The Legacies of the *Kitzmiller* Trial

Eric Rothschild

Judge John Jones’s 139-page opinion in *Kitzmiller v Dover Area School District* in favor of the eleven parents who had sued the school district to stop the presentation of “intelligent design” (ID) as a scientific alternative to the theory of evolution in biology class was so emphatic in its recognition that the policy violated the Constitution that it was hard to imagine in retrospect that any other outcome was possible. But that’s not how it felt when the plaintiffs’ team, of lawyers and legal assistants from Pepper Hamilton, the ACLU of Pennsylvania, and Americans United for Separation of Church and State, expert witnesses from around the country, and the crack staff at NCSE undertook the effort—the stakes could not have been higher.

The school district instituted its ID policy in October 2004 in a particular cultural moment in America. The 2004 presidential election that reached its conclusion just as the ID policy was passed and went into effect in Dover was marked by anti-marriage equality legislation amendments used tactically to drive cultural conservative voter turnout. In early 2005, the country witnessed the conclusion of the drama of Michael Schiavo being blocked from applying the end-of-life wishes of his wife Terri by Florida and national politicians nakedly exploiting the tragic situation to appeal to constituents who were opposed to abortion.

At a time of cultural, sectarian conservative ascendency, public schools, controlled by local officials, were (and remain) the ripest opportunity to press this agenda, and ID was a popular option. ID was getting a receptive hearing in the media. Articles relating to evolution often balanced quotes from mainstream evolutionary biologists with proponents of intelligent design, suggesting a false equivalence to the lay reader. (This problem was significant enough for the *Columbia Journalism Review* to address as a media failing [Mooney and Nisbet 2005], and inspired NCSE’s Project Steve, which demonstrated that scientific dissenters from the theory of evolution could be matched in numbers just by evolution supporters named Steve, Stephen, Stephanie, and so on.) A prestigious panel commissioned by the National Review voted Michael Behe’s *Darwin’s Black Box* one of the hundred best non-fiction books of the twentieth century, keeping company with Aleksandr Solzhenitsyn’s *The Gulag Archipelago*, Rachel Carson’s *Silent Spring*, Hannah Arendt’s *The Origins of Totalitarianism*, and the diary of a young girl named Anne Frank (National Review 1999). The marketing of ID to lay audiences in conservative media had clearly been highly successful and school boards around the country were poised to add ID to their curriculums. They had not all jumped to do that before Dover did, because of resistance by science teachers and the science community (with NCSE playing a crucial role), and for fear of the kind of expensive legal proceedings that Dover experienced. But if Dover had won, the barriers to ID’s entry into biology curriculum would have disappeared. Even in school districts where
public and school officials were opposed to ID, parents and voters would have been empowered to demand it as part of a “balanced” scientific education.

After the case was decided, ID advocates loudly lamented that Judge Jones’s courtroom was not the appropriate forum to decide the scientific merits of ID, but they would have treated an opinion in their favor as validation out of all proportion with ID's standing in the scientific community. A proliferation of ID in science curriculums might have been “the Wedge” for further sectarian religious practice in public institutions, exactly as the ID think tank, the Discovery Institute, had planned and prophesied.

Instead ID was humiliated. The plaintiffs’ expert team of biologist Ken Miller, paleontologist Kevin Padian, theologian John Haught, science education expert Brian Alters, philosopher of science Rob Pennock, and ID chronicler Barbara Forrest exposed ID from every discipline. William Dembski and Stephen C Meyer of the Discovery Institute, leading lights of the ID movement, signed on as experts, but then abandoned the school district before their positions could be tested by cross examination. Michael Behe showed more loyalty than Dembski and Meyer by appearing at trial to present his scientific case for ID, and more courage in undergoing interrogation by the plaintiffs’ side. As I was his interrogator (delivering on a collaboration with NCSE’s Nick Matzke, the value of which can never be sufficiently appreciated), I will dispense with false humility: it was a triumph. The cross examination revealed Behe’s “irreducible complexity” concept of intelligent design to be a fraud, capped with his concession that ID could only be characterized as science under a standard that also swept in astrology. The Discovery Institute recognized that the trial was such a disaster for its mission that it filed a brief at the end of trial beseeching the judge to rule narrowly against the school district because of the board members’ confused and bad behavior, without addressing whether ID was science or religion.

Judge Jones did not obligé. He did find that the school board members who instituted the policy acted with the sole purpose of imposing their sectarian religious views of creation on students, and then lied to cover their tracks. But he also evaluated the extensive evidence presented at trial from scientists, educators, and philosophers, and determined that ID was a religious proposition not a scientific one. He was purposeful about conducting this evaluation for the benefit of other districts that might consider a similar policy, and his judicial brethren who might confront a similar claim—not because his decision could bind them, but as a resource that might guide their thinking.

Judge Jones’s objective has largely been accomplished; no other school district has adopted a curriculum that includes intelligent design. At the time of the trial, Kansas and Ohio had adopted an ID-friendly set of state science education standards and an ID-friendly model lesson plan, respectively, but they backed off after Judge Jones’s decision. No school district today includes ID or other forms of creationism expressly in their curriculum. There are, however, still threats to good science education, in Louisiana and Tennessee for example, where state law appears to provide freedom to teachers to introduce religiously motivated criticisms of established science at their discretion. But wholesale policies to teach religion as science have not been adopted. The trial victory was the dam that didn’t break.

The legacy of the Kitzmiller trial extends beyond the achievement of its primary objectives, the protection of good science education and the separation between church and state in
public schools. The *Kitzmiller* trial was important in part because it was a true trial—a six-week examination under oath of the local policymakers, and the national experts whom they were relying on to support their purported rationale (good science education) and obscure their actual sectarian, religious rationale. The affected members of the community—board members, teachers, parents—were able to give their accounts of what happened, why they acted as they did, and how it affected them. Both parties and Judge Jones viewed a full trial as the appropriate forum to contest important issues, rather than being limited to academic, legal briefing as Constitutional cases often are. This is not unique to *Kitzmiller*, but it is also not necessarily the norm. In *Speak Now: Marriage Equality on Trial*, chronicling the *Perry* trial for marriage equality in California, Kenji Yoshino (2015) compared that trial to *Kitzmiller*, because in both, “the trial distinguished secular fact from religious belief.” In both cases, the purported secular motivations for the policy could not withstand the scrutiny of the trial, and could not be sustained by experts exposed to the rigors of cross examination. In both cases, the court and the public also got to see the human faces of the plaintiffs seeking to vindicate their constitutional rights. In both cases, the plaintiffs' dignity and intelligence sparkled, revealing the best of American citizenship.

It should not be lost in the celebration of *Kitzmiller*’s national impact that it was first and foremost a community’s story. The community of Dover suffered some ruptures over the intelligent design policy and trial, but meaningful things happened because community members had been activated. A school board election after the trial brought in a reform...
slate dedicated among other things to good science education. Dover’s science teachers, who were prepared to risk their jobs rather than be forced to misrepresent ID as real science to their students, were liberated to teach evolution comprehensively, without fear of reprisal. Several plaintiffs became leaders in the Pennsylvania ACLU. All of the plaintiffs had the experience of the American justice system addressing their grievance with their elected officials, and vindicating their Constitutional rights.

The last legacy is personal. The team of parents, teachers, lawyers, legal assistants, and experts from NCSE and around the country that collaborated to win the Kitzmiller trial is family forever. In November, many of us will gather, as we have done on many of the preceding anniversaries, for the ten-year reunion of the trial. The nation will evolve past this sectarian dispute, and eventually forget that ID was ever treated as a legitimate scientific challenge to the theory of evolution. For the Kitzmiller trial participants, however, it is a shared accomplishment that we will always cherish.

REFERENCES

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