

# “How Can We Give Up Our Child?” A Practice-Based Approach to Teaching Legal Ethics

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Published in a Special Issue of  
the **Law Teacher**<sup>2</sup> (December 2008) on  
*The Values of Common Law Legal Education*

## Excerpts

*The little girl they named Jessica was born February 8, 1991. It was now the last week of July, 1993, and she was almost 2 ½ 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>3</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.

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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,

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<sup>2</sup> The *Law Teacher* is a fully-refereed academic journal centrally concerned with legal education. Three issues are published annually by Sweet & Maxwell (UK). The editor is Nigel Duncan, Inns of Court School of Law, City University (London). The editorial board is supported by an international advisory panel of law teachers throughout several different countries. See: [http://www.sweetandmaxwell.co.uk/academic/lr\\_journals.aspx](http://www.sweetandmaxwell.co.uk/academic/lr_journals.aspx)

<sup>3</sup> 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* (1994) (autobiographical account by the adoptive mother).

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>4</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>5</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.

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>6</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.

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<sup>4</sup> 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.

<sup>5</sup> The simulations themselves are never graded.

<sup>6</sup> 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."

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>7</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>8</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>9</sup>

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>10</sup> The students then write their second paper comparing their simulated advice to Jan DeBoer with how Scarnecchia actually handled the situation.<sup>11</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>12</sup> The same student recognized that addressing these questions implicated the most fundamental values of the legal profession:

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<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> 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* (1997) and James Meredith, *Three Years in Mississippi* (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."

<sup>10</sup> 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> )

<sup>11</sup> 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.

<sup>12</sup> S08W-Ex2-2a.

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>13</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>14</sup>

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<sup>13</sup> S08W-Ex2-2a. 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."

<sup>14</sup> 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*.