COMMENT

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A Man, His Dream[1], and His Final Banishment: A Marxian Interpretation of Amended Louisiana Student Practice Rule

He did the sprinkling act, and obtained official permission to gouge his way through . . . . The pieces were falling majesti-

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[1] The term dream in this title is taken from M. Dyson's most recent book, in which he explained how Martin Luther King, Jr.'s dream was turning into a "nightmarish condition" when he saw the reality of the late 1960s in the U.S. MICHAEL ERIC DYSON, I MAY NOT GET THERE WITH YOU 21 (2000). I suggest an analogy with the dream of Robert Kuehn when he established the Tulane Environmental Law Clinic (hereinafter TELC) and saw his dream turn into a nightmare for TELC and its supporters and creators, with the onset of the Shintech controversy and its concomitant restrictions on the representation of indigent clients. A second analogy flows from the belief King and Kuehn shared in protecting the rights of the disenfranchised (African-Americans in particular) from the exploitation and oppression of the white elites. For King's theoretical account see DYSON, *supra*.

> cally into place, and Victor Mattiece could smell a billion dollars. Maybe two or three.
> Then an odd thing happened. A lawsuit was filed . . . . The plaintiff was an obscure environmental outfit known simply as Green Fund. The lawsuit was unexpected because for fifty years, Louisiana had allowed itself to be devoured and polluted by oil companies and people like Victor Mattiece. It had been a trade-off. The oil business employed many and paid well . . . . The politicians from the governors down took the . . . money and played along. All was well, and so what if some . . . suffered.[2]

If you threw a stone into a placid pond you would see concentric rings expanding from the point of impact. With similar imagery, this paper will propound a new explanation of the events surrounding the Shintech confrontation in Convent-Romeville, Louisiana, where the subsidiary of a Japanese conglomerate unsuccessfully tried to open a new chemical manufacturing facility. This paper will examine the actions of a law professor who brought claims of environmental injustice into the national spotlight, and stirred up turbulence in the seemingly tranquil waters of Louisiana culture into which he cast the stone of social justice.

Many theories have been espoused to explain the confrontation between Shintech opponents and supporters. The theory propounded by the media[3] explains the final result, a limitation in the representation of indigent people's rights,[4] in terms of the coercion imposed by the Lousiana Supreme Court in deciding to reformulate the boundaries of Law Student Practice Rule XX, and the local business community's financial manipulation of state supreme court elections.[5] Under this theory, the fact that

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[2] JOHN GRISHAM, THE PELICAN BRIEF 221-22 (1992).

[3] *See 60 Minutes II: Justice for Sale* (CBS television broadcast, Apr. 12, 2000). This report can be accessed through the CBS Homepage at http://cbsnews.cbs. com/now/story/0,1597,175831-412,00.shtml (last visited Apr. 18, 2000). This report, for reasons unknown, has not been released in video format for purchase by the general public.

[4] This severe limitation on the representation of the rights of indigent people in Louisiana is due to the amendments between 1998 and 1999 of Rule XX, enacted by the state supreme court. Rule XX of the Administrative Rules of the Louisiana Supreme Court previously allowed indigent people and community organizations to seek legal representation with local environmental clinics. Now, rigid eligibility guidelines and open book membership provisions drastically curtail the aforementioned rights.

[5] According to this view, the judges of the Louisiana Supreme Court voted to restrict, under a new version of Rule XX, the rights of law school clinics to represent indigent clients and community organizations because they were influenced and pressured by corporations, who are the largest contributors to judicial election cam-

local judges are elected makes them susceptible to influence by the business community,[6] which has the means to finance an electoral campaign. Consequently, elected judges often feel a duty toward their funding constituency,[7] in this particular case, big business. This theory, however, is too simplistic. It is the existing economic and political structure itself that perpetuates both the mode of production and the legal superstructure, as the final result of the controversy (discussed below) has eventually and undisputedly demonstrated. In fact, Chief Justice Pascal Calogero[8] of the Supreme Court of Louisiana, who happened to be reelected during this heated controversy, defeated the candidate supported by the business coalition of the Bayou State.[9]

Another aspect of the controversy highlighted the opinions of the members of the small community[10] at the center of the media inquiry. Several people in the predominantly African-American

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paigns. Louisiana is one of thirty-nine states where judges are elected and not appointed. John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. ENVTL. L.J. 217, 221 n.2 (2001). For a scathing critique of these possible pressures on the judges of those states see Peter A. Joy, *Insulation Needed For Elected Judges*, THE NAT'L LAW J., Jan. 10, 2000, at A19.

[6] Joe Gyan, Jr., *U.S. Judge Hears Arguments On Student Lawyers*, THE BATON ROUGE ADVOCATE, July 22, 1999, at 5B. The reporter refers to statements made by U.S. District Court Judge Fallon, who was conducting the suit against the Louisiana Supreme Court, filed in April 1999 by different organizations challenging the amendments to Rule XX. According to Gyan, Judge "Fallon noted that Louisiana's judiciary is elected and said political and business pressure is to be expected." *Id.* at 5B. According to Judge Fallon, the article written by Nicastro on the possibilities open to law students to use political avenues to challenge the Rule XX amendments is predicated on a fallacy. How could the students appeal to the political process if that remedy is in fact the one which prompted, through the electoral process, the eventual outcome of a Louisiana Supreme Court elected with the support of the state businesses? This process is in actuality precluded to them. *Contra* Frances M. Nicastro, Case Comment, *Southern Christian: A Call for Extra-Constitutional Remedies, Legal Clinical Education, and Social Justice*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 333, 346 (2001).

[7] Judge Fallon acknowledged the pressure on the judiciary, but at the same time declared that "no one is alleging any payoffs." Gyan, *supra* note 6, at 5B.

[8] Chief Justice Calogero has been publicly attacked in the media for his pro-business stance in the controversy surrounding the amendments to Rule XX. See in particular James Gill, *Influencing Louisiana's Judiciary*, THE NEW ORLEANS TIMES-PICAYUNE, Dec. 3, 1999, at 7B.

[9] Joe Gyan, Jr., *Cusimano Quits High Court Race*, THE BATON ROUGE ADVOCATE, Oct. 10, 1998, at 1A.

[10] According to a business reporter, the local residents of Convent-Romeville were not originally opposed to the chemical facility until Greenpeace stirred up the waters. According to that author, Greenpeace "didn't much care one way or the other about environmental justice. But it didn't like the PVC industry." Robyn E.

community of Convent, where the siting of the new Shintech facility was originally planned, were interviewed[11] during the course of a media frenzy that touched the lives of many people in Louisiana and beyond for over two years. Answers to rhetorical questions regarding the trade-off between pollution and environmental illness that attend business expansion[12] were pursued relentlessly. What constitutes the Gordian knot in this clash of opposing views can be found in Louisiana's economic base and its hierarchical scheme of oppression of man (disenfranchised African-Americans) and nature. This paper will also look behind the facade of fair political representation on the Bayou to the dramatic relationship between poverty and class exploitation that constitutes a symbiosis representative of the American process, economy, and legal system, and how these realities help manufacture, manipulate, and ultimately reflect the broader national economic and social strata.[13]

One theory[14] used to explain the tactics of both sides in their accusations against each other looks at the concept of "outsider"

Blumner, *EPA Aims At Racism, Hits Minorities*, JOURNAL OF COMMERCE, Oct. 8, 1998, at 7A.

[11] Dan Rather conducted the interviews aired on national TV on 60 Minutes II, aired on April 12, 2000.

[12] Chris Fink, *Backers, Opponents Turn Out For Hearing On Shintech Permit*, THE BATON ROUGE ADVOCATE, June 30, 1999, at 1B.

[13] What this author discusses as manipulation to manufacture an "informed consent," two other authors call "education." Roy Whitehead, Jr. & Walter Block, *Environmental Justice Risks in the Petroleum Industry*, 24 WM. & MARY ENVTL. L. & POL'Y REV. 67, 80 (2000). According to them, "education" is what the black and poor community needed to accept a new polluting facility in their neighborhood. In Nazi Germany this education was called propaganda; in today's capitalist society we sanitize it and re-sell it as the suggestion of a consulting firm. Whatever you call it, the forces of Gramscian hegemony act upon the false consciousness of the exploited. The idea of hegemony is based on a consensual and unquestioned acceptance of what is at the foundation of a given social order. This promotes both stability and consensus around political assumptions and theoretical analysis of the underpinnings of the economic and political social order. For an interesting presentation and practical application of Gramscian hegemony in a current political and economical context, see JEREMY LESTER, THE DIALOGUE OF NEGATION: DEBATES ON HEGEMONY IN RUSSIA AND THE WEST (2000); BENEDETTO FONTANA, HEGEMONY AND POWER: ON THE RELATION BETWEEN GRAMSCI AND MACHIAVELLI (1993); TEODROS KIROS, TOWARD THE CONSTRUCTION OF A THEORY OF POLITICAL ACTION: CONSCIOUSNESS, PARTICIPATION AND HEGEMONY (1985).

[14] Binder explains the controversy in terms of the confrontational rhetoric that surrounds environmental justice disputes all over the country. In her law review article she delves into the inordinate effects of name-calling as a tactic used by both parties to the confrontation. In this paradigm, the term outsider is the ultimate tag to designate your adversary and its plan. Lisa A. Binder, *Religion, Race, and Rights:*

as a synonym for nefarious harbinger,[15] debating who is viewed as such and who really is one. In this context, both supporters and opponents of the Shintech project have been blamed for their use of tactics such as name-calling,[16] which have distanced and alienated the parties involved, making it impossible to reach any mutual understanding.[17] To some extent, name-calling is the matrix of discord and cause of ill will that precluded any real chance to reach a solution in this case.[18]

This paper's intention is not to castigate the authors, commentators, or actors in the events surrounding the siting of the chemical facility, but rather to cast stones against the egregious and diverse attempts to economically subjugate the oppressed. This scheme has ultimately proven successful for the Louisiana political, business, and judicial establishments in achieving their goal of short-term profit[19]. These interests were also successful in driving environmental justice out of the Louisiana legal arena.[20] The final injustice in this cautionary tale was the departure of the Director of the Tulane Environmental Law Clinic,[21] the main protagonist in this commentary.

This author looks at the events and sees a well-defined trend, which has already been the subject of study by famous

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A Rhetorical Overview of Environmental Justice Disputes, 6 WIS. ENVTL. L.J. 1, 34 (1999).

15 With this theory, authors try to identify and isolate the outsider in the community and scapegoat him/her/it as the real cause of trouble. In the Shintech controversy, the outsider could have been the Japanese conglomerate, but was instead viewed as the left wing environmentalist who came to disturb the placid life of the parish.

16 Binder, *supra* note 14, at 33.

17 Binder, *supra* note 14, at 63.

18 Binder, *supra* note 14, at 32-33, 63.

19 With the construction of the new Shintech facility in Plaquemine, evidently some of the economic problems in the community might be solved. The long-term effects such as an increase in health problems leading to cancer, leukemia and birth deformities, are not, however, part of the equation.

20 According to the CBS report and to Kuehn (phone interview) only one environmental justice case has been accepted by TELC since the drastic curtailment enacted by the amendments of Rule XX. These data run counter to what a legal author, such as Nicastro, would like us to believe. Using Judge Fallon's words in the *Southern Christian* case, she conveys the message that the income criteria enacted by the amendments of Rule XX would actually render the legal representation of the poor still possible. Nicastro, *supra* note 6, at 344.

21 Bob Kuehn announced his departure from Tulane Law School in the first week of Mar. 1999. See in particular *The Law Clinic Legacy*, THE NEW ORLEANS TIMES-PICAYUNE, Mar. 6, 1999, at B6.

Durkheimian[22] theorists. History repeats itself. This paper tells of a man who became the victim of his own dream and was banned by the wealthy rulers of Louisiana, in a Durkheimian parallel,[23] as exemplified by Kai Erikson in his theoretical reading of Anne Hutchinson's trial.[24]

I

HISTORICAL OVERVIEW

> . . . it's difficult to whip a bear with a switch. David pulled it off, but the best bet is always on Goliath.[25]

In August 1996, Shintech Inc., a Houston-based subsidiary of the Japanese Shinetsu Chemical Co., launched a plan to operate a chemical (polyvinyl chloride, a very toxic agent) manufacturing facility in St. James Parish, Louisiana. A confrontation quickly arose between a pro-business faction (Governor and state administration, Business Council of New Orleans and the River Region, Louisiana Association of Business and Industry, and Chamber of Commerce of New Orleans and the River Region) and its opponents (St. James Citizens for Jobs and the Environment, Greenpeace and Louisiana Environmental Action Network) within the local[26] and state communities.[27] The names of the parties involved in this litigation are known to readers of

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[22] Emile Durkheim, a French sociologist of the 19th century, spoke of a functional link between ritual punishment and solidarity within the community. According to him, punishment in its rituality is an actual response to the external threat to the solidarity of norms and values of the community in danger. EMILE DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE 459 (1948). *See also* JAMES M. INVERARITY ET AL., LAW AND SOCIETY: SOCIOLOGICAL PERSPECTIVES ON CRIMINAL LAW 131 (1983).

[23] The banishment of Bob Kuehn by the legal community of Louisiana parallels the arguments made by Durkheim over a century ago to explain the necessity of punishment of the external entity that endangered the solidarity of the community. *See* INVERARITY ET AL., *supra* note 22, at 149. In other words, Kuehn became the scapegoat and the ritual punishment was necessary to bring the business and legal communities of Louisiana together again.

[24] Kai T. Erikson, in his book *Wayward Puritans*, studied in Durkheimian terms the trial of Anne Hutchinson in the 1600s Puritan society of Massachusetts. He spoke of repressive justice as an answer to "boundary crises" that affected the community. KAI T. ERIKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE 69 (1966). My reading of Kuehn's banishment is permeated by the same analysis as Erickson. In both cases, there is a functional link between the crisis in the community's solidarity and the need for swift ritual punishment.

[25] GRISHAM, *supra* note 2, at 223.

[26] Within the same community in Convent, there was a major fracture between those who supported the Shintech initiative and those who opposed it.

New Orleans and Baton Rouge newspapers because of their extensive coverage of the fiery exchanges and altercations that took place among the parties. In October 1996, St. James Citizens for Jobs and Environment, the local environmental movement formed out of concern for and in response to the Shintech initiative,[28] sought legal representation by the Tulane Environmental Law Clinic (TELC). Upon accepting the case, TELC filed two complaints with the Environmental Protection Agency (EPA). The first petition was based on Title V of the Clean Air Act (CAA),[29] seeking to overturn a previously issued permit from the local agency overseeing air emissions in the state of Louisiana. The second complaint was based on a supposed violation of Title VI of the Civil Rights Act,[30] insofar as the decision to site a chemical facility in a prevalently minority and low-income neighborhood is actionable under the April 1994 executive order by President Clinton[31] providing federal redress in case of environmental injustice. On September 10, 1997, EPA, according to the provisions of Title V of the CAA, which allow a federal agency to oversee a state agency permitting authority, overturned the origi-

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[27] Even at the state level a major split was present; for example, the state chapter of the NAACP sided with the Shintech supporters, while the national and New Orleans chapters supported the opponents. *See* Terry Carter, *EPA Steps in to Clear the Air: Environmental Racism Charged in Challenge to Location of Chemical Plant*, 83 A.B.A. J. 32 (Nov. 1997).

[28] "The heated battle over the siting of the Shintech complex is evidence that people still distrust the chemical industry and view it as a polluter . . . . This type of nagging distrust is particularly strong within minority communities closest to the plants that dot the Mississippi River corridor." Tara R. Kebodeaux and Danielle M. Brock, *Environmental Justice: A Choice Between Social Justice and Economic Development?*, 28 S.U. L. REV. 123, 140 (2001). The authors discuss the distrust of minority communities toward the specific industry but fail to ask why it is always the same communities which get higher exposure to air and water pollutants. Would the nagging distrust be the same if these polluting facilities were built around rich white neighborhoods? The answer is no because of NIMBY (not in my backyard) groups, which have the political clout to defeat such supposedly community-enticing projects.

[29] 42 U.S.C. §§ 7661-7661(f) (1994).

[30] Title VI of the Civil Rights Act reads in part "[n]o person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d) (1994).

[31] As provided in part by Executive Order 12,898 section 1-1 par. 1-101, "[E]ach Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. . . ." Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

nal permit that the Louisiana Department of Environmental Quality had issued to the Japanese-owned chemical company.[32] The EPA office in charge of reviewing the second petition faced a moot issue regarding the complaint that environmental injustice violations were present in the siting of the Shintech facility in the disproportionately minority area of Convent, Louisiana, since the chemical company decided, in September 1998, to change its plans and open the facility somewhere else.[33]

Within two years of its proposal, in fact, the plan to build the facility in Convent was shelved. This was principally because EPA had rejected the approval of the state permit for air emissions in accordance with the provisions of the CAA,[34] and probably, too, because the chemical company was subject to pressure by other companies which had become leery of the possibility of an unprecedented negative ruling on the issue of civil rights violations as related to environmental justice.[35] Shintech rerouted its efforts by planning, in September 1998, a smaller facility in Addis-Plaquemine, Louisiana, forty miles up the Mississippi River from the original site.

The litigation concerning Shintech's siting proposal has acquired national resonance because of its trappings of injustice re-

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[32] *See* United States Environmental Protection Agency, In re: Shintech Inc., Order Responding to Petitioners' Requests That the Administrator Object to Issuance of State Operating Permits, Permit Nos. 2466-VO, 2467-VO, 2468-VO, http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/shin1997.pdf (last visited Feb. 18, 2002).

[33] *Enviro Justice: Shintech Withdraws Controversial LA Plan*, GREENWIRE, Sept. 18, 1998. According to an author citing the Shintech litigation, "the delay and costs of defending against hopeless accusations of environmental racism in the media, in the administrative process, and possibly even in the federal courts, may influence developers to avoid brownfields altogether." Paul J. Flynn, Note, *Finding Environmental Justice Amidst Brownfield Requirement*, 19 VA. ENVTL. L.J. 463, 483 (2000). It remains obscure in the author's argument how a "hopeless accusation," if substantiated as frivolous, would not be immediately dismissed in court due to the rules of civil procedure.

[34] On August 31, 1998, the state District Judge Kay Bates had also ordered a bias hearing in accordance with the request of three organizations which had claimed the biased position of the Louisiana Department of Environmental Quality (LDEQ) on the Shintech matter, and its approval of the company's air permit. *See* Frank Esposito, *Bias Hearing Further Stalls Shintech Plant*, PLASTIC NEWS, Sept. 7, 1998, at 4.

[35] On February 5, 1998, EPA had promulgated an Interim Guidance, which opened the door to federal courts for claimants who challenged actions deemed discriminatory in terms of environmental justice. At the same time, the federal environmental agency formulated a five-step procedure for the analysis of the disparate impact of the facility's permit on the affected population. For a conservative critique of this regulatory tool, see Whitehead and Block, *supra* note 13, at 75-77.

garding environmental planning against the poor black communities of this Nation, and the South in particular. Although the opposition was formed by a coalition of environmental justice groups, its strategic epicenter quickly became the Tulane Environmental Law Clinic, and its Director Robert "Bob" Kuehn. The Law Clinic's services were retained by the local grassroots organization, St. James Citizens for Jobs and the Environment, because the group could not afford private legal representation.

To recapitulate, the stance assumed by TELC in asserting the rights of its clients, as explained above, was twofold: on one side it attacked the Louisiana Department of Environmental Quality air emissions permit issued summarily to Shintech, while on the other it challenged the siting of the chemical facility in a prevalently black community as being in violation of the residents' rights under Title VI of the Civil Rights Act of 1964.[36] TELC's effective strategy, conviction, and advocacy provoked the wrath of Louisiana Governor Mike Foster and the Louisiana Association of Business and Industry (LABI), a local business organization.[37] When the actual litigation was at its apex and the opponents of the Shintech project in Convent appeared to have won the war,[38] the pro-business coalition, in a surprise move in the summer of 1997,[39] petitioned the Chief Justice of the Louisi-

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[36] TELC asserted that the siting violated President Clinton's Executive Order 12,898 as part of the Title V air permit challenge. The primary racial discrimination challenge was premised on Title VI of the Civil Rights Act of 1964. In an interesting twist of events, when "the EPA accepted the citizens' Title VI civil rights complaint for investigation, making the Shintech permitting dispute the agency's test case for implementing its new environmental justice enforcement policy," it created a locus for redress against racially motivated environmental political decision-making. Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL'Y 33, 50-51 (2000).

[37] James Gill, *Law Clinic, Shintech And Idealism*, THE NEW ORLEANS TIMES-PICAYUNE, Jan. 16, 1998, at B7.

[38] On September 10, 1997, EPA rejected the initial terms of Shintech's permit and ordered Louisiana DEQ to reopen its permit proceedings.

[39] Two letters were sent in July 1997, and the third one "coincidentally" on September 9, one day before the EPA decision was made public, from business organizations to Louisiana Chief Justice Pascal Calogero, requesting an investigation of the activities of TELC. Interestingly enough, Justice Calogero did not act upon those requests until September 25, 1997, two weeks after EPA had overturned the air emissions permit, when he sent a letter to Tulane Law School Dean Edward Sherman informing him of a re-examination of the activities of the environmental law clinic in the context of Rule XX. This action, interpreted in terms of Marxian theory, points more to the fact that the legal superstructure, as a creature of the mode

ana Supreme Court for an investigation of any misconduct in TELC's zealous representation of environmental cases.[40]

Although the allegations proved false, the Justices of the state Supreme Court caved in to pressure from the local business community during the November 1997 re-election campaign of Chief Justice Pascal Calogero,[41] to consider several proposed amendments to Rule XX;[42] the so-called "student practice rule" aimed at restricting the jurisdictional reach of the clinic. On June 17, 1998, over six months after the re-election of Chief Justice Calogero, the Supreme Court of Louisiana, using its legislative powers, reformulated one of the rules of representation before the state.

The 1988 version of the Rule read that "an eligible law student may appear in any court or before any administrative tribunal in this state on behalf of . . . any indigent person or community organization."[43] While this formulation clearly allows law clinics to represent any community organizations in their defense of the impinged rights of their members, a different set of rules was approved by the Louisiana Supreme Court. The new version of Rule XX drastically curtailed the operational rights of law clinics in the state, holding that such clinics may represent indigent individuals or indigent community organizations only under severely restricted parameters for calculating eligibility for representation.[44] According to a legal author, the 1999 Amendments "se-

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of production, needed change after the business community, and in this particular case Shintech received an adverse ruling on the company's air permit petition.

[40] For an interesting analysis of these events, see Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235, 246 (1999).

[41] In Louisiana, judges are elected and funding for an electoral campaign is obtained through private contributions. In this scenario, the prospect of a political challenge on the side of the plaintiffs in the *Southern Christian* case is simply laughable if we compare the monetary contributions that law students at Tulane may raise against those of state business constituencies. According to one author, "[t]he students could have appealed to the political process . . . could have proposed a referendum . . . ." Nicastro, *supra* note 6, at 346-47.

[42] Rule XX of the Louisiana Supreme Court Rules, entitled "Limited Participation of Law Students in Trial Work," has allowed eligible law students to appear in court on behalf of indigent people since 1971, and now, after consecutive amendments in 1998 and 1999, indigent community organizations upon a judicial certification of the indigence of at least fifty-one percent of its members.

[43] LA. SUP. CT. R. XX § 3 (as amended Nov. 21, 1988).

[44] The major provisions originally enacted through these changes consisted of "prohibiting law clinic representation of any group that is affiliated with a national organization; requiring law clinics to follow guidelines in determining indigence used

verely limit[ed] access to the courts for grassroots organizations and lower-income individuals while intruding on the education of law students in Louisiana."[45] This was accomplished by specific changes in section 4 of the new Rule, which stated that "[l]aw school clinical program staff and student practitioners who appear in a representative capacity pursuant to this rule may represent any individual or family unit whose annual income does not exceed 200% of the federal poverty guidelines."[46] In addition, the new section 5, titled Representation of Indigent Community Organizations, required that "[l]aw 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."[47]

Finally, according to the 1999 Commentary to section 10 of new Rule XX promulgated by the Louisiana Supreme Court:

> [I]n furtherance of the Court's policy against solicitation of legal clients generally, the ethical prohibitions against attorney solicitation, and the Court's view that law students should not be encouraged to engage in the solicitation of cases, Section 10, as amended, prohibits a student practitioner from representing a client who has been the subject of targeted solicitation by any law clinic representative.[48]

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by the LSC [Legal Services Corporations] before representing clients; requiring community organizations represented by a law clinic to certify in writing, subject to public inspection, their inability to pay for legal services; and prohibiting the solicitation of cases or clients including forming, creating, or incorporating any organization." Jennifer L. Jung, Comment, *Federal Legislative and State Judicial Restrictions on the Representation of Indigent Communities in Public Interest and Law School Clinic Practice in Louisiana*, 28 CAP. U. L. REV. 873, 881 (2000). In a few words, the community organizations in Louisiana now have to prove indigence. An apposite rewording of Rule XX now requires that at least fifty-one percent of the members fall below federal poverty guidelines.

[45] Joy, *supra* note 40, at 238.

[46] LA. SUP. CT. R. XX § 4 (as amended Mar. 22, 1999). The original amendment, on June 17, 1998, referred instead to the Legal Services Corporation (LSC) eligibility guidelines, thus imposing a showing of an annual income of 125% of the LSC federal poverty guidelines for a person who is seeking legal representation to become eligible. LA. SUP. CT. R. XX § 4 commentary (as amended Mar. 22, 1999).

[47] LA. SUP. CT. R. XX § 5 (as amended Mar. 22, 1999). The original amendment on June 17, 1998 required that at least seventy-five of the organization's members be eligible for federal assistance. Sam A. LeBlanc III, *Debate over the Law Clinic Practice Rule: Redux*, 74 TUL. L. REV. 219, 228 (1999).

[48] LA. SUP. CT. R. XX § 10 commentary (as amended Mar. 22, 1999). The March, 1999 amendments repealed a provision enacted on June 17, 1998 by the Louisiana

This last amendment was clearly intended to clip the wings of the students and their clinics and at the same time to isolate communities and community organizations from legal representation against the environmental racism of our capitalist society. The effect of all of these rule changes, interpreted in Marxist terms, was to realign the state law to a more consonant role of system superstructure, the rule now practically disallowing a law clinic's representation of environmental justice organizations and low-income individuals in the state of Louisiana.[49] Rule XX is a vivid exemplification of the influence and power of the business community on the rest of society in Louisiana.[50]

Following an historical purview, on June 30, 1998,[51] and again on March 22, 1999,[52] the state supreme court modified minor details in the new Rule XX. These amendments related to a less drastic requirement for the percentage of indigent people who

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Supreme Court, which prohibited the law clinic's representation of community organizations which were affiliated with larger national organizations. LA. SUP. CT. R. XX § 1 commentary (as amended Mar. 22, 1999).

[49] James Gill, *High Court's Way Of Doing Things*, THE NEW ORLEANS TIMES-PICAYUNE, July 5, 1998, at B7.

[50] James Gill, *High Court Target Of Disgust*, THE NEW ORLEANS TIMES-PICAYUNE, June 28, 1998, at B11.

[51] The Louisiana Supreme Court revised within the same month the provision related to the percentage of indigent members in the organization, lowering the number from 75% to 51%. Another change concerned the certification in writing of the members' inability to afford legal representation. This certification is done now through the court system, avoiding the previously judicially regulated public scrutiny. Although the issue of disclosure of the finances of community organization members has apparently been resolved by the Louisiana Supreme Court, by saying that the court system would review any challenges, this procedure has not been adopted yet by the state's ultimate legal authority. *See* Kuehn, *supra* note 36, at 98-99. In addition, the requirement to disclose the members' income, even if supposedly viewed only by the court system, will still chill citizen participation. E-mail from Robert Kuehn, University of Alabama School of Law, to Giancarlo Panagia (Aug. 7, 2001) (on file with author).

[52] This time the Supreme Court's changes related to the increase of eligibility standards for low-income members of the organization, raising the threshold to 200% of the federal guidelines, and the overturning of the ban on law clinics from representing local groups affiliated to major national organizations. According to Nicastro, another of the "alternative channels by which the plaintiffs [in the *Southern Christian* case] could have achieved their desired end [would have been for the plaintiffs to request] . . . that the Louisiana Supreme Court consider amending Rule XX to authorize, for the first time, the providing of services to non-profit organizations, with a separate list of eligibility requirements." Nicastro, *supra* note 6, at 347. That hardly qualifies as an alternative, though, since before the amendments were enacted, the law indeed allowed legal representation of non-profit organizations without any specific eligibility provisions, and after the enactment those mandates were exactly what the plaintiffs in *Southern Christian* indeed challenged.

are members of the community organization,[53] and, first, to the suspension for further reconsideration, and later the repeal of a provision previously enacted to discourage the creation, by students at the law clinics, of local community organizations.[54] Finally the Louisiana Supreme Court deleted the prohibition against the legal representation of those local community organizations affiliated with larger national groups,[55] leaving, however, most of the major controversial changes and their repercussions intact.

Less than a month after the March Amendment, on April 16, 1999, several groups, organizations, and individuals challenged the constitutionality of the changes to Rule XX in federal district court.[56] The argument was that under the provisions of the new Rule XX, the First Amendment rights of individuals, members of organizations, and students were being violated in their speech, association, and petition component, together with rights protected under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[57] On July 27, 1999, federal district

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[53] *See* LeBlanc III, *supra* note 47, at 229.

[54] LA. SUP. CT. R. XX § 10 commentary (as amended Mar. 22, 1999). *See also* LeBlanc, *supra* note 47, at 230.

[55] *See* Joy, *supra* note 40, at 251.

[56] Joy, *supra* note 40, at 241. This author describes succinctly the claims of the twenty-one plaintiffs, between organizations and singular individuals, who joined in the effort to challenge the Louisiana Supreme Court amendments in his article, at 241-42. For a brief and interesting discussion of these legal issues, see Nicastro, *supra* note 6, at 338-44.

[57] Plaintiffs list eight specific bases for the relief sought, by asserting that the Rule XX Amendments: 1) constitute impermissible viewpoint discrimination in violation of the First Amendment of the United States Constitution . . .; 2) violate Equal Protection under the Fourteenth Amendment . . . by discriminating against Plaintiffs on the basis of their political views; 3) infringe Plaintiffs' rights of freedom of speech, association, and to petition government redress of grievances under the First Amendment . . . by placing restrictions on student solicitation of clients and cases (Rule XX, Section 10); 4) impinge on the academic freedom of professors and students in contravention of the First and Fourteenth Amendments . . . by imposing the newer, more restrictive income requirements potential clients must meet in order to qualify for representation (Rule XX, Sections 4 and 5); 5) violate the First and Fourteenth Amendments . . . because the new income guidelines and allegedly intrusive verification procedures suppress Plaintiffs' freedom of speech, freedom of association, and right to petition government for redress of grievances (Rule XX, Section 5); 6) are unconstitutionally vague and overbroad in that the financial disclosure and certification requirements contained in Rule XX, Section 5 provide insufficient guidance on how to comply, thereby violating the rights of the clients, students, and professors under the First and Fourteenth Amendments . . .;

Judge Eldon Fallon granted the Louisiana Supreme Court's motion to dismiss the plaintiffs' request for relief. Judge Fallon stated, "this Court does not believe that the modifications to Rule XX implicate any cognizable protected interest as to any of the various parties,"[58] basically dismissing the plaintiffs' suit "because it failed to state a claim upon which relief could be granted."[59]

To make matters worse for the environmental community in Louisiana, on February 26, 1999, Kuehn announced that he would not come back to Tulane Law School, resigning after ten years at the Law Clinic that he helped establish. A local newspaper reported "the decision was made for personal reasons and not as a result of criticism leveled against the clinic in recent months by Gov. Foster."[60] Although the resignation came at a suspicious time (any speculation is good in this regard), the conventional wisdom is that Kuehn quit his job "sua sponte."[61] One way or another, however, Bob Kuehn was chased out of his position as Director of TELC. LABI had finally won the war and banned Kuehn and his support of the economically disenfranchised from the local legal community.

This series of events did not stop the several plaintiffs from filing, on August 17, 1999, a timely appeal before the United States Court of Appeals for the Fifth Circuit. On November 7, 2000, a three-judge panel of the Fifth Circuit heard the appeal of the plaintiffs and their request to reverse the decision of the dis-

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> 7) violate the donor's rights to freedom of speech and association to advance his beliefs by contributing funds, contrary to the First and Fourteenth Amendments . . .; and 8) violate Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment . . . by virtue of the arbitrary and capricious manner in which the Rule XX Amendments were adopted, depriving them of fundamental rights without fair notice or any opportunity to be heard.

S. Christian Leadership Conference, La. Chapter v. Sup. Ct. of La., 61 F. Supp. 2d 499, 502-03 (E.D. La. 1999). The plaintiff filed corresponding claims of the violation of the same rights as recognized under the Louisiana State Constitution.

[58] *Id.* at 514.

[59] Jung, *supra* note 44, at 889.

[60] Mark Schleifstein, *Director of Tulane Law Clinic Resigning*, THE NEW ORLEANS TIMES-PICAYUNE, Feb. 26, 1999, at A-10.

[61] In a telephone interview with this author, Prof. Kuehn confirmed that his decision was motivated by personal reasons, namely his duty toward his family to raise his children in an environment not permeated by racism. According to Prof. Kuehn, pressures exerted by the local business establishment were not part of his decision-making process. This author remains respectfully dubious.

trict court "so the case could go to trial."[62] According to press reports, the hearing demonstrated that the three judges "seemed less than sympathetic"[63] to the plight of the poor and the cause of the plaintiffs and students who fight for the right to represent them.[64] As the local press reported, one of the three circuit judges, Judge Edith Jones, "appeared unconvinced that restrictions on law students representing clients is a bad thing."[65] She actually proposed that the law professors should litigate the clinic's cases. Counsel for the appellants interjected that "that would defeat a basic purpose of the law clinics—giving students experience arguing cases."[66] The fact that this appeal was litigated before "a hostile bench"[67] confirms the impression that the rules of representation in the state of Louisiana are not going to be changed any time soon to suit the claims of the poor of that state.[68]

Worse yet, since August 2000, the same Fifth Circuit Court of Appeals that heard this case has been publicly contemplating a possible change in its own rules of representation by law students.[69] If this change were to take place, the same prohibitions would exist in the federal courts that oversee cases from Louisiana, Mississippi, and Texas.[70] This would confirm a trend toward disempowerment of the wretched, consistent with Marxist interpretation of these events, since the three states resemble one another in their basic modes of production[71] and legal superstructure.

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62 Susan Finch, *Limits on Law Clinics Appear Likely to Stand; Defenders of the Poor Disappointed*, THE NEW ORLEANS TIMES-PICAYUNE, Nov. 8, 2000, at 4.

63 Janet McConnaughey, *Judges' Questions Discourage Law Clinic Head*, ASSOCIATED PRESS, Nov. 7, 2000.

64 *See* Finch, *supra* note 62, at 4.

65 Finch, *supra* note 62, at 4.

66 McConnaughey, *supra* note 63 (quoting David Udell, head of the Brennan Center for Justice's poverty program, and litigating counsel for the appellants in this case).

67 McConnaughey, *supra* note 63 (quoting attorney Jane Johnson, Director of the Tulane Civil Litigation Clinic).

68 James Gill, *Never Mind Rights for the Riffraff*, THE NEW ORLEANS TIMES-PICAYUNE, Nov. 10, 2000, at 7.

69 Cain Bourdeau, *Law Schools Fear Rule May Stop Students from Practicing in Federal Court*, ASSOCIATED PRESS, Aug. 3, 2000.

70 *Id.*

71 A search conducted on Lexis-Nexis provides ample proof of oil interests and resource exploitation and refinement shared by the region occupied by the three different states. In accordance, see in particular Business Wire and PR Newswire reports. Interestingly enough, the three states in question have been the subject of

II

THE FIFTH CIRCUIT DECISION

On May 29, 2001, the Fifth Circuit released its opinion on the appeal. It came as no surprise that the three-judge panel affirmed the decision of District Judge Eldon. As the appellate judges pointed out in their de novo review, the four issues before the court were:

> (1) whether the Plaintiffs have standing; whether Plaintiffs have stated a claim that Rule XX, on its face, violates protected freedoms of speech and association by (2) the tightening of the indigence requirements or by the (3) imposition of solicitation restrictions on student representation in the role of an attorney; and (4) whether the LSC's promulgation of the rule constitutes actionable viewpoint discrimination in this context.[72]

The appellate court, in an opinion by Judge Garwood decided in favor of the plaintiffs on the standing issue, acknowledging that at least some of them could demonstrate a negative impact of the rule in such a way that would "constitute an injury in fact."[73] The appellate court, however, was not as lenient on the other three issues. The court rejected the second claim related to the Rule's tightening of the indigence requirements. Judge Garwood rejected the interpretation of the plaintiffs' counsel that First Amendment freedom of speech and association could be violated by the imposition of new guidelines for eligibility for legal representation by community organizations' members. The three-judge panel agreed, instead, that no restriction of speech was present in the new Rule XX formulation. The court, based on the 1973 U.S. Supreme Court San Antonio School District case,[74] looked at the regulation on its face and did not find any restriction of First Amendment rights to free speech. In fact, the Rule on its face does not limit legal representation based on speech, but only on class. As the opinion suggested, "the indigence requirements alone implicate no speech interests, and are simply subject to Equal Protection requirements. Classifications

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judges' performance and evaluations in three different projects financed by conservative business advocacy groups in the last quinquennium. *See* Echeverria, *supra* note 5, at 226, 228 and 230.

[72] S. Christian Leadership Conference, La. Chapter v. Sup. Ct. of La., 252 F.3d 781, 787 (5th Cir. 2001).

[73] *Id.* at 788.

[74] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

based on wealth alone are not subject to strict scrutiny."[75] Although the argument per se is faultless, it does indeed reaffirm one of the points raised by this essay. It is the classification based on wealth or lack thereof that allows the legal system to lower the standard of inquiry and, thus, negatively impact the poor of Louisiana. The court further held that, "[u]nder rational basis review, the indigence requirements are valid. They are rationally related to one of the stated purposes of Rule XX: providing representation to those who cannot afford it for themselves."[76] Here the court, in lowering the standard of review, has to demonstrate merely a rational relation between the measure adopted, the amendments of Rule XX, and the stated purpose of the measure, allegedly providing legal representation for the poor of Louisiana. In reality, by looking at how few new cases TELC was able to accept after the implementation of the Rule changes, the measure ended up negatively impacting those same poor it was allegedly purported to help.[77]

The Fifth Circuit also provided a negative answer to the third issue raised by the plaintiffs, who challenged the section 10 amendments as being violative of First Amendment free speech rights. The court unanimously affirmed the newly imposed restrictions on students in the legal representation of previously solicited clients. The judges agreed that "the students are not prohibited from or restricted in working on clinic solicited cases as paralegals, as legal (or factual) researchers, or as trial assistants."[78] In this fashion, the limitation, as brilliantly espoused by the court, concerns only student representation of solicited clients. By limiting the students' participation as counsel, the court opined, the new Rule XX did not "prohibit or punish speech,"[79] but instead imposed a "viewpoint neutral" restriction,[80] which is subject to rational basis review. Once again, the measure is rationally related to its purpose, the legal system's policy against

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[75] *S. Christian Leadership Conference*, 252 F.3d at 789.

[76] *Id.*

[77] It would be interesting to conduct a study or survey to demonstrate how many people who "flip burgers" in Louisiana would qualify for legal representation according to the amendments to Rule XX.

[78] *S. Christian Leadership Conference*, 252 F.3d at 790.

[79] *Id.*

[80] *Id.* at 791.

solicitation by legal personnel.[81] The Appellate Court's explanation, however, treads on fragile ground.

Rule XX does not limit speech by the clinics' members—any person associated with a clinic can engage in any sort of outreach activity and can even solicit individual clients. Indeed, the clinics are allowed to represent clients so solicited, with one caveat—the students, who are not lawyers, may not represent, *as lawyers*, any client so solicited.[82]

This reasoning is fallacious on two grounds. First, the court contradicts itself when it says that Rule XX does allow clinics to represent solicited clients as long as the students are not acting as counsel, because this form of representation goes against those same policies and ethical prohibitions so strenuously defended in a previous part of the opinion.[83] Secondly, it is very bizarre that students are allowed to work only as clerks when the purpose of clinical education is to provide first-hand experience as counsel for the poor.

Similarly, the court reasons that no actual limitation of speech is at stake in this newly imposed amendment of section 10. According to the court, "Rule XX imposes no restrictions on the kind of representations the clinics can engage in or on the arguments that can be made on behalf of a clinic client. Rule XX applies to all clinic students equally, and is entirely viewpoint neutral."[84] This reasoning is sound on its face, but it fails to describe the actual impact of the new section 10 requirements. Although on its face the provisions do not challenge any particular form of speech, in reality these new requirements will be felt by the working poor, and those viewpoints that business organizations battle against on a regular basis. Businesses and the wealthy will not have any reason to retain law clinics and students as counsel for their claims. Instead, the brunt of the viewpoint neutral provisions will be felt "equally" by the students and those poor who the Louisiana legal system whimsically decided should not receive free legal advice, counseling, or representation.

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[81] *Id.*

[82] *Id.* at 791-92 (emphasis in original).

[83] The previous reasoning of the same panel: "the Court's policy against solicitation of legal clients generally, [and] the ethical prohibitions against attorney solicitation. . . ." *S. Christian Leadership Conference*, 252 F.3d at 791.

[84] *Id.* at 792.

The fourth issue considered by the court on appeal related to the "jus quaesitum"[85] whether the state Supreme Court amendments to Rule XX could constitute a form of viewpoint discrimination actionable at law. According to the plaintiffs in the action, such "enactment of Rule XX constitutes an unconstitutional attempt by the Court to suppress political speech it has deemed undesirable."[86] The appellate court replied that because the amended court rule "is facially viewpoint neutral and is not otherwise constitutionally objectionable,"[87] the appellate court would have to find the Louisiana Supreme Court's motivation furthered by a suppressive purpose. The issue, the court explained, thus became "whether the Plaintiff's allegations of suppressive purpose, if true, would render Rule XX unconstitutional."[88] The Fifth Circuit reasoned that no evidence had been proffered that would even "suggest that the Louisiana Supreme Court itself bore any particular ill will towards any of the Plaintiffs."[89] At that juncture, the simple motivation "to defuse the political pressure, and to diminish the likelihood of the recurrence of similar activities in the future,"[90] would not reach the threshold of unconstitutional action because "the rule is of wholly general and prospective application—it applies to all student legal clinics in Louisiana, not just TELC."[91]

This argument is also fallacious for two reasons. First, according to the reasoning of the appellate court, in order to suppress the free speech of the one group, which spurred the so-called "unwanted political pressure on the LSC,"[92] the same LSC would go so far as to deny a particular kind of speech, concerning environmental justice, by the adoption of a "viewpoint neutral general rule."[93] This argument is made by using the mantle of "general rule," which applies across the board to all law schools clinics, thus avoiding infringing constitutional principles[94] of protected speech or equal protection. But it is a long-standing doc-

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[85] Reminiscent of my previous education in Roman Law, where the 'quaesitum' is the issue before the court.

[86] *S. Christian Leadership Conference*, 252 F.3d at 792.

[87] *Id.*

[88] *Id.* at 794.

[89] *Id.*

[90] *Id.* at 794-795.

[91] *Id.* at 794.

[92] *S. Christian Leadership Conference*, 252 F.3d at 794.

[93] *Id.* at 795.

[94] *Id.*

trine in this country which requires an inquiry into discriminatory intent as opposed to impact. In this case the alleged motivation on the part of the LSC,[95] contrary to the Fifth Circuit Court's assertion, does violate the rights of a discrete and insular group. Also valid is the impact argument because, in actuality, it was TELC that absorbed the brunt of this amendment since its caseload consisted substantially of legal claims in this particular kind of litigation.

This allows the reader to understand why the Fifth Circuit's argument is both fallacious and fictitious. According to Judge Garwood, "Rule XX will produce no legally significant chilling effect on the expressive speech of any of the Plaintiffs in this case."[96] This argument is totally unsound and untrue. The caseload of TELC after the introduction of the new amendments was reduced dramatically, clearly demonstrating "a chilling effect" resulting from the new Rule XX. The same three-judge panel acknowledged that the new changes "will result in a decrease in the availability of clinical representation for some of the Plaintiffs."[97] But the Court went even further and recognized and condoned the consequences of LSC's action. Judge Garwood opined that "some of the client organizations in this case may indeed find it somewhat more difficult to qualify for clinic representation in the wake of Rule XX, and the clinics themselves will either be forced to change their educational model or to refrain from soliciting particular clients."[98] It is clear here that the court is conscious of the fact that the new indigence requirements make it extremely hard for poor, working class people to obtain the very counsel that was one of the purposes for which law school clinics were created. The court is also aware that TELC specifically, not the general law clinics, has been "forced to change the[ir] educational model."[99] Therefore, it is ludicrous for the court to claim that "this [will cause] minimal impact on the clinics and the client organizations."[100]

The impact might be minimal if it were to be spread out amongst several law clinics and environmental justice groups represented by those clinics, but in reality TELC and its prospective

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[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *S. Christian Leadership Conference*, 252 F.3d at 795.
[99] *Id.*
[100] *Id.*

clients have suffered the most repercussions of the amendments of Rule XX. This is in consonance with the requests of the business organizations; see accordingly LeBlanc's article,[101] where the author heavily criticized the educational model and advocacy of law clinics such as TELC, and applauded the curtailment of the law clinic's rights and clipping of their legal wings.[102] This is in assonance with the critical Marxist perspective of this essay, which is confirmed in its underpinnings by the words in the opinion released by the Fifth Circuit. In the atheoretical approach of its opinion, the Court reasoned, "even this minimal impact on the clinics and the organization is 'suppressive' *only in comparison to the earlier version of Rule XX*."[103] The court felt the need to strengthen its reasoning by adding that "[t]his is a crucial distinction."[104] Indeed it was. The comparison to the previous formulation of Rule XX enhances the conclusion that the change was needed and requested by business organizations in order to align the legal superstructure, norms, and rules of law to the mode of production, oil, and chemical enterprises[105] represented by local business organizations.

The Appellate Court affirmed the district court's granting of a motion to dismiss because, on the last issue, whether or not the promulgation of the new Rule XX was actionable under a First Amendment viewpoint discrimination, the changes created by the Louisiana Supreme Court did not constitute impermissible discrimination. According to the court, since the amendments were issued "by an across-the-board, wholly prospective and viewpoint neutral general rule,"[106] no speech by individuals or groups had been singled out and discriminated against. As the three-judge panel concluded, they were "convinced that the new version of Rule XX would not silence any group or individual's speech except to the extent that it ceases to support private speech."[107] This is highly problematic since the lack of support for private speech the court was referring to corresponds exactly to those same requests funneled by LABI and its acolytes to the Supreme Court. The circle closes itself. The mode of production

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101 LeBlanc III, *supra* note 47, at 223.
102 LeBlanc III, *supra* note 47, at 224.
103 *S. Christian Leadership Conference*, 252 F.3d at 795 (emphasis in original).
104 *Id.*
105 *See* Echeverria, *supra* note 5, at 254.
106 *S. Christian Leadership Conference*, 252 F.3d at 795.
107 *Id.*

needs the legal superstructure to protect its habitat. When legislation or rules are inadvertently passed that would compromise in the short and long run the local business environment, it is necessary that a new realignment be put into place. In this instance the Louisiana Supreme Court, and ultimately the Fifth Circuit, realized that the current interpretation of the First Amendment to the U.S. Constitution, another form of superstructure, will not "requir[e] the LSC to continue, in perpetuity, an optional program[108] that allegedly benefits a particular political viewpoint once that program has begun."[109]

It is still unclear whether the plaintiffs in this litigation will appeal for a rehearing en banc or take their claims directly to the U.S. Supreme Court.[110] If the plaintiffs take the hint offered by the reporter of the local newspaper they will realize how limited their chances to prevail really are in such a conservative court as the Fifth Circuit. As the reporter commented, "Jones and Garwood were appointed by President Reagan. Goodwin was appointed by President Nixon."[111] Accordingly, another appeal to the same circuit might be an exercise in futility. In her lapidarian style, the writer intimated that the decision of the three judges might have been tainted by the conservative credo. By the same token, if the same lawsuit were taken to the highest court of the land and certiorari were granted, the conservative majority would hardly constitute the optimal forum for relief in this highly controversial case given its connotations of race and class.

This bleak overture and possible conclusion to the scenario notwithstanding, it is necessary to provide a theoretical framework so that followers of the Shintech saga may perceive what is at the core of this struggle. A foundation is necessary to explain who is involved and why in the broader ongoing conflict that was

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[108] The program being TELC's legal representation of environmental justice organizations, as it was run in accordance with the provision of the 1988 version of Rule XX.

[109] *S. Christian Leadership Conference*, 252 F.3d at 795 n.13.

[110] Ed Mc Hale, *Federal Appeals Court Upholds Louisiana Supreme Court*, ASSOCIATED PRESS, May 29, 2001.

[111] Susan Finch, *Judges Uphold Limits on Student Law Clinics; Appeals Panel Backs Dismissal of Lawsuit*, THE NEW ORLEANS TIMES-PICAYUNE, May 30, 2001, at 4. In actuality, Judge Garwood is a member of the 9th Circuit on a temporary stint in another circuit because of appellate backlogs. Notwithstanding his provenience, Judge Garwood, because of his conservative background, fit perfectly in a circuit adamantly opposed to claims on behalf of the environment or nature.

merely exemplified by the happenstance of a corporation's plans to build yet another facility in "cancer alley," Louisiana.

III

MARXIST ANALYSIS

Slavery is no longer legal in America, and African-Americans have obtained legal equality.[112] Yet, Louisiana has pockets of poverty where exploitation by the capitalist system and its corporate functionaries precludes the Fourteenth Amendment and the Civil Rights Act of 1964[113] protections from sheltering the citizens of cancer alley and affording them genuinely equal access to the law. In this world, the capitalist mode of production (in Louisiana, oil refineries and chemical manufacturing companies with a very restricted morphological[114] diversification) reigns supreme and the legal superstructure reflects the economic power that is its base. The Shintech controversy is just another anecdotal tale in the saga of corporate capitalism. In the economy of Louisiana the advent of new industries would bring enough revenue to break the cycle of poverty[115] in which the local underclass has been languishing for generations. But at what cost? At the cost of unborn lives, at the cost of illness, at the cost of cancer. It has

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[112] Karl Marx has expressed inconsistency between legal equality and economic inequality. Other authors have applied his theories to the environmental field. "Although our constitution ensures each person the equal power of a single vote, vast economic inequity gives some citizens substantially greater influence". DANIEL A. COLEMAN, ECOPOLITICS 153 (1994).

[113] 42 U.S.C. §§ 1971, 1975-1975(d), 2000a-2000h-6 (1994).

[114] According to Black, "Morphology is the horizontal aspect of social life." DONALD BLACK, THE BEHAVIOR OF LAW 37 (1976). It applies to a differentiation within the same nucleus, community, society, etc. In this particular instance, it relates to the differentiation, or lack of it, in the mode of production peculiar to the Louisiana community at large.

[115] Authors Whitehead and Block use the example of Mayor Dennis Archer, who fights poverty in Detroit by dismissing environmental justice claims and instead "advocates, [that] jobs and tax revenues can be considered a substantial benefit." Whitehead & Block, *supra* note 13, at 80. More interestingly, Newman, an activist and staff member of Citizens Clearinghouse for Hazardous Wastes, a national environmental justice organization, discusses the issue in terms of "economic deprivation" and "vulnerability to the lure of economic development and jobs" of those smaller rural communities, especially targeted by corporate interests, for their intrinsically "limited" political clout. Penny Newman, *Killing Legally with Toxic Waste: Women and the Environment in the United States*, *in* CLOSE TO HOME: WOMEN RECONNECT ECOLOGY, HEALTH AND DEVELOPMENT WORLDWIDE 51 (Vandana Shiva ed., 1994).

been said that at the political level this comes with the tradeoff.[116]

The vast expansion of business, which has been injurious to the health of poor minorities and polluted the environment, is the political and economic reality of Louisiana, which, in contrast to other states of the Union, represents the epitome of "internal colonialism." This Gramscian[117] concept "describe[s] political and economic inequalities between regions within a given society."[118] This form of colonialism exploits the resources and inhabitants of the geographic periphery to the advantage of the center, from which the power emanates. In the former area, the exploited "populations . . . usually consist of people with a different . . . racial, or class background."[119] As recognized by Kuletz, this Gramscian understanding of the exploitation of the peripheral regions undermines the underpinnings of the democratic values of capitalist societies. In addition, Kuletz, in a self-accusatory tone, acknowledges that these "regional inequalities are . . . necessary features of industrial society—features we choose not to see in order to maintain the myth of American equality and democracy."[120] This is the political and economic matrix[121] which surrounded Shintech and the decision to open a new facility in St. James Parish. With the full-fledged support of the Louisiana business community and some residents of the planned site, this ini-

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116 As stated by James Gill, a Louisiana journalist who has become extremely vocal since the inception of the Shintech controversy, and by Lisa Binder, an environmental law attorney with a Los Angeles firm, who has authored a law review article on the same dispute. Binder, *supra* note 14, at 29.

117 Antonio Gramsci, an Italian Marxist political scholar and founder of the Italian Communist Party was persecuted and imprisoned by the fascist government from 1926 until his death in 1937. His theory of internal colonialism was modeled around the concept of the metropolis (the northern part of Italy) exploiting the colonial countryside of the southern regions. Antonio Gramsci, *La Relazione Di Antonio Gramsci Sul III Congresso (Lione) Del Pci*, 12 RINASCITA 516, 523 (1956).

118 VALERIE L. KULETZ, THE TAINTED DESERT 8 (1998).

119 *Id. See also* Newman, who stresses how "class, race and ethnicity in a community are driving factors in site selections" of highly polluting facilities. Newman, *supra* note 115, at 51.

120 KULETZ, *supra* note 118, at 8.

121 Some authors acknowledge how difficult it is to change this status quo. "A program for economic democracy will naturally be resisted by those benefiting from concentrated economic power. Their monopoly on command over production, investment, and state policy can block challenges from less-powerful political formations." COLEMAN, *supra* note 112, at 154.

tiative was supposedly intended to improve the stagnant local peripheral economy.[122]

A good portion of the residents welcomed the proposal from the start.[123] Myriad motives underlaid this acceptance, but of primary importance were economic desperation,[124] economic[125] or environmental blackmail,[126] and hegemony.[127] Although the terminology of class conflict has become nearly obsolete, the three above-cited motives mask a reality lasting over two centuries. The lack of reporting does not necessarily negate the actuality of the perpetual conflict. Due to the workings of hegemony,

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[122] Adam J. Siegel, *Environmental Protection for the Affluent*, THE DARTMOUTH, Oct. 27, 1997.

[123] *Id.*

[124] An interesting point has been raised in this context.

> It is well known that the poor are hardest hit by environmental problems. Their communities are where dangerous waste dumps or polluting industries are placed. They have the least defense against environmental ills. Consumer choice is rarely an option for the poor. For them the crisis has the greatest urgency.

COLEMAN, *supra* note 112, at 203. Hence follows the acceptance of cancer-causing industrial production within the impoverished community.

[125] The term economic blackmail has been used in cases of environmental injustice related to the disposal of nuclear waste on Native American reservations or in Indian country. The similarity with the construction of polluting facilities in minority or poor neighborhoods is striking. In both places, businesses and government agencies find the perfect locus to unload hazardous or polluting materials on the disenfranchised of society, who are also unable, for different reasons, to coalesce in a unified front to reject these activities in their communities.

[126] White, a professor of public policy at the University of Pittsburgh, refers to the term environmental blackmail in the arena of environmental justice. This basically happens every time "people of color, because of economic constraints, are forced to accept circumstances and conditions that may be hazardous to them, their families, and their communities." Harvey L. White, *Race, Class, and Environmental Hazards*, *in* ENVIRONMENTAL INJUSTICES, POLITICAL STRUGGLES 74 (David E. Camacho ed. 1998). White in this particular instance is referring to Prof. Bullard's theory of malicious conspiracy, which is at the core of corporate environmental decision-making. For an interesting explanation of this theory and the use of environmental blackmail, see ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 83 (1990).

[127] Cammett, a Gramscian author and historian at Rutgers University, described the concept of hegemony as "the predominance, obtained by consent rather than force, of one class or group over other classes." JOHN M. CAMMETT, ANTONIO GRAMSCI AND THE ORIGINS OF ITALIAN COMMUNISM 204 (1967). Gramsci believed that reality was being totally obfuscated through the workings of ideological propaganda, as explicated by the ruling class within and without the "institutions of civil society." Cammett, *supra*. For Gramsci's analysis of the concept of hegemony see ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Howe & Geoffrey Nowell Smith trans.) (1971).

some of the poor in St. James Parish succumbed to economic desperation, hence blackmail.

One of the purported principles upon which this country is founded is equality under law. This allows each person to enter the economic market and become part of its egalitarian façade, but it will not guarantee economic equity. How could it? According to certain authors, all the economic market need guarantee is that both parties to a transaction are free to participate in the bargaining exchange promoted by the capitalist system, so that a win-win situation is the outcome of the trade. According to them, "gains from trade are always made in the free market, and by both sides."[128] But in this scenario, as the authors remind us, the "commercial interaction was for 'keepsies' in the terminology of the playground, and not unilaterally revocable."[129] Therefore, if the "fish,"[130] using the example of the authors, is contaminated with mercury, the "housewife"[131] would realize ex post facto that she had been gypped because she was unskilled in the rules of the market game, but she would supposedly be happy that she participated in the exchange, which ostensibly made her equal to the other party in the transaction.

What becomes irrelevant to certain authors is that within the economic market of a capitalist society the parties to a transaction, although possibly "legally equal," will not have the same bargaining power. This creates a dynamic in which the upper class has the power to dominate the lower and underclass. An environmental scholar referring to Bookchin's social ecology[132] analysis suggests that Western society is enthralled by "an obses-

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[128] Whitehead & Block, *supra* note 13, at 84.

[129] Whitehead & Block, *supra* note 13, at 84.

[130] Whitehead & Block, *supra* note 13, at 83. The authors use the example of a housewife who goes to the market and buys a fish from a retailer and then explain in economic terms how sound and positive the effects of the market are.

[131] Whitehead & Block, *supra* note 13, at 83. It is interesting to note how sexist the example given by Whitehead and Block really is. The buyer at the market is purportedly a female (housewife) and the retailer is a male. Throughout the entire paper the two authors always use obsolete stereotypes with terminology that confirms their ultra-conservatism or the use of pronouns always in the male context, which informs the reader as to who is the actor in their world.

[132] Murray Bookchin is a fervid contemporary environmental author and founder of social ecology, a structuralist philosophy and analysis of the relations among labor, mankind and nature. For a more complete and accurate description of Bookchin's creature "social ecology" and its message, see INSTITUTE FOR SOCIAL ECOLOGY, MURRAY BOOKCHIN: BIOGRAPHY, *at* http://www.social-ecology.org/about/faculty/bookchin.html (last visited Feb. 19, 2002).

sion with hierarchy and the mechanisms of power politics and power economics . . . made possible [by] the chronic domination, oppression and exploitation of . . . one ethnic group by another, and the poor by the rich."[133] Although, in Marxian terms, it is the capitalist mode of production that has furthered public acknowledgment of legal equality, the same system has shackled minorities and the poor. That author describes the forces of capitalist production in the way illustrated by another new left theorist, Herbert Marcuse. By adopting Marcuse's jargon,[134] we are introduced to a description of capitalism that has "reduced both nature and people to raw materials with strictly utilitarian value."[135] Here, although the Marcusian argument is ad hoc, a personal critique of the author must be made. This arises from his use of a dichotomy or disjunction, of European origin, of human and nature as counter-posed to the holistic and Unitarian approach[136] embraced by the indigenous tribes of the Americas. Marcuse failed to grasp the thread that encompasses and unifies every form of life that inhabits this planet, but he did realize the workings of capitalism on the substrata of our society.

This is the reality in contemporary Louisiana, where multinational corporations continuously exploit poor communities. In Marxist theory, a change of the mode of production can ultimately effect a change in the legal superstructure. In the 1960s, theorists such as Bookchin and Marcuse saw the possible solution for economic inequality, oppression and exploitation in the "revolution."[137] Today, there are several ill-fated attempts to

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[133] RODERICK F. NASH, THE RIGHTS OF NATURE 164 (1989). Nash refers to Bookchin's publication, *The Ecology of Freedom*, where the author, an anarchist of Marxist schooling, develops his theory of human domination of nature.

[134] Herbert Marcuse, a German born philosopher, fled his country to avoid Nazi persecution of Jews, and moved to the United States, where he later founded the New Left movement. He became extremely famous in the 1960s because he sided with his students at U. Cal. San Diego during the student revolution.

[135] NASH, *supra* note 133, at 166. Nash, here, refers to Marcuse's publication, *Counterrevolution and Revolt*. The author in this book added nature as another victim of human exploitation and advocated its liberation as another aspect of the human revolution. HERBERT MARCUSE, COUNTERREVOLUTON AND REVOLT 62, 74 (1972).

[136] NASH, *supra* note 133, at 117.

[137] See NASH, *supra* note 133, at 11 for a comparison of the two theorists' views of ideological and institutional dismantlement via revolutionary means or changes. Bookchin in *The Ecology of Freedom* advocates revolutionary changes for the dissolution of society in a symbiosis of anarchism and ecology. Marcuse, instead, in *Counterrevolution and Revolt*, was less clear about the post-revolutionary society, which dismantled the previous economic and political system and liberated the vic-

change the system from the superstructure. Less valid attempts[138] pursue the course of deconstructing the modern social constructs of White America. Notwithstanding this historical and theoretical framework, we as a society are forced to accept the sad truth of capitalist economics. The reality, as expressed by Inverarity, is that "legal equality in a capitalist system reproduces economic inequality."[139] With this in mind, we can now study the events, which led to the Shintech controversy and the amendment of the Louisiana Supreme Court Rule XX.

Even assuming the honesty of LeBlanc's assertions that "Shintech was only the defining event, the proximate cause"[140] of the "imbroglio" surrounding the circumstances that led to the reformulation of Rule XX, the word "imbroglio"[141] carries a fraudulent connotation in the original meaning of the word. Its Italian etymology means something that is tied together without a correct, or in a confused, pattern; this lack of a pre-fixed structure leads to arbitrariness and fraud when an individual uses imbro-

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tims of humanity. Although the two authors share a revolutionary thought, Bookchin, in *The Ecology of Freedom,* has been critical of Marcuse because of his narrow analysis based on class and exploitation as counterposed to a social ecology' analysis of hierarchy and domination, which reaches beyond the economic differences in society and also studies other structural blocks. Examples on this point are gender and ethnicity. MURRAY BOOKCHIN, THE ECOLOGY OF FREEDOM 284 (1982).

138 The post-modern movement not only has fractured the unstable unity of the New Left, but has so far been unable to propose a valid alternative to the Marxist dialectic.

139 INVERARITY ET AL., *supra* note 22, at 71.

140 LeBlanc III, *supra* note 47, at 224. Sam LeBlanc III, a New Orleans attorney and Chairman of the New Orleans Regional Chamber of Commerce at the time of the Shintech controversy, was very adamant, because of his position in the local community, in his attacks against TELC. According to Bob Kuehn's interview, LeBlanc had a personal and professional interest (or grudge?) at stake, after being repeatedly defeated by third year law students of TELC, in the representation of business interests in environmental litigation. Nicastro leaves the issue of the Shintech controversy being the catalyzing event "open to debate." Nicastro, *supra* note 6, at 337. However, throughout her paper, she repeatedly shows an undisputed interest in downplaying or leaving "aside" the economic and political circumstances of the *Southern Christian* litigation. *See* Nicastro, *supra* note 6, at 334, 339, 354. As a corollary, she concludes that the decision in "*Southern Christian* is not a barrier to the pursuit of social justice." Nicastro, *supra* note 6, at 335. This author respectfully disagrees because the litigation affirming Rule XX and effectively and meaningfully limiting legal representation for environmental justice organizations indeed precludes the vindication of social justice claims. Finally, to paraphrase Nicastro, the "economic and political motivations," which are the underpinnings of the latest amendments of Rule XX, thus are to be scrutinized instead of being left "aside." Nicastro, *supra* note 6, at 338.

141 LeBlanc III, *supra* note 47, at 223.

glio or trickery. LeBlanc might be either unaware of this meaning, or ostentatiously waving it in our faces. Semantics aside, we find ourselves agreeing with LeBlanc's introduction to his essay, in which he states that the "amendments conform to the original intent of the Louisiana Supreme Court when it adopted the rule, as well as the original justification for the rule as articulated by the deans of the law schools in Louisiana."[142] The pellucid analysis of the history of Rule XX offered by LeBlanc specifies the two original purposes of the rule: providing an avenue for the needy to retain counsel coupled with the privilege offered to law students to practice clinical skills. LeBlanc refers also to the 1988 Amendment, following letters from deans of two local schools requesting the Louisiana Supreme Court to allow representation, in different matters including environmental, of "community organizations". Following the disappointing defeat of Shintech's plan, Louisiana "big business," through its tentacular lobbying and financial and political backing of several Louisiana Supreme Court justices, achieved its purpose: to restrict the operation of local law school clinics.

Unlike the majority of authors[143] that see this process as a "revirement," a French legal term that indicates the overturning of a previous doctrine and adoption of a severely restricted form of legal recourse for those who cannot secure legal representation in Louisiana, I propose a different reading of these particular events and their meaning. In Marxist theory, the adoption of the "student practice rule" in 1971 was a consequence of the influence of the economic base on the legal superstructure. Looking at events through a new interpretive matrix it is possible to explain why the amendments of 1988 were already waivering, and why they were finally overruled between 1998 and 1999. Put into a historical context, the amendments to Rule XX passed on November 21, 1988, followed the requests of two local law school deans[144] to allow clinic students to represent community organi-

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[142] LeBlanc III, *supra* note 47, at 219.

[143] *See* Peter A. Joy, *supra* note 40, at 238; Adam Glaser, *The Implications of Changes to Louisiana's Law Clinic Student Practice Rule*, 12 GEO. J. LEGAL ETHICS 751, 751 (1999); James Gill, *High Court's Way of Doing Things*, THE NEW ORLEANS TIMES-PICAYUNE, July 5, 1998 at B7; telephone interview with Robert Kuehn (March 31, 2000).

[144] Letter from the Deans of Tulane University School of Law and Loyola University School of Law, to John A. Dixon, Jr., former Chief Justice of the Supreme Court of Louisiana. *See also* Joy, *supra* note 40, at 256 n.104.

zations in court. Thus, the state supreme court extended the legal representation eligibility that was originally limited to any indigent person to community organizations. The 1988 Amendments[145] were an attempt made at the legislative level, although enacted by the supreme state judiciary body under its controversial regulatory power, to modify the legal superstructure without a precursory change of the economic mode of production that would in Marxian terms be necessary to underpin the newly extended power of representation. These amendments[146] were an anachronistic[147] move that the capitalist system of Louisiana could not actually absorb. Inverarity cautions us about the mistake of looking at the economy of the United States in trying to explain what actually happens in one particular state. Inverarity contends that analysis must be attentive to "the regional variations in dominant modes of production that produce a wide range of internal variations in the forms of law."[148] It is in this economic, social, and political climate that the reformulated Rule XX and its antecedents must be put into perspective. Louisiana is to this day a state of "extremes,"[149] although the local business community raises a chorus of protest when this statement is made. Part of the extremes is clearly shown by indisputable facts such as the choice to build polluting chemical facilities in "a predominantly black area and an area the state was targeting for

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145 The amendment to Rule XX, § 3 as of November 21, 1988, read "[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 . . . ." Joy, *supra* note 40, at 256 n.103. *But see* LeBlanc III, *supra* note 47, at 232-34; Nicastro, *supra* note 6, at 347. They claim that the Louisiana Supreme Court never extended a 1988 blanket authorization for law clinics to represent even-handedly the entire spectrum of non-profit organizations. This interpretation actually confirms the need for the legal superstructure to revert to its initial position of extension of the legal arm of the local mode of production, and explains why it was necessary to amend section 3 to reflect its structural economic underpinning.

146 While LeBlanc is very attentive in his article to pointing out that the terminology of Rule XX was slightly changed, in a way that allowed a misapplication of the rule to community organizations, which were not indigent, he wastes two pages of his article, at 222-23, describing something that in a theoretical framework becomes totally irrelevant. The reason why Rule XX was amended again in 1988 and 1999 is because in its previous formulation it disturbed the relationship between mode of production and legal superstructure, not because of an inconsequential misinterpretation of the terms indigent and organization.

147 The change will always be anachronistic unless a utopian Marxist society becomes reality in Louisiana.

148 INVERARITY ET AL., *supra* note 22, at 63.

149 LeBlanc III, *supra* note 47, at 225.

economic development to bring jobs to the poor residents."[150] The "big business" consortium explains that pollution is the "trade-off" for this sort of economic development. This kind of reasoning would be embarrassing to authors such as Rawls, who espouse the concept of "distributive justice."[151] Beside these futile attempts at hermeneutics, futile because they would require a total redistribution of economic privileges behind a "veil of ignorance," what stands at the core of Louisiana society is a monstrous two-headed antagonism, the race conflict as part of the class conflict. Although LeBlanc negates the reality of the dichotomy, his own words belie a different mind-set. He refers to the portrayal of the media in Shintech and the dichotomization of "economic development versus devastation of the fragile environment; the poor versus the wealthy; white versus black; good versus evil."[152] Evidence of accurate choice of words and juxtaposition of sentences is the use of "fragile" to refer to the environment, the pairings of "economy" with wealth or lack of it,[153] and "white" skin color with goodness. The consequence of the bigoted parallelism chosen by its author certainly cannot go unnoticed.[154]

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[150] Robin Blumner, *EPA Aims at Racism, Hits Minorities*, J. OF COMMERCE, Oct. 8, 1998, at 7A.

[151] John Rawls, Professor of Philosophy at Harvard University, in his book *A Theory of Justice*, proposed an interesting idea for allocating the distribution of benefits and costs from behind a veil of ignorance at the inception of any society. Allocation of costs according to principles of maximum liberty enjoyed equally by every member of society would be synonymous with an equal distribution of liberty and justice. JOHN RAWLS, A THEORY OF JUSTICE 12, 14-15, 19, 65 (1971). The acceptance of exposure to lethal pollution as a means of survival for a poor community goes beyond even a liberal interpretation of Rawls' distribution of justice.

[152] LeBlanc III, *supra* note 47, at 225.

[153] In contemporary sociology these struggles are explained in terms of conflict theory. According to Vold and Bernard in *Theoretical Criminology*, 3rd edition, conflict theory concerns itself with the identification of the role and values of societally diverse interest groups, and how some groups more than others ultimately influence the decision-making regarding the creation and content of law. GEORGE B. VOLD AND THOMAS J. BERNARD, THEORETICAL CRIMINOLOGY 273 (1986). One branch of conflict theorists, the elitists, "hold that government is controlled by a more or less unified 'power elite' or ruling class, composed primarily of those with great wealth and/or key positions in the corporate power structure." JAMES W. COLEMAN, THE CRIMINAL ELITE 94-95 (4th edition 1998). These authors believe that in a class society, the poor are going to challenge the laws of the wealthy to rid themselves of exploitation or oppression, depending on whether the challenge is based exclusively on issues of class or on issues of both class and race. For examples of elitist theorists, see COLEMAN, *supra*, at 120 n.3.

[154] By this argument, LeBlanc also pairs "poor" with "white," but a closer look at the structuring of the sentence will show how the juxtaposition of the term "white"

It is a class conflict because the corporate capitalist system of Louisiana thrives on the "exploitation" of the working class. Depriving legal representation to indigent people or organizations automatically denies the economically needy access to the courts. Capitalist society, in Marxist terms, requires legal equality. In the United States, the worker has the same legal rights as a corporation, but lacks economic equality. The editor of a partisan magazine blasts the "self-defeating yearning for equality of outcome, as opposed to opportunity."[155] In his/her interpretation, the "opportunity" should be myopically viewed and, hence, onesidedly restricted to accept the working conditions imposed by "big business." There is no mention made of opportunities to challenge these same conditions in court.

LeBlanc castigates the attempts of academic institutions and law clinics to further social agendas or programs. Supposedly, this goal should be accomplished by those businesses "whose mission is to improve the economy in a state populated by too many poor and illiterate citizens and a state still struggling to recover from the depression of the 1980s . . . ."[156] The question for LeBlanc should be how many of these chartered organizations expressed these socialist sentiments at the time of registration? Instead, LeBlanc responds to those who "suggest that 'big business' is only out to make itself and its shareholders wealthy without concern for the environment or the public wealth."[157]

There could be an interesting debate between LeBlanc and James Gill, who wrote earlier in a New Orleans newspaper that

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in LeBlanc's sentence structure is especially chosen. The claims in the Shintech controversy have been made by the corporate lobby in defense of "economic development" against the radical left wing environmental groups, which infiltrated the local community. It goes without explanation that the "poor" in society have a claim against the "wealthy." *See supra* note 153. It goes without saying that the battle is between the forces of "good" against "evil." It could not be otherwise. In fact, according to this viewpoint, each side in conflict truly believes itself to be on the side of goodness. Without doubt, people living on both sides of the "iron curtain" during the cold war were taught through ideological propaganda to believe that they were acting for the good to defeat evil. After these well selected and counterpoised pairings, why suddenly, if we follow the pattern of juxtaposition offered by LeBlanc, do the "white[s]" have a claim against the "black[s]?"—What needs to be rectified in this equation? This final juxtaposition needs to be explained, possibly in terms other than white supremacy.

155 *Environmental Justice*, OIL & GAS J., Sept. 22, 1997, at 21.

156 LeBlanc III, *supra* note 47, at 225. Interestingly enough, Mr. LeBlanc, or most probably the corporations which retain his legal services, helped, through hefty contributions, elect the Republican administration that contributed to that depression.

157 LeBlanc III, *supra* note 47, at 233.

"politicians and business types have long been in the habit of depicting industrial development as a 'trade-off' whereby pollution is just the price to be paid for prosperity."[158] The positions are clearly antithetical, one perspective from the Chairman of the local chamber of commerce, the other from a relatively unbiased reporter for the local paper. They use the same terminology, but interpret the events in diametrically opposite ways. LeBlanc dismisses the opposing position as being either "naïve or dishonest"[159] in rebutting accusations of simple-minded profiteering. While the Chairman emphasizes jobs for the community and the chance to improve lifestyles, Gill sarcastically responds, "[t]hat makes perfect sense, so long as I get the money, and you get the cancer, of course."[160]

Rawls's principles of "distributive justice" show us the irony of inverting roles here, a point succinctly made by one participant at the Department of Environmental Quality permit hearing held in Addis, Louisiana,[161] for the new siting plan proposed by Shintech. Gill surmises this also when he opines that "it is not easy to imagine a time when, say, LABI members suffer the same inconveniences as poor black people in the upriver parishes."[162]

Without the help of environmental law clinics in Louisiana, community organizations will have a hard time securing legal counsel.[163] Those forces that undergird the structural framework of capitalism caused the unfortunate outcome faced by the state's environmental justice movement. In Louisiana, an attempt was made in 1988[164] to change the legal superstructure. In November 1988, the Louisiana Supreme Court responded to a request from two local schools by ruling community organizations eligible for legal representation under Rule XX, section 3,[165] thereby upset-

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158 James Gill, *Justice for Those Who Can Pay*, THE NEW ORLEANS TIMES-PICAYUNE, Feb. 26, 1999, at B7.

159 LeBlanc III, *supra* note 47, at 233.

160 Gill, *supra* note 158, at B7.

161 Chris Fink, *Backers, Opponents Turn Out for Hearing on Shintech Permit*, THE BATON ROUGE ADVOCATE, June 30, 1999, at B-2.

162 Gill, *supra* note 158, at B7.

163 According to data provided by CBS, "[i]n the 18 months before the [Rule's] restrictions took effect, the Tulane Environmental Law Clinic took on 31 new Louisiana cases. In the 18 months after, and to this day, the clinic has taken on just one." *Justice for Sale*, *supra* note 3. *Contra* Nicastro, *supra* note 6, at 344.

164 *See* Kuehn, *supra* note 36, at 84-85.

165 Kuehn, *supra* note 36, at 85.

ting the then standing system of influence upon the local legal superstructure by the regional mode of production. This negatively impacted the local mode of production, whose direct response was a tightening of the "privilege" of representation, achieved ten years later through the new amendments to Rule XX.

Louisiana, duly represented by Governor Foster and the Chairman of the New Orleans Chamber of Commerce, restored the pre-1988 legal status quo, which is more consonant with the mode of production of this particular area of the Nation[166] and, by the use (or abuse) of legal tools, helps protect its economic interests. LeBlanc expressed auspicious and felicitous approval of the Rule XX 1998 Amendment by suggesting that, "hopefully, this new rule will achieve what we in the legal profession all truly desire—justice for all under the law."[167] His assessment could not have been more on target. The principle of legal egalitarianism is expressed next to the important caveat, synthesized by the terms "under the law." That same "law" is the legal superstructure that presently reflects, once again, the economic base of the mode of production of Louisiana.

IV

THE OUTSIDER CONCEPT

The concept of "outsider" as the symbol of somebody or something extraneous to the local community and harmful to its well-being is used by one author to define the rhetoric employed in

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166 It is important to remember that counter-attacks to environmental law clinics in the country are motivated by the need of the capitalist economic system to defend the local mode of production of the specific area. Accordingly, it is easy to explain two other instances where local politicians and businesses felt they needed to exercise pressure upon two local schools and their environmental law clinics. In 1988, the University of Oregon's Environmental Law Clinic was the object of an investigation following complaints by the local timber industry, joined in their quest for 'justice' by local government officials. *See* Joy, *supra* note 40, at 269. A more recent example relates to the struggles of University of Pittsburgh School of Law Environmental Law Clinic, which is being antagonized by a second local senator for its stance on issues of deforestation related to a lawsuit filed on behalf of several conservation groups. *See Senator Wants to Punish Pitt for Logging Suit*, PENNSYLVANIA LAW WEEKLY, May 28, 2001, at 9. It is noticeable how the mode of production, in this instance logging, in two distant areas of the nation, is the motor for the local economy and at the same time the motor for resistance to change as advocated by the two environmental law clinics.

167 LeBlanc III, *supra* note 47, at 234 (referring to the amendments of 1998 and 1999).

hotly debated controversies involving environmental justice issues, such as the siting of chemical plants in black neighborhoods. As Binder points out, this terminology quickly entered the jargon of social and environmental disputes.[168] The author is very perspicacious in her analysis, not only of the use or abuse of such rhetoric, but also of the ultimate consequences that such exchanges actually produce. The practical effect in these cases is the distancing and expulsion of the threatening alien from the epicenter of the community.

I shall use her material and some of her conclusions to extend an analysis that has been conducted only partially. In some instances, her conclusions might inadvertently misconstrue what should be the core of contention. From this critique, I will build a different theorization on the use of the term "outsider," and highlight its negative connotations[169] and its potentially dangerous abuse in the context presented by the events following the Shintech confrontation.

At the base of Binder's analysis is a belief that "name-calling"[170] the opposite side and defining them as "outsiders" causes the failure of the parties to reach any compromises. Examples of terminology such as a "bunch of outlaws, vigilantes or nuts" proffered by Binder is evidence that this rhetoric causes the above cited effect. At the same time, derogatory and vernacular expressions are used to create a fissure within the opposite front, which may well be the precise effects the business-legal community wanted to accomplish in the Shintech controversy. In such a fractious environment, Binder points out the "difficult[y] to engage in a reasoned debate about the appropriateness of siting."[171] This is the key to interpreting the conduct of some agents that want to further destabilize the newly created scene. The incendiary words used by Governor Foster serve a double purpose. First, they are supposed to foment anger in the local community, but he also hopes to foster a concerted effort within the local business community. As successive facts proved, both goals have been fully accomplished.

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168 Binder, *supra* note 14, at 3. "In cases like Shintech, the initiative may come from the community, but the money and resources (and perhaps even the initiative) are supplied by outside groups." Flynn, *supra* note 33, at 487-88.

169 In the United States, an example of this is the terminology surrounding the concept of communism.

170 Binder, *supra* note 14, at 33.

171 Binder, *supra* note 14, at 33.

Binder is fully aware of the strategy adopted by Governor Foster, but fails to depict or comprehend the entire picture and its ramifications, which are vividly clear in the mind of the Governor. The author opines that, "such a characterization of siting opponents seeks, at least in part, to divide the interests of the community from the interests of the movement."[172] This is true, but it is too simplistic. No doubt Governor Foster was openly trying to re-route "siting advocates [to] criticize siting opponents for disregarding the interests of impoverished minority communities,"[173] but the characterization of the outsiders as "radicals"[174] had the specific intent of pinpointing those "external threats" to the community in a Durkheimian[175] sense, as created and operationalized by the work of Erikson.[176]

What is relevant to the discussion of the term "outsider" is not who defines it as such, or who has been defined as such, but who has been ultimately treated as such. Binder emphasizes that "the failure to reach a compromise in hotly contested siting disputes often results in the facility opting to site elsewhere."[177] The fact that Shintech has been able to successfully relocate its plant in Addis-Plaquemine, Louisiana, forty miles upriver from Convent-Romeville, does indeed demonstrate that the Japanese conglomerate was not the scary outsider that siting opponents depicted in the minds of the local communities. So, who proved to be the outsider? Who represented the "external threat?" Binder fails to communicate that to us.

What Binder instead points out is that by establishing a specific trend shown by the failure to reach a compromise, the community gives an answer that in a Weberian[178] "rational

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[172] Binder, *supra* note 14, at 33.

[173] Binder, *supra* note 14, at 36.

[174] Binder, *supra* note 14, at 36.

[175] Emile Durkheim, *supra* note 22, believed that there was a functional relationship between external threat and solidarity, which requires in the end the purificatory process of ritual punishment.

[176] Kai Erikson, Professor of Sociology at Yale University, in his historical account of Anne Hutchinson's trial, tested the validity of Durkheim's theory of threat and his functionality argument.

[177] Binder, *supra* note 14, at 62.

[178] Max Weber, a German sociologist who lived between the 19th and the early 20th century, studied the different modes of legal decision making and demonstrated how the formal rational law, and general substantive rules of law applied equally by procedural rules, created the optimal climate for the development of a rational capitalist society. MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY 814 (Guenther Roth & Claus Wittich trans. 1978).

capitalism" framework is totally unacceptable. It could not be otherwise because it goes against what Weber suggested for the workings of a well-ordered bureaucracy.[179] As stated by Binder, "this trend defers solution of the problem . . . resulting in an unpredictable, ad hoc approach to environmental justice disputes."[180] Since Binder probably adheres to a Weberian interpretation of law in a capitalist society,[181] it is clear that she disapproves of the "ad hoc approach."[182] It is helpful and instructive to use an example from Inverarity to make an analogy with the outcome sought by Binder. The example is centered on the juxtaposition of the opposing results that are created by the system of civil justice, and their inherent faultiness, in the interpretative key offered by Weber.[183] As it reads, "the more basic principle with jury awards is their unpredictability . . . juries do not behave systematically and predictably in tort cases."[184] As Inverarity succinctly summarizes, "the law must in its very structure be coherent, consistent, and predictable."[185] This is what Weber requires,[186] for example, for formal rational law to provide the structure for rational capitalism. The absence of this element, notwithstanding Binder's resolute quest for uniformity of approach, is what has caused, in her opinion, the failure to reach a compromise in the siting of the Shintech plant in Convent-Romeville. Binder is very critical of the ad hoc approach and

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179 "The modern capitalist enterprise rests primarily on calculation and presupposes a legal and administrative system, whose functioning can be rationally predicted, at least in principle, by virtue of its fixed general norms." WEBER, *supra* note 178, at 1394, as cited in INVERARITY ET AL., *supra* note 22, at 119. For an explanation of the origins of capitalism in modern society *see also* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans. 1958). Here the author traces the roots of capitalism in the protestant German society, and its ethics and thoughts.

180 Binder, *supra* note 14, at 62.

181 Weber spoke of the rational predictability of the legal system as being the precursor for the birth of capitalism in European countries. *See* WEBER, *supra* note 179, at 974, 1394. *See also* INVERARITY ET AL., *supra* note 22, at 122.

182 Binder, *supra* note 14, at 62.

183 For Weber the modern system of civil justice is inherently faulty because it is based on substantive irrational law. Juries reach their decision on a case-by-case basis completely erasing the possibility of uniformly applying the general rules of law. WEBER, *supra* note 178, at 762-63. *See also* INVERARITY ET AL., *supra* note 22, at 108.

184 INVERARITY ET AL., *supra* note 22, at 120.

185 INVERARITY ET AL., *supra* note 22, at 120.

186 The German author spoke of the judge in terms of "an automaton" who rendered justice in a calculable or "predictable" way. WEBER, *supra* note 178, at 1395, as cited in INVERARITY ET AL., *supra* note 22, at 115.

tends to stretch her interpretation of the specific controversy in Convent to justify her theorization of inadequacy of approach. Instead, the sources of discord can be more easily explained in materialistic terms of capital versus labor and the dichotomy of community versus external threat.

The lack of will to compromise, as evidenced once again by the "outsider" terminology and its negative effects, has also been the cause of Binder's conclusion that this is what transpired in both sides' attitudes even while recognizing the "underlying problem" at the core of the controversy. The author states that, "implicit in the discourse of both sides of the debate is the assumption that there is a problem in the subject community (whether it be poverty, joblessness, disease, or discriminatory siting)."[187] These are not the "underlying problems." These, instead, are the clichés and consequences of individualistic, as opposed to communitarian, actions taken within the institutional framework of a capitalist society, whose structure has been criticized in the writings of Bookchin and Marcuse.[188] Within this framework, what Binder is totally oblivious to is the exploitation of the realities of poverty and joblessness, at the expense of diseases (such as cancer), once the discriminatory siting occurs.

The second element to which Binder's analysis is oblivious is the aforementioned element of "external threat" that is "implicit"[189] in this debate. This relates to the techniques used effectively by the business-legal community in their successful attempt to ostracize whoever did not share their values, interests, and sentiments.

If we look closely at the events preceding the 1998 amendments, a pattern becomes discernible. Aside from the Shintech siting controversy per se, a peripheral confrontation has developed, touching the circumstances surrounding the focal conflict. This confrontation manifested itself in the Louisiana state legal community, so the solution was found at the judicial level. Although some previous attempts were directed toward a larger audience, the funneling process has conflated the pro-business protest in the direction of the supreme body of judicial power in search of a "quasi-legislative" solution.

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187 Binder, *supra* note 14, at 63.

188 NASH, *supra* note 133, at 11 (referring to Bookchin's critique of the "institutional framework," and to Marcuse's criticism of the U.S. economic system).

189 NASH, *supra* note 133, at 11.

Reading the series of events with a Durkheimian interpretation,[190] it is possible to discern what the roots of discontent within the business community were and why the solution sought suddenly became "legislative," although "regulatory" would be a more accurate term. Louisiana big business felt that the actions of the law clinic were going against the values, interests, and sentiments of the community at large. Therefore, at the communitarian level, the business community waged a three-pronged attack: the Director of TELC, the students working at TELC, and TELC itself.

"Bob" Kuehn represented what Erikson calls a threat to the business-legal community of Louisiana.[191] The business organizations and their cohort, in this case the legal profession, as an example of mechanical solidarity, were frustrated by the success of a lawyer who was putting his career at stake working in an environmental law clinic. This clinic of his own creation had on several occasions successfully retarded the trend of environmental racism demonstrated by the business consortium in Louisiana. This latter group, "based on similarity of individual characteristics . . . characterized by a consensus on values, harmony (if not identity) of interests, and unity of purpose,"[192] felt that this "external threat" could eventually dismantle the cohesiveness of the community.[193] It is in this context that the increasing "barrage" of diversified attacks should be interpreted.

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[190] Durkheim believed that punishment as a response to a threat to the community actually reinforced the solidarity within that society. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 103 (George Simpson trans. 1960). In our case, the business and legal community of Louisiana felt that TELC and its director were threatening their beliefs and values.

[191] Kai Erikson, in *Wayward Puritans*, studied the trial of Anne Hutchinson and the "boundary crisis" she created within the society of Puritan Massachusetts in the mid 1600s. She became a threat because she planted the seed of anarchy into a highly homogenous society, ERIKSON, *supra* note 24, at 107. *See also* INVERARITY ET AL., *supra* note 22, at 143.

[192] INVERARITY ET AL., *supra* note 22, at 148.

[193] While Bob Kuehn was the internal threat to the community, the real external threat to the values of the business community has to be found in the far-reaching consequences, at first, of the end of apartheid in South Africa and, secondly, of President Clinton's Executive Order 12,898, which guides federal agencies into identifying discrimination based on minority or class status. *See* Exec. Order No. 12,898, 54 Fed. Reg. 7629 (Feb. 11, 1994). It is clear that the end of apartheid, the last standing cornerstone of segregation, between 1990 and 1994, symbolized by the election of Nelson Mandela as the new president of South Africa, further delegitimizes the longstanding economic and social segregation of the African-American population of the U.S. South. In addition, the federal agencies policy guidance, instituted

The Secretary of the Louisiana Department of Economic Development, Kevin P. Reilly Sr., sent a letter to Tulane University's President, requesting him 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."[194] (The veiled threat posed in the Reilly's epistolary format is clear).[195] The interests of the University and the state were in conflict here, and if the University would not take charge, powerful and wealthy alumni would. (A certain analogy with the carrot and the stick comes to mind). Another example of the acrimony and deep-seated hostility demonstrated by the business community during the events surrounding the legal action by TELC and its director, is the terminology used in calling the members (students and faculty) of TELC "vigilantes"[196] or "storm troopers."[197]

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by Clinton's Executive Order 12,898, enhances and underpins the possible joining of forces between minority and low-income populations in a fight for better living conditions. The order's wording actually does render race and class equivalent as indexes of discrimination in the identification of environmental justice violations. Although the end result of this policy (minority and low-income populations becoming self-conscious of their status as exploited populations) might have been just a hypothesis in the writings of Martin Luther King, Jr. or Howard Zinn, the agenda of environmental justice pushed by Bob Kuehn at TELC could very well have resulted in the eventual joining of forces of two of society's more obvious targets of environmental injustice.

In historical terms, it is interesting that in 1993, "former Louisiana Governor Edwin Edwards and his Department of Environmental Quality Secretary, Kai Midboe, became unhappy with the TELC and asked the Louisiana Supreme Court to investigate and change the student practice rule." Joy, *supra* note 40, at 256-57. Although the Louisiana Supreme Court, at that time, rejected that request, it has to be considered, a posteriori, the intrinsic importance of the signing of Executive Order 12,898 by President Clinton. It was this particular event and its consequences (the federally subscribed equivalence of discriminated status of low-class and minority populations in terms of environmental injustice) joined to those effects caused by the political and social upheaval created by the only geographically distant new government of South Africa, which eventually threatened the status quo on this side of the Atlantic. That is, the superstructure intentionally supported by the close-knit business-political-legal community of Louisiana.

194 Joy, *supra* note 40, at 238 n.6.

195 Kevin P. Reilly, Sr., the Secretary of the Louisiana Department of Economic Development has been extremely critical of TELC and its advocacy against big business throughout this period. *See* Katherine S. Mangan, *La. Governor Threatens to End Tax Breaks for Tulane U. in Dispute Over Law Clinic*, THE CHRONICLE OF HIGHER EDUCATION, Sept. 5, 1997, at A55.

196 Kevin McGill, *The Court is the Defendant in Law Clinic Lawsuit*, ASSOCIATED PRESS NEWSWIRES, April 16, 1999, *available at* WESTLAW, APWIRESPLUS.

197 Peter A. Joy and Charles D. Weisselberg, *Submissions to the Louisiana Supreme Court Regarding Challenges to the State's Student Practice Rule: Access to*

LeBlanc, partner in a New Orleans law firm and Chairman of the Chamber of Commerce (and thereby a precious link between the two forces of the solidarity community), has clarified his acolytes' actions by saying that, "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."[198] This expression confirms that the establishment's interest was threatened by the actions and the philosophy of a man who was no longer a member of that community. The response to this "illicit" conduct was the scapegoating of Kuehn and his clinic. Inverarity, in his analysis of Durkheim's theory, refers to "ritual [a]s a response to external social forces,"[199] where ritual is nothing other than the community's defensive reaction to "the disruption of solidarity by a threat."[200] Kuehn and his clinic represented that germ of disruption that might in the long run destroy the solidarity of the Louisiana business community.

LeBlanc expressed this well when he extolled the accomplishments of the Louisiana law school's clinics, "except in one area, environmental law,"[201] and criticized how TELC had become "involved in the politics of environmental issues unrelated to legitimate legal clinic practices."[202] We find the core of the controversy in a protest letter by another business representative who criticizes "TELC for promoting legal views that 'are in direct conflict with business positions.'"[203] These examples provide additional evidence of the link between the legal and business communities, which Kuehn had so severely criticized.[204]

In this context, it is understandable how the mechanical solidarity machinery has worked against Kuehn. Using the prose of a sociologist who has studied the function of scapegoating, it is

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Justice, Academic Freedom, and Political Interference: A Clinical Program Under Siege, 4 CLINICAL L. REV. 531, 535 (1998).

198 Chris Gray, *Court Reins in Student Lawyers*, THE NEW ORLEANS TIME-PICAYUNE, June 18, 1998, at A1 (quoting Sam Leblanc).

199 INVERARITY ET AL., *supra* note 22, at 132.

200 INVERARITY ET AL., *supra* note 22, at 131.

201 LeBlanc III, *supra* note 47, at 223.

202 LeBlanc III, *supra* note 47, at 223.

203 Joy, *supra* note 40, at 246, quoting 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).

204 Professor Kuehn, in a telephone interview with the author, criticized the local legal community for failing to protect the Tulane law clinic from interference by the business community. Telephone interview with Professor Kuehn (Mar. 31, 2000).

possible to put the negative effects of this machinery into perspective. Girard tells us that "[i]f the modern mind fails to recognize the strongly functional nature of the scapegoat operation and all its sacrificial surrogates, the most basic phenomena of human culture will remain misunderstood and unresolved."[205] The scapegoating of Kuehn has been the center of the solidarity workings and scheming. If we do not stress that Kuehn has become the victim of the ritual imposed upon him by a specific mechanical solidarity, we have failed to read and recognize the events of our daily lives. Terms such as "vigilantes," "storm-troopers," or "guerrilla" are used to isolate the deviant in the community, in Kuehn's case the deviant of the legal community.

When LABI complained to the state supreme court about TELC's activities, it specifically requested that Rule XX be changed to require the law student to be the legal representative for the clinic and to banish the practicing attorney from active participation in the court or administrative proceeding. In reviewing the kind of punishment LABI originally requested for the "supervising attorney" of the law clinic, we can surmise how one solution proposed by the business community was to remove the legal expertise from the litigation stage of the controversy. "The proposal sought to require the student to serve as the primary spokesperson, limiting the supervisory attorney . . . . LABI claimed that the Tulane Environmental Law Clinic often employs the supervising attorney as the primary legal presenter. LABI argued that this is inconsistent with the Rule's purpose . . . ."[206] The Louisiana Supreme Court refused to buy this argument, but something else worked better in the implementation of the ultimate plan. The amended Rule XX has restricted the pool of indigent people who can be represented by law clinics in the future.

Having failed to enervate the power of representation of the clinic's attorney, LABI successfully limited access to environmental civil litigation for the racially and socially disenfranchised. With this accomplished and Kuehn gone from TELC, the solidaristic community proclaimed its victory. To paraphrase a southern writer and lawyer,[207] the bet on Goliath has paid off.

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[205] RENE GIRARD, VIOLENCE AND THE SACRED 276 (Patrick Gregory trans., 1977). *See also* INVERARITY ET AL., *supra* note 22, at 132.

[206] Adam Glaser, *The Implications of Changes to Louisiana's Law Clinic Student Practice Rule*, 12 GEO. J. LEGAL ETHICS 751, 756 (1999).

[207] John Grisham in his book, *The Pelican Brief*, makes an analogy between the stand of David against Goliath and the struggle of the "obscure environmental outfit

Volumes can be written about what actually routed Bob Kuehn from his job beyond the desire to raise a family in a more egalitarian and cleaner environment. Several attempts have been made by Governor Foster to foment an uproar of Tulane alumni against both Kuehn and his students,[208] and by Economic Development Secretary Reilly to demand a Tulane University internal investigation into the activities of TELC.[209] To put Kuehn's career at TELC into context, it might be elucidating to consider some comments made by LeBlanc in his essay. He states that "both businesspersons and law clinic practitioners have rules under which they must work. Violations of those rules bring consequences."[210] LeBlanc is talking about communitarian, rather than legal rules. He further writes that:

> the law schools and the universities of which they are a part can institute social programs and can even have political agendas, assuming their actions do not conflict with their tax-exempt status or alumni philosophy. (Indeed, they can have social programs that conflict with those two items as long as they are willing to face the consequences.)[211]

The consequences to which LeBlanc refers could be multifarious, but the fact is that TELC is now limited in its capability to represent "indigent" clients and Bob Kuehn is no longer its Director. Analogizing from Erikson's work on Anne Hutchinson's trial in the Puritan community of Massachusetts,[212] the same sort of punishment was applied in both cases: banishment. From another perspective, Inverarity has stated that "the episode demonstrates Durkheim's thesis that episodes of repressive justice occur

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simply known as Green Fund" against the big oil corporation and its magnate. JOHN GRISHAM, THE PELICAN BRIEF 221-23 (1992). *See also* Janet McConnaughey, *Court Tightens Restrictions on Student Law Clinics in La.*, THE LEGAL INTELLIGENCER, Nov. 13, 1998, at 4. She, too, uses the analogy, referring to the "mighty blow" inflicted upon the law clinic, via the state supreme court, by "Goliath's friends."

208 James Gill, *Foster Should Make Peace with Tulane*, THE NEW ORLEANS TIMES-PICAYUNE, Mar. 1, 2000, at B7.

209 Joy, *supra* note 40, at 244 (quoting a letter by Reilly to Tulane University President D. Eamon Kelly).

210 LeBlanc III, *supra* note 47, at 233.

211 LeBlanc III, *supra* note 47, at 234.

212 In *Wayward Puritans*, Erikson stresses how the conviction and banishment inflicted upon Anne Hutchinson ultimately achieved the purpose of re-solidifying the local community. An interesting point made by Erickson is that the crime committed by Hutchinson was not definable even by her prosecutors. ERIKSON, *supra* note 24, at 94, 101. It is still unclear whether the offense perpetrated by Kuehn was against the community or capitalist society at large.

in response to organizational problems of solidarity."[213] In this case, the strain upon solidarity arose from a conflict in the Louisiana legal system concerning the interpretation of environmental justice rights.

The law students of TELC have been portrayed by the opposing sides as either villains or heroes. In reality, the students (and Kuehn) were martyred purists, fighting for the oppressed. They became objects of the same fiery remarks directed at TELC by the business establishment. The terms "modern day vigilantes," "legalistic guerrilla," and "bunch of outlaws" were aimed at them to create the idea of deviance in the eyes of the community. The newspapers report that approximately two-dozen students work at TELC each year. In other parts of the country, far removed from Louisiana, the students of TELC are unknown except for those who have been interviewed on network programs such as Frontline and Sixty Minutes. It is hard to say what their "retribution from business and political leaders around Louisiana"[214] was. Interestingly, the term retribution connotes the idea of punishment, which the students might have received in one form or another.[215] Without information relative to their employment, it is hard to say whether they have been outcast by the Louisiana legal-business community, but Kuehn confirmed in a telephone interview that most of them had to seek employment beyond Louisiana's borders.[216]

It is important to establish whether the label of deviants was successfully imposed upon them. If the solidarity reached its goal of highlighting the element of deviance, "the accomplishment of the status change . . . constitutes a repressive sanction."[217] If there was an actual "status change" from students to deviants, it might be possible to ascertain what kind of punishment was reserved for them. As followers of a heretical view, they might have faced the same destiny as Kuehn. In this case, the "retribution" by the mechanical solidarity would have been a repressive

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213 INVERARITY ET AL., *supra* note 22, at 143.

214 S. Christian Leadership Conf., La. Chapter v. Sup. Ct. of La. 61 F. Supp. 2d 499, 501 (E.D. La. 1999).

215 It is not to be forgotten that, "students from the Tulane Law School helped organize the resistance." Flynn, *supra* note 33, at 487. Whatever negative connotation might be attached to the word "resistance," the price paid by those students was pretty steep indeed.

216 Telephone interview with Robert Kuehn (Mar. 31, 2000) (on file with the author).

217 INVERARITY ET AL., *supra* note 22, at 149.

one. The type of retribution imposed upon the environmental law clinic per se is relevant. It is easy to read the response of the community to what Inverarity calls "the behavior of the deviant."[218]

TELC is seen as deviant despite the fact that it also "provide[s] better education for law students and legal assistance for the needy of [the] state."[219] In this light, the community corrects "the wrong behavior" of the deviant. The community seeks only what Durkheim would refer[220] to as restitutive sanctions against the "offender." Inverarity, by explaining Durkheimian punitive theorization, speaks in terms of "sanctions, characterized by efforts to restore the disrupted relationship,"[221] where the relationship is a "legal" one between TELC and the business community. The goal of a "restitutive sanction" was sought by the business organizations of Louisiana, namely to restore the rules of representation to what they were prior to 1988. With that accomplished, and with Shintech re-locating only 40 miles up-river, justice has been served in its restitutive fashion.

Although it might seem incongruous to exercise both systems of repression within the same community, we have to remember that hardly any society is the epitome or realization of either of the two models. As expressed by Inverarity, "while Durkheim's theory is written in terms of types, social reality is actually constituted by degrees of preponderance."[222] With this clarification, it is possible to make sense of the different solutions and punishments arising out of the amendments of Rule XX. The intertwined business and legal communities are financial supporters of institutions such as Tulane, and they can dictate the conditions for this monetary patronage. The response of the establishment

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[218] INVERARITY ET AL., *supra* note 22, at 152. The author argues that, in this instance, the community, devoid of a "collective conscience," is more prone to look at and punish the "behavior" of the offender. After all, the solidarity here was not properly strengthened by the same homogeneity of interests and values, which coalesced against Kuehn.

[219] LeBlanc III, *supra* note 47, at 233.

[220] For Durkheim, a community inflicts restitutive sanctions in cases where only an organic solidarity is present. This means that the legal and business community did not share the same kind of beliefs regarding the nature of TELC's advocatory conduct. This also means that a diversity of interests fractured the unified front within the community, which sought only sanctions, and would allow TELC to again be part of the relationship among education, law and business.

[221] INVERARITY ET AL., *supra* note 22, at 149.

[222] INVERARITY ET AL., *supra* note 22, at 151.

to the interference of TELC in everyday business has been to make certain that this form of harassment will not happen again. What the leaders of this particular community sought is proof of the strength in solidarity.

The business community had to make sure that Tulane in general, and the new Director of TELC in particular, were advised of the consequences of interference in the legal community. Once again, Durkheim's theories[223] successfully explain the actions of big business in Louisiana. As Inverarity suggests, "Durkheim's ideas resemble the familiar notion of scapegoating, in which an individual is singled out for sacrifice as a means of satisfying some collective need."[224] The fact that Kuehn is no longer the Director of TELC is a quintessential example of those "consequences" to which LeBlanc was referring in his above cited passage. As a consequence of the status change and punishment of the deviant, the lesson to be learned is that only business as usual is going to be tolerated by the establishment in Louisiana.[225]

In this context, TELC is evidence of the possible rehabilitation of an institution gone off-track for a period of time and then redeemed. By interpreting the effects of the sanction imposed upon this branch of the academic institution in its offender role, by the organic solidarity of the community, "the harm-doer re-

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[223] Durkheim studied the case of French Captain Alfred Dreyfus, charged and originally convicted of espionage in the early 20th century. Durkheim used this example for his notion of political scapegoat. *See also* INVERARITY ET AL., *supra* note 22, at 154. An analogy can be constructed between the scapegoating of Dreyfus by the French authorities and the "trial" of Kuehn as orchestrated by the business community of Louisiana and its bravoes. One author speaks in terms of "disintegration of mechanical solidarity" to identify the moment when French solidarity was actually collapsing before the wrongful conviction of Captain Dreyfus. INVERARITY ET AL., *supra* note 22, at 154. Not to worry, Mr. LeBlanc, my analogy falls far short of suggesting that the solidarity of your business community is about to crumble.

[224] INVERARITY ET AL., *supra* note 22, at 156.

[225] For a different explanation other than the functionalist theory (Durkheimian) on the reaction of the Louisiana's business community, see Chambliss. According to this author "it was not 'the community' nor its search for 'moral boundaries' that culminated in the labeling of Anne Hutchinson and her followers as deviants. It was rather the threat she posed to the authority, power, and economic well-being of the ruling class that was her undoing." William J. Chambliss, *Functional and Conflict Theories of Crime*, *in* WHOSE LAW? WHAT ORDER: A CONFLICT APPROACH TO CRIMINOLOGY 13 (William J. Chambliss and Milton Mankoff eds. 1975). Clearly, the scapegoating of Kuehn is comparable, in conflict theory, to that of Anne Hutchinson, with the sinister economic sword, in both instances, looming toward each of the deviants. Is conflict theory capable of explaining the community solidarity in terms other than haves and have-nots?

turns to his or her original position in society, legally if not financially."[226] This interesting comment by Inverarity brilliantly describes the position in which TELC now stands. If we dissect Inverarity's expression and look at the situation from a legal perspective in the context of Rule XX, we see the clinic as being in the position it held prior to the 1988 amendment. On the other hand, by looking at the outcome in a financial context, we can only surmise the losses experienced by the University on two different levels. The first one relates to the expense of litigation and TELC's rights to represent environmental plaintiffs in Louisiana. The second one relates to revenue loss caused by the LABI campaign to boycott the policies of the University, and to halt the monetary support of the controversial law clinic.

In conclusion, the financial factor has permeated the object of litigation. What has palpably transpired in the eye of this insensitive nation has been the insatiable thirst for profit at the expense and exploitation of the disenfranchised poor communities of "cancer alley." The valorous labors of TELC in the clinic's victorious representation of the environmental rights of one of these communities has unfortunately brought about the demise of the environmental law clinic's ability to represent the economically oppressed. The bleak picture which rises from the ashes is the successful attempt by the business community "to restore social relations to their original state,"[227] obtaining, once again, "carte blanche" in the unabated control of what Vine Deloria Jr. describes as the "natural resources."[228] In this instance, his characterization is perfectly extendable, due to the comparable exploitation of humanity and nature, to the natural resources of the Bayou State.

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226 INVERARITY ET AL., *supra* note 22, at 150.

227 INVERARITY ET AL., *supra* note 22, at 150.

228 Vine Deloria, Jr., a law professor and a Sioux, develops a concept of natural resources, which includes humanity. This is in accord with indigenous Native American beliefs and antithetical to authors who see a dichotomy of nature/mankind. Vine Deloria, Jr., Toward a Planetary Metaphysics 1, 18 (Apr. 18-20, 1974) (manuscript presented to The Conference on Nonhuman Rights, Claremont, Cal., as cited in NASH, *supra* note 133, at 247 n.115). Another author explains that "Native American religions view gods, people, and nature as an integral whole." Sarah B. Gordon, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1449 (1985).

CONCLUSION

> . . . my view was that we should not curtail a program that teaches advocacy while giving previously unrepresented groups and individuals access to the judicial system in order to satisfy critics who are discomforted by successful advocacy.[229]

Justice Johnson correctly identified the real victims of the Amended Rule XX in her dissenting opinion. The disenfranchised are the unspoken victims in this paper (and our daily conversations). The havoc that the implementation of the new Rule XX is going to create for the poor[230] and minorities in Louisiana will soon be forgotten[231] by our fast-paced society. What the solidaristic community of Louisiana wants to know, from now on, are the names of people that advocate such causes as environmental justice. In a McCarthian[232] move, the Louisiana Supreme Court has modified Rule XX to require community

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

230 District Judge Fallon, reflecting on the claims of plaintiffs in the lawsuit against the amendments to Rule XX, understood that the contention was about economic discrimination, which, in this author's opinion, also translates into racial tones in the South. He wrote in his opinion that "[T]hese groups also maintain that the income guidelines imposed by Rule XX infringe on their protected right to collective activity by compelling the disclosure of sensitive, private financial information that could expose their members to retaliation. They assert that application of the income criteria will force them to segregate their members along economic lines." S. Christian Leadership Conference, La. Chapter v. Supreme Court of La., 61 F. Supp. 2d 499, 506. The judge dismissed the entire argument by simply pointing out that a right of legal representation is not recognized in civil courts, therefore no underpinning is present to ground any constitutional claim of the disenfranchised, especially in terms of class segregation.

231 Two authors actually do suggest solutions for the minority communities invaded by polluting factories. Their answer is both tax incentives and benefits and participatory negotiation of the community involved. Kebodeaux & Brock, *supra* note 28, at 146-148. Interestingly, the alternative solution to open polluting facilities in rich white neighborhoods did not make their list of final solutions.

232 Wisconsin Senator Joseph McCarthy was the leader of the movement, which created the "red scare" against Communism in the U.S. in the 1950s. *See* HOWARD ZINN, THE TWENTIETH CENTURY: A PEOPLE'S HISTORY 138 (1984). One of the strategies or techniques used in the époque was the seizure and release of memberships in so-called subversive organizations as well as any affiliation in these organizations. See the passage of the McCarran Act in 1950 *in* LAWRENCE S. WITTNER, COLD WAR AMERICA: FROM HIROSHIMA TO WATERGATE 96-97 (1978). For an interesting practical application to higher education and its persecution at the time, *see also* NOAM CHOMSKY ET AL., THE COLD WAR AND THE UNIVERSITY (1997). Following the request of the Louisiana business community, the targeting of environmental organizations and their members is now sanctioned by the rules of that state.

organizations that seek law clinic representation to submit membership lists. As Justice Johnson poignantly notes, this "would expose members to the possibility of economic reprisals, loss of employment, threats of physical coercion, and other manifestations of public hostility."[233] This is what happens when the working class attempts to change the legal superstructure and arouses the ire of the establishment. The end result is dictated by the mode of production and its direct influence on the superstructure.

Without subverting the institutional and economic framework at the core of the corporate capitalist society, any attempt by the superstructure to modify the base is destined to fail miserably. The final solution to the Shintech controversy must be seen in this light, or otherwise the suffering of the disenfranchised of this nation would go unexplained, or worse, totally misinterpreted. We should bow our heads to the students of TELC, who were doing what was right in a world where righteousness and justice are not synonymous, or even distantly related, concepts.

Thank you to these paladins of environmental justice wherever they may be. And a closing note of gratitude to a man who, unlike his peers in the Louisiana legal establishment, is not the "one dimensional man" a Marxist author[234] so heavily criticized as the prototype of our times. Prof. Kuehn as "ghibellin fuggiasco,"[235] in exile in Alabama, by way of Michigan and Utah, has taught us all a valuable lesson. He organized and established his dream; in a different society he would still be where he belongs, raising a family in an environment where class and race are just social con-

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233 Resolution Amending Rule XX (Bernice Johnson, dissenting opinion, *supra* note 229, at 298.

234 Herbert Marcuse, in his 1960 book, *One Dimensional Man*, heavily criticized both the structure and ideology of the one-dimensional society, and its two alternatives, the U.S. and the now defunct Soviet Union.

235 Dante Alighieri, a famous Italian poet of the 13th century and author of the *Divine Comedy*, was referred as the "ghibellin fuggiasco" (ghibelline fugitive) in his exile from his hometown of Florence, by the late 18th century Italian author Ugo Foscolo, in the poem "On Sepulchres," a tribute to the glorious Italian figures throughout the centuries, who are supposedly buried in the Holy Cross church of Florence. In reality, historically, Dante belonged to a different party other than the ghibelline (from the Saxon term 'wibeling' meaning supporter of the Salian German Emperor), in fact he was a member of the "white" guelph political faction, ostracized by the other "black" faction, which was supported by the Roman Pope. Dante was never allowed to return home and died in exile in Ravenna, Italy, where he was buried.

structs and not painful realities of capitalistic abuse and exploitation.[236]

[236] The same utopian design was envisioned by Martin Luther King, Jr. in "his demands for a 'revolution of values' and society-wide economic change . . . driven in part by his democratic socialist principles." DYSON, *supra* note 1, at 80. At this juncture, Karl Marx and his utopia are not only comparable but also at the root of the "revolutionary" attempts described above.