

## "HOW CAN WE GIVE UP OUR CHILD?" A PRACTICE-BASED APPROACH TO TEACHING LEGAL ETHICS

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*The little girl they named Jessica was born February 8, 1991. It was now the last week of July, 1993, and she was almost 2½ years old. They were meeting with their lawyer. They had an incredibly difficult decision to make: whether seven days from now would be the last time they would ever see her.*

THE PRECEDING paragraph describes a critical moment in what is generally known as the "Baby Jessica Case," one of the most famous American family law cases of the past 20 years.<sup>1</sup> The clients are a couple who thought they had adopted an infant only to face a court ruling that they must return the child two years later to the biological father, who had not known about the adoption proceedings. The deadline for giving up Jessica is in seven days. Their only hope of ever regaining custody is a long-shot, protracted appeal to the U.S. Supreme Court. The lawyer believes that it would be best for them, for Jessica, and for the legal system not to pursue that appeal.

The American Bar Association (ABA), which serves as the accrediting agency for most law schools in the United States, requires that during the three years of post-graduate law school that constitutes American legal education students take a course in professional responsibility. Course coverage must include the ABA's Model Rules of Professional Conduct (Model Rules or "MRs"), approved by the ABA's governing body, the House of Delegates, with the intent that these rules will be adopted by each of the 50 states as obligatory on attorneys licensed to practice by that state. At many law schools this is the

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1 The case produced two separate state Supreme Court decisions—*In the Interest of B.G.C.*, 496 N.W.2d 239 (Iowa 1992); *In re Baby Girl Clausen*, 502 N.W.2d 649 (Michigan 1993); the trial court proceedings were covered by Court TV; the case was the subject of both a made-for-TV movie and a major magazine article—Lucinda Franks, "The War for Baby Clausen," *The New Yorker* 56 (March 22, 1993); and the highly publicized litigation prompted the promulgation of the Uniform Adoption Act. See Joan Heifetz Hollinger, "Adoption and Aspiration: The Uniform Adoption Act, the DeBoer-Schmidt Case, and the American Quest for the Ideal Family," (1995) *Duke Journal of Gender Law and Policy* 15 and Robby DeBoer, *Losing Jessica* (New York, Doubleday, 1994) (autobiographical account by the adoptive mother).

only required course after the first year. At my law school the course is typically taught in at least four different sections by different tenured faculty members and is taken during the second year. Each teacher has broad discretion in designing the content and teaching methodology. The meeting between lawyer and client in the Baby Jessica case described above is reenacted by my students as the culminating simulation exercise in my section of this course.

#### A.

In their recent article on "The Values of Common Law Legal Education," Roger Burridge and Julian Webb challenge the conventional wisdom that legal education is a "process of intellectual rather than character formation."<sup>2</sup> They envision a law school that "takes the task of developing moral judgment (and the capacity for moral action) seriously, utilizing contextually rich and emotionally engaged, problem-based and experiential learning techniques."<sup>3</sup> This vision can only be accomplished, they insist, by overcoming prevalent suspicion among legal academics of the "practitioner context"<sup>4</sup> and of experiential and "constructivist" teaching methods developed by teachers of simulations, clinics and practitioner placement courses.<sup>5</sup> However, in their article Burridge and Webb are largely preoccupied with discrediting what they term the "debased liberal education ideal"<sup>6</sup> underlying such suspicion, leaving sympathetic readers hungry for affirmative reasons for trying such new approaches<sup>7</sup> and concrete suggestions for doing so.<sup>8</sup>

In my contribution to this volume of essays responding to their critique and

2 "The Values of Common Law Legal Education: Rethinking Rules, Responsibilities, Relationships and Roles in the Law School" (2007) 10 *Legal Ethics* 72, 75. Burridge is Professor and Head of the School of Law, University of Warwick (UK) and Webb is Professor of Legal Education, University of Warwick, and Director, UK Centre for Legal Education.

3 *Ibid*, 95.

4 "The practitioner context is often regarded with suspicion..." *Ibid*, 94.

5 "[C]onstructivist learning approaches involving clinics, simulations and practitioner placements, are seen as symptoms of a pernicious vocationalism..." *Ibid*, 96.

6 *Ibid*, 94.

7 They do say, briefly, the "benefits of clinical and other constructivist methods have long been associated with moral as well as intellectual development." *Ibid*, 96.

8 This observation is not intended as a criticism. Burridge and Webb themselves realize that their article is only a first step: "So, where does that leave us in considering the role of legal education in value formation? The short answer would seem to be—with rather a lot of work to be done." *Ibid*, 85. They are to be praised for arousing hunger among legal educators for a feast of pedagogical theory and practice, of which this volume might perhaps be the first course. Elsewhere both Burridge and Webb have already served up substantial appetizers, in terms of both theory and concrete proposals. See, eg, Roger Burridge, "Learning law and legal expertise by experience" in Roger Burridge, Karen Hinett, Abdul Paliwala and Tracey Varnava (eds), *Effective Learning and Teaching in Law* (Institute for Teaching and Learning in Higher Education, 2002); Julian Webb, "Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education" in Anthony Bradney and Fiona Cownie (eds), *Transformative Visions of Legal Education* (Oxford, Blackwell, 1998).

vision, I will summarize recent theories and research on teaching values generally, and in the American law school context in particular, and then use the Baby Jessica exercise to illustrate how these insights can be used to justify and inform a practice-based approach to teaching legal ethics.

## B.

The work of the moral philosopher Alasdair MacIntyre<sup>9</sup> suggests that a practice-based approach may be not only a valid method for teaching values, but perhaps even a necessity. Beginning with the plausible assertion that “it is always within some particular community with its own specific institutional forms that we learn or fail to learn to exercise the virtues,”<sup>10</sup> MacIntyre goes on to claim that virtues can only be understood by reference to a specific form of social activity, the practice,<sup>11</sup> which he defines as follows:

- a practice is a coherent and complex form of socially established cooperative human activity
- this activity has its own internal objectives<sup>12</sup> and standards of excellence
- human ability to accomplish these objectives and in the process achieve such excellence is systematically extended through participation in this activity.<sup>13</sup>

“Every practice... require[s] the exercise of technical skills... [but a] practice is never just a set of technical skills.” These skills serve the internal objectives of the practice, but at the same time as the exercise of these skills expand the human ability for excellence, the internal objectives are themselves transformed and enriched.<sup>14</sup>

9 *After Virtue: A Study in Moral Theory* (3rd ed.) (Notre Dame, Notre Dame Press, 2007). Professor Timothy Mahoney of Providence College (Rhode Island), who teaches both classical philosophy and business ethics, suggested the relevance of MacIntyre to me after he reviewed Burridge and Webb, *supra* n. 2, at my request.

10 *Ibid.*, 194–5.

11 *Ibid.*, 186–7. He does provide the following caveat: “[My argument does not] in any way imply that virtues are *only* exercised in the course of what I am calling practices.” *Ibid.*, 187 (emphasis in original). MacIntyre’s connection of virtue to practices is critiqued by David Miller, “Virtues, Practices and Justice” and Elizabeth Frazer and Nicola Lacey, “MacIntyre, Feminism and the Concept of Practice” in John Horton and Susan Mendus (eds.), *After MacIntyre: Critical Perspectives on the Work of Alasdair MacIntyre* (Notre Dame, Notre Dame Press, 1994).

12 I have substituted throughout my summary of MacIntyre’s argument the word “objectives” for the term he uses, “goods.” I am, no doubt, distorting and simplifying his theory but I do so because I think, for many of the likely readers of this essay, the term “goods” carries a distracting connotation of material items that are the subject of commercial exchange.

13 *Ibid.*, 187. “Bricklaying is not a practice; architecture is. Planting turnips is not a practice; farming is.” Practices are not limited to occupational activities. For MacIntyre, the game of chess is a practice; so is raising a family. *Ibid.*, 187–8. “Virtue” is then defined “an acquired human quality which enables us to achieve” the objectives internal to a practice. *Ibid.*, 191.

14 *Ibid.*, 193.

The objectives and standards of excellence internal to a practice “can only be identified and recognized by the experience of participating in the practice in question.”<sup>15</sup> Furthermore, we can become practitioners only “by subordinating ourselves within the practice in our relationship to other practitioners.”<sup>16</sup> It is this subordination of self that gives rise to such cardinal virtues as “justice, courage and honesty.”<sup>17</sup>

What are the educational implications of MacIntyre’s argument? If he is right that virtues are learned by experiencing the activities of a practice, then teaching from “the practitioner perspective” may in fact be the best way to lay the necessary foundation for moral judgment and ethical commitment.<sup>18</sup> Even if a student is not sure she will become a lawyer after law school, a legal education which provides “experience of participating in the practice” of law can enable her to glimpse a way of life which has the goal not of self-advancement and individual gratification but rather the achievement of objectives of a particular collective social activity.<sup>19</sup> The practice of law can only properly be understood in terms of the lawyer’s duties to others: clients, other parties and their lawyers, legal officials, the justice system, and society in general.

A second implication of MacIntyre’s analysis is that a practice-based approach to teaching ethics will enable the student to explore values with the aid of the practitioner’s moral compass. “A practice involves standards of excellence and obedience to rules ... To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judged by them. It is to subject my own attitudes, choices, preferences and tastes to the standards which currently and partially define the practice.”<sup>20</sup> To visit the world of legal practice is to leave behind moral relativism and the autonomy of personal preference. The moment when one becomes a lawyer in the United States is not the law school commencement ceremony or passage of the bar examination, but the taking of a solemn oath administered by a judge. The oath is a promise of obedience to a collective set of values adopted by a professional community that extends over both space and time.<sup>21</sup> An American

15 *Ibid*, 188–9.

16 *Ibid*, 191.

17 *Ibid*, 190. “We have to learn to recognize what is due to whom [i.e. justice]; we have to be prepared to take whatever self-endangering risks are demanded along the way [courage]; and we have to listen carefully to what we are told about our own inadequacies and reply with the same carefulness for the facts [honesty].” *Ibid*, 191.

18 Paul Maharg in his recent, important book on *Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-first Century* 48 n. 7 (Aldershot, Ashgate, 2007) also notes the relevance to legal education of MacIntyre’s insights about the role of practices in learning virtue.

19 MacIntyre of course recognizes that individual practitioners are not necessarily selfless in their practice. “Great violinists [can] be vicious [and] great chess players mean-spirited. Where the virtues are required, the vices also may flourish. It is just that the vicious and mean-spirited necessarily rely on the virtues of others for the practices at which they engage to flourish...” MacIntyre, *supra* n. 9, 193.

20 *Ibid*, 190.

21 “[E]very practice has its own history ... To enter into a practice is to enter into a relationship not only with its contemporary practitioners, but also with those who have preceded us in the practice, particularly those whose achievements extended the reach of the practice to its present point.” *Ibid*, 194.

lawyer thus is not free to choose to help a friend in need if doing so requires disclosing a client's secret nor to represent both husband and wife in a divorce, even if she thinks it is a good idea and they both want her to do so.<sup>22</sup> The profession has already made these value choices for her. To reject these value choices is to leave the professional community (either voluntarily or by expulsion).

Immersion in the values of a practice is not, however, inconsistent with critique of those values.<sup>23</sup> Indeed, for MacIntyre, an essential component of a practice is the relentless striving for ever higher standards of excellence in service of an ever more demanding set of objectives. An example of this process might be the struggle of the ABA House of Delegates over the proposal of its own expert commission to give lawyers discretion to disclose confidential information to prevent a client from committing a crime or fraud through the use of the lawyer's services if serious financial harm to another person is likely to result. The proposal was rejected at the 2002 meeting of the House of Delegates but the following year the House of Delegates reversed itself and added this exception to the ABA Model Rules, in large part because of intervening events such as scandals involving the Enron Corporation and the Arthur Anderson accounting firm.<sup>24</sup>

### C.

An approach to teaching values informed by MacIntyre's analysis appears to be fully consistent with the views of Burrige and Webb, who state:

[E]ffective learning *about* values would benefit from learning processes that will enable a felt experience of, rather than a mere intellectual acquaintance with, those values...Students need to be given opportunities to participate directly in activities that uncover and engage their values and/or oblige them to confront some degree of inter-personal value conflict.<sup>25</sup>

For teachers at law schools in the United States, like myself, both the work of MacIntyre and the course of action advocated by Burrige and Webb resonate powerfully with the recently issued recommendations of the Carnegie

22 ABA Model Rule 1.7(b)(3) prohibits the representation of opposing parties in the same litigation even if the parties consent. See *Vinson v. Vinson*, 588 S.E. 2d 392 (Va. Ct. App. 2003) (prohibiting the representation of both husband and wife in divorce proceedings).

23 "[T]he standards are not themselves immune from criticism, but nonetheless we cannot be initiated into a practice without accepting the authority of the best standards realized so far." MacIntyre, *supra* n. 9, 190.

24 The exception is stated in ABA Model Rule 1.6(b)(2) and b(3). See *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005*, 133-37 (American Bar Association, 2006).

25 Burrige and Webb, *supra* n. 2, 97 (emphasis in original).

Foundation for the Advancement of Teaching in its book-long study of American legal education.<sup>26</sup> The Carnegie Report, which is receiving serious attention by leaders in both legal education and the legal profession, is particularly critical of American law schools for their lack of attention to the development of moral judgment and professional identity:

[A] number of studies have shown that students' moral reasoning does not appear to develop to any significant degree during law school... This picture of a lack of growth in moral thinking during law school is borne out by studies of practicing lawyers, which reveal scores for attorneys that are comparable to those of entering law students."<sup>27</sup>

According to the Report, the typical American law school course in professional responsibility takes a "law of lawyering" approach that "teaches what kinds of violations are subject to sanctions and how borderline cases have been resolved."<sup>28</sup> The Report concludes that this approach may actually do more damage than good:

When legal ethics courses focus exclusively on the law of lawyering, they can convey a sense that attorneys' behavior is bounded only by sanctions such as the threat of malpractice charges and give the impression that most practicing lawyers are motivated primarily by self-interest and will refrain from unethical behavior only when it is in their immediate self-interest to do so... Such a narrow focus misses an important dimension of ethical development—the capacity and inclination to notice moral issues when they are embedded in complex and ambiguous situations, as they usually are in actual legal practice. This capacity is critical because ethical challenges cannot be addressed unless they are noticed and taken seriously... By defining 'legal ethics'

26 William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, and Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* (San Francisco, Jossey-Bass, 2007) (hereinafter "Carnegie Report" or "The Report"). For those who might want to limit the recommendations of the Carnegie Report to the distinctive post-graduate nature of American legal education, in contrast to the undergraduate setting addressed by Burrige and Webb, an even more recent publication by the Carnegie Foundation is instructive: "[T]he apparent rivalry between liberal and professional education in the academy is ill conceived and unnecessary... [S]ignificant education is formative. Formative learning shapes persons and lives as students enter into a practice and begin to acquire new capacities and understanding, sharing the larger cultural community shaped by that practice. This is perhaps most evident in education for the professions, but we insist that it is, or should be, true of the liberal arts and sciences as well." William M. Sullivan and Matthew S. Rosin, *A New Agenda for Higher Education: Shaping a Life of the Mind for Practice*, 23–24 (emphasis added) (San Francisco, Jossey-Bass, 2008).

27 Carnegie Report, *supra* n. 28, 133. Compare Burrige and Webb, *supra* n. 2, 87 ("legal education has largely failed to take responsibility for its own lack of moral imagination and conviction").

28 Report, *supra* n. 26, 148. According to the Report, the law of lawyering approach is appealing to law teachers not only because it enables them to present the course in a format similar to other required law school courses but also "protects them from having to confront questions of moral right or wrong in their teaching." *Ibid.*

as narrowly as most legal ethics courses do, these courses are likely to limit the scope of what graduates perceived to be ethical issues.<sup>29</sup>

Like Burrige and Webb, the Report does not only criticize, but also holds out hope for improvement: "the research makes quite clear that higher education can promote the development of more mature moral thinking [and] that specially designed courses in professional responsibility and legal ethics do support that development."<sup>30</sup>

The leading research in legal education referenced by the Report was conducted by Steven Hartwell at the University of San Diego between 1988 and 1994.<sup>31</sup> Hartwell experimented with a legal ethics course that combined theory with experiential teaching. He divided students into small groups to discuss problems designed "to raise issues that lawyers face but which were often not amenable to solution by reference to formal ethical rules."<sup>32</sup> As a group, the students had to identify the ethical issue, determine what ought to be done, and reach consensus on the justification for that action. "Although the students were invited to refer to any formal ethical rule for guidance, they could not justify their [decision] on that basis... The students devoted more than half of their available class time... to working together in small groups... and evaluating their [proposed decisions and justifications] in class discussions."<sup>33</sup> Hartwell administered the most widely used instrument for measuring moral reasoning, the Defining Issues Test (DIT), to his students at the beginning and end of the course (and again four months later).<sup>34</sup> For all

29 *Ibid*, 149. In a longitudinal study of 700 Australian law students from 21 law schools, Adrian Evans (another contributor to this special issue) found that, overall, Australian law schools have minimal impact on graduates' values formation, but that the insertion of personally challenging circumstances into a number of hypothetical ethical scenarios can allow students to more clearly identify their preferred decisions and the values sets which motivated those decisions. See Adrian Evans and Josephine Palermo, "Australian Law Students' Perceptions of Their Values: Interim Results in the First Year—2001—of a Three Year Empirical Assessment" (2003) 5 *Legal Ethics* 1&2, 103-129; Adrian Evans and Josephine Palermo, "Zero Impact: Are Law Students' Values Affected by Law School?" (2005) 8(2) *Legal Ethics* 240-264; and Adrian Evans and Josephine Palermo, "Almost There: Empirical Insights into Clinical Method and Ethics Courses in Climbing the Hill towards Lawyers' Professionalism" (2008) 17(1) *Griffith Law Review*.

30 Carnegie Report, *supra* n. 26, 134.

31 "Promoting Moral Development Through Experiential Teaching" (1994-95) 1 *Clinical Law Review* 505.

32 *Ibid*, 533.

33 *Ibid*, 523. They were asked to express their justifications in terms of general principles such as the integrity of the attorney, the fairness of the legal system and the public's right to be informed.

34 For a description of the DIT and other empirical assessment tools and their potential application to legal education, see Neil Hamilton, "Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity" (2008) 5 *University of St. Thomas Law Journal* 136-43. The DIT and the theories underlying it were criticized in the 1980s as potentially biased toward male and/or Eurocentric values, see, eg. Carol Gilligan, *In a Different Voice* (Cambridge, Harvard 1982) and Hartwell, *supra* n. 31, 512-22 (summarizing critiques). Those who have continued to use the DIT in the face of these critiques point to empirical research that they claim indicates the DIT has validity across cultural settings and, to the extent that gender effects appear, women tend to score better; they also advocate the use of improved techniques for scoring the DIT combined with other assessment methods rather than sole reliance on the DIT. Hamilton, *ibid.*, 136; James R. Rest, "Background: Theory and Research" in James R. Rest and Darcia Narvaez (eds), *Moral Development in the Professions: Psychology and Applied Ethics*, 22-25 (Hillsdale, New Jersey, Lawrence Erlbaum, 1994).

three classes taught using this method the test results showed significant improvement.<sup>35</sup> In contrast, students at the same law school taking a conventional professional responsibility course and simulation-based courses in client counseling and negotiation did not achieve any improvement in DIT scores;<sup>36</sup> these results are consistent with other research showing no improvement on the DIT between the first and third years of law school and before and after taking a conventional professional responsibility course.<sup>37</sup>

Hartwell theorizes that the significant improvement in moral reasoning, as measured by the DIT, can be attributed to two factors: using a different form of discourse and assumption of a different role than found in other law school courses.

In typical legal discourse, the method is advocacy and the goal is persuasion... In moral discourse, the method is self-revelation and the goal is self-knowledge... Students... did not primarily offer, or defend, opinions; instead they undertook the role of moral decisionmaker.<sup>38</sup>

To explain further what he means by moral discourse, Hartwell quotes James Elkins:

Moral discourse is not values clarification... What we seek to know is where we stand and how that affects those who inhabit the world we offer. [What] we offer, in contrast to the opinions we are willing to articulate publicly, defines our character. Ethics talk is too easily mistaken as a forum for polemic and opinion.<sup>39</sup>

It is important to note that the "DIT assesses only one dimension of professional performance"—moral reasoning—while other "dimensions clearly impact on professional performance."<sup>40</sup> Moral development theorists have therefore identified four inter-dependent psychological components influencing moral behavior (the "Four Component Model"): (1) ethical sensitivity and awareness, (2) moral reasoning and judgment (measured by the DIT), (3) moral motivation and identity formation, and (4) ethical

35 According to a recent, comprehensive review of the effect of professional education on ethical development, the "dilemma discussion" technique used by Hartwell has been shown to produce improved DIT scores in medical, dental and nursing education but Hartwell's experiment "seems to provide the largest gain" among the professional education courses studied. Muriel Bebeau, "The Defining Issues Test and the Four Component Model: contributions to professional education" (2002) 31 *Journal of Moral Education* 271, 282. Hartwell himself reports, "we did not anticipate the very favorable results we obtained." Hartwell, *supra* n. 31, 522.

36 Hartwell, *supra* n. 31, 527-28, 533 n. 98. A similar study of students in 2002 and 2004 produced comparable results. Steven Hartwell, "Moral Growth or Moral Angst? A Clinical Approach" (2004-2005) 11 *Clinical Law Review* 115.

37 Bebeau, *supra* n. 35, 274-75; Carnegie Report, *supra* n. 26, 133-35.

38 Hartwell, *supra* n. 31, 530-32.

39 *Id.* 530 n. 87, quoting "Difficulties in Talking Ethics" (1993) *Vermont Law Review* 353, 373.

40 Bebeau, *supra* n. 35, 283.



implementation.<sup>41</sup> The Carnegie Report provides an eloquent paraphrase of the first three components as applied to legal practice:

Law school graduates who enter legal practice... need the capacity to recognize the ethical questions their cases raise, even when those questions are obscured by other issues and therefore not particularly salient. [Ethical awareness] They need wise judgment when values conflict [moral judgment], as well as the integrity to keep self-interest from clouding their judgment [moral motivation].<sup>42</sup>

#### D.

My legal ethics course is organized around a series of in-class simulated client meetings that force the students to deal with issues of confidentiality, conflict of interest, and the division of control between lawyer and client. The simulations are paired with real life stories relating to the same issues. The Baby Jessica case is part of a unit that extends over three weeks.<sup>43</sup>

In the first week we simulate an initial meeting in December 1992 between the adoptive father, Jan DeBoer, and Suellyn Scarnecchia, a professor at the University of Michigan Law School Child Advocacy Clinic, to discuss whether the clinic would provide free representation to him and his wife. Half of the students in the class are assigned specific roles and responsibilities in relation to the Baby Jessica simulations. All these students must prepare to play the role of the lawyer—although only four students are chosen to play the lawyer role over the span of the three-week unit. In advance of class students became deeply familiar with the Baby Jessica case through reading excerpts from an extended magazine article, an autobiographical account by the adoptive mother, and one of the major court decisions in the case.

The simulated meeting is performed twice in the classroom by different students; the second student has not seen the first role play. The primary purpose of conducting two simulations based on identical instructions is to provide students with contrasting examples; the two simulations consistently differ in instructive and realistic ways.<sup>44</sup> We then discuss and contrast the two simulations in class and also view videotaped interviews with the parties and lawyers in the actual case as well as a portion of the custody trial that took place after the clinic agreed to represent the adoptive parents.

41 *Ibid.*, 283–87. See also Muriel J. Bebeau, “Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions” (2008) 5 *University of St. Thomas Law Journal* 366.

42 Carnegie Report, *supra* n. 26, 146–7.

43 The students in the other half of the class have similar responsibilities for the “Simon Case” simulation, focusing on confidentiality issues, which takes place earlier in the semester. The Simon Case simulation is described in detail in Clark D. Cunningham, “How to Explain Confidentiality?” (2003) 9 *Clinical Law Review* 579. The course home page is <http://law.gsu.edu/ccunningham/PR/>

44 The simulations themselves are never graded.

Both simulations are videotaped and posted on the course web site displayed with a running second-by-second time code. Students assigned to the Baby Jessica case then have two weeks to write a 5–7 page paper analyzing how well the lawyer learned the client's objectives, defined the scope of representation, explained the division of control between client and lawyer, identified potential conflicts of interest, and explained to the client the need to obtain the client's informed consent to representation in light of such potential conflicts. Students are required to analyze the videotapes closely, citing to specific segments by time code, something similar to what sociolinguists call discourse analysis, which involves repeated viewing of recorded speech events with attention to every detail.<sup>45</sup> Two or three of the best papers are then posted on the course web sites as examples, with the authors' identity removed; I endeavor to select papers which differ in their analysis and conclusions.

Viewed through the lens of the Four Component Model, the first part of the Baby Jessica exercise can be seen as focusing on ethical sensitivity.<sup>46</sup> The first client meeting presents an obvious conflicts of interest problem when Jan DeBoer confides that he has a criminal history that he wants kept secret from the clinic's other prospective client, his wife. Students who role play the lawyer typically focus exclusively on this issue, missing other potential conflicts, including one specifically applicable rule, Model Rule 1.8(f). Most of their fellow students also miss these issues in the papers they write, in contrast to this excellent paper submitted the last time I taught the course:

Effectual representation relies heavily upon the client's fundamental sense that his attorney will represent him with undivided loyalty. MR 1.7 ensures this trust through the prohibition of incompatible interests that may weaken allegiance...Conflicts arising from adverse legal interests between common clients are fairly straightforward. Material limitations, by contrast, are more subtle. Generally, the lawyer is

45 As one student observed in a paper written for the course, "One doesn't usually have a chance to review an interview, much less review it dozens of times. It's particularly instructive to realize how inaccurate not only first impressions can be, but even tenth impressions." Quoted in "How to Explain Confidentiality," *supra* n. 43, 593.

46 As described in "How to Explain Confidentiality," *supra* n. 43, 590–94, this course evolved through a process of trial-and-error with the current design prompted in large part by negative student reactions to my initial efforts. My reading of MacIntyre, the Carnegie Report and the research literature on moral development came later, but nonetheless may help me understand why some of the current features of the course seem effective. In co-operation with my colleagues in the National Institute for Teaching Ethics & Professionalism (NIFTEP), I hope to develop objective methods to assess the course design, especially by drawing from the moral development literature. In the meantime, both the numerical and free response information from student evaluations are sufficiently encouraging for me to continue this approach. I was particularly heartened, and indeed moved, by this comment from one student evaluation: "Your simulations are, I think, aimed at creating a situation as close as you can to putting us there... Your last class may have saved whatever legal career is ahead for me... I have been worried that [I would] become so disillusioned with the profession that it would be difficult for me to stay in law school, much less ever hope to practice... You saved my idealism." For more information about NIFTEP see: <http://law.gsu.edu/ccunningham/Professionalism/NIFTEP/>

materially limited whenever there is a significant risk that his ability to recommend or carry out a proper course of action will be impaired by other responsibilities or interests... [There were a] series of potential disqualifying material limitations neither attorney fully addressed. The first of such issues is Scarnecchia's receiving compensation for her work from the University of Michigan. Rule 1.8(f) states, "A lawyer shall not accept compensation for representing a client from one other than the client" without strict qualifications... Scarnecchia also needed to discuss how his/her own personal interests may create a disqualifying conflict. Rules 1.16(a)(1) and 1.7(a)(2) combine to preclude... representation where "there is a significant risk that the representation of one or more clients will be materially limited by... a personal interest of the client." Here, Scarnecchia clearly states that she promotes a public policy interest in children's rights. To the extent that her interest in children's rights expand beyond the DeBoers' interest in securing custody of Jessica, Scarnecchia's interest creates a conflict requiring a reasonable belief that representation will be uncompromised as well as her clients' informed consent to proceed. Neither Scarnecchia raised this issue.<sup>47</sup>

Ethical sensitivity requires not only "knowing the regulations, codes and norms of one's profession, and recognising when they apply" but also being "aware of alternative courses of action [and] knowing cause-consequence chains of events."<sup>48</sup> Typically students who did recognize that there was a specific conflicts of interest rule triggered when someone other than the client was paying the lawyer nonetheless trivialized its significance in the Baby Jessica case, seeing the "informed consent" requirement as unproblematic because the client was eager to receive free legal services from the law school clinic. Not, however, the student quoted above, who pointed out:

Arguably, Jan understands that a third-party is paying for his representation or is at least offering services gratuitously. What he does not seem to understand is the nature of the conflict emanating from this agreement and Scarnecchia's need to obtain informed consent to proceed. Informed consent here requires Scarnecchia to explain the disparate interests that the University of Michigan and the DeBoers could have respecting the time spent on the case and case objectives... Neither Scarnecchias addressed this potential conflict or obtained informed consent to proceed, leaving potentially devastating issues lying in wait.<sup>49</sup>

47 Exercise Two (The Baby Jessica Case) Writing Assignment: Part Two (Spring 2008, Wednesday Section)—Sample Paper S08W-Ex2-2a.

48 Bebeau, *supra* n. 35, 283.

49 S08W-Ex2-2a, *supra* n. 47.

Most students also see no potential conflict between the lawyer's personal interests and those of the clients, since both lawyer and clients want "what is best for Jessica." But as another excellent paper from the same semester explained:

Initially, the goals of the representation appear to be congruent: the DeBoers want "what's best for Jessica" and the goal of the clinic is to "take a public policy position on children's rights and teach students about important issues like this." However, it is a possibility that the clinic's goal of "taking a public policy position" could at some point come into conflict with "what's best for Jessica" as an individual, or that pressure from the University could have an effect. Scarnecchia should also recognize that her own interests as an advocacy lawyer, who seeks "to battle injustice," and to generally "raise interest in children's rights" could potentially conflict with her clients' specific goals for the well-being of their child.<sup>50</sup>

The second and third week of this unit are designed to demonstrate that ethical issues missed or trivialized in the first simulation are difficult and consequential. As I describe these two weeks, I will endeavor to interpret them in terms of the other three elements of the Four Component Model: (2) moral reasoning and judgment, (3) moral motivation and professional identity, and (4) ethical implementation.

In the third week students reenact the meeting described in the introduction that took place in late July 1993 between Scarnecchia and Jan DeBoer<sup>51</sup> about whether to appeal to the U.S. Supreme Court the decision of the Michigan Supreme Court ordering the DeBoers to give Jessica to her biological father by August 2, 1993.<sup>52</sup> During the second week of this unit we prepare for this counseling session by discussing a similar critical moment in the 1962 University of Mississippi desegregation case in which the distinguished civil rights attorney Constance Baker Motley persuaded her client, James Meredith, to keep going in his law suit despite great personal risk.<sup>53</sup>

50 Exercise Two (The Baby Jessica Case) Writing Assignment: Part Two (Spring 2008, Tuesday Section)—Sample Paper S08T-Ex2-2a.

51 In both simulations I play the role of Jan DeBoer. In the Simon Case simulations earlier in the semester some of the students prepare to play the lawyer role, and the others are assigned the client role.

52 In February 1993 the clinic won a custody hearing by persuading the trial judge that it was in Jessica's best interest to stay with the DeBoers, only for that decision to be reversed on jurisdictional grounds by the Michigan Supreme Court on July 2, 1993.

53 Just as as the federal government was poised to enforce the court's integration order—with troops and loss of life as it turned out—Meredith wrote to Motley saying he wanted to drop his lawsuit. The students read excerpts from autobiographies by both the lawyer and the client—Constance Baker Motley, *Equal Justice Under Law* (New York Farrar, Strauss and Giroux, 1997) and James Meredith, *Three Years in Mississippi* (Cincinnati, Meredith Publications, 1966)—and watch in class a part of the documentary about the Civil Rights Movement, *Eyes on the Prize*, that includes interviews with Motley and Meredith, dramatic footage of the rioting, arson and killings that accompanied Meredith's enrollment at the university, and an historical assessment of the case as "the last battle of the Civil War."

During the third week I am able to “bring” Suellyn Scarnecchia into the classroom by showing part of an interview I recorded with her in which she and I spent considerable time discussing the critical moment when she advised the DeBoers against pursuing the case further in the U.S. Supreme Court. Immediately after my students reenact this meeting, we view in class this videotaped discussion.<sup>54</sup> The students then write their second paper comparing their simulated advice to Jan DeBoer with how Scarnecchia actually handled the situation.<sup>55</sup>

As one of the exemplar student papers explains, “upon entering the historic meeting with the DeBoers, [Scarnecchia] had two questions in mind. First, would transferring Jessica a third time should the DeBoers prevail [in the Supreme Court] be in the child’s best interest? Second, was the overwhelming risk of an adverse ruling from the Supreme Court that would create bad law for adoptive parents’ and children’s’ rights nationwide worth taking?”<sup>56</sup> The same student recognized that addressing these questions implicated the most fundamental values of the legal profession:

The Model Rules state that “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.” The responsibilities are distinct, generating a complex of potentially opposing imperatives that Scarnecchia must balance in the instant case... While a lawyer’s concurrent responsibilities are usually harmonious, the circumstances here potentially create a tension... Resolution depends upon the independent exercise of Scarnecchia’s judgment and skill.<sup>57</sup>

Scarnecchia, like Constance Baker Motley advising James Meredith, wanted to encourage and enable her clients to decide with wisdom and courage whether to proceed with a lawsuit of national import—but as professionals both faced the challenge of giving that advice free of influence from either their personal motives or the imperatives of the law reform organizations to which they had dedicated themselves.<sup>58</sup> Although I generally agree with Hartwell that moral reasoning is not well developed by a legalistic application of the conduct rules,

54 This 15 minute video can be viewed as a webcast through the internet at [http://law.gsu.edu/ccunningham/PR/Video/SESI\(new\).html](http://law.gsu.edu/ccunningham/PR/Video/SESI(new).html) (requires installation of Quicktime media software which can be downloaded at no charge at: <http://www.apple.com/quicktime/download/standalone.html>)

55 Part of the paper is also an opportunity to revise the analysis of the first paper with the benefit of ensuing class discussion, instructor comments on the first paper, the sample papers posted on the web site, and the wisdom of hindsight from the second simulation.

56 S08W-Ex2-2a, *supra* n. 47.

57 *Ibid.* The student goes on to say: “Scarnecchia is not simply an agent carrying out the DeBoers’ orders; she is also an advisor, bound to “exercise independent professional judgment and render candid advice,” including non-legal factors that “may be relevant to the client’s situation.”

58 Motley was a staff attorney at the famous Legal Defense Fund of the National Association for the Advancement of Colored People (NAACP) that successfully litigated *Brown v. Board of Education*.

I give the rules a greater role than apparently he does, consistent with MacIntyre's view that virtues are best understood within the context of actual standards of how a particular practice should be performed. The second simulation thus presents a complex moral dilemma *created* by the application of the conduct rules but not *resolved* by them. Students are thus not merely applying principles stated at a frustrating level of generality or their own personal preferences. They have the compass of professional values but still face a challenging moral landscape to navigate, and they are free to take different paths and even reach different destinations.

The student papers quoted in this article were written during the Spring 2008 semester when I taught two sections: one on Tuesday and the other on Wednesday. The two Tuesday simulations showed significantly different approaches to Scarnecchia's dilemma. For example, one student attorney, when asked by the client what the lawyer would do in his place, gave direct advice to end the case. The other student attorney, faced with the same question, declined to give such a direct answer. The two student papers posted on the course web site as exemplars demonstrated sophisticated application of all four elements of the Four Component Model in coming to different conclusions about what the "right way" was to handle this meeting. One student firmly supported the decision to give direct advice to end the litigation, but began with recognition of the complexity of the decision by analogizing the Baby Jessica situation to Motley's meeting with Meredith.

When Meredith wanted to drop the case, [Motley] convinced him not to. However... Meredith's reluctance to go forward was entirely justified—in addition to the factors he referenced in his letter, it was clear that dropping the case could save his life. I think in both [cases] Motley and Scarnecchia were able to reconcile [their] passion for the cause with [their] client's objectives, and thus meet [their] duty under MR 1.8(f)(2), because both clients also cared deeply about the cause. However, it is a dangerous situation to be in, and the lawyer should consider the possible conflicts of interest before going forward.<sup>59</sup>

Having concluded that Scarnecchia's advice about potential harm to Jessica and to the law relating to children's rights from proceeding was not improperly motivated by her personal interests and organizational obligations but consistent with client loyalty—an analysis that demonstrated moral awareness and reasoning — this student then moved to the third and fourth components: moral motivation/professional identity and effective implementation:

The biggest difference between the approach taken by B1 and B2 Scarnecchia was their willingness to tell Jan whether they thought he

59 S08T-Ex2-2a, *supra* n. 50.

should continue the fight. B2 Scarnecchia, when asked if she thought it was best to stop, said "not necessarily" ... B1 Scarnecchia, in contrast, gave her opinion: ... 'I'm inclined to say it's time to stop'." ... I believe the willingness of B1 Scarnecchia to give her opinion, in a caring and respectful way, was consistent with a client-centered counseling approach generally and with her duty to Jan and Robby in particular. If I were the client, and I asked for a straight opinion from my lawyer, I would be [angry] if I got an evasive answer. For me, part of a client-centered counseling approach is giving the client the information they want, even if that includes my personal opinion ... I feel that Scarnecchia had a duty to the DeBoers to continue the candid approach that the DeBoers had valued in the past, and that this honesty was the best way to help her clients act consistently with their character and values. Robby notes in *Losing Jessica* that "I liked her (Scarnecchia's) straightforward approach. I wanted to hear the truth without any sugarcoating." p.27. In the article "A Client's Perspective" Daisy Floyd said that having a lawyer who "supported me in acting consistently with my character," was essential. Additionally, she said "that's what most clients really want from their lawyers- to move through the conflict without losing their integrity, their values, their identity." Scarnecchia had a duty to respect the relationship and try to advise them in the way they would find most helpful. She also was acting in accord with her own character and integrity. The real Scarnecchia, of course, also expressed her opinion to the DeBoers, and rather emphatically. "There was at that point in my representation of them such an integrated view of what their interests were that I was able to really push them on, this is what you've told me before that this is why you're doing this, that this is what your interests are, and I'm going to try to hold you to that."<sup>60</sup>

The author of the other exemplar student paper from the Tuesday section thought it more likely that advice that includes the "risk of making bad law" is tainted by conflict of interest (moral reasoning) and questioned the sincerity of both student lawyers in their delivery of advice (moral motivation/professional identity):

In Jan's case, the risk of making "bad law" is almost entirely a concern of third parties, although, as discussed earlier, moral considerations probably warrant some mention of it. Both the classroom and real-life Scarnecchias, however, came very near to the MR 1.8(f) line, if not crossing it, in introducing third-party considerations in counseling the DeBoers against further action in their legal battle over Jessica. Evidence for this assertion derives from the "persuasive" tone of both subgroup meetings; in neither case could it be honestly said that the attorney had

not previously made up her mind that proceeding was a bad idea. I think it is perfectly sensible, and in fact sanctioned by the Model Rules, for an attorney to make up his or her mind as to the preferred means of pursuing a representation objective prior to consultation with his or her client, but masquerading the reasons for this preference as “factors the client should consider” is insulting to the client and probably a violation of MR 1.4. Furthermore, it is bound to result in a client’s feeling divested of control.<sup>61</sup>

The same student then went on to provide a very sophisticated critique at the fourth level of the Four Component Model, implementation:

Scarnecchia was obliged to discuss the risk of Jessica’s suffering “transfer trauma” as a result of a successful appeal because that consideration might make such an appeal a poor means of furthering the DeBoers’ stated objective of seeking the child’s best interest. Moreover, making the DeBoers aware of the bigger picture impact of their case on Supreme Court precedent raises both legal and moral considerations necessary for informed decision-making. Nonetheless, the discussion in both subgroups did not enable informed decision-making by the DeBoers because it gave them no sense of the seriousness of these risks, strategies that may be useful to minimize them, or corresponding benefits of proceeding with their legal battle. First, while both... Scarnecchias discussed the risk of “transfer trauma,” neither of them took seriously the notion Jan himself raised in both subgroups that the DeBoers might win at the Supreme Court level and then opt not to transfer Jessica from the Schmidts... The... Scarnecchias also failed to adequately describe the risks of making “bad law” through pursuing an ultimate failure at the Supreme Court level... B1-Scarnecchia... might have given Jan a more complete sense of the risk of making bad law if he explained to him that “bad” precedent would only extend from their case to disputes similarly turning on the standing of persons granted temporary custody in one state to modify custody orders in another state under the authority of the UCCJA... [I]t would have been possible to give him a clearer picture of the other parties whose options may have been affected by his and Robby’s decision to proceed. Similarly, an explanation that a denial of certiorari would not have the same binding effect as a loss in the Supreme Court would also have furthered his informed decision. Finally, neither Scarnecchia revisited the idea that high-profile Supreme Court cases, no matter what the outcome, often bring about policy reform by state legislatures and/or Congress.<sup>62</sup>

61 Exercise Two (The Baby Jessica Case) Writing Assignment: Part Two (Spring 2008, Tuesday Section)—Sample Paper S08T-Ex2-2b.

62 *Ibid.*



The Baby Jessica simulations, I hope, offer one of many possible examples of the new approach to legal education advocated by Burrridge and Webb. They aspire to be “contextually rich” by using real people and events<sup>63</sup> and “emotionally engaging” by combining role playing with vicarious involvement through journalistic and autobiographical accounts and documentary videos of a heart-wrenching case full of difficult decisions.<sup>64</sup> The excerpted student papers show that “problem-based and experiential learning techniques... that uncover and engage [students’] values and/or oblige them to confront some degree of inter-personal value conflict”<sup>65</sup> can, as they assert, “enable a felt experience of, rather than a mere intellectual acquaintance with, those values”—an approach just the opposite of “technocratic training seemingly calculated to knock the moral stuffing out of anyone.”<sup>66</sup>

When I asked the students who wrote the excellent papers quoted above, I invited them also to comment on the draft of this article. One student responded in detail, and I conclude with an excerpt: “By prepping for the Scarnecchia case, I had to wrestle with my own beliefs, values, and fears in the midst of a living scenario. I had to harmonize my own assumptions with the law, and in so doing, gained an understanding of the substance of the law as I would never have been able to do otherwise.”

63 “[The course] has focused on the hard decisions lawyers have to make. It did so in the most interesting way possible—telling stories about people who had to make the decisions.” Student evaluation.

64 I sometimes conclude the Baby Jessica unit by showing the made-for-TV movie reenactment of a scene featured on magazine covers at the time: Scarnecchia taking Jessica from the arms of Robby DeBoer and carrying her away, sobbing, to a waiting car for transfer to the Schmidts. That was indeed the last time Jan and Robby DeBoer saw the little girl they thought would be their daughter, and it was their own lawyer who in effect executed the court’s order.

65 Burrridge and Webb, *supra* n. 2, at 97.

66 W. Wesley Pue, “Educating the Total Jurist” (2005) 8 *Legal Ethics* 208, 220. Burrridge and Webb engage with Pue as a thoughtful legal educator who shares their aspiration for an enhanced values content to legal education but is worried about practice-oriented approaches. See Burrridge and Webb, *supra* n. 2, 73–74.