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ACADEMIC FREEDOM FOR K–12 TEACHERS

Is there anything left of academic freedom for K–12 teachers? The *Hazelwood School District v. Kuhlmeier* decision removed the legal framework for defending teachers' academic freedom in the United States. Since that time, some conservatives have maligned academic freedom as "political correctness" and redefined it as student and parent rights to their viewpoints in classrooms and the curriculum. Lower courts have consistently relied on *Hazelwood* as a precedent, and the U.S. Supreme Court defaults to this 1988 decision to refuse to hear K–12 academic-freedom cases. The result of a long-term erosion of rights and professional autonomy is an increasingly difficult battleground of academic freedom for teachers.

Academic freedom for teachers is traditionally interpreted as freedom of expression. J. Kindred (2006) in the *Education Law Journal* defines the concept as "a right to raise new and controversial ideas in an effort to stimulate thought and the further pursuit of truth . . . a right to critically speak out against their [i.e., teachers'] employers" (p. 217). Clauses guaranteeing freedom of expression under constitutional law protect the freedom to acquire materials for teaching and more generally the professional autonomy to construct or select content, resources, and assessment or instructional methods that are responsive to courses, disciplines, and students. This includes the ability to make professional judgments without coercion or censorship. However, it is important to understand that the First Amendment basically stops at schoolhouse doors in the United States; teachers in Canada continue to be protected by section 2b in the Charter of Rights and Freedoms. Canadians have generally managed

to address academic freedom at district and teacher union levels, or outside of the courts, but analysts describe an erosion of rights in Canada that parallels recent history in the United States, and Canadian judges invariably look south for legal precedent.

This discussion outlines the history of academic freedom for teachers and provides an overview of recent cases and trends. The neoconservative revival of academic freedom is juxtaposed against teacher activists who took a stand on academic freedom as fundamental to teaching in democratic systems of governance. Many believe that teaching controversial issues and promoting a collective sense of academic freedom have never been more important. This is the case for K–12 teachers as much as the university professoriate. Perhaps a statement on the times, educators of the current generation generally draw a blank when asked: "What is academic freedom for K–12 teachers?"

ACADEMIC FREEDOM FOR DEMOCRACIES

In many ways, mass education and academic freedom are synonymous, one requiring the other in democratic systems. Throughout the 1920s, the percentage of eligible students attending high school jumped from 31 to 51 percent. Average secondary school class sizes increased from 20 in 1915 to 31 in 1932. Mass education and the public schools had perennial critics, but during the 1920s criticism turned excessively alarmist. Conservative and liberal parents condemned the public schools and withdrew their children, reversing a 20-year downward trend in the percentage of students enrolled in private and sectarian schools. Control over the curriculum was particularly troubling, and in 1928, the National Education Association (NEA) reported that "a nationwide and insidious propaganda of prodigious proportions has been and continues to be carried on by the private power companies of this country [i.e., the United States], and . . . has attacked the entire public school and educational system" (p. 352). To defend against this, that same year in Minneapolis the NEA (1928) passed a "Freedom of the Teacher" resolution:

> Whereas, the classroom teachers are the ones who must use these censored text books and literature and are held responsible for the proper guidance and training of the youth, who are to become future citizens, therefore be it Resolved, that we most earnestly protest against the use of the public schools and educational system of our country by any private concern or organization in behalf of selfish class interests against the general and public welfare. (p. 352)

In 1935, the NEA expanded this to include the belief that schools and school personnel should have the opportunity to present different points of view on controversial questions to help students be better prepared for life.

Oppressive conditions reigned, and by the mid 1930s over 20 states required loyalty oaths, meant to effectively isolate and eliminate radical teachers. A little red rider law was passed in the District of Columbia in 1935, revoking salaries

from teachers who "taught or advocated communism." The NEA and the American Federation of Teachers (AFT) fought against intimidation and for the repeal of loyalty and red rider laws. These were nevertheless heady days when it seemed like the schools really could play a lead in reconstructing the social order. In 1932, Teachers College professor George Counts challenged teachers with a resonant question: "Dare progressive education be progressive?" In the height of the depression, the effects of capitalism were horrific, and teachers generated a tremendous resistance to conservative governance, intimidation, and oppression. Academic freedom for teachers was part and parcel of democratic reform and social justice.

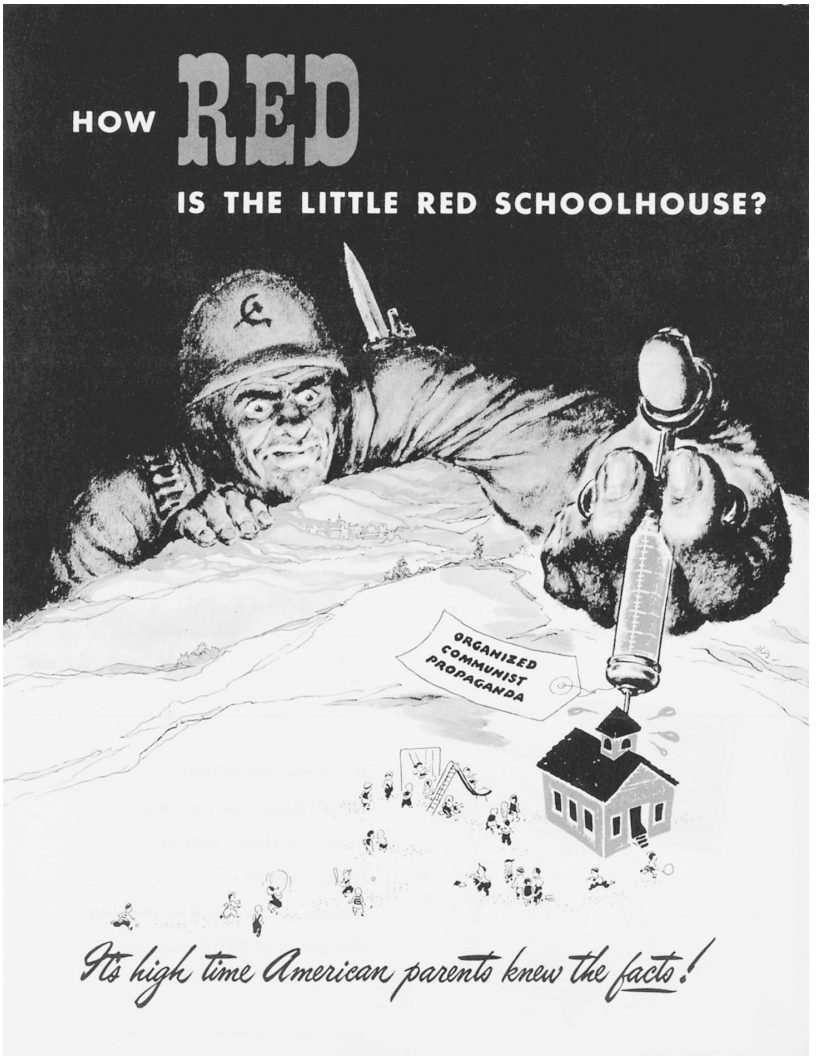

FIGURE A.1 Red Baiting School Propaganda from 1949.

Similar conditions and sentiments prevailed in the late 1940s and early 1950s. The McCarthy era in the United States extended the loyalty oaths and red riders of the 1930s to a regressive practice of intimidation and red-baiting. The force of the schools as instruments of national security was tremendously challenging to teachers interested in defending academic freedom and fundamental rights to professional practice without coercion. The civil rights movement emerged from this context, demanding that teachers reject any pretense of neutrality. In his famous *Letter from Birmingham Jail* in 1963, Martin Luther King linked academic freedom to civil disobedience. He encouraged moderate professionals to get off the fence and speak out against injustice by exercising First Amendment rights. The day after King was shot in 1968, Riceville, Iowa, teacher Jane Elliott gave her third-grade students a lesson in racism that they would never forget. This and subsequent blue-eyed/brown-eyed experiments she conducted stand as extraordinarily meaningful expressions of academic freedom. In a later era, she would have been fired despite the lifelong lessons in discrimination the students experienced.

Inspired by civil rights and increasing activism, in December 1965 Beth Tinker and John Tinker, 13 and 15 years old, and Christopher Eckhart, 15 years old, decided to express their objection to the Vietnam War by wearing black armbands to school. Hearing of the plan, on December 14, principals of Des Moines, Iowa, schools adopted a policy that students wearing protest armbands would be asked to remove the symbols and, if they refused, be suspended. On December 15, Mary Beth and Christopher wore their armbands and were suspended. On December 16, John did the same and was suspended until after the New Year as well. The students' parents filed complaints in the district court, only to be dismissed. The circuit court appeal was split, affirming the district court's decision to dismiss the appeal. The Supreme Court eventually heard the case and in 1969 delivered its decision upholding the students' rights. "It can hardly be argued," the judges wrote in opinion, "that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. . . . This has been the unmistakable holding of this Court for almost 50 years" (393 U.S. 503, 1969, sect. 1, para. 2). The opinion affirmed that administrators "do not possess absolute authority" over students and teachers. As a profound legal framework for academic freedom, this decision prevailed until the late 1980s.

At the time *Tinker v. Des Moines* was decided in the Supreme Court, academic freedom for teachers was fairly respected. Yet in 1969, only 55 of 2,225 school district contracts contained provisions to protect the right. Twenty-nine of these contracts were based on the Linden, Michigan, agreement stating that democratic values were best upheld

> in an atmosphere which is free from censorship and artificial restraints upon free inquiry and learning, and in which academic freedom for teacher and student is encouraged. B. Academic freedom shall be guaranteed to teachers and no special limitations shall be placed upon [teaching and learning] subject only to accepted standards of professional educational

> responsibility. C. Freedom of individual conscience, association and expression will be encouraged and fairness of procedures will be observed both to safeguard the legitimate interests of the schools and to exhibit by appropriate examples the basic objectives of a democratic society. (NEA, 1969a, p. 9)

A year earlier, the Supreme Court ruled in favor of Township High School teacher Marvin Pickering's appeal that his board of education erred in firing him for publishing a letter critical of their budgeting process (391 U.S. 563, 1968). Given the *Pickering v. Board* and *Tinker v. Des Moines* decisions in addition to the robust statement in the Linden contract, the NEA (1969b) reaffirmed its resolution on academic freedom in 1969.

Censorship nonetheless persisted, and in 1980, the American Library Association reported that 62 percent of 910 censorship cases from 1966 to 1975 involved public schools. Increasing erosions of academic freedom prompted the *Education Digest* to ask: "Is academic freedom dead in public schools?" This was an ominous start to a decade that would, if not kill, nearly eliminate academic freedom for teachers. In 1983, three days before the April issue of a Hazelwood East High School (St. Louis, Missouri) student newspaper, the *Spectrum,* was to be printed, Principal Robert E. Reynolds censored the proofs and deleted two pages. He objected to the content of an article that dealt with teen pregnancy and another with the impact of divorce on students. The staff of the *Spectrum*, enrolled in a Journalism II course, objected, but the issue was published without the two pages. Upon encouragement from their previous journalism teacher, who transferred schools a month prior to the censor, three students (Cathy Kuhlmeier, Leslie Smart, and Leann Tippett) contacted the American Civil Liberties Union and filed suit in the district court. The censored articles were taken to the *St. Louis Post-Dispatch* and published in their entirety.

In 1985, the district court sided with the principal, but the appeals court decision upheld the rights of the students. On January 13, 1988, the Supreme Court reversed the lower court's decision with a five-to-three majority opinion that regressively shaped the future of academic freedom for K–12 teachers:

> school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community . . . 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. (484 U.S. 260, 1988, sect. B, para. 4)

Those last three words—"legitimate pedagogical concerns"—subsequently provide the test for administrative intervention into curriculum and teaching and establish precedent for all legal deliberation to follow to date. Placing power over the curriculum in the hands of administrators, Justice White continued: "This standard [of legitimate pedagogical concerns] is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"

(484 U.S. 260, 1988, para 4b). With this default position, the Supreme Court has since refused to hear K–12 academic freedom cases. In dissent, however, Justice Brennan wrote, "the case before us aptly illustrates how readily school officials (and courts) can camouflage viewpoint discrimination as the 'mere' protection of students from sensitive topics" (484 U.S. 260, 1988, Dissent, sect. B, para. 5). He called the majority opinion a stamp of "brutal censorship" (sect. C, para. 2).

The *Duke Law Journal* immediately declared "the end of an era." Newspapers and civil liberties groups denounced the decision and accurately predicted

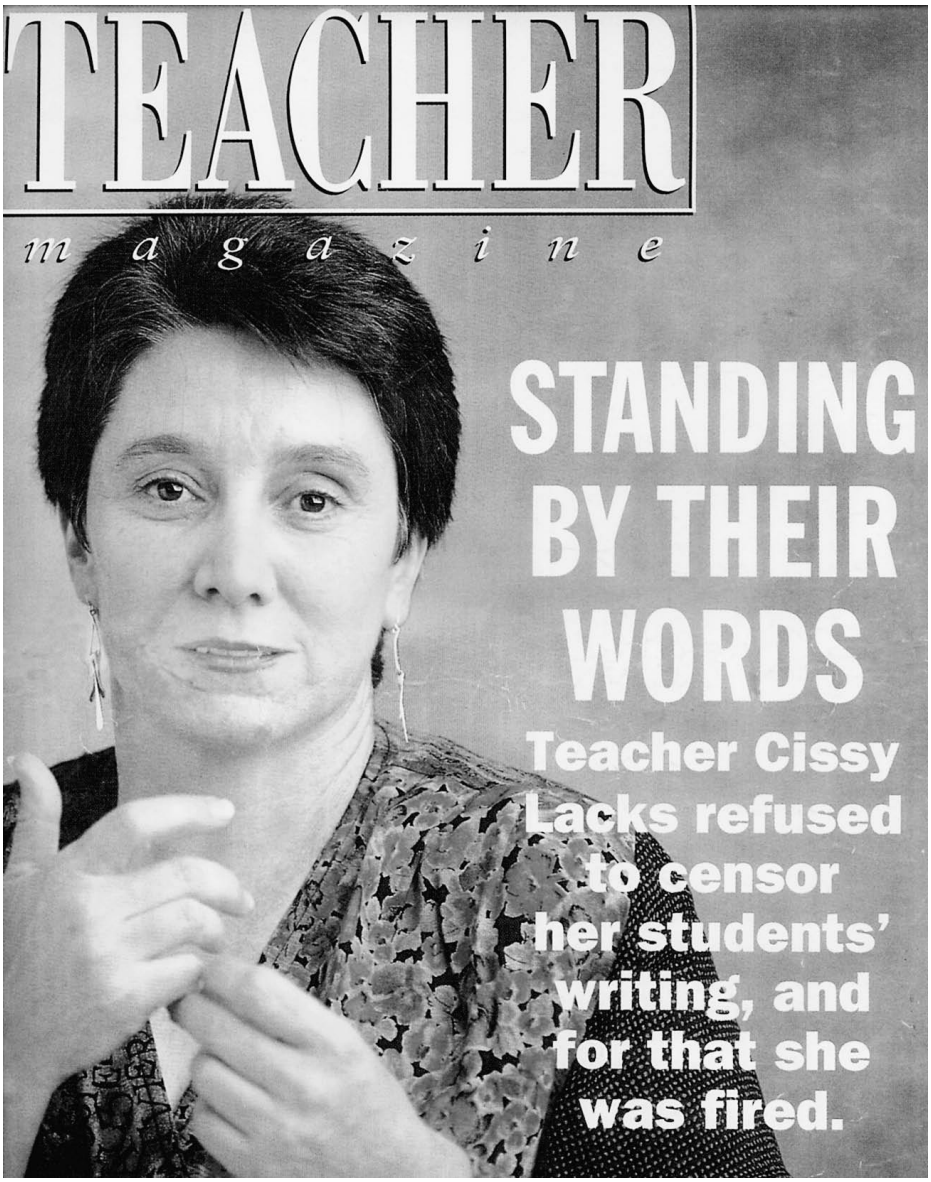

FIGURE A.2 Source: As first appeared in Teacher Magazine, September, 1995. Reprinted with permission from Editorial Projects in Education.

the end of academic freedom for K–12 teachers and students. Looking back, Canadian legal analyst Nora Findlay (2002) aptly concluded: "With *Hazelwood,* everything changed . . . Schools have the ability to censor material that raises 'legitimate pedagogical concerns' (i.e., the censorship can be justified educationally); this decision supports control of schools, not freedom of expression" (pp. 353–354). Indeed, trends in the history of academic freedom for teachers suggest a gradual erosion of activism and rights, marked by a vigorous defense in the 1930s and 1950s and a noticeable decline of support through the late 1980s and the current era.

SILENT NO MORE

Of course, prior to and between *Tinker v. Des Moines* and *Hazelwood v. Kuhlmeier* were numerous cases that tested or weakened academic freedom for K–12 teachers. But since *Hazelwood,* teachers have not had an opportunity in the U.S. Supreme Court to put the "legitimate pedagogical concerns" standard to test. Cases that in an earlier era would have gone to the Supreme Court were left with an unsettling feeling that the "myth" of academic freedom for teachers "dies slowly." Peggie Boring's and Cissy Lacks' cases are two such injustices that deserved a fair hearing in the high court. Their legacy is nonetheless significant, as both Boring and Lacks have been courageous in championing academic freedom and sharing their resistance narratives with teachers. Along with others, such as Nadine and Patsy Cordova, Releah Cossett Lent and Gloria Pipkin, they chose to be "silent no more."

In September 1991, Charles D. Owen High School drama teacher Peggie Boring and an extraordinary group of students chose the play *Independence* to rehearse and perform. *Independence* is fundamentally about love, care, and compassion, explored through intensely difficult relationships (divorced mother with three daughters: one a lesbian, one pregnant with an illegitimate child, and the third with street-sense vocabulary). Owen High School (Black Mountain, North Carolina) had just opened with a new theater, and the drama group was ecstatic over the facility. Both teacher and students were winners of prestigious awards and scholarships, and the group earned a chance to perform at the International Thespian Festival later that year. With script approval by the performers' parents and implicit approval from the school's administrators, their rendition of *Independence* was award winning and advanced to the state finals in competition. However, after a rehearsal in front of an English class in the school, a parent complained about the content of *Independence.* The principal intervened and insisted on censoring certain parts of the play. Boring reluctantly agreed, and the group went on to alternate winner at the competition. At the end of the school year, Boring was reassigned to a middle school for lack of compliance with the district's controversial materials policy.

Boring predictably lost an appeal of the dismissal at the school-board level but won her initial legal appeal in the Fourth Circuit court in 1996. A Fourth Circuit panel subsequently reviewed and in 1998 reversed the closely divided decision. Insofar as the principal and superintendent were acting on "legitimate

pedagogical concerns," Boring evidently had no right to participate in creating the school curriculum through selection and production of plays (136, F.3d, 364; Daly, 2001; Russo & Delon, 1999; Zirkel, 1998).

In January 1995, English teacher Cissy Lacks, who had been teaching since 1972 and had a record of successes similar to Peggie Boring, was forced into the same battleground of academic freedom. Lacks drew on proven creative writing and poetry methods, including drama exercises accommodating the students' everyday "street" language. This method draws creative expression from reluctant and troubled students before moving to refinement of genre, technique, and style. For one assignment, the students wrote, performed, and videotaped short plays, which, all in all for the class, totaled to 40 minutes and contained 150 instances of profanity. Like most high schools, the tape represented a fair cross section of language and themes common to Berkeley High School (Ferguson-Florrisant School District of St. Louis). Following up on a student's complaint, the principal confiscated the tape from Lacks' locked classroom closet, reviewed it, and moved to suspend and eventually fire her for disobeying the school discipline code (i.e., no profanity). Lacks described her termination hearings before the school board as a kangaroo court. An appeal to the Federal District court won an injunction to have her reinstated, but the board rejected it. Her appeal trial in the Eighth Circuit court in 1998 trapped Berkeley High's principal on perjury, but the court nonetheless decided on behalf of the school district. Her claims to academic freedom in the selection of professionally proven methods and First Amendment rights to profanity in creative writing were summarily dismissed. Similar to the *Boring v. Buncombe* decision, the Eighth Circuit decision rested on *Hazelwood*—the board's prohibition of profanity was based on "legitimate pedagogical concerns" for acceptable social standards in the curriculum (147, F.3d, 718, 1998; Daly, 2001; Lacks, 2001, 2003; Russo & Delon, 1999). And like Boring, Lacks was denied a hearing by the Supreme Court. In Canada in 2003, Richard Morin's use of a video to teach resulted in a similar treatment and outcome.

Boring's and Lacks' cases are significant not only for constitutional and employment law, but for their power in reminding teachers of the relevance of academic freedom to everyday practice. As Lacks (2003) concluded:

> my story was the same as the myriad of stories like mine in schools everywhere. . . . Learning fields had become mined battlefields, but it was going to take my case, and some others, and a handful of catastrophic school violence incidents before most teachers would understand how vulnerable they were, and how ineffective this new censorship dogma would render them. (p. 113)

NEOCONSERVATIVE REVIVAL OF ACADEMIC FREEDOM

From the beginning of Boring's case, which quickly made headlines in local papers, conservative Christians rose up in moral outrage against the play *Independence* and the teacher's direction for the drama program. The "Friends

and Supporters of Owen High School" took out a print ad in the local newspaper to chastise the teacher as an agitator for profanity, blasphemy, sexual promiscuity, adultery, and homosexuality. Although *Independence* and Boring's pedagogy may have drawn the wrath of conservatives in previous decades, it was no coincidence that this occurred in the early 1990s.

These nascent days of a neoconservative revival of academic freedom were punctuated by President George H. W. Bush's commencement speech at the University of Michigan on May 5, 1991. The president noted that "political correctness [PC] has ignited controversy across the land," declaring "certain topics off-limits, certain expression off-limits, even certain gestures off-limits." Chock-full of contradictions, the address set off a series of articles on PC in the *Atlantic Monthly, Newsweek,* and the *New York Times.* Nearly overnight, defenders of academic freedom were redefined to what Bush called "disputants" and sympathizers of PC. However, many educators including Henry Giroux reasoned that the PC battle was less a correction of bad educational practices and more a strategy for eliminating debate.

September 11, 2001, reinforced conservative backlash and made academic freedom for K–12 teachers ever more elusive. Parents and students with a range of political interests took it upon themselves to safeguard the patriotic curriculum. Civil liberties be damned, numerous corporate groups introduced curriculum to help buttress America's militaristic counter to terrorism. Even elementary and middle school students, such as 11-year-old Emil Levitin (pseudonym, see republicanvoices.org), began to patrol and report what teachers taught in classrooms and how well they entertained conservative or certain Christian viewpoints.

In September 2003, David Horowitz launched a campaign with parents and students to promote an academic bill of rights, effectively a manifesto for conservative viewpoints. A "Students for Academic Freedom" Web site and blog were created at the time, and a year later, a "Parents and Students for Academic Freedom" (PSAF) campaign and site was launched. The PSAF's *Academic Freedom Code for K–12 Schools* spells out a conservative agenda under a disguise of neutrality:

> Whereas parents and taxpayers have a right to expect that taxpayer resources will be spent on education, not political or ideological indoctrination; Therefore be it resolved that this state's [board of education or other relevant regulating body] will promulgate clear regulations for appropriate professional and ethical behavior by teachers licensed to teach in this state; that these guidelines shall make it clear that teachers in taxpayer supported schools are forbidden to use their classrooms to try to engage in political, ideological, or religious advocacy. (Horowitz, 2004)

In response to Horowitz, an *Academic Freedom Bill of Rights* for postsecondary students was introduced into federal and state legislatures in 2004. In February 2005, the Florida House of Representatives, for example, passed the bill through the House Choice and Innovation Committee and the

Education Council. It died on the calendar in May 2005, but similar legislation across the United States has serious implications for both K–12 and post-secondary education.

In the midst of this neoconservative revival, in October 2005 a North Carolina high school student was turned over to police by a Wal-Mart clerk for photocopying an anti-President George W. Bush poster for a civics course assignment. Selina Jarvis, the Currituck County High teacher who gave the Bill of Rights assignment, was then questioned by the Secret Service. And in early March 2006, Aurora, Colorado, social studies teacher Jay Bennish was suspended after a student covertly recorded and circulated a tape of Bennish's in-class comparison of the arrogance of the Bush administration's policies with the arrogance of Hitler's Nazi Party. The Fox Network's coverage and the student's tape continue to be downloaded and circulate from YouTube.

CAVEAT PEDAGOGUE

On this battleground of surveillance, economic and military in/security, the commercialization of education, and neoconservative revival, academic freedom attenuates and censorship proliferates. There is no more important time for those who can to exercise and defend academic freedom as a viable, necessary form of activism. Are we not witnessing some of the worst fears of academic labor where power in the conception of curriculum is invested in administrators and a few appointed or elected officials while execution rests in teachers? As legal scholar Karen Daly (2001) cautions,

> the legal limitations that may be placed on an individual teacher's classroom speech encourage school boards and administrators to monopolize discussions about curricular and other pedagogical concerns, crowding out the voices of those on the front lines of education. This micromanagement of the teaching process reduces teacher morale, discourages innovative educational methods, and creates a disincentive for intelligent, independent-minded individuals to enter into the profession. (p. 3)

It should be clear that the cultural, historical, and legal dimensions of academic freedom for K–12 teachers only partially explain why we are at this juncture. Like education itself, academic freedom is profoundly political. Whether it remains a taken-for-granted discourse of the left is uncertain. What is for sure, however, is that the battleground of academic freedom for K–12 teachers can no longer be dismissed or neglected.

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Stephen Petrina

ACCOUNTABILITY

Accountability of schools is a relatively contemporary concern, dating probably to James Coleman's 1966 report *Equality of Educational Opportunity.* This report examined achievement of children of different races and shifted the attention toward outcomes and away from resources and inputs. That this report was followed closely by the development of the *National Assessment of Educational Progress* in 1970 meant that there were student test results available to indicate the outcomes of schooling. Since then demands for schools to be accountable have been accentuated by the often-conflicting demands of policymakers and politicians who control the educational purse strings and professional educators with the knowledge and skills to educate children within a democracy.

THE MEANING OF ACCOUNTABILITY

Accountability is a means of interaction in hierarchical, often bureaucratic, systems between those who have power and those who do not. Complex hierarchical systems do not permit those in power to be everywhere and do everything at the same time to achieve what they consider to be desirable outcomes.

BATTLEGROUND

SCHOOLS

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