

THE APOLITICAL CLINIC

BY ADAM BABICH



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Not so many years ago, controversy about the Tulane Environmental Law Clinic was front-page news. At the time, I was in a private law practice far from Louisiana and did not pay close attention. But as the clinic's director since May 2000, I find those events still shape many people's perceptions about the clinic—both positively and negatively. Some approach the clinic as if it were part of an environmentalist crusade to stop economic growth. Others believe that the clinic's crusade is to protect Louisiana residents' health and welfare.

The clinic, however, is not on a crusade at all. Its real mission is more mundane, if not by much. Every year, the clinic's attorneys and staff have the privilege of helping 26 third-year law students find their voices as advocates under the stressful—but exhilarating—conditions of complex litigation. And along the way, the clinic serves the larger community by helping Louisiana lawyers meet their obligation to ensure that access to the courts on environmental issues is not denied to “people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval.”¹

It may seem odd for an environmental law clinic to deny that its purpose is to protect health and welfare. But as a program of Tulane Law School, our job is to train environmental lawyers, not environmentalists. Granted, most professionals who devote their careers to environmental issues—whether working on

behalf of regulated companies, government, or non-profits—believe in environmental protection. And by making legal expertise available on environmental issues to people who could not otherwise afford it, the clinic helps improve the regulatory system and, thus, advance environmental protection. But questions about how to balance environmental protection with other goals, or how to protect the environment in any specific situation, raise issues of policy. And clients, not clinic lawyers or student attorneys, decide policy issues. The clinic's mission is therefore best expressed as one of training students, and making the legal system accessible to all, rather than in terms of substantive objectives. As lawyers and student attorneys, we focus on developing and implementing legal strategies to achieve our clients' lawful goals—not on selecting those goals.²

Why not make policy decisions? The short answer is that our clients are fully capable of making their own decisions. And aside from our clients, on whose behalf would we make policy? Every organization, of course, has constituents. For organizations built around specific issues—such as environmental protection—those constituents' shared interests can provide a specific policy-making agenda. Tulane Law School, however, has a constituency as diverse as the legal profession itself. The views of Law School alumni and supporters about how to reconcile commerce and environmen-



Justice Pascal Calogero swears in student attorneys.

tal protection—to the extent these issues are on their radar at all—are probably all over the map.

There are, however, a few things our constituents do agree about. Those areas of agreement encompass things fundamental to our training as professionals and our shared values as members of the bar. As lawyers, we all agree that law students should be trained to be strong, ethical advocates. Further, a basic tenet of our profession is that access to the courts should not be rationed on the basis of ability to pay or viewpoint. And finally, it is a fundamental principle of our legal system that nobody is above the law. These are the principles that animate an apolitical clinic.

An apolitical clinic is not, of course, the only possible model. One could run an environmental clinic more along the lines of a public-interest law firm such as Earthjustice or Defenders of Property Rights—organizations that make no bones about advancing specific agendas. The director of such a clinic could fairly invoke academic freedom to justify whatever value judgments were implicit in that director's choice of political

viewpoints to advance, and students would have a similar educational experience of learning by doing. Most of our students, however, are headed for employment with organizations that put a premium on representing clients, rather than their lawyers' views. For this reason, an apolitical clinic offers an experience that is arguably more relevant to most Tulane law students' future careers.

There is a flip side, however, to the fact that most clinic students go on to work for law firms or government after graduation. This means that, other than pro bono work, the clinic may provide many students with their only exposure to public interest litigation. It might be fairly argued, therefore, that we should run a “progressive” clinic to sensitize those students to the importance of environmental protection before economic forces shape them into apologists for the status quo. Law students, however, are generally fully formed adults. They look to law professors to help them develop their legal knowledge, professionalism, and appreciation of legal ethics—but not necessarily for political, philosophical or

moral guidance. Also, because the clinic exposes its students to real-world environmental disputes, the clinical experience helps students develop and refine their philosophies more effectively than could any professorial force-feeding of “progressive” ideas.

In addition, to put it bluntly, the apolitical model appeals to my own biases. My training is as an advocate, not as an activist or policy expert. I am as full of opinions as the next person, but the discipline of my chosen profession is to empower clients to set their own objectives and then figure out how to accomplish those objectives, within the law, as efficiently and reliably as possible. Like many lawyers with a background in private practice, my view is that advocates can best serve their clients by maintaining a professional objectivity about the underlying dispute. A core of objectivity helps lawyers find the flexibility to explore settlement possibilities, foster collegial relationships with opposing counsel, and give clients advice that reflects the risks, as well as the potential benefits, of particular positions. This is not to say that lawyers do not believe in



*Clinic clients announce
an effort to reform
Louisiana's Clean
Water Act program.*

their clients' positions. Although successful advocates preserve their ability to see both sides of disputes, they also develop and refine theories of their cases that they can present with conviction.

But why should you believe me when I say the clinic has no political agenda? Anyone who has ever taught a class knows how attuned students are to hypocrisy. It rarely escapes students' notice when teachers fall short of their own standards. It would be madness for me to tell the world that Tulane Law School was running a 26 law-student clinic along the lines of a professional law firm while trying to secretly run an environmentalist political advocacy group. Those 26 law students would notice! This does not mean, by the way, that I never express a political or policy opinion in front of a student attorney. My policy opinions may be largely irrelevant to my role as an educator, but I interact with my students as adults—I do not walk on eggs in their presence. The key to running an apolitical clinic does not lie in having no opinions, but in adopting no agenda other than to advance the lawful goals of clients.

In 1991, *Tulane Lawyer* published an impolitic, albeit ironic, statement that the clinic had hired a staff member "to commit barratry," i.e., to stir up litigation. In 1962, "barratry" was how South Carolina Senator Olin Johnston described Thurgood Marshall's efforts to help African-Americans defend their civil rights.³ The next year, the Supreme Court found that Virginia's barratry law imposed unlawful restraints on advocacy.⁴ Some critics of the clinic tout the 1991 *Tulane Lawyer* article as a confession of wrongdoing. But that interpretation is belied by the same article, which quotes a clinic spokesperson as follows: "There's no need for me to seek out cases . . . they come to us." So regardless of whether the term "barratry" is used to compare the clinic to the heroes of the civil rights movement or to suggest that the clinic somehow stirs up litigation, it misses the mark. The clinic has never engaged in barratry and does not solicit clients.

Some people have expressed the concern that providing legal help to clients who would otherwise go unrepresented can delay the issuance of environmental

permits. And it cannot be denied that public participation in the regulatory process, like the democratic safeguards in our political system, sometimes can cause delay. For this reason, legal scholars and politicians have long debated and experimented with reforms to streamline legal processes without sacrificing fairness. But denying justice to people who cannot afford lawyers, or whose views are controversial, would not be a responsible way to speed things up. Although most lawyers and clients would like to see disputes resolved more efficiently, the U.S. legal system remains the envy of other nations. By emphasizing the rule of law, the system preserves a balance between vibrant economic activity, strong health and safety standards, and individual rights. Whatever the legal system's faults, clinic lawyers and student attorneys take their obligation seriously to make it work as efficiently as possible for their clients.

Some readers might ask whether political pressure has played a role in my decision to leave environmentalism out of the clinic's curriculum. First, aside from a shared expectation of an ethical, professional and pedagogically sound approach, neither Tulane Law School nor university administrators have pressured me to run the clinic one way or another. But if the question were cast as whether feedback from alumni, the business and legal communities, and the courts has helped sharpen the clinic's mission, I would have to answer "yes."

Because I had never run a clinic



Student attorneys and staff of the 2003-04 Environmental Law Clinic.

before coming to Louisiana, my selection of an approach was necessarily influenced by the voices—some well-informed, some perhaps less so—of Tulane Law School’s constituents. Moreover, I knew the clinic would be under scrutiny and one of my goals in developing an approach has been to make the clinic as widely respected as practical, regardless of whether our con-

stituents agreed with every one of our clients’ positions. A major advantage of the apolitical model is that the more fully people understand the clinic, the less controversial it becomes—without becoming any less effective on behalf of clients.

Over the last year, the clinic has won important victories for its clients. For example, in a Fifth Circuit case, the

court vacated EPA’s approval of a state plan to allow increased air emissions of volatile organic compounds (many of which can cause cancer) in return for reductions in less dangerous nitrogen oxides. The 19th Judicial District vacated a state decision that gave the go-ahead for destruction of wetlands without a full assessment of effects on flooding and water quality. And the Eastern District of Louisiana confirmed that federal hazardous waste law can provide a remedy for citizens concerned about the Army Corps’ plans to dredge and dispose of contaminated sediments in the Lake Pontchartrain eco-system.

In light of the clinic’s record of success, one might fairly ask how the clinic—no matter how apolitical—can hope to avoid controversy. We can point to the credit the clinic brings to Tulane University and the State of Louisiana as part of a top-five ranked environmental law program. But ultimately, we are counting on people to remember and appreciate how the American legal system works. It operates from the premise that when all sides to a dispute are well represented, justice will prevail in settlement or trial. A “lawyer’s representation of a client... does not constitute an

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*Student attorney
Casey Youn meets
with Gov. Mike
Foster about
Louisiana's Clean
Water Act program.*

endorsement of the client's political, economic, social or moral views or activities."⁵

Indeed, under court rules, clinic student attorneys must promise not to place their own interests or those of the clinic above the interests of their clients. Denying service to clients for fear of controversy would cause much deeper offense to the values of law school constituents than could any lawful position the clinic might advance on behalf of a client.

The clinic, therefore, is built on three principles: (1) that law students should be trained to be capable, civil, and ethical advocates; (2) that legal representation should not be denied on the basis of ability to pay or point of view; and (3) that nobody is so rich or powerful as to be above the law. When I recently discussed these guiding principles with an attorney representing one of our client's opponents, he responded that his father

had gone to war to defend those very values. The fictional lawyer in the novel *To Kill a Mockingbird* embodies these principles. As a result, that character is so popular among Louisiana lawyers that when bar applicants select "fictional names" to preserve anonymity on the bar exam, the Louisiana Supreme Court has had to forbid applicants from using "Atticus Finch." As long as the clinic charts its course by values that are this central to the training of all U.S. lawyers, we serve the law school's entire constituency, the legal system, society at large, and our clients.

If you are part of the legal or environmental community, we consider you to be among the Tulane Environmental Law Clinic's constituents. So this is your environmental law clinic and—whether you agree with all, some, or none of our clients' positions—we want it to make you proud.

NOTES

- ¹ ABA Model Rules of Prof'l Conduct, R. 1.2 cmt. 5.
- ² Restatement (Third) of the Law Governing Lawyers § 16(1) (2000) (A lawyer must "proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation.")
- ³ Richard L. Revesz, "Thurgood Marshall's Struggle," 68 *N.Y.U. L. Rev.* 237, 248 (1993) (describing the 1962 confirmation battle over Justice Marshall's appointment to the Second Circuit).
- ⁴ *NAACP v. Button*, 371 U.S. 415 (1963).
- ⁵ ABA Model Rules of Prof'l Conduct, R. 1.2(b).

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