

# Law Journals and Restrictions on Freedom of Speech: The Barrier that Should Be Broken

Jennifer Fox

During a regular day at a law school in the Midwest, two students engaged in a conversation about the Law Review journal and the restrictions upon their freedom of speech. One student observed, “The main goal of Law Review is to discuss legal-based topics and expand upon them. I don’t think that there should be any further restrictions upon our articles other than they need to be law-based.” The other student commented, “Yes, I agree, but it’s not like I could write about incest or something.” In the United States, there is a real controversy about the freedom given to law students review editors.

The true issue is: why was that student restricted from writing about incest? Although it is a controversial topic in today’s society, it *is* a topic with a legal basis. The law does prohibit incest. But a new viewpoint on this topic could further the legal world’s knowledge about a taboo legal subject and make a real impact upon society. At the University of Illinois School of Law, the Law Review states it “provides practitioners, judges, professors, and law students with cogent analyses of important topics in the law.”<sup>1</sup> With the University of Illinois restrictions upon the subject matter of article topics, in this case being “topics in the law,” students should not be further limited in their topic decisions because of their right to the freedom of speech under the First Amendment of the Constitution. Due to the fact that a Law Review journal is a public forum, and an article that focuses on any legal-based topic would further a law school’s pedagogical goal, students should be free to write about any legal-based topic as they so choose.

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<sup>1</sup> University of Illinois Law Review, <http://www.illinoislawreview.org/about/>.

## FREEDOM OF SPEECH IN SCHOOLS: BACKGROUND

The United States Supreme Court first examined a student's right to the freedom of speech in a monumental case: *Tinker v. Des Moines Independent School District*. In *Tinker*, students wanted to peacefully protest the United States' involvement in Vietnam.<sup>2</sup> In order to show their disdain for the involvement in Vietnam, the students chose to wear black armbands to class in the public schools.<sup>3</sup> The school district quickly learned of this peaceful protest, and enacted a "no arm-band policy."<sup>4</sup> The students sued in federal court, claiming their First Amendment right to the freedom of speech had been violated.<sup>5</sup> The trial court agreed with the school officials' argument that the policy had been enacted to avoid potential disturbances at school.<sup>6</sup>

The students appealed to the United States Supreme Court, which held that school officials are not permitted to silence school expression just because they do not agree with the students' opinions.<sup>7</sup> The Court stated that the school must reasonably forecast a disturbance, which is based upon evidence, and would either lead to a substantial disruption of the school environment or an invasion of the rights of others.<sup>8</sup> The Court implemented a landmark ruling in stating "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech and expression at the schoolhouse gate."<sup>9</sup> In this case, the Supreme Court

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<sup>2</sup> *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

<sup>3</sup> *Id.* at 504.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 507.

<sup>8</sup> *Id.* at 505.

<sup>9</sup> *Id.* at 504.

determined that students' right to freedom of speech, through a non-verbal action, had been violated.<sup>10</sup>

In subsequent Supreme Court cases, the Court further elaborated upon a student's right to the freedom of speech while on school premises. In *Bethel School District No. 403 v. Fraser*, the Supreme Court held that schools are permitted to limit any speech that is considered to be vulgar, lewd, and plainly offensive.<sup>11</sup> The Court stated that the freedom to advocate "unpopular and controversial issues in schools and classrooms must be balanced against in society's countervailing interest in teaching students the boundaries of socially appropriate behavior."<sup>12</sup> A student's right to the freedom of speech in a public school is not automatically coextensive with the rights of adults in other settings.<sup>13</sup> In a case specific example, the Supreme Court held in *Morse v. Frederick* that despite the fact that a student has the right to promote political speech on school premises, a student is not permitted to use speech promoting illicit drug use, due to the fact it would undermine the policies of the school.<sup>14</sup>

#### FIRST AMENDMENT FREEDOM OF SPEECH IN SCHOOL SPONSORED WRITING

Law Review articles, which are limited in scope to legal-based issues, should not be further limited due to their public use, and because a legal-based article would further the pedagogical goals of law schools. The Supreme Court of the United States has outlined the qualifications for a public forum in terms of school-sponsored activities and explained what schools are permitted to restrict in a pivotal case: *Hazelwood School District v. Kuhlmeier*.

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<sup>10</sup> *Id.* at 507.

<sup>11</sup> *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

<sup>12</sup> *Id.* at 679.

<sup>13</sup> *Id.* at 680.

<sup>14</sup> *Morse v. Frederick*, 127 S.Ct. 2618 (2007).

In *Hazelwood*, the Supreme Court examined what is the extent to which educators may exercise editorial control over the contents of a high school newspaper that was produced as part of the school's journalism curriculum.<sup>15</sup> The respondents in this case were three former Hazelwood East students who were staff members of Spectrum, the school newspaper.<sup>16</sup> The petitioners, the school district, principal, and various officials of Hazelwood East, claimed that the students' articles pertaining to pregnancy and divorce were inappropriate, and in turn deleted two pages from the Spectrum.<sup>17</sup> The students claimed that the removal of their articles violated their First Amendment right to the freedom of speech.<sup>18</sup> The Supreme Court held that the determination of what manner of speech is inappropriate properly rests with the school board, not the federal courts.<sup>19</sup>

In order to determine if the students' freedom of speech had been violated, the Court looked to see if Spectrum was a public forum.<sup>20</sup> The Court determined that school facilities could be deemed a public forum:

“Only if school authorities have by policy or practice opened those facilities for indiscriminate use by the general public or by some segment of the public, such as student organizations. If facilities have instead been reserved for other intended purposes, ‘communicative or otherwise’ then no public forum has been created and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the community.”<sup>21</sup>

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<sup>15</sup> *Hazelwood School District v. Kuhlmeier*, 484 US 260 (1988).

<sup>16</sup> *Id.* at 260.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 263.

<sup>20</sup> *Id.* at 260.

<sup>21</sup> *Id.*

Here, the Court stated that the intended purpose of Spectrum was a learning experience for journalism students and was not a public forum.<sup>22</sup> Due to the fact it was not a public forum, the Court ruled that the school was permitted to regulate the contents of the newspaper through reasonable means.<sup>23</sup>

The Court further elaborated in *Hazelwood*, that a school may “disassociate itself from speech that would substantially interfere with its work or impinge upon the rights of other students, but also from speech that is for example, ungrammatical, poorly written, inadequately researched, biased, or prejudiced, vulgar or profane, or unsuitable for immature audiences.”<sup>24</sup> The Court stated that without this permission, a school would be constrained from fulfilling their role as a “principle instrument in awakening the child to cultural values, prepare them for later professional training, and in helping him to adjust normally to his environment.”<sup>25</sup> The Court ruled “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.”<sup>26</sup> Here, the students’ First Amendment right to freedom of speech was not violated.<sup>27</sup>

Law Review articles greatly vary from the issues presented in *Hazelwood*. For instance, a Law Review can be identified as a public forum. As stated in *Hazelwood*, a public forum is “for indiscriminate use by the general public or by some segment of the public.”<sup>28</sup> Most Law Reviews throughout the country permit public submissions. For instance, the University of Illinois School

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<sup>22</sup> *Id.* at 264.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 265.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Hazelwood School District*, *supra* note 15 at 260.

of Law states that the Law Review “journal attracts articles from scholars nationwide.”<sup>29</sup> By permitting individuals from the legal community and scholars to submit articles for the Law Review, the Law Review became a public forum. This limits the discretion in which Law Review can limit its student members on their article subject matter. The Law Review can limit articles that are grammatically incorrect or poorly researched, but the subject matter should not be further confined past a legal-based topic.

Additionally, unlike in *Hazelwood*, where the school needed to fulfill their role as a “principle instrument in awakening the child to . . . prepare them for later professional training,”<sup>30</sup> law students have already been thrust into their professional lives. Law students no longer need the strict guidance and direction of the school in order to properly be prepared for their legal careers. The Law Review may help students stylistically or for guidance on their legal based topics, such as having “editorial control over the style” of the article<sup>31</sup>; but there is no need to limit the “content of student speech”<sup>32</sup> as was performed by the school in *Hazelwood*. The pedagogical goal of a Law Review journal is to focus and expand the knowledge of the legal world. By permitting a law student to write about any legal topic, even those that may be considered “taboo,” the article would automatically cover the pedagogical goals of the Law Review. Due to the ruling in *Hazelwood*, there is no reason to limit law students further than providing they have to write on a legal-based topic.

#### HAZELWOOD IMPLICATIONS IN MODERN-DAY SETTINGS

As the ruling in *Hazelwood* has been applied in modern-day settings, cases across the country further prove that a law student’s First Amendment right to the freedom of speech would

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<sup>29</sup> University of Illinois Law Review, <https://www.law.illinois.edu/academics/journals>.

<sup>30</sup> *Hazelwood School District*, supra note 15 at 265.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

be violated if they were limited in their writings for the Law Review. For instance, in *Corlett v. Oakland University Board of Trustees*, the District Court for Eastern Michigan discussed the issue of reconciling the tension “between the rights of students to engage in free speech as protected by the First Amendment and the interests and responsibilities of schools to provide ‘a safe atmosphere conducive to learning.’”<sup>33</sup> In *Corlett*, a student was reprimanded with suspension for sexually inappropriate journal entries submitted for an Advanced Legal Writing course at Oakland University.<sup>34</sup> The professor and University contended that the student’s speech threatened to create a disruption to the functioning of the University.<sup>35</sup> The student contested that his free speech rights were violated.<sup>36</sup>

As the District Court cited, the United States Court of Appeals for the Sixth Circuit had previously stated in *Ward v. Polite*, 667 F.3d 727, 732 (6th Cir. 2012), that the freedom of speech claims in schools “implicate[ ] two strands of law that occasionally run into each other . . . public schools are not expression-free enclaves . . . [but school officials must] reasonably forecast[ ] that such displays could cause substantial disruption or materially interfere with the learning environment.”<sup>37</sup> This has been enforced in the University setting.<sup>38</sup> The District Court further cited *Hazelwood* and stated that a “school need not tolerate student speech that is inconsistent with its basic educational mission.”<sup>39</sup> But the court also quoted, *McCauley v. University of the Virgin Islands*, which stated “universities undoubtedly retain some

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<sup>33</sup> *Corlett v. Oakland University Bd. of Trustees*, 958 F.Supp. 2d 975, 980 (2013).

<sup>34</sup> *Id.* at 976.

<sup>35</sup> *Id.* at 980.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; *Ward v. Polite*, 667 F.3d 727, 732 (6th Cir. 2012); *Defoe ex. rel. Defoe v. Spiva*, 625 F.3d 324, 335 (6th Cir. 2010).

<sup>38</sup> *Corlett*, supra note 32 at 800.

<sup>39</sup> *Id.*; *Hazelwood*, supra note 15 at 562.

responsibility to teach students proper professional behavior, in other words, to prepare students to behave and communicate properly in the workforce.”<sup>40</sup>

The District Court commented that

“*Hazelwood* involved speech that the Court described as ‘(1) “school–sponsored”, (2) part of the curriculum or serving curricular goals, and (3) “bear[ing] the imprimatur of the school.”<sup>41</sup> Nothing in the Court’s decision or the Sixth Circuit’s discussion in *Ward* suggests that the *Hazelwood* Court was setting a standard to apply to *all* student expression that happens to occur in a curricular activity. Rather, *Hazelwood* applies only where the speech in question reasonably could be construed as representing the school’s own viewpoint.”<sup>42</sup>

The District Court did not believe that the University thought that the plaintiff’s writing represented the school, but the District Court held that the school district did have the right to reprimand the plaintiff for his inappropriate comments.<sup>43</sup>

A student-ran newspaper has also been determined to be a limited public forum in *Draudt v. Wooster City School District Board of Education*.<sup>44</sup> In *Draudt*, the school newspaper, the *Blade*, was determined by the United States District Court for the Northern District of Ohio to be a limited public forum due to a number of reasons.<sup>45</sup> First, the District Court found that outside columnists from the community were able to write letters and columns for *Blade*, enabling the newspaper to be considered a limited public forum.<sup>46</sup> By being a limited public forum, the school’s editorial control of the paper was limited.<sup>47</sup> Additionally, the school widely distributed the paper to the community, and printed the *Blade* at the town’s newspaper, leading it to be a

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<sup>40</sup> *Corlett*, supra note 32 at 804.

<sup>41</sup> *Hazelwood*, supra note 15 at 562.

<sup>42</sup> *Corlett*, supra note 32 at 805.

<sup>43</sup> *Id.* at 807.

<sup>44</sup> *Draudt v. Wooster City School Dist. Bd. of Educ.*, 246 F.Supp.2d 20 (2003).

<sup>45</sup> *Id.* at 826.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*



public forum.<sup>48</sup> Furthermore, the school district had not exercised much editorial control in the past.<sup>49</sup> These combined factors led the District Court to conclude the Blade was a limited public forum; thereby limiting the control the school district could have over the contents of the newspaper.<sup>50</sup>

It can be demonstrated through *Corlett* and *Draudt* that Law Review articles should not be further restricted due to the students' right of freedom of speech under the First Amendment. As it can be examined in *Corlett* and *Hazelwood*, a Law Review article, even if focused upon a taboo topic such as incest, would not "reasonably forecast a substantial disruption or materially interfere with the learning environment."<sup>51</sup> Any topic that is based upon a legal issue would not cause a disruption amongst the law school, where learning and knowledge is considered to be paramount. Furthermore, although a student needs to abide by the educational mission of the law school, an article that focuses on a legal-based topic *would* be abiding by the educational mission: it would further the legal communities' knowledge and possibly better the legal community overall. Additionally, Law Review itself prepares students "to behave and communicate properly in the workforce," by requiring adequate legal research and proper citation format in their Law Review articles.<sup>52</sup> That is enough of a restriction upon law students in writing their Law Review articles. As long as the articles abide by the proper standards of Law Review, the topics should not be limited.

There have been multiple cases in recent years pertaining to the First Amendment right to the freedom of speech in school publications that are considered to be extra-curricular. In

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Hazelwood*, supra note 15 at 562.

<sup>52</sup> *Corlett*, supra note 32 at 804.

*Romano v. Harrington*, the United States District Court for the Eastern Division of New York examined what control a school has over a newspaper that is an extra-curricular activity for students.<sup>53</sup> In *Romano*, the plaintiff was fired from his position as an advisor to the student newspaper, following the school's extra-curricular newspaper publication of a student article that opposed Martin Luther King Day.<sup>54</sup> The plaintiff claimed that his rights were violated under the First and Fourteenth Amendments, because this was an extra-curricular activity, thereby leading to more editorial freedom.<sup>55</sup> The defendants claimed that the "concept of curriculum for First Amendment purposes should not be limited to classroom endeavors *per se*, but should include the many so-called extra-curricular or co-curricular activities, such as student publications, through which the school furthers its educational mission."<sup>56</sup> The defendants further contended that in *Hazelwood*, the important factor was the school board's sponsorship of *Spectrum*, not the paper's connection to the classroom, which demonstrates that the extra-curricular nature is immaterial.<sup>57</sup>

The District Court was not persuaded that "*Hazelwood* necessarily establishes, as a matter of law, that plaintiff's discharge as a faculty advisor comports with the First Amendment."<sup>58</sup> The District Court cited the *Board of Education Island Trees v. Pico*, which stated that the "inroads on the First Amendment in the name of education are less warranted outside the confines of the classroom and its assignments . . . . [E]ducators may exercise greater editorial control over what students write for class than what they voluntarily submit to an extra-

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<sup>53</sup> *Romano v. Harrington*, 725 F.Supp.2d 687 (E.D. NY 1989); see also, *Desilets on Behalf of Desilets v. Clearview Reg. Bd. of Educ.*, 266 N.J.Sup. 531 (1993) ("In our view, then, the *Hazelwood* Court did not limit its holding to classroom activities only, and its emphasis on "curricular" activities must be read in light of the very broad definition which it gave to that term.").

<sup>54</sup> *Id.* at 687.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 689.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

curricular, albeit school-funded, publication.”<sup>59</sup> The District Court ruled that the expressions in the extra-curricular newspaper were less limitable than those stated in *Hazelwood*.<sup>60</sup>

The court in *Romano* perfectly exemplifies the reason as to why Law Review articles should be less limitable: Law Review is an extra-curricular activity. Law Review is *not* part of the curriculum for law students, but rather, it is an extra-curricular in which law students may choose to participate. As the court in *Romano* stated, educators may have more control in a classroom environment, but educators do not have the same amount of control for an extra-curricular activity.<sup>61</sup> Due to the fact that Law Review, although school-funded, is an extra-curricular activity, the school should not be able to interfere with the students’ legal-based topics for articles. Students should be able to select any legal-based topic, and through the guidance of the faculty advisor, create a publishable-quality legal-based article.

## CONCLUSION

The freedom of speech is a right that has been provided to Americans under the First Amendment of the Constitution. But, there are limitations under the freedom of speech depending upon the circumstances. As stated in *Tinker*, “it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech and expression at the schoolhouse gate.”<sup>62</sup> Additionally, as *Hazelwood* emphasized, “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

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<sup>59</sup> *Id.* at 690.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Tinker*, supra note 2 at 504.

legitimate pedagogical concerns.”<sup>63</sup> Due to the restriction upon Law Review articles to be based on a legal topic, articles should not be further limited. As previously stated, the pedagogical goal of Law Review is to enhance the legal communities’ knowledge on legal topics, and therefore any topic should be considered a potential source of knowledge. Furthermore, because Law Reviews permit individuals outside of the law school to submit articles, Law Review is a public forum, which thereby limits the amount of editorial control law schools may hold over articles. Due to the right of freedom of speech, law students should be permitted to write on any law-based topic as they so choose.

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<sup>63</sup> *Hazelwood*, supra note 15 at 260.