

# Washington University Journal of Law & Policy

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Volume 39 *New Directions in Negotiation and ADR*

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2012

## Deeply Contacting the Inner World of Another: Practicing Empathy in Values-Based Negotiation Role Plays

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### Recommended Citation

Jennifer Gerarda Brown, *Deeply Contacting the Inner World of Another: Practicing Empathy in Values-Based Negotiation Role Plays*, 39 WASH. U. J. L. & POL'Y 189 (2012), [https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol39/iss1/7](https://openscholarship.wustl.edu/law_journal_law_policy/vol39/iss1/7)

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# Deeply Contacting the Inner World of Another: Practicing Empathy in Values-Based Negotiation Role Plays

Jennifer Gerarda Brown \*

## I. INTRODUCTION

Teachers of law are preparing students to be peacemakers—or, at least, to facilitate peace by helping clients resolve conflict in particular ways. Much of the curriculum in law school focuses on resolving or preventing conflict in courts, legislatures, and administrative agencies. In dispute resolution classes, we strive to broaden students’ understandings of the mechanisms, models, and norms by which they can assist their clients to resolve conflict.

I have come to believe that if we take this peacemaking business seriously, our job as legal educators is not only to teach students the doctrine, theory, and practical skills associated with lawyering, but also to help our students grow into healthier, happier,<sup>1</sup> “better” human beings. Our job, in other words, can sometimes include nurture of their growth not only intellectually, but also socially, emotionally, and (dare I say it) morally.<sup>2</sup>

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1. See generally Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999).

2. Kathy Abrams and Hila Keren have analyzed the “ambivalent reception” that greets the growing field of law and emotion. Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2033 (2010). Abrams and Keren conclude that this chilly reception stems from a failure to appreciate the “pragmatic potential” of “thorough interdisciplinary investigation of the emotions”; such investigation, they argue, can aid in “normative thinking about the law: either about its amelioration or about its role in shaping the affective lives of its subjects.” *Id.* at 2041; see also Kristin B. Gerdy, *Clients, Empathy, and*

Legal educators who focus on students' emotional growth have strong justifications for their pedagogy. Lawyering is difficult.<sup>3</sup> The practice of law is often taxing intellectually, and lawyers must withstand many pressures: the demand for billable hours, complex and often narrow specializations, and competition from other lawyers (not only in the U.S. but in an increasingly global market for legal services). Lawyers must often handle difficult people in difficult situations.<sup>4</sup> Clients, judges, opposing counsel, and sometimes members of their own firms or legal teams can make demands that require an integrated response, one that combines intellectual rigor and precision with emotional sensitivity and accuracy. These demands can wear on lawyers in many ways, and those with "emotional intelligence" complementing their technical legal knowledge are often better able to exercise the professional *judgment* that integrates multiple facets of the presenting problems.

The foundation and most of the structure for students' emotional health and growth is already laid by the time they enroll in law school. Families of origin, friendships and romantic relationships, various forms of community engagement, recreational activities, and faith communities are likely to exert greater influence on the social and emotional lives of law students than a few law professors ever could.<sup>5</sup> Prior experience with individuals, groups, and institutions will

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*Compassion: Introducing First-Year Students to the "Heart" of Lawyering*, 87 NEB. L. REV. 1 (2008).

3. Cf. SCOTT PECK, *THE ROAD LESS TRAVELLED* 15 (anniv. ed. 2003) (famous first sentence: "Life is difficult"). Peter Reilly surveys the development of interpersonal skills training in legal education, noting that

[I]n 1955, Harvard Law School Dean Erwin Griswold called upon the bar and the legal academy to recognize the need for human relations training in law school. Griswold said that such training could help lawyers better understand their own emotional needs and that of their clients . . . .

Peter Reilly, *Teaching Law Students How to Feel: Using Negotiations Training to Increase Emotional Intelligence*, 21 NEGOTIATION J. 301, 308–09 (2005) (citation omitted).

4. Reilly, *supra* note 3, at 309.

5. See Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 GA. ST. U. L. REV. 385, 391 (1992) (noting disputes about whether "such basic behaviors as cooperation and caring can be learned later in life"). Coincidentally, just a few days before turning in this draft for the roundtable discussion, I received an email from Fred Pryor Seminars promoting a seminar on "Developing Emotional Intelligence." See Fred Pryor Seminars, *Developing Emotional Intelligence*, FRED PRYOR SEMINARS AND CAREERTRACK, [http://www.pryor.com/mkt\\_info/seminars/desc/IQ.asp](http://www.pryor.com/mkt_info/seminars/desc/IQ.asp) (last visited Mar. 24, 2012).

have already determined, to a large extent, whether law students have the maturity and perception to process the emotions they or others feel.

But even if our influence is small, reasons abound to explore and use it wisely.<sup>6</sup> What if, in addition to core competencies such as writing, statutory interpretation, and case analysis,<sup>7</sup> we also developed a sense of core emotional competencies and set out, intentionally and thoughtfully, to teach those?<sup>8</sup> Peter Reilly has argued that Negotiation courses particularly “allow students the opportunity not only to analyze, but also to experience and feel (and perhaps even fuse into their own personalities and constitutions) the principles, theories, and concepts of negotiations, thereby training the students in understanding emotion and increasing their emotional intelligence.”<sup>9</sup> He therefore presents a “gentle plea” for law schools

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6. Dispute resolution classes, particularly, can give students the chance to integrate their emotional and social foundation with the skills, practices, theories, and new values that they acquire in law school. In my experience, all of these classes give rise to such conversational opportunities: Professional Responsibility, Negotiation, Mediation, and Dispute Resolution survey courses. I’m sure that my personal experience does not exhaust the list of courses in which this training is possible. Teachers of Therapeutic Jurisprudence, Client Counseling and Interviewing, Clinics, and Externship Seminars (back at school; not necessarily on site with the externship supervisor) suggest that these courses also provide similar opportunities for integrative conversation.

7. Prawfsblawg summarizes a key point of the *Carnegie Report* this way: “Lawyers are best taught through a curriculum that integrates the three pillars of doctrine, skills, and professional identity, rather than having a curriculum that focuses on doctrine, and treats the other pillars as ‘add ons.’” Jason Solomon, *What Did the Carnegie Report Say Anyway?*, PRAWFSBLAWG (Sept. 27, 2009, 3:38 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2009/09/what-did-the-carnegie-report-say-anyway.html>.

8. I am not the only one asking this question. Even as this Scholarship Roundtable met in St. Louis, Susan Daicoff held a call-in “Topic Meeting” in which she discussed “the soft skills of lawyering.” Susan Daicoff, (*S*)*Killing Me Softly: Unifying the “Soft Skills” of Law Practice and Legal Education (Synthesizing Leadership, Collaboration, Professionalism, Emotional Intelligence, Conflict Resolution, Problem Solving, and Comprehensive Lawyering)*, SANTA CLARA L. REV. (forthcoming). In the abstract for this talk Daicoff says that “[a] reevaluation of the competencies needed to be a 21st century lawyer, thus seems appropriate. Some even assert that it is time to decisively redefine both the role of the lawyer and the content of legal education.” *Id.* Daicoff continues: “Despite resistance to training in the ‘soft skills’ of law practice, such as human relations skills, there is empirical evidence that the soft skills of law practice are precisely those skills that differentiate the most successful lawyers from the rest of the pack.” *Id.*; see also WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW: SUMMARY 6 (2007) [hereinafter CARNEGIE REPORT SUMMARY].

9. Reilly, *supra* note 3, at 302.

to “make training in emotions, whether as part of a negotiations course or as a stand-alone course, a curriculum staple.”<sup>10</sup> I agree with Professor Reilly about the importance of emotions and the potential that Negotiation courses hold as a site for training in this area.<sup>11</sup> This Essay extends his thesis to discuss the relationship between negotiation pedagogy<sup>12</sup> and a particular aspect of emotional intelligence—empathy.

Theorists and practitioners seem to agree about the importance of this elemental—if somewhat elusive—competency. Yet, whether and how we can teach empathy continues to puzzle us. This Essay suggests one potentially fruitful tool for nurturing empathy: a series of role plays that Lawrence Susskind and I developed with David Kovick and Kate Harvey. These role plays, *Williams v. Northville*, *Ellis v. MacroB*, and *Springfield OutFest*, involve values-based disputes (“VBDs”) in which individuals with deep convictions and religious faith essential to their core identities find themselves in conflict with institutions perceived to be hostile to their beliefs, conflicting specifically about a policy or norm that guarantees LGBT equality.<sup>13</sup> These role plays convey important lessons about focusing

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10. *Id.*

11. My thesis is both narrower and broader than Professor Reilly’s. I am focused more narrowly because I will discuss empathy specifically versus emotional intelligence generally. But this Essay also seeks to extend or elaborate upon Professor Reilly’s work because while he promoted negotiation training generally for its potential to increase students’ ability to perceive, name, and channel emotion, I describe a specific intervention or type of role playing in which a particular emotional experience may be available to students. *See id.* at 303 (citing ROBERT K. COOPER & AYMAN SAWAF, EXECUTIVE EQ: EMOTIONAL INTELLIGENCE IN LEADERSHIP AND ORGANIZATIONS xiii (1998)).

12. Throughout this Essay, I discuss empathy in both negotiation and mediation contexts, and make few efforts to distinguish the two processes. While it is true that the presence of a mediator often makes a big difference (as, for example, when the mediator models empathy for the parties or leads the parties in exercises that help to develop and demonstrate the parties’ empathy for each other), the basic nature of empathy in the two contexts remains unchanged. Furthermore, because many teachers of negotiation use mediation role plays to convey specific lessons, I am focusing on three specific mediation role plays as potential vehicles for teaching empathy. It may also be possible to run these exercises without a mediator participant if a negotiation teacher wanted to maintain a strictly dyadic structure in simulations.

13. See generally app. 1 for a brief description of the characters and situations included in each role play. The role plays are based on three cases actually litigated in federal courts. I have used the three cases to illustrate the potential for mediation to help resolve these apparent clashes between “religious liberty” and “gay rights.” *See generally* Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty*, 95 IOWA L. REV. 747 (2010).

on values and identity, in addition to interests, in order to resolve even these deep, value-based disputes.<sup>14</sup>

This Essay adds some thoughts about the way values-based dispute simulations offer students a powerful opportunity to practice empathy. This practice comes simply in playing a character who is fully and sensitively drawn to be dramatically different from the student. In order to play the character with any kind of competence, the student must empathize with the character, must enter into his or her world view, and must respond to others' behavior as the character would.

At the end of this Essay, I share some reflections from students who have participated in such role plays. For now, however, let's consider one, because it vividly conveys the sort of experience that values-based role plays can provide in practicing empathy, especially for the students assigned to play characters very different from themselves:

What I generally remember thinking at the beginning was that while I am neither a mom, nor a religious person, nor someone who opposes recognizing same sex families, I could identify with the character's desire for parenting autonomy, and with her belief that she should be free to raise her kids according to her own values. When we started the role play, I noticed myself actually feeling resentful—hostile, even—toward the “administrators” who seemed convinced that their own worldview was the only correct one. As the exercise went on, it was easy to imagine how parents in this position would feel marginalized and upset that they were being treated or viewed like bigots when (in their minds, at least) they only wanted the freedom to control their kids' exposure to issues of genuine cultural controversy. I stopped seeing the character as backward and cranky, and instead felt some sympathy with

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14. These lessons are thoughtfully explored in an excellent teaching note prepared by Professor Susskind and a group of his students. See Lawrence Susskind et al., *Teaching about the Mediation of Values-Based and Identity-Based Disputes: Teaching Notes to Accompany Three Role-Play Simulations: Ellis v. MacroB, Springfield Outfest, and Williams v. Northville*, available at <http://www.pon.org> (last visited Apr. 19, 2012).

her desire to live in a more pluralistic society, where no one is forcing their values on anyone else.<sup>15</sup>

This student recently said that even a year after participating in the role play, “I still tell folks about the experience and how eye-opening it was.”<sup>16</sup> I believe it was stepping into the shoes of this “other” and, as Carrie Menkel-Meadow has put it, “taking the other person’s feet”<sup>17</sup> that so dramatically impacted this student. The purpose of this Essay is to theorize a bit about why experiencing the “other” in this way should be so powerful, and then modestly propose one specific intervention to create such learning experiences.

This Essay proceeds in several steps. Part II surveys a small piece of the prior wisdom about empathy, working through the sometimes confusing vocabulary to make clear the specific emotional phenomenon on which this Essay focuses. With some clearer picture in mind about the meaning of “empathy” for purposes of this discussion, Part III reviews some of the ways teachers, trainers, and practitioners<sup>18</sup> of dispute resolution have proposed to teach empathy in its various forms. Part IV focuses on simulation, describing several popular role plays that are touted vehicles for teaching empathy. I also discuss some recent critique of role plays as negotiation pedagogy. Part V focuses the discussion still more narrowly on the values-based role plays described above, the specific process that can occur when a student enters into role fully in these simulations, and the pedagogical payoff of such role plays for teaching empathy.

## II. EMPATHY: WHAT IT IS AND WHY WE CARE

Writers in dispute resolution have attempted to capture this elusive concept in various ways. Sometimes, the same word—empathy—is used to talk about different things (cognitive

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15. E-mail from Student “Mrs. Williams” to Jennifer Gerarda Brown (on file with author).

16. *Id.*

17. Menkel-Meadow, *supra* note 5, at 389.

18. I include practitioners on the theory that some approaches to mediation understand the mediator’s role to include assisting the parties in developing and communicating an empathic understanding of each other. *See id.* at 416 (describing “‘conceptual turn taking,’ role-playing, and the kind of interacting that occurs in legal mediation, all of which are structured learning experiences that enable us to see the position of the other”).

understanding vs. emotional connection and resonance). At other times, referring to what may be the same phenomenon, we use different words (“empathy” vs. “recognition”). This Part surveys some of the literature related to empathy, not only to observe the numerous and subtle ways that scholars have explored empathy, but also to gain clarity about the specific understanding of empathy that can enhance students’ emotional intelligence. I argue that in addition to cognitive, analytical forms of empathy, lawyers sometimes need affective empathy—an ability to enter into and resonate with the emotional reality of another.

The literature reflects two views of empathy, one cognitive and the other affective. As Kimberly Rogers and coauthors explain:

Empathy broadly refers to our reaction to the observed experiences of others. Previous investigators and theorists have taken two main approaches to the study of empathy. The first approach emphasizes “cognitive empathy,” which can be defined as the process of understanding another person’s perspective. The second approach emphasizes “affective empathy,” defined as an observer’s emotional response to the affective state of others. Recently, researchers have adopted a more multi-dimensional approach, acknowledging that both components are an integral part of empathy. This approach views the cognitive and affective components of empathy as two separate, but related constructs.<sup>19</sup>

Although cognitive empathy holds greater sway among scholars who write about empathy in legal disputes, I want to suggest that for *training* purposes, we should give students opportunities to practice affective empathy as well.

Affective empathy is an important piece of legal negotiation training for (at least) two reasons. First, the lawyer/client relationship can be strengthened when clients know that their lawyers not only understand the clients’ positions and interests, but also resonate with the clients’ feelings about the conflicts in which they are embroiled.<sup>20</sup>

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19. Kimberley Rogers et al., *Who Cares? Revisiting Empathy in Asperger Syndrome*, 37 J. AUTISM & DEVELOPMENTAL DISORDERS 709, 709 (2007) (citations omitted).

20. See Gerdy, *supra* note 2, at 7 (finding that surveyed clients place value on knowing



The client is likely to trust a lawyer who seems to be on her side, and that trust will open lines of communication essential to competent, problem-solving representation. Some measure of affective empathy, then, facilitates compassionate and *effective* lawyer-client relationships.

Second, and possibly more tentatively, I want to suggest that when people feel under siege, and when their deepest values and identities are at stake, resolution of related conflicts may become more possible when those people under siege feel not just understood, but affirmed in some small way. Even if individuals and the lawyers who represent them must ultimately reject or put aside the world view that animates opponents' positions in conflict, chances for resolution—for lasting peace—may increase if the opponents know that the other side has been willing to enter their world, see their perspective, and *feel* how important the issues are from that perspective. Some measure of affective empathy thus facilitates a lawyer's ability to resolve conflict with third parties.<sup>21</sup>

How then should we understand affective empathy? This “deeper”<sup>22</sup> sense of empathy emerges from the psychotherapeutic literature, and is what Judith Jordan describes when she writes that “[e]mpathy involves the capacity to perceive another's affective state, to *resonate with that emotional state*, and to gain some understanding or clarity about the other's subjective world.”<sup>23</sup> When we empathize with another, we allow ourselves to enter into a “sustained . . . immersing . . . in the experience of the other” so that “[a] genuine meeting of persons can occur.”<sup>24</sup> Leslie Greenberg and Robert Elliott write that “[e]mpathy involves *listening from the inside* as if ‘I am the other,’ as opposed to occupying an outside vantage point.”<sup>25</sup> In this

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that their lawyers care about them).

21. See Susskind et al., *supra* note 14, at 8 (noting a distinction between “cognitive understanding” and “empathic understanding”).

22. Depth functions as a metaphor, here, since it's not at all clear that emotions are deeper than thoughts.

23. Judith v. Jordan, *Relational Development Through Mutual Empathy*, in *EMPATHY RECONSIDERED: NEW DIRECTIONS IN PSYCHOTHERAPY* 343, 344 (Arthur C. Bohart & Leslie S. Greenberg eds., 1997) (emphasis added).

24. Arthur C. Bohart & Leslie S. Greenberg, *Empathy and Psychotherapy: An Introductory Overview*, in *EMPATHY RECONSIDERED*, *supra* note 23, at 3, 5.

25. Leslie S. Greenberg & Robert Elliott, *Varieties of Empathic Responding*, in *EMPATHY*

way, “[e]mpathy is the process of *deeply contacting the inner world of another*, being attuned to the nuances of feeling and meaning as well as the essence of another’s current experience.”<sup>26</sup> This “more or less immediate apprehension of [another’s] subjective world [requires] imaginative entry into the experience of the other.”<sup>27</sup> In this view, Greenberg and Elliott argue, empathy is “an affective form of understanding,” something one “feels rather than just understands intellectually;” thus empathy “does not depend on labored reasoning and differs from conceptual understanding.”<sup>28</sup> It is this understanding of empathy that Habib Chamoun and Randy Hazlett seem to adopt when they write about “mutual empathy, . . . ‘the experience of being known and accepted deeply by another, being aware of another being aware of you . . . among the most psychologically important human experiences.’”<sup>29</sup>

When we leave the realm of psychotherapy<sup>30</sup> and enter the world of legal dispute resolution, however, many writers shift away from understanding empathy as an affective process and establish a more analytical, cognitive function for empathy. Robert Mnookin, Scott Peppet, and Andrew Tulumello express this shift neatly: “[T]he best negotiators also have the capacity to demonstrate their understanding of the other side’s needs, interests, and perspectives—what we mean

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RECONSIDERED, *supra* note 23, at 167, 167–68 (emphasis added).

26. *Id.* at 168 (emphasis added).

27. *Id.* at 168–69.

28. *Id.* at 169. But when it comes to the verbal communication of empathy, Greenberg and Elliott start to echo Friedman and Himmelstein, as well as Mnookinian analyses: “At the core of empathic communication is communicated accurate understanding.” *Id.* at 175. But simply trying seems to go a long way: “[I]n many instances clients are quite satisfied simply with the sense that their therapist is trying to understand.” *Id.*

29. Habib Chamoun & Randy Hazlett, *The Psychology of Giving and Its Effect on Negotiation*, in RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE 151, 152–53 (Christopher Honeyman, James Coben & Giuseppe De Palo eds., 2009) (quoting Maureen O’Hara, *Relational Empathy: Beyond Modernist Egocentrism to Postmodern Holistic Contextualism*, in EMPATHY RECONSIDERED, *supra* note 23, at 295, 314).

30. I should add that the therapist’s office is not the only place where this view of empathy holds sway. The affective account of empathy seems to comport with lay understandings of the word. If wiki materials are any indication, the wisdom of the crowd is that empathy involves the “ability to co-experience and relate to the thoughts, emotions, or experience of another.” *Empathy vs Sympathy*, DIFFEN, [http://www.diffen.com/difference/Empathy\\_vs\\_Sympathy](http://www.diffen.com/difference/Empathy_vs_Sympathy) (last modified Feb. 14, 2012) (Diffen is an open, public, wiki site created and edited specifically to compare and contrast things).

by empathy.”<sup>31</sup> In the Mnookinian<sup>32</sup> view, “[e]mpathy does not require people to have sympathy for another’s plight—to ‘feel their pain.’ . . . Instead, we see empathy as a ‘value-neutral mode of observation,’ a journey in which you explore and describe another’s perceptual world without commitment.”<sup>33</sup> This cooler understanding of empathy could be interchangeable with “theory of mind,” another term used to describe “the ability to understand the feelings, intentions, and motivations of others.”<sup>34</sup>

Another concept closely related to cognitive empathy is “perspective-taking.” “Perspective taking assumes that individuals perceive the world from differing vantage points, and that because the experiences of each individual are to some degree dependent on his or her vantage point, messages must be formulated with this perspective in mind.”<sup>35</sup> In other words, a party engaged in perspective taking “communicate[s] a desire to understand accurately” in part by acknowledging that the world may look different to another person.<sup>36</sup> Like cognitive empathy, perspective taking facilitates communication and improves the quality and creativity of problem-solving.<sup>37</sup> And like empathy more generally, perspective taking requires some imagination. Robert M. Krauss and Ezequiel Morsella quote Roger Brown’s succinct summary: “Effective coding requires that the point of view of the auditor be realistically imagined.”<sup>38</sup> In order to express oneself effectively, in other words, one must imagine how the listener will react to what is being said, so that even as a person speaks, she

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31. ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 10 (2000).

32. If I am the first to coin the adjectival “Mnookinian,” I would like to suggest with all due modesty that this verbal innovation alone renders my paper a valuable contribution to the negotiation literature. I said all “due” modesty.

33. MNOOKIN ET AL., *supra* note 31, at 47.

34. Rogers et al., *supra* note 19, at 710 (noting the confusion that has arisen from the similarity between cognitive notions of empathy and theory of mind).

35. Robert M. Krauss & Ezequiel Morsella, *Communication and Conflict*, in *THE HANDBOOK OF CONFLICT RESOLUTION* 131, 137 (Morton Deutsch & Peter T. Coleman eds., 1st ed. 2000).

36. David W. Johnson, Roger T. Johnson & Dean Tjosvold, *Constructive Controversy: The Value of Intellectual Opposition*, in *THE HANDBOOK OF CONFLICT RESOLUTION*, *supra* note 35, at 65, 71–72.

37. *Id.*

38. Krauss & Morsella, *supra* note 35, at 137 (quoting ROGER BROWN, *SOCIAL PSYCHOLOGY* 242 (1965)).

listens to herself with the ears of another. Perspective taking is not automatic, however, and negotiators face significant barriers to this essential human capability, a problem to which we will return below.<sup>39</sup>

Like Mnookin and his co-authors, Friedman & Himmelstein articulate a cognitive view of empathy.<sup>40</sup> Enhancing the parties' understanding of their conflict and of each other is central to the mediation process; exploring feelings and making emotional connections—while important—is less crucial.<sup>41</sup> So, when discussing the extent to which a mediation will explore deeper levels of meaning, Friedman and Himmelstein write:

Whether this level of meaning will be explored is a function of three different questions: First, is the mediator personally open to this level of strong feeling, pain, fear, disappointment, hope, or longing that can accompany this deeper exploration? Second, are the parties capable of and willing to entertain this kind of conversation and the feelings that may come up? The very depth and strength of the conflict itself often pressures the parties to go to this level. Finally, does the atmosphere in the room feel safe enough for the parties to engage in this quality of inquiry?<sup>42</sup>

That such deeper exploration remains an option—only a possibility, and not essential—suggests the ways that Friedman and Himmelstein have conceived “understanding” to be a key to dispute resolution ingredient that can flexibly operate at various levels of emotional intensity. As they make clear, although it may be helpful, “[i]t is not indispensable to a successful mediation for the parties to understand

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39. See *infra* notes 124–27 and accompanying text.

40. See GARY FRIEDMAN & JACK HIMMELSTEIN, *CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING* (2008).

41. *Id.*; see also Chris Guthrie, *I'm Curious: Can We Teach Curiosity?*, in *RETHINKING NEGOTIATION TEACHING*, *supra* note 29, at 63 (“Good negotiators must understand their counterparts’ perspectives, interests, and arguments to do well at the bargaining table.”); ROGER FISHER & WILLIAM URY WITH BRUCE PATTON, *GETTING TO YES* 25 (Penguin Books 3d ed. 2011) (1981) (“The ability to see the situation as the other side sees it . . . is one of the most important skills a negotiator can possess.”).

42. FRIEDMAN & HIMMELSTEIN, *supra* note 40, at 132.

each other at an emotional as well as a cognitive level.”<sup>43</sup> I should not overstate the cognitive nature of “understanding” in their view, however, since they frequently advise that listening “has an inner life” and must occur “from the heart” and “from the [i]nside [o]ut.”<sup>44</sup> Friedman and Himmelstein’s approach to mediation is steadfastly focused on “the inner world of conflict.”<sup>45</sup>

Morton Deutsch similarly bridges the divide between affective and cognitive definitions of empathy, as he considers the multiple levels at which empathy might operate—levels that implicate both analytic and emotional processes: “(1) knowing what the other is feeling; (2) feeling in some measure what the other is feeling; (3) understanding why the other is feeling the way she does, including what she wants or fears; and (4) understanding her perspective and frame of reference as well as her world.”<sup>46</sup>

Carrie Menkel-Meadow, too, has articulated an integrated view of empathy, one that stresses the “feeling” aspect without sacrificing analysis.<sup>47</sup> Her work on altruism and lawyering focuses on *action* (altruism), but consistently acknowledges its relationship to feelings (empathy).<sup>48</sup> Menkel-Meadow explains:

Empathy is a form of understanding that includes both cognitive and affective bases of knowing but does not necessarily give rise to acts or behaviors. . . . In empathy, as distinguished from sympathy, we come to understand the situation of the other by experiencing her emotion and understanding her experience from her perspective, usually achieved by imagining oneself to be in the position of the other

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43. *Id.* at 112.

44. *Id.* at 70.

45. *Id.* at xxi.

46. Morton Deutsch, *Justice and Conflict*, in *THE HANDBOOK OF CONFLICT RESOLUTION*, *supra* note 35, at 41, 58.

47. *See* Menkel-Meadow, *supra* note 5, at 389.

48. *Id.* Menkel-Meadow says that “altruism is the action component of empathetic fellow-feeling.” *Id.* at 413. The relationship is not always causal, however; she also notes that prosocial acts may occur in the absence of fellow-feeling, and care does not always lead to altruistic action. *Id.* at 390.

(colloquially known as “standing in the shoes” of the other, to which I would add, by taking the other person’s feet).<sup>49</sup>

Menkel-Meadow thus establishes some key components of empathy for our purposes: it involves *feeling as well as understanding*, it requires *imagination*, and it puts the empathizing person “*in the position of the other*.”<sup>50</sup> Menkel-Meadow outlines a three-stage process for empathy: “*perception* or apprehending the situation of the other; *cognition* or understanding the meanings of the situation of the other; and *affect* or feeling the emotional content of the other’s experience, from her perspective.”<sup>51</sup>

In a closely related concept, “recognition,” one might read Robert A. Baruch Bush and Jay Folger’s work as staking out some middle ground between the intensely emotional work of therapeutic, affective empathy and the more analytic nature of cognitive empathy. Recognition, they write, is “the evocation in individuals of acknowledgement, understanding, or empathy for the situation and the views of the other.”<sup>52</sup> As Bush and Folger explain:

The field has (again, to some extent) used this dimension of the process to help individuals activate their inherent capacity for understanding the problems of others. Mediation has thus engendered, even between parties who start out as fierce adversaries, acknowledgment and concern for each other as fellow human beings. This has been called the *recognition* dimension of the mediation process.<sup>53</sup>

Some aspects of recognition echo the key qualities of empathy for our purposes. “Genuine appreciation of the other’s human predicament”<sup>54</sup> permits a party to “consciously [let] go of his own viewpoint” in order to “see things from the other party’s perspective.”<sup>55</sup> Bush and Folger elaborate:

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49. *Id.* at 389.

50. *Id.* (emphasis added).

51. *Id.* (emphasis added).

52. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 22 (1994).

53. *Id.* at 20.

54. *Id.* at 89.

55. *Id.* at 90.

The hallmark of a recognition shift is *letting go*—however briefly or partially—of one’s focus on self and becoming interested in the perspective of the other party as such, concerned about the situation of the other as a fellow human being, not as an instrument for fulfilling one’s own needs.<sup>56</sup>

Whatever the depth of a person’s empathic experience, what seems clear is that empathy requires imagination as well as perception. Even when we ask questions, listen carefully, and gather as much information from others as we can—both about how the world looks to them and how they feel about what they see—at some point we must take a leap of faith. We make an imaginative guess and attend to the feelings that our guess elicits in ourselves. In the words of Morton Deutsch, “[e]mpathic concern allows you to sympathetically imagine how someone else feels and put yourself in his or her place.”<sup>57</sup>

Many scholars and teachers of dispute resolution have recognized the importance of imparting lessons of empathy in order to enhance students’ effectiveness as counselors and negotiators. Menkel-Meadow, for example, begins with the lawyer-client relationship. She posits that lawyers who can empathize with their clients’ situations might arrive at better decisions, and with more consideration for the clients’ needs.<sup>58</sup>

As we move from the attorney-client relationship into disputes with other parties, the importance of empathy is well accepted. Among its benefits, commentators have noted that empathy:

- “opens channels of cooperativeness and willingness to explore different options;”<sup>59</sup>
- “enhanc[es] the creativity of the parties and the willingness to listen to what either party has to say in a negotiation;”<sup>60</sup>

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56. *Id.* at 20.

57. Deutsch, *supra* note 46, at 57.

58. Menkel-Meadow, *supra* note 5, at 411.

59. Chamoun & Hazlett, *supra* note 29, at 152.

60. *Id.*

- reduces attribution of negative outcomes to others' characters or intentions rather than circumstances beyond their control (fundamental attribution error);<sup>61</sup> and
- increases problem-solving while reducing retaliation.<sup>62</sup>

Empathy seems to be an “apple pie” proposition—only in rare cases do we find it problematic,<sup>63</sup> provided it is tempered with a clear sense of one's own interests and goals.<sup>64</sup> The controversy centers instead on whether empathy can be learned (and correspondingly, taught), and if so, whether and how we can create opportunities for such learning and teaching in dispute resolution courses. Thus, Part III considers some ways that dispute resolution scholars and practitioners have suggested that empathy—whether cognitive or affective—might be taught.

### III. TEACHING EMPATHY: CURIOSITY, IMAGINATION, AND IDENTITY

Before a student can experience empathy, some degree of emotional intelligence is required. The student must have “emotional perception,” an aspect of emotional intelligence that Peter Reilly describes as “registering, deciphering, and attending to emotional messages as they are expressed in facial expressions and voice tone.”<sup>65</sup> An emotionally perceptive person can “(1) identify emotions in [him]self; (2) identify emotions in other people; (3) express

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61. Keith G. Allred, *Anger and Retaliation in Conflict: The Role of Attribution*, in THE HANDBOOK OF CONFLICT RESOLUTION, *supra* note 35, at 236, 250 (citing Dennis T. Regan & Judith Totten, *Empathy and Attribution: Turning Observers into Actors*, 32 J. PERSONALITY & SOC. PSYCHOL. 850 (1975)).

62. *Id.*

63. I'm thinking here about cases of extreme violence, violation, and degradation; to ask a victim to empathize with the perpetrator of such crimes might aggravate the injury. On the other hand, even in these cases, some victims of atrocity have found the choice to understand and even forgive the perpetrator an empowering one. Thus, to note that empathy may be “problematic” is not to say that it is off-limits for discussion in those cases.

64. See FRIEDMAN & HIMMELSTEIN, *supra* note 40, at 55–57 (highlighting autonomy as a value in mediation; parties should not be so overcome with understanding the other side's story that they lose ownership of their own); Menkel-Meadow, *supra* note 5, at 409 (“Sharing in ‘fellow feeling’ might not be appropriate in cases where there is genuine moral opprobrium for the other side. Some criminal, civil rights, and environmental cases come to mind, where the adversariness and otherness is real and the two sides are morally opposed.”).

65. Reilly, *supra* note 3, at 303.



emotions accurately; and (4) discriminate between real and phony emotional expressions.”<sup>66</sup> Reilly suggests emotional training for law students to increase sensitivity to “the subtle signs of emotions in others—in their faces, voices, and postures.”<sup>67</sup> Professor Reilly’s general case for emotional intelligence is important, because empathy—feeling what another is feeling—is most helpful if a person is able to *name* the feeling and then make some sense of it (fold it into his own analysis of the situation and also, in some cases, communicate that feeling and understanding back to the person with whom he is empathizing). Thus, the competencies Professor Reilly wishes to promote are precursors to the empathy on which I focus here; we must increase people’s ability to notice and label what *they* are feeling before we can expect them to share “fellow feeling” with others.

Negotiation and Mediation theorists subscribing to the cognitive view of empathy have clear ideas about how such empathy might be modeled and nurtured between disputing parties. Mnookin and his co-authors, closely aligned with Friedman and Himmelstein, advocate “looping” to build empathy and understanding. This cognitive empathy can begin even before the parties are face to face. As Mnookin and his co-authors advise: “As you prepare [for a negotiation], if you can’t imagine how the situation makes sense from [the other side’s] point of view, that means you still need to acquire more information from him.”<sup>68</sup> Once the parties are in conversation, the key to building understanding is the “empathy loop,” which Mnookin and his co-authors describe in three steps: “(1) You inquire about a subject or issue[;] (2) The other side responds[;] (3) You demonstrate your understanding of the response and test or check that understanding with the other person.”<sup>69</sup> Friedman and Himmelstein formulate the mediator’s loop of understanding in four slightly different steps: “1. Understand each party[;] 2. Express that

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66. *Id.* (citing David R. Caruso et al., *Emotional Intelligence and Emotional Leadership*, in MULTIPLE INTELLIGENCES AND LEADERSHIP 55 (Ronald E. Riggio et al. eds., 2002)).

67. *Id.* at 310 (emphasis omitted) (citing as an example the sort of lie detection training Paul Ekman says is already available); see PAUL EKMAN, EMOTIONS REVEALED: RECOGNIZING FACES AND FEELINGS TO IMPROVE COMMUNICATION AND EMOTIONAL LIFE 15 (2003).

68. MNOOKIN ET AL., *supra* note 31, at 58.

69. *Id.* at 63.

understanding[;] 3. Seek confirmation from the parties that they feel understood by the mediator[;] 4. Receive that confirmation.”<sup>70</sup>

Bush and Folger give the mediator some responsibility for nurturing the parties’ perspective taking, which can lead to empathy and recognition. To do this, they say, mediators “reinterpret, translate, and reframe parties’ statements—not to shape issues or solutions but to help make each party more intelligible to the other.”<sup>71</sup> But the mediators’ work is not done at this point. Mediators then “ask parties to consider the significance of such reformulations, pointing out opportunities for recognition without forcing them.”<sup>72</sup> In this way, even as mediators are helping the parties to form shared understandings at the cognitive level, they are also fostering emotional connections: “Instead of dropping relational issues, mediators mine them for recognition opportunities.”<sup>73</sup>

Indeed, Bush and Folger describe something close to the Mnookinian “empathy loop” when they describe the way mediators create “openings, by asking the parties to talk about events or views of the other and then drawing on these statements to help explain one party to the other in a new way.”<sup>74</sup> As the mediator also “listens for and invites each party’s expressions of their own motives and sensitivities,” the mediator notes the way such expressions “call for response and recognition from the other.”<sup>75</sup> The mediator then “helps each to hear and respond to what the other is saying about how they want to be understood.”<sup>76</sup> The loop of understanding serves a teaching function; as the parties observe the mediator listening and gaining understanding about them as well as their opponents, the parties may begin to see how they, too, can understand the other’s perspective.<sup>77</sup>

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70. FRIEDMAN & HIMMELSTEIN, *supra* note 40, at 68.

71. BUSH & FOLGER, *supra* note 52, at 101.

72. *Id.*

73. *Id.*

74. BUSH & FOLGER, *supra* note 52, at 196

75. *Id.*

76. *Id.*

77. See FRIEDMAN & HIMMELSTEIN, *supra* note 40, at 109–13 (explaining how “the mediator’s understanding of the parties” can lead to “helping the parties to understand each other”).

On the affective side, ways of nurturing empathy may be more varied and slightly less systematic. Most fundamentally, Sandy and Cochran describe the genesis of empathy in early childhood. Young children learn empathy, they argue, through “*explicit modeling* by adults” (“adults behaving in ways they desire children to imitate”) and “*induction*” (“parents and teachers giving explanations that appeal to the child’s pride, desire to be grown up, and concern for others”).<sup>78</sup> One might ask whether lawyers representing clients and/or mediators intervening in disputes apply analogous measures to foster empathy and pro-social behavior in disputing parties. Sandy and Cochran note that as children develop, so does their capacity for perspective taking, and this in turn gives role playing and pretend play a greater potential for practicing the skills and modes of thought that help children in dispute resolution.<sup>79</sup>

As we move into adulthood, Deutsch observes that empathy “is most readily aroused for people with whom we identify, with those we recognize as people who are like ourselves and belong to our moral community.”<sup>80</sup> Conversely, “[e]mpathy is inhibited by excluding the other from one’s moral community, by dehumanizing him, and by making him into an enemy or a devil.”<sup>81</sup> Deutsch says that in order to do justice in conflict resolution, participants to a conflict must grant “full recognition of one another’s equal moral status.”<sup>82</sup> To train people in such “constructive” conflict resolution, we should undertake, among other tasks, “to enlarge the scope of the student’s moral community so that he perceives that all people are entitled to care and justice [and] increase the empathic capacity of the student so that he can sense and experience in some measure the injustice that the victims of injustice experience.”<sup>83</sup>

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78. Sandra V. Sandy & Kathleen M. Cochran, *The Development of Conflict Resolution Skills in Children: Preschool to Adolescence*, in THE HANDBOOK OF CONFLICT RESOLUTION, *supra* note 35, at 316, 325–26.

79. *Id.* at 335–36 (“Unlike young children, who have trouble getting outside their own identities, middle-years children can engage easily and independently in role plays, which require them to separate their own thoughts and actions from those of the characters they play.”).

80. Deutsch, *supra* note 46, at 57–58.

81. *Id.* at 58.

82. *Id.* at 55.

83. *Id.*

To achieve the first of these goals, enlarging the scope of the student's "moral community," Deutsch suggests an exercise in role reversal:

A good place to start is to help students become aware of their own social identities: national, racial, ethnic, religious, class, occupational, gender, sexual, age, community, and social circle. Explore what characteristics they attribute to being American, or white, or Catholic, or female, and so on, and what they attribute to other, contrasting identities such as being Russian or black. Help them recognize which of these identities claim an implicit moral superiority and greater privilege in contrast to other people who have contrasting identities. *Have them reverse roles*, to assume an identity that is frequently viewed as morally inferior and less entitled to customary rights and privileges. Then act out, subtly but realistically, how they are treated by those who are now assuming the "morally superior and privileged" identity.<sup>84</sup>

Such exercises, Deutsch argues, raise students' awareness of "implicit assumptions about their own identity as well as other relevant contrasting identities, [making students] more sensitive to the psychological effects of considering others to have identities that are morally inferior and less privileged."<sup>85</sup> Deutsch suggests "intergroup simulations" in which students develop and then discuss "prejudice, stereotypes, and hostility toward members of other competing groups" despite their awareness that group assignment is random.<sup>86</sup>

In tandem with exercises that mark lines of difference and explore the way prejudice and hierarchy can form along them, Deutsch suggests role playing to increase empathy: "Role playing, role exchanging or role reversal,<sup>87</sup> and guided imagination<sup>88</sup> are three

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84. *Id.* at 57 (emphasis added).

85. *Id.*

86. *Id.*

87. *Id.* at 58 ("Role exchange or role reversal is similar to role playing, except that it involves reversing or exchanging roles with the person with whom you are interacting in a particular situation (as during conflict).").

88. *Id.* ("In guided imagination, you help the student take on the role of the other by

interrelated methods commonly employed in training people to become empathically responsive to others.”<sup>89</sup> As Deutsch sees it, role playing involves “imagining that you are someone else, seeing the world through his eyes, wanting what he wants, feeling the emotions he feels, and behaving as he would behave in a particular situation or in reaction to someone else’s behavior.”<sup>90</sup> We shall return to Deutsch’s view of role playing below and see the way that values-based role plays create enhanced opportunities for this kind of imaginative work.

Closely related to imagination is curiosity, and Chris Guthrie<sup>91</sup> has noted the importance of curiosity in stimulating “exploratory behavior.”<sup>92</sup> Mnookin and his coauthors argue that empathy “requires genuine curiosity” and “cannot be easily faked with the insincere use of catch-phrases.”<sup>93</sup> To foster students’ curiosity, Guthrie suggests that teachers implement strategies that inject a sense of challenge and purpose into role play exercises. Teachers can challenge students to “identify concrete listening or understanding goals prior to participating in negotiation simulations or listening exercises,” such as “understand[ing] the other side’s perspective fully before she shares her own” or “identify[ing] every interest motivating the other side.”<sup>94</sup> When teachers debrief, Guthrie suggests, they should focus not only on substantive outcomes but also on information gathering to assess “the listening goals students set and their efforts to meet those goals.”<sup>95</sup> To increase students’ sense of purpose, Guthrie suggests, “[N]egotiation teachers should instruct students to identify, ideally in writing, the purposes they think listening carefully will serve.”<sup>96</sup>

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stimulating the student to imagine and adopt various relevant characteristics (not caricatures) of the role or person that is being enacted, such as how he walks, talks, eats, fantasizes, dresses, and wakes up in the morning.”)

89. *Id.*

90. *Id.* at 58.

91. Guthrie, *supra* note 41, at 63.

92. *Id.* at 65 (defining curiosity as “a desire to know, to see, or to experience that motivates exploratory behaviour” (quoting Jordan A. Litman, *Curiosity and the Pleasures of Learning: Wanting and Liking New Information*, 19 COGNITION & EMOTION 793, 793 (2005))).

93. MNOOKIN ET AL., *supra* note 31, at 64.

94. Guthrie, *supra* note 41, at 67.

95. *Id.*

96. *Id.* at 67–68 (such purposes could include getting a “better deal” or eliciting

#### IV. ROLE PLAYS: “THE QUICK AND THE DEAD”

In his plea for greater attention to emotional intelligence in legal education, Peter Reilly argues for greater use of simulation and role play as the chief vehicle for “active involvement, or experience, whereby the concepts and principles of emotional intelligence can be transformed from theory to practice.”<sup>97</sup> In theory, empathy should be one such “principle of emotional intelligence” that could be practiced in role plays. Yet, when we consider the vast array of traditional, existing negotiation role plays, we find much greater emphasis on cognitive empathy than affective empathy.<sup>98</sup>

Much of the debate about the value of role plays in negotiation pedagogy focuses on the effectiveness with which they convey substantive knowledge or specific skills.<sup>99</sup> In recent years, I have had a growing hunch that some of the most valuable lessons from negotiation role plays are not necessarily the ones described in the discussion leader’s guide as the theoretic or skill-based focus of the exercise. “Alpha-Beta Robotics,”<sup>100</sup> for example, is designed to teach students about the influence of culture on negotiation. In Alpha-Beta, students are assigned and confidentially instructed to apply negotiation styles that map many stereotypes about eastern or western

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information that might facilitate the creation of joint gains).

97. Reilly, *supra* note 3, at 305.

98. See app. 2 (an annotated bibliography of some popular negotiation role plays).

99. See Art Hinshaw & Roselle L. Wissler, *How Do We Know That Mediation Training Works?*, DISP. RESOL. MAG., Fall 2005, at 21 (examining the effects of mediation training on mediator performance and proposing ways to study the question further); Nadja Alexander & Michelle LeBaron, *Death of the Role Play*, in RETHINKING NEGOTIATION TEACHING, *supra* note 29, at 179; Noam Ebner & Kimberlee K. Kovach, *Simulations 2.0: The Resurrection*, in VENTURING BEYOND THE CLASSROOM 245 (Christopher Honeyman, James Coben & Giuseppe De Palo eds., 2010) (offering a spirited response to Alexander & LeBaron, including the insight that “[a]ny experiential method employed to fill the gap left in the instructional toolbox due to the critique on role-play needs to be subjected to the same examination that cleared this space”); Paul Kirgis, *Hard Bargaining in the Classroom: Realistic Simulated Negotiations and Student Values*, 28 NEGOTIATION J. (forthcoming 2012); see also Anne Scully-Hill, Paul Lam & Helen Yu, *Beyond Role Playing: Using Drama in Legal Education*, 60 J. LEGAL EDUC. 147, 150 (2010) (“Reading relevant plays and observing dramatic presentations of lawyers . . . [s]tudents can learn empathy and the ability to see the social or human implications of their work.”).

100. This role play was created by Professor Thomas Gladwin, University of Michigan School of Business, and appears in RUSSELL KOROBKIN, NEGOTIATION THEORY & STRATEGY, TEACHERS MANUAL AND SIMULATION MATERIALS 275 (2002).

approaches to negotiation. However, the instructions do not use the terms “eastern” or “western.” Instead, the negotiation styles are described as “Alphan” or “Betan,” using descriptive phrases such as: “show emotion easily, exuberantly and rapidly” and “confident and optimistic,” on the one hand and “behave patiently,” and “emphasize reserve and modesty” on the other. Students are supposed to observe the way these styles affect the parties’ communication and ability to reach an agreement in a cross-cultural deal-making negotiation. Unfortunately, a stereotypical east/west dichotomy is often salient for students performing this exercise—so salient, in fact, that students will read a geographic & cultural subtext in the instructions. For example, one group of my students assigned to the formal, passive, and patient style greeted their counterparts by bowing. Notwithstanding the fact that the cultural stereotypes originate in the students (and possibly the instructor) rather than the role play instructions per se, students seem reluctant to draw many lessons about cross-cultural negotiations from instructions that so transparently resonate with cultural stereotypes.

I continue to use the exercise, however, for a different reason: as Alpha-Beta provides students an opportunity to play a personality, style, or culture very different from their own, it causes them to rethink their ordinary negotiation style. After Alpha-Beta, they reexamine their assumptions about power, passivity, and proactivity. In some measure, their empathy for contrasting negotiation styles may be increased.

When teaching Alpha-Beta, I sometimes “cast” students against type in the passive or aggressive roles, assigning brash and assertive students to the patient, indirect style and putting more reticent students into the aggressive style.<sup>101</sup> Responsive papers to this “casting” can be quite insightful. For example, an assertive male student, assigned to negotiate in a passive, patient style, wrote:

I think I am who I am. If that means I fall into peoples’ stereotypes then it is what it is. What I thought was most

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101. It helps to teach this exercise later in the semester, after I’ve had a chance not only to observe students in role plays and debriefing, but also to read their written responses to their role play experiences.

interesting about the past Alpha /Beta exercise was that I was forced not to be the aggressive person. I liked it. I really got to see a method that could really work for me. I think you ... stereotyped us[,] then forced us not to act according to our stereotype in that last exercise? If that was not your intention that is the way it seemed from my perspective. I am not mad about it[;] I really did enjoy it. I was able to not follow my stereotyping.<sup>102</sup>

A cooperative female, assigned to the aggressive style, found it surprisingly easy to adapt to her role (and, interestingly, applied an additional lens of gender to the experience):

In our [negotiation] class . . . I have not directly experienced gender bias. However, in the beginning of the Alpha/Beta game, I had to force myself to be assertive (more “male”). As the exercise played out, though, and I began to feel provoked, I found myself behaving differently. Our “Eastern” opponents repeated “we don’t think that’s fair” and “that would be difficult.” The frustration caused by their indefinite responses and refusal to say what would be fair or to present a solution of their own made playing my assigned competitive, aggressive role easier. I doubt that anyone would have complimented me on acting like a lovely, little lady.<sup>103</sup>

Part of what occurs is that the Alpha-Beta role play allows students to step out of their own skins, if only briefly. In debriefing discussions, students have remarked that the exercise allowed them to tap into feelings and styles that had not previously seemed accessible. It also gave them insights into the ways other negotiators may have seen their ordinary negotiation and communication styles (whether assertive or passive, competitive or cooperative) in prior negotiation role plays. This perspective taking by explicitly leaving their usual position and taking up that of other negotiators proved valuable for the balance of the semester.

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102. Student Response Paper (Mar. 23, 2009) (on file with author).

103. Student Response Paper (Mar. 23, 2009) (on file with author) (Interestingly, this student attributes both gender and cultural identities to the two contrasting negotiation styles).



Casting students against type runs counter to advice from some negotiation trainers. For example, Nadja Alexander and Michelle LeBaron assert, in a reconstructed conversation about negotiation pedagogy, “I never ask participants to assume a role that is not their own.”<sup>104</sup> Alexander and LeBaron warn that for some students, “taking on others’ identities may be perceived as disrespectful and nonsensical.”<sup>105</sup> The imaginative aspect of role playing that I find so valuable, these authors find problematic: “it literally takes people ‘out of their skins’ into a synthetic situation that may have little relevance to their lives.”<sup>106</sup>

Alexander and LeBaron present a valuable critique of role plays. Clearly, if participants take their roles “too far” so that they are playing a caricature rather than the living, breathing person they have imagined, even the lesson in empathy is degraded.<sup>107</sup> If the role play is written poorly or superficially, so that the character seems “contrived,” it will be difficult for many participants to “experience much connection” to their roles or to “play them authentically.”<sup>108</sup> I agree with Alexander and LeBaron that we should “[d]esign role plays that are as close to real life as possible, drawing on composites of actual scenarios or real issues so that the simulation has an air of authenticity.”<sup>109</sup> The value-based role plays described below follow just this strategy. They are based on research I conducted using pleadings, court opinions, press materials, blogs by the parties, and even interviews with disputants and their lawyers to heighten the

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104. Alexander & LeBaron, *supra* note 99, at 181. Is it ironic (or is it just me) that a plea for real-world-based negotiation training entitled “Death of the Role Play” begins with a reconstructed dialogue?

105. *Id.* at 182.

106. *Id.* at 183. Alexander and LeBaron see a potential benefit in “participants becoming at least a little more familiar with their inner terrains.” *Id.* at 182. They recognize some benefit in the “spice,” and stimulation that role plays lend. *Id.* at 184. But with grave doubts about the extent to which role plays enhance “concept learning, analytical skills and real life skills transfer,” the authors see more value in role plays as entertainment than pedagogy. *Id.* at 185–86.

107. *Id.* at 186.

108. *See id.*

109. *Id.* at 192–93; *see also* Noam Ebner & Yair Efron, *Using Tomorrow’s Headlines for Today’s Training: Creating Pseudo-Reality in Conflict Resolution Simulation-Games*, 21 NEGOTIATION J. 377 (2005).

multi-dimensional aspects of the characters involved.<sup>110</sup> I do not believe (nor do I think the authors suggest) that such “actual scenarios” must *always* be similar to situations participants deal with in the wider world.<sup>111</sup>

I also agree with Alexander and LeBaron that we should guard against stereotyping in writing and performing role plays.<sup>112</sup> But I disagree with their assertion that students should never be assigned to play “ethno-cultural identities different from their own.”<sup>113</sup> Students can feel a deep resonance with a character who exists outside the student’s lived experience.<sup>114</sup> Alexander and LeBaron acknowledge the opportunities in perspective taking that role plays can provide.

But Alexander and LeBaron’s rationale for improvisation rather than strict adherence to a script—itself a perfectly legitimate guideline for role-playing—betrays, again, some distrust of simulations that draw students too far from their own authentic core. They advise that teachers should “[e]ncourage improvisation . . . so that *participants draw on their own experience and behave as they would themselves, given the context . . . [to] enhance the realism of the experience.*”<sup>115</sup> Even Noam Ebner and Kimberly Kovach, defending role plays against Alexander & LeBaron’s critique, agree that “simulations can be much more realistic if the participants are instructed to ‘be themselves’ and act and react as if the situation described actually happened to them.”<sup>116</sup>

In Part V, I explain why role plays that draw students out of “themselves” and into a character quite different from themselves can increase empathy.

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110. See Brown, *supra* note 13, at 755.

111. Alexander & LeBaron, *supra* note 99, at 186.

112. *Id.* at 193.

113. *Id.*

114. Sometimes role playing outside personal experience can be valuable. Alexander and LeBaron suggest that teachers of negotiation should “[t]ake advantage of roles that participants may know through interaction, but not from inside another’s moccasins.” *Id.* at 194 (e.g., police officers playing unemployed youth or managers playing line workers).

115. *Id.*

116. Ebner & Kovach, *supra* note 99, at 259.

### V. ROLE-PLAYING IN VALUES-BASED DISPUTES

Precisely because they touch upon deeply held values, opinions, beliefs and traditions, values-based disputes can challenge students in ways we do not generally find in many standard role plays. Tort, contract, real estate and even family law based fact patterns may permit students to mold the characters to their own personalities, values, and styles. Even if at some level students believe that the characters they are playing have behaved wrongly or foolishly, they nonetheless can assume that most other aspects of the character are consistent with their own values, emotions, or viewpoints.

Values-based role plays are less conducive to such mirroring for most students. Because the central conflict may be about education, sexuality, religion, public protest, or parenting, and because one or more of the characters holds a firm and very deep conviction about the specific issue, the characters are less likely to be molded into the normal range of law student history or experience. I have argued that in the “real world,” these values-based disputes are ripe for mediation.<sup>117</sup> Here, I want to extend this thesis to educational contexts and posit that for many of the same reasons that these disputes are appropriate for mediation, they are also good teaching and training tools for students of Negotiation. As a mediator might work with the parties to process the apparent clash of identities and values in the cases, so too a teacher can work with students to explore and experience emotions, opinions, or perspectives and values *in role* that the students would not necessarily share in their ordinary lives.

Let’s recall Morton Deutsch’s description of role plays, particularly as they relate to exercises that combat prejudice and work to enlarge a student’s moral universe. Deutsch suggests that through role playing, a student can imagine that he or she “[is] someone else, seeing the world through his eyes, wanting what he wants, feeling the emotions he feels, and behaving as he would behave in a particular situation or in reaction to someone else’s behavior.”<sup>118</sup> But Deutsch also noted the value of role reversal as a pedagogical tool for

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117. See generally Brown, *supra* note 13 (arguing that mediation may be optimal for resolving certain “paradigmatic” cases that pit gay rights against religious liberty).

118. Deutsch, *supra* note 46, at 58.

increasing empathy and enlarging a student's "moral universe."<sup>119</sup> Role plays of values-based disputes combine these elements. They require some (not all) students to imagine that they are someone else and see the world through his eyes. Because so much public discourse around these values-based disputes is extremely polarized—the student may have a chance to take this imaginative journey into the mind and heart of someone who exists “on the other side” in the real world. This sort of character is much more foreign—more dramatically “other”—for the student who must play him. The student must more fully surrender his own values system and, at least for the hour or two that the role play continues, adopt the values of his character.

This practice is valuable, for as Lawrence Susskind and his students have argued, “even in disputes not worth calling ‘values-based,’ values and identity are often present in the sense that the parties’ interests often connect to deeper values or identities that are never articulated.”<sup>120</sup> They view role plays as opportunities for mediators to guide disputants in dialogue that increases “understanding . . . without asking them to change what they believe.” Susskind and his co-authors note that such dialogue can pursue “cognitive” understanding “in which a party is better able to see and describe the other person’s point of view,” and a second, more “empathic” understanding that “leads parties to a greater sense of trust and decreased level of defensiveness.”<sup>121</sup> Susskind and his co-authors advocate for this second, empathic understanding as a goal in mediating values based disputes—and I agree. They say: “The point is not to transform the parties’ identities or values, but rather for the parties to engage with each other’s beliefs.”<sup>122</sup>

Just as mediating such disputes “puts a human face on previously faceless enemies,”<sup>123</sup> so too portraying a character can help a student

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119. *Id.*

120. Susskind et al., *supra* note 14, at 4.

121. *Id.*; *see also* Brown, *supra* note 13, at 801–02.

122. Susskind et al., *supra* note 14, at 8.

123. *Id.* (“After participating in the humanizing experience of listening to others’ voices and expressions of their concerns, it is often difficult to view those people simply as monsters.”) (citing JOHN FORESTER, *DEALING WITH DIFFERENCES: DRAMAS OF MEDIATING PUBLIC DISPUTES* (2009)).

see and feel the essential humanity in a person who might previously have seemed odd at best and an enemy at worst. This can be true no matter how deeply the conversation in negotiation delves into underlying values.<sup>124</sup> Simply by portraying a character whose positions differ from the student's own, and by articulating the character's reasons with as much conviction as the student can muster, the process of humanizing can occur.

The thesis of this Essay is that role playing in highly charged values-based disputes is a good way for students of negotiation to build their capacity for empathy and perspective taking. The greatest benefit comes to students who are assigned to play the role of a party whose beliefs are quite different from the student's own. When a student assumes the role of a person whose beliefs and values clash with her own, that student must surrender her own identity in some small way, must suspend her own self advocacy to advocate for the beliefs and values of the character she has been assigned to play. As she assimilates the general and confidential information of her character, the student begins to imagine what it might be like to think and feel as the character does. In order to play the role at all, the student *must* take the character's perspective.

This characteristic helps to address one of the chief problems with perspective taking—that is, that despite our innate abilities to empathize, we are often not very accurate in our intuitions about the thoughts and feelings of others.<sup>125</sup> Nicholas Epley and Eugene Caruso have identified the triple-A barriers that “keep people from using their perspective-taking ability to its full potential:” activation, adjustment for egocentric bias, and accessing accurate information. Epley and Caruso support their thesis with a review of experimental studies focusing on various failures in research subjects' perspective taking.

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124. *See id.* at 14 (“[F]ocus on letting students realize that not everyone holds the same values, and that not all stake holders will be willing to talk about their values. Playing one of the three games at multiple tables highlights these differences, since students will start with the same information but will presumably have different experiences, depending on how they interpret their roles.”).

125. Nicholas Epley & Eugene M. Caruso, *Perspective Taking: Misstepping Into Others' Shoes*, in HANDBOOK OF IMAGINATION AND MENTAL SIMULATION 295, 296 (Keith Markman, William Klein & Julie Suhr eds., 2008).

Epley and Caruso's analysis ably demonstrates the complexity of these barriers, and role plays are not a panacea. However, the values-based role plays possess characteristics that may address each of the barriers Epley and Caruso identify. First, as professors distribute roles, they can *activate* students' perspective taking, urging students to prepare for the negotiation by imagining how the situation looks and feels from the perspective of the characters they are assigned to play. Second, as the values-based role plays supply students with a rich description of each character's emotional response to the conflict, students are better able to *adjust* for egocentric bias; although the students may begin with an egocentric default (focusing on the question, "how would *I* respond to this situation?"),<sup>126</sup> the role play facts may challenge that default. In addition, if teachers distribute the instructions and confidential facts a few days before the negotiation is to be performed, students have sufficient time to adjust away from the egocentric inferences they are likely to draw under time pressure.<sup>127</sup> Finally, well-drawn facts in the values-based role plays can put some restraints on people's tendency to over-adjust from egocentric bias when taking the perspective of "others who are centrally defined by their dissimilarity to the self."<sup>128</sup> By creating a multidimensional character who is driven by multiple interests and values—not just the religious values or identity at issue in the dispute—the role plays may help students avoid the tendency to "overestimate the extent to which the beliefs of opposing groups differ from their own."<sup>129</sup> The third barrier to perspective taking, *accessing accurate* information about another, can cause perspective takers to "rely on stored knowledge about the target under consideration . . . [including] stereotypes."<sup>130</sup> This barrier may also be eased when a student is provided general and confidential facts that modify the more readily available information on which a student would otherwise rely: information about himself or herself, on the one hand (that egocentric bias again), or at the other extreme, mere

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126. *Id.* at 300–01.

127. *Id.* at 301.

128. *See id.* at 302.

129. *Id.*

130. *Id.* at 303.

stereotypes about a given group (e.g., “fundamentalist Christians” or “gay people”). Thus, although Epley and Caruso review a wide variety of experimental results suggesting that perspective taking often fails or goes astray, the values-based role plays are designed in ways that give students better opportunities to practice this skill than they will often encounter, either in real-world conflicts or in standard negotiation role plays.

Notwithstanding the challenges, students are surprisingly good at getting into and staying in role. Peter Reilly notes that role plays can elicit strong emotions in students, sometimes to their great surprise, even when the students are called upon to play characters very different from themselves. He cites as an example the simulation entitled “Charlene Walker,” in which students must play a low-income mother of three who works at night as an exotic dancer:

This negotiation, then, almost invariably intensifies quickly, with body language, emotion, and behaviors that frequently transition from play acting to “real life,” including anguish-filled facial expressions, vocal expressions of anger and exasperation, and even outright yelling.<sup>131</sup>

In the values-based role plays, students also report that they were able to adopt their characters’ beliefs with surprising ease, and once in role, found it jarring to return to the real world:

Emotions can be running high when the simulation comes to a close, only to have participants—some of whom were emotionally committed to their roles and others who may have taken on a role contrary to their personal beliefs—scatter and be forced to deal with their feelings and reactions on their own. I would vote for debriefs, even short debriefs, to be a mandatory part of each simulation, so that everyone can both come down off the emotional stimulation of the case and better process their opinions about the experience.<sup>132</sup>

A student in the Outfest mediation strongly identified with the anti-gay protestor party s/he played: “No one at the table seemed to truly

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131. Reilly, *supra* note 3, at 305.

132. Susskind et al., *supra* note 14, at 16.

hear what my interests were. This led me to feel that the City favored the OutFest organizers, particularly [when the other participants] pushed potential “solutions” that to me clearly failed to meet needs that I had already articulated multiple times.”<sup>133</sup>

Similarly, a student of mine who played the Father in *Williams v. Northville* had this to say about his experience:

I think what most strikes me now is the fact that I found it so easy to get into character, despite being in such strong disagreement with the views I was expressing. I think I was well aware throughout the entire role play of the repugnance (or so I saw it) of the position I held and of the things I was saying, but I was somehow able to block that out for the sake of winning<sup>134</sup> a favorable result for my side . . . fighting zealously for a position that did not reflect my own personal opinion, and that was in fact quite opposed to it.<sup>135</sup>

Sometimes, in order to humanize a character students find very different from themselves, they search for a deeper, more fundamental point of commonality with the character. The student I quoted at the beginning of this Essay, who played the mother in *Williams v. Northville*, eloquently expressed her efforts to find a deeper point of connection with her character; she identified this as a “desire for parenting autonomy, and . . . belief that she should be free to raise her kids according to her own values.”

A student’s own competitive instincts may come into play to spur her adoption of the character’s interests. For example, the student quoted above, who played the father in *Williams v. Northville*, compared his own competitive nature to that of the character:

Of course, it is possible that my intransigence may also have been the result of the nature of the character I was asked to represent, who, as I recall, was actually supposed to be

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133. *Id.* at 18.

134. My student insightfully connected this experience to the role of lawyers in dispute resolution processes: “In this way, even though the exercise was a mediation, it may also shed much light on other forms of ADR, such as arbitration or negotiation, where lawyers play an active role.” Email from Student/“Mr. Williams” to Jennifer Gerarda Brown (Nov. 19, 2011) (on file with author).

135. *Id.*



intransigent in real life. But what is interesting is that from my vantage point now, it's hard for me to separate out how much of the way I behaved in the role play had to do with being in character, and how much had to do with my competitive-lawyer instincts being given the chance to express themselves in a role that was well-suited to those instincts . . . . Related to this, I also can't help but recall the [Thomas-Kilmann Conflict Mode Instrument]. I remember being surprised that I scored on the über-competitive extreme of the spectrum. I don't see myself as a competitive person, and I think most people around me don't see me this way either. But perhaps the truth is that I've simply learned to manage those competitive instincts in most situations (or a more unsettling possibility: perhaps I've learned to appear reasonable and non-competitive to myself and others while not actually being so) and I only let my true colors show when it is socially acceptable, e.g. in role plays involving inflexible characters. How much did my personality have to do with the way I played the role? Interesting question, though I suppose I'm not the most objectively situated person to answer it.<sup>136</sup>

It seems possible that this student, like the student who played his spouse, was plumbing his identity for elements of commonality with the character he was called upon to play. While the student playing the mother found some imaginative overlap with her character in “a desire for autonomy,” the student playing the father found it in a competitive streak he imagined he might share with the character.

What interests me is that, as different from their characters' as both students felt their own substantive values to be, they both felt comfortable and fully committed to the role once the mediation began. And each found a way to empathize with a radically different character by first finding some dimension, some value or characteristic—even if somewhat abstract—on which they could experience a common ground with the character.

To create the potential for such experiences, teachers of negotiation need not take extraordinary measures. If the role plays

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136. *Id.*

come after a few weeks in the course and the enrollment is small enough, a teacher will already have some sense of the students in the class, their general approach to negotiation, and perhaps also some of their values. This knowledge will allow the teacher to assign some students to characters with world views different from those the students have expressed. I present the role plays for what they are: negotiations or mediation of values-based disputes; I do not emphasize empathy when instructing the students. I do encourage students to be careful and thoughtful when playing their characters, to avoid stereotyping and to read the materials thoroughly so that they can gain a better sense of what might be driving the character's interests and values in the dispute.

Similarly, when debriefing, the points about empathy are easy to elicit in the context of discussions about the parties' interests and values. As part of that discussion, it is easy to pull the focus momentarily away from the *characters'* emotional states to ask the students what *their own* thoughts and feelings were as they encountered the characters they would play, how their impressions evolved as they prepared for the role play, and how their feelings continued to change and sometimes intensify once they found themselves at the table playing their roles.

This, as it turns out, may be excellent practice for the real world. Experiences like this provide significant exercise, however brief, of the student's "empathy" muscles. Just as physical fitness regimes build strength and endurance under somewhat artificial conditions, readying the athlete to lift heavy objects or run distances in "real world" situations,<sup>137</sup> so too practicing empathy in values-based negotiation exercise may build in students a capacity for many of the key elements of empathy: perspective taking, curiosity, imagination, and compassion.

In this way, the values-based role plays differ from standard role plays. Often, those simulations focus on skills. The payoff of values-based exercises, in contrast, may be less about something students do

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137. Consider yoga: no one in the real world finds opportunities to assume a "half moon" or "eagle" pose in the ordinary course of the day, but people do trip on sidewalks and need balance, which is practiced in such poses so that it begins to kick in automatically (when you fall off the sidewalk).

or skills they acquire, and more about something the students *become* when they are in role. To adopt this alien character and values system students must shuffle and even displace their own perspective and values.

Values-based negotiation role plays may do this more effectively than standard (commercial, tort, real estate) role plays. In those contexts, it is easy for students to imagine the character they play as being, at core, similar to themselves. In role, the students essentially play themselves in the context of a new challenge or legal circumstance. Rarely do general or confidential facts of standard negotiation role plays go deep enough to displace a student's own identity. If we are to credit the analyses of scholars like Ebner, Kovach, Alexander, and LeBaron (and I think we should), this may be by design. When the chief lesson of a role play is skill acquisition, allowing students to "be themselves" while negotiating will better train their focus on the matter at hand, such as setting a valid reservation price, generating creative options for resolution, or discerning the interests of the negotiation counterpart.

When the point of the exercise is building a student's capacity for empathy, on the other hand, changing character may be beneficial, and standard negotiation role plays provide few opportunities for such work. Occasionally, it is true, a character may be divorced, gay, disabled, or financially troubled in ways that may feel quite alien to a student assigned to play the role.<sup>138</sup> Such exercises are valuable for challenging the student to imagine how it might feel to be gay, divorced, or disabled, etc., and to see the ways that might affect the party's interests and goals in the negotiation. Still, the student can remain safely within the realm of her own psyche—her emotional, spiritual, or social background and composition can be transplanted into the mind and heart of the character whose sexual orientation, marital status, or financial condition differs from her own.

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138. I heard a great story from the Houston Mediation Competition in November, 2011, where a big, burly man played the role of a young woman, a former beauty queen sickened by an erroneous prescription following plastic surgery. With great sincerity and passion he repeated several times during the mediation, "a girl has a right to feel pretty," and everyone stayed entirely in role. Email from Carolyn Kaas to Jennifer Gerarda Brown (Nov. 12, 2011) (on file with author).

When, in contrast, the character's "deeper" interests and goals—her understanding of God, religion, scripture, and people's relationship to God and each other—are very different from the student's, something more challenging arises. The student must set aside her own worldview to make room for a character's understanding of the universe and the meaning of life. When a student undertakes the role of someone dramatically different from herself, she engages in empathy—both cognitive and affective—simply by playing the role. She hears herself speaking for the character, articulating that person's "information and perspective,"<sup>139</sup> and sometimes, to her own great surprise, she experiences emotional reactions (anger, resentment, gratitude, or pain) triggered by her imaginative entry into that character's inner world. These are the seeds of empathy.

#### VI. CONCLUSION

It has been said that "you don't make peace with a friend; you make peace with an enemy."<sup>140</sup> Although people who repeat this may use the words "friend" and "enemy" in a literal way (think Middle East or South Africa), this aphorism may hold some truth in smaller scale and far less violent contexts as well. In conflict, when beliefs, memories, values, and goals are seemingly inconsistent, our counterparts may appear to us foreign indeed, an inscrutable and confusing source of irritation, thwarting our desires and denying our needs. They may even become the "enemy" in the microcosm of our interpersonal or institutional conflicts. To resolve such conflicts, we must "make peace" with this "enemy."

To train law students to be peacemakers, we should raise their emotional intelligence, and an important part of that goal is enhancing their capacity for empathy—cognitive and affective. This Essay discussed one tool in this larger project. Values-based negotiation role plays, because they create characters with deeply held convictions, provide opportunities for students to experience

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139. See Johnson, Johnson & Tjosvold, *supra* note 36, at 72.

140. This truism has been uttered by a large and varied group of people, from Hillary Clinton to Moshe Dayan to Mac Maharaj.

conflict from the perspective of a person dramatically different from themselves. This “other”—someone the student might even identify at first blush as a sort of “enemy”—can be drawn in a sufficiently multi-dimensional way to inspire the student’s imagination. By imaginatively entering the world of the character, and then following through in words and actions, speaking for the character and responding to behavior of other participants in the conflict, the student can follow a fuller arc of empathetic understanding. Set aside any other teaching goal—forget about whether the case settles, the reservation price is exceeded, or creative options are generated. If nurturing the minds and hearts of our negotiation students is a task we are willing to undertake, then we might devote some time to this kind of imaginative travel in foreign, even “enemy” territory.

## APPENDIX 1

## OVERVIEW OF VALUES-BASED ROLE PLAYS

This overview simply quotes the description of each role play found in the PON teacher's package.<sup>141</sup>

Ellis v. MacroB

This is a five-person, non-scorable simulation focused on mediating values-based legal disputes; specifically, disputes involving potentially conflicting values and interests around issues of homosexuality and religious faith. This simulation focuses on a dispute between an employee and his/her employer, a large, privately-held software company. It also explores the role of attorneys representing their clients in negotiated agreements around values-based disputes. In this simulation, until recently Ellis was senior project manager at MacroB, a computer software company headquartered in California. The simulation begins after a dispute arose between Ellis and MacroB after the launch of a company-wide diversity campaign that featured a series of diversity posters, including one that read: "I am a gay man and I am MacroB." The posters were placed in employee work areas, including one located on the exterior wall of Ellis's cubicle. Ellis is devoutly religious in a faith tradition that holds that homosexuality is sinful and wrong, and Ellis was deeply disturbed by the poster. In response, Ellis posted several Bible scripture verses on the inside wall of his/her cubicle that included quotations that condemned homosexuality and predicted dire outcomes for those who engaged in homosexual acts. When asked to remove them by management, Ellis refused. The issue was elevated to the company's Diversity Manager, P. Geer. After several meetings with Geer, Ellis offered to remove the passages if MacroB removed its posters depicting homosexual employees. After several meetings and no agreement, Ellis was given a

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141. Program on Negotiation at Harvard Law School, [http://www.pon.org/catalog/product\\_info.php?products\\_id=468](http://www.pon.org/catalog/product_info.php?products_id=468) (last visited Feb. 11, 2012).

week off with pay to reconsider, and MacroB removed the Bible verses that Ellis posted. Upon returning to work, Ellis reposted all of the Bible passages and refused to remove them. During multiple meetings, the conversation between Ellis and Geer deteriorated, and when it became clear that Ellis would not remove the passages, Ellis was fired for insubordination. At the urging of a mutual legal professional, Ellis and MacroB have reluctantly agreed to speak with a mediator. After hearing from both parties, the mediator, Cheney, believes that some consensual resolution might be possible. The simulation begins at the point where Ellis, Geer, and their attorneys have convened with the mediator, Cheney.

#### Williams v. Northville

This is a five-person, non-scorable negotiation simulation focused on mediating values-based legal disputes, specifically disputes involving potentially conflicting interests around issues of homosexuality and religious faith. This simulation focuses on a dispute between a public school and parents over classroom discussions and materials depicting same-sex couples and their families. It also explores the role of attorneys representing their clients in negotiated agreements around values-based disputes. In *Williams vs. Northville*, Jim and Jan Williams are the parents of two elementary school children in the Northville Public School System. A dispute arose between the Williamses and the school system about materials in the school's diversity curriculum that presented homosexual relationships and families headed by same-sex couples. J. Williams asked the school principal, S. Smith, for advance notification anytime homosexuality, same-sex marriage, or families headed by same-sex couples would be raised in class, and that the Williams children be excused from class during these discussions. Principal Smith denied Williams' request, explaining that no parental notification was required to discuss homosexual families in class in this way. The Williamses filed a lawsuit against the school district in state court asserting a parental right to have their sons excused from the parts of the curriculum that were contrary to their religious beliefs. The

judge in the state trial court resolved the legal question raised by the Williamses in favor of the school district, holding that parents do not have the right to restrict what a public school may teach their children. This simulation begins at the point where the Williamses have filed an appeal of the lower court's decision. Prior to oral argument in the case, the administrator of the appellate court mediation program has urged the parties to attempt to mediate the dispute.

#### Springfield Outfest

This is a six-person, non-scorable negotiation simulation focused on mediating values-based legal disputes, specifically disputes involving conflicting views and values regarding homosexuality and religious faith. This simulation focuses on a dispute between two private organizations and a city over speech rights that will or won't be granted as part of a permit for a festival on city property. It also explores the role of attorneys representing their clients in negotiated agreements around values-based disputes. In Springfield OutFest, Springfield Pride is a local advocacy organization that supports the city of Springfield's sizeable lesbian, gay, bisexual, and transgender (LGBT) community. Springfield Pride's largest event of the year, by far, is the OutFest, an annual street festival permitted by the city of Springfield to celebrate National Coming Out Day, to and support and affirm LGBT identity. In addition to drawing large, supportive crowds, the festival also attracts members of the public who oppose the message of the festival and LGBT lifestyles in general. One group in particular, Salvation Now!, is a nationwide network of grassroots religious and social campaigners who seek to bring their religious message directly to those they consider to be living sinful lifestyles. The local Salvation Now! organizers have been a regular and increasingly visible presence at the OutFest over the past several years, including last year. Salvation Now! members arrived at the OutFest, megaphones at the ready, and began broadcasting a message that many at the festival found offensive and hateful. Springfield Pride had organized a human buffer of numerous volunteers, who were



prepared to shield the crowd from the protesters. The volunteers carried massive signs to block the signs of the protesters and blew whistles to drown out their megaphones. As tensions mounted, the police arrested several Salvation Now! members for refusing to follow police instructions and disrupting the peace. Although these criminal charges were eventually dropped, the confrontation dampened the festival atmosphere and attracted quite a bit of unfavorable media attention to the city of Springfield and the OutFest. The simulation begins one year later. Springfield Pride has just submitted its permit application for this year's upcoming OutFest. Fearing either an escalation of last year's confrontation or legal liability and court challenges, the city has requested a meeting with all parties to try to agree on some parameters and rules before this year's festival.

## APPENDIX 2

A BRIEF AND ARBITRARILY SELECTIVE ANNOTATED BIBLIOGRAPHY  
OF TRADITIONAL NEGOTIATION ROLE PLAYS EXPLORING  
“EMPATHY”Eazy’s Garage

An exercise exploring the tension between empathy and assertion. Can be played with two participants (lawyers only) or four (two lawyer/client pairs). Does involve long term relationship so more emotional empathy work to do, possibly, when clients are there but not much when just the lawyers.

Energy Assistance

PON site says Version II of this game, in contrast to Monroe Energy Assistance Game I, “forces the parties to deal with fundamental disagreements over values. The parties have to find some way of dealing with their ideological differences, not just differing economic interests.” But this game is constructed as a series of transcripts from earlier hearings, which the participants are supposed to discuss. I’m not entirely clear on whether they are also meant to play, in role, the characters they are assigned who are experiencing this values clash.

Camilia Pictures

Although the PON Clearinghouse site lists one of the issues raised by this exercise as “the tension between empathy and assertiveness,” it is clearly using these terms in the Mnookinian sense, since the Camilia pictures negotiation is conducted by lawyers for the parties. The “empathy” experienced and expressed here is therefore likely to be more of the “understanding” variety, a cognitive rather than emotional process.

DONS Negotiation

Another PON simulation designed to raise issues of ethics and principal/agent tensions. Students assigned to play characters

with secrets to hide and questionable behavior in their pasts may find it difficult to empathize with their characters.

Commonwealth v. McGorty

A plea bargain negotiation between two prosecutors, a public defender, and an alleged rapist designed to raise principal/agent issues. As the PON website states, “It should be noted that this case involves highly sensitive issues and that one-quarter of the participants are asked to assume the role of an alleged rapist . . . [This] often makes for a provocative and memorable learning experience. At the same time, some participants may find the scenario upsetting. The Teaching Note contains suggestions for how to handle the emotional sensitivity of this case.”

Author! Author!

A dispute between three would-be screenwriters claiming credit for a movie script to which they all believe they made substantial contributions. Negotiators have wildly divergent views of the facts; they do not share common understandings about who should be involved (in the script development or the negotiation). Confusion about who is coming to the negotiation and the reason for their presence often jumpstarts emotional reactions.