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Les Mains Sales: The Ethical and Political Implications of SLAPP Suits

Richard O. Brooks*

I. Introduction

As environmentalists, we like to think of ourselves as the protagonists in a morality play — the champions of environmental harmony doing battle with the forces of greed and ignorance. We continue the tradition of Joseph Campbell's *Hero with a Thousand Faces.*[1] Unstained by original sin or "les mains sales" (dirty hands),[2] we claim to be able to do battle without wrestling with the state of our own souls.[3] The struggle is claimed to lie outside ourselves — a Manichean struggle between the forces of good and evil.[4] We know which side we are on.

The latest version of this morality drama is the story of the Strategic Lawsuit Against Public Participation (SLAPP).[5] According to the legal-scholar vagabonds who sing to us this modern tale, the "enemy" is the greedy and ignorant developer. He uses the "tarnished and suspect" mechanism of the legal system to deceitfully twist the enabling democratic process of citizen participation into a grubby, expensive, and in-

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1. J. CAMPBELL, HERO WITH A THOUSAND FACES (1968).

2. J.P. SARTRE, LES MAINS SALES, NO EXIT AND THREE OTHER PLAYS 125 (1989).

3. *See* T. SHAFFER, AMERICAN LEGAL ETHICS (1985) (An author sensitive to the need for lawyers to struggle with themselves).

4. P. ALFARIC, LES ECRITURES MANICHENES (1918).

5. Canan & Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC'Y REV. 384 (1988); Canan & Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988).

timidating countersuit to further his evil efforts to rape Mother Nature. We all hope that the tale has a happy ending. The rule of law, embodied in neutral constitutional principles, statutes, the rules of procedure, and the Model Code of Professional Responsibility, can stop the evildoers and punish them.

I do not propose to simply debunk this satisfying myth in order to wallow in a curiously-satisfying-perverse cynicism. I do believe that environmentalists often do good and that developers often do harm to Mother Nature. I will argue, however, that we environmentalists must recognize that we have "dirty hands," soiled often by the questionable motives of our clients and our methods.[6] Ironically, the developers' alleged transformation of a political struggle into a legal battle is a time-honored trick perfected by the reformer, not the developer.[7] I will further suggest that contrary to our deepest beliefs, the rule of law and procedural due process will rescue neither us, the environmentalists, nor the developers, from our bitter little struggles. Unable to find solace in "an objective law," we will have the difficult task of justifying our actions by appeal to, at best, arguable substantive moral standards, while paradoxically committing ourselves to an uneasy political struggle. This will lead us back into necessarily stained professional conduct. The end of the tale is not triumph, but "troubled sleep."[8]

Anyone who has practiced law knows that intimidation runs throughout the law. It is an integral part of everyday functioning of the law. The authors of the studies on SLAPP suits have posed a problem much larger than simply the problem of developer countersuits.[9] That is, what is the relationship between bona fide law suits on the one hand, and the exercise of force on the other?

The recognition of such intimidation has a long history.

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6. This recognition of our own dirty hands was forcefully brought to my attention by D. LUBAN, LAWYERS AND JUSTICE 317 (1988).

7. S. SCHEINGOLD, THE POLITICS OF RIGHTS (1974).

8. J.P. SARTRE, TROUBLED SLEEP (1950).

9. Canan & Pring, *supra* note 5.

Since some of you in the conference quoted Aristotle, and others quoted de Tocqueville, I will remind you of *Book I* of Plato's *Republic*,[10] in which Thrasymachus, arguing with Socrates about the nature of justice becomes fractious. Socrates says, wait a minute, you're trying to push me around. You're not really willing to enter into a dialogue. You really want to win this argument through the sheer force of your personality and intimidation. Socrates then suggests that this is not a way in which a rational dialogue can take place.

I would suggest to you that the discourse in Plato's *Republic* may have been the beginning of a long history of intimidation in discourses over the nature of law and justice. Underlying that history is the reality of inequality of resources in the legal process.[11] I would urge Professors Canan and Pring, who have done such marvelous work on the SLAPP issue, to view it as part of the more general role of intimidation in the legal process. Such an inquiry should lead to the question: What are the appropriate and feasible ways of controlling intimidation in the legal process?

II. The Search for Principles for Deterring Improper Countersuits

Let me give you, in typical law school fashion, the hypotheticals which we did not have this morning, the counterhypotheticals. First, consider that a developer wants to build a large manufacturing plant with federal and state assistance. This plant would be in violation of the Clean Air Act[12] or the Clean Water Act.[13] Operation of the plant will result in pollution and the resultant unregulated environmental harm. An environmental group, composed of citizens affected and citizens genuinely interested in the environment, brings an action to force compliance. The corporation which is building the plant countersues on one of the grounds found in

10. PLATO, THE REPUBLIC, BOOK I (F.M. Cornford trans. 1945).
11. J. AUERBACH, UNEQUAL JUSTICE (1976).
12. 42 U.S.C. §§ 7401-7642 (1988).
13. 33 U.S.C. §§ 1251-1376 (1987 & Supp. 1990).

traditional SLAPP suits.[14] I think this is the kind of lawsuit we have all been talking about this morning.

Second, suppose that a town wants to build a large recycling center. Although stringently regulated, the center may change the character of the neighborhood. The neighbors, worried about their property values, decide to oppose it on environmental grounds, or at least to delay the plant until they can sell their homes or bargain for damages or modifications to the plant.[15] The town countersues.

Third, suppose a group of businessmen sue to stop the federally-assisted recycling center from being located near the business center. They believe that the recycling center, promoted by a citizens' group of environmentalists, will genuinely affect the environment of their small village business center.[16] The recycling center's builders countersue, believing that they have done careful studies, and that the center will actually diminish environmental harm from the existing waste system. Now let us examine these three cases and suggest how we might approach them.

Initially, we could approach these examples on the basis of our substantive pro-environmental biases. We would clearly reject the countersuits in example number one. After all, the corporation building this manufacturing plant does not have any right to bring a suit in that case. We might have more doubts in example number two, especially in light of the motivations of the citizens and the desirability of a recycling center. We may support the countersuit in number three depending on the merits of the particular study of the environment concluded by the builders of the recycling center. Most members of interest groups would take this approach.

We lawyers and law students, although happy to represent these interests, believe that they are transcended ei-

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14. Canan & Pring, *supra* note 5.

15. In my experience, it is not uncommon to locate recycling centers and incinerators in or near low-income areas. *See* R. Brooks, The Regulation of Garbage-Burning Incinerators in Vermont: The Vicon Experience and Beyond (Sept. 1986) (unpublished manuscript on file with the author).

16. Recently, "recycling centers" have been found which turn out to be, in fact, unregulated dumps.

ther by a neutral rule or a majority-adopted law. Therefore, the second approach and the approach which law schools often try to teach, not always very satisfactorily, is to develop neutral satisfactory rules that apply to all three cases. And what are the neutral satisfactory rules? We have discussed some of them in our conference already. We were given a list of them by our last speaker,[17] and they are very interesting.

We could appeal to constitutional law on the theory that somehow, out of constitutional law, we can find some principles that guide us in these cases. I refer the reader to the article by Professor Stein[18] and ask whether the rules he proposed resolve our problem. I might also say that although I am not a constitutional lawyer, and with great wariness even suggest this, I believe there is what is called a "sham exception" to the *Pennington-Noer* doctrine.[19] This indeed clouds the issue a bit, more than perhaps Professor Stein had time to present this morning. If I am correct and there is an exception, then indeed reliance upon constitutional doctrine may be questionable. A lawyer may say that my countersuit is not a sham and hence is exempt. I am going to bring an action here and I should not get clobbered on constitutional grounds.

I am going to skip over the statutory amendment to the Civil Rights Law that has been proposed as a neutral rule for handling this.[20] That rule was so well handled in the comments by our principal speakers.[21] However, I must say, commenting solely as an environmentalist, I would not like this particular rule myself, and perhaps I might be delighted at a later time to talk about this.

We can look at Rule 11 of the Federal Rules of Civil Procedure[22] and its state equivalents; in short, we can look for a

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17. *See* Stein, *SLAPP suits: A Slap at the First Amendment*, 7 PACE ENVTL. L. REV. 45 (1989).

18. *Id.*

19. Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

20. Proposed amendments to N.Y. CIV. RIGHTS LAW §§ 70, 76 (Consol. 1990) (adding new sections 70-a, 76-a) (proposed June 7, 1990).

21. *See* Canan & Pring, *supra* note 5.

22. FED. R. CIV. P. 11. *See* Graham, *Navigating Between the Scylla of Tolerating Litigation Abuse and the Charybdis of Chilling Legitimate Advocacy: An Overview*

neutral procedural rule.[23] The problems with implementing Rule 11 suggest that it will not provide the answers we seek.

The third approach, which I sense is the approach which our scientific study of countersuits took this morning, is what I will call, for lack of a better title, the "critical legal studies approach."[24] This approach says, thank you very much, Brooks, for those hypotheticals, but they are irrelevant to the case. The fact of the matter is that, if you look historically, what you find is that the only countersuits that are brought are by these rotten, greedy developers, perhaps like those in example one. Consequently, your second and third hypotheticals are irrelevant! That is an interesting assertion. It is an assertion which I would like to see buttressed by an appropriate empirical survey of the range of cases which would give rise to spurious suits or countersuits. I would suggest that the research of our colleagues, Professors Canan and Pring, is unconsciously biased in the selection of those suits. They have not picked up on those suits where environmentalists have abused the legal process.[25]

The fourth and final approach to the hypotheticals I have listed is an approach that does not simply examine history, but also tries to articulate normative ethical standards for what should be done in each particular case. This is the approach which I am going to argue for and which is different from the approach that tries to articulate neutral satisfactory rules. One source of these substantive rules, the ethical rules, are the rules governing the legal profession. We should ask whether these rules provide for adequate standards in these particular cases. Let me flatly state the arguable proposition that the rules of professional responsibility do not provide an adequate basis for curbing these kinds of lawsuits. There is a reason for this. If one looks at the Model Code of Professional Responsibility or the Model Rules of Professional Conduct

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of Federal Rule 11 and Comparable Ohio Provisions, 18 CAP. U.L. REV. 1 (1989).

23. *Id.*

24. M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

25. Admittedly, this is more difficult to do, and would require a review of cases in which environmentalists brought frivilous suits or sought to delay projects.

which are adopted in some states, you will find that basically, they tend to be totally committed to a principle of partisanship and non-accountability of the lawyer.[26] By this I mean they explicitly or tacitly expect the lawyer to be a "hired gun," to represent a client zealously, to consult with a client regarding the client's purposes, but not to be responsible for the morality of the client's purposes. The underlying model for the rules of professional responsibility, I would argue, is that the attorney's job is to defend zealously the client's rights. This advocacy view, best applicable to criminal cases, is also carried over to civil cases and indeed to bargaining outside the courtroom. Very specifically, the Model Code of Professional Responsibility, concerning the representation of a client within the bounds of law, states that an attorney shall not: "[f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."[27] In addition, an attorney in representing a client shall not: "[k]nowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law."[28] The so-called subjective test has been applied to the meaning of "good faith." Hence "good faith" is what the lawyer believes is good faith. If any of you, like myself, have had much to do with the developers' lawyers, the fact of the matter is that they are ready to believe at a moment's notice that most of their SLAPP suits are probably well justified. This is illustrated by the fact that they have advanced such legal claims as inverse condemnation and "unconstitutional taking" with great regularity over fifty years, despite the fact that those claims have been knocked down again and again. I used to think that it was simply either that they were dumb or that they were tricky, but the fact of the matter is that they genuinely believe that

26. D. LUBAN, *supra* note 6, at 393.
27. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1986).
28. *Id.* DR 7-102(A)(2).

property is being "taken" by regulation. In fact, the Supreme Court may finally be beginning to agree with them.[29]

Some states adopt a different ethical code called the Model Rules of Professional Conduct. There is a somewhat different standard in these rules which talks about "meritorious claims" and contentions: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[30] This, by the way, has been interpreted in terms of an objective test; that is, the notion that a reasonable person looking at the action could say yes, that is a reasonable action to bring in this particular case.[31]

The question then is whether the SLAPP defenses raised have been reasonable ones. In the cases I have looked at, *Bell v. Mazza*,[32] *Missouri v. NOW*,[33] and *Sierra Club v. Butz*,[34] the courts wrote very long opinions indicating that the countersuits are being treated seriously. Courts appear to have a very difficult time with them. There are dissents in many of the cases where the countersuit is being dismissed.[35] In short, these are arguable decisions. A lawyer looking at appellate court decisions would not necessarily be discouraged from bringing countersuits.

Of course, the lower court experience with SLAPP suits may be different. Professors Canan and Pring talked this morning about only twenty percent of such countersuits being successful. They appear to suggest that one is either a really "dumb" or evil lawyer if one takes a one-in-five chance on a legal action. I am not so sure about that. I would be delighted to hear, for example, from tort lawyers, particularly personal injury lawyers, or any lawyers taking actions on a contingency fee basis whether they think a one-in-five chance is an outra-

29. Recently, the Supreme Court has entertained inverse condemnation claims.
30. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983).
31. *Id.* The key language here is, "unless there is a basis for doing so . . . ." *Id.*
32. 394 Mass. 176, 474 N.E.2d 1111 (1985).
33. 620 F.2d 1301 (8th Cir. 1980).
34. 349 F. Supp. 934 (M.D. Cal. 1972).
35. 620 F.2d 1301 (8th Cir. 1980).

geous thing to do.[36] Succeeding on only a twenty percent basis does not seem to me to be a tremendously persuasive argument for establishing a non-meritorious claim.

My central point is that it does not seem that interpreting these claims either on objective or subjective grounds under the legal ethics provisions would necessarily find a lawyer unethical. I defer to those who have studied these actions at the lower court level because the suits may be less deserving at that level.

What is wrong with relying upon the ethical rules of professional conduct? I think the whole premise of our discussion up until now is that somehow the ethics that justify what lawyers should do is enshrined in the various rules of professional ethics and that these rules should be the rules of the gladiator; that is, the only rules of the advocacy system. I would like to suggest to you that reliance on professional rules is not intellectually correct or morally right, that the advocacy system and its current set of legal ethical rules is seriously flawed, and that it is based on a series of erroneous ethical theories. The ethical rules of the profession may be tacitly based on the notion of legal realism, that is, the notion that somehow lawyers are neutral parties simply given the responsibility to predict what the courts are going to do.[37] I do not think that is a lawyer's central job.

Alternatively, the advocacy ethic may be based upon a "bad man theory"; somehow the law is simply supposed to curb the "bad man" and the lawyer should proceed, as Oliver Wendell Holmes, Jr. said, as if representing a bad man when he approaches the law.[38] In any case, I think this is a fallacious theory. It ignores the fact that the law has substantive moral content and that it seeks to promote cooperation and

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36. I suppose their answer might depend on how many billable hours they have and what other kinds of lawsuits they have in front of them. As a matter of fact, there is an empirical theory which indicates that lawyers' willingness to take "chancy" contingency fee suits depends on what other suits they have "in the hopper" at that particular time.

37. The following discussion is based upon the more extensive arguments of David Luban. *See* D. LUBAN, *supra* note 6.

38. *Id.* at 20.

not merely advocacy.

The third notion justifying the current ethical rules is that this system of law is an adversarial system, which reveals the truth. Even if this were true, and few believe that advocacy does reveal the truth, that revelation would be true in only very narrow, limited circumstances. These circumstances would best fit the criminal defense system where the issue is not so much truth as it is defending the autonomy of the individual from the force of the state.[39] Since we are talking about SLAPP civil suits here, at least for the most part, I am inclined to think that the paradigm of criminal actions as a basis of the advocacy ethic is not applicable.

Finally, the advocacy ethic is justified by saying, this is my role as a lawyer; I am an advocate; I represent the interest; I am told what to represent; I march into court. I do not think this is a persuasive argument, because the roles we have in society must also have their moral justification. We cannot simply say, this is my role. We have to prove that role is part of an institution that serves some form of moral good.[40] In summary, I think the traditional justification for this set of professional moral rules is erroneous and therefore, to be led into a discussion of these rules ignores the fact that such a discussion takes us away from some fundamental ethical considerations.

III. The Need for Substantive Ethical Standards

What can we do instead? We can ask some very basic moral questions which are difficult to answer. Is the lawyer who is engaging in a SLAPP suit in a mode of practice which inflicts unjustifiable damage on others? Is the lawyer involved in deceit? Is the lawyer involved in manipulations which violate the spirit and generality of the law as a whole? Is the lawyer pursuing substantially unjust results?[41] These are very broad questions, but they are no less valid for being broad.

These questions cut both ways. Our first example, a man-

39. *See* Sierra Club v. Butz, 349 F. Supp. 934 (M.D. Cal. 1972).
40. *Id.*
41. *Id.*

ufacturing plant opposed by environmentalists, would suggest that they would imply that a countersuit may be improper, resulting in unjustifiable damage and manipulation of the law. On the other hand, where a citizen group of property owners is engaged in a battle against a recycling center, it may also, in fact, inflict unjustifiable damage on those people who are, in effect, customers and beneficiaries of the recycling center. It may violate the spirit and generality of the law and may indeed be an unjust result to stop the building of the recycling center. I say *may be* and not, must be. It may be, for example, if the lawyer for the citizen group says this recycling center is in fact doing very real harm to the nearby neighbors' property values and they are not being compensated for that harm as they should be compensated for it.[42] So under those circumstances, it may be fair to take action of some sort or another. *The important thing is that one must weigh the basic moral value of the lawsuit in the specific case.*[43] This is the basic lesson.

IV. "Dirty Hands"

Most environmental groups do not weigh the moral value of their suits apart from their political context. As an environmental attorney, I do not do so either. Many environmental groups and lawyers view themselves as part of an ongoing political battle. Some environmental lawyers, especially in Vermont, Oregon and a few other environmentally-sensitive states see themselves as part of the political movement. They see law and lawyering as part of a political movement. I am part of this group. We believe that as part of this political movement, we are going to get "dirty hands." We are going to do some things which, from a substantive moral view, would be moral violations.

Let me tell you some of the things I have done. I have

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42. Brion, *An Essay On LuLu, Nimby and the Problem of Distributive Justice*, 15 ENVTL. AFF. 437 (1988).

43. The specific justice-based evaluation of lawyers' actions is set forth in SHAFFER, AMERICAN LEGAL ETHICS (1985); *see also* Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

represented a group of citizens over a three year period who ultimately stopped a resource recovery facility — a euphemism for a place that burns garbage. Many of those citizens who came to me initially were primarily interested in their property values and neighborhood amenities. They were the citizens living right next to the plant. Not one of them had been involved in environmental action before the plant was to be built; not one of them showed any history of environmental activism at all; nor have most of them (since they succeeded in stopping the plant) been involved in any other environmental action.[44]

In taking these actions, I contested the air quality permit, a utility siting permit and, along with other groups, upset a special subsidized-electricity rate for this plant. In probable violation of the Model Code of Professional Responsibility,[45] I worked with a publicity agent and used continuous publicity on behalf of this lawsuit at all stages. On several of the actions, I acted in a clearly subservient manner to the judgment of the citizens' group despite the abjurations of the code regarding independent judgment.[46] I do not think I am atypical.

I practiced as a land use attorney in Connecticut for more than ten years, was a consulting attorney for Natural Resources Defense Council for three years in Connecticut and Rhode Island, and have directed the Environmental Law Center for the past ten years. I have observed that a fair amount of this kind of action goes on each and every day by environmental action groups across the country.

What is the justification? The justification does not rest upon neutral legal principles nor upon fixed lawyering ethical codes, nor can the justifications be based upon substantive moral standards. The justification rests upon our appeal to politics rather than ethics.

This morning, Professors Canan and Pring have raised some very basic theoretical and practical problems about

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44. Although motives may not be relevant under formal ethics rules, they may be relevant to substantive moral evaluation.

45. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1986).

46. *Id.* Canon 5.

politics and its relation to law. Their work poses the question: When is it appropriate to translate a political action into a legal action? Interestingly enough, they accuse the developers of promoting this transformation. However, we environmental lawyers "invented" the activity. We delight in taking political actions through legal channels. Those in the civil rights movement, and a wide range of other people, took actions that were, in effect, "political" actions and translated them into court actions.

So the question becomes a much more difficult one. When is it appropriate to do that? Under what circumstances? From a legal point of view, these are arguments that have a constitutional dimension, *i.e.*, the nature of a political question, and the propriety of the court screening-out certain political questions.[47] From the viewpoint of social and political philosophy, the justification rests on the fact that environmentalists feel that they are engaged in a political battle, a political battle in which the existing democratic system and the existing court system is corrupted, by money, an imbalance of wealth, and by institutional inertia.[48] As a consequence, many of the actions taken by environmentalists and their lawyers may be understood only in light of this political battle.

In a partially unjust community, parties cannot act according to the prevailing standards of justice and succeed in moving the community to be better. This is not a "clean hands" justification. It is a "dirty hands" defense, but I believe it. I do not feel righteous about it. I think "dirty hands" is where we are in the environmental movement.

For those who believe, as I think some do here, that we can keep our hands clean and fight environmental battles, and that the other side is merely a group of "rotten" people issuing SLAPP suits, I think they are wrong. The problem with the SLAPP suits is not that they are ethically wrong — of course they are. But the problem is that the developers are on the wrong side of the war. Their "dirty hands" are not justified, our "dirty hands" are. And so, I sound an off-key note in

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47. *See* BICKEL, *The Passive Virtues*, 75 HARV. L. REV. 40, 65-75 (1962).
48. D. LUBAN, *supra* note 6, at 358.

this particular conference today by suggesting that the morality play of SLAPP suits is not the entire song. I nonetheless thank you for listening to my supplementary tune.