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Benjamin P. Edwards

University of Nevada, Las Vegas – William S. Boyd School of Law

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WHEN FEAR RULES IN LAW'S PLACE: PSEUDONYMOUS LITIGATION AS A RESPONSE TO SYSTEMATIC INTIMIDATION

Benjamin P. Edwards*

ABSTRACT

When reprisals and intimidation make certain types of cases too risky for most plaintiffs to file, courts should preserve access to justice by allowing more plaintiffs to proceed pseudonymously. As it stands, courts may be deciding requests to proceed under a pseudonym without understanding the full scope of possible retaliation risks, including that past retaliation may work continuing harm through the stress created by fear.

Unusually heightened retaliation risks may be best exemplified by the nasty reprisals befalling plaintiffs in separation of church and state cases. Although multiple books addressed the issue in the mid-90s, the violent trend has continued since that time. This Article traces that trend further into the current day to provide a more accurate assessment of systemic risks. A timely understanding of the current environment is essential because courts have begun to express skepticism about whether the risk remains or whether a few dated, anecdotal accounts actually constitute a trend. As courts and practitioners seek guidance about requests for pseudonymity today, there is urgent need for information and guidance on this issue. This Article's guidance reaches beyond the separation of church and state context to argue that courts should alter their analysis when faced with any set of cases generating similar trends.

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* Adjunct Law Professor and Director of the Investor Advocacy Clinic at Michigan State University College of Law. Thanks to David B. Thronson, Veronica T. Thronson, Alexandra M. Meador, B. Chase Wink, Bezalel Stern, Michael D. Sant'Ambrogio, Glen Staszewski and Frank S. Ravitch for comments on drafts. An earlier draft of this paper was presented at the Michigan State University Junior Faculty Workshop.

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I. INTRODUCTION

On socially-charged issues, a history of backlash and intimidation against plaintiffs may convince potential plaintiffs that court proceedings are too dangerous to pursue. For example, plaintiffs bringing separation of church and state cases regularly receive nasty, vitriolic threats. Because describing these threats as disturbing fails to convey the emotions they induce, I spotlight three examples below:

Letter received by a plaintiff: You would look so cute without an eye to offend you and without a tongue to offend me and mine . . . We will make some lovely incisions in your filthy bellies and pull out those nervy Guts one by one, slow and easy.¹

Twitter post directed at a plaintiff: your home address posted online i cant wait to hear about you getting curb stomped² you fucking worthless cunt.³

Note received by a plaintiff: You're Next!
(accompanied by parrot's severed head).⁴

¹ This is from a threatening letter received by Vashti McCollum after she challenged sectarian religious instruction in her child's public school. VASHTI MCCOLLUM, ONE WOMAN'S FIGHT 98 (rev. ed. 1961).

² "Curb stomp" refers to a brutal act where a person "stomps on the back of [the victim's] head while [she] is forced to bite a street curb." *Monschke v. Cross*, No. 11-5276 RBL/KLS, 2012 WL 2565026, at *4 (W.D. Wash. June 11, 2012) (explaining "curb stomp").

³ Ophelia Benson, *Who's Oppressing Whom*, COUNCIL FOR SECULAR HUMANISM, http://www.secularhumanism.org/index.php?section=fi&page=benson_32_4 (last visited Aug. 30, 2012) (errors in original).

⁴ Christina Lee Knauss, *A Quiet Life No More*, THE STATE, Sept. 19, 2004, at D1.

Alongside countless threats and attacks like these, named plaintiffs have had their houses firebombed and burned to the ground, their children assaulted, and more.⁵ Sadly, a plaintiff who considers bringing a case to enforce separation of church and state⁶ protections should expect similar threats. Compounding the issue, modern technology has made it easier for non-parties to disseminate litigants' contact information and to encourage others to harass plaintiffs.⁷

To avoid this abuse, some plaintiffs seek judicial permission to proceed under a pseudonym. Courts must make difficult decisions about when to allow plaintiffs to adopt a pseudonym. If they set too high a bar for finding protectable interests, courts will effectively turn their backs on cases they would otherwise be hearing by allowing intimidation and fear of reprisal to force plaintiffs out of court. Even when pseudonyms are allowed, defendants and non-parties may attempt to "out" the plaintiff. Justice Stevens spotlighted this problem in *Santa Fe Independent School District v. Doe*. The Justice explained that although the district court had allowed the plaintiffs to "litigate anonymously to protect them from intimidation or harassment," the school district "apparently neither agreed with nor particularly respected" the district court's decision to protect the plaintiffs' identities.⁸ Attempts by defendants to ferret out the plaintiffs' identities led the district court to order that all efforts to expose the plaintiffs' identities cease because the court wanted the issues "addressed on their merits, and not on the basis of intimidation or harassment of the participants on either side."⁹ Thus, intimidation and harassment could still deter plaintiffs from filing and thereby impede the rule of law if pseudonyms are infrequently allowed or loosely enforced.

In this Article, I examine how courts assess whether a plaintiff faces a risk of injury or retaliation. I also examine how courts should treat cases where plaintiffs will likely face unsettling risks merely because of the nature of the action. I argue that history should serve as a guide to determine the risks future plaintiffs may face, including the likelihood that plaintiffs will genuinely and reasonably fear for their safety. The

⁵ See FRANK S. RAVITCH, *SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSENTERS* 13-16 (1999) (describing harassment suffered by plaintiffs).

⁶ For ease of use, this Article refers to cases involving separation of church and state issues as "church-state" cases.

⁷ See, e.g., David Carr, *A Shooting, and Instant Polarization*, N.Y. TIMES, Apr. 1, 2012, at B1 ("On Twitter, the movie director Spike Lee passed on what he thought was Mr. [George] Zimmerman's address, but it was wrong and an elderly couple was forced to flee from their home.").

⁸ 530 U.S. 290, 294 n.1 (2000) (quoting *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 809 n.1 (5th Cir. 1999)).

⁹ *Id.* (quoting from district court order).

dangers in church-state cases, specifically, illustrate a possible systemic risk for otherwise well-functioning democracies: on certain issues, fear may rule in law's place if people are too afraid to ask, much less litigate to ensure, that the law be enforced.¹⁰ To preserve constitutional rights and access to justice, legal systems must provide well-functioning mechanisms to check against intimidation—especially when fear generated by past reprisals may be keeping people out of court.¹¹

Many authors have touched on the need to rethink current standards for pseudonymous plaintiffs. For example, Professor Jayne S. Ressler grappled with the issue in light of the need to rethink how we apply ancient common law norms in the age of the internet.¹² Jed Greer, on the other hand, examined whether plaintiffs should proceed under pseudonyms in civil litigation addressing childhood sexual abuse or claims under the Alien Tort Claims Act.¹³ Still other scholars have sought to build intellectual frameworks for pseudonymous litigation or to allow defendants the right to proceed under a pseudonym.¹⁴ This Article joins the discussion and addresses how courts should consider requests for pseudonymity when plaintiffs risk pariah status, intimidation, and reprisals for bringing unpopular court actions. To make the argument, I focus on church-state actions as the paradigmatic case type where the current, narrow analysis may miss the impact of past reprisals on plaintiff's decisions to file.¹⁵

¹⁰ This danger has been discussed by numerous scholars. See RAVITCH, *supra* note 5, at 206 (noting that many cases “will never be heard for fear of backlash”); Nadine Strossen, *How Much God in the Public Schools*, 4 WM. & MARY BILL RTS. J. 607, 610, 615–16 (1995) (“[G]iven that many victims of this kind of religious freedom violation are understandably reluctant to challenge such violations—in light of the harassment and worse they would face—the cases that come to our attention, numerous as they are, still represent only the tip of the iceberg.”).

¹¹ See discussion *infra* Section IV.

¹² See Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 KAN. L. REV. 195 (2004).

¹³ See Jed Greer, *Plaintiff Pseudonymity and the Alien Tort Claims Act: Questions and Challenges*, 32 COLUM. HUM. RTS. L. REV. 517 (2001); Amit Shertzer, Note, *Plaintiff Anonymity During Civil Litigation of Childhood Sexual Abuse Cases*, 33 CARDOZO L. REV. 2199, 2204–06 (2012).

¹⁴ See Adam A. Milani, *Doe v. Roe: An Argument for Defendant Anonymity When a Pseudonymous Plaintiff Alleges a Stigmatizing Intentional Tort*, 41 WAYNE L. REV. 1659 (1995); Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential*, 37 HASTINGS L.J. 1 (1985); Lior Jacob Strahilevitz, *Pseudonymous Litigation*, 77 U. CHI. L. REV. 1239 (2010).

¹⁵ Similar risks for plaintiffs may exist to greater or lesser degrees in cases involving abortion, sexual orientation, gender expression, challenges to union governance and possibly also in cases challenging affirmative action practices.

To ground this argument, Section II presents the standards and policies federal courts consider when adjudicating requests to adopt a pseudonym and overviews the commonly applied “factor balancing test.”¹⁶ Section III goes into greater detail about how courts analyze whether a plaintiff faces a risk of injury or retaliation because of filing. Section IV discusses, documents, and categorizes the reprisals plaintiffs have suffered in past church-state cases. Section V makes the case for changing the analytic structure courts apply when considering pseudonymous litigation to account for histories of violence and intimidation in similar cases.

II. FEDERAL CASE LAW GOVERNING PSEUDONYMOUS LITIGATION

The Federal Rules of Civil Procedure do not address requests to proceed under a pseudonym. Accordingly, the procedural methods for raising the issue vary by circuit.¹⁷ The Fourth Circuit and the D.C. Circuit suggest that plaintiffs approach the court *ex parte* to secure permission to file a complaint under a pseudonym.¹⁸ The Tenth Circuit has ruled that district courts lack jurisdiction over the parties if the parties fail to secure explicit permission before proceeding pseudonymously.¹⁹ The Fifth Circuit allows plaintiffs to proceed under a pseudonym provided they promptly move for a protective order at the onset of litigation.²⁰

While the procedural mechanisms remain unsettled, circuit courts have coalesced around the same analytic framework for requests to proceed under a pseudonym. The current balancing test weighs the plaintiff's privacy interest against the public interest in knowing the plaintiff's name and against any unfairness to the defendant. This test gradually emerged over the latter part of the twentieth century as more courts considered how to address requests to adopt a pseudonym. The Fifth Circuit reached the issue with its seminal decision in *Southern Methodist University Ass'n of Women Law Students v. Wynne & Jaffe*, a

¹⁶ Although state courts might also benefit from reexamining their practices, this Article focuses on the federal standards because the vast majority of church-state litigation flows through the federal courts.

¹⁷ Donald P. Balla, *John Doe Is Alive and Well: Designing Pseudonym Use in American Courts*, 63 ARK. L. REV. 691, 706 (2010).

¹⁸ *James v. Jacobson*, 6 F.3d 233, 235 (4th Cir. 1993); *Qualls v. Rumsfeld*, 228 F.R.D. 8, 10 (D.D.C. 2005).

¹⁹ *W.N.J. v. Yocom*, 257 F.3d 1171, 1173 (10th Cir. 2001). The harsh result in *W.N.J.* may be partially explained by the indelicate nature of the suit. The plaintiffs sought to challenge laws against fornication and sodomy and the court of appeals may have wanted to dispose of the appeal without reaching the issues. *Id.*

²⁰ See *Doe v. Stegall*, 653 F.2d 180, 181–82 (5th Cir. 1981).

sex discrimination case.²¹ The decision identified factors where pseudonymity had been allowed in the past, yet when applying those factors, the court declined to protect the sex-discrimination plaintiffs.²² Two years later, the Fifth Circuit returned to the issue in *Doe v. Stegall* and clarified that the analysis required courts to balance the public's right to know with a plaintiff's privacy interest.²³ Notably, *Stegall* protected the identities of plaintiffs bringing a challenge to the practice of Bible reading in Mississippi public schools and did so because of safety concerns.²⁴ Since the Fifth Circuit's decisions, the test has broadened to encompass fairness to the defendant as well.²⁵

Now, for any type of pseudonymity, courts generally balance three interests to determine whether a plaintiff may adopt a pseudonym: (i) the public's interest in knowing the plaintiff's identity; (ii) fairness to defendants; and (iii) the plaintiff's need for privacy protection.²⁶ Each of these policy interests encompasses a variety of concerns, and circuit courts that review lower courts' decisions regarding these interests, do so only under an abuse of discretion standard.²⁷

²¹ 599 F.2d 707, 712 (5th Cir. 1979) ("Plaintiffs have not cited, nor have we found, any prior decisions which recognize or even discuss the right of Title VII plaintiffs to proceed anonymously.").

²² *Id.* at 712-13.

²³ 653 F.2d 180, 186 (5th Cir. 1981) ("The decision requires a balancing of considerations calling for maintenance of a party's privacy against the customary and constitutionally-embedded presumption of openness in judicial proceedings.").

²⁴ *Id.*

²⁵ See *James v. Jacobson*, 6 F.3d 233 (4th Cir. 1993).

²⁶ The Second Circuit recently articulated the test as balancing the "plaintiff's interest in anonymity . . . against both the public interest in disclosure and any prejudice to the defendant." *Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185, 189 (2d Cir. 2008); see also *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000) (same); *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 714 (5th Cir. 1979) ("[T]his ruling strikes a sensible balance between [the defendant's] need to defend this lawsuit and the [plaintiff association's] desire to avoid the purportedly adverse consequences of revealing" its members' identities); *Doe v. Hartford Life and Accident Ins. Co.*, 237 F.R.D. 545, 549 (D.N.J. 2006) (courts must balance "the strong interest in ensuring public access to judicial proceedings . . . against the private interests favoring anonymity").

²⁷ See *Sealed Plaintiff*, 537 F.3d at 190 ("[O]ur review of a district court's decision to grant or deny an application to litigate under a pseudonym is for abuse of discretion.").

A. THE THREE INTERESTS

1. *The Public's Interest in Knowing the Plaintiff's Identity*

The public's interest in knowing the plaintiff's identity derives from the public's interest in open court proceedings, generally.²⁸ The United States Supreme Court traced the history of open proceedings to Blackstone and Hale, early English jurists, who argued in favor of "the importance of openness to the proper functioning of a trial...."²⁹ With this history before it, the Court interpreted the Constitution as "enacted against the backdrop of the long history of trials being presumptively open."³⁰

Nevertheless, pseudonymous proceedings do not significantly diminish the public's right of access, because court proceedings remain open and the press retains its freedom to report on courtroom happenings and decisions.³¹ Supporters of open courts point to historical, constitutional, and policy grounds justifying the requirement that public business be conducted publicly and argue that some of these justifications apply to pseudonymous plaintiffs.³² But because the use of a pseudonym does not actually "close" a court, reporters may still access decisions and report on hearings and courtroom happenings even when the plaintiff's identity is obscured. Thus, despite the "history of trials being presumptively open," courts should carefully consider the public's specific interest in knowing the plaintiff's identity instead of automatically assuming that pseudonymous proceedings should be avoided because of the long history of open courts.

Many circuit and district courts also characterize Rule 10(a) of the Federal Rules of Civil Procedure as protecting the public's interest in open trials because it requires plaintiffs to "name all the parties."³³

²⁸ See *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir. 1997) ("Identifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is using their courts."); *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (stating that open courts provide "a measure of accountability" and allow "the public to have confidence in the administration of justice").

²⁹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

³⁰ *Id.* at 575; *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979) (recognizing that "both civil and criminal trials have traditionally been open to the public"). Moreover, the Sixth Amendment explicitly provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. CONST. amend. VI.

³¹ See Steinman, *supra* note 14, at 18.

³² See Ressler, *supra* note 12, at 195.

³³ See *Doe v. Del Rio*, 241 F.R.D. 154, 156 (S.D.N.Y. 2006) (stating that Rule 10(a) "has constitutional overtones" related to the public interest in open proceedings).

Emphasizing the importance of Rule 10(a), other courts have found that it exists for more than “administrative convenience” and that it “protects the public’s legitimate interest in knowing all the facts and events surrounding court proceedings.”³⁴

These decisions, however, may overstate Rule 10(a)’s importance for pseudonymous plaintiffs. Professor Carol M. Rice disputes whether Rule 10(a) has *any* direct connection to the policy goals advanced by open judicial proceedings. She argues that Rule 10(a)’s pleading requirements are not designed to preserve open courts or to bar pseudonymous pleading, and contends that “Rule 10(a) simply seeks to distinguish the more formal caption in the complaint from all others, which for economy need not list every party” and that “Rule 10(a) does not necessarily dictate the substance of the name designation.”³⁵

Despite the weaknesses of relying on Rule 10(a) or the longstanding history of open trials, other policies do justify the public’s interest in knowing the plaintiff’s name. In *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court praised open trials for giving the public “assurance that the proceedings were conducted fairly to all concerned,” as well as discouraging perjury, misconduct, and “decisions based on secret bias or partiality.”³⁶ When a plaintiff adopts a pseudonym, though, there is always a risk that the judge may have a personal connection with that plaintiff. But because the plaintiff’s identity is unknown, the public is left with few, if any, ways to uncover the judge’s bias. For this reason, academics also agree that open judicial proceedings deter corruption and enhance public confidence in the courts.³⁷ Professor Steinman noted that public observance of the judicial process protects the court against unfounded accusations that it has abused its power.³⁸ This in turn may improve compliance with court orders and allow for community catharsis by replacing self help with dispute resolution through the judicial process.³⁹

Still, a policy of complete openness carries significant disadvantages. As Professor Ressler points out, “a judicial system that often appears to value openness at any price” may force special burdens on plaintiffs who lose their privacy.⁴⁰ In many instances, such as with minor plaintiffs or plaintiffs facing potentially severe retaliation, privacy interests may outweigh the benefits accruing from complete openness.

³⁴ See *Doe v. Rostker*, 89 F.R.D. 158, 160 (N.D. Cal. 1981).

³⁵ Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 911 (1996).

³⁶ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

³⁷ See Ressler, *supra* note 12; Shertzer, *supra* note 13, at 2204–06.

³⁸ Steinman, *supra* note 14, at 16–17.

³⁹ *Id.*

⁴⁰ See Ressler, *supra* note 12, at 195.

Even more, many of the rationales for open proceedings may be only partially implicated by pseudonymous plaintiffs. Ressler argues that only in a “rare case” will the public not be able to “realize the full benefits of an open trial without knowing the plaintiff’s name” because the pertinent characteristics of the plaintiff’s identity may still be made available.⁴¹ Her arguments echo those of the Fifth Circuit, which also found that the “public right to scrutinize governmental functioning is not so completely impaired by a grant of anonymity to a party as it [would be] by [the] closure of the trial itself.”⁴² Along the same lines, the Fourth Circuit has recognized that pseudonymous witnesses do not make trials unfair because juries may make standard credibility determinations by observing witnesses’ demeanor without knowing their true names.⁴³ Indeed, pseudonymous proceedings may actually make trials fairer by making it far less likely for jurors to search the Internet to discover, and become influenced by, information not presented at trial.⁴⁴

Still, pseudonymous litigation does present some tension with the public’s right of access to judicial proceedings because the public cannot assess whether material conflicts of interest exist without also knowing the plaintiff’s identity.⁴⁵

2. Relevant Privacy Interests

In addition to considering the public’s interest in knowing the plaintiff’s name, courts weigh the plaintiff’s interest in maintaining privacy. The Supreme Court has implicitly recognized this interest by hearing cases with pseudonymous plaintiffs.⁴⁶ For instance, the Supreme Court has repeatedly decided landmark cases involving pseudonymous

⁴¹ *Id.* at 218.

⁴² *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981).

⁴³ *James v. Jacobson*, 6 F.3d 233, 242 (4th Cir. 1993). *James* involved plaintiffs seeking to proceed under a pseudonym to protect their children from being haunted by publicity from troubling revelations about their paternity. The plaintiffs had discovered that the doctor hired to artificially inseminate one of the plaintiffs with the other plaintiff’s sperm had actually used his own sperm instead. *Id.* at 235.

⁴⁴ Because jurors may easily conduct independent research through online search engines, some courts have struggled to ensure that juries only consider information on the record. *See, e.g., United States v. Farhane*, 634 F.3d 127, 168 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 833 (2011) (“[T]he district court learned that Juror # 8, using the electronic search engine ‘Google,’ had discovered that co-defendant Tarik Shah had pleaded guilty to unspecified charges and then communicated that fact to other jurors.”).

⁴⁵ *See id.*

⁴⁶ *See Ressler, supra* note 12, at 213–14.

plaintiffs.⁴⁷ The first came in 1961 with *Poe v. Ullman*, a case challenging Connecticut's contraceptive prohibitions.⁴⁸ The Supreme Court did not discuss the propriety of the pseudonym but noted that the plaintiffs used "fictitious names."⁴⁹ Later, in *Roe v. Wade*, the Supreme Court made a similar comment.⁵⁰ More recently, the Supreme Court recognized in *Santa Fe Independent School District v. Doe* that the district court had permitted students and parents challenging student-led prayer at public-school football games to litigate anonymously to protect them from intimidation and harassment.⁵¹ Thus, the Supreme Court has recognized that the threat of reprisals may justify privacy.

When assessing the strength of a plaintiff's privacy interest, courts must also consider the public's interest in knowing the plaintiff's identity and other relevant interests.⁵² A plaintiff's privacy interest grows particularly strong in cases involving hotly contested social issues because plaintiffs, by filing, may make "revelations about their personal beliefs and practices that . . . [invite] . . . opprobrium analogous to the infamy associated with criminal behavior."⁵³ Courts recognize that plaintiffs' privacy interests grow stronger when they may face unlawful retaliation or risk injury.⁵⁴

In other instances, courts have protected plaintiff privacy when so-called matters of "utmost intimacy" will be discussed.⁵⁵ Though the term lacks a precise definition, it encompasses a wide variety of private matters. Courts have protected the identities of rape survivors, homosexual plaintiffs, transgender plaintiffs, plaintiffs with stigmatizing diseases, and plaintiffs with mental illnesses on grounds of utmost intimacy.⁵⁶ Some courts also treat questions of faith and religion as a matter of utmost intimacy, recognizing that a person's faith is a private

⁴⁷ The Supreme Court's indulgence should not necessarily be read as an endorsement. The Court may treat it as one of the issues "which merely lurk in the record, neither brought to the attention of the Court nor ruled upon [and is therefore] not to be considered as having been so decided as to constitute precedent" *Webster v. Fall*, 266 U.S. 507, 511 (1925).

⁴⁸ 367 U.S. 497 (1961).

⁴⁹ *Id.* at 498 n.1.

⁵⁰ 410 U.S. 113, 120 n.4 (1973).

⁵¹ 530 U.S. 290, 294 (2000).

⁵² See *M.M. v. Zavaras*, 939 F. Supp. 799, 801 (D. Colo. 1996) ("The issue of pseudonymity requires weighing the scales between the public's interest and the rights to privacy advanced by the movant."), *appeal dismissed*, 98 F.3d 1349 (10th Cir. 1996).

⁵³ *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981).

⁵⁴ See *Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004) ("The danger of retaliation is often a compelling ground for allowing a party to litigate anonymously."); *Doe v. Del Rio*, 241 F.R.D. 154, 161 (S.D.N.Y. 2006).

⁵⁵ *Stegall*, 653 F.2d at 185.

⁵⁶ See Ressler, *supra* note 12, at 246 (collecting cases).

matter.⁵⁷ Cases involving child plaintiffs have also received special solicitude.⁵⁸ In many of these cases, courts often consider how fears of stigmatization may impact a plaintiff.⁵⁹ These fears may be more salient now because the Internet enables people to directly attack plaintiffs in ways which would never have been possible a decade ago, such as by posting their home addresses or other embarrassing information on social media websites.⁶⁰

Still, the boundary lines for protectable privacy interests remain murky. Consider *Wynne & Jaffe*, a case where anonymous female lawyers sought to litigate sexual harassment issues at Texas law firms.⁶¹ The Fifth Circuit was not sympathetic to the plaintiffs' concerns for their professional reputations and fears about being shut out of the job market. It noted that the plaintiffs "face no greater threat of retaliation than the typical plaintiff alleging Title VII violations, including the other women who, under their real names and not anonymously, have filed sex discrimination suits against large law firms."⁶² Finding no compelling privacy interest to protect, nor any general authorization to proceed anonymously, the Fifth Circuit affirmed the district court's order requiring the plaintiffs to reveal their names in the pleadings.⁶³

Although case law provides some guidance, the scope of protectable privacy interests remains disputed. For example, many courts will treat mental illness as a matter of utmost intimacy and protect plaintiffs' identities to shield them from the public revelation of their mental illness.⁶⁴ In contrast, other respected jurists caution against treating mental illness as a matter of utmost intimacy because to do so "would be to propagate the view that mental illness is shameful."⁶⁵ Thus, the imprecise boundaries of what constitutes a private interest make the overall balancing test less predictable as well.

⁵⁷ *Stegall*, 653 F.2d at 186 ("[R]eligion is perhaps the quintessentially private matter. Although they do not confess either illegal acts or purposes, the Does have, by filing suit, made revelations about their personal beliefs and practices that are shown to have invited an opprobrium analogous to the infamy associated with criminal behavior.").

⁵⁸ See Shertzer, *supra* note 13, at 2208.

⁵⁹ *Id.* at 2209.

⁶⁰ See Ressler, *supra* note 12, at 256.

⁶¹ *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979).

⁶² *Id.* at 713.

⁶³ *Id.*

⁶⁴ See, e.g., *Doe v. Hartford Life & Accident Ins. Co.*, 237 F.R.D. 545, 550 (D.N.J. 2006) (recognizing a "substantial public interest in ensuring that cases [involving] mental illness" are adjudicated "without the risk of stigmatization").

⁶⁵ *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 872 (7th Cir. 1997).

3. Fairness to the Defendant

Courts evaluate one final interest when deciding whether to allow plaintiffs to proceed under a pseudonym: whether granting the plaintiff anonymity would be fair to the defendant.⁶⁶ Ressler divides this interest into two parts: (i) “whether plaintiff pseudonymity will prejudice the defendant’s case by jeopardizing access to information necessary to the defense” and (ii) “whether plaintiff pseudonymity is fair to the defendant, who is ‘required to defend himself publicly while the plaintiff could make her accusations from behind a cloak of anonymity.’”⁶⁷

The likelihood of prejudice to the defendant is higher in cases with controverted factual records, where the plaintiff’s personal credibility plays a large role in establishing the weight of evidence. In these cases, the defendant enjoys a strong interest in both knowing the plaintiff’s name and in publicizing the plaintiff’s name to shake out any information bearing on the plaintiff’s credibility. In contrast, when the matter is a question of law and the facts are undisputed, a defendant may suffer little prejudice from a pseudonymous plaintiff.⁶⁸

What then of cases where the defendants already know the plaintiffs’ names or where plaintiffs are willing to disclose their names, provided the defendants keep such information from the public? In these instances, the defendants’ interest in fairness is diminished because defendants may depose plaintiffs, request ordinary discovery, and otherwise litigate the case normally. The Fourth Circuit endorsed this approach in *James v. Jacobson* when it reversed a district court’s decision to deny the plaintiffs’ request for pseudonymity. The court found that the defendant would not be prejudiced because “the defendant effectively could cross-examine the [plaintiffs] about any aspect of their personal lives put in issue by their evidence” without suffering any disadvantage.⁶⁹ Thus, prejudice against the defendant may not always be a material factor in the balancing test—particularly when defendant already knows the plaintiff’s identity.

⁶⁶ The Fourth Circuit stressed this factor and corresponding interest in *James v. Jacobson*, 6 F.3d 233 (4th Cir. 1993).

⁶⁷ Ressler, *supra* note 12, at 230 (quoting *Doe v. Shakur*, 164 F.R.D. 359, 361 (S.D.N.Y. 1996)).

⁶⁸ See *Doe v. Barrow County*, 219 F.R.D. 189, 194 (N.D. Ga. 2003) (“This is not a case that will be determined by plaintiff’s credibility or recitation of facts. Rather, as long as plaintiff has standing to sue, this case will depend on the resolution of a legal question.”).

⁶⁹ 6 F.3d at 242.

B. MOVING FROM INTERESTS TO FACTORS

To help balance the three interests fairly, courts have recognized various factors that should be considered in reaching a decision about how the three interests balance in any particular case. In 2007, Ressler distilled the dominant five factors as follows:

- (1) whether the plaintiff would risk suffering injury if publicly identified;
- (2) whether the plaintiff is challenging governmental activity;
- (3) whether the plaintiff would be compelled to admit her intention to engage in illegal conduct, thereby risking criminal prosecution;
- (4) whether the plaintiff would be required to disclose information of the utmost intimacy; and
- (5) whether the party defending against a suit brought under a pseudonym would be prejudiced.⁷⁰

Though these five factors speak to the main interests (open courts, plaintiff privacy interests, and fairness to the defendant), courts also consider many other factors.⁷¹ Uncertainty remains about how many factors a court should consider and how much weight courts should assign to each factor. Considering the issue in 2008, the Second Circuit articulated a list of *ten* non-exhaustive factors.⁷² Grappling with the same issue, another court arrived at a list of nine different factors, six weighing in favor of pseudonyms and three factors weighing against.⁷³ One commentator has described the trend as a “tendency to amass long,

⁷⁰ Ressler, *supra* note 12, at 226 (collecting cases). Courts continue to recognize additional factors such as whether the litigant's identity remains confidential or whether the litigant is a minor. See *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir. 2008) (explaining “the caution that this list is non-exhaustive and district courts should take into account other factors relevant to the particular case under consideration”).

⁷¹ See *Doe v. Hartz*, 52 F. Supp. 2d 1027, 1046–47 (N.D. Iowa 1999) (considering whether the plaintiff's identity has remained confidential or has already been compromised).

⁷² *Sealed Plaintiff*, 537 F.3d at 190.

⁷³ See *Doe v. Provident Life & Accident Ins. Co.*, 176 F.R.D. 464, 467–68 (E.D. Pa. 1997). The *Provident Life* standard was recently adopted by the Third Circuit. *Doe v. Megless*, 654 F.3d 404, 410 (3d Cir. 2011) (“As district courts have been able to apply the *Provident Life* test and it does not conflict with the tests that have been adopted by our sister circuits, we see no value in upsetting its application. Accordingly, we endorse it.”).

non-exhaustive lists of factors”⁷⁴ In light of the growing number of relevant factors, one court recently cautioned that any list must be viewed as “non-exhaustive and district courts should take into account other factors relevant to the particular case under consideration”⁷⁵ Thus, the factor analysis is helpful in balancing the interests of parties and the public, but the non-exhaustive nature of the factors makes it more difficult to predict which plaintiffs will qualify for pseudonymous litigation.

III. THE RISK OF INJURY WITHIN THE FACTOR FRAMEWORK

The single most important factor for assessing the strength of plaintiffs’ privacy interests is whether they risk injury by filing the suit. Ultimately, courts should make their decisions about the risks particular plaintiffs face only after considering the reaction and retaliation that have arisen out of similar cases.

At first blush, balancing plaintiffs’ privacy interests against the public interest in open judicial proceedings seems perfectly sensible. As always, however, implementation controls the outcomes, and courts making discretionary decisions may reach different conclusions.⁷⁶ Indeed, Professor Donald P. Balla worried that courts weighing pseudonym usage with “loose and undefined” factors may make decisions that simply “boil down to the arbitrary leanings of individual judges.”⁷⁷

An observer might wonder about arbitrariness when looking at how courts draw different lines to define the risk of injury or retaliation. Although all courts agree that risk of physical injury will justify pseudonymous litigation,⁷⁸ district courts differ on whether potential psychological or economic injuries may be considered.⁷⁹ The Southern District of New York Court held that the “desire to avoid professional

⁷⁴ Shertzer, *supra* note 13, at 2218.

⁷⁵ *Sealed Plaintiff*, 537 F.3d at 189–90.

⁷⁶ As mentioned above, courts disagree about whether mental illness should be treated as a matter of utmost intimacy. Compare *Doe v. Hartford Life & Accident Ins. Co.*, 237 F.R.D. 545, 550 (D.N.J. 2006) (treating mental illness as a matter of utmost intimacy), with *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 872 (7th Cir. 1997) (cautioning against treating mental illness as shameful).

⁷⁷ Balla, *supra* note 17, at 695.

⁷⁸ See *Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011); *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190 (2d Cir. 2008); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067 (9th Cir. 2000); *M.M. v. Zavaras*, 139 F.3d 798, 803 (10th Cir. 1998); *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993); *Doe v. Stegall*, 653 F.2d 180, 185–86 (5th Cir. 1981).

⁷⁹ See, e.g., *Stegall*, 653 F.2d at 186 (“[T]hreats of violence generated by this case . . . tip the balance against the customary practice of judicial openness.”).

embarrassment and economic loss is insufficient to permit [plaintiffs] to appear without disclosing [their] identity.”⁸⁰ But the Southern and Eastern New York District courts explicitly found that “psychological harm is a class of injury that could justify pseudonymous litigation.”⁸¹ Some courts formulate the risk of injury “factor more narrowly, as [including only] a risk of physical retaliation”⁸² Others articulate the factor more broadly as “whether identification poses a risk of retaliatory physical or mental harm to the requesting party.”⁸³ Despite the varying articulations, most courts adopt the better-reasoned standard and seek to protect plaintiffs from both physical and mental injuries.⁸⁴ After all, because all evidence indicates that the mind physically resides in the brain, the line between physical and mental injury may be illusory.⁸⁵

Moving past the threshold issue of what forms of injury qualify, the unguided discretion courts enjoy when evaluating how much risk plaintiffs face for filing suit may be the more troubling matter. Courts are not actuaries, and the case law provides little guidance about how a court should quantify the risks plaintiffs face or what sorts of risks qualify. The Ninth Circuit has, perhaps, the most developed guidance, which instructs lower courts to consider the following: (i) “the severity of the threatened harm,” (ii) “the reasonableness of the anonymous party’s fears,” and (iii) “the anonymous party’s vulnerability to such retaliation.”⁸⁶ These additional factors help frame the analysis, but they do not explicitly instruct courts to consider retaliation that has occurred in similar cases.

⁸⁰ *Free Mkt. Comp. v. Commodity Exch., Inc.*, 98 F.R.D. 311, 313 (S.D.N.Y. 1983); *see also* *John Doe v. U.S. Life Ins. Co.*, 123 F.R.D. 437, 439 n.1 (S.D.N.Y. 1988) (“Courts should not permit parties to proceed pseudonymously just to protect the parties’ professional or economic life.”).

⁸¹ *Doe v. Del Rio*, 241 F.R.D. 154, 161 (S.D.N.Y. 2006); *Doe v. Smith*, 105 F. Supp. 2d 40, 44 (E.D.N.Y. 1999) (finding particularized allegations of threats to mental health sufficient to justify pseudonymous proceedings).

⁸² *Del Rio*, 241 F.R.D. at 158 n.6.

⁸³ *Doe v. Pittsylvania County*, 844 F. Supp. 2d 724, 732 (W.D. Va. 2012) (emphasis added) (citation omitted).

⁸⁴ *See* *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993) (focusing on “whether identification poses a risk of retaliatory physical or mental harm”); *Del Rio*, 241 F.R.D. at 158 (“The risk of injury may be physical or psychological, greater or less, more or less likely.”); *Doe v. Smith*, 105 F. Supp. 2d 40, 42 (E.D.N.Y. 1999) (considering “whether identification would put the plaintiff at risk of suffering physical or mental injury”); *cf.* *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981) (seemingly recognizing risk of mental injury from “serious social ostracization based upon militant religious attitudes”).

⁸⁵ *See generally* Antonio R. Damasio, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1994).

⁸⁶ *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000) (citations omitted).

The way courts define retaliation may shift the scale against pseudonymity. Some courts define retaliation narrowly and decline to consider any non-retaliatory harm that may flow from the stigma of being identified as a plaintiff.⁸⁷ Other courts simply expect plaintiffs to endure “embarrassment and harassment” and find that embarrassment and harassment “are generally insufficient to demonstrate retaliatory harm.”⁸⁸

By using narrow definitions, courts may overlook the mental injury and trauma plaintiffs experience from anticipating the same horrific reprisals that other plaintiffs have suffered in similar cases.⁸⁹ In other words, plaintiffs may fear a specific retaliation that goes beyond mere harassment not because any such threat has been made, but because such retaliation is a predictable occurrence in certain types of cases.

Consider, for example, the facts in *Doe v. Pittsylvania County*. In that case, Barbara Hudson filed suit to challenge the county board’s undisputed practice of “regularly opening its meetings with Christian prayer” and asked to proceed anonymously.⁹⁰

Though Ms. Hudson may not have been aware of it at the time, in many ways, her suit paralleled *Wynne v. Town of Great Falls* because both addressed local governments opening meetings with sectarian prayer.⁹¹ The backlash in *Wynne* was horrifying. After the plaintiff succeeded on the merits, someone broke into her home, decapitated her pet African grey parrot and left a note reading “You’re Next!” affixed to the severed head.⁹² Her home was vandalized on nine separate occasions.⁹³ Her cat was hanged from a tree and gutted.⁹⁴ She was ostracized, and sand was poured into her truck’s gas tank.⁹⁵ A plaintiff

⁸⁷ See *Nelson v. Green*, 3:06CV00070, 2007 WL 984127, at *2 (W.D. Va. Mar. 28, 2007) (finding that risk of retaliation did “not favor anonymity-although identification of [plaintiff’s] identity could conceivably pose a risk of future mental harm, that harm would not be ‘retaliatory’ in nature”).

⁸⁸ *Yacovelli v. Moeser*, 1:02CV596, 2004 WL 1144183, at *7 (M.D.N.C. May 20, 2004) (finding that “[a]t most, the students here face social ostracism and harassment which may upset them and disrupt their college community life”).

⁸⁹ See Michael J. Higdon, *To Lynch A Child: Bullying and Gender Nonconformity in Our Nation’s Schools*, 86 IND. L.J. 827, 847–60 (2011) (discussing harms caused by bullying and fear).

⁹⁰ *Doe v. Pittsylvania County*, 844 F. Supp. 2d 724, 727 (W.D. Va. 2012).

⁹¹ *Wynne v. Town of Great Falls*, 376 F.3d 292, 294 (4th Cir. 2004) (finding local practice of opening meetings with sectarian prayers unconstitutional); see also Knauss, *supra* note 4.

⁹² Knauss, *supra* note 4.

⁹³ Jack Kilpatrick, *Wiccan’s Case Reveals Town’s Intolerance*, DESERET NEWS, Aug. 14, 2004, available at 2004 WLNR 16980408.

⁹⁴ *Id.*

⁹⁵ *Id.*

filing a similar suit is likely to be tormented by the fear of similar reprisals, and that fear may itself cause significant mental harm.

Although strikingly similar to *Wynne*,⁹⁶ in *Pittsylvania County*, the court declined to allow Ms. Hudson to proceed under a pseudonym because she had not shown specifically that she was at risk of physical or mental harm if her identity were revealed.⁹⁷ Remarkably, even before her identity was revealed, Ms. Hudson had received a troubling letter—purportedly from the Ku Klux Klan—and put it before the court.⁹⁸ That letter reads:

Ms. Hudson

Thought you might be interested to know the K.K.K. met on Monday Night. The meeting was not about the black community, it was about who made the complaint to the ACLU about prayer.

Your name was brought into the mix as a person of interest. We have instructed our atty. to file every F.O.I.A. available to verify the person that filed the complaint.

Will keep you posted!

Grand Dragon⁹⁹

For reasons unknown, the court did not read the letter as containing a “veiled threat” that could “tip the scales in favor of anonymity” despite the Ku Klux Klan’s well-documented history of terroristic violence.¹⁰⁰ The decision also found threatening calls to plaintiff’s publicly identified

⁹⁶ One could draw a superficial distinction arguing that as a Wiccan plaintiff, Wynne faced unique stigma because of general witchcraft-related fears. This tenuous distinction should not carry much weight because church-state plaintiffs are routinely reviled as atheists. See Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 Iowa L. Rev. 347, 357–63 (2012) (tracing history of discrimination).

⁹⁷ See *Doe v. Pittsylvania County*, 844 F. Supp. 2d 724, 732–34 (W.D. Va. 2012). The decision does not reveal whether the court was told about the retaliation in *Wynne*.

⁹⁸ *Id.* at 740.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 740–44; see also David Chalmers, *Essay: The Ku Klux Klan*, S. POVERTY L. CTR. (last visited Dec. 24, 2012), <http://www.splcenter.org/get-informed/intelligence-files/ideology/ku-klux-klan/the-ku-klux-klan-0> (“The Ku Klux Klan is a native-born American racist terrorist organization.”).

counsel irrelevant to the analysis because they did not indicate that the plaintiff herself faced any risk of retaliatory harm.¹⁰¹

What is troubling about the *Pittsylvania County* court's analysis is not that it denied Ms. Hudson anonymity. Rather, it is that her request may have been denied because the court focused too narrowly on the risk of specific physical retaliation. The decision does reveal that the court was presented with information about "a number of cases dating as far back as 1945 in which Establishment Clause plaintiffs faced harassment, retaliation, and physical violence."¹⁰² Despite this knowledge, the court found that "general fears of retaliation [did] not [show] the need for pseudonymous litigation in this case."¹⁰³ Yet, the court never considered whether Ms. Hudson's familiarity with the Establishment Clause cases or cases like *Wynne* caused her to suffer mental injury from fear that she would experience similar retaliation. Thus, while the court only found general harassment aimed at Ms. Hudson, it should have considered that this general harassment would likely result in specific harms, given the history of retaliation against plaintiffs in cases like hers.

Although other judges, when presented with the facts in *Pittsylvania County*, may have ruled differently, substantial precedent supported the court's analysis. The *Pittsylvania County* court followed other decisions that have rejected a "type of 'it has happened before, therefore it *might* happen here' argument as being insufficient to justify a protective order cloaking plaintiff in anonymity."¹⁰⁴ These decisions decline to recognize a risk of retaliation or injury to a particular plaintiff merely because harm has befallen plaintiffs in other cases.¹⁰⁵ Without a full briefing on the history of violence in particular kinds of cases showing that the violence has continued to the present day, courts may remain unconvinced that plaintiffs objectively and reasonably fear for their safety. For example, one court denied a plaintiff's request to proceed under a pseudonym

¹⁰¹ *Pittsylvania County*, 844 F. Supp. 2d at 734–39.

¹⁰² *Id.* at 733.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (emphasis in original) (quoting *Doe v. Beaumont Indep. Sch. Dist.*, 172 F.R.D. 215, 217 (E.D. Tex. 1997)); accord *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, No. 08–00359JMS–BMK, 2008 WL 5423191, at *4 (D. Haw. Dec. 31, 2008), *aff'd sub nom. Doe ex rel. Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, CIV.08–00359JMS/BMK, 2009 WL 308351 (D. Haw. Feb. 6, 2009), *aff'd sub nom. Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 596 F.3d 1036 (9th Cir. 2010); *Qualls v. Rumsfeld*, 228 F.R.D. 8, 12 (D.D.C. 2005) (holding that vague, unsubstantiated fears of retaliatory actions do not permit a plaintiff to proceed under a pseudonym).

¹⁰⁵ See *Doe v. Beaumont Indep. Sch. Dist.*, 172 F.R.D. 215, 217 (E.D. Tex. 1997).

when supported only by “three anecdotal accounts of religious discrimination and harassment.”¹⁰⁶

This analysis raises a crucial question: when do isolated or anecdotal accounts become a worrying trend? Courts may reasonably doubt whether a particular plaintiff faces any real risk of retaliation because of a few isolated instances of discrimination. This position surely becomes less reasonable when many more than three anecdotal accounts accumulate. At some point, the volume and severity of past reprisals reaches a point where objectively reasonable people will simply decide to “bite their tongues and go about their lives” instead of facing the risk.¹⁰⁷ At some point, a history of reprisals will induce enough fear to chill litigation and cause stress-induced mental injuries in plaintiffs who do decide to file. As discussed below, in the church-state context, we passed that point long ago.

IV. A HISTORY OF REPRISAL IN CHURCH-STATE CASES

Church-state cases have long given rise to threats and violence. The backlash is well documented. In the introduction to his 1996 book, *Without a Prayer: Religious Expression in Public Schools*, Professor Robert Alley recounts a conversation he had with a public school principal about Bible lessons being taught during his son's classes.¹⁰⁸ When Alley first broached the issue, the principal asked “What are you, a Jew?”¹⁰⁹ After an anti-Semitic aside, the principal warned Alley not to press his complaint further.¹¹⁰ The principal told Alley that he would stop the religious instruction if Alley insisted, but that he would also make sure that the other students knew which parent had insisted that the “Bible stories” stop.¹¹¹ As Alley explained, this would position his child to absorb any unpleasant backlash. Alley knew about reprisals following other complaints and worried about what to do.¹¹²

Alley's experience led him to thoroughly document violence and discrimination suffered by church-state plaintiffs. Writing at about the

¹⁰⁶ *Freedom From Religion Found., Inc. v. Cherry Creek Sch. Dist. # 5*, No. CIV.A.07-CV-02126-MS, 2009 WL 2176624, at *5 (D. Colo. July 22, 2009).

¹⁰⁷ See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2171 (1996) (“Simply stated, the ostracism that befalls plaintiffs who challenge cherished governmental endorsements of religion is so extreme that most who are offended by these practices bite their tongues and go about their lives.”).

¹⁰⁸ ROBERT S. ALLEY, *WITHOUT A PRAYER: RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS* 16–17 (1996).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

same time, Professor Frank S. Ravitch showed that violence arising from instances where the government engages in religious speech traces back even further.¹¹³ Ravitch's book, *School Prayer and Discrimination*, traces the trend back to at least the Philadelphia Bible Riots of 1844, where fifty-eight people died and "one hundred and forty others were wounded."¹¹⁴ The riots were sparked by a school board resolution allowing Catholic children to opt out of reading from the King James Version of the Bible.¹¹⁵

The violent trends have continued since Ravitch and Alley published their books. Because Ravitch and Alley cover cases predating 1996 in detail, I focus on instances occurring since that time. As shown below, these are not sporadic or isolated events. Reprisals against church-state plaintiffs must be viewed as additional incidents in a chain of violence stretching back more than a century.

Nearly all of the cases detailed below involve instances where schools or government engaged in religious speech by endorsing particular faiths. When plaintiffs challenge whether a public institution should be making such statements, the public seems to misconstrue the suit as an assault on the statement itself or the closely and passionately held views of religious adherents. For example, a case challenging compulsory Bible reading in public schools may be wrongly interpreted as an assertion that children should not be allowed to read the Bible.

To build the case for my argument that courts must not close their eyes to violent trends, this section spends substantial time cataloging the abuse that has followed after plaintiffs lodge their suits. I argue that these incidents are not sporadic or unforeseeable. Plaintiffs do fear reprisals for filing suit because so many plaintiffs have suffered for speaking up. Courts must recognize the legitimacy of these fears and protect plaintiffs' identities. If courts do not stand up for plaintiffs' rights, the reprisals documented below will have served their purpose: they will drive people out of the courts and allow fear to rule in law's place.

A. VIOLENT TIMELINE

1. Retaliation Against Vashti McCollum in 1945

In 1945, over a hundred years after the Philadelphia Bible Riots of 1844, Vashti McCollum challenged a voluntary program in her child's public school, where students were allowed to select Protestant,

¹¹³ RAVITCH, *supra* note 5, at 4 (describing harassment suffered by plaintiffs).

¹¹⁴ *Id.* at 6.

¹¹⁵ *Id.*

Catholic, or Jewish instruction.¹¹⁶ She thought the case would be resolved quickly. She was wrong. Later, McCollum described how she misjudged the situation, explaining that she “took it for granted that responsible people could follow their convictions without being thrown into disgrace and out of a job.”¹¹⁷ She faced overwhelming backlash: her house was vandalized, she received hate mail and threatening phone calls, and her son was physically attacked.¹¹⁸

These incidents were not isolated occurrences. Ms. McCollum received over six thousand pieces of mail after becoming the public face of the suit.¹¹⁹ Although she received many letters of encouragement, over a thousand of the letters contained crudely scrawled threats such as: “I hope you loose [sic] every cent you and your husband have, and are tared [sic] and feathered and rode out of your community on a broom stick.”¹²⁰ Others simply told her to “Go to hell!” or warned that “this country is not for you you dirty lousy thrash [sic] out with you.”¹²¹

If anonymous letters were not enough, the harassment also arrived in more personal forms. Vandals defaced Ms. McCollum's car and house with the letters “ATHIST [sic].”¹²² She was “fired from her job as a dance instructor,” pelted with rotten produce, and the “family cat was lynched.”¹²³

2. Arson and Violence in 1982

About forty years after Ms. McCollum's ordeal, in another well-documented church-state case, the named plaintiffs, Joann Bell and Lucille McCord, complained about sectarian weekly prayer sessions at their children's public school.¹²⁴ The two Oklahoma moms endured vicious reprisals.¹²⁵ Someone burned Ms. Bell's house to the ground.¹²⁶ A

¹¹⁶ See *McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (declaring that “the First Amendment had erected a wall between Church and State which must be kept high and impregnable”).

¹¹⁷ *McCollum*, *supra* note 1, at 46.

¹¹⁸ See *ALLEY*, *supra* note 108, at 84–89.

¹¹⁹ *McCollum*, *supra* note 1, at 97.

¹²⁰ *Id.*

¹²¹ *Id.* at 98.

¹²² *Id.* at 81.

¹²³ Douglas Martin, *Vashti McCollum*, 93, *Who Brought Landmark Church-State Suit, Is Dead*, N.Y. TIMES, Aug. 26, 2006, available at 2006 WLNR 14792010.

¹²⁴ See UPI, *School Prayer Lawsuit Divides Oklahoma District*, N.Y. TIMES, Dec. 12, 1982, § 1, at 39, available at 1982 WLNR 332537 (stating that Ms. Bell was a member of the Church of the Nazarene and Ms. McCord was a member of the Church of Christ).

¹²⁵ *Id.*

school cafeteria worker assaulted Ms. Bell in a parking lot and “smashed her head repeatedly against a car door.”¹²⁷ They were mailed their own obituaries.¹²⁸ Ms. McCord’s son’s prize goats were “slashed and mutilated with a knife,” and an upside down cross was hung on his locker.¹²⁹ The Bells also received threatening phone calls.¹³⁰ One caller said he “was going to break in the house, tie up the children, rape their mother in front of them, and then ‘bring her to Jesus.’”¹³¹ Eventually, the harassment succeeded in running the plaintiffs out of town.¹³²

Local officials were unsympathetic. They blamed the plaintiffs for the harassment they endured. The school’s superintendent, Paul Pettigrew, commented that the “only people who have been hurt by this thing are the Bells and McCords. The school goes on. They chose to create their own hell on earth.”¹³³

3. Jessica Ahlquist Faces Abuse in 2010

The reprisals endured by the McCollums, Bells, McCords and others are well documented and decades old. A court might be tempted to disregard these instances because they happened in 1945 and in the 1980s.¹³⁴ Recent experiences show, however, that vicious attacks and harassment remain the norm.

In 2010, an “unnamed family with two children” in public school complained about a prayer mural posted in the auditorium at Cranston High School West (“Cranston West”) in Cranston, Rhode Island.¹³⁵ On

¹²⁶ Sandhya Bathija, *Hell in Little Axe: An Oklahoma Mom’s Chilling Battle With Religious Bigotry*, WALL OF SEPARATION (Nov. 25, 2008), <http://www.au.org/blogs/wall-of-separation/hell-in-little-axe-an-oklahoma-moms-chilling-battle-with-religious-bigotry>.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*; see also *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1397 (10th Cir. 1985) (“Their children were called ‘devil-worshippers’ by other students and, in one instance, an upside-down cross was hung on Robert McCord’s locker.”).

¹³⁰ Strossen, *supra* note 10, at 612 (“Having received phone calls warning that her house would be torched, Joann is convinced that” arsonists burned her house down.).

¹³¹ ALLEY, *supra* note 108, at 107–08.

¹³² The Tenth Circuit’s opinion recognized that “[t]he harassment persisted and was severe enough to force plaintiffs and their families to move into the adjoining school district.” *Bell*, 766 F.2d at 1398.

¹³³ Bathija, *supra* note 126.

¹³⁴ Because other authors cover it in such extensive detail, I have not provided much information about the many reprisals against church-state plaintiffs between 1945 and the 1980s. For more information, see RAVITCH, *supra* note 5; ALLEY, *supra* note 108.

¹³⁵ Ahlquist v. City of Cranston, 840 F. Supp. 2d 507, 510–12 (D.R.I. 2012).

behalf of this anonymous family, the American Civil Liberties Union (“ACLU”) requested that officials remove the prayer mural.¹³⁶ After learning about the controversy, Jessica Ahlquist, a student at Cranston West, spoke out in favor of removing the prayer mural by starting an on-line Facebook page and by appearing at public hearings.¹³⁷

Ahlquist faced intense backlash from the start. Speaking at a school committee meeting, she revealed that she was an atheist and that she opposed the presence of the prayer mural.¹³⁸ The crowd responded angrily. Taking the floor after Ahlquist, one speaker declared “[i]f people want to be Atheist, it’s their choice and they can go to hell if they want.”¹³⁹ After this hearing, Ahlquist and a companion who also supported removing the prayer mural “were escorted from the meeting by the police because of concerns for their safety.”¹⁴⁰ At another meeting, a speaker declared that if the prayer mural were removed, the school would be “spitting in the face of Almighty God.”¹⁴¹

The harassment was not limited to harsh and impassioned criticism at public meetings. Ahlquist “experienced bullying and threats at school, on her way home from school and on-line.”¹⁴² State officials publicly vilified Ahlquist. Peter G. Palumbo, Ahlquist’s state representative, called her “an evil little thing” on a talk radio show.¹⁴³ During the controversy, local flower shops declined to deliver to Jessica because of “safety reasons.”¹⁴⁴

The anonymous local family that initially complained decided to remain anonymous, and Ahlquist agreed to serve as the plaintiff for a lawsuit.¹⁴⁵ The court proceedings were straightforward and decided in Ahlquist’s favor.¹⁴⁶ The threats, however, were graphic and continuous. One tweet presented in the introduction of this Article reads: “your home address posted online i [sic] cant wait to hear about you getting curb

¹³⁶ *Id.*

¹³⁷ *Id.* at 512–16.

¹³⁸ *Id.*

¹³⁹ *Id.* (quoting speaker at public meeting).

¹⁴⁰ *Id.* At subsequent meetings, speakers called for her to be charged with a hate crime for opposing the prayer mural. *Id.*

¹⁴¹ *Id.* at 514.

¹⁴² *Id.* at 516.

¹⁴³ Abby Goodnough, *Student Faces Town’s Wrath in Protest Against a Prayer*, N.Y. TIMES, Jan. 26, 2012, at A12.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See *Ahlquist*, 840 F. Supp. 2d at 524–25 (describing a controlling Supreme Court case as “directly on all fours” with the dispute).

stomped you fucking worthless cunt.”¹⁴⁷ At one point, Ahlquist required a police escort to and from school.¹⁴⁸ And because her address was posted online, Ahlquist was forced to consider transferring schools.¹⁴⁹

The harassment continued even after the lawsuit ended. This piece of handwritten hate mail arrived four months after the court decision:

The cops will not watch you forever.

We will get you good.

Tell your little asshole sister to watch her back.

There are many of us, “Crusaders,” we have a better pool going to see who gets you first!

Your fuckin old man better move or keep you locked up if you know whats good for you.

We know where he works, what kind of cars you have + the plate numbers of the cars.

Get the fuck out of R.I. you bitch whore. You are nothing more than a sex-toy of a slut. Maybe you will gang-banged before we throw you out of one of our cars.

WE WILL GET YOU— LOOK OUT!¹⁵⁰

Perhaps because of the police escorts, Ahlquist has not reported suffering any actual physical violence. Still, her experience warns others about what to expect if they become the face of a church-state suit.

¹⁴⁷ Ophelia Benson, *Who's Oppressing Whom*, COUNCIL FOR SECULAR HUMANISM, http://www.secularhumanism.org/index.php?section=fi&page=ben_son_32_4 (last visited Aug. 30, 2012).

¹⁴⁸ Elisabeth Harrison, *R.I. Student Draws Ire Over School Prayer Challenge*, NPR (Feb. 14, 2012), <http://www.npr.org/2012/02/14/146538958/rhode-island-district-weighs-students-prayer-lawsuit>.

¹⁴⁹ Mathew Cortina, *RI Teen Who Brought Down Prayer Banner Unwittingly Caught in the Crosshairs?*, CHRISTIAN POST (Jan. 20, 2012), <http://www.christianpost.com/news/ri-teen-who-brought-down-prayer-banner-unwittingly-caught-in-the-crosshairs-67390/#KjRpmZ2zd8mtqzEs.99>.

¹⁵⁰ Hemant Mehta, *Jessica Ahlquist Gets Nasty Hatemail*, FRIENDLY ATHEIST (Apr. 11, 2012), <http://www.patheos.com/blogs/friendlyatheist/2012/04/11/jessica-ahlquist-gets-nasty-hatemail/>.

4. *Damon Fowler Disowned in 2011*

Complaints about church-state entanglement do not need to reach the courthouse to trigger backlash. In 2011, Damon Fowler, a senior at a public high school in Louisiana, discovered that his graduation ceremony would include a Christian prayer.¹⁵¹ Knowing that public schools cannot constitutionally subject students to graduation prayers,¹⁵² Fowler contacted the school officials to point out that the planned prayer was unconstitutional and notified them that he would contact the ACLU if the prayer occurred.¹⁵³ The school initially agreed to cancel the prayer, but Fowler's name was leaked as the source of the complaint.¹⁵⁴

Fowler never actually filed suit. As with the other instances, people threatened to kill him and other students boasted that they were going to "jump him."¹⁵⁵ Illustrating the real dangers of ostracism that many plaintiffs fear, Fowler's own parents disowned him, refused all financial support, turned him out of the house, and tossed his belongings out onto the porch of the family home.¹⁵⁶ After he complained, one of Fowler's teachers demeaned him in a local publication as "a student who really hasn't contributed anything to graduation or to [his] classmates"¹⁵⁷ Fowler did not even succeed at stopping the prayer. In a rancorous move, the school included a student-led invocation before a moment of silence despite earlier assurances that the graduation ceremony would not include prayers.¹⁵⁸

¹⁵¹ American Humanist Association, *Humanists Launch "Naughty" Awareness Campaign*, STATES NEWS SERVICE (Nov. 21, 2011), <http://www.americanhumanist.org/news/details/2011-11-american-humanist-association-naughty-atheist-awareen>.

¹⁵² See *Lee v. Weisman*, 505 U.S. 577, 586–87 (1992) (stating that "the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding" that school sponsored graduation prayer is unconstitutional).

¹⁵³ Greta Christina, *High School Student Stands Up Against Prayer at Public School and Is Ostracized, Demeaned and Threatened*, ALTERNET (May 25, 2011), http://www.alternet.org/story/151086/high_school_student_stands_up_against_prayer_at_public_school_and_is_ostracized_demeaned_and_threatened.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Mark Rainwater, *Student Challenges Prayer at Bastrop Graduation: Threatens to Contact ACLU If Prayer Is Offered*, BASTROP DAILY ENTERPRISE, May 18, 2011, <http://www.bastropenterprise.com/features/x2132687894/Student-challenges-prayer-at-Bastrop-graduation>.

¹⁵⁸ Mark Rainwater, *Just Like Any Other Graduation*, BASTROP DAILY ENTERPRISE, May 20, 2011, <http://www.bastropenterprise.com/news/x1796494554/Just-like-any-other-graduation>.

5. Federal Marshalls Guard Judge in 2011

In the recent case of *Schultz v. Medina Valley Independent School District*, threats and intimidation again followed a church-state challenge when a San Antonio family disputed a local practice of offering student-led prayers at public school graduations.¹⁵⁹ As with the other cases, the plaintiffs faced public calls for violence against them. One person wrote, "This Agnostic sh_thead [sic] needs to thank God that he graduated . . . in one piece!"¹⁶⁰ Another declared, "In my day he would have been crying out to God while being stomped by bullies . . ."¹⁶¹

Despite the outcry, the case continued. The plaintiffs secured a preliminary injunction prohibiting prayers at graduation, which the Fifth Circuit quickly dissolved in a *per curiam* decision.¹⁶² The public reacted strongly to the initial ruling and to the Fifth Circuit's intervention. Public focus pivoted toward the district court judge who issued the ruling, showing that church-state cases may also subject courts to unusual pressures.¹⁶³ In this case, the district court judge was inundated with letters and calls, one saying that he should "die from cancer or drink human waste."¹⁶⁴ Others threatened to "kick his ass."¹⁶⁵ To protect the judge, U.S. Marshals began "a nearly round-the-clock security detail."¹⁶⁶

Still, the backlash had other effects. At the time, an additional student had sought to join the case under a pseudonym. In view of the risks, the anonymous plaintiff opted to withdraw rather than reveal his name.¹⁶⁷ Unlike federal judges, prospective plaintiffs do not enjoy the

¹⁵⁹ See Guillermo Contreras, *No Prayer at School Graduation*, SAN ANTONIO EXPRESS-NEWS, June 1, 2011, at 1B, available at 2011 WLNR 10939041.

¹⁶⁰ Comment to *Prayer Outlawed From Local High School Graduation Ceremony*, NEWS 4 WOAI (June 1, 2011 11:31 a.m.), <http://www.woai.com/news/local/story/Prayer-outlawed-from-local-high-school-graduation/FneUQ8DknUyffJc7pUQ4LA.csp>.

¹⁶¹ *Id.*

¹⁶² Order at 1, *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 11-50486-00511498424 (5th Cir. June 3, 2012) (*per curiam*), available at <http://www.scribd.com/doc/57111291/Schultz-v-Medina-School-Dist-6-3-11>.

The Fifth Circuit was not convinced that plaintiffs were substantially likely to prevail on the merits in showing that "individual prayers or other remarks to be given by students at graduation [would be], in fact, school sponsored." *Id.*

¹⁶³ *Id.*

¹⁶⁴ Guillermo Contreras, *Colorful Judge Biery at Eye of Legal Storm*, SAN ANTONIO EXPRESS-NEWS, July 3, 2011, at 1A, available at 2011 WLNR 13234891.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Guillermo Contreras, *Student Bails out of Prayer Case*, SAN ANTONIO EXPRESS-NEWS, Dec. 7, 2011, at 2B, available at 2011 WLNR 25326432.

comforts of life tenure, guaranteed salary, or the vigilant protection of the United States Marshal Service.¹⁶⁸

The district court eventually approved a settlement in the case, and the judge concluded his order with the following unusual personal statement:

To the United States Marshal Service and local police who have provided heightened security: Thank you.

To those Christians who have venomously and vomitously cursed the Court family and threatened bodily harm and assassination: In His name, I forgive you.

To those who have prayed for my death: Your prayers will someday be answered, as inevitability trumps probability.

To those in the executive and legislative branches of government who have demagogued this case for their own political goals: You should be ashamed of yourselves.

To the lawyers who have advocated professionally and respectfully for their clients' respective positions: Bless you.¹⁶⁹

B. CHURCH-STATE CASES ARE VOLATILE

The foregoing cases make the point unmistakably clear: church-state cases are dangerous. They are not outliers. Although the point could be proved by simply continuing to enumerate a litany of examples, it may be more analytically useful to categorize cases by the type of retaliation plaintiffs have faced and the fears that haunt prospective plaintiffs.

1. Arson

Plaintiffs in church-states cases should recognize that they may become targets for arson. In 1963, the Supreme Court decided *Abington School District v. Schempp* and found for the first time that public schools could not constitutionally compel Bible reading.¹⁷⁰ For their

¹⁶⁸ U.S. CONST. art. III, § 1.

¹⁶⁹ *Schultz v. Medina Valley Indep. Sch. Dist.*, No. SA-11-CA-422-FB, slip op. at 3 (W.D. Tex. Feb. 9, 2012), available at http://pdfserver.amlaw.com/tx/Schultz_v_Medina_Valley.pdf.

¹⁷⁰ 374 U.S. 203 (1963).

trouble, one of the plaintiff's children was beaten on the way home from school and the family's home was firebombed.¹⁷¹

The Schempp family has not been the only one to face arsonists. As mentioned above, Joann Bell's home was also burned to the ground after anonymous callers threatened to torch it.¹⁷² When the local volunteer fire department arrived, their truck tanks, curiously, contained no water and they did not fight the fire.¹⁷³

2. Death Threats

Once a church-state suit receives publicity, death threats are likely to follow. In one famous case from 1995, Lisa Herdahl filed suit to challenge the "broadcast [of] morning devotionals and sectarian prayers over [the public] school intercom system."¹⁷⁴ Afterward, unnamed persons focused on her family and threatened to bomb her home.¹⁷⁵ The family's children were ostracized and called "atheists" and "devil worshipers" by their classmates.¹⁷⁶ Before being driven from her employment, the convenience store she managed received a bomb threat.¹⁷⁷

Although obvious, it bears noting that death threats are frequently used to induce fear and to intimidate, rather than to convey an actual intent to kill. However, potential plaintiffs may reasonably fear for their lives. In other contexts such as with abortion doctors, zealots have followed through on their threats to kill people.¹⁷⁸ When persons are killed, death threats grow even more terrifying. Consider one of the death threats arising out of *Kitzmiller v. Dover*. In that case, Tammy Kitzmiller challenged a public school district's policy of teaching

¹⁷¹ See ALLEY, *supra* note 108, at 98.

¹⁷² Strossen, *supra* note 10, at 612–13.

¹⁷³ *Id.* at 613.

¹⁷⁴ Herdahl v. Pontotoc Cnty. Sch. Dist., 887 F. Supp. 902, 904 (N.D. Miss. 1995).

¹⁷⁵ Gary Borg, *Judge Strikes Down School's Prayers*, CHI. TRIB., June 4, 1996, available at 1996 WLNR 5186889.

¹⁷⁶ Strossen, *supra* note 10 at 614 (citing Stephanie Saul, *A Lonely Battle in Bible Belt: A Mother Fights to Halt Prayer at Miss. School*, NEWSDAY, Mar. 13, 1995, at A8).

¹⁷⁷ *Id.*

¹⁷⁸ See, e.g., Joe Stumpe & Monica Davey, *Abortion Doctor Shot to Death in Kansas Church*, N.Y. TIMES, Mar. 31, 2009, http://www.nytimes.com/2009/06/01/us/01tiller.html?pagewanted=all&_r=0 ("George Tiller, one of only a few doctors in the nation who performed abortions late in pregnancy, was shot to death here Sunday in the foyer of his longtime church as he handed out the church bulletin.").

"intelligent design" (i.e., creationism instead of evolution.)¹⁷⁹ One of the death threats she received reads, in part, "I will be watching in the years to come how God punishes you or your daughters. Madelyn [sic] Murray (a famous atheist) was found murdered for taking prayer and bible [sic] reading out of the schools, so watch out for a bullet."¹⁸⁰ The chilling threat refers to the death of Madalyn Murray O'Hair, the former president of American Atheists, whose dismembered corpse was found alongside the dismembered corpses of her son and granddaughter in 2001.¹⁸¹ Even the judge who decided the *Kitzmiller* case "accepted the protection of federal marshals after [his family also] received death threats" because of his decision.¹⁸²

3. Physical Assaults

Retaliation sometimes takes the form of direct physical assault. In one relatively recent case, Joseph Tyler Deveney, an eighteen-year-old plaintiff, successfully challenged school-sponsored prayer at his graduation ceremony.¹⁸³ For his trouble, he was attacked by a group of eight teenagers.¹⁸⁴ Making the rationale for the attack unmistakably clear, one of the assailants "looked at Deveny [sic] and said, 'Oh, you hate God?'" before hitting him in the face.¹⁸⁵

Deveney has not been the only plaintiff to face physical assaults. As mentioned above, Joann Bell was also briefly hospitalized after a school employee bashed her head into a car door and ripped out chunks of her hair while threatening to kill her.¹⁸⁶ Because of the risk of physical

¹⁷⁹ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 764 (M.D. Pa. 2005) ("To briefly reiterate, we first note that since [intelligent design] is not science, the conclusion is inescapable that the only real effect of the [intelligent design] Policy is the advancement of religion.").

¹⁸⁰ Ed Brayton, *Plaintiff Intimidation in Church/State Cases*, SCI. BLOGS (Jan. 17, 2007), <http://scienceblogs.com/dispatches/2007/01/17/plaintiff-intimidation-in-chur/>.

¹⁸¹ Ross E. Milloy, *Bodies Identified as Those of Missing Atheist and Kin*, N.Y. TIMES, Mar. 16, 2001, at A10, available at 2001 WLNR 3338091 (describing the discovery of the corpses). Although we do not know who killed O'Hair, many believe that she was murdered in what appeared to be an extortion scheme by a former employee of American Atheists whom she had previously fired. *Id.*

¹⁸² Clay Evans, *Misjudging Our Judges*, BOULDER DAILY CAMERA (CO), June 18, 2006, at E01, available at 2006 WLNR 12107700.

¹⁸³ See *Deveney v. Bd. of Educ. of Cnty. of Kanawha*, 231 F. Supp. 2d 483, 484, 488 (S.D. W. Va. 2002).

¹⁸⁴ See Charles Schumaker, *Police Briefs: Student Beaten for Prayer Suit, He Says*, CHARLESTON GAZETTE & DAILY MAIL, June 19, 2002, available at 2002 WLNR 1037691.

¹⁸⁵ *Id.*

¹⁸⁶ See Strossen, *supra* note 10, at 612.

assault, named plaintiffs in a controversial case may find that they have to adjust their habits and routines so as not to ever be caught alone.

4. Proxy Violence

Sometimes, plaintiffs may find their pets and other animals slaughtered as a means to intimidate them. Melinda Maddox filed a suit challenging a decision to install “a two-and-one-half ton monument to the Ten Commandments as the centerpiece of the rotunda in the Alabama State Judicial Building” for the express purpose of reminding everyone of “the sovereignty of the Judeo-Christian God over both the state and the church.”¹⁸⁷ She faced particularly nasty backlash. Someone shot all of the windows out of her house.¹⁸⁸ Unknown persons shot all the squirrels in her yard and hung the corpses from her trees as gruesome warnings.¹⁸⁹

In addition to the proxy violence, callers threatened to kill her, unknown persons threatened her parents, and her vehicle was vandalized.¹⁹⁰ One caller referred “to a brutal murder that had been in the news at the time, t[elling] her, ‘You should be hogtied and thrown in the Escambia River, like that girl was last year.’”¹⁹¹ When she complained, local officials suggested that she drop her case.¹⁹²

Although this breakdown separates death threats from proxy violence, proxy violence may be best viewed as a form of death threat. By hanging dead squirrels in Melinda Maddox’s yard, the perpetrators clearly intended to place her in fear for her life. Indeed, the note affixed to the severed head of Darla Wynne’s pet parrot explicitly used proxy violence to make a death threat when it said, “You’re Next!”¹⁹³

5. Extreme Ostracism

Church-state plaintiffs should also expect to endure more than ordinary criticism. They are likely to face “serious social ostracization [sic] based upon militant religious attitudes.”¹⁹⁴ Indeed, publicly named church-state plaintiffs routinely report extreme social ostracism. Lisa

¹⁸⁷ *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003).

¹⁸⁸ Rob Boston, *Uncommon Courage*, CHURCH & STATE (May 1, 2008), <https://www.au.org/church-state/may-2008-church-state/featured/uncommon-courage>.

¹⁸⁹ *Id.*

¹⁹⁰ Rob Boston, *Plucky Lindy*, CHURCH & STATE (Apr. 1, 2004), <https://www.au.org/church-state/april-2004-church-state/featured/plucky-lindy>. One of the death threats was particularly chilling.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Knauss, *supra* note 4.

¹⁹⁴ *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981).

Herdahl's story provides one example. After she filed suit, nearly "every house and business posted a sign opposing" her lawsuit.¹⁹⁵

The Herdahl family has not been the only one to face ostracism. In *Dobrich v. Walls*, the Dobrich family sued to stop public school teachers from proselytizing, distributing Bibles, and giving special privileges to students for attending Christian clubs.¹⁹⁶ After the case attracted attention, anti-Semitic threats drove the Jewish family out of town.¹⁹⁷

These are not isolated instances. Other plaintiffs have also been ostracized in extreme ways. In 2001, troubled by religious holiday displays on town property, Anonka Jocham brought suit seeking to end the practice.¹⁹⁸ From the outset, the court explained that Ms. Jocham's "request was not well-received, . . . several (but not all) [of the county] Commissioners reacted angrily" to her request, and other attendees "directed derisive comments toward the plaintiffs."¹⁹⁹ Afterward, at a religious rally held at the local courthouse, Ms. Jocham and her co-plaintiffs were denounced, and rally participants spat on a reporter who had covered the initial public meeting.²⁰⁰

These cases showcase some of the risks plaintiffs face. Having appraised the risks, I next argue that courts should reexamine existing standards to ensure adequate protection of plaintiffs' safety and privacy interests.

V. COURTS SHOULD RECOGNIZE THAT PAST REPRISALS CREATE PSYCHOLOGICAL HARM

The recent cases documented above show that the terrifying trend of reprisals against church-state plaintiffs continues. These reprisals send a clear message to potential plaintiffs: if you file a church-state case, you are choosing "to create [your] own hell on earth."²⁰¹ The backlash against efforts to maintain separation of church and state has continued unabated since the Philadelphia Bible Riots of 1844. Moreover, frequent demagoguery continually inflames passion around separation-of-church-

¹⁹⁵ Strossen, *supra* note 10, at 614.

¹⁹⁶ *Dobrich v. Walls*, 380 F. Supp. 2d 366, 371 (D. Del. 2005) ("Plaintiffs allege that prayers have been recited at graduation ceremonies, athletic events, potluck dinners, ice cream socials, awards ceremonies, and other events.").

¹⁹⁷ *Id.*; see also Neela Banerjee, *Families Challenging Religious Influence in Delaware Schools*, N.Y. TIMES, July 29, 2006, at A10, available at 2006 WLNR 13104007 ("[H]er son was ridiculed in school for wearing his yarmulke. She described a classmate of his drawing a picture of a pathway to heaven for everyone except 'Alex the Jew.'").

¹⁹⁸ See *Jocham v. Tuscola County*, 239 F. Supp. 2d 714 (E.D. Mich. 2003).

¹⁹⁹ *Id.* at 720.

²⁰⁰ *Id.* at 721.

²⁰¹ Bathija, *supra* note 126.

and-state issues and makes it difficult for plaintiffs to seek judicial remedies.

The backlash in church-state cases illustrates a systemic risk to our democracy. Even though potential plaintiffs often have strong, constitutional arguments,²⁰² the Constitution's words mean little when individuals fear to file. Although it remains difficult to survey individuals who are too afraid to step forward, it seems obvious that people may decide not to complain because they do not want to receive death threats.²⁰³

We can, however, observe intimidation's effects in past cases by looking at the individuals that form a circle of support around cases with named plaintiffs. For example, along with hate mail, Ms. McCollum also received letters of support thanking her for doing what the authors feared to do themselves. One wrote, "Good luck and thanks for being the whipping boy for those others (me) who think as you do but do not do as you have done"²⁰⁴ In recent times, people have been willing to complain anonymously yet stop short of filing because they do not "want to be made out to be a villain."²⁰⁵ Similarly, in Ms. Ahlquist's case, an anonymous parent initially complained to the ACLU, which then wrote a letter of complaint. That parent remained anonymous when Ms. Ahlquist agreed to serve as the public plaintiff.²⁰⁶ For every named plaintiff, many more probably considered filing a suit and opted against it because they did not want to face the backlash.²⁰⁷ In this sort of environment,

²⁰² See *Lee v. Weisman*, 505 U.S. 577, 599 (1992) ("No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment."); *accord* *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989) ("[N]ot even the 'unique history' of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief.").

²⁰³ See Epstein, *supra* note 107, at 2171 ("Simply stated, the ostracism that befalls plaintiffs who challenge cherished governmental endorsements of religion is so extreme that most who are offended by these practices bite their tongues and go about their lives.").

²⁰⁴ MCCOLLUM, *supra* note 1, at 188.

²⁰⁵ Vassar, *Other Towns Should Consider Nativity Scene Policy*, SAGINAW NEWS, Dec. 18, 2009, at A6, available at 2009 WLNR 25474837 (explaining why local resident requested that the ACLU keep his identity secret to publicly complain about a nativity scene).

²⁰⁶ See Goodnough, *supra* note 143.

²⁰⁷ For yet another example, consider how intimidation and fear also influenced the Medina Valley case. A pseudonymous student plaintiff withdrew from the case when it became clear that his identity might be exposed to an angry public. See Contreras, *supra* note 167.

constitutional protections may mean little when people fear to speak up.²⁰⁸

Without privacy protection, bad actors may win through intimidation what they could never secure in court. The chilling effect is real. Faced with the same choice presented to the plaintiffs described above, many people suffer injustice silently.²⁰⁹ We can hardly blame them. Given the past reprisals, keeping silent about church-state issues may be a wise choice. Tragically, as this Article explains, constitutional protections do not help if people fear to demand that the laws be followed.²¹⁰

Still, a central question remains: how should courts address the problem in church-state cases and in other areas where plaintiffs face similar risks? An analytic framework for pseudonymous litigation already exists. Moreover, many plaintiffs have successfully brought cases under pseudonyms after convincing courts that they face a risk of retaliatory harm. The most straightforward way to address the problem is to broaden the analysis slightly to account for the retaliation experienced by past plaintiffs.

As the analysis is applied now, courts miss significant mental injuries plaintiffs will suffer for filing. This approach must change. Though most courts recognize that plaintiffs should be permitted to litigate under a pseudonym if open proceedings present a specific risk of physical or mental injury, courts have never explicitly recognized possible damage from fears created by past systemic retaliation as a risk that fits within these categories.²¹¹

When plaintiffs file church-state actions, they expose themselves to possible retaliation and intimidation from those who hold opposing interpretations of (or simply do not care about) the Constitution's limits

²⁰⁸ As one author explains "people are often too intimidated to insist on their legal rights . . . because they're afraid they'll be bullied, ostracized, and threatened with violence by their classmates, their co-workers, their communities, their friends, even their families And I'm angry because these people aren't wrong to be afraid." GRETA CHRISTINA, *WHY ARE YOU ATHEISTS SO ANGRY? 99 THINGS THAT PISS OFF THE GODLESS* ch. 1, list no. 33 (Kindle ed. 2012).

²⁰⁹ Epstein, *supra* note 107.

²¹⁰ *Id.*

²¹¹ See *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993) (stating "whether identification poses a risk of retaliatory physical or mental harm"); *Doe v. Del Rio*, 241 F.R.D. 154, 158 (S.D.N.Y. 2006) ("The risk of injury may be physical or psychological, greater or less, more or less likely."); *Doe v. Smith*, 105 F. Supp. 2d 40, 42 (E.D.N.Y. 1999) (considering "whether identification would put the plaintiff at risk of suffering physical or mental injury"); *cf. Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981) (recognizing risk of mental injury from "serious social ostracization [sic] based upon militant religious attitudes").

on governmental endorsements of religion. While plaintiffs may not always experience the harsh retaliation chronicled above, they will undoubtedly be tormented by the fear of suffering reprisals similar to those experienced by plaintiffs in prior cases. They will fear arson, death threats, physical assault, proxy violence, and extreme social ostracism.²¹² The reprisals from past cases live on through the fear they continue to generate. As Faulkner famously wrote, "The past is never dead. It's not even past."²¹³

Courts have repeatedly recognized in a variety of non-anonymous contexts that living in fear of violence causes significant mental harms.²¹⁴ Courts should extend those holdings to cases in which plaintiffs seek anonymity. Scholars have discussed how "people who are forced to live under the shadow of such threats suffer a myriad of psychological and health problems including nightmares, heart problems, inability to work, loss of appetite, and insomnia."²¹⁵ Compounding the fear generated by past reprisals, plaintiffs also fear that they will be blamed for stirring up controversy and bringing the attacks on themselves.²¹⁶

Counsel in these cases should put the plaintiff's fears squarely before the court when requesting permission to proceed pseudonymously. An affidavit from a medical professional describing the likely effects of the fear may suffice to explain the impact past reprisals have on future plaintiffs. Courts should not require plaintiffs to possess superhuman resilience and should be satisfied by an objective medical analysis showing that publicly facing the perils of a church-state case (or

²¹² See *supra* Section II.

²¹³ WILLIAM FAULKNER, *REQUIEM FOR A NUN* 73 (Vintage Int'l 2011) (1950).

²¹⁴ *Heisler v. Kralik*, 981 F. Supp. 830, 837 (S.D.N.Y. 1997), *aff'd sub nom.* *Heisler v. Rockland County*, 164 F.3d 618 (2d Cir. 1998) (stating inmates may seek "damages in the absence of any physical attack if the inmate has suffered 'extreme and officially sanctioned psychological harm' from living in fear of attack" (citation omitted)); *Simpson v. Burrows*, 90 F. Supp. 2d 1108, 1127 (D. Or. 2000) (awarding damages to lesbian couple for psychological harm caused by hate mail); *Tompkins v. Cyr*, 995 F. Supp. 664, 673-74 (N.D. Tex. 1998) (discussing psychological harm caused by threats from anti-abortion harassment).

²¹⁵ Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 291 (2001) (citing Arne Ohman, *Fear and Anxiety as Emotional Phenomena*, in *HANDBOOK OF EMOTIONS* 512-14 (Michael Lewis & Jeanette M. Haviland eds., 1993)).

²¹⁶ When individuals fear that they will be blamed and stigmatized for the wrongs others commit against them, they are less likely to come forward with complaints. See Julie Goldscheid, *Reconsidering Domestic Violence Services and Advocacy*, 29 PACE L. REV. 227, 239 (2009) ("[P]ersistent, victim-blaming attitudes that deter women from seeking help and that limit the redress available for those who do seek assistance.").

other cases provoking extreme passions) will subject plaintiffs to psychological trauma.

Critics of this approach may object that the harms presented do not always flow from actual retaliation directed at a particular plaintiff. This misses the point. Past aggressors acted not only to intimidate their contemporary plaintiffs, but future plaintiffs as well. Current plaintiffs deserve recognition as secondary victims of campaigns of intimidation. Their suits stand as individual actions within a chain of precedent. Indeed, some death threats, such as the one received by Tammy Kitzmiller that referenced the gruesome murder of Madalyn Murray O'Hair, even incorporate references to past atrocities. The fear created by past reprisals lives on.

Courts must recognize that even when filing under a pseudonym, plaintiffs act with extraordinary courage. If their identities are exposed, they may be shunned, fired from their jobs, or otherwise cut off from society. Distressingly, they are right to fear exposure even when granted the protection of a pseudonym. The Supreme Court has commented on the problem. Justice Stevens noted in *Santa Fe* that the school district “‘apparently neither agreed with nor particularly respected’” the district court’s decision to protect the plaintiffs’ identities.²¹⁷ By requiring every plaintiff to step forward with a steel skin, the courts may tacitly concede constitutional oversight to the aggressors, essentially allowing fear to usurp the rule of law. While courts do not choose which cases they hear, in this situation, they must make meaningful decisions about which plaintiffs to protect with pseudonyms. By setting an unreasonably high bar for what constitutes a protectable fear, courts force plaintiffs to face their aggressors unarmed and turn their backs on cases they would otherwise be hearing. As one noted jurist declared in another context, “the federal courts must be safe havens for those who seek to vindicate their rights. No litigant should fear for his safety, or that of his family, as a condition of seeking justice.”²¹⁸

The solution to systematic intimidation is to recognize how the system functions and to evaluate the cases within this context. Potentially unconstitutional practices continually recur because objections to these practices are not worth the trouble. Courts should therefore be presented with the full history of reprisals so that they can

²¹⁷ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 n.1 (2000) (quoting *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 809 n.1 (5th Cir. 1999)).

²¹⁸ *Doe v. Kamehameha Sch.*, 625 F.3d 1182, 1182 (9th Cir. 2010).

consider how past intimidation threatens current plaintiffs. In church-state cases, the history of violence is clear and unmistakable.²¹⁹

VI. CONCLUSION

Ultimately, the overarching policy question is whether courts should allow intimidation to usurp the rule of law? If courts decline to protect plaintiffs' identities, the courts themselves may lose their power to ensure that the Constitution's requirements are observed. After all, courts cannot hear cases that plaintiffs do not file. The dangers discussed above are simply too well and too long known for courts to ignore. Twenty years ago, Justice Blackmun discussed the dangers flowing from admixtures of government and religion. He recognized that religion remains uniquely divisive and noted that across the spectrum of litigated issues, opponents of school prayer are some of the only plaintiffs that actually receive death threats.²²⁰ Indeed, the cases profiled above show that violence and death threats have not abated in recent years.

Despite (or perhaps because of) the dangers, courts must assert their primacy to ensure that fear does not continue to displace the rule of law. Whenever a climate of fear exists because of past intimidation, courts are uniquely positioned to remedy this problem. By accounting for systemic intimidation when considering plaintiffs' requests to litigate anonymously, judges can ensure that intimidation does not block access to the courts. The use of pseudonyms may not solve all problems flowing from intimidation, but courts should not ask individual plaintiffs to bear these risks when such a simple solution is possible.

²¹⁹ Although beyond the scope of this Article, the same systemic risk may appear in other types of cases such as those involving abortion rights, queer plaintiffs and others. For example, in *Roe v. Operation Rescue*, the court allowed the plaintiffs to use a pseudonym because of the documented history of violence from anti-abortion activists. 123 F.R.D. 500, 505 (E.D. Pa. 1988) (remarking that "the conduct of certain anti-abortion protesters leaves little doubt in the court's mind that requiring [plaintiffs] to go beyond giving verified statements by attending hearings and depositions may subject them to undue harassment").

²²⁰ *Lee v. Weisman*, 505 U.S. 577, 607 n.10 (1992) (quoting Michele A. Parish, *Graduation Prayer Violates the Bill of Rights*, UTAH B.J., June/July 1991, at 19.