Combatting SLAPPs: Absolutism Is Not the Answer

SLAPPs: Getting Sued for Speaking Out, by George W. Pring and Penelope Canan, Temple University Press, 1996, 279 pages.

Reviewed by Daniel O. Conkle[*]

Professors George W. Pring and Penelope Canan have spent more than a decade studying the phenomenon they call "SLAPPs": "Strategic Lawsuits Against Public Participation."[1] Advocates as well as scholars, Pring and Canan now have published what they describe as "a `Handbook on SLAPPs' for Americans who do not want to be cut off from public issues or from those who govern them."[2] "A new breed of lawsuits is stalking America," the authors write.[3] "Like some new strain of virus, these court cases carry dire consequences for individuals, communities, and the body politic."[4]

Pring and Canan present research that is extremely interesting and important, and they advance a convincing argument that SLAPPs have chilled political speech and impaired our system of democratic governance. They propose solutions that are bold and powerful. Unfortunately, however, their solutions are bold and powerful to a fault. Thus, in dealing single-mindedly with the problems caused by SLAPPs, the authors give inadequate attention to the complexity of the phenomenon they are studying and inadequate weight to competing considerations.

SLAPPs are lawsuits that are filed against individuals or groups in response to political activities such as "circulating a petition, writing a letter to the editor, testifying at a public hearing, reporting violations of law, lobbying for legislation, peacefully demonstrating, or otherwise attempting to influence government action."[5] A majority of these lawsuits claim libel or slander;[6] others rely on other legal theories, such as business interference.[7] According to Pring and Canan, however, SLAPPs use these conventional legal categories "to mask their real purpose."[8] Regardless of their particular legal theories, the authors write, we should treat these lawsuits together, as SLAPPs, because all of them are "triggered by defendants' attempts to influence government action-the exact activity covered by the Petition Clause of the First Amendment."[9]

Elaborating, Pring and Canan offer an expansive definition of SLAPPs. Thus, SLAPPs are civil complaints or counterclaims filed against nongovernmental individuals or organizations on the basis of "communications made to influence a governmental action or outcome . . . on . . . a substantive issue of some public interest or social significance."[10] Under this definition, "the parties' subjective motives or good faith" is irrelevant, as is "who was right or wrong on the merits."[11]

So defined, SLAPPs not only rely on differing legal theories, but they also arise in diverse factual contexts. Many are designed primarily to advance commercial interests. Real estate developers, for example, bring suits against citizens who have attempted to block proposed developments, and businesses sue environmental or consumer activists who have lobbied for governmental action. Other SLAPPs, by contrast, are brought by service-oriented organizations, including nonprofit organizations, against citizens who have frustrated their efforts to establish group homes in particular neighborhoods. Still others are brought by individual plaintiffs, such as police officers, public teachers, and other public servants, who claim that citizens have unfairly criticized their official performance.

Utilizing their extensive research, Pring and Canan devote approximately half of their book to a detailed description of particular SLAPPs-and their adverse effects on those involved-in these various factual settings.[12] The authors rely not only on reported judicial opinions, but also on in-depth interviews with nearly a thousand individuals.[13] The result is a colorful and lively account of the real-world impact of these lawsuits.

Based on their research, Pring and Canan "conservatively estimate that thousands of SLAPPs have been filed in the last two decades, tens of thousands of Americans have been SLAPPed, and still more have been muted or silenced by the threat."[14] Notably, the authors conclude that "filers of SLAPPs rarely win in court."[15] Even so, they claim that "the

legal system is not effective in controlling SLAPPs"[16] because SLAPP defendants "are frequently devastated" by the lawsuits,[17] leading to a troublesome chilling effect not only on their own political participation, but also on that of other citizens who witness the effects of the litigation.[18]

To more effectively control SLAPPs, the authors urge a broad interpretation of the Petition Clause of the First Amendment.[19] As noted earlier, SLAPPs, by definition, are lawsuits based upon "communications made to influence a governmental action or outcome . . . on . . . a substantive issue of some public interest or social significance."[20] According to the authors, however, every such communication is protected by the Petition Clause. In particular, the clause "covers any peaceful, legal attempt to promote or discourage government action at any level (federal, state, or local) and in any branch (legislative, executive, judicial, and the electorate)."[21] It therefore protects "all means of expressing views to government,"[22] including formal complaints or reports to government agencies, letters, lobbying, demonstrations, picketing, and boycotts, as long as the expressive activities, in whatever form, are "aimed at producing government action."[23] As a result, the Petition Clause embraces all of the expressive activities on which SLAPPs might be predicated.

Pring and Canan believe that the Petition Clause should be construed not only to *protect* all of these expressive activities, but to protect them *absolutely*. Although "sham" petitioning would not be protected, the authors would extend absolute protection to any genuine attempt to influence government action. They ground their argument on a broad reading of the Supreme Court's 1991 decision in an antitrust case, *City of Columbia v. Omni Outdoor Advertising, Inc.*[24] Applying the *Noerr-Pennington* doctrine and explaining the doctrine's "sham" exception,[25] *Omni* held that federal antitrust liability cannot be predicated on lobbying and related activities that are directed toward the adoption or enforcement of laws, even if those activities are in fact designed to restrict competition.[26] Pring and Canan note that the Court narrowly construed the doctrine's "sham" exception, limiting its scope to cases "in which `persons use the governmental process-as opposed to the outcome of that process'-as a `weapon.'"[27]

Pring and Canan argue that *Omni* should not be confined to its particular legal and factual context. Although the Court's holding is framed in terms of the Sherman Act[28] and most of its language suggests that the opinion is one of statutory interpretation,[29] the authors claim that *Omni* should be read as an interpretation of the Petition Clause. What is more, they contend that it should be read to provide absolute constitutional protection not only against antitrust and similar claims of unlawful business competition or interference,[30] but against *all* claims that depend upon communications made by the defendant to influence government action. As did the Court in *Omni*, the authors would recognize a narrowly drawn "sham" exception, but this exception would be largely inconsequential. Accordingly, they write, "dismissal of a SLAPP should be granted in all cases except where the [defendant's] activities are `not genuinely aimed at procuring favorable government action at all.'"[31] For all practical purposes, then, SLAPP claims would be categorically barred by the Petition Clause, regardless of their particular legal theory or particular factual context.

Pring and Canan's reading of *Omni* is difficult to square with the context and language of the Court's opinion. Further, as the authors concede, their proposed extension of *Omni* is inconsistent with other Supreme Court precedents. In the context of libel and slander, for example, the Court has firmly rejected the constitutional absolutism that the authors find in *Omni*. Thus, in its 1985 decision in *McDonald v. Smith*,[32] the Supreme Court ruled unanimously that the Petition Clause does not provide absolute protection against defamation claims, but instead provides the same protection that is afforded to expression under the First Amendment's Speech, Press, and Assembly Clauses.[33]

Through these various clauses, the First Amendment in fact provides substantial protection against defamation claims. Not surprisingly, the greatest protection is available to defendants who criticize public officials or public figures. Under *New York Times Co. v. Sullivan*[34] and its progeny,[35] such defendants are protected even if their criticisms include demonstrably false and damaging statements, as long as the defendants do not make these statements "with `actual malice'-that is, with knowledge that [they are] false or with reckless disregard of whether [they are] false or not."[36] To recover in this context, moreover, plaintiffs have the burden of proving the defendants' "actual malice" with "convincing clarity."[37] The First Amendment also provides considerable, albeit lesser, protection to defendants who

are sued for making false statements about private individuals. Thus, at least if they are speaking on matters of public concern, such defendants cannot be held liable in the absence of fault, and they cannot be forced to pay presumed or punitive damages absent a showing of "actual malice."[38] As protective as these standards are, however, they are not absolute. Defendants who deliberately lie, for example, even about a public official or public figure, are not protected by the First Amendment.

The Supreme Court's defamation standards reflect a careful weighing of competing considerations, including not only the value of free expression, but also the interest of individuals in protecting their reputations from the damaging effects of false accusations. In *McDonald*, the Court dismissed the notion that this process of constitutional balancing is confined to claims arising under particular clauses of the First Amendment. Instead, the Court held that the Speech, Press, Assembly, and Petition Clauses provide what amounts to a unitary protection for freedom of expression. In so doing, the Court specifically rejected a claim that the Petition Clause provides absolute protection even when the other clauses do not. The Court explained:

> To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.[39]

In a concurring opinion, Justice Brennan elaborated. "There is no persuasive reason," he wrote, "for according greater or lesser protection to expression on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard fence, publishing an editorial in the local newspaper, or sending a letter to the President of the United States."[40] Justice Brennan thus joined the Court's ruling, agreeing that "expression falling within the scope of the Petition Clause, while fully protected by the actualmalice standard set forth in *New York Times Co. v. Sullivan*, is not shielded by an absolute privilege."[41]

In light of *McDonald*'s unanimous and resounding rejection of Petition Clause absolutism, Pring and Canan's constitutional argument, built on the slender reed of *Omni*, is one that the Supreme Court almost surely would reject. Conceding that possibility, the authors suggest that there are ways to "get around" *McDonald*.[42] State courts, for example, can provide absolute protection under the petition clauses of their state constitutions,[43] and state legislatures can enact laws providing absolute immunity against SLAPPs[44] as a matter of statutory rather than constitutional law.[45]

Pring and Canan contend that non-absolutist approaches, like that of the Supreme Court in *McDonald*, force SLAPP defendants into an unacceptable "fact quagmire."[46] Standards such as "actual malice" are quite protective of defendants' expressive rights, of course. Thus, as the authors acknowledge, SLAPP plaintiffs rarely prevail on their claims.[47] But such standards nonetheless are fact-sensitive, therefore "making it extremely difficult for defendants . . . to win pretrial dismissal, stop the chill, and protect their constitutional rights."[48]

Needless to say, the authors' absolutist stance would protect the expressive rights of SLAPP defendants. At the same time, however, the legitimate interests of plaintiffs would be sacrificed altogether. Thus, plaintiffs would be foreclosed from receiving compensation for their injuries, no matter how egregious the defendants' misconduct. In particular, plaintiffs could not vindicate their reputations through defamation lawsuits; indeed, as long as the defendants were engaged in petitioning activity, plaintiffs could be libeled and slandered at will. As suggested earlier, the authors' approach, absolutely barring defamation claims by public officials and public figures, would go considerably beyond the Supreme Court's ruling in *McDonald*. But Pring and Canan actually would take a huge step further, for they would apply the same approach even to claims by private citizens who are neither public officials nor public figures. Even in that context, with private citizens seeking to protect their good names from false accusations, the defendants' "lying and bad motives" would be beside the point.[49] "[E]ven lies need protection," the authors write, "if we want `citizen involvement' in our political governance."[50]

Pring and Canan's diagnosis is sound: SLAPPs chill political expression in a serious way. The authors' remedy,

however, is extremely difficult to accept, especially when the courts are already rejecting most SLAPP claims, albeit not through early dismissals.[51] If SLAPPs were a brain tumor, they might call for radical surgery. But they seem to be more of a headache-to be sure, a very bad headache for SLAPP defendants,[52] and a serious headache for the political system itself. Taking a knife to plaintiffs' claims would certainly relieve the pain. Yet it would cause even greater injury, not only to plaintiffs, but to the American system of law and justice-a system that prides itself not on absolutism, but on the successful accommodation of competing rights and interests.[53]

* Professor of Law and Nelson Poynter Senior Scholar, Indiana University-Bloomington.

1. George W. Pring & Penelope Canan, SLAPPs: Getting Sued for Speaking Out x (1996). Professors at the University of Denver, George W. Pring is an academic lawyer and Penelope Canan a sociologist. In 1984, the authors initiated the University of Denver's Political Litigation Project, through which they have conducted interdisciplinary research relating to SLAPPs. *Id.* at x, 2. Pring and Canan themselves coined the "SLAPPs" terminology, but it is now used widely in the courts and elsewhere. *Id.* at 3.

2. *Id.* at xii. The authors previously had published various book chapters and articles relating to their research. For a list of citations,
see *id.* at 223 n.2

3. *Id.* at 1.

4. *Id.*

5. *Id.* at 1.

6. *Id.* at 217.

7. *See id.* at 150-51, 217.

8. *Id.* at 150.

9. *Id.* at 3.

10. *Id.* at 8-9.

11. *Id.* at 8. As a result, the authors' "SLAPP" terminology (AStrategic Lawsuits "gainst Public Participation")-or at least the "S" in "SLAPP"-may be misleading. In particular, there is nothing in the authors' definition that requires that SLAPPs be filed for "strategic" reasons.

12. *Id.* at 30-142.

13. *Id.* at xi.

14. *Id.*

15. *Id. See also id.* at 1 (noting that "the vast majority of such suits fail in court").

16. *Id.* at xi.

17. *Id.*

18. *Id.* at xi-xii.

19. The Petition Clause protects "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I.

20. Pring & Canan, *supra* note 1, at 8-9.

21. *Id.* at 16 (footnotes omitted).

22. *Id.*

23. *Id.* The authors also contend that "even non-petitioning activity deserves protection if it is an integral part of the overall petitioning effort." *Id.* at 67.

24. 499 U.S. 365 (1991).

25. *See* Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965). For a general discussion of the doctrine, its "sham" exception, and related matters, see Stephen F. Ross, Principles of Antitrust Law 524-41 (1993).

26. *Omni*, 499 U.S. at 380.

27. Pring & Canan, *supra* note 1, at 27 (quoting *Omni*, 499 U.S. at 380). For a case exemplifying the "sham" exception and fitting *Omni*'s description of it, see California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (finding a potential "sham" when the defendants were alleged to have filed repetitive and frivolous objections to the plaintiffs' applications for operating authority, not in a genuine attempt to influence the licensing agencies, but simply to cause the plaintiffs expense and delay).

28. *Omni*, 499 U.S. at 384.

29. The Court's brief reference to the Petition Clause does include a suggestion that its ruling "perhaps" would be required by the clause. But the Court's primary argument is that the clause and its policies provide relevant background for the Court's interpretation of the federal antitrust laws. The Court's discussion of the Petition Clause reads as follows:

[I]t is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right "to petition the Government for a redress of grievances," to establish a category of lawful state action that citizens are not permitted to urge. Thus, beginning with [*Noerr*], we have [ruled that the] federal antitrust laws . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government. This doctrine . . . rests ultimately upon a recognition that the antitrust laws, "tailored as they are for the business world, are not at all appropriate for application in the political arena."

Id. at 379-80 (citations omitted).

30. *Cf.* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (holding that the First Amendment precluded state-law business interference claims against the participants in a consumer boycott that was designed to secure political and social change).

31. Pring & Canan, *supra* note 1, at 27 (quoting *Omni*, 499 U.S. at 380) (internal quotation marks omitted).

32. 472 U.S. 479 (1985).

33. *See* Pring & Canan, *supra* note 1, at 22-24. These clauses forbid laws "abridging the freedom of speech, or of the press, or the right of the people peaceably to assembly." U.S. CONST. amend. I.

34. 376 U.S. 254 (1964).

35. *See*, *e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

36. New York Times Co. v. Sullivan, 376 U.S. at 279-80.

37. *Id.* at 285-86.

38. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); *see* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

39. *McDonald*, 472 U.S. at 485 (citations omitted).

40. *Id.* at 490 (Brennan, J., concurring).

41. *Id.*

42. *See* Pring & Canan, *supra* note 1, at 24 & 231 n.67.

43. *See id.* at 23, 28.

44. The authors' "Model Anti-SLAPP Bill" provides as follows:

Acts in furtherance of the constitutional right to petition, including seeking relief, influencing action, informing, communicating, and otherwise participating in the processes of government, shall be immune from civil liability, regardless of intent or purpose, except where not aimed at procuring any governmental or electoral action, result, or outcome.

Id. at 203. According to the authors, this provision "spells out the acts or communications covered with the maximum constitutional breadth under the U.S. Supreme Court ruling in the *Omni* case." *Id.* at 205. The model bill also contains various procedural and penalty provisions, all designed for the benefit of SLAPP defendants. *See id.* at 203-04.

A number of states have adopted or considered various forms of anti-SLAPP legislation, although most such legislation is not as broad or categorical as the authors' model bill. *See id.* at 189-201.

45. In a decision that the authors applaud, the Supreme Court of Rhode Island recently interpreted that state's anti-SLAPP statute to provide SLAPP defendants with absolute protection (in the absence of "sham" petitioning) even against defamation claims. Hometown Properties, Inc. v. Fleming, 680 A.2d 56 (R.I. 1996); *see* Alexandra Dylan Lowe, *The Price of Speaking Out*, A.B.A. J., Sept. 1996, at 48, 49-51. The court noted that its interpretation of the Rhode Island statute was supported by its belief (consistent with that of Pring and Canan) that the *Noerr-Pennington* doctrine, as a matter of state as well as federal constitutional law, should not be confined to the particular context in which the doctrine arose. *See Fleming*, 680 A.2d at 60-61.

46. *See* Pring & Canan, *supra* note 1, at 22-24.

47. *Id.* at xi, 1.

48. *Id.* at 23.

49. *Id.* at 13.

50. *Id.* The authors elaborate: "[O]ne of the reasons we argue that misstatements and even lies should not take away the Petition Clause protection is that once such a case is allowed to go to trial, it is predictable that a judge or jury will react negatively to such unappealing actions." *Id.* at 67.

51. In addition to their absolute immunity proposal, the authors make other suggestions that are considerably more palatable. For example, they urge defendants not only to seek judicial sanctions, but to file countersuits ("SLAPPbacks") against plaintiffs who have brought and pursued frivolous SLAPP lawsuits, and they explain the legal theories on which such countersuits might be grounded. *See id.* at 162, 168-87. The authors also provide other practical advice for SLAPP defendants and their attorneys. *See, e.g., id.* at 145-67.

52. As the authors observe, defending SLAPPs-like defending other lawsuits-can be time-consuming, expensive, and

unnerving. "[E]ven if successfully defended," they write, SLAPPs "can mean enormous expense, lost time, insecurity, risk, fear, and all the other stresses of extended litigation." *Id.* at 8.

53. Early in their book, Pring and Canan themselves describe the judicial approach that currently predominates in SLAPP cases, a balancing approach that the authors reject, but that many would regard as entirely appropriate and desirable:

Citizens' constitutional right to political speech is not absolute; no constitutional right is. Other citizens also have constitutional rights: to sue, to go to trial, to have their plans and reputations protected. But neither are those rights absolute. When two sides each have fundamental constitutional rights, they must be balanced, must somehow be qualified or limited so that each does not cancel out the other. Courts strike this balance in the overwhelming majority of SLAPPs (appropriately, we believe) by finding for the [defendants].

Id. at 11-12.