DOCUMENT RESUME

ED 298 534 CS 211 514

AUTHOR Robbins, Jan C.
TITLE Student Press and the "Hazelwood" Decision. Fastback 274.
INSTITUTION Phi Delta Kappa Educational Foundation, Bloomington, Ind.
REPORT NO ISBN-0-87367-274-7
PUB DATE 88
NOTE 41p.; Fastback sponsored by the University of Northern Iowa Chapter of Phi Delta Kappa.
AVAILABLE FROM Phi Delta Kappa, Eighth and Union, Box 789, Bloomington, IN 47402 ($.90).
PUB TYPE Reports - Evaluative/Feasibility (142) -- Viewpoints (120)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Censorship; *Court Litigation; Faculty Advisers; Federal Courts; *Freedom of Speech; High Schools; *Journalism Education; *School Newspapers; Secondary Education
IDENTIFIERS *Hazelwood School District v Kuhlmeier; *Supreme Court; Tinker v Des Moines Independent School District

ABSTRACT

This fastback examines Hazelwood School District v. Kuhlmeier (1988), the first high school student press case ever to reach the United States Supreme Court. The pamphlet reviews the background and implications of the Hazelwood decision and speculates as to how it will be applied to student expression in the public high schools. Chapters include: (1) "Student Press and the Public Forum Doctrine"; (2) "Whatever Happened to Tinker?"; (3) "Strict Scrutiny v. Rational Relationship"; and (4) "Applying Hazelwood in the Public Schools." The fastback concludes that official censorship of the student press, and of student expression generally, seems to have been reborn with Hazelwood, because it now governs all student expression in curriculum-related or other school-sponsored activities. (MS)

FASTBACK

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Student Press and the *Hazelwood* Decision

Jan C. Robbins

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Research for this fastback was partially funded by the University of Northern Iowa Graduate College and the University of Northern Iowa Chapter of Phi Delta Kappa.

Series Editor, Derek L. Burleson

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by
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Library of Congress Catalog Card Number 88-61691
ISBN 0-87367-274-7

Bloomington, Indiana

This fastback is sponsored by the University of Northern Iowa Chapter of Phi Delta Kappa, which made a generous contribution toward publication costs.

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Introduction

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

– U.S Constitution, Amendment 1

In one sense school-sponsored student publications are part of the curriculum or, at least, important extracurricular adjuncts to it. In another sense they are vehicles for the exercise of student expression. School officials traditionally have been accorded comprehensive authority to prescribe and control the curriculum. On the other hand, the First Amendment to the U.S. Constitution, applied to the states via the due process clause of the Fourteenth Amendment, prohibits them, as agents of government, from abridging freedom of speech and press.

To what extent, then, may school officials legitimately control the content of student publications and the behavior of those engaged in producing them? To what extent do they run afoul of constitutional protections if they do so?

These were precisely the questions raised in *Hazelwood School District* v. *Kuhlmeier* (1988), the first high school student press case ever to reach the U.S. Supreme Court. The facts of *Hazelwood* are not unique; they epitomize the problems that arise when students' exercise of First Amendment rights come in conflict with the authority of school officials. Here are the facts.

Spectrum, the school-sponsored student newspaper of Hazelwood (Mo.) East High School, was produced eight to ten times a year in four- to six-page editions by students in the school's Journalism II class. Typically it carried articles on topics of interest to students such as sports, faculty interviews, and school events, as well as news stories, reviews, and items of more general current interest. The school allocated funds for the paper in its annual budget. These funds were supplemented by sales of the paper in the library and lunch room at 25 cents a copy.

Students in the class received journalism instruction, course credit, and a grade; but their primary activity was production of the paper. Students in the class constituted the paper's editorial staff and largely determined its content and layout. Students from outside the class also submitted material for the paper. Most of the work on the paper was done in class, although not all the material produced in class saw print.

The Journalism II teacher served as the newspaper's advisor. He exercised some editorial control and submitted each issue of the paper to the school principal for prepublication review. When he submitted proofs of the 13 May 1983 edition of *Spectrum*, the principal ordered deletion of two full pages containing five articles. The principal gave no reason for the deletions at the time, but later said that he had found only two of the five articles objectionable.

One objectionable article dealt with three Hazelwood students' experiences with teenage pregnancy, the other with the impact of parental divorce on a Hazelwood student. Pseudonyms had been used for the names of students in the pregnancy article, but the principal said that he thought they could be identified from context. The divorce article, he said, named the student and gave reasons for the parents' divorce, but the parents had not been consulted or given an opportunity to respond. (At the time he ordered the deletions he did not know that the name of the student in the divorce article had previously been deleted from the printer's copy.)

The other stories on the deleted pages dealt with reasons why teenagers run away from home, teenage pregnancy generally, the dif-

ficulties of teenage marriage, and the proposed federal regulation requiring that parents of minors be notified if their children received birth control advice or devices from a federally funded clinic. These were deleted simply because they appeared on the same pages as the objectionable stories, and the principal did not believe there was time to revise the paper's layout before publication.

The students did not learn of the deletions until the issue appeared. They met with the principal, who told them that the articles were "inappropriate, personal, sensitive, and unsuitable." The students then photocopied the articles and distributed them to students on campus, an action for which they were not punished.

Three Journalism II students who served on the *Spectrum* staff, but had not written any of the stories in question, filed suit under the Civil Rights Act (42 U.S.C.S 1983), arguing that their First and Fourteenth Amendment rights to freedom of speech and press had been violated. *Spectrum*, they said, was a "student newspaper published . . . as an *adjunct* to the school's journalism curriculum" and therefore a "free speech forum" protected by the First Amendment (emphasis added). The deleted articles, they said, "did not violate any pre-existing, objective standard for censoring articles," contained no libelous, obscene, or private matter, and would have caused no material or substantial disruption of the work and discipline of the school. Their deletion, the students claimed, was a form of censorship, or prior restraint.

The school district responded that *Spectrum* was not a public forum but "a product of the Journalism II class" and thus a part of the school curriculum. "The decision of which articles to produce in *Spectrum*," it argued, "is committed to the discretion of Hazelwood East officials."

When brought to trial in the U.S. District Court for the Eastern District of Missouri, the court held for the school district and its officials (*Kuhlmeier* v. *Hazelwood School District*, 1985). The court said, "*Spectrum* was an integral part of the Journalism II course" and found the actions taken at Hazelwood East "amply justified." Stating that

although "school officials still must demonstrate that there was a reasonable basis for the action taken, based on the facts before them at the time of the conduct in question," the court concluded, "The full panoply of precise substantive and procedural regulations is not required within the context of a program that is an integral part of a high school's curriculum. That is what is meant by the rule that school officials have a great deal of discretion in the realm of curriculum." The students appealed the decision.

The U.S. Court of Appeals for the 8th Circuit reversed the district court and held for the students (*Kuhlmeier* v. *Hazelwood School District*, 1986). "*Spectrum*," it said, "is a public forum because it was intended to be and operated as a conduit for student viewpoint." Therefore, "School officials must demonstrate that the [deletion] was 'necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others'." From the evidence presented at the trial the principal could not show that "any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder." The school district appealed this decision to the Supreme Court.

In February 1988 the U.S. Supreme Court reversed the circuit court of appeals. "Educators," it said, "do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."

Hazelwood is the most important decision the Supreme Court has made dealing with students' First Amendment rights since the landmark *Tinker* v. *Des Moines Independent Community School District* in 1969, which dealt with students' rights to wear black armbands at school in protest of the Vietnam War. For those concerned with high school student publications and other school-sponsored activities in which student expression is an integral part (school plays, speeches, debate tournaments, etc.) this decision is of great importance, because

it, rather than *Tinker*, now governs official attempts to limit student expression in most of those activities.

In this fastback I shall review the background and implications of the *Hazelwood* decision and speculate as to how it will be applied to student expression in the public high schools.

Student Press and the Public Forum Doctrine

In 1985 the district court, which ruled in favor of the school district in *Hazelwood*, stated: "When faced with determining the scope of students' First Amendment rights within the context of school-sponsored programs, courts focus on whether the particular program or activity is *an open and public forum of free expression or an integral part of the curriculum*" (emphasis added) That is, before courts can answer the fundamental question – whether school officials may control student expression – courts must make a crucial First Amendment decision concerning the public forum doctrine. Following is an explanation of this doctrine.

If student expression in school occurs in the context of a pure or semi-public forum, the powers of government to control it are severely limited. If it occurs in the context of the school curriculum and therefore in a non-public forum, official regulation of expression is much more broadly permitted. The decision depends on how the now well-established First Amendment public forum doctrine is held to apply to the facts particular to the expression and the school. It is the Supreme Court's holding in this regard that lies at the heart of the landmark *Hazelwood* decision.

Under the public forum doctrine developed by the Supreme Court in *Perry Education Association* v. *Perry Local Educators' Association* (1983), places and activities under government control fall into one of three categories. 1) Those such as public streets and parks,

which traditionally have allowed assembly and open debate, are called "pure" or "traditional" public forums. 2) Those such as university facilities, school board meetings, and public fairgrounds, which are not intended or primarily used for unrestricted freedom of expression but which the state has allowed the public to use for expressive activity, are called "semi-public" or "limited" public forums. 3) Those such as military posts, jails, and prisons, which by long tradition or by government policy or practice have not allowed freedom of expression and assembly, are called "non-public" forums.

The Supreme Court has held that "the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public" (*Grayned* v. *City of Rockford*, 1972). Streets and sidewalks do not lose their pure public forum status simply because there is a school nearby. But neither the Supreme Court nor any other court has ever held that schools themselves are pure public forums in the sense that streets, sidewalks, and public parks are. On the other hand, it has been clear since *Tinker* that in some circumstances school facilities and activities are, or by the action of school officials can be turned into, limited or semi-public forums for student expression.

In *Tinker*, where school officials had prohibited a group of high school students from wearing black armbands to school in opposition to the Vietnam War, the Supreme Court noted that these officials had not

> purport[ed] to prohibit the wearing of all symbols of political or controversial significance. . . . students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol – black armbands worn to exhibit opposition to this nation's involvement in Vietnam – was singled out for prohibition.

In language that is today accepted as the basis of the the public forum doctrine, the Court said, "Clearly, the prohibition of expression

of one particular opinion [in school], at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."

Since *Tinker*, federal courts have held that schools created limited or semi-public forums when they: 1) used a district's school-to-parents message distribution system to carry politically partisan messages (*Bonner-Lyons* v. *School Commission of City of Boston*, 1973); 2) opened school facilities during school hours to outside speakers (*Vail* v. *Board of Education of Portsmouth School District*, 1973) or military recruiters (*Clergy and Laity Concerned* v. *Chicago Board of Education*, 1984); and 3) opened school facilities during non-school hours for meetings by community groups (*National Socialist White People's Party* v. *Ringers*, 1973; *Lawrence University Bicentennial Commission* v. *City of Appleton*, 1976; *Knights of the K.K.K., Etc.* v. *East Baton Rouge*, 1978; *Country Hills Christian Church* v. *United School District 512*, 1983).

Without direct reliance on the public forum doctrine, but in clear sympathy with it, courts also have held that schools may not deny recognition to student groups or individuals without a showing that they would materially and substantially disrupt the work of the school (*Dixon* v. *Beresh*, 1973; *Fricke* v. *Lynch*, 1980).

Most recently, in *Bender* v. *Williamsport Area School District* (1986), the Supreme Court let stand a lower court decision that a school policy allowing use of school facilities during school hours for meetings by high school student groups created a limited public forum for meetings of similar character, even for student religious groups. (See fastback 253 *Voluntary Religious Activites in Public Schools: Policy Guidelines*.)

The high school student press was explicitly held to constitute a semi-public forum within weeks of the *Tinker* decision. In *Zucker* v. *Panitz* (1969), school officials had prohibited publication in a school newspaper of a paid student advertisement opposing the war in Vietnam, while allowing publication of articles and expressions of stu-

dent opinion concerning the war. The U.S. District Court for the Southern District of New York held that the school paper was "a forum for the dissemination of ideas":

> Here, the school paper appears to have been open to free expression of ideas in the news and editorial columns as well as in letters to the editor. It is patently unfair in light of the free speech doctrine to close to the students the forum which they deem effective to present their ideas.

Later, in *Gambino* v. *Fairfax County School Board* (1977) – a case very similar to *Hazelwood* – school officials had prohibited publication in a school newspaper of an article titled, "Sexually Active Students Fail to Use Contraception." A district court held that the paper was "entitled to the First Amendment protection afforded a public forum."

Similarly, in *Stanton by Stanton* v. *Brunswick School Department* (1984), a district court held that officials could not prohibit publication of a quotation dealing with capital punishment next to a student's yearbook picture, because the yearbook "has been permitted, as a matter of fact, to serve the purpose of affording a forum in which senior students may express their personal views, opinions, and ideas through the selection of quoted material."

These precedents were recognized by the circuit court in *Hazelwood* (1986) when it stated:

> Although *Spectrum* was produced by the Journalism II class, it was . . . a forum in which the school encouraged students to express their views to the entire student body freely, and students commonly did so. [It] was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a public forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment.

Despite the precedents, the *Hazelwood* district court (1985) had originally held that "*Spectrum* was an integral part of Hazelwood East's

curriculum, as opposed to a public forum for free expression by students"; and it is this view that was upheld by the U.S. Supreme Court. "School facilities," said the Supreme Court, "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" (emphasis added). Now let us turn to the effects of this ruling.

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Whatever Happened to *Tinker*?

The immediate effect of the *Hazelwood* decision is to deny the applicability of the landmark *Tinker* decision with regard to student expression in almost all forms of curriculum-related or school-sponsored activity, including high school student publications. But it is important for educators to understand the line of reasoning both the district and the Supreme Court used in arriving at their decisions.

The district court in *Hazelwood* (1985) wrote: "Two lines of cases have developed for dealing with student free speech and press issues. . . . One line of cases consists of those situations where student speech or conduct occurred *outside* of official school programs. In the other are cases where the speech or conduct in question occurred *within* the context of school-sponsored programs" (emphasis added). In the first line of cases, students' First Amendment rights generally prevail; while in the second, results have been mixed:

> In the first line of cases the free speech and press rights of students are at their apogee. The primary focus is on the extent to which the exercise of such rights would interfere with the educational process In such cases, school officials are rarely able to show that non-program related student speech or conduct will materially disrupt the educational process. In the second line of cases, however, the interests of school officials and the special function performed by schools in our society are given considerably more weight. The initial focus is not so much on the effect of the students' speech or conduct as it is on

the nature of the school-sponsored program or activity in question. Where the particular program or activity is an integral part of the school's educational function, something less than substantial disruption of the educational process may justify prior restraints on students' speech and press activities.

The district court, and ultimately the Supreme Court, held that it was the second line of cases that applied to *Hazelwood*. Said the Supreme Court:

> The question whether 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. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

This ruling is the culmination of a series of cases begun in the conservative decade of the 1980s, marking a gradual erosion of the *Tinker* precedent.

In 1981 a U.S. district court in *Seyfried* v. *Walton* upheld a school superintendent's cancellation of a high school production of the musical, *Pippin*, because of its "sexual content." The court ruled that the superintendent's action "was no different from other administrative decisions involving allocation of education resources." On appeal the circuit court (1981) agreed, although it made a distinction between student expression in student newspapers and other non-program-related forums. Said the appeals court: "Those responsible

for directing a school's educational program must be allowed to decide how its limited resources can be best used to achieve the goals of educating and socializing its students. The critical factor . . . is the relationship of the play to the school curriculum." The court went on to say: "[T]he school's sponsorship of a play would be viewed as an endorsement of the ideas it contained [and] a school has an important interest in avoiding the impression that it has endorsed a viewpoint at variance with its educational program."

The U.S. Court of Appeals for the Ninth Circuit drew a similar conclusion in *Nicholson* v. *Board of Education* (1982), in which a principal required that articles on certain controversial issues – minority unrest in the community, police-student relations, the school's handling of students' Fifth Amendment rights – be submitted to him for review before publication "to ensure their accuracy." A high school journalism teacher who served as the school newspaper advisor refused to comply, was later dismissed, and challenged his dismissal on grounds that it was based on constitutionally protected actions he had taken as the paper's advisor. The court upheld his dismissal on grounds he had violated other school rules and policies, but noted, in passing, that students' First Amendment rights "are not coextensive with those of adults and may be modified or curtailed by school policies that are reasonably designed to adjust those rights to the needs of the school environment":

> Writers on a high school newspaper do not have an unfettered constitutional right to be free from pre-publication review. . . . In the present case, the school possessed a substantial educational interest in teaching young, student writers journalistic skills which stressed accuracy and fairness . . . When [the principal] informed appellant and his journalism class that certain articles in the school-sponsored newspaper must be reviewed for accuracy, he properly exercised his supervisorial authority to read those occasional articles about subjects so sensitive that it would be derelict to accord untrained, adolescent writers absolute freedom from pre-publication review for accuracy.

Then, in *Bethel School District* v. *Fraser* (1986), the Supreme Court ruled for authorities who had disciplined a student who had used elaborate sexual metaphors and innuendo in a speech at a school assembly nominating a fellow student for school elective office. "The First Amendment," it said, "does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission":

> The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. . . . First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children. . . . These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis* to protect children – especially in a captive audience – from exposure to sexually explicit, indecent, or lewd speech.

Adopting these arguments, the Supreme Court in *Hazelwood* concluded that "the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression." Since "school officials [at Hazelwood] did not evince either 'by policy or practice' any intent to open the pages of *Spectrum* to 'indiscriminate use' by its student reporters and editors, or by the student body generally," but "reserved the forum for its intended purposes as a supervised learning experience for journalism students . . . no public forum was created." Therefore "school officials were entitled to regulate the contents of *Spectrum* in any reasonable manner. *It is this standard, rather than our decision in* Tinker, *that governs this case*" (emphasis added).

Thus the *Hazelwood* Court rejected – indeed explicitly rejected – the applicability of *Tinker* wherever the name and resources of

the school are lent to activities involving the dissemination of student expression and when school officials have not "by policy or practice" allowed or encouraged free expression in those activities. But the Court did not stop there. It went on to erect a new standard for regulating student speech in curriculum-related or school-sponsored activities that extends to school officials' broad new powers of censorship and control. That standard is the subject of the next chapter.

Strict Scrutiny v. *Rational Relationship*

The ultimate effect of the *Hazelwood* decision is to replace the rigorous constitutional test of "strict scrutiny" applied under *Tinker* to official attempts to limit student expression in curriculum-related or school-sponsored activity with a much less restrictive test of "rational relationship" or "reasonableness."

The test of "strict" or "critical" scrutiny applies to pure and semi-public forums. Official attempts to restrict expression in such forums will withstand judicial review if and only if they are "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end" (*Perry Education Association* v. *Perry Local Educators' Association*, 1983). Public forum restrictions "cannot be justified upon a mere showing of a legitimate state interest." Instead, "the interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest" (*Kusper* v. *Pontikes*, 1973). Furthermore, "it is not enough that the means chosen [to further] the interest be *rationally related* to that end," for "If the State has open to it a less drastic way of satisfying the legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties" (*Elrod* v. *Burns*, 1975; emphasis added).

When the Court in *Tinker* reversed the suspensions of the students who wore black armbands to school, it set out four basic principles governing student First Amendment rights:

1. "Students in school as well as out of school are 'persons' under our Constitution . . . possessed of fundamental rights which the State must respect."
2. "The classroom is peculiarly the 'marketplace of ideas'," but the right to freedom of expression extends as well to "the cafeteria . . . the playing field, [and] the campus during the authorized hours."
3. School officials may not regard students "as closed-circuit recipients of only that which the State chooses to communicate," may not "confine students to the expression of those sentiments that are officially approved," and may not "suppress expressions of feelings with which they do not wish to contend."
4. But student freedom of expression must be "applied in light of the special characteristics of the school environment. . . . conduct 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 . . . not immunized by the constitutional guarantee of freedom of speech."

From *Tinker* to *Hazelwood* virtually all courts and commentators read the first three of these principles as establishing public forum status for most school activities and the fourth as defining the limits of "compelling state interest," the standard of strict scrutiny (see Nahmod, "Beyond Tinker: The High School as an Educational Public Forum," *Harv. Civil Rights – Civil Liberty Law Review* 5: 278, 1970; also Comment, "The Public School as a Public Forum," *Texas Law Review* 54: 90, 1975).

Schools always have had the power to control expression that is constitutionally unprotected, for example, expression that is obscene, inciting to violence, libelous, or in violation of copyright. And this power also is incorporated under the strict scrutiny test.

The following cases illustrate the point. Immediately following *Tinker*, a federal district court (*Zucker* v. *Panitz*, 1969) applied the test

of strict scrutiny to attempts to limit expression in the official, school-sponsored student press. Within a year of *Tinker*, a U.S. circuit court (*Scoville* v. *Board of Education*, 1970) applied it to attempts to limit on-campus expression in nonschool or so-called "underground' student media as well, holding that students could not be expelled for writing off school premises, but distributing in school, a paper containing criticisms of school officials.

In succeeding years courts typically held that *Tinker* and strict scrutiny protected students in cases in which school officials sought to control the student press. In school-sponsored press cases, for example, it was held that school officials could not prohibit:

1. Distribution of a school literary magazine containing four-letter words and a description of a movie scene in which a couple "fell into bed" (*Koppel* v. *Levine*, 1972).
2. Distribution of a school newspaper containing a sex education supplement (*Bayer* v. *Kinzler*, 1974).
3. Publication in a school paper of an article titled, "Sexually Active Students Fail to Use Contraceptives" (*Gambino* v. *Fairfax County School Board*, 1977).
4. Publication of articles containing the word "damn," descriptions of new teachers' attitudes toward homosexual teachers, or an explanation of why an earlier edition of the paper had not been distributed on schedule (*Reineke* v. *Cobb County School District*, 1980).
5. Publication of a quotation concerning capital punishment next to a student's picture in the school yearbook (*Stanton by Stanton v. Brunswick School Dept.*, 1984).

In cases concerning distribution of unofficial student publications, courts held that school officials could not expel a student for bringing a supposedly obscene publication onto campus without being given a hearing (*Vought* v. *Van Buren Public Schools*, 1969). They could not prohibit a student from distributing in school an anti-war leaflet

and "A High School Bill of Rights" on grounds that distribution violated a school regulation prohibiting use of school facilities for advertising or promoting nonschool organizations without prior approval (*Riseman v. School Commission*, 1971).

In another set of cases dealing with procedural issues, courts ruled that school officials could not prohibit students from distributing nonschool literature on campus where: 1) there was a blanket prohibition of distribution of all nonschool literature without prior approval (*Vail* v. *Board of Education*, 1973); 2) there were no criteria to be followed by officials in granting or denying permission to distribute (*Quarterman* v. *Byrd*, 1971); 3) the criteria for granting or withholding permission were vague or overbroad (*Jacobs* v. *Board of School Commissioners*, 1973; *Baughman* v. *Freienmuth*, 1973; *Cintron* v. *State Board of Education*, 1974; *Pliscou* v. *Holtville Unified School District, 1976; Hernandez* v. *Hanson*, 1977; *Leibner* v. *Sharbaugh*, 1977); and 4) the procedures or time limit for obtaining permission to distribute were not clearly specified or failed to provide for the contingency that school officials might refuse to act on a request for permission (*Eisner* v. *Stamford Board of Education*, 1971; also *Pliscou* and *Leibner*).

In still another set of cases dealing with the "substantial disruption" rationale in *Tinker*, the courts ruled that school officials could not prevent distribution of nonschool student publications 1) without evidence that it would cause a substantial disruption to the work and discipline of the school (*Fujishima* v. *Board of Education*, 1972; *Peterson* v. *Board of Education*, 1973; *Karp* v. *Becken*, 1973; also *Hernandez*), or 2) where no guidance was given as to what constituted substantial disruption (*Nitzberg* v. *Parks*, 1975). Also, they could not prohibit students from distributing a nonschool student paper off school grounds and after school hours where there was no evidence of substantial disruption to work and discipline in the school (*Shanley* v. *Northeast Independent School District*, 1972; *Thomas* v. *Board of Education*, 1979).

Even in cases in which restrictions on the student press were upheld, the "strict scrutiny" test in *Tinker* provided the applicable constitutional standard. For example, in school-sponsored student press cases, it was held that 1) the "invasion of the rights of others" component of *Tinker* justified prohibition of distribution of a student newspaper containing a student sexual activity questionnaire, because the nature of the questionnaire had the potential of causing significant emotional harm to students in the school's population (*Trachtman* v. *Anker*, 1977) and 2) the "material and substantial disruption" component of *Tinker* justified seizure of an issue of a student newspaper that contained material that threatened fights among students (*Frasca* v. *Andrews*, 1979).

With regard to nonschool publications, the courts held that the "material and substantial disruption" component justified discipline of students who brought unofficial publications onto school grounds or distributed them there where 1) the discipline was for disobedience and insubordination in the presence of clear and specific school regulations rather than an effort to suppress publication content (*Schwartz* v. *Schuker*, 1969; *Graham* v. *Houston Independent School District*, 1970; *Sullivan* v. *Houston Independent School District*, 1973); 2) the student publication contained obscene, profane, or vulgar content (*Vought* v. *Van Buren Public Schools*, 1969; *Baker* v. *Downey City Board of Education*, 1969); or 3) the publication advocated a student walkout in protest of the manner in which school disciplinary rules were enforced (*Dodd* v. *Rambis*, 1981).

Courts also have used the "material and substantial disruption" component to uphold prohibition of distribution of nonschool publications on campus when the publications 1) solicited funds from students in violation of specific school rules (*Katz* v. *McAuly*, 1971); 2) were obviously sectarian in nature (*Hernandez* v. *Hanson*, 1977); or 3) contained advertising of illegal drug paraphernalia (*Williams* v. *Spencer*, 1980).

When the *Hazelwood* Court held that *Tinker* did not govern curriculum-related or school-sponsored activities, it also, as we have

seen, defined those activities as non-public forums (except where school officials had turned them into public ones). Regulation of expression in non-public forums is not subject to strict constitutional scrutiny, but only to a test of rational relationship or reasonableness. The Court's language in *Perry Education Association* v. *Perry Local Educators' Association* (1983) explains the distinction:

> Implicit in the concept of the non-public forum is the right to make distinctions in access on the basis of subject matter and speaker identity. . . . The touchstone for evaluating these distinctions is whether they are *reasonable in light of the purpose which the forum at issue serves*. . . . The State may reserve [non-public forums for their] intended purposes . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. (emphasis added)

Thus the *Hazelwood* decision replaces strict scrutiny with the much less restrictive reasonableness standard. That is what is meant by the Court's holdings that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are *reasonably related to legitimate pedagogical concerns*" and "school officials were entitled to regulate the contents of *Spectrum* in *any reasonable manner*" (emphases added).

The next chapter will deal with the application of this reasonableness standard as it applies to student expression in the schools.

Applying *Hazelwood* in the Public Schools

The *Hazelwood* decision has given school officials substantial power to regulate student expression. Broad as this power is, it is not without limits. This power may be exercised only in student publications or other school-sponsored activities that are not intended or operated as semi-public forums for student expression. And it may be exercised only when it is reasonably related to the achievement of legitimate educational goals.

Spaces or facilities do not become public forums merely because they are owned and controlled by government or even because they are "used for the communication of ideas or information" (*U.S. Postal Service* v. *Greenburgh Civic Association*, 1980). Neither does the government create a public forum "by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse" (*Cornelius* v. *NAACP Legal Defense & Education Fund*, 1985). More particularly, government property or government-sponsored activities will not be considered true public forums "where the full exercise of First Amendment rights would be inconsistent with 'the special interests of a government in overseeing the[ir] use' " (*International Society for Krishna Consciousness* v. *New Jersey Sports and Exposition Authority*, 1982).

The primary factor in determining whether property or activities are a public forum is how they are used, and the crucial question is whether the appropriate authorities have "abandoned any claim of spe-

cial interest in regulating" them (*Greer* v. *Spock*, 1976) or have by policy or practice opened them for free and regular use for expressive activity. "Selective access does not transform government property into a public forum"; and where access has been selectively granted, "the constitutional right of access . . . extend[s] only to other entities [or activities] of similar character" (*Perry Education Association* v. *Perry Local Educators' Association*, 1983).

The clearest case in which a student publication or other school-sponsored activity is not a semi-public forum is when it is an integral component of the curriculum. As the circuit court said in *Nicholson* v. *Board of Education* (1982), "the special characteristics of the high school environment, particularly one involving students in a journalism class that produces a school newspaper, call for supervision and review by school faculty and administrators."

In *Hazelwood*, the student newspaper *Spectrum* was produced in a course defined in the school's curriculum guide as a "laboratory situation in which the students . . . [apply] skills they have learned in Journalism I" and by board policy as "developed within the adopted curriculum and its educational implications and regular classroom activities." Explicit course goals included "publishing the school newspaper under the pressures of pre-established deadlines" and recognizing "the legal, moral, and ethical restrictions imposed upon journalists within the school community." Students received formal instruction in the class from a faculty member and were given course credit and grades. There was an assigned textbook. The newspaper's staff consisted of students enrolled in the course; most of the work on the paper was done in class; and that done outside was not substantially greater than work required for other courses. "School officials," wrote the Supreme Court, "did not deviate in practice from their policy that production was to be part of the educational curriculum and a 'regular classroom activit[y]'."

In such circumstances as described above, an activity such as the school newspaper is clearly a part the official curriculum and, there-

fore, not a public forum. But school activities, including production of school newspapers, do not become public forums immune to the *Hazelwood* standard simply because they are extracurricular. For example, in *Seyfried* v. *Walton* (1981) participation in a school play, although voluntary, was considered to be a part of the theater arts curriculum:

> [T]he selection of the artistic work to be given as the spring production does not differ in principle from the selection of course curriculum, a process which courts have traditionally left to the expertise of educators. Just as a student has no First Amendment right to study a particular aspect or period of history in his or her senior history course, he or she has no First Amendment right to participate in the production of a particular dramatic work.

In *Bethel School District* v. *Fraser* (1986) the Supreme Court held that "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." And in *Hazelwood*, in addition to the fact that it was produced by a class, *Spectrum* was identified as the "school" paper in policy and masthead. It was sold in school under official auspices (in the journalism classroom, library, and lunch room) and received funds from the school budget. It had an official advisor (the Journalism II teacher) who was a paid school employee and who exercised substantial control over publication dates, number of pages, assignment of stories, adjustment of layout, selection of letters to the editor, and editing of story content, often without consultation with the students. A previously published statement of policy placed definite responsibilities on student staff and writers and the paper was regularly subject to pre-publication review by the principal.

If these curricular and extracurricular circumstances help to define the non-public forum status of school activities, what measures might define them as public forums or limited public forums? Though cases decided before *Hazelwood* may not be determinative, they are at least informative.

In the first case, *Zucker* v. *Panitz* (1969), in which a school paper was held to be a public forum for student expression, the district court noted that the paper was "used as a communications media regarding controversial topics" and cited a large number of stories to demonstrate the point. "Here," it said, "the school paper appears to have been *open to free expression of ideas* in the news and editorial columns as well as in letters to the editor" (emphasis added).

In *Gambino* v. *Fairfax City School Board* (1977), a case that is directly analogous to *Hazelwood*, a district court held that "While the state may have a particular proprietary interest in a publication that legitimately precludes it from being a vehicle for First Amendment expression, *it may not foreclose constitutional scrutiny by mere labeling*" and "The extent of state involvement in providing funding and facilities for [the paper] *does not determine whether First Amendment rights are applicable*." On grounds of school policy and the actual articles previously published, the court held that the paper "*was conceived, established, and operated as a conduit for student expression on a wide variety of topics*" and its content "is not suppressible by reason of its objectionability to the sensibilities of the School Board or its constituents" (emphases added).

In *Stanton by Stanton* v. *Brunswick School Department* (1984), the district court held with respect to a school yearbook that:

> completely apart from the question of whether or not school authorities could be required to provide a vehicle for the expression and transmission of personally-held views on matters of importance to senior students, the [yearbook] has now been so utilized for a period of years under the aegis of . . . representatives of the school department . . . [and] The record shows an intent to continue this practice. . . . Those representatives . . . acting within the scope of their authority . . . have created . . . a de facto public forum.

In the 1983 district court decision allowed to stand by the Supreme Court decision in *Bender* v. *Williamsport Area School District* (1987), the district court said that "If the alleged forum is, in reality, a mere

extension of the curriculum, it would make perfect sense to permit an administrator to decide what shall be included on the basis of content." But the high school student activity hour actually at issue was in fact a semi-public forum because, said the court, "more than twenty-five student organizations benefited from [it]" and "the high school never deprived any other proposed group from benefiting from [it]."

Finally, the *Hazelwood* circuit court, although it was ultimately overruled by the Supreme Court, held that *Spectrum* was a public forum because "Students chose the staff members, determined the articles to be written and printed, and determined the content of those articles." Also, the paper's coverage extended beyond merely school news with articles on use of drugs and alcohol, desegregation, religions, cults, and runaways, among other topics. And it was sold to the public as well as to students.

Each year a statement was published in *Spectrum* saying that it was a student newspaper, that it would be guided by the First Amendment, and that its content reflected the views of students rather than teachers or administrators. Board policy stated that "Students are entitled to express in writing their personal opinions" and that "School sponsored student publications will not restrict free expression or diverse viewpoints . . ." Still another board policy on controversial issues accorded students the right to "study any controversial issue . . . have access to all relevant information . . ." and "form and express one's own opinions . . ." Students, said the circuit court, were "encouraged . . . to express their views to the entire student body freely, and . . . commonly did so."

Given that a school newspaper or other activity is curriculum-related or school-sponsored, and therefore not a limited or semi-public forum, what limits then apply to attempts by school officials to regulate student expression? The Supreme Court has said, "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are *reasonable in light of the purpose served by the forum and are viewpoint-neutral*" (*Cornelius*

v. *NAACP Legal Defense & Education Fund*, 1985; emphasis added). Thus official restriction of student expression even after *Hazelwood* must pass a two-part test.

The first part is "reasonableness." To pass this test, restrictions need not be the most reasonable or the only reasonable ones, nor is strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the forum mandated, nor must the restriction be narrowly tailored or the government's interest be compelling. But reasonableness will be "assessed in the light of the purpose of the forum and all the surrounding circumstances" (*Cornelius*), including all the facts before the school officials at the time of the conduct in question.

The second part of the test is "viewpoint neutrality," and it is the central issue for all constitutionally acceptable attempts to limit expression. Again, the language of the Court in *Cornelius*: "Government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject. . . . [and even] the existence of reasonable grounds . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination."

Assuming viewpoint neutrality, then the reasonableness component of the standard set in *Hazelwood* imposes few other meaningful limits on school officials. This is clearly evident from the words of the *Hazelwood* Court:

> Educators are entitled to exercise greater control over this . . . form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that *the views of the individual speaker are not erroneously attributed to the school.* Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play 'disassociate itself' not only from speech that would 'substantially interfere with [its] work . . or impinge upon the rights of other students,' but also from

speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.

A school must be able to set high standards for the student speech that is disseminated under its auspices – *standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world* – and may refuse to disseminate student speech that does not meet those standards.

[School officials] must be able to take into account the emotional maturity of the intended audience . . . retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized order, or *to associate the school with any position other than neutrality on matters of political controversy*. (emphases added)

Thus, under the standard set in *Hazelwood*, the First Amendment is implicated only when the decision to censor student expression in a school publication or other school-sponsored activity has no valid educational purpose.

Conclusion

In this writer's view, official censorship of the student press, and of student expression generally, seems to have been reborn with *Hazelwood*, because it now governs all student expression in curriculum-related or other school-sponsored activities.

As yet *Hazelwood* makes no inroads on the strict scrutiny protection of First Amendment rights granted by *Tinker* and its progeny for student expression that takes place *outside* of curriculum-related and school-sponsored activities. For example, *Tinker* and strict scrutiny still protect expression in student-generated nonschool, or so-called underground, publications distributed in school, just as it does the wearing of armbands, buttons, or other political symbols by students on school grounds. But unless school officials have by policy or practice turned school-sponsored or curriculum-related activities into limited public forums, they may exercise prior restraint over student expression in those activities so long as the restraint is justified by valid educational purposes and reasonably related to their achievement.

In this writer's opinion, there is little doubt that it was the intent of the *Hazelwood* Court to strengthen school officials' powers of censorship. Consider that *Hazelwood* revolved around two newspaper articles, one dealing with three students' experiences with teenage pregnancy, the second dealing with a student's experience with parental

divorce. If the Supreme Court had based its decision on *Tinker*, it could have held for the school officials solely because both articles created legitimate possibilities for "invasion of the rights of others." Justice Brennan even remarked at hearing that he did not know why *Hazelwood* was being heard, since *Tinker* had already decided it.

Consider also that *Hazelwood* involved excision of two full pages of *Spectrum*, containing three articles, also on controversial topics, which the principal did not find troublesome. If the Supreme Court had based its decision on the public forum doctrine, it could have held for the students solely on grounds that the excision was not sufficiently "narrowly drawn" to meet the traditional test of strict scrutiny. But the *Hazelwood* majority chose to reject *Tinker* and the protections of the public forum doctrine, probably largely, as Justice Scalia said at hearing, because in *Tinker* the school had not paid for the students' black armbands!

While it may be fruitless to second-guess the Supreme Court's intent, the effect of *Hazelwood* is certainly not in doubt. On the day the decision was handed down, a principal in California, aware that the school paper intended to run an interview with an unnamed student who had tested positive for AIDS, told the newspaper staff, "You won't run that story now." And in Michigan a principal refused permission for the school paper to reproduce a condom ad as an illustration for a more general piece on AIDS. In 1987, before *Hazelwood* was decided, the Student Press Law Center reported it had received 600 requests for legal assistance from students confronted with attempts at official censorship. When the ruling of *Hazelwood* came in February 1988, Mark Goodman, executive director of the Student Press Law Center, remarked, perhaps with some hyperbole, "The First Amendment for high school students doesn't have much meaning anymore."

Of course, there are many legitimate reasons for according school officials substantial control over the student press. The courts have long held that teachers and officials "must be accorded wide latitude

over decisions affecting the manner in which they educate students" (*Nicholson* v. *Board of Education*, 1982), and that "by and large, public education . . . is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems which do not directly and sharply implicate basic constitutional values" (*Epperson* v. *Arkansas*, 1968). They have done so first because of "the importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests" (*Ambach* v. *Norwick*, 1979), and second because the rights of students in the school setting "are not automatically coextensive with the rights of adults in other settings . . . [especially where] the audience may include children . . . in a captive audience" (*Bethel School District* v. *Fraser*, 1986).

Thus "the undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior" (*Bethel*), for "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political" (*Board of Education* v. *Pico*, 1982).

The problem is that for at least equally valid reasons the Supreme Court has long held that "the Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,' [rather] than through any kind of authoritative selection" (*Keyishian* v. *Board of Regents*, 1967), and "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" (*Shelton* v. *Tucker*, 1960). Hence, "the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment" (*Pico*). As early as 1943, the Supreme Court wrote in *Board of Education* v. *Barnette*:

> Boards of Education . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

The Court resoundingly reaffirmed these "important principles" in *Tinker* when it declared that schools could not be "enclaves of totalitarianism" and that students did not "shed their constitutional rights to freedom of expression at the schoolhouse gate":

> The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities [among which] is personal intercommunication among the students. *This is not only an inevitable part of the process of attending school; it is also an important part of the educational process* (emphasis added)

Doubtless many teachers and other school officials will continue to recognize the educational importance of student freedom of expression and, regardless of *Hazelwood*, will choose not to censor student speech and even to open as limited public forums such school activities as the student newspaper. Doubtless, too, some state courts will hold that state constitutions prohibit official censorship of student speech. Some state legislatures have already begun to consider statutes that would prohibit it.

But wherever there are strained relations between school officials and the local student press, or wherever student opinion disagrees with the opinions of principals, school board members, or vocal community groups, the full impact of *Hazelwood* will be felt; and it is precisely there that student speech is most in need of constitutional protection.

Those who believe that the much-heralded "judicial conservatism" of the current Supreme Court is really judicial activism with a politi-

cally conservative bent will no doubt find confirmation of their views in the *Hazelwood* decision. As Justice Brennan wrote in his scathing dissent (in which he was joined by Justices Marshall and Blackmun), "The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today."

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