

YES, AND: CORE CONCERNS, INTERNAL MINDFULNESS, AND EXTERNAL MINDFULNESS FOR EMOTIONAL BALANCE, LIE DETECTION, AND SUCCESSFUL NEGOTIATION

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Leonard Riskin's article, *Further Beyond Reason*, illustrates many useful points about emotion, negotiation, and mindfulness. Both as one of the authors Professor Riskin cites for the enormous effects of emotion on negotiation,¹ and as an author of several works concerning various forms of meditation that may help optimize emotion in negotiation,² I agree that emotion deserves careful

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¹ Leonard Riskin, *Further Beyond Reason: Mindfulness, Emotions, and the Core Concerns in Negotiation*, 10 NEV. L.J. 289 n. 30 and accompanying text. On my views on how emotion affects negotiation, see generally Clark Freshman, Adele Hayes & Greg Feldman, *The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know About How Mood Relates to Successful Negotiation*, 2002 J. DISP. RESOL. 5 (2002) [hereinafter Freshman et al., *Lawyer-Negotiator as Mood Scientist*] (reviewing research on how emotion affects negotiation and suggesting how it may be similar—and potentially different—when applied to lawyers and/or negotiations involving legal issues); Clark Freshman, *Identity, Beliefs, Emotion, and Negotiation Success*, in THE HANDBOOK OF DISPUTE RESOLUTION 99 (Michael L. Moffitt & Robert C. Bordone eds., 2005) [hereinafter Freshman, *Emotion, Identity, and Negotiation Success*] (explaining that emotions may be triggered by different expectations from the culture of an individual and her or his sense of identity, and these emotions may in turn affect negotiation); Clark Freshman, Adele Hayes & Greg Feldman, *Efficient Emotion: How Emotions Affect First Year Law Grades, Negotiation Performance, and Mental Health* (May 24, 2010) (unpublished manuscript, on file with author) [hereinafter Freshman et al., *Efficient Emotion*].

² In earlier works, like Riskin, I focused on internal mindfulness: how a given individual becomes aware of her or his own internal thoughts, emotions, and so on. In particular, see Clark Freshman, Adele M. Hayes & Greg C. Feldman, *Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support*, 7 HARV. NEGOT. L. REV. 67 (2002) [hereinafter Freshman et al., *Meditation and Negotiation Success*]. In later works, I focused on the importance of what I called external mindfulness: awareness of the thoughts—particularly heightened cognitive load—and emotions of others, both of which

attention. I agree, too, that mindfulness meditation and related practices may improve negotiation. Furthermore, I concur with Dan Shapiro and Roger Fisher (a co-author of the bestselling *Getting to Yes*) that attention to certain “core concerns” may be valuable in many ways.³ Yet this Article suggests that both parts of Riskin’s latest article and parts of the argument on “core concerns” by Fisher and Shapiro⁴ may, *with certain individuals in certain circumstances*, not work; indeed, focusing on core concerns may even produce less functional emotions and therefore decrease the chances of an optimal outcome. This Article addresses the limitations inherent within the core concerns approach and suggests “external mindfulness” as a complementary skill to check when core concerns help and when other tools, including both internal and external mindfulness, may help as well as—or better than—the core concerns approach.

In earlier works, like Riskin, I focused on internal mindfulness: how a given individual becomes aware of her or his own internal thoughts, emotions, and so on.⁵ In later works, I focused on the importance of what I called external mindfulness: awareness of the thoughts—particularly the heightened cog-

may give us important insights on their own for negotiation and may improve our ability to detect deception. See Clark Freshman, *After Basic Mindfulness Meditation: External Mindfulness, Emotional Truthfulness, and Lie Detection in Dispute Resolution*, 2006 J. DISP. RESOL. 511 (2006) [hereinafter Freshman, *External Mindfulness, Negotiation, and Lie Detection*].

³ ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2005).

⁴ I use the somewhat wordy phrases such as “Riskin’s latest article” rather than “Riskin” and “the argument on ‘core concerns’” by Fisher and Shapiro deliberately for several reasons. Riskin’s article has many very important points unrelated to the “points” about which I have doubts; I doubt not that they work, but question how well they will work in certain circumstances. So, too, Riskin’s “latest article” is certainly not the beginning of his work in this area, and I hope to learn more from his future works. And, finally, no one is defined by her or his writing, particularly someone so gifted as a teacher, mediator, mentor, and friend as Riskin. To put this footnote in scholarly context, an overlapping consensus, as John Rawls would put it, of otherwise diverse scholarship agrees that individuals cannot be captured in some single moment of evolving scholarship. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* (1993) (a leading left-leaning philosopher arguing some institution may be more just if there is an overlapping consensus of otherwise diverse views that supports it); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (a leading libertarian—some might say “conserving philosopher”—saying his arguments in a given book can barely capture his ever-shifting views); RICHARD POSNER, *AGING AND OLD AGE* (1995) (a leading conservative judge and former law professor borrowing the philosophical argument that any given individual has “future selves” that may be very different from the current self); JOSEPH GOLDSTEIN, *ONE DHARMA* 140-42 (2002) (a leading American Buddhist teacher explaining the core Buddhist teaching of “no self”: individuals change according to shifting causes and conditions); Clark Freshman, *Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687 (1997) (one version of postmodern theory shows that current conditions mean that all things are shifting and difficult to define over time).

⁵ In particular, see Freshman et al., *Meditation and Negotiation Success*, *supra* note 2, at 68, for a response to Riskin’s suggestion that lawyers turn to mindfulness by showing how a variety of meditative techniques produce similar benefits and how any given individual may find some techniques fit better or worse.

nitive load—and emotions of others, both of which on their own may give us important insights for negotiation and improve our ability to detect deception.⁶

Riskin sets out his claims through a vivid example of a business divorce and a careful logical argument. It is a model that appeals to the mind, the heart, and the gut; I follow his lead. For those who have not read Riskin's piece—or who have not read it mindfully enough to recall his business divorce example—a brief summary follows.

First, the mind of the piece makes several related claims. Riskin argues that conflicts are best resolved using the interest-based model, popularized by *Getting to Yes*⁷ and further distilled by the Harvard Project on Negotiation to seven elements: interests, legitimacy, relationships, alternatives, options, commitments, and communication.⁸ Here, “best resolved” deserves some unpacking. At the individual level, a conflict could be “best resolved” from the point of view of any party to the negotiation, such as Riskin's hypothetical businesspeople, Jack and Phil.⁹ Meanwhile, at the ideological level, a conflict is “best resolved” where the final solution is a “wise” one that reflects “objective standards” rather than mere background power or negotiation maneuvers.¹⁰ Interest-based ideology tries to close this gap between individual satisfaction and its ideological commitments by noting that agreements not based on objective criteria, or those that do not give some attention to other “stakeholders” affected by the negotiation, will not be stable.¹¹

⁶ See generally Freshman, *External Mindfulness, Negotiation, and Lie Detection*, *supra* note 2; Freshman, *Emotion, Identity, and Negotiation Success*, *supra* note 1.

⁷ Riskin, *supra* note 1, at n. 10, citing ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 83 (Bruce Patton ed., 2d ed. 1991)). If one scratches the surface, it turns out that a female business professor at Harvard Business School actually used the idea of negotiating to meet underlying interests many decades earlier. Brian R. Fry & Lotte L. Thomas, *Mary Parker Follett: Assessing the Contribution and Impact of Her Writings*, 2 J. MGMT. HIST. 11, 12 (1996).

⁸ Program on Negotiation at Harvard Law School, Glossary of Terms: “seven elements,” <http://www.pon.harvard.edu/glossary/> (last visited June 5, 2010); see also Bruce Patton, *Negotiation*, in THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 1, at 279, 280.

⁹ Compare Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) (explaining that individuals may sometimes support agreements reached in mediation because they feel more satisfied with the process), with TOM TYLER, *WHY PEOPLE OBEY THE LAW* 111 (2006) (arguing that satisfaction with the mediation process may reflect “false consciousness” when it compromises the real interests of the parties).

¹⁰ FISHER & URY, *supra* note 7, at 82-83 (defining a wise agreement as one based on objective standards).

¹¹ There is some evidence for this. See, e.g., Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, L. & SOC. REV. 323, 324 (1995) (surveying studies that parties are more likely to comply with agreements they reach in mediation than with those ordered by courts). From my own point of view, I suspect what is best for any given individual in any given negotiation may sometimes track what is best for various others. Sometimes this is because others may indeed undermine agreements if their own interests are not accommodated. At other times, a given individual may have an interest in others being happy as well (like a mother and a child) or may have an interest in being seen as caring about others (such as a politician or others concerned with reputation). In other instances, what is best for an individual may depend far less on how it affects others. Overall, I worry that the language of “wise agreements” and “stakeholders” may mask the interest that some negotiation writers and teachers have that others

Second, the heart of the piece says that emotion often affects a negotiator's ability to achieve the best agreements. Although Riskin mentions how positive emotions matter, he spends more time discussing how negative emotions get in the way of reaching objectively wise agreements. In a similar way, Shapiro and Fisher's book claimed that it would be too "daunting" to work directly with the "many" distinct emotions.¹² They therefore suggested that negotiators may defuse negative emotion and foster positive emotion "indirectly" by paying attention to core concerns. For his part, Riskin's current article suggests that mindfulness can help negotiators better work with these five core concerns: appreciation, affiliation, autonomy, status, and role.¹³

Third, Riskin suggests that various forms of "mindfulness" and related practices will make it easier to attend to core concerns, thus taming negative emotions, harnessing positive emotions, and fulfilling the promise of efficient, fair, and wise agreements that give parties what they "need." Using core concerns to overcome emotional barriers makes logical sense, yet it often fails for a variety of reasons.

To illustrate his claims, Riskin uses an example involving a vivid business divorce,¹⁴ and this Article works with the same example, which I've summarized in the italicized material that follows:

Many years ago, close friends Jack and Phil formed a boiler manufacturing company.¹⁵ Their initial agreement appeared to create value by pairing complimentary differences: Phil handled the office and Jack handled sales.¹⁶ As years passed, things changed on two fronts. Although Jack had handled all sales on his own for many years, Phil put his son, Phil, Junior, in charge of sales in the Southeast while Jack kept Midwest sales. After taking over the Southeast, Phil, Junior brought in more sales than Jack. Phil and his son think Jack's sales style relies too heavily on socializing, and Jack thinks Phil, Junior's success was merely a result of economic growth in the Southeast.¹⁷

"be fair" or "do the right thing" as judged by the writers themselves. Cf. Menkel-Meadow, *supra* note 9 (arguing that individuals in a dispute may be the best judge of what is best for themselves in settling a claim).

¹² FISHER & SHAPIRO, *supra* note 3, at 12; see also Riskin, *supra* note 1, at 299.

¹³ When I first read Riskin's article, I thought that he had "adopted" the claim that core concerns work *better* than addressing emotions directly. We traded several emails about this. As I re-read his piece, it became clearer to me that his current article simply makes the quite reasonable and useful claim that, if one wants to pay attention to core concerns, then mindfulness helps. Of course, it also implicitly claims that it really is worth addressing core concerns. As I mentioned, I agree with both claims. I also suspect that Riskin would agree with me that, if one is concerned with emotion, external mindfulness might also be helpful. And I suspect that both he and I would agree that there may be still other approaches that would be helpful as well.

¹⁴ Riskin, *supra* note 1, at 295-96.

¹⁵ A digression on the unconscious: the boiler business "overheats," and Riskin, following Shapiro and Fisher, suggests one generally check their emotional temperature!

¹⁶ See, e.g., FISHER & URY, *supra* note 7 (creating value often comes from differences); DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* (1986) (trading on differences can create value); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

¹⁷ Often success depends just on being in right place at right time, such as Bill Gates's opportunity to master computers because his school gave students more access to computers than comparable schools at the time. MALCOM GLADWELL, *OUTLIERS: THE STORY OF SUC-*

According to Riskin, habitual negotiating—and lawyering—would get to the wrong solution. Conversely, the trio of interest-based negotiation, core concerns, and mindfulness would reveal the best solutions. Habitual lawyering would cling to narrow legal questions, such as the authority of Phil to put his son, Phil, Junior, in charge.¹⁸ However, if Phil and Jack, or at least their lawyers, had read *Getting to Yes*, they could try to understand—or, perhaps, feel—each other’s underlying interests and reach a more creative and fair agreement.¹⁹ Nonetheless, Riskin notes that negative emotions might get in the way of a successful resolution and cause the parties to become angry and “positional” instead.

Enter, then, the core concerns. Rather than address emotion directly,²⁰ Riskin instead suggests that Jack or Phil might address the far less numerous five core concerns. Jack might, for example, play to Phil’s autonomy and suggest they brainstorm solutions to their problems together. Alas, try as Jack

CESS 53 (2008); see generally RICHARD E. NISBETT, *INTELLIGENCE AND HOW TO GET IT: WHY SCHOOLS AND CULTURES COUNT* (2009).

¹⁸ Thank goodness, Riskin agrees that this tendency of lawyers to see things in terms of legal issues is partly a product of impersonal forces that shape the way lawyers see problems. In the months since I wrote this, and even just after attending a meeting with dozens of professors from around the globe on innovation in teaching negotiation, I still just found myself hearing voices in my head asking: Does Phil’s decision to hire his son reflect an illegal form of nepotism that closes a key job to those not sharing his race? See Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Scientific Theories Identify Discrimination and Promote Coalitions Between “Different” Minorities*, 85 *CORNELL L. REV.* 313, 319 (2002) (explaining that preferences to hire one like oneself, conscious or unconscious, inevitably benefit those from this in-group at the expense of all others). Does Phil’s decision violate some kind of corporate opportunity doctrine or duty to minority shareholders by potentially putting the benefit to him and his son at the expense of a better manager? I think Riskin would forgive “me” as he forgives “himself”: in an early article on mindfulness, he shared how, while writing about being mindful, he spilled coffee—twice! See *infra* note 83.

¹⁹ Like much of law, and like much of economics, from which negotiation theories borrow heavily, even interest-based negotiation often hovers in the mind rather than the heart; indeed, as this Article and other works explain, the heart (or at least certain feelings) is seen as an obstacle to be overcome. Compare ROBERT MNOOKIN, *BEYOND-WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 4, 44-68 (2000) (positing a “tension” between empathy and assertiveness), with Michelle LeBaron & Mario Patera, *Reflective Practice in the New Millennium*, in *RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE* 45, 48 (Christopher Honeyman, James Coben & Giuseppe De Palo eds., 2009) (suggesting negotiation teaching may rely too heavily on cognitive approaches), and LEIGH THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* (4th ed. 2009) (emphasizing the importance of both cognition and feeling). See generally MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005) (generally cited for the idea that people’s fast decisions—which occur in a blink of an eye—are good, but actually citing evidence that quick decisions only work for experts with lots of experience with similar problems); cf. Maureen O’Sullivan, *Truth Wizards: What They Know and How They Know It* (August 2007) (unpublished manuscript, previously presented as *Emotion Regulation in Accurate Lie Detection: Accusatory Reluctance and the Control of Prejudice*, as part of the symposium on *Emotional Regulation from Multiple Perspectives* at the biannual meeting of the International Society for Research on Emotion) (on file with author) (according to O’Sullivan’s decades of research, most people make snap judgments about who is lying and stick with them, but those best at detecting lies tend to go back and forth before coming to a more nuanced conclusion).

²⁰ Riskin, *supra* note 1; FISHER & SHAPIRO, *supra* note 3.

might, however, Phil may offend Jack with an insensitive comment, or Phil's negativity simply might infect Jack, causing him to participate half-heartedly in the brainstorming, if at all. Now, enter mindfulness. Riskin believes that Jack and Phil could practice mindfulness both to remind them to attend to the core concerns in the first place and to keep the negotiation productive and moving towards a wise solution.²¹

All told, it is a promising story, and I have no doubt it may work *for some people*. Yet therein lies our problem. Riskin's theory returns to the question that confounds negotiation scholarship, negotiation teaching, and negotiations themselves: How much are we alike and how much do we differ?²² Scholars, including Shapiro, Fisher, Ury, and Patton (the latter three being co-authors of the second edition of *Getting to Yes*), cite both contemporary psychology and ancient Buddhism for the idea that "we" are very much the same.

Riskin borrows contemporary social psychology's creed and accepts the theory of fundamental attribution error. Under this theory, we all tend to blame others' behavior on the individual failures of those individuals, even though we all would act the same in similar circumstances.²³ To paraphrase a famous social psychology text, it is the situation and not the person.²⁴ So, too, Buddhism is often thought to teach the idea of non-self.²⁵ We have no abiding self; "our" actions merely reflect the consequences of many impersonal conditions.²⁶

Although the core concerns approach may help solve many dilemmas and conflicts, this Article also offers other guides both to test whether the core concerns really do facilitate more productive emotions, or otherwise facilitate

²¹ In Buddhist psychology, these are the separate practices of initial attention, *vicāra*, and sustained attention, *vicāra*. For an accessible guide to stages of concentration in meditation practice, see generally SHALIA CATHERINE, *FOCUSED AND FEARLESS: A MEDITATOR'S GUIDE TO STATES OF DEEP JOY, CALM AND CLARITY* (2008).

²² Compare G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE* 3 (2d ed. 2006) (suggesting that negotiators understand their typical approach, such as competitive, cooperative, avoidant, etc., and "bake with the flour [they] have"), with Freshman, *External Mindfulness, Negotiation, and Lie Detection*, *supra* note 2 (noting that a fixed negotiator personality is largely a myth and individuals often negotiate differently in different contexts), Freshman, *Emotion, Identity, and Negotiation Success*, *supra* note 1 (explaining that notions of negotiator personality clash with insights from both social psychology, which suggests context matters more than individual differences, and postmodernism, which suggests that contemporary society includes many shifting identities), and Sheila Heen & John Richardson, *I See a Pattern Here and the Pattern Is You: Personality and Dispute Resolution*, in *HANDBOOK OF DISPUTE RESOLUTION*, *supra* note 1, at 35, 47-48 (expressing skepticism about how well personality tests can predict behavior but suggesting that they may be helpful for recognizing patterns in oneself and others).

²³ Riskin, *supra* note 1, at 305 (citing fundamental attribution error). For more on fundamental attribution error in general, see LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION* (1991).

²⁴ ROSS & NISBETT, *supra* note 23, at 4.

²⁵ GOLDSTEIN, *supra* note 4, at 140-42.

²⁶ For more information on impersonality, see, for example, *id.* But see B. Alan Wallace, *A Buddhist View of Free Will: Beyond Determinism and Indeterminism*, in *NEUROSCIENCES AND FREE WILL* 59, 61 (Robert Pollack ed., 2009), available at http://www.columbia.edu/cu/cssr/ebook/FreeWill_eBook.pdf ("Buddhism asserts a measure of free will insofar as one can reflect on one's options and decide on the best course of action in terms [of] its moral suitability.").

better solutions, and other tools to themselves optimize emotions and/or solutions. (I say better solutions “and/or” emotions because, while optimal emotions may often reveal solutions that are “better” from some perspective, or perspectives, the two sometimes diverge.²⁷) Part I evaluates Riskin’s argument that emotions are too difficult to address individually and concludes that much scientific evidence does not support this claim. For one, evidence demonstrates that it is relatively easy to identify and distinguish particular emotions.²⁸ In particular, many researchers believe many emotions are largely the same across different cultures.²⁹ In addition, studies have shown that almost anyone can markedly improve her or his ability to identify such emotions in less than an hour of training, even those with what we often think of as psychological disabilities.³⁰

Part II introduces “external mindfulness,” a variation on Riskin’s mindfulness approach. Through external mindfulness, parties learn to recognize the predictable physical signs of particular emotions, both in other peoples’ faces and in their own physiological responses. These physical and physiological signals can then help parties determine whether their appeals to the core concerns make emotions better, make no difference, or even make them worse. In this way, external mindfulness complements the core concerns approach while safeguarding parties from the approach’s limitations.

Indeed, one significant limitation is that the core concerns may not be nearly so core. Imagine that Jack read Shapiro and Fisher’s suggestion³¹ that he should invite Phil to brainstorm. Jack would expect that gesture at affiliation—one of Shapiro and Fisher’s “core concerns”³²—to tame Phil’s negative emotions and engender positive ones. It might work, but it might not. As I suggest below in Part III, we should expect such “surprise” failures in some instances and, too, some remarkable successes in others. Although different individuals may respond in different ways to the same tactics, the problems often lie with the nature of some of the core concerns concepts, specifically

²⁷ Because women may feel better when they fit expectations of being less assertive than men, they may feel better when they “don’t ask” for more in a negotiation, such as a better first year salary. LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE* 123 (2008). But this failure to ask may result in a lower salary and, combined over a lifetime of raises based in large part on starting salaries, much less money. In the future, this lower salary may haunt these women, contribute to lesser salaries for other women, and hurt those for whom the women otherwise may care. I say “may” deliberately since there is conflicting evidence on when higher salaries and wealth lead to greater happiness. Compare DANIEL GILBERT, *STUMBLING ON HAPPINESS* (2007) (arguing that money is associated with greater happiness), with MARTIN SELIGMAN, *AUTHENTIC HAPPINESS: USING THE NEW POSITIVE PSYCHOLOGY TO REALIZE YOUR POTENTIAL FOR LASTING FULFILLMENT* (2004) (citing research that, past a certain point, money is not associated with greater happiness). To take a second general complication, theorists often say identifying more options will make possible better solutions. See, e.g., FISHER & URY, *supra* note 7. But some recent research suggests that some people, particularly maximizers who want the very best, feel worse when they experience “choice overload.” See Chris Guthrie, *Panacea or Pandora’s Box? The Costs of Options in Negotiation*, 88 IOWA L. REV. 601, 635 (2003).

²⁸ See *infra* notes 45-51 and accompanying text.

²⁹ See *infra* note 50 and accompanying text.

³⁰ See *infra* notes 55-60 and accompanying text.

³¹ FISHER & SHAPIRO, *supra* note 3, at 79.

³² *Id.* at 52-54.

affiliation and autonomy. Research suggests that these core concerns may be core for *some* individuals, but not for others. Indeed, there may be a cultural component to this in that some cultures may prioritize some of the core concerns more than others.

I. IS IT POSSIBLE TO TEACH PEOPLE TO RECOGNIZE DISTINCT EMOTIONS?

Before we compare different strategies to work with emotions—direct vs. indirect, core concerns and mindfulness vs. other approaches—it is worth reviewing how emotions affect negotiation. Elsewhere, I have contrasted the folklore on emotion with the conclusions of modern science and research.³³ The folklore approach comes from “insights” and “expertise” and “wisdom” that practitioners and scholars believe and teach. As in diverse disciplines, this received “wisdom” turns out to have little or no support in serious study.³⁴ On the one hand, folklore makes several limiting assumptions:

- Negative emotions, particularly anger, affect negotiation. Riskin’s article and the book by Shapiro and Fisher both say that both positive and negative emotions matter, but both devote more time to arguably negative emotions. Riskin, for example, uses the word “*problem*” to describe emotions rather than, say, “problems and possibilities.”³⁵
- Emotions that affect negotiation are primarily strong ones. These strong, negative emotions are often responses to “difficult” people. Alas, this perspective often opens the door to difficult distorted perceptions and stereotyping of unwanted behavior demonstrated by disfavored groups often labeled as “too emotional,” such as women, African-Americans, Latinas and Latinos, and bisexuals, lesbians, and gay men.³⁶

³³ See Freshman et al., *Lawyer-Negotiator as Mood Scientist*, *supra* note 1, at 7.

³⁴ Clark Freshman, *Were Patricia Williams and Donald Dworkin Separated at Birth?*, 95 COLUM. L. REV. 1568, 1577-79 (1995) (reviewing RICHARD A. POSNER, *OVERCOMING LAW* (1995), with a reply by Posner). Personal trainers often tell those of us who exercise that we should “cool down” after exercising—some say by stretching and others say by doing a slower or otherwise less intense version of the exercise. These experts posit many explanations, but, alas, there turns out to be no evidence to support them. Gina Kolata, *Is the Exercise Cool-Down Really Necessary?*, N.Y. TIMES, Oct. 13, 2009, at E1, available at <http://www.nytimes.com/2009/10/15/health/nutrition/15best.html>. Indeed, there is reason to believe that cooling down may even *diminish* the benefits of exercise! *Id.*

³⁵ Riskin, *supra* note 1, at 294; FISHER & SHAPIRO, *supra* note 3, at 4-8 (stating that positive and negative emotions both matter does not mean they will matter equally). In my own research on positive and negative mood, I found that both had independent explanatory power. Freshman et al., *Efficient Emotion*, *supra* note 1, at 19.

³⁶ I list particular groups deliberately since the relevant stereotyping of others as too emotional applies to some groups but not others; indeed, Asians may be stereotyped as too unemotional. Of course, I may be ignorant of the way that other groups also face stereotypes of being too emotional or angry, and I welcome correspondence on this point. See Freshman, *supra* note 34, at 1591.

By this two-punch pathologizing and competency questioning, Posner does not hear what outsiders [such as women or people of color] say, and apparently cannot even read what they write. One listens, if at all, to the pathological and the incompetent only to diagnose *their condition*, not to consider *their arguments*. This is hardly an adequate means to fulfill Posner’s professed pragmatic project: to ‘keep debate going and inquiry open’ (p.6). The approach instead reminds one of the patterns of pathologizing that often obscure those outside preferred groups.

A principal way to deal with these strong, negative emotions from difficult people is to “cool” them out.³⁷ (“Them” may be either, or both, the difficult emotions or the outsiders who tend to get labeled as too difficult.)

In contrast to this folklore approach to negotiation, I have proposed a science of emotional efficiency based on recent negotiation studies³⁸:

- Positive emotions are not merely the absence of negative emotions (“not too bad”) but distinct emotions (“feeling great”) that independently affect negotiation.³⁹
- Even mild emotions (for example, a kick from chocolate or a pleasant scent) affect negotiation.⁴⁰
- Even mild emotions have an effect on otherwise mentally healthy people.⁴¹
- Negotiators should try to develop positive emotions and better manage negative emotions because a more positive and less negative mix of emotions typically leads to better negotiation outcomes.⁴²

Id. (emphasis in original). For discussion of the way that the same behavior may be labeled—and even sincerely experienced—as assertive if from a man but bitchy if from a woman, see generally Clark Freshman, Note, *Beyond Atomized Discrimination: Use of Acts of Discrimination Against “Other” Minorities to Prove Discriminatory Motivation Under Federal Employment Law*, 43 STAN. L. REV. 241, 242 & n.3 (1990). For the way women themselves may internalize such notions, see BABCOCK & LASCHEVER, *supra* note 27, at 87; LAURA KRAY & LINDA BABCOCK, *Gender in Negotiations: A Motivated Social Cognitive Analysis*, in NEGOTIATION THEORY AND RESEARCH 201, 208 (Leigh Thompson ed., 2006) (asserting that women may be more concerned about creating a good impression in negotiation because they are expected to be more “communally oriented” and identifying research that suggests this may perception may be well founded as women who were self-promoting in interviews were viewed as less likeable).

³⁷ Riskin, *supra* note 1, at 307 (cooling out negative emotions); FISHER & SHAPIRO, *supra* note 3, at 150-52 (providing examples of how to cool out negative emotions). For a more exhaustive survey of this prevalent view, see Freshman et al., *Lawyer-Negotiator as Mood Scientist*, *supra* note 1, at 66-67.

³⁸ Freshman et al., *Lawyer-Negotiator as Mood Scientist*, *supra* note 1.

³⁹ *Id.* at 12.

⁴⁰ *Id.* at 12-14.

⁴¹ *Id.*

⁴² I laid out a preliminary synthesis of what was then the state of the art on emotion and negotiation research in Freshman et al., *Lawyer-Negotiator as Mood Scientist*, *supra* note 1. Since then, my own research has changed. See Freshman et al., *Efficient Emotion*, *supra* note 1. Although I previously saw negative emotions as inefficient, more recent research has persuaded me that negative emotions such as anger may sometimes lead to better outcomes. Some go so far as to suggest that emotions should not be seen as negative or positive in general but as helpful or less helpful in particular contexts. See DALAI LAMA & PAUL EKMAN, *EMOTIONAL AWARENESS: OVERCOMING THE OBSTACLES TO PSYCHOLOGICAL BALANCE AND COMPASSION* 17-29 (Paul Ekman ed., 2008). This empirical finding and other theoretical accounts persuade me that one might treat emotions as generally positive and generally negative or generally efficient and generally inefficient. Cf. Bruce Barry, Ingrid Smithey Fulmer & Nathan Goates, *Bargaining with Feeling: Emotionality in and Around Negotiation*, in NEGOTIATION THEORY AND RESEARCH, *supra* note 36, at 99, 105 (summarizing decades of research on the effect of emotion on negotiation and concluding that “positive affect contributes to cooperative behavior and negative affect disrupts it, notwithstanding evidence that certain manifestations of affect, in certain contexts, yield an opposite conclusion”).

It is less clear to me what this means for my own negotiations and for teaching negotiation. First and foremost, the studies showing that positive emotions are associated with better outcomes are vast and replicated by different scholars over decades; however, the

Given this importance of emotions, Riskin's sympathetic reference to Shapiro and Fisher's claims that it would be too "daunting" to become aware of the "many" emotions⁴³ merits a closer look. Before accepting this argument, we should consider questions such as: Can one learn to improve awareness of his or her own emotions and the emotions of others? What are the benefits and costs of learning this kind of awareness? And, of course, how do these costs and benefits of learning emotional awareness compare with the costs and benefits of learning how to work with the core concerns? (Of course, it need not be a competition: I urge every negotiator to learn *both* the core concerns *and* external mindfulness.)

The simplest answer is that clear, scientific evidence demonstrates most individuals can improve emotional awareness with an hour of training.⁴⁴ As Shapiro and Fisher acknowledge, there are many definitions of emotion.⁴⁵ If

suggestions that negative emotions, for example anger, are sometimes associated with better outcomes are either purely speculative and anecdotal or confined to a few very recent studies by a few scholars. Second, even if the theories and this embryonic research are correct that emotions differ with context, the question remains who, if anyone, may distinguish the minority of cases when generally negative emotions have a useful effect. Consider, for example, Allred's careful study of anger and negotiation. Keith G. Allred et al., *The Influence of Anger and Compassion on Negotiation Performance*, 70 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 175, 181 n.2 (1997). There, he induced anger by giving conflicting information to two sides of a job negotiation. Those playing employers were led to believe the applicant did not really care about computers, and the employee was led to believe exactly the opposite: that computers were an important marker of the employee's status. Both, therefore, might have felt "justified" in displaying "anger"—and viewed the anger of the other as simply illegitimate!

My initial inclination is to believe that disentangling the minority of cases of useful anger from destructive anger may be akin to the problem of picking stocks rather than buying diverse index funds: it is possible for managers to beat the market. But, like using anger strategically, beating the market involves several distinct decisions—picking the time to go into a stock, picking the stock to go into, and picking the time to get out. In addition to these analytic problems, there are the problems of herd mentality, loss aversion, and other cognitive and emotional biases. For general introductions to the problem of such cognitive errors for investment choices, see, for example, MAX H. BAZERMAN, SMART MONEY DECISIONS 3 (2001), and JASON ZWEIG, YOUR MONEY AND YOUR BRAIN: BECOME A SMARTER, MORE SUCCESSFUL INVESTOR (2007). No wonder empirical research suggests that few manage to beat the stock market consistently over time. See generally BURTON G. MALKIEL, A RANDOM WALK DOWN WALL STREET (1973). I suspect time may show that only an analogous small number of negotiators can manage to use anger effectively.

On the other hand, to the extent one does want to distinguish the times when anger and other negative emotions may be efficient, this requires careful attention to the effects rather than relying on the generic strategy suggested by the core concerns.

⁴³ "They [Fisher & Shapiro] assert that, during some negotiations, so many emotions are at work that negotiators are often unable to attend to and address them directly. So they propose a method for dealing with emotions in negotiation indirectly." Riskin, *supra* note 1, at 292. "Fisher and Shapiro believe that negotiators are influenced by too many emotions to notice and address directly [and therefore suggest focusing on the core concerns instead]." *Id.* at 299.

⁴⁴ M.G. Frank et al., Improving the Ability to Recognize Micro Expressions of Emotion (2008) (unpublished manuscript, on file with author).

⁴⁵ Definitions of "emotion" are rather diverse. See, e.g., FRONTIERS IN SOCIAL PSYCHOLOGY: NEGOTIATION (A. Kruglanski & J. Forgas eds., 2006) (positing that there are more than 250 theories regarding the psychology of emotion); see also SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 415 (2d ed. 1991). These definitions are also subject to revi-

one adopts a broad definition that includes hundreds of distinct emotions, then it is easy to understand why Shapiro and Fisher assume it is harder to recognize these distinct emotions rather than the five core concerns they identify. Fortunately, however, under one widely-accepted definition, there are seven universal emotions.⁴⁶ According to Paul Ekman, a leading pioneer in the scientific study of emotion,⁴⁷ these basic emotions are happiness, surprise, fear, anger, sadness, contempt, and disgust.⁴⁸ Decades of research by Ekman and others show these emotions exist in countries as diverse as the United States, Japan, and Papa New Guinea, among others.⁴⁹

Furthermore, people display these seven basic emotions in distinct facial expressions, which people can easily learn to recognize.⁵⁰ For example, contempt or scorn reveals itself by a distinctive half smile on one side of the face.⁵¹ According to one study, people recognize such pattern expressions better after just one hour by using Ekman's microexpression training tool.⁵² This training tool involves a pretest where participants identified quick changes in expression—between 1/5 and 1/30 of a second—as one of the seven basic emotions. Next, the tool shows examples of each basic emotion while Ekman narrates how to recognize and distinguish between often confused emotions, such as surprise and fear. Users then practice with another set of fast expressions and got feedback on the expression they identify correctly. On practice examples, users also could freeze the image to see the emotion at its peak. Users can review more videos, again narrated by Ekman, reviewing key emotions before finally taking a posttest.⁵³

This simple method works and may be quite useful in negotiation. One study shows that persons diagnosed with schizophrenia improve to a normal level after this one-hour training;⁵⁴ another study shows similar results for peo-

sion. Paul Ekman, for example, has been rather limited in what he would count as an emotion but recently has expanded that definition. PAUL EKMAN, *EMOTIONS REVEALED* 190 (2d ed. 2007) (entertaining the possibility that there may be distinct pleasant emotions).

⁴⁶ EKMAN, *supra* note 45, at 10-14.

⁴⁷ Ekman was named one of the 100 most influential scientists of the twentieth century by *Time* magazine. *Time* 100, *TIME*, May 11, 2009, at 35; *see also* Jill Bolte Taylor, *The 2009 TIME 100: Scientists & Thinkers—Paul Ekman*, *TIME.COM*, Apr. 30, 2009, <http://www.time.com> (search “Time.com” for “Paul Ekman”; then follow “Paul Ekman – The 2009 Time 100” hyperlink).

⁴⁸ EKMAN, *supra* note 45, at 10-14.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 183-86. Picture Dick Cheney! If you did, you might want to review the list of ways to defuse negative emotion outlined by Shapiro and Fisher. *See* FISHER & SHAPIRO, *supra* note 3, at 150-52.

⁵² Ekman's microexpression training tool is available at F.A.C.E. Training—Products, <http://face.paulekman.com/products.aspx> (last visited June 5, 2010). For more information on Ekman's study, *see generally* PAUL EKMAN, *TELLING LIES* (2d ed. 2009). Other resources on improving emotional awareness also exist. For a recent example of a computer tool developed specifically for autistic children, *see* The Transporters, <http://www.thetransporters.com> (last visited June 5, 2010).

⁵³ For a description of the online version of the tool, *see* F.A.C.E. Training—Products, *supra* note 52.

⁵⁴ *See* EKMAN, *supra* note 52, at 352.

ple with autism.⁵⁵ It is plausible that people without such disabilities may learn even more quickly. Moreover, both these studies looked only at very quick expressions of emotions, expressions of 1/5 to 1/30 of a second, which Ekman calls “microexpressions.”⁵⁶ Ekman associates microexpressions with concealed emotions, the kind a person either displays unconsciously or wishes to conceal from others.⁵⁷ Such microexpressions may be particularly useful for negotiation because they can indicate deception, and negotiators often want to know when others are lying.⁵⁸

At the same time, awareness of longer expressions of emotion also may be helpful to negotiators and easier to recognize than such fleeting microexpressions. Furthermore, the microexpression research depends on persons recognizing a single fast expression out of context. In a real life encounter, negotiation or otherwise, a person may express an emotion multiple times and in conjunction with other clues, such as changes in voice or body language. Because the microexpression training tool shows awareness of these same facial patterns—only at breakneck speed—they should *a fortiori* improve recognition of the macro expressions that people leave on their faces for longer times—like Dick Cheney’s lingering contempt. Finally, a separate training tool by Ekman shows how to recognize subtle expressions, the movements of only some of the muscles associated with an emotion.⁵⁹ Research shows training in these subtle expressions of emotions is associated with greater accuracy in spotting lies.⁶⁰

II. IF WE COULD DETECT DISTINCT EMOTIONS, HOW WOULD THAT HELP NEGOTIATION?

Although we know with scientific precision that most can indeed identify specific emotions at the very low cost of one hour, the question still remains: How does external awareness of emotion benefit negotiation? As yet, I know of no studies that test specifically whether those trained in external mindfulness

⁵⁵ M.G. Frank et al., *supra* note 44.

⁵⁶ EKMAN, *supra* note 45, at 214-16.

⁵⁷ *Id.*

⁵⁸ M.G. Frank et al., *supra* note 44.

⁵⁹ See F.A.C.E. Training—Products, *supra* note 52.

⁶⁰ Gemma Warren, Elizabeth Schertier & Peter Bull, *Detecting Deception from Emotional and Unemotional Cues*, 33 J. NONVERBAL BEH. 59, 59-69 (2009). The study showed that training in microexpressions also tended to be associated with an improvement in recognizing lies. The finding on microexpressions did not reach statistical significance, however. In other words, under generally accepted scientific principles of statistics, there was an unacceptably high chance that the results on microexpressions could come from chance. Paul Ekman believes that the study suffers from two flaws that may understate the significance of microexpressions for detecting lies. First, the study included a small number of people, and a larger study may well have included enough people that the findings would become statistically significant. Interview with Paul Ekman, Professor of Psychology, Emeritus, Univ. of Cal., S.F., Sch. of Med., in S.F., Cal. (Oct. 2009). Second, the study did not use a regression analysis to test whether the training in microexpressions had a benefit above and beyond the training in subtle expressions. *Id.* In contrast, my own research on emotions and negotiation used a regression analysis to show that both positive and negative emotion have an independent association with negotiation outcomes. Freshman et al, *Efficient Emotion*, *supra* note 1.

of emotion do better at negotiation. That's not so bad: there's not very much study to see whether any particular technique of teaching negotiation actually works!⁶¹ However, such research would be easy enough to construct, and I hope to do so. In the meantime, my experience and discussion with negotiation teachers and negotiators at trainings across the United States and Europe suggests several ways it helps.

To begin with, once we know how to spot even concealed emotions, we can learn much about such things as our potential leverage and standards or threats⁶² that may work with a given person. For instance, when looking at apartments to rent, I stopped by an open house, with no other potential tenants in sight. "Not many people here today," I said to the apartment's owner, not knowing whether I was late or whether there simply was not high demand. As I looked at the owner's face, she showed a quick expression of fear, a movement of one set of muscles that draws her inner eyebrows up.⁶³ Instantly I thought: maybe I can get this place for less! (I say maybe because all I knew for sure was that she had the emotion, not necessarily why, nor how long that emotion would last, nor how much she would believe whatever triggered that emotion at that time.)

This experience mirrors the results of simulated real estate negotiations that Harvard Business School Professor Michael Wheeler and I developed from a research study.⁶⁴ In each negotiation, an actor played a potential buyer of medical office space, which he hoped to purchase and lease to doctors. In several videos, some negotiators in the study "selling" showed similar fleeting expressions of fear on their face when the actor made certain arguments or questioned their other offers. In one video, however, the counterpart showed multiple expressions of contempt through both facial expressions and body language. Even without knowing whether the subjects were lying, the knowledge of the emotions alone may improve negotiation. When negotiators see fear, they may not know if the person is lying, but they can make a decent hypothesis that their argument is working or that the person really is anxious to make a deal.

Also, external mindfulness of emotion may allow a negotiator to recognize a lack of positive emotion or an emerging negative emotion that could benefit from attention to the core concerns. For example, Jack may notice that Phil's

⁶¹ Research does support some particular teaching methods. *See, e.g.*, BABCOCK & LAS-CHEVER, *supra* note 27, at 132 (teaching people to set higher goals); HALLAM MOVIOUS & LAWRENCE SUSSKIND, *BUILT TO WIN* 13-24 (2009) (discussing reasons why negotiation training may often not improve negotiation results and particularly criticizing the way that institutions may not support changes in the way people negotiate); James J. Gillespie et al., *Lessons from Analogical Reasoning in the Teaching of Negotiation*, 15 *NEGOTIATION J.* 363, 363-71 (Oct. 1999) (pointing out the analogy between a past simulated negotiation and a new one).

⁶² What words and demeanor are interpreted by which people as "threats" rather than "standards" is not clear. *GETTING TO YES* counsels that one can resolve disputes by looking at, among other things, what a court would do. FISHER & URY, *supra* note 7. Yet Thompson reminds us what any lawyer knows: what is heard as a threat may also provoke a negative reaction and lead people to exit negotiations. THOMPSON, *supra* note 19, at 118.

⁶³ EKMAN, *supra* note 45, at 164.

⁶⁴ Research notes and videos are on file with author. The pilot research is not published but is used in trainings conducted by Wheeler and me.

face has not been expressing happiness;⁶⁵ instead, Phil has been thinning his lips, slightly drawing down his eyebrows, and widening his eyelids—in short, displaying the signs of emerging anger.⁶⁶ As we saw, Jack knows that even mild anger may make Phil see issues more narrowly, think less creatively to find a solution, and increase his likelihood to lie and make threats.⁶⁷ Thus, Jack wants to take advantage of this early warning sign, a kind of opportunity that the Dalai Lama calls the “spark before the flame.”⁶⁸

Similarly, external mindfulness also helps to test whether a given attempt to manage emotion actually works. Following the classic suggestion from *Getting to Yes*,⁶⁹ suppose Jack suggests that he and Phil brainstorm some solutions. Perhaps Jack notices a subtle smile emerging in Phil’s face or a change in his voice. Success! He may continue in this path. Instead, suppose Jack notices that Phil shows a quick half smile on one side of his face, an expression associated with contempt. Jack might respond by asking Phil what he thinks of the idea, asking Phil for a suggestion, or normalizing Phil’s reaction by suggesting that negotiation like this can often bring up difficult emotions.⁷⁰

Indeed, if we negotiators and negotiation teachers practiced this external mindfulness check, we would notice that some “conventional wisdom” about emotional management actually fails. For example, *Getting to Yes* itself suggests that parties might take turns venting emotion. Although there are conceptual problems in testing, research now suggests that venting may simply lead to more anger.⁷¹ Likewise, conventional wisdom posits that active listening, such as saying “I hear what you’re saying,” lets speakers know they are heard.⁷² Yet more recent research on couples suggests such active listening does not work so well.⁷³ When I say classic active listening phrases such as “I hear what you’re saying” with my sister, she tells me to “Stop that psychobabble!” In short, then, training in awareness of specific emotions is possible. And such training is likely to be useful. Contrary to the assertions that recognizing emotions is

⁶⁵ Daniel S. Messinger, Alan Fogel & K. Laurie Dickson, *All Smiles Are Positive, but Some Smiles Are More Positive than Others*, in *WHAT THE FACE REVEALS* 328, 328-29 (Paul Ekman & Erika L. Rosenberg eds., 2d ed. 2005) (distinguishing mere social smiles from smiles that are genuine but weak or genuine and strong).

⁶⁶ EKMAN, *supra* note 45, at 139-40.

⁶⁷ Freshman et al., *Lawyer-Negotiator as Mood Scientist*, *supra* note 1, at 12-14.

⁶⁸ DALAI LAMA & EKMAN, *supra* note 42, at 23.

⁶⁹ FISHER & URY, *supra* note 7, at 60.

⁷⁰ Although Ekman has decades of research to show that one may recognize emotions, it is less clear how one responds to this recognition. He suggests a range of responses in *EMOTIONS REVEALED*, but there is no evidence cited that these methods work. *See generally* EKMAN, *supra* note 45.

⁷¹ *See, e.g.*, FISHER & SHAPIRO, *supra* note 3, at 157; FISHER & URY, *supra* note 7, at 31; Freshman et al., *Lawyer-Negotiator as Mood Scientist*, *supra* note 1, at 69.

⁷² John Barkai, *Teaching Negotiation and ADR: The Savvy Samurai Meets the Devil*, 75 NEB. L. REV. 704, 741-42 (1996) (claiming that active listening is easy to learn, self-corrects, and helps negotiation).

⁷³ One of the foremost scientists of what actually works in couples therapy, John Gottman can predict whether couples will separate based on observing a fifteen minute conversation. He is strongly critical of the notion that active listening will work in any conversation, let alone in heated conversations between couples. *See* JOHN GOTTMAN, *THE MARRIAGE CLINIC* 9 (1999) (concluding that “active listening exchanges hardly ever occurred, and they predicted nothing” in many conversations between couples).

difficult, such external mindfulness is trainable at low cost and promises significant benefits.

As useful as learning to recognize emotion may be, caveats exist. First, although research suggests most people improve their ability to recognize emotion in half an hour, not everyone does so. Some people are so good in the beginning that ceiling effects apply, and they do not improve.⁷⁴ Others just show an insensitivity to emotion that defies the studied training.⁷⁵ Nonetheless, the benefits and costs of learning distinct emotions suggest it is a valuable investment.

III. WHY CORE CONCERNS OFTEN FAIL OR BACKFIRE AND HOW EXTERNAL MINDFULNESS HELPS

At this point, I am tempted to end my discussion with a familiar gesture to the “Yes, and . . . ?” perspective: Awareness of emotion may enhance work with the core concerns.⁷⁶ Instead, I make a stronger claim: Awareness of emotion is a crucial tool to complement the core concerns. Indeed, attending to the core concerns will often not work and may even make difficult negotiations worse for several reasons. First, the core concerns approach does not consider the effects of emotions that parties may experience from sources other than the negotiation itself.⁷⁷ As my real-time reflection below in the middle of writing this illustrates, emotions, whatever their cause, can influence people. Second, the core concerns may not be universal. Specifically, personality differences and cultural variation may lead people to react differently to the core concerns.

A. *Real Time Reflection to Illustrate How Emotion Affects My Analysis*

Before I go on to explain why the core concerns often fail or even backfire, I want to share a little mindfulness to reinforce how emotion affects cognition. As I wrote the last paragraph, I was aware of my face hardening. In contrast, when I wrote earlier about how core concerns and emotional awareness could complement each other, I noticed a subtle elasticity in my face and a lightness in my body. If I had filmed myself writing,⁷⁸ I could have checked for subtle activity in my facial muscles associated with sincere happiness. As I was just writing, however, I noticed a change in my breathing. The area where

⁷⁴ New tools developed by Paul Ekman aim to improve recognition by using more examples as well as more difficult examples—namely profile shots! Visit www.paulekman.com for more information.

⁷⁵ I often invite friends to trainings, and most improve. I was particularly excited to invite two of my closest friends, both of whom often make insensitive comments and fail to offer encouragement. I was not surprised when both scored quite low on the pretest. More disappointingly, they both scored poorly on the post-test as well. At least I now know not to take their insensitivity personally; they simply cannot notice how they affect me and others!

⁷⁶ For further discussion of the “yes and” perspective, see generally DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS* (1999).

⁷⁷ Dan Shapiro first discussed his perception that my work focused on emotions, whatever their source, whereas his research focused on emotions from within the negotiation context when he and I presented a joint program several years ago.

⁷⁸ Why not, with my Mac?

my abdomen meets my lower ribs felt a bit stuck, and I detected my breaths becoming a bit shorter and my vision turning a bit blurry.

As I am writing now, I have just gotten off the phone with a close friend who has been suffering from depression. A few weeks ago, she asked my opinion about raising her antidepressant dose, which her oncologist had prescribed six years ago. I suggested that she see a psychiatrist, and it was quite difficult these few weeks. She wanted just to ask her doctor for a higher dose of the same antidepressant, but I knew from my research and my own experience that psychiatrists often got better results. And, depression being depression, it sometimes manifested as anger—even anger directed at me for my suggestions.⁷⁹ Hearing her on the phone just now, she sounded encouraged after seeing a psychiatrist to remedy some side effects. In between this writing and talking, I also texted a real estate agent about buying my first home.

What do I make of this? My physical signs, noted above, indicate low-grade fear.⁸⁰ As with any emotion, I do not know exactly why this fear arose. Perhaps I was afraid that my friends Len (Riskin) and Dan (Shapiro) would take my skepticism personally. Maybe I was fearful about my first real estate purchase. It is possible that my fear was unrelated to any specific content but was a kind of negative emotion and thinking that may arise on its own in those who suffer from multiple episodes of depression.⁸¹

As I became aware of my fear, another question arose: Would the fear make me see things in a more adversarial way as I write and cause me to exaggerate the conflict between core concerns and emotion? Would I act needlessly competitive and suggest that my friends' approach is inferior to my own?

As I write this, I feel a certain pre-smile on my face, and my breath feels less constrained. The mindfulness alone may have done this, and no additional intervention may be required. Nonetheless, like Riskin, Fisher, and Shapiro suggest,⁸² I also decide it is time to take a break because there are "strong negative emotions."⁸³ Yet my case is different; I follow a different model of emotion and pause once I begin to feel even these slight, impending negative emotions. Starting my writing again tomorrow, I will likely have many posi-

⁷⁹ Compare TERRENCE REAL, *I DON'T WANT TO TALK ABOUT IT: OVERCOMING THE SECRET LEGACY OF MALE DEPRESSION* (1998) (suggesting that men with symptoms of depression often display anger), with Joseph P. Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies*, 74 J. PERS. & SOC. PSYCHOL. 565, 568 (1998) (showing that those induced to be in even mildly negative mood by criticism of how they handled a test were more likely to engage in threats during negotiations).

⁸⁰ EKMAN, *supra* note 45, at 164.

⁸¹ For additional discussion of autonomous depression, see, for example, ZINDEL V. SEGAL ET AL., *MINDFULNESS-BASED COGNITIVE THERAPY FOR DEPRESSION: A NEW APPROACH TO PREVENTING RELAPSE* (2002) (noting that mindfulness-based therapy seemed to work only for those with multiple episodes of depression and theorizing such persons are more likely to have autonomous depression that arises on its own rather than in response to any specific stressor).

⁸² FISHER & SHAPIRO, *supra* note 3, at 153.

⁸³ Leonard Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEG. L. REV. 1, 30 n.126 (2002) (writing a mindfulness article, Riskin spilled his coffee—twice).

tive emotions after I return from taking my dog⁸⁴ to the dog park, especially if it is a sunny day.⁸⁵

A lesson emerges here: Emotion, *whatever its source*, may influence cognition and action. In contrast, the core concerns approach focuses primarily on the negotiation itself as a source of emotion.⁸⁶ While my “negotiation” with the writing of my friends, Len and Dan, may have produced my fearful emotions, these emotions also could have been a reaction to my friend’s depression or my impending house purchase.⁸⁷ I could have attempted to change my emotion through affiliation—reminding myself that Dan and I did trainings together, that Dan attended a day long training I gave at Harvard Business School, that Len suggested my name for a conference at Harvard, a law professor’s convention, this very symposium, and for my first meditation retreat, which led to other retreats and practices that have brought me (and those who encounter me) much joy! But I also could have changed my emotion by playing with my dog or by learning the good news from my friend with depression.

With that example in mind, notice the many roles for external awareness of particular emotions, even quite mild ones. Imagine if Roger, Dan, Len, and I were negotiating over how to write a book together. They might prepare by reminding me how nice it has been to work together (affiliation), asking what topics I think we might address (autonomy), and so on. But that framework leaves them unprepared to notice the mild negative emotion I experienced at my house.⁸⁸ Instead, my mild negative emotion might affect them mildly,⁸⁹ and they, too, might become more competitive than necessary. Indeed, my friends may become even more competitive when I fail to react positively to their careful preparation and attention to the “universal” core concerns.

⁸⁴ On companion animals and depression, see, for example, Rachel Gordon, ‘Assistance Dog’ Designation Opens Doors for Pooches, S.F. CHRON., Oct. 19, 2004, at A-1. See also Joan Esnayra, *Help from Man’s Best Friend: Psychiatric Service Dogs Are Helping Consumers Deal with the Symptoms of Mental Illness*, 27 BEHAV. HEALTHCARE 30-32 (2007) (regarding dogs for depression as service animals under the law); WebMD, *The Pet Prescription: Is It for You?*, <http://www.webmd.com/balance/features/pet-prescription-is-for-you> (last visited June 5, 2010) (noting that studies have found owning a pet lowers stress, relieves depression, reduces blood pressure and triglycerides, and improves exercise habits, all of which can lower the risk of heart attacks).

⁸⁵ See G.W. Lambert et al., *Effect of Sunlight and Season on Serotonin Turnover in the Brain*, 360 LANCET 1840, 1840 (2002) (“[T]he rate of production of serotonin by the brain was directly related to the prevailing duration of bright sunlight ($r=0.294$, $p=0.010$), and rose rapidly with increased luminosity. Our findings are further evidence for the notion that changes in release of serotonin by the brain underlie mood seasonality and seasonal affective disorder.”); see also Michael R. Cunningham, *Wealth, Mood and Helping Behavior: Quasi-Experiments in the Sunshine Samaritan*, J. PERSONALITY & SOC. PSYCHOL. 1947 (1979).

⁸⁶ I say primarily because the core concerns approach also offers tools like the break I was just about to take when there are “strong negative emotions.”

⁸⁷ Thomas H. Holmes & Richard H. Rahe, *The Social Readjustment Rating Scale*, 11 J. PSYCHOSOMATIC RES. 213, 213-18 (1967).

⁸⁸ I did not get the house. However, as I have decided the market still may be going down, all is not lost.

⁸⁹ For discussion on emotional contagions, see, for example, DANIEL GOLEMAN, *SOCIAL INTELLIGENCE: THE NEW SCIENCE OF HUMAN RELATIONSHIPS* (2006) (identifying the phenomenon that occurs when one person has a negative emotion that leads those nearby to develop the same negative emotion).

B. *Why Core Concerns May Backfire*

Months after I wrote the reflection above, I think it shows two things. First, we need to pay attention to all sources of emotion, not just those from within the negotiation itself. Core concerns instead work largely with the negotiation and the relationship between the parties to the negotiation.

As I write this, I'm traveling in a luxurious business class seat on the way back from a conference on negotiation teaching in Istanbul, and I'm feeling fine. Indeed, I'm feeling fine partly because the airline met a core concern: they respected my autonomy by giving me the chance to upgrade to first class for only \$500, which made me feel good, even though I'm still "only" in business. Without the emotional "noise" I had at my last reflection—not just from the business seat but also from my friend's incredible success with the psychiatrist I found for her—I can now be pretty sure it's fair to say what follows. As my happiness with the offer alone of a first class seat shows, I really do believe that some core concerns explain how I feel. *And* I still think the core concerns approach ignores emotions external to the negotiation itself.

Second, the core concerns may not be as "universal" as proponents suggest. Indeed, the approach may backfire, exaggerating negative emotions and dampening positive emotions. I am not sure how to quantify this problem with the core concerns approach: just how often do they help and how often do they hurt—and how often do they make no difference? For now, I think it's good enough just to note that it's plausible there are enough times that sometimes it's not useful to address a particular core concern, and sometimes it's not useful to address a core concern in a particular way. Below, I illustrate the logical ways in which the core concerns may not work as promised and how external mindfulness of emotion may help balance the shortcomings of the core concerns.

1. *The Core Concerns May Not Be Universal*

Core concerns may not apply to all negotiators for three sets of reasons: (1) the general ways in which no single approach may apply to all people; (2) the particular problems that the core concerns may trigger, such as resentment at being patronized, and, (3) the people we encounter in negotiations, particularly in the legal context. Let's return to Jack and Phil. Maybe if Jack tries to suggest brainstorming with Phil, then Phil will feel better from having his autonomy respected. But maybe Phil is very solution-oriented, and he may just want to hear a proposal. Worse, perhaps Phil will try brainstorming but get frustrated because he is just a solution-oriented person. And, if Phil's lawyer is involved, then, like many lawyers, he may be suspicious of sharing the information needed to brainstorm.

The first-level problem of any generalized approach (rather than an individualized approach) brings us to the core of social psychology's claim that peoples' behavior depends on the situation in which they find themselves rather than their personality. Essentially, social psychology posits that seemingly diverse people in the same situation will behave the same. Indeed, there is a significant body of research that supports the position. For example, the Milgram experiments demonstrated that while we generally think only "evil" people would use electric shocks on innocents, a high percentage of diverse people

were willing to follow orders from experimenters in white coats to do just that.⁹⁰ On a more positive note, Tom Tyler's pioneering research found that most people derive greater satisfaction from participating in a process like mediation than from simply attaining the desired outcome.⁹¹ Likewise, social psychologists note that mild interventions such as exposing people to pleasant scents and giving them chocolate put people in a better mood and correlate to better negotiation outcomes.⁹² These experiments all suggest that people share some basic, "universal" characteristics.

Nonetheless, even most social psychologists agree that individuals differ by certain personality characteristics. Some of you reading this may get migraines from chocolate (God have mercy!); some of you, like me, may get headaches from Glade™ and other "pleasantly" scented air fresheners.⁹³ Such logical distinctions and ad hoc statistics of exceptions might give us *some* pause. But the very social psychology that says most people will behave in similar ways in similar situations is the same social psychology that has decades of research to show that there are the "big five" distinctions in personality, including how much people are prone to worry ("neuroticism"), how much they pay attention to detail ("conscientious"), and how much they are extroverted versus introverted.⁹⁴

Some of these exact personality differences may doom the core concerns approach *in some situations with some people*. Starting with affiliation, I might respond well to Riskin's reminder that we are both meditators devoted to promoting meditation for lawyers and others. However, social psychology finds that some people are more introverted and others more extroverted.⁹⁵ If I am strongly introverted, then this attempt to draw me out on a personal level might trigger negative emotions.

Notably, recent research suggests an important cultural twist. It finds that people from some countries, including the United States, are more likely to say⁹⁶ they are extroverted, while those from countries, such as France, fall

⁹⁰ See generally PHILIP ZIMBARDO, *THE LUCIFER EFFECT* (2007) (describing the Milgram experiments and later similar research on why people may do bad things based on social and institutional circumstances).

⁹¹ TYLER, *supra* note 9, at 151-52. People may be more satisfied with participation in the process, as in mediation, but this may be understood as false consciousness when this sense of fulfillment leads them to settle for too little of their real needs. *Id.* at 111.

⁹² See generally Alice M. Isen, Andrew S. Rosenzweig & Mark J. Young, *The Influence of Positive Affect on Clinical Problem Solving*, 11 *MED. DECISION MAKING* 221 (1991).

⁹³ MedlinePlus Medical Encyclopedia, <http://www.nlm.nih.gov/medlineplus/ency/article/000709.htm> (last visited June 5, 2010) (asserting that chocolate may trigger migraines); L.J. Stovner et al., *Epidemiology of Headache in Europe*, 13 *EUR. J. NEUROLOGY* 333, 335 (2006) (stating that migraines will affect 12-27.5% of people at some point in their lives); Diane Mapes, *Odor Tyrants: Those Sensitive to Scent Fight Back*, *MSNBC.COM*, Mar. 31, 2008, <http://www.msnbc.msn.com/id/23836093/> (describing a 2003 study of more than 10,000 mothers and their infants in England found air fresheners, deodorants and aerosols were "significantly associated" with headaches in moms).

⁹⁴ ROSS & NISBETT, *supra* note 23, at 93.

⁹⁵ See, e.g., *id.*

⁹⁶ I use the language "say they are" because the research relies on the way that people answer questions. This is not a fault of this particular set of research but a general limitation of research in personality. It is relatively quick and cheap to get people to answer surveys. It is relatively hard to get people to agree to have researchers follow them around across

somewhat in the middle, and those from countries, such as Indonesia, are much more likely to be introverted.⁹⁷ If Phil were from Indonesia, then, we might be less surprised if we noticed negative emotions like anger or contempt or fear in his face when Jack suggested brainstorming.⁹⁸

In short, some personalities and/or those from certain cultures may warm up to attention to core concerns, others may not react at all, and some may get upset. As I've said, I love brainstorming, and I love other attempts to respect my autonomy, and I love the social process of brainstorming. But many will not.

2. *The Example of Difficulty of Using the Core Concern of Affiliation*

As with autonomy, if Phil tries to influence Jack through affiliation, that also may work, do nothing, or backfire. Affiliation refers to a person's need to feel included and connected.⁹⁹ Just as I might have tried to improve my feelings about Dan and Len by remembering how we were connected in many common activities, or share common professional commitment, so, too, might Phil or Jack. In my case, however, different attempts at affiliation, however well-intentioned, might trigger quite a range of emotions. For example, if someone introducing me referred to all meditators a "Buddhists," this might trigger a negative reaction in both me and those meditators who think of themselves as mere meditators, but not Buddhists—even if we meditate based on principles shared with Buddhist teachings.¹⁰⁰ There are enough individuals who identify as meditators without any spiritual or religious affiliation—some

different activities and have the raters say what they think the people do! Compare SHELL, *supra* note 22, at 3-25, which asserts that people should negotiate in part according to their type, as measured by, among other things, the Thomas-Kilman conflict resolution mode, but the footnotes cite studies that observers often disagree with how participants describe their negotiation style.

⁹⁷ Robert R. McCrae et al., *Personality Profiles of Cultures: Aggregate Personality Traits*, 89 J. PERSONALITY & SOC. PSYCHOL. 407, 420 fig.2 (2005). Of course, it is worth noting that this research relies on how individuals report their own preferences, and higher rates of extroversion in the United States could, in part, reflect a desire to fit in with a culture that values extroversion. Subsequent research addressed this bias by asking people to rate someone they valued rather than themselves. While addressing the concern, it still leaves open the possibility that people from countries who value extroversion, like the United States, may attribute socially desirable characteristics, such as extroversion, to those they like just as they might attribute such characteristics to themselves. Robert R. McCrae & Antonio Terracciano, *Universal Features of Personality Traits from the Observer's Perspective: Data from 50 Cultures*, 88 J. PERSONALITY & SOC. PSYCHOL. 547, 548 (2005).

⁹⁸ I write this sentence with some trepidation: I don't want to suggest that negotiators should engage in some type of ethnic profiling! As I've written elsewhere, even if culture matters, it's hard to know what the relevant culture is. Freshman, *supra* note 4, at 1694-95; Clark Freshman, *The Promise and Perils of "Our" Justice: Psychological, Critical and Economic Perspectives on Communities and Prejudices in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 1, 17 (2004). When I was teaching lie detection to a US-owned engineering firm based in Italy, they said they hated to hear how people in the Middle East like to socialize before they negotiate. "Those people are basically just engineers, and they want to get down to business like the rest of us."

⁹⁹ FISHER & SHAPIRO, *supra* note 3, at 53-54.

¹⁰⁰ I say "shared with" advisedly since historians have shown how many meditation methods taught by the historical Buddha were in fact taught to him by other meditation masters of his day. KAREN ARMSTRONG, *BUDDHA* 56-57 (2001) (describing how the historic Buddha

days I subscribe to this view—that Jon Kabat-Zinn,¹⁰¹ a renowned meditation expert, goes out of his way not to describe his program as Buddhist or even spiritual.¹⁰² Or perhaps the offensiveness would lie not in invoking affiliation by labeling one as a “meditator” or a “Buddhist,” but by invoking what some well-intentioned *person trying* to build on affiliation would assume was a shared Buddhist principle. For example, many would cite abstention from drinking as a Buddhist principle, but I think of it as just a historic artifact.¹⁰³ Many, like Len and Dan, know me well enough not to invoke these kinds of affiliations, but someone reading Dan’s book or Len’s article might very well.

Attempts at affiliation fail even if the person attempting to build on affiliation is more right about who I am than I am. For example, my reaction to “meditator” or “Buddhist” could reflect some of what psychologists of discrimination call “peripheral group discrimination.” As someone whose mindfulness is on the margins of acceptance at my current law school, I might exaggerate my differences with less accepted versions of mindfulness techniques, such as avowedly “religious” ones, on faculties that I often find not receptive to religion. Psychologists find this phenomenon among untenured faculty members who dislike students more than tenured faculty members do, pledges who dislike rival fraternities more than the actual members of their fraternity do, and so on.¹⁰⁴ And, of course, we all know the words of Shylock, who rejected his Venetian borrower’s attempts to socialize so poetically:¹⁰⁵

Yes, to smell pork; to eat of the habitation which
your prophet the Nazarite conjured the devil into. I
will buy with you, sell with you, talk with you,
walk with you, and so following, but I will not eat
with you, drink with you, nor pray with you. What
news on the Rialto? Who is he comes here?

learned common meditation methods of the day, such as concentrating on a single object, whether his breath or a certain image).

¹⁰¹ Jon Kabat-Zinn has created a meditation program widely studied by scientists. For a review of the effectiveness of his programs and discussion of the numerous studies on its effects on cancer, diabetes, HIV/AIDS, multiple sclerosis, and other problems, see SHAUNA L. SHAPIRO & LINDA E. CARLSON, *THE ART AND SCIENCE OF MINDFULNESS: INTEGRATING MINDFULNESS INTO PSYCHOLOGY AND THE HELPING PROFESSIONS* 189 (2009).

¹⁰² See, e.g., JON KABAT-ZINN, *WHEREVER YOU GO, THERE YOU ARE* (2005); cf. SHARON SALZBERG, *FAITH: TRUSTING YOUR OWN DEEPEST EXPERIENCE* (2002) (explaining that she does not agree with many beliefs often described as Buddhist though she is a renowned teacher).

¹⁰³ For information on abstention from drinking as a Buddhist principle, see, for example, GOLDSTEIN, *supra* note 4, at 76. Some people take the more moderate position that, if the Buddha were “right” about many things, then one should consider his views about other things as well. In contrast, I agree with Shapiro and Fisher, who argue in general that we may sometimes pay too much attention to people because they are experts in one area. FISHER & SHAPIRO, *supra* note 3, at 108 (using “status spillover” to refer to “constant risk that the opinions of a person who has high status . . . will be given undeserved weight on a subject to which their status is irrelevant”).

¹⁰⁴ Freshman, *supra* note 18, at 435-49 (discussing peripheral group discrimination); see Jeffrey G. Noel et al., *Peripheral Ingroup Membership Status and Public Negativity Toward Outgroups*, 68 *J. PERSONALITY & SOC. PSYCHOL.* 127, 132-35 (1995).

¹⁰⁵ WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 1, sc. 3 (Cornmarket Press 1971).

And affiliation may not miss the mark by picking the wrong kind of affiliation. We could conclude that Shylock doesn't want to affiliate with non-Jews, or maybe it is this particular non-Jew. Since I wrote this, however, I learned that—just as some people may be so introverted that they just don't want to brainstorm with anyone at any time—some people may be very sensitive to false attempts at affiliation. When I was in Istanbul at an international meeting of negotiation teachers, the organizers had us visit the local market to bargain over the price of something. One woman was so upset that everyone tried to bond with her and invoke some commonality that she asked me to write a piece about the dangers of community and insincere attempts to invoke community!¹⁰⁶ (To further complicate things, as I'm revising this many months later, I wonder if she invited me to write about the dangers of community in a crafty way to build community with me! And, as I revise this a few months even later, I wonder if my lack of reply to various drafts of hers reflects an unconscious resistance to being drawn into any community—even one based on skepticism about community!)

And yet, it does make sense for us to *consider* the effects of affiliation, perhaps most often when it will not succeed. Research on discrimination shows almost anything can be the basis for different treatment or discrimination.¹⁰⁷ Then again, research also shows that what Shapiro and Fisher call affiliation can *sometimes* be a potent antidote. At football stadiums, when African-Americans ask a white fan for directions, they are much less likely to receive help than white fans.¹⁰⁸ But African-Americans who wears, say, a Longhorns jackets is much more likely to get help from a white fan with another Longhorns jacket than those who wear no jacket and ask for directions. In core concerns language, something as simple as a jacket builds enough affiliation to overcome racism.

It is precisely because affiliation *may* work (as with a jacket) but also *may backfire* (as with saying someone else and I are Buddhists) that we need external mindfulness. If someone who knows me refers to “we Buddhists,” or “we meditators,” or our “commitment to truth,” he is making a decent bet because affiliation often works, and those identities probably would resonate with most meditators. Again, compared to other negotiation approaches that make broad claims—such as “set a high but reasonable first offer”—it may work much of the time.¹⁰⁹ Although it is a rather difficult distinction for most people to

¹⁰⁶ Cf. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 132-36 (1996). People may object when something that is valuable in its pure form, such as the physical intimacy between loved ones, is turned into a commercial transaction between what they might see as “a trick” between a “John” and a “hooker.” Though there may be much merit to arguments that “sex workers” provide a valuable service to many, I use the language in the last sentence to capture some of the heart and emotion behind the sentence that mere neutral language might not capture.

¹⁰⁷ See, e.g., Freshman, *supra* note 18, at 380 n.253 (citing Fiske for the proposition that almost anything can become the basis for discrimination).

¹⁰⁸ See John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, in *CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE* 3, 27 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998).

¹⁰⁹ On the general advice to set high offers, see, for example, THOMPSON, *supra* note 19, at 49 (noting that offers correlate highly with outcomes); SHELL, *supra* note 22, at 160. Many,

make, someone may improve his bet by trying to discern my reaction: Do I show a polite but insincere smile or some quick but readily identifiable negative emotion, such as disgust or anger? As I noted above, it is not a hard skill to acquire, and people can learn to improve their ability to identify universal emotion.¹¹⁰

But Riskin and we mindful negotiators (I am pretty sure Riskin will like that label) sometimes only need to distinguish if there is *any* negative emotion to know when to pull back on an approach. For example, if we want positive emotion when we brainstorm because research shows it helps creativity,¹¹¹ then we only need to spot any negative emotion before we pull back. This is even easier than having to distinguish between particular emotions.¹¹² If a negative emotion exists, Riskin might then address a different core concern, take a different approach to promote positive emotion or dampen negative emotion (e.g. calling a break), or try a different type of affiliation (e.g. “We writers have to agree on something so those editors don’t get on our backs”).¹¹³ If his approach is met with a genuine smile, Riskin might make similar allusions later on to build more positive emotion and dampen negative emotion. In this way, external mindfulness can help parties to a negotiation tailor their attempts to optimize emotion with a particular technique, whether invoking one affiliation rather than another or trying a completely different tactic.

In other circumstances, of course, identifying the particular emotion *would* be *more* useful. If I offer a rent that is half of the asking price, I would want to know if what I see is fear (suggesting I might stick with my offer) or contempt (suggesting I indeed may have triggered the feared chilling effect). But this same limitation applies to other negotiation advice and the core concerns themselves. It is useful to know that one should aim “high but reasonable,” but it is better if we could know the highest, reasonable price. It is useful to know we should invoke some affiliation, but it is more useful to know how we could get the affiliation right. And this underscores the promise—and the limitations—of core concerns like affiliation. Core concerns advocates say it is hard to identify a particular emotion, but, as a logical matter, there is no reason to assume it is any easier *in all circumstances* to identify the affiliation that might work (mindful negotiator, for me) rather than backfire (Buddhist, for me).

3. *The Example of Problems with the Core Concern of Autonomy*

Like affiliation, similar problems arise with the core concern of autonomy. To review, autonomy means the capacity to make meaningful decisions in one’s life, such as to play a meaningful role in negotiation. In *Beyond Reason*,

including Shell, posit that offers should not be too high, but there seems to be no scientific evidence for this “too high” limit. SHELL, *supra* note 22, at 160. Thompson says that this fear that an offer will “insult” is “more apparent than real,” but supports her own assertion merely with what she says “[m]anagers tell us.” THOMPSON, *supra* note 19, at 49.

¹¹⁰ *Supra* notes 44-55 and accompanying text.

¹¹¹ Freshman et al., *Efficient Emotion*, *supra* note 1, at 6 n.16.

¹¹² *See generally* EKMAN, *supra* note 45.

¹¹³ *Cf.* Jerome McCristal Culp, Jr., *The Woody Allen Blues: “Identity Politics,” Race, and the Law*, 51 FLA. L. REV. 511, 525 (1999) (claiming that if individuals “are to protect themselves from political oppression, they must form coalitions around their oppression”). For discussion on obstacles to coalitions, see Freshman, *supra* note 18, at 426-39.

for example, Fisher relates how he was driving with his wife to visit a friend's house.¹¹⁴ At one of the stops, Fisher bought a particular gift for their hosts and received free flowers with his purchase.¹¹⁵ When his wife gave the flowers away, however, Fisher was upset.¹¹⁶ After thinking about the situation and his feelings, he realized he had no objection to his wife's act— he just wished she had talked to him first.¹¹⁷

To return to our business divorce, it makes sense that Jack might ask Phil to sit down with him and brainstorm some options. Perhaps, as Riskin, Shapiro and Fisher predict,¹¹⁸ regardless of the solution, this really will make Phil feel better because Jack has honored his autonomy. If Jack had external mindfulness, however, he might notice other possibilities. He may see that Phil also had negative emotions. Perhaps Phil had only negative emotions, some initial positive emotions that faded, or some other emotional pattern. Jack might hypothesize that Phil didn't like brainstorming. It would be a hypothesis since Phil might like brainstorming but not the way Jack did it; or, as with my reflection above, he might be in a bad mood for a totally different reason.

So, too, we should expect that moves to enhance autonomy may lead to a variety of responses in different people. If we can successfully make someone feel their autonomy respected, we may discover positive emotions from them. Recall Tom Tyler's careful studies showing that people prefer processes like mediation and arbitration that honor autonomy.¹¹⁹ Indeed, Tyler found people prefer mediation and arbitration so much that they are often happier with an autonomy-honoring process even when they receive worse monetary or other tangible awards.¹²⁰

Nonetheless, autonomy may sometimes backfire and trigger negative emotions. Widely reported research on choice overload suggests that "we" are often less satisfied when "we" are given "too many" choices.¹²¹ In one often cited study, people who had a choice of just a few chocolates were happier than those who had the choice of more chocolates.¹²² Therefore, while Jack might think he should just give Phil some optimal number of choices, this may not be the best strategy. In Neuro-Linguistic Psychology, trainers sometimes say,

¹¹⁴ FISHER & SHAPIRO, *supra* note 3, at 83 (relating story of Fisher getting a gift on a ride with his wife).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 73, 93 (noting that negative emotions "[u]sually" arise "because a decision was made without consulting the other person" and "respecting people's core concern for autonomy . . . can stimulate positive emotions in them and in yourself").

¹¹⁹ TYLER, *supra* note 9, at 151-52.

¹²⁰ *Id.* at 147.

¹²¹ BARRY SCHWARTZ, THE PARADOX OF CHOICE 201 (2004); Sheena S. Iyengar, Rachael E. Wells & Barry Schwartz, *Doing Better but Feeling Worse: Looking for the "Best" Job Undermines Satisfaction*, 17 PSYCHOL. SCI. 143 (2006), available at http://www.columbia.edu/~ss957/articles/doing_better_feeling_worse.pdf; see also Alix Spiegel, *Day-to-Day: The Mechanics of Choice: More Isn't Always Better* (NPR radio broadcast Apr. 25, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5361844>; see generally SHEENA IYENGAR, HOW WE CHOOSE: THE SUBTEXT OF LIFE (2010).

¹²² SCHWARTZ, *supra* note 121, at 20.

“Two is a dilemma, and three is a choice,”¹²³ as if more than three might be overwhelming.

As it turns out, though, a closer look at the research shows two distinct patterns regarding how “we” handle choice. Maximizers—those who always want to do the very best—are less happy with more choice.¹²⁴ Conversely, satisficers—those who just want to do okay—are not any less happy with more choices.¹²⁵ For those of us who give some credence to the Meyer-Briggs personality test, differences in peoples’ preferences for choice make sense. The test posits that “judgers” like to take their time before making a decision while “intuitives” like to just get the decision made and over with.¹²⁶ In short, then, Jack and the rest of us negotiators cannot assume that a mere increase in brainstorming will make all of our opponents and counterparts¹²⁷ feel better. If Phil is a maximizer or an intuitive, he may dislike brainstorming because it presents too many options or takes too long to reach a decision. Thus, Jack’s attempt to honor Phil’s autonomy may get overshadowed by Phil’s perspective on decision-making, a function of Phil’s personality. External mindfulness can help Jack recognize when his focus on autonomy succeeds and when it meets resistance.

As I am towards the end of my luxurious journey, I now reflect: it still feels right to say “Yes, and.” Some research does indeed support the idea that *successful* attempts to build affiliation may increase positive emotion and promote better outcomes. And much evidence also supports the idea that *successful* attempts to make people feel their autonomy respected will also promote positive emotions and/or reduce negative ones.

So, after many months of reflecting and exchanging with Len and Dan—perhaps even years if we include discussions of related topics—I’m left believing the core concerns and mindfulness are both quite valuable, *and* some concerns remain. In the case of both core concerns, two potential sand traps¹²⁸ exist. First, some people will not share positive responses to any attempt to invoke particular core concerns. Take affiliation. Some people may be loners who dislike community, or at least dislike it in negotiation, or in certain contexts of negotiation. Second, even if we find ourselves with someone who likes *some* kind of community bond, we may get wrong the kind of community she wants: I would be comfortable with another mindful negotiator who went to

¹²³ Janet Konefal, Professor of Psychology, Univ. of Miami Sch. of Med., Class Lecture at the University of Miami School of Medicine (May 1998).

¹²⁴ Guthrie, *supra* note 27, at 605 (“[T]he very presence of multiple options has a tendency to induce people to make suboptimal decisions.”). For information on maximizers versus satisficers, see, for example, Clark Freshman & Chris Guthrie, *Managing the Goal-Setting Paradox: How to Get Better Results from High Goals and Be Happy*, 25 NEGOTIATION J. 217, 220 (2009).

¹²⁵ *Id.*

¹²⁶ ISABEL BRIGGS MYERS & PETER B. MYERS, GIFTS DIFFERING: UNDERSTANDING PERSONALITY TYPE 69-71 (2d ed. 1995).

¹²⁷ Jonathan Cohen suggests we think of others in a negotiation as “counterparts” rather than “opponents.” Jonathan R. Cohen, *Adversaries? Partners? How About Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution*, 20 CONFLICT RESOL. Q. 433, 438-39 (2003).

¹²⁸ I borrow the metaphor of sand traps in negotiation from Leigh Thompson. See generally THOMPSON, *supra* note 19.

similar retreats, but I would get chilly with someone who talked about what “we lawyers” are like. As we saw, these same two sand traps exist for autonomy. Some may prefer to have decisions made rather than make them; some may want to “participate in the process,” but a process very different from the kind we like.

I’ve tried to reveal these sand traps in several ways. In part, I’ve reworked the particular example of the business dispute that Len painted so vividly. Implicitly, I’ve relied on an appeal to our intuitions, or perhaps our experiences, of when these approaches might not work. Also, I’ve invoked systematic research on different accounts of personality differences and other psychology research to suggest why people might react in different ways. Some may be persuaded by anecdotes like Len’s, some by my appeal to intuitions, and some by research. And, if I were giving this paper as a live discussion, I would use external mindfulness to “read” my audience to see which points resonated and which needed further elaboration!

IV. DIGGING DEEPER: THE NON-EMOTIONAL APPEALS OF CORE CONCERNS

Although I raise doubts about whether the core concerns really will promote greater negotiation success in all circumstances, I have no doubt these core concerns may be valuable in many contexts. Narrowly defined, success might only be a matter of increasing readily measurable outcomes. For example, we may measure how well “we” do by how well every party to the negotiation did or, more broadly, we may measure how well all those affected by the negotiation did.¹²⁹ Alternatively, we might view outcomes in a broader way that reflects other values. When it comes to emotion in particular, therapeutic jurisprudence teaches that we should consider the emotional outcome as one value among many, including others like economic outcomes.¹³⁰ Thus, we might consider core concerns such as autonomy and affiliation to be valuable in themselves. Indeed, many philosophers and theorists, including legal philosophers, make exactly this point on the intrinsic value of autonomy and affiliation.¹³¹ On autonomy, no less an authority than the Supreme Court of the United States teaches that autonomy is an important value even when it does not change an outcome.¹³² Of course, the question then arises: If values like

¹²⁹ Judith E. Innes, *Evaluating Consensus Building*, in *THE CONSENSUS BUILDING HANDBOOK* 631, 631-42 (Lawrence Susskind, Sarah McKernan & Jennifer Thomas-Larmer eds., 1999).

¹³⁰ Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* 5, 9-10 (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., 2000); see also Freshman & Guthrie, *supra* note 124, at 218.

¹³¹ For information on the value of autonomy, see, for example, Rawls, *supra* note 4, at 72-81.

¹³² The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

autonomy and affiliation matter on their own, then why not just advocate for them individually, rather than tethering them to improving emotion and negotiation outcomes? As I cannot read minds, I cannot speak for Riskin or Shapiro and Fisher. While I have rather strong doubts about many aspects of Freudian analytic psychology, I do not doubt that they also have unconscious motivations. No doubt they believe, perhaps rightly so, that attention to affiliation and autonomy will often promote better emotional and negotiation success. Indeed, it works as a good general rule. My colleagues might agree that external mindfulness would also improve success. On the other hand, they might think external mindfulness would not be worth it. Perhaps it would be too taxing for people to track seven elements of negotiation from the Harvard Project on Negotiation,¹³³ five core concerns, *and* seven basic emotions.¹³⁴

Additionally, they may agree with me that we can promote one value by telling people it will enhance some outcome, even when it might not. Years ago, I began my own research on emotion and negotiation with that explicit idea. My mom died from depression, and I was rather depressed in law school. For years, I studied both negotiation and cognitive-behavioral therapy, which many considered to be the best treatments for depression.¹³⁵ I noticed a parallel between the two. Cognitive behavioral therapy teaches that people often become depressed, or anxious, or both, when they view things too dichotomously. Hence, we might get anxious if we think we either (1) get our article published at Harvard or (2) fail, with no gray area in between. Instead, we might feel better if we thought we would be happy simply to express our views in a forum that could reach others.

As it turns out, interest-based negotiation—the kind popularized in part by *Getting to Yes*—teaches similar principles. Combining the cognitive behavioral therapy and interest-based negotiation, I thought that it would be easier to reach more people at risk of depression if I spoke about negotiation than if I spoke about depression. Moreover, when I set out to study this, my psychology collaborator thought we could do even better if we taught students to pay attention to emotion in order to improve negotiation skills. Through our experience, my collaborator and I discovered that those with better emotional skills actually not only did better at negotiation but even made better grades their first year of law school!¹³⁶

In conclusion, I still value internal autonomy and mindfulness of the sort Riskin emphasizes and the external thought that I emphasize. Furthermore, I still value the core concerns, particularly autonomy and affiliation. Nonethe-

Fuentes v. Shevin, 407 U.S. 67, 90-91 n.22 (1972) (quoting Stanley v. Illinois, 405 U.S. 645, 656 (1972))

¹³³ Cf. Program on Negotiation at Harvard Law School, *supra* note 8.

¹³⁴ I am grateful to Roy Lewicki for underscoring this point when he asked about research on how well one could “parallel process” awareness of emotion, whether this might signal lying, and track the rest of the negotiation. It’s a good question, and it may merit further research. In the meantime, I recommend, for those who can afford it, that they have one person on “their side” track the process, including external mindfulness, and leave other tasks to someone else to lead.

¹³⁵ See, e.g., Keith S. Dobson, *A Meta-Analysis of the Efficacy of Cognitive Therapy for Depression*, 57 J. CONSULTING & CLINICAL PSYCHOL. 414, 417 (1989).

¹³⁶ Freshman et al., *Efficient Emotion*, *supra* note 1.

less, I argue that we need external mindfulness to notice when those core concerns—or at least the way in which we are tending to them—may not bring about either the emotional outcomes or negotiation outcomes we seek. Moreover, I cannot be sure whether the negative emotions I felt when writing made me exaggerate the differences, or whether the positive emotions I felt while reflecting on my affiliation with my friends, Dan (Shapiro) and Len (Riskin), led me to downplay those differences and overplay the value of their work. As much as I wish to promote these values, I, too, feel the pull of the values—and the feelings—of a commitment to scientific truth and romantic authenticity.¹³⁷ Furthermore, I hope that I remain mindful of how these values work together, when they diverge, and how I relate to them.

¹³⁷ *But see* Ian Ayres & Barry J. Nalebuff, *Common Knowledge as a Barrier to Negotiation*, 44 *UCLA L. REV.* 1631 (1997).