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After Hazelwood: Free Speech Constraints and Theatre Programs

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IN the fall of 1989, the sleepy Ozark campus of Southwest Missouri State University was rocked by controversy that propelled SMSU's theatre program into the national limelight. The battle lines were clearly demarcated in the academic press: the "academic Christians" sought to educate the public on AIDS and other related gay issues with the play *The Normal Heart;* the "culturally illiterate lions" tried to keep the play from ever being produced. Despite enormous pressures from the religious and political right, academic freedom and free speech triumphed in the end and *Normal Heart* played its full run to full houses. The SMSU story seems fairly typical of the challenges faced by theatre in the arena of free speech: the problems are ultimately settled in the court of public opinion, not the courts of law.

Although theatre artists and teachers seldom settle their controversies in the courts, the courts have established a body of judicial doctrine that is relevant to the administrator of academic theatre. The question addressed in this paper is deceptively simple: "What constitutional constraints govern the lives of academic theatre teacher/directors? In other words, what should drama teachers, directors and administrators know about the legal limits of their freedom of expression? Conversely, what are the limitations imposed by the courts on administrative officials regarding their ability to control or regulate what theatre students and teachers do? The answers to these questions are derived from case law that suffers from two limitations worth noting at the outset. In the first place, most of the cases that reach the courts concern high schools more so than colleges. Even in the most recent landmark decision regarding student free expression, the Supreme Court expressly declined to extend its judgment to colleges (Hazelwood, p. 274). It is not surprising that high school principals are more anxious to regulate controversy than college presidents, at least insofar as *public* schools are concerned. More will be said regarding this distinction in the conclusion.

A second limitation of case law is the fact that specific cases involving censorship of *theatrical* productions are almost nonexistent in the legal literature. As in the SMSU controversy, these "threats" to free speech rarely get to the courts. There are far more cases of student journalists taking their principals or school boards to court for infringing on their freedom of press. This should not be surprising, considering the differences between the work of theatre students and journalism students. When student thespians typically perform, they perform works selected by faculty. Even if the text selected by the faculty member should prove controversial, no actor is required to take a controversial role. Nor is the audience who comes to see the play a captive audience. On the other hand, student journalists individually write their own "scripts;" they don't interpret another's work. Moreover, the audience for a high school newspaper does not have quite the degree of choice held by theatregoers. One never knows for sure what surprises are in store for the reader of a newspaper.

PRIOR RESTRAINT AND HAZELWOOD

Can school officials legitimately control what plays are read and produced by students and faculty? The answer is a heavily qualified yes, they can. The 1988 decision of the Supreme Court in *Hazelwood School District v. Kuhlmeier* established a new standard for judging when censorship is appropriate in an educational setting. Prior to the Hazelwood decision the courts applied the broader standard of Tinker. In *Tinker v. Des Moines Independent Community School District*, the High Court determined that school officials may only restrain the free speech of students when they are able to forecast substantial disruption. That is, if administrators can demonstrate that the limitation on the public speech, including symbolic speech, of students is necessary to forestall a serious disruption of orderly processes required to conduct education, the restriction will be found lawful.

The Hazelwood decision significantly narrowed the range of student freedom of expression by permitting prior censorship on pedagogical grounds. School officials may censor information that is taught or conveyed as part of the school curriculum. Although the Kuhlmeier case stemmed from a group of high school journalists who objected to their principal deleting (censoring) two pages of controversial material from a school newspaper, the rationale articulated by the Court explicitly extended the applicability of the Court's decision to theatrical productions. Specifically, the Court sanctioned greater control over activities that "may fairly be characterized as part of the school curriculum," including "school sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" (P. 260). Indeed, subsequent lower court decisions have established a pattern of using the Hazelwood standard for a broad range of censorship decisions, including the removal of books from school library shelves *(Virgil v. School Board of Columbia County, 1989)*. As Cox observed, " ... numerous state decisions have extended the definition of the school curriculum to include such activities as music, drawing, physical education, dancing, dramatics and other extracurricular activities" (p. 1045).

HAZELWOOD CONSTRAINTS

Although the Hazelwood Court has opened the door for greater prior restraint of theatrical productions by school authorities, this authority is not without its own constraints. One qualification is that the speech, or play, that an administrator seeks to censor must constitute part of the curriculum. In other words a play produced by students off the school premises is far less likely to be subject to control than one produced on the school grounds. "School officials have had legal difficulties," noted Hudgins and Vacca, "with prohibitive actions regarding the control of content of nonschool publications" (p. 363). Typical is the

warning of Judge Irving Kaufman in *Thomas v. Board of Education:* "We may not permit school administrators to seek approval of the community-at-large by punishing students for expression that took place off school property. Nor may courts endorse such punishment because the populace would approve."

A second mitigating factor in Hazelwood is that the restriction imposed on student speech must be "reasonably related to legitimate pedagogical concerns" (Hazelwood, P. 260). Educators do not have unbridled discretion to censor a theatrical production. "Such censorship would violate the Constitution if it had 'no valid educational purpose' or was 'unreasonable,'" contend Fischer, et al. (p. 148). Unfortunately, the courts have not been helpful yet in determining what is "reasonably" related to curricular matters. Prior to Hazelwood, the determination of what constituted a "reasonable" warrant for censoring a script or production was in part decided by examining the nature of prior restraint policies instituted by the school. In order to be deemed reasonable, such policies needed to be clearly spelled out and had to contain due process safeguards. Drawing upon the landmark decision in *Quarterman v. Byrd* (1971), the Fourth Circuit Court in *Baughman v. Freienmuth* (1973) outlined five requirements for determining whether prior regulations were reasonable:

(1) Prior restraints must contain precise criteria sufficiently spelling out what is forbidden so that reasonably intelligent students will know what they may or may not write.
(2) A definition of the term "distribution" and its application to different kinds of material must be included.
(3) There must be prompt approval or disapproval of what is submitted to school officials for their review.
(4) The results of failure to act promptly must be specified.
(5) An adequate and prompt appeals procedure must be included. (Hudgins and Vacca, pp. 367-368)

The implication of these criteria is that a school has some sort of written policy or guidelines governing prior censorship. It is certainly possible for school officials to suppress a theatrical production without any such guidelines. In fact, one of the few pre-Hazelwood cases involving the cancellation of a school play production found the Third Circuit Court anticipating Hazelwood. *Seyfried v Walton* (1981) involved a suit by students over the cancellation of a school-sponsored production of "Pippin." Even though the script had been edited and approved for production by the school principal, the school superintendent ordered the production canceled shortly after rehearsals had begun. The school board affirmed the judgment of the superintendent. The Court sided with the school officials largely because the play "was considered a part of the curriculum in theatre arts," (p. 216) and because the Court was reluctant to second-guess school officials on curricular matters that "do not directly and sharply implicate basic constitutional values" (p. 217). In this case, the school officials urged that "Pippin" was inappropriate for high school students because of its sexual content. Had the objection centered about objections to political ideas contained in the play it is quite conceivable that the Court would have resorted to the more stringent Tinker standard.

Post-Hazelwood decisions thus far have granted administrators great latitude in deciding what seems "reasonably" related to the curriculum. The 11th Circuit Court deferred to a Florida school board in *Virgil v. School Board of Columbia County* (1989) in its decision to remove a work from a school's humanities curriculum that contained works by Chaucer and Aristophanes. The same sweeping reasoning was applied in the *Krizek v. Board of Education* case in Illinois. In this case, the school board refused to renew a teacher's contract on the grounds that he had shown an R-rated film in class. "The Court implied that an R-rated movie

was part of the school's curriculum because the public might reasonably perceive an R-rated movie to bear the imprimatur of the school" (Cox, p. 1043). Thus, applying the Hazelwood "reasonableness" standard, the school board could have legitimately forbidden the teacher to show the film.

A final limitation on the application of Hazelwood centers on the distinction between a public forum and a private forum. If a venue of public expression such as a newspaper, or even a stage, is determined to be a public forum, then the Courts permit far less restriction of free expression. Some school systems have adopted policies that "have established student newspapers as public forums" (Shoop, p. 583). In such cases, school officials would be unable to argue that the newspaper was essentially a part of the curriculum. While the courts would allow the customary limitations of time, place, and manner on public fora, they would resist restrictions on content. Thus a Pennsylvania court ruled that a school board could not refuse to rent a school auditorium to the Campus Crusade for Christ for a weekend magic show that contained a fifteen minute evangelical message. The court noted that the school board had rented the auditorium to a vast number of groups sponsoring many different types of activities, and had therefore turned the auditorium into a "public forum." They could not, therefore, pick and choose renters on the basis of the content of their message *(Gregoire v. Centennial School District,* 1987).

COLLEGES AND PRIOR RESTRAINT

The Hazelwood court made a clear distinction between the rights of adults in a public arena and the rights of younger, more impressionable students in a high school environment. The court was unwilling to extend this distinction beyond high school. In spite of occasional waves of public fanaticism that reach college campuses, such as in the SMSU case discussed above, or in the NEA funding controversy, the threats to free expression are fewer and less severe. The simple fact is that colleges are far more protective of academic freedom and artistic expression than high schools. Colleges are perceived to be crucibles of controversy when it comes to artistic expression. As the AAUP statement on "Academic Freedom and Artistic Expression" emphasized, colleges offer diverse artistic performances to "encourage creativity, expression, learning, and appreciation." The university maintains a sort of "institutional neutrality" in that the works presented in the university setting do not represent the views of the university (Strohm, p. 13). It can only be hoped that the academic and artistic freedom of the university will hold up to the challenges of "political correctness, which tends to be a challenge from within." Academicians know to be outraged by efforts to silence the "correct" views of a play like *The Normal Heart.* Will they similarly defend the rights of a playwright who may strike the "incorrect" attitude toward blacks, native Americans, women, gays, or any other minority?

REFERENCES AND NOTES

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