

Political Interference with Clinical Legal Education: Denying Access to Justice

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Court rules in every state permit law students, under faculty supervision, to represent clients as part of clinical legal education programs. The success of students enrolled in the Tulane Environmental Law Clinic (TELC) in representing individuals and community groups led some politicians and business groups to engage in tactics aimed at depriving potential clinic clients from receiving law student representation. In an apparent capitulation to the demands of critics of the TELC and its clients, the Louisiana Supreme Court amended the student practice rule to limit the clients that clinical law students can represent and to interfere with clinical legal education at law schools in Louisiana. The author examines the process leading up to the amendments to the Louisiana student practice rule and evaluates the practical implications of the amendments on clinical legal education and potential clinic clients. The author also analyzes concerns about the judicial independence of an elected judiciary and explores access to the courts as a precondition for access to justice and the role of law school clinical programs in helping to make access to justice possible for some in our society. The author concludes with a call for the legal profession to institute reforms to inhibit future intrusions on student practice rules and clinical legal education in other states.

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* Professor and Director, Criminal Justice Clinic, Washington University School of Law. I am very grateful to Jane Harris Aiken, Kathleen Clark, Clark Cunningham, Daniel Keating, Ronald Levin, Karen Tokarz, and Charles Weisselberg for their advice and assistance with earlier drafts. I wrote this Essay at the invitation of the *Tulane Law Review* to voice concerns over the amendments to the student practice rule in Louisiana. I present these concerns with the knowledge that another author is writing in support of the amendments, although neither of us has seen the other's work. Prior to writing this, I co-authored, on behalf of the Association of American Law Schools, a submission to the Louisiana Supreme Court urging the court not to change the rule. 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, in 4 CLIN. LAW REV. 539 (1998) (condensed version). I also joined more than 1000 law school faculty and deans in signing a petition to the Louisiana Supreme Court urging the court to repeal the amendments. The views I express here are my own, although they were shaped by my earlier work on this issue.

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Justice

That Justice is a blind goddess,
Is a thing to which we black are wise:
Her bandage hides two festering sores
That once perhaps were eyes.¹

The recent amendments to the Louisiana Law Student Practice Rule,² which restrict law student representation of individuals and community organizations, illustrate for many the lack of justice Langston Hughes speaks about in his poetry. It is not a stretch of the imagination to envision Langston Hughes joining with grass roots community groups and civil rights organizations like the Southern Christian Leadership Conference,³ and academic associations like the Association of American Law Schools,⁴ who view the Louisiana

1. LANGSTON HUGHES, *THE PANTHER AND THE LASH* 45 (Vintage Books 1992).

2. See LA. SUP. CT. R. XX (as amended Mar. 22, 1999). The present version of Louisiana's Rule XX prohibits all forms of client solicitation and limits law student legal representation of clients to only those clients meeting stringent, inflexible income guidelines. See *id.* §§ 4, 10. All 50 states, the District of Columbia, and Puerto Rico have adopted student practice rules to enable law students working under the supervision of law faculty or other supervising attorneys to represent clients before courts and administrative tribunals. See Joan Wallman Kuruc & Rachel A. Brown, *Student Practice Rules in the United States*, B. EXAMINER, Aug. 1994, at 40, 40-41.

3. The Southern Christian Leadership Conference and others filed a lawsuit against the Louisiana Supreme Court challenging the amendments to the Louisiana law student practice rule. See *Southern Christian Leadership Conference v. Supreme Court*, No. 99-1205, 1999 U.S. Dist. LEXIS 11503 (E.D. La. July 27, 1999), *appeal filed*, No. 99-30895 (5th Cir. Aug. 27, 1999). The named plaintiffs in the lawsuit consist of the following civil rights, environmental, and community groups: Southern Christian Leadership Conference (Louisiana Chapter), St. James Citizens for Jobs and the Environment, Calcasieu League for Environmental Action Now, Holy Cross Neighborhood Association, Fishermen's and Concerned Citizens' Association of Plaquemines Parish, St. Thomas Residents Council, Louisiana Environmental Action Network, Louisiana Association of Community Organizations for Reform Now, North Baton Rouge Environmental Association, and Louisiana Communities United. See *id.* at *1. In addition, Professors Robert Kuehn, Christopher Gobert, Elizabeth E. Teel, and Jane Johnson, law faculty from Tulane University School of Law, and Professor William P. Quigley from the Loyola University School of Law are named plaintiffs. See *id.* The following student organizations and Tulane law students and alumni are also named plaintiffs: Tulane Environmental Law Society, Tulane University Graduate and Professional Student Association, Inga Haagensohn Causey, Carolyn Delizia, and Dana Hanaman. See *id.* Finally, C. Russell H. Shearer, a contributor to the Tulane Environmental Law Clinic (TELC), is the last named plaintiff. See *id.*

The Louisiana Supreme Court's first set of amendments to the student practice rule, effective July 1, 1998, were characterized by the Louisiana Environmental Action Network as "retaliation for environmental groups becoming effective in Louisiana." *NPR Morning Edition: Rules on Law School Clinics* (NPR radio broadcast, July 30, 1998) [hereinafter *NPR Broadcast*] (quoting Marylee Orr of the Louisiana Environmental Action Network).

4. The Association of American Law Schools (AALS) urged the Louisiana Supreme Court not to amend the student practice rule by arguing that the business groups' request for amendments had serious implications for the academic freedom of clinical law students and faculty, would negatively affect the quality of legal education at law schools in

Supreme Court's changes to the student practice rule as a serious attack on legal education, particularly clinical legal education, and access to justice. Of great concern is the apparent capitulation of a majority of the elected justices on the Louisiana Supreme Court to the demands of some business organizations⁵ and politicians⁶ to change the student practice rule to restrict clinical legal education and deny access to affordable legal counsel for certain individuals and groups.

The amendments make Louisiana's student practice rule the "most restrictive student practice rule in the nation,"⁷ and severely limit access to the courts for grassroots organizations and lower-income individuals⁸ while intruding on the education of law students in Louisiana. The amendments impose narrow, inflexible income

Louisiana, and would severely limit access to justice for some individuals and community groups. 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 [hereinafter AALS Submission], in 4 CLIN. L. REV. 539 (1998).

5. Demands for the Louisiana Supreme Court to investigate the TELC and to change the Louisiana student practice rule came in the form of a letter campaign to the court from various business organizations. See Letter from Daniel L. Juneau, President, Louisiana Association of Business and Industry, to Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana (Sept. 9, 1997) (on file with the *Tulane Law Review*) [hereinafter LABI Letter 1997]; Letter from Erik F. Johnsen, Chairman, Business Council of New Orleans and the River Region, to Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana (July 16, 1997) (on file with the *Tulane Law Review*) [hereinafter Business Council Letter 1997]; Letter from Robert H. Gayle, Jr., President and Chief Executive Officer, The Chamber/New Orleans and the River Region, to Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana (July 8, 1997) (on file with the *Tulane Law Review*) [hereinafter Chamber Letter 1997]. These demands are discussed *infra* notes 46-48 and accompanying text.

6. Louisiana Governor Murphy J. "Mike" Foster and the Secretary of the Louisiana Department of Economic Development, Kevin P. Reilly, Sr., publicly criticized the TELC and requested restrictions on law clinics. See Marcia Coyle, *Governor v. Students in \$700M Plant Case*, NAT'L L.J., Sept. 8, 1997, at A1; Susan Hansen, *Backlash on the Bayou*, AM. LAW., Jan./Feb. 1998, at 50, 55; Katherine S. Mangan, *La. Governor Threatens to End Tax Breaks for Tulane U. in Dispute over Law Clinic*, CHRON. HIGHER EDUC., Sept. 5, 1997, at A55; *Reilly Is Off Base Trashing Tulane*, ADVOCATE (Baton Rouge), Aug. 17, 1997, at 14B. In addition, Secretary Reilly wrote a letter to the president of Tulane University, Dr. Eamon Kelly, urging, among other things, Tulane to "undertake an internal review to determine if the [Tulane Environmental Law] Clinic's activities are in the best interests of the university and the state." Letter from Kevin P. Reilly, Sr., Secretary, Department of Economic Development, State of Louisiana, to Dr. Eamon Kelly, President, Tulane University 2 (Aug. 8, 1997) (on file with the *Tulane Law Review*) [hereinafter Reilly Letter 1997]. Such criticism is discussed *infra* notes 30-36 and accompanying text.

7. Letter from Carl C. Monk, Executive Director, Association of American Law Schools, to Murphy J. Foster, Governor, State of Louisiana 1 (Aug. 21, 1998) (on file with the *Tulane Law Review*).

8. See Complaint ¶¶ 76-89, Southern Christian Leadership Conference v. Supreme Court, No. 99-1205, 1999 U.S. Dist. LEXIS 11503 (E.D. La. July 27, 1999) (on file with the *Tulane Law Review*) [hereinafter *SCLC Complaint*]. "[D]ozens of Louisiana citizen groups are protesting the changes, which they liken to attempts to limit legal representation of black citizens during the civil rights movement." NPR Broadcast, *supra* note 3.

guidelines for individual and family clients eligible for representation by clinical students and faculty,⁹ require that a community organization demonstrate its inability to retain private counsel and that the incomes of at least 51% of the organization's members meet rigid income guidelines;¹⁰ and prohibit clinical students from representing any client "if any clinical program supervising lawyer, staffperson, or student practitioner initiated in-person contact, or contact by mail, telephone or other communications medium, with an indigent person or indigent community organization for the purpose of representing the contacted person or organization."¹¹ Under the amended rules, even those eligible for clinic student representation are subject to invasive and often dilatory tactics from opposing counsel or parties probing clinic clients' personal finances.¹²

9. The incomes for individuals and families may not exceed 200% of the federal poverty guidelines established by the Department of Health and Human Services. *See* LA. SUP. CT. R. XX § 4 commentary (as amended Mar. 22, 1999).

Thus, for example, an individual may be represented if his/her annual income does not exceed \$16,480 (200% of \$8,240); a four person family unit may be represented if their annual income does not exceed \$33,400 (200% of \$16,700). . . . [T]hese income figures will change annually with the promulgation of new federal poverty guidelines.

Id.

Nothing in Rule XX or the commentary allows for a clinical program to consider factors such as whether a potential client has substantial debt, whether the potential client has the funds available to pay for necessary legal services, or whether any other lawyer is willing to take the client's case. As Louisiana Supreme Court Justice Bernette J. Johnson notes in her dissent to the rule, "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. Ct. Res. to Amend and Reenact Rule XX, at 2 (La. Mar. 22, 1999) (Johnson, J., dissenting), *reprinted in* 74 TUL. L. REV. 285, 298 (1999).

10. *See* LA. SUP. CT. R. XX § 5 (as amended Mar. 22, 1999). "Law school clinical program staff and student practitioners who appear in a representative capacity pursuant to this rule may represent any indigent community organization provided at least 51% of the organization's members are eligible for legal assistance pursuant to Section 4 of this rule." *Id.*

11. *Id.* § 10.

12. This aspect of the new rule surfaced in the first case brought by one of the Tulane law clinics when the client was not a court appointment or referral. *See* Telephone Interview with Jane Johnson, Professor of Clinical Law, Tulane Civil Litigation Clinic (July 22, 1999) (discussing *Magsino v. Gridiron Constr., Inc.*, an unreported state district court case). The opposing party in this case sought to depose the clinic client about her income and ability to pay for legal services, but the Louisiana Supreme Court denied the writ for judicial review filed on behalf of the clinic's client. *See Magsino v. Gridiron Constr., Inc.*, No. 99-1930, 1999 La. LEXIS 2076, at *1 (La. July 13, 1999) (denying certiorari). The writ application maintained that "Rule XX of this Court is being used as a legal weapon by defendants in this case to try to prevent the plaintiff, a former school teacher who is surviving on disability assistance, from collecting an arbitration award levied against defendants in arbitration conducted by the Better Business Bureau (BBB)." Brief of Isabelle Magsino, Plaintiff-Appellant at 1, *Magsino v. Gridiron Constr., Inc.*, No. 99-1930, 1999 La. LEXIS 2076 (La. July 13, 1999) (on file with the *Tulane Law Review*). Even though the plaintiff had prevailed

The amendments to the student practice rule were triggered by business groups and politicians unhappy with the successful legal work of clinical law students and faculty at the Tulane Environmental Law Clinic (TELC). These business groups and politicians did not confine their strategies to legal arguments before judges and administrative agency decision makers concerning the interpretation and application of existing rules and laws in individual cases with the TELC's clients. Instead, the business groups and politicians chose a variety of strategies beyond litigating against the TELC's clients, with the goal of preventing the TELC from providing access to the courts for some of its clients. The strategy that ultimately proved most effective was direct lobbying of Louisiana Supreme Court justices during a judicial campaign year by business groups and politicians, many of whom had supported the justices during their previous campaigns.¹³ The Louisiana Supreme Court, in an apparent response to the overtures,¹⁴ changed the student practice rule to deny clinic legal representation to many individuals and community groups, and to prevent potential clients from receiving offers of legal assistance.

The Louisiana Supreme Court's amendments to the student practice rule provide a rare opportunity to examine interference with student practice rules and clinical legal education, and issues of access to justice and judicial independence. To set the stage for exploring these issues, Part I reviews the underlying controversy between the TELC's clients and those opposing the TELC's efforts to provide legal counsel to individuals and community groups otherwise unable to afford access to the courts. Part II examines the rationales announced

in her arbitration proceedings and was merely seeking to enforce her award, the defendants maintained that they needed to test the plaintiff's credibility in reporting her income to the clinic. *See id.* The Louisiana Supreme Court's denial of the writ does not explain why a clinic client's opposing party has standing to inquire into the clinic client's eligibility or why the attorney-client privilege between a clinic client and counsel should not bar the disclosure of information that clients provide to student lawyers and faculty lawyers. The denial of the writ also contradicts Chief Justice Calogero's opinion that "the Court considers the information and documents which are given to law clinics, or generated by law clinics, concerning the financial eligibility of clinic clients, to be confidential and not subject to public scrutiny or disclosure." Letter from Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana, to Edward F. Sherman, Dean, Tulane University School of Law 1 (Apr. 7, 1999) (on file with the *Tulane Law Review*).

13. *See infra* notes 110-113 and accompanying text.

14. After the Louisiana Supreme Court amended the student practice rule, one news commentator remarked that the court had "caved in to demands from the captains of industry, enraged by the success of the Tulane Environmental Law Clinic." James Gill, *High Court Target of Disgust*, TIMES-PICAYUNE (New Orleans), June 28, 1998, at B-11. Another news commentator noted that some business groups "congratulated one another on their influence over the Louisiana Supreme Court." Kathy Finn, *The Face of Business Not Always a Pretty Picture*, NEW ORLEANS CITYBUSINESS, June 26, 1998, at 17.

by the Louisiana Supreme Court in amending the student practice rule. Part III evaluates the practical implications of the amendments to the student practice rule for clinic clients, clinic students, and clinical faculty in Louisiana. Part IV analyzes access to the courts as a precondition for access to justice and the role of law school clinical programs in helping to make access to justice possible for some in our society. Part V explores some of the extralegal strategies employed by politically powerful groups in Louisiana aimed at influencing the Louisiana Supreme Court. Part VI analyzes political influence on the elected judiciary and its conflict with judicial ethics, and Part VII concludes with a call for the legal profession to institute reforms to inhibit future intrusions on student practice rules and clinical legal education in other states.

I. THE LOUISIANA STUDENT PRACTICE RULE CONTROVERSY

A. *Present Status of the Amendments to the Student Practice Rule*

The amendments to the Louisiana student practice rule prompted litigation in federal district court by clinic clients, potential clinic clients, clinical law students and faculty, law student organizations, and a donor to one clinical program.¹⁵ Twenty-one plaintiffs asserted eight specific bases for relief.¹⁶ Their complaint included claims that the amendments constituted impermissible viewpoint discrimination in violation of the First Amendment by restricting legal advocacy;¹⁷ infringed clients' and potential clients' First Amendment rights of freedom of speech, association, and to petition the government by imposing restrictive income guidelines and requiring intrusive income verification requirements on individuals and members of organizations;¹⁸ violated the First Amendment academic freedom rights of clinical students and faculty by restricting the clients, and therefore the cases, that are available for teaching purposes;¹⁹ and violated the First Amendment rights of potential clients to receive information concerning their legal rights, and the First Amendment rights of clinical students and faculty to convey that information, by prohibiting clinical student representation of any client if any student,

15. See *Southern Christian Leadership Conference v. Supreme Court*, No. 99-1205, 1999 U.S. Dist. LEXIS 11503 (E.D. La. July 27, 1999).

16. See *id.* at *8-*9.

17. See *SCLC Complaint*, *supra* note 8, ¶ 53.

18. See *id.* ¶¶ 57-72.

19. See *id.* ¶¶ 90-118.

faculty member, or staff person has informed the potential client of the client's legal rights.²⁰

Judge Eldon E. Fallon, the federal district court judge who heard the legal challenge to the Louisiana Supreme Court's amendments, granted the Louisiana Supreme Court's motion to dismiss.²¹ In rejecting all of the plaintiffs' claims, Judge Fallon determined that the plaintiffs' case essentially challenged the change to the student practice rule because it was "precipitated by political pressure, and was not based on any improper conduct on the clinics' part."²² He held that, as long as the change in the rule was not "purposeful discrimination against a suspect or quasi-suspect classification," the Louisiana Supreme Court's actions in amending the rule "were not illegal or unconstitutional, and if they were precipitated by some otherwise nondiscriminatory political motive, such motivation by itself does not automatically equate to an unconstitutional or even an improper motive."²³ Judge Fallon concluded by saying, "Furthermore, in Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary."²⁴

While the district court judge's opinion was surprisingly candid about the effect of political influence on elected state judges, it was silent about the effect of the rule change on clinical legal education in Louisiana and the implications for justice, fairness, and an independent judiciary that serve as the underpinnings of both the judicial canons of ethics and our legal system. The trial court's opinion also failed to consider fully the plaintiffs' claims that important, fundamental First Amendment rights were violated by the Louisiana Supreme Court's amendment of the student practice rule.

The plaintiffs, who assert that fundamental rights are at stake, have appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit.²⁵ To better understand the claims of those challenging the amendments to the student practice rule, it is necessary to explore both the events and process preceding the amendments.

20. See *id.* ¶¶ 73-75.

21. See *Southern Christian Leadership Conference*, 1999 U.S. Dist. LEXIS 11503, at *47.

22. *Id.* at *44.

23. *Id.* at *44-*45.

24. *Id.* at *45.

25. See *Southern Christian Leadership Conference v. Supreme Court*, No. 99-30895 (5th Cir. Aug. 27, 1999), *appeal filed from* No. 99-1205, 1999 U.S. Dist. LEXIS 11503, at *47 (E.D. La. July 27, 1999).

B. Events Preceding the Amendments to the Student Practice Rule

The legal work of the TELC's law students and faculty²⁶ on behalf of community groups and environmental organizations drew the ire of business groups and politicians, who called Tulane students and faculty "modern day vigilantes" and "storm troopers" for pursuing clients' claims of improperly issued state pollution permits and environmental discrimination in relation to Shintech Corporation's proposed location of a massive \$700 million polyvinyl chemical plant.²⁷ The location for the proposed plant was an area with eleven existing chemical plants and over 130 other industrial plants known as "Cancer Alley," a predominantly African-American, lower-income community.²⁸

The residents' complaint of environmental discrimination over the location of the Shintech chemical plant became "the principal test case" for a nationwide backlog of similar complaints filed with the Environmental Protection Agency (EPA) on behalf of minority communities.²⁹ After the citizen groups proved successful in asserting their legal claims to block the location of the plant, the business groups and politicians supporting the construction of the plant endeavored to limit the citizen groups' access to legal advocacy through the TELC.

Louisiana Governor Murphy J. "Mike" Foster and Foster's liaison on the Shintech matter, Secretary of the Louisiana Department of Economic Development, Kevin P. Reilly, Sr., publicly criticized the TELC.³⁰ Reilly stated that he would "use every legitimate method at [his] command to defeat [the clinic],"³¹ and he instructed his staff to

26. While the Louisiana Supreme Court's resolution amending the student practice rule does not single out the TELC by name, even Sam LeBlanc, Chairman of The Chamber/New Orleans and the River Region, one of the groups requesting the amendments, stated with respect to the amendments, "The intention was basically to bring all law clinics, but particularly the Tulane Environmental Law Clinic, down to what they are supposed to be doing." Chris Gray, *Court Reins in Student Lawyers*, TIMES-PICAYUNE (New Orleans), June 18, 1998, at A1 (internal quotations omitted) (quoting Sam LeBlanc).

27. See Coyle, *supra* note 6, at A1; Hansen, *supra* note 6, at 52.

28. The proposed site was in St. James Parish, approximately 40 miles south of Baton Rouge, Louisiana, and called "Cancer Alley" because of the chemical and industrial plants in the area and the elevated rates of cancer for residents. See Terry Carter, *One Chief Justice's Political Gumbo: Add Big Business, Mix in Law Schools Clinics to Make Re-Election Bid Brouhaha*, A.B.A. J., Dec. 1998, at 26, 26; Coyle, *supra* note 6, at A1; Hansen, *supra* note 6, at 52; Deborah Mathis, *Environmental Hazards Make Small Town Hellish Place to Live*, GANNETT NEWS SERVICE, June 1, 1999, available in 1999 WL 6969116.

29. See Hansen, *supra* note 6, at 52.

30. See Coyle, *supra* note 6, at A1; Hansen, *supra* note 6, at 55; Mangan, *supra* note 6, at A55.

31. See Vicki Ferstel, *Shintech's Opponents Tracked*, ADVOCATE (Baton Rouge), Nov. 5, 1997, at 1A (internal quotations omitted) (quoting Kevin P. Reilly, Secretary, Department of Economic Development, State of Louisiana).

"do everything we can to prevent [the TELC] from tying up the permit application process."³² When criticism alone did not persuade the TELC's students and faculty to abandon their clients, Foster proceeded to ask donors and supporters of Tulane to threaten to withhold financial support for Tulane as a tactic to pressure the president of Tulane University and the dean of Tulane Law School to order the students and faculty to withdraw from the Shintech matter.³³ Reilly also demanded that Tulane University review the TELC "to determine if the Clinic's activities are in the best interests of the university and the state."³⁴ When asked if the low-income residents seeking enforcement of the environmental laws had a right to counsel in the Shintech matter, Foster replied, "Let them use their own money, not Tulane's."³⁵

When Tulane's top administrators refused these overtures, Foster threatened to "yank the school's tax breaks."³⁶ The TELC still refused to resign from the Shintech matter, and the business groups supporting Foster and the Shintech chemical plant shifted their strategy away from threats and pressure on Tulane to a forum where they hoped to find more receptive ears—the elected justices of the Louisiana Supreme Court.

The new strategy was developed at a closed door meeting of the New Orleans Business Council,³⁷ where Foster complained about the TELC, and was asked by business leaders in attendance what they could do to help him.³⁸ In addition to prompting some Tulane financial supporters to contact Tulane's administrators and cease

32. Memorandum from Kevin P. Reilly, Sr., Secretary, Department of Economic Development, State of Louisiana, to Harold Price, Deputy Secretary, Department of Environmental Quality, State of Louisiana 1 (Nov. 15, 1996) (on file with the *Tulane Law Review*).

33. See Coyle, *supra* note 6, at A1.

34. Reilly Letter 1997, *supra* note 6, at 2.

35. See Coyle, *supra* note 6, at A1 (internal quotations omitted) (quoting Murphy J. Foster, Governor, State of Louisiana).

36. Hansen, *supra* note 6, at 52 (internal quotations omitted).

37. One reporter described the New Orleans Business Council as a "secretive council . . . [of] 59 members, virtually all of them chairmen, presidents and CEOs of major corporations based in the New Orleans metropolitan area. It has been described by critics as an economic star council that meets behind closed doors to make decisions about the city." See Christi Daugherty, *It's Not Easy Being Green*, GAMBIT WKLY., July 22, 1997, at 9.

38. See *id.* When asked what businesses could do to help the business climate in New Orleans, Governor Foster reportedly responded, "One thing that would help would be to get that bunch at Tulane under control." *Id.* (internal quotations omitted). Foster later explained that he was "telling some of the alumni to think about their support [for the University]." *Id.* (internal quotations omitted).

financial support of the university,³⁹ the business leaders came up with the idea of sending a series of letters to the Louisiana Supreme Court requesting an investigation of the TELC.⁴⁰ Soon after the meeting, business groups sent letters to the Louisiana Supreme Court asking the elected justices to change the student practice rule to prevent clinical students from representing community and environmental groups seeking to raise legal claims before agencies and courts.⁴¹

Although there is no public record of any private conversations between business groups or politicians and Louisiana Supreme Court justices or staff, it is public knowledge that an official with one of the business groups lobbying the Louisiana Supreme Court, The Chamber/New Orleans and the River Region, was also an employee of the Louisiana Supreme Court.⁴² This employee initiated a program called "Chamber to Chamber" to bring together members of the judiciary and local chambers of commerce,⁴³ was involved in the Louisiana Supreme Court's initial investigation of the clinical

39. See *The Chemical Plant that Could Break Tulane*, COUNTERPUNCH, July 16-31, 1997, at 4, 5. "As a private school, Tulane depends on financial support from wealthy individuals and corporations for survival. Many of the richest business-owners in New Orleans are major contributors to Tulane. And quite a few of them are members of the New Orleans Business Council." Daugherty, *supra* note 37, at 9.

40. At the meeting, business leaders were urged "to send a series of letters to the Louisiana Supreme Court demanding that the justices investigate the clinic." *Shintech's Secret Backer*, COUNTERPUNCH, Nov. 16-30, 1997, at 2, 2-3.

41. "The Louisiana Supreme Court launched an inquiry into the state's student legal clinics after fielding complaints about Tulane University School of Law's representation of state residents who have blocked construction of a plastics plant promoted by local business and political leaders." Mark Ballard, *Tulane Law Clinic Will Be Scrutinized*, NAT'L L.J., Oct. 20, 1997, at A8; see also Mark Ballard, *La. High Court Reins in Legal Clinic*, NAT'L L.J., July 6, 1998, at A11 (noting that the Louisiana Association of Business and Industry and two chamber of commerce organizations had requested an investigation of the TELC claiming it had exceeded its mandate when intervening in the Shintech matter); Carter, *supra* note 28, at 26 (stating that the Louisiana Supreme Court became involved in the matter after receiving complaints from business groups); Coyle, *supra* note 6, at A1 (noting that Governor Foster and his advisors assailed the TELC in front of business leaders, threatened retaliation, and called for an investigation by the supreme court); Hansen, *supra* note 6, at 52 (stating that Governor Foster's business supporters "began applying their own brand of pressure" by sending complaint letters to the supreme court).

42. In response to requests by business groups, Chief Justice Pascal Calogero launched an investigation of the clinics and initially announced that Kim Sport, Deputy Judicial Administrator, would be one of the joint directors of the investigation. See James Gill, *Law Clinics, High Court Face Off*, TIMES-PICAYUNE (New Orleans), Apr. 28, 1999, at B7. As noted by one local commentator, "Sport had for years been a big wheel in the Chamber and was head of its West Bank chapter in 1997." *Id.*

43. See Christi Daugherty, *Business of the Court*, GAMBIT WKLY., Aug. 3, 1999, at 9.

programs in Louisiana,⁴⁴ and was a public spokesperson for the Louisiana Supreme Court on the student practice rule matter.⁴⁵

The business groups' letters to the Louisiana Supreme Court criticized the TELC for promoting legal views that "are in direct conflict with business positions,"⁴⁶ and asked that the student practice rule "be corrected" to stop the clinical students from using "court rules to fight, harass and interfere with Louisiana's interest to attract new business."⁴⁷ One letter outlined ten specific recommendations, including the following: imposing strict income guidelines for all clients represented by the TELC, requiring the TELC to represent government and business interests as well as environmental interests, requiring a screening panel to give approval "initially *and on an ongoing basis*" for cases handled by the TELC, preventing clinical faculty from representing clients before courts or administrative agencies unless a clinical student is with them as the "primary spokesperson" for the clients, and restricting the representation of community organizations to only those organizations that represent "broader interests for the specific community affected."⁴⁸

Like the criticisms and threats by Foster and Reilly, these letters failed to cite any specific instances when any clinical law student or faculty member violated the student practice rule, advanced a legal claim that was not made in good faith, or violated any rule of professional conduct. Like the criticisms and threats by Foster and Reilly, these letters were aimed at stopping the TELC from providing access to the courts and administrative agencies for clients with environmental claims. In effect, the Louisiana Supreme Court was lobbied to stop the clinical law students and faculty from fulfilling the dual goals of the student practice rule: "[to] provid[e] assistance to

44. There are reports that Kim Sport was looking into the TELC's activities as early as July 23, 1997, even before the Louisiana Supreme Court announced its formal investigation. See *SCLC Complaint*, *supra* note 8, ¶ 34. One newspaper reported that the Deputy Secretary of the Department of Environmental Quality had sent a "list of companies involved in clinic lawsuits" to Kim Sport in 1997 and that the court immediately began "reviewing the activities of law clinics." *Economic Chief Targets Groups: Reilly, Shintech Compiled Files on Opponents*, *TIMES-PICAYUNE* (New Orleans), Nov. 6, 1997, at A2; see also Ferstel, *supra* note 31, at 1A (noting that the Secretary of the Department of Economic Development had admitted to collecting information on the clinics).

45. Kim Sport visited *The Times-Picayune* newspaper to explain the Louisiana Supreme Court's changes to the student practice rule. See Gill, *supra* note 42, at B7.

46. Chamber Letter 1997, *supra* note 5, at 1.

47. Business Council Letter 1997, *supra* note 5, at 1.

48. LABI Letter 1997, *supra* note 5, at 1-2.

clients unable to pay for such services and to encourage law schools to provide clinical instruction in trial work of varying kinds.”⁴⁹

C. *Process Leading to the Amendments to the Student Practice Rule*

There are apparently no laws or court rules in Louisiana that required the Louisiana Supreme Court to open its process of amending the student practice rule to the public. There were no public hearings or a public comment period concerning the proposed changes to the student practice rule, nor were there any public proceedings or deliberations of the Louisiana Supreme Court over the requests for changes to the student practice rule. Nor has the court made public any reports or results of its investigations into operation of the student practice rule in Louisiana.⁵⁰

Without public transcripts or records available to document the process leading to the amendments, the only additional insights into the process that one can glean are those mentioned in the opinions that accompany the resolution amending and reenacting the student practice rule, as well as secondary sources such as media accounts of the process. Only by surveying this material is it possible to determine if there is support for those challenging the amendments to allege that the amendments

result from the effort of the [Louisiana Supreme Court] to effectuate the will of the Governor of Louisiana and certain organized business interests in Louisiana, and suppress the views of Louisiana residents seeking to protect the public health and environment, by curtailing the availability of high quality legal representation as provided by the Tulane Environmental Law Clinic . . . to clients who are unable to afford private counsel.⁵¹

1. What the Justices Said About the Amendment Process

Justice Bernette Johnson provides some information about the process leading up to the amendments in her dissent from the court’s resolution to amend the student practice rule.⁵² Justice Johnson states

49. LA. SUP. CT. R. XX § 1 (as amended Mar. 22, 1999).

50. In September 1997, Chief Justice Calogero informed in-state law schools that it was launching an investigation of clinic operations and that the investigators would “report back” to the court. See Letter from Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana, to Edward F. Sherman, Dean, Tulane University School of Law 1-2 (Sept. 25, 1997) (on file with the *Tulane Law Review*).

51. SCLC Complaint, *supra* note 8, ¶ 3.

52. See Sup. Ct. Res. to Amend and Reenact Rule XX (La. Mar. 22, 1999) (Johnson, J., dissenting), reprinted in 74 TUL. L. REV. 285, 297 (1999).

that the business groups asked the Louisiana Supreme Court to investigate the TELC while the business groups and the TELC "were embroiled in a legal controversy over . . . [the licensing of] a Shintech chemical plant."⁵³ She asserts that the Louisiana Supreme Court should not have acted on complaints to "curtail a program that teaches advocacy while giving previously unrepresented groups and individuals access to the judicial system in order to satisfy critics who are discomforted by successful advocacy."⁵⁴ She notes that while the complaints were directed specifically at the TELC, the Louisiana Supreme Court conducted a survey of all of the law school clinical programs in Louisiana.⁵⁵ Justice Johnson states, "An exhaustive review of all Louisiana law clinics failed to uncover any violations of the Law Student Practice Rule."⁵⁶ Justice Johnson also notes that the Louisiana Supreme Court did not receive any complaints of any unethical conduct by law students from any of the agencies or courts where the students practice.⁵⁷

Justice Harry T. Lemmon also mentions one of the Louisiana Supreme Court studies that "suggested . . . the word 'indigent' should be defined, because rules and regulations should define words that have an indefinite meaning."⁵⁸ He also states, presumably referring to information the justices considered, that other states apparently permit clinical programs to provide legal services to organizations not primarily composed of indigent persons.⁵⁹

2. What Others Said About the Amendment Process

The circumstances surrounding the amendments to the student practice rule received a great deal of media attention in Louisiana and elsewhere. As a result of this attention, some information about the

53. *Id.* at 1 (Johnson, J., dissenting), reprinted in 74 TUL. L. REV. 285, 297 (1999).

When the complaints were received, these business entities and the Tulane Environmental Law Clinic were embroiled in a legal controversy over whether a Shintech chemical plant should be licensed in St. James Parish (Convent, La.). The law clinic represented individuals and organizations in the community that opposed the issuance of the permit.

Id. (Johnson, J., dissenting).

54. *Id.* (Johnson, J., dissenting), reprinted in 74 TUL. L. REV. 285, 297 (1999).

55. *See id.* (Johnson, J., dissenting), reprinted in 74 TUL. L. REV. 285, 297 (1999).

56. *Id.* (Johnson, J., dissenting), reprinted in 74 TUL. L. REV. 285, 297 (1999).

57. *See id.* (Johnson, J., dissenting), reprinted in 74 TUL. L. REV. 285, 297 (1999).

58. *See id.* at 1 (Lemmon, J., concurring in part and dissenting in part), reprinted in 74 TUL. L. REV. 285, 292 (1999).

59. *See id.* at 2 (Lemmon, J., concurring in part and dissenting in part), reprinted in 74 TUL. L. REV. 285, 293 (1999).

facts and circumstances surrounding the amendment process was made public.

As discussed previously, one of the two original investigators for the Louisiana Supreme Court simultaneously held an official position with one of the business organizations lodging a complaint against the TELC.⁶⁰ Although this may appear to be a conflict of interest, apparently no rule or law in Louisiana prohibited it. In addition to this Louisiana Supreme Court investigation, which did not find any violations of the student practice rule by the TELC or any of the other clinical programs at any law school in Louisiana,⁶¹ the Louisiana Supreme Court ordered its librarian to survey law schools across the country to investigate the scope of other states' clinical programs' practices.⁶² The librarian's report was not made public, but there is every indication that the report revealed that the TELC's representation of community organizations was entirely consistent with the practices of law school clinics around the country.⁶³

Although the Louisiana Supreme Court was not required to release the results of its reports, Tulane Law School's Dean Edward Sherman maintained that the reports "totally vindicated the [Louisiana] clinics."⁶⁴ This position is supported by Justice Johnson's

60. See *supra* notes 42-45 and accompanying text.

61. See Sup. Ct. Res. to Amend and Reenact Rule XX, at 1 (La. Mar. 22, 1999) (Johnson, J., dissenting), reprinted in 74 TUL. L. REV. 285, 297 (1999).

62. See SCLC Complaint, *supra* note 8, ¶ 44. In e-mail messages sent to law schools around the country, Louisiana Supreme Court Librarian Carol Billings asked if clinics in other states "ever represent community organizations, various interest groups, or non-profit corporations[.]" E-mail from Carol Billings, Librarian, Supreme Court of Louisiana, to the University of California at Davis Law Librarian 1 (Apr. 22, 1998) (on file with author).

63. See SCLC Complaint, *supra* note 8, ¶ 44. Justice Lemmon apparently refers to the librarian's study when he notes that the student practice rules in other states permit clinical programs to provide legal services to community groups without requiring that the organizations be "composed primarily of indigent persons." See Sup. Ct. Res. to Amend and Reenact Rule XX, at 2 (La. Mar. 22, 1999) (Lemmon, J., concurring in part and dissenting in part), reprinted in 74 TUL. L. REV. 285, 293 (1999). As the Director of the Milton A. Kramer Law Clinic of Case Western Reserve University School of Law in 1998, I was one of the clinic directors surveyed. During the short telephone survey, I indicated that our clinical program regularly represented nonprofit groups, and that the student practice rule in Ohio did not prohibit such representation. At the end of the conversation, the librarian informed me that her survey indicated that this was true with most of the clinical programs she had surveyed. See Telephone Interview with Carol Billings, Librarian, Supreme Court of Louisiana (Apr. 1998).

64. Siobhan Roth, *State Ruling Chills Legal Clinicians*, LEGAL TIMES, Sept. 7, 1998, at S39 (internal quotations omitted) (quoting Edward F. Sherman, Dean, Tulane University School of Law). In response to a public records request, the Louisiana Supreme Court did not make its investigation of in-state law schools or survey of other law school clinic programs available. See E-mail from Mark Schleifstein, Reporter, *Times-Picayune*, to Peter A. Joy, Professor and Director, Criminal Justice Clinic, Washington University School of Law 1 (Sept. 29, 1999) (on file with the *Tulane Law Review*).

dissent, which states that the Louisiana Supreme Court found neither violations of the student practice rule nor any ethics complaints against any clinical law students.⁶⁵

Prior to amending the student practice rule, the Louisiana Supreme Court received submissions from several interested national groups expressing their views. The Association of American Law Schools (AALS), the Clinical Legal Education Association (CLEA), and the Society of American Law Teachers (SALT), filed formal submissions with the Louisiana Supreme Court urging the court not to amend the student practice rule.⁶⁶ These submissions argued that there were serious academic freedom, access to justice, and ethical issues enmeshed with the business groups' effort to make the student practice rule more restrictive.⁶⁷ Joining with the AALS, CLEA, and SALT, the deans of American law schools passed a resolution opposing any change to the Louisiana student practice rule, noting that the rule had "worked well in Louisiana for twenty-five years" and that the proposals "would cripple both clinical education in Louisiana and the use of law students to help meet the obligation of the bar to provide legal assistance to those unable to pay."⁶⁸

Despite the urging of every legal and educational organization addressing the matter, the Louisiana Supreme Court passed the first set of amendments, on June 17, 1998.⁶⁹ The Louisiana Supreme Court enacted the amendments without any opportunity for comment or review, notwithstanding assurances for a public comment period that the deans at Loyola and Tulane law schools believed they received from the court.⁷⁰ The lack of any opportunity for public comment prompted the Board of Governors of the Louisiana State Bar Association,⁷¹ Louisiana's Attorney General,⁷² the League of Women

65. See Sup. Ct. Res. to Amend and Reenact Rule XX, at 1 (La. Mar. 22, 1999) (Johnson, J., dissenting), reprinted in 74 TUL. L. REV. 285, 297 (1999).

66. See Peter A. Joy & Charles D. Weisselberg, *Access to Justice, Academic Freedom, and Political Interference: A Clinical Program Under Siege*, 4 CLIN. L. REV. 531, 535-37 (1998).

67. See *id.* at 537.

68. Resolution of Law School Deans (Jan. 30, 1998) (passed at the mid-year meeting of the American Bar Association, Section of Legal Education and Admissions to the Bar) (on file with the *Tulane Law Review*).

69. See Sup. Ct. Res. to Amend and Reenact Rule XX (La. June 17, 1998) (on file with the *Tulane Law Review*).

70. See Letter from Edward F. Sherman, Dean, Tulane University School of Law, and John Makdisi, Dean, Loyola University School of Law, to Walter F. Marcus, Jr., Associate Justice, Supreme Court of Louisiana 1-2 (July 13, 1998) (on file with the *Tulane Law Review*).

71. See Letter from Patrick S. Ottinger, President, Louisiana State Bar Association, to the Justices of the Supreme Court of Louisiana 1 (Aug. 31, 1998) (on file with the *Tulane*

Voters,⁷³ and other groups to request the Louisiana Supreme Court to stay the amendments pending an opportunity for public debate.⁷⁴ The Louisiana Supreme Court did not open up the process for a formal public comment.⁷⁵ The court, however, temporarily suspended one aspect of the amendments, the provision prohibiting clinical students from representing any client who was offered legal assistance by any form of solicitation by anyone associated with a clinical program.⁷⁶

On March 22, 1999, the Louisiana Supreme Court passed a resolution modifying some of the original amendments.⁷⁷ The court repealed the ban against representing community organizations affiliated with national organizations⁷⁸ and modified the income eligibility guidelines slightly to "ease [the] administration of the rule."⁷⁹ Even with an additional nine months of investigation and consideration, the Louisiana Supreme Court's resolution, and the dissenting and concurring opinions accompanying it, do not set forth any factual bases for the need to amend the student practice rule.⁸⁰ In its rule-making capacity, the Louisiana Supreme Court is not explicitly bound by any state law to provide any factual basis for its rules. Nor, despite the protestations of the Louisiana State Bar Association Board of Governors, the Louisiana Attorney General, and community groups such as the League of Women Voters, was the Louisiana Supreme Court required to stay the effective date of any of the amendments or provide time for public comments.

Finally, Judge Fallon concluded that there were no limits on the Louisiana Supreme Court's exercise of discretion while acting in its

Law Review); Resolution of the Louisiana State Bar Association Board of Governors (Aug. 29, 1998) (on file with the *Tulane Law Review*).

72. See Letter from Richard P. Ieyoub, Attorney General, State of Louisiana, to the Justices of the Supreme Court of Louisiana 1 (Oct. 1, 1998) (on file with the *Tulane Law Review*).

73. The president of the League of Women Voters characterized the revisions to the student practice rule as "draconian" and explained her group's belief that the amendments were discriminatory, harmed the citizens of Louisiana, and that the income guidelines were "a gross invasion of privacy." Malinda Hills-Holmes, *League to Court: Rescind Ruling on Law Clinics*, TIMES-PICAYUNE (New Orleans), Aug. 20, 1998, at B6 (letter to the editor).

74. See Joe Gyan, Jr., *Ieyoub Asks Court to Hear Opposition to Law Clinic Rules*, ADVOCATE (Baton Rouge), Oct. 7, 1998, at 5B.

75. There is no record of the Louisiana Supreme Court soliciting comments from the public or holding public hearings.

76. See LA. SUP. CT. R. XX § 10 commentary (as amended Mar. 22, 1999).

77. See Sup. Ct. Res. to Amend and Reenact Rule XX (La. Mar. 22, 1999), reprinted in 74 TUL. L. REV. 285, 285-86 (1999).

78. See LA. SUP. CT. R. XX § 1 commentary (as amended Mar. 22, 1999).

79. *Id.* § 4 commentary.

80. See Sup. Ct. Res. to Amend and Reenact Rule XX (La. Mar. 22, 1999), reprinted in 74 TUL. L. REV. 285, 285-99 (1999).

rule-making capacity, barring conflicts with Louisiana statutory law, the Louisiana Constitution, or the United States Constitution.⁸¹ Judge Fallon determined that, absent findings of such conflicts, there were no legal prohibitions against elected justices yielding to political pressure to restrict and deny clinical education opportunities to law students and access to the courts for those clients the clinics would otherwise represent.⁸²

II. THE STATED RATIONALES BEHIND THE AMENDMENTS TO THE LOUISIANA STUDENT PRACTICE RULE

Six of the seven justices joined in the resolution adopted by the Louisiana Supreme Court amending and reenacting the student practice rule.⁸³ As indicated earlier, the resolution itself does not explain the rationale behind the changes, but the five separate concurring and dissenting opinions provide the stated rationales of the various justices for and against amending the student practice rule.⁸⁴

A. *Mandatory Income Guidelines*

1. Eligibility of Individuals and Families

All of the justices writing opinions discussed the mandatory income guidelines as applied to individuals and families. There is wide disagreement among the justices in the majority writing on this issue about what the correct level of poverty should be for client

81. See *Southern Christian Leadership Conference v. Supreme Court*, No. 99-1205, 1999 U.S. Dist. LEXIS 11503, at *45 (E.D. La. July 27, 1999), *appeal filed*, No. 99-30895 (5th Cir. Aug. 27, 1999).

82. See *supra* notes 23-24 and accompanying text. Under the district court's analysis, judicial fairness and impartiality are not required in all official acts by the Louisiana Supreme Court. See *Southern Christian Leadership Conference*, 1999 U.S. Dist. LEXIS 11503, at *45-46. In this respect, the promulgation of court rules in Louisiana is unlike the promulgation of local court rules in the federal system, where federal district court rules must be consistent with "the principles of right and justice." *Frazier v. Heebe*, 482 U.S. 641, 645 (1987) (internal quotations omitted) (quoting *In re Ruffalo*, 390 U.S. 544, 554 (1968) (White J., concurring)). In *Frazier*, the United States Supreme Court invalidated a local court rule that denied admission to the Bar of the United States District Court for the Eastern District of Louisiana for any lawyer who failed to demonstrate continuous and uninterrupted Louisiana residence or maintenance of a Louisiana law office. See *id.* at 649-51.

83. Chief Justice Calogero and Justices Kimball, Knoll, Lemmon, Traylor, and Victory joined in the resolution adopting the amendments; Justice Johnson dissented from the resolution. See Sup. Ct. Res. to Amend and Reenact Rule XX (La. Mar. 22, 1999), *reprinted in* 74 TUL. L. REV. 285, 285 (1999).

84. Chief Justice Calogero wrote a concurring opinion; Justices Lemmon, Traylor, and Victory wrote separate opinions concurring in part and dissenting in part; and Justice Johnson wrote a dissenting opinion. See *id.*, *reprinted in* 74 TUL. L. REV. 285, 286 (1999).

eligibility under the student practice rule, with three of the justices expressing some concern that the guidelines may be too generous.

Justice Lemmon notes that there are several different levels of indigence, and he states that he would be willing to increase the threshold beyond 200% of the federal poverty level if law schools had the resources to handle the legal needs for large numbers of indigent persons and organizations of indigent persons.⁸⁵ Justices Chet D. Traylor and Jeffrey P. Victory join with Justice Lemmon to some extent, though both justices stress that only the most indigent should be eligible for legal assistance through law school clinical programs.⁸⁶

Chief Justice Pascal F. Calogero counters the criticisms that the guidelines are too liberal or that clinical programs should be restricted to serving only those even poorer than the poverty limits in the amended student practice rule. Chief Justice Calogero states in his concurring opinion that the income guidelines are reasonable to ensure that there is a sufficiently wide pool of potential clients with cases suitable for the educational goals of clinical programs.⁸⁷ Chief Justice Calogero states that any focus on whether the poorest of the poor receive legal assistance through the student practice rule is "hardly relevant in this examination [of the student practice rule]. This Court's only business in this area is governing the practice of law The Court is not charged by the Louisiana Constitution with instituting social programs"⁸⁸

None of the justices point to any findings of fact to support the apparent belief of some of the justices that, without such guidelines, some individuals and families would receive legal representation from clinical programs without being needy enough. The only justice to explore this aspect is Justice Johnson, who notes that the law schools had informed the court that they determined client eligibility based on poverty guidelines, court referrals, and "the client's ability to retain private counsel."⁸⁹ Justice Johnson dismisses the majority's concern that without stringent income guidelines some clients with the ability to pay will receive legal services from clinical programs. In her

85. See *id.* at 2 (Lemmon, J., concurring in part and dissenting in part), *reprinted in* 74 TUL. L. REV. 285, 292 (1999).

86. See *id.* at 1 (Traylor, J., concurring in part and dissenting in part), *reprinted in* 74 TUL. L. REV. 285, 296 (1999); *id.* at 1 (Victory, J., concurring in part and dissenting in part), *reprinted in* 74 TUL. L. REV. 285, 295 (1999).

87. See *id.* at 2 (Calogero, C.J., concurring), *reprinted in* 74 TUL. L. REV. 285, 288 (1999).

88. *Id.* (Calogero, C.J., concurring), *reprinted in* 74 TUL. L. REV. 285, 288 (1999).

89. *Id.* at 1 (Johnson, J., dissenting), *reprinted in* 74 TUL. L. REV. 285, 297-98 (1999).

experience, "[t]hose with the ability to do so, hire the best legal talent available. Those without the ability to pay for private counsel use law clinics."⁹⁰

While none of the justices discuss it, the Louisiana Supreme Court did receive a series of letters and submissions from the law schools in Louisiana. On numerous occasions, the law schools' clinics indicated that they only represented individuals and community organizations that could not afford private legal representation.⁹¹ There is nothing in any of the justices' opinions that either contradicts these statements by the law schools or establishes a factual basis for imposing inflexible income guidelines on clinical students' representation of clients.

2. Eligibility of Community Organizations

The five justices writing opinions also discuss the eligibility requirements for community organizations in their separate opinions. The four justices favoring the imposition of income guidelines on entities, such as nonprofit corporations, favor the requirement that the members of the entities, as well as the entities themselves, must prove eligibility.⁹² Under the amended student practice rule, 51% of the membership of the entities must meet the financial eligibility guidelines and the entity must verify that it is unable to pay for private counsel.⁹³ Justice Victory would require even more than the majority, as he would require national organizations that have local affiliated

90. *Id.* at 2 (Johnson, J., dissenting), reprinted in 74 TUL. L. REV. 285, 298 (1999).

91. See, e.g., Letter from Edward F. Sherman, Dean, Tulane University School of Law, to Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana 2 (Apr. 14, 1998) (on file with the *Tulane Law Review*); Letter from John Makdisi, Dean, Loyola University School of Law, and William Quigley, Director, Loyola Law Clinic, to Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana 2 (Apr. 6, 1998) (on file with the *Tulane Law Review*); Letter from Edward F. Sherman, Dean, Tulane University School of Law, and John Makdisi, Dean, Loyola University School of Law, to Timothy F. Averill, Deputy Judicial Administrator and General Counsel, Supreme Court of Louisiana 1 (Dec. 31, 1997) (on file with the *Tulane Law Review*); Letter from Robert R. Kuehn, Professor and Director, Tulane Environmental Law Clinic, to Timothy F. Averill, Deputy Judicial Administrator and General Counsel, Supreme Court of Louisiana 2-3 (Dec. 23, 1997) (on file with the *Tulane Law Review*).

92. See Sup. Ct. Res. to Amend and Reenact Rule XX, at 4-5 (La. Mar. 22, 1999) (Calogero, C.J., concurring), reprinted in 74 TUL. L. REV. 285, 290 (1999); *id.* at 1-2 (Lemmon, J., concurring in part and dissenting in part), reprinted in 74 TUL. L. REV. 285, 292 (1999); *id.* at 1 (Traylor, J., concurring in part and dissenting in part), reprinted in 74 TUL. L. REV. 285, 296 (1999); *id.* at 1 (Victory, J., concurring in part and dissenting in part), reprinted in 74 TUL. L. REV. 285, 295 (1999).

93. See LA. SUP. CT. RULE XX § 5 (as amended Mar. 22, 1999).

organizations in Louisiana to prove that 51% of their entire national membership meets the income guidelines.⁹⁴

In her dissent, Justice Johnson states her opposition to the rule requiring 51% of organizations' members to demonstrate eligibility for legal assistance before the organization itself will be eligible.⁹⁵ She states that compelling the disclosure of financial information of members will result in compelled disclosure of the membership of an organization.⁹⁶ When members are engaged in advocacy of an unpopular cause, Justice Johnson maintains that such disclosure "would expose members to the possibility of economic reprisals, loss of employment, threats of physical coercion, and other manifestations of public hostility."⁹⁷ Justice Johnson continues that the rank and file membership "has a right to privacy with regard to their identity, numbers, and indigency."⁹⁸

B. Solicitation Ban

Only three of the justices discuss the anti-solicitation provision of the amended student practice rule, and Chief Justice Calogero is the only member of the majority to state any reasons for favoring the ban. Justices Lemmon and Johnson would repeal the solicitation ban.

Justice Lemmon believes the solicitation ban violates United States Supreme Court precedent. He argues that the Louisiana Supreme Court is seeking to do indirectly what it cannot do directly, by prohibiting legally solicited clients from receiving clinical student lawyer representation.⁹⁹ Justice Lemmon is critical of the Louisiana Supreme Court prohibiting constitutionally protected offers of legal assistance in this indirect fashion, and he "question[s] the wisdom and fairness of this prohibition."¹⁰⁰

Justice Johnson points out that, as public interest lawyers, clinical student lawyers and faculty provide important information about substantive rights and remedies, as well as the availability of legal

94. See Sup. Ct. Res. to Amend and Reenact Rule XX, at 1 (La. Mar. 22, 1999) (Victory, J., concurring in part and dissenting in part), *reprinted in* 74 TUL. L. REV. 285, 295 (1999).

95. See *id.* at 2 (Johnson, J., dissenting), *reprinted in* 74 TUL. L. REV. 285, 298 (1999).

96. See *id.* (Johnson, J., dissenting), *reprinted in* 74 TUL. L. REV. 285, 298 (1999).

97. *Id.* (Johnson, J., dissenting), *reprinted in* 74 TUL. L. REV. 285, 298 (1999).

99. See *id.* at 3 (Lemmon, J., concurring in part and dissenting in part), *reprinted in* 74 TUL. L. REV. 285, 293-94 (1999).

100. *Id.* (Lemmon, J., concurring in part and dissenting in part), *reprinted in* 74 TUL. L. REV. 285, 293 (1999).

services to potential clients.¹⁰¹ Chief Justice Calogero responds to Justices Lemmon's and Johnson's arguments by maintaining that the prohibition is directed at law students authorized to practice under the student rule, whom he claims lack the same constitutional rights as fully licensed lawyers.¹⁰²

III. PRACTICAL IMPLICATIONS OF THE AMENDMENTS TO THE LOUISIANA STUDENT PRACTICE RULE

It is difficult to consider the practical implications of the Louisiana Supreme Court's amendments to the student practice rule without reference to the circumstances preceding the amendments. In 1988, the Louisiana student practice rule was amended specifically to make it clear that law students could represent community organizations.¹⁰³ In a letter to the Louisiana Supreme Court from the deans of Loyola and Tulane law schools, the deans asked for the specific inclusion of "community organizations" in the list of eligible clients under the student practice rule.¹⁰⁴ The deans explained that they wanted to ensure that law school clinics could represent groups "who consist of members who are primarily indigent or who have no funds available to hire an attorney."¹⁰⁵ The deans continued to explain that this clarification would not have a negative impact on the private bar, who, "by definition, would not ordinarily chose [sic] to undertake this kind of non-compensable representation."¹⁰⁶ Within a year of this clarification, the TELC started teaching law students through the representation of clients.¹⁰⁷

In 1993, approximately four years after the TELC started representing clients, former Louisiana Governor Edwin Edwards and his Department of Environmental Quality Secretary, Kai Midboe,

101. See *id.* at 2 (Johnson, J., dissenting), reprinted in 74 TUL. L. REV. 285, 298 (1999).

102. See *id.* at 3 (Calogero, C.J., concurring), reprinted in 74 TUL. L. REV. 285, 289 (1999).

103. See LA. SUP. CT. R. XX § 3 (as amended Nov. 21, 1988) (subsequently amended June 17, 1998; June 30, 1998; and Mar. 22, 1999) ("[A]n eligible law student may appear in any court or before any administrative tribunal in this state on behalf of the state, any political subdivision thereof, or any indigent person or community organization . . .").

104. See Letter from John R. Kramer, Dean, Tulane University School of Law, Thomas H. Sponsler, Dean, Loyola University School of Law, Jane Johnson, Professor of Clinical Law, Tulane Civil Litigation Clinic, and John P. Nelson, Professor of Clinical Law, Loyola Law Clinic, to John A. Dixon, Jr., Chief Justice, Supreme Court of Louisiana 3 (Oct. 21, 1988) (on file with the *Tulane Law Review*).

105. *Id.* (emphasis added).

106. *Id.*

107. See Interview with Robert R. Kuehn, Professor and Former Director, Tulane Environmental Law Clinic, in St. Louis, Mo. (Aug. 23, 1999).

became unhappy with the TELC and asked the Louisiana Supreme Court to investigate and change the student practice rule.¹⁰⁸ In little more than a month, the Louisiana Supreme Court denied the request in a one-page letter to Midboe.¹⁰⁹

In 1994, Louisiana's largest business lobby, Louisiana Association of Business and Industry (LABI), was directly involved in judicial elections and supported the election of three of the current supreme court justices.¹¹⁰ Two of the LABI-backed candidates unseated incumbent justices, marking the first time challengers had won in more than twenty years.¹¹¹ In the three elections before LABI requested changes in the student practice rule, it contributed approximately \$420,000 to judicial candidates.¹¹² Even the district court judge hearing the challenge to the amendments acknowledges the political pressure on the Louisiana Supreme Court to change the student practice rule during an election campaign.¹¹³ The district court decision also notes the temporal relationship between the business community's complaints and the changes to the student practice rule.¹¹⁴

This is the context that prompted the plaintiffs to allege that the amendments amounted to viewpoint discrimination against the TELC's clients,¹¹⁵ as well as interference with the academic freedom of law students and faculty at Louisiana's law schools.¹¹⁶ This is also the context that compels greater scrutiny of the stated rationales offered by the justices supporting the restrictions. In some respects, the reasons for the amendments to the student practice rule are more questionable than the particular amendments themselves.

108. See Letter from Kai David Midboe, Secretary, Department of Environmental Quality, State of Louisiana, to Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana 1 (Oct. 15, 1993) (on file with the *Tulane Law Review*).

109. See Letter from Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana, to Kai David Midboe, Secretary, Department of Environmental Quality, State of Louisiana 1 (Nov. 18, 1993) (on file with the *Tulane Law Review*).

110. LABI successfully backed the elections of Justice Jeffrey Victory in 1994, and Justices Jeannette Theriot Knoll and Chet Traylor in 1996. See Mark Schleifstein, *Supreme Court Election May Shift Balance*, TIMES-PICAYUNE (New Orleans), Sept. 20, 1998, at A1; Joe Gyan, Jr., *Calogero Upbeat About Supreme Court Runoff*, ADVOCATE (Baton Rouge), Oct. 5, 1998, at 8A.

111. See Schleifstein, *supra* note 110, at A1.

112. See Shelia Kaplan & Zoë Davidson, *The Buying of the Bench*, NATION, Jan. 26, 1998, at 11, 15.

113. See Southern Christian Leadership Conference v. Supreme Court, No. 99-1205, 1999 U.S. Dist. LEXIS 11503, at *43-*44 (E.D. La. July 27, 1999) (Fallon, J.), *appeal filed*, No. 99-30895 (5th Cir. Aug. 27, 1999).

114. See *id.*

115. See SCLC Complaint, *supra* note 8, ¶ 53.

116. See *id.* ¶¶ 90-118.

*A. The Mandatory Income Guidelines**1. Eligibility of Individuals and Families*

The Louisiana Supreme Court offers no factual basis for establishing rigid clinic eligibility guidelines. The absence of any articulated need leads to an examination of the usual arguments that are offered for limiting free legal services to those who have low incomes.

When the government is funding legal services, there are usually income guidelines to ration the legal services to only the poorest of the poor. In Louisiana, the inflexible income guidelines for clinic client eligibility bear no relationship to any allocation of financial resources by either the state of Louisiana or the federal government. While the federal government has the right to establish fixed eligibility guidelines for federally funded legal services programs, the private law schools at Tulane University and Loyola University are not using government funds to support their clinical programs. If they were using government funds, the governmental entities providing the funds would appear to have a greater claim to an interest in regulating how the funds are used than the Louisiana Supreme Court. As applied in Louisiana, the income eligibility guidelines establish controls on how private law schools may allocate the clinical legal services available through the support of private donations and tuition.

In permitting law students the right to practice law under student practice rules, a state supreme court may be concerned about some practicing lawyers losing potential clients to clinical programs. Prior to the amendments in Louisiana, there were no complaints by the private bar, there was no showing that the private bar was losing business to the clinic programs, nor was there any showing that any of the individuals, families, and community groups receiving pro bono legal assistance from clinical law students and faculty could otherwise afford lawyers.

The mandatory guidelines also have the practical effect of depriving potential clients who have large outstanding debts relative to their incomes from receiving needed legal assistance. Nor do the mandatory guidelines permit law school clinical programs to consider whether private counsel is available to undertake difficult matters without charging lower-income and slightly moderate-income persons prohibitive fees. The imposition of the mandatory guidelines represents a branch of the government intruding into both the academic design of law school programs and the voluntary efforts of

providing needed community legal services, an aspect of clinical legal education programs.

Finally, the imposition of explicit guidelines now provides lawyers representing parties litigating against clinic clients the ability to delay litigation by probing into the clinic clients' private finances and income eligibility.¹¹⁷ This vexatious tactic already has been alleged in one case,¹¹⁸ and the Louisiana Supreme Court refused to address the issue.¹¹⁹

2. Eligibility for Community Groups

Many of the same concerns about the mandatory income guidelines as applied to individuals and families also apply to stringent guidelines for a majority of the membership of community groups. The Louisiana Supreme Court requires the groups to certify in writing that they are unable to pay for legal services, and requires 51% of the organizations' members to meet the income guidelines.¹²⁰ This approach belies the fact that organizations are separate legal entities, such as nonprofit corporations, and that the entities and not the individual members are the clients and parties to litigation. By imposing stringent income requirements on the entities' members, the Louisiana Supreme Court requires the membership of organizations seeking clinic student representation in effect to waive their rights of privacy concerning their private, personal incomes. This rule also makes it difficult for persons of all income levels to freely join organizations in Louisiana if they ever wish to seek representation by a clinical program, because members must be willing to reveal their personal incomes. Under the majority view of the Louisiana Supreme Court, the privacy rights and associational rights of an organization's members must yield if the community groups they join ever seek representation by a clinical program.

117. One environmental defense lawyer pointed out in a bar journal that attorneys opposing clinic clients have an ethical obligation to police client eligibility, and to report any clinical students or faculty for ethical violations if their clients do not meet the income guidelines set forth in the student practice rule. See Anne J. Crochet, *Supreme Court Changes Rule Governing Law School Clinics*, 46 LA. B.J. 239, 239-41 (1998).

118. See *supra* note 12.

119. See *Magsino v. Gridiron Constr., Inc.*, No. 99-1930, 1999 La. LEXIS 2076, at *1 (La. July 13, 1999) (denying certiorari).

120. See LA. SUP. CT. R. XX § 5 (as amended Mar. 22, 1999).

B. *Solicitation Ban*

The sweeping solicitation ban is difficult to justify other than as a capitulation to the requests of the business groups. There is no record of any prospective clients in Louisiana ever complaining about allegedly being solicited by clinical law students, faculty, or staff. The justices do not reference any findings from their investigations that indicate prospective clients were being solicited by anyone associated with the law school clinical programs, much less by clinic students. In fact, the directors of the clinical programs at Loyola and Tulane law schools informed the Louisiana Supreme Court, "The clinics do not solicit cases and never have."¹²¹ Justice Johnson explains in her dissent that the solicitation ban was urged on the Louisiana Supreme Court by business interests protesting "legitimate activity by the clinic to educate and to provide valuable information to the public about substantive rights and remedies."¹²²

One might argue that if the clinical programs are not otherwise soliciting clients, from a practical standpoint the solicitation ban is not really that bad. The ban, however, does have practical, negative impact on the work of clinical law students and faculty in Louisiana as well as to the rights of potential clients. The solicitation ban denies otherwise eligible clients the right to receive information necessary to access the courts, and it denies clinical law students, faculty, and staff their free speech rights to make offers of legal assistance to those in need.

The solicitation ban also is far more restrictive than the applicable rules of lawyer professional conduct in Louisiana, which permit direct mail solicitation and recorded telephone communications to prospective clients, permit telephone solicitation and in-person solicitation of lawyers' family members and former clients, and permit telephone and in-person solicitation of any prospective client when the lawyer is not primarily motivated by pecuniary gain.¹²³ As a practical

121. Letter from Luz Molina, Acting Director, Loyola Law Clinic, and Jane Johnson, Professor of Clinical Law, Tulane Civil Litigation Clinic, to Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana 1 (Dec. 15, 1998) (on file with the *Tulane Law Review*).

122. See Sup. Ct. Res. to Amend and Reenact Rule XX, at 2 (La. Mar. 22, 1999) (Johnson, J., dissenting), reprinted in 74 TUL. L. REV. 285, 298 (1999).

123. The Louisiana Rules of Professional Conduct permit direct mail solicitation and recorded telephone solicitations. See LA. REV. STAT. ANN. tit. 37, ch. 4, rule 7.2 (West Supp. 1999). With respect to verbal person-to-person communications the rules provide:

(a) A lawyer shall not solicit professional employment in person, by person to person verbal telephone contact or through others acting at his request or on his behalf from a prospective client with whom the lawyer has no family or prior

matter, the breadth of the solicitation ban now prevents clinical law students and faculty from notifying established clinic clients of important legal rights that their clients may have and the clinical students' readiness to help their clients secure their rights through legal proceedings.

In his dissent from this broad solicitation ban, Justice Lemmon argues that the Louisiana Supreme Court could not prohibit the solicitation directly under prevailing United States Supreme Court precedent.¹²⁴ He is apparently referencing the Court's cases that have invalidated both rules prohibiting lawyers from sending truthful direct mail solicitations to potential clients¹²⁵ and rules prohibiting lawyers from in-person solicitation of clients where the solicitation is not done for pecuniary gain.¹²⁶ By prohibiting clinical students from representing any client who has been contacted in any fashion by anyone associated with the clinical program, the Louisiana Supreme Court is attempting to impose indirectly what Justice Lemmon warns it could not do directly.

C. *Effect of the Amendments on the Academic Freedom of Clinical Law Students and Faculty*

The amendments to the student practice rule also seriously infringe upon clinical learning opportunities and the academic freedom rights of clinical students¹²⁷ and law faculty.¹²⁸ By responding to the business groups' demands to impose restrictions on the types of clients, and therefore types of cases, that clinical faculty select for teaching purposes, the Louisiana Supreme Court has intruded significantly on how students learn and faculty teach.

professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

Id.

124. See Sup. Ct. Res. to Amend and Reenact Rule XX, at 3 (La. Mar. 22, 1999) (Lemmon, J., concurring in part and dissenting in part), *reprinted in* 74 TUL. L. REV. 285, 293-94 (1999).

125. See *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 472-78 (1988).

126. See *In re Primus*, 436 U.S. 412, 431 (1978); *NAACP v. Button*, 371 U.S. 415, 429-30, 443-44 (1963).

127. Students have academic freedom rights guaranteed by the First Amendment that protect the "freedom of teachers to teach and of students to learn." *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968).

128. The academic freedom right of university faculty includes the right to teach without interference from other faculty, the university administration, or persons outside of the university. See, e.g., *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1275 (5th Cir. 1982); *Vance v. Board of Supervisors of S. Univ.*, No. 96-2196, 1996 U.S. Dist. LEXIS 18542, at *3 (E.D. La. Dec. 6, 1996).

Academic freedom has long been a cornerstone of educational systems dating back to the Middle Ages.¹²⁹ In the United States, the tradition of academic freedom has been present since the founding of the earliest universities,¹³⁰ and it became synonymous with the rights of each professor "to teach, carry on research, and publish without interference from the government, the community, the university administration, or his fellow faculty members."¹³¹ This tradition has led the United States Supreme Court to acknowledge that, "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."¹³²

Courts have long recognized that the First Amendment protects a teacher's selection of course material and pedagogy, including such decisions as discussing controversial social issues in civics classes¹³³ and role playing in history classes.¹³⁴ In clinical legal education courses, the clinic law office, client meetings, courtrooms, and administrative hearings are the classrooms. Clinics teach fundamental lawyering skills and professional values. For clinical faculty, the selection of clients' cases for clinical students is as important as the faculty's selection of course materials for their clinical courses. In this respect, the selection of cases for clinical students is the analog to the selection of which court decisions or legal treatises to discuss in class in traditional classroom courses.

As long as the clinic clients and cases are appropriate for their instructional purposes, appropriate educational standards are being followed, and the types of cases and legal problems are consistent with those generally selected by clinical law faculty elsewhere, the clinical faculty in Louisiana have the First Amendment right not to have their educational decisions limited solely because some business groups and politicians are unhappy with successful advocacy by the clinical programs.¹³⁵

129. See PEARL KIBRE, *SCHOLARLY PRIVILEGES IN THE MIDDLE AGES* 325-30 (1962).

130. See RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 126-44 (1955).

131. *Dow Chem. Co.*, 672 F.2d at 1275 (quoting THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 594 (1970)).

132. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

133. See *Sterzing v. Fort Bend Indep. Sch. Dist.*, 376 F. Supp. 657, 662 (S.D. Tex. 1972), *vacated on other grounds*, 496 F.2d 92 (5th Cir. 1974).

134. See *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1111-13 (5th Cir. 1980).

135. This parallels the argument made to the Louisiana Supreme Court in the AALS submission. The AALS's argument provides a more detailed discussion of both the concept of academic freedom and the application of academic freedom analysis to the amendments of

By regulating the types of clients that clinical students can represent as a response to the business groups unhappy with the TELC, the Louisiana Supreme Court is intruding on the academic freedom of clinical students and faculty. As noted by Justice Johnson in her dissent, the Louisiana Supreme Court acted to "curtail a program that teaches advocacy while giving previously unrepresented groups and individuals access to the judicial system in order to satisfy critics who are discomforted by successful advocacy."¹³⁶

IV. CLINICAL LEGAL EDUCATION AND ACCESS TO THE COURTS AS PRECONDITIONS FOR ACCESS TO JUSTICE

The amendments to the student practice rule in Louisiana raise questions concerning the availability of legal counsel for all persons and groups with legal problems and the role of clinical legal education programs in providing access to the courts for those in need. The relationship between access to the courts and access to justice is inextricable. Leaders of the bench and bar have long recognized that equal access to courts is a precondition for justice,¹³⁷ and that justice cannot be rationed¹³⁸ to only those who can afford to hire lawyers.¹³⁹

All too often, the rights of individuals and groups are lost if their legal rights are not asserted in the courts and before administrative agencies. Without lawyers asserting and defending the rights of individuals and groups, there are usually no remedies for the unrepresented. The very notion of "fairness" in our legal system contemplates a meaningful opportunity to be heard. Without a lawyer representing litigants and potential litigants, individuals and groups are either mute¹⁴⁰ or simply excluded in most legal proceedings.¹⁴¹

the student practice rule in Louisiana. See AALS Submission, *supra* note 4, in 4 CLIN. L. REV. 539, 557-58 (1998).

136. See Sup. Ct. Res. to Amend and Reenact Rule XX, at 1 (La. Mar. 22, 1999) (Johnson, J., dissenting), *reprinted in* 74 TUL. L. REV. 285, 297 (1999).

137. The first comprehensive survey of the legal needs of the poor and the agencies providing them access to the courts begins with the sentence, "Freedom and equality of justice are twin fundamental conceptions of American jurisprudence." REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 1 (2d ed. 1921).

138. "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice." *In re Smiley*, 330 N.E.2d 53, 63 (N.Y. 1975) (internal quotations omitted) (quoting Learned Hand, Address Before the Legal Aid Society of New York (1951)).

139. "Equal Justice Under the law . . . Is Perhaps The Most Inspiring Ideal Of Our Society . . . It Is Fundamental That Justice Should Be The Same, In Substance and Availability, Without Regard To Economic Status." Laurence E. Norton, II, *Not Too Much Justice for the Poor*, 101 DICK. L. REV. 601, 601 (1997) (omission in original) (quoting former Supreme Court Justice Lewis Powell).

140. "At the very heart of our recognition of the right to counsel elsewhere has been our articulated conviction that the right to be heard would be of little avail if it did not

Without lawyers, meaningful participation in legal proceedings becomes impossible. By amending the student practice rule, the Louisiana Supreme Court has effectively denied legal representation to persons and community groups whose only realistic source of legal assistance in Louisiana are clinical programs.¹⁴²

A. Role of Clinical Programs in Educating Law Students and Helping to Provide Access to Justice

"Real-client"¹⁴³ clinical legal education programs are an established part of the law school curricula in more than 180 American law schools.¹⁴⁴ Through the representation of clients in law school clinical programs, law students develop an understanding of lawyering skills, experience the opportunity to engage in these lawyering skills on their clients' behalf, and develop the skill of learning how to learn from experience by developing their capacity for self-critique. As Professor Anthony Amsterdam explains, engaging students in the process of critiquing their work sharpens students' ability "for understanding past experience and for predicting and planning future conduct."¹⁴⁵ Clinical teaching methodology and the lessons students learn in clinical courses "are also the beginning of the students' development of conscious, rigorous self-evaluative methodologies for learning from experience—the kind of learning that makes law school the beginning, not the end, of a lawyer's legal education."¹⁴⁶

comprehend the right to be heard by counsel." *Smiley*, 330 N.E.2d at 59 (Jones, J., dissenting) (internal quotations omitted) (quoting *People ex rel. Menechino v. Warden*, 267 N.E.2d 238, 241 (N.Y. 1971)).

141. It has been said that

[t]he lawyer's function is essentially that of presenting a grievance so that those aspects of the complaint which entitle a person to a remedy can be communicated effectively and properly to a person with power to provide a remedy. . . . [I]t is altogether possible that for many a remedy is available if the grievance is properly presented. . . .

Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1336 (1964).

142. See SCLC Complaint, *supra* note 8, ¶ 13.

143. "[R]eal-client' refer[s] to clinics where students provide representation to real clients with legal problems. These clinics are to be distinguished from clinics that are simulation based and use hypothetical clients." Peter A. Joy, *The MacCrate Report: Moving Toward Integrated Learning Experiences*, 1 CLIN. L. REV. 401, 403 n.9 (1994).

144. A listing of law school clinics by law school or by subject can be accessed through the *Clinical Legal Education Homepage* (visited Oct. 22, 1999) <<http://www2.wcl.american.edu/clinic>>.

145. Anthony G. Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612, 617 (1984).

146. *Id.*

While clinical education has been a part of law school education since the 1920s,¹⁴⁷ the importance and value of clinical legal education did not become frequent themes of the bench and the bar until the late 1960s.¹⁴⁸ Recently, the importance of clinical legal education was echoed by the American Bar Association (ABA) in the 1992 MacCrate Report.¹⁴⁹ According to the MacCrate Report, law schools must play an essential role in teaching the fundamental lawyering skills¹⁵⁰ and the fundamental values of the profession¹⁵¹ necessary to

147. From the time of the American Revolution to the latter part of the nineteenth century, most persons desiring to become lawyers in the United States did not attend law schools but rather served as apprentices to practicing lawyers or were admitted to practice in states that required no training whatsoever. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980s*, at 3-10, 35-42 (1983). As law schools became the dominant form of legal education in the early part of the twentieth century, several law schools began to teach students lawyering skills and professional values by using real cases. See, e.g., John S. Bradway, *Some Distinctive Features of a Legal Aid Clinic Course*, 1 U. CHI. L. REV. 469 (1934) (describing clinical legal education and the clinical program at Duke University); John S. Bradway, *The Beginning of the Legal Clinic of the University of Southern California*, 2 S. CAL. L. REV. 252 (1929) (describing a general practice clinic); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933) (advocating a legal clinic in every law school staffed by full-time "teacher-clinicians").

148. See, e.g., *Jordan v. United States Dep't of Justice*, 691 F.2d 514, 522-23 (D.C. Cir. 1982) ("This [student intern] practice has been praised by members of the judiciary and encouraged by the Judicial Conference of the United States, and we have ample reason to extend our commendation.") (footnotes omitted); Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United States, 83 F.R.D. 215, 222 (1979) (recommending support for "student practice programs" in law schools); Final Report of the Advisory Committee on Proposed Rules for Admission to Practice, 67 F.R.D. 161, 164, 167-68 (1975) (recommending that law schools should teach trial skills); SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, *REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS* 3-4 (1979) (recommending litigation-skills programs in law schools); Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 233-36 (1973) (calling for more hands-on lawyering skills courses as a way of improving the advocacy skills of lawyers); George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 172-80 (1974) (tracing the Ford Foundation's history of funding law school clinical programs through the Council on Legal Education for Professional Responsibility); Benjamin R. Civiletti, *Clinical Education in Law School and Beyond*, A.B.A. J., May 1981, at 576, 576 (calling for more clinical legal education).

149. This report is known as the MacCrate report because Robert MacCrate was the Chair of the Task Force that produced the report. See SECTION ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM* (1992) [hereinafter MACCRATE REPORT].

150. The MacCrate Report identifies 10 fundamental lawyering skills: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, dispute resolution, organization and management of legal work, and resolving ethical dilemmas. See *id.* at 138-40.

151. The MacCrate Report identifies four fundamental values of the profession: providing competent representation; promoting justice, fairness, and morality; improving the profession; and fostering professional self-development. See *id.* at 140-41.

equip lawyers to assume the responsibility of client representation. The MacCrate Report recommends that law schools teach these important lawyering skills and professional values through well-structured clinical programs.¹⁵²

Among the four fundamental values of the profession identified by the MacCrate Report is every lawyer's obligation to strive to promote justice, fairness, and morality.¹⁵³ This value encompasses the ethical obligation to provide access to justice by providing pro bono legal services to persons of limited means and to community groups.¹⁵⁴ This value also requires lawyers to consider the implications for justice, fairness, and morality when making decisions for clients, when counseling clients with respect to client decisions, and when dealing with others, including clients and other lawyers.¹⁵⁵ In addition to promoting this professional value, Professor Jane Harris Aiken

152. *See id.* at 234-35, 332.

153. *See id.* at 140-41.

154. In Louisiana, this obligation is found in Rule 6.1 of the Rules of Professional Conduct, which provides:

Rule 6.1 Pro Bono Publico Service

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Louisiana Rules of Professional Conduct, LA. REV. STAT. ANN. tit. 37, ch. 4 app., art. 16, Rule 6.1 (West 1988).

155. The MacCrate Report specifically states:

As a member of a profession that bears "special responsibilit[ies] for the quality of justice," a lawyer should be committed to the values of:

- 2.1 Promoting Justice, Fairness, and Morality in One's Own Daily Practice, including:
 - (a) To the extent required or permitted by the ethical rules of the profession, acting in conformance with considerations of justice, fairness, and morality when making decisions or acting on behalf of a client;
 - (b) To the extent required or permitted by the ethical rules of the profession, counseling clients to take considerations of justice, fairness, and morality into account when the client makes decisions or engages in conduct that may have an adverse effect on other individuals or on society;
 - (c) Treating other people (including clients, other attorneys, and support personnel) with dignity and respect;
- 2.2 Contributing to the Profession's Fulfillment of its Responsibility to Ensure that Adequate Legal Services Are Provided to Those Who Cannot Afford to Pay for Them;
- 2.3 Contributing to the Profession's Fulfillment of its Responsibility to Enhance the Capacity of Law and Legal Institutions to Do Justice.

MACCRATE REPORT, *supra* note 149, at 213 (citations omitted) (emphasis omitted).

suggests that all law teachers, in clinical courses and in the classroom, have a corresponding duty to teach justice, fairness, and morality.¹⁵⁶ By representing traditionally unrepresented individuals, families, and community groups in Louisiana before the amendments to the student practice rule, the TELC and other clinical programs were giving life to this professional value.

The importance of professional skills programs in teaching lawyering skills and professional values is promoted by the legal profession. The current ABA accreditation standards state that each ABA-accredited law school "shall offer . . . instruction in professional skills."¹⁵⁷ And in 1996, ABA accreditation standards were amended to specifically recognize the value of clinical legal education by stating that each ABA-accredited law school "shall offer live-client or other real-life practice experiences."¹⁵⁸

B. Importance of Student Practice Rules to Clinical Legal Education and Access to Justice

A law student's representation of clients is made possible by the student practice rule in the jurisdiction where the student practices law through a clinical program. Every state, plus the District of Columbia and Puerto Rico, has adopted student practice rules to facilitate law students representing clients as their clients' attorneys in legal proceedings.¹⁵⁹ In addition, the United States Judicial Conference adopted a model student practice rule and most federal courts permit student practitioners.¹⁶⁰

The student practice rules in many jurisdictions are based on the ABA Model Student Practice Rule promulgated in 1969.¹⁶¹ The key features of the student practice rules in these jurisdictions are: "(a) qualification requirements for student practitioners, (b) enumeration of permissible student activities, and (c) requirements

156. See Jane Harris Aiken, *Striving to Teach "Justice, Fairness, and Morality"*, 4 CLIN. L. REV. 1, 2 (1997).

157. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS Standard 302(a)(4) (1998) (emphasis added).

158. *Id.* Standard 302(d) (emphasis added).

159. See Kuruc & Brown, *supra* note 2, at 40-41. A list of citations to all of the student practice rules and summary of the key features of the rules may be found in a recent article by Professor David Chavkin. See David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507, 1546-54 (1998).

160. See George K. Walker, *A Model Rule for Student Practice in the United States Courts*, 37 WASH. & LEE L. REV. 1101, 1101-02 & nn.5-6 (1980).

161. See A.B.A. MODEL RULE ON STUDENT PRACTICE (1969), reprinted in BAR ADMISSION RULES AND STUDENT PRACTICE RULES 993-95 (Fannie J. Klein ed., 1978).

for supervising attorneys.”¹⁶² Until the Louisiana Supreme Court amended its student practice rule, first adopted in 1971,¹⁶³ it was substantially similar to the ABA Model Student Practice Rule and the student practice rules adopted nationwide.¹⁶⁴

Student practice rules in every jurisdiction are usually designed to facilitate the twin goals of clinical legal education: (1) teaching students how to learn lawyering skills and professional values through real life lawyering experiences¹⁶⁵ and (2) providing needed legal services to clients traditionally unable to afford legal counsel.¹⁶⁶ These two goals are inextricably intertwined. By responding to complaints that the TELC was providing too much access to justice for its clients, the Louisiana Supreme Court burdened the law schools in Louisiana with regulations that limit the types of clients, and therefore the types of cases and learning experiences law students will have in the future.

C. *Political Interference with Law School Clinical Programs and Access to Justice*

Political interference with law school clinical programs and efforts to curtail traditionally unrepresented persons' access to justice are not new.¹⁶⁷ Attempting to provide equal access to justice in a society where a client's right to a lawyer is generally conditioned on the client's ability to pay is a project charged with conflict. Inevitably, clinical programs providing meaningful access to justice for poor clients, unpopular clients, or clients challenging the interests of government officials or more powerful clients and institutions will suffer attacks like those attacks experienced by clinical programs in Louisiana. These attacks are often the same type of attacks as those experienced by legal services organizations.¹⁶⁸

162. AALS Submission, *supra* note 4, in 4 CLIN. L. REV. 539, 549 (1998).

163. See Southern Christian Leadership Conference v. Supreme Court, No. 99-1205, 1999 U.S. Dist. LEXIS 11503, at *2 (E.D. La. July 27, 1999), *appeal filed*, No. 99-30895 (5th Cir. Aug. 27, 1999).

164. See AALS Submission, *supra* note 4, in 4 CLIN. L. REV. 539, 549-51 (1998).

165. See David R. Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67, 68 (1979).

166. See Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 HOW. L.J. 31, 32-33 (1993).

167. See generally Joy & Weisselberg, *supra* note 66, at 534 (discussing a prior incident of political influence on the University of Oregon's clinical program).

168. "[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,

For example, in the late 1960s, two University of Mississippi Law School faculty members associated with North Mississippi Rural Legal Services were fired after state legislators and university trustees complained about the faculty members working on a school desegregation case.¹⁶⁹ In addition to terminating the faculty members, the law school ended its relationship with the legal service office.¹⁷⁰ Other state funded law school clinical programs have been threatened with closure by state officials for successfully bringing prison conditions lawsuits,¹⁷¹ for suing governmental bodies,¹⁷² and for representing persons on death row.¹⁷³ In yet another instance, there was an attempt by a state agency to apply a state "conflicts of interest" statute to bar state-funded clinical programs from participating in any administrative case against the state.¹⁷⁴ In every instance, these attempts to stop clinical programs from providing access to justice for their clients failed.

The only instance of another clinical program enduring attacks as prolonged as those experienced by the TELC involved the environmental law clinic at the University of Oregon.¹⁷⁵ Due to the clinic's successes in forest conservation and endangered species cases,

180 (1984). The attacks on government funding of legal services for those who cannot afford to hire attorneys have been well documented by commentators. See, e.g., Jerome B. Falk, Jr. & Stuart R. Pollak, *Political Interference with Publicly Funded Lawyers: The CRLA Controversy and the Future of Legal Services*, 24 HASTINGS L.J. 599 (1973); Warren E. George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681 (1976); Note, *The Legal Services Corporation: Curtailing Political Interference*, 81 YALE L.J. 231 (1971).

169. See Schneider, *supra* note 168, at 183. The two law professors successfully sued for reinstatement, pointing out that they had been terminated due to their relationship with the legal services program while other faculty were permitted other forms of outside employment. See *Trister v. University of Miss.*, 420 F.2d 499, 504 (5th Cir. 1969).

170. See Elizabeth M. Schneider & James H. Stark, *Political Interference in Law School Clinical Programs: Report of the AALS Section on Clinical Legal Education, Committee on Political Interference* 1 n.1 (1982) (on file with author).

171. Clinics at the University of Iowa were threatened with state legislation that would have prevented them from representing any client in litigation against the State of Iowa. See Schneider, *supra* note 168, at 185.

172. The Colorado legislature passed a measure to prohibit law professors from assisting in any litigation against any governmental unit, but the governor vetoed the legislation. See Schneider and Stark, *supra* note 170, at 2.

173. Some members of the Idaho legislature complained after the clinical program at the University of Idaho successfully obtained a stay of execution for a client on death row. See Hansen, *supra* note 6, at 53.

174. See *In re Determination of Executive Comm'n on Ethical Standards re: Appearance of Rutgers Attorneys*, 561 A.2d 542, 543 (N.J. 1989). The agency sought to bar the clinics at Rutgers University from representing clients in public benefits, parole, and other administrative agency hearings. See *id.* at 544. In a 4-3 decision, the New Jersey Supreme Court ruled that the law did not apply to the clinical faculty at Rutgers. See *id.* at 552.

175. See Joy & Weisselberg, *supra* note 66, at 534.

representatives of the timber industry and government officials persuaded the University of Oregon to investigate the clinical program.¹⁷⁶ The committee found that the clinic "fulfills its educational function extremely well, through its advocacy serving a proper social role."¹⁷⁷ Despite being vindicated, the environmental law clinic at the University of Oregon now handles litigation outside of the law school at a nonprofit environmental organization.¹⁷⁸

Like the attacks on the environmental law clinic at the University of Oregon, the attacks on the TELC were prompted by the successes of the clinical law students and faculty fulfilling their ethical obligations to competently advance the claims of their clients. The problem with the TELC, in the eyes of the politicians and business groups seeking the amendments to the student practice rule, was that the TELC was too successful in providing access to justice for the TELC's clients.

By imposing inflexible income guidelines, some justices on the Louisiana Supreme Court indicate that they are simply restricting the law school resources of clinical law students, faculty, and staff to assisting only the poorest of the poor. If there had been some factual basis demonstrating a need for such an amendment to the student practice rule, and if the Louisiana Supreme Court had not been solicited to change the rule by those seeking to impede the work of the TELC, then such a position would be more reasonable. Given the dearth of free or affordable legal services, not only for the poorest of the poor but for those not quite so poor,¹⁷⁹ and the lack of evidence that

176. *See id.*

177. Report of the Ad Hoc Study Committee for the Environmental Law Clinic, University of Oregon School of Law 15 (Nov. 30, 1988) (on file with author).

178. *See* Joy & Weisselberg, *supra* note 66, at 534 n.20.

179. Unfortunately, equal justice under the law still remains more of a dream than a reality for those who do not have access to affordable attorneys. In his concurring opinion, Chief Justice Calogero recognizes that the great majority of the poor in our country likely go without needed legal services. *See* Sup. Ct. Res. to Amend and Reenact Rule XX, at 2 (La. Mar. 22, 1999) (Calogero, C.J., concurring), *reprinted in* 74 TUL. L. REV. 285, 288 (1999).

While Chief Justice Calogero does not cite any studies, studies show that less than 30% of the legal needs of Americans living at or near the poverty line (approximately one-fifth of the U.S. population) are being addressed by the justice system. *See* ALBERT H. CANTRIL, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE 1-2 (American Bar Ass'n 1996) (providing survey results of households with combined annual incomes at or below 125% of the poverty level as defined by the federal government and used as the eligibility guideline for federally funded legal services); *see also* National Survey of the Civil Legal Needs of the Poor 4, in TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY (American Bar Ass'n 1989) (determining that only 20% of the legal problems that households at or below 125% of the poverty level experienced were addressed with legal assistance); LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 23 (American Bar Ass'n 1994) (reporting that

clinics were preferring potential clients with the ability to retain private counsel over those who could not, it is difficult to see how the amendments to the student practice rule are advancing any interests except those of the business groups and politicians who have been upset with the work of the TELC.

V. EXTRALEGAL STRATEGIES PROMPTING THE AMENDMENTS TO THE LOUISIANA STUDENT PRACTICE RULE

The events leading to the amendments to the student practice rule in Louisiana illustrate a strategy not confined to individual cases and controversies before judges and administrative agency decision makers. Although experiencing defeat on the underlying merits of the legal claims supporting the location of the Shintech chemical plant,¹⁸⁰ the business groups and politicians successfully implemented an extralegal strategy to prevent the TELC's clients from securing affordable legal representation in the future. So far, the strategy of the business groups and politicians has proved successful.

In adjudicative matters, judges are supposed to be neutral decision makers who follow the law and, when deciding matters without juries, apply the law to the facts before them without any interest in the outcome.¹⁸¹ Even when acting in an administrative or legislative rule-making capacity, as the justices of the Louisiana Supreme Court were acting in amending the student practice rule, the applicable codes of judicial conduct require judges to promote public confidence in the integrity and impartiality of the judiciary, and to

approximately 71% of situations that confront low-income households and that involve legal issues are not addressed by the legal system). Only 39% of the legal needs of "moderate" income households, those with combined annual incomes above 125% of the poverty level but below \$60,000 (approximately three-fifths of the U.S. population), are being addressed by the justice system. See CANTRIL, *supra*, at 2, 5. This means that the unmet legal needs total approximately 12.4 million matters among low-income households and 38.1 million matters among moderate-income households. See *id.* at 6.

180. See generally Marcia Coyle, *EPA Move Makes Tulane the Victor*, NAT'L L.J., Sept. 22, 1997, at A13 (responding to citizen petitions filed by the TELC, the U.S. Environmental Protection Agency rejected state-issued air permits for the Shintech chemical plant); *Tulane Environmental Law Clinic is Commended for Fighting for the Poor Against Big Business*, NAT'L L.J., Jan. 4, 1999, at A12 (stating that Shintech withdrew its plans to build the chemical plant in the community where the TELC's clients reside, and that the clinical students and faculty of the TELC were runners-up for the *National Law Journal* Lawyer of the Year Award).

181. This tenet of our legal system has been expressed by the United States Supreme Court: "A fair trial in a fair tribunal is a basic requirement of due process. . . . To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955).

avoid the appearance of impropriety.¹⁸² Whenever judges appear to depart from these norms, there are serious implications for the rights of those affected by the judges' decisions, and the public's confidence in the legal system is shaken.

Professors Lynn LoPucki and Walter Weyrauch contend that the prevailing view that courts apply law to the facts to generate outcomes is incomplete, and call for a theory of legal strategy that accounts for results that fall outside of this traditional model.¹⁸³ They argue that this "conventional view" does not explain how legal strategy can manipulate the legal process to determine outcomes.¹⁸⁴ LoPucki and Weyrauch provide multiple examples where "star litigators" and "dream teams" regularly win cases that have no merit by manipulating the legal system to benefit their clients.¹⁸⁵ According to this theory, legal strategies fall into three broad categories: strategies requiring the willing acceptance by the judge or other decision maker,¹⁸⁶ strategies that constrain judges,¹⁸⁷ and strategies that transcend judges—a category including extralegal strategies.¹⁸⁸

182. See MODEL CODE OF JUDICIAL CONDUCT (1998). The Model Code of Judicial Conduct is the basis for all state codes of judicial ethics, and provides that judges "SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY." *Id.* Canon 1. Canon 2 provides: "A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES." *Id.* Canon 2. The Louisiana Code of Judicial Conduct contains these same two canons. See Louisiana Code of Judicial Conduct, LA. REV. STAT. ANN. tit. 13, Canons 1-2 (West Supp. 1999).

183. See Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. (forthcoming Apr. 2000).

184. See *id.*

185. See *id.*

186. These are strategies that seek to persuade the judge, jury, or other decision maker by gaining the confidence of the decision maker through adopting particular speech, dress, or mannerisms that appeal to the decision maker; by undermining the credibility of opposing counsel, the opposing party, or adverse witnesses; and by structuring legal and factual arguments that appeal to the decision maker through claims based on social norms, community expectations, public policy, precedent, the application or interpretation of applicable law, logic, or demands of the legal system. See *id.*

187. These are strategies that pressure judges to reach favorable resolutions without necessarily persuading them, such as selecting which cases to pursue, making good trial records, planning to avoid litigation or to shape litigation by establishing favorable facts, and waging media campaigns to affect underlying attitudes toward particular types of cases or legal issues. See *id.*

188. These are strategies that achieve certain results by preventing opposing parties from having meaningful access to the courts. These strategies include the following: cost strategies that rely on the high cost of litigation to defeat opposing parties' ability to pursue an adjudication; delay strategies that affect outcomes by reducing opposing parties' ability to pursue an adjudication or collect a judgment; contractual strategies that bar claims from being asserted or assure favorable decision makers; forum shopping; settlement strategies that produce outcomes not possible from litigation; and extralegal strategies that deter opposing parties from suing or pursuing pending litigation by applying varying degrees of pressure on

In LoPucki's and Weyrauch's taxonomy, the lobbying of the elected justices of the Louisiana Supreme Court by the business community to change the student practice rule is an extralegal strategy that promises to transcend judges' decisions in the future. This extralegal strategy prevents clients eligible for clinic representation from learning about their legal rights from clinical programs, and prevents previously eligible clinic clients from continuing to receive clinic representation to assert their legal rights in the future. A brief look at some of the extralegal influences on elected judges illuminates the types of pressures the elected justices of the Louisiana Supreme Court faced in considering the business groups' requests to amend the student practice rule.

A. *The Influence of Campaign Contributions*

To illustrate the influence of political campaign contributions on elected judges, LoPucki and Weyrauch use the example of the litigation between Texaco and Pennzoil over Getty Oil Company,¹⁸⁹ and the multi-billion dollar judgment Pennzoil won before a Texas jury.¹⁹⁰ They note that two days after the case was assigned to Judge Anthony Farris in Texas, Joe Jamail, Pennzoil's lead counsel, donated \$10,000 to Judge Farris's reelection campaign.¹⁹¹ Judge Farris did not recuse himself, and "Jamail's generosity seemed to be rewarded with an almost continuous stream of rulings in Pennzoil's favor."¹⁹² By the time the case reached the Texas Supreme Court, Jamail had given \$248,000 in campaign contributions to the justices hearing the case, and the law firm representing Texaco, including the chief appellate lawyer for Texaco, had donated \$190,000 to the justices.¹⁹³ The Texas Supreme Court refused Texaco's application for a writ of error, thereby permitting Pennzoil's award of \$7.53 billion in compensatory and \$1 billion in exemplary damages, as modified and affirmed by the Court of Appeals of Texas,¹⁹⁴ to stay undisturbed.¹⁹⁵

the opposing party or the decision maker ranging from simple courtesy, to embarrassment, to threats, and finally to clearly illegal activities such as presenting false evidence, physical violence, and bribing judges. *See id.*

189. *See Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987).

190. *See LoPucki & Weyrauch, supra* note 183.

191. *See id.*

192. *Id.*

193. *See Richard Woodbury, Is Texas Justice for Sale?*, TIME, Jan. 11, 1988, at 74, 74.

194. *See Texaco, Inc.*, 729 S.W.2d at 866.

195. *See Texaco, Inc. v. Pennzoil Co.*, 748 S.W.2d 631, 631 (Tex. Ct. App. 1988) ("The Texas Supreme Court refused, [no reversible error], appellant Texaco's application for writ of error on November 2, 1987.").

LoPucki and Weyrauch acknowledge that, because campaign contributions to elected judges do not meet the legal standards for constituting a bribe, "conventional theory maintains the fiction that [campaign contributions] have no impact on outcomes."¹⁹⁶ According to this legal fiction, none of the contributions to either the trial judge hearing the Texaco-Pennzoil case nor to any of the justices of the Texas Supreme Court influenced any of their decisions in any way. This fiction is so pervasive that even when a single lawyer donated as much as 21% of the campaign funds for a judge presiding over a case the lawyer was arguing, the opposing party's attempt to disqualify the judge was denied.¹⁹⁷ This fiction applies equally to parties, and a disqualification motion was similarly denied in another case in which one of the parties donated more than 17% of the campaign funds for the judge's election.¹⁹⁸ Professor Anthony Champagne, a political scientist in Texas, describes the result of this fiction more bluntly: "You contribute to your friends and hope your friends will take care of you."¹⁹⁹ Unless a judge literally states that he or she is selling a vote on a matter, the judge can preside over campaign contributors' cases and rule in their favor without fear of disqualification, disciplinary action, or criminal sanctions.

The "fiction" is often palpable. In a recent survey supervised by the Texas Supreme Court, nearly half of the judges in Texas responding believed that "campaign contributions significantly influence courtroom decisions."²⁰⁰ This same survey indicated that more than two-thirds of the lawyers and court personnel in Texas share the belief that campaign contributions influence judges' decisions.²⁰¹

While no comparable survey has been done in Louisiana, there is no reason to believe that campaign contributions to Louisiana's judges are any less influential than contributions in Texas. In a public opinion poll commissioned by the Louisiana Supreme Court and released the day before the amendments to the student practice rule, ninety-one

196. LoPucki & Weyrauch, *supra* note 183.

197. *See River Rd. Neighborhood Ass'n v. South Tex. Sports, Inc.*, 673 S.W.2d 952, 952 (Tex. Ct. App. 1984) (en banc).

198. *See id.*

199. Woodbury, *supra* note 193, at 74 (internal quotations omitted).

200. Osler McCarthy, *Campaign Gifts Sway Judges, 48% Say in Poll*, AUSTIN-AM. STATESMAN, June 10, 1999, at B1. The survey, which was supervised by the Texas Supreme Court and in which 51% of Texas judges responded, indicated that 48% of judges "considered campaign donations to be 'fairly' or 'very' influential" in affecting judges' decisions. *Id.*

201. The supreme court's survey, to which 42% of lawyers and 43% of court personnel responded, indicated that 79% of lawyers and 69% of court personnel in Texas believed that campaign contributions affect judges' decisions. *See id.*

percent of those surveyed agreed that "people with political connections are treated differently."²⁰² The Louisiana Supreme Court's survey also showed that 82% believe "wealthy and poor are not treated the same," 80% believe "judges are too influenced by politics," and 59% believe "whites and minorities are not treated alike."²⁰³ One member of a focus group stated, "If you have money and power, you know what button to push. Money talks."²⁰⁴

Campaign contributions to elected judges as a strategy to shape court decisions and to deny potential litigants meaningful access to justice are often conspicuous. Texans for Public Justice issued a report entitled "Payola Justice," which contends that the largest contributors to successful judicial candidates receive more favorable treatment from the courts.²⁰⁵ Studies show that in 1985, when much of the contributions to the justices came from plaintiffs' lawyers, the Texas Supreme Court ruled in favor of plaintiffs in 69% of the cases.²⁰⁶ In 1998, the justices of the Texas Supreme Court received most of their contributions from "corporations and doctors, and their lawyers."²⁰⁷ Recent studies of Texas Supreme Court decisions show that in 1998 defendants won 69% of the cases, and insurance companies won nearly 90% of the time.²⁰⁸ The Texas Medical Association makes no effort to hide that it extends its lobbying efforts to the judiciary.²⁰⁹ In the last five years, doctors and hospitals have won 86% of their cases before the Texas Supreme Court.²¹⁰ One court watcher has expressed his belief that the Texas Supreme Court "is now comprised of judges elected with the aid of doctors who are more philosophically attuned to a doctor's philosophy."²¹¹ Nevertheless, the fiction contends that the

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

203. *Id.*

204. Joe Gyan, Jr., *State's Court System Takes One on the Chin*, ADVOCATE (Baton Rouge), June 25, 1998, at 9B (internal quotations omitted).

205. See Texans for Public Justice, *Payola Justice: How Texas Supreme Court Justices Raise Money from Court Litigants 1* (visited Oct. 25, 1999) <<http://www.onr.com/tpj/reports/payola/toc.html>>.

206. See Texas Citizen Action-Court Watch, *The Texas Supreme Court in 1996-97* (visited Oct. 25, 1999) <<http://www.texasca.org/courtwatch/tscwr.htm>>.

207. See 60 Minutes: *Justice for Sale: Whether There's a Connection Between Campaign Contributions to Texas Supreme Court Justices and the Outcomes of Cases* (CBS television broadcast, Nov. 1, 1998).

208. See *id.*

209. See *Lobbying: TX Medical Association Grows More Powerful*, AM. HEALTH LINE, May 20, 1999, available in LEXIS, Cmpgn Library, Hltline File.

210. See *id.*

211. *Id.* (internal quotations omitted) (quoting Court Watch Director Walt Borges).

shift in campaign contributions and the corresponding shift in the courts' decisions are merely coincidental.

The lack of public confidence in the elected judiciary's ability to be fair and impartial is understandable when one looks at the apparent strategic value of political influence and campaign contributions in the amendments to the student practice rule in Louisiana. Since the Louisiana Supreme Court first rejected efforts to monitor clinical programs and to change the student practice rule in 1993, LABI, one of the business groups calling for amendments to the student practice rule, became directly involved in judicial elections and supported the election of three of the current the Louisiana Supreme Court justices.²¹² Prior to requesting changes in the student practice rule, LABI made judicial campaign contributions of approximately \$420,000 to state judicial candidates.²¹³

As a result of the apparent efficacy of these extralegal strategies, the motives of the Louisiana Supreme Court have been questioned²¹⁴ at a time when only 50% of the general public in Louisiana approve of the job the Louisiana courts are doing,²¹⁵ and when 91% of those polled in the Louisiana Supreme Court's own survey agreed that "people with political connections are treated differently [by the courts]."²¹⁶ Even the district court judge hearing the challenge to the Louisiana Supreme Court's amendments to the student practice rule observed that, in Louisiana, where the state court judges are elected, it is no "surprise when political pressure somehow manifests itself within the judiciary."²¹⁷

In some respects, it is remarkable that Judge Fallon did not promote the fiction that campaign contributions and political pressure did not influence the elected justices of the Louisiana Supreme Court. Perhaps this is because, as a voter in Louisiana, he had personal knowledge of the hard-fought election that occurred while the

212. LABI backed the elections of Justice Jeffrey Victory in 1994, and Justices Jeannette Theriot Knoll and Chet Traylor in 1996. See, e.g., Gyan, *supra* note 110, at 8A; Schleifstein, *supra* note 110, at A1.

213. See Kaplan & Davidson, *supra* note 112, at 15.

214. See, e.g., Gray, *supra* note 26, at A1; Gill, *supra* note 42, at B7; Roth, *supra* note 64, at S39.

215. In surveys completed by a sampling of the general public, 50% approve of the job the Louisiana courts are doing while 36% disapproved and 15% did not know or refused to answer. See Herbert M. Kritzer & John Voelker, *Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts*, JUDICATURE, Sept.-Oct. 1998, at 59, 60.

216. Gyan, *supra* note 202, at A1.

217. Southern Christian Leadership Conference v. Supreme Court, No. 99-1205, 1999 U.S. Dist. LEXIS 11503, at *45 (E.D. La. July 27, 1999) (Fallon, J.), *appeal filed*, No. 99-30895 (5th Cir. Aug. 27, 1999).

Louisiana Supreme Court was considering the requests to amend the student practice rule and the large amounts of money involved in the campaign. During the time that the Louisiana Supreme Court considered the requests for changes to the student practice rule, the Chief Justice of the Louisiana Supreme Court, Pascal F. Calogero, Jr., was in the midst of a hotly contested re-election campaign in which he spent more than \$900,000 in the primary.²¹⁸

B. Other Indications of Political Pressure on the Elected Justices in Louisiana

Political contributions to elected judges are not the only extralegal influences on judges' decisions. There are concerns that the mobilization of public opinion on cases and issues influences the way judges decide cases, irrespective of the underlying legal merits of the cases. If political contributions are the carrots influencing judges' decisions, then fears that a judge will not adhere to the desires of interest groups are the sticks.

For example, Koch Industries sponsors a pro-business rating system for judges, and business groups have used the ratings in judicial campaigns in Alabama, Kansas, Louisiana, Mississippi, Texas, and West Virginia.²¹⁹ Such studies never examine whether a judge applied the controlling law, but simply whether the judge decided cases in favor of business.²²⁰ A similar study figured into the race for the Louisiana Supreme Court at the same time the justices were considering the business groups' request for changes to the student practice rule.²²¹

While the business groups' requests for changes to the student practice rule were pending, two of the judicial candidates for the Louisiana Supreme Court made direct appeals to the business community for support. The challenger said he was running as a "conservative" and claimed he would give the business community a fair chance on the court.²²² The incumbent, Chief Justice Calogero,

218. See Joe Gyan, Jr., *Cusimano Quits High Court Race*, ADVOCATE (Baton Rouge), Oct. 10, 1998, at 1A.

219. See John J. Fialka, *How Koch Industries Tries to Influence Judicial System*, WALL ST. J., Aug. 9, 1999, at A20.

220. See *id.*

221. See Joe Gyan, Jr., *'96 Report: Calogero Voted Pro-Business 33% of Time*, ADVOCATE (Baton Rouge), Sept. 24, 1998, at 3B.

222. District Judge Charles "Chuck" Cusimano said he was running as a conservative and that the business community "wants an equitable chance in the court." Joe Gyan, Jr., *LBI Endorsement Goes to Challenger in High Court Race*, ADVOCATE (Baton Rouge), July 23, 1998, at 4B (internal quotations omitted).

who was often the swing vote on controversial cases before the Louisiana Supreme Court,²²³ denied claims that he was not "pro-business" enough by making public a business-backed study.²²⁴ The study showed that he had a pro-business score of 80% on environmental cases, and that he "was among the five best [justices] on the court," in terms of overall pro-business votes.²²⁵ If nothing else, these claims by the candidates demonstrate that it is a judicial election liability in Louisiana not to toe the business line.

Judges who make campaign promises about how they would decide cases evoke serious questions about their ability to decide matters impartially, independently, and fairly. At least three former justices of the United States Supreme Court have noted that elected judges who apply the law fairly to criminal defendants, especially those in capital cases, face the danger of losing their next elections.²²⁶

The unmistakable influence of public opinion and political influence on elected judges' use of discretion is best illustrated by a study of the four states where judges can override a jury's sentence in death penalty cases. Professor Stephen B. Bright and Patrick J. Keenan found that in the three of those states where judges face elections, the judges overrode jury sentences of life imprisonment and imposed the death penalty in at least three times as many cases as when the judges overrode jury sentences of the death penalty to impose sentences of life imprisonment.²²⁷ In the one state where the state judges are not elected, the judges overrode the jury recommendation of death and imposed life sentences in every case they considered.²²⁸ This disparate application of judicial discretion led Justice John Paul Stevens to observe that the danger of judges bending

223. See Schleifstein, *supra* note 110, at A1.

224. See Gyan, *supra* note 221, at 3B.

225. *Id.* (internal quotations omitted).

226. See *Harris v. Alabama*, 513 U.S. 504, 519 (1995) (Stevens, J., dissenting) (noting that elected judges "must constantly profess their fealty to the death penalty"); *Wainwright v. Witt*, 469 U.S. 412, 459 (1985) (Brennan, J., dissenting) (noting that there is an acute risk of judicial bias in capital cases where community pressure on elected judges to convict one accused of a capital crime "can overwhelm even those of good conscience"); Ruth Marcus, *Justice White Criticizes Judicial Elections*, WASH. POST, Aug. 11, 1987, at A5 ("If a judge's ruling for the defendant . . . may determine his fate at the next election, even though his ruling was affirmed and is unquestionably right, constitutional protections would be subject to serious erosion." (internal quotations omitted) (quoting Justice White)).

227. See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 793 (1995) (reviewing statistics for Alabama, Florida, and Indiana).

228. See *id.* at 794 (reviewing statistics for Delaware).

to political pressure in capital-case sentencing is as great as colonial judges bending to the wishes of King George III.²²⁹

VI. THE ETHICS OF POLITICAL INFLUENCE ON THE JUDICIARY

Extralegal influences on judges, both in terms of political contributions and the mobilization of public opinion, have led to a growing interest among legal commentators. Extralegal influences on elected judges threaten the guarantee of equal justice under law and the promise that judicial and administrative proceedings will lead to outcomes that are fair to individuals and that are socially just.²³⁰ The issues explored by commentators include concerns that the influence of contributions and pressure to conform to majoritarian views deny parties their rights to due process and fair adjudications,²³¹ recommendations for judicial campaign finance reform to counteract the influence of campaign contributions,²³² and recommendations to create new standards for disqualifying elected judges to ensure that campaign contributions and other influences will not interfere with

229. Justice Stevens observed:

The "higher authority" to whom present-day capital judges may be "too responsive" is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty.... The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.

Harris, 513 U.S. at 519-20 (Stevens, J., dissenting) (footnote omitted).

230. Equal justice under the law is premised on the codependent principles that the adjudicative system has fair, impartial decision makers and proceedings that are equally accessible to all, or else "justice" will be absent from the system. See Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 *BUFF. L. REV.* 181, 182 (1978). Cappelletti and Garth maintain:

The words "access to justice" are admittedly not easily defined, but they serve to focus on two basic purposes of the legal system—the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. First, the system must be equally accessible to all; second, it must lead to results that are individually and socially just.

Id.

231. See, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 *U. CHI. L. REV.* 689 (1995); Mark Andrew Grannis, Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 *MICH. L. REV.* 382 (1987); Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 *HARV. C.R.-C.L. L. REV.* 187 (1996).

232. See, e.g., Kathryn Abrams, *Some Realism about Electoralism: Rethinking Judicial Campaign Finance*, 72 *S. CAL. L. REV.* 505 (1999); Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 *LAW & CONTEMP. PROBS.* 79 (1998); Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 *J.L. & POL.* 57 (1985).

judges' ethical obligations to be fair and impartial.²³³ Still other commentators advocate nonpartisan merit selection for judges instead of elections.²³⁴

As a final step in the examination of the Louisiana student practice rule, I will consider whether judicial ethics regulation can make a meaningful contribution to resolving some of the problems of a politicized judiciary. The place to begin in considering the ethical obligations of the elected judiciary is the code of judicial conduct governing judges' actions. Each state, whether it has an elected or appointed judiciary, has its own code of judicial conduct based on the ABA Model Code of Judicial Conduct.²³⁵ Louisiana is no exception, and the Louisiana Code of Judicial Conduct²³⁶ substantially tracks the ABA Model Code.

The Louisiana Code requires judges to uphold the independence and integrity of the judiciary,²³⁷ provides that judges must avoid the appearance of impropriety and must act to promote public confidence in the integrity and impartiality of the judiciary,²³⁸ commands judges to perform all the duties of their offices impartially without influence from partisan interests,²³⁹ and expects a judge to "disqualify himself or

233. See, e.g., Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449 (1988).

234. See, e.g., Karen L. Tokarz, *Women Judges and Merit Selection Under the Missouri Plan*, 64 WASH. U. L.Q. 903 (1986).

235. See MODEL CODE OF JUDICIAL CONDUCT (1998).

236. See Louisiana Code of Judicial Conduct, LA. REV. STAT. ANN. tit. 13 (West Supp. 1999).

237. Canon 1 of the Louisiana Code of Judicial Conduct provides:

A Judge Shall Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and shall personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code are to be construed and applied to further that objective. As a necessary corollary, the judge must be protected in the exercise of judicial independence.

Id. Canon 1.

238. Canon 2 of the Louisiana Code of Judicial Conduct provides, in pertinent part:

A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All Activities

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow . . . relationships to influence judicial conduct or judgment. A judge shall not . . . advance the private interest of the judge or others . . .

Id. Canon 2.

239. Canon 3 of the Louisiana Code of Judicial Conduct provides, in pertinent part:

herself in a proceeding in which the judge's impartiality might reasonably be questioned."²⁴⁰ Read together, these standards of judicial conduct require a judge to recuse himself or herself whenever anyone would have reasonable doubts concerning the judge's ability to be fair and impartial.

In the context of an elected judiciary, a reasonable person would expect any judicial ethics code based on the Model Code to require a judge to disqualify himself or herself whenever the judge is considering a matter involving lawyers or parties who have made substantial financial contributions to the judge. Under this standard of reasonable doubt concerning a judge's ability to be fair and impartial, one might have reasonably expected recusal by those justices of the Louisiana Supreme Court who received substantial campaign contributions from LABI and others seeking the amendments to the student practice rule. While this seems to be a reasonable expectation, in practice, neither the ABA Model Code nor any other judicial code of ethics based on the Model Code, including the Louisiana Code, is interpreted by most elected judges to require disqualification in such matters, or even when lawyers and parties appear in contested court cases before the judges they support with generous campaign contributions.

Because prevailing judicial ethics rules do not provide explicit standards for elected judges to follow in considering the effect of campaign contributions on the fairness and impartiality of their actions, as well as the appearance of fairness in their actions, too many elected judges ignore the obvious intent of ethical rules based on the ABA Model Code. At present, the only enforceable constitutional requirements for impartial judges are where the judge or decision

A Judge Shall Perform the Duties of Office Impartially and Diligently

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

- (1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall be unswayed by partisan interests, public clamor, or fear of criticism.

....

B. Administrative Responsibilities.

- (1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice....

maker has a direct, pecuniary interest in the outcome²⁴¹ or where the judge has been the target of criticism or some form of abuse by a party appearing before the judge.²⁴²

The inadequacy of the present judicial ethical rules in the area of judicial campaign contributions is a matter of great concern. The need to ensure the independence of an elected judiciary led the ABA to appoint a special Ad Hoc Committee on Judicial Campaign Finance to recommend new, specific rules for disqualification of judges resulting from contributions to judges' election campaigns.²⁴³ These new unambiguous disqualification rules would require a judge to disqualify himself or herself in every proceeding in which the judge's impartiality may be reasonably questioned, including instances when a party or a party's lawyer has contributed a threshold amount to the judge's campaign.²⁴⁴ The amended Model Code does not set specific dollar amount limits. Rather, the amendment "leaves that issue up to individual jurisdictions, recognizing that jurisdictions vary with respect to the cost of judicial campaigns, the size of the electorate, the availability of alternative sources such as public funding, and other factors."²⁴⁵

241. See, e.g., *Ward v. Village of Monroe*, 409 U.S. 57, 60-61 (1972); *Turney v. Ohio*, 273 U.S. 510, 522-24 (1927).

242. See, e.g., *Taylor v. Hayes*, 418 U.S. 488, 501-03 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-67 (1971).

243. See ABA Ad Hoc Comm. on Judicial Campaign Finance, Am. Bar Ass'n, *Report to the House of Delegates* (May 5, 1999) (visited Nov. 9, 1999) <<http://www.abanet.org/cpr/adhoc599.html>> [hereinafter Ad Hoc Committee Report]. The Ad Hoc Committee was created in 1998 to review recommendations concerning contributions to judges' election campaigns that arose out of a special Task Force On Lawyers' Political Contributions. The Task Force on Lawyers' Political Contributions investigated the phenomenon of "pay to play" campaign contributions—lawyers' campaign contributions made to secure legal work from government entities—as well as the effect of contributions in judicial elections. See *id.*

244. Proposed Canon 3(E)(1), as amended, provides:

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(e) the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than [[[\$] for an individual or [\$] for an entity]]] [[is reasonable and appropriate for an individual or an entity]].*

* This provision is meant to be applicable wherever judges are subject to public election. Where specific dollar amounts determined by local circumstances are not used, the "reasonable and appropriate" language should be used.

Id. (footnote omitted).

245. Conference Report: ABA Annual Meeting, 15 Laws. Man. on Prof. Conduct (ABA/BNA) 396, 399 (Aug. 18, 1999) [hereinafter Conference Report].

The proposed changes to the Model Code were cosponsored by several ABA committees,²⁴⁶ and adopted by the ABA House of Delegates at its most recent Annual Meeting in August, 1999.²⁴⁷ It is now up to the Louisiana Supreme Court, other state supreme courts, or in some jurisdictions, state legislatures, to adopt the changes to their versions of the Model Code. Unfortunately, even these new explicit ethics rules for recusal confine themselves to legal proceedings, and the recusal rules do not explicitly address judges acting in their rule-making capacity. As a result, even these changes do not appear to prevent elected justices of a state supreme court from considering changes to court rules, like the student practice rule in Louisiana, when those lobbying for the changes are the elected justices' campaign contributors.

Given the appearance of influence, if not the actual influence, of campaign contributions on this aspect of judicial duties, the campaign contribution recusal rules should extend to require recusal of elected judges acting in any official capacity. If the changes to the judicial code of conduct proposed by the ABA are not adopted, and if they are not strengthened, then the oath that elected judges take to be fair and impartial will continue to be questioned.

VII. CONCLUSION

The amendments to the student practice rule in Louisiana precipitate concerns about interference with clinical legal education programs, concerns about how the organized bar, the judiciary, and our legal system provide access to justice for persons with legal claims, and concerns about whether judges fairly treat the parties and issues before them. Contrary to the bar's perennial preoccupation with lawyer professionalism,²⁴⁸ these underlying issues of fairness of the judicial system and the allocation and delivery of legal services are the most pressing issues for our society.

246. In addition to the Ad Hoc Committee on Judicial Campaign Finance, the other cosponsors of the new ethics rules were the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Judicial Division, and the ABA Special Committee on Judicial Independence. See Ad Hoc Committee Report, *supra* note 243.

247. See Conference Report, *supra* note 245, at 399.

248. The organized bar's persistent preoccupation with lawyer professionalism focuses on such issues as the public's image of lawyers and "the emphasis on money, 'Rambo' lawyers, lawyers' dissatisfaction with their work, the 'speed up' in the legal workplace, and the breakdown of collegiality." Peter A. Joy, *What We Talk About When We Talk About Professionalism: A Review of Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession*, 7 GEO. J. LEGAL ETHICS 987, 992 (1994) (book review).

For the last twenty-five years, the clinical law students and faculty of law schools in Louisiana have worked to address the allocation of legal services by providing access to the courts when their clients could not find affordable legal assistance elsewhere. In doing so, Louisiana law schools also have worked to fulfill the challenge of American law schools to provide students with "cases and situations involving the relationship of the processes of the law to the fundamental problems of contemporary society."²⁴⁹ As Professor Arthur Kinoy wrote thirty years ago, such clinical programs "provide a fascinating teaching tool for probing into the most fundamental theoretical, substantive, and conceptual problems, all within the context of the throbbing excitement of reality."²⁵⁰

Regrettably, the Louisiana Supreme Court's recent restrictions on the clinical programs have the practical effect of narrowing access to justice rather than broadening it, simultaneously intruding on the academic freedom of law students and faculty. It is all the more distressing that the restrictions on clinical legal education in Louisiana appear to be the result of those seeking to stop clinical programs from competently and professionally providing access to the courts, and perhaps access to justice, for families and community groups who have no place else to turn for affordable lawyers.

249. Arthur Kinoy, *The Present Crisis in Legal Education*, 24 *RUTGERS L. REV.* 1, 7 (1969).

250. *Id.*