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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

Bruce L. Beverly

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Introduction:

The family law attorney is in a unique position when representing clients; s/he must zealously represent the client within the bounds of the law while often holding conflicting attitudes about the client's position. 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 in order to successfully represent clients who may have acted in a morally bankrupt or repulsive manner. The attorney who cannot set aside sometimes raging displeasure with a particularly disagreeable client runs the risk of acting in a manner which could jeopardize the client's case and the lawyer's license to practice law. Therefore, it is vitally important that we, as law school domestic relations instructors, teach students to look 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*¹ 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 allowing the professor and 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.

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 with the problem of 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 in to one or both perspectives.

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¹ See generally *Saavedra v. Schmidt*, 96 S.W.3d 533 (Tex. Ct. App. 2002).

“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 that the students read *Saavedra*. This case is presented in the excellent Oliphant & Ver Steegh casebook² 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. The Texas Court is openly incredulous of the apparently dubious decision of the California trial court to grant custody of the child to the father, Manuel Saavedra, a convicted sexual offender.³ As with most legal textbooks, the case is edited for content, and upon first reading gives the student a decidedly bad taste for both father and the California court that would be so blinded by the mother’s failing to appear in court, that the court would deliver custody of the child into the hands of a molester. The typical discussions are had about the elements of emergency jurisdiction under the UCCJEA, when a court may exercise emergency jurisdiction, and how the Texas court responded to the lack of communication or assurances by the California court as to the safety of the children by assuming emergency jurisdiction.⁴ The discussion typically would also include the idea of mandamus, wherein the court could be ordered to act pursuant to the law if it failed to do so, and the practical effect that could have on the case and the court’s reaction to the client.

However, the facts in this case gave me pause. Knowing the Texas court reasonably well⁵ 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 interest of the child could ever knowingly place a child with a sex offender, without the presence of someone’s negligence or a differing set of circumstances which were not apparent from the bare reading of the casebook version. 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 which were filled with inconsistency, and the myriad questions which were raised by the limited facts in the textbook. 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 unique manipulations of ethical responsibility and

² ROBERT E. OLIPHANT & NANCY VER STEEGH, WORK OF THE FAMILY LAWYER 418-21 (Aspen 2012).

³ *Id.* at 419-20.

⁴ See generally *Saavedra v. Schmidt*, 96 S.W.3d 533 (Tex. Ct. App. 2002).

⁵ Author is Board Certified in Family Law by the Texas Board of Legal Specialization, and practiced in Texas for the vast majority of his 17 ½ year practice, almost exclusively in Family Law.

zealous advocacy, wrapped in the enigmatic obligations of the best interest 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 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 preparing them for the reality of family law practice. The results of implementation of this approach in the family law classroom as well as implications for future practice are also discussed.**

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 1993.⁶ A custody dispute arose in the Superior Court of California, San Joaquin County as a result of the requested divorce.⁷ Initially, custody of the children was awarded to Mother, while Father was granted only supervised visitation, assumably for the reason that Father had been convicted of child molestation.⁸ “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 of California.⁹ The State of California, apparently outraged over Mother’s clear violation of their 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.¹⁰ Armed with the California order, Father moved the Texas court to enforce his custody order and deliver the children to him.¹¹ Mother countered Father’s motion with a petition for the Texas Court to assume emergency jurisdiction under the UCCJEA.¹² According to the case, the facts are stated that “[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.”¹³ The opinion of the court proceeds to discuss the UCCJEA, and the bases under which one 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 *mandatorily* required to communicate with each other over the exercise of the emergency jurisdiction and more specifically the length of the order.¹⁴ The

⁶ OLIPHANT & VER STEEGH, at 418 (*reprinting* Saavedra v. Schmidt, 96 S.W.3d at 536 (Tex. Ct. App. 2002)).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 419.

¹² *Id.*

¹³ *Id.* at 418-19.

¹⁴ *Id.* at 419.

Texas Court of Appeals lays out the basis by which the Texas trial court extends its temporary jurisdiction over the children the subject of the suit, and chastises the California court in uncharacteristically harsh language over the fact that the California court refused to cooperate with the Texas court despite the latter court's multiple attempts to talk to the California court.¹⁵ 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 in the best interests of a child."¹⁶ The Texas Court of Appeals recounts the trial court's incredulity that the California court would award custody to a registered sex offender (Father), approve Father's home for placement of the children in California pursuant to a home-study which the Court deemed "woefully inadequate," and the belief that the California court was more concerned with punishing Mother than acting in the children's best interests.¹⁷ The appeals opinion, based upon those facts lends itself well to the knee-jerk reaction which I received in class, and justifiably so.

In my opinion, however, there were as many questions raised by the opinion as there were answered: What happened to the original divorce suit? What was the child molestation charge that Father was convicted of 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 from California? Did Mother know she was under an order not leave California with the children? What were these so called "allegations of unseemly conduct"¹⁸ that caused TDPRS to get involved? What was the disposition of the case? Were there any other circumstances that might explain the apparent 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 their 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 a prohibition from leaving the State of California with the children? The facts just didn't adequately answer any of these questions, and upon further investigation, would reveal that the reality of the case was far stranger than that recounted by the appellate opinion. 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 further recounted more operative facts.¹⁹

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. However, the Mother being praised while blatantly and repeatedly violating court orders under the guise of protecting her children is also not a position which I can legitimately abide either - though it certainly, on the face of the case, provides a better justification and sound bite. The facts of the case were substantially more

¹⁵ *Id.* at 419, 420.

¹⁶ *Id.* at 420.

¹⁷ *Id.*

¹⁸ *Id.* at 419.

¹⁹ *E.g.*, Lisa Davis, *Law and Borders*, SAN FRANCISCO WEEKLY, November 14, 2001, available at <http://www.sfweekly.com/2001-11-14/news/law-and-borders/full/>; Lisa Davis, *Harsh Judgment*, SAN FRANCISCO WEEKLY, June 10, 2002, available at <http://www.sfweekly.com/2002-06-19/news/harsh-judgment/>; *Couple's bitter custody battle pits Texas against California*, LUBBOCK AVALANCHE-JOURNAL, August 11, 2001, available at http://lubbockonline.com/stories/081101/sta_081101103.shtml.

complicated, however, providing the grey area within which the student must navigate in order to reach objectivity.

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,²⁰ or one who is unfamiliar with legal analysis. During law school orientation, in exhorting first year students to refrain from giving legal opinions to those inevitable family members who will seek the student 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. While they will have a little understanding, they can still hurt a person’s legal case by giving them untested advice, and additionally, they will be breaking the law. The first year law student is forced by the casebook method to get an opinion. Many 1L’s have opinions about the heady legal topics which 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 to the students situations of abuse, inconsistency, discrimination, or retribution and the instructor expects students to “pick a side.” Most of the time, the instructor will push an agenda, knowingly or otherwise, that they intend for the students to step away buying into, but the importance and necessity of getting off the fence is the paramount instructional goal.

Often law school is referred to as “the crucible of thought,” for the reason that it is designed to encourage debate, to investigate the whys of the law, instead of just the pragmatic application of statutory or common law strictures. 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. Black-letter law is generally so riddled with exception, misinterpretation, and turmoil 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 zealously represent either side of a case, 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”

²⁰ Beryl Blaustone, *Teaching Law Students to Self-Critique and to Develop Critical Clinical Self-Awareness in Performance*, 13 CLINICAL L. REV. 143, 148 (2006).

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' 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."²¹ 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."²² 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, if not improper conclusions, then certainly to premature conclusions based upon the easy homogeneity of the presentation.

Contrarily, the definition of objectivity which I prefer to use 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."²³ In this light, objectivity is the ability to assess a case or fact pattern with neutrality, despite the obvious biases that we each carry with us. The objectivity with which this author seeks to instill in a student of family law is a higher position of clarity premised on not the *removal* of informational biases and factors, but 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/her client, usually giving the attorney a biased view. As the representation continues, however, 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. The good attorney will understand intuitively that it is not always correct that clients intentionally *lied* about a particular set of facts, but rather that they recounted that information as the client perceives the situation as they *lived* it, or relayed that information which would inflame the lawyer to work harder for them. As a practical matter, the skills which 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/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, able to more effectively manage his/her client's needs, and will ultimately be happier in the practice of law. It is important for the law school curriculum to adapt to new approaches for engagement with these kind of issues, in fact to deal with the "messiness" of the reality of legal situations which students are often not exposed to substantially until clinical experiences, and even then not often sufficiently.

Strategies for Teaching Saavedra: Modifying Positionality through Psychodrama

The Challenges of Teaching Objectivity

²¹ Gregory Howard Williams, *Teaching Criminal Law: "Objectivity" in Black and White*, 9 HARV. BLACKLETTER J. 27, 29 (1992).

²² *Id.* (quoting David K. Hill, *Law School, Legal Education and the Black Law Student*, 12 T. MARSHALL L. REV. 457, 462 (1987)).

²³ "Objective" as defined by DICTIONARY.COM, available at <http://dictionary.reference.com/browse/objective> (last viewed Feb. 5, 2013).

If we accept the definition which I have made of the objective perspective in the evaluation and argumentation of the family law case, and particularly [in?] *Saavedra*, the question becomes: how does one actually teach the dispassionate respect for the facts of the case and the argument which must be made, within the confines of the zealous and *otherwise* passionate embrace of the law? This is the question which 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 exist intertwined and co-dependent due to the relationships between the *parens patriae* activity of the court in regulating the family, and the relationship between spouses and parents. The family lawyer must navigate these treacherous waters with an eye to the final outcome being in the best interests of their client and the family -- 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 client's 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 an invaluable skill, and one which 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 as espoused by many commentators in legal academia.²⁴ 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 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 relied upon by the court 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. The inspection of the case on a deeper level is required in order to unlock the potential for teaching objectivity.

The Stages of Moving Positionality: Using Case and Psychodrama as Complimentary Techniques

There are several strategies and stages of thought which I propose 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

²⁴ Many educators have indicated that the Socratic method in law school teaching is a poor method, in that it leaves student 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 (2010); James R. Beattie, Jr., *Socratic Ignorance: Once More Into The Cave*, 105 W. VA. L. REV. 471 (2003); Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113 (1999).

Saavedra to appeal to the various learning styles. By changing up the way that the 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 all of the finer nuances to be revealed by their professor 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, it is conceded. No case or fact pattern is ever completely knowable, and, as stated below, just as “truth” may be said to be unknowable, so too may “objectivity” be ultimately completely unknowable – due to the inherent inability of each person to look at a situation through anything other than the subjective lens of their personal perspective. However, in order to obtain the further third stage, students must be given all of the available information, whether in the casebook or not, so as to place them in doubt of their original position. The 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 – i.e. 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 where the student/attorney reaches a level of calm understanding of the facts, the positions of both parties, and the direction of the case. Armed with the facts that are known and the perspectives of both parties, attorneys can then represent either party, understand the arguments which 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 the “psychodrama” could be the key.

The psychodrama, as espoused by Jerry Spence’s Trial Lawyer’s College, is a training tool for lawyers which emphasizes their duty to investigate not only the bare facts of a case, but also the experiential knowledge of the parties.²⁵ Dr. J.L. Moreno (1889-1974), a principal co-founder of group psychotherapy, originated psychodrama in 1921 and described it as “the science which

²⁵ See Dana K. Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, 21 N. ILL. U. L. REV. 1, 5 (2001).

explores the ‘truth’ by dramatic methods.”²⁶ 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.²⁷

Professor Dana K. Cole further describes the 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.”²⁸

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. While I am not experienced in psychodrama, I did on numerous occasions attempt to incorporate the concepts of psychodrama into my courtroom presentation and litigation.²⁹ The application of psychodrama naturally fits the goals of the family law teacher and practitioner in that it 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.’”³⁰ Armed with as much factual clarity as one may have available, the “seekers” (the advocates and students) can render the distillation of the thoughts and feelings of the parties, derive the motivations of the players, and reach a state of being “sadder but wiser,” empathetic neutrality, or the educated objectivity which is the hallmark of the “Third Stage.”

The “Third Stage” is the pinnacle of the exercise. This stage is the point where students realize that there may be more than one viable position, and while the existence of arguments for both parties may become apparent, they must be able to set aside their initial revulsion for Father and California to take up the possibility, and positionality 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

²⁶ J.L. MORENO, WHO SHALL SURVIVE?: FOUNDATIONS OF SOCIOMETRY, GROUP PSYCHOTHERAPY, AND SOCIODRAMA 81 (3d ed. 1978).

²⁷ Cole, *supra* note 28, at 7-8 (quoting ADAM BLATNER, FOUNDATIONS OF PSYCHODRAMA: HISTORY, THEORY, AND PRACTICE 1 (3d ed. 1988)).

²⁸ *Id.* at 8.

²⁹ Texas is one of the few states which still routinely allows and hears jury trials in divorce and custody issues.

³⁰ Cole, *supra* note 28, at 6-7 (quoting John Nolte, Brochure for the “Psychodrama and Telling the Story” Workshop, Oct. 23-25, 1998 (Midwest Ctr. for Psychodrama & Sociometry, Omaha, Neb.)).

“seekers” are, through the activity of acting out the positions of the parties in an in-class psychodrama, able to better understand the level of apparent animosity, the antagonism, the fear for the children’s safety, the confusion of the Court(s) and the need for cooler heads to prevail; they begin to see those 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. 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,³¹ which allows us to ask students multiple choice questions which they may answer from their laptops, and from which we may obtain instantaneous feedback. It is likely that 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 apparent 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. Therefore, as with any casebook investigation, the class would begin with a modified Socratic dialogue on the bare facts offered by the text, and a baseline assessment of the attitudes of the students.

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-- a director, protagonist, auxiliaries and the audience.³² 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 who “is given the opportunity to work on an issue by acting out a particular scene (or scenes) spontaneously.”³³ The auxiliaries are persons in the group who are enlisted by the director to assist in acting out the scene by portraying real or imaginary characters in a particular drama, and the audience are members of the group not directly involved in the enactment.³⁴

After electing the various members of the scene, the psychodrama process begins with a “warm-up” wherein the protagonist is given the opportunity to learn about the role that s/he is to play, and for the director to “set the scene.”³⁵ At this point, the group is given the ‘extended facts’ in the *Saavedra* case, perhaps breaking down the facts for one group into facts favorable to Father, and in another group, facts favorable to Mother, allowing each of the protagonists to play one of the parents. After the general release of extended facts, students would retake the Turning Point survey, answering the same questions previously asked as to whether they favored Mother or

³¹ See *Turning Technologies for Higher Education*, <http://www.turningtechnologies.com/higher-education> (last visited Feb. 25, 2013).

³² Cole, *supra* note 28, at 13.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 17.

Father, and specific questions about whether the additional facts changed their perception of the parties or the situation. The results would then be saved for later comparison with the final results.

After setting the scene for each group, the protagonist plays out several different scenarios which are unlimited in time and could be set in the past, in the future, or in the present of the case in controversy.³⁶ Given the bizarre nature of the particular facts of the *Saavedra* case, it would be particularly helpful to have the groups each present a particular scene to their group, and then combine the groups. This would allow the Mother and Father to play off against each other, after discovering their individual motivations. A few of the situations which the groups explore are the discovery by Father that Mother has, in violation of the California Court order, moved the children to Texas, or the revelation by Mother that Father had fondled her 12-year-old niece. The groups might enact a scene where Mother confronts Father, and each of the protagonists circle each other and lay out their case against the other, 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.³⁷

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

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. While psychodrama as a useful tool for litigation training is not new, my belief is that revisiting the use of the psychodrama in legal education, especially within the aspect of family law, supports the

³⁶ *Id.* at 14.

³⁷ Cole, *supra* note 28, at 18.

increasingly relevant late generational expectations for learning³⁸ 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/Google generation, argues that the entire profession of law is built on “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.³⁹ Adaptation to the adult learner’s needs is a practical, less-stress inducing, and more satisfying approach for professors and students.⁴⁰ For the current student population, approaches such as psychodrama, and other modified Langdellian approaches, support their 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 the psychodrama, which requires the drama participant to engage their core preconceptions of case facts, while acting in a collaborative search for empathetic understanding,⁴¹ supports these key, evidence-based, adult learning needs.

Another influential factor in the personal and academic lives of current law school students is the challenge of negotiating and interpreting a barrage of constantly available information. According to Linda Anderson, Gen X and Y students need and want to filter the information which is most relevant to them because of their inundation with information throughout their lives.⁴² She proposes several andragogically-friendly techniques from her teaching which mimic elements of the psychodramatic approach. First, she describes “Thinking Aloud Pair Problem Solving.”⁴³ In this activity, students are paired to predict the result of an application of a rule of law. One student reads the problem and poses solutions while the other listens and asks clarifying questions. This allows students to begin to understand the problem solving process in others. The technique espoused by Professor Anderson is undoubtedly helpful, but ultimately suffers from the same criticism of the case method, in that while the ultimate solution to the case is the goal, the pair problem solving still deals with the relatively sterilized case problem set, removed from the empathetic action from which true understanding is revealed. Alternatively, psychodrama counter-intuitively allows the concentration of a case’s factual circumstances into an experiential learning

³⁸ 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.

³⁹ 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).

⁴⁰ *Id.*

⁴¹ See, e.g., Cole, *supra* note 28, at 14 (“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 ‘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.’”).

⁴² Linda Anderson, *Incorporating Adult Learning Theory into Law School Classrooms: Small Steps Leading to Large Results*, 5 APPALACHIAN L. J. 127, 131 (2006).

⁴³ *Id.* at 138.

technique which has the added benefit of moving the student beyond understanding premised solely on written or verbal information, but “emphasizing the personal participation in the discovery and validation of knowledge.”⁴⁴

Anderson also advocates a “Group Predictions” activity in which small groups of students read two preliminary cases which are referenced in a third case and are asked to predict the application in the third case while only having the facts of the case, and not the outcome.⁴⁵ The predictions are recorded and the class votes on the most likely outcome. If the majority solution is correct, or incorrect, the students examine together the thinking pattern which led to the chosen solution. This approach to student leadership in learning and decision making also supports her recommendation that professors embrace strategies that show more respect to students’ “abilities to contribute to their own learning.”⁴⁶ The application of psychodrama, while not necessarily predictive in the same fashion as advocated by Anderson, still reveals empathetic learning which 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.

Finally, adult-friendly learning strategies, according to Anderson, also better help students to understand how concepts will play out in real practice, how classroom assignments are relevant, and how they fit the objectives of the course.⁴⁷ Ultimately, adult learners want “praxis” or the ability to test their knowledge in new environments.⁴⁸ Psychodrama techniques, applied to future scenarios, reinforce immediate and ongoing feedback which is critical to learning for adults⁴⁹ and their ability to negotiate the changing waters of future real-life cases. Most importantly, the psychodrama exercise enhances the student’s ability to access the emotional depth necessary to reach a state of learned neutrality, or that objectivity of thought which can only be reached with a majority of both factual *and* emotional information.

The final influential 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 the 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.⁵⁰ For Schwartz, self-regulated learning activities involve three distinct stages:

⁴⁴ Cole, *supra* note 28, at 14; *see also* PETER FELIX KELLERMANN, FOCUS ON PSYCHODRAMA: THE THERAPEUTIC ASPECTS OF PSYCHODRAMA 31, 86 (1992).

⁴⁵ *Id.*

⁴⁶ *See* Anderson, *supra* note 45, at 140.

⁴⁷ *Id.* at 144.

⁴⁸ *Id.*

⁴⁹ *Id.* at 145.

⁵⁰ Michael Hunter Schwartz, *Teaching Law Students to be Self-Regulated Learners*, 2003 MICH. ST. DCL L. REV. 447, 452 (2003).

“forethought, performance, and reflection...each of which has multiple components,”⁵¹ and which stages directly mirror the active qualities of the psychodrama:

- The Forethought Stage involves classifying the task, invoking past beliefs about learning, assessing the ability of efficacy to achieve the task, setting goals to achieve the task, and devising a strategy to achieve the outcome. In the proposed psychodramatic approach, this stage is accomplished at the “warm-up” stage, when the additional facts are revealed to the students, the director sets the stage, and the protagonist prepares the character for presentation. The preconceived notions of the group are marshaled at this stage, as the full extent of the casebook facts, and the unwritten unseen facts are revealed, forcing the student to reevaluate their initial positions, and begin to open to possible new positions.⁵²
- The Performance Stage, per Professor Schwartz, involves the specific learning activities which often include pre-reading, reading and discussion, and post-reading.⁵³ In teaching *Saavedra* via psychodrama, this would be the “Action Portion” in which the group acts out various important scenes in the story of the relationship and subsequent conflict between Mother and Father, thusly 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 also forward to consider how the learning might be applied in future situations. 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 reflective stage. This stage directly mirrors the final “Post Action Sharing” reached at this point in a psychodrama, a debriefing which reveals what was learned by the group, and which establishes the basis for the learned neutrality which is the basis for mindful objectivity.⁵⁴

Of course, as Schwartz argues, part of reflection involves comparing performance to a standard set by the learner and/or the professor.⁵⁵ In *Saavedra*, 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. The formative and summative assessment again supports the idea that self-regulated learners want to have prompt, accurate, and detailed evaluation.⁵⁶ It must be pointed out that the purpose of the psychodrama in the family law case 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 is for the exploration of the students to recognize the value of emotional information to the complete and confident representation of either side of the argument.

⁵¹ *Id.* at 454-55.

⁵² *Id.* at 455-458.

⁵³ *Id.* at 458-460.

⁵⁴ *Id.* at 460-461

⁵⁵ *Id.* at 462.

⁵⁶ *Id.* at 460-61.

Purposefully structured, reflective strategies which allow more student agency in their learning, Schwartz argues, are increasingly important in law school andragogy because of a growing amount of research which indicates that “self-regulated learners are intrinsically motivated, self-directing, self-monitoring, and self-evaluating”—all skills critical to life-long learning and effectiveness in law practice.”⁵⁷

So far, we have seen the alignment of current adult learning research with the psychodramatic approach and the benefits to students in terms of increased content knowledge of legal precedent and procedures and 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 they 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. Peter Reilly’s *Teaching Law Students How 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 relationship to their clients and other attorneys.⁵⁸ 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.”⁵⁹
- 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.”⁶⁰
- 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.”⁶¹
- 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.”⁶²

⁵⁷ *Id.* at 469 (quoting Gerald F. Hess, *The Legal Educator’s Guide to Periodicals on Teaching and Learning*, 67 UMKC L. REV. 367, 385 (1998)).

⁵⁸ Peter Reilly, *Teaching law students how to feel: Using negotiations training to increase emotional intelligence*, 21 NEG. J. 301-314 (2005).

⁵⁹ *Id.* at 303.

⁶⁰ *Id.*

⁶¹ *Id.* at 304.

⁶² *Id.*

Reilly describes a classroom exercise in which students role-play a case in which they must manage the initial encounter of a client who is less than forthcoming in describing the mitigating circumstances of her case. The issue to be addressed in the exercise is fundamentally about 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. Reilly argues that using a role play strategy, in which students assume identities outside of their own, is “generally effective in providing students with a license to experiment with behaviors they might not feel comfortable displaying “in their own skin” or when playing themselves.”⁶³ The exercise, properly implemented, is ultimately about teaching “students the nuts and bolts of *connecting* with another person during an interview, a conversation, or a negotiation.”⁶⁴ In the psychodramatic approach proposed, 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.”⁶⁵ 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 insights which are gained in the properly presented psychodrama directly provide the experiential *connecting* which Reilly describes as being important to the development of the critical emotional intelligence of the practicing lawyer.

Reilly argues that classroom activities which focus on building emotional intelligence have immediate benefit to the students, but also to the profession as a whole. 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.⁶⁶ They also broaden students’ overly analytical orientations, reduce their adversarial tendencies, and address their shortcomings in interpersonal relations and emotional intelligence.⁶⁷ 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”⁶⁸ which makes the profession, and its practitioners, more accessible. Psychodrama similarly achieves the goals and benefits which Reilly espouses.

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, the prudent author would have to give the disclaimer and warnings that frequently accompany the use of psychodrama both in therapy and litigation exercises: care must be exercised by the director to not allow the situational experiences of the drama go too far. It would be easy for a participant to live out their own intensely personal traumatic tales in the guise of an experiential learning exercise, thereby re-victimizing and re-traumatizing participants with past family crises. 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

⁶³ *Id.* at 305.

⁶⁴ *Id.* at 306.

⁶⁵ Cole, *supra* note 28, at 18.

⁶⁶ Reilly, *supra* note 52, at 308.

⁶⁷ *Id.* at 309-10

⁶⁸ *Id.* at 310.

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.