

Washington University Journal of Law & Policy

Volume 4 *Access to Justice: The Social Responsibility of Lawyers*

2000

Denying Access to Legal Representation: The Attack on the Tulane Law Clinic

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https://openscholarship.wustl.edu/law_journal_law_policy/vol4/iss1/5

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Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic

Robert R. Kuehn*

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* Visiting Professor of Law, University of Utah College of Law. The following Article is based on a presentation by Professor Kuehn in the Public Interest Law Speaker Series at Washington University School of Law on November 17, 1999. From 1989 to 1999, Professor Kuehn was the director of the Tulane Environmental Law Clinic and is one of the plaintiffs in the federal court challenge to the Louisiana Supreme Court’s new restrictions on law school clinics. The author would like to thank Washington University School of Law students L.J. Cox, Erica Freeman, and Justin Pitt, and University of Michigan Law School students Stephen Crowley, Brian Gruber, and Patrick Raulerson, for their research assistance, Washington University School of Law and the University of Michigan Law School for supporting the research on which this article is based, and Kirsten Engle, Oliver Houck, Peter Joy, Rena Steinzor and Elizabeth Teel for their helpful comments on an earlier draft.

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We went to Atlanta and had meetings with all kinds of lawyers, but they looked like they were afraid to take our case. Tulane took it, and they’re doing a good job. If they weren’t, the Governor wouldn’t be so worried about them.

—Emelda West, St. James Citizens for Jobs & the Environment¹

If Shintech is defeated, I’ll just know that I’ll have to do a better job next time of getting people out of the way.

—Louisiana Governor Murphy J. “Mike” Foster, Jr.²

Widespread advocacy campaigns by professors and students are beyond the legal parameters of helping indigent people.

—Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court³

1. Melba Newsome, *Slaying Goliath*, AMICUS J., Spring 1998, at 12-13.
 2. Meeting with Murphy J. “Mike” Foster, Jr., Governor, State of Louisiana, in Baton Rouge, La. (Aug. 13, 1980); see Joe Gyan, Jr., “Outlaw” Leader Leaving La., ADVOCATE (Baton Rouge, La.), May 15, 1999, at 1B.
 3. James Varney, *Justice Calogero Seeking 3rd Term*, TIMES-PICAYUNE (New Orleans, La.), Aug. 7, 1998, at A2.

Legal representation is not available to most Americans who have legal problems. A 1992 American Bar Association study, for example, found that each year approximately half of all low-income and moderate-income households face legal problems and that 71% and 61% of these households' legal needs, respectfully, are never addressed by the civil justice system.⁴ The number of lawyers working for the needy declined by about one-third since 1980,⁵ with fewer than 20% of America's lawyers performing any pro bono legal services.⁶ The supply of this limited, free work is usually restricted to routine legal matters and often "goes to friends, relatives, and organizations likely to attract paying clients."⁷ Former President Jimmy Carter observed that "[n]inety percent of our lawyers serve ten percent of our people. We are over-lawyered and under-represented."⁸

When people require assistance to advance public interests, rather than private interests, the lack of legal representation is even more

4. A.B.A. CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 15 (1994). In 1991, 85% to 92% of low-income residents in Louisiana with civil legal needs were unable to receive assistance from an attorney. William P. Quigley, *The Unmet Civil Legal Needs of the Poor in Louisiana*, 40 LA. BAR J. 477 (1993). See also Talbot D'Alamberte, *Tributaries of Justice: The Search for Full Access*, FLA. BAR J., Apr. 1999, at 12, 27 n.19 (reporting that only 19% of low-income individuals with legal needs were represented by lawyers in Florida); Karen A. Lash et al., *Equal Access to Justice: Pursuing Solutions Beyond the Legal Profession*, 17 YALE L. & POL'Y REV. 489 & n.1 (1998) (observing that only one-fourth of poor California families with civil legal problems receive full or partial legal assistance).

5. Luke Cole, *The Crisis and Opportunity in Public Interest Law: A Challenge to Law Students to be Rebellious Lawyers in the '90s*, 4 B.U. PUB. INT. L.J. 1, 2 (1994).

6. Rosalind Resnick, *Looking at Alternative Services; The Lawyer/Non-Lawyer Wall Continues to Erode*, NAT'L L.J., June 10, 1991, at 1. Lawyers at the nation's 100 largest law firms dedicated over one-third less time to pro bono work in 1999 than in 1992. John Turretini & Keith Cunningham, *The Way We Were*, AM. LAW., July 2000, at 96. Only nineteen of the largest 100 firms averaged the fifty hours or more of annual pro bono work recommended by the ABA's Model Rules of Professional Conduct. Bruce Buckley, *The Do-Good Law Firms*, NAT'L JURIST, Nov-Dec. 2000, at 31, 32 (citing the American Lawyer survey); see also *Not Too Much to Brag About*, AM. LAW., July 2000, at 161.

7. GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 469 (3d ed. 1994).

8. Jimmy Carter, Remarks at the 100th Anniversary Luncheon of the Los Angeles County Bar Association, in PUBLIC PAPERS 834, 836 (1978). Supreme Court Justice Sandra Day O'Connor lamented: "There has probably never been a wider gulf between the need for legal services and the availability of legal services" than exists today. William J. Dean, *Challenge to Law Firms*, NAT'L L.J., Oct. 2, 1995, at 3 (quoting Justice O'Connor's 1991 address to the ABA).

severe—less than .001% of lawyers in the legal profession are public interest lawyers.⁹ “Although recent data are unavailable, the best available estimates suggest that the number of full-time public interest lawyers is less than one attorney for every 240,000 Americans.”¹⁰ Citizens advancing issues of public concern often have no choice but to turn for free assistance from law school professors or one of the nation’s law school clinics.¹¹

Legal needs remain unsatisfied in spite of ethical rules commanding that “[e]very lawyer, regardless of professional prominence or work load, has a responsibility to provide legal services to those unable to pay.”¹² Many members of the legal profession have called for transforming this responsibility into a mandatory ethical requirement for all members of the bar.¹³ However, no state currently mandates pro bono service and only Florida requires all members of the bar to report annually the number of hours of pro bono services performed.¹⁴

9. Debra S. Katz & Lynne Bernabei, *Practicing Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting to Challenge the Power*, 96 W. VA. L. REV. 293, 300 (1993-94).

10. Deborah L. Rhode, *The Professional Responsibilities of Professional Schools*, 49 J. LEGAL EDUC. 24, 36 n.49 (Mar. 1999).

11. See, e.g., Hope Babcock, *Environmental Justice Clinics: Visible Models of Justice*, 14 STAN. ENVTL. L.J. 3, 35 (1995) (observing that “without question” there was a need for a law clinic to address environmental justice issues); Joan C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1475, 1505 (1998) (arguing that the need for clinical programs to address unmet legal needs has scarcely been greater). Kevin R. Johnson & Amanda Perez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory Into Practice and Practice Into Theory*, 51 SMU L. REV. 1423, 1429 (1998) (noting the lengths to which clients must go to find and meet with law clinic attorneys). Supreme Court Justice Sandra Day O’Connor advocated mandatory clinical legal education for all law students to help meet the country’s severe legal services shortage. Dubin, *supra*, at 1475 n.73 (quoting Justice O’Connor’s 1991 address to the ABA).

12. MODEL RULES OF PROF’L CONDUCT R. 6.1 cmt. 1 (1999).

13. See, e.g., Benjamin L. Cardin & Robert J. Rhudy, *Expanding Pro Bono Legal Assistance in Civil Cases to Maryland’s Poor*, 49 MD. L. REV. 1 (1990) (discussing a recommendation of the Advisory Council of the Maryland Legal Services Corporation, supported by the Maryland Attorney General, for a court rule establishing mandatory pro bono service by all attorneys to assist low-income persons in civil matters); Tigran W. Eldred & Thomas Schoenherr, *The Lawyer’s Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 399 (1993-94); Steven Lubet & Cathryn Stewart, *A “Public Assets” Theory of Lawyers’ Pro Bono Obligations*, 145 U. PA. L. REV. 1245, 1246-47 (1997).

14. See FL. RULES OF PROF’L CONDUCT R. 4.6.1(d) (1999). Louisiana has a voluntary pro bono reporting program that documented fewer than 100,000 hours of pro bono services to Louisiana residents during 1998. *Access to Justice Program Seeking Donations from Bar*

While some form of mandatory pro bono assistance appears necessary, this Article does not advocate for such a requirement. Instead, this Article argues for more modest requirements: simply, where members of the bar, and in particular law schools, have voluntarily stepped in to address unmet legal needs and help fulfill the responsibility of the legal profession, society ought not interfere. Moreover, members of the legal profession, as a matter of legal ethics, may not interfere. This freedom from interference is particularly crucial where such volunteer efforts are not taxpayer-funded and where denial of pro bono services effectively deprives needy individuals and community groups of legal representation in matters that may significantly affect their health and welfare.

Part I of this Article begins by chronicling recent events involving the efforts of a lower-income minority community in Louisiana to obtain free legal representation to oppose the construction of a petrochemical plant. Part II describes the backlash that ensued when the Tulane Environmental Law Clinic agreed to provide representation to the community and began raising environmental discrimination claims. Part II further recounts efforts by the Louisiana governor, business interests, members of the legal profession, and the Louisiana Supreme Court to deny access to legal representation for individuals and community groups. Part III documents the harm that resulted from this denial of access to legal representation by law clinic students. Finally, this Article analyzes and rebuts the justifications given for this denial and similar efforts to interfere with attempts by other law school clinics and law professors to provide free legal assistance. This Article argues that we will realize our commitment to equal justice under the law only when we adopt and enforce specified measures to curtail such denials of legal representation.

The significance of the Tulane story set forth below is not simply that this community found it so difficult to locate members of the

Members, BAR BRIEFS (New Orleans, La.), May 1999, at 1. In contrast, five of the eight Tulane Law School clinics alone provided over 65,000 hours in free legal assistance during 1997. See *infra* note 315 and accompanying text (stating that the Tulane Environmental Law Clinic provided 25,000 hours); Memorandum from Jane Johnson, Tulane Law Clinic, to Monte Mollere, Louisiana Bar Association (Nov. 17, 1998) (on file with author) (citing statistic that Tulane civil, criminal, immigration and juvenile justice clinics donated over 43,000 hours).

legal profession willing to donate their time to ensure that the community's legal interests were heard. The statistics noted above demonstrate the difficulty of obtaining the services of scarce public interest lawyers. What is significant about this story is the hostility from certain public officials, business interests, lawyers, and the judiciary to this community's efforts to obtain legal assistance from law students and professors. These hostile reactions speak negatively about the commitment of society and the legal profession to equal access to justice. These negative reactions also highlight the need for stronger measures to deter interference in the provision of free legal services to needy individuals and community groups.

I. THE SHINTECH PROPOSAL AND AN APPEAL FOR FREE LEGAL ASSISTANCE

In the fall of 1996, a group of Louisiana residents approached the Tulane Environmental Law Clinic (Tulane Clinic or Clinic) seeking legal assistance to challenge the proposed siting of a large chemical plant in their community. To the Clinic, it appeared, at first, as just another request, albeit a large one, for the type of free legal services the Clinic had provided to Louisiana residents for the previous seven years. However, when the Clinic slowed the plant's regulatory approval, the governor of Louisiana, certain business groups, prominent members of Louisiana's bar, and the Louisiana Supreme Court viewed the Clinic's advocacy as intolerable and as an abuse of the free legal services provided by the state's law clinics.

A. *"Enough is Enough"*

Convent is a lower-income, rural, 84% African American community along the Mississippi River in St. James Parish, Louisiana.¹⁵ Located in the eighty-five-mile area commonly referred

15. See U.S. ENVIRONMENTAL PROTECTION AGENCY, TITLE VI ADMINISTRATIVE COMPLAINT RE: LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY PERMIT FOR PROPOSED SHINTECH FACILITY: SUMMARY DOCUMENTATION OF DRAFT REVISED DEMOGRAPHIC ANALYSIS, Attachment 3 (Apr. 1998) (on file with author) (citing statistics showing 83.7% of the 3,165 residents within a three-mile radius of the center of the proposed facility are African American).

to as “Cancer Alley” or the “Chemical Corridor,” Convent is a highly toxic community even by Louisiana and Chemical Corridor standards. In 1995 industrial facilities in the Convent area emitted 251,179 pounds of toxic air pollution per square mile: over sixty-seven times the amount per square mile emitted for the rest of the parish, the third most polluted parish in the state; ninety-three times more than the amount emitted per square mile for the highly-polluted Chemical Corridor; 129 times more than the average for Louisiana, described as easily the most polluted state in America on a square mile or per capita basis; and 658 times more than the U.S. average.¹⁶ A person could spend half a day in Convent and be exposed to almost as much toxic air pollution as the average American breathes in a year.

Unfortunately, industrial development has not resulted in a noticeable economic improvement for many Convent residents. The median annual income for the Convent area is only \$11,476, compared to a median income for the parish of \$23,000 and a national average of \$30,000.¹⁷ Almost half of the households in Convent have incomes less than \$15,000 per year, less than 50% of the children graduate from high school, and unemployment runs as high as 60%.¹⁸ Convent is a classic example of a local community

16. Charles A. Flanagan, Convent Area School and Toxic Release Inventory Sites With 1995 Total Air Emissions (1998) (on file with author) (explaining an analysis based on 1995 U.S. EPA Toxics Release Inventory data for 50-square mile Convent area). See also FROM PLANTATIONS TO PLANTS: REPORT OF THE EMERGENCY NATIONAL COMMISSION ON ENVIRONMENTAL AND ECONOMIC JUSTICE IN ST. JAMES PARISH, LOUISIANA 7, 9 (Sept. 15, 1998) (including a map by Charles A. Flanagan); LOUISIANA DEP'T OF ENVTL. QUALITY, TOXICS RELEASE INVENTORY 1996, 31 (1998); *Coddling Polluters*, GAMBIT WKLY. (New Orleans, La.), July 28, 1998, at 7 (“[I]f pollution figures are analyzed by square mile or per capita, then [Louisiana is] easily the most polluted state in America”); Chris Gray, *Louisiana Is Nation's No. 2 Polluter*, TIMES-PICAYUNE (New Orleans, La.), June 19, 1998, at A2 (explaining an analysis based on 1995 U.S. EPA Toxic Release Inventory data for a fifty-square mile Convent area).

17. Amended Complaint Under Title VI of the Civil Rights Act, Re: Louisiana Dep't of Environmental Quality/Permit for Proposed Shintech Facility (July 16, 1997), No. 04R-97-R6, at 2 n.8 (on file with author) (using 1990 census data for the area within four miles of the proposed Shintech site).

18. Alexander Cockburn, *Environmental Justice Is Put to the Test*, L.A. TIMES, Aug. 28, 1997, at B8 (“[L]ess than 50% of the children graduate from high school, more than 60% of the residents are unemployed . . .”); Deborah Mathis, *Environmental Hazards Make Small Town Hellish Place to Live*, GANNETT NEWS SERVICE, June 1, 1999 (“In Convent, there is little good to show for the proliferation of industrial neighbors. More than 60 percent of the residents live

suffering the burdens of industrial pollution while the economic benefits of the industry flow outside the community to non-resident employees and distant corporate officers and shareholders.

Residents of Convent, therefore, had reason to be skeptical when word leaked in the summer of 1996 that a Japanese chemical company, Shintech, was planning to build a massive \$700 million chemical manufacturing plant in their community. While apparent that state and local officials had encouraged this plan for quite some time, the news was met with concern by many local residents.¹⁹ The residents heard promises, as they had many times before, that the plant would bring jobs and economic development. As they learned more about the proposed plant, the residents became worried about potential threats to their families' health.²⁰ Shintech proposed to manufacture polyvinyl chloride (PVC) using a process that would release almost three million pounds of air pollution per year, including 693,200 pounds per year of toxic air pollution from carcinogenic chemicals such as dioxin, ethylene dichloride, and vinyl chloride.²¹

The additional possibility of accidental releases of toxic chemicals caused concern, with two elementary schools and Head Start centers within approximately one mile of the proposed Shintech site.²² A study found that within a ten-mile radius of two similar vinyl production facilities in Lake Charles, Louisiana, residents are exposed to an increased risk of serious health consequences and even

below the poverty line. Unemployment is chronic."); Newsome, *supra* note 1, at 12-13 ("Unemployment there is a staggering 62 percent; 50 percent of the adult residents lack a high school diploma; half of all people live below the poverty line.").

19. See Howard Castay, *New Company and More Jobs for St. James Parish*, ENTERPRISE (Vacherie, La.), Aug. 14, 1996; Leonard Gray, *New Plastics Plant Plans More Industry for Convent*, L'OBSERVATEUR (LaPlace, La.), Aug. 17, 1996, at 1.

20. See Newsome, *supra* note 1, at 12.

21. *Public Notice, Louisiana Dept. of Environmental Quality, Air Quality Division, Request for Public Comment and Notification of a Public Hearing on a Proposed Air Pollution Source, St. James Chemical Production Complex, Shintech Inc. and Its Affiliates, Convent, St. James Parish, Louisiana*, ADVOCATE (Baton Rouge, La.), Nov. 7, 1996, at 10C; see Jim Morris, *In Strictest Confidence: The Chemical Industry's Secrets*, HOUSTON CHRON., July 26, 1998, at A1 (discussing the environmental problems caused by the production of vinyl chloride and ethylene dichloride in Louisiana and Texas).

22. Letter from Lisa Lavie, Tulane Environmental Law Clinic, to Carol Browner, Administrator, U.S. Environmental Protection Agency (Aug. 27, 1997) (on file with author); see also Flanagan, *supra* note 16.

death should a significant chemical accident occur.²³ Shintech acknowledged that even a relatively small spill of one-hundred pounds of chlorine could harm residents one mile away; a larger release of 1,600 pounds of chlorine could harm populations over ten miles away.²⁴

During the period from 1994 to 1997, 141 emergency releases of toxic chemicals were reported in the Convent area, an average of three per month and a 500% increase in the average number of accidental releases since 1993.²⁵ However, local residents were rarely warned of the releases, and even when notified, it was usually long after the release occurred. Shintech's method for dealing with such releases consisted of a program, taught to area children through the distribution of free coloring books, that the chemical industry calls "Shelter In Place." Critics refer to program as "Duck & Cover"—covering your mouth and nose with a wet cloth and hiding indoors until told it is safe to leave.²⁶

Dismissive attitudes by state officials regarding the need to closely review the Shintech proposal compounded the residents' fears. From the available evidence, the Louisiana Department of Environmental Quality (DEQ) was making approval quite easy for Shintech. As Louisiana Governor Murphy J. "Mike" Foster, Jr. told one reporter: "The DEQ's job is to go out and make it as easy as they can within the law."²⁷ The DEQ's three proposed air permits were issued the same day the agency received Shintech's thirty-four page single-spaced analysis, with twenty-eight technical appendices, of the likely environmental and social impacts of the project.²⁸ The

23. FROM PLANTATIONS TO PLANTS, *supra* note 16, at 15 (citing CALCASIEU PARISH OFFICE OF EMERGENCY PREPAREDNESS, EHSs COMMONLY FOUND IN CALCASIEU PARISH (Revised Apr. 26, 1996)).

24. *Id.* at 16 (citing Shintech Corp., Supplemental Air Permits Application (Jan. 1997), and U.S. EPA, TECHNICAL GUIDANCE FOR HAZARDS ANALYSIS (Dec. 1987)).

25. Letter from Lisa Lavie Jordan & Robert R. Kuehn, Tulane Environmental Law Clinic, to Ann E. Goode and Mary O'Lone, U.S. Environmental Protection Agency (May 26, 1998) (on file with author) (citing an analysis prepared by INFORM of potential impacts of accidental releases in Convent).

26. See FROM PLANTATIONS TO PLANTS, *supra* note 16, at 17; Dr. Fred Millar, Fact Sheet: Shelter in Place—Duck & Cover for the New Milenium [sic]? (1998) (on file with author).

27. Lolis Eric Elie, *A Call From the Governor*, TIMES-PICAYUNE (New Orleans, La.), Sept. 4, 1998, at B1.

28. See SHINTECH INC. AND ITS AFFILIATES, ST. JAMES PARISH, LOUISIANA, ANALYSIS

Louisiana Constitution mandates that the DEQ review a permit applicant's impact statement and determine whether the proposed project minimizes adverse environmental effects by considering alternate projects, alternate sites, and mitigation measures.²⁹ This mandatory review was clearly impossible for the DEQ to accomplish in less than a day.

Additionally, Governor Foster went to great lengths to persuade Shintech to locate in Convent, pledging to Shintech's president "to bring [his] project to a speedy, profitable and mutually beneficial fruition."³⁰ Unbeknownst to local residents, Governor Foster's liaison on the Shintech project instructed his agency staff "to be sure to do everything we can to prevent [environmentalists and local residents] from tying up the permit application process."³¹ Meanwhile, in November and December of 1996, while the DEQ was considering Shintech's applications for environmental permits, Shintech, its lobbying firm, and its public relations firm gave \$5,000 each, the maximum contribution allowed under Louisiana law, to Governor Foster's reelection campaign.³²

OF ENVIRONMENTAL CONSIDERATIONS TAKEN INTO ACCOUNT IN SITING AND DESIGNING THE NEW FACILITY (Nov. 7, 1996) (on file with author); *Public Notice, Louisiana Dept. of Environmental Quality, supra* note 21.

29. *Save Ourselves, Inc. v. La. Env'tl. Control Comm'n*, 452 So. 2d 1152, 1156 (La. 1984). "[T]he [DEQ's] role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it; the rights of the public must receive active and affirmative protection at the hands of the [DEQ]." *Id.*

30. Letter from Gov. M.J. "Mike" Foster, Jr., to Chirhiro Kanagawa, President, Shintech, Inc. (Feb. 13, 1996) (on file with author); *see also* Letter from Gov. M.J. "Mike" Foster, Jr., to Chirhiro Kanagawa, President, Shin-Etsu Chemical Co., Ltd. (May 6, 1996) (on file with author) ("[I]f there is any thing you feel the Office of the Governor can do to help Shintech or Shin-Etsu, please do not hesitate to contact me directly."). Governor Foster's strong pledge of support continued after local residents challengend the company's permit applications. *See* Letter from Gov. M.J. "Mike" Foster, Jr., to Chirhiro Kanagawa, President, Shin-Etsu Chemical Co., Ltd. (Mar. 21, 1997) (on file with author) ("From the state of Louisiana's perspective, environmental permitting continues to proceed smoothly So please allow me to once more pledge the full support and cooperation of my entire administration. Again, if there is anything you feel my office can do to be of assistance to Shintech or Shin-Etsu, please let me know.").

31. Memorandum from Kevin P. Reilly, Sr., Louisiana Department of Economic Development, to Harold Price, Louisiana Department of Economic Development (Nov. 15, 1996) (on file with author).

32. Ken Silverstein & Alexander Cockburn, *The Chemical Plant That Could Break Tulane*, COUNTERPUNCH, July 16-31, 1997, at 4. A financial statement by Governor Foster revealed that in 1997 he made over \$50,000 in dividends from Merrill Lynch, the largest U.S. shareholder in Shintech's parent company. Dan Nicolai, *Foster, Shintech, People's Will*,

When local residents met with Governor Foster and tried to explain their position, he dismissed their concerns by joking that his youthful exposure to mosquito spraying was probably responsible for his present lack of hair.³³ Governor Foster later derided the residents as a “bunch of housewives” who had no business making public policy.³⁴ Governor Foster’s special counsel and deputy chief of staff bragged that the Shintech permits were “expected to breeze through” the approval process.³⁵

As for oversight of polluting facilities once built, Governor Foster declared: “I believe DEQ should not be policemen.”³⁶ Governor Foster’s position was evidenced by news that pollution citations and fines in Louisiana dropped to a ten-year low and toxic pollution emissions increased by eight million pounds during Governor Foster’s first full year in office.³⁷ Community concerns about lax oversight were reinforced upon learning that the DEQ, at Shintech’s request, suppressed reports that the proposed site of the plant contained contaminated soil and groundwater.³⁸ Shintech had a reason for suppressing such information from the local residents: “[P]remature disclosure . . . could have a detrimental effect on both

ADVOCATE (Baton Rouge, La.), Feb. 23, 1998, at B6 (analyzing Governor Foster’s financial stake in the Shintech dispute).

33. Christi Daugherty, *Economic Development or Environmental Racism*, GRIS GRIS (Baton Rouge, La.), Apr. 19, 1997, at 16.

34. John McQuaid, *Burdens on the Horizon*, TIMES-PICAYUNE (New Orleans, La.), May 21, 2000, at J-5. Governor Foster stated: “This [action by local female residents] is a great way to stop development, but that is not good public policy. If you want a bunch of housewives making public policy, that is a good approach.” *Id.*

35. Ken Grisson, *No Hidden Agendas’ in Gov. Foster’s Plans*, EUNICE NEWS (Eunice, La.), Dec. 14, 1997, at 1A (interviewing Terry Ryder, Special Counsel and Deputy Chief of Staff). Similarly, Governor Foster’s liaison on Shintech permitting matters told the DEQ at the initial Shintech public hearing: “We hope that this permit will be issued and approved rather quickly so that we can get on with construction of this plant.” Videotape: Kevin P. Reilly, Sr., Secretary, Louisiana Department of Economic Development, Remarks at the DEQ’s Public Hearing on Proposed Shintech Air Permits (Dec. 9, 1996) (on file with author).

36. Joe Macaluso, *Where Does Foster Stand?*, ADVOCATE (Baton Rouge, La.), Jan. 7, 1997, at 16C; *see also* Ed Anderson, *2 Appointees Criticized; 1 a Surprise*, TIMES-PICAYUNE (New Orleans, La.), Jan. 6, 1996, at A1 (quoting Governor Foster as saying DEQ will not work as a “policeman or adversary” to polluters).

37. Christi Daugherty, *A Fine Mess*, GAMBIT WKLY. (New Orleans, La.), July 14, 1998, at 19; Manuel Roig-Franzia, *Pollution Penalties Lowest in 10 Years*, TIMES-PICAYUNE (New Orleans, La.), June 12, 1998, at A1.

38. *See* Chris Gray, *Contamination Was Kept Quiet, Opponents Say*, TIMES-PICAYUNE (New Orleans, La.), Feb. 19, 1998, at A9.

the purchase price and community relations.”³⁹

When it comes to jobs, chemical plants in Louisiana historically have not hired local residents.⁴⁰ A poll of Convent-area residents found that 63% believed that businesses who build in minority areas rarely keep promises about providing jobs to local residents.⁴¹ In the nearby community of St. Gabriel, only 8.7% of almost 1,900 permanent jobs at ten local chemical plants were filled by local residents.⁴² Likewise, Shintech refused to commit to hire local residents.⁴³

A spokesperson for the Louisiana Chemical Association pointed out that 99% of chemical plant systems are now computer controlled and that chemical plant operators must have computer knowledge and a good grasp of physics and chemistry.⁴⁴ Not surprisingly, given Shintech’s stated job requirements and the low education level of most Convent residents, the staff director of the state agency promoting the plant acknowledged that “very few” of the 165 new

39. Letter from Jeffrey S. Heaton, Vice President, CK Associates, Inc., to Dale Givens, Secretary, Louisiana Department of Environmental Quality (Aug. 12, 1996) (on file with author).

40. FROM PLANTATIONS TO PLANTS, *supra* note 16, at 22.

41. Chris Gray, *Shintech Foes Live Closest to Site, Poll Says*, TIMES-PICAYUNE (New Orleans, La.), Jan. 18, 1998, at A1 (presenting results of an independent newspaper poll covering every household in the Convent area that had a telephone and was willing to participate).

42. EAST IBERVILLE PARISH & TOWN OF ST. GABRIEL EMPLOYMENT SURVEY (Sept. 1995) (on file with author); FROM PLANTATIONS TO PLANTS, *supra* note 16, at 22-23 (citing same survey).

Two St. James Parish Councilmen also expressed the view that local residents do not benefit from chemical plant hiring. “I see very few people from my [Convent] district getting the good jobs at these industries. What seems to be happening is companies are hiring away from other industries in other parts of the parish, and these people who need the jobs are not getting them.” ST. JAMES PARISH COUNCIL, OFFICIAL PROCEEDINGS OF THE ST. JAMES PARISH COUNCIL 33 (Feb. 11, 1998) (remarks of Councilman Ralph Patin, Jr.) (on file with author). Councilman Elton Aubert remarked: “Those people who need the jobs are not getting them, and I feel we need to address this. The highest rate of poverty is in [Convent]. Industry is moving in, but the plight of these people is not improving.” ST. JAMES PARISH COUNCIL, OFFICIAL PROCEEDINGS OF THE ST. JAMES PARISH COUNCIL 28 (Feb. 4, 1998) (on file with author).

43. See Shintech Inc., Environmental Economic Development Program Agreement (n.d.) (“Shintech will provide equal opportunity to qualified citizens of St. James Parish to compete for employment with Shintech at its new facility consistent with its staffing needs.”) (on file with author).

44. Tom Guarisco, *La. Chemical Industry Finds Qualified Applicants Rare*, ADVOCATE (Baton Rouge, La.), Jan. 25, 1998, at 1A (quoting Bettie Baker, Louisiana Chemical Association).

permanent jobs created by Shintech would go to local residents.⁴⁵

Information that the state promised Shintech \$130 million in assistance if the plant located in Louisiana, a taxpayer-financed subsidy of almost \$800,000 per permanent job created, further dampened hopes that Shintech would aid the long-term economic development of Convent.⁴⁶ This subsidy, which amounted to over \$4,500 from each resident of the Parish, was offered to a company that realized an annual after-tax profit at its PVC production facility in Texas of \$750,000 per employee.⁴⁷

In return, the state did not ask Shintech to commit to hire any St. James Parish or Louisiana residents, or use any Parish or Louisiana contractors or suppliers.⁴⁸ The planned subsidy would exempt approximately \$27 million in property taxes that Shintech would otherwise have to pay over a ten-year period to fund St. James Parish's public schools.⁴⁹ The head of the Louisiana Department of Economic Development, the state agency promoting Shintech and administering the subsidy, previously described the tax break program offered to Shintech as "essentially useless" in promoting local economic development.⁵⁰

Alarmed by these facts, local residents joined together and formed a new community organization, the St. James Citizens for Jobs and

45. E-mail from Paul Adams, Louisiana Department of Economic Development, to Kevin Reilly, Secretary, Louisiana Department of Economic Development (Mar. 24, 1997, 03:49:06 CST) (on file with author) ("[T]he numbers in the Greenpeace material, you sent me, are essentially correct. . . [T]he comment about very few of the 165 jobs going to local residents because of technical training required, may be correct."). As the Job Service Office manager for St. James Parish put it: "When we take applications for one of these large plants, we get a lot of applications from people with no education beyond high school, very little if any work experience, and that just won't cut it." Vicki Ferstel, *Industrial Revolution: Jobs May Bring Prosperity But Cost Culture*, ADVOCATE (Baton Rouge, La.), Oct. 26, 1997, at 1A.

46. E-mail from Paul Adams to Kevin Reilly, *supra* note 45.

47. See STANDARD & POOR'S REGISTER OF CORPORATIONS (1998); *Shin-Etsu Chemical Posts Record Group Earnings*, JJI PRESS TICKER SERVICE (May 15, 1998); LA. ENVTL. ACTION NETWORK, THE MYTH OF SELLING FALSE HOPES TO LOCAL RESIDENTS (1998) (on file with author).

48. Gray, *supra* note 41; Shintech Inc., *supra* note 43.

49. See LOUISIANA COALITION FOR TAX JUSTICE, TAX BREAKS AVAILABLE TO SHINTECH'S PROPOSED PLANT (n.d.) (on file with author).

50. See Ed Anderson, *Tax Breaks Useless, Panel Told*, ADVOCATE (Baton Rouge, La.), Mar. 2, 1994, at B8 (reporting the testimony of Kevin Reilly, Secretary, Louisiana Department of Economic Development, before the Louisiana Joint Legislative Committee on the Budget).

the Environment, and decided to oppose the siting of the plant in Convent.⁵¹ Under the banner “Enough is Enough,” the residents maintained that they were already bearing far more than their fair share of toxic pollution resulting from industrial development. Rather than merely urging “not in my backyard,” the residents argued that their backyard was already full and questioned whether it was fair to place such a hazard in anyone’s backyard.

The citizens’ group knew that their opposition promised to be a David versus Goliath struggle. Not only was Shintech a \$6 billion, multi-national corporation with a team of lawyers, engineers, lobbyists, and public relations specialists,⁵² but Governor Foster and, ultimately, the entire executive branch of state government were prepared to push Shintech’s permit applications swiftly along. Further, the state’s powerful petrochemical and other business interests stood ready to lend their support to Shintech, and parish officials were eager to help Shintech win over local residents.⁵³

The complexity of the project was equally overwhelming. Shintech’s air permit applications alone were in excess of seven hundred pages and were composed of detailed charts and highly technical data.⁵⁴ The next year promised additional voluminous, technical applications for water pollution, hazardous waste, coastal use, and wetlands permits. Faced with such an enormous task, local residents turned to state environmental organizations who were quick

51. See Ziba Kashef, *Saving Our Backyard*, ESSENCE, Sept. 1999, at 160; Newsome, *supra* note 1, at 12.

52. Shintech, with annual sales of almost \$1 billion, is a wholly-owned subsidiary of Shin-Etsu Chemical Co., a Japanese chemical company with \$6 billion in annual revenues. STANDARD & POOR’S REGISTER OF CORPORATIONS (1999); THE MAJOR COMPANIES DATABASE, 1999, LEXIS, Financial Library, Company File; Shin-Etsu Chemical, *Financial Summary (Consolidated)*, at <http://www.shinetsu.co.jp/english/profile/consols/consols.html> (last visited Mar. 1, 2000).

53. See Leah Bankston, *Economic Development or Environmental Racism*, GRISGRIS (Baton Rouge, La.), Jan. 1998, at 17 (reporting that parish president secretly compiled dossiers for Shintech detailing the race, sex, and attitudes of eighteen parish officials whose approval was needed by Shintech in order to build the plant); Daugherty, *supra* note 33, at 17 (noting that the parish economic development office, using public funds, anonymously mailed a pro-Shintech flyer to more than 400 parish residents); Ron Nixon, *Toxic Gumbo*, S. EXPOSURE, Summer-Fall 1998, at 11, 14 (same); Vicki Ferstel, *Shintech Plans Draw Environmentalist Suit*, ADVOCATE (Baton Rouge, La.), June 14, 1997, at 1B (quoting parish official as admitting he destroyed documents profiling parish officials after he provided the document to Shintech).

54. Amended Complaint Under Title VI of the Civil Rights Act, *supra* note 17, at 5.

to point out that many of the issues were legal in nature. They stressed that local residents needed to find legal assistance if their voice was to be heard in the numerous upcoming permit proceedings.

B. The Tulane Environmental Law Clinic Provides Legal Assistance

Facing Shintech and a determined governor, the residents of Convent turned to the only legal help they could afford—free law students at Tulane University.⁵⁵

All fifty states, as well as the District of Columbia, Puerto Rico, and most federal courts, have rules that allow law students to practice law under the supervision of licensed attorneys.⁵⁶ In Louisiana, Loyola Law School, Southern Law School, and Tulane Law School have law school clinical programs, with only Tulane offering services in environmental law.⁵⁷ Like most law school clinics, the Tulane Clinic is a small operation that provides free legal assistance to needy individuals and community groups that otherwise cannot afford the assistance of the private bar.⁵⁸ Student attorneys at the Clinic are long on enthusiasm and idealism but short on experience. The Clinic does not have a team of scientists, engineers, or public relations specialists at its disposal and does not have money to fund typical legal expenses such as filing fees, depositions, and the like. The Clinic is hardly the kind of legal representation one would hire if one had a choice of attorneys.

Limited resources restricted the Clinic to filing legal challenges to fewer than ten out of the more than 1,500 environmental permits

55. *CBS Evening News: Tulane University Law Students Help Poor People of Convent, Louisiana, Keep Out Another Chemical Plant* (CBS television broadcast, Oct. 19, 1998) (on file with author).

56. Frank G. Avellone, *The State of State Student Practice: Proposals for Reforming Ohio's Legal Internship Rule*, 17 OHIO. N.U. L. REV. 13 (1990) (citing ABA, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR AND THE NATIONAL CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS 46-48 (1990)); see also David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507, app. A (1998) (listing student practice rules).

57. Resolution Amending Rule XX, at 1 n.1 (La. Mar. 22, 1999) (Johnson, J., dissenting), reprinted in 74 TUL. L. REV. 285, 297 (1999).

58. See Tulane Environmental Law Clinic, at <http://www.law.tulane.edu/programs/environmental/envirolaw/clinic.html> (last visited Oct. 13, 1999); Susan Hansen, *Backlash on the Bayou*, AM. LAW. Jan.-Feb. 1998, at 50, 53-54.

issued annually in Louisiana.⁵⁹ After reviewing Shintech's air permit applications and considering the other permits and legal proceedings that would likely be involved, the Clinic informed Convent residents that the matter might be more than the Clinic could handle and recommended that the residents get help elsewhere.⁶⁰ After unsuccessfully seeking the assistance of national environmental and civil rights organizations, the local residents came back to the Clinic pleading that, without the students' help, they would go unrepresented.⁶¹ Fearing that the residents' concerns would go unaddressed, the Clinic's independent legal advisory board, after further deliberations, unanimously approved the Clinic's representation of the citizens' group.⁶²

Thereafter, the Clinic students represented the citizens in a series of public hearings on proposed permits⁶³ and asserted rights to adjudicatory hearings and impartial agency decision makers.⁶⁴ When these efforts proved unsuccessful, the Clinic filed lawsuits, on behalf

59. Response of Tulane Law Clinic to Allegations Regarding Tulane Environmental Law Clinic in Business Organizations' March 12th Letter and Supplemental Comments, attachment to letter from Edward F. Sherman, Dean, Tulane Law School, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Apr. 14, 1998) (on file with author).

60. Hansen, *supra* note 58, at 53.

61. *Id.*; Newsome, *supra* note 1, at 15 ("When the SJCJE began pursuing the issue, no legal group would touch it except the students at Tulane's Environmental Law Clinic."). As one local resident explained, "We went to Atlanta and had meetings with all kinds of lawyers, but they looked like they were afraid to take our case. . . . Tulane took it, and they're doing a good job. If they weren't, the governor wouldn't be so worried about them." *Id.* (quoting Emelda West, member, St. James Citizens for Jobs and the Environment).

62. See Hansen, *supra* note 58, at 53; Marsha Shuler, *Official Defends Tulane*, *ADVOCATE* (Baton Rouge, La.), July 25, 1997, at 1A.

63. See Comments of St. James Citizens for Jobs and the Environment et al. in Opposition to the Permit Application by Shintech, Inc. and Its Affiliates for a Polyvinyl Chloride Production Complex in Convent, Louisiana—Review No. 16803 (DEQ Jan. 23, 1997) (comments on proposed air pollution permit applications); Comments of St. James Citizens for Jobs and the Environment et al. in Opposition to the Permit Application by Shintech, Inc. and Its Affiliates for a Polyvinyl Chloride Production Complex in Convent, Louisiana—Reference No. LA0102733 (DEQ Mar. 10, 1997) (comments on proposed water pollution discharge permit application); Comments to the Department of the Army Corps of Engineers New Orleans District on the Shintech, Inc., Permit Application # SE (Mississippi River) 1610 Submitted on Behalf of St. James Citizens for Jobs and the Environment et al. (U.S. Army Corps of Engineers (New Orleans) (Dec. 19, 1996)) (comments on proposed federal wetlands permit).

64. See Motion to Recuse DEQ Officials, *In re Shintech, Inc. and Its Affiliates* (DEQ May 1997 & Mar. 1998); Request for Adjudicatory Hearing, *In re Shintech, Inc. and Its Affiliates* (DEQ June 1997 & Feb. 1998).

of a coalition of affected community organizations, challenging: air pollution, water pollution, and coastal zone permits; denials of access to public records; and the failure of biased agency officials to recuse themselves from the decision-making process.⁶⁵ The Clinic students also filed a petition asking the U.S. Environmental Protection Agency (EPA) to review and veto the state's proposed air pollution permits for the facility, a process set forth under the federal Clean Air Act.⁶⁶

After hearing local residents repeatedly complain of unequal exposure to environmental pollution and witnessing the state's hostile attitude toward environmental discrimination concerns, the Clinic filed a civil rights complaint with the EPA in July, 1997. The complaint alleged that the state's actions in issuing permits to the plant violated the residents' rights under Title VI of the Civil Rights Act of 1964.⁶⁷

65. See Motion for Appeal, *In re Shintech, Inc. and Its Affiliates Part 70 Permits and Prevention of Significant Deterioration Permit* (19th La. Dist. Ct. June 27, 1997) (No. 442,230) (appeal of state air pollution permits); Motion for Appeal, *In re Shintech Inc and Its Affiliates LPDES Permit LA0102733* (19th La. Dist. Ct. July 7, 1997) (No. 442,229) (appeal of state water pollution discharge permit); Petition for Judicial Review and Injunctive Relief, *St. James Citizens for Jobs and the Env't v. Hymel* (23rd La. Dist. Ct. June 13, 1997) (No. 24607) (appeal of parish coastal use permit); Petition for Declaratory Judgment, Injunction, and Writ of Mandamus, *St. James Parish Citizens for Jobs and the Env't v. Hymel* (23rd La. Dist. Ct. Aug. 8, 1997) (No. 24722) (lawsuit against St. James Parish under Louisiana Public Records Law); Petition for Declaratory Judgment and Writ of Mandamus, *St. James Citizens for Jobs and the Environment* (19th La. Dist. Ct. Apr. 7, 1998) (No. 448816) (lawsuit against DEQ under Louisiana Public Records Law); Application for Supervisory Writs of Review and Relief from the Louisiana Department of Environmental Quality and Request for Expedited Consideration and Stay of Proceedings, *In re Shintech Inc. and Its Affiliates* (19th La. Dist. Ct. Apr. 13, 1998) (No. 448928) (alleging bias by DEQ officials).

66. Petition Under Title V of the Clean Air Act, *In re Shintech, Inc. and Its Affiliates' Polyvinyl Chloride Prod. Facility* (EPA May 22, 1997). The Clinic also filed a petition asking the EPA to review the state's Prevention of Significant Deterioration (PSD) permit under the federal Clean Air Act. *In re Shintech, Inc. and Its Affiliates, Prevention of Significant Deterioration Permit PSD-LA604* (EPA 1997).

67. Amended Complaint Under Title VI of the Civil Rights Act, *supra* note 17. Local residents first raised environmental justice concerns one year earlier during informal meetings about the proposed plant. See Memorandum from Janice F. Dickerson, Community-Industry Relations Coordinator, Louisiana Department of Environmental Quality, to James J. Friloux, Ombudsman, Louisiana Department of Environmental Quality (Aug. 16, 1996) (on file with author) (summarizing a community meeting on the Shintech proposal and noting that "[s]everal environmental justice issues were raised in questions from the audience.").

The Center for Constitutional Rights filed an Americans With Disabilities Act case against Governor Foster and the DEQ on behalf of Convent residents with respiratory disabilities. See Amended Complaint—Class Action, *Lewis v. Foster* (E.D. La., filed Aug. 20, 1998) (No. 98-

These legal efforts were largely successful, illustrating the extent of the flaws in the state's permitting process. In September, 1997 the EPA granted the citizens' petition under Title V of the Clean Air Act and vetoed Shintech's air pollution permits, identifying fifty technical deficiencies.⁶⁸ The EPA's action marked the first time the agency granted a citizen's petition.⁶⁹ In addition, state judges: held that the citizens' allegations of unlawful bias in the state's permitting process were sufficient to justify an evidentiary hearing;⁷⁰ refused Shintech's request to dismiss the lawsuit alleging that the coastal use permits were issued illegally;⁷¹ found that the state's issuance of the water permits would affect a taking of the adjacent residents' property to which they were entitled to compensation;⁷² and forced the Parish to reduce its charges for access to public documents relating to the proposed plant.⁷³ Finally, in the action that most angered Governor Foster and business interests, the EPA accepted the citizens' Title VI civil rights complaint for investigation, making the Shintech permitting dispute the agency's test case for implementing its new

1563); *see also* *Suit Against Shintech Claims Plant Would Hurt the Disabled*, *ADVOCATE* (Baton Rouge, La.), Aug. 22, 1998, at 5B.

68. Order Partially Granting and Partially Denying Petitions for Objection to Permits, *In re* Shintech Inc. and Its Affiliates' Polyvinyl Chloride Prod. Facility, Permits Nos. 2466-VO, 2467-VO, 2468-VO (EPA Sept. 10, 1997); *see also* Maria Giordano & Bob Warren, *EPA Rejects Permit for Shintech Plant*, *TIMES-PICAYUNE* (New Orleans, La.), Sept. 11, 1997, at A1.

69. *First Citizen Petition Under Title V Granted to Block Construction of Industrial Facility*, 28 *ENV'TREP.* (BNA) 835 (1997).

70. Written Reasons for Judgment, *St. James Citizens for Jobs & the Env't v. La. Dep't of Env'tl. Quality*, No. 448928 (19th La. Dist. Ct. Aug. 31, 1998), vacated, 734 So. 2d 772 (La. App. Ct. 1999) (holding that although citizen groups have the right to raise the issue of agency bias, there is no statutory entitlement to judicial review of a bias issue until the permit is issued), *writ denied*, 746 So. 2d 601 (La. 1999); *see also* Mark Schleifstein, *Shintech Opponents Win Round*, *TIMES-PICAYUNE* (New Orleans, La.), Sept. 1, 1998, at A2.

71. *See* John McMillan, *Hearing Called a Victory*, *ADVOCATE* (Baton Rouge, La.), Sept. 3, 1997, at 3B.

72. *See* William Pack, *Shintech Gets Permit, May Have to Pay Compensation*, *ADVOCATE* (Baton Rouge, La.), Jan. 24, 1998, at 1B (reporting the court's decision that DEQ must change Shintech's water discharge permit to require reasonable compensation for damages sustained by plant's neighbors). The decision was announced in court by the judge but no written order or judgment was ever issued in the case.

73. *See* Reasons for Judgment, *St. James Parish Citizens for Jobs & the Env't v. Hymel*, No. 24722 (23rd La. Dist. Ct. June 17, 1999); E-mail from Thomas Milliner, Tulane Environmental Law Clinic, to Robert Kuehn, Former Director, Tulane Environmental Law Clinic (Feb. 2, 2000, 09:13:50 CST) (on file with author) (stating that, to settle the lawsuit, the Parish agreed to reduce copying fees from \$.75 per page to \$.10 per page).

environmental justice enforcement policy.⁷⁴

II. A BACKLASH AGAINST ACCESS TO ENVIRONMENTAL JUSTICE

An attorney, mindful of the professional obligations to act “with zeal in advocacy upon the client’s behalf” and to “take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor,”⁷⁵ should view the efforts of the Tulane Clinic as consistent with the same level of competence and diligence required of any attorney. Governor Foster, however, viewed the Clinic’s actions as exemplifying three of the social justice issues that he most vehemently dislikes: civil rights, environmental regulation, and use of the legal system by plaintiffs’ attorneys.

A. Governor Foster’s Hostility Toward and Threats Against Tulane

Governor Foster’s hostility to civil rights was manifested most dramatically by his close association with David Duke, the former leader of the Ku Klux Klan and avowed racist and anti-Semite.⁷⁶ In the 1995 campaign for Louisiana governor, Duke withdrew from the race and threw his support to Foster, a previously insignificant candidate in the race. Immediately after the endorsement, Foster’s support in the polls rose from just 6% or 7% to 17%. Duke credits his

74. See Vicki Ferstel, *Shintech Becomes Test Case*, ADVOCATE (Baton Rouge, La.), Sept. 12, 1997, at 1A; Hansen, *supra* note 58, at 52. Dr. Robert Bullard, executive director of the Environmental Justice Resource Center at Clark Atlanta University and an expert on environmental justice, described the Shintech case as “our Brown vs. the Board of Education.” Chris Gray, *National Environmental Group Joins Shintech Fight*, TIMES-PICAYUNE (New Orleans, La.), Mar. 22, 1998, at A34.

75. See MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (1999). Indeed, at the time that the Tulane students were seeking to ensure that their clients’ legal rights were fully protected, attorneys for the state and Shintech were using what appeared to be every possible legal maneuver to deny the local residents an opportunity to present their cases. See E-mail from Lisa Jordan, Acting Director, Tulane Environmental Law Clinic, to Robert Kuehn, Former Director, Tulane Environmental Law Clinic (Feb. 29, 2000, 10:47:37 CST) (on file with author) (detailing efforts of DEQ and Shintech attorneys to deny the residents’ requests for an adjudicatory hearing and to delay or dismiss lawsuits challenging the air permits, coastal use permit, and refusal of the DEQ to recuse from the permitting decisions).

76. See B. Drummond Ayres, Jr., *A Mystery in Louisiana Governor’s Race*, N.Y. TIMES, Oct. 11, 1999, at A14 (describing Duke as “the former Ku Klux Klan leader”); Bruce Nolan, *Foster Paid Duke \$150,000 For List*, TIMES-PICAYUNE (New Orleans, La.), May 21, 1999, at A1 (describing Duke as “the former Klansman and Nazi sympathizer”).

support with helping Foster make the runoff and ultimately win the gubernatorial election.⁷⁷

Unknown to the public until recently, Governor Foster paid Duke \$150,000 for the exclusive rights to Duke's mailing list of supporters just prior to Duke's 1995 endorsement,⁷⁸ a violation of state campaign ethics laws.⁷⁹ The mailing list price was so grossly in excess of the typical campaign mailing list value that observers characterized the purchase as nothing more than an attempt to buy Duke's support.⁸⁰ Duke has referred to Foster and himself as "friends for a long time" and "perhaps the highest elected official in America who refuses to condemn and repudiate [him]."⁸¹ Governor Foster, in turn, repeatedly invited Duke to secret meetings at the governor's mansion and Governor Foster's home; they also met secretly at Duke's home.⁸²

In the midst of the Duke controversy, Governor Foster insisted that he did not agree with "any of this [Duke's] racial stuff," but angrily described as "silly" questions from reporters concerning his continued refusal to renounce Duke's bigoted beliefs.⁸³ Consistent with what Duke reported that he and Governor Foster discussed during private meetings, Governor Foster's first executive order, issued three days after taking office in 1996, banned affirmative action.⁸⁴ Governor Foster was the only governor in the country at that

77. See Marsha Shuler, *Duke Says Foster Money Helped the Racist Cause*, ADVOCATE (Baton Rouge, La.), June 13, 1999, at 1A.

78. Nolan, *supra* note 76; Marsha Shuler & Joe Gyan, *Foster, Duke Link Probed: Grand Jury Looks at Voter List Sale*, ADVOCATE (Baton Rouge, La.), May 21, 1999, at 1A. Foster defended the secret nature of the deal by saying: "It ain't real cool to put out there that you're buying something from David Duke." Manuel Roig-Franzia, *Foster Admits Hiding Duke Deal*, TIMES-PICAYUNE (New Orleans, La.), May 25, 1999, at A1.

79. Ayres, *supra* note 76; Leslie Zganjar, *Ethics Board Fines Gov. Foster \$20,000 for Duke List Payments*, ASSOCIATED PRESS (Louisiana), Aug. 19, 1999.

80. Steve Ritea, *Price Was Sky High*, TIMES-PICAYUNE (New Orleans, La.), May 21, 1999, at A6.

81. See James Gill, *Foster Tough to Unseat*, TIMES-PICAYUNE (New Orleans, La.), July 9, 1999, at B7; Roig-Franzia, *supra* note 78; Shuler, *supra* note 77.

82. Roig-Franzia, *supra* note 78.

83. *Id.*

84. La. Exec. Order MJF 96-1, *reprinted in* 22 La. Reg. 76 (Feb. 20, 1996) ("Affirmative Action"); see James Gill, *Foster's Take on the Duke List*, TIMES-PICAYUNE (New Orleans, La.), May 26, 1999, at B7 ("Duke has said before that he had a deal whereby he would throw his support behind Foster, who, when elected, would return the favor by prohibiting affirmative

time to do so. Similarly, one of the first actions at the DEQ after Governor Foster took office was to change the name of the agency's "Environmental Justice Group" to the "Community-Industry Relations Group" (CIRG).⁸⁵ Consistent with the name change, the CIRG proceeded to change its mission from aiding minority and lower-income communities with pollution concerns to promoting the virtues of petrochemical production in distressed communities.⁸⁶

Governor Foster's attitude toward environmental regulation is similarly hostile. Governor Foster paid \$60,000 to run an ad in the *Wall Street Journal* showing a businessman bending over backwards and bragging about the state's efforts to eliminate restrictions on businesses.⁸⁷ As Governor Foster stated in the ad, "I want to take a hard look at every regulation in this state to see whether it is really doing what it is supposed to do. Most of us in business know which ones are needed."⁸⁸

Governor Foster considers environmental regulation a form of harassment against honest businesses⁸⁹ and labeled the EPA "our

action in state contracts.").

In an interesting historical connection, Governor Foster's grandfather, Murphy J. Foster, was governor of Louisiana from 1892 to 1900. During this eight-year term, he "was committed to stripping poor white people and all black people of the right to vote. He did this by enacting a poll tax and requiring that voters be property owners." Lolis Eric Elie, *Grandfather Not so Grand*, *TIMES-PICAYUNE*, (New Orleans, La.), Jan. 10, 1996, at B1. As a result of grandfather Foster's efforts, "Black-voter registration which had been 130,000 on January 1, 1897, was reduced to 5,320 on March 17, 1900, and 1,342 in 1904. Thus, for all practical purposes, black citizens were eliminated from participation in politics." JOE GRAY TAYLOR, *LOUISIANA: A HISTORY* 144 (1984). Grandfather Foster's "greatest legacy was his effort to make racism the guiding principle of Louisiana law. Foster . . . helped organize the Knights of White Camellia and the White League, two organizations that were committed to the violent overthrow of the ideals of American democracy. Elie, *supra*. The grandson and current governor has described his grandfather as a "man of courage" and "vision" whose actions must be viewed in context. *Id.*

85. DEQ, ENVIRONMENTAL JUSTICE IN LOUISIANA: AN OVERVIEW OF THE LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S COMMUNITY-INDUSTRY RELATIONS PROGRAM (n.d.) (on file with author) ("The Environmental Justice Group [renamed the Community-Industry Relations Group with the advent of the Foster Administration] is an unofficial group working under the auspices of the Office of the Secretary.").

86. See Vicki Ferstel, *Officials Accused of Bias*, *ADVOCATE* (Baton Rouge, La.), May 27, 1997, at 1B (documenting pro-industry actions of the DEQ CIRG office).

87. Suz Redfeam, *DED Goes Big Time With Tort Reform Ad*, *BATON ROUGE BUS. REP.*, Sept. 17, 1996, at 54.

88. *Id.*

89. *A Welcome Focus on Environment*, *ADVOCATE* (Baton Rouge, La.), Oct. 28, 1997, at

only enemy” when it questioned the state’s environmental permitting practices.⁹⁰ His administration has worked hard to undo the limited pro-environmental legislation passed under previous administrations.⁹¹ When one state legislator was critical of Governor Foster for his lack of efforts to protect a small community from an adjacent waste site, Governor Foster called on the business community to wage a “holy war,” or “jihad,” to defeat the legislator’s reelection efforts.⁹²

The third aspect of the Tulane Clinic’s involvement in the Shintech proposal that struck a raw nerve with Governor Foster was that the Clinic members were plaintiff’s lawyers seeking to interfere with business plans. Governor Foster’s dislike of plaintiff’s lawyers runs to the depth of his dislike of civil rights and environmental regulation. To Governor Foster, “the clinic was behaving like the trial lawyers he has fought so hard through most of his administration.”⁹³ He has often blamed lawyers for what, in his view, is wrong with society and has referred to plaintiff’s lawyers as “slimeballs,”

18B (noting Foster’s earlier remark).

90. Ed Anderson, *Foster Likes Casino Deal’s Chances in Special Session*, TIMES-PICAYUNE (New Orleans, La.), Mar. 1, 1998, at A10. An assistant to Louisiana Department of Economic Development Secretary Kevin Reilly, Governor Foster’s liaison on Shintech, described the EPA as “anti-industrial [and] anti-chemical.” Brian Chapman, Shintech, the State of Louisiana, and the Environmentalists 10, Address Before CERL International Petrochemical Conference (June 29-30, 1998) (on file with author).

91. Steve Ritea, *Candidates Speak on Tort Reform*, TIMES-PICAYUNE (New Orleans, La.), Oct. 10, 1999, at A1 (stating that Foster-backed legislation restricts the availability of punitive damages in hazardous waste lawsuits); *Toxic Legislation*, GAMBIT WKLY. (New Orleans, La.), July 20, 1999, at 7 (noting Governor Foster backed legislation to restrict the availability of medical monitoring for people exposed to toxic pollution).

Governor Foster’s hostility toward environmental regulation could be the result of his investment in the oil and gas industry. A 1996 story in the Times of Acadiana reported that Foster invested heavily in oil and gas holdings and became independently wealthy as a result of oil royalties from inherited family land. See *The Edwin Edwards Test*, GAMBIT WKLY. (New Orleans, La.), Sept. 28, 1999, at 7 (reporting on the Times of Acadiana story). A former editor at the Times of Acadiana argued that, given the large size of Governor Foster’s oil and gas holdings and the relative influence of the oil and gas industry in Louisiana, Governor Foster had a significant potential conflict of interest when involved in matters relating to the petrochemical industry. *Id.*

92. *Foster Calls for “Holy War” in Senate Race; Senators Endorse Jefferson*, ASSOCIATED PRESS (Louisiana), Sept. 24, 1999; Steve Ritea, *Foster, Incumbent Turn Senate Race Into “Holy War,”* TIMES-PICAYUNE (New Orleans, La.), Oct. 17, 1999, at A6.

93. Mark Schleifstein, *Foster, Clinics Face Off on Rules*, TIMES-PICAYUNE (New Orleans, La.), Aug. 2, 1998, at A1.

“renegades,” and “hogs at the trough.”⁹⁴ Governor Foster has been criticized for singling out plaintiff trial attorneys for his attacks, while sparing the corporate attorneys who represent insurance companies or large businesses.⁹⁵ Ironically, Governor Foster enrolled as a part-time student at Southern Law School in fall, 2000 amidst charges that the school bent its rules to admit him.⁹⁶

As the Tulane Clinic students raised an increasing number of legal objections to the Shintech permits, Governor Foster’s impatience grew. Once students began enjoying success in the area of environmental justice, Governor Foster decided it was time the Clinic stepped aside and allowed the plant to be built.⁹⁷ On April 3, 1997 the EPA informed the state that the residents’ concerns about environmental justice should be addressed before any Shintech permits could be issued.⁹⁸ On the same day he learned of the EPA’s concerns, Governor Foster called the president of Tulane University to complain about the Clinic’s supposed antidevelopment actions in the Shintech case.⁹⁹ The university president told Governor Foster that he would ensure that the Clinic handled the case in accordance with its guidelines, but refused on academic freedom grounds to interfere with the Clinic’s actions.¹⁰⁰

The next month, after the Tulane Clinic filed its complaint with the EPA under Title VI of the Civil Rights Act, Governor Foster tried another approach. At a closed meeting of the New Orleans Business Council (Business Council), Governor Foster told business leaders they could help him get the Tulane Clinic under control by

94. Christi Daugherty, *Moore Grief for Foster*, GAMBIT WKLY. (New Orleans, La.), Dec. 7, 1999 at 12.

95. *Id.*

96. James Gill, *Foster Gets Special Treatment At Southern*, TIMES-PICAYUNE (New Orleans, La.), Sept. 10, 2000, at B7; Steve Ritea, *School Bent Rules to Admit Governor*, TIMES-PICAYUNE (New Orleans, La.), Sept. 7, 2000, at A1.

97. As one reporter noted: “Nothing angered Foster more than claims made [by the Tulane Clinic] under the rubric of ‘environmental justice.’” Schleifstein, *supra* note 93.

98. Letter from Samuel J. Coleman, Director, EPA, Region 6, Compliance and Assurance Division, to J. Dale Givens, Secretary, Louisiana Department of Environmental Quality (Apr. 3, 1997) (on file with author).

99. Christi Daugherty, *It’s Not Easy Being Green*, GAMBIT WKLY. (New Orleans, La.), July 22, 1997, at 9; Vicki Ferstel, *Issue of Bias Raised*, ADVOCATE (Baton Rouge, La.), Apr. 7, 1997, at 1A.

100. Daugherty, *supra* note 99.

reconsidering their financial support for the University.¹⁰¹ Governor Foster later publicly echoed this strategy: “I am telling some of the alumni to think about their support [for the University].”¹⁰²

At the same meeting, business leaders were urged to write to the Louisiana Supreme Court demanding that the justices investigate and restrict the activities of the Tulane Clinic.¹⁰³ Thereafter, three business groups sent letters to the court complaining that the Clinic harmed their economic interests and asked the court to restrict the Clinic’s activities.¹⁰⁴ When the court ultimately granted these requests and imposed dramatic new restrictions on the clinics’ activities, Governor Foster applauded the ruling.¹⁰⁵

Governor Foster took his attack on the Tulane Clinic to a statewide television audience. He declared that the Clinic is “a law unto themselves” and that they are acting as “vigilantes.”¹⁰⁶ Governor Foster warned: “I’m going to encourage anybody from Tulane to do what they can to put a stop [to the Clinic’s actions] . . . I’m going to look differently at Tulane from a perspective of . . . major tax breaks if what they’re gonna do is support a bunch of vigilantes out there that can make their own law.”¹⁰⁷ The tax breaks Governor Foster referenced were not state subsidies but rather the same exemptions from taxes and the same stipends for state students who attend in-state schools that every private college in Louisiana enjoys.¹⁰⁸

When asked about the Clinic students’ help to local residents who cannot otherwise afford attorneys, Governor Foster responded: “Tell [the local residents] to use their own money, not Tulane’s.”¹⁰⁹ Governor Foster later defended his threats against Tulane and repeated his suggestion that the University’s tax exempt status be

101. *Id.*; Ferstel, *supra* note 86; Silverstein & Cockburn, *supra* note 32.

102. Daugherty, *supra* note 99.

103. *Id.*

104. *See infra* notes 158-63 and accompanying text.

105. *See infra* note 245 and accompanying text.

106. *Louisiana: The State We’re In* (Louisiana Public Broadcasting television broadcast, July 11, 1997) (tape of broadcast on file with author).

107. *Id.*; Hansen, *supra* note 58, at 55.

108. Chris Gray, *Law Clinic Under Fire*, TIMES-PICAYUNE (New Orleans, La.), Aug. 3, 1997, at A1.

109. Marcia Coyle, *Governor v. Students in \$700M Plant Case*, NAT’L L.J., Sept. 8, 1997, at 1, 27; *Louisiana: The State We’re In*, *supra* note 106.

revoked if it was going to allow law students to block businesses from locating in the state.¹¹⁰ He also described the Tulane Clinic's professors and students as "outlaws" and "bullies."¹¹¹

Later that summer, Kevin Reilly, Governor Foster's economic development director and liaison on the Shintech matter, wrote to the president and the deans at Tulane. He complained that the Tulane Clinic conducted "legalistic guerrilla attacks against environmentally-responsible industry" and was damaging the state's economic development efforts.¹¹² Reilly asked that the University request the Louisiana Supreme Court to review the activities of the Clinic to determine if it had overstepped the court's charter.¹¹³ Reilly later criticized the Clinic for providing legal representation to community groups opposed to Shintech and claimed that the Clinic had a "chilling effect on the state's economy. . . [and was] corrupting the legal system."¹¹⁴ At a public meeting with New Orleans area community leaders, he referred to the Clinic as "environmental fascists" who use "brown shirt tactics."¹¹⁵

Reilly instructed his agency staff to "be sure [they] do everything [they] can to prevent [the Tulane Clinic and community groups] from tying up the permit application process."¹¹⁶ Reilly used his office to

110. Gray, *supra* note 108; Marsha Shuler, *Foster: Threat Against Tulane Is Appropriate*, ADVOCATE (Baton Rouge, La.), July 24, 1997, at 1A.

111. *CBS Evening News*, *supra* note 55; *Law Clinics Say Rules Hurt Poor*, ADVOCATE (Baton Rouge, La.), June 18, 1998, at 4A. Ironically, in the midst of his attack on the Tulane Clinic, Governor Foster preached to graduating law students that they should "care more about [their] service and reputation than [their] fees." Sherry Sapp, *Foster Encourages Grads to Guard Against Overcomplicating Law*, ADVOCATE (Baton Rouge, La.), May 31, 1997, at 9C.

112. Letter from Kevin P. Reilly, Sr., Secretary, Louisiana Department of Economic Development, to Eamon Kelly, President, Tulane University (Aug. 8, 1997) (on file with author).

113. *Id.*

114. John McMillan, *Reilly Says He's Not Hostile to Tulane, But Defends Letter*, ADVOCATE (Baton Rouge, La.), Aug. 16, 1997, at A12.

115. Memorandum from Debbie Grant, Tulane University, to Robert Kuehn (July 5, 1998) (on file with author) (describing remarks of Kevin P. Reilly, Sr., at a June 17, 1998, MetroVision meeting in New Orleans, Louisiana).

116. Memorandum from Kevin P. Reilly to Harold Price, *supra* note 31. Reilly made a similar threat to use state resources against Shintech opponents one year later when it was revealed he was assembling dossiers: "I'm going to use every legitimate method at my command to defeat them." Vicki Ferstel, *Shintech's Opponents Tracked*, ADVOCATE (Baton Rouge, La.), Nov. 5, 1997, at 1A. Taking his boss's command to heart, one Department of Economic Development employee sought to warn a parish elected official from opposing

develop dossiers and track the activities of the Clinic and another organization opposing the Shintech plant.¹¹⁷ Reilly even instructed his agency's general counsel to investigate the tax status of one of the nonprofit community organizations opposing Shintech to determine possible violations of tax laws.¹¹⁸ The DEQ's legal department aided Reilly's surveillance efforts by supplying him with information on Tulane Clinic attorneys.¹¹⁹ Reilly also confirmed that he ordered his department attorneys to compile a list of all legal filings made by the Tulane Clinic.¹²⁰ When Governor Foster was confronted with this information, he responded that he had no problem with Reilly using his state position and taxpayer funds to investigate groups opposed to the Shintech plant.¹²¹

At a meeting at the governor's mansion in September, 1997, Foster complained to the president of Tulane and the dean of Tulane Law School about the Clinic's actions in the Shintech case and requested that they take action.¹²² Governor Foster's special counsel also complained about the legal actions taken in the Shintech case, especially the Clinic's efforts "to blaze new territory in the environmental justice arena here," and expressed his desire that Tulane and the Louisiana Supreme Court step in and "require

Shintech by telling the official that "any attack on a prospective chlorine producer was not going to be well received by the existing chlorine producers in the area or the chemical manufacturing community at large." Chapman, *supra* note 90.

117. Ferstel, *supra* note 116.

118. *Id.*; see also Memorandum from Kevin P. Reilly, Sr., Louisiana Department of Economic Development, to Daryl Manning, Louisiana Department of Economic Development (Dec. 30, 1997) (on file with author) (requesting investigation of the Louisiana Coalition for Tax Justice); Memorandum from Susan Louise Dunham, Attorney, Louisiana Department of Economic Development, to Kevin P. Reilly, Sr., Secretary, Louisiana Department of Economic Development (Jan. 7, 1997) (on file with author) (concluding that the activities of the Louisiana Coalition for Tax Justice do not violate federal tax laws).

119. See Memorandum from R. Katherine Long, Office of Legal Affairs, Department of Environmental Quality, to Daryl Manning, General Counsel, Louisiana Department of Economic Development (Oct. 23, 1997) (on file with author) (transmitting seventeen pages of information on the Tulane Clinic "[i]n accordance with [their] telephone conversation").

120. Ferstel, *supra* note 116.

121. Ed Anderson & Chris Gray, *Foster Endorses Probes of Shintech Adversaries*, TIMES-PICAYUNE (New Orleans, La.), Nov. 7, 1997, at A3.

122. Telephone interview with Dr. Eamon M. Kelly, Former President, Tulane University (Oct. 8, 1999); see also Marsha Shuler, *Foster, Officials of Tulane Agree to Disagree*, ADVOCATE (Baton Rouge, La.), Sept. 5, 1997, at 1A.

accountability.”¹²³

Other officials appointed by Governor Foster took up the campaign to get the Tulane Clinic to cease representation of the Convent residents. Members of the Louisiana Board of Regents (Board), appointed by the governor, proposed denying Tulane University access to millions of dollars from the education trust fund.¹²⁴ The Board claimed it was their responsibility to determine whether Tulane University, through the Clinic’s actions in the Shintech case, hampered the state’s economic development plans.¹²⁵ The Board later dropped the idea of withholding money from the University.¹²⁶

The DEQ also followed Governor Foster’s lead and engaged in a series of actions designed to prevent the Tulane Clinic from presenting the residents’ claims to state and federal courts and agencies. The DEQ’s actions ranged from denying citizens access to public documents, hiding evidence of contamination on the proposed Shintech site, preventing citizens from speaking at public hearings, and refusing to accept or acknowledge receipt of comments filed by the Tulane Clinic.¹²⁷ The head of the agency’s air division, which by

123. Coyle, *supra* note 109 (reporting remarks of Terry Ryder).

124. The state receives this trust fund money for settlement of claims concerning royalties from offshore oil leases and makes it available to all of the state’s institutions of higher education. Littice Bacon-Blood, *Shintech Could Cost Tulane Money*, TIMES-PICAYUNE (New Orleans, La.), Apr. 25, 1998, at C2.

125. Press reports indicated that Roland Toups was one of the Board members who wanted to link Tulane’s eligibility for state funds to the Tulane Clinic’s compliance with Governor Foster’s economic development agenda. *See id.* Toups, at the time of these remarks, was chairman of the board of The Chamber of Greater Baton Rouge and employed by Turner Industries, the third largest petrochemical plant contractor in the United States. *See* The Chamber of Greater Baton Rouge at http://www.brchamber.org/chamber/chair_jet.html (last visited Apr. 28, 1998) (identifying Toups as Chairman of the Board and employed by Turner Industries, Ltd.); Turner Industries, Ltd. at <http://www.turner-industries.com/companies/til.html> (last visited Oct. 17, 1999).

126. *See* Littice Bacon-Blood, *State Giving Tulane \$700,000*, TIMES-PICAYUNE (New Orleans, La.), Aug. 19, 1998, at A2; *see also Leave Clinic Alone*, ADVOCATE (Baton Rouge, La.), June 4, 1998, at 13A (reporting Louisiana House of Representatives Education Committee’s approval of a resolution directing the Board of Regents to restrain from interference with the operations of the Tulane Clinic).

127. *See* Motion to Recuse DEQ Officials at 4-31, *In re Shintech, Inc. and Its Affiliates* (DEQ Mar. 6, 1998); *see also* Vicki Ferstel, *Groups Want DEQ Officials Off Shintech Case*, ADVOCATE (Baton Rouge, La.), Dec. 9, 1997, at 1A; Chris Gray, *State Favors Shintech Plant, Opponents Say*, TIMES-PICAYUNE (New Orleans, La.), Dec. 9, 1997, at B3.

law is required to ensure that the rights of the public “receive active and affirmative protection,”¹²⁸ instructed his staff to treat the local residents as adversaries in the permitting process.¹²⁹

The DEQ went so far in its efforts to aid Shintech as to surreptitiously use an employee in the secretary’s office to organize local residents to support Shintech.¹³⁰ Until the state began using its resources, such as DEQ personnel, to aid Shintech, no Convent resident spoke in favor of the plant at the numerous public hearings held on the matter.¹³¹ Despite the state’s extraordinary efforts, at the last public hearing on the facility’s proposed air permits attended by over one-hundred people, no local resident spoke in favor of the plant.¹³² The only independent public opinion poll found that a majority of Convent residents opposed the plant.¹³³

128. *Save Ourselves v. La. Env'tl. Control Comm'n.*, 452 So. 2d 1152, 1157 (La. 1984).

129. *Written Reasons for Judgment, St. James Citizens for Jobs & the Env't v. La. Dep't of Env'tl. Quality*, No. 448928 (19th La. Dist. Ct. Aug. 31, 1998) (“Moreover, this court recognizes that the DEQ in its memorandum submitted in this matter acknowledged that Assistant Secretary Von Bodungen instructed his staff not to meet with the Applicants and regards the Applicants’ position as adversarial to that of the DEQ.”).

130. *See Motion to Recuse DEQ Officials*, *supra* note 127, at 17-20 (detailing actions of the DEQ’s Community-Industry Relations Group Coordinator); *see also* Ferstel, *supra* note 127; Gray, *supra* note 127.

131. Telephone Interview with Pat Melacon, President, St. James Citizens for Jobs & the Environment (Mar. 3, 2000); *see also* Department of Environmental Quality, *Public Hearing Attendance Record Sintech [sic] Inc. and Its Affiliates* (n.d.) (on file with author) (identifying no resident of Convent as speaking in favor of the proposed plant on the agency’s list of attendees at a December, 1996 public hearing).

132. Chris Gray, *Emotions Flare at Hearing for Shintech Permits*, *TIMES-PICAYUNE* (New Orleans, La.), Jan. 24, 1998, at B3; John McMillan, *Group Denounces Shintech Plan*, *ADVOCATE* (Baton Rouge, La.), Jan. 24, 1998, at 3B (observing that after a Shintech spokesperson opened the hearing, “speaker after speaker” attacked the proposed site of the plant). Even a special DEQ public hearing in Convent on environmental justice failed to result in any substantial local support for the plant. *See* Mike Dunne, *Foes Cite Pollution, Injustice*, *ADVOCATE* (Baton Rouge, La.), Jan. 25, 1998, at 1B (“Had the Romeville Elementary School been a boat Saturday, it would have capsized. One side was filed with Shintech opponents, the other side a small group of Shintech supporters.”); Nicolai, *supra* note 32 (“At the state public hearing in January, 90 percent of St. James residents who spoke were against Shintech, including the state representative from the area.”).

133. Gray, *supra* note 41 (publishing results of a newspaper poll finding that Convent area residents opposed Shintech building a plant in St. James Parish by a 52% to 38% margin; opposition among African Americans was even stronger). The newspaper poll also showed that, despite Governor Foster’s well-publicized attacks on Tulane, the local residents supported the Tulane Clinic’s involvement in the Shintech dispute by a 54% to 22% margin. *Id.*

B. Industry: Access to Justice That's Bad for Business is Bad for Louisiana

Industry leaders in Louisiana were not pleased with either the Clinic's representation of local residents opposing the Shintech plant or with the allegations of environmental discrimination. The business community's attack on the Clinic came on three fronts: direct pressure on Tulane to restrict the Clinic; efforts to encourage the state to pressure Tulane; and efforts to encourage the Louisiana Supreme Court to intervene and prevent the Clinic from providing legal assistance.

Local industry's anger at Tulane and attempts to encourage the University to shut down or restrict the Clinic, described as "the polluters' worst enemy,"¹³⁴ began long before Shintech. In the early 1990s, the petrochemical industry complained to Tulane officials about the Clinic, partly in response to a request the Clinic filed on behalf of community groups in late 1989 to deny tax exemptions to industrial facilities with poor environmental records.¹³⁵

Attempts to pressure Tulane to restrict the Clinic were manifested not simply by complaints but also through an economic boycott by certain petrochemical corporations. After the Clinic filed comments challenging American Cyanamid Company's waste disposal practices, the company wrote Tulane warning that "Cyanamid cannot continue to support an institution that does not support and will not listen to many of their benefactors."¹³⁶ DuPont Corporation, another Louisiana petrochemical company whose environmental practices were challenged by the Clinic on behalf of community groups,

134. Sheila Kaplan & Zoë Davidson, *The Buying of the Bench*, NATION, Jan. 26, 1998, at 11, 15.

135. For example, the president of the Louisiana Chemical Association met with and wrote to the president of Tulane complaining about the Clinic's legal representation activities and asking that the president investigate. See Letter from Dan Borne, Louisiana Chemical Association, to Dr. Eamon Kelly, President, Tulane University (Oct. 19, 1990) (on file with author); see also Letter from Dan Borne, Louisiana Chemical Association, to Edward E. Sherman, Dean, Tulane Law School (Jan. 29, 1997) (on file with author) (thanking the dean for providing a meeting at which the association complained about the Tulane Clinic).

136. Letter from D.J. Romanik, Plant Manager, American Cyanamid Company, to Edwin Lupberger, Tulane Board of Administrators and Annual Fund Corporate Chair (Apr. 8, 1991) (on file with author).

reportedly ceased recruiting at the Tulane engineering school and “even instructed employees who are tulane [sic] graduates not to donate money to the institution.”¹³⁷ Chevron reportedly curtailed its long-standing practice of donations to the Tulane Chemical Engineering Department when the Clinic served the company with a notice of intent to sue on behalf of Louisiana residents concerned about alleged violations of the federal Clean Water Act.¹³⁸ Further, the president of the Louisiana Chemical Association stated that he routinely tells association members not to support Tulane University because of the Clinic.¹³⁹ In 1990, the Port of South Louisiana, which played a major role in convincing Shintech to locate in Convent,¹⁴⁰ wrote to companies and strongly urged them not to contribute further to Tulane Law School because of Clinic activities, referring to the Clinic students as “storm troopers.”¹⁴¹

While Tulane University benefits greatly from these types of industry donations and support,¹⁴² the extent of this business boycott is unknown. One prominent alumni did observe, though, that the Clinic’s work “has and will result in lower contributions” and to decisions by local business leaders to stop recruiting at Tulane.¹⁴³

137. Letter from Richard D. Gonzalez, Chairman, Department of Chemical Engineering, Tulane University, to Dr. Eamon Kelly, President, Tulane University (July 5, 1995) (on file with author). DuPont was a participant in the Enterprise for the Environment (E4E) initiative which pledged, as one of its consensus goals, to “create decision processes that meaningfully involve affected stakeholders and engage all citizens in protecting the environment.” See Ruckelshaus, *infra* note 391.

138. E-mail from Carl Voelcker, Assistant Director, Corporate and Foundation Relations, Tulane University, to Robert R. Kuehn, Director, Tulane Environmental Law Clinic (June 12, 1998, 15:33:54 CST) (on file author).

139. Daugherty, *supra* note 99, at 9 (quoting Dan Borne, President, Louisiana Chemical Association).

140. The Port of Louisiana agreed to sell Shintech 500 acres of land needed for the facility. See Memorandum from R.J. Clements, Executive Director, Port of South Louisiana, to Bill Morris, Global Associates, Inc. (Apr. 24, 1996) (on file with author).

141. Letter from R.J. Clements, Executive Director, Port of South Louisiana, to B.K. Shackelford, Complex Manager, Triad Chemical (Apr. 9, 1990) (on file with author).

142. See Barbara Koepfel, *Cancer Alley, Louisiana*, NATION, Nov. 8, 1999, at 16, 20 (alleging that certain departments at Tulane have “thrived” from major gifts from petrochemical companies).

143. Hansen, *supra* note 58, at 57 (quoting Ernest Edwards, Jr., a partner with the New Orleans law firm of Lemle & Kelleher). A number of Tulane alumni, some using the letterheads of their businesses, have written to inform the University that, because of the Clinic’s action, they will no longer contribute to the University or law school. See, e.g., Letter from Robert G. Jones & Sarah Quinn Jones, Alumni and Prudential Securities Employees, to Dr. Eamon Kelly,

The second strategy employed by business interests was to assist and encourage the state to pressure Tulane. In this regard, Louisiana business could not have found a better ally than Louisiana Department of Economic Development Secretary Kevin Reilly. Reilly, himself a wealthy businessman, worked hard to attract Shintech to Louisiana and served as Governor Foster's liaison on the Shintech matter. As described above, Reilly directed his staff to do everything they could to prevent Tulane from delaying Shintech's permit application process. Reilly also sent a letter to all department heads at Tulane asking that they intervene and prevent the Clinic from representing the Convent residents.¹⁴⁴ When the Louisiana Supreme Court heard of Governor Foster's complaint regarding the Clinic and called Reilly for information, he sent a list of companies for the Court to call regarding complaints about the Clinic.¹⁴⁵ Reilly was instrumental in providing a \$2.5 million unsecured state loan to a group led by the head of the state NAACP, whom Governor Foster was courting for support of Shintech.¹⁴⁶ The money was approved by a Reilly-lead state economic development council the same day that the state NAACP leader broke his silence and blasted Shintech plant opponents.¹⁴⁷

Publicly, Shintech claimed to understand the need for minorities to have access to attorneys.¹⁴⁸ However, behind the scenes,

President, Tulane University (July 8, 1993) (on file with author); Letter from Philip J. Knieper, Jr., Engineering School Alumnus, to Dr. Eamon Kelly, President, Tulane University (May 4, 1990) (on file with author); Letter from Thomas G. Robbins, Law School Alumnus, to Edward F. Sherman, Dean, Tulane Law School (Mar. 20, 1998) (on file with author).

144. See *supra* text accompanying notes 31, 112-20.

145. Christi Daugherty, *Life of Reilly*, GAMBIT WKLY. (New Orleans, La.), Nov. 18, 1997, at 9.

146. See Marsha Shuler, *Johnson, Shintech, Big Loan*, ADVOCATE (Baton Rouge, La.), Sept. 14, 1997, at 1A. The \$2.5 million in financing was approved over the objections of the council's staff and included, on Reilly's motion, an extra \$500,000 that was not sought by the group. *Id.*

147. *Id.* The timing of the approval of the funds and public criticism of plant opponents was called "coincidental" by the NAACP leader. *Id.* (quoting Ernest Johnson, President, Louisiana NAACP). The NAACP's national board later unanimously voted to oppose the Shintech plant. NAACP National Board of Directors, Resolution Against Environmental Racism in Louisiana (Oct. 17, 1998) (on file with author).

148. John LaPlante, *Shintech's Not Trashing Tulane*, ADVOCATE (Baton Rouge, La.), July 31, 1997, at 9B (quoting Dick Mason, Controller, Shintech, Inc., as stating that society needs groups to help "minorities who don't have access to attorneys defend themselves against people

Shintech's representatives encouraged Reilly's attacks on the Clinic. Shintech's public relations consultant, Tom Spradley, sent a memorandum to Reilly alerting him to the Clinic's environmental justice claim and arguing that the petition "amounts to harassment" and was a "frivolous filing."¹⁴⁹ Likewise, Harris, Deville & Associates, Inc., another Shintech public relations consultant, prepared and sent Reilly a chronology of the Clinic's legal filings in the case.¹⁵⁰ The consultants even sent Reilly proposed "talking points" to read at the initial public hearing on Shintech to ensure Reilly followed Shintech's public relations strategy.¹⁵¹ At that hearing, Reilly attacked Shintech's opponents, including the Clinic, and paraphrased the Bible: "God forgive them, for they know not what they do."¹⁵²

While Shintech was working behind the scenes to fuel the state's attack on the Clinic, the company simultaneously was ensuring that local supporters of the plant were well represented. During the summer of 1997, when the EPA was investigating allegations of environmental discrimination, Shintech paid a law firm to represent some St. James Parish citizens supporting Shintech and to intervene in a lawsuit in defense of Shintech's permits.¹⁵³ Shintech financed

who would make their lives worse In this case, however, I don't think I'm going to make their lives worse.").

149. Facsimile transmission from Tom Spradley, Spradley & Spradley, to Kevin Reilly, Louisiana Department of Economic Development (Sept. 26, 1997) (on file with author). Spradley & Spradley donated \$5,000 to Governor Foster's reelection campaign while the Shintech air permits were pending before state regulators. Silverstein & Cockburn, *supra* note 32.

150. Facsimile transmission from Jim Harris, Harris, Deville & Associates, Inc., to Kevin Reilly, Louisiana Department of Economic Development (Sept. 26, 1997) (on file with author). Harris, Deville & Associates donated \$5,000 to Foster's reelection campaign while the Shintech air permits were pending before state regulators. Silverstein & Cockburn, *supra* note 32.

151. Memorandum from Jim Harris, Harris, Deville & Associates, to Kevin Reilly, Louisiana Department of Economic Development (Dec. 2, 1996) (on file with author).

152. Kevin P. Reilly, Sr., *supra* note 35; see *Luke* 23:34 ("Father forgive them; for they know not what they do."). While a state legislator, Reilly declared Louisiana "a banana republic" with a "lazy, stupid population" that is happy as long as they have "a pickup truck and two shotguns." Peter Carlson, *A Louisiana Legislator Calls His State "A Banana Republic" and Gets Cheers in Response*, *TIME*, Aug. 19, 1985, at 32.

153. See Daugherty, *supra* note 145 (reporting that Shintech paid the legal bills of Nannette Jolivette, a lawyer with a large Lafayette, Louisiana, law firm, who was hired to represent pro-Shintech groups); Maria Giordano, *Groups Intervene to Back Shintech*, *TIMES-PICAYUNE* (New Orleans, La.), Aug. 9, 1997, at B1; see also Gloria W. Roberts et al., *Shintech Deception*,

other expenses of the local group, organized with the aid of the DEQ, including computers and fax machines.¹⁵⁴

The business interests' final, and ultimately most effective, strategy against the Clinic was an appeal to the Louisiana Supreme Court. This plan first developed during Governor's Foster's May, 1997 closed-door appearance before the Business Council.¹⁵⁵ Described as an "economic star chamber," the Business Council's members consist of many of the state's most influential corporate executives and some of Tulane University's biggest donors, including three emeritus members of Tulane's Board of Administrators.¹⁵⁶ Interestingly, the proposal to ask the court to restrict the Clinic was reportedly made by the chief executive officer of Entergy—a large, New Orleans-based energy conglomerate that owned the \$4 million property upon which Shintech proposed to build and that stood to make \$70 million per year in electricity sales to Shintech.¹⁵⁷

Shortly after Governor Foster's appearance before the Business Council, business organizations sent three letters to the Louisiana Supreme Court complaining about the Tulane Clinic and requesting that the court take action to ensure that the Clinic stopped interfering with business interests. The first was a one-page letter from the New Orleans' area Chamber of Commerce (Chamber) complaining that the Clinic "faculty and students' legal views are in direct conflict with business positions."¹⁵⁸ The Chamber did not allege any violation of court rules, but did ask for an investigation of the "positions and

GAMBIT WKLY. (New Orleans, La.), Nov. 18, 1997, at 6.

Shintech also hired attorney Wilbur Reynaud, the owner of both St. James Parish newspapers, as its local representative in the same lawsuit. Daugherty, *supra* note 33. "Throughout the process, the newspapers have given Shintech regular front-page coverage, except for the DEQ hearing, which the papers did not cover. Shortly after the hearing, however, one of Reynaud's papers, *The News-Examiner*, ran a front-page editorial excoriating those who attended the meeting for heckling the Shintech speakers." *Id.*

154. Melba Newsome, *Battle on the Bayou*, VIBE, April, 1998, at 56.

155. See *supra* text accompanying notes 101-04.

156. Cockburn, *supra* note 18; Daugherty, *supra* note 99.

157. James Gill, *Law Clinic, Shintech and Idealism*, TIMES-PICAYUNE (New Orleans, La.), Jan. 16, 1998, at B7; *Shintech's Secret Backer*, COUNTERPUNCH, Nov. 16-30, 1997, at 2.

158. Letter from Robert H. Gayle, Jr., President and Chief Executive Officer, The Chamber/New Orleans and the River Region, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (July 8, 1997) (on file with author).

stands taken by the Tulane Law Clinic.”¹⁵⁹ The Business Council followed shortly thereafter with a similar letter requesting that the court enforce its student practice rules to prevent the Clinic from using “the court rules to fight, harass and interfere with Louisiana’s interest to attract new business . . .” and expressed confidence that “the court never intended for these rules to be a source of anti-business clinics under the auspices of a university.”¹⁶⁰

Five days after Governor Foster’s unsuccessful September, 1997 meeting with Tulane officials, the Louisiana Association of Business and Industry (LABI) sent the third letter of request to the court.¹⁶¹ Like the other business interests, LABI complained that the Clinic was “bad for business in Louisiana” and that “the abuses of [the Louisiana Law Clinic Student Practice Rule] have cost Louisiana industry millions of dollars.”¹⁶² LABI added criticism that “the Clinic has severely increased the burden on the state and its regulators.”¹⁶³

The Louisiana Chemical Association, representing petrochemical companies in Louisiana including Shintech, did not send a letter to the court, but rather publicly echoed LABI’s concern that the legal activities of the Clinic have “a tendency to tie DEQ up in knots responding to [the Clinic’s] briefs.”¹⁶⁴ The Louisiana Chemical Association also objected that Clinic students “far overstate the

159. *Id.*

160. Letter from Erik F. Johnsen, Chairman, Business Council of New Orleans and the River Region, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (July 16, 1997) (on file with author).

161. Letter from Daniel L. Juneau, President, Louisiana Association of Business and Industry, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Sept. 9, 1997) (on file with author).

162. *Id.* LABI’s “evidence” that the Clinic was in violation of Rule XX consisted of a factually inaccurate account of a case filed some years earlier in federal court in which no party made any suggestion that the Clinic’s actions were improper and the seventy-page results of a Westlaw “Allnewsplus” electronic database search of the term “Tulane Environmental Law Clinic.” *Id.*; Letter from Robert R. Kuehn, Professor, Tulane Environmental Law Clinic, to Timothy F. Averill, Deputy Judicial Administrator, Louisiana Supreme Court (Dec. 23, 1997) (on file with author) (responding to LABI’s allegations and explaining the circumstances of the settlement conference in the federal court case).

163. Proposal to Amend and Enforce Rule XX, at 5, attachment to letter from Daniel L. Juneau, President, Louisiana Association of Business and Industry, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Sept. 9, 1997) (on file with author).

164. Gray, *supra* note 108 (quoting Dan Borne, Spokesman, Louisiana Chemical Association).

impact of [legislative] bills with hyperbolic testimony. [Student attorneys] read invidious motives into bills that just aren't there."¹⁶⁵

A final letter to the court, this time from the Chamber of Commerce branch in southwest Louisiana, likewise offered no evidence of any wrongdoing but claimed that the "Clinic's activities had an adverse effect on economic growth and development not only in Baton Rouge and New Orleans areas but also in Southwest Louisiana."¹⁶⁶ In support of its request to restrict legal representation, the Chamber argued that "the legal process should not be manipulated for delay if delay only serves to kill a project and not to ensure that a project meets applicable environmental requirements."¹⁶⁷

The business groups continued to justify their requests to restrict legal representation in later statements. LABI asserted that Louisiana businesses were tired of defending "lawsuit after lawsuit after lawsuit" and tired of the Tulane Clinic's "Chicken Little rhetoric."¹⁶⁸ LABI contended that the Clinic "is not supposed to be a public policy advocate They practice barratry—ambulance chasing—they stir up controversy, get things going, then say, 'We're here to save you.' It's not the way they're supposed to work."¹⁶⁹ However, LABI offered no examples of improper law suits, and no explanation of why existing court and ethical rules restricting frivolous lawsuits and unauthorized solicitation were inadequate to police the Clinic.

The Chamber echoed the need to "prevent 'ambulance chasing' by overzealous, inexperienced student lawyers" and lamented that the actions of the Clinic "have shown us just how uncertain our economic future can be when irresponsible acts are tolerated."¹⁷⁰ The Chamber alleged, more than once, and always without support, that

165. *Id.*

166. Letter from Joseph W. Cironi, President, The Chamber-Southwest Louisiana, to Pascal F. Calogero, Chief Justice, and Jeanette Theriot Knoll, Justice, Louisiana Supreme Court (Nov. 6, 1997) (on file with author).

167. *Id.*

168. Hansen, *supra* note 58, at 57.

169. Christi Daugherty, *Target: Tulane*, GAMBIT WKLY. (New Orleans, La.), Oct. 13, 1997, at 9 (quoting Dan Juneau, President, LABI); Dan Juneau, *Law Clinics Need to Obey the Rules*, L'OBSERVATEUR (LaPlace, La.), Oct. 11, 1997, at 4A.

170. Sam A. LeBlanc, III, *Business Unfairly Portrayed in Law Clinic Flap*, TIMES-PICAYUNE (New Orleans, La.), June 27, 1998, at B6 (letter to editor) (describing the Clinic's representation in the Shintech matter and other industry expansions).

the Clinic was not representing the needy but instead was representing national organizations with sufficient resources of their own.¹⁷¹ This allegation was repeatedly denied by the Clinic, and the Louisiana Supreme Court admitted finding no evidence that the Clinic ever represented any person or organization that could afford a private attorney.¹⁷²

The Chamber further sought to justify restrictions by alleging that the Clinic advocated controversy instead of progress and was not trying to protect the environment.¹⁷³ The Chamber's chief communications officer explained that the requested restrictions were justified because the Clinic's work occasionally undermined the Chamber's efforts to attract business; Shintech was a case in point.¹⁷⁴ The Business Council's chairman explained: "What we are interested in is a fair and orderly process not disturbed and delayed, particularly delayed, by lawsuits [by the Clinic] that have very little merit."¹⁷⁵ The desire for a court-ordered "level playing field" also was expressed in a June, 1998 letter in support of reelecting the Chief Justice of the Louisiana Supreme Court that was signed by more than two dozen prominent business leaders: "All 'business' needs or

171. *Id.*; see also Richard B. Schmitt, *Louisiana Shackles Law-School Clinics*, WALL ST. J., Oct. 29, 1998, at B1 ("Business groups say the rules return the clinics to their original mission of representing the truly needy. . .").

172. E-mail from Robert Kuehn, Director, Tulane Environmental Law Clinic, to Oliver Houck, et al. (Oct. 2, 1998, 09:23 CST) (on file with author) (recounting statements by Chief Justice Calogero during the October 1, 1998 campaign debate at Tulane University).

173. *Louisiana: The State We're In*, *supra* note 106 (interviewing Sam A. LeBlanc, III). For a different opinion on the work of the Tulane Clinic, see Pamela Coyle, *Tulane Law Clinic Honored for Work*, TIMES-PICAYUNE (New Orleans, La.), July 5, 2000, at 1B (reporting Tulane clinic is the first recipient of the ABA's Award for Distinguished Achievement in Environmental Law and Policy); Joe Gyan Jr., 'Outlaw' Leader Leaving La., ADVOCATE (Baton Rouge, La.), May 15, 1999, at 1B (noting that Tulane Clinic was named the Conservation Organization of the Year by a previous governor and presented a certificate by the present Lieutenant Governor for "ground-breaking work in environmental racism and outstanding service to the 'working poor'"); *Lawyer of the Year-Runners-Up*, NAT'L L.J., Dec. 28, 1998-Jan. 4, 1999, at A12 (selecting the Tulane Clinic as runner up for its Lawyer of the Year Award); Michael Wagner, *Fight for Civil Rights Goes On Leader Says*, TIMES-PICAYUNE (New Orleans, La.), May 10, 1999, at 3B (reporting that the NAACP recognized the Tulane Clinic for its contributions to civil rights).

174. Daugherty, *supra* note 169 (quoting Tom Honan, Chief Communications Officer, the Chamber).

175. *Fox News* (Fox News Channel television broadcast, Sept. 1998) (on file with author) (interview with Herschel Abbott, Chairman, Business Council).

requires in the highest court of our state is a level playing field on which to compete.”¹⁷⁶ The request for a “level playing field” was followed one week later by the Chief Justice’s release of dramatic new restrictions on Louisiana law clinics that effectively prevent a repeat of the Tulane Clinic’s representation of community groups in the Shintech matter.

C. The Legal Profession: Access to Justice Yields to Attorney Self-Interest

The Louisiana legal profession’s response to this attack on the Tulane Clinic was mixed. While some jumped to defend the Clinic, most notably the Louisiana Attorney General,¹⁷⁷ members of the Louisiana bar were behind the efforts to deny legal assistance to the individuals and community groups that the Clinic traditionally represented.

176. “Open Letter to Our Fellow Business Men and Women” to 600 Business Leaders (June 1998) (on file with author). Signatures included the chairman and two past chairmen of the Chamber, the chairman and past chairman of the Business Council, and prominent members of LABI. See Pamela Coyle, *Court Race May Get Messy; Chief Justice Faces Challenge*, TIMES-PICAYUNE (New Orleans, La.), June 14, 1998, at A1; Clancy DuBos, *Opening Volley, GAMBIT WKLY.* (New Orleans, La.), June 16, 1998, at 17 (describing those who signed the letter as a “who’s who of local business leaders”); Joe Gyan, Jr., *Political Philosophies, Affiliations Dominate Race*, ADVOCATE (Baton Rouge, La.), Aug. 30, 1998, at 1A; see also Kaplan & Davidson, *supra* note 134, at 14 (identifying Edward Diefenthal, one of the business leaders who signed the Calogero support letter, as a prominent LABI member and major financial contributor to Louisiana Supreme Court election campaigns); The New Orleans Regional Chamber of Commerce, *1998 Board of Directors*, at <http://chamber.gnofn.org.bod.html> (last visited Nov. 6, 1999) (identifying Ned Diefenthal as a member of the Chamber’s board of directors).

LABI similarly defended its heavy financial involvement in Louisiana Supreme Court elections as an effort to obtain “a level playing field.” Carl Redman, *LABI, Lobbying and the Law*, ADVOCATE (Baton Rouge, La.), Sept. 27, 1998, at 15B (quoting Ginger Sawyer, Vice-President for Political Action, LABI). The same “level playing field” justification was used to defend the efforts of business groups attempting to deny standing to environmental plaintiffs. See *Morning Edition: Supreme Court to Take Up Issue of Citizens Suing Companies Over Pollution* (National Public Radio broadcast, Oct. 12, 1999) (quoting Jan Amenson, National Association of Manufacturers).

177. See, e.g., Letter from Richard P. Ieyoub, Louisiana Attorney General, to Chief Justice and Associate Justices, Supreme Court of Louisiana (Oct. 1, 1998) (on file with author) (requesting a stay of new law clinic restrictions and arguing that the restrictions “could adversely affect the protection of those public values and interests which clinical practitioners most often assert.”); see also Mark Schleifstein, *Ieyoub Asks High Court to Suspend Clinic Rules*, TIMES-PICAYUNE (New Orleans, La.), Oct. 7, 1998, at A2.

The Louisiana Bar Association's Board of Governors (Board of Governors) was equivocal on the issue. After the new restrictions on Louisiana law clinics were first issued, the Board of Governors sent a resolution requesting the court to stay the rule changes so the matter could be considered at the next meeting of the Bar's House of Delegates.¹⁷⁸ The court refused the request and provided the Board of Governors only thirty days to respond.¹⁷⁹ Although it was not publicly reported, after the resolution was submitted to the court and widely reported in the press, the Chief Justice of the Louisiana Supreme Court expressed his displeasure to the president of the Bar Association that the Board of Governors intervened in the law clinic dispute.¹⁸⁰ The Board of Governors subsequently was unable to respond within thirty days and appeared to equivocate its earlier resolution by informing the court that it never intended to "take sides" or to express a position on the merits of the new restrictions.¹⁸¹

Meanwhile, no attorney was more vigorous in the attack on the Clinic than Governor Foster's special counsel. In public statements about the Clinic, the special counsel repeatedly objected to the

178. Letter from Patrick S. Ottinger, President, Louisiana State Bar Association, to Chief Justice and Associate Justices, Louisiana Supreme Court (Aug. 31, 1998) (on file with author) (transmitting the August 29, 1998 Louisiana State Bar Association Board of Governors Resolution); see also Mark Ballard, *La. Bar Gets Into Law Clinic Fight*, NAT'L L.J., Sept. 21, 1998, at A8; Joe Gyan, Jr., *La. Bar Backs Clinics*, ADVOCATE (Baton Rouge, La.), Sept. 9, 1998, at 1A; Mark Schleifstein & Susan Finch, *State Bar Wants Court to Suspend Law Clinic Rules So It Can Study Them*, TIMES-PICAYUNE (New Orleans, La.), Sept. 9, 1998, at A2 (quoting David Bienvenu, immediate past president, Louisiana State Bar Association, as stating: "The board of governors believes that as the voice of the legal profession, the organized bar, it should have the opportunity to express its views on issues affecting the legal profession, which includes amendments to Rule XX.").

179. See Letter from Justice Walter F. Marcus, Jr., Associate Justice, Louisiana Supreme Court, to Patrick S. Ottinger, President, Louisiana State Bar Association (Sept. 2, 1998) (on file with author).

180. Interview with Edward Sherman, Dean, Tulane Law School (Oct. 21, 1999) (relating the substance of an October, 1998 conversation with Patrick S. Ottinger, President, Louisiana State Bar Association).

181. Letter from Patrick S. Ottinger, President, Louisiana State Bar Association, to Walter F. Marcus, Jr., Associate Justice, Louisiana Supreme Court (Oct. 12, 1998) (on file with author). Contrary to these assertions, the Bar's Access to Justice Committee had taken a position that the court's new restrictions on law clinics be removed and that the committee present this position to the court. The Committee forwarded this recommendation to the Board of Governors. Louisiana State Bar Association, *Access to Justice Committee Minutes at* http://www.lsb.org/html/access_minutes_sept.html (last visited Nov. 6, 1999) (minutes from Committee's September 26, 1998 meeting).

Clinic's filing of environmental discrimination charges against the state. He argued that the Clinic went "too far" in "trying to blaze new territory in the environmental justice arena" and urged Tulane University officials and the Louisiana Supreme Court to "require accountability" by the Clinic.¹⁸² In a private meeting with Tulane officials, Governor Foster's special counsel was sharply critical of Clinic professors and pressed the university president and law school dean to retreat on the Shintech case.¹⁸³ When the Louisiana Supreme Court agreed to intervene and imposed new restrictions on the state's law clinics, he praised the court's actions: "[I]ndividuals don't have a constitutional right to have free legal representation in civil cases."¹⁸⁴

During this time, Governor Foster's special counsel served as chairman and vice-chairman of the Louisiana Bar Association's Environmental Law Section (Environmental Law Section), which took no public position on the attack on the Clinic or on efforts to amend the student practice rule.¹⁸⁵ Unlike the environmental law sections of other state bars, the Environmental Law Section has no program for providing legal services to those who cannot afford an attorney.¹⁸⁶ The Environmental Law Section also has taken no steps to implement the ABA's 1993 resolution urging increased delivery of legal services to persons and communities raising environmental justice claims and expansion of law school clinical programs to

182. Coyle, *supra* note 109, at 27 (reporting remarks of Terry Ryder).

183. Telephone Interview with Dr. Eamon M. Kelly, *supra* note 122.

184. *Morning Edition: Rules on Law School Clinics* (National Public Radio broadcast, July 30, 1998).

185. E-mail from Daria Burgess Diaz to Robert Kuehn, Director, Tulane Environmental Law Clinic (Oct. 15, 1999, 02:57 CST) (on file with author) (relating that Terry Ryder, Governor Foster's special counsel, was past chairman of the Louisiana State Bar Association Environmental Law Section from 1998-99, chairman from 1997-98, and vice-chairman from 1996-97). See, e.g., Scott Allen, *Environmental Lawyers Unite to Help Low-Income Communities*, BOSTON GLOBE, Dec. 1, 1994, at 36 (reporting on the Boston Bar Association's Lawyer pro bono environmental law program); B. Suzi Ruhl, *Committee on Access to Justice Serves Low-Income Citizens*, FLA. B. ENV'T L & LAND USE L. SEC. REP., July 1999, at 2 (explaining the Florida Bar's Environmental and Law Use Law Section's program to provide pro bono services to disadvantaged communities in Florida).

186. E-mail from Daria Burgess Diaz to Robert Kuehn, Former Director, Tulane Environmental Law Clinic (Mar. 1, 2000, 09:16 CST) (on file with author); E-mail from Daria Burgess Diaz to Robert Kuehn, Director, Tulane Environmental Law Clinic (Oct. 18, 1999, 10:48 CST) (on file with author).

address environmental justice problems.¹⁸⁷

The Environmental Law Section's only action was to publish an article in the Louisiana Bar Journal on the new law clinic rules. The article, written by an environmental defense attorney whose firm often opposed the Clinic, urged all licensed attorneys to report any representation of ineligible clients to the bar ethics committee and seek disqualification of the law clinic students and supervising attorneys from the case.¹⁸⁸ The acting director of the Clinic objected that the article violated the Journal's requirement that such articles not take a position that appears to favor one section of the bar.¹⁸⁹ The acting director requested permission to write a different perspective on the new restrictions, but the editorial board denied his request.¹⁹⁰

Attorneys representing businesses that were defeated in proceedings by Clinic students played a prominent role in the effort to restrict the availability of clinic services. The chairman of the Business Council was a Tulane Law School alumnus, member of the Tulane University Associate's Board of Directors and the Chamber's board of directors.¹⁹¹ As Business Council chairman, the attorney attacked the Clinic with rhetoric of a level playing field undisturbed by unmeritorious lawsuits.¹⁹² Interestingly, the chairman is the president and former general counsel of BellSouth Corporation in Louisiana, whose 1996 plans to demolish a historic building in New Orleans were blocked in a case represented by Clinic students.¹⁹³

187. See ABA House of Delegates, Resolution on Environmental Justice (Aug. 11, 1993).

188. Anne J. Crochet, *Supreme Court Changes Rule Governing Law School Clinics*, 46 LA. B.J. 239, 240-41 (1998).

189. See Letter from Christopher Gobert, Acting Director, Tulane Environmental Law Clinic, to Larry Feldman, Jr., Editor, Louisiana Bar Journal (Mar. 25, 1999) (on file with author) (requesting that editorial board reconsider a decision not to print his article on Rule XX).

190. Facsimile transmission from Larry Feldman, Jr., Editor, Louisiana Bar Journal, to Christopher Gobert, Acting Director, Tulane Environmental Law Clinic (Mar. 29, 1999) (on file with author) (denying request to print submission).

191. See *Associates Announce New Board of Directors*, TULANIAN, Spring 1999, at 49 (noting position of Herschel L. Abbott, Jr.); The New Orleans Regional Chamber of Commerce, *1998 Board of Directors*, at <http://chamber.gnofn.org/bod.html> (last visited Nov. 6, 1999) (identifying Hershel L. Abbott, Jr. as a member of board).

192. *Supra*, note 175 and accompanying text.

193. See Coleman Warner, *Bell South Seeks Approval to Demolish Old Building*, TIMES-PICAYUNE (New Orleans, La.), Jan. 24, 1996, at B1; Coleman Warner, *Bell Won't Demolish Building*, TIMES-PICAYUNE (New Orleans, La.), Mar. 22, 1996, at B1; Coleman Warner, 1917

Many of the Chamber's officers and directors are prominent local attorneys.¹⁹⁴ Notably, the chairman of the New Orleans chapter was a partner and environmental defense attorney with a prominent New Orleans law firm, as well as a graduate of Tulane Law School's environmental law program.¹⁹⁵ The chairman's attacks on the Clinic were numerous. He supported the court's denial of access to the Clinic's legal services on the grounds that Clinic lawyers were "overzealous and that the Clinic's actions [showed] how uncertain our economic future can be when irresponsible acts are tolerated."¹⁹⁶ At the time he requested that the court restrict the Clinic's services, he and his law firm were engaged in a protracted legal battle with Clinic lawyers over the eligibility of a Louisiana hazardous waste incinerator for state tax breaks.¹⁹⁷ Those multi-million dollar tax breaks were earlier ruled unlawful by a trial judge, and the chairman and his firm were unsuccessful in their four-year legal battle to preserve the tax exemptions.¹⁹⁸

Building to Become Hotel; Landmark Almost Razed, TIMES-PICAYUNE (New Orleans, La.), Oct. 8, 1997, at C1; see also TULANE LAW SCHOOL, ALUMNI DIRECTORY 1993, 1 (1993) (identifying Abbott as "Gen. Counsel/Louisiana: South Central Bell Telephone," the predecessor corporation to BellSouth); *Chamber Recognizes BellSouth Activism*, TIMES-PICAYUNE (New Orleans, La.), Aug. 22, 1996, at C1 (noting that Abbott, identified as BellSouth president in Louisiana, accepts 1996 Business at Its Best Award from the Chamber "for its community participation and for being a role model for business.").

194. See The New Orleans Regional Chamber of Commerce, *1998 Board of Directors available at* <http://chamber.gnofn.org/bod.html> (last visited Nov. 6, 1999) (identifying attorneys and their respective firms as officers or members of the Board of Directors: Sam A. LeBlanc, III, Adams & Reese; Walter J. Leger, Leger & Mestayer; Herschel L. Abbott, Jr., BellSouth; Gary Elkins, Elkins, P.L.C.; Richard McMillan, Jones, Walker; and Paul Pastorek, Adams & Reese).

195. See James Gill, *High Court Reins in Lower Class*, TIMES-PICAYUNE (New Orleans, La.), June 21, 1998, at B7; 9 MARTINDALE-HUBBELL LAW DIRECTORY LA249B (1999) (listing Sam A. LeBlanc, III, with the New Orleans law firm of Adams & Reese).

196. LeBlanc, *supra* note 170; see generally Letter from Sam A. LeBlanc, III, et al., to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Mar. 12, 1998) (on file with author) (arguing why the court should limit the ability of the Clinic to provide representation to community organizations).

197. See Motion to Vacate and Motion for Continuance, *Robinson v. Ieyoub* (La. 19th Judicial Dist. Ct. Feb. 10, 1995) (No. 412,867) (identifying LeBlanc as counsel for Rollins Environmental Services (LA), Inc.). Adams & Reese lists ten petrochemical and waste disposal companies among its major representative clients. 9 MARTINDALE-HUBBELL LAW DIRECTORY LA256B (1999).

198. See *Robinson v. Ieyoub*, 727 So. 2d 579 (La. Ct. App. 1998), *writ denied*, 747 So.2d 1096, 1097 (La. 1999).

Attorneys in the Chamber chairman's firm would go even further to rein in the Clinic's effectiveness. As one senior partner stated, if an applicant for a job at the firm had the Tulane Clinic on their resume, "they might as well not come through the front door."¹⁹⁹ The attorney justified blacklisting Clinic students on grounds that the business community would not want to hire firms that employed former Clinic students.²⁰⁰ Disturbingly, the remarks came during a meeting of the "Inns of Court," an organization dedicated to promoting the professionalism of the bar by making "the legal system more accessible" and perfecting the availability of justice in the United States.²⁰¹ The DEQ also was reported to engage in blacklisting, allegedly refusing to hire qualified Tulane alumni because of their participation in the Clinic during law school.²⁰² In a related, but more indirect way, Shintech's lawyers also supported the attack on the Clinic. As one lawyer for Shintech's New Orleans law firm stated, he was a contributing alumnus of Tulane Law School, thus making it inappropriate for the Clinic to represent citizens opposed to his

199. E-mail from Crawford Rose to Robert Kuehn, Director, Tulane Environmental Law Clinic (May 16, 1999) (on file with author) (recounting remarks of Henry B. Alsobrook, Jr.). Alsobrook is a Tulane University and Tulane Law School graduate, the former chairman of the law school's Dean's Council, and a former adjunct professor of professional responsibility at Tulane Law School. 9 MARTINDALE-HUBBELL LAW DIRECTORY LA255B (1999); Interview with John Kramer, Former Dean (1986-96), Tulane Law School (Oct. 21, 1999).

200. *Id.* A student who had applied to the Tulane Clinic for the 1999-2000 academic year informed the author that she was withdrawing her application because she had been warned by a Louisiana attorney that having the Clinic on her resume might scare off potential local employers and harm her legal career. Interview with unidentified second-year Tulane Law School student (Apr. 1999). Tulane environmental law students who are not even in the Clinic have experienced hostility when interviewing for positions, even part-time, with local firms. E-mail from Oliver Houck, Tulane Law School, to Robert Kuehn, Former Director, Tulane Environmental Law Clinic (Feb. 3, 2000) (recounting student's conversation about the hostility experienced when interviewing for a part-time position).

201. E-mail from Crawford Rose to Robert Kuehn, *supra* note 199; American Inns of Court, *Professional Creed*, at <http://www.innsocourt.org/about/creed.html> (last visited Oct. 16, 1999) ("I will contribute time and resources to public service, charitable activities and pro bono work. I will work to make the legal system more accessible, responsive and effective."); American Inns of Court, *Mission Statement*, at <http://www.innsocourt.org/about/mission.html> (last visited Oct. 16, 1999). ("The Mission of the American Inns of Court is to foster excellence in professionalism . . . in order to perfect the quality, availability, and efficiency of justice in the United States.")

202. Telephone Interviews with Malcolm Pipes, Environmental Law Clinic alumnus (Oct. 23 and 30, 1999) (relating discussion with DEQ official).

clients' projects.²⁰³

D. The Louisiana Supreme Court: A Certain Kind of Access and Only for Certain People

1. The Court's Changing Politics

The business groups' 1997 requests for an investigation into the Tulane Clinic's activities were not the first time the Louisiana Supreme Court was asked to investigate the Clinic. In 1993, Kai Midboe, then secretary of the DEQ, sent a letter to the Chief Justice of the Louisiana Supreme Court, Pascal F. Calogero, Jr., complaining about certain Clinic actions and requesting that the court "exercise its oversight jurisdiction to determine if the Tulane Environmental Law Clinic is complying with the intent and provisions of [the Louisiana Law Clinic Student Practice Rule]."²⁰⁴ Midboe's request was triggered by a letter from a Clinic staff attorney to a local newspaper, sent in her own name, and by public comments made by the Clinic's director that were critical of the governor's position on reduction of a state hazardous waste tax.²⁰⁵ Midboe's request, like the later requests from the business groups, questioned the appropriateness of the Clinic's alleged use of the law student practice rule "to engage in

203. E-mail from Sean O'Neill, Tulane Law School student, to Robert Kuehn, Former Director, Tulane Environmental Law Clinic (Oct. 21, 1999) (on file with author) (relating discussion with a partner at Liskow & Lewis).

204. Letter from Kai David Midboe, Secretary, Louisiana Department of Environmental Quality, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Oct. 15, 1993) (on file with author).

205. See Michael Dehncke, *Life in Louisiana*, TULANE LAW SCHOOL DICTA (New Orleans, La.), Oct. 25, 1993, at 1; Josh Landis, *State and Industries Pressure Environmental Law Clinic*, TULANE HULLABALOO (New Orleans, La.), Nov. 19, 1993, at 1.

Prior to Midboe filing the complaint, Governor Edwin Edwards called Tulane University President Eamon Kelly and demanded that Kelly either "shut [Tulane Clinic director Robert Kuehn] up or get rid of him." Landis, *supra*. Governor Edwards reportedly threatened to withdraw state support for a new downtown basketball arena (of which Tulane was a leading proponent and which would be used by the University's basketball team), cut off "capitation" (a state program which partially funds Louisiana students at private schools), and prevent Tulane medical students from working in the state's hospitals unless Kuehn was silenced. *Id.*; see also Coyle, *supra* note 109, at 26; Hansen, *supra* note 58, at 54. President Kelly, arguing that it was an issue of academic freedom, reportedly informed Governor Edwards that he was not going to silence an individual solely for their opinions. Landis, *supra*.

political conduct.”²⁰⁶ The court responded to the request to investigate the Clinic and prohibit its alleged political conduct with a one-page letter sent one month later which stated: “It was the feeling of the justices that there is no need to either create an oversight committee or to develop standards of conduct different from those that are already provided in Supreme Court Rule XX.”²⁰⁷

Given the brusqueness with which the court disposed of this 1993 complaint and the obvious political nature of the new, Shintech-related attacks, one might have thought that the 1997 business groups’ complaints would meet with a similar quick denial. However, in the intervening four years, the composition and philosophy of the court had changed dramatically.

In 1994, after the Louisiana Supreme Court decided a sales tax case in a manner contrary to LABI’s position, LABI launched a newsletter to track court decisions and urged businesses to get involved in court elections.²⁰⁸ In the first successful flexing of LABI’s political muscle, LABI successfully backed the 1994 election of Jeffrey P. Victory as the newest justice to the court.²⁰⁹ Two years later, LABI again successfully backed the election of two new justices, Jeannette Knoll and Chet Traylor, who themselves were aided by endorsements and support from Governor Foster.²¹⁰ Both Knoll and Traylor defeated incumbent justices, marking the first time in over twenty years that an incumbent justice was defeated in a bid for reelection.²¹¹ Almost half of Justice Traylor’s campaign

206. Letter from Kai David Midboe to Pascal F. Calogero, Jr., *supra* note 204.

207. Letter from Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court, to Kai David Midboe, Secretary, Louisiana Department of Environmental Quality (Nov. 18, 1993) (on file with author).

Similarly, an attorney who opposed a lawsuit filed by the University of Oregon Law School’s environmental law clinic filed an ethics complaint alleging that clinic professors had misled a judge by selectively presenting studies about the declining number of spotted owls; the Oregon State Bar’s ethics board dismissed the complaint. Bill Bishop, *Ethics Complaint Dismissed by Bar*, REGISTER-GUARD (Eugene, Or.), May 22, 1990, at 1C.

208. Redman, *supra* note 176 (quoting LABI’s president as saying that LABI would treat judicial elections as just another political activity).

209. See Ed Anderson, *Foster Backs Cusimano for Supreme Court*, TIMES-PICAYUNE (New Orleans, La.), Oct. 1, 1998, at A4; Joe Gyan, Jr., *Court Runoff; Cusimano, Calogero to Meet Nov. 3*, ADVOCATE (Baton Rouge, La.), Oct. 4, 1998, at 1A.

210. Anderson, *supra* note 209.

211. *Id.*; Gyan, *supra* note 209.

contributions came from oil and gas industry executives, their lawyers, and LABI, “which spearheaded Traylor’s campaign against incumbent [Justice] Joe Bleich.”²¹²

In 1997, while the complaints of LABI and other business groups were pending before the court, two more justices, including Chief Justice Calogero, faced reelection. Chief Justice Calogero, in particular, was expecting a tough challenge from a pro-business conservative. In an early attempt to gather business support, Calogero sent a letter of support written by two dozen of the most prominent names in the New Orleans business community to 600 business leaders.²¹³ As noted previously, the letter of support was signed by the chairman and two past chairmen of the Chamber, the chairman and past chairman of the Business Council, and prominent members of LABI—the leaders of the three business groups whose complaints against the Clinic were under consideration by the court.²¹⁴

Thus, when the business complaints were filed in 1997 it was a very different Louisiana Supreme Court than the court that so quickly disposed of the complaint against the Clinic in 1993. Differences were apparent in the pro-business composition of court members and in the court’s awareness of the political influence of LABI and Governor Foster. As one political analyst put it, “[LABI’s] ability to elect judges has turned the court around, and the court already has become more cognizant of what business likes and does not like.”²¹⁵ The Chief Justice later acknowledged that he was sympathetic to business complaints about the Clinic.²¹⁶

2. Investigating the Tulane Environmental Law Clinic

Louisiana law schools were first informed of the complaint letters from the business groups and of the court’s decision to investigate in

212. Kaplan & Davidson, *supra* note 134, at 15.

213. Coyle, *supra* note 176.

214. See *supra* text accompanying note 176.

215. Mark Schleifstein, *Election Might Shift Balance on Supreme Court*, TIMES-PICAYUNE (New Orleans, La.), Sept. 20, 1998, at A1 (quoting Bernie Pinsonat).

216. Christine Jenkins, Notes of Meeting-Rule XX with Chief Justice Calogero (Aug. 19, 1998).

a September, 1997 letter from the Chief Justice.²¹⁷ The letter, sent with the complaint letters attached, informed the law school deans that information would be sought concerning the operations of all of the state's law clinics. The letter, as well as a follow-up letter seeking answers to specific questions about the schools' law clinics, identified the court's investigators as Timothy Averill and Kim Sport.²¹⁸

The court claimed that it was simply procuring information for a discussion with the law schools about the operations of the clinics and not conducting an investigation into their activities.²¹⁹ However, unbeknownst to Tulane, Sport began investigating the Tulane Clinic shortly after the court received the complaint letters from the Chamber and Business Council. In late July, 1997, Sport called Governor Foster's office seeking information on the Clinic.²²⁰ Governor Foster's attorney referred Sport to the Louisiana Department of Economic Development, which then sent Sport a list of companies opposed to the Clinic.²²¹ Although Sport first denied investigating the Clinic as early as July, 1997,²²² Sport later admitted that she had been investigating, but only on behalf of Chief Justice Calogero.²²³ Sport stated that Calogero instructed her to contact the

217. Letter from Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court, to Edward F. Sherman, Dean, Tulane Law School (Sept. 25, 1997) (on file with author). See Roxana Hegeman, *Supreme Court Opens Inquiry Into Law Clinics*, TIMES-PICAYUNE (New Orleans, La.), Oct. 3, 1997, at A3.

218. Letter from Timothy F. Averill, Deputy Judicial Administrator—General Counsel, Louisiana Supreme Court, to Edward F. Sherman, Dean, Tulane Law School (Oct. 8, 1997) (on file with author).

219. See Daugherty, *supra* note 169. Paulette Holahan, Deputy Judicial Administrator, Louisiana Supreme Court, stated her belief that the situation was blown out of proportion because the court was not conducting an official investigation, but simply a routine look at how law clinics in the state operate. "I think there's more attention being given to this than it warrants," she said. *Id.*

220. Daugherty, *supra* note 145. Sport claimed that she contacted Governor Foster's office after acquiring a videotape of an interview with Governor Foster in which he claimed that the Tulane Clinic had failed to provide him with requested information. *Id.*

221. *Id.* See also E-mail from Harold Price, Louisiana Department of Economic Development, to Kim Sport, Louisiana Supreme Court (July 23, 1997, 16:24 CST) (on file with author). Sport was advised to contact two lawyers with the Baton Rouge office of Adams & Reese, the law firm of Chamber president Sam LeBlanc.

222. See Daugherty, *supra* note 145.

223. *Coalition Takes on Supreme Court*, GAMBIT WKLY. (New Orleans, La.), Apr. 20, 1999, at 12.

Department of Economic Development to inquire about any information or complaints concerning the Clinic.²²⁴

After the issuance of the court's new law clinic rules, it was revealed that Sport was the Chamber's chairwoman in 1996 and still served on the Chamber's board.²²⁵ Sport, who also served as the court's chief spokesperson defending the new clinic restrictions, repeatedly denied it was a conflict of interest for a high-ranking official with one of the complaining parties to work for the court investigating the complaints.²²⁶

While the Clinic investigation was underway, Sport was developing a court program entitled "Chamber to Chamber."²²⁷ The goal of the program was to bring delegations from the state chambers of commerce to have "candid discussions with host judges" about how the court system might better serve the community and create support for court operations.²²⁸ During communications with LABI one month after complaints were filed against the Clinic, Sport discussed LABI's possible participation in "Chamber to Chamber" and the upcoming reelections of two justices, including Chief Justice Calogero.²²⁹ Sport asked LABI to apprise her of LABI's efforts regarding judicial elections and informed LABI's president that she shared a copy of LABI's latest magazine, dealing with judicial elections, "with the Chief Justice to demonstrate to him just how closely the business community was monitoring issues affecting the

224. *Id.* Sport stated that she discovered that the letter which Governor Foster alleged to have received from the Tulane Clinic, refusing to provide him with requested information, did not exist. Daugherty, *supra* note 145.

225. *Coalition Takes on Supreme Court*, *supra* note 223 (quoting the Chamber's vice president for community development describing Sport as "very involved with the Chamber"); Pamela Coyle, *Director of Community Relations at Supreme Court Takes Sabbatical*, *TIMES-PICAYUNE* (New Orleans, La.), Dec. 18, 1999, at A2; Ronette King, *Local Chamber Adopts New Name 7-Parish Group Get New Leader*, *TIMES-PICAYUNE* (New Orleans, La.), Jan. 29, 1999, at C1.

226. Christi Daugherty, *Business of the Court*, *GAMBIT WKLY.* (New Orleans, La.), Aug. 3, 1999, at 9; *see generally* James Gill, *Law Clinic, High Court Face Off*, *TIMES-PICAYUNE* (New Orleans, La.), Apr. 28, 1999, at B7.

227. Daugherty, *supra* note 226.

228. *Id.*

229. Letter from Kim Sport, Community Relations Director, Louisiana Supreme Court, to Dan Juneau, President, Louisiana Association of Business and Industry (Aug. 11, 1997) (on file with author); *see also* James Gill, *Influencing Louisiana's Judiciary*, *TIMES-PICAYUNE* (New Orleans, La.), Dec. 3, 1999, at B7.

judiciary.”²³⁰

The court quickly dispelled any misconceptions concerning the purpose of the inquiry when it dispatched two staff persons to the state’s law schools. Spending less than a day at Loyola and Southern law schools, the court staff spent over two days at Tulane quizzing the Clinic’s staff and students about their activities.²³¹ It was clear that the Tulane Clinic was the target of the court’s attention and that a full-fledged investigation had begun.

In the fall of 1997, the dean of Tulane Law School sent the Chief Justice a copy of a resolution on the agenda of the upcoming meeting of the Board of Governors expressing support for clinical education and for not changing the student practice rule.²³² The dean’s efforts were discouraged by the Chief Justice’s representative, who called the dean to relay the Chief Justice’s concerns that the resolution could contribute to the kind of continuing public debate that the court wished to avoid.²³³ According to the dean, he was assured that if the court decided to make any amendment to Rule XX after completing its investigation, the court would provide an opportunity for comment and discussion on any proposed amendments.²³⁴ The dean withdrew the resolution out of respect for the court’s desire to reduce the public debate. Thereafter, the dean repeatedly informed the Board of Governors, as well as three sections of the ABA and other concerned individuals and groups, that the court would provide opportunity for the public to comment if amendments to Rule XX were proposed.²³⁵

230. Letter from Kim Sport to Dan Juneau, *supra* note 229.

231. Hansen, *supra* note 58, at 57.

232. See Letter from Edward F. Sherman, Dean, Tulane Law School, to Walter F. Marcus, Jr., Justice, Louisiana Supreme Court (July 16, 1998) (on file with author) (recounting telephone conversation with Tim Averill of the Louisiana Supreme Court in October, 1997).

233. *Id.*

234. *Id.*

235. *Id.* While discouraging the law schools from gaining the support of the bar association, the court did provide the business groups with copies of the information submitted by the law schools and a chance to respond to the law schools’ explanations. See, e.g., Letter from Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court, to Daniel L. Juneau, President, Louisiana Association of Business and Industry (Jan. 23, 1998) (on file with author). The documents were provided to the business entities over the objections of the director of the Tulane Clinic who complained that providing the documents would simply trigger another round of unsubstantiated accusations against the Clinic. See Letter from Timothy F. Averill, Deputy Judicial Administrator—General Counsel, to Robert R. Kuehn, Tulane Environmental Law Clinic (Jan. 13, 1998) (on file with author).

3. The Original June 1998 Restrictions

On June 17, 1998, with no advance notice or consultation with the state's law schools, the court issued its response to the complaints of the business groups. The amendments to Louisiana Supreme Court Rule XX, the Louisiana law clinic student practice rule, were effective on July 1, 1998 and included:

1) a prohibition on the representation of any community organization affiliated with a national organization;

2) an eligibility standard for representing "indigent" individuals based on the federal poverty guidelines used by the Legal Services Corporation;

3) a prohibition on representing any non-affiliated community organization unless the organization certifies that at least 75% of its members are eligible for representation under the Legal Services Corporation's federal poverty guidelines;

4) a new oath for student practitioners paralleling the oath given to practicing attorneys, but notably striking the following pledge contained in the Louisiana lawyer's oath: "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice";

5) a ban on representation of any indigent person or community organization if any clinical program supervising lawyer, staff person, or student practitioner initiated contact for the purpose of representing the contacted person or organization; and

6) a ban on representation of any indigent community organization if the clinical program, staff person, or student practitioner provided legal assistance in forming, creating, or incorporating the organization.²³⁶

236. LA. SUP. CT., R. XX (Limited Participation of Law Students in Trial Work) (as

In contrast, federal district courts in Louisiana allow law students to represent any person, regardless of income, in any civil matter, provided the client has consented in writing and attorney fees are not provided in the case.²³⁷ In addition, the federal courts in Louisiana, as is true of federal and state courts in all other states, do not seek to restrict contact between clinics and prospective clients.²³⁸ Moreover, contrary to suggestions by the Louisiana Supreme Court,²³⁹ Legal Services Corporation offices are not subject to similar eligibility restrictions. The Legal Services Corporation's income eligibility regulations specify that an office is not prohibited from providing legal assistance to clients that exceed the maximum annual income levels "if the assistance provided the client is supported by funds from a source other than the Corporation."²⁴⁰

Loyola and Tulane Law Schools immediately criticized the Louisiana Supreme Court's new restrictions on the grounds that the rules would restrict local chapters of community organizations from access to the courts and violate citizens' constitutionally-protected right to information on available legal remedies.²⁴¹ The Association

amended June 17, 1998). The amendments also prohibited any student from appearing "in a representative capacity before regular or special sessions of state or federal legislatures." *Id.*

237. E., M. & W. LA. D. UNIF. R. 83.2.13 (Appearances by Law Students) (1999).

238. *See id.*; Letter from Carl C. Monk, Executive Vice President and Executive Director, Association of American Law Schools, to M.J. "Mike" Foster, Jr., Governor, State of Louisiana (Aug. 21, 1998) (on file with author) (noting that no other law student practice rule seeks to restrict or prohibit clinic students from providing information or offers of free legal assistance).

239. *See, e.g.*, Hugh M. Collins, *High Court Explains Student-Lawyer Rule Change*, TIMES-PICAYUNE (New Orleans, La.), June 25, 1998, at B6 (letter to editor from Judicial Administrator, Louisiana Supreme Court).

240. 45 C.F.R. § 1611.3(e) (1999). In addition, unlike the new Louisiana law student practice rule, a party is prohibited during the ongoing proceeding from challenging the authority of any Legal Services Corporation office to provide representation to a particular client and prohibited from gaining access to information furnished by a client to establish financial eligibility. 42 U.S.C. § 2996e(b)(1)(B) (1994); 45 C.F.R. §§ 1618.1, 1611.7(c) (1999); *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987), *cert. denied*, 487 U.S. 1235 (1988); Anderson v. Redman, 474 F. Supp. 511, 519-20 (D. Del. 1979).

The only restriction that the Internal Revenue Service places on client eligibility for tax exempt public interest law firms is that the firm may not undertake a case in which a court-awarded fee is possible "if the organization believes the litigants have a sufficient commercial or financial interest in the outcome of the litigation to justify retention of a private law firm." Rev. Proc. 92-59, 1992-29 I.R.B. 11.

241. Chris Gray, *Court Reins in Student Lawyers*, TIMES-PICAYUNE (New Orleans, La.), June 18, 1998, at A1; Joe Gyan, Jr., *Law School Deans Challenge Rules*, ADVOCATE (Baton Rouge, La.), June 30, 1998, at 1B; *Law Clinics Say Rules Hurt Poor*, ADVOCATE (Baton Rouge,

of American Law Schools (AALS) called the new Louisiana law clinic student practice rule “the most restrictive student practice rule in the nation.”²⁴² The president of Tulane University wrote that the extraordinarily restrictive regulations originated when “the governor, the business community and the courts combin[ed] to deprive the working poor of their right to counsel.”²⁴³ State newspaper editorials blasted the court for caving in to pressure from Governor Foster and business groups and for imposing unjustified restrictions on the ability of needy persons to obtain essential legal assistance.²⁴⁴

La.), June 18, 1998, at 1A. *See also* Letter from John Makdisi, Dean, Loyola Law School, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (July 23, 1998) (on file with author); Letter from John Makdisi, Dean, Loyola Law School, and Edward Sherman, Dean, Tulane Law School, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (June 26, 1998) (on file with author); Letter from Edward F. Sherman, Dean, Tulane Law School, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (July 30, 1998) (on file with author); Letter from Edward F. Sherman to Walter F. Marcus, Jr., *supra* note 232.

The chancellor of Southern Law School explained the state-funded school’s silence on the adverse impacts of the Rule XX restrictions: “We are a little different from Tulane and Loyola because we do not have the financial resources to go out and represent organizations.” Stephen F. Chiccarelli & Charles F. Thensted, *A Roundtable Discussion With the State’s Law School Leaders*, 47 LA. B.J. 18, 24 (1999).

242. Letter from Carl C. Monk to M.J. “Mike” Foster, Jr., *supra* note 238. The AALS stated that the Louisiana student practice rule was the most restrictive student practice rule in six ways: 1) no other student practice rule limits the representation of organizations to community organizations and prohibits the representation of organizations that have any affiliation with national organizations; 2) no other rule requires members of an organization to reveal their incomes, nor does any other state require that a majority of the organization’s members meet some income or poverty restrictions; 3) no other rule requires individual law clinic clients to meet federal poverty standards; 4) no other rule seeks to restrict or prohibit clinic students from providing information or offers of free legal assistance; 5) no other rule prohibits the representation of community organizations where a clinical program has provided legal assistance in forming, creating, or incorporating the organization; and 6) no other rule prohibits law students from appearing in a representative capacity before the legislature. *Id. See also* Janet McConnaughey, *Official: La. Rules Severe*, *ADVOCATE* (Baton Rouge, La.), June 20, 1998, at 1A (noting that Monk argues the new rules appear uniquely severe and likely to hurt everyone but business).

243. Eamon M. Kelly, *A Power Play Against Environmental Justice*, *TIMES-PICAYUNE* (New Orleans, La.), June 25, 1998, at B6. The Tulane president also argued that the actions of Governor Foster, the business community, and the supreme court presented a classic case for the need of the federal government to issue regulations on environmental justice and to restrict local governments and industries from using their power advantages to impose themselves on poor and minority residents. *Id.*

244. *See, e.g., Clinic Restrictions May Go Too Far*, *ADVOCATE* (Baton Rouge, La.), June 21, 1998, at 14B; Kathy Finn, *The Face of Business: Not Always a Pretty Picture*, *NEW ORLEANS CITYBUSINESS*, June 26, 1998, at 18 (“[W]hen business began swinging its weight behind the idea of clamping down on the law students . . . the uglier side of the private sector

Governor Foster and the business groups, however, praised the decision. The Governor declared that “[t]he court is finally tightening up on that bunch of outlaws trying to shut everything down.”²⁴⁵ LABI called the court’s ruling “a step in the right direction,” while the Chamber praised the denial of legal representation to community organizations that have opposed Chamber-sponsored projects.²⁴⁶

The resolution accompanying the court’s rule offered no justification or explanation, other than three concurring justices arguing that the court had not gone far enough and that clinics should be prohibited from representing all community organizations.²⁴⁷ When public outcry over the restrictions ensued, the court quickly attempted to justify its actions. The court claimed that it was simply seeking to clarify its intent behind a 1988 amendment that allowed law students to represent community organizations.²⁴⁸ The court contended that representation of a local affiliate of a national organization was never contemplated as a prospective organization that might benefit from clinic representation.²⁴⁹ The court’s attempted justification was belied by the court’s subsequent admission that it was unable to locate the 1988 request from the deans of Loyola and Tulane law schools that led to the referenced amendment.²⁵⁰ In fact, the deans’ 1988 request clearly showed their intent to allow student

began to emerge.”); Gill, *supra* note 195; *A Loss for Law Clinics*, TIMES-PICAYUNE (New Orleans, La.), June 29, 1998, at B6.

245. *Law Clinics Say Rules Hurt Poor*, *supra* note 241 (quoting Governor Foster); *see also* Gov. M.J. “Mike” Foster, Jr., *Gov. Mike Foster on Law Clinic*, ADVOCATE (Baton Rouge, La.), June 30, 1998, at 6B (letter to editor) (defending the attack on the Tulane Clinic and supporting the court’s new restrictions).

246. Press Release, Louisiana Association of Business & Industries, LABI Responds to Supreme Court Ruling on Law Clinics (June 18, 1998) (on file with author).

247. Resolution Amending Rule XX (La. June 17, 1998) (Marcus, Victory, and Traylor, JJ., concurring).

248. Collins, *supra* note 239; Press Release, Chief Justice Pascal F. Calogero, Jr., Press Release of Louisiana Supreme Court (June 23, 1998) (on file with author).

249. Collins, *supra* note 239.

250. *See* Jenkins, *supra* note 216 (reflecting that in a private meeting with four community groups, Chief Justice Calogero stated the court did not at the time have on file the 1988 request from the Tulane and Loyola law schools to add language making it clear that community organizations could be represented by the clinics); *see also* Barry Kohl, Notes of Meeting with Justices Catherine Kimball and Harry Lemmon at State Supreme Court, New Orleans, La. (Sept. 25, 1998) (on file with author) (reflecting that in a private meeting with six community groups, Justice Lemmon stated that the 1988 letter from Tulane and Loyola law schools seeking an expansion of the rule to cover community groups did not exist).

attorneys to represent any community organization that lacked funds to hire an attorney:

The Clinics would like to represent community organizations which cannot afford to retain private counsel. Examples of such groups include public housing tenant organizations or certain environmental or consumer organizations who consist of members who are primarily indigent *or who have no funds available to hire an attorney.*²⁵¹

One month after the deans' request was submitted in 1988, the court adopted verbatim the proposed language as an amendment to the law clinic student practice rule.²⁵²

When pressed as to why, after more than ten years, the court now was narrowly construing the term "indigent" in the rules governing eligibility for law clinic representation, the court acted as if the Clinic's organizational clients were a surprise.²⁵³ However, in 1993, in response to the DEQ secretary's request for an investigation, Tulane Law School informed the court that "[t]he Clinic has represented over 90 different community organizations, including groups such as the League of Women Voters of Louisiana, the Southern Christian Leadership Conference, the Sierra Club, and the St. Bernard Sportsmen's League."²⁵⁴ Additionally, in the four years preceding the business groups' complaints to the court, the Clinic appeared before the court on more than ten occasions on behalf of clearly-identified community groups.²⁵⁵ Many of these groups were

251. Letter from John Kramer, Dean, Tulane Law School, et al., to John A. Dixon, Jr., Chief Justice, Louisiana Supreme Court (Oct. 21, 1988) (emphasis added) (on file with author).

252. Order on Rule XX (La. Nov. 21, 1988) (on file with author) ("Acting upon the suggestion of the Deans of the Loyola and Tulane Law School," section 3 of Rule XX is amended to add the phrase "or community organization" to list of eligible clients).

253. See Schleifstein, *supra* note 93 (relating Chief Justice Calogero's defense of the court's ten-year acquiescence to the Clinic's practices on grounds that nobody complained until now).

254. Letter from John R. Kramer, Dean, Tulane Law School, to Kim Sport, c/o Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Oct. 28, 1993) (on file with author).

255. See, e.g., Calcasieu League for Envtl. Action Now v. Thompson, 664 So. 2d 459 (La. 1995); *In re* Browning-Ferris Indus. Petit Bois Landfill, 663 So. 2d 742 (La. 1995); Mouton v. Dep't of Wildlife and Fisheries, 663 So. 2d 710 (La. 1995); Secure Env't for Everyone v. Midboe, 651 So. 2d 290 (La. 1995); Alliance for Affordable Energy, Inc. v. La. Pub. Serv. Comm'n, 650 So. 2d 247 (La. 1995); Mouton v. Dep't of Wildlife and Fisheries, 649 So. 2d

obviously ineligible for clinic assistance under a definition of indigency that required at least half of the organization's members to have incomes below the federal poverty level.²⁵⁶

After the press criticized the new restrictions, the court asserted that the strict income limitations on the representation of individuals assures that law students will represent the people most in need of free legal services.²⁵⁷ However, during the nine-month investigation, the court's investigators never asked if a clinic had ever turned away an "indigent" client, under the federal poverty guidelines, in favor of a client who could afford to pay an attorney. In fact, the clinics never did.²⁵⁸ Moreover, none of the business groups' complaint letters or

396 (La. 1995); *In re Am. Waste and Pollution Control Co.*, 642 So. 2d 1258 (La. 1994); Calcasieu League for Envtl. Action Now v. Thompson, 642 So. 2d 863 (La. 1994); *In re Campbell Wells Corp.*, 635 So. 2d 1105 (La. 1994); *In re Indus. Pipe, Inc.*, 629 So. 2d 398 (La. 1993); *In re Recovery I, Inc.*, 629 So. 2d 383 (La. 1993).

256. In *Am. Waste and Pollution Control Co.*, the court listed community organizations appearing in the case. 642 So. 2d at 1261 n.2. The Tulane Clinic represented fourteen of these organizations, including the League of Women Voters of Louisiana, the Orleans Audubon Society, and the Sierra Club-Delta Chapter. *Id.*

257. See Collins, *supra* note 239; Kohl, *supra* note 250 (quoting Justice Kimball as explaining: "Schools stated that they had more clients than they could serve. In some rare occasions some non-indigents were represented. By restricting the representation (organizations, etc.), indigent individuals could be fully represented because the clinics would not be overloaded.").

258. See Letter from John Makdisi, Dean, Loyola Law School, and Edward F. Sherman, Dean, Tulane Law School, to Timothy F. Averill, Deputy Judicial Administrator—General Counsel, Louisiana Supreme Court (Dec. 31, 1997) (on file with author) ("The clients of all our clinics are either indigent individuals or community organizations that could not otherwise afford legal representation in the matter."); Letter from Edward F. Sherman, Dean, Tulane Law School, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Apr. 14, 1998) (on file with author) ("Our clinics only represent clients who cannot afford counsel, and a further restriction to *in forma pauperis* status is unnecessary and unduly limiting.").

As professor Peter Joy observed:

If there had been some factual basis demonstrating a need for such an amendment to the student practice rule [to redistribute clinic resources to assisting only the poorest of the poor], and if the Louisiana Supreme Court had not been solicited to change the rule by those seeking to impede the work of the TELC, then such a position would be more reasonable. Given the dearth of free or affordable legal services, not only for the poorest of the poor but for those not quite so poor, and the lack of evidence that clinics were preferring potential clients with the ability to retain private counsel over those who could not, it is difficult to see how the amendments to the student practice rule are advancing any interests except those of the business groups and politicians who have been upset with the work of the TELC.

Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235, 270-71 (1999).

subsequent briefs expressed concern that the clinics were misdirecting resources that could otherwise be used to provide free legal assistance to the most needy. In fact, the business groups were seeking just the opposite—to expand the availability of law clinic assistance to for-profit businesses in Louisiana.²⁵⁹

During his reelection campaign, Chief Justice Calogero was repeatedly forced to defend the court's restrictions. Early in the campaign, the Chief Justice labeled criticism of the court as "hysterical and unfair,"²⁶⁰ perhaps because he claimed that the new restrictions would not have much effect on the clinics and their clients.²⁶¹ A few weeks later, he acknowledged that the court's ruling could be "debilitating"²⁶² and that even a family of four with an income of \$24,000, now barred from Clinic representation, could not afford to pay an attorney to handle significant legal problems.²⁶³ The Chief Justice also conceded that the court found no evidence that any of the community organizations previously represented by the Clinic could have afforded to hire an attorney to handle their case, nor could he identify a single community organization in Louisiana that could qualify under the new indigency definition.²⁶⁴

Candidly, the Chief Justice admitted that politics had played a role in the rule change and that he sympathized with business complaints.²⁶⁵ This sympathy was reflected in remarks by the Chief

259. Proposal to Amend and Enforce Rule XX, *supra* note 163 ("[T]he educational experience of the Clinic would be greatly enhanced if balanced representation of business and environmental interests were required under Rule XX.").

260. See Susan Finch, *Supreme Court Contest Costly*, TIMES-PICAYUNE (New Orleans, La.), Sept. 4, 1998, at B1 (quoting remarks of Chief Justice Calogero during a campaign appearance).

261. See Jenkins, *supra* note 216 (reflecting comments by Chief Justice Calogero in a private meeting: "He felt that the Law Clinics were over reacting: Claimed to have asked both Tulane and Loyola and they both indicated that a majority of their present clients were indigent. The justices therefore did not expect this rule change to have much of an effect on the clinics.").

262. Anand Vaishnav, *High Court Hopefuls Trade Shots*, TIMES-PICAYUNE (New Orleans, La.), Sept. 22, 1998, at A2 (quoting Chief Justice Calogero during a campaign appearance).

263. Mark Schleifstein, *Director of Tulane Law Clinic Resigning*, TIMES-PICAYUNE (New Orleans, La.), Feb. 26, 1999, at A10 (reporting the remarks of the chief justice in an earlier interview); E-mail from Robert Kuehn to Oliver Houck, *supra* note 172 (recounting statements by Chief Justice Calogero during October 1, 1998 campaign debate at Tulane University).

264. E-mail from Robert Kuehn to Oliver Houck, *supra* note 172.

265. Jenkins, *supra* note 216 (reporting comments by Calogero in private meeting: "He did admit to politics on the court playing a role in the Rule change and was sympathetic to business

Justice during a private meeting with Loyola and Tulane University officials. During this meeting, the Chief Justice explained that the court did not want litigants with political agendas to “outgun” the other side, so, to even the playing field, the decision was made to restrict the activities of the Clinic.²⁶⁶ The Chief Justice explained that, while it was not the job of the court to intervene in a fight between two parties, it was appropriate for the court to take steps to restrict the ability of one side to bring a suit.²⁶⁷ An account of a meeting shortly after the Chief Justice learned that LABI decided to support his opponent in his upcoming reelection bid further demonstrated his desire to gain the business groups’ political approval. In the context of discussing Rule XX, the Chief Justice reportedly remarked that, after he supported LABI and what they wanted, it was unfair for the business groups to support his opponent without first contacting him.²⁶⁸

The Chief Justice further justified the restrictions in remarking publicly that “widespread advocacy campaigns by professors and students are beyond the legal parameters of helping indigent people.”²⁶⁹ Justice Kimball similarly relied on the alleged “agenda” of the Clinic professors in seeking to justify the new restrictions.²⁷⁰

complaints, although he stated that the Governor had not contacted him.”).

266. Telephone Interview with Luz Molina, Loyola Law School (Dec. 7, 1998) (recounting statements made by Chief Justice Calogero during a meeting earlier that day). The Chief Justice’s sympathy to the business groups is also evidenced by a report revealing that Calogero voted the “pro-business” position in environmental cases 80% of the time. *See* Joe Gyan, Jr., *Calogero Publicizes '96 Report*, *ADVOCATE* (Baton Rouge, La.), Sept. 24, 1998, at 3B (reporting results of a 1996 study of the voting patterns of Louisiana Supreme Court justices). Calogero’s pro-business score on environmental cases was the highest, by far, of his scores on seven economic issues and over twice his overall pro-business score of 33%. *Id.*

267. Molina, *supra* note 266.

268. Interview with John Kramer, Former Dean, Tulane Law School (Oct. 21, 1999) (on file with author) (stating that Calogero made the remarks to him during a private meeting on September 3, 1998).

269. Varney, *supra* note 3.

270. *See* Kohl, *supra* note 250 (quoting Justice Kimball as commenting: “Shintech gave rise to reviewing Rule XX. Complaints by business groups were that the clinic was following an agenda of the director of the clinic (Kuehn). Kai Midboe had also asked for court to look into clinics.”); *see also* Gov. M.J. “Mike” Foster, Jr., *Governor Weighs in on Law Clinic Rules*, *TIMES-PICAYUNE* (New Orleans, La.), June 26, 1998, at B10 (letter to editor) (alleging that the Clinic’s actions in the Shintech matter “seem to be driven by the radical political agenda of its professors”). *But see* R. Paul Tuttle, *Governor’s Letter Dubbed Insult*, *TIMES-PICAYUNE* (New Orleans, La.), July 5, 1998, at B6 (letter to editor) (reflecting that a former Tulane Clinic

However, during the court's review of the clinics, the law schools asserted that such claims were unsubstantiated and false.²⁷¹ Despite repeated requests for evidence supporting their allegations, neither the business groups nor Governor Foster produced any evidence to support allegations of manipulative law professors with anti-development agendas.²⁷²

Finally, the court justified its prohibition on contacting prospective clients by assuming, contrary to the language in the amended rule, that the new restriction was not regulating the activities of the law schools or its supervising attorneys, but rather only the activities of law clinic students.²⁷³ The inclusion of this restriction, which exists in no other state's rules of professional conduct or law student practice rules, was not the result of a complaint from any court or any prospective or past clinic client that was solicited in an uninvited or offensive manner.²⁷⁴ Instead, the restriction resulted from the business groups' and Governor Foster's repeated and unsupported allegations that the Clinic engaged in some form of improper solicitation of clients.²⁷⁵

Two weeks after issuing the new rules and after the deans of the

student took offense to Governor's claim that law students are manipulated by "radical law professors").

271. Letter from Robert R. Kuehn to Timothy F. Averill, *supra* note 162 (challenging LABI's claim that the Clinic carries out its own philosophies, rather than the objectives of the client, and calling such claims unsubstantiated, false and defamatory).

272. Letter from Robert R. Kuehn, Tulane Environmental Law Clinic, to Murphy J. "Mike" Foster, Jr., Governor, State of Louisiana (July 2, 1998) (on file with author) (noting Governor Foster's allegation that Tulane Clinic professors were advancing a radical political agenda and manipulating students, citizens and community groups and demanding evidence that supports such allegations); Letter from M.J. "Mike" Foster, Jr., Governor, State of Louisiana, to Professor Robert R. Kuehn, Director, Tulane Environmental Law Clinic (July 6, 1998) (on file with author) (responding to a request for evidence of agendas by stating, "They reflected opinions only and were not an attempt to recite 'facts.' As you can tell, from time to time, I get a little passionate about my beliefs.").

273. See Collins, *supra* note 239.

274. Joy, *supra* note 258, at 260 (noting lack of record before the Louisiana Supreme Court of any clinic client complaining about any alleged solicitation).

275. See, e.g., Supplemental Comments on Proposed Amendments to Law Student Practice Rule, attachment to Letter from Daniel L. Juneau, Louisiana Association of Business and Industry, et al., to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Mar. 12, 1998) (on file with author) ("The TELC solicitation creates litigation where none would have or should have existed."); Proposal to Amend and Enforce Rule XX, *supra* note 163 ("[T]he Clinic engages in activities bordering on solicitation of clients.").

law schools and a local editorial page writer pointed out the unconstitutionality under *In re Primus*²⁷⁶ and *NAACP v. Button*²⁷⁷ of the prohibition on initiating client contact, the court felt compelled to suspend the client-contact provision.²⁷⁸ At the same time, the court changed the indigency criteria for representation of community organizations by lowering the percentage of members that must meet the Legal Services Corporation federal poverty level guidelines from 75% to 51%.²⁷⁹

The court was mistaken if it believed that these minor changes would quell the firestorm of protests over its new restrictions. Criticism from affected citizens and the media continued unabated.²⁸⁰ In response to the protests, the newly-reelected Chief Justice promised to revisit the rules.²⁸¹ However, in the meantime, the court

276. 436 U.S. 412, 431 (1978) (stating that outreach activities by lawyers to advise citizens of their civil rights, to advocate litigation, and to provide legal services “comes within the generous zone of First Amendment protection reserved for associational freedoms”).

277. 371 U.S. 415, 429-30 (1963) (holding that in the context of advocating for civil rights, litigation through “solicitation” is a form of political expression protected by the First Amendment).

278. Order on Rule XX, Part II (La. June 30, 1998) (on file with author) (suspending section 10 of the June 17, 1998 amendments “pending further orders of the Court”); see James Gill, *High Court Target of Disgust*, TIMES-PICAYUNE (New Orleans, La.), June 28, 1998, at B11 (explaining how the court’s justification for forbidding law students from representing clients who were the subject of solicitation runs contrary to a 1978 U.S. Supreme Court opinion); Letter from John Makdisi and Edward Sherman to Pascal F. Calogero, *supra* note 241 (including a seven-page memorandum outlining the reasons for a request for reconsideration and stay of amendments).

279. Order on Rule XX, Part I (La. June 30, 1998) (on file with author).

280. See, e.g., Khara Coleman, *Alexander Vows to Fight Changes in Law Clinic Rules*, TIMES-PICAYUNE (New Orleans, La.), July 4, 1998, at B3 (relating that state representative and civil rights leader Avery Alexander vows to fight the rules which he calls a “throw-back to Jim Crow days”); Christi Daugherty, *Clinic Cut-Off: A Working Mom No Longer Can Rely on Tulane’s Assistance*, GAMBIT WKLY. (New Orleans, La.), Sept. 8, 1998, at 15 (profiling former client of the clinic, a full-time working mother with income of approximately \$1,200 per month complaining that the court’s new rules deny her clinic assistance); Clancy DuBos, *On Reconsideration*, GAMBIT WKLY. (New Orleans, La.), July 7, 1998, at 17 (calling the new rules “an abomination”); James Gill, *High Court’s Way of Doing Things*, TIMES-PICAYUNE (New Orleans, La.), July 5, 1998 (“The rules will still achieve the desired effect, and block access to the courts for people with no other recourse when industry poses threats to their health and welfare.”); *Law Clinic Rule is Still Too Strict*, ADVOCATE (Baton Rouge, La.), July 5, 1998, at B14; Kay Mattelka, *League Calls Court Ruling “Chilling,”* TIMES-PICAYUNE (New Orleans, La.), July 2, 1998, at B6 (letter to editor) (calling on court to reconsider its new restrictions).

281. See Joe Gyan, Jr., *Cusimano Quits High Court Race*, ADVOCATE (Baton Rouge, La.), Oct. 10, 1998, at A1.

refused the requests of the law school deans, Louisiana State Bar Association, and Louisiana Attorney General to stay the effect of the new rules.

4. The Revised March 1999 Restrictions

On March 22, 1999, nine months after the original revisions to Rule XX and six months after the Chief Justice promised to revisit the issue, the court issued another set of amendments to the Louisiana law clinic student practice rule. The March, 1999 amendments, effective April 15, 1999:

- 1) drop the prohibition on representing indigent community organizations affiliated with national organizations;
- 2) raise the income limit for representation of any individual or family to 200% of the federal poverty guidelines; and
- 3) prohibit any student from appearing in a representative capacity if any clinical program supervising lawyer, staff person, or student practitioner initiated contact for the purpose of representing the contacted indigent person or community organization.²⁸²

In comments accompanying the latest amendments, the court again sought to explain its intent behind the 1988 amendments. The court claimed it meant only to allow for the representation of organizations composed of indigent persons.²⁸³ However, the court again overlooked the Tulane and Loyola law school deans' 1988 request to represent environmental organizations "who have no funds available to hire an attorney."²⁸⁴ Despite repeated requests to review the record on which the new restrictions were based,²⁸⁵ the court

282. LA. SUP. CT. R. XX (Limited Participation of Law Students in Trial Work) (as amended Mar. 22, 1999).

283. Resolution Amending Rule XX, at 1 (La. Mar. 22, 1999) (Calogero, C.J.), *reprinted in* 74 TUL. L. REV. 285, 287 (1999).

284. Letter from John Kramer to John A. Dixon, *supra* note 251.

285. *See, e.g.*, Letter from Thomas W. Milliner, Instructor, and Lisa W. Jordan, Acting Director, Tulane Environmental Law Clinic, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Oct. 19, 1999) (on file with author) (requesting access to public records relating to the court's investigation of the Tulane Clinic); Letter from Michael H. Rubin,

refused to release the results of its nine-month investigation of the Clinic. The court's librarian reportedly revealed that the court's survey of other law clinics around the country found that the practices of other clinics were consistent with those of the Tulane Clinic—they represented community organizations including national non-profit groups.²⁸⁶

The business groups and Governor Foster managed to reinstate the ban on contacting individuals or community groups, even though the Chief Justice previously informed community organizations that the court would not likely reinstate the provision.²⁸⁷ The court defended the newly-worded ban as necessary to ensure that law students are not encouraged to engage in client solicitation and contended that the ban's effect is limited because law clinic professors, but not students, can still represent these solicited clients.²⁸⁸ The court never explained how a student would be detrimentally effected if engaged in a practice clearly allowed outside of the clinic context under both the Louisiana Rules of Professional Conduct and U.S. Supreme Court precedent.²⁸⁹ The court also failed to explain why its purported

Counsel for Louisiana Supreme Court, to Thomas W. Milliner, Instructor, and Lisa W. Jordan, Acting Director, Tulane Environmental Law Clinic (Oct. 27, 1999) (on file with author) (denying request to review internal court documents); Letter from Marylee Orr, Louisiana Environmental Action Network, et al., to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Nov. 10, 1998) (on file with author) (requesting all information collected by court staff during its investigation); Letter from Edward F. Sherman to Pascal F. Calogero, Jr., *supra* note 241 (noting that law schools have been denied access to results of investigation and other documents and requesting materials be made public).

286. See Joy, *supra* note 258, at 249.

287. See Jenkins, *supra* note 216 (reflecting notes of private meeting with Calogero: “[Chief Justice Calogero] thought it was not likely the court would reopen [the prohibition on students representing people who had been solicited or lobbied by the clinic].”). After the solicitation ban was suspended on June 30, 1998, Governor Foster and business groups expressed their disagreement with the suspension and continued to argue that the prohibition was needed. See, e.g., Joe Gyan Jr., *Law Clinics Ruling Softened*, ADVOCATE (Baton Rouge, La.), July 2, 1998, at A1 (reporting that Governor Foster's press secretary stated the Governor is disappointed with the suspension); Letter from Daniel L. Juneau, President, Louisiana Association of Business and Industry, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Sept. 18, 1998) (on file with author) (arguing that the solicitation ban is constitutional and should be reinstated).

288. Resolution Amending Rule XX, *supra* note 283, at 2.

289. See LA. RULES OF PROF'L CONDUCT R. 7.2(a) (1999) (“[L]awyer shall not solicit professional employment . . . from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.”); *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S.

concern about students learning bad solicitation habits could not be addressed by prohibiting students from initiating contact with prospective clients while allowing this practice by the supervising attorney and other clinic staff. Nor did the court say why its ban should not be limited to contact with persons with whom the Clinic lawyer or staff has no prior professional relationship, a limitation consistent with the scope of the for-profit, anti-solicitation provision in the Louisiana Rules of Professional Conduct.²⁹⁰

Justice Johnson's dissent to the newest amendments noted that the complaints were sent to the court while the business entities and the Clinic were embroiled in the Shintech controversy.²⁹¹ Justice Johnson argued that the court "should not curtail a program that teaches advocacy while giving previously unrepresented groups and individuals access to the judicial system in order to satisfy critics who are discomfited by successful advocacy."²⁹² The dissent observed that, as the Chief Justice previously admitted, "[a]n exhaustive review of all Louisiana law clinics failed to uncover any violations of the Law Student Practice Rule," and that no complaint of unethical conduct or practices was received from any court or agency before which students practiced.²⁹³ Justice Johnson rejected the majority's concern that, without the very strictest limits on the income of the clinic's clients, law clinic resources would be compromised by those who have the ability to pay for legal services. She reasoned: "Those with the ability to do so, hire the best legal talent available. Those without the ability to pay for private counsel use law clinics."²⁹⁴

Apparently, the court believed that revising the income restrictions slightly for individual clients fashioned a compromise that would put the issue behind them.²⁹⁵ However, again, the court

415 (1963); *see also* Resolution Amending Rule XX, at 2 (La. Mar. 22, 1999) (Johnson, J., dissenting), *reprinted in* 74 TUL. L. REV. 285, 298 (1999) ("Public interest lawyers may provide not only information about substantive rights and remedies, but also about their availability to provide legal services.").

290. LA. RULES OF PROF'L CONDUCT R. 7.2(a) (1999).

291. Resolution Amending Rule XX, at 1 (Johnson, J., dissenting).

292. *Id.*

293. *Id.*

294. *Id.* at 2.

295. *See* Gill, *supra* note 226 (reporting that court communication director Kim Sport gave the impression to newspaper staff during a briefing that the court had fashioned a compromise

did not understand, or did not care to understand, that as long as community group eligibility is dependent on a demonstration of the indigency of the organization's individual members, group representation by the clinics is effectively eliminated. The presidents of Loyola and Tulane Universities explained that by equating the ability of an organization to afford an attorney with the income of its members the court had "severely limit[ed] the legal avenues open to worthy organizations who perhaps cannot otherwise afford legal services."²⁹⁶ The deans of Loyola and Tulane law schools noted: "In all other states, a clinic can represent an organization so long as it determines that the organization itself cannot afford to hire an attorney."²⁹⁷

When the court did not respond to requests to revisit Rule XX and make the limitations less hostile to community groups, a coalition of twenty-one community organizations, law professors, law students, student organizations, and a law clinic donor filed suit in federal court challenging the restrictions.²⁹⁸ The suit alleged that the supreme court's restrictions on community group representation constituted viewpoint discrimination, prohibited by the First and Fourteenth Amendments, and interfered with the academic freedom of clinic professors and students.²⁹⁹ Furthermore, the suit contended that the solicitation ban interferes with the rights of clinic professors, clinic students and their clients to free speech and free association.³⁰⁰

The Louisiana Supreme Court filed a motion to dismiss the

that would put an end to the controversy).

296. Scott S. Cowen & Bernard P. Knoth, *Revised Rule Concerns University Presidents*, TIMES-PICAYUNE (New Orleans, La.), Apr. 8, 1999, at B6 (letter to the editor); *see also Rule XX: New, Not Improved*, TIMES-PICAYUNE (New Orleans, La.), Apr. 11, 1999, at B6 (arguing that the court has put such a heavy burden on organizations by forcing them to keep detailed dossiers on "how much money [their members] make, how many children they have, and whether they have been divorced or made other changes that affect their finances," that joining the group itself would be intimidating).

297. Edward F. Sherman & John Makdisi, *Rule on Law Clinics Still Too Restrictive*, TIMES-PICAYUNE (New Orleans, La.), Apr. 9, 1999, at B6 (letter to editor).

298. *See* Marcia Coyle, "We Can't Even Give It Away," NAT'L L.J., May 3, 1999, at A4; Mark Schleifstein, *Groups File Suit to Challenge Limits on Law Clinics*, TIMES-PICAYUNE (New Orleans, La.), Apr. 17, 1999, at A2.

299. Complaint, *S. Christian Leadership Conference v. Supreme Court of La.*, No. 99-1205 (E.D. La. filed Apr. 16, 1999).

300. *Id.*

complaint, and on July 27, 1999, the district court granted the motion and dismissed the lawsuit.³⁰¹ On the issue of viewpoint discrimination, the district court held that, because there is no right to civil representation, rules that may restrict the availability of civil representation cannot give rise to constitutional claims.³⁰² The district court refused to address, however, the plaintiffs' contention that regardless of whether or not a right is involved, a state may not impose penalties on or withhold benefits from individuals simply because they choose to exercise First Amendment freedoms.³⁰³

The district court also found that the U.S. Supreme Court cases of *In re Primus* and *NAACP v. Button* did not apply because the law clinic rules regulate only non-lawyer students.³⁰⁴ In the district court's view, the supervising attorneys are free to do what they like, provided that they are not acting in a supervisory capacity over law clinic students.³⁰⁵ The district court also held that the Louisiana Supreme Court's purported concern about the resulting harm to law students exposed to solicitation was rationally related to a legitimate state interest and a proper matter for the supreme court to address.³⁰⁶ However, the district court did not consider the lack of any record of a complaint regarding solicitation or consider that this purported concern could have been addressed more narrowly.³⁰⁷

Finally, the court rejected academic freedom arguments by claiming that other academic freedom cases involved situations in which the government was requiring schools to affirmatively act.³⁰⁸ Here, the court argued, the rules merely limited what professors and students may do outside the classroom.³⁰⁹

In a candid acknowledgment of the political motivation behind the new restrictions, the district court observed: "in Louisiana, where

301. *S. Christian Leadership Conference v. Supreme Court of La.*, 61 F. Supp. 2d 499 (E.D. La. 1999).

302. *Id.* at 507.

303. See Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss at 5-8, *S. Christian Leadership Conference v. Supreme Court of La.* (E.D. La. 1999) (No. 99-1205).

304. *S. Christian Leadership Conference*, 61 F. Supp. 2d at 507.

305. *Id.* at 509-10.

306. *Id.* at 512-13.

307. See *supra* note 289-290 and accompanying text.

308. *S. Christian Leadership Conference*, 61 F. Supp. 2d at 509-10.

309. *Id.*

state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary.”³¹⁰ The district court then advised the plaintiffs, composed in large part of minority organizations lacking political and economic power, that “[t]heir energies would more properly be focused on the political rather than the legal system.”³¹¹ Ironically, the district court did not recognize that the U.S. Supreme Court made the opposite finding over twenty-five years earlier. In striking down restrictions on the ability of the NAACP to offer free legal assistance on challenges to segregation practices in the South the Court observed: “Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.”³¹²

On August 17, 1999 the plaintiffs filed an appeal of the district court’s decision with the U.S. Fifth Circuit Court of Appeals.³¹³

III. THE HARM FROM DENYING ACCESS TO LEGAL REPRESENTATION

Governor Foster, business interests, and the Louisiana Supreme Court achieved their desired result—in the first eighteen months after the Rule XX amendments went into effect, the Clinic filed only one new state court case or agency comment.³¹⁴ In contrast, just prior to the new restrictions, the Clinic accepted over thirty new cases and provided over 25,000 hours of free legal assistance annually to individuals and community organizations in Louisiana.³¹⁵ In environmental law, aside from one national public interest

310. *Id.* at 513.

311. *Id.*

312. *Button*, 371 U.S. at 429-30.

313. Notice of Appeal, *S. Christian Leadership Conference v. Supreme Court of La.* (E.D. La. 1999) (No. 99-1205).

314. *Id.*

315. *Eyewitness News: Special Report* (WWL-TV broadcast, Feb. 15, 2000) (on file with author) (contrasting the thirty-one cases filed in 1997, the year proceeding the Rule XX restrictions, to the one new state case filed since the rules went into effect on July 1, 1998); Letter from Robert R. Kuehn, Director, Tulane Environmental Law Clinic, to Monte Mollere, Access to Justice Committee, Louisiana Bar Association (Nov. 17, 1998) (on file with author) (explaining that from January 1989 to December 1996, the Tulane Clinic represented over 165 different Louisiana community organizations in over 205 cases).

environmental law office and the pro bono services of a few members of the private bar, the Clinic is the only source of free environmental law representation in Louisiana.³¹⁶ Therefore, what some dissenting members of the court sought all along—the elimination of all representation of community organizations—effectively is a reality.³¹⁷

Community group activism has always been the paramount means of advancing environmental interests in Louisiana; well over 95% of the Clinic's clients were, before the new restrictions, such groups.³¹⁸ The U.S. Supreme Court recognized that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.”³¹⁹ The Court further recognized that for minority groups, “association for litigation may be the most effective form of political association.”³²⁰ In the

316. E-mail from Lisa Jordan, Acting Director, Tulane Environmental Law Clinic, to Robert Kuehn, Former Director, Tulane Environmental Law Clinic (Feb. 23, 2000) (on file with author).

317. Resolution Amending Rule XX, at 2 (La. June 17, 1998) (Marcus, Victory, and Traylor, JJ., concurring).

We vote for the changes to Rule XX made by the Court, although we are concerned that the Court has not gone far enough to insure that organizations represented by the student law clinics are truly indigent. Thus, we favored the elimination of representation of organizations altogether, leaving only indigent individuals as clients for the clinics, as our rule originally intended.

Id.

One editorial writer speculated that Chief Justice Calogero probably thought he was helping the clinics by putting together a majority in favor of allowing clinics to continue representing community groups but under much stricter rules. Clancy DuBos, *Not Over Yet*, GAMBIT WKLY. (New Orleans, La.), Mar. 30, 1999. However, the director of the Tulane Environmental Law Clinic noted that any supposed compromise by Chief Justice Calogero to help the clinics was useless, because the supreme court's intrusive and burdensome requirement for community organizations to prove the indigent status of its individual members effectively denies those organizations access to the law clinics and the courts. *Id.*

318. E-mail from Lisa Jordan to Robert Kuehn, *supra* note 316.

319. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (finding state's effort to compel disclosure of the names and addresses of the NAACP's members unconstitutional). Alexis De Tocqueville observed that in a democracy it is almost impossible for citizens to achieve anything by themselves and they must form associations to help one another. II ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 107 (Phillips Bradley ed., Alfred A. Knopf trans., 1945) (1840).

320. *Button*, 371 U.S. at 431. The deans of Loyola and Tulane Law Schools argued: “Organizational litigation has been the most important vehicle for protection of individual rights in the last 40 years. A single low-income individual generally lacks the finances and ability to withstand pressure and retaliation that is involved in litigation that seeks to protect or

environmental justice movement, group activism plays an especially important role.³²¹

Potential community organization clients very rarely meet the court's new requirement of at least 51% impoverished members³²² and fear that asking their members to share private financial information will discourage membership and harm the organization.³²³ The groups, who frequently have no paid staff, also face substantial administrative burdens in trying to obtain and update financial information from each individual member.³²⁴ Some community organizations may not operate with identifiable memberships and now have no means of gaining eligibility.

Potential individual clients, even if they are eligible under the court's new poverty restrictions, cannot afford the filing fees and other expenses of litigation.³²⁵ As one public interest environmental

establish rights for group members." Sherman & Makdisi, *supra* note 297.

321. Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGICAL L. Q.* 619, 663-67 (1992). See generally PEOPLE OF COLOR ENVIRONMENTAL GROUPS DIRECTORY (Robert D. Bullard ed., 1994); Dorceta E. Taylor, *The Rise of the Environmental Justice Paradigm*, 43 *AM. BEHAV. SCIENTIST* 508 (2000).

322. See, e.g., Brief of Amicus Curiae, League of Women Voters of Louisiana in Support of Reversal at 2, *S. Christian Leadership Conference v. Supreme Court of La.* (5th Cir. 2000) (No. 99-30895) ("The League cannot ask its membership to provide the information required by Rule XX, as that request would intrude upon their privacy and drive many valuable members from the League."); *Rule XX: New, Not Improved*, *supra* note 296 (arguing that the heavy burden on organizations to keep detailed dossiers on their members would intimidate persons from joining the group).

323. See Brief of Amicus Curiae, League of Women Voters of Louisiana, *supra* note 322, at 2.

324. The total annual budget of the statewide Sierra Club chapter in Louisiana is only \$17,500 a year; the group receives no financial assistance on litigation from the national organization. Barbara Vincent, *Sierra Club Chapter Critical of Law Clinic Ruling*, *TIMES-PICAYUNE* (New Orleans, La.), July 1, 1998, at B6 (letter to editor by club president). The total annual budget of the Southern Christian Leadership Conference, Louisiana Chapter, is less than \$2,000. E-mail from Harold Green, Environmental Chair, Southern Christian Leadership Conference, Louisiana Chapter, to Robert Kuehn, Former Director, Tulane Environmental Law Clinic (Oct. 8, 1999) (on file with author). Were these affiliates of national organizations treated under Rule XX as "indigent persons," rather than as "community organizations," their annual incomes would qualify them for representation by law clinic students.

325. Brief of Amicus Curiae James M. Klebba & Edward F. Sherman in support of Reversal at 9, *S. Christian Leadership Conference v. Supreme Court of La.* (5th Cir. 2000) (No. 99-30895) ("To think that an individual indigent could advance the same causes as a group is unrealistic"); Brief of Amicus Curiae League of Women Voters of Louisiana, *supra* note 322 ("Indeed, the League can barely afford even pro bono law school clinic representation, since

lawyer observed: "Individuals facing environmental problems have little chance of solving those problems alone."³²⁶

Individuals and community organizations are further discouraged because they now fear harassment from opposing attorneys. The law clinics warned that, by imposing financial disclosure requirements on individual group members, the court provided opposing attorneys with a weapon to delay clinic lawsuits, drive up the costs of clinic pro bono representation, and coerce clinic clients to abandon suits.³²⁷ Louisiana defense lawyers encouraged this tactic by claiming that opposing counsel had an ethical obligation to police clinic client eligibility.³²⁸

In response to public statements raising these concerns, the Chief Justice informed the Tulane Law School dean that if the financial eligibility of a clinic client were questioned, the court would review the complaint and make such inquiry as it deemed necessary.³²⁹ Although the Chief Justice stated that the court may confidentially review any information produced or received by the clinic, the Chief Justice did not prohibit opposing parties from seeking such financial information from clinic clients.³³⁰ The Louisiana Supreme Court has not yet adopted this process for handling challenges to financial eligibility as a rule.

In one of only a handful of cases brought by any Louisiana law clinic under the new indigency standards, an opposing attorney served discovery requests for information concerning the client's income and inability to pay for legal services.³³¹ The clinic objected to the discovery requests and filed a motion for protective order. Despite correspondence from the Louisiana Supreme Court stating

even that 'free' service can often require the client organization to bear the substantial out-of-pocket costs associated with legal advocacy-court costs, copying, and filing fees").

326. Cole, *supra* note 321, at 644-65.

327. See Letter from John Makdisi to Pascal F. Calogero, Jr., *supra* note 241; Letter from Dean Edward F. Sherman, Tulane Law School, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Dec. 8, 1998) (on file with author).

328. Crochet, *supra* note 188.

329. Letter from Pascal F. Calogero, Jr., Chief Justice, to Dean Edward F. Sherman, Tulane Law School (Apr. 7, 1999) (on file with author).

330. *Id.*

331. See Plaintiff-Appellant's Brief on Writ of Certiorari, *Magsino v. Gridiron Constr., Inc.* (La. 1999) (No. 99-CD-1930).

that such inquiries would not be allowed and the fact that the income of the client was never an issue in the case, the trial court denied the motion for protective order and granted opposing counsel's motion to compel discovery.³³² The clinic appealed the denial of the protective order to the Louisiana Supreme Court and asked the court to abide by its representation to the law clinics that financial information of clients would be protected.³³³ The court denied the appeal, allowing the invasive discovery to proceed.³³⁴

The inability of clinics to represent organizational clients has also harmed student learning and runs contrary to the stated purpose of Rule XX—"to provide clinical instruction in trial work of varying kinds."³³⁵ Without access to state court and agency proceedings, Clinic students lose valuable opportunities to gain courtroom experience. In addition, as the law schools argued: "Representing organizations presents distinctly different ethical and practical problems from representing individuals."³³⁶ The law school deans added: "To the extent that the clinical students have less access to a diverse set of clients and legal and ethical issues, their education will suffer."³³⁷ Environmental cases, in particular, are primarily pursued through community groups. Thus, the inability of law school clinics to represent those groups is a loss not only to the community groups and their members, but also to the students who would learn important skills by acting as student lawyers in the cases.

The court attempted to discount the harm to the public by arguing that clinic professors, rather than students, could now represent the disenfranchised community groups, with students acting as the professor's paralegals or law clerks.³³⁸ Ironically, the business groups argued for just the opposite—requiring students to be the primary spokespersons in all court and agency appearances and restricting the

332. *Id.*

333. *Id.*

334. *Magsino v. Gridiron Constr., Inc.*, 747 So. 2d 34 (La. 1999).

335. LA. SUP. CT., R. XX, § 1 (Limited Participation of Law Students in Trial Work) (as amended March 22, 1999).

336. Letter from Dean John Makdisi to Pascal F. Calogero, Jr., *supra* note 241.

337. Amicus Brief of James M. Klebba and Edward F. Sherman, *supra* note 325, at 7.

338. *See* Resolution Amending Rule XX, at 3 (La. Mar. 22, 1999) (Calogero, C.J.), reprinted in 74 TUL. L. REV. 285, 288-89 (1999).

law clinic professors to supervision only.³³⁹

The deans of Loyola and Tulane law schools repeatedly explained that the types of hands-on learning through interviewing and counseling clients, negotiating with opposing parties, and litigating before courts and agencies occurs only when students assume the responsibility of the client's lawyer, and not when students simply act as clerks or paralegals.³⁴⁰ Recognizing this crucial aspect of clinical education, the ABA recently amended its accreditation standards to state that every law school "shall offer live-client or other real-life practice experiences."³⁴¹ As the AALS argued to the court: "Clinics are essential to the education of the next generation of lawyers. Clinical education is more than a trial advocacy course or a clerkship at a law firm . . . Hence, law school clinics do not simply provide an alternative forum for skills instruction . . ."³⁴²

The AALS also argued that it was not realistic to suggest that law professors could handle the cases. Law schools will not support law faculty representing clients unless students are able to participate as student attorneys in the cases: "Law schools do not fund clinics so that law faculty can engage in litigation. Rather, law schools fund clinics because training students with real cases is an effective method to teach the theory and practice of law, as well as the values of the profession."³⁴³

Therefore, restricting law students to the role of law clerks or

339. See Letter from Daniel L. Juneau to Pascal F. Calogero, Jr., *supra* note 161

340. See, e.g., Amicus Brief of James M. Klebba and Edward F. Sherman, *supra* note 325, at 3, 5.

341. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ABA, STANDARDS FOR APPROVAL OF LAW SCHOOLS Standard 302(d) (1998). The ABA's influential MacCrate Report identified fundamental lawyering skills that law students should learn and recommended that law schools teach these skills through clinical programs. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ABA, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992).

342. Submission of the Association of American Law Schools to the Supreme Court of the State of Louisiana Concerning the Review of the Supreme Court's Student Practice Rule at 7-8, *reprinted in* 4 CLINICAL L. REV. 539, 544-45 (1998).

343. Brief for Amici Curiae, the Association of American Law Schools, the American Association of University Professors, and the Clinical Legal Education Association in Support of Reversal at 4, *S. Christian Leadership Conference v. Supreme Court of La.* (5th Cir. 2000) (No. 99-30895); see also *id.* at 12 ("Because clinics exist in law schools so that students can learn with real cases, faculty cannot represent clients unless the students are able to participate in the cases.").

paralegals while law professors litigate cases is not the “clinical instruction in trial work” that Rule XX and other law clinic student practice rules advocate or that law schools would use their limited funds to finance.

IV. DETERRING DENIALS OF ACCESS TO LEGAL REPRESENTATION

One reaction to the extraordinary efforts in Louisiana to “de-lawyer” community organizations and deny access to environmental justice is to attribute these events to Louisiana and its reputation for corrupt politics. However, politicians and attorneys outside of Louisiana likewise strive to prevent law clinics and law professors from providing free legal assistance.

Legislators sought to curtail the activities of law school clinics beginning in the late 1960s with the attack on University of Mississippi law school faculty, who were providing free legal assistance in a school desegregation case, and continued thereafter with attacks in Iowa, Colorado, Idaho, and Tennessee.³⁴⁴ Elected officials have often singled out law professors and students providing free legal assistance on environmental matters. In a well-publicized 1980s case, the environmental law clinic at the University of Oregon was attacked by legislators and timber interests when the clinic provided legal assistance to those attempting to protect the endangered spotted owl.³⁴⁵ In response to these attacks and a legislative proposal to withdraw funding from the University of Oregon School of Law, the Oregon clinic incorporated as a separate non-profit public interest law office and moved outside the law school.³⁴⁶ Though not as well-publicized, politicians and business interests attempted to curtail environmental pro bono activities at the University of West Virginia,³⁴⁷ the University of Wyoming,³⁴⁸ and

344. See Peter A. Joy & Charles D. Weisselberg, *Access to Justice, Academic Freedom, and Political Interference: A Clinical Program Under Siege*, 4 CLINICAL L. REV. 531, 532-33 (1998); ELIZABETH M. SCHNEIDER & JAMES H. STARK, AALS SECTION ON CLINICAL LEGAL EDUCATION 1, 1-3 (1982).

345. Joy & Weisselberg, *supra* note 344, at 534.

346. *Id.*

347. *Consol Talks to WVU Officials About Law Professor Handling Case Against It*, U.P.I. (Oct. 15, 1984); *West Virginia News in Brief*, U.P.I. (June 10, 1987); *W.Va. Newspaper Editorials*, U.P.I. (June 25, 1987) (reprinting editorial from the Charleston Gazette Newspaper).

the University of Pittsburgh³⁴⁹ by arguing that law professors should not be allowed to use university resources to support their pro bono environmental work. However, none of these public attacks in other states, that all involved publicly-funded law schools,³⁵⁰ were fueled by a governor, nor did the state's supreme courts supply politicians and business interests with the restrictions on legal representation they sought.

A. Ends, Means, and Will of the People Justifications

If in hindsight the attack on the Tulane Clinic was predictable, given attacks on other law school clinics and the environmental and civil rights issues involved, the assault is still indefensible in a society that values public participation and access to the judicial system.

When criticized for his attacks, Governor Foster defended his actions by arguing that the Clinic was interfering with his efforts to create jobs³⁵¹ and that the Clinic was blocking the "will of the

348. See Kerry Drake & Chris Tollefson, *Legislator Slams UW*, CASPER STAR-TRIBUNE (Wyoming), Feb. 27, 1996, at A1; Kerry Drake, *UW Clears Squillace of Wrongdoing*, CASPER STAR-TRIBUNE (Wyoming), July 21, 1995, at A1; *Legislators May Question University Funding*, POWELL TRIBUNE (Wyoming), Oct. 17, 1995, at 7; Mark Lumpkin, *Children Protest Law Professor Defending Anti-Logging Interests*, LARAMIE DAILY BOOMERANG (Wyoming), July 19, 1994, at 1.

349. See Jim Buck, *Pitt Law Prof Argues His Case*, BRADFORD ERA (Bradford, Pa.), Apr. 24, 1998, at 1; Jim Buck, *Pitt Sets Guidelines for Law Professors*, BRADFORD ERA (Bradford, Pa.) Apr. 22, 1998, at 1; Casey Cobbs, *University of Pittsburgh Re-Examines Faculty Work Policy*, BRADFORD ERA (Bradford, Pa.), Feb. 28, 1996, at 3.

Similarly, pro bono consulting services by a Texas environmental law professor to a neighborhood group challenging a state air permit were curtailed by a rider in a Texas appropriations bill that prohibited any state employee from being retained or serving as an expert witness or consultant in litigation against the state. Letter from Frank F. Skillern, Professor, Texas Tech University School of Law, to Robert R. Kuehn, Director, Tulane University Law Clinic (Mar. 27, 1998) (on file with author). See also *Hoover v. Morales*, 164 F.3d 221, 227 (5th Cir. 1998) (holding the appropriation riders unconstitutional).

350. See Joy & Weisselberg, *supra* note 344, at 535, 536 (calling the attacks on the Tulane Clinic "unparalleled attacks on the academic freedom of students and professors at a private law school").

351. Gyan, *supra* note 173; Elie, *supra* note 27. Governor Foster expressed his ends-justify-means philosophy and his intolerance of opposing points of view in a private meeting with this author. After listening to the Governor express his views on lawyers, the environment, and economic development, I suggested that many people who cared as much as the Governor did about economic development believed that the best thing that could happen would be for Shintech to be defeated. I further explained that this was because the defeat might finally force industry to sit down with communities and develop a long-term, comprehensive land use plan

people.”³⁵² Forces attacking professors at other law schools also sought to justify their attacks on the grounds that the professors’ pro bono activities cost jobs and wasted local tax revenues.³⁵³ Even if true, these arguments still do not justify denying access to legal representation to individuals and community groups who cannot afford to pay for legal services.

The argument that denial of access to legal representation is warranted because such access interferes with job creation simply argues that job-creation ends justify anti-access-to-legal-representation means. One serious question, at the onset, is how any politician could profess to care about improving education or economic development while simultaneously seeking to punish

for the chemical corridor. Governor Foster would have none of this conciliatory talk and stated: “If Shintech is defeated, I’ll just know that I’ll have to do a better job next time of getting people out of the way.” Meeting with Murphy J. “Mike” Foster, Jr., *supra* note 2.

352. Sherry Sapp, *Foster Plans Romeville Follow-Up*, *ADVOCATE* (Baton Rouge, La.), Aug. 5, 1997, at 1B; Shuler, *supra* note 110. Ironically, at the same time that Foster was arguing that the will of the people should prevail and prevent those with opposing points of view from being heard, his liaison on Shintech, Kevin Reilly, was arguing that “it’s extremely important that Louisiana shake its populist image” in order to become more “business-friendly.” McMillan, *supra* note 114.

At times, Foster defended his attack through the additional charge that local residents were solicited or manipulated by the Clinic’s professors and students. *See, e.g.*, Gyan, *supra* note 287 (quoting a spokesperson expressing Governor’s disappointment with suspension of ban on solicitation because it “makes the [community] groups subject to manipulation by the political agendas of their supervisors.”); Transcript of Interview with Governor Foster for broadcast of *Louisiana: The State We’re In*, *supra* note 106 (“[I]f you do a good investigative report, you’ll find they solicit clients. This is their whole purpose in life.”) (on file with author). However, Governor Foster was aware from the beginning of the controversy that local residents came to Tulane seeking help. Daugherty, *supra* note 99, at 9; Letter from Robert R. Kuehn to Murphy J. “Mike” Foster, Jr., *supra* note 272 (reminding Governor Foster that his special counsel, Terry Ryder, called the Tulane Clinic in November 1996 to inquire as to the Clinic’s role in the Shintech controversy and was told the Clinic was not yet representing the local residents but was reviewing the case and considering their request for help). Governor Foster later conceded in a letter that he had no facts to back up his allegations of solicitation or manipulation but never publicly corrected or apologized for his groundless charges. *See* Letter from M.J. “Mike” Foster, Jr. to Robert R. Kuehn, *supra* note 272 (stating allegations against the Tulane Clinic students and staff “reflected opinions only and were not an attempt to recite ‘facts’. As you can tell, from time to time, I get a little passionate about my beliefs.”).

353. *See* Cobbs, *supra* note 349 (reporting that a legislator alleges that litigation by University of Pittsburgh law professors will result in reduced timber sales, taxes, and wages); *Consol Talks to WVU About Law Professor Handling Case Against It*, *supra* note 347 (coal company complains that litigation by University of West Virginia law professor has forced it to lay off 320 miners); Lumpkin, *supra* note 348 (asserting that pro bono activities of University of Wyoming law professor will put timber employees out of work).

financially a national university that is one of the largest private employers in the state.³⁵⁴

Even if attacks on access to law school legal representation are motivated solely by an altruistic desire to improve the economic welfare of local residents, threatening, intimidating, and interfering with a citizen's ability to petition the government cannot be condoned.³⁵⁵ Politicians assert time after time that their vision of what is best for society justifies interfering with someone else's legal rights. The internment of innocent Japanese-Americans during World War II was justified by the allegedly noble purpose of ensuring that any support for Japan, however remote, would not interfere with the war effort.³⁵⁶ With McCarthyism in the 1950s and the denial of basic

354. See *Largest Private Sector Employees*, NEW ORLEANS CITYBUSINESS, Dec. 27, 1999, at 50 (citing statistics that Tulane University's educational programs employ over 4,000; its related healthcare services employ over 3,500); Press Release, Tulane Makes a Billion Dollar Difference (Dec. 3, 1998) (on file with author) (reporting that Tulane has more than 8,000 employees and a payroll of approximately \$551 million). "Tulane is one of the only private institutions in the country that gives back more to the state, in terms of tax revenue and the sharing of educational costs, than it gets from the state." *Id.* (quoting Gene D'Amour, Tulane Vice President for Government/Agency Affairs and Institutional Program Development). This economic impact report did not include benefits derived from Tulane volunteer efforts, such as the law clinics, which provide more than \$15 million annually in donated time and services to New Orleans and the state. *Id.* As one local paper observed, "If the governor genuinely cares about jobs, he should be encouraging businesses to support Tulane, not boycott it." *The Governor's Gripe*, GAMBIT WKLY. (New Orleans, La.), July 29, 1997, at 7.

355. Governor Foster has not hesitated to use his power to quiet those who disagree with him on public policy issues unrelated to Shintech. See, e.g., Jack Wardlaw, *Foster Rejects Ethics Panelist Who Sought Tough Penalties*, TIMES-PICAYUNE (New Orleans, La.), Feb. 5, 2000, at A1 (reporting that Foster refused to reappoint a state board of ethics member who urged tougher penalties for Governor Foster's failure to report the campaign list purchase from David Duke); *Foster Resorts to Intimidation*, ADVOCATE (Baton Rouge, La.), Oct. 13, 1998, at 8B (stating that Foster has "chosen to play the politics of intimidation with his critics" by seeking to pressure a public interest think tank to retract its criticism of the Governor's road construction policies). In addition, Governor Foster's unrepentant willingness to buy the support of David Duke, in the process violating campaign finance laws, demonstrates the means he is willing to employ to win a contest. Marsha Shuler, *Duke Dealings Show Desire to Win Strong*, ADVOCATE (Baton Rouge, La.), May 28, 1999, at 13B; see also Hugh Aynesworth, *Governor Confronts Private Eye*, WASH. TIMES, Sept. 30, 1999, at A13 (reporting that in the 1999 re-election campaign, Foster was accused of trying to intimidate a private detective into abandoning an investigation into Foster's activities).

356. See, e.g., 138 CONG. REC. E2351 (daily ed. Aug. 3, 1992) (statement of Rep. Cox) ("Some of the most grievous wrongs ever committed in American politics and government were justified by noble purposes. The Army-McCarthy hearings, just as the Japanese internment during World War II, waived concerns about justice for individuals in order to wage a broader war.").

civil rights to those accused of harboring sympathy toward communists, the save-America-from-communism end allegedly justified the vicious personal attacks employed by politicians to expose alleged sympathizers.³⁵⁷ In the 1960s Southern governors and Southern courts supported segregation and denied citizens' civil rights in their efforts to preserve the "Southern way of life."³⁵⁸ When President Nixon tried to justify his illegal activities in the 1970s, he reasoned that "[i]t's good for the country if I'm elected; therefore, whatever I do to get elected is good for the country."³⁵⁹ When Oliver North and others in the 1980s sought to defend the illegal Iran-Contra secret weapons deals, they argued that defense of democracy in Latin America justified skirting the law.³⁶⁰ Finally, some suggest that illegal campaign fund-raising practices in the 1990s resulted from an ends-justify-the-means mentality among political party officials.³⁶¹

357. See, e.g., *id.*; JACK ANDERSON & RONALD W. MAY, MCCARTHY: THE MAN, THE SENATOR, THE "ISM" 408 (quoting Arthur Peterson, Republican State Assemblyman from Prescott, Wisconsin: "Joe McCarthy has not fooled the unscrupulous and the self-seeking—his pattern of action is too familiar to them; they know to what depths a man will sink to attain his own aims and to further his own ambitions."); *id.* at 407 (quoting Congressman Charles Kersten of Wisconsin: "McCarthy's campaign [of questioning the loyalties of State Department officials] will result in a net substantial good to America.").

Among the victims of McCarthyism's ends-justify-means mentality were lawyers in Louisiana who were arrested and charged with violation of the Louisiana Subversive Activities and Communist Control Law because of their membership in organizations providing free legal services in civil rights cases. See *Dombrowski v. Pfister*, 380 U.S. 479, 492-93 (1965).

358. See, e.g., J. Lindsay Almond, Jr., *Virginia Gov. Defends Segregation*, CRISIS, Mar. 1959, at 134, 189 (noting speech by Virginia Governor that defended segregation as the right and duty of the state to protect the people and to mold the character and promote the welfare of their children); Coleman, *supra* note 280 (reporting that White Citizens Council in Louisiana claimed that the NAACP threatened the Southern way of life by promoting integration).

359. H. R. Haldeman & Joseph Dimona, *The Ends of Power*, NEWSWEEK, Mar. 6, 1978, at 39, 41. On White House tapes, Nixon justified the creation of the "Plumbers," the secret White House unit to investigate leaks to the press: "We're up against an enemy, a conspiracy. They're using any means. *We are going to use any means.* Is that clear?" ABUSEOFPOWER, THE NEW NIXON TAPES, 8 (Stanley I. Kutler ed., 1998) (emphasis in original). When Attorney General John Mitchell was chastised for putting the re-election of Nixon above his other public duties, he responded: "In my mind the re-election of Richard Nixon, compared to what was on the other side, was so important that I put it in exactly that context." *John Mitchell, Convicted in Watergate, Dies at 75*, SAN JOSE MERCURY NEWS, Nov. 10, 1988, at 2A.

360. See Christopher Madison, *Did Panels Lose a Battle—or a War?*, NAT'L J., July 18, 1987, at 1858. During Senate hearings, Senator Daniel Inouye asked: "Should we, in the defense of democracy, adopt and embrace one of the most important tenets of Communism and Marxism: The ends justify the means?" *Id.*

361. See Kent Jenkins, Jr. & Julian E. Barnes, *What Is Thomson Aiming For?*, U.S. NEWS

In American jurisprudence, meritorious ends, do not justify improper means.³⁶² Justice Brandeis warned that one must be most on guard to protect liberties when government officials put forth beneficial ends. “Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by mean of zeal, well-meaning but without understanding.”³⁶³

Controversies over environmental regulation are all too often portrayed as “jobs vs. environment” disputes that use job-creation ends to justify sacrificing the voice of those seeking to protect the environment. Sincere or meritorious economic ends can only be pursued if the means respect the right of affected partners to be heard and represented in the decision-making process. Even where efforts to deny access are not legal, official approval of such oppressive methods ignores the principle of “equal justice under law” engraved on the U.S. Supreme Court building.

The other purported justification for denying access to legal representation, that the will of the people justifies suppressing the ability of the minority to be represented, is equally insupportable. Even if it is the majority’s will to allow a particular activity, this does not eliminate the minority’s rights to insist that the majority act consistent with democratic principles and the law, to be heard in public hearings, and to use available legal processes to enforce their rights still exist. The fathers of democracy warned that the tyranny of the majority, whether fueled by the supposed mandate that accompanies election to public office or by a belief in what the majority wants, must not suppress lawful dissent.³⁶⁴

& WORLD REP., July 14, 1997, at 18 (reporting that investigator for Republicans alleged that people were told, by actions if not words, that getting Democratic candidates elected in 1996 justified funneling improper foreign contributions into campaign coffers).

362. See WILLIAM DOUGLAS, *WE THE JUDGES* 354 (1956).

363. *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

364. See, e.g., I ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 260 (Phillips Bradley ed., Alfred A. Knopf trans., 1945) (1840) (“I think that liberty is endangered when this power [of the majority] finds no obstacle which can retard its course and give it time to moderate its own vehemence.”); JOHN STUART MILL, *ON LIBERTY* 4-5 (1869) (warning that precautions are as much needed against the tyranny of the majority as against any other abuse of power); THE FEDERALIST NO. 51 at 397, 400 (Alexander Hamilton) (John C. Hamilton ed., 1869) (“It is of great importance in a republic, not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . If a majority be

Attacks on pro bono legal representation, in effect, seek to deny the check and balance on governmental abuse that is the traditional role of the courts. To Governor Foster, the issue of whether an additional chemical plant should be built in Convent was left to the legislature: "You have the right to help formulate the policy of the state through seeking to influence its legislature. Why don't you just come lobby the legislature to stop certain kinds of expansion. I have no problem with that."³⁶⁵ Of course, it is convenient to advise powerless minorities to seek redress solely from a majoritarian-controlled legislature and to refrain from using non-legislative means, even where provided by law. It is inappropriate for elected officials to insist that appealing to the legislature is the only means to initiate change, as the U.S. Supreme Court already recognized that "litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."³⁶⁶ Redress from the courts is especially appropriate where, as in the case of environmental disputes, the law explicitly provides for both public participation in executive branch decision making and judicial review of those decisions.³⁶⁷

Access to legal representation and the courts is crucial to advance public concerns about the environment. "In no other political and social movement has litigation played such an important and

united by a common interest, the rights of the minority will be insecure.").

365. Letter from M.J. "Mike" Foster, Jr. to Robert R. Kuehn, *supra* note 272; *see also* Shuler, *supra* note 110 ("Foster said the clinic is trying to block the will of the St. James Parish Police Jury, which supports the plant and the jobs it will create.").

The National Governors' Association, to which Governor Foster belongs, adopted a different view on the right of all members of the public to participate in environmental policy disputes. The Association's Enlibra doctrine includes the principle that "[s]uccessful environmental policy implementation is best accomplished through balanced, open and inclusive approaches . . ." National Governors Association, *NR-1 Enlibra: A New Shared Doctrine for Environmental Management* (1999), at <http://www.nga.org/pubs/policies/nr/nr01.asp> (last visited Nov. 21, 2000); *see also* Western Governors' Association, *Principles for Environmental Management in the West* (1999) (adopting a similar Enlibra principle), available at <http://www.westgov.org.nga.policy/99/99013.htm> (last visited Nov. 21, 2000).

366. *Button*, 371 U.S. at 430. "The vital need to hold the government accountable to those it serves and the need to provide legal voices for those muted by poverty and political impotence cannot be overemphasized." *Township of Mt. Laurel v. Public Advocate*, 416 A.2d 886, 893 (N.J. 1980).

367. *See, e.g.*, 42 U.S.C. § 7661a(b)(6) (1994) (federal Clean Air Act requirements for state-issued air permits include public notice, opportunity for public comment and a hearing, and opportunity for judicial review by any person who participated in the public comment process).

dominant role [as in the environmental movement].”³⁶⁸ Those attacking law school representation know that, when you deny citizens representation in environmental matters, you significantly weaken their voice and their ability to restrain unlawful government actions.³⁶⁹

Regardless of the majority’s will and the possibility of a legislative solution, the minority, at a minimum, has the right to be heard and to insist upon compliance with laws. “Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.”³⁷⁰ Without alternative means of legal representation, the effect of denying judicial access to those with opposing points of view is to leave the actions of the executive branch unchecked.

1. Addressing Attacks by Politicians on Legal Representation

Deterring attacks by politicians on the efforts of law schools to provide legal assistance to controversial clients or causes will not be easy. In some situations, efforts to deny law schools the ability to provide assistance may be illegal. The U.S. Supreme Court has repeatedly found that government actions motivated by an intent to suppress disfavored viewpoints violate the First Amendment.³⁷¹ This

368. David Sive, *The Litigation Process in the Development of Environmental Law*, 13 PACE ENVTL. L. REV. 1, 3 (1995) (defending his earlier quote reprinted in PETER BORELLI, ENVIRONMENTAL PRIORITIES FOR THE FUTURE 58 (1988)). The executive director of the Sierra Club Legal Defense Fund observed: “Litigation is the most important thing the environmental movement has done over the past 15 years.” Tom Turner, *The Legal Eagles*, AMICUSJ, Winter 1988, at 25, 27 (quoting Rick Sutherland).

369. The president of League of Women Voters of Louisiana argued that sometimes legal recourse is the only way to ensure that individuals and community organizations can access government decision making and hold government accountable. Malinda Hills-Holmes, *Supreme Court and Law Clinics*, ADVOCATE (Baton Rouge, La.), Sept. 10, 1998, at 10B. Professor Pepper argues: “[F]irst-class citizenship is dependent on access to the law Our law is usually not simple, usually not self executing. For most people most of the time, meaningful access to the law requires the assistance of a lawyer The lawyer is the means to first-class citizenship.” Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617.

370. *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

371. *See, e.g., Perry v. Sindermann*, 408 U.S. 593 (1972) (holding unconstitutional the

strict prohibition applies even where the action is denial of a privilege that the government is not obligated to extend.³⁷² Government efforts to restrict advocacy are also subject to equal protection challenges where they seek to impose restrictions on some, but not all, state-funded employees based on the nature of the employee's legal work.³⁷³

In the area of environmental justice, efforts to interfere with a complaint of racial discrimination may violate federal civil rights laws. Regulations implementing the Civil Rights Act of 1964 provide that no person shall intimidate, threaten, coerce, or discriminate against any individual or group because that person or group has filed a civil rights complaint, participated in an investigation into such complaint, or opposed any practice made unlawful by the act.³⁷⁴ Despite repeated requests that the EPA investigate Governor Foster's intimidation and threats against the Clinic for filing a civil rights complaint in the Shintech case, the EPA has failed to take any

denial of renewal of a state junior college professor's teaching contract because of his criticism of college administration); *see also* Hoover v. Morales, 164 F.3d 221, 227 (5th Cir. 1998) (holding as unconstitutional Texas university policy and legislative appropriations riders prohibiting state employees from acting as consultants or expert witnesses on behalf of parties opposing state in litigation). Even where the government denies that its action is motivated by an attempt to suppress a particular disfavored idea, "those justifications cannot save an exclusion that is in fact based on the desire to suppress a particular point of view." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985).

The New Jersey Supreme Court has upheld, against charges that the professors violated state government ethics rules, the right of law clinic faculty at Rutgers University School of Law to handle cases where the state may have opposing interests. *In re* Determination of Executive Comm. on Ethical Standards re: Appearance of Rutgers Attorneys, 561 A.2d 542 (N.J. 1989).

372. *See, e.g.*, Healy v. James, 408 U.S. 169, 185-86 (1972) ("[T]he Court has consistently disapproved government action . . . denying rights and privileges solely because of a citizen's association with an unpopular organization"); *Speiser v. Randall*, 357 U.S. 513 (1958) (invalidating effort to deny property-tax exemptions to veterans who refused to take an oath disavowing advocacy of the overthrow of the government by force or violence).

373. *See* *Trister v. Univ. of Miss.*, 420 F.2d 499 (5th Cir. 1969) (holding that the University of Mississippi's attempt to prohibit clinical law professors from working on a school desegregation lawsuit violated the equal protection clause because the university imposed restrictions on clinical professors that are more onerous than those imposed on other law school professors). *But cf.* *Buck, supra* note 349 (responding to criticism of law professors' pro bono work on behalf of environmental organizations, the University adopted a new policy requiring professors who collect legal fees awarded by a court to donate the money to the University but does not require professors who are paid consultant fees to donate their fees to the University).

374. *Nondiscrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency*, 40 C.F.R. § 7.100 (1999).

action.³⁷⁵

In many situations, however, efforts of elected officials to deny access to legal representation are not illegal. In such cases, public condemnation and the power of the ballot box may be the only way to address such efforts. The attacks on Tulane were denounced by the media and the public.³⁷⁶ Over time, Governor Foster was forced to moderate his public criticism and efforts to restrict the Clinic.³⁷⁷ It is also likely that Governor Foster's attacks, and the perception that the DEQ was not addressing the concerns of local residents, influenced the EPA's unprecedented decision to veto Shintech's state air permits.

Unfortunately, while voting politicians out of office is an effective means of expressing public displeasure, it is difficult to achieve. Often, the cause is unpopular and the clients lack political power. In addition, those opposing law clinic representation in environmental disputes usually are politically powerful. The reelections of Governor Foster and the Chief Justice of the Louisiana Supreme Court show how difficult it can be to translate public outrage over denial of access to legal representation into election-day victories. At a minimum, public criticism should make elected officials hesitate before seeking to deny access to justice.

B. The Rhetoric and Reality of the New "Green" Business Ethic

Some business interests perceive law clinics as impeding what is otherwise the inexpensive and quick regulatory approval of environmentally-threatening projects. To an amoral firm intent only on maximizing profits, it makes good business sense to eliminate or

375. See Letter from Lisa W. Lavie & Robert R. Kuehn, Tulane Environmental Law Clinic, to Michael Mattheisen, et al., Environmental Protection Agency (Dec. 9, 1997) (on file with author) (documenting efforts of Governor Foster and his staff to intimidate and threaten the Tulane Clinic and its clients); Letter from Elizabeth Teel, Tulane Environmental Law Clinic, to Ann E. Goode, Director, Office of Civil Rights, Environmental Protection Agency (Aug. 10, 1999) (on file with author) (detailing further efforts by the state to threaten, intimidate and discriminate against complainants and their attorneys and protesting the failure of the EPA to take action on the complaint).

376. See Gray, *supra* note 41 (finding through a newspaper poll that Convent residents favored the involvement of the Tulane Clinic in the Shintech dispute by a 54% to 22% margin).

377. See Hansen, *supra* note 58, at 56.

restrict legal representation on behalf of environmental groups. Without legal representation, environmentally-concerned citizens are less able to participate in the regulatory approval process, oversight agencies have fewer reasons to delay or deny permits, and firms save time and money in developing and operating projects.

However, maximizing profits need not be the only goal or responsibility of business, though some contend the opposite.³⁷⁸ Many business philosophers argue that a corporation should strive to make a profit while avoiding injury to others and respecting individual rights.³⁷⁹ At least thirty-nine states allow corporate officers and boards of directors to make decisions based on criteria other than maximizing profits, including the concerns of communities most impacted by the corporation's activities.³⁸⁰ These "other constituency" laws authorize, but do not require, corporate officials to consider the impact of their decisions on constituencies other than shareholders.³⁸¹

Many major corporations now subscribe to voluntary environmental codes of conduct, or "green codes," based on this theory of social responsibility. Among Standard & Poor's five-hundred largest companies, approximately 98% have adopted a corporate environmental policy and almost 40% subscribe to one or more voluntary environmental codes of conduct.³⁸²

Almost all of the business interests that have attacked the pro

378. See, e.g., Milton Friedman, *The Social Responsibility of Business Is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970, (Magazine) at 33 (calling efforts to instill social responsibility in businesses in areas such as safety and pollution "pure and unadulterated socialism").

379. See, e.g., Norman Bowie, *New Directions in Corporate Social Responsibility*, BUS. HORIZONS, July/August 1991, at 56 (describing this as the "neoclassical view of corporate responsibility").

380. Rorie Sherman, *Ethicists: Gurus of the '90s*, NAT'L L.J., Jan. 24, 1994, at 1. The chief proponent of the "stakeholder theory," R. Edward Freeman, argues that the manager's task is to protect and promote the rights of various corporate stakeholders, including stockholders, employees, customers, suppliers, and the local community. Bowie, *supra* note 379, at 56; see also R. Edward Freeman, *The Politics of Stakeholder Theory: Some Future Directions*, 4 BUS. ETHICS Q. 409, 417 (1994) ("Corporations shall be managed in the interests of its stakeholders, defined as employees, financiers, customers, employees, and communities.").

381. John R. Boatright, *Fiduciary Duties and the Shareholder-Management Relation: Or, What's So Special About Shareholders?*, 4 BUS. ETHICS Q. 393, 402 & n.27 (1994).

382. INVESTOR RESPONSIBILITY RESEARCH CENTER, CORPORATE ENVIRONMENTAL PROFILES DIRECTORY 1998 (EXECUTIVE SUMMARY) 62-63 (1998).

bono environmental efforts of law school professors and clinics either have their own code of conduct or belong to trade associations with such codes. Without exception, these business codes reflect the need to respect the concerns of citizens and local communities and to dialogue with the public about potentially harmful operations. No codes advocate profit maximization as the only goal of the organization and none supports strategies of silencing concerned citizens or critics. For example, the International Chamber of Commerce (ICC) “represents chambers of commerce in all parts of the world.”³⁸³ The ICC’s “Business Charter for Sustainable Development” directs individual corporations and business organizations “to foster openness and dialogue with employees and the public, anticipating and responding to their concerns about the potential hazards and impacts of operations, products, wastes or services.”³⁸⁴ The ICC repeatedly states the need for dialogue with public interest groups:

All sectors of society, including government, business, public interest groups and consumers have a role to play in contributing to sustainable development and business recognizes that these sectors need to work in partnership, bringing their values and experience to bear on the challenge Public interest groups and individual consumers exert pressure through their behavior and attitudes. Therefore, industry appreciates the need to seek out these concerns and to include them in its development of policy.³⁸⁵

The New Orleans Chamber surpasses the ICC’s principles of openness, dialogue, and respect for the concerns of public interest

383. International Bureau of Chambers of Commerce, at http://www.iccwbo.org/home/menu_ibcc.asp (last visited Oct. 27, 1999).

384. International Bureau of Chambers of Commerce, *Principles for Environmental Management*, at <http://www.iccwbo.org/home/environment.charter.asp> (last visited Oct. 27, 1999).

385. International Bureau of Chambers of Commerce, *Responsible Entrepreneurship*, at http://www.iccwbo.org/home/statements_rules/statements/1998/final_responsible.asp (last visited Oct. 27, 1999). The U.S. Chamber of Commerce has no comparable green code and boasts that it “leads the opposition” to the environmental justice movement. See U.S. Chamber of Commerce, *Environmental and Regulatory Reform*, at <http://www.uschamber.com/policy/6-environment/content.html> (last visited Feb. 29, 2000).

groups by proclaiming itself “an association of over 2,100 business firms . . . working to unify the community.”³⁸⁶

LABI also advocates the need for communication and dialogue with affected communities, although it does not publish a code of conduct. LABI’s president was urging its members to do a better job of discussing environmental issues with affected communities at the same time that he was pressing the Louisiana Supreme Court to restrain the Clinic.³⁸⁷ Likewise, LABI’s public affairs expert advised “that businesses encourage public participation and work with environmental and community groups.”³⁸⁸

Petrochemical companies belong to the Chemical Manufacturing Association (CMA), which describes its green code, “Responsible Care,” as “the chemical industry’s premier voluntary environmental, health and safety performance improvement initiative.”³⁸⁹ The CMA requires its members to adopt and practice the Responsible Care principles as a condition of membership. One of Responsible Care’s guiding principles is “to seek and incorporate public input regarding our products and operations.”³⁹⁰ Members are required “to recognize and respond to community concerns” about chemical industry operations and to develop community outreach programs that include “[a] continuing dialogue with local citizens to respond to questions and concerns about safety, health, and the environment.”³⁹¹ One Dow

386. The New Orleans Regional Chamber of Commerce, at <http://chamber.gofn.org/membersh.html> (last visited Nov. 6, 1999).

387. See Carl Redman, *LABI Tells Industry to Explain Environmental Issues Better*, ADVOCATE (Baton Rouge, La.), Jan. 16, 1998, at 1B (reporting speech by Dan Juneau, President, LABI).

388. *Id.* (reporting remarks of Lawrence Hurst, regional director for communication and public affairs with Motorola).

389. Chemical Manufacturers Association, *Responsible Care*, at <http://www.cmahq.com/responsiblecare.nsf/pages/about> (last visited Oct. 27, 1999).

390. *Id.*

391. *Id.* The chairman and chief executive officer of Union Carbide Corporation explained the focus on dialogue with the public: “We [in industry] welcome your involvement. We want you to tell us when you mistrust something we’re doing. We want to listen to you and work with you.” Robert D. Kennedy, *Achieving Environmental Excellence: Ten Tools for CEOs*, PRISM (Third Quarter 1991), at 79.

A number of officials with petrochemical facilities in Louisiana also were part of the “Enterprise for the Environment” (E4E) initiative. See *Enterprise for the Environment*, at <http://webu6102.ntx.net/e4e/particip.html> (last visited Feb. 21, 2000) (identifying Monsanto Corporation, Amoco Corporation, BP America, Dow Chemical Company, Novartis Corporation

Chemical plant manager offered a less altruistic explanation of the chemical industry's focus on dialogue: "It became pretty clear that if we were going to survive in Louisiana we had to create a dialogue with people who disagreed with us. There was really nowhere else to go."³⁹²

Similarly, oil and gas exploration and production companies belong to the American Petroleum Institute (API).³⁹³ The API members adopted the "Environmental Mission and Guiding Environmental Principles,"³⁹⁴ and pledged to "recognize and to respond to community concerns about our raw materials, products and operations," "[to] be a good corporate citizen wherever it operates," "build community dialogue," and "address community concerns" about environmental, health and safety issues.³⁹⁵

The environmental code of the American Forest and Paper Association (AF&PA), whose members and supporters lead attacks on environmental law clinics and professors outside of Louisiana,

and DuPont Company officials as participants). The E4E's consensus vision of an improved environmental system includes the objective to "create decision processes that meaningfully involve affected stakeholders and engage all citizens in protecting the environment." William D. Ruckelshaus, *Stepping Stones*, ENVTL. FORUM, Mar./Apr. 1998, at 30, 32 (setting forth the twelve elements of the consensus "Vision for the Future").

392. Peter Fairley, *Louisiana Plants Find Pride in Performance*, CHEM. WEEK, July 1/8, 1998, at 46 (quoting Larry Adcock, former plant manager for Dow Chemical's Plaquemine, Louisiana, petrochemical complex). At the time Adcock made this remark, the Louisiana Supreme Court was granting business's request that law clinics stop representing local community groups with interests contrary to those of the Louisiana chemical industry.

393. American Petroleum Institute, *Protecting the Environment*, at <http://www.api.org/ehs/PTE/protectintro.html> (last visited Oct. 27, 1999), Louisiana oil and gas exploration and production companies have long sought to silence the Tulane Clinic. See, e.g., Letter from B.A. "Red" Adams, Sr., Chairman of the Board, Oil & Gas Rental Services, Inc., to Eamon Kelly, President, Tulane University (July 25, 1997) (objecting to Tulane's role in the Shintech controversy and threatening to withdraw financial support for University) (on file with author); Letter from David K. McGowan, McGowan Working Partners, to Robert Kuehn, Director, Tulane Environmental Law Clinic (Sept. 21, 1992) (objecting to the Tulane Clinic's involvement in a dispute over permitting of company's oilfield waste disposal well) (on file with author).

394. AMERICAN PETROLEUM INSTITUTE, PROMOTING PARTNERSHIPS: COOPERATION BETWEEN THE PETROLEUM INDUSTRY AND ENVIRONMENTAL, EDUCATIONAL AND COMMUNITY GROUPS (Sept. 1996) (reprinting the principles in the inside front cover).

395. *Id.*; American Petroleum Institute, *Protecting the Environment*, at <http://www.api.org/ehs/PTE/protectcommunity.html> (last visited Oct. 27, 1999); American Petroleum Institute, *Protecting the Environment*, at <http://www.api.org/pasp/step/step/html> (last visited Oct. 27, 1999).

likewise encourages dialogue. AF&PA members publicly pledge to “seek out interested parties regularly and communicate on industry activities and performance” and to “work with others to address concerns and to reach consensus on important issues” of environment, health, and safety.³⁹⁶ Similarly, the National Association of Manufacturers’ “Business Network for Environmental Justice” pledges to “work cooperatively with all environmental justice stakeholders in addressing issues and concerns.”³⁹⁷

None of the business groups attacking the Tulane Clinic or other law schools respected these principles of dialogue and respect for the concerns of community organizations. In Louisiana, no business entity acknowledged the existence of these codes or the need for dialogue with the Clinic and its clients. Rather, businesses focused solely on their own pecuniary interests.³⁹⁸ And while business interests in Louisiana sought to strip Clinic clients of representation, they provided legal representation and financial support to those residents who favored industry projects.³⁹⁹ Of course, those opposing

396. American Forest & Paper Association, *Environmental, Health & Safety Principles*, at <http://www.afandpa.org/iinfo/Environment/principles.pdf> (last visited Feb. 3, 2000). AF&PA members account for ninety percent of industrial forest land in the United States. *Id.*

397. Business Network for Environmental Justice (BNEJ), at <http://www.nam.org/rer/bnej.html> (last visited May 26, 2000).

398. The New Orleans Chamber did make the argument that society loses when it tolerates one segment of the community, through representation from the law clinics, blocking development projects favored by business interests. *See* LeBlanc, *supra* note 170. Given the large number of opponents in Tulane Clinic cases that held official positions in the business groups, it is more likely that the groups’ true justification for going after the Clinic was that they lose when law clinic representation interferes with a member’s ability to engage in business as it sees fit. *See, e.g., supra* notes 191-98 and accompanying text (describing how chairmen of both the Chamber and Business Council were defeated in proceedings handled by Tulane Clinic students); King, *supra* note 225 (identifying a Cytec (formerly American Cyanamid) plant manager as the Chamber’s West Bank Council chairman); *Id.* (identifying Paul Pastorek, a partner in the law firm of Adams & Reese, as the Chamber’s New Orleans Council chairman and the recipient of the Joseph W. Simon Memorial Award); *Id.* (identifying Daniel Packer of Entergy corporation as a Chamber official); *Id.* (noting that Kennett Stewart, owner of Industrial Pipe, received the Chamber’s “Chairman’s Award”); *Business People*, TIMES-PICAYUNE (New Orleans, La.), Feb. 21, 1998, at F3 (identifying Kennett Stewart of Industrial Pipe, Inc., as the Chamber’s Plaquemines Council chairman). American Cyanamid, Entergy, and Industrial Pipe have been opposing parties in proceedings handled by the Tulane Clinic; Adams & Reese represented opposing parties in proceedings handled by the Clinic.

399. *See supra* text accompanying notes 153-54. While industrial interests in Louisiana were advocating that a community organization’s eligibility for law clinic representation should be determined by examining the incomes of individual members, their trade association, the

law clinics continue to have access to the best legal representation money can buy.⁴⁰⁰

The lobbying efforts of these companies reveal this same inconsistency—the rhetoric of public dialogue along with blatant efforts to silence public opposition. The chemical industry, in particular, repeatedly attempts to weaken federal and state environmental laws while preaching the Responsible Care mantra of concern for the health and safety of the public.⁴⁰¹

Business interests have the right to reject notions of social responsibility and to be guided solely by an amoral desire to maximize profits and avoid illegality. However, if, as the green codes themselves claim, business has a social responsibility and “want[s] . . . [the public] to track [them], not trust [them],”⁴⁰² then attacks on law school professors and clinics expose these principles of dialogue and respect as self-serving rhetoric. Suppression of opposing points of view is inconsistent with any theory of a socially-responsible corporation. It is, however, consistent with a one-way public relations effort and a philosophy that the concerns of some are not worthy of being heard or respected.⁴⁰³ This philosophy is especially evident

National Association of Manufacturers, successfully argued in federal court that to determine if a client is a “small entity” eligible for an award of attorneys fees under the Equal Access to Justice Act, the court should look to the net worth of the association, rather than to the net worth of its members. See *EAJA’s Net Worth, Employment Ceilings Apply to Association Itself, Not Its Members*, 67 U.S.L.W. 1286 [Summary & Analysis] (Nov. 17, 1998).

400. Clancy DuBos, *Losing a Friend*, GAMBIT WKLY. (New Orleans, La.), Mar. 9, 1999, at 19 (“LABI, not satisfied with having the best and highest-paid law firms to argue its cause, wants to crush even the most rag-tag opposition to Louisiana’s ‘open door’ policy toward polluters by restricting their access to the courts.”).

401. Karen Heller, *Ads, Advocacy, Outreach, Activists*, CHEMICAL WEEK, June 17, 1992, at 19.

402. Kennedy, *supra* note 391. Peter M. Sandman, director of the environmental communication research program at Rutgers University, is credited with coining the buzz phrase among adherents to the CMA’s Responsible Care program: Tell people “to track us, not trust us. Over the long haul, we hope to earn your trust.” Karen Heller, *Listening to—and Taking On—the Skeptics*, CHEMICAL WEEK, July 17, 1991, at 85 (quoting from a 1990 presentation by Sandman).

403. See Elizabeth Kirschner & Allison Lucas, *Community Advisory Panels Convert the Neighbors*, CHEMICAL WEEK, Dec. 8, 1993, at 29. In 1993, the CMA developed an \$8.5 million Responsible Care advertising campaign “to get the public to feel that we listen and are valuable to them.” Ronald Begley, *Selling Responsible Care to a Critical Public*, CHEMICAL WEEK, Dec. 8, 1993, at 23. The president of the Louisiana Chemical Association stated that the primary challenge for Louisiana’s chemical industry is to make sure the public is aware of the progress made by the industry to reduce pollution. See Fairley, *supra* note 392 (comments of Dan

when those concerns are inconsistent with business notions of what is best for society or may interfere with profit-maximization ends.

When business interests attack law students and professors, they demonstrate not just the “dark” and “uglier side” of the private sector,⁴⁰⁴ but also the hypocritical side. If, conversely, someone proposed a rule prohibiting the legal representation of businesses in regulatory matters, business interests would vigorously protest the unfair silencing of their voices, and rightfully so. The mantra that representation by law clinics and professors is “bad for business” does not justify denying others access to legal representation. Businesses deviate from significant aspects of their own green codes by actively working to deny access while simultaneously preaching the rhetoric of dialogue and tolerance.

1. Obtaining Compliance With Green Codes

The dilemma is how to move beyond rhetoric and achieve compliance with the codes. Self-policing of these codes by either the associations or their members is rare.⁴⁰⁵ Consequently, many critics dismiss corporate ethics codes as mere public relations smokescreens.⁴⁰⁶ Professors Sabel, Fung, and Karkkainen suggest that green codes depend on consensus, and, for that reason, sanctions by the association may threaten a member’s individual interests to the point that consensus is lost.⁴⁰⁷ They believe that greater familiarity with the codes and public accountability may overcome this problem

Borne).

404. Finn, *supra* note 244 (criticizing business for “swinging its weight behind the idea of clamping down on the law students, to the point of silencing their voice.”).

405. One empirical study suggests that “there is little relationship between codes of conduct and corporate violations, contrary to the expectation that the codes serve as an effective form of self-regulation.” M. CASH MATHEWS, *STRATEGIC INTERVENTION IN ORGANIZATIONS* 76 (1998) (surveying 212 codes from companies with annual sales in excess of \$100 million).

406. See Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 *GEO. L.J.* 1559, 1630-31 n.422 (1990). The overall effect of Responsible Care, which includes commitments to reduce pollution and accidents, in improving environmental protection was described as “difficult to measure.” Daniel J. McConville, *Responsible Care Gains Respect*, *ASAP*, Jan. 1992, at 52.

407. Charles Sabel, et al., *Beyond Backyard Environmentalism*, 24 *BOSTON REV.* 4 (Oct./Nov. 1999).

and lead to increased efforts to self-police.⁴⁰⁸ Requiring and publishing independent evaluations of green code compliance may be one way to increase accountability.⁴⁰⁹

However, unless knowledge of noncompliance with green codes leads to public pressure on members of the association to conform, there is little motivation to change, especially where there may be some economic advantage to silencing opposing points of view. For some management officials, public condemnation may motivate them to take action to ensure compliance. Where, however, a company is driven primarily by economic concerns, it must also be subject to public condemnation in the form of economic pressure. For example, a combination of economic and social pressures successfully induced American corporations operating in South Africa during apartheid to adopt and comply with the Sullivan principles.⁴¹⁰ Some commentators suggest that similar pressures could be employed to induce corporations to adopt and comply with environmental codes that go beyond the minimum standards set by environmental statutes.⁴¹¹

Successfully applying social and economic pressure will require significant efforts to publicize non-compliance and organize economic action. The repeated, yet unaddressed, criticisms of the failure of CMA members to live up to the principles of Responsible Care⁴¹² demonstrate the difficulty of organizing an effort to force

408. *Id.*

409. *See* Heller, *supra* note 401.

410. The Sullivan principles are a corporate code designed in 1977 by Reverend Sullivan, a West Virginia minister then a member of the General Motors Board of Directors, to help eliminate apartheid by obligating American corporate signatories to eliminate racial inequities within their South African operations. *See* DAVID HAUCK ET AL., TWO DECADES OF DEBATE: THE CONTROVERSY OVER U.S. COMPANIES IN SOUTH AFRICA 155-58 (1983); JONATHAN LEAPE ET AL., BUSINESS IN THE SHADOW OF APARTHEID: U.S. FIRMS IN SOUTH AFRICA 217-18 (1985).

411. *See, e.g.*, Valerie Ann Zondorak, *A New Face in Corporate Environmental Responsibility: The Valdez Principles*, 18 B. C. ENVTL. AFF. L. REV. 457, 479-84 (1991) (discussing the virtues of the Valdez principles, a voluntary code promulgated by the Coalition for Environmentally Responsible Economics in the wake of the Exxon Valdez disaster).

With CMA seeking to sell Responsible Care to Wall Street, another way to put economic pressure on offending firms would be to inform potential investors of instances of noncompliance. *See* McConville, *supra* note 406 (noting efforts of the CMA's Outreach Committee Stakeholder Task Force to inform the financial community of Responsible Care).

412. *See, e.g.*, Heller, *supra* note 401 (criticizing the lobbying practices of industry

companies to turn their green code rhetoric into reality.

C. The Legal Profession's Readiness to Ignore its Responsibility to Ensure Access to Legal Representation

Self-interest overrode long-standing fundamentals of professional conduct in the case of the members of the Louisiana bar who worked to deprive Clinic clients of representation as well as in cases of other lawyers in other states involved in attacks on law students and professors providing free legal assistance in environmental matters.⁴¹³

Forty-four states, including Louisiana and the District of Columbia, adopted some form of the ABA's Model Rules of Professional Conduct (Model Rules), and five other states base their lawyer ethic rules on both the ABA's Model Rules and the ABA's Model Code of Professional Responsibility (Model Code).⁴¹⁴ Rule 6.1 of the Model Rules establishes every lawyer's responsibility to provide pro bono publico legal services.⁴¹⁵ The preamble to the Model Rules reminds all lawyers to be mindful "of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional

representatives as not matching the spirit of Responsible Care).

413. See *supra* notes 182-203, 345-50 and accompanying text; Lumpkin, *supra* note 348 (noting that alumnus of the University of Wyoming's College of Law lead the attack on law professor's pro bono work on behalf of environmental groups); Alan Pittman, *UO Environmental Law Clinic Funding Axed*, WHAT'S HAPPENING (Eugene, Or.), Sept. 2, 1993, at 1 (reporting that two local timber industry lawyers who have been advocating de-funding the Oregon Environmental Law Clinic are pleased that the university has severed funding for the clinic); E-mail From Patrick McGinley, West Virginia University College of Law, to Robert Kuehn, Former Director, Tulane Environmental Law Clinic (April 5, 2000) (noting lawyers for coal companies lead public and behind-the-scenes attacks on law professor's pro bono activities) (on file with author); E-mail from William Luneburg, University of Pittsburgh School of Law, to Robert Kuehn, Former Director, Tulane Environmental Law Clinic (Feb. 10, 2000, 16:57:31 EST) (noting that a lawyer for the U.S. Forest Service started an attack by circulating a document identifying the role of University of Pittsburgh law professors) (on file with author); E-mail from Michael Axline, University of Oregon School of Law, to Robert Kuehn, Former Director, Tulane Environmental Law Clinic (Feb. 10, 2000, 14:13:13 PST) (explaining that lawyers for the forestry industry were heavily involved in the attack on the Oregon clinic and lead the charge in many instances) (on file with author).

414. RICHARD A. ZITRIN & CAROL M. LANGFORD, *LEGAL ETHICS IN THE PRACTICE OF LAW* 7 (1995).

415. MODEL RULES OF PROF'L CONDUCT R. 6.1 (1999). The Ethical Considerations to the Model Code express a similar responsibility to render pro bono services. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-25, 8-3 (1980).

time and civic influence on their behalf.”⁴¹⁶ The version of the Model Rules adopted by the Louisiana Supreme Court states that “a lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations.”⁴¹⁷ The Model Rules explain that every lawyer should financially support programs that provide free legal services to persons of limited means, such as law clinics, and either provide direct pro bono services or make financial contributions when actual pro bono service is not feasible.⁴¹⁸

One primary goal of law clinics is to assist the bench and bar in fulfilling its responsibility to provide “competent legal services for all persons, including those unable to pay for these services.”⁴¹⁹ Indeed, Louisiana’s law clinics, like those in other states, provide a significant portion of the pro bono legal services available in the state.⁴²⁰

Attorneys leading the attack on the Tulane Clinic never demonstrated that any Clinic client could have afforded the services of the private bar or explained how former clients of the Clinic would find representation if law students were disqualified.⁴²¹ Rather, they

416. MODEL RULES OF PROF’L CONDUCT Preamble cmt. 5. This professional responsibility does not originate in the Sixth Amendment right to representation in a criminal case and, therefore, applies even to those seeking legal assistance on civil matters. Therefore, efforts of an attorney to deny legal assistance to certain unrepresented clients cannot be justified on the grounds that there is no constitutional right to free legal representation in civil cases. *See Morning Edition, supra* note 184 and accompanying text (quoting Governor Foster’s special counsel as stating that he supports new law clinic restrictions because “individuals don’t have a constitutional right to have free legal representation in civil cases”).

417. LA. RULES OF PROF’L CONDUCT R. 6.1 (1999). A recent amendment by the ABA to Model Rule 6.1 sets a goal for every lawyer of fifty hours of pro bono publico legal services per year and identifies activities on which a substantial majority of the fifty hours should be spent. MODEL RULES OF PROF’L CONDUCT R. 6.1 & cmt. 5 (1999).

418. MODEL RULES OF PROF’L CONDUCT R. 6.1 & cmt. 10.

419. LA. SUP. CT., RULE XX sec. 1 (as amended Mar. 22, 1999). The other stated goal of law clinics in Louisiana is “to provide clinical instruction in trial work of varying kinds.” *Id.*

420. *See supra* note 11.

421. The attorney who chaired Chief Justice Calogero’s re-election campaign expressed no concern that former Tulane Clinic clients were now going unrepresented but criticized opponents of the new restrictions for creating negative publicity in the national media regarding the court’s action. *Eyewitness News: Special Report, supra* note 315 (comments of state representative Mitch Landrieu).

Addressing the responsibility of members of the bar to raise funds and handle matters that can no longer be handled because of new funding limitations on a legal services office, the ABA noted: “If these traditional principles of our profession [to ensure the availability of legal

suggested that Louisiana clinics should cease representing individuals and community organizations that cannot afford attorneys and instead begin representing businesses.⁴²² Surely, none of the lawyers attacking the Clinic, or their law firms, stepped forward to volunteer their time or financial resources to represent the former clients of the clinics.⁴²³ Similarly, those lawyers leading or supporting attacks in other states never proposed or provided an alternative source of legal representation for the clients aided by the law schools.⁴²⁴

services for those unable to pay] are to be accepted as more than hollow rhetoric, lawyers in every jurisdiction acting through the organized bar should take all necessary actions to prevent the abandonment of indigent clients." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 347 (1981).

422. See *supra* note 259 and accompanying text (noting that attorneys LeBlanc and Abbott requested a requirement that law clinics represent for-profit businesses).

423. These firms' commitment to providing pro bono legal services is questionable. While the law firm of the chairman of the Chamber boasts of its community involvement, its public service program "is not related to business or the law." See Adams & Reese L.L.P., *Community Service*, at <http://www.arlaw.com/html/communityservice-main.html> (last visited Nov. 6, 1999); Adams & Reese, L.L.P., National Association of Law Placement Form (n.d.) (indicating that Adams & Reese's pro bono activities are "community service" to "United Way; Covenant House; American Cancer Society; Points of Light Foundation, etc.") (on file with author). Inexplicably, the only two firms in Louisiana that participate in the ABA's Law Firm Pro Bono Project, whose principles commit the firm to encourage and support efforts to provide access to the justice system for persons otherwise unable to afford it, had attorneys who supported denying legal representation to the clients of the Tulane Clinic. See The Law Firm Pro Bono Project, *Member List 1999-2000*, at <http://www.probonoinst.org/members/> (last visited Feb. 10, 2000) (identifying New Orleans law firms of Adams & Reese and Jones, Walker, Waechter, Poitevent, Carrere & Denegre as members); PROFESSIONALISM COMMITTEE, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, AMERICAN BAR ASSOCIATION, TEACHING AND LEARNING PROFESSIONALISM app. D (1996) (reprinting "Law Firm Pro Bono Challenge Statement of Principles"); *supra* notes 195, 196 and accompanying text (identifying activities of members of Adams & Reese and Jones, Walker in attack on Tulane).

424. See electronic mail from Patrick McGinley, *supra* note 389 (critics of University of West Virginia law professor's pro bono activities knew that, without the law professors' free legal assistance, the clients could not have found other qualified counsel); E-mail from William Luneburg, *supra* note 411 (noting that no one who questioned the propriety of University of Pittsburgh law professors and students providing free legal assistance identified any alternative source of legal representation for the clients); E-mail from Michael Axline to Robert Kuehn, *supra* note 413; E-mail from Mark S. Squillace, University of Wyoming College of Law, to Robert Kuehn, Former Director, Tulane Environmental Law Clinic (Feb. 11, 2000) (stating that no discussion of how the client groups might find other legal assistance took place during the attack on Wyoming law professor's pro bono environmental activities) (on file with author).

Attorneys attacking law professors at publicly-funded universities have sought to justify their actions on the ground that state money should not be used to support political advocacy or oppose economic development activities. See, e.g., Katherine Bishop, *Oregon Law Clinic Battles the Timber Industry*, N.Y. TIMES, Aug. 5, 1988, at B5; Lumpkin, *supra* note 348.

In seeking to ration justice to business interests and others with means to afford private attorneys,⁴²⁵ the lawyers attacking law school clinics and professors ignored not only their responsibility to provide alternative means of legal representation, but also their duty not to deny legal representation to parties with controversial causes. Comment Three to Model Rule 1.2 states that “legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval.”⁴²⁶ Some lawyer oaths, given upon admission to the bar, similarly state: “I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person’s cause for lucre or malice.”⁴²⁷

A number of ABA opinions reinforce the responsibility not to deny legal services to persons advancing unpopular causes. ABA Formal Opinion 324 holds that an attorney on a legal aid society’s board of directors “is under a similar obligation not to reject certain types of clients or particular kinds of cases merely because of their controversial nature, anticipated adverse community reaction, or because of a desire to avoid alignment against public officials, government agencies, or influential members of the community.”⁴²⁸ A later ethics opinion, addressing threats to cut financial assistance to

425. See Lash, *supra* note 4, at 501 & n.39 (quoting from a February 16, 1951 address by Judge Learned Hand before the Legal Aid Society of New York: “Thou shalt not ration justice.”).

426. MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 3 (1999). See also MODEL RULES OF PROFESSIONAL CONDUCT R. 6.2 cmt. 1 (“An individual lawyer fulfills this [pro bono] responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients.”). Although the comments to the Model Rules have not been explicitly adopted in Louisiana, the Louisiana Supreme Court relies on the comments in interpreting and applying the Louisiana Rules of Professional Conduct. See, e.g., *Farrington v. Law Firm of Sessions, Fishman*, 687 So. 2d 997, 999 (La. 1997); see also *Schmidt v. Gregorio*, 705 So. 2d 742, 743 (La. App. Ct. 1993) (relying on ABA ethical opinion interpreting Model Rule of Professional Conduct).

The Model Code similarly directs that a person should not be denied representation because the client or the cause is unpopular or community reaction is adverse, but couches that obligation in terms of the lawyer’s duty not to decline such unattractive representation. See MODEL CODE OF PROF’L RESPONSIBILITY EC 2-26, 2-27, 2-28 (1980).

427. See, e.g., Louisiana State Bar Association, *The Lawyers Oath*, at http://www.lsbao.org/newsite/html/lawyers_oath.html (last visited Feb. 18, 2000); MI. STATE BAR R. 15, § 3 (Procedure for Admission; Oath of Office) (1999). In an unexplained yet revealing act, the Louisiana Supreme Court struck this sentence from the new law student practice rule oath. See *supra* note 236 and accompanying text.

428. ABA Comm. on Prof’l Ethics and Prof’l Responsibility, Formal Op. 324 (1970).

a law school clinic, extended the obligation to encourage the acceptance of controversial clients and cases to attorneys involved in the oversight of law school clinics.⁴²⁹ The ABA's Committee on Ethics and Professional Responsibility clarified that this duty applies to all attorneys: "We stress that all lawyers should use their best efforts to avoid the imposition of any unreasonable and unjustified restraints upon the rendition of legal services by legal services offices for the benefit of the indigent and should seek to remove such restraints where they exist."⁴³⁰

Again, the attorneys attacking the the availability of law school legal assistance ignored these ethical considerations and attempted to restrict the availability of legal services. The attorneys' efforts were motivated primarily by the controversial nature of the clients and disagreement with their causes. For example, the attorney leading the Chamber sought to justify the organization's actions by arguing that the projects that Tulane Clinic clients sought to block were beneficial to the community and should not be opposed by anyone.⁴³¹ In a similar situation, the attorney who organized the effort to prohibit a University of Wyoming law professor from providing pro bono legal services complained of the radical, economically-damaging positions taken by the law professor's clients.⁴³² The attorneys heading up the Chamber and the Business Council argued that representation of community organizations that might object to certain large-scale development projects amounted to political activism and that clinics should be prohibited from handling such "politically motivated cases."⁴³³

429. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (1972).

430. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974). *See also Professional Responsibility: Report of the Joint Conference*, 44 A.P.A. 1159, 1217 (1958) (reporting that "No member of the Bar should indulge in public criticism of another lawyer because he has undertaken the representation of causes in general disfavor. Every member of the profession should, on the contrary, do what [they] can to promote a public understanding of the service rendered by the advocate . . .").

431. *See* LeBlanc, *supra* note 170.

432. Drake, *supra* note 348; Lumpkin, *supra* note 348.

433. *See* Supplemental Comments on Proposed Amendments to Law Student Practice Rule, *supra* note 275 (including signature of attorneys LeBlanc and Abbott). The attorney chairman of The Chamber argued that certain types of law clinics, "particularly in the area of domestic relations, financial problems, criminal matters, and others," pursue "legitimate goals" but that others, such as environmental law clinics, are "social programs and can even have

Representation of community groups is not “radical”—Louisiana is the only state that seeks to prohibit law schools from representing such entities. Nor is representation of community groups “political”—business associations are groups that have cadres of lawyers to represent them on environmental matters.⁴³⁴ When community groups sue for compliance with environmental laws, it is no more political than when businesses or business associations sue to avoid environmental restrictions.⁴³⁵ Business’ attacks on access to legal representation are simply a case of some lawyers believing that certain clients and their causes do not belong on the legal system’s playing field, to borrow the business interests’ own metaphor.⁴³⁶

Attorneys in Louisiana sought to restrict not just the clients and cases that law clinics may volunteer to assist, but also their methods of lawyering. They argued that Tulane Clinic attorneys were overly zealous and had “gone too far” in raising the issue of environmental discrimination.⁴³⁷ The Chief Justice of the Louisiana Supreme Court contended that certain types of legal advocacy were “beyond the parameters of representing indigent people.”⁴³⁸ Again, these comments do not argue for a level playing field—they seek to restrict

political agendas.” Sam A. LeBlanc, III, *Debate Over the Law Clinic Practice Rule: Redux*, 74 TUL. L. REV. 219, 234 (1999).

By suggesting that law clinic clients are not capable of generating their own positions on environmental issues, these attorneys not only patronize those with less economic and political power, but also insinuate that clinic supervising attorneys are breaching their fiduciary duty to the client. See MODEL RULES OF PROF’L CONDUCT R. 1.2(a) & cmt. 1 (1999) (mandating that the client has the ultimate authority to determine the purposes to be served by legal representation); MODEL CODE OF PROF’L RESPONSIBILITY EC 7-7 (1980). By pleading that potential clients be kept ignorant of their legal rights and remedies, the attorneys also ignore the U.S. Supreme Court’s observation that “we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.” *Bates v. State Bar*, 433 U.S. 350, 376 (1977).

434. I am indebted to Professor Oliver Houck for this observation. See also Letter from Luz Molina, Acting Director, Loyola Law Clinic, and Jane Johnson, Director, Tulane Civil Law Clinic, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Dec. 15, 1998) (on file with author).

435. *Id.*

436. As one observer noted: “This is the equivalent of selectively disbaring attorneys who have won on controversial matters.” Frank H. Wu, *A Lesson in Power Politics*, NAT’LLJ., May 3, 1999, at A21.

437. See LeBlanc, *supra* note 170 and accompanying text; Coyle, *supra* note 109 and accompanying text.

438. Varney, *supra* note 3 and accompanying text.

how law school professors and students advocate so that their clients receive second-class lawyering.⁴³⁹

Limiting the advocacy that certain clients and causes may receive is contrary to the rules of professional responsibility. Ethics rules mandate the duty of all attorneys “to use legal procedure for the fullest benefit of the client’s cause” and to zealously assert the client’s position under the rules of the adversary system.⁴⁴⁰

Moreover, the assertion that certain people should receive different, and less, advocacy is repugnant to notions of fair play and due process. As Supreme Court Justice Lewis Powell argued, “[i]t is fundamental that justice should be the same, in substance and availability, without regard to economic status.”⁴⁴¹ There is nothing unique about law clinics that makes certain types of advocacy inappropriate; once a clinic agrees to represent the client, clinic attorneys are ethically bound, like all lawyers, to use the legal system to their client’s fullest advantage.

Attempts by attorneys to get university officials to intervene against law school professors and students are particularly disturbing.⁴⁴² Model Rule 5.4(c) provides that “[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such advice.”⁴⁴³ Efforts of an attorney to get law professors to provide something less than diligent,

439. See *Interview with Archibald Cox, Professor, Harvard Law School*, U.S. NEWS & WORLD REP., Aug. 3, 1981, at 33 (quoting Cox as arguing that to ensure persons represented by legal service attorneys do not get second-class coverage, legal services attorneys must be able to do all the things that privately-retained attorneys do for their clients). See also *Valquez v. Legal Services Corporation*, 164 F.3d 757, 769-72 (2d Cir. 1999) (holding restrictions on Legal Services Corporation lawyer’s ability to amend or challenge existing laws unconstitutional), *cert. granted*, 120 S.Ct. 1553 (2000).

440. MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt.1 (1999); *Id.*, at Preamble cmt. 2 (1999). The Model Code reads: “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.” MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1980).

441. M. Catherine Richardson, *Legal Services for the Poor Should Be Maintained*, N.Y.L.J., May 1, 1997, at S1 & n.3 (reprinting quote by Justice Powell in Francis J. Larkin, *The Legal Services Corporation Must Be Saved*, JUDGES J., Winter 1995, at 1).

442. See *supra* notes 183-84 and accompanying text (noting efforts of Governor Foster’s special counsel to get Tulane officials to intervene).

443. MODEL RULES OF PROF’L CONDUCT R. 5.4(c) (1999). The Model Code contains an almost identical provision. MODEL CODE OF PROF’L RESPONSIBILITY DR 5-107(B) (1980) (“Avoiding Influence by Others Than the Client”).

zealous representation can be viewed as attempts to induce other attorneys to violate ethical rules and commit professional misconduct.⁴⁴⁴

The blacklisting of clinic students in hiring practices⁴⁴⁵ also raises significant ethical concerns. While the Model Rules prohibit a lawyer from entering into an agreement that restricts another lawyer's right to practice law, the rules do not explicitly address discriminatory hiring practices.⁴⁴⁶ It is professional misconduct to "engage in conduct that is prejudicial to the administration of justice."⁴⁴⁷ However, this prohibition refers to bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and only if that bias or prejudice was manifested in the course of representing a client.⁴⁴⁸

Although no rule might explicitly prohibit blacklisting, the comments to the Model Rules state that "representing a client does not constitute approval of the client's views or activities."⁴⁴⁹ Additionally, there are ethical provisions, noted above, establishing the responsibilities of an attorney to ensure that legal representation is available to those whose cause is controversial or unpopular. Moreover, the emerging professionalism movement and its emphasis on civility and the accessibility of the legal system to all persons dictates that no law student or law school should be punished simply for providing legal assistance to an unpopular client or cause.

Attacks on the availability of legal representation cannot be justified as simply a case of following the directives of an elected official, carrying out the decisions of a business association, or doing the bidding of the attorney's client. These attacks have not occurred in the attorneys' capacity as paid advocates for their clients' interests,

444. See MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (1999) (stating it is professional misconduct for a lawyer to knowingly assist or induce another to violate or attempt to violate the Rules of Professional Conduct).

445. See *supra* text accompanying notes 199-202. If the hiring boycott of Tulane students by chemical companies were led by employees who are attorneys, then those discriminatory hiring practices would raise the same ethical issues for those attorneys. See *supra* notes 136-39 and accompanying text.

446. MODEL RULES OF PROF'L CONDUCT R. 5.6 (1999).

447. MODEL RULES OF PROF'L CONDUCT R. 8.4(d).

448. MODEL RULES OF PROF'L CONDUCT R. 8.4(a) cmt. 2.

449. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 3.

but outside the law firm employment context. In the disbarment proceedings against former Vice-President Spiro T. Agnew, the court rejected the argument that the ethical rules do not apply to an attorney when working for an elected official or when engaged in some activity other than the practice of law:

The professional ethical obligations of an attorney, as long as he remains a member of the bar, are not affected by a decision to pursue his livelihood by practicing law, entering the business world, becoming a public servant, or embarking upon any other endeavor. . . . [A] lawyer who enters public life does not leave behind the canons of legal ethics.⁴⁵⁰

Furthermore, Model Rules 6.3 and 6.4, and similar provisions in the Model Code, clarify that a lawyer may serve as a director, officer, or member of a service organization, including legal services or law reform organizations, even if that organization may serve persons or advance interests adverse to the lawyer's client.⁴⁵¹ Thus, whatever moral insulation is afforded when the attorney acts pursuant to the client's direction is generally unavailable when the attorney is acting outside the context of the attorney-client relationship. Consistent with other ethical obligations to clients who may want a law clinic or law professor silenced, an attorney may support, or at a minimum remain neutral toward, the legal service efforts of a law school. An attorney cannot justify attacks as a means to aid clients who have not retained the attorney for the purpose of attacking the law school program.

This critique is not offered to single out certain attorneys for criticism. Rather it is offered to show how easily the public service provisions of the rules of professional responsibility are ignored when attorneys perceive them to be contrary to their own, or their

450. *Md. State Bar Ass'n Inc. v. Agnew*, 318 A.2d 811, 815 (Md. Ct. App. 1974). An ethical violation by a lawyer who also is a public official "makes his offense a more serious one than a singular violation of the disciplinary rules by an individual attorney." *Office of Disciplinary Counsel v. Eilberg*, 441 A.2d 1193, 1197 (Pa. 1982).

451. MODEL RULES OF PROF'L CONDUCT R. 6.4, 6.5 (1999); MODEL CODE OF PROF'L RESPONSIBILITY Canon 8, EC 8-1 (1980). The Model Rules' endorsement of uncompensated public service notwithstanding the client's interests is tempered by the comment that "[i]n determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7 [conflicts of interest]." MODEL RULES OF PROF'L CONDUCT R. 6.4 cmt. 1 (1999).

client's, interests. Attorneys seeking to deny pro bono legal representation by law schools obviously failed to consider whether their efforts are inconsistent with ethical responsibilities.⁴⁵²

The apparent ease with which attorneys ethically disengage from one of the defining characteristics of the legal profession is troubling. How can one explain prominent attorneys leading attacks on other attorneys seeking to ensure that legal representation is available to all citizens? How is it possible that at an Inns of Court meeting on professionalism an attorney proclaims that firms should discriminate in hiring decisions against students who participate in clinic programs?

One answer to these questions is the intense economic pressures attorneys encounter and the win-at-all-costs attitude that results.⁴⁵³ By working to deny legal assistance to opposing clients and causes, lawyers, although not retained to make such attacks, may perceive that they are increasing their economic rewards through future business from pleased clients or easier wins in future cases.⁴⁵⁴

452. See, e.g., LeBlanc, *supra* note 170, at 234 (arguing that concern over new law clinic restrictions are much ado about nothing and contending that new restrictions will achieve "justice for all under law," but failing to propose any alternative source of legal assistance for those now unable to obtain the assistance of the state's law clinics); *Morning Edition*, *supra* note 184 and accompanying text (quoting Governor Foster's special counsel defending the denial of legal assistance by arguing that "individuals don't have a constitutional right to have free legal assistance in civil cases").

453. See generally Orrin K. Ames, III, *Duty to the Client: The Need for Perspective and Balance*, FLA. BAR NEWS, Oct. 1, 1999, at 24; *Professionalism in Practice*, ABA J., August 1998, at 48, 52-56 (reprinting a panel discussion on economic pressures that contribute to unprofessional or unethical behavior); Terry Carter, "Inns of Court" Movement Taming "Rambo" Lawyers, NAT'L L.J., June 5, 1989, at 8 (stating that the emphasis on the bottom line has skewed some perceptions of the ethical lines not to be crossed).

454. Norman Spaulding has noted that "paying clients (in many instances without even speaking a word on the subject) have a great deal of authority to determine which public interest causes and pro bono clients [of firms] are legitimate. Paying clients thus help define the line between popular and unpopular clients of limited means." Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1420 (1998). Professor Laurence Tribe observed that "[t]oo many lawyers use their poorer and less powerful clients, and let themselves get used by their richer and more powerful clients." Michael S. Serrill, *A Prophet's Unlikely Defender*, TIME, Jan. 23, 1984, at 34 (quoting from comment by Tribe about the role lawyers play in American society).

Regardless of an influential client's perceived wishes, an attorney's effort to delay or deny access to legal representation motivated by a desire for financial gain is contrary to the lawyer's oath to never "delay any person's cause for lucre or malice." See Louisiana Bar Association, *supra* note 427 and accompanying text.

Another explanation may be the failure of ethical rules to condemn clearly behavior that is intended to deny legal representation to others. By not making this responsibility explicit, a lawyer may rationalize that this obligation is less important than the explicit ethical rules, such as the obligation to zealously represent the client.⁴⁵⁵

1. Reinforcing the Duty of Non-Interference With Legal Representation of Unpopular Causes

The lack of respect for professional obligations demonstrates the need for a number of reforms. First, the AALS should explicitly prohibit law firms from discriminating against law schools and clinic students in their hiring practices. The AALS already bars a legal employer from recruiting at law schools if the firm discriminates on the basis of race, color, religion, national origin, sex, age, disability, or sexual orientation.⁴⁵⁶ A similar rule is needed to prohibit employers from discriminating on the basis of a law student's participation in a law school course or program or on the basis of a law school's offering of a particular course or program.⁴⁵⁷

455. See generally David Fagelson, *Rights and Duties: The Ethical Obligations to Serve the Poor*, 17 LAW & INEQ. 171, 172 (1999) (arguing that failure to make explicit the ethical principles that impose an obligation to serve the poor has led to skepticism about the existence of such an obligation).

456. AALS, EXECUTIVE COMM. REG. 6.19 (1999) (stating that each member school shall, as a condition of obtaining any form of placement assistance, require employers to provide an assurance of the employer's willingness to observe the principles of equal opportunity stated in Bylaw 6-4(b)). Bylaw 6-4(b) reads, in part: "A member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, handicap or disability, or sexual orientation." AMERICAN ASSOCIATION OF LAW SCHOOLS, BYLAW SEC. 6-4(b) (1999).

457. Employers have the right to interview and hire students based on what class or program they have participated in or, conversely, to exclude students based on what class or program they have not participated in where such decisions are related to bona fide qualifications for the job. However, excluding students from interviews or employment based on what class or program they have participated in is not linked to bona fide qualifications for employment. E-mail from Peter Joy, Professor, Washington University School of Law, to Antonette Lopez, Professor, University of New Mexico School of Law (May 3, 2000) (on file with author) (including recommendation from the Political Interference Group of the AALS Section on Clinical Legal Education that AALS adopt a rule prohibiting prospective employers from discriminating against students on the grounds of their participation in law school courses or programs).

Further, to ensure that attorneys do not interfere with legal representation of persons or organizations who lack funds or whose cause is unpopular, ethics rules should adopt an explicit responsibility not to interfere. An attorney could interpret the present rule to mean that an attorney cannot reject a person or cause who seeks that particular attorney's assistance.⁴⁵⁸ While the explicit responsibility to ensure that those unable to afford an attorney are represented implies an equal duty not to interfere with such representation, the ethical rules are silent on this countervailing obligation of non-interference.⁴⁵⁹

The rules of professional responsibility need to state that a lawyer's duty not to deny legal services based on a person's views or activities also means that an attorney should not seek to interfere with the efforts of other attorneys to provide representation to these persons.⁴⁶⁰ Moreover, this duty should be adopted as a mandatory rule, not simply as an interpretory comment.⁴⁶¹ Absent the authority and prominence of a rule, an attorney could claim ignorance or read

458. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 3 (1999); MODEL CODE OF PROF'L RESPONSIBILITY Canon 2, EC 2-26, 2-27, 2-28 (1980). *But see* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974) (stating "all lawyers" should seek to avoid imposing restraints on the availability of legal services for indigents and should seek to remove such restraints where they exist).

459. See MODEL RULES OF PROF'L CONDUCT R. 6.1 (1999); MODEL CODE OF PROF'L RESPONSIBILITY Canon 2, EC 2-25, 8-3 (1980).

460. Surprisingly, very little has been written on the notion that attorneys have a duty not to interfere with the efforts of other attorneys to provide legal services to those unable to pay or whose cause is unpopular. Timothy Terrell and James Wildman argue that a lawyer's responsibility to assist and enable those in the profession who desire to distribute legal services to those unable to pay means that "lawyers at the very least should not interfere with the efforts of other lawyers who seek to provide this wide distribution." Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism,"* 41 EMORY L.J. 403, 430-31 (1992). However, they rely on concepts of professionalism, not rules of professional conduct, as the basis for this responsibility not to interfere with the pro bono efforts of others. See E. Wayne Thode, *The Ethical Standard for the Advocate*, 34 TEXAS L. REV. 575, 592, 596-97 (1961) (proposing the following oath: "I recognize that it is sometimes difficult for clients with unpopular causes to obtain proper legal representation. I will do all that I can to assure that the client with the unpopular cause is properly represented and that the lawyer representing such a client receives credit from and support of the bar for handling such a matter.").

461. The text of the rules of professional responsibility are authoritative and create duties, while the comments are intended as guides to interpreting the rules. MODEL RULES OF PROF'L CONDUCT Preamble cmts. 13, 21 (1999). Many states that follow the Model Rules have not explicitly adopted the comments, although they do use the comments to interpret and apply their state rules of professional responsibility. See *supra* note 426.

the duty as less important than the explicit provisions in the ethical rules.⁴⁶² Without a strong statement that interference with efforts to ensure that all persons have access to legal representation will not be tolerated, attacks by attorneys on law school professors and clinics will continue.

D. Judicial Integrity and Independence Lost

To observers, the conduct of the Louisiana Supreme Court regarding the Tulane Clinic was about politics—the politics of a popular governor determined to get his way or to punish those who interfered; the politics of business organizations willing to use their influence to elect judges that would vote favorably for their interests; and the politics of judges worried about being reelected.⁴⁶³ Clearly, what the conduct of the court did not reflect was strict adherence to ideals of appropriate judicial conduct, an independent judiciary, or

462. Even if this responsibility of non-interference were made explicit, there is still the problem that it is prefaced with the language that legal representation “should not,” rather than “shall not,” be denied. Consequently, noncompliance would not give rise to a disciplinary action. See MODEL RULES OF PROF'L CONDUCT Preamble cmt. 13 (1999) (casting imperatives in “shall not” defines proper conduct for purposes of professional discipline; others, such as “may,” are permissive and define areas in which the lawyer has professional discretion); *Id.* at R. 6.1 cmt. 11 (explaining that the responsibility to render pro bono publico service is not intended to be enforced through disciplinary process).

Potential First Amendment problems may argue against a mandatory prohibition on efforts to restrict the availability of legal services to those unable to pay or whose cause is controversial. See generally Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 *FORDHAM L. REV.* 569, 587 (1998) (“When speaking in clearly public capacities . . . lawyers receive relatively robust free speech protection . . . [W]hen speaking in capacities that might adversely implicate the administration of justice or perception of administration of justice by the government, the Court has regarded the government as freer to place conditions on its sponsorship”).

463. See, e.g., *Frontline: Justice for Sale* (PBS television broadcast, Nov. 23, 1999) (on file with author) (reporting that the actions of the Chief Justice were influenced by a desire to secure business support for a reelection campaign); Gill, *supra* note 279 (“[I]t is an impossible chore to put an acceptable gloss on rules that sacrifice the public interest, and the noblest goals of the legal profession, to sordid legal expediency. The real reason for the new rules . . . is obvious to everyone. The court has caved in to demands from the captions of industry.”); DuBos, *supra* note 280 (“Bowing to pressure from well-heeled business interests that are more interested in economics than the environment . . .”); Siobhan Roth, *State Ruling Chills Legal Clinicians*, *LEGAL TIMES*, Sept. 7, 1998, at S39 (reporting that the Tulane Law School dean notes that a request for change to the student practice rule arose in an election year in which two justices were up for reelection and in which the influence of the business groups over the justices had grown).

equal justice for all.

Ethics rules expressly require that judicial decision making exclude political concerns. The Model Code of Judicial Conduct, as well as the Louisiana judicial code, state that “a judge shall uphold the integrity and independence of the judiciary” and “shall avoid impropriety and the appearance of impropriety in all activities.”⁴⁶⁴ The codes require a judge to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” and prohibit a judge from allowing “political or other relationships to influence judicial conduct or judgment.”⁴⁶⁵ An appearance of impropriety results when “the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”⁴⁶⁶

The Louisiana Supreme Court’s investigation of the Tulane Clinic appeared improper and lacked integrity, independence, and impartiality. The Chief Justice reportedly admitted that politics on the court influenced the court’s decision.⁴⁶⁷ The federal judge reviewing the constitutionality of the new restrictions condoned the court’s restrictions and stated that political decisions by Louisiana’s elected judiciary are to be expected.⁴⁶⁸ As set forth in Part II, the manner in which the court conducted its investigation of the Tulane Clinic furthered the appearance of impropriety. Examples abound: refusing requests to provide an opportunity for the parties most affected by the new restrictions to be heard yet inviting comments from business interests; denying requests of the law school deans, bar association and state attorney general for public hearings and a stay of the new

464. MODEL CODE OF JUDICIAL CONDUCT Canon 1, 2 (1999); LA. CODE OF JUDICIAL CONDUCT Canon 1, 2 (1999).

465. MODEL CODE OF JUDICIAL CONDUCT Canon 2A, 2B (1999); LA. CODE OF JUDICIAL CONDUCT Canon 2A, 2B (1997); *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 3B (1997) (mandating that in the performance of administrative responsibilities, judges shall discharge their responsibilities without bias or prejudice); LA. CODE OF JUDICIAL CONDUCT Canon 3B (1999) (same).

466. MODEL CODE OF JUDICIAL CONDUCT Canon 2A (1997).

467. *See supra* notes 265-68 and accompanying text. In public, the Chief Justice denied that politics had anything to do with the court’s law clinic decision. Schleifstein, *supra* note 93 (newspaper interview with Chief Justice Calogero).

468. *See* S. Christian Leadership Conference, 61 F. Supp. at 507.

restrictions; discouraging participation by the bar association and other lawyer groups in the Clinic review; failing to abide by its promise that the law schools would be notified and allowed an opportunity to comment in advance of any change to the student practice rule; assigning an official from the business groups to investigate the law clinics and serve as the court's chief spokesperson on the new restrictions; refusing to require business groups to support their allegations with facts; ignoring numerous requests from the law schools and the affected community organizations to discuss the new restrictions; and refusing to provide the public and the law schools access to the information on which the new restrictions were based.

Any one of these actions would support a claim that the court acted in a manner that created the appearance of impropriety and lack of judicial independence.⁴⁶⁹ Collectively, however, they suggest that the court abandoned any effort to ensure that the review process was fair, impartial, and competent. When, in the midst of the court's review, the business groups dropped the pretext of concern over the operation of all of the state's law clinics and focused their complaints and requests for restrictions exclusively on the Tulane Clinic, the AALS argued that this became an economically and politically-motivated effort to restrict a specific clinic and that the business groups claims of unethical or illegal activity should be reviewed by the appropriate state ethics committee and not by the court.⁴⁷⁰ Even though the court later acknowledged that it was investigating claims of "unethical" conduct and even though one justice subsequently maintained that the Clinic violated the existing student practice rule, the court did not accede to the request for appropriate disciplinary proceeding safeguards.⁴⁷¹ If it had agreed to the request for

469. Professor Graham Strong argues that the court's cozy relationship with business interests "is, in itself, an ethical concern for the court because they have the responsibility to make the public feel . . . they are getting an impartial judiciary." Daugherty, *supra* note 224, at 9. Chief Judge Joseph F. Murphy, Jr. of the Maryland Court of Special Appeals observed that, "[t]he criticism that this is judicial meddling in a legislative function is not totally without merit." Nancy Kercheval, *Louisiana Style Crackdown on Legal Clinics Not Expected at Maryland's Law Schools*, DAILY REC. (Baltimore, Md.), Nov. 28, 1998, at 1C.

470. Letter from Carl C. Monk, Executive Director, Association of American Law Schools, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Apr. 3, 1998) (on file with author).

471. See Kohl, *supra* note 250 (indicating from the notes of a private meeting with Justices

safeguards, the court would have been required to provide the law schools with the due process rights afforded all attorneys who are alleged to have violated the rules of professional conduct.⁴⁷²

In addition to the code of judicial conduct, judges are also subject to the rules of professional responsibility, including the duties to provide pro bono service and not to deny legal assistance to those unable to afford legal services or with controversial or unpopular causes. Thus, the same concerns about the actions by lawyers in the attack on the Tulane Clinic apply equally to judges. Like the attorneys attacking the Tulane Clinic, at no time did the justices of the Louisiana Supreme Court express concern that the Clinic's clients would now be without legal representation, with the exception of the one justice who dissented from the new clinic restrictions. Moreover, the court was not troubled that the attack was motivated by disagreement with the economic and political positions of clinic clients. The court sought to justify its failure to address the lack of necessary legal services to lower-income individuals and organizations by asserting that access to legal representation is a "social program" that the court is not charged with instituting.⁴⁷³ This justification may explain why the court struck the provision from the student attorney oath that pledged to never reject the cause of the defenseless or oppressed.⁴⁷⁴

Asserting that a state supreme court lacks the authority to address the unavailability of legal services abdicates the court's responsibility to ensure that lawyers practicing under its supervision respect the rules of professional conduct. While a court may hesitate to institute mandatory pro bono reporting or service programs or to determine

Kimball and Lemmon that the court was reviewing charges against Tulane Clinic which, "if true, would be 'unethical'"; Resolution Amending Rule XX, at 1, 2 (La. Mar. 22, 1999) (Lemmon, J., concurring in part and dissenting in part) *reprinted in* 74 TUL. L. REV. 285, 292-93 (1999). The Louisiana Rules for Lawyer Disciplinary Enforcement provide that it is the disciplinary counsel, not the supreme court, who shall initially evaluate and investigate allegations of lawyer misconduct. LA. SUP. CT. R. XIX sec. 11(F) (2000).

472. See LA. SUP. CT. R. XIX secs. 11, 18 (2000) (guaranteeing that if an action on a complaint of misconduct results in other than dismissal by disciplinary counsel, respondent shall be afforded the procedural protections set forth in the code of civil procedure and code of evidence).

473. Resolution Amending Rule XX, at 2 (La. Mar. 22, 1999) (Calogero, C.J.), *reprinted in* 74 TUL. L. REV. 285, 288 (1999).

474. See *supra* note 236 and accompanying text.

ways to increase the availability of law clinic services to needy citizens, it cannot contend that it lacks the authority to address the problem. After all, the Louisiana Supreme Court claimed to have “exclusive and plenary power to define and regulate all facets of the practice of law, including . . . the professional responsibility and conduct of lawyers.”⁴⁷⁵ Whatever the true motivation for refusing to address the legal needs of the Clinics’ former clients, by all appearances the Louisiana Supreme Court was simply looking for a way to address the business organizations’ requests that the playing field be “evened” by running off Clinic lawyers and their clients.⁴⁷⁶

The absence of any rule governing how the court adopts or amends court rules of practice may also explain the apparent ease with which the Louisiana Supreme Court denied procedural rights to the law clinics and the public. The applicability of legislated rule-

475. Memorandum of the Louisiana Supreme Court in Support of Its Motion to Dismiss This Action for Failure to State a Claim Upon Which Relief Can Be Granted and For Lack of Standing at 11, *S. Christian Leadership Conference v. Supreme Court of La.*, 61 F. Supp. 2d 499 (E.D. La. 1999) (No. 99-1205).

On a prior occasion, the Louisiana Supreme Court argued that nothing in its authority can or should be used to deprive a person who cannot afford an attorney from gaining access to the court. *La. State Bar Ass’n v. Edwins*, 329 So. 2d 437, 446 (La. 1976) (“We do not believe any bar disciplinary rule can or should contemplate depriving poor people from access to the court so as effectively to assert their claim.”). The court further noted that a court-adopted rule that places an unreasonable burden upon an individual’s right to enforce claims allowed by law “might be deemed violative of the access to the courts guaranteed to all our people by our state constitution.” *Id.* (citing LA. CONST. art. 1, § 22).

476. See *supra* notes 266-67 and accompanying text (reporting that Chief Justice Calogero justifies restrictions as effort to even-up the playing field by preventing Tulane Clinic from outgunning the other side). This same justification for the special restrictions on clinic clients is reflected in the Chief Justice’s opinion: “[N]or may the Court take executive or legislative positions either in favor of or against legal partisans.” Resolution Amending Rule XX, at 2 (La. Mar. 22, 1999) (Calogero, C.J.), reprinted in 74 TUL. L. REV. 285, 288 (1999).

Reflecting a view different from the Louisiana Supreme Court, the New Jersey Supreme Court has recognized the importance of ensuring that public interest advocates are heard: “The practice of public interest law is a much needed catalyst in our legal system. It helps to create a balance of economic and social interests and to assure that all interests have a fair chance to be heard with the help of an attorney.” *Township of Mt. Laurel v. Pub. Advocate*, 416 A.2d 886, 893 (N.J. 1980). Law professor and former Watergate Special Prosecutor Archibald Cox also proposes to deal with conflicting interests without restricting one side’s access to legal representation: “provide counsel for both, and the courts decide who’s right.” See *Interview With Archibald Cox*, *supra* note 439. Likewise, the ABA has urged greater availability of law clinic services to those raising environmental justice claims. ABA House of Delegates, *supra* note 187.

making procedures to the judicial branch is unclear.⁴⁷⁷ Moreover, when courts adopt or amend court rules, the courts act in a legislative capacity that does not implicate the same procedural rights as adjudicative or administrative proceedings.⁴⁷⁸

The federal rules of procedure require that rules governing court practice shall only be adopted or amended after public notice and an opportunity for public comment.⁴⁷⁹ A number of state supreme courts have adopted similar notice and comment requirements for court rulemaking; some also require that proposals for rules be reviewed by advisory committees.⁴⁸⁰ These requirements ensure that courts will hear from the bar and those most affected by new rules prior to imposing any restriction on access to legal representation.

On the same day that the Louisiana Supreme Court issued the new restrictions on the law clinics, it released the results of a public opinion poll showing that 91% of the state's residents believe that politically-connected individuals are treated differently by state courts; eighty-two percent believe that the wealthy and poor are treated dissimilarly by the state's judicial system.⁴⁸¹ When the pollsters asked what role, if any, politics played in court dealings, the

477. See, e.g., *La. Consumers' League, Inc. v. La. Pub. Service Comm'n*, 351 So. 2d 128, 132-33 (La. 1977) (imposing a requirement of reasonable notice and an opportunity to be heard upon independent public service commission; Chief Justice Calogero would go further and apply the state administrative procedure act even though the commission is a constitutionally-created state agency).

478. See, e.g., *Lewis v. La. State Bar Ass'n*, 792 F.2d 493, 497 (5th Cir. 1986). This is not to suggest that those with liberty or property interests affected by judicial rule making have no due process rights. See, e.g., *Schware v. Bd. Bar Exam'rs*, 353 U.S. 232 (1957) (holding that state supreme court denied due process where record did not support refusal to grant admission to bar); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980) (holding that due process requires impartial decision maker).

479. FED. R. CIV. P. 83(a)(1) (1999); FED. R. CR. P. 57; see also 28 U.S.C. § 2071(b) (1999) (mandating that any rule proscribed by a federal court, other than the Supreme Court, shall only be adopted after giving public notice and an opportunity to comment). At least one court has suggested that such judicial rule making conform with the requirements of the federal administrative procedure act. See *Baylson v. Disciplinary Bd. of Supreme Court of Pa.*, 764 F. Supp. 328, 334 (E.D. Pa. 1991), *aff'd on other grounds*, 975 F.2d 102 (3d Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

480. See, e.g., *IL. SUP. CT. R. 3* (2000); *IL. SUP. CT., ADMIN. ORDER, MR. NOS. 10549, 3140* (1997); *OH. SUP. CT. R. 5(A)* (1999); *UT. SUP. CT. R. PROF. PRACTICE 11-101* (2000). Each federal court, except the Supreme Court, is required to appoint an advisory committee for the study of the court's rules of practice. 28 U.S.C. § 2077(b) (1999).

481. See Joe Gyan, Jr., *Survey: Treatment in Court Unequal*, *ADVOCATE* (Baton Rouge, La.), June 17, 1998, at 1A.

standard response was laughter and comments questioning the seriousness of the researcher's inquiry.⁴⁸² Similar polls in other states found that voters, by large margins, believed that judicial decisions are influenced by campaign contributions⁴⁸³ and that attorneys and judges agreed that campaign donations influence judicial decisions.⁴⁸⁴ The mere perception that the judiciary may be selling its independence caused Justice Anthony Kennedy to warn:

This [figure showing the public's belief that judges are influenced by money] is serious because the law commands allegiance only if it commands respect. It commands respect only if the public thinks the judges are neutral. And when you have figures like that, the judicial system is in real trouble.⁴⁸⁵

Given that polls show that public confidence in the integrity and impartiality of the judiciary is already extremely low, one might expect courts to be more attentive to the manner in which they treat law clinics and their clients.⁴⁸⁶ One explanation, albeit a cynical one,

482. Pamela Coyle, *Does Politics Influence Courts? Funny Question*, TIMES-PICAYUNE (New Orleans, La.), June 17, 1998, at B1.

483. Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limitations in Judicial Elections*, 74 CHI-KENT L. REV. 133, 138 & n.26 (1998) (finding in an Ohio poll that 81% of residents believed that judges' decisions are influenced some or most of the time by campaign contributions); Sheila Kaplan, *The Very Best Judges That Money Can Buy*, U.S. NEWS & WORLD REP., Nov. 29, 1999, at 35, 36 (finding in a Texas State Supreme Court and Texas State Bar Association poll that 83% of the public think judges are unduly influenced by campaign contributions); Michelle Millhollon, *Poll: Funds Can Sway La. Judges*, ADVOCATE (Baton Rouge, La.), Jan. 10, 2000, at 1A (reflecting that by a 56% to 33% margin, East Baton Rouge Parish voters believe that campaign contributions influence judges' decisions and 66% of college graduates believe that contributions influence decisions).

484. In a Texas poll, almost half of the judges considered campaign donations to be fairly or very influential in affecting judges' decisions and 79% of lawyers also believed contributions affected judges' decisions. See Joy, *supra* note 258, at 274 & nn.200-21 (citing poll by Texas State Supreme Court and Texas State Bar Association); see also Kaplan, *supra* note 483, at 36 (citing same poll).

485. *Frontline: Justice for Sale*, *supra* note 463 (interviewing Justices Anthony Kennedy and Stephen Breyer about the effect of political donations on state judgeship races); see also Kaplan, *supra* note 483, at 36.

486. Upon reelection, Chief Justice Calogero stated that improving public perception of the performance of the state's judicial system was his "top priority." Gyan, *supra* note 281, at 1A. Similarly, in his 1999 State of the Judiciary speech, Chief Justice Calogero acknowledged the strong public perception of court bias based on wealth and political connections and stated that his "objective is to devote the remaining 8 years of [his] term of office to continuing

for the Louisiana Supreme Court's blind eye to the unfairness of the process and the public perception it created is that the public opinion polls are right—the political and economic power of politicians and business interests is so great that the court dared not refuse their demands to rein in law clinics. Another explanation could be that the court was blinded by its own claim of unbridled power to regulate student attorneys and who they can represent.⁴⁸⁷ Apparently, the court took this power to include the ability to conduct an investigation that, by all appearances, failed to comport with judicial standards of integrity, impartiality, and due process.

1. Increasing Judicial Integrity and Independence in Overseeing Access to Legal Representation

The conduct of the Louisiana Supreme Court supports the need for procedures to help restore public trust in courts and reduce the influence of politics and campaign contributions on access to legal representation.

One lesson garnered from the way in which the “discussion” of the operation of all the Louisiana’s law clinics turned into an investigation of a particular law clinic is that couching misconduct in the form of a request for new regulations on lawyer conduct should not nullify the procedural rights of an attorney under the state’s disciplinary process. If a person relies on an allegation of misconduct to justify a request for new regulations on an attorney’s conduct, then a court should refer the allegation to the disciplinary process, or

improvement of the administration of the Judicial Branch as a whole, as well as its image.” Press Release, Louisiana Supreme Court (Mar. 30, 1999) (on file with author) (containing the chief justice’s speech).

487. See, e.g., Memorandum of the Louisiana Supreme Court in Support of Its Motion to Dismiss, *supra* note 475, at 8-11 (arguing that the court has exclusive and plenary power to define and regulate all facets of the practice of law; rules it establishes limiting the parties that non-lawyers may represent are uniquely within its constitutional, statutory, and inherent authority).

The Louisiana Supreme Court used this same assertion of unbridled authority to justify its refusal to supply applicants who fail the bar exam with access to their graded exam (which is immediately destroyed), sample best answers, or model answers used by bar examiners. See Gary R. Robert, *Criticism of Louisiana’s Chief Justice is Justified*, TIMES-PICAYUNE (New Orleans, La.), Jan. 14, 2000, at 6B (letter to editor) (criticizing manner in which court oversees the bar admissions process).

instruct the complainant to do so, and delay any consideration of the request for new rules pending the outcome of that process.⁴⁸⁸

In addition, the experience of the Tulane Clinic confirms the need for courts to adopt written notice and comment procedures governing the adoption and amendment of rules of practice. It is insupportable that courts, charged with ensuring that citizens are afforded due process rights when executive branch agencies engage in rule making, should not provide equivalent rights when they adopt or amend rules. Court rules have the same ability to harm the property or liberty interests of attorneys or the public.

The actions of the Louisiana Supreme Court support the observation that judicial elections impede the independence of the courts and threaten “the most essential safeguard of a free society.”⁴⁸⁹ Judges are elected in some form in thirty-nine states.⁴⁹⁰ Many legal scholars have commented on the problems associated with an elected judiciary and proposed reforms such as judicial appointments, limitations on campaign contributions and expenditures, and publicly-financed judicial campaigns.⁴⁹¹ Organizations in Louisiana

488. I am indebted to Professor Peter Joy for this proposal. When an earlier complaint was made against the Tulane Clinic and the court was asked to exercise its oversight of Rule XX to determine if action by the court was needed, the Louisiana Supreme Court refused to take any action and referred the complaining party to the rules of professional conduct. Letter from Pascal F. Calogero, Jr., to Kai David Midboe, *supra* note 204; *see also supra* notes 204-06 and accompanying text.

489. William S. Sessions, *Professional Obligations*, ABA J., Aug. 1998, at 62, 64 (quoting a 1970 statement by Senator Sam J. Erwin, Jr.). The president of the ABA has argued: “When the independence of judges is threatened, we risk our democratic institutions of separation of powers, checks and balances, and judicial protection of constitutional liberties.” Jerome J. Shestack, *With Professionalism Movement Under Way, It is Time for Lawyers to Address Justice Issues*, NAT’L L.J., Aug. 3, 1998, at C1, C15.

490. Kaplan, *supra* note 483, at 35.

491. *See, e.g.*, Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 113-25 (Summer 1998) (reviewing and critiquing proposals for addressing problems with judicial elections); John J. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339 (1988) (presenting argument by former chief justice of Texas Supreme Court for merit selection of judges); Peter A. Joy, *Insulation Needed for Elected Judges*, NAT’L L.J., Jan 10, 2000, at A19 (arguing for stronger recusal rules and low campaign contribution limits); Thomas R. Phillips, *Comment*, 61 LAW & CONTEMP. PROBS. 127, 138 (Summer 1998) (presenting proposal by chief justice of Texas Supreme Court for a comprehensive system of public funding of judicial elections); *see also* REPORT AND RECOMMENDATIONS OF THE AMERICAN BAR ASS’N TASK FORCE ON LAWYERS’ POLITICAL CONTRIBUTIONS (July 1998) (recommending six steps to address judicial campaign problems, including limits on contributions and recusal of judges

are using the court's attack on the Tulane Clinic as a prime example for why the state should appoint, rather than elect, judges.⁴⁹²

The heavy dependence of the Louisiana Supreme Court on support from business groups merits a reexamination of the wisdom of an elected judiciary.⁴⁹³ Professor Peter Joy argues that in the context of an elected judiciary, and particularly in light of the large sums of money contributed by the business interests in Louisiana and the aggressive efforts by justices to capture their support in reelection bids, a reasonable person would have expected the justices to disqualify themselves from the investigation of the law clinics.⁴⁹⁴ Yet, he notes that judicial codes of ethics do not require disqualification in such circumstances and there are no indications that justices of the Louisiana Supreme Court were ever troubled by this apparent conflict or the appearance of impropriety it created.⁴⁹⁵

Professor Joy argues for adoption of the ABA's recent amendment to the Model Code of Judicial Conduct that provides for disqualification where a party or a party's lawyer made contributions to the judge in excess of a certain amount.⁴⁹⁶ These rules, however, only apply to a "proceeding" in which the judge's impartiality might be reasonably questioned. Joy wisely recommends that the campaign contribution recusal rule be extended explicitly to apply whenever a

who accept campaign contributions above a certain limit from parties or their attorneys).

492. Lanny Keller, *Judicial Campaigns Undermine Respect*, ADVOCATE (Baton Rouge, La.), Jan. 13, 2000, at 9B (reporting that the Louisiana Organization for Judicial Excellence is working to enact some system of merit selection of judges).

493. The ability of LABI, the chief complaining business group, to influence Louisiana Supreme Court elections was evidenced by their success during the previous three years in putting three new pro-business justices on the court. *See supra* notes 209-12 and accompanying text. Almost half of the campaign contributions to one of the justices who most vehemently attacked the Tulane Clinic came from business interests seeking the restrictions; LABI had "spearheaded" his election to the court less than two years earlier. *See supra* note 212 and accompanying text. Two other justices, including the chief justice, faced imminent reelection campaigns and courting the complaining business interests for support. *See supra* notes 209-12 and accompanying text.

494. *See Joy, supra* note 258, at 281.

495. The chief justice claimed that a new rule requiring that all campaign contributions be made to committees supporting the candidates, instead of directly to the candidates themselves, removed him and the other justices from the political process. Schleifstein, *supra* note 93.

496. Joy, *supra* note 258, at 283; MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(e) (as amended in August 1999), reprinted in LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 01:3001, 3011 (1999).

judge is acting in any official capacity, including rulemaking.⁴⁹⁷

The conduct of the Louisiana Supreme Court reveals a potential weakness of the recusal rule—the rule does not cover instances where the campaign contributions are from an organization that is not itself a party. In many instances, the party or lawyer may be a member of that organization, and the issue before the judge may be one that the organization publicly promoted. For example, a trade association might vigorously mount a campaign for tort reform, and one of its prominent members might be before the judge on an issue relating to tort reform. In that instance, although the lawyer himself did not personally contribute to the judge's campaign, a campaign contribution from the affiliated association to the judge might create the appearance of partiality. The judicial code does not explicitly address this situation and recusal would be difficult to obtain. Therefore, disclosure by lawyers and parties of membership in or contributions to organizations that made significant contributions to a judge would promote public confidence and help avoid the appearance of impropriety, but would raise First Amendment freedom of association problems.⁴⁹⁸

The attack on the Tulane Clinic suggests that when there is an elected judiciary, judges become politicians, first and foremost, and are vulnerable to the corrupting influence of campaign contributions. While meritorious selection of judges is one solution, the role of Governor Foster in the Tulane Clinic situation cautions that any system for appointing judges must ensure that such appointments are, to the greatest extent possible, based on merit and not on politics. Transferring the selection process from the public to a politician may not solve the problem of judges that are willing to favor that politician's interest and deny legal representation to views out of

497. Joy, *supra* note 258, at 283.

498. Carrington, *supra* note 491, at 115-16 (arguing that disclosure of membership in organizations, as a way to address issue advocates not before the court, might raise First Amendment problems). Professor Erwin Chemerinsky notes that disclosure requirements could create problems since they ensure that judges will know which lawyers and parties contributed to their judicial campaigns and how much they donated. Chemerinsky, *supra* note 483, at 145. He argues, however, that eliminating disclosure requirements would create even worse problems by hiding the problem from the public. *Id.* at 145-46. Instead, he proposes limits on both campaign contributions and expenditures. *Id.* at 139-49.

favor with that politician.⁴⁹⁹

The conduct of the Louisiana Supreme Court does, however, support greater restrictions on campaign contributions. Likewise, it evidences a need for stronger disqualification rules for judges and a system of judicial appointments that ensures that candidates are chosen on merit.

2. Anti Civil Rights Redux

As a final observation, the Louisiana Supreme Court is the only court that has sought to curtail its law student practice rule to reduce the ability of law students to assist needy individuals or community groups.⁵⁰⁰ Moreover, a review of published cases reveals that not since 1974 in *In re Primus*⁵⁰¹ has any court attempted to restrict the ability of a lawyer to offer free legal assistance.⁵⁰²

499. See M. H. Gertler, *Leave Judicial Choices to Voters*, TIMES-PICAYUNE (New Orleans, La.), Jan. 20, 2000, at B6 (warning of the consequences of allowing Governor Foster to interject politics into the appointment of judges).

500. Joan Wallman Kuruc & Rachael A. Brown, *Student Practice Rules in the United States*, 63 BAR EXAMINER, Aug. 1994, at 40, 46 (“States that have amended their rules since the middle 1970s have attempted to respond to a changing legal environment . . . These amended rules allow practical exposure to a greater variety of clients, legal activities and substantive bodies of law . . .”); E-mail from David F. Chavkin, Professor, Washington College of Law, American University, to Robert Kuehn, Former Director, Tulane Environmental Law Clinic (Feb. 20, 2000, 10:43:47 EST) (law clinic scholar does not recall any effort by a state to narrow the clients who could be represented by law clinic students) (on file with author); E-mail from Peter Joy, Professor, Washington University School of Law, to Robert Kuehn, Former Director, Tulane Environmental Law Clinic (Feb. 18, 2000, 14:54:28 CST) (on file with author) (law clinic scholar and former chair of the AALS Section on Clinical Legal Education also knows of no effort to narrow the clients that law clinic students may represent).

501. The 1974 action of the South Carolina Supreme Court sought to prohibit attorneys from offering free legal representation to pregnant mothers who had been sterilized by the state as a condition of continued receipt of Medicaid assistance. 436 U.S. 412 (1978).

502. A search of cases relying on *In re Primus* and *NAACP v. Button*, 371 U.S. 328 (1963), turned up no later instance of a state seeking to restrict the not-for-profit solicitation activities of an attorney. Likewise, the briefs of the plaintiffs and Louisiana Supreme Court in the federal court challenge to Rule XX do not identify any case since *In re Primus* where a state sought to restrict an attorney’s pro bono activities. See Brief of Appellants, *S. Christian Leadership Conference v. Supreme Court of La.* (5th Cir. 2000) (No. 99-30895); Plaintiffs’ Memorandum of Law in Opposition to Motion to Dismiss, *S. Christian Leadership Conference v. Supreme Court of La.*, at 21, 61 F. Supp. 2d 499, 560-01 (E.D. La. 1999) (No. 99-1205); Brief of Louisiana Supreme Court, Appellee, *S. Christian Leadership Conference v. Supreme Court of La.* (5th Cir. 2000) (No. 99-30895); Memorandum of the Louisiana Supreme Court in Support of Its Motion to Dismiss, *supra* note 475. In *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 472-73 (5th

The Louisiana Supreme Court's conduct also appears to be the first government attack on lawyers providing free legal assistance on civil rights claims since the concerted efforts of the South in the 1960s to run off civil rights lawyers.⁵⁰³ Like the attack on the Tulane Clinic, those leading the 1960s attacks thought the civil rights lawyers were stirring up trouble among the economically and politically weak masses.⁵⁰⁴ Civil rights opponents sought to punish lawyers communicating offers of free legal assistance and sought to compel community organizations to disclose membership lists.⁵⁰⁵ Those opponents also sought to discourage legal assistance by accusing civil rights attorneys of representing clients without proper authorization and violating ethics rules.⁵⁰⁶

These attacks took place, in part, in Louisiana. In *Dombrowski v. Pfister*,⁵⁰⁷ the U.S. Supreme Court intervened to protect civil rights lawyers in Louisiana from prosecution by the state for failing to register as members of the National Lawyers Guild. Another federal court protected Richard Sobol, a lawyer who moved to Louisiana in 1966 to represent African-Americans in civil rights litigation, from criminal charges of practicing law without a license.⁵⁰⁸ The Louisiana

Cir. 1980), the Fifth Circuit struck down a court order, entered at the request of Gulf Oil, prohibiting attorneys in a class action from communicating with any potential or actual class member not a formal party to the suit where the attorneys attested that they neither received nor expect to receive from class members any compensation for their services.

503. See JACK GREENBERG, *CRUSADERS IN THE COURTS* 217-22 (1994) (detailing efforts of virtually every Southern state to pass laws and start legislative investigations, criminal prosecutions, suits for injunctions, and disbarment proceedings to run the NAACP and the NAACP Legal Defense and Education Fund (LDF) out of the South).

504. *Id.* at 217 (stating that the South saw the NAACP and LDF as the masterminds behind the desegregation efforts).

505. See *NAACP v. Button*, 371 U.S. 328 (1963) (finding a Virginia law prohibiting attorneys from contacting persons and offering free legal assistance unconstitutional); *NAACP v. Patterson*, 357 U.S. 449 (1958) (holding an effort of Alabama attorney general to compel the NAACP to disclose its membership lists unconstitutional).

506. See GREENBERG, *supra* note 503; *In re Primus*, 436 U.S. 412 (1978) (finding the effort of the South Carolina Supreme Court to sanction an attorney for advising a lay person of legal rights and offering free legal assistance unconstitutional); *Sobol v. Perez*, 289 F. Supp. 392 (E.D. La. 1968) (involving a civil rights attorney criminally charged with the unauthorized practice of law).

507. 380 U.S. 479 (1965). The Court ordered the district court to enjoin prosecution of the attorneys and of the Louisiana Subversive Activities and Communist Control Law. *Id.* at 497.

508. See *Sobol v. Perez*, 289 F. Supp. 392 (E.D. La. 1968). The federal court observed that the state's criminal prosecution was meant to serve as a warning to civil rights lawyers and potential clients who might consider retaining lawyers to advance their rights to equal

State Bar Association and the Louisiana Attorney General intervened in support of efforts to prosecute Sobol.⁵⁰⁹

A number of prominent persons have noted similarities between the Louisiana Supreme Court's restrictions on the Tulane Clinic and these earlier attempts to suppress legal assistance on civil rights matters. A veteran Louisiana civil rights leader called the court's restrictions "a throwback to Jim Crow days" and characterized the changes as "the most vicious attack on the rights of working people to organize since 1956," when the state tried to force the NAACP to reveal its membership lists.⁵¹⁰ In a letter sent to a local newspaper shortly after issuance of the new law clinic restrictions, the president of Tulane University argued that "[t]he action of the Governor, the business community and the State Supreme Court present a classic case for the need of such regulations [on environmental discrimination] to deter such racially insensitive behavior."⁵¹¹

It may be that the business interests and the court did not act against the Tulane Clinic because of racial animus. However, the statement by the chairman of the Chamber that the Shintech controversy over environmental justice was "the defining event, the proximate cause" of the court's action⁵¹² and the observation that the Tulane Clinic's assertion of environmental discrimination motivated Governor Foster to act⁵¹³ give support to the belief that this was yet another instance of a Southern court imposing restrictions on lawyers raising civil rights claims. If the Shintech case was the environmental justice movement's *Brown v. Board of Education*,⁵¹⁴ then the result of

protection. *Id.* at 402.

509. *Id.* at 394. The Louisiana State Bar Association fully supported the district attorney's position that Sobol violated the Louisiana unauthorized practice of law statute, that the statute was constitutional, and that the prosecution should proceed; the attorney general did not take a position on whether or not Sobol violated the law but did argue that the statute was constitutional. E-mail from Richard Sobol to Robert Kuehn, Former Director, Tulane Environmental Law Clinic (Mar. 1, 2000, 10:01:06 PST) (on file with author).

510. Coleman, *supra* note 280 (quoting state Representative Avery Alexander).

511. Letter from Eamon M. Kelly, President, Tulane University, to Jim Amos, Editor, TIMES-PICAYUNE (June 24, 1998) (on file with author). The Times-Picayune ran the letter but redacted the final phrase "to deter such racially insensitive behavior." Kelly, *supra* note 243.

512. LeBlanc, *supra* note 170, at 224.

513. Schleifstein, *supra* note 93 (observing that nothing angered Governor Foster more than claims made by the Tulane Clinic under the rubric of environmental justice).

514. Gray, *supra* note 74.

the Louisiana Supreme Court's action is separate and unequal access to justice in Louisiana.

V. CONCLUSION

The constitutionality of the new restrictions on Louisiana's law clinics will ultimately be determined by the federal courts. But as the Louisiana Supreme Court's own lawyer acknowledged, it is important to know the difference between having the right to do something and doing the right thing.⁵¹⁵

Whether it is illegal to do so or not, politicians do not do the right thing when they deny citizens the ability to obtain legal representation. Business interests likewise do not do the right thing when they proclaim a belief in dialogue with and tolerance of diverse viewpoints of citizens while at the same time vigorously working to suppress the ability of some citizens to be heard.

It is not only not the right thing, but also inconsistent with rules of professional responsibility and canons of judicial ethics, for judges and members of the bar to put their own political or economic interests above their professional duties and deny access to legal representation. If the legal profession's statements about the necessity to ensure that all persons have access to legal representation even if their causes are unpopular are to have any meaning, then attacks on the ability of law students and law professors to provide free legal assistance must be condemned by members of the profession and explicitly prohibited by the rules of professional conduct.

With a history of similar attacks on law professors and law clinics outside of Louisiana, the attack on Tulane is not likely to be the last attempt to deny access to justice or to interfere with the ability of law schools to provide legal representation to those in need. Although no other state has yet sought to narrow its student practice rule to exclude certain community organizations or points of view, one

515. Michael H. Rubin & Judge Brady M. Fitzsimmons, *Simply Complying With the Rules of Ethics Doesn't Make You an Ethical Lawyer*, in IN OUR OWN WORDS: REFLECTIONS ON PROFESSIONALISM IN THE LAW 95 & n.1 (Roger A. Stetter ed., 1998) (repeating a comment by Justice Potter Stewart in Columbia University Seminars on Media and Society, *Ethics in America—Preface to Ethics: An Introduction to Ethical Reasoning* (Corporation for Public Broadcasting 1988)).

conservative legal organization has embraced the new Louisiana restrictions as a justified response to liberal activism by law school clinics.⁵¹⁶ Even in the absence of specific steps to limit clinic representation, the attack on the Tulane Clinic may discourage university or law school officials elsewhere from taking on controversial cases, especially where those cases may displease politicians, alumni, or businesses with political or financial influence over the university.⁵¹⁷

Promoting tolerance of law clinic and law professor representation of unpopular causes will require not just greater exposure and criticism of attempts to deny such representation, but also a recommitment of the legal profession to its pro bono ideals. Without such efforts, the promise of equal justice for all is, in the reality of law schools and their clinics, hollow.

516. See Roth, *supra* note 463 (quoting the Washington Legal Foundation's objection that clinics are "repositories for activist professors" and noting a dislike of clinic representation of community groups "since not all members of a group may share that organization's goals"). See also *A One-Sided Paper Chase*, N.Y. TIMES, Feb. 28, 2000 (National Edition), at A23 (including an editorial page advertisement by the Washington Legal Foundation contending that law clinics lack academic integrity and arguing for a "level playing field" in which clinical programs defend property rights and advance the interests of private enterprise); Brief of Amici Curiae of the Washington Legal Foundation and Economic Freedom Law Clinic in Support of Defendant-Appellant and In Support of Affirmance, *S. Christian Leadership Conference v. Supreme Court of La.* (5th Cir. 2000) (No. 99-30895) (arguing that actions of the Louisiana Supreme Court do not implicate any federal right or interest).

517. See Frank Askin, *A Law School Where Students Don't Just Learn the Law; They Help Make the Law*, 51 RUTGERS L. REV. 855, 857 (1999) ("the recent experience of the Tulane environmental law clinic counsels some measure of caution by public law faculties using institutional resources for advocacy purposes"); Janet McConnaughey, *Nation's Law Clinics Fear La. Rules Poison Legal Environment*, ADVOCATE (Baton Rouge, La.), Nov. 13, 1998, at 6B (quoting Stanford Law School clinic professor's concerns that the attack is "reinforcing conservative views in lots of law schools that they want to keep out of controversial things..." although there have not been any obvious attempts to replicate Louisiana's restrictions); David E. Rovella, *Law Schools Urged to Take Death Cases*, NAT'L L.J., Dec. 7, 1998, at A9 (citing the attack on the Tulane Clinic, the dean of Northwestern University School of Law expressed concern about a backlash if law school clinics agree to take on appeals of death row inmates); Roth, *supra* note 463 (explaining that AALS officials fear that rules will discourage law professors from trying to obtain cases that provide the best learning experiences for their students).