

# Shintech: Environmental Justice at Ground Zero

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## ABSTRACT

*This is a history of environmental justice in the American South, and more particularly Louisiana, where low-income communities of color are surrounded by some of the largest petro-chemical complexes in the world. It rises from a proposal to site yet another giant facility, Shintech, within a population already exposed to nation-leading volumes of toxins. Going forward, it would bring the emerging concept of environmental justice to court. It would also bring public demonstrations, accusations of racism, investigations by national media (60 Minutes, Frontline), and vigorous attempts by the Governor and industry lobbies to curb student law clinics that were defending the rights of these same communities. When the Louisiana Supreme Court agreed to do so, a suit challenging its decision was filed in federal court, opening yet another front. These events were all related and, while Shintech wound to its own conclusion, they raised questions of equity, policy, and law that are, yet today, not at rest.*

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## INTRODUCTION

In October of 1998 several hundred New Orleans business leaders came to the Hilton Riverside Hotel for the “Tulane Business Forum,” an annual event particularly favored this time with keynotes by both Governor Murphy “Mike” Foster and Tulane’s newly-invested President Scott Cowen.<sup>2</sup> By all indications, it would be a friendly affair.

The Governor, who ran both a construction company and a plantation,<sup>3</sup> had promised to “run Louisiana like a business” as well in his recent campaign.<sup>4</sup> Following his election he placed an advertisement in the Wall Street Journal featuring a cartoon figure in top hat and tails, twisting his body in a way that might be taken for indecent but for its caption: “Louisiana Bends Over Backwards for Business.”<sup>5</sup> Tulane’s Cowen, in turn, had received a doctoral degree in business administration from George Washington University, and had gone on to serve as Dean and Professor of Management at Case Western University.<sup>6</sup> They looked comfortably matched at the podium until Foster, a few words into his remarks, launched an attack on what he perceived to be a grave threat to Louisiana: a student law clinic at Tulane was apparently stopping economic progress cold.<sup>7</sup>

Warmed to his theme that day, the Governor went straight to a New Orleans Chamber of Commerce luncheon where he again complained about law students

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2. Keith Darcé, *Foster Pans Student Law Clinic During Tulane Forum Their Zeal Cost State Big Bucks, Governor Says*, TIMES-PICAYUNE (New Orleans), Oct. 30, 1998, at 2A.

3. See Ron Thibodeaux, *Mike Foster Jr.*, 64 PARISHES (May 7, 2013), <https://64parishes.org/entry/mike-foster-jr>. His family also owned significant properties in oil. *Id.*

4. See Lynn Schnaiberg, *Changing of La. Guard Brings Fresh Look at Schools*, EDUC. WK., June 5, 1996, at 12.

5. Suz Redfean, *DED Goes Big Time with Tort Reform Ad*, BATON ROUGE BUS. REP., Sept. 17, 1996, at 54.

6. *Biography Scott S. Cowen*, TUL. U. (Mar. 2018), <https://www2.tulane.edu/administration/president/cowen/biography.cfm>. He also served as President of the American Assembly of Collegiate Schools of Business. *Id.*

7. See Darcé, *supra* note 2.

“blocking projects on strange theories,” and continued: “If you [chamber members] are going to allow this to continue, then you ought to let the (Tulane) ROTC make bombing runs on Baton Rouge.”<sup>8</sup>

Nor did it stop there. Throughout the two-year controversy that triggered these outbursts, Foster, who referred to plaintiff lawyers as “slime balls” and “hogs at the trough”<sup>9</sup> (until he needed one to sue an oil company that had damaged his property),<sup>10</sup> had equally choice words for Tulane clinic students whom he variously described as “outlaws,”<sup>11</sup> “bullies” and “a bunch of modern day vigilantes who are making up reasons to drive business out of the state.”<sup>12</sup> Apparently enjoying the phrase, he told a statewide television audience that he would remove the university’s tax exemptions “if what they’re gonna do is support a bunch of vigilantes out there that can make their own law.”<sup>13</sup> He would go on to urge Tulane alumni to stop financial contributions to the school<sup>14</sup> and the Louisiana Supreme Court to prohibit student practice outright in environmental law.<sup>15</sup> For all intents and purposes, he was at war.

Where did this all come from? The immediate trigger was a \$700 million poly-vinyl chloride plant called Shintech, to be located in a small, largely African-American community along the Mississippi River called Convent. It was said to be the second largest chemical facility in the world.<sup>16</sup> Foster had already sealed the deal with Japanese chemical giant Shin-Etsu (in which he also held stock and which had contributed the maximum of \$5,000 to his recent campaign).<sup>17</sup> Only permits from his Department of Environmental Quality remained whose “job,” per the Governor, was “to go out and make it as easy as they can within the law.”<sup>18</sup> This, nonetheless,

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8. *Id.*

9. Christi Daugherty, *Moore Grieff for Foster*, GAMBIT WKLY. (New Orleans), Dec. 7, 1999, at 12.

10. E-mail from Gladstone Jones to author (July 5, 2016) (on file with author). Jones represented Foster in the matter, which ultimately reached a damage settlement. Ironically, the Governor had excoriated Jones a few years earlier for representing a poor community seeking damages from an Exxon waste disposal operation in Grand Bois, La. *Id.*

11. *CBS Evening News: Tulane University Law Students Help Poor People of Convent, Louisiana, Keep Out Another Chemical Plant* (CBS television broadcast Oct. 19, 1998) (on file with author); *Law Clinics Say Rules Hurt Poor*, ADVOCATE (Baton Rouge), June 18, 1998, at 4A.

12. Christi Daugherty, *It's Not Easy Being Green*, GAMBIT WKLY., July 22, 1997.

13. *Id.*; Susan Hansen, *Backlash on the Bayou*, AM. LAW., Jan.–Feb. 1998, at 51.

14. Daugherty, *supra* note 9.

15. See discussion *infra* Part VIII.

16. See Howard Castay, *New Company and More Jobs for St. James Parish*, ENTERPRISE (Vacherie, La.), Aug. 14, 1996; Leonard Gray, *New Plastics Plant Plans More Industry for Convent*, L'OBSERVATEUR (LaPlace, La.), Aug. 17, 1996, at 1; Alexander Cockburn, *Environmental Justice Put to the Test*, L.A. TIMES, Aug. 28, 1997.

17. Ken Silverstein & Alexander Cockburn, *The Chemical Plant That Could Break Tulane*, COUNTERPUNCH, July 16–31, 1997, at 4. Apparently, Foster also received over \$50,000 in dividends from Merrill Lynch, the largest U.S. shareholder in Shintech’s parent company. Dan Nicolai, *Foster, Shintech, People's Will*, ADVOCATE (Baton Rouge), Feb. 23, 1998, at B6.

18. Lolis Eric Elie, *A Call from the Governor*, TIMES-PICAYUNE (New Orleans), Sept. 4, 1998, at 1B.

would prove to be a challenge. Among other things the plant would be emitting some three million tons of air pollution a year, more than a quarter of that in compounds like dioxin (*inter alia*, the active ingredient of Agent Orange whose Vietnam War victims were still being identified), ethylene dichloride and vinyl chloride—all known carcinogens.<sup>19</sup> Even before the new plant proposal, Convent residents were experiencing nation-leading levels of toxic air.<sup>20</sup> With Shintech, their exposure would go off the charts. Some members of the community were, not surprisingly, concerned.

And so, it began. Shintech, the apple of the Governor's eye and tangible evidence of his leadership, challenged by low-income residents, many of them African-American, which raised emerging issues in environmental justice and, in turn, issues with the Governor going back a century. Also in the balance was the ability of small communities like Convent, facing locked-in state decisions and some of the largest industries in the world, to receive assistance from law schools like Tulane. To Foster, deriding the Shintech opponents as "a bunch of housewives,"<sup>21</sup> the answer was simple: "Tell them to use their own money, not Tulane's."<sup>22</sup> As if they had such money.

Everything about Shintech had a personal edge, and it never let down.

### I. THE PROJECT AND THE TOWN

*We got sick and tired of being sick and tired.*<sup>23</sup>

—Gloria Braxton

Rumors of the Shintech proposal came in on the wind. In July 1996 a St. James Parish councilman named Erik Poche learned of it and scheduled a meeting at

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19. *Public Notice, Louisiana Dept. of Environmental Quality, Air Quality Division, Request for Public Comment and Notification of a Public Hearing on a Proposed Air Pollution Source, St. James Chemical Production Complex, Shintech Inc. and Its Affiliates, Convent, St. James Parish, Louisiana, ADVOCATE (Baton Rouge)*, Nov. 7, 1996, at 10C.

20. *See infra* text accompanying notes 31–32. These exposures had known consequences, even at the time. *See* Marise S. Gottlieb, Charles L. Shear & Daniel B. Seale, *Lung Cancer Mortality and Residential Proximity to Industry*, 45 ENVTL. HEALTH PERSPECTIVES 157, 157–63 (1982) (living within one mile of petrochemical plants appears to double the chance of developing a malignancy); *see also Study: Cancer High Downwind of Plants*, TIMES-PICAYUNE/STATES-ITEM (New Orleans), July 23, 1985, at A-6. These were air emissions alone; St. James also led Louisiana in toxic discharges to surface waters with 40.96% of state totals. *See infra* note 112. Coincidence or not, Louisiana parishes were in the top ten counties in the country for bladder cancers, and number one in colon and rectal cancers, organs vulnerable to water toxins. *See* LA. TUMOR REGISTRY, LA. STATE UNIV. HEALTH SCI. CTR.-NEW ORLEANS, *CANCER IN LOUISIANA, 2001–2005* 23 (2008); *see also* Keith Schneider, *Pollution Alley: Louisiana's Petrochemical Legacy*, AMICUS J., Fall 1984, at 31 (citing studies by the National Cancer Institute and the Environmental Defense Fund).

21. John McQuaid, *Burdens on the Horizon*, TIMES-PICAYUNE (New Orleans), May 21, 2000, at J-5.

22. Marcia Coyle, *Governor v. Students in \$700M Plant Case*, NAT'L L.J., Sept. 8, 1997, at 1, 27.

23. *Transcript*, PBS: BILL MOYERS JOURNAL (Feb. 19, 2010), <http://www.pbs.org/moyers/journal/02192010/transcript1.html?>

Hymel's Restaurant.<sup>24</sup> As it turned out, Dale Hymel, the parish president, had heard of it some months before and wrote directly to the company's president in Japan to offer parish support.<sup>25</sup> It was later discovered that Shintech had floated the proposal to Governor Foster in early January, who replied quickly promising "a speedy, profitable and mutually beneficial" result.<sup>26</sup> The first public notice of any of this came with Shintech's application for an air permit that July, six months after these commitments had been made. The community meeting at Hymel's Restaurant lit a spark that, fueled by these surprises and more questions than answers, was soon to catch fire.

St. James was a vulnerable place to live. It sat in the epicenter of the Mississippi industrial corridor with some eighteen chemical plants of its own in a band along the river, green fringes of small communities in between. Eleven of these plants lay within a few miles of Convent and its 3,000 residents, some 84 percent of whom were minorities.<sup>27</sup> Forty percent of them lived below the poverty line. They had by no means moved to the nuisance.<sup>28</sup> Following the civil war their towns arose next to the old plantations, and the industry that followed later simply introduced another plantation culture of its own, low wages, minimal employment, and the profits going as far away as Germany and Japan.<sup>29</sup> Despite decades of chemical development along the river, even to one of Shintech's most vocal supporters, "[i]t never occurred to anybody else that these plants were locating right here, right next to black people and these people were not benefitting at all."<sup>30</sup>

The price they paid was daunting. In 1995, industrial plants sent over 250,000 pounds of toxic air pollution *per mile* into Convent communities, which amounted to 67 times the rate for the rest of St. James, which was in turn the third

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24. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 108.

25. *Id.* at 120.

26. See Kuehn, *supra* note 1, at 42 (citing letters from Foster to Shintech and Shin-Etsu officials in Japan).

27. U.S. ENVIRONMENTAL PROTECTION AGENCY, TITLE VI ADMINISTRATIVE COMPLAINT RE: LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY PERMIT FOR PROPOSED SHINTECH FACILITY: SUMMARY DOCUMENTATION OF DRAFT REVISED DEMOGRAPHIC ANALYSIS (1998) (Attachment 2) (showing that 83.7% of the 3,165 residents within a four-mile radius of the center of the proposed facility as African American).

28. *Environmental Justice Case Study: Shintech PVC Plant in Convent, Louisiana*, U. MICH., <http://www.umich.edu/~snre492/shin.html> (last visited Feb. 24, 2019).

29. See ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 32; ENVIRONMENTAL JUSTICE RESOURCE CENTER, FROM PLANTATIONS TO PLANTS: REPORT OF THE EMERGENCY NATIONAL COMMISSION ON ENVIRONMENTAL AND ECONOMIC JUSTICE IN ST. JAMES PARISH, LOUISIANA at 6 (1998) [hereinafter FROM PLANTATIONS TO PLANTS]. The Commission, chaired by Rev. Bernice Powell Jackson, Executive Director of the United Church of Christ Commission for Racial Justice, and Dr. Robert D. Bullard, Executive Director of the Environmental Justice Resource Center, Clark Atlanta University, was comprised of twenty members, largely African-American, including legislators, academics, medical researchers, lawyers and community representatives, all long involved in racial justice issues.

30. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 106 (quoting Convent resident Carol Gaudin).

most polluted parish in the state.<sup>31</sup> These concentrations nearly doubled those of the rest of the chemical corridor; they also exceeded Louisiana as a whole (whose per capita pollution rates led the country) by 129 times, and the national average by a stunning 658 times.<sup>32</sup>

As the Director of the Tulane Environmental Law Clinic would later write, “A person could spend half a day in Convent and be exposed to almost as much toxic air pollution as the average American breathes in a year.”<sup>33</sup>

These were not just statistics. In May 1996, as the Shintech news was about to break, Brenda Huguet<sup>34</sup> of Convent, the mother of six children, while car-pooling

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31. See FROM PLANTATIONS TO PLANTS, *supra* note 29, at section 1-1, which includes the following tables:

TOXIC AIR POLLUTANT RELEASES PER SQUARE MILE PER YEAR (1995)

United States (12.1%*)	382 lbs./sq. mile
Louisiana (30.8%)	1,943 lbs./sq. mile
Industrial Corridor Parishes (36.8%)	2,708 lbs./sq. mile
St. James Parish (49.6%)	30,560 lbs./sq. mile
Convent Area, w/o Shintech (83.7%)	251,179 lbs./sq. mile

\* African American percentage of population (Source: 1995 Toxics Release Inventory, 1990 U.S. Census)

TOXIC AIR POLLUTANT RELEASES PER PERSON PER YEAR (1995)

United States (12.1%)	7 lbs./person
Louisiana (30.8%)	21 lbs./person
Industrial Corridor Parishes (36.8%)	27 lbs./person
St. James Parish (49.6%)	360 lbs./person
Convent Area, w/o Shintech (83.7%)	2,277 lbs./person

\* African American percentage of population

More than 6.5 million pounds per year of these emissions were discharged within 2 miles of Convent area schools, and over 18 million within 4.5 miles. The children were not spared. See Charles A. Flanagan, *Mapping the Other Truth in the Shintech Case: Emancipatory Mapping for Environmental Justice in South Louisiana*, doctoral thesis, Louisiana State University, at 93, fig. 19 (2005) (on file with *Georgetown Environmental Law Review*). The Shintech facility, less than two miles away, would add up to half a million more. *Id.*

32. *Id.*; see also *Coddling Polluters*, GAMBIT WKLY. (New Orleans), July 28, 1998, at 7 (“[I]f pollution figures are analyzed by square mile or per capita, then [Louisiana is] easily the most polluted state in America.”).

33. Kuehn, *supra* note 1, at 39.

34. Author interview with Lisa Lavie Jordan, April 19, 2016 [hereinafter Lavie Interview]. Lavie, a Supervising Attorney with the Tulane Clinic, kept a chronology of Shintech developments, “Shintech Controversy Timeline” (undated, on file with author) [hereinafter Timeline]. Inter alia, Lavie represented Brenda Huguet and other residents in the proceedings to follow.

three of them on the main road through town, was caught in a cloud of benzene and collapsed onto the dashboard. A neighbor in the passenger seat grabbed the wheel and drove to the nearest telephone to call 911. Huguet was taken to the local hospital in a police car, went into full respiratory arrest for four hours before being able to breathe on her own. She lost thirty-six percent of her lung capacity and was projected to be on medication for the rest of her life. Pollution has consequences.

This was only benzene. Shintech would bring other chemicals including dioxin, a byproduct of vinyl chloride found by EPA scientists to be “by far the most potent carcinogen and ‘the most potent reproductive toxin’ yet evaluated by the Agency.”<sup>35</sup> Small wonder, then, that a group of Convent residents was not reassured when, in their one meeting with the Governor to come, he opened with a lengthy monologue that ended by relating that as a child he had been exposed to 2-4-5-T (Agent Orange) with no ill effects except, pointing to his bald head, for “my hair.”<sup>36</sup> If meant in jest, it did not carry. Foster had no more an idea of what it was like to live daily among the chemical plants of that community than they had about a millionaire who lived on a plantation and operated the state in pretty much the same fashion. They were ships passing in the night.

Accidental toxic releases were yet another burden, chronic throughout the corridor. Schools were closed. Residents spent the night away from home in school auditoriums or were transported to towns across the river. Between 1994 and 1997, 141 emergency releases of toxins were reported in the Convent area, averaging three per month, and were on the increase.<sup>37</sup> One industry response was to distribute a coloring book called *Shelter in Place* that instructed readers to “Duck & Cover” by covering their mouths and noses with a wet cloth and hiding indoors<sup>38</sup>—rather difficult to do while driving children through an invisible cloud. Brenda Huguet was not alone.

On the other hand, of course, there were supposed to be jobs—or at least the prospect of jobs. Shintech said it would employ some 2,000 workers during construction, and 165 to operate the facility.<sup>39</sup> Largely on this basis, the state offered

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35. EPA, INTEGRATED RISK ASSESSMENT FOR DIOXINS AND FURANS FOR CHLORINE BLEACHING IN PULP AND PAPER MILLS, July 1990, at 1.

36. Leah Blankston, *Economic Development or Environmental Racism*, GRIS (Baton Rouge, La.), Apr. 19, 1997, at 16; Lavie Interview, *supra* note 34. (Lavie attended the meeting as well).

37. See Letter from Lisa Lavie Jordan & Robert R. Kuehn, Tulane Environmental Law Clinic, to Ann E. Goode and Mary Malone, U.S. Environmental Protection Agency (May 26, 1998) (referencing an analysis prepared by INFORM of potential impacts of accidental releases in Convent). *Inter alia*, two elementary schools and Head Start centers were located within 1 mile of the plant site. *Id.* See also FROM PLANTATIONS TO PLANTS, *supra* note 29, at 17.

38. DR. FRED MILLAR, FACT SHEET: SHELTER IN PLACE—DUCK & COVER FOR THE NEW MILLENNIUM? (1998) (on file with author).

39. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 118.

Shintech more than \$120 million worth of tax exemptions to lure them to come<sup>40</sup> (although the state's chief of economic development had previously labelled these incentives "essentially useless")<sup>41</sup>, which amounted to a whopping \$750,000 per job. Unfortunately, for communities like Convent, the employment numbers did not add up either. As both the state and industry acknowledged, even plant construction would require skilled equipment operators and craftsmen from outside the region, and the permanent positions sought degrees in computers and engineering.<sup>42</sup> St. James Parish's Chief Jobs Service Officer put his dilemma bluntly: local applicants "just won't cut it."<sup>43</sup> Not surprisingly, then, less than nine percent of the industry jobs in nearby St. Gabriel were held by local residents, a pattern repeated up and down the corridor.<sup>44</sup> If history were any guide, very little was going to trickle down to Convent.

There was a more pervasive reason for the lack of jobs for these communities as well, one that had coursed through Louisiana for centuries. Their African-American residents were the last to get hired. As Emelda West, described as a "feisty and fiercely religious 74-year old African American mother of seven," would say, "I got five sons [one of them with a master's degree in Public Administration] and why is it they can't make a decent living?"<sup>45</sup> She was a taxpayer and a property owner, she went on. "If a Caucasian boy can come out of high school and get a job in a plant, don't tell me my child is overly qualified. You understand me—yes, it's racism."<sup>46</sup>

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40. *Id.*

41. See Ed Anderson, *Tax Breaks Useless, Panel Told*, ADVOCATE (Baton Rouge), Mar. 2, 1994, at B8 (reporting the testimony of Kevin Reilly, Secretary, Louisiana Dep't of Econ. Dev., before the Louisiana Joint Legislative Committee on the Budget, who stated that "it is nothing but a 'necessary evil' . . . I wish we didn't have to do it"). More pernicious, these industrial exemptions crippled funding for parish services; see *infra* notes 49, 50 and accompanying text.

42. Tom Guarisco, *La. Chemical Industry Finds Qualified Applicants Rare*, ADVOCATE (Baton Rouge), Jun. 25, 1998 (LCA official stating that plant operators needed computer skills and "a good grasp of physics and chemistry."). See also Kuehn, *supra* note 1, at 57 (citing email of Paul Adams, La. DECD, as stating that "very few of the 165 [permanent] jobs would go to local residents").

43. Viki Ferstel, *Industrial Revolution: Jobs May Bring Prosperity but Cost Culture*, ADVOCATE (Baton Rouge), Oct. 26, 1997 at 1A.

44. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 106–7 (black employment at St. James parish plants ranged from a low of 4.2 percent to a high of 19.4); FROM PLANTATIONS TO PLANTS, *supra* note 29, at 22–23 (citing EAST IBERVILLE PARISH & TOWN OF ST. GABRIEL EMPLOYMENT SURVEY (Sept. 1995)). See also Kuehn, *supra* note 1, at 44 n.42 (quoting two St. James Parish Councilmen: "I see very few people from my [Convent] district getting the good jobs at these industries. What seems to be happening is companies are hiring away from other industries in other parts of the parish, and these people who need the jobs are not getting them" (Councilman Ralph Patin, Jr.) and "Those people who need the jobs are not getting them, and I feel we need to address this. The highest rate of poverty is in [Convent]. Industry is moving in, but the plight of these people is not improving." (Councilman Elton Aubert) (citing ST. JAMES PARISH COUNCIL, OFFICIAL PROCEEDINGS OF THE ST. JAMES PARISH COUNCIL (1998))).

45. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 234.

46. *Id.*



There it was: she'd said it. A significant part of what followed with Shintech would turn on that charge, and that very phrase. Not all African Americans in Convent saw it that way, of course. Some wanted the jobs, any jobs.<sup>47</sup> One saw an opportunity to leverage the plant into better jobs.<sup>48</sup> Mike Foster would claim later that he walked through the community "knocking on doors" and never met a person opposed to the plant, not one.<sup>49</sup> Several wondered aloud whether he'd gone to the wrong town instead.<sup>50</sup> He'd certainly not knocked on their doors. More ships passing.

The Shintech project, then, was hardly an unmixed blessing for Convent, Louisiana, or for that matter the Parish of St. James. The millions of dollars in tax breaks offered by the State came directly from the parish rolls, which meant the second largest chemical facility in the world would make no contribution to local roads, police, hospitals, or public schools,<sup>51</sup> which, statewide, were losing more than \$100 million a year to the industrial exemption.<sup>52</sup> In effect, the poorest communities in Louisiana were subsidizing some of the wealthiest corporations on earth. Permanent employees would come from elsewhere and the profits would go elsewhere as well, in this case to Tokyo. Only pollution in staggering volumes, adding to loads at already staggering levels, remained local and the residents

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47. *Id.* at 106–7.

48. *Id.*

49. Lavie Interview and Timeline, *supra* note 34.

50. *Id.*

51. See Oliver A. Houck, *This Side of Heresy: Conditioning Louisiana's Ten-Year Industrial Tax Exemption Upon Compliance with Environmental Laws*, 61 TUL. L. REV. 289, 295–310 (1986) (analyzing the exemption). The program has continued since, even in periods of severe budget shortfalls: "Lost local revenue over the past 10 years cut into law enforcement and corrections by \$316.6 million, parish governments by \$281 million, libraries by \$75 million, roads by \$60.5 million, and levees by another \$27.8 million. The \$587 million in tax revenue lost to local school districts is more than three times the \$185 million needed to pay for universal prekindergarten statewide." Mark Ballard, *Study Finds La. Industrial Tax Exemption Too Generous*, ADVOCATE (Baton Rouge), June 21, 2016 at 7A. Recent efforts by Governor Edwards to soften the blow on local communities include reductions by 20 percent, and the possibility of exemption vetoes by local taxing authorities. See Mark Ballard, *Property Tax Changes Spark Sharp Divisions*, ADVOCATE (Baton Rouge), May 23, 2018 at 3A. Of course, losing 80 percent of local revenues for a full decade remains a serious hit. On the other hand, a first-ever local veto of an exemption for Exxon-Mobil, which has dominated Louisiana politics for decades, has now brought calls to limit or eliminate local participation. See Mark Ballard, *Battle Over Exxon Tax Breaks May Spark Legislation*, ADVOCATE (Baton Rouge), Feb. 3 2019, at 7B. See also Editorial, *Don't Drive Exxon Mobil to Texas*, ADVOCATE (Baton Rouge), Jan. 30, 2019.

52. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 15. This number, too, has escalated to an impressive "16.7 billion in lost revenue for local governments over the past decade." Ballard, *supra* note 51, at 7A.

would breathe them every day. That was a lot to ask them to pay.<sup>53</sup>

At the time the news of Shintech first broke, however, little of this was known. The meeting at Hymel's Restaurant was followed by another, held by a group calling itself the St. James Citizens for Jobs and the Environment. Quite unique for the region, it was integrated, black and white.<sup>54</sup> Its elected head was a white housewife named Pat Melancon, who later explained:

We've got just about every kind of chemical plant that you can imagine here. Most of these chemicals are either known cancer-causing chemicals or they're suspected to cause cancer in humans . . . Right now, I have a father-in-law that's dying of pancreatic cancer. I lost my mother at 57 from cancer. My neighbor died of cancer. The next-door neighbor to us, my aunt behind us, all died of cancer.<sup>55</sup>

Several of its more vocal leaders were African-American, including Emelda West who told Frontline, "Everybody was coming over here, dumping their waste on us, poison our air, polluting our water."<sup>56</sup>

It was the same story on both sides of the color line. Theirs was a home-grown movement and one look at each other told them that they were thoroughly outgunned.

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53. As it turns out, Shintech's neighbors would be breathing a markedly disproportionate amount of toxins-per-job, depicted in the following chart:

CHEMICAL INDUSTRY TOXIC AIR RELEASES PER JOB

New Jersey	65
United States	513
Texas	897
East Baton Rouge Parish	1,100
Louisiana	1,960
Shintech	3,488

Dr. Paul H. Templet, Louisiana State University, cited in FROM PLANTATIONS TO PLANTS, *supra* note 29, at section 5-2. Dr. Templet, a scientist by training, served as Louisiana DEQ Administrator from 1988 to 1992.

54. *Id.* at 108; see also Lavie Interview, *supra* note 34. Lavie attended the meetings.

55. *Frontline: Justice for Sale* (PBS television broadcast Feb. 19, 2010) (transcript available at: <https://www.pbs.org/wgbh/pages/frontline/shows/justice/etc/script.html>) (statement of Patricia Melancon).

56. *Id.* (statement of Emelda West).

## II. THE CLINIC AND THE CASE

*We went to Atlanta and had meetings with all kinds of lawyers, but they looked like they were afraid to take our case . . . . Tulane took it, and they're doing a good job. If they weren't, the governor wouldn't be so worried about them.*<sup>57</sup>

—Emelda West, St. James Citizens

Bob Kuehn stood six feet tall with a square jaw and dark hair neatly trimmed, he looked like a Texas Ranger.<sup>58</sup> He came to Tulane from the Environmental Enforcement Section of the US Department of Justice, where he had risen to handle complex cases against multiple defendants (and law firms), largely on his own. When in 1989 the law school decided to add an environmental clinic to its menu, Kuehn was an obvious choice. By nature, conservative, he was not a man to jump without looking and had absolute faith in the practice of law. This, Shintech would sorely try.

The reasons for the new clinic were compelling. Louisiana led the nation in nearly every type of pollution,<sup>59</sup> and scraped bottom in environmental enforcement of any kind.<sup>60</sup> The few environmental attorneys in state agencies (with the occasional exception of the AG's Office) were committed to defending their government clients, who, as the Shintech controversy would reveal, were part of the problem in the first place. No federal environmental agency had an office in Louisiana, let alone a lawyer. Apart from a miniscule number of private practitioners willing to take cases against major corporations out of their own pockets, there was not a public interest environmental law firm within 500 miles.<sup>61</sup> Beyond corporate defense firms, there was little knowledge of even the rudiments of environmental law, which had quickly become one of the most complex and bewildering subjects in the profession. William Ruckelshaus, a much-admired Administrator of the federal EPA during the Nixon Administration, once quipped that he had only three people in his agency who understood the Clean Air Act and

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57. Melba Newsome, *Slaying Goliath*, AMICUS J., Spring 1998, at 12–13.

58. He acted like one too, serious, straight-up, and dedicated to the job (his secretary recalls him calling no fewer than five times from the airport one morning, each with a different to-do . . . and this was in the time of pay phones). Author Interview with Eileen Ryan, Tulane Law School, Dec. 20, 2015. Ryan served as the Tulane Environmental Law Clinic administrator throughout Kuehn's tenure as its director.

59. See *This Side of Heresy*, *supra* note 48, at 310–23; Keith Schneider, *Pollution Alley: Louisiana's Petrochemical Legacy*, AMICUS J., Fall 1984 at 26.

60. *Id.*; see also David Snyder, *Louisiana Lags in Fighting Abuse of Environment*, TIMES-PICAYUNE (New Orleans), Sept. 1, 1983 (last of six series on lax attention to environmental programs).

61. During the 1980s the Sierra Club Legal Fund opened a New Orleans office that became actively involved in environmental justice cases. See *infra* note 297; ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 111–99, 207. The office was later closed due to inadequate local financial support, but two of its principals Monique Harden and Nathalie Walker continued to practice as Advocates for Environmental Human Rights for several years.

he “did not allow them to take the elevator at the same time.”<sup>62</sup> This same Act was at the heart of the Shintech case.

Tulane’s law school sat like an airport terminal on the university campus, housing a range of clinical programs. They provided a bridge to practice, and assurance that graduates actually *could* practice before being released onto clients and courts of law. They also provided, as part of their charter, legal services for people unable to afford them. These services, too, would play a prominent role as the controversy played out.

The environmental clinic had drawn accolades from its clients and from institutions as diverse as the American Bar Association,<sup>63</sup> the Louisiana Lieutenant Governor (subsequently elected Governor, for “ground-breaking work in environmental racism and outstanding service to the working poor”),<sup>64</sup> the NAACP, and the City of New Orleans.<sup>65</sup> Critics of the clinic did not dispute the quality of what they did, but rather the fact that they did it at all. Front and center among them was the Louisiana chemical industry, which, too, would come to a head with Shintech.

Kuehn tried to duck the case. When first approached by St. James Citizens for Jobs and the Environment (“St. James Citizens”), he saw immediately that it would involve a long and complicated set of proceedings, not ideal for students who were also carrying full course loads and would be rotating off the case as they graduated or their clinic terms expired.<sup>66</sup> He had no technical support, and Shintech’s air permit applications alone ran over 700 pages, many of which were in engineer-speak and almost incomprehensible diagrams and tables.<sup>67</sup> More fundamentally, as the only legal resource of this kind in Louisiana, the clinic was already overbooked. Kuehn referred them to several national groups, and offered to help from the sidelines if and as he could.<sup>68</sup>

They came back empty-handed. They had tried, among others, the Sierra Club, the NRDC, and the Columbia’s Center for Constitutional Rights for Legal Representation to no avail.<sup>69</sup> Which began to hem Kuehn in. As one St. James resident later described:

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62. Address of William Ruckelshaus to ALI/ABA Environmental Law Conference, Wash. D.C., February 1982, attended by the author.

63. Pamela Coyle, *Tulane Law Clinic Honored for Work Communities Got Help in Environmental Cases*, TIMES-PICAYUNE (New Orleans), July 5, 2000.

64. Joe Gyan Jr., *Outlaw’ Leader Leaving La.*, ADVOCATE (Baton Rouge), May 15, 1999 (quoting Lt. Gov. Kathleen Blanco).

65. See list of awards and commendations attached to email from Professor Adam Babich, Dir., Tulane Env’tl L. Clinic, to author, July 02, 2016 (on file with author).

66. Hansen, *supra* note 13, at 50, 53–54.

67. *Robert R. Kuehn*, *supra* note 1, at 8.

68. See Hansen, *supra* note 13.

69. Telephone Interview with Robert Kuehn (May 6, 2015).

When we first started, nobody helped us. We started on our own. I can remember going to bed at night and we needed legal representation and we didn't know where to go. I kept saying, 'we can't keep this up, we don't have a lawyer. We need a lawyer to be helping us.' I just couldn't get over this – what are we going to do? Every night I prayed . . . . It took so long for Tulane to say 'yes.'<sup>70</sup>

Kuehn may also have been influenced by a telephone call from Governor Foster's special counsel and Deputy Chief of Staff, expressing concern that the clinic might take the case.<sup>71</sup> The call seemed quite out of line. More of the same pressure, much more, would soon follow. In the meantime, Kuehn felt obliged to say yes.

Over the ensuing weeks, the clinic did exactly what a corporate law firm would have done for a client like Mike Foster himself, concerned concerning that emissions from a new chemical plant would injure his sugar crop. Clinic students represented the St. James Citizens and other groups in a series of public hearings, and filed challenges to state air, water, and coastal zone permits, denials of public records requests, and, eventually, agency bias in the decision-making process.<sup>72</sup> They also petitioned EPA to review and override the state's hastily-granted air permits (approved the day following the submission of a mammoth administrative record).<sup>73</sup> It was full-bore client representation, as required by the ethical standards of the profession.<sup>74</sup>

Whether these legal actions by themselves would have brought down the Wrath of God will never be known, because the St. James clients and their allies then filed yet another claim: a violation of their civil rights. Shintech would become a test case for EPA's newly-announced environmental justice policy. In effect, the petition said that the disparate (and extraordinarily high) pollution levels to which this community would be exposed were themselves a form of racial discrimination. Although the document focused exclusively on emissions data and made no reference to the Governor, its civil rights challenge became the proverbial red flag to the bull.

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70. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 110 (quoting Brenda Huguet); *see also* statements of Emelda West, *supra* note 55 and accompanying text.

71. Kuehn interview, *supra* note 69.

72. Kuehn, *supra* note 1, at 9.

73. *Id.* at 49. The petition was co-signed by Greenpeace and named St. James Citizens and nineteen other community and state-wide organizations.

74. *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2018).

### III. THE PLAY OF THE GAME

*You're damned right I investigated them. I'm going to use every legitimate method at my command to defeat them.*<sup>75</sup>

—Kevin Reilly, Director of Environmental Development

The deck was stacked from the start, indeed from well before the start. Louisiana's DEQ, by law an independent regulatory agency, was also acting as the company's agent, public relations arm, and a declared opponent of the St. James Citizens. The breadth of this involvement was remarkable.<sup>76</sup>

In July 1996, one month before the project surfaced, the Department was cooperating with Shintech to conceal its site assessment which acknowledged that the contamination found "may have a potential to present material risk of harm to public health and the environment."<sup>77</sup> The company requested the report be kept confidential, explaining that its release could have a "detrimental effect on both purchase price and community relations."<sup>78</sup> That was good enough for DEQ. Request granted.

Two months later, the company submitted its required groundwater report, showing extensive contamination at this level, too. Again, it requested confidentiality on the basis of "community relations," and DEQ again concurred.<sup>79</sup> Apparently, this discovery was no more a problem than the first, although groundwater contamination is extraordinarily expensive to remediate, if possible at all.

That same month, Shintech applied for permission to begin site clearing, grading, road construction, and drainage, all before receiving its state permits. The agency, no surprise at this point (except to the local community, which had no clue), approved.<sup>80</sup> Shortly thereafter the company forwarded a public opinion poll on its project, apparently unfavorable, to friendly St. James councilmen, requesting strict confidence: "Please stress to them to basically keep this information to themselves. I would hate for Eric Poche or Pat Melancon [St. James Citizens leaders] to somehow use this against us."<sup>81</sup> Bad facts went underground.

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75. Christi Daugherty, *Life of Reilly: Battle Against PVC Plant in Louisiana*, GAMBIT WKLY., Nov.18, 1997.

76. See generally Motion to Recuse DEQ Officials, In the Matter of Shintech, STATE OF LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY, March 6, 1998 (detailed allegations, including those below). The Motion was subsequently vindicated by a reviewing court; see Mark Schleifstein, *Shintech Opponents Win First Round: Judge Supports Hearing on Claims*, TIMES-PICAYUNE (New Orleans), Sept. 1, 1998, at A2.

77. Chris Gray, *Contamination Was Kept Quiet, Opponents Say*, TIMES-PICAYUNE (New Orleans), Feb. 19, 1998 at A9.

78. Kuehn, *supra* note 1, at 43–44, citing letter from Jeffrey S. Heaton, Vice President, CK Associates, Inc., to Dale Givens, Secretary, Louisiana Dep't of Env'tl. Quality.

79. Lavie Interview and Timeline, *supra* note 34.

80. *Id.*

81. *Id.*

These were just the hors d'oeuvres. DEQ's first hearing on the air permits were a one-way affair, in which Shintech officials and supporters were given first go at the microphone and more time to speak, squeezing out some 100 opponents and running the proceedings until 1:00 a.m.<sup>82</sup> When being asked late into the evening by residents with small children in tow whether the hearing could be postponed until morning, the request was abruptly dismissed.<sup>83</sup> Meanwhile, the St. James Office of the President suddenly raised the price of copies of public documents from 25 to 75 cents per page, increasing costs for citizens by some 200 percent.<sup>84</sup> The squeeze was on.

So was a counter-offense. Another DEQ office called Community-Industry Relations was busy organizing a pro-Shintech constituency group of its own. The Agency's Group Coordinator, Janice Dickerson, canvassed the area for supporters,<sup>85</sup> supplied computer and fax services<sup>86</sup> and, evidence suggests (although later denied), assisted in authoring a letter for the aging Gladys Maddie, written in evident anger and excoriating Shintech opponents as racists, by name.<sup>87</sup> It was published by a local newspaper, coincidentally owned by a lawyer on retainer to Shintech.<sup>88</sup> Dickerson is said to have collaborated closely with Shintech's own public relations firm,<sup>89</sup> and with a university forum that called the plant's critics "little dictators" and "little Hitlers."<sup>90</sup> Even Governor Foster hadn't tried that one. The circle was complete, and openly ad hominem.

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82. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 123; Lavie Interview, *supra* note 34. (Lavie attended this hearing as well).

83. Lavie Interview and Timeline, *supra* note 34. A subsequent Shintech memorandum to its consultants and employees is alleged to have congratulated them for "having successfully frustrated" citizen input at this hearing. FROM PLANTATIONS TO PLANTS, *supra* note 29, at section 6-3.

84. See Reasons for Judgment, St. James Parish Citizens for Jobs & the Env't v. Hymel, No. 24722 (23rd La. Dist. Ct. June 17, 1999); E-mail from Thomas Milliner, Tulane Env'tll L. Clinic, to Robert Kuehn (Feb. 2, 2000) (on file with author) (Parish agrees to reduce copying fees from \$.75 per page to \$.10 per page).

85. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 115; see also Vicki Ferstel, *Groups Want DEQ Officials Off Shintech Case*, ADVOCATE (Baton Rouge), Dec. 9, 1997, at 1-A; Chris Gray, *State Favors Shintech Plant, Opponents Say*, TIMES-PICAYUNE (New Orleans), Dec. 9, 1997, at B3.

86. Melba Newsome, *Battle on the Bayou*, VIBE, April 19, 1998 at 56.

87. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 115 (Dickerson allegedly spent the preceding evening closeted with Maddie). The letter, complaining of intervention by environmentalists who had only recently "hung up their sheets," found "the exploitative use of the color of our skin and socio-economic condition sickening and insulting." Letter to the Editor, *Where is the Environmental Justice?*, NEWS-EXAMINER (St. James), Apr. 24, 1997. The theme and language are strikingly similar to those of Dickerson herself, see *infra* notes 91, 189 and accompanying text. Whoever authored the letter, it was picked up avidly by the Wall Street Journal, see Henry Payne, *Environmental justice hurts the poor*, WALL STREET J., Sept 16, 1997.

88. Christi Daugherty, *Economic Development or Environmental Racism*, GRIS (Baton Rouge), Apr. 19, 1997, at 16. Apparently, Shintech hired the owner of both St. James Parish newspapers to promote its cause. *Id.*

89. Motion to Recuse, *supra* note 76.

90. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 115; Ferstel, *supra* note 85.

At the same time, Shintech was hiring an attorney named Nannette Jolivette, then in Lafayette, to help in the pro-Shintech effort.<sup>91</sup> Jolivette would intervene in several of the proceedings on behalf of plant supporters, ensuring as she explained after the arrangement was revealed, that her clients “were included in the democratic process.”<sup>92</sup>

All of this was peanuts compared to the engagement of Governor Foster’s office itself, which leaned heavily on his agencies, the bar, the business community, the Tulane University and its alumnae, and even the Louisiana NAACP.<sup>93</sup> After a meeting with the Governor, the New Orleans chapter leader, who had previously spoken against the plant, suddenly announced that he was neutral instead.<sup>94</sup> Two months later, on the same day the Foster Administration approved an unsecured loan of up to \$2.5 million to another organization headed by this same leader, he announced in favor of Shintech.<sup>95</sup> To be sure, the loan was to support training for minorities, but other expectations may have been on the table as well. As if to confirm them, his announcement was garnished with scathing criticism of Shintech opponents, again by name.<sup>96</sup>

Most aggressive of all was Foster’s Secretary of Economic Development, Kevin Reilly, who, in tune with the Governor, accused the Tulane clinic of conducting “legalistic guerilla attacks” against Shintech that were “corrupting the legal system.”<sup>97</sup> Clinic students and professors, he told a group of New Orleans leaders, were “environmental fascists” using “brown shirt tactics” to thwart state

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91. Maria Giordano, *Groups Intervene to Back Shintech*, TIMES-PICAYUNE (New Orleans), Aug. 9, 1997 at B1. After this arrangement surfaced in the press, Jolivette apparently renounced it; see *Vox Populi*, GAMBIT MAGAZINE, Nov. 18, 1997. From 1988–1992 Jolivette had worked with the firm Adams and Reese in New Orleans, a major player in the subsequent attempt to disqualify the Tulane Environmental Law Clinic from student practice; see Kuehn, *supra* note 1, at 67, 72–74 (describing firm’s actions). After brief service with the Clinic itself, Jolivette returned to corporate and government practice until her appointment to the federal Eastern District Court in New Orleans. *La’s First Black Female Federal Judge, Nannette Jolivette Brown, Honored*, LA. WKLY., Jan. 23, 2012.

92. See Nannette Jolivette, *Real Issues in St. James*, GAMBIT WKLY., Oct. 7, 1997; see also Nannette Jolivette Brown, *The Many Faces of Environmental Justice*, LOYOLA LAWYER, Spring 2009. There is no question that Jolivette’s representation was ethical. St. James Citizens might nevertheless be forgiven for thinking that she continued to represent the interests of Shintech as well, which had hired her and had showed no interest in dialogue with them prior to the filing of their environmental justice petition, or following. See Letter of Gloria Roberts et al. to the Editor, GAMBIT WKLY., *Shintech Deception*, Nov. 18, 1997.

93. Kuehn, *supra* note 1, at 43, 63 (describing pressure).

94. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 114.

95. *Id.* Marsha Shuler, *Johnson, Shintech, Big Loan*, ADVOCATE (Baton Rouge), Sept. 14, 1997, at 1A. The \$2.5 million in financing was approved over the objections of the council’s staff and included, on the state’s motion, an extra \$500,000 that was not sought by the local chapter.

96. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 114; FROM PLANTATIONS TO PLANTS, *supra* note 29, at section 6-4.

97. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 113; John McMillan, *Reilly Says He’s Not Hostile to Tulane, But Defends Letter*, ADVOCATE (Baton Rouge), Aug. 16, 1997, at A12.



plans.<sup>98</sup> Reilly's own tactics spoke for themselves. Coordinating closely with the company he launched investigations into both the St. James Citizens group and the Tulane clinic which represented them.<sup>99</sup> When these investigations were discovered, Governor Foster told the press that he had no problem with Reilly using his position and state funds to investigate citizens opposed to the Shintech plant.<sup>100</sup>

One of these investigations was particularly troubling. A Baton Rouge good-government group called the Coalition for Tax Justice, headed at the time by an African American woman, Stephanie Anthony, had written a letter to the Advocate newspaper criticizing the \$150 million in tax breaks given to the company on the grounds that it would produce very few jobs in return.<sup>101</sup> This letter apparently spurred Reilly to enlist state attorneys in an investigation into the Coalition's tax exemption, a chilling inquiry for any public-interest organization. After the inquiry surfaced, Reilly was unapologetic: "You're darned right I investigated them," he told the press, "I'm going to use every legitimate method at my command to defeat them."<sup>102</sup>

What was happening here was not merely an affirmative campaign to promote a new chemical plant. It was a no-holds-barred campaign to obstruct citizens and others who questioned it. In the end, facing all these headwinds, the St. James Citizens group held its ground. More than one hundred residents came to the final Shintech hearing, and not a single one spoke in favor of the plant.<sup>103</sup> The only two speakers to do so were from elsewhere, and on contract with the company.<sup>104</sup> As one reporter wrote: "Had the Romeville Elementary School been a boat Saturday, it would have capsized. One side was filled with Shintech opponents, the other side a small group of Shintech supporters."<sup>105</sup> Even the state representative from the area opposed.<sup>106</sup> How did this happen?

Lisa Jordan, a Tulane clinic supervisor and lead assistant to Kuehn on the case, remembers:

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98. Memorandum from Debbie Grant, Tulane University, to Robert Kuehn (July 5, 1998), (describing Reilly's remarks to a MetroVision meeting in New Orleans, Louisiana, the previous month).

99. Ed Anderson & Chris Gray, *Foster Endorses Probes of Shintech Adversaries*, TIMES-PICAYUNE (New Orleans), Nov. 7, 1997, at A3.

100. *Id.* Reilly's attacks were seconded by La DEQ's Air Quality chief who referred to the Clinic and its clients as "the enemy" and ordered his staff "not to meet with plant opponents," John McQuaid, *Burdens on the Horizon*, TIMES-PICAYUNE (New Orleans), May 21, 2000, and by DEQ's newly-appointed Ombudsman, who told Kuehn following a meeting that he was "surprised you're still standing." Motion to Recuse, *supra* note 76, at 22.

101. Daugherty, *supra* note 75.

102. *Id.*

103. See John McMillan, *Group Denounces Shintech Plan*, ADVOCATE (Baton Rouge), Jan. 24, 1998, at 3B (observing that after a Shintech spokesperson opened the hearing, "speaker after speaker" attacked the proposed site of the plant).

104. See *id.*

105. Mike Dunne, *Foes Cite Pollution, Injustice*, ADVOCATE (Baton Rouge), Jan. 25, 1998, at 1B.

106. *Id.*

I would go to these meetings with the clients and I got very close to them. That was my life. We would always start a meeting with a prayer and Miss West—she usually led the prayer. She would always end the prayer with ‘I take authority over Shintech in Jesus’ name. Shintech will not locate here!’ . . . . I’m not a religious person, but I started to believe that. You know I really did. Part of me started to believe—I just couldn’t envision them [Shintech] coming.<sup>107</sup>

It began with the power of prayer. It would not rest there for long.

#### IV. ENVIRONMENTAL JUSTICE RISING

*What does it feel like to be consistently afraid of having your health endangered, especially when it seems related to the color of your skin, the amount of money you have, and your lack of political clout?*<sup>108</sup>

—Chronicles from the Environmental Justice Frontline

Environmental justice arose in Louisiana, well before anyone knew the phrase, not out of animus on the part of industry but because of the places it chose to locate and what it chose to release.<sup>109</sup> Enabled by state zoning, a wave of chemical plants dropped on African American communities like a bomb. As Dr. Florence Robinson of the Alsen area near Baton Rouge described:

The first plant came about 1955. As a matter of a fact, it was in 1955 that the Louisiana legislature passed a resolution and in that resolution they designated industrial zones. Four of those zones were in Alsen or contiguous with Alsen. What is really significant about that is in 1955 we [African Americans] couldn’t vote. We were systematically denied the right to vote. So, that was taxation without representation. . . . Alsen is a classic example of what the 1969 civil rights commission called “institutionalized racism.”<sup>110</sup>

This phenomenon has been documented in national studies linking hazardous waste sites to minority communities,<sup>111</sup> soon expanding to air and water

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107. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 112.

108. *Id.* at 9.

109. These plant locations were not entirely innocent of racial bias. There is evidence that they were selected precisely because low income and minority communities could offer less resistance. See ALLEN, *supra* note 1, at 83 (citing consultant report to the City of Los Angeles, CERRELL ASSOCIATES, POLITICAL DIFFERENCES FACING WASTE-TO-ENERGY CONVERSION PLANT SITING (1984), described as a “how-to-manual” for industry recommending the selection of low-income and less well-educated communities).

110. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 21.

111. See U.S. GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS & SURROUNDING COMMUNITIES (1983); COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

discharges as well.<sup>112</sup> Over time the problem was getting worse, not better.<sup>113</sup> New sites were rising in Willow Springs, Mossville, Bayou Sorrell, East Baton Rouge, and a suite of lawsuits over them attracted the attention of national organizations, academics, the media, and eventually the government.<sup>114</sup> Like it or not, Louisiana became the proving ground for a new question: exactly what *was* environmental injustice, and what did it require?

To industry and its boosters, the answer was simple: it required a *purpose* to discriminate—which of course would be difficult for would-be plaintiffs to prove, and easily denied.<sup>115</sup> They were not picking on anyone. They had good reasons to locate where they did, and the plants would indeed bring jobs to the very people doing the complaining.<sup>116</sup> Corporate lobbies and state officials went further to decry the claimed injuries as bogus, the product of degraded “lifestyles” instead.<sup>117</sup> To people on the receiving end of the fumes and the flares, however,

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112. See OFFICE OF POLLUTION PREVENTION AND TOXICS, U.S. ENVIRONMENTAL PREVENTION AGENCY, TOXIC RELEASE INVENTORY AND EMISSIONS REDUCTIONS 1987–1990 IN THE LOWER MISSISSIPPI INDUSTRIAL CORRIDOR 25 (1993) (“Many of the facilities emitting large amounts of TRI chemicals are located in areas with predominately minority populations”).

113. “Despite growing national attention to the issue of “environmental justice,” people of color today are even more likely than whites to live in communities with commercial hazardous waste facilities than they were a decade ago. The disproportionate environmental impacts first identified and documented in the 1987 report TOXIC WASTES AND RACE IN THE UNITED STATES have grown even more severe”. BENJAMIN A. GOLDMAN & LAURA FITTAN, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLES & UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE REVISITED (1994).

114. See BULLARD, *supra* note 1, at 103 (“Some residents of the region suspect that their communities are rapidly becoming sacrifice zones because of the placement there of garbage dumps, landfills, incinerators, and petrochemical plants. Nowhere is this more apparent than in SE Louisiana where unincorporated African American communities are especially vulnerable to industrial pollution”). See also Oliver A. Houck, *Save Ourselves: The Environmental Case That Changed Louisiana*, 72 LA. L. REV. 409, 421–24 (2012) (describing Bayou Sorrell, East Baton Rouge and related litigation); Oliver A. Houck, *Willow Springs: A Civil Action in Louisiana*, 62 LOYOLA L. REV. 237 (2016) (describing Willow Springs and Mossville litigation).

115. See U.S. COMM’N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 34 (2003) (“Business representatives and local government officials overwhelmingly object to using disparate impact in the legal analysis of Title VI environmental violations”); Local authorities objected as well, See Catherine M. Cooney, *Still Searching for Environmental Justice*, 33 ENVTL. SCI. & TECH. 200 (1999).

116. See STEPHEN B. HUEBNER, CENTER FOR THE STUDY OF AMERICAN BUSINESS, ARE STORM CLOUDS BREWING ON THE ENVIRONMENTAL JUSTICE HORIZON? (1998) (criticizing a “disparate impact” standard for environmental racism, but accepting the phenomenon as proven).

117. Gus Von Bodungen, Assistant Secretary for Air Quality, Louisiana DEQ: “See, they claim all kinds of health threats and the plant is not even built . . . it’s always lifestyle—excessive smoking, excessive drinking, whatever, you know, drugs, and anybody that does a study and leaves drugs out is really leaving out a major part of lifestyle,” ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 117; David Maranis & Michael Weiskopf, *Jobs and Illness in Petrochemical Corridor*, WASH. POST, Dec. 22, 1987 (quoting Louisiana Chemical Association leader Fred Loy (“They say the chemical plants are causing the miscarriages [in St. Gabriel, Louisiana], but they have no proof. I could [as easily] say they screw too much and that’s the cause of the miscarriages.”)). For a more complete description of state and industry blame-shifting, see Houck, *Willow Springs*, *supra* note 114, at 244–45 and sources cited therein; see generally GERALD MARKOWITZ & DAVID ROSNER, DECEIT AND DENIAL: THE DEADLY

the intent of a corporation headquartered in Texas, Delaware, or Japan was quite irrelevant.<sup>118</sup> If the discharges they unleashed were grossly disproportionate to black communities, this impact was what mattered. It wasn't intent they were breathing, and what they were breathing was what had given rise to the issue in the first place. And so, the sides were drawn.

Up to the time the Shintech controversy began, industry had the law largely in its corner. The Civil Rights Act of 1964 had prohibited discrimination in many forms, housing and employment among them; Title VI, in particular, both barred discrimination in any program receiving federal funding<sup>119</sup> (Section 601) and required federal agencies to develop regulations to redress violations<sup>120</sup> (Section 602). By the 1970s Louisiana was receiving significant federal monies for its various environmental programs, air permitting prominent among them. Title VI seemed to fit square-on.

Gradually, however, reviewing courts began to engraft an intent requirement onto private claims under Title VI,<sup>121</sup> virtually nullifying its effect in pollution cases and liberating dischargers up and down Cancer Alley from the threat of environmental justice lawsuits. Left standing, however, were EPA 1984 regulations applying Title VI prohibition to projects with the "purpose *or* effect" of discrimination, keeping the federal door open.<sup>122</sup>

For the next decade, whatever the regulations said, the Agency was reluctant to fold environmental justice into permit decisions it believed should be based

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Politics of Industrial Pollution (2002); Jim Morris, *In Strictest Confidence: The Chemical Industry's Secrets*, HOUSTON CHRON., July 26, 1998, at A-1 (Chemical Manufacturers Association campaign to obfuscate toxic and carcinogenic impacts).

118. See Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 39 (1993).

119. 42 U.S.C. § 2000d.

120. *Id.* § 2000d(1).

121. For early cases see U.S. COMM'N ON CIVIL RIGHTS, *supra* note 115. In 1983 the Supreme Court read an intent requirement into the non-discrimination mandate of Section 601 of the Act, *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983), rejecting a disparate impacts test. Section 602 remained, however, which among other things allowed federal agencies to go further in their own regulations in order to achieve the Act's goals; as noted above, EPA's regulations the following year prohibited discriminatory intent *or* effect. Twenty years later, in *Alexander v. Sandoval*, 532 U.S. 275 (2003), a 5-4 Court all but slammed the door on this avenue as well, holding that while Section 602 authorized more stringent regulations, it did not authorize citizens to enforce them—a true Catch-22. See generally *Environmental Justice and Title VI of the Civil Rights Act: A Critical Crossroads*, SECTION OF ENV'T, ENERGY, & RES. NEWSLETTER (American Bar Association, Chicago, IL.), Mar./Apr. 2012, at 6-7. Citizens were left with the burden of either proving actual intent to discriminate, or petitioning EPA to enforce its own regulations. Meanwhile, however, the Court's more recent decision in *Texas Dept. of Housing and Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507 (2015), approving private claims under the Fair Housing Act based on disparate impacts, might crack open the door at some point for reconsideration of its Title VI jurisprudence. For the risks in relying solely on EPA discretion see discussion, *infra* notes 336-39.

122. 40 C.F.R. § 7.35(c) (2003).

solely on science and technology.<sup>123</sup> Finally, in 1994 President Clinton issued an executive order to “[a]ddress Environmental Justice in Minority Populations and Low-Income Populations”<sup>124</sup>—the very definition of Convent and like communities across Louisiana.

Stripped of its trappings, the Order required federal agencies to ensure that none of their activities (including funding) had the *effect* of discriminating against people, or groups, identifiable by race, color or national origin.<sup>125</sup> The disparate impacts test had returned, but for the fact that the Order also stated that it should “not be construed to create any [private] right to judicial review.”<sup>126</sup> It would be up to the agencies themselves to make it work.

Four years later, after continuing pressure from its Office of Civil Rights, the Agency issued Interim Guidance for processing Title VI complaints.<sup>127</sup> The Guidance dictated that the Agency conduct a community impact assessment that included cumulative emissions in the area.<sup>128</sup> A finding of disparate impact triggered a more elaborate review and even the loss of federal funding.<sup>129</sup> The question was whether this review would be effective, and once again Louisiana would provide the first answers.

## V. TWO PRECURSORS

In June 1989, Louisiana’s senior Senator J. Bennett Johnston celebrated his birthday in the town square of a small African American community near Shreveport called Homer, one of the poorest communities in one of the poorest regions of the state.<sup>130</sup> Johnston told the crowd that he had a present for them: he had negotiated a deal with a group of European investors to bring a \$750 million radioactive waste processing facility to Homer.<sup>131</sup> It would be entirely safe, he said, and create 400 jobs.<sup>132</sup> He did not read his audience well.

Much about the project smacked of Shintech to come. The lucrative price tag, the alleged jobs (none of which the consortium would be willing to promise to local residents),<sup>133</sup> and the announcement by surprise. According to Essie

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123. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 115 (describing EPA’s reluctance). While obviously a reluctance tinged with politics, EPA was also experiencing great difficulty implementing even its clear-cut technology-based standards for pollution control over stiff industry resistance. It may not have wanted to add yet another, and yet more controversial, burden.

124. Exec. Order 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

125. *Id.* at Sec. 2-2.

126. *Id.* at Sec. 6-609.

127. U.S. E.P.A., INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1988).

128. *Id.* at 8–11. This cumulative analysis was particularly important for proposals in areas like Convent, already subject to extraordinary pollution loads.

129. See 40 C.F.R. §§ 7.115(c)–7.130(b) (suspension or denial of federal funding).

130. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 65–66.

131. *Id.* at 66. The description of the Homer controversy that follows is taken largely from this source.

132. *Id.*

133. *Id.*

Youngblood, a retired schoolteacher and descendant of Georgia slaves whose farm overlooked the site, “All the plans had been made, no one never told us nothing.”<sup>134</sup> They “wanted to put it there,” she continued, “because they thought we wouldn’t be able to afford a lawyer to fight them. They thought nobody here had an education, and that we wouldn’t know what to do.”<sup>135</sup> Homer did it anyway. Residents formed a group called CANT (Citizens Against Nuclear Trash) and found legal representation from the Sierra Club Legal Defense Fund and other national groups.<sup>136</sup> The fight was on.

It was not pretty. The company offered a rainbow of blandishments: it gave money to a local church (accepted by the pastor, then rejected by the congregation), sent kids to summer camp, and funded the Girl Scouts.<sup>137</sup> How much greener could it be? The head of the Chamber of Commerce in Shreveport told a public meeting that he would be happy to have the nuclear waste operation as his next door neighbor, which drew cries of “take it!” from the crowd.<sup>138</sup> The company flew the president of the local NAACP to Europe, first class, all expenses paid, after which he announced his support for the project.<sup>139</sup> The national NAACP, meanwhile, voted the other way.<sup>140</sup> In the end, the campaign won some supporters and left deep scars behind.

The script also played out in Washington before the Nuclear Regulatory Commission—which during its deliberations received the new Clinton executive order—and before a new Louisiana DEQ that posed a number of difficult questions, thirty-four of them in fact, among which: how and why did they choose Homer?<sup>141</sup> The results were embarrassing. Dr. Robert Bullard, a leading environmental justice scholar, told the Commission that at every step, winnowing alternative sites down, the siting decision became more targeted on black communities.<sup>142</sup> The NRC equivocated, stalled, and issued contradictory partial opinions on whether it had an environmental justice violation.<sup>143</sup> Eventually, with no government decision on the immediate horizon and blaming “hellacious delays,” the project sponsors pulled the plug.<sup>144</sup> Game over, but without a formal decision, the reach of the Clinton executive order and EPA’s new policy remained up in the air.

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134. *Id.* at 66 (citing interview with Essie Youngblood, May 1999).

135. *Id.*

136. *Id.* at 69.

137. *Id.* at 78–79.

138. *Id.* at 89.

139. *Id.* at 87.

140. *Id.*

141. *Id.* at 84.

142. *Id.* at 89–90.

143. The Commission made a “preliminary” finding in favor of a violation, then rescinded it, and then went quiet. *Id.* at 80–83, 91–92.

144. *Id.* at 93–94.

The second shoe to drop was in Carville, a small community south of Baton Rouge, largely poor, over seventy percent black.<sup>145</sup> It was a surprise candidate for a hazardous waste facility, owned by a newly-created corporation called Supplemental Fuels Incorporated (SFI), which would in turn feed one of the largest incinerators in the nation.<sup>146</sup> As in Convent, the impacts on Carville residents would join those from a dozen neighboring plants, throw in the presence of two state prisons, a state hospital for leprosy patients,<sup>147</sup> and the remains of a remarkable plantation owned by a former slave, Louis Smith, called even more remarkably “Small Hope.”<sup>148</sup> Although SFI’s waste plan had been in the works since the 1980’s, it was not until 1993, in what was becoming a familiar pattern, that the state moved to permit the operation with little notice and less time to respond.<sup>149</sup> Which, here too, did not work out well. The reaction was fierce.

In the process, because a hazardous waste permit was in play, the Louisiana DEQ was required to hold adjudicatory hearings,<sup>150</sup> which came right to the point.

Leonard Jackson, member, Iberville Police Jury:<sup>151</sup>

We started out at a disadvantage because of this young lady right here [indicating the DEQ hearing officer] campaigning for SFI. When we told her . . . that we did not want SFI in our community she said well, let me tell you something Mr. Jackson, ‘this here is the type of facility y’all need in St. Gabriel and Carville’ . . . [have you looked] at the ten hazardous waste facilities and where are they located at? All of them are located within a minority district. Is this a coincidence? Is this the only place you can find to put hazardous waste facilities and chemical industries? Why every time you get ready to build a facility it has to be located in a minority district?

Dr. Florence Robinson, Biologist, Southern University:<sup>152</sup>

I’d like to think that the more waste that comes into Carville and SFI means less waste coming into my community, but I don’t wish that evil on anyone. You see, I live in the middle of a triangle of facilities which, when they were sited, when they were opened, were considered innovative, state-of-the-art, very much needed, useful facilities. Two of them now are Superfund sites and the third is a Superfund site waiting to happen . . . These sitings have been occurring for many years, even generations, and the practice has become

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145. See Clinic petition, *infra* note 169, at 2 (demographics of St. Gabriel and Carville).

146. ALLEN, *supra* note 1, at 158–59.

147. *Id.* at 159.

148. See Bob Anderson, *Site May Hold Key to Black-White Relations*, ADVOCATE (Baton Rouge), Nov. 7, 1993.

149. ALLEN, *supra* note 1, at 158.

150. In the Matter of Supplemental Fuels, Inc., 94-1569 (La. App.1 Cir, 1995); 656 So. 2d 29, 33.

151. Testimony of Leonard Jackson, Public Hearing Transcript, Supplemental Fuels, LA D9852818544, Aug 6, 1993 at 98–100.

152. Testimony of Dr. Florence Robinson, *id.* at 110–12.

entrenched in the system. Thus, the State of Louisiana is guilty of institutionalized racism and environmental injustice.

Coming to the required consideration of alternative sites, the hearing became yet more embarrassing:<sup>153</sup> there hadn't been any:

Q: (Diaz, Tulane Clinic): Have you ever had any previous involvement with a hazardous waste facility?

A: (Hansen, SFI): No, I have not.

...

Q: Did you look at any other sites besides this one?

A: We had other sites considered, but none seriously.

Q: What sites were those?

A: Other river locations.

...

Q: Do you have anything more specific than that?

A: No, I can't even give you the exact location.

The spectacle went on for three days. Over 100 witnesses testified, speaking to what they saw as targeted, cumulative harm. The transcript ran some 700 pages. Most were germane to the Shintech story—they not only challenged the permit but also lodged a Title VI complaint with the EPA.<sup>154</sup>

For Louisiana, this was new ground.<sup>155</sup> The issue was seized on by Charles Ellis, whose corporate law firm was representing one of the few landowners in Carville able to afford it,<sup>156</sup> and Robert Wiygul, a Sierra Club Legal Defense Fund attorney whose clients in North Mississippi were facing a suite of incinerator proposals.<sup>157</sup> Burning toxic wastes was in vogue, and the sites were going rural and black. Wiygul had uncovered the EPA regulations that seemed to bar disparate impacts but could not find instances of their application to environmental

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153. Daria Diaz cross examination of Lloyd Hansen, Public Hearing Transcript, Supplemental Fuels, LAQ D9852815144 (May 14, 1993), at 131–32.

154. See Letter of Dan J. Rondeau, Director, Office of Civil Rights, U.S. EPA, to Kai Midboe, Secretary, Louisiana Dep't of Env'tl. Quality (Oct. 8, 1993); Bob Anderson, *EPA's Civil Rights Office Examines Handling of Toxic Permit Application*, ADVOCATE (Baton Rouge), Oct. 9, 1993, at 1-A.

155. Citizen lawsuits based on Title VI were being pioneered in California and New Jersey by civil rights attorneys including Luke Cole; while ultimately unsuccessful, they helped set the stage. See Dennis Hevesi, *Luke Cole, Advocate for Minorities, Dies at 46*, N.Y. TIMES, June 10, 2009; LUKE W. COLE & SHEILA FORSTER, FROM THE GROUND UP, ENVIRONMENTAL RACISM AND THE ENVIRONMENTAL JUSTICE MOVEMENT (2001).

156. Interview with Charles Ellis (July 10, 2016); E-mail from Charles Ellis to Oliver Houck (July 8 & 10, 2016) (on file with author). See also COLE & FOSTER, *supra* note 155.

157. Interview with Robert Wiygul, Staff Attorney, Sierra Club Legal Defense Fund (July 11, 2016) (on file with author).



permitting. It was an “Aha!” moment, Ellis recalls: “Robert had the theory, but he had a weak case up in Mississippi, no other bad stuff around; I had the *ideal* facts with SFI, it was the perfect storm.”<sup>158</sup>

Feeling its way forward, in October 1993 EPA accepted the petition for further inquiry.<sup>159</sup> The pressure was now on Louisiana DEQ, which in March, denied the permit it had all but approved some six months before.<sup>160</sup> Pursuant to a Louisiana Supreme Court opinion rising from yet another hazardous waste incinerator,<sup>161</sup> the failure to consider alternatives was fatal.<sup>162</sup> DEQ’s decision was as much a surprise to opponents as it was to SFI, which promptly appealed. The appellate court, however, openly amazed that the industry’s chief witness “could not state the location of alternative sites” he had allegedly considered, and that DEQ’s permit writer was unaware of any consideration at all, upheld the denial.<sup>163</sup>

Although a win for SFI opponents, DEQ’s opinion rejected their Title VI claims. “Environmental justice is an important ingredient of sound environmental policy in Louisiana,” the agency dutifully stated, but without “established standards” for disproportionate impacts, a claim of “having more emissions” could not “stand the test for scientific certainty.”<sup>164</sup> This rather missed the point. Subjecting a community to 130 times “more emissions” than the rest of the state (and over 600 times the rest of the country) was the very gravamen of the offense,<sup>165</sup> as the Shintech case too would show. The issue would not go away.

Meanwhile, the SFI case rippled widely. The local movement it stimulated led to incorporation of the area as St. Gabriel, increased political clout, and involvement in justice issues beyond its borders.<sup>166</sup> One former alderman would lend his support for Shintech opponents, stating, “I’m someone who has witnessed the jobs, and not with one plant but ten, in St. Gabriel. I’ll be the first to tell them—forget about the jobs . . . but you’ll have the plant anyway.”<sup>167</sup> On the national level, SFI and sister cases in the Gulf Coast south were largely responsible for prompting White House action that same year.<sup>168</sup> They also prompted the Tulane Clinic to file a “generic” environmental justice petition with EPA, alleging

158. Interview with Charles Ellis, *supra* note 156. Ellis raised the issue in the adjudicatory hearings as well, Transcript, *supra* note 153, at 212–13, eliciting, he recalls, “snickers in the room,” *id.*

159. Rondeau Letter, *supra* note 154. EPA’s acceptance floored Leonard Jackson, who told the press “I had no idea they would even consider helping us.” Bob Anderson, *supra* note 154.

160. Denial of Operating Permit, Supplemental Fuels Incorporated, St. Gabriel, Louisiana, Iberville Parish, EPA ID Number LAD 985 218 544, Master File, La. DEQ (on file with author).

161. *Save Ourselves, Inc. v. La. Env’tl. Control Comm’n*, 452 So. 2d 1152, 1157 (La. 1984); *see also* *Blackett v. La. Dep’t of Env’tl. Quality*, 506 So.2d 749, 755 (La. App. 1st Cir. 1987).

162. Denial of Operating Permit, *supra* note 160, at 3–5.

163. 665 So. 2d at 38.

164. Denial of Operating Permit, *supra* note 160, at 2–3.

165. *See* text, *supra* note 31.

166. ALLEN, *supra* note 1, at 159–62.

167. *Id.* at 107 (quoting Leroy Alfred).

168. *See* Scott Bronstein, *Around the South Environmental Racism?*, L.A. TIMES, Dec. 7, 1993.

violations in Louisiana across the board.<sup>169</sup> EPA accepted this one too, keeping the pressure on Baton Rouge.<sup>170</sup>

## VI. THE SHINTECH PETITIONS

At the same time, the Agency was offering a carrot: grant money to launch an office within DEQ focused on environmental justice<sup>171</sup> that promised at least the potential to deal with badly-unbalanced burdens in a more proactive way. Instead, the Department took a different tack.

The coordinator for this office would be Janice Dickerson, and her demands of the chemical complex were modest, if indeed they were demands at all.<sup>172</sup> "Industry should not be expected," she and a senior colleague explained, "to support services that are the duty of government to provide,"<sup>173</sup> overlooking the fact that industry's tax exemptions had left local governments unable to provide these services in the first place. As for residents affected by airborne toxins, her response was access to health care "rather than," one historian writes, "asking questions about how they became unhealthy in the first place."<sup>174</sup> DEQ's environmental justice program, prepared with the assistance of "the major chemical associations in Louisiana,"<sup>175</sup> would instead "strive to instruct people how to solve

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169. Supplemental and Amended Complaint, EPA File No. 18-93-R6, Tulane Environmental Law Clinic, to Dan J. Rondeau, Office of Civil Rights, US EPA, Nov. 7, 1994 (expanding on original complaint filed Mar. 31 1994) (on file with author). *See also Environmental Justice Cases in Louisiana*, ADVOCATE (Baton Rouge), Mar. 1999, at 4A (summarizing eight environmental justice complaints filed with federal agencies, against Louisiana DEQ between 1993–1998).

170. *See* Letter from Dan. J. Rondeau, Office of Civil Rights, US EPA to William Kucharski, Secretary, Louisiana Dep't of Env'tl. Quality, April 15, 1994 (on file with author).

171. *See* discussion, *supra* note 88.

172. It was not always thus. In the late 1960's Dickerson's African American community came under siege by a large pulp and paper plant whose emissions were "killing grass, trees and vegetables," so "they had to be doing something to humans as well." Jon Bowermaster, *A Town Called Morrisonville*, AUDUBON MAGAZINE, Jul.–Aug., 1993. She organized a citizen group (Victims of Toxic Environments United), got nowhere with state agencies, filed a civil action against the plant, and eventually won a settlement at least enabling the relocation of the residents. "For most whites the environment is just a cause," she explained, but "[f]or blacks, it's a matter of life and death." *Id.* She went on to become a community organizer for the Gulf Coast Tenants Association in Baton Rouge, a group that would later throw in vigorously against the Shintech project. After taking the environmental justice portfolio at Louisiana DEQ (with the backing of the Louisiana Chemical Association and Mid-Continent Oil and Gas), however, the life-and-death urgency of toxic pollution apparently yielded to other agendas, "namely, DEQ's dedication to industry allegiance." ALLEN, *supra* note 1, at 94–95. This shift was at least accelerated by her resentment of white intrusion into what she perceived as a black issue. *See infra* notes 188–89 an accompanying text.

173. *See* Roger K. Ward & Janice F. Dickerson, *Environmental Justice in Louisiana: An Overview of the Louisiana Department of Environmental Quality's Environmental Justice Program*, LA. DEP'T OF ENVTL. QUALITY, April 1995, at 4.

174. ALLEN, *supra* note 1, at 99.

175. Ward & Dickerson, *supra* note 173, at 4–5.

their own problems,”<sup>176</sup> to wit a new children’s playground and “environmental justice panels” composed of industry and local residents, no outsiders allowed.<sup>177</sup>

In the agency’s “insular cosmology,” the historian concludes, communication with other communities, even those facing identical problems, was counter-productive and communication with outside experts was beyond the pale.<sup>178</sup> Facing corporations the size of Exxon Mobil and Dow, then, and some of the most frightening toxic loadings in America, local residents were on their own.

Against this backdrop, the Shintech clash was inevitable. In April 1997, the St. James Citizens filed their first petition with the EPA Regional Office in Dallas asking it to reject the state’s Shintech permits on the Clean Air Act and other grounds, including disparate impacts.<sup>179</sup> After some indecision, the Region found the discrimination claims beyond its purview, but rejected the permits on other errors—some of them quite fundamental—that sent the company back to the drawing board.<sup>180</sup>

Meanwhile, in response to recurring citizen complaints (e.g., Gloria Roberts: “I saw pollution; I saw more deaths from cancer, and I saw no jobs for our people here”),<sup>181</sup> the Clinic filed a second petition with EPA’s Office of Civil Rights in Washington.<sup>182</sup> The petition cited the Agency’s own findings that the average St. James Parish resident was already exposed to 360 pounds of toxic air pollutants annually, as compared to 21 pounds for the average Louisianan; that ninety-five percent of people living within a mile of the plant were African American; and that eighteen toxic waste facilities producing one-fifth of all air pollution in the state were located within a four-mile radius of the Parish<sup>183</sup>—even before Shintech would come on line. A related chart showed that adding the new plant would result in statewide loadings down here and Convent loadings in the stratosphere.<sup>184</sup>

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176. ALLEN, *supra* note 1, at 98.

177. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 55. Not surprisingly, community participation on the panels had been “minimal.” Ward & Dickerson, *supra* note 173, at 9.

178. ALLEN, *supra* note 1, at 99.

179. Shintech, Inc. and Its Affiliates’ Polyvinyl Chloride Prod. Facility, EPA Order, May 22, 1997. The Clinic also filed a petition asking the EPA to review the state’s Prevention of Significant Deterioration (PSD) permit under the federal Clean Air Act. Shintech, Inc. and Its Affiliates, Prevention of Significant Deterioration Permit PSD-LA604, EPA Order, June 30, 1997.

180. Order Partially Granting and Partially Denying Petitions for Objection to Permits, *In re* Shintech Inc. and Its Affiliates’ Polyvinyl Chloride Prod. Facility, Permits Nos. 2466-VO, 2468-VO, EPA, Sept. 10, 1997; *see also* Maria Giordano & Bob Warren, *EPA Rejects Permits for Shintech Plant*, TIMES-PICAYUNE (New Orleans), Sept. 11, 1997, at A1.

181. *60 Minutes: Justice for Sale?* (CBS television broadcast Mar. 24, 2000), <https://www.cbsnews.com/news/justice-for-sale/> (quoting Gloria Roberts of the St. James community).

182. Amended Complaint Under Title VI of the Civil Rights Act, Re: Louisiana Dep’t of Environmental Quality/Permit for Proposed Shintech Facility (July 16, 1997), No. 04R-97-R6, at 2 n.8 (on file with author) (using 1990 census data for the area within four miles of the proposed Shintech site).

183. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 115, at 39 (summarizing allegations).

184. Lavie Interview, *supra* note 34.

EPA embraced the new petition, evidenced by Administrator Browner announcing that “if the concerns of the local residents are not fully addressed” in the new permit process, “EPA will expedite its review of the [civil rights] complaint.”<sup>185</sup> DEQ, however, was marching even more quickly to a different drummer. At the start of the Foster Administration, the name “Environmental Justice Program” had been removed for the newer “Community-Industry Relations,”<sup>186</sup> a change both symbolic and real. Among other things, Shintech upset this model which produced a backfire of its own.<sup>187</sup>

To Dickerson in particular, the opposition to Shintech was racist, drummed up by outsiders like the Tulane Clinic (in her words: “drenched in racism and exclusion of African Americans”)<sup>188</sup> and by a group, the St. James Citizens, headed by “a white middle class woman.”<sup>189</sup> To Jolivette, perhaps reflecting her background in corporate practice, the issue was as much about jobs: “Poor people don’t have the luxury of being anti-industry,” she told the press. “Their poverty will kill them long before the possibility of some [pollution related illness].”<sup>190</sup> Unfortunately, Shintech would offer few jobs to residents of Convent,<sup>191</sup> for which they would be trading health risks that followed fence-line communities of color like a cloud. Which way did environmental justice lie?

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185. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 126; Ferstel, *supra* note 85.

186. *Id.* at 55; *see also* text, *supra* note 172.

187. The model, nonetheless, endures. *See* James Gill, *Pollution Needs More ‘Dialogue,’ ‘Study,’* ADVOCATE (Baton Rouge), May 19, 2016, at 7B (responding to complaints over fumes from a hazardous waste incinerator, DEQ will form a “dialogue committee” with the incinerator operator).

188. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 115 (citing memorandum of Janice Dickerson, Community Industry Relations Coordinator, to Herman Robinson, Assistant Secretary, Office of Legal and Enforcement, re: “Response to Bob Kuehn’s August 18, 1997 Accusation,” dated Aug. 8, 1997.).

189. *Id.* For the actual makeup of the St. James Citizens, *see* text *supra* notes 54–56. Indeed, some of Louisiana’s most highly-respected African American leaders were among the most vocal in opposition to Shintech, including the Reverend Avery Alexander, longstanding member of the Louisiana House of Representatives; Pat Bryant, Director of the Gulf Coast Tenants Organization; Harold Green, President of the Southern Christian Leadership Conference; and Dr. Beverly Wright, Director of Xavier University’s Deep South Center for Environmental Justice. *See, e.g.,* Khara Coleman, *Alexander Vows to Fight Changes in Law Clinic Rules*, TIMES-PICAYUNE (New Orleans), July 4, 1998, at B-3 (alleging a return to Jim Crow era). All had worked on civil rights for years, indeed lifetimes. The only national environmental organization active in Shintech was Greenpeace, represented at the time by Monique Harden and Damu Smith, both of them African-American. Shintech was a bi-racial campaign.

190. Sara Shipley, *Race, Jobs, Pollution in Bayou*, CHRISTIAN SCI. MONITOR (Jan. 12, 1998), <https://www.csmonitor.com/1998/0112/011298.us.us.1.html>.

191. A fact which both the state and the parish acknowledged, *see supra* notes 40–41; *see also* relative toxics-per-jobs ratios, *supra* note 53. Even had local jobs been forthcoming, St. James Citizens “were also fighting for a different economic vision,” one that did not impose high toxics exposure as a condition of possible employment. FROM PLANTATIONS TO PLANTS, *supra* note 29, at section 5.

## VII. THE GOVERNOR AND THE KLAN

*Past is never dead. It's not even past.*<sup>192</sup>

—William Faulkner

Faulkner might have been speaking universally, but he was writing of the American South, where, one hundred years after Appomattox, the Civil War had not ended. No place less so than Louisiana. Within a year of Lee's surrender, a white mob attacked a group of African Americans on the streets of New Orleans, leaving thirty-seven dead and 136 wounded, almost all of them black.<sup>193</sup> They had been conducting a parade. Then came a massacre at Colfax Courthouse in Grant Parish where 150 blacks were killed while trying to protect their central government building.<sup>194</sup> One historian called this massacre "[t]he bloodiest single instance of racial carnage in the Reconstruction era."<sup>195</sup> Colfax was followed by the one-sided Battle of Liberty Place in New Orleans,<sup>196</sup> the Coushatta incident in Grant Parish in which black officeholders were lynched this time instead,<sup>197</sup> and the Thibodaux Massacre in Franklin where somewhere between 50 and 300 sugar plantation workers who were striking for higher wages were chased down and killed (by, as the press reported, "Shreveport guerillas, well versed in nigger killing," brought in by the planters).<sup>198</sup> All of the dead were African Americans. These were but the highlights.

Individual violence was more pandemic still. Opposition to black voting rights led to more than 3,000 murders and acts of mayhem within a few weeks of the presidential election of 1868, almost all of them white-on-black.<sup>199</sup> Lynchings in Louisiana came in second only to those in Mississippi and reached their peak in the 1890's.<sup>200</sup> Ouachita Parish led the entire country in these hangings over the ensuing decades, followed by its sister parishes Caddo and Bossier, respectively numbers two and three.<sup>201</sup> These acts were fomented and often executed by a string of white supremacy groups beginning with the Ku Klux Klan, which then

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192. WILLIAM FAULKNER, REQUIEM FOR A NUN act 1, at 73 (1952).

193. JOE GRAY TAYLOR, LOUISIANA RECONSTRUCTED 104–5 (1974).

194. LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION xiii (2008).

195. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 437 (1988).

196. Justin Nystrong, *The Battle of Liberty Place*, LA. ENDOWMENT FOR THE HUMANITIES (Jan. 3, 2011), <https://64parishes.org/entry/the-battle-of-liberty-place>.

197. Ted Tunnell, *Coushatta Massacre*, LA. ENDOWMENT FOR THE HUMANITIES (Jan. 6, 2011), <https://64parishes.org/entry/coushatta-massacre>.

198. CUMMINS ET AL., *supra* note 1, at 260.

199. W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCTION DEMOCRACY IN AMERICA 1860–1880 680–81 (1935).

200. CUMMINS ET AL., *supra* note 1, at 268–69.

201. *Id.* at 269.

yielded to the more artfully-named Knights of the White Camellia<sup>202</sup> and the White League. The latter groups had been formed by former Confederate soldiers and were described as “the military arm of the Democratic Party.”<sup>203</sup> The President of the United States, Andrew Johnson, turned a blind eye,<sup>204</sup> as did the Supreme Court, reversing the convictions of Colfax massacre participants because their acts were not official acts of the state.<sup>205</sup> The door to pre-Civil War racism blew open once more, presided over by a familiar oligarchy of planters and wealthy businessmen of the “Bourbon Era.”<sup>206</sup> The leading Bourbon of the time was a sugar baron, former state senator, and then an elected governor: Murphy Foster.

Foster came in with an agenda not unfamiliar to politics today: the promotion of business interests and the decimation of public programs in education, health care, and other institutions.<sup>207</sup> Public schools hit rock bottom. One historian writes, “Between 1880 and 1900, Louisiana was the only state to show an absolute rise in the percentage of native whites who could neither read nor write,” and “the only state in which black illiteracy continued at a rate greater than 70 percent.”<sup>208</sup> The governing attitude was dismissive. Education was said to consign students to “that sphere of labor and social position and occupation to which they are best suited and seem ordained by the proper fitness of things.”<sup>209</sup> The official government newspaper of the time wrote, “The complaints of the downtrodden are simply bosh and nonsense”<sup>210</sup> and, it added, “little short of flat communism.”<sup>211</sup>

The other tenet of Foster Bourbonism, however, was its most viscerally felt: “White supremacy at all hazards.”<sup>212</sup> On this score, Murphy Foster was a man of his time and considerably more. Born to a sugar planter in Franklin, Louisiana, not far from the Thibodeaux Massacre, he is reported to have helped organize both the Knights of the White Camellia and the White League.<sup>213</sup> In politics he rose to lead the state Senate and became the pivotal force behind the Separate

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202. Justin Nystrom, *Knights of the White Camellia*, LA ENDOWMENT FOR THE HUMANITIES (Jan. 31, 2013), <https://64parishes.org/entry/knights-of-the-white-camellia>.

203. GEORGE C. RABLE, *BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION* 132 (1984).

204. Johnson, a southerner, opposed both civil rights legislation and adoption of the Due Process Amendment to the Constitution. FONER, *supra* note 195, at 250–51.

205. *United States v. Cruikshank*, 92 U.S. 542, 546 (1875).

206. CUMMINS ET AL., *supra* note 1, at 223, 231.

207. *Id.* at 232.

208. *Id.* at 243.

209. Crystal Alesia Gaines, *Cumming v. Richmond County Board of Education*, ENCYCLOPEDIA OF AFRICAN AMERICAN EDUC. (2010).

210. CUMMINS ET AL., *supra* note 1, at 261.

211. *Id.*

212. *Id.* at 232.

213. Jason Berry, *Politically Out of Favor, Duke Casts Shadow*, L.A. TIMES (June 13, 1999), <http://articles.latimes.com/print/1999/jun/13/opinion/op-45995>.

Cars Act,<sup>214</sup> forbidding blacks from riding in the white section of trains, later approved by the Supreme Court in the now-infamous *Plessy* decision (Mr. Justice Story: “If one race be inferior to another socially, the Constitution of the United States cannot put them upon the same plane.”).<sup>215</sup> Foster is reported to have resurrected the Separate Cars Act from a previous defeat in order to punish black legislators who had voted against him on another issue.<sup>216</sup> The resulting *Plessy* opinion, in turn, led to the segregation of virtually everything in sight, beginning with schools, street cars, corner bars, and continuing its string until bi-racial prostitution was outlawed, as well.<sup>217</sup> The overriding objective, however, would be to take African Americans out of political life entirely, and Foster was up to the task.

Two years into his first term, the Governor announced that it was time to disenfranchise “the mass of vice and venality without any proprietary interest in the state.”<sup>218</sup> No one had to guess whom he had in mind. In the meantime, however, he was facing a serious re-election threat from a more moderate candidate, John Pharr, causing one of Foster’s supporting newspapers to complain that some Democrats were defecting “to the coons and [the] communists.”<sup>219</sup> The election itself was marred by the usual voter intimidation and fraud to ensure the complete obliteration of opposing votes (for example, the tally from four parishes heavy with black voters reported a Foster victory by an astonishing 9,499 to 1.<sup>220</sup> One wonders who the 1 was). “Rob them! You bet!” a Bourbon paper crowed.<sup>221</sup> With this behind him, the stage was set for the final coup.

In 1898, a Constitutional Convention was called and it agreed on requiring voters to demonstrate that they could read and write—or to produce evidence that they owned at least \$300 of property (protecting, one assumes, the illiterate wealthy), along with tax receipts from the previous two years.<sup>222</sup> Voters would also pay a poll tax of \$1 per year (close to \$50 today).<sup>223</sup> The president of the

214. Louisiana Railway Accommodations Act, Acts of 1890, No. 111.

215. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896); see also KEITH WELDON MEDLEY, *WE AS FREEMAN: PLESSY V. FERGUSON* 204 (2003). Justice Harlan’s lone dissent accurately predicted the consequences of *Plessy* on Louisiana: “Slavery, as an institution tolerated by law, would, it is true, have disappeared from our country, but there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom . . . and to place in a condition of legal inferiority a large body of American citizens.” *Id.* at 563. As if to confirm his prophecy, New Orleans soon broke out in the worst race riot in its history. See WILLIAM IVY HAIR, *CARNIVAL OF FURY: ROBERT CHARLES AND THE NEW ORLEANS RACE RIOT OF 1900* (ed. 2008).

216. TIM MCNEESE, *PLESSY V. FERGUSON: SEPARATE BUT EQUAL* 52 (2007). The only opposition to the Act came from, besides the badly outnumbered African Americans, Foster’s constituents who claimed it did not go far enough. CUMMINS ET AL., *supra* note 1, at 249.

217. CUMMINS ET AL., *supra* note 1, at 267–68.

218. *Id.* at 265.

219. *Id.* at 263.

220. *Id.* at 264.

221. *Id.* at 263.

222. *Id.* at 266.

223. *Id.*

Convention was frank about its purpose: "Doesn't it stop the negro from voting," he asked his colleagues to their applause, "and isn't that what we came here for?"<sup>224</sup> Governor Foster, addressing the full legislature shortly thereafter, proclaimed, "The White supremacy for which we have now so long struggled . . . is now crystallized into the constitution."<sup>225</sup> The amendments took immediate effect<sup>226</sup> and produced immediate results. While the white vote also dropped (there were poor whites in Louisiana, too), the African American vote virtually disappeared. Within seven years its numbers had plummeted from 130,344 to 1,342.<sup>227</sup> By 1922, fewer than 600 blacks remained on the rolls, statewide.<sup>228</sup>

As the nineteenth century ended, Jim Crow had won phase two of the Civil War. In Louisiana, the most militantly-resistant of the southern states, Governor Murphy Foster had played a dominant, perhaps *the* dominant, role. To be sure, he reflected the majority of his time and place, but his leadership on the suppression of African Americans was unrelenting, and terribly effective. One century later his grandson, Murphy "Mike" Foster would be elected to the same governor's mansion. Throughout this campaign he referred to his forbearer as a man of "vision."<sup>229</sup> Although the fact of this vision could not be doubted, its substance was more questionable, as were its lingering effects leading up to the Shintech controversy. This time the Klan, despite attempts to conceal it, came front and center.

Fast forwarding a century, the lineup for the 1995 gubernatorial campaign had no clear winners. Indeed, it had no front-runners. Mike Foster was muddling along in the polls along with others in single figures.<sup>230</sup> Waiting in the wings was David Duke, the former Grand Imperial Wizard of the Louisiana-based Knights of the Ku Klux Klan and an avowed white supremacist.<sup>231</sup> Which would not have mattered but for the fact that Duke was openly considering the governor's race and had a core base of believers who had, surprisingly, delivered him a seat in the state House of Representatives only six years before.<sup>232</sup> In 1990, he reached yet higher for the US Senate against Louisiana's powerful senior member, J Bennett Johnston.<sup>233</sup>

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224. MEDLEY, *supra* note 1, at 209.

225. *Id.* at 212 (citing Official Journal of the Senate of Louisiana Second Regular Session, Baton Rouge, 1989).

226. CUMMINS ET AL., *supra* note 1, at 266.

227. *Id.*

228. *Id.*

229. Lolis Eric Elie, *Grandfather Not So Grand*, TIMES-PICAYUNE (New Orleans), Sept. 4, 1998, at 1B.

230. See Shuler, *infra* note 240.

231. See TYLER BRIDGES, *THE RISE OF DAVID DUKE* (1994) (describing Duke's background and campaigns through 1992).

232. *Id.* at 139-66.

233. *Id.* at 167-93.



The senator managed to keep his seat, yet he and others were shocked by the fact that Duke had garnered some 43.5 percent of the vote.<sup>234</sup>

The following year Duke launched what seemed to be a moon shot for the governor's office and ended up in a run-off with the ill-reputed Edwin Edwards,<sup>235</sup> losing to a geyser of out-of-state money, media celebrities, and enough concerned whites (their bumper sticker: "Vote for the Crook: It's Important!") to turn the tide.<sup>236</sup> Duke, overtly racist, nonetheless pulled fifty-three percent of the white vote—statewide.<sup>237</sup> A few years later came another governor's contest, and there was no one of Johnston's or Edwards' stature in the lists.

Mike Foster won, but no one knew the full details until four years later as he was running for a second term in office. It was then discovered that back in '95, Foster had purchased Duke's mailing list of supporters for \$150,000, a price some campaign professionals found over-the-top.<sup>238</sup> At about the same time, Duke suddenly announced that he was no longer considering the governor's race and was endorsing Foster instead.<sup>239</sup> Per Duke, with his support, Foster's poll numbers leapt from 7 to 17 percent,<sup>240</sup> giving him front-runner status and momentum that carried him to victory. Whether these developments were simple coincidence or political deal-making, there was nothing illegal about them. Except that Foster failed to report the mailing list deal to state election authorities. Nor did Duke report it on his income tax returns, which is why it surfaced at all.<sup>241</sup> Foster had executed the transaction in secret, through an intermediary, under another name.<sup>242</sup>

Outed by federal and state investigations, Foster defended himself with accustomed vigor: the money paid was no bribe but for a "durn good list,"<sup>243</sup> he had "nothing to hide"<sup>244</sup> then or now, and media questions about his relationship to Duke (whom he acknowledged meeting at this plantation home and other

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234. *Id.* at 193.

235. *Id.* at 194–237.

236. *Id.* at 230.

237. *Id.* at 236–37.

238. Steve Ritea, *Price Was Sky-High for list Experts Say – Duke Defends Value of Names*, TIMES-PICAYUNE (New Orleans), May 21, 1999.

239. David Firestone, *A Dealing with David Duke Haunts Louisiana Governor*, N.Y. TIMES, June 22, 1999.

240. *Id.* Mr. Duke "has a core base of support that is very loyal, and after he endorsed Foster in 1995, Foster went from 7 percent in the polls to 17 percent," Mr. Crouere said. "He can never win an election, but he can determine who does, and that's why Foster paid 25 times what that list was worth." See also Marsha Shuler, *Duke Says Foster's Money Helped the Racist Cause*, ADVOCATE (Baton Rouge), June 13, 1999.

241. B. Drummond Ayres Jr., *A Mystery in Louisiana Governor's Race*, N.Y. TIMES, October 11, 1999.

242. Manuel Roig-Franzia, *Foster Admits Hiding Duke Deal—They Struck Pact on List at Homes*, TIMES-PICAYUNE (New Orleans), May 25, 1999.

243. James Gill, *Foster's Take on the Duke List*, TIMES-PICAYUNE (New Orleans), May 26, 1999.

244. *Id.*

“intimate settings”)<sup>245</sup> were “silly.”<sup>246</sup> He only kept things secret because “it ain’t real cool to put out there that you’re buying something from David Duke.”<sup>247</sup> In that, he seemed to be correct. Newspaper headlines surrounding the incident read like an indictment: “Foster paid Duke \$150,000 for Voter List – Ex Klansman Takes Fifth in Testimony Before Grand Jury”; “Foster Admits Hiding Duke Deal – They Struck Pact on List at Homes, Coffee Shop”; “Duke Says Money Helped the Racist Cause”; and perhaps most wounding, “Grandfather Not So Grand,” referring to Murphy Foster of a century before.<sup>248</sup>

Whether Foster’s dealings with Duke were racist or simply tactical, the fact was they *looked* racist, which had to hurt. What aggravated the charge was that he never disavowed Duke, even when the facts were revealed and their implications made evident, as well. Clerics of all faiths weighed in: “When you deal with David Duke in any way that offers any kind of acceptance or possible endorsement of any kind, that is a tragic thing for the leader of the state to do,” said one.<sup>249</sup> “I shudder to think that my governor in any way helps him spread this hate in the state and in our country,” stated another,<sup>250</sup> who went on to say that the governor had promised religious leaders during the campaign (when little of this was known) that he would “speak out against David Duke once he was elected governor.”<sup>251</sup> Foster never did. Instead, per one reporter, whenever asked to repudiate Duke, Foster gets angry and refuses.<sup>252</sup> Pushed hard on the matter, the governor explained, “Mr. Duke has always treated me with respect and it is well-documented that I don’t condemn and hate others.”<sup>253</sup> This would indeed be news to some who got in Foster’s path, including those involved in the Shintech case to come.

These events might be reduced to ambiguity but for an additional fact. Foster’s first official act in the Louisiana White House was to revoke a state executive order requiring affirmative action in government contracting. It is likely that the governor saw this as pro-business, although how much it actually boosted

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245. Roig-Franzia, *supra* note 242.

246. *Id.*

247. Leslie Zganjar, *Foster Fined for Duke List Payments*, ASSOCIATED PRESS, August 20, 1999.

248. For a fuller list, see B. Drummond Ayres Jr., *A Mystery in Louisiana Governor’s Race*, N.Y. TIMES, October 11, 1999; Bruce Nolan, *Foster Paid Duke \$150,000 for Voter List – Ex-Klansman Takes Fifth in Testimony Before Grand Jury*, TIMES-PICAYUNE (New Orleans), May 21, 1999; Steve Ritea, *Price Was Sky-High for List, Experts Say – Duke Defends Value of Names*, TIMES-PICAYUNE, May 21, 1999; James Gill, *Foster’s Take on the Duke List*, TIMES-PICAYUNE (New Orleans), May 26, 1999; Marsha Shuler, *Duke says Foster’s Money Helped the Racist Cause*, ADVOCATE (Baton Rouge), June 13, 1999; Leslie Zganjar, *Foster Fined for Duke List Payments*, ASSOCIATED PRESS, August 20, 1999; Lolis Eric Elie, *Grandfather Not So Grand*, TIMES-PICAYUNE (New Orleans), January 10, 1996.

249. Shuler, *supra* note 240 (quoting Rev. Chris Andrews, pastor of First United Methodist Church and president of the National Conference of Community and Justice).

250. *Id.* (quoting Rabi Barry Weinstein of Congregation B’nai Israel Synagogue).

251. *Id.*

252. Roig-Franzia, *supra* note 242.

253. *Id.*

business and why it was so urgent as to do the very first thing leaves one to wonder. Anyone on earth would recognize it as reducing black opportunity as well. David Duke claimed (although this statement came years after the fact) that he and Foster had struck a deal trading his support for a repeal of the affirmative action order.<sup>254</sup> The ex-Grand Wizard, of course, could have been trying to claim another victory for the white cause—or not. But even without a Duke side deal, rescinding the order was either remarkably tone deaf or artfully tone communicating. Perhaps it was both.

In the end, what is not ambiguous is that Mike Foster followed in his grandfather's footsteps, the third Murphy Foster in a row, which says good things about political skill and family allegiance. Unfortunately, one of the things for which grandfather Foster is best remembered is an unabashed racism and an agenda that carried it forward with crippling effect for most of the next century. This, too, Mike Foster never renounced (stating only that it had to be viewed "in context"),<sup>255</sup> any more than he had David Duke, whom he said he got to know in the state legislature and, although not agreeing with his racist agenda, found worthy of respect (Duke himself would tell the press that Foster was the only elected official in America who would not repudiate him).<sup>256</sup> One is reminded of the famous Lincoln-Douglas debates preceding the Civil War, in which the future President told his opponent: "You never treat it [slavery] as a wrong. What other thing that you consider as a wrong, do you deal with as you deal with like that? . . . Although you pretend to say so yourself, you can find no fit place to deal with it as a wrong."<sup>257</sup> This was over a century and a half ago. Some phenomena are ageless.

All of this was in the background then when the Shintech case arose: the media frenzy over the Duke list, the reference back to the family patriarch, the repeal of affirmative action, each raising the race question. Then came the Tulane Clinic's environmental justice petition bottomed on yet another form of racism. Opposition to the Shintech plant on statutory grounds was something the Governor could deal with, an aggravation to be lawyered, bought-off, or bulldozed out of the way. But as senior *Times Picayune* reporter Mark Schleifstein would observe, "nothing angered Foster more than claims made under the rubric of 'environmental justice.'"<sup>258</sup> Doubtless, Foster viewed the charge as backwards; he was helping African Americans by bringing them another chemical plant.<sup>259</sup> From

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254. Gill, *supra* note 243.

255. Elie, *supra* note 229.

256. Shuler, *supra* note 240.

257. Abraham Lincoln, POLITICAL DEBATES BETWEEN LINCOLN AND DOUGLAS (1897), reprinted at [www.bartleby.com/251/](http://www.bartleby.com/251/).

258. Mark Schleifstein, *Foster, Clinics Face Off on Rules*, TIMES-PICAYUNE (New Orleans), Aug. 2, 1998, at A1.

259. See ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 118. Further, despite his actions there is no evidence that the Governor harbored racial animus at a personal level at all—a not-uncommon phenomenon in America. Complicating any such assessment, he took the time while in office to attend a

the vehemence of his reaction, however, it seems likely as well that the implication of environmental racism hit a deeper and recently-aggravated nerve.

The Governor would strike back, this time against the Clinic itself and with a phalanx of allies yet more eager than he was to rid themselves of the Tulane program once and for all.

### VIII. RULE XX AND THE COURT

*The Court is finally tightening up on that bunch of outlaws trying to shut everything down.*<sup>260</sup>

—Governor Mike Foster, 1999

*We don't ask for the same number of lawyers that the governor has. We don't ask for the same number of lawyers that the Chamber of Commerce has. But we do ask that the janitor, the waitress, the truck driver, the welfare mother, the child, the person in school at least has a fighting chance.*<sup>261</sup>

—Professor William Quigley, Loyola University, 1999

Since 1971, law student practice had been permitted by the Louisiana Supreme Court under its Rule XX, designed to ensure adequate supervision and legal services to those under-represented by the private bar.<sup>262</sup> What the Court allowed, however, it might be persuaded to take away. For Foster and others long galled by the Tulane Clinic, asking Tulane funders to curb it had not been particularly successful. The more direct route was to ask the Court itself to impose limits that would make effective practice impossible. One stroke of the Court's pen could de-lawyer the other side.

It had been tried once before. In 1993, Governor Edwards' DEQ Administrator had written Chief Justice Pascal Calogero requesting him to curb the Clinic's "political conduct" (a staffer had questioned the reduction in hazardous waste fees

majority black law school in Baton Rouge, Southern University, ultimately earning a degree. Students reported him to be an active and engaging member of the class. *See Law School a Learning Experience for Louisiana Governor*, DIVERSE: ISSUES IN HIGHER EDUCATION (Jan. 4, 2001), <http://diversereducation.com/article/1086/>.

260. Joe Gyan, Jr, *Law Clinics Say Rules Hurt Poor*, ADVOCATE (Baton Rouge), June 18, 1998, at 1-A.

261. Susan Finch, *Professors Protest Law Clinic Rules*, TIMES-PICAYUNE (New Orleans), Jan. 8, 1999. Professor Quigley, a leading civil rights lawyer, played an active role in opposing new Louisiana Supreme Court rules limiting student practice at both Loyola and Tulane. *See* discussion *infra* this Section. He went on to represent opponents of a new power plant near minority communities in New Orleans (featuring a City Council hearing in which paid actors masqueraded as Entergy supporters), and environmentalists charged with criminal trespass for peaceful protest of a natural gas pipeline to St. James Parish. *See* Kevin Litten, *City Council's Vote on New Natural Gas Plant Was Illegal, Lawyers Say*, TIMES-PICAYUNE (New Orleans), Mar. 6, 2018 (power plant), and Tristan Baurick, *Legal Fight over Bayou Bridge Pipeline Will Go to Trial*, TIMES-PICAYUNE (New Orleans), Nov. 16, 2018 (pipeline).

262. La. S. Ct. R. XX (1971).

that funded DEQ's own regulatory program).<sup>263</sup> The Department had also been a defendant in several Clinic cases, adding fuel to the fire. Calogero declined, expressing "the feeling of the justices" that there was no need to create an "oversight committee" or develop "standards of conduct" for student practice beyond the existing rule.<sup>264</sup> Which might have presaged a similar response this time, a short four years later. The political landscape, however, had shifted.

In May 1997, on the heels of the Clinic's environmental justice filing over Shintech, Foster went to the Business Council in New Orleans to strategize a response not to the petition itself but to the problem of the Clinic.<sup>265</sup> He chose well. Unlike other business groups, the Council was composed exclusively of corporate chief executives, some sixty of them at the time, whose proceedings were conducted behind closed doors. It was, in the words of one member of the press, "an economic star council."<sup>266</sup> As founding member Jim Bob Moffett of Freeport McMoRan later explained, "There were a lot of people who were concerned that the [Council] was going to be misunderstood, that we were going to be too visible."<sup>267</sup> Moffett, for his part, was still smarting from Tulane's involvement in rebuffing the dumping of gypsum wastes from his fertilizer plants into the Mississippi River, some ten million tons per year, above the water intake structures for Jefferson Parish and New Orleans.<sup>268</sup> His prescription for environmentalists: Louisiana businesses should "kick their butts and send them back home."<sup>269</sup>

During Foster's visit, the proposal to ask the Court again to limit the Tulane clinic apparently came from the CEO of energy conglomerate Entergy Corporation, which stood to make \$70 million per year in electricity sales to Shintech, and happened as well to own the property (valued at another \$4 million) on which the plant would be built.<sup>270</sup> The overlaps in interest here were only beginning, as were the interlocking relationships with other business lobbies, and an

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263. Letter of Kai David Midboe, Secretary Louisiana Dep't of Env'tl. Quality, to Pascal Calogero, Chief Justice, Louisiana Supreme Court, dated Oct. 15, 1993 (on file with author). See also Mark Schleifstein, *DEQ Takes Law Clinic Fight to Top Court*, TIMES-PICAYUNE (New Orleans), Oct. 16, 1993, at B-4.

264. Letter from Pasccal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court, to Kai David Midboe, Secretary, Louisiana Dep't of Env'tl. Quality (Nov. 18, 1993) (cited in Kuehn, *supra* note 1, at 706 n.207).

265. Siverstein and Cockburn, *The Chemical Plant That Could Break Tulane*, COUNTERPUNCH, July 16-31, 1997, at 4.

266. Christi Daugherty, *It's Not Easy Being Green*, GAMBIT WKLY., July 22, 1997, at 9; see also Alexander Cockburn, *Environmental Justice Is Put to the Test*, L.A. TIMES, Aug. 28, 1997, at B8 (describing the Council as an "economic Star Chamber"); Kuehn, *supra* note 1, at 65.

267. Kathy Finn, *James Moffett: The Business Side*, NEW ORLEANS CITY BUSINESS, Nov. 1993, at 62.

268. See Oliver A. Houck, *Major Money's Influence in Freeport-Indonesia Affair*, TIMES-PICAYUNE (New Orleans), Feb. 29, 1996, at B-7 (criticizing Freeport's response to the gypsum dumping controversy and its overseas mine in Iryan, Jaya); Bruck Egger, *Moffett Criticizes Environmentalists*, TIMES-PICAYUNE (New Orleans), Nov. 23, 1991, at B-1.

269. Egger, *supra* note 268, at B-3.

270. *Shintech's Secret Backer*, COUNTERPUNCH, Nov. 16-30, 1997, at 2.

embarrassing list of setbacks by community groups represented by the clinic student-lawyers.

A volley of salvos followed. A letter to the Court from the New Orleans Region Chamber of Commerce was filed on July 8,<sup>271</sup> that of the Business Council on July 16,<sup>272</sup> and the Louisiana Association of Business and Industry (LABI) on September 8,<sup>273</sup> with subsequent echoes from yet other industry lobbies. As it happened, the chairman of the Chamber, a corporate law firm partner, had confronted Tulane law students in a challenge to tax exemptions for a client's refinery with a long record of environmental law violations,<sup>274</sup> and a later, long-running battle over exemptions for hazardous waste incinerators.<sup>275</sup> The chair of the Business Council, who was president and former general counsel to Bell Corporation, had faced opposition to his company's proposal to demolish a historic structure in New Orleans (ultimately defeated).<sup>276</sup> LABI's president, for his part, also led the Louisiana Chemical Association, whose member companies were also challenged by community groups represented by Clinic student-attorneys.<sup>277</sup>

For many in power, representation by Tulane law students was particularly galling. The University was the mother institution for many of these corporate chiefs and their attorneys, schooled in an era when the word "environment" did not appear in the curriculum, nor even the language. Worse, some of these students were their own offspring or those of friends and social acquaintances. Worse yet, they were winning against highly-paid attorneys a surprisingly high percentage of the time.<sup>278</sup> For the Governor, neutering the clinic had become personal during

271. Letter from the Louisiana Chamber of Commerce to Chief Justice Calogero (July 8, 1997) [hereinafter Chamber letter].

272. Letter from Erik F. Johnsen, Chairman, Business Council of New Orleans and the River Region, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (July 16, 1997) [hereinafter Business Council letter].

273. Letter from Daniel L. Juneau, President, Louisiana Association of Business and Industry, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Sept. 9, 1997) [hereinafter LABI letter].

274. Jay Friedheim, *Environmental Clinic's First Case!*, BENCH, undated, at 5 (on file with author).

275. See *Robinson v. Reyoub*, 727 So.2d 579 (La. Ct. Ap. 1998), writ denied, 747 So. 2d 1096 (La. 1999).

276. See Coleman Warner, *Bell South Seeks Approval to Demolish Old Building*, TIMES-PICAYUNE (New Orleans), Jan. 24, 1996, at B1; Coleman Warner, *1917 Building to Become Hotel; Landmark Almost Razed*, TIMES-PICAYUNE (New Orleans), Oct. 8, 1997, at C1.

277. See TUL. ENVTL. L. CLINIC, CLOSED CASE LIST 1999 (American Cyanamid Injection Well Exemption Client: Marrero Tenants Association; Waggaman Civic Association Student: William Foster). We appeared at a public hearing and submitted written comments in opposition to a proposed EPA exemption to the federal land ban that would allow American Cyanamid (the largest injector of hazardous waste in the nation) to continue, without limitation, its injection of hazardous waste. In spite of broad public opposition, EPA granted the exemption. (June 1990 – Nov. 1990). A state lawsuit to invalidate the permit ultimately prevailed. See *Opposition to Application of Cytec Industries Inc. for Writ of Certiorari*, No. 96-1443, La. Sup. Ct., Tulane Environmental Law Clinic, June 24, 1996.

278. Greg Johnson and Megan Spencer, *The Tulane Environmental Law Clinic: A Profile of the South's Most Active Environmental Public Interest Organization*, LISKOW AND LEWIS (New Orleans),

the Shintech affair; for his business allies, however, it had been both personal and professional for years.

The thrust of the petitions was at one level surprisingly frank. As if written by the same hand, they complained, per LABI, that the clinic was bad for business in Louisiana;<sup>279</sup> per the Chamber, the clinic's "legal views [were] in direct conflict with business positions";<sup>280</sup> per the Business Council, the clinic "interfere[d] with Louisiana's interest to attract new business."<sup>281</sup> This was Grievance A, which boiled down to the assumption that challenging the state's own compliance with environmental laws was inimical to the public welfare. Bad-for-business (even if one assumes that environmental compliance is in fact bad for business) was, apparently, disqualifying.

Reaching for more substance, both the Governor and the petitioners complained of the clinic's "radical political agenda"<sup>282</sup> (apparently meaning legal challenges to government policies, which of course corporate law firms did for their clients daily), "vigilante" conduct by clinic students<sup>283</sup> (perhaps the most closely-supervised practitioners in Louisiana), and "solicitation" of clients<sup>284</sup> (a claim short on evidence and, as seen earlier, the very antithesis of what actually happened in Shintech, which gave rise to the fray).<sup>285</sup> Somewhat surprisingly, the clinic was also accused of "bullying" both the Governor (who enjoyed his own reputation on this score)<sup>286</sup> and some of the largest corporations in America (which carried considerable throw-weight of their own), and of having unbalanced a "level playing field."<sup>287</sup>

On reflection, one is struck by how easy it seems to have been—and how seemingly necessary—to see oneself as Foster and the corporate lobbies apparently did: as victims in scenarios where they, in fact, held stables of law firms and

sponsored by the National Petroleum and Refiners Association, Oct. 2011 (on file with author) (finding a "greater than 50% success rate").

279. See, LABI letter, *supra* note 273; *Frontline: Justice for Sale* (PBS television broadcast Nov. 23, 1999), <https://www.pbs.org/wgbh/pages/frontline/shows/justice/etc/script.html> (statement of Bill Moyers).

280. Chamber letter, *supra* note 271.

281. Business Council letter, *supra* note 272.

282. See Christi Daugherty, *Target: Tulane*, GAMBIT WKLY., Oct. 13, 1997 (quoting Daniel Juneau, LABI President). See also Gov. J. Foster, Letter to the Editor, *Governor Weighs in on Law Clinic Rules*, TIMES-PICAYUNE (New Orleans), June 28, 1998, at B-10 (stating clinic driven by "radical law professors").

283. Mark Schleifstein *Foster-Clinic Face Off on Rules*, TIMES-PICAYUNE (New Orleans), Aug. 2, 1998.

284. LABI letter, *supra* note 273.

285. See discussion, *supra* notes 57, 71.

286. See *Foster Calls for 'Holy War' in Senate Race*, ASSOCIATED PRESS, Sept 24, 1999 (urging a "jihad" or "holy war" to defeat a legislator critical of his policies). To which the legislator replied, "Lies, half-lies and intimidation are just some of the tools his administration has used to crush anyone who dares to disagree." Steve Ritea, *Forster, Incumbent Turn Another Race into a Holy War*, TIMES-PICAYUNE (New Orleans), Oct 17, 1999.

287. See Business Council letter, *supra* note 271 (letter of business leaders seeking "a level playing field" from the Court).

virtually all of the political cards. Kuehn, reflecting on a hearing in which a student argument prevailed over a team of company lawyers, later observed: “The sad commentary is that the governor and the court are trying to say that eight licensed attorneys against one student attorney are not good enough odds. They now want to make it 8 to 0.”<sup>288</sup> Whatever the allegations made in the tortuous investigation that followed, no evidence appeared that the clinic, nor its students, had engaged in rogue behavior, politics, client solicitation, representation of ineligible parties, or other improper conduct.<sup>289</sup> Foster himself, when asked well into the controversy to support his (frequent) allegations of clinic misbehavior, replied, “They reflected opinions only and were not an attempt to recite ‘facts’”<sup>290</sup>—as if that exonerated the claims. There were no such facts. What happened instead was politics.

The political shift had begun several years before when LABI, unhappy with a state Supreme Court decision, decided to throw itself into judicial elections, starting with those at the top.<sup>291</sup> In 1994, armed with generous donations from defense lawyers, oil and gas companies, and tobacco giants Philip Morris and R.J. Reynolds, the organization successfully backed the election of a new, pro-business candidate to the Court.<sup>292</sup> Two years later, it pulled something of a coup, unseating two incumbent justices for the first time in Court history in favor of LABI candidates largely funded by the organization who then contributed to a “string of pro-business rulings.”<sup>293</sup> All of this would have mattered less for the Rule XX issue but for the fact that in the following election cycle, one year away, Chief Justice Calogero himself would be on the line. Leaving nothing to chance, LABI (its political director: “We don’t pick our opponents lightly . . . . And we really worked for a long time to find Chuck Cusimano”)<sup>294</sup> chose Republican

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288. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 202.

289. Although in the absence of a record of the Court’s investigation and conclusions such a negative is difficult to confirm, it seems certain that had such facts appeared, the Court would have asked the universities to respond, as it did with the original business petitions. Moreover, in a subsequent election debate, Justice Calogero acknowledged that there was no evidence that the clinic had ever represented an ineligible party. Kuehn, *supra* note 1, at 68 n.172. *See also* Resolution Amending Rule XX (La. Mar. 22, 1999), reprinted in *Resolution of the Louisiana Supreme Court Upon Amending Rule XX*, 74 TUL. L. REV. 285, 297 (1999) (Johnson, J., dissenting) (“An exhaustive review of all Louisiana law clinics failed to uncover any violations of the Law Student Practice Rule.”).

290. *See* Letter from M.J. “Mike” Foster, Jr., Governor, State of Louisiana, to Professor Robert R. Kuehn, Director, Tulane Environmental Law Clinic (July 6, 1998).

291. Carl Redman, *LABI, Lobbying and the Law*, ADVOCATE (Baton Rouge), Sept. 27, 1998; Sheila Kaplan & Zoe Davidson, *The Buying of the Bench*, NATION, Jan. 26, 1998, at 14.

292. In the case triggering LABI’s involvement, the Court had approved the Louisiana Attorney General’s ability to hire private firms on a contingency fee basis to clean up 2,500 abandoned oil wells across the state, many of which were leaking into adjacent lands and waters. Kaplan & Davidson, *supra* note 291. By replacing an incumbent justice with its own candidate, LABI secured a re-hearing and, by a single vote, the reversal of the decision. *Id.*

293. *Id.* at 14–15.

294. *Frontline: Justice for Sale* (PBS television broadcast Nov. 23, 1999), <https://www.pbs.org/wgbh/pages/frontline/shows/justice/etc/script.html> (remarks of Ginger Sawyer, Political Director, LABI).



district judge Charles Cusimano, who came out of the box with more than \$670,000 in campaign contributions, half of them from business interests, including about \$27,000 from LABI and its four political action committees.<sup>295</sup> Justice Calogero might be forgiven for thinking he could become the first Chief Justice in Louisiana unseated at the polls.

He did not reject the petitions this time. Instead, Calogero set up an inquiry under two staffers, one of whom Kim Sport, was his Director of Community Relations.<sup>296</sup> She apparently took this to mean the business community. It was later learned that Sport had served as Chairwoman of one of the petitioners, the New Orleans Chamber of Commerce, only the previous year and was still “very involved” in its programs.<sup>297</sup> Her husband, also a Chamber leader, had founded the Jefferson Business Council as well.<sup>298</sup> At the Court, Sport had launched an aptly-named “Chamber to Chamber” program, linking elected judges with local Chamber officials for “candid discussions” about how the courts could serve the greater community and create support, in turn, for court operations.<sup>299</sup> After recruiting LABI to her program, she was careful to show Justice Calogero a recent issue of the organization’s journal discussing judicial elections “to demonstrate to him just how closely the business community was monitoring the judiciary.”<sup>300</sup> When it came to the Clinic’s compliance with Rule XX, the Chamber was effectively investigating its own complaint.

The investigation went south from there. Although the investigation ostensibly focused on all Louisiana law clinics, it quickly became clear that its target was Tulane and, specifically, of its five clinical programs, the one representing disadvantaged communities on environmental issues.<sup>301</sup> Although it was explained to the affected schools as a preliminary inquiry to which they would later be able to

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295. LAURA STAFFORD & SAMANTHA SANCHEZ, CAMPAIGN CONTRIBUTIONS AND THE LOUISIANA SUPREME COURT 7 (Inst. on Money in State Politics 2003); see also Pamela Coyle, *Court Race May Get Messy: Chief Justice Facing Challenge*, TIMES-PICAYUNE (New Orleans), June 14, 1998.

296. Kuehn, *supra* note 1, at 78, 78 n.221 (citing e-mail from Harold Price, Louisiana Dep’t of Econ. Dev., to Kim Sport, Louisiana Supreme Court (July 23, 1997) (advising her to contact two lawyers with the Baton Rouge office of Adams & Reese, the law firm of Chamber president Sam LeBlanc)).

297. See *Coalition Takes on Supreme Court*, GAMBIT WKLY, Apr. 20, 1999, at 12; Pamela Coyle, *Director of Community Relations at Supreme Court Takes Sabbatical*, TIMES-PICAYUNE (New Orleans), Dec. 18, 1999. Apparently, although she was investigating the merits of the Chamber’s petition, no conflict of interest was perceived.

298. Susan Finch, *Kim Sport-Top Female Achiever: Attorney and Community Activist*, NEW ORLEANS MAGAZINE, at <http://www.mynorleans.com/New-Orleans-Magazine/July-2012/Kim-Sport-Top-Female-Achiever/>.

299. Christi Daugherty, *Business of the Court*, GAMBIT WKLY, Aug. 3, 1999.

300. James Gill, *Influencing Louisiana’s Judiciary*, TIMES-PICAYUNE (New Orleans), Dec. 3, 1999, at B7.

301. Letter from Robert R. Kuehn, Professor, Tulane Environmental Law Clinic, to Timothy F. Averill, Deputy Judicial Administrator—General Counsel, Louisiana Supreme Court (Dec. 23, 1997) (responding to business group allegations); Letters from Edward F. Sherman, Dean, Tulane Law School, to Pascal F. Calogero, Chief Justice, and Jeanette Theriot Knoll, Justice, Louisiana Supreme Court (Dec. 30, 1997) (also rebutting allegations) (on file with author).

respond, the information discovered remained closed until the end.<sup>302</sup> A resolution from Tulane's Board of Governors supporting the clinics was withheld from the public at the Court's request, in order, it was said, to avoid controversy.<sup>303</sup>

Unfortunately for the Court, however, the controversy was already raging. New Orleans' *Gambit* magazine spoke for the local press more widely, stating: "LABI, not satisfied with having the best and highest-paid law firms to argue its cause, wants to crush even the most rag-tag opposition to Louisiana's 'open door' policy toward polluters by restricting their access to the courts."<sup>304</sup> A column in the *Times-Picayune* was more succinct: "High Court Reins in Lower Class."<sup>305</sup> Similar commentary appeared on PBS's *Frontline*<sup>306</sup> and CBS's *60 Minutes*<sup>307</sup> which covered the Rule XX issue extensively, reaching audiences nationwide. The American Association of Law Schools weighed in,<sup>308</sup> and at its annual meeting in New Orleans, staged a protest rally on the Supreme Court steps (shrugged off by Governor Foster, who opined that they should be entertaining themselves in the French Quarter instead).<sup>309</sup>

The heat was now on Justice Calogero from both directions, but his immediate survival depended on the Louisiana business community, which in turn depended on how he dealt with Rule XX and the Tulane Clinic. Then, in June 1998, just a few months away from the elections, an "Open Letter" signed by past and present representatives of the Chamber, Business Council, and LABI was circulated to a Who's Who of other business leaders, largely Republican, and supporting, of all things, the re-election of Justice Calogero, a Democrat, instead.<sup>310</sup> They must have known something. Within days, the Court issued new restrictions for law

302. Letter from Edward Sherman, Dean, Tulane Law School, to Walter Marcus, Justice, Louisiana Supreme Court (July 16, 1998) (on file with author).

303. *Id.*

304. Clancy DuBos, *Losing a Friend*, GAMBIT WKLY, Mar. 9, 1999, at 19. Much the same appeared in the New Orleans business journal. See Kathy Finn, *The Face of Business: Not Always a Pretty Picture*, NEW ORLEANS CITY BUSINESS, June 26, 1998, at 18 ("the uglier side of the private sector began to emerge").

305. James Gill, *High Court Reins in Lower Class*, TIMES-PICAYUNE (New Orleans), June 21, 1998.

306. *Frontline*, *supra* note 55 (host Bill Moyers's comments).

307. *60 Minutes: Justice for Sale?: A Legal Clinic Challenges Business and Government* (CBS television broadcast Mar. 24, 2000), <https://www.cbsnews.com/news/justice-for-sale> (opening with "Justice is supposed to be blind. But what if it can be bought?").

308. Janet McConnaughey, *Official: La. Rules Severe*, ADVOCATE (Baton Rouge), June 20, 1998, at 1A (quoting AALS official).

309. Mark Schleifstein, *Professors Protest Law Clinic Rules; Access Restricted for Poor Minorities, Critics Say*, TIMES-PICAYUNE (New Orleans), Jan. 8, 1999, at 2A. Apparently, one professor carried a sign reading "Outlaws for a lean Environment." Joe Guyan, *Law Clinic Restrictions Protested*, ADVOCATE, Jan. 8, 1999.

310. Kuehn, *supra* note 1, at 68–69, 69 n.176 (citing "Open Letter to Our Fellow Business Men and Women" to 600 Business Leaders (June 1998) (on file with Robert R. Kuehn)); *see also* Clancy DuBos, *Opening Volley*, GAMBIT WKLY, June 16, 1998 (describing letter as a "who's who of local business leaders").

student practice.<sup>311</sup> The coincidence of these two events speaks for itself. LABI quickly commended the decision as “a step in the right direction.”<sup>312</sup> Governor Foster added his blessing, pleased that the Court was clamping down on student-attorneys, or in his words, a “vigilantes and outlaws.”<sup>313</sup> The funding spigot opened for Calogero, his final number exceeding \$1 million, and he won re-election going away.<sup>314</sup>

The Rule changes were in several respects a compromise. Some of the more aggressive demands presented to the Court—that it require the clinic to represent businesses and government agencies as well as low-income clients (raising serious conflict issues) and that there be outside review of all cases “initially *and on an on-going basis*” (emphasis in original) by a body representing “the various types of interests affected” (in effect an industry veto)—were rejected outright.<sup>315</sup> Of the provisions adopted, one, prohibiting solicitation of clients, was a nod to the myth held dear among the business community (Governor Foster: “If you do a good investigative report, you’ll find they solicit clients. This is their whole purpose in life.”).<sup>316</sup> As the Deans of both Tulane and Loyola law schools informed the Court, their clinics did not do it, and, given the demand on their services, had no need to do it.<sup>317</sup> Another provision, however, barred representation of any organization affiliated with a national group, eliminating chapters of the Sierra Club and Audubon Society outright.<sup>318</sup>

Most invidiously, the new rules set stringent “indigency” thresholds for both individuals and local groups represented by the Clinic, allowing only those below the (extremely low) federal poverty line.<sup>319</sup> Excluded were the “working poor” in communities like Convent who made enough to get by, but had no means of paying private counsel, or even locating counsel with the remotest knowledge of

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311. LA. SUP. CT. R. XX [hereinafter Original Adopted Rules] (Limited Participation of Students in Trial Work).

312. Press Release, La. Ass’n of Bus. and Indus., LABI Responds to Supreme Court Ruling on Law Clinics (June 18, 1998).

313. See *CBS Evening News*, *supra* note 11.

314. See *Frontline*, *supra* note 55 (comments of host Bill Moyers). A third candidate, Loyola Law Professor William P. Quigley, also finished out of the running but kept the Rule XX issue visible throughout the campaign.

315. See Letter from Daniel L. Juneau, *supra* note 273; Schleifstein, *supra* note 258.

316. *Louisiana: The State We’re In* (Louisiana Public Broadcasting television broadcast July 11, 1997) ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 112 (citing Louisiana Public Broadcasting radio interview with Governor Foster, June 1997).

317. See Letter from Dean John Makdisi, Dean, Loyola Law School, and Edward F. Sherman, Dean, Tulane Law School, to Timothy F. Averill, Deputy Judicial Administrator—General Counsel, Louisiana Supreme Court (Dec. 31, 1997) (on file with author). A prior Tulane law dean, John Kramer, had contributed to this myth by declaring that the Supreme Court had found first contact with potential clients in similar cases to be protected under the First Amendment. See *In re Primus*, 436 U.S. 412 (1976) and *NAACP v. Burton*, 371 U.S. 415 (1963). Although well-grounded as a matter of constitutional law, his statements clearly provoked an opposite reaction within the business community.

318. See Original Adopted Rules, *supra* note 311 (his prohibition led the list).

319. See *id.*

laws like the Clean Air Act, to say nothing of the willingness to take on the corporations the size of American Cyanamid, Dupont, and Shell. These provisions boded ill for the Clinic. But they were not the final word.

Following re-election, Justice Calogero agreed to revisit the rules, apparently impressed by the fact that, among other things, a family of four on a combined income of \$24,000 a year could hardly afford counsel for complex litigation.<sup>320</sup> This effort came late in the game, indeed after he had won the game, but, at the least, Justice Calogero seemed willing to listen.<sup>321</sup> After more jousting, the Court relaxed its requirements. The indigency standard was doubled to 200 percent of federal poverty levels, and the prohibition on representing groups with national affiliations was dropped altogether,<sup>322</sup> leaving only the symbolic solicitation ban. The bite of even these requirements was yet softened by subsequent clarifications that the rules applied only to clinic students, and in no way prevented the Clinic itself and its Attorney Supervisors from representing any group they wished.<sup>323</sup> In effect, student-practitioners could represent qualified parties and clinic attorneys the rest.

Even these adjustments failed to persuade dissenting Justice Bernadette Johnson, who noted that the matter had been prompted by legal controversy over one specific case, Shintech, and that the complaints were directed uniquely at the Tulane Environmental Law Clinic, leading to a “review of all Louisiana law clinics [that] failed to uncover any violations of the Law Student Practice Rule.”<sup>324</sup> She continued:

Generally, my view was that we should not curtail a program that teaches advocacy while giving previously unrepresented groups and individuals access to the judicial system in order to satisfy critics who are discomforted by successful advocacy.<sup>325</sup>

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320. See Mark Schleifstein, *Director of Tulane Clinic Resigning*, TIMES-PICAYUNE (New Orleans), Feb. 26, 1999 (reporting remarks of Justice Calogero on an earlier occasion). Robert Kuehn, founding Director of the Tulane Environmental Law Clinic, resigned as the Rule XX controversy was winding down to take a position at the University of Alabama. His successor, Adam Babich, continued the Clinic as an active and successful program (see Johnson & Spencer, *supra* note 278 (industry review of the Clinic)), and has written separately on the minimal impact of the final rules, see *infra* note 323.

321. In this vein, the Chief Justice, who at first categorized the widespread criticism of the new rules as “overreactions,” see Christine Jenkins, Notes of Meeting-Rule XX with Chief Justice Calogero (Aug. 19, 1998), cited in Kuehn, *supra* note 1, at 216, was later to acknowledge that the new requirements would have in fact been “debilitating.” Anand Vaishnav, *High Court Hopefuls Trade Shots*, TIMES-PICAYUNE (New Orleans), Sept. 22, 1998 at A-2.

322. “Limited Participation of Law Students in Trial Work,” Louisiana Sup. Ct. R. XX, as amended Mar. 22 1999.

323. See Adam Babich, *How the Tulane Environmental Law Clinic Survived the Shintech Controversy and Rule XX Revisions*, 32 ENVTL. L. REP. at 1146 (2002), at 11476, 11477 & nn. 8, 11 (citing the rule, judicial interpretations, and Court policy preventing challenges to Clinic representation from “becoming a sideshow in underlying litigation”).

324. Sup. Ct. Res. To Amend and Reenact Rule XX (La. Mar. 22, 1999), (Johnson, J., dissenting).

325. *Id.*

All of this reflected the public view of the Rule XX controversy throughout. By coincidence, she was the only African American member of the Court.

Neither did the final amendments satisfy clinic clients or Bob Kuehn, who had spent nearly two years defending the program from a rolling drumbeat of rumors and ad hominem attacks that no facts, nor absence of facts, could quell. The Southern Christian Leadership Coalition and other groups the clinic had represented, incensed that clinic services would be restricted in any way, filed suit against the rules in federal court in New Orleans alleging viewpoint discrimination.<sup>326</sup> It was a bold case, asking a federal judge to slap down a state supreme court, and it was dismissed on grounds that since litigation itself was not a protected right, there was no constitutional problem with restricting it<sup>327</sup> while also acknowledging that the restrictions were imposed for political reasons. “In Louisiana, where state judges are elected,” wrote the trial court, “one cannot claim complete surprise when political pressure manifests itself within the judiciary.”<sup>328</sup> The Fifth Circuit affirmed, reasoning that the rules did not single out environmental speech because, after all, they applied to Loyola clinics as well<sup>329</sup> (overlooking the targeting of Tulane’s environmental clinic that Louisiana Justice Johnson had found so evident). This bench, too, accepted that the Louisiana justices may well have sought to “defuse the political pressure” in amending their rules, but “such motivation” was not unconstitutional.<sup>330</sup> You elect the judiciary, stuff happens.

The Rule XX fight was over. When the dust had settled, the Governor and the business community had won new regulations, but the victory was more pyrrhic than real. They succeeded in banning a practice in which the Tulane clinic did not engage, and in securing a requirement for at least one member of the “working poor,” who, in the kinds of cases undertaken, were abundant.<sup>331</sup> As Kuehn’s successor at the clinic would later write: “Lawsuits are not always correctly decided, of course, and the fact that the revised rule passed muster does not mean the revisions were a good idea. But the practical effect of the revisions has not been, as some feared, to deny legal representation to the Clinic’s clients.”<sup>332</sup> The Chamber and its allies had taken a hard swing—an extremely hard swing—and missed.

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326. Complaint, *S. Christian Leadership Conference v. Supreme Court of La.*, No. 99-1205 (E.D. La. filed Apr. 16, 1999).

327. *S. Christian Leadership Conference v. Supreme Court of La.*, 61 F. Supp. 2d 499 (E.D. La. 1999).

328. *Id.* at 513.

329. *S. Christian Leadership Conference v. Supreme Court of La.*, 252 F.3d 781, 794–95 (5th Cir. 2001).

330. *Id.*

331. *See id.*

332. Babich, *supra* note 323, at 11478. For a contrary view from the business community, see Sam A. Leblanc, *Essay: Debate Over the Law Clinic Practice Rule: Redux*, 74 TUL. L. REV. 219 (1999) (claiming the Rule successfully curbed clinic practice). Then again, Leblanc was on the opposing side, and often the losing side of Clinic representation, *see supra* notes 275–76, and had advocated restrictions that were eventually rejected, *see text at notes 316–21 supra*. For a discussion of the ethics

## IX. GROUND ZERO

*The lesson that Shintech has learned is one that many other industries have learned—they have to present a very strong, very positive public relations campaign and they have to go in [to the community] in small doses. That's what Shintech learned. Is that a lesson in environmental justice? No, but that is certainly the response of industrial groups and associations that are trying to get around it, just as they would any other environmental law or regulation.*<sup>333</sup>

—Monique Harden, civil rights attorney, 1999

*You don't give a shit about brown and black people. This is a dog-and-pony show and everybody in this room knows it.*<sup>334</sup>

—Cherri Foytlin, resident,  
St. James Parish, Formosa Petrochemicals hearing, December 2018

The environmental justice issue soldiers on, as does the notion that serious health risks are a fair bargain for local employment that may, in turn, be largely a mirage. Federal environmental justice policy has soldiered on less bravely. EPA has been reluctant to answer the bell even when petitioned to do so<sup>335</sup> and, when forced to answer, it has denied patently disparate impact claims<sup>336</sup>. The Trump Administration has proposed to abolish the Agency's Office of Civil rights entirely.<sup>337</sup> For the moment, though, this Office is what remains to redress what Congress intended to redress over fifty years ago.<sup>338</sup>

Once again, St. James Parish has become ground zero. Fueled by a new pipeline, port terminal and a surge in natural gas, a barrage of new chemical plants

of corporate practice seeking to disqualify representation of members of the affected public, see Kuehn, *supra* note 1, at 96–146; see also Peter A. Joy, *Government Interference with Law School Clinics and Access to Justice: Where is There a Legal Remedy?*, 61 CASE WESTERN RESERVE L. REV. 1087 (2011).

333. ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 134.

334. Julie Dermansky, *Permit Hearing for Taiwanese Plastic Plant in Louisiana Turns into a Referendum on Environmental Racism*, DESMOG (Dec. 13, 2018), <https://www.desmogblog.com/2018/12/13/formosa-plastics-plant-st-james-parish-louisiana-environmental-racism>. She was not alone in emotion or language. See *infra* note 357.

335. See *Californians for Renewable Energy v. EPA*, 2018 WL 1586211 (N.D. Cal. Mar. 30, 2018) (compelling the Agency to address a backlog of 247 petitions dating back 17 years).

336. See Oliver Milman, *Environmental Racism Case: EPA Rejects Alabama Town's Claim Over Toxic Landfill*, GUARDIAN, Mar. 6, 2018 (exposure of minority community to significant and abnormal illnesses consistent with the health effects of improperly-stored coal ash did not suffice).

337. See Juliet Eilperin et al., *Trump Administration Plans to Minimize Civil Rights Efforts in Agencies*, WASH. POST, May 29, 2017 (proposed elimination of civil rights offices in EPA and other agencies). See also Phil McKenna, *Chief Environmental Justice Official at EPA Resigns, with Plea to Pruitt to Protect Vulnerable Communities*, INSIDE CLIMATE NEWS, Sept 3, 2017.

338. On the positive side, so long as the EPA program remains, the mere possibility of losing federal funding can still produce positive results. *With Groundbreaking Title VI Settlement Signed, North Carolina Environmental Justice Organizations Vow to Continue Their Fight*, WATERKEEPER ALLIANCE (May 3, 2018). Title VI itself still stands.

were under construction at the time of this writing, each topping the previous in size and impacts.<sup>339</sup> The most recent is a \$9.4 billion Formosa Petrochemicals facility, self-labeled the “Sunshine Project” and said to be “one of the largest single-site ethylene production processes in the world.”<sup>340</sup> Continuing what has become a pattern, three of the plants are Asian-owned and all four, like their predecessors, are the beneficiaries of a suite of financial blandishments, including the ever-generous ten-year industrial tax exemption. Formosa alone will reap an estimated \$1.5 billion in government subsidies, \$1.4 billion of which are taken via the ten-year exemption from the parish’s own revenues.<sup>341</sup> Extending the pattern, while corporate announcements feature job creation, less mention made of who will get them.<sup>342</sup> As if to emphasize the issue, St. James has already launched plans for “man camps,” last seen on the fracking yards of North Dakota, to accommodate several thousand new workers.<sup>343</sup> By definition, they are not for locals.

Less mention yet is made of the toxins in their emissions, nor their synergistic and cumulative impacts when added to existing loads. The Formosa facility’s base product, like Shintech, is ethylene oxide, a key ingredient of mustard gas

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339. See Editorial, *A New Wave of Industry Growth*, ADVOCATE (Baton Rouge), Dec 10, 2018. The facilities are Wanhua Chemical (\$1.25 billion), South Louisiana Methanol (\$1.3 billion), Yuhuang Chemical (\$1.8 billion), and Formosa Petrochemical (\$9.4 billion). For more detail see Jennifer Larino, *Chinese Chemical Firm Invests in Parish: Methanol Complex Coming to St. James*, TIMES-PICAYUNE (New Orleans), Aug 18, 2016; Press Release, St. James Parish Project, South Louisiana Methanol, 2015, [www.southlouisianamethanol.com/st-james-parish-project/](http://www.southlouisianamethanol.com/st-james-parish-project/); Sam Karlin & Timothy Boone, ‘*This is a Big One*’: *Formosa Picks St. James Parish for \$9.4 Billion Chemical Complex*, NEW ORLEANS ADVOCATE, April 23, 2018. Clean Air Act petitions to EPA on the Yuhang plant drew an EPA objection resulting in a modification to its permit, but air permits for South Louisiana Methanol escaped EPA objection under a new Administration. See Yuhuang Chemical Inc. Methanol Plant, Order on Petition No. VI–2015–03 (Aug. 31, 2016); Yuhuang Chemical Inc, Methanol Plant, Order on Petitions Nos. VI–2017–5 and VI–2017–13 (April 2, 2018); South Louisiana Methanol St. James Methanol Plant, Order on Petitions Nos. VI–2016–24 and VI–2017–014 (May 29, 2018). The Tulane Environmental Law Clinic represented petitioners in these matters.

340. See Karlin & Boone, *supra* note 339.

341. See *Louisiana Offers \$115 Billion in Incentives to Lure Plastic Plants to St. James*, NEW ORLEANS BUSINESS NEWS. Notwithstanding this price tag, the greatest catch-of-the-day belongs to a Liquid Natural Gas plant in Calcasieu Parish, that will cull an astonishing \$2.4 billion from the local tax base. See Sam Karlin, *Massive Exemption Slated for Vote*, ADVOCATE (Baton Rouge), Dec. 14, 2018. The exemption was subsequently approved. The wisdom of saddling a parish with high levels of poverty with the burden of paying incentives for some of the largest corporations in the world to locate where for other reasons they would locate anyway is discussed earlier in this article at note 51 *supra*.

342. The final St. James approval of the Formosa plant did provide for a workforce training facility giving local residents the opportunity to attend, but contained no commitment to their subsequent employment, and no quota for local employment as requested by a Parish councilman representing the affected area. See David J Mitchell, *Major Hurdle Cleared for Formosa Plant*, ADVOCATE, Jan. 25, 2019. For a local reaction, see comments of Chastity White: “We won’t get the jobs, and we all get the sickness. My son suffers from asthma, and what will I be able to leave for him with this coming in and ruining us? Nothing. Nothing.” Press Release, Louisiana Bucket Brigade, Oct. 31, 2018.

343. David J. Mitchell, *St. James Parish Council, Planning Commission to Hold Hearings on Proposed \$9.4 Billion Formosa Chemical Complex*, ADVOCATE (Baton Rouge), July 25, 2018.

during World War I and now listed by EPA as a human carcinogen.<sup>344</sup> It is but one of a suite of toxins and other pollutants Formosa and other plants will release to the community.<sup>345</sup> Little correlation was made between these emissions and local consequences until a 2018 EPA report linked ethylene oxide to cancer risks by zip code.<sup>346</sup> Two neighboring parishes with ethylene production plants showed cancer risks to residents exceeding the Agency's standard by up to 700 times.<sup>347</sup> The highest rates were closest to these two facilities, which are considerably smaller than Formosa.<sup>348</sup> Industry has responded that the EPA's risk levels are wrong.<sup>349</sup> The State DEQ responded by saying that the results were a mystery and

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344. See Della Hasselle & Nick Reimann, *In Louisiana's River Parishes, Another Possible Cancer-causing Agent in the Air, EPA Says*, ADVOCATE (Baton Rouge), Sept. 26, 2018 (history, inter alia, of ethylene oxide).

345. Formosa's air releases also include upwards of thousands of tons per year of volatile organic compounds, particulates and nitrogen oxides, each presenting health risks of its own, plus lesser amounts of more lethal formaldehyde, toluene and benzene. Collectively, they add 23 million tons of greenhouse gasses to the momentum of climate change. The plant will also store hazardous and explosive materials, and discharge wastewater into the Mississippi River, the sole source of drinking water for downstream communities. Mitchell, *supra* note 343. These figures do not include accidental releases and flaring, which are considerable for all chemical plants and particularly those of the river parishes. See Sara Sneath, *37 Chemical Releases Reported in St. James Parish in Only 14 Months*, TIMES-PICAYUNE (New Orleans), March 27, 2019; see also Hasselle & Reimann, *supra* note 344 (noting that while the Union Carbide ethylene plant released 30,000 pounds of ethylene oxide under permit, it flared off an additional 5,100 pounds as well). Nor do they include unlawful discharges, which have plagued other Formosa plants in Louisiana, Texas and the Far East. See Dermansky, *supra* note 334 (hearing testimony of Mark Nguyen); see also *Violation Tracker: Formosa Plastics*, GOOD JOBS FIRST, <https://violationtracker.goodjobsfirst.org/parent/formosa-plastics> (detailing violations in the United States).

346. See Steve Hardy & Della Hasselle, *New Cancer-Causing Danger in Baton Rouge-New Orleans Corridor, EPA Report Says*, ADVOCATE (Baton Rouge) (Sept. 30, 2018), [https://www.theadvocate.com/baton\\_rouge/news/article\\_7da74512-c376-11e8-a2f0-bfcdeb36764f.html](https://www.theadvocate.com/baton_rouge/news/article_7da74512-c376-11e8-a2f0-bfcdeb36764f.html) [hereinafter Hardy & Hasselle]. This report came on the heels of another two years earlier on cancer risks from chloroprene, a "likely" carcinogen, originating from yet another St. John plant inherited from Dupont, now called Denka. *Id.*; see also Nick Reimann, *St. John School Board Sued over Chemical Plant*, ADVOCATE (New Orleans), Nov. 13, 2018; Della Hasselle & Nick Reimann, *Despite Chemical Exposure Many St. John Residents Decide to Stay, Fight Denka in Court*, ADVOCATE (New Orleans), Feb. 9, 2018 (describing 10 private lawsuits representing more than 3,800 individuals also filed against the company). Risk levels, including apparently those near a schoolyard, exceeded EPA standards by 375 times, giving St. John Parish the "highest risk of cancer from airborne pollution in the country." *Id.* The number of chemical plants in St. James will dwarf those of St. John.

347. Hardy & Hasselle, *supra* note 346. The two ethylene oxide emitting plants were Evonik Materials in St. John Parish, and Union Carbide in St. Charles Parish. Hasselle & Reimann, *supra* note 346, includes a map with risks for each zip code. A more generalized EPA map of pollution risks to minority communities can be found online with "EPA EJSCREEN," with overlays of demographics, income and other factors. EPA EJSCREEN, <https://ejscreen.epa.gov/mapper/> (last visited March 19, 2019). In all, St. John the Baptist and St. James parishes led the nation for cancer risks from ethylene oxide, and St. Johns as well for chloroprene. LEAN, 2014 NATIONAL AIR TOXICS ASSESSMENT, Aug. 22, 2018.

348. See map in Hardy & Hasselle, *supra* note 346.

349. See David Hammer, *Toxic Truth: Cancer Alley, Myth or Reality?*, WWLTV (Feb. 26, 2018), <https://www.wwtv.com/article/news/local/toxic-truth-cancer-alley-myth-or-reality/289-523447797>. Both



referred the matter to the Department of Public Health, which said the same.<sup>350</sup>

The St. James Parish landscape is now Shintech on steroids, with the tip of the spear aimed at a group of small communities also called St. James. The residents here, some of whose families go back to the time of Reconstruction, are largely poor and almost uniformly black, which, too, might seem familiar.<sup>351</sup>

None of this is by accident. The South Louisiana Port Authority has posted a map of the Parish outlining existing and available industrial sites; stretching inland from the river, they blanket the land.<sup>352</sup> Meanwhile the Parish itself adopted a land-use ordinance with the unusual category “Residential/Future Industrial,” openly inviting new chemical plants to locate where black people had been living for a very long time. Coincidence or no, this category was almost exclusively composed of the minority community of St. James.<sup>353</sup> The words

the Louisiana DEQ Secretary and the Public Health Officer question the risk because high rates of cancer do not appear in the state Tumor Registry, which until recently refused to identify specific areas with high rates of cancer on grounds of “privacy,” although one might wonder whether whose privacy was really involved. *Id.* (Before the EPA report, the Public Health Officer had apparently never heard of chloroprene; the DEQ Secretary dismissed other health surveys stating, “You can knock on any door and you can ask the question, ‘Has anybody in this house had cancer?’ And the answer is going to be ‘yes.’ But is that really a statistically significant method of collecting data?” *Id.*). When the legislature recently required the Registry to disclose cancer incidence by zip code, the results were most dramatic in St. John Parish (which led the state), but also significant in St. James, particularly for colon and rectal cancers. *See* LA. TUMOR REGISTRY, LA. STATE UNIV. HEALTH SCI. CTR.-NEW ORLEANS, CANCER INCIDENCE IN LOUISIANA AND ST. JOHNS PARISH BY CENSUS TRACT, 2009–2014, and CANCER INCIDENCE IN LOUISIANA AND ST. JAMES PARISH BY CENSUS TRACT, March, 2017. These figures are perforce conservative, even misleading, because they do not identify types of cancer in fewer than 16 individuals, nor small populations. *See* Email of Andy Jacoby to Oliver Houck, April 18, 2018 (on file with author) (describing, inter alia, the “less than 16” and small population exclusions). *See also* LA. TUMOR REGISTRY, LA. STATE UNIV. HEALTH SCI. CTR.-NEW ORLEANS, CANCER IN LOUISIANA, 2011–2015 17 (2018) (less than 16 exclusion, inter alia). Mr. Jacoby is both a practicing attorney and President of the Center for Human-Environmental Research, located in New Orleans. *Id.* Despite these limitations, the Parish of St. James led Louisiana for the number of most prevalent cancers among white males, black males and black females. Lower incidence in white females might reflect that they neither live near the plants nor work in them.

350. Hammer, *supra* note 349.

351. *See* Anne Rolfes, *Black Communities in St. James on the Losing End of Louisiana's 'Big Win,'* LENS (New Orleans) (Sept. 17, 2018), <https://thelensnola.org/2018/09/17/black-communities-in-st-james-on-the-losing-end-of-louisianas-big-win/> (reporting that Welcome, Freetown, Burton Lane, Chatman Town and other parts of the St. James community are 87% black and some \$37,000 a year below the white-majority population just across the river).

352. *See Resident Industry in St. James Parish*, PORT OF SOUTH LOUISIANA, <http://portsl.com/st-james-parish/> (last updated May 29, 2018) (identifying, inter alia, 58 facilities, many of them petrochemical). The Port Authority operates its own facilities and finances other projects as well, *see* David J. Mitchell, *Port of South Louisiana in Line to Buy Former Petroplex Site in Vacherie*, ADVOCATE (Baton Rouge), May 26, 2017, [https://www.theadvocate.com/baton\\_rouge/news/article\\_e2e84bbc-4256-11e7-b6ce-07b86f5fe3a5.html](https://www.theadvocate.com/baton_rouge/news/article_e2e84bbc-4256-11e7-b6ce-07b86f5fe3a5.html).

353. *See* St. James Parish, La., Ordinance 14-03 (Mar. 5, 2014). The ordinance requires authorities to “consider” 2-mile buffer zones around plantations, schools, and churches (its referenced map includes only “Catholic churches”) within two miles of facilities, though even this requirement may be waived; excluded from the list are park, playgrounds, and residences. *Id.* at Sec. 86-37 (i), (j). Decisions made

“future industrial” could not more clearly predict its fate. Even the postal office has been closed, and the only evacuation route from the river, blocked by a pipeline, is now closed as well.<sup>354</sup> It has all the appearance of an eviction, and at least by the “effects” test a violation of the Civil Rights Act of 1964. In the meantime, the St. James community has been left with two worst-case options, fight or flight, and not surprisingly, both have come into play.

The fight part came first, and although other new plants in the area had scuttled through relatively unscathed, the Formosa project triggered a storm. Sensing perhaps serious civil rights problems with its “residential/future development” category for a discretely black population, the Parish had since eliminated it, which required Formosa, the last one in, to apply for special approval.<sup>355</sup> Local residents formed an opposition group called RISE St. James, and took their case to the press.<sup>356</sup> The public hearing that followed, characterized by reporters as “heated,” drew more than a hundred people in opposition, eighteen of whom spoke against the plant, several calling it racism, one so outspoken that her remarks were stricken from the record.<sup>357</sup> Only a single person spoke in favor: a company representative.<sup>358</sup> She said that Formosa was responding with, *inter alia*, community beautification projects that “provide children a safe place to play.”<sup>359</sup> There it was again, the palliatives last seen in the Homer and Shintech controversies, as if they even began to address the problem.<sup>360</sup>

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under these provisions have not been protective. *See* South Louisiana Methanol, Nos. VI-2016-24 and VI-2017-014, E.P.A. (2018) (on file with author).

354. *See* Rolfes, *supra* note 351.

355. The latest Parish action, St. James Parish, La. Ordinance 17-31 (May 3, 2018), removed the “Residential/Future Industrial” category (which had stood firm in a previous iteration only 3 months before, see St. James Parish, La. Ordinance 18-02 (Feb. 26, 2018)). It did not, however, alter approvals to new plants already approved under this category, including South Louisiana Methanol located in the heart of the St. James community. See Section 2, Ordinance 18-02. It also retained an earlier section providing for approvals of exceptions to its zoning categories based on “public benefits” such as “job creation,” “expansion of the tax base,” and “enhancing the attractiveness of the parish for future development.” See Ordinance 17-21, (h). In effect, it is the “residential/future industry” category revisited, this time as a large and unguided loophole.

356. *See* Sharon Lavigne, *St. James Parish Rising: Documenting a Legacy of Environmental Racism in Louisiana*, STORY CENTER, <https://www.storycenter.org/storycenter-blog/st-james-parish-rising-documenting-african-american-history-and-a-legacy-of-environmental-exploitation-in-louisiana> (last visited March 25, 2019).

357. *See* Dermansky, *supra* note 334. Other speakers were equally confrontational, including a long-standing human rights activist who stated, “What is going on here is very profane. What you are doing is against humanity [and] if Jesus were present he would say, ‘F\_\_\_ you.’” *Id.* A more moderate speaker with deep family roots in the Parish added, “You want my people to be civil, but this is not civil. I’m opposed to racism, which means I’m opposed to this plant.” *Id.*

358. *Id.*

359. *Id.*

360. *See* text at note 137 *supra* (Homer, youngsters to Girl Scout camps), and note 177 *supra* (Shintech, a new children’s playground).

Inevitably, as predicted, the Formosa plant was approved by a vote of 5–0 (1 absent, 1 abstaining).<sup>361</sup> Also predictably, the public opposition has since hardened against all the new plants with large rallies and national support.<sup>362</sup> RISE St. James and other groups have filed a lengthy records request with the Parish, exploring, in its words, why Parish officials “basically changed a black district into the petrochemical district.”<sup>363</sup> If a lawsuit follows, the beating heart of the Civil Rights Act may not be completely stilled.

This leaves flight. To the Reverend Harry Joseph of the Mount Triumph Baptist Church and his neighbors, suffering from a wasted landscape (Rose Miller, 80 years of age: “We had 11 fruit trees. They all died. The pecan trees died. Vegetables don’t grow right any more. Frogs, butterflies, grasshoppers, birds—we don’t see them anymore”), and a bewildering range of illnesses (news reporter: “Their kids have asthma. Their friends have alarmingly high rates of cancer. Their skin breaks out in strange rashes. The evidence is anecdotal, but compelling nonetheless”),<sup>364</sup> there is but one choice remaining. They have asked for corporate buyouts, from houses where many were born, tended their gardens, raised their children, and buried their dead.<sup>365</sup> They would lose money, even if they were able to sell. The chemical plants are said to have “slashed” home values and “scared off” buyers.<sup>366</sup> To date the corporate owners of these plants have not offered to pitch in, although there may be movement in that direction.<sup>367</sup> Whether they do, at this point environmental justice in St. James looks more like eviction in order to advance a government and corporate agenda that colors them gone. It does not look like ratcheting

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361. David J. Mitchell, *Formosa Wins Backing from St. James Council, but Only if Conditions on Hiring, Other Matters Finalized*, ADVOCATE (Baton Rouge), Jan. 19, 2019.; David Mitchell, *Major Hurdle Cleared for Formosa Plant*, ADVOCATE (Baton Rouge), Jan. 25, 2019 (describing conditions).

362. See RISE St. James, Upcoming Events, FACEBOOK [https://www.facebook.com/pg/risestjames/events/?ref=page\\_internal](https://www.facebook.com/pg/risestjames/events/?ref=page_internal).

363. See Sabrina Canfield, *Cancer Alley Residents Decry ‘Environmental Racism’ in Louisiana*, COURTHOUSE NEWS SERVICE (Jan. 15, 2019), <https://www.courthousenews.com/cancer-alley-residents-decry-environmental-racism-in-louisiana/> (quoting Sharon Lavigne, President, RISE ST. James).

364. See Stephanie Riegel, *Industrial Waste: How a St. James Community Is Struggling to Live Among an Expanding Oil and Gas Industry*, GREATER BATON ROUGE BUS. REPORT (Dec. 6, 2017), <https://www.businessreport.com/business/industrial-waste-how-a-st-james-community-is-struggling-to-live-among-an-expanding-oil-and-gas-industry>.

365. Lauren Zanolli, *‘Cancer Alley’ Residents Say Industry Is Hurting Town: ‘We’re Collateral Damage’*, GUARDIAN (June 6, 2017), <https://www.theguardian.com/us-news/2017/jun/06/louisiana-cancer-alley-st-james-industry-environment>.

366. Riegel, *supra* note 364 (describing buy-out effort).

367. The Louisiana Environmental Action Network (LEAN) has been trying to advance this option by recruiting industry to fund buyouts for willing sellers. Telephone Interview with Mary Lee Orr, Executive Director, LEAN (Dec. 6, 2018). Although unquestionably humane, whether this initiative attracts significant corporate participation and whether it also serves to shield the chemical industry from civil rights complaints (“we’ve offered to pay them”) remains to be seen.

down on chemical emissions to the point that eviction is not necessary in the first place.

All but forgotten by now, eclipsed by the Rule XX fight and the new petrochemical boom, was the fate of the Shintech plant itself which, following EPA's acceptance of the environmental justice petition, quietly opted to find another location up-river.<sup>368</sup> Significantly, instead of producing its own raw materials, a process involving serious toxins, it would purchase them from a Dow Chemical plant nearby, saving production costs and, with further reductions by Dow, reportedly lowering net loadings to zero.<sup>369</sup> Although not welcomed by all of its new neighbors, on a broader plane it represented, if not a win-win, at least a better-better for industrial development and environmental protection.<sup>370</sup>

One would hardly know it. Neither the State of Louisiana nor any trade association advertised this felicitous result.<sup>371</sup> In a meeting with Governor Foster, Kuehn had suggested that Shintech showed the need for more comprehensive zoning for the chemical corridor, ensuring that livable spaces remained for all its inhabitants.<sup>372</sup> Instead, the Governor replied that if the plant were defeated "I'll just know that I'll have to do a better job getting people out of the way."<sup>373</sup> At least he was being honest. Prescient, as it turns out, as well. Shintech demonstrated what environmental justice could do with a willing administration behind it. RISE St. James is testing what it still might be able to do in the hands of those most affected, those the Civil Rights Act intended to serve.

Meanwhile, needing no urging from Governor Foster, Louisiana's petrochemical lobbies have since proposed legislation depriving Tulane University of all

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368. Leonard Gray, *Shintech Leaving St. James, Heading to Plaquemine*, L'OBSERVATEUR, Sept. 21, 1998.

369. Mark Schleifstein, *Shintech Taking its Plant Upriver*, TIMES-PICAYUNE (New Orleans), Sept. 18, 1998, at A-1 (Shintech emissions at the new site would be cut to one-third, and offset entirely by concurrent reductions at Dow). Although the reductions claimed were for volatile organic compounds harmful in their own right, no offset calculation was offered for other toxins, see *In re Shintech, Inc.*, (La. App. 1 Cir. 02/15/02); 814 So. 2d 20.

370. See John McQuaid, *EPA Caught in Cross-Fire Over Civil Rights*, TIMES-PICAYUNE (New Orleans), May 22, 2000 (quoting EPA General Counsel Gary Guzy, "Shintech in many ways is a win-win situation").

371. Indeed, Louisiana industry saw the Shintech outcome as a serious threat and launched efforts to kill both the EPA guidelines and Louisiana's compliance with them, each partially successful. See ROBERTS & TOFFOLON-WEISS, *supra* note 1, at 191-98.

372. Kuehn, *supra* note 1, at n. 351, citing private meeting with Governor Foster in Baton Rouge, Louisiana, Aug. 13, 1999.

373. *Id.* The Governor nonetheless, apparently in a cooler moment, went on to set up a task force to make recommendations on the Mississippi Corridor which included cumulative impact analysis and earlier exploration of "alternative sites and processes." See Mark Schleifstein, *Require Impact Study for Major Industrial Projects, Panel Says*, TIMES-PICAYUNE (New Orleans), Oct. 1, 1999 at A-2. Neither has occurred.

state support unless it dropped its environmental clinic, so far without success.<sup>374</sup> But in these matters, there is always another day. On the other hand, there is always hope that state policies and industry practices will at some point make student representation less essential for Louisianans whose resources are few, choices yet fewer, and are on the short end of so many things.

That day, too, has yet to come.

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374. See David Jacobs, *Chemical Reaction*, BATON ROUGE BUS. REPORT, Dec. 15, 2009 (industry urged legislature to “cut off every dollar it sends to Tulane”); see also Bill Barrow, *Bill Targeting Tulane Clinic Fails: Measure Dies in Senate Committee*, TIMES-PICAYUNE (New Orleans), May 20, 2010 at A-2; James Gill, *Polluters Have Had Enough of Law Clinics*, TIME-PICAYUNE (New Orleans), May 12, 2010.