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A Strategy for Teaching Objectivity to the Domestic Relations Student: Utilizing Psychodrama to Explore Attorney Empathy Toward Improving Family Law Outcomes

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I. INTRODUCTION

The family law attorney is in a unique position when representing clients; he or she must zealously represent the client within the bounds of the law while often holding conflicting attitudes about the client's position.[1] While bound by the equally onerous obligations of acting as an officer of the court and in a child's best interests, the attorney must attempt to navigate these treacherous waters with an assumed objectivity so that he or she may successfully represent clients who may have acted in a morally bankrupt or repulsive manner.[2] The attorney who cannot set aside sometimes raging or visceral displeasure with a particularly disagreeable client runs the risk of acting in a manner that could jeopardize the client's case, and the lawyer's license to practice.[3] Therefore, it is vitally important that we, as law school domestic relations instructors, teach students to look

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1. *See* Craig A. Colbrook, Balancing The "Family" And "Law" In Family Law, 25-MAR C.B.A. REC. 40 (2011).

2. *See id.* at 41.

3. Brian Frasier, *West Virginia Lawyer Disbarred for Beating Client with a Bat*, MILW BLOG (Nov. 19, 2012), http://milawyersweekly.com/milwblog/2012/11/19/west-virginia-lawyer-disbarred-for-beating-client-with-a-bat/.

critically at the facts behind cases, to look deeper, and to find the other side of the story in order to reach the necessary equilibrium to maintain objectivity.

The case of *Saavedra v. Schmidt*[4] offers an opportunity to demonstrate the dangers of assumption and non-neutrality by allowing the careful seeker to read between the lines of the stated case facts, and by giving the professor and the student the ability to choose which story carries the most weight. Ultimately, the goal of legal inquiry is not the discovery of unknowable truth, but rather to instill in students the value of having and making personal value choices as an attorney, while maintaining the objectivity or neutrality necessary to represent either side of an argument to the best of their ability. Family law makes this very difficult, and *Saavedra* lends itself well to a disclosure of the pitfalls.[5]

As a philosophy exercise, one may flippantly state that, like truth, objectivity is unattainable, as all human experience is based in the individual and unique perception of the person seeking the truth and, as such, all persons will see a situation differently. Certainly, this is accurate, but leaving the inquiry there does not help resolve the problem that arises when an attorney must nonetheless try to be objective. One might resort to the truism above that it is seeking the truth that is important, not the actual truth itself; the journey is the goal. But again, we are back to where we began, and no closer to demonstrating how we may understand each side of a case without buying into one or both perspectives.

II. "CRITICAL INCIDENT OR TEACHABLE MOMENT?"

The idea for this article came to me after a particularly unfortunate classroom discussion resulting from a casebook assignment, which required the students to read *Saavedra*. This case is presented in the excellent Oliphant & Ver Steegh casebook,[6] which I use as an example of a fundamental problem with the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). *Saavedra* describes what happens when two courts at the heart of an interstate child custody battle fail to communicate about the case despite the clear direction of the UCCJEA that they do so.[7] The Texas court is openly incredulous of the apparently dubious decision of the California court to grant custody of the child to the father, Manuel Saavedra, a convicted sexual offender.[8] As is common with

4. 96 S.W.3d 533 (Tex. Ct. App. 2002).
5. *See generally id.*; *see also infra* Part II.
6. ROBERT E. OLIPHANT & NANCY VER STEEGH, WORK OF THE FAMILY LAWYER 418-21 (3d ed. 2012).
7. *See generally Saavedra*, 96 S.W.3d at 535.
8. OLIPHANT & VER STEEGH, *supra* note 6, at 419-20.

most legal textbooks, *Saavedra* is edited for content, and upon first reading gives the student a decidedly bad taste for both the father and the California court that would deliver custody of a child into the hands of a molester due solely to Mother's failure to follow the orders of the court to appear.[9] The typical discussions are about the elements of emergency jurisdiction under the UCCJEA, when a court may exercise emergency jurisdiction, and how the Texas court responded to the California court's lack of communication or assurances as to the safety of the children by assuming emergency jurisdiction.[10] Further discussion would then turn on the filing of a writ of mandamus against the California court by the parties in order to secure compliance with the Uniform Act requiring communication between Texas and California, and the practical effect that could have on the case and the California court's reaction to the client who would dare file the writ.

However, the facts in this case gave me pause. Knowing the Texas court reasonably well,[11] and despite my preconceived ill-founded belief in "how those California courts can be," I could not believe that any court, California or otherwise, which espouses the best interests of the child could ever knowingly place a child with a sex offender, without the presence of someone's negligence, or additional circumstances that were not clear from the bare, edited reading of the casebook version of *Saavedra*.[12] Therefore, my first question in class that day was, "Do you think it might be important to know the circumstances surrounding the father's conviction [for molestation]?" The immediate answer blurted out to me from a particularly garrulous student was: "Who cares? He's a pedophile!"

My reaction, for lack of a proper andragogical term, was "without merit." I was shocked that any person, much less a student of the law, could not understand the importance of seeking out the hidden facts of a case, the clear spaces that were filled with inconsistency, and the myriad questions that the limited facts in the textbook raised. The unfortunate nature of my response aside, I began to think about how I could, as a teacher, better prepare my students to look at all cases skeptically, *objectively*, with an eye to both sides of an argument in any given family law situation. On further reflection, it came as little surprise to me that this student reacted the way he did; the process by which we traditionally teach law students lends itself to the exact reaction that I received; that is, the knee-jerk, opinionated, fact-starved response of the legal interpretation novice. Family law requires

9. *See id.* at 418-21.

10. *See generally Saavedra*, 96 S.W.3d at 535, 538-39.

11. The author is Board Certified in Family Law by the Texas Board of Legal Specialization, and practiced in Texas for the vast majority of his seventeen-and-a-half year practice, almost exclusively in Family Law.

12. OLIPHANT & VER STEEGH, *supra* note 6, at 418-21.

unique manipulations of ethical responsibility and zealous advocacy, wrapped in the enigmatic obligations of the best interests of the child, and nestled in the cold bosom of court officer ethical obligations and adherence to the rule of law.

What we must do is recognize the inability of traditional legal education to teach the "objectivity" necessary to a sophisticated family lawyer, and modify the current teaching strategies to invest the student with the facts necessary to draw neutral conclusions, while not devaluing the right and importance of the student's emotional and personal beliefs in a particular fact situation. This paper explores a possible teaching strategy utilizing the "psychodramatic" approach, rooted in case analysis and Socratic methods, but modified to be aligned with best practices in adult-learning theory, which assists students to move toward a position of objectivity by enhancing their critical thinking skills, and ultimately better prepares them for the reality of family law practice.[13] Additionally, the results of implementation of this approach in the family law classroom, as well as implications for future practice are discussed.[14]

III. *SAAVEDRA*: THE CASE BACKGROUND

The case facts as revealed in the textbook are limited, and consist initially of the following: The controversy at issue in the *Saavedra* case started when Debra Kay Schmidt ("Mother") moved for separation and then divorce from Manuel E. Saavedra in 1993.[15] A custody dispute arose in the San Joaquin County Superior Court in California, as a result of the requested divorce.[16] Initially, custody of the children was awarded to Mother, while Father was granted only supervised visitation, presumably because Father had been convicted of child molestation.[17] "Years later," Mother removed the children from California and fled to Texas, in direct violation of a California court order not to remove the children from the state.[18] The State of California, apparently outraged over Mother's clear violation of its order, awarded sole legal custody of the children to Father, "who had never enjoyed unsupervised visitation with the children . . . ," and further ordered that Mother have no contact with the children.[19] Armed with the California order, Father moved the Texas court to enforce his

13. *See infra* Part V.A-B.
14. *See infra* Part VI.
15. OLIPHANT & VER STEEGH, *supra* note 6, at 418 (reprinting *Saavedra*, 96 S.W.3d at 536.)
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

custody order and deliver the children to him.[20] Mother countered Father's motion with a petition for the Texas court to assume emergency jurisdiction under the UCCJEA.[21]

The facts are stated in the casebook: "[f]ollowing a series of legal proceedings and allegations of unseemly conduct by the parents, the Texas Department of Protective and Regulatory Services [("TDPRS")] involved itself in the dispute. A Texas court assumed temporary emergency jurisdiction and entered temporary orders regarding the placement of the children."[22] The court's opinion proceeds to discuss the UCCJEA; the bases under which a court may assume temporary emergency jurisdiction; and the further requirement that the court of continuing jurisdiction ("California") and the court exercising temporary emergency jurisdiction are mandated to communicate with each other over the exercise of the emergency jurisdiction and more specifically the length of the order. [23]

The Texas Court of Appeals opinion articulated the basis by which the Texas trial court extends its temporary jurisdiction over the children, the subject of the suit, and chastised the California court in uncharacteristically harsh language because it refused to cooperate with the Texas court, despite multiple attempts to communicate.[24] Specifically, the court of appeals restated the trial court's observation that "'[i]n my years on the Bench, I have not experienced a situation where I have not had a Court respond to my requests, or attempt to cooperate with an agency for the best interests of the children . . . .'"[25] The Texas Court of Appeals reiterated the trial court's incredulity over the California court's decision to award custody of the children to a registered sex offender, Father, and to approve Father's home for their placement pursuant to a home-study, which the court deemed "woefully inadequate." The Texas Court of Appeals was also convinced that the California court was more concerned with punishing Mother than acting in the children's best interests.[26] The appellate opinion, based upon those facts, understandably lends itself well to the knee-jerk reaction that I received in class. In my view, however, the opinion raised as many questions as it answered: What happened to the original divorce suit? For what child molestation charge was Father charged and convicted in California? How many years after Mother filed suit for divorce in California did she flee to Texas, and what was the reason for that exit? Did

20. OLIPHANT & VER STEEGH, *supra* note 6, at 419.
21. *Id.*
22. *Id.* at 418-19.
23. *Id.* at 419.
24. *Id.* at 419-20.
25. OLIPHANT & VER STEEGH, *supra* note 6, at 420.
26. *Id.*

Mother know she was under an order not to leave California with the children? What were these so-called "allegations of unseemly conduct"[27] that caused TDPRS to get involved? What was the disposition of the case? Were there any other circumstances that might explain the apparently bizarre behavior of the California court in this case? Was this just an example of a rogue court in California, or was Texas the rogue, interposing its conservative bias against the valid, and sovereign, decision of a sovereign California court that had maintained continuing, exclusive jurisdiction over these parties for years? Why was Mother under an order prohibiting her from leaving California with the children? The facts just did not adequately answer any of these questions, and upon further investigation, would reveal that the reality of the case was far stranger than what the appellate opinion recounted.[28] Upon further investigation, it was revealed that this case was reported with some infamy. News organizations had reported this case as one of a judicial misuse of power, and had recounted more operative facts.[29]

It would be appropriate here to state, for the record, that I endorse no sympathy with either Father's or Mother's case in *Saavedra*; I find both positions equally reprehensible for different reasons. There is no factual dispute that Father was convicted of inappropriate sexual behavior with a child, for which this author believes there is no excuse.[30] However, the Mother received praise while blatantly and repeatedly violating court orders under the guise of protecting her children, a position that I also cannot legitimately abide—though it certainly, on the face of the case, provides a better justification and sound bite. The facts of the case were substantially more complicated, however, providing the grey area within which the student must navigate in order to reach objectivity.

IV. TRADITIONAL APPROACHES TO TEACHING OBJECTIVITY IN THE LAW SCHOOL CLASSROOM

The essential premise of legal education is one of perspective; the first year law student comes to law school as a legal novice, or one who is unfamiliar with legal analysis.[31] During law school orientation, in exhorting

27. *Id.*

28. *See generally Saavedra*, 96 S.W.3d 533.

29. *See, e.g.*, Lisa Davis, *Law and Borders*, S.F. WEEKLY (Nov. 14, 2001), http://www.sfweekly.com/2001-11-14/news/law-and-borders/full/; Lisa Davis, *Harsh Judgment*, S.F. WEEKLY (June 19, 2002), http://www.sfweekly.com/2002-06-19/news/harsh-judgment/; *Couple's Bitter Custody Battle Pits Texas Against California*, LUBBOCK AVALANCHE-JOURNAL (Aug. 11, 2001), http://lubbockonline.com/stories/081101/sta_081101103.shtml.

30. OLIPHANT & VER STEEGH, *supra* note 6, at 418.

31. *See* Beryl Blaustone, *Teaching Law Students to Self-Critique and to Develop Critical Clinical Self-Awareness in Performance*, 13 CLINICAL L. REV. 143, 148 (2006).

first year students to refrain from giving legal opinions to those inevitable family members who will seek them out for advice since they are in law school, I refer to them as "dull tools" in order to make them aware that a little knowledge can be a dangerous thing.[32] While they will have a little understanding, fledgling law students can still hurt a person's legal case by giving them untested advice; additionally, they will be breaking the law.[33] The casebook method forces the first year law student to form an opinion. Many first year law students have opinions about the heady legal topics that are undertaken in first year classes; for example, tort reform, or public condemnation of property for private use. It is the apparent aim of the first year method (whether Socratic, modified Socratic, or pure lecture) to reveal situations of abuse, inconsistency, discrimination, or retribution to the students; then the instructor expects students to "pick a side." Most of the time, the instructor will push an agenda, knowingly or otherwise, that he or she intends for the students to buy into, but the importance and necessity of getting off "the fence" is the paramount instructional goal.[34]

Often, law school is referred to as "the crucible of thought," because it is designed to encourage debate, to investigate the "whys" of the law, instead of the mere pragmatic application of statutory or common law strictures.[35] One of the most difficult tasks that law school professors undertake is to instill in first year law students the ability to develop opinions, that is, to establish a position on a certain topic and be able to defend that position based upon educated discourse. When students first start to establish these positions, they are often hard to shake, and while it is inspiring to see them begin to question the presumed status quo and develop cogent arguments for their beliefs in certain public policy or ethical debates, by the second year of law school, we are teaching them one of the great mysteries of the law: often there is no right answer.[36]

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32. Trey Woodfin, Comment, *Awkward Situation: "I'm Sorry Mom but it is Against the Law for Me to Answer That"*, 35 J. LEGAL PROF. 157, 158 (2010); Tracey Read, *Non-Lawyer Practiced Law in Euclid, Says Supreme Court*, NEWS-HERALD (Dec. 5, 2013), http://www.news-herald.com/general-news/20131206/non-lawyer-practiced-law-in-euclid-says-supreme-court; s*ee, e.g.*, *Frequently Asked Questions*, MISS. BAR, http://msbar.org/ethicsdiscipline/unauthorized-practice-of-law/frequently-asked-questions.aspx (last visited Apr. 8, 2014) (persons that pay unlicensed attorneys must file a suit which can cost even more money to prosecute).

33. Woodfin, *supra* note 32, at 158; Read, *supra* note 32; s*ee also Frequently Asked Questions*, *supra* note 32.

34. *See* UNIV. OF ILL., PRE-LAW ADVISING SERVICES HANDBOOK 4 (2012).

35. Gerald Blessey, *A Tribute to Robert A. Weems*, 82 MISS. L.J. 809, 809 (2013); James P. Rowles, *Toward Balancing the Goals of Legal Education*, 31 J. LEGAL EDUC. 375, 377-378 (1982).

36. *See* Talon, *Success in Your First Year of Law School*, TOP LAW SCHOOLS.COM (Oct. 2010), http://www.top-law-schools.com/success-in-first-year.html.

Black letter law is generally so riddled with exception, misinterpretation, and turmoil [37] that students frequently share their frustrations of the inconsistency and vicissitudes of the law. The cognitive dissonance in legal education occurs when students begin to take upper level courses beyond the first year, and we as instructors ask them to temper the opinion process of the first year into a more critical and introspective "objectivity." In that process, they wrestle with the differing perspectives and their ability to separate the opinions, which they have so recently espoused, and the clarity of third person perspective necessary to represent either side of a case zealously, regardless of personal bias.

One of the more important rebuilding skills that must take place after the first year of law school is the idea that an attorney must develop "objectivity." The general concept of "objectivity" that I will use in this discussion is in direct contrast to the legal education concept of objectivity as identified in Professor Gregory Howard Williams's excellent paper on teaching criminal law, wherein he correctly states that law school communities endorse an "objective view" in order to render a homogenized, watered-down version of the law in an "attempt to create an illusion that we have a [system where] . . . all share a common set of beliefs and normative values."[38] Therefore, Williams asserts that "objectivity" is actually a hidden way to "perpetuate and reinforce the cultural, social, political, and economic values of their dominant group." [39] Thus, by insisting upon "objectivity" in this sense, the law student assesses each fact pattern or case devoid of "racial, sexual, economic, or political background," which often leads to improper conclusions, and at the very least to premature conclusions based upon the easy homogeneity of the presentation.[40]

In contrast, the definition of objectivity which I prefer for our purposes is the dictionary definition of "objective," stated as: "1. existing independently of perception or an individual's conceptions; . . . 2. undistorted by emotion or personal bias; 3. of or relating to actual and external phenomena as opposed to thoughts, feelings, etc."[41] In this light, objectivity is the ability to assess a case or fact pattern with neutrality,

37. *See, e.g.*, OKLA. STAT. ANN. 40, § 72.1(B) (West 2013) (stating that the exceptions for child labor include: (1) children working either on farms or for parents or any entity in which a parent owns an equity interest; or (2) children engaged in the sale or delivery of newspapers to consumers.); 28 U.S.C. § 2680 (2012) (stating all the exceptions to 28 U.S.C. § 1346, which provides when the United States can be a defendant in a trial).

38. Gregory Howard Williams, *Teaching Criminal Law: "Objectivity" in Black and White*, 9 HARV. BLACKLETTER J. 27, 29 (1992).

39. *See id.* (quoting David K. Hill, *Law School, Legal Education and the Black Law Student*, 12 T. MARSHALL L. REV. 457, 462 (1987)).

40. *See id.*

41. *Objective*, DICTIONARY.COM, http://dictionary.reference.com/browse/objective (last visited Feb. 5, 2013).

despite the obvious biases that we each carry with us. This author seeks to instill in a student of family law objectivity in the form of higher position of clarity, premised not on the *removal* of informational biases and factors, but on quite the opposite. The student must be given all facts available, including racial, gender, political, *and* legally operative facts in order to reach a state of equilibrium. In the typical family law case, an attorney will generally begin representation with facts derived solely from his or her client, usually leaving the attorney with a biased view. However, as the representation continues, the lawyer often learns that the facts are not as one-sided as were originally reported, requiring a constant shifting of goals and expectations in a particular outcome. A good attorney will understand intuitively that clients do not intentionally *lie* about a particular set of facts, but rather, they recount the relevant information as they perceived it, as they *lived* it, or relay the information that would inflame the lawyer to work harder for them. As a practical matter, the skills that the competent family lawyer must use to navigate this informational disconnect should begin in law school and not be left for the discovery of the new and idealistic practitioner who is representing his or her first client. A lawyer who can at least identify the need to maintain objectivity before being presented with a difficult dilemma will be more efficient, more able to manage his or her client's needs effectively, and will ultimately be happier in the practice of law. Law school curriculum must adapt to new approaches for engagement of these kinds of issues in order to deal with the messy reality of legal situations that students are often not substantially exposed to until clinical experiences.

V. STRATEGIES FOR TEACHING *SAAVEDRA*:

A. Modifying Positionality through Psychodrama

1. The Challenges of Teaching Objectivity

If we accept the definition that I proposed of the objective perspective, particularly in regard to *Saavedra*, the question becomes: how does one actually teach the dispassionate respect for the facts of the case and the argument that must be made within the confines of the zealous and *otherwise* passionate embrace of the law? This is the question that I will seek to answer and explain.

What is the goal of teaching objectivity? Family lawyers, as stated above, live in a unique tension between the rights of the client, the protection of the child, and respect for the rule of law and the court. Each of these positions are, at times, completely independent of one another, yet each exists intertwined and co-dependent due to the relationships between

the *parens patriae* activity of the court in regulating the family, and the relationships between spouses and parents. The family lawyer must navigate these treacherous waters with an eye to the final outcome of the best interests of his or her client and the family. This is not an easy burden. Unlike criminal law, which ideally cares about the action of the law upon the individual and not the guilt or innocence of the alleged wrongdoer, family lawyers must advocate their clients' wishes while navigating all of the concomitant interests with which they are charged. Teaching the future family lawyer to establish and maintain moral positions, while sometimes subjugating those personal statements of belief and personal compass headings to the interests of the client, is both an invaluable skill and one that is too often left for students to discover on their own in practice. The goal then is to attempt to teach objectivity, or at least to reveal to the student the potential traps for the unaware and the uninformed attorney.

How does one teach "objectivity?" *Saavedra* is a prime example of the potential failure of the Socratic method, a failure which many commentators in legal academia espouse.[42] If taught without reference to the underlying questions and problems within the case, the invaluable teaching moments, which are available in an in-depth analysis of the underlying facts, and which controlled the opinions in this matter, are irretrievably lost. *Saavedra* could easily lend itself to simplistic Socratic dialogue, along the lines of: "Who were the parties? What was the dispute? What was the problem that the court in Texas identified? What did the court in Texas indicate about the case, what did they do? What was the statutory support the court relied upon in making its determination?" The final outcome known, the case could easily be further passed over and relegated to the case outline to make room for more interesting and "important" cases. Deeper inspection of the case is required to unlock its potential for teaching objectivity.

B. The Stages of Moving Positionality

1. Using Case and Psychodrama as Complementary Techniques

I propose several strategies and stages of thought for teaching objectivity in this case. If we accept the premise that modern law students are not all similarly positioned in their preferred learning styles, it is incumbent upon the instructor to tailor the discussion of *Saavedra* to appeal

42. Many educators have indicated that the Socratic method in law school teaching is a poor method because it leaves students to learn on their own, without reference to black letter rules, or concrete conclusions. *See generally*, *e.g.*, Grant H. Morris, *Teaching with Emotion: Enriching the Educational Experience of First-Year Law Students*, 47 SAN DIEGO L. REV. 465, 467 (2010); James R. Beattie, *Socratic Ignorance: Once More into the Cave*, 105 W. VA. L. REV. 471, 472-73 (2003); Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 114 (1999).

to the various learning styles. By altering the way information is revealed in *Saavedra*, students may also have an opportunity to distinguish and further refine their individual learning styles as well.

Based upon direct observation, students in the typical casebook method travel through several stages of understanding, summarized here in simplified form. In the first stage, students are assigned a series of cases to read for a particular class. They have a vague understanding of the general topic they are studying, from the headings in the textbook if nowhere else, and they read the case, often without much understanding. Certainly, many students with whom I have spoken read the cases to obtain a general outline of the facts and the parties and the outcome, but expect their professor to reveal all of the finer nuances in the class seminar, wherein the case will be identified for what is intended. Depending on the facts of the case, students may also develop the "knee-jerk" reaction to the facts and outcome, deciding, as in *Saavedra*, that Father has no right to seek redress for any wrong, and that he is merely harassing Mother, who is the completely innocent, and ultimately vindicated, heroine of the saga. As I experienced in my first class on this case, at least one student had made that determination without the rest of the facts. The stage at which students make up their minds about a case, despite a lack of all or most reasonable information about it, is therefore "Stage One."

"Stage Two" is a state of "educated skepticism;" one which students reach after discussion and revelation of additional case facts. They reassess their original positions from a perspective of additional knowledge or investigation. No person, attorney, or student is ever blessed with perfect knowledge. No case or fact pattern is ever completely knowable and, as stated below, just as "truth" may be said to be unknowable, so too "objectivity" may ultimately be completely unknowable. This is due to the inherent inability of each person to look at a situation through anything other than the subjective lens of his or her personal perspective. However, in order to obtain the further third stage, students must be given all of the available information, whether from the casebook or elsewhere, to place them in doubt of their original positions. These newly revealed facts should bring students to the conclusion that, perhaps, there is more to the case than originally meets the eye. By instilling this skepticism, or by convincing students that they may not have all of the necessary information required to properly establish a hard and fast opinion, students rapidly approach the third stage.

"Stage Three" of the experience is the point at which the student or attorney reaches a level of calm understanding of the facts, the positions of both parties, and the direction of the case. Armed with the known facts and the perspectives of both parties, attorneys can then represent either party,

understand the arguments that will be made against their client's position, and better articulate their client's position and response to the opposing party's objections. But, how do we achieve this level of clarity? I believe that the use of "psychodrama" could be the key.

The psychodrama that Jerry Spence's Trial Lawyer's College espouses is a training tool for lawyers that emphasizes their duty to investigate not only the bare facts of a case, but also the experiential knowledge of the parties.[43] Dr. J.L. Moreno (1889-1974), a principal co-founder of group psychotherapy, originated psychodrama in 1921 and described it as "the science which explores the 'truth' by dramatic methods."[44] Furthermore,

> Adam Blatner described psychodrama as follows: "Psychodrama is a method of psychotherapy in which patients enact the relevant events in their lives instead of simply talking about them. This involves exploring in action not only historical events but, more importantly, dimensions of psychological events not ordinarily addressed in conventional dramatic process: unspoken thoughts, encounters with those not present, portrayals of fantasies of what others might be feeling and thinking, envisioning future possibilities, and many other aspects of the phenomenology of human experience."[45]

Professor Dana K. Cole further describes psychodrama as "a spontaneously created play, produced without script or rehearsal, with improvised props, for the purpose of gaining insight that can only be achieved in action. In psychodrama, life situations and conflicts are explored by enacting them, rather than talking about them."[46]

Having read for years the multiple arguments for the use of psychodrama in the presentation of "mindful" jury arguments, I was struck by how this technique would lend itself perfectly to the presentation of a family law argument in the family law teaching context. Although personally not experienced in psychodrama, I did attempt to incorporate the concepts of psychodrama into my courtroom presentation and litigation on numerous occasions.[47] The application of psychodrama naturally fits the goals of the family law teacher and practitioner:

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43. *See* Dana K. Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, 21 N. ILL. U. L. REV. 1, 5 (2001).

44. J.L. MORENO, WHO SHALL SURVIVE? FOUNDATIONS OF SOCIOMETRY, GROUP PSYCHOTHERAPY, AND SOCIODRAMA 81 (3d ed. 1978); Cole, *supra* note 43, at 8.

45. Cole, *supra* note 43, at 7-8 (quoting ADAM BLATNER, FOUNDATIONS OF PSYCHODRAMA: HISTORY, THEORY, AND PRACTICE 1 (3d ed. 1988)).

46. *Id.* at 8.

47. Texas is one of the few states that still routinely allows and hears jury trials in divorce and custody issues. *See Divorce by Jury*, DIVORCE.COM, http://divorce.com/divorce-jury (last visited Mar.

> [I]t is a tool that permits us to access the experience of others – to see things as they saw them and to feel it as they felt it – in other words, to truly empathize. Psychodrama also allows us to access our own experiences and to better understand our experiences. "Psychodrama expands our understanding of experiences, hence our understanding of ourselves."[48]

Armed with as much factual clarity as possible, the "seekers," or the advocates and students, can render the distillation of the parties' thoughts and feelings, derive the motivations of the players, and reach a state of being "sadder but wiser," empathetic neutrality, or the educated objectivity that is the hallmark of the "Third Stage."

The "Third Stage" is the pinnacle of the exercise. In this stage students realize that there may be more than one viable position. While the existence of arguments for both parties may become apparent, students must be able to set aside their initial revulsion for Father and California to take up the possibility, and position, that not all is as it seems, and to further acknowledge that they may be called upon to represent persons with whom they find conflict. The "seekers" are, through the activity of acting out the positions of the parties in an in-class psychodrama, able to understand the level of apparent animosity better, the antagonism, the fear for the children's safety, the confusion of the courts, and the need for cooler heads to prevail. They begin to see the positions of the advocates hired to represent these unfortunate people and the children caught in between.

Pragmatically, classroom activities must be well defined to help students to move through the three progressive stages of thought.[49] First, before any discussion of how the casebook version of the dispute is woefully short of detail, it is important to reveal, on both sides of the argument, individual facts, which may or may not direct the student to different conclusions about the parties and the arguments. Thus, I would propose that the instructor first go through the case in the tried and true Socratic method, asking the students the pertinent questions of the facts revealed in the original excerpt. As a baseline assessment, the instructor would then ask the class as a whole about their attitudes toward each of the parties in the case and the courts. My law school employs the Turning Point clicker technology, which allows us to ask students multiple-choice

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17, 2014); Family Law, *Case Law Development: Jury Trial in Divorce Actions*, FAMILY LAW PROF BLOG (Dec. 6, 2006), http://lawprofessors.typepad.com/family_law/2006/12/case_law_develo.html.

48. Cole, *supra* note 43, at 6-7 (quoting John Nolte, *Brochure for the "Psychodrama and Telling the Story" Workshop*, MIDWEST CTR. FOR PSYCHODRAMA & SOCIOMETRY (Omaha, Neb.) Oct. 23-25, 1998)).

49. *See infra* Part V.

questions that they may answer from their laptops, and from which we may obtain instantaneous feedback.[50] Likely, most of the class would side overwhelmingly with Mother and against Father, and would further side with the Texas court against the California court's apparently arbitrary delivery of the child's custody into the hands of Father, who is a convicted child molester. While I do not necessarily disagree with this initial assessment, the responses establish the baseline to the argument, which will be important in the later review. As with any casebook investigation, the class would, therefore, begin with a modified Socratic dialogue on the bare facts offered by the text, and a baseline assessment of the students' attitudes.

As a second step, the class is broken up into several groups, within which I would allow the groups to elect the various players in the customary psychodrama—"the director, the protagonist, the auxiliaries and the audience."[51] The director, "usually a therapist in a therapeutic situation," runs the scene, and the protagonist, working in a particular area referred to as the "stage," is the main character whom "is given the opportunity to work on an issue by acting out a particular scene (or scenes) spontaneously."[52] The auxiliaries are persons in the group whom the director enlists to assist in acting out the scene by portraying real or imaginary characters in a particular drama, and the audience members are not directly involved in the enactment.[53]

After electing the various members of the scene, the psychodrama process begins with a "warm-up" during which the protagonist is given the opportunity to learn about the role that he or she is to play, and the director is given the opportunity to "set the scene."[54] At this point, the group receives the "extended facts" in the *Saavedra* case, perhaps breaking down the facts for one group into facts favorable to Father, and in another group into facts favorable to Mother, allowing each of the protagonists to play one of the parents. After the general release of extended facts, students retake the Turning Point survey, answering the same questions from the previous survey, including whether they favored Mother or Father, and specific questions about whether the additional facts changed their perceptions of the parties, or the situation. The results would then be saved for later comparison with the final results.

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50. *See Higher Education*, TURNING TECH. FOR HIGHER EDUC., http://www.turningtechnologies.com/higher-education (last visited Feb. 25, 2013); *Classroom Clickers*, ENGAGING TECH., http://www.engaging-technologies.com/classroom-clickers.html#sthash.JDKQ3H57.dpbs (last visited Apr. 10, 2014).

51. Cole, *supra* note 43, at 13.

52. *Id.*

53. *Id.*

54. *Id.* at 17.

After setting the scene for each group, the protagonist plays out several different scenarios that are unlimited in time and could be set in the past, in the future, or in the present of the case in controversy.[55] Given the bizarre nature of the particular facts of the *Saavedra* case, it is particularly helpful to have the groups each present a particular scene before combining the groups. This would allow the Mother and Father to play off each other after discovering their individual motivations. A few of the situations that the groups explore include Father's discovery that Mother has, in violation of the California court order, moved the children to Texas,[56] or Mother's revelation that Father had fondled her twelve-year-old niece.[57] The groups might enact a scene where Mother confronts Father, and each of the protagonists circle each other and lay out their cases, with the auxiliaries playing the parts of the children of the parties, the Texas court, the TDPRS, the California court, the governors of each state, and members of the legislature. The director of the particular scene would throw in additional facts, perhaps asking the protagonists to reverse roles and enact the reactions of the other party, or the children.

Lastly, there would be a debriefing session, or post-action sharing, that:

> gives the individual members of the group an opportunity to empathize with the protagonist by sharing their own thoughts, feelings and experiences with the protagonist. The group members do not give advice, but rather express similar thoughts, feelings or experiences the drama produced or reproduced for them. It is a time to appreciate and acknowledge the gift the protagonist gave to the group and to embrace the protagonist.[58]

In this critical stage, it is important to discuss the feelings and perspectives the group gained, framed in the context of the family lawyer's role, the ethical obligations to clients, and the best interests of the child. Group members are encouraged to discover a solution for the difficulties the parties met and to discuss what they can do to facilitate change in the parties, the system, and themselves.[59] Lastly, students are required to journal the experience, outside of class, preferably while the experience is still fresh and raw, and given a final Turning Point survey, answering the same questions concerning their opinions of the facts and whether the experience enlightened them in any way.

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55. *Id.*at 14.
56. *Couple's Bitter Custody Battle Pits Texas Against California*, *supra* note 29.
57. *Saavedra*, 96 S.W.3d at 537 n.2.
58. Cole, *supra* note 43, at 18.
59. *Id.*

VI. THE FUTURE OF ENGAGED ANDRAGOGY: MEETING THE NEEDS OF ADULT LEARNERS

Several current, effective educational practices influencing the law school classroom environment, and arguably the whole of higher education, support the argument that strategies like the psychodramatic approach previously described should become more common.[60] While psychodrama as a useful tool for litigation training is not new, I believe that revisiting the use of psychodrama in legal education, especially within the aspect of family law, supports the increasingly relevant late generational expectations for learning,[61] and a need to increase the emotional intelligence and empathy of future law professionals by shifting to more andragogical-friendly classroom strategies.

First, Joan Catherine Bohl, in her excellent article on teaching the MTV and Google generation, argues that the "entire profession [of law] is built on communication and persuasion, understanding audience, and managing human interaction," so to ignore the diverse learning needs of the current adult student audience is antithetical to this core premise.[62] Adaptation to the adult learner's needs is a practical, less stress-inducing, and more satisfying approach for professors and students.[63] For the current student population, approaches such as psychodrama and other modified Langdellian methods, support students' need to see learning as voluntary and based on their past experiences; respectful of their perspectives, yet challenging to core beliefs; collaborative in the sense that they are helping to construct learning outcomes and activities; pragmatic and problem-centered; and able to be immediately evaluated and modified based on results with an eye to future application. The structure of psychodrama, which requires the drama participant to engage their core preconceptions of case facts, while acting in a collaborative search for empathetic understanding,[64] supports these key, evidence-based, adult-learning needs.

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60. *See generally infra* Part VI.

61. Specifically, the author has taught law students from each of the typical generational categories (i.e. Gen. X, Gen. Y, Millennials, and Baby Boomers); he has observed that each category generally has its broadly preferred learning style, interaction style, and broad expectations about the structure of legal education.

62. Joan Catherine Bohl, *Generation X and Y in Law School: Practical Strategies for Teaching the "MTV/Google" Generation*, 54 LOY. L. REV. 775, 790 (2008).

63. *Id.*

64. *See*, *e.g.*, Cole, *supra* note 43, at 18.

> In order to be sufficient to evoke change, the process of self-discovery must be emotional, not just intellectual. The protagonist must *experience* the meaning of their feelings in the present. Psychodrama was designed by Moreno to facilitate the emotional insight that can only be accomplished by actual experience and not written or verbal information. To emphasize the focus on experiential learning, he called the self-discovery generated through psychodrama

Another influential factor in the personal and academic lives of current law school students is the challenge of negotiating and interpreting the barrage of constantly available information. According to Linda Anderson, students from generations X and Y need and want to filter the information that is most relevant to them because they are inundated with information throughout their lives.[65] She proposes several andragogically friendly techniques from her teaching, which mimic elements of the psychodramatic approach.[66] First, she describes "Thinking Aloud Pair Problem Solving."[67] In this activity, "[s]tudents are paired . . . to predict the result of [an] application of a rule of law."[68] One student reads the problem and poses solutions while the other listens and asks clarifying questions.[69] Students begin to understand the problem solving process in others.[70] The technique that Professor Anderson espoused is undoubtedly helpful, but ultimately suffers from the same criticism of the case method: while the ultimate solution to the case is the goal of the learning by casebook method, the problem solving still deals with the relatively sterilized casebook facts, removed from the unedited facts and empathetic action from which true understanding is gleaned. Alternatively, psychodrama counter-intuitively allows the concentration of a case's factual circumstances into an experiential learning technique, which has the added benefit of moving the student beyond understanding premised solely on written or verbal information, and "emphasiz[es] the personal participation in the discovery and validation of knowledge."[71]

Anderson also advocates a "Group Predictions" activity in which small groups of students read two preliminary cases that are referenced in a third case and are asked to predict the application in the third case based only on the facts of the third case, ignorant of its outcome.[72] The predictions are

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> "action-insight." The term describes insight based on overt behavior and not inner thinking. It is learning by doing. "The learning gained through such an experience is passionate and involved, emphasizing the personal participation in the discovery and validation of knowledge."

Id. (emphasis added) (quoting Peter Felix Kellerman, Focus on Psychodrama: The Therapeutic Aspects of Psychodrama 90 (1992)).

65. Linda S. Anderson, *Incorporating Adult Learning Theory into Law School Classrooms: Small Steps Leading to Large Results*, 5 APPALACHIAN J.L. 127, 131 (2006).

66. *See id.* at 139-44.

67. *See id.* at 138.

68. *Id.* at 139.

69. *Id.*

70. Anderson, *supra* note 65, at 139.

71. Cole, *supra* note 43, at 14; *see also* PETER FELIX KELLERMANN, FOCUS ON PSYCHODRAMA: THE THERAPEUTIC ASPECTS OF PSYCHODRAMA 31, 86 (1992).

72. *See* Anderson, *supra* note 65, at 140.

recorded and the class votes on the most likely outcome.[73] If the majority solution is correct, or incorrect, the students examine together the logical chain that led to the chosen solution.[74] This approach to student leadership in learning and decision-making also supports her recommendation that professors embrace strategies that show more "respect for [students'] abilit[ies] to contribute to their own learning."[75] The application of psychodrama, while not necessarily predictive in the same fashion as Anderson advocated, still reveals empathetic learning that is generally student-directed, requiring the direct intervention of each member of the group in the discovery process, thereby providing student leadership in the activity of self-aware and self-guided learning.[76]

Finally, adult-friendly learning strategies, according to Anderson, help students to better understand how concepts will play out in real practice, how classroom assignments are relevant, and how the assignments fit the objectives of the course.[77] Ultimately, adult learners want "praxis," or the ability to test their knowledge in new environments.[78] Psychodrama techniques, applied to future scenarios, reinforce immediate and ongoing feedback that is critical to adult-learning[79] and future lawyers' ability to negotiate the changing waters of future real-life cases. Most importantly, the psychodrama exercise enhances the students' ability to access the emotional depth necessary to reach a state of learned neutrality, or that objectivity of thought that can only be reached with a majority of both factual *and* emotional information.[80]

The final influential and educational practices relevant in support of the psychodrama approach help to address the needs for future attorneys to be self-directed, lifelong learners who have a more highly developed level of emotional intelligence upon which to build better relationships with clients and other attorneys. Using psychodrama strategies, the groups ultimately become agents in a mutually beneficial problem solving environment. According to Michael Schwartz in *Teaching Law Students to be Self-Regulated Learners*, self-regulated learning involves the key ideas of goal setting, control of behavior and learning strategies, and motivational strategies on the part of students.[81] For Schwartz, "self-regulated learning

73. *Id.*
74. *Id.*
75. *Id.*
76. *See supra* notes 46-59 and accompanying text.
77. *See* Anderson, *supra* note 65, at 144.
78. *See id.* at 144 & n.62.
79. *See id.* at 145.
80. *See supra* Part V.B.1.
81. Michael Hunter Schwartz, *Teaching Law Students to be Self-Regulated Learners*, 2003 MICH. ST. D.C.L. L. REV. 447, 452 (2003).

involves . . . three [distinct] stages: forethought, performance, and reflection, each of which has multiple components."[82] These stages directly mirror the active qualities of psychodrama:

- The Forethought Stage involves classifying the task, invoking past beliefs about learning, assessing the ability to achieve the task, setting goals to achieve the task, and devising a strategy to achieve the outcome.[83] In the proposed psychodramatic approach, the "warm-up" activity accomplishes this stage; when the additional facts are revealed to the students, the director sets the stage, and the protagonist prepares the character for presentation.[84] The groups' preconceived notions are marshaled at the Forethought Stage, as the full extent of the casebook facts and the unwritten unseen facts are revealed, forcing the student to reevaluate his or her initial positions and begin to open to possible new positions.[85]

- The Performance Stage, per Professor Schwartz, involves the specific learning activities, which often include pre-reading, reading, discussion, and post-reading.[86] In teaching *Saavedra* via psychodrama, this would be the "Action Portion" during which the group acts out various important scenes in the story of the relationship and subsequent conflicts between Mother and Father,[87] thus presenting an integrated, self-regulated performance of the issues armed with the generalized case background revealed in the Forethought Stage.

- The Reflection Stage, per Professor Schwartz, involves looking back on how effectively the task was accomplished and forward to consider how the learning might be applied in future situations.[88] Class discussions on the outcomes of the drama, reflective journals and papers, and ultimately application to future cases, both in class and in real settings, conclude the reflection stage. This stage directly mirrors the final "Post Action Sharing" reached at this point in a psychodrama, a debriefing that reveals what the group learned, and which

82. *See id.* at 454-55.
83. *See id.*
84. *See supra* note 54 and accompanying text.
85. *See* Schwartz, *supra* note 81, at 454-55.
86. *See id.* at 458-60.
87. *See supra* note 55 and accompanying text.
88. *See* Schwartz, *supra* note 81, at 460-61.

> establishes the basis for the learned neutrality that is the basis for mindful objectivity.[89]

Of course, as Schwartz argues, part of reflection involves comparing performance to a standard that the learner and/or the professor set.[90] In psychodrama, the assessment standard is articulated in part by the group's immediate feedback on the drama, but more directly in comments and evaluation of the reflective journaling activities.[91] The formative and summative assessment again supports the idea that self-regulated learners want prompt, accurate, and detailed evaluation.[92] It must be pointed out that the purpose of psychodrama in the family law context is *not* to change or force any particular view upon the participants of the class, either for or against either party or court. The psychodrama exercise helps students explore and recognize the value of emotional information to the complete and confident representation of either side of the argument.

Purposefully structured, reflective strategies that allow more student agency in their learning, Schwartz argues, are increasingly important in law school andragogy because of a growing amount of research that indicates that "[s]elf-regulated learners are intrinsically motivated, self-directing, self-monitoring, and self-evaluating"—all skills critical to life-long learning and effectiveness in law practice.[93]

So far, we have seen current adult-learning research align with the psychodramatic approach, which benefits students in terms of increased content knowledge of legal precedent and procedures, as well as the support of active and student-centered and defined learning outcomes. While these are certainly important to improving traditional classroom approaches, if, ultimately, students are not able to become more self-aware of their biases and how these biases influence their engagement with their clients and others, then greater content knowledge through self-defined and mediated learning fails to be effective. Several authors have argued that a key goal of law school curricular reform should also involve work on improving students' interpersonal skills.[94] Peter Reilly's *Teaching Law Students How*

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89. *Compare id. with supra* notes 58-59 and accompanying text.

90. *See* Schwartz, *supra* note 81, at 461.

91. *See supra* notes 58-59 and accompanying text.

92. *See* Schwartz, *supra* note 81, at 460-61.

93. *See id.* at 468-69 (quoting Gerald F. Hess, *The Legal Educator's Guide to Periodicals on Teaching and Learning*, 67 UMKC L. REV. 367, 385 (1998)).

94. *See* Peter Reilly, *Teaching Law Students How to Feel: Using Negotiations Training to Increase Emotional Intelligence*, 21 NEGOT. J. 301, 301 (2005); Lewis D. Solomon, *Perspectives on Curriculum Reform in Law Schools: A Critical Assessment*, 24 U. TOL. L. REV. 1, 38-39 (1992) (noting that law school curriculum reform must include a focus on legal skills, clinics, and interpersonal skills in performing legal tasks); Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 516 (2007) ("Law school

to Feel: Using Negotiations Training to Increase Emotional Intelligence states that this may best be achieved through improving "emotional intelligence" or how students perceive, facilitate, understand, and manage their emotions in relationships with their clients and other attorneys.[95] For Reilly, emotional intelligence is comprised of four unique components and skill sets, which themselves evolve through multiple stages:

- Emotional perception involves "registering, deciphering, and attending to emotional messages as they are expressed in facial expressions and voice tone."[96]
- Emotional facilitation involves a "focus[ ] on how emotion affects the cognitive system and can thereby lead to more effective reasoning, decision making, problem solving, and creative expression."[97]
- Emotional understanding is about "the ability to label emotions . . . to deduce the *relationship* among them—how they blend together and how they transition from one stage to another and progress over time."[98]
- Emotional management "provides the ability to: (1) be open to one's feelings, both pleasant and unpleasant; (2) stay aware of, monitor, and reflect upon one's emotions; (3) engage, prolong, or detach from an emotional state; (4) manage emotions in one's self; and (5) manage emotions in others."[99]

Reilly describes a classroom exercise in which students role play a case and must manage the initial encounter of a client who is less than forthcoming in describing the mitigating circumstances of her case.[100] The issue to be addressed in the exercise is fundamentally how the student, projecting ahead to working with real clients, would begin to build the bonds of trust necessary for an effective attorney-client relationship.[101] Reilly argues that using a role play strategy, in which students assume identities outside of their own, is "generally effective in providing students

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has too little to do with what lawyers actually do and develops too little of the institutional, interpersonal, and investigative capacities that good lawyering requires.").

95. Reilly, *supra* note 94, at 303, 309-310.
96. *See id.* at 303.
97. *Id.*
98. *See id.* at 304.
99. *See id.*
100. *See* Reilly, *supra* note 94, at 305-06.
101. *See id.* at 306-07.

with a license to experiment with behaviors they might not feel comfortable displaying 'in their own skin' or when playing themselves."[102] The exercise, properly implemented, is ultimately about "teach[ing] students the nuts and bolts of *connecting* with another person during an interview, a conversation, or a negotiation."[103] In the proposed psychodramatic approach,[104] the entire goal of the exercise "is to discover the emotional truth of the protagonist, allowing the protagonist to gain insight, self-awareness, enlightenment and illumination—in essence, a deeper and richer understanding."[105] Psychodrama, in the strongest possible terms, removes barriers for the empathetic receipt and delivery of otherwise watered down, homogenous facts, thereby creating an emotional awareness of client, witness, and court. The properly present psychodrama produces insights that directly provide the experiential "connecting" that Reilly describes as important to the development of the critical emotional intelligence of the practicing lawyer.[106]

Reilly argues that classroom activities that focus on building emotional intelligence immediately benefit the students, but eventually benefit the profession as a whole as well.[107] First, they help to move students away from a "win-at-all-costs" mentality to a more collaborative "joint gain problem solving" approach with their clients and other attorneys.[108] They also broaden students' overly analytical orientations, reduce their adversarial tendencies, and address their shortcomings in interpersonal relations and emotional intelligence.[109] Finally, they result in a "greater capacity to *connect* with their clients — to see, hear, and understand their clients completely and thoroughly, with focus and intention,"[110] which makes the profession, and its practitioners, more accessible. Psychodrama similarly achieves the goals and benefits that Reilly espouses.

VII. FINAL REFLECTIONS ON TEACHING USING THE PSYCHODRAMATIC METHOD

As an experience, teaching a family law class with psychodrama vignettes in conjunction with the various modules on child related issues, family violence, divorce, and the denial of same sex marriage should have great impact. However, a prudent author would have to give the disclaimer

102. *See id.* at 305.
103. *See id.* at 306.
104. *See supra* Part V.
105. Cole, *supra* note 43, at 18.
106. *See* Reilly, *supra* note 94, at 306.
107. *See id.* at 302, 310-11.
108. *Id.* at 308.
109. *Id.* at 309-310.
110. *Id.* at 310.

and warnings that frequently accompany the use of psychodrama both in therapy and litigation exercises: the director must exercise care not to allow the situational experiences of the drama go too far.[111] It would be easy for a participant to live out his or her own intensely personal and traumatic tales in the guise of an experiential learning exercise, thereby re-victimizing and re-traumatizing participants with past family crises.[112] The clearest way to avoid this is simply to make sure that none of the participants has been involved in similar situations to which the instructor is trying to lend illumination. However, it also makes sense for the instructor to place persons in clearly antithetical roles by placing the student in the position of his or her clear opposite, seeking out the understanding that can only come with such role reversal.

111. Cole, *supra* note 43, at 37.
112. *Id.*