

LAW AS POLITICS: A RESPONSE TO ADAM BABICH

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Way back in the 1960s, an era in which many people think we are still mired, we each made a career decision to be lawyers for poor people. While the road over the past thirty-five years has taken several twists and turns, we are still lawyers for poor people. When we started on this road, we believed that we were making a political decision – that lawyering on behalf of poor people meant representing the oppressed against entrenched interests, including the state. While we may no longer say things like “when the revolution comes” (well, sometimes we do), we still believe that choosing to represent the poor is a political choice with dramatic consequences in the nature of one’s work.

Adam Babich may disagree, but the work of the Tulane Law School’s Environmental Law Clinic proves our point. Professor Babich describes the clinic’s environmentalist work on behalf of the unenfranchised and calls it apolitical. It is a little bit like buying a gold fish and telling everyone about your pet dog. You can call it what you want, but you should not expect others to take it for a walk.

The “political interference” committee of the AALS Section on Clinical Education has had to address outside attacks on law school clinics primarily in situations involving environmental clinics.¹ This should come as no surprise. Unlike most (all?) other law school clinics, environmental clinics, by definition, handle only cases that seek to prevent government or industry from carrying out projects involving land use, industrial development, and manufacturing that threaten the environment through pollution, endangering species of animals, or destruction of or injury to natural resources.

If there is any clinic that is inherently “political,” it is an environmental clinic. Empowering individual citizens, or community groups, to stand up to the powerful forces of government and industry by providing them with competent legal advocates is political, however one defines that word. Politics is about interests and power. Environmen-

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¹ For a comprehensive history of political interference with law school clinics see Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 *FORDHAM L. REV.* 1971 (2003).

tal disputes involve the competing, and conflicting, interests of citizens in preventing or reducing pollution, and in preserving the natural environment, versus the interests of government and industry in carrying out development and manufacturing projects in the name of progress or profit or both. Government and industry have political and economic power. Most individuals and communities do not. Providing competent, effective legal representation to affected individuals and communities helps to “level the playing field” by empowering the relatively weak to stand up to and oppose the inherently strong.

Because the role and the goal of environmental clinics, as defined by Professor Babich, is “to represent those who could otherwise not afford competent legal help on environmental issues” and to “giv[e] a voice to clients who would not be heard otherwise”, environmental clinics are inherently “political”, that is, they are designed to empower those without power to assert their interests in opposition to the competing interests of the rich and powerful.

Professor Babich purports to draw a distinction between adhering to a commitment to professionalism and advancing a political agenda. As applied to environmental clinics this is a false dichotomy, unless, of course, a clinic was to represent, in different cases, the victims of environmental misbehavior and its perpetrators. So long as the Tulane environmental clinic, like all environmental clinics of which we are aware, represents only the victims of environmental misbehavior, or organizations that advocate on behalf of environmental protection, in opposition to proposals of government to engage in public works projects or to grant permission to private business interests to engage in environment-compromising activities, or in opposition to private business initiatives involving industrial development or manufacturing, the clinic’s activities are essentially political, if operationally “legal”, in nature. That the Tulane clinic carries out this political work professionally does not change its nature.

There is nothing new in Professor Babich’s position. He has taken a forty year old debate concerning the delivery of legal services and recast it in different terms. The vocabulary has changed more than the argument. As Alan Houseman and Linda Perle noted in their recent history of legal services, the basic structure for the modern legal services program included the notion of “a commitment to redress historic inadequacies in the enforcement of legal rights of poor people caused by lack of access to those institutions that were intended to protect those rights”.² Back in the 1970s, we called that “law

² HOUSEMAN AND PERLE, *SECURING LEGAL JUSTICE FOR ALL: A BRIEF LEGAL HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES* (2003).

reform.”³ As Gary Bellow and others noted,⁴ law reform may have been a goal, but the large majority of legal services lawyers spent their days on service cases, a practice dominated by routine domestic, housing and consumer matters.

That debate was transformed over the years to a question of “access” vs. “impact.”⁵ The access/impact debate was made more sophisticated with the influence of client-based and cross-cultural lawyering literature, as clinicians and legal services attorneys questioned the role of the lawyer in setting community or client priorities.⁶ None of those commentators, however, considered this to be a question devoid of politics. To the contrary, some of the commentators most concerned with politics objected to poor people’s lawyers usurping priority setting, arguing, among other things, that it was racist for white lawyers to impose their views on communities of color.⁷

John Calmore, writing about “cause lawyers,” believes this discussion must be considered in the context of the intersection of race, space and poverty. Calmore rejects the impact approach of many cause lawyers, stating that “practicing law in the community is not a tourist adventure and, therefore, we must eschew the routine of the autonomous, interloping advocate who dreams up cases in the home office and then tests them on the community.”⁸ This is not a call for service or “apolitical” lawyering. Like Gerald Lopez, Calmore rejects the service vs. impact dichotomy as “regnant” lawyering, urging instead a collaborative community-based advocacy. Calmore argues that effective lawyering requires collaboration with clients, not only to re-

³ See William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the LSC from the 1960’s to the 1990’s*, 17 ST. LOUIS U. PUB. LAW REV. 241 (1998).

⁴ See Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA Briefcase 106 (1977); Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978).

⁵ See, e.g., Marshall Breger, *Legal Services for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 282 (1982); Deborah Cantrell, *A Short History of Poverty Lawyers in the United States*, 5 LOY. J. PUB. INT. 11 (2003); Geoffrey Hazard, *Social Justice through Civil Justice*, 36 U. CHI. L. REV. 699 (1968); EARL JOHNSON, *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* (1974).

⁶ See, e.g., GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

⁷ See Paul E. Lee and Mary M. Lee, *Reflections from the Bottom of the Well: Racial Bias in the Provision of Legal Services to the Poor*, 27 Clearinghouse Review 311 (1993). For a fuller critique of the role of attorneys in “cause lawyering” see John O. Calmore, *A Call to Context: The Professional Challenge of Cause Lawyering at the Intersection of Race, Space and Poverty*, 67 FORDHAM L. REV. 1927 (1999) and Ray Brescia, Robin Golden and Robert Solomon, *Who’s in Charge, Anyway? A Proposal for Community-Based Legal Services*, 25 FORDHAM URB. L. J. 831 (1998).

⁸ Calmore, *supra* note 7 at 1956.

present them, but to represent the interests of the community as well.⁹ While we agree with this approach, we believe that community-based lawyering, which requires identifying community, negotiating competing interests and group work, requires more, not less politics.

We are currently involved in a mini-version of this debate in our Community Lawyering Clinic, in which we provide outreach at various locations in the New Haven community. Our largest outreach site is at Junta for Progressive Action, a social services agency in the center of New Haven's largest Hispanic community. When we asked our colleague, Kica Matos, Junta's Executive Director and a lawyer, to help define community legal issues, she told us that "access to lawyers" is the primary issue. Matos believes that her community (unlike us, she lives and works there) has been so underserved that providing lawyers in the community is a sufficient aspiration.

Like the old legal services practices, virtually all of the Junta cases are "service" cases, the only change being the large number of immigration issues in the docket. Many of those individual cases present deeper issues which may result in the opportunity for law reform. Whether they head in that direction, however, is a decision for our clients. We teach our students to offer a full range of legal services including engaging in impact litigation that may be unpopular, result in bad public relations, or annoy the University. But, as in Professor Babich's clinic, it is our clients who make the decisions about which legal services they need. We are currently litigating a class action against Yale New Haven Hospital, which is not necessarily favored by our employer. Our colleague Deborah Cantrell is representing a client in a grievance against an alumnus, who complained to the law school administration. We have made the choice that our clients, not us, would decide the issues to litigate, but it is illusory to suggest that we are not involved in the political nature of those decisions.

We subscribe fully to Professor Babich's three guiding principles:

(1) Law students should be educated to be capable, civil, and ethical advocates. And, we would add, they should be inspired to be socially responsible members of the legal profession.

(2) Legal representation should not be denied on the basis of ability to pay or point of view. And, we would add, law students should be inspired to value providing pro bono representation to clients who can not pay after they become members of the bar as central to their ethical obligations as lawyers.

(3) Nobody is so rich or powerful as to be above the law. And, we would add, law school clinics should inculcate in students the pro-

⁹ *Id.*

fessional value of representing the poor and powerless in asserting their rights against the rich and powerful.

These three guiding principles do not, in our opinion, define an “apolitical” clinic. Quite the contrary. We believe that, taken together, and considering their full implications, they describe political dimensions of a well-designed law school clinic.

Given the limited resources of clinical programs and legal services offices, each of us makes a political decision when we decide which cases to take. By choosing to go to Junta, we acquiesced to the expressed wishes of our constituency of clinic students, who wanted to provide legal services to an under-served, low-income community, with a large Spanish-speaking clientele, many of whom were undocumented workers, with problems heavily weighted towards immigration law. We also do outreach at an AIDS residence and a domestic violence center. Those choices were also initiated by student desire to represent particular communities. In our Immigration Clinic, our case load consists entirely of political asylum cases. We have a Prison Clinic, an International Human Rights Clinic and an Environmental Clinic. Those are political choices, regardless of whether the cases revolve around service or law reform cases.

We believe that the choices about which clients a clinic will represent, and what types of cases the clinic will handle on behalf of those clients, are political decisions. That seems to us particularly obvious when the decision is to represent the poor and unenfranchised in affirmative impact cases against the government and other institutions with economic and political power when the clients’ interests are in conflict with those of their powerful adversaries. Of course, what a clinic offers such clients is competent and ethical legal services, which includes the ethical obligation to defer to the clients in setting the objectives of the legal representation.

Professor Babich appears to conflate means and ends when he makes the unconvincing claim that his clinic is “apolitical.” Competent and ethical lawyering should be the hallmark of any law school clinical program. But on whose behalf, in whose interests, and in what form that lawyering should be deployed are separate issues. The decision to represent only low income clients who cannot afford the cost of sophisticated environmental lawyers in affirmative cases seeking to block governmental and industrial projects that threaten the environment is a political decision. Providing competent and ethical legal representation to advocate a position decided on by the clients is what it means to be a competent and ethical lawyer.

Based on Professor Babich’s description, Tulane’s Environmental Law Clinic is quite political. While we appreciate his “efforts to man-

age controversy” through a self-described “adoption of a self-consciously apolitical philosophy,” the fact remains that the clinic as a “law firm of last resort” represents clients “the overwhelming majority” of which “seek to reduce pollution or preserve natural resources.” By creating a construct which predetermines that a certain class of client, i.e. those seeking to reduce pollution, is more likely to seek the services of the clinic than those seeking to reduce oppressive environmental regulation of business, Professor Babich has made a political decision. In fact, given that these cases have been approved by an Advisory Board appointed by the clinic, with standards that tend to exclude business and industrial clients, the Tulane Environmental Law Clinic is making decisions that are more politicized than many of us. When we go to Junta, we ask whether there is a legal issue, not whether the client meets predetermined standards set by our advisory board.

Professor Babich presents this result more as coincidence than plan, but the facts belie his argument. He states as a conclusion that those who can pay would rather be represented by experienced lawyers than law students and those who can pay rarely approach the clinic for help. We accept this recitation, just as we accept that landlords rarely, if ever, approach our Landlord/Tenant Clinic for help. At the same time, we have no question that many landlords, including wealthy corporations, would jump at the chance to have free representation of the quality that they observe our students providing to their adversaries.

In our Community and Economic Development Clinic, we represent the City of New Haven, a private foundation seeking to start a community development bank and a coalition of municipalities and non-profits seeking to reform Connecticut’s school financing system, all of which could pay legal fees, had they chosen to do so. In each of these cases, our clients determined that it was advantageous to be represented by a clinical program willing to devote substantial resources to their claims without facing the economic pressure of escalating legal fees. On our part, representing the City of New Haven and a private foundation offered the opportunity to form a community development bank, a result that we and our students believed was important in creating future opportunities for New Haven’s low-income community. We and our clients each made a similar analysis in our client’s decision to retain us to assist in a challenge to Connecticut’s school finance system.

We are confident that the Tulane Law School’s Environmental Clinic would have no problem filling its docket by representing business interests for free. We could be facetious and note that they could

represent industrial polluters, but the issue is more nuanced than that. Business interests, including affordable housing developers, frequently are stymied by complex environmental regulations, which are perceived by many of those interests as examples of over-regulation. This is particularly true in any attempt to redevelop crowded urban sites, where any redevelopment often depends on demolition or building on brownfields. In a truly apolitical world, the Tulane Clinic would be representing at least one such client. We are glad that they have made the political decision to do otherwise.

