

ANTI-SLAPP LAW MAKE BENEFIT FOR GLORIOUS  
ENTERTAINMENT INDUSTRY OF AMERICA:

*BORAT, REALITY BITES, AND THE CONSTRUCTION OF AN  
ANTI-SLAPP FENCE AROUND THE FIRST AMENDMENT\**

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The scene – which should now be familiar to pop-culture mavens and First Amendment scholars alike – opens as the intrepid Kazakh journalist Borat is wandering down a lonely highway.<sup>1</sup> Hope pulls up in the form of a recreational vehicle populated by three gregarious fraternity dudes from the University of South Carolina. They are only too happy to take him into their vehicle and their confidences. So begins a bacchanal, whereby the merry foursome drinks, engages in crude humor,<sup>2</sup> and gives Borat relationship advice that includes that counseling him to treat women with callous disregard. The scene also – briefly – exposes two of the students as bigots. One wistfully states that he wishes that slavery was still legal in America, while another complains that only minorities can get ahead, presumably by exploiting the fruits of affirmative action, political correctness, or some such other liberal plot. Those comments, about one-eighth of the scene, comprise what could fairly be called the scene's political content.<sup>3</sup>

Months and more than \$250 million in box office receipts later,<sup>4</sup> the students sued the producers of the film, claiming that the producers tricked them into participating in the film, thereby damaging the students' reputations.<sup>5</sup> It is clear from the scene that the students are guilty of being raging jackasses. It is less clear, however, how the scene enhances anyone's understanding of racism or sexism in America or how it connects to the public interest at all. It was therefore surprising when a California Superior Court judge struck down the suit *John Doe 1 v. One America Productions* in its preliminary phase, using a law designed to protect citizens' basic rights of political participation: an anti-SLAPP<sup>6</sup> statute.

How was it that anti-SLAPP law – which was created to protect grassroots activists from the litigious excesses of developers and corporations<sup>7</sup> – ended up protecting a multinational media conglomerate from a couple of drunken fratboys in a motor home? Briefly, the anti-SLAPP statute allows a defendant to stay

<sup>1</sup> BORAT: CULTURAL LEARNINGS OF AMERICA FOR MAKE BENEFIT GLORIOUS NATION OF KAZAKHSTAN (Twentieth Century Fox 2006).

<sup>2</sup> The scene includes students chugging liquor to M.C. Hammer's song "U Can't Touch This," viewing a pornographic film starring Pamela Anderson, and listening to a vivid description of a game called "When the Snake Eat the Pig." See The Unofficial Borat Homepage: The Essential Guide to the Borat Movie, <http://www.webgeordie.co.uk/borat/boratmovieguide.htm> (last visited Oct. 25, 2008).

<sup>3</sup> This is aside from the scene's general description of women as "bitches."

<sup>4</sup> See Box Office Mojo, Borat: Cultural Learnings of America for Make Benefit of Glorious Nation of Kazakhstan,

<http://www.boxofficemojo.com/movies/?id=borat.htm> (last visited Oct. 25, 2008).

<sup>5</sup> See *John Doe 1 v. One Am. Prods., Inc.*, No. SC091723, at \*4 (Cal. Super. Ct. Feb. 15, 2007).

<sup>6</sup> SLAPP stands for Strategic Lawsuit Against Public Participation. CAL. CIV. PROC. CODE § 425.16 (West 2008). Although this Article deals primarily with the California anti-SLAPP statute, it applies to anti-SLAPP statutes around the country. At least twenty-five other states have adopted similar statutes. See *infra* note 9.

<sup>7</sup> See the discussion of the work of George Pring and Penelope Canan, *infra* note 20.

discovery, get his or her lawsuit dismissed, and recover fees if a court finds that the suit: (1) arose from the defendant's action in furtherance of his or her right of free speech or petition in connection with a public issue; and (2) does not carry a probability that the plaintiff will prevail.<sup>8</sup> California's anti-SLAPP statute, and others like it across the United States, were originally created to protect citizens from litigation arising from their participation in public political processes.<sup>9</sup>

In the 1970s and 1980s, corporations, companies, and wealthy individuals found a way to use the courts to quell opposition to their initiatives by filing a so-called "Strategic Lawsuit Against Public Participation" ("SLAPP"). For instance, when a developer is faced with residents who claim a project should be denied approval on environmental grounds, the developer could quell dissent by filing a meritless defamation lawsuit against the opposition. Faced with the prospect of costly litigation, the opposition could be cowed into silence in exchange for an agreement to drop the suit. California's anti-SLAPP law, and others like it across the United States, gave dissenters another option, offering them a mechanism to get a SLAPP suit dismissed and to collect their attorney's fees from whoever filed the meritless suit in the first place. Such anti-SLAPP laws offered this litigation privilege to those who were sued over their participation in government debates and public controversies, focusing especially on those who were sued for exercising their rights to petition or lobby the government and participate fully in civic life.

At first glance, it seems like the move from protection of protesters to protection of producers is a perversion of the anti-SLAPP law. However, this Article will argue that this is a natural extension of the anti-SLAPP doctrine that reflects changes in the statute and its evolving interpretation in judicial decisions. It will examine how the California anti-SLAPP statute has evolved from a law that protected basic participation in public affairs into a privilege that builds an anti-litigation fence around all constitutionally protected speech.

Part I of this Article lays out the basic provisions of the California anti-SLAPP law. Part II reviews the statute's legislative history, paying special attention to the 1997 amendment of the law that significantly broadened its protections. Additionally, this Part discusses the way in which the courts have interpreted the law, focusing on how they determine what qualifies as a public issue.<sup>10</sup>

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<sup>8</sup> See *infra* Parts I & II for a more in-depth description and analysis of the content of the anti-SLAPP statute.

<sup>9</sup> See *infra* Parts II.A & II.B.

<sup>10</sup> See CAL. CIV. PROC. CODE § 425.16(e)(4) (West 2008).

Part III considers two particularly informative cases involving motion pictures: the *Borat* case and the *Reality Bites* case. Part IV argues that the evolution of the scope of anti-SLAPP law is appropriate, concluding that developments in the contemporary media landscape and the United States' broad conception of the First Amendment should lead to a robust interpretation of the anti-SLAPP law. This interpretation of anti-SLAPP law would give entertainment-oriented speech the same status as government-petition and political speech.

A broad interpretation of anti-SLAPP law should be adopted in California and in the twenty-six other states and territories that have anti-SLAPP protections,<sup>11</sup> as well as in those states which have yet to adopt anti-SLAPP statutes.<sup>12</sup> Such a development would deter questionable, if not frivolous, lawsuits against producers of news and entertainment. A broad interpretation also increases the vibrancy and effectiveness of certain news and entertainment products.

#### I. BASIC PROVISIONS OF THE CALIFORNIA ANTI-SLAPP STATUTE

The California anti-SLAPP statute is a litigation privilege that allows a defendant in a lawsuit to file a special motion to strike causes of action when the claim has been filed in retaliation for the defendant's exercise of the constitutional right to petition the government or to exercise free speech in connection with a public issue.<sup>13</sup> The motion will succeed unless the court finds that the plaintiff has established that there is a probability that his or her claim will succeed on the merits.<sup>14</sup> The plaintiff must demonstrate that the complaint is "both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."<sup>15</sup> The court is supposed to base its decision on the pleadings and on affidavits stating the facts of the case.<sup>16</sup> Filing an anti-SLAPP motion stays discovery until the motion is resolved, unless a court decides oth-

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<sup>11</sup> The states which have adopted anti-SLAPP ordinances include Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, and Washington. California Anti-SLAPP Project: Fighting SLAPPs, Protecting the First Amendment, <http://www.casp.net/statutes/menstate.html> (last visited Oct. 25, 2008).

<sup>12</sup> While others debate whether there should be a federal anti-SLAPP law that could be used to contest federal claims such as copyright violations, such a discussion is beyond the scope of this Article.

<sup>13</sup> § 425.16(b)(1). For a more detailed discussion of how the anti-SLAPP statute defines an act in furtherance of a person's right of free speech or petition in connection with a public issue, see *infra* Part II.

<sup>14</sup> § 425.16(b)(1).

<sup>15</sup> *Taus v. Loftus*, 151 P.3d 1185, 1204 (Cal. 2007) (quoting *Wilson v. Parker, Covert & Chidester*, 50 P.3d 733 (Cal. 2002)).

<sup>16</sup> § 425.16(b)(2).

erwise.<sup>17</sup> If a defendant's anti-SLAPP motion prevails, the defendant receives a mandatory award of attorney's fees and costs related to the action.<sup>18</sup> Similarly, if the court finds that an anti-SLAPP motion has been made frivolously or is solely intended to cause delay, the plaintiff against whom the anti-SLAPP motion is filed receives a mandatory award of costs and fees related to the anti-SLAPP motion.<sup>19</sup>

## II. LEGISLATIVE HISTORY AND INTERPRETATION

The legislative history of the anti-SLAPP laws, the scholarship that the statutes are based upon, and courts' interpretations of those statutes and their revisions indicate that California anti-SLAPP law was conceived with a narrow focus of protecting actual political participation. This narrow focus includes government petition and activism, but grew to encompass more general protection of the exercise of First Amendment rights.

### A. *The Scholarship of George W. Pring and Penelope Canan*<sup>20</sup>

Pring and Canan's scholarship formed the foundation for California's and other states' anti-SLAPP statutes, with legislative committee reports crediting the scholars' findings for creating awareness of the problem of the use of courts to silence public debate.<sup>21</sup> In their seminal article, *Strategic Lawsuits Against Public Participation*,<sup>22</sup> Pring and Canan define what a SLAPP is, how it has been used, and why it should be curtailed. The article defines SLAPPs as "attempts to use civil tort action to stifle political expression."<sup>23</sup> Pring and Canan begin their analysis with the assumption that the First Amendment offers protection to "any peaceful,

<sup>17</sup> § 425.16(g).

<sup>18</sup> § 425.16(c).

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 34 SOC. PROBS. 506 (1988) [hereinafter Canan & Pring, *Strategic Lawsuits*]; George W. Pring & Penelope Canan, "Strategic Lawsuits Against Public Participation" ("SLAPPS"): *An Introduction For Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937 (1992) [hereinafter Pring & Canan, *Introduction*].

<sup>21</sup> See *Anti-SLAPP (Strategic Lawsuit Against Public Participation) Law: Hearing on A.B. 1158 Before the S. Judiciary Comm.*, 2005-2006 Reg. Sess. (Cal. 2005) ("[SLAPP] suits were first identified by University of Denver Law School Professor George Pring and University of Denver Sociology Professor Penelope Canan . . . as 'civil lawsuits . . . that are aimed at preventing citizens from exercising their political rights or punishing those who have done so.'"). See also Sharon J. Arkin, *Bringing California's Anti-SLAPP Statute Full Circle: To Commercial Speech and Back Again*, 31 W. ST. U. L. REV. 1 (2003) (citing *Special Motion to Strike 'SLAPP' (Strategic Lawsuit Against Public Participation) Suits: Hearing on S.B. 1296 Before the S. Judiciary Comm.*, 1997-1998 Reg. Sess. (Cal. 1997), available at <http://www.leginfo.ca.gov/bilinfo.html>). See also *Zhao v. Wong*, 48 Cal. App. 4th 1114, 1123 (1996) ("Without exception, the documents in the chaptered bill file all refer to 'the empirical research of the two University of Denver professors,' in effect incorporating the scholarship of Canan and Pring into the legislative history.").

<sup>22</sup> Canan & Pring, *Strategic Lawsuits*, *supra* note 20, at 506.

<sup>23</sup> *Id.*

legal attempt to promote or discourage governmental action," which includes official actions such as petitioning and testifying, as well as appealing to "sway voters on public issues."<sup>24</sup> They then set out to find if parties were using the courts to curtail those rights.

The scholars drew their findings from an analysis of 100 lawsuits, spread across forty-eight counties in twenty-six states and the District of Columbia, studying the key documents for each case.<sup>25</sup> Pring and Canan coded each case so that they could analyze the participants, issues, and claims, as well as the substantial and procedural history of each case.<sup>26</sup> They indicated that most SLAPPs follow a three-stage process: (1) "aggrieved citizens speak out to some branch of government or the electorate on a public issue," behavior protected by the First Amendment; (2) enemies of the aggrieved citizens file lawsuits using tort claims such as defamation or nuisance; and (3) the case is decided.<sup>27</sup> Pring and Canan found that seventy-seven percent of SLAPPs were filed in retaliation for one party's lobbying the government to take action that had an adverse effect on a second party.<sup>28</sup> Twenty-two percent of SLAPPs were filed in cases where two parties were petitioning the government seeking different results on the same issue.<sup>29</sup> The third category of SLAPPs included suits filed against boycott organizers for economic damages.<sup>30</sup> Plaintiffs in SLAPPs ranged from individuals to corporations to states.<sup>31</sup> Damages sought in SLAPPs ranged from \$10,000 to \$100 million dollars, averaging \$7.4 million dollars.<sup>32</sup> Given the eye-popping damages sought by plaintiffs in such suits, the ever-increasing cost of legal fees, and the general lawsuit-induced trauma to defendants, it is unsurprising that Pring and Canan identified a "ripple effect" from the folklore of such suits that could discourage political participation.<sup>33</sup>

Having identified SLAPPs as problems that posed a threat to average folks' participation in the civic arena, Pring and Canan sought a solution. They perceived the SLAPP problem as one of arena: SLAPPs started out as political disputes carried out in public and administrative spheres. When a suit is filed, those political disputes then leave the public arena and go to the less-appropriate

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 507. The documents included the complaints, answers, motions to dismiss, summary judgments, demurrers, and any rulings. *Id.*

<sup>26</sup> *Id.* at 507-08.

<sup>27</sup> *Id.* at 508.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 508-09.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 509-10.

<sup>32</sup> *Id.* at 511-12.

<sup>33</sup> *Id.* at 515. *But see* Joseph W. Beatty, Note, *The Legal Literature on SLAPPS: A Look Behind the Smoke Nine Years After Professors Pring and Canan First Yelled "Fire!"*, 9 U. FLA. J.L. & PUB. POL'Y 85, 88-90 (1997) (arguing that the research of Pring and Canan might have overstated the problem of SLAPPs).

venue of the courthouse, with its attendant costs.<sup>34</sup> The remedy, Pring and Canan suggest, is to return the dispute to its proper public or administrative arena by invoking a First Amendment right to petition.<sup>35</sup> Writing before the passage of anti-SLAPP statutes, Pring and Canan envisioned that the First Amendment would be invoked as a legal defense. Now, anti-SLAPP statutes have codified and strengthened that strategy, turning their suggested First Amendment defense into a litigation privilege that can be used to dismiss claims at their inception.

The scholars' original conception of what constituted a SLAPP suit was narrower than the *Borat* court's conception and almost certainly did not include suits aimed at entertainment-oriented expression. Pring and Canan list

circulating a petition for signatures; voicing criticism at a school board meeting; testifying at a zoning hearing against a new real estate development; sending a letter to public officials; reporting police misconduct; filing a complaint with a government consumer, civil rights, or labor relations office; reporting violations of law to health authorities; lobbying for reform legislation; filing administrative agency appeals; engaging in peaceful, legal demonstrations; being a named party in a non-monetary, public-interest lawsuit; and just going to a public meeting and signing the attendance sheet

as the types of speech that have been subject to SLAPP suits.<sup>36</sup> Pring and Canan explicitly connected SLAPPs and anti-SLAPP protections to political advocacy, going so far as to declare that SLAPP suits were most likely to be filed against political activists who were critical of environmental, real estate and development, and civil rights or neighborhood issues.<sup>37</sup> It is probably safe to surmise that Pring and Canan did not envision their law as a protection for movie studios producing entertainment products for profit.

However, whether or not they anticipated it, Pring and Canan's work planted the seeds that would grow into today's robust protection against SLAPPs. Although Pring and Canan focus their work on those who are sued related to their advocacy of the government, the scholars do mention that influencing voters is a valid exercise of First Amendment freedom.<sup>38</sup> Additionally, their formulation of the problem of SLAPPs as the transfer of a controversy from an appropriate venue – the public sphere, where speech is free at its basic level – to an inappropriate sphere – the

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<sup>34</sup> Canan & Pring, *Strategic Lawsuits*, *supra* note 20, at 515.

<sup>35</sup> *Id.* at 515-16.

<sup>36</sup> See Pring & Canan, *Introduction*, *supra* note 20, at 946-48.

<sup>37</sup> *Id.* at 938.

<sup>38</sup> *Id.* at 959.

court, where speech costs money and could lead to damages – is analogous to the application of anti-SLAPP law to entertainment-oriented speech. When a party files suit against the producers of entertainment-oriented speech, it is removing the controversy from the sphere of public discourse, where it can be discussed, and where harms, like those to a reputation, can be repaired through discourse and persuasion without chilling the production of speech. Filing suit moves the controversy to the legal system, a highly structured venue where rules restrict the discourse and may restrict the ability of participants to marshal their case in public,<sup>39</sup> and a venue that not only carries potentially exorbitant legal fees, but also the possibility of a catastrophic judgment. Furthermore, like the danger posed to government petitioners, there is also the possibility that the threat of a suit could chill certain kinds of entertainment-oriented expression, making it less likely that producers will make biopics or features that intersect with reality. While, on the surface, Pring and Canan's conceptions of the SLAPP problem and the anti-SLAPP solution seem incompatible with entertainment-oriented speech, government petition and the exercise of free expression in entertainment production actually share important characteristics that make them compatible with anti-SLAPP movements.

### B. *The 1992 Act*

Based on Pring and Canan's scholarship, California passed the first version of its anti-SLAPP statute.<sup>40</sup> The statute gave defendants the opportunity to file a special motion to strike causes from court when the cause arose from the defendant's act in furtherance of the defendant's constitutional right to petition or right to free speech in connection with a public issue.<sup>41</sup> The specific actions protected included:

[A]ny written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.<sup>42</sup>

The original statute did not extend the litigation privilege to

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<sup>39</sup> A gag order might be filed in a case that would prevent producers from telling their side of a story. In extreme, though unlikely, cases, such a suit might lead to an injunction against an entertainment-oriented product's release.

<sup>40</sup> CAL. CIV. PROC. CODE § 425.16 (1992).

<sup>41</sup> *See id.*

<sup>42</sup> *Id.*



any and every expressive exercise. Rather, it focused on specific acts of political speech, advocating for or against issues under current government review. This specificity indicates that the legislature may have originally intended the scope of the anti-SLAPP law to be narrow, in line with the most conservative reading of Pring and Canan's scholarship.

However, even with the narrow language of the statute, courts varied in their interpretations. Several cases, including *Averill v. Superior Court*<sup>45</sup> and *Church of Scientology v. Wollersheim*,<sup>44</sup> construed the new statute broadly. In *Averill*, the court found that a woman's allegedly slanderous statements to her employer, urging the employer to forego support of a charity establishing a battered women's shelter in her neighborhood, could be protected from a lawsuit by anti-SLAPP law, even though the statements were made in private conversations, not in a public forum.<sup>45</sup> Significantly, the *Averill* court departed from the conception that the statements in question had to be actually petitioning a government entity to qualify for protection.<sup>46</sup> The court in *Wollersheim* found that the defendant was being sued in retaliation for his activities as a witness and a plaintiff against the Church of Scientology.<sup>47</sup> The court reasoned that the right to participate in court proceedings is a constitutional right akin to the right to petition and that the Church's size and power over a large number of people made it a matter of public interest.<sup>48</sup> The court also took media coverage of the Church into consideration in concluding that the Church's dealings were a public issue.<sup>49</sup>

However, another court adopted a restrictive interpretation of the new statute, taking an especially suspicious view of the media. In *Zhao v. Wong*, the court moved to restrict the type of expression that would be considered ripe for protection under the anti-SLAPP law.<sup>50</sup> At its most basic level, *Zhao* involved two men who were trying, through speech and the media, to influence government and public opinion in order to put pressure on a murder investigation and a will contest.<sup>51</sup> The defendant in the case, Daniel Wong, accused his brother's lover, Xi Zhao, of murdering his brother and forging his brother's will.<sup>52</sup> Wong made these accusations to his father, as well as to a reporter from the *San Jose*

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<sup>45</sup> *Averill v. Superior Court*, 50 Cal. Rptr. 2d 62 (Ct. App. 1996).

<sup>44</sup> *Church of Scientology v. Wollersheim*, 49 Cal. Rptr. 2d 620 (Ct. App. 1996).

<sup>45</sup> *Averill*, 50 Cal. Rptr. 2d at 65.

<sup>46</sup> *Id.* at 65-66.

<sup>47</sup> *Wollersheim*, 49 Cal. Rptr. 2d at 649.

<sup>48</sup> *See id.* at 633.

<sup>49</sup> *Id.*

<sup>50</sup> *Zhao v. Wong*, 55 Cal. Rptr. 2d 909 (Ct. App. 1996).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 911.

*Mercury News*, which was not a party to the case, despite that it published an article about the suspicious nature of the death.<sup>53</sup> Zhao sued Wong for slander on the basis of his statements to Wong's father and the reporter – statements which were designed to urge the police to investigate the death more thoroughly.<sup>54</sup> However, the court ruled that these reasons did not qualify under its narrow conception of the protection of the anti-SLAPP law:

We regard plaintiff's cause of action based on the press interview as involving typical allegations of slander per se with tenuous and speculative links with the petition clause. . . . We read the statute, however, as providing an extraordinary remedy for a narrowly defined category of litigation.<sup>55</sup>

Furthermore, the court ruled that speech occupying the "highest rung" of First Amendment values is the only kind of speech that is to be protected by the anti-SLAPP statute:

The concept of "public significance" embraces not only governmental activities, but also other activities affecting the common interest of a substantial part of the community. . . . Media coverage cannot by itself, however, create an issue of "public interest" within the statutory meaning. Rather, the term refers to matters occupying the highest rung of the hierarchy of First Amendment values, that is, to speech pertaining to the exercise of democratic self-government.<sup>56</sup>

The *Zhao* court's view would certainly close anti-SLAPP law to the *Borat* producers; the court generally took a dim view of the media:

It would be absurd to suppose that a newspaper can generate a public issue by the mere fact of printing a story, even when it expects lively interest among its readers. If that were the case, a newspaper could bring itself, and others, within the statute by its own decision to cover a controversy even if the public has no interest in it.<sup>57</sup>

Faced with conflicting appellate decisions and perturbed about the *Zhao* court's narrow conception of the scope of anti-SLAPP law, the legislature returned to the issue of SLAPP protection, vastly expanding the law's reach.

### C. *The 1997 Amendments*

While the anti-SLAPP statute began with narrowly focused

<sup>53</sup> *Id.* Based on those statements and statements to others, the *Mercury News* published a story entitled *What-or-Who-Killed Tai-Kin Wong*. *Id.*

<sup>54</sup> *Id.* at 920.

<sup>55</sup> *Id.* at 921.

<sup>56</sup> *Id.* at 913.

<sup>57</sup> *Id.* at 920.

speech protections, the Assembly in 1997 added provisions that widened the scope of the law to protect a greater range of expression. First of all, the Assembly added the instruction that the law be "construed broadly" in order to "encourage continued participation in matters of public significance," and to avoid chilling that participation "through abuse of the judicial process."<sup>58</sup> Additionally, this amendment not only preserved the earlier Act's general protection of public/political participation in connection with the public interest, but also added a new and broader category of protection, saying that an

"[A]ct in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes . . . (4) *or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.*<sup>59</sup>

This provision removes the specificity from the statute's earlier versions, opening the door for protection of speech products, such as the *Borat* film, that are not related to a public issue, if a public issue is defined as a controversy currently under governmental review.<sup>60</sup> It does this by adding the words "issue of public interest" to the statute. This change opened the anti-SLAPP door to so many expressive subjects that it caused one commentator to exclaim that it was hard to find any popular subject that would not qualify for protection.<sup>61</sup>

According to the legislative history of the 1997 amendment, expanding the scope of the law was exactly what the Assembly intended. The purpose of mandating broad construction of the law was to "better protect exercise of constitutional rights against meritless claims."<sup>62</sup> The statute was amended to resolve conflicts in California appellate courts over whether the original statute was intended to apply only to a narrowly defined subset of expression, as interpreted in *Zhao v. Wong*,<sup>63</sup> or whether it was meant to protect a swath of speech, as in *Averill v. Superior Court*<sup>64</sup> and *Church of Scien-*

<sup>58</sup> S.B. 1296, 1997-98 Assem., Reg. Sess. (Cal. 1997), available at [http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb\\_1251-1300/sb\\_1296\\_bill\\_19970812\\_chaptered.html](http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_1251-1300/sb_1296_bill_19970812_chaptered.html).

<sup>59</sup> *Id.* (emphasis added).

<sup>60</sup> See Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 859 (2000).

<sup>61</sup> See Jerome I. Braun, *California's Anti-SLAPP Remedy after Eleven Years*, 34 MCGEORGE L. REV. 731, 743 (2003).

<sup>62</sup> *Special Motion to Strike 'SLAPP' (Strategic Lawsuit Against Public Participation) Suits: Hearing on S.B. 1296 Before the S. Judiciary Comm.*, 1997-1998 Reg. Sess. (Cal. 1997) [hereinafter *Special Motion*], available at [http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb\\_1251-1300/sb\\_1296\\_cfa\\_19970514\\_160353\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_1251-1300/sb_1296_cfa_19970514_160353_sen_comm.html).

<sup>63</sup> *Zhao*, 55 Cal. Rptr. 2d at 909. For a more detailed discussion of *Zhao*, see *supra* Part II.B.

<sup>64</sup> *Averill v. Superior Court*, 50 Cal. Rptr. 2d 62 (Ct. App. 1996).

*tology v. Wollersheim*.<sup>65</sup> Based on its report and the changes made to the text of the statute, it is obvious that the Legislature came down on the side of greater speech protection: “[t]he Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process.”<sup>66</sup>

A representative application of the 1997 anti-SLAPP law, with its broad definition of the public issue prong, is *Sipple v. Foundation for National Progress*.<sup>67</sup> In this case, a court granted anti-SLAPP protection to a magazine, striking a defamation suit. The suit was filed by a political consultant after the magazine reported allegations of domestic violence against him.<sup>68</sup> The court ruled that, in light of the 1997 amendment to the law, the discussion of the political consultant’s past relationships and his alleged abuse of former wives, was “in connection with a public issue,” even if it was not connected to the custody battle at the center of the news coverage. The court identified domestic violence as the public issue, stating that “[d]omestic violence is an extremely important public issue in our society.”<sup>69</sup>

The *Sipple* court stepped even further away from the original purpose of the anti-SLAPP statute: this case involved no political activism. Domestic violence was not a current political or governmental issue – the speech in question was not in the context of the passage of a new domestic violence law or program of stepped-up enforcement. Rather, this case represented the use of the anti-SLAPP statute to protect the magazine’s exercise of its First Amendment rights. It merely rendered the already media-friendly rule from *Sullivan v. New York Times Co.* even more amicable to First Amendment interests by offering an earlier opportunity to dismiss the case and granting fees to the defendants.<sup>70</sup>

Other cases also demonstrated that the new scope of anti-SLAPP law moved beyond matters under current government review, escaping the political realm altogether. One case found that the anti-SLAPP law protected morning radio talk jocks from a suit for slander, infliction of emotional distress, and invasion of privacy for calling a failed *Who Wants to Marry a Millionaire* contestant a “local loser,” a “big skank,” and “chicken butt” because there was considerable public discussion of the FOX reality television show.<sup>71</sup>

<sup>65</sup> *Church of Scientology v. Wollersheim*, 49 Cal. Rptr. 2d 620 (Ct. App. 1996).

<sup>66</sup> *Special Motion*, *supra* note 62, at 2.

<sup>67</sup> *Sipple v. Found. for Nat'l Progress*, 83 Cal. Rptr. 2d 677 (Ct. App. 1999).

<sup>68</sup> *Id.* at 679.

<sup>69</sup> *Id.* at 684.

<sup>70</sup> *Sullivan v. N.Y. Times*, 376 U.S. 254 (1964).

<sup>71</sup> *Seelig v. Infinity Broad. Corp.*, 119 Cal. Rptr. 2d 108, 117 (Ct. App. 2002).

While *Sipple* and similar cases applied anti-SLAPP law broadly to protect speech emanating from the media in the public sphere, courts also expanded the anti-SLAPP law into spheres that were unrelated to the media or to government controversies with results that disturbed legislators.

#### D. *The 2003 Act: Limiting the Scope of the Anti-SLAPP Law*

With new instructions to interpret the law broadly, courts began granting an increasing number of anti-SLAPP motions.<sup>72</sup> Some of those anti-SLAPP motions were granted in favor of corporate defendants being sued by public interest groups.<sup>73</sup> According to one commentator, the trend reached its apex in *DuPont Merck Pharmaceutical Company v. Superior Court*.<sup>74</sup> The court in *DuPont* partially granted an anti-SLAPP motion in favor of a pharmaceutical company that was being sued in a class-action based on state consumer protection laws for allegedly making misleading statements about its drugs.<sup>75</sup> The company claimed that its misleading statements, although possibly actionable under the state laws, were being suppressed by the class-action lawsuit and were, therefore, subject to anti-SLAPP protection.<sup>76</sup> The court agreed, saying that the statements were acts in furtherance of free speech on an issue of public interest because the drug under scrutiny was taken by a large number of people with serious medical consequences.<sup>77</sup> The court therefore found that the issue-of-public-interest prong of the anti-SLAPP analysis was satisfied and remanded the case to a lower court to determine if the plaintiff had a probability of success on the merits.<sup>78</sup> Canan herself decried the trend personified by *DuPont* when she said, “[h]ow ironic and sad, then, that corporations in California have now turned to using meritless anti-SLAPP motions as a litigation weapon. This turns the original intent of one of the country’s most comprehensive and effective anti-SLAPP laws on its head.”<sup>79</sup>

Apparently, the Legislature had not intended the anti-SLAPP statute to provide legal protection for the allegedly false

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<sup>72</sup> See Arkin, *supra* note 21, at 2 (2003) (“Between 1992, when the statute was first enacted, and January 1, 2000, there were only 34 published appellate decisions on the statute. But between January 1, 2000, and September 25, 2003, there were 184 published and unpublished decisions. Of those decisions, 148 have been rendered from September 25, 2002 to September 25, 2003.”) (citations omitted).

<sup>73</sup> See *id.* at 9-10.

<sup>74</sup> *DuPont Merck Pharm. Co. v. Superior Court*, 92 Cal. Rptr. 2d 755 (Ct. App. 2000).

<sup>75</sup> *Id.* See also Arkin, *supra* note 21, at 9-10.

<sup>76</sup> *DuPont*, 92 Cal Rptr. 2d at 758-59.

<sup>77</sup> *Id.* at 759.

<sup>78</sup> *Id.* at 760.

<sup>79</sup> *Anti-SLAPP (Strategic Lawsuit Against Public Participation) Law: Restrictions on Use of Special Motion to Strike: Hearing on S.B. 515 Before the S. Judiciary Comm., 2003-2004 Reg. Sess. at 6 (Cal. 2003) [hereinafter *Hearing on S.B. 515*].*

statements of pharmaceutical companies; shortly after the *DuPont* verdict, it passed a law rolling back some of its anti-SLAPP provisions.<sup>80</sup> The committee report for the 2003 statute dealt directly with *DuPont*, specifically stating that the Legislature was overturning the decision.<sup>81</sup> The statute stripped the ability of defendants to file anti-SLAPP motions in cases that were brought purely in the public interest or on behalf of the general public when: (1) plaintiffs sought no greater damages than the public or members of a class; (2) the action sought to enforce a significant public right and would confer a public benefit on a class of people; and (3) private enforcement is necessary, but places a large financial burden on the plaintiff.<sup>82</sup>

The Legislature effectively dialed back SLAPP protection for corporate defendants subject to class actions. The reasoning behind this was simple: defendants deserved protection from SLAPP suits because the possibility of financial damage from a SLAPP was severe enough to chill free speech. Since corporations have such deep pockets and marketing-based incentives to speech, the fear of lawsuits would not silence their commercial expression.<sup>83</sup> However, the Legislature explicitly exempted one group of deep-pocketed corporations from the Act's strictures – those in the business of creating and distributing news and entertainment.<sup>84</sup> The act exempts “any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of gen-

<sup>80</sup> CAL. CIV. PROC. CODE § 425.17 (West 2008).

<sup>81</sup> See *Hearing on S.B. 515, supra note*, at 79. The report indicated that

Proponents assert that SB 515's exemptions are necessary following an appellate court's expansion of the law to allow a SLAPP motion in a class action lawsuit alleging that the defendant's public false statements and conduct before a regulatory agency and to the general public violated California's Consumer Legal Remedies Act and Unfair Business Practices Act.

*Id.* (citing *DuPont*, 92 Cal Rptr. 2d at 755)..

<sup>82</sup> § 425.17(b) (West 2008). The act also stripped financial services companies of the ability to file anti-SLAPP motions in connection with the defense of suits stemming from their marketing to customers. *Id.*

<sup>83</sup> See *Hearing on S.B. 515, supra note* 79, at 6 (“Proponents argue that this chilling effect does not apply when a large corporate defendant has massive resources that it may rely upon in litigation, unlike the private citizen.”).

<sup>84</sup> See *id.* at 14. The report indicates that:

Proposed subdivision (d) of newly added Section 425.17 would exempt the news media and other media defendants (such as the motion picture industry) from the bill when the underlying act relates to news gathering and reporting to the public with respect to the news media or to activities involving the creation or dissemination of any works of a motion picture or television studio. For claims arising from these activities, the current SLAPP motion would remain available to these defendants.

*Id.*

eral circulation.”<sup>85</sup> Although the Legislature was seeking to restore balance to the anti-SLAPP legislation, it recognized that there was something special about the creation of expression – even the creation of expression solely for the purposes of entertainment – that qualified it to retain the use of the powerful anti-SLAPP motion. It is likely that the Legislature exempted media from the Act since the very purpose of the anti-SLAPP law was to protect speech and the dissemination of information - the very activities in which media corporations engage.<sup>86</sup>

### III. BORAT AND REALITY BITES

#### A. John Doe 1 v. One America Productions: *The Borat Case*

Examining *John Doe 1 v. One America Productions*,<sup>87</sup> one could argue that the court has stretched the anti-SLAPP statute further than it has been to date. Unlike the subject matter at issue in the cases above, *Borat* makes no pretensions about what it is - a raunchy, satirical comedy aimed less at viewers' minds than at their funny bones. While the movie might touch upon several political themes, it is, without a doubt, an entertainment product.

The *John Doe 1* case revolves around a scene in which Borat, a fake Kazakh journalist played by comedian Sacha Baron Cohen, is seen hitchhiking down a lonely southern highway after his separation from his producer and the breakdown of his car. Three University of South Carolina students pick Borat up and proceed to get drunk and spew racist and sexist nonsense. Their statements include admonishments not to trust women, a wistful hope that slavery had not been outlawed, and an assertion that one must be a minority to get ahead in America, the subtext being that affirmative action and political correctness had ruined the country for white men like themselves.<sup>88</sup> In short, the students exposed themselves as bigoted buffoons. Once the movie was released and became profitable, two of those featured in the scene sued for fraud, rescission of copyright, false light invasion of privacy, appropriation of likeness, and negligent infliction of emotional distress.<sup>89</sup>

The plaintiffs, naturally, contended that what happened on camera was not the whole story. The students alleged that pro-

<sup>85</sup> § 425.17(d).

<sup>86</sup> See *Hearing on S.B. 515*, *supra* note 68, at 14 (“CAOC [Consumer Attorneys of California] argues that the reason for these exemptions is simple. ‘Newspapers and other media are in the business of disseminating information to the public.’”).

<sup>87</sup> *John Doe 1 v. One Am. Prods., Inc.*, No. SC091723, at \*4 (Cal. Super. Ct. Feb. 15, 2007).

<sup>88</sup> BORAT: CULTURAL LEARNINGS OF AMERICA FOR MAKE BENEFIT GLORIOUS NATION OF KAZAKHSTAN (Twentieth Century Fox 2006).

<sup>89</sup> Complaint, *John Doe 1* [hereinafter “Complaint”], available at [http://cdn.digitalcity.com/tmz\\_documents/110906\\_borat\\_wm.pdf](http://cdn.digitalcity.com/tmz_documents/110906_borat_wm.pdf)

ducers recruited them to be in the film at their fraternity house and that the producers told them that the film would not be shown in the United States.<sup>90</sup> Additionally, the producers took the plaintiffs to a bar, bought them drinks, and then presented them with a consent agreement for their participation in the film, which the students signed.<sup>91</sup> The scene was then filmed, allegedly with the producers encouraging the bad behavior.<sup>92</sup> Upon the film's release, the plaintiffs said they were humiliated and suffered damages to their reputations.<sup>93</sup>

The defendant invoked an anti-SLAPP motion, finding the court receptive despite the entertainment-oriented nature of the expression at issue in the case. Although the plaintiffs argued that the case was really about the producers' breach of contract and fraudulent behavior, the court reasoned that the claims were, in fact, related to conduct in furtherance of free speech.<sup>94</sup> This, the court reasoned, was due to the fact that the breach of contract was the actual showing of the film inside the United States and because the damages also resulted from the film's portrayal of the plaintiffs.<sup>95</sup> The film, the judge said, was an exercise of First Amendment rights that qualified for anti-SLAPP protection since it invoked issues of widespread public concern:

Further, it is beyond reasonable dispute (and undisputed) that the topics addressed and skewered in the movie – racism, sexism, homophobia, xenophobia, anti-semitism, ethnocentrism, and other societal ills – are issues of public interest, and that the movie itself has sparked significant public awareness and debate about these topics. . . . “Major societal ills are issues of public interest.”<sup>96</sup>

With this opinion, it became clear that nearly any exercise of First Amendment freedom could qualify for potential anti-SLAPP protection if it touches upon a social ill, or perhaps any issue that has a prominent place in the public discourse. In addition, the court suggested that the motion-picture medium itself is deserving of categorical protection, regardless of its entertainment-oriented nature:

Indeed, the Court cannot stress too highly the importance of the free speech rights at stake in this case. Movies are of sig-

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<sup>90</sup> *Id.* at 5.

<sup>91</sup> *Id.* at 6.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *John Doe I* No. SC091723, at \*4.

<sup>95</sup> *See id.* (“Indeed, at oral argument counsel effectively conceded, as he must, that this action would not exist at all if the movie were not playing in the United States.”).

<sup>96</sup> *Id.* at \*4-5 (citing *Lieberman v. KCOP Television, Inc.* 110 Cal. App. 4th 156, 164 (2003)).



nificant public interest. . . . "They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform."<sup>97</sup>

Furthermore, the court recognized that the special nature of the *Borat* film – part fiction and part documentary – strengthened the validity of the anti-SLAPP claim.<sup>98</sup> The very fact that the duping of the students and others like them was the film's core content made it difficult for the plaintiffs to argue that the defendants were not acting in furtherance of First Amendment rights to free speech.

Aside from finding that *Borat* qualified for protection as expression related to a public issue, the court also ruled that the plaintiffs did not meet their burden of establishing a prima facie case on any of the causes of action.<sup>99</sup> The judge found deficiencies in the plaintiffs' pleadings, in the evidence presented, and in the basis of the claims themselves.<sup>100</sup> The lack of consideration given to the merits of the plaintiffs' case could indicate bad lawyering, overly zealous judging, or something else entirely. It could be argued that the lack of a clear exposition of the second prong of the anti-SLAPP motion diminishes the value of the opinion. However, the decision's value lies in the clear exposition of how *Borat*, with its entertainment-oriented purpose, fits into the framework provided by the anti-SLAPP statute.

### B. Dyer v. Childress<sup>101</sup>

Soon after *John Doe 1*, it appeared that an appellate court moved away from the expansion of the law. On its face, it may be argued that *Dyer v. Childress* stands for the proposition that a motion picture cannot support an anti-SLAPP motion. Indeed, the lawyers for the plaintiffs in *John Doe* have argued just that.<sup>102</sup> However, a close reading of *Dyer* suggests that it is clearly distinguishable from the *Borat* case.

<sup>97</sup> *Id.* at \*7 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)).

<sup>98</sup> *Id.* at \*8.

<sup>99</sup> *Id.* at \*6-8.

<sup>100</sup> *Id.*

<sup>101</sup> *Dyer v. Childress*, 55 Cal. Rptr. 3d (Ct. App. 2007).

<sup>102</sup> See Leslie Simmons, "Borat" Plaintiffs Seek Reconsideration After "Reality" Anti-SLAPP Ruling, THE HOLLYWOOD REP. ESQ., Mar. 7, 2007, available at <http://www.allbusiness.com/services/legal-services/4468695-1.html> (*John Doe 1* attorney Olivier Taillieu "contends that if one replaces terms describing the Dyer plaintiff with his clients, 'one can see that the issues addressed, and conclusively ruled on in Dyer, are identical to the issues presented in this case. They were even argued by the same lawyer – Mr. Petrich himself.'").

*Dyer* revolves around the allegation that Helen Childress, the screenwriter of the film *Reality Bites*, improperly used the name of one of her film school classmates, Troy Dyer, as a character in her film.<sup>103</sup> The character named Troy Dyer is a "rebellious slacker" played by a scruffy, goateed Ethan Hawke.<sup>104</sup> The defendant said she chose to use Dyer's name as an inside joke because the real Dyer was "straight laced, mature, [and] conservative."<sup>105</sup> Although Childress declared that she received Dyer's permission to use his name, ten years after the film's release, Dyer sued, seeking to enjoin the release of the movie's tenth anniversary edition DVD.<sup>106</sup>

In support of their anti-SLAPP motion, the defendants pointed to the important issues addressed in the film as it sought to cover the flannel-clad, Pearl-Jam listening spirit of the early 1990s.<sup>107</sup> Issues addressed in the film included selling out, youth alienation, economic difficulty, and the AIDS epidemic. However, the court rejected this contention, finding that the producers of *Reality Bites* were not eligible for anti-SLAPP protection because the disputed issue in the case did not have a connection to the speech that concerned the public issues.<sup>108</sup> Even though the movie as a whole addressed issues of public concern, the court held that the use or misuse of Dyer's name did not touch on a public issue.<sup>109</sup> Therefore, although some portions of the movie might qualify for anti-SLAPP protection, the issue of whether Dyer was portrayed in a false light does not.

### C. *Distinguishing Doe from Dyer*

Both *John Doe I* and *Dyer* are correctly decided. At first glance, this statement seems incongruous. After all, *Borat* deals with serious subjects like racism, sexism, America's obsession with fame, and xenophobia. *Reality Bites* addresses some heady topics as well, such as AIDS, economic malaise, and selling out. Yet, both movies receive the appropriate amount of protection from anti-SLAPP law because the incident at issue in *Doe* actually mattered to the message of the film and was cognizable to the film's audience, while the incident at issue in *Dyer* had very little, if any, connection to the issues at the heart of the film.<sup>110</sup>

In *Borat*, the conceit that the movie is reality is an integral part of its message. The film purports to hold a mirror up to cer-

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<sup>103</sup> See *Dyer*, 55 Cal. Rptr. 3d at 545-46.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 546.

<sup>106</sup> *Id.* at 545.

<sup>107</sup> *Id.* at 547-48.

<sup>108</sup> *Id.* at 548.

<sup>109</sup> *Id.*

<sup>110</sup> Of course, it did not help that the *Dyer* defense lawyers failed to assert that the naming of the character was central to the film's discussion of public issues.

tain segments of American society. The use of actual college students enhances the realistic effect of the film. When a viewer watches *Borat*, he gets the impression that the characters are a real sample of American life. This impression comes not only from the extremely realistic performances of those who are duped into appearing in the movie, but also from the knowledge that the characters are "real" Americans. This knowledge is key to the film's effectiveness. If viewers knew, or even suspected, that the players were actors or that the action was scripted, then the film could not have as strong a claim to being a truthful examination of America. Instead, the film would be vulnerable to arguments that it is merely the product of some vulgar Englishman's imagination, a representation of the worst stereotypes that effete Europeans hold about ugly Americans. The presence of "real" Americans, and the viewer's belief that those Americans are real, makes *Borat* more difficult to dismiss. The use of citizens, and maybe even the duplicitous nature of that use, is an important part of *Borat's* expressive content.

Unlike *Borat*, the decision to use the name "Troy Dyer" in *Reality Bites* had very little to do with the film's message. If the viewer is outside of the small circle of citizens that knows the real Troy Dyer, the seemingly random choice of that name has no effect on the viewer's perception of the film.<sup>111</sup> The issue of Troy Dyer's name is not a public issue. It is a private issue because his name, or its significance, is not known or understood by the film's public audience.<sup>112</sup> Furthermore, any satirization of the real Troy Dyer seems ancillary to the purpose of the film: portraying the lives and loves, sagas and scandals of the grungy, disaffected Generation X. Thus, it would be difficult to argue that a suit brought by a private individual in order to prevent the use of his name carries a chilling effect on the valid exercise of the constitutional rights of free speech and petition. Stealing a friend's identity in order to embarrass him in front of millions of people is not an exercise of constitutional liberty, but rather a false statement of fact that is likely to succeed on the merits of the case.

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<sup>111</sup> Except for the fact that Troy Dyer is, admittedly, a pretty cool sounding name for a character who is supposed to personify cool disaffection. However, it is easy to imagine other names that might sound just as cool, like Trey Jones, Zane Rockton, or Brock Stevenson, to name just a few examples.

<sup>112</sup> One might imagine that the filmmakers could have made their commentary public by explaining in a short documentary before the film that Troy Dyer is a real person in Wisconsin who is a financial planner, who they want to satirize as the opposite of the Troy Dyer character. This would, possibly, make a point about the pedestrian nature of modern American life.

#### IV. ANTI-SLAPP STATUTES SHOULD BE CONSTRUED BROADLY TO ENCOMPASS A WIDE RANGE OF ENTERTAINMENT-ORIENTED AND INFORMATIVE EXPRESSION IN ADDITION TO PROTECTING TRADITIONAL PETITION OF THE GOVERNMENT

A narrow interpretation of anti-SLAPP law is inappropriate since it makes little sense to distinguish speech that petitions government directly from speech which seeks to persuade other citizens. Furthermore, it makes little sense, and may be impossible, to distinguish speech that is "political" or "in the public interest" from speech that has purely entertainment value.

If the right to petition the government is protected by the Constitution, then there is no reason that the right of citizens to petition each other and to influence each other's opinions, should receive any less protection. The United States government, at least in theory, derives its powers from the consent of the governed.<sup>113</sup> If the government is viewed as an extension of the people's collective consent, it can also be inferred that the people are part of the government – they are its very foundation. If Pring and Canan, and twenty-six state legislatures, wish to protect individuals' rights to petition the government, it is appropriate that the right to petition each other, to push and pull on each others' political beliefs and opinions, should also be protected. Indeed, Pring and Canan, the scholars behind the creation of anti-SLAPP ordinances, acknowledge that the right to sway voters is one of the central freedoms guaranteed by the First Amendment.<sup>114</sup>

##### A. *The Distinction Between Fictional and Factual Content Is Not a Reliable Indicator of its Value to Shape the Public Discourse*

When considering whether speech deserves the protection of the anti-SLAPP statute, courts appear to look for certain things. First, it seems that courts favor factual, journalistic content over fictional, entertainment-oriented content. News coverage, even news coverage of subjects as vapid as the possibility of a Britney Spears sex tape,<sup>115</sup> or as narrowly focused as a homeowners association newsletter,<sup>116</sup> seems to automatically qualify as protected speech connected to the public interest, unlike a fictionalized

<sup>113</sup> See, e.g., Abraham Lincoln, the Gettysburg Address, available at <http://www.loc.gov/exhibits/gadd/gatr1.html> ("[T]hat government of the people, by the people, and for the people, shall not perish from the earth.").

<sup>114</sup> See Canan & Pring, *Strategic Lawsuits*, *supra* note 20, at 506.

<sup>115</sup> *Spears v. US Weekly LLC*, No. SC07989 (Cal. Super. Ct. Nov. 3, 2006), available at [http://online.wsj.com/public/resources/documents/bevhill-court\\_doc.pdf](http://online.wsj.com/public/resources/documents/bevhill-court_doc.pdf) (holding that US Weekly's showing of the protected nature of its speech was sufficient to satisfy the public interest prong of the anti-SLAPP statute).

<sup>116</sup> See *Damon v. Ocean Hills Journalism Club*, 102 Cal. Rptr. 2d 205 (Ct. App. 2000).

biopic detailing the life and loves of Elizabeth Taylor.<sup>117</sup> However, this distinction between factual and fictional content makes little sense because (1) fictional, entertainment-oriented content is viewed by larger audiences than public affairs-oriented content; (2) fictional, entertainment-oriented content can have a greater effect on society's basic attitudes (especially attitudes on issues like race and class);<sup>118</sup> (3) the movement toward so-called reality television has led to a blurring of the lines between fact and fiction; and (4) factual content might have less value to the public discourse than fictional content.

These changes in the way people receive and share information and entertainment might not be wholly unpalatable developments. For instance, many people now receive a daily digest of news from programs such as *The Daily Show* or *The Colbert Report*, which mix actual public affairs with humor.<sup>119</sup> Recent studies have revealed that *Daily Show* and *Colbert Report* viewers are more informed about current events than readers of daily newspapers.<sup>120</sup> Furthermore, films like *Borat* and Michael Moore documentaries entertain as they inform, sneaking news and opinions in between laughs.

The anti-SLAPP law, applied to motion pictures, probably eases production of that expression that, perhaps, blurs the line between entertainment and news in a positive manner. It is not hard to believe that those with the resources will try to stop publication or broadcast of material that they find unflattering, even if it is true. Moreover, certain lawyers have no trouble threatening a lawsuit to try to stop public discussion of their client even when they know the content of the discussion is true. For example,

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<sup>117</sup> See *Taylor v. Nat'l Broad. Co., Inc.*, 1994 WL 762226 (Cal. Super. Ct. Sept. 29, 1994) (holding that although a televised miniseries about actress Elizabeth Taylor's life was not subject to prior restraint even if defamatory, it was not entitled to protection under the anti-SLAPP law). The case, however, comes to contradictory conclusions, saying that the anti-SLAPP motion could not be granted because the suit was not filed to chill speech, even though the suit was filed to prevent the airing of an expressive product. The court concluded that "[R]espondents have not presented any facts which would suggest this lawsuit was filed primarily to chill the valid exercise of constitutional rights but rather the facts indicate that the lawsuit was brought in good faith for the purpose of deterring a potentially unflattering rendition of plaintiff's life story." *Id.* at \*7.

<sup>118</sup> See generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (detailing test results indicating that viewing such programs as *The Cosby Show* might influence subconscious attitudes about race, making whites and blacks less racist).

<sup>119</sup> Brian Stelter, *Finding Political News Online, the Young Pass It On*, N.Y. TIMES, Mar. 27, 2008, available at <http://www.nytimes.com/2008/03/27/us/politics/27voters.html?hp> ("It is not news that young politically minded viewers are turning to alternative sources like YouTube, Facebook and late-night comedy shows like 'The Daily Show.'").

<sup>120</sup> See THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, KEY NEWS AUDIENCES NOW BLEND ONLINE AND TRADITIONAL SOURCES (Aug. 17, 2008), <http://peoplepress.org/report/?pageid=1356> ("The *Colbert Report* and *The Daily Show* are notable for having relatively well-informed audiences that are younger than the national average: 34% of regular *Colbert* viewers answered the three political knowledge questions correctly, as did 30% of regular *Daily Show* viewers.").

Marty "Mad Dog" Singer, an entertainment lawyer famous for his over-the-top letters threatening legal action against media outlets,<sup>121</sup> has stated that he has no trouble threatening a lawsuit to stop material from being released to the public, even when he knows the material is true: "A lawyer is not supposed to ethically illicit [sic] lies, whether it's civil or criminal. On the other hand, I might know a story is true and I'm still able to kill the story."<sup>122</sup> It is no wonder that Singer, whose practice is primarily devoted to legal action on behalf of his wealthy clients against media companies, has criticized the application of the anti-SLAPP law to anything that does not coincide with his definition of a public issue.<sup>123</sup>

Even those matters that instinctively seem private, such as a person's illness or sexual proclivities, might have considerable pertinence to attitudes within the public sphere. For instance, imagine that in the early stages of the AIDS epidemic, Rock Hudson had admitted that he suffered from the disease and worked to raise awareness of it. Such a movement may have led to greater acceptance of AIDS patients and greater advocacy for research into treatments and cures. It might have even saved lives, as the presence of a celebrity visibly dying of the disease might have convinced others to take precautions to prevent its spread. Although advocating for the exposure of celebrities' illnesses causes discomfort, the extra legal room provided by the anti-SLAPP laws can have clear benefits that allow producers and provocateurs to create more effective media products.

Consider the Michael Moore documentary *Bowling for Columbine*. In that film, Moore approached National Rifle Association President Charlton Heston at home, representing himself (insincerely but accurately) as a concerned member of the N.R.A.

<sup>121</sup> See, e.g., Letter from Martin Singer to William Bastone, Editor, *The Smoking Gun* (Jan. 6, 2006), available at <http://www.thesmokinggun.com/jamesfrey/freysides/singerfrey1.html> (threatening substantial liability for publication of any story detailing how author James Frey fabricated his memoir *One Million Little Pieces*).

<sup>122</sup> See Matthew Belloni & Stephen Galloway, *Power Lawyers Q&A: Martin Singer*, *THE HOLLYWOOD REP. ESQ.*, July 23, 2007, available at [http://www.hollywoodreporter.com/hr/search/article\\_display.jsp?vnu\\_content\\_id=1003615573](http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=1003615573).

<sup>123</sup> See *id.* Singer explains,

I defend the right to a free press but I feel the right of free speech goes too far. . . I don't believe that the anti-SLAPP statute is (designed) to protect the tabloids. For example, we had a case where Britney Spears sued a publication over an issue of a sex tape – it didn't exist – and we lost on the anti-SLAPP statute. The anti-SLAPP statute shouldn't apply to that type of case. Now if it's a case involving a public issue that's in the news – the "Borat" cases have come down recently, and clearly that may be a public issue – but writing a story about somebody's private life or something like that, I don't think the anti-SLAPP statute [sic] should apply."

*Id.* Singer represented Britney Spears in *Spears v. US Weekly LLC*, No. SC07989 (Cal. Super. Ct. Nov. 3, 2006).

Heston, who at the time of filming was elderly and perhaps suffering from the effects of Alzheimer's Disease,<sup>124</sup> invited Moore into his home and sat for an interview.<sup>125</sup> Moore proceeded to badger Heston, who said several controversial things. A somewhat frazzled looking Heston admitted that he likes to keep loaded guns around the house because they make him feel safe even though he knows he is in no danger.<sup>126</sup> He also posits that America might be more prone to gun violence because its population consists of a mixed ethnicity.<sup>127</sup> Finally, after giving a few implausible statements that make him look uncaring at best and foolish at worst, Heston ends the interview and walks away from Moore as Moore waves a picture of a girl killed by gun violence.<sup>128</sup> The whole interview is set over the music from *Mr. Rogers' Neighborhood*.<sup>129</sup> Several months later, Heston announced that he was suffering from symptoms of Alzheimer's.<sup>130</sup>

It is easy to imagine that Charlton Heston, or his family, could have sued Michael Moore for invasion of privacy, trespass, elder abuse, or intentional infliction of emotional distress, over Moore's portrayal of the late actor in the so-called documentary. Moore was borderline duplicitous. He was mean to Heston. Heston was elderly and possibly infirm. However, it appears that the anti-SLAPP law would, and should, prevent such a suit from going anywhere.

A similar case that involved straight journalism, *Hall v. Time Warner*,<sup>131</sup> used the anti-SLAPP statute to protect a television journalist who aggressively pursued an interview with Marlon Brando's elderly former housekeeper in a retirement home, after the housekeeper was named in Brando's will. Her suit claimed television reporters "exploited the non-existent security features of the . . . facility and thereby gained easy access to Ms. Hall," and "purposefully and viciously awakened, intimidated, and illegally obtained audio-tape and videotape of [Hall]."<sup>132</sup> She claimed breach of contract, fraud, negligence, intentional and negligent infliction of emotional distress, unfair business practices, and elder abuse.<sup>133</sup> However, the court found that, even though the housekeeper was

<sup>124</sup> Stephen Whitty, The Best Action Hero, Stephen Witty on Film with the Star-Ledger, [http://blog.nj.com/whitty/2008/04/the\\_best\\_action\\_hero.html#more](http://blog.nj.com/whitty/2008/04/the_best_action_hero.html#more) (Apr. 6, 2008, 11:19 EST).

<sup>125</sup> See BOWLING FOR COLUMBINE (MGM Studios 2002); YouTube.com – Charlton Heston in Michael Moore's *Bowling for Columbine*, <http://www.youtube.com/watch?v=Q1iuEcu7O50>.

<sup>126</sup> BOWLING FOR COLUMBINE (MGM Studios 2002).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> See *supra* note 124.

<sup>131</sup> *Hall v. Time Warner, Inc.*, 63 Cal. Rptr. 3d 798 (Cl. App. 2007).

<sup>132</sup> *Id.* at 802.

<sup>133</sup> *Id.*

a private person, she "became involved in an issue of public interest by virtue of being named in Brando's will. Defendants' television broadcast contributed to the public discussion of the issue by identifying Hall as a beneficiary and showing her on camera."<sup>134</sup> The court therefore ruled that the reporters qualified for protection under anti-SLAPP law, as long as Hall could not demonstrate a probability of success in the case.<sup>135</sup>

It is somewhat disturbing that a court would protect reporters who infiltrated a nursing home to wake up a private elderly woman to satisfy the public's curiosity about a dead actor's will. It might also be disturbing that the same law that protected the reporters in *Hall* also gave Moore the confidence he needed to know that he could bother Charlton Heston<sup>136</sup> and portray him in an unflattering light. However, it is this freedom that makes the Heston scene in *Bowling for Columbine* effective. Moore would not have been able to convey the same point if he had interviewed Heston at an office, in a suit, with handlers around to make sure the actor made no missteps. Interviewing Heston at home, in his dotage, underscores that (1) Heston has guns but will never have to use them because he lives in a secure and fabulous gated mansion and (2) Heston is slightly unhinged. Put simply, Moore's portrayal says that America is a place where the top gun owner is not with it, an ad-hominem attack that calls into question the entire gun lobby.

Now, it is clear that Heston probably could not have won such a suit on its merits. Heston was a public figure and a big-time actor who chose to insert himself into one of the most controversial issues facing the United States. Even so, the actor, or his family, could have sued to have the scene removed from the film or for damages to his image. However, the anti-SLAPP law, with its mandatory fee award provision, makes such a suit a more taxing proposition. From Moore's perspective as a budget filmmaker,<sup>137</sup> any legal risk increases the chance that his unconventional film will lose money, thereby preventing him from getting funding in the future. It is not difficult to imagine that, in the absence of the anti-SLAPP law, Moore, or his producers, may decide that the risk of bothering Heston at his home is simply not worth the possibility of a lawsuit. In this manner, the anti-SLAPP law's protection enhances the effectiveness of those entertainment products that

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<sup>134</sup> *Id.* at 805-06.

<sup>135</sup> *Id.*

<sup>136</sup> And, likely, some of the other figures, both public and private, that Moore regularly ambushes in his features.

<sup>137</sup> It was not until *Fahrenheit 9/11* that Moore achieved widespread commercial success. *Bowling for Columbine* grossed \$21,576,018, while *Fahrenheit 9/11* grossed \$119,114,517. The Numbers, <http://www.the-numbers.com/people/directors/MIMOO.php> (last visited Nov. 1, 2008). Prior to *Bowling for Columbine*, Moore's largest hit was *Roger & Me*, which grossed approximately \$6.7 million. *Id.*



blend entertainment with reality.

*B. Requiring Judges to Distinguish Speech They Believe to Be Connected to the Public Interest from Speech Outside of the Public Interest Runs Afoul of the Spirit of the First Amendment*

First Amendment law generally protects speech from government suppression when that suppression is based on the speech's content.<sup>138</sup> In a narrow conception of the anti-SLAPP statute, a judge is given wide discretion to decide whether speech, based on its content, is connected to a public issue or to an issue of public interest. One might argue that the government is merely forbidden from suppressing speech based on content, which is not what the anti-SLAPP statute does. Rather, the anti-SLAPP statute confers a litigation privilege that offers enhanced protection to certain categories of speech. Further examination will illustrate why judicial power over this decision should be distressing to those who wish to minimize government regulation of speech.

A narrow conception of the anti-SLAPP statute's public interest prong grants judges the power to choose which speech qualifies for anti-SLAPP protection based upon the court's conception of the public interest. While courts are trusted to make some speech distinctions – for instance, judges determine whether a plaintiff is a public figure for the purposes of libel law<sup>139</sup> – in general, the principles of the First Amendment seek to avoid content-based governmental decision-making whenever possible.<sup>140</sup> Judges could potentially use state power to determine a hierarchy of the value of certain issues. Additionally, if content producers see that certain issues are more likely to receive the protection of anti-SLAPP motions, perhaps those producers will be more likely to produce content that will meet with judicial approval. Furthermore, those expressions that do not meet with judicial approval might be subject to greater risk of liability at the hands of private parties wielding the sword of the state legal system, chilling that expression. The larger marketplace of ideas will therefore be shaped, in some part, by the preferences of the state.<sup>141</sup>

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<sup>138</sup> See, e.g., *Cohen v. California*, 403 U.S. 15, 19 (1971). The court held that

[a]t the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression.

See also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

<sup>139</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>140</sup> See *supra* note 138.

<sup>141</sup> One may argue that this does not run counter to some understandings of the First Amendment at all. Indeed, the government is free to participate in the marketplace of

Indeed, the California Assembly was seeking to allay concerns over plaintiff-directed judicial involvement in the public sphere when it passed the anti-SLAPP statute: “[t]he Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.”<sup>142</sup> If the Legislature was disturbed by the idea of private parties commandeering the courts to chill the public discourse, it is logical to conclude that it would be equally distressed by the idea of judges shaping the public discourse according to their own values.

C. *Greater Speech Protection Can Lead to a More Vibrant Marketplace of Ideas*

A primary reason for the protection of speech from government intrusion is a desire to maintain a vibrant public discourse. Additional protection of expression from private lawsuits will lead to greater production of expressive content. With the increasing cost of legal counsel, a broader interpretation of the anti-SLAPP ordinance effectively acts as a fence around the First Amendment. If the mere threat of litigation can chill speech, then this fence may be a bulwark against that. Although the *Borat* case is one that uses the anti-SLAPP statute to protect corporate media from a lawsuit, it is easy to imagine that independent, or self-produced, online media could also benefit from the protections that an enlarged understanding of the anti-SLAPP law can provide. In a media environment where increasing amounts of content are being produced by amateurs, which is later viewed by large audiences, the anti-SLAPP law can serve to protect the content of independent producers posted on the Internet.

D. *The Anti-SLAPP Law's Second Prong Safeguards Against Abuse*

Some might argue that a robust interpretation of anti-SLAPP laws puts too much power into the hands of expressive enterprises, giving them leave to victimize members of the public without fear of legal recourse. However, the anti-SLAPP law already has a built-in safety to protect against this concern. The law's second prong exempts from the anti-SLAPP motion any plaintiff who can make a showing of a probability of success on the

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ideas by sending out its own messages, including the use of taxpayer dollars to fund public health and anti-drug campaigns or wartime propaganda.

<sup>142</sup> CAL CIV. PRO. CODE § 425.16(a) (West 2008). To achieve this goal to an even greater extent, it might be appropriate to delete the public issue requirement from the statute altogether.

merits by establishing a prima facie case based upon pleadings and declarations.<sup>143</sup> This exemption prevents the good cases from being thrown out with the bad. For instance, in *M.G. v. Time Warner*,<sup>144</sup> a Little League baseball team's suit for invasion of privacy survived an anti-SLAPP motion, even though the suit stemmed from the media's stories about the team's manager, who pleaded guilty to child molestation.<sup>145</sup> The plaintiffs in the case merely demonstrated that the stories about the manager had been illustrated with a team photo, thereby causing exposure of the team members' identities.<sup>146</sup> Because of the existence of this second prong, anti-SLAPP law does not offer prohibitive resistance to plaintiffs from filing suits based upon furtherance of First Amendment rights. Rather, it assures that the suits that are brought are based upon information that can support them.

Some may suggest strengthening the standard of the second prong by requiring the plaintiffs to show that the suit is not frivolous, rather than just requiring a probability of success. However, a measure of this sort would serve to make the entire anti-SLAPP statute redundant, as the Federal Rules of Civil Procedure already bar frivolous lawsuits from court and subject the filers of such lawsuits to sanctions.<sup>147</sup>

### CONCLUSION

Although it seems incongruous that the *Borat* film should receive enhanced protection from lawsuits as an exercise in political participation under the California anti-SLAPP statute, the ruling in *John Doe 1 v. One America Productions* reflects the natural evolution of this doctrine. Both the statute and its legal interpretations have been increasingly broadened since its passage sixteen years ago. Additionally, this broad interpretation of the law is an appropriate response to the increasing importance of fictional expression in our society and the changing media landscape. Furthermore, the law continues to safeguard the rights of plaintiffs with its exemption for those who show that there is probability that their cases will succeed. In short, the evolution of the anti-SLAPP law in its current direction will lead to more vibrant speech, an improved public discourse, and fewer lawsuits seeking to restrict the free flow of information and entertainment.

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<sup>143</sup> CAL. CIV. PRO. CODE § 425.16 (West 2008).

<sup>144</sup> *M.G. v. Time Warner, Inc.*, 107 Cal. Rptr. 2d 504 (Ct. App. 2001).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See, e.g., FED. R. CIV. P. 11; CAL. CIV. PROC. CODE § 128.5 (West 2008).