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The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation

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The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation

Erin Ryan[†]

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Why are emotions important, above and beyond correct evaluations? . . . We might want to reply, simply, that having emotions is an essential part of being human. Yet even if having an emotional texture is essential to being human, the question of why we should prize emotions still would arise. Why should we especially prize being human, if that is what it is, unless it embodies something that objectively merits being prized? We don't have to prize every trait we have; why then should the fact that the trait is part of our essence make a significant difference? We need to investigate further the special value of having emotions.

—Robert Nozick¹

I. INTRODUCTION

In the kitchen. At the water cooler. Behind the bench. In the war room. People parse the deluge of input with sight. Through sound. By touch, taste, smell. And *feeling*.

Feeling – emotionality – is the sixth sense, the sixth critical human filter through which we make sense of the universe. It is an epistemological axiom: without the information gleaned from the emotional sense that imbues human interaction and institutions with meaning, our world would seem reduced to hollow shells and randomly-acting forms. We would see a lost child and not understand why she is crying; we might hear a quiver in the voice of another and neither imagine the cause nor foresee its impact on his immediate behavior. Without recourse to our vast emotional database, we would tumble helplessly into the yawning gaps left open by language. In a meeting with new clients, we could never grasp the full essence of their need. In a divisive summit over historically disputed political boundaries, we would be utterly lost.

So long as human beings lead emotional lives, we depend on the data emotional sense provides to understand what is casting the shadows that we observe in the physical form of human actions. It is our telescope into the black box of human agency, behavior, and causation. It is the way we understand, evaluate, and hypothesize about other people's emotional experience of the world and the way we consult our own oracle. Navigating the human landscape without this sixth sense would be like studying a sphere in two dimensional space. So why do we ask lawyers to pretend otherwise?

1. Robert Nozick, *Emotions*, in *THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS* 87, 90 (1989).

We hardly need reminding that emotionality is a defining human characteristic, and emotional sense proves just as universal. Different cultural groups emote differently, and emphasize its proper role and reliability in different ways.² Yet nobody is entirely without emotional sense,³ partially acknowledged as “sensitivity,” “intuition,” or “emotional intelligence,” and which this piece broadly defines as the mental manipulation of affective data.⁴ Affective data – like the crying child and quivering voice – stimulate complex psychological (and occasionally physiological) reactions in people,⁵ but do not so inspire machines. Indeed, as the technological world mimics more and more the abilities of the biological, emotionality remains the distinctive hallmark of humanity. Artificial intelligence has produced chess-playing machines that can reason analytically, and mechanical devices have been designed to gather data akin to that perceived by the first five senses – but thus far, emotional sense has proved beyond the reach of engineering. To deny the salience of emotionality in fields we generally consider realms of reason – foremost among them the law – would be tantamount to entrusting our most pivotal societal institutions to the care of robots.

2. See Hillary Anger Elfenbein & Nalini Ambady, *Universals and Cultural Differences in Recognizing Emotions*, 12 CURRENT DIRECTIONS IN PSYCHOL. SCI. 159 (2003) (finding some universals but significant enough differences between cultural expressions of emotion to yield an in-group advantage for evaluating emotional content in social interactions), available at <http://faculty.haas.berkeley.edu/anger/CurrentDirections.pdf>; Sieghard Beller & Andrea Bender, *Cultural Differences in the Cognition and Emotion of Conditional Promises and Threats – Comparing Germany and Tonga*, Department of Psychology, University of Freiburg, D-79085 (exploring different cultural groups’ emotional responses to verbalized conditional promises and threats), available at <http://www.cogsci.northwestern.edu/cogsci2004/papers/paper309.pdf>; Kynug Il Kim & Arthur B. Markman, *Fear of Isolation, Cultural Differences, and Recognition Memory*, Department of Psychology, University of Texas, Austin (demonstrating distinct cultural groups’ varying sensitivity to context information based on distinct cultural fears), available at <http://www.cogsci.northwestern.edu/cogsci2004/papers/paper125.pdf>.

3. That is to say, no one with a healthy brain lacks emotional sense. Scientists have, however, studied brain-damaged and autistic individuals who lack normal human abilities to evaluate the emotional content of human social intercourse, including that perceived in facial expressions and tones of voice. See Ralph Adolphs, *Neural Systems for Recognizing Emotion*, 12 CURRENT OPINION IN NEUROBIOLOGY 169 (2002); Ralph Adolphs et al., *A Role for Somatosensory Cortices in the Visual Recognition of Emotion as Revealed by Three-Dimensional Lesion Mapping*, 20 J. OF NEUROSCIENCE 2683 (2000), available at <http://www.medicine.uiowa.edu/adolphs/jn.pdf>; S. B. Hamann & Ralph Adolphs, *Normal Recognition of Emotional Similarity Between Facial Expressions Following Bilateral Amygdala Damage*, 37 NEUROPSYCHOLOGIA 1135 (1999), available at <http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?CMD=display&DB=pubmed>.

4. See *infra* Part II (defining emotional sense in more depth).

5. See, e.g., Nozick, *supra* note 1, at 91.

Few would advocate that we so empower the robot, but many nevertheless resist the idea that emotionality is a critical component of reasonable, rational decisionmaking.⁶ Lawyers (in whose hands we *have* entrusted our most pivotal societal institutions) are especially resistant to the idea that their reasoning should ever be “clouded” by emotion.⁷ Our societal tendency to undervalue emotional sense as a tool of epistemology follows from the millennia over which Western thinkers have imposed a value-laden dichotomy between cognition and emotion, casting cognition as the virtuous champion of objective truth and emotion as an amoral, primitive wilderness to be tamed by reason.⁸ But solid legal decisionmaking calls for the most careful of consideration, and the resulting repression of emotionality in deliberation can dull the edge with which lawyers think about the problems they are asked to solve.

Indeed, lawyers are routinely asked to negotiate the vexing, layered, and often emotionally-charged problems that others have finally relinquished to the care of professionals. Much of the stuff of these problems can be articulated in terms of common law rights and duties, statutory rules and remedies, costs and benefits, profits and losses. But within the pores of these dispassionate analyses lurk the lost child and the quivering voice, the full scope of the client’s need and history-fed bitterness over disputed boundaries. In contemplating the root cause and ricocheted effects of legal problems, and in managing the matrices of human interaction that arise in negotiated attempts to solve them, lawyers rely on an inductive process of knowing that is driven as much by emotional sense as it is by more dispassionate logics.

As this piece sets forth, emotional sense fuels a pre-linguistic, quasi-inductive reasoning process – an inner-deliberation that runs beneath conscious thought – that enables each of us to draw on stored

6. See, e.g., Jim Camp, *Can Women Be Great Negotiators? As Long as They Keep Their Emotions Under Control*, <http://www.career-intelligence.com/management/GreatNegotiators.asp> (last visited July 29, 2004) (arguing that both men and women are made vulnerable by emotionality in negotiation settings).

7. See, e.g., Jeffrey Rosen, *Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun*, *THE NEW REPUBLIC*, May 2, 1994, at 13 (critiquing Justice Blackmun’s jurisprudence for relying too heavily on emotional input). See also Samuel Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 *CORNELL L. REV.* 655 (1989) (arguing that lawyers inappropriately suppress acknowledgement of emotional inputs to evaluation and decisionmaking).

8. This philosophical legacy is often attributed to Plato’s metaphysics, discussed *infra* Part III. See also Pillsbury, *supra* note 7, at 674 (discussing how the law’s “general distrust of emotions” stems from the philosophic tradition that contrasts reason with emotion).

information about emotional phenomena to hypothesize about motives, behavior, and consequences, both within ourselves and in others.⁹ The deliberative use of emotional sense depends on the thinker's own experience of emotions, but it is a separate, more complex mental phenomenon than the direct experience of a particular emotional state.¹⁰ Epistemologically stated, it is the process by which emotionally resonant knowledge is drawn upon to help organize the chaos of raw input into a state of resolve that can then be operated on by more formal inductive reasoning.¹¹ The raw data requiring such pre-treatment arises from a thinker's consideration of virtually anything having to do with human experience.

For lawyers, the final destination of virtually all individual deliberation is collective deliberation. In lawyering, the thinker deliberates in service of a larger endeavor (a dispute, a lawsuit, a transaction, a legislative proposal), which invariably involves decisionmaking by at least one other person (at minimum, the client). Collective deliberation is, of course, the most basic form of negotiation, and be it preparing for litigation, conducting a private settlement hearing, or addressing the Senate – it is the currency of legal practice. Most broadly understood as the interactive communication process that takes place “whenever we want something from someone else or another person wants something from us,”¹² negotiation includes not only the more overt episodes of deal-making but also the exchanges in which we want someone to understand or agree with us, or we want to understand someone else. Every client contact, partner meeting, and strategy session draws on the same negotiating skills that a lawyer brings to the more recognized negotiating forum of the settlement conference,¹³ and the importance of negotiation in policy-making arenas is self-evident.¹⁴

9. *See infra* Part II.

10. *See infra* p. 16.

11. *See id.*

12. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 6 (1999). Shell further observes that “All of us negotiate many times a day. We negotiated as children for things we wanted: attention, special treats, and raises to our weekly allowance of spending money. We negotiate as adults for much more complex sets of desires that, when you examine them closely, often come down to the same things we negotiated for as children. Negotiation is a basic, special form of human communication, but we are not always aware that we are doing it.” *Id.*

13. *See generally* ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 3 (2000) (“Negotiation is central to lawyering, and . . . lawyers play a critical role in many of society’s negotiations.”).

14. *Cf.* ROGER FISHER, *INTERNATIONAL CONFLICT FOR BEGINNERS* (1969) (treating the role of negotiation in resolving international conflict).

Having set forth the baseline of emotionally-informed knowing that facilitates individual deliberation, the piece then explores how emotionally-derived knowledge sustains collective deliberation. As deliberation moves from the individual to the collective endeavor, deliberators draw on epistemological emotionality both substantively and procedurally, not only in honing private deliberations, but also through the iterated process by which parties evaluate and adjust for the impacts of each round of exchange on participants to maintain effective learning and communication between parties. This looped consultation of emotional sense, in which parties explore and adjust to one another's emotional vocabularies and the emotional data conveyed, gives rise to an ever-present, subterranean discourse that underlies collective deliberation – an unspoken negotiation of emotional content that runs beneath the surface of the overall deliberative endeavor.

Although negotiators are increasingly exhorted to appreciate the impact of raw emotions at the table, this piece goes further in arguing that lawyers and negotiators should become aware of the *epistemological* function of emotionality. When negotiators better understand the way in which emotional knowing informs their practice, they can more effectively channel it – harvesting insight where emotional wisdom is most strong and containing judgment distortion where emotional wisdom is weakest, facilitating the search for the Pareto frontier.¹⁵

Epistemological emotionality thus fuels the process of individual and collective deliberation that permeates legal practice, but negotiating lawyers are discouraged from refining (or even acknowledging) their use of emotional knowledge by a professional culture that disdains it. Lawyers prefer to see themselves as keenly rational thinkers, and negotiators as practitioners of a science with hard skills and identifiable principles. And indeed, fine lawyers *are* rational thinkers and good negotiators *do* engage in a highly structured practice – but these disciplines coexist with, rather than supplant, their continuous appeal to emotionally-derived wisdom in understanding human variables. Modern scholars of philosophy,¹⁶

15. The Pareto frontier defines that set of potential outcomes in which no interest can be further advanced without compromising satisfaction of another. *See, e.g.*, JOHN BLACK, OXFORD DICTIONARY OF ECONOMICS 343 (2000) (defining the concept of Pareto-optimality).

16. *See, e.g.*, PETER GOLDIE, THE EMOTIONS: A PHILOSOPHICAL EXPLORATION (2000); PATRICIA GREENSPAN, EMOTIONS AND REASON: AN INQUIRY INTO EMOTIONAL JUSTIFICATION (1988); ANTHONY HATZIMOYSIS, PHILOSOPHY AND THE EMOTIONS (2003); RONALD DE SOUSA, THE RATIONALITY OF EMOTION (1987); Nozick, *supra* note 1.

psychology,¹⁷ organizations,¹⁸ business,¹⁹ education,²⁰ and even neuroscience²¹ are increasingly cognizant of the fruits of emotional wisdom, and interest in the subject has even arisen in circles of legal academia.²² This growing recognition attests to the importance of emotional knowing in all aspects of reasoned human discourse – and nowhere is reasoned human discourse more important than in the deliberative enterprise of law, which requires its agents to reflect carefully about the meaning of social interactions and institutions, and accords great significance to their resulting choices.

In legal arenas, the epistemological value of emotional insight is pivotal, as lawyers, judges, and policymakers consult emotional data in evaluating facts, understanding arguments, formulating proposals, and negotiating resolutions. The stakes for solid individual and collective deliberation could not be higher. Yet most continue to practice as though acknowledging emotionality in legal discourse

17. See, e.g., REUVEN BAR-ON & JAMES A. PARKER, *THE HANDBOOK OF EMOTIONAL INTELLIGENCE: THEORY, DEVELOPMENT, ASSESSMENT, AND APPLICATION AT SCHOOL AND IN THE WORKPLACE* (2000).

18. See, e.g., CARY CHERNISS ET AL., *THE EMOTIONALLY INTELLIGENT WORKPLACE: HOW TO SELECT FOR, MEASURE, AND IMPROVE EMOTIONAL INTELLIGENCE IN INDIVIDUALS, GROUPS, AND ORGANIZATIONS* (2001); STEPHEN FINEMAN, *Emotion in Organization* (1993).

19. See, e.g., DANIEL GOLEMAN ET AL., *PRIMAL LEADERSHIP: REALIZING THE POWER OF EMOTIONAL INTELLIGENCE* (2002); Leigh L. Thompson et al., *Some Like it Hot: The Case for the Emotional Negotiator*, in *SHARED COGNITION IN ORGANIZATIONS: THE MANAGEMENT OF KNOWLEDGE* (Leigh Thompson et al. eds., 1999); Leigh L. Thompson, *Relationships and Emotion: Building Rapport*, in *THE MIND AND HEART OF THE NEGOTIATOR* 168 (Leigh Thompson ed., 1997).

20. See, e.g., PETER SHARP, *NURTURING EMOTIONAL LITERACY: A PRACTICAL GUIDE FOR TEACHERS, PARENTS AND THOSE IN THE CARING PROFESSIONS* (2001).

21. See, e.g., ANTONIO R. DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1995).

22. See, e.g., Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996) (tracing the impact of emotionality in substantive doctrines of criminal law and arguing that legal doctrines structured to reflect “evaluative” emotionality can promote the intended purposes of criminal law); Pillsbury, *supra* note 7 (arguing lawyers inappropriately suppresses acknowledgement of emotional inputs to evaluation and decisionmaking); Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977 (2001) (injecting emotionality into consumer choice theory); Jenik Radon, *Sovereignty: A Political Emotion, Not a Concept*, 40 STAN. J. INT'L L. 195 (2004); Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193 (2002); Cass Sunstein, *Probability Neglect: Emotions, Worst Cases, and the Law*, 112 YALE L.J. 61 (2002) (arguing that emotional responses unduly trump probability analysis in risk assessment); R. George Wright, *An Emotion-Based Approach to Freedom of Speech*, 34 LOY. U. CHI. L.J. 429 (2003) (analyzing legal protection of emotional expression). See also 2000 Symposium on Law, Psychology, and the Emotions, 74 CHICAGO-KENT L. REV. 1423 *et seq.* (2000).

represents a betrayal of the profession.²³ As courts remain clogged with lawsuits, as legal disputants increasingly seek negotiated outcomes through alternative dispute resolution,²⁴ and as critical international deliberations risk derailing over emotionally-charged content and culturally distinct approaches²⁵ – clients, constituents, and lawyers themselves deserve a fuller model of legal thinking.²⁶

This article thus sets forth the foundational role of epistemological emotionality in legal deliberation and negotiation – the fruits, perils, changing cultural norms, and change that remains needed in a world where all lawyers negotiate²⁷ and all negotiators deliberate. Although we seldom acknowledge the tacit negotiation of affective undercurrents that underlie individual and collective deliberation, it is only by recognizing its emotional content and better synthesizing emotional and analytical responses to negotiating stimuli that we can advance our skills to the next level. As lawyers on behalf of our clients, leaders for our constituents, or advocates for our cause, we should strive to meet this challenge, not only to improve any given outcome, but to fulfill the true potential of problem-solving negotiation as a socially constructive tool of law and public policy.

Part II articulates the concept of “emotional sense” and outlines its role in the Deliberation Beneath, the pre-analytic process through which a thinker pre-screens cognitive inputs by evaluating affective characteristics against a learned database of emotional experience.

23. See, e.g., Melissa Nelken, *Negotiation and Psychoanalysis: If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School*, 46 J. LEGAL EDUC. 420, 427 (1996) (describing the unemotional professional ideal of lawyering and the shame that lawyers feel when they depart from this ideal). See also Dwight Golann & Helaine Golann, *Why is it Hard for Lawyers to Deal with Emotional Issues?*, 9 DISP. RESOL. MAG., Winter 2003, at 26 (quoting a typical lawyerly reflection: “[t]he fact is, I sometimes don't feel that I'm being professional when I work with emotions. It's not what lawyers do. . . . Dealing with facts and arguments, analyzing issues, generating strategies, and most important, solving problems [is what makes me feel professional.]”).

24. See Erin Ryan, *ADR, the Judiciary, and Justice: Coming to Terms with the Alternatives*, 113 HARV. L. REV. 1851, 1852 (2000) (reviewing the rise of negotiated settlement as the primary means of legal dispute resolution).

25. See, e.g., FISHER, *supra* note 14; ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 30 (Penguin Books 1991) (1981). (observing how Israeli-Palestinian negotiations over even the most practical matters, such as water distribution, are permeated by strong tides of emotion that can destabilize progress).

26. Anecdotal evidence suggests that nonlawyer negotiators have already been learning better, prompting one legal commentator to urge lawyers to improve their emotional skills so as to protect their market share. See Lawrence R. Richard, *Hiring Emotionally Intelligent Associates*, 43-OCT RES GESTAE 24, 28.

27. See MNOOKIN, *supra* note 13, at 3.

The Deliberation Beneath may proceed unnoticed beneath the surface level of analysis that attracts greater conscious scrutiny, but it provides essential resources for the deliberative stages that follow.

Part III reviews the traditional segregation of emotion and cognition in Western thought, how this has created a legal culture that disparages open consideration of emotional input, and how scholars have increasingly rejected the paradigm that subordinates emotionally-derived knowledge.

Part IV uncovers the Negotiation Beneath, the subterranean exchange of emotional information between individuals that facilitates a substantive negotiation. In the Negotiation Beneath, the process of emotionally-informed individual deliberation identified in Part II expands in settings of collective deliberation into an iterated process of cross-emotional reflection within and between participants. It reviews how concepts of emotional sense elucidate notions of negotiating “intuition” and cognitive biases that threaten negotiating efficiency, concluding with reflections from neurobiology on the adaptive value of emotional sense.

Part V concludes the piece by recommending that a more purposeful synthesis of emotional and analytic data in deliberation and negotiation will improve the potency with which lawyers, judges, and lawmakers approach the problems they are called upon to solve.

II. THE DELIBERATION BENEATH

At a more complex level, emotions are experiences. They are the feelings that accompany the emergent actions that address the anticipated futures of gain or loss in one's attachments to others, one's livelihood and safety, and the perceived possibility or impossibility of changing the world to one's liking or advantage: joy, grief, fear, rage, hope and despair. Though we associate them with objects in the world, these feelings, which philosophers call qualia, are internally derived and do not belong to those objects, such as the sweetness of fruit, the repugnance of carrion, the inviting softness of velvet, and so on.

—Walter J. Freeman²⁸

28. Walter J. Freeman, *Emotion is Essential to All Intentional Behaviors*, in *EMOTION, DEVELOPMENT, AND SELF-ORGANIZATION: DYNAMIC SYSTEMS APPROACHES TO EMOTIONAL DEVELOPMENT* 209 (Marc D. Lewis & Isabel Granic eds., 1998), available at <http://sulcus.berkeley.edu/wjf/CE.%20Neurodynamics.and.Emotion.pdf> (last visited Feb. 23, 2005).

Commonly understood, deliberation refers to the activity of careful consideration, the manufacture of mature reflection by examining and weighing the reasons for and against a particular course of action.²⁹ This article probes the importance of emotional inputs to deliberation both by groups and within individuals, with special attention to deliberation in lawyering, the most deliberative of all professions.

By profession, lawyers are perhaps also the least “emotional” – setting the stage for the epistemological dilemma that is the subject of this inquiry. If, as argued here, epistemological emotionality is an underappreciated but critical component of legal deliberation and negotiation, and lawyers are educated amidst a professional culture that disparages emotional inputs to decisionmaking, just how disabled are most lawyers in performing their essential tasks? Stated better, how much more *able* will lawyers become when they are trained to develop their emotional resources rather than expunge them?

As detailed in Part III, the legal culture harbors a deep distrust of emotion as that inherent human weakness that would, given half the chance, wholly undermine reason. Distrust of emotion has been successfully inculcated in generations of lawyers, who so fear betraying this bedrock professional norm that, on the one hand, they shut down channels of emotionally-informed information in circumstances where it might genuinely facilitate deliberation. On the other hand, they periodically allow their judgment to be unduly swayed by the kind of inadequately considered emotional input that really *can* short-circuit the mature deliberative process. Both represent failures by the individual to harness innate emotional resources, which can aid deliberators in interpreting, forecasting, and managing human behaviors within and in others. Fuller understanding leads to richer deliberation, which, in turn, leads to more robust decisionmaking. Like all human beings, lawyers inevitably rely on emotional sense in interpreting their worlds, but they do so in spite of their training rather than because of it. Indeed, it is the lack of self-reflective training that makes legal deliberators vulnerable to the kind of dysfunctional emotional influence that lawyers most fear.³⁰

Lawyers would do better with more honed emotional resources, but they have been taught to subjugate the very resources that would

29. See, e.g., RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 348 (2d ed. 1998).

30. “Dysfunctional” emotional influence on decisionmaking might be demonstrated by hasty decisions taken, for example, out of unreflective anger, fear, excitement, vengeance, pride, competition, or exuberance.

help them develop effective lawyer-client partnerships, long-sighted public policies, and ethically reflective leadership skills. Ultimately, this piece posits that, like other basic legal skills, emotionally-informed deliberation can improve with training, and training begins with understanding. This Part explores the emotional contribution to individual deliberation that is the foundation for all individual and group decisionmaking, and as such, already an inescapable part of lawyering.

A. *Emotional Sense as an Epistemological Tool*

In probing the cognitive processes through which deliberators evaluate and react to incoming information, this piece often relies on the perilous terms, “emotionality” and “emotional sense.” The terms are useful because we all experience emotions, and most of us proceed believing that we basically know what other people are talking about when they reference emotion. The terms are perilous because the project of actually defining emotion more precisely than that has pre-occupied human thinkers for at least three thousand years.³¹ Although it is certainly not my task to resolve that epic ontological puzzle here, I will brave the positivist assertion that what is common in our collective emotional experience has enough substance that we can rely on a colloquial understanding of the word “emotion” to engage a meaningful discussion about its role in deliberation and negotiation.³²

For the purposes of this discussion, then, we need only agree that the word “emotions” refers to the subjective experiences most of us recognize involving various shades of joy, grief, fear, anger, hatred, compassion, envy, hope, guilt, gratitude, disgust, and love.³³ We can

31. See Posner, *supra* note 22, at 1979 (observing that even now, “psychology lacks a widely accepted theory of emotion and many fundamental issues about the nature of emotion remain unresolved.”). Indeed, a potent critique of scholarship about the relationship between emotion and cognition is that “the cognition/emotion debate begs the question of what constitutes an emotion.” Laura Little, *Negotiating the Tangle of Law and Emotion*, 86 CORNELL L. REV. 974, 987 (reviewing SUSAN BANDES, *THE PASSIONS OF THE LAW* (1999)).

32. See Kahan & Nussbaum, *supra* note 22, at 277 (asserting, with regard to the ongoing debate about the meanings and mechanisms of emotions, that “there is enough common ground and overlap that we are entitled to think of the debate as a genuine debate about something reasonably stable. . .”).

33. See *id.* at 276 (identifying these as the commonly accepted “major emotions”).

avoid the pressing psycho-philosophical questions of whether, for example, emotions are more physical or more mental phenomena, because the answers don't alter this analysis very much, if they do so at all.

The more interesting question is what I mean by "emotional sense." If visual sense represents the mental manipulation of optical data, this piece takes "emotional sense" to be that set of human characteristics that enables the mental manipulation of affective data. Admittedly, this definition tempts circularity, since the word "affective" is defined as "causing emotion or feeling."³⁴ So to rectify any such circularity, "affective data" here refers to all incoming information that either incites (1) a direct emotional response (such as jealousy or relief); or (2) a fast but reflective thought process in which the thinker compares the incoming information against an inner database of learned information and memories about emotional experiences that the thinker has either experienced directly or observed in others (for example, perceiving the crying lost child³⁵ and retrieving internally stored information about fear, helplessness, tears, loss, childhood, parenting, etc.).³⁶

34. See RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY, *supra* note 29, at 22.

35. See *supra* Part I.

36. Applying the nomenclature of sense to emotion might elicit objection because, someone might argue, the conveyance of sensory information suggests a quality of objectivity that cannot be present in reference to anything having to do with inherently subjective emotions. However, the predicate notion that sensory information conveys unmediated truths about the world is patently illusory. Vision and hearing, like emotional sense, require elaborate mental processing to parse relevant information from the huge quantities of incoming data that would otherwise overwhelm functional cognition, and to interpose missing material where needed.

For example, we actually possess two visual blind spots where the optic nerve head attaches to the retina of each eye, but we do not perceive these holes in our visual field because our brains extrapolate the likely-missing content from the surrounding signals and "fill it in" for us. See, e.g., *Seeing More than your Eye Does*, at <http://serendip.brynmawr.edu/bb/blindspot1.html> (last visited Dec. 6, 2004). Due to the demonstrated cognitive drive to resolve sensory uncertainty, we often perceive visual information that is simply not present in the external world or organize visual input according to recognizable frames of reference that we choose based on factors unrelated to the visual input itself. See, e.g., Ronald Chen & Jon Hansen, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1189-94 (2004) (demonstrating, through compellingly educational illusion samples, how the strong cognitive preference for visual certainty induces people to "see" things that are not actually there). From the moment our brains begin interpreting sensory data, it becomes "subjectified" by the cognitive filters we apply to organize it into recognizable patterns and usable chunks. What we "see" with our eyes is thus as much a product of mental manipulation as it is what is actually "out there."

Though the two variants of affective processing are isolated here for the purposes of definition, they are arguably bound together in various causal patterns more often than they are separated. We respond emotionally to memories that we retrieve analytically, and a direct experience of an emotion may prompt a more analytic consultation of the emotional database.³⁷ For this reason, affective data may arrive from an external source or arise as the product of an independent internal thought process.³⁸

The “mental manipulation” of this affective data occurs as a discursively inductive enterprise, spanning the subconscious to the pseudo-conscious to the intentional, in which the data is processed toward one or more responsive ends. For example, on hearing the quiver in the voice of another,³⁹ the perceiver first apprehends the quiver as affective data, and then reflects, if perhaps instantaneously, on distress, composure, resonant past experiences, literature, or the like. The perceiver might then consider the origin of the emotion she recognizes in the quiverer, or perhaps how the quiverer’s experience of this emotion may impact his immediate or future behavior, or whether it sheds any light on his past acts. This consideration may seem to take place instantaneously, perhaps via a nonverbally mediated thought-process, or it may take measurable time through a more analytical process of thought.⁴⁰ Ultimately, the perceiver concludes the process by responding to the data in some way based on the fruits of her deliberation – perhaps by soothing, or by intentionally choosing to ignore the quiver, or perhaps by choking up herself.

37. See, e.g., Nozick, *supra* note 1, at 89 (“This does not mean we first are conscious of beliefs and evaluations and *then* have an emotion; sometimes we may discover our implicit beliefs and evaluations by pondering the emotions we are aware of feeling.”).

38. Some would argue that all data becomes potentially “affective” under the second variant of affective processing (in which a datum triggers consultation to the inner emotional database), based on the conviction that this process of triggered consultation is virtually automatic, taking place unconsciously. See, e.g., Freeman, *supra* note 28, at 5 (describing emotional experience, from the Pragmatic perspective, as an “integral part of the ongoing interaction between one’s self and one’s social environment”).

39. See *supra* Part I.

40. The word “analytical” is roughly defined as pertaining to “a proposition that is necessarily true independent of fact or experience.” See *The Free Dictionary. Com* at www.thefreedictionary.com/analytical (last visited Jan. 7, 2005). For example, “all spinsters are unmarried” is an analytical proposition. *Id.* In this discussion, I use “analytical” to refer the sort of logic-mediated reasoning process that operates independently of emotional input.

Even a seemingly unmediated responsive emotional reaction such as the latter involves a (fast) mental manipulation of the affective data, during which the perceiver recognizes the other party's emotion, locates its significance internally, empathizes, and responds in kind.⁴¹ Indeed, empathy (understood not as sympathy, but as "putting on another's shoes" to understand his perspective) is perhaps the classic example of an emotional sense-processed reaction to affective data. But a decision not to respond outwardly at all to an affective datum also invokes exercise of emotional sense, as it follows the same trajectory of reflective evaluation. By contrast, if the perceiver did not respond outwardly because she did not perceive emotional content in the quiver, that would not represent an invocation of the emotionally mediated decisionmaking process (though it might represent a failure of emotional sensitivity).

This is the process through which individual deliberation is informed by emotionally-derived wisdom, the analytically-refined product of emotional sense. Thus understood, emotional sense fuels a pre-linguistic, quasi-inductive reasoning process that reaches deeply into cognition.⁴² It enables us to draw on past experiences of emotional states and learned emotional inferences to hypothesize about present motives and future behavior in ourselves and by others who may not otherwise offer the information. It is through these specialized emotional inferences that we are able to bridge gaps between what we can know through more direct means and what we must choose to believe (even as a matter of probability) in order to make effective decisions.⁴³ Forming a body of emotional wisdom, these beliefs func-

41. This conception of how emotionality is enmeshed in cognition reflects the "evaluative" understanding of emotional operation, which follows from the Aristotelian critique of the Platonic view. See Kahan & Nussbaum, *supra* note 22, at 285-93 (discussing the "evaluative" conception of emotion and reasoning); see also *infra* Part III.

42. For a more thorough discussion of a similar view of emotionality in cognition, see Kahan & Nussbaum, *supra* note 22, at 275-79. Kahan and Nussbaum there contrast the "mechanistic" view of emotion, in which emotions are considered forces more or less devoid of thought or perception, with their preferred "evaluative" conception, which holds that emotions "embody beliefs and ways of seeing, which include appraisals or evaluations of the importance or significance of objects and events." *Id.* at 278. They further contend that the evaluative view "has enjoyed widespread acceptance and has proven the dominant influence in the development of law, if not in legal scholarship." *Id.*

43. See, e.g., Freeman, *supra* note 28, at 4 (identifying emotions with the process by which a person forms the intention to depart from a state of rest).

tion as emotionally-derived knowledge.⁴⁴ Emotional sense, emotionally-derived knowledge, and the emotionally-informed decisionmaking that follows is what ultimately enables us to navigate our uncertain world.

The deliberative use of emotional sense, though largely enabled by emotional experience, is more nuanced than the comparatively simple, direct experience of particular emotional states. Rather, it represents the epistemological process by which emotional knowledge is drawn upon to organize input into a state of understanding that can *then* be operated on by more formal inductive reasoning. The insight a person gains into external and/or internal phenomena by testing and evaluating affective data this way yields tremendous resources for understanding a situation and making choices about what to do next. Making those choices may involve a more purely analytic process of reasoning, but the reasoning will be between alternatives that have already been appraised by the emotional epistemological process. It is in this respect that emotional sense is a component – an analytically-prior component – of analytic reasoning, at least in consideration of matters implicating human affairs.⁴⁵ It helps us to understand experiences that we have not shared, and know things we could not otherwise know, constituting an exceptionally powerful epistemological tool.⁴⁶

44. One might argue that what I am calling emotionally-derived knowledge cannot really be regarded like other knowledge, because it is so inherently subjective. It is certainly true that emotional knowledge is inherently subjective, but that does not mean that it is not like other kinds of knowledge. Essentially, all mentally-held knowledge is a collection of beliefs about the world. Like most other forms of knowledge, emotionally-derived knowledge may vary in accuracy. *See infra* Part III (discussing emotional error). Similarly, various historic beliefs about the shape of the world (considered “knowledge” in their times) have varied in accuracy, as have countless witnesses’ convictions (about what the defendant was wearing at the time, etc.). But we move through the world relying on the knowledge we carry with us, for better or ill, and emotional knowledge, though it may serve us differently than other forms of knowledge, should not on this ground be considered of lesser integrity.

45. That is to say, emotional sense is most epistemologically valuable in interpreting matters involving human behavior, like government, and least valuable in consideration of abstract sciences that lack an anthropocentrically causal component, like physics.

46. *See Pillsbury, supra* note 7, at 676-77 (“Emotions are fundamentally a way of making sense of the world. We use emotion to synthesize chaotic reality and give it personal meaning. Emotion provides the basic means for relating the inner subjective self to the outer objective world.”).

B. *Emotionally-Informed Decisionmaking*

This far-reaching view of emotional sense is appropriate to the vast influence of emotional sense in our lives.⁴⁷ Daniel Shapiro attempts to characterize the pervasive presence and influence of emotionally charged experience in setting forth his “Law of Perpetual Emotion” as a guide for negotiating lawyers:

Emotions are a constant stream within us, just as rivers and streams flow with an endless deliverance of water. We constantly respond emotionally to the environment surrounding us and to our own thoughts, feelings and behaviors. We react emotionally when other negotiators arrive late, smirk at our idea, raise their voices, appreciate our ideas or listen closely. We also react emotionally when we question the truth of the other’s statement, worry about how we are going to close the meeting in time to pick up the kids at school, and so on.⁴⁸

Such environmental emotionality is salient for all people, but it takes on special importance for professionals committed to understanding the particulars of another’s experience enough to help improve it, as do lawyers, negotiators, and policymakers.⁴⁹ Accordingly, some legal scholars have called attention to the importance of emotionality as a legitimate tool of deliberative epistemology.⁵⁰ For example, Professor Don Welch explains that emotions

can enlarge and deepen our perception and understanding of the way things are. Not only do certain emotional responses motivate us to learn more about various features of the world, but they can foster an appreciation of those realities that goes beyond the understanding yielded by a narrower view. Through such emotions as sympathy, admiration and fear, for example, we identify with the plight of others, expanding our sense of human needs and interest. An affective involvement with the

47. See, e.g., Justin D’Arms, *Empathy and Evaluative Inquiry*, 74 CHI.-KENT L. REV. 1467, 1468 (2000) (“[E]valuative judgments in particular seem to be so intimately connected to our emotional reactions to the world that it is far from obvious how these forms of judgment could proceed without emotional influence.”).

48. Daniel L. Shapiro, *A Negotiator’s Guide to Emotion: Four ‘Laws’ to Effective Practice*, 7 No. 2 DISP. RESOL. MAG. 3, 4 (2001).

49. Again, the preceding analysis is not particular to legal deliberation, but reflects the way that human beings deliberate about any subject that implicates human experience. The special interest that this piece takes in legal deliberation is reflective of the heightened societal importance that attaches to deliberation undertaken by lawyers, and the fact that lawyers have been historically discouraged from becoming more sophisticated about epistemological emotionality.

50. See, e.g., D’Arms, *supra* note 47, at 1469 (investigating “empathy’s role as a means of acquiring knowledge or justified beliefs”).

lives of others – such as those for whom public policies are created – can contribute to our achievement of clear perception, depth of understanding, and keen judgment.”⁵¹

Welch thus argues that the emotionality which already plays an undeniable role in the discourse of public policy should be at least acknowledged, and preferably welcomed. The argument is not that people should make policy decisions only on the basis of direct emotional responses, but that they should use emotional knowledge as one tool in the set and consider critically the impacts of emotional inputs.⁵²

To this end, Justice William Brennan warned legal decision-makers that ignoring emotional input threatens to alienate them “from the wellspring from which concepts such as dignity, decency, and fairness flow.”⁵³ Indeed, the Aristotelian understanding of emotion and cognition has long posited that “emotions are or include forms of cognition, and through their education they become the media of sound evaluative judgment [and] are therefore, in the person of practical wisdom, sites of the synthesis of intellect and character that define his or her special excellence.”⁵⁴

As influential as the Aristotelian view of emotion as cognition has proved among modern philosophers, it failed over most of the course of Western history to displace the prevailing view of his teacher, Plato, that emotions are antithetical to reason, morality, and

51. D. Don Welch, *Ruling with the Heart: Emotion-Based Public Policy*, 6 S. CAL. INTERDIS. L.J. 55, 72 (1997). Professor Welch further argues that “Emotions expand our epistemological horizons and broaden our decision making capacities because they embody ways of thinking that have traditionally been considered inferior by dominant groups. The traditional criticisms of emotional decision making parallel and reflect the denigration of women and those traits considered ‘feminine.’” *Id.* at 73.

52. Welch argues that emotionality plays a valuable role in the analysis, evaluation, and advocacy of public policy on at least three levels: “first, they motivate individuals to act in ways that we consider to be moral; second, they enhance our understanding and improve our perspective; and third, they serve as warning signals that certain judgments or decisions need to be scrutinized carefully. . . . [I]n at least these ways emotional considerations make positive contributions to the development of public policy that should be valued rather than scorned.” *Id.* at 67-68.

53. William J. Brennan, 42nd Annual Benjamin N. Cardozo Lecture to Association of the Bar of the City of New York (Sept. 14, 1987), reprinted in William J. Brennan, *Reason, Passion and “The Progress of the Law”*, 10 CARDOZO L. REV. 3, 22 (1988).

54. John Deigh, *Nussbaum’s Defense of the Stoic Theory of Emotions*, 19 QUINNIPIAC L. REV. 293, 295 (2000) (explaining Aristotle’s views on the relationship between emotion and cognition). See also Part III, *infra* (same).

justice.⁵⁵ It is this philosophical legacy that saturates the legal culture, and that encourages lawyers to disavow consideration of emotional inputs even as they surreptitiously rely upon them, continuously if unconsciously, in the work of deliberation and negotiation.⁵⁶ Even as the emotion-cognition dichotomy loses traction in modern philosophy, it clings tightly in legal arenas, curtailing the ability of lawyers, judges, and lawmakers to marshal fully the resources available to them in pursuit of their deliberative ends.

III. EMOTION & REASON IN THE LEGAL PROFESSION: A CULTURAL LEGACY OF DUALISTIC OPPOSITION

It is one of the marks of a civilized culture that it has devised legal procedures that minimize the impact of emotional reactions and strive for calm and rational disposition.

—Henry Weihofen⁵⁷

Epistemological appeal to emotional sense is universal, but law relegates it to a suspect category of cognition. Why?

A. Hegemonic Rationality and the Law

In reviewing the general suppression of emotionality in legal arenas, Professor Samuel Pillsbury invites us to consider the paradigmatic images that Americans hold of “justice” and “injustice.” Justice, he reminds us, takes place “in a somber courtroom where a robed judge, sworn jurors, and informed counsel calmly and deliberatively apply their highest powers of reason to reach a legal decision.”⁵⁸ By contrast, “[i]njustice is a blood-thirsty mob bearing lit torches, pounding on the doors of the jail, desperate to wreak bodily revenge upon the suspected wrongdoer held within.”⁵⁹ To him, these images reflect the general juridical disposition toward reason and emotion, namely that “Emotion is unalterably opposed to Reason and thus to Justice itself.”⁶⁰

Certainly, the accomplishment of a legal system that protects defendants from the tyranny of the angry lynch mob should be considered among our proudest cultural accomplishments. And indeed,

55. See *infra* Part III.

56. See Arthur J. Jacobson, *Legal Emotion: The Women's Story in Totem and Taboo*, 16 *CARDOZO L. REV.* 1139 (1995) (observing the unconsciousness of this process).

57. HENRY WEIHOFEN, *THE URGE TO PUNISH* 131 (1959).

58. Pillsbury, *supra* note 7, at 655.

59. *Id.*

60. *Id.*

decision-makers may be unduly swayed by inadequately considered emotional responses as often as their decisions may fail to take proper account of emotionally-informed wisdom. But fear of the former has driven the work of *all* emotionality underground in legal arenas, where it continues to influence deliberation beyond recognition or redress.⁶¹ As Professor Eric Posner has noted, legal theory's neglect of emotions "should be puzzling, because emotions play an important role in many areas of the law."⁶² Various legal rules explicitly contemplate emotion, including criminal law doctrines contrasting crimes of premeditation and passion, and most rules of evidence have been designed to prevent the prejudicial inflammation of jurors' sentiments.⁶³ Emotional bases have sufficed for recovery in tort⁶⁴ and to justify various health and environmental risk regulations.⁶⁵

But consideration of emotional sense reveals that the implicit role of emotionality in legal discourse goes much deeper. The reflective processing of affective data goes to how lawyers evaluate the content of a client's story, a legal argument, or a litigation proceeding, and how they formulate appropriate responses. As Daniel Shapiro warns lawyers wary of acknowledging the role of emotionality in their practice, "[j]ust because we exclude something does not mean that it no longer affects us."⁶⁶ And as marketing professionals well know, human judgment is especially vulnerable to distortion by the persuasive influence of inputs we do not consciously heed (hence, the pervasiveness of thinly-veiled sexual innuendo in marketing campaigns, and the increasing saturation of all commercial venues by inconspicuous advertising⁶⁷). By excluding consideration of epistemological emotionality, we remain subject to its influence but powerless to refine or even resist its contribution.

61. *See id.* at 684.

62. Posner, *supra* note 22, at 1977.

63. *See id.*

64. For example, the torts of intentional infliction of emotional distress, loss of consortium, etc.

65. *See* Posner, *supra* note 22, at 1977.

66. Shapiro, *supra* note 48, at 3.

67. For example, advertising now appears on the floors of supermarkets, in the corners of television screens during feature programs, and on the sides of fast-food containers. The now forbidden (but exceptionally effective) practice by which movie theaters once spliced individual frames showing food items into feature films to encourage concession sales also speaks to the vulnerability of the human mind to subconscious persuasion. *See* VANCE PACKARD, *THE HIDDEN PERSUADERS: WHAT MAKES US BUY, BELIEVE, AND EVEN VOTE THE WAY WE DO* (1957) (discussing the use of subliminal advertising in film); WILSON BRIAN KEY, *SUBLIMINAL SEDUCTION* (1974) (discussing subliminal advertising in general). Outcry following publication of these books led to the Federal Communications Commission's declaration that "the use of

Nevertheless, lawyers are understandably reluctant to acknowledge such unpalatably “soft” deliberative inputs given the predominant culture of the law, which follows the tradition established by millennia of Western thinkers exalting analytical thinking as the very vehicle of justice and denigrating emotionality as a mentally passive, unruly characteristic that “undermines rationality and impinges upon moral responsibility.”⁶⁸ The legal culture’s reluctance to acknowledge the pivotal function of emotionality in deliberation is a vestige of the dichotomy that Western philosophy historically imposed on cognition and emotion as competing elements in the mental landscape. As Pillsbury describes,

[t]he predominant culture of the law promotes formal, deliberative, and dispassionate decisionmaking. Its modern ideal is a complete rationalistic rule structure which determines results in an objective, i.e., impersonal, fashion. Legal adjudication centers around proceedings of religious solemnity according to principles of scriptural authority. The culture of modern law discourages informal, intuitive, personal, or passionate decisionmaking.⁶⁹

Even lawyers who practice in such “soft” legal areas such as mediation are hindered by the legal culture’s disdain for acknowledging the role of deliberative emotionality. Professor Dwight Golann, a practicing mediator, confesses the paradigmatic concern of lawyers confronting emotionality in his admission that “[t]he fact is, I sometimes don’t feel that I’m being professional when I work with emotions. It’s not what lawyers do.”⁷⁰ When prompted to describe what does “feel professional,” Golann cited “dealing with facts and arguments, analyzing issues, generating strategies and, most important, solving problems.”⁷¹ Despite the fact that even Golann’s evaluation of professional norms explicitly draws on emotional input, his legal training has created cognitive dissonance for him about the role of emotional inputs in what is perhaps the most overtly emotional area of law.⁷²

subliminal perception is inconsistent with the obligations of a licensee and contrary to the public interest because, whether effective or not, such broadcasts are intended to be deceptive.” 39 Fed. Reg. 3714 (Jan. 29, 1974).

68. Pillsbury, *supra* note 7, at 674.

69. *Id.* at 665.

70. Golann & Golann, *supra* note 23, at 26.

71. *Id.*

72. Unlike litigation, mediation often expressly encourages participants to consult and express emotional bases for their positions in the mediated dispute. *See, e.g.*, Mary Elizabeth Lund, *A Focus on Emotion In Mediation Training*, 38 Fam. & Conciliation Courts Rev. 62, 62 (2000) (“[M]ediators must learn to understand their own

It serves neither the clients nor the process when lawyers are preoccupied with their professional identities while trying to manage the overt emotionality that arises in negotiated dispute resolution environments.⁷³ Clients who feel that their attorney is missing or ignoring the emotional impact of their dilemma may become dispirited, and those who perceive their attorney's distaste for dealing with the significant emotional content of their case may become angry. But as Golann's example demonstrates, lawyers who learn to subjugate emotional sense to suit the decorum of the profession – beginning early on in law school⁷⁴ – face great difficulty resurrecting it for the more facile manipulation required in the various settings of legal negotiation with clients, adversaries, and colleagues. Legal education is beginning to address the problem,⁷⁵ but for most, the maxim remains that “the law is reason, free from passion.”⁷⁶

B. *Law and Philosophy on Emotional Knowledge*

The traditional Western hostility toward emotionality in reasoned discourse dates back at least to Plato's metaphysics, as developed in *THE REPUBLIC*. There Plato expounded his understanding of the tripartite human soul, which he saw as constituted by motivation (impulses and appetites), cognition (rational thought and will), and passion (literally “thumos,” translated as the higher emotions⁷⁷), the

emotions and the emotional reactions of mediation participants to intervene effectively in conflict.”).

73. One mediator observes that “given their left-hemisphere mindset, attorneys sometimes have great difficulty dealing with the emotions of their clients. Having been trained in the logic-driven rigors of fact-finding, analysis, and debate, it can become impossible to properly address highly charged matters of the heart and spirit. For that matter, attorneys often unwittingly feed the emotional fires of their clients.” L. Therese White & Bill White, *Managing Client Emotions*, 56 *DISP. RESOL. J.* 15, 16 (2002).

74. See, e.g., Leti Volpp, *Lawyering at the Margins: On Reason and Emotion*, 11 *AM. U. J. GENDER, SOC. POL'Y & L.* 129, 130 (2002) (“When I was a student in law school, we were told that we had to completely separate any emotion we might feel from the principles for which we were reading cases, that to succeed in law school and to be successful lawyers, we had to learn to bifurcate our reasoning from our emotions.”).

75. See generally Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 *PSYCHOL., PUB. POL'Y, & L.* 1173 (1999) (observing that the traditional black-letter law school curriculum is giving way to one that also teaches interpersonal lawyering skills, and arguing that more such change is needed).

76. ARISTOTLE, *THE POLITICS OF ARISTOTLE* 146 (Ernest Baker trans., 1946).

77. Klaus R. Scherer, *Plato's Legacy: Relationships Between Cognition, Emotion, and Motivation 2* (1995) (unpublished manuscript) at <http://www.unige.ch/fapse/emotion/publications/pdf/plato.pdf> (last visited Jan. 2, 2005) (summarizing keynote addresses at meetings of the Societe Psychologique de Quebec, Quebec 1993, and the

latter of which acted to curb motivation in the service of cognition. Reflecting his analogous theory of relations between social classes, Plato assumed a strict separation and innate antagonism between the three, and posited the ethical supremacy of cognition over emotion and appetite.⁷⁸

Plato's views have suffered periodic criticism over time, perhaps most importantly from his own student, Aristotle, who rejected Plato's separatist account in favor of his own belief that emotional experiences incorporate rational beliefs and judgments such that emotion and cognition are inextricably entangled.⁷⁹ Nevertheless, Plato's morally-charged segregation of emotion and cognition persisted over the centuries in influencing philosophical efforts to parse mental phenomena.⁸⁰ His philosophical legacy remained vital during the Middle Ages in the writings of St. Augustine,⁸¹ during the Renaissance Period in Descartes' mind-body dualism,⁸² and into the Age of Enlightenment in the work of Immanuel Kant and Moses Mendelsohn.⁸³

Even as modern and postmodern philosophers eventually moved on from Plato's dichotomy, it remains alive and well in legal discourse. For example, in "Sentimental Journey," an article written on the occasion of Justice Harry Blackmun's retirement from the Supreme Court, Professor Jeffrey Rosen voices the paradigmatic hostility to emotionality in legal analysis in his critique of Justice Blackmun's jurisprudence, which he considers overly emotional:

[F]eeling deeply is no substitute for arguing rigorously; and the qualities that made Blackman an admirable man ultimately condemned him to be an ineffective Justice. By reducing so many cases to their human dimensions and refusing to justify his impulses with principled legal arguments, Blackmun showed the dangers of the jurisprudence of sentiment.⁸⁴

Assoziatione Italiana de la Psicologia delle Emozioni, Milano 1994) (citing the translation of "thumos" from the Encyclopedia Britannica).

78. This ethical model supported Plato's idealized class of the philosopher/king. *Id.* at 2. For a deeper discussion of the impact of Platonic metaphysics on Western conceptions of emotion and cognition, see *id.* at 1-7.

79. See ARISTOTLE, THE NICOMACHEAN ETHICS, 87-105 (Book II, Parts v-vii) (H. Rackham, trans., William Heinemann ed., 2d ed. 1934). Aristotle is also famous, however, for the maxim that "the law is reason, free of passion." ARISTOTLE, THE POLITICS OF ARISTOTLE, *supra* note 76.

80. See Freeman, *supra* note 28, at 1-2.

81. See *id.* at 1.

82. See *id.* at 2.

83. See Scherer, *supra* note 77, at 3.

84. Rosen, *supra* note 7, at 13.

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Rosen's argument resounds Platonic, but the debate was subsequently joined by Professor Martha Nussbaum, who turned to Aristotle for support in refuting the categorical rejection of reasoned emotionality that Rosen's view represents:

Rosen appears to believe, as I think quite a lot of people do before they start thinking much about the structure of emotions, that emotions are something quite unthinking, opposed to reasoning in some very strong and primitive way, and that they are mindless surges of affect. Simply stated, they believe that emotions do not contain or rest upon any kind of thought. [But emotions] are really not at all like gusts of wind or surges of the blood. . .⁸⁵

Nussbaum argues that Aristototele's position in *THE RHETORIC* better accounts for the sophisticated relationship between emotion and cognition:

[Aristotle] argued that to have anger, you have to have certain beliefs about what has happened, about the seriousness of what has happened, about the deliberateness with which that damage was inflicted, and a host of other beliefs. . . . So, emotions are not just mindless; they embody thoughts. Therefore, we cannot dismiss them from judicial reasoning and writing just by opposing them in an unreflective way to reasoning and thought.⁸⁶

Despite increasing support among legal academics for the Aristotelian view that emotion is inextricable from cognition, many practicing lawyers still habitually side with Plato about the appropriate role of emotionality in "reasoned" discourse. For example, negotiation coach Jim Camp asks the question "Can Women Be Great Negotiators?" and answers with the resounding "As Long As They Keep Their Emotions Under Control."⁸⁷

Accordingly, we tend to downplay the importance of the role of emotionality in deliberation, or at best to characterize it in de-emotionalized terms (for example, "intuition" or "experience"), and we are made uncomfortable when the constant pulse of emotional undercurrent breaches the surface. Not coincidentally, the stigma attached to overt expressions of emotionality in realms of "reason" marginalizes from public discourse people whose emotionality runs close to the

85. Martha C. Nussbaum, *Emotion in the Language of Judging*, 70 *ST. JOHN'S L. REV.* 23, 24-5 (1996).

86. *Id.*

87. See, e.g., Camp, *supra* note 6.

surface of expression – for example, many women,⁸⁸ as well as other members of historically subordinated groups.⁸⁹ Emotional men are twice damned, betraying dominant cultural norms and the acceptable norms for their gender.

Still, prominent voices from the law have occasionally taken positions more supportive of a unified view of emotion and cognition. In *THE ART OF THE ADVOCATE*, English barrister Richard Du Cann famously argued that “most human action is prompted by feeling,”⁹⁰ and that it would distort reality to suggest that “emotion is an unreliable guide to a true decision on fact, and that there is therefore something suspect in evoking or displaying emotion.”⁹¹ Even Oliver Wendell Holmes suggests the primacy of inductive reasoning over deductive logic in his observation that “the life of the law has not been logic: it has been experience.”⁹² Implicit in his statement is the notion that experience entails something more than just analytical process; it recognizes important patterns, understands why they are important, and suggests epistemological empathy.

More recently, Justice Stephen Breyer invoked the important role that emotional data plays in his jurisprudence during his confirmation hearings. Praising the emotional content in the work of one of the Brontë sisters, Breyer described how literature helps him engage his emotional sense in the face of academic antagonism toward emotionality. The story Justice Breyer turned to is one about endless row-houses, and as he explained,

what Brontë tells you is they are not the same. Each one of those persons and each one of those houses and each one of those families is different, and they each have a story to tell. Each of those stories involves something about human passion.

88. See Welch, *supra* note 51, at 73 (“The traditional criticisms of emotional decisionmaking parallel and reflect the denigration of women and those traits considered ‘feminine.’”); Deborah M. Kolb, *Her Place at the Table: Gender and Negotiation*, in *NEGOTIATION* 141 (Lavinia Hall ed., 1993) (arguing that “women’s voices are often hushed in formal negotiation” because, inter alia, “[w]hat women expect from interactions is a grounding for emotional connection, empathy, shared experiences and mutual sensitivity, and responsibility. In this two-way interactional model, to understand is as important as being understood and empowerment is as important as being empowered.”).

89. See Welch, *supra* note 51, at 73 (“Emotions expand our epistemological horizons and broaden our decisionmaking capacities because they embody ways of thinking that have traditionally been considered inferior by dominant groups.”).

90. RICHARD DU CANN, *THE ART OF THE ADVOCATE* (Penguin Books 1964), cited in John C. Shepherd & Jordan B. Cherrick, *Advocacy and Emotion*, 138 F.R.D. 619, 620 (1991).

91. *Id.*

92. HOLMES, *THE COMMON LAW* 1 (University Press: John Wilson & Sons 1881).

Each of those stories involves a man, a woman, children, families, work, lives. And you get that sense out of the book. So sometimes, I have found literature very helpful as a way out of the tower.⁹³

The “tower” Justice Breyer speaks of is of the ivory persuasion, representing the Western intellectual tradition of celebrating analysis quarantined from emotionality.

Modern philosophers have also made intellectual room for emotionality as a legitimate, and even valuable, tool of epistemology. For example, Professor Robert Nozick has postulated that emotions capture experience in a different, more representational manner than language-based memories can – an analog recording to language’s digital version of events.⁹⁴ He argues that emotion is a valuable way of knowing things because the experience of a “fitting” emotion (one that is reasonably proportionate to the triggering affective data) conveys a special quality of information about value:

Emotions provide a kind of picture of value, I think. They are our internal psychophysiological response to the external value, a response that is specially close by being not only due to that value but an analog representation of it.^[95] . . . Emotion provides a psychophysical replica of value, perhaps by exhibiting a parallel mode of organization, perhaps also by itself possessing some of the characteristics (such as intensity and depth) involved in value. . . . A mere evaluation, unaccompanied by feeling, can state that it is valuable and even track when it is valuable, but it cannot give us a representation or model of the value or of the situation of that thing’s being valuable, The peculiarly intimate connection of emotion to value resides in the way emotion can provide an analog model of value and of its more inclusive salient category.⁹⁶

Nozick’s insight is that emotional knowledge represents a true difference in kind from language-based knowledge, due to the unique quality of representation that inheres in affect. He suggests metaphors of the visual image versus the textual description, or the analog representation versus digital representation, to convey the way in which

93. *Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States: Hearings before the Comm. on the Judiciary*, 103rd Cong., 2d Sess. 232-33 (1994) (statement of Stephen G. Breyer), cited in Nussbaum, *supra* note 85, at 23.

94. See Nozick, *supra* note 1, at 96-7.

95. “Roughly put,” Nozick explains in a footnote, “an analog model or representation of a process somehow replicates that process rather than merely describing it.” *Id.* at 93 n. “*”.

96. *Id.* at 93, 98.

emotional thoughts track their sources of inspiration by intensity or by that ineffable quality of value (the goodness or badness of the thing or situation that stimulates an affective response) that language can only describe but not contain. In acknowledging emotional insight as a category of cognition, Nozick departs substantially from the traditional view.

Professor Justin D'Arms refutes the Platonic separation between reason and emotion more directly in asserting the epistemological value of empathy.⁹⁷ He acknowledges that emotions can occasionally distort good judgment (what Nozick might call an "unfitting" emotion), and credits to that intuition the historical disjunction between reason and emotion which has given rise to the notion "that the conditions for good legal and ethical judgment are cool and dispassionate."⁹⁸ As he explains, "[s]ometimes things are not as they seem to us when we are in the grip of an emotional reaction. Not everything we are ashamed of is really shameful, not everything that angers us is really objectionable."⁹⁹ However, he argues that instances in which an emotion distorts good judgment should be regarded as special cases of "emotional error," which should no more displace the role of emotionality in good judgment than should the fact that our eyes and ears occasionally play tricks on us displace our trust in vision and hearing as aids to good judgment:

The possibility of emotional error shows that it would be a mistake to trust one's emotional reactions in every case. But it is important to recognize that the mere possibility of emotional error is an insufficient basis for returning to an older conception of judgment and evaluation that aspires to immunize these processes from emotional influence. After all, sensory error is possible as well. But to grant that vision and hearing can produce illusions and mistaken beliefs is not to grant that these sensory modalities have no role to play in rational judgment. . . . The possibility of emotional error should be treated as a reason for caution and fallibilism about our emotional reactions, rather than as a reason to attempt to purge them completely.¹⁰⁰

D'Arms further emphasizes that "evaluative judgments in particular seem to be so intimately connected to our emotional reactions to the world that it is far from obvious how these forms of judgment could

97. D'ARMS, *supra* note 47, at 1469.

98. *Id.* at 1468.

99. *Id.*

100. *Id.*

proceed without emotional influence,”¹⁰¹ reflecting an understanding of cognition that closely mirrors the concept of emotional sense.

The concept of emotional error provides an important vehicle for distinguishing between the strengths and weaknesses of emotionally-derived beliefs about the world. Returning to Professor Pillsbury’s lynch mob, or even reflecting on the first blush of romance, we might easily extrapolate that emotionally-informed understanding formulated during a heightened emotional state is especially prone to error, and particularly likely to foster distorted judgment.¹⁰² That is why we don’t entrust sentencing decisions to lynch mobs (and perhaps why parental consent is required for marriages between seventeen-year-olds).

At the same time, the heightened emotional state conveys valuable information about the root cause. Outrage over a crime speaks to the heinous nature of the wrong, even if it can’t ensure due process for the alleged perpetrator. Giddiness in the new romantic speaks powerfully to motivation, even if it can’t necessarily be relied upon as a long-term indicator. In addition, though judgments made during a state of heightened emotion may warrant critical scrutiny, the emotional knowledge of rage and elation that follows from the experience may serve to enhance later deliberation, when the stored information about rage or elation may be cross-referenced against incoming affective data, allowing the deliberation to be informed by an understanding of the nature and consequences of passion in a comparatively dispassionate way.

Critical evaluation of emotional epistemology is thus necessary to help deliberators learn to distinguish between circumstances in which emotionally-informed judgment deserves scrutiny, and circumstances in which it can provide important insight. Moreover, such critical evaluation could inform efforts to improve important avenues of legal decisionmaking. Our legal institutions already take account of emotional epistemology in structuring jury decisionmaking so as to avoid some of the ways in which emotion can contribute to bad judgment. For example, rules of evidence that exclude “prejudicial” materials from the consideration of jurors follow from the common-sense understanding that, as discussed above, judgments made during a heightened state of emotion (e.g., disgust or outrage) are especially prone to emotional error. But are there ways in which legal

101. D’ARMS, *supra* note 47, at 1468.

102. It warrants noting that the concept of “emotional error” serves an epistemological function only; a judgment-obscuring emotion like embarrassment or jealousy is not necessarily “erroneous” in other respects.

institutions could foster more positive contributions by emotional insight to decisionmaking?

At least one legal academic has suggested that they can, and should. Indeed, Professor Pillsbury maintains that the criminal justice system is already so hopelessly driven by emotionally-informed decisionmaking that justice requires legal reform to assist jurors and judges in more effectively managing the contributions of their emotional insights. He recommends that jury instructions should be given with explicit directions to aid jurors in appropriately channeling their various emotional responses while they evaluate evidence and consider sentencing recommendations. His suggestion is not that raw emotion dictate the result, nor that emotional input entirely be purged (though he argues that the current, emotionally “neutral” instructions do both, the former ironically resulting from the latter). Rather, he urges that legal institutions should help jurors consciously synthesize the emotional and analytical insights they have accumulated in reviewing the evidence into a coherent, fully deliberated legal judgment.¹⁰³ For example, Pillsbury proposes that courts could instruct capital juries on moral outrage and empathy in death-sentencing decisions as follows:

The sentencing decision which lies before you is one of the most important you will ever make. Although you should approach the decision rationally, your emotions – your feelings – will necessarily be involved as well. You should not let your emotions decide the case but rather should use your emotions to help you decide.

The crime of which [name of the defendant] stands convicted is one of great evil, and to the extent you feel anger at the wrongs to others for which the defendant is legally responsible, there is nothing wrong with feeling such anger. But anger can overwhelm proper judgment. To ensure that it does not, I suggest you try to care for the good in [defendant].

As a human being [defendant] is a person who has done some good as well as bad and is capable of good as well as bad. Set aside your feelings about the crime for a moment and consider the defendant as you might a neighbor, a colleague at work, or a social acquaintance, someone that you know and care about. Consider the extent to which [defendant] has done and is capable of doing good. Then reconsider what [defendant] did in this case.

103. See Pillsbury, *supra* note 7, at 703-04.

If, while keeping in mind all that is positive about [defendant] you determine that [he or she] deserves the maximum penalty, then, and only then, should you vote to impose it.¹⁰⁴

Pillsbury's work highlights that under-appreciation of unconscious emotional input to decisionmaking represents the chief weakness of emotionally-informed understanding. Acknowledging the value of insights informed by both outrage and empathy, Pillsbury's proposal would help jurors consider and evaluate the sources from which their judgments arise to reach a wise conclusion in an environment of indeterminate inputs. His work recognizes the potential for judgment enhancement by emotional insight but also for judgment distortion by emotional inputs that are not subject to healthy deliberative scrutiny (reflecting the marketers' grasp of our vulnerability to subconscious persuasion¹⁰⁵). But Pillsbury warns that healthy scrutiny is compromised by a legal culture that refuses to more openly consider the cognitive function of emotional inputs.

Contemporary scholars in science and humanities disciplines have also posited that cognition and emotion are not mutually exclusive functions of the mind, often characterizing the relationship as one of symbiosis.¹⁰⁶ Professor Stephen Fineman argues that, contrary to the rational conception of organizational behavior, emotion is the unifying principle around which modern organizations function.¹⁰⁷ Professor Arthur Jacobson has explored the relationships between emotionality and legal institutions themselves, introducing his project by explaining the driving but under-recognized force of emotional response in legal decisionmaking:

My aim is to uncover the unconscious emotions characteristically associated with some basic legal institutions. These emotions are ones we invariably have when we follow or enforce rules, fulfill duties, and claim or exercise rights. We know the conscious emotions that we experience – the cruelty of rules and our fear of them, the hopes in rights, security of duties, and so forth. Yet not all the emotions that we encounter in basic legal institutions are conscious. We experience unconscious emotions as well.¹⁰⁸

104. *Id.*

105. *See supra* text accompanying note 67.

106. *See, e.g.,* Freeman, *supra* note 28, at 6; *see also* Part VI, *infra*.

107. FINEMAN, *supra* note 18 (arguing that rational and cognitive elements are "subordinate to and encompassed by" the emotional in organizational behavior).

108. Jacobson, *supra* note 56.

Such research increasingly recognizes the foundational role that emotional experience plays in all human constructs, legal institutions included.

C. *Emotionality and Leadership*

When the presence of emotion no longer indicates the absence of rationality, then perhaps lawyers who emerge as political leaders will be permitted to manifest greater emotional sensitivity in public life. Certainly, that day had not yet arrived in 1972, when Ed Muskie's quest for the democratic presidential nomination was ended by tears he shed while refuting personal criticism of his wife,¹⁰⁹ nor in 1988, when the tears Patricia Schroeder shed on withdrawing from her own presidential campaign became more memorable than any of her accomplishments as an undefeated twelve-term member of Congress.¹¹⁰

However, in 2003, tears shed by presidential candidate John Kerry made news for – not really making news. After Kerry welled up while listening to an unemployed woman's determination to send her children to college, American Politics specialist Jeffrey Berry told a reporter, "America has changed and matured, and we no longer equate masculinity with John Wayne on a horse. So politicians are allowed a . . . broader palette of emotions."¹¹¹ That so many political leaders are also lawyers ensures that many of the professional norms of lawyering carry over to the political sphere – but most voters are not lawyers, and perhaps this accounts for the growing disjuncture between an American public that demands emotional sensitivity from political leaders and the lawyer/politicians who perceive emotional sensitivity as a sign of weakness.

Professor Nussbaum argues that emotionality should not only be tolerated but is, in fact, a necessary element of public decisionmaking in her assessment that "[s]ympathetic emotion that is tethered to the evidence and free from [unreasonable bias] is not only acceptable, but actually essential to public judgment."¹¹² Indeed, the voting public

109. See Jill Lawrence, "Woman's Plight Pushes Kerry to Tears," USA TODAY (online), Sept. 4, 2003, available at http://www.usatoday.com/news/washington/2003-09-03-kerry-usat_x.htm ("The incident has been immortalized in campaign lore as the reason the Maine senator failed to win the nomination.").

110. See Gwen Florio, "Another male-dominated campaign raises the question: When will we finally have our first Ms. President?" TIMES UNION, Sept. 28, 2003, at G1, available at 2003 WL 59897921 (noting that "[A]t least as many people know Schroeder for the tears she shed that day as for the fact that she ran for president.").

111. See Lawrence, *supra* note 109.

112. Nussbaum, *supra* note 85, at 25.

appears to be converging on Nussbaum's view, at least as indicated by the current conventional wisdom that a political candidate must "connect emotionally" with voters to be a serious contender. As Professor Don Welch has observed,

We want public policy made by people who find emotional resonance with those for whom public policy is made. While Bill Clinton's affirmation, "I feel your pain" has now been widely caricatured, that statement initially struck a responsive chord with the electorate.¹¹³

Welch maintains that President Clinton's "I-feel-your-pain" refrain became the object of ridicule not because Americans decided that it was unimportant for a president to empathize with citizens, but because many observers began to question its sincerity.¹¹⁴

Presidential politics demonstrate the empirical reality that cultural norms about emotionality are in flux. People experience vastly diverging levels of comfort with overt expressions of emotionality, and they differ in opinion about the appropriate relationship between emotionality and reason. After all, we may want our presidential candidates to feel our pain when deliberating public policy choices, but many probably still don't want them to cry about it in public.

So what is the message for lawyers? If anything, the added dimension of cultural uncertainty makes it even more important that lawyers become more conscientiously fluent in emotional subtext. Although epistemological emotionality in individual deliberation is laden with these conflicting cultural mores and the resulting professional self-doubt among lawyers, the stakes run even higher in settings of collective deliberation. There, success hinges on the ability of participants not only to manage emotionally-informed individual deliberation, but to establish a learning environment that effectively mediates between differing preferences and approaches.

IV. THE NEGOTIATION BENEATH

Two excesses: to exclude reason, to admit nothing but reason.
—Blaise Pascal¹¹⁵

Intricate as it may be, individual deliberation is merely the preparation for the matrix of interaction that then unfolds between the deliberator and others in the cast of characters who will determine

113. Welch, *supra* note 51, at 68.

114. *Id.*

115. BLAISE PASCAL, *PENSEES* 85 (A.J. Krailsheimer trans., Penguin Books 1966) (1670).

how a given matter will actually be resolved. The individual must now turn from the deliberation within back to the client, the constituent, partner, adversary, or judge and engage in an iterated process of collective deliberation about the end result – a process generally recognized as negotiation.

The importance of skilled negotiation to lawyering can hardly be understated, since, as argued below,¹¹⁶ most lawyering activities can be understood in the broad terms of negotiation. The importance of emotionally-informed deliberation to skilled negotiation is foundational, as currents of emotionality in negotiation run deep. Participants nimbly interpret emotional cues and adjust responsively, setting off wave after wave of new interpretation and response. More overtly expressed emotion can lubricate progress or destabilize the process, depending on the content of the demonstration and the receptiveness of the audience. Often, the epistemological emotional exercise of empathy becomes the necessary ingredient for building bridges across gulfs of perspective, cultural differences, and distributional conflict in the face of scarce or disputed resources.

This Part explores how negotiators rely on emotional resources to help shepherd the negotiating process past pitfalls of misunderstanding, communication breakdown, damaged trust, and even substantive impasse. Expanding on the use of emotional sense in individual deliberation, negotiators consult a constant stream of emotional data during the negotiation to monitor and respond to signs of progress or looming peril. But in addition to monitoring subtle emotional undercurrents, negotiators must establish a carefully calibrated forum for direct emotional expression that takes account of the cultural and idiosyncratic preferences of individual participants. Within this “wise emotional dialogue,” negotiators can deploy overtly emotional cues for targeted effects and defuse emotional error or exploitation. Establishing a wise emotional dialogue confronts each negotiator with the responsibility of balancing the tensions that arise between encouraging and defusing, indulging and withstanding, and conveying and concealing emotional impulses as required by the unique circumstances of each negotiation. All the while, negotiators contend with the mystery of intuition and the hurdles of cognitive biases, each adaptively informed by emotional sense.

Ultimately, each task engages negotiators in what becomes an epistemological emotionality-loop: an individual must consult her own emotional sense to hypothesize about the other parties’ projected

116. See *infra* Part IV.A.

experiences (and respond accordingly), and then consult emotional sense to evaluate the success of her projections (and modify as necessary) – all as the other parties concurrently (and interactively) engage in the same looped process. This discursive process of evaluating and adjusting to emotive expression and undercurrents, which proceeds continuously beneath the substantive exchange on which attention is directly focused, constitutes the Negotiation Beneath. Facilitating the substantive negotiation above, the Negotiation Beneath generates a constant stream of connective tissue that holds the overall enterprise together against the forces of inherent interest conflicts that might otherwise tear an emerging resolution apart.

A. *Negotiation and Lawyering*

In evaluating the significance of emotional knowledge to negotiated lawyering, it is important to first appreciate the breadth of the enterprise.

The most prevalent kind of negotiation extends far beyond the traditional deal-making and dispute resolution that comes to mind for many lawyers, though it certainly includes these bargain-based practices as well. Professor Roger Fisher, a founder of modern negotiation theory, describes negotiation in this most basic form as a process of iterated communication for the purpose of reaching a joint decision.¹¹⁷ “Like it or not,” he explains, “you are a negotiator,” and you do it every day.¹¹⁸ In addition to the settlement conference, venture planning, or treaty negotiation, you negotiate “with your spouse about where to go for dinner and with your child about when the lights go out. . . [negotiation] is back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed.”¹¹⁹ Even reaching agreement with another on how to understand a case or structure an argument constitutes this most basic form of iterated, deliberative exchange.

Viewed as such, nearly all lawyering activities are negotiation at varying levels of interaction and formality. A lawyer engaged in a settlement or plea bargaining conference is negotiating in the commonly understood way, attempting to get the best deal for her client. But the same lawyer engages similar skills of listening, persuasion,

117. See FISHER, URY & PATTON, *supra* note 25, at 32.

118. *Id.* at xvii.

119. *Id.*

and brainstorming when meeting with a client to discuss a case, or strategizing for litigation with colleagues. In all contexts, she must work to understand the other parties' beliefs and concerns and convey her own ideas in a manner that the other parties can understand and will find persuasive. She must work to establish a learning environment in which the parties can collaborate toward formulating the plan of action that most satisfies the various interests at hand.

Even legal writing draws on certain negotiating skills. Like the effective dealmaker, the effective writer must understand his audience and engage them in a persuasive (if seemingly one-sided) dialogue that anticipates their concerns and demonstrates why his proposal is the best answer while maintaining sensitivity to the audience's special needs or sensitivities (e.g., the court's demand for respect, a potential opponent's need not to feel cornered, a decision-maker's desire not to appear biased, etc).

Recognizing the pervasive importance of negotiation to lawyering, many law schools have focused increasing attention on the need for better negotiation training in the curriculum. Once a sporadically offered or backwater skills course, some schools have now invested in the development of sophisticated negotiation teaching and research programs, such as the Program on Negotiation at Harvard Law School, the Stanford Center on Conflict Resolution, and the University of Missouri-Columbia Center for the Study of Dispute Resolution. A few law schools even require negotiation training for first year students, such as Stanford and William & Mary. While more traditional negotiation programs focus primarily on bargaining skills, some have also introduced the development of interpersonal skills training that introduces students to personality profiles, conflict styles, and enhanced listening skills, representing a solid model upon which to base training of emotional sense and the related skills discussed here.¹²⁰

Better training in those areas would serve lawyers well in the complicated negotiating circumstances they often encounter. As in individual deliberation, negotiating lawyers must recognize and respond to a variety of affective data. But in a culture as ambivalent about the role of emotionality as it is immersed in it, managing the exercise of emotional sensibility in professional contexts proves a balancing act fraught with its own special tensions. Compassion, excitement, and hope are all building blocks of the negotiating

120. Among many others, the University of California, Hastings College of the Law Center for Negotiation and Dispute Resolution exemplifies such a program.

relationships that engender value-creating agreements and sustainable partnerships. And yet where emotionality is viewed as oppositional to analytical reason, demonstrating any of these emotions could undermine perceptions of the lawyer as a rational actor. If emotions suggest weakness, betraying trace emotionality could compromise perceptions of a negotiator's strength and integrity. How does the effective legal negotiator proceed?

B. *Consulting Emotional Data during a Negotiation*

Even when overt demonstrations of emotionality risk censure, a negotiator must nevertheless maintain and consult a constant stream of emotional sense data to keep the negotiation on track. The demands made on her emotional sense during her ongoing inner deliberation are squared when she negotiates with someone else (or raised to the power of however many other people are involved). Now the object of her emotionally-informed deliberation is not just to evaluate input and elect a response, but to maintain the targeted rapport with the other emotionally-reactive individuals while adjusting for their own changing emotional postures and preferences.¹²¹

Accordingly, monitoring the interpersonal progress of a negotiation is a ritualized courtship of action, evaluation, and reaction that engages the negotiator in parsing out and reinforcing actions that impact favorably (or otherwise accomplish the intended result) while avoiding behaviors that seem to alienate (or otherwise impede the intended result). After all, in forging productive negotiating relationships, having good intentions is not enough – said intentions must also be *perceived* as such by the other party.¹²² The negotiator relies on emotional sense to divine how best to cooperate in a joint communicative enterprise that must take account of another's emotional sense and sensibilities. She must decide how to deploy appropriate emotional cues to ease progress along, and how to respond appropriately to emotional cues deployed by the other party. She must evaluate the other party's tolerance or demand for overt expressions of emotionality and find an appropriate balance with her own. She must critically evaluate incoming affective data to discern dishonesty, and guard against emotional exploitation by an opportunistic adversary. And, she must figure out how to accomplish all of this

121. Emotional preferences are discussed further below at Part IV.D.

122. See DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 44-57 (1999) (discussing the frequent disjuncture between an actor's intention and the actual impact of his behavior on another).

while maintaining an appropriate presentation of what she and/or her negotiating partners consider “professionalism.”

To take three examples:

Scenario One: The Longstanding Attorney and In-State Specialist. Suppose you and I are preparing together for a trial that begins tomorrow. I am the longstanding, favorite attorney of my corporate client, who is litigating an alleged breach of contract out of state. I have been admitted *pro hoc vice* to continue working on the case, because the Board of Directors is concerned that the process remain informed by my detailed understanding of the client’s interests. However, you are the in-state specialist that the Board has hired to navigate the case through unfamiliar state law. Our relationship is cordial, though we often differ in our interpretations and opinions about strategy. We have allocated spheres of responsibility, but we work to maintain coherence in our overall presentation. The usual tension mounts as opening arguments approach, but we are careful to maintain a working environment that values our various strengths and respects our differing perspectives.

Scenario Two: The Junior Associate and the Partner. Alternatively, suppose I am the junior associate and you are the partner working on the details of a merger. You prefer to work relatively independently, but require my close collaboration because you are overwhelmed with new deadlines after inheriting the caseload of a partner who has suffered a heart attack. Excited about the opportunity to work with you at last, I hope to impress you with my skills while maintaining the distance you require to work efficiently.

Scenario Three: The County Counsel and the Board of Supervisors. Or, I am the County Counsel and you are the Director of the County Board of Supervisors. We are in closed session with the rest of the Board discussing a controversial plan to rezone agricultural areas for commercial use, which has drawn serious protest from the community. We have been arguing heatedly over the matter, and two Board members have already walked out.

In these contexts, negotiating the interactive affective currents becomes a dance of bilaterally looped emotional sense: I act – perhaps it is a speech act, perhaps an initiative taken – and look for what you seem to think about what I meant by that action, and then I try to gauge how you feel about your conclusions regarding my intentions. (As the longstanding attorney in the first scenario, I wonder: Did you see my statement as conveying respect? But did that strike you as inappropriately obsequious?) The source materials for my judgments arise from both analytical and emotional input. I may

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evaluate your reaction based on the affective data of the trace emotional signals that you convey by your expression, posture, or tone of voice, which I understand based on an empathetic consultation of my own emotional database of experience. (As the junior associate in the second scenario, I consider: Does your distracted tone reflect dissatisfaction with my work, concern for your colleague, or anxiety that your lifestyle may lead to a similar result?)

Based on these calculations, I decide what should constitute my next act. (As County Counsel in the third scenario, I wonder: Should I take a more assertive approach? Retire to regroup?) I may elect this act based on a cost-benefit analysis of the alternatives, subject to a risk analysis of your potential responses in light of my partial information about your interests and my subjective judgments about your feelings. (If I am too aggressive, I may risk dismissal by triggering your pride, though I believe you probably value my services more than your pride under the circumstances. . .) Alternatively, I may react in anger or respond in a nurturing way so quickly that it appears instinctive, through a decisionmaking process unmediated by purely analytical thinking. Or both. Meanwhile, you are simultaneously engaged in a complementary process.

Compared to the relatively inconspicuous emotionally-informed Deliberation Beneath, the quality of deliberation I rely on in these circumstances is more conscious, and more directly enmeshed with other forms of inductive and deductive reasoning. (And compared to the subtle emotional inferences at play in individual deliberation, the emotional content of the Negotiation Beneath corresponds more closely to our conventional understanding of emotional states.) But the core insights I draw on in evaluating and responding to negotiating stimuli remain the individually-deliberated epistemological products of emotional-sense. On both ends of the ritual, affective data is the currency of the exchange. We can never know for sure what the other party actually experiences; we have only our marriage of emotional sense and analysis to guide our judgment. Even when presented with verbal testimonial about the other party's experience, we unfailingly test that information against what our emotional sense tells us is true (often recognized, in this context, as "intuition"¹²³).

Lacking well-honed, fine-tuned emotional sensibility, a negotiator could neither establish nor evaluate rapport with other parties, perceive exploitation, or take remedial steps at breakdown. Without

123. See *infra* Part IV.F.

effective dialogue between our separate emotional senses, it would be extremely difficult to reach the hallowed “wise agreement” that Roger Fisher and William Ury first encouraged negotiators to seek.¹²⁴ However, the skills required for establishing such a dialogue can be learned, and the better negotiators learn to identify the emotional preferences of their partners and calibrate a comfortable and efficient emotional exchange – call it a “wise emotional dialogue” – by which the parties quietly shepherd the substantive negotiation toward resolution.

C. *Establishing a Wise Emotional Dialogue*

Whereas the looped consultation of emotional data operates largely on emotional undercurrents, the wise emotional dialogue creates a forum for more overt emotional exchange in which negotiators deploy targeted emotional cues or directly broach emotional matters within the established boundaries of collective comfort. In a wise emotional dialogue, the negotiating parties encourage one another’s collective orientation toward the goal and discourage opportunistic emotional manipulation. Ideally, a successful emotional dialogue engenders the good will that enables parties to efficiently navigate roadblocks, uncertainties, and outright conflicts by facilitating respectful listening and empathetic consideration of opposing interests. But the emotional dialogue also provides a forum to communicate effectively about disappointments or problems arising in the negotiation. Creating an environment that respects participants’ varying sensibilities allows the negotiators to learn, through the exchange, that which is needed to reach agreement.

Finding the contours of a wise emotional dialogue requires sensitivity to both the emotional preferences of negotiating partners and the immediate circumstances. As the longstanding attorney in Scenario One, I may decide that our successful emotional dialogue makes it appropriate to smile and tell you earnestly how much I appreciate your cooperative style. As the junior associate in Scenario Two, I may facilitate an effective emotional dialogue by avoiding direct reference to the grief I presume you feel but do not wish to discuss, while signaling my supportive intentions through body language, tone of voice, and prompt performance of assigned tasks. As the County Counsel in Scenario Three, I may work toward the establishment of a healthier emotional dialogue by defusing tension

124. See generally FISHER, URY & PATTON, *supra* note 25.

following the two board members' walkout, perhaps by acknowledging the feelings of frustration I perceive among the remaining board members and affording them an opportunity to be heard before proceeding further.

But when one board member seeks to dominate by intimidation, I may work to preserve the emerging dialogue by respectfully (or, if need be, aggressively) reasserting control over the meeting. Every wise emotional dialogue may look different; the wisdom is in the achievement of a forum that advances the substantive goal by addressing the needs of the negotiation within the acceptable emotional parameters of the participants. Wise negotiators set forth appropriate affective cues at the appropriate times, and when combating such emotional manipulation as intimidation, the appropriate cue may be one that conveys courage, resolution, or displeasure.

Nevertheless, the cultivation within a dialogue of emotionally positive motivational cues, such as excitement or optimism, may prove the most effective lubricants for the critical negotiating process of brainstorming opportunities for creating value in agreements.¹²⁵ Hope, both expressed and experienced, encourages negotiators to press forward even when the substance of a negotiation appears inauspicious.¹²⁶ Acknowledging that "the role of emotion or feeling, either positive or negative, remains one of the least studied areas of negotiation," Professors Max Bazerman and Martha Neale nevertheless advise that negotiators can improve their outcomes and experiences by cultivating positive emotionality during the negotiation.¹²⁷ They explain that negotiators can

begin to understand the impact of emotion on negotiation by considering what is known about the benefits of positive feelings or good humor. Psychologist Alice Isen and her colleagues have found that positive emotion is associated with greater generosity and helpfulness. It also enhances how much you like other people, improves your view of human nature, and your creative problem-solving ability, and lessens your aggressiveness and hostility.¹²⁸

They report on studies showing that negotiators who began in a good mood (induced, for example, by a gift) are able to reach more creative,

125. Cf. MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 121-22 (1992).

126. Cf. *id.*

127. BAZERMAN & NEALE, *supra* note 125, at 122.

128. *Id.* at 122.

optimal agreements employing fewer competitive or contentious tactics.¹²⁹ Thus, a wise emotional negotiator recognizes the value not only of encouraging positive emotions in her negotiating partner, but in herself.

The wise communication of ambition, curiosity, surprise, tolerance, adurance, or disappointment can also align cooperation or otherwise contribute to the course of an effective negotiation. Even unintentional displays of emotion – including those that may cause discomfort – can prove useful in the quest for an optimal agreement, because they may convey missing data about interests at hand. The most useful data from such an unintentional emotional moment is often yielded to the emoting party herself, enabling re-evaluation of her own established and/or previously unrecognized interests – perhaps, as Professor Nozick suggests, by conveying a palpable representation of value (positive or negative) implied by a particular alternative.¹³⁰ For example, a tort plaintiff who reacts angrily to a proposed settlement that offers full monetary compensation with a nondisclosure agreement may learn (and his attorney should recognize) that his interests in public acknowledgment and/or remedial changes by the defendant are as important as his need for financial redress.

As much as emotionally-derived wisdom can benefit a negotiation, lawyers must also be wary of the real ways that poorly-managed or exploitative emotionality can endanger a negotiation and use the emotional dialogue as a forum to address such problems. As Professor Fisher notes,

In a negotiation, particularly in a bitter dispute, feelings may be more important than talk. The parties may be more ready for battle than for cooperatively working out a solution to a common problem. People often come to a negotiation realizing that the stakes are high and feeling threatened. Emotions on one side will generate emotions on the other. Fear may breed anger, and anger, fear. Emotions may quickly bring a negotiation to an impasse or an end.¹³¹

To the extent that expressions of emotion tend to self-replicate, relationships can be harmed, hope lost, creativity stifled, and good faith extinguished when negative emotionality is let loose in a negotiation. If one party criticizes another of bad faith or lacking abilities, the accused is likely to become equally unsatisfied with the process.

129. *Id.*

130. See *supra* text accompanying notes 94-96.

131. FISHER, URY & PATTON *supra* note 25, at 29.

Emotional error¹³² can also harm a negotiation's progress if a negotiator responds to affective data in a way that strikes others as disproportionate. When an emotional reaction is surprising, wise negotiators will seek to learn what it is that underlies the unexpected response in order to determine whether it is actually erroneous, potentially manipulative, or may signify a previously underappreciated interest (as for the angry tort plaintiff). The wise negotiator uses her emotional sense to coax others back to the table when emotional error interrupts a negotiation in which coinciding interests dictate a favorable resolution. Moreover, she must resist the interference of personal error by monitoring her emotional responses and evaluating them against all other available data about the situation. Of course, if people could do this consistently, then emotional error would cease to exist. But awareness of the potential for error combined with the exercise of individual will to constrain it offers a level of human surge-protection wholly unavailable to the emotionally unwise.

Ideally, a prepared negotiator can anticipate scenarios that might trigger a destabilizing emotional response and carefully craft his presentation to avoid the trigger or alleviate the underlying sensitivity. For example, the longstanding attorney and in-state specialist from the first scenario cultivate an environment that minimizes competition by assigning tasks and stressing the contributions each has to offer. The junior associate assisting the overworked partner probably avoids reference to heart attacks. The County Counsel carefully navigates the idiosyncratic hot-buttons he knows about when directing comments to the various members of the Board and recommends an open meeting to stem public sentiment that the Board is operating unaccountably.

However, a wise negotiator surprised by an unanticipated breakthrough of negative emotion must deliberate carefully to select the best alternative. Perhaps the emotional demonstration is useful, and the information conveyed by the emotion can be harnessed toward building a more stable outcome that better cares for the neglected interest behind the sore emotional response. For example, the tort lawyer whose client reacts angrily to the non-disclosure proposal¹³³ can learn whether he is angry because he wants public acknowledgement or because he wants assurances that the same fate will not befall someone else, and renegotiate the settlement accordingly. The

132. See *supra* text accompanying notes 99-100.

133. See *supra* pp. 44-45.

surprised negotiator can also seek to palliate a neglected interest directly, where possible, by empathizing or relationship repairing (for example, demonstrating as County Counsel that no disrespect was intended to the offended Board members who walked out of the meeting). Alternatively, a surprising response may signal to the emotionally-informed observer that further negotiations should be postponed or discontinued entirely.

Finally, wise negotiators must guard against the predatory deployment of emotionality by others. Opportunistic parties may conspire to mislead or exploit the emotional sensitivity of others. Emotions may be strategically manipulated for distributional gain: sympathy exploited, anger fanned, or fear stoked. Even positive emotions may leave a negotiator vulnerable, as it has been suggested that overly happy negotiators may be more susceptible to certain cognitive biases that lead them to form suboptimal agreements that insufficiently satisfy their interests.¹³⁴ For example, a flattered customer may be overly pliant while negotiating terms. An eager party may close negotiations too early, leaving value on the table or failing to address contingencies that threaten implementation. A negotiator misled into a state of deep but unwarranted gratitude may agree to suboptimal terms because she feels a false pull of reciprocity.

Under conditions of uncertainty about the intentions of other parties, trusting emotional sense can leave a party fearing vulnerability to exploitation. It may seem safer to shut down the flow of emotional data (or drive it back underground), even if doing so yields an agreement farther from the Pareto frontier than might have been achieved through more efficient emotional exchange. It is this very fear of exploitation that underlies two of the primary tensions that Professor Robert Mnookin has identified in negotiation: the tension between empathy and assertiveness and that between creating and distributing value.¹³⁵ But a wise emotional negotiator must also balance the tension between harnessing emotional exchange to advance the progress of a negotiation and suppressing it defensively as necessary.

134. See BAZERMAN & NEALE, *supra* note 125, at 122 (noting that happy or content negotiators may be more susceptible to framing, escalation of commitment, and availability effects).

135. See MNOOKIN, *supra* note 13, at 9-10.

D. Managing the Fourth Tension

Professor Mnookin identifies the three primary tensions with which a negotiator contends as those between value-creation and distribution, empathy and assertiveness, and principal and agent.¹³⁶ But in addition to the primary tensions, a negotiator must also balance the competing demands of functional emotionality within each specific negotiating environment, constituting a Fourth Tension of negotiation.

Establishing a wise emotional dialogue necessitates that parties maintain an uncertain equipoise between the competing pitfalls of overly conveying and overly concealing emotionality while consulting emotional data, deploying intentional cues, monitoring for error, defending against manipulation, and navigating the unique emotional styles of the other negotiators. Every smile, every grimace, every decision to rebuke and every spoonful of swallowed pride represents a chosen point along the continuum charted by the Fourth Tension.

The emotionally wise negotiator manages this tension by skillful application of his own emotional resources. A wise decision to give or to guard emotional impulses implicates individual emotional preferences as much as it does the overall negotiating goals, and it must be made pursuant to the most carefully informed deliberation. It goes without saying that parties must learn to control the interference of unintentionally apparent negativity in strained negotiations and unwisely apparent positivity where it conveys information that strategically would best remain private. Less obvious, but equally important, is the necessity of balancing the positive and negative impacts of otherwise productive emotionality in a negotiation between parties of differing emotional styles.

While this balance must be achieved in any negotiation, it becomes especially important in cross-cultural negotiations – broadly defined to include negotiations between different ethnic cultures, different genders, different age groups, and even members of different family groups that exhibit unique preferences regarding the expression and contemplation of emotionality. Of course, individual styles between similarly situated group members may also depart so dramatically as to match this level of difference, and the fact that negotiators may not be on the lookout for cultural-level style differences in such cases can make these negotiations especially fraught. But anticipated cultural differences provide negotiators a more foreseeable challenge in navigating the fourth tension.

136. *Id.*

For example, cultural groups harbor different tolerances for embarrassment. No one likes to be humiliated, but certain cultural groups will (at least stereotypically) go to greater lengths than others to protect the dignity of all parties from affront. As such, American lawyers must learn the art of “saving face” to negotiate successfully with parties from China and other Asian cultures in which the emotional offense taken at dignitary harms could undermine an otherwise productive exchange. At the same time, they must consult emotional sense to ascertain whether their particular negotiating partners are responding in a manner consistent with the cultural stereotype, or whether the affective data indicates that a different approach is warranted.

Sometimes emotional sensitivity is all that can save an exchange gone awry in light of other cross-cultural misfires. In one anecdotal example of a failed opportunity, an Irish-American friend traveled in a region of the Irish countryside where people customarily nod their heads when they are confused by what you are telling them, in order to signal their desire that you explain better what it is you mean. My friend faced no language barrier, looked similar to his hosts, and was fairly knowledgeable about other core elements of the culture. However, as an American, he generally nodded his head in agreement to encourage the speaker or to signal that he was following what he was being told. Soon into his visit, he wondered why the people were so redundant. Not long afterward, they seemed not only tiresome, but just plain tired. This was also a community for whom expressing frustration was considered rude, so the hosts were extremely reluctant to tell the visitor outright how exhausting he was becoming to them. The American failed to see (until it was too late) even the subtle emotional cues that might have helped him discover what he was missing that might have helped him salvage rapport.

To the extent that parties are culturally unaccustomed to overt emotional expression, even positive expressions of emotion can prove – if disproportionate to prevailing cultural norms – threatening to a negotiation. Conversely, if a negotiation stalls after one party looks in vain for signs of cooperation or good will in the poker face of another, the latter may need to push beyond the limits of her emotional comfort zone to satisfy the former’s more pressing need for emotional reassurance. Among certain company, tears of joy at the table might seal the deal; in others it might threaten to destabilize the negotiation. The wise negotiator must evaluate and experiment with the proper quality of emotional exchange in each situation, or risk negotiation impasse.

E. Intuition, Cognitive Bias, and Emotional Sense

All negotiators manage the fourth tension at varying levels of consciousness, but we seldom acknowledge the debt of these management choices to emotional sense. At most, we consider it an “intuitive” skill, without recognizing that intuition is, in fact, a sophisticated process of synthesizing affective data. It may be that the concept of “intuition” seems less threatening a participant in the realm of deliberation than irrationality-equated “emotion,” but we are hard-pressed to explain intuition, while emotional sense provides at least some mechanisms suitable for discussion. Perhaps the more “rational” approach in legal education would be to scrutinize more closely the influence of emotional factors that we can, at least partly, explain.

For example, the law students to whom I have taught negotiation were frequently perplexed by how much credence they should give to (what they called) intuition. To them, intuition represented an inner-direction toward a preferred course of action arising from something other than logical analysis. Each of them had experienced intuitive direction at some point in their negotiating experience, but the more they learned about negotiating skills, the more uncomfortable they became “just going with their intuition.” In the educational setting in which they had been presented with rule-like admonitions (“separate the people from the problem”¹³⁷) and orderly formulas (“one, negotiate the process; two, identify interests; three, explore value-creating trades. . .”¹³⁸), giving credence to emotionally-derived information would have threatened the intellectual integrity of their legal training. And yet each of them had felt compelled to make one or more negotiating decisions that they could not trace to information yielded by a particular exchange of ideas or some other obvious basis.

The students had somehow come to trust an intuition about the given odds, the veracity of their negotiating partner, or even the potential for recognizing unseen future benefits. These “intuitions” arose from somewhere, but they weren’t sure where, and the nakedness of the uncertainty made them uncomfortable. “If I can’t explain it,” they reasoned, “I should probably just stick to the formulae.” But pressed, they trusted intuition again and again, creating cognitive dissonance for them about the value of their training.

137. See FISHER, URY & PATTON, *supra* note 25, at 17.

138. Checklist approaches like this are advanced in such foundational instructional texts as Fisher’s *GETTING TO YES* (*supra*, note 25) and Shell’s *BARGAINING FOR ADVANTAGE* (*supra*, note 12).

Often, the mysterious source of the “intuition” was the inductive but unconscious processing of affective data – the epistemological operation of emotional sense. The process can be so fast, and so facile, that it can be easy to miss what is happening, or even how we might exert control over it (like the way we forget about breathing, though, if we focus on it, we can elect to breathe more deeply or slowly, or hold our breath until it hurts). Legal education would be better served by crediting what part of the mystery of judgment we *can* understand, by teaching the concept, care, and feeding of emotional sense. This could be taught by introducing the process of emotional epistemology in the same way we teach negotiators to understand the influence of such barriers to negotiation commonly identified as “cognitive biases,” including reactive devaluation, risk and loss aversions, and naïve realism.

In fact, these very cognitive biases may be better understood with reference to emotional sense. Reactive devaluation describes the tendency for a negotiating party to devalue a concession from the other side simply because it is offered by an adversary – even where persuasive (or objective) evidence suggests the concession holds greater value than the party perceives.¹³⁹ For example, a concession withheld seems more valuable than one on the table, and an offer to settle for what had seemed the ideal amount just yesterday may seem suspiciously low once offered.¹⁴⁰ Reactive devaluation is clearly an irrational phenomenon (since the objective value of the settlement is the same in either scenario), and it can often be understood as emotional error resulting from distrust of an adversary. Cultivating better emotional literacy among lawyers might help disputants avoid the inefficiencies that reactive devaluation can cause in a negotiating process.

Similarly, naïve realism is the powerful cognitive bias that describes people’s tendency to assume that they see the world exactly as it is (unmediated by personal biases), and that other reasonable people will thus come to the same conclusions they do (the “false consensus” presumption).¹⁴¹ Naïve realism, a nearly universal bias that fuels discord between spouses and superpowers alike, can be cured by

139. See Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO S. J. ON DISP. RESOL. 235, 246-47 (1993) (explaining risk aversion, loss aversion, and reactive devaluation).

140. *Id.*

141. See Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in VALUES AND KNOWLEDGE 103, 110-11 (Edward S. Reed et al. eds., 1996). (explaining naïve realism).

the conscientious practice of empathy – the exercise of imagining the situation through the unique lens of another’s experience – an emotionally-informed epistemological skill.

People’s consistent demonstration of risk and loss aversions further indicate emotionally-mediated analysis. Risk aversion predicts that most negotiators will not gamble for a potential gain, even though the potential gain is considered more economically valuable than the expected value of not taking the risk. For example, offered a choice between (1) a sure gain of \$20 or (2) a 25 percent chance of gaining \$100 and a 75 percent chance of gaining nothing, vastly more test subjects will choose the sure gain (\$20), even though the “expected value” of the gamble ($25\% \times \$100 = \25) is slightly higher.¹⁴² The economist would argue that, under neutral circumstances, the probability-adjusted potential for gain renders the gamble the economically superior choice. And yet the overwhelming majority choose the smaller expected value, every time.¹⁴³ Is economics a false science? Surely not. But the simple “expected value” model does not account for the full calculus of human decisionmaking, which also takes account of such emotional inputs as the sense of well-being or pleasure that most attach to knowledge of a secure outcome¹⁴⁴ or the reluctance to risk the experience of shame and disappointment that would accompany the gamble 75 percent of the time.

However, even as risk aversion demonstrates that people are hesitant to gamble for a potential gain when it puts a smaller, sure gain at risk, loss aversion tells us that most people *will* gamble to avoid a potential loss, even if losing the gamble implies a greater loss.¹⁴⁵ Thus, the same test subjects who would avoid the gamble for the extra \$80 in the first example would prefer the risk if the gamble was between losing \$20 for certain and testing the odds of a 25 percent chance of losing \$100 and a 75 percent chance of losing nothing. As explained by Professor Mnookin,¹⁴⁶ say you want to leave a room and you have two options. Those exiting through the front door must pay \$20. Three out of four who exit through the back door leave for free, but one out of four must pay \$100. Which way do you leave? According to researchers, if you are like most people, you’ll chance the rear door.

142. See Mnookin, *supra* note 139, at 243-45.

143. *Id.* at 244.

144. The minority in this experiment are considered “risk-seekers,” for whom the thrill of the gamble outweighs the pleasure in security.

145. See Mnookin, *supra* note 139, at 244.

146. *Id.* (proposing the following thought-experiment to illustrate loss aversion).

Loss aversion suggests an intriguing paradox because whether something is seen as a potential gain or loss often depends heavily on how the situation is framed for the perceiver. For example, settling litigation for \$100,000 rather than going to trial may strike a loss avoiding defendant as a *loss* that she might prefer to avoid by gambling on a favorable jury verdict – unless her emotionally savvy lawyer frames the settlement as an opportunity to *hold onto* the more compelling \$900,000 that she currently possesses but could *lose* as the result of a negative judgment and sunk litigation fees.

Although the economist would evaluate the expected value ratios in the above-described risk and loss aversion scenarios as economically equivalent, it is significant that apparently rational people consistently treat them differently. Nevertheless, the fact that their preferences are not predicted by “expected value” does not mean that people are behaving irrationally; indeed, the very predictability with which people defy the expectation suggests a human logic that the economic model somehow misses. Loss aversion indicates that people attach some emotional value to having something, and that the negative emotional experience of losing something one already has tips the decisionmaking scale in a way that not getting something that one has never had does not.

Notably, the conservative tendencies encouraged by this “bird-in-the-hand” preference would seem to facilitate survival under conditions of scarcity. This insight, combined with the suggestion that the preference appears virtually hard-wired in most people, suggests that there may even be a strategically selected-for, biological basis for certain wisdom that we apprehend through the emotional experience of wanting security. And in fact, neurobiologists are finding evidence that emotionality does serve important survival-oriented purposes.

F. *Emotional Epistemology and Neurobiology*

Attributing to emotional sense its due in cognition should in no way diminish reasoning as the *other* defining human characteristic. As often as our behavior may wax similarly impulsive, our canine and feline friends have not comparably mastered the art of delayed gratification. And yet, that human beings share with dogs and cats certain emotional responses to the world is to be expected in light of the shared origins of mammalian brains. Indeed, new insights from neurobiology underscore the value of emotionally-informed wisdom by shedding light on the “pre-rational” mechanism of emotional influence on mammalian, and especially human, response.

In recent years, researchers have isolated the primary role of the amygdala, an almond-shaped mass of gray matter near the base of the brain, in orchestrating human responses via such emotional and motivational cues as fear or attachment. In the past, scientists believed that all emotional reactions to sensory experiences involved the cerebral cortex, where logical thought is processed. However, new research indicates that some nerve pathways convey signals directly from the ear to the amygdala, where sympathetic and parasympathetic decisions about behavior are rendered with emotional significance but without cortical involvement – like the release of adrenaline, increasing the heart rate and preparing the muscles for response.¹⁴⁷ Although such revelations certainly impact the ongoing philosophical mind-body debate that we have agreed to leave alone here, they also inform our discussion by indicating the adaptive value of emotional inputs to effective decisionmaking.

For example, neurobehaviorist Dr. R. Joseph has found that neurons located in the amygdala serve to monitor and abstract from the cluttering array of sensory stimuli certain information of “motivational significance,” which assists in organization of the appropriate response. For human beings, this organized process results in the experience and expression of appropriate feelings and behaviors.¹⁴⁸ As Dr. Joseph explains,

This includes the ability to discern and express even subtle social-emotional nuances such as friendliness, fear, affection, distrust, anger, etc. . . . Moreover, some neurons located in the amygdala are responsive to faces and facial emotions conveyed by others. Many neurons are also able to respond to visual, tactual, olfactory, and auditory stimuli simultaneously.¹⁴⁹

In other words, through the amygdala, we are hard-wired to take mental account of affective data about our ongoing interaction with the immediate environment that may bypass our centers of language-mediated, analytical thought entirely. Just as our ancestors did in the harsh proving grounds that selected for this trait, we will perceive and respond simultaneously to various streams of sensory and emotional data in a negotiating environment that may never see the light of deductive logic. Our negotiating partners will perceive and

147. See National Institute of Mental Health, *Basic Behavioral Science Research for Mental Health*, NIH Publication No. 96-3682, 1995; Ralph Adolphs et al., *Fear and the Human Amygdala*, 15 *J. OF NEUROSCIENCE* 5879 (1995).

148. “Limbic System,” *The Encyclopedia of Human Behavior*, Academic Press, Inc., 1994, available at <http://www.europe.apnet.com/insight/10301996/amygd2.htm> (last visited Jan. 2, 2005).

149. *Id.*

respond emotionally to the data that we communicate just as automatically.

Research into the role of the amygdala in converting environmental stimuli into human action suggests that our use of emotional sense in mediating world experiences is a matter not only of good negotiating judgment but of basic evolutionary biology. The development of an emotional sense organ in a section of the brain distant from the neocortex affirms that emotionality is not a mere subset of rational thought, nor an aberration of the analytical process, but an independent source of human knowledge that has helped to ensure the very survival of the species. Informed by affective data straight from the limbic system, emotional sense thus forms an elegant bridge between the things we know more with our bodies, like the sense of taste, and the things we know primarily with our minds, like common sense.

The lesson should not be that rational thought should give way to raw, evolutionarily prior emotional response – but instead that we are creatures fortunate enough to receive and respond to stimuli gathered by (at least) two different parts of our brains, for different reasons. Rather than pretending that there is only one, or insisting that only one of them matters, deliberators should focus attention on improving the capacity to harness the value of each, and in their synthesis, find wisdom.

G. *Emotional Intelligence and the Competitive Market for Negotiators: Recommendations for Legal Education*

That the Negotiation Beneath already takes place in every negotiation does not mean that it cannot benefit from improvement through conscious intervention. This is especially so for most lawyers, whose education not only ill-prepares them for dealing with emotionality in their work, but actively stunts their development of emotional sensibility.¹⁵⁰ The concept of “emotional intelligence” tracks some of the important features of well-honed emotional sense, and the legal profession has been cited as one whose practitioners often match higher-than-average analytical intelligence with lower-than-average emotional intelligence.¹⁵¹

To this end, some argue that lawyers are facing a serious competitive disadvantage now that clients increasingly expect more emotionally sensitive, client-centered legal care and nonlawyer

150. See *supra* Part II.

151. See, e.g., Richard, *supra* note 26.

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practitioners with better emotional skills may soon be authorized to provide it.¹⁵² Lawrence Richard, a trained lawyer and psychologist who consults to law firms on management and organizational behavior, warns that lawyers who do not become more emotionally competent will not survive in the new legal marketplace.¹⁵³ In a 1999 legal column urging that law firms consider emotional intelligence in hiring decisions, he wrote:

[J]ust last week an ABA committee recommended doing away with the restriction on nonlawyers from practicing. Within two years, we will see a very different legal landscape. [Nonlawyer practitioners] will be commonplace in the U.S. legal marketplace. You can't afford to wait until then, because by then, competing providers of legal services will already have had a significant head start in cultivating emotional intelligence among their professionals."¹⁵⁴

Richard cites research suggesting that "the cognitive factors we always valued in the legal profession," cited as academic intelligence, work experience, and competence in a particular practice area, "simply do not predict success."¹⁵⁵ Rather, he explains:

The research suggests that these three factors taken together only account for a third of the factors that predict who is going to be successful, while the emotional intelligence or EQ factors predict the other two thirds. And as you climb the ladder of responsibility, EQ increases in importance. Among leaders, such as CEOs of companies and managing partners or practice group leaders in firms, it has been estimated that EQ factors for more than 90 percent of one's success.¹⁵⁶

Richard appears to define success according to the traditional indicators of financial prosperity, professional esteem, and client loyalty. It is significant that even by the traditional yardsticks of legal practice, emotional competence proves critical. Law schools and Bar Associations should take note and mandate negotiation training, including emotional sense training, for all law students and in continuing legal education requirements.

In an effort to improve interpersonal skills among students of negotiation, Professor Don Peters researched interpersonal style differences that they must overcome in establishing the learning exchange that characterizes effective negotiation. Exploring the impacts of

152. *See id.* at 28.

153. *Id.*

154. Richard, *supra* note 26, at 28.

155. *Id.*

156. *Id.*

personality characteristics first identified by psychologist Carl Jung and indexed in the Myers-Briggs Type Indicator¹⁵⁷ (including introvert/extrovert, sensing/intuitive, judging/perceiving, and thinking/feeling tendencies), he found that different pairings of these personality tendencies result in unique problem-solving scenarios, each with identifiable patterns of progress and breakdown.¹⁵⁸

Based on his results, Peters urges that students of negotiation locate their own style tendencies and study what these common traits can tell them about their personal negotiating preferences and how they tend to interact with the varying styles of others. This way, students can “connect their habitual action patterns to ineffective consequences”¹⁵⁹ that result from them, and develop effective strategies for monitoring and modifying them as needed.¹⁶⁰ Similar work may be useful to help lawyers and law students discover their specific emotional preferences and identify their common consequences in negotiation, so that they can develop corresponding plans of corrective action.

Equally needed is closer attention to how the demands on emotional sense change in the various contexts in which lawyers practice. Although this piece addresses the most basic forms of deliberation by individuals and in groups, it would be useful to better understand how the demands on lawyers’ emotional sense change when they are acting as litigators, mediators, judges, advisors, legislators, and more formal negotiators. Lawyers must manage the fourth tension in each of these contexts, but it would stand to reason that the balance is achieved along very different points of the continuum.

For example, a lawyer might press toward more open discussion of emotional content in establishing the tenor of emotional dialogue for a mediation, especially if addressing emotional concerns appears necessary for full resolution of the dispute. A trial litigator may need to keep an especially close reign on her internal emotional impulses while working in an especially combative interpersonal environment. Legislators likely assume different emotional postures when they are working with constituents and when they are working with other

157. See Don Peters, *Forever Jung: Psychological Type Theory, the Myers-Briggs Type Indicator and Learning Negotiations*, 42 DRAKE L. REV. 1, n.1 (1993). (“Jung’s typology creates a specific method for careful observation of similarities and differences found in common behavioral patterns of individuals. . . [t]he Myers-Briggs Type Indicator (“MBTI”) is a psychometric instrument designed to make Jung’s theory of psychological types accessible and useful.”).

158. Peters, *supra* note 157.

159. *Id.* at 107.

160. See *id.* at 107-13.

lawmakers, but it may be appropriate that they rely more heavily on emotionally inductive reasoning in their task of representing others than do judges, who are called upon to perform the most deductive of all legal tasks in applying the rules of law. However, even judges rely on emotional sense in the epistemological manner described here in filtering the experiences with which they are presented through those established rules.

Most needed, however, is curricular reform in law schools and continuing legal education to address the critical neglect of emotional resource development in lawyers. Lawyers and their clients would all benefit by greater attention to the cultivation of emotional sense by legal education, to fortify both individual and collective deliberation among lawyers, jurists, and policymakers. Lawyers trained to understand the role of emotion in cognition will be empowered with a fuller panoply of resources in deliberative problem-solving, enabling them to produce more cogent analyses, navigate tricky interpersonal terrain, and better resist the effects of emotion-induced judgment errors.

Perhaps the best model for such education comes from the interpersonal skills training programs already in place at some law school negotiation programs, like those at Harvard, Stanford, University of Missouri-Columbia, University of California-Hastings, University of Illinois-Urbana Champagne, and Washington University, which emphasize improved self-learning, self-monitoring, listening, and mindfulness in negotiation through facilitated small group workshops and reflective writing assignments.¹⁶¹ Emotionally-informed negotiation can be taught through the carefully crafted simulations and negotiating exercises already in use in such programs, and materials could be modified to help students identify emotional inputs to the inductive reasoning that underlies both deliberation and negotiation. Given the critical role that lawyers play in society, we owe society no less.

V. CONCLUSION: BEYOND THE EMOTION-REASON DUALISTIC OPPOSITION

Because courts view the law as fundamentally dispassionate and competing adjudicative processes such as the lynch mob as highly emotional, courts have often concluded that lack of emotion is an essential attribute of justice. I call this the myth of dispassion because it rests upon two fictions: (1) that emotion

161. See generally Bruce Patton, *On Teaching Negotiation*, in *TEACHING NEGOTIATION: IDEAS AND INNOVATION* 7 (Michael Wheeler ed., PON Books 2000).

necessarily leads to injustice, and (2) that a just decisionmaker is necessarily a dispassionate one.

—*Samuel H. Pillsbury*¹⁶²

Thus, beneath the surface of every negotiation – whether between siblings or heads of state – runs a current of raw and agile emotionality, continuously bridging the gaps between actions and intentions, filtering otherwise arbitrary symbols through the charged gateway of meaning. To recognize the force of emotional inputs on legal decisionmaking is to deeply rattle the hegemony of rationality, quarantined from emotionality, as the exclusively legitimate mediator of deliberative human experience. But it is also to highlight the opportunities for deliberative progress and improvement.

Lawyers are particularly vulnerable to the illusory emotion-reason dualistic opposition in light of the emotionally pejorative intellectual history of western legal culture. But even so, it has long been recognized that effective lawyering relies on the skillful appeal to emotional sense. As former President of the American Bar Association John Shepard has noted:

Advocates follow a long line of philosophers, theologians, writers, and thinkers who have debated the question of whether there is a conflict between emotion and reason. Whatever the outcome of this profound debate, successful lawyers have always understood that their power of persuasion depends upon a melding of the heart and the mind.¹⁶³

Wherever a pressing problem is to be solved, a wise agreement reached, or a valuable deal consummated, lawyers must establish a wise, if subterranean, emotional dialogue to complement their invocation of rational persuasion. A failure to appreciate the impact of the emotionally-charged data exchanged in a negotiation risks the miscommunication and misjudgment that leads to avoidable inefficiencies. Moreover, the failure to heed one's own emotional responses to incoming data may deny the negotiator important information that properly bears on a choice between alternatives. But as with any learned skill, the cultivated synthesis between a negotiator's rational and emotional resources improves with greater focus and understanding.

Thus, negotiators in general – and lawyers in particular – should make greater effort to master the emotional vocabulary of human interaction and deliberation. In personal deliberation, we should heed

162. Pillsbury, *supra* note 7, at 666.

163. Shepherd & Cherrick, *supra* note 90, at 629.

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the ways in which affective data influences our legal judgment, and learn to consult it optimally while avoiding the distorting effects of emotional error. In settings of negotiation, we should seek to more consciously appreciate the emotional cues that we receive from negotiating partners, to improve negotiation efficiency, forestall impasse, and avoid exploitation. We should more consciously monitor the emotional cues that we send to avoid misunderstandings and encourage the kind of rapport that leads to optimal negotiating outcomes.

Finally, we should become as familiar with the stages and elements of the Negotiation Beneath as we have become with the Negotiation Above, so that we can shepherd the process as productively as possible. Just as *Getting to Yes* first road-mapped the stages and methods of negotiation that had previously seemed mysterious and impossible to explain (in other than “instinctive” terms), so should we define the stages, outline the goals, and explore the corrective mechanisms involved in cultivating the wise emotional dialogue.

In so doing, our goal should not be to privilege emotional sense over rational thought in the way that rational thought has always dominated, but instead to develop a more advanced synthesis of these two genuine media of human knowledge. Exclusive reliance on either medium, quarantined from the other, robs the deliberator of her fullest potential for problem-solving. By acknowledging the salience of wise emotionality in individual and collective deliberation, lawyers will not only improve their own personal repertoires, but propel the practice of law, negotiation, and policymaking toward new horizons of efficacy.

