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Karen Kramer Faaborg

High School Play Censorship: Are Students' First Amendment Rights Violated When Officials Cancel Theatrical Productions?

KAREN KRAMER FAABORG*

Introduction

In 1981, the Third Circuit held that a school superintendent's decision to cancel a play production as "inappropriate for school sponsorship" does not infringe students' First Amendment rights.[1] The court reasoned that such a decision is no different from other administrative decisions involving allocation of education resources and selection of curriculum; therefore, constitutional guarantees are not implicated.[2] This article examines the *Seyfried v. Walton* opinion and concludes that this reasoning is superficial and incorrect.

Seyfried, the only reported opinion on this issue, establishes dangerous precedent not only for school play cancellations, but for other students' rights issues as well. In quickly accepting the school officials' argument that the selection of a play is like the selection of curriculum, the court completely avoided the complex issues involved in other students' rights areas, especially in library book removal and student press cases. *Seyfried* opens the door for finding traditionally extra-curricular activities to be curricular in nature, so that judicial restraint is necessary in challenging the authority of school officials. Indeed, a Pennsylvania district court, pondering the constitutionality of denying a student-initiated prayer club the right to meet during a school activity period, has recently cited *Seyfried* for the proposition that "if the alleged forum is, in reality, a mere extension of the curriculum, it would make perfect sense to permit an administrator to decide what shall be included on the basis of content."[3] Any activity or forum that takes place on school pro-

* J. D., University of Cincinnati College of Law; Assistant Professor of Arts Administration, College Conservatory of Music, University of Cincinnati.

[1] Seyfried v. Walton, 668 F.2d 214 (3rd Cir. 1981).

[2] *Id.* at 219.

[3] Bender v. Williamsport Area School Dist., 563 F. Supp. 697, 707 (M.D. Pa. 1983).

perty can become a "mere extension of the curriculum" under this kind of reasoning.

A recent issue of a journal directed to high school administrators contains an article entitled, "A Legal Brief: Stop, Don't Raise That Curtain."[4] The article informs principals about the facts and conclusions of the *Seyfried* case and, intentionally or not, serves as a little primer on how to legally censor school plays. It concludes with a suggestion that principals can also use a *Seyfried* argument to censor school publications.

In a follow-up article on the *Seyfried* decision, the trade publication *Variety* catalogued a growing number of school play cancellations across the country as of January, 1982; clearly, the *Seyfried* cancellation is not an isolated instance. Among those reported were: a production of *Grease* banned in Des Moines, Iowa; *Inherit the Wind*, cancelled in Pylesville, Maryland, because of fear of upsetting certain fundamentalist groups in the community; *One Flew Over the Cuckoo's Nest*, cancelled in Anne-Arundel County, Maryland, by a high school principal who wants to present plays which portray an "uplifting, cheerful, happy entertainment experience"; *Godspell*, banned in Wilmington, Delaware, after a straw vote of unidentified friends in the religious and legal community indicated to the high school principal that there would "probably be fewer legal problems if he cancelled than if he did not."[5]

This discussion reviews the First Amendment rights of public school students, presents the lines of cases ignored by the *Seyfried* court, examines the issues raised by the *Seyfried* case, and concludes that students' First Amendment rights are infringed when school officials summarily cancel theatrical productions. Such an infringement cannot be cured by labelling the decision a curricular one.

Factual Background

In December of 1980, the director of theatre at Caesar Rodney High School, a ninth through twelfth grade public school located in Dover, Delaware, selected the musical *Pippin* for production in the Spring of 1981.[6] The director, who also taught English at the school, had directed the school's last seven productions, including *Oklahoma, Brigadoon*, and

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[4] NASSP *Bulletin*, 67:110-12 (May, 1983).

[5] VARIETY, January 27, 1982, p. 92, cols. 4 & 5.

[6] *Pippin* is a fantasy about King Charlemagne's son and his search for a full and exciting life. The musical chronicles his efforts to find himself and the meaning of existence as he experiences the "glories" of war, the "joys" of the flesh, the exhilaration of social and political activities, the artistic life, and the way of the church; each is ultimately unsatisfying. At the end of the play, he is "trapped . . . but happy" in a simple life of domesticity and ordinary responsibilities with a widow and her son.

Gypsy. In each case, it had been her responsibility to make the selections; neither she nor her predecessors had sought approval of their selections from school administration.[7] Because *Pippin* contains some sexually explicit scenes, the director thought it would be inappropriate for high school production as written, but believed it could be edited and staged in a way that would be appropriate. Accordingly, she consulted with the assistant principal of the school after she edited the script and the two agreed that, although the revised scenes were still sexually suggestive, they were appropriate for a high school production.[8]

Tryouts for the spring production were held in late February, 1981, using two copies of the script from the school library. On February 26 rehearsals began and on March 2 cast copies of the script, rented from the copyright holder, were received at the school and distributed. The director told the students when she distributed the scripts that there would be changes which she would give them at a later date. She recorded her modifications in her copy of the script and gave these changes to the students on March 9.

By March 6, however, a parent had read an unmodified script and had complained to the president of the board of trustees of the school district that portions of the play mocked God and prayer. On March 9, the president relayed the complaint to the district superintendent, who obtained a copy of the modified script from the director. The superintendent concluded on March 11, after consultation with members of his staff, that the musical, as modified, was inappropriate, and directed that it not be presented as the school's spring production. He explained to the director that he did not find that the play mocked God or prayer; rather, it mocked people who were hypocritical about religion. He found it inappropriate as a high school production, he said, because of its "emphasis

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[7] This account of the facts of the case is taken from the detailed account set out by the District Court in its findings; see, Seyfried v. Walton, 512 F. Supp. 235 (D. Del. 1981). It is supplemented by another detailed account which appeared in the trade publication VARIETY on Wednesday, April 8, 1981, page 1, col. 1.

[8] The two scenes so revised were segments of scene four and scene seven. In scene four, Pippin's grandmother, Berthe, sings of the joys of the flesh and urges Pippin to take advantage of his youth while he can. This is followed by a dance in which several girls attempt to seduce Pippin and which culminates in a sequence where, "All the boys and the girls become involved and they begin to show Pippin every possible form of sexual activity." Pippin's enthusiasm ultimately wanes and by the end of the dance, he is exhausted and repelled. The version of the play which Mrs. Coverdale planned to produce retained scene four but "toned down" the dance. Her annotated script indicated that the "dancers will 'entice' Pippin" but that "the 'tone' will be tasteful." By scene seven Pippin has begun to experience some of the things he will ultimately come to value. He feels genuine affection for the widow Catherine and finally they go to bed on stage while dancers simulate sexual intercourse. In Mrs. Coverdale's revised version, the bed scene and the dance were stricken. Instead Pippin and Catherine embrace and then walk off the stage hand in hand. In the context of the remainder of the play, it is implicit that they have experienced physical intimacy.

on, and references to, sexual activities."[9] At a regular meeting of the board of the school district held on March 17, the board heard the views of the interested parents: four spoke in favor of presenting the play, one against. The board declined to intervene in the matter. As a result, the school did not present a spring play in 1981.

On March 23, 1981, the Delaware Chapter of the American Civil Liberties Union, acting on behalf of three of the high school students and their parents, filed a complaint for injunctive, declaratory, and monetary relief under 42 U.S.C. § 1983. An expedited trial date was set for April 7, 1981, before Judge Stapleton in the District Court of Delaware. However, it was already too late for the play to go on whatever the outcome. After a two-day trial, the district court entered judgment in favor of the defendants. Sitting without a jury, Judge Stapleton held that the school superintendent's decision to cancel the production as inappropriate for school sponsorship did not offend the students' First Amendment rights.[10] Plaintiffs appealed to the United States Court of Appeals for the Third Circuit. Judge Aldisert, writing for a three-judge panel, accepted the reasoning of the district court and affirmed.[11] Plaintiffs announced subsequently that they would not appeal to the United States Supreme Court. John Williams, a lawyer representing the American Civil Liberties Union, was pessimistic that the Court would accept a discretionary appeal on this issue and said that his clients, Seyfried, *et al.*, were equally pessimistic about the outcome even if certiorari were granted because of the conservative makeup of the Court.[12] Hence, *Seyfried* as it now stands is the only precedent for any future litigation on play cancellations.

The First Amendment Rights of Public School Students

The Supreme Court has construed the First Amendment in a number of cases related to the public schools. The Court has stated that the First Amendment does not tolerate laws that "cast a pall of orthodoxy over the classroom."[13] The Court has recognized that the actions of a local school board must not infringe rights protected by the First Amendment "despite the fact that the local school board has important, delicate, and highly discretionary functions."[14] In *Tinker v. Des Moines Independent*

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[9] 512 F. Supp. at 236.

[10] *Id.* at 239.

[11] 668 F.2d at 217.

[12] VARIETY, Wednesday, January 27, 1982, p. 87, col. 3.

[13] Keyishian v. Board of Regents, 385 U.S. 598, 603 (1967).

[14] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

Community School District,[15] the court noted that "students do not shed their rights to freedom of speech or expression at the schoolhouse gate." *Tinker* extended the protections of the First Amendment to the secondary school classroom but required them to be considered "in light of the special characteristics of the school environment."[16] In *Tinker*, the Court struck down a public school regulation prohibiting students from wearing black armbands as a symbol of opposition to the war in Vietnam. The Court said that students are not "closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."[17] Regulation in the school must be done for constitutionally permissible reasons. *Tinker* stands for the proposition that a student's First Amendment rights can only be restricted when school authorities can demonstrate that the student's conduct materially disrupted or involved substantial disorder in the school environment or invaded the rights of others.[18]

Nevertheless, the Court has also recognized that, at least at the secondary level of education, the primary function of state-operated schools is indoctrinative. Public schools are vitally important "in the preparation of individuals for participation as citizens," and as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system."[19] School boards thus have broad discretion in the management of schools and, within the constitutional limits set out above, the state is free to create an academic environment where teaching and learning will proceed free from disruption. This view recognizes that a school board may make choices and select materials suitable for use in achieving its indoctrinative purpose. Through its curriculum and educational programs the school board carries out its inculcative function. It is the prescriptive model of education that Judges Stapleton and Aldisert relied on in fashioning their holding in *Seyfried* and in justifying the hands-off stance they took. Courts have ordinarily felt compelled to exercise judicial restraint when faced with purely curricular matters.[20]

Even in curricular matters, however, the authority of school officials is not unfettered. Discretion over curriculum is subject to constitutional limitations.[21] Unfortunately, these limitations are not uniformly applied.

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[15] 393 U.S. 503 (1969).

[16] *Id.* at 506.

[17] *Id.* at 511.

[18] *Id.* at 513.

[19] Ambach v. Norwich, 441 U.S. 68, 76-77 (1979). *See also* West Virginia v. Barnette, 319 U.S. at 637.

[20] Epperson v. Arkansas, 393 U.S. 97 (1963).

[21] *Id.* at 107.

The problem that the *Seyfried* case pinpoints is one that concerns many commentators: courts have failed to recognize the difference between the right to receive information and the right of self expression,[22] or between inculcation and suppression in the school environment.[23] The right to receive information focuses on participatioin in democratic politics and relates to the inculcative function of the schools. In carrying out this inculcative function, school officials are barred by the First Amendment from suppressing ideas with which they do not wish to contend or that are politically repugnant.[24] The right to receive information hampers the board's free-wheeling power even in curricular matters, and it is the underlying theory of the entire line of library book removal cases.

The right to self expression is the heartbeat of *Tinker* and is based on a public forum theory. The state can prohibit self expression only if it represents a substantial interference with the purpose of the place qualifying as a public forum. *Tinker* applies ordinary First Amendment standards to the expressive activities of students in schools.[25] In schools, however, disruption may be generated by the content of the expression; elsewhere, it must arise from time, place and manner considerations. This is the limited public forum analysis used in the public school setting that will be described more fully below.

In library book removal cases and curriculum cases, it is the students' right to access to ideas that is at issue; in school publications or demonstrations cases, it is the students' right to self-expression that is at issue. The fact that most courts have failed to make this distinction may be at the root of the problem in fully defining students' First Amendment rights. This issue has never been raised at all regarding school play productions. Is cancelling a school play analogous to censoring self-expression in student publications, or is it analogous to denying access to ideas in book removal cases? *Seyfried*, our only relevant precedent, simply avoided the issue altogether.

Removal of Books from School Libraries

If courts view the public schools as being centers of indoctrination and transmission of community mores, then schools have almost unlimited power to select and review library books. If, on the other hand, courts

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[22] *See e.g.*, Tushner, *Free Expression and the Young Adult: A Constitutional Framework*, U. ILL. L.F. 1976: 746; and Singleton, *Public Schools, Students and the First Amendment*, LAND AND WATER L.R. 18: 837 (1983).

[23] Singleton, *supra* note 17 at 850.

[24] Board of Educ. v. Pico, 457 U.S. 853, 871 (1982).

[25] *See* Gambino v. Fairfax County School Bd., 429 F. Supp. 731 (E.D. Va. 1977), *aff'd*, 564 F.2d 157 (4th Cir. 1977).

view the public school as a marketplace of ideas, the constitutional rights of students and teachers must be given full consideration. Conflicting judicial philosophies have emerged from the various circuits. Decisions supporting school authority have come almost entirely from the Second Circuit.[26] Decisions supporting the individual rights of students and teachers have come from the First, Sixth and Eighth Circuits.[27] Decisions out of the Fifth, Seventh, and Tenth Circuits have taken a less clear-cut position. Nonetheless, there has been a well-marked trend to favor students' right in book removal cases.

The 1976 *Minarcini* decision is interesting in the *Seyfried* context. A local school board had removed certain books from a school library which had been recommended by the teachers as texts and library materials to be used in conjunction with a high school class. The board had made its decision based on the belief that it was consistent with Ohio law which permitted a local school board to exercise its authority in such a manner. The court of appeals, however, noted that once the local board had made its decision to establish a school library, it could not legitimately place conditions on the kinds of materials to be available in the library solely on the basis of the socio-political values of the board members.[28] While mere removal of the books did not, alone, constitute a freedom of speech infringement, the board members' objections as to the content of the books created such an infringement.[29]

Prior to the *Seyfried* decision, the Second Circuit, which had been the only stronghold for school board authority in library matters, reversed and remanded a district court dismissal of an action brought where officials removed nine books from the school library. In *Pico v. Board of Education, Island Tree Union Free School District*,[30] Justice Sifton suggested that school board members "acted because of political motivation," and remanded for trial on the issue of whether the books were removed because of their ideas. The board appealed to the Supreme Court and on October 12, 1981, the Court agreed to hear the case.

Pico[31] contains the latest word on the status of library book removal cases, and provides an excellent comparative study for *Seyfried*. In *Pico* the Board of Education, rejecting recommendations of a committee of parents and school staff that it had appointed, ordered that certain

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[26] *See* President's Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 298 (2nd Cir. 1972).

[27] *See e.g.*, Minarcini v. Strongville City School Dist., 541 F.2d 577 (6th Cir. 1976).

[28] *Id.* at 582.

[29] *Id.*

[30] 638 F.2d 404 (2nd Cir. 1980).

[31] 457 U.S. 853 (1982).

books which the Board characterized as "anti-American, anti-Christian, anti-Semitic, and just plain filthy," be removed from high school and junior high school libraries.[32] Students brought an action under 42 U.S.C. § 1983, alleging a denial of First Amendment rights. The District Court granted summary judgment for the Board on the theory that the Board acted not on religious principles but on its belief that the books removed from the library were "irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's students."[33] The Supreme Court, in a plurality opinion written by Justice Brennan, held that the District Court erred in entering summary judgment in favor of the board where there remained a genuine issue of material fact as to the Board's justification for removal of the books.[34] Thus, whether removal of books from school libraries denies students their First Amendment rights depends on the motivation behind the school official's actions.

Brennan affirms the right of secondary school students to receive information and ideas.[35] He rejects the Board's contention that in library matters, as in curricular matters, they must be allowed unfettered discretion because of their inculcative duty:

> [W]e think that the [Board's] reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and regime of voluntary inquiry that there holds sway.[36]

Pico refused to extend a school board's curricular authority beyond the classroom. It also views the voluntary nature of the library to be crucial; by contrast, *Seyfried* concludes that the voluntary nature of play participation and attendance is irrelevant to considerations of what constitutes curriculum.

Pico creates an intent test for determining future violations of student rights in book removal cases. If school officials *intended* (emphasis in original) by their removal to deny students access to ideas with which they disagree, and if this intent was the decisive factor in the decision, then officials have violated the constitution.[37] Brennan acknowledges that such motivation would not be demonstrated if it were shown that the officials had decided to remove the books because they were "per-

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[32] *Id.* at 857.
[33] *Id.* at 859.
[34] *Id.* at 875.
[35] *Id.* at 868.
[36] *Id.* at 869.
[37] *Id.* at 871.

vasively vulgar."[38] A key factor in the opinion for our purposes in analyzing *Seyfried* is the plurality's view that the intent of the officials in *Pico* could not be determined largely because the officials had not established regular and facially unbiased procedures for the review of controversial materials. The use of "highly irregular and ad hoc" procedures creates the suspicion that the officials' motives are unconstitutional.[39]

Pico was decided after *Seyfried*, but it is only the conclusion of a prevailing tendency in book removal cases to inspect the motives of officials and to demand procedural safeguards.[40] Furthermore, the Second Circuit opinion in *Pico* clearly indicated that the deciding factor on remand to the District Court would be the justification for the official's actions. Students "should have . . . been offered an opportunity to persuade a finder of fact that the ostensible justifications for [the official's] action . . . were simply pretexts for the suppression of free speech."[41] This Second Circuit opinion was cited by both judges in *Seyfried* for its acknowledgement of the inculcative role of school boards; therefore, although both were aware of this trend in book removal cases to demand an inspection of motives and procedural safeguards, both declined to consider such a requirement in the *Seyfried* context. Had the Third Circuit acknowledged this line of cases, perhaps it too would have remanded for a showing that the ostensible justifications of the school officials in *Seyfried* were not simply pretexts for suppression of free speech.

Censorship of School Publications

The federal courts are sharply divided on the extent to which school officials may regulate the content of school newspapers. One common thread runs through the circuits, however; courts have required a threshold showing of substantial disruption, even in cases in which the publication was authored by students for academic credit and produced on school property using school facilities.[42] In the wake of *Tinker*, courts have established at least three significant constitutional rules regarding school publications: (1) Student newspapers or magazines that receive state subsidies, direct or indirect, are public forums entitled to full First Amendment protection; (2) Once school officials establish newspapers as

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[38] *Id.*

[39] *Id.* at 875.

[40] *See* Minarcini v. Strongville City School Dist., 541 F.2d 577 (6th Cir. 1976); Right to Read Defense Comm. of Chelsea v. Community School Bd., 454 F. Supp. 703 (D. Mass. 1978).

[41] 638 F.2d 404, 417 (1980).

[42] Gambino v. Fairfax County School Bd., 564 F.2d 157.

forums, they may not censor constitutionally-protected expression unless it substantially interferes with the orderly operation of the schools; (3) Schools may not cut off funding to a student newspaper based on disapproval of the content of the paper.[43] Note that under *Tinker*, substantial interference is a strict standard; speech that merely causes a disturbance or commotion because of its controversial nature, or causes some students to be distracted from their work, is not enough. "Undifferentiated fear or apprehension of disturbance is an impermissible justification for regulation."[44] Speech may cause a disturbance, but the Constitution demands that schools accept that risk.

The *Gambino* case illustrates the evolving recognition of student newspapers as forums, and the concommitant prohibitions on administrative censorship. In *Gambino*, the school board argued that the student newspaper was an "in-house" organ and a part of the curriculum, therefore subject to administrative censorship and control. This argument was based on the following circumstances: (1) the publication received more than half of its budget from the board; (2) a faculty advisor supervised the paper; (3) students and classroom time and school facilities were used to write and edit the articles; (4) members of the staff received academic credit for their work. The Fourth Circuit ruled in favor of the students. It reasoned that the school's censorship constituted impermissible state regulation of a public forum. Because the paper was a forum, it could not be construed to be a part of the curriculum.[45]

Because the First Amendment shields only protected speech, some federal courts have suggested that school officials may regulate the content of student newspapers despite their status as forums. Courts that have considered the question have indicated in dicta that a narrowly defined and understandable set of rules requiring prior submission of newspaper copy to school authorities may be constitutional. However, every set of prior review guidelines submitted to the courts has been held unconstitutional.[46] The Fourth Circuit has attempted to formulate the requirements of a prior restraint system that might pass constitutional muster—the system "must contain precise criteria sufficiently spelling out what is forbidden so that a reasonably intelligent student will know what he may write and what he may not write."[47]

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[43] *See* Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973).

[44] 395 U.S. at 508.

[45] 429 F. Supp. at 736; *aff'd*, 564 F.2d 157.

[46] *See* Goughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973); Shanley v. Northeast Indep. School Dist., 462 F.2d 960 (5th Cir. 1972); Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2nd Cir. 1971).

[47] 478 F.2d at 1351.

A prior restraint system, even though precisely defining what may not be written is nevertheless invalid unless it provides for:

(1) A definition of distribution and its application to different kinds of material;
(2) Prompt approval or disapproval of what is submitted;
(3) Specification of the failure to act promptly; and
(4) An adequate and prompt appeals procedure.[48]

So far no school district has been able to formulate a sufficiently narrow set of guidelines to avoid constitutional infirmity. The Seventh Circuit has held that prior restraints on student expression are unconstitutional *per se*.[49] The court interpreted *Tinker* as forbidding the use of prior restraints in the school setting, allowing only post-publication punishments for students who publish material that later proves to be substantially disruptive.[50]

The school publications cases and the school theatrical production cases are distinguishable but highly analogous. The *Seyfried* opinions made no attempt to examine or distinguish them; yet, the fact that many school newspapers are outgrowths of classes in English or Journalism and therefore tied to the curriculum in just the same way as a play production seems to demand that these cases be confronted. It is doubtful that the school officials in *Seyfried* could have made the threshold showing of substantial disruption, at least by strict *Tinker* standards. Furthermore, the school officials in *Seyfried* trampled the prior restraint doctrine. The superintendent simply cancelled the production by fiat. There was no established policy, students were offered no administrative appeal, and the Board seemed unaffected by the protests of parents at its subsequent regular meeting. Clearly, an impermissible prior restraint under the school publications line of cases.

Censorship of Theatrical Productions Outside the School Setting

The *Seyfried* courts also ignored another line of cases that would have been helpful in analyzing the issue presented: the Supreme Court has ruled a number of times on the constitutionality of censoring adult theatre. In his opinion, Judge Aldisert alludes briefly to one of the *Hair* cases, *Southwestern Promotions, Ltd. v. Conrad*.[51] He agrees in general with the *Conrad* conclusion that dramatic expression is "speech" for the purposes of the First Amendment,[52] but he fails to use the *Conrad* case

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[48] *Id.*
[49] Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972).
[50] *Id.* at 1358.
[51] 420 U.S. at 548 (1975).
[52] 668 F.2d at 216.

for analytical purposes; it provides an excellent model of First Amendment considerations in the "adult" context.

In *Conrad*, a promoter of theatrical productions applied for the use of the Tivoli, a privately owned Chattanooga theatre under long-term lease to the city, to present *Hair* there for six days beginning November 23, 1971. This was to be a road company showing of the musical that had played for three years on Broadway and had appeared in over 140 cities in the United States. Upon the basis of outside reports from which it concluded that the production would not be "in the best interest of the community," members of the auditorium board rejected the application.[53] Southeastern Promotions had met similar resistance in other cities and had successfully sought injunctions ordering local officials to permit use of municipal facilities.[54] Southeastern's subsequent motion for an injunction in Chattanooga was denied. Following a hearing, the District Court concluded that the musical contained obscene conduct not entitled to First Amendment protection.[55] The Sixth Circuit affirmed. The Supreme Court reversed on the basis that the city's rejection of Southeastern's application to use a public forum "accomplished a prior restraint under a system lacking in constitutionally required minimal procedural safeguards."[56]

The Court begins its analysis with a recognition that theatres are "public forums designed for and dedicated to expressive activities."[57] Whether some other privately owned theatre in the city might have been used for the production was "of no consequence."[58]

> Thus it does not matter for purposes of this case that the board's decision might not have had the effect of total suppression in the community. Denying use of the municipal facility . . . constituted the prior restraint.[59]

By contrast, both Judges Stapleton and Aldisert suggested that First Amendment rights had not been abridged in *Seyfried* since the book was still available in the library.[60] Furthermore, Blackmun's opinion in *Conrad* reaffirms that live drama is protected by the First Amendment. "By its nature, theatre is the acting out—or singing out—of the written word, and frequently mixes speech with live action of conduct."[61]

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[53] 420 U.S. at 548 (1975).
[54] *Id.*
[55] *Id.* at 531.
[56] *Id.* at 552.
[57] *Id.* at 555.
[58] *Id.* at 556.
[59] *Id.*
[60] 668 F.2d at 216; 512 F. Supp. at 239.
[61] 420 U.S. at 557-558.

In explaining the prior restraint doctrine in general, Blackmun recites the "deeply etched" principle that "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand."[62] The settled rule is from *Freedman v. Maryland*: a system of prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system."[63] Blackmun adopts the *Freedman* safeguards for theatrical productions:

> First, the burden of instituting judicial proceedings and of proving that the material is unprotected, must rest on the censor.
>
> Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo.
>
> Third, a prompt judicial determination must be assured.[64]

Justice Blackmun points out that those safeguards must be applied in the screening of stage productions with equal if not greater force where an administrative board may keep off stage "anything not deemed culturally uplifting or healthy," since the board may well be less responsive than a court to constitutionally protected interests in free expression.[65]

> The perils of prior restraints are well illustrated where neither the Board nor the lower courts could have known precisely the extent of nudity or simulated sex in the musical, or even that either would appear, before the play was actually performed.[66]

Therefore, the very nature of live theatrical productions may demand more rigorous safeguards for the protection of First Amendment rights than other kinds of entertainment.

Had the *Seyfried* decision been made under a *Conrad* analysis, we would have a different result. There were no procedural safeguards in operation in the school district; the action of the superintendent and board of education operated as an impermissible prior restraint. There was no precedent at the school for requiring administrative approval at the time of play selection; indeed, the opposite was true. The director had selected seven previous productions entirely on her own. Neither she nor her students had notice of administrative restrictions. Furthermore, no hearing for plaintiffs preceded the Superintendent's decision that *Pippin* would not be the spring musical. The board meeting after the decision was made seemed to be more of a gesture to the community and a

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[62] *Id.* at 559.
[63] 380 U.S. 51 (1965).
[64] 420 U.S. at 560.
[65] *Id.* at 561.
[66] *Id.*

rubber-stamp approval of the Superintendent's action than a hearing on the issue. The burden of instituting administrative and judicial proceedings was on the students. Also, the burden of proof in the *Seyfried* trial was on the students. The board and the court simply accepted the Superintendent's bald assertion that the production was sexually offensive.

Seyfried is distinguishable from *Conrad*. Schools are different from other public forums. But, Judges Stapleton and Aldisert failed even to acknowledge the issues raised in censorship of theatrical productions outside the school setting. In so doing, they ignored a large and helpful body of law, and they skipped a crucial step in analyzing the First Amendment issues in the school context. Had they looked at *Conrad*, they might have concluded that the constitutional rights of students to perform live theatre are abridged when a school district has no written policy which shifts the burden of initiating proceedings and the burden of proof to school officials, stipulates a time limit for the restraint, and guarantees a prompt determination. Instead, they endorsed the unfettered discretion of the superintendent to deem what is and what is not "culturally uplifting and healthful."

The *Seyfried* Rationale: Course Curriculum Theory

The rationale worked out by District Judge Stapleton and fully adopted by the Third Circuit is that "the selection of the artistic work to be given as the spring production does not differ in principle from the selection of course curriculum, a process which courts have traditionally left to the expertise of educators."[67] Both courts aver that students' First Amendment rights are not trammeled where play productions are "viewed by staff and administration alike as an integral part of the school's educational program."[68] Both courts imply thereby that there are no limits placed on administrative control of curriculum. It is true that in the absence of mandatory statutes or constitutional provisions, a local board of education has complete discretion in determining what courses shall be offered, continued, or discontinued. Furthermore, local school boards possess wide discretionary latitude in exercising authority over the adoption of textbooks and instructional materials. There are limits to this discretion, however, when such authority conflicts with the rights of faculty and students.

Generally, faculty are licensed under the doctrine of academic freedom to make decisions about the selection of course content, instructional

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[67] 512 F. Supp. at 238.
[68] *Id.*

materials, and teaching methods,[69] particularly in the absence of a local board policy to guide the teacher in making such determinations. In the *Keefe* case a teacher was suspended after parental complaints concerning the teacher's use of a particular magazine article containing a vulgarity. The court ordered a reinstatement because of the absence of an articulated local board policy which would have served to give notice to the teacher that an article containing such vulgarity was unacceptable for classroom use.[70] Thus, from a "procedural due process" standpoint, a local board is barred from exerting authority over relevant teacher-selected course materials unless it has developed a written policy regarding textbooks, teaching methods, instructional practices, and materials deemed unsuitable and inappropriate.

Students have a constitutionally-based right to receive information that serves as a limitation on administrative control over curriculum. In the 1982 *Pratt* decision,[71] the court considered whether the local school board's removal of film versions of the short story "The Lottery" constituted a First Amendment violation. In finding against the school board, the court reasoned that notwithstanding the board's power and discretion to generally regulate curriculum matters, school boards do not have an absolute right to remove instructional materials from the curriculum. The court found the motive for the school board's removal of the films to be critical in determining whether a freedom of speech violation had occurred. Since the board based its decision on citizen's complaints that the film's ideological and religious themes were offensive, rather than on the basis of the unsuitability of the materials in fostering education objectives, the court found that the school board had not established a "substantial and reasonable" rationale for "interfering with the students' right to receive information."[72]

Even if the course curriculum theory were the correct rationale in the *Seyfried* case, the issue is not so easily dismissed. Neither judge examined the rights of the faculty member who selected the play nor the rights of the students who were to perform in it. Both judges moved swiftly and surely to the conclusion that since the play was somehow curricular in nature, the students have no First Amendment rights. Neither opinion makes reference to the lines of cases mentioned here. Both seem quite content that their decision does not cast a "pall of orthodoxy" or create a chilling effect, since "no student was prohibited from expressing his

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[69] Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[70] Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969).

[71] Pratt v. Independent School Dist. No. 831, 620 F.2d 711 (8th Cir. 1982).

[72] *Id.* at 774.

views on any subject; no student was prohibited from reading the script . . . ; and no one was punished or reprimanded for any expression of ideas.''[73]

Five major issues are left unresolved by the *Seyfried* analysis:

(1) What is the test for the course curriculum categorization that will trigger a *Seyfried* result in future cases? Are all school plays part of the curriculum? If not, how do we distinguish those that are not?

(2) Is the production of a dramatic script protected speech? How do theatrical productions outside the school setting relate to the analysis? Are school plays protected speech? Of what importance is the distinction between inculcation and suppression or between the right to receive information and the right to self expression in this analysis?

(3) Is a school theatre a public forum? Is a public forum analysis appropriate to a school play production case?

(4) What procedural safeguards should be estabished?

(5) Where does the burden of proof lie? How is the burden to be allocated? Do traditional allocations apply?

Applications to School Play Cancellations

The chief inquiry remaining after the *Seyfried* case may well be whether a school play production can rightly be said to constitute curriculum. *Webster's New Collegiate Dictionary*[74] defines ''curriculum'' as: (1) the courses offered by an educational institution or one of its branches; (2) a set of courses constituting an area of specialization.[75] Nothing about this definition would suggest that a play production is curriculum since it is not a course offering. More significantly, no case law exists that supports the conclusion that a play production is part of curriculum. The New Jersey Supreme Court has recently defined a school play as an extracurricular activity.[76] Furthermore, the very process of play selection used in the *Seyfried* case undermines the curriculum theory: teachers don't create new course offerings in December and institute them on their own initiative the following March.

Even more convincing, however, is the fact that school libraries and school publications are not curricular in nature. As *Gambino* and other newspaper cases make clear, a student publication is an extra curricular activity even if classroom time and school facilities are used to write and edit the articles and even if members of the staff receive academic credit

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[73] *Id.*

[74] Merriam (1981).

[75] *Id.* at 277.

[76] Playcrafters v. Teaneck Township Bd. of Educ., 177 N.J. Super. 66, 76, *aff'd*, 88 N.J. 74 (1981).

for their work.[77] The only meaningful distinction that can be drawn between a school publication and a school play is the student authorship of the publication. But this distinction goes to the self-expression argument, not to the curriculum argument. As *Pico* and other book removal cases make clear, a library is not part of the curriculum. Justice Brennan emphasized the voluntary nature of the library in dismissing the school official's argument that the library is part of the curriculum.[78] There simply seems to be no basis for the *Seyfried* conclusion that a school play is part of the curriculum.

The district court in *Seyfried* concedes in a footnote that participation and attendance at the spring production is voluntary and thus depends on interest. But Judge Stapleton insists, "This makes it no less a part of the school's educational program. Like elective courses, the spring production is designed to provide an educational experience for those who choose to participate."[79] The court points to a "direct tie" to the curriculum at the high school since students who are enrolled in the theatre arts class are given credit for participation in one of the two productions each year.[80] Yet, neither Judge Stapleton nor Judge Aldisert attempts to distinguish those school newspaper cases where students receive credit for participation on a publication staff. The *Seyfried* opinion establishes no test or helpful criteria for future determinations of what constitutes curriculum.

A second major inquiry after *Seyfried* is whether the production of a dramatic script is protected speech. Clearly it is. The entire line of cases on adult theatrical productions, of which *Conrad* is just a meaningful example, is unwavering on this issue. Live drama is the speaking out of the written word. Justice Blackmun recognized in *Conrad* that live drama is subject to the same standards applied to other forms of expression.[81] Otherwise, as Justice Douglas points out in his *Conrad* concurrence, municipal officials are permitted to pick and choose between those productions which are "clean and healthy and culturally uplifting" in content and those which are not. Under such a regime, the works of Aristophanes, a great debunker of "established tastes and received wisdom," would have met a cold fate at the hands of establishment censors.[82] As we know from *Tinker* and its progeny, we must apply ordinary First Amendment standards to the expressive activities of students in schools. *Tinker* makes no concessions in doctrine either to the special

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[77] 429 F. Supp. at 736.
[78] 457 U.S. at 869.
[79] 512 F. Supp. at 239, n. 5.
[80] *Id.*
[81] 420 U.S. at 557.
[82] *Id.* at 564.

needs of schools or the immaturity of students. Therefore, the First Amendment rights of young adults in schools are exactly the same as those of adults.[83] In schools, however, disruption may be generated by the content of the expression; this is the limited public forum analysis used in the public school setting.

A third inquiry, then, is whether a theatre is a forum. Clearly it is. In the context of the adult society it is an unlimited public forum. Justice Douglas points out in *Conrad*, "A municipal theater is no less a forum for the expression of ideas than is a public park, or a sidewalk."[84] This conclusion is borne out by the entire body of theatrical production case law. A far more difficult question for our purposes is whether a school auditorium is a public forum; this is where school publications law is most helpful to our analysis. A student publication is transformed into a forum where there is some minimal connection to the state.[85] Such a minimal connection is easy to establish in the case of a school auditorium. Under traditional public forum analysis, a public building is a public forum and a public school auditorium is a public building; the fact that a school auditorium is a public forum seems beyond dispute.

Like a student publication, however, a school play production is a limited public forum; it is limited in that, because of the special nature of the school environment, school officials may impose some regulation of content. As was pointed out above, disruption may be generated by the content of the expression, whereas, outside the schools, disruption must be regulated by time, place and manner considerations. In a school play situation, then, school officials may regulate the content of the plays selected, but subject to the limitations of that regulatory power as outlined in the publications and library cases.

The fourth inquiry explores the limits of that regulatory power. According to the prior restraint principles established in each of our three models,[86] school officials who wish to regulate the selection of plays must proceed pursuant to a set of narrowly drawn guidelines that clearly spell out, in language reasonably intelligent students can understand, what students may produce and what they may not. Prohibited materials must be confined to those that are defamatory or obscene in nature; the regulations cannot prohibit production of materials merely because officials find the ideas or subject matter distasteful or because they

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[83] *See* Gambino, 429 F. Supp. 731, *aff'd*, 564 F.2d 157.

[84] 420 U.S. at 557.

[85] *See* Gambino, 564 F.2d 157; Joyner v. Whiting, 477 F.2d 456.

[86] *See* Freedman v. Maryland, 380 U.S. 51; Pico, 457 U.S. 853; Baughman v. Freienmuth, 478 F.2d 1345.

disagree. Furthermore, this system will be invalid unless it provides for prompt approval and review procedures.

At the review stage, the proper inquiry is the intent of the school officials in denying students the right to produce the play. After *Pico*, if the intent of the officials was to deny access to ideas with which they disagreed and if that intent was the decisive factor, the officials have violated the Constitution. Applying the *Tinker* standard in this context, the intent of the officials cannot have been to avoid the possibility of a disturbance or to avoid upsetting members of the community, or to allay fears or apprehension of disruption. The only permissible intent is to prohibit expression that is unprotected.

In *Seyfried*, the official's intent is suspect for two reasons: (1) the script as rewritten by Mrs. Coverdale is quite subtle in its presentation of human sexuality;[87] and (2) the original impetus for the superintendent's action was the complaint of a community member that the play mocked God and prayer. This suspicious intent is underscored by the fact that the board president made remarks to the newspapers at the time regarding the religious content of the play.[88] Before reaching the review of content stage, however, the *Seyfried* officials violated the students' constitutional rights; they had no procedural safeguards whatsoever.

The fifth and final inquiry concerns the proper allocation of the burden of proof. *Pico* places this burden on the students. It says that the students should have the opportunity to persuade a fact finder that the ostensible justifications for censorship were mere pretexts for the suppression of speech.[89] A more classic constitutional allocation would place on the students only the burden of establishing a prima facie case. The elements of a prima facie case would address whether there were valid selection procedures and whether they were followed. Once the students establish the prima facie case under a classic construction, the burden shifts to the school officials to prove that their intent was a constitutionally permissible one and not a mere pretext for the suppression of free speech.[90]

All five of these issues, unmentioned in *Seyfried*, are left for a future court to resolve. At the rate school play cancellations occur, according to the *Variety* article, perhaps we won't have to wait too long.

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[87] See the detailed account in the district court opinion at 512 F. Supp. 235. Also see notes 6 and 8.

[88] VARIETY, Wednesday, April 8, 1981, p. 74.

[89] 474 F. Supp. at 417.

[90] *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

Conclusion

In the final analysis, one has to wonder what was really bothering the *Seyfried* courts. Why would two learned and highly respected judges give such short shrift to a complex constitutional issue? The answer may lie in the public nature of the play production; perhaps there is some symbolic difference between a school play and a school newspaper or reading list.

Judge Stapleton alludes to such a difference when he asserts that "a school-sponsored theatrical production in the life of a school is quite different from that of the library or of non-program related expressions of student opinion."[91] Unfortunately, he does not explain what that difference is. Both judges give credence to the school board's argument that school sponsorship of a play is likely to be viewed by the community as an endorsement of the ideas it contains, and both seem convinced that a school has an important interest in avoiding the impression that it has endorsed a viewpoint at variance with its educational program.[92]

If this is the problem that compelled the result in *Seyfried*, it should have been acknowledged forthrightly. As it is, we are left with a dangerous and sweeping theory that is easily adapted to other fact patterns and other issues.

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[91] 512 F. Supp. at 239.

[92] 668 F.2d at 216; 512 F. Supp. at 239.