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SLAPPs: Strategic Lawsuits Against Public Participation*

George W. Pring**

Americans are being sued for speaking out politically. The targets are typically not extremists or experienced activists, but normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making. The cases are not isolated or localized aberrations, but are found in every state, every government level, every type of political action, and every public issue of consequence. There is no dearth of victims: in the last two decades, thousands of citizens have been sued into silence.

What is this new (and, we believe, growing) litigation

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phenomenon? The civil lawsuits we are studying at the University of Denver's Political Litigation Project are all filed against non-governmental individuals and groups for having communicated their views to a government body or official on an issue of some public interest.[1]

We call the suits "SLAPPs," for Strategic Lawsuits Against Public Participation. We have found that this accurately captures both their causation and their consequences.

SLAPPs are frighteningly common and easy to stimulate.[2] How likely are you to:

* circulate a petition for a good cause?
* write your mayor or senator?
* call a consumer protection office for help?
* report police misconduct?
* serve as an officer of the League of Women Voters during a good-government campaign?
* speak up at a school board meeting about a bad teacher or unsafe brakes on school buses?
* testify against a developer at a zoning hearing?
* support a public-interest, law-reform lawsuit?

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1. Canan & Pring, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506 (1988); Canan & Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 Law & Soc'y Rev. 385 (1988); Pring, *Intimidation Suits Against Citizens: A Risk for Public-Policy Advocates*, 7 Nat'l L. J. 16 (July 22, 1985); Canan, Political Claims and Legal Derailment (paper presented at the Annual Meeting of the Law and Society Ass'n, June 8-11, 1989); Canan, *Political Claims, Legal Derailment, and the Context of Litigation* (manuscript 1990).

2. Pell, *SLAPPed Silly*, Calif. Law, Feb. 1990, at 24; Stiak, *Stand Up and Be Sued*, Sierra, Nov.-Dec. 1989, at 28; *Political Intimidation Suits: SLAPP Defendant Slaps Back*, 4 Civil Trial Manual (BNA) 459 (Oct. 19, 1989); Pell, *The SLAPPs Are Back*, California, Sept. 1989, at 18; Zweig, *A SLAPP in the Face*, Forbes, May 29, 1989, at 106; Pell, *The High Cost of Speaking Out*, California, Nov. 1988, at 88; Holzberg, *Defamation Suits 'Chill' Activists*, 10 Nat'l L. J., July 25, 1988, at 3; Weimer, *Developers Use the Law to Stifle Opposition*, Newsday, May 29, 1988 § 10 (Ideas), at 10; Gest, *A Chilling Flurry of Lawsuits*, U.S. News & World Rep., May 23, 1988, at 64; Hentoff, *You Don't Need a Press Card to Be Sued for Libel*, Washington Post, July 19, 1986; Anderson & Spear, *Legal System Abused to Stifle Critics*, Washington Post, Mar. 20, 1986, at 23, col. 1; Anderson & Spear, *First Amendment Rights Expensive*, Washington Post, Mar. 21, 1986, at 23, col. 1; Note, *Counterclaim and Countersuit Harassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions*, 74 Mich. L. Rev. 106 (1975).

That is all it takes to become the target of this newest litigation explosion. Every year, we estimate, hundreds of these lawsuits are filed. They appear to be a "new" phenomenon; virtually all the cases we have found have been filed after 1970.

SLAPPs strike at a wide variety of traditional American political activities. We have found people sued for reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections, filing agency protests or appeals, being parties in law-reform lawsuits, and engaging in peaceful boycotts and demonstrations.[3] Yet these are among the most important political rights citizens have.

The apparent goal of SLAPPs is to stop citizens from ex-

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3. For examples of reported SLAPPs, *see* Protect Our Mountain Env't v. District Court, 677 P.2d 1361 (Colo. 1984)(en banc); Webb v. Fury, 282 S.E.2d 28 (W.Va. 1981); City of Long Beach v. Bozek, 31 Cal. 3d 527, 645 P.2d 137, 183 Cal. Rptr. 86 (1982) (en banc), *vacated and remanded*, 459 U.S. 1095, *aff'd on indep. state const. grounds*, 33 Cal. 3d 727, 661 P.2d 1072, 190 Cal. Rptr. 918 (1983); Smith v. Silvey, 149 Cal. App. 3d 400, 197 Cal. Rptr. 15 (1983); Myers v. Plan Takoma, Inc., 472 A.2d 44 (D.C. 1983); Streif v. Bovinette, 88 Ill. App. 3d 1079, 411 N.E.2d 341 (1980); Miner v. Novotny, 60 Md. App. 124, 481 A.2d 508 (1984); Weissman v. Mogol, 118 Misc. 2d 911, 462 N.Y.S.2d 383 (Sup. Ct. 1983); Okun v. Superior Court, 29 Cal. 3d 442, 629 P.2d 1369, 175 Cal. Rptr. 157, *cert. denied*, 454 U.S. 1099 (1981), *on remand sub nom.* Maple Properties v. Harris, 158 Cal. App. 3d 997, 205 Cal. Rptr. 532 (1984), *cert. denied*, 470 U.S. 1054 (1985); Chavez v. Citizens for a Fair Farm Labor Law, 84 Cal. App. 3d 77, 148 Cal. Rptr. 278 (1978); County of Butte v. Bach, 172 Cal. App. 3d 848, 218 Cal. Rptr. 613 (1985); Berkey v. Delia, 287 Md. 302, 413 A.2d 170 (1980); Bell v. Mazza, 394 Mass. 176, 474 N.E.2d 1111 (1985); North Star Legal Found. v. Honeywell Project, 355 N.W.2d 186 (Minn. Ct. App. 1984); Board of Educ. of Miami Trace Local School Dist. v. Marting, 7 Ohio Misc. 64 (1966); Searle v. Johnson, 709 P.2d 328 (Utah 1985); Lange v. Nature Conservancy, Inc., 24 Wash. App. 416, 601 P.2d 963 (1979), *cert. denied*, 449 U.S. 831 (1980); Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980); Missouri v. National Org. for Women, Inc., 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980); Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Cal. 1972); Great Western Cities, Inc. v. Binstein, 476 F. Supp. 827 (N.D. Ill.), *aff'd mem.*, 614 F.2d 775 (7th Cir. 1979); Wilmorite, Inc. v. Eagan Real Estate, Inc., 454 F. Supp. 1124 (N.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1372 (2d Cir.), *cert. denied*, 439 U.S. 983 (1978); Weiss v. Willow Tree Civic Ass'n, 467 F. Supp. 803 (S.D.N.Y. 1979); Miller & Son Paving, Inc. v. Wrightstown Township Civic Ass'n, 443 F. Supp. 1268 (E.D. Pa. 1978), *aff'd mem.*, 595 F.2d 1213 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979).

ercising their political rights or to punish them for having done so. SLAPPs send a clear message: that there is a "price" for speaking out politically. The price is a multimillion-dollar lawsuit and the expenses, lost resources, and emotional stress such litigation brings. This is a message with import for every American, activist or not. As these suits become an increasing (and increasingly known) risk for the ordinary citizen who decides to speak out on a public issue, SLAPPs raise substantial concern for the future of citizen involvement or public participation in government, a fundamental precept of representative democracy in America.[4]

The SLAPPs Study

My University of Denver colleague, sociology Professor Penelope Canan, and I are engaged in the first nationwide study of SLAPPs, through the Political Litigation Project at the University of Denver. This article surveys the legal findings of our work to date. True to the interdisciplinary nature of the study, Professor Canan's article, which is also published

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4. *See* Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring); PUBLIC INVOLVEMENT AND SOCIAL IMPACT ASSESSMENT (G. Daneke, ed. 1983); H. ZEIGLER, THE IRONY OF DEMOCRACY (2d ed. 1972); C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970); P. BACHRACK, THE THEORIES OF DEMOCRATIC ELITISM (1967); MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948); Aron, *Citizen Participation at Government Expense*, 39 PUB. ADMIN. REV. 477 (1979); Shuck, *Public Interest Groups and the Policy Process*, 37 PUB. ADMIN. REV. 132 (1977); Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972).

Political participation levels are already low in the United States. Political involvement, other than voting, is confined to approximately 10% of the adult population and is correlated with income, occupational prestige, and education. *See* L. MILBRAITH, POLITICAL PARTICIPATION: HOW AND WHY PEOPLE GET INVOLVED IN POLITICS (1965); R. WOLFINGER & S. ROSENSTONE, WHO VOTES? (1980); S. VERBA & N. NIE, POLITICAL PARTICIPATION IN AMERICA (1976). Further, even voting levels in the United States are the lowest of any industrialized, multiparty democracy where voting is voluntary. *See* C. TAYLOR & D. JODICE, WORLD HANDBOOK OF POLITICAL AND SOCIAL INDICATORS (1983). SLAPPs, because they most directly affect the small percentage of active participants in the political process, are likely to decrease participation levels further. Our on-going research will test the hypothesis, derived from our previous study, that SLAPPs "chill" political participation. Canan & Pring, *Strategic Lawsuits Against Public Participation*, 35 Soc. PROBS. 506 (1988); Canan & Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC'Y REV. 385 (1988).

in this volume,[5] highlights what we are learning about the non-legal aspects of SLAPPs: their sociological, political, economic, and psychological ramifications.

We began our study of SLAPPs five years ago. However, our involvement with the phenomenon reaches back to the 1970's, when we found ourselves respectively studying and defending environmental and community advocates. We observed first hand the "role reversal" when these citizens and groups found themselves named as defendants in lawsuits and facing staggering monetary claims. We saw committed, hard-charging activists become frightened into silence, supporters drop out, resources diverted, fund-raising wither, public-issue campaigns flounder, and community groups die.

Finding ourselves academic colleagues with a shared experience, we collected[6] and studied 228 SLAPPs. Our selection criteria were four in number. To qualify as a SLAPP, the case had to be:

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5. Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23 (1989).

6. SLAPPs, like many litigation phenomena, are not easy to locate or to locate completely. First, they are certainly not labeled by filers as "anti-Petition Clause activity lawsuits" or neatly catalogued by courts as "political retaliation suits." Rather, they are found under a number of different guises, typically submerged in the welter of conventional torts, such as "defamation," "business interference," "abuse of process," and the like. *See infra* text accompanying notes 11-16.

Second, SLAPPs need not go to trial to be successful, and those that do are unlikely to be representative of all such suits. Thus, many do not result in *reported* decisions, thereby eluding traditional legal research, which is limited to official court reporters.

As a result, we face a problem common to researchers of American trial court phenomena. We may never know how many SLAPPs have been filed and whether they are increasing, given the lack of centralized recording, accurate cataloguing, and uniform reporting of lawsuit filings in America. *See, e.g.*, BEZANSON, LIBEL LAW AND THE PRESS: MYTH AND REALITY 237-47 (1987).

Our SLAPPs were obtained from four sources: (1) a mail survey of 975 public interest groups, (2) computerized and key word searches of case reporters and legal literature, (3) referrals from attorneys, citizens, and journalists, and (4) the systematic perusal of a small random sample of six trial courts' computerized case-filing systems for 1983. Virtually all SLAPPs found were filed between 1958 and 1988. We found SLAPPs in every state and in the District of Columbia. Given the collection problems, neither these 228 nor any sampling of cases can technically be said to be statistically representative; nevertheless, they do provide a body of data large and diverse enough to permit effective analysis of the problem.

1. a civil complaint or counterclaim (for monetary damages and/or injunction),

2. filed against non-governmental individuals and/or groups,

3. because of their communications to a government body, official, or the electorate,

4. on an issue of some public interest or concern.

In the study's first phase, we performed a quantitative, statistical examination of SLAPPs to expose their "legal profile."[7] In the second phase, we turned to qualitative techniques, performing in-depth, interview-based studies of eleven select cases.[8] Finally, in 1990, we are performing a nationwide survey of hundreds of politically involved citizens, including both SLAPP participants and not.[9]

What emerges is a gripping profile of a new and, we believe, growing legal risk for ordinary citizens who speak up on community political issues. Filers[10] of SLAPPs seldom win a final victory in court, yet seem to achieve their political purposes. Targets seldom lose legally, yet frequently are devastated and depoliticized — "chilled" in first amendment vernacular.

Legally, SLAPPs masquerade as ordinary lawsuits, which

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7. Canan & Pring, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506 (1988).

8. Canan & Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 Law & Soc'y Rev. 385 (1988).

9. *See id.* The survey includes both a telephone interview and a mail-out questionnaire directed at four types of politically involved citizens: (1) "filers" — those who initiate the SLAPP, either by filing a complaint or a counterclaim; (2) "targets" — those against whom the SLAPP is filed; (3) "ripples" — those involved in the petitioning activity which provoked the SLAPP, but were not named as parties to the suit (hence, part of its "ripple effect"); and (4)"untouchables" — those who are similarly politically active, but have never been sued in and have no knowledge of SLAPPs. Altogether 400 individuals will be surveyed. One hundred from each of these four groups, with intra- and inter-group comparisons enabling us to analyze and measure, *inter alia*, future differences in political and legal participation ("chill").

10. We use "filers" (rather than "plaintiffs") and "targets" (rather than "defendants") to describe, respectively, the initiators and recipients of SLAPPs. The majority of SLAPPs are new-case complaint filings, where the filer is the plaintiff, and the target, the defendant. Some SLAPPs arise, however, in a counterclaim or cross-claim filed by a defendant. These are typically against the target for initiating a law-reform or government-challenge lawsuit inimical to the filer's interests.

contributes to some courts' inability to distinguish and deal with them readily. They come camouflaged as any of six ordinary torts. In the 228 cases we have studied, the typical legal charges are defamation (53%),[11] business torts (32%),[12] judicial torts (20%),[13] conspiracy (18%),[14] constitutional-civil rights violations (13%),[15] and nuisance/other (32%).[16]

They can strike any issue area. The cases studied involved urban/suburban development and zoning (25%), complaints against public officials and employees (20%), environmental/animal rights (18%), civil/human rights (11%), neighborhood problems (7%), and consumer protection (6%).

The Constitutional-Legal Safeguards

SLAPPs occur despite the fact that the U.S. Constitution, state constitutions, federal and state civil rights laws, privilege and immunity statutes, and court decisions expressly protect citizens in their efforts to participate in and influence government decision making. The petition clause of the first amendment specifically guarantees the "right to petition the Government for a redress of grievances."[17] Its shield has been expanded beyond its literal terms to protect any peaceful, lawful attempt to promote or discourage government action at all levels and branches of government, including the electorate.[18]

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11. Including libel and slander.

12. Including interference with contract, business, economic expectancy, etc., as well as with antitrust and restraint of trade.

13. Including abuse of process and malicious prosecution (very typical where targets have filed government-challenge or law-reform litigation as their means of communicating with government or lobbying it for change).

14. Typically a redundant charge of having engaged with others to commit one of the other standard SLAPP torts.

15. Frequently, targets are charged with violations of filers' due process, equal protection, or other constitutional or statutory civil rights, occasionally with discrimination.

16. The percentages total more than 100% since the cases typically contained multiple legal claims.

17. U.S. CONST. amend. I.

18. LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 96-16, 99th Cong., 1st Sess. 1141-45 (1982); Note, *The Misapplication of the Noerr-Pennington Doctrine in Non-Anti-*

Overshadowed, even forgotten, alongside its more famous cousins — free speech, press, and assembly — the petition clause's historical roots and pedigree, nevertheless, run even deeper in our culture. Over 1,000 years ago, it first appeared in English law.[19] It gave birth to the Magna Carta in 1215, figured prominently in our colonial unrest and the Declaration of Independence, and appeared in eight state constitutions even before it was added to our federal Bill of Rights in 1791.[20]

The petition clause is said by our U.S. Supreme Court to be "among the most precious of the liberties guaranteed by the Bill of Rights,"[21] one of the "fundamental principles of liberty and justice which lie at the base of all civil and political institutions,"[22] even "implie[d]" in our "very idea of government."[23] It has become one of the "human rights" recognized by international law.[24] It can even make a plausible claim to be the "original" political right.[25] Aristotle observed that "if liberty and equality, as is thought by some, are chiefly to be found in a democracy, they will be best attained when all persons alike share in the government to the utmost."[26] This concept of "public participation" or "citizen involvement" in governance has been a hallmark of the American po-

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trust Right to Petition Cases, 36 STAN. L. REV. 1243, 1244 (1984); Annotation, *Right of Petition and Assembly Under Federal Constitution's First Amendment - Supreme Court Cases* (1985), 86 L. Ed. 2d 758 (1987).

19. It has been traced as far back as the 10th Century "Andover Code" of Edgar the Peaceful, in a masterful unpublished dissertation: D. SMITH, THE RIGHT TO PETITION FOR REDRESS OF GRIEVANCES: CONSTITUTIONAL DEVELOPMENT AND INTERPRETATIONS 12 (Texas Tech Univ. 1971).

20. *See* I SOURCES OF ENGLISH CONSTITUTIONAL HISTORY (C. Stephenson & F. Marcham, rev. ed. 1972); E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY (1957); B. SCHWARTZ, I THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971); D. SMITH, *supra* note 19.

21. Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 222 (1967).

22. DeJonge v. Oregon, 299 U.S. 353, 364 (1937).

23. United States v. Cruikshank, 92 U.S. 542, 552 (1876).

24. *See* Article 21(1) of the Universal Declaration of Human Rights, G.A. Res. 217, 3 U.N. GAOR, U.N. Doc. 1/777 (1948); Article 25 of the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 GAOR, Supp. 16, U.N. Doc. A/6316 (1966).

25. D. SMITH, *supra* note 19.

26. ARISTOTLE, POLITICS, BOOK IV (Barker ed. 1946).

litical experience since the founding of our country.[27]

The petition clause, a host of other laws,[28] and our political ethos encourage, promote, and make it a test of good citizenship for Americans to debate, campaign, lobby, testify, complain, litigate, demonstrate, and otherwise "invoke the law" on public issues.[29] In dismissing a famous SLAPP, one state supreme court summed up this ethic:

> Citizen access to . . . government constitutes one of the foundations upon which our republican form of government is premised. In a representative democracy, government acts on behalf of the people, and effective representation depends to a large extent upon the ability of the people to make their wishes known to government officials acting on their behalf.[30]

So the petition clause, indeed our entire political system, recognizes that the "word of the represented" is essential to the way government shapes our lives. Further, the right is not dependent on whether the citizens' views are right or wrong, wise or foolish, public-spirited or venally self-interested. Implicit in this concept is a very modern (almost "Chicago School") view of the superior competitiveness of truth in a

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27. Smith, *"Shall Make No Law Abridging. . .": An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 CINN. L. REV. 1153 (1986). Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986); Note, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569 (1987); *see also supra* notes 18-19.

28. For example, state constitutional petition clauses, citizen-suit statutes, open meeting laws, administrative procedure codes, freedom of information and public records acts, etc. *See* Feller, *Private Enforcement of Federal Anti-Pollution Laws Through Citizen Suits: A Model*, 60 DEN. L.J. 553 (1983); DiMento, *Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues And A Direction for Future Research*, 1977 DUKE L.J. 409; SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1st SESS., PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS, IN III STUDY ON FEDERAL REGULATION PURSUANT TO S. RES. 71, 1 (1977); P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983); *see also supra* note 4.

29. Nader & Todd, *Introduction* to THE DISPUTING PROCESS: LAW IN TEN SOCIETIES 1 (L. Nader & H. Todd eds. 1978).

30. Protect Our Mountain Env't, Inc. v. District Court, 677 P.2d 1361, 1364 (Colo. 1984) (en banc).

free market of ideas. As Justice Holmes stated in one of his famous dissents, destined to become the law: "[T]he ultimate good desired is better reached by free trade in ideas [and] the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution."[31]

SLAPPs are a contradiction of these fundamental principles, as they are a counter-attack against petition-clause-protected activity. While the SLAPP defendants typically prevail legally (over 77% of SLAPPs are ultimately won by targets),[32] these principles do not always "win." Principles do not stop the *filing* of SLAPPs, do not *terminate* them quickly,[33] and do not prevent the *effects*. Thus, they pose the very risk of censorship which Justice Holmes eschewed.

These are not ordinary lawsuits, as Professor Canan's article illustrates. They are classic "dispute transformation" devices, a use of the court system to empower one side of a political issue, giving it the unilateral ability to transform both the forum and the issue in dispute. One moment a citizen is testifying against a city zoning permit for a proposed housing subdivision; suddenly, "city hall" becomes "courthouse," and "zoning" becomes "slander." One set of interests has successfully transformed a public, political-arena debate into a private, judicial-arena adjudication. Not only are parties' resources diverted from the original issue, the new forum typically will not be able to resolve the problem (zoning), limited as it is to adjudicating the camouflage (slander).

Who files SLAPPs? Who are typical targets? What are the stakes for the parties, the issues, and the future of public participation in governance? These are some of the areas covered in Professor Canan's article.

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31. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

32. The in-court-success rate is higher if the petition clause is raised by targets' counsel (82% of these cases are won by targets), as opposed to reliance on more generic, non-political free speech or other defenses.

33. The average duration of the SLAPPs studied, from filing to final court (usually appellate) disposition, was *nearly three years*.

Typical SLAPPs

Since the Pace University School of Law SLAPP conference puts us in one of the hotbeds of SLAPPs activity, a review of recent SLAPPs in New York City and surrounding counties will give an excellent overview of the phenomenon:

1. In 1984, Suffolk County developer SRW Associates filed a $11,200,000 libel, prima facie tort, and conspiracy suit against nine Patchogue homeowner groups and sixteen individuals. The targets had advertised and testified against township approval of SRW's proposed thirty-six home luxury development on forty acres of prime South Bay shore front. Three and one-half years later the suit was dismissed on appeal.[34]

2. That same year, another Suffolk County developer, Oceanside Enterprises, filed a $1,033,168 treble-damage malicious prosecution action against officers of a Greenlawn civic association. The association had filed an unsuccessful test case against the county for approving Oceanside's proposed residential development. Four years and eight months later the suit was dismissed on appeal.[35]

3. In 1987, Nassau County developer Terra Homes filed a $6,652,000 business interference, defamation, and trespass suit against seven Wantagh residents. The citizens had protested and lobbied local officials against Terra's proposed two-home development. That case was still locked in pretrial arguments two years later.[36]

4. That same year, Nassau County contractor Thomas Theodore filed a $3,000,000 libel suit against two Valley Stream couples. They had circulated flyers urging residents to attend zoning violation hearings and oppose expansion of parking for a local shopping center. Two years later that case

34. SRW Assocs. v. Bellport Beach Property Owners, 129 A.D.2d 328, 517 N.Y.S.2d 741 (2d Dep't 1987).

35. Oceanside Enterprises v. Capobianco, 146 A.D.2d 685, 537 N.Y.S.2d 190 (2d Dep't 1989).

36. Terra Homes v. Blake, No. 1563/88 (N.Y. Sup. Ct., Nassau County filed Aug. 17, 1987).

was still languishing in pretrial.[37]

5. Also in 1987, Robert Reale, purchaser of a Brooklyn lot from the City of New York, filed a $10,000,000 counterclaim for business interference, libel, civil rights violations, malicious prosecution, fraud, and conspiracy against a neighborhood association and twenty homeowners. The residents had filed suit against the city challenging the legality of the sale. After two years, the case is still reported in pretrial.[38]

6. Again in 1987, another Brooklyn developer, Cymbidium Development Corporation, filed a $1,500,000 abuse of process and malicious prosecution suit against a neighborhood preservation group and twenty-five "John Does." The group had also sued the city for approving the developer's thirteen-story condominium across the street from historic Prospect Park. That SLAPP was dismissed by the trial court in a near-record two months.[39]

7. In 1988, Westchester County developer Alvin Lukashok filed a $14,500,000 libel suit against a Croton Falls civic group and ten residents. The group had sent a letter to the Town Board supporting its denial of the developer's proposed one hundred thirty-four room hotel. The trial court dismissed the complaint and the case was affirmed on appeal.[40]

8. Also in 1988, two New York developers filed a $200,000,000 countersuit against two neighborhood improvement groups and fifty-three residents. The residents had circulated a letter of opposition and filed a court appeal to the city's lease of property under the Queensboro Bridge for the developers' shopping mall. The case was reported near settlement in late 1989.[41]

Those eight cases are the only real estate developer

37. Theodore v. Mackey, (N.Y. Sup. Ct., Nassau County filed Jan. 13, 1988).

38. Sixty-Fourth St. "400" Block Ass'n v. City of New York, No. 7788/87 (N.Y. Sup. Ct., Kings County filed June 8, 1987).

39. Esposito v. Citizens for the Preservation of Windsor Terrace, No. 12163-87 (N.Y. Sup. Ct., Kings County July 14, 1987).

40. Lukashok v. Concerned Residents of North Salem, 554 N.Y.S.2d 39 (2d Dep't 1990).

41. Sutton Area Community v. City of New York, No. 8478-88 (N.Y. Sup. Ct., N.Y. County Nov. 7, 1988) (*appeal filed* Aug. 1988).

SLAPPs in the greater New York City area. In the same period, the state experienced a rash of other SLAPPs:

* by police, teachers, and other public officials and employees against their critics;

* by landlords against tenants reporting problems to city health authorities;

* by businesses against consumers reporting problems with their products or services; and

* by dumps, toxic waste incinerators, bars, and other less-than-attractive enterprises against their NIMBY ("Not-In-My-Back-Yard") homeowner opponents.

Solutions

Solutions for the SLAPP phenomenon can come from all three branches of government.

Legislative

A variety of legislative "cures" are possible. First, and perhaps the most effective are "privilege" or "immunity" statutes. Many states offer absolute or qualified immunity from subsequent suit to individuals testifying in judicial proceedings.[42] A number have extended this immunity to individuals reporting violations of law to government authorities,[43] or testifying in non-judicial proceedings before government agencies.[44] The difficulty with immunity statutes is that few, if any, jurisdictions provide absolute immunity to the full range of petition-clause-protected activities.

A second legislative solution is exemplified by a bill proposed during 1988 in the New York General Assembly. The "Civic Protection Bill"[45] would elevate land developers and

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42. *E.g.*, OKLA. STAT. tit. 12, § 12-1443.1 (1980).

43. *E.g.*, WASH. REV. CODE § 4.24. 500-520 (Supp. 1990). This law was passed in direct reaction to a widely publicized Vancouver, Washington SLAPP. Robert John Real Estate Co. v. Hill, No. 87-2-01696-3 (Wash. Super. Ct., Clark County filed July 14, 1987) (real estate developer sued two of his purchasers, a Vancouver husband and wife, for successfully reporting tax and other violations by the developer to state authorities).

44. *E.g.*, OKLA. STAT. tit. 12, § 12-1443.1 (Supp. 1990).

45. Proposed amendments to N.Y. CIV. RIGHTS LAW §§ 70, 76 (Consol. 1990) (ad-

other applicants for government permits to the status of "public figures." This would ostensibly discourage their filing of a libel or slander suit, because they would be required to bear the higher burden of proving "actual malice" on the part of their opponents. The problem with this approach, of course, is twofold. First, filers do not seem deterred *from filing* SLAPPs by the difficulty or doubtfulness of ultimate trial burdens; as SLAPPs exert their chilling effect from their mere filing (or threat of filing), filers may not need to worry about ultimate legal victory. Second, the New York bill only addresses one of the six categories of SLAPP claims (libel/slander); so even if maximally effective, it might only push filers to use the other readily available tort categories.

A third legislative solution directly addresses the financial burden of SLAPPs. In a precedent-setting 1985 move, the legislature of Suffolk County, New York, created a "legal defense fund" to provide attorneys' fees for residents sued for having participated in county permit proceedings.[46]

Executive

Citizen contact with the executive branch of government is the most frequent generator of SLAPPs, giving that branch a particular interest in resolving such suits if it is to stay in touch with those it represents. Executive branch officials, not surprisingly, are speaking out against SLAPPs. State attorneys general have intervened or filed *amicus curiae* briefs urging dismissal in SLAPPs.[47] School boards have sided with parents who lodged complaints about, and then were sued by, teachers.[48]

New York Attorney General Robert Abrams' article[49] is an outstanding example of the action our public leaders can

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ding new sections 70-a, 76-a) (proposed June 7, 1990).

46. *See* N.Y. Times, Nov. 18, 1987, (Long Island Weekly), at 1.

47. *See, e.g.*, Story v. Shelter Bay Co., 52 Wash. App. 334, 760 P.2d 368 (1988); La Pointe v. West Contra Costa Sanitary Dist., No. 295995 (Cal. Super. Ct., Contra Costa County May 25, 1988).

48. *E.g.*, Swenson-Davis v. Martel, 135 Mich. App. 632, 354 N.W.2d 288 (1984).

49. Abrams, Strategic Lawsuits Against Public Participation (SLAPP), 7 PACE ENVTL. L. REV. 33 (1990).

take against SLAPPs. He speaks from first-hand experience of the importance of citizen input on public issues and the "pernicious" effects of SLAPPs. Recognizing that no single judicial or legislative remedy can completely address the problem, he urges: (1) stricter judicial standards for identifying and dismissing SLAPPs (as in the next section of this article), (2) expanded education for the judiciary on SLAPPs, (3) strengthened immunity statutes, (4) government ("legal defense fund") supplied attorneys fees, (5) more liberal use of attorneys-fee sanctions against filers of groundless or frivolous lawsuits, (6) *amicus curiae* briefs filed by the Attorney General's Office in SLAPP cases, and (7) expansion of mandatory *pro bono* legal services to cover SLAPP victims.

Judicial

As Attorney General Abrams suggests, one of the most basic solutions is improving courts' handling of SLAPPs. Many trial courts have had no difficulty in recognizing that such suits impact constitutional-political rights and in promptly dismissing them. Other courts have either failed to recognize the suits for what they are or, even more frustratingly, have recognized the constitutional "chill," but allowed the case to drag on despite it.[50]

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50. Courts that recognize the principles at stake, but nevertheless refuse to dismiss, typically do so for either of two reasons.

The first is the "fact issue" problem: the court may feel it cannot grant a defense motion to dismiss if there is a "fact issue" requiring jury resolution ("actual malice" in the libel case, "malicious intent" under a qualified immunity statute, etc.). A classic example is the United States Supreme Court's most recent handling of a SLAPP, McDonald v. Smith, 472 U.S. 479 (1985). There, a disgruntled citizen wrote two rather intemperate letters to the President of the United States, opposing a proposed appointee for United States Attorney. The citizen alleged that the appointee was a "mad dog," and a "liar," and guilty of unethical conduct. The disappointed candidate filed a $1,000,000 SLAPP for libel; the district court and court of appeals refused to dismiss, and the Supreme Court affirmed, remanding the case for trial. The Supreme Court ruled that the "actual malice" libel standard of New York Times v. Sullivan, 376 U.S. 254 (1964), applied to petition clause cases. This unfortunately creates (at least for federal constitutional defenses) a fact issue which could justify denial of dismissal and prolong SLAPPs, just as it has been criticized for doing in free press/speech cases. *McDonald*, 472 U.S. at 485. *See, e.g.*, Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 14 (1983). The

The Colorado Supreme Court has pioneered a procedure for early identification, balancing, and disposition of SLAPPs, in a precedent-setting 1984 case. As Attorney General Abrams indicates,[51] the *POME* case[52] can well serve as a model for other courts.

The case followed the familiar pattern. Protect Our Mountain Environment ("POME"), a community-environmental group, testified and filed a lawsuit against the county to challenge its approval of a large residential-commercial development in a pristine elk meadow some thirty miles west of Denver. The developer filed a $40,000,000 abuse of process and conspiracy SLAPP against POME, several of its leaders, and their attorney. The trial court refused to dismiss on petition clause grounds, and POME appealed directly to the state supreme court.[53]

The Colorado Supreme Court, in a unanimous opinion, announced that it was "adopt[ing] a new rule" for trial courts' handling of dismissal motions based on the petition clause. The new three-part rule is:

1. Every dismissal motion based on the petition clause will be treated as a motion for summary judgment and expedited.

2. The burden of proof will be shifted from the movant to

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way out of this quagmire lies in the *POME* case approach, *infra* notes 52-54 and accompanying text.

A second (also avoidable) barrier to dismissal can occur if there are any seemingly "non-SLAPP" complaint counts. The court may dismiss all the obvious SLAPP-type counts (involving government communications), but allow the case to proceed on one or two others (thus handing the filer the victory in reality). An example is the case where targets' communications with government officials are held to be privileged, but the case is allowed to proceed because targets sent "unprivileged" copies or otherwise repeated their statements to non-government parties (media, neighbors, etc.). The way out of this quagmire is to treat all related communications as part of the same protected transaction or to take a broader view of the many indirect routes by which we lobby government, other than direct communication (boycotts being a prime example of pressuring merchant A to lobby government official B).

51. Abrams, *supra* note 49.

52. Protect Our Mountain Env't, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984).

53. The author filed a friend of the court brief, in support of dismissal, on behalf of the Colorado Chapters of the American Civil Liberties Union, League of Women Voters, Common Cause, and a Denver neighborhood association.

the filer of the complaint and there will be a "heightened standard" of proof required (strict scrutiny).

3. The filer will be required to prove *all* of the following to survive the motion to dismiss:

> a. target's petitioning was "devoid of reasonable factual support" or "lacked any cognizable basis in law," and
> b. target's "primary purpose" was "harass[ment]" or "some other improper objective," and
> c. target's activity could "adversely affect a legal interest" of filer's.[54]

This imaginative approach blends the best of, and is consistent with, the United States Supreme Court's handling of SLAPP cases.[55] While a qualified immunity, it mandates early detection and identification of SLAPPs and sets up reasonably balanced but firm standards for prompt disposition of appropriate cases. It also opens up a healthy "reverse chill"; presumably, a filer who receives a *POME*-type dismissal faces the even more likely prospect of a successful countersuit (the "SLAPP-Back" discussed next) or an attorneys' fees motion for filing a groundless, frivolous suit.

Still, court efficiency in identification-disposition of SLAPPs, while cutting short the chill, may do little to discourage future filing of SLAPPs. The most effective long-range tool for discouraging filings at the outset appears to be the "SLAPP-Back," a subsequent counterclaim or countersuit for damages by the target against the filer.[56]

Some noteworthy jury verdicts have recently been recovered by SLAPP targets who have countersued dismissed filers:

1. A $13,500,000 jury verdict against Boswell Corporation, the United States' largest cotton agribusiness, and in favor of three Bakersfield, California farmers it had SLAPPed.[57] The

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54. *POME*, 677 P.2d at 1369.

55. *See* McDonald v. Smith, 472 U.S. 479 (1985); Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961); Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).

56. See "SLAPP-Back" articles, *supra* note 2.

57. J.G. Boswell Co. v. Family Farmers for Proposition 9, No. 179027 (Cal.

small cotton farmers had published a newspaper advertisement urging voter support for the Peripheral Canal water project and castigating Boswell for opposing it in order to gain a monopoly on cotton.

2. A $5,197,000 jury verdict against Shell Oil Company and in favor of a Sacramento, California plumbers' union attorney it had SLAPPed.[58] Raymond J. Leonardini, the attorney, himself a former state consumer protection official, had reported to state health officials that Shell's pipe resin, used in domestic water pipes, contained a cancer-causing substance.

3. A $260,000 jury verdict against a Saratoga, California developer and in favor of SLAPPed community opponents, in the case described in Professor Canan's article.[59]

There are a significant number of legal grounds for successful SLAPP-Backs: (1) violation of U.S. Constitutional rights,[60] (2) violation of state constitutional rights, (3) federal civil rights statutes, (4) state civil rights statutes, (5) abuse of process, (6) malicious prosecution and, other state law torts, where available, including per se tort, outrageous conduct, intentional infliction of emotional distress, etc.

Arguments can be made against the SLAPP-Back solution. Some targets may be so chilled that the prospect of further court exposure, even as a plaintiff, is not attractive. Also, as David Sive has pointed out, this increases court loads, and

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Super. Ct., Kern County July 8, 1988). The jurors awarded compensatory damages of $3,000,000 ($1,000,000 to each of the target farmers) and punitive damages of $10,500,000. *Id.* The case is on appeal. The author testified as an expert witness for the farmers.

58. Leonardini v. Shell Oil Co., 216 Cal. App. 3d 547, 264 Cal. Rptr. 883, 892 (1989). The jury awarded compensatory damages of $175,000, punitive damages of $5,000,000, and attorney's fees of $22,000. *Id.*

59. *Supra* note 5. The jury awarded compensatory damages of $60,000 and punitive damages of $200,000 Parnas Corp. v. Pierce Canyon Homeowners Ass'n, No. 450512 (Cal. Super. Ct., Santa Clara County filed May 19, 1980). Professor Canan testified as an expert witness for the community leaders in that case.

60. The "state action" requirement limits use of United States Constitution first and fourteenth amendment claims to cases against governmental filers, as do certain of the federal civil rights statutes. Comparable state constitutional provisions and state civil rights statutes may have no "state action" limitation, thus making them available for SLAPP-Backs against private filers.

filers' attorneys, not filers, should be the focus of sanctions.[61] However, if court congestion is not the focus of reform, while reducing SLAPPs is, the first argument is irrelevant. As to the second point, four- and five-digit attorneys' fees appear far too mild a loss (perhaps even an acceptable "cost of doing business") compared to the risk of a multimillion-dollar damage award.

The attention these multimillion-dollar recoveries are receiving in the media and bar[62] are persuasive testament to the conduct-changing impact of SLAPP-Backs. Attorneys for prospective filers, who do not warn their clients in advance of the SLAPP-Back exposure, may now be courting a malpractice action or grievance filing. Conversely, overly defense-oriented target attorneys who fail to advise their clients of this post-dismissal remedy (or fail to engage or consult a plaintiff personal injury specialist) may be facing ethical exposure as well.

Conclusion

SLAPPs are becoming a substantial risk for ordinary citizens who accept the openness of our American political system and speak out on public issues. They may also be a substantial threat to the continuation of the American political ideal of an informed and involved citizenry. SLAPPs' effects on human, societal, economic, and political levels are the subject of Professor Canan's article and the future of our research. Enough is known now, however, to expedite our search for solutions. The best of these solutions lie with our courts—the very institution designed to protect individual liberties and political rights, yet, ironically, the very institution being manipulated to produce the "chilling effect" of SLAPPs.

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61. Sive, *Countersuits, Delay, Intimidation Caused by Public Interest Suits*, 12 Nat'l L. J., June 19, 1989, at 27, col. 3.

62. *See* articles cited *supra* note 2.