

PROFILE

Cases And Controversy

Adam Babich arrived at the Tulane Environmental Law Clinic shortly after the Louisiana Supreme Court limited the ability of students to represent clients in court. Today, this "medium-size law firm" is still bringing successful suits in one of the law's most contentious areas: ensuring that indigent clients receive environmental justice in one of the nation's poorest and most polluted states

Five years before Hurricane Katrina demonstrated to the world how people in poverty are exposed to environmental hazards much more than the well-to-do, Adam Babich left his job as a litigator at a Chicago firm and moved to New Orleans to take over as director of Louisiana's premier public interest environmental legal services organization. The Tulane Environmental Law Clinic is located less than three miles from the Superdome and the Ernest N. Morial Convention Center, where for the better part of a week TV shots of thousands of displaced African Americans and other poor people with little food or water tugged at the conscience of a nation. The largest of its kind in the nation, the clinic brings together people who normally could not afford to pay for environmental legal services with third-year "student-attorneys" at Tulane Law School and their licensed faculty supervisors.

"If there is one theme that pervades the cases I've litigated in my career, it is that environmental law should be applied in an even-handed manner," Babich said in a recent interview at the clinic's offices on the Tulane campus, where 26 students work with 4 experienced lawyers. "Many of the clinic's cases relate to governmental agencies' tendency to provide some people much more environmental protection than others. Agencies often use pollution trading, cost-benefit analyses, and lack of enforcement to allow increased pollution in lower-income and minority neighborhoods, while paying much more attention to demands for state-of-the-art protection for whiter, wealthier communities. These failures to apply the law in an even-handed way undercut the credibility of the environmental protection system.

"So far, efforts to recover from Hurricane Katrina show that, when push comes to shove, government decisions — for example, decisions about how and where to dispose of debris — still tend to marginalize the interests of lower-income Americans and minorities. Potentially hazardous debris from the storm is being funneled to a new landfill next to a Vietnamese-American community in east New Orleans and to an existing landfill that looms over a historic African American community in Plaquemines Parish. This is in addition to the already disproportionate share of the pollution burden borne by Louisiana's minority population.

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*Photograph by
Cheri Babich*

environmental standards, under the theory that our recovery from Hurricane Katrina is too important to be constrained by the usual standards." Today, nearly a third of the country's energy and a good deal of its chemicals flow through Louisiana, which nonetheless remains one of the nation's poorest states.

"A good example of how this happens is the clinic's liquefied natural gas terminal case," Babich continues. The clinic represented the Gulf Restoration Network, the Louisiana Charter Boats Association, and the local Sierra Club chapter in a permit challenge recently rejected by the Fifth Circuit. "The Department of Transportation explained that it would be too expensive to require Shell Oil's Gulf

Landing facility to adopt technology to better protect marine life in the Gulf. But the government did not bother to quantify the costs of Shell's failure to use state-of-the-art technology to less powerful users of the same resource, such as the fishermen who rely on that marine life to make their livings."

"Today in southeastern Louisiana, there is a tendency to shortcut opportunities for public comment and waive environmental standards, under the theory that our recovery from Katrina is too important to be constrained by the usual standards."

An associate professor on Tulane's law faculty as well as clinic director, Babich started out as a lowly computer geek, taking a job after college as a system operator for EPA Region III in Philadelphia. It was the late 1970s, and as part of the implementation of the Resource Conservation and Recovery Act, the agency's big computers were being used to compile long lists of "imminent and substantial endangerment" sites. Many of them, he realized, were in his neighborhood. "I decided to go to law school and sue the people responsible for these sites," he says today.

Since then, Babich seems to have litigated from every possible angle. He made his mark early in his legal career in Colorado. First as an assistant attorney general and later as a private practitioner, he brought numerous suits to help clean up the state's legacy of mining waste and to chip away at the walls the federal government has erected to insulate pollution at federal facilities from health and safety requirements. He represented the Sierra Club in a successful challenge to a Broomfield, Colorado, facility that purported to avoid cradle-to-grave regulation under RCRA by mixing hazardous wastes into fuel.

In the late 1980s, he was the lead attorney for the Sierra Club in its fight against the U.S. Department of Energy's Rocky Flats plant, which made plutonium triggers for nuclear bombs. The government argued

that it could incinerate hazardous waste mixed with plutonium nine miles from downtown Denver without state oversight. The court granted the Sierra Club summary judgment and a settlement resulted in the incinerator's shutdown.

RCRA was not the only new law aimed at hazardous waste with a citizen suit provision. Superfund also proved to be a critical tool in cleaning up Colorado's pollution legacy. In the years since, Superfund has had a huge effect on environmental law, Babich says today. "Now that the broad scope of Superfund liability has become settled, it has completely changed the way businesses think about their relationship to the environment. Before Superfund, the idea was the government tells you what to do, and you do it. If you make a mess, it's not your problem as long as you didn't break the law. The message of Superfund is that you have to be careful no matter what the government says. Also, cleanups happen today with the government hardly getting involved. When real estate changes hands, owners and buyers investigate the property and remediate if necessary. What Superfund did was to unleash private initiative and creativity about avoiding, discovering, and cleaning up environmental problems."

Babich is a big believer in the positive forces unleashed by environmental laws (with the caveat that they can also have unintended consequences). An example he gives is the Clean Air Act's requirement that, in non-attainment areas, new pollution is permissible only if offset by larger reductions. "When the CAA is administered honestly and competently, new industrial growth can actually result in cleaner air." He freely admits that he had little time for policy issues that didn't affect his clients directly until he left private practice in the mid 1990s to join ELI as editor-in-chief of the *Environmental Law Reporter*. Ever since, he has been a nationally known voice on environmental policy.

In 1997, Babich joined a Chicago law firm to represent primarily corporate clients. Is there a professional contradiction here? In a word, no: "I don't think representing, say, a demolition contractor who made a mess and has to figure out how to clean it up and exit the legal system with the business intact is being anti-environmental. It's part of dealing with environmental regulations and helping make them work."

Indeed, what is the proper role of the environmental litigator? "Not everyone appreciates the roles lawyers and litigation play in society," Babich wrote in an article entitled "The Apolitical Law School Clinic," published last year. "So the process of training lawyers is bound to be a little controversial. Training lawyers by bringing or defending actual lawsuits can be more controversial still. And when those lawsuits



challenge powerful interests or affect issues of community or statewide concern, controversy becomes almost inescapable."

Which Babich discovered when he arrived in New Orleans in May 2000, on the heels of a controversy about the clinic's representation of St. James Citizens for Jobs and the Environment, which challenged a \$700-million polyvinyl chloride plant next to an African American community in Convent, Louisiana. In the *Forum's* January/February issue, Itzhak E. Kornfeld explained: "[In 1997, t]he Convent citizens won, Shintech withdrew its application, and the governor reacted by threatening to cut off state funding for Tulane, while the Association of Business and Industry successfully pressured the Louisiana Supreme Court to limit clinic student practice in a blatant attempt to curb citizen enforcement of environmental law. The clinic succeeded [in 1999], however, in getting the rule modified and Tulane law students today are soldiering forward as before."

Babich's approach to managing controversy has been to emphasize the clinic's focus on legal education and professional legal services, and to disavow any "environmentalist" agenda. "The clinic's student-attorneys and lawyers work to achieve their clients' goals, not to advance substantive goals of the clinic," he says today. "Every step the clinic takes is rooted in principles fundamental to all lawyers' professional training. Those include being strong, ethical, and professional advocates for clients and working to ensure access to the courts regardless of clients' ability to pay and regardless of whether client goals, though lawful, may be controversial. Further, that nobody is above the rule of law. Our apolitical philosophy puts the clinic squarely in the mainstream of U.S. legal practice."

And clients there are plenty. In Louisiana, EPA and the state sometimes seem to be seeking new ways to allow emissions increases, rather than enforcing the law. Representing the Louisiana Environmental Action Network in the Fifth Circuit, the clinic succeeded in having the court vacate EPA's approval of a state plan to allow increased emissions of volatile organic compounds (many of which are carcinogenic) in exchange for reductions of less dangerous nitrogen oxides. Bogus trading schemes have been a problem and as a result of another lawsuit the clinic handled for LEAN, EPA and the state acknowledged that Louisiana had issued and banked invalid emission credits. Babich says, however, that the Louisiana Department of Environmental Quality and EPA Region VI have never performed an audit to determine which permits are based on invalid credits. This failure, he says, undercuts the credibility of trading in the state "to the detriment

of the regulated community who could benefit from an honestly administered system."

A major reason for poor air quality, Babich says, is the practice of allowing plants to escape penalties for "accidental" releases. For some facilities, such releases have become a normal way of doing business. But representing St. Bernard Citizens for Environmental Quality and the Louisiana Bucket Brigade, the clinic won an important victory in a summary judgment in district court that found that Chalmette Refinery, LLC—sited next to a "fenceline" community—had violated the CAA through repeated preventable accidental releases of sulfur dioxide and also through purposeful releases of benzene, a carcinogen.

The clinic also litigates numerous Clean Water Act and NEPA cases. In a state with a growing popular and political appreciation of the importance of ecological services provided by wetlands, the rapid pace of their destruction has grave implications for hurricane protection in the parishes that depend on them, for wildlife and recreation, and for employers and workers in the seafood industry. In 2004, the clinic represented three citizens when a district court created precedent that Babich says should enhance protections for the resource. It rejected as arbitrary and capricious an Army Corps of Engineers environmental assessment of a subdivision that would destroy 40 acres of wetlands. The court found "no support" for the corps's assertion that mitigation measures would successfully reduce adverse impacts and found that the corps failed to take into account the cumulative effects of the project.

In general, Babich is optimistic about Louisiana and its environment. He sees a growing environmental awareness—noting Governor Blanco's insistence that future liquefied natural gas terminals must adopt the environmentally protective technology that Shell Oil's Gulf Landing facility may have avoided—and an increased level of openness and professionalism among state regulators. "We have a lot of challenges ahead," he says, "and no doubt there will be plenty of mistakes, disputes, and lawsuits. But overall, I think we're groping toward a more balanced and inclusive style of decisionmaking and a broader recognition that the state's natural beauty and unique communities are a source of strength that is worth preserving." The best way to face challenges is to tap citizens' energy and expertise, according to Babich: "Both industry and government need to look at citizens as equal players. The way to make that happen is to make sure citizen organizations have a legal voice in court." —S.R.D.

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