

NOTE

Attorneys as State Actors: A State Action Model and Argument for Holding SLAPP-Plaintiffs' Attorneys Liable Under 42 U.S.C. § 1983

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Introduction

Strategic Litigation Against Public Participation ("SLAPP") is a recently identified genre of intimidation suit that menaces citizen activism. Though it presents itself as a common law tort claim, a SLAPP's purpose and effect are extra-legal: the litigation intimidates and diverts defendants, often entirely preventing them from advocating their views. A SLAPP defendant's right to advocate viewpoints on matters of public concern can be rendered meaningless by a well-timed and well-orchestrated SLAPP.

In Part I, this Note surveys several aspects of the SLAPP phenomenon, including the various forms SLAPPs take, the problem with SLAPPs, and factors to consider in finding solutions. Common defenses and deterrents, and reforms put forward to mitigate the harm done by SLAPPs are insufficient. This Note proposes using 42 U.S.C. § 1983 damages actions against SLAPP-plaintiffs' attorneys to deter or punish their participation in SLAPPs.

Because section 1983 damages are only available against state actors, Part II analyzes the question whether and when attorneys are state actors. An analysis of the United States Supreme Court's usage of the title "officer of the court" frames the state action question. This Part then proposes a model for applying the state action doctrine to attorneys. The model explains the Supreme Court's application of the state action doctrine to attorneys in three areas: when they act as defense counsel, when they use peremptory challenges, and when they invoke pre-judgment remedies. Though attorney/state actors have been denied qualified immunity from section 1983 actions, it should be extended to their use of state procedures. Part II goes on to discuss the section 1983 liability of SLAPP-plaintiffs' attorneys under the state action model, concluding that in appropriate circumstances they are state actors who may be liable.

Part III discusses the advantages of the section 1983 countersuit against SLAPP-plaintiffs' attorneys and runs through the elements of that claim, including the possible state-of-mind requirement.

I. SLAPP Suits

The SLAPP phenomenon first was identified by Penelope Canan and George Pring at the University of Denver's Political Litigation Project.¹ The increasing incidence of environmental advocates and organizations being named as civil defendants prompted their study of the issue.² The Canan/Pring study developed a four-pronged definition for SLAPPs: "1. a civil claim for money damages, . . . 2. filed against nongovernmental individuals and organizations, . . . 3. based on advocacy before a government branch or official or the electorate, [and] . . . 4. on a substantive issue of some public or societal significance."³ Professor Pring has identified six legal claims most frequently alleged in SLAPP complaints: defamation, business torts, conspiracy, abuse of process, interference with constitutional rights, and nuisance.⁴ Although SLAPPs are a common concern in the environmental area,⁵ the phenomenon may occur in a variety of circumstances,⁶ and the Canan/Pring definition is arguably skewed to identify only suits *against* environmentalists.⁷

1. Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC'Y REV. 385 (1988).

2. *Id.* at 387.

3. *Id.* (footnotes and emphasis omitted). The fourth requirement is arguably too restrictive. One commentator has suggested that "[i]f the suit is intended to intimidate and thus deny citizens their first amendment [sic] rights, the suit is a SLAPP." Victor J. Cosentino, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 CAL. W. L. REV. 399, 401 (1991).

4. George W. Pring, "SLAPPs"—*Strategic Lawsuits Against Public Participation—A New Ethical, Tactical, and Constitutional Dilemma*, C534 A.L.I.-A.B.A. 937, 941 (June 25, 1990).

5. See, e.g., Robert Abrams, *Strategic Lawsuits Against Public Participation (SLAPP)*, 7 PACE ENVTL. L. REV. 33 (1989); Richard O. Brooks, *Les Mains Sales: The Ethical and Political Implications of SLAPP Suits*, 7 PACE ENVTL. L. REV. 61 (1989); Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23 (1989); George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3 (1989); Ralph M. Stein, *SLAPP Suits: A Slap at the First Amendment*, 7 PACE ENVTL. L. REV. 45 (1989).

6. For example, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), fits the Canan/Pring definition. In that case, a civil libel action was brought against four Alabama clergymen and a newspaper for an editorial advertisement which advocated a number of views on southern racial politics and implicitly criticized Alabama's authorities. *Id.* at 256-58.

7. See Brooks, *supra* note 5, at 66; see generally Cosentino, *supra* note 3, at 400-01 (arguing that the Canan/Pring definition is too narrow).

A recent California SLAPP illustrates the phenomenon. In the early 1980s, the West Contra Costa Sanitary District proposed to solve Contra Costa County's landfill shortage by constructing a waste-to-energy burn plant that would use garbage as fuel to burn sludge, converting it into energy.⁸ Alan La Pointe opposed the idea. He and others questioned the Sanitary District's financing of the plant and the plant's environmental impact.⁹ La Pointe's investigation into the plant's financing prompted a grand jury investigation which concluded that the Sanitary District had improperly used bond money from other projects.¹⁰ Although the state attorney general's office declined to prosecute, it noted that a taxpayer's action would be appropriate.¹¹ La Pointe filed such a suit.¹²

The Sanitary District responded with a \$42 million dollar cross-complaint against La Pointe for intentional interference with prospective economic advantage, conspiracy to interfere with economic relations, and indemnity.¹³ The Sanitary District alleged, among other things, that La Pointe had "solicited and succeeded in obtaining the imposition of regulatory requirements" on the burn plant proposal; "participated in at least two successive Grand Jury investigations"; "undermined the credibility of [the project's] consultants and experts"; and "attempted to undermine the credibility of the [Sanitary District's] Board of Directors and its management."¹⁴ Sanitary District officials said they would identify 490 "Does,"¹⁵ and the suit was filed one month before a major public hearing on the burn plant.¹⁶ California Attorney General John Van de Kamp called the suit "a belligerent and unfounded attempt to strangle public debate."¹⁷ La Pointe's advocacy before the government and electorate on an issue of public significance made him the target of a suit for money damages—a SLAPP.

8. Todd Woody, *SLAPP and SLAPP Back*, THE RECORDER (San Francisco), Sept. 29, 1992, at 6.

9. *Id.*

10. *Id.*

11. *Id.*

12. *La Pointe v. West Contra Costa Sanitary Dist.*, No. 295995 (Cal. Super. Ct. Contra Costa County filed Oct. 27, 1986).

13. Cross-Complaint for Damages, *La Pointe v. West Contra Costa Sanitary Dist.*, No. 295995 (Cal. Super. Ct. Contra Costa County filed Feb. 26, 1988).

14. *Id.* at 7-8.

15. Woody, *supra* note 8, at 6. California allows plaintiffs to sue unknown defendants under a fictitious name, usually "Doe." CAL. CODE CIV. PROC. § 474 (West 1979). Once identified, defendants may be added to the action by proper notice. *Id.*

16. *Sewer Agency Must Pay Richmond Man \$205,100 Damages for Suit Against Environmentalist*, S.F. CHRON., Oct. 9, 1992, at D8 [hereinafter *Sewer Agency*].

17. Memorandum of Amicus Curiae Attorney General of the State of California in Support of Demurrer to Cross-Complaint at 2, *La Pointe v. West Contra Costa Sanitary Dist.*, No. 295995 (Cal. Super. Ct. Contra Costa County filed Apr. 15, 1988).

The La Pointe case will resurface throughout this Note to illustrate various points.

A. The Problem with SLAPPs: Toward Finding a Solution

A unique problem with SLAPPs is that their success is not contingent on a victory in court. SLAPP plaintiffs seek to “circumvent [the] political process by enlisting judicial power against their opponents. They unilaterally transform the dispute topics (e.g., zoning becomes libel) and move the forum of the dispute from the city hall to the courtroom.”¹⁸

Five advantages accrue to a SLAPP plaintiff the moment it files suit.¹⁹ First, a SLAPP transforms the positions of the parties.²⁰ In the political forum, an active citizen can mobilize the electorate and media to scrutinize the incipient SLAPP-plaintiff's intentions and behavior, as well as the behavior of administrative bodies. By filing suit, a SLAPP plaintiff moves the dispute to the courtroom, a forum isolated from immediate political pressure, and shifts the focus onto the SLAPP defendant's intentions and behavior.²¹ Second, the financial risks faced by a politically active citizen increase.²² Before suit, a citizen can spend time and money proportionally to his or her interest in public advocacy. Once a SLAPP is filed, the SLAPP defendant must incur the costs of a legal defense. The SLAPP's claim for money damages may put a large portion of the SLAPP defendant's resources in jeopardy. Third, defending a suit distracts the SLAPP defendant from the political activity that elicited the complaint.²³ Fourth, filing a SLAPP suit delays an issue's resolution long enough for public interest to wane.²⁴ Finally, a SLAPP can have a chilling effect on third-party political participation.²⁵ Although SLAPPs have a low probability of success,²⁶ “[p]robability is not something most people will rely on when told that they may lose everything they have. It is much safer to be quiet.”²⁷ The mere filing of a SLAPP may have a powerful effect on the legal laity.²⁸

18. Pring, *supra* note 4, at 943.

19. Cosentino, *supra* note 3, at 403-05.

20. *Id.* at 403.

21. *Id.*

22. *Id.* at 404.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 405.

27. *Id.*

28. In *J.S. Boswell Co. v. Family Farmers for Prop. 9, No. 179027* (Cal. Super. Ct. Kern County July 8, 1988), a friend of the SLAPP defendants who had donated to their cause thought he was a defendant in the suit “and labored under that misapprehension for the four years prior to the suit's resolution.” He testified, “I had never been sued before. I

In the La Pointe case, Alan La Pointe would later allege that when the Sanitary District filed its suit against him, he was "concerned over the possibility that he might become personally liable for a huge judgment."²⁹ He also "lacked the funds to defend himself in any protracted litigation."³⁰ Other opponents of the burn plant "were intimidated by the threat that they soon might be named as Doe defendants."³¹ The Sanitary District had taken the upper hand in the political arena by filing its SLAPP against La Pointe.

In light of the effects of SLAPPs, Victor Cosentino has offered five objectives for a solution to the SLAPP problem, as well as four limitations.³² First, a solution should protect defendants from the economic costs of their defense. Second, the "chilling effect" of SLAPPs should be reduced or eliminated. Third, SLAPPs should be resolved quickly. Fourth, attorneys should be discouraged from filing SLAPPs. Fifth, the economic incentives to file SLAPPs should be eliminated. Of the ideal solution, says Cosentino, "[t]rue success will be achieved only when the plaintiff refrains from filing the SLAPP in the first place."³³

Cosentino's suggested limitations seek "to prevent the solution from becoming as damaging as the problem it is trying to solve."³⁴ First, a solution to the SLAPP problem must not be a reactionary response to SLAPP-like suits.³⁵ Because of the possibility that legitimate suits may be mistakenly classified as SLAPPs, it must be "expedient and quick, but must not trigger a judicial knee-jerk reaction."³⁶ Second, it must overcome the dearth of facts available to a court at the early stages of litigation in federal and other notice-pleading jurisdictions.³⁷ Third, the solution must not protect actual tortious behavior masking itself as petitioning activity.³⁸ Fourth, the solution must not deny potential or alleged SLAPP plaintiffs their rights, including due process.³⁹

thought I was being sued. I found out many years later I was not being sued, but for a long time I was very upset about it." Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response*, 7 J.L. & POL. 417, 469 (1991).

29. First Amended Complaint for Damages at 8, *La Pointe v. West Contra Costa Sanitary Dist.*, No. C-89 0710 DLJ TSC (N.D. Cal. filed May 22, 1989).

30. *Id.*

31. *Id.*

32. See Cosentino, *supra* note 3, at 407-12.

33. *Id.* at 411.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 412.

39. *Id.*

B. Defending SLAPPs

There are three categories of defenses to SLAPPs. The first is defending specifically on the merits of the particular claims. The specific defenses to common SLAPP theories are beyond the scope of this Note.⁴⁰

The second category of defense is premised on the constitutional right to petition⁴¹ as embodied in the Noerr-Pennington doctrine. The doctrine has evolved from three antitrust cases⁴² and “stands for the proposition that parties undertaking legitimate petitioning of the government are immunized from any civil cause of action by a third party injured by the petitioning activity.”⁴³ The recent case of *Columbia v. Omni Outdoor Advertising*⁴⁴ strengthened and broadened this doctrine. Professors Pring and Canan hail the case as setting “a clear, new standard of maximum protection for Petition-Clause activity.”⁴⁵ *Omni* holds in part that “a concerted effort to influence public officials regardless of intent or purpose”⁴⁶ is protected by the Petition Clause. The only exception to this immunity is the “sham” exception “in which persons use the governmental *process*—as opposed to the *outcome* of that process—as [a] weapon.”⁴⁷

The third category of defense is based upon state privileges. For example, California provides a statutory privilege for communications made during legislative or judicial proceedings.⁴⁸ This “potent privilege can block many different tort actions, such as defamation, abuse of process and intentional interference with prospective economic ad-

40. For discussions of specific defenses to common SLAPP theories, see John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 420-25 (1993); Joseph J. Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 105, 123-31 (1988).

41. “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.” U.S. CONST. amend. I. For a historical discussion of the right to petition and comments on its modern application, see Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 HASTINGS CONST. L.Q. 15 (1993).

42. *California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

43. Jeffrey A. Benson & Dwight H. Merriam, *Strategic Lawsuits Against Public Participation (SLAPPs): An Overview*, C750 A.L.I.-A.B.A. 837, 843 (Aug. 19, 1992).

44. 499 U.S. 365 (1991).

45. George W. Pring & Penelope Canan, “SLAPPs”—“Strategic Lawsuits Against Public Participation” in *Government—Diagnosis and Treatment of the Newest Civil Rights Abuse*, in 9 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 379, 391 (Steven Saltzman & Barbara M. Wolvovitz eds., 1993).

46. 499 U.S. at 380 (quoting *Pennington*, 381 U.S. at 670).

47. *Id.* SLAPPs fall within this exception. Their filing is not immunized by the Petition Clause.

48. CAL. CIV. CODE § 47(b) (West Supp. 1993).

vantage.”⁴⁹ It extends to communications with some connection to any official proceeding, whether made in the proceeding or not.⁵⁰

The West Virginia Supreme Court may have judicially crafted a similar, but absolute, state constitutional privilege for petitioning activity in *Webb v. Fury*.⁵¹ Noting that the West Virginia constitution warrants “giv[ing] even greater room for activities alleged to be protected by the right [to petition],”⁵² the court referred to the defendant’s communications to federal agencies as “absolutely privileged petitioning activity.”⁵³ While the conclusion that West Virginia grants an absolute privilege to petitioning may be questionable, states *can* be more solicitous of expressive rights under their own constitutions than the federal constitution requires.⁵⁴

In the burn plant example, Alan La Pointe demurred to the Sanitary District’s cross-complaint on the ground that it was an “attempt to thwart the exercise of constitutional rights by concerned citizens on a matter of ongoing public concern”⁵⁵ The court sustained the demurrer with leave to plead more specific facts regarding La Pointe’s wrongful conduct so the court could determine whether it was protected by the United States or California Constitution.⁵⁶ After the Sanitary District failed to amend, its cross-complaint was dismissed.⁵⁷ Thus, for LaPointe, the constitutional defense proved effective.

C. Deterrents to SLAPPs

Common deterrents to SLAPPs include attorneys’ fees awards, sanctions imposed under Rule 11 of the Federal Rules of Civil Procedure and its state counterparts, attorney disciplinary proceedings, and countersuits against SLAPP plaintiffs and their attorneys.⁵⁸ Each has significant limitations.

49. Barker, *supra* note 40, at 430.

50. *See id.* at 429-30.

51. 282 S.E.2d 28 (W. Va. 1981).

52. *Id.* at 37 n.4.

53. *Id.* at 37. The defendant, Webb, had lodged an administrative complaint with the Office of Surface Mining, Department of the Interior, and requested a hearing with the United States Environmental Protection Agency. *Id.* at 31.

54. *See, e.g., PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (holding California free speech right preventing private shopping center from prohibiting handbill distribution consistent with federal constitution).

55. Memorandum of Points and Authorities in Support of Demurrer at 5, *La Pointe v. West Contra Costa Sanitary Dist.*, No. 295995 (Cal. Super. Ct. Contra Costa County filed Apr. 4, 1988).

56. First Amended Complaint for Damages at 8-9, *La Pointe v. West Contra Costa Sanitary Dist.*, No. C-89 0710 DLJ TSC (N.D. Cal. filed May 22, 1989).

57. *Id.* at 9.

58. *See Brecher, supra* note 40, at 131-32.

1. Attorneys' Fees Awards

Attorneys' fees awards might cause SLAPP plaintiffs to consider more carefully the legitimacy of their claims. Despite the American Rule, which generally denies attorneys' fees to the prevailing party,⁵⁹ attorneys' fees awards have recently become a more viable response to SLAPPs—and a more likely deterrent.⁶⁰ When the court dismissed the Sanitary District's cross-complaint against La Pointe, it awarded him \$23,098 in attorneys' fees⁶¹ under a California statute that authorizes such an award in an action "which has resulted in the enforcement of an important right affecting the public interest."⁶²

Attorneys' fees awards may provide little economic deterrence, however, when the cost to a SLAPP plaintiff of unchecked political activity is greater than the potential award.⁶³ A SLAPP plaintiff pursuing a large project may consider attorneys' fees awards just another cost of doing business.

2. Rule 11 Sanctions

Sanctions against attorneys and their clients under Rule 11 of the Federal Rules of Civil Procedure⁶⁴ and its state counterparts might discourage SLAPPs in the same way as attorneys' fees awards. Because courts are reluctant to deter attorneys from pursuing available remedies, however, Rule 11 sanctions are usually difficult to impose in more than nominal amounts.⁶⁵ Like attorney's fees, Rule 11 sanctions may provide scant economic deterrence unless they are awarded at

59. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

60. See *Gordon v. Marrone*, 573 N.Y.S.2d 105, 110 (N.Y. Sup. Ct. 1991). *But see* Brecher, *supra* note 40, at 132-36 (discussing the difficulty of recovering fees under current law).

61. Order Dismissing Cross-Complaint and Awarding Attorneys' Fees at 2, *La Pointe v. West Contra Costa Sanitary Dist.*, No. 295995 (Cal. Super. Ct. Contra Costa County filed Sept. 7, 1988). La Pointe settled the Sanitary District's appeal of the attorneys' fees award.

62. CAL. CIV. PROC. CODE § 1021.5 (West 1980).

63. Cosentino, *supra* note 3, at 416.

64. Rule 11 provides:

Every pleading, motion and other paper . . . shall be signed by at least one attorney of record. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading . . . ; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry . . . it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading . . . is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction. . . .

FED. R. CIV. P. 11.

65. Barker, *supra* note 40, at 417-19; Cosentino, *supra* note 3, at 417-18.

levels commensurate to the profit a SLAPP plaintiff stands to realize by thwarting political debate.⁶⁶

3. *Attorney Disciplinary Proceedings*

The threat of disciplinary proceedings under state rules of professional conduct does not deter attorneys from bringing SLAPPs for three reasons.⁶⁷ The threat of a SLAPP is unlikely to prompt a citizen complaint, much less a hearing. Also, a lay person is unlikely to complain if a suit is brought, as a legal novice is probably unable to distinguish a frivolous claim from a legitimate one. Finally, lawyers are generally reluctant to inform on one another,⁶⁸ a situation accompanied by a general lack of enforcement by the bar.⁶⁹

4. *Countersuits*

Probably the most effective deterrent to SLAPP plaintiffs and their attorneys is the threat of a countersuit by the defendant.⁷⁰ Malicious prosecution, abuse of process, violation of state and federal constitutional rights, and state and federal civil rights statutes are typical grounds for SLAPP countersuits.⁷¹ This deterrent, however, also has significant shortcomings. A countersuit further extends the unwanted litigation for the SLAPP defendant. For example, one element of the malicious prosecution cause of action, probably the most common SLAPP countersuit theory, is a resolution of the case favorable to the defendant.⁷² Therefore, suit on this theory cannot be brought until there has been a judgment for the defendant.

A modest number of SLAPP countersuits have succeeded on civil and constitutional rights theories, but the courts have denied them precedential value by depublishing these cases. In *Monia v. Parnas*

66. Cosentino, *supra* note 3, at 417-18.

67. *See id.* at 418-20; Barker, *supra* note 40, at 416-17.

68. Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1981) ("A lawyer possessing unprivileged knowledge of [lawyer misconduct] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.") with Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 979-82 (1988) ("[W]hile there has not been an extensive conspiracy of silence among lawyers, many lawyers in fact are . . . disinclined to report [fellow lawyers] to the disciplinary authorities. . . . While there are lawyers who take seriously their ethical obligations to report the violations of other lawyers, it is unusual to find the bar authorities enforcing this rule.") (footnotes omitted).

69. *See* Ann Marie, *Competency and the Legal Profession: The Current Reality of Self-Regulation under the ABA Code of Professional Responsibility*, 53 INS. COUNS. J. 72, 87 (1986); Rotunda, *supra* note 68 at 979-82.

70. Such countersuits are often called "SLAPP-Back" suits. *See* Pring, *supra* note 5, at 19; Woody, *supra* note 8, at 1.

71. Pring, *supra* note 5, at 20.

72. Brecher, *supra* note 40, at 126-27.

Corp.,⁷³ the California Supreme Court let stand a jury verdict of \$260,000 for malicious prosecution, abuse of process, and interference with constitutional rights, but decertified the appellate court opinion.⁷⁴ In *J.S. Boswell Co. v. Family Farmers for Prop. 9*,⁷⁵ a jury award of \$3 million in compensatory damages and \$10.5 million in punitive damages was upheld by a California appellate court in an unpublished opinion.⁷⁶

Alan La Pointe sued both the Sanitary District and its attorneys for bringing their SLAPP against him.⁷⁷ He sued the Sanitary District alone under 42 U.S.C. § 1983 and for violating his California constitutional rights. He sued both the Sanitary District and its attorneys for conspiracy to violate section 1983 and for malicious prosecution. The Sanitary District's attorneys settled with La Pointe for \$225,000⁷⁸ and La Pointe won a verdict of \$205,100 against the Sanitary District itself after trial of the civil rights claim.⁷⁹

D. Legal Reforms Dealing with SLAPPs

Many scholars have advocated reforms to deal with the peculiar problems of SLAPPs.⁸⁰ For instance, one commentator argues that a malicious prosecution counterclaim should be allowed immediately, instead of requiring a resolution of the case in favor of the SLAPP defendant/counterclaimant.⁸¹ This commentator also urges that attorneys' fees should be statutorily authorized where the defendant "sought to advance the public's [interest], rather than his own . . . , in the underlying action."⁸² Other reforms have been advanced or tested in the courts and legislatures.

73. 278 Cal. Rptr. 426 (1991).

74. McMurry & Pierce, *supra* note 28, at 831.

75. No. 179027 (Cal. Super. Ct. Kern County July 8, 1988); see Robert I. McMurry & David H. Pierce, *Strategic Lawsuits Against Public Participation (SLAPPs): The Benefits and Risks*, C750 A.L.I.-A.B.A. 823, 832 (Aug. 19, 1992).

76. Costantini & Nash, *supra*, note 28, at 417.

77. *La Pointe v. West Contra Costa Sanitary Dist.*, No. C-89 0710 DLJ TSC (N.D. Cal. 1989).

78. Letter from Margaret A. Corrigan of Rogers, Joseph, O'Donnell & Quinn, attorneys for Alan La Pointe, to author (Oct. 16, 1992) (on file with the *Hastings Constitutional Law Quarterly*).

79. *Sewer Agency*, *supra* note 16 at D8.

80. See Pring, *supra* note 5, at 15-21.

81. Brecher, *supra* note 40, at 137-40.

82. *Id.* at 140.

1. Judicial Reforms

Several courts have recognized the SLAPP phenomenon.⁸³ Some have taken steps to abate SLAPPs. In *Protect Our Mountain Environment, Inc. (POME) v. District Court*,⁸⁴ the Colorado Supreme Court announced a rule raising the burden on SLAPP plaintiffs. When the defendant in an alleged SLAPP action files a motion to dismiss asserting the constitutional right to petition, the plaintiff can only sustain the action by showing that:

- (1) the defendant's administrative or judicial claims were devoid of reasonable factual support, or if so supportable lacked any cognizable basis in law for their assertion;
- (2) the primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and
- (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.⁸⁵

A dissenting opinion proposed a similar rule in the West Virginia case of *Webb v. Fury*.⁸⁶ Justice Neely suggested that where conduct is prima facie protected by the First Amendment, the court should require the plaintiff to make "more specific allegations than would otherwise be required."⁸⁷ In addition, Justice Neely proposed an early preliminary hearing, in which costs are advanced by the plaintiff and the court awards attorney's fees to a defendant prevailing on the merits.⁸⁸

2. Legislative Reforms

Some legislatures have moved to reduce the harm of SLAPPs. For example, California provides a special motion to strike for causes of action "arising from any act of [a] person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue."⁸⁹ The statute also provides for the recovery of attorney's fees and costs.⁹⁰ In New York, a "[p]ublic applicant or permittee"⁹¹ plaintiff must demonstrate that its suit for damages has "a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of

83. See, e.g., *Westfield Partners v. Hogan*, 740 F. Supp. 523, 524-25 (N.D. Ill. 1990) ("The court perceives this, with a great deal of alarm, as part of a growing trend of what have come to be known as 'SLAPP suits.'").

84. 677 P.2d 1361 (Colo. 1984).

85. *Id.* at 1369.

86. 282 S.E.2d 28 (W. Va. 1981).

87. *Id.* at 47 (Neely, J., dissenting).

88. *Id.*

89. CAL. CIV. PROC. CODE § 425.16(b) (West Supp. 1994).

90. *Id.* § 425.16(c).

91. N.Y. CIV. RIGHTS LAW § 76-a(1)(b) (McKinney Supp. 1994).

existing law,"⁹² if it relates to "any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission."⁹³ Otherwise, it will be dismissed. Both the California and New York statutes increase the chance that SLAPPs will be dismissed early and reduce the threats and costs to SLAPP defendants.

While state legislative and judicial reforms offer hope to SLAPP defendants, other avenues to defend against and deter SLAPPs should be pursued. Application of existing federal law could substantially deter SLAPPs.

E. A Proposal: Attorney Liability under 42 U.S.C. § 1983

A SLAPP countersuit theory holding SLAPP-plaintiffs' attorneys liable under 42 U.S.C. § 1983 for initiating meritless suits that chill defendants' First Amendment rights may be the solution.⁹⁴ Attorney liability under section 1983 compares favorably to other SLAPP deterrents,⁹⁵ and it serves well Cosentino's objectives for a solution.⁹⁶ It is particularly appropriate in light of attorneys' ethics and training, which make them uniquely situated to avoid the costs of SLAPPs.⁹⁷

One problem with allowing SLAPP defendants to file section 1983 counterclaims is the possibility for abuse.⁹⁸ Some attorneys may want to put this counterclaim theory into everyday use, even in response to legitimate suits. And qualified or good faith immunity, which stops private suits against executive officials for constitutional violations at the summary judgment stage,⁹⁹ is not currently available to attorneys.¹⁰⁰ Thus, whether by statute or common law development, a section 1983 countersuit against attorneys must be limited to instances in which there is probable cause that the original suit was

92. N.Y. CIV. PRAC. L. & R. 3211(g) (McKinney Supp. 1994).

93. N.Y. CIV. RIGHTS LAW § 76-a(1)(a).

94. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

95. See *infra* notes 225-28 and accompanying text.

96. See *supra* notes 32-39 and accompanying text.

97. See *infra* notes 229-33 and accompanying text.

98. The obvious public policy reason for the "favorable termination" element of the malicious prosecution action is to keep countersuits to a minimum.

99. See *Harlow v. Fitzgerald*, 457 U.S. 800, 807-08 (1982).

100. See *Wyatt v. Cole*, 112 S. Ct. 1827 (1992), discussed *infra* notes 194-220 and accompanying text.

brought to chill the defendant's rights rather than to settle a legitimate grievance. SLAPP counterclaimants should have to apply to the courts for permission to pursue a section 1983 claim.¹⁰¹

A major limitation on using section 1983 against SLAPP-plaintiffs' attorneys is the requirement that their action be "under color of" law.¹⁰² The United States Supreme Court interprets this requirement identically to the Fourteenth Amendment's state action requirement.¹⁰³ "The ultimate issue in determining whether a person is subject to suit under [section] 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'"¹⁰⁴

II. Applying the State Action Doctrine to Attorneys

The state action doctrine is "a conceptual disaster area."¹⁰⁵ Unfortunately, this Note does not relieve that problem. Instead, this Part begins by discussing state action theory. Then it examines the historical meaning of the attorney's title, "officer of the court," which frames the state action issue. Next, this Part proposes a model that harmonizes the Supreme Court cases dealing with the attorney-as-state-actor question and addresses the availability of qualified immunity to attorney/state actors. Finally, using the Federal Rules of Civil Procedure as a framework, this Part discusses the state-actor status of SLAPP-plaintiffs' attorneys.

A. The State Action Doctrine

A seminal declaration of the state action doctrine appears in *Ex parte Virginia*.¹⁰⁶ There the Court declared:

101. Requiring parties to petition the court before bringing an action, while not common, is not unprecedented. *See, e.g.,* *Elmore v. McCammon*, 640 F. Supp. 905, 912 (S.D. Tex. 1986) (further actions by pro se litigant to be reviewed by court before summons issues).

Allowing defendants to petition for a malicious prosecution counterclaim, rather than requiring a prior "favorable termination," could improve that cause of action as a deterrent to frivolous claims also.

102. 42 U.S.C. § 1983 (1988).

103. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).

104. *Id.* (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), discussed *infra* notes 184-93 and accompanying text.)

105. Charles L. Black, Jr., *The Supreme Court 1966 Term Forward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967); *see* Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587, 588 (1991) ("[N]early every article about the state action doctrine published in the last twenty years quotes and concurs with Professor Charles Black's characterization . . .").

106. 100 U.S. 339 (1880).

[T]he prohibitions of the 14th Amendment are addressed to the States. . . . They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes action may be taken. A State acts by its legislative, its executive, or its judicial authorities. . . . The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws.¹⁰⁷

In *Home Telephone & Telegraph Co. v. City of Los Angeles*,¹⁰⁸ the Court extended the doctrine, holding that actions unauthorized by the state remain state action if taken under the guise of state authority: “[W]here an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the [Fourteenth] Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant. . . .”¹⁰⁹

The state action requirement assures that the Constitution governs government, not private individuals.

[T]he Constitution controls the deployment of governmental power and defines the rules for how such power may be structured and applied. The Constitution, therefore, is not a body of rules about ordinary private actions, but a collection of rules about the rules and uses of law: in a word, *metalew*.¹¹⁰

Phrased differently, the state action requirement controls the reach of constitutional protections. Where courts find state action, constitutional rights are implicated. Thus, the doctrine assures that the Fourteenth Amendment “protects the individual from arbitrary governmental interference.”¹¹¹ Where state action is not found, constitutional rights are not implicated. Here the doctrine “prevents federal courts from using the [Fourteenth] Amendment to govern directly the actions of individuals.”¹¹² This “preserves the federalist structure of governmental power and maintains the separation of power among the branches of the federal government.”¹¹³

Common practical approaches to the state action doctrine provide little guidance in determining whether attorneys are state actors. Professor Tribe gives coherence to the state action requirement through a two-lens approach—first focusing on “the actual partici-

107. *Id.* at 346-47.

108. 227 U.S. 278 (1913).

109. *Id.* at 287. This is the “abuse of authority” doctrine.

110. LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 246 (1985).

111. William M. Burke & David J. Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003, 1012 (1973).

112. Strickland, *supra* note 105, at 595.

113. *Id.*

pants in a controversy and examin[ing] the Constitution's application to the individuals and organizations who act as the state's agents," then "look[ing] beyond the human figures . . . to examine the substantive law."¹¹⁴ More often, however, courts and commentators attempt to define discrete categories of cases where state action can be found.¹¹⁵ In hard cases, the categories can be as deceptive as they are helpful.¹¹⁶ Attorneys do not fall neatly into, or out of, any category.

B. The Attorney as an "Officer of the Court"

Lawyers and judges often use the term "officer of the court" to make a point about the role or responsibilities of attorneys. Unfortunately, "many have little more than a vague idea of its meaning or of the responsibilities that follow from that status."¹¹⁷ The meaning of the phrase has varied from one circumstance to another and lacks independent legal significance. This discussion of the title "officer of the court" only frames the question of whether or not an attorney is a state actor. Because the attorney's function varies, an attorney's particular role in a given case should determine state actor status.

Historically, the title "officer of the court" derived from the distinction in England between solicitors and barristers.¹¹⁸ It became part of the Supreme Court's lexicon in *Ex parte Garland*.¹¹⁹ The *Gar-*

114. TRIBE, *supra* note 110, at 248.

115. See, e.g., Strickland, *supra* note 105. Professor Strickland posits six theories of state action: overt conduct of state employees, officers, and agencies; the creation and enforcement of substantive civil law; state inaction—the denial of judicial relief or other state intervention; governmentally regulated private conduct as state action; joint participation with state officials as state action; and assumption of state powers—the government function theory of state action. *Id.* at 596-633; see also Lugar v. Edmondson Oil Co., 457 U.S. 937, 939 (1982) ("[T]he Court has articulated a number of different factors or tests in different contexts: e.g., the 'public function' test, . . . the 'state compulsion' test, . . . the 'nexus' test, . . . and . . . a 'joint action test. . . .'" (citations omitted)).

116. See, e.g., Jenner v. Shepherd, 665 F. Supp. 714, 720-21 (S.D. Ind. 1987) (weighing whether police officer's presence during "final altercation" between landlord and tenant created state action under "public function" theory in landlord's detention of property for nonpayment of rent).

117. Nathaniel E. Gozansky & Consuelo L. Kertz, *Private Lawyers' Liability Under 42 U.S.C. § 1983*, 24 EMORY L.J. 959, 959 (1975).

118. See *People v. Culin*, 162 N.E. 487, 490 (N.Y. 1928). While barristers were regulated by the Inns of Court, solicitors or attorneys were officers of the court by virtue of their regulation by the courts themselves. Robert J. Martineau, *The Attorney as an Officer of the Court: Time to Take the Gown Off the Bar*, 35 S.C. L. REV. 541, 544 ("Two explanations of the English attorney's special title were commonly accepted. One explanation was that an attorney was subject to court regulation because he was an officer of the court. The other was that an attorney was an officer of the court because he was subject to its regulation."). This, of course, reveals little about an attorney's historical rights and duties.

119. 71 U.S. (4 Wall.) 333 (1866). The issue in the case was whether a post-Civil War Congress could constitutionally require an oath of Civil War-era allegiance for admission to practice before the courts of the United States. *Id.* at 374-76. Requiring such an oath, if

land Court's holding turned on whether an attorney was an officer of the United States and it wrote:

The profession of an attorney . . . is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys . . . are not elected or appointed in the manner prescribed by the Constitution They are officers of the court, admitted . . . upon evidence of their possessing sufficient legal learning and fair private character.¹²⁰

To contest the *Garland* majority's view, Justice Miller, leading a four-judge dissent, quoted the Judiciary Act of 1789¹²¹ and pointed out that "[t]he right to practise law in the courts as a profession, is a privilege granted by the law, under such limitations . . . as the law-making power may prescribe."¹²² Attorneys, Justice Miller wrote, "are as essential to the successful working of the courts, as the clerks, sheriffs, and marshals, and perhaps as the judges themselves, since no instance is known of a court of law without a bar."¹²³ The title "officer of the court" has made its way into modern cases in the mold cast by *Garland*.¹²⁴ The Supreme Court has often been divided about the meaning of the term in relation to the role of attorneys.¹²⁵

operating to exclude individuals from a profession, would constitute an unconstitutional ex post facto punishment, but it could constitutionally be required of officers of the United States. The Court held the oath requirement unconstitutional as to *Garland*, whose ties to the Confederacy had been pardoned by the president. *Id.* at 375.

120. *Id.* at 378.

121. "[I]n all the courts of the United States, the parties may plead and manage their causes personally; or by the assistance of such counsel or attorneys-at-law as, by the rules of the said courts respectively, shall be permitted to manage and conduct causes therein." Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (1789) (current version at 28 U.S.C. § 1654 (1988)).

122. *Garland*, 71 U.S. at 384 (Miller, J., dissenting).

123. *Id.*

124. Martineau, *supra* note 118, at 551-52 n.31.

125. For example, the Court held in *In re Griffiths*, 413 U.S. 717 (1973), that Connecticut's exclusion of aliens from the practice of law violated the Equal Protection Clause. *Id.* at 729. The Court conceded that the state's statutory scheme made "every lawyer a 'commissioner of the Superior Court' . . . [with] authority to 'sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgements [sic] of deeds'"—with the assistance of a county sheriff or a town constable. *Id.* at 723 (quoting CONN. GEN. STAT. ANN. § 51-85) (West 1985)). Citing *Garland*, however, the Court held that lawyers were "not officials of government by virtue of being lawyers." *Id.* at 729.

Chief Justice Burger, joined by Justice Rehnquist, dissented from the majority's view of attorneys. He wrote:

I am unwilling to accept what seems to me a denigration of the posture and role of a lawyer as an "officer of the court." . . . By virtue of his admission a lawyer is granted what can fairly be called a monopoly of sorts; he is granted a license to appear and try cases; he can cause witnesses to drop their private affairs

“Officer of the court” is invoked regularly in matters of admission to the bar and in disciplinary proceedings.¹²⁶ The primary use of the title has been “in defining the obligations of individual attorneys.”¹²⁷ Thus, although “officer of the court” has been denied independent legal significance, it is regularly used to support the heightened responsibility of attorneys.¹²⁸

and be called for depositions . . . ; the enormous power of cross-examination of witnesses is granted exclusively to lawyers. . . . In most States a lawyer is authorized to issue subpoenas commanding the presence of persons and even the production of documents The broad monopoly granted to lawyers is the authority to practice a profession and by virtue of that to do things other citizens may not lawfully do. . . . The lawyer’s obligations as an officer of the court permit the court to call on the lawyer to perform duties which no court could order citizens generally to do, including the obligation to observe codes of ethical conduct not binding on the public generally.

The concept of a lawyer as an officer of the court and hence part of the official mechanism of justice in the sense of other court officers, including the judge, albeit with different duties, is not unique in our system but it is a significant feature of the lawyer’s role in the common law.

Id. at 730-31 (Burger, C.J., dissenting). His appeal referred not only to the profession’s reputation, but to the attorney’s role in fact, in history, and (on a slightly different point) in comparison to other legal systems. *Id.* at 730-33.

126. Gozansky & Kertz, *supra* note 117, at 960-62 (“Such language traditionally has been used to support regulations governing the admission to practice and to serve as standard ‘boiler plate’ in all opinions dealing with disbarment or some lesser disciplining of lawyers.”). In *Theard v. United States*, 354 U.S. 278 (1957), the Court refused to disbar an attorney from the federal courts because of his disbarment from the courts of Louisiana. “The two judicial systems of courts,” it said, “have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included.” *Id.* at 281; *accord In re Snyder*, 472 U.S. 634, 643 (1985). The Court cited approvingly from *People v. Culkin*, 162 N.E. 487 (N.Y. 1928), in which Judge Cardozo wrote, “Membership in the bar is a privilege burdened with conditions. The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.” *Id.* at 489 (citations omitted).

127. Martineau, *supra* note 118, at 558. Professor Martineau posits nine categories of duty in which “officer of the court” is invoked. They are: duty to provide services to the court, duty to obey the law, duty to preserve professional integrity, duty to preserve the integrity and dignity of the legal system, duty to promote fair administration of justice, duty to be truthful, duty to know the law, duty to inform the court of the law and the facts, and duty to inform the client. *Id.* at 559-70.

128. In *Powell v. Alabama*, 287 U.S. 45 (1932), where the Scottsboro defendants’ convictions were overturned for ineffective assistance of counsel, the Court wrote, “Attorneys are officers of the court, and are bound to render service when required by such an appointment.” *Id.* at 73. In *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966), the Ninth Circuit held that court-ordered representation, like that recommended in *Powell*, does not constitute a Fifth Amendment taking. *Id.* at 636. This holding is inconsistent with the Court’s dicta in *Cammer v. United States*, 350 U.S. 399 (1956), which viewed attorneys as independent businesspeople, and under which the taking of attorneys’ labor without compensation would be unconstitutional. *See Cammer*, 350 U.S. at 405. Ignoring *Garland’s* four-judge dissent, the *Cammer* Court wrote:

[N]othing that was said in *Ex parte Garland* or in any other case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or

The uneven history of the title “officer of the court” suggests the unique and intricate relationship attorneys have to the justice system. Given this relationship, an attorney’s rights and liabilities should not be defined a priori by attorney status, but rather by analyzing the nature of the attorney’s involvement in each particular case.

In most cases, the only logic stated is that because an attorney is an officer of the court *ipso facto* a certain result follows. This reasoning . . . substitut[es] a label for an analysis. Courts should analyze the role of the attorney in terms of the function of the attorney in the legal system, and determine whether the result purportedly dictated by the label is necessary or appropriate for the proper functioning of the legal system.¹²⁹

The next Parts attempt such an analysis.

C. Attorneys as State Actors

This Part begins by setting forth a model for determining when attorneys are state actors. It then surveys areas where the Supreme Court has or has not held attorneys to be state actors. The variety of roles attorneys play has led to divergent results in different cases. The model explains these results.

1. When Attorneys Are State Actors

Attorneys litigate within the framework of procedural rules. Within this framework, courts and legislatures leave discretion to the attorney: what procedure to invoke, when to invoke the procedure, upon whom to invoke the procedure, on what factual predicate or legal theory to invoke the procedure—the list varies with each circumstance. Imposing narrower procedural rules would increase certain costs and burdens on the judiciary. The state avoids these costs by delegating numerous decisions to attorneys, who are well-suited to make them. But the state’s constitutional responsibilities do not vanish. They are delegated as well.¹³⁰ Attorneys become state actors when they use state procedures against adverse parties.

An example illustrates this idea. Procedural rules let an attorney choose against whom to file suit. The state *could* require the attorney to submit for ex parte approval a proposed defendants list that in-

judges. Unlike these officials a lawyer is engaged in a private profession, important though it may be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business.

Id.

129. Martineau, *supra* note 118, at 541.

130. See *infra* text accompanying note 160.

cludes constitutional rationales for naming each defendant.¹³¹ But the courts and legislatures have delegated these decisions to attorneys. By allowing discretion into procedural rules, the state grants decisional power to attorneys. These grants of discretion substitute the attorney's decisions for those of a judge or other state officer or body.

To the extent an attorney uses state procedures against an adverse party (i.e., to the party's legal detriment¹³²), the United States Supreme Court has held the attorney a state actor. Where the attorney's use of procedure violates the adverse party's civil rights, the Court has found the attorney/state actor culpable or liable¹³³ or found the procedural rule an unconstitutionally broad grant of discretion.¹³⁴ Where it has chosen both, attorneys have unfortunately been threatened with liability for good faith use of presumably constitutional procedures.¹³⁵ Where the Court has chosen neither, the attorney has been using procedural discretion against a non-adverse party, and thus not to the party's legal detriment.¹³⁶

This model applies equally to lay litigants. Indeed, under the model, a teenager contesting a parking ticket may be a state actor. This apparent expansion of state action would be shocking, but the procedure does not enable the teenager to violate the civil rights of any adverse party.¹³⁷ It does not matter that the teen is a state actor. Intuitive rejection of the notion that a party can so easily become a state actor may be misplaced disapproval of liberal grants of state power to presumptively private parties. The proper objection is against procedures that put rights-abridging state power in "private" hands.

131. In *Elmore v. McCammon*, 640 F. Supp. 905 (S.D. Tex. 1986), the court required further actions by a pro se litigant to be reviewed before a summons would issue. *Id.* at 912. "While this procedure may not save the Court's resources, it will, hopefully, protect innocent defendants while at the same time preserving Plaintiff's right of access to the courts." *Id.* This balance is commonly struck by attorneys—at a savings to the judicial system.

132. As used in this discussion, "legal detriment" means "peril vis a vis the state" or "liability recognized and enforceable by the state."

133. See, e.g., *Edmonson v. Leesville Concrete*, 111 S. Ct. 2077, 2087 (1991), discussed *infra* notes 146-53 and accompanying text; *Georgia v. McCollum*, 112 S. Ct. 2348, 2357 (1992), discussed *infra* notes 154-69.

134. See, e.g., *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969), discussed *infra* notes 172-83 and accompanying text; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), discussed *infra* notes 184-93 and accompanying text.

135. See, e.g., *Wyatt v. Cole*, 112 S. Ct. 1827, 1834 (1992), discussed *infra* notes 194-220 and accompanying text; *Lugar*, 457 U.S. at 937, discussed *infra* notes 184-193.

136. See, e.g., *Polk County v. Dodson*, 454 U.S. 312, 326 (1981), discussed *infra* notes 140-45 and accompanying text.

137. The adverse party in this example is a government, which does not have civil rights.

This discussion singles out attorneys because they regularly invoke state power and because finding that an attorney is a state actor is more likely to be meaningful.¹³⁸ Singling out attorneys is also more accurate: where the following discussions suggest that the Court has found attorneys to be state actors, the Court has generally referred to the *litigant* as the state actor.¹³⁹ The fiction the Court engages—that an attorney is a mere agent of the litigant—suspends reality and disservices both the state action analysis and attorney accountability. More objectionable than this model's apparent extension of state action to private parties, in these cases private parties were identified as state actors, though their attorneys properly should have been.

a. Defense Counsel

In *Polk County v. Dodson*,¹⁴⁰ a public defender was alleged to have violated her client's civil rights by providing inadequate representation because she withdrew from his case.¹⁴¹ The Court sweepingly held that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding."¹⁴² The Court rejected the court of appeals' construction of the complaint, which read the plaintiff's allegation of having been injured by counsel "acting pursuant to administrative rules and procedures for . . . handling criminal appeals," to state a valid section 1983 action.¹⁴³ The public defender had withdrawn pursuant to a procedural rule,¹⁴⁴ but the Court found no "pol-

138. Because non-attorneys presumably lack explicit knowledge of constitutional rights, much of the rationale for extending § 1983 liability to them is absent, and they are likely beneficiaries of a good faith defense. Hence, this Note does not advocate § 1983 liability for non-attorneys. A non-attorney who invokes a procedure capably knowing of or intending to violate constitutional rights, however, probably should be liable.

139. In some of the cases, it must be presumed that an action was brought, or a procedure used, by an attorney, rather than in propria persona. *But see* *Fuentes v. Shevin*, 407 U.S. 67, 71-72 (1972) (husband of an appellant, who was familiar with ex parte application procedure, replevied wife's child's property).

140. 454 U.S. 312 (1981).

141. *Id.* at 314-15.

142. *Id.* at 325. *But see* *Georgia v. McCollum*, 112 S. Ct. 2348, 2356-57 (1992), discussed *infra* notes 154-69 and accompanying text (finding that defense counsel's use of peremptory challenges, a traditional function of defense counsel, was state action).

143. *Dodson*, 454 U.S. at 326.

144. Rule 104(a) of the Iowa Rules of Appellate Procedure states:

If counsel appointed to represent a convicted indigent defendant in an appeal to the supreme court is convinced after conscientious investigation of the entire record . . . that the appeal is frivolous and that he cannot, in good conscience, proceed with the appeal, he may move the supreme court in writing to withdraw.

IOWA R. APP. P. 104(a).

icy" effectuated by a rule or procedure that allegedly violated the client's rights.¹⁴⁵

Dodson shows the adversity element of the state action model. Although her withdrawal may have disadvantaged her client, it did not further the client's *legal* detriment. Discontinuing representation of her client was not a use of procedure against an adverse party. Only a use of state procedure against an adverse party can be state action.

b. The Peremptory Challenge

Peremptory challenges allow an attorney to strike a certain number of potential jurors virtually without cause. This procedure allows attorneys to shape juries advantageously for their clients and disadvantageously for their clients' opponents. In both the civil and criminal contexts, the Court has found that the peremptory challenge constitutes an exercise of state action.

In *Edmonson v. Leesville Concrete*,¹⁴⁶ the Court found a private civil litigant's use of peremptory challenges to be state action.¹⁴⁷ Thus, if the opposing party could make a *prima facie* showing of racial discrimination by the challenger, the court would require a race-neutral explanation of the challenge.¹⁴⁸ The Court found peremptory challenges to be a privilege having its source in state authority.¹⁴⁹ Peremptory challenges "are permitted only when the government, by statute or decisional law, deems it appropriate . . ."¹⁵⁰ Examining in detail "the extent to which the [litigant] relied on governmental assistance and benefits, . . . whether the [litigant was] performing a traditional governmental function, . . . and whether the injury caused [was] aggravated in a unique way by the incidents of governmental authority," the Court found the use of peremptory challenges to be state action.¹⁵¹

145. *Dodson*, 454 U.S. at 326.

146. 111 S. Ct. 2077 (1991).

147. *Id.* at 2083.

148. *Id.* at 2081; see *Batson v. Kentucky*, 476 U.S. 79, 94 (1986) (holding that *prima facie* showing of racial peremptory challenges requires prosecutor to explain challenges on race-neutral grounds).

149. *Edmonson*, 111 S. Ct. at 2083.

150. *Id.* This satisfied the first part of a two-part test from *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), discussed *infra* notes 184-93 and accompanying text. The *Lugar* test as recited in *Edmonson* is "first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, and second, whether the private party charged with the deprivation could be described in all fairness as a state actor." *Edmonson*, 111 S. Ct. at 2082-83 (citations omitted).

151. *Id.* at 2083 (citations omitted). Perhaps unsure of the implications of its holding, the Court left several bases on which to distinguish later cases, including the fact that peremptory challenges "occur within the courthouse itself." *Id.* at 2087.

The peremptory challenge is a grant of procedural discretion to attorneys subject only to the limitation that it not be used in a race-biased fashion. By invoking this privilege, whether motivated by “sudden impressions and unaccountable prejudices”¹⁵² or by race bias, an attorney seeks a legal advantage over the adverse party. Thus, a peremptory challenge is state action as to that party. The *Edmonson* Court could have found that the peremptory challenge is too broad a grant of discretion because of its potential racist use. Implicitly affirming that the peremptory challenge is a constitutional procedure, however, the Court remanded so the lower court could determine whether the attorney was a culpable state actor in using it.¹⁵³ Whether the defense could proffer a race-neutral explanation for its challenges would determine its culpability.

In *Georgia v. McCollum*,¹⁵⁴ the Court extended *Edmonson*'s holding to the criminal defense context.¹⁵⁵ The Court held that a criminal defendant's peremptory challenge makes use of “‘governmental assistance and benefits’ that are equivalent to those found in the civil context in *Edmonson*. ‘By enforcing a discriminatory peremptory challenge, [a] Court . . . elect[s] to place its power, property and prestige behind the [alleged] discrimination.’”¹⁵⁶ Peremptory challenges, even by a criminal defendant, “perform a traditional function of the government” in selecting an impartial trier of fact.¹⁵⁷ This, in turn, “‘insur[es] continued acceptance of the laws by all of the people.’”¹⁵⁸ The fact that trial by jury is constitutionally compelled in the criminal context reinforced the Court's finding of state action.¹⁵⁹ The Court observed that “[t]he State cannot avoid its constitutional responsibilities by delegating a public function to private parties.”¹⁶⁰ It distinguished *Polk County v. Dodson*,¹⁶¹ writing that “the determination whether a public defender is a state actor for a particular purpose depends on the nature and context of the function he is perform-

Justice O'Connor's dissent dissected and rejected the bases on which the majority rested its decision. *Id.* at 2089-95 (O'Connor, J., dissenting). “The peremptory is,” Justice O'Connor wrote, “an enclave of private action in a government-managed proceeding.” *Id.* at 2090.

152. *Edmonson*, 111 S. Ct. at 2090 (O'Connor, J., dissenting) (citations and quotations omitted).

153. *Id.* at 2089.

154. 112 S. Ct. 2348 (1992).

155. *Id.* at 2358.

156. *Id.* at 2355 (quoting *Edmonson*, 111 S. Ct. at 2084) (alterations in original; internal quotation marks omitted).

157. *McCollum*, 112 S. Ct. at 2355.

158. *Id.* (quoting *Edmonson*, 111 S. Ct. at 2083).

159. *Id.*

160. *Id.* at 2355-56.

161. 454 U.S. 312 (1981), discussed *supra* notes 140-45 and accompanying text.

ing.”¹⁶² Lastly, the Court observed that state action will be found “even though the motive underlying the exercise of the peremptory challenge may be to protect a private interest.”¹⁶³

Justice O’Connor dissented, finding it remarkable “that criminal defendants being prosecuted by the State act on behalf of their adversary when they exercise peremptory challenges”¹⁶⁴ She argued that *Dodson*’s logic was evaded by the Court’s holding, in which “defendants and their lawyers transmogrify from government adversaries into state actors when they exercise a peremptory challenge, and then change back to perform other defense functions.”¹⁶⁵ Chief Justice Rehnquist and Justice Thomas concurred out of deference to the holding in *Edmonson*,¹⁶⁶ while Justice Scalia derided what he called following that decision “logically to its illogical conclusion.”¹⁶⁷

By using the peremptory adversely to the state,¹⁶⁸ McCollum’s counsel did, in fact, “transmogrify” into a state actor. Implicitly finding the grant of discretion to bring peremptory challenges constitutional, the Court remanded for a determination whether McCollum’s counsel could offer a race-neutral explanation.¹⁶⁹

c. Prejudgment Remedies

The Court has most thoroughly developed state action doctrine as it applies to attorneys in the area of prejudgment remedies. To protect creditors, states may allow summary prejudgment attachment and garnishment procedures, but these procedures can impinge putative debtors’ due process rights. When a prejudgment remedy has violated a debtor’s rights, the Court has held the attorney to be a state actor in order to reach the conclusion that the statute authorizing the attachment is unconstitutional.¹⁷⁰ Analytically, though, the attorney’s use of prejudgment remedies is always state action, which only gets noticed by the courts when that use violates constitutional rights.¹⁷¹

162. *McCollum*, 112 S. Ct. at 2356. *But see supra* text accompanying note 142.

163. *McCollum*, 112 S. Ct. at 2356-57.

164. *Id.* at 2361 (O’Connor, J., dissenting).

165. *Id.* at 2362.

166. *Id.* at 2359 (Thomas, J., concurring).

167. *Id.* at 2365 (Scalia, J., dissenting).

168. The Court gave the state standing as a third party to contest McCollum’s challenges. *Id.* at 2357 (“As the representative of all its citizens, the State is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial.”).

169. *Id.* at 2359.

170. If there were no state actor, there would be no constitutional claim.

171. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), is a landmark case that demands mention. In *Flagg Brothers*, an owner of stored goods alleged in a § 1983 action that a warehouseman’s proposed sale of the goods under New York Uniform Commercial Code § 7-210 would violate her civil rights. *Id.* at 153. The Court found neither “depriva-

*Sniadach v. Family Finance Corp.*¹⁷² concerned a Wisconsin garnishment statute that gave plaintiffs ten days in which to serve a complaint on defendants after serving the garnishee.¹⁷³ The statute allowed a creditor to request a summons of the court clerk and set in motion “the machinery whereby the wages are frozen” by serving the garnishee.¹⁷⁴ Only a victory on the merits in the main suit would unfreeze the wages.¹⁷⁵ Granting that “[s]uch summary procedure may well meet the requirements of due process in extraordinary situations,” the Court held that no such situation presented itself in *Sniadach*, “nor [was] the Wisconsin statute narrowly drawn to meet any such unusual condition.”¹⁷⁶

The Court’s holding rests on the insufficiency of notice as a violation of due process,¹⁷⁷ but deals at length with the effects of garnishing a wage earner’s pay.¹⁷⁸ This suggests that the Court was concerned with garnishment as a whole and that mere pre-garnishment notice may not have garnered the Court’s approval. Justice Harlan’s concurrence bolsters this view: “I think that due process is afforded only by the kinds of ‘notice’ and ‘hearing’ which are aimed at establishing the validity, or at least the probable validity, of the underlying claim . . . before [the defendant] can be deprived of his property.”¹⁷⁹

The plaintiff’s attorney in *Sniadach*, by invoking Wisconsin’s garnishment statute adversely to *Sniadach*, was a state actor.¹⁸⁰ The statute gave attorneys almost unlimited discretion to garnish a putative debtor’s wages and the attorney’s use of the statute violated *Sniadach*’s rights. Since the only limits¹⁸¹ on an attorney’s choice to exer-

tion of any right ‘secured by the Constitution and laws’ of the United States,” *id.* at 156, nor state action. *Id.* at 157. This is actually not a prejudgment remedy case because the statute did not countenance a legal proceeding. The statute permits an exercise of self-help under the substantive law. The New York statute laid out a complicated “procedure” under which a warehouseman’s lien could be enforced, but following the procedure could not operate to the property owner’s legal detriment unless and until compliance was at issue in a legal proceeding. Thus, the statute did not create a state procedure, use of which would be state action.

172. 395 U.S. 337 (1969).

173. *Id.* at 338.

174. *Id.* at 338-39.

175. *Id.* at 339.

176. *Id.*

177. *Id.* at 342.

178. “A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support.” *Id.* at 340. “The leverage of the creditor on the wage earner is enormous.” *Id.* at 341.

179. *Id.* at 343 (Harlan, J., concurring).

180. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 927 (1982) (holding that state action was an implicit predicate of *Sniadach*’s application of due process standards).

181. The threat of a common law abuse of process action may hem in attorneys’ discretion to garnish wages, but, given garnishees’ minimal assets, such a threat is remote.

cise the procedure were the inconvenience of requesting a summons of the clerk, serving the garnishee, and serving a complaint on the defendant within ten days of this service, the Court found the rule an unconstitutional grant of discretion.

The observation that garnishment may be appropriate in “extraordinary situations”¹⁸² suggests that attorney discretion to garnish wages should be curtailed to where such a circumstance could be alleged.¹⁸³ A narrower garnishment statute would not prevent the attorney using it from being a state actor. It would reduce the chance that the attorney could violate a debtor’s civil rights.

In *Lugar v. Edmondson Oil Co.*,¹⁸⁴ the Court held that a claim stated a section 1983 cause of action because it alleged that the defendant-creditor’s use of Virginia’s attachment procedure violated the plaintiff’s civil rights.¹⁸⁵ The district and appellate courts had not resolved whether Lugar alleged that his civil rights were violated under the Virginia statute or under the respondent’s erroneous application of the statute against him,¹⁸⁶ but “resolution of this issue [was] essential to the proper disposition of the case.”¹⁸⁷ The Court held that “[p]etitioner did present a valid cause of action under [section] 1983 insofar as he challenged the constitutionality of the Virginia statute; he did not insofar as he alleged misuse or abuse of the statute.”¹⁸⁸

The language of the opinion suggests that only an attack on the statute will withstand summary judgment.¹⁸⁹ Whether or not an attor-

182. *Sniadach*, 395 U.S. at 339.

183. Modern statutes require such allegations. In *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), discussed *infra* notes 184-93 and accompanying text, the attachment statute required an allegation of “belief that petitioner was disposing of or might dispose of his property in order to defeat his creditors.” *Id.* at 924.

184. 457 U.S. 922 (1982).

185. *Id.* at 942.

186. *Id.* at 940.

187. *Id.*

188. *Id.* at 942. Where Lugar alleged that deprivation occurred from “respondents’ ‘malicious, wanton, willful, oppressive [sic], [and] unlawful acts,’” the Court took that to mean “‘unlawful under state law’” and not a manifestation of state action. *Id.* at 940. This was not a deviation from the “abuse of authority” doctrine, *see supra* notes 108-09 and accompanying text, because if “respondents invoked the statute without the grounds to do so [it] could in no way be attributed to a state rule or state decision.” *Lugar*, 457 U.S. at 940. Where the Court was able to read it as a “challenge [to] the state statute as procedurally defective under the Fourteenth Amendment,” *id.* at 941, the complaint stated a cause of action. Lugar’s first count implicated the Virginia statute for allowing issuance of a levy without posting of a bond, without establishing a factual basis for resorting to attachment, and without a sufficiently prompt hearing to release the assets. *See Joint Appendix at 4-5, Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1987) (No. 80-1730) (allegations six, seven, and nine). This count stated a cause of action.

189. “Petitioner did present a valid cause of action . . . insofar as he challenged the constitutionality of the Virginia statute.” *Lugar*, 457 U.S. at 942. Compare this to *Edmonson v. Leesville Concrete*, 111 S. Ct. 2077 (1991), discussed *supra* notes 146-53 and accom-

ney is a state actor appears to hinge on the fortuity of the statute's constitutionality. This probably motivated the dissenting Justices. Chief Justice Burger objected that "[r]espondents did no more than invoke a presumptively valid . . . procedure available to all."¹⁹⁰ He protested the possibility that innocent use of a procedural framework "transforms [one's] acts into actions of the State."¹⁹¹ Echoing Justice Burger, Justice Powell called the decision an "example of how expansive judicial decisionmaking can ensnare a person who had every reason to believe he was acting in strict accordance with law."¹⁹²

The state action model's refinement of the *Lugar* court's analysis clears up the problem that motivated the dissenters. Lugar alleged that the statute's broad grant of discretionary power to Edmondson's attorneys was unconstitutional. Whether it was or not, Edmondson's attorneys were state actors when using it against him. Lugar's allegation that his rights were violated by their choices under the procedural rules stated a cause of action. The liability of Edmondson would turn on whether they were entitled to qualified immunity or could establish a good faith defense,¹⁹³ a strong likelihood given the statute's presumptive validity.

2. *Should Attorney/State Actors Have Qualified Immunity?* *Wyatt v. Cole*

*Wyatt v. Cole*¹⁹⁴ rounds out this Part's survey of cases concerning attorneys as state actors. Its facts effectively mirror *Lugar v. Edmondson Oil Co.*,¹⁹⁵ but *Wyatt* examines the availability of qualified or good faith immunity for the attorney/state actor.

Cole used a Mississippi replevin statute against Wyatt.¹⁹⁶ Cole's refusal to comply with a post-seizure order to return the property elicited Wyatt's suit.¹⁹⁷ The district court, assuming Cole's liability under section 1983 for use of the replevin statute, held him entitled to qualified immunity from suit "for conduct arising prior to the statute's invalidation."¹⁹⁸ The Supreme Court reversed.¹⁹⁹

panying text, and *Georgia v. McCollum*, 112 S. Ct. 2348 (1992), discussed *supra* notes 154-69 and accompanying text, where the constitutionality of the preemptory challenge was assumed, but allegations of race-biased use stated a cause of action.

190. *Id.* at 943 (Burger, C.J., dissenting).

191. *Id.*

192. *Id.* at 944 (Powell, J., dissenting).

193. *See Wyatt v. Cole*, 112 S. Ct. 1827 (1992), discussed *infra* notes 194-220 and accompanying text.

194. 112 S. Ct. 1827 (1992).

195. 457 U.S. 922 (1982), discussed *supra* notes 184-93 and accompanying text.

196. *Wyatt*, 112 S. Ct. at 1829.

197. *Id.*

198. *Id.*

199. *Id.* at 1831.

The opinion discussed two circumstances in which an immunity from section 1983 has been recognized. First, if at the time of section 1983's enactment, "the tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine";²⁰⁰ and, second, where there are "special policy concerns involved"²⁰¹ as there were in *Harlow v. Fitzgerald*,²⁰² which extended qualified immunity to government officials required to exercise discretion.²⁰³

Cole did not and, according to the Court, could not argue that there was a historical immunity, because "such protection did not extend to complaining witnesses who . . . set the wheels of government in motion by instigating a legal action."²⁰⁴ Cole argued that "at common law, private defendants could defeat [the analogous torts of] malicious prosecution or abuse of process . . . if they acted without malice and with probable cause."²⁰⁵ But these defenses,²⁰⁶ wrote the Court, "would still not entitle them to the qualified *immunity* from suit accorded government officials"²⁰⁷

As to "special policy concerns," the Court distinguished *Harlow* as an anomaly that "completely reformulated qualified immunity along principles not at all embodied in the common law."²⁰⁸ Justified by "the attendant harms to governmental effectiveness caused by lengthy judicial inquiry,"²⁰⁹ *Harlow* qualified immunity was limited to parties holding office "requiring them to exercise discretion . . . [and] principally concerned with enhancing the public good."²¹⁰

The Court carefully narrowed its holding in *Wyatt*, writing that "[t]he precise issue encompassed . . . is whether qualified immunity . . . is available for private defendants faced with [section] 1983 liability for invoking a state replevin, garnishment or attachment statute."²¹¹

200. *Id.* (quotations omitted).

201. *Id.* at 1833.

202. 457 U.S. 800 (1982).

203. *Id.* at 813-15.

204. *Wyatt*, 112 S. Ct. at 1831.

205. *Id.* at 1832.

206. As Chief Justice Rehnquist pointed out, "[d]escribing the common law as providing a 'defense' is something of a misnomer." In context, "defense" is a "useful shorthand for capturing plaintiff's burden and the related notion that a defendant could avoid liability by establishing either a lack of malice or the presence of probable cause." *Id.* at 1838 n.1 (Rehnquist, C.J., dissenting).

207. *Id.* at 1832 (majority opinion; emphasis added).

208. *Id.* (citation and quotations omitted).

209. *Id.*

210. *Id.* at 1833 (emphasis added).

211. *Id.* at 1834.

Furthermore, the Court was careful not to foreclose the availability of the defenses argued by Cole in support of immunity.²¹²

In dissent, Chief Justice Rehnquist argued that public policy warrants extending immunity to private defendants because “society will be benefitted if private parties rely on the law to provide them a remedy, rather than turning to some form of private, and perhaps lawless, relief.”²¹³ Calling the decision a “needlessly fastidious adherence to nomenclature,”²¹⁴ Chief Justice Rehnquist pointed out that, because probable cause is a question of law to be decided on summary judgment, denying the earlier relief of qualified immunity “will only manage to increase litigation costs needlessly for hapless defendants.”²¹⁵

Justice Kennedy’s concurrence supported this adherence to nomenclature, pointing out that, “[b]y casting the rule as an immunity, we imply the underlying conduct was unlawful, a most debatable proposition in a case where a private citizen may have acted in good-faith reliance upon a statute.”²¹⁶ Extended back to *Harlow*, however, this view implies that government officials’ unlawful conduct is immunized, a most unseemly proposition itself.

Contrary to the holding in *Wyatt*, the attorney/state actor should have the same qualified immunity as state officials. The absence of such immunity, however, is not a profound threat to attorneys whose practice area already makes them adept litigators. Two observations place *Wyatt*’s rejection of qualified immunity for private section 1983 defendants in perspective.

On one hand, this Note’s state action model is less palatable if qualified immunity is not available to private defendants. Chief Justice Rehnquist’s observation is apt:

[I]t is at least passing strange to conclude that private individuals are acting ‘under color of law’ because they invoke a state garnishment statute and the aid of state officers . . . but yet deny them the immunity to which those same state officers are entitled, simply because the “private” parties are not state employees.²¹⁷

The rule that section 1983 immunity can exist only if it was available at the time of the statute’s passage is aptly criticized by one commentator, who asks: “If the common law is to be the guiding light, should not the law of [section] 1983 at least be able to benefit from the genius of the common law system, the abilities to evolve to meet changing

212. *Id.*

213. *Id.* at 1839 (Rehnquist, C.J., dissenting).

214. *Id.* at 1838.

215. *Id.* at 1839.

216. *Id.* at 1836 (Kennedy, J., concurring).

217. *Id.* at 1840 (Rehnquist, C.J., dissenting).

conditions and to learn from the foibles of the past?"²¹⁸ Important policies like those that supported *Harlow's* extension of immunity exist where parties resort to the court system. For example, the courts' traditionally restrictive approach to attorney liability has been justified by the policy that "it is socially more useful to provide broad encouragement to prospective litigants to resort to court with real or imagined grievances rather than hedge access with requirements of good faith."²¹⁹ *Wyatt* should be reversed or limited to its facts. Extending qualified immunity to attorneys who use procedural discretion in good faith, instead of requiring them to make the same showing later on summary judgment, would reduce the perceived danger of the model's apparent expansion of attorney liability.

On the other hand, denying attorneys qualified immunity is not a radical leap into protracted professional liability litigation. Absent immunity, a section 1983 action against attorneys should be allowed only after a showing of probable cause.²²⁰ It would be no great burden to require attorneys—litigators, in particular, who invoke procedures against adverse parties—to withstand a summary judgment motion on their own good faith or probable cause. *Harlow's* protection of certain government officers from the perils of litigation does not necessarily have to extend to those whose professional calling is courting those very perils. Society would benefit, despite an increase in attorney liability litigation, from the decrease in rights-infringing intimidation suits.

C. SLAPP-Plaintiffs' Attorneys as State Actors Liable Under Section 1983

This Part returns to the problem of SLAPPs, exploring how SLAPP-plaintiffs' attorneys should be liable for civil rights infringement under 42 U.S.C. § 1983. A simple complaint under the Federal Rules of Civil Procedure is a framework for discussing plaintiffs' attorneys' use of procedure as state action. Then, some elements of a successful SLAPP are added to the batter. The complaint is, of course, the first in a long series of filings that require adverse parties to respond on pain of monetary or other loss.

The Federal Rules of Civil Procedure give attorneys carte blanche to file suit.²²¹ Upon filing, the clerk issues and delivers a sum-

218. Martin A. Schwartz, *Private Defendants Are Denied Qualified Immunity*, N.Y. L. J., July 21, 1992, at 3.

219. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 233 (1986).

220. See *supra* notes 98-101 and accompanying text.

221. "A civil action is commenced by filing a complaint with the court." FED. R. CIV. P. 3. Rule 11 and other disincentives to frivolous litigation come into play *after* the defendant has been served and has hired an attorney—and well after a SLAPP has achieved most of its purpose.

mons to the plaintiff or the plaintiff's attorney, who is responsible for service of the summons and a copy of the complaint.²²² By writing or symbol, the summons holds out in four places the authority of the court or the federal rules. On this authority, the summons threatens default judgment.²²³

The rules grant attorneys discretion on when to file, against whom to file, in what jurisdiction, on what factual bases, on what legal theories, for what amount—the list is truly endless. These grants of discretion lessen societal costs by reducing the number of decisions that must be made by the formal elements of the justice system: judges, magistrates, clerks, and the like. Each grant of discretion replaces a judge's or other state officer's determination with that of an attorney trained and obliged to use that discretion properly.²²⁴ Filing suit is a procedure used adversely to, and to the legal detriment of, the

222. FED. R. CIV. P. 4. A formbook appears as follows:

SUMMONS

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

Civil Action, File Number _____

A. B., Plaintiff	}	<i>Summons</i>
v.		
C. D., Defendant		

To the above-named Defendant:

You are hereby summoned and required to serve upon _____, plaintiff's attorney, whose address is _____, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk of the Court.

[Seal of the U.S. District Court]

Dated _____

(This summons is issued pursuant to Rule 4 of the
Federal Rules of Civil Procedure).

(As amended Dec. 29, 1948, eff. Oct. 20, 1949.)

WEST PUBLISHING CO., FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 219 (1993) (reprinted with permission, Copyright © 1993 by West Pub. Co.).

223. WEST PUBLISHING CO., *supra* note 222, at 219. One of the rationales for the state action finding in *Edmonson v. Leesville Concrete*, 111 S. Ct. 2077 (1991), discussed *supra* notes 146-53 and accompanying text, and *Georgia v. McCollum*, 112 S. Ct. 2348 (1992), discussed *supra* notes 154-69 and accompanying text, was the state's apparent imprimatur on the peremptory challenge. The state's imprimatur on a complaint is factually distinguishable, of course, but only in ways not meaningful to legal laypeople.

224. *See infra* notes 229-33 and accompanying text.

defendant. The summons issued based on a filing carries with it state compulsion and state power.

A SLAPP-plaintiff's attorney can manipulate the discretions available within this procedure to suppress the speech and political activity of his or her client's opponents. Filing a frivolous claim against legal laypeople based on their participation in constitutionally protected speech activity is an example. An attorney who uses his or her power in this way is a state actor who has deprived persons of their First Amendment rights, and who should be liable under 42 U.S.C. § 1983.

III. Liability of SLAPP-Plaintiffs' Attorneys Under Section 1983

This Part discusses the advantages over other deterrents of using section 1983 against SLAPP-plaintiffs' attorneys. Ideally suited as they are to prevent the filing of frivolous suits, attorneys are appropriate objects of liability when they do not. Finally, this part discusses the possibility that the Sanitary District's attorneys in the *La Pointe* case could have been liable under section 1983.

A. Section 1983 Liability Compared to Other SLAPP Deterrents

As a deterrent, section 1983 liability compares favorably to, or enhances, other deterrents. Section 1983 damages are less determinate and predictable than attorney's fees awards. The indeterminacy of a potential damage award should discourage SLAPP plaintiffs and their attorneys from incorporating legal fees and damages into the calculus of a project they are trying to push through.²²⁵

Section 1983 damages have the dual advantages over Rule 11 sanctions of (1) providing a discrete harm to be recompensed, and (2) supporting an award that incorporates the significance of constitutional violations. Where Rule 11 sanctions punish for pleadings "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,"²²⁶ a section 1983 action fully develops the constitutional harm done to the SLAPP defendant and elicits corresponding damages.

The section 1983 action shares a disadvantage with other counter-suit theories: the litigation is extended for the countersuing SLAPP defendant. A section 1983 countersuit, however, does not require a favorable outcome for the defendant in the main suit before it can be

225. See *supra* text accompanying note 63.

226. FED. R. CIV. P. 11.

brought, a distinct advantage over the malicious prosecution counterclaim.²²⁷

Section 1983 damages enhance the prospect of successfully pursuing a SLAPP countersuit. The possibility of a substantial recovery should motivate attorneys to pursue SLAPP countersuits on a contingency fee structure, which is ideally suited for the SLAPP defendant wary of litigation expenses. Furthermore, attorneys' fees and expert fees are recoverable in a section 1983 action.²²⁸ This gives section 1983 another distinct advantage over malicious prosecution and other common law theories, where attorneys' fees come out of the damage recovery.

Ideally, section 1983 liability would deter altogether the filing of SLAPPs, achieving the best solution to the SLAPP problem. This would completely protect defendants and third parties from the costs and chilling effects of SLAPPs, without depriving plaintiffs of due process.

B. Attorneys as the Most Efficient Cost Avoiders

The costs of frivolous claims to defendants and society are manifest. An early study indicated that the average SLAPP defendant was engaged in the litigation for an average of thirty-two months,²²⁹ a figure from which one can presume substantial legal fees and expenses. During 1985, the average value of defendants' time and expenses (exclusive of legal fees and expenses) in tort cases generally was estimated to be between \$6,125 and \$6,467.²³⁰ The most important costs of SLAPPs, however, are intangible: the loss to citizens of their free and active participation in the political process, and the loss to society in citizen activism and participation.

A countersuit theory for section 1983 damages utilizes the ability of attorneys to distinguish meritorious claims from non-meritorious ones. Given attorneys' ethical standards and training, they can and should be responsible for filtering out frivolous and rights-menacing suits. The American Bar Association has stated that "[a]s a member of a profession that bears special responsibilities for the quality of justice," a lawyer should be committed to the value of promoting justice, fairness, and morality.²³¹ This includes "counseling clients to take [these] considerations . . . into account when the client makes deci-

227. See *supra* text accompanying note 72.

228. 42 U.S.C. § 1988(b)-(c) (Supp. III 1991).

229. Canan & Pring, *supra* note 1, at 389.

230. JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 61 (1986).

231. ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 140 (1992). This statement disavows enumerating "ingredients that are either necessary or suf-

sions or engages in conduct that may have an adverse effect on other individuals or on society.”²³² Under these standards, “[e]ffective counseling requires . . . [a]ttempting to persuade the client to modify his or her decisions or actions to accommodate the[se] interests . . . and . . . [t]aking action to safeguard the interests of third parties or the general public; or . . . [w]ithdrawing from representation of the client.”²³³ Attorneys should be held to know of, consider, and counsel their clients regarding the constitutional rights of adverse parties. Because attorneys are aware of constitutional rights, and because they are ethically obligated to promote justice and fairness, they should be responsible for distinguishing valid causes of action from frivolous ones. They alone can prevent costly frivolous suits from ever being filed.

Requiring attorneys to use their discretion is the most efficient way to avoid both the monetary and First Amendment costs of SLAPPs. In the parlance of the law and economics movement, attorneys are the most efficient cost-avoiders of frivolous litigation. When attorneys use the state’s dispute resolution mechanism to stifle free speech and to gain political advantage for their clients, they should be held liable under section 1983.

C. Possible Liability of the Sanitary District’s Attorneys in *La Pointe v. West Contra Costa Sanitary District*

Though the theory was not tested in the *La Pointe* case, the Sanitary District’s lawyers may have been accountable under 42 U.S.C. § 1983 for bringing the Sanitary District’s SLAPP. The clear elements of a section 1983 claim are (1) a violation of a federally protected right, (2) by a state actor.²³⁴ Though section 1983 has never been found to contain a state-of-mind requirement,²³⁵ and its language does not suggest one,²³⁶ there probably would be a requirement of at least knowing or reckless action in the context of a SLAPP countersuit.²³⁷

The verdict in *La Pointe*’s suit against the Sanitary District establishes that his First Amendment rights were violated. The second ele-

ficient to avoid malpractice,” *id.* at 132, but describes ethical standards to which the bar should be held.

232. *Id.* at 213.

233. *Id.* at 176-77.

234. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

235. *Parratt v. Taylor*, 451 U.S. 527, 534 (1981).

236. Compare 42 U.S.C. § 1983 with 18 U.S.C. § 242 (1988) (section 1983’s criminal counterpart, which provides: “Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any [person] to the deprivation of any rights . . .” (emphasis added)); see *Parrat*, 451 U.S. at 534-35.

237. See *Parrat*, 451 U.S. at 547-49 (Powell, J., concurring); *Harrison v. Brooks*, 446 F.2d 404, 407 (1st Cir. 1971) (holding that where “state official’s judgment and discretion are of vital concern,” at least knowledge or recklessness must be alleged).

ment is established if one accepts this Note's theory that attorneys are state actors when using procedure adversely to their clients' opponents. Several facts from the *La Pointe* case suggest that the Sanitary District's attorneys may have been reckless, or worse, in bringing the SLAPP.

The Sanitary District's countersuit alleged La Pointe to have taken acts that fall clearly within well-established constitutional protections. One of the Sanitary District's defense strategies in La Pointe's section 1983 suit was to point out its reliance on advice of counsel. "The board initially discussed whether this is protected constitutional speech' its defense counsel said in opening argument, 'and the lawyer said, No, this went over the line, you can bring a lawsuit.'"²³⁸ If the Sanitary District actually asked its attorneys whether La Pointe's speech was constitutionally protected and received such a reply, this raises a strong inference that the attorneys were at least reckless. Handwritten notes produced by the Sanitary District's attorneys to La Pointe suggest that *the attorneys* thought better of some allegations, but left them in the cross-claim at the behest of the Sanitary District.²³⁹ This raises an equally damning inference—that the attorneys filed the suit knowing of its potential harm to First Amendment rights.

The timing of the SLAPP, one month before a major hearing on the burn plant,²⁴⁰ could suggest either knowledge or intention²⁴¹ that the suit would discourage public opposition. This inference would be especially strong if the statute of limitations on the SLAPP's causes of action extended any great length beyond the time of the hearing.

Finally, the use of "Doe" defendants²⁴² may raise inferences about the Sanitary District's attorneys' state of mind. A newspaper article appearing the day after the Sanitary District's attorneys filed the counterclaim included the following: "The countersuit . . . takes aim at up to 500 unidentified people who the district contends have conspired with La Pointe. The district plans to begin identifying those persons within the month, [a Sanitary District attorney] said."²⁴³ If the attorneys used "Does" to allow or enhance the intimidating power

238. Woody, *supra* note 8, at 1 (internal quotations omitted).

239. The notes read as follows: "Meeting w/PI [Public Information] committee at [illegible] re x/c [cross-complaint] & press release. [Board member], [board member], [District's outside publicist], [attorney]. Recommend removal of "politically & philosophically" opposed language from x/c & press release. [District's outside publicist] disagrees, as does PI [committee]. Leave as-is, file & serve." Handwritten notes of Sanitary District attorney (Feb. 24, 1988) (on file with the *Hastings Constitutional Law Quarterly*).

240. See *supra* note 16 and accompanying text.

241. The timing alone of a SLAPP would not raise an inference of recklessness.

242. See *supra* note 15 and accompanying text.

243. Michael Hytha, *WestSan Files Countersuit in Energy-plant Plan Case*, W. COUNTY TIMES (Contra Costa County), Feb. 27, 1988, at 2A.

of the Sanitary District's public announcement of the suit, this would support an inference of knowledge or intention.

These facts, and others not developed during discovery or trial, may have been sufficient to show that the Sanitary District's attorneys had the state of mind requisite to liability under section 1983 for infringing Alan La Pointe's First Amendment rights.

Conclusion

The SLAPP genre of intimidation suit is particularly harmful because of its effects on active citizen discussion of public issues. The defenses to SLAPPs provide tardy reassurance to SLAPP defendants, and the deterrents that exist in attorney's fees awards, Rule 11 sanctions, and attorney disciplinary proceedings are insufficient. A solution to the problem should protect defendants from the legal costs of SLAPPs, eliminate their "chilling effects," resolve them quickly, discourage attorneys from filing them, and eliminate the economic incentives to file them, but not be reactionary.

Adding damages awards against attorneys for violating 42 U.S.C. § 1983 would provide an additional deterrent and an arrow in the SLAPP defendant's countersuit quiver. Section 1983 compares favorably to other countersuit theories and it exploits the fact that attorneys are the most efficient cost avoiders for frivolous suits.

The state action doctrine should not be a hurdle to holding attorneys liable under section 1983. The Supreme Court's cases in the areas of defense counsel, peremptory challenges, and prejudgment remedies show that attorneys are state actors as to adverse parties against whom they use state procedures. When an attorney's manipulation of procedural discretion violates the adverse party's civil rights, the attorney should be held liable under section 1983. Though an attorney/state actor should have qualified immunity, after *Wyatt* such an attorney must establish a good faith defense, such as probable cause, which may be decided at the summary judgment stage. To the end of protecting free and active citizenship, this price is not extraordinary.