

After Basic Mindfulness Meditation: External Mindfulness, Emotional Truthfulness, and Lie Detection in Dispute Resolution

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Prologue: My First Meditation Retreat With Len

Some years ago, our mutual friend, Carrie Menkel-Meadow, suggested Len Riskin and I talk about our shared interest in mindfulness meditation and negotiation. At the time, I had students sit quietly, eyed closed, get in touch with what was going on before a negotiation, write it out, and then crumple up the paper. It was a primitive form of meditation and journaling and, as I look back through research, not a very sound theoretical or empirically-supported way to help.² Eventually, mindfulness meditation and practices helped move me from my very primitive attempts at mindfulness to a very rich practice that helped transform my teaching, writing, and, really, my life. But that comes later.

In the beginning,³ Len invited me to my first serious meditation retreat. Gently, he advised me to commit fully to the retreat and to look deeply inside, not outside. He said retreats were silent. Indeed, to reinforce the inward focus, he said teachers would

¹ Professor of Law, University of Miami School of Law. Copyright 2006 by Clark Freshman. Direct correspondence to clark_freshman@post.harvard.edu. I am very grateful to Barbara Cuadras and Sue Ann-Cambell for their expert skill at gathering even the most obscure sources. I am also grateful to Brian Barrish for outstanding research assistance. Finally, I am grateful to my many teachers and colleagues, including Paul Ekman, Michael Wheeler, and Howie Cohn.

² From a theoretical point of view, Western science would call the throwing a way an attempt at suppression. And, as I've written elsewhere, suppression tends simply to bring the thoughts or feelings rebounding back with greater force. Clark Freshman & Adele M. Hayes, and Greg Feldman, *The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know From Research and the Implications for Improving Negotiation Outcomes*, 2002 J. DISP. RESOL.4, 66-68 [hereinafter, *The Lawyer-Negotiator*]. From a Buddhist point of view, this throwing away would simply be a form of aversion, one of the classic hindrances that gets in the way of seeing clearly. See, e.g., JOSEPH GOLDSTEIN, ONE DHARMA 68 (2002); see also Leonard L. Riskin *The Contemplative Lawyer: On the Potential Benefits of Mindfulness Meditation to Law Students, Lawyers and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 23, 26-29 (2002) (Riskin defines aversion as "a form of craving, with a negative valence").

³ Perhaps it is worth going back to how I first became interested in meditation. There are many wonderful stories of how people came to meditation from tremendous suffering. See generally SHARON SALZBERG, FAITH: TRUSTING YOUR OWN DEEPEST EXPERIENCE 7 (2002) (explaining a key Buddhist teaching that life inevitably involves the potential for suffering, and how meditation offers a path away from suffering). Well, my shoulder hurt, and I was terrified that I'd never work out again, my body would fall apart, no one would like me, I'd be completely, alone. Where I was living in West Hollywood, this would be a very reasonable response, even an apathetic one. Within Buddhist contexts, it would look a lot more like attachment and craving. Whatever label we use, I went to physical therapy. Eventually the physical therapist suggested yoga. It "worked" in that my pain went away, and I've continued to be able to exercise. Some years later, my favorite yoga teacher offered an introductory meditation class. It felt great! Soon I wanted to share this with my class, and then with other negotiation teachers, and then eventually the invitation from Len arrived.

tell me to avoid any contact, verbal or nonverbal, with others. As I walked, I should walk looking down and if, somehow, I saw someone else, I should avert my eyes.

Dutifully, I arrived at the retreat and, as soon as we sat to take our formal vows of silence, I was already looking deep inside. It was not always fun. As one meditation teacher later said, “Self-knowledge is never a pretty thing.” Soon, I found myself walking back to my room.. Along the way, not too mindfully, I saw my collaborator, psychology professor and clinical psychologist Adele Hayes. I imagine a smile might have formed, but I quickly looked away. The same scene repeated over the next day and a half or so. Finally, we had a break in the silence. I was so excited to hear how proud Adele would be of my commitment.

Not! She yelled, “What is wrong with you? Did I do something to upset you? You could at least tell me what’s going on.” Soon I came to a realization: I had gone so deep inside so early that I failed to hear that the teachers did *not* tell us to avert eye contact!

And therein lies the theme for my short piece today: the importance not just of looking inside, internal mindfulness, but being mindful of others, external mindfulness. In the classic text by the historic Buddha on mindfulness, he repeatedly emphasized both internal and external mindfulness.⁴ Although others often speak of “nonjudgmental acceptance” as mindfulness, I prefer Tara Brach’s positive formulation of “accepting absolutely everything about ourselves and our lives, by embracing with wakefulness and care our moment-to-moment experience.”⁵ More specifically, it is noting our moment by moment changing thoughts, body sensations, and emotions.⁶ In more advanced forms, this may include awareness of concepts as well. In other words, we note how our experiences may reflect concepts rather than getting wrapped up in the details of our thoughts. On the first retreat, rather than having fantasies of what the next wonderful meal would be like, I would note “desire” – the most relevant Buddhist concept. And, for negotiators and others, it may include awareness of the arising of negotiation concepts.

⁴The classic Buddhist text on mindfulness in the Theravadan tradition, the tradition popular in Thailand and other parts of Southeast Asia, is the *Sattipatthana Sutta*. For one translation, see *Sattipatthana Sutta, The Foundations of Mindfulness* [hereinafter, “*Mindfulness*”] in THE MIDDLE LENGTH DISCOURSES OF THE BUDDHA 145 n. 143, at 1191 (Bhikkhu Nanamoli & Bikkhu Bodhi, trans., 2nd Ed, 2001). (translator’s note defining “internally” as “in . . . [one’s] own body” and “externally” as “the body of another.”

1191, at note 143

⁵TARA BRACH, RADICAL ACCEPTANCE: EMBRACING YOUR LIFE WITH THE HEART OF A BUDDHA 25(2003). Brach further explains that this “acceptance” means accepting the reality as reality. *Id.* at 25-26. It does not mean putting up with abuse, but rather leaves us open to skillful action. *Id.*

⁶ See *Mindfulness*, *supra* note 4; for a contemporary set of instructions, see, e.g., GAVIN HARRISON, IN THE LAP OF THE BUDDHA 35-39 (1994). For a relatively secular introduction to this style of mindfulness meditation, I recommend the tape and cd series of guided meditation by John Kabat-Zinn, the medical researcher who has shown the benefits of meditation for many disorders. Series three includes both shorter guided meditations, as brief as 10 minutes, and longer meditations. In addition, it includes meditations that both focus on changing events and those designed specifically to develop feelings of friendliness and goodwill (known as “metta”). <http://www.mindfulnessstapes.com/series3.html> (last visited Nov. 21, 2006). The variety of objects is particularly helpful since some people will resonate with some objects of meditation, such as the breath, and others with different objects, such as the metta phrases. This is consistent with both Buddhist teaching on meditation and contemporary medical advice. See, e.g., Clark Freshman, Adele M. Hayes & Greg C. Feldman *Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support*, HARV. NEGOT. L. REV 67, 71-73 (2002) [hereinafter, “*Adapting Meditation*”].

In particular, this may include our bargaining tendencies, such as tendencies to competing, avoiding, positional bargaining, and so on.⁷ As I recently sat to negotiate the terms for a new teaching position, I could drop back from the details of salary and courses, and note “comparing” and “competing” as those tendencies arose.⁸ For present purposes, I focus on external mindfulness of emotions, thinking, and bargaining tendencies, such as competing, avoiding, and so on.

Section one below explains how external mindfulness gives us another way to test what I call the myth of negotiator personality: the belief we always negotiate in some fixed way, such as competitive, cooperative or avoidant. Section one also offers other benefits of external mindfulness. Section two presents methods to develop external mindfulness, contrasting the traditional Buddhist methods with modern, simple, and empirically-supported methods. Section three addresses the question Carey’s *Liar-Liar* and Jack Nicholson’s *Few Good Men* asked: Can we handle the truth of external mindfulness? Or, as both the movies and some economic theories canvassed by Ian Ayres suggest, would we better off not knowing?

Part 1: The Myth of Negotiator Competition

A quick preview: despite the popularity of labels for ourselves and others as competitors, avoiders,⁹ and so on, much evidence suggests that *many* of us vary our

⁷ *Id.*

⁸ Although Len does not make the connection explicit, scholars familiar with more modern theories, might understand mindfulness meditation as pragmatism in practice. We name the paradigms and schemas through which we see experience. For a review of the way through which we always see experience through our own paradigms, see STEVE WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (U. OF CHICAGO PRESS, 2001); *Were Pat Williams and Ronald Dworkin Separated At Birth?* 5 COLUM. L. REV. 1568 (1995) (discussing how racial and gender stereotypes may shape the way Posner views works by women and persons of color).

⁹ See, e.g., RICHARD G. SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 9 (2d ed. 2006) ((advising negotiators to ask themselves “what moves come most naturally and comfortably” as if the any given negotiator felt comfortable with the same moves even in vastly different situations). Andrea Schneider undertook a far more ambitious project to survey lawyers and ask them to self-report how they rated themselves on a wide variety of characteristics reflecting many different negotiation theories. Andrea Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOTIATION L. REV. 143, 162 (Spring 2002). In principle, this permits a computer model to identify which characteristics tend to exist together rather than prejudging the relationship between the concepts. *Id.* This is a vast improvement over prior research.

At the same time, such research may lead people into the dangerous assumption that people’s negotiating behavior will be the same in different negotiations. This assumption differs from the dominant social psychological perspective and research that people’s behavior tends to reflect contexts more than personality traits. Indeed, psychologists now label the tendency to think of behavior as best explained by stable traits rather than circumstances as the fundamental attribution error. See, e.g., Maureen O’Sullivan, *The Fundamental Attribution Error in Detecting Deception: The –Boy-Who-Cried-Wolf-Effect*, 29 PERS. & SOC. PSYCH. BUL. 94, 94 (2003) (the fundamental attribution error is “the tendency, when forming impressions of others, to overestimate the importance of dispositional factors (e.g., sociability or aggressiveness) in the person being judged and to underestimate the importance of the situation in which the observed behavior is occurring (e.g., a party or job interview).”). Although the research may therefore be unhelpful to the extent it supports the idea that individual negotiators always negotiate the same, that was not the purpose of the study. Rather, it attempted to show, and persuasively did, that many lawyers are not adversarial, and they are still effective. *Id.* at 167 (those lawyers with a problem-solving approach were rated more effective by their peers than those with an adversarial approach). Likewise, Melissa Nelken’s recent study of student responses to negotiator style show that most law students do not have a competitive

negotiating approaches in different circumstances. Often these different circumstances track predictable responses to our emotions. More on that later. But first a confession: I love labels, too. I know my sign, my Buddhist personality type, my anagram type, and if I see some checklist of some other “type,” I’ve got my pen out right away. I don’t think I’m alone. I think I have good company. There is often a tension between our instinctual pull to labels and our intellectual ability to question them. Our attachment¹⁰ to labels of negotiator personality hurts us. In part, it hurts us simply because it is not accurate. People behave differently in different circumstances; when we assume they always act the same, we make dangerous mistakes.¹¹ As detailed more below, this includes believing lies and disbelieving the truth.¹² Most of us¹³ negotiate in different ways under different circumstances. Of course, *that* level of generality does not help much.

But scientific study shows a more precise connection: we negotiate in different ways when we experience different emotions. As I’ve explored in depth elsewhere, an entire constellation of studies shows that our behaviors vary with emotions.¹⁴ Partly our emotions affect our *strategies*. When we have positive emotions, most of us tend to negotiate more cooperatively; When we have negative emotions, we tend instead to negotiate more competitively.¹⁵ Partly our emotions also affect our *perceptions*. When

style – even at a law school purportedly competitive. Melissa Nelken, *The Myth of the Gladiator and Law Students’ Negotiation Styles*, 7 CARDOZO J. DISP. RESOL 1(2005)

¹⁰ I use the term “attachment” advisedly. In Buddhist thought, attachment is the clinging to anything, including any clinging to fixed views of ourselves. See JOSEPH GOLDSTEIN, *ONE DHARMA: THE EMERGING WESTERN BUDDHISM* (2003) (134). All such clinging eventually causes stress or suffering. *Id.*

¹¹ See, e.g. O’Sullivan, *supra* note 9.

¹² One of the reasons why people in general are so poor at catching liars is they act as if generally trustworthy people always tell the truth and others never tell the truth. the more that we think people are simply liars, rather than seeing that people lie at times, the worse we are at catching liars. *Id.* at 1325 (“So the tendency to judge other people on the basis of enduring traits, rather than situationally relevant states, is one of the reasons most lie catchers are so inaccurate . . .”).

¹³ A caveat: at least one negotiation study suggests that some people, those who score high on Machiavellianism, tend always to compete, and other people, those who score high on wanting social acceptability, tend always to cooperate. Joseph P. Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies*, 74 J. Pers. & Soc. Psychol. 565, 570-74 (1998); see generally Joseph P. Forgas, Robert Johnson & Joseph Ciarrochi, *Mood Management: The Role of Processing Strategies in Affect Control and Affect Infusion*, in PERSONAL CONTROL IN ACTION: COGNITIVE AND MOTIVATIONAL MECHANISMS 155, 156 (Miroslaw Kofta, Gifford Weary & Grzegorz Sedek eds. 1998)

¹⁴ See e.g., Alice M. Isen, *On The Relationship Between Affect and Creative Problem Solving*, IN AFFECT, CREATIVE EXPERIENCE, AND PSYCHOLOGICAL ADJUSTMENT 3, 3 (Brunner/Mazel 1999) (“A growing body of research indicates that positive affect is associated with greater cognitive flexibility and improved creative problem solving across a broad range of settings.”) Some, however, believe there is evidence that positive emotion, or positive emotional traits, such as types of optimism, may lead one to less accurate judgments. See e.g. Martin F. Seligman, *Learned Optimism* 291 (1990) (optimism “may sometimes keep us from seeing reality with the necessary clarity”). Of course, to further complicate matters, there are times when less accurate judgments may lead to better health! Shelley E. Taylor et al., *Psychological Resources, Positive Illusions, and Health*, 55 AM. PSYCHOL. 99, 106-07 (2000) (“The ability to remain optimistic, even unrealistically optimistic, in the face of deterioration . . . appear[s] to be physiologically protective”); Shelley E. Taylor, *Positive Illusions: Creative Self-Deception and the Healthy Mind* (Basic Books Inc. 1989).

¹⁵ Forgas, *supra* note 12.

we have negative emotions, we have a less accurate picture of what others want. Allred, for example, found that those made angry during a negotiation tended to have less accurate views of the goals of others than those who were not angry.¹⁶ Of course, perceptions and strategies feed each other. The more we think others have antagonistic interests, the more we feel competitive.

Whatever the pathway, even mild emotions not only trigger different aspects of our personalities but they also affect our bottom line success. In particular, when it comes to all but the most rote tasks, we generally do better when we have more positive emotion and worse when we have more negative emotion. And it doesn't take much: Stanford Business School students who saw a short "funny" video – one of a talk by Apple's Steve Job – got better negotiation results than those who saw a deadpan video by GM's head.¹⁷ Fellow hypochondriacs take note: Columbia medical school professors reached quicker and faster diagnoses when they received chocolate first.¹⁸

So it pays to be happy, and it costs to be angry, but what is to be done? Elsewhere I've suggested we try to promote our own happiness, and how the mindfulness that people like Riskin teach helps with this in at least three ways. First, as new research continues to show, mindfulness itself increases happiness and the predisposition to happiness.¹⁹ Second, internal mindfulness lets us learn what puts us in a good mood. Chocolate may put Columbia doctors in a bad mood, but it may put those of us predisposed to migraines in a rather foul mood.²⁰ Third, internal mindfulness lets us know when our emotions may be efficient for negotiating. Awareness of our own positive emotions may tell us we are in a kind of sweet spot, much as the sweet spot of a tennis racket is the best place for many shots.²¹ And awareness of our negative emotions may reveal what Ekman calls a "hot spot" of negative emotion or strained thinking. This is often not the best time to act, or even to think.²²

External mindfulness helps us avoid the risks that my first meditation retreat exposed. We may be aware of our own moods but fail to notice the emotional landscape

¹⁶ See e.g., Keith G. Allred et al., *The Influence of Anger and Compassion on Negotiation Performance*, 70 *ORG. BEHAV. & HUM. DECISION PROC.* 175, 181 (1997).

¹⁷ Roderick Kramer et al., *Self-enhancement Biases and Negotiator Judgment: Effects of Self-esteem and Mood*, 56 *ORG. BEHAV. & HUM. DEC. PROC.* 110 (1993)

¹⁸ Alice M. Isen, Andrew S. Rosenzweig & Mark J. Young, *The Influence of Positive Affect on Clinical Problem Solving*, 11 *MED. DEC. MAKING* 221 (1991)

¹⁹ See, e.g., Freshman, Hayes, and Feldman, *Adapting Meditation*, *supra* note 6, at 74-75 (reviewing evidence that meditation is associated with less depression).

²⁰ Alice M. Isen, Andrew S. Rosenzweig & Mark J. Young, *The Influence of Positive Affect on Clinical Problem Solving*, 11 *MED. DEC. MAKING* 221 (1991). So, too, music that puts some people in a good mood may not affect others in the same way. At informal meetings of the United Nations Security Council, diplomats began playing music at the beginning of each session. Barbara Crosette, *Stop The Music, Envoy Says*, *N.Y. TIMES* (New York, NY) A10 (June 12, 2001). At least one diplomat was not amused, asking the Council to "stop such jokes." *Id.*

²¹ Freshman, Hayes, and Feldman, *The Lawyer-Negotiator as Mood Scientist*, *supra* note 2 at 70-75 (discussing shorter and longer term strategies to either adapt behavior to predictable effects of emotions or change emotions themselves).

²² Paul Ekman, "Lies and Emotion," *forthcoming in EMOTIONS REVEALED* (2nd ed. 2007) (manuscript on file with author).

of others. This then raises the question for the next section: how can we develop the external mindfulness of the emotions of others.

Part Two: External Mindfulness and the Science of Emotional Recognition

Historic Buddhist texts recognize the importance of emotional mindfulness, but modern science supplies our best tools. As I mentioned above, the key Buddhist text on mindfulness does indeed mention the importance of mindfulness of other's emotions and thoughts. How does one develop that? One leading translation drops a simple footnote: the original understanding was that other forms of intense concentration and spiritual practices would lead to . . . psychic powers!²³ To be fair, however, the calming quality of mindfulness may improve our awareness of others to the extent it lowers our own negative emotion. Less negative emotion may mean less distortion and projection of our own fears onto others. Still, this may reduce distortion but not give us much more insight into other's emotion or their motivations. After all, *sometimes* we may negotiate in response to our fears and projections. As Twain said, "Some of the worst things in my life never happened."²⁴

Decades of research by Paul Ekman offers both research and a simple teaching tool. Decades of observation and study of emotion in different cultures, including the United States, Japan, and even Papua New Guinea led Ekman to several conclusions. First, all individuals, even in different cultures, share seven basic emotions.²⁵ This includes one positive emotion of happiness, and seven negative emotions (sadness, anger, contempt, disgust, surprise, and fear).²⁶ Second, each of these seven basic emotions often shows up in the face in similar ways across cultures. For example, as Darwin first observed, extreme sadness (or anguish, as Ekman calls it) often leads the inner eyebrows to curl up and towards each other, leading to a kind of horse shoe in the forehead.²⁷ Third, when emotions are concealed, either because individuals try to keep them from others, or because they don't recognize them for themselves, the emotions still leak out in

²³ *Mindfulness*, *supra* note 4 at 143 ("under the contemplation of feeling, mind, and mind-objects, the contemplation externally, apart from those possessing telepathic powers, must be inferential.").

²⁴ GOLDSTEIN, *supra* note 2, at 68.

²⁵ PAUL EKMAN, *EMOTIONS REVEALED* (2004)

²⁶ Ekman's earlier work identified all of these seven emotions except for contempt. See, e.g. PAUL EKMAN AND WALLACE V. FRIESEN, *UNMASKING THE FACE: A GUIDE TO RECOGNIZING EMOTIONS FROM FACIAL EXPRESSIONS* 1 (1975) [hereinafter, "UNMASKING"] Although all cultures share these seven basic emotions, there are ranges of agreement among individuals about how much various emotions are reflected in various faces. There is more agreement about happiness, for example, than fear. See, e.g. PAUL EKMAN AND WALLACE V. FRIESEN, *UNMASKING THE FACE: A GUIDE TO RECOGNIZING EMOTIONS FROM FACIAL EXPRESSIONS* 25(1975) (showing that over 90% of persons agreed a particular photo reflected happiness in the United States, Brazil, Chile, Argentina and Japan, but lower percentages of agreement on faces showing fear).

²⁷ EKMAN, *EMOTIONS REVEALED*, *supra* note 24, at 100 (expression of sadness leads to horseshoe in forehead).

very quick microexpressions of emotion.²⁸ These microexpressions last less than 1/5 of a second.²⁹

This research presents a challenge and an opportunity for external mindfulness. It is a challenge because the expressions of the emotion come and go so quickly that an individual might easily miss them. Indeed, when I show videos of Kato Kaelin at the O.J. Simpson trial at normal speed, people – at best – notice a crinkling in the nose. At a slowed speed, however, one sees a wrinkling of his entire face (eyes, lips, nose) that makes him look like some kind of gremlin. This is the classic microexpression of disgust that Ekman identified.³⁰

The opportunity comes from training tools for recognition of emotion. Ekman developed a CD that teaches the basics of recognition of these seven emotions with examples at very quick speeds.³¹ Research shows even an hour of training improves recognition of emotion.³² As widely reported, numerous government agencies, including TSA now use his methods to recognize emotion.³³

As with internal mindfulness, external mindfulness does not deliver perfect results in every instance. Many of us, particularly those of us who do not meditate, associate meditation with pure relaxation and escapism. But internal mindfulness really sheds a light on whatever is arising in our minds and bodies, and that is not always a pleasant thing. It may often be a useful thing because it may tell us when we are in a state where action would might not be wise. As Len’s teacher suggests, mindfulness may give us a wedge of awareness where between our impulses and our actions.³⁴ So, too, with external mindfulness. We may recognize a positive emotion in others that may make brainstorming and delving into difficult issues appropriate. Or we may glimpse anger brewing that suggests a time for a break or some other intervention.

External mindfulness also faces the challenge of ambiguity and change. When we see an emotion, we know it is there, but not why. My favorite kind of emotion to recognize is contempt. This emotion of judging shows up as a distinct half smile.³⁵ I remember telling my therapist about something I read by Gottman on emotion and couple’s counseling. And then I saw the expression of contempt flash on his face. I kept on with the comments, turned to something else, and it was soon the end of the session. I wondered: Was he feeling contempt for what I’d said earlier? Was I wrong about Gottman? Was it something else? So I asked – obliquely. “What do you think of Gottman by the way?” There was a brief pause. “Oh, *him!*” And soon I learned why he thought Gottman was overrated.

Just as we may not immediately know the source of an emotion, we may not know how it changes either. At one point, Ekman theorized people either had an intense

²⁸ EKMAN, EMOTIONS REVEALED, *supra* note 24, at 239 (microexpression represent conscious attempts to conceal emotion or unconscious emotions).

²⁹ EKMAN, EMOTIONS REVEALED, *supra* note 24, at 15.

³⁰ EKMAN, EMOTIONS REVEALED, *supra* note 24, at 182-86 (expression of disgust)

³¹ The CDs are available at paulekman.com.

³² PAUL EKMAN, TELLING LIES 130 (3rd ed.)

³³ Bernard E. Harcourt, *Search and Defend*, N.Y. TIMES, Aug. 25, 2006 (available at nytimes.com) (last visited Nov. 22, 2006).

³⁴ Riskin, *supra* note 2, at 86 (quoting his teacher Flickstein)

³⁵ EKMAN, EMOTIONS REVEALED, *supra* note 24, at 185 (expression of contempt)

emotions that faded quickly or mild emotions that came and went slowly. By looking at physiological measures of emotion, he discovered instead a more diverse landscape. People vary in four independent experiences of emotion: how quickly the emotion arises, how intense it gets at its peak, how long it lasts at its peak, and how long it takes to return to a baseline.

Even with all of these complications, external mindfulness presents several simple opportunities for negotiators. First, when we recognize certain negative emotions, like anger, we know to pause and assess. Anger presents problems whatever its source. As we saw, it may make people both more competitive and less accurate in their views of us.³⁶ And Gottman's research on couples – no matter what my therapist thinks! – suggests that signs of contempt are one of the “four horseman” that predict a breakdown in marriages.³⁷ So, too, we can expect contempt in a negotiation may be an important warning sign. Second, we may monitor whether the emotion seems to fade on its own. This may mean looking more vigilantly to see if other expressions of anger show up on the face. Or, we may try some particular intervention. With anger, for example, Ekman suggests we might sometimes recognize why circumstances might make someone angry.³⁸ In a negotiation, we might say, “I can imagine you might be very frustrated that we cannot make a larger offer.” Third, we need to use our external mindfulness to see if a particular intervention is working. If I followed Ekman's advice to name a potential source of emotion with my sister, for example, she might say, “Don't give me that understanding crap!” Or, like many, she might feel that, let anger brew. But often the face would reveal this, and we might try another tactic. The same vigilance to checking emotional reactions works with positive emotions. We might play some music in the background to set a certain tone but discover the silly love song we find so endearing reminds someone else of that bad relationship from the seventies.

External mindfulness *may* also lead to richer and more complicated payoff: identifying the truth and catching other negotiators at lies. In part, I like to say training may improve emotional truthfulness. We know more about the true feelings of others, and this alone has the predictable consequences (and opportunities) discussed above. Still many want to no about other kinds of truthfulness. One may distinguish several types of lies: lies about past activities, lies about feelings, lies about future intentions, and lies about opinions.

Each of these lies may matter to negotiators. We want to know about past acts that may affect value. We want to know about feelings that may affect our negotiations or our future interactions. We want to know about future intentions since so many people do not follow through on deals.³⁹ We may also want to know about opinions, such as what others really think about the value of objects.

³⁶ Allred, *supra* note 16.

³⁷ JOHN GOTTMAN, WHY MARRIAGES SUCCEED OR FAIL AND HOW YOU CAN MAKE YOURS LAST (1995) (describing research that shows marriages likely to fail when there are expressions of contempt).

³⁸ Paul Ekman, “Afterword,” to EMOTIONS REVEALED *supra* note 24 (afterword available at http://paulekman.com/pdfs/emo_rev_after.pdf) (last visited Nov. 22, 2006).

³⁹ Mike Wheeler of Harvard Business School is developing a fascinating teaching tool to study this. He has obtained permission from the Game Show Network to show excerpts from episodes of *Friend or Foe?* In that game, contestants in the final round get to split a money prize. At a certain point, each secretly, and simultaneously, gets to choose “friend” or “foe” by pressing a button. If both choose friend, they split; if one chooses foe, that one gets all the money; if both choose foe, neither get money.

If we really could use emotional awareness to sort truth from fiction, we might avoid much of this. Both the inefficiency and the emotional stress stem in large part from some combination of mistrust and deception. Simply put, negotiators may fake an interest in an item so that, when they “concede,” another party will concede even more on an item of real interests.⁴⁰ Economists call this strategic opportunism.⁴¹ To take a stereotypic example, fathers may say they are interested in custody only so mothers give up spousal support. In some instances, perhaps even in custody disputes, research suggests people may fear this more than it occurs.⁴² (And that leaves room for an exploration of internal mindfulness such as our own mistrust or vulnerability schemas.⁴³ A recent example: I received an email from a faculty member at a school considering hiring me. It said, in part, “We’ll do what we can at our end.” I thought, “Oh no, trouble: he’s preparing me for a soft landing.” But my partner read the same email and thought, “Sounds good.” The ending: the offer came.)

Without some way to check our fears and mistrust, they soon may themselves become a source of dysfunction. Our fear that we are being lied to may make us anxious, and this anxiety, and its accompanying negative emotions, may make us act more adversarial.⁴⁴ And our own behavior may bring out this exact kind of behavior in others.⁴⁵

Alas, the story of emotional awareness and lie catching is still in progress. In part, the story parallels much of the difficulties in extrapolating from spotting emotions to catching lies that Ekman has identified elsewhere. Ekman’s research shows that people who lie often betray emotions of fear (perhaps from fear of getting caught)⁴⁶ and disgust (such as disgust with themselves for lying).⁴⁷ Some people, such as manipulative liars like Hitler, also show a kind of repressed smile or what Ekman calls “duping delight.”⁴⁸ But these emotions do not perfectly track lying. First, some people do not show any such

⁴⁰ On this kind of strategic opportunism, and how lawyers with reputations for fair dealing may avoid this type of inefficiency, see Ronald J Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 520-522 (1994); DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND STRATEGIC GAIN* 29-45 (1986).

⁴¹ On this kind of strategic opportunism, and how lawyers with reputations for fair dealing may avoid this type of inefficiency, see Ronald J Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 520-522 (1994).

⁴² Scott Altman, *Lurking in the Shadow*, 68 S. CAL. L. REV. 493 (1993).

⁴³ On a brilliant guide to using Buddhist mindfulness practices together with awareness of our distorting cognitive schemas, see Tara Bennett-Goleman, *EMOTIONAL ALCHEMY: HOW THE MIND CAN HEAL THE HEART* 257-58, 301(2002)..

⁴⁴ When we experience even mild negative emotions, we are more likely to engage in competitive tactics, see J.P. Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies* 74 J PERS SOC PSYCHOL 565.(1998)

⁴⁵ On the way that our fears of behavior may make others behave in exactly this way, see Peter Kramer’s discussion of mutual projective identification. Peter Kramer, *SHOULD YOU LEAVE?: A PSYCHIATRIST EXPLORES INTIMACY AND AUTONOMY—AND THE NATURE OF ADVICE* 209-211, 221 (1997).

⁴⁶ EKMAN, *TELLING LIES*, *supra* note 30, at 134 (describing a pattern of eyebrow movement consistent with “sadness, grief, distress, and probably also with guilt). Ekman’s research shows this is difficult to fake and therefore, he hypothesizes, difficult to conceal. *Id.* at 134 n.*.

⁴⁷ EKMAN, *TELLING LIES*, *supra* note 30, at 79 (explaining that emotions of guilt, fear and delight may characterize lying).

⁴⁸ EKMAN, *TELLING LIES*, *supra* note 30, at 76-77 (describing the duping delight that people may feel when they think they are getting away with a lie).

emotion when they lie.⁴⁹ Second, people may feel these emotions for other reasons. In Shakespeare, Othello accused his wife of cheating and mistook her denials for an admission of guilt. Instead, she was simply afraid he would disbelieve her. Thus, Ekman cautions us not to make Othello's error.⁵⁰ With these caveats, emotion may still improve our odds of identifying the truth. Years of Ekman's studies show there's much room for improvement since nearly all of us do no better at chance at catching liars in his research. Indeed, as I write this, Ekman and his associates continue to train law enforcement, including TSA, in catching liars.⁵¹

Translating this to the negotiation context poses some challenges. By Ekman's definition, a lie does not include a misstatement if people think they have permission to lie.⁵² And Ekman says a classic example may include negotiations.⁵³ This goes beyond mere definitions. When people think they are playing by the rules, they may not leak out emotions like disgust in the same way.⁵⁴

Ultimately, how well external mindfulness may go from emotions to lies is an unfolding area of my own research. As I write this, Mike Wheeler of Harvard Business School and I are planning further research to look for expressions when individuals say things in negotiation that are not true – even if Ekman would not call them lies.⁵⁵

Part III: The Public Policy of External Mindfulness

So far we've seen how any of us who learn external mindfulness may do better for ourselves, but how does external mindfulness affect others? The short answer is often that positive emotions mean better results for all parties to a negotiation. Indeed, many of the research studies on emotion and negotiation, such as the study with Stanford business students, measure success by the joint gains of all parties, not by how well any given individual alone did.⁵⁶ Questions still remain about how external mindfulness may affect justice. Will those with emotional mindfulness simply learn how to exploit other parties more skillfully?⁵⁷ How will this affect the already poor results that many studies

⁴⁹ EKMAN, TELLING LIES, *supra* note 30, at 131-32 (“Not every individual who is telling a lie will show either a micro or squelched expression . . .”).

⁵⁰ EKMAN, TELLING LIES, *supra* note 30 at 170 (explaining the error occurs when people confuse mere stress with lying).

⁵¹ See text accompanying note 32.

⁵² EKMAN, TELLING LIES, *supra* note 30, at 28 (people who lie often show microexpressions of fear, disgust, or “duping delight”).

⁵³ EKMAN, TELLING LIES, *supra* note 30, at 70 (stating that a homeowner who does not reveal his true bottom line is not lying because it is implicitly “authorized” to ask one price, but have another secret price in mind).

⁵⁴ EKMAN, TELLING LIES, *supra* note 30, at 70-71 (explaining why people may not leak out guilt but might leak out fear).

⁵⁵ Wheeler and I will offer a version of this at the 2007 meeting of the ABA Section on Dispute Resolution meeting.

⁵⁶ Freshman, Hayes & Feldman, *supra* note 2, at 14 (reviewing emotion and negotiation studies that measure success by joint gains).

⁵⁷ In an analogous way, I have raised concerns that revealing discrimination in car sales, as Ian Ayres has done so precisely, may enable other dealers to discriminate as well. Clark Freshman, *Revisioning the Constellations of Critical Race Theory, Law and Economics, and Empirical Scholarship*, 55 STAN. L. REV. 2267, 2320 (2003). Ayres has acknowledged this problem; he concludes that whether it makes sense to reveal discrimination may depend on the possibilities of remedying the situation. Ian Ayres, *Is Discrimination Elusive?* 55 STAN. L. REV. 2419, 2431 (2003). He also suggests wise compromises, such as conducting

say women and minorities may receive in negotiations?⁵⁸ Ayres's models of negotiations with some minorities suggest they assume that African-American women may dislike and even fear negotiation.⁵⁹ Training salespeople in negotiation may give some women a better chance: those that don't betray fear in their faces may get sales people to offer them better prices. Or it may be an even more familiar story: all women may do badly, and some women may do even worse. This fits broader categories of injustice. For many minority groups, those who fit closer to a dominant ideal may do better.⁶⁰ So, too, it may mean that minorities and women must, yet again, try harder. Even if women succeed in masking emotions of fear when they negotiate, this is still an extra step that insiders like most white men need not take.⁶¹

So, too, one might ask whether it really helps to be aware of the negative emotion around us. I often joke in trainings before I reveal how to recognize contempt: "Beware," I say, "once you learn to see contempt, you will see it far too often." Perhaps, then, Ayres and other economists are correct that it may hurt negotiations when we know too much.⁶²

Some of these problems, of course, affect internal mindfulness as well. Even something as benign as internal mindfulness might be exploited. During World War II, for example, some Zen priests used training in concentration meditation to help kamikaze pilots stay focused as they attacked their targets.⁶³ So, too, one may, like I did on my retreat, go so far inward, that we lose touch with the feelings of others.

I like to think external mindfulness may instead more often work more fulfill the promise of Getting To Yes and other negotiation tactics for collaboration. As *Getting To*

testing by government but not publicizing the results. *Id.* Of course, even if training individuals in certain negotiation techniques does not advantage them over other *parties*, it may advantage parties at the expense of non-parties. To take an easy example, parties may be more creative and "create value" for themselves but shift costs onto nonparties, much as negotiators often try to game the tax system. J. Gillespie & Max Bazerman., *Parasitic Integration.*, 13 NEG. J.271 (1997).

⁵⁸ On the poor results of African-Americans in negotiations, see Ian Ayres, PERVERSIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION (2001); see also Clark Freshman, *Revisioning the Constellations of Critical Race Theory, Law and Economics, and Empirical Scholarship*, 55 STAN. L. REV. 2267 (2003) (discussing how both law and economics and other methods, including Critical Race Theory, may shed light on how minorities fare in negotiation).

⁵⁹ Ian Ayres, *Further Evidence of Discrimination in Car Bargaining*, 94 MICH. L. REV. 109, 137 (1995) (using statistical analysis of actual negotiation over car sales to show that African-American women may pay more for cars partly based on assumptions by dealers and/or salespeople that African-American women have higher negotiation costs, such as greater dislike for bargaining).

⁶⁰ *Whatever Happened To Anti-Semitism? How Social Science Theories Identify Discrimination And Promote Coalitions Between Different Minorities*, 85 CORNELL L. REV. 313, 435 (2001).

⁶¹ See generally Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. Contemp. Legal Issues 701, 719 (2001) (outgroup members may be tempted to try to act more like ingroup members in order to get equal treatment).

⁶² Ian Ayres & Barry Nalebuff, *Common Knowledge as a Barrier to Negotiation*, 44 UCLA L. REV. 1631 (1997)

⁶³ Zen and the Samurai Tradition in Modern Japan, www.

<http://mll.kenyon.edu/~japanese02/J28sp99/projects/rushton/2/index.html> (last visited Nov. 22, 2006)

("The Kamikaze pilots relied upon the Buddhist sect of Zen and its meditative techniques to maintain a lucent vigil upon their goal."). Indeed, even during the retreat for lawyers that Len and I attended, there was a similar story. One participant said her zen priestess trained them to feel how they could open and close their heart; they could use a closed heart in dealing with negotiations with others.

Yes, some competitive tactics cannot work if all parties to a negotiation try them. In contrast, collaborative tactics work better the more that all parties use them.⁶⁴

To be specific, if we thought we couldn't get away with lying – or strategic opportunism – we would reach better solutions faster and with less stress. If we thought others would catch us when we said we really did want the kids, we would skip that attempt to develop a bargaining chip. We could instead proceed directly to dealing with underlying interests. Mnookin and Gilson have suggested that lawyers with a reputation for cooperation may reach better solutions because they signal the willingness of parties to negotiate fairly.⁶⁵ Using agents with a reputation for lie detection could serve a similar function by letting people know competitive tactics would be less likely to succeed. And mediators with such training could serve a similar function in that area.

Conclusion

Len has introduced a generation of scholars and practitioners to mindfulness. In only a small number of years, Len has further distilled his case for mindfulness and his elegant introductory instructions. I've suggested here another path of meditation that goes from internal mindfulness to external mindfulness. One might see these as parallel paths. Or one might see them as related gardens. Instead, I like to see internal and external mindfulness as different pillars for a more efficient and joyful way to work together to transform our differences into fair and efficient solutions to problems. Whatever the metaphor, Len has been the pathbreaker, the master gardener, and a visionary architect. We, and I, owe him much.

⁶⁴ ROGER FISHER, WILLIAM URY, & BRUCE PATTON, *GETTING TO YES* xix (2nd ed. 1991) (“Unlike almost all other negotiation strategies, if the other side learns this one, it does not become more difficult to use; it becomes easier.”).

⁶⁵ Mnookin and Gilson, *supra* note 37.