MUZZLING STUDENT JOURNALISTS

In the Wake of Supreme Court's 1988 Hazelwood Ruling, School Press Censorship Incidents Mount

INTRODUCTION

In 1969, the U.S. Supreme Court held that students in public high schools enjoy a right of free speech -- provided that their activity is not disruptive of the educational process at school. Though the ruling concerned students' rights to engage in symbolic speech -- in this case the wearing of armbands -- it was widely read as a victory for an uncensored student press as well. Editorials critical of school administrators, for example, could not be constitutionally censored (unless by some stretch they could be proved to be disruptive of school activities).

But in January 1988 the Supreme Court issued a ruling in *Hazelwood School District v. Kuhlmeier* that specifically addressed the issue of student press freedom and set a more restrictive standard. To the alarm of free press advocates, the *Hazelwood* ruling gave school authorities wide latitude in reviewing and censoring student speech. Without overturning the 1969 decision, the Court nonetheless ruled that the First Amendment does not offer the same protection to public school students that it does to adult citizens. Indeed, it is fair to say that the Court found that the First Amendment -- in its essential sense that freedom of the press is not to be abridged -- does not apply to high school students.

Now, almost four years after the *Hazelwood* decision, there is considerable evidence to suggest that censorship in the nation's schools is more widespread. Though students may be learning about how the Constitution and the Bill of Rights are meant to work in theory, they are learning in practice what it is like to endure censorship and restrictions of free expression.

BEFORE HAZELWOOD

The Supreme Court first touched on First Amendment rights in schools in a 1943 ruling that students could not be compelled to salute the American flag.[1] But the case centered on compelled displays of patriotism, not on the educational setting as such, and it was not until 1969 in *Tinker v. Des Moines Independent Community School District* that the Court first addressed the prohibition of students' speech.[2]

The case arose from the actions of a group of Iowa students who, in 1965, wore black armbands to school in protest of the Vietnam war. Des Moines school authorities judged the students to be in violation of a policy against the wearing of armbands and suspended three students, including John Tinker, from school.

The Court decided for the students. In a phrase that came to serve as a guidepost for almost two decades, the Court said, "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[3] Recognizing the need to take the school's educational mission into account, the

[1] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)

[2] *Tinker v. Des Moines Independent Comm. School District*, 393 U.S. 503 (1969)

[3] *Ibid*., at 506.

Court drew a standard: expression was not to be suppressed unless it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[4] In the *Tinker* case, the Court found that "the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it."[5]

As the makeup of the Supreme Court changed in the 1980s the broad protection of the *Tinker* standard was narrowed. In 1986 the Court made a significant shift away from student free expression in *Bethel School District. v. Fraser*.[6]

The case involved a student at Bethel County High School in the state of Washington, Matthew Fraser, who made a speech at a student assembly. Fraser's speech contained off-color humor and sexual double entendre which Bethel High authorities claimed violated school rules prohibiting obscene or profane language and gestures.

The Court made a distinction between Fraser's speech and the Iowa students' wearing of armbands. For one thing, the Court noted, the speech occurred at a school-sponsored event. For another, the event included an audience of minors. Where the wearing of armbands had not intruded on the work of other students, Fraser's speech was seen differently: the Court implied that the work of the school assembly was impeded by "lewd, indecent, or offensive speech."[7]

Thus, the Court set the groundwork for a new rule governing student speech: expression that merely occurred on school grounds was one thing but expression that was part of a school-sponsored activity was another. In the latter case, school officials had greater authority in exercising control over student speech.

THE HAZELWOOD RULING

The Court developed this distinction further in the *Hazelwood* case, decided on January 13, 1988. In this ruling, the Court went on to consider the role of the student newspaper as a school-sponsored activity.[8]

The case arose when students at Hazelwood East High School in suburban St. Louis were prevented by the school's principal from publishing articles discussing teen pregnancy and the effects of divorce on Hazelwood students. The student newspaper, *Spectrum*, was produced by a journalism class and was, according to school board policy, controlled by the faculty as part of the curriculum.

The Court stated that, given these conditions, the newspaper could not be seen to be a "public forum" open to all views. Whereas the *Tinker* rule was still held to protect a student's personal expression that might happen to occur on school premises, it did not extend to a school-sponsored publication. Thus, "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."[9]

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[4] *Ibid*., at 513.

[5] *Ibid*., at 505.

[6] *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

[7] *Ibid*., at 683.

[8] *Hazelwood School Dist. v. Kuhlmeier*, 108 S.Ct. 562 (1988).

[9] *Ibid*., at 571.

In the *Hazelwood* case, the Court found that the principal's censorship was supported by legitimate educational concerns; i.e., that "frank talk" by students about sex and birth control issues was "inappropriate in a school-sponsored publication distributed to 14-year-old freshmen."[10]

Though such a standard gives unprecedented latitude to school officials in controlling student expression, it is worth noting the areas the ruling leaves untouched. A publication that is stated or understood to be an open forum for student opinion would probably be subject to less control by student officials. An "underground" (non-school-sponsored) publication would not be covered by the *Hazelwood* ruling.

Publications at private and parochial schools are unaffected, since the First Amendment pertains to actions by government officials. And college and university students are specifically not brought under the guidelines of the *Hazelwood* ruling.

AFTER HAZELWOOD

Student journalists and their advocates greeted the *Hazelwood* ruling with dismay. The decision "struck a potentially devastating blow for scholastic journalism," according to the Washington-based Student Press Law Center.[11] The SPLC contends that the subjects authorities can now permissably censor are "frightening in their breadth and vagueness, suggest[ing] that school officials might be allowed to censor a great number of things simply because they disapprove of them."[12]

One of the prime objections to the *Hazelwood* ruling is that the justification of censorship due to "legitimate pedagogical concerns" has created an overly broad standard. Indeed, the *Hazelwood* case, according to a dissent by Justice William Brennan, "aptly illustrates how readily school officials (and courts) can camouflage viewpoint discrimination as the `mere' protection of students from sensitive topics."[13]

There is a good deal of evidence to suggest that such behavior has been one of the after-effects of the *Hazelwood* ruling. While there is no comprehensive nationwide survey of censorship in the schools, the SPLC and others have documented dozens of censorship cases over the last four years -- both those that have been vigorously contested and those that have not.

"I can say without hesitation that things have gotten worse," says Mark Goodman, executive director of SPLC. Goodman says there has been "a dramatic increase" in requests for legal assistance at the SPLC: from 548 requests in 1988, to 929 in 1990. He adds that "probably over 90 percent" of the students seeking assistance report that school officials have mentioned the *Hazelwood* decision as a justification for their actions.[14]

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[10]*Ibid*., at 571.

[11]We are indebted to the Student Press Law Center, which is the leading organization monitoring freedom of the student press in the United States, for its assistance in compiling the material in this report.

[12]Student Press Law Center, Hazelwood Packet, Spring 1988, p. 2.

[13]*Hazelwood*, at 578.

[14]Interview with author, Sept. 4, 1991.

Commenting on an overview of cases reported in its "Student Press Law Center Report" (published three times a year), the SPLC suggests that high school authorities are finding a wide array of "legitimate pedagogical concerns" when it comes to student expression.

Two recent incidents especially illustrate how far afield some school officials have gone from truly legitimate educational concerns. At Jefferson High in Boulder, Montana, the school district decided to put in place a committee to review in advance all student newspaper articles having to do with teacher contract negotiations. The board president claimed the goal of the policy was "to teach journalism students the importance of balanced news coverage." The students' advisor, Mark Kelly, responded that the students did not need the school board to "censor the newspaper" in order to "teach them objectivity." Eventually, after pressure from Kelly, the policy was rescinded.

In another instance, Brian Desilets, a junior high school student in New Jersey was prevented from publishing reviews of two movies simply because the movies ("Mississippi Burning" and "Rain Man") carried an "R" rating. (The resolution of the Desilets case will be discussed later in this report.)

The *Hazelwood* decision specifically justified censorship in several areas: "potential topic sensitivity," student speech "that is inconsistent with its educational mission," and speech that might "associate the school with any position other than neutrality on matters of political controversy."

In actual practice, those justifications have led most frequently to censorship of four areas of student expression: (1) material that challenges or criticizes school authorities or school policies; (2) discussion of topics having to do with sex; (3) investigative or "real world" journalism revealing "sensitive" or embarrassing information; (4) discussion of political or religious issues deemed too controversial for the school environment.

Questioning Authority

According to Mark Goodman, the most common censorship case has to do with material critical of school authorities (with matters related to sex "a close second").[15]

A typical case occurred only months after the *Hazelwood* ruling, in the spring of 1988. At Broomfield High School in Colorado, student editors claimed Principal James Sandoval had censored an editorial criticizing the *Hazelwood* decision and objecting to the principal's prior review of the school newspaper. Subsequently, he refused to approve an editorial that criticized his plan to make study halls mandatory, though he left intact a companion editorial taking the opposite view. Following the suggestion of their advisor, editors ran blank space and a box explaining that the critical editorial and a related cartoon "were removed by administrative order." The author of the deleted editorial said, "When he censored it, he never gave us a reason. Later, he said that it was `derogatory to the whole school.' I thought it was a bogus reason he came up with to make everyone happy." Sandoval later told the local newspaper that the editorial was one of a series of "derogatory" pieces and that students should not be given "carte blanche to do whatever they want at anyone's expense."

"Derogatory" opinion is often judged to be harmful to the school. At Lewis Central High in Council Bluffs, Iowa, Principal Harold Condra removed an article in late 1990 that criticized the school's head basketball coach, saying it "presented the school in a bad light." Explained Condra, "I think our school newspaper should present a positive picture of the school." Condra threatened to suspend students after they distributed copies of the editorial during a basketball game. Informed by his superintendent that a state law protected student rights in matters of free speech, Condra did not suspend the students.

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[15] *Ibid*.

In November of 1990, at Central High in Manchester, New Hampshire, student journalists who wrote an editorial criticizing a freshman class advisor who failed to disclose numerical results of a class election were required by Principal William Burns to write a letter of apology to the teacher and to apologize twice over the school public address system. When they decided not to make the second public apology, Burns temporarily suspended publication of the student paper. The editorial, titled "Just a Sham," had said, in part, "At a time when democracy is blossoming all over the world, Central High School's freshman class and advisor are taking a giant step backward."

Matters of sex

The *Hazelwood* ruling itself sprang from student journalists' desire to publish an article on teen pregnancy at Hazelwood East High School. The Supreme Court found it reasonable to suppress "frank talk" about sex when it is deemed inappropriate for a teenage audience. Many school authorities do find the subject inappropriate.

In April of 1990, students at Moses Lake High in Washington complained their rights had been violated when Principal Larry Smith confiscated the results of a survey they took regarding students' sexual experiences. They were allowed to print an article dealing with teen pregnancy, but not the survey information. In a later editorial, a student journalist criticized the censorship. "Why hide a problem or shelter the student body on a subject matter when discussing it in a responsible manner can educate them and keep them from making unfortunate choices that will affect the rest of their lives?" he wrote. The students were backed up by their advisor. "If we're going to teach journalism in our schools," she said, "we've got to let kids have a moral voice."

A similar incident was reported at Arlington Heights High in Fort Worth, Texas. Principal Winifred Taylor prevented distribution of a student survey on attitudes toward homosexuality. The principal then attempted to establish a policy of reviewing material before it was printed in the student newspaper. After the interest of the local press was attracted, students and authorities reached an agreement that gave the principal the right to review all surveys distributed in the classroom. The students published the questions of the original survey on homosexuality in the school newspaper.

Discussion of the AIDS epidemic continues to be of importance to young people. But "frank talk" about AIDS is sometimes censored. According to Goodman of the SPLC, when students at a high school in a conservative Arizona community wrote an article about AIDS it was approved by their advisor and principal. But before publication, the superintendent reviewed the article and removed all references that AIDS is *sexually* transmitted.

Real world journalism

Investigative journalism is another sphere often seen by authorities as too problematic for a student newspaper. At Northrop High in Fort Wayne, Indiana, a student reporter uncovered dishonest financial practices by a tennis coach at the school. With encouragement from his advisor he verified his facts and wrote the story. Principal H. Douglass Williams prevented it from being published. Authorities admitted the story was accurate. But Williams told the local newspaper, "The original reason I pulled the article, which I still feel is important, was that it would have been divisive within the school."

"Divisiveness" was the issue in three incidents at Madison Memorial High in Madison, Wisconsin. In May of 1990 the student paper was temporarily held from distribution because it had a front-page story on a lunchroom racial fight. The principal, Carolyn Taylor, elected to hold a school assembly before allowing distribution of the paper. The following spring, Taylor announced she would review the student paper before publication. Students charged she was unhappy with a recent report in the paper that claimed the average grade- point average for the school's black students was a D-plus.

The president of the minority parents' council applauded Taylor's policy: "She's showing us that she's going to make a good-faith effort to be sensitive to all groups," he said.[16] Shortly thereafter, Principal Taylor refused to approve a story about an off-campus shooting of a 16-year-old student. The student reporters wanted to include the name of the victim; the victim's family wanted it withheld. In place of the story, the students prepared a box explaining that the principal "would not allow this story to be printed as written." When Taylor requested that her own explanation be included, the student staff resigned in protest, with plans to start an alternative publication.

At Custer High in Custer, South Dakota, the school board pressured student journalists not to run an article about a former student arrested in a burglary case. Previous articles on the subject had been published but school officials decided another one would cause hardship to the accused's family. The students published a statement explaining their story "has been deleted according to the wishes of the school board and the administration." The chairman of the school board defended the actions of the board, saying, "In the school system, you have to be concerned about the students you write about. When you're out working for a big newspaper, it's a totally different matter."

Too controversial

Some authorities have noted that the *Hazelwood* ruling affirmed the right of school officials to keep "matters of political controversy" out of publications "reserved for intended educational purposes." Thus, the Ninth U.S. Circuit Court of Appeals ruled in August of 1991 that the Clark County, Nevada, school district was within its rights in preventing Planned Parenthood from placing an advertisement in school yearbooks and newspapers.[17]

At least one school official has even tried recently to apply such a rule to a free speech case that did not involve a school-sponsored publication. A student at Woodlawn High in Baltimore claims he was barred from wearing a T-Shirt to school that carried an anti-abortion message. The student was driven home when he refused to change his shirt. He claims Principal Louis Sergi told him "School is not the place to express your political views." He is currently suing the school district.[18]

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[16]Newsletter on Intellectual Freedom, July 1991, p. 112.

[17]*The Wall Street Journal*, August 8, 1991.

[18]*The Washington Post*, August 13, 1991.

A similar question has arisen when it comes to distributing leaflets on school grounds. In Prospect Park, Pennsylvania, the Interboro School District implemented a policy that allowed leafletting but forbade material that "proselytizes a particular religious or political belief." The policy also required material to be submitted and approved three days in advance of distribution. But in May of 1991, a federal judge ruled the restrictions are unconstitutional, applying in his decision the Supreme Court's *Tinker* standard rather than the *Hazelwood* standard, since the leaflets were not a school-sponsored activity. The judge equated students in school hallways with citizens going about their business who have the right to speak their views. He ruled, "a public secondary school environment is not fully `educational' where students' personal inter-communication is restricted to particular issues."[19]

Views of Administrators

Two national surveys have been conducted in the aftermath of *Hazelwood* that have examined the attitudes of school administrators and student advisors on issues of censorship and free expression.

In the spring of 1989, J. William Click of Winthrop College and Lillian Lodge Kopenhaver of Florida International University sent a 41-question survey to principals and advisors at 531 United States high schools. Forty-one percent of the principals and 68 percent of the advisors responded.[20]

The survey found a good deal of disagreement between principals and advisors on censorship issues, and, indeed significant disagreement among principals themselves on relevant issues. For example, two thirds (67 percent) of the principals agreed that "student rights to publish a newspaper must be balanced against the realization that students are not trained journalists." But only one-third (34 percent) of advisors agreed with that statement.

Presented with a statement that "guarantees of freedom of expression in the student newspaper outweigh public relations considerations," only 28 percent of principals agreed, while 29 percent disagreed. (Two-thirds of the advisors agreed with the statement.) Fully half the principals agreed that "school administrators should have the right to prohibit publication of articles they think harmful, even though such articles might not be legally libelous, obscene or disruptive." (Of the advisors, 77 percent disagreed.)

Perhaps just as significant are the attitudes of administrators toward the First Amendment in society at large. Only 51 percent of the principals agreed with the statement that "society has an obligation to protect the First Amendment rights of groups such as the American Nazi Party and the Ku Klux Klan." Slightly more, 62 percent, agreed that "society has an obligation to protect the First Amendment rights of high school students."

A majority of principals and advisors did not agree that "the *Hazelwood* decision says that school officials must control the content of the student newspaper." Yet 20 percent of principals and 11 percent of advisors did agree. Click and Kopenhaver concluded that their survey "has indicated a more alarming extent of censorship than has been hypothesized."[21]

In late 1989, Jim Patten, a journalism professor at the University of Arizona in Tucson, conducted a survey of

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[19]*Slotterback v. Interboro School District*, (E.D. PA, May 14, 1991).

[20]"Opinions of Principals and Newspaper Advisors toward Student Press Freedom and Advisers' Responsibilities Following *Hazelwood v. Kuhlmeier*," Click and Kopenhaver, in a paper presented to the Assn. for Education in Journalism and Mass Communication, Minneapolis, August, 1990.

[21]*Ibid*., p. 12.

high school journalism advisors. He received 350 responses (39 percent of those polled).[22]

A majority of advisors told Patten that their administrators were generally supportive of student press freedom and that "nothing much has changed" for them since the *Hazelwood* decision. But Patten found evidence of a "chilling effect" after *Hazelwood*. He reported that 23 percent of the advisors said students are less likely to report on controversial matters than before the ruling, that 17 percent said their students are less likely to write editorials critical of school policies, and that 12 percent report new prior review policies since the *Hazelwood* decision. In addition, 41 percent of the advisors said that, with the passage of time, their students are becoming more accepting of *Hazelwood*'s standards.[23]

Post-Hazelwood Court Rulings

Undoubtedly, many students who believe their First Amendment rights have been violated are discouraged from taking the matter to court, in light of the *Hazelwood* ruling. Yet several free expression cases have drawn lower court rulings over the last four years, with mixed results.

One of the most encouraging decisions for student free speech came in the previously noted case of the New Jersey junior high school student who was prevented from publishing reviews of two movies because the movies carried an "R" rating. With the help of the American Civil Liberties Union, the student, Brian Desilets, sued in state court. (He was subsequently prohibited from writing an article about his case for the student paper.) In May of 1991 a Superior Court judge ruled that under the New Jersey Constitution Desilets enjoyed greater free speech protection than under federal law. The judge ordered the school district to allow Desilets to publish an uncensored article about his case in the student newspaper.[24]

The Student Press Law Center hailed the Desilets ruling as a major victory. "This is going to be the beginning of a trend in student free expression cases around the country," said Mark Goodman.[25] Noting that former Supreme Court Justice William Brennan has pointed in the past to the potential of state constitutions protecting individual rights in ways that the federal constitution does not, the SPLC predicts more student press advocates will increasingly consider a state court strategy.

In federal court, cases in defense of free expression have been both won and lost since *Hazelwood*. Student press advocates have taken heart from a ruling in *Romano v. Harrington*, decided by a U.S. District Court in New York in November of 1989.[26] In this case, the court declined to apply the Hazelwood standard to a student newspaper that was not a part of the school curriculum. The case was brought by Michael Romano, the advisor to a student newspaper, *The Crow's Nest*, at Port Richmond High School in Staten Island, New York. Romano had been removed as advisor after the newspaper published an opinion article opposing a federal holiday in honor of Martin Luther King, Jr.

The court found that *The Crow's Nest* was a "school-sponsored" publication in that it was funded by the school.

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[22]"High School Confidential: The Alarming Aftermath of the *Hazelwood* Decision," Jim Patten, *Columbia Journalism Review*, September/October, 1990.

[23]*Ibid*., p. 10.

[24]*Newark Star-Ledger*, May 8, 1991.

[25]*Ibid*.

[26]*Romano v. Harrington*, 725 F. Supp. 687 (E.D. N.Y. 1989).

But the paper was not judged to be a part of the curriculum because it was published outside of a class setting and students received no academic credit for their work. School officials argued that the newspaper was part of the curriculum in the broad sense of the term and that "preventing (or punishing) the publication of the controversial anti-King article was reasonably related to their legitimate pedagogical goal of minimizing tensions within an integrated student body that had experienced occasional racial conflicts," as the court summarized it.[27]

The court admitted the *Hazelwood* ruling might be interpreted to allow a broad understanding of the term "curriculum." But the ruling went on to say, "because *Hazelwood* opens the door to significant curtailment of cherished First Amendment rights, this Court declines to read the decision with the breadth its dictum invites. Because educators may limit student expression in the name of pedagogy, courts must avoid enlarging the venues within which that rationale may legitimately obtain without a clear and precise directive."[28]

The court also referred to the 1982 Supreme Court decision in *Board of Education v. Pico*,[29] which held that administrators could not remove books from the school library on a partisan or political basis. According to U.S. District Court in *Romano*, "*Pico* explains that inroads on the First Amendment in the name of education are less warranted outside the confines of the classroom and its assignments."[30]

The *Pico* ruling also came up in another censorship case, with different effect. In *Virgil v. School Board of Columbia County* (1989), the U.S. Court of Appeals for the 11th Circuit upheld the decision of a Florida school board to discontinue use of a textbook on grounds that selections from Chaucer's *The Miller's Tale* and Aristophanes' *Lysistrata* were "vulgar" and "sexually explicit."[31]

The school board had justified its actions on the grounds that "the sexuality of the selections is violative of the socially and philosophically conservative mores, principles and values of most of the Columbia County populace." The appeals court questioned exactly how "persons just below the age of majority can be harmed by these masterpieces of Western literature," but they went along anyway.

The appellate court distinguished the removal of books from a school library (as in *Pico*) from the removal of books from a school's curriculum, as in *Virgil*. The court found the *Hazelwood* case and the *Bethel* case to be pertinent to *Virgil*.

"Notwithstanding their status as literary classics, *Lysistrata* and *The Miller's Tale* contain passages of exceptional sexual explicitness," according to the court. "It is clear from *Hazelwood* and other cases that this is a legitimate concern. School officials can `take into account the emotional maturity of the intended audience in determining...[the appropriateness of] potentially sensitive topics' such as sex and vulgarity," wrote the court, quoting *Hazelwood*.[32] The court found the school board had acted reasonably in removing the textbook in question.

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[27]*Ibid*., at 688.

[28]*Ibid*., at 689.

[29]*Board of Education v. Pico*, 457 U.S. 853 (1982).

[30]*Romano v. Harrington*, at 690.

[31]*Virgil v. School Board of Columbia County*, 862 F. 2d 1517, (11th Circ. 1989).

[32]*Ibid*., at 1523

A third important case, also decided in 1989, goes perhaps further than any other in using the *Hazelwood* justifications to *extend* authorities' control over student speech. In *Poling v. Murphy*, the U.S. Court of Appeals, 6th Circuit, upheld a school's disciplinary actions against a student who criticized the school administration in a speech before a student assembly.[33]

The case arose after Dean Poling, a junior at Unicoi High in Erwin, Tennessee, made a campaign speech on his own behalf for the office of student council president. Said Poling, "The administration plays tricks with your mind and they hope you won't notice. For example, why does Mr. Davidson stutter when he is on the intercom? He doesn't have a speech impediment. If you want to break the iron grip of this school, vote for me for president."[34]

School administrators disqualified Poling as a candidate after his speech, due to the remarks about Mr. Davidson's stutter and the administration's "iron grip." Dean Poling's father sued on behalf of his son, on the grounds that his First and Fourteenth Amendment rights were violated.

The appellate court, following *Hazelwood* and *Fraser*, established that Poling's speech was part of a school-sponsored activity. They also found Unicoi school officials' actions to be "reasonably related to legitimate pedagogical concerns," as follows: "The art of stating one's views without indulging in personalities and without unnecessarily hurting the feelings of others surely has a legitimate place in any high school curriculum, and we are not prepared to say that the lesson Unicoi High tried to teach Dean Poling and his captive audience was illegitimate."[35]

In an analysis of the *Poling* decision, one critic has argued that *Poling* shows how easily the "school-sponsored activity" rule can be used to chill student speech. Writing in the *Toledo Law Review*, Theodore Gallagher contends that "Even if Unicoi High's assembly...was school-sponsored, one must wonder if the lesson taught to Dean Poling and his fellow students satisfied the second prong of the *Hazelwood* rule: that the actions of the school be related to legitimate pedagogical concerns. Especially in light of the student council election, an exercise in the workings of democracy, the Sixth Circuit has allowed Unicoi High to send out a confusing message to its students. On one hand, the students were involved in the American democratic process of electing someone to represent their views. On the other hand, when someone stood and delivered a speech that was very likely in tune with their views, he was disqualified. Rather than learn a lesson about `the art of stating one's views without...unnecessarily hurting the feelings of others,' the students could have taken home the lesson that criticizing authority is improper."[36]

Legislative Remedies

Shortly after the *Hazelwood* decision, one of the dissenting justices commented that principals, advisors and students ought to understand that though the decision allows censorship in certain events it does not *require* it. Schools and school boards are still free to adopt policies that are patterned after the *Tinker* standard.[37]

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[33]*Poling v. Murphy*, 872 F.2d 757 (6th Circ. 1989).

[34]Facts of this case taken from discussion of *Poling v. Murphy* by Theodore Gallagher in *Toledo Law Review*, Vol. 21, pp. 539-564.

[35]*Ibid*., at 553.

[36]*Ibid*., at 562.

[37]"In Iowa, Free Speech for Students," by Nat Hentoff, *Washington Post*, August 28, 1989.

States, as well, are able to offer students more protection than the *Hazelwood* ruling does. Either state constitutions or state laws may set standards closer in line with *Tinker*. California, for example, had a state law on the books even before *Hazelwood* that specifically protects students' free speech. Since the *Hazelwood* ruling, Massachusetts, Iowa, and Colorado have passed laws to protect students' rights of free expression.

In Massachusetts, the specific intent of a law passed in 1989 was to protect students from the impact of the *Hazelwood* decision. Sponsor Rep. Nicholas Paleologos told a civil liberties conference, "This year when I read the newspaper articles about the *Hazelwood* case I just got angry, because it seemed we had spent the last three or four years trying to reform education and produce kids that were more creative and independent and capable of thinking critically -- it seemed that all this effort to make students more thoughtful and independent would now be swept under the rug by a Supreme Court that wanted to muzzle everybody."[38]

The heart of the Massachusetts law echoing the *Tinker* standard says, "The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school."[39]

In Iowa, the home of the *Tinker* case, the state legislature passed a law in 1989 that, as in Massachusetts, restored the *Tinker* standard in student free speech cases. The Iowa law reads, in part, "Except as limited by this section, students of public schools have the right to exercise freedom of speech, including the right of expression in official school publications." The exceptions are for materials that are obscene, libelous, or which encourage students to violate the law, school regulations, or to cause "the material and substantial disruption of the orderly operation of the school." The law also contains a section that prohibits prior restraint of official school publications (except when material violates the above conditions).[40]

At least 17 other states have seen attempts to pass similar legislation, including Indiana, Michigan, Kansas, and New Jersey. The New Jersey legislation is given a good chance of passing in 1991 or 1992.

CONCLUSION

The *Hazelwood* decision significantly widened the gap between what schools preach and what they practice -- teaching students the ideals of democratic life while at the same time denying them the practice of free and uncensored expression. In advance of the passage of Iowa's student free speech law, Cryss Farley, executive director of the Iowa Civil Liberties Union, wrote that without a legislative response to *Hazelwood*, "student journalism in Iowa faces the specter of being reduced to the lowest common denominator of non- controversial reporting. Presumably the latest basketball scores and a picture of the homecoming queen may still pass muster, but will the practice of such pabulum journalism promote the critical thinking and respect for constitutional rights that should be fostered in our schools?"[41]

Similar reasoning was expressed nearly two decades earlier by the Supreme Court in the *Tinker* case. That Court saw a danger in allowing authorities to choke off the free flow of ideas in a setting that is devoted to the pursuit of knowledge. The *Tinker* court quoted an earlier ruling that stated "the vigilant protection of constitutional freedoms is

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[38]"Representative Paleologos Explains...", in *The Bill of Rights Network* (newsletter).

[39]Mass. code, Ch.71, Sec. 82.

[40]Iowa code, Sec. 280.22.

[41]"Law would restore students' free speech," by Cryss Farley, *The Des Moines Register*, March 22, 1988.

nowhere more vital than in the community of American schools." Said the Court: "The classroom is peculiarly the `marketplace of ideas.' 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.'"[42]

A look at current censorship practices since the *Hazelwood* ruling shows a disturbing turn away from such thinking on the part of school administrators and authorities. There is some question about how well school principals understand their own country's Bill of Rights; witness the 67 percent of principals reported to believe that student rights in publishing "must be balanced against the realization that students are not trained journalists" -- as if the First Amendment protects only those with the proper "training."[43]

There is a dangerous amount of leeway now given to administrators to use such vague standards as "potentially sensitive topics," and "legitimate pedagogical concerns," to justify silencing speech that poses no real threat to students. There is further danger in the High Court's suggestion that censorable material includes speech that would "associate the school with anything other than neutrality on matters of political controversy." By this standard, the *Tinker* students who wore black armbands to protest the Vietnam war would again be in jeopardy. In current times, it might be likely that students who sported yellow ribbons in support of the Persian Gulf War would be seen as "non-controversial" while students who wore armbands in protest of that war would be subject to restriction.

The majority of examples we have examined in this report involve students, particularly student journalists, who are sincerely trying to learn to criticize constructively and to participate in a vigorous exchange of ideas. In too many cases, students have been taught that this is somehow inappropriate, or even dangerous. As Justice Brennan wrote in his dissent in *Hazelwood*,[44] "Such unthinking contempt for individual rights is intolerable from any state official. It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees."

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This newsletter is a publication of the Fund for Free Expression, which was created in 1975 to monitor and combat censorship around the world and in the United States. It was researched and written by Dave Denison, a former editor of The Texas Observer.

[42] *Tinker*, at 512.

[43] Click and Kopenhaver, see note 31.

[44] *Hazelwood*, at 580.

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