

# Write or Fight

## SLAPPs Against Journalists in Brazil, the United States, and Spain

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Journalists have faced legal threats since the profession's beginning. They are vulnerable to the use of legal strategies to silence their reporting and rely upon laws ensuring media freedoms and protections (Waisbord, 2019). Journalists are now facing such legal action at unprecedented levels. In 2022, 363 journalists worldwide were imprisoned, whereas 302 were imprisoned in 2021 and 282 in 2020 (Committee to Protect Journalists, n.d.). A 2022 analysis of attacks against journalists revealed that 28% were administered through the legal system. Such attacks included imprisonment, arrest, laws restricting press freedoms, surveillance, criminal charges, and more (Mapping Media Freedom, n.d.). Within this wide range of legal threats, the scope of the current study focuses on a specific form: Strategic Lawsuits Against Public Participation (SLAPPs).

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### STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPPs)

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The term 'SLAPP' was coined by George Pring (1989) and Penelope Canan (1989) within the political context of the United States. Both scholars mapped and criticized the emerging practice of using litigation against political speech to move public debate to court proceedings. They investigated trends in litigation in-

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volving political speech, broadly understood. Pring, for instance, defined SLAPPs as containing the following criteria:

1. a civil complaint or counterclaim (for monetary damages and/or an injunction),
2. filed against non-governmental individuals and/or groups,
3. because of their communication to a government body, official, or the electorate,
4. on an issue of some public interest or concern. (Pring, 1989, p. 8)

The phenomenon has since evolved. Now, criminal charges are often included in SLAPP suits (Zuluaga & Dobson, 2021). In 1993, Merriam and Benson proposed an additional criterion to the SLAPP definition: litigations without merit and containing an ulterior political or economic motive (Benson & Merriam, 1993). The criterion adds a subjective element to the term: how can we define what is legitimate or not? How do we know the aims of those who file lawsuits? Because of these questions, SLAPPs are a particularly challenging topic of study, where researchers struggle both to quantify and qualitatively analyze the problem.

While clothed in legal dress, this type of litigation does not seek justice but to silence. The European Commission defines SLAPPs as court proceedings that are either manifestly unfounded or fully or partially unfounded proceedings that contain elements of abuse, justifying the assumption that the primary purpose of the court proceedings is to prevent, restrict or penalize public participation (European Commission, 2022). Legal interference in public discourse, specifically in journalistic reporting, can decrease freedom of speech generally, and is often associated with disrupting the free marketplace of ideas (Mill, 1859). With increasing regularity, court proceedings are used to limit or challenge this exercise.

### **SLAPPs Against Journalists**

In 2020, the European Centre for Press and Media Freedom tracked 91 SLAPP cases affecting 138 journalists in European Union Countries (Mapping Media Freedom, n.d.). Similarly, Media Freedom Rapid Response (MFRR) found trends of utilizing SLAPPs against journalists and the media in the 11 European countries studied (Article 19, 2022). In the United States, news organizations are receiving an increasing number of subpoenas for the exposure of their sources (U.S. Press Freedom Tracker, n.d.). In Brazil, news agencies have been consistently attacked by political players, including a record number of legal cases against the press in 2020 (Teixeira, 2020).

Worldwide, the COVID-19 pandemic may have led to an increase in SLAPP suits, limiting press freedom around the world. Papadopoulou and Maniou

(2021) analyzed 357 cases of press freedom violations that occurred early in the pandemic. The most common were legal threats (31.1% of the total) and were highest in Europe. While the authors found instances of new laws created with the intent to limit press freedom, legal threats also included arbitrary extensions of pre-existing laws. They found that, in a majority of cases, powerful entities intimidate and silence journalists using laws already in place. Journalists who had reported on the crisis, for example, were imprisoned under charges such as inciting fear and panic (Papadopoulou & Maniou, 2021).

European legal experts brought together by the Index on Censorship have found that SLAPP cases can be particularly damaging to the defendant as they can extend for lengthy periods of time. The plaintiff may benefit from a friendly legal climate, as is found in the lack of statutes of limitations in libel cases. Plaintiffs have also been found to engage in “location shopping,” filing in jurisdictions where their cases are easier to win, and further disadvantaging defendants who are not familiar with foreign legal systems. Perhaps due to rising public animosity towards the media, politicians are slow to prioritize enacting legal mechanisms to protect journalists. When such changes have been implemented, the outcome is mixed. Even seemingly beneficial changes do not always improve journalists’ legal standing. Countries that have changed the charge of defamation from a criminal to a civil suit, for example, have some of the highest rates of SLAPPs; journalists may be more successful in criminal cases due to the plaintiff’s higher burden of proof to demonstrate harm (Mhainin, 2020).

Often filed in response to a journalist’s reporting, SLAPPs are used routinely by people in power, most commonly politicians and businesspeople, to remove a journalist’s most basic right and responsibility. Thus, SLAPPs may prevent the sharing of information and, as Article 19 proposes, be “part of an eroding climate for media freedom” (Article 19, 2022, p. 9). By having their work challenged and scrutinized, journalists’ credibility is undermined and public sentiment towards the news becomes increasingly negative. Moreover, journalism is an unstable field with low job security. Even when journalists win SLAPP cases, they have spent an exorbitant amount of money and time they likely do not have (Article 19, 2022).

### **Feminist Legal Theory**

As many have noted, journalists are particularly vulnerable to SLAPPs due to societal and institutional power differentials; thus, we adopt the perspective of feminist legal theory throughout this work. Generally, feminist legal theorists challenge the claim that the law is neutral, objective, and fair in its form and

structure. In this framework, the law and its agents have been and continue to be tools to perpetuate women's and girls' subordination. Laws are productions of a political-historical context, inseparable from power inequalities. The patriarchal structure of society is reflected, in this sense, not only in the text of the law but in the way it is executed, affecting the material conditions of women and other vulnerable members of society (Smith, 2010). Furthermore, we subscribe to postmodern perspectives of feminist jurisprudence studies.

We understand that, historically, the feminist theory of law attributed a binary role to women, reducing gender to the question of dependence and motherhood or to danger, and the risk of abuse (Franke, 2001). In early feminist legal work, power was conceived of as something which people (predominantly male) possess and consciously exercise for their own ends against others. Postmodern feminist legal theorists seek to deconstruct this totalizing image of male power by focusing on intersectionality, multiple discourses, and the construction of social worlds (Eichner, 2001).

In this sense, feminist legal theory will help us analyze SLAPPs beyond a simple justice/injustice framework. Instead, SLAPPs are complex mechanisms of oppression with multiple actors, which express known and hidden power dynamics both in the text of the law and in court processes. While our case studies involve female journalists, we chose them not to attest that SLAPPs are mainly directed toward women but to balance pre-existing research imbalances within the humanities. We infer that these lawsuits have elements of discrimination and structural oppression, and that an analysis of these elements is crucial for garnering a more complete understanding of SLAPPs and their contexts.

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### CURRENT STUDY

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Given the use of SLAPPs to silence journalists and the dire effects this may have on democracy's foundational right to freedom of speech (Article 19, 2022), there is an urgent need to map and theorize their use. While press and legal experts have discussed the vulnerability of journalists to the harm SLAPPs can cause (Mhainín, 2020) more research is needed on the specific mechanisms that allow for these impacts. Thus, in the current study we utilize feminist legal theory to analyze three case studies. Case studies were chosen from each of the authors' countries of study to answer the following research question:

*How are Strategic Lawsuits Against Public Participation (SLAPPs) used as an intimidation tool against journalists across Brazil, the United States, and Spain?*

### Methods

We analyze three case studies using Situational Analysis, a methodology that relies on Social Worlds/Arenas Theory (SW/AT; Clarke et al., 2018). This method allows for a specific focus on the actors, power differences, and legal elements of the systems enabling SLAPPs. As a poststructuralist theory, SW/AT understands phenomena to be formed by many different factors at once. It uses cartographic metaphors to examine how social "worlds" (groups and discourses of varying sizes) interact and negotiate conflict. Part theory and part research methodology, Situational Analysis derives from grounded theory and feminist research methodologies (Clarke, 2021). It has been used in a range of fields, including gender (e.g. Eriksson & Emmelin, 2013; Nielsen, 2010) and media studies (e.g. Osazee-Odia & Nwokoro, 2021; Romenti & Valentini, 2010).

According to Clarke and colleagues (2018), within each situation under analysis, there are arenas—the physical and institutional spaces in which groups interact and within which social worlds engage. Social worlds are always in flux, "...negotiating, collaborating, struggling with other groups, seeking authority, social legitimacy, and the power to achieve their goals" (Clarke et al., 2018, p. 150). While Situational Analysis is not often used for comparative purposes, it may be particularly relevant to studying SLAPPs. Situational Analysis is a conflict-based theory which closely aligns with the adversarial legal system and the lawsuits that arise from it — and takes into account other factors involved in lawsuits but usually kept outside of legal studies. These include economic objectives, abuse, non-human actors, and the lived experiences of those involved. This theory also offers a nuanced definition of power that does not focus on its overt external manifestations or on the vulnerability of the oppressed, but on the complexity of the situation in which two (or more) actors find themselves (Clarke et al., 2018). Situational Analysis has also been found to be particularly beneficial when analyzing power (Valderrama Pineda, 2015).

### Procedure

Each researcher began by familiarizing him/herself with the situation by researching SLAPPs as a societal phenomenon within their country of study and presenting their case to all other researchers (Phase 1). Researchers then returned to their own research sphere and immersed themselves in media produced about the case (Phase 2). Items analyzed include legal filings on behalf of the litigant and defendant and on behalf of concerned third party organizations (e.g. court filings by ABRAJI, *Associação Brasileira de Jornalismo*); news articles about the cases (e.g. first-per-

son and legal reporting in the *New York Times* and its vertical *The Cut*); social media posts and threads; and especially any timelines or post-event narratives (such as the launch of the “El Master” podcast by *eldiario.com*). As they worked, researchers memoed and compiled messy situational maps.

These maps were then transcribed into Ordered Situational Maps, where researchers followed Clarke (2018) in teasing apart the distinctions between individual human elements/actors, collective human elements and actors (and their discursive constructions), implicated/silent actors, nonhuman elements, socio-cultural/symbolic elements, spatial elements, political and legal/judicial elements, economic elements, temporal elements, and major issues/debates. With the complexities at hand, we began to summarize our data (Phase 3), taking the opportunity to present our cases to each other once again, and to enter the information into three comparative tables (Phase 4). Several themes emerged as we moved into Phase 5, discussing and comparing categorizing choices. We debated the ways that the situations seemed to parallel and to diverge; several points of disagreement came up, and we took careful notes of those as avenues for future research. Our written analysis (Phase 6) is a summary of those discussions with a focus on some of the more vital topics. Hoping to visually express these similarities (a continuation of Phase 6), we follow Valderrama Pineda (2015) in creating an abstracted schematic map of these social worlds and some of the situations’ unifying elements (See Figure 1). While this map was intended to highlight the similarities between three situations, it brought additional differences to light, which required a return to Phase 5 and the assimilation of that data into this paper.

### Sample

The current study includes analysis from three case studies: Elvira Lobato in Brazil, Moira Donegan in the United States of America, and Raquel Ejerique in Spain. In 2008, Brazilian journalist Elvira Lobato’s professional future was put into jeopardy. Lobato worked at *Folha de São Paulo*, the country’s largest newspaper. After publishing reports about dubious financial investments made by *Igreja Universal*, a powerful evangelical church, Lobato was the target of more than one hundred simultaneous lawsuits (Abraji, 2021). These lawsuits were registered across the country, generally in small cities (Lobato, 2008). Lobato’s case is a hallmark. It was one of the first, and most brazen, contemporary cases of judicial harassment targeting journalists in Brazil. As is often the case with SLAPPs, Lobato won every one of the lawsuits filed against her. Despite having won the *Prêmio Esso* journalism award<sup>2</sup> for the investigation that was the lawsuits’ focus (“Elvira Lobato Conquis-

ta...”, 2008), the stress related to them hastened her retirement (Lopes et al., 2022).

American journalist Moira Donegan created the “Shitty Media Men” list in October 2017. In an effort to combat sexual violence perpetrated against female media professionals, Donegan created a shared Google document, conceived of as a space for women to anonymously disclose their experiences with sexual misconduct. Through such actions, women could then formalize and expand their “whisper network,” thereby gaining agency to better protect themselves and others. The list was immediately put into use, with over 30 women listing over 70 men and accusing them of misconduct ranging from harassment to rape.

Donegan intended for the list to be utilized as an intimate source of information sharing (Donegan, 2018), but the list (and sometimes its contents) quickly found its way to news sources such as *BuzzFeed*, *Reddit*, and eventually *Harper’s* magazine. Facing backlash and exposure as the list’s creator, Donegan removed it after only 12 hours (Donegan, 2018). In that time, however, writer and literary magazine founder Stephen Elliott claims he suffered significant emotional, financial, and reputational harm as one of the accused on the list. At least one anonymous contributor had written that he was guilty of sexual harassment and rape. On October 10, 2018, Elliott filed a suit against Donegan and, as he perceived them, 30 “Jane Does” who contributed to the list for Defamation of Character by Libel in the hopes of receiving a written retraction, financial compensation, and the names of the anonymous women (Elliott v. Donegan et al., 2018). The case ended in an undisclosed settlement in 2023 (Testa, 2023).

In April 2018, Raquel Ejerique, a journalist at the Spanish news site *eldiario.es*, was confronted with legal action claiming that she had insulted and defamed Cristina Cifuentes (Luque, 2018). Cifuentes was then president of the *Comunidad de Madrid*<sup>3</sup> and Ejerique had published a series of articles investigating inconsistencies in Cifuentes’ academic record. The articles had been edited by *eldiario.es*’ editor Ignacio Escolar, who was also charged. In their first court appearance, Ejerique and Escobar refused to retract the articles, saying that they were truthful and relevant to the public interest (“Spanish politician aims...”, 2018).

The case continued until 2021, and gained momentum with further allegations of privacy violations, criminality, and the addition of the Rey Juan Carlos university as a plaintiff. The Audiencia Provincial de Madrid<sup>4</sup> eventually declared that Ejerique and Escolar were not guilty of the offenses charged; in 2021, the court responded to an appeal made by Cifuentes. The

court declined to reopen the case, stating that it does not appear that the information published by Ejerique and Escobar was acquired illegally (Pinheiro, 2021).

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## RESULTS

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### Main actors

The identified main actors in all three cases highlight the power differentials characteristic of SLAPPs (Article 19, 2022). In the United States, Elliott's self-reported gender identity, financial well-being (Elliott v. Donegan et al., 2018), and position as founder of a well-regarded literary magazine, place him at a power advantage. As Donegan writes in a 2018 essay in *The Cut*, "like me, many of the women who used the spreadsheet are particularly vulnerable: We are young, new to the industry, and not yet influential in our fields" (Donegan, 2018, para. 5). In Brazil, the church had substantial media power and its bishop Edir Macedo is the owner of one of the biggest television channels in Brazil, which aired threats against Lobato (Costa, 2008). Quoting journalist Eugênio Bucci, the *Associação Brasileira de Jornalismo* states in their court filing that,

...há de se considerar a assimetria monstruosa entre, de um lado, a parte que, sob a desculpa de ter sido ofendida, massacra o jornalista com as táticas mal-intencionadas do assédio e, de outro lado, o próprio profissional da imprensa, que muitas vezes sequer dispõe de recursos próprios para pagar uma equipe de advogados que consiga acompanhar tramitações de ações em tantas comarcas diferentes. A desproporção de forças, por si só, já denota cruamente a injustiça perpetrada. (Bucci, 2021, as cited by Abraj, 2021, p. 16)<sup>5</sup>

In Spain, Cifuentes was advantaged by being the leader of a political party and the mayor of Madrid; Ejerique was a contributor to an online-only news publication that had been in business for only six years. As Ejerique states in a 2018 profile, "It's worrying when the president of a region like Madrid has made you her enemy" (Luque, 2018, para. 7). Further, because the charges were criminal complaints levied against individuals, not a publication, both Ejerique and Ignacio were compelled to pay for their own legal defense, while Cifuentes' was covered by the taxpayer.

Our identification of implied/silent actors indicates the intimidation tactics of the SLAPP suits may have affected many more beyond the main actors. The vast groups identified include survivors of sexual violence, Brazilian news consumers, and the Madrid electorate. All three of these lawsuits are understood to have far-reaching ramifications.

### Important Elements

We compared economic and legal elements across the three situations. These elements again highlight the role of power. In the American and Spanish cases, the plaintiff used their own high economic status as a supposed vulnerability. In Elliott v. Donegan, economic elements such as the plaintiff's reputation, book sales, and earning potential were arguments for the potential harm that befell him. In Spain, Cifuentes accused the journalists of pursuing "una lucrativa exclusiva"<sup>6</sup> (Precedo, 2019, para. 6), and implied that they were the paid mouthpieces of a powerful cabal seeking to take down a successful politician (Libertad Digital, 2018). In Brazil, Lobato reported on *Igreja Universal's* range of multi-million dollar purchases, including 23 television stations, 40 radio stations, and over a dozen companies owned by church officials; she also reported evidence that the church had invested its money in tax havens. In return, she was met with the expense of travel to each of the more than one hundred *Juizados Especiais*<sup>7</sup> in which cases against her were filed. Her early retirement was also a financial loss. All three SLAPPs involved financial cost to the defendant, in addition to legal trouble.

In each case, aspects of their state's legal systems benefited the plaintiff. In the United States, the plaintiff is incentivized as their courts tend to award punitive damages (Gotanda, 2003). In Brazil, it was legally required that the defendant or her representative be physically present when accused in *Juizados Especiais* cases—even 111 of them. *Juizados Especiais'* lower barriers, designed to increase the average person's access to justice and conflict resolution (Neto et al., 2021) led to their weaponization. Spanish law has a provision for judges to throw out specious cases early in the process. In this SLAPP, as in most Spanish defamation cases (Griffen, 2017), the judge chose not to. Legal systems in these cases were ill-prepared for lawfare, and poorly equipped to protect the vulnerable party.

### Discursive Topics

The plaintiffs in all three cases used claims of persecution and victimization to center themselves and make it appear as though they were in a lower position of power. Elliott claims Donegan has power and uses said power to victimize men as he makes statements such as that Donegan "benefited substantially" (Elliott v. Donegan et al., 2018, p. 8) and she "publicly admitted her hatred of men, in particular her distrust of and bias against 'straight' men, as well as her enjoyment of 'the witch hunt'" (Elliott v. Donegan et al., 2018, p. 10). In Brazil, the filings claimed that the church's faithful were harassed by neighbors and colleagues as a result of the news reporting, suggesting that the journalist should be punished for a

third party's actions. In Spain, Cifuentes repeatedly claimed that reporting on her Master of Arts degree was vicious harassment, calling it an "ataque feroz",<sup>8</sup> (Libertad Digital, 2018, para. 3) and a "cacería personal"<sup>9</sup> (Libertad Digital, 2018, para. 1).

Situational Analysis asks us to follow the discursive construction of non-human actants. These are any non-human elements—physical or abstract—that are tied to the situation (Clarke et al., 2018). In these three cases, they include digital evidence, such as the IP and email addresses of Jane Does (USA) and the administrative system that held Cifuentes's academic records (Spain). They also include discussions of anonymity and exposure.

Digital elements in both the American and Spanish cases were discursively constructed as objective records of nefarious involvement. Elliott stated that he would subpoena Google for its record of contributors to the *Shitty Media Men list*, an effort which was ultimately unsuccessful. Cifuentes and the *Universidad Rey Juan Carlos* both sought the identity of the individual who had sent a screenshot of Cifuentes's academic record to journalists; they were stymied by the system's inability to track different users. While digital records in neither case proved to be a boon to the plaintiff, both plaintiffs felt entitled to them. No human actors in these cases questioned the digital elements' supposed infallibility in record keeping.

In a similar vein, both American and Spanish cases took the exposure of anonymous sources as a focus, though actors constructed it differently discursively. In the USA, the legal process was explicitly positioned as a method through which the anonymous contributors would be identified for prosecution. In his affidavit, Elliott states that, "Plaintiff will know, through initial discovery, the names, email addresses, pseudonyms and/or "Internet handles" used by Jane Doe Defendants to create the List, ... Through discovery, Plaintiff can obtain the email address information..." (Elliott v. Donegan et al., 2018). The use of the legal system for further harassment was thus undisguised.

In Spain, the demand that Ejerique and Escolar expose their source(s) was more opaque, framed by an allegation that Cifuentes's record had been obtained illegally. This accusation was directed at undermining the source's right to anonymity and directly implicated the journalists; it was the subject of Cifuentes' and *Universidad Rey Juan Carlos*' final appeal, three years after Cifuentes first took Ejerique and Escolar to court. It was a valuable tool for prolonging the legal process and draining defendant funds, but it was presented as an important pursuit of the public good. Not an effort to expose a source but rather to protect the personal data of the public from being exposed by that source.

In its rejection of this claim and appeals based upon it, *La Audiencia Provincial de Madrid* wrote that,

...[el] silencio acerca de cómo se obtuvo la información y todas las circunstancias para publicar la misma obedece al ejercicio del secreto profesional, con alcance constitucional, y este silencio no debe interpretarse como una sospecha de haber obrado con conocimiento de la ilicitud.<sup>10</sup> (in Pinheiro, 2021, para. 9)

The court noted that the journalists had taken efforts to anonymize the data of other individuals in the records they received, keeping only that which was newsworthy. This, and their steadfast silence in the face of legal demands to reveal their sources, could be productively framed as evidence of their professionalism.

The discursive construction of anonymity in Lobato's fight against a multitude of court cases was distinct. In this situation, the plaintiff was hiding behind 111 false fronts: the citizens who had been requested to file near-identical complaints. Many of those citizens were church bishops. A report on a television station owned by church leader Edir Macedo repeatedly expressed the veiled threat that, "A Universal tem cinco mil templos"<sup>11</sup> (Costa, 2008, para. 2). But none of the plaintiffs admitted to filing their lawsuit on the church's behalf. Lobato's journalistic sources were not sought for exposure, as the lawsuits focused on charges of religious oppression. Outside of the courtroom, it was understood that church leaders were behind the lawsuits; within the courtroom, they existed neither as plaintiff nor defendant.

All three cases indicate the ways that anonymity can become intertwined with power. In America, the plaintiff was explicit about using legal power to expose women who had written about sexual misconduct. In Spain, the defendants' refusal to surrender anonymity was portrayed as evidence of illegal conduct, but ultimately upheld by judicial understandings of professional practices within journalism. And in Brazil, we see that anonymity can bolster intimidation and preserve power: sometimes the most powerful figures in a lawsuit are the ones least likely to be named.

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## DISCUSSION

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The results of the current study highlight the use of power and privilege to abuse the legal system targeting journalists with SLAPPs. Plaintiffs used tactics to decenter the accusations made against them in the press and instead bring focus to their own perspective. They painted themselves as victims, and attempted to make the journalists appear to abuse their "power." However, the identified main actors and elements highlight the true role of privilege of the plaintiff. Plaintiffs with

significant institutional power have used it, paradoxically, to claim absolute victimhood obscuring their privilege. The true ownership of power is important as the legal elements identified show that the legal system benefits those with privilege allowing for these SLAPP cases. These claims of victimhood ensure that the veracity of the journalistic work is no longer the debate, but instead the alleged damages become the central debated issue. Regardless of the outcome of the cases, these elements silenced journalists as the original story was no longer the focus of media attention and debate. Instead discursive topics centered on the plaintiffs’ “victimhood.” Lobato pointed precisely to this chilling effect in an interview, mentioning that she had lost a crucial prerogative to continuing reporting on the *Igreja Universal*.

I was a very active reporter, but I stopped reporting. I lost the fundamental precondition, which was impartiality [...] It’s no use saying to the young reporters: if you write a well-researched article, you’re protected. Judicial harassment doesn’t contest the merit. It is a deliberate action to silence the journalist [audio podcast episode]. (Lopes et al., 2022)

The results of this study also highlight some of the social worlds that these cases have in common (see Figure 1). Within the legal arena are laws upholding both freedom of speech and various anti-free-speech laws. Within the journalistic arena is professional dedication to freedom of speech but also the ongoing risk of legal action and draining of resources. Conflict occurs not only across arenas, but within. For example, laws protecting freedom of speech lie uneasily beside anti-libel, religious offense, and privacy laws. Such internal conflict is well expressed in the feminist legal theory term of “interlegality,” the precept that laws often occupy the same legal spaces but operate on different scales and to different ends (de Sousa Santos, 1987). The law is both the avenue

through which SLAPPs are administered, and the only method through which they can be removed.

The plaintiffs’ adept legal and rhetorical turn from power to victimhood is also familiar within feminist legal theoretical frameworks. Historically, these frameworks associated such a power-fragility paradox with endless societal demands to perform masculinity (Dowd, 2008). A gendered study of SLAPPs is beyond the scope of this paper but we note that despite the three defendants being female, gendered elements were notably absent from our findings. Defamation laws are, however, deeply gendered. Legal proceedings’ foci have shifted from the issue of widespread violence against women to the potential harm caused to individual men by false allegations (Gray, 2021). In our study, plaintiffs’ portrayals of journalists as powerful and politically motivated are remarkably similar. There may well be gendered elements at play within this dynamic.

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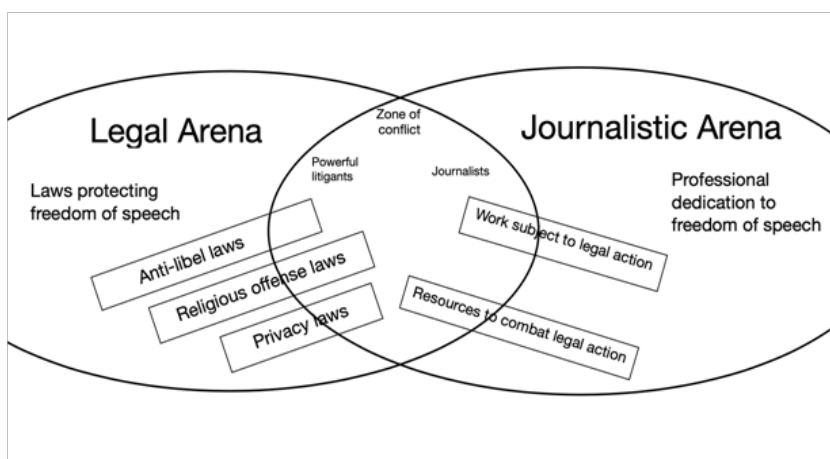
### LIMITATIONS

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While this study provides insight into mechanisms of intimidation through SLAPPs, it is limited in its ability to generalize. The sample consists of one case per country; robust comparisons cannot be made across location. The sample also includes only relatively recent cases, and thus comparisons cannot be made across time. Given the changing landscape of media and free speech laws, SLAPPs and mechanisms of intimidation are likely to evolve. For example, New York’s limited anti-SLAPP law was expanded in 2020 (Gibson Dunn, 2022). The trend of increasing hostile attitudes towards journalists may impact SLAPP lawsuits as well (Mhainín, 2020).

The current sample limits the ability to generalize to other populations. Feminist legal theory posits

**Figure 1:** *Social Arenas Across Cases*



groups are susceptible based on power differentials (Smith, 2010), thus certain marginalized journalists may be even more susceptible to SLAPPs (e.g., racial/ethnic minorities, diverse sexual orientations, gender minorities). The range of potential legal intimidation tactics may expand if the power differential between the plaintiffs and defendants is greater. More precarious journalists such as freelancers may also be particularly susceptible given their lack of financial resources.

The current study can only speak to perceived intimidation. While SLAPPs can have a terrifying effect of silencing journalists, the scope of the current study can only address the mechanisms that may serve as intimidation. The results cannot speak to the actors' subjective experience of intimidation, for which in-depth interviews would be helpful.

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#### FUTURE DIRECTIONS

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Despite these limitations, the current study provides insight into the intimidation of journalists through SLAPPs and offers specific mechanisms that powerful entities have utilized to force journalists into silence. Further research should explore the plethora of ripple effects that legal silencing and resource draining may have. Abuse of power has negative effects at the individual, group, and global levels. In terms of the individual level, future studies should understand how intimidation tactics take a toll on journalists' mental health. No known studies explore the psychological effects of SLAPPs on journalists. However, literature from other fields indicates professionals may experience negative mental and emotional reactions when faced with similar lawsuits regarding their livelihoods (e.g.; Clemente & Padilla-Racero, 2020; Ryll, 2015).

In terms of group impacts, results of this study also indicated that the effects of intimidation may be felt beyond the targeted journalists. For example, in Donegan's case, 30 other women were targeted and many more were identified as implicated/silent actors. Future research should explore their experiences. More information is needed to understand how this case and its corollary in Canada, filed by Jeremy Dodd after his appearance on the same list, may have impacted American and Canadian women's tendency to disclose or discuss sexual misconduct. More information is also needed to understand the impact these intimidation tactics have on journalists' reporting behavior. Prior research indicates journalists report change in their behavior due to lawsuits (Schultz & Voakes, 1999), but more information is needed as to the specific changes that occur, as well as longitudinal analysis.

To study global impacts, more information is needed to understand the detrimental effects SLAPPs may have on freedom of speech and free press. Other authors have posited the deleterious effects of SLAPPs on free speech (Article 19, 2022), and our study offers preliminary evidence that SLAPPs impact journalists' ability to share information. However, more research is needed on the correlation of media freedom with SLAPPs and surveys of journalists to understand how their choices of reporting (e.g., self-censorship) are directly affected by SLAPPs. It is our hope that from further research our civil and legal cultures can enact change. As our understandings of power become more nuanced, our legal systems can and should become more finely tuned.

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#### NOTES

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<sup>1</sup> Brazilian Association of Investigative Journalism

<sup>2</sup> Esso Journalism Prize

<sup>3</sup> Community of Madrid

<sup>4</sup> Provincial Court of Madrid

<sup>5</sup> "...one has to consider the monstrous asymmetry between, on the one hand, the party that, under the excuse of having been offended, massacres the journalist with the malicious tactics of harassment and, on the other hand, the professional himself, of the press, which often does not even have its own resources to pay a team of lawyers that can monitor the proceedings of actions in so many different districts. The disproportion of forces, by themselves, already crudely denote the injustice perpetrated."

<sup>6</sup> "a lucrative exclusive"

<sup>7</sup> Special Civil Courts

<sup>8</sup> Ferocious attack

<sup>9</sup> Personal hunt

<sup>10</sup> "[the] silence about how the information was obtained and all the circumstances for publishing it is due to the exercise of professional secrecy, within constitutional scope, and this silence should not be interpreted as an indication of having acted with knowledge of the illegality."

<sup>11</sup> "The Universal Church has five thousand temples."



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## ABSTRACT | RESUMÉ | RESUMO | RESUMEN

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**Write or Fight: SLAPPs Against Journalists in Brazil, the United States, and Spain**

**Sur le terrain ou dans les salles d'audience : les SLAPP à l'encontre des journalistes au Brésil, aux États-Unis et en Espagne**

**Escrever ou defender-se : SLAPPs contra jornalistas no Brasil, nos Estados Unidos e na Espanha**

**Escribir o defenderse : SLAPPs contra periodistas en Brasil, Estados Unidos y España**

**En.** Strategic Lawsuits Against Public Participation (SLAPPs) are unfounded court proceedings containing elements of abuse which prevent, restrict, or penalize public participation. Journalists face SLAPPs threatening censure, fines, and jail time. Even when unsuccessful, such cases nonetheless require the defendant's money and time. While researchers have posited that journalists are specifically vulnerable to the harm SLAPPs can cause, more research is needed on the specific mechanisms that allow for these impacts. Using Adele Clarke's Situational Analysis methodology, we examine case studies from Brazil (Elvira Lobato), the United States (Moirá Donegan), and Spain (Raquel Ejerique) to understand how SLAPPs are used as an intimidation tool in each of these contexts. We base our situational analyses on a range of cultural artifacts relating to each case including legal documents, social media posts, and news articles. To highlight the cases' shared and disparate elements, we compare their active and implicated human actors, economic elements, legal elements, and discursive topics. Making use of feminist legal theory, we identify these lawsuits' relationships to discrimination and structural oppression. Results indicate that in all three cases, the accusers positioned themselves as victims both within legal documents and in the press. This despite having significant institutional power over the defendant. Legal attempts to expose anonymous sources are present in two of our three cases and we discuss discursive constructions of anonymity. Implications regarding the legal structures that allow for SLAPPs and support further marginalization are discussed.

**Keywords:** SLAPPs, feminist legal theory, journalists' safety, legal safety

**Fr.** Les *Strategic Lawsuits Against Public Participation* (SLAPP) sont des procédures-bâillons non fondées et abusives qui empêchent, restreignent ou pénalisent la participation des citoyens au débat public. En particulier, les journalistes sont confrontés à des SLAPP qui les menacent de censure, d'amendes et de peines de prison. Même lorsqu'elles n'aboutissent pas, ces actions en justice requièrent néanmoins de l'argent et du temps de la part des accusés. Bien que les chercheurs aient avancé l'hypothèse que les journalistes sont particulièrement vulnérables aux dommages que peuvent causer les SLAPP, il est nécessaire d'approfondir les recherches sur les mécanismes spécifiques qui permettent ces atteintes. En utilisant la méthodologie de l'analyse situationnelle d'Adele Clarke, nous examinons des études de cas du Brésil (Elvira Lobato), aux États-Unis (Moirá Donegan) et en Espagne (Raquel Ejerique) pour comprendre comment les SLAPP sont utilisés comme outils d'intimidation dans chacun de ces contextes. Nous avons basé nos analyses situationnelles sur une série de données et documents relatifs à chaque cas, y compris des documents juridiques, des messages sur les médias sociaux et des articles de presse. Pour mettre en évidence les éléments communs et différents des affaires, nous avons comparé les acteurs humains actifs et impliqués, les éléments économiques, les éléments juridiques et les sujets discursifs. En nous appuyant sur la théorie juridique féministe, nous avons analysé les relations que ces procès entretiennent avec la discrimination et l'oppression structurelle. Les résultats indiquent que dans les trois cas, les accusateurs se sont positionnés en tant que victimes à la fois dans les documents juridiques et dans la presse. Et ce, en dépit du fait qu'ils disposent d'un

pouvoir institutionnel important sur les accusés. Notre article étudie également les constructions discursives de l'anonymat, des mesures juridiques en vue de révéler des sources anonymes étant présentes dans deux des trois cas analysés. Les structures juridiques qui permettent les poursuites-bâillons et participent à une marginalisation accrue des journalistes sont également analysées.

**Mots-clés :** SLAPP, théorie juridique féministe, sécurité des journalistes, sécurité juridique

**Pt.** As *Strategic Lawsuits Against Public Participation* (SLAPPs) são ações judiciais infundadas e abusivas que impedem, restringem ou retaliam a participação no debate público. Jornalistas estão sendo alvos desse tipo de ação, sob a ameaça de serem silenciados, multados e condenados a penas de prisão. Mesmo quando não chegam ao final ou resultam em condenação, essas ações judiciais obrigam os réus a gastarem tempo e recursos financeiros para se defender. Embora pesquisadores tenham levantado a hipótese da vulnerabilidade especial dos jornalistas aos danos causados pelas SLAPPs, são necessárias mais pesquisas sobre os mecanismos específicos que permitem esses ataques. Utilizando a metodologia de Análise Situacional de Adele Clarke, este trabalho discute estudos de caso do Brasil (Elvira Lobato), dos Estados Unidos (Moirá Donegan) e da Espanha (Raquel Ejerique), buscando compreender como as SLAPPs são usadas como ferramentas de intimidação em cada um desses contextos. As análises situacionais foram baseadas em uma série de dados e documentos relacionados a cada caso, incluindo documentos jurídicos, postagens em mídias sociais e artigos na imprensa. A fim de evidenciar as semelhanças e diferenças nos casos, realizou-se uma comparação entre os agentes humanos ativos envolvidos, os elementos econômicos, os elementos jurídicos e os tópicos discursivos. Com base na teoria jurídica feminista, identificamos as relações entre essas ações judiciais, a discriminação e a opressão estrutural. Os resultados mostram que, em todos os três casos, os autores das ações se posicionaram como vítimas tanto nos documentos jurídicos quanto na imprensa, apesar de terem poder institucional significativo sobre os réus. Este artigo também discute as construções discursivas do anonimato, uma vez que dois dos três casos estudados envolvem medidas judiciais para obrigar jornalistas a revelar fontes anônimas. Ainda são discutidas as estruturas jurídicas que permitem movimentar ações de assédio judicial e contribuem para o aumento da marginalização dos jornalistas.

**Palavras-chave:** SLAPP, teoria jurídica feminista, segurança de jornalistas, segurança jurídica

**Es.** Las demandas estratégicas contra la participación pública (conocidas como SLAPP por sus siglas en inglés) son procedimientos judiciales infundados que contienen elementos de abuso y que impiden, restringen o penalizan la participación pública. Dichas demandas representan riesgos de censura, multas y penas de cárcel para los periodistas. Aun si no prosperan, estos casos consumen el dinero y el tiempo del acusado. Si bien algunos estudios han postulado que los periodistas son especialmente vulnerables a los daños que pueden causar las SLAPP, es necesario investigar más sobre los mecanismos específicos que posibilitan estos perjuicios. Utilizando la metodología de análisis situacional de Adele Clarke, examinamos estudios de caso en Brasil (Elvira Lobato), Estados Unidos (Moirá Donegan) y España (Raquel Ejerique) para comprender cómo se utilizan las SLAPP como herramientas de intimidación en cada uno de estos contextos. Basamos nuestros análisis situacionales en una serie de artefactos culturales relacionados con cada caso, tales como documentos jurídicos, publicaciones en redes sociales y artículos de prensa. Para destacar los elementos comunes y dispares de los casos, comparamos los actores humanos activos e implicados, los elementos económicos, los elementos jurídicos y los temas discursivos. Haciendo uso de la teoría jurídica feminista, identificamos las relaciones de estas demandas con la discriminación y la opresión estructural. Los resultados indican que en los tres casos los acusadores se posicionaron como víctimas tanto en los documentos legales como en la prensa, a pesar de tener un poder institucional significativo sobre las acusadas. En dos de nuestros tres casos se evidencian intentos legales de exponer a las fuentes anónimas; analizamos las construcciones discursivas del anonimato. Se discuten las implicaciones relativas a las estructuras legales que posibilitan las SLAPP y fomentan una mayor marginación.

**Palabras clave:** SLAPP, teoría jurídica feminista, seguridad de los periodistas, seguridad jurídica