Decentering the First Amendment

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George W. Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out.* Philadelphia: Temple University Press, 1996. Pp. xiv + 279. $59.95 cloth; $24.95 paper.

I. The Authors' Law-Centered Ideology and Alternative Visions

The power and limits of this book lie in its simplicity. In *SLAPPs,* Pring and Canan identify a problem, tell why it is serious, and offer a way to deal with it. The problem is the proliferation of SLAPP suits (an acronym for strategic lawsuits against political participation), which are civil complaints or counterclaims filed against nongovernment individuals or organizations that have tried to use their influence by speaking or writing on public issues.

A typical SLAPP suit involves a developer suing a neighborhood group in response to the group's claim at a zoning meeting that the developer's proposed housing development will cause environmental degradation. The developer sues for libel, slander, or defamation on the grounds that what was said was a lie and damaged his reputation.

The authors cut to the chase by convincingly showing that despite all this talk about slander, damage, truth, and reputation, these suits try to stop behavior that is protected by the First Amendment's petition clause, which grants the right of individuals to petition government for redress of grievances. Judges should see these cases as that and noting else. In the authors' minds, this right is the foundation of political participation, and

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the responses to these suits should be swift and straightforward in order to avoid chilling participation. The proper swift response is a countersuit asking for summary dismissal on the grounds that the litigation violates the petition clause of the First Amendment.

The book attempts to document the seriousness of the problem by showing the wide variety of policy issues and settings where these suits appear. It discusses the impact of these cases, especially how they chill participation even when the SLAPPs lose in court as they usually do, and it describes the best ways to counter SLAPP suits. Both authors have been heavily involved with SLAPP issues around the country. Pring has been an expert witness regarding the chilling effects of such lawsuits. Canan was actually a target of a threatened suit, has worked on such litigation, and has spoken all over the country about the danger of this kind of litigation.

The book *SLAPPs* is driven by a powerful ideology that is based on faith in the effectiveness and dominance of formal law. Official law is at the center of this story. The book is about threats to that law and how law can be used in its official capacity to stave off these threats. Pring and Canan's perspective resembles that of the former film critic and now columnist Frank Rich in his discussion of the film *The People versus Larry Flynt.* Like Rich (1996:55), the authors want us to "root for the Constitution." Rich's column, which was reprinted as an advertisement for the film (e.g., in *New Yorker* 1996:55) claims that *The People versus Larry Flynt* is "an eloquent antidote to anyone who would jawbone the First Amendment to clean up the gross excesses of our culture."

The *SLAPPs* authors have to contend with a different kind of jawboning of the First Amendment and with cultural excesses that do not involve sexual degradation and voyeurism but rather lying, name calling, exaggeration, and accusations that many people find offensive, excessive, and indicative of the decline of our civic culture. Whatever their legal rights, the targets of SLAPP suits often carry out these civic cultural excesses. In this book the name callers, petition circulators, and passionate opponents are the heroes, or at least the victims who must be legally vindicated, not because of their character or who they are but because their beliefs and activities are protected by the petition clause of the First Amendment even if their behavior is unseemly and their words false.

The Pring and Canan ideology frames people, problems, and solutions in legal terms. The law is the petition clause of the First Amendment, and those who file SLAPP suits are outside the law. Pring and Canan condemn these lawsuits with a language that demonizes the SLAPP suit filers as lawless and identifies the targets of these suits as upholders of our basic rights. They associate the filers with the spread of disease: "Like some new strain of

virus," these suits are "stalking America." "Americans by the thousands are being sued, simply for exercising one of our most cherished rights: the right to communicate our views to public officials, to 'speak out' on public issues." In thousands of suits, both groups and individuals are now being "routinely sued in multimillion-dollar damage actions for such "all-American political activities" as circulating a petition, writing a letter to an editor, testifying, lobbying, or peacefully demonstrating" (p. 1).

The authors' goal to make petition clause law more effective is in the tradition of the early days of the Law and Society Association when the Association's objectives were stated on the cover of the *Law & Society Review:*

> to explore the relationships between the law and society in such a way as to contribute to the understanding of law as a social and political phenomenon *and to expedite the utilization of law as a more effective instrument of public policy.* (My emphasis)

This stance toward law and policy is law centered, makes assumptions about the efficacy of law, and leads to a focus on rather specific and concrete questions often defined by policymakers or people trying to influence policy (compare Leo 1996). The people in *SLAPPs* are "juridical subjects" (Silbey & Sarat 1988) whose lives and situations the authors define in relationship to formal law. Their lives are described in regard to the effect that the First Amendment has on them. We learn a little about the personal lives of people involved, but these personal details still have as their backdrop the questions of constitutional rights and violations.

The authors do not use the word "ideology" to describe their work, which they see as empirical and theoretical. In fact they only use "ideology" to describe their adversaries, those who bring SLAPP suits. In the appendix, which, curiously, is the only place the authors raise some of their most significant methodological and political issues, Pring and Canan accuse those who bring SLAPP suits of doing so to promote and enforce "a form of ideological power that is both a reflection of intolerance and a means of undemocratic dominance" (p. 222). Perhaps, but the authors of the book also bring forth their own form of ideological power that may be a reflection of tolerance and democratic values but is an ideology nonetheless.

The authors are only partially correct about the book being an empirical study based on theoretical underpinnings. There are, as we shall see, some rich, fascinating, and important data here, and the way Pring and Canan gather their information is often imaginative and encompassing. Their claims for theory, however, are exaggerated and are further evidence of the strong ideological pull of the book. They do not cite much literature on community conflict, use virtually none of it in the text, and fail to consider recent works that look at the role of law in such conflict.

The literature on political participation is similarly limited, and there is no discussion of the free speech literature that questions the effectiveness of the First Amendment. The authors use some of the ideas from the dispute transformation literature to show how SLAPP litigation redefines public issues into narrow legal ones, but the only literature propelling the book is the work that defends the importance of the speech and petition clauses of the Constitution, certainly a form of political ideology.

I do not stress the ideological underpinnings of this book to stigmatize it or dismiss it on its face. All works are ideological in the sense that they manifest visions and preferences guiding the choices that go into the production of a study. Pring and Canan's strong advocacy of First Amendment rights makes the book compelling. Nor do I emphasize the ideological aspects of the book because I disagree with its policy conclusions. I agree that when push comes to shove, the petition clause should triumph over other concerns. It is important to stress their ideology in order best to observe what the authors do not emphasize or do not see. Ideologies foreground some things and downplay others. Emphasizing the authors' ideology helps to give a clearer picture of what the book tells us and does not tell us about law.

II. Decentering Law

Pring and Canan's visions of law emerge from the older law and society *zeitgeist* that had its origins in the optimism emerging from the civil rights movement and the federal courts' interest in individual liberties from the late 1930s until the early to mid-1970s. The ideological dimensions of much of the recent sociolegal scholarship has a view of law and policy that differs dramatically from Pring and Canan's (Silbey & Sarat 1988). This contemporary view has less faith in law and is less interested in making law more effective by expediting its use. The newer vision has emerged in a post-Vietnam, post-Watergate America, "where our highest legal aspirations have been sullied and where there is indeed a clear picture of the inefficiency of many attempts at centralized legal controls" (Silbey & Sarat 1988:173). This vision also arises from the influence of contemporary European and American scholarship on legal pluralism (Merry 1988).

This newer approach envisions formal, official law not at the center but rather as part of a plethora of networks, institutions, and practices that exist alongside or in competition with official law (Merry 1988; Yngvesson 1993). The centrality of law is, to the users of this newer approach, an empirical question or, to use a common term, a problematic. This decentered view of law is especially attentive to variability. Law is pluralistic and relatively independent of the state, and law's role "varies significantly among different terrains of social struggle." These struggles are "multi-

ple site-specific accommodations between domination and resistance" (McCann 1994:9–10).[1] The power and meaning of particular legal conventions are shaped by extralegal discourses and situational factors that differ with each context and activity. The relationships among these are "dialectical" and "interactive" rather than linear or mechanical (McCann 1994:137; see also Bower 1994).

While the *SLAPPs* authors are optimistic about the power of official law, the practitioners of this other approach are skeptical.[2] Pring and Canan describe people's lives as they relate to formal law. The contrasting approach looks beyond the juridical person to see how official law links, if at all, to the other dimensions of people's lives, a linkage that is so diffuse that those who take this approach call the dynamic "law in society." While Pring and Canan stress general patterns and similarity, the alternative approach looks for diversity. Folk definitions of rights intermingle with official definitions in the alternative view. In fact, this alternative approach highlights everyday rights talk and tends to move official law into the shadows—a furtive, powerful shadow perhaps but one that both frames and is framed by other discourses and practices. Reading Frank Rich's column on Larry Flynt, the law-centered approach might ask, "What did the Supreme Court say to vindicate First Amendment rights?" The contemporary approach would see the conversion of the column into a paid ad for the film as a form of cultural production and ask, "How is this ad representative of such powerful cultural resonance that the film company decided to use it to sell tickets?" (In the center of the otherwise black and white ad is a picture of Woody Harrelson, the actor who plays Flynt, with a full-color American flag taped over his mouth.)

The newer approach does not make the older, Pring/Canan approach outmoded. Indeed, a legal system that is so diverse may very well include situations where official, centralized law is effective. The importance of the alternative approach is that it offers certain insights that Pring and Canan miss, and the approach furnishes ways of seeing their own data that are different and useful. By failing to decenter law, the authors misperceive the impact of SLAPP suits and do not sufficiently link the legal issues to other important political and social issues.

[1] On resistance see particularly Merry 1990; Yngvesson 1993; Scott 1985; Bower 1994.

[2] The writers in this newer tradition do not denigrate the importance of official law as much as they emphasize its diffuse, paradoxical, indirect, and limited consequences. See McCann 1994; Engel & Munger 1996; Bower 1994.

III. Taking a Decentered View of SLAPPs

The book opens with a discussion of what SLAPPs are and why they are dangerous. The book has some wonderful examples of tacky, vengeful, impassioned, angry, gut-level, extraordinarily important grassroots politics, but Pring and Canan are so eager to identify and focus on violations of official law that they ignore their own evidence and exaggerate the "chilling" effects of a number of key SLAPP suits.

A. The Importance of Folk Definitions of Rights

Pring and Canan's law-centered approach pays little attention to the importance of folk definitions of rights, law, and propriety. Because the authors so heavily emphasize formal constitutional rights, they miss entirely or underemphasize some very important additional characteristics in their morality play about the First Amendment. Their "juridical subjects" are one dimensional. The authors ignore the pluralistic, culturally based, capacious, and diverse characteristics of rights talk. People often use such talk to describe or advocate positions that are quite different from official law, and this talk gets intermingled with other forms of discourses. The evidence is there, but that is not the story they want to tell so they pay no attention it. This is especially true for the way the authors view those who have filed SLAPPs, but the authors also marginalize the views of those in communities who are on their right side of these issues.

In their strongest statement about rights Pring and Canan say:

> No country on earth protects the "rights" of citizens as does ours. *Every American almost instinctively says, "I have my rights," "I know my rights," "I insist on my rights."* From the Constitution down to the smallest village ordinance, from the great freedoms of the First Amendment down to a parking ticket, our laws spell out individual freedoms, rights guarantees, and securities against unjust treatment from government and our fellow citizens. . . . These same laws encourage us to assert, demand, and defend these rights when they are abused. . . .
>
> SLAPPS endanger these rights. What is the value of having a right when, if you assert it, you can be sued for millions of dollars? (Pp. 128–29; my emphasis)

The statement emphasizes the importance and power of formal law. It only mentions in passing the "almost instinctively" developed rights-oriented responses. Again this is consistent with the story they want to tell, a tale of the necessity of protecting rights through official law. The other story, which is really about rights and culture (Haskell 1987; Scheingold 1974; Milner 1989) rather than instinct, pays much more attention to how people talk about rights when they claim to have, know, and assert them.

Since Pring and Canan predominantly see people as juridical persons, the authors view the SLAPP targets essentially as holders of official rights and the filers as transgressors upon these rights. As a result, the authors miss other significant things about these struggles and the role that rights play in them. This is particularly true of the way the authors view the SLAPP filers.

Mark Tushnet (1984) shows how describing an issue in official rights terms can mask what is in fact taking place. One of his examples in fact involves the petition clause. When he marched in a demonstration on a cold Washington, DC, day, he was not there to exercise his rights as a petitioner of government. He was there to try to change that government's Central American policy. The focus on constitutional rights foregrounds and reifies official law while blurring the less abstract, everyday political events and motivations that are behind the legal issue.

Pring and Canan's formal legal frame similarly blurs and ignores important issues. Just as Tushnet's story involved more than exercising his right to petition, so does Pring and Canan's story involve more than people operating in a "marketplace of ideas," a phrase often used in official discussions of First Amendment law. The authors assert that both sides have access to this open political process, for example, through zoning board hearings and city council meetings as forums for attack and rebuttal. This open process requires as much information as possible so that government "can sort the wheat from the chaff without the help of court censorship" (p. 24). In this marketplace, information flows freely, and the best way to deal with inaccuracy is through additional information, not through lawsuits that penalize people for furnishing information. Pring and Canan's argument, which is of course one of the most common defenses of free speech, is that the marketplace approach is far superior to the alternative of censorship through litigation.

The marketplace metaphor is parsimonious but highly idealized and bereft of some key processes that determine real market transactions. Ideas are not simply freely floating in the market waiting to get plucked and used. The sort of free-flowing equality that makes the idealized marketplace work often is missing in the marketplace of ideas where the ability to communicate is affected by money, status, and power. In its more literal manifestations, the workings of a market depend on the relationships between individuals and on norms of acceptable and unacceptable practice (do you negotiate or accept the offered price, for example). People's sense of their rights impact upon their willingness to buy or sell. Do you trust the sales person? Is she behaving properly toward you?

The more literal image of the marketplace meshes with the decentered approach to law. The transactions over the marketplace are often not separated from the nature of the people in-

volved. The cacophony of the "marketplace of ideas" is not all that noisy compared with the mix of ideas, norms, and practices that operate in the more literal marketplace.

Keep this vision of cacophony in mind as we consider how and why SLAPPs emerge. The typical SLAPP suit is not filed by a large and powerful national corporation against a band of powerless local people. Instead the typical suit involves, in the authors' terms, "Davids versus Davids" (p. 145). The filers are usually local operators who may be more important than the targets, but their importance seldom gets beyond the local community. Larger players have other resources at their disposal and feel less personally threatened. SLAPPs are most frequently provoked by what gets said in public hearings. The suits are often filed as personal vendettas by very angry people who say, "You can't tell those lies about me and get away with it." For example, the leading causes of SLAPP suits by police officers arise from incidents involving parking, accidents, and speeding (p. 50). Though Pring and Canan do not describe how these police-citizen conflicts emerge, they probably develop from heated words exchanged at the scene, followed by the alleged violator's making a formal complaint as well as a noisy public one against the officer. This is followed by the angry officer taking legal action against the complaining party on the grounds that his or her reputation has been falsely maligned. "I don't have to take that shit from anyone." Many of these suits seem less "strategic" in the sense that they are a part of a well-thought-out set of plans and actions and more like the response of a person who feels that she is at the end of her rope.

This description resembles the situations and motivations of the litigants in Merry's (1990) study of why poor people go to court more than it resembles a calculated approach to litigation. The people going to court in Merry's study typically do so because they were sick and tired of getting stepped on by their friends, relatives, or neighbors. They defined these transgressions according to their own definitions of their rights, which were often very different from official definitions. Because they were so angry and had so few places to turn for help and because the courts were quite accessible, these citizens sued—or at least tried to sue. Court officials struggle to minimize this litigation by convincing the filers they do not belong in court, while the filers resist this response by talking about how their rights, property, and propriety have been violated and how they need vindication in a court of law. They have no great illusions of big victories that solve their problems, but the filers in Merry's study see going to court as a chance to avenge themselves and to get their antagonists off their backs if only for a little while.

SLAPP suits have that same feel about them. Filers are angry because they feel that their opponents tell lies about them and

violate norms of fundamental fairness: "Anybody has the right to take a shot at me . . . to try to knock me out of the box. . . . But . . . [the targets] not only wanted me removed but they wanted to make sure that I never get a job anywhere else" (p. 139). "I've taken a lot, and I don't have to take that," said a teacher suing a group of religious parents who had started a public campaign against her (p. 74). The head of a real estate firm said about the woman who discovered that the firm owed back taxes on her subdivision and went public with the information, "Do you have any idea how much effort she put into destroying our reputation, our credit, our whole business. She did it and now we are going to get every last nickel she has" (p. 131). A fur industry publication wrote, "Someone goes on tv and says fur trappers torture animals. . . . Why can't we face him in court—and make him back up such a ridiculous statement, or pay for the damages" (p. 95). While arguing that courts must be on guard against "unscrupulous developers" who use lawsuits to suppress opposition, a lawyer for a real estate developer who had filed a SLAPP suit said that courts should intervene "when there are deliberate attempts to inflame the community with erroneous information about the proposed development" (p. 30).

Speaking against a bill that would discourage SLAPP suits, a lobbyist for Colorado builders said, "the subject bill will have a chilling effect upon a builder's right to bring action for . . . slander or libel." This lobbyist's use of this rights talk, which turns the chilling argument on its head (compare Tushnet 1984), indicates the cultural importance of arguing in rights terms even when there is a chasm between official and folk definitions of rights.

Pring and Canan's focus on the case rather than the problem, a choice consistent with their ultimate concern with formal legal doctrine, underestimates the importance of the emotionally charged problem stage, as reflected in the filers' views of what they think is happening to them. Merry (1990:97–98) distinguishes between "problems" and "cases." Problems are emotionally intense struggles rather than rational conflicts of interest, while a case is seen as a "cool difference" of interest. Once an emotionally intense struggle is transformed into a case, both the court officials and the plaintiffs assert its meaning as a set of issues and interests devoid of or outside of the emotional intensity.

Powerful notions of folk justice fuel the emergence of SLAPPs, even if they do not carry official imprimatur and even if we find them anathema to our political views. Pring and Canan deal with these views dismissively by not explaining their pervasiveness and by labeling them as selfish as contrasted with the "civic motivations" of those targeted by SLAPPs (p. 220). By the terms of official law, particularly the First Amendment, the authors are right, but there is more to the story. The filers also view

their positions as having important civic implications and see themselves as defending notions of property and civility that transcend individual gain and that are important for society as a whole.

Filers often define their actions in terms of property rights, which they tend to interpret more broadly than the formal law does. That is consistent with other studies of folk definitions of property rights (Merry 1990; Milner 1993). In a Colorado case, the developer saw his targets as violating his "constitutional right" to develop his property. This emphasis on property rights is consistent with other studies that have shown the strength of private property values in American culture and the way that people link property ownership with being good citizens (Matsuda 1988; Perin 1977; Milner 1993; see also Rose 1994).

Both police unions and teachers unions funded SLAPP suits. Those who are defined by law as public officials may file SLAPP suits because these people don't see themselves as being public in the way that official law does. This is not so surprising for police departments, which are typically seen as closed, suspicious organizations. The teachers' perceptions are less obvious but also involve a sense that their important work absolves them of certain kinds of public criticism:

> If I ran for president of the United States, I would expect criticism . . . but as a teacher you're usually sensitive, caring . . . and that [a group of parents' extended and public attack on her teaching] hurts a lot. I mean, we are not set up politically to take this sort of thing. (P. 68)

Teachers have little faith in the marketplace of ideas because they see themselves as being limited in what they can say in response to attacks on their reputation or actions precisely because they are public employees (p. 57).

Pring and Canan's response to these conflicts between parents and teachers is indicative of their lack of interest in folk rights. They say that teachers should not file suit because, however harassed these teachers feel, the parents are within their rights. The authors encourage all involved to "trust in the system" that allows for mediation of these disputes, but these teachers seem to go to court because whatever the cost and however much suing violates their identities as helpers, they feel there is nowhere else to go. Courts are accessible and give the teachers a forum for showing how unfairly, if not illegally in a formal sense, they have been treated.

The closest the authors come to confronting these cultural issues of property, propriety, and rights is in the appendix where they define SLAPPs as conflicts between democracy and capitalism. In this very abbreviated discussion (pp. 221–22) they recognize that the conflict over political and democratic freedoms is pervasive and enduring in the United States. They also recognize

the value of both these freedoms, but they misconstrue SLAPPs. To the authors as advocates with strong anti-SLAPP values and law-centered perspectives, SLAPP filers illegitimately use the legal process to advocate a narrow and intolerant set of economic values. The filers are undemocratic. The previous discussion of folk rights paints a more shaded and nuanced picture. The filers talk of the importance of fair play, respect, moderation, and honesty, all of which also resonate with democratic values, even though their manifestations in the SLAPP suits are unconstitutional. The actions that they take as a result of these values may be officially as undemocratic as Pring and Canan say they are. In constitutional law, free speech triumphs over offended sensibilities. That triumph, however, begs the question of how to combine the robustness of free expression with all those other cultural values, and this is a question that communities face all the time. There is a lot more going on there than the law-centered perspective discusses, and in everyday politics these issues are far less clear cut than the authors imply.

B. How the Authors Underestimate Variability and Resilience

Much of the book is devoted to documenting the pervasiveness of SLAPPs by documenting the large numbers of subjects and settings where these suits have emerged: ones involving real estate, land use, public servants' suits against taxpayers, the environmental movement, among others. But the way these examples are reported makes it hard to answer some important questions. Pring and Canan's approach lets us see the scope of the problem but not the differences between cases. The book becomes redundant because the dynamics are described so similarly in each chapter that is concerned with the scope of the problem. Pring and Canan underestimate the ability of those people supposedly chilled by SLAPP suits to overcome those chilling effects. When combined with their failure to consider the powerful definitions of rights, truthfulness, and decorum that are particular tapped into by those who file such suits, some important issues of community politics get lost. The importance of all of this comes from Pring and Canan's data, but they keep it at the margins or fail to discuss it all. An alternative reading of their data leads to a different and richer understanding by avoiding these pitfalls and telling a more complete story that is sometimes at odds with the one the authors tell.

1. Variability in the Distribution of SLAPP Cases

Though the authors claim that they focus on 11 SLAPP situations, these are never reported in full nor are they analyzed comparatively. Through some very hard work, they manage to identify 241 cases that are the basis for much of what they discuss, but

Pring and Canan do not offer any information about how the number of cases has fluctuated from year to year, nor do they tell how they arrive at the statement that there have been "thousands of cases" and that "thousands of people" have been directly affected. There is no way of telling whether the problem that is stalking America is getting better or worse. If SLAPPs are stalking America like a new strain of virus, then an epidemiologist would certainly report where the virus has been found. Assuming that more suits have been filed lately, which, if not supported by data, is consistent with the authors' tone, there is also a counter trend as SLAPP targets have developed good ways to stop the suits in their tracks. There is no way of knowing the extent to which the new counter strategies affect the numbers of SLAPPs.

Information on other important comparisons is missing. There is no way to tell if there are regional or cultural differences, nor are there ways of telling why some people or groups are reluctant to participate in politics after being SLAPP targets while others are not. Does the issue leading to the SLAPP affect the way SLAPPs emerge? (The authors very briefly discuss this question on p. 219.) Why do some lawyers understand the best ways to counter SLAPP suits while others still do not have a clue?

One factor that seems important from Pring and Canan's own evidence but is not discussed comparatively or thoroughly is access to legal services. What appears to be crucial for both targets and filers is easy and relatively inexpensive access to lawyers. Hints of this appear here and there throughout their discussions of the cases, but they offer little insight into the access question except to advise SLAPP targets to make certain that they get attorneys who understand the best way to counter a SLAPP suit is by getting the court to dismiss it. There are all kinds of tantalizing bits of information about lawyers and SLAPPs. An upscale Washington, DC, neighborhood group gets the influential Arnold and Porter firm to countersue someone who had filed a SLAPP suit against it. Similarly a consumer group gets the prestigious Chicago firm of Kirkland and Ellis to represent it in a counter SLAPP. A high-powered Los Angeles firm represented a Huntington Beach developer in a SLAPP suit against those who complained about his development plans. The targets responded by hiring a person who had been chosen Los Angeles "lawyer of the year" to file a countersuit (p. 134). Pring and Canan suggest that there is money to be made by lawyers in these countersuits because they are very winnable and conducive to contingency fees, but we get little sense of how or why these lawyers got involved.

Insurance companies play both a facilitating and limiting role. Liability insurance sometimes covers legal expenses, but at the same time insurance companies appear to put pressure on their client to settle (see, for example, p. 99). There is other evi-

dence that institutionalized access to free or cheap legal assistance is crucial, although the authors do not give this possibility much attention. Public officials may file SLAPP suits because they have access to free legal counsel through the government's own legal staff or through a public employees' union like the Colorado Education Association (pp. 65–66). Public employee unions may be so willing to get involved because they themselves worry about being sued for failure adequately to represent their members. Other variations of access to government attorneys appear. In a Texas case the state attorney general intervened on behalf of the targets of the SLAPP suit (p. 134). There is a brief mention of conservative legal foundations offering legal services to those logging companies and others filing SLAPPs because they believe that their property rights were violated. The League of Women Voters, the ACLU, and Nader organizations have all been involved in behalf of the targets of SLAPPs.

All of this suggests variability and offers the promise of description of the link between access to attorneys and the ways SLAPPs develop and get played out. We know that access to legal services varies, sometimes as a result of differences in legal culture (Engel 1984). To understand dispute transformation, one of the theoretical underpinnings Pring and Canan claim for their book, it is essential to know the interaction between lawyers and others in the process that defines a dispute as a legal one (Milner 1986; Stern 1976; McCann 1994).

In the most explicit discussion about access to lawyers, Pring and Canan offer some reasons why attorneys are reluctant to get involved in defending someone against a SLAPP. Lawyers want up-front money which SLAPP targets frequently do not have. Most lawyers do not have legal expertise in this area and thus do not see the constitutional implications of the case. Attorneys may risk their popularity with local businesses, which are often on the filing end of a SLAPP. These reasons may all be true, but there is no way to find out from the book because the cases they report do not offer information either to confirm or deny these reasons for lawyers' reluctance.

2. *Variability in the Effect of SLAPP Suits: Differences between What the Authors Say and What the Authors Show about the Chilling Effect*

According to Pring and Canan, no SLAPP effect is more pervasive and insidious than the chill. Indignation about chilling fuels the book's passion like nothing else. SLAPPs chill free speech by making those who have been sued reluctant to continue to participate in political life. SLAPP targets may fear speaking out on public issues or writing letters to newspapers or even signing petitions. The authors claim that SLAPPs are insidious because even though the filers seldom win in court, they "win in the real

world" (p. 44) because the threat of having to expend the time and money necessary to fight these suits chills political participation.

Let us think about these contentions as two hypotheses: that people are chilled and that the SLAPP filers come out ahead. To test the chill hypothesis, Pring and Canan (p. 219) identified 241 SLAPP cases and did phone interviews and sent followup questionnaires to four groups of people in these communities where SLAPPs had been filed. These four groups of respondents are "filers," those people who had filed a SLAPP; "targets," those who had a SLAPP filed against them; those who were initially identified as having views similar to the targets' and were aware of the SLAPP but were not targeted themselves; and a control group composed of comparably politically active people who knew nothing of the SLAPP in their community. Respondents were given hypothetical situations involving political conflict and asked whether they would be likely to participate in that conflict and whether they would ask others to do so.

Pring and Canan report their findings this way (p. 219):

> SLAPPs very effectively teach even the most politically active not to participate, not to speak out, not to take a stand. Indeed SLAPPs encourage the active to return to the vast ranks of the uninvolved and apathetic Americans. . . .
>
> The factorial surveys of the "vignette" responses prove scientifically for the first time that SLAPP litigation typically "chills" victims' willingness to participate in the future. . . . Those with no experience or knowledge of SLAPPs . . . are significantly less cautious and more optimistic about political involvement.
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> SLAPPs are proven, effective tools for eliminating many persons from political participation and constraining those who do survive.

The authors present no statistical data, factorial or otherwise, from the survey to support these conclusions. In the text there is a great deal of anecdotal evidence of chilling, so for the sake of argument give them the benefit of the doubt about what the data show about SLAPPs and chilling. Even if we give them the benefit of the doubt about the statistics, however, there is still much evidence that their claims of the chilling impact of SLAPP suits are exaggerated.

Approaches to the study of law and society that focus on legal pluralism and resistance stress the variety of ways people respond to formal law and the forms of small- and large-scale resistance to legal and political authority. Studies in this tradition show that litigation has a wide variety of effects on individuals (Merry 1990; McCann 1994; Galanter 1974). Some people vow never to get involved again, others become enamored of the process, while still others understand that, however reluctantly, they may want

to come back to court because whatever the hassles, suing is their most accessible weapon. Litigation might build solidarity, develop political consciousness, and assist in developing accompanying political strategies. All of these are consequences and processes that have little directly to do with formal law and official decisions. These studies are only rough analogies to Pring and Canan because this other research focuses on people who initiated the lawsuits rather than those, like the SLAPP targets, who are compelled to defend themselves in court, but the thrust of the findings suggest that responses to SLAPPs varied more than the authors admit.

There is much interesting anecdotal evidence suggesting that the chill is not as sweeping as Pring and Canan say and that the "real world" is more diverse and complicated than they Canan imply. There is in fact much more variability and resistance in the targets' response to SLAPP suits in their data than Pring and Canan consider. The authors sometimes mention this but usually in passing and have terse ad hoc explanations as they move on to what for them is the far greater point about the chilling effects. They do not care to make anything of this resiliency and variability.

Here are some examples. A furniture store SLAPPed a woman who went public about the establishment's delay in delivering her furniture. It took a year for the case to be dismissed. Instead of leading to chilling effect, the incident "launched [the woman's] career as a consumer activist" (p. 135). A "crusader" against raw milk who was sued by a dairy claimed he was now more cautious but nonetheless continued his crusade (p. 137). In a highly publicized suit that Pring and Canan see as particularly outrageous, a woman was SLAPPed by a real estate company for going public in her successful attempt to show that the company was not paying taxes it owed on properties in her subdivision. She lost her house, and her marriage suffered because of this long ordeal. Nonetheless, she was not completely chilled. The state passed a whistle blowers' bill as a result of this incident, and in her own words she describes how her reluctance to participate in the political process as a result of this experience was temporary:

> I missed an awful lot of years that I didn't get involved. Now when people say "Your vote doesn't count" I disagree with them. I want people to understand that if they come forward, it is going to cost them dearly. But I do hope that my story inspires other people to believe that they can make a difference. (P. 133)

Discussing a bitter rezoning conflict where developers filed a SLAPP suit against a group that had publicly opposed a project, the authors try to explain away the lack of chilling effects.

> Atypically, all participants interviewed claimed not to have been chilled by the experience; targets, city officials, and filers' attorneys all report that they would "do it again" and had "no regrets." Of course, willing interviewees may exclude those who feel otherwise in any given case, and they may overstate their future courage as well. As the attorney representing the targets reminds us, even the more heroic clients were "devastated" and "exhausted" by the SLAPP, and the memory of the those feelings may undercut their future political involvement. (P. 41).

Given the way the authors report the data, it is impossible to know how "atypical" this response is, but what is more significant is how, with their choice of that word, they try to explain away this situation. The authors never raise such questions about the validity of the responses on the part of those who claimed they have been chilled. Instead, the authors, as well as the targets' lawyer, who certainly had an interest in emphasizing his/her clients devastation, speak for the targets. If we interpret the words so that the parties are allowed to speak for themselves, it appears that their willingness to do public political battle survived, and these targets of a SLAPP suit say that they would become involved in a political issue again.

According to Pring and Canan, a Colorado environmental lawyer who was SLAPPed said he had " 'some sleepless nights' but says the experience will not change him" (p. 166).

> I'm going to go on doing it as I've been doing it. . . . I'm going to continue to speak truth to power until the last breath. If the right to speak the truth has gone out of the legal system, it still exists on the outside.

According to its founder, Earth First!, whose members have been both SLAPPed and slapped around by loggers, has not been chilled, and his statement offers some clue about how resistance to the lawsuits works to prevent chilling. Earth First! members moved into the center of enemy territory in order to organize and protest in the timber communities themselves.

> We went out there, got arrested, got beat up, sued, run over by bulldozers, and we'd come back. . . . We slowly won grudging respect from the loggers. . . . We were accessible, and even if they didn't agree with us, they knew where we drank, they knew where we lived. The communities themselves became less afraid of us, and that's where the timber companies acted and tried to portray us as a very violent, secretive, almost cultish force. But that's kind of rear-guard defense action against us, and it's not working. (Pp. 88–89)

Their strategy made them more a part of the community and reduced the possibility that their adversaries could depersonalize them by branding them as secretive and cultish. Depersonalization is a useful weapon in depriving people of rights.

Pring and Canan claim that the conflict over building Two Forks Dam in Colorado "is a clear example" of a SLAPP filer win-

ning "both in court and in the real world" (p. 79). Yet in the same paragraph the authors indicate that the victory was both unclear and short lived. In the 1980s, as the environmentalists had feared, the Denver Water Board went ahead with plans for the building the dam. This time

> [t]he dam was opposed by much the same [pre-SLAPP] coalition, but this time its older and wiser members were more effective in wooing political support away from the [Denver Water] board early on. In a surprise coup, they persuaded the just-installed George Bush administration to veto federal support for Two Forks . . . and the Two Forks Dam remains a casualty of the water wars today. (P. 79)[3]

Research in the decentering tradition has shown that people get all kinds of benefits from lawsuits even if they lose. They develop solidarity, use the case for publicity, build movements on the basis of shared loss, adopt the rights discourse for broader political purposes, or gain victory outside of the court by taking advantage of the fact that the legal victors may have been legally correct but were morally or politically wrong. Legal discourse and the practices associated with litigation affect the ongoing political struggles (McCann 1994:138–79). Seeing the SLAPPs as part of an ongoing mixture of litigation and political struggle would get the authors away from the chill/nonchill, constitutional/unconstitutional dichotomy and move them toward an explanation of the previous mentioned examples that elude them.

These examples certainly do not counter the authors' contention that chilling is the norm, although, as I said earlier, it is not possible to make accurate comparisons because Pring and Canan do not furnish the necessary statistics. These stories of resistance to the potentially devastating and debilitating effects of a lawsuit suggest that the responses to SLAPPs, like responses to so many attempts at legal ordering, are more diverse than the authors claim. Because of their ideologies regarding law and because of their policy emphasis, this part of the story is given little attention, and the explanations for differences in responses remain hidden. Only in the Earth First! case do the participants themselves offer any explanation, but the authors do not delve

[3] There are other examples of how in their eagerness to show chilling effects, Pring and Canan get careless. They claim that a Big Sur land trust's SLAPP suit against the Nature Conservancy "slowed their [the Conservancy's] preservation efforts" (p. 89) but offer no data to support this. In their discussion of a SLAPP by a chemical company against a retired teacher—a suit still pending after seven years—the authors claim that the litigation "has left her [the teacher] in limbo, wondering whether her statement will cause Delta [the chemical company] to rekindle its costly attack." There is no record that they interviewed this person. Also, immediately prior to their statement about the teacher's plight, Pring and Canan quote the teacher's attorney as saying, "I know Ann [the teacher] stands strong and proud, determined to exercise her Constitutional rights. She will not be cowed into submission" (p. 126).

into its significance. There are occasional short, ad hoc answers to some of these but nothing convincing.[4]

C. Going beyond SLAPPs to Understand Important Issues in Community Politics

Their claims to the contrary (pp. 210–11), the authors have little to say about community conflict and nothing to say about communitarianism, which is presently the most discussed normative theory about contemporary American communities. The absence is apparent in the way Pring and Canan talk about NIMBYs.

The authors' focus on rights and legal language gives a less than full picture of NIMBY ("Not in My Back Yard") conflicts, which are among the most common and difficult to resolve forms of community conflicts. A typical NIMBY: A facility is proposed by a government agency, private developer, land owner, or nonprofit charity. It might be a group home, a park, cemetery, or an office complex. Some people who live in the area near the proposed development organize opposition, which is based on perceived threats to property values or personal safety. When they speak against the projects at hearings or write letters and pamphlets attacking the projects and their developers, these opponents are, in legal language, exercising their First Amendment rights and deserve protections against SLAPPs, however exaggerated the NIMBY advocates' claims. There have been many SLAPPs against such opponents.

As Pring and Canan's own evidence suggests (pp. 106–7), there may be class issues involved in NIMBY politics. There are important socioeconomic differences between opponents and supporters of such neighborhood projects. Opponents of the projects proposed for their neighborhood are much more likely to have a higher income (around $50,000) than are supporters, whose incomes are on the average half of that. Opponents are more likely to be white, older, male, and homeowners in contrast to the less well-educated, nonwhite renters. Neighborhood preservation and protection take on a different and more jaded meaning in light of these findings, more like a struggle between

[4] Compare the way McCann (1994:234) handles a similar statement. Discussing the legal and political struggle over pay equity for women, a union activist said, "If you have a truly just claim and the legal system will not honor it, it can break your back. But people will not go away. Their sense of justice and truth is greater than their sense of legality, narrowly understood." This rhetoric has a context that is richly documented in McCann's book. Legal strategy and political strategy merged in a variety of ways, often effectively, sometimes not. These litigants were members of social networks that helped them develop solidarity and educated them about rights talk. The law did not beat the union activist down because she had other resources at her disposal. Formal law for her was both something to circumvent and something to which to aspire. That is not to say that those Pring and Canan claim were chilled or those I claim were not chilled operated in the context surrounding the union activist's statement. We just can't tell. While it is possible to examine the union activist's claim, it is not possible to do so with the claims made by the SLAPP targets.

the wealthy and settled and those poorer, younger renters whose perceptions about what their back yard should be like are more flexible. Seeing the issue as one between SLAPP filers and targets makes the NIMBY advocate into a hero or victim, which he or she is in a constitutional sense, but says nothing about the impact of this strategy, which is based on a set of values that often represent only a portion of the community.

NIMBY advocates also appear less heroic if we consider other questions. What constitutes the borders of the neighborhood or "back yard," and who decides on these borders? Do NIMBY advocates represent narrow sets of interests that violate some sense of responsibility for adherence to a more encompassing sense of public interest? Do NIMBY advocates have any responsibility when undesirable projects like halfway houses for the mentally ill or housing for the homeless trickle down from more influential "settled neighborhoods" to poorer, less influential ones where there are fewer settled white people to keep the project out? Along with them exercising their free speech rights, do these advocates have any responsibilities at all that are connected to these rights?

This rights and responsibilities link is one of the central tenets of communitarianism's critique of the overemphasis on individual rights. In one way, eliminating the chilling effects of SLAPPs fosters communitarianism by removing an obstacle to the robust community participation that communitarianism advocates (Ackerman 1995:664–67). Free speech, however, does not come off totally unscathed in communitarian thought. Communitarians believe in a politics that is less determined by individual rights and more based on a sense of responsibility and a desire for linkages based on something other than what Mary Ann Glendon (1991) calls in the subtitle of her book the "the impoverishment of political discourse" that rights entail. A fuller discourse would take into consideration the issues of fair play and mutual responsibility rased by SLAPP filers. Communitarians like Amitai Etzioni and Mary Ann Glendon stress that responsibility and restraint are basic values. As Glendon (pp. 76–144) particularly points out, responsibility as well as sociability are missing from our bereft discourses about proper community and individual behavior. NIMBY advocates often display such lack of responsibility for others and often pay little attention to the responsibilities their "back yard" may have for those less fortunate. NIMBY discourse is based on formulations of rights talk—the right to protect property, to personal security, and to privacy. So at the same time that SLAPP stopping encourages one important communitarian value, it may be discouraging others.

Glendon's (1991:182) case for a better community politics "pins so many hopes on cogent argument, persuasion, negotiation, and self-restraint." In her view, those who believe there is

little room for mutual understanding, who are cynical about the empowering potential of the family, labor union, or school, or those who have given up on ordinary politics will be comfortable with a rights-based politics with the courts in the lead. Glendon fails to consider the role that rights holding and rights talk play in making it possible for previously oppressed and silenced groups to gain the legitimacy and confidence to be part of the process of negotiation, persuasion, and self-restraint (compare Williams 1991:146–65). Pring and Canan offer a mirror image of Glendon's limitation. They celebrate rights but do not consider how rights-based practices and discourse might hamper community politics.

Pring and Canan may be skeptical about communitarianism (as I am), but skepticism is not the issue here. What's important is that their formal law-centered vision leads them away from seeing the importance of these issues as a context in which SLAPPs emerge. These questions of the nature and effectiveness of community, the role of responsibility, the tension between neighborhood democracy and the larger polity are all issues that Pring and Canan cannot address, given their focus. I am not arguing that the authors should have changed their mission, which was to write a book about the dangers of SLAPP suits. I am arguing that that approach offers only a skeletal conception and description of community politics and legal culture.

IV. Visions of Law and Visions of Policy

By placing formal First Amendment law at the center, Pring and Canan satisfy their policy agenda that stresses constitutional implications and legal remedies. That is a valuable contribution, but perhaps an even more and interesting contribution is one that the authors had no intention of highlighting and that sometimes runs counter to their explanations, descriptions, and beliefs. The book shows how much variability and resistance there is in the SLAPP situation where the formal legal order is so central. This is another piece of evidence showing the fascinating mixture of legal pluralism in a country, part of whose legal culture is so attached to formal law (compare Silbey & Sarat 1988). In that sense both the law-centered and the decentered vision benefit from the book.

"Expediting the utilization of law," to quote from the old Law and Society Association mission statement, is just part of a larger and more interesting story than Pring and Canan choose to tell. Granting their perspectives and their emphasis on policy analysis and advocacy, *SLAPPs* could still benefit from the information that the decentering of law approach highlights. People who are active in politics and who are concerned with the possibility of being sued would certainly benefit from knowing more about

variations in where the suits were filed, about the role that access to lawyers played, and about the reasons that some target of these suits were not chilled. Those involved in community politics, where legal discourse coexists with other ways of framing issues, would have a better understanding of the cultural power of both sides' appeal to rights and fair play. They would more likely see law as the best of a series of mechanisms to use when there is conflict, but not one that will solve all of the key issues. Folk definitions of rights are important parts of the mix because they are an integral part of the culture and because they raise issues of fairness, honesty, autonomy, propriety, and responsibility that formal law, even landmark First Amendment rulings, cannot deal with very well. Just as Larry Flynt's court victories dealt with only a small part of a larger cultural and political issue, so also do SLAPP suits.

References

Ackerman, Robert M. (1995) "Tort Law and Communitarianism: Where Rights Meet Responsibilities," 30 *Wake Forest Law Rev.* 649–69.

Bower, Lisa C. (1994) "Queer Acts and the Policy of 'Direct Address,'" 28 *Law & Society Rev.* 1009–33.

Engel, David M. (1984) "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community," 18 *Law & Society Rev.* 551–82.

Engel, David M., and Frank W. Munger (1996) "Rights, Remembrance, and Reconciliation," 30 *Law & Society Rev.* 7–53.

Galanter, Marc (1974) "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Society Rev.* 95–160.

Glendon, Mary Ann (1991) *Rights Talk: The Impoverishment of Political Discourse.* New York: Free Press.

Haskell, Thomas (1987) "The Curious Persistence of Rights Talk in the Age of Interpretation," 74 *J. of American History* 984–1012.

Leo, Richard (1996) "Police Scholarship for the Future: Resisting the Pull of the Policy Audience," 30 *Law & Society Rev.* 865–79.

Matsuda, Mari (1988) "Law and Culture in the District Court of Honolulu, 1844–45: A Case Study of the Rise of Legal Consciousness," 32 *American J. of Legal History* 16–41.

McCann, Michael W. (1994) *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization.* Chicago: Univ. of Chicago Press.

Merry, Sally Engle (1990) *Getting Justice and Getting Even.* Chicago: Univ. of Chicago Press.

Milner, Neal (1986) "The Dilemmas of Legal Mobilization: Ideologies and Strategies of Mental Patient Liberation," 8 *Law & Policy* 105–29.

——— (1989) "The Denigration of Rights and the Persistence of Rights Talk: A Cultural Portrait," 14 *Law & Social Inquiry* 631–75.

——— (1993) "Ownership Rights and the Rites of Ownership," 18 *Law & Social Inquiry* 227–53.

Perin, Constance (1977) *Everything in Its Place.* Princeton, NJ: Princeton Univ. Press.

Rich, Frank (1996) "A Reprint of Frank Rich's Op-Ed Column in the *New York Times*," *New Yorker,* Dec. 16, p. 55. [Advertisement]

Rose, Carol M. (1994) *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership.* Boulder, CO: Westview.

Scheingold, Stuart (1974) *The Politics of Rights: Lawyers, Public Policy and Political Change.* New Haven, CT: Yale Univ. Press.
Scott, James (1985) *Weapons of the Weak: Everyday Forms of Peasant Resistance.* New Haven, CT: Yale.
Silbey, Susan S., & Austin Sarat (1988) "Dispute Processing and Legal Scholarship: From Institutional Critique to the Reconsideration of the Juridical Subject." Disputes Processing Working Paper, series 8, no. 9. Madison: Institute for Legal Studies, Univ. of Wisconsin Law School.
Stern, Gerald M. (1976). *The Buffalo Creek Disaster.* New York: Vintage.
Tushnet, Mark (1984) "An Essay on Rights," 62 *Texas L. Rev.* 1363–1403.
Williams, Patricia (1991) *The Alchemy of Race and Rights: Diary of a Law Professor.* Cambridge: Harvard Univ. Press.
Yngvesson, Barbara (1993) *Virtuous Citizens, Disruptive Subjects.* New York: Routledge.