

September 1989

The SLAPP from a Sociological Perspective

Penelope Canan

Follow this and additional works at: <https://digitalcommons.pace.edu/pelr>

Recommended Citation

Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 Pace Envtl. L. Rev. 23 (1989)

DOI: <https://doi.org/10.58948/0738-6206.1536>

Available at: <https://digitalcommons.pace.edu/pelr/vol7/iss1/12>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

The SLAPP from a Sociological Perspective*

Penelope Canan, Ph.D.**

I.

Strategic Lawsuits Against Public Participation (SLAPPs) involve the use of litigation to derail political claims, moving a public debate from the political arena to the judicial arena, where the playing field appears more advantageous.¹ Because the courts are being used in reaction to efforts to influence governance, the lawsuits violate the Constitutional safeguard of political speech that is guaranteed in the petition clause of the first amendment.²

* This address was presented during "Strategic Lawsuits Against Public Participation (SLAPPs) — Protecting Property or Intimidating Citizens," the Fall Colloquium of the Pace University School of Law's Center for Environmental Legal Studies, co-sponsored by the Environmental Law Committee of the Westchester County Bar Association, White Plains, New York, October 14, 1989.

This research was sponsored by the National Science Foundation, Law and Social Science Program under Grant No. SES-8714495. The author thanks George W. Pring, Professor of Law, University of Denver College of Law, Nicholas A. Robinson, Professor of Law, Pace University School of Law, and Reid T. Reynolds, Colorado State Demographer, for helpful comments on earlier drafts of this manuscript. Copyright © 1990 by George W. Pring and Penelope Canan. All rights reserved. This and the article by Professor Pring are adapted from the authors' forthcoming book, tentatively entitled, GETTING SUED FOR SPEAKING OUT.

** Penelope Canan is an Associate Professor of Sociology at the University of Denver where she received her M.A. (1972) and Ph.D. (1976). She is the co-principal investigator of the Political Litigation Project, sponsored by the National Science Foundation. Her work, combining the sociology of law, community and politics, has been published in the *LAW & SOCIETY REVIEW*, *SOCIOLOGICAL PERSPECTIVES*, *SOCIAL PROBLEMS*, and *SOCIOLOGICAL INQUIRY*. Her applied sociological research regarding the social impacts of proposed industrial projects — from utility rate hikes to geothermal development to rapid transit systems — has been commissioned by private industry and governments across the nation.

1. See P. Canan and G. W. Pring, *Strategic Lawsuits Against Public Participation*, 35 *Soc. PROBS.* 506 (1988).

2. The petition clause guarantees "the right of the people . . . to petition the

As the social scientist of a five-year collaboration, I want to talk today about our research effort to understand SLAPPs from a socio-legal perspective. In other words, I will be taking a non-legal viewpoint to ask: What do we know about SLAPPs using insights from economics, political science, psychology, anthropology, and my own discipline, sociology? These interdisciplinary perspectives have produced three kinds of knowledge about SLAPPs.³

First, we have a good impression of the larger landscape of these disputes and a quantifiable picture of their patterns. Second, we have been able to learn about the heart and soul, the blood and guts, the greed and glory, the panic and the terror, the justifications and the celebrations, as well as the ramifications, of SLAPPs on people's lives. And, third, we have been able to use SLAPPs to add to our understanding of the relationship between law and the political vitality of American communities.

SLAPPs are not events, rather they comprise a political legal phenomenon. This means that we must treat each SLAPP as a window on a much larger process. So each SLAPP is not just the story of a legal dispute between opposing hostile parties. Rather, each SLAPP is a window on the relationship between democratic structures and judicial rules. It is a window on the link between political tolerance and economic dominance, and a window on the tension between constitutionalism and capitalism.

To date, we have studied 228 SLAPPs using various approaches. We always began with summarizing the information found in legal documents, public records, newspaper clippings, and personal papers. We might call this the "peeking over the windowsill approach" that has produced the quantitative data I will present. We have also been able to put our whole heads inside the window and really look around in twelve disputes. In these twelve instances, we conducted in-depth case studies,

Government for a redress of grievances." U.S. CONST. amend. I.

3. See Canan & Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 *LAW & SOC'Y REV.* 385 (1985).

where over 100 participants were personally interviewed for periods lasting between one and five hours. We had verbatim transcripts made of these interviews; we had them coded for content;⁴ and we have analyzed them to produce both the qualitative information that I will present here, as well as a model of SLAPP disputes that we will be testing this winter.

II.

Quantitatively speaking, having looked over the window-sill in 228 examples of SLAPPs, we know that 1,873 parties (1,464 individuals and 409 groups) spoke out to a government agency or official, usually in the executive branch, and usually at the local level. These individuals and groups either provided information that challenged the viability of a proposed new economic venture, one that needed a governmental license or public permit, or they commented on the performance of a public servant.

The parties who found fault with the proposed ventures did so on the basis of one of four claims:

- (1) environmental concerns (*e.g.* threats to wilderness, natural areas, or endangered species);
- (2) neighborhood concerns as part of a "not in my backyard stance" in siting controversies over dumps, toxic waste disposals, mines, quarries, half-way houses for the mentally disturbed, restaurants, or bars;
- (3) as disgruntled consumers or tenants; or
- (4) as opponents of urban or suburban development.

In the public servant cases, the government contact involved criticism of police officers, public school teachers, city council members, or other government officials who turned out not to appreciate citizens having an opinion about their performance.

4. See J. Seidel, *The Ethnograph: A Program for the Computer Assisted Analysis of Text Based Data* (1988) (Qualis Research Associates, Littleton, Colo.).

The 1,873 parties who spoke out were sued, usually for defamation, for an average of \$9,000,000 by 654 other parties (423 individuals and 231 groups) whose self-declared primary interest was economic, occupational, or industrial. Typical SLAPP filers were real estate developers, property owners, police officers, alleged polluters, business owners, and state or local government agencies.

Most defendants of the SLAPPs prevailed after an average of thirty-six months and the involvement of a number of court levels. Legal factors like type of claims, number of claims, amount and type of relief requested, duration, or number of appeals seemed to have no bearing on the legal outcomes of these cases. However, the chances of a defendant winning a SLAPP suit substantially improved (from 67% to 82%) if the petition clause had been raised as a defense.

III.

Parnas Corp. v. Pierce Canyon Homeowner's Ass'n,⁵ a SLAPP filed in 1980 in Saratoga, California, make these numbers come alive. I would like to tell you about this case.

Saratoga, on the fringe of San Jose, was squarely part of the American boomtown experience know as the Silicon Valley. Between 1960 and 1970, the population of Saratoga almost doubled, and the population of the county of Santa Clara increased by one-half.⁶ During the next decade, Saratoga's population increased by another 10% and the county's population increased by 30%. By 1980, the population of Saratoga was 30,000, and the population of Santa Clara County was about 1.3 million people. Population growth, land speculation, and associated land values skyrocketed as apricot orchards were bulldozed for the new harvest of silicon chips and microprocessors, riding the cutting edge of high technology.⁷

5. *Parnas Corp. v. Pierce Canyon Homeowners Ass'n*, No. 450512 (Cal. Super. Ct., Santa Clara County filed May 19, 1990).

6. POPULATION STATISTICS FROM U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATION REP., Series P1, table 2, table 4 (1970, 1980).

7. See M.S. MALONE, THE BIG SCORE, THE BILLION-DOLLAR STORY OF SILICON

In 1980, many citizens felt that a "pro-development, maximum density philosophy" was threatening the quality of life in Saratoga.⁸ The citizens bemoaned changes in their community's rural character, its public safety, scenic beauty, excessive traffic, and excessive public costs. They maintained that these changes amounted to a community decline and were associated with a maximum development stance. Disgruntled by a "loss of faith in the local government's ability to responsibly withstand development pressures," citizens groups in Saratoga proposed a ballot vote on something they called "Measure A."⁹

Measure A called for an initial one-year moratorium on land development on the Saratoga hillside. During this year, the citizens wanted environmentally-informed land use standards designed and put in place. From then on, the city would thus be required to monitor and to limit the density on development.

Land developers opposed Measure A. Kamingar Parnas was a land speculator who was directly affected because Measure A would apply to a parcel for which he had already obtained development permits. He was apprehensive because exceptions to the Measure's application on existing permits had to be approved by a four-out-of-five vote of the City Council. In addition, three seats on the Council were up for grabs in the same election.

One of the citizens groups that backed Measure A was the West Valley Taxpayers and Environmentalists Association (WVTEA) headed by Victor Monia. Monia was a self-made executive in the product packaging field. Monia, like many of his neighbors, was new to the area, was ready to put down roots, and euphoric about finding the good life on "the way to San Jose." The WVTEA began as a tiny *ad hoc* group, formed to keep a local college from building a football stadium in

VALLEY (1985).

8. THE BALLOT STATEMENT: ARGUMENT IN FAVOR OF MEASURE A (Saratoga, Cal., Jan. 18, 1980). On file with the City Attorney, City of Saratoga.

9. CITIZENS' ADVISORY COMMITTEE, STATEMENT OF MEASURE A (Apr. 4, 1980). On file with the Saratoga City Hall.

their neighborhood. Under Monia's leadership, it developed into a viable, grassroots political organization having 500 families as members.

Victor Monia agreed to write the pro-Measure A ballot statement. Monia's statement, along with opposing statements, was sent to all homes in the community to inform voters about the ballot issue. Monia also organized door-to-door campaigns to encourage residents to vote on Measure A. However, neither Monia nor his organization participated in the production of a pro-Measure A political flyer that urged a pro-Measure A vote "to stop developers like Parnas, who was involved in the Mayor of Fremont's conflict of interest case."

As it turned out, a man named Rhodes, who was the former Mayor of Fremont, a nearby town, had left office "prematurely." After an investigation by the FBI of his land deals and related conflicts of interest,¹⁰ he paid the highest penalty ever assessed under the state's political reform act (California Fair Political Practices Act).¹¹ Mayor Rhodes and Kamingar Parnas had been involved in many land deals, some of which were enhanced by the mayor's failure to remove himself from voting situations in which he had a personal financial interest.

Although anti-Measure A forces outspent pro-Measure A forces eight to one, Measure A passed. The city council was subsequently transformed. The three council seats that were up for election were won by pro-Measure A candidates. This outcome occurred in an election that the local newspaper observed was seen not as a personality contest, but as an election decided on the issues. The election was a mandate from the people that the local government take responsibility for monitoring development.

One month later, Parnas Corporation sued three homeowners groups and their presidents for defamation which it alleged was contained in the political flyer. Monia and WVTEA had been SLAPPED. Parnas asked for \$40,150,000 in

10. See Wilson, *Ex-Fremont Mayor Rhodes to Pay \$75,000 Penalty in Disclosure Case*, San Jose Mercury News, May 10, 1980.

11. CAL. GOVERNMENT CODE § 83100 (West 1990).

damages.¹² The pursuit of the lawsuit was very telling. Parnas deposed newly-elected pro-Measure A city council members, who saw the deposition process as a threat that they, too, might be sued. Significantly, Parnas failed to drop Monia and WVTEA from the suit when it was learned that they were not involved with the flyer. Once the corporation received suitable density variances, it lost interest in pursuing the case. Two years later, the lawsuit was dismissed for failure to prosecute. But the damage was done.

Over those two years, all three homeowners groups fell apart. People withdrew from the organizations, afraid that they would be swept under \$40,150,000 worth of liability. The groups' presidents and their families were traumatized personally, financially, and psychologically.

Victor Monia found that the trauma of a \$40 million lawsuit also had career consequences. The lawsuit distracted him from the pressing demands of his company and resulted in reduced productivity that contributed to his departure from the company. It undermined his sense of control over his life; it introduced stress into his marriage; it subverted his leadership position in the community; and it robbed the neighborhood of an energetic leader.

Monia and WVTEA fought back, filing suit against Parnas in what the popular press called a "SLAPP-back."¹³ He won \$260,000, most of which were punitive damages. He fought back alone, however, as no one would join him in the suit. The other leaders and Monia's neighbors had all learned that there is a high price for speaking out.

IV.

The Parnas SLAPP illustrates the motivating factors in many SLAPPs. It can also teach us about the impact of SLAPPs on political participation, as well as the politically acceptable avenues available to developers, like Kamingar

12. Parnas Corp. v. Pierce Canyon Homeowners Ass'n, No. 450512 (Cal. Super. Ct., Santa Clara County filed May 19, 1980).

13. Monia v. Parnas Corp., No. 541313 (Cal. Super. Ct., Santa Clara County filed Dec. 12, 1984).

Parnas, who may be frustrated by citizen opposition.

Having studied 228 cases, we have found that there may be any one of four general motivations for filing SLAPPs, all of which were present in the Parnas SLAPP. These motives are:

- (1) the intent to retaliate for successful opposition on an issue of public interest;
- (2) the attempt to prevent expected future, competent opposition on subsequent public policy issues;
- (3) the intent to intimidate and, generally, to send a message that opposition will be punished; and
- (4) a view of litigation and the use of the court system as simply another tool in a strategy to win a political and/or economic battle.

Individually or cumulatively, these motives provide evidence that the SLAPP filer has a total disregard for the citizenship rights of others and a lack of concern over what reduced political debate means for American democracy.

The effects of SLAPPs on political participation are far-reaching. In the Parnas case, over 500 families within one neighborhood were chilled from political involvement in the future. Moreover, this community may suffer a decline in the quality of the public decisions that are made, since the prevailing viewpoint of maximum development will have a less formidable countervailing voice.

However, we can never calculate the ripple effects of this attempt to silence effective public opposition. What about the impact of this lawsuit on scores of people who have read newspaper reports about the plight of these citizens? What about friends and families who have received letters describing their ordeal? What about Boy Scout and Girl Scout leaders who, as a result of these suits, grow up to circumscribe their wholly enthusiastic invocations to "get involved" with gusto? Like the pebble thrown in the water, a single SLAPP can have effects far beyond its initial impact.

What are politically acceptable avenues available to developers like Parnas? Can we all understand being frustrated by citizen opposition and wanting to protect one's property interests? Yes, we can. We believe that Kamingar Parnas shares every right afforded to all Americans to influence the governmental context in which development occurs. Certainly, the empirical evidence points to the overwhelming influence that land developers have on the rules of the development game.¹⁴ Indeed, in the specific case of Saratoga, California, a lopsided degree of influence appears to have been the basis of the citizen revolt in 1980.

What Parnas does *not* have a right to do is to punish other citizens, like Victor Monia, for speaking out about how they think their government should operate, and how they think the rules of the development game in their community ought to be played. Trying to punish one's opponents for trying to influence their government, or in any way silence them politically, is exactly the behavior that the petition clause prohibits.

V.

The petition clause is designed to encourage *informed* political change. It treats all citizens' viewpoints as relevant and deserving of the same protection. It is also designed to protect political speech as a safeguard from the intolerance and repression that breeds hatred; for with hatred and fear comes *violent* political upheaval.¹⁵ Finally, the petition clause is an assertion that the government itself governs at the pleasure of "[w]e, the people,"¹⁶ and *not* at the pleasure of those who can abuse their economic power by filing lawsuits against their citizen opponents.

14. See J.R. LOGAN & H.L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* (1987); J. FORESTER, *PLANNING IN THE FACE OF POWER* (1989).

15. *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis & Holmes, JJ., concurring).

16. Rhodes, *We the People and the Struggle for a New World; the Constitution of the United States of America and International Human Rights*, 30 *How. L. J.* 997 (1987).

It is the sovereignty of the individual that the petition clause is all about; it is this feature of American democracy that is emulated around the world, whether it be in Tianamen Square, East Germany, or Poland. Over a century ago, de Tocqueville praised this remarkable aspect of the United States' experiment in democracy. He observed:

Whenever the political laws of the United States are to be discussed, it is with the doctrine of the sovereignty of the people that we must begin.

The principal of the sovereignty of the people, which is always to be found, more or less, at the bottom of almost all human institutions, generally remains there concealed from view. It is obeyed without being recognized, or if for a moment it be brought to light, it is hastily cast back into the gloom of the sanctuary.

In America, the principle of the sovereignty of the people is not either barren or concealed, as it is with some other nations; it is recognized by the customs and proclaimed by the laws; it spreads freely, and arrives without impediment at its most remote consequences. If there be a country in the world where the doctrine of the sovereignty of the people can be fairly appreciated, where it can be studied in its application to the affairs of society, and where its dangers and its advantages may be judged, that country is assuredly America.¹⁷

Professor Pring and I hope that our research, and forums like this one, in which we can present questions, discuss findings, and debate issues, stem the tide of SLAPPs, and in so doing, reaffirm this country's commitment to governance by "[w]e, the people."

17. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 55-56 (1956).