
ARTICLES

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How Judicial Hostility Toward Environmental Claims and Intimidation Tactics by Lawyers Have Formed the Perfect Storm Against Environmental Clinics: What’s the Big Deal About Students and Chickens Anyway?

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Makes you wonder what the polluters are doing, that they feel they need their own special law to protect them from law students suing them for free as part of a school project.

And I don't mean that in a disparaging way toward law students at all. But when big industry seems to be so afraid of people who are still learning their profession, you'd have to think they're doing some stuff so blatantly illegal that even a student can nail them for it.¹

Since 1976, when the first environmental clinic was started at the University of Oregon's law school, clinics have proliferated. Today, approximately one out of five law schools has an environmental clinic.² With respect to clinics in general, the *Association of American Law Schools Directory of Law Teachers* lists "nearly 1400 full-time faculty teaching clinical courses."³ Yet far from being an uncontroverted part of the academic landscape, clinics—particularly environmental clinics—have endured political blowback⁴ from challenging the environmentally destructive behavior of major economic interests. The effectiveness of environmental clinics is no greater than established environmental organizations—perhaps less effective given the length of time it takes for law students guided by faculty to mount a legal challenge and the complexity and difficulty of the cases these clinics take on. Nonetheless, environmental clinics repeatedly find themselves the target of efforts to shut them down, restricted in the types of cases and/or clients they can take on, and

¹ Anonymous, Comment to *Bill Would Ban Law Clinics Suing State*, 2THEADVOCATE.COM (May 18, 2010, 12:12 PM), <http://www.2theadvocate.com/news/94030164.html>.

² Gabriel Nelson, *Law: Students' Role in Farm Pollution Suit Angers Md. Lawmakers, Sparks Nat'l Debate*, GREENWIRE (Apr. 8, 2010, 12:27 PM), <http://www.eenews.net/public/Greenwire/2010/04/08/1>. Thirty-five of those clinics, including one from British Columbia, Canada, participate in a listserv maintained by the University of South Carolina's law school, on which clinicians share information and collectively problem solve. Clinics from many large state-funded schools are on the list.

³ Robert R. Kuehn & Peter A. Joy, *Lawyering in the Academy: The Intersection of Academic Freedom and Professional Responsibility*, 59 J. LEGAL EDUC. 97, 98 (2009) [hereinafter Kuehn & Joy, *Lawyering in the Academy*] (noting in addition that "a number of law professors act as attorneys in cases handled as part of law school seminars, applied legal research and writing classes, or live-client components of related upper-level substantive courses." *Id.* (footnotes omitted)). See also *id.* ("[T]he American Bar Association . . . requires every accredited law school to offer substantial opportunities in live-client or other real-life practice experiences.").

⁴ Nelson, *supra* note 2.

limited by supervisory boards with the power of case approval. Why is this? What is it about law students working for credits and grades that powerful interests find so threatening that they spend their resources on eliminating clinics instead of confronting them in court? Is the attack on clinics part of a broader attack on public access to the courts for righting environmental wrongs? Do these attacks reflect something about the nature of the attacker and her victim?

This Article seeks to answer those questions, and concludes that clinics, like environmental organizations, function in an environment that is exceptionally hostile to the types of clients they represent and the cases they bring. This means that the claims environmental clinics file, like those filed by the national groups, will be met with a barrage of opposing filings based on a number of jurisdictional and other challenges enabled by the U.S. Supreme Court's anti-public interest jurisprudence. Unlike the well-funded, publicly visible, and widely supported national organizations, environmental clinics are more vulnerable to less conspicuous attacks brought directly by the economic interests they challenge and their political supporters.⁵ Perhaps clinics unwittingly invite these attacks that in turn weaken their ability to function in this already hostile environment. The combination of the two can create a perfect storm for environmental clinics.

Even more curious is the role that lawyers play in attacks on clinics and the bullying techniques they use to discourage clinic-initiated litigation. There is something about students that brings the bully out in those who face them across the table⁶ that goes beyond the usual

⁵ The chief, often sole protectors of these clinics are other environmental clinics and professional organizations such as the American Bar Association and the Association of American Law Schools, who use their organizing and institutional capacities to mount counter campaigns. *See, e.g.*, Letter from Susan Westerberg Prager, Exec. Dir., Chief Exec. Officer, Ass'n of Am. Law Sch., to Chancellor William E. Kirwan, Univ. Sys. of Md., and Clifford M. Kendall, Chair, Bd. of Regents, Univ. Sys. of Md. (Mar. 31, 2010) (offering assistance in combating concerns raised about the University of Maryland's environmental clinic), *reprinted in* AALSNEWS (The Ass'n of Am. Law Sch., D.C.), May 2010, at 2, *available at* <http://www.aals.org/documents/newsletter/may2010newsletter.pdf>; *accord* Statement of ABA President Lamm Re: Proposed Legislation Affecting Funding for University of Maryland School of Law, ABANOW (Apr. 1, 2010), <http://www.abanow.org/2010/04/statement-of-aba-president-lamm-re-proposed-legislation-affecting-funding-for-university-of-maryland-school-of-law/>.

⁶ I have witnessed this behavior many times during my nearly twenty years as a director of an environmental clinic at Georgetown University Law Center and it has never ceased to amaze me. Sometimes this behavior has revealed itself in letters threatening to cut off contributions to the Law Center or to seek sanctions under Rule 11 of the Federal Rules of

reasons given for these attacks—namely, that environmental clinics empower people who are otherwise without power to confront those who disregard their interest, that they are successful, and that they have enormous staying power and endless student enthusiasm. This behavior, although part of the general incivility problem afflicting the legal profession, is something more, and has to do with the nature of today's lawyers and the context in which they learned how to be lawyers and practice law. Although many articles have been written about attacks on environmental clinics,⁷ none has identified this second reason—the milieu in which lawyers are educated and trained—and placed it in the broader context of judicial hostility toward environmental claims brought against established economic interests.

This Article lays the groundwork for these conclusions by first briefly discussing the origins of clinics and clinical pedagogy in general. Then it describes the various attacks on the clinics, some consequences of those attacks, and how certain responses to those attacks run afoul of basic ethical precepts as well as notions of academic freedom.⁸ The third part of the Article, after briefly listing some of the conventional reasons for these attacks, focuses on a less conventional one—namely, that they are fueled by the asocial behavior of lawyers who are in the vanguard of many of these attacks. It shows how such behavior is akin to that of a schoolyard bully who, in sensing a weaker opponent, acts out in ways that have been fodder for psychological literature. This part of the Article also describes the various barriers the Court has erected that make it difficult for public interest litigants, particularly poorly funded and understaffed environmental clinics, to prosecute legal claims representing

Civil Procedure. Other times the behavior has manifested itself in shouting and threatening not to hire future graduates of the program if the clinic persists in its representation.

⁷ See, e.g., Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235 (1999); Kuehn & Joy, *Lawyering in the Academy*, supra note 3; David Luban, Essay, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209 (2003); Elizabeth M. Schneider, *Political Interference in Law School Clinical Programs: Reflections on Outside Interference and Academic Freedom*, 11 J.C. & U.L. 179 (1984); Nina W. Tarr, *Ethics, Internal Law School Clinics, and Training the Next Generation of Poverty Lawyers*, 35 WM. MITCHELL L. REV. 1011 (2009).

⁸ Although the involvement of lawyers in these anti-environmental clinic campaigns raises questions about their professional responsibility, others have discussed this problem in detail; I do not revisit those issues here. See, e.g., Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971 (2003) [hereinafter Kuehn & Joy, *Ethics Critique*].

individuals who threaten the economic and political status quo. The Article concludes that the more conventional explanation for the attacks against clinics are incomplete because they neither explain the persistence of the attacks nor show how the combination of intimidation and hostile judicial doctrine make it extremely difficult for environmental clinics to do their job.

I

THE PUBLIC, PROFESSIONAL, AND PEDAGOGICAL BENEFITS OF CLINICAL EDUCATION

Clinical education in United States law schools began in the 1960s in response to a concern that the schools were not sufficiently training their graduates to represent clients with real legal problems. To respond to that problem, law schools developed law clinics, which drew on the clinical model used by medical schools to the extent that they focused on the use of real legal problems with real clients as a means of training “law students in the skills that they [would] need to become effective and ethical lawyers.”⁹ One impetus for the growth of law school clinical programs was former Chief Justice Warren Burger’s statement, subsequently published in a law journal article, in which he reported that ““from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation”” and “called for expanded law school skills programs: [saying] ‘[t]he law school . . . is where the groundwork must be laid.’”¹⁰

There are many public, professional, and pedagogical benefits that flow from law school clinics. First, law students offer legal assistance to individuals who cannot otherwise get access to the courts.¹¹ A

⁹ Letter from Susan Westerberg Prager, Exec. Dir., Chief Exec. Officer, Ass’n of Am. Law Sch., to Chancellor William E. Kirwan, Univ. Sys. of Md., and Clifford M. Kendall, Chair, Bd. of Regents, Univ. Sys. of Md. (Mar. 31, 2010) (explaining the origins of clinical legal education), reprinted in AALSNEWS (The Ass’n of Am. Law Sch., D.C.), May 2010, at 2, 3, available at <http://www.aals.org/documents/newsletter/may2010/newsletter.pdf>.

¹⁰ Jorge deNeve et al., *Submission of the Association of American Law Schools to the Supreme Court of the State of Louisiana Concerning the Review of the Supreme Court’s Student Practice Rule*, 4 CLINICAL L. REV. 539, 542 (1997) (third alteration in original) (quoting Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 233 (1973)).

¹¹ See *id.* at 565 n.20 (“Law students as well as practicing attorneys may provide an important source of legal representation for the indigent. . . . Given the huge increase in law school enrollments over the past few years, . . . I think it plain that law students can be

clinic, by “[p]roviding 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.”¹² Clinics fill a gap left by private practitioners who infrequently represent the type of clients clinics do because these individuals not only lack the resources to pay them, but also often raise claims that conflict with the interests of other clients the lawyer represents. In addition, “[l]aw school clinics may be one of the few places that the law school intersects with the local community.”¹³ This can lessen “town and gown” friction for the law school. Because of the type of clients clinics represent and the issues they bring to court, clinic students may also educate judges, administrators, and legislators about the importance of certain social justice issues and may themselves be subsequently “inspired . . . to re-engage in public interest lawyering” at a later point in their professional lives.¹⁴

These benefits are not restricted to the courts. Clinics can and do play an important role in representing citizens before administrative agencies. Professor Marc Mihaly underscores the importance of providing expert help to citizens appearing before government agencies.¹⁵ According to Professor Mihaly, “[i]f we believe in the

expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by today’s decision.” (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 44 (1972) (Brennan, J., concurring) (alteration in original)).

¹² Stephen Wizner & Robert Solomon, *Law as Politics: A Response to Adam Babich*, 11 CLINICAL L. REV. 473, 474 (2005).

¹³ Tarr, *supra* note 7, at 1043. *See also id.* (noting as evidence of community relationship that “[f]or both good and bad, some clinics have set up advisory or community boards that can influence what types of cases are accepted, the focus of the programs, and other priorities”). *But see* Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 366 (2008) (“The external pressure of the market to train lawyers for designated functions—unyielding in the current political moment—is both a direct and indirect cause of the dilution (and sometimes, elimination) of the social justice mission of law school clinics.”); *id.* at 387 (“Law schools and universities, especially private institutions, are notoriously resistant to being held accountable to empowered community organizations and to answering for the choices that are made in program development.”).

¹⁴ Robert Greenwald, *The Role of Community-Based Clinical Legal Education in Supporting Public Interest Lawyering*, 42 HARV. C.R.-C.L. L. REV. 569, 570 (2007).

¹⁵ *See* Marc B. Mihaly, *Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership With Experts and Agents*, 27 PACE ENVTL. L. REV. 151, 207–08 (2009) (“[P]ublic participation without expert assistance in the process of environmental decision-making gives an appearance of participation without substance. . . . [It] is merely an opportunity to transmit views. Members of the public miss statutory or regulatory deadlines and fail to exhaust their legal remedies sufficiently to meet standing requirements. Their comments do not compete on a

underlying purpose of public participation, we must equip citizens with the agents and experts they need to make their participation authentic and effective.”¹⁶ The complexity of “[g]overnance in modern industrial democracy,” especially “environmental governance,” puts a premium on providing citizens with expertise and representation so that they can effectively participate in agency decision making on environmental matters.¹⁷ This expertise renders unassisted participation virtually useless.¹⁸ In the absence of assistance, filing deadlines are often missed, and issues that litigants want to bring before courts are not first properly vetted before the regulatory agency; consequently, courts can easily dismiss them based on the prudential exhaustion or ripeness doctrines.¹⁹ Unrepresented citizen commentators may also commonly raise issues that are of concern to them and not to the decision-maker, with the result that they are ignored and the commentator loses credibility with the agency decision-maker.²⁰ “[T]he difference between repetitive, useless input and valuable input frequently lies in the quality of

technical level with the input of stakeholder and staff, proponents, and organized stakeholders. The process of environmental review serves primarily as a *post hoc* rationalization for a previously determined project design or rule formulation, and participation consultants or staff integration of the unassisted lay citizen into a process designed to give the appearance of participation without effect on the decision-makers. Sophisticated representation and use of experts can change this trajectory. A thoughtful partnership of citizens and experts can move the participatory effort from a mere expression of position to an effective force, one that reverses unstated agreements among project proponents and the agency, and brings citizens to the bargaining table with some significant power to exercise.” (footnote omitted) (internal quotation marks omitted).

¹⁶ *Id.* at 223.

¹⁷ *Id.* at 226. Professor Mihaly singles out the National Environmental Policy Act (NEPA) as a congressional initiative that puts a premium on legal representation. *See id.* at 198–99 (“Despite this *de jure* empowerment, NEPA and the little NEPA’s have operated to create a new forum for expertise more than empower the general public, and in the process these statutes have given rise to a new class of professionals[, creating a new role for attorneys].”); *id.* at 199 (“NEPA has created a new role for environmental consultants, both attorneys and other experts, and it is they who participate in the process, and they who ‘consume’ the participation rights.”).

¹⁸ *Id.* at 151.

¹⁹ *See also id.* at 211–12 (“The successful ‘invention’ and advocacy of an alternative, one that may be quite unwelcome to agency staff or existing stakeholders, must be so convincing that the agency or proponent’s counsel will advise that a conservative litigation prevention strategy requires inclusion of the alternative in the environmental document.”).

²⁰ *See id.* at 154 (“In [the absence of attorneys and consultant experts,] testimony frequently misses statutory or regulatory deadlines, fails to raise the issues necessary to exhaust administrative remedies, emphasizes policy issues of concern to the testigant, rather than the decision-maker, and makes points without foundation.”).

expertise provided to the citizen participant.”²¹ Professor Mihaly believes that

[t]he assertion that public participation is alive and well in the absence of assistance by experts and attorneys also advantages those whose interests are served by minimizing the effects of disparity in resources. If public participation matters, we must begin with the understanding that it becomes most truly effective when conjoined with representation and expertise.²²

Good policy flows from a process that gives decision-makers the benefit of sharply and cogently presenting different views.²³ When participation in either the regulatory or litigation process does not provide “useful new evidence or concepts to decision-makers of a rationalist government seeking the public interest,”²⁴ it is ineffective and will have no effect on the ultimate decision.²⁵ It seems clear, at least to Professor Mihaly, that citizens who wish to be effective either in the regulatory or judicial process require experts to help them “provide the sophisticated content, presentation, and political acuity necessary to have effect. . . . [E]nvironmental decision-makers require technical input, which unassisted lay participants cannot provide.”²⁶ Mihaly goes on to say that

²¹ *Id.* at 161.

²² *Id.* at 226.

²³ *See id.* at 162 (“Good policy flows from processes that give decision-makers the benefit of conflicting views. The environmental arena is marked by pervasive conflict over the application of theories, the underlying data, and disputes over how to incorporate the resulting uncertainty into decision-making.”). *See also* David L. Markell, *Citizen-Friendly Approaches to Environmental Governance*, 37 ENVTL. L. REP. NEWS & ANALYSIS 10,362, at 10,363 (2007), available at <http://www.elr.info/articles/vol37/37.10362.pdf> (“Proponents suggest that greater opportunities for public involvement in agency decisionmaking processes may help to enhance accountability and transparency in governance, contribute to more informed, and thereby improved, results, and foster a greater degree of connection between the governed and the governing (and a blurring of the line between the two) that leads to greater social capital and societal trust.” (footnote omitted)); *id.* (“[Procedural justice] literature suggests that citizens’ assessments of the fairness of third-party decisionmaking procedures are important to judgments about the legitimacy of such processes, independent of the outcomes of such procedures.”).

²⁴ Mihaly, *supra* note 15, at 166.

²⁵ *See id.* at 167 (“Presentation determines outcome. Citizens who do not understand the rules and customs of the forum will make presentations that have the appearance, if not the substance, of amateurism, and decision-makers will discount the material presented.”). *See also id.* (“[U]nassisted lay participants who express conclusory opinions unsupported by a substantial factual underlay will have no material effect on the ultimate outcome.”).

²⁶ *Id.* at 168. Although Mihaly does not say that attorneys are the only experts who can provide this expertise, he notes that it is usually lawyers who provide this assistance. *Id.*

[d]ecision-makers, whether administrative law judges, corporate leaders or governmental officials, need expertise The solution . . . lies not in a naive embrace of unassisted lay citizen advocacy, but rather in the ability to combine the energy and political value of a grass roots group with the expertise necessary to craft a message that will alter the course of an environmental decision-making process.²⁷

Environmental clinics can, and often do, play a critical role in advising clients in the agency decision-making process.

Second, there seems to be near universal agreement that clinics provide important academic and professional learning opportunities for law students. According to Erwin Chemerinsky, Dean of the University of California at Irvine's law school,

There is no better way to prepare students to be lawyers than for them to participate in clinical education. Clinics provide students the opportunity to practice law under close supervision and thus can provide students education in the lawyering skills and professional values that they will be using as attorneys, whether they practice in the private sector, government, or public interest organizations. Law, which is inevitably abstract in a classroom, becomes real when the student has to advise a client, negotiate a deal, or argue to a judge.²⁸

Clinical education is widely seen among law school educators as enhancing the curriculum of law schools and as "an important component of the overall education of our nation's future lawyers."²⁹

Law school clinics are not only "unique vehicles for law schools to expose law students to the professional skills that they must develop," but they also "strongly reinforce the non-clinical curriculum in developing student's legal analysis and research skills" as they "provide law students paramount opportunities to engage in problem solving, factual investigation, counseling, and negotiation."³⁰ They offer "experiential learning through working with clients," provide

²⁷ *Id.* at 172.

²⁸ Erwin Chemerinsky, *Why Not Clinical Education?*, 16 CLINICAL L. REV. 35, 35 (2009).

²⁹ deNeve et al., *supra* note 10, at 539. *See also id.* at 540 (discussing that clinical education most decidedly "is not 'an "amusing" academic exercise,' but rather is an important component of a quality law school curriculum").

³⁰ *Id.* at 543-44; *see also id.* at 544 ("Prior to the advent of clinical programs, these skills 'had previously been considered as incapable of being taught other than through the direct practice experience' of a newly-licensed lawyer." (quoting ABA Task Force on Law Schools and the Profession, *Legal Education and Professional Development—An Educational Continuum* (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) 234 (1992) [hereinafter MacCrate Report])).

future lawyers “with the opportunity to better understand and help bridge the access-to-justice gap of poor and low-income clients in their own communities,” and help “to seed in law students a professional commitment to public service.”³¹ Another benefit of law school clinics, not often referred to, is that they can become “the law school’s research laboratory for the development of new ideas” through the litigation of often difficult and conceptually challenging cases, providing an opportunity for clinicians and clinical students to develop new legal theories and expand existing legal doctrine.³²

“Clinical education is more than a trial advocacy course or a clerkship at a law firm” because students are taught how to

reflect on the practice of law; how to integrate the doctrines learned in traditional classes into practice; how to formulate hypotheses and test them in the real world; how to approach each decision creatively and analytically; how to identify and resolve issues of professional responsibility; and how to expand existing legal doctrine for the protection of the poor and powerless.³³

Clinical instruction emphasizes the “conceptual underpinnings” of skills that lawyers learn in their law practices.³⁴ However, clinical supervisors do a better job of assessing law student skills and providing feedback on student performance because they “provide more intensive guidance than is generally available in any other

³¹ Greenwald, *supra* note 14, at 569.

³² deNeve et al., *supra* note 10, at 555. These new theories and cases also provide grist for scholarly writings such as this article. *See also* Hope M. Babcock, *A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Re-invigorated, and Re-empowered*, 2005 UTAH L. REV. 443 (2005) (representation of that same tribe led to an exploration of Indian sovereignty); Hope M. Babcock, *Administering the Clean Water Act: Do Regulators Have “Bigger Fish to Fry” When It Comes to Addressing the Practice of Chumming on the Chesapeake Bay?*, 21 TUL. ENVTL. L.J. 1 (2007) (triggered by the filing of a state rulemaking petition); Hope M. Babcock, *Environmental Justice Clinics: Visible Models of Justice*, 14 STAN. ENVTL. L.J. 3 (1995) (grew out of establishing one of the first environmental justice clinics in the country); Hope M. Babcock, *Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water Everywhere, Perhaps Some Drops for Us*, 91 CORNELL L. REV. 1203 (2006) (grew out of the representation of an eastern state-recognized Indian tribe trying to protect its traditional fishing grounds).

³³ deNeve et al., *supra* note 10, at 544; *see also id.* at 547 (“[L]aw school clinics provide unique educational opportunities for students to integrate ‘all the fundamental lawyering skills’ and professional values into an actual practice setting. . . . Clinics provide students with an opportunity to reflect on the development of their lawyering skills. Clinics also provide an unmatched level of supervision and guidance.” (quoting MacCrate Report, *supra* note 30, at 238)).

³⁴ *Id.* at 545 (quoting MacCrate Report, *supra* note 30, at 234).

setting.”³⁵ This “distinguishes clinical training from the unstructured practice experience students encounter after graduation.”³⁶

The focus on applied learning and the close supervision provided in clinical programs “enables students to relate their later practice experience to concepts they have learned in law school.” . . . This training can be translated into a fuller understanding of how to recognize and resolve the ethical dilemmas encountered in actual practice. The same dynamic applies to the training that clinical programs offer in the organization and management of legal work.³⁷

Students emerge from clinics with enhanced legal skills and a more robust understanding of ethical issues than had they entered practice without this training. As a result, they bring a higher level of professionalism into the practice area or forum they chose to enter.

Despite their public, pedagogical, and professional benefits, law school clinics—especially environmental clinics—have been subject to persistent attacks by the economic and political interests they challenge. The next section describes some of these attacks, their sources, and their subtle and not so subtle impacts on environmental clinical practice.

II THE SORDID HISTORY OF SOME ANTI-CLINIC CAMPAIGNS, THE TOOLS CLINICAL OPPONENTS USE, AND SOME EFFECTS OF THESE CAMPAIGNS

This part of the Article briefly describes the history of some of the more prominent attacks on law school clinics, particularly environmental clinics. It identifies some of the tools used in those campaigns by clinic opponents and then tries to grapple with some of the effects of these campaigns not only on specific clinics, but on public interest representation in general.

³⁵ *Id.*

³⁶ *Id.* (quoting Peter Toll Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L.J. 277, 280 (1982)); *see also id.* (“This close and direct faculty supervision, and the resulting ‘co-counsel’ relationship [creates] an effective adult-learning environment.” (quoting Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 347 (1982))).

³⁷ *Id.* at 546 (citations omitted) (quoting MacCrate Report, *supra* note 30, at 234).

***A. A Brief Recitation of the History of Clinical Attacks
and of Some Conventional Reasons Why They Happen***

Given the clients clinics represent and the established interests they challenge on their clients' behalf, it is no surprise that clinics in general have engendered strong opposition.³⁸

State-funded law schools have been the predominant target for such interference. This is due to their vulnerability to the political views of elected officials, the perceived impropriety of a state-funded school suing to require another state entity to spend taxpayer moneys, concerns that law clinic lawsuits against important industries might undermine the economic base of the state, disagreement with the use of taxpayer money to fund legal services for the poor, or a desire to avoid "taking sides" on controversial social or political issues.³⁹

However, the repeated assaults on Tulane Law School's environmental clinic⁴⁰ show the vulnerability of even private law schools to such attacks.⁴¹ According to Professors Kuehn and Joy,

³⁸ See *Statement of ABA President Lamm Re: Proposed Legislation Affecting Funding for University of Maryland School of Law*, ABANOW (Apr. 1, 2010), <http://www.abanow.org/2010/04/statement-of-aba-president-lamm-re-proposed-legislation-affecting-funding-for-university-of-maryland-school-of-law/> ("Law school clinical programs provide immensely valuable public service in making legal assistance available to members of society who might not otherwise have access to the justice system. At the same time, [they teach students] about navigating court systems, about how the law works to meet clients' needs, and about lawyers' fundamental professional responsibility to advocate for clients who cannot advocate for themselves, even when the clients or their causes might prove unpopular or controversial. . . . Yet there is a [legislative] proposal . . . to withhold funds from the [law school] unless [the clinic] reports [to the legislature] on clients and cases served by the school's clinical legal program, expenditures for those cases and funding sources [because it is an intrusion of the attorney client relationship]."); Robert R. Kuehn, *The Attack on the University of Maryland Law School Clinics*, CLINICAL LEGAL EDUC. ASS'N (Mar. 27, 2010), <http://www.law.umaryland.edu/about/features/enviroclinic/documents/CLEA.pdf> (expressing concern over the attack on the University of Maryland environmental clinic because it interferes with the clinic's ability to "zealously" represent its clients and to assure access to the justice system for all those who cannot afford adequate legal counsel because of economic or social constraints, particularly objecting to the interference happening "at the bidding of wealthy, powerful poultry interests").

³⁹ Kuehn & Joy, *Ethics Critique*, *supra* note 8, at 1990; see also *id.* at 1977-89 (discussing attacks by state legislatures on state-funded clinics in Connecticut, Arkansas, Colorado, *Idaho, Iowa, Tennessee, *Rutgers, *Arizona State University College of Law, *Oregon (1981), *Tulane (1982), *Wyoming, *Pittsburgh (1985), and St. Mary's law schools (asterisked schools are publicly funded law schools)).

⁴⁰ The continuing nature of these attacks was recently confirmed by a letter sent this summer from the operator of a landfill that had been the subject of neighborhood disputes since it opened in the early 1980s in a predominantly lower income, African American community, threatening the members of Tulane University's Board of Trustees and the

[w]hile early attacks were often defended [by the attackers] on the unfounded belief that clinics were interfering with the ability of members of the bar to compete for paying clients, or motivated by a desire to prevent lawsuits against the state, more recent attacks, such as those on environmental law clinics, appear to be motivated by a desire to protect the financial interests of clients, alumni, and university donors. . . . [T]he true concern of law clinic critics is that clinics are “bringing suits that wouldn’t be brought at all if the clinic didn’t do it.”⁴²

Environmental clinics have been the “principal lightning rod” drawing most of these attacks.⁴³ For example, a lawsuit by the Maryland environmental clinic against a major poultry company provoked a Maryland state senator to introduce legislation in the General Assembly withholding

\$750,000 in university funding until all 22 of the Law School’s clinics submitted a report “listing and describing each legal case in the past five years in which they participated in a court action, including the client represented, complete delineation of the expenditures for each case, and the source of funds for each expenditure.”⁴⁴

environmental clinic’s legal advisory board with a lawsuit for their collective failure to properly supervise clinic attorneys. See Letter from Adam Babich, Professor, Tulane Univ. Law Sch., to W.L. West, Lemle & Kelleher, L.L.P. (Sept. 2, 2010) (on file with author). The triggering event for the letter was the clinic sending a notice of violation to the landfill owners the previous month. *Id.*

⁴¹ Kuehn & Joy, *Ethics Critique*, *supra* note 8, at 1990. While serving as director of Georgetown’s environmental clinic, I received one letter from a prominent Washington lawyer threatening the imposition of Rule 11 sanctions if I did not withdraw from a case, and the dean of the Law Center received a letter from the president of a company that we were opposing in a state administrative licensing proceeding, also a graduate of the Law Center, threatening to withdraw his financial support from the school if we did not end our opposition.

⁴² *Id.* (footnote omitted).

⁴³ See Luban, *supra* note 7, at 237 (citing as examples attacks on environmental law clinics at West Virginia, Wyoming, Pittsburgh, and Tulane law schools).

⁴⁴ Jamie Smith, *Into the Fire: State Legislators Fuel a Heated Debate on Clinical Legal Education*, IN PRACTICE (The Clinical Law Program at the Univ. of Md. Sch. of Law, Balt. Md.) Spring 2010, at 1, available at <http://www.law.umaryland.edu/programs/clinic/documents/ClinicSpring2010.pdf>. A massive effort by the American Bar Association, national legal education associations, and more than 500 individual faculty members and deans as well as untold letters, e-mails, and phone calls from Maryland Law School alumni and students reduced the proposed bill to a request for public information about the environmental law clinic’s cases over the past two years. *Id.* at 2.

A similar effort led by Louisiana's Chemical Association (LCA)⁴⁵ resulted in the introduction of legislation forbidding law clinics at public and private law schools that receive state funds from suing government agencies, individuals, and businesses for damages or from "raising most constitutional challenges."⁴⁶ The legislation would also have given the legislature oversight over law clinics.⁴⁷

One obvious explanation for these attacks is that environmental clinics and their clients frequently adopt anti-development positions that threaten important established economic and political interests.⁴⁸ According to Professor Stephen Wizner, "[u]nlike 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 endanger not only the environment in some way, but also where the litigation jeopardizes some established economic interests.⁴⁹ The obvious result of challenging "powerful interests or affect[ing] issues of community or statewide concern," is that "controversy becomes almost inescapable."⁵⁰

"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."⁵¹ The response to environmental clinics is often also

⁴⁵ The breathtaking reach of LCA's campaign against Tulane included urging its members to: stop their corporate support of Tulane, including matched employee giving and recruiting; personally contact all of the school's charitable donors to educate them about the environmental clinic's activities; work to reduce or eliminate all state general appropriation support for Tulane; urge the state Board of Regents to cease any support of Tulane; and enlist the efforts of the Governor and Louisiana's congressional delegation in emphasizing the detrimental impact of Tulane's environmental clinic's activities on the state's manufacturing jobs. Memorandum from Dan. S. Borne, President, La. Chem. Ass'n, to the Members of La. Chem. Ass'n (May 7, 2010) [hereinafter LCA Memorandum] (on file with author).

⁴⁶ Jordan Blum, *Bill Would Ban Law Clinics Suing State*, 2THEADVOCATE.COM (May 18, 2010), <http://www.2theadvocate.com/news/94030164.html>.

⁴⁷ *Id.*

⁴⁸ See Luban, *supra* note 7, at 237 (saying these positions "put them at odds with business interests"); *id.* at 238 (describing how the Western Legal Foundation put an anti-clinic attack ad in the *New York Times*, explaining the reasons for its opposition to law school clinics).

⁴⁹ Wizner & Solomon, *supra* note 12, at 473.

⁵⁰ Adam Babich, *The Apolitical Law School Clinic*, 11 CLINICAL L. REV. 447, 447 (2005).

⁵¹ Wizner & Solomon, *supra* note 12, at 473 ("If there is any clinic that is inherently 'political,' it is an environmental clinic."). See also Tarr, *supra* note 7, at 1042

political. Some state legislatures have restricted the scope of clinical practice by conditioning the school's receipt of public funds.⁵² For example, a North Dakota state grant program limited the remedies available in suits brought by clinics against state agencies to declaratory and injunctive relief, and the Federal Bureau of Prisons attempted to require "that a grantee could not file suit against the agency unless the grantee's attorney first attempted to informally resolve the matter."⁵³ Similar restrictions may even be "imposed by the law school or university to avoid political or funding

("[A]ccording to the ethics rules in most states, a lawyer's work with a client is not an endorsement of that 'client's political, economic, social or moral views or activities.' Nevertheless, law clinics, particularly those associated with public institutions or those engaged in politically controversial work like environmental law clinics, are the target of attacks because of the work they do for clients and organizations. As state funding for public education diminishes, public law schools are functioning more like private institutions, but the affiliation or identification as a state school continues to create conflicts for the legal work the clinic might provide." (footnotes omitted)). Recent examples of such attacks are those levied against Tulane and the University of Maryland's environmental law clinics. See Bill Barrow, *Tulane Still Target of Law Clinics Bill, Though Amendments Could Spare Loyola, Others*, NOLA.COM (May 17, 2010, 4:55 PM), http://www.nola.com/politics/index.ssf/2010/05/tulane_still_target_of_law_cli.html; *Law: Fight Over Environmental Clinics Moves to La.*, GREENWIRE (May 11, 2010, 12:53 PM), <http://www.eenews.net/Greenwire/print/2010/05/11/14> (describing a bill, supported by the Louisiana Chemical Association, introduced by a state legislator prohibiting law clinics at state-funded universities from filing lawsuits against government agencies, seeking money damages, or making state constitutional claims, which while not explicitly referencing either Tulane or environmental clinics, "carves out exceptions" for criminal defense, family law, and domestic violence clinics); Nelson, *supra* note 2 (describing how a Clean Water Act lawsuit against Perdue Farms and an 80,000-bird poultry farm triggered the passage by both houses of the Maryland legislature legislation requiring the environmental law clinic to turn over to the legislators a breakdown of clients and budgets for the past two years, stripping from the bill provisions that would have levied a \$250,000 fine against the University if it did not comply); see also *id.* (discussing how the "political blowback that Maryland's [environmental] clinic has encountered" is not an isolated occurrence: the University of Pittsburgh's environmental law clinic had to scramble to find new sources of funding ten years after the state legislature modified the University's appropriation to prohibit the clinic from using public money as a result of its involvement in lawsuits seeking to block timber sales in Pennsylvania's Allegheny National Forest; the environmental law clinic at Rutgers University was sued by real estate developers in 2006 after it represented clients opposed to a controversial shopping mall project—the state Supreme Court eventually sided with the clinic; the University of Oregon's environmental law clinic was finally "spun off from the university in 1993" in response to a threat by state lawmakers—who were egged on by state business organizations, angry over the clinic's work on endangered species litigation involving timber sales—to shutter the entire law school, after more than a decade of sparring with legislators over the clinic's continued existence).

⁵² Kuehn & Joy, *Ethics Critique*, *supra* note 8, at 2030.

⁵³ *Id.* at 2035.

controversies, or voluntarily imposed by the law clinic as ways to avoid possible controversies, allocate scarce clinic resources, or advance educational goals.”⁵⁴

“Law school clinic directors, therefore, often find themselves trying to defuse, avoid, embrace, or otherwise manage controversy.”⁵⁵ Clinics have an ally in the courts, with the notable exception of the Louisiana Supreme Court. That court “remains the only court that has responded to clinic critics by restricting the cases and clients that law clinics may handle.”⁵⁶ Most courts have generally been protective of law school clinics and their supervising attorneys and have expanded student practice rules addressing the cases and clients clinics can take on.⁵⁷ Professors Kuehn and Joy note that the refusal of federal courts to adopt Louisiana’s student practice rule restrictions, as well as criticism by judges in other states of that state’s Supreme Court’s actions, “suggest[s] that, contrary to the desire of critics of law school clinics, Louisiana’s narrow view of the appropriate role of law schools in providing legal services to needy clients and causes is not typically shared by other members of the judiciary.”⁵⁸

B. Tools Used to Attack Law School Environmental Clinics and Ones That May Be Used in the Future

Those who attack environmental clinics use a variety of tools, such as cutting off clinic funds or the funds of the parent university, requiring that clinic cases be pre-approved by internal or external boards, and arranging that the clinic’s authority to bring certain types of cases or represent certain types of clients be eliminated or severely curtailed. Most often, disgruntled economic interests who find

⁵⁴ *Id.* at 2030.

⁵⁵ Babich, *supra* note 50, at 447. Perhaps in response to Tulane’s “bruising battle” against the state over his clinic’s continued existence, Professor Babich proposes what he calls the apolitical environmental law clinic that maintains a non-substantive agenda and focuses on empowering clients while still offering pedagogical advantages and services to Tulane’s “diverse constituencies.” *Id.* at 450–51. *But see* Wizner & Solomon, *supra* note 12, at 474 (disagreeing with Babich that an environmental clinic can ever be apolitical because they “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”).

⁵⁶ Kuehn & Joy, *Ethics Critique*, *supra* note 8, at 1991.

⁵⁷ *Id.* *But see id.* at 1976 n.13 (reporting on actions of Michigan juvenile court judges in denying court appointments to Michigan Law School’s child Advocacy Clinic, as an example of at least one court expressing its “displeasure with a clinic’s policies or litigation strategies”).

⁵⁸ *Id.* at 1991–92.

themselves as defendants in clinic lawsuits—such as the chemical industry in Louisiana or the poultry industry in Maryland—are behind such initiatives.

As noted previously, state law schools are particularly vulnerable to the withdrawal of public funding. Private schools who “are dominated by private bar ‘benefactors’ and boards of trustees” and state-funded law schools that rely on private fundraising to supplement their public revenue are also susceptible to threats of funding withdrawal by individuals.⁵⁹ “Soft money and grants are another source of unwarranted interference in the work of clinics. . . . Law school clinics no longer rely heavily on federal grants, but may still receive state, local, or foundation money [that donors can condition in ways] that constrains the ability of the lawyers in the clinic to represent clients fully.”⁶⁰ Such threats can have a serious chilling effect on a vulnerable clinic’s practice.

Law schools have diverse constituencies, and while they may share common educational and professional goals, they may not share “substantive philosophies,” especially concerning how conflicts between commercial development and environmental protection should be resolved.⁶¹ “[N]o one likes to be sued,” and this fact can create obdurate enemies for the clinic even among those who support the idea of clinical education in the abstract.⁶² This reality may dampen the enthusiasm of clinical directors to campaign against those who criticize their work, since “[t]he same people dedicated to de-lawyering your clients may be potential or current supporters of your institution.”⁶³ Schools that adopt policies or procedures that limit a clinic’s choice of cases, clients, potential defendants, or court-ordered remedies, such as seeking an award of attorneys’ fees against a state agency, are generally undertaking such initiatives “to shield the

⁵⁹ Ashar, *supra* note 13, at 413.

⁶⁰ Tarr, *supra* note 7, at 1043.

⁶¹ Babich, *supra* note 50, at 460 (noting how law schools such as Tulane have “a constituency as diverse as the legal profession itself” resulting in the varying views of Tulane and its supporters about how to reconcile the conflict between “commerce and environmental protection, [which] are presumably all over the map”).

⁶² *Id.* at 468 (“[S]ome law-school constituents may never become clinic supporters, just as some academic research may be unpopular with some constituents.”).

⁶³ *Id.* (explaining the reluctance of clinicians “to treat their critics as enemies”).

university from criticism by politicians and possible threats to state funding.”⁶⁴

Sometimes clinic opponents are graduates of the law school or the parent university.

Alumni are major constituents of most law schools and can apply both positive and negative pressures involving law clinics. As donors, they can financially support clinics but may insist on a particular political bent or content They may also put financial pressure on law school deans to eliminate a clinic that the donor perceives to be inconsistent with a particular perspective.⁶⁵

Alumni are also potential employers of students, and irritating them may economically disadvantage students. This fact can be especially problematic for students in a tight job market,⁶⁶ such as the one currently facing law school graduates.⁶⁷ This may lead students who are dependent on particular alumni networks for assistance in finding a job to avoid participating in a clinic that has drawn that alumnus’ ire.⁶⁸ To the extent that “the desires and preferences of law students and law professors . . . are shaped by dominant market forces,” and when those forces oppose what a clinic is doing, the internal support for the clinic can be subtly affected within the law school.⁶⁹

An extreme litigation tool used by defendants in environmental lawsuits, although not yet to my knowledge against any environmental clinic, is the strategic lawsuit against public participation, or SLAPP suits as they are commonly known.⁷⁰ It is worth spending a moment on this type of litigation because there is every reason to think that those who try to intimidate law clinics from

⁶⁴ Kuehn & Joy, *Lawyering in the Academy*, *supra* note 3, at 115. *See also id.* at 116 (“[Direct d]ecanal control over individual case selection is usually motivated by a desire to avoid bad publicity or outside attacks on the school.”).

⁶⁵ Tarr, *supra* note 7, at 1042 (footnote omitted).

⁶⁶ *See id.* (“Alumni are potential employers for the students and have sometimes been useful in supporting efforts to expand professional training in the school, but their perception of what is needed may not coincide with the clinic faculty’s opinions.”).

⁶⁷ *See, e.g.*, Katy Hopkins, *Law Jobs Will Be Harder to Come By*, U.S. NEWS & WORLD REP. (June 25, 2010), <http://www.usnews.com/education/best-law-schools/articles/2010/06/25/law-jobs-will-be-harder-to-come-by.html>.

⁶⁸ *See* Tarr, *supra* note 7, at 1042 (“Students rely heavily on alumni networks when job hunting, and if alumni are unhappy about a clinic, students may shy away from participating.”).

⁶⁹ Ashar, *supra* note 13, at 413 (footnote omitted).

⁷⁰ *See* Luban, *supra* note 7, at 219 (describing SLAPP suits as a “[l]ess familiar, but equally important, . . . adversarial attempt to exclude voices rather than information from the process”).

initiating certain types of actions in court will eventually start using them against clinic clients.

SLAPP suits, like clinic harassment campaigns, are intended to frighten into silence those who threaten established economic interests. Both seek to stop citizens from engaging in processes that protect their interests and both engage in “abusive” practices. SLAPP suits, like anti-clinic campaigns, impose a heavy cost not only on their target, but also on society by preventing individuals from participating in “government programs that rely on citizen input to perform their functions” and by delaying “solutions to the problems that gave rise to the lawsuits.”⁷¹

“SLAPP suits typically pose as common tort actions such as defamation, interference with a contract, restraint of trade, conspiracy, due process violations, and even abuse of process or malicious prosecution claims.”⁷² Not surprisingly, among the areas of law drawing the most attention by SLAPP plaintiffs are real estate development, zoning, and environmental law.⁷³ Not in My Backyard (popularly known as NIMBY) suits are another common form of SLAPP suit, often involving wilderness, pollution, and animal rights issues, and targeting groups such as “The Sierra Club, eco-activists, and land trusts.”⁷⁴ These suits transform what are essentially political disputes into legal ones by alleging “some technical legal injury,” taking “the debate out of the public forum and into a judicial forum, where only the technicalities of the legal injury can be addressed, instead of the underlying problem’s political implications.”⁷⁵ In a SLAPP suit, “the focus is shifted away from the citizen’s claimed injury and onto the filer’s alleged injury. These transformations all

⁷¹ P. Caleb Patterson, Comment, *Have I Been SLAPPed? Arkansas’s Attempt to Curb Abusive Litigation: The Citizen Participation in Government Act*, 60 ARK. L. REV. 507, 508 (2007).

⁷² *Id.* at 511–12; *see also id.* (“All of these are attempts to tack legal consequences onto what is, at its core, a wholly lawful exercise of the citizen’s petition rights.”); *see also id.* at 507 (“Abusive litigation is a tactic used to punish citizens who exercise their right to petition in our democracy.”).

⁷³ *Id.* at 512, 526 (listing other SLAPP targets as including consumer rights, animal rights, public officials, civil rights, and neighborhood problems, among others; “[r]eal estate SLAPPs are the largest category of abusive litigation suits, comprising a full one-third of all such suits filed.”).

⁷⁴ *Id.* at 528 (footnotes omitted).

⁷⁵ *Id.* at 510–11.

serve the filer's ultimate interest of silencing debate on the original political issue."⁷⁶

Even though, according to Professor Luban, eighty percent of SLAPP suits are dismissed before trial, this does not matter—their “aim is not legal victory but intimidation.”⁷⁷ SLAPP suit “[d]efendants facing ruinous legal bills and the risk of substantial personal liability agree to cease protest activities in return for having the SLAPP suit dropped.”⁷⁸ These liabilities effectively compel SLAPP suit defendants to drop any legal initiative they had taken against the SLAPP suit plaintiff. One estimate is that since the 1970s

⁷⁶ *Id.* at 511 (footnote omitted).

⁷⁷ Luban, *supra* note 7, at 219. *See also* Patterson, *supra* note 71, at 507–08 (noting the actual goal of these suits is not a “win in court,” but to “intimidate and harass political critics into silence”); *id.* at 512 (“A SLAPP filer never really intends to win the lawsuit on its merits; his goal is to drag the litigation out as long as possible and force the target to focus what resources she may have on defending the suit.” (footnote omitted)). Another tool used by defendants to frighten public interest plaintiffs into dropping their lawsuits is Rule 68. *See generally* Jenny R. Rubin, Note, *Rule 68: A Red Herring in Environmental Citizen Suits*, 12 GEO. J. LEGAL ETHICS 849, 852 (1999) (“[Under Rule 68,] defendants may make an offer of judgment anytime [sic] after receiving a complaint. Invoking Rule 68 shortly after the case is filed ensures that most of the defendant’s attorneys’ fees will be recoverable from the plaintiff if the plaintiff prevails but is awarded less than provided for in the offer.”); *id.* at 853 (“[T]o the extent that Rule 68 discourages citizen suit enforcement of environmental laws, the Rule prevents implementation of the environmental protection scheme envisioned by Congress. . . . [Since] most environmental statutes include attorneys’ fees in their definition of costs, [this makes a public interest] plaintiff who rejects an offer of judgment potentially liable for the defendant’s post-offer attorneys’ fees.” (footnotes omitted)); *id.* at 852 (“Because many federal statutes promoting public interest litigation do define attorneys’ fees [including defendants’ attorneys’ fees] as recoverable costs, Rule 68 has become a powerful inducement to settlement in public interest litigation.” (footnote omitted)); *id.* at 853–54 (“[Since public interest plaintiffs] have limited funds, the ability of defendants to recover attorneys’ fees shifts the balance of power in settlement negotiations in favor of defendants. Because accepting an offer of judgment is the only certain means of avoiding liability for the defendant’s fees and costs, plaintiffs claim that they are coerced into accepting unfavorable settlements.” (footnote omitted)); *id.* at 852–53 (“First, these offers present the threat of a large assessment of costs against the plaintiff, which the plaintiff is guaranteed to avoid only by accepting the offer. Second, at the early stages of litigation, it is extremely difficult for the plaintiff to adequately assess an offer of judgment and weigh the inherent risks of accepting or rejecting it. Finally, since many public interest suits seek injunctive relief, the undeveloped information available early in litigation makes it hard for plaintiffs to evaluate whether an offer consisting only of monetary relief is acceptable.” (footnotes omitted)). According to Rubin, “the risk of liability for the defendant’s post-offer costs is the main obstacle to vigorous citizen suit prosecution[,]” and “prevents citizen plaintiffs from fully litigating their claims, even though such process is a substantive right under federal environmental law. Thus, the risk of having to pay such fees presents a significant deterrent to effective citizen suit litigation.” *Id.* at 853–54.

⁷⁸ Luban, *supra* note 7, at 219.

when these lawsuits started to be filed, “thousands of citizens have been directly sued and thousands more have been frightened into silence by the threat of such suits.”⁷⁹ In this regard, SLAPP suits and the attacks on environmental clinics share a common goal—drive the environmental plaintiffs out of court and eliminate their ability to sue.

C. *Some Effects of These Attacks*

Although the risk of personal liability may be less for clinical directors and clinical students than defendants in a SLAPP suit, nonetheless anti-clinic campaigns have been effective in curtailing clinic activities in some instances.⁸⁰ Even when an attack fails, they are frequently “near misses,” and because “eventually some will succeed[,]”⁸¹ the fear of such an attack can have a chilling effect on environmental clinics at other schools. When these attacks result in the imposition of restrictions on the cases and clients a clinic can take, they “do not simply drive the needy client to another lawyer outside the law school but deny legal assistance altogether.”⁸² They may also create ethical dilemmas for clinicians and academic freedom issues for the parent law school.

One indirect effect of publicized attacks on environmental clinics has been to dissuade similar clinics at other schools from taking on controversial cases or clients “because of fears that taking such cases could result in threats to their continued operation.”⁸³ For example, after the first attack on Tulane’s environmental law clinic, several law schools took proactive prophylactic measures to curtail the activities of their environmental clinics to protect against the same thing happening to them.⁸⁴ Even without taking such steps, environmental

⁷⁹ Patterson, *supra* note 71, at 508.

⁸⁰ See Luban, *supra* note 7, at 240 (“Obviously, the degree to which clinicians self-censor cannot be known, but . . . self-censorship exists. In effect, the assaults on environmental-law clinics function like SLAPP suits, intimidating law school administrators and clinic directors even when they fail.”).

⁸¹ *Id.*

⁸² Kuehn & Joy, *Ethics Critique*, *supra* note 8, at 2023.

⁸³ *Id.* at 1989. See also *id.* at 1989 nn.87–88 (documenting complaints to law school deans from prominent alumni and state legislators).

⁸⁴ See Kuehn & Joy, *Lawyering in the Academy*, *supra* note 3, at 100 (“A 2005 survey of law clinic teachers found that one-third ‘worried’ about the reaction of the law faculty or administration to their clinic casework. Seventeen percent of clinic faculty reported making changes in their case selection choices because of those worries, and more than ten percent reported making significant or major changes. In a more recent survey of clinical faculty, fifteen percent of clinical teachers reported that the clinical program director had suggested they avoid a particular case. Nine percent of teachers stated that their law school

clinicians may wisely “hesitate before taking on volatile cases that may provoke dangerous backlash against the[ir] clinics or their law schools,”⁸⁵ thus depriving an otherwise deserving client of judicial redress.

Attacks on environmental clinics and attempts to interfere with their relationship with their clients can create ethical problems for clinical directors. Schools that give themselves the authority “to scrutinize case selection and assume that they have a ‘right’ to intervene” run the risk of interfering with the attorney-client relationship that clinical directors have with their clients.⁸⁶ This interference creates a professional responsibility problem for clinical directors who, because they are lawyers, cannot ethically “permit a person who provides compensation or employment, be it a dean, university president or trustee, to interfere with, direct, or regulate that lawyer’s independent professional judgment or otherwise interfere with the client-lawyer relationship.”⁸⁷ Even when there is no direct interference by a third party, such as by an important alumnus or a member of the law school’s administration or by the university’s board of trustees, it still may be naive for a clinical director—who is, after all, a faculty member—to think that “her professional judgment may not be impaired by litigating against a member of the university or law school governing body or influential donor.”⁸⁸ Large donors

dean had made the same suggestion, and seven percent responded that on their own initiative they had avoided a case because they suspected the dean would prefer they did so.” (footnotes omitted)).

⁸⁵ Luban, *supra* note 7, at 240.

⁸⁶ Tarr, *supra* note 7, at 1031 (noting that the Model Rules of Professional Conduct (MRPC), specifically MRPC 5.4 cmt. 2 (2008), explicitly prohibit a third party from directing or regulating the lawyer’s professional judgment in rendering legal services). The way to avoid this happening in the case of clinics that rely on the law school, donations, grants, or other sources of outside funding is to “develop and highlight policies that clarify that outside-funding sources cannot dictate the lawyer’s actions.” *Id.* at 1037 (citing MODEL RULES OF PROF’L CONDUCT R. 5.4, R. 1.7 cmt. 13, R. 1.8 cmts. 11, 12 (2008)); *see also id.* at 1041 (stating that “lawyers are generally free to accept or reject clients,” while third parties may not interfere with the attorney’s relationship with her client).

⁸⁷ Kuehn & Joy, *Lawyering in the Academy*, *supra* note 3, at 112 (“The lawyer’s obligation to a client is not modified by a third-party’s employment of the lawyer.” *Id.*). *But see* Ashar, *supra* note 13, at 386 (“The professional responsibility rules explicitly prohibit the influence of third parties in a representation. Because associational standing in litigation has limited reach, the rules channel members of collectives into relationships of individual representation by lawyers. These relationships and the rules then potentially cut these individuals off from the organizations and the resistance strategies through which they have gotten involved in the social conflict from which the legal action stems.” (footnotes omitted)).

⁸⁸ Kuehn & Joy, *Lawyering in the Academy*, *supra* note 3, at 113.

“may have substantial influence with the university president or law school dean,” while administrators control the terms of the faculty member’s employment.⁸⁹ This may be particularly true for untenured junior clinical directors or those who do not have “presumptively renewable long-term contracts [and] may be particularly cautious about taking on any potentially controversial matter.”⁹⁰ These kinds of subtle pressures on clinical directors can create problematic ethical situations where a conflict between their self-interest and that of their clients is just below the waterline.⁹¹

These review initiatives run afoul of another ethical constraint on clinicians, namely the prohibition against sharing a client’s confidential information with another individual.⁹²

While this principle may not prevent outside influences on clinic decisions, it at least means that, in the absence of client consent, professors may only provide outsiders limited information about their cases. Therefore, when a university official or law school dean seeks to influence a faculty member’s representation of a client, they may be acting on incomplete information.⁹³

Additionally, attacks on law clinics that have a “reasonable likelihood of preventing certain persons or causes from obtaining legal representation or of interfering with a clinic lawyer’s independent professional judgment, . . . may constitute actions prejudicial to the administration of justice[,]” and thus run afoul of the Model Rules of Professional Conduct.⁹⁴ According to Professors Kuehn and Joy, such attacks

intended to deny or delay clients access to clinic representation or to induce a clinic attorney to render less than independent professional representation would lack a substantial purpose other than to embarrass, delay, or burden the clinic attorney or her client.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ MODEL CODE OF PROF’L CONDUCT R. 1.8 (2010). *See, e.g., id.* at R. 1.8(f)(2) (“A lawyer shall not accept compensation for representing a client from one other than the client unless . . . there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship . . .”).

⁹² *See* Kuehn & Joy, *Lawyering in the Academy*, *supra* note 3, at 111 (“Unless sharing the information with a dean or other official outside the course advances the client’s interests, the professor-attorney must protect confidential client information.”).

⁹³ *Id.* at 111–12.

⁹⁴ Kuehn & Joy, *Ethics Critique*, *supra* note 8, at 2025. *See, e.g.,* MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 5 (“Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval.”).

Because such efforts are prohibited by imperative rules of professional conduct, they could constitute misconduct under the Model Rules or Model Code [if the attacking party is a lawyer].⁹⁵

Those in the academy who allow attacks on law school clinics to interfere with the clinic's administration can run afoul of principles of academic freedom.⁹⁶ Professors Kuehn and Joy believe that "efforts to avoid controversy or appease certain influential persons or groups infringe on both the faculty's collective right to establish educational policies and undermine the academic freedom of the individual professor to choose the most appropriate and effective means to educate students."⁹⁷ The Association of American Law Schools' (AALS) submission to the Louisiana Supreme Court echoed this concern in its defense of Tulane's environmental law clinic; AALS advocated that applying the factors courts consider when legal questions arise about particular course materials or teaching methods clearly shows that Tulane's clinical instructors "have a First Amendment right to select cases as their course materials for their clinics."⁹⁸ Law schools hire clinical instructors to teach students lawyering skills and professional values through the representation of actual clients. According to the AALS, "[o]nce these teachers have been hired for that purpose, they must have the right, like any other law professor, to choose the materials which in their opinion are best suited to performing their objective."⁹⁹ Any interference in that

⁹⁵ Kuehn & Joy, *Ethics Critique*, *supra* note 8, at 2029 (footnote omitted). Professor Sameer Ashar recounts a story told by William Simon, that illustrates how the MRPC can be used against progressive lawyers, about how southern bar associations accused NAACP lawyers of having conflicts of interests between their group and individual clients during their national desegregation campaign and how, according to Simon, this represented an "almost-fetishistic attachment of the guardians of the profession to individualistic lawyer-client relationships," which they then used "to preserve the status quo and prevent movements from using law." Ashar, *supra* note 13, at 387 n.126.

⁹⁶ See also Kuehn & Joy, *Lawyering in the Academy*, *supra* note 3, at 102 ("Decisions about which matter to undertake or strategy to pursue may affect not only student learning and the client's interests but also the interests of the university and, in public universities, the state.").

⁹⁷ *Id.* at 115.

⁹⁸ deNeve et al., *supra* note 10, at 557 (identifying these screening factors as including "whether the teaching materials and methods are appropriate to their instructive purpose; whether the materials and methods are appropriate to the relevant educational standards being used at the particular educational level; and whether the materials and methods are appropriate to the professional standards of educators in the particular field." *Id.* (citations omitted)).

⁹⁹ *Id.* at 558.

choice, whether by the Louisiana bar or business interests, “impinge[s] on the academic freedom of law teachers.”¹⁰⁰

Attacks such as those on environmental clinics, which focus on “taking out the adversary” through attacking her lawyer, are impoverishing the adversarial system.¹⁰¹ Professor Luban takes particular note of what he calls “[s]ilencing doctrines[, which] include statutes, rules, and judicial decisions that allow opponents to attack the funding or restrict the activity of their adversaries’ advocates.”¹⁰² He argues that “targeting advocates for the other side rather than arguing against them on the merits—robs the adversary system of its strongest claim to legitimacy,”¹⁰³ and leaves a system with only one adversary that is adversarial “in name alone.”¹⁰⁴ “When judges and legislatures create doctrines that enable well-funded parties to take out the other side’s lawyer, they undermine basic fairness and turn the adversary system into a system of procedural injustice.”¹⁰⁵

Regardless of the ethical, academic freedom, or systemic problems that attacks on environmental clinics may generate, the fact that these attacks may inhibit the activities of vulnerable clinics means that in all likelihood they will continue.¹⁰⁶

Moreover, the breadth of clinical programs that have been attacked demonstrates that no law clinic program is immune from such assaults. Any law school clinic is just one controversial case, one unpopular client, one angry legislator, alumnus or opposing attorney, or one unsupportive dean or university official away from attempts to interfere in its case and client selection.¹⁰⁷

¹⁰⁰ *Id.*

¹⁰¹ Luban, *supra* note 7, at 213.

¹⁰² *Id.* at 220. Expanding this thought further, Professor Luban quotes Felix Cohen’s coinage of the phrase “‘transcendental nonsense’ to describe issues that look like legitimate legal inquiries but in fact employ contentless abstractions that cannot be given content without arguing in a circle. [But u]nfortunately, in law, metaphysical questions invite political answers: the gut fills in the blanks, and judges forced to decide the question reach whatever result they find congenial.” *Id.* at 230 (footnote omitted).

¹⁰³ *Id.* at 213.

¹⁰⁴ *Id.* at 219.

¹⁰⁵ *Id.* at 219–20.

¹⁰⁶ See Kuehn & Joy, *Ethics Critique*, *supra* note 8, at 1992 (“[G]iven the frequency and severity of [these] attacks . . . over [nearly] two decades, outside efforts to influence a clinic supervisor’s case and client selection are likely to continue in one form or another.”).

¹⁰⁷ *Id.*

With this understanding in mind, this Article now turns to the reasons why clinics, especially environmental clinics, draw so much opposition and why those reasons have not abated over time.

III SOME UNCONVENTIONAL REASONS WHY CLINICS ARE PERSISTENTLY ATTACKED

The common reasons given for why environmental clinics are attacked are the success that these clinics have had in the courts, the types of clients they represent, and the economic interests they target.¹⁰⁸ However, this Article suggests those explanations are not sufficiently robust, and puts forward two additional reasons; namely, that these attacks feed on the hardening hostility that the judicial branch feels toward granting certain types of citizens access to the courts, and the growing incivility of the legal profession. This incivility manifests itself in bullying behavior by lawyers and their clients, and feeds off the comparative economic insecurity of law students and clinic directors, which makes them more vulnerable to intimidation than larger, national environmental organizations.¹⁰⁹ Since the more conventional reasons for why clinics are attacked have been well covered,¹¹⁰ Part III of this Article focuses on these two novel explanations for why environmental clinics are in the cross-hairs of angry economic interest groups, concluding that both factors play a role in the current hostility toward clinics and are not easily abated.

A. Part and Parcel of Judicial Hostility Toward "Citizen" Access to the Courts

Suits by citizens authorized under various federal laws such as the Clean Water Act¹¹¹ or Endangered Species Act,¹¹² or more generally under the Administrative Procedure Act,¹¹³ have brought hordes of complainants into federal court objecting to the behavior of government agencies and the activities of private entities that violate

¹⁰⁸ See *supra* Part II (discussing some of these reasons).

¹⁰⁹ This second explanation owes much to the psychological literature on the behavior of bullies.

¹¹⁰ See *supra* note 7 and accompanying text (listing some of these articles).

¹¹¹ 33 U.S.C. § 1365 (2006).

¹¹² 16 U.S.C. § 1540(g) (2006).

¹¹³ 5 U.S.C. § 702 (2006).

these laws. Congress enacted these provisions granting citizens access to the courts to provide additional foot soldiers in the campaign to arrest and abate environmental degradation¹¹⁴ out of a somewhat cynical recognition that the federal or state government itself might be engaged in wrongful conduct.¹¹⁵ Because agencies are necessarily constrained by their budgets—and sometimes by political considerations—suits by ordinary citizens were intended to fill a void

¹¹⁴ See Marisa L. Ugalde, *The Future of Environmental Citizen Suits After* *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 8 ENVTL. LAW. 589, 594 (2001) (“Government agencies lack effective enforcement capabilities because they are short on resources, possess limited information, and are subject to political pressure. Moreover, the agency itself may be in violation of a regulation, or a special interest group that is closely aligned with the agency may be engaged in the wrongful conduct. In such situations the agency may be hesitant to bring an enforcement action.” (footnotes omitted)). See also Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL’Y F. 39, 43 (2001) (“[T]he citizen-suit device is ‘a mechanism for controlling unlawfully inadequate enforcement of the law.’” (quoting Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 165 (1992))); James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 5–7 (2003) (discussing the virtues of citizen suits, as they “force rule of law and compliance with national environmental protection objectives”; “hold unelected governmental agencies accountable [thereby motivating] governmental agencies charged with the responsibility to bring enforcement and abatement proceedings”; “help uphold bicameral lawmaking and tripartite governance and help effectuate often inscrutable congressional objectives They stem directly from the core of a representation reinforcing democracy”; “help assure laws enacted by Congress, . . . are ‘faithfully execute[d]’ by the Executive, with ‘[c]ontroversies’ resolved by a Judiciary”; and citizen suit authority “enhances public participation, helps educate law students, shapes public opinion, and encourages responsible environmental stewardship here and elsewhere, regardless of moral reference” (fourth and fifth alterations in original) (footnotes omitted)); Will Reisinger et al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?*, 20 DUKE ENVTL. L. & POL’Y F. 1, 61 (2010) (“[Citizen suit] provisions act as an insurance policy, as a way to ensure that environmental laws can be enforced even when state and federal governments fail to do so.”); Lucia A. Silecchia, *The Catalyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1, 2 (2004) (“Acknowledging the importance of citizen suits in giving teeth to environmental laws, and recognizing the often prohibitive costs of such litigation, Congress also included fee-shifting provisions in most environmental citizen suit statutes. These fee-shifting provisions change the so-called ‘American rule’ for attorney fees by allowing victorious citizen plaintiffs to recover their attorney fees from the losing party.” (footnote omitted)); Cassandra Stubbs, *Is the Environmental Citizen Suit Dead? An Examination of the Erosion of Standards of Justiciability for Environmental Citizen Suits*, 26 N.Y.U. REV. L. & SOC. CHANGE 77, 79 (2000) (“Citizen suits were an attractive solution to the problem created by the discrepancy between sweeping environmental laws and limited agency capacity for enforcement.”).

¹¹⁵ See Adler, *supra* note 114, at 44 (“Citizen suits also can operate to prevent political considerations within the executive department from limiting enforcement activities.”).

in the agencies' ability to implement environmental laws.¹¹⁶ Many of the rationales supporting citizen suits also apply to the need for citizen participation in agency decision-making.¹¹⁷

On the other hand, those who object to anything that opens the doors of the court to these types of lawsuits, or object to anything that encourages public participation in agency decision making, complain that these initiatives interfere with the ordinary workings of government—including the government's prerogative of choosing how it will spend its enforcement resources.¹¹⁸ These same critics

¹¹⁶ See Ugalde, *supra* note 114, at 612 (“[C]itizen suits fill a necessary void in the agencies' ability to fulfill their role in regulation of environmental legislation.”); see also Adler, *supra* note 114, at 43–44 (“Allowing for citizen suits theoretically fills the void [left by inadequate government resources] by deputizing countless private citizens and activist groups to act as private attorneys general without any public oversight. Centralized regulatory agencies are further limited in their ability to provide optimal enforcement of environmental regulations because they have limited information. The environmental impact of various activities will vary from place to place, and local knowledge and expertise is necessary to identify those environmental impacts which are of greatest concern. This sort of location-specific information is inherently beyond the reach of centralized regulatory agencies. Local citizen groups, on the other hand, may be in a better position to observe these effects and act accordingly.” (footnote omitted)); *id.* at 44 (endorsing the role of citizen suits in “see[ing] that important legislative purposes heralded in the halls of Congress are not lost or misdirected in the vast hallways of the federal bureaucracy.” (quoting Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971))); Robert L. Glicksman & Matthew R. Batzel, *Science, Politics, Law, and the Arc of the Clean Water Act: The Role of Assumptions in the Adoption of a Pollution Control Landmark*, 32 WASH. U. J.L. & POL'Y 99, 127 (2010) (citing S. REP. NO. 92-414, at 79 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3747) (acknowledging the “public service” citizens suits performed).

¹¹⁷ See Mihaly, *supra* note 15, at 160 (“Yet . . . insider staff and officials frequently need outsider citizen input to make them wise. . . . [I]n part because staff members are not privy to all information, and . . . good partnerships among citizens, experts and advocates can provide valuable new data and analysis. . . . [E]specially . . . in regimes where elected officials have values antithetic to good science and priorities heavily weighted towards the expressed positions of economically dominant stakeholders. In such environments, expert staff members are pressured to select among facts and approaches to reach predetermined conclusions.”). See also H.R. REP. NO. 92-911, at 134 (1972), quoted in Glicksman & Batzel, *supra* note 116, at 127 (explaining the role of citizen suits to enable plaintiffs to act as private attorneys general and noting that they “provide[d] an open door for those who have legitimate interests in the courts, and encourages more meaningful participation in the administrative processes.”).

¹¹⁸ Ugalde, *supra* note 114, at 612 n.145 (“[A]rguing that citizen groups seriously interfere with effective government regulatory action because the initiation of citizen suits removes the threat of an enforcement action, which is the principal coercive mechanism available to regulators[.]” *Id.* (citing Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. NEW ENG. L. REV. 311, 312–13 (1998))); see also *id.* (“[T]he initiation of citizen suits may result in over-enforcement of the law, diverting too many agency resources from other uses.” (citing A.H. Barnett & Timothy D. Terrell, *Economic Observations on Citizen Suit Provisions of*

contend that citizen suits are often filed for the tangential purpose of gaining publicity,¹¹⁹ and can have negative unintended effects.¹²⁰ Professor Jonathan Adler takes on the fundamental premise underlying citizen suits that increasing the capacity of the government to enforce laws through citizen suits is a “good,” saying:

Insofar as the environmental regulatory scheme is ill-equipped to address given environmental concerns, increasing the stringency of enforcement will do little, if anything, to advance ecological values. Insofar as detailed and complex regulatory provisions provide opportunities for special-interest rent-seeking, citizen suits can facilitate further exploitation outside of the legislative arena. Insofar as existing environmental programs embody mistaken priorities, citizen suits can amplify the improper emphases. And insofar as the existing regulatory regime is too rigid to allow for environmentally beneficial innovation, citizen suits threaten to ossify the process even more.¹²¹

He notes that while citizen suits allegedly address “free rider problems and the high costs of collective political action,” they do not

Environmental Legislation, 12 DUKE ENVTL. L. & POL'Y F. 1 (2001)); Adler, *supra* note 114, at 62 (“Optimal enforcement is nearly always less than complete enforcement. At some point, devoting resources to additional prosecutions will produce diminishing marginal returns. This is particularly true where, as in the environmental context, many violators have technically broken the law but have not caused any measurable harm.”); *id.* at 64 (“By increasing the potential costs associated with facility siting and upgrade, over-enforcement can forestall the environmental improvement that results from technological advance and economic development. . . . In addition, excessive enforcement of existing environmental rules can create perverse incentives to take ‘preventative’ action that actually entails the destruction or degradation of environmental resources.”).

¹¹⁹ See Ugalde, *supra* note 114, at 609 (“Citizen groups are often motivated by factors other than simply claiming victory, such as the political, media-related, and symbolic ramifications of litigation. The initiation of a lawsuit may be a strategic decision intended to garner publicity and to prompt political or agency action in a situation where the adjudication process would be unsuccessful.”).

¹²⁰ See May, *supra* note 114, at 22 (“Citizen enforcement suits also have the unintended dual effects offering the concurrent negative incentives for agencies (usually states) to roll back permit requirements [anti backsliding], and for polluters to race into the awaiting arms of regulators to negotiate judicial settlements to preclude citizen enforcement.”). Many of these same complaints are made against public participation in agency decision making. See Mihaly, *supra* note 15, at 160 (“Modern commentators have argued that public participation interferes with [government] expertise. Such public involvement, they contend, can be counterproductive to the operation of good government, especially in the environmental arena where, for example, lay perceptions of hazardous risk contravene good science, and repeated citizen litigations distorts EPA’s priorities.” (footnote omitted)).

¹²¹ Adler, *supra* note 114, at 57–58.

work that way.¹²² The individuals or groups who bring these suits are neither “public-spirited activists” concerned about local environmental problems nor “altruists.”¹²³ In fact, “national advocacy groups file the lion’s share of suits,” and the majority of them “are filed against the least significant sources.”¹²⁴ The result:

By removing any need for the consideration of actual environmental impacts, and driving down the costs of establishing defendant liability, the citizen-suit provisions encourage the filing of suits against vulnerable plaintiffs, irrespective of the environmental benefit [while] the prospect of large fines further facilitates rent extraction, through private settlements, again with little need to consider the environmental results.¹²⁵

According to Professor Adler, “[c]itizen-suit provisions create incentives for environmentalist plaintiffs to pursue their self-interest, in the form of settlements, remediation projects, and attorneys’ fees, or to pursue symbolic victories with other value.”¹²⁶ When the courts’ standing jurisprudence does not require that plaintiffs “have an actual environmental stake in the case at hand, there is little to prevent private plaintiffs from using citizen-suit provisions as a means of pursuing other agendas—from NIMBY opposition to development to economic rent-seeking or organizational empire-building.”¹²⁷

¹²² *Id.* at 45 (quoting Brief Amicus Curiae of Americans for the Environment in support of Petitioners at 1–2, *Friends of the Earth, Inc. v. Laidlaw Env’tl. Serv. (TOC), Inc.*, 528 U.S. 167 (2000) (No. 98-822), 1999 WL 311758 at *1–*2) (“‘It is a commonplace observation that the diffuse nature of environmental harms makes environmental interests relatively difficult to organize into an effective political force.’ . . . [T]hat ‘as a result of free rider problems and the high costs of collective political action, effective expression of the broad public interest in environmental protection faces major obstacles in the American political system.’ Citizen-suit provisions address this concern by enabling a small group of individuals to enforce environmental regulations directly without any concern for political constraints.” (footnotes omitted)).

¹²³ *Id.*

¹²⁴ *Id.* at 51.

¹²⁵ *Id.* See also *id.* at 57 (“[C]itizen suit[s] are] probably best understood as a Band-Aid superimposed on a system that can meet with only mixed success.” (quoting Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 165 (1992))); *id.* at 58 (criticizing citizen suits for “facilitat[ing] and encourag[ing] litigation over paperwork violations and permit exceedences, which may or may not impact environmental quality” and for failing to “provide any incentive to ferret out new and undetected violations. Why bother investigating potential environmental harm when a technical violation is sufficient to support summary judgment?” (footnote omitted)).

¹²⁶ *Id.* at 58.

¹²⁷ *Id.* at 61.

Many of these themes have found their way into the rhetorical statements of clinic opponents.¹²⁸ They also find resonance in the Supreme Court's jurisprudence erecting barriers to citizen access to the courts to protest environmental harm.¹²⁹ This jurisprudence has provided clinic opponents with a barrage of challenges to clinic lawsuits.

The Court has exhibited increasing hostility toward environmental lawsuits brought by individual citizens or citizen groups.¹³⁰ Courts frequently raise both constitutional and prudential barriers against environmentalist plaintiffs and have made it increasingly difficult for prevailing plaintiffs to earn attorneys' fees,¹³¹ despite the enactment

¹²⁸ See, e.g., LCA Memorandum, *supra* note 45 ("The LCA Board of Directors voted to actively engage the clinic by targeting Tulane itself, which gives cover to its out-of-state, student want-to-be lawyers and their job killing lawsuits." "Lawsuits filed by one of the law clinics have cost the state thousands of jobs and untold millions of dollars in tax revenues." "What is consistent about TELC's [Tulane Environmental Law Clinic] activities is a wanton disregard for the economic well being of the state. Louisiana's business community has been targeted in a number of ways . . ." "[When] the attack has centered on DEQ, the permitting time has been extended so that companies look elsewhere to make investments that must hit the window of economic opportunity squarely in order to clear return-on-investment hurdles. Tulane has learned very well that the power to delay permits is the power to destroy projects.").

¹²⁹ See generally Hope M. Babcock, *The Problem with Particularized Injury: The Disjuncture Between Broad-Based Environmental Harm and Standing Jurisprudence*, 25 J. LAND USE & ENVTL. L. 1 (2009) [hereinafter Babcock, *Problem with Particularized Injury*] (discussing jurisprudential barriers, particularly standing, to environmental lawsuits). See also Stubbs, *supra* note 114, at 79–81 (discussing the political origins of environmental citizen suits in the early 1980s in response to the Reagan administration's failure to enforce environmental laws).

¹³⁰ See May, *supra* note 114, at 4 ("Examining case development reveals citizen suits are more challenging to litigate than ever. Challenges abound, including statutory and common law preclusion, constitutional challenges such as standing, mootness, sovereign immunity and separation of powers, and remedies and attorney fees . . ."); see also Stubbs, *supra* note 114, at 81–83 (noting that the Court was initially very "generous" toward environmental cases brought under the Administrative Procedure Act, which "were decided in a context of judicial support for expansion of access to the courts for the purpose of enforcing public law" but that this "initial period of expansive interpretation of standing and jurisdiction for environmental and administrative review did not last. Over the past ten years, critics have accused the courts of instigating a 'backlash,' a 'severe blow to environmental activism,' and a 'slash and burn expedition through the law of environmental standing.'" (footnotes omitted)).

¹³¹ See, e.g., *Astrue v. Ratliff*, 130 S. Ct. 2521 (2010) (holding that attorneys' fees belong to the client, not the attorney); *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010) (limiting the use of lodestar calculations to enhance an attorney fee award to extraordinary circumstances); *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2158 (2010) (involving the Retirement Security Act, in which the Court allowed litigants to recover fees even when they are not prevailing parties if they achieve "some degree of success on the merits" beyond the "trivial" or a "purely procedural victor[y]" (alteration in

by Congress of 150 fee-shifting statutes.¹³² Professor Jim May notes that “[c]ase law demonstrates, if nothing else, that statutory shortcomings coupled with judicial ambivalence make for tough sledding for environmental citizen suit enthusiasts.”¹³³

The Court’s constitutional and prudential jurisdictional hurdles, especially the standing doctrine, have fundamentally altered the citizen suit.¹³⁴ “Today the environmental citizen plaintiff must have

original) (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 688, 694 (1983)); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001) (eliminating the use of the catalyst theory as a basis for awarding fees under the Fair Housing Act and the American with Disabilities Act); *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983) (advocating narrow interpretation of fee-shifting statutes because of sovereign immunity concerns); *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975) (articulating a presumption against expanding fee awards unless specifically authorized by Congress). See also Meredith Z. Maresca, *Employee Benefits—Attorneys’ Fees: Supreme Court Rules Parties Must Achieve “Some Success on Merits” to Receive Fees*, 78 U.S.L.W. 1753 (May 25, 2010) (discussing *Hardt* and that “[g]uided by its decision in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), the [C]ourt said that because nothing in the section showed that Congress meant to abandon the traditional ‘American rule’ that each party is responsible for its own attorneys’ fees unless a statute says otherwise, some degree of success on the merits was necessary for an award of fees”).

¹³² Silecchia, *supra* note 114, at 10.

¹³³ May, *supra* note 114, at 4. See also Peter Manus, *Our Environmental Rebels: An Average American Law Professor’s Perspective on Environmental Advocacy and the Law*, 40 NEW ENG. L. REV. 499, 514 (2006) (“There’s this issue, . . . whether an individual can actually sue the government if the government decides to ignore its NEPA-based responsibility to minimize its impacts on the environment. And without the threat of a lawsuit with a resounding punishment at its conclusion, . . . we’re back to Holmes’ ‘bad man’ calculus and the reality that NEPA has less clout than its upbeat list of policy goals might appear to provide. . . . ‘The lack of attention to NEPA’s policies speaks to the tendency of our society to devalue those provisions of law that are not enforceable through the judicial system.’ And in writing the NEPA statute but leaving it less than readily enforceable, Congress has not ignored the environment. To the contrary, Congress has addressed it, yet managed to leave it vulnerable to unredressable abuses.” (footnote omitted)).

¹³⁴ See May, *supra* note 114, at 11 (“Notice, preclusion, jurisdictional, constitutional and fee defenses, though not the only issues facing citizen suitors, are often preeminent.”). Some hurdles not addressed in this Article include the requirement in statutorily authorized citizen suits that plaintiffs allege an ongoing violation and that the government not be diligently prosecuting the violation. See Stubbs, *supra* note 114, at 86 (“[The effect of *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987) created] more litigation issues for defendants to raise (thereby prolonging litigation), for reducing the deterrent effects of the statute [CWA] by not imposing civil penalties on parties who had clearly violated the statute, and for decreasing incentives for industry to comply with the Clean Water Act.” (footnote omitted)); *id.* at 89 (“*Gwaltney* seems to have had the uniform effect of creating another layer of dispute in citizen suit litigation, but the differences among courts appear mainly to be technical variations.”). See also Reisinger et al., *supra* note 114, at 53 (“[C]ourts have placed citizen plaintiffs with the burden of proving that the state’s prosecution is not diligent. Courts have held that

the resources and capacity to extensively research and allege proof of a direct and personalized injury, that the injury is ongoing, and that the form of relief is recognized by the Supreme Court, even if Congress already statutorily recognizes the relief requested.”¹³⁵ Of the prudential doctrines, the most troublesome is separation of powers.¹³⁶ Its use by defendants in environmental litigation is increasing.¹³⁷ The

diligence will be presumed, and, where an agency has specifically addressed concerns of analogous citizen suit, ‘deference to an agency’s plan of attack is particularly favored.’” (quoting *Am. Canoe Ass’n v. City of Attalla*, No. 03-AR-0293-M, 2003 U.S. Dist. LEXIS 25057, at *6 (N.D. Ala. May 13, 2003)); *id.* at 3 (“The cooperative framework, which presupposes diligent and uniform state regulation, has broken down. State and federal enforcement budgets are being slashed, reducing government oversight and potentially allowing more violations of law to go unpunished. Moreover, political considerations—including interstate competition and pressure from industry to minimize regulation—threaten to further compromise the states’ ability to enforce the laws. As government enforcement becomes increasingly less reliable, citizen enforcement of environmental law is more necessary than ever.” (footnote omitted)).

¹³⁵ Stubbs, *supra* note 114, at 130 (noting that modern standing jurisprudence is a “change from generous jurisdictional requirements in the 1970s”); *see generally* Babcock, *Problem with Particularized Injury*, *supra* note 129 (discussing modern standing jurisprudence). *But see* Manus, *supra* note 133, at 518 (“It can be tough for environmentalists to swallow, but a good-sized portion of environmental law is all about circumventing the blunt fact that whales can’t sue. We must sue for them, and that means that either their injuries must translate into our own injuries or we must convince the law to recognize us as the whales’ legal protectors. But before the law can see things that way, the culture must see them that way.” (footnote omitted)).

¹³⁶ Another troublesome prudential doctrine is the political question doctrine. *See* Philip Weinberg, “*Political Questions*”: *An Invasive Species Infecting the Courts*, 19 DUKE ENVTL. L. & POL’Y F. 155, 157 (2008) (noting the test for whether there is a nonjusticiable political question embedded in a particular case is whether it involves issues “‘decided, or to be decided, by a political branch of government coequal with this Court,’ or leading to ‘embarrassment of our government abroad,’ or ‘policy determinations for which judicially manageable standards are lacking?’” (quoting *Baker v. Carr*, 369 U.S. 186, 226 (1962))). Weinberg’s article discusses the application of political question doctrine to environmental cases and shows the doctrine should not block courts from hearing these disputes. *See also id.* at 158 (“[T]he requirements of a nonjusticiable political question as ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion’” (second alteration in original) (quoting *Baker*, 369 U.S. at 217)); John Harrison, *The Relation Between Limitations on and Requirements of Article III Adjudication*, 95 CALIF. L. REV. 1367, 1375 (2007) (“[T]he fear that drives judicial reticence in political question cases is about second-guessing highly sensitive and discretionary decisions, even when those decisions are about or substantially constrained by legal principles.”); Martin H. Redish, *Judicial Review and the “Political Question”*, 79 NW. U. L. REV. 1031, 1033–39 (1984) (setting out the history, scope, and rationale for the doctrine).

¹³⁷ *See* May, *supra* note 114, at 37 (“Defendants are raising novel separation of powers defenses to citizen enforcement suits.”).

core concern implicit in this doctrine—and reflected in the many issues “that cluster about Article III” such as standing, mootness, and ripeness—is what Professor John Harrison calls “an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”¹³⁸

When an environmental plaintiff is denied access to the courts because of a jurisdictional defect in the case’s presentment, either for constitutional or prudential reasons, that usually means the case is over, as “[t]here is not necessarily another more concerned environmental plaintiff waiting to challenge a defendant’s conduct” after the first plaintiff’s suit has been dismissed.¹³⁹ When these jurisdictional barriers are added to the Court’s disinclination “to give deference to the legislature, analytic confusion in the lower courts, and normative decision making by judges,” citizen suit litigation, including those cases brought by environmental clinics, is all but hobbled.¹⁴⁰ The Court’s antagonistic demeanor toward citizen suits has an impact well beyond environmental litigation. “[I]t demonstrates general judicial hostility to all forms of nontraditional litigation,”¹⁴¹ what Professor Luban calls “progressive” litigation¹⁴²—the type of litigation typically brought by clinics.

¹³⁸ Harrison, *supra* note 136, at 1367 (“All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.” *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984))); *see also id.* at 1368 (explaining that the core of this offensive tactic is that “courts are off their turf,” when injuries are not sufficiently particularized or the issues raised in the dispute involve too much political discretion). *But see* Oliver A. Houck, *Standing on the Wrong Foot: A Case for Equal Protection*, 58 SYRACUSE L. REV. 1, 14 (2007) (“Far from violating the separation of powers, the [Professor Louis L.] Jaffe school sees citizen standing as vindicating that same separation. Courts are not making policies here. They are, instead, vindicating laws that have often been years in the making, forged in democratic debate and compromise, and now vulnerable to a kind of administrative repeal. No body of laws makes this case more apparent than environmental law. Not surprisingly, in no other body of law has standing played such a pivotal role.” (footnotes omitted)).

¹³⁹ Stubbs, *supra* note 114, at 131.

¹⁴⁰ *Id.* at 78 (“[F]ailure to give deference to the legislature, analytic confusion in the lower courts, and normative decision making by judges have all contributed [to] the hobbling of citizen suit litigation.”).

¹⁴¹ *Id.* at 131–32 (“Perhaps the most troubling aspect of the Supreme Court’s jurisprudence in environmental citizen suits is its demonstrated willingness to erode congressional power to define legal rights and remedies and to rely instead on its own normative decision making.”); *see also* Harrison, *supra* note 136, at 1371 (“[T]he standing

According to Professor Houck, the arguments particularly about citizen standing will continue because the elements of Article III standing “are not what the argument is really about. It is, instead, about equal access to justice.”¹⁴³ According to Professor Houck, environmental law stands at the crossroads of the debate over access to the courts.¹⁴⁴ Standing has become “the *causa bellae* of corporations, conservative scholars and business-sponsored public interest firms that related in no way with its values. In their view they were responding to a movement of a Rastafarian underclass of hippies and radicals or, alternatively, of upper class and out-of-touch elites.”¹⁴⁵

Under conventional case or controversy doctrine, their [private] financial interests will provide them the necessary ticket inside. For

doctrine is essentially negative. It is designed to keep private people from enforcing the duties that rest on others, including both the government itself and other private people, simply because those duties have been violated.”)

¹⁴² Luban, *supra* note 7, at 210 n.1 (defining the word “progressive” as meaning “left-of-center, or, more specifically, something like ‘socially and economically egalitarian in domestic affairs, and cosmopolitan in international affairs’”).

¹⁴³ Houck, *supra* note 138, at 2 (footnote omitted); *see also id.* at 19–20 (adding to standing “a wide range of defenses, including ripeness, mootness, private right of action and the political question doctrine” as well as constitutional challenges based “on the commerce clause, the dormant commerce clause, private property rights, federalism and preemption, all with the goal of re-barring the door.”); Reisinger et al., *supra* note 114, at 50–51 (“The denial of federal court as a venue for citizen suits . . . has several adverse effects for citizen litigants, each decreasing the potential for effective public enforcement of environmental laws.” These include the “[l]oss of [f]ee-shifting [o]pportunities” as states rarely have fee-shifting laws, which “removes an important incentive to bring suit;” “[l]ess [i]mpartial [d]ecision-making” as a result of states having elected judges thrusting “[l]ocal politics . . . into the center of environmental enforcement;” the fact that many states have their own version of sovereign immunity, which post-*Bragg* could mean that “the cloak of sovereign immunity could be used as a complete bar to citizen suit enforcement of federal environmental standards against recalcitrant state agencies.”). On the topic of sovereign immunity and the *Bragg* decision, *see generally* Hope M. Babcock, *The Effect of the United States Supreme Court’s Eleventh Amendment Jurisprudence on Clean Water Act Citizen Suits: Muddied Waters*, 83 OR. L. REV. 47 (2004).

¹⁴⁴ *See* Houck, *supra* note 138, at 41 (“Environmental law stands at the crossroads of a great debate at the heart of American governance. The debate is magnified by the number of people affected, the strength of their beliefs and the size of the impacts on both the public and private estate.”); *see also id.* at 20 (“The threshold and principal challenge, however, has been the standing of environmental plaintiffs to sue. Over the past three decades, of the twenty-seven Supreme Court opinions with a significant discussion of standing, one-third have arisen from environmental law. It is the principal battleground between public and private rights.” (footnote omitted)); *id.* at 15 (referring to the passage of environmental laws and saying “[never] has any body of law so broadly pitted public versus private interests in American life.”).

¹⁴⁵ *Id.* at 17–18 (footnote omitted).

environmental plaintiffs, it remains a case-by-case fight. If they lose, for failure to establish sufficient “injury,” or “causation,” or “redress,” one side of the public-private equation here drops out of court.¹⁴⁶

This result fits exactly with the strategy of clinic opponents, to de-lawyer one side of the debate.

It does not help that environmental law “seemed perversely targeted at private industry. . . . [And environmental] cases were also targeted at the federal agencies that were promoting and approving these same activities, agencies completely unaccustomed to the public eye, to say nothing of public challenge. The insult level was intense all around.”¹⁴⁷ Standing is a means by which the courts can keep the “mob” from “interfering with what America is really about: private business.”¹⁴⁸ According to Professor Houck, “what remains indelible is this world-view that fuses corporate enterprise with America, regards critics as enemies, and sees environmental law as the primary threat.”¹⁴⁹ Leading this “Rastafarian” mob of hippies and radicals are environmental clinics and their clients.¹⁵⁰

The Court’s fee-shifting decisions are also problematic for environmental plaintiffs, including environmental clinics.¹⁵¹ The Court’s holding in *Buckhannon Board & Care Home, Inc. v. West*

¹⁴⁶ *Id.* at 23 (footnote omitted). *But see* Manus, *supra* note 133, at 515 (“Hohfeld points out that this uncontrolled free-for-all of competing privileges is part of the law, and not simply a lawless void waiting to be filled. On the bottom line, we see that those who would create an environmental right are not working in a vacuum. They are working against an environmental anti-right that we’ve lived with for a long, long time.” (emphasis omitted)).

¹⁴⁷ Houck, *supra* note 138, at 16.

¹⁴⁸ *Id.* at 12. Houck views the Court’s standing jurisprudence as “a means by which courts grant particular private advocates privileged claims on the conduct of public policy.” *Id.* at 11 (quoting JEREMY RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* 64 (1989)). *See also id.* at 8 (“[T]he [standing] doctrine acts as a rough-justice gatekeeper What also emerges is that, under this test, members of the Court and judges below have exercised wide reign in accepting cases they favor and blocking those they do not, not on the merits but rather on grounds of standing.”); *id.* at 3 (“By overwhelming percentages, the same judges who deny citizen standing are those who reject substantive environmental claims across the board.”); *id.* at 9 (referring to the “accordion-like nature of the [standing] doctrine”).

¹⁴⁹ *Id.* at 18.

¹⁵⁰ *Id.* at 17.

¹⁵¹ *See* Luban, *supra* note 7, at 241 (“In more than half a dozen decisions over the past fifteen years, the U.S. Supreme Court has cut back on statutorily authorized attorneys’ fees given to prevailing parties in civil rights and environmental cases.”); Silecchia, *supra* note 114, at 5 (noting that the lack of judicial fee shifting can have a significant impact on the way in which environmental statutes are enforced).

*Virginia Department of Health & Human Resources*¹⁵² severely limits the use of the catalyst theory to enable the recovery of attorneys' fees to only those instances where a plaintiff's success is embodied in a court's decision. The Court's recent decisions in *Astrue v. Ratliff*¹⁵³ and *Perdue v. Kenny ex rel. Winn*¹⁵⁴ have made both the recovery of fees more difficult and the amount awarded smaller.¹⁵⁵ While recovery of attorneys' fees is important to public interest environmental plaintiffs,¹⁵⁶ an attorney fee award is crucial for an

¹⁵² 532 U.S. 598 (2001).

¹⁵³ 130 S. Ct. 2521 (2010).

¹⁵⁴ 130 S. Ct. 1662 (2010).

¹⁵⁵ See Silecchia, *supra* note 114, at 41–42 (“[N]early every court that has required a prevailing party as a prerequisite to fee recovery has applied *Buckhannon*'s judicial imprimatur test to reject catalyst claims.” (quoting Kyle A. Loring, Note, *The Catalyst Theory Meets the Supreme Court—Common Sense Takes a Vacation*, 43 B.C. L. REV. 973, 993 (2002))); *id.* at 40 (“*Buckhannon* was described as a case that ‘will probably become known as the most significant attorney’s fees decision of the generation.’” (quoting J. Douglas Klein, Note, *Does Buckhannon Apply? An Analysis of Judicial Application and Extension of the Supreme Court Decision Eighteen Months After and Beyond*, 13 DUKE ENVTL. L. & POL’Y F. 99, 100 (2002))). The exceptions have been courts that have interpreted statutory language awarding fees as appropriate, found in most environmental laws, to which courts continue to apply the catalyst theory because *Buckhannon* did not overrule *Ruckelshaus*. *Id.* at 13. See, e.g., *id.* at 56 (discussing *Loggerhead Turtle v. The Cnty. Council of Volusia Cnty.*, 307 F.3d 1318 (11th Cir. 2002), in which the Circuit Court of Appeals “argued for a narrow reading of *Buckhannon* . . . [because] (i) ‘there is clear evidence that Congress intended that a plaintiff whose suit furthers the goals of a “whenever . . . appropriate” statute be entitled to recover attorney fees;’ (ii) that the *Buckhannon* opinion ‘expressly addressed only the meaning of “prevailing party”’ and never mentioned *Ruckelshaus*, the landmark ‘whenever . . . appropriate’ case; and, finally, (iii) that the ESA [Endangered Species Act] provides for equitable relief only. Therefore, the court concluded that failing to allow for the catalyst rule would ‘cripple the citizen suit provision of the Endangered Species Act.’” (third and fourth alterations in original) (footnotes omitted)). Silecchia considers “[t]he most disturbing aspect of the post-*Buckhannon* landscape is that it has given rise to two vastly different standards for allocating fees. . . . [and] the gulf between these two standards is growing.” *Id.* at 61.

¹⁵⁶ Due to the expense and complexity of developing and proving environmental claims and the imbalance of resources between environmental plaintiffs and industrial or government defendants, attorneys' fees in environmental cases are particularly important to public interest organizations. See Ugalde, *supra* note 114, at 594 (“Fee-shifting provisions can be useful because environmental litigation is often expensive given the complex and technical matters at issue. This type of litigation also is costly because in many cases the defendants are the government or private industries that have substantial resources at their disposal.” (footnote omitted)); *id.* at 610 (“Environmental litigation is extremely costly and requires substantial resources rarely at the disposal of environmental public interest groups. It is inevitable, therefore, that environmental groups will exhibit reluctance to bring suit when faced with the prospect of expending hundreds or thousands of hours and dollars for litigation with little chance of financial return.” (footnote omitted)). The same imbalance in resources afflicts local environmentalists when they try to participate in agency proceedings. See also Mihaly, *supra* note 15, at 168 (“In most

environmental clinic dependent on outside funds for its continued existence. Since plaintiffs cannot recover money damages when they win an environmental case, often the only way that environmental attorneys can be reimbursed for their time and expenses is through court-awarded attorneys' fees and costs.¹⁵⁷ It is not hard to conclude that the Court's attorney fee decisions will "have a chilling effect on citizen suits because the high costs of litigation would preclude the initiation of suits."¹⁵⁸ They may actually freeze clinic litigation altogether.

Buckhannon has additional negative consequences for environmentalist plaintiffs and environmental clinics. By removing the possibility of attorneys' fees as an incentive for defendants to enter into settlements with their protagonists, *Buckhannon* assures

environmental conflicts, the existing stakeholders have become sophisticated and experienced actors. They anticipate citizen arguments and know how to counter them. . . . The media—assisted by the stakeholder proponents—will minimize citizen participation lacking in content, good presentation, and political acuity.”); *id.* at 169–70 (“The environmental effort has become dauntingly complex, an unavoidable result of its success. . . . [T]he environment is now everything and almost no area of human endeavor lies apart from its reach. . . . Thus, the human endeavor to protect the environment has emerged as one of the most complex social efforts ever under-taken. The resulting environmental regulation of necessity has become as complex as the regulated activity, and now regulation itself is seen as a mere part of the redesign of society necessary to create a sustainable future.” (footnote omitted)). Mihaly makes the interesting additional point that “the increasing complexity of environmental issues has made those situations where values dominate the proceedings ever more scarce. The environmental endeavor has transitioned from articulation of values and standards to an era of implementation, where complex policy, scientific, and economic concerns pervade almost all proceedings,” again disadvantaging all but the most environmentally and technically sophisticated citizen participants. *Id.* at 170.

¹⁵⁷ See Ugalde, *supra* note 114, at 595 (“[E]nvironmental litigation is unique in that the relief sought is often injunctive rather than monetary. Fee-shifting provisions, therefore, are a necessary means of reimbursing citizen plaintiffs for their work as private attorneys general.” (footnote omitted)).

¹⁵⁸ *Id.* at 596 (“Fee-shifting provisions in federal environmental statutes have been the foundation for bringing thousands of environmental cases.”); see also *id.* at 599 (discussing the importance of the “catalyst theory” under which attorneys won fee awards where “the lawsuit acted as a catalyst for the voluntary change of the wrongdoer’s conduct even if the suit did not result in a favorable judgment or settlement. . . . The catalyst theory encourages public interest litigation and is an incentive for public interest groups with limited funds to bring citizen suit actions.” (footnotes omitted)). Particularly troubling to Silecchia in *Buckhannon* was the Court’s dismissal as “speculative” and “unsupported by any empirical evidence” arguments that the catalyst theory would be necessary “to prevent defendants from unilaterally mooting an action before judgment in order to avoid an award of attorney’s fees” or to avoid “deter[ring] plaintiffs with meritorious but expensive cases from bringing suit.” Silecchia, *supra* note 114, at 37–38 (alteration in original) (footnote omitted).

that these cases will drag on longer, expending the cash-strapped resources of environmental clinics.¹⁵⁹ *Buckhannon* will also lessen the enthusiasm of defendants to enter into enforceable court-ordered settlements because attorneys' fees may be awarded in such circumstances.¹⁶⁰ *Buckhannon* additionally enables defendants to completely "avoid an award of attorney's fees as long as the compliance occurred prior to resolution by the courts" where a suit with a high likelihood of success prompts the defendant to cease its illegal behavior—usually at the last minute, and after the plaintiff has expended substantial resources.¹⁶¹

By limiting the circumstances in which attorneys' fees may be awarded to environmental clinics and the amount they may collect, the Court has stripped them of critical funds to enable their continued existence as congressionally mandated private attorneys general under

¹⁵⁹ Ugalde, *supra* note 114, at 608. *But see id.* at 612 ("[Before] *Buckhannon* the threat of litigation often prompted a quick settlement in order to avoid high litigation costs and an award of fees," noting that while "*Buckhannon* did not entirely eliminate settlement options, by restricting settlement to court-ordered consent decrees the Court has seriously impaired the motivation to settle." (footnote omitted)).

¹⁶⁰ *See id.* at 613 ("Defendants now will be reluctant to enter into court-sanctioned consent decrees because of the increased possibility of being subjected to an award of attorney's fees. The incentive to settle also is severely reduced in that the defendant may attempt to voluntarily cease the wrongful conduct in order to avoid fees altogether." (footnote omitted)). *See also* Silecchia, *supra* note 114, at 63–71 (discussing various policy implications raised by *Buckhannon's* abandonment of catalyst theory, such as whether it will affect parties' willingness to settle and/or influence the contents of those agreements; the enhanced ability of "defendants to moot cases deliberately on the eve of judgment to avoid paying fees," especially injunctions that "are much more easily mooted"; possibly drive interested public interest lawyers out of the field of environmental citizen suit litigation; assure only the filing of the strongest cases and thus reduce the potential "political, media-related, and symbolic ramifications of litigation").

¹⁶¹ Ugalde, *supra* note 114, at 609. Ugalde also notes that the decision in *Buckhannon* "potentially undermines the benefits presumed by environmentalists to arise from the Court's decision in *Friends of the Earth v. Laidlaw Environmental Services, Inc.* . . . The relaxed standing requirements of *Laidlaw* may be no more than a hollow victory, however, when viewed in light of the Court's decision in *Buckhannon*." *Id.* at 610 (footnotes omitted). *See also* Silecchia, *supra* note 114, at 66–67 ("[P]laintiff's attorneys say that [barring catalyst recovery] gives defendants an incentive to drive litigation along, requiring plaintiff's counsel to expend significant resources and then, at the eleventh hour when plaintiffs appear likely to prevail, unilaterally change their policies to moot the litigation and award a fee award." (second alteration in original) (quoting Marcia Coyle, *Fee Change is a Sea Change*, NAT'L L.J., June 11, 2001, at A1)); *id.* at 80 ("Ironically, the failure to correct the *Buckhannon* decision could lead to plaintiff's attorneys dragging out law suits beyond a point in time where the parties could reach a fair settlement, in order to insure that they meet the *Buckhannon* definition of 'prevailing party.' This will increase the costs of litigation and discourage settlement." (quoting Settlement Encouragement and Fairness Act, S. 1117, 108th Cong. (2003) (statement of Sen. Feingold))).

most environmental laws.¹⁶² These decisions have chilled lawsuits not only against private economic interests, but also against the government.¹⁶³ For those members of the Court who rail against the idea of citizens flooding courts with unmeritorious claims and interfering litigation destabilizing the status quo,¹⁶⁴ it is a natural step

¹⁶² Ugalde, *supra* note 114, at 611 (“[T]he [*Buckhannon*] Court strips many environmental public interest groups of the funds necessary to fulfill their role as private attorneys general.”); *see also id.* at 612 (“[A]llowing compensation to citizen groups through the award of fees furthers these goals by providing an incentive to continue to augment agency enforcement.”); Silecchia, *supra* note 114, at 39 (“[T]he dissent [in *Buckhannon*] painted a gloomy picture of the impact *Buckhannon* would have on citizen litigation generally. . . . [Warning] that by rejecting the catalyst theory, the majority would ‘impede access to court for the less well-heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general.’” (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 623 (Ginsburg, J., dissenting) (2001))).

¹⁶³ Ugalde, *supra* note 114, at 611 (“Due to the expected decreased enforcement from agencies and environmental public interest groups, potential violators are the ultimate beneficiaries of the elimination of the catalyst rule. Defendants may find it more advantageous economically to continue violating the law because of the reduced risk of a fees award. Additionally, even if enforcement actions are brought against them, defendants can avoid litigation costs simply by ceasing their behavior.”). *See also* May, *supra* note 114, at 10–11 (“[J]udicial trends show courts construing citizen suit notice requirements more strictly. . . . [J]udicial trends show less tolerance for citizen suits seeking agency compliance with mandatory duties (‘action forcing’ cases) absent a strong showing that the federal agency (usually EPA) failed entirely to perform a mandatory duty Congress specifically ordered accomplished by a date certain deadline. . . . [And] constitutional defenses continue to limit citizen suits. . . . Mootness continues to loom large.” (footnotes omitted)).

¹⁶⁴ These same concerns underlie the benefits of public participation in agency decision-making. *See* Mihaly, *supra* note 15, at 164–65 (stating that public participation in government decision-making improves society as it: “[i]mproves decisions by providing decision-makers with relevant and accurate information; [h]elps decision-makers gauge the nature and depth of public opinion; [i]ntroduces new concepts that staff or frequent participants may not advance; [i]nforms decision-makers of the substance, weight, significance and politics of stakeholder concerns in ways that staff cannot; [p]rovides an organizing device and political entrance vehicle for new stakeholders who, in turn, can reorder public priorities and advocate for new governing processes; [p]rovides a vehicle for public policy advocacy on the substantive issues which, in turn, may change the politics in question; . . . [e]nhances the depth and detail of news reporting on the subject, thus educating the general public; and [c]ounters corruption, collusion, and graft.”); *id.* at 165 (“Change to the underlying process is significant because it in turn may change the eventual outcome.”). A more serious concern is the growth of ecoterrorism. *See* Donna E. Correll, Note, *No Peace for the Greens: The Criminal Prosecution of Environmental Activists and the Threat of Organizational Liability*, 24 RUTGERS L.J. 773, 777 (1993) (“The aggressive tactics of the more militant environmental groups are causing alarm within law enforcement agencies. The Federal Bureau of Investigation’s Domestic Terrorism Unit has actively pursued the prosecution of environmental ‘terrorists.’”). One response has been “congressional legislation addressing ecotage, and a new policy of law enforcement priority for the prosecution of environmental activists.” *Id.* Pressure from

to render decisions that hamstring those efforts. A less salutary result for lower courts may be the chilling effect of those decisions on settling these cases, which will ensure continued expenditure not only of environmentalist plaintiffs' resources, but also those of the court.

Despite the hurdles placed in the way of environmental suits¹⁶⁵ and the vehemence of their detractors, they keep getting filed.¹⁶⁶ On average, per year, there have been "nearly 770 citizen 'actions' a year—aggregating notices (about 650), complaints (at least 70) and judicial consent orders (at least 50). Coupled with an average of 83 reported decisions annually, there are about 850 citizen suit 'legal events' every year."¹⁶⁷ Despite the Court's best efforts to stop them, these lawsuits

have transformed the environmental movement, and with it, society. [They] have secured compliance by myriad agencies and thousands of polluting facilities, diminished pounds of pollution produced by the billions, and protected hundreds of rare species and thousands of

timber industry lobbyists resulted in the passage of legislation criminalizing tree-spiking, and lobbyists "from several industries, including livestock, mining, and timber industries from the Pacific Northwest, have been especially aggressive in seeking to curtail environmental activism affecting industry in part by lobbying for tougher measures directed against ecoterrorism. . . . [R]outine media attention requested by environmentalists for demonstrations and events to publicize environmental issues has resulted in an unexpected law enforcement backlash. Consequently, tougher prosecution policies against environmental activism have also been more widely publicized. Such attention is calculated to have a chilling effect on specific 'direct-action' organizations, and perhaps on the environmental movement generally." *Id.* at 777–78.

¹⁶⁵ See Stubbs, *supra* note 114, at 79–80 ("Citizen suits are limited in multiple ways: they are only available for enforcement of administrative regulations and cannot be used to gain judicial review of related common law principles; monetary fines awarded must be paid to the U.S. Treasury; and the provisions do not establish private rights of action or per se negligence in private common law suits. . . . The plaintiffs cannot themselves receive cash payments from the defendants . . ." (footnotes omitted)). Stubbs' article also lists limitations, including the availability of preemption by government action, the jurisdictional requirements of a pre-filing notice letter warning the defendants and the government of the plaintiffs' intent to sue, that the violation be ongoing, and that the government not be diligently prosecuting the alleged violator.

¹⁶⁶ See May, *supra* note 114, at 47 ("As gravity is to Earth, environmental citizen suits are to environmental law, easily overlooked, but always there, tugging toward a hard surface.").

¹⁶⁷ *Id.* at 9. See also *id.* at 4–5 ("Since 1995, citizens have filed 426, or about one lawsuit a week, and have earned 315 compliance-forcing judicial consent orders, under the CWA and CAA alone. During the same period, under all environmental statutes, citizens have submitted more than 4,500 notices of intent to sue, including more than 500 and 4,000 against agencies and members of the regulated community, respectively. This is an astonishing pace over eight years of about two notices of intent to sue every business day, which easily outpaces EPA referrals for enforcement to the U.S. Department of Justice (DOJ).").

acres of ecologically important land. The foregone monetary value of citizen enforcement has conserved innumerable agency resources and saved taxpayers billions.¹⁶⁸

¹⁶⁸ *Id.* at 3–4 (footnotes omitted). May attributes a slight decline in the number of citizen suits being filed to many factors, including the constitutional, prudential, and statutory jurisdictional barriers citizens must scale. May also notes a palpable sense of patriotism and fair play among environmental organizations to give federal agencies more leeway to divert resources and attend to new priorities after September 11, 2001. *See id.* at 30–31 (“The number of agency forcing notices and cases has declined since 1995, and dramatically so since 1999. [The decline] is likely attributable to [the fact that] citizens have all but exhausted nondiscretionary duty citizen suits to enforce water quality requirements [T]he Bush Administration [was] more prone both to defend itself vigorously against citizen suits and to contest attorney fees in light of *Buckhannon*, making action-forcing litigation less attractive. . . . [I]t is more challenging to find courts sympathetic to environmental issues”); *see also id.* at 21–22 (explaining a recent decline in citizen enforcement actions as being due to “the energy and resources necessary to perfect a notice of intent to sue eclips[ing] those for preparing a civil complaint. The prospects of extensive preclusion, jurisdictional, standing, procedural and merits challenges may dissuade some from the pursuit. . . . [Also implicated is] the ascendancy of the Court’s Eleventh Amendment sovereign immunity jurisprudence mak[ing] citizen enforcement suits against states—who are often significant polluters that lack the resources or will to comply—less likely.” (footnote omitted)); *id.* at 9 (“Statistical trends, however, reveal an overall decline in citizen legal events since 1995, although the numbers are rebounding. Three factors likely contribute most significantly to the decline.” First, the difficulty, costs, and length of time its takes environmental plaintiffs to overcome “the statutory and constitutional architecture of environmental citizen suits,” often achieving results that are “either fleeting or dubious.” Second, the ambivalence of courts toward citizen suits is reflected in their granting deference to defendant administrative agencies. “Some [judges] are hostile to them, few know much about them, and fewer still are conversant with the myriad suite of statutory, common and constitutional law citizen suits occupy. Third, . . . many citizen litigators had misgivings about how the Court would resolve *Laidlaw*, and about associated aftershocks.” (footnotes omitted)); *id.* at 29 (“Courts are also loath to find EPA has a mandatory duty to enforce the law.”); *id.* at 30 (“The spoils of successful action forcing cases can be fleeting. Even after finding an agency has failed to meet a mandatory duty, courts limit relief solely to what the enabling statute specifically provides be done, and no more, no matter how dilatory or environmentally destructive the delay. Recent agency forcing cases show injunctive relief is usually limited.”). May also notes that despite what appears to be a “recent upward swing in citizen enforcement cases, . . . those against state and local governments are waning, possibly owing to the Supreme Court’s recent extensions of the degree of sovereign immunity states enjoy under the Eleventh Amendment” *Id.* at 21. In addition, May comments on the decline in agency referrals to the DOJ, as well as EPA initiated enforcement actions and judicially enforceable settlements. *Id.* at 41 (“[T]he total number (not just CWA and CAA) of environmental civil actions filed by the DOJ is down by 20%”). There has been “a stark decline” of judicially enforceable settlements in CWA and CAA enforcement cases: “a 40% decrease.” *Id.* at 41–42 (“[C]ivil penalties and SEP values EPA has recouped in the last five years are down by an eye-opening 62 and 70% respectively.”).

On the other hand, the sheer quantity of these lawsuits and their overall success¹⁶⁹ cannot help but strengthen the protestations of their opponents, including those who attack clinics for bringing such cases.

One may see reflected in the actions of the Court and in the rhetoric of those who oppose citizen suits how environmental clinics inherited all of the animosity toward environmentalist plaintiffs. In that sense, environmental clinics and their clients are indistinguishable from other plaintiffs who challenge industrial or governmental practices for being in nonconformance with environmental laws, except for the fact that the burdens created by this opposition are heavier for clinics without the resources of the wealthier environmental organizations to surmount them. The story could end here, a story about hostility toward public access to the courts, in which clinics play a minor role in challenging entrenched economic interests and the governmental status quo. But there may be another story to tell. This second story has its basis in the legal profession's problems with incivility, and centers on the aggressive, intimidating behavior clinic opponents—often lawyers or economic interests advised by lawyers—display toward clinicians and their students. This behavior feeds on anti-environmental rhetoric and on the Court's thinly veiled hostility toward environmental litigation and the lawyers who bring and try those cases. It is to this story that this Article now turns.

B. Clinic Opponents as Bullies

It may be no accident that lawyers “often play a prominent, and sometimes dominant, role in interfering in law school clinics”¹⁷⁰ despite “ethics rules and advisory ethics opinions urging the legal profession to make legal services available to all in need”¹⁷¹ After all, lawyers are merely “zealously” representing their clients' interests, which are under attack as a result of some environmental clinic's misguided sense of the illegality of their client's actions.

¹⁶⁹ *Id.* at 2 (“From 1978 to 1983, citizens averaged less than 100 notices of intent to sue a year, most of which were Clean Water Act (CWA) cases. By comparison, citizens averaged about 550 notices of intent to sue a year from 1995 through 2002, spread liberally throughout the nation's environmental laws.” (footnote omitted)); *see also id.* at 3 (“Since the first environmental citizen suit in 1970, and 880 more by 1988, citizens of all walks and pursuits, some with environmental interests, other economic, have filed more than 2,000 citizen suits.” (footnotes omitted)).

¹⁷⁰ Kuehn & Joy, *Ethics Critique*, *supra* note 8, at 1990.

¹⁷¹ *Id.* at 2022.

However, the behavior this section addresses is more than just “zealous representation,” however misguided some lawyers’ interpretation of that now defunct standard may be. The intimidation litigation tactics that some lawyers use against clinics go way beyond any interpretation of a lawyer’s representational duty to her client. This section of the Article seeks to understand what may happen to a lawyer when confronted by students who have not yet been admitted to the bar,¹⁷² let alone received their law degree. It may be that there is something vaguely demeaning and incipiently threatening to a lawyer’s sense of self-worth in those situations that incites bullying behavior, leading lawyers, who are feeling the economic stresses of a recession, to fall back on the intimidation tactics they learned in law school and brought with them into practice.¹⁷³ Alternatively, it may be something as simple as lawyers misconstruing their ethical duty toward their clients that encourages the incivility one finds today in the conduct of lawyers, which spills over into bullying behavior toward their legal opponents—in this case, clinical students.¹⁷⁴

There is no question in my mind that the tactics I have observed some lawyers use over my years as a clinical director fall within the definition of bullying. Although bullying is an “imprecise term with many subtypes and categories,” what I have observed is consistent with how the literature on bullying describes this type of antisocial behavior—the repeated use of “practices that are ‘directed deliberately or unconsciously, [to] cause humiliation, offence and distress, and that interfere with . . . performance and/or cause an unpleasant . . . environment.’”¹⁷⁵ One usually observes bullying when

¹⁷² See deNeve et al., *supra* note 10, at 540 (“These [business] groups seek to address situations they view as problematic, including: ‘students being empowered with all the rights of a fully qualified member of the Louisiana Bar;’ ‘. . . [expressing] legal views [that] are in direct conflict with business positions;’” (second and fourth alterations in original) (footnote omitted) (quoting letters from the Business Council of New Orleans and the chamber of commerce to Louisiana Supreme Court Chief Justice Calogero)).

¹⁷³ See Stephanie Francis Ward, *Immature Antics: Confront Lawyer Bullies Head On, Without Apology*, A.B.A. J., July 2004, at 32 (describing the experience of a Dallas Assistant District Attorney confronted by the bullying tactics of a defense attorney).

¹⁷⁴ Stephen J. Morse, *Crazy Reasons*, 10 J. CONTEMP. LEGAL ISSUES 189, 208 (1999) (“A cause is only a cause. It is not per se an excuse.”).

¹⁷⁵ Rebecca Flanagan, *Lucifer Goes to Law School: Towards Explaining and Minimizing Law Student Peer-to-Peer Harassment and Intimidation*, 47 WASHBURN L.J. 453, 455 (2007) (alterations in original) (footnote omitted); see also David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 480 (2000) (Workplace bullying is “the deliberate, hurtful and repeated mistreatment of a [t]arget . . . by a bully . . . that is driven

there is a power imbalance between the bully and her victim.¹⁷⁶ Often the bully is seeking to control an individual or a situation.¹⁷⁷

Sometimes the problem stems from a narcissistic personality, involving haughtiness and projecting blame for failure on others. Other times a problem may result from an attempt to preserve the bully's status quo, where the bully makes excuses for his own shortcomings or elevates her own sense of self-worth through intimidation and unwarranted unprofessional behavior toward others.¹⁷⁸

"Haunted by feelings of inadequacy, bullies 'lash out at others who threaten their presumption of superiority' by doing what they can to undermine them."¹⁷⁹

The targets of bullies are often "nice people" because bullies reason that nice people are unlikely "to confront or stop them."¹⁸⁰ Sometimes, the victims are "vulnerable people" who "present a nonthreatening profile by their words and actions."¹⁸¹ Other times, the victims are the "bold, best, and brightest."¹⁸² Critical to a bully's success is the low probability that there will be any immediate consequences from his/her aberrant behavior, either from the bully's

by the bully's desire to control [another person].' The term 'bullying' includes 'all types of mistreatment at work'" (alterations in original) (footnote omitted) (quoting GARY NAMIE & RUTH NAMIE, *BULLYPROOF YOURSELF AT WORK!* 17 (1999)). "Social psychologist and professor Loreleigh Keashly refers to workplace bullying as 'emotional abuse,' characterized by 'hostile verbal and nonverbal, nonphysical behaviors directed at a person(s) such that the target's sense of him/herself as a competent person and worker is negatively affected.'" *Id.* (quoting Loreleigh Keashly, *Emotional Abuse in the Workplace: Conceptual and Empirical Issues*, 1 J. EMOTIONAL ABUSE, no. 1, 1998, at 85, 87).

¹⁷⁶ See Yamada, *supra* note 175, at 480–81 ("Under Keashly's conceptualization, power imbalances between the bully and target usually are present.").

¹⁷⁷ See Jill Schachner Chanen, *Taking a Bully by the Horns: Victims of Control Freaks Don't Have to Suffer Silently*, A.B.A. J., Aug. 1999, at 90, 90 ("Bullying is characterized by a pattern of deliberate, hurtful and menacing behaviors. . . . 'At its heart, bullying is a control issue,' . . .").

¹⁷⁸ *Bullying in Law Firms: Hard to Define, Easy to Spot*, YOUR ABA (June 2007), <http://www.abanet.org/media/youraba/200706/article03.html> [hereinafter *Bullying in Law Firms*]. Bullies may also lack "the specific cognitive capacity to attribute mental states to oneself and others and to acknowledge that others have beliefs, desires, and intentions that are different from one's own." Flanagan, *supra* note 175, at 456 (citing Tunde Paal & Tamas Bereczkei, *Adult Theory of Mind, Cooperation, Machiavellianism: The Effect of Mindreading on Social Relations*, 43 PERSONALITY & INDIVIDUAL DIFFERENCES 541, 542 (2007)) (discussing the Theory of the Mind methodology for studying bullying).

¹⁷⁹ Yamada, *supra* note 175, at 482 (citing GARY NAMIE & RUTH NAMIE, *BULLYPROOF YOURSELF AT WORK!* 55 (1999)).

¹⁸⁰ *Id.* (citing NAMIE & NAMIE, *supra* note 179, at 51).

¹⁸¹ *Id.* (citing NAMIE & NAMIE, *supra* note 179, at 52–54).

¹⁸² *Id.* (citing NAMIE & NAMIE, *supra* note 179, at 54).

victim or by someone else in a position of authority, like a lawyer's senior partner or her firm's management committee, or a court.¹⁸³ Clinic students easily fit the victim and situational typology; rarely are there immediate consequences stemming from the bully's offensive behavior.

Since bullying behavior is not necessarily a matter of a flawed disposition, and bullies can be made as a result of situations that they have been in or currently find themselves in, it is worth examining the extent to which law schools may incubate bullying characteristics in their students and law firms may encourage the retention of those characteristics.¹⁸⁴

"Behaviors modeled by professors, intense competition among students for scarce jobs, and the relationship between class rank and employment" can encourage students to adopt bullying behavior in law school.¹⁸⁵ In addition, the litigation-oriented law school curriculum "may teach new lawyers that it is expected and desirable to be confrontational when a dispute arises, and that it is normal to go to court at the drop of a hat."¹⁸⁶ Instead of "encouraging students to resist the bad examples they see in practice, law school may have conditioned students to mimic them."¹⁸⁷

¹⁸³ See Flanagan, *supra* note 175, at 461 ("To rationalize bullying behaviors towards or by peers, a student needs to be assured there will be no immediate consequences for the anomalous behavior, either from the victim or by the law school administration. Victims view the acquiescence of authority figures as consent to the perpetrators' actions." (footnote omitted)).

¹⁸⁴ See *id.* at 457 (discussing the social psychology method of studying bullying, "[s]ocial psychology is the study of the situational, rather than the dispositional, factors that impact behavior"); *id.* ("Bullying is triadic, not dyadic, and the bystanders play as important a role as the bully and the victim in the creation of a bullying atmosphere.").

¹⁸⁵ *Id.* at 453; see also *id.* ("[B]ullying is the unnamed missing link in the causal chain between the law school curriculum and the prevalence of depression and substance abuse in law schools."); *id.* at 462 ("The intrinsic human need for self-direction is perverted by the need to compete; this can result in either excessive need to dominate others or learned helplessness.").

¹⁸⁶ Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367, 374 (1996) ("[T]he prevailing first year curriculum sends the message that litigation is the best way to solve legal disputes." *Id.* (internal quotations marks omitted)).

¹⁸⁷ *Id.* at 382. See *id.* at 375 ("Young lawyers file frivolous or socially counter-productive claims, . . . not because they had too much civil procedure in law school, but because that is what they see other lawyers doing. . . . '[I]f what [law students] see in . . . firms is inconsistent with the ideals taught in law school, the best academic effort may be for naught.'" (fourth and fifth alterations in original) (quoting American Bar Association, Report of Comm'n on Professionalism, 112 F.R.D. 243 (1986))).

Moreover, the lessons students learn in law school somehow change them.¹⁸⁸ Professor Rebecca Flanagan talks about how law school, particularly the maxim of “[l]earning to think like a lawyer,” dehumanizes law students.¹⁸⁹ “Dehumanization occurs when ‘others,’ such as law school classmates, are ‘thought not to possess the same feelings, thoughts, values, and purposes in life that we do.’”¹⁹⁰ According to Professor Flanagan, teaching students to think like a lawyer, what she calls “acquisition of legal logic,” divorces law students from their emotions, which not only removes “the passion that brought students to law school, but also alienates them from other values, such as compassion and sympathy. Without compassion or sympathy, peers are just hurdles to be removed, not colleagues in the journey to becoming lawyers.”¹⁹¹ In an academic environment that encourages students to pay attention only to facts and rules and not their feelings, it becomes relatively easy for them to “rationalize bullying behavior as a logical response to competition.”¹⁹² A “trust no one ethos” is also prevalent in law school, which contributes to students feeling alienated from their peers.¹⁹³

According to Professor Roger Schechter, the lesson students learn in law school “seems to be that pure, unadulterated self-interest, and hardball competition are the rule It follows, then, that the rule will stay the same at the law firm as well.”¹⁹⁴ Seen as a form of hazing,¹⁹⁵ faculty and law school administrators view bullying “as a necessary way to teach students what life will be like for them as

¹⁸⁸ See Flanagan, *supra* note 175, at 457 (“Something about the law school environment changes students, not just internally, as is the case for depression and substance abuse, but externally, in their relationships with friends, families, and colleagues.”).

¹⁸⁹ *Id.* at 460 (“Learning to ‘think like a lawyer’ is also dehumanizing. Thinking like a lawyer is the process of divorcing emotional responses to cases and facts and viewing them with a logical, critical eye focused on analysis.”).

¹⁹⁰ *Id.* (“Dehumanization is one of [two] central processes in the transformation of ordinary, normal people into indifferent or even wanton perpetrators of evil.” (alteration in original) (quoting PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* xii, 219 (2007))).

¹⁹¹ *Id.* at 465.

¹⁹² *Id.* (“In an environment that encourages students to look at facts and rules instead of feelings, students can rationalize bullying behavior as a logical response to competition.”).

¹⁹³ *Id.* at 464 (“A ‘trust no one’ ethos spreads among many students.”).

¹⁹⁴ Schechter, *supra* note 186, at 391.

¹⁹⁵ See Flanagan, *supra* note 175, at 464 (“These behaviors are often dismissed as ritual hazing that students need to endure to become part of the legal field.”).

practicing attorneys.”¹⁹⁶ Thus, “[b]ullying and intimidation become a hazing ritual initiating law students into the legal profession.”¹⁹⁷

Law firms today are beset with economic pressures brought on by a recession economy that did not exist a generation ago. This has led to increased competition among and within firms. Their exponential growth has resulted in the disappearance of client loyalty and loyalty toward one’s colleagues, the loss of time to mentor the behavior of young lawyers, and greater anonymity among firm lawyers.¹⁹⁸ Competition at all levels in the firm is encouraged and “[w]hile no workplaces are free from bullying . . . law firm environments are perfect breeding grounds for it. As individuals, lawyers tend to be ego-driven, aggressive and competitive. As workplaces, firms encourage competition among lawyers. Together, these characteristics make law firms bully-prone.”¹⁹⁹ Like law schools, bullying behavior both within and outside of the firm “is not only tolerated but transcends to being expected,” becoming an accepted part of the organization’s culture.²⁰⁰ It should be no surprise then that more than fifty percent of the lawyers who participated in a *National Law Journal* study described their colleagues as “obnoxious.”²⁰¹

“In a profession that prides itself on upholding the laws that govern society, rules can fly out the window when lawyers become

¹⁹⁶ *Id.* (“Professors may send the message that it is okay to bully in law school because they are ‘soften[ing] up’ students to be nonchalant about bullying when they see it in practice.” (alteration in original)).

¹⁹⁷ *Id.* at 465.

¹⁹⁸ See Allen K. Harris, *The Professionalism Crisis—The “Z” Words and Other Rambo Tactics: The Conference of Chief Justices’ Solution*, PROF. LAW., Winter 2001, at 1, 6 (“[M]ost observers would likely agree that there exists today a substantial civility deficit in the legal profession. . . . Numerous causes are likely: client expectations based upon frequent media portrayal of excessively aggressive lawyer styles, increased competition from growing numbers of attorneys, increasing law firm size with the resulting loss of senior partner mentoring and role-modeling, new emphasis on advertising, increased numbers of colleagues with resulting relative anonymity, and institutional incentives for aggressive utilization of procedural rules.” (first alteration in original) (footnote omitted) (quoting Brent E. Dickson & Julia Bunton Jackson, *Renewing Lawyer Civility*, 28 VAL. U. L. REV. 531, 532 (1994))).

¹⁹⁹ Chanen, *supra* note 177, at 91.

²⁰⁰ Flanagan, *supra* note 175, at 456.

²⁰¹ Orrin K. Ames III, *Concerns About the Lack of Professionalism: Root Causes Rather Than Symptoms Must Be Addressed*, 28 AM. J. TRIAL ADVOC. 531, 534 (2005) (“Justice O’Connor [noted] that ‘over 50% of the attorneys surveyed used the word ‘obnoxious’ to describe their colleagues.’” (quoting Sandra Day O’Connor, *Professionalism*, 76 WASH. U.L.Q. 5, 7 (1998))).

bullies.”²⁰² Although the problem of uncivil behavior has drawn the attention of local bar associations,²⁰³ judges,²⁰⁴ and academics,²⁰⁵ bullying behavior as a part of the problem has garnered less attention.²⁰⁶ Professor Schechter’s description of what he calls uncivil behavior—refusing to shake hands in court, name calling, shouting, use of vulgarities, and temper tantrums—are intimidation tactics that bear the mark of bullying.²⁰⁷ Sometimes referring to their tactics as hardball lawyering, lawyers view litigation as war and describe it in military terms.²⁰⁸ The lawyer’s goal is “to make life miserable” for opposing counsel, which is reflected in “[a] disdain for common courtesy and civility, assuming that they ill-befit the true warrior[; a]

²⁰² *Bullying in Law Firms*, *supra* note 178.

²⁰³ See Schechter, *supra* note 186, at 383 n.57 (reporting that civility codes have been adopted in Texas, Georgia, Kentucky, Los Angeles, New York, Cleveland, Nashville, and Little Rock).

²⁰⁴ See Harris, *supra* note 198, at 5–6 (reporting on the “hell order” issued by Oklahoma U.S. District Judge Wayne Alley criticizing discovery practices of two lawyers, as saying “[i]f there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes.” In addition to his ‘hell’ order, Judge Alley also issued his oft-quoted ‘dueling’ order in regard to lawyer incivility: ‘[The response] contains mutterings about bad faith and personal disputes between counsel. . . . I suppose counsel have a penumbral Constitutional right to regard each other as schmucks, but I know of no principle that justifies litigation pollution on account of their personal opinions. This case makes me lament the demise of duelling [sic]. I cannot order a duel, and thus achieve a salubrious reduction in the number of counsel to put up with.’ (second, third, and fourth alterations in original) (footnote omitted)).

²⁰⁵ See, e.g., Ames, *supra* note 201; Harris, *supra* note 198; Schechter, *supra* note 186.

²⁰⁶ Much to my surprise when I searched the legal literature for various combinations of lawyers and bullying, in addition to commentaries in professional journals, I found only three articles—Flanagan, *supra* note 175, Yamada, *supra* note 175, and Schechter, *supra* note 186—all of which I have relied on heavily in this part of the Article.

²⁰⁷ See Schechter, *supra* note 186, at 378–79 (“Lawyers are . . . increasingly prone to behave as combatants, refusing to extend common courtesies to one another. Sometimes called the ‘Rambo’ style of litigation, it includes such practices as refusing to return phone calls, grant routine extensions of deadlines, or even shake hands in court, along with more abrasive and hostile behaviors such as vulgarity and name calling, shouting, temper tantrums, or even occasional fisticuffs during deposition.” (footnotes omitted)). Schechter describes an example of the latter, reported by *Newsweek*, which occurred in “a Dallas office tower where a deposition was being taken in a big-ticket commercial case. Lawyers from two Manhattan firms . . . were arguing over a document when tempers flared. ‘Somebody pointed a finger,’ as the account in *Newsweek* put it, ‘another grabbed at a piece of paper, and suddenly three grown men in tailored suits were squirming around the floor, fists a-flying among the bodies.’” *Id.* at 379 n.44.

²⁰⁸ See *id.* at 375 n.30 (“[T]he adversary system is male-constructed and is an ‘intellectualized substitute for dueling or medieval jousting.’” (quoting Leslie Bender, *A Lawyer’s Primer on Feminist Theory*, 38 J. LEGAL EDUC. 3, 7 (1988))).

wondrous facility for manipulating facts and engaging in revisionist history[; and a] hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact-finding.”²⁰⁹ Unfortunately, uncivil behavior is not restricted to litigation; “[i]t infects all aspects of law practice including transactional, government, public sector, non-profit, and in-house corporate and other organizational practices.”²¹⁰

One excuse lawyers who practice these “hardball” intimidation tactics give is that they are merely being zealous advocates on behalf of their clients; thus, giving their behavior not only the imprimatur of their peers, but also of their profession.²¹¹ However, Model Rule of Professional Conduct 1.3 to “diligent[ly] represent[.]” one’s client has replaced Canon 7’s duty of “zealous representation.”²¹² The Model Rules deleted “zealous” from the Code perhaps because under the old standard some lawyers believed that their clients were served best “by the intimidation of opponents, a relentless refusal to accommodate, and the use of tactics that impose escalating expenses on an adversary,”²¹³ justifying unprofessional behavior and a “‘Rambo’ or

²⁰⁹ Harris, *supra* note 198, at 10.

²¹⁰ *Id.* at 12 (“Lack of professionalism and the need to cure it extend beyond litigation.” *Id.* (quoting WORKING GROUP ON LAWYER CONDUCT AND PROFESSIONALISM, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM (1999), available at <http://ccj.ncsc.dni.us/natplan/NatlActionPlan.html> (adopted by the Conference of Chief Justices))). See also Schecter, *supra* note 186, at 380 (“The problem of incivility also involves the bench. Lawyers complain of rude and arrogant judges whose inappropriate behavior is then mimicked by members of the local bar.”).

²¹¹ See Harris, *supra* note 198, at 5 (“Stephen L. Carter laments the apparent perception that in law, and in politics, the job of the hired professional requires incivility. . . . [and referring to a New York divorce lawyer as saying] in response to New York’s chief judge’s proposed rules of civility between opposing counsel . . . ‘I have never heard a client complain that his or her lawyer was rude.’”).

²¹² *Id.* at 10. See also *id.* at 12–13 (“Lawyers who rationalize ‘Rambo’ tactics as zealousness are, perhaps, confusing the former duty of ‘zealous representation,’ contained in the former Model Code of Professional Responsibility (Canon 7), with the current duty to represent one’s client diligently as set forth in the Model Rules of Professional Conduct (Rule 1.3).” Alternatively, “such lawyers may be erroneously relying on the wording in the Preamble to the Rules of Professional Conduct or the language in the Comment to Rule 1.3” which says lawyers “should ‘act with zeal.’”); *id.* at 13 (noting that the Preamble to Rule 1.3 states that “[a]s [an] advocate, a lawyer zealously asserts a client’s position under the rules of the adversary system” and that “a lawyer can be a zealous advocate on behalf of his client” as well as a “Comment to Rule 1.3 which provides that attorneys should ‘act with zeal.’”).

²¹³ *Id.* at 5 (“Some [lawyers] perceive abusive conduct as gaining new adherence cloaked in the mantle of forceful advocacy.” (quoting Richard A. Gilbert, *Standards of Professional Courtesy*, 1 HCBA LAWYER No. 7, 30 (June/July, 1991))); *id.* at 12 (“[T]here is a causal connection between incivility in the legal profession and zealous

‘win at all costs,’ attitude.”²¹⁴ Lawyers may also be relying too heavily on ethical rules to fulfill their professional obligations.²¹⁵ But, a lawyer’s professional obligations encompass “what is more broadly expected of them, both by the public and by the best traditions of the legal profession itself.”²¹⁶ Uncivil behavior and bullying tactics do not comport with either expectation, let alone any sense of what it is to be a “professional.”²¹⁷

The extent to which lawyers trained as bullies in the use of intimidation tactics are fueling attacks on environmental clinics requires empirical demonstration, which is beyond the scope of this Article. It is only a theory, but perhaps an intriguing one. Environmental clinical directors and students fit the profile of victims of bullying, and their attackers that of schoolyard bullies, picking on their weaker and more vulnerable opponents. Their tactics come straight from the schoolyard—yelling at, threatening, and demeaning their victims—and because they are lawyers, instead of a stick or their fists, they use their skills to abuse the legal process to drive their

advocacy. . . . Sadly, among all too many attorneys today, zealous advocacy is not viewed so much as an ethical responsibility as it is a weapon to use to club opponents.” (second alteration in original) (internal quotation marks omitted)); *see also* Luban, *supra* note 7, at 219 (“[Instead of having an adversarial system of litigation that maximizes] high-quality input, our adversary system of litigation builds in a principle of zeal that requires lawyers to hide the ball.”).

²¹⁴ Harris, *supra* note 198, at 10 (quoting an Illinois circuit judge, “Zealous advocacy is the buzz word which is squeezing decency and civility out of the law profession. Zealous advocacy is the doctrine which excuses, without apology, outrageous and unconscionable conduct, so long as it is *done ostensibly for a client, and, of course, for a price*” (emphasis in original)).

²¹⁵ *See id.* at 7 (“[O]ver reliance on lawyer ethical codes as the ‘complete fulfillment of legal ethics’ or as the standard lawyers should aspire to, is probably a more accurate, fundamental cause of the malaise in legal professionalism.” (footnote omitted)).

²¹⁶ *Id.* (distinguishing between Rules of Professional Conduct or other ethical rules and “professionalism,” and also saying “It is easy . . . to confuse compliance with the rules with being moral and . . . minimally acceptable conduct with acting as a professional.” (alterations in original) (internal quotation marks omitted)).

²¹⁷ Unfortunately, lawyer misconduct has a broader impact than just on its victims. *See id.* at 6 (identifying as among the impacts of lawyer misconduct on interests larger than clients and lawyers “(1) the influence of the law as an institution with a critical role in a democratic society; (2) the cost of administering the justice system; (3) the impact that the efficiency of the legal system has on society as a whole; and (4) the future of the privilege, often taken for granted, of lawyer self-regulation”). *See also id.* at 5 (quoting Richard A. Gilbert, former chairperson of the Hillsborough County Association’s Profession Conduct Committee as saying “Many believe that relations between lawyers have so deteriorated that our profession nears a crisis—one that not only implicates how we deal with each other but threatens our usefulness to society, the ability of our clients to bear the cost of our work, and the essential values that mark us as professionals.”).

antagonists from court. At minimum, these antics are a distraction from the hard work facing environmental clinics; at maximum, they may undermine the psychological toughness of clinics to face off against these bullies, leading to avoidance rather than unpleasant confrontations. They may also have a scarring effect on students, dissuading them from pursuing a career in litigation, especially public interest litigation. When added to third-party campaigns to defund clinics or otherwise curtail their practice and the Court's hostility toward environmental citizen suits, these intimidation practices may be the final factor driving clinics away from certain cases.

These explanations for the continuing attacks on clinics do not lend themselves to easy solutions as they stem either from the current conservative Court's antagonism toward opening courts to environmental litigants or from the bullying behavior of lawyers. The Court's antagonism has fed anti-citizen suit rhetoric, which has been directed at environmental clinics, and has resulted in decisions that offer defendant attorneys an array of delaying and debilitating procedural maneuvers with which to harass their clinical opponents and drive them from court. The incipient bully in lawyers, nourished by law schools and firms, finds in the vulnerability of clinical directors and students tempting targets for intimidating practices unchecked by a misguided sense of the lawyer's ethical duties toward her clients. Although efforts are underway to reform the curriculum of law schools to make it less litigation oriented, changing law school culture to make it less of a breeding ground for bullies, as well as increasing the oversight of the professional behavior of lawyers through bar civility codes, is akin to turning an aircraft carrier around. The overwhelming momentum toward bullying behavior driven by a highly competitive recession economy and the successful deployment of bullying tactics to advance in law school and in private practice means that change will not come soon or easily.

One possible approach to bullying behavior is to make clinics less vulnerable to intimidation tactics by making their directors more secure in their jobs. This could be done by granting them tenure or long-term contracts, and by teaching clinicians and students how to respond to these attacks,²¹⁸ including by filing complaints with the

²¹⁸ See, e.g., *Bullying in Law Firms*, *supra* note 178 (describing proactive measures that can be taken in law firms to reduce bullying); Flanagan, *supra* note 175, at 468 (suggesting changes in law schools to reduce the "systemic failures that give rise to bullies"); accord Chanen, *supra* note 177, at 91 (suggesting proactive steps for victims of bullying to take,

local bar. An approach to judicial hostility is to use other branches of government, negotiation, grassroots organizing, and the press for resolving environmental disputes.²¹⁹ However, none of these approaches guarantees that individual attacks on environmental clinics will end or that those attacks will not be sufficiently successful to warrant their repetition elsewhere.

IV CONCLUSION

There exists a decades-long phenomenon of attacks on environmental clinics despite their professional, pedagogical, and public benefits. There are two particularly intractable, intertwined reasons for these attacks—namely, judicial hostility toward opening the courts to the types of cases clinics bring and the emergence of a new type of lawyer, whose response to the increasing economic competitiveness of the legal profession is to engage in intimidation tactics, finding easy targets in environmental clinicians and students. Reforming the behavior of these lawyers is no easier than making courts more welcoming toward the types of cases environmental clinics file; both verge on the impossible. Instead, the solution may be to harden the targets to be less vulnerable and to seek places other than the courts to resolve environmental disputes. However, neither of these solutions gets to the root cause of the problem; both seek to solve it by avoidance or deflection. By understanding how judicial hostility toward the type of cases clinics bring and how the bullying nature of opposing counsel contributes to the attacks on clinics' continued viability, clinics may be able to come to solutions that are more tractable and appealing, as well as develop defenses to ensure their sustained viability.

including “[d]on’t [t]ake [i]t [p]ersonally”); Schecter, *supra* note 186, at 383, 393–94 (suggesting teaching of civility in law schools and other curricular changes).

²¹⁹ See Mihaly, *supra* note 15, at 167–68 (“The decision-maker can tolerate using testimony, comments or other normal inputs to the proceeding to move decisions within a defined, if unexpressed range of possible outcomes; but if the desired outcome lies outside that range, the participants must alter the political landscape through a sophisticated political and public relations advocacy campaigns . . .”). *But see* Manus, *supra* note 133, at 500 (“It might be cynical to dismiss all environmental sentiment as a recurring fad that waxes and wanes and sometimes disappears altogether, more or less the sideburns of the social science world. It is probably the case, however, that the great majority of us persist in relegating environmental values to the world of politics, where ‘the environmental problem’ tends to knock around on the jumble table of hot-button issues along with classroom prayer, funding for the arts, and TV violence.”).

