"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.[1] 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).

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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."[2] 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."[3] This vision can only be accomplished, they insist, by overcoming prevalent suspicion among legal academics of the "practitioner context"[4] and of experiential and "constructivist" teaching methods developed by teachers of simulations, clinics and practitioner placement courses.[5] However, in their article Burridge and Webb are largely preoccupied with discrediting what they term the "debased liberal education ideal"[6] underlying such suspicion, leaving sympathetic readers hungry for affirmative reasons for trying such new approaches[7] and concrete suggestions for doing so.[8]

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[9] 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,"[10] MacIntyre goes on to claim that virtues can only be understood by reference to a specific form of social activity, the practice,[11] 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[12] 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.[13]

"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.[14]

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.

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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."[15] Furthermore, we can become practitioners only "by subordinating ourselves within the practice in our relationship to other practitioners."[16] It is this subordination of self that gives rise to such cardinal virtues as "justice, courage and honesty."[17]

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.[18] 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.[19] 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."[20] 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.[21] 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.[22] 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.[23] 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.[24]

C.

An approach to teaching values informed by MacIntyre's analysis appears to be fully consistent with the views of Burridge 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.[25]

For teachers at law schools in the United States, like myself, both the work of MacIntyre and the course of action advocated by Burridge 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 Burridge and Webb, *supra* n. 2, 97 (emphasis in original).