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Reducing the Cost of Free Expression: A Call for Fee Shifting in Cases Challenging Freedom of Expression

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Introduction

On March 24, 1979, Jocelyn Vargas was shot outside the Alhambra Theatre on Polk Street in San Francisco after attending a showing of the movie *Boulevard Nights*.[1] On March 23, 1980, William Alm was injured in his home when a tool he was making shattered.[2] On October 26, 1984, John Daniel McCollum shot himself to death after listening to Ozzy Osbourne's song *Suicide Solution*.[3] In January 1988 Wilhelm Winter and Cynthia Zheng consumed poisonous mushrooms, became critically ill, and later required liver transplants.[4]

The common thread joining this seemingly disparate list of personal injuries or tragedies is the attempt, unsuccessful in each circumstance, to blame the injuries, or death, on words or pictures. In each case the defendants incurred substantial legal fees in their defense, fees not recoverable from the plaintiffs. Each defendant learned by experience the true cost of free expression, and unless the rules of the game are changed, many others will learn that same expensive lesson.

I
Personal Injury Claims Brought Against Those Who Exercise Rights of Free Expression

A. Claims of Physical Injury

Jocelyn Vargas asserted that the makers of the film *Boulevard Nights*

> knew, or should have known, that said movie was a violent movie and would attract certain members of the public to view said movie who were prone to violence and who carried weapons . . . [and] would, or were likely to cause grave bodily injury upon other members of the general public at or near the showing of said movie

and that they "negligently failed to warn" Vargas of these facts.[5] Claiming negligence and negligent misrepresentation, William Alm sued the publisher and author of a book entitled *The Making of Tools*.[6] The parents of John Daniel McCollum, a nineteen year-old with serious emotional problems and a history of alcohol abuse, sued multiple defendants involved in the recording and distribution of Ozzy Osbourne's music under theories of negligence, product liability, and

1. Bill v. Superior Court, 187 Cal. Rptr. 625, 626 (Ct. App. 1982).
2. Alm v. Van Nostrand Reinhold Co., 480 N.E.2d 1263, 1264 (Ill. Ct. App. 1985).
3. McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 189-90 (Ct. App. 1985).
4. Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1034 (9th Cir. 1991).
5. *Bill*, 187 Cal. Rptr. at 626.
6. *Alm*, 480 N.E.2d at 1264, 1266.

intentional misconduct.[7] Wilhelm Winter and Cynthia Zheng sued the publishers of *The Encyclopedia of Mushrooms* under theories of product liability, breach of warranty, negligence, negligent misrepresentation, and false representations, alleging that the book contained erroneous information about a deadly mushroom that led them to believe the variety was, in fact, one of the edible types.[8]

B. Claims of Emotional Injury

In two very recent unreported cases, efforts were made to impose substantial economic liability on authors because their words allegedly caused not physical injuries but emotional damage to readers and their family members.[9] On April 27, 1994, plaintiffs Kimberly Mark and her husband William Mark filed a complaint in the Superior Court of the State of California for the County of San Luis Obispo against a number of therapists, two organizations, and Laura Davis, author of *The Courage to Heal Workbook*.[10] That book, authored and published in 1990, was intended to complement a book published two years earlier by Laura Davis and Ellen Bass entitled *The Courage to Heal*.[11] Both books were designed to assist those who were, or might have been, victims of childhood sexual abuse to recognize and overcome the emotional toll of such abuse. The books posit the belief that the human mind is capable of repressing memories of seriously traumatic events and offer guidance and counseling to those who believe they perhaps were victims of childhood sexual abuse, but who have either no memories or incomplete memories of specific events.

In addition to suing the defendant therapists for medical malpractice and negligence, Kimberly Mark also sued author Laura Davis for misrepresentation and negligence.[12] Mark alleged that *The Courage to Heal Workbook* was filled with factual misstatements which "taught and/or induced" her to believe that certain memories she had of childhood sexual abuse were real, when in fact they were false.[13] Mark alleged that both her therapy and the book caused her substantial

7. *McCollum*, 249 Cal. Rptr. at 188-89.

8. *Winter*, 938 F.2d at 1034.

9. *See* David v. Jackson, No. 540624 (Cal. Super. Ct. Sacramento County filed June 22, 1994); Mark v. Davis, No. 075386 (Cal. Super. Ct. San Luis Obispo County filed Apr. 27, 1994).

10. Mark v. Davis, No. 075386 (Cal. Super. Ct. San Luis Obispo County filed Apr. 27, 1994).

11. ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL (1st ed. 1988); LAURA DAVIS, THE COURAGE TO HEAL WORKBOOK (1990).

12. Mark v. Davis, No. 075386 (Cal. Super. Ct. San Luis Obispo County filed Apr. 27, 1994).

13. *Id.*

emotional distress and seriously damaged her relationship with her family by leading her to falsely accuse her father of molestation.[14] Her husband sued for loss of consortium.[15]

Shortly thereafter, Deborah David, her husband, children, and parents filed suit in the Superior Court of the State of California for the County of Sacramento against a number of therapists, an organization, and both Laura Davis and Ellen Bass.[16] In her First Amended Complaint filed on June 22, 1994, David brought claims against the authors for medical malpractice, intentional infliction of emotional distress, negligence, negligent infliction of emotional distress, negligent referral and supervision, loss of consortium/affection, breach of fiduciary duty, false advertising, fraud and misrepresentation, public nuisance, breach of contract, and breach of implied covenant of good faith and fair dealing.[17] She asserted that her therapists and both books convinced her that memories of childhood sexual abuse were real, when in fact they were false.[18] Just as Kimberly Mark had alleged, David alleged that she confronted her father, accused him of molesting her as a child, and thereby devastated her family and interfered with her relationship with her parents and their relationship with her children.[19]

C. Logical Justification for Injury Claims Flowing from Free Expression

It cannot be disputed that Jocelyn Vargas, William Alm, John McCollum, Wilhelm Winter, and Cynthia Zheng each suffered a discernable and identifiable physical injury, or that the resulting suits each alleged a credible nexus between a work of creativity and a physical injury. If a book represented as an authoritative source on the selection and consumption of mushrooms misidentified a mushroom as safe and edible when it was in fact deadly, or if a book describing the proper method of making tools erred in its instructions such that one who carefully followed those instructions suffered personal injury, to

14. *Id.*

15. *Id.*

16. David v. Jackson, No. 540624 (Cal. Super. Ct. Sacramento County filed June 22, 1994).

17. *Id.*

18. *Id.*

19. *See id.*; Mark v. Davis, No. 075386 (Cal. Super. Ct. San Luis Obispo County filed Apr. 27, 1994). In the cases filed by Deborah David and Kimberly Mark, the respective courts sustained demurrers without leave to amend and entered judgments of dismissal. *See* Mark v. Davis, No. 075386 (Cal. Super. Ct. San Luis Obispo County Oct. 7, 1994) (order sustaining demurrers of defendant and judgment of dismissal); David v. Jackson, No. 540624 (Cal. Super. Ct. Sacramento County Sept. 8, 1994) (order sustaining demurrers of defendants and judgment of dismissal).

impose liability for such errors does not offend logic or reason. After all, the accuracy or inaccuracy of the factual statements made in those volumes can be proven, as can a causal link between any factual error and the resulting physical injury. Similarly, when a rock star in his song counsels young listeners to commit suicide, and one does, or when movie producers have reason to know because of earlier incidents that a particular movie invites a violent reaction, but fail to take steps to protect or warn patrons, there may be a reasonable and logical argument that would support the imposition of monetary liability.

In contrast, the emotional injuries assertedly suffered by Kimberly Mark, Deborah David, and their respective families are somewhat less demonstrable than the physical injuries of Jocelyn Vargas, William Alm, John McCollum, Wilhelm Winter, or Cynthia Zheng, and the mechanism of injury is less clear. The fundamental logic, however, that suggests the possibility of imposition of liability against a book author for physical injury would support the imposition of like liability for emotional injury. The books at issue are aimed at a market of emotionally vulnerable readers, and by their terms direct such readers through the process of determining whether or not they were victims of sexual abuse as children, and guide them along the road to recovery in the event they were. It is certainly foreseeable that many who would read either or both books are characterized most sharply by their emotional fragility, and likely would be influenced by those who have expertise in the area of emotional healing. Consequently, it is foreseeable that some readers would be convinced erroneously by the books' teachings that they were victims of particular conduct at the hands of their parents, that they would then confront their parents, and by so doing would damage their family relationships. Given the foreseeability of such harm occurring to some small percentage of the readers of the books, one can argue that the authors of such books should be liable in such circumstances. The law, however, is properly to the contrary.

II
Both the First Amendment and the Common Law Bar Such Lawsuits

A. Established Law Prohibits Claims of Injury Based on the Exercise of Rights of Free Speech

The First Amendment clearly applies to the publication and distribution of books,[20] and the rights it grants are accorded a preferred place in our democratic society.[21] Above all else, the First Amendment "means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," whether by injunction or by economic penalty.[22]

As the Court noted in *Smith v. California*, the free publication and dissemination of books and other forms of printed words are within constitutionally protected freedoms of liberty of press and speech;[23] it is immaterial that dissemination takes place under commercial auspices.[24] "[T]he central concern of the First Amendment . . . is that there be a free flow from creator to audience of whatever message a film or a book might convey. . . . [T]he central First Amendment concern remains the need to maintain free access of the public to the expression."[25]

Subject to certain limited exceptions,[26] authors, publishers, musicians, and movie producers owe no duty to the general public for injuries allegedly resulting from the content of their respective works.[27] Courts in California[28] and elsewhere[29] have relied on a combination of the First Amendment, traditional common law principles, and pub-

20. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 (1963); Smith v. California, 361 U.S. 147, 149-50 (1959), *reh'g denied*, 361 U.S. 950 (1960); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938). "First Amendment guarantees of freedom of expression extend to all artistic and literary expression, whether in music, concerts, plays, pictures or books." McCollum v. CBS, Inc., 249 Cal Rptr. 187, 192 (Ct. App. 1988) (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981)).

21. Thomas v. Collins, 323 U.S. 516, 530 (1945), *reh'g denied*, 323 U.S. 819 (1945).

22. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972). *See also* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

23. 361 U.S. at 149-50, *reh'g denied*, 361 U.S. 950 (1960).

24. *Id.* at 150.

25. Young v. American Mini Theatres, Inc., 427 U.S. 50, 77 (1976) (Powell, J., concurring), *reh'g denied*, 429 U.S. 873 (1976).

26. *See, e.g.*, McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 192-93 (Ct. App. 1988); Olivia N. v. NBC, 141 Cal. Rptr. 511, 513-14 (Ct. App. 1977) [hereinafter *Olivia I*], *cert. denied*, NBC v. Niemi, 435 U.S. 1000 (1978).

27. *See, e.g.*, Olivia N. v. NBC, 178 Cal. Rptr. 888 (Ct. App. 1981) [hereinafter *Olivia II*].

28. *See, e.g.*, McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Ct. App. 1988); Bill v. Superior Court, 187 Cal. Rptr. 625 (Ct. App. 1982).

lic policy considerations in determining that these artists owe no duty to plaintiffs allegedly harmed by their publications. The overriding themes common to these decisions are the courts' recognition of the chilling effect upon free expression that such liability would create and a universal unwillingness to so chill free expression.

In *Olivia N. v. NBC*, the plaintiff, who was attacked and "artificially raped" with a bottle, sued a television network and its San Francisco affiliate claiming that the assailants had been incited to their action because they had seen a similar attack the previous evening in a television film.[30] The trial court dismissed the case after plaintiff's counsel indicated in opening statement that the plaintiff would not attempt to prove that the television movie was intended to incite the "artificial rape."[31] The court of appeal affirmed, holding that the movie was constitutionally protected and that plaintiffs could not establish tort liability absent a showing of intended incitement:

> Appellant does not seek to impose a prior restraint on speech; rather, she asserts civil liability premised on traditional negligence concepts. But the chilling effect of permitting negligence actions for a television broadcast is obvious. "The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." Realistically, television networks would become significantly more inhibited in the selection of controversial materials if liability were to be imposed on a simple negligence theory . . . . The deterrent effect of subjecting the television networks to negligence liability because of their programming choices would lead to self-censorship which would dampen the vigor and limit the variety of public debate.[32]

The protections granted by the First Amendment may yield in the face of intended incitement of lawless conduct, but not in the face of alleged negligence.

In *Bill v. Superior Court*[33] a California Court of Appeal rejected on First Amendment grounds the plaintiff's attempt to impose liability based upon the content of a movie:

> Film producers considering a movie about gangs, or about violence, or bearing some resemblance to a movie which attracted violence-prone persons, would be required to take into account the potential for liability to patrons for acts of violence on the part of persons over whom the producers would have no control. If, under such

29. *See, e.g.*, DeMuth Dev. Corp. v. Merck & Co., 432 F. Supp. 990 (E.D.N.Y. 1977); Roman v. City of New York, 442 N.Y.S.2d 945 (1988); Alm v. Van Nostrand Reinhold Co., 480 N.E.2d 1263 (Ill. Ct. App. 1985).

30. *Olivia II*, 178 Cal. Rptr. at 890-91.

31. *Id.* at 891.

32. *Id.* at 892 (citations omitted) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964)).

33. 187 Cal. Rptr. 625 (Ct. App. 1982).

> circumstances, they were held to have a duty to warn potential patrons of the risk of attending their movie, they would have to anticipate that the warning would deter substantial portions of the public from attending it .... And if, under such circumstances, they were held to be responsible for providing security protection at and in the vicinity of every theater at which the movie is shown, including public streets, the attendant costs might be substantial indeed. It is thus predictable that the exposure to liability in such situations would have a chilling effect upon the selection of subject matter for movies similar to the effect which concerned the court in *Olivia N.*[34]

The court also discussed plaintiff's claims under established principles of common law and held that the defendants did not owe any duty to the plaintiff, even independent of First Amendment concerns.[35]

In *McCollum v. CBS, Inc.*[36] a California Court of Appeal relied on both constitutional and common law principles to dispose of an action seeking to impose liability for exercise of First Amendment freedoms. The court held that the plaintiffs' pleading failed to allege any basis for overcoming the bar of the First Amendment's guarantee of free speech and expression, and affirmed the order of dismissal following the sustaining of a demurrer without leave to amend.[37]

The court also concluded as a matter of law that the defendants owed no duty to the plaintiffs and that the decedent's suicide was not a reasonably foreseeable risk or consequence of the defendants' artistic expression.[38] In concluding its duty analysis, the court stated,

> Finally, and perhaps most significantly, it is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. Such a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation and controversy. No case has ever gone so far. We find no basis in law or public policy for doing so here.[39]

Finally, the court held that because there were no allegations that the defendants intended to cause the decedent's suicide, the plaintiffs' intentional tort theories must also fail.[40]

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34. *Id.* at 628-29.

35. *Id.* at 630-34.

36. 249 Cal. Rptr. 187 (Ct. App. 1988).

37. *Id.* at 191-98. The court disposed of the case on First Amendment grounds, holding that because the recorded lyrics did not constitute an incitement to commit suicide, the lyrics were a form of protected expression. *Id.* at 196. To hold otherwise "would lead to a self-censorship which would dampen the vigor and limit the variety of artistic expression." *Id.* at 195.

38. *Id.* 196-97.

39. *Id.* at 197 (footnote omitted).

40. *Id.* at 197-98.

In *Winter v. G.P. Putnam's Sons*, the court relied on both First Amendment principles and traditional tort analysis.[41] "Guided by the First Amendment and the values embodied therein," the court declined to extend liability under any of the plaintiffs' articulated theories "to the ideas and expression contained in a book."[42] The court continued,

> We conclude that the defendants have no duty to investigate the accuracy of the contents of the books it publishes. A publisher may of course assume such a burden, but there is nothing inherent in the role of publisher or the surrounding legal doctrines to suggest that such a duty should be imposed on publishers. Indeed the cases uniformly refuse to impose such a duty. Were we tempted to create this duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs.[43]

Because the plaintiffs did not pursue the authors of *The Encyclopedia of Mushrooms*, the court was not compelled to consider the question of author liability.[44]

Other courts have reached the same conclusion. For example, in *DeMuth Development Corp. v. Merck & Co.* the plaintiff, a chemical manufacturer, sued Merck, the publisher of a drug and chemical encyclopedia, for the negligent and willful misrepresentation of the toxicity of a chemical manufactured by the plaintiff, which allegedly caused a loss of the plaintiff's business and customers.[45] The court granted Merck's motion for summary judgment, holding that the publisher owed no legal duty to the plaintiff.[46] The fact that the defendant published the encyclopedia for a serious purpose and expected its readers to rely upon it as an authoritative source did not create a basis for liability:

> Nor does plaintiff point to any "relationship of the parties, arising out of contract or otherwise," which "in morals or good conscience" placed Merck under any duty towards plaintiff or its business. On the contrary, Merck's right to publish free of fear of liability is guaranteed by the First Amendment, and the overriding societal interest in the untrammeled dissemination of knowledge. The right is circumscribed only by laws such as those respecting national secrets, copyright, obscenity, defamation and unfair competition. The court has already held that no claim for defamation is stated and plaintiff does not rely on any grounds other than negligence and willful misrepresentation.[47]

41. 938 F.2d 1033 (9th Cir. 1991).
42. *Id.* at 1036.
43. *Id.* at 1037.
44. *Id.* at 1034.
45. 432 F. Supp. 990, 993 (E.D.N.Y. 1977).
46. *Id.*
47. *Id.* (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)).

Despite an alleged factual misrepresentation, the court refused to impose a duty upon Merck.[48] To do so would create "the spectre of unlimited liability, with claims devastating in number and amount crushing the defendant because of a momentary lapse from proper care."[49]

In the case of *Roman v. City of New York*, a New York Supreme Court found that authors and publishers of written materials owe no duty to prospective readers.[50] The *Roman* court, relying on common-law principles, held that defendant Planned Parenthood was not liable to the plaintiff for an alleged misstatement contained in a booklet it published.[51] The plaintiff obtained the booklet at issue after attending a lecture on sterilization and allegedly relied upon statements therein that pregnancy was not possible and contraceptives were not necessary following a tubal ligation.[52] The plaintiff later received a tubal ligation, did not use contraception, and subsequently became pregnant.[53]

The court's discussion focused largely on its conclusion that Planned Parenthood did not owe a duty to the plaintiff for an alleged negligent misstatement contained in the booklet.[54] After determining that a defendant is bound only where some relational duty arises, either by contract, public calling, or otherwise, the court stated,

> This court need not decide whether a relational duty would have existed if plaintiff Carmen Roman had sought out Planned Parenthood's advice. She did not. The evidence is clear and overwhelming that plaintiff sought the advice of friends and relatives and relied on the knowledge of the physicians and staff at Queens General Hospital. She did not go to defendant and defendant did not contact her. Their sole relationship is her fortuitous receipt of defendant's booklet at the hospital. That defendant pointedly intended the booklet to provide information to the general public, including plaintiff, and the fact that it could have reasonably foreseen plaintiff's reliance thereon, does not change the result. One who publishes a text cannot be said to assume liability for all "misstatements", said or unsaid, to a potentially unlimited public for a potentially unlimited period.[55]

48. *Id.* at 993-95.

49. *Id.* at 993-94 (quoting WILLIAM PROSSER, LAW OF TORTS 708 (4th ed. 1971)).

50. 442 N.Y.S.2d 945 (1981).

51. *Id.* at 947-48.

52. *Id.* at 946.

53. *Id.*

54. *Id.* at 947. The court very quickly disposed of the plaintiff's claim that the statements in the booklet constituted actual fraud, as there was no evidence to support a conclusion that such statements constituted a knowing or intentional misrepresentation. *Id.*

55. *Id.* at 947-48 (citations omitted). In Alm v. Van Nostrand Reinhold Co. the court refused to impose negligence liability upon the publisher. 480 N.E.2d 1263 (Ill. Ct. App. 1985). The court cited language identical to that cited by the court in *Roman* and held that

Deborah David's sole relationship with Laura Davis and Ellen Bass was the fortuitous purchase of the books *The Courage To Heal Workbook* and *The Courage To Heal.* William Alm's sole relationship with Van Nostrand Reinhold Company was the fortuitous purchase of a book about the making of tools. John Daniel McCollum's sole relationship with Ozzy Osbourne was the fortuitous purchase of a phonograph record. The fact that Laura Davis and Ellen Bass as well as Van Nostrand Reinhold Company intended their books to provide information and guidance to the general public does not give rise to a duty to every member of the public who reads those books. The fact that Ozzy Osbourne knew of his influence with teenagers likewise does not give rise to a duty to every member of that group who listens to his songs. To hold otherwise would create unlimited liability, to anyone, forever.

B. Policy Considerations Militate Against Such Claims

It is perhaps a hallmark of our time that so many members of the public believe that anything bad that happens to them should be blamed on someone else, and that anything they do not like or with which they do not agree should be suppressed. The First Amendment to the United States Constitution was adopted more than two centuries ago precisely to prevent such censorship, whether by governmental injunction or by the visitation of economic destruction on those who would speak or write.

Claimants such as those described here simply do not possess cognizable claims against book authors or publishers, songwriters, or other artists whose only alleged wrong was their exercise of their constitutionally protected right to express their views, philosophies, and beliefs, in word or image. Recognition of such claims, no matter how logical or compelling they may seem in a particular factual context, can only deter or chill the willingness of people to speak, write, or

to impose a duty on those in the publishing business "would open the doors 'to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.'" *Id.* at 1266 (quoting Yuhas v. Mudge, 322 A.2d 824, 825 (N.J. Super. Ct. App. Div. 1974)). The court refused to create such a severe burden on the defendant. *Id.* at 1265. In addition to reliance on common law principles, the court also based its decision on First Amendment principles and recognized that any action which limits free expression must be scrutinized for potential infringement of the public right of free access to ideas as well as the rights of publishers to freely disseminate ideas. *Id.* at 1267 (citing CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973)). The court dismissed the plaintiff's attempt to distinguish a "how to" book from books on philosophy, politics, religion, and the like, instead recognizing the chilling effect liability would engender. *Alm*, 480 N.E.2d at 1267. "Even if liability could be imposed consistently with the Constitution, we believe that the adverse effect of such liability upon the public's free access to ideas would be too high a price to pay." *Id.*

otherwise express their views by creating the prospect of unlimited liability to all persons who now occupy, or who may at any time in the future occupy, this planet. Such broad liability, and the resultant chill on freedom of expression, will not make the world a safer place, only a more barren one.

III
The Problem

Favorable as the existing protection may seem for authors, lyricists, artists, or other disseminators of words or images, protection must be made more favorable. Absent a method of shifting the cost of successful defense of claims of physical or emotional injury against those who would speak, write, or otherwise disseminate their thoughts, ideas, and views, such lawsuits will continue to be filed. The mere assertion of such claims, even when successfully defended, creates a clear and definable risk of chilling the dissemination of concepts, ideas, and thoughts. At present, the creator-defendant must face the sometimes staggering cost of his or her defense, with no prospect of recovering that cost when the defense is successful. Those who experience that reality, or see others experience it, frequently react by withholding further expression of thoughts and ideas.

IV
An Avenue to a Solution

The problem faced by those who would express their views or thoughts in the fashions described above—having to expend substantial, non-recoverable funds simply to vindicate their clear and uncontrovertible rights—is not unique to such communicators. Others with equal rights of free expression, but who utilize those rights in other contexts, have faced over the years and still face in many jurisdictions precisely the same problem.

Those who speak on public issues, whether political, social, or otherwise, are vulnerable to the same costly suits, and "enjoy" with the same frequency the vindication of their rights at the same excessive level of expense as the authors, artists, and others described earlier. In recent years, for example, citizens who speak out against real estate developments, or against political candidates, ballot propositions, or civic changes, have felt the lash of those who sue to silence and intimidate. Like the authors, publishers, movie producers, and

songwriters in the foregoing cases, those victims of SLAPP[56] suits prevail against such attacks on their freedom of expression, but only at substantial economic cost.

For some victims of SLAPP suits, however, the cavalry is on the way. Some states have recently enacted legislation designed to protect such victims, or at least to shift the costs and fees incurred by them to those responsible for such suits.

In California, for example, the legislature enacted Code of Civil Procedure section 425.16 in 1992.[57] Section 425.16 is designed to provide a mechanism for early challenge to such suits and for fee shifting where appropriate. Under that statute, a person sued for exercising his or her right of speech or press in connection with a public issue may file at the outset of the litigation a special motion to strike. The court must then make a determination as to whether or not the plaintiff has established a probability that he or she will prevail on the claim, and, if not, the court shall both grant the motion to strike and award the defendant his or her attorney fees in bringing that challenge.

Expansion of that statute, and comparable ones, to cover claims made against authors, songwriters, or others exercising their protected right to convey words, images, ideas, and philosophies may be the only method by which such communicators can protect themselves from the sometimes devastating cost of defending their right to free expression. After all, free expression is free expression, whether it is political, informational, or artistic. However, it is hardly "free" if one must spend substantial funds simply to vindicate the right to exercise it. Consequently, there is no reason in law or logic why the mechanism provided in anti-SLAPP legislation could not, and should not, be made available to all who exercise their rights of expression in any context.

V
A Legislative Proposal

Borrowing heavily from California's Code of Civil Procedure section 425.16, the so-called anti-SLAPP legislation, the legislature could readily craft procedural protections that apply to all who would express themselves, whether politically, socially, artistically, or other-

56. SLAPP is becoming recognized as a handy acronym for Strategic Lawsuits to Avoid Public Participation.

57. 1992 Cal. Stat. ch. 726.

wise, and in any medium of expression. The following proposal, for example, would accomplish precisely such an end:

> MOTION TO STRIKE CHALLENGE TO EXERCISE OF RIGHT OF FREE EXPRESSION
>
> (a) A cause of action against a person arising from any act of that person in furtherance of the person's right of free speech or free expression under the United States or California Constitution shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability that the plaintiff will prevail on the claim. In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based;
>
> (b) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination;
>
> (c) In any action subject to subdivision (a), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney fees to a plaintiff prevailing on the motion, pursuant to § 128.5;[58]
>
> (d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, a district attorney, or city attorney, acting as a public prosecutor;
>
> (e) As used in this section, "act in furtherance of a person's right of free speech or free expression under the United States or California Constitution" includes any written, oral, pictorial, or graphic presentation or representation of any opinion, philosophy, thought, idea, perspective, or characterization, and shall be interpreted broadly to accomplish the purpose of this statute.

Such a rule balances the legitimate interests of plaintiffs who have meritorious claims not barred by clear authority and communicators who should not be forced to foot the bill to defeat non-meritorious claims barred by such clear authority. Subdivision (a) allows a defendant to mount an early challenge to a case attacking his or her exercise of the right of free expression and to shift the economic burden of that challenge if successful, while subdivision (c) discourages frivolous challenges by shifting the costs thereof.

58. California Code of Civil Procedure § 128.5 authorizes the shifting of costs and attorney fees to a party, the party's counsel, or both for "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." CAL. CIV. PROC. CODE § 128.5 (West Supp. 1995).

VI
Conclusion

A single unsupportable claim against a protected dissemination of words, images, or thoughts inflicts economic damage and chills expression. Several such claims, even if defeated, inflict economic devastation and ultimately cause silence, actual or metaphorical. Unless, and until, a means is provided, whether as recommended here or otherwise, for the victim of a legally baseless or hopeless challenge to his or her exercise of protected expression to recover the cost of his or her vindication, free expression will simply cost too much, and we will all be that much poorer.