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Southern Christian: A Call for Extra-Constitutional Remedies, Legal Clinical Education, and Social Justice

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SOUTHERN CHRISTIAN: A CALL FOR EXTRA-CONSTITUTIONAL REMEDIES, LEGAL CLINICAL EDUCATION, AND SOCIAL JUSTICE

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INTRODUCTION

> The aim of the law clinics and the dedication of their staffs and students are indeed laudable. They should be commended for their enthusiasm, hard work, and willingness to devote time and effort toward altruistic endeavors. The [district court] recognizes the pronounced degree of anger, angst, and frustration they are experiencing as a result of [the Louisiana Supreme Court's] alteration in the [student] practice rules. To [the staff and students of law clinics], such a change appears unfair. However, unfairness does not always automatically rise to the level of unconstitutionality. Indeed, it rarely does.[1]

In July 1999, the District Court for the Eastern District of Louisiana granted a defendant's motion to dismiss a plaintiff's complaint for failure to state a claim upon which relief could be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and for lack of standing.[2] *Southern Christian Leadership Conference, Louisiana Chapter, et al. v. Supreme Court of the State of Louisiana* held that none of the plaintiff-constituencies stated a claim upon which the court could grant relief when the plaintiffs claimed that the Louisiana Supreme Court's amendment to the State's student practice rule violated rights guaranteed by the First and Fourteenth Amendments to the United States Constitu-

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1. Southern Christian Leadership Conference, La. Chapter, et al. v. Sup. Ct. of La., 61 F. Supp. 2d 499, 513 (E.D. La. 1999) [hereinafter *Southern Christian*].

2. *See id.* at 501.

tion.[3] The district court acknowledged that the movant's burden for a 12(b)(6) motion was heavy.[4] Nevertheless, the court found the plaintiffs' complaint failed to set forth deprivation of any protected interest because "[n]onlawyers have no constitutional or legal right to represent individuals or organizations in courts or before administrative tribunals."[5]

Southern Christian teaches a couple of very important lessons. First, the United States Constitution is not the ultimate arbiter of what is fair. Instead, teachers, students, and citizens living in a society dominated by law, politics, and economics, must strive to utilize extra-constitutional means for achieving their laudable goals. *Southern Christian* is a stark reminder that while the American legal system often protects those behaviors and social institutions that are desirable, merely because a behavior or social institution is desirable does not mean that it gains the law's protection. Some things are beyond its scope. Second, *Southern Christian* highlights the success that law school clinical programs can have in meeting the educational needs of law students, as well as the legal needs of underserved communities. It provides a springboard to consider whether, perhaps, law schools across the country ought to strengthen, if not mandate, clinical legal programs in their curriculum. These lessons are understood only after careful examination of the *Southern Christian* opinion and a structured review of what clinical legal programs have to offer indigent clients, students of the law, and society at large.

In pursuit of this end, this Comment describes the facts and circumstances that prompted the plaintiffs to bring suit in *Southern Christian.* Each of the plaintiff-constituencies' claims is examined in an effort to show that the district court's opinion was a proper application of constitutional law. Despite the court's holding, there are multiple solutions that the plaintiff-constituencies may pursue to achieve their ends in lieu of further appeal.

Moving away from the specific circumstance in *Southern Christian,* Part III of this Comment elaborates on the role of legal clinics in today's society; explaining how clinical programs have developed over time, can serve low-income clients, and can teach students about career opportunities in the legal profession. Part III ends by arguing that clinical programs, by creating an opportunity to serve underrepresented constituencies, benefit society at large and all persons in the legal profession.

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3. *See id.*
4. *See id.* at 513.
5. *Id.*

Ultimately, this Comment concludes that law schools across the country should re-evaluate their current curriculum and consider expanding current clinical programs, perhaps even to the point of instituting clinical requirements for their students. *Southern Christian* is not a barrier to the pursuit of social justice; rather, the opinion is a call to action, a call to move beyond the narrow constitutional constructs of what ought to exist, and a call to improve legal education.

I. *SOUTHERN CHRISTIAN*: IMPETUS TO THINK OUTSIDE THE BOX

Southern Christian raises many issues for teachers, students, and practitioners of the law, as well as for an ordered society, whose continued existence depends on a base guarantee of social justice for its people. Ought there exist restrictions governing the practice of law by students who are not licensed practitioners? If so, how ought the courts and legislature promulgate these restrictions? Which constitutional rights, if any, attach in these circumstances?

A. *The Facts*

The case of *Southern Christian* provides a canvas upon which to flesh out potential answers to these questions. Like many other states,[6] the Louisiana Supreme Court has adopted a student practice rule to allow for unlicensed law students to assist selected clients with their legal cases; Rule XX is entitled "Limited Participation of Law Students in Trial Work."[7] The rule is divided into many sections; sections 1, 4, and 5 provide the main source of debate in this case.

Section 1 stands for three propositions. First, it is primarily the responsibility of the "bench and bar" to supply legal services to the public at large, including those persons who are unable to afford such services. Second, to assist in that task, the Louisiana court adopted Rule XX, allowing law students some ability to perform legal services. Third, Rule XX was also intended to "*encourage law schools* to provide clinical instruction in trial work of various kinds."[8] Originally, the rule permitted eligible law students to represent the State, its subdivisions, or any indigent person; the Louisiana Supreme Court, however, subsequently

6. See David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507, 1546–54 (1998) for a list of citations to student practice rules of individual states and a summary of the key features of such rules.

7. *Southern Christian*, 61 F. Supp. 2d at 501 (citing LA. SUP. CT. R. XX).

8. *Id.* (emphasis added).

amended the rule to include indigent community organizations among the potential clients that students could represent.[9]

The controversy in *Southern Christian* arose when the Louisiana Supreme Court amended the rule further. The court set a standard by which to determine whether a potential client qualifies as "indigent"; section 4 allows representation of any "individual or family unit whose annual income does not exceed 200% of the federal poverty guidelines established by the Department of Health and Human Services."[10] This standard, however, does not apply when the court finds that a client ought to qualify for assistance from the clinic and so appoints or refers the client to the clinic.[11]

Section 5 of the amended rule requires that indigent community organizations certify, in writing, the inability to pay for legal services; such writing is subject to inspection by the Louisiana Supreme Court.[12] The amended rule sets forth two additional requirements for a community organization to qualify as indigent. First, at least 51% of the organization's members must be eligible for legal assistance under section 4.[13] Second, the court also requires the organization to provide information to the staff of the clinic that shows the organization "lacks, and has no practical means of obtaining, funds to retain private counsel."[14]

The enhanced restriction upon indigent community organizations would ultimately cast a pall on the amendments. In fact, these amendments were imposed after the success of one community organization, with the assistance of a legal clinic organized at Tulane Law School, in preventing a chemical facility from locating in its area.[15] Tulane Environmental Law Clinic ("T.E.L.C.") represented St. James Citizens for Jobs & the Environment ("St. James") in an effort to prevent Shintech Corporation from constructing a chemical facility in the area.[16] The community group, St. James, opposed Shintech Corporation's proposed location for two reasons. First, the facilities posed risks to the health of local inhabitants, as well as to the environment. Second, the town was already supporting a disproportionate share of chemical facilities that posed similar environmental and

9. *See id.*
10. *Id.* at 502.
11. *See id.*
12. *See id.*
13. *See id.*
14. *Id.*
15. *See id.* at 501.
16. *See id.*

health risks.[17] T.E.L.C. filed objections with the Environmental Protection Agency, as well as to the courts arguing that air permits granted by the Louisiana Department of Environmental Quality ("L.D.E.Q.") violated a Presidential Executive Order on environmental justice, as well as Title VI of the Civil Rights Act of 1964.[18] Subsequently, Shintech Corporation located elsewhere.[19]

The plaintiffs in *Southern Christian* alleged that business and political leaders, dissatisfied with a loss of business revenue, exerted pressure on Tulane University, as well as on the Louisiana Supreme Court to tighten regulation on student practice.[20] Whether this casts a pall upon the Louisiana Supreme Court's decision to amend the student practice rule is open to debate.[21]

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17. *See id. See also* Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235, 243 (1999) (explaining that the "location for the proposed plant was an area with eleven existing chemical plants and over 130 other industrial plants known as 'Cancer Alley,' a predominantly African-American, lower-income community").

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.* Judge Fallon, in dicta, admitted "in Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary." *Southern Christian*, 61 F. Supp. 2d at 513. See *also* Joy, *supra* note 17, at 240, where the author asserts that "[t]he amendments to the student practice rule were triggered by business groups and politicians unhappy with the successful legal work of clinical law students and faculty at the Tulane Environmental Law Clinic (TELC)." The author further asserts that the business and political constituencies utilized extralegal remedies to effectuate their goals; "[t]he strategy that ultimately proved most effective was direct lobbying of Louisiana Supreme Court justices during a judicial campaign year by business groups and politicians, many of whom had supported the justices during their previous campaigns." *But see* Sam A. LeBlanc III, *Debate Over the Law Clinic Practice Rule: Redux*, 74 TUL. L. REV. 219, 224 (1999). The author stated that while the Shintech matter may have been a proximate cause for the amendment to the practice rules, it was not the sole cause:

> Other activities of the TELC over the course of many years provided substantial fuel for the eventual fire. For instance, law clinic practitioners had been involved in objecting to a number of facilities being expanded in the state, had lobbied on the issue of an environmental 'scoreboard' as a prerequisite for the industrial tax exemption historically given to business to encourage capital development in the state, and fought against planned infrastructure improvements, such as the Industrial Canal Locks, for many years. The bases for the objections or positions were perceived by many to be merely pretextual. The organizations represented by the TELC were perceived as sham organizations created strictly for the purpose of opposing projects or as local organizations affiliated with national organizations that could well afford to pay for legal representation.

Id.

Possible economic and political motivations aside, the central issue before the Louisiana District Court was whether the claimants had any grounds upon which to sustain a claim that the amendments to the practice rule violated provisions of the First or Fourteenth Amendments to the United States Constitution.

B. *The Legal Questions*

Plaintiffs asserted eight specific bases for relief.[22] The district court's opinion tackled the claims of each plaintiff-constituency in turn. There were four constituencies including clients of T.E.L.C., a donor of financial support to T.E.L.C., the professors affiliated with T.E.L.C., and the students who participated in T.E.L.C.

1. The Client-Plaintiffs

Ten community organizations claimed that the new clinic regulations deprived them of the ability to speak, associate, and petition the government freely and that the disclosure requirements infringed upon their right to collective activity because such disclosure had the tendency to expose their members to retaliation, thereby creating a chilling effect upon a member's desired association.[23] "In essence, the client-plaintiffs' complaint [was] that the manner in which Rule XX constrict[ed] the operation of law clinics interfer[ed] with [the community organizations'] ability to exercise their constitutional rights in a legal forum."[24] The community organizations' argument rested upon the fact that they could not express their concerns in a legal forum without representation by counsel, which was limited by Rule XX.[25]

The district court then faced the initial question of whether, in a civil context, a right to be represented by counsel attached. The district court reiterated that "no such right [to counsel] exists [for the community organizations] in civil cases."[26]

In an effort to support their claim, the plaintiffs relied upon the principle set forth in *In re Primus*.[27] Namely, "representation of public interest groups organized for the purpose of collective

22. *See Southern Christian*, 61 F. Supp. 2d at 503.
23. *See id.* at 506.
24. *Id.* at 507.
25. *See id.*
26. *Id.* at 506 (citing Bass v. Perrin, 170 F.3d 1312 (11th Cir. 1999); United States v. Sardone, 94 F.2d 1233 (9th Cir. 1996); Lassiter v. Dep't of Soc. Servs. of Durham County, 452 U.S. 18 (1981)).
27. 436 U.S. 412 (1978).

political expression is amenable to First Amendment protection."[28] *In re Primus* held that a First Amendment right attached when an attorney advised a lay person of her legal rights and subsequently sent such lay person notice that free legal assistance was available from a nonprofit organization, with which the attorney was affiliated.[29]

Just as the rule limiting the attorney's solicitation of an indigent client in *In re Primus* fell under First Amendment protections, perhaps the disclosure requirements now levied on the community organizations ought also to fall under First Amendment protections, such that the restrictions must cede to First Amendment rights of association. In both instances, a party was facing a legitimate regulation: limited solicitation by attorneys and limited disclosure requirements for clinic participation. And in both instances, the moving parties sought to have those requirements cede to broader First Amendment rights of association.

The key distinguishing feature between the two situations, however, is the posture of the parties. *In re Primus* dealt with a licensed attorney approaching potential clients. The adversarial legal system is premised on rights of association between licensed attorneys and clients. In *Southern Christian*, however, the district court dealt with unlicensed law students forming representational relationships with clients. Unlicensed law students have no associational rights in a legal forum except for those granted by a state court's discretion and guidance.[30]

In fact, *In re Primus* supports the district court's opinion. The holding of *In re Primus* assured that a licensed attorney was able to associate with indigent clients. Similarly, Rule XX allows licensed attorneys in the clinical programs to solicit and exercise First Amendment associational rights with any indigent client, should they so choose.

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28. *Southern Christian*, 61 F. Supp. 2d at 507 (discussing the plaintiffs' reliance on *In re* Primus, 436 U.S. 412 (1978) and NAACP v. Button, 371 U.S. 415 (1963)).

29. *In re* Primus, 436 U.S. at 421.

30. *See* LeBlanc III, *supra* note 21, at 231. The author explains that one of the most important questions presented in *Southern Christian* is fundamental: who ought to be eligible to provide clients with legal assistance? The author asserted that in "a day and age when anybody can do anything, this might seem to be profoundly irrelevant. On the other hand, to individuals who seriously respect the law, it is [an] essential [inquiry]." *Id.*

2. The Donor-Plaintiffs

Also relying on First Amendment freedoms, a donor to T.E.L.C. claimed that Rule XX impinged his right to "express and advance his beliefs."[31] The district court noted that the donor's position "seemed to be that the burden at issue was not the imposition of a particular spending limit, but the way in which Rule XX controlled how funds were spent."[32] The district court stressed that Rule XX did not prevent the donor from contributing to his choice of community organizations directly. "At most, the donor-plaintiff's objection [was] that Rule XX restrict[ed] his ability to channel funds to their ultimate recipients, the community groups, in the manner he [saw] fit."[33] The district court explained that none of the cases submitted by the plaintiffs supported this contention.[34]

Plaintiffs cited, among other cases, *Colorado Republican Federal Campaign Committee v. Federal Election Commission*,[35] in support of their contention. In *Colorado Republican*, the United States Supreme Court held that expenditures for radio advertisements, although reflecting poorly on opposing party's candidate, were spent independently of any specific candidate's campaign scheme and not pursuant to any general or particular understanding with a candidate.[36] In this circumstance, the Court held that a political expenditure provision could not limit the amount spent on such independent radio advertisements because to do so would violate First Amendment rights.[37]

In *Southern Christian*, however, the plaintiff was free to donate unlimited contributions directly to the legal clinic of his choice. Although Rule XX restricted a clinic's choice of clientele, a donor was free to contribute the funds directly to the community organization of his choice. Accordingly, no First Amendment right was denied to the donor.

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31. *Southern Christian*, 61 F. Supp. 2d at 508.

32. *Id.*

33. *Id.*

34. *See id.* at 509 (explaining that the court did "not read any of the cases cited by Plaintiffs to stand for the proposition that a donor has a constitutional right to demand that funds he supplies be expended in a certain way, particularly when the complained of regulation burdens the conduit (i.e., TELC), and not the ultimate recipient" of the donation).

35. Colorado Republican Fed. Campaign Comm., et al. v. Fed. Election Comm'n., 518 U.S. 604 (1996).

36. *See id.* at 613.

37. *See id.*

3. The Professor-Plaintiffs

The law professors claimed that the amendments to Rule XX inhibited their ability to "engage students in . . . the types of cases which afford the best possible teaching and learning opportunities. They insist[ed] that this burden[ed] their constitutional rights to freedom of association with students, freedom of speech, and academic freedom."[38] Reviewing the facts of the case, the district court was "of the opinion that, at its core, the professor-plaintiffs' grievance [was] that the Amendments deprive[d] them of the freedom to instruct and employ law students in whatever fashion they desire[d]."[39] The law faculty could not object to any impingement upon their own right to advance any theory or idea in the classroom. The terms and effect of Rule XX created no such restriction. The law faculty instead claimed that Rule XX "intrude[d] upon a derivative right, one drawn from the supposed freedom of law students to obtain a clinical education in the manner that is most pedagogically beneficial."[40]

In response, the district court explained that Rule XX merely placed a restriction on the law faculty's ability to employ a student in a representative capacity. Rule XX did not prevent the law faculty from representing or soliciting clients of their choice, or from employing students in any nonrepresentative capacity. As a matter of principle and legal process, the district court stressed that "[i]f it is within the province of the Louisiana Supreme Court to erect boundaries to student practitioners' authority to appear in court, then it is also appropriate for the same limitations to govern how professors direct those students."[41] The district court, therefore, found the professor-plaintiffs to have suffered no cognizable injury.[42]

Indeed, the authority that the professor-plaintiffs presented to support their claim was readily distinguishable from the case at bar. Professor-plaintiffs cited *Edwards v. Aguillard*[43] "for the proposition that courts apply exacting scrutiny to legislative attempts to 'interfere with the ability of teachers to educate in the manner they deem appropriate.'"[44] In *Edwards*, the Supreme Court of the United States ruled on whether a legislative act,

38. *Southern Christian*, 61 F. Supp. 2d at 509.
39. *Id.*
40. *Id.*
41. *Id.* at 510.
42. *See id.*
43. Edwards et al. v. Aguillard et al., 482 U.S. 578 (1987).
44. *Southern Christian*, 61 F. Supp. 2d at 509 (also citing Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978)).

requiring schools to teach creation science if and when evolution theories were taught, violated the Establishment Clause.[45] The Court upheld the court of appeals decision that the "actual intent [of the requirement] was 'to discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism, a religious belief.'"[46]

In applying a three-prong test to hold that the statute did violate the Establishment Clause, the Supreme Court explained that "[s]tates and local school boards are generally afforded considerable discretion in operating public schools."[47] In this sense, the professor-plaintiffs gained support for their claim that any legislative infringement upon their teaching methods must be scrutinized. The case at bar, however, did not have the direct relationship that existed in *Edwards*. In *Southern Christian*, Rule XX did not restrict the subject matters that professors might teach. It merely limited the ways in which law faculty could assign students to clients participating in the legal clinic. Through an indirect limit on the professors' ability to teach students by assignment, the historical principles behind judicial constraints on the ability of non-lawyers to practice law justify the incidental restraint.

Precedent in Louisiana[48] explains why it is proper and desirable that the legislature and the court have a hand in determining eligibility requirements for the practice of law. The Louisiana Supreme Court explained:

> The Legislature may, in the exercise of its police power, and in the performance of its duty to protect the public against imposition or incompetence on the part of persons professing to be qualified to practice the so-called learned professions, fix minimum qualifications or standards for admission to the bar. But the courts of justice have, besides that interest, another and special interest, in the character and qualifications of the members of the bar—who are considered in this country as officers of the courts. In fact, a proper administration of justice depends as largely upon the conscience, competence and conduct of the members of the bar, as upon the work of the men on the bench.[49]

45. *Edwards*, 482 U.S. at 583.

46. *Id.* at 582.

47. *Id.* at 583.

48. *Ex parte* Steckler et al., 154 So. 41 (1934).

49. *Id.* at 45.

The district court supported its decision by describing the absurd consequences of providing law professors a carte blanche to employ tactics of their choice to educate their students.[50] But a simpler analogy exists that illustrates more poignantly the policy behind licensing requirements. First, imagine if First Amendment rights inhered to give educators in other professions unlimited discretion in their teaching assignments. Then, apply this principle to a scenario in which a medical student is participating in an outpatient clinical program. Merely because her professor believes that the student would benefit from unfettered discretion to prescribe certain medicines and perform certain medical procedures does not, and should not, prevent the governing medical board from interceding and placing reasonable restrictions upon this discretion. If it did, patients' medical care might be sacrificed to the misjudgment of an unlicensed medical student. Similarly, while the court recognizes the utility of student practice in legal clinics, it also must balance this learning tool against the broader societal protections at stake, that is, that clients ought to have competent representation.

4. The Student and Student-Organization Plaintiffs

The plaintiffs agreed that there does not exist any fundamental right of a non-lawyer to practice law; the plaintiffs also agreed that courts possess the inherent power to regulate both lawyers and clinical law student practice.[51] The students argued, however, that the power to regulate the clinical law student prac-

50. See *Southern Christian*, 61 F. Supp. 2d at 510, where the opinion states: Taken to its logical conclusion, the right the faculty implores this Court to recognize is one that bestows upon professors unfettered discretion to instruct students, not only in the classroom but also in the "real-world" context, in whatever manner they choose so long as the professors feel it is the most pedagogically beneficial. Under this theory, a professor supervising a criminal law clinic might determine that the best educational experience for students would be to first learn how it feels to be a criminal and to spend time incarcerated. If the Louisiana Supreme Court then amended Rule XX to prohibit student practitioners from any activity that might constitute a crime, this would automatically burden the professor's constitutional rights. While this may actually be true in a purely theoretical sense, it is clear that the State could constitutionally proscribe such behavior. In this case, the Rule XX Amendments more narrowly define the students' already limited privilege to engage in what would otherwise be the unauthorized practice of law. To place restrictions on such a privilege burdens the professor's rights no more than the above hypothetical proscription against criminal law clinic students engaging in criminal activity.

51. *See id.*

tice must not violate the United States Constitution.[52] "The students and student organizations object[ed] that Rule XX infringe[d] their constitutional rights because it detract[ed] from their educational opportunities and burden[ed] their ability to associate and advocate for expression of collective views"; in this way, the students argued that they had suffered "a concrete, particularized injury to a protected interest."[53]

In response, the district court focused almost exclusively on the propriety of the income restriction created by Rule XX. The court explained that "[c]ourts routinely uphold the utilization of income levels as criteria for conditioning certain public benefits."[54] The students tried to distinguish their case by showing that "all of [the district court's cited] decisions somehow involved the use of public funds," but the Tulane clinic received only private funds.[55] The district court found the distinction unpersuasive; in sum, the court explained:

> Although the Louisiana Supreme Court does not offer public funding for legal services for the poor, through the mechanism of Rule XX it does supply "labor" for the provision of legal services to the poor. By allowing students to represent indigents, the State is essentially offering free assistance through the students themselves, rather than through public funds. By analogy, then, the State should be permitted to employ the same guidelines for determining who will receive these limited public resources.[56]

The district court went on to explain why the restriction conformed to both constitutional law and the policy behind the student practice rule. "Rule XX has always had a public service orientation, one geared towards supplying needed legal services to those least able to pay for them. Without any income criteria whatsoever for determining who might qualify for aid, it is conceivable that the poor themselves might not receive any legal assistance."[57]

What is interesting is that the opinion lacks any discussion of the due process rights that may have required that the Louisiana Supreme Court provide students either with a pre- or post-amendment opportunity to be heard. Though the district court

52. *See id.* at 511.
53. *Id.* at 510.
54. *Id.* at 511.
55. *Id.*
56. *Id.*
57. *Id.* at 512.

opinion cited *Bass v. Perrin*[58] for the proposition that "there is no constitutional right to legal representation in a civil case,"[59] review of the case raises an interesting question about due process.

In *Bass*, the Eleventh Circuit asked whether the decision to deprive a prison inmate of outdoor exercise time could hold potential due process implications.[60] The Due Process Clause of the Fourteenth Amendment protects against deprivations of "life, liberty, or property without due process of law."[61] Since a prisoner is already deprived of his or her liberty "in the ordinary sense of the term," it is difficult to determine whether process is due when there are alterations made to the already sanctioned deprivation of liberty.[62]

The Eleventh Circuit opinion set out two circumstances in which process may be due for a subsequent deprivation of liberty. First, "when a change in a prisoner's conditions of confinement is so severe that it essentially exceeds the sentence imposed by the court," process may be due.[63] Second, "when the state has consistently given a certain benefit to prisoners (for instance, via statute or administrative policy), and the deprivation of that benefit 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,'" process may be due.[64] "In the first situation, the liberty interest exists apart from the state; in the second situation, the liberty interest is created by the state."[65]

In *Bass*, the Eleventh Circuit found that the inmates had a liberty interest in outdoor exercise time. This constituted a liberty interest created by the state.[66] Ultimately, the Eleventh Circuit found no due process infringement because the inmates who were deprived of exercise time were provided with, and took advantage of, a full appeals process.

One might question whether the law students in *Southern Christian* could rely on a similar principle. The students could argue that Rule XX constituted a state-created property right, a right of students to represent individuals and organizations

58. Bass v. Perrin, 170 F.3d 1312 (11th Cir. 1999).
59. *Southern Christian*, 61 F. Supp. 2d at 506.
60. *Bass*, 170 F.3d at 1315.
61. U.S. CONST. amend. XIV, § 1.
62. *Bass*, 170 F.3d at 1318.
63. *Id.* at 1318 (citing Sandin v. Conner, 515 U.S. 472, 484 (1995) and Vitek v. Jones 445 U.S. 480, 492-93 (1980)).
64. *Id.*
65. *Id.*
66. *See id.*

under a broad and fluid criteria of indigency. Then, the students could assert that the subsequent amendment of Rule XX diluted this right.

While the district court explained that "[n]onlawyers have no constitutional or legal right to represent individuals or organizations in courts or before administrative tribunals," the district court admits that "Rule XX authorize[d] law students in clinics to do so [if only] on a limited basis."[67] An analogy may be drawn to the inmates who had no constitutional or legal right to liberty, in the ordinary sense of the word. Once the penal system allowed them circumscribed freedom, such as daily outdoor exercise time, the system had created a liberty interest. Perhaps, the Louisiana Supreme Court created some property interest in students' ability to practice law, albeit in a defined manner.

While no one disputes the Louisiana Supreme Court's ability to alter those rights,[68] it might be useful to inquire whether the court acted properly in the manner by which it altered those rights. If a property right attached to those students who enjoyed the more broad terms of former Rule XX, what process was due in altering that rule? In an article describing the controversy, one author pointed out the peculiar fact that there appeared to be no laws or court rules in Louisiana that required the court to open its amendment process to the public.[69] "There were no public hearings or a public comment period concerning the proposed changes to the student practice rule, nor were there any public proceedings or deliberations of the Louisiana Supreme Court over the requests for changes to the student practice rule."[70]

If there was no appeal process, then it appears tenable that the student-plaintiffs may sustain a due process claim against the Louisiana Supreme Court. In fact, there did appear to exist a viable appellate process. The students could have appealed to the political process. As the district court pointed out, the plaintiffs' efforts "would more properly [have been] focused on the political rather than the legal system."[71] The district court ended its opinion by declaring that "Rule XX Amendments are not vague or overly broad, and they represent a constitutional exercise of the Louisiana Supreme Court's authority."[72]

67. *Southern Christian*, 61 F. Supp. 2d at 513.
68. *See id.* at 510.
69. *See* Joy, *supra* note 17, at 247.
70. *Id.*
71. *Southern Christian*, 61 F. Supp. 2d at 513.
72. *Id.* at 514.

II. THE FIRST LESSON OF *SOUTHERN CHRISTIAN*, EFFECTIVE ALTERNATIVES TO LITIGATION ABOUND

It is interesting to see professors and students of the law focus almost exclusively on constitutional protections to shield them from hardship that the amendment to Rule XX might work upon them. There were, and are, alternative channels by which the plaintiffs could have achieved their desired end. For example, the plaintiffs could have proposed a referendum or asked that Rule XX be amended to include public comment procedures. Also, the plaintiffs could have requested that the Louisiana Supreme Court consider amending Rule XX to authorize, for the first time, the providing of services to non-profit organizations, with a separate list of eligibility requirements.[73] *Southern Christian* is a call for legal scholars to recognize that the Constitution is not the only measure to ensure fairness. The case is also a testament to the success of legal clinics. It raises the question of how legal clinics fit into the present and future of legal education.

Before such a conclusion can be reached, however, the needs of various constituencies must be examined. Can legal aid clinics serve as effective educational tools for law students? Do legal aid clinics serve clients in an effective fashion? What impact will more widespread utilization of legal aid clinics hold for society?

III. THE BIGGER PICTURE: THE SECOND LESSON OF *SOUTHERN CHRISTIAN* IS THAT CLINICAL LEGAL EDUCATION IS EFFECTIVE AND UPON INVESTIGATION SERVES NOT ONLY ITS CLIENTS, BUT LAW STUDENTS AND SOCIETY AT LARGE

What follows is an explanation of how clinical legal education has developed in the United States. This Comment then explains how clinical education effectively educates students, effectively serves indigent clients, and meets broader goals of social justice.

A. *Development of Clinical Legal Education in the United States*

When researching the development of clinical education in American law schools, two themes dominate. First, legal clinics are used as tools for achieving professional competency goals. Second, legal clinics are used as vehicles of social justice for

73. *See* LeBlanc III, *supra* note 21, at 234.

underserved communities. Inquiry into both reveals that these roles overlap in many ways and are not mutually exclusive.

Clinical legal programs were initially a response to Harvard Dean Christopher Columbus Langdell's casebook method of legal instruction.[74] The implementation of the casebook method replaced apprenticeship requirements for law practice in the late 1800s.[75] Legal clinics were employed to supplement the "casebook method of legal instruction and to offer law students experiential learning opportunities similar to the medical school model while providing free legal services to indigent clients."[76] At its birth, clinical legal education focused predominantly on legal instruction, but also contained a social justice component.

It is interesting that while the implementation of legal clinics posed a substantial question of teaching methodology, most of the clinics were student-inspired.[77] For example, in 1893, "students at the University of Pennsylvania Law School established what they called a 'legal dispensary,' borrowing from the terminology of medical education."[78] "Beginning a decade later, clinics were organized at several law schools: the University of Denver, Northwestern University, and Harvard."[79]

The courts stepped in and contributed, in a substantial way, to the discourse on social justice, when the Supreme Court held that a defendant had a constitutional right to legal representation in capital cases pending before state courts.[80] Eventually, the right to representation was extended to federal capital cases, felony defendants in state courts, and finally, a right to counsel was recognized for all defendants who risked imprisonment.[81]

Soon after, the social justice aspect of clinical legal education was brought to the forefront during the 1960s and 70s, a time of social revolution and student activism.[82] "Unprecedented opportunities" for the development of law clinics developed during this time period due to widespread student

74. *See* Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1463 (1998). *See also* Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, 64 TENN. L. REV. 1099, 1100 (1997).

75. *See* Dubin, *supra* note 74, at 1463.

76. *Id.*

77. *See* MacCrate, *supra* note 74, at 1103.

78. *Id.*

79. *Id.*

80. *See id.* at 1108 (discussing Powell v. Alabama, 237 U.S. 45, 71-72 (1932)).

81. *See generally id.* at 1108–09 (discussing Johnson v. Zerbst, 304 U.S. 458, 463 (1938); Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963); and, Argensinger v. Hamlin, 407 U.S. 25, 30–31, 37 (1972)).

82. *See* Dubin, *supra* note 74, at 1465.

demand, as well as financial support from private institutions.[83] For example, in 1968 the Ford Foundation committed $12 million, distributed over a ten-year period, to help institute clinical education as a part of law school curriculum.[84] Ford created the Council on Legal Education and Professional Responsibility (C.L.E.P.R.) comprised of representatives from the Association of American Law Schools (A.A.L.S.) to administer his program.[85] "CLEPR emphasized 'public service aspects of professional responsibility, as opposed to the more operational aspects of lawyers' ethics.' CLEPR explicitly mandated that funded programs be not only 'educationally sound and professionally relevant' but also 'socially progressive.'"[86] The president of C.L.E.P.R. explained it this way:

> So far as society is concerned it sorely needs the services which only law students and their professors can provide in the great mass of individual cases involving the 'little man'. . . . Fighting for justice for an individual is essential for the individual and for society if it is to continue to be a society worth living in. If lawyers don't do this, who will? And the regular participants in the machinery of justice need incentives to spruce up their own performance and keep the machinery up to date. One of the best incentives would be the regular appearance on the scene of a fresh crop of law students.[87]

In the wave of this development, the American Bar Association (A.B.A.) revised its standards for accreditation of law schools. Recognizing developments in clinical practice and professional responsibility, the 1973 standards set three objectives for all students: instruction in subjects in the core curriculum; training in professional skills; and instruction in the legal profession.[88]

Over time, the practice of law has become more complex. A process of professional differentiation has narrowed the scope of an attorney's legal work and client representation.[89] In

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83. *Id.*

84. *See id.*

85. *See id.*

86. *Id.*

87. *Id.* at 1466 (quoting COUNCIL ON LEGAL EDUC. FOR PROF. RESP., CLINICAL LEGAL EDUCATION IN THE LAW SCHOOL CURRICULUM 3 (1969)).

88. *See* MacCrate, *supra* note 74, at 1123 (quoting A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM 262–63 (1992) [hereinafter MACCRATE REPORT]).

89. *See id.* at 1124–25.

response, the A.B.A. Section of Legal Education and Admission to the Bar convened two national conferences. The first conference was held in October of 1987. Participants at the conference "sought to assess the stage and state of professional skills instruction and clinical legal education."[90] "Five months later, in March of 1988, the A.B.A. convened a second national conference at the University of Virginia in Charlottesville. This conference connected the law schools directly to the profession at large and was entitled Legal Education for a Changing Profession."[91] The keynote address focused not only on the skills-based learning that law schools must employ, but also on the basic tenet of social justice that attorneys owe to underserved communities:

> [The speaker hoped] that the law schools would seize the opportunity which [was] theirs to help shape the profession and from the outset of law studies seek to create in students an awareness that they are headed for a profession that not only expects its members to have certain learning, skills and competence, but expects them voluntarily to subscribe to a common body of values and assumed responsibilities which justify the continuation of the profession's exclusive right to engage in the practice of law.[92]

Subsequently, the A.B.A. commissioned a task force to create a "conceptual vision of the lawyering skills and professional values that lawyers should seek to acquire."[93] The statement of skills and values included problem solving, legal analysis and reasoning, legal research, factual investigation, communication (both oral and written), counseling, negotiation, litigation and dispute resolution procedures, legal organization and management, and resolution of ethical dilemmas.[94]

In pursuit of these ends, the A.B.A. Task Force Report stated that clinical courses (both simulated and live-client) "occupied an important place in the curriculum of virtually all A.B.A.-approved law schools."[95] In 1996, the A.B.A. revised accreditation standards requiring law schools to offer adequate opportunities for instruction in professional skills. "This might be accomplished through clinics or externships."[96] Left with the mandate that law schools must advance some sort of "hands-on"

90. *Id.* at 1125.
91. *Id.*
92. *Id.* at 1125-26.
93. *Id.* at 1127.
94. *See id.*
95. *Id.* at 1129.
96. *Id.*

education for their students, it remains open to debate which form the education should take.

Given the history of clinical education, it is clear that it is aimed not only at increasing the skills of law students, but also towards meeting the goals of indigent persons. Since there is also an overarching need for lawyers to provide legal services to underrepresented communities in society, it appears that clinical education is the most viable solution to both the legal education and social justice quandary. To substantiate this claim, however, two things must be established. First, clinical programs do, in fact, serve a valuable educational purpose for students. Second, there exists a need for representation that can be met, in part, through the use of clinical programs.

B. *Good for Students: Legal Clinics are a Useful Educational Tool for Adult Learners and May Offer an Opportunity for Career Guidance*

1. Learning Tools: Real World Practice, Ethics, Multi-Cultural Awareness

Clinical legal programs provide extremely useful learning tools for students. First, as legal education presently stands, most law students find themselves bored by the casebook teaching method. One empirical study revealed that "the amount of time spent studying and preparing for class, the frequency of participation in informal discussions, the degree of interest in law school work, the degree of difficulty experienced with classwork, and students' emotional reaction to law school" decreases dramatically over time.[97] "Only 20% of . . . students surveyed found their fifth semester to be intellectually stimulating."[98]

The Socratic method, while teaching "students how to analyze the law in a written appellate opinion, a form of the law [lawyers] will often confront in practice," fails to provide students with a real world context in which to solve problems.[99] In contrast, clinics introduce students to real world hypotheticals, with real world clients, and real world interaction between opposing parties and supposedly neutral judges and magistrates. Furthermore, supervision by professors opens the door to potential men-

97. Christopher T. Cunniffe, *The Case for the Alternative Third-Year Program*, 61 ALB. L. REV. 85, 103 (1997).

98. *Id.* at 103–04.

99. Jennifer Howard, *Learning to "Think Like a Lawyer" Through Experience*, 2 CLINICAL L. REV. 167, 172 (1995).

tor relationships that may not have developed without the programs.[100]

In addition, clinical programs offer an avenue to teach law students about social justice. One commentator on the subject stated:

> Although law school graduates as a group exert enormous influence on public policy, lawyers individually do not necessarily acknowledge this role. The law school-imbued notion that the practice of law is a technical matter of value-free representation of a client's best interests—without regard to societal implications—prevails among practicing lawyers. Legal education needs to confront this narrow vision of legal advocacy not only because it is in error, but because critical analysis of one's role in the social and legal systems should be an essential part of any higher education experience.[101]

Because of the unique way in which adults learn, legal clinics will likely meet this educational goal.

As adults, law students learn in a different way from children. The following are four characteristics of adult learners: (1) adults see themselves as independent learners—they choose to interpret information for themselves, as opposed to relying on an authority figure's interpretation; (2) adults tend to draw upon their own experience in interpreting information; (3) adults' readiness to learn is increased when the learning is related to "developmental tasks," that is, those steps necessary for them to perform their social role; and, (4) adult learners are more inclined to learn only the information that will readily be applied to situations at hand, as opposed to learning for some future date.[102] "In other words, adults approach learning with a 'problem-centered' frame of mind."[103]

For this reason, experiential learning opportunities, such as clinical programs, are those most likely to affect the knowledge of adults. As experience-based programs, clinical programs offer a "significant challenge of playing the lawyer role for the first time . . . that has been found to lead to learning episodes of

100. *See generally* Suzanne J. Levitt, *Submission of the Clinical Legal Education Association to the Supreme Court of the State of Louisiana Concerning the Review of the Supreme Court's Student Practice Rule*, 4 CLINICAL L. REV. 571 (1998).

101. Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 41 (1995) (footnotes omitted).

102. *Id.* at 47.

103. *Id.* (footnote omitted).

personal significance."[104] One author cites a Chinese proverb that explains this theory quite accurately: "Tell me, I forget. Show me, I may remember. Involve me, and I understand."[105] Essentially, by placing law students in a role to help underserved persons in society, those underserved constituencies become "real"; they become a legitimate concern to which attention ought to be paid. This ethical obligation of lawyers is then understood at the very start of the lawyer's career.

In addition, clinical education can help to develop multicultural sensitivity in law students. It is difficult for casebooks or simulation exercises to replicate the experience of working under the supervision of faculty to represent clients whose economic class, ethnicity, sexual orientation, physical or mental ability, or other significant personal characteristics differ from those of the student.

> In such a setting, clinical students not only develop general practical skills of legal representation, they also increase the breadth of their knowledge about culturally diverse clientele located outside the social and economic mainstream. In many cases, such representation provides an excellent vehicle for developing a sensitivity to general problems of client relations and professional responsibility.[106]

2. Career Guidance

Furthermore, clinics provide an opportunity for students to make informed career choices. A study performed at the University of Denver College of Law revealed that participation in a clinic reinforced students' prior intentions to handle public interest cases by ninety-six percent.[107] Additionally, 57% of students who had not originally intended to practice any sort of public interest, changed their mind as a result of the clinical course.[108]

> Where the questionnaire granted students the opportunity to comment on the *reason* for the change in their intentions, they acknowledged a 'personalization' of the plight

104. *Id.* at 50.

105. *Id.* (footnote omitted).

106. Charles R. Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 LA RAZA L. J. 140, 148 (1995).

107. *See* Sally Maresh, *The Impact of Clinical Legal Education on the Decisions of Law Students to Practice Public Interest Law, in* EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION 154, 163 (Jeremy Cooper & Louise G. Trubek eds., 1997).

108. *See id.*

> of the poor, a realization that many of their clients needed representation through no fault of their own, a recognition that the integrity of the judicial system is dependent on equal access to representation regardless of individual resources, and that the 'right' to counsel is not an inalienable right.[109]

Furthermore, the other 43% who did not change their minds did not indicate failure of the program; rather, they were students who made an informed decision to continue with other pursuits after gaining exposure to a new career possibility. The next question is whether an effective learning tool also effectively serves clients' needs.

C. *Client Benefits: Legal Clinics Provide Effective Assistance to Low Income Persons*

Before advocating that clinics be more widely implemented, or even a mandatory tenet of each law school's curriculum, it is important to query whether these programs serve the best interests of indigent clients. In *Southern Christian*, it appears that T.E.L.C. succeeded in preventing a business from establishing a plant that would have negatively impacted health and environment in the proposed locale.[110]

This case aside, few studies address the standard of legal assistance afforded by student practitioners. In an effort to fill this gap, one article compared student performances in the Criminal Defense Clinic of New York University School of Law with the representation of attorneys for indigent defendants in the Criminal Court of the City of New York ("institutional defenders").[111] The study employed an outcome or result-based comparison, as well as an "effort expended" comparison. In both instances, the results demonstrated that students achieved better outcomes and expended more diligent effort for their clients.[112] The study focused on product, as well as process.[113]

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109. *Id.* at 164.

110. *See* discussion *supra* Part I.A.

111. *See* Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853 (1996).

112. *See id.* at 919.

113. *See id.* at 863.

1. Outcomes Analysis Revealed That Students Achieved More Favorable Results for Their Clients Than Institutional Defenders

The study examined two stages of representation—the arraignment and the post-arraignment.[114] In both stages, the results indicate that students fared better than licensed attorneys. "Nearly half of the clients of institutional defenders pleaded guilty at [the] initial court appearance, as compared with 27% of the students' clients."[115] Furthermore, "[i]n those cases where the defendants pleaded guilty, students negotiated more pleas to reduced charges, and were slightly more likely to have secured a non-jail sentence."[116] Lastly, "[of] those cases that involved a bail determination (i.e., the case was not disposed of by plea or dismissal), students obtained a higher rate of release on recognizance."[117]

In cases not resolved at arraignment, the clients of students pled guilty less often (37%) than the clients of institutional defenders (53%).[118] In those instances where the clients of students did plead guilty, those clients were substantially more likely to plead to a lesser charge and receive a noncustodial sentence.[119] "Students' clients were 20% more likely to have their cases dismissed . . . and were half as likely as clients of institutional defenders to receive bench warrants for failing to return to court."[120]

2. Lawyer Performance Analysis Also Revealed the Success of Student Practitioners

Not surprisingly, the favorable outcomes achieved by the students overlapped the fact that the effort expended by the students proved to exceed that expended by institutional defenders. But comparing lawyering process with performance was difficult because it is a subjective, qualitative evaluation. "In order to assess lawyering performance, it [was] necessary first to delineate the component parts of lawyering . . . . Several surveys of practicing attorneys [had] attempted to find out what skills they regularly employ[ed] in their law practices."[121] The study ultimately

114. *See id.* at 867.
115. *Id.* at 870.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 885 (footnote omitted).

employed six foci to guide evaluation: interviewing, fact investigation, negotiation, counseling, problem solving, and litigation.[122]

a. Interviewing

While students fared better than institutional defenders in fact investigation, negotiation, counseling, and problem solving, the students did exceptionally well in the area of interviewing. This is salient because "ABA Standards state that 'defense counsel should seek to establish a relationship of trust and confidence with the accused.' Commentators and courts have also recognized the pivotal nature of the attorney-client relationship. The time to begin trying to build rapport is in the initial interview of the defendant."[123]

There are many reasons for student success in this regard. First, and probably most fundamental, was that the students did not have tight time constraints upon which to end the initial client meeting.[124] "Defendants consistently reported that their conversations with their [institutional defenders] were rushed and brief."[125] Furthermore, "[l]aw students [were] better situated to gain the trust and confidence of their clients. Unlike the appointed counsel scenario . . . student attorneys [were] obliged by the terms of the student practice order to solicit a potential client's consent to student representation."[126] In effect, the defendant chooses her advocate, as opposed to accepting appointed counsel. The defendant then feels that she is an active participant in the representation.

b. Fact Gathering

The successful interview also sets the stage for effective fact gathering. "If an attorney has a relationship of trust and confidence with his or her client, he or she is more apt to learn the critical facts."[127] Furthermore, "students' lack of familiarity with courthouse routines liberates their approaches to information gathering."[128]

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122. *See id.* at 888.
123. *Id.* at 890 (footnotes omitted).
124. *See id.* at 892.
125. *Id.* at 892.
126. *Id.* at 894.
127. *Id.* at 901.
128. *Id.* at 903 (explaining that in one case, "a student moved for the names and addresses of the prosecution's witnesses. The judge granted the motion readily and noted her surprise that other defense attorneys did not make the same request. In another case, a student asked a judge to sign sub-

c. Litigation Skills

Similar findings go for all other foci, except for litigation skills. "Trial advocacy skills present perhaps the greatest challenge for students."[129] This is one shortcoming that clinical programs have worked towards improving and must continue to do so.

CONCLUSION

In *Southern Christian Leadership Conference, Louisiana Chapter, et. al. v. Supreme Court of the State of Louisiana*, the district court properly held that the plaintiffs had failed to state a claim upon which the court could grant relief. First, it is clear that there is not, and as a matter of policy there should not be, an inherent right of an unlicensed law student to represent clients in a legal proceeding. Second, to the extent that Louisiana courts, and courts across the nation, have provided students with such a right, it should continue to be within the courts' purview to define such rights. So long as the students are afforded an opportunity to express their concerns about those restrictions, as in *Southern Christian*, there is no due process violation.

The lessons held by *Southern Christian* are twofold. First, for the plaintiffs who will surely be disappointed with the court's holding, the lesson is to look beyond the United States Constitution in search of fairness. Other channels to effect change abound and should not be ignored. Second, for law schools across the nation, *Southern Christian* highlights the positive aspects that clinical programs hold for law students, underrepresented constituencies, and society at large. That students, teachers, and practitioners of the law would grasp these lessons may be a preliminary step towards truly achieving justice for our society.

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poenas for various police reports. Much to the astonishment of everyone in the courtroom, the judge agreed.").

129. *Id.* at 917.