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Dean v. Utica Community Schools: An Arrow Through the Heart of School Administrative Control Over Student Expression in School Newspapers

Charles B. Upton II

DEAN V. UTICA COMMUNITY SCHOOLS: AN ARROW THROUGH THE HEART OF SCHOOL ADMINISTRATIVE CONTROL OVER STUDENT EXPRESSION IN SCHOOL NEWSPAPERS

I. INTRODUCTION

Dean v. Utica Community Schools[1] marks a milestone in U.S. constitutional law and exemplifies the emerging trend toward more student freedom and less school administrative control over the content of student-authored school newspapers. This trend is disturbing not only because *Dean* offends Supreme Court precedent but also because the decision is harmful to schools. In fact, this step backward in terms of school administrative control is described by the National Scholastic Press Association[2] as follows: "The decision . . . is the single most important legal victory for America's high school student media since . . . *Hazelwood School District v. Kuhlmeier* and could represent a significant turning point for student journalists trying to combat the ever-growing incidence of administrative censorship."[3]

The *Dean* decision of the District Court for the Eastern District of Michigan represents a dynamic shift away from the rigid First Amendment standard introduced by the Supreme Court in *Hazelwood School District v. Kuhlmeier*,[4] which held that high school officials retain the right to impose reasonable restrictions on student-authored newspapers without violating the students' First Amendment freedom of

1. 345 F. Supp. 2d 799 (E.D. Mich. 2004).

2. "The National Scholastic Press Association is a nonprofit organization at the University of Minnesota, serving student media in secondary schools and journalism education programs in the United States and abroad." Natl. Scholastic Press Assn., *NSPA Membership*, http://www.studentpress.org/nspa/index.html (accessed Feb. 1, 2005). Its primary goal is to improve the journalistic skills of its members. *Id.* "Membership in NSPA is by publication, not by school or individual." *Id.*

3. Mike Hiestand, *Trends in High School Media, Dean v. Utica FAQ* ¶ 1, http://www.studentpress.org/nspa/trends/~law0205hs.html (Feb. 1, 2005).

4. 484 U.S. 260 (1988).

speech rights.[5] If followed, the *Dean* decision would mark a significant change in the manner in which school administrators may regulate student expression in public high schools by eroding administrative authority over what goes into school newspapers.

In *Hazelwood*, the Court held that because school administrators had reasonable concerns about publishing two student-authored articles in the public high school newspaper, the refusal to publish the articles did not constitute a First Amendment violation.[6] The first article concerned a teenage pregnancy and contained interviews with several pregnant teenagers, which the administration feared would compromise anonymity. The administration believed that the second piece, which concerned the impact of divorce on the school's students, had problems with biased reporting.[7] The Court declared that these reasons were sufficient to establish a reasonable pedagogical concern that warranted prohibiting publication of the articles.[8]

The *Hazelwood* Court further determined that the administration's refusal to publish the articles was constitutional because it found that the newspaper was a non-public forum.[9] The Court explained that although the administration had given the students some control over the newspaper's content, that control was merely a learning experience and did not establish the paper as a limited public forum.[10] The administration did not intend the newspaper to be a forum for public expression, and the school's policies indicated that the school administration maintained control over the paper.[11] Thus, school administrators did not violate the students' First Amendment rights by refusing to allow them to publish the articles because the paper was a non-public forum and the school based its censorship on a reasonable

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5. *Id.*

6. *Id.* at 263–264. For an in depth critique of the *Hazelwood* decision, see William Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 Iowa L. Rev. 505 (1989).

7. 484 U.S. at 263.

8. *Id.* "Pedagogical" is defined as: "of, relating to, or befitting a teacher or education." *Merriam-Webster's Collegiate Dictionary* 856 (10th ed., Merriam-Webster, Inc. 2000). *See* Kevin G. Welner, *Looking up the Marketplace of Ideas and Locking Out School Reform: Court's Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. Rev. 959, 996 (2003) (arguing that the pedagogical concern test is a rational basis test).

9. 484 U.S. at 270. The court declared that the facts "fail[ed] to demonstrate the clear intent to create a public forum" that would be necessary to open the paper up as a limited public forum. *Id.* (citing *Cornelius v. NAACP Leg. Def. & Educ. Fund*, 473 U.S. 788, 802 (1985)).

10. *Id.* The court held, "school officials did not evidence by policy or practice, any intent to open the pages of the Spectrum to indiscriminate use by its student reporters and editors, or by the student body generally." *Id.* (citations omitted).

11. *Id.*

pedagogical concern.[12]

This note examines how the *Dean* court, presented with facts similar to those in *Hazelwood*, directly contradicted the *Hazelwood* decision by holding that the student's First Amendment rights trumped the school's interest in controlling student expression.[13] By analyzing the reasoning applied in *Dean*, that the newspaper was a limited public forum[14] and that the school's censorship was unreasonable, this note takes the position that the court misapplied First Amendment precedent. Part II will discuss the historical antecedents leading up to the *Dean* case. Part II will also describe the relevant case law preceding *Dean* and will discuss an emerging trend toward broadening the *Hazelwood* standard. Part III will discuss the erroneous *Dean* decision and why the trend away from *Hazelwood* is harmful. Finally, Part IV of this note will suggest ways that school administrators can still maintain some control over student expression under *Dean* by offering practical suggestions to retain administrative authority and control over their schools' newspapers.

II. HISTORICAL DEVELOPMENT

This section will trace the development of First Amendment law from the beginning of speech regulations on America's public high school newspapers. This section will then discuss forum analysis, which is a critical element in determining the amount of control school administrators have over student expression. Finally, this section will demonstrate the emerging trend that is broadening the *Hazelwood* standard, and will conclude with a discussion of *Dean*.

A. A Brief History of Regulation of Speech in Public Schools

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[15] The First Amendment applies to the states through the Fourteenth Amendment.[16] Thus, neither the states nor the federal government may infringe upon the right of freedom of expression or of the press. However, couched in absolute terms, the freedom guaranteed

12. *Id.*

13. 345 F. Supp. 2d at 813–814.

14. For a discussion of the court's forum analysis, see *infra* pt. II(A)(1). An analysis of the court's reasonable pedagogical concern holding can be found *infra* pt. III(B).

15. U.S. Const. amend. I.

16. *Gitlow v. N.Y.*, 268 U.S. 652, 666 (1925) (declaring that freedoms of speech and press are liberty rights protected from state infringement by the due process clause of the Fourteenth Amendment).

by the First Amendment is not without limitations.[17] In fact, the Supreme Court has carved out a number of areas in which expression has little or no First Amendment protection.[18] In contrast, other areas of expression, such as speech in America's public high schools, are highly protected and can only be limited in certain situations.[19]

In its seminal case on student speech, *Tinker v. Des Moines Independent School District*,[20] the Supreme Court held that students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." [21] According to *Tinker*, courts must apply those rights in light of the school environment's "special characteristics."[22] The Court in *Tinker* held that school officials may only censor student speech in a public forum to avoid serious disruption of the school environment.[23]

Regardless of the Court's ruling in *Tinker*, the rights of students in public schools are not always the same as the rights of adults in other settings.[24] For First Amendment purposes, student speech falls into three categories,[25] each of which entitles the government to a certain level of regulation.[26] First, *Tinker* governs student speech that "happens to occur on the school premises."[27] Second, government speech, such as a school

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17. *Butterworth v. Smith*, 494 U.S. 624, 629 (1990) (citing *Smith v. Butterworth*, 466 F.2d 1318, 1321 (1989)).

18. The following well-defined and narrowly-limited categories of speech have little or no First Amendment protection: obscenity, *Miller v. Cal.*, 413 U.S. 15, 24 (1973), fighting words, *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942), and words likely to incite imminent lawless action, *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969). The following two areas of speech receive some First Amendment protection but less than that of normal speech: libel, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964), and commercial speech, *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 759–760 (1976).

19. *E.g. Hazelwood*, 484 U.S. at 273 (granting school administrators authority over material printed in the school newspaper in certain situations).

20. 393 U.S. 503 (1969).

21. *Id.* at 506. Public high school administration's suspension of students for wearing black armbands to protest the Vietnam War violated the students' First Amendment rights. The Court reasoned that wearing armbands was "closely akin" to speech; thus, it carried all First Amendment protections. *Id.* at 504–506. This type of speech is generally referred to as symbolic speech. *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968) (characterizing the burning of a draft card as symbolic speech).

22. *Tinker*, 393 U.S. at 506. A public high school is unique because it is not required to tolerate speech that contradicts its educational goals, even though the government might otherwise be unable to censor that speech outside of the school setting. *Hazelwood*, 484 U.S. at 266.

23. *Tinker*, 393 U.S. at 506.

24. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986) (holding that a public high school may discipline a student for using improper language in a speech nominating a classmate for student government).

25. *Kincaid v. Gibson*, 236 F.3d 342, 348 (6th Cir. 2001).

26. *See Hazelwood*, 484 U.S. at 267.

27. *Tinker*, 393 U.S. at 503.

official speaking at a school assembly, is subject to any viewpoint-based regulation because the school itself may always choose what viewpoint it wants to endorse.[28] Finally, *Hazelwood* controls school-sponsored speech.[29]

1. Forum Analysis: The Critical Determination

Because the type of forum determines what level of protection the speech is due, the threshold determination in any school-sponsored speech analysis under *Hazelwood* is the type of forum in which the speech took place.[30] The Supreme Court has recognized four types of forums: a traditional public forum, a public forum by designation, a limited public forum, and a non-public forum.[31] The traditional public forum carries the highest level of First Amendment protection while the public forum by designation carries the same protection of speech for which it is designated, including a traditional public forum when it is designated as such. The limited public forum carries mid-level First Amendment protection and a non-public forum carries the lowest level.[32] Government property, historically open to the public for expressive activities, is a traditional public forum.[33] In most instances, the government may not completely close this forum to communicative activity.[34] A public forum by designation has been opened by the government for the purposes of speech activity.[35] While the government can completely close this forum, if it remains open, it is treated as a traditional public forum.[36]

When analyzing a traditional public forum, a public forum by designation or a limited public forum, the government may enforce content-based restrictions[37] only if they can withstand strict scrutiny.[38]

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28. *Rosenberger v. Rector & Visitors of the U. of Va.*, 515 U.S. 819, 833 (1995).

29. 484 U.S. at 273.

30. *Dean*, 345 F. Supp. 2d at 805.

31. *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 44–49 (1983); *Rosenberger*, 515 U.S. at 833. Some scholars consider the traditional public forum and the public forum by designation to be essentially the same and accordingly write that Supreme Court only has three types of forums. Richard B. Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. Cin. L. Rev. 739, 739 (1991).

32. *Kincaid*, 236 F.3d at 354.

33. *Perry Educ. Assn.*, 460 U.S. at 45. An example of a traditional public forum is a sidewalk or public park. *U.S. v. Grace*, 461 U.S. 171, 180 (1983).

34. *Perry Educ. Assn.*, 460 U.S. at 45–46.

35. *Cornelius*, 473 U.S. at 802 (explaining how to determine the existence of a public forum by designation).

36. *Id.*

37. Courts presume content-based regulations are invalid. *Simon & Schuster, Inc. v. Members of N.Y. St. Crime Victims Bd.*, 502 U.S. 105, 115 (1991). However, courts permit the regulation of

Strict scrutiny requires that the regulation serves a compelling governmental interest and employs the least restrictive means, which should be the least restrictive available to achieve that interest.[39] The government may then enforce only content-neutral time, place, and manner regulations[40] that are narrowly-tailored to serve a significant government interest and leave open ample alternative channels of communication.[41] Contrary to the meaning of the term in other areas of constitutional jurisprudence, in this context "narrowly-tailored" does not require the government to employ the "least restrictive or least intrusive means" available.[42] The Court in *Ward v. Rock Against Racism* explained that "narrowly-tailored" requires that (1) the government's interest must be better served with the regulation than without it, and (2) the regulation must not be substantially broader than necessary to achieve the government's objective.[43]

The third type of forum is a limited public forum. Although it is not created specifically to further expression, it is closely related to the concept of sharing ideas.[44] In a limited public forum, the government may leave the forum open for use by the public for assembly and speech, certain speakers, or discussion of specific subjects.[45] Speech restrictions

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content when the speech is of "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572.

38. Strict scrutiny is the most stringent analysis the court can apply to a First Amendment question. *E.g. Tex. v. Johnson*, 491 U.S. 397, 403 (1989) (applying strict scrutiny and holding that flag burning carried First Amendment protection because it was political speech).

39. *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989).

40. A city ban on news racks containing commercial advertising material but not banning news racks that contained newspapers is an example of an impermissible content-based regulation. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993). For a discussion of the difference between content-based and content-neutral restriction, see Erwin Chemerinsky, *Content Neutrality as a Central Problem of Free Speech: Problems in the Supreme Court's Application*, 74 S. Cal. L. Rev. 49 (2000) (arguing that the Supreme Court has erred in its jurisprudence in the area of content-neutrality). Time, place, and manner restrictions are necessary in order to ensure that all citizens may be heard and to avoid the chaos of everyone speaking at once. Norman Redlich, John Attanasio, & Joel K. Goldstein, *Understanding Constitutional Law* 431 (2d ed., Lexis 1999).

41. *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

42. *Ward*, 491 U.S. at 797–798. The court made it clear that the government regulation need not be the "least intrusive" method of furthering its legitimate interests because "least intrusive" was never part of the constitutional analysis the Court had applied in this realm of its jurisprudence. *Id.* at 800.

43. *Id.* at 799–800.

44. *Rosenberger*, 515 U.S. at 833. A state fair is an example of a limited public forum. *Heffron v. Intl. Socy. for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981).

45. *Rosenberger*, 515 U.S. at 833; *see also* Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 Nw. U. L. Rev. 1357 (discussing the nuanced Supreme Court jurisprudence regarding the limited public forum).

in this type of forum may only be made to further the forum's normal activity.[46]

Finally, a non-public forum encompasses everything that is not a traditional public forum, public forum by designation, or limited public forum.[47] In a non-public forum, the government may limit access based on subject matter and speaker. The regulations must be rationally related to a legitimate governmental purpose and interference with expression must not be substantial.[48] Although the government may restrict content, the restriction must be viewpoint-neutral meaning the government cannot censor based solely on viewpoint.[49]

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46. *Rosenberger*, 515 U.S. at 833.

47. *Perry Educ. Assn.*, 460 U.S. at 45–46. An airport terminal operated by a public authority is an example of a non-public forum because it was not traditionally made open for speech activity. *Intl. Socy. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 686 (1992). Private property might also fall into this category. *Hudgens v. Natl. Labor Rel. Bd.*, 424 U.S. 507, 519–520 (1976) (holding that private property rights trump free speech rights). The Court nonetheless upheld a California Supreme Court decision recognizing a right to free expression on privately owned property within the state "so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980). For an in-depth discussion of this area of the law, see Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L Rev. 633 (1991).

48. *Perry Educ. Assn.*, 460 U.S. at 46.

49. *Cornelius*, 473 U.S. at 806. The conflicting ideas on viewpoint-neutrality in school-sponsored speech are beyond the scope of this note. For discussions on each side of the issue, see Janna J. Annest, Student Author, *Only the News That's Fit To Print: The Effect of* Hazelwood *on the First Amendment Viewpoint-Neutrality Requirement in Public Sponsored Forums*, 77 Wash. L. Rev. 1227 (2002) (arguing that *Hazelwood* eliminates viewpoint-neutrality in school-sponsored speech cases and that the decision is necessary to better school systems); Susannah Barton Tobin, Student Author, *Divining* Hazelwood: *The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 Harv. Civ. Rights-Civ. Libs. L. Rev. 217 (2004) (arguing that although the Court's intent was to eliminate viewpoint-neutrality in the school-sponsored speech context, viewpoint-neutrality is the constitutionally correct decision). In *Hazelwood*, the Court completely omitted viewpoint-neutrality from its opinion causing a split among the U.S. Circuit Courts of Appeals. Some courts interpret the omission to mean that the majority intended to retain viewpoint-neutrality in all speech regulations. *E.g. Planned Parenthood of S. Nev. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (holding that viewpoint discrimination is impermissible in advertisements in a high school publication); *Searcy v. Harris*, 888 F.2d 1314, 1319 (11th Cir. 1989) (declaring that *Hazelwood* does not eliminate the viewpoint-neutral regulation in public high school extracurricular activities). Nonetheless, in his dissenting opinion in *Hazelwood*, Justice Brennan suggests that the majority intended to abandon the viewpoint-neutrality requirement. 484 U.S. at 287. Justice Brennan's dissent has led other courts to rule that *Hazelwood* eliminates viewpoint-neutrality in the context of the school-sponsored non-public forum. *E.g. Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (holding that *Hazelwood* does not require viewpoint restrictions on school-sponsored speech); *C.H. v. Oliva*, 195 F.3d 167, 172 (3d Cir. 1999) (ruling that viewpoint-based regulations of student speech are permissible under *Hazelwood*), *aff'd in part and rev'd in part*, 226 F.3d 198 (2000) (reversed on grounds other than the viewpoint decision); *Fleming v. Jefferson*, 298 F.3d 918, 926 (10th Cir. 2002) (holding that *Hazelwood* allows educators to make viewpoint-based restrictions on school speech) *cert. denied*, 537 U.S. 1110 (2003).

B. The Modern Trend is Away from the Hazelwood *Standard*

This section will show how courts have whittled down the *Hazelwood* rule, thereby expanding the expressive rights of student journalists.[50]

1. Case Law Has Narrowed the Areas and Situations in which the Hazelwood Standard Applies, thereby Broadening Students' Expressive Rights

There is an emerging trend away from the *Hazelwood* standard and toward broadening students' freedom of expression rights within public high schools.[51] Two cases in particular, *Romano v. Harrington*[52] and *Desilets v. Clearview Regional Board of Education*, [53] have shifted emphasis away the *Hazelwood* ruling which conferred broad regulatory authority to school officials to regulate student-authored newspapers.[54]

In *Romano v. Harrington*, the District Court for the Eastern District of New York determined that under *Hazelwood*, a school could not terminate a teacher for allowing publication of a student-authored article opposing a holiday for Dr. Martin Luther King, Jr.[55] The court distinguished the case from *Hazelwood* by deciding that because the students received feedback but not a grade or academic credit as the students did in *Hazelwood*, the school newspaper was an extracurricular

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50. After the *Hazelwood* decision, Arkansas, Colorado, Iowa, Kansas, and Massachusetts enacted statutes to broaden the free speech rights of student journalists. Ark. Code Ann. § 6-18-1201 (2005); Colo. Rev. Stat. Ann. § 22-1-120 (West 2005); Iowa Code Ann. § 280.22 (West 2005); Kan. Stat. Ann. § 72-1506 (2004); Mass. Gen. Laws ch. 71, § 82 (2005). Such statutes are sometimes referred to as anti-*Hazelwood* laws. David L Hudson, Jr., *K–12 Public School Student Expression: Newspapers & Yearbooks*, "Anti-Hazelwood laws," http://www.firstamendmentcenter.org/speech/studentexpression/topic.aspx?topic=K-12_newspapers_yearbooks (last updated Sept. 22, 2006). Alabama, Connecticut, Illinois, Missouri, Nebraska, and Oregon failed in attempts to pass statutes responding to *Hazelwood*. *Id.* Additionally, California enacted a statute similar to the anti-*Hazelwood* statutes prior to the Supreme Court's decision. Cal. Educ. Code Ann. § 48907 (West 2005). For a discussion of the impact *Hazelwood* has had on state legislation, see Alexander Wohl, *The* Hazelwood *Hazard: Litigating and Legislating in the State Domain When Federal Avenues Are Closed*, 5 St. Thomas L. Rev. 1 (1992).

51. For commentary asserting that the modern trend is toward narrowing students' First Amendment rights, see Katherine Say, Student Author, *Differing Viewpoints under the First Amendment: Student Versus School Authorities*, 28 Okla. City U. L. Rev. 905 (2003) (contending that *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000) reflects the trend toward increasing the discretion of school authorities over students' First Amendment expressive rights). In *Boroff*, the court held that the school administration did not act unreasonably, and thus did not violate the First Amendment, when, in following the school's dress code, it prohibited students from wearing t-shirts featuring a rock group. 220 F.3d at 468–471.

52. 725 F. Supp. 687 (E.D.N.Y. 1989).

53. 647 A.2d 150, 154 (N.J. 1994).

54. *Romano*, 725 F. Supp 687; *Desilets*, 647 A.2d 150.

55. 725 F. Supp 687.

activity, not part of the class curriculum.[56] The *Romano* court recognized that *Hazelwood* "invite[s] a broad interpretation of the term curriculum," but still rejected the argument that the curriculum included an extracurricular activity, such as the newspaper, although it furthered the school's educational goals.[57] Instead, the court relied upon the Supreme Court's holding in *Board of Education, Islands Trees Union Free School v. Pico* to minimize the *Hazelwood* decision.[58] In the court's view, *Pico*'s holding counseled against an expansion of the *Hazelwood* decision because of the significant First Amendment concerns involved in the case.[59] The *Romano* court argued that the proper interpretation of *Hazelwood* is very narrow.[60]

In *Desilets v. Clearview Regional Board of Education*, the Supreme Court of New Jersey held that prohibiting a student from writing reviews of R-rated movies in the school newspaper violated his First Amendment rights.[61] Although the court found that the newspaper was a non-public forum, it reasoned that the school had no legitimate pedagogical concerns to justify prohibiting articles about R-rated movies, nor did it have an educational policy dealing with that subject.[62] The court asserted that the record suggested that such a policy, if it existed at all, was "vaguely defined and loosely applied."[63]

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56. *Id.*

57. *Id.* at 689.

58. 457 U.S. 853 (1982). In *Pico*, the Court prohibited the public school board from removing certain books from the school's libraries when the intent behind the removal was to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Id.* at 872 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). The court held that the school board's intent behind the removal was the primary factor in determining the constitutionality of the censorship. *Id.* at 871. Further, the Court noted that although the school board's removal of certain books could not be based on ideas, the decision did not affect the authority of the school board to add books to the libraries. *Id.* at 871–872. For analysis of the *Pico* decision, see Marjorie Heins, *Viewpoint Discrimination*, 24 Hastings Const. L.Q. 99, 159–167 (1996).

59. *Romano*, 725 F. Supp. at 689–690.

60. *Id.* at 689.

61. 647 A.2d at 154.

62. *Id.* The court emphasized the need for having a policy in place regarding content of the newspaper prior to any problems arising from that content. "The inherent complexity surrounding the nature and scope of educational policy affecting expressional activity demonstrates that the educational legitimacy of a school policy governing such activity should, if possible, first be considered and determined by the administrative agency charged with regulating public education." *Id.* It is apparent that the court was deeply troubled by the lack of policy regarding the school newspaper. "[T]he evidence in this case concerning the school's educational policy was, at best, equivocal and inconsistent." *Id.*

63. *Id.*

2. *The Culmination: Katherine Dean Takes on Utica Community Schools in* Dean v. Utica

The facts in *Dean* are similar to those found in *Hazelwood.* Katherine Dean was a student reporter for Utica High School's student newspaper, the *Arrow.* [64] At Utica High, participation in production of the newspaper was a class for which students received grades and academic credit. Dean and another journalism student began researching an article for the *Arrow* regarding a pending lawsuit brought by Joanne and Rey Frances against Utica Community Schools (UCS).[65] Mr. and Mrs. Frances resided in a neighborhood next to the UCS bus garage and claimed that diesel fumes from the idling buses constituted a nuisance, violated their privacy rights, and were hazardous to their health.[66] The students interviewed Mr. and Mrs. Frances and viewed a videotape of a school board meeting at which Mrs. Frances expressed her concerns about the diesel fumes. The students also attempted unsuccessfully to interview UCS school administrators, who were either unavailable or refused to comment on the pending litigation.[67] Prior to publication, the principal obtained a copy of Dean's article and passed it on to the assistant superintendent, who forwarded it to the superintendent.[68]

Numerous concerns about the article and the advice of legal counsel prompted the administrators to prohibit the article from being published in the upcoming edition of the *Arrow.*[69] The administrators' concerns included the following: the article's sources included an unnamed school district employee and scientific data from *USA Today*; the article used a pseudonym instead of the Frances' name; the article was inaccurate because environmental studies conducted for the pending litigation found that UCS's activities at the bus garage had no health impact; and that it was inappropriate for the newspaper to publish an article discussing litigation in which the high school was involved.[70] After the school refused to publish her article, Dean brought suit alleging a

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64. *Dean*, 345 F. Supp. 2d at 800.

65. *Id.* at 802.

66. *Id.* at n. 2. Rey Frances later died of lung cancer and the lawsuit against UCS settled out of court in 2003. *Id.*

67. *Id.* at 802.

68. *Id.* at 802–803. The three school officials involved were Principal Machesky, Assistant Superintendent Eckhardt, and Superintendent Sergent. *Id.*

69. *Id.* at 802–803.

70. *Id.* Because Dean was still in the process of revising the article, there were some minor, but insignificant differences in the draft the school officials reviewed and the one she ultimately hoped to publish. *See id.* The only significant difference was that the article Dean wished to publish contained the Frances' actual names instead of pseudonyms. *See id.* at 815–818 apps. A & B (reprinting the two articles in their entirety)

violation of her First Amendment rights and seeking an injunction compelling UCS to publish her article with an explanation that the school unconstitutionally censored the work.[71]

The Eastern District of Michigan granted summary judgment for Dean holding that the *Arrow* was a limited public forum because it was a vehicle for public expression and not a traditional class[72] and that the suppression of the article was not reasonable under the circumstances.[73] The court further held that even if the *Arrow* was a non-public forum, the school administrators did not base their suppression of the article on a reasonable pedagogical concern as required by the Supreme Court's holding in *Hazelwood*.[74]

III. THE *DEAN* COURT'S ANALYSIS

This section will discuss how the *Dean* court misapplied *Hazelwood*. First, this section will argue that the court incorrectly determined that the school newspaper, the *Arrow*, was a limited public forum. Second, this section will contend that the court improperly held UCS's suppression of the speech unconstitutional and that the administrators did have sufficient pedagogical concern to prohibit publication of the student's article. This section will conclude with a discussion of how the policy implications behind the *Dean* decision are harmful to America's schools.

A. The District Court Erred When It Determined That the Arrow Was a Limited Public Forum

In *Dean*, the court employed the Sixth Circuit's two-step analysis to determine the *Arrow*'s forum type.[75] The first step was to determine the type of forum the school intended to create.[76] To do this, the court used both the six-part intent test from *Hazelwood* and the three-part intent test adopted by the Sixth Circuit.[77] The second step was an examination

71. *Id.* at 800. Because she was a minor, Dean sued through her mother and next friend, Colleen Elsarelli. *Id.*

72. *Id.* at 806.

73. *Id.* at 814.

74. *Id.* at 814.

75. *Id.* at 807.

76. *Id.* at 809.

77. *Id.* at 807. For purposes of this note, the sub-headings have been grouped together for easier consideration. The actual prongs that the court considered are as follows:

> (1) whether the students produced the newspaper as part of the high school curriculum; (2) whether students receive credits and grades for completing the course; (3) whether a member of the faculty oversaw the production; (4) whether the school deviated from its policy of producing the paper as part of the educational curriculum; (5) the degree of control the

of the context in which the forum took place.[78]

The facts in *Dean* were analogous to those in *Hazelwood*, therefore the court should have followed Supreme Court precedent and determined that the *Arrow* was a non-public forum. Instead, the *Dean* court ruled that the *Arrow* was a limited public forum, which triggered a higher level of First Amendment protection.[79] The court virtually eliminated any control school authorities had over the content of the newspaper by labeling it a limited public forum, because only regulations that restrict use incompatible with the forum's normal activity are permitted in such a forum.[80] Very few areas of speech are incompatible with the normal activities of a newspaper.[81] The holding that the *Arrow* was a limited public forum was inappropriate because the facts of the case did not show that UCS had the "clear intent to create a public forum" required by the Supreme Court.[82]

1. UCS's Written Policies Toward the Arrow

Beginning its forum analysis, the *Dean* court examined the curriculum guide for the newspaper class as well as the *Arrow*'s masthead.[83] The guide stated that the class was intended to "plan, assign, and produce a regularly scheduled newspaper for the school/community audience."[84] Further, students were to "[e]mploy an understanding of the rights and responsibilities that accompany the First Amendment."[85] The court held that this language clearly showed UCS's intent to permit the *Arrow* to operate as a limited public forum because the language "for the school/community audience" conveyed the administration's intent to use the *Arrow* as a vehicle of expression throughout the community and to open the paper up as a forum for public discussion.[86]

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administration and the faculty advisor exercise; and (6) applicable written policy statements of the board of education. The Sixth Circuit examines three additional intent factors: (1) the school's policy with respect to the forum; (2) the school's practice with respect to the forum; and (3) the nature of the property at issue and its compatibility with expressive activity. *Id.*

78. *Id.* at 806.

79. *Rosenberger*, 515 U.S. at 833.

80. *Dean*, 345 F. Supp. 2d at 805.

81. A newspaper is an extremely broad forum for expression. Thus, the Constitution would likely prohibit the school from censoring all but a few narrow areas of speech which have historically carried little or no constitutional protection. For examples of speech that carry limited First Amendment protection, see *supra* n. 18.

82. *Cornelius*, 473 U.S. at 802.

83. *Dean*, *345* F. Supp. 2d at 808.

84. *Id.*

85. *Id.*

86. *Id.* This language might give a reader the impression that UCS was leaving the *Arrow* open

However, the court failed to consider whether the paper's simple distribution in the community rendered it a forum open for the sharing of ideas as required by the Supreme Court. Likely, it did not. In *Hazelwood*, the school newspaper was widely distributed in the community and had language regarding an understanding of First Amendment rights similar to that of the *Arrow*.[87] But not even this language, coupled with public distribution of the paper, was enough to open the paper up as a limited public forum[88]

The language of the *Arrow's* masthead also contains a point favoring the court's finding that the paper was a limited public forum. It states:

> Our main purpose is to (1) inform the students, faculty, and community of school related news; (2) broaden the range of thinking of staff members and readers; (3) provide a forum for readers; (4) train the students in the function of the press in a democratic society; and (5) provide entertaining features of interests to the students.[89]

Although not expressly mentioned by the court, numbers (3) and (4) likely gave the impression that UCS intended to open the *Arrow* up as a forum to the community and run it like a real-world publication. The court reasoned that with the other relevant factors, the masthead showed UCS's intent to create a limited public forum.[90] However, of significance is the fact that in following *Hazelwood*, the court adopted the position that the paper's masthead should be "understood in the context of the paper's role in the school's curriculum."[91] Thus, the court's holding[92] is only accurate when considered along with its particular line of reasoning. Considering the full context of the paper operating as a graded class[93] and ultimate administrative control over the content,[94] the mere language in the masthead is not evidence that the *Arrow* was a limited

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to the entire community, a characteristic necessary for a court to find that the paper is a limited public forum. *Cornelius*, 473 U.S. at 802.

87. 484 U.S. at 262. The high school newspaper printed over 4,500 copies for distribution to students, faculty, and the community. *Id.*

88. *Id.* at 269. In *Hazelwood*, the school actually had a policy stating that the student newspaper "accepts all rights applied by the First Amendment." The Court held that this policy simply meant that, "the administration [would] not interfere with the students' exercise of those First Amendment rights that attend the publication of a school-sponsored newspaper." *Id.* The Court concluded that this written policy was not enough to establish the paper as a non-pubic forum. *Id.*

89. *Dean*, 345 F. Supp. 2d at 808.

90. *Id.*

91. *Id.* (quoting *Hazelwood*, 484 U.S. at 269).

92. *Id.* at 804–814.

93. *See infra* nn. 101–104 and accompanying text (discussing the effect of grades on forum analysis).

94. *See infra* nn. 113–130 and accompanying text (arguing why UCS did have editorial control over the paper).

public forum.

In its holding, the court made two additional points regarding UCS's applicable written policies. First, the court noted that UCS could not produce any document indicating that the *Arrow* was a non-public forum.[95] Although in hindsight the school surely would have preferred to have the *Arrow*'s function described in writing, the absence of such a document did not indicate that the paper was a limited public forum.[96] Further, although the court stated that "there is no document that states that the *Arrow* is not a public forum," it is unreasonable to think that a school, especially after *Hazelwood*, would think it necessary to have such a document.[97]

Second, the court held that the school's use of outside advertising revenue to produce the *Arrow* gave the impression that the paper was a limited public forum.[98] However, the suggestion that outside advertising is a factor in forum analysis puts financially burdened schools, such as UCS[99] in the precarious position of deciding between losing the paper to lack of funding or taking the funding and risking interpretation of the paper as a limited public forum. Moreover, the court neglected to recognize that soliciting advertising is, in and of itself, an educational lesson.[100]

2. *Grades and Academic Credit Were Given for Participation on the Arrow*

As part of its analysis, the court considered the undisputed fact that the students received grades and academic credit for completing the

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95. *Dean*, 345 F. Supp. 2d. at 808. It is unclear whether the *Dean* court would have required both a curriculum guide and a policy statement for it to label the *Arrow* a limited public forum. *Id.* However it is logical that if the school had the written documentation that the court was looking for, it would not have mattered what form the document took.

96. *See Hazelwood*, 484 U.S. at 260 (holding that a school newspaper, which had no policy stating it was a non-public forum, was a non-public forum). In fact, the written policies of the paper in *Hazelwood* gave the impression of a limited public forum. *Id.* at 268.

97. *Dean*, 345 F. Supp. 2d at 808. Even if the court had consulted legal counsel, it is unlikely that counsel would have made such a suggestion because the *Hazelwood* Court never suggested that a school must state in writing that it is a non-public forum. *See* 484 U.S. at 260 (holding that a high school newspaper was a non-public forum even when it did not have a written statement declaring what type of forum it was).

98. *Dean*, 345 F. Supp. 2d at 808.

99. Regarding UCS's financial problems, UCS Superintendent Sergent said, "[s]ince 2002, our district has absorbed a staggering loss of more than $19 million in operating dollars." Utica Community Schs., *A Message from Dr. Joan C. Sergent, Michigan's 2005 Superintendent of the Year*, http://www.macomb.k12.mi.us/utica/home_hc/content_finance.htm (accessed Aug. 8, 2005) (copy on file with Author).

100. *Dean*, 345 F. Supp. 2d at 808. In fact, the school listed advertising sales in the course description, giving the impression that the school valued its educational benefit. *Id.*

course.[101] This was an important factor of the *Hazelwood* analysis,[102] but was not given the attention it deserved by the *Dean* court. The fact that UCS gave grades and academic credit for participation on the *Arrow*'s staff should have established that the *Arrow* was a class rather than an extracurricular activity. It is clear that speech within a classroom receives less First Amendment protection than speech elsewhere.[103] Despite this fact, the court determined that the *Arrow* was an extracurricular activity and thus entitled to more First Amendment protection.[104]

3. Was the Arrow Part of the Educational Curriculum?

Continuing its analysis, the court declared that UCS deviated from its policy of producing the *Arrow* exclusively as part of the educational curriculum.[105] The court erroneously labeled the *Arrow* a non-traditional class, (similar to an extracurricular activity). The court reached this conclusion because the school allowed the students to take the class more than once for credit reasoning that in doing so, the school was encouraging "sustained activity" more consistent with an extracurricular activity.[106] However, "sustained activity" and continued participation allows the newspaper staff to develop important reporting skills.[107]

By categorizing participation in the *Arrow* as an extracurricular activity, the court distinguished participation on the *Arrow*'s staff from classes such as Calculus, which the curriculum guide did not allow students to take more than once for credit.[108] Students must take several years of math courses to learn the subject; they simply take these courses in separate disciplines.[109] Perhaps if UCS had separated the discipline

101. *Id.* at 807.

102. 484 U.S. at 268. In *Hazelwood*, grades and academic credit reinforced the fact that the school had ultimate control over the paper. The school's control was an important factor in determining whether the school intended to open the paper up as a public forum. *Id.* at 268–269. The lack of grades or academic credit likely would have been an indicator that the school had less control. However, a school newspaper class that does not provide students with grades and academic credit might still be a non-public forum. *Desilets*, 647 A.2d at 152.

103. *Tinker*, 393 U.S. at 506.

104. *Dean*, 345 F. Supp. 2d at 807; *see also supra* nn. 51–60 (considering how a court's forum analysis is impacted by a finding that a high school newspaper is an extracurricular activity).

105. *Dean*, 345 F. Supp. 2d at 807–808.

106. *Id.*

107. A look at a prominent journalism school's website further illustrates this point. *See* Northeastern U. Sch. of Journalism, *Graduate*, http://www.journalism.neu.edu/graduate/ (accessed Nov. 12, 2006) (stating that the school's "hands-on training and work experience prepares graduates for careers as reporters and editors at newspapers, magazines, online publications and the broadcast media.")

108. *Dean*, 345 F. Supp. 2d at 807.

109. Utica High School requires "three credits of Mathematics" for graduation. Utica

into courses such as "Journalism" and "Research and Investigating," as it does its math courses into "Algebra," "Geometry," and "Calculus," the court would have held differently. The purpose of the journalism class was to develop journalism skills over time. The mere fact that the school called the class by one name did not mean that the students stopped learning after the first year in the course. Instead, the students' knowledge of journalism increased as they continued to receive grades and academic credit for participation on the *Arrow's* staff even after the first year.[110]

4. Was the Arrow Compatible With Expressive Activity?

The court then considered whether the *Arrow* was compatible with expressive activity and ultimately determined that expression is the essence of a student newspaper.[111] Although the holding was a true statement, the Supreme Court has held that a student newspaper is a non-public forum unless the school clearly intends to open up the paper for broad expression.[112] The facts clearly show that UCS did not intend to do so with the *Arrow*.

5. Faculty and Administrative Control Over the Arrow and UCS's Actions Toward the Paper

Throughout its opinion, the *Dean* court repeatedly addressed the issues of faculty and administrative control over the paper and the administration's actions toward the paper.[113] First, the court examined the extent to which a faculty member oversaw the *Arrow*'s production. The court declared that while a teacher did oversee the class, the students controlled every major aspect of the *Arrow*.[114] This determination represented a basic flaw that ran throughout the analysis: although the assigned teacher did not exercise a great deal of control over the paper, there is no evidence that the school board or anyone else took away the authority of the teacher to do so.[115] Furthermore, the court did not

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Community Schs., *Graduation Requirements*, https://www.astihosted.com/UCSDCP/DesktopDefault.aspx?tabid=205 (accessed Nov. 12, 2006).

110. *Dean*, 345 F. Supp. 2d at 807.

111. *Id.* at 808.

112. *Cornelius*, 473 U.S. at 802.

113. 345 F. Supp. 2d at 807–809. These two elements are scattered throughout the opinion. *Id.* However, the court's misguided reasoning is essentially identical for all of the elements and is best considered together.

114. *Id.* The court declared that there was no "genuine factual dispute" over who controlled production. *Id.*

115. *See id.* at 801–802 (considering administration involvement in the newspaper class and

suggest that the teacher would not have been able to edit or control the paper's affairs if she wished. In fact, the teacher did exercise some control over the paper when she "provide[d] advice on which stories to run and review[ed], criticize[d], and check[ed] the grammar contained in the articles."[116] These are all typical editorial duties that the court failed to consider in its forum analysis.[117]

Second, the *Dean* court erred in finding that because the school faculty exercised little control over the paper's affairs, it deviated from running the paper as a class.[118] However, the *Arrow* should have been determined a class because it had significant educational components.[119] The court even acknowledged that "[t]he newspaper class at Utica High School is intended to teach journalism."[120] The teacher chose to permit the students to manage the paper so that they would have an opportunity to learn managerial skills.[121] The fact that the school never needed to exercise its power was more reflective of a well-run paper with good students than of a neglectful administration with little control.[122]

Third, the court contended that with the sole exception of the Dean article, UCS's administration and faculty exercised little or no control over the *Arrow*'s content.[123] Again, the court's analysis here is misguided because it is imprudent to require our schools to operate as quasi-parents and then tell them how to exercise that control.[124] Schools should not have to fear losing control over their newspapers simply because they determine that the best way to teach journalism is to offer students as

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never mentioning that the school took away the teacher's authority).

116. *Id.* at 801.

117. *Id.* at 805–809.

118. *Id.* at 809.

119. *Id.* at 801. The educational components of the class are apparent from reading the opinion. The students learned various journalistic skills including producing, writing, and editing, all of which would clearly fall under this category. *Id.*

120. *Id.* at 804.

121. The value of real-world, hands-on learning emphasized by leading business school, Wharton, is vital in management training. "Wharton offers multiple venues in which students can use their theoretical skills in a real-world setting including options such as a field application project course and the annual *Wharton Business Plan Competition*." Wharton Bus. Sch., *Career Development*, http://mba.wharton.upenn.edu/mba/professional/development/ (accessed July 2, 2005) (copy on file with Author). Thus, letting the students manage the paper was simply a tool used by many institutions to teach valuable educational lessons.

122. *Dean*, 345 F. Supp. 2d at 808.

123. *Id.*

124. America's public high schools have quasi-parental duties under what is known as *in loco parentis*. *Bd. of Educ. of Ind. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 840 (2002). *In loco parentis* means, "of relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent." *Black's Law Dictionary* 351 (Bryan A. Garner ed., 8th ed., West 2004).

much managerial control over the paper as possible.

Finally, the court examined the actual practice of UCS in relation to the *Arrow*, continuing to operate under the misguided assumption that failing to exercise control demonstrated a lack of the right to control on the part of the faculty and school.[125] Because the school had not intervened in the affairs of the paper for twenty-five years, the court found that it intended to allow the students to operate the paper as an independent news source. On its face, this fact supports the court's finding that the paper was a limited public forum.[126] However, had the school intended to run the paper as an independent news source, it likely would not have spent the money on a teacher to oversee the paper nor would have had any written policies regarding its operation.[127] The fact that the school liberally permitted the students to run the paper does not establish an intent to give up a reserved right to censor the paper when necessary.

Thus, the district court should have found that the *Arrow* was a non-public forum because it operated as a class and because its core educational purpose was to teach journalism skills.[128] The teacher and the administration took a hands-off approach to the paper for two reasons: first, because the paper operated in a proper manner without administrative involvement and, second, to further the students' learning of the requisite skills for working on and managing a newspaper.[129] These actions in no way indicated intent to operate the *Arrow* as a vehicle for public expression as required by the Supreme Court in *Hazelwood.*[130]

B. The District Court Improperly Applied Hazelwood's Pedagogical Concern Standard

In considering the reasons for which UCS refused to print Dean's article, the *Dean* court did not properly follow the pedagogical concern test articulated by the Supreme Court in *Hazelwood.* After Dean authored her piece, UCS exercised its authority as a school to prohibit publication of the article in the *Arrow.*[131] The *Dean* court held that even if the *Arrow* was a non-public forum, the school did not base this

125. *Dean*, 345 F. Supp. 2d at 809.

126. *Id.*

127. *See supra* n. 99 (noting UCS's financial difficulties).

128. *See supra* nn. 101–104 and accompanying text.

129. *See supra* nn. 113–130 and accompanying text (asserting that a hands-off approach does not violate the *Hazelwood* intent standard).

130. *Hazelwood*, 484 U.S. at 270.

131. *Dean*, 345 F. Supp. 2d at 803.

censorship on a reasonable pedagogical concern.[132] The court granted summary judgment in favor of Dean notwithstanding an articulation of several pedagogical concerns by the UCS administration.[133] The court erred in its decision that this censorship was not a reasonable use of the school's power to regulate student expression in the newspaper. At a minimum, the dispute over whether the article was worthy of publication represented a legitimate factual dispute that should have overcome summary judgment.

The court concluded that the administrations' arguments were unfounded based solely on deposition and declaration testimony without an evidentiary hearing.[134] Summary judgment, however, is only appropriate when there is no genuine issue as to any material fact.[135] Material facts are to be determined based on law, applied on a case-by-case basis,[136] and all inferences are to be made in a light most favorable to the non-moving party.[137] The court misapplied these well-established rules in its decision to grant Dean's motion for summary judgment.

The school made five assertions as to why it would not print the article.[138] First, the students did not research the article properly, nor correct inaccuracies; second, the article referenced *USA Today,* which the superintendent believed to be an inadequate research tool; third, the article was biased and prejudicial; fourth, the article contained pseudonyms;[139] and lastly, the article alleged that the school district's actions had endangered the community—an allegation that the school claimed was untrue.[140]

In *Hazelwood,* the Court held that the school might "disassociate itself from work that is ungrammatical, poorly written, [or] inadequately researched."[141] Under this clear precedent, an examination of the *Dean* opinion shows that the court misapplied the *Hazelwood* standard. *Hazelwood* suggests that a school can set high standards for the quality of

132. *Id.* at 806.

133. *Id.* at 814.

134. *Id.* at 800.

135. Fed. R. Civ. P. 56(c).

136. *Anderson v. Liberty Lobby,* 477 U.S. 242, 247 (1986).

137. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986).

138. *Dean,* 345 F. Supp. 2d at 802–803.

139. *Id.* The opinion includes an appendix reproducing the article that the school administrators reviewed as well as the article Dean intended to publish. In the article the administrators reviewed, Dean used pseudonyms instead of the Frances' actual names, stating that the names were changed because of the pending litigation. *Id.*

140. *Id.* at 800 n. 4.

141. 484 U.S. at 271–272.

work produced under its auspices.[142] In certain circumstances, a school newspaper may set higher standards than those of a real-world newspaper.[143] Although the *Dean* court found otherwise, the evidence suggested that the administration found Dean's article academically unsuitable for publication.[144] Moreover, the court's reasoning implies that the school fabricated these drafting problems simply because it did not want to publish the piece.[145] Given the Supreme Court's assertion that courts should permit administrators great latitude over what they publish in their school's newspapers, it is unclear why the court flatly rejected the concerns of the administrators in this case.[146]

Because several questions of material fact did exist, the court erred in granting summary judgment in favor of Dean. The UCS administrators based their refusal to publish Dean's article on a reasonable pedagogical concern, which the district court should have recognized and held acceptable under *Hazelwood*'s high standard. At the very least, the court should not have granted summary judgment on this issue.

C. For Policy Reasons, Dean Is a Dangerous Departure From the Hazelwood Standard

The reasoning in *Dean* is contrary to Supreme Court precedent.[147] Yet, *Dean* is in line with the modern trend of broadening *Hazelwood*, giving more First Amendment freedom to student journalists and less authority to school administrators. An examination of the Court's reasoning in *Hazelwood* demonstrates the perils of lessening administrator authority and of broadening the standard like the *Dean* court did.

Hazelwood places primary emphasis on the authority of school administrators to convey knowledge in a proper learning

142. *Id.* The Court made the argument that because the newspaper was a product of the school, the school had ultimate authority over the work that students produced under its name. The Court reasoned that because the school's reputation was important, there was a compelling need for a school to regulate work bearing its name. *Id.* For an extension of this argument, see *Fleming*, 298 F.3d at 923 (holding that when a public high school publication, such as a newspaper, bears the imprimatur of the school, the school has broad, sweeping power to censor the material, including censoring based on viewpoint). The *Dean* court firmly rejected this imprimatur concept. 345 F. Supp. 2d at 810. The court should have followed the Supreme Court's high standard without adopting *Fleming*'s broader imprimatur analysis.

143. *Hazelwood*, 484 U.S. at 272.

144. 345 F. Supp. 2d at 803.

145. *See id.* at 809–813 (holding that every reason the school cited for censoring the article was unreasonable).

146. *Hazelwood*, 484 U.S. at 271–272.

147. *See id.* at 273 (holding that because a school newspaper is non-public forum, the school administration is able to restrict most speech in the paper).

environment.[148] Recognizing the possibility of the school newspaper's audience to misattribute the views of a student reporter to the school itself, *Hazelwood* declared that schools do not have to promote a particular manner of speech.[149] However, the *Dean* court forced the school to tolerate student speech even when the school had a reasonable concern with the material.

This toleration requirement is equivalent to the *Tinker* disruption standard,[150] which was not the proper Supreme Court precedent for this issue. *Tinker* dealt with pure speech—the wearing of armbands to protest the Vietnam War—which the Court declared must be a substantial disruption to the school environment for the school to censor it.[151] A school newspaper, however, is distinct under *Hazelwood* because it is school-sponsored.[152] In *Dean*, the *Arrow* was school-sponsored[153] and "designed to impart knowledge," fulfilling the *Hazelwood* requirement of conveying knowledge in a proper learning atmosphere.[154] Therefore, UCS did not have to promote the speech in Dean's article about a pending lawsuit against itself.[155] Essentially, the *Dean* court wanted the school to subsidize the exercise of free speech, which is not required by the Constitution.[156]

Dean's failure to follow *Hazelwood* is dangerous because allowing students rather than administrators to control publication of the school newspaper presents the potential for a contentious school setting. It is irresponsible to allow the publication of certain articles in a high school newspaper where the potential to disrupt the school environment is higher than if the same articles were published in a city newspaper. As the Supreme Court noted in *Hazelwood*, schools must account for the emotional maturity of their audience when determining what material to publish.[157] Furthermore, because members of the high school student

148. *Id.* at 271–272

149. *Id.*

150. 393 U.S. at 506.

151. *Id.*

152. 484 U.S. at 270–271.

153. 345 F. Supp. 2d at 807.

154. *Hazelwood*, 484 U.S. at 271.

155. *Id.* at 270–271.

156. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983) (reasoning that a government decision not to subsidize the exercise of a fundamental right does not infringe upon that right). The Court found that an internal revenue statute, which granted tax exemption to certain nonprofit organizations that did not participate in lobbying efforts, was in accord with the First Amendment. The court further held that the statute did not violate the equal protection clause even though the statute subsidized lobbying activities by veterans' organizations, but not by charities generally. *Id.* at 547–549.

157. 484 U.S. at 272.

body write these articles, courts should leave the regulation of such expression to schools operating under the theory of *in loco parentis*.[158]

Regulating student speech should be the responsibility of the school board, not the courts. The Supreme Court recognized in *Bethel School District v. Fraser* that the "determination of what manner of speech in the classroom or the school assembly is inappropriate properly rests with the school board" rather than with the federal courts.[159] A school board is the body responsible for regulating the school's functions. Since the community elects the school board to represent their interests,[160] board members should reflect the standards of the parents within the district. Furthermore, the school board should be the body charged with monitoring school expression because it is in the best position to determine what might disrupt the school environment and how a particular article might affect the school.[161]

In *Hazelwood*, the Court noted that a ruling in favor of the students would likely result in lessening students' vehicles for expression.[162] The *Dean* decision could have the same effect if school administrators see the dissolution of school newspapers as the easiest way to defend against potentially harmful student expression. School boards face many difficulties[163] and will likely want to avoid the problems of a school newspaper operating as freely as a city newspaper. As the Supreme Court noted, the option of eliminating the paper might appear much safer and easier.[164]

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158. *See supra* n. 124 (discussing *in loco parentis*).

159. 478 U.S. 675, 683 (1986).

160. "The National School Boards Association is a not-for-profit [f]ederation of state associations of school boards across the United States. Founded in 1940, NSBA . . . represents 95,000 local school board members, virtually all of whom are elected." Natl. Sch. Bds. Assn., *About NSBA*, http://www.nsba.org/site/page.asp?TRACKID=&CID=625&DID=9192 (accessed Nov. 12, 2006). Regarding school board policy, the NSBA said,

"It is a crucial school board role in our system of education governance. Like Congress, state legislatures, and city or county councils, school boards establish the direction and structure of their school districts by adopting policies through the authority granted by state legislatures. School board policies have the force of law equal to statutes or ordinances. Policies establish directions for the district; they set the goals, assign authority, and establish controls that make school governance and management possible. Policies are the means by which educators are accountable to the public."

Natl. Sch. Bd. Assn., *School Board Policies*, http://www.nsba.org/site/page_nestedcats.asp ?TRACKID=&DID=193&CID=61 (accessed Nov. 12, 2006).

161. *Bethel*, 478 U.S. at 683.

162. 484 U.S. at 276 n. 9.

163. Examples of the wide-ranging problems that school boards face include meeting the standards of No Child Left Behind, school violence, and funding issues. Natl. Sch. Bds. Assn., *School Law, School Law Issues*, http://www.nsba.org/site/page_nestedcats.asp?TRACKID=&CID =381&DID=8622 (accessed Nov. 12, 2006).

164. *Hazelwood*, 484 U.S. at 276 n. 9.

IV. WHAT SHOULD WE DO NOW? HOW ADMINISTRATORS CAN SAFELY REGULATE AFTER *DEAN*?

This section will show how, even after *Dean*, administrators can manage their school newspaper in such a way that a court will likely label the paper a non-public forum, which allows administrative control and avoids the drawbacks of complete student control. To prove the need for administrative action, an analysis of two real-world curriculum guides will follow. This analysis will show where the curriculum guides would be lacking if an administration were to face a situation similar to that in *Dean*. Finally, this section will offer an ideal curriculum guide for schools that wish to run their newspaper class as a non-public forum.

A. How School Administrators Should Properly Manage the Journalism Course

If a school board decides that a student newspaper is of value to its curriculum, there are certain steps it can take to retain ultimate control over the editorial process notwithstanding cases like *Dean* that dissolved much of school administrative authority.[165] While this editorial control by the school board may limit the learning experience, it gives administrators the opportunity to maintain a balance between an effective journalism course and its pedagogical duties.

In *Hazelwood*, the Court considered six factors in determining the forum type of the high school newspaper. If a school can maintain its newspaper as a non-public forum, it can retain the editorial control it desires.[166] Even the *Dean* court, which broke from much of the *Hazelwood* precedent, used these factors in its analysis.[167]

To maintain their newspapers as non-public forums, schools must, at a minimum, meet the following six prongs identified in *Hazelwood* and adopted in *Dean*: 1) the students must produce the newspaper as a part of the high school curriculum; 2) the students must receive credits and grades for completing the course; [168] 3) a member of the faculty must oversee the production of the newspaper; 4) the administration and faculty advisor must maintain some level of visible control over the

165. *See supra* pt. II(B) (discussing the modern trend toward broadening First Amendment rights of students and lessening the authority of school administrators).

166. 484 U.S. at 269–272.

167. 345 F. Supp. 2d at 807.

168. Grades and academic credit for the school newspaper class were not determinative of a non-public forum in *Dean*. *Id.* However, grades and academic credit were significant factors in the Court's analysis in *Hazelwood* where the newspaper class was found to be a non-public forum. 484 U.S. at 268.

newspaper; [169]5) the journalism class should adhere to a strict curriculum guideline; and 6) the school board should make a written policy statement regarding the class.[170] For practical purposes and ease of consideration, school boards should couple the elements into three distinct categories because of the similarities in each part.

The first two elements identified in *Hazelwood* and adopted in *Dean* are intended to classify participation in a paper as a traditional class rather than an extracurricular activity by requiring the students to produce the newspaper as a part of the high school curriculum and receive credit and grades for completing the course.[171] To meet these factors, the school board should limit publication in the paper to class members. Allowing authors outside of the journalism class to submit work[172] lends to the impression that the school paper is a forum for public discourse which greatly increases the likelihood that the paper could be labeled a limited public forum.[173] Thus, school administrators risk losing most of their editorial control to First Amendment protection if they allow outside authors to publish in the school newspaper.

Further, even if student journalists are the only contributors to the paper, a court may label the paper an extracurricular activity. In that case, the court will likely consider the paper not school-sponsored and the administration will lose ultimate control.[174] If a school wants to retain control over the content of a student-run paper, it must make clear that the paper is a class rather than an extracurricular activity. Otherwise, a court will afford the extracurricular paper much broader First Amendment protection and deny the school the content control it desires.[175]

The third and fourth elements promulgated by *Hazelwood* and followed by *Dean* state that a member of the faculty must oversee the production of the newspaper and that the administration and faculty advisor must maintain some level of visible control over the newspaper.

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169. 345 F. Supp. 2d at 807.

170. *Dean*, 345 F. Supp. 2d at 807.

171. *Dean*, 345 F. Supp. 2d at 807; *Hazelwood*, 484 U.S. at 269–272.

172. In *Dean*, the school newspaper accepted and published articles and letters from outside authors. 345 F. Supp. 2d at 807. This fact was a main reason for the court's conclusion that the school deviated from its policy of running the *Arrow* as part of the educational curriculum. *Id.*

173. *Rosenberger*, 515 U.S. at 833.

174. *Romano*, 725 F. Supp. at 690 (analogizing that administrators may exercise more control over required reading lists than over extracurricular lists; therefore, the same amount of control would apply for other extracurricular activities). If the school paper is unauthorized, it is not school-sponsored even when handed out on school grounds. *Burch v. Barker*, 861 F.2d 1149, 1150 (9th Cir. 1988).

175. *See Romano*, 725 F. Supp. at 689 (holding that an extracurricular paper is a limited public forum).

As in *Hazelwood*, to oversee the paper's production, the faculty advisor of the journalism class should select editors, schedule publication dates, determine edition length, give assignments, and deal with the printing company.[176] As a safeguard to ensure ultimate publishing authority, a school board should compile each of these items into a checklist and require its journalism instructors to perform every requirement before publishing each edition of the school paper.

Although it is unclear from existing jurisprudence exactly what degree of control a school must maintain over its paper to ensure that the newspaper is a non-public forum,[177] it is clear that editing by teachers and administrators is central to any court's analysis of how much First Amendment freedom to afford a school newspaper.[178] Assuming schools will place value on some form of student authority over the paper for academic reasons, it should still instruct its teachers to frequently monitor the content of the paper.[179] Even if the teacher wants to afford the students broad control over the paper, the board should require the teacher to make final edits to each edition, as the teacher did in *Hazelwood*, to ensure that the school, not the students, has ultimate editorial control over the paper.[180]

Additionally, the school board should attempt to run the paper without outside advertising. Outside advertising in a high school newspaper renders the paper more likely to be categorized as a limited public forum and diminishes the appearance of ultimate administrative control over the paper.[181] Running a more traditional paper with outside influences and benefactors causes the school to lose some of its control over the paper.[182] Although funding from outside advertisers may help subsidize production costs, if the school board decides that the

176. 484 U.S. at 268. Here, the faculty advisor did all of these things and the Court found it important enough to list each one in its opinion. *Id.*

177. *See id.* at 268–270 (holding that when school administrators exercised limited editorial control over content it was sufficient to find that the paper was a non-public forum). *But see Dean*, 345 F. Supp. 2d at 801 (holding that even when the faculty "provides advice on which stories to run and reviews, criticizes, and checks the grammar contained in the articles," the school has not established content control).

178. The *Dean* court mentioned the fact that the teachers did not exercise editorial control throughout its analysis. 345 F. Supp. 2d at 807–808. This is crucial because *Hazelwood* listed administrative control as one of the primary factors in its determination that the school newspaper was a non-public forum. When the school exercises editorial control over the paper, it is more likely the court will determine the school did not deviate from the paper functioning as a class. 484 U.S. at 268–269.

179. *Dean*, 345 F. Supp. 2d at 807–808.

180. 484 U.S. at 268.

181. *See supra* nn. 98–100 (discussing the impact of outside advertising on forum analysis).

182. *Dean*, 345 F. Supp. 2d at 808.

journalism class is worth having, it should fully fund it and not rely on advertising. The board should conduct a thorough cost-benefit analysis weighing the possible damage the school could incur from loss of reputation, litigation, and other costly predicaments if they were to lose control of the paper against the value of retaining control.

The final elements urge the journalism class to adhere to strict curriculum guidelines and the school board to create a written policy statement regarding the class. The school board should write a strict curriculum guide that includes the six elements and should strictly prohibit any deviation from the guide.[183] It is possible that journalism teachers will side with students on issues of First Amendment concerns as the teacher did in *Dean*.[184] Depending on how the teacher operates the class, a court may still consider the newspaper to be a limited public forum in spite of the most diligent school boards.[185] To prevent problems that might arise out of deviations from the giude by journalism teachers, the board should appoint an administrator to monitor the teacher's activities. Further, the board should carefully hire journalism teachers and frequently review the manner in which the journalism class is run.

While not essential, the school should carefully draft a written policy statement to avoid confusion similar to that which arose in *Dean* concerning the purpose of the class.[186] The vague description of the *Arrow* in the curriculum guide gave the court latitude to label the newspaper an extracurricular activity instead of a class.[187] Therefore, the school board should explain in the policy statement that the paper is operated as a class, rather than as an extracurricular activity, and that the class functions just like other school classes.[188] Finally, the board should consult legal counsel in carefully drafting both the policy statement and the curriculum guide to help the faculty maintain control over, and properly operate the paper.[189]

The departure from *Hazelwood* will place significant economic

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183. *See id.* at 807 (holding that UCS's deviation from its policies of running the paper as part of the class curriculum was pertinent to a finding that the paper was limited public forum).

184. In *Dean* the journalism teacher sided with the students, objecting to the administrator's refusal to publish Dean's article. *Id.* at 803.

185. *See id.* at 807 (holding that the paper was not run and supervised according to the established policies).

186. *Id.* at 807–808.

187. *Id.* at 807–809. For a discussion of relevant portions of the *Arrow*'s curriculum guide, review *supra* nn. 83–97 and accompanying text.

188. *See supra* nn. 51–60 and accompanying text (asserting that a ruling that a school newspaper is an extracurricular activity is practically determinative of a court finding that the publication is a limited public forum).

189. *See Dean*, 345 F. Supp. 2d at 808 (considering the implications a policy statement has on the determination of forum type).

burdens on our nation's schools. To implement an effective curriculum guide and policy statement, and to properly regulate a school newspaper under *Dean*, will cost administrators thousands of dollars in labor and legal fees. Not only will the decision place an unnecessary burden on America's educators, but it will be detrimental to the quality of journalism courses throughout the country.

B. Real-World Curriculum Guides: What Schools Are Doing Wrong

If school administrators wish to improve the likelihood that a court will determine that a school newspaper is a non-public forum, they need to closely review the current curriculum guide. The two existing curriculum guides examined in detail below exemplify this point. Each guide has a number of weaknesses when viewed in light of the *Dean* decision.

The first guide, from Marietta High School,[190] states in relevant part:

> Students will learn to interview people, write articles, edit copy, design layouts, write headlines, sell advertising, and photograph pictures for the school's newspaper, *The Original*. Students will work individually to complete stories to meet the editor's deadlines. In addition, students will fulfill class assignments designed to improve writing and journalistic techniques. Students will learn to use a desktop publishing program for the Macintosh to edit and layout newspapers. Students will be expected to participate in periodic afterschool work sessions.[191]

Under the *Dean* standard, this guide is problematic for several reasons and would be unlikely to provide much support for a claim that the school's newspaper was a non-public forum. First, the requirement that students "sell advertising" presents a unique set of problems for schools that wish to maintain a newspaper as a non-public forum and increases the likelihood that the paper will be treated as a limited public forum.[192] Second, the phrase "[s]tudents will work individually" needs clarification. Because administrative control is likely the most important element in the court's forum analysis, even if students complete the work on their own, the guide should state that the instructor will ultimately edit and approve student work prior to publication.[193] Without such a

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190. Marietta High Sch., *2006–2007 Curriculum Guide* 40, http://mariettacityschools.k12.oh.us/assets/mhs%20curric%20guide.pdf (accessed Nov. 16, 2006). Marietta High School is in Marietta, Ohio, and is part of the Marietta City School System.

191. *Id.*

192. *See supra* nn. 126–130 and accompanying text (discussing the implications of selling outside advertising on a court's forum analysis).

193. *See infra* nn. 198–199 and accompanying text (examining the importance that school faculty or administration edit and approve all material in the school paper if they wish to maintain

statement, "work individually" leaves the impression that the students, not the faculty, have final approval over the content of the paper. Third, the phrase "afterschool work sessions" might imply that the paper operates as an extracurricular activity.[194] The guide should explicitly state that "afterschool work sessions" are in no way reflective of an extracurricular activity, but are homework for a class.

The second guide, from Olympia High School,[195] states in relevant part:

> This course provides the practical journalistic experience of producing the school newspaper. Students will plan, design, write, illustrate, sell advertising for, take pictures for, and distribute the newspaper. Preparation for publication occurs in a lab setting and will require time outside of class. Completion of Journalism I is recommended.[196]

The language of this curriculum guide does not help prove that the school's newspaper is a non-public forum. Similar to the first guide, this guide also requires the students to spend "time outside of class" without further clarification as to the purpose of the time. The guide needs to clarify this terminology so that a court will not misconstrue the paper as an extracurricular activity.[197] Additionally, the phrase "practical journalistic experience" could be misinterpreted to mean that the school intends to operate the class like a real-world newspaper. As a result of this language, a court may find that the school administrators wanted to afford full expressive rights to the student newspaper.[198] To prevent such a misinterpretation, the board should explain that the students are in a traditional classroom environment and that the school paper is edited by the instructor and thus does not operate in the same manner as a real-world newspaper.

Perhaps the most significant problems in each of these guides are not in what they say but in what they do not say. A curriculum guide presents a unique opportunity for school administrators to outline for a court exactly how the school authorities intend the school newspaper to

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the publication as a non-public forum).

194. *See supra* nn. 51–57 and accompanying text (discussing why a finding that the paper is an extracurricular activity will likely lead to a finding that it is a limited public forum).

195. Olympia High Sch., 5 *Curriculum Guide 2005–2006* 17, http://www.olympiahigh.ocps.net/freshman/index_files/2005-06_Guide.pdf (Feb. 8, 2005). Olympia High is in Orlando, Florida and is part of the Orange County Public School System.

196. *Id.*

197. *See supra* nn. 51–57 and accompanying text (considering the effect an extracurricular paper will have on a court's forum analysis).

198. *See supra* nn. 58–61 and accompanying text (discussing the importance of the school administration's intent in a court's forum analysis).

operate.[199]

If the administration wants the paper to be a non-public forum, its curriculum guide should be much more detailed than the above guides. It should emphasize that the class is not a forum for public discourse, that the primary function of the course is to teach journalism, and that all authority over the newspaper lies ultimately with the school administration.[200]

To avoid the class being labeled as an extracurricular activity, the guide should state that the students will receive a grade and academic credit for the class which signals to a court that the school intends to operate the paper as a limited public forum.[201] Additionally, the school board should outline in the guide the exact roles of the teacher and administration involved with the school paper so that a court will recognize the board's desire that the administration as well as the students have active roles. It is also problematic that neither guide specifies who has ultimate editorial control nor the right of final refusal on the publication decisions, both of which are significant factors in establishing intent toward the type of forum of the publication.[202]

These guides were likely written quickly without advice from legal counsel as to the possible repercussions of a lawsuit alleging First Amendment violations. It is unlikely that either guide would be of any benefit to the school in a situation similar to that in *Dean*. However, a well-written curriculum guide that, at a minimum, implements the suggestions above, could support a defense that the paper is a non-public forum.

C. Drafting a Proper Curriculum Guide

School administrators who wish to maintain their school newspapers as non-public forums should adopt language similar to the model curriculum guide below.[203]

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199. *Hazelwood* established the precedent that courts should look at the newspaper class's curriculum guide as a legally relevant written statement for the school to declare its intent for the paper. 484 U.S. at 268.

200. While this may seem like awkward language to include in a class curriculum guide, it is necessary in light of the *Dean* decision because a school does not want to give a court the opportunity to misconstrue its intentions with the paper. *See supra* nn. 105–110 and accompanying text (discussing what the *Dean* court was looking for in a curriculum guide).

201. *See supra* nn. 101–104 and accompanying text (examining the importance of students receiving a grade and academic credit in a court's forum analysis).

202. *See supra* nn. 197–199 and accompanying text (considering how school administrative control is necessary in maintaining a school newspaper as a non-public forum).

203. *See supra* nn. 199–200 and accompanying text (discussing the importance of a curriculum guide in a court's forum analysis).

> Journalism I – Grades 9–12 (this course is not an extracurricular activity—students will receive grades and academic credit for their participation):
>
> > The primary purpose of this course is to teach students journalism skills. As a class, the school newspaper is a non-public forum and is not a vehicle for public expression. Students will learn to draft articles, conduct interviews, edit copies, design layouts, write headlines, and take photographs for the newspaper. The students will be fully responsible for completing their assigned work. The journalism teacher and an assigned member of the school administration will review all material prior to publication and will have final approval over what is published. If there is a conflict between faculty members over what will be published, a vote of the school board will determine whether the piece in controversy may be published. Students will participate in both in-class and out-of-class work—the out-of-class work will be "homework" for the course.

This model curriculum guide incorporates all of the suggestions offered in this note. Adopting such language will allow administrators to maintain control over the content of their school's newspaper. Although this language may seem excessive for a school newspaper curriculum guide, if a school were to face a situation similar to that faced by Utica Community Schools in *Dean* the court would not be able to ignore the administration's intent for the newspaper as evinced in the guide. In the end, this model curriculum guide would be the written proof of the administration's intent to create a non-public forum for its newspaper.

V. CONCLUSION

The *Dean* decision is in error for two reasons. First, the district court improperly applied precedent and First Amendment forum analysis in finding that the *Arrow* was a limited public form instead of a non-public forum. Second, the school had legitimate concerns about the article's use of pseudonyms, unreliable sources, and other inaccuracies, which were sufficient to meet the reasonable pedagogical concern standard required by the Supreme Court.

The *Dean* decision represents an alarming trend away from the well-settled standard regarding school-sponsored speech established by the Supreme Court in *Hazelwood.* It directly contradicts this precedent and is dangerous to the functioning of America's public high schools. This decision removes power from school administrators and places it in the hands of students and the courts. To counteract these negative effects and in order to prevent losing control over the content of high school

newspapers, school administrators should implement specific policies and draft new curriculum guides for their journalism courses.

Charles B. Upton II[*]

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[*] © 2006, Charles B. Upton, II. Notes & Comments Editor, Stetson L. Rev. J.D. Candidate, Stetson U. College of L., 2006; B.A., U. of Tenn., 2000. I would like to thank Ian Peterson for bringing this case to my attention and for all of his insight throughout the writing process. I would also like to thank my fiancée, Anna Holt, for the love, support, and happiness she brings to my life. I dedicate this note to the loving memory of my father, Carlton B. Upton, who instilled in me the values that make all I do possible.