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Censorship in Secondary School Newspapers: *Hazelwood School District v. Kuhlmeier*

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I. INTRODUCTION

In the secondary school context, censorship applies to both restrictions on publication and upon distribution of student newspapers. The purpose of censorship in this context is to protect those *about* whom the expression speaks and those *to* whom the expression speaks. The Supreme Court in *Hazelwood School Dist. v. Kuhlmeier*[1] recently categorized first amendment protection for student speech in student created newspapers based on a distinction between school-supported newspapers (official) and non-school-supported (underground) newspapers distributed on a secondary school's campus. The Court held that school-supported newspapers are not within the purview of the First Amendment because they have a specific educational purpose.[2] In regulating such newspapers, school administrators may impose whatever restrictions they choose so long as the restrictions are related to teaching concerns.[3] In comparison, the Court implied that underground newspapers constitute a public forum for expression of student thought and as such merit some constitutional protection.[4] The Court further implied that had the school-supported paper in *Hazelwood* been opened to indiscriminate use by the public, it would have lost its exempt status and become a public forum, subject to the protections of the First Amendment.[5]

While this *Hazelwood* categorization for determining First Amendment protection creates a clearer, more precise distinction in approaching First Amendment analysis, it also creates greater confusion in that no clear interpretation is provided as to what combination of activities and what extent of those activities is sufficient to change a newspaper considered outside the bounds of the First Amendment to a newspaper subject to the previous Court-defined protections of the First Amendment.

This note will discuss the general aspects of the *Hazelwood* case, the evolving standard for allowable restraints on student expression in

1. 108 S. Ct. 562 (1988).
2. *Id.* at 570.
3. *Id.* at 571.
4. *Id.* at 570-71.
5. *Id.* at 567-69.

student newspapers, and the *Hazelwood* addition to that standard. Following these discussions, it will conclude with an evaluation of the *Hazelwood* addition.

II. THE *Hazelwood School District v. Kuhlmeier* CASE

The principal of Hazelwood High School, in accordance with a written school policy,[6] deleted two full pages of the official school newspaper which contained five articles, two of which were deemed objectionable.[7] The authors of the deleted articles subsequently brought an

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6. The Hazelwood School Board Policy No. 348.5 read as follows:

Student Publications

a. Students are entitled to express in writing their personal opinions. The distribution of such material on school property may not interfere with or disrupt the educational process. Such written expressions must be signed by the authors.

b. Students who edit, publish or distribute hand-written, printed or duplicated matter among their fellow students within the schools must assume responsibility for the content of such publications.

c. Libel, obscenity, and personal attacks are prohibited in all publications.

d. Unauthorized commercial solicition [sic] will not be allowed on school property at any time. An exception to this rule will be the sale of non-school sponsored student newspapers published by students of the District at times and in places as designated by school authorities.

Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1377 nn.6 & 7 (8th Cir. 1986).

The Hazelwood School Board Policy No. 348.51 read as follows:

School Sponsored Publications

School sponsored publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism. School sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities.

Students who are not in the publications classes may submit material for consideration according to the following conditions:

a. All material must be signed.

b. The material will be evaluated by an editorial review board of students from the publication classes.

c. A faculty-student review board composed of the principal, publications teacher, two other classroom teachers, and two publications students will evaluate the recommendations of the student editorial board. Their decision will be final.

No material shall be considered suitable for publication in student publications that is commercial, obscene, libelous, defaming to character, advocating racial or religious prejudice, or contributing to the interruption of the education process.

Id.

7. One article objected to by the school administration expressed the story of three Hazelwood East High students' experiences with pregnancy. The other article discussed the impact of divorce on several Hazelwood East High students whose parents had been divorced. *Hazelwood*, 108 S. Ct. at 565.

action in the Eastern District Court of Missouri.[8] The district court refused to apply the test established in *Tinker v. Des Moines Independent Community School District*[9] of restricting student expression only if it materially disrupts classwork, involves substantial disorder, or invades upon the rights of others.[10] The court concluded that, in the context of a high school newspaper case, the *Tinker* test applies only to papers which are public fora[11] and not to papers that are an integral part of school curriculum.[12] Accordingly, the district court found that the deletion of the articles was not forbidden under the Constitution.[13]

On appeal, the Eighth Circuit reversed the district court's decision and held that the school newspaper was a "public forum for the expression of student opinion" and that the two articles objected to by the administration could not "reasonably have been forecast to materially disrupt classwork, give rise to substantial disorder, or invade the rights of others."[14] The Court of Appeals, premising their holding on the criteria set out in *Tinker*, held that the school could not censor publications in an official school newspaper unless tort liability for the school could arise from the publication.[15]

The United States Supreme Court, in reviewing *Hazelwood*, reversed the Court of Appeals and sided with the Eastern District Court of Missouri. The Supreme Court stated:

> [S]chool facilities may be deemed to be public forums only if school authorities have by "policy or by practice" opened those facilities "for indiscriminate use by the general public" . . . . If the facilities have

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8. Kuhlmeier v. Hazelwood School Dist., 607 F. Supp. 1450 (E.D. Mo. 1985).

9. 393 U.S. 503 (1969). *See infra* note 24 and accompanying text.

10. *Id.* at 513.

11. A public forum is any meeting place or medium used for open discussion or pursuing remedies. BLACK'S LAW DICTIONARY 589 (5th ed. 1979).

Many different places have been found to be public fora. *See generally* Hague v. C.I.O., 307 U.S. 496 (1939) (streets, sidewalks and parks are considered to places constituting a public forum); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (city theater may be a public forum).

Conversely, other places have been found not to constitute public fora. *See generally* Brown v. Louisiana, 383 U.S. 131 (1966) (libraries are not traditionally a public forum); Hefron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) (fairground is a limited public forum); Adderley v. Florida, 385 U.S. 39 (1966) (jailhouse is not a public forum); Greer v. Spock, 424 U.S. 828 (1976) (military base is not a traditional public forum); Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (school's internal mail system is not a traditional public forum); Lehman v. Shaker Heights, 418 U.S. 298 (1974) (advertising spaces on a municipally-owned transit system are not public fora); Los Angeles v. Taxpayers For Vincent, 466 U.S. 789 (1984) (a city utility pole is not a public forum).

12. *Kuhlmeier*, 607 F. Supp. at 1466.

13. *Id.*

14. *Kuhlmeier*, 795 F.2d at 1370.

15. *Id.* at 1376.

> instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.[16]

The Court further explained that a public forum is not created simply "by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."[17] Accordingly, the Court said that deleting the offensive articles was wholly within the bounds of the Constitution because the school officials "did not evince either 'by policy or by practice' any intent to open the pages of *Spectrum* [the newspaper] to 'indiscriminate use' by its student reporters and editors, or by the student body generally. Instead they 'reserve(d) the forum for its intended purpose(s)' as a supervised learning experience."[18]

The Court invalidated the application of the *Tinker* criteria to restraints imposed upon official school newspapers. The Court stated:

> It is this standard [of intent to open the paper to indiscriminate use], rather than our decision in *Tinker*, that governs this case. . . . [W]hether the First Amendment requires a school to *tolerate* particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to *promote* particular student speech.[19]

Accordingly, the Court rejected the suggestion that school officials may only apply prior restraints on school-sponsored publications pursuant to specific written regulations. To hold otherwise would "unduly constrain the ability of educators to educate."[20] In addition, the Supreme Court explicitly refused to address "whether the Court of Appeals correctly construed *Tinker* as precluding school officials from censoring student speech to avoid 'invasion of the rights of others' except where that speech could result in tort liability to the school."[21]

III. Status of Prior Restraints on the Constitutional Right of Free Speech in Secondary Schools

Throughout history, courts have viewed schools as society's train-

16. *Hazelwood,* 108 S. Ct. at 568 (citing Perry Education Assn. v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)).

17. *Id.* (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)).

18. *Id.* at 569 (citing *Perry Education Assn.*, 460 U.S. at 46 & 47).

19. *Id.* (emphasis added).

20. *Id.* at n.6.

21. *Id.* at n.5 (citing Tinker v. Des Moines School Dist., 393 U.S. 503, 513 (1969)).

ing grounds.[22] Accordingly, these courts have upheld restraints on minors' rights of free speech that support the values of society.[23] In order to fully understand the impact and significance of the *Hazelwood* decision, one must examine the history of federal court cases addressing restraints on secondary school student expression.

A. *Judicially Created Restraints on Free Speech in Secondary Schools*

In *Tinker v. Des Moines Independent Community School District,*[24] secondary school students wore black armbands in protest of the United States' policy towards Vietnam. The students were suspended for this act although their protest was peaceful and caused no substantial disruption to school activities. The students challenged the school's suspension on free speech grounds. The Supreme Court, in reviewing this case, upheld the students' rights to peacefully protest. However, the Court held that students' freedom of speech rights are limited to expressions which (1) do not materially disrupt classwork, (2) do not involve substantial disorder, or (3) do not invade upon the rights of others.[25] This three-pronged test set the foundation for future free speech challenges in secondary schools.

In a later case, *Bethel School District No. 403 v. Fraser,*[26] the Supreme Court faced a similar issue involving a school's power to censor student expressions. In *Bethel,* a student was suspended for giving a lewd nomination speech filled with sexual innuendos at a school-sponsored assembly. The student challenged the school administration's ac-

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22. "Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the 'work of the schools.' " Bethel School Dist. No. 403 v. Fraser, 106 S.Ct. 3159, 3165 (1986) (citing *Tinker*, 393 U.S. at 508). *See* Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (A school is "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."). *Cf.* Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982); Gainsberg v. New York, 390 U.S. 629 (1968); Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986); Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979).

23. *Cf.* Board of Educ., Island Trees Union Free School Dist. No 26 v. Pico, 457 U.S. 853 (1982); Gainsberg v. New York, 390 U.S. 629 (1968); Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159 (1986); Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979).

A few examples of such restraints that are prevalent in our current social system are restrictions on driving, buying alcohol, curfew hours, ratings of certain movies, and voting.

24. 393 U.S. 503 (1969).

25. [C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Id. at 513. *See also* Burnside v. Byars, 363 F.2d 744, 749 (1966).

26. 106 S. Ct. 3159 (1986).

tion basing his position on free speech grounds. The Supreme Court upheld the school administration's sanction and limited the student's right of free speech. The Court stated:

> [C]onstitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings. . . . It does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, that the same latitude must be permitted to children in a public school.[27]

Although in *Bethel* no substantial disruption occurred as a result of the speech, the Court justified the school's sanction because the penalties were unrelated to any political viewpoint, and for the Court to allow such a "vulgar and lewd speech . . . would undermine the school's basic educational mission."[28] Thus, *Bethel* added a judicial gloss to the criteria set forth in *Tinker*.

B. Limitations on Secondary School Students' Rights Of Free Speech As Applied To "Underground" Student Newspapers

Underground newspapers are not part of the school curriculum nor are they officially recognized by the school as a school paper. The courts have granted limited First Amendment protection to student expression in underground newspapers. Although the issue has never been addressed by the Supreme Court, many lower federal courts have faced this issue and have justified prior restraints based on the content of such newspapers.[29] These courts have done so on the same grounds stated by the Supreme Court in *Tinker* and *Bethel*—to protect against disruption, substantial disorder, infringement upon the rights of others, and diminishing a school's ability to accomplish its educational mission.[30]

The federal courts have implied that underground student newspapers which are not composed, printed, or distributed on the school premises would receive complete First Amendment protection.[31] These

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27. *Id.* at 3164.

28. *Id.* at 3166.

29. *See* Bystrom v. Fridley High School, Indep. School Dist. No. 14, 822 F.2d 747 (8th Cir. 1987); Thomas v. Board of Educ., Granville Cent. School Dist., 607 F.2d 1043 (2d Cir. 1979); Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971); Burch v. Barker, 651 F. Supp. 1149 (W.D. Wash. 1987); Sullivan v. Houston Indep. School Dist., 333 F. Supp. 1149 (S.D. Tex. 1971).

30. *See* Tinker v. Des Moines School Dist., 393 U.S. 503, 513 (1969) (disruption, substantial disorder, and infringement upon rights of others); Bethel School Dist. No. 403 v. Frazer, 106 S.Ct. 3159, 3166 (1986) (school's educational mission).

31. *See Eisner,* 440 F.2d at 808; *Bystrom,* 822 F.2d at 750; *Thomas,* 607 F.2d at 1052;

same courts, however, have dictated guidelines for constitutionally permissible administrative restrictions[32] which create both procedural and substantive limitations when an underground newspaper is distributed upon a secondary school's campus.

The procedural requirements for constitutionally permissible restraints all provide for screening of any printed material before distribution upon a school's campus. However, the procedures of screening are limited in order to protect the students' right of expression. First, any submitted material must be reviewed within a definite brief period of time.[33] Second, the procedures must specify to whom and how material may be submitted for clearance.[34] Third, the procedures must explain how appeals should be made from an adverse decision.[35] Fourth, the decision of whether prior restraints may be placed upon a certain expression or whether an offending author may be punished, must be made by an impartial and independent decision-maker.[36] Fifth, school administrators cannot punish the authors of off-campus expressions simply because they reasonably foresee the possibility of in-school distribution.[37] And finally, the procedures must not be vague or overbroad.[38]

Substantive requirements focus on a balance between the school's interests and the student's constitutional rights. The courts have held that any administrative restriction which requires review and approval before distribution must not threaten any student author nor prohibit distribution on school property unless the distribution materially interferes with normal classroom activity or normal school functions.[39] Bare allegations of interference with normal classroom activity or school functions based on undifferentiated fears or apprehensions of disturbance are not sufficient to support regulation. There must be a demonstrable, reasonable basis for interference with student speech.[40] Fur-

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Sullivan, 333 F. Supp. at 1162; *Burch*, 651 F. Supp. at 1155.

32. *See generally Thomas*, 607 F.2d at 1048; *Eisner*, 440 F.2d at 810; *Burch*, 651 F. Supp. at 1157-58.

33. *Eisner*, 440 F.2d at 810; *Burch*, 651 F. Supp. at 1156 ("[T]ime limits for decision making must exist at every level of the appeal process.").

34. *Eisner*, 440 F.2d at 811; *Burch*, 651 F. Supp. at 1157.

35. *Burch*, 651 F. Supp. at 1157.

36. The courts, however, fail to define who or what constitutes an impartial and independent decision-maker. In *Thomas*, the school board was deemed impartial and independent. *Thomas*, 607 F.2d at 1048.

37. *Id.* at 1053-54 (Newman, J., concurring).

38. If the regulation contains vague or overbroad statements, those portions of the regulation are considered to be invalid on their face. *See Bystrom*, 822 F.2d at 750; *Eisner*, 440 F.2d at 811.

39. Sullivan v. Houston Indep. School Dist., 333 F. Supp. 1149, 1169-70 (S.D. Tex. 1971).

40. *Tinker*, 393 U.S. at 508; *Eisner*, 440 F.2d at 810; *Sullivan*, 333 F. Supp. at 1070 (requiring actual interference with normal school activity or functions).

thermore, prior restraints may only be used in specific instances when no regulation as to time, place, or manner would avert the potential harm.[41] In the eighth circuit, this requirement is interpreted very broadly; school authority to censor is limited to situations which would result in tort liability for the school.[42]

The federal courts have also specified the subject matter which is outside of First Amendment protection. One justifiable restraint applies to material judged to be obscene to minors.[43] Materials are deemed obscene if, taken as a whole, they appeal to prurient interests, depict or describe sexual conduct in a patently offensive manner, and lack serious literary, artistic, political, or scientific value.[44] In addition, certain material may be considered obscene to a minor although that same material would not be considered obscene to an adult.[45] Another justifiable restraint applies to material presenting a clear and present likelihood of substantially disrupting discipline within the school.[46] The rationale for allowing restraints on material likely to cause student disruption is that the school must be able to meet the state's educational goals or the school ceases to be of value. Finally, material advertising any product or service not permitted to minors by law,[47] or expressions which are libelous, indecent, or vulgar,[48] are subject to prior restraint regulations.

C. *Judicial Deference to Administrative Restraints On Secondary School Student Speech As Applied To "Official" School Newspapers*

Until *Hazelwood,* the Supreme Court had never addressed free speech rights for students writing in an official school newspaper. However, the Eastern District Court of New York addressed the issue

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41. *Burch,* 651 F. Supp. at 1155.

42. *Bystrom,* 822 F.2d at 753-54. The *Bystrom* court holding was in accordance with the Eighth Circuit Court decision in *Hazelwood.* The Eighth Circuit's decision was subsequently overruled. However, in so doing, the Supreme Court expressly refused to decide whether tort liability to the school was a limitation on valid prior restraints for publications in a school-supported newspaper. *See Hazelwood,* 108 S. Ct. at 570 n.5.

Potential tort liability becomes an issue because parents are required to send their children to schools wherein the children can experience the educational process. When a student's rights of privacy and access to education are violated, the school fails in reaching the state's educational goals. The school may be liable to the injured student for not preventing or guarding against such violations.

43. *Bystrom,* 822 F.2d at 751.

44. Miller v. California, 413 U.S. 15, 24 (1973).

45. *See generally* Gainsberg v. New York, 390 U.S. 629 (1968).

46. *See, e.g., Bystrom,* 822 F.2d at 754.

47. *Id.* at 753.

48. *Id.* at 752-53.

in the case of *Frasca v. Andrews*.[49] This court, like the Supreme Court in *Hazelwood,* saw the official school newspaper as presenting a situation outside of the bounds of constitutional protection.[50] In *Frasca,* the school principal prevented distribution of the school's official newspaper although no written restriction policy existed. He did so on the basis that the contents of two of the letters to the newspaper's editor were objectionable. The principal claimed that a contentious letter from the school's lacrosse team and the editors' defiant response to it[51] were bound to cause substantial disruption and that another letter, from an anonymous party, unfairly infringed upon the rights of one particular student.[52] The *Frasca* court basically applied the *Tinker* standard and upheld broad prior restraint discretion in favor of the school administration. In so doing, the court held that for prior restraints on publication and distribution of student expressions within the official school newspaper, the Constitution did not require that the school's restrictions be written in order to be valid.[53]

IV. THE *Hazelwood* CASE RATIONALE

In *Hazelwood,* the Court held that the student articles were not protected by the First Amendment because they were printed in a school paper deemed "curriculum." By so doing, the Supreme Court added a new preliminary inquiry to the *Tinker* criteria. This new inquiry determines whether the *Tinker* criteria are applicable to allow limited First Amendment protection to particular student speech. *Hazelwood* establishes a new prong which requires a determination as to whether the student speech is being offered through a newspaper considered to be established for educational purposes or through a newspaper considered to be established for public discourse. If it is through a newspaper for public discourse, then the *Hazelwood* protective zone for educational purposes is pierced and the *Tinker* criteria apply to determine the constitutional protection of the student's speech. If, on the other hand, the student's speech is offered through a newspaper for educational purposes, then there is no constitutionally protectable interest at stake, and thus no standard nor criteria need be applied and the school authorities may regulate the speech regardless of whether a writ-

49. 463 F. Supp. 1043 (E.D.N.Y. 1979).

50. The official school newspaper is a newspaper supported by the school with funds, equipment, a supervisor, and, often, with academic credit for participation on the editorial staff. *See generally Hazelwood,* 108 S. Ct. at 565.

51. *Frasca* 463 F. Supp. at 1046.

52. The anonymous letter severely criticized the then vice-president of the student government. *Id.*

53. *Id.* at 1049-50.

ten policy exists. With the newspaper for educational purposes, the only limitation on the school authorities is that their actions be "reasonably related to legitimate pedagogical concerns."[54]

A. *Appropriateness Of The Hazelwood Standard*

The scope and appropriateness of restraints in the secondary school environment is an oft-considered dilemma.[55] The courts, as the final arbitrator, often end up balancing the competing interest of the state and the individual in an effort to secure justice. Ideally this balancing should rest with the legislature. However, in the secondary school atmosphere, judicial balancing is often required. There is a fine line between discipline necessary to enhance learning and restraints that deform and smother learning. On the one hand is the need to teach students how to work within society—how to present ideas in a legally and socially acceptable manner. On the other hand is the fact that too many restraints or too much control stifles the learning process; and both students and society suffer.

Under present systems, states have assumed a definite responsibility in educating their youth, in teaching good citizenship, and in protecting and preserving constitutional rights. The Constitution of most states preserves the right to a public education.[56] Citizens of every state pay taxes in support of this educational right. In addition, most states have compulsory statutory provisions which require adults who have legal control over minors to send those minors to public or private schools.[57] The interest and liability of the state therefore becomes sub-

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54. *Hazelwood*, 56 U.S.L.W. at 4082.

55. *See* Levin, *Educating Youth for Citizenship: the Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647 (1986); Churton-Hale, *Tinker Goes to the Theater: Student First Amendment Rights and High School Theatrical Productions in Seyfreid v. Walton*, 11 HASTINGS CONST. L.Q. 247 (1984).

56. ALA. CONST. amend. 284; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art XIV, § 1; CAL. CONST. art. IX, §§ 1 and 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VII, § 1; HAW. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, pt. 2, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. § 91; MICH. CONST. art. VIII, §§ 1 and 201; MINN. CONST. art. XIII, § 1; MISS. CONST. art. 8, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, §§ 1 and 2; NEB. CONST. art. VII, § 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, §§ 1 and 2; N.D. CONST. art. VIII, §§ 1-4; OHIO CONST. art. VI, §§ 2 and 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PENN. CONST. art. III, § 14; R.I. CONST. art. XII, §§ 1 and 2; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. XIII, § 1; WASH. CONST. art. IX, §§ 1 and 2; W.VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1. *See also* N.J. Const. art. VIII, § 4 ¶ 1.

57. For example, the state of Utah's compulsory education statute reads:

stantial when student expression interferes with the school's educational mission or infringes upon the rights of others.[58]

Students also have substantial interests both in receiving education[59] and in enjoying the constitutional right of free speech.[60] In secondary schools, educating should be the primary objective. The atmosphere should be one of learning. Apprehension, fear, or anticipating negation and restriction as a result of expressing one's views may stifle the learning process. "Students ought to have access to a variety of views . . . anything less than candor about how the world works, will induce either boredom or cynicism."[61]

The school atmosphere plays an influential role in the psychological and sociological development of a student's attitude toward himself—toward his individual abilities, his relationship to the world's situations, his facility in social interaction, and his development of personal goals, aspirations, and ideologies.[62] These self-evaluating attitudes create the individual; eventually they affect society at large.[63] Restrictions on a young student's expression of individualism or intellectual insight

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53-24-1. MINOR REQUIRED TO ATTEND SCHOOL - PENALTY FOR VIOLATION.

(1) Any person having control of a minor between six and 18 years of age is required to send the minor to a public or regularly established private school during the school year of the district in which the minor resides.

(2) It is a misdemeanor for a person having control of a minor under Subsection (1) to willfully fail to comply with the requirements of this chapter. A district board of education shall report cases of willful noncompliance to the appropriate juvenile court. Officers of the juvenile court shall immediately take appropriate action.

UTAH CODE ANN. § 53-24-1 (1986).

Many states only require minors to receive an 8th grade education. *Eg.* ARIZ. REV. STAT. ANN. § 15-321 (B)(4) (1956); ARK. STAT. ANN. § 80-1504 (1947); IOWA CODE § 299.2 (1971); S.D. COMP. LAWS ANN. § 13-27-1 (1967); WYO. STAT. ANN. § 21.1-48 (Supp. 1971).

58. Thomas v. Board of Educ. 607 F.2d 1043, 1049-50 (2d Cir. 1979) (the school has substantial educational interest in avoiding the impression that a student expression has been authorized by the school when, in fact, it has not been authorized).

59. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) (right to education is not considered to be a fundamental right, yet it has significance to both individuals and society); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments.").

60. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969).

61. Shrag, *Are We Willing to Pay the Price of Censoring Students Education?,* 98 L.A. Daily J., Sept. 11, 1985, at 6, col. 3.

62. *See* Asimov, *The Ultimate Effects of Creeping Censorship,* 95 L.A. Daily J., May 6, 1982, at 4, col. 3.

63. *See generally* Maddocks, *The 60's Recollected—Not Necessarily In Tranquility,* Christian Sci. Monitor, Mar. 11, 1988, at 19, col. 1.

may deform and smother the student's potential, perhaps creating a significant danger or loss to society.

Secondary school students, however, often lack sufficient maturity and experience to understand the impact of their statements and actions. If this were not so, students could be allowed to say or do anything they desired, for they could be assumed responsible for all the ramifications and all the potential problems.[64] Yet, this is not the case. Therefore, restrictions on some students' constitutional rights are often mandated in order to protect the constitutional rights of others as well as to enable the school to educate.

Accordingly, the Supreme Court in *Hazelwood* created a categorical determination that enables states to more easily accomplish their educational mission. The categorical approach, however, requires the courts to balance the competing interests of the state and the individual students. Such a balancing may be needed in the secondary school context in order to find justice; and indeed, securing justice is a proper role of the courts.

At first, it may appear that the Court, by using the *Hazelwood* categorical approach, has not done any balancing. However, though not expressly stated or explained, the Court does balance the state's interest against the students' interest when the Court determines in which category the student expression is offered. For example, if the speech is offered through a newspaper for educational purposes, the Court will find the state's interest to educate greater than the student's interest in free speech (unless, of course, the newspaper has been opened to indiscriminate use by the public). This must be so because any school program inevitably infringes upon some freedom granted by the Constitution. If no granted freedom could ever be infringed upon for some greater cause or freedom, then the education process could never be accomplished in the secondary school atmosphere. Conversely, if the speech is offered through a newspaper that has no specified educational purpose, the Court will not automatically grant deference to the state's interest but will evaluate the student's free speech interest to determine whether it be greater than the interests of the state in educating. In the

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64. Accordingly, prior restraints are often justified by many practical reasons such as the inadequacy of sufficient sanctions against student expressors and the inadequacy of possible restitution available to those injured by damaging expressions or by the resulting school disruption. *See generally* Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988); *Tinker,* 393 U.S. at 513; Bethel School Dist. No. 403 v. Fraser, 106 S.Ct. 3159, 3164 (1986); Bystrom v. Fridley High School, Indep. School Dist. No. 14, 822 F.2d 747, 753-54 (8th Cir. 1987); Thomas v. Board of Educ., Granville Cent. School Dist., 607 F.2d 1043, 1049-50 (2d Cir. 1979); Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 808-10 (2d Cir. 1971); Frasca v. Andrews, 463 F. Supp. 1043, 1050 & 1052 (E.D. N.Y. 1979); Burch v. Barker, 651 F. Supp. 1149, 1154-55 (W.D. Wash. 1987).

newspaper with no specified educational purpose, the *Tinker* criteria apply to guide this balancing. Therefore the Court, by adopting the *Hazelwood* categorical approach, has enhanced the ability of the state to freely educate and also has secured justice in the secondary school context by balancing the competing interests of individual students within the educational parameters established by the states.

B. Criticisms of the Hazelwood Standard

Although the addition of the *Hazelwood* categorization to the previously established standard enhances the states' ability to educate and allows for a balancing of individual interests, it also creates potential problems and confusion. The categorization gives little guidance, if any, to law-makers in interpreting what combinations of activities, what extent of those activities, or what degree of school support will keep a newspaper for educational purposes free from becoming a newspaper for public discourse (public forum). The *Hazelwood* decision states that because

> public schools do not possess all of the attributes of streets, parks, and other traditional public forums. . . . School facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities for "indiscriminate use" by the general public, or by some segment of the public, such as student organizations.[65]

"[B]y policy or by practice" is further defined by the Court as requiring more than "inaction" or "permitting limited discourse."[66] It requires some element of intent on the part of the state. The Court stated that the government creates a public forum "only by *intentionally* opening a nontraditional forum for public discourse."[67] The Court's implied definition of "indiscriminate use" seems to rest on whether the forum has been used for something other than its intended purposes.[68] Again, intent is the controlling factor. The Court further stated that if the forum had been reserved for its "intended purposes 'communicative or otherwise,' then no public forum has been created . . . ."[69] Once again, the Court, in determining when a forum for educational pur-

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65. *Hazelwood*, 108 S. Ct. at 568 (citing Perry Education Assn. v. Perry Local Educators' Ass'n, 460 U.S. 37, 46-47 n.7 (1983)).

66. *Id.* (citing Cornelius v. NACCP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 802 (1985)).

67. *Id.* (emphasis added).

68. *Id.*

69. *Id.* (citing *Perry Education Assn.*, 460 U.S. at 47).

poses becomes a forum for public discourse, focuses on the *intentions* of the school authorities.

Intent refers only to state of mind, not to what incites a person to act or not to act.[70] It implies some sort of purpose, aim, or design.[71] However, there is substantial ambiguity in the Court's definition of intent. The Court fails to distinguish whether the intended purpose of a forum applies to the activity involved, to the status of the individuals with access to that forum, or to both the activity and the status of the individuals.

If the Court's intent focus is toward the activity, then further ambiguities arise. For example, it must be determined what exactly is the intended activity of the forum.[72] Is the intended activity of the student newspaper simply writing? Or, is it specifically teaching journalism? Furthermore, it must be determined whether there is a distinguishable difference between the possibly intended activities (i.e. a difference between simply writing and specifically teaching journalism). If, on the other hand, the Court's intent focus is not toward the activity but is instead directed toward the status of individuals who have access to the forum, still further ambiguities arise. For example, it must be determined to whom the forum was intended to be open, and what actually constitutes access to the forum. It must also be determined what amount of limited access by others, not originally intended to be users of the forum, is sufficient to change the intended restrictive purpose of the forum. If the intent focus is towards both the activity and the status of the individuals with access to the forum, then the ambiguities created by both of these focuses become barriers to determining when a forum changes from its intended purposes to "indiscriminate use."

Secondary school newspapers could come from totally off-campus resources, totally on-campus resources, or all varieties of combinations in between. Likewise, the amount of previous control and guidance given to a student newspaper could range from no control to total or absolute control. The Court, in creating the categorical standard for determining the applicability of First Amendment protection, gives only indiscriminate factual situations with no discussion of distinguishing traits to guide the determinations of the inevitable future cases within

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70. Motive is what incites a person to action. Intent refers only to state of mind with which the act is done or omitted. BLACK'S LAW DICTIONARY 727 (5th ed. 1979).

71. Witters v. United States, 106 F.2d 837, 840 (D.C. Cir. 1939).

72. In *Hazelwood* the activity was defined in the school policy governing the school newspaper. However, the Court nonetheless looked at the circumstances to determine whether the newspaper forum had been reserved for its intended educational purposes. *Hazelwood,* 108 S. Ct. at 568-69.

the extremes.[73] Various combinations of the factors, or the importance of each factor in comparison to the others, is not covered or even alluded to in the *Hazelwood* opinion.

In addition, because intent is a state of mind, it is difficult, if not impossible, to establish by direct proof. Accordingly, intent must be inferred from the circumstances.[74] This is true for many contexts. For example, in the construction of a Last Will and Testament, intent or intention means the sense and meaning gathered from the words used therein. In the context of civil or criminal liability, a person's intent is inferred from any result possibly contemplated.[75] Accordingly, the Court's test, "by policy or by practice" opening the forum to "indiscriminate use," supplies no greater insight. The circumstances nonetheless determine the result. Any conceivable result could be construed to fulfill the prior intent requirement. Therefore, the Court's test professes to give guidance but in application sheds no light on what combination of activities or what extent of those activities is sufficient to change a newspaper forum for a specific educational purpose to a newspaper for public discourse. As a result, the ambiguity in interpreting the guidelines stated by the Court may increase confusion and arbitrariness for future decision-making.

CONCLUSION

Most states have assumed some sort of a responsibility to educate children by requiring them to attend secondary schools. The *Hazelwood* Court, in supporting the states' education goals, has created a categorization for judicial balancing of students' rights within these educational parameters. In so doing, the Court has increased the ease in which educators may educate. However, by so doing without sufficiently defining the judicial guidelines given, the Court has created confusion and problems for both the legislature and the judiciary.

James E. Ellsworth

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73. The factual guidelines mentioned are that there was a faculty advisor who "selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company." In addition, there was a scheduled class hour for which grades and credit were given in accordance with individual performance in the course. *Id.* at 568.

74. State v. Gantt, 26 N.C. App. 554, 555, 217 S.E.2d 3, 5 (1975); State v. Evans, 219 Kan. 515, 519, 548 P.2d 772, 777 (1976) (state of mind can be shown by the act, circumstances, and inferences deducible from that act or those circumstances).

75. BLACK'S LAW DICTIONARY 725-26 (5th ed. 1979).