.

The *Hazelwood* standard, which disallows administrative censorship of student speech only when it "has no valid educational purpose,"[100] is an incredibly lenient standard to begin with. It allows school officials tremendous amounts of discretion in determining what aspects of speech invoke "legitimate pedagogical concerns" such that the school should step in and regulate student speech.[101] Given this lax standard, it is unlikely that the principal's decision to

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97. *Id.* at 1137.

98. *Id.*

99. *Id.*

100. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

101. *Id.*; *see also* Conward v. Cambridge Sch. Comm., 171 F.3d 12, 23 (1st Cir. 1999) (holding that the school's decision to terminate a tenured teacher was reasonably related to legitimate pedagogical concerns because the teacher had handed a student a piece of paper containing lewd words); Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 370 (4th Cir. 1998) (holding superintendent's granting of principal's request to transfer plaintiff, a drama teacher, to another school was reasonably related to legitimate pedagogical concerns because the teacher had selected the play "Independence," in which one of the characters was a lesbian and one was pregnant with an illegitimate child, for her drama students to perform at competitions); Settle v. Dickson County Sch. Bd., 53 F.3d 152, 155-56 (6th Cir. 1995) (holding that teacher's decision not to accept student's outline for a proposed research paper on the life of Jesus Christ was reasonably related to legitimate pedagogical concerns because the teacher believed that the student, who knew a lot about Jesus Christ, would not learn what the research paper project was intended to teach); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723-24 (2d Cir. 1994) (holding superintendent's decision to forbid school board member from entering school for the remainder of the year and school board's decision to censure the board member was reasonably related to legitimate pedagogical concerns because the board member had passed around slides, including one

disqualify Henerey from the student council election would have been overturned by any court. However, the Eighth Circuit goes further than is necessary, muddling the *Hazelwood* standard and expanding what constitutes acceptable school board policies under the current view of vagueness and overbreadth.

Much of the problem with *Henerey* stems from the court's addition of section II-C of the opinion, which was unnecessary as far as the court's decision in the current case.[102] In section II-C, the court relies on a Sixth Circuit case,[103] which found that civility and compliance with school rules were legitimate pedagogical concerns.[104] Although the Supreme Court in *Hazelwood* referred to the necessity of teaching students "the shared values of a civilized social order,"[105] that decision was in the context of controlling speech that advocated drug or alcohol use or irresponsible sex—not in the context of following school rules. While the concerns mentioned in *Hazelwood* were somewhat concrete—protecting immature audiences from vulgar, profane or sexually explicit speech, avoiding the implied advocation of illegal and immoral activity, and dissociating the school from speech that is contrary to its educational goals (i.e., ungrammatical, poorly written, inadequately researched, biased, prejudiced, etc.)[106]—the Eighth Circuit in *Henerey* does not ground what it refers to as

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that pictured two bare-chested women and a bare-chested man, as part of his guest presentation in a tenth grade mathematics class); Miles v. Denver Pub. Sch., 944 F.2d 773, 778 (10th Cir. 1991) (holding that principal's decision to place teacher on four-day administrative leave and to place a letter of reprimand in teacher's file was reasonably related to legitimate pedagogical concerns because the teacher had referred in class to a rumor circulating around the school about two students "making out" on the tennis court); McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp. 2d 918, 925 (E.D. Mo. 1999) (holding that the superintendent's decision to forbid the marching band from playing the song "White Rabbit" by Jefferson Airplane in its fall program was reasonably related to legitimate pedagogical concerns because the superintendent reasonably believed the song promoted drug use); Bull v. Dardanelle Pub. Sch. Dist. No. 15, 745 F. Supp. 1455, 1460 (E.D. Ark. 1990) (holding that the school district's decision not to allow the plaintiff, an honor student with a 3.40 grade point average, to run for student council president was reasonably related to legitimate pedagogical concerns because the plaintiff's teachers felt he had demonstrated a "lack of maturity" in their classes).

102. *See* Henerey v. City of St. Charles, 200 F.3d 1128, 1135-36 (8th Cir. 1999). The court acknowledged that the section was unnecessary from the outset. The court began its reasoning with the sentence, "[e]ven assuming, for the purpose of argument, that Henerey's action in handing out the condoms constituted the expression of constitutionally protected speech . . . it does not follow that a First Amendment violation occurred." *Id.* at 1135.

103. *See* Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989).

104. *See Henerey*, 200 F.3d at 1135.

105. *Hazelwood*, 484 U.S. at 271 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

106. *Id.* at 271-72.

legitimate concerns in any concrete examples. Instead, the court gives school administrators control over any speech that might have an adverse effect on "decorum" or that could create "an environment in which learning *might* be impeded."[107]

Had Henerey's slogan been "Let's Band Together" as opposed to "The Safe Choice," and had he opted to hand out rubber bands instead of condoms, it is quite possible that decorum could be threatened or learning might be impeded by students shooting rubber bands at each other. Such an act of expression would implicate none of the pedagogical concerns the Supreme Court referred to in *Hazelwood*, yet under the court's decision in *Henerey*, it could subject the speaker to discipline. Especially because such an expansion on the definition of what constitutes a legitimate pedagogical concern was not central to the court's decision, the court's attempt to expound on the point in its opinion does more harm than good. Instead of making the definition clearer, it makes it broader, enlarging the sphere of school authority.

Additionally, section II-C of the court's opinion states that school districts should be able to require prior notice from "*anyone* proposing to introduce students to information or materials of an explicit sexual nature."[108] This choice of phrasing, which includes materials and information provided by *anyone*, extends the facts at hand by going beyond the realm of student speech and moving quite clearly into teachers' classrooms. *Hazelwood* has already been applied by courts where the issue was teacher conduct in the classroom.[109] Therefore, there was no reason for the *Henerey* court, where the only question posed regarded student speech, to implicate those cases.

Aside from section II-C, in finding that the school board rule Henerey was disciplined for violating was not overbroad or vague, the court gives school officials unfettered discretion to determine what students can and cannot say. In *Bystrom v. Fridley High School, Independent School District No. 14*,[110] the Eighth Circuit upheld a school guideline prohibiting material that "is pervasively indecent or vulgar" over complaints of vagueness and overbreadth.[111] The court seemed somewhat reluctant to do so, however, purporting to understand the student's complaints and acknowledging that the terms were largely

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107. *Henerey*, 200 F.3d at 1135 (emphasis added).

108. *Id.* at 1136 (emphasis added).

109. *See, e.g.*, Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718, 724 (8th Cir. 1998); Gerig v. Bd. of Educ. of Cent. Sch. Dist., R-III, 841 S.W.2d 731, 735 (Mo. Ct. App. 1992).

110. 822 F.2d 747 (8th Cir. 1987).

111. *Id.* at 752.

subjective.[112] Though the rule in question in *Henerey* was much broader than in *Bystrom*, the court showed none of its earlier reluctance.

Rather, the court in *Henerey* upholds a rule that prohibits "materials unsuitable for distribution in the schools . . . as well as . . . [m]aterials the principal is convinced would materially disrupt class work or involve substantial disorder or invasion of the rights of others."[113] The rule provides no standard against which the principal must reason, therefore providing no standard for persons charged with violating the rule to use in pleading their cases to the principal. The rule, on its face, gives administrators complete authority to decide what is unsuitable and what might cause a disruption. Under a rule prohibiting vulgarity or profanity, there is at the very least a community standard of what is obscene, which administrators can then use to judge what speech comes close enough to that standard to be considered vulgar or profane. There is no generalized standard, nor is there even an obscenity analogy, for the principal's subjective reasoning.

Under such a rule, there is no way for a student to know in advance if his conduct will be punishable. The rule is vague and broadly—if at all—defines what students can or cannot say or do. Moreover, the rule is overbroad in that it allows students to be punished when they did not know that their actions would violate the rule. The instant case is a good example. While the other candidates for office were also handing out campaign materials without prior approval, Henerey was the only student punished for doing so. Henerey apparently crossed the line, despite the fact that the rule makes no mention of prohibiting the distribution of condoms. Thus, Henerey was disciplined *as if* the rule had given him notice that his conduct would violate the rule. The court's holding therefore encourages officials to draft rules as broadly as possible so as not to limit their discretion; the court seems to be saying "so long as there is a rule in place, no matter what it says, it puts students on notice that their speech may subject them to disciplinary measures."

Placing such discretion in the hands of administrators will likely not mean that students—especially today's rambunctious and opinionated teenagers—will stop speaking their minds at school. However, giving administrators such discretion will unfairly result in the disciplining of those students who have not been able to discern their principal's subjective definition of "inappropriate" subject matter. The court's holding here undermines the traditional tug-of-war

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112. *Id.* The court reasoned:

> The concepts of indecency and vulgarity contain large elements of subjectivity, and whether a certain characteristic of a student writing is 'pervasive' . . . is also a question on which reasonable people might well differ. We nevertheless hold that this portion of the guidelines is valid. We believe this holding is compelled by *Bethel School District No. 403 v. Fraser* . . . .

Id.

113. Henerey v. City of St. Charles, 200 F.3d 1128, 1134 (8th Cir. 1999).

between students eager for more freedom and administrators trying to teach students to exercise their rights responsibly. Giving administrators such broad discretion prohibits students from exercising any rights not specifically approved by the administration. Without ever having the flexibility to be able to exercise their rights within a curricular setting, students learn only to follow orders, not to exercise rights responsibly. The discretion the court grants therefore keeps administrators from succeeding in their original mission as educators.

VI. CONCLUSION

The oft-repeated mantra, "students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[114] still rings true where students make a personal act of expression that just happens to occur at school. But students' constitutional rights are becoming increasingly circumscribed in the context of curricular activities. *Henerey* shows how blurred the distinction between the two types of speech—personal acts of expression at school and curricular speech—has become.

In deciding *Henerey*, the Eighth Circuit has taken previous case law to an even further extreme. The court has broadened the definition of "legitimate pedagogical concern" and has given school administrators unfettered discretion in determining when student speech violates a school rule. This decision was unnecessary and unwise. In allowing administrators such broad authority, the Eighth Circuit has made it nearly impossible for students to determine what speech or conduct they could be disciplined for, thereby chilling not only speech, but also the educational process the court purports to protect.

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114. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); *see, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (1986); Henerey v. City of St. Charles, 200 F.3d 1128, 1131 (8th Cir. 1999); Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718, 724 (8th Cir. 1998).