

# THE APOLITICAL LAW SCHOOL CLINIC

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*This essay examines the pedagogical, institutional, and public relations benefits of deriving law school clinic decisions and procedures exclusively from the following politically neutral 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 rich, powerful, or influential enough to be above the law. The essay first summarizes the backdrop against which the Tulane Environmental Law Clinic adopted this self-consciously apolitical approach. It then analyzes that approach's advantages with respect to training advocates, empowering clients, and serving law school constituents. Next, the essay describes case selection criteria for an apolitical clinic, including discussion of opportunities for student appearances, focusing services on those who would otherwise go unrepresented, and the board approval process. Finally, the essay explores the utility of the apolitical philosophy in managing controversy.*

## I. INTRODUCTION

Not everyone appreciates the roles lawyers and litigation play in society.<sup>1</sup> So the process of training lawyers is bound to be a little controversial. Training lawyers by bringing or defending actual lawsuits can be more controversial still. And when those lawsuits challenge powerful interests or affect issues of community or statewide concern, controversy becomes almost inescapable. Law school clinic directors, therefore, often find themselves trying to defuse, avoid, embrace, or otherwise manage controversy.

To some of our colleagues, especially university or law-school fundraisers, any suggestion of controversy translates to a risk of un-

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<sup>1</sup> See, e.g., David Barnhizer, *Princes of Darkness and Angels of Light: The Soul of the American Lawyer*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 371, 372 (2000) ("Rather than being perceived as helping professionals and conservators of democratic values . . . lawyers have become the butt of jokes that call into question the basic values of the adversary system and the lawyer's responsibility within it.").

happy potential donors.<sup>2</sup> But most of us agree that fundraising concerns alone cannot drive an educational institution's priorities. Former Harvard University President Derek Bok explained, "[T]he purely pragmatic university, intent upon increasing its financial resources by any lawful means, may gain a temporary advantage now and then, but it is an institution that is likely not to prosper in the long run."<sup>3</sup> No self-respecting law school would knowingly "sacrifice[ ] essential values that are all but impossible to restore" for "ephemeral gains in the continuing struggle for progress and prestige."<sup>4</sup>

In any event, clinic directors can only go so far to avoid controversy. Like all lawyers, we owe our clients a duty of loyalty and our independent professional judgment.<sup>5</sup> We cannot ethically allow fundraising concerns to affect our representation of clients—at least not on cases we have already accepted. Ethical concerns also limit the extent to which clinics may consider fundraising or similar institutional concerns in case selection, in part because most clinics qualify as "legal aid office[s]."<sup>6</sup> This does not mean, however, that a "damn the torpedoes" attitude is the only, or best, way to deal with controversy.

At Tulane Law School's Environmental Law Clinic, our efforts to manage controversy consist largely of attempts to engage Tulane University constituents in dialogue about the Clinic's role and, more broadly, about the role of lawyers and litigation in society. These "public-relations" activities have inspired—or at least coincided with—an examination of the Clinic's operating procedures to elimi-

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<sup>2</sup> Controversy, of course, may also attract positive interest from other donors.

<sup>3</sup> DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* 206 (2003).

<sup>4</sup> *Id.* at 208.

<sup>5</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2003) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").

<sup>6</sup> ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (Feb. 9, 1972) explains that legal aid offices should not avoid controversial cases:

[L]awyer-members of a governing body of a legal aid clinic should seek to avoid establishing guidelines (even though they state only broad policies; see Formal Opinion 324) that prohibit acceptance of controversial clients and cases or that prohibit acceptance of cases aligning the legal aid clinic against public officials . . . or influential members of the community; see Formal Opinion 324. Acceptance of such controversial clients and cases . . . is in line with the highest aspirations of the bar to make legal services available to all. Lawyer-members of a governing body of [a] legal aid clinic should seek to establish guidelines that encourage, not restrict, acceptance of controversial clients and cases, and this is particularly true if laymen may be unable otherwise to obtain legal services.

But failure "to obtain establishment of [such] guidelines . . . is . . . not a matter involving the possibility of disciplinary action." *Id.*; cf. *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 273 (1957) ("It is . . . important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar.").

nate any suggestion of an environmentalist agenda. The result has been the Clinic's adoption of a self-consciously apolitical philosophy.<sup>7</sup> The essence of that philosophy is that each and every clinic decision, procedure, and activity is derived from politically neutral principles.

In this essay, I try to crystallize a view of the apolitical law-school clinic that I have not seen explained in the literature.<sup>8</sup> I hope the

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<sup>7</sup> This, by the way, was more a matter of emphasis than major change. For example, we used to say that our purpose was

“i) to train law students, through representation of clients as student attorneys, to be effective environmental lawyers with high ethical standards and sensitivity to the natural environment and the needs of the public; ii) to provide legal assistance to individuals and organizations seeking to protect and restore the natural environment for the benefit of the public where those individuals and organizations are not otherwise able to obtain representation from the private bar; and iii) to advance the development of environmental law through the selection of cases involving important precedent or issues.”

Tulane Environmental Law Clinic, Legal Advisory Board Guidelines (in effect May 2000) (on file with author). In contrast, our current mission statement is

(1) To train effective and ethical lawyers by guiding law students through actual client representation and (2) To represent those who could otherwise not afford competent legal help on environmental issues. The Clinic broadens public participation in environmental decisions by giving a voice to clients who would not be heard otherwise.

Tulane Environmental Law Clinic, 2004 Annual Report (June 15, 2004).

When I joined the Clinic in May 2000, Clinic lawyers used the term “client-driven,” which means about the same thing as “apolitical,” to describe the Clinic's work. In early 2003, I discussed the apolitical approach in a presentation to an industry trade association. After I spoke, a lawyer who had served as a student attorney in the Clinic before my tenure offered the opinion that the Clinic's approach had not changed significantly.

<sup>8</sup> For an overview of some related commentary see Robert F. Cochran, Jr. *et al. Symposium: Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591, 592 n.1 (2003). Professor Deborah L. Rhode, although questioning “whether conceptual boundaries are [so] sharply drawn,” explained:

I, in the very good company of my coauthor David Luban and colleague William Simon, am anointed a leader of the “directive” school, which encompasses lawyers who are “willing to assert control of moral issues that arise during representation.” This approach is contrasted with the “client-centered” model, which makes the client's own values preeminent, and the “collaborative” model, which invites the client, in consultation with the attorney, to “draw on his own moral resources” in resolving ethical questions.

*Id.* at 602 (footnotes omitted).

The political activism that this essay contrasts with an apolitical perspective is different from the “moral activism” urged by some commentators. See Paul R. Tremblay, *Moral Activism Manqué*, 44 S. TEX. L. REV. 127, 148 (2002) (“[Moral] activism's fundamental message is that practices which are lawful can still be wrong.”). A lawyer can accept moral responsibility for his or her professional activities without becoming a political activist. See Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1639 (1998) (“[L]abeling political arguments ‘moral’ invites confusion.”). Indeed, regardless of the “adversary system excuse,” see David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER 83 (David Luban ed. 1983), most lawyers would probably agree that not all legal means or goals are morally acceptable. But many would disagree about where to draw that line. In any event, the apolitical approach does not require adoption of an amoral philosophy or one of absolute moral relativism. See *infra* notes 32 & 50.

essay reflects my enthusiasm for Tulane's approach, but that enthusiasm does not imply a criticism of other clinics or a dismissal of alternative approaches. Nor do I offer the apolitical approach as a panacea for all public-relations woes. The approach does, however, provide a touchstone that (1) is pedagogically satisfying, since it emphasizes a commitment to professionalism—rather than to a political viewpoint—as the motivating force behind each student attorney's activities, (2) is fully consistent with clinics' roles as public-service organizations and their duties to clients, and (3) helps defuse controversy by offering a compelling, politically neutral, and—best of all—honest justification of a clinic's advocacy of even the most unpopular viewpoints.

## II. BACKGROUND

During the two years before I joined the Tulane Environmental Law Clinic in May 2000, controversy about the Clinic was national news.<sup>9</sup> On behalf of its clients, the Clinic had engaged the State of Louisiana in a bruising battle about whether the state violated principles of environmental justice by imposing disproportionate burdens of pollution on people in African-American and lower income communities.<sup>10</sup> The battle came to a head when EPA granted the Clinic's petition to veto a state-issued air permit for a major new chemical factory.<sup>11</sup> This victory formed the basis of a cable-television movie called "Taking Back Our Town."<sup>12</sup> It also sparked a backlash from some Louisiana politicians and members of the business community who asked the Louisiana Supreme Court to rein in the Clinic.<sup>13</sup> The Court ultimately revised the student practice rule, albeit in a way that does not limit the Clinic's ability to represent clients in high impact or

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<sup>9</sup> See Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 *FORDHAM L. REV.* 1971, 1982-85 (2003).

<sup>10</sup> For more information about the environmental justice situation in Louisiana, see Adam Babich, *Environmental Justice in Louisiana*, 51 *LA. B.J.* 90 (Aug. 2003); Emily Bazelon, *Bad Neighbors*, *LEGAL AFFAIRS*, May/June 2003, at 53; J. TIMMONS ROBERTS & MELISSA M. TOFFOLON-WEISS, *CHRONICLES FROM THE ENVIRONMENTAL JUSTICE FRONTLINE* (2001).

<sup>11</sup> EPA, Order Partially Granting and Partially Denying Petitions for Objections to Permits, In the Matter of Shintech Inc. and its Affiliates' Polyvinyl Chloride Production Facility, Permit Nos. 2466-VO, 2467-VO, 2468-VO (Sept. 10, 1997), at <http://www.epa.gov/Region7/programs/artd/air/title5/t5memos/shin1997.pdf>.

<sup>12</sup> *Taking Back Our Town* (Lifetime Television broadcast, Dec. 10, 2001).

<sup>13</sup> La. Sup. Ct., Resolution Amending and Reenacting Rule XX, (Johnson, J. dissenting) (1999) at 1, at <http://www.lasc.org/rules/Html/xxbjj.PDF> ("The complaints suggested that the environmental law student practitioners should be regulated more closely because business in the state was being negatively impacted by their misguided challenges to environmental permits and other practices.").

controversial cases.<sup>14</sup>

This history of controversy still shapes many people's perceptions about the Clinic. Some see the Clinic's student attorneys as heroes—environmental warriors willing to take on the state's entire power structure to protect Louisiana residents' health and welfare.<sup>15</sup> Others think the Clinic is part of an environmentalist conspiracy to stop economic growth.<sup>16</sup> Neither perception is accurate.

### III. THE APOLITICAL PHILOSOPHY

It may seem odd for an environmental law clinic to deny that its purpose is to protect health, welfare, and the environment. But as explained below, an apolitical—and thus non-substantive—agenda offers pedagogical advantages, helps maintain a focus on empowering clients, and allows clinics to serve their law schools' diverse constituencies.<sup>17</sup>

#### A. Training Professionals

As a program of Tulane Law School, the Clinic's job is to train

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<sup>14</sup> See Adam Babich, *How the Tulane Environmental Law Clinic Survived the Shintech Controversy and Rule XX Revisions: Some Questions and Answers*, 32 *Envtl. L. Rep.* (Envtl. L. Inst.) 11476 (Dec. 2002).

<sup>15</sup> For example, one commentator described a Clinic director and student attorneys as "martyred purists." Giancarlo Panagia, *A Man, His Dream, and His Final Banishment: A Marxian Interpretation of Amended Louisiana Student Practice Rule*, 17 *J. ENVTL. L. & LITIG.* 1, 44 (2002).

<sup>16</sup> Cf. Robert E. Holden & Tad Bartlett, *Leaving Communities Behind: The Evolving World of Environmental Justice*, 51 *LA. B.J.*, Aug./Sept. 2003, at 94. Based in part on the outcome of a case the Clinic handled, Attorneys Holden and Bartlett argue:

ultimately the goal of the EJ [*i.e.*, Environmental Justice] movement is not mere dialogue—or the respect, right to participation and institution of pollution controls . . . which are already part of the environmental regulatory regime—but a dramatic choice of whether *any* industrial and economic development should be allowed in areas with high proportions of racial minorities.

*Id.* at 95 (emphasis added). In their conclusion, however, these authors provide a more positive view of environmental justice, predicting:

EJ will continue to push industry and the administrative agencies into more meaningful dialogue with minority communities about environmental issues, and will continue to push industry to ensure that many of the benefits of new industrial facilities, such as jobs, are realized among the neighboring communities that bear the burdens of the industrialization.

*Id.* at 97.

<sup>17</sup> The primary focus of the Clinic's attorneys and staff, therefore, is helping third-year law students find their voices as advocates under the stressful—but exhilarating—conditions of environmental litigation. Along the way, the Clinic serves the larger community by helping the Louisiana bar meet its 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." MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 5 (2003).

lawyers, not activists.<sup>18</sup> The two are not mutually exclusive, of course, and many excellent lawyers are also activists—motivated at least as much by substantive goals as by a desire to deliver first-rate professional services to clients. But although professional lawyers are (almost by definition) equipped to function effectively as activists, the converse is not necessarily true. And most professional lawyers are not activists. Instead, they advocate for their clients' viewpoints only. It is professionalism—not activism—that goes to the heart of what it means to be a lawyer.

Training lawyers is a process of enculturation.<sup>19</sup> Law school students not only learn to “think like lawyers” in terms of analytical technique,<sup>20</sup> but also begin to internalize the four core values that define the legal profession: (1) integrity, (2) competence, (3) respect for the rule of law, and (4) loyalty to clients.<sup>21</sup> For even our best students,

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<sup>18</sup> Cf. Coleman Warner, *New Law Program Starts at Loyola*, TIMES-PICAYUNE, Dec. 3, 2004, at B-1 (quoting Environmental Law Professor Robert Verchick as follows: “One thing I’m not interested in is what side students are on . . . . There’s nothing I’m going to do that’s going to change their politics. I (just) want them to love this topic.”).

<sup>19</sup> “Enculturation” is “the process by which an individual learns the traditional content of a culture and assimilates its practices and values.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 747 (1993). “Enculturation” has a nicer ring to it than “indoctrination.” See Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1936 (2002) (“[T]he majority of law teachers would subscribe to the notion that law teachers have at least some responsibility for the socialization and acculturation of law students into the norms and values of the legal profession.”).

<sup>20</sup> To me, thinking like a lawyer means primarily (1) spotting relevant issues, (2) analyzing facts in terms of the elements of applicable and analogous rules, (3) deriving such rules and elements from cases, statutes, and other materials, (4) distinguishing the important from what is less important, (5) maintaining the intellectual flexibility to understand and argue all sides of an issue, and (6) organizing information around a theme, to tell a story. See, e.g., Stephen Wizner, *Is Learning to “Think Like a Lawyer” Enough?*, 17 YALE L. & POL’Y REV. 583, 587 (1998) (“Thinking like a lawyer requires analytical rigor, logical reasoning, the ability to recognize and draw distinctions, and an ability to advocate either side of an issue logically and persuasively, whether or not one agrees with or believes in the position one is advancing.”); Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 891 (1984) (“[L]awyers operate in unique contexts with unique materials. Educating students in lawyer-think means grounding them in those contexts and materials.”); Ruta K. Stropus, *Mend It, Bend It, And Extend It: The Fate of Traditional Law School Methodology In The 21st Century*, 27 LOY. U. CHI. L.J. 449, 467 n.120 (1996) (defining “think like a lawyer” as “the ability to ‘think precisely, to analyze coldly’”) (quoting KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 116 (1930)).

Stephen Wizner has argued that “The implicit message authoritatively conveyed by many law teachers is that idealism and a commitment to social justice are not part of ‘thinking like a lawyer.’” Wizner, 17 YALE L. & POL’Y REV. at 589. While this may be a fair criticism of legal education, that criticism does not diminish the value of “thinking like a lawyer” as a tool for achieving client objectives.

<sup>21</sup> The literature is replete with lists of such “core values.” See, e.g., ABA House of Delegates, Resolution 10F (July 13, 2000), at <http://www.abanet.org/cpr/mdprecom10f.html> (listing “undivided loyalty to the client,” the competent “exercise [of] independent legal judgment,” the “duty to hold client confidences inviolate,” the “duty to avoid conflicts,” a “duty to help maintain a single profession of law,” and a “duty to promote access to jus-

tice”); ABA Commission On Multidisciplinary Practice, Report To The House Of Delegates (May 11, 2000), at <http://www.abanet.org/cpr/mdpfinalrep2000.html> (including “competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest, and *pro bono* obligations”); Melissa L. Breger, *et al.*, *Teaching Professionalism in Context: Insights from Students, Clients, Adversaries, and Judges*, 55 S.C. L. REV. 303, 312 & n.33 (2003) (including “zeal, loyalty, judgment, expertise, excellence, dedication, competence, and civility” and, in a footnote, “integrity, honesty and respect”); Douglas McElvy, *Progress: Impossible Without Change*, 65 ALA. LAW. 364, 366 (2004) (listing “integrity, service and fairness”); Barry Sullivan, *Naked Fitzies and Iron Cages: Individual Values, Professional Virtues, and the Struggle for Public Space*, 78 TUL. L. REV. 1687, 1715 (2004) (listing “adherence to the rule of law . . . competence and diligence, loyalty and confidentiality, public service, and the willing representation of the indigent and the unpopular”); Anthony J. Luppino, *Multidisciplinary Business Planning Firms: Expanding the Regulatory Tent Without Creating a Circus*, 35 SETON HALL L. REV. 109, 120 (2004) (including “maintenance of the lawyer’s independent judgment, avoidance of conflicts of interest, and preservation of the confidentiality of communications with clients”); Carla D. Pratt, *Should Klansmen be Lawyers? Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857, 858 (2003) (including “loyalty, confidentiality and competence” and “the core value of justice”); Burnele V. Powell, *The Lesson of Enron for the Future Of MDPs: Out of The Shadows and Into the Sunlight*, 80 WASH. U. L.Q. 1291, 1306 n.54 (2002) (listing “protections for confidentiality, the avoidance of conflicts of interest, the exercise of competency, and the protection of the legal culture”); *see also* In re DeRose, 55 P.3d 126, 131 (Colo. 2002) (“Truthfulness, honesty, and candor are core values of the legal profession.”).

These lists are reasonably consistent. My list treats “client confidentiality” and “conflict avoidance” as duties flowing from the core value of loyalty—rather than as their own core values. Similarly, my list treats “civility” as flowing from “integrity” and “competence,” and “independence of judgment” as flowing from “competence” and “loyalty.” I do not, however, believe there is a core value creating duties “to help maintain a single profession of law” or to “protect[ ] legal culture.” Further, while it would be nice if there were a core value of “public service,” including a commitment “to promote access to justice,” I question whether this value is in fact core to the twenty-first century legal culture that most lawyers experience. Although a basic tenet of our profession (flowing from our “respect for the rule of law”) is that everyone should have access to justice, relatively few lawyers appear to believe that they have a personal duty to expand representation. *See* Tigran W. Eldred & Thomas Schoenherr, *The Lawyer’s Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 374-75 (1993/94) (“[T]he legal culture in this country has understood *pro bono* work to be an act of personal charity, to be performed at the discretion of the individual attorney.”) (footnote omitted); MODEL RULES OF PROF’L CONDUCT R. 6.1 (2003) (“Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of *pro bono* legal services per year.”); *id.* R. 6.1 cmt. 9 (“[W]hen it is not feasible for a lawyer to engage in *pro bono* services” lawyers may “discharge the *pro bono* responsibility by providing financial support to organizations providing free legal services to persons of limited means.” Also, “it may be more feasible to satisfy the *pro bono* responsibility collectively, as by a firm’s aggregate *pro bono* activities.”); *id.* R. 6.1 cmt. 12 (“The responsibility set forth in this Rule is not intended to be enforced through disciplinary process”); *id.* pmb. ¶ 6 (Lawyers “should seek improvement of the law [and, *inter alia*] access to the legal system . . . . [A]ll lawyers should devote professional time and resources . . . to ensure equal access . . . . A lawyer should aid the legal profession in pursuing these objectives.”).

My list, like most of those cited above, does *not* include a passion for fairness or justice as a core value. Although lawyers should not press unjust positions, *see infra* notes 32 & 50, in most situations lawyers’ duties as loyal, zealous advocates trump their desires to see the most fair and just result prevail. Indeed, our system is based on the premise that justice is most likely to prevail in a context where all sides to a dispute are zealously represented.

living up to the standard of professionalism these values imply will be a lifelong struggle requiring more technical skills, diplomacy, empathy, steadfastness, flexibility, courage, confidence, humility, discipline, creativity, attention to detail, loyalty, and passion than we can ever hope to teach them.<sup>22</sup> The best lawyers remain students of an art that no one can truly master.<sup>23</sup> They spend their careers in a continual battle with themselves—striving to overcome weaknesses, develop strengths, and find and maintain personal balance in the midst of extraordinary professional demands.

A key question for any class on “lawyering,” therefore, is how to best launch students into a lifelong struggle to become and remain true professionals. At least part of the answer is to take every opportunity to reinforce our profession’s core values and to show students how those values motivate and shape effective, passionate advocacy. In this context, the apolitical clinic offers the pedagogical advantage of stressing and reinforcing professional values in their purest form—neither adulterated nor reinforced by a substantive agenda, such as an institutional commitment to environmentalism.<sup>24</sup> Moreover, because such a clinic defines its purpose solely in terms of those values, all of the clinic’s functions are grounded in principles with a motivational power that is wholly independent of whether student attorneys agree with their clients’ goals.

An apolitical clinic also offers an educational experience that is arguably more relevant to most students’ future careers, since most

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*Compare* MODEL RULES OF PROF’L CONDUCT pmb. ¶ 1 (2003) (A lawyer is “a public citizen having special responsibility for the quality of justice.”), *with id.* pmb. ¶ 2 (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”), *and id.* pmb. ¶ 8 (“[W]hen an opposing party is well represented, a lawyer can be a zealous advocate [and] assume that justice is being done.”). Moreover, the legal system as a whole seems to value finality as much as justice. *See, e.g.,* *Beard v. Banks*, 124 S. Ct. 2504, 2511 (2004) (New criminal procedure rules do not apply to *habeas corpus* petitioners outside of narrow exceptions because, *inter alia*, “[a]pplication of new rules to cases on collateral review . . . continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards.”) (quoting *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion)); *Cat-skill Development, L.L.C. v. Park Place Entertainment Corp.*, 286 F. Supp. 2d 309, 312 (S.D.N.Y. 2003) (“In considering relief under Rule 60(b), the Court must weigh plaintiffs’ need for substantial justice against the value of preserving the finality of judgments.”).

<sup>22</sup> MODEL RULES OF PROF’L CONDUCT pmb. ¶ 7 (2003) (“A lawyer should strive to attain the highest level of skill . . . and to exemplify the legal profession’s ideals of public service.”).

<sup>23</sup> How many of us have truly mastered professionalism? For example, who among us never procrastinates, is always appropriately civil, and can always be counted on to live up to each of his or her commitments in full and on time?

<sup>24</sup> *Cf.* ANTHONY T. KRONMAN, *THE LOST LAWYER* 376 (1993) (suggesting that teachers “encourage their students to think of the law as an independent discipline, with demands and satisfactions of its own, and not merely as the action arm of some more comprehensive policy science”).



are headed for employment with law firms or government—organizations that put a premium on representing clients, rather than their lawyers' views. On the other hand, 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 law schools should run “progressive” clinics to sensitize students to the importance of values such as environmental protection before economic forces shape them into apologists for moneyed interests.<sup>25</sup>

Most law students, however, are fully formed adults.<sup>26</sup> They look to their professors to help them develop as lawyers and professionals, but not necessarily for political guidance.<sup>27</sup> Also, because the clinic exposes its students to real-world disputes affecting the rights of lower income people and communities, the clinical experience helps students develop and refine their political philosophies more effectively than could any professorial force-feeding of “progressive” ideas.<sup>28</sup>

Of course the apolitical model does not provide the only principled approach to training professionals.<sup>29</sup> One could run an environ-

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<sup>25</sup> Cf. Daphne Eviatar, *Clinical Anxiety: Rebellious Lawyers are Shaking up Law School Clinics*, LEGAL AFF., Nov./Dec. 2002, at 37 (asserting that some educators approach clinical legal education as “a progressive ‘movement,’ not unlike civil rights or feminism”); see also Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 38, 61 (1995) (arguing that “lessons of social justice should be a core element of the law school curriculum in general and the content of clinical courses in particular,” but noting “the delicate question of level of instructor influence must also be considered when introducing issues of social justice to supervisor-student discussions”).

<sup>26</sup> But see Jeff Zaslow, *The Coddling Crisis: Why Americans Think Adulthood Begins at Age 26*, WALL ST. J., Jan. 6, 2005, at D1 (“A 2003 poll by the University of Chicago’s National Opinion Research Center found that most Americans think adulthood begins at about age 26.”).

<sup>27</sup> See Stanley Fish, *Why We Built the Ivory Tower*, N.Y. TIMES, May 21, 2004, at A23, for an argument that teachers should not “surrender . . . academic obligations to the agenda of any non-academic constituency—parents, legislators, trustees or donors” because academicians are “unlikely to be qualified” as moral or political instructors and “our job is not to change the world, but to interpret it.” But Dean Fish’s assertion that “it’s not the business of the university” to teach “responsible citizenship and moral behavior” has a limited application to law schools, where we teach a discipline guided by a code of professional conduct and a tradition of service and civility. For lawyers, Dean Fish’s concern about “deciding in advance which of the competing views of morality and citizenship is the right one” becomes relevant only when we venture beyond the shared values that underlie our profession. Pace University’s president has written that Fish “overlooks the teaching value of applying knowledge to real situations and reflecting on them with the disciplines of classroom, lab and library.” David A. Caputo, *Letter to the Editor*, N.Y. TIMES, May 24, 2004, at A22.

<sup>28</sup> See Wizner, *supra* note 19, at 1935 (“This awakening to a sense of social responsibility occurs when students represent low-income clients who are seeking to protect their basic interests in income, liberty, or fairness.”).

<sup>29</sup> Stephen Wizner has argued:

mental 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 agendas.<sup>30</sup> 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.<sup>31</sup> If I am correct that the apolitical clinic offers a pedagogical advantage, therefore, it is one of degree rather than kind.

### B. Empowering Clients

A law school clinic that eschews a policy agenda has no principled basis for making most policy decisions.<sup>32</sup> Is this a problem? The short answer is “No”—most clients are fully capable of making their own decisions.<sup>33</sup> And, as the ABA's model rules reflect, in the typical at-

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We need to profess a social, political and moral agenda in our teaching, an agenda that exposes students to the maldistribution of wealth, power and rights in society, and that seeks to inculcate in them a sense of their own ability and responsibility for using law to challenge injustice by assisting the poor and the powerless.

Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 331 (2001). Similarly, others have argued:

[L]ong range social change goals can be promoted, if not accomplished, by clinical legal education. Clinical programs reinforce student interest in public interest work, which many observe tends to diminish during the three years of law school. The U.C. Davis Immigration Law Clinic excites and energizes law students. Representing clients with a purpose refines and hones their legal skills. Inspired by the experience, many have pursued careers in immigration law and other public interest activities.

Kevin R. Johnson & Amagda Pérez, *Clinical Legal Education And The U.C. Davis Immigration Law Clinic: Putting Theory Into Practice and Practice Into Theory*, 51 SMU L. REV. 1423, 1455 (1998) (footnote omitted).

<sup>30</sup> Indeed, advocacy organizations run several law school clinics, including highly respected environmental law clinics at Stanford Law School and the University of Colorado School of Law.

<sup>31</sup> See, e.g., Arturo J. Carrillo, *Bringing International Law Home: The Innovative Role Of Human Rights Clinics in the Transnational Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527, 576-77 (2004) (“In practice, academic freedom means that clinical professors [at human rights clinics] and their students are largely free to canvass the situation of human rights at home and abroad for unchampioned, underdeveloped, or controversial issues that other non-governmental actors, for whatever reason, cannot or will not address to the same extent.”).

<sup>32</sup> I say “most” because the lack of a policy agenda does not prevent anyone from making reasonable common-sense and moral judgments. James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, 21 CAP. U. L. REV. 735, 792-93 (1992) (“Without the kind of judgment we first learn (and continue to practice) as judgment of character we would be not only morally awash but professionally inept.”). In other words, professional ethics do not replace personal ethics. MODEL RULES OF PROF'L CONDUCT pmb1. ¶ 7 (2003) (“[A] lawyer is also guided by personal conscience and the approbation of professional peers.”)

<sup>33</sup> See Cochran, *supra* note 8, at 604 (remarks of Deborah L. Rhode: “A framework that promotes clients' interests is especially justifiable where clients are relatively dis-

torney-client relationship it is the client who sets the “objectives of representation.”<sup>34</sup> Similarly, the Restatement provides that a lawyer must “proceed in a manner reasonably calculated to advance a client’s lawful objectives, as defined by the client after consultation.”<sup>35</sup>

The Clinic’s lawyers and student attorneys, therefore, focus on developing and implementing legal strategies to achieve clients’ lawful goals—not on selecting those goals.<sup>36</sup> In this regard, our apolitical philosophy puts the Clinic squarely in the mainstream of U.S. legal practice, allowing the Clinic to serve as an effective advocate for its clients.<sup>37</sup> This framework for the attorney-client relationship makes it

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empowered and protecting their rights has value independent of the merits of their particular claims.”); DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 153 (1977) (“[A] client can best live with a decision, and follow through with a decision, if it is one the client has made.”).

<sup>34</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2003) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation . . .”). Lawyers may, however, “limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” *Id.* R. 1.2(c). And of course, lawyers cannot help their clients achieve goals that are unlawful. *Id.* R. 1.2(d).

<sup>35</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1).

<sup>36</sup> As Stephen Gillers has explained, however, good lawyers provide advice about “the wisdom of a particular course of conduct” rather than thinking of themselves as mere “technician[s].” Adam Liptak, *Torture and Legal Ethics: How Far Can a Government Lawyer Go?*, N.Y. TIMES, June 27, 2004, § 4, at 3 (quoting Prof. Stephen Gillers); see also Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers’ Norms*, 9 GEO. J. LEGAL ETHICS 1101, 1148 (1996) (“In our zeal to make lawyers accountable to poor clients, we should avoid measures that would prevent lawyers from serving poor clients aggressively and well.”). Clinic student attorneys and staff are therefore available to counsel clients about appropriate goals. See MODEL RULES OF PROF’L CONDUCT pmb1. ¶ 1 (2003) (“As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications.”).

<sup>37</sup> To provide just five examples of the Clinic’s effectiveness: First, on November 23, 2004, the Clinic provided a notice of intent to bring a state-law citizen suit on behalf of St. James Citizens for Jobs and the Environment and the Louisiana Environmental Action Network about the spreading of sewage sludge from a New Orleans suburb in Saint James Parish fields. Two weeks later, the potential defendant announced it would stop that practice. Allen Powell II, *Convent Residents Claim Victory Over Sludge*, TIMES-PICAYUNE, Dec. 18, 2004, at B1. Second, in a recent 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. *La. Envtl. Action Network v. EPA*, No. 02-60991 (5th Cir. Nov. 20, 2003). Third, a Louisiana state court vacated a state decision that gave the go-ahead for destruction of wetlands without a full assessment of effects on flooding and water quality. *O’Reilly v. La. Dep’t. of Env. Quality*, No. 509564 (19th Jud. Dist. Mar. 4, 2004). Fourth, the U.S. District Court for the Eastern District of Louisiana created precedent that should enhance protections for Louisiana wetlands when it rejected an Army Corps Environmental Assessment that “contain[ed] no support for the Corp’s conclusion that the mitigation measures would remove or reduce the identified adverse impacts of the project” and failed “to give an in depth analysis to the cumulative effects of the project.” *O’Reilly v. U.S. Army Corps of Eng’rs*, No. 04-940, 2004 WL 1794531, at \*5 (E.D. La. Aug. 10, 2004). And fifth, the Eastern District confirmed that federal hazardous waste law can provide a remedy for citizens con-

easier for lawyers to maintain a professional objectivity about underlying disputes.<sup>38</sup> In turn, that 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.<sup>39</sup>

But again, there are respectable alternatives to the apolitical approach. Some activist lawyers serve, and empower, a client base by preparing plans for litigation to resolve specific issues, and then finding clients and fact-patterns to facilitate the favorable resolution of those issues.<sup>40</sup> To some, this lawyer-driven (as opposed to client-driven) type of practice may seem inappropriate, since it uses lawsuits as tools to change public policy, rather than simply to resolve individual disputes.<sup>41</sup> But the entire enterprise is supervised by courts, who decide cases in the context of real factual disputes that involve actual clients. When such cases result in decisions that identify and require changes in illegal practices, therefore, it is difficult to mount a coherent argument that the lawyers' case-selection processes somehow taint

cerned about the U.S. Army Corps of Engineers' plans to dredge and dispose of contaminated sediments in the Lake Pontchartrain eco-system. *Holy Cross Neighborhood Ass'n v. U.S. Army Corps of Eng'rs*, No. 03-370, 2003 U.S. Dist. LEXIS 20030 (E.D. La., Nov. 4, 2003).

<sup>38</sup> See, e.g., John A. Bozza, *So You Want To Be A Trial Lawyer?*, PA. LAW., July/Aug., 2003, at 22, 27 ("Lawyers must be advice-givers whose judgments are grounded in objectivity and flow from an emotionally detached assessment of the circumstances of the case and the client's best interests."); Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV., 443, 470 (1996) ("Every client and every activist group must have a person who can inform them of their options and help them to evaluate the consequences of their actions.").

<sup>39</sup> This is not to say that lawyers do not believe in 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.

<sup>40</sup> See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 317 (1988) ("[P]ublic interest lawyers bent on law reform [sometimes] recruit clients as plaintiffs."). A "law school clinic lawyer" explained in an interview:

We knew what lawsuit we wanted to file. We had to go out and find clients, and so we had to interview people that would be happy with the position we wanted to take.

So I guess in that sense, we had already said up front, "This is what we're going to do; this is how we want to do it. Do you want to be a named plaintiff?"

Southworth, *supra* note 36, at 1102. Similarly, a "staff attorney in a legal advocacy organization" stated, "I'd say that we go to them with a plan first. We get them to sign off on it before we do anything." *Id.*

This type of activist agenda, however, does not necessarily require activist attorneys. Well-counseled clients can make their own decisions about how to fit cases together to achieve larger goals and, if they choose, do their own recruiting. A clinic's apolitical philosophy, therefore, does not require its clients to forego opportunities to gain "small[ ] successes that fit together, mosaic-style, into a won war." See Marc Feldman, *Political Lessons: Legal Services For The Poor*, 83 GEO. L.J. 1529, 1538 (1995).

<sup>41</sup> See LUBAN, *supra* note 40, at 317 (noting that public interest law practices "have elicited bitter criticism, which . . . seeks to discredit the entire enterprise of public interest law").

the outcomes.<sup>42</sup> Moreover, this type of litigation has a history of sparking needed reforms.<sup>43</sup> As David Luban points out, “Oliver Brown (as in *Brown v. Board of Education*) was a recruited client.”<sup>44</sup>

Should law schools run clinics on such a model? The answer may depend on individual clinic directors’ backgrounds.<sup>45</sup> For example, I came to Tulane with a background largely in private practice. So my training—and the expertise I have to offer students—is as an advocate but not as an activist or policy expert. I am as full of opinions as the next person, but the essence of my style of lawyering is to let clients set their own objectives. My job is to accomplish those objectives as efficiently and reliably as possible within the law.<sup>46</sup> Other styles, however, can provide students with equally valid educational experiences.

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<sup>42</sup> *Id.* (“There is clearly nothing wrong with recruiting clients for law reform activities. It does not matter whose idea the project is, all that matters is that the client, like the lawyer, is committed to the project.”); see also *In re Primus*, 436 U.S. 412, 414 (1978) (A state may not “punish a member of its Bar who, seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a nonprofit organization with which the lawyer and her associates are affiliated.”).

<sup>43</sup> Perhaps because of this history, Tulane Law School’s alumni magazine published an ironic statement in 1991 that the Clinic had hired a staff member “to commit barratry.” *Ambulance-Chasing on the Bayou*, TUL. LAW., Spring 1991, at 27. Technically, barratry is “[v]exatious incitement to litigation, [especially] by soliciting potential legal clients.” BLACK’S LAW DICTIONARY 160 (8th ed. 2004). But the term has also been used in an attempt to rein in activist lawyers. For example in 1962, “barratry” was how South Carolina Senator Olin Johnston described Thurgood Marshall’s efforts to help African-Americans defend their civil rights. 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). The next year, the Supreme Court found that Virginia’s barratry law imposed unlawful restraints on advocacy. *NAACP v. Button*, 371 U.S. 415 (1963).

Some critics of the Clinic have touted the 1991 *Tulane Lawyer* article as a confession of wrongdoing. Tom Guarisco, *An Industry Comes Out Swinging: La. Chemical Lobby Targets Red Tape, Taxes And Tulane*, GREATER BATON ROUGE BUS. REP., Mar. 16, 2004, at 13 (reporting that a trade association spokesperson claims that “the clinic’s avowed goal is barratry”). 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.” *Ambulance-Chasing on the Bayou*, TUL. LAW., Spring 1991, at 27. 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.

<sup>44</sup> LUBAN, *supra* note 40, at 318.

<sup>45</sup> For all the effort clinical instructors put into selecting and analyzing pedagogical approaches, the quality of the clinical experience probably has more to do with the instructors’ mentoring skills than with their philosophies. And to ask clinic directors to run their clinics in a manner out of step with their backgrounds and training would be like asking them to litigate and teach with one hand tied behind their backs.

<sup>46</sup> *But see supra* notes 32 & 36 and *infra* note 50.

### C. *Serving Constituents*

Unlike most environmental public-service organizations, the Tulane Environmental Law Clinic does not have a constituency that would uniformly embrace an environmentalist agenda.<sup>47</sup> And when any organization's agenda is divorced from its constituents' interests, long-term sustainability becomes a question. A clinic may seem invulnerable for a while due to the integrity of law-school or university administrators, the clinic's power in drawing strong applicants to a law school, or a perceived role in bolstering U.S. News & World Report rankings. But these circumstances are subject to change, since administrators come and go and competing law schools may offer equally attractive clinical programs. It is unnecessary to argue that an activist philosophy is unsustainable to emphasize the long-term advantages of a mission that sits well with constituents. A number of factors, such as location, whether the university is public or private, and the characteristics of law school and university alumni, may make the advantages of serving constituents more or less pronounced.

Every vital organization has constituents. For an organization that draws its constituents together around specific issues—such as environmental protection—those constituents' shared interests provide a solid foundation for a substantive agenda. Tulane Law School, however, has a constituency as diverse as the legal profession itself. Our constituents share educational and professional goals—not substantive philosophies. The views of Law School alumni and supporters about how to reconcile commerce and environmental protection, therefore, are presumably all over the map.

How can a law school clinic ever serve a diverse constituency? The answer is obvious. Rather than focusing its agenda on substantive goals, the clinic can adopt as its touchstones those shared principles fundamental to all lawyers' professional training. Specifically, as lawyers we all agree that law students should be trained as strong, ethical and professional 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. Finally, it is fundamental to our legal system that nobody is above the law. These are the principles, therefore, that animate an apolitical clinic. In fact, they are an apolitical clinic's *only* core principles.

## IV. CASE SELECTION

The legal profession's obligation to provide broad access to jus-

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<sup>47</sup> Of course the Clinic's clients are constituents, but so—among others—are students, parents, alumni, members of the legal and business communities, and supporters.

tice does not translate to an individual duty to accept every case that comes down the pike. To the contrary, private practitioners are free—so long as they pay their bills and avoid conflicts—to decide which clients and causes merit their representation. In other words, “Good lawyers don’t have to take bad clients,” or even clients they do not like.<sup>48</sup> A law school clinic that takes a wholly subjective approach to case selection, however, cannot credibly claim to implement an apolitical philosophy. As a clinic director, therefore, I feel the need for a more transparent case-selection policy than I would have employed in private practice.

### A. *First Come, First Serve*

The Tulane Environmental Law Clinic evaluates potential new matters on a modified “first come, first serve” basis. We believe in keeping our student attorneys busy, so the Clinic generally operates at full capacity. When we anticipate available student-attorney time, we tend to accept the first available case, subject to the considerations explained below. To qualify, of course, a case must involve environmental issues, and we must have the resources and competence to handle it.<sup>49</sup> Also, we will not accept a case unless it has a good faith basis in law and fact and is reasonably calculated to advance a lawful purpose. There is no requirement or expectation that we will agree with our clients’ goals. We will not, however, knowingly accept a case that requires us to advance positions we believe to be unjustified or irresponsible, or that we cannot competently advocate.<sup>50</sup> Nor will we

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<sup>48</sup> SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION* 31 (1994) (“Edward Bennett Williams, the brilliant trial lawyer, once sought to explain his representation of people like Frank Costello by saying ‘Everyone is entitled to a lawyer.’ ‘Yes,’ was the response, ‘but they are not entitled to you.’”); see also Charles W. Wolfram, *A Lawyer’s Duty to Represent Clients, Repugnant and Otherwise*, in *THE GOOD LAWYER* 217 (David Luban ed. 1983) (“In distilled form, under the ABA code a lawyer has professional discretion to accept or reject any proposed representation.”); but see MODEL RULES OF PROF’L CONDUCT R. 6.2 (2003) (“A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause.”).

<sup>49</sup> But we do not generally shy away from a matter because of legal or factual complexity. The challenge of explaining complex material in terms that a non-specialist (such as a judge) can understand and find compelling is one of the most valuable educational experiences we offer.

<sup>50</sup> See Louisiana Lawyer’s Oath, at [http://www.lascba.org/lawyers\\_oath.asp](http://www.lascba.org/lawyers_oath.asp) (“I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land.”). This language apparently comes from a 1908 draft by the ABA Committee on Code of Professional Ethics. See Susan D. Carle, *Lawyers’ Duty To Do Justice: A New Look at the History of the 1908 Canons*, 24 *LAW & SOC. INQUIRY* 1, 30 (1999). The language appears in the lawyers’ oaths of several states besides Louisiana. See, e.g., Oath of Admission to the Florida Bar, at <http://www.flabar.org/tfb/TFBProfess.nsf/0/04e9eb581538255a85256b2f006ccd7d>, Michigan Court Rules R. 15 § 3, at

usually accept a case we do not have a reasonable chance to win.<sup>51</sup> That said, our clinic-specific case-selection criteria are that cases must (1) contribute to the educational objectives of the Clinic, (2) be consistent with our concept of the Clinic as a law firm of last resort, and (3) receive approval by our litigation advisory board.

### B. Educational Objectives

The Clinic's educational mission necessarily affects case selection. For example, we make a special effort to accommodate clients who have already shown the ability to work well with student attorneys, and we are less inclined to accept cases involving clients who have difficulty putting their confidence in student lawyers. We are also unlikely to accept a case that will require a protracted (*e.g.*, a five-month) investigation. Although a student attorney may have a valuable experience doing nothing but investigating one case during his or her tenure at the Clinic, we are most confident in our ability to deliver a first-class educational experience when our cases move more quickly through the investigatory stage. Similarly, we avoid taking cases that would require more extensive travel than we consider practical for law students.

The Clinic has also adopted a preference for cases that offer opportunities for student appearances in court or before administrative agencies. Student appearances are least problematic in Louisiana when at least one of the Clinic's clients is an individual who meets the Louisiana Supreme Court's definition of "indigent."<sup>52</sup> Students may

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fault.asp, South Dakota, Rules and Regulations for Admission to Practice Law in South Dakota § 16-16-18 (Jan 1, 2004), at <http://www.sdjudicial.com/index.asp?category=barexamination&title=regulations&nav=42>. It is also in the oath for practice before federal jurisdictions, such as the U.S. District Court for the Northern District of Alabama, at [http://www.alnd.uscourts.gov/Local/Attorney\\_Admissions\\_Application.pdf](http://www.alnd.uscourts.gov/Local/Attorney_Admissions_Application.pdf), and the U.S. Patent and Trademark Office, at <http://www.uspto.gov/web/forms/sb1209.pdf>.

<sup>51</sup> We analyze our chances of success in terms of whether they are excellent, good, reasonable, or poor. Our board approval guidelines explain:

We consider the chance of success to help ensure that the clinic and its clients make informed decisions, but we do not impose a "chance of success" threshold on the case selection process. When the potential client's position appears supported by binding precedent or overwhelming persuasive authority, we consider the chance of success to be "excellent." When the potential client's position appears consistently supported by extensive persuasive authority, we consider the chance of success to be "good." When the potential client's position appears supported by the most reasonable reading of available authority, we consider the chance of success to be "reasonable." When the potential client's position, despite a good-faith basis in fact and law, does not appear consistent with the most reasonable reading of available authority, we consider the chance of success to be "poor."

Tulane Environmental Law Clinic, Legal Advisory Board Guidelines (in effect January 2005) (on file with author).

<sup>52</sup> LA. SUP. CT. R. XX § 4, at <http://www.lasc.org/rules/html/xx499.htm> (defining "indi-



appear as lawyers on behalf of such a client before state courts and agencies.<sup>53</sup> Louisiana's student practice rule does not authorize appearances before legislative bodies, but at least in Louisiana, one need not be a lawyer to make such an appearance.<sup>54</sup> Students may appear in federal district courts in Louisiana regardless of their clients' indigence.<sup>55</sup> There is no rule, however, that authorizes our students to appear as lawyers before federal agencies, and they can appear before the Fifth Circuit only on a case-by-case basis, at the discretion of that court.

Once the Clinic has accepted a matter, student-practice rules should not be an issue in the litigation. This is because these rules do not establish pleading or proof requirements or defenses to lawsuits; instead they create obligations that Clinic lawyers owe to the judiciary, their clients, and their students.<sup>56</sup> In fact, the Louisiana Supreme

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gence" for these purposes, as someone "whose annual incomes does not exceed 200% of the federal poverty guidelines"). More than 19% of Louisiana's population is below the poverty level. U.S. Census Bureau, Louisiana QuickFacts, at <http://quickfacts.census.gov/qfd/states/22000.html> (based on the 2000 census).

The indigence definition, however, is not a limitation on the Clinic's ability to represent clients. Instead, Rule XX "operates only to set forth the limited circumstances under which unlicensed law students may engage in the practice of law in Louisiana; it has no other reach." *S. Christian Leadership Conf. v. Sup. Ct. of La.*, 252 F.3d 781, 784 (5th Cir.), cert. denied 534 U.S. 995 (2001). Hugh Collins, the Louisiana Supreme Court's Judicial Administrator, has explained on behalf of the Court's chief justice that Rule XX "only addresses appearances by law students as litigators" and "does not regulate the activities of law schools or licensed attorneys on the staffs of law school clinics." Hugh Collins, *High Court Explains Student-Lawyer Rule Change*, NEW ORLEANS TIMES-PICAYUNE, June 25, 1998, at B6. If a matter failed to qualify for student practice, students would be "barred only from serving in an attorney's representative capacity . . . and could perform a wide variety of legal related work or research, so long as it was reviewed and any formal documents (such as pleadings, motions, agreements or the like) were actually submitted by a licensed supervising attorney." 252 F.3d at 790 n.6.

<sup>53</sup> LA. SUP. CT. R. XX § 3. For an analysis of the Louisiana Supreme Court's student-practice rule, see Babich, *supra* note 14.

<sup>54</sup> La. Sup. Ct., Resolution Amending and Reenacting Rule XX, at 6 (Calogero, J. concurring) (1999), at <http://www.lasc.org/rules/html/xpfc.pdf> ("We have simply said that our Rule XX does not provide the authorization for persons to appear before the Legislature. One does not need to be a lawyer to make legislative appearances."). We are litigators, however, not lobbyists and our students rarely make legislative appearances.

<sup>55</sup> Louisiana's Rule XX does not apply in federal court. *Concerned Citizens of New Sarpy v. Orion Ref. Corp.*, No. 01-3704 (E.D. La. Sept. 16, 2002) (adopting an Aug. 20, 2002 magistrate judge's report); see also *Sperry v. Florida*, 373 U.S. 379 (1963) (holding that practice before federal forums is governed by federal rules); *Ellis v. Weasler Eng'g, Inc.*, 258 F.3d 326, 337 (5th Cir. 2001) (With respect to "matters covered by the Federal Rules of Civil Procedure . . . [i]t is settled that if the Rule on point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law.") (quoting an explanation of the Erie Doctrine in *Gasparini v. Ctr. For Humanities, Inc.*, 518 U.S. 415, 428 n. 7 (1996)).

<sup>56</sup> See *Colyer v. Smith*, 50 F. Supp. 2d 966, 971 (C.D. Cal. 1999) (holding a non-client litigant "must establish a personal stake in the motion to disqualify sufficient to satisfy the 'irreducible constitutional minimum' of Article III"); *In re Yarn Processing Patent Validity*

Court has clarified that defendants cannot expect access to clients' private financial information to investigate the Clinic's compliance with the state's student-practice rule.<sup>57</sup> By the same token, of course, it is not the Clinic's job to investigate whether defense lawyers have conflicts, are up-to-date on CLE requirements, or maintain client funds in separate accounts. As the ABA model rules note, "The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule."<sup>58</sup>

We do not believe that the student appearance is the *sine qua non* of the clinical experience. In fact, when we and our opponents' lawyers are good enough, our student attorneys settle their cases before they get a chance to argue in court. With or without a clinical experience, most lawyers figure out how to sign briefs and deliver an argument reasonably quickly. But too many lawyers never learn the basic skills required to litigate complex factual and legal issues effectively, including focused planning and research, persuasive drafting, and targeted discovery. And in complex statutory fields such as environmental law, intellectual property, antitrust, securities, or tax, lawyers' most challenging work usually occurs in the library, during the document review process, and during drafting, rather than in the courtroom. An environmental law clinic, therefore, is more than a trial skills clinic; it focuses on strategic thinking, careful investigation and research, and succinct, persuasive writing.

It is nonetheless both a challenge and a treat to argue a case and especially to go to trial. A steady stream of student appearances adds an extra measure of excitement to the Clinic's practice that enhances the educational experience. Thus, even though a fair percentage of

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Litig., 530 F.2d 83, 90 (5th Cir. 1976) (ruling, in context of a motion to disqualify, "[w]e are reluctant to extend [standing] where the party receiving such an advantage has no right of his own [with respect to an alleged conflict of interest] which is invaded"); see generally Douglas R. Richmond, *The Rude Question of Standing in Attorney Disqualification Disputes*, 25 AM. J. TRIAL ADVOC., Summer 2001, at 17.

Louisiana District Court Judge R. Michael Caldwell held that the issue of Rule XX compliance is not one about which the trial court "is called upon to make a determination." Oral Reasons for Judgment on Motion to Dismiss, In re Waste Management of Louisiana, No. 492, 277, slip op. at 2 (La. 19th Jud. Dist. Apr. 8, 2002). If "there's no complaint from the clients," allegations of Rule XX violations are "more properly addressed to the Supreme Court and/or to disciplinary counsel for consideration . . ." *Id.*

<sup>57</sup> In an April 7, 1999 letter, Chief Justice Pascal F. Calogero explained that information about clients' financial eligibility is "confidential and not subject to public scrutiny or disclosure" and that "the person or entity who is questioning a client's eligibility should be informed of this correspondence and should be asked to contact this Court," at <http://www.tulane.edu/~telc/CJ%20Calogero%20Ltr,%204.7.99.pdf>.

<sup>58</sup> See MODEL RULES OF PROF'L CONDUCT Scope ¶ 20 (2003).

our cases will be resolved without the need for courtroom work, and not every student attorney will appear in court or before an agency, we prefer to take cases that provide an opportunity for student practice.

### *C. A Law Firm of Last Resort*

To help broaden access to the courts,<sup>59</sup> the Clinic's case-selection approach favors clients who would otherwise go unrepresented.<sup>60</sup> Of course these are the clients that the Clinic attracts anyway, since few litigants who can afford professional legal services choose to rely on inexperienced law students for representation.<sup>61</sup> Our "law firm of last resort" analysis, however, does not require that each potential client invest all of its assets in paying for private lawyers before calling us. Instead the question is whether the client can reasonably afford private counsel under the circumstances of the case and in the context of other demands on that client's resources. For example, we will represent a political subdivision of the state or a nonprofit organization in a case that, in our judgment, would not be practical for those organizations to bring without us. Also, the Clinic determines whether an organizational client can reasonably afford private counsel in light of that organization's own assets, not the aggregate assets of its members.<sup>62</sup>

### *D. The Legal Advisory Board*

The Tulane Environmental Law Clinic maintains a legal advisory board. We do this for three reasons: (1) the process of seeking case-

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<sup>59</sup> The purpose of Louisiana's student-practice rule is to create "one means of providing assistance to clients unable to pay for such services and to encourage law schools to provide clinical instruction in trial work of varying kinds." LA. SUP. CT. R. XX § 1.

<sup>60</sup> Also to advance our desire to broaden access, we give special consideration to potential clients whom we have repeatedly turned away in the past due to lack of Clinic resources. And we generally prefer to work with clients who are involved with community organizations that will participate in the litigation. The involvement of such organizations provides some evidence that the case impacts an issue of widespread community concern, rather than the concern of one individual. Also, our experience is that individuals who litigate in conjunction with community organizations are better situated to withstand the potential pressures of public interest litigation.

<sup>61</sup> See La. Sup. Ct., Resolution Amending and Reenacting Rule XX, (Johnson, J. dissenting) (1999) at 2, at <http://www.lasc.org/rules/Html/xxbjj.PDF> ("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.").

<sup>62</sup> Cf. *Tex. Food Indus. Ass'n v. U.S. Dept. of Agric.*, 81 F.3d 578, 579 (5th Cir. 1996) (To determine an association's eligibility for a fee award under the Equal Access to Justice Act, courts should consider "the association's net worth and size," not its members' individual assets.). To deny benefits to an organization because of some wealthy members would "unfairly exclude from [the law's] clear reach an association's eligible members." *Id.* at 582.

specific approval from a board forces us to think objectively and critically about potential cases before committing to them, (2) members of the board sometimes point out issues—including pitfalls or opportunities—that we have overlooked, and (3) knowing that a committee of respected lawyers review proposed cases may help assuage concerns among our constituents. It is important, however, that neither Tulane Law School nor University administrators appoint or control this board. In other words, no outside force requires that we listen to the board. Instead, board approval is a discipline we impose upon ourselves.

What would be the problem with a university or law-school controlled board? ABA ethics opinions disfavor a case-by-case approval process by a controlling authority. Specifically, Informal Opinion 1208 concluded that it would be improper to require clinic directors “to seek, ‘on a case-by-case basis,’ the prior approval of the dean or a faculty committee before accepting a case involving an affirmative lawsuit against a federal, state or municipal officer.”<sup>63</sup> This is to

avoid the possibility that the judgment of a lawyer will be in any way influenced by the governing body, for the loyalty of the lawyer runs to his client and not to the governing body. It is not important whether the members of the governing body which furnishes or pays for legal services for another are lawyers; for the loyalty of the lawyer is to his client and not to the entity paying him.<sup>64</sup>

The ABA committee based that opinion primarily on Formal Opinion 324<sup>65</sup> which, in turn, cites Disciplinary Rule 5-107(B)<sup>66</sup> and Ethical Consideration 5-24<sup>67</sup>—the pertinent parts of which are now reflected in Model Rule 5.4(c). That rule states, “A lawyer shall not permit a person who recommends, employs, or pays the lawyer to

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<sup>63</sup> ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (Feb. 9, 1972).

<sup>64</sup> *Id.*

<sup>65</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 324 (Aug. 9, 1970) says “it is more desirable for a board of directors of a legal aid society . . . to set broad guidelines respecting the categories or kinds of clients and cases [its attorneys may accept] rather than to act on a case-by-case, client-by-client basis.” Formal Opinion 324 was reaffirmed by ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (Aug. 10, 1974). One can argue, however, with the reasoning of these opinions. See Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 105-06 n. 134 (1981) (asserting that the opinions “fail to offer tenable rationales”).

<sup>66</sup> MODEL CODE OF PROF'L RESPONSIBILITY DR 107(B) (1980) contained essentially the same language as MODEL RULES OF PROF'L CONDUCT R. 5.4(c) (2003).

<sup>67</sup> MODEL CODE OF PROF'L RESPONSIBILITY EC 5-24 (1980) included the statement: “Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman.”

render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."<sup>68</sup> Thus, the ethical opinions disfavoring case-by-case board approval apply to situations in which the board employs or pays a clinic's director or staff attorneys.<sup>69</sup> Those opinions are not relevant to a board that is wholly divorced from administration of the law school and, thus, has no binding authority over, or financial pull with, clinic attorneys. Indeed, Informal Opinion 1262 states, "The Committee does not see how it can be a violation of the Code of Professional Responsibility to require consultation with a committee of lawyers, if that is desired."<sup>70</sup>

## V. MANAGING CONTROVERSY

### A. *Accommodating Opponents*

I have suggested that an apolitical philosophy can help defuse controversy by offering a compelling, politically neutral, and honest justification of a clinic's advocacy of unpopular viewpoints. But is defusing controversy a worthy goal for a law school clinic? Clearly not if it conflicts with the clinic's duties to clients or its integrity as a legal services organization. Indeed, it would be a poor law school that set an example for its students of turning its back on the professions' duty to see that justice is not denied to "people . . . whose cause is controversial or the subject of popular disapproval."<sup>71</sup> But although an apolitical philosophy can help defuse controversy, it does not affect the zeal of the clinic's representation, nor require the clinic to turn away clients whose viewpoints threaten powerful interests.

One might nonetheless argue that offering the apolitical approach as a tool for managing controversy advocates—at least in part—an accommodation to those very people whose "bitter criticism . . . seeks to discredit the entire enterprise of public interest law."<sup>72</sup>

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<sup>68</sup> MODEL RULES OF PROF'L CONDUCT R. 5.4(c) (2003).

<sup>69</sup> Pa. Bar. Assn. Comm. Leg. Eth. Prof. Resp. Informal Op. 99-10, 1999 WL 516720, (Mar. 25 1999) states:

Because you are employed by the School to operate the Clinic, and the Clinic is charged with rendering legal services, there is a direct relationship between your employment status and your ability to represent clients. Rule 5.4(c) is intended to prevent a situation where, as here, a lawyer's employer can limit, impede, or otherwise interfere with that lawyer's exercise of independent professional judgment on behalf of clients, even though the employer is paying that lawyer's compensation.

<sup>70</sup> ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1262 (Feb. 27, 1973).

<sup>71</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 5 (2003).

<sup>72</sup> See LUBAN, *supra* note 40, at 317. Some readers might ask whether political pressure has played a role in my decision to leave environmentalism out of the Tulane Environmental Law 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

But if a clinic can accommodate critics and still zealously represent its clients, where is the downside?<sup>73</sup> An important part of effective advocacy is separating what is important (effectively representing clients) from that which is dispensable (never giving an inch when you are in the right). And saying “we hear you and have taken steps to accommodate your concerns” is one of the most effective ways there is to defuse controversy.

Because universities and law schools have such diverse constituencies, clinic directors cannot afford to treat their critics as enemies. The same people dedicated to de-lawyering your clients may be potential or current supporters of your institution. Offering such constituents a politically neutral explanation for the clinic’s activities is one way to say “we’re not angry with you—we are merely living up to professional obligations and training students to live up to theirs.”

### B. *Apolitical Public Relations*

A major advantage of an apolitical clinic is that the more thoroughly people understand it, the less controversial it becomes. Business people can understand that clinical education is a crucial part of maintaining a first-rate legal educational program. And one can show corporate representatives the rules of professional responsibility and ABA ethical opinions in black and white and they can understand that it would be wrong for the clinic to reject clients because of controversy.<sup>74</sup> Granted, no one likes to be sued and some law-school constituents may never become clinic supporters, just as some academic research may be unpopular with some constituents. But once business people understand that threats and pressure are unproductive—and in fact could never be productive in the context of a university with integrity—they are more likely to accept clinical education as one facet of an educational system that, as a whole, merits their support.

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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 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 was to make the Clinic as widely respected as practical, regardless of whether our constituents agree with every one of our clients’ positions.

<sup>73</sup> Of course, the downside might be huge to a clinic director whose expertise as a litigator (and therefore as a teacher) is rooted in an activist style of litigation. See *supra* note 45. As a former private practitioner and government enforcement lawyer, however, the apolitical approach is fully consistent with my training and style of lawyering.

<sup>74</sup> See Robert R. Kuehn, *Shooting the Messenger: The Ethics of Attacks on Environmental Representation*, 26 HARV. ENVTL. L. REV. 417, 433-36 (2002) (discussing and citing the black letter law and arguing that “[i]n seeking to restrict access to justice to certain environmental points of view, lawyers attacking environmental representation neglect their duty not to deny legal representation to parties with controversial causes”).

When university constituents express concerns about legitimate clinic activities, therefore, the best response is to engage those constituents in a dialogue about the importance of the clinics' educational role, the constraints that prevent reputable universities or law schools from interfering with clinics' legitimate activities, and the role of lawyers as professional advocates in society. The first step in such a dialogue is to try to get your own ducks in a row, so that your message is not undercut by the behavior of other university employees, who may be unaware of the principles that drive—and justify—your clinic's activities. If your university colleagues offer to try to moderate the clinic's activities, they will likely, albeit unintentionally, mislead constituents into believing that a strategy of pressuring the university can be successful. Such misinformation can make constructive dialogue difficult and intensify controversies that do not advance anyone's interest.<sup>75</sup>

My experience is that once our critics understand the apolitical model, many are willing to accept the legitimacy of the Clinic's operations. Understanding that clients control the policy goals that drive the Clinic's activities can provide a reassurance analogous to that offered by civilian control of the military. These critics may disagree with our clients' goals, but can take some comfort from the fact that their dispute is with those clients, not with the Clinic's lawyers or students, and certainly not with Tulane Law School or University. Those critics who are not satisfied generally fall back on one of two arguments. The first is: "I don't believe you—I still think that the Clinic has an activist agenda." The second comes down to: "I do not like lawyers and disapprove of the roles that litigation and lawsuits play in society."

### *1. Credibility Issues*

Why should people believe me when I say the Tulane Environmental Law 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 twenty-six law-student clinic along the lines of a professional law firm while trying to secretly run an environmentalist political advocacy group. Those students would notice! This does not

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<sup>75</sup> An advantage of the apolitical philosophy in this regard is that one does not need to be a lawyer or an environmentalist to understand it. Reasonably intelligent university colleagues should be capable of understanding an apolitical clinic's operating principles, understanding why a university cannot interfere in legitimate clinic activities, and explaining these things to their constituents.

mean, by the way, that I never express a political or policy opinion in front of a student attorney. These opinions may be largely irrelevant to my role as an educator, but I interact with my students as adults—I do not walk on egg shells 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 educate students, advance the lawful goals of clients, and serve the public by broadening access to justice.

A look at the Clinic's docket, however, might suggest to some that our case-selection reflects an environmentalist agenda. The overwhelming majority of the Clinic's activities are on behalf of clients who seek to reduce pollution or preserve natural resources. Indeed, in the past five years, the Clinic has accepted only one defense case, and that involved individuals, not an industrial polluter. But most members of the regulated community can afford representation by members of the private bar. Indeed, because most people would rather be represented by experienced lawyers than law students, these potential clients rarely approach the Clinic for help.<sup>76</sup> If they did, many would probably be precluded by the Clinic's case selection criteria, which emphasize the Clinic's role as a law firm of last resort.<sup>77</sup>

Our expectation is that as we reinforce our commitment to the apolitical philosophy over time, we will gain credibility with many of our critics. Most likely, however, a few of our clients' opponents are more interested in de-lawyering the Clinic's clients than in a fair evaluation of the Clinic's role in training students and expanding access to justice. And some may never understand the futility of pressuring a law school or university about legitimate clinic activities. This means that some level of controversy—we think a manageable level—will probably remain inherent in the process of guiding law students through actual litigation.

## 2. *Frustration with Lawyers and Litigation*

Those who disapprove generally of lawyers and litigation tend to argue that providing legal help to clients who would otherwise go unrepresented can harm the economy by delaying issuance of environmental permits.<sup>78</sup> And it cannot be denied that public participation in

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<sup>76</sup> Indeed, the only defense case a potential client has approached us about during my tenure is the one such case we accepted.

<sup>77</sup> See *supra* notes 59 through 62 and accompanying text. Some constituents have expressed the concern that they have no way to verify the Clinic's determination that a client could not reasonably afford to pay market rates for legal help. Fair enough—we do not trot out our clients' private financial information for public review. *But see supra* note 61. But just as our clients would have no basis to object if a defense lawyer failed to collect on a bill for services, defendants have no legally protected interest in ensuring that plaintiffs pay top dollar for access to the judicial system or to participate in regulatory decisions.

<sup>78</sup> See Louisiana Chemical Association & Louisiana Chemical Industry Alliance, Eco-



the regulatory process, like the democratic safeguards in our political system, can sometimes cause delay.<sup>79</sup> Legal scholars and politicians have long debated and experimented with reforms to streamline legal processes without sacrificing fairness.<sup>80</sup> But denying justice to people who cannot afford lawyers, or whose views are controversial would not be a responsible way to speed things up.<sup>81</sup> Although most lawyers and clients would like to see disputes resolved more efficiently, the U.S. legal system remains the envy of other nations.<sup>82</sup> By emphasizing the rule of law, the system preserves a balance between vibrant economic activity, strong health and safety standards, and individual rights.<sup>83</sup> Whatever the legal system's faults, the Clinic's job is to train students to function effectively within it and the Clinic's lawyers and student attorneys take their obligation seriously to make the system work as efficiently as possible for their clients.

In light of the Clinic's record of success on high profile cases,<sup>84</sup> one might ask how the Clinic—no matter how apolitical—can hope to

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economic Development Plan (Jan. 7, 2004) (Offering a plan for "Civil Justice Reform" that includes the following action items: "Reduce delays resulting from legal challenges to permits," and "publicize the effect that lawsuits brought by clients who are represented by Tulane have on the economy and eliminate state funding of Tulane University.").

<sup>79</sup> See Thomas O. McGarity, *Public Participation in Risk Regulation*, 1 RISK 103, 112-13 (1990) (noting that public participation "tends to bear out in practice the aspiration that ours is a government by the people," but "[a]lthough it is unfair to characterize all time consumed in public participation as 'delay,' public participation undeniably slows down the governmental wheels") (footnote omitted).

<sup>80</sup> See, e.g., Lawrence B. Solum, *Alternative Court Structures in the Future of the California Judiciary: 2020 Vision*, 66 S. CAL. L. REV. 2121 (1993); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215 (1983).

<sup>81</sup> David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 219-220 (2003) ("When judges and legislatures create doctrines that enable well-funded parties to take out the other side's lawyer, they undermine basic fairness and turn the adversary system into a system of procedural injustice.").

<sup>82</sup> See Hon. Clarence Thomas, *The Judiciary and Civility*, FED. LAW., June 2001, at 21 ("Our legal system, we say, it's litigious. Perhaps, it is. Yet . . . we are the envy of the rest of the world."); *United States v. Reid*, 214 F. Supp. 2d 84, 96 (D. Mass. 2002) ("[W]e should listen . . . to those around the world who aspire to the legal system we in America have, because that system has contributed to a level of freedom, of stability, and of material well-being that rightly are the envy of the world.") (quoting RONALD A. CASS, *THE RULE OF LAW* 151 (2001)); see also *In re McConnell*, 370 U.S. 230, 236 (1962) ("An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice."); LINOWITZ & MAYER, *supra* note 48, at 207-08 ("In a real sense, law is what America is all about. . . . We have not relied on popular assemblies to vindicate the rights of the citizen; we have put our faith in documents and courts and lawyers.").

<sup>83</sup> See Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 126 (2002) (The rule of law "strikes a balance between society's need for political independence, social equality, economic development, and internal order on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other.").

<sup>84</sup> See *supra* note 37.

avoid offending important constituents. The answer is that we count on people (especially alumni who are, after all, lawyers) to remember and appreciate how the U.S. 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.<sup>85</sup> A “lawyer’s representation of a client . . . does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”<sup>86</sup> And for the Clinic to turn down legitimate cases for fear of controversy would cause much deeper offense to the values of our constituents than could any lawful position the Clinic might advance on behalf of a client. 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.<sup>87</sup>

## VI. CONCLUSION

An apolitical clinic is built on three principles: that (1) law students should be trained to be capable, civil, and ethical advocates, (2) legal representation should not be denied on the basis of ability to pay or point of view, and (3) nobody is so rich or powerful as to be above the law. The fictional lawyer in the novel “*To Kill a Mockingbird*” embodies these principles.<sup>88</sup> 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.” And when I discussed the Clinic’s 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. So long as the Clinic charts its course by values this central to the training of all U.S. lawyers, it will not only serve its clients, but also the Law School’s entire constituency, the legal system, and society at large.

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<sup>85</sup> See David Luban, *Silence! Four Ways the Law Keeps Poor People from Getting Heard in Court*, LEGAL AFF., May/June 2002, at 54 (“By making each party responsible for presenting its own case, the adversary system arranges incentives so that every point of view gets presented as fully and sympathetically as possible.”).

<sup>86</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2 (b) (2003).

<sup>87</sup> LA. SUP. CT. R. XX § 6(g), at <http://www.lasc.org/rules/html/xx499.htm>.

<sup>88</sup> James R. Elkins explains:

[Atticus Finch] represents Tom Robinson zealously because his character, as person and lawyer, makes it impossible for him not to do for Tom Robinson what he would do for any client or neighbor who sought his services. It is this kind of zeal and this kind of devotion to advocacy that makes a good lawyer someone to revere even as we laugh at the lawyers made the butt of common jokes.

Elkins, *supra* note 32, at 740.

# A REPLY TO WIZNER AND SOLOMON'S "LAW AS POLITICS"

ADAM BABICH

Professors Wizner and Solomon believe it is inherently political to represent people who would otherwise lack access to the legal system. Therefore, they argue, the Tulane Environmental Law Clinic is political too. Fair enough: why argue about semantics? When I use the phrase "apolitical clinic" in the foregoing essay, however, I refer to a clinic that has no agenda other than following basic tenets of the legal profession, that is promoting equal access to justice and the rule of law, and training law students to be capable and ethical lawyers.

According to Wizner and Solomon, "it is illusory to suggest that we are not involved in the political nature of [client] decisions." But the rules governing our profession tell us that representing a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities."<sup>1</sup> The rules also encourage us to represent people "unable to afford legal services, or whose cause is controversial."<sup>2</sup> Working to advance such clients' lawful goals is very different from promoting an independent political agenda.

Wizner and Solomon complain that the approach to lawyering that I call apolitical is "nothing new." They are correct. As the essay states, "our apolitical philosophy puts the Clinic squarely in the mainstream of U.S. legal practice." The essay's purpose is not to introduce a new style of lawyering, but to crystallize my view of the apolitical law-school clinic by (1) identifying its pedagogical, institutional (in terms of serving constituents), and public relations advantages, (2) establishing that the approach is consistent with clinics' duties to clients, and (3) showing how the approach can be implemented in case-selection decisions.

Wizner and Solomon adopt the "I don't believe you" response that the essay describes as one of two arguments the Tulane Environmental Law Clinic's most persistent critics fall back on. They speculate that the Clinic must have a policy of representing "only the victims of environmental misbehavior, or organizations that advocate on behalf of environmental protection." They are mistaken. As the essay points out, "the only defense case a potential client has ap-

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<sup>1</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 (b) (2003).

<sup>2</sup> *Id.* R. 1.2 cmt. 5; *see also* LA. SUP. CT. R. XX § 1 (authorizing student practice as, *inter alia*, "one means of providing assistance to clients unable to pay for such services.").

proached us about during my tenure . . . we accepted.”

Wizner and Solomon also speculate that, but for politics, the Clinic would represent “at least one” member of the regulated community. Nothing about our politics, however, prevents us from advancing business interests.<sup>3</sup> Although Wizner and Solomon are correct that our policy of serving as a law firm of last resort would preclude representation of many companies, it is hardly unheard of for a small business to be unable to afford competent environmental counsel.<sup>4</sup> We do not, however, solicit clients. So for us to represent such a business, it must ask for our help.

Finally, Wizner and Solomon “would add” to the Clinic’s guiding principles that a clinic should teach students to (1) “be socially responsible members of the legal profession,” (2) “value providing *pro bono* representation,” and (3) understand “the professional value of representing the poor and powerless . . . against the rich and powerful.” The Clinic’s mission, however, is already to train ethical lawyers. Under the Model Rules, ethical lawyers share Wizner and Solomon’s commitment to social responsibility, *pro bono* representation, and equal access to justice.<sup>5</sup>

I was surprised by Wizner and Solomon’s response. Aside from semantics, and Wizner and Solomon’s mistaken assumptions about case selection at the Clinic, we do not appear to disagree about much. I had expected a critique of my essay from colleagues who still await the revolution to go more like this: *Given the stark reality of twenty-first century America, with poor people, minorities, and the environ-*

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<sup>3</sup> Denying legal representation to alleged polluters would cripple their ability to work within the system and, ultimately, make environmental compliance more difficult to monitor and enforce. In contrast, providing environmental defendants with a voice in the legal system can promote practical, cost-effective resolution of environmental disputes and discourage governmental overreaching.

<sup>4</sup> So long as unmet need persists among people who cannot afford lawyers, however, there is no reason for the Clinic to represent people who can reasonably afford private representation. Granted, accepting such cases would save clients some money, but it would also deny members of the bar (such as our alumni) an opportunity to earn fees. In contrast, representing people who would otherwise lack access to the legal system helps not only those clients, but serves the bar and the public as a whole. See, e.g., Adam Babich, *The Violator Pays Rule*, ENVTL. F., May/June 2004, at 30, 36 (Because “society has a keen interest in ensuring that judges make fully informed decisions in . . . public-law cases,” denying access to the judicial system to litigants who cannot afford lawyers “would skew the information available to judges and therefore undercut the regulatory system’s credibility.”).

<sup>5</sup> MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 7 (2003) (“A lawyer should strive . . . to exemplify the legal profession’s ideals of public service.”); *id.* R. 6.1 (“Every lawyer has a professional responsibility to provide legal services to those unable to pay.”); *id.* pmbl. ¶ 6 (Lawyers “should seek improvement of [*inter alia*] access to the legal system . . . and “should be mindful . . . of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.”).

*ment all under siege, it is not enough to teach law students to be professional “mouthpieces” for whoever happens to walk in the door. We are each on this earth only a short time and we owe it to our clients, our children, and our own better natures to use that time well. Rather than accommodating critics and law school constituents, we must direct our energies toward legal and social reform and teach our students to do the same.*

My reply to that argument is more difficult, but comes down to this: As law professors, we do our best service when we arm students with the most powerful tools we have at our disposal and expose them to as much reality as we can fit into the curriculum. Ultimately, we must count on our students—like our clients—to make the best use of the tools and information we provide, and trust them to make their own choices.