ACCESS TO JUSTICE, ACADEMIC FREEDOM, AND POLITICAL INTERFERENCE: A CLINICAL PROGRAM UNDER SIEGE

PETER A. JOY* AND CHARLES D. WEISSELBERG**

Attacks on poor people's access to justice and on the academic freedom of students and teachers are not new. Perhaps it is only inevitable that as "real-client" law school clinical programs proliferate, these programs will sometimes become the target of politicians and others who disagree with the clinics' work. Many of us who teach in clinical programs have received inquiries from people outside of the law school community, such as alumni, legislators, or trustees, who ask why "the law school" is involved in a particular case.[1] Most of these inquiries are benign, and alumni, legislators, and trustees are satisfied once they understand what law school clinics do and what they teach. Occasionally, however, the inquiries turn into full-fledged and serious attacks on the clinics and their universities. This introduction to the "Friends of the Court Submissions"[2] before the Louisiana Supreme Court deals with a grave threat to clinical legal education in the State of Louisiana as well as to the program at Tulane University.

In an effort to impede the work of Tulane's Environmental Law Clinic, business groups requested the Louisiana Supreme Court to change the state student practice rule to severely limit clinical students' ability to advocate for their clients. In response to these complaints, the Court is examining the state's student practice rule and the role of law school clinics in legal education. The *Clinical Law Review* is publishing edited versions of the submissions by the Association of American Law Schools (AALS) and the Clinical Legal Education Association (CLEA) to the Louisiana Supreme Court. These submissions will be of interest to clinicians and others since the submissions describe the development of law school clinical programs and address

* Assistant Professor and Director, Milton A. Kramer Law Clinic, Case Western Reserve University Law School.

** Professor, University of Southern California Law School.

1 At times, these inquiries are also directed to law school deans and university presidents.

2 The "submissions" resemble *amicus curiae* briefs in every respect except nomenclature. They are not called "briefs" because there is no "case" pending before the Louisiana Supreme Court.

issues of access to justice,[3] academic freedom,[4] and professional responsibility in the clinical setting. It is also our hope that these submissions may serve as useful references for clinicians responding to inquiries about the clients they represent from forces outside of their law school communities.

Political Interference in Law School Clinics

Although a handful of American law schools have had client clinics for many years,[5] organized efforts to develop clinical programs began in earnest in the 1960s.[6] As clinics began representing previously disenfranchised client populations, clinicians, especially those at state funded institutions, became subject to some of the same attacks experienced by legal services organizations.[7]

One of the first noted instances of political interference occurred at the University of Mississippi in the late 1960s. Two law school faculty members who were affiliated with the North Mississippi Rural Legal Services were dismissed after university trustees and state legislators complained about the faculty's involvement with a legal services office that filed a school desegregation case.[8] Not only were the faculty members terminated,[9] but the law school also ended its rela-

---

[3] The First Amendment is implicated when people seek to vindicate their rights in court, and litigation can be "a form of political expression" protected by the First Amendment. *See NAACP v. Button*, 371 U.S. 415, 429-30, 443-44 (1963). "Clinic students who represent indigent persons. . .begin to appreciate the seriousness of the plight of persons who face a mix of legal and social problems, who may not be able to articulate their positions lucidly, whose limited resources may significantly limit possible options, and who may perceive the law to be an oppressive rather than positive force in their lives." Henry Rose, *Law Schools Should be about Justice too*, 40 CLEV. ST. L. REV. 443, 451 (1992).

[4] "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978).

[5] *See, e.g.*, Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 939-43 (1997) (describing Tennessee's clinic, which was established in 1947).

[6] *See Submission of the Association of American Law Schools to the Supreme Court of the State of Louisiana Concerning the Review of the Supreme Court's Student Practice Rule* (AALS Submission), *infra*, at notes 8 and 9 and accompanying text (describing the development of clinical programs); *see also* Wallace J. Mlyniec, *The Intersection of Three Visions - Ken Pye, Bill Pincus, and Bill Greenhalgh - and the Development of Clinical Teaching Fellowships*, 64 TENN. L. REV. 963, 964-78 (1997) (discussing some of these early efforts).

[7] "[S]tate legislators and private groups have attempted to interfere with the curriculum of law school clinical programs, particularly at state law schools. The goal has been clearly expressed: to stop law school 'live-case' clinics from involvement in public interest litigation. . .as part of a broader war on legal services and public interest legal groups[.]" Elizabeth M. Schneider, *Political Interference in Law School Clinical Programs: Reflections on Outside Interference and Academic Freedom*, 11 J.C. & U.L. 179, 180 (1984).

[8] *Id.* at 183.

[9] The two law professors sued for reinstatement claiming that they had been singled out solely due to their relationship with the legal services program while other faculty were

tionship with the legal services office.[10]

The last thirty years have seen other sporadic, though serious, efforts to shut down law school clinics. In 1981, several clinics at the University of Iowa were threatened with termination in retaliation for successful efforts in prison-conditions litigation.[11] Six members of the Iowa House of Representatives introduced legislation that would have prohibited the clinics from representing any clients, especially inmates, in litigation against the state.[12] The bill never made it out of committee, and a subsequent effort to include it as an amendment to the university's appropriation bill was defeated.[13] Also in 1981, the Colorado legislature almost succeeded in a similar effort to prohibit law professors from assisting in litigation against any governmental unit, but the legislation was vetoed by the governor.[14] The following year, a bill passed one chamber of the Idaho legislature to prevent any public institution from offering a class or legal clinic in which students participated in any lawsuit against the state.[15] In 1989, Idaho legislators complained again after the Idaho Legal Aid Clinic successfully petitioned for a stay of execution for an inmate on the state's death row.[16] In Tennessee in 1981, issues over attorneys' fees in civil rights lawsuits led to the separation of the clinic from a legal services program.[17] In New Jersey, the legislature passed a "conflicts-of interests" statute that would have prevented any state employee from representing any private individual before any state agency.[18] Strictly construed, the law would have barred clinics at Rutgers University from participating in parole, public benefits, and any other administrative cases. Fortunately in 1989, the New Jersey Supreme Court ruled (4-3) that the statute did not apply to Rutgers clinicians.[19]

---

permitted outside employment. *Trister v. University of Miss.*, 420 F.2d 499 (5th Cir. 1969). "The district court upheld the dismissal, but the Fifth Circuit reversed on the ground that the law school's imposition of different and more onerous restrictions than those imposed upon other law professors in the same category violated plaintiffs' rights to equal protection." Schneider, *supra* note 6 at 181-82; *Trister*, 420 F.2d at 504.

10 Elizabeth M. Schneider & James H. Stark, Political Interference in Law School Clinical Programs: Report of the AALS Section on Clinical Education, Committee on Political Interference 1, n.1 (1982) (citing AAUP BULLETIN (Spring 1970), at 74-86). Copy on file with the authors.

11 *Id.* at 1.

12 Schneider, *supra* note 7, at 185.

13 *Id.*

14 Schneider and Stark, *supra* note 10, at 2.

15 *Id.*

16 Susan Hansen, *Backlash on the Bayou*, AM. LAW. 53 (Jan.-Feb. 1998), at 53.

17 Schneider & Stark, *supra* note 10, at 2; *see also* Blaze, *supra* note 5, at 960.

18 N.J. STAT. ANN. § 52:13D-16(b).

19 *In re Determination of Executive Commission on Ethical Standards re: Appearance of Rutgers Attorneys*, 116 N.J. 216, 561 A.2d 542 (1989).

No law school clinic has been the target of as many sustained attacks as the in-house environmental law clinic at the University of Oregon. For many years, the Oregon clinic has been involved in forest conservation and endangered species cases, including a lawsuit against the U.S. Bureau of Land Management to protect the Northern Spotted Owl.[20] Following repeated complaints by government officials and representatives of the timber industry, the President of the University of Oregon appointed a committee to study the clinic and its use of public funds. In November 1988, the committee issued its report, finding that the clinic "fulfills its educational function extremely well, through its advocacy serving a proper social role."[21] Today, in part because of the attacks on the environmental law clinic, the clinic still functions at the University of Oregon, but litigation occurs outside of the law school, at the Western Environmental Law Center, a not-for-profit organization.[22]

There are now client clinics at some 147 law schools in the United States.[23] In light of the innovative public interest work accomplished at so many clinics, it is perhaps surprising that there are not more attacks. Given their placements within respected law schools and universities, clinical programs may be somewhat insulated from the types of pressures placed upon, for example, the Legal Services Corporation. Nevertheless, instances of political interference must be taken quite seriously when they do occur.

The AALS, American Bar Association (ABA), Society of American Law Teachers (SALT), American Association of University Professors (AAUP), and CLEA have all, from time to time, come to the aid of law school clinics. Thus, clinicians whose programs are under attack need not stand alone. The AALS Section on Clinical Legal Education has had a long-standing committee to assist clinics experiencing problems of political interference. In 1982, Professors Elizabeth Schneider and James Stark wrote a report for this AALS committee, documenting instances of political interference, and the ABA issued a useful policy statement.[24] The AALS, AAUP, and

---

20 Telephone conversation with Prof. Michael Axline (Feb. 23, 1998).

21 REPORT OF THE AD HOC STUDY COMMITTEE FOR THE ENVIRONMENTAL LAW CLINIC, UNIVERSITY OF OREGON SCHOOL OF LAW (Nov. 30, 1988), at 15. Copy on file with the authors.

22 *Supra* note 20.

23 *See AALS Submission, infra,* at note 11 and accompanying text.

24 *See* Schneider & Stark, *supra* note 10, at 12-13. The ABA's Council on the Section of Legal Education and Admissions to the Bar issued a statement as follows:

> The Council has received several reports of inappropriate interference in law school clinical activities. Improper attempts by persons or institutions outside law schools to interfere with the ongoing activities of law school clinical programs and courses have an adverse impact on the quality of the educational mission of affected law

SALT all filed *amicus curiae* briefs in the New Jersey Supreme Court to support the Rutgers clinics. And the AALS, CLEA, and SALT took formal positions to support Tulane in the recent investigation by the Louisiana Supreme Court.

The Tulane Environmental Law Clinic

While the previous discussion highlights interference with law school clinical programs at public universities, the recent initiatives against clinicians and students at Tulane University's Environmental Law Clinic demonstrate that private universities are not immune from political interference. The Tulane clinic, a program at a private school, was targeted by government officials and business groups because of its representation of residents who oppose the construction of a manufacturing plant in their neighborhood.

Business groups and government officials have called the Tulane students "modern-day vigilantes" and "storm troopers." But their clients — low and moderate income residents living along the levee about 40 miles south of Baton Rouge, in the middle of an area known as "Cancer Alley" — view them as heroes.[25] The proposed site for the manufacturing plant is in an area populated mostly by African-Americans, and the residents' complaint of environmental discrimination has "emerged as the principal test case for a growing backlog of similar environmental justice complaints filed with the EPA on behalf of minority communities around the country."[26]

Since starting their representation of a local citizen's group in its effort to block construction of a $700 million polyvinyl chloride plant by the Shintech Corporation in November of 1996, the clinical students, their supervising faculty,[27] and the Tulane University Law School have been the targets of well-publicized attacks by the Governor of Louisiana, other government officials, and business groups. Louisiana Governor M.J. "Mike" Foster has threatened to stop any and all state support or contracts with Tulane, as well as to "yank the school's tax breaks."[28] The Secretary of the Louisiana Department of

---

schools and jeopardize principles of law school self-governance, academic freedom, and ethical independence under the ABA Code of Professional Responsibility. In appropriate ways, the Council shall assist law schools in preserving the independence of law school clinical programs and courses.

Memorandum D8283-25, from James P. White, Consultant on Legal Education to the American Bar Association (Feb. 21, 1983). Copy on file with the authors.

[25] Marcia Coyle, *Governor v. Students in $700 M Plant Case,* NAT'L L.J., Sept. 18, 1997, at A1; Hansen, *supra* note 16, at 51.

[26] Hansen, *supra* note 16, at 52.

[27] Clinic Director Robert Kuehn and Clinic Staff Attorney Lisa Lavie of the Tulane Environmental Law Clinic.

[28] Hansen, *supra* note 16, at 52; *see also*, Coyle, *supra* note 25, at A1, A26-A27.

Economic Development, Kevin P. Reilly, wrote Tulane University's President, Eamon Kelly, charging that "the Clinic's practice of conducting legalistic guerrilla attacks against the environmentally-responsible industry" was damaging job prospects of the state's citizens. He asked the University to review the Clinic "to determine if the Clinic's activities are in the best interests of the university and the state."[29] In media interviews, Governor Foster was asked whether the poor residents of the neighborhood had a right to counsel in the Shintech matter, and he reportedly replied, "Let them use their own money, not Tulane's."[30] These attacks were calculated to encourage people to stop making charitable contributions to Tulane University and its law school, and to force Tulane's Environmental Law Clinic to abandon its clients.

Despite this campaign of high-pressure tactics, the administration of Tulane University, led by President Kelly and Tulane Law School's Dean Edward Sherman, continues to support the academic freedom of the clinical students and faculty, and the right of the clients to be represented. These unparalleled attacks on the academic freedom of students and professors at a private law school, as well as the "interference with ordinary people's right to be represented[,]"[31] have been widely criticized and are the focus of national press coverage.[32]

When these high-pressure tactics proved unavailing, several business groups wrote letters to the Louisiana Supreme Court asking the Court to amend the Louisiana student practice rule[33] recommending, among other things, a prohibition on clinical students' abilities to express "legal views [that] are in direct conflict with business positions[.]"[34] The Louisiana Supreme Court opened an investigation of the clinical programs in the state, sending investigators to Louisiana's three law schools. The investigators spent a substantial amount of time at the Tulane Environmental Law Clinic.

The pressure brought to bear on the Tulane clinic so alarmed aca-

---

29 Letter from Kevin P. Reilly to Dr. Eamon P. Kelly (Aug. 8, 1997), at 1-2. Copy on file with the authors.

30 Coyle, *supra* note 25, at A26.

31 Hansen, *supra* note 16, at 52.

32 *See e.g.*, Hansen, *supra* note 16, at 51-57; Coyle, *supra* note 25, at A1, A26-A27; and Shelia Kaplan and Zoë Davidson, *The Buying of the Bench*, NATION, Jan. 26, 1998, at 11, 15; *see also* Editorial, *Law students v. state*, TIMES-PICAYUNE (Aug. 10, 1997), at B-6; Editorial, *Our Views: Reilly is off base trashing Tulane*, BATON ROUGE SUNDAY ADVOCATE (Aug. 17, 1997), at 14B.

33 LA. SUP. CT. R. XX.

34 Letter from The Louisiana Chamber of Commerce to Chief Justice Calogero (July 8, 1997, at 1; *see also* Letter from Louisiana Association of Business and Industry to Chief Justice Calogero (Sept. 9, 1997) (enclosing a "Proposal to Amend and Enforce Rule XX"); Letter from the Business Council of New Orleans and the River Region to Chief Justice Calogero (July 16, 1997). Copies on file with the authors.

demic legal associations that the AALS, CLEA, and SALT filed submissions with the Louisiana Supreme Court pointing out the serious constitutional, ethical, and pedagogical issues implicated by the proposed changes.[35] In framing their responses, the organizations worked closely together to coordinate their submissions.[36] While each is an independent entity with its own separate and distinct mission, all three organizations share a vision of legal education in which clinical legal education and academic freedom are essential components. The submissions are also significant in other respects. CLEA's submission marks one of the first instances of this relatively new association taking part in a highly-public debate. The AALS submission is notable because it expresses without hesitation the formal position of the organization supporting clinical legal education.[37]

At this writing, it is still unclear what action, if any, the Louisiana Supreme Court will take as it considers the proposed amendments to the Louisiana student practice rule.[38] As argued in the submissions to the Court by the AALS, CLEA, and SALT, the Louisiana Supreme Court should not abdicate its responsibility for facilitating the high quality legal education provided by clinical programs, nor should it ignore the important academic freedom and ethical issues implicated by the proposed amendments to the student practice rule. If the Louisiana Supreme Court does modify its state's student practice rule, it will be a regrettable and unprecedented action that will threaten every clinical program that represents individuals and groups who turn to the courts for redress against more powerful interests.

---

[35] What follows are edited versions of the submissions. Copies of the complete submissions are available from the authors.

[36] The authors of the submissions shared materials, reviewed drafts of each others' work, and coordinated the content of their submissions to limit duplication. In addition, the Submission of CLEA is referenced in footnote 17 of the Submission of the AALS. Finally, the value place on clinical legal education is exemplified by the work of a clinical law student, Jorge deNeve from the University of Southern California, on the Submission of the AALS.

[37] This is important because the relationship between clinicians and the AALS has, at times, been strained. Here, however, the Executive Director of the AALS, Carl C. Monk, acted immediately to ensure that the AALS would take a strong position before the Louisiana Supreme Court. The Executive Committee of the AALS unanimously voted to file a submission on this important issue. Prof. Monk and Prof. Elliott S. Milstein, a clinician and member of the AALS' Executive Committee, were very involved in reviewing and editing the AALS' submission.

[38] It has been reported that one of the business groups urging the changes, LABI, has spent over $420,000 on judicial campaigns in the last three elections. Kaplan and Davidson, *supra* note 32, at 15. These donations have been described as a "wise investment," and some commentators contend that since these contributions to judicial races the Louisiana Supreme Court has "increasingly ruled for business interests[.]" *Id.*