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Volume 15 | Issue 2 Article 8

2011

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Slapping Criminal Speech: How Evolution of the Illegality Exception Has Impacted California's Anti-SLAPP Statute

Orlando J. Villalba[*]

> *The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.*[1]

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[*] Senior Counsel at Mortgage Recovery Law Group in Glendale, California. I would like to thank all who helped prepare this article for publication, particularly my colleague and friend Bob Mitchell for his historical acumen, and the insightful and meticulous students of the *Chapman Law Review* for their diligence and editorial guidance. I am indebted to the staff at the Riverside County Law Library for sharing their time and resources with me. I am especially grateful to Silvia for her support and patience, without which this article would not exist. I would like to dedicate this article to *April* and her Rain Song; my hopes for you are immeasurable.

[1] NAT'L ASSEMBLY OF FR., DECLARATION OF THE RIGHTS OF MAN AND CITIZEN 22 (A.J. Peaslee, trans. 1950) (1789).

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INTRODUCTION

For hundreds of years, democracy proponents have emphasized the need to protect speech. Indeed, many of our country's earliest leaders believed protecting speech was so important that they made freedom of speech the first of all of our fundamental rights secured within the Bill of Rights (and likely would not have approved of the Constitution but for the general understanding that a Bill of Rights would be adopted immediately after ratification).[2] And while the limits of free speech have been tested on numerous occasions in our nation's history, it remains among our most cherished freedoms.

In 1992, California, like many other states, affirmed the importance of protecting speech when it adopted legislation

2 Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 869 (1960).

aimed at curbing so-called "SLAPP" lawsuits.[3] SLAPPs ("strategic lawsuits against public participation") are meritless lawsuits filed for the purpose of repressing free speech and petitioning rights.[4] California's anti-SLAPP legislation sought to provide SLAPP defendants, who were essentially being sued for exercising their free speech rights, a means by which to achieve early termination of lawsuits against them.[5] Anti-SLAPP legislation was initially seen as a great victory for free speech.

But free speech is not always so pleasant and appealing and, perhaps more importantly, does not always render itself so attractive to our protective senses. Inevitably, uncomfortable scenarios cause us to question the extent of permissible speech. What should we do when somebody burns our flag? Or, when somebody speaks in discriminatory tones? Or, when somebody's speech borders on (or even crosses the line of) illegality? It is this last question which seems to have posed particular difficulty for California courts of late, especially as such courts have been called upon ever more frequently to interpret the extent of protection provided by anti-SLAPP legislation.

The instant article addresses what has become known in California as the illegality exception to the anti-SLAPP statute: a court-created carve-out to the anti-SLAPP statute which exempts illegal speech from the statute's protections. Part I of this article provides a brief background to California's anti-SLAPP law, reviewing its historical underpinnings as well as its procedural mechanics. Part II details the development and evolution of the illegality exception, with particular attention to the conflicting and sometimes unpredictable use of illegality (and, in more recent times, criminality) as a means to determine application of the exception. Finally, Part III of this article diagnoses the present and future application of the illegality exception and offers ideas for remediation of the most concerning contradictions in the application of the doctrine.

I. An Overview of California's Anti-SLAPP Law

A. Historical Development

According to sociologists, the term SLAPP litigation refers to "civil lawsuits that are aimed at preventing citizens from exercising their political rights or punishing those who have done

3 Dixon v. Superior Court, 36 Cal. Rptr. 2d 687, 693–94 (Ct. App. 1994).

4 George W. Pring & Penelope Canan, SLAPPs: Getting Sued For Speaking Out 1–3 (1996).

5 *See, e.g.*, Sipple v. Found. for Nat'l Progress, 83 Cal. Rptr. 2d 677, 682 (Ct. App. 1999).

so."[6] SLAPP suits are "brought to obtain an *economic* advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff."[7] Indeed, the motivation of the SLAPP plaintiff is not to win his or her lawsuit; instead, the plaintiff's true desire is to cause "delay and distraction . . . and to punish activists by imposing litigation costs on them for exercising their constitutional right to speak and petition the government for redress of grievances."[8] An oft-referred to example of a prototypical SLAPP suit is one "filed by a well-heeled land developer trying to silence a neighborhood organization that protests the developer's plans."[9] Additional examples of SLAPP suits typically involve alleged causes of action for "defamation, various business torts such as interference with prospective economic advantage, nuisance, and intentional infliction of emotional distress."[10]

In 1992, the California Legislature responded to the escalating numbers of SLAPP suits by enacting section 425.16 of the California Civil Procedure Code (commonly referred to as the anti-SLAPP statute).[11] In adopting the anti-SLAPP statute, the Legislature observed:

> [T]here has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.[12]

Because otherwise meritless SLAPP suits seek to deplete "'the defendant's energy' and drain 'his or her resources' . . . the Legislature sought 'to prevent SLAPPs by ending them early and without great cost to the SLAPP target.'"[13]

With the enactment of the anti-SLAPP statute, SLAPP defendants were empowered with the ability to file a new type of

---

6 Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 449 (Ct. App. 1994) (quoting Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506, 506 (1988)), *overruled by* Equilon Enters. v. Consumer Cause, Inc., 52 P.3d 685, 694 n.5 (Cal. 2002).

7 *Wilcox*, 33 Cal. Rptr. 2d at 450.

8 *Dixon*, 36 Cal. Rptr. 2d at 693.

9 Visher v. City of Malibu, 23 Cal. Rptr. 3d 816, 819 (Ct. App. 2005).

10 *Wilcox*, 33 Cal. Rptr. 2d at 449.

11 *Dixon*, 36 Cal. Rptr. 2d at 693.

12 CAL. CIV. PROC. CODE § 425.16(a) (West 2011).

13 Varian Med. Sys., Inc. v. Delfino, 106 P.3d 958, 966 (Cal. 2005) (quoting Simmons v. Allstate Ins. Co., 112 Cal. Rptr. 2d 397, 401 (Ct. App. 2001); Equilon Enters. v. Consumer Cause, 52 P.3d 685, 692–93 (Cal. 2002)).

"special motion to strike."[14] More specifically, subsection (b) of the statute provides that:

> [a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.[15]

In enacting the anti-SLAPP statute, the Legislature identified four categories of "acts" which are protected by the statute, and thus subject to the special motion to strike:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law,
>
> (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law,
>
> (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or
>
> (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.[16]

Aside from the above general categories of protected acts, the Legislature did not limit application of the provision to any specific types of actions, "recognizing that all kinds of claims could achieve the objective of a SLAPP suit—to interfere with and burden the defendant's exercise of his or her rights."[17] Indeed, "[n]othing in the statute itself categorically excludes any particular type of action from its operation."[18] As a result, the anti-SLAPP statute has been found applicable to a wide range of actions, including breach of contract and fraud claims,[19] defamation claims,[20] malicious prosecution claims,[21] abuse of process claims,[22] and even petitions for injunctive relief.[23]

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14 CIV. PROC. § 425.16(b)(1).

15 *Id.*

16 *Id.* at § 425.16(e).

17 Church of Scientology of Cal. v. Wollersheim, 49 Cal. Rptr. 2d 620, 634 (Ct. App. 1996).

18 Navellier v. Sletten, 52 P.3d 703, 711 (Cal. 2002).

19 *See, e.g.*, *id.* at 713; Midland Pac. Bldg. Corp. v. King, 68 Cal. Rptr. 3d 499, 501 (Ct. App. 2007); Philipson & Simon v. Gulsvig, 64 Cal. Rptr. 3d 504, 507 (Ct. App. 2007).

20 *See, e.g.*, Nygard, Inc. v. Uusi-Kerttula, 72 Cal. Rptr. 3d 210, 213 (Ct. App. 2008); Gilbert v. Sykes, 53 Cal. Rptr. 3d 752, 757 (Ct. App. 2007); McGarry v. Univ. of San Diego, 64 Cal. Rptr. 3d 467, 488 (Ct. App. 2007); Computerxpress, Inc. v. Jackson, 113 Cal. Rptr.

B. Procedural Mechanics

The anti-SLAPP statute seeks to protect SLAPP defendants by providing them a procedure to obtain early dismissal of meritless claims and insulating them from the costs and intrusions of discovery prior to dismissal.[24] This aim is accomplished through several mechanisms provided in the statute.[25]

Initially, the statute limits discovery once a special motion to strike is filed, providing that "[a]ll discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section."[26] This discovery stay generally remains in effect until the court rules on the defendant's special motion to strike.[27] A plaintiff can move for relief from this stay in order to conduct limited and specified discovery, but whether such relief is allowed is subject to the trial court's finding of good cause.[28]

As for the procedure of the motion itself, a special motion to strike allows the trial court to "evaluate[] the merits of the lawsuit using a summary judgment-like procedure at an early stage of the litigation."[29] To encourage this early resolution, the statute allows a defendant to bring its special motion to strike "within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper."[30] Oral argument on the motion "shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing."[31]

2d 625, 632, 649 (Ct. App. 2001); Sipple v. Found. for Nat'l Progress, 83 Cal. Rptr. 2d 677, 685 (Ct. App. 1999).

21 *See, e.g.*, Jarrow Formulas, Inc. v. LaMarche, 74 P.3d 737, 739 (Cal. 2003); Daniels v. Robbins, 105 Cal. Rptr. 3d 683, 688 (Ct. App. 2010); Drummond v. Desmarais, 98 Cal. Rptr. 3d 183, 186–87 (Ct. App. 2009); Sycamore Ridge Apartments, LLC v. Naumann, 69 Cal. Rptr. 3d 561, 567 (Ct. App. 2007).

22 *See, e.g.*, Booker v. Rountree, 66 Cal. Rptr. 3d 733, 735 (Ct. App. 2007); Ramona Unified Sch. Dist. v. Tsiknas, 37 Cal. Rptr. 3d 381, 384 (Ct. App. 2005).

23 *See, e.g.*, City of L.A. v. Animal Def. League, 37 Cal. Rptr. 3d 632, 635 (Ct. App. 2006); Thomas v. Quintero, 24 Cal. Rptr. 3d 619, 621 (Ct. App. 2005); Bernardo v. Planned Parenthood Fed'n of Am., 9 Cal. Rptr. 3d 197, 203 (Ct. App. 2004).

24 *See, e.g.*, *Sipple*, 83 Cal. Rptr. 2d at 682.

25 *Id.*

26 CAL. CIV. PROC. CODE § 425.16(g) (West 2011).

27 *Id.*

28 *Id.*

29 Varian Med. Sys., Inc. v. Delfino, 106 P.3d 958, 966 (Cal. 2005).

30 CIV. PROC. § 425.16(f).

31 *Id.*

In determining whether to strike a claim under the anti-SLAPP statute, the court engages in a two-step analysis.[32] In the first step, "the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity."[33] "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in [section 425.16] subdivision (e)."[34] If the court finds that defendant has made a satisfactory showing on the first step, the court then must determine "whether the plaintiff has demonstrated a probability of prevailing on the claim."[35] "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute."[36]

In considering the defendant's burden on the first prong, it is important to recognize that "[s]ection 425.16 applies to a cause of action arising from an act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue."[37] Therefore, the most important consideration in the first prong analysis "is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity."[38]

Moreover, the "definitional focus" of this inquiry "is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning."[39] As such, an anti-SLAPP defendant need not necessarily establish its actions are constitutionally protected under the First Amendment as a matter of law.[40] Rather, the

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32 *See* Navellier v. Sletten, 52 P.3d 703, 708 (Cal. 2002); Equilon Enters. v. Consumer Cause, Inc., 52 P.3d 685, 694 (Cal. 2002); Ramona Unified Sch. Dist. v. Tsiknas, 37 Cal. Rptr. 3d 381, 387 (Ct. App. 2005).

33 *Navellier*, 52 P.3d at 708; *Equilon*, 52 P.3d at 694.

34 *Navellier*, 52 P.3d at 708; Braun v. Chronicle Publ'g Co., 61 Cal. Rptr. 2d 58, 61 (Ct. App. 1997).

35 *Navellier*, 52 P.3d at 708; *Equilon*, 52 P.3d at 694. *See also* Computerxpress, Inc. v. Jackson, 113 Cal. Rptr. 2d 625, 632 (Ct. App. 2001) ("[T]he burden shifts to the plaintiff to establish a probability of prevailing, by making a prima facie showing of facts which would, if proved, support a judgment in plaintiff's favor.").

36 *Navellier*, 52 P.3d at 708.

37 Governor Gray Davis Comm. v. Am. Taxpayers Alliance, 125 Cal. Rptr. 2d 534, 540 (Ct. App. 2002).

38 *Navellier*, 52 P.3d at 709.

39 *Id.* at 711. *See also* Church of Scientology of Cal. v. Wollersheim, 49 Cal. Rptr. 2d 620, 634 (Ct. App. 1996).

40 Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 449 (Ct. App. 1994). *See also* Oasis W. Realty, LLC v. Goldman, 250 P.3d 1115, 1126 (Cal. 2011); *Navellier*, 52 P.3d at 713;

statute merely requires a defendant to make "a prima facie showing [that] the plaintiff's suit arises 'from any act of [defendant] in furtherance of [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue.'"[41] And, in determining whether this showing has been made, a court should emphasize substance over form; it is the "principal thrust or gravamen of a cause of action [that] determines whether the anti-SLAPP statute applies."[42] Indeed, "[t]he anti-SLAPP statute does not apply where protected activity is only collateral or incidental to the purpose of the transaction or occurrence underlying the complaint."[43]

As noted, "the Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish [that his or] her actions are constitutionally protected under the First Amendment as a matter of law."[44]

> Instead, under the statutory scheme, a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary. . . . Otherwise, the second step would become superfluous in almost every case, resulting in an improper shifting of the burdens.[45]

Thus, where a defendant meets his burden as to the first prong, the court then proceeds to evaluate the plaintiff's burden on the second prong.[46] In this phase of the analysis, "the trial court must consider facts so as to make a determination whether plaintiffs can establish a prima facie probability of prevailing on their claims."[47] Though the court does not weigh the evidence

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Fox Searchlight Pictures, Inc. v. Paladino, 106 Cal. Rptr. 2d 906, 916 (Ct. App. 2001).

41 *Wilcox*, 33 Cal. Rptr. at 452 (quoting CAL. CIV. PROC. CODE § 425.16(b) (West 2011) (second and third alterations in original). *See also* Paul for Council v. Hanyecz, 102 Cal. Rptr. 2d 864, 870 (Ct. App. 2001), Equilon Enters. v. Consumer Cause, Inc., 52 P.3d 685, 694 n.5 (Cal. 2002); *Wollersheim*, 49 Cal. Rptr. 2d at 630.

42 Cal. Back Specialists Med. Grp. v. Rand, 73 Cal. Rptr. 3d 268, 272 (Ct. App. 2008). *See also* Wang v. Wal-Mart Real Estate Bus. Trust, 63 Cal. Rptr. 3d 575, 585 (Ct. App. 2007); Ramona Unified Sch. Dist. v. Tsiknas, 37 Cal. Rptr. 3d 381, 388 (Ct. App. 2005); Martinez v. Metabolife Int'l, Inc., 6 Cal. Rptr. 3d 494, 499 (Ct. App. 2003).

43 *Rand*, 73 Cal. Rptr. 3d at 272. *See also* Baharian-Mehr v. Smith, 117 Cal. Rptr. 3d 153, 159 (Ct. App. 2010); *Wang*, 63 Cal. Rptr. 3d at 585; Scott v. Metabolife Int'l, Inc., 9 Cal. Rptr. 3d 242, 249 (Ct. App. 2004); Martinez v. Metabolife Int'l, Inc., 6 Cal. Rptr. 3d 494, 499 (Ct. App. 2003).

44 *Paladino*, 106 Cal. Rptr. 2d at 916.

45 Chavez v. Mendoza, 114 Cal. Rptr. 2d 825, 830 (Ct. App. 2001).

46 *See* Oasis W. Realty, LLC v. Goldman, 250 P.3d 1115, 1120 (Cal. 2011); Zamos v. Stroud, 87 P.3d 802, 806 (Cal. 2004); Navellier v. Sletten, 52 P.3d 703, 708 (Cal. 2002); *Equilon Enters.*, 52 P.3d at 694.

47 Blanchard v. DIRECTV, Inc., 20 Cal. Rptr. 3d 385, 398 (Ct. App. 2004) (emphasis omitted).

presented, "it must determine whether plaintiffs have demonstrated evidence which, if credited, would justify their prevailing at trial."[48]

In determining whether the plaintiff has met her burden on the second prong, the court considers whether the plaintiff has "demonstrate[d] that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."[49] However, several cases have held that a plaintiff need only show that her case has "minimal merit" to meet this burden.[50] Despite the statistical confusion this standard might create,[51] upon such a showing of minimal merit, the defendant's motion to strike will be denied and the case will proceed forward in litigation.[52]

II. EVOLUTION OF THE ILLEGALITY EXCEPTION

While litigants pursuing and opposing anti-SLAPP motions must be prepared to address both prongs of the anti-SLAPP analysis, the remainder of this article, with a few exceptions, focuses primarily upon the first prong. A compelling development has taken place over the past ten years with respect to how courts are applying the anti-SLAPP statute to speech and petitioning activity that straddles and sometimes crosses the lines of illegality. California courts have lacked consistency in determining how much protection the anti-SLAPP statute should provide in these instances. As shown below, while California courts initially applied a wide-ranging exclusion to these types of speech and activity, that exclusion appears to be retracting and taking on an air of uncertainty.

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48 *Id*. (emphasis omitted).

49 Matson v. Dvorak, 46 Cal. Rptr. 2d 880, 886 (Ct. App. 1995).

50 *See, e.g.*, *Goldman*, 250 P.3d at 1120; Soukup v. Law Offices of Herbert Hafif, 139 P.3d 30, 51 (Cal. 2006); Jarrow Formulas, Inc. v. LaMarche, 74 P.3d 737, 745 (Cal. 2003); *Navellier*, 52 P.3d at 712.

51 It is true that few ever accuse attorneys of being mathematicians. Judicial adoption of the "minimal merit" standard in anti-SLAPP cases might help explain why. After all, section 425.16(b)(1) provides that an action arising from one's right to petition or exercise free speech will be stricken unless the plaintiff can establish "a probability" of prevailing on the claim in question. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2011). Merriam-Webster defines "probability" as "the quality or state of being probable," and in turn, defines "probable" as both "supported by evidence strong enough to establish presumption but not proof" and "likely to be or become true or real." ENCYCLOPEDIA BRITANNICA, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 989 (Frederick C. Mish et al. eds., 11th ed. 2008). Something that is probable (or, by extension, presumed or likely) would therefore seem to be of greater reliability than mere "minimal merit." *Id.*

52 *Soukup*, 139 P.3d at 51; *Jarrow Formulas*, 74 P.3d at 745; *Navellier*, 52 P.3d at 712.

A. The Birth of the Anti-SLAPP Statute's Illegality Exception

The first major development in the life of the anti-SLAPP statute's illegality exception occurred in the California Court of Appeal's 2001 decision *Paul for Council v. Hanyecz*.[53] *Paul* involved a political action committee (the plaintiff), which had been formed to assist Paul Christiansen in his bid for reelection to the Laguna Niguel City Council.[54] Defendants were three individuals, whom the plaintiff alleged had wrongfully interfered with Christiansen's candidacy by influencing the election with illegal campaign contributions to Christiansen's opponent.[55] Plaintiff's complaint alleged that defendants' actions amounted to a violation of the Political Reform Act of 1974.[56]

In response to plaintiff's complaint, defendants filed a special motion to strike under the anti-SLAPP statute.[57] In their motion, defendants acknowledged that they did, in fact, engage in actions to subvert the political contribution rules.[58] They did this by having certain family members make contributions to various candidates, then reimbursing their family members for such contributions.[59] Thus, as the court considered the defendants' anti-SLAPP motion, there was no dispute among the parties that defendants had violated the Political Reform Act.[60]

Nonetheless, defendants claimed they were entitled to protection under the anti-SLAPP statute because their actions were done in furtherance of their political speech rights.[61] More specifically, defendants claimed their money laundering was "in furtherance of their constitutional rights of free speech," and arose "out of acts in furtherance of their constitutionally protected conduct."[62] The trial court agreed with defendants and granted their special motion to strike.[63] Plaintiffs appealed, and the court of appeal framed the question on appeal as:

> [W]hether a defendant can properly claim that an action filed against it is a SLAPP suit for which it is entitled to section 425.16 protection, when its conduct involved actions which violate the law; or to put it

53 *See Flatley*, 139 P.3d at 12 (discussing Paul for Council v. Hanyecz, 102 Cal. Rptr. 2d 864 (Ct. App. 2001)).

54 *Paul*, 102 Cal. Rptr. 2d at 867.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.* at 871.

61 *Id.* at 867.

62 *Id.*

63 *Id.* at 868.

> another way, can a defendant successfully assert that although the acts in which it engaged, and which are the subject of the plaintiff's complaint, were illegal, they were done in furtherance of the constitutional rights of free speech or petition for redress of grievances in connection with a public issue and therefore the plaintiff is required, under section 425.16, to meet the predicate showing mandated by that statute?[64]

The court of appeal answered this question by concluding that, "in such circumstances, defendants are not entitled to protection under section 425.16."[65] In reaching this result, the court considered this issue to exist solely within the context of the first prong, noting: "we need not address the second step of section 425.16's two-step motion to strike process because we hold, *as a matter of law*, that defendants cannot meet their burden on the first step."[66]

In engaging in the first prong's "arising from" analysis, the *Paul* court emphasized the policy of the statute in protecting the valid exercise of the constitutional rights of speech and petition. The court acknowledged defendants' contention that their campaign money laundering activity was taken "in furtherance" of their constitutional right of free speech, and that "it is technically true that laundering campaign contributions is an act in furtherance of the giving of such contributions, that is, in furtherance of an act of free speech."[67] However, the court "reject[ed] the notion that section 425.16 exists to protect such illegal activity" as money laundering.[68] As such, defendants had failed to show the court that "plaintiff's suit was brought primarily to chill a *valid* exercise . . . of free speech or petition," and thus had failed to satisfy their burden regarding the first prong's "arising from" requirement.[69]

In the course of reaching its holding, the *Paul* court was remarkably careful in framing how its decision should be understood by future parties and courts.[70] The court made a point to emphasize that its decision "involve[d] a factual context in which the defendants have effectively conceded the illegal nature of their election campaign finance activities for which they claim constitutional protection."[71] As such,

64 *Id.*
65 *Id.*
66 *Id.* at 870.
67 *Id.* at 871.
68 *Id.*
69 *Id.*
70 *See id.*
71 *Id.*

> there was no dispute on the point and we have concluded, as a matter of law, that such activities are *not* a valid exercise of constitutional rights as contemplated by section 425.16. However, had there been a factual dispute as to the legality of defendants' actions, then we could not so easily have disposed of defendants' motion.[72]

The court warned that, in future cases, where a plaintiff

> contests [the] point [of illegality], and unlike the case here, cannot demonstrate as a matter of law that the defendant's acts do not fall under section 425.16's protection, then the claimed illegitimacy of defendant's acts is an issue which [the] plaintiff must raise *and* support in the context of the discharge of the plaintiff's burden to provide a prima facie showing of the merits of the plaintiff's case.[73]

The *Paul* court further referred to this showing as

> an *additional* burden" which the plaintiff must meet "in the same manner the plaintiff meets the burden of demonstrating the merits of its causes of action: by showing the defendant's purported constitutional defenses are not applicable to the case as a matter of law *or* by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses.[74]

Though the *Paul* court made these final points "[i]n order to avoid any misunderstanding as to the basis for [its] conclusions,"[75] it may have instead created more confusion and uncertainty by its parting words than it would have otherwise. As the court acknowledged, its case was an easy one because the issue of illegality was not contested.[76] Rather than limiting its opinion to the facts before it, however, the *Paul* court continued to opine as to how courts should proceed in the event they encountered different and more difficult facts.[77] Where future cases involve disputed illegality, the court professed, an "additional burden" shifts to the plaintiff to show that defendant is not entitled to the constitutional protections it seeks.[78] By referring to this burden as "additional" to the one already faced by the plaintiff in the context of the second prong, the *Paul* court seemingly created a *third prong* for cases specifically involving speech and petitioning activities which potentially cross the line of illegality.[79] However, given the court's ambiguity as to plaintiff's "additional burden," the third prong is at best amorphous under *Paul*.

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72 *Id.*
73 *Id.* at 871–72.
74 *Id.*
75 *Id.* at 871.
76 *Id.*
77 *Id.* at 871–72.
78 *Id.* (emphasis omitted).
79 *See id.* at 872.

In the years following, *Paul*'s illegality exception was acknowledged and accepted by other appellate courts in California.[80] Indeed, in 2002, California's Fifth Appellate District was faced with an appeal where the plaintiff sought application of the illegality exception.[81] In *Kashian v. Harriman*, a prominent businessman and civic leader (Kashian) sued an attorney (Harriman) for claims of unfair business practices and defamation in connection with several environmental lawsuits filed by Harriman, as well as a letter written by Harriman and later published by the Fresno Bee newspaper.[82]

In response to Kashian's complaint, Harriman filed an anti-SLAPP motion, contending that his litigation activities and letter were absolutely privileged.[83] Kashian opposed the motion primarily on second prong grounds, submitting evidence in support of the claims and arguing that the actions of Harriman were not privileged.[84] The trial court granted the motion, and Kashian appealed.[85] On appeal, Kashian shifted his focus, and argued that, under *Paul*, Harriman was not entitled to relief under the anti-SLAPP statute because the statute does not protect illegal activity.[86] The appellate court, however, noted that the facts in *Paul* were distinguishable because, here, "the legality of Harriman's litigation activities is a matter of considerable dispute."[87] The court went on to add that "conduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage . . . simply because it is *alleged* to have been unlawful or unethical. If that were the test, the statute (and the privilege) would be meaningless."[88] The court, therefore, directed its attention to the second prong before ultimately affirming the trial court's decision.[89]

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80 *See, e.g.*, City of L.A. v. Animal Def. League, 37 Cal. Rptr. 3d 632, 644 (Ct. App. 2006); Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty U.S.A., Inc., 29 Cal. Rptr. 3d 521, 535 (Ct. App. 2005); 1-800 Contacts, Inc. v. Steinberg, 132 Cal. Rptr. 2d 789, 801–02 (Ct. App. 2003); Yu v. Signet Bank/Va., 126 Cal. Rptr. 2d 516, 529 n.3 (Ct. App. 2002); Governor Gray Davis Comm. v. Am. Taxpayers Alliance, 125 Cal. Rptr. 2d 534, 541–42 (Ct. App. 2002); Chavez v. Mendoza, 114 Cal. Rptr. 2d 825, 830 (Ct. App. 2001).

81 Kashian v. Harriman, 120 Cal. Rptr. 2d 576, 589 (Ct. App. 2002).

82 *Id.* at 581–84.

83 *Id.* at 584.

84 *Id.*

85 *Id.* at 585.

86 *Id.* at 589.

87 *Id.* at 590.

88 *Id.*

89 *Id.* at 591, 609. Interestingly, though the case involved a disputed allegation of illegality regarding Harriman's petitioning activity, the court did not appear to engage in any "third prong" type of analysis contemplated by *Paul*.

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Later in 2002, California's First Appellate District similarly encountered an appeal involving a special motion to strike opposed on the basis of illegal petitioning activities.[90] In *Governor Gray Davis Committee v. American Taxpayers Alliance*, a group supporting the reelection of Governor Gray Davis filed an action against a taxpayers group ("taxpayers") responsible for a television commercial critical of Davis, claiming the taxpayers violated the Political Reform Act's reporting requirements.[91] Taxpayers responded by filing a special motion to strike the complaint, characterizing Davis' claims as "a classic SLAPP suit."[92] After the trial court denied the motion, the court of appeal reviewed the matter *de novo*.[93] In addressing the illegality issue under the first prong analysis, the court observed that this case was again unlike *Paul* in that illegality had not been conceded by the defendant taxpayers, and the evidence did not otherwise conclusively establish illegality.[94] Therefore, the court concluded that the defendant taxpayers had met its burden under the first prong, and the burden shifted to plaintiff Davis to establish a probability of prevailing on the merits.[95]

Interestingly, in turning the matter over to the second prong analysis, the court referenced *Paul*'s guidance in handling matters of disputed illegality.[96] Citing *Paul*, the *Davis* court observed that the "asserted violation of the Political Reform Act by appellant is an issue we must examine in the context of the discharge of the respondent's burden to construct a prima facie showing of the merits of its case."[97] The court then analyzed the scope of the Political Reform Act in the face of the speech protections under the First Amendment.[98] Concluding that the Political Reform Act must be read narrowly to preserve free speech rights, the court found that the plaintiff failed to establish a likelihood of prevailing on the merits.[99] The court's analysis in this respect negated *Paul*'s "additional burden" prophecy, engaging in the continued illegality analysis strictly through the second prong's underlying merits examination. As shown below,

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90 *See* Governor Gray Davis Comm. v. Am. Taxpayers Alliance, 125 Cal. Rptr. 2d 534 (Ct. App. 2002).

91 *Id.* at 538.

92 *Id.* at 539.

93 *Id.*

94 *Id.* at 542.

95 *Id.* ("[W]ith the legality of appellant's exercise of a constitutionally protected right in dispute in the action, the threshold element in a section 425.16 inquiry has been established.").

96 *Id.* at 541–42.

97 *Id.* at 542.

98 *Id.* at 551.

99 *Id.* at 551–52.

the *Davis* court's deviation from *Paul* in this manner served as an early example of the inconsistent manner in which the illegality exception would be applied by California courts.[100]

B. The California Supreme Court Endorses the Illegality Exception in *Flatley v. Mauro*

In 2006, the California Supreme Court decided *Flatley v. Mauro*,[101] the landmark case on the illegality exception. With *Flatley*, the court gave even greater legitimacy to the exception, endorsing *Paul*'s analysis and application of the doctrine.[102]

Flatley involved a dispute between an entertainer, Michael Flatley, and an attorney, Dean Mauro, who represented Tyna Marie Robertson (a former paramour of Flatley's).[103] Following a tryst between Robertson and Flatley, Mauro sent a letter to Flatley accusing him of sexually assaulting Robertson.[104] The letter included a draft of an unfiled civil complaint against Flatley for the assault, and further demanded a settlement payment of $100 million.[105] Mauro threatened that if settlement was not reached between the parties, Mauro would disclose various details of the incident and various other personal details about Flatley to the press and several governmental and law enforcement agencies.[106] Mauro continued to make similar demands in several telephone calls with Flatley's attorneys following this letter, where the settlement amount was described as at least "seven figures."[107]

Flatley did not pay Mauro, and Mauro subsequently filed the complaint against Flatley.[108] Mauro and Robertson then appeared on television, recounting the allegations that Flatley had raped Robertson.[109] Robertson later dismissed her claims against Flatley.[110]

Meanwhile, Flatley filed suit against Mauro, alleging civil extortion, intentional infliction of emotional distress, and wrongful interference with economic advantage.[111] The claims

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[100] *See infra* Parts II(B), II(C), & II(D).
[101] Flatley v. Mauro, 139 P.3d 2 (Cal. 2006).
[102] *Id.* at 13–14.
[103] *Id.* at 5.
[104] *Id.* at 6–7.
[105] *Id.* at 7–8.
[106] *Id.*
[107] *Id.* at 8–9.
[108] *Id.* at 5, 9.
[109] *Id.* at 5.
[110] *Id.* at 5 n.2.
[111] *Id.* at 5.

were based upon the demand letter Flatley received from Mauro, as well as the telephone calls Mauro made to Flatley's attorneys.[112] Mauro responded to the complaint by filing a special motion to strike under the anti-SLAPP statute.[113] Mauro argued that his communications were "prelitigation settlement offer[s]," and as such, Flatley's claims arose from Mauro's protected right of petition.[114] Though he did not deny sending the letter in question nor did he contest the nature of the telephone calls as described by Flatley, Mauro nonetheless maintained that his activity on behalf of Robertson "amounted to no more than the kind of permissible settlement negotiations that are attendant upon any legal dispute or, at minimum, that a question of fact exists regarding the legality of his conduct," which he claimed precluded a finding of illegality.[115]

Predictably, Flatley opposed the motion.[116] Flatley argued "Mauro's communications constituted criminal extortion and were therefore not protected by the anti-SLAPP statute," and that Flatley "could demonstrate a probability of prevailing on the merits."[117] The trial court denied the motion, and the court of appeal affirmed.[118] "The Court of Appeal held that, because Mauro's letter and subsequent telephone calls constituted criminal extortion as a matter of law, and extortionate speech is not constitutionally protected, the anti-SLAPP statute did not apply."[119] Mauro then appealed to the California Supreme Court.[120]

In an opinion drafted by Justice Moreno, the supreme court relied heavily on *Paul*, devoting five pages of its opinion toward specifically reviewing and analyzing the *Paul* opinion.[121] In the end, the court endorsed *Paul*'s application of the illegality exception:

> We agree with *Paul* that section 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition. A contrary rule would be inconsistent with the purpose of the anti-SLAPP statute as revealed by its language.[122]

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112 *Id.*
113 *Id.*
114 *Id.* at 9.
115 *Id.* at 21.
116 *Id.*
117 *Id.* at 6.
118 *Id.* at 5.
119 *Id.*
120 *Id.*
121 *See id.* at 10–14.
122 *Id.* at 13.

The supreme court went on to encapsulate the illegality exception as follows:

> [W]here a defendant brings a motion to strike under section 425.16 based on a claim that the plaintiff's action arises from activity by the defendant in furtherance of the defendant's exercise of protected speech or petition rights, but either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action.[123]

The court also made clear its position that determination of the illegality exception is strictly a first prong matter:

> [W]e emphasize that the question of whether the defendant's underlying conduct was illegal as a matter of law is *preliminary, and unrelated to the second prong* question of whether the plaintiff has demonstrated a probability of prevailing, and the showing required to establish conduct illegal as a matter of law—either through defendant's concession or by uncontroverted and conclusive evidence—is not the same showing as the plaintiff's second prong showing of probability of prevailing.[124]

In turning to the specific facts before it, the court applied the illegality exception to Mauro's detriment. The court noted case law establishing the proposition that extortion is not a constitutionally protected form of speech.[125] The court further observed that the facts establishing extortion were not in dispute since Mauro did not deny sending the letter or engaging in the telephone calls.[126] Therefore, evaluating Mauro's conduct, the court concluded that "the letter and subsequent phone calls constitute[d] criminal extortion as a matter of law."[127] The court relied upon sections 519(2) and (3) of the California Penal Code in emphasizing that "[t]hese communications threatened to 'accuse' Flatley of, or 'impute to him,' 'crime[s]' and 'disgrace' unless Flatley paid Mauro."[128] That the threats were half-couched in legalese, the court noted, does not disguise their essential character as extortion.[129] Because Mauro's actions amounted to extortion as a matter of law, and were therefore not constitutionally protected nor entitled to anti-SLAPP protection,

123 *Id.* at 15.
124 *Id.* (emphasis added).
125 *Id.* at 21.
126 *Id.*
127 *Id.* at 2.
128 *Id.* (quoting CAL. PENAL CODE § 519(2), (3) (West 2011)).
129 *Id.*

the supreme court affirmed the denial of Mauro's special motion to strike.[130]

Notably, although the supreme court's decision was unanimous, Justice Werdegar drafted a concurring opinion in *Flatley*, deviating sharply from the reasoning employed by Justice Moreno and the majority, and strongly cautioning against the adoption of an illegality exception.[131] For one, he argued that such an exception is better left to the Legislature than the Judiciary.[132] He pointed to the Legislature's amendment of section 425.18(h), where it limited "SLAPPback" motions brought by parties whose actions in the underlying case were "illegal as a matter of law."[133] If the Legislature wanted a similar exception with respect to section 425.16, it could have adopted one statutorily.[134]

Justice Werdegar also questioned the breadth of the majority's illegality exception.[135] He feared that, by precluding lawsuits based upon "illegal" actions, perhaps the exception would swallow the entire rule: "[s]ince by definition all conduct sued upon is alleged to be illegal, the majority's assurances that the 'narrow circumstance' . . . for plaintiffs' invoking an illegal-as-a-matter-of-law defense to an anti-SLAPP motion will occur only in 'rare cases' . . . are not convincing."[136]

Justice Werdegar also criticized the practicality of treating the illegality exception solely as a first prong issue: "[t]he standard the majority articulates for its new exception . . . is virtually indistinguishable from the standard we previously have articulated for satisfying the statute's second prong."[137] Justice Werdegar referenced the supreme court's prior opinion in *Navellier v. Sletten*, cautioning that the majority's now conflicting guidance is likely to cause confusion among lower courts. He further added that the similarity between application of the illegality exception and the second prong analysis

> may well sow doctrinal confusion among courts previously given to understand that "any claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the

130 *Id.* at 24.

131 *Id.* at 24–26 (Werdegar, J., concurring).

132 *Id.*

133 *Id.* As discussed more fully below, a "SLAPPback" motion is essentially an anti-SLAPP motion seeking to dismiss a malicious prosecution action brought in response to an earlier action previously dismissed by an anti-SLAPP motion.

134 *Id.*

135 *Id.* at 25–26.

136 *Id.* at 25 (quoting *Flatley*, 139 P.3d at 12, 15).

137 *Id.* at 26.

> discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case."[138]

In the end, however, Justice Werdegar agreed that Mauro was not entitled to relief under the anti-SLAPP statute.[139] He concluded that Mauro failed to show that the lawsuit arose from protected speech or petitioning activity.[140] In other words, while the majority concluded Mauro was not entitled to protection because his speech and petitioning activity was illegal, Justice Werdegar found that the lawsuit was not based upon speech or petitioning activity in the first place.[141] The gravamen of Flatley's claims was Mauro's attempt to extort money from him, and, according to Werdegar, such an action does not arise from protected speech or petitioning.[142]

The Werdegar concurrence raised several red flags concerning the application of *Flatley*, *Paul*, and the illegality exception in future cases. Notably, should the judiciary expand on developing this doctrine when the Legislature has not specifically incorporated the doctrine into the anti-SLAPP statute (despite having done so with respect to section 425.18)? And, what exactly does "illegality as a matter of law" mean? Is it not true that every lawsuit potentially involves allegations of illegality? Finally, is the illegality exception truly a first prong issue, or does *Flatley*'s pronouncement of the exception render it identical to the analysis called for under the second prong? As shown below, while some cases have applied *Flatley* and *Paul* with little difficulty or confusion, others seem to fall directly into the pitfalls Justice Werdegar raised, rendering future application of these doctrines inconsistent and perhaps unpredictable.[143]

C. Applying the Illegality Exception Immediately After *Flatley*

i. *Soukup v. Law Offices of Herbert Hafif*

It did not take long to see *Flatley*'s direct impact on other cases. In a companion case to *Flatley*, the California Supreme Court rendered its decision in *Soukup v. Law Offices of Herbert Hafif*,[144] on the same day it announced its decision in *Flatley*. Though *Soukup*'s facts differ from *Flatley*, its decision sheds

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138 *Id.* (alteration in original) (quoting Navellier v. Sletten, 52 P.3d 703, 712 (Cal. 2002)).
139 *Id.* at 24.
140 *Id.*
141 *Id.*
142 *Id.*
143 *See infra* Part II(C).
144 Soukup v. Law Offices of Herbert Hafif, 139 P.3d 30 (Cal. 2006).

further clarification on the reasoning and intent underlying the *Flatley* decision.

In *Soukup*, the plaintiff (Peggy Soukup) was a former employee of defendant (Law Offices of Herbert Hafif or "LOHH").[145] LOHH had previously sued Soukup and others for malicious prosecution, among other claims, in an underlying action.[146] Soukup moved to strike that action based upon the anti-SLAPP statute, and the court granted her motion and dismissed LOHH's claims against Soukup.[147]

Following the dismissal of LOHH's claims in the underlying action, Soukup filed a new action against LOHH and others, claiming abuse of process and malicious prosecution.[148] In turn, LOHH and the other defendants moved to strike Soukup's claim based upon the anti-SLAPP statute.[149] LOHH's anti-SLAPP motion created a "SLAPPback" scenario, but, at the time this motion had been filed, the California Legislature had not yet adopted the SLAPPback legislation that exists today.[150] Soukup opposed LOHH's motion, arguing that the underlying activity upon which her suit was based is, by definition, not protected speech because she had already achieved its dismissal by way of her prior anti-SLAPP motion.[151] The trial court ultimately denied LOHH's motion.[152] LOHH appealed and the court of appeal reversed, leading to an appeal to the California Supreme Court.[153]

During the time after the trial court denied LOHH's motion to strike and before the supreme court made its decision, the California Legislature enacted new legislation regarding SLAPPbacks.[154] This legislation sought to protect litigants who had previously been successful in dismissing claims by use of the anti-SLAPP statute and who subsequently filed malicious prosecution actions against their SLAPPers (an action known as

145 *Id.* at 35.

146 *Id.* at 38.

147 *Id.* at 39.

148 *Id.* at 40.

149 *Id.*

150 *Id.* at 35.

151 *Id.* at 40.

152 *Id.* at 41.

153 *Id.* The appellate court first affirmed, but was directed to reconsider its ruling in light of the California Supreme Court's decisions in *Jarrow Formulas, Inc. v. LaMarche*, 74 P.3d 737 (Cal. 2003), and *Navellier v. Sletten*, 52 P.3d 703 (Cal. 2002). *Soukup*, 139 P.3d at 42. Upon reconsideration in light of *Jarrow* and *Navellier*, the court of appeal reversed, leading to Soukup's petition for review to the California Supreme Court. *Id.*

154 *Soukup*, 139 P.3d at 35.

a "SLAPPback").[155] As part of the new legislation, the Legislature incorporated its own illegality exception with respect to special motions to strike SLAPPback suits: "A special motion to strike may not be filed against a SLAPPback by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law."[156]

In light of the newly enacted SLAPPback legislation, Soukup argued to the supreme court that LOHH is not entitled to anti-SLAPP relief given the SLAPPback statute's illegality exception.[157] She argued that LOHH's underlying lawsuit was a violation of state and federal law, namely section 1102.5 of the California Labor Code and 29 U.S.C. § 1140.[158] The supreme court disagreed with Soukup insofar as it concluded that she could not establish a violation of these statutes as a matter of law.[159] Both of the statutes were forms of retaliation/whistleblower regulations, which required that she prove the existence of an employer-employee relationship between LOHH and herself.[160] Because Soukup was not an employee at the time the actions had been filed, she could not establish violations of these statutes as a matter of law.[161] Accordingly, the court concluded the first prong of the analysis had been satisfied and the matter would hinge upon a determination under the second prong's probability of prevailing analysis.[162]

Though *Soukup* differentiates itself from *Flatley* in the sense that its decision hinges upon its application and interpretation of section 425.18 of the California Civil Procedure Code, rather than section 425.16, several notable aspects of the opinion shed light upon the court's intention behind *Flatley*. For one, it is interesting to note that Soukup sought to employ the illegality exception based upon two non-criminal statutes.[163] In other words, Soukup's argument completely avoided the question of whether illegality requires criminality in this context. And even though the Supreme Court ultimately disagreed with Soukup's application of the illegality exception, it did so on grounds other than criminality.[164] It would appear to have been much easier for

155 *Id.* at 42–43.
156 CAL. CIV. PROC. CODE § 425.18(h) (West Supp. 2011).
157 *Soukup*, 139 P.3d at 45.
158 *Id.*
159 *Id.* at 48.
160 *Id.* at 48–49.
161 *Id.*
162 *Id.* at 50–51.
163 *Id.* at 45.
164 *Id.* at 49.

the court to dispose of Soukup's argument by noting that the statutes she relied upon were not criminal statutes, and thus she was not entitled to the illegality exception. The fact that the court did not do so may be persuasive support for those who believe that the illegality exception does not necessarily require a showing of criminality.

While the court did not discuss or address criminality, it did bring a new concept into the discussion: specificity.[165] In the process of discussing the meaning and impact of the illegality exception contained in section 425.18(h), the court noted that one aspect of plaintiff's burden in establishing illegality is to identify the illegality with specificity.[166] The court advised that "the plaintiff must identify with particularity the statute or statutes violated by the filing and maintenance of the underlying action."[167] The court further added:

> [A]s part of the plaintiff's burden of demonstrating illegality as a matter of law, the plaintiff must show the specific manner in which the statute or statutes were violated with reference to their elements. A generalized assertion that a particular statute was violated by the filing or maintenance of the underlying action without a particularized showing of the violation will be insufficient to demonstrate illegality as a matter of law.[168]

Therefore, following *Soukup*, a plaintiff who intends to invoke the illegality exception need not necessarily show that the actions in question were criminal, but must provide the particular law establishing the illegality, and the specific manner in which the law was violated.[169]

Finally, on a larger scale, one must question whether *Soukup*'s reasoning even applies to the development of the illegality exception in the context of section 425.16. After all, *Soukup*'s decision is dependent upon its interpretation of the legislatively-provided illegality exception in section 425.18.[170] As Justice Werdegar noted in *Flatley*, if the Legislature wanted this same type of analysis applied in section 425.16, it would have amended the statute to reflect this desire, much the way it implemented the exception in section 425.18(h).[171] On the other hand, *Soukup*'s analysis and reasoning regarding how section 425.18(h) should be interpreted and implemented is largely based

165 *Id.* at 48.
166 *Id.*
167 *Id.*
168 *Id.*
169 *Id.* at 48. *See also* Hutton v. Hafif, 59 Cal. Rptr. 3d 109, 119–20 (Ct. App. 2007).
170 *Soukup*, 139 P.3d at 47–48.
171 Flatley v. Mauro, 139 P.3d 2, 25 (Cal. 2006) (Werdegar, J., concurring).

upon its reading of the *Paul* and *Davis* opinions, both of which were entirely based upon section 425.16.[172] Because those cases shaped the court's interpretation of the legislatively-created illegality exception in section 425.18(h), it seems only natural to use that same interpretation as it applies to the judicially-created illegality exception to section 425.16.

ii. *Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*

In the months following the *Flatley* decision, potential confusion as to how to apply the illegality exception began to show among California appellate courts.[173] One particular case, *Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc*., involved an advocacy group (defendant) who was formed as part of an effort to "expose the abusive treatment of animals" by Huntingdon Life Sciences, a biomedical testing lab.[174] Plaintiff, Novartis Vaccines and Diagnostics, Inc., a biopharmaceutical company, used Huntingdon in testing some of its products.[175] Defendant engaged in a campaign against plaintiff in which it carried out "home visits" to plaintiff's employees, during which defendant's agents terrorized plaintiff's employees by breaking their windows, vandalizing their cars, and setting off alarms in their yards, among other tactics.[176] Plaintiff filed suit against defendant seeking an injunction against those acts.[177]

In response to the complaint, defendant filed a special motion to strike under the anti-SLAPP statute.[178] Defendant did not deny that it engaged in the actions complained of, but rather, claimed that its actions were protected activity under the anti-SLAPP statute because they centered around speech made in a public forum in connection with a matter of public interest.[179] The trial court denied the motion, however, concluding that defendant "had not met its burden."[180]

On appeal, California's First Appellate District relied upon *Flatley* in articulating the application of the illegality exception.

172 *Soukup*, 139 P.3d at 46–47.

173 *See, e.g.*, Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 50 Cal. Rptr. 3d 27, 34–36 (Ct. App. 2006); Guzzetta v. City of Desert Hot Springs, No. D049595, 2007 WL 549828, at *6 (Cal. Ct. App. Feb. 23, 2007).

174 *Id.* at 29.

175 *Id.*

176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.* at 30.

180 *Id.* at 35.

Quoting *Flatley*, the *Novartis* court noted that "section 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition."[181] With that principle in mind, the court then turned to the facts at hand.

It was at this point the court's analysis began to reveal confusion in applying *Flatley*.[182] The court engaged in a thorough analysis of whether the conduct of defendant amounted to illegality.[183] The court noted that the evidence of defendant's acts was not in dispute, and that defendant had essentially conceded that the attacks on plaintiff's employees were unlawful.[184] As such, the court concluded, the defendant's statements were "not the sort of speech section 425.16 was designed to protect."[185]

What is perhaps most confusing about the *Novartis* opinion is whether it is applying the illegality exception at all. Clearly there was an apparent intent to apply the exception, given the opinion's thorough review of the *Flatley* decision.[186] As we know from *Paul* and *Flatley*, the plaintiff holds the burden of proof in establishing that defendant's purported protected activity is illegal as a matter of law.[187] However, in *Novartis*, the court held that the trial court was correct in concluding that *defendant* "had failed to show that" the complaint was aimed at speech protected by section 425.16.[188] To this end, it appears that *Novartis*' ruling is based upon a failure by defendant to satisfy its burden. However, under *Paul* and *Flatley*, a defendant would never have had the burden of disproving illegality in the first instance. As such, either the illegality exception was applied incorrectly here (*i.e.*, the court improperly placed the burden on defendant instead of plaintiff), or it was not applied at all (*i.e.*, the court determined that it was not speech in the first instance, rather than speech which lost its protection due to illegality).[189]

181 *Id.* at 34.
182 *Id.* at 35.
183 *Id.* at 35–36.
184 *Id.* at 35.
185 *Id.* at 36.
186 *Id.* at 34.
187 *See* Flatley v. Mauro, 139 P.3d 2, 12 (Cal. 2006); Paul for Council v. Hanyecz, 102 Cal. Rptr. 2d 864, 871–72 (Ct. App. 2001).
188 *Novartis*, 50 Cal. Rptr. 3d at 36.
189 Interestingly, another aspect of *Novartis*' application of the anti-SLAPP statute reveals confusion. Once the court concluded that defendant had failed to satisfy the first prong, the opinion went ahead and analyzed whether plaintiff had satisfied its burden on the second prong. *See id.* at 36–39. However, this second prong analysis is superfluous

iii. *Birkner v. Lam*

A year after the *Novartis* decision, California's First Appellate District again addressed the application of the illegality exception in *Birkner v. Lam*.[190] In this case, the defendant, Lam, appealed the denial of his special motion to strike after the trial court concluded the plaintiffs' causes of action were not based upon petitioning activity.[191] Though the trial court did not find that the activity complained of (the service and refusal to rescind a notice to terminate plaintiffs' tenancy) was illegal, it concluded that it did not arise from petitioning activity.[192]

On appeal, the court considered both the "arising from" and illegality arguments.[193] With respect to the former, the court observed that although the prosecution of an unlawful detainer action itself is protected activity under the anti-SLAPP statute, the termination of a tenancy is generally not protected.[194] However, where the service of a termination notice is a prerequisite for filing an unlawful detainer action, as it was in this case, such service does constitute activity in furtherance of a constitutionally protected right to petition.[195] Therefore, the court ruled, defendant's burden on the first prong had been satisfied.[196]

The plaintiff then argued that the protection of the anti-SLAPP statute should nonetheless be denied in this case because Lam's actions in serving the termination notice (in violation of the San Francisco Administrative Control's rent ordinance regulation) were illegal as a matter of law.[197] The court disagreed, holding that the evidence did not "conclusively establish" Lam's conduct was illegal as a matter of law.[198] Notably, the court's ruling did not reference any need for criminality in this context. Rather, the court simply decided that, because the presented evidence failed to show even a violation of the rent ordinance, the illegality exception did not apply.[199] Again, it would seem to have been much easier for the

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and extraneous in that failure to satisfy the first prong should mean immediate denial of the motion. There was no need to engage in second prong analysis.

190 Birkner v. Lam, 67 Cal. Rptr. 3d 190 (Ct. App. 2007).

191 *Id.* at 192.

192 *Id.* at 194.

193 *Id.* at 195–98.

194 *Id.* at 195.

195 *Id.*

196 *Id.* at 197–98.

197 *Id.* at 198.

198 *Id.*

199 *Id.*

court to dispose of defendant's illegality argument by simply pointing to the fact that no criminal violations had been asserted.

iv. *Cohen v. Brown*

California's Second Appellate District rendered its first significant decision on the post-*Flatley* illegality exception in *Cohen v. Brown*.[200] This case involved a dispute among two attorneys who were retained to prosecute a personal injury case on behalf of a person injured in a car accident.[201] Brown had been retained at the outset of the underlying case and filed the complaint.[202] Shortly before trial, Brown contacted Cohen to obtain his services in preparing for and trying the case.[203] Cohen claimed, however, that Brown misrepresented the amount of work required on the case and the level of experience Brown had in trying cases such as this.[204] When the case settled before trial, Brown informed Cohen that he would not be getting any portion of the attorney's fees realized from the settlement.[205] Brown further threatened (and later acted upon his threat) to file a complaint with the State Bar against Cohen, in an effort to force Cohen to authorize the release of funds to the underlying plaintiff (with no funds going to Cohen).[206]

Cohen filed suit against Brown for extortion, among other claims.[207] Brown filed a special motion to strike, claiming his actions in furtherance of the State Bar complaint were protected petitioning activity.[208] The trial court denied Brown's motion, concluding that his actions had an "extortive context," and were therefore illegal as a matter of law.[209] Brown appealed.[210]

On appeal, the appellate court relied upon *Flatley* in observing that "extortion is not constitutionally protected speech and thus cannot constitute the 'valid' exercise of speech and petition that is protected by section 425.16."[211] The court went on to conclude that, as in *Flatley*, Brown's actions amounted to extortion under sections 518, *et seq.* of the California Penal

200 Cohen v. Brown, 93 Cal. Rptr. 3d 24 (Ct. App. 2009).
201 *Id.* at 27–28.
202 *Id.*
203 *Id.* at 28.
204 *Id.* at 29.
205 *Id.* at 30.
206 *Id.* at 30–31.
207 *Id.* at 31–32.
208 *Id.* at 32.
209 *Id.* at 34.
210 *Id.*
211 *Id.* at 36 (quoting Flatley v. Mauro, 139 P.3d 2, 21 (Cal. 2006)).

Code.[212] Having determined that Brown's stated basis for relief under the anti-SLAPP statute was not viable, the court ended the inquiry before reaching the second prong.[213] Therefore, although the court did not explicitly address whether criminality must be shown before the illegality exception is applied, the opinion is notable in that it *did* rely upon the violation of the Penal Code before applying the illegality exception.[214]

D. California Appellate Courts Transform the Illegality Exception into a "Criminality" Exception

i. *Cabral v. Martins*

Perhaps in recognition of Justice Werdegar's concern that the illegality exception would swallow the anti-SLAPP doctrine as a whole, or perhaps as a consequence of the ambiguous scope and meaning of the term "illegal as a matter of law," California appellate courts have begun to deviate from the original reasoning in *Paul* and have started to shape the doctrine into a consideration of criminality more than illegality.[215] Though, as shown above, the criminality question indirectly played into several previous decisions, the first opinion to fully commit to the criminality requirement appears to be *Cabral v. Martins*.[216]

Cabral arose from a divorced couple's ongoing dispute over the ex-husband's unpaid child support.[217] Meanwhile, the ex-husband's mother revised her estate plan to disinherit him from her estate.[218] The ex-wife, having had past difficulty in collecting her judgment against her ex-husband, filed suit against, among others, the attorneys who assisted in revising the mother's estate plan.[219] The ex-wife's claim relied upon a California statute authorizing damages against those who assist a child support obligor in avoiding payment obligations (sections 1714.4 and 1714.41 of the California Civil Code).[220] The attorneys filed a

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212 *Id.* at 36–37.

213 *Id.* at 37.

214 *Id.*

215 *See, e.g.*, Gerbrosi v. Gaims, Weil, West & Epstein, LLP, 122 Cal. Rptr. 3d 73, 82 (Ct. App. 2011); Ogunsalu v. Gill, No. D057612, 2011 WL 1457190, at *6 (Ct. App. Apr. 15, 2011); Freisleben v. Riper, No. G042825, 2011 WL 940975, at *4–5 (Ct. App. Mar. 18, 2011); Mendoza v. ADP Screening & Selection Servs., Inc., 107 Cal. Rptr. 3d 294, 303 (Ct. App. 2010); G.R. v. Intelligator, 110 Cal. Rptr. 3d 559, 567 (Ct. App. 2010); Roosen v. Farrell, No. B209873, 2010 WL 3371510, at *10 (Ct. App. Aug. 27, 2010); Cabral v. Martins, 99 Cal. Rptr. 3d 394, 403 (Ct. App. 2009).

216 Cabral v. Martins, 99 Cal. Rptr. 3d 394 (Ct. App. 2009).

217 *Id.* at 398.

218 *Id.*

219 *Id.*

220 *Id.* at 399.

special motion to strike the ex-wife's claims, claiming protection under the anti-SLAPP statute.[221] The trial court granted the motion and the ex-wife appealed.[222]

On appeal, the ex-wife sought to employ the illegality exception by arguing that the attorneys' actions cannot be protected because they violated the child support evasion statute.[223] The appellate court disagreed, concluding that even if the attorneys had violated the statute, the ex-wife's argument was without merit.[224] The court believed that the ex-wife's attempted reliance upon *Flatley* and *Paul* was misplaced.[225] *Flatley*, the court noted, was distinguishable from the ex-wife's case because in *Flatley* the court took caution in limiting its holding "to 'the specific and extreme circumstances of [the] case,' in which the assertedly protected communications, as a matter of law, fell outside the ambit of protected speech."[226] The court distinguished *Paul* by noting, in that case, the allegedly protected actions of the defendants "were admittedly illegal, under the provisions of a statutory scheme specifically aimed at confining otherwise protected political activity within constitutionally valid bounds."[227]

The *Cabral* court further pointed out that, unlike in *Flatley* and *Paul*, in Cabral's case "the attorney respondents' actions in the course of the probate proceedings and the litigation defense were neither *inherently criminal* nor otherwise *outside the scope of normal, routine legal services*."[228] The court went on, noting that "[e]ven if the attorney respondents' actions had the effect of defeating or forestalling [the ex-wife's] ability to execute her judgment for child support, thereby (according to [the ex-wife]) violating the child support evasion statutes, this is not *the kind of illegality* involved in *Flatley* . . . and *Paul* . . . ."[229] In light of these observations, the court went on to hold that the attorneys' actions satisfied the first prong's inquiry of the anti-SLAPP analysis.[230]

Though *Cabral* purported to rely upon and apply the reasoning behind *Paul* and *Flatley*, a closer review of the *Cabral*

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221 *Id.* at 399–400.
222 *Id.* at 400.
223 *Id.* at 402.
224 *Id.*
225 *Id.*
226 *Id.* (quoting Flatley v. Mauro, 139 P.3d 2, 24 n.16 (2006)).
227 *Id.* at 403.
228 *Id.* (emphasis added).
229 *Id.* (emphasis added).
230 *Id.* at 404.

opinion against the backdrop of *Paul* and *Flatley* reveals a marked deviation from the prior cases. Indeed, as emphasized in the excerpt from the court's opinion above, the *Cabral* court distinguished its case from *Paul* and *Flatley* on the basis that it did not involve inherently criminal behavior.[231] However, *Paul* (which was wholly endorsed by *Flatley*) did not involve any allegation that the defendant had violated the Penal Code or committed any other criminal act. Instead, the plaintiff in *Paul* accused the defendant of violating election laws, not criminal laws.[232] Additionally, nowhere in the *Flatley* decision does the supreme court ever discuss the phrase "inherently criminal." The *Cabral* court seems to have made up the "inherently criminal" standard here.

Moreover, the *Cabral* court fails to offer any explanation as to what it means by actions that are "outside the scope of normal, routine legal services," or what "kind of illegality" is sufficient for the illegality exception.[233] Since *Paul* and *Flatley* never mention these concepts, *Paul* and *Flatley* provide us with no insight as to their meaning. In fact, as many of the anti-SLAPP cases preceding *Cabral* have illustrated, the meaning of the phrase "illegal as a matter of law" already caused a significant amount of uncertainty in this area of law.[234] With *Cabral*'s introduction of additional inquiries regarding the "inherent" criminality of an act, the breadth of scope for "normal, routine services," and the undefined "kind of illegality" deserving of separate treatment over other unspecified types of illegality, it is even less clear what is required to employ the illegality exception after *Cabral* than it was before.[235] Indeed, following *Cabral*, many would reasonably conclude that the illegality exception is simply a discretionary consideration the trial court should employ depending upon the allegations, evidence, and statutory violations in question on a case-by-case basis. The problem with such a conclusion is that, under well-established appellate authority, the standard of review regarding a trial court's anti-SLAPP ruling is *de novo*, not abuse of discretion;[236] and as such, the determination by the trial judge in the first instance simply cannot be one of discretion on a case-by-case basis. Beyond that, however, a trial court's required approach regarding the illegality exception following *Cabral* appears undefined.

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231 *Id.* at 403.
232 *Id.* at 402.
233 *Id.* at 403.
234 *See supra* Part II(A)–(C).
235 *Cabral*, 99 Cal. Rptr. 3d at 403.
236 *See* Oasis W. Realty, LLC v. Goldman, 250 P.3d 1115, 1120 (Cal. 2011).

ii. *Mendoza v. ADP Screening and Selection Services, Inc.*

Once *Cabral* planted the flag for a criminality approach to the illegality exception, other cases soon began to cement its stake.[237] One notable example of such a case is found in *Mendoza v. ADP Screening and Selection Services, Inc*.[238] In *Mendoza*, the plaintiff sued an employment-screening company ("SASS"), seeking damages purportedly incurred when the screening company provided information from the "Megan's Law" website to an employer with whom plaintiff had applied for employment.[239] Plaintiff claimed SASS improperly used information from the website for purposes related to employment, which amounts to a violation of sections 290.46(1)(2)(E) and (4)(A) of the California Penal Code, and subjects the company to a civil claim for damages.[240]

SASS responded to the complaint with a special motion to strike, claiming that it had a constitutional right under the anti-SLAPP statute to republish information from the website to its clients.[241] Though SASS admitted to causing the proliferation of this information, it claimed that its actions did not violate the Penal Code section prohibiting "use" of the information for employment purposes.[242] The trial court granted the motion to strike and plaintiff appealed.[243]

On appeal, the court considered, among other issues, whether SASS' actions in using information from the Megan's Law website amounted to illegality sufficient to preclude application of the anti-SLAPP statute.[244] Plaintiff relied upon *Flatley* in arguing that SASS' violation of the applicable Penal Code sections triggered the illegality exception of the anti-SLAPP statute.[245]

The appellate court disagreed, based in large part on its conclusion that "the [California] Supreme Court's use of the phrase 'illegal' [in *Flatley*] was intended to mean criminal, and not merely violative of a statute."[246] The court supported its conclusion with two levels of reasoning. For one, it noted, the

237 *See supra* note 215.

238 Mendoza v. ADP Screening & Selection Servs., Inc., 107 Cal. Rptr. 3d 294 (Ct. App. 2010).

239 *Id.* at 298–99.

240 *Id.* at 298.

241 *Id.* at 299.

242 *Id.*

243 *Id.* at 300.

244 *See id.* at 301–03.

245 *Id.* at 302–03.

246 *Id.* at 303.

Flatley court applied the illegality exception upon a finding that Mauro had engaged in criminal extortion, punishable under the Penal Code.[247] Second, the court reasoned, *Flatley* could not have intended for just any statutory violation to trigger the illegality exception because such an approach would undermine the anti-SLAPP statute in the first place.[248] The court opined that, because a "plaintiff's complaint *always* alleges" some illegal conduct, a mere statutory violation would give the plaintiff too easy an opportunity to cancel out the speech protections intended by the anti-SLAPP statute (reasoning that seems more connected to *Flatley*'s concurrence than its majority opinion).[249]

In applying its interpretation of *Flatley* to the facts before it, the *Mendoza* court concluded that the illegality exception did not apply.[250] The court found SASS' conduct was neither illegal nor criminal, as those terms are applied in the anti-SLAPP context.[251] Notably, the court drew this conclusion despite the fact that the acts in question violated provisions of the Penal Code. To this point, the court observed that the particular Penal Code sections violated here (sections 290.46(j) and (l)) did not amount to either a misdemeanor or felony; instead, they either served as an enhancement statute (as in subdivision (j)), or they served to provide civil remedies to the acts in question (as in subdivision (l)).[252]

The plaintiff encouraged the appellate court to consider *Novartis*, which involved underlying allegations of criminal conspiracy.[253] The appellate court distinguished *Novartis*, however, from the instant case.[254] Although the court admitted that, in *Novartis*, the conduct in question amounted to criminal conspiracy sufficient to deny anti-SLAPP relief, here, the court noted, SASS' conduct was "not of the same criminal nature."[255] The court failed to expand any further on this point to describe what it meant by the phrase "same criminal nature." In the end, the court noted, the illegality exception did not apply because "SASS did not concede that its underlying conduct was criminal, nor did the evidence conclusively establish that its conduct was criminal."[256]

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247 *Id.*
248 *Id.*
249 *Id.*
250 *Id.*
251 *Id.*
252 *Id.*
253 *Id.*
254 *Id.*
255 *Id.*
256 *Id.* For similar treatment by subsequent courts, see Cross v. Cooper, 127 Cal.

Among the interesting aspects of the *Mendoza* opinion is the path it takes to arrive at and utilize criminality in the illegality exception. The *Mendoza* court relies almost entirely upon *Flatley* in its conclusion that an act must be criminal to be exempted from protection under the statute.[257] On the other hand, at no point does the court ever cite to the *Cabral* decision. Yet, a simple review of the two opinions shows that nowhere in the *Flatley* decision does the court ever indicate an act must be "criminal" to be exempted, while *Cabral* could hardly make the point less emphatically, as discussed *supra*. Perhaps the *Mendoza* court preferred to rely upon supreme court precedent over appellate court precedent, but one would think at least a passing reference to *Cabral* would have been appropriate.

Another notable characteristic in *Mendoza*'s analysis is its willingness to boldly assert principles missing from the precedent it cites. For example, the court concludes that the illegality exception requires a showing that the violation in question amounts to either a misdemeanor or felony.[258] Yet, nowhere in *Flatley*, *Paul*, or any other case on the matter, has a California court ever concluded a misdemeanor or felony penalty is required for an act to be exempted from the anti-SLAPP statute. Indeed, the *Paul* opinion never uses the words "crime" or "criminal," nor does it ever contemplate any potential criminal consequences and/or punishments of the underlying act—money laundering. Certainly, if the *Paul* court had intended for criminality and punishment to be its guide, it would surely have commented at least once as to the criminal, rather than mere illegal, nature of the conduct in question. Similarly, the *Flatley* court never discusses "substantive crimes" versus other, undefined non-substantive crimes, in considering application of the illegality exception. Yet, the *Mendoza* court used this as a point of distinction between its facts and *Flatley*'s. Indeed, with the exception of *Cabral*, every case preceding *Mendoza* emphasized "illegality" and "unlawfulness" far more than criminality in determining the application of the illegality exception.

Rptr. 3d 903, 925, 929 (Ct. App. 2011) (holding that defendant was entitled to anti-SLAPP protection since criminal conduct was not conceded and uncontroverted evidence did not establish criminal activity); and Fremont Reorganizing Corp. v. Faigin, No. B218178, 2011 WL 3806350, at *8 (Ct. App. Aug. 30, 2011) (holding that the anti-SLAPP statute could apply since the conduct in question was not illegal).

[257] *Mendoza*, 107 Cal. Rptr. 3d at 303.

[258] *Id.*

iii. *G.R. v. Intelligator*

Nearly a year after California's First Appellate District decided *Cabral*, the Fourth Appellate District considered (and by implication, adopted) the criminality requirement described by *Cabral* and *Mendoza*. In *G.R. v. Intelligator*[259] the court of appeal considered whether the illegality exception applied in an action for invasion of privacy by an ex-husband against his former wife's attorney.[260] The husband claimed Intelligator invaded his privacy when, during marital dissolution proceedings, Intelligator filed a copy of the husband's credit report with the court without first redacting the husband's sensitive and personal information in the report.[261]

Intelligator acknowledged her failure to redact, and further conceded that her actions amounted to a violation of Rule 1.20 of the California Rules of Court.[262] Yet, Intelligator contended she was entitled to relief under the anti-SLAPP statute because her actions were protected petitioning activity (in other words, *Flatley* did not apply here).[263] Husband, on the other hand, argued that the illegality exception precluded anti-SLAPP relief for Intelligator because her actions violated a rule of court.[264]

The court disagreed with the husband, asserting that *Cabral*, *Paul*, and *Flatley*, establish that conduct must be found criminal before it will be exempted from the protections of the anti-SLAPP statute.[265] Considering the facts before it, the court concluded (as in *Cabral*) that the redaction of personal identifiers and subsequent violation of the rules of court was "not the type of criminal activity addressed in either *Flatley* . . . or *Paul*."[266] The husband pointed to the potential sanctions an attorney faces as punishment for violating a rule of court.[267] The court of appeal found that to be unpersuasive, however, observing that "if an attorney were subject to a separate action each time he or she committed a rule violation in the representation of his or her client, the effect would be to chill the hearty pursuit of a protected activity—the right to petition."[268] In light of these

259 G.R. v. Intelligator, 110 Cal. Rptr. 3d 559 (Ct. App. 2010).

260 *Id.* at 562.

261 *Id.*

262 *Id.* at 561, 565.

263 *See id.* at 564–67 (citing cases to determine what was protected activity, supporting Intelligator's argument that the anti-SLAPP statute could apply).

264 *Id.* at 564.

265 *Id.* at 566–67.

266 *Id.* at 567.

267 *Id.*

268 *Id.*

principles, the court found the defendant had satisfied the first prong, and therefore it rested its decision on a determination regarding the husband's probability of prevailing on the merits of his claim.[269] As for the state of the illegality exception, the criminality requirement imposed by *Cabral* and *Mendoza* was strengthened by the analysis put forward by the *Intelligator* court.

iv. *Gerbosi v. Gaims, Weil, West & Epstein, LLP*

As illustrated in one of the most recently published California opinions on the illegality exception, *Gerbosi v. Gaims, Weil, West, & Epstein, LLP*,[270] the criminality requirement has not only taken a firm hold of the illegality exception doctrine, but the ambiguities in its application are beginning to create uncertainty with other, previously well-established aspects of the doctrine.

Gerbosi involved appeals from the denial of two anti-SLAPP special motions to strike from two separate, but related cases.[271] Both cases arose out of events either involving or having some direct or indirect relation to Anthony Pellicano, a private investigator who was indicted on conspiracy and wiretapping charges in 2006 by a federal grand jury.[272] In one of the cases, Erin Finn sued the Gaims law firm alleging seven different causes of action: invasion of privacy; intentional infliction of emotional distress (IIED); unlawful eavesdropping; unfair competition; negligence; malicious prosecution; and abuse of process.[273] Finn had previously dated one of Gaims' clients (Robert Pfeifer), but following their separation, she became embroiled in litigation with him (both directly and as a witness to a separate litigation matter involving Pfeifer).[274] Finn's lawsuit arose from her claim that, after she and Pfeifer separated, Pfeifer, Gaims, and Pellicano "set out to destroy" her and used illegal wiretaps and harassing lawsuits to do so.[275] Meanwhile, Michael Gerbosi, who was Finn's next-door neighbor, also filed suit against Pfeifer, Gaims, and Pellicano (among others),

269 *Id.*

270 Gerbosi v. Gaims, Weil, West & Epstein, LLP, 122 Cal. Rptr. 3d 73 (Ct. App. 2011).

271 *Id.* at 77.

272 *Id.* at 77–78.

273 *Id.* at 78.

274 *Id.* at 77.

275 *Id.* at 78.

alleging unlawful wiretapping, unlawful eavesdropping, invasion of privacy, and other similar claims.[276]

Gaims filed a special motion to strike Finn's claims first, then filed a special motion to strike Gerbosi's claims a week later.[277] Gaims' argument for anti-SLAPP relief was similar for both motions: Gaims contended that the causes of action in each of the complaints arose from Gaims' activity as counsel for Pfeifer in his litigation against Finn, and because neither Finn nor Gerbosi could show a likelihood of prevailing on their claims, the two complaints should be stricken.[278] Both Finn and Gerbosi asked the trial court for leave to conduct discovery prior to opposing the motions, which the court granted.[279] Thereafter, Finn and Gerbosi filed oppositions to the motions, and after argument the trial court denied both motions.[280] Gaims appealed on each motion.[281]

California's Second Appellate District heard Gaims' appeal. In rendering its opinion, the court first addressed, and quickly discarded, Gaims' appeal of the motion to strike in the Gerbosi action.[282] The court observed that, although Gaims held the status of a lawyer, the firm had not represented any client in connection with litigation involving Gerbosi.[283] As such, the court reasoned, the claims of wiretapping and privacy invasion did not arise out of, and were not conducted in furtherance of, "protected 'petitioning' activity."[284] With that, the court affirmed the ruling denying Gaims' motion as to Gerbosi strictly under a first prong analysis.[285]

Finn's complaint presented a more difficult analysis for the court because Finn and Gaims' client had been involved in litigation with each other.[286] In addressing Finn's complaint, the court separated Finn's claims into two groups: one for her invasion of privacy, eavesdropping, and unfair competition claims, and the second for the rest of her claims.[287] With respect to the first group, the court held that Gaims was not entitled to anti-SLAPP relief because those causes of action are each "based

276 *Id.*
277 *Id.* at 78–79.
278 *Id.*
279 *Id.* at 79.
280 *Id.*
281 *Id.*
282 *See id.* at 80–81.
283 *Id.*
284 *Id.* at 81.
285 *See id.*
286 *Id.*
287 *Id.* at 81–82.

on *alleged criminal* activity."[288] In the court's opinion, this group of claims was precluded because each of them was "predicated on violations of the Penal Code."[289]

One of the more confusing aspects of the court's criminality conclusion is the fact that, of the three causes of action in this first group, only one appears based upon the Penal Code: unlawful eavesdropping (section 632 of the California Penal Code).[290] The other two claims, invasion of privacy and unfair competition, are not claims governed by the Penal Code, but rather are claims arising from the California Constitution and the California Business and Professions Code, respectively.[291] In any event, in light of its criminality conclusion and in reliance upon *Flatley*, the court concluded there was no need for a second prong analysis on these claims.[292]

As for the second group of claims (IIED, negligence, malicious prosecution, and abuse of process), the court held them to be protected under the anti-SLAPP statute, and the court engaged in no illegality analysis as to these claims in reaching its result.[293] In other words, although every one of Finn's claims was based upon the same underlying actions by Gaims, the court held one group to be excluded due to illegality but the other to be protected under the anti-SLAPP statute.[294] The court offered no other explanation for this distinction other than the conclusive statement that it "agree[d] with Gaims that the anti-SLAPP statute applie[d]" to the latter group of claims.[295]

The court's interpretation and application of *Flatley* to the first group of claims is worth particular attention here. The court noted that it understood *Flatley* "to stand for" the proposition that "when a defendant's assertedly protected activity *may or may not be criminal* activity, the defendant may invoke the anti-SLAPP statute unless the activity is *criminal* as a matter of law."[296] The *Gerbosi* court's opinion goes on to assert that, in *Flatley*, "the [California] Supreme Court observed that an activity could be deemed *criminal* as a matter of law when a defendant concedes *criminality*, or the evidence conclusively

288 *Id.* at 81 (emphasis added).
289 *Id.*
290 *Id.* at 78.
291 *Id.*
292 *Id.* at 82.
293 *Id.* at 82–83.
294 *Id.*
295 *Id.*
296 *Id.* at 82 (emphasis added).

shows *criminality*."[297] Tellingly, the court chose not to quote, or even cite to, any portion of the *Flatley* or *Paul* opinions for this point.

The *Gerbosi* court also opined on the burden shifting process in the face of the illegality exception, again invoking a questionable interpretation of *Flatley*.[298] In a partial quote of the *Flatley* opinion, the *Gerbosi* court asserted that *Flatley* stands for the proposition that "a defendant's 'mere assertion that his or her underlying activity was constitutionally protected' *will not suffice to shift to the plaintiff the burden of showing that the defendant's underlying activity was criminal, and not constitutionally protected.*"[299] Such a rule, *Gerbosi* adds—again partially quoting *Flatley*—would "eviscerate the first step of the two-step inquiry set forth in the anti-SLAPP statute."[300] In other words, under *Gerbosi*'s view, a claim of petitioning activity by the defendant does not shift any burden of proof to plaintiff to show criminality to fend off anti-SLAPP protection; a plaintiff need only allege defendant's purported protected activities are criminal as a matter of law and the inquiry ends.[301]

However, taking a closer look back at *Flatley*, the point it was making when it contemplated an evisceration of the first step was of a more subtle, although important, difference than the one which *Gerbosi* attributes to it. *Flatley*'s entire statement, from which *Gerbosi* draws its partial quotation, provided:

> [I]t would eviscerate the first step of the two-step inquiry set forth in the statute if the defendant's mere assertion that his underlying activity was constitutionally protected sufficed to shift the burden to the plaintiff to establish a probability of prevailing *where it could be conclusively shown that the defendant's underlying activity was illegal and not constitutionally protected*.[302]

Thus, *Flatley* cautioned us that an assertion of protected conduct, by itself, should not shift the burden to plaintiff to show a likelihood of success on the merits of its claims.[303] *Gerbosi* misapplied this point, concluding that the assertion of protected conduct by a defendant should not, by itself, shift the burden to plaintiff to show illegality as a matter of law.[304]

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297 *Id.* (emphasis added).
298 *Id.*
299 *Id.* (emphasis omitted) (emphasis added) (quoting Flatley v. Mauro, 139 P.3d 2, 13 (Cal. 2006)).
300 *Id.* (quoting *Flatley*, 139 P.3d at 13).
301 *Id.*
302 *Flatley*, 139 P.3d at 13 (emphasis added).
303 *Id.*
304 *Gerbosi*, 122 Cal. Rptr. 3d at 82.

Indeed, on this point *Gerbosi* again fails to refer to the *Paul* opinion. In fact, *Gerbosi* never once cites to *Paul* throughout its entire opinion. *Gerbosi* even shies away from those portions of the *Flatley* opinion which discuss *Paul* on this point. Had *Gerbosi* focused on *Flatley*'s thorough discussion of *Paul*, its position on burden shifting might be different. *Flatley*, after all, quotes and endorses the portion of *Paul*'s opinion where it describes the burden of demonstrating illegality as falling on the plaintiff:

> [I]f the plaintiff contested the validity of the defendant's exercise of protected rights "and unlike the case here, cannot demonstrate as a matter of law that the defendant's acts do not fall under section 425.16's protection, then the claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's burden to provide a prima facie showing of the merits of the plaintiff's case.[305]

Recall, it was *Paul*'s reasoning that the *Flatley* court found persuasive and controlling in announcing its holding. And, in the process of describing how the illegality exception should operate, it was *Paul* that described that establishing illegality was an "*additional* burden" held by plaintiff—a

> burden [that] should be met in the same manner the plaintiff meets the burden of demonstrating the merits of its causes of action: by showing the defendant's purported constitutional defenses are not applicable to the case as a matter of law *or* by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses.[306]

Gerbosi's refusal to shift this additional burden upon the plaintiff (and thus, allowing it to rest exclusively upon its allegations) marks a stark departure from the procedure envisioned by *Paul* and the other courts who subsequently adopted *Paul*'s vision. This includes the California Supreme Court's decisions in *Flatley* and *Soukup* (the latter of which noted that "a defendant who invokes the anti-SLAPP statute should not be required to bear the additional burden of demonstrating in the first instance that the filing and maintenance of the underlying action was not illegal as a matter of law," and that "as part of the plaintiff's burden of demonstrating illegality as a matter of law, the plaintiff must show the specific manner in

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305 *Flatley*, 139 P.3d at 12 (quoting Paul for Council v. Hanyecz, 102 Cal. Rptr. 2d 864, 871–72 (Ct. App. 2001)).

306 *Paul*, 102 Cal. Rptr. 2d at 872 (quoting Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 455 (Ct. App. 1994)).

which the statute or statutes were violated with reference to their elements").[307]

III. The Present and Future Outlook of the Anti-SLAPP Statute's Illegality Exception

What started with a limited and fact-specific carve-out of the anti-SLAPP statute—molded in its infancy by cases like *Paul*, *Kashian*, and *Flatley*—has been simultaneously retracted and expanded into an amorphous and ambiguous doctrine operating far different than these initial cases intended.[308] The discussion below considers the questions: how did the doctrine arrive at its current state and what impact will its changes have on future application of the doctrine?

A. Where Does the Illegality Exception Stand Now and How Did It Get Here?

In its early phases, *Paul* and *Kashian* set the stage for how the illegality exception would operate. *Paul* was careful to note that the exception would have only very limited application; indeed, *Paul* emphasized the exception would only be applied in the rare instances of where a party concedes illegality as to its purported protected speech and/or activity, or where such illegality could be shown as a matter of law.[309] *Kashian*, taking heart to this limited application, further noted that the requisite illegality was not something that could be established through mere allegations; illegality was an aspect of the exception that must be proven.[310] And, as *Paul* and others added, the illegality requirement was an "additional" burden of proof carried by the plaintiff, above and beyond the plaintiff's burden of proving a likelihood of success as part of the second prong analysis.[311]

Flatley, and its companion case *Soukup*, endorsed and adopted the illegality exception.[312] And, perhaps more importantly, the California Supreme Court endorsed the exception within the specific confines laid out in *Paul* (and to a lesser extent *Davis* and *Kashian*).[313]

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[307] Soukup v. Law Offices of Herbert Hafif, 139 P.3d 30, 47–48 (Cal. 2006).

[308] *See, e.g.*, *Gerbosi*, 122 Cal. Rptr. 3d at 82; Mendoza v. ADP Screening and Selection Servs., Inc., 107 Cal. Rptr. 3d 294, 303 (Ct. App. 2010); Cabral v. Martins, 99 Cal. Rptr. 3d 394, 403 (Ct. App. 2009).

[309] *Paul*, 102 Cal. Rptr. 2d at 871–72.

[310] Kashian v. Harriman, 120 Cal. Rptr. 2d 576, 590 (Ct. App. 2002).

[311] *See, e.g.*, *Soukup*, 139 P.3d at 48; *Kashian*, 120 Cal. Rptr. 2d at 590; *Paul*, 102 Cal. Rptr. 2d at 871–72.

[312] *Soukup*, 139 P.3d at 47; Flatley v. Mauro 139 P.3d 2, 13 (Cal. 2006).

[313] *Flatley*, 139 P.3d at 13.

Moving forward to the illegality exception's present application, however, the focus of the doctrine appears to have changed. Illegality has become synonymous with criminality. Despite the fact that neither *Paul*, nor *Davis*, nor *Kashian*, nor *Flatley*, nor *Soukup* ever state that criminality is a requirement for applying the doctrine, subsequent cases such as *Cabral*, *Mendoza*, and *Gerbosi* all equate illegality with criminality.[314] In fact, by the time the Second Appellate District decided *Gerbosi*, the illegality exception not only required that the underlying actions/speech be subject to the Penal Code, but that the actions/speech be punishable by either a misdemeanor or felony charge.[315] Actions subject to other penalties under the Penal Code, such as sentence enhancements or civil penalties, no longer suffice to establish application of the illegality exception. Notably, the underlying actions in cases such as *Paul* and *Soukup*—and later *Novartis*—are not based upon and do not otherwise reference any Penal Code violations.

Expanding the meaning of "illegality" is not the only development in the doctrine, as seen above. The burden of proof has also evolved. By way of *Paul* and *Flatley*, among other decisions, California courts had initially established that the plaintiff held the burden of proving illegality, either as a matter of law or by way of a concession by the defendant.[316] Starting with *Novartis* and later *Gerbosi*, however, plaintiff's burden appears far less than it once was, and perhaps may be gone altogether. Notably, under *Gerbosi*, a plaintiff need only *allege* illegality (or, more accurately stated, criminality), to initiate the exception.[317] Indeed, so long as the plaintiff at least alleges criminality (and so long as such allegation is punishable by felony or misdemeanor), the defendant appears foreclosed from any protection in the anti-SLAPP statute.[318]

As such, under the latest California precedent applying the anti-SLAPP statute, a proactive plaintiff who anticipates an anti-SLAPP challenge would be wise to specifically tailor his or her complaint in a manner that insulates the lawsuit from anti-SLAPP challenge. Such a plaintiff should allege that the

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314 *See* Gerbosi v. Gaims, Weil, West & Epstein, LLP, 122 Cal. Rptr. 3d 73, 82 (Ct. App. 2011); Mendoza v. ADP Screening and Selection Servs., Inc., 107 Cal. Rptr. 3d 294, 303 (Ct. App. 2010); Cabral v. Martins, 99 Cal. Rptr. 3d 394, 403 (Ct. App. 2009).

315 *Mendoza*, 107 Cal. Rptr. 3d at 303; *Cabral*, 99 Cal. Rptr. 3d at 403.

316 *Flatley*, 139 P.3d at 12; *Paul*, 102 Cal. Rptr. 2d at 871–72.

317 *See Gerbosi*, 122 Cal Rptr. 3d at 82 ("[A] defendant's '*mere assertion* that his [or her] underlying activity was constitutionally protected' will not suffice to shift to the plaintiff the burden of showing that the defendant's underlying activity was criminal, and not constitutionally protected." (quoting *Flatley*, 139 P.3d at 13)).

318 *Mendoza*, 107 Cal. Rptr. 3d at 303.

underlying speech and/or petitioning activities giving rise to the lawsuit are criminal. So long as these allegations are made with particularity (ideally identifying the Penal Code section that would apply if pursued as a criminal matter), the lawsuit should be able to survive a special motion to strike challenge (assuming the court follows *Gerbosi*). Ironically, in such a scenario, even if the lawsuit were a SLAPP, it would be permitted to continue as long as it meets these superficial pleading requirements.

On the other hand, a defendant faced with such a complaint would be wise to characterize the claims as primarily based upon civil remedies (to the extent possible) and otherwise based upon actions which cannot be punished by misdemeanor or felony charges. Such a defendant should also be prepared to carry the burden of proof on such characterization, but the defendant can take solace in the fact that success in characterizing the complaint in this fashion will advance the defendant to, at the very least, a second-prong determination forcing the plaintiff to show a likelihood of success on the merits. The defendant in this scenario faces a steep uphill battle since a well-pled complaint is seemingly impossible to beat. However, because so few civil claims are brought under the Penal Code, there may be room for maneuvering by defendants.

So how did we arrive at such an inconsistent application of the illegality exception? Much of the explanation for this lies in the *Cabral*, *Mendoza*, and *Gerbosi* courts' overlooking of *Paul* (or their otherwise refusal to apply *Paul*). In reaching its implied conclusion that the illegality exception required a showing that the questioned activity was inherently criminal or otherwise outside the scope of normal, routine legal services, the *Cabral* court claimed its facts were distinguishable from *Paul* (and *Flatley* for that matter).[319] *Cabral* noted that, unlike *Paul* and *Flatley*, its facts did not involve inherent criminality. *Cabral* appears to overlook the fact that *Paul* did not involve any allegations or proof that the defendant had violated any Penal Code section.[320]

Mendoza, in following *Cabral*'s lead, not only incorporates new elements into the illegality exception analysis, it also appears to ignore *Paul* altogether. *Mendoza* arrives at its conclusion (that the illegality exception did not apply in its case) because the purportedly illegal conduct was not criminal, and better yet, did not involve punishment by either misdemeanor or

319 *Cabral*, 99 Cal. Rptr. 3d at 403.
320 *Paul*, 102 Cal. Rptr. 2d at 867.

felony.[321] Strangely, however, *Mendoza* carries out this analysis without ever once citing to the *Paul* opinion.

Gerbosi continues the trend of ignoring *Paul* (and by extension *Flatley*, as it relied upon *Paul*). Like *Mendoza*, *Gerbosi* never once cites to *Paul* throughout its opinion, despite *Paul*'s undeniable influence on the development of the illegality exception.[322] Perhaps the *Gerbosi* court's disregard for *Paul* was born out of the parties' failure to rely upon or argue *Paul* during the appeal; a closer look at the briefs on appeal in *Gerbosi* reveal that neither the appellant nor the respondent ever cites to *Paul* throughout their briefing on appeal.[323] Consequently, the *Gerbosi* court devotes no attention to *Paul* in its opinion, thus never relying upon *Paul*'s guidance regarding the scope of illegality's meaning or the shifting of burdens among plaintiff and defendant throughout this process.

In any event, the bottom line for future parties and courts addressing the illegality exception is one of uncertainty. Some may follow *Paul*, *Kashian*, and *Flatley*'s reasoning in applying the early, California Supreme Court-endorsed version of the doctrine. This group will utilize the illegality exception where a plaintiff has carried its burden of proof in establishing illegality by the defendant, either as a matter of law or as conceded by the defendant. Conversely, others will follow *Cabral*, *Mendoza*, and *Gerbosi*. This group will apply the exception where the plaintiff has merely alleged criminality by the defendant, but only where such criminality is shown to be punishable by misdemeanor or felony. And, needless to say, future parties will face unpredictable (and likely contradictory) decisions as a result.

B. How Do We Resolve These Uncertainties?

i. Legislative Amendment

It is generally recognized that "[u]ncertainty undermines the rule of law."[324] As seen above, uncertainty regarding application of the illegality exception has already begun to undermine the principles which the state's anti-SLAPP laws seek to protect; and, as such, the current state of contradiction and

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321 *Mendoza*, 107 Cal. Rptr. 3d at 303.

322 *See Paul*, 102 Cal. Rptr. 2d at 868, 870.

323 *See* Appellants' Opening Brief, Gerbosi v. Gaims, Weil, West & Epstein, LLP, 122 Cal. Rptr. 3d 73 (Ct. App. 2011) (No. B219587), 2010 WL 1703225; Respondents' Brief, Gerbosi v. Gaims, Weil, West & Epstein, LLP, 122 Cal. Rptr. 3d 73 (Ct. App. 2010) (No. B219587), 2010 WL 3022530; Appellants' Reply Brief, Gerbosi v. Gaims, Weil, West & Epstein, LLP, 122 Cal. Rptr. 3d 73 (Ct. App. 2010) (No. B219587), 2010 WL 4155938.

324 Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1160 (1997).

unpredictability must be addressed. The most ideal manner for this will occur in the legislative setting. Recall that the Legislature has previously addressed the illegality exception as it pertains to the SLAPPback statute. More specifically, as part of enacting section 425.18, the Legislature enacted a provision specifically incorporating elements of the illegality exception to SLAPPback suits: "A special motion to strike may not be filed against a SLAPPback by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law."[325] In enacting this provision, the Legislature appears to have been influenced by *Paul*, as particularly evidenced by: (1) the timing of the enactment of section 425.18 (*i.e.*, after *Paul* and before *Flatley*), and (2) the use of phrases such as "illegal" and "as a matter of law."[326]

Of course, given developments in the doctrine subsequent to *Flatley*, simply enacting legislation similar to that imposed in section 425.18(h) will be of little assistance. In other words, codifying the principle that anti-SLAPP protection is unavailable to a party whose underlying actions were "illegal as a matter of law"[327] would do nothing to cure the current inconsistencies regarding the questions of criminality and burden of proof. Future courts and litigants need guidance specifically targeted toward whether criminality is a prerequisite for the exception and who is to carry the burden of proof in determining whether the exception will be imposed. Any meaningful legislative assistance must directly address these two issues. If criminality is a requirement for illegality, the Legislature should specifically state as much as part of a modification to section 425.16. And if so, the Legislature should also indicate what criminality means. Is the underlying action required to be subject to a provision of the Penal Code? Does it mean that the underlying action must be punishable by a misdemeanor and/or felony? Whether the Legislature endorses or rejects a criminality requirement, it should spell out what is required to avoid the current uncertainty that exists.

Any legislative involvement also must address uncertainty regarding burden of proof. Early case law on the illegality exception appeared to unequivocally place this burden on the plaintiff, but recent cases have shown a hesitation to engage in such burden shifting. The Legislature should specifically set out who holds the burden in consideration of the exception, and what

325 CAL. CIV. PROC. CODE § 425.18(h) (West 2011).
326 *Id.*
327 *Id.*

level of proof needs to be meet (*i.e.*, mere allegation or proof as a matter of law).

Legislative involvement could go a long way to tighten the application of the illegality exception. But, in order to have any meaningful impact, such legislative involvement must at a minimum address the issues outlined above.

ii. Clarification from the California Supreme Court

Should the Legislature fail or otherwise choose not to enact legislation clarifying application of the illegality exception, the California Supreme Court will be the next-best source for returning consistency in this area of law. Granting review of an appeal involving these issues will not only allow the opportunity to cure inconsistencies in the law and provide courts greater guidance on application of this doctrine, it would serve as a great opportunity to return the doctrine to the roots upon which it is based.

As emphasized above, any examination by the supreme court should focus upon the reasoning employed by early cases invoking the exception, particularly *Paul* and *Flatley*. In all likelihood, such a focus would render the *Cabral* and *Gerbosi* opinions a short life-span, at least to the extent they are read as holding criminality a prerequisite for the illegality exception.

Paul and other early cases addressing the illegality exception began their analysis with focused consideration toward the underlying purpose and intent behind the anti-SLAPP statute. As *Paul* observes, though the statute encourages the "continued participation in matters of public significance," it is unlikely the Legislature intended to give defendants a means by which to protect themselves for their illegal activities.[328] Thus, *Paul* concluded, "while it is technically true that laundering campaign contributions is an act in furtherance of the giving of such contributions, that is, in furtherance of an act of free speech, we reject the notion that section 425.16 exists to protect such illegal activity."[329]

Flatley also reminds us that the underlying purpose of section 425.16 is to prevent chilling of the "valid exercise" of free speech and petitioning rights.[330] "As a necessary corollary to this statement, because not all speech or petition activity is

328 *Paul*, 102 Cal. Rptr. 2d at 869.

329 *Id.* at 871.

330 Flatley v. Mauro, 139 P.3d 2, 9 (Cal. 2006). *See also* Soukup v. Law Offices of Herbert Hafif, 139 P.3d 30, 42 (Cal. 2006).

constitutionally protected, not all speech or petition activity is protected by section 425.16."[331] Certainly, the Legislature in adopting section 425.16 and by extension carving out a litigation protection against lawsuits arising from acts in furtherance of one's "right of petition or free speech under the United States Constitution or California Constitution,"[332] never intended to protect speech otherwise unprotected by the United States and California Constitutions. This therefore begs the question: what type of speech do these constitutions refuse to protect?

In *Wilcox v. Superior Court*, the Second Appellate District deliberated this very question in considering whether to apply the anti-SLAPP statute to a dispute between a group of certified court reporters and a separate alliance of reporters.[333] The plaintiff/cross-defendants sought to strike the alliance's cross-complaint, and following the trial court's denial of their motion to strike, the plaintiff/cross-complainant sought a writ of mandate challenging the trial court's determination.[334] The appellate court ordered the mandate be issued, based on a finding that the motion to strike should have been granted.[335]

In the process of reaching its decision, the *Wilcox* court was faced with the question of what the anti-SLAPP statute "means by 'furtherance' of the defendant's 'right of petition or free speech.'"[336] The court addressed this question by analogy. If, for example, a defendant's "act" in furtherance of its speech and petitioning rights was "a lawsuit against a developer," the defendant would have a prima facie First Amendment defense (and thus the first prong of the anti-SLAPP analysis would be satisfied).[337] If, however, "the defendant's act was burning down the developer's office as a political protest the defendant's [special] motion to strike could be summarily denied without putting the developer to the burden of establishing the probability of success on the merits in a tort suit against the defendant."[338] In other words, in enacting the statute, the Legislature meant to protect acts such as the filing of lawsuits as a form of speech and petitioning activity, but did not want to protect destruction of property even though such actions are a form of speech.

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331 *Flatley*, 139 P.3d at 331.

332 CAL. CIV. PROC. CODE § 425.16(a) (West 2011).

333 Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 448 (Ct. App. 1994).

334 *Id.* at 449.

335 *Id.* at 459.

336 *Id.* at 452 (quoting CIV. PROC. § 425.16(a)).

337 *Id.*

338 *Id.* at 452–53.

As *Wilcox* illustrates, we must draw a line between speech that is protected and speech that is not protected, and apply that line in the context of the anti-SLAPP statute's illegality exception. Where do we draw that line? The most prudent source in answering this question would seem to lie in the well-established precedent addressing First Amendment rights and particularly those cases deciding protected and unprotected speech. Of course, a discussion examining the treatment of illegal speech and First Amendment protection would span volumes far beyond the confines of the instant article. However, even a brief sampling of California and federal cases addressing this issue shows that the line between protected and unprotected speech deviates from the mere consideration of whether speech is criminal or not; though, at the same time, it appears foolish to completely remove the consideration of criminality from this analysis.

Indeed, the California Supreme Court has observed, "the goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, 'communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs.'"[339] But, as the court adds, "[a]s speech strays further from the values of persuasion, dialogue and free exchange of ideas, and moves toward willful threats to perform illegal acts, the state has greater latitude to regulate expression."[340] And, as we have seen, threats are but one area where the First Amendment has allowed restrictions on speech; other categories of restricted speech "include defamatory speech, fighting words, incitement to riot or imminent lawless action, obscenity and child pornography."[341] California courts, such as *Larson v. City and County of San Francisco*, have also added that, "[l]ike ordinary speech, commercial speech that is *misleading, fraudulent, or concerns unlawful activity* is not protected at all by the First Amendment."[342]

As this list of restricted categories of speech reveals, mere criminality is not the test for determining protection. Indeed, the test for determining whether speech is protected is a difficult and fact-specific one, as the United States Supreme Court

339 *In re* M.S., 896 P.2d 1365, 1371 (Cal. 1995) (quoting Shackelford v. Shirley, 948 F.2d 935, 938 (5th Cir. 1991)).

340 *M.S.*, 896 P.2d at 1371.

341 Larson v. City & Cnty. of S.F., 123 Cal. Rptr. 3d 40, 57 (Ct. App. 2011).

342 *Id.* at 58 (emphasis added).

acknowledged in its recent decision, *United States v. Stevens*.[343] While the Court acknowledged that it "has often described historically unprotected categories of speech as being 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,'" the determination is not one based on a simple cost-benefit analysis.[344] The *Stevens* decision points to the child pornography scenario as a prime example. There, the Supreme Court recognized a limitation on speech not only as a result of a cost-benefit analysis, but also in recognition that the speech in question was "'intrinsically related' to the underlying abuse, and was therefore 'an *integral part of* the production of such materials, an activity illegal throughout the Nation.'"[345] As the Supreme Court noted in *New York v. Ferber*, the child pornography case, "[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."[346]

Thus, we can conclude that speech can be restricted under the First Amendment where it is "an integral part of" a crime *(i.e.* extortion, as in *Flatley*), or where it is "misleading, fraudulent, or concerns unlawful activity" as noted in *Larson*. Though the line does not appear drawn specifically at criminality, criminality certainly plays a substantial role in this analysis. As such, to base application of the illegality exception solely upon criminality would circumscribe the exception more narrowly than the Legislature and the United States and California Constitutions appear to intend. Perhaps the California Supreme Court, to the extent it decides to take on this issue, will use criminality as a guide-post in refining the illegality exception, and implement criminality more appropriately as a starting point than an end point in the anti-SLAPP context.

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343 *See* United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).

344 *Id.* (emphasis omitted) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992)).

345 *Stevens*, 130 S. Ct. at 1586 (emphasis added) (quoting New York v. Ferber, 458 U.S. 747, 759, 761 (1982)).

346 *Ferber*, 458 U.S. at 761–62 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)).