Dover Comes to Ohio

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Immediately following the Kitzmiller decision in December 2005, I argued before the Ohio State Board of Education in January 2006 that in adopting an “intelligent design”-friendly science curriculum indicator and model lesson plan for 10th-grade biology, the board had set a “Dover Trap” for Ohio school districts (http://pandasthumb.org/archives/2006/02/the-dover-trap.html). I didn’t anticipate that the trap would be sprung by an individual teacher rather than by a local school board, and I certainly didn’t anticipate that it would occur in my own school district. But that was the case in Mount Vernon, Ohio. Emboldened by the state board’s actions, a middle school science teacher systematically inserted creationist materials into his teaching of science.

As a result, over the last three years a painful drama has been playing out in Mount Vernon, Ohio. It has involved contentious school board meetings, a lengthy administrative hearing, three federal lawsuits, and occasionally acrimonious debates among citizens. Finally, it resulted in the firing of a popular and enthusiastic middle school science teacher who was found (among other things) to have injected creationism into his teaching of science and to have persistently violated the Establishment Clause of the First Amendment to the Constitution. The Mount Vernon News has had good coverage throughout the affair where additional details can be found (http://www.mountvernonnews.com/local/freshwater/stories.php).

BACKGROUND

Mount Vernon is the county seat of Knox County, a conservative rural county an hour northeast of Columbus. With a population of just over 16 000, Mount Vernon is predominantly white (94%), Christian, and heavily churched. Mount Vernon is also home to the Ohio Conference of the Seventh-Day Adventist Church with an associated boarding high school, and also has a Catholic elementary school.

The county has three post-secondary educational institutions: Kenyon College, a secular private liberal arts college; Mount Vernon Nazarene University, a rapidly growing Christian institution; and a branch campus of Central Ohio Technical College, a vocational school.

The Mount Vernon City School District serves about 2200 students in grades 6–12 from the city and surrounding rural areas. According to a recent analysis of district personnel records, 17% of district teachers are graduates of Mount Vernon Nazarene University and another 4% are graduates of other evangelical educational institutions. Ohio’s Cedarville University—which says it takes a “creationist approach to scientific research and study” (http://www.cedarville.edu/About.aspx)—has seven graduates who work as teachers in the district.
**Main Character**

At the center of the controversy is John Freshwater, a middle school science teacher with 25 years' teaching experience, most of it in Mount Vernon. He has an Associate's degree in Recreation and Wildlife and a Bachelor's degree in Education. Freshwater is also a deacon of Trinity Worship Center (http://www.mvtrinity.com/index.php?id=497), an Assemblies of God congregation. The church served as local headquarters for Freshwater and his attorney during the administrative hearings related to his case, and its pastor, Don Matolyak, is one of Freshwater's core advisors, providing spiritual counsel and strategic advice, occasionally serving as Freshwater's spokesman, and making his church address available for a fund-raising organization supporting Freshwater.


**Precipitating Incident**

On Friday, December 7, 2007, John Freshwater performed a classroom demonstration using a high-voltage, high-frequency, low-amperage signal generator, a sort of Tesla coil. The device can be used to stimulate light emissions from gases, and Freshwater's demonstration exploited that property, using sealed glass tubes filled with various gases and challenging students to identify each ionized gas by the color of the light it emitted.

At the end of that exercise, as he had done in previous years, Freshwater asked if any of the students wanted to see how the arc produced by the device felt on their skin. Freshwater brought the tip of the device near the forearms of several volunteers, one student at a time, allowing a high-voltage arc to jump from the tip to the student's skin. While sworn testimony differed on the shape, seriousness, and persistence of the marks produced by the device, it was undisputed that the device did produce a red mark—essentially a radio-frequency burn—on students’ skin that lasted from a few hours to a few days.

The parents of one of the student volunteers reported the incident to school administrators the following Monday, and eventually it gave rise to an investigation by an outside firm on behalf of the Mount Vernon Board of Education, to several contentious board meetings, to a federal lawsuit against Freshwater and the district, and to the board's adoption of a resolution of its intent to terminate Freshwater's employment. The board resolution of intent led to a prolonged and expensive state administrative hearing on the termination over a two-year period that cost the district an estimated $920 000; two more federal lawsuits; an appeal of the outcome of the administrative hearing in the state courts of Ohio (still in progress); and complaints by Freshwater to both the Ohio Civil Rights Commission and the US Equal Employment Opportunity Commission.
**Winter–Spring 2008**

On the evening of the classroom demonstration, one of the student volunteers, an 8th-grade student, complained to his father about irritation on his arm, and in later sworn testimony, the father said he observed and photographed a cross-shaped red mark on the child’s forearm, roughly 10–15 cm by 5–7.5 cm (a photo is available here: http://pandasthumb.org/archives/2008/06/teaching-intell.html). Later that evening, when the student complained that the irritation was still so painful that he could not sleep, his mother took more pictures of the mark. The following Monday, December 11, 2007, the parents, Steve and Jenifer Dennis, reported the incident to the superintendent, Steve Short, showing him photographs of their son’s arm.

That day Short met with William White, the middle school principal. White later testified that on Short’s instructions, he and assistant principal Brad Ritchey met with Freshwater to investigate what had happened. White testified that Freshwater first denied that anything had happened, and then conceded that there had been a classroom exercise that involved “shocks” (http://pandasthumb.org/archives/2008/10/day-4-science-c.html). White instructed Freshwater to cease using the Tesla coil and later testified that he had observed religious materials displayed in Freshwater’s classroom at that time.

Administrators met several times with Freshwater in the following months concerning the religious material displayed in his classroom, which—according to later testimony—included the Ten Commandments, some Bible verses on small wall posters, a poster depicting President GW Bush and Colin Powell praying, and Freshwater’s personal Bible on his desk. In April, White sent a letter to Freshwater instructing him to remove the religious displays. White testified that he told Freshwater the religious materials had to be removed and that his personal Bible had to be out of sight when students were in the room, though he could read it during “off” time.

On April 16, 2008, four months after the initial incident, Freshwater participated in a press conference and rally on the public square of Mount Vernon. The event was organized by “Coach” David Daubenmire, formerly a teacher and coach in Mount Vernon and founder of a fundamentalist ministry (http://www.ptsalt.com/). Freshwater read a statement written by Daubenmire in which he focused on instructions to remove his personal Bible from his desk while students were in the room and his refusal to comply with those instructions (http://www.secularleft.us/articles/Freshwater_Response_4.16.08.pdf).

When additional allegations about inappropriate conduct arose from more parents, teachers, and students, the board of education’s attorneys hired an independent human resources consulting firm, HR On Call, to investigate the allegations. HR On Call personnel interviewed the Dennises, current and former teachers and administrators, and Freshwater himself. HR On Call also inspected Freshwater’s classroom. A report submitted to the board by HR On Call outlined a number of areas of concern about Freshwater, including allegations regarding religious items displayed in the classroom, teaching religious beliefs in his classes by using creationist material, his conduct as monitor of the Fellowship of Christian Athletes in the middle school, and his alleged insubordination in response to instructions from administrators.
On June 20, 2008, the board of education acted on the investigator’s report by adopting a “Resolution of intent to consider termination of the teaching contract(s) of John Freshwater”—the first step in the formal process of terminating a teacher for cause as mandated by Ohio statutes. That resolution specified four main grounds for the Board’s action.

1. Using the high-frequency signal generator to mark students’ arms with a cross, a religious symbol;

2. Failing to adhere to the Academic Content Standards and approved curriculum by teaching creationism and intelligent design;

3. Exceeding permissible limits on his activities as monitor of the Fellowship of Christian Athletes; and

4. Insubordination in his failure to comply with instructions concerning religious materials displayed in his classroom and in bringing additional religious materials into the classroom subsequent to being given those instructions.

**LEGAL PROCEEDINGS**

Legal proceedings to resolve this case took place over a period of three years, including a lengthy administrative hearing and several court actions. The latter included a suit brought by the parents of the student marked with the high-frequency device, filed in June 2008 (*Doe v Mount Vernon Board of Education, et al*); a countersuit by Freshwater alleging defamation and intentional infliction of emotional distress, filed in September 2008; a suit brought by Freshwater (*Freshwater v Mount Vernon Board of Education, et al*); and Freshwater’s appeal in the Knox County Court of Common Pleas of the school board’s decision to terminate his teaching contract (http://ncse.com/creationism/legal/freshwater-termination-hearing).

An important player in the Freshwater affair was R Kelly Hamilton, Freshwater’s personal attorney, whose behavior in the various legal actions also became a part of the story. In a radio interview, Hamilton said, “I’ve known for several years prior to this event taking place that God made it very clear that one day I would be arguing about the First Amendment as it relates to His Bible.” (For more on that interview, see http://pandasthumb.org/archives/2009/09/freshwater-upda-2.html.)

There were hearings in federal court on whether sanctions should be imposed on Hamilton for his failure to comply with subpoenas issued in discovery; for access to Hamilton’s billing records, which had evidentiary implications regarding the date(s) of preparation of certain affidavits; and on whether Hamilton was even Freshwater’s attorney of record for settlement talks in one federal proceeding.

**ADMINISTRATIVE HEARING**

Ohio law provides that a teacher may contest a school board’s resolution of intent to terminate. In this case, the matter was heard by a neutral referee accepted by both parties and began on October 2, 2008 in the Knox County Commissioners’ offices.

The initial expectation was that the hearing would take six or eight days. In the end it took 38 days spread over 21 months, with more than 350 exhibits—mostly documents—entered
into evidence. It generated more than 6300 pages of transcripts of the sworn testimony of more than eighty witnesses. I attended 36 of the 38 days and wrote over one hundred reports and commentaries on The Panda's Thumb, a group science blog. (See “Freshwater” tag cloud: http://pandasthumb.org/mt/search.fcgi?blog_id=2&tag=Freshwater&limit=20.)

Finally on June 23, 2010, the administrative hearing adjourned. More than six months later, in January 2011, the referee delivered his report (http://ncse.com/webfm_send/1545) to the board of education, recommending that Freshwater's teaching contract be terminated. The referee noted that there was sufficient evidence for termination whether the level of proof was the stricter “clear and convincing evidence” criterion or the more permissive requirement of merely a “preponderance of the evidence”.

The referee's report listed three grounds for termination based on the evidence and testimony in the hearing:

1. Failure to adhere to the approved curriculum. According to testimony from parents, students, and at least one staff member, Freshwater used creationist handouts and a creationist video in his classes.

2. Improper participation in Fellowship of Christian Athletes activities. FCA teacher/monitors are prohibited from participating in the meetings and are forbidden from contacting prospective speakers or praying with students. According to testimony, Freshwater violated all three prohibitions.

3. Insubordination. According to testimony, Freshwater not only failed to remove all religious displays from his classroom when instructed, but after receiving these instructions in writing he added two additional Christian books, placing them on his lab table in the classroom.

The referee concluded:

By [his] course of conduct John Freshwater repeatedly violated the Establishment Clause. Without question, the repeated violation of the Constitution of the United States is a “fairly serious matter” [statutory language] and is, therefore, a valid basis for termination of John Freshwater's contract(s).

On January 10, 2011, citing the grounds in the referee’s report, the Mount Vernon Board of Education voted 4–1 to terminate Freshwater’s teaching contract. (The full text of the resolution is available from http://pandasthumb.org/archives/2011/01/freshwater-the-6.html).

**Appeal of the Board’s Decision**

Freshwater appealed the board of education’s decision in the Knox County Court of Common Pleas in early February 2011. Judge Otho Eyster reviewed the evidence and testimony from the administrative hearing, and on October 5, 2011, almost exactly three years after the administrative hearing started, denied Freshwater's request for additional hearings. He ruled that the hearing record provided “clear and convincing evidence” to support the Board of Education's action.

Freshwater elected to appeal Judge Eyster's decision, and in October 2011 the Rutherford Institute announced that it would support Freshwater's appeal in Ohio’s Fifth District...
Court of Appeals (http://www.rutherford.org/articles_db/press_release.asp?article_id=972)
That case is still pending (documents are available from http://ncse.com/creationism/legal/
freshwater-termination-hearing). A call to the court clerk determined that the earliest date
to schedule a hearing would be in early April 2012.

**FEDERAL COURT PROCEEDINGS**

Before, during, and after the nearly two years of the administrative hearing, a series of
legal actions in federal court were initiated and then subsequently settled, withdrawn, or
dismissed. The various legal documents are available at NCSE’s website (http://ncse.com/
creationism/legal/other-cases).

In June 2008, the Dennises filed suit in federal court against the board of education, the
superintendent, the middle school principal, and Freshwater. They alleged that Freshwa-
ter had burned the shape of a cross on their son's arm with the Tesla coil, had led prayer
sessions at Fellowship of Christian Athletes meetings, and had based his science teaching
in part on his religious beliefs, including the teaching of “intelligent design” (http://ncse.
com/creationism/legal/doe-v-freshwater-mv). The district's insurance company eventually
settled this suit on behalf of the district defendants in August 2010 and on behalf of Fresh-
water in December 2010.

This lawsuit featured prolonged disputes about discovery, with the Dennis family's finally
filing a motion requesting that the court compel Freshwater and Hamilton to comply
with previous discovery orders. The motion to compel was granted, and Hamilton was
subsequently sanctioned by the federal court for his dilatory responses to discovery
requirements (documents are available from http://ncse.com/creationism/legal/doe-v-
freshwater-mv). The suit also featured the withdrawal of two insurance company attorneys
representing Freshwater as a school employee on the grounds that certain events, never
specified, made it impossible for them to represent Freshwater within the Ohio Rules of
Professional Conduct.

In September 2008, Freshwater filed a countersuit in federal court, claiming that the allega-
tions in the Dennis family's suit were defamatory and slanderous. That counterclaim was
eventually dismissed after most of its allegations were eliminated in summary judgments
by the federal court. In addition, in June 2009, Freshwater filed a federal suit against a
range of defendants associated with the affair, including “the Board, two individual Board
members and four other district administrators, the investigative firm and its two employ-
ees, and up to eight unknown (even to him) 'employees, agents or others associated' with
the Board who may have 'conducted or facilitated' actions against him” (http://ncse.com/
creationism/legal/freshwater-v-mount-vernon). That suit was eventually dismissed with
prejudice at Freshwater's request.

Attorney Hamilton's behavior also became an issue in various federal actions. In one fed-
eral court hearing, Freshwater failed to produce the Tesla coil when ordered to do so by the
court. In response to a question by the court, Hamilton explained that his wife mistakenly
believed the Tesla coil was groceries and put it in the freezer at their home. I was in the
courtroom when Hamilton proffered this excuse, and the expression on Judge Gregory
Frost's face was priceless.
In a federal court session to reconsider sanctions imposed on Hamilton, he claimed that his laptop was “completely destroyed” in a flood due to a water leak in his kitchen, destroying all his billing records. As a consequence, the date of preparation of some key affidavits was left undetermined. Hamilton had not backed up his hard drive and accepted the opinion of his local computer shop that the data were unrecoverable. So, he said, he threw the laptop away. (For more on the flood as well as other problems Hamilton had in the discovery process, view the document at http://ncse.com/webfm_send/1400.) Later, Freshwater testified that he also threw away a laptop that contained records relevant to discovery when he could not turn it on.

The main results of the various federal actions were a settlement by the district’s insurance company with the Dennis family, and the imposition of sanctions, including a requirement to pay some of the Dennis family’s legal costs, on Freshwater’s attorney R Kelly Hamilton for failure to comply with the requirements of the discovery process.

Almost lost in the noise generated by the administrative hearing and federal court proceedings was Freshwater’s filing of religious discrimination complaints with the Ohio Civil Rights Commission and the federal Equal Employment Opportunity Commission. After an investigation, the Ohio Civil Rights Commission dismissed the complaint. There’s no official word yet on EEOC action, but the EEOC almost always adopts state commission findings on duplicated complaints in a sort of work-sharing arrangement.

**Effects on the Community**

In *The Devil in Dover*, journalist Lauri Lebo (2008) described the effects of the *Kitzmiller v Dover Area School District* trial on that Pennsylvania community. There was considerable rancor dividing neighbors and, in Lebo’s case at least, a disagreement that divided family members. The children of Christian plaintiffs were called “atheists” in the schools and anonymous threatening letters were sent to plaintiffs. The effects still linger, I am told.

Many of those same things happened in Mount Vernon. At school board meetings, on local web message boards, and in letters to the editor of the *Mount Vernon News*, partisans on both sides fulminated about either the injustice being done to a good Christian man or the effrontery of evangelical Christian teachers imposing their beliefs on children in the public schools. As was the case in Dover, middle school students reportedly accused children of Freshwater’s opponents of being atheists, and at least some physical intimidation among students was reported. The Dennis family, plaintiffs in the original federal suit, eventually moved to a neighboring county, in part because of harassment of their children in the Mount Vernon schools which originated not only from other students but reportedly also from at least a few district staff members.

Freshwater’s supporters persistently framed the whole affair as being solely concerned with Freshwater’s keeping his personal Bible on his desk, ignoring other charges. That was an effective public relations approach. There was even a web site called www.bibleonthedesk.com, and though the domain now has a new owner, its earlier content is available via Web Archive (http://web.archive.org/web/20080806114819/http://www.bibleonthedesk.com/).

As was the case in Dover, the Freshwater affair was costly to the district. While the district’s insurance company paid settlements to the Dennis family in the federal court suit,
an estimated $920,000 has come out of the district’s funds, mostly for legal costs associated with the administrative hearing. It was also costly for Freshwater, who lost his job and had to sell his home and 27 acres in the country to pay his legal costs.

Much of the length and expense of this acrimonious affair was due to Freshwater’s having taken bad advice throughout the process. As I noted on Panda’s Thumb:

> This is becoming very sad to watch. Freshwater is not an intrinsically bad or evil person, but, like not a few of his colleagues, he is terribly misguided in his views of what is appropriate for a public school teacher. Further, he has been operating on the basis of very bad advice—from Daubenmire to start with and then Hamilton for the last two years—exacerbated by a socio-religious context full of people playing “Let’s you and them fight.” While he is not an unwilling victim (after all, he has chosen to act on the bad advice), he is clearly being set up as a hero/martyr by his co-religionists who are more than happy to see someone else taking the point (and the arrows). That’s an awfully hard social role to decline when his family, friends, congregation, and principal advisers like his pastor Don Matolyak are all enthusiastically casting him in it and supporting him. Were he to try to decline or abandon that role he would be isolated and shunned, and that’s a high social price to pay. Freshwater has literally bet his farm that it’s worth it. (http://pandasthumb.org/archives/2010/07/freshwater-tigh.html)

He lost the bet and lost his farm. Freshwater, and Daubenmire and his other advisers, made it virtually impossible for the district to do anything but terminate him.

**Effects on District Voters**

During the three years of the “Freshwater Affair,” there were two elections for school board. In November 2009, two new members of the five-member board were elected, defeating two incumbents who had voted for the resolution of intent to terminate Freshwater’s contract. One of the new members, Steve Thompson, is a strong Freshwater supporter and had served on the so-called Community Council for Free Expression—an organization headquartered in Freshwater’s church set up to raise funds for Freshwater’s legal defense, though his name (and others) disappeared from the Council’s website around the time of the election. The other new board member, Paula Barone, is a staunch supporter of honest science education and the separation of church and state. The difference between Thompson and Barone in votes cast to elect them to the School Board was just one vote, reflecting the deep split in the community at the time.

However, two years later, community sentiment had markedly shifted away from Freshwater. In November 2011, Jolene Goetzman and Margie Bennett—incumbents who had voted to terminate Freshwater—were re-elected by large margins, placing first and second in a field of six candidates for the three open positions. Two strong supporters of Freshwater, Jeff Cline and Steve Kelly, placed fifth and sixth. So as in Dover in the aftermath of the *Kitzmiller* trial (but before that decision came down), Mount Vernon voters in general supported board members who value honest science education and the separation of church and state.

Finally, in the weeks preceding the 2011 election, a new organization, Concerned Mount Vernon School District Citizens, was formed. The organization registered a Political Ac-
tion Committee and raised funds to place a newspaper advertisement supporting board candidates who were committed to honest science education and the separation of church and state. The organization also stimulated letters to the editor, encouraged appropriate postings on local web boards, and worked on get-out-the-vote efforts in support of those candidates. Members plan to transform the ad hoc pre-election organization into a more permanent form to find good candidates for the board and to provide continued support to board members, administrators, and (most important) teachers who are committed to the goals of honest science education and the separation of church and state.

It’s not over, though. Freshwater’s appeal of his termination is still making its way through the state appeals court system. Mount Vernon is still divided. Letters to the editor still make the same tired creationist arguments “… proving convincingly that [evolutionary theory] is untenable at best and should not be taught in our public education system” (thus Kenneth Dove, in a letter to the editor in the January 19, 2012, Mount Vernon News). A substantial minority of people in Knox County agrees with Dove. The defenders of excellence in public education need to stay on watch for the next moves to subvert the teaching of honest science in the public schools. They will surely come.

REFERENCES

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