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Who Won? What Precedents Emerged?*

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The First Amendment and Religious Discrimination: Who Won? What Precedents Emerged?

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I. INTRODUCTION

Teacher evaluation is a perennial source of conflict in education. Conflict often leads to disputes which often lead to court cases in order to resolve those disputes legally and formally. The dispute between Cowan and her school district led to a court case that raised issues concerning community religious beliefs, supervisory integrity and consistency, teacher free speech, the board of education's justification for nonrenewal of the teacher's employment contract, reinstatement as a court-dictated relief after a jury verdict in favor of the teacher, and the law's prohibition against religious discrimination. It is to these matters we turn our attention in exploring the case of Cowan v. Strafford R-VI School District¹ and then some related cases.

The sections below on facts, complaints, claims, and the district court's proceedings will be lengthier than usual for two related reasons. First, in what has already been published by the courts and commentators on Cowan these sections have been shortchanged considerably, primarily because the material on these sections is not easily or readily accessible. Nevertheless, the content of these sections is central to the complexity of the case. Second, because there is much to comment on regarding the issues raised by this complex case, a solid foundation is necessary so that the reader can understand what evoked the points that will be made in the commentary and conclusion sections.

At the outset I alert the reader that this case focuses substantively on two issues essential to our public schools: the protection of classroom speech of teachers; and the protection of statutory civil rights, specifically the right to be free from religious discrimination. As the case progressed through the federal district court and then the federal appellate court, the focus switched to procedural rules and the appropriate remedy for a favorable verdict.

The reader should keep this point in mind and consider the consequences of the loss of the original focus. In the conclusion section at the end of this paper I shall comment on the unfortunate legal consequences for future cases dealing with similar substantive issues. Based on this introduction it should be obvious that I believe that Cowan deserves attention from lawyers and educators.

II. FACTS ²

The Strafford School District is located about ten miles east of the city of Springfield, in southwest Missouri. The district has one elementary school, one middle school, and one high school located on one campus. It employs about 75 teachers. Leslie Cowan began teaching at Strafford in the fall of 1990 as a probationary second grade teacher. Superintendent James Tice had hired Cowan after she successfully worked in the district's summer school. In Cowan's first year, Lucille Cogdill, the elementary school principal, observed Cowan twice and filed completed Formative Observation forms. She also filed a Summative Evaluation Report in mid-March of 1991.

On the first Formative form dated September 27, 1990, Cogdill wrote, "Competent knowledge w/creative ideas for motivation," "Good verbal & nonverbal communication—clear directions," and other positive remarks. Cogdill finished the form with the comment, "Good Soc. St. lesson incorporating effective teaching strategies. I enjoyed seeing students excited w/Soc. St." On the second Formative form dated March 15, 1991, Cogdill wrote, "Teacher maintained learning environment conducive to lng [abbr. for learning]; anticipated distractions, and dealt w/ them," "Teacher interacted with students in friendly and respectful manner," "Teacher had lesson plans and was prepared for lesson," and other positive remarks. Cogdill finished her report with the comment, "Good reading lesson—Involved the students."

On her positive Summative Evaluation Report on Cowan for the 1990-1991 school year dated March 20, 1991, Cogdill ended with the comment, "Leslie is learning effective teaching strategies, Mrs. _____ [name unclear] is her mentor." By what she circled on that form Cogdill indicated that she rated Cowan at "Performance Expectation" on all of Strafford's 19 performance categories.

The Strafford Board of Education (BOE) renewed Cowan's contract for a second year, 1991-1992. Again, Principal Cogdill observed Cowan twice and filed completed Formative Observation forms. On the first form dated March 31, 1992 Cogdill wrote, "Classroom conducive to learning," "Teacher and students interact in mutually respectful manner," "Teacher walked around room to assure individual understanding," and other positive comments.

On the second observation form dated April 24, 1992 Cogdill checked off each of the eight characteristics listed under the heading Instructional Process Characteristics, thereby indicating that Cowan had met them all. Cogdill also wrote, "Good verbal communication," "Classroom organized in manner conducive to lng [learning]," "Good lesson on following directions," and other positive comments. On the Summative Evaluation Report for the 1991-92 year Cogdill again rated Cowan as meeting Performance Expectations in all 19 of the listed Performance Area categories for the Instructional Process, Classroom management, Interpersonal Relationships, and Professional Responsibilities.

On March 30, 1992, the BOE unanimously voted to renew Cowan's contract for a third year to begin in September, 1992. Then, on the last day of her second school year, in May 1992, Cowan sent a letter home with her students, congratulating the students for completing the second grade and making reference

to a “magic rock,” which she attached to the letter. Cowan had sent the same letter the prior year, also on the last day of school and also addressed to her students. The schools district did not receive any complaints at that time. The letter read:

Dear Second Grader,

You have completed second grade. Because you have worked so hard, you deserve something special and unique; just like you! That something special is your very own magic rock.

The magic rock you have, will always let you know that you can do anything you set your mind to. To make your rock work, close you [sic] eyes, rub it and say to yourself three times, “I am a special and terrific person, with talents of my own!” Before you put your rock away, think of three good things about yourself. After you have put your rock away, you will know that the magic has worked.

HAVE FUN IN THIRD GRADE!!!!

Cowan gave the letters with the “magic rocks” to her students to encourage them to do well over the summer. She testified that she “thought it would be a good motivation for them at the end of the school year.” Cogdill testified that she viewed the Magic Rock Letter as a “method to boost self-esteem.”

During the summer Sara Lynn Campbell, whose daughter had been in Cowan’s second-grade class during the 1991-92 school year, spoke with Cogdill about the Magic Rock Letter to indicate that the letter was contrary to Campbell’s Christian beliefs. Campbell said, “[The letter] would indicate that there was some supernatural power in a rock. And we don’t believe in supernatural powers in rocks.” Two other parents also complained about the letter.

Sara Campbell showed the letter to her father, Reverend Frank Stark, the former pastor of the First Baptist Church of Strafford. Stark met with Cogdill to express his displeasure with the letters because it conflicted with his religious faith and to notify her about a forthcoming seminar on New Age beliefs and practices. The seminar, sponsored by the Greene County Baptist Association, was organized to focus on the alleged infiltration of New Ageism into public schools. Stark also spoke with Reverend Keith Vawter, then current pastor of the First Baptist Church and Superintendent Tice’s pastor. Vawter told his congregation that New Age was a “verifiable concern that they should have, that “we had a teacher in our school system teaching New Age to the students,” and that the “teacher [Cowan] dressed up as a Gypsy and passed out magic rocks to the students.” (Cowan had dressed up on Halloween as a gypsy but had not done so at any other time.) Vawter also spoke to Tice about the letter.

On August 13, 1992, after learning about Cowan’s Magic Rock Letter from the parents and seeing a copy of it,³ Cogdill for the first time (according to Cowan’s testimony) told Cowan that Cogdill had concerns about Cowan’s performance as a teacher. Cogdill referred to the Magic Rock Letter and the students’ performances on the Missouri Mastery Achievement Test (MMAT). On the next day Cogdill told Cowan to “avoid any ‘magical’ ideas” in her teaching. Cogdill criticized Cowan’s lesson plans and requested Cowan to focus on her “teaching objectives and be sure that her lesson plans reflect a planned procedure.”

Cowan initiated that August 13 meeting to find out why a student had been “moved out of her room.” Cowan also initiated the next day’s conference in order to pursue further the previous points raised by Cogdill. In her note sheet from the first day’s meeting on August 13, Cogdill wrote that she spoke about “the fact that 2/3 of all subtests on her students’ achievement tests showed a decrease from the previous year.” (Cogdill later acknowledged that she had not looked at these test scores until the summer of 1992 even though they were available to her in May of 1991.) In her notes for August 14, Cogdill wrote, “I assured her that I would be positive and that I feel my job is to keep her informed of any problems.... I told her I would help her this year in all of these” [that is, all of the items mentioned earlier: avoiding magical ideas; focusing on teaching objectives; and being sure that her lesson plans reflect a planned procedure].

Superintendent Tice initialed and dated each day’s note sheet at Cogdill’s request when Tice and Cogdill conferred several days later (August 17, 1992) to discuss the entire matter concerning Cowan. Afterwards, Tice informed the BOE about the Magic Rock Letter issue.

On August 28 Cogdill prepared and gave to Cowan two “job targets,” or notices of deficiency, in regard to the major area of “Instructional Process.” On a Job Target Sheet under the subheading of “Improvement Objective(s)” Cogdill wrote “1. Prepare lessons designed to achieve state and local objectives; 2. Communicate learning objectives to students.”

On a second Job Target Sheet, dated August 29, 1992, in regard to the major area of “Interpersonal Relationships” under the subheading “Improvement Objective(s)” Cogdill wrote, “1. Provides [sic] a climate which opens up communication between teacher and parent; 2. Initiates [sic] communication with parents when appropriate.” The target date for completion of all four job target objectives was April 1993. Cogdill wrote that she would help Cowan achieve the objectives. As directed by the BOE, Cogdill had chosen these two major areas and their four objectives to be of highest priority for Cowan’s renewal for the third year of employment. Cogdill had recently rated the two major areas as satisfactory on Cowan’s Summative Evaluation Report dated April 28, 1992. She had given the same evaluation the prior year.

Cowan did initiate some parental activities pursuant to the Job Target Sheets that were prepared for her. However, Cowan later testified that Cogdill did not even attend two parent conferences initiated by Cowan, as Cogdill had promised she would according to the Job Target Sheet signed by both Cogdill and Cowan and dated August 29, 1992. Nor did Cogdill “monitor plans and observe teaching techniques on a weekly basis,” as Cogdill had promised on the first Job Target Sheet signed by both Cowan and Cogdill. Cowan later testified at the jury trial that Cogdill only observed her three times during her last year, on November 24, January 26, and March 23. Cowan also testified that she wrote a formal letter to Cogdill in October 1992 requesting feedback but did not obtain a response from Cogdill.

At the teachers’ meeting at the start of the 1992-93 school year Cogdill told her teachers “to refrain from using words like magic or anything that would make people feel that [the teachers] were involved with New Age in the classroom.” She said that she would attend a seminar on New Age “so that we don’t

have any misconceptions about what our school believes.” She did attend the seminar, which Reverend Frank Stark had mentioned to her previously in the spring when discussing the Magic Rock Letter. The seminar was devoted to issue of New Ageism and the alleged infiltration of New Age thinking into the public schools and into people’s thinking. Stark coordinated the Greene County Baptist Association.

Cogdill filed three Formative Observation forms during Cowan’s third, and final, year. On Nov.24, 1992 Cogdill wrote mostly positive comments, including “Teacher interacts with students in friendly manner,” “Most students were on task,” and “Manipulations are good motivation for math lesson.” She also wrote, “Student interaction was not related to lesson,” and “Students need to be placed in rows to maintain orderly _____ [word unclear].” On January 26, 1993 Cogdill wrote “Good time on task,” “Teacher waited until all students ready to begin lesson (good strategy),” “Teacher provided reinforcement through positive comments,” “Good lesson on alphabetizing word,” and other positive remarks. On March 23, 1993 Cogdill wrote, “Obj. was clearly stated and taught _____ [remaining words unclear],” “Clear directions—all students understood,” “Students seemed to conform to classroom rules,” “Good lesson on measurement,” and other positive comments. She also wrote “Bulletin boards somewhat bare — 6 students facing wall (?)”

In light of the written comments on the three observation forms and the lack of any contradictory oral comments to her, Cowan assumed that she was meeting her job targets. Nevertheless, during the afternoon of March 30, 1993, Cogdill suggested to Cowan that she resign in light of her pending nonrenewal. Cowan refused to do so. That same night Cogdill recommended to the BOE in closed executive session that Cowan not be renewed for the next year. Cowan subsequently wrote a letter to Cogdill, stating that Cogdill had not raised her criticisms with Cowan, that Cowan had met her job targets, and that Cowan believed that Cogdill’s evaluative recommendation was essentially a reaction to the fact that the Magic Rock Letter had offended some people in the community.

On April 8, 1993 Cowan spoke to the BOE in executive session to present information to the board members prior to their voting of her renewal. Cogdill also presented information to the BOE about the achievement of Cowan’s students in comparison with the students of the other two second-grade teachers. The scores of Cowan’s students on the 1991-92 MMAT were lower than the students of the other teachers. The comparison showed that the Reading scores for Cowan’s students were 8 and 19 mean points below the other two classes; the Mathematics scores were 17 and 21 mean points lower. The BOE voted unanimously on that date not to renew Cowan’s contract for the next year.

During this time of considering whether to renew Cowan’s employment contract, the BOE held meetings in April and May at which Cowan and parents who supported her spoke to the board. Nevertheless, the BOE followed Cogdill’s recommendation not to re-employ Cowan. One BOE member later testified that Cogdill’s “recommendation had a lot of weight... She’s the evaluator. I believe in people doing their jobs and holding them accountable.”

After the nonrenewal vote, parents of 15 of 18 of Cowan’s students wrote

a letter to the BOE to support Cowan and to request an explanation for the nonrenewal. Also, three teachers later in court testimony supported Cowan enthusiastically. On the other hand, some parents testified against Cowan due to her poor performance, especially in regard to the fact that there was a discrepancy between the high grades the students received from Cowan and the low scores the students earned on the MMAT. Later MMAT data showed that Cowan's students again scored lower than the students of the other two second-grade teachers, lower by 10 and 13 mean points in Reading; 21 and 32 in Mathematics. Nevertheless, these scores were not available to the BOE when it voted against Cowan, having been received a month or two after the vote. Thus, they could not support the BOE's defense that it voted based on Cowan's poor performance. Furthermore, Cowan attributed the low test scores in large measure to the fact that she had a high number of students with attention deficit disorder(ADD) in her class, students who are often associated with low test scores.

Superintendent Tice on May 6, 1993 wrote to Cowan to give her reasons, pursuant to her April 15 request for reasons for the BOE's action. Tice stated that the nonrenewal decision was based on the following:

1. Inability to consistently prepare lesson plans according to the state and district learning objectives;
2. Inability to consistently communicate with parents in a timely manner and in an appropriate atmosphere;
3. Inability to communicate learning objectives to students; and
4. Failure to effectively utilize a variety of teaching strategies."

Cowan subsequently applied to other school districts for a teaching position but was unsuccessful in obtaining one. Cowan then began to work with her husband at their local gasoline station. (As of the summer of 2000 she still was working at the gasoline station.)

III. COMPLAINTS FILED

Cowan on or about June 14, 1994, filed a four-count complaint against the Strafford School District and Superintendent Tice in the United States District Court, Western District of Missouri, Southern Division, located in Springfield, Missouri.

Counts I and II of Cowan's complaint about religious discrimination arose out of Title VII of the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991, Public Law 102-66 (42 U.S.C. §2000e et seq) and out of the First and Fourteenth Amendments to the U.S. Constitution.

Count III of the complaint about retaliation for the exercise of free speech rights arose out of the First and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. §1983.

Court IV arose out of the Missouri Fair Employment Practices Act, R.S. Mo. 213.000 et seq.

For Count I (religious discrimination under Title VII) and Count II (religious discrimination under the religion clauses of the First Amendment) Cowan

sought (1) a declaration that the nonrenewal of her employment contract was unlawful; (2) an injunction against further violations; (3) reinstatement to her teaching position with credits towards tenure and elimination of the effects of the unlawful action; and (4) compensation for past and future humiliation, embarrassment, reputational damage, and reduced employability suffered as a result of the unlawful action. For Count III (academic freedom and freedom of speech under the First Amendment) and Count IV (unfair employment action under the Missouri Fair Employment Practices Act) Cowan sought, in addition to the four types of relief listed for Counts I and II, (5) punitive damages, (6) reasonable attorney's fees and costs, and (7) any further relief as the court deemed just and reasonable.

IV. COWAN'S CLAIMS IN THE DISTRICT COURT

By the time the district court proceedings began Cowan had combined Count IV, her parallel state claim based on the Missouri Fair Employment Practices Act, with Count I, her federal claim based on Title VII. The result was that these two parallel claims of religious discrimination were tried simultaneously because it was impossible to double recover on the same point of discrimination. Therefore, the three substantive issues for the court to decide were whether the defendants, in recommending and deciding not to renew Cowan's employment contract, violated the religion clauses of the First Amendment, and/or Title VII of the Civil Rights Act of 1991, and/or the freedom of speech provision of the First Amendment.

A. The Establishment and Free Exercise of Religion

Cowan claimed that the cautions issued by Principal Cogdill against references to magic that could offend Strafford's religious community constituted a religious test for further employment for her as a public school teacher. As such, the BOE's nonrenewal action, based on Cogdill's recommendation, was a violation of the Establishment of Religion clause and the Free Exercise of Religion clause of the First Amendment. Based on Torcaso v. Watkins⁴ Cowan drew an analogy between Cogdill's requests about "avoiding any 'magical' ideas" and the Maryland Constitution's requirement for a public office holder to declare a belief in God. In that case the Plaintiff Roy Torcaso claimed that the state's religious oath violated the religion clauses of the Constitution. Maryland law required Torcaso to declare: "I, Roy R. Torcaso, do declare that I believe in the existence of God."⁵ "Torcaso was appointed to the office of Notary Public by the Governor of Maryland but was refused a commission to serve because he would not declare his belief in God."⁶ The Supreme Court ruled that the oath constituted a prohibited religious test, saying that "neither a State nor the Federal Government ... can constitutionally pass laws or impose requirements which aid all religions as against non-believers...."⁷ For Cowan, the Supreme Court's reasoning covered her as well as Torcaso.

B. Religious Discrimination in Employment

Cowan claimed that the BOE discriminated against her based on religion

when it did not renew her employment contract. Such discrimination is prohibited by federal statute. Specifically, the Civil Rights Act of 1991 (Public Law 102-166, Nov.21, 1991) amended Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-2) by adding the following subsection:

“(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” [emphasis added]

Cowan claimed that the speech and acts of Cogdill in regard to religion constituted a “motivating factor” in Cogdill’s recommendation to the BOE not to re-employ Cowan. In that way Cogdill and the BOE violated Cowan’s Title VII civil rights.

C. Freedom of Speech

Cowan claimed that the BOE and Superintendent Tice violated her constitutional freedom of speech rights under the First Amendment. (She had filed her suit under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, a section of the Civil Rights Act of 1871. Section 1983 provides in pertinent part that someone person who acts under state law to deprive a person “of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action” in court.)

Cowan claimed that the speech contained in the Magic Rock Letter was “constitutionally protected speech and may not lawfully form the basis of a recommendation or decision not to renew plaintiff’s teaching contract.”⁸ Specifically, the letter containing her protected speech was a “motivating factor” in defendant Superintendent Tice’s recommendation and the BOE’s decision not to renew [her] contract.”⁹ That is, she claimed that the letter “offended the viewpoints, values, religious tenets and/or beliefs of certain persons in the school and community”¹⁰ who then spoke and/or voted against her renewal of employment based on that letter.

V. DISTRICT COURT PROCEEDINGS AND DECISIONS

A. Pre-trial Motions

On January 12, 1995, which was seven months after Cowan filed her complaints with the district court, the defendants filed a motion for summary judgment on Counts I, II, and III. Judge Russell G. Clark, Senior Judge of the United States District Court, dealt with that motion in an Order dated June 14, 1995. Judge Clark set forth the pertinent standards for ruling on a motion for summary judgment as follows:

1. Summary judgment is appropriate where there are is “no genuine issue of material fact.”¹¹ Summary judgment is appropriate where the issues for resolution are legal, not factual. Thus, a judge grants the summary judgment as a matter of law.

2. Summary judgment is granted only where there is “such clarity that there is no room for controversy.”¹²
3. Summary judgment is appropriate when the nonmoving party has not made a sufficient showing on every element of its case on which it bears the burden of proof.”¹³
4. The motion for summary judgment is “viewed in the light most favorable to the opposing party.”¹⁴

It is with these four standards in mind that Judge Clark had to determine whether to grant a motion of summary judgment. Appeals on decisions about summary judgment are possible but must be made in a proper and timely manner.

The district court denied the defendants’ motion for summary judgment on Count I, the Title VII claim of employment discrimination based on religion. The defendants had responded to Cowan’s claim by stating that their decision not to renew Cowan’s employment contract was based only on Cowan’s poor performance in the classroom and not in any way based on discrimination.

Judge Clark made two critical points in denying the motion. First, he noted that the key issue for deciding on the motion was whether there existed a genuine dispute about a material fact (Standard # 1 above). The judge ruled that Cowan had indeed shown that there was a material factual dispute as to when the BOE discussed the renewal of her teaching contract. The question was: Did the discussion take place prior to the appearance of the Magic Rock Letter? The BOE claimed that the discussion was prior¹⁵; Cowan disagreed. The date of the discussion was critical to the BOE’s case, as the BOE, Cowan, and the judge all agreed. If Cowan was correct about the date, she would be able to argue that the Magic Rock Letter precipitated the job targets, the recommendations for nonrenewal, and the negative vote by the BOE. Because of the dispute on the date, Cowan survived the defendants’ motion. She could and would proceed to trial.

Second, recognizing that Cowan would need to present her case to a jury, Judge Clark also commented on the issue of whether a mixed-motive legal analysis applied to the case. The mixed-motive analysis stems from the Supreme Court’s decision in Price Waterhouse v. Hopkins.¹⁶ If a mixed-motive analysis were applied, first Cowan would have to establish that religion was a motivating factor in the decision not to renew her teaching contract. Then the BOE would have the burden of persuasion to show that it would not have renewed Cowan’s contract in any case. The judge decided to postpone his decision about the applicability of the mixed-motive analysis. Judge Clark said that even if the mixed-motive analysis did not apply and “the traditional analysis for employment discrimination is applied,.... a genuine issue of fact remains as to whether the reason [for nonrenewal] articulated by the District is pretextual.”¹⁷ By making these points in his decision to deny summary judgment, the judge not only permitted the trial to proceed but also suggested the paths the trial could take. With either a mixed motive or a pretextual analysis applying to her, Cowan could argue before a jury that religious discrimination occurred.

In regard to Count II, the claim that defendants violated the religion clauses of the First Amendment, the defendants argued that the BOE had not established

any religious test for its teachers to meet. Nor did it, it argued, restrict its teachers' rights to believe and practice their religious faiths. Rather, the BOE was only directing its teachers to avoid references to magic or fantasy in such a way that could be "misconstrued by the public" as promoting the unconstitutional teaching of religion.¹⁸

The district court distinguished the facts in Torcaso, cited by Cowan in this matter, from those in the instant case. The court found that whereas there was an explicit test established in Maryland's Constitution in the form of an oath by a public appointee affirming a belief in God, there was no such test established by the Strafford BOE for its employees. Rather, the BOE had only cautioned its teachers to "avoid" misleading uses of magic or fantasy that might be "construed as an affirmative promotion of religion."¹⁹ Based on that finding, the district court granted summary judgment to the defendants on the claim of violation of the two religion clauses of the First Amendment. Cowan did not appeal this decision of the court. Therefore, Cowan's First Amendment religion claim dropped out of the case.

Judge Clark denied the motion for summary judgment on Count III, Cowan's First Amendment Free Speech claim. In setting the stage for dealing with this claim, the judge noted that pursuant to the precedent established by the Supreme Court in Mount Healthy City School District of Education v. Doyle²⁰ Cowan had the initial two-part burden in this suit. First, she had to establish that her speech in the letter was constitutionally protected. Second, she had to show that her speech was a substantial or motivating factor in the BOE's decision not to renew her contract. If she was able to meet her burden, then the defendants had the burden to show that Cowan would not have been rehired even if the protected speech had not been made.

The defendants argued that Cowan's speech was not protected speech because it was not about a matter of public concern, as determined by the precedent set in Pickering v. Board of Education.²¹ They argued that it was private speech. They also argued that Cowan's letter was not a factor in Superintendent Tice's recommendation to the BOE or in the BOE's decision not to renew Cowan's contract. The BOE argued that the BOE relied solely on its evaluation of Cowan's poor teaching performance.

Cowan argued that her speech did not fall neatly into either type of speech category, public concern or private, as defined in court decisions. For Cowan, her speech was not a matter of public concern as was the speech about the Vietnam War in Tinker v. Des Moines.²² Nor was her speech like the speech about private grievances in Connick v. Myers.²³ Rather, she argued, her speech was protected because it was classroom speech. That is, as Cowan later wrote, her letter to her students was written by her as their teacher and in the course of—indeed, as the year-end culmination of—the instructional program for which Cowan was responsible.²⁴

Judge Clark ruled that Cowan's speech was protected speech because it was valid classroom speech. For him classroom speech was not only protected but important to every teacher. To show the importance of academic freedom of speech and to connect it to the First Amendment, Judge Clark quoted from Ward v. Hickey,²⁵ a case dealing with the speech of a 9th grade biology teacher about the

abortion of Down's Syndrome fetuses. Ward itself relied on and quoted from Keyishian v. Board of Regents,²⁶ a case dealing with the freedom of speech of university professors. Judge Clark said:

“Few subjects lack controversy. If teachers must fear retaliation for every utterance, they will fear teaching.... ‘The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.’”²⁷

Judge Clark went on to rely further on Ward and to state in his own words that if a school district can reasonably believe that a teacher has been informed about what speech is proscribed, then a teacher's speech is unprotected. “Otherwise, classroom speech related to classroom activity or curriculum made by a teacher is protected speech.”²⁸ In short, a BOE cannot retaliate for speech that is has not prohibited.

The judge further stated that the Magic Rock Letter, “without argument” was intended to “motivate” Cowan's students and instill in them self-confidence,” goals which are “properly included in classroom instruction.”²⁹ Furthermore, Judge Clark, after examining the evidence, found that Cowan could not have known ahead of time that references to magic were proscribed. For these reasons the judge ruled that Cowan had met her first burden of showing that her speech was protected.

However, according to Judge Clark, Cowan did not have to meet the second part of her burden at the time of his consideration of the defendants' motion for summary judgment. That is to say, Cowan did not have the burden then to prove that her protected speech was a motivating factor in the nonrenewal of her teaching contract. This was so because Judge Clark agreed with Cowan's contention that a genuine issue of material fact remained about the Magic Rock Letter being a motivating factor in the nonrenewal of Cowan's teaching contract, as in the Title VII claim. In light of that matter and others known to him, the judge denied the defendants' summary judgment motion, thereby allowing the claim that the defendants violated Cowan's right to First Amendment freedom of speech to proceed to a jury trial.

B. Jury Trial

The jury trial began on August 19, 1996 and lasted five days. The jury dealt only with Counts I and III. Judge Clark, in recognition of the claim of religious discrimination under the above Title VII provision, allowed Cowan to proceed under a mixed-motive analysis, as set forth in Price Waterhouse. First, Cowan had the burden to prove that religion “played a motivating part in an employment decision.”³⁰ Second, the BOE could “avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the [unlawful criterion of religion] into account.”³¹

Cowan presented to the jury her case on the two remaining claims, the Title VII employment discrimination based on religion claim (Count I) and the First Amendment free speech claim (Count III). After Cowan finished her presentation of witnesses and exhibits, the defendants moved for judgment in their favor as a

matter of law. Judge Clark denied their motion. After the defendants finished their own case, they moved again for judgment as a matter of law. Again the judge denied the motion.

Judge Clark then submitted the case to the jury. The judge charged the jury to deliberate on the two claims before it. The judge gave a mixed-motive Price Waterhouse instruction, charging the jury, in part, to find in favor of Cowan if it believed:

- (1). “That the religious concerns, beliefs, perceptions, or sensibilities of some members of the community regarding the Magic Rock Letter distributed by plaintiff to her students was a substantial or motivating factor in the recommendation and eventual vote for nonrenewal of plaintiff’s teaching contract”³² and
- (2) that the BOE would not have decided as it did without the Magic Rock Letter.

In another, related instruction to the jury the judge stated that Cowan, in order to prove her case need not “show that the religious concerns, beliefs, and sensibilities of some members of the community” constituted the “sole motivation or even the primary motivation” of the nonrenewal of Cowan’s teaching contract.³³

The jury found in favor of Cowan on both of the claims before it, awarding \$18,000 (equivalent to one year’s lost earnings) in damages on the Title VII religious discrimination claim but not awarding any damages on the Free Speech claim.

C. Defendant’s Post-trial Motions

Two weeks after the jury verdict against it, the defendant BOE on September 10, 1996, filed two motions in the District Court. The first motion was for judgment notwithstanding the verdict (that is, judgment as a matter of law). On October 21, Judge Clark denied that motion for judgment as a matter of law. He based his decision on Rule 50(a)(1) of the Rules of Civil Procedure. In pertinent part, the rule states:

“If during a trial a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law....”

Regarding that motion for judgment notwithstanding the jury’s verdict, Judge Clark relied on and quoted from an Eighth Circuit case. He said that a judge may grant such a motion “only when all of the evidence points one way and is ‘susceptible of no reasonable influences sustaining the position of the non-moving party.’”³⁴

Judge Clark reasoned, in the negative, that he could not say that religious concerns or beliefs were not a motivating factor in the recommendation by Cogdill and Tice or in the nonrenewal of the contract by the BOE itself. For the judge, Cogdill was a person involved in the decision-making process. After a review of the facts connecting Cogdill’s actions to the Magic Rock Letter, the judge concluded, “The jury could easily have deduced and apparently did that due to Principal Cogdill’s concern regarding the letter, this had an effect on Cogdill’s recommendation to the Strafford School Board not to renew plaintiff’s contract.”³⁵ The

judge added that “the evidence and testimony presented at trial is sufficient to support the jury’s verdict.”³⁶ Therefore, Judge Clark denied the BOE’s motion. The district court also denied the defendant’s other motion for a new trial. The court quoted an Eighth Circuit decision, stating that a new trial may be granted “when the first trial, through a verdict against the weight of the evidence, an excessive damage award, or legal errors at trial, resulted in a miscarriage of justice.”³⁷ The judge disagreed with the BOE’s claim that sustaining the jury’s verdict in this case “would result in a ‘miscarriage of justice.’”³⁸ The court strengthened its position by adding, “In short, the court believes that defendant received a fair trial, the jury did not wholly believe its story, and no miscarriage of justice will occur if the verdict is allowed to stand and a new trial is not allowed.”³⁹

D. Plaintiff’s Post-Trial Motion

The district court on December 12, 1996 also dealt with Cowan’s motion for injunctive relief wherein Cowan requested reinstatement to her former position as an elementary school teacher in the Strafford School District. Cowan had filed the motion on September 9, which was two weeks after the jury’s verdict in her favor. Judge Clark had postponed his decision until after a hearing could be held. He held that hearing on December 9 at which time both parties to the case presented testimony and argument.

Cowan filed the motion for reinstatement to her position as a teacher in the Strafford School District based on the general rule that reinstatement is the preferred remedy when unlawful employment termination occurs. This rule has its support in *Albemarle Paper Co. v. Moody*,⁴⁰ a Supreme Court case from North Carolina dealing with the purpose of Title VII. The Supreme Court stated that the objective of Title VII was not only “to achieve equality of employment opportunities and remove barriers” but also “to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers.”⁴¹

The Supreme Court went on the quote form an accompanying analysis of Congress’s Conference Committee Report on the Equal Employment Opportunity Act of 1972 which “strongly affirmed the ‘make whole’ purpose of Title VII.”⁴² The Act of 1972 “requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.”⁴³

Judge Clark recognized that the Supreme Court and the Eighth Circuit appellate court had given direction to trial courts on the matter of relief to plaintiffs suffering Title VII discrimination. In *Albemarle* the Court pointed out that it was “clear” that

“Congress’ purpose in vesting a variety of ‘discretionary’ power in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but rather to make possible the ‘fashion[ing] [of] the most complete relief possible.’”⁴⁴

The Supreme Court went on to say that a court dealing with a finding of unlawful Title VII discrimination should deny relief, including reinstatement

“only for reasons which, if applied generally, would frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.”⁴⁵

Judge Clark accepted the Supreme Court’s and the Eighth Circuit’s preference for reinstatement but quickly added that “in extraordinary circumstances” reinstatement may not be the appropriate remedy for a Title VII favorable verdict.⁴⁶ The judge then went on to assert that evidence of “hostility” and “acrimony” existed such that it constituted “sufficient extraordinary circumstances to deny reinstatement to Cowan.” The judge specified the hostility and acrimony between principal Cogdill and Cowan; the hostility between Superintendent Tice and Cowan (Tice had testified that Cowan “was a liar” and “would be a disruptive factor” if reinstated); the “untenable” options of having an outside evaluator and supervisor for Cowan in the small school district, and the negative reaction of some parents to Cowan’s teaching performance.⁴⁷ The judge also commented that in light of the undisputed evidence about the negative performance of Cowan’s students in comparison with the other second grade classes, it would be in the best interests of the children not to reinstate Cowan.⁴⁸

After denying Cowan reinstatement, Judge Clark utilized another equitable option. In deciding an equitable remedy for discrimination the court can use its discretion to award front pay to the aggrieved person. The judge noted that the challenge in awarding front pay is determining the appropriate amount of money due a person. “The court must avoid giving the plaintiff a windfall but simultaneously must attempt to make plaintiff whole.”⁴⁹ Using his discretion and “equitable power,” the judge awarded the “fair and just” amount of two years of front pay, which came to \$36,000 based on Cowan’s salary of \$18,000 per year. (This sum was in addition to the \$18,000 awarded by the jury.)

VI. THE EIGHTH CIRCUIT APPELLATE DECISION

Both Cowan and the School District appealed to the Eighth Circuit Court of Appeals in St. Louis in November 1997. Cowan challenged the district court’s denial of reinstatement while the BOE appealed decisions denying summary judgment, judgment as a matter of law, a new trial, relief from judgment, and reconsideration of a motion for a new trial. The appellate decision dealt with the seven points of district court error claimed by the defendant BOE and the one point claimed by the plaintiff Cowan. On all combined eight points claimed for appeal by the BOE and Cowan the appellate court affirmed Judge Clark’s decisions at the district court level. On May 12, 1998, the Eighth Circuit denied the BOE’s request for rehearing and a request for a rehearing en banc. Following the decision by the Appellate Court, Cowan reached a settlement with the School District regarding attorney fees due her because she was the prevailing party on her claim of religious discrimination. In return for not pursuing the case further Cowan received money to pay her lawyer’s fees in addition to the \$54,000 (\$18,000 back pay and \$36,000 front pay) awarded to her by the jury and the district court judge.⁵⁰

VII. COMMENTARY

A. Introduction

The issues and specific questions raised by this Magic Rock Letter case are of eight types. The eight types are: (1) substantive law (e.g., what are a teacher's First Amendment free Speech rights?); (2) civil procedure law (e.g., will an appellate court review a denial of a motion for summary judgment after a full trial on the merits of the case has taken place?); (3) lawyering issues (e.g., how should a lawyer question a witness or discover evidence?); (4) pedagogy (e.g., on which aspects of her job should a teacher focus on to improve her evaluations?); (5) educational administration/supervision (e.g., how should a school principal observe a teacher and write up supervisory documents?); (6) organizational procedures (e.g., how should an organization, such as a board of education, conduct public meetings and prepare minutes of its meetings?); (7) social-political matters (e.g., to what extent should a community's religious views influence its schools' practices?); and (8) reinstatement (e.g., under what criteria should a teacher be reinstated to her former position upon a favorable verdict of employment discrimination?).

While it is possible to separate out the eight types of issue analytically, it is crucial to recognize that in a court case issues are intertwined. Thus, as Cowan progressed after the filing of four substantive legal claims, civil procedure rules and related issues arose concerning those substantive claims. The need to appreciate and understand the intertwining issues in Cowan was the motivation for presenting an expanded set of event facts earlier. The facts serve as the basis for understanding the ultimate decisions on the substantive claims and their related civil procedure issues in Cowan's long quest for reinstatement as a teacher in the Strafford School District. In this section we shall comment on some of the intertwined issues that appear in Cowan.

B. Substantive Issues: Religious Discrimination & Free Speech

1. Religious Discrimination

No doubt exists that the center of Cowan's case was the Magic Rock Letter and that Title VII religious discrimination (Count I) was the focus of legal attention as shown in the judges' decisions, the lawyers' briefs, and public's attention to the case. The controversial attention to the Title VII claim far exceeded the attention given to Count III, the constitutional freedom of speech claim. Except for one sentence in the appellate decision, a reader of the Eighth Circuit's opinion would not even know that Cowan had a favorable verdict on a First Amendment claim. Moreover, that one sentence does not indicate to the reader what the specific legal issue for that claim was or even on what aspect of the First Amendment Cowan won.

The focus on the Title VII claim was deserved because of at least five factors in the case: (1) the Title VII claim stemmed from a then-recent 1991

amendment to the Civil Rights Act of 1964, which altered the conceptual underpinning (proof scheme) for arguing an employment discrimination claim; (2) the focus on an attempt by a teacher to use a common element in children's literature, magic, to motivate her students to achieve improved self-esteem; (3) the involvement in the community in regard to religious comments about the use of magical ideas in teaching; (4) the strong hostility and acrimony that developed between the plaintiff teacher and the defendant BOE, as represented by the school principal and the district superintendent, and (5) the post-trial consequences for the teacher even though she won a favorable verdict on the two counts heard by the jury. The combination of just these five factors led to a strong reaction by virtually everyone connected with the case.

The Title VII amendment in the Civil Rights Act of 1991 was Congress's reaction to the 1989 Price Waterhouse decision by the U.S. Supreme Court. In that case, the Court, with only a plurality, decided that based on its interpretation of the Civil Rights Act of 1964 a new proof scheme was in order in discrimination cases where the employer had both legal and illegal motives for its actions. Justice Brennan delivered the opinion of the Court and was joined by Justices Marshall, Blackmun, and Stevens:

"We hold that when a plaintiff in a Title VII case proves that her gender [that is, the illegal motive] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account."⁵¹

With the above concluding statement the court acknowledged that employment decisions can be based on more than one criterion at the same time. As such, when there exists a mixed motive, the plaintiff has the burden to prove that the illegal criterion was a motivating factor in the adverse decision. Then the employer has the burden to prove by the preponderance of the evidence that it would have made the same decision at that time if it had not used the illegal motive at all.⁵²

In addition, according to the Supreme Court, the employer may not prevail even if it submits "a legitimate and sufficient reason for its decision if that decision did not motivate it at the time of the decision."⁵³ This statement about timing of a motivating reason is pertinent to the BOE's situation in this case. This statement means that the BOE could not have used the data about Cowan's students' performance on the standardized tests as support for its defense in court, which was that Cowan's performance was the sole criterion for not renewing Cowan. This is so because the data were not available when the BOE made its decision in March of 1993. The data became available only several months later, in May or June.

In following the Supreme Court's direction that with a mixed-motive there is a shifting burden of proof from the plaintiff to the employer, the Eighth Circuit in decisions prior to Cowan's case had settled on what type of evidence it requires of a plaintiff. It did so in response to points raised by both Justice Brennan in his decision for the plurality in Price Waterhouse and by Justice O'Connor in her lengthy concurring discussion on what is appropriate evidence.⁵⁴ First, the Eighth Circuit had held in Stacks v. Southwestern Bell Yellow Pages that there is:

"no restriction on the type of evidence a plaintiff may produce to demon-

strate that an illegitimate criterion was a motivating factor in the challenged employment decision. The plaintiff need only present evidence, be it direct or circumstantial, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the challenged decision.”⁵⁵

Second, the Eighth Circuit in Radabaugh v. Zip Feed Mills had also held in another case that:

“the plaintiff must present ‘evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude...sufficient to permit the factfinder to infer that that attitude was more likely than not a motivating factor in the employer’s decision.’”⁵⁶

The Cowan appellate court rightly utilized these prior decisions as guides for its examination of the record before it. Pursuant to Stacks, it used all the evidence adduced at the Magic Rock Letter trial without differentiating between direct evidence and circumstantial evidence. It simply examined whether there was sufficient evidence for the jury below to conclude that religion was a motivating factor, and it concluded that there was. Pursuant to the criterion from Radabaugh, the court examined whether there was sufficient evidence for the jury to conclude that persons involved in the decision making process were motivated by religion, and it concluded that there were such persons. It concluded not only that Cogdill could be “clearly” considered as part of the decision-making process but also that the jury could reasonably find that her animus toward Cowan “infected” that process.⁵⁷ The court did not pursue the traditional issue of whether the plaintiff presented a prima facie case of discrimination, as directed by the seminal Title VII case of McDonnell Douglas Corp v. Green.⁵⁸ It dodged the prima facie issue even though the BOE urged the court in its brief to recognize that Cowan did not present a prima facie Title VII employment discrimination case. The court merely noted that the BOE had not properly raised the prima facie issue in the district court below; therefore, that issue was not “properly” before it.⁵⁹

It is arguable that the court could have raised the prima facie issue on its own had it determined that the issue was a critical one in Cowan.⁶⁰ By not addressing the prima facie issue fully, the court was able to avoid another, crucial issue that surfaced in the district court but was not contested by the BOE.⁶¹ That issue centered on the type of claim permissible in the eighth circuit under the prohibition against religious discrimination. Prior cases in the circuit had dealt with traditional discrimination claims wherein the plaintiffs claimed that they suffered because of their religious beliefs (for example, in Agarwal v. Regents of University of Minnesota,⁶² a professor claimed that his discharge resulted from racial and religious discrimination against his religious beliefs).

In the instant case Cowan claimed that the discrimination against her resulted because she offended the religious sensibilities of some members of the community and because the defendants created a religiously intimidating environment. Because Cowan had no in-circuit precedent, she relied on a case from the Sixth Circuit for her different approach to religion as a motivating factor in an employment decision. Cowan claimed that the defendants, the BOE together with

Superintendent Tice, based their actions “upon religious considerations to protect the religious sensibilities of certain persons in the school and community....” Further, “the defendants’ conduct...created an intimidating work environment influenced by certain religious elements in the school and community....”⁶³

Relying on Turic v. Holland Hospitality, Inc.,⁶⁴ Cowan introduced two concepts, religious sensibilities and a religiously intimidating work environment, in her filed complaint and in her opposition to the defendants’ motion for summary judgment. These concepts are explicitly evident in one of the jury instructions used by Judge Clark and quoted earlier. Similarly, in Turic, plaintiff Kimberly Turic, a former busser at the defendant’s Holiday Inn in Holland, Michigan, did not allege that her consideration of an abortion was propelled by her own religious beliefs nor that her employer’s order not to discuss abortion at work was in conflict with her own religious beliefs. (That is, she did not claim “the classic religious ‘accommodation’ violation.”⁶⁵) Rather, she alleged that “she was fired to protect the religious sensibilities of the rest of the staff and that “their religion was impermissibly forced upon her.”⁶⁶

The Turic trial court, citing the Sixth Circuit appellate court’s prior cases, permitted Turic to proceed with her claim because the “Sixth Circuit has permitted such ‘employment atmosphere’ claims of religious discrimination....”⁶⁷ The court noted that religious harassment, like sexual harassment, can be of two types, quid pro quo or hostile environment. Having decided that Turic’s claim based on religious sensibilities and a religiously intimidating atmosphere constituted a bona fide claim of religious discrimination under Title VII, the trial judge denied the defendant’s motion for summary judgment on that claim. A bench trial was held, and Turic won a favorable verdict on her Title VII claim that the employer acted in response to the opposition to an abortion by Turic’s co-workers. The defendant appealed, but the Sixth Circuit Appellate Court affirmed the trial judge’s decision regarding liability under Title VII.

The Eighth Circuit, on the other hand, did not accept the opportunity provided to it by *Cowan* to deal with a religious sensibilities or employment atmosphere claim of religious discrimination. The appellate court refused to hear the BOE’s argument about a lack of a prima facie case on what the Strafford BOE labeled as a “novel and anomalous theory of religious discrimination.”⁶⁸ The Eighth Circuit noted simply that it had previously neither considered nor adopted this type of claim of religious discrimination. Without a record to examine, because the BOE did not contest the claim properly at the trial, the appellate court justifiably would not consider this religious sensibilities claim for the first time on its own. The court was wise to take that stand on an issue of first impression in its circuit. Cowan was fortunate that the court decided, in affirming the lower court’s decision, that in any case there was sufficient evidence for a reasonable jury to conclude as it did.

Even without support from the Eighth Circuit, the Sixth Circuit’s decision to permit a religious sensibilities claim of violation of Title VII is sensible and consistent with other permitted types of violation, especially regarding sex. Under the factor of sex in the Title VII statute two types of claim are acceptable nationwide, hostile environment⁶⁹ and quid pro quo.⁷⁰ The hostile environment regarding sex

may well be considered as the analog for the intimidating religious environment concept used by Turic and Cowan. Similarly, regarding the factor of race, the original legislative intention was most likely to protect minorities from racial discrimination. Nevertheless, recent court cases have dealt with reverse discrimination wherein majority whites have brought claims of racial discrimination.⁷¹ It can be argued that reverse discrimination, as it is often called, is similar to Cowan's and Turic's type of religious discrimination claim. For Turic and Cowan, in effect, there was reverse religious discrimination wherein the key was not the plaintiffs' beliefs but the religious beliefs of the defendants.

Because the religious sensibilities claim was relatively new, there no doubt was a lack of experience in determining just what constituted a prima facie case for the plaintiff so as to prove that religion was a motivating factor in discrimination. Indeed, the Eighth Court did not conclude that Cowan had not presented a prima facie claim. It said only that it questioned whether Cowan had pled a prima facie case.⁷² Then the court held that Cowan had presented to the jury sufficient evidence. That, it appears, is precisely the essence of a definition of a prima facie case for proving that a prohibited motivating factor was used in an employment decision. This concept of sufficient evidence is what Judge Clark initially employed in the trial court when he decided to charge the jury under a mixed-motive analysis. Both the trial court and the appellate court were correct concerning religious discrimination.

Cowan was also correct regarding the religious discrimination claim. The strategy used by Cowan was to accept Judge Clark's ruling against her on Count II (based on the First Amendment religion clauses), to not appeal it, and to rely only on the discrimination claim to bring in the factor of religion. With this strategy Cowan actually strengthened her case before the jury. This occurred because Cowan was able to focus the jury's attention on the statutory law which portrayed her as a victim of community and board of education discrimination rather than on the weighty constitutional matters of her personal religious beliefs.

Not only was Cowan's focus clearer but the odds of her winning in court improved in light of the decisions in favor of local boards of education in recent cases involving the First Amendment religion clauses.⁷³ Cowan was able to present herself not only as a victim of discrimination but also as an advocate of students for whom she exercised her right of free speech to develop their self-esteem. Thus, Cowan wore a white hat, and the BOE wore a black hat. She was courageously correct to accept defeat on Count II before she reached the jury. Her loss on the summary judgment motion created a clean path to victory. In this way she outwitted the BOE and outmaneuvered it.

2. Free Speech

The Eighth Circuit did not comment on Cowan's favorable First Amendment verdict other than to note that no damages were awarded to her. As noted earlier, the appellate court did not even state on which First Amendment aspect (free speech, free press, establishment of religion, free exercise of religion, or free assembly) Cowan based her successful claim. From the appellate decision it is

simply not possible to know what constitutional issue the parties argued in the district court.

The appellate court did not discuss the First Amendment free speech claim because the BOE's efforts in its appellate brief regarding the First Amendment claim were contained within the context of a point about summary judgment. The Eighth Circuit simply decided that the denials of the BOE motion for summary judgment were not properly before the court. Therefore, that decision precluded any substantive discussion of Cowan's First Amendment claim wherein it would identify the issue at stake.

Nevertheless, the threshold issue of Cowan's free speech claim was significant legally and educationally. That issue was whether Cowan's speech, as contained in the Magic Rock Letter, was protected by the constitution. Generally, to be protected, speech by a public employee must be of public concern,⁷⁴ which the Supreme Court characterized in Connick v. Myers as speech "relating to any matter of political, social, or other concern to the community."⁷⁵ In contrast, if a public employee's speech concerns personal grievances, complaints about conditions of employment, or expressions about other "matters only of personal interest," then that speech is not constitutionally protected.⁷⁶ However, as Cowan contended, the dichotomy between public and private speech was set forth in Connick to apply to an assistant district attorney in New Orleans who opposed her transfer within her office and complained strongly about staff morale. Cowan rightly argued that the Connick dichotomy did not apply well at all to public school teachers. Much of what teachers say to their students does not fit neatly into either of the two Connick categories of speech in that teachers of necessity deal with knowledge, skills, personal values, and community values as they seek to educate their students. Cowan argued that the Magic Rock Letter was a good example of teacher speech that was neither purely public nor purely private. True, the letter was not about a broad political or social matter. On the other hand, it was not about a private grievance or other matter of personal interest. The letter stemmed from Cowan's classroom endeavor to motivate students to improve their self-esteem, a value encouraged by everyone concerned with the education of young students. To his credit Judge Clark recognized that although Cowan sent the letter at the end of the school year, the letter was part and parcel of Cowan's classroom effort to educate her students. He said astutely, "While motivating students and instilling in them self-confidence may not be part of the formal curriculum [that is, the knowledge and skills prescribed and tested by the BOE], it is apparent that those issues are properly included in classroom instruction."⁷⁷ With this statement the judge determined that the Magic Rock Letter met two necessary characteristics of teacher protected speech, namely, the speech was classroom speech and that it was valid and proper speech, as distinguished from inappropriate or obscene speech.⁷⁸

The shift away from the Connick dichotomy to a focus on teacher classroom speech led via Ward to the Supreme Court's decisions on academic freedom as a special concern of the First Amendment. This shift permitted the court to acknowledge that every board of education is entitled to have some control over classroom speech if the limitations are "reasonably related to legitimate pedagogical concerns."⁷⁹ Such limitation of classroom speech depends on, among other

things, the age of the students, the relationship between teaching method and the school's educational objectives, and the context of the speech, of course. However, when limiting classroom speech, the school must give the teacher prior notice of what is prohibited.⁸⁰ In short, Cowan's First Amendment claim came down to the issues of legitimate pedagogical concerns and due process.

Judge Clark applied these two standards to Cowan's Magic Rock Letter. He determined that Cowan had not received prior notice that the school prohibited speech about magic. He said, "...the District could not reasonably expect Cowan to know that references to magic were prohibited."⁸¹ With this decision Cowan's Magic Rock Letter now had its third necessary characteristic for becoming protected. That is, in addition to being (1) classroom speech that was (2) valid and proper Cowan's speech about magic (3) had not been prohibited by the BOE. The Magic Rock Letter was now constitutionally protected speech as a limit upon the BOE's legitimate control of teacher speech. As such, Cowan was protected under the tradition of academic freedom.

In court the decision as to what constitutes protected speech is a matter of law, not a matter of fact. For this reason it was Judge Clark, not the jury, who correctly decided that the Magic Rock Letter was proper classroom speech and that Cowan did not have prior notice not to write a letter about magic. It was the judge who correctly applied the Connick standard of examining "the content, the form, and the context of a given statement, as revealed by the whole record."⁸² On the other hand, it was the jury who correctly dealt with the issue of whether the Magic Rock Letter was a motivating factor in the BOE's negative employment decision. It was the jury who determined that the letter did motivate the BOE's decision and that absent the letter the BOE would not have decided as it did. Thus, although the BOE argued that "there was not even a scintilla of evidence to support Cowan's Title VII or First Amendment claims,"⁸³ it was the jury who decided that there was more than a scintilla of evidence present and the preponderance of that evidence favored Cowan.

The reasoning and decisions of the district court and the two verdicts of the jury regarding Title VII and the First Amendment, as sustained by the appellate court, were justified and significant. Both the judge and the jury maintained the profound principle proclaimed by Supreme Court Justice Fortas that neither "students or teacher shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁸⁴ They recognized that a teacher's effort to motivate self-esteem in second-graders is at the heart of classroom teaching and is a valid pedagogical goal.

Furthermore, they supported the fundamental democratic principle of due process through prior notice, especially for a teacher who, following a prescribed book in the curriculum featuring a magic stone, wrote a well-intentioned letter using the device of magic. (The book is Sylvester and the Magic Pebble by William Steig, published in 1969. The book won the Caldecott Medal, the most prestigious award in children's literature, in 1970.) They supported Cowan's basic trial assumption, manifested in her demand for a jury trial, that a jury of her peers would find in her favor because her position was one of victim of vindictive discrimination and lack of support from her superiors who feared alienating the conservative

religious segment of their community. Thus, Cowan won both her substantive battles.

C. Pedagogy

Teachers constantly make decisions about what they will teach, how they will teach, and how they will meet the needs of their students. Cowan and related cases indicate that teachers do not have the pedagogical freedom that they prefer or have been led to believe they have. Public school K-12 teachers too often assume that they have the same academic freedom as university professors who teach adults. With this false assumption some public school teachers do not even begin to question their own actions, not considering seriously enough such daily actions such as the films/videos they show, the supplemental books they use or the homework topic they assign. Such actions might well lead to a reprimand or the subsequent loss of employment.

Cowan did not consider that her use of magic might raise a controversy because the book, Sylvester and the Magic Pebble, and its teacher's guide that inspired her to write the Magic Rock Letter were on the approved curriculum book list. The teacher's guide offers the following two items under the heading "Creative Writing Activities":

Mr. Duncan [the father of Sylvester the donkey] put the magic pebble in an iron safe for safe keeping. Place a "magic pebble" in a small, metal safe or lock box with a key. Place the safe at a writing center. Instruct the students to open the safe, take out the pebble make a wish and complete this story-starter: This was my lucky day. I wished for...

Make a collection of good luck charms; a rabbit's foot, a four-leaf clover, a lucky horseshoe, a lucky number a new penny, a mustard seed, and a quartz crystal are but a few. Have each child choose a lucky charm and write a paragraph explaining how it will bring good luck.

Under the heading "Critical Thinking Questions" the teacher's guide offers this question: "If you had a magic pebble, what would you wish for?" With such guidance based on a book on the approved curriculum list it is not surprising at all that Cowan engaged her students in an activity involving magic. Cowan did not and could not imagine that her use of magical thinking would be prohibited by her principal or her board of education.

Nevertheless, teachers must realize that pedagogical decision making is most complex and that they need to keep their eyes on community values as well as local school policy. They need to stay in close contact with their colleagues, always seeking advice as to what are the keys to professional success while they maintain local employment. What is acceptable elsewhere may not be acceptable locally. For example, the 1998 Massachusetts Teacher of the Year won praise for using a magic rock activity similar to the one that led to Cowan's nonrenewal in Missouri.⁸⁵

Finally, it is necessary to state explicitly that the key to every teacher's success involves (1) student achievement in regard to cognitive learning (for example, mathematics and language arts) as measured by teacher and/or standardized tests; (2) the learning of psychomotor and social skills (for example, reading and interpersonal development); (3) the learning and practice of positive common

values (for example, honesty, cooperation, and nonviolent relationships); and (4) teacher maintenance of acceptable classroom discipline and decorum. It is on these items together that teachers should focus if they wish to keep their jobs. An over emphasis on any one item may lead a teacher into trouble. Indeed, the BOE claimed that Cowan had poor performance in that her students did not achieve scores as high as the students in the other two second-grade classes on the state's standardized tests.

D. Administrative Supervision

Administrators must not lose sight of the principle of sound supervision as they get caught up in thousands of administrative details that face them regularly. Sound supervision draws on philosophical (especially moral) and psychological theories of human behavior and human needs as well as research data on human development.⁸⁶ Specifically, the literature on sound supervision offers principles and guidelines for humane action and advocates such concepts as the establishment of a trusting relationship, cooperative activity between administrator and employee, flexibility of procedures, continuity of effort, administrative and peer support, public and comprehensible criteria, respect for privacy, openness, increased individual choice, and personal responsibility for self and professional growth.

Administrators must guide their teachers firmly, clearly, and explicitly to excellent performance while giving them support. Administrators must observe their teachers regularly and confer with them about their strengths and weaknesses in content areas, skills, and values. They must offer teacher specific guidelines and timelines so that teachers can develop appropriately. They need to document in their formative and summative reports their observations and the essentials of their conferences. The writing of clear and explicit documents is the sine qua non of teacher evaluation by administrators.

Administrators must be able to demonstrate that their recommendations to teachers are based upon performance evidence. They need to remember to keep their word if they wish to maintain trust and credibility. It bears repeating that the jury in Cowan simply did not credit Principal Cogdill's testimony over Cowan's when it was revealed that Cogdill failed to do as she had promised: "I assured her that I would be positive and that I feel that my job is to keep her informed of any problems.... I told her that I would help her this year..."⁸⁷ Supervisors who do not provide ample documentation of their recommendations to their teachers for improvement and of their own efforts to effect that improvement have little if any basis for subsequently recommending to their boards of education a negative employment decision.

One primary lesson from Cowan is the need for consistent curricular decisions and evaluation systems which have the support of teachers, supervisors, and members of the community. Another lesson is the need for trust and support of teachers. Teachers look to their administrators for help in dealing with parental complaints. Teachers and their organizations react strongly when a principal sacrifices a teacher when a parental or community uproar occurs.

E. The Influence of the Religious Community on the Schools

In the year 2000 it should come as no surprise to anyone who has followed American politics that religious conservatives are active politically today. During the

1980s and the 1990s the previously quiet, nonactivist fundamental Protestant Christian groups turned much of their attention to changing public education.⁸⁸ These groups spoke out deliberately and loudly on family values and education. They let their voice be heard in Strafford, Missouri, in the spring of 1992 through the work of the Christian Right. Detwiler defines the Christian Right as a “movement [that is] a loose network of conservative Christian activists guided by certain presuppositions, which center on the nature of reality or truth, the role of the public schools in protecting and advancing that truth, the reasons for the collapse of public education, and the theological justification for using political tactics to achieve a complete transformation of contemporary American culture.”⁸⁹ Diamond more succinctly defines the Christian Right as “a political movement rooted in a rich evangelical subculture, one that offers participants both the means and the motivation to try to take dominion over secular society.”⁹⁰

In a newly found activism based on their view of society from a biblical perspective, the religious right sought not only to change the public school’s curricular approach but to “take back” the public schools. Ralph Reed, executive director of the Christian Coalition founded in 1989 by Pat Robertson the religious television broadcaster, said, “I honestly believe that in my lifetime we will see a country once again governed by Christians...and Christian values. What Christians have got to do is take back this country, one precinct at a time, one neighborhood at a time, and one state at a time.”⁹¹ The keen attention paid to the public schools is consistent with the view of the religious right that the public school system “no longer represents their interests or values.”⁹²

Whether the Christian community at large in Strafford or the First Baptist Church of Strafford in particular considered themselves members of the Christian Coalition or the Christian Right officially is of little consequence. What does matter is that Sara Campbell, her father Frank Stark (former pastor of the Baptist church), and Keith Vawter (current pastor of the Baptist church) all expressed ideas consistent with those of the Christian Right. What is more, the two pastors promoted a seminar in the fall of 1992 concerning the alleged influence of New Ageism on the public schools. The purpose of the seminar, sponsored by the Greene County Baptist Association, was to alert people about the beliefs and practices of New Ageism because they are contrary to those of fundamental Christians.

Gaddy, Hall, and Marzano in their book list 41 practices alleged to have a New Age link, including magic, stress management, transcendental meditation, yoga, zen, biofeedback, holistic health, religious pluralism, and alternative medicine.⁹³ It is to such practices that Campbell, Stark, and Vawter were sensitive when Cowan’s letter appeared in May, 1992. It was about such practices of “Eastern Mysticism in disguise” that Cogdill spoke to her teachers during the opening 1992-93 faculty meeting on August 25, 1992. In her notes for that meeting Cogdill wrote, “I will attend a seminar on the subject and learn more about it so we don’t have any misconceptions about what our school believes.” Cogdill did attend that seminar along with 100 other people.

Judith Mathis of the Christian Awareness Project spoke at that fall seminar and distributed a set of handouts created from several sources and entitled “Eastern Mysticism in Disguise as New Age Education: Capturing Hearts & Minds for

a New World Order.” The title page also bore an excerpted quotation from Deuteronomy 18:10-12, “There shall not be found among you anyone who...useth divination...or a witch...or a consulter of mediums.”

One sheet included in the handout was a copy of the cover page of Report #5 by Citizens for Excellence in Education,⁹⁴ entitled “Occult in the Classroom.” In this special report, the first two paragraphs, in pertinent part, state:

...today, unbelievable as it may seem, the Christian child in public education may easily find himself face to face with teaching about demonology or classroom activities that involve watered-down forms of demonology....

The term “New Age” is used to refer to a time of enlightenment; a time of new consciousness where peace and love will guide our way. But in reality the New Age movement is nothing more than old age occult mysticism wrapped in Western technological terms.

Other sections of the distributed Handbook dealt with the DUSO [Developing Understanding of Self and Others] Curriculum; Secular Humanism/Moral Relativism/Situational Ethics; Global Education and World Religion; Suicide/Death Education/Rock Music; Values Clarifications; Sex Education; Pumsy Curriculum [“an elementary school curriculum designed to build positive self-esteem in children], and Solutions [advice and tips on how parents should “fight back” to eliminate the bad elements in public education]

The list of topics in the seminar’s handbook matches well the list of topics in Gaddy’s book entitled Educational Practices with an Alleged New Age Link. That list contains 31 items, including creative visualization, death education activities, guided fantasies, multicultural international education, values education, whole brain learning, left brain/right brain theory, and thinking skills programs.⁹⁵

It is with this background in mind that some members of the Strafford community reacted to Cowan’s Magic Rock Letter. Given their heightened sensitivity to the alleged decline of public school education as an agency that they believe should support Christian values and not New Age activities, it is easy to understand the threat to them posed by the Magic Rock Letter. The letter contains an explicit mention of magic to effect the personal self-esteem of students. The use of an inanimate object with some kind of supernatural power brought about by the magical rubbing of the rock was contrary to their Christian Right beliefs and practices, as Reverend Stark so testified.

The Magic Rock Letter offers all of the elements of magic practiced in social matters.⁹⁶ Whether the complainers realized it intuitively or realized it through a content analysis, they surely recognized that in its few sentences the letter presented a:

1. Spell (incantation; formula) to indicate the desired result: “I am a special and terrific person, with talents of my own!” The student are directed to say the spell three⁹⁷ times.
2. Rite, which is the action accompanying the spell. The letter directs the students to rub the rock as they say the spell.
3. “Medicine,” which is anything that is supposed to have magical powers. The “medicine” here is the rock given to each student.
4. Proper condition for the performers. Here the proper condition is the

correct and serious emotional attitude created by the students as they close their eyes when they recite the spell and rub the rock.

5. Tradition, which is the social context supporting the magic. A tradition has resulted from the common presence in our society of instances of magic, especially for children in our country. For example, our society supports: a Tooth Fairy; Wishing on a Star (“Star light, star bright, First star I see tonight; I wish I may, I wish I might, Have the wish I wish tonight”); a Lucky Wishbone from the Thanksgiving turkey; a Rabbit’s foot as a lucky charm; Finger crossing; Four-leaf clovers; a Horse-shoe hung open-end up for good luck; a Found penny that brings good luck; the Avoidance of stepping on a sidewalk crack so as not to bring bad luck, Charm Bracelets, and Stories, such as “Jack and the Beanstalk,” “The Wizard of Oz,” “Aladdin and His Lamp,” “Rumpelstiltskin,” and the Harry Potter books of magic and wizardry. In support of the tradition of magic many observers agree with Aveni’s conclusion, “Though our rational side denies it, magic is everywhere. It has always been with us and it always will be.”⁹⁸

The key to understanding the strong negative reaction to magic in general and the Magic Rock Letter in particular is the feeling that the belief in the efficacy of magic undermines the belief in religion. Magic and religion are seen by the Christian Right as being distinctly different from each other. “Magic consists of the direct control by man of the forces of nature, while religion relies upon the propitiation of these and other higher powers.”⁹⁹ Moreover, there is a recognition by the parents and religious leaders that the belief in and the use of magic, as well as any of the other alleged practices of New Ageism, will lead to their loss of control over their children and their congregations. For example, loss of control will result because, in no small part, children will be able to gain self-esteem on their own through the magic of the Magic Rock Letter, or from the DUSO and Pumsy Curriculums (mentioned by Judith Mathis above), or from the creative, thinking programs (listed by Gaddy above).

In short, the religious right community in Strafford, already sensitized to the alleged failure of the public schools and the alleged advances of New Age practices, pounced on the Magic Rock Letter as a concrete instance of the threat to their Christian faith and status. The members of the religious right sought to crush the use of magic because, as the anthropologists have shown, magic gives a sense of power and confidence.¹⁰⁰ Therefore, they sought to stop Cowan’s teaching method as soon as they heard about it. In referring to Cowan in his announcement to his First Baptist congregation about the forthcoming seminar on New Ageism in the public schools, Reverend Vawter said that New Ageism was a “verifiable concern” for the congregation, that “a teacher in our school system [was] teaching New Age to the students,” and that she even “on the last day of school...dressed up as a Gypsy and passed out magic rocks to the students.” (Cowan had dressed up as a Gypsy on Halloween but at no other time.) Cowan had become a serious threat and vulnerable scapegoat for the religious right.

By talking to Cogdill and Tice about their objections to the Magic Rock Letter, by inviting Cogdill to the Christian Right’s seminar opposing New Ageism as

conducted by Judith Mathis, and by speaking about Cowan in a negative way in church, the leaders of the First Baptist Church put pressure on the public schools of Strafford. Cogdill instructed her teachers to refrain from using words like magic or anything that would make people feel that [they] were involved with New Age in the classroom.” However, given the predisposition of the religious right, any use of magic by a teacher could easily be misconstrued to indicate that the school was involved with practices that were anti-Christian. In this way the Christian Right community of Strafford directly influenced the town’s public schools.

Two comments fifteen years ago by Circuit Judge Canby in his concurring opinion in Grove v. Mead School Dist. No. 354¹⁰¹ are appropriate here regarding the position of the Christian Right against the public schools. These comments are appropriate even though they refer specifically to the First Amendment religion clauses. Judge Canby wrote about the “delicate area of church-state relations” which was of special concern to him. In Grove, the mother of a high school student complained about a novel, The Learning Tree, being used in her daughter’s English class. First, Canby said:

It is apparent that so long as plaintiffs deem that which is ‘secular’ in orientation to be anti-religious, they are not dealing in the same linguistic currency as the Supreme Court’s establishment decisions. If the establishment clause is to have any meaning, distinctions must be drawn to recognize not simply ‘religious’ and “anti-religious,” but ‘non-religious’ governmental activity as well.¹⁰²

Second, the judge went on to speak about school material alleged to be “offensive” to members of the community. On this point, Canby said:

...it [the Free Exercise Clause] does not protect the individual from being religiously offended by what the government does.... Plaintiffs are religiously offended by a particular novel; others previously before us have been offended by Trident submarines or the nuclear arms race. Were the free exercise clause violated whenever governmental activity is offensive to or at variance with sincerely held religious precepts, virtually no governmental program would be constitutionally possible.”¹⁰³

Even closer to Cowan are the comments of Circuit Judge Bauer in his majority opinion in Fleischfresser v. Directors of School Dist. 200,¹⁰⁴ which dealt with the use of the Impression Reading Series by some local public schools in Illinois. In referring to included authors in the reading series, such as C. S. Lewis, A. A. Milne, Dr. Seuss, Ray Bradbury, L. Frank Baum, and Maurice Sendak, the judge said that the works of these authors:

“have one important characteristic in common; they all involve fantasy and make-believe to a significant degree. The parents would have us believe that the inclusion of these works in an elementary school curriculum represents the impermissible establishment of pagan religion. We do not agree. After all, what would become of elementary education, public or private, without the works such as these and scores and scores of others that serve to expand the minds of young children and develop their sense of creativity? With that off our chest, we can now properly dispose of the parents’ claim....”¹⁰⁵

Finally, the comment by Supreme Court Justice Jackson in his concurring opinion in McCollum v. Board of Edu.,¹⁰⁶ often quoted by judges in later cases, including Judges Canby and Bauer above, is most appropriate here. Justice Jackson, in referring to wide range of religious groups in our country, said:

“Authorities list 256 separate and substantial religious bodies to exist in the...United States.... If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.¹⁰⁷

Admittedly, some people of the religious right prefer to see the discrediting end of the public schools. Nevertheless, the weakening of the public schools, as shown through complaints about magic and fantasy that have been litigated in Grove, Fleischfresser, and Cowan, is ultimately not at all to the benefit of anyone, including the religious right. Those involved in public education, including Tice, Cogdill, and the Strafford board of education members, need to be vigilant and supportive of the accepted secular curriculum rather than acquiescent to community pressure about the use of magic to effect self-esteem. Magic and fantasy have always existed and will continue to exist in our lives and in the literature used in our public school curriculum. Cowan ought not to have been challenged or made to feel defensive because of her use of the Magic Rock Letter. As she herself said, “I never thought it would offend anybody. I just did it for the self-esteem of the kids. It wasn’t a question I ever asked myself.”¹⁰⁸ Cogdill had recognized this point, too.

VIII. CONCLUSION

The conflict between the parties in Cowan started with a teacher’s end-of-year letter to her students. Cowan thought that the Magic Rock Letter “would be good motivator” to build self-esteem. She had “good intentions.” What resulted was a complex lawsuit. Like every complex case involving religion, and/or free speech, and/or employment discrimination Cowan seizes and holds our attention for several reasons combined. The Magic Rock Letter employed the common age-old technique of magic to appeal to young students who always are fascinated by magic, wizardry, and fantasy. The record-setting sales and readership of this year’s blockbuster series of books featuring Harry Potter and the Hogwarts School of Witchcraft and Wizardry are indicative of the appeal of magic and fantasy to young readers.

The Magic Rock Letter also brings to the fore the need and role of building self-esteem in students as part of the public school curriculum. Each of us recognizes the legitimacy of helping children develop positive self-esteem. Principal Cogdill acknowledged that the building of self-esteem is “very important” and the District Court Judge Clark found that the instilling of self-confidence is an element of education “properly included in classroom instruction.” Nevertheless, Cogdill subsequently advised Cowan to avoid magical ideas and even recommended to the local board of education not to rehire her young probationary teacher who stove to develop self-esteem in her students. For his part the judge subsequently refused to

reinstate Cowan to her teaching position after a jury supported the employment discrimination and free speech claims brought in her lawsuit when she lost her job. Despite a Supreme Court precedent urging reinstatement as the appropriate remedy for an act of civil rights discrimination and despite Cowan's express desire to return to her teaching position.

The Magic Rock Letter evoked opposition and criticism from the leaders of a conservative Protestant church because they claimed that the use of magical rocks was contrary to their religious beliefs. The leaders believed, incorrectly and unfortunately, that investing supernatural power in a rubbed rock in children's fiction indicated the teaching of New Ageism in the Strafford public elementary school. For these leaders and some of their parishioners the use of magic is a practice which threatens and offends their religious sensibilities.¹⁰⁹

As we study Cowan, we recognize that the emphasis on magic, self-esteem, and religious beliefs, separately or even together, does not indicate the underlying issue of this case, which is, I believe, how to maintain the integrity of public education. In this sense Cowan is similar to several other recent lawsuits that involve some combination of the elements of religion, magic/witches/wizardry, and classroom curriculum that have attracted national and/or regional attention, namely:

1. Grove v. Mead School Dist. No. 354, local board of education did not violate the First Amendment religion clauses by refusing to remove a novel, The Learning Tree, from the sophomore English literature curriculum Grove had claimed that the novel embodies the religion of secular humanism.¹¹⁰
2. Mozert v. Hawkins County Bd. of Educ., requiring public school students to study the Holt Reading Series did not create an unconstitutional burden under the Free Exercise of Religion clause.¹¹¹
3. Smith v. Bd. of School Com'rs of Mobile County, use of 44 approved home economics, history, and social studies textbooks did not advance secular humanism or inhibit theistic religion in violation of the Establishment clause, even assuming secular humanism is a religion.¹¹²
4. Fleischfresser v. Directors of School Dist. 200, use of the Impressions Reading Series in elementary school had a secular purpose, did not endorse any religion, and did not foster excessive entanglement of government with religion; therefore, there was no violation of the Establishment of Religion clause. Parents had objected to Neo-Paganism and Witchcraft stories in the books.¹¹³
5. Guyer v. School Bd. of Alachua County, the depiction of witches, cauldrons, and broomsticks in the context of the school's Halloween celebration did not have the primary effect of endorsing or promoting religion; therefore, there was no violation of the Establishment of Religion clause, even assuming such symbols could have religious significance to believers in witchcraft.¹¹⁴
6. Brown v. Woodland Joint Unified School Dist., use of Impressions Reading Series in grades 1-6 and its related activities did not endorse the religious rituals of witchcraft and did not require studies to practice the "religion" of witchcraft; therefore, there was no violation of the Establishment of Religion clause or the California Constitution.¹¹⁵

7. *Settle v. Dickson County School Board*, the refusal of a teacher to permit a high school student to write a research paper on The Life of Jesus Christ was within the ordinary authority of the teacher to determine the focus of classroom learning; therefore, there was no violation of the student's freedom of speech rights.¹¹⁶
8. *Altman v. Bedford Cent. School Dist.*, Roman Catholic parents and students challenged 36 programs and/or activities which they claimed violated their rights under the First Amendment. Court held for the school on all claims except for three, (1) the construction of likeness of the Hindu deity Ganesha; (2) school sponsorship of "worry dolls"; and (3) promotion of Earth worship and prayer to the Earth.^{117, 118}

Furthermore, with all the international publicity and "frenzy" surrounding the fourth book by J. K. Rowling in her series on magic, witchcraft, and wizardry, Harry Potter and the Goblet of Fire, it is highly likely that some teacher will soon use this book in a public school classroom and that some religious-right parent will legally challenge the local board of education on that matter.¹¹⁹ A lawsuit will likely eventuate and provide yet another examination of the intersection of religion, magic/witchcraft/wizardry, protected teacher speech, and the public school curriculum. Whether it is Harry Potter's magic or Leslie Cowan's magic, I agree with one commentator that the vehicle in the book, story, or letter "is magic but the subject is society."¹²⁰ It is with such reasoning that a recent reviewer of Harry Potter and the Goblet of Fire rightly wrote that author J.K. Rowling "teaches good values. (Those parents who have objected to the Potter series on the ground that it promotes unchristian values should give it another read.)"¹²¹

At this point it is appropriate to tie in another popular book and its film version, perhaps the most popular book and film ever which features magic, witchcraft, and wizardry. That book was the Harry Potter of its time. By coincidence and good luck this year is the centennial of the appearance of that book, L. Frank Baum's The Wizard of Oz, and a recent front page article in The New York Times described the celebration held at the University of Indiana in Bloomington by the International Wizard of Oz Club. The article was correct, I believe, when it stated that The Wizard of Oz has worked its way into the national psyche as a fable of eternal hope in which things are not always as fearsome as they seem, where even lions are cowards and wizards are just pretending to be fierce, and where it is always best to be at home.¹²²

(It is refreshing to find an article on a newspaper's front page honoring a children's book for the messages contained in the book. Its messages, including the three mentioned above, are positive and traditional ones, supporting the very values that educators, clerics, and others advocate. Surely it is these messages that earned The Wizard of Oz its popularity since 1900, its inclusion in the many anthologies of children's literature, and the citation and praise of Judge Bauer in his Fleischfresser opinion, quoted earlier in this paper's section on "The Influence of the Religious Community on the Schools." L. Frank Baum used the vehicle of magic, witchcraft, and wizardry to write about life. We need to support and focus on his messages. Patrick Hearn, who delivered the keynote address at the centennial celebration of Baum's book, put it succinctly when he said, "Baum dared to offer delight without

instruction.”¹²³ Schools would do well to emulate Baum in this regard as well as his successor, J.K. Rowling.)

With each of the above eight cases and especially Cowan, as the primary subject of this paper, we must look deeper than the legal issues concerned with employment discrimination, and First Amendment religion clauses, and First Amendment free speech clause. We need to understand that there is a continuing theme in these cases, not only for the parties named in the lawsuits but also for the public observing the legal courtroom conflicts through the media’s reports. As we acknowledge that we are constantly fascinated by these cases, we need to recognize explicitly that the public’s fascination with these cases is not due to the appeal of a passing glimpse into occult practices, or the use of magic to change behavior and perceptions, or the nostalgia connected with favorite childhood literature. We also need to recognize that while the Magic Rock Letter can provide the basis of a lively dinner-table conversation or classroom discussion, Cowan is really not about magic rocks.

We need to recognize and remember that Cowan, like the other cases, is ultimately about the integrity of public school education in our democratic society.¹²⁴ Our focus on the integrity of the public schools will sharpen if we look at two key factors, the role of the religious right in our society and the behavior of the professional and lay leaders of the public schools.

First, Cowan leads us to consider the degree to which society at large will permit the minority religious right community or any other minority set of beliefs to influence the workings of the public schools. We need to recall that the religious right has set its agenda to “take back” the public schools. Or, to put it another way, one agenda of the Christian Right is to “re-Christianize” the schools.¹²⁵ This agenda includes such efforts as introducing creationism into the curriculum, removing the theory of evolution from the curriculum, posting the Ten Commandments in every classroom, modifying the existing sex education courses to include units based on Bible morality, permitting school prayer and Bible reading, removing New Ageism-based practices, and promoting school celebrations of Judeo-Christian holidays.

The efforts by other minority religious groups of all types to influence the curriculum and direction of the public schools presents a serious challenge to the role of the public schools as a unifying institution in our diverse society. The challenge exists because, on the one hand, some people are working to “re-Christianize the schools while, on the other hand, some other people are abandoning the public schools by preferring to establish specialized charter schools, private sectarian schools, or home-schools.¹²⁶ Therefore, society at large must discuss the integrity and role of the public schools as several types of religious conservatives, along with the help of private entrepreneurs, seek to change the enrollment, the tone, and the practices of our public schools.

Second, Cowan leads us to look at the actions of people leading our public schools, especially the professional administrators. The roles of the local superintendent and the local school principal are multifaceted, as any leadership role inevitably is. A local school administrator must lead the faculty while at the same time leading the community. The local administrators must lead, support, and develop the school’s faculty members as they aim to provide an appropriate modern demo-

cratic education to the students. At the same time, the administrators must lead and be sensitive to the community's needs and preferences. As the intermediaries between the lay community and the professional staff, the administrators must at any given time be both agents of change and protectors of the status quo.

School administrators must balance their concerns so that they can be sensitive to each constituency's interests and still protect the integrity of the schools they lead. School administrators must be responsive to their communities' values, but they must not do so at the expense of the integrity of their schools. Sensitivity and responsiveness must come with a devoted obligation to the continued development of an excellent public education in our democracy.

In Strafford, Superintendent Tice and especially Principal Cogdill offered little, "lukewarm" support and guidance to Cowan as a new teacher whom they reported to be a "creative" one early on in her first year of teaching. They failed to guide her to success in using her creative methods to achieve good scores on the approved standardized tests. Then, when complaints arose about the Magic Rock Letter, they failed further to support Cowan, who was reaching out to her students to motivate them to develop self-confidence and self-esteem. In their efforts to work with some vocal leaders within their community these administrators failed to protect the school's authority to determine the school's curriculum within the guidelines set by the law. They caved in to the religious community by telling Cowan to avoid "magical ideas," as if she or anyone else could completely avoid magical ideas in daily life and in teaching the standard repertoire of children's literature. In short, by their actions these professional educational leaders failed to protect the integrity of their schools. In the end, as they appeased the religious right community rather than protect their schools, these designated administrative leaders sacrificed Cowan and make life easier for themselves temporarily.¹²⁷

Lisa Van Amburg, Cowan's lawyer, commented insightfully on the case. She said, "Increasingly in this day and age, members of the community are trying to impose their personal, particularly religious, philosophies on the public schools, and administrators need to be aware of the constitutional and statutory limits in responding to these pressures."¹²⁸ She was correct. Professional administrators need also to be aware of their professional and ethical obligations to their faculties and their chosen field of public education so that they do not contribute to the destruction of the very institutions they are leading.

In this way, by examining the actions of the religious community's leaders and the actions of the public school's leaders, we can understand that Cowan is ultimately about the continued integrity of the public schools in our society. The various aspects of the case all combine to direct our attention to this deeper issue that Cowan presents to us. We must not be satisfied in discussing only the readily apparent issues of Title VII, the freedom of speech provision in our constitution, and the appropriateness of promoting self-esteem in the public school curriculum. As for the first question posed in the subtitle of this paper, Who won?, my answer is a typical lawyer's answer: "It depends." If win means who won the verdict on the Title VII religious discrimination claim and the First Amendment free speech claim, then Cowan won. If win means did the school district succeed in not rehiring Cowan in 1993 soon after complaints about the Magic Rock Letter arose, then the

school and the religious-right community won. In agreement, Lisa Van Amburg called the results of the lawsuit a “hollow victory” due to the absence of reinstatement of Cowan. “The justice system woefully let her down.”¹²⁹ In the larger sense of the word win, it is my opinion that no one won and everyone lost in Cowan. Superintendent Tice has now retired; Principal Cogdill maintains her job; and Leslie Cowan works at a gas station. In the summer of 2000 the chilling effect of the religiously intimidating environment was still present in Strafford.¹³⁰

As for the second question in the subtitle of this paper, What precedents emerged?, my answer is a disappointed lawyer’s answer: “Unfortunately none.” Because of the rules of our legal system no precedents emerged for two reasons. First, precedents arise only in published decisions so that they may be available to all people, not only to those personally knowledgeable of a particular decision. In Cowan only the Eighth Circuit’s appellate decision qualifies in this regard. The three decisions by District Court Judge Clark cited in this paper are unpublished “orders.”¹³¹

Accordingly, Judge Clark’s decisions and his reasoning on Cowan’s complaint on free speech, rights on religion under the First Amendment, and religious discrimination, as well Judge Clark’s reasoning on Cowan’s motion for reinstatement, are not readily available to the public. Hence, they do not set any precedents for future cases.

Second, the appellate court did not deal substantively with two key issues of Cowan’s suit: (1) First Amendment protection for speech contained in the Magic Rock Letter; and (2) “religious sensibilities” and “employment atmosphere” as bases for claiming religious discrimination under Title VII. The court did not decide on these two issues that are at the core of the case and on which most commentary centers. The appellate court did not so decide because the BOE failed to bring these two issues properly to the court. Because the BOE’s timing was in error, the appellate court simply refused to deal with these issues.

The net result is that the appellate court made no comment at all on whether the Magic Rock Letter constituted protected classroom speech, as Judge Clark had ruled. Nor did the court comment substantively on whether religious sensibilities and employment atmosphere are legal theories which can support a claim of religious discrimination in the eighth circuit. The court only said that it has “neither considered or adopted”¹³² these theories as they were articulated in Turic in the Sixth Circuit. Since the district court did not discuss these theories, the appellate court decided “not [to] address the issue here.”¹³³ Thus, without a discussion by the Eighth Circuit Court of Appeals there is no precedent established for that circuit.

Although Cowan won on her claims of protected speech and religious discrimination based on a negative employment atmosphere, no precedent emerged on either claim. Cowan had potential to set precedents, but, alas, it did not. Now we can only look to the future for what might have happened in Cowan. Even so, lawyers, teachers, administrators, and boards of education can all still look to Cowan for guidance; it is an engrossing case.

IX. ENDNOTES

¹ No. 94-3217-CV-S-4, 1996 U.S. Dist., (W. Mo. Dec 12, 1996), 140 F. 3d 1153 [125 Ed. Law Rep. [613]] (8th Cir. 1998).

² The facts are derived from various court documents, including the judges' published and nonpublished decisions as well as the parties' briefs and motions to the courts, the supervising principal's formative and summative reports, newspaper articles, the plaintiff's original letter to her students, the telephone conversations with the leading lawyer for each side of the case, and the telephone conversation with the plaintiff.

³ Cogdill testified that she had not seen the magic rock letter until the parent showed it to her. However, Cowan testified that she had given a copy to Cogdill before Cowan sent it home to the parents and previously had given Cogdill a copy of the same letter because she had sent it home in 1991, too.

⁴ *Torcaso v. Watkins*, 367 U.S. 488 (1961).

⁵ *Torcaso v. Watkins*, 162 A.2d 438,440 (1960).

⁶ *Id.* at 489.

⁷ *Id.* at 495.

⁸ Cowan's Complaint in the United States District Court, Western District of Missouri, Southern Division, June 14, 1994, paragraph 23.

⁹ *Id.* at paragraph 22.

¹⁰ *Id.* at paragraph 8.

¹¹ Judge's Order, June 14, 1995 at 1.

¹² *Id.*

¹³ *Id.* at 2.

¹⁴ *Id.*

¹⁵ BOE Brief to Eighth Circuit, at 8.

¹⁶ 490 U.S. 228, 109 S.Ct. 1775, 104 L. Ed.2d 268 (1989).

¹⁷ Judge's Order of June 14, 1995 at 4.

18 Id. at 6.

19 Judge's Order, June 14, 1995 at 6.

20 429 U.S. 274 (1977).

21 391 U.S. 563 (1968).

22 393 U.S. 503 (1969).

23 461 U.S. 138 (1983).

24 Cowan's Brief to the Eighth Cir. at 36.

25 996 F.2d 448 [84 Ed. Law Rep. 46]] (1st Cir. 1993).

26 385 U.S. 589 (1967).

27 Judge's Order of June 14, 1995 at 7, quoting Ward, 996 F.2d at 453, quoting, in part, Keyishian 385 U.S. at 604.

28 Id.

29 Id. at 8.

30 Price Waterhouse, 490 U.S. at 258.

31 Id.

32 Instruction #6 to the jury, as cited in Cowan's brief to the Eighth Circuit, at 27.

33 The defendants objected to this instruction and two others and in their appeal to the Eighth Circuit raised these objections as errors of the district court. The defendants argued that because of the district court's errors in instructing the jury the court should reverse the first-trial decisions of the lower court on motions for a judgement as a matter of law. The Eighth Circuit rejected the defendants' request, saying that even if the district court "gave faulty instructions, any error could not be considered plain since the evidence was sufficient to support a finding of discrimination." Cowan, 140 F.3d at 1159, n.4.

34 Keenan v. Computer Assoc. International, 13 F.3d 1266, 1269 (8th Cir. 1996).

35 Judge's Order of Oct. 21, 1996, at 4.

36 Order by Judge Russell G. Clark, Oct. 21, 1996 at 4.

- 37 Id., quoting Gray v. Bicknell, 86 F.3d 1472, 1480 (8th Cir. 1996).
- 38 Id. at 6.
- 39 Id.
- 40 422 U.S. 405 (1975).
- 41 Id. at 418, quoting in part from Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971).
- 42 Id. at 420-421.
- 43 Id. at 421, quoting from 118 Cong. Rec. 7168 (1972).
- 44 Id. at 421, quoting in part from 118 Cong.Rec. 7168 (1972).
- 45 Id.
- 46 Judge's Order on Dec. 12, 1996 at 8, quoting from Standley v. Chillhowee R-IV School Dist., 5 F.3d 319, 321 [85 Ed. Law Rep. 1010]] (8th Cir. 1993).
- 47 Id. at 8-10.
- 48 Id. at 10.
- 49 Id.
- 50 Personal telephone conversations with Cowan's and the School District's lawyers.
- 51 Price Waterhouse, 490 U.S. at 258.
- 52 For a court's attempt to explain the proof scheme in discrimination cases see Bergen Commercial Bank v. Michael Sisler, 157 N.J. 188 (1999).
- 53 Id. at 252.
- 54 Id. at 276-277
- 55 996 F.2d 200, 201 n.1 (8th Cir. 1993).
- 56 997 F.2d 444, 449 (8th Cir. 1993) (quoting Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 182 (2nd Cir. 1992)).

⁵⁷ Cowan, 140 F.3d at 1158.

⁵⁸ 411 U.S. 792, 802-804 (1973). See also the clarifying sequel Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-256 (1981).

⁵⁹ Cowan, 140 F.3d at 1158. See below the section on lawyering for further comment.

⁶⁰ See below the section on lawyering for a further, specific comment on this point.

⁶¹ See below the section on lawyering for further comment.

⁶² 788 F.2d 504 [31 Ed. Law Rep. [764]] (8th Cir. 1986).

⁶³ Cowan's Complaint, June 14, 1994, Paragraphs 10 and 11.

⁶⁴ 842 F. Supp. 971 (W. D. Mich. 1994), 85 F.3d 1211 (6th Cir. 1996).

⁶⁵ Turic, 842 F. Supp. at 979.

⁶⁶ Id.

⁶⁷ Id., citing Blalock v. Metals Trades, Inc., 775 F.2d 703 (6th Cir. 1985), EEOC Decision No. 72-1114, 4 F.E.P. Cases 842 (1972), and Weiss v. United States, 595 F. Supp. 1050 (E.D. Va. 1984).

⁶⁸ Strafford BOE's Brief to the Eighth Circuit at 20.

⁶⁹ See, for example, Harris v. Forklift System, 510 U.S. 17(1993).

⁷⁰ See, for example, the first sexual harassment case heard by a federal district court, Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976).

⁷¹ See Hopwood v. State of Texas, 78 F.3d 932 [107 Ed. Law Rep. [552]] (5th Cir. 1996).

⁷² Cowan, 140 F.3d at 1159.

⁷³ See the Conclusion section *infra* for specifics on this point.

⁷⁴ Pickering v. Bd. of Edu., 391 U.S. 563 (1968); Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503 (1969).

⁷⁵ Connick, 461 U.S. at 146.

- 76 Id.
- 77 Judge’s Order, June 14, 1995 at 8.
- 78 See *Miles v. Denver Public Schools*, 944 F.2d 773 [69 Ed. Law Rep. [1060]] (10th Cir. 1991) for teacher disciplined for improper classroom speech.
- 79 *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1988).
- 80 See *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969) where a teacher in class used an article from the Atlantic Monthly which contained a vulgar term for an incestuous son.
- 81 Judge’s Order of June 14, 1995 at 8.
- 82 Connick, 461 U.S. at 148.
- 83 BOE’s brief to the Eighth Circuit at 28.
- 84 Tinker, 393 U.S. at 506.
- 85 Jordana Hart, “The Test of a Great Teacher,” The Boston Globe, July 13, 1998, at B1.
- 86 For a longer discussion of this topic with specific references see Ronald T. Hyman and Ellen V. Whitford, “The Law and Sound Supervision: Two Sources to Guide Teacher Evaluation,” 19 *Illinois State School Law Quarterly* 82 (1999) and Ronald T. Hyman, “Sound Supervision and the Law on Teacher Evaluation,” 43 *Focus on Education* 50 (1999).
- 87 Cogdill’s notes, initialed by the superintendent, of the conference on August 14, 1992, between Cogdill and Cowan.
- 88 See Barbara B. Gaddy, T. William Hall, and Robert J. Marzano, School Wars: Resolving Our Conflicts over Religion and Values (1996); Sara Diamond, Not by Politics Alone: The Enduring Influence of the Christian Right (1998); Fritz Detwiler, Standing on the Premises of God: The Christian Right’s Fight to Redefine America’s Public Schools (1999); June Edwards, Opposing Censorship in the Public Schools: Religion, Morality, and Literature (1998); Clyde Wilcox, Onward Christian Soldiers?: The Religious Right in American Politics (1996); and Catherine A. Lugg, “Reading, Writing, and Reconstructionism: The Christian Right and the Politics of Public Education,” 14 Educational Policy 622 (Nov. 2000).
- 89 Detwiler, supra, at 2.
- 90 Diamond, supra, at 1.

⁹¹ Detwiler, supra, at 65.

⁹² Id. at 1.

⁹³ Gaddy, supra, at 46-47.

⁹⁴ Citizens for Excellence in Education (CEE), the most proactive of the Christian Right groups, is an affiliate of the National Association of Christian Educators (NACE) headed by Robert Simonds. CEE is one of the five most prominent Christian groups involved in public school issues.

⁹⁵ Gaddy, supra, at 51-52.

⁹⁶ See Anthony Aveni, Behind the Crystal Ball: Magic, Science, and the Occult from Antiquity through the New Age (1996); David Carroll, The Magic Makers: Magic and Sorcery through the Ages (1974); Arthur S. Gregor, Witchcraft and Magic: The Supernatural World of Primitive Man (1972); John Middleton, ed., Magic, Witchcraft, and Curing (1967); Bronislaw Malinowski, Argonauts of the Western Pacific (1984; originally 1922); James George Frazer, The New Golden Bough (T. H. Gaster, ed.) (1959), and Raymond W. Firth, "Magic," 14 Encyclopedia Britannica 623 (1960).

⁹⁷ The number three is often associated with powerful concepts and rituals from biblical times until today. For example, the three patriarchs in Genesis, the three-part priestly blessing in Numbers 6:26, the Holy Trinity, and the three witches who appear at the beginning of Shakespeare's play Macbeth. Note that in many stories that use magic the number three appears connected with the spell or the rite. For example, Dorothy in The Wizard of Oz in order to create magic must clap the heels of her shoes together three times and command the shoes to take her home by saying, "Take me home to Aunt Em!"

⁹⁸ Aveni, supra, at 3.

⁹⁹ Firth, supra, at 623, citing Frazer, supra, volumes I and II of his 1890 treatise.

¹⁰⁰ See in particular E. E. Evans-Pritchard, "The Morphology and Function of Magic: A Comparative Study of Trobriand and Zande Ritual and Spells" in Middleton, supra. (That chapter is a reprint of an article from The American Anthropologist 31, 1929: 619-41.); see also Firth, supra and Malinowski, supra.

¹⁰¹ 753 F.2d 1528 [22 Ed. Law Rep. [1141]] (9th Cir. 1985).

¹⁰² Id. at 1536.

¹⁰³ Id. at 1542, citation omitted.

104 15 F.3d 680 [89 Ed. Law Rep. [429]] (7th Cir. 1994).

105 Id. at 688.

106 333 U.S. 203 (1948).

107 Id. at 235.

108 The Times-Picayune, August 27, 1996, at A2.

109 Two points about the Magic Rock Letter are now in order. First and minor is the point that I have seen no comments about the spelling error in the letter, namely you instead of your in the second sentence of the second paragraph. There also are punctuation errors in the letter. In its published opinion the appellate court corrected some errors without even noting them. The silence is odd in light of the opposition to the letter. In addition, some parents had complained about errors Cowan had made in correcting her students' papers. I, therefore, expected to find some mention of Cowan's own errors in her letter to her students as further evidence to support the BOE's claim of Cowan's poor performance. Second, I found no mention or criticism of the first sentence of the second paragraph, "The magic rock you have, will always let you know that you can do anything you set your mind to." While I support Cowan's use of magic to instill self-esteem, I am not willing to tell children that even with magic they can do whatever they set their minds to do. Can children, even by invoking, magic fly to the moon by flapping their arms? Can they survive a rattlesnake bite? Can they survive a hunger strike of two months without food and water? I believe that it would have been better to say something like: "The magic rock you have will always let you know that with a strong effort you can do many things." I remain surprised by the absence of comments about these matters.

110 Grove, supra.

111 827 F.2d 1058 [41 Ed. Law Rep. 473]] (6th Cir. 1987).

112 827 F.2d 684 [41 Ed. Law Rep. [452]] (11th Cir. 1987).

113 Fleischfresser, supra.

114 634 S0.2d 806 [90 Ed. Law Rep. [961]] (Fla. App. 1Dist. 1994).

115 27 F.3d 1373 [92 Ed. Law Rep. [828]] (9th Cir. 1994)

116 53 F.3d 152 [100 Ed. Law Rep. [32]] (6th Cir. 1995).

117 45 F. Supp.2d 368 [135 Ed. Law Rep. [410]] (S.D.N.Y. 1999).

118 For a long and detailed case study of the events that gave rise to this lawsuit against the Bedford Central School District see, Rosemary C. Salomone, “Struggling with the Devil: A Case Study of Values in Conflict,” 32 *Georgia Law Rev.* 633 (Winter 1998).

¹¹⁹ See the articles, for example, by Jodi Wilgoren, “Don’t Give Us Little Wizards, the Anti-Potter Parents Cry,” The New York Times, November 1, 1999, at A1; Bernard Weinraub, “New Potter Book Is Casting a Spell,” The New York Times, July 3, 2000, at A1; and Jonathan Zimmerman, “Harry Potter and His Censors: False Charges and Phony Moralism,” Education Week, August 2, 2000, at 44.

¹²⁰ Steven R. Wiesman, “A Novel That Is a Midsummer Night’s Dream,” The New York Times, July 11, 2000, at A24.

¹²¹ Joan Acocella, “Under the Spell: Harry Potter Explained,” The New Yorker, July 31, 2000, at 78.

¹²² Dinitia Smith, “Celebrating 100 Years of Oz, Wherever the Road May Lead,” The New York Times, July 23, 2000, at 1.

¹²³ Id.

¹²⁴ See Salomone, supra, for a somewhat different concept of what these cases are about. Her article precedes the district court decision in Altman.

¹²⁵ Lugg, supra.

¹²⁶ For a case involving a home-schooled student (for religious reasons) who sued a board of education for permission to attend high school part-time see Swanson v. Guthrie ISD I-L, 135 F.3d 694 [123 Ed. Law Rep. 1087]] (10th Cir. 1998). Note also that in Colorado City, Arizona, a church leader of a polygamist religious group ordered his followers to teach their children at home. Thus, the public school enrollment is expected to decrease from 1,000 to 500 students at the start of the 2000-2001 school year. Leader of Polygamists Orders Home-Schooling, The New York Times, August 6, 2000, at 14.

¹²⁷ In this sense Cowan resembles the case of the New York City elementary school teacher who used a children’s book entitled Nappy Hair. (The book is “critically acclaimed,” written by a black author, and recommended by Teachers College of Columbia University for classroom use.) “The book is a coming-of-age story about a black girl’s appreciation of her hair; ‘nappy’ refers to the kinky texture of some black people’s hair.” The purpose of the story is “to engender pride and self-esteem.” After some parent protests, threats, and accusations of racism, the board of education transferred the teacher to another school in the New York City school district. See Lynette Holloway, “Teacher in Book Dispute Starts New Job in Queens School,” The New York Times, December 5, 1998, at B4.

128 Zirkel, supra, at 91.

129 E-mail correspondence with Lisa Van Amburg, August 8, 2000.

130 Telephone interview with Leslie Cowan on August 1, 2000.

131 Of the three orders by Judge Clark the last one from December 12, 1996, is available to people with access to an electronic legal research service. The first two are only available from the court or from one of the parties in Cowan. I received a photocopy of each of the three orders from one of the lawyers in the case.

132 Cowan, 140 F.3d 1158, footnote 3.

133 Id.