

Michael Newdow, in pro per and as counsel
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Sacramento, CA 95823
916-427-6669

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No. 2:05-CV-00017-LKK-DAD

THE REV. DR. MICHAEL A. NEWDOW, IN PRO PER;
JAN DOE AND PAT DOE, PARENTS;
DOECHILD, A MINOR CHILD;
JAN POE; PARENT;
POECHILD, A MINOR CHILD;
JAN ROE; PARENT;
ROECHILD-1 AND ROECHILD-2, MINOR CHILDREN;

Plaintiffs,

v.

THE CONGRESS OF THE UNITED STATES OF AMERICA;
THE UNITED STATES OF AMERICA;
THE STATE OF CALIFORNIA;
THE ELK GROVE UNIFIED SCHOOL DISTRICT ("EGUSD");
DR. STEVEN LADD, SUPERINTENDENT, EGUSD;
THE LINCOLN UNIFIED SCHOOL DISTRICT ("SUSD");
JANET PETSCH, ASSOCIATE SUPERINTENDENT, SUSD;
THE SACRAMENTO CITY UNIFIED SCHOOL DISTRICT ("SCUSD");
DR. M. MAGDALENA CARRILLO MEJIA, SUPERINTENDENT, SCUSD;
THE ELVERTA JOINT ELEMENTARY SCHOOL DISTRICT ("EJESD");
DR. DIANNA MANGERICH, SUPERINTENDENT, EJESD;
THE RIO LINDA UNION SCHOOL DISTRICT ("RLUSD");
FRANK S. PORTER, SUPERINTENDENT, RLUSD;

Defendants.

PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

1 Pursuant to case law¹ and Rule 26(a)(1)² of the Federal Rules of Civil Procedure,
2 Plaintiffs move to have the Court enter a protective order that protects the true identity of the
3 Plaintiffs (other than Michael Newdow). Submitted herewith in support of this Motion is a
4 proposed Protective Order and a Memorandum in support of this Motion.

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6 Respectfully submitted,

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12 /s/ Michael Newdow

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14 Michael Newdow, in pro per and as counsel for Plaintiffs
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¹ Doe v. Porter, 370 F.3d 558 (6th Cir. 2004); Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981).

² Fed. R. Civ. P. Rule 26(a)(1) states that disclosures must be made “[e]xcept ... to the extent otherwise ... directed by order.”

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12 Civil Action No.
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38 FRANK S. PORTER, SUPERINTENDENT, RLUSD;
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40 Defendants.
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43 PLAINTIFFS' PROPOSED PROTECTIVE ORDER
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1 On motion of the Plaintiffs and for good cause shown, the Court hereby ORDERS the
2 following:

3 The Plaintiffs herein shall be allowed to proceed in this cause with the use of pseudonyms
4 in place of their true identities. The pseudonyms being used are:

- 5 (1) Jan Doe and Pat Doe (Parents)
- 6 (2) DoeChild (a minor child)
- 7 (3) Jan Poe (a parent)
- 8 (4) PoeChild (a minor child)
- 9 (5) Jan Roe (a parent)
- 10 (6) RoeChild-1 and RoeChild-2 (minor children)

11
12 The parties shall utilize these pseudonyms for these Plaintiffs in all filings with the clerk
13 and the Court, and if any party for any reason deems it necessary to use the actual and true
14 name of any plaintiff in any filing with the clerk or the Court, such filing shall be made under
15 seal.

16 It is further ORDERED that the true identities of these Plaintiffs shall be disclosed to the
17 counsel for the Defendants, but that said identities shall not be disclosed further except as
18 necessary to ascertain the residency status, taxpayer status, or school enrollment status of the
19 Plaintiffs, and that such disclosure beyond counsel for the Plaintiff shall be strictly limited to
20 those absolutely necessary to make those ascertainments. Each person to whom the identity of
21 the Plaintiffs is disclosed shall be informed that, under penalty of contempt of this order, they
22 are not to make any disclosure of such names. When making disclosure, counsel for the
23 Defendants shall provide each person to whom such disclosure is made with a copy of this
24 order.

25 It is further ORDERED that Plaintiffs shall not be required to be present in open court
26 hearings of this cause and that any and all testimony to be presented by such Plaintiffs may be
27 presented by deposition testimony. All such depositions, and affidavits and pleadings shall
28 refer to these Plaintiffs by their respective pseudonyms.

1 It is the intent of this ORDER to preserve the anonymity of the individual Plaintiffs to the
2 greatest extent possible while affording the parties adequate information to effectively address
3 the issues in this matter. All parties are directed to seek a determination from this Court as to
4 any perceived ambiguity in this ORDER before disclosing the true identity of any individual
5 Plaintiff.

6
7 Entered on this _____ day of _____, 2005

8
9
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11 _____
12

1 Prepared for Entry:

2
3
4 By: /s/ Michael Newdow

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40 Defendants.
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44 MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PROTECTIVE ORDER
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1 Plaintiffs, through counsel, submit this Memorandum in Support of Plaintiffs' Motion for
2 Protective Order.

3 **BACKGROUND**

4 This lawsuit has been filed with pseudonyms, rather than true names, for all Plaintiffs
5 except Michael Newdow. As alleged in the Complaint, these pseudonymous Plaintiffs are all
6 residents and citizens of Sacramento or San Joaquin Counties in California. This case
7 involves objections to the use of the words, "under God," in the Pledge of Allegiance as
8 recited in the public schools. Each of the pseudonymous Plaintiffs is a minor child enrolled in
9 a public school where the Pledge is recited, or the parent of such a child. It is believed that
10 disclosure of the actual and true names of either the children or their parents will subject the
11 minor children (and their parents) to potential harm.

12 13 **LAW AND ARGUMENT**

14 "Judicial proceedings are supposed to be open ... in order to enable the proceedings to be
15 monitored by the public. The concealment of a party's name impedes public access to the
16 facts of the case, which include the parties' identity." Doe v. City of Chicago, 360 F.3d 667,
17 669 (7th Cir. 2004). Nonetheless, "[t]he presumption that parties' identities are public
18 information, and the possible prejudice to the opposing party from concealment, can be
19 rebutted by showing that the harm to the plaintiff ... exceeds the likely harm from
20 concealment. Id. In other words:

21 In cases where the plaintiffs have demonstrated a need for anonymity, the district
22 court should use its powers to manage pretrial proceedings, see Fed. R. Civ. P. 16(b),
23 and to issue protective orders limiting disclosure of the party's name, see Fed. R. Civ.
24 P. 26(c), to preserve the party's anonymity to the greatest extent possible without
25 prejudicing the opposing party's ability to litigate the case.

26
27 Doe v. Advanced Textile Corp., 214 F.3d 1058, 1069 (9th Cir. 2000).

1 It should initially be noted that the United States Supreme Court has permitted
2 pseudonymous filings in precisely this type of litigation. Santa Fe Independent School District
3 v. Doe, 530 U.S. 290 (2000) (parents individually and as “next friends” to their children
4 challenged prayers at public high school football games).¹ This Court has the authority in its
5 discretion to enter a protective order to control discovery and protect the rights of the parties.
6 Doe v. Porter, 370 F.3d 558, 560-561 (6th Cir. 2004) (upholding lower court’s grant of
7 protective order allowing the use of pseudonyms in challenge to religious instruction in
8 schools); Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981) (reversing lower court’s denial of
9 protective order allowing for pseudonyms. The Stegall court noted that “religion is perhaps
10 the quintessentially private matter,” and that the plaintiffs’ disclosures about their religion
11 “have invited an opprobrium analogous to the infamy associated with criminal behavior.” Id.,
12 at 186).

13 Holding “that a party may preserve his or her anonymity in judicial proceedings in special
14 circumstances when the party’s need for anonymity outweighs prejudice to the opposing party
15 and the public’s interest in knowing the party’s identity,” Advanced Textile, 214 F.3d at 1068,
16 the Ninth Circuit has determined:

17 that in cases where, as here, pseudonyms are used to shield the anonymous party from
18 retaliation, the district court should determine the need for anonymity by evaluating the
19 following factors: (1) the severity of the threatened harm, (2) the reasonableness of the
20 anonymous party’s fears, and (3) the anonymous party’s vulnerability to such retaliation.

21
22 Id. In this case, the evaluation of those factors demonstrates that need. Even the mildest
23 threatened harm – harassment of children in the public schools – warrants the requested relief.

¹ Additionally, it might be noted that the high Court just decided a case involving a pseudonymous filing where the justification appears to be nowhere near as compelling as in the instant action. In City of San Diego v. Roe, No. 03-1669 (U.S. Dec. 6, 2004), a police officer who was terminated from his job because of sexually explicit videotapes he had made was permitted to file pseudonymously.

1 Additionally – as the attached Exhibits show – the fears are reasonable, and each of the
2 children (and each adult) is vulnerable to the harms.

3 Joann Bell – a parent with three children enrolled in a public school district – filed a
4 federal lawsuit to stop school-sponsored prayer meetings. In Exhibit A she writes:

5 After I filed the lawsuit, my family and I received numerous threatening
6 telephone calls and letters. These threats promised physical harm and even
7 death to my family members and me as a result of my involvement as a plaintiff
8 in the lawsuit. Many of the telephone calls told me that our home would be
9 burned. I could not even perform such simple tasks as shopping for groceries in
10 the community without being confronted by other persons about the lawsuit.

11
12 Additionally, when she responded to a bomb threat at her children’s school, “several school
13 employees circled the car. One of the employees grabbed me by the hair of the head and
14 battered my head against the frame of the car’s door.” After the family’s home “was burned in
15 a fire of suspicious origin,” the family moved from the school district “motivated by a grave
16 concern for the safety of our family.” Exhibit A.

17 Megan Black – a third grader – was grabbed and yanked by her public school teacher for
18 not reciting the now-religious Pledge of Allegiance. This was followed by more than two
19 years of taunts and harassment by her fellow students, which did not end until she changed
20 schools. Exhibit B.

21 Bailey Wood was pushed up against a building by a classmate who made the sign of the
22 cross, was called a “monkey” because she believed in evolution, and was called “stupid”
23 because she didn’t believe in God. This apparently all stemmed from the fact that her atheism
24 was exposed when she didn’t say the words, “under God,” in the Pledge. Exhibit C.

25 “I dreaded the first day of school each and every year,” writes Abigail Schweter, because
26 her not saying the Pledge as a child resulted in her being “ostracized” and risked a
27 “confrontation with the teacher.” Exhibit D.

1 Ellen Janowitz was “frequently ridiculed in front of the class” by her teacher, because she
2 could not, in good conscience, recite the entire Pledge. At age 15, she suffered “stares and
3 silence of my fellow students [that] were excruciating [and] are still painful to recall” twenty
4 years later. Exhibit E.

5 A book written by Professor Frank Ravitch of the Michigan State University College of
6 Law details numerous other cases.² For instance, the Herdahls were a Lutheran family in a
7 Southern Baptist Mississippi town. When the Herdahl children did not participate in
8 “decidedly Southern Baptist” public school prayers, they were harassed by “[b]oth teachers
9 and students.” When the family filed suit to stop this clearly unlawful practice, “the
10 harassment got even worse. Her family received bomb threats. She received a death threat,
11 and the name calling and ridicule worsened.”³

12 A second story recounted by Professor Ravitch concerned individuals in Alabama. The
13 Herrings were “a Jewish family whose children had been subjected to severe religious
14 discrimination and harassment in school.” The children “were physically assaulted by
15 classmates because of their religion; swastikas were drawn on their lockers, bookbags, and
16 jackets; and they were regularly taunted by the other children.” The mother, in a sworn
17 statement to the Court, stated:

18 Every day that I send my children to Pike County schools, I wonder if I am sending
19 them into a war zone. ... The consequences of the school environment on my
20 children’s psyches are devastating. My children are growing up believing that
21 America is a caste society and they are untouchables – except for the purpose of
22 getting beaten up. One child suffered “serious nightmares.”⁴
23

24 “Rachel Bauchman, a Jewish high school student, objected to overtly religious songs,
25 which were sung at high school graduations by the high school choir of which she was a

² Ravitch FS. *School Prayer and Discrimination: The Civil Rights of Religious Minorities and Dissenters*. (Northeastern University Press: Boston, 2001).

³ *Id.*, at 8-9.

1 member. ... Rachel obtained a court order prohibiting the graduation songs. However, at the
2 urging of parents and some students, the choir performed one of the religious songs anyway.
3 ... When Rachel and her mother got up to leave – Rachel in tears – parents and students in the
4 audience jeered and spat on them.”⁵

5
6 The proposed ORDER provides Defendants with adequate means of ascertaining the
7 residency status, taxpayer status, or school enrollment status of the Plaintiffs. Discovery, if
8 needed, can also be accomplished under the proposed ORDER while preserving Defendants’
9 rights.

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12 **CONCLUSION**

13 Good cause having been shown, the Court should preserve the anonymity of the Plaintiffs
14 by entering a protective order.

15
16 Respectfully submitted,

17
18 /s/ Michael Newdow

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⁴ Id., at 9-11.

⁵ Id., at 11-12.

EXHIBITS

AFFIDAVIT OF JOANN BELL

1. Joann Bell, of lawful age, depose and state:

1. I am a lifelong resident of the State of Oklahoma. I have raised four children who are now all adults. During my children's upbringing, I was occupied at various times as either a full-time homemaker or in employment outside my home. I now have three grandchildren.

2. During the spring of 1981, my three youngest children attended school at Little Axe Independent School District #70 in Cleveland County, Oklahoma. At that time, I learned that the school was engaged in sponsoring prayer meetings. I then unsuccessfully attempted to the Little Axe Administration and School Board to discontinue this practice, as I believed it violated the First Amendment.

3. After failing to convince members of the Little Axe School Board and Administration to stop the school-sponsored prayer meetings, I filed a federal lawsuit in May of 1981. That case, *Bell v. Little Axe*, (subsequently appealed, 766 F.2d. 1391, 10th Circuit, 1985) was tried in the U.S. District Court for the Western District of Oklahoma during December of 1982.

4. After I filed the lawsuit, my family and I received numerous threatening telephone calls and letters. These threats promised physical harm and even death to my family members and me as a result of my involvement as a plaintiff in the lawsuit. Many of the telephone calls told me that our home would be burned. I could not even perform such simple tasks as shopping for groceries in the community without being confronted by other persons about the lawsuit.

5. On May 14, 1981, I was notified by telephone about a bomb threat to my children's school. My husband and I rushed to the school out of concern for our children's safety. After we arrived at the school, several school employees circled the car. One of the employees grabbed me by the hair of the head and battered my head against the frame of the car's door while she attempted to pull me from the vehicle.

6. On September 18, 1981, my home was burned in a fire of suspicious origin. I had no insurance for this loss. On the day following the fire, many members of the community drove past my property while honking their horns or yelling taunts at my family and me.

7. After the destruction of my home, my family moved out of the Little Axe School District. In addition to the lack of a residence, the move was motivated by a grave concern for the safety of our family.

8 My fellow citizens' resentment of my involvement in *Bell v. Little Axe* created personal nightmare for my family and me. This resentment and the actions it triggered deprived us of any peace of mind or any semblance of a normal family life.

Further, Affiant sayeth not.


Joann Bell

Subscribed to and sworn before me this 5th day of October, 2004

My commission expires:
11-21-2005


Notary Public
#01019273

EXHIBIT A
PAGE 2

I, Karl James Black, do declare as follows:

As my wife, Linda, and I are Atheists we had explained to both of our daughters, even before entering school, that they would not be participating in recitation of the Pledge of Allegiance if any teacher ever lead the class in such an 'exercise'. Amanda and Megan were instructed to remain seated and quiet during recitation of the Pledge if it were to take place.

In 1994 my youngest daughter, Megan, began attendance of the Third Grade at Tyler Elementary in the Van Buren Public School System. The teacher, Ms. Sala, was in the habit of having the children stand, place their right hands 'over their hearts', and recite the Pledge of Allegiance every morning.

Ms. Sala noticed immediately that Megan remained seated and did not recite the Pledge. She asked her why she didn't stand and Megan simply told her "Because I am an Atheist." Nothing more was said at that time.

In early October, after several weeks of peaceful coexistence, Ms. Sala suddenly decided she had had enough. She stormed over to Megan's desk, grabbed her by the upper arm, yanked her to her feet, and yelled at her "You will stand!"

Megan did complain that her arm hurt, though it was not bruised. Of course I was in the Administration Office the very next day with Ms. Sala and the Principal, Mr. Gross, and I most certainly did raise my voice more than once in our discussion.

I pointed out that this is exactly why this nonsense of reciting the Pledge should stop as most teachers do not think it is voluntary and that it produces exactly this type of hatred towards those who do not wish to conform. I received profuse apologies, and denials of hate, but my request that recitation of the Pledge be stopped was refused.

Naturally, this 'outed' Megan to the rest of her classmates and pointed her out as a troublemaker. The typical response of the religious was "You don't believe in God? You're going to go to Hell!"

This immediately began a decline in Megan's acceptance and by the Fifth Grade she was the class scapegoat, frequently being picked on. The harassment was broad, rarely was her Atheism the brunt of the matter, but the implication by example of the teacher to the entire class almost certainly provided the impetus that set up this scenario.

Fortunately, going into the Sixth Grade meant going to another school within the district where Megan could start over, away from the clique that had developed in Tyler. It was, however, a trying and upsetting time for our family, Megan in particular.

Clearly, Linda and I could have sued the school and, assuredly, would have won. We decided, as taxpayers, that it would do our cash strapped public schools no good and did not pursue that option. To the best of my knowledge Ms. Sala was not reprimanded.

I declare under penalty of perjury under the laws of the State of Michigan that the foregoing is true and correct.

Executed on December 10, 2003 at Belleville, Michigan.



Karl Black

EXHIBIT B

AFFIDAVIT OF BAILEY WOOD FREI

STATE OF KANSAS)
) ss:
COUNTY OF DOUGLAS)

I, Bailey Wood Frei, do declare as follows:

1. I am a ten-year-old girl and a fourth grade student at Sunflower Elementary, a public school in Lawrence, Kansas. In my class, we say the Pledge of Allegiance every day. During The Pledge, I don't say "under God" because I don't think God is real or true. I don't have the nerve to sit down and not say The Pledge at all. I used to be silent just during this part, but now I say "under the government" instead. Still, this has made me feel different and allowed the other kids in my class to find out that I am an atheist without me telling them.
2. Once, during recess in third grade, a girl in my class named Grace pushed me hard up against a portable classroom building, made the sign of the cross on me, and said, "everyone has to believe in God." It hurt my back and she almost made me cry. It upset me that she was making fun of me and teasing me. I also was afraid that she would do it again or that other people might start treating me that way too. Later that day she started calling me "Monkey" and said, "If you think we evolved from monkeys then you're a monkey." She kept calling me this for a few days. Also, one time she came up to me while I was in line at the drinking fountain and said, "people who don't believe in God are stupid." Even though I know this isn't true, since I get straight A's, it still hurt my feelings that she was treating me this way.
3. When I was in Kindergarten, my teacher had us do a project about who is the boss of whom. She talked about how the principal was her boss, and the school board was the principal's boss. She also said that parents were the kid's bosses, the government was the parent's bosses, and the president was the boss of the government. Then one kid asked her who was the president's boss and she said "God." I don't really remember how that made me feel, but I remember thinking that she was wrong and she shouldn't be saying that in a public school.
4. Once, while working quietly at our desks in third grade, my teacher called me up to her desk and asked me if I went to church. I said that I didn't. She then just said, "OK" and I walked back to my desk. I don't know why she asked me this - it made me feel uncomfortable - I was worried that she might stop liking me because of my not going to church.

I declare under penalty of perjury under the laws of the State of Kansas that the foregoing is true and correct.

Executed on this 5th day of December, 2003 at Lawrence, Kansas

Bailey Wood Frei
Bailey Wood Frei

[Signature]
Notary Public

My Appointment Expires: 2-28-04



EXHIBIT C

December 11, 2003

To Whom it May Concern,

"I, Abigail Marie Schweter, do declare as follows: Throughout my years in public schooling, my parents religiously prevented me from partaking in the Pledge of Allegiance. Their issue with the Pledge was the fact that it included the words, "under God". As a nervous and shy elementary school student, I dreaded the first day of school each and every year. Mostly I was concerned with my confrontation with the teacher. Sometimes teachers took my stand very personally, and I was so scared of this reaction. Children were definitely not the only ones that ostracized me. At least once or twice my teacher would feel the need to involve the Principle in this matter. I was an intelligent and well behaved child, but was often made to feel like I was doing something wrong. It did get a bit better with time, but even in high school I faced similar treatment from certain teachers and peers.

Now, as a parent myself, it is extremely important to me that our first amendment is upheld ("...no law respecting an establishment of religion, or prohibiting the free exercise thereof..."). My son's learning environment should be a neutral grounds for communication, equality, and understanding. Taking the words "under God" back out of our Pledge (restoring it to it's original pre-1954 form) would put the emphasis back on support for one's country, rather than someone else's religion.

I declare under penalty of perjury under the laws of the State of New York that the foregoing is true and correct. Executed on December the 11th of the year 2003 at Earlton, New York."

Signed,



Abigail M. Schweter



Ellen A. Schweter
11/11/03

EXHIBIT D

Ellen Janowitz
167 Gordon Rd
Walnut Creek, CA 94598
Home phone: (925) 256-1134 email: embulf@att.net

I, ELLEN BULF, do declare as follows

I went through the public school system in Palo Alto, California from kindergarten through high school. In 1963, in my tenth grade math class, I stopped saying the Pledge of Allegiance after the word "America." My reason was increasing mental anguish, which had reached a crisis point, over publicly professing belief in things I privately thought were false. This included "liberty and justice for all" (it was the civil rights era, and clearly we did not have liberty or justice for all) and "under God" (because I didn't believe in God). I stood up with the class, put my hand over my heart, and sincerely hoped that no one would notice that I left some words out.

My teacher confronted me. He demanded that I explain to the class why I was not saying the entire pledge. Self-conscious and unprepared, I muttered something about not wanting to say things which I did not believe in.

The teacher became openly hostile to me for the rest of the semester. I was frequently ridiculed in front of the class. He accused me of being a traitor and rejecting the values on which my country was founded. He demanded I explain to the class why I thought I was smarter than the greatest minds who ever lived, as well as those who built our country and fought for it. Was I a Communist? If not, why was I acting like one? People like me were a disgrace and an affront to good God-fearing Americans. And if I thought I was so smart, why wasn't I in AP math? (This was particularly hurtful because I had dropped down from AP math.) I was accused of rejecting goodness, truth, and morality and setting a bad example for others. I was barely 15, shy and self-conscious even under normal circumstances. Any attempt of self-defense was met with more enthusiastic attacks, so I tried to respond as little as possible. The stares and silence of my fellow students during these tirades were excruciating. They are still painful to recall.

For months, I dreaded going to that class. When I had a question, the answer might begin with, "Well, it seems Miss Bulf *doesn't* know everything!" I stopped asking questions and dropped farther behind. I was often too upset at being ridiculed to concentrate. When my grades suffered, the teacher offered nothing but criticism and contempt. I never told my parents about the abuse to which I was being subjected. Although they were secular in their beliefs, they remembered the recent McCarthy era and thought it best to say whatever the school required so as not to make oneself conspicuous. I suffered through the sadistic ordeal with no support until June finally released me.

Blaming myself for my lack of math ability, I never took math again in high school, which prevented me from my goal of majoring in Biology in college. I only realized

years later that I could have done well, with help and encouragement. (Later, in my twenties, I enrolled in junior college and took the last two years of high school math, with good grades; I then went to a state college, graduating with a degree in Biology at the age of 28.)

The climate of fear intimidated others in the class. At my twentieth high school reunion, a fellow classmate approached me and recalled vividly my humiliation in tenth grade math. He told me that he, a fellow atheist, had been pained by the experience, and had wanted to stand up for me, but didn't for fear of being victimized himself. He wanted to apologize. Watching me suffer alone was one of his strongest memories of high school, one which had caused him to live with twenty years of guilt.

Executed on Dec. 11, 2003 at Walnut Creek, California

Ellen Bult
Ellen Bult

