

Chapter 18

The Peloza, Bishop, and Johnson Cases

As a result of attempts by Darwin skeptics to secure a place both at the table of scientific discussion and in the classroom, the federal courts have put evolution “virtually beyond criticism.”¹ Yet, according to evolutionist Eugenie Scott, theists “claim” truth as conscientiously as Darwinists do, and, she admits, “there is truth on both sides.”² This fact, however, cannot be admitted in the public schools, and Darwin skeptics have lost every single court case that attempted to convey “there is truth on both sides” since 1925, with the exception of the Scopes trial. Court rulings in cases involving those who are open critics of Darwinism have been blatantly discriminatory, dishonest, and unconstitutional. Indications now exist that the Supreme Court is aware of this and may try to correct this problem in future rulings.

In past cases involving Darwin skeptics, my research of over 100 cases over the past 30 years indicates that schools typically presented trumped-up and often obviously bogus reasons for dismissal or denial of tenure such as incompetence, erroneous claims that a faculty member falsified documents, or other allegations that were clearly proposed to cover up the real reason—religious discrimination. Several more recent cases have been increasingly open about the rationale for termination; consequently, in these cases it is easier to litigate the actual issues in court. Thus, several cases have been fought openly on freedom of speech and First Amendment grounds. For example, in referring to the Bishop case, University of Chicago law professor Mike McConnell stated: “This is principally a free speech case. It was litigated as a free speech case; it was decided as a free speech case.”³

A major problem is that many of these court decisions were based on stereotypes and common beliefs. Professor Ronald Numbers vividly demonstrates that many common beliefs about both creationists and the history of creationism are wrong. In reference to the thesis set

¹ Witham, 2002, p. 7.

² Witham, 2002, p. 270.

³ Quoted in John Myers, 1992a.

forth in Andrew Dickson White's 1896 classic, *A History of the Warfare of Science with Theology in Christendom*, he successfully argues that "creationist conflicts rarely conformed to the battle lines drawn by White."⁴ Yet the courts are still likely to be influenced by the portrait of religion sketched by authors like White.

In order to explain the background of the three major cases—Peloza, Bishop, and Johnson—which are reviewed in this chapter, it is necessary to backtrack a bit, and review the prior history of cases involving evolution in the American courts.

Attempts to Legislate Balance in the Teaching of Evolution

One of the activities supported by a number of creationists in the 1980's was legislation requiring some type of "balance," or at least an approach they felt was less biased about the evidence for the divine origin of the universe, life, and humans. Although many prominent creationists oppose this approach because they believe that the state should not regulate specific science content, most creationists agree that science is being inaccurately presented in the classroom, where evolutionary naturalism is usually taught as the only explanation for how life began and developed. They believe that a sizable amount of scientific evidence exists that contradicts evolution and supports the concept of a creator or designer of the universe.⁵

One group involved in this effort was the *Citizens for Fairness in Education* (CFE) headed by Roman Catholic Paul Ellwanger. The two-model bill passed by the state of Arkansas in March (and by Louisiana in July) of 1980, and soon introduced in nineteen other states as well, was essentially the bill that CFE developed.⁶ Ellwanger concluded that the idea of "balanced treatment" (presenting both evolution and creation) in public schools "is considered by legal and scientific professionals as the only constitutional way to achieve a fair hearing of the powerful scientific case for creation in our pluralistic society," and added that:

⁴ Numbers, 1992, p. xiv.

⁵ Phillip Johnson, 1991, pp. 15–110.

⁶ Larson, 1985, pp. 1–14.

This balanced treatment on origins can be attained by only two methods—the voluntary (by resolution) route or the mandatory (by legislation) route. CFE is in favor of both but we accentuate the latter method for reaching the most schools in America in the shortest possible time.... Our balanced treatment bill leaves the religious aspects on origins for the homes, synagogues, temples, churches, and philosophy courses.... CFE is not a creationist or religious group [and is] ... in favor of academic freedom and opposed to the suppression of scientific information on the subject of origins, whether that information happens to contradict either evolution or creation.⁷

The Arkansas bill was ruled unconstitutional by the courts because of separation of church and state concerns. The act, as summarized by the supreme court, is as follows:

The Creationism Act forbids the teaching of the theory of evolution in public schools unless accompanied by instruction in "creation science." No school is required to teach evolution or creation science. If either is taught, however, the other must also be taught.. The theories of evolution and creation science are statutorily defined as "the scientific evidences for [creation or evolution] and inferences from those scientific evidences."⁸

A similar bill, passed in Louisiana was later overturned by the Supreme Court in 1987.⁹

One of the main allegations of Darwinists that the courts agreed with in the aforementioned cases was the claim that creationists were attempting to inject what many Darwinists viewed as religious dogma into science education. Most leading Creationist and Intelligent Design Groups staunchly denied this claim, however. Concern about such religious or ideological control over teaching is legitimate, but the question that needs to be asked by the courts is whether the mere presentation (as opposed to teacher endorsement) of non-Darwinian viewpoints in a classroom amounts to an imposition of religion by the state. We don't think so. Under the umbrella of academic freedom, an educator should be allowed to present criticism of any aspect of Darwinism or evolution that has previously been published in reputable peer-reviewed science journals.

⁷ Ellwanger, 1984, pp. 1–4.

⁸ *Edwards v. Aguillard*, 482 U.S. 578 (1987).

⁹ *Edwards v. Aguillard*, 482 U.S. 578 (1987).

The Current Trend

Since the 1987 Supreme Court ruling on creationism in *Edwards*, courts have resoundingly ruled against creationists of all types in all of the important cases, including those of Webster, Peloza, Johnson, and Bishop discussed in some detail later in this chapter. A review of these cases involving educators who have been terminated (or censored) due to their objections to naturalistic Darwinism, illustrates the current trend of the courts to rule against educators who are labeled not only creationists, but also Christians. In all of the cases, the problem teachers encountered that caused them to end up in court or which caused them to lose their position occurred due to who the Darwin skeptic *was*, or the beliefs they held, not what they *did*. These are all well-documented religious discrimination cases where the courts, in essence, have ruled against the civil rights of creationist and ID professors, teachers, and science professionals, thus guaranteeing that only the Darwinian position on origins can legally be presented in public schools.

Peloza v. Capistrano Unified School District

Our first example is the case of a Mission Valley, California biology teacher, John E. Peloza. The court case began on September 30, 1991, when Peloza filed a lawsuit in the U.S. District Court against the San Juan Capistrano Unified School District and its administrators for alleged violations of his civil rights. Peloza claimed that the school district was in violation of the establishment clause by requiring him to teach atheistic evolution as fact which “unlawfully establishes the religion of secular humanism and atheistic naturalism.”¹⁰ Peloza also asked the court to declare that “he had the right to discuss his personal beliefs, including those touching on religious matters, with students during non-instructional time at the high school, such as during lunch, class-breaks, and before and after school hours.”¹¹

¹⁰ Zal, 1992, p. 1.

¹¹ Zal, 1992, p. 1.

On January 16, 1992, in the United States District Court, Central District of California, Judge David W. Williams handed down a ruling which forbade Pelozo from discussing his personal beliefs *anytime, anywhere*, on school property, and concluded that the school acted properly in requiring Pelozo to teach only naturalistic evolution and not present the arguments for design in nature. Since much of human communication, including that in the schools, is colored by “personal beliefs,” the only way Pelozo could comply with this was to not talk to anybody about anything that could be seen as reflecting his personal beliefs—a difficult judgment.

The record and my interviews with those involved in the case confirms that Pelozo was not teaching, or even arguing for the right to teach any form of creationism, but rather was only endeavoring to help students think critically about Darwinism and this topic in general.¹² His complaint argued only that it is improper for the school district to *require* him to teach evolutionary naturalism *as fact*, and his request was merely to be allowed to critique evolution as a teacher would any other theory. As a result of this request, he was removed from the biology classroom and forced to teach physical education where the subject of biological origins would be less likely to surface.¹³ The school district ordered him, in writing, to refrain from

initiating conversations about your religious beliefs during instructional time, which ... includes any time students are required to be on campus as well as the time students immediately arrive for the purposes of attending school for instruction, lunch time, and the time immediately prior to students’ departure after the instructional day.¹⁴

No evidence exists that Pelozo was trying to convert students to any religion but rather only help them to understand both sides of the origins controversy. Secondly, no other teachers were similarly restricted—and Darwinist teachers were free to indoctrinate students in their views. Yale law professor Stephen Carter, who studied this case in detail, concluded that Pelozo

¹² Zal, 1992; Pelozo, 1991, p. 2.

¹³ Nahigian, 1992; Rutan et al., 1991.

¹⁴ *Pelozo v. Capistrano*, 1994, No. 8171.

“was not telling his students about creationism in the sense that the term is usually meant.”

Carter’s account continues as follows:

“I never quote Genesis in my classroom,” [Peloza] told an interviewer. “I have taken God out of this.” Still, Peloza must have had in mind something like the classic creationist position: “When I give my presentation,” he said, “I give two sides, one that we are here by chance and the other that we are here by design.” *Here by design*: in other words, created by a designer—which is probably why an attorney for the school district shot back, “Creationism is not a scientific theory, it is a religious belief. It is inappropriate to teach religion in a science class.”¹⁵

District Judge David W. Williams concluded, *without* even bothering to give a hearing to both sides, that to “teach” creationism (a term he never defined) is “illegal,” relying upon the Supreme Court case, *Edwards vs. Aguillard*, on the constitutionality of teaching creationism in public classrooms, which in fact stated *exactly the opposite*, namely that teaching creationism and alternate theories to Darwinism such as Directed Panspermia, are perfectly legal:

It is equally clear that requiring schools to teach creation science with evolution does not advance academic freedom. The Act *does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum* with the presentation of theories, besides evolution, about the origin of life.... The Act provides Louisiana school teachers with no new authority.¹⁶

Judge Williams concluded that Peloza had no basis for claiming that the school officials violated his rights by ordering him to follow their interpretation of the state-mandated science curriculum.¹⁷ His decision could be interpreted as giving free rein to California public schools to force teachers to teach that Darwinism as a fact, and that no creator or higher intelligence was involved in this process. The decision also precludes theistic evolution, and is one more indication that the United States has “officially embraced atheism as the state religion.”¹⁸

¹⁵ Carter, 1993, p. 158.

¹⁶ *Edwards v. Aguillard*, 482 U.S. 578 (1987), p. 578, emphasis added.

¹⁷ James Wood, 1992, p. 658.

¹⁸ Zal, 1992, p. 2.

The media commonly characterized Pelozo as endeavoring to “teach” creationism.¹⁹ This ploy has been very successful in stifling the religious and academic freedom of many teachers, such as those who were terminated (on suspicion alone or an erroneous understanding of terms, such as “Intelligent Design”) because they “might have discussed” creation in the classroom—something now commonly deemed such a serious “crime” in America that mere suspicion has been enough to terminate a career. The media also commonly quoted the judge’s implication by stating that Pelozo was a “loose cannon” implying that he was a contemptible person²⁰. The judge’s irresponsible comment hardly describes someone who simply wanted to teach evolution as science and talk about his personal beliefs during free time with students—a right that atheistic and agnostic instructors have. Furthermore, Pelozo was not quibbling with the requirement that he teach evolution, *but rather* with teaching “evolution as fact.”²¹

After Pelozo lost at the district court, the school district filed a motion requesting reimbursement for “attorney’s fees,” a motion granted by Judge Williams on April 14 for the whopping amount of \$32,633.49. Pelozo’s attorney eloquently argued that this award could only be interpreted as punishment against Pelozo for endeavoring to defend his right to discuss his beliefs and conclusions with students. The U.S. Court of Appeals (9th circuit) agreed with Pelozo, and on July 25 and October 4, 1994, reversed this ruling. Judge Williams ruled as to Pelozo’s other claims:

While at the high school, whether he is in the classroom or outside of it during contract time, Pelozo is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school’s classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment. Such speech would not have a secular purpose, but would have the primary effect of advancing religion, and would

¹⁹ See, e.g., James Wood, 1992, p. 658, and Scott and Cole, 1992, p. 1.

²⁰ For example, see Ohio National Education Newsletter February 1992 page 1 sent to all NEA members in Ohio

²¹ Zal, 1992, p. 1.

entangle the school with religion. In sum, it would flunk all three parts of the test articulated in *Lemon v. Kurtzman*.²²

The difficulty with this argument is obvious. If consistently applied, it actually would rule out the discussion of *any* arguments that have a religious base or foundation. For many people, abortion, polygamy, pedophilia, adultery, and incest all are wrong, and the basis for their position on these issues is ultimately religious for many people. All of these behaviors have been widely practiced by some societies without problems, and the original source of their condemnation were Judeo-Christian ethics. To be consistent, an argument against all of these behaviors would “have the primary effect of advancing religion, and would entangle the school with religion.” Thus, it would be forbidden. Consequently, only one side of these issues could be presented. In addition, the position in favor of marital fidelity and against same-sex marriages, plus numerous other topics that have a religious basis, could not be discussed except in cases where one side only is advocated. Of course, some could argue that condemning these behaviors has a valid secular purpose, but so does teaching the controversy for all of these conditions.

The court did not address the difference between a teacher *initiating* a religious discussion (in or out of class) and merely *answering questions* raised spontaneously by students about religious beliefs outside of class time. It is also absurd to argue that high school students equate a teacher’s obviously personal views with those of the school—most all junior high and high school students know full well that the teacher’s views on politics, religion, sports, and most other topics expressed in class are not the state’s. It is far more beneficial to the students’ education if teachers are allowed to express and discuss a wide variety of views. It is hard to imagine a more repressive ruling—one that would have been unusual even in the Soviet Union during the heyday of communism.

Ironically, even though *Peloza* evidently was required to teach evolution as fact, The Science Framework for California Public Schools *prohibits* teaching evolution as a fact:

²² *Peloza v. Capistrano School District*, No. 12057; *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See *Roberts v. Madigan*, 921 F.2d 1047, 1056-58 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 3025 (1992).

“science is limited by its tools—observable facts and testable hypotheses ... nothing in science or in any other field of knowledge shall be taught dogmatically. A dogma is a system of beliefs that is not subject to scientific tests and refutation.” The policy also proclaims that “science is never dogmatic; it is pragmatic—always subject to adjustment in the light of solid new observations like those of Joule, or new, strong explanations of nature like those of Einstein and Darwin”²³ Thus, it could be argued that Peloza, in expressing doubts about the factuality of evolution, was acting not out of religious motivation but out of a secular purpose dictated by the State of California.

One problem in understanding the court decisions is the fact that key terms such as “creation” and “evolution” are rarely defined; thus, one does not know for certain what the court briefs and judgments are permitting or forbidding, and the observer has to infer all this from reviewing the entire case. Evolution, for example, can be defined simply as any biological change, such as the process of breeding the over 200 modern dog types from a mongrel. On the other hand, evolution is often more commonly defined as a naturalistic process in which life forms slowly change by processes of natural law into different life forms that are better adapted to their environments. What is often insisted upon in the California Framework is not simply evolution, but naturalism or atheistic evolution (as discussed by Provine—see below). Thus, the framework sometimes appears to be religiously biased in favor of atheism. Likewise, the term “creation” is a term which can be defined to mean *only* that an intelligence is responsible for what we see in the natural world—and does not need to carry any Christian or religious connotations. In that context, a teacher who speaks about “creation” in contrast with evolution would not be teaching religion, but only an alternate view of the scientific evidence.

²³ *The Science Framework for California Public Schools* adopted by the State Board of Education on November 9, 1989, p. 18

The Bishop Case

Dr. Philip Bishop, an honor graduate of the U.S. military academy at Annapolis, James Madison University, and the University of Georgia, is now a tenured professor of exercise physiology at the University of Alabama, director of the university's human performance laboratory, and an expert in exercise physiology. His *curriculum vitae* listing his many publications, honors and awards is over 45 pages long, and includes over 300 articles in peer reviewed publications and conferences. He publishes more extensively than most professors at his university. His record was so outstanding that he was recommended for early tenure by his department chair.²⁴ It was also “undisputed that [Bishop] covered the course material fully and that he was a well-regarded and successful teacher.”²⁵

The focus of the Bishop case was the university's claim that it had the absolute right to restrict all “occasional in-class comments” and any “optional out-of-class lecture” that mentioned “the professor's personal views on the subject of his academic expertise.” Bishop admitted that his “personal religious bias” colored his teaching perspective on his subject matter, human physiology, to the following extent: he had begun each semester's classes with a two-minute discussion and his conclusion, from his study of physiology, was that this field provided abundant evidence for intelligent design, and not evolutionary naturalism.²⁶ At other times he also may occasionally mention his doubts about Darwinism's ability to create the living world, spending no more than 5 out of the 2,250 minutes of class time, which is about the typical time other professors spend on relating their personal beliefs.²⁷ When the university learned what he was doing, they totally forbade him from *even mentioning his “religious” beliefs in class* (they never defined religion, so, again, one cannot be certain what was being censored). To defend his academic freedom Professor Bishop took the university to court. The U. S. District Court for the Northern District of Alabama in a summary judgment ruled against the university on most every

²⁴ Wagner, 2000. p. 131.

²⁵ Bishop supreme court brief, Bishop v. Delchamps, p. 15. Note: Bishop won his case at the lower court level but lost on the University of Alabama appeal

²⁶ McFarland, 1992, p. 2; Wolf, 1991.

²⁷ Wagner, 2000. p. 132-133.

count on the basis of academic freedom, noting that faculty members are free to divulge their personal views in the classroom as long as they are not disruptive.²⁸ The university appealed this decision to the court of appeals for the eleventh Circuit court²⁹, which agreed with the trial courts statement of facts but the three judge panel reversed the decision “thereby reinstating the censorship of professor Bishop.”³⁰ The court added that “restricting Bishops speech was a part of” the university’s authority to control the content of its curriculum³¹. They added that any lecture where he mentioned his doubts about Darwinism must be clearly separated from his classes, and the time and place both must be approved by the university prior to the lecture. Dr. Bishop also included an optional lecture titled “Evidence of God in Human Physiology,” taught on his own time, which the district court “ordered him to stop.”³²

Although Bishop’s “comments were nondisruptive, noncoercive, and clearly identified as ‘personal bias,’” the university argued that allowing professors to present their own views in class implies that the university endorses them. In other words, the university argued that it endorses “everything it does not censor.”³³ Bishop argued that occasional expressions of personal belief at a public university “cannot be construed as bearing the university’s imprimatur, and thus are protected under the First Amendment when they are nondisruptive and noncoercive.”³⁴

The University endeavored to stop Bishop and *only* Bishop from mentioning, even briefly, his personal world view in the classroom, which he voiced to “help students in understanding and evaluating” his classroom presentations.³⁵ His brief argued that suppressing only one philosophical perspective, as the university had done, would be intellectually dishonest. Bishop’s attorneys also argued that if only those with an atheistic or agnostic world view could

²⁸ Wagner, 2000. p. 133.

²⁹ Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991)

³⁰ Wagner, 2000. p. 133.

³¹ Wagner, 2000. p. 133

³² Jaschik, 1991, p. A23; Hartwig, 1991, p. 55, McConkey, 2000, pp. 131-140

³³ Bishop supreme court brief, Bishop v. Delchamps, p. 10.

³⁴ Bishop supreme court brief, Bishop v. Delchamps p. 9.

³⁵ Bishop supreme court brief, Bishop v. Delchamps p. 7.

freely express their views, students might come to the erroneous conclusion that all professors shared the same world view. McFarland characterized the case as follows:

The university administration ordered Dr. Bishop to discontinue his classroom speech as well as his optional on-campus-talk. No other faculty and no other topic have been similarly curtailed. Dr. Bishop obtained a federal court order protecting his free speech and academic freedom, but it was overruled in a disastrous opinion by the U.S. Court of Appeals... The Court held that public university professors have no constitutional right of academic freedom and that their right of free speech in the lecture hall is subject to absolute control (censorship) by the University administration.³⁶

Bishop makes a valid point. Nearly everyone who has studied sociology in some depth has had an instructor who has openly argued for Marxism in class, but no student infers from this that the university officially endorses Marxism. Why is there such a high degree of sensitivity when a Christian point of view, or even simply a design theory point of view, is expressed even only in passing in a class, but not when a professor systematically preaches Marxism, radical feminism, atheism, or other views of the world which are broadly just as “religious” in character?

Wagner concluded the court ruled that the University in his case had the absolute right to censor Bishop in clear violation of his academic freedom because the issue involved a professor critiquing Darwinism³⁷.

The Court Demeans Bishops Views

Another concern in this case was the university’s attempt to apply derogatory labels to Bishop’s view of origins, referring to them as “Bible belt” and therefore “inappropriate” at a university.³⁸ Professor Carl Westerfield (the head of Bishop’s academic unit) even claimed that Bishop’s beliefs “hurt the reputation” of the university!³⁹ Bishop’s brief argued that the school officials “proceeded on the mistaken assumption that religious discussion must be ‘kept out of the classroom’ entirely, on account of the establishment clause,” and that the establishment clause forbids not only open government endorsement of religion—but also forbids government

³⁶ McFarland, 1992, p. 2.

³⁷ Wagner, 2000, p. 135-137.

³⁸ McConkey, 2000, p. 132

³⁹ Myers, 1992a, p. 2.

employees to act as individuals (as Bishop did) rather than as an extension of the governmental institution.

The Amicus Curiae and the brief prepared by Bishop's attorneys to appeal the case to the U. S. Supreme Court documented the fact that the type of censorship Bishop suffered is "reoccurring on campuses throughout the nation":

"We are shocked at the breadth of speech rendered vulnerable by the court of appeals' decision.... the decision ... [gives] universities broad power to censor any comments that might "produce more apprehension than comfort in students" (Pet. App. A10). This view is completely antithetical to the premise underlying higher education—that students grow intellectually from confronting new or disturbing ideas, not from avoiding them.... [and the] petitioner was reprimanded for his expressions solely because of the religious viewpoint presented in it ... [and that the university] ... routinely permits faculty to present non-religious perspectives in the classroom in their area of expertise. Amici's experience shows that such discrimination is, unfortunately, typical. Religiously committed academics in public universities across the country face resistance when they attempt, however briefly, to discuss or even disclose their ideological perspective in the course of their teaching or scholarship.⁴⁰

Valid concerns in this case include the court of appeals limiting the petitioner's classroom speech goes far beyond both the petitioner and the classroom because the court's rationale authorizes limitations on other forms of faculty expression:

If a professor's in-class speech can be attributed to the university merely because he is employed there, so can his comments in the media or statements in his scholarly work. Surely, some students taking a professor's classes might feel discomfort or anger at his extra-curricular speech or scholarship. A major concern in this case is that the university imposed restrictions on Bishop's speech that it did not apply to any other professor and specifically singled out religious speech—specifically Bishop's religious speech—for censorship but did not attempt to censor the religious speech of any other professor⁴¹

The Bishop appeal to the circuit court argued that the university restricted Dr. Bishop's speech "solely because of its religious content," and argued that "speech presenting a religious perspective is entitled to the same non-discriminatory treatment as other forms of speech."⁴².

⁴⁰ Bishop supreme court brief, Bishop v. Delchamps, 91-286 pp. 5–6.

⁴¹ Bishop supreme court brief, Bishop v. Delchamps 91-286 p. 15.

⁴² Bishop supreme court brief, Bishop v. Delchamps 91-286 p. 13.

Contrary to extensive case law and the Constitution, the court of appeals' decision authorized "virtually limitless censorship of in-class or classroom-related speech by professors" if it can be construed as "religious" or "religiously motivated," even "if the views expressed are clearly identified as personal."⁴³ Strictly applied, it would be inappropriate for a professor to state that he is Jewish or Muslim, goes to church, celebrates Christmas, or believes in God.⁴⁴ . Yet the same professor is allowed to state that he does *not* believe in God or does *not* believe in a religious world view. In short, he can lecture *against* whatever the state defines as "religious" values or beliefs, but not *for* them⁴⁵. As pointed out by attorney and law professor Phillip Johnson, the decision in this case reflects an obvious contempt for those who have serious questions about Darwinism. Johnson concluded the following about the appellate court's opinion:

A subtext of contempt appeared when [Judge] Gibson explained why a professor of physiology was not allowed to tell his class about his doubts concerning the orthodox theory of human evolution.... If Bishop really had opinions about evolution that qualified as rational (let alone authoritative!), they would be welcome in classroom discussion. Of course the university could not, and would not, prevent a professional from saying (to whoever would listen) that he had been held captive on a flying saucer or that he thought the Holocaust never happened—although the university would certainly regard such a professor as an embarrassment and would try to keep the damage to a minimum. The court even tried to imply that Bishop was somehow guilty of dishonesty—by discussing his religious beliefs "under the guise of University courses"⁴⁶

The appeals court held that the university could suppress religious speech merely to avoid a "potential establishment conflict"⁴⁷ and even argued that the "expression of a religious position in a secular subject, no matter how carefully presented, creates the appearance of endorsement of that position by the university and engenders anxiety in students who may feel compelled to

⁴³ Bishop supreme court brief, Bishop v. Delchamps 91-286 p. 9.

⁴⁴ Robinson, 1991

⁴⁵ Wood, 1992; McFarland, 1991; Larson, 1985

⁴⁶ Johnson, 1995, p. 181.

⁴⁷ Pet. App. A21,

feign a similar belief and, worse still, deny their own beliefs”⁴⁸. The U.S. Supreme Court rejected the petition for *Writ of certiorari*, and thus the case ended⁴⁹.

Negative Implications of the Bishop Case for Academic Freedom

To suppress speech on these grounds is ludicrous—it would be close to impossible for instructors to teach courses that range from the behavioral sciences to political science to philosophy (and even physics and chemistry classes) if this rule were consistently applied. As Bishop’s attorney argued, “discomfort, anger, anxiety on the part of a student or two cannot authorize suppression of a viewpoint”⁵⁰. The whole point of free-speech laws is to protect speech *specifically* in cases where it engenders disputes, disagreements, discomfort, anger or anxiety. Speech that does not generate these emotions is never suppressed, and thus its protection is of little concern.⁵¹ . Certainly, *anti-Christian speech* in universities “engenders anxiety” in Christian students and others, but efforts to suppress *that* type of speech have consistently failed.

Furthermore, if strictly applied this would require courses in the history of western civilization (and every other civilization) to expunge all discussion of the significant contributions that religion and religious beliefs have made to civilization in history, and that no college or university could offer *any* general course on philosophy or the history of philosophy and even the history of science.

Yet, the court of appeals ruled that the university *can* “restrict speech”—even that which “falls short of an establishment violation.”⁵². In other words, this court ruled in this case that it can convict one of an establishment violation even if it rules that the person’s actions fell short of committing the violation! This position is totally irreconcilable with the long history of freedom-

⁴⁸ Pet. App. A22

⁴⁹ Petition for Writ of Certiorari. (the document a losing party files with the Supreme Court asking the Supreme Court to review the lower court decision. Rejecting it means that they refused to hear the case).

⁵⁰ Bishop Supreme Court brief, Bishop v. Delchamps. p. 15

⁵¹ Hudson, 1992

⁵² Pet. App. A22

of-speech rulings in America. Although the courts have held that schools may restrict student or teacher speech that “substantially interferes” or clearly impinges upon “the rights of others,”⁵³, the courts’ past rulings have required *overwhelming evidence* that such major effects have occurred, and not merely indications that such *might* have occurred, as the ruling in this case indicates. This decision signifies a new trend: for statements that can be interpreted as an endorsement of theism, all other considerations (including the First Amendment) must be suppressed.

The Bishop case is critically important because, as Berkeley emeritus law professor Phillip Johnson explains, the judge’s opinion is a prime example of what he calls the “sham neutrality” of liberal Rationalism:

What gives anyone, even a federal judge, the right to say how things really are?... Nonetheless liberal rationalists, like other people, do make metaphysical judgments.... When metaphysical statements cannot be made honestly, they have to be stated in code and enforced with power. Thus... toleration (which may include the right to censor the “insensitive” speech of others) is extended to the morally worthy and denied to the unworthy without any explanation of the difference.⁵⁴

The blatant bias shown in this case was so extreme that even many secular organizations were appalled. *Americans United for Separation of Church and State* are well-known for their opposition to presenting theism in a positive light in public schools, and generally advocate the presentation of only non-theistic world views. Robert Boston, a spokesman for *Americans United*, noted that he believed this was the first time “a Federal Court had applied the secondary-school ruling to a public university,” and that courts in the past have viewed college students as “more mature and better able to judge” if a professor’s statements amount to institutional endorsement of religion⁵⁵

⁵³ Tinker, Supra 393 U.S. At. 509

⁵⁴ Johnson, 1995, pp. 181-182

⁵⁵ Jaschik, 1991, p. A23.

General counsel for the *American Association of University Professors*, Robert M. O'Neil stated that while the court might have been correct to affirm the university's right to prevent Bishop "from mentioning his personal religious beliefs on campus," the judges had given university administrators far too much discretion, and the decision's wording was "dangerous and very sweeping," and "could represent an invitation for intrusion into the core of academic freedom—what goes on in the classroom."⁵⁶ J. Scott Houser, executive director of the *Southern Center for Law and Ethics*, concluded that this appellate court decision should concern all faculty: "In effect, it reduces the professor to a puppet of the university. The court held that the institution retains academic freedom, but professors do not."⁵⁷

Even the University of Alabama counsel, Kenneth R. Goodwin, stated that he was surprised by the court's broad ruling, giving his university "unprecedented authority" to manage course content and professors' speech. Mr. O'Neal added, "I think there is general agreement within the academic community that faculty ought not to intrude their own religious views into the teaching of secular material."⁵⁸ Of course, faculty commonly (and often blatantly) inject their personal religious views in class—and this has been almost universally accepted by academia as appropriate, as long as the professor's views are close to agnosticism or atheism.⁵⁹ Such views, however, normally are not circumscribed, and if an attempt was made to do so, a howl of protest from the academic community likely would result. Furthermore, the courts have consistently ruled in favor of faculty who endeavor to inject anti-religious, atheistic, or agnostic material into their classes.⁶⁰ Attorney and emeritus law professor Phillip Johnson said of this case:

The opinion by Judge Floyd Gibson for the federal court of appeals said that the relevant principle was not freedom of speech but the right of educational administrators to control what is said in the classroom. The judiciary should not interfere with such internal

⁵⁶ Jaschik, 1991, p. A23

⁵⁷ quoted in Jaschik, 1991, p. A23.

⁵⁸ quoted in Jaschik, 1991, p. A23

⁵⁹ Smith, 1990; Fairhurst, 1923

⁶⁰ Bergman, 1984.

university matters, said Gibson, because “federal judges should not be *ersatz* deans or educators.” If Bishop and other professors were dissatisfied with the restrictions placed on them by their academic superiors, their remedy was not to go to federal court but to seek employment at a different university that was more tolerant. As the court stated in this *reductio ad absurdum* of free-market ideology, “University officials are undoubtedly aware that quality faculty members will be hard to attract and retain if they are to be shackled in much of what they do.”⁶¹

From Johnson’s point of view Judge Gibson’s avoidance of the freedom of speech issue is completely unacceptable. Wagner concluded that “viewed in the light of our tradition of academic freedom the University of Alabama failed in its responsibility to defend Professor Bishop...all of us who teach in public colleges and universities ... are left to contend with one of the worst judicial opinions on higher education in recent memory” .⁶²

The Byron Johnson Case

Byron R. Johnson was an assistant professor of criminology at Memphis State University from 1986 until 1991, when his contract was terminated one semester before he would have been eligible for tenure.⁶³ The reason given was that “he did not fit in” because of his religion. The university further told him that he “should consider teaching at some smaller religious affiliated school.” His problems began when he formed the Christian Faculty/Staff Fellowship.⁶⁴ His department chair, Jerry Sparger, was evidently his major critic. The background of the case is as follows:

Beginning in 1987, Dr. Johnson was instrumental in organizing a Christian Faculty/Staff Fellowship at Memphis State. He did not, however, discuss his religious beliefs in class. Although Dr. Johnson published more and received higher teaching evaluations than any other assistant professor in his department, he received substantially smaller salary increases from 1988 through 1990 than other department members, and was eventually terminated. During discussions with Dr. Johnson, university officials told him he “did not fit in” and that “given his philosophical leanings, he should consider teaching at some smaller religious affiliated school.” Dr. Johnson has sued the university in Federal

⁶¹ Johnson, 1995, p. 176)

⁶² Wagner, 2000. p. 139.

⁶³ *Johnson v. Carpenter et al.*, No. 91-2075, at 4-8, W.D. Tenn. Jan. 25, 1991

⁶⁴ see *Action*, March, 1991, p. 6

District Court under Federal Civil rights laws ... and that lawsuit is now in pretrial discovery.⁶⁵

This is one of the very few Darwin doubter cases that I have researched where the victim was able to survive in academia in spite of his problems. Dr. Johnson was, against all odds, able to obtain another position at Morehead State University in Kentucky before his case reached the final stages in the court of appeals. Amazingly, his new employer did not even inquire about his past position! This case eventually was settled out of court in Johnson's favor under terms that both parties agreed not to make public (Johnson, 1995). This outcome indicates that Johnson's claims of illegal discrimination were either true or that the defendants agreed that the court would find in Johnson's favor. Johnson is now the director of the Criminal Justice Research Center at Lamar University in Beaumont, Texas.

Common Elements in All Three Cases

In all of these cases, I found no evidence that the teachers were "teaching creationism," as opposed to merely criticizing Darwinism. Furthermore, in *none* of these cases was it alleged that the teacher was anything less than fully competent. Pelosa in fact was acknowledged as an excellent teacher, and was a runner-up for biology teacher of the year.⁶⁶ As for Bishop's opening statements of belief, which never exceeded a few minutes each semester, he clearly labeled them as his personal bias, and no one has alleged that he engaged in prayer or Bible reading, or lectured on religious topics in class.⁶⁷ According to Bishop, "the university had to scratch around to find two students who complained," and "one of those later called me up and said ... 'I'll testify on your side.'"⁶⁸ In the Bishop case, Ray Mellichamp, a tenured faculty member at the University of Alabama for twenty-three years, concluded from his work with Bishop that Bishop is a

⁶⁵ *Bishop v. Delchamps*, 1991, p. 4.

⁶⁶ Larsen, et al., 1992.

⁶⁷ Bishop, 1991 p1-2.

good teacher, doing a good job of research, and he makes one comment in class, that a student complains about, and the university goes into orbit. It has been a complete puzzle to me ... why they ever appealed the decision from the district court—it just doesn't make sense.⁶⁹

Many schools are no longer afraid to press the issue of the instructor's personal religious beliefs and the fear that the professor may influence students toward accepting, or evaluating positively, those beliefs. Conversely, no corresponding concern seems exist in the case of individuals who have expressed atheistic or Marxist ideas, and the courts consistently have defended the professor's academic freedom to make statements about such notions. Only the cases of creationists have not prevailed in the courts. My search of published academic freedom cases has found no exceptions to this generalization.

Teaching Atheism

In the Bishop and Johnson cases the university alleged that expressing what it judged as religious (anti-Darwin) views—no matter how carefully done—might cause students to accept similar views, and the courts agreed. Yet in these cases it seems likely that the court's actual concern was over the direction in which the students' beliefs might change, i.e., away from Darwinism and possibly towards theism. In reference to past court cases in this area in general, it seems likely that if the change in students' beliefs has been in the direction of religious disbelief and atheism, the professor typically has been firmly supported by the courts.⁷⁰ A good example of this situation is revealed in a study by Professor of the History of Biology in the Department of Ecology and Evolutionary Biology and in the Department of History; and also the Charles A. Alexander Professor of Biological Sciences.⁷¹

Cornell University Professor Will Provine first presents his students with the theistic side of the origins debate, then for the rest of the quarter endeavors to demolish the arguments for theism by teaching Darwinism. He noted that at the beginning of his course, about 75% of his

⁶⁸ Myers, 1992, p. 2

⁶⁹ Myers, 1992a, p. 4

⁷⁰ Myers, 1992a, p. 4

⁷¹ <http://www.eeb.cornell.edu/provine/provineworks.html>

students were either creationists or at least believed there was a “purpose in evolution” (i.e., were theists and believed that God directed evolution). Provine proudly notes that the percentage of theists dropped to 50% by the end of the course—this compares to about 95% in society as a whole.⁷² He obviously is enormously successful in influencing his students to move toward the atheistic world view, and is very open about his success. Yet the university and courts have not interfered, even though he not only has openly “expressed his religious viewpoint” (which the court ruled Bishop could not do), but furthermore, has *deliberately tried to indoctrinate students in atheism*. Although Cornell is a private University, it does receive enormous amount of public funds in research grants, student loans, and grants. Consequently, the Bishop case does influence their policies because private universities that receive public monies are under obligation to obey most court rulings, even if they originally were applied to state supported institutions.

Another case of a professor who deliberately indoctrinates students in Darwinism is biology Professor Tom Langen of Clarkson University in Potsdam, New York, who openly *admitted* that he spends much time in his introductory biology course focusing on Darwin, the history of life on Earth and even the “antievolutionary alternatives to the standard scientific account”:

I provide an overview of the basic claims of young earth creationism and intelligent design theory, and then have students evaluate them in relation to the foundational assumptions and ethical ideals of science. I provide my opinion about why these antievolutionary theories are merely pseudoscientific alternatives to the standard scientific account, followed by a discussion among the students on whether these popular antievolutionary alternatives can be categorized as science⁷³

Essentially, he is teaching about a ‘religious’ view which educators who are skeptical of Darwinism have been reprimanded for by their university and the courts. He feels the educational system, both public and private. *must* teach against creationism and

⁷² Provine, 1993, p. 63

⁷³ Langen, 2004, p. 114

ID because to “ignore antievolutionary theories in the science classroom because they are not accepted science” ignores the question of what is “accepted science”:

Examining antievolutionary theories in relation to the assumptions and ideals of standard accepted science can help to clarify on what ethical and epistemological grounds most scientists come to vehemently reject antievolutionary claims as coequal rivals to the standard evolutionary account.⁷⁴

Scott and Branch, who actively oppose “teaching creationism” because it is (in their view) religion, wrote that Langen’s approach is commendable.⁷⁵ This shows that they *do* support teaching creationism (which the courts have ruled is a religious view), *as long as the teaching opposes creation or ID*. Many additional cases could be cited to show teaching creationism or ID is permissible, as long as you teach *against* it.

Keith M. Parsons, a paleontologist at the University of Houston, Clear Lake, is even more hostile in his teaching against creation than the professors cited above. He writes:

When lecturing to my students about any subject dealing with the history of life, I am quickly made aware of the pervasive influence of creationist propaganda in insulating my students’ minds against knowledge of evolution. I consider creationism in all of its guises—whether “young earth” fundamentalism or the allegedly more sophisticated “intelligent design” variety—to be pernicious nonsense. I find that before I can instruct my students on evolution, I have to disabuse them of large amounts of misinformation and disinformation spread by creationists. Therefore, I have included a second appendix explaining what evolution is, how it is known to be true, and why the arguments against it are empty⁷⁶

Can Darwin Doubting Educators Who Are Religious Prevail in Court?

The cases cited above are instructive as to what the future may hold. The courts consistently have ruled that all attempts to challenge or present the “other side” of Darwinism in

⁷⁴ Langen, 2004, p. 114

⁷⁵ Langen, 2004, p. 116

⁷⁶ Parsons, 2004, p. ix.

the classroom constitutes “teaching religion,” yet opponents of creation or ID are free to discuss and attack those same views in their classrooms. The result is that our schools now indoctrinate, not educate on evolutionary principles. Today it is very difficult to teach science objectively and still survive, if one’s colleagues and students perceive that one holds a Christian or a “religious” world view. Good education requires teachers to present several viewpoints in their classroom, but not coercively, thus allowing students to form their own conclusions. If it is perceived that the instructor is functioning as an advocate for theism, and not objectively teaching science, the likelihood of prevailing in court is less likely. Yet another problem, according to Senator Rick Santorum, is the fact that many judges are “hostile to religion in any form.”⁷⁷ Thus, even when educators who are Darwin Doubters present only scientific and philosophical considerations to their students, the perception that disagreement with Darwinism implies “creationism” or “religion” will continue to prejudice all cases of discrimination against Darwin Doubters that reach the courts.

Conclusions

This chapter documents the fact that those who question the Darwinian world view and are challenged could end up in court and, in all of the cases I have researched, the victims have lost. The courts have not upheld their academic freedom if they were accused of supporting the anti-Darwinian view but their academic freedom was upheld if they supported opposing world view. Furthermore, very rarely are those who challenge Darwin skeptics in the classroom required to account for their actions. I am aware of only two cases in this category, both discussed in some detail elsewhere in this book⁷⁸, that made it to court in the last half century, and in both of these cases the court ruled that the instructor has a right to teach against not only creationism, but against the religious beliefs of their students as a matter of academic freedom, a

⁷⁷ Santorum, 2004, p. 61

⁷⁸ *Moore v. Gaston County Board of Education*, 357 F. Supp. 1037, 1043 (W.D.N.C. 1973)

freedom denied to Darwin skeptic educators.

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