

# ANNUAL SALTMAN LECTURE: FURTHER BEYOND REASON: EMOTIONS, THE CORE CONCERNS, AND MINDFULNESS IN NEGOTIATION\*

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## INTRODUCTION

In 1995, President Bill Clinton and a number of American dignitaries traveled to and from Israel on Air Force One to attend the funeral of Israel's Prime

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This Article is an extended version of the 2009 Annual Saltman lecture, delivered at the University of Nevada, Las Vegas William S. Boyd School of Law, Saltman Center for Conflict Resolution, on March 27, 2009.

Since 2005, Dan Shapiro and I have regularly co-taught negotiation training workshops in which we have integrated what we call "tools of awareness" (primarily mindfulness) with the basic ideas about negotiation set forth in Roger Fisher & Daniel Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (2005). I have learned a great deal from working with Dan, whose insights, wisdom, and enthusiasm have had a major impact on me and my work. I am also grateful to Jennifer Morrow, of Northwestern University's School of Continuing Studies and ADR Systems, who first proposed this training collaboration and who has helped us greatly in offering Negotiation Institutes. Her ideas also appear in this Article, even if I can no longer trace them. This Article has benefitted immeasurably from my extensive recent collaboration with Rachel Wohl, with whom I have taught several versions of a workshop on mindfulness for conflict resolvers, into which we have incorporated the Core Concerns System developed by Fisher and Shapiro. Some months ago, I prepared a brief essay on awareness and ethics. Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 So. TEX. L. REV. 493 (2009). As that essay was based on a symposium luncheon address, it was necessarily superficial; in it, however, I promised a more extensive consideration of the subject in the future. I thought this Article would fulfill that promise, but it does not. Once I began writing, I realized that I had my hands full addressing the interactions between the Core Concerns System and mindfulness. In future writing, I still hope to explore the potential effect of this interaction upon the ethical dimension of law and dispute resolution practice.

I do not, however, mean to suggest that the rest of this Article is deep or in any way authoritative. It is a preliminary exploration in which I have noted some possible mechanisms and outcomes of interactions involving negotiation, the Core Concerns System (and other approaches to negotiation), and mindfulness. Commentators in this Symposium in the *Nevada Law Journal* have already clarified and extended my thinking. I hope others will continue, as I will, to explore these interactions.

For their suggestions or their comments on earlier drafts of this Article or other closely related writings, I thank James Austin, Melissa Blacker, Daniel Bowling, Jonathan Cohen, Stuart Cohn, Mark Fenster, Catherine Damme, Clark Freshman, Jeffrey Harrison, Jack Himmelstein, Peter Huang, Ran Kuttner, Lea Johnston, Juan Perea, Don Peters, Richard Reuben, Scott Rogers, Danny Sokol, Daniel Shapiro, Jean Sternlight, Charles Wiggins, and Rachel Wohl. I also thank faculty and students at the University of Nevada, Las Vegas, William S. Boyd School of Law and the University of Florida Levin College of Law and faculty at St. John's University School of Law for comments on presentations based on previous versions of this Article. Some essential ideas in this article crystallized as I prepared for a presentation for the Center for Spirituality and Health at the University of Florida College of Medicine; thanks to the Center's director, Dr. Lou Ritz, for inviting me and for his helpful comments. I learned a great deal from extensive conversations about meditation and the brain with James H. Austin, M.D., whose knowledge, wisdom, and patience I greatly appreciate. Many thanks to Eduardo Mordujovich, J.D. 2009, University of Florida, for excellent research assistance and editorial suggestions, and to Edward Hart and his colleagues in the U. F. Legal Information Center, for getting mountains of materials for me. I am also grateful for the financial assistance of the Summer Research Grant Program at the University of Florida Levin College of Law. Special thanks to Michael and Sonja Saltman for funding this lecture series, to Jean Sternlight for inviting me to give the Saltman Lecture, and to the editors of the *Nevada Law Journal*, who helped me coax this into final form. And I could not be more grateful to friends and colleagues who prepared the

Minister, Itzak Rabin.<sup>1</sup> Newt Gingrich, then Speaker of the U.S. House of Representatives, was on board and hoped to use the long flights to negotiate the budget with President Clinton.<sup>2</sup> According to President Clinton's spokesperson, however, he "just didn't feel like negotiating the budget with the Speaker" after a long day hosting former presidents, secretaries of state, and congressional leaders.<sup>3</sup> Nonetheless, Gingrich felt offended by Clinton's unwillingness to negotiate.<sup>4</sup> To make matters worse, when the plane landed at Andrews Air Force Base, Gingrich had to exit through the rear door, rather than joining the President and others who left through the forward door.<sup>5</sup> In reaction to Clinton's behavior, Gingrich admitted, he deliberately added provisions to a spending bill that he knew would prompt a presidential veto and precipitate a "shutdown" of the government.<sup>6</sup> "This is petty, but I think it is human," Gingrich explained.<sup>7</sup> "You just wonder: Where is their sense of manners? Where's their sense of courtesy?"<sup>8</sup> Newt Gingrich has plenty of company in succumbing to strong negative emotions in situations of conflict, including some Democratic politicians who openly ridiculed his behavior.<sup>9</sup> Although this happens to virtually everyone on occasion, most of us fail to openly acknowledge such failures. And even if we ignore or suppress strong negative emotions, they often affect our negotiation behavior in unproductive ways.

In the last three decades, numerous books and articles have proposed methods for getting beneath the surface in a negotiation, for example, by uncovering motives, beliefs, or perspectives that could account for the conflict or explain attempts to resolve it.<sup>10</sup> Generally, this literature emphasizes the parties' interests in a negotiation, rather than their positions. A position is what the party says it wants or is entitled to have; an interest or need is the underlying goal or motive that propels the party to assert its position.<sup>11</sup> *Getting to Yes*, first published in 1981, popularized this notion of focusing on underlying interests.<sup>12</sup> Since then, many writers have refined or elaborated upon it,<sup>13</sup> and

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written comments that appear in this symposium: Deborah Calloway, Clark Freshman, Katherine Kruse, Ran Kuttner, Peter Reilly, Daniel Shapiro, Jeffrey Stempel, and Ellen Waldman.

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<sup>1</sup> Todd S. Purdum, *A Washington Potboiler Steals Budget's Thunder*, N.Y. TIMES, Nov. 17, 1995, at A1, available at <http://www.nytimes.com/1995/11/17/us/battle-over-the-budget-the-flight-a-washington-potboiler-steals-budget-s-thunder.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981); ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 40-55 (2d ed., Penguin Books 1991) (1981); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 795-801, 824-25 (1984).

<sup>11</sup> See Menkel-Meadow, *supra* note 10, at 795-801, 824-25.

<sup>12</sup> See FISHER & URY, *supra* note 10, at 11; FISHER ET AL., *supra* note 10, at 40-55.

others have extended it through a series of newer constructs. For example, Doug Stone, Bruce Patton, and Sheila Heen propose that we consider every conversation as if it were three conversations (The *What Happened?* Conversation, the *Feelings* Conversation, and the *Identity* Conversation).<sup>14</sup> Bernard Mayer suggests that we view conflict as if it had three dimensions—emotional, cognitive, and behavioral—and that full resolution requires resolution along all three dimensions.<sup>15</sup>

In 2005, Roger Fisher and Daniel Shapiro published *Beyond Reason: Using Emotions as You Negotiate*, in which they describe how negative emotions can impede interest-based negotiation and how positive emotions can foster it.<sup>16</sup> They assert that, during some negotiations, so many emotions are at work that negotiators are often unable to attend to and address them directly.<sup>17</sup> So they propose a method for dealing with emotions in negotiation indirectly, through attention to five “core concerns”—appreciation, affiliation, autonomy, status, and role—which they assert all people share.<sup>18</sup> Left unfulfilled, these core concerns can precipitate negative emotions.<sup>19</sup> For instance, on Air Force One, all of Speaker Gingrich’s core concerns took hits,<sup>20</sup> and this produced negative feelings and hostile behavior.

Conversely, satisfaction of the core concerns leads to positive emotions. Fisher and Shapiro suggest that we use the core concerns in negotiations as a “lens” to diagnose some of the emotional aspects of the situation and as a “lever” to produce positive emotions, which can foster and enhance interest-based negotiation.<sup>21</sup>

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<sup>13</sup> See, e.g., DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN passim* (1986); WILLIAM URY, *GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE passim* (1991).

<sup>14</sup> DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 7-8 (1999).

<sup>15</sup> BERNARD MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER’S GUIDE* 98-102, 106-08 (2000).

<sup>16</sup> ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* 5-8 (2005).

<sup>17</sup> *Id.* at 12-14.

<sup>18</sup> *Id.* at 15-18.

<sup>19</sup> In constructing the Core Concerns System, Fisher and Shapiro drew upon a great deal of empirical research. See *id.* at 218-29.

<sup>20</sup> To simplify, I assume that Gingrich thought that, by refusing to negotiate the budget with him, President Clinton failed to *appreciate* Gingrich’s pressing need to negotiate the budget, to foster his *autonomy*, or provide him a fitting *role*. The requirement that he leave through the rear door probably impinged on Gingrich’s concerns for *affiliation* (with the President and other leaders) and *status*. See Purdum, *supra* note 1.

<sup>21</sup> FISHER & SHAPIRO, *supra* note 16, at 18. Interest-based negotiation refers to negotiations that focus more on the parties’ interests (i.e., their motives or goals) than on their positions (i.e., claims or demands). See FISHER ET AL., *supra* note 10, at 40-55; Menkel-Meadow, *supra* note 10, at 801-04.

I call this the “Core Concerns System”<sup>22</sup> and I have found it extremely useful,<sup>23</sup> not only in negotiation, but in virtually any kind of human interaction. In this Article, I focus on one particularly common problem: Sometimes people who understand the Core Concerns System, know how to use it, and intend to employ it in a particular negotiation, either fail to do so or fail to do so skillfully; when they review the negotiation, they regret not having used the Core Concerns System, and believe that using it would have produced a better process and outcome. When this occurs, it often results from deficits or faults in the negotiator’s awareness.

It follows—and this is my principal proposal—that a negotiator can enhance his ability to employ the Core Concerns System through improving his awareness skills. I focus on one good way to do this: a method of present-moment, non-judgmental awareness, commonly known as mindfulness. A person cultivates the ability to be mindful principally through forms of meditation that have been developed most extensively by followers of Buddhist philosophy and psychology, and which are now commonly employed in the West—in health care, psychology, business, athletics, law practice, and legal education.<sup>24</sup> These forms of meditation also have become a focus of neuroscientific and other research.<sup>25</sup> I will suggest that there is great potential for synergy—or mutual reinforcement—between mindfulness and the Core Concerns System: Mindfulness can help people use the Core Concerns System; and knowledge of the Core Concerns System can enhance the practice of mindfulness.

Much of what I say about the relationship between mindfulness and the Core Concerns System applies equally to the relationship between mindfulness and other systematic approaches to conflict resolution, especially those designed to get beneath the surface, such as interest-based negotiation, and mediation models that attempt to promote a broad understanding of “the problem.”<sup>26</sup> Mindfulness and these other approaches can mutually reinforce each other. Thus, the Core Concerns System appears in this Article both as a representative of the family of interest-based approaches to conflict and as a method for fostering such approaches.

Here is the plan: Part I describes how negative emotions can impede skillful negotiation. Part II explains the Core Concerns System and how it can help negotiators to identify some causes of negative emotions and promote positive emotions and thereby foster interest-based negotiations. Part III identifies a

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<sup>22</sup> Dan Shapiro calls it the “Core Concerns Framework.” See Daniel Shapiro, *From Signal to Semantic: Uncovering the Emotional Dimension of Negotiation*, 10 NEV. L.J. 461, nn. 5-8 and accompanying text (2010).

<sup>23</sup> I generally agree with Professor George Box’s statement that “[a]ll models are wrong but some are useful.” G.E.P. Box, *Robustness in the Strategy of Scientific Model Building*, in ROBUSTNESS IN STATISTICS 201, 202 (Robert L. Launer & Graham N. Wilkinson eds., 1979).

<sup>24</sup> See *infra* Part IV.A.

<sup>25</sup> See *infra* notes 119-29, 131-139, 142, 148-150, 163, and accompanying text.

<sup>26</sup> See GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING (2008) (describing the Understanding-Based approach to mediation); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: “The Problem” in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 867-902 (2008) (describing the gap between the aspirations and reality in court-oriented mediation and suggesting programs through which court-based programs could seek to close it).

series of obstacles to effectively using the Core Concerns System. Part IV explains mindfulness and related tools of awareness and suggests how they can help overcome these obstacles to using the Core Concerns System. Part V explains the potential for reciprocity—how knowledge of the Core Concerns System can enhance a negotiator’s mindfulness. The conclusion crystallizes the main points and endeavors to put them into a broader context.

### I. THE PROBLEM: EMOTIONS IN NEGOTIATION

Most of us have trouble dealing with emotions that are associated with conflict. Negotiators—especially those trained in law—commonly address this problem by trying to exclude emotions from negotiation and to focus solely on so-called objective, rational factors, such as money. Negotiators may come to this approach through mentoring, training, or education. Most traditional law school courses, for instance, exclude consideration of the emotions of the parties, lawyers, and judges.<sup>27</sup> But many negotiators adopt this approach without any training, and without even thinking about it. Some of them have little or no conscious awareness of emotions.<sup>28</sup> Others may ignore emotions in order to avoid uncomfortable anxiety. Still others might fear that recognizing, expressing, or attempting to address emotions will overwhelm their cognitive faculties and escalate the conflict, making it more difficult to resolve.

Speaking generally, Fisher and Shapiro assert that the Core Concerns System can promote better interest-based negotiation by addressing some causes of negative emotions and fostering positive emotions.<sup>29</sup> I accept those premises, for purposes of this article—in part to keep it at a manageable length—even though the relationship between mood and negotiation success is quite complex, especially in negotiations conducted by agents.<sup>30</sup> Accordingly, when I

<sup>27</sup> See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-48, 57-60 (1982). In recent years, some professors have introduced consideration of emotions, usually in courses that involved clinical experiences or experiential learning associated with professional skills, especially interviewing and counseling, negotiation, and mediation. Professor Joshua Rosenberg offers a course called “Interpersonal Dynamics” at the University of San Francisco School of Law. Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225, 1234-35 (2004); see also Joshua D. Rosenberg, *Teaching Empathy in Law School*, 36 U.S.F. L. REV. 621, 637-42 (2002). Professor William Blatt offers a course called “Emotional Intelligence: Life Skills for Lawyers” at the University of Miami School of Law. E-mail from William S. Blatt, Professor of Law, Univ. of Miami Sch. of Law, to author (July 21, 2009) (on file with *Nevada Law Journal*) [hereinafter E-mail from Blatt to author]. Recent studies of legal education have called for attention to emotional competencies. E.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 60 (2007). For an extensive review of the role of emotions in law and negotiation, with recommendations for law schools, see Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231 (2005).

<sup>28</sup> For a description of a person with this kind of limitation, see DANIEL J. SIEGEL, *THE MINDFUL BRAIN: REFLECTION AND ATTUNEMENT IN THE CULTIVATION OF WELL-BEING* 300-04, 307-08 (2007).

<sup>29</sup> See FISHER & SHAPIRO, *supra* note 16, at 171-81.

<sup>30</sup> Clark Freshman et al., *Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support*, 7 HARV. NEGOT. L. REV. 67, 73-76 (2002); Clark Freshman et al., *The Lawyer-Negotiator as Mood Scientist: What We Know and Don’t Know About*

discuss addressing emotions, I usually mean negative emotions. And I realize that, in particular circumstances, (1) categorizing a certain emotion as positive or negative may be problematic, and (2) negative emotions can provide a negotiator an advantage.

Although a negotiation that excludes direct expression or consideration of emotions often enables parties to settle disputes, it also can precipitate several problems. For instance, parties frequently will not reach the best feasible resolution because they fail to look beneath their asserted positions for the interests, beliefs and perspectives that lie beneath them.<sup>31</sup> As Bernard Mayer has suggested, “full” resolution of a conflict requires resolution along three dimensions—cognitive, emotional, and behavioral.<sup>32</sup> And, as Daniel Shapiro argues elsewhere, “[e]motions are a means to communicate relational identity concerns.”<sup>33</sup> Thus, to the extent that negotiators keep emotions out of the negotiation process, they—or their principals—are less likely to achieve an emotional resolution because they do not address the needs associated with such emotions.<sup>34</sup> Of course, emotions tend to sneak in anyway. When that happens, these emotions can prompt adversarial perspectives and behavior, making it less likely that the substantive interests will get attention. In addition, negative emotions can impair the parties’ ability to think clearly, render them vulnerable to exploitation, and possibly harm relationships.<sup>35</sup> Thus, negative emotions can even impair a negotiator’s ability to skillfully conduct adversarial negotiations.

The Gingrich-Clinton episode described at the beginning of this Article is just one high-profile example of negative emotions obstructing judgment. This can happen in more mundane situations, too. Consider this hypothetical:

Thirty years ago, Jack and Phil, now in their early 60s, left the employ of a boiler manufacturer for whom they worked as salesmen. They started their own firm, J-P Boilers (JPB), which would compete with their former employer. Phil was good at management and finance, while Jack excelled in sales. To facilitate management decisions (but, according to Jack, not to apportion control), they agreed to split the closely held stock unevenly, with Phil getting fifty-one percent, and Jack receiving forty-nine percent. Over the years, JPB has prospered. Phil has worked primarily in the office, and Jack has handled sales, spending much of his time on the road. Phil has remained physically fit, while Jack has done perhaps a bit too much entertaining and now enjoys noticeably less energy than he did a few years ago.

In recent years, their once-close relationship has deteriorated to the point that they avoid one another and communicate only by email—even when they are sitting in the same office. Two interrelated issues have produced much of the stress.

First, three years ago, Phil put his son Phil, Jr., a recent M.B.A. graduate of a prestigious school, in charge of Southeast sales, with Jack’s very reluctant acquiescence. This left Jack with Midwest sales (which has been the biggest portion of JPB’s business). Since that time, sales have accelerated greatly in the Southeast. Phil believes this is the result of Phil Jr.’s winning personality and his use of technol-

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*How Mood Relates to Successful Negotiation*, 2002 J. DISP. RESOL. 1, 45-63 (2002) [hereinafter Freshman et al., *Mood Scientist*].

<sup>31</sup> See FISHER ET AL., *supra* note 10, *passim*; Menkel-Meadow, *supra* note 10, *passim*.

<sup>32</sup> See MAYER, *supra* note 15, at 108.

<sup>33</sup> Daniel L. Shapiro, *Negotiating Emotions*, 20 CONFLICT RESOL. Q. 67, 68 (2002).

<sup>34</sup> See Riskin & Welsh, *supra* note 26, at 877-94 (describing a particular case in which the professionals systematically ignored some of the plaintiff’s obvious core concerns).

<sup>35</sup> See FISHER & SHAPIRO, *supra* note 16, at 5-6.

ogy in marketing and sales. Phil contrasts these with Jack's reliance on personal relationships with customer representatives, and a good deal of time on the golf course and in the clubhouse bar. Jack, on the other hand, attributes the growth of sales in the Southeast to the exceptionally dynamic economy that region has enjoyed in the last three years.

The second issue is that Phil would like to give Phil, Jr. a more prominent role in the business, essentially putting him in charge of sales; at the same time, he would like to get rid of Jack, who Phil believes has not been pulling his weight.<sup>36</sup>

Imagine that, at the urging of their lawyers, friends, and relatives, Jack and Phil agree to negotiate one-on-one to attempt to address this problem.<sup>37</sup> In litigation, this case would necessarily have a narrow problem definition.<sup>38</sup> Each side would assert its claim as to what formal role Jack was entitled to play. Alternatively, either Jack or Phil might seek to dissolve the corporation.<sup>39</sup> Their claims would rest on legal or equitable principles that they believe a court should recognize. In terms of negotiation theory, both Jack and Phil would be asserting "positions" (statements of what they want or are entitled to) in contrast to the real "interests" (the needs or goals that motivate them to assert these positions). A negotiation, however, can address both the parties' positions and their underlying interests; by addressing party interests, it often is possible to use processes and secure outcomes that better serve the parties.<sup>40</sup> I have used various versions of this scenario in teaching negotiation and mediation. When students or teachers attempt to identify the underlying interests, they come up with a list that looks something like this:

***Jack's interests:***

- PJB's continued prosperity;
- Health care or health insurance;
- Recognition of his contribution to PJB;

<sup>36</sup> This fact pattern draws on role-play exercises developed and copyrighted by Michael Keating. J. Michael Keating, Jr., *The Corporate Divorce Negotiation Role Play* (1992) (on file with *Nevada Law Journal*). It is used with his permission. E-mail from J. Michael Keating Jr. to author (Sept. 27, 2009) (on file with *Nevada Law Journal*).

<sup>37</sup> I realize that Jack and Phil might be better off with lawyers or a mediator. But it is easier to explain the operation of the Core Concerns System using a simple one-on-one negotiation.

<sup>38</sup> See Michael Moffitt, *Pleadings in the Age of Settlement*, 80 *IND. L.J.* 727, 736-37 (2005). For an extensive discussion of the process of establishing the problem definition in a mediation, see Riskin & Welsh, *supra* note 26, at 904-09.

<sup>39</sup> My colleague, Professor Stuart Cohn, has emphasized the severity of the problem Jack faces if he seeks to litigate.

In order for him to bring a suit challenging the various steps being taken or considered by Phil, his most likely suit in most states which follow the Model Business Corporation Act (over 40) is a suit for dissolution (MBCA s. 14.30) based on "oppression," i.e. a failure to meet his reasonable expectations at the time he formed the corporation with Phil. Dissolution is a draconian remedy and obviously will roil the waters enormously, even though courts have the power to order a less intrusive remedy. But the mere filing of such a suit already will raise the dander level considerably. To make matters worse, in most Model Act states, once Jack files his lawsuit, he is subject to having his shares purchased involuntarily by the corporation or by Phil at "fair value," per MBCA s. 14.34. In other words, if Jack wants judicial relief, he seeks it at the risk of losing his shares.

E-mail from Stuart Cohn, John H. & Mary Lou Dasburg Professor of Law, Levin College of Law, to author (June 23, 2009) (on file with *Nevada Law Journal*).

<sup>40</sup> See FISHER ET AL., *supra* note 10, at 9-14; Menkel-Meadow, *supra* note 10, at 809-13, 817-29.



- Slowing down, traveling less, having more leisure time;
- Remaining active (possibly in the boiler business); maintaining relationships with customers, many of whom have become friends;
- A satisfying role in the business;
- An enjoyable work atmosphere;
- (Possibly) improving his relationship with Phil.

***Phil's Interests:***

- PJB's continued prosperity;
- Recognition for his contribution to PJB;
- Continuing to work in the boiler business;
- Helping Phil Jr.;
- Establishing a significant role for Phil Jr.;
- Modernizing sales and marketing;
- (Possibly) improving his relationship with Jack;
- A satisfying role in the business;
- An enjoyable work atmosphere.<sup>41</sup>

Through good, interest-based negotiation, Jack and Phil might be able to reach any number of agreements that would respond to most or all of these interests, and thus serve them collectively better than likely outcomes of judicial proceedings or narrowly focused adversarial negotiations. To take one obvious example, they might decide that Jack would leave his current position with PJB but remain connected through a consulting or special employment arrangement under which he would retain some of his old clients, as well as his health insurance, and perhaps provide sales coaching for Phil, Jr. They might re-establish their cordial relations.

However, even if Jack and Phil knew about interest-based negotiation, they might fail to address underlying interests. Any number of barriers—behavioral, cognitive, and emotional—could impair their ability to negotiate in an interest-based fashion.<sup>42</sup> The three kinds of barriers interact with one another, of course, but I will concentrate on emotional barriers.

Negative emotions permeate Jack and Phil's relationship. Phil, for instance, dislikes Jack because he believes that Jack stands in the way of modernizing the firm and of giving Phil, Jr. an appropriate role. He condemns

<sup>41</sup> Using the core concerns framework, we could say that each also had "interests" based on the core concerns: Appreciation, Autonomy, Affiliation, Status, and Role. I think of the core concerns as psychological, identity-based interests. However, Daniel Shapiro, the co-creator of the Core Concerns Framework, is wary about using the terms interchangeably. He explains:

Some people have described the core concerns as core interests, and I think it could make sense.

From my own perspective, however, the word "concerns" calls forth a more emotional sense, whereas interests seems a bit more business-like/political in its historical use and nature.

....

... An unmet concern . . . can be seen clearly to trigger an action tendency (and concomitant emotion). An interest (at least in terminology) seems to be a bit less intrinsically emotionally charged.

E-mail from Daniel Shapiro, Dir. of the Harvard Int'l Negotiation Program, Harvard Law School, to author (June 10, 2007) (on file with *Nevada Law Journal*).

<sup>42</sup> For discussions of behavioral, cognitive, and emotional barriers, see *BARRIERS TO CONFLICT RESOLUTION passim* (Kenneth J. Arrow et al. eds., 1995); Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235 *passim* (1993).

Jack's lifestyle, though he may also harbor a bit of envy. Moreover, Phil is frustrated in his desire to give Phil Jr. a bigger role in the business. On the other hand, Jack dislikes Phil for excluding him. He believes that Phil is selfishly motivated to promote Phil, Jr., and thus thinks that Phil is a bad person. Hence, each is angry with the other.

Psychologists have documented the effects of mood on negotiation. Negotiators who are in a good mood, reach better, interest-based outcomes than those in a neutral mood.<sup>43</sup> Positive emotions, it appears, foster good problem solving, creativity, and empathy.<sup>44</sup> A good mood may promote the release of dopamine, which can improve cognition.<sup>45</sup> In sharp contrast, negative affect usually produces a negative impact on negotiation.<sup>46</sup> In particular, negative emotions are associated with poor judgment and less concern about others, and they can distract negotiators from attending to their real interests.<sup>47</sup>

Thus, to the extent that negative emotions dominate their negotiation, Jack and Phil are more likely to wind up with a narrow definition of the problem, take adversarial positions, and pay relatively little attention to their underlying interests. They might, for instance, focus on the narrow issue of whether Jack should have an equal voice in management,<sup>48</sup> and take strictly contrary positions; Phil would rely on legal arguments based on the corporate documents, while Jack would rely on the equities and his claim that the original purpose of apportioning stock was to facilitate management decisions. If they continue to conceptualize the problem narrowly (as would a court), they are likely to reach the same sort of outcome that a court would reach: that Jack either has or does not have an equal right to influence significant decisions. However, even with an agreement or court judgment recognizing such a right, successful implementation of the right could turn on whether they can recast their relationship. Of course, their level of anger and hostility may prevent them from doing so; and that could lead to PJB's liquidation (judicial or otherwise), which would satisfy few of their interests, or continuation of the *status quo*, which both find unbearable.

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<sup>43</sup> Peter J.D. Carnevale & Alice M. Isen, *The Influence of Positive Affect and Visual Access on the Discovery of Integrative Solutions in Bilateral Negotiation*, 37 *ORG'L BEHAV. & HUM. DECISION PROCESSES* 1, 7-8 (1986); Freshman et al., *Mood Scientist*, *supra* note 30, at 19, 22-24. This is true even if the good mood was induced by the researchers. Carnevale & Isen, *supra* at 7-8; Freshman et al., *Mood Scientist*, *supra* note 30, at 15.

<sup>44</sup> See Alice M. Isen, *Positive Affect and Decision Making*, in *HANDBOOK OF EMOTIONS* 417 (Michael Lewis & Jeannette M. Haviland-Jones eds., 2d ed. 2008); Freshman et al., *Mood Scientist*, *supra* note 30, at 22-24, 31.

<sup>45</sup> F. Gregory Ashby et al., *A Neuropsychological Theory of Positive Affect and Its Influence on Cognition*, 106 *PSYCHOL. REV.* 529, 533-35 (1999).

<sup>46</sup> See Shapiro, *supra* note 33, at 70.

<sup>47</sup> See Freshman et al., *Mood Scientist*, *supra* note 30 at 21-24; Shapiro, *supra* note 33, at 70. *But see* Clark Freshman, *Yes, and: Core Concerns, Internal Mindfulness, and External Mindfulness for Emotional Balance, Lie Detection, and Negotiation Success*, 10 *NEV. L.J.* 365, n. 42 and accompanying text (2010) ("[R]ecent research has persuaded me that negative emotions such as anger may sometimes lead to better outcomes.").

<sup>48</sup> Of course, they might also focus on whether Jack should leave the business or whether the business should be sold.

## II. ADDRESSING THE CHALLENGE OF EMOTIONS IN NEGOTIATION: THE CORE CONCERNS SYSTEM<sup>49</sup>

In a negotiation, Fisher and Shapiro tell us, everyone has five “core concerns”: appreciation, affiliation, autonomy, status, and role.<sup>50</sup> We all want to feel *appreciated* by others, to *affiliate* with others, to have *autonomy*, to have others recognize our *status*, and to have a meaningful *role*. We have these concerns not only in negotiation, but also in many other interactions. Just imagine walking into a business or community organization meeting with a dozen people whom you do not know; passing a group of colleagues on their way out to a lunch to which you were not invited; going to the annual office holiday party; or attending your first class in law school. In any of these situations, each of the core concerns could manifest in varying degrees.

Left unsatisfied, any of the core concerns can produce negative emotions.<sup>51</sup> And negative emotions can interfere with good interest-based problem solving. Satisfaction of these core concerns, however, leads to positive emotions, and positive emotions enhance one’s ability to engage skillfully in interest-based negotiation.<sup>52</sup> Fisher and Shapiro believe that negotiators are influenced by too many emotions to notice and address directly;<sup>53</sup> for that reason, they suggest that a more practical, robust approach is to deal with these emotions *indirectly*<sup>54</sup> by employing the core concerns as a diagnostic “lens” (to understand the situation and to plan, conduct, and review the negotiation) and as a “lever” (to improve the situation by fostering positive emotions in all parties, which can support better interest-based negotiation).<sup>55</sup> A negotiator uses the core concerns as a “lever” by expressing appreciation, building affiliation, respecting autonomy, acknowledging status, and choosing a fulfilling role.<sup>56</sup>

<sup>49</sup> A number of approaches to interest-based conflict resolution suggest ways to address difficult emotions. *See, e.g.*, ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 200-201 (2000); STONE ET AL., *supra* note 14, at 85-107; LEIGH L. THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR 125 (4th ed. 2009); URY, *supra* note 13, *passim*; WILLIAM URY, THE POWER OF A POSITIVE NO: SAVE THE DEAL, SAVE THE RELATIONSHIP—AND STILL SAY NO 33-42 (2007).

I have chosen to focus on the core concerns framework developed by Roger Fisher and Daniel Shapiro (FISHER & SHAPIRO, *supra* note 16) for several reasons: (1) Dealing effectively with emotions is essential to skillfully carrying out any of the interest-based approaches to negotiation, (2) the Core Concerns System takes emotions as its central focus, (3) it is simple and, in my experience, extremely helpful, and (4) I am very familiar with the system.

<sup>50</sup> FISHER & SHAPIRO, *supra* note 16, at 15-18.

<sup>51</sup> *Id.* at *passim*. Fisher and Shapiro define emotion as: “An experience to matters of personal significance; typically experienced in association with a distinct type of physical feeling, thought, physiology, and action tendency.” *Id.* at 209. Scholars have defined emotion in many ways. *See, e.g.*, Paul Ekman, *All Emotions are Basic*, in THE NATURE OF EMOTION 15 (Paul Ekman & Richard J. Davidson eds., 1994).

<sup>52</sup> FISHER & SHAPIRO, *supra* note 16, at 18-21.

<sup>53</sup> For a contrary view, see Freshman, *supra* note 47, at 366.

<sup>54</sup> In this Symposium, Shapiro has characterized this approach as one dealing with the “emotional dimension” of negotiation. *See* Shapiro, *supra* note 22, at 470.

<sup>55</sup> FISHER & SHAPIRO, *supra* note 16, at 18-21.

<sup>56</sup> *Id.* at 25-142.

I will illustrate using an emotion-laden piece of Jack and Phil's negotiation.

Phil makes a proposal and immediately picks up the coffee carafe to fill the cup in front of Jack.

Jack responds: "No, Phil, I don't want coffee, and I know exactly what you're trying to pull. Man, I never met a more pompous, self-satisfied, arrogant *jerk!* I mean, really, why *would* you bother to actually learn *anything* about what *I* need to do—what needs to be done for this company—'cause you have it all figured out, don't you? You've been watching too many Kevin Costner flicks, buddy, yeah, you build your spreadsheet and the customers come. After all this time, you have *no idea* what it takes to develop customers and really take care of them. You have *no idea* what I've been doing all these years. Without me, you'd be exactly where you *belong*."

Overcome with anger and other negative emotions, Phil responds with something like: "You're a *bum*, a has-been, a never-was. You've been goofing off for *years*. I don't *ever* want to see you again."

Plainly, this interchange escalates negative emotions, which could lead either to termination of the negotiation or to very adversarial strategies and tactics that would miss opportunities for addressing underlying interests.

But if Phil were able to use the Core Concerns System at this moment, events might unfold differently. Imagine that, before his negotiation with Jack, Phil reads *Beyond Reason* and takes a negotiation-training program based on it. (This would mean that he has learned the fundamentals of interest-based negotiation, in addition to the Core Concerns System.)<sup>57</sup> In brief, using the core concerns as a lens, Phil would realize that Jack's anger and consequent nasty words resulted principally from Jack's core concern for appreciation—the most fundamental of the core concerns. Phil also would realize that the negative thoughts and emotions that Jack's statement precipitated in him derived from his own core concern for appreciation—and likely from other core concerns as well. Then, using the core concerns as a lever, he would seek to appreciate Jack, perhaps saying something like: "Jack, would you be willing to help me understand what your life on the road, working for our firm, has been like?"

*If* Jack is willing to explain—and this is a big "*if*"—Phil might be able to appreciate Jack's work and to express that appreciation. For instance, Phil might say, "I had no idea what challenges you've dealt with, and the personal costs you incurred. I think you have made a remarkable contribution to the company and I am very grateful to you." As a result of such an interchange, both *might* experience an increase in positive emotions, which could foster their ability to do interest-based negotiation. Of course, as a tactical matter, Phil should make such comments—and they would be effective—only if they

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<sup>57</sup> *Beyond Reason* does not mention all of the ideas associated with interest-based negotiation. However, it does include the most comprehensive recent formulation of the idea produced by the Program on Negotiation at Harvard Law School—the Seven Elements of Negotiation: Relationship, Communication, Interests, Options, Legitimacy, BATNA (Best Alternative to a Negotiated Agreement) and Commitments. FISHER & SHAPIRO, *supra* note 16, at 207-08.

are genuine and if they are appropriate, given Jack and Phil's long-standing relationship and the context of the moment.<sup>58</sup>

Here is a more detailed picture of how Phil might use the core concerns—as a lens and as a lever—in preparing for, conducting, and reviewing the negotiation.

A. *As a Lens, Directed at Jack*

Using the core concerns as a *lens* to understand Jack, Phil would review past events privately, or ask Jack questions. In so doing, Phil might realize that Jack:

1. Thinks that Phil does not *appreciate* his contribution to PJB;
2. Is concerned about his *affiliation* with Phil and with PJB;
3. Feels a need for *autonomy* in decision-making about PJB and his relationship to it;
4. Is concerned about his *status* in relation to Phil, Phil, Jr., and PJB; and
5. Believes that he does not have a fulfilling or appropriate *role* in PJB.

Thus, Phil should be able to see that Jack's core concerns were significant in the evolution of the conflict and would remain important to Jack during the negotiation.

Such understandings also might lead to further insights. For example, before he began to use the Core Concerns System, Phil believed that Jack had harmed PJB—for example, by staying on the road too long, drinking too much, grasping for power, and opposing both modernization and the inclusion of Phil, Jr. Furthermore, Phil believes that Jack's behaviors are manifestations of his character flaws—his laziness, selfishness, rigidity and small-mindedness.<sup>59</sup> These beliefs about Jack's character precipitated or enhanced Phil's disdain, anger, and resentment toward Jack.

If, however, Phil could direct the core concerns lens at Jack, he might learn that the elements of Jack's behavior to which he objected grew out of Jack's unsatisfied core concerns, rather than from his character. As shown above, Phil might see that Jack's surly behavior springs from an unsatisfied concern for *appreciation*, and recognize that other core concerns likely induced Jack's other negative behaviors. Jack's concern for *affiliation*, for instance, could have propelled him into social and drinking relationships with his customers. His need for *autonomy* could have kept him on the road. Insights such as these might eliminate or reduce the strength or influence of Phil's negative emotions toward Jack. As Longfellow put it, "If we could read the secret history of our enemies, we should find in each man's life sorrow and suffering enough to disarm all hostility."<sup>60</sup> When Phil realizes that Jack's behavior derives from Jack's core concerns for appreciation, affiliation, autonomy, sta-

<sup>58</sup> See Shapiro, *supra* note 22, at 462.

<sup>59</sup> Such beliefs could result from what psychologists call the "fundamental attribution error . . . —the tendency . . . to attribute another person's behavior to dispositional factors (those internal to the person) rather than to situational (external) factors." Jean R. Sternlight & Jennifer Robbenolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 462 (2008).

<sup>60</sup> HENRY WADSWORTH LONGFELLOW, *DRIFTWOOD* (1857), *quoted in* JOHN BARTLETT, *BARTLETT'S FAMILIAR QUOTATIONS* 467 (Justin Kaplan ed., 17th ed. 2002).

tus, and role, he comes to see Jack more fully.<sup>61</sup> This realization might even foster empathy, compassion, or other positive emotions toward Jack.

*B. As a Lens, Directed at Himself*

Similarly, Phil could focus the core concerns lens on himself—before, during or after the negotiation. In doing so, Phil might recognize that he believes that Jack does not *appreciate* him and all that he has contributed by managing PJB. He might see that he has (or does not have) a need to for a stronger *affiliation* with Jack, Phil, Jr., or other people in the industry. He might recognize his own need for *autonomy* in managing the firm, and his concerns about *status* and having a fulfilling *role* in the business. Phil could realize that these core concerns stimulated some of his negative attitudes and actions toward Jack. And of course, Phil might be able to recognize that he, himself, has the same concerns in connection with the negotiation process and outcome.

*C. As a Lever, to Stimulate Positive Emotions in Jack*

Phil's new insights about Jack would enable him to use Jack's core concerns as a *lever* to attempt to stimulate positive emotions in Jack. For instance, Phil might express *appreciation* for Jack's commitment to PJB, his strong relations with customers, his willingness to travel, and other interests or perspectives that Jack expresses during the negotiation. Phil might build *affiliation* with Jack by recalling their long history of work and friendship: by sitting in such a way as to convey closeness; by initiating in-person, rather than email contact, and talking about the real issues in their relationship.<sup>62</sup> In addition, he could respect Jack's *autonomy* in the negotiation by consulting with Jack before making any decisions about negotiation procedure. He might propose a brainstorming process or ask Jack to suggest options for addressing various issues.<sup>63</sup> He could acknowledge Jack's *status* as a founder of the firm, as a great boiler salesman, as an expert on boilers, as a good golfer, and a *bon vivant*.<sup>64</sup> Finally, Phil could try to ensure that Jack had a *fulfilling role* in the negotiation (i.e., a role that has "a clear purpose," is "personally meaningful," and "is not a pretense"<sup>65</sup>), with lots of opportunities to speak freely and to influence the focus, procedures, and outcome.

*D. As a Lever, to Stimulate Positive Emotions in Himself*

Using the insights about his own core concerns as a lever, Phil might try to help Jack *appreciate him* by, say, asking Jack to listen to Phil describe his own work life and worries about the firm, and then to relate his understanding of

<sup>61</sup> Using the "three conversations" framework set forth in *Difficult Conversations*, these concerns would be part of the "Identity Conversation." See STONE ET AL., *supra* note 14, at 109-28.

<sup>62</sup> See FISHER & SHAPIRO, *supra* note 16, at 52-68.

<sup>63</sup> See *id.* at 79-81.

<sup>64</sup> See *id.* at 94-102.

<sup>65</sup> See *id.* at 117-18.

what Phil said.<sup>66</sup> Any work Phil did to *build affiliation*, described above in section C, also could stimulate positive emotions in himself. And Phil could expand his own *autonomy* by making recommendations and engaging in brainstorming.<sup>67</sup> Finally, Phil might deliberately take the time to privately enjoy his own *status* as the manager of a substantial business<sup>68</sup> and make sure that he, too, has an appropriate, fulfilling *role* in the negotiation.<sup>69</sup>

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Phil's use of the Core Concerns System in this fashion—assuming the core concerns lens gives him accurate insights and that his exercise of the lever is genuine, skilful and appropriate in the context of their relationship and the moment—could produce positive emotions in both negotiators. This, in turn, would enhance their ability to engage in interest-based negotiation. And that could lead to good, interest-based outcomes that are more satisfying to Phil and Jack than those likely to emerge from adversarial negotiation (or trial).

Understanding the Core Concerns System, I think you will agree, is simple. Implementation, however, is not always easy, and—as I shall show in the next section—negotiators who understand the system and intend to use it, sometimes are unable to do so.

### III. OBSTACLES TO IMPLEMENTING THE CORE CONCERNS SYSTEM

I have found the Core Concerns System extremely useful, not only in formal negotiations, but also during interactions with people in virtually any context. Successful implementation calls for deploying a systematic perspective in order to understand some common causes of negative emotions and then taking action, as appropriate, to foster positive emotions, which should enhance the parties' chances of conducting interest-based negotiations or having better interactions.

The method is clear and easily grasped from reading *Beyond Reason*. In training programs based on the *Beyond Reason*—through lectures, demonstrations, and role-play exercises—students quickly learn to identify core concerns in others and in themselves and develop good ideas about how to address them. And yet, I have observed, in myself and others with whom I have worked, certain obstacles to consistent, skilful implementation of the system in actual negotiations. For a variety of reasons, some negotiators who are familiar with the system and would like to use it—and even intend to use it—do not actually do so, or do not do so skillfully. Some do not even begin to use the core concerns. Others may begin using the core concerns as a lens, but later lose track of them. Looking back, they wish that they had used the system, or used it more skillfully.<sup>70</sup>

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<sup>66</sup> See *id.* at 49.

<sup>67</sup> See *id.* at 75-82.

<sup>68</sup> See *id.* at 50.

<sup>69</sup> See *id.* at 105-06.

<sup>70</sup> I have written elsewhere about a similar phenomenon that occurs in connection with implementing in practice some basic ideas about interest-based negotiation that are com-

This could happen to Phil. If it does, what could explain that outcome? The culprits could include any of the following intricately interrelated factors: an excessively self-centered focus; strong negative emotions; automatic, habitual ways of thinking, feeling, and behaving; insensitivity to emotions; insufficient social skills; or a distracted, wandering mind.

A. *Excessively Self-Centered Perspectives*

Humorist Ambrose Bierce defines an egotist as “a person of low taste, more interested in himself than in me.”<sup>71</sup> The strong tendency toward a self-centered focus is deeply ingrained in our society—and is a basic aspect of human nature. Neurologist James H. Austin, drawing in part on Buddhist teachings, identifies three “interactive components of selfhood”—the “*I-Me-Mine*.”

The *I* exists physically, feels, is aware, acts, knows, thinks, and personifies various roles.

Things happen to the *Me*, both physically and mentally. . . . [A]ll private thoughts, opinions, and body parts are “*Mine*.” All these possessions are *Mine*. *My* self is the sole axis around which the rest of the world revolves.

The triad obviously serves useful, constructive, and adaptive ends . . . [but] it also has a covert, dysfunctional side. Zen tries to liberate, transform, and redirect these habitual unfruitful energies along more constructive lines.

But can our very own sovereign *I* create problems? You bet it can. Let us begin by expressing its range of problems in simple a-b-c terms. Our *I* is also *arrogant* and *aggressive*. Even so, it has a vulnerable partner: the fearful *Me*. This *Me* feels besieged. It can get *battered*.

Finally, our *Mine* is readily captured by its “own” greedy longings. It clutches at other people, it *covets* and *clasps* onto material goods. . . . It cherishes and clings to each of its biased opinions.<sup>72</sup>

The focus on self both supports and draws reinforcement from the presence of strong emotions. Such a self-centered focus could undermine Phil’s ability to feel genuinely curious about Jack, to listen to Jack,<sup>73</sup> or to care about Jack. It also could explain his negative feelings toward Jack. Moreover, Phil could be so strongly centered on himself that he might even forget about his commitment to use the Core Concerns System with respect to Jack.<sup>74</sup>

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monly taught in law schools and CLE programs. See Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1, 55-57 (2002) [hereinafter Riskin, *Contemplative Lawyer*]; Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. LEGAL EDUC. 79, 82-83 (2004) [hereinafter Riskin, *Mindfulness*].

<sup>71</sup> AMBROSE BIERCE, THE UNABRIDGED DEVIL’S DICTIONARY 63 (2000).

<sup>72</sup> JAMES H. AUSTIN, ZEN-BRAIN REFLECTIONS: REVIEWING RECENT DEVELOPMENTS IN MEDITATION AND STATES OF CONSCIOUSNESS 13-14 (2006).

<sup>73</sup> See STONE ET AL., *supra* note 14, at 168-71.

<sup>74</sup> Professor Leigh Thompson has identified egocentrism—“the tendency for people to view their experiences in a way that is flattering or fulfilling for themselves”—as a principal cause of ineffective negotiation. THOMPSON, *supra* note 49, at 6.



### B. *Strong Negative Emotions*

In much the same way that the “Star Wars” missile defense system could be knocked out by the very missiles against which it was designed to protect the U.S.,<sup>75</sup> the Core Concerns System is vulnerable to the same emotions that it was created to address. In other words, before Phil can use the Core Concerns System, or while he tries to use it, strong, negative emotions might simply overpower his cognitive capacity or will to do so. This could happen before the negotiation begins, or at any point during the negotiation. For example, even if Phil is calm enough, before the negotiation, to use the core concerns as a lens to help him plan for it, Jack might do or say something during the negotiation, such as I have suggested in the example above, that would prompt the outbreak of strong negative emotions that would dominate Phil’s thoughts and behavior.

### C. *Automatic, Habitual Ways of Thinking, Feeling, and Behaving*

Phil’s ability to use the core concerns may be impaired by “top-down,”<sup>76</sup> automatic, habitual ways of thinking, feeling, and behaving that do not take core concerns or other interests into account. Some of these—such as automatically thinking of his own interests first, becoming angry when he senses a threat to his sense of identity, and acting out his anger—might overlap with the excessively self-centered focus described above. Other troublesome habitual ways of thinking might include common cognitive barriers to wise negotiation, such as (1) the “fundamental attribution error,” or “tendency . . . to attribute another person’s behavior to dispositional factors (those internal to the person) rather than to situational (external) factors;”<sup>77</sup> (2) “reactive devaluation”—a tendency to negatively evaluate a proposal that comes from a source deemed untrustworthy;<sup>78</sup> and (3) “optimistic overconfidence”—a tendency to overvalue the strength of one’s own position.<sup>79</sup> In addition, Phil has many long-ingrained habits of thinking, feeling, and behaving in relation to Jack, any of which could stop him from using the Core Concerns System in this negotiation. Most of us are almost wholly unaware of such phenomena, in part because they may take place beneath our conscious awareness. Another reason for our limited awareness could be that we hold the perspective known as “naïve realism,” which Lee Ross and Donna Shestowsky summarize “in three first-person propositions”:

The first proposition is that I see actions and events as they *are in reality* or, in other words, that my perceptions and reactions are a relatively unmediated reflection of the “real nature” of whatever it is to which I am responding. The second proposition is that *other people*, to the extent that they are willing and able to see things in a similarly objective fashion, will *share* my perceptions and reactions. The third proposi-

<sup>75</sup> See Strobe Talbott, *The Case Against Star Wars Weapons*, TIME, May 7, 1984, at 81, available at <http://www.time.com/time/magazine/article/0,9171,954303,00.html>.

<sup>76</sup> Here I use “top down” in the sense in which psychiatrist Daniel Siegel uses it, to mean “how engrained brain states can impinge on emerging neural circuit activations and thus shape our awareness of ongoing experience in the present moment. SIEGEL, *supra* note 28, at 135. The term is used in various ways. *Id.* at 134-37.

<sup>77</sup> See Sternlight & Robbenolt, *supra* note 59, at 462.

<sup>78</sup> See Mnookin, *supra* note 42, at 246.

<sup>79</sup> See BARRIERS TO CONFLICT RESOLUTION, *supra* note 42, at 46-50, 59-60.

tion pertains to the consequences of discovering that other individuals have perceived some event or reacted to it *differently* from me. In that case, I infer that *they* (but not *I*) have been influenced by something *other than* the objective features of the events in question. More specifically, I infer that *their* responses have been *biased* by their personal traits or dispositions, their motivations and emotions, their expectations and beliefs, the faulty or incomplete information available to them, or some other distorting influence.<sup>80</sup>

The perspective of naïve realism (itself an automatic way of perceiving and thinking) keeps us from noticing the operation of the automatic, habitual processes of thinking, feeling and behaving that I have described above. And such limited awareness contributes to the common “gap,” described by Michael Moffitt and Scott Peppet, between how we *advise ourselves* to act, and how we *actually act*<sup>81</sup>—or, using Chris Argyris’s terminology, between our “espoused theory of action” and our “theory-in-use.”<sup>82</sup> As a result of this gap, many negotiators who espouse an interest-based approach to negotiation are likely to follow a markedly different theory-in-use, one “governed by four principles or values: (1) our intended purpose, (2) maximizing ‘winning’ and minimizing losing, (3) suppressing negative feelings and (4) emphasizing rationality.”<sup>83</sup>

For any of these reasons, Phil’s determination and ability to use the Core Concerns System may simply vanish—and he may not be aware that it has vanished.

#### D. *Insensitivity to Emotions*

Phil may lack the natural sensitivity or skill to recognize emotions, especially in others; this could prevent or impede his use of the Core Concerns System.<sup>84</sup> And awareness of emotions could be nearly essential to remembering to use the Core Concerns System or feeling motivated to address them. Thus, if Phil does not actually become aware that Jack is experiencing negative emotions, he is unlikely to remember or be motivated to employ the Core Concerns System.

#### E. *Insufficient Social Skills*

On the other hand, Phil may figure out which core concerns are motivating certain of Jack’s behaviors, decide what he needs to do in order to foster Jack’s core concerns, and then bungle the execution. He might, for instance, determine that, in Fisher and Shapiro’s terms, he needs to “express appreciation” or “acknowledge status.” Yet his interpersonal skills may be inadequate to the

<sup>80</sup> Lee Ross & Donna Shestowsky, *Contemporary Psychology’s Challenges to Legal Theory and Practice*, 97 Nw. U. L. REV. 1081, 1090-92 (2003) (citations omitted); see also Sternligh & Robbennolt, *supra* note 59, at 463-65 (explaining naïve realism and the importance of a lawyer understanding it).

<sup>81</sup> Scott R. Peppet & Michael L. Moffitt, *Learning How to Learn to Negotiate*, in THE NEGOTIATOR’S FIELDBOOK 615, 617 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

<sup>82</sup> *Id.* at 617-18. The terms “espoused theory of action” and “theory-in-use” were developed by Professor Chris Argyris. See CHRIS ARGYRIS ET AL., ACTION SCIENCE (1985).

<sup>83</sup> Peppet & Moffitt, *supra* note 81, at 620 (summarizing ideas of Chris Argyris).

<sup>84</sup> See SIEGEL, *supra* note 28, at 300-01.

task. He may be unable to figure out what to say or to actually say it in a way that Jack can interpret accurately.

#### F. *Inadequate Focus*

Another potential reason that Phil may inappropriately fail to use the Core Concerns System is that he is simply too distracted and unfocused to remember to do so. These distractions could come from emotions, thoughts, or sensations in the body, which incessantly intrude into most of our mental lives.<sup>85</sup> And even if he remembers to use the core concerns as a lens in planning the negotiation, these distractions may cause him to mindlessly abandon—or simply forget—this effort while he is negotiating or reflecting back on the negotiation.

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Fisher and Shapiro provide a number of good behavioral techniques to help a negotiator prevent or reduce the power of some of these potential challenges, especially those associated with strong emotions. They recommend, for instance, take “your own emotional temperature,” asking yourself whether your emotions are “out of control,” “risky,” or “manageable.”<sup>86</sup> Next, they suggest that you “[s]oothe yourself: cool down your emotional temperature,” so that you can “be in control of your emotions, not have them control you.”<sup>87</sup> Because it may be hard to think clearly after a strong negative emotion arises, they urge the negotiator to develop a plan in advance and select a self-soothing behavior before the negotiation, while still “able to reflect clearly.”<sup>88</sup> They offer the following specific techniques:

- Slowly count backward from ten.
- Breathe deeply three times, in through your nose and out through your mouth.
- Pause. Allow yourself to sit comfortably in silence for a moment. Ask yourself what is at stake for you.
- Take a “justified” break to go to the bathroom or make a phone call. During the break, relax. Think about how to move the negotiation forward.
- Visualize a relaxing place like a sandy beach, a sunlit forest, or a symphony performance.
- Change the subject, at least briefly.
- Adopt a relaxed position: Sit back, cross your ankles, let your hands rest on your lap or the table.
- Let upsetting or offensive comments fly by and hit the wall behind you
- Call to mind a good walk-away alternative that you have prepared.<sup>89</sup>

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<sup>85</sup> See Riskin, *Contemplative Lawyer*, *supra* note 70, at 25-26; Leonard L. Riskin, *Knowing Yourself: Mindfulness*, in *THE NEGOTIATOR'S FIELDBOOK*, *supra* note 81, at 239-40.

<sup>86</sup> FISHER & SHAPIRO, *supra* note 16, at 147-48.

<sup>87</sup> *Id.* at 150.

<sup>88</sup> *Id.* at 150.

<sup>89</sup> *Id.* at 150-51. They also suggest ways to calm yourself after the negotiation or during a break:

- Listen to calming music
- Distract yourself: Watch TV for a few minutes, make a phone call to a friend, read the paper

Any of these techniques might help Phil develop a state of mind in which he could employ the Core Concerns System. Nonetheless, such states of mind tend to be temporary, and in the heat of the moment, Phil might have trouble accessing them. For those reasons, I describe below some “tools of awareness” that have the potential to enable negotiators to more reliably and consistently overcome obstacles to using the Core Concerns System. These tools include a number of specific techniques that can produce *states* of mind that, with practice, can become *traits*.

#### IV. OVERCOMING THE OBSTACLES TO USING THE CORE CONCERNS SYSTEM: MINDFULNESS AND RELATED TOOLS OF AWARENESS

Each of the obstacles to using the core concerns framework described above—strong, negative emotions; an excessively self-centered focus; automatic, habitual ways of thinking, feeling and behaving; insensitivity to emotions; a distracted, wandering mind—derives from, or is associated with, a lack of mindful awareness. Conversely, the presence of mindful awareness could help a negotiator such as Phil prevent or surpass these obstacles, thus enabling him to use the Core Concerns System, when it is appropriate to do so.

In this Part, Section A describes the nature and meaning of mindfulness. Section B gives a brief overview of some effects and outcomes of mindfulness practice. Section C explains how to cultivate and deploy mindful awareness, and Section D theorizes about how mindfulness practice and mindful awareness can help overcome the obstacles to implementing the Core Concerns System that I described above in Part III.

##### A. *The Meaning and Nature of Mindfulness*

As I generally use the term in this Article, “mindfulness” (or “mindful awareness”) means a certain way of paying attention—intentionally, moment-to-moment, with equanimity and without attachment—to whatever passes through the conventional senses and the mind.<sup>90</sup> Researchers have “operation-

- Take a walk. But don’t obsess over who’s to blame for the anger-inducing situation. Try to appreciate the other’s perspective. Think about ways to deal with the situation.
- Forgive: Let go of the grudge.

*Id.* at 151-52.

<sup>90</sup> In the words of Jon Kabat-Zinn, “Mindfulness can be thought of as moment-to-moment, nonjudgmental awareness, cultivated by paying attention in a specific way, that is, in the present moment, and as non-reactively, as non-judgmentally, and as openheartedly as possible.” JON KABAT-ZINN, *COMING TO OUR SENSES: HEALING OURSELVES AND THE WORLD THROUGH MINDFULNESS* 108 (2005); *see also* JON KABAT-ZINN, *WHEREVER YOU GO, THERE YOU ARE: MINDFULNESS MEDITATION IN EVERYDAY LIFE* 3-7, *passim* (1994) [hereinafter KABAT-ZINN, *WHEREVER YOU GO*]; HENEPOLA GUNARATANA, *MINDFULNESS IN PLAIN ENGLISH* 149-54 (1991), *available at* [http://www.urbandharma.org/pdf/mindfulness\\_in\\_plain\\_english.pdf](http://www.urbandharma.org/pdf/mindfulness_in_plain_english.pdf).

The term “mindfulness” can carry at least two other meanings. First, Harvard psychology professor Ellen Langer uses the term in connection with her notion of “mindful learning.” “When we are mindful,” she says, “we implicitly or explicitly (1) view a situation from several perspectives, (2) see information presented in the situation as novel, (3) attend to the context in which we are perceiving the information, and eventually (4) create new categories through which this information may be understood.” ELLEN J. LANGER, *THE*

alized” the idea of mindfulness, that is, turned it into a construct that they could use for research.<sup>91</sup> Bishop and his colleagues, for instance, define mindfulness to include: “the self-regulation of attention so that it is maintained on immediate experience, thereby allowing for increased recognition of mental events in the present moment . . . [and] a particular orientation toward one’s experiences in the present moment, an orientation that is characterized by curiosity, openness, and acceptance.”<sup>92</sup> Building upon that definition, UCLA psychiatrist Daniel Siegel describes mindfulness as involving an “awareness of awareness” and an attitude toward moment-to-moment experience based upon “curiosity, openness, acceptance, and love (COAL).”<sup>93</sup>

The opposite of mindfulness is mindlessness, which Professor Ellen Langer tells us “is characterized by an entrapment in old categories; by automatic behavior that precludes attending to new signals; and by action that operates from a single perspective. Being mindless, colloquially speaking, is like being on automatic pilot.”<sup>94</sup>

People frequently confuse mindfulness with “flow,” a concept popularized by psychologist Mihaly Csikszentmihalyi.<sup>95</sup> Daniel Siegel shows us that the two forms of awareness are quite different. To explain mindfulness, Siegel has developed the acronym “SOCK,” which is based on the idea that three “streams

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POWER OF MINDFUL LEARNING 111 (Addison-Wesley 1997) [hereinafter LANGER, MINDFUL LEARNING]; see also ELLEN J. LANGER, MINDFULNESS 62-74 (Addison-Wesley 1989). Although related, this Western idea differs from the Eastern notion of mindfulness on which this Article focuses. Essentially, the Eastern notion of mindfulness is based upon observing; Langer’s Western notion of mindfulness rests more on thinking. Second, there is a non-technical meaning of mindfulness, which is equivalent to paying attention or remembering something, reflected in injunctions to mind your manners or remember your ancestors or recall the suffering of others in times of joy.

For a discussion of various meanings of “mindfulness,” see SIEGEL, *supra* note 28, at 3-28.

<sup>91</sup> See SIEGEL, *supra* note 28, at 11-13.

<sup>92</sup> Scott R. Bishop et al., *Mindfulness: A Proposed Operational Definition*, 11 CLINICAL PSYCHOL.: SCI. & PRAC. 230, 232 (2004).

Ruth Baer and her colleagues used five mindfulness questionnaires to produce five “facets” of mindfulness: “Nonreactivity to [i]nner [e]xperience”; “[o]bserving/noticing/attending to sensations/perceptions/thoughts/feelings”; “[a]cting with awareness/[avoiding] automatic pilot/concentration/nondistracton”; “[d]escribing/labeling with words”; “[n]onjudging of experience.” Ruth A. Baer et al., *Using Self-Report Assessment Methods to Explore Facets of Mindfulness*, 13 ASSESSMENT 27, 34-35 (2006), available at <https://web-space.utexas.edu/neffk/pubs/Baer%20paper.pdf>.

<sup>93</sup> SIEGEL, *supra* note 28, at 15.

<sup>94</sup> LANGER, MINDFUL LEARNING, *supra* note 90, at 4. Although Langer’s notion of mindfulness differs from the Eastern conception, Langer’s explanation of mindlessness is the opposite of mindfulness in both senses of the latter term.

<sup>95</sup> MIHALY CSIKSZENTMIHALYI, *FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE* (1990). Csikszentmihalyi says that

[t]he optimal state of inner experience is one in which there is *order in consciousness*. This happens when psychic energy—or attention—is invested in realistic goals, and when skills match the opportunities for action.

. . . .

. . . ‘Flow’ is the way people describe their state of mind when consciousness is harmoniously ordered, and they want to pursue whatever they are doing for its own sake.

*Id.* at 6.

of awareness”—“sensation,” “observation,” and “concept”—help us “know” the present moment, the fourth stream of awareness.<sup>96</sup> Mindfulness, Siegel tells us,

involves the disidentification with the objects of attention as the defining features of who we are . . . . This observer-made capacity for discernment is what distinguishes mindful awareness from the notion of “flow” in which we are non-self-consciously immersed in the sensations of an experience. In flow, we lose ourselves as immersion in sensation can “carry us away” and we become lost in the automaticity of that stream. At times that may be a good thing, as when we eat, make love, go for a walk, or ponder a problem. But in daily life keeping all four streams in balance may be at the heart of mindful living . . . .

Stress and suffering emerge throughout life. With mindful awareness a new possibility is created to reformulate the suffering while not avoiding the sensory experience. Nothing is intentionally blocked; rather all guests are welcome. When a preconceived thought shows up at the door, it can be seen, observed, thought and known for what it is.<sup>97</sup>

This notion of accepting the reality of what is, rather than shutting it out, is a central premise of mindfulness, and finds poetic expression in Rumi’s *The Guest House*:

This being human is a guest house.  
Every morning, a new arrival.  
A joy, a depression, a meanness,  
some momentary awareness comes  
as an unexpected visitor.

Welcome and entertain them all!  
Even if they’re a crowd of sorrows,  
who violently sweep your house  
empty of its furniture  
still, treat each guest honorably.  
He may be clearing you out  
for some new delight.

The dark thought, the shame, the malice,  
meet them at the door laughing,  
and invite them in.

Be grateful for whoever comes,  
because each has been sent  
as a guide from beyond.<sup>98</sup>

#### B. *The Effects and Outcomes of Mindfulness*

When a person is not mindful, he is more likely to be governed by, or subject to, his thoughts, emotions, and body sensations, especially those that are automatic or habitual.<sup>99</sup> At such times, the person is prone to behave in a

<sup>96</sup> SIEGEL, *supra* note 28, at 64-65, 68-72.

<sup>97</sup> *Id.* at 78-79.

<sup>98</sup> Rumi, *The Guest House*, in THE ESSENTIAL RUMI 109 (Coleman Barks et al. trans., 1995).

<sup>99</sup> Discussing the nature and outcomes of mindfulness practice and mindful awareness is exceedingly complex and potentially confusing, for a number of reasons. First, commentators often fail to distinguish between claimed *outcomes* of mindfulness and claimed *aspects*

of the nature of mindfulness. For instance, an *aspect* of mindfulness includes the non-judgmental awareness of thoughts, emotions, and body sensations, whereas potential outcomes include freedom from impulsive behavior and clarity of mind. In addition, sometimes it is not clear to what extent benefits result from mindfulness practice as opposed to mindful awareness. Moreover, claims about the nature and outcomes of mindfulness may be grounded upon any number of sources, e.g., ancient or modern Buddhist philosophy and psychology; the experiences of teachers and practitioners of mindfulness meditation; or the outcomes of research studies.

Another source of confusion is the wide variety of ways in which commentators have characterized and labeled the forms of meditation commonly used to develop mindfulness. Some commentators, for example, identify two forms of meditation: concentration and mindfulness. See GUNARATANA, *supra* note 90, at 149-56 (describing concentration and mindfulness as interdependent partners in meditation, the former “providing the power [that] keeps the attention pinned down to one item” while the latter “picks the objects of attention[ ] and notices when the attention has gone astray”). James Austin used the terms “concentrative” and “receptive” to make a similar, perhaps even stronger distinction. AUSTIN, *supra* note 72, at 30-31. Others have identified three forms of meditation. For instance, Lutz, Dunne, and Davidson deal with the Tibetan tradition; the English-language terms they use are “Focused Attention,” “Open Presence,” and “Non-Referential Compassion.” See Antoine Lutz et al., *Meditation and the Neuroscience of Consciousness*, in THE CAMBRIDGE HANDBOOK OF CONSCIOUSNESS 499, 511-19 (Philip David Zelazo et al. eds., 2007) [hereinafter Lutz et al., *Consciousness*]. Non-Referential Compassion is similar but not identical to forms of meditation in the Theravada tradition that are meant to inculcate certain positive states of mind: loving kindness, sympathetic joy, empathy, and compassion. See SHARON SALZBERG, *LOVING-KINDNESS: THE REVOLUTIONARY ART OF HAPPINESS passim* (1st ed. 1995). Some meditation teachers would categorize these as concentration practices.

For purposes of this Article, it makes sense to distinguish three forms of meditation—concentration, mindfulness, and loving-kindness or compassion (and to ignore other forms). In practice, these forms often are intricately interrelated. For example, mindfulness meditation training (especially in the Vipassana and Mindfulness-Based Stress Reduction traditions) begins with concentration forms of meditation; this commences with a focus on the breath, and then proceeds to body sensations, thoughts, and emotions. Such experience provides a foundation for “bare attention” or “choice-less awareness,” which some say is the real mindfulness practice. See, e.g., Daniel J. Goleman, *The Buddha on Meditation and States of Consciousness*, in MEDITATION: CLASSIC AND CONTEMPORARY PERSPECTIVES 322, 333-34, 354 (Deane H. Shapiro, Jr. & Roger N. Walsh eds., 1984) (indicating a common emphasis on “bare attention” as a fundamental aspect of mindfulness practice across a comparative study of several meditation systems); see also NYANAPONIKA, *THE HEART OF BUDDHIST MEDITATION* 30-56 (1996) [hereinafter NYANAPONIKA, *HEART*]; NYANAPONIKA THERA, *THE POWER OF MINDFULNESS: AN INQUIRY INTO THE SCOPE OF BARE ATTENTION AND THE PRINCIPLE SOURCES OF ITS STRENGTH* (2001), available at <http://www.buddhanet.net/powermindfulness.pdf>. Many contemporary mindfulness meditation training programs in the United States also include meditation practices designed to develop positive mental states, including “kindly awareness” or “loving-kindness.” See, e.g., ZINDEL V. SEGAL & J. MARK G. WILLIAMS, *MINDFULNESS-BASED COGNITIVE THERAPY FOR DEPRESSION: A NEW APPROACH TO PREVENTING RELAPSE* 93-94, 302-03 (2002) [hereinafter SEGAL & WILLIAMS, *COGNITIVE THERAPY*]. People planning to do a mindfulness or concentration meditation begin or end their session with loving-kindness, and are to be mindful toward anything that arises during loving-kindness practice in general. In addition, the mindfulness perspective is commonly said to include loving-kindness toward all objects of awareness. For more on loving-kindness and related forms of meditation, see SALZBERG, *supra*, *passim*.

Another cause of confusion is that commentators from different practice traditions and various research traditions may have different understandings of the nature and outcomes of these types of meditation. See Lutz et al., *Consciousness*, *supra*, at 508-10. For a review of various kinds of meditation, see generally DANIEL GOLEMAN, *THE MEDITATIVE MIND: THE VARIETIES OF MEDITATIVE EXPERIENCE* (1988) [hereinafter GOLEMAN, *MEDITATIVE MIND*].

“reactive” fashion, rather than a thoughtful, “responsive” fashion. When a person is mindful, however, she can experience and observe thoughts, emotions and body sensations—be “present” with them—and yet enjoy a degree of freedom from them, which enables the person to behave skillfully or responsively.<sup>100</sup> As Shauna Shapiro and Linda Carlson explain:

To the extent that a person is able to observe the contents of consciousness, he or she is no longer completely embedded in or fused with such content. For example, if a person is able to see *it*, [then] that person is no longer merely *it*; that is, that person must be *more* than *it*. Whether the *it* is pain, depression, or fear, re-perceiving allows one to disidentify from thoughts, emotions, and body sensations as they arise, and simply be with them instead of being defined (i.e., controlled, conditioned, determined) by them. Through re-perceiving one realizes that “this pain is not me,” “this depression is not me,” “these thoughts are not me,” as a result of being able to observe them from a metaperspective.<sup>101</sup>

In recent years, mindfulness practices have made significant contributions in many sectors of Western society, including athletics, psychotherapy, health

A related problem is that in various contemplative traditions and in research studies, different terms may be employed to label similar forms of meditation. Lutz, Dunne, and Davidson explain “the often confusing use of the terms ‘mindfulness’ and ‘awareness’”:

In the Mindfulness Based Stress Reduction (MBSR) designed by Jon Kabat-Zinn (2005), for example, the term “mindfulness” is used primarily to refer not to the focusing aspect of mind, but rather to the meta-awareness that surveys that focus and its relation to the intended object. Likewise, in MBSR the term “awareness” sometimes seems to stand primarily for attention or the focusing aspect of mind. In contrast, popular works on Tibetan Buddhist meditation . . . use these same two terms, but their meaning is reversed: “mindfulness” refers to attention or focus, while “awareness” refers to a faculty of mind that surveys the mental state at a meta-level.

Lutz et al., *Consciousness*, *supra*, at 509. Moreover, people practice mindfulness meditation for various purposes—ranging from spiritual enlightenment to just lightening up. Deane Shapiro found that, with practice, meditators’ intentions moved along a continuum of self-regulation, self-exploration, and self-liberation and selfless service. The outcomes achieved correlated positively with intentions. Deane H. Shapiro, Jr., *Adverse Effects of Meditation: A Preliminary Investigation of Long-Term Meditators*, 39 INT’L J. PSYCHOSOMATICS 62 (1992); Michael J. Mackenzie et al., *A Qualitative Study of Self-Perceived Effects of Mindfulness-Based Stress Reduction (MBSR) in a Psychosocial Oncology Setting*, 23 STRESS AND HEALTH: J. INT’L SOCIETY FOR INVESTIGATION STRESS 59 (2007).

Of course, it is beyond my ability and the space limitations to address each of these complications. When I make assertions about the nature and outcomes of mindfulness I will try to support them with references to literature. Nonetheless, I will have to simplify, and I hope that, with the foregoing explanation, I will have earned the reader’s indulgent understanding for what follows.

<sup>100</sup> See SHAUNA L. SHAPIRO & LINDA E. CARLSON, THE ART AND SCIENCE OF MINDFULNESS: INTEGRATING MINDFULNESS INTO PSYCHOLOGY AND THE HELPING PROFESSIONS 99 (2009). Shauna Shapiro, Linda Carlson, John Austin, and Benedict Freedman have identified a model of mindfulness practice that can help explain this. Their model contains three axioms: *Intention*, *Attention*, and *Attitude*. Shauna L. Shapiro et al., *Mechanisms of Mindfulness*, 62 J. CLINICAL PSYCHOL. 373, 375-76 (2006). The idea is that one forms an *intention* to pay *attention* mindfully, which leads to a shift in *attitude* that they call “re-perceiving.” *Id.* at 377. Re-perceiving is “the capacity to dispassionately observe or witness the contents of one’s consciousness.” SHAPIRO & CARLSON, *supra*. In their terms, it is a “metamechanism of action, which overarches additional direct mechanisms that lead to change and positive outcome [including] (a) self-regulation; (b) values clarification; (c) cognitive, emotional, and behavioral flexibility; and (d) exposure” (i.e., a person becomes more capable of being present with strong emotions). *Id.*

<sup>101</sup> SHAPIRO & CARLSON, *supra* note 100, at 96.



care, and education. Mindfulness meditation has been an important part of the training provided by professional basketball coach Phil Jackson, who has enjoyed extraordinary success as coach of the Chicago Bulls and the Los Angeles Lakers.<sup>102</sup> In psychology, mindfulness practice has proved successful in interventions designed to address anxiety and depression—using Mindfulness-Based Stress Reduction, Mindfulness-Based Cognitive Therapy, or Acceptance and Commitment Therapy—and in treating more complex personality disorders.<sup>103</sup>

In education, mindfulness meditation can promote basic values, such as cognitive and academic performance, psychological well-being and mental health, and the development of the “whole person.”<sup>104</sup> Mindfulness meditation has made inroads into legal and dispute resolution education, appearing in offerings that carry academic credit as well as extra-curricular courses and continuing education programs for lawyers, judges, mediators, and negotiators.<sup>105</sup>

<sup>102</sup> See PHIL JACKSON & HUGH DELEHANTY, *SACRED HOOPS: SPIRITUAL LESSONS OF A HARDWOOD WARRIOR* (1995).

<sup>103</sup> SHAPIRO & CARLSON, *supra* note 100, at 64-73.

<sup>104</sup> See Shauna Shapiro et al., *Toward the Integration of Meditation into Higher Education: A Review of Research*, 113 *TEACHERS COLLEGE RECORD* (forthcoming Mar. 2011) (manuscript at 9), available at <http://www.contemplativemind.org/programs/academic/MedandHigherEd.pdf>.

<sup>105</sup> See generally Symposium, *Mindfulness in Law and ADR*, 7 *HARV. NEGOT. L. REV.* 1 (2002); Riskin, *Contemplative Lawyer*, *supra* note 70; Riskin, *Mindfulness*, *supra* note 70, at 79-90; Idealawg, *Contemplative Lawyers: Some Mindfulness Resources*, <http://westallen.typepad.com/idealawg/2008/09/contemplative-lawyers-some-mindfulness-resources.html> (last visited May 28, 2010); The Initiative on Mindfulness in Law and Dispute Resolution, <http://www.law.ufl.edu/imldr/index.shtml> (last visited May 28, 2010).

Professor Deborah Calloway teaches a course called *Contemplative Lawyering* at the University of Connecticut Law School. University of Connecticut School of Law, <https://www.law.uconn.edu/people/104> (last visited May 28, 2010). Professor William Blatt teaches a course called *Emotional Intelligence*, which includes mindfulness, at the University of Miami School of Law. E-mail from Blatt to author, *supra* note 27. In spring 2009, Charles Halpern taught a course called *Effective and Sustainable Law Practice: The Meditative Perspective* at the University of California-Berkeley School of Law. UC Berkeley School of Law, <https://www.law.berkeley.edu/php-programs/courses/coursePage.php?cID=6636&termCode=B&termYear=2009> (last visited May 28, 2010); see also Charles Halpern, *Reflections on a New Course: Effective and Sustainable Lawyering: The Meditative Perspective* (Apr. 24, 2009), [http://www.contemplativemind.org/programs/law/CH-Reflections\\_on\\_Course.pdf](http://www.contemplativemind.org/programs/law/CH-Reflections_on_Course.pdf) (last visited May 28, 2010). Professors Maria Arias and Victor Goode teach a course called *LAW: Love in Action with Wisdom (a Wisdom that contains Compassion)* at CUNY Law School. The Center for Contemplative Mind in Society, <http://www.contemplativemind.org/programs/academic/fellowships.html#twok8> (last visited May 28, 2010). Professor David Zlotnick teaches *Integrating Mindfulness Theory and Practice into Trial Advocacy* at Roger Williams University School of Law. *Id.* I have taught a number of law school courses involving mindfulness, including *Understanding Conflict*, a course in Dispute Resolution for LL.M. students at the University of Missouri School of Law, and a Tools of Awareness for Lawyers course at the University of Florida. Mark Umbreit, Professor of Social Work and Conflict Resolution at the University of Minnesota, introduced a course called *Peacebuilding Through Transformative Dialogue in the Global Community: A Mindfulness-Based Approach*. *Id.*

In fall 2009, The University of Miami School of Law began to offer an extensive extra-curricular Contemplative Practices Program, led by Scott Rogers of the Institute for Mindfulness Studies. See *The Mindful Law Student*, [www.themindfullawstudent.com/um.html](http://www.themindfullawstudent.com/um.html) (last visited May 28, 2010).

### C. *Cultivating and Deploying Mindfulness*

Mindfulness is both a path and a destination.<sup>106</sup> In the words of Buddhist monk and scholar Nyanaponika Thera, mindfulness is “the unflinching master key for *knowing* the mind, and is thus the starting point; the perfect tool for *shaping* the mind, and is thus the focal point; [and] the lofty manifestation of the achieved *freedom* of the mind, and is thus the culminating point.”<sup>107</sup> Shauna Shapiro and Linda Carlson distinguish between “big M” Mindful Awareness and “little m” mindfulness practice.<sup>108</sup>

One cultivates the ability to be mindful by practicing mindfulness. The cultivation process can be formal or informal. Formal cultivation involves practicing mindfulness meditation, an ancient set of techniques most extensively developed by followers of the Buddha. In mindfulness meditation, one systematically learns to pay attention to the breath, body sensations, thoughts, and emotions—one at a time, at first, and then simultaneously.<sup>109</sup> Informal

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Bar associations and organizations of dispute resolution professionals also have sponsored mindfulness programs. Along with others, for example, I have been involved in presentations or workshops on mindfulness for the American Bar Association, the Massachusetts Bar Association, the Florida Bar Association, the Missouri Bar Association, the Association for Conflict Resolution, the New England Association for Conflict Resolution, the Conflict Resolution Association of Northern California, and many other similar groups. Recently, the Annual Northwest Dispute Resolution Conference at the University of Washington School of Law included five concurrent sessions dealing with mindfulness. Conference Brochure, 16th Annual Northwest Dispute Resolution Conference (May 1-2, 2009), available at [http://mediate.com/nwadr/NWADR\\_Conference\\_Brochure.pdf](http://mediate.com/nwadr/NWADR_Conference_Brochure.pdf).

The Center for Contemplative Mind in Society sponsors meditation retreats for lawyers and law students and has offered mindfulness training for judges. See The Center for Contemplative Mind in Society, <http://www.contemplativemind.org/programs/law/pas-tevents.html> (last visited May 28, 2010).

Prominent members of the legal profession have emphasized the importance of mindfulness. See, e.g., CHARLES HALPERN, MAKING WAVES AND RIDING THE CURRENTS: ACTIVISM AND THE PRACTICE OF WISDOM *passim* (2008); Edward W. McIntyre, *A Call for Mindfulness in Our Profession*, 16 MASS. BAR ASS'N L.J., April 2009, at 1, 6, available at [http://www.massbar.org/media/487022/lj\\_04.09%20for%20web.pdf](http://www.massbar.org/media/487022/lj_04.09%20for%20web.pdf).

<sup>106</sup> As Krishnamurti put it, “Meditation is not a means to an end. It is both the means and the end.” Jiddu Krishnamurti, quoted in SURYA DAS, BUDDHA IS AS BUDDHA DOES: THE TEN ORIGINAL PRACTICES FOR ENLIGHTENED LIVING 136 (2007). Researchers studying mindfulness have sought to distinguish between the nature of mindfulness and the outcomes of mindfulness. See Baer et al., *supra* note 92, at 42.

<sup>107</sup> See NYANAPONIKA, HEART, *supra* note 99 at 24.

<sup>108</sup> SHAPIRO & CARLSON, *supra* note 100, at 4-8.

<sup>109</sup> For basic information about mindfulness meditation, see SHAPIRO & CARLSON, *supra* note 100, *passim*; KABAT-ZINN, WHEREVER YOU GO, *supra* note 90, *passim*; GUNARATANA, *supra* note 90, *passim*. Much of my own experience with practicing and teaching meditation has been in the Theravadan tradition and in Mindfulness-Based Stress Reduction. Theravadan Buddhism, which is prevalent in Sri Lanka, Thailand, Burma, Laos, and Cambodia, emphasizes mindfulness practice, which also is known as *vipassana* meditation and insight meditation. Tibetan Buddhism and Zen Buddhism—the latter dominant in East Asia, including China, Korea, and Japan—incorporate, but place less emphasis upon, mindfulness meditation practices. See WALPOLA RAHULA, WHAT THE BUDDHA TAUGHT xii (1974); 1 HEINRICH DUMOULIN, ZEN BUDDHISM: A HISTORY: INDIA AND CHINA 27 (James W. Heisig & Paul Knitter trans., 1988). For an explanation of modern Mindfulness-Based Stress Reduction approach, see JON KABAT-ZINN, FULL CATASTROPHE LIVING: USING THE WISDOM OF YOUR BODY AND MIND TO FACE STRESS, PAIN AND ILLNESS (1990) [hereinafter

practice includes a number of techniques that produce present-moment, non-judgmental awareness in daily life, such as deciding to be mindful during certain tasks or events—for example, brushing your teeth, answering the phone, waiting for a stop light to change, or standing in line at the grocery store.

As a general matter, people who achieve a state of mindful awareness cannot maintain it indefinitely. Even advanced practitioners frequently lose it.<sup>110</sup> With sufficient and continued practice, however, a person can become more adept at regaining and sustaining it.<sup>111</sup> Eventually, mindfulness can change from a “state” to a “trait.”<sup>112</sup>

#### *D. How Mindfulness Meditation or Mindfulness Can Help Overcome Obstacles to Implementing the Core Concerns System*

The ability to observe thoughts, sensations, and emotions with equanimity makes it easier to look for, or automatically recognize, their root causes, which sometimes are core concerns. In this way, mindful awareness affords a person an opportunity to deliberate about the significance of the particular core concern at play and to decide whether and how to address it. Section 1, below, explains how this process works, in general, with respect to each of the obstacles to using the Core Concerns System that I identified in Part III, above: excessively self-centered perspectives; strong negative emotions; automatic, habitual ways of thinking, feeling and behaving; insensitivity to emotions; and insufficient social skills. Section 2 suggests how mindful awareness could help Phil use the Core Concerns System, as appropriate, in his negotiation with Jack.

##### *1. In General*

In this section, I propose that mindfulness meditation or mindful awareness can help reduce the obstacles to using the Core Concerns System described above by (a) diminishing attention to self-centered concerns and thereby enhancing attention others; (b) reducing the strength of negative emotions and enhancing positive emotions, including compassion toward other and self; (c) developing awareness, distance and freedom regarding thoughts, emotions, and behaviors; (d) fostering sensitivity to the emotions of others; and (e) developing social skills. Each of these elements may interact with all or most of the others. In an attempt at clarity, however, I present them separately.

##### *a. Diminished Attention to Self-Centered Concerns*

Buddhist teachings hold that human suffering arises from an attachment to the sense of self, along with the belief that we can achieve lasting contentment

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KABAT-ZINN, FULL CATASTROPHE LIVING]; SEGAL & WILLIAMS, COGNITIVE THERAPY, *supra* note 99; Center for Mindfulness in Medicine, Health Care, and Society, Univ. of Mass. Med. Sch., <http://www.umassmed.edu/Content.aspx?id=41254&LinkIdentifier=id>. (last visited May 28, 2010). For a discussion of various forms of meditation, see GOLEMAN, MEDITATIVE MIND, *supra* note 99, *passim*.

<sup>110</sup> See JACK KORNFELD, *AFTER THE ECSTASY, THE LAUNDRY: HOW THE HEART GROWS WISE ON THE SPIRITUAL PATH* *passim* (2000).

<sup>111</sup> See Richard J. Davidson, *On the Buffer*, in EMOTIONAL AWARENESS 93, 93-94 (Paul Ekman ed., 2008) (discussing the importance of continued meditation practice).

<sup>112</sup> See SIEGEL, *supra* note 28, at 118-21.

through satisfying the self by gaining or keeping what is pleasant (which is associated with craving) and by avoiding that which is unpleasant (which is associated with aversion).<sup>113</sup> In Buddhist thought, however, the self, or ego, is an illusion, a concept that arises moment to moment. It lacks permanence—as does everything else.<sup>114</sup> Mindfulness meditation is part of the Buddhist path to develop these insights and thus reduce suffering.<sup>115</sup> In Shauna Shapiro and Linda Carlson's words:

[A]s one strengthens the capacity for mindful observing of mental activity there is often a corresponding shift in the self-sense. The "self" starts to be seen through or deconstructed—that is, it is realized to be a psychological construction, an ever-changing system of concepts, images, sensations, and beliefs. These aggregates or constructs that were once thought to compose the self, are eventually seen to be impermanent and fleeting . . . .

Through re-perceiving, not only does a person learn to stand back from and observe his or her inner commentary about life and the experiences encountered, a person also begins to stand back from his or her "story" about who and what he or she ultimately is. Identity begins to shift from the contents of awareness to awareness itself.<sup>116</sup>

A famous American Indian story tells illuminates the choice between a focus on the self and other:

An old Cherokee is teaching his grandson about life. "A fight is going on inside me," he said to the boy.

"It is a terrible fight and it is between two wolves. One is evil—he is anger, envy, sorrow, regret, greed, arrogance, self-pity, guilt, resentment, inferiority, lies, false pride, superiority, and ego." He continued, "The other is good—he is joy, peace, love, hope, serenity, humility, kindness, benevolence, empathy, generosity, truth, compassion, and faith. The same fight is going on inside you—and inside every other person, too."

The grandson thought about it for a minute and then asked his grandfather, "Which wolf will win?"

The old Cherokee simply replied, "The one you feed."<sup>117</sup>

The metaphor of the two wolves finds support in contemporary neuroscience. Neurologist James Austin identifies two neural networks in the brain; one network is self-centric (or ego-centric), and the other network is other-centric (or allo-centric).<sup>118</sup> Activation of these circuits correlates with a focus

<sup>113</sup> See the explication of The Four Noble Truths in the *Mahasattipassana Sutta: The Greater Discourse on the Foundations of Mindfulness*, in *THE LONG DISCOURSES OF THE BUDDHA: A TRANSLATION OF THE DIGHA NIKAYA 335, 344-49* (Maurice Walshe trans., Wisdom Publications 1995) (1987); MATTHEW FLICKSTEIN, *SWALLOWING THE RIVER GANGES: A PRACTICE GUIDE TO THE PATH OF PURIFICATION 7-10* (2001).

<sup>114</sup> See JOSEPH GOLDSTEIN, *ONE DHARMA: THE EMERGING WESTERN BUDDHISM 151-56* (2002).

<sup>115</sup> See generally NYANAPONIKA, *HEART*, *supra* note 99; see also GOLDSTEIN, *supra* note 114, at 132-56.

<sup>116</sup> SHAPIRO & CARLSON, *supra* note 100, at 97 (drawing upon S.C. HAYES ET AL., *ACCEPTANCE AND COMMITMENT THERAPY* (1999)).

<sup>117</sup> First People, *A Cherokee Legend*, <http://www.firstpeople.us/FP-HTML-Legends/TwoWolves-Cherokee.html> (last visited May 28, 2009).

<sup>118</sup> JAMES H. AUSTIN, *SELFLESS INSIGHT: ZEN AND THE MEDITATIVE TRANSFORMATIONS OF CONSCIOUSNESS 53-56* (2009).

on either self or other.<sup>119</sup> Although these circuits do not precisely correspond with the good wolf and the bad wolf, the bad wolf does correspond roughly with the aspects of the self-centric network that manifest as what Austin calls the “pejorative self” or the “problematic self.”<sup>120</sup> The two networks have a “see-saw,” reciprocal relationship;<sup>121</sup> when one is particularly active, the other is relatively inactive. Thus, when we are focusing heavily on ourselves, we are not paying much attention to others, and *vice versa*. When we do not deliberately focus our attention on either self or other, these circuits automatically trade off dominance two or three times each minute.<sup>122</sup> Most incoming stimuli are filtered first through the self-centric network, which gives that network a “major head start in shaping all of our priorities.”<sup>123</sup> When a person is mindful, however, the manifestations of each network (e.g., self-centered or other-centered thoughts, emotions, perceptions, and beliefs) are easier to notice; they appear in “bolder relief.”<sup>124</sup> That makes it easier to observe the beliefs, perceptions, emotions, and impulses associated with each circuit, and to examine them or decide quickly whether to follow them or let them be. In other words, mindful introspection enhances a person’s ability to decide which wolf to feed. And we feed—and strengthen—each circuit by attending to it or acting in accord with it. Austin describes the transformation of the “pejorative self” or “problematic self” through long term Zen practice (of which mindfulness is an important aspect) in the following two graphics:

FIGURE 1.<sup>125</sup>

THE DISSOLUTION OF		
I	ME	MINE
<b>MEANS SUBTRACTING</b>		
the aggressive doing-self; self-concepts in time	the besieged, fearful self	the clutching self that: had possessed other people and things; had been captured by its own dualistic either/or attitudes
<b>AND IS EXPERIENCED AS</b>		
freedom from compulsive doing; freedom from “shoulds and oughts”; timelessness	total fearlessness; deep peace	the world as it really is, without self-referent attachments; the world’s original diversity, coherence, and unity

<sup>119</sup> The two circuits overlap substantially with what neurologists have called “top-down” and “bottom-up” circuits. See *id.* at 29-34; SIEGEL, *supra* note 28, at 134-40.

<sup>120</sup> AUSTIN, *supra* note 118, at 153-58, 199-204; Interview with James H. Austin, M.D., Dep’t of Neurology, Univ. of Mo. Sch. of Med., in Gainesville, Fla. (Mar. 7, 2009).

<sup>121</sup> Interview with James H. Austin, *supra* note 120; Letter with attachments from James H. Austin, M.D., Clinical Professor of Neurology, Univ. of Mo. Sch. of Med., Columbia, Mo., to author (Aug. 20, 2009) (on file with *Nevada Law Journal*).

<sup>122</sup> See AUSTIN, *supra* note 118, at 103-12; Attachment to letter from James Austin to author, *supra* note 121.

<sup>123</sup> See Attachment to letter from James Austin to author, *supra* note 121.

<sup>124</sup> Interview with James H. Austin, *supra* note 120.

<sup>125</sup> James H. Austin, *Your Self, Your Brain and Zen*, 5 CEREBRUM 5 (2003), available at <http://www.dana.org/news/cerebrum/detail.aspx?id=2896>.

FIGURE 2. THE PEJORATIVE SELF AND THE DIRECTION OF ITS TRANSFORMATION<sup>126</sup>

<i>The Problem Self</i>	<i>The Transformed Self</i>
An arrogant <i>I</i>	An ACTUALIZED <i>i</i>
A besieged <i>ME</i>	A BUOYANT <i>me</i>
A clutching <i>MINE</i>	A COMPASSIONATE <i>mine</i>

To the extent that meditation practice or mindfulness reduces the dominance or strength of the “pejorative self,” it decreases the activity of the self-centric network, allowing the allocentric network activity to increase; this, in turn, produces greater opportunities and inclinations to focus on other persons. Thus, empathy, compassion, and kindness can arise naturally<sup>127</sup>—at least in theory.

Of course, most practitioners of mindfulness meditation do not fully succeed in transforming the problematic aspects of the self, or even get insights about the impermanent nature of the self that I described above. Many, however, do make progress in this direction. They get “small insights”—intuitive glimpses in the direction of what Austin has called “selfless insight.”<sup>128</sup> In Austin’s view, “When the hard edges of the self soften . . . or when the self recedes or is less dominant, that leaves room for our natural instincts of compassion to emerge. As self becomes less intrusive, the other networks in the brain become more active.”<sup>129</sup> A Hindu saying puts it more poetically:

When I forget who I am I serve you.  
 Through serving I remember who I am  
 And know I am you.<sup>130</sup>

*b. Reducing Negative Emotions and Enhancing Positive Emotions, Including Compassion, Toward Other and Self*

Mindfulness can reduce the experience of stress, anxiety, and depression;<sup>131</sup> enhance the ability to regulate emotion; and promote the development of positive mental states.<sup>132</sup> In particular, mindfulness can help us catch the

<sup>126</sup> AUSTIN, *supra* note 72, at 14.

<sup>127</sup> *Id.*; attachment to letter from James Austin to author, *supra* note 121.

<sup>128</sup> *See* AUSTIN, *supra* note 118, at 156-57, *passim*.

The practice of mentally noting thoughts, emotions, and body sensations (*see supra* note 99 and accompanying text) helps foster such insights. “We usually think of these phenomena as coming from ‘myself,’ but they actually result in part from events over which we have no control.” I am grateful to Daniel Bowling for encouraging me to include this idea. E-mail from Daniel Bowling, ADR Program Staff Attorney, U.S. Dist. Ct. of N. Cal. to author (June 25, 2009) (on file with *Nevada Law Journal*).

<sup>129</sup> Telephone Interview with James H. Austin, M.D., Dep’t of Neurology, Univ. of Mo. Sch. of Med. (Nov. 4, 2008). For fuller explanations, *see* AUSTIN, *supra* note 72, at 197-200; AUSTIN, *supra* note 118, at 103-12, 187-88.

<sup>130</sup> SHAPIRO & CARLSON, *supra* note 100, at 98.

<sup>131</sup> *See* Shauna L. Shapiro et al., *Effects of Mindfulness-Based Stress Reduction on Medical and Pre-Medical Students*, 21 J. BEHAV. MED. 581, 589-94 (1998); *see generally* Shapiro et al., *supra* note 104, at 14.

<sup>132</sup> *See* Shapiro et al., *supra* note 104, at 16-18 (citing and discussing studies).

negative thoughts, which could precipitate negative emotions and reactive behaviors, and examine them, or just let them go.<sup>133</sup>

Through the practice of mindfulness meditation, positive emotions, such as happiness,<sup>134</sup> compassion for self<sup>135</sup> and others, and empathy,<sup>136</sup> *tend to* develop naturally,<sup>137</sup> along with insights about the self and about one's own suffering, and from a recognition that others suffer in much the way that we do.

Professor Clark Freshman writes that “[m]indfulness promotes happiness in at least three ways”:

First, as new research continues to show, mindfulness itself increases happiness and the predisposition to happiness. Second, internal mindfulness lets us learn what puts us in a good mood. Chocolate may put Columbia doctors in a good mood, but it may put those of us predisposed to migraines in a rather foul mood. Third, internal mindfulness lets us know when our emotions may be efficient for negotiating. Awareness of our own positive emotions may tell us we are in a kind of sweet spot, much as the sweet spot of a tennis racket is the best place for many shots. And awareness of our negative emotions may reveal what Ekman calls a “hot spot” of negative emotions or strained thinking. This is often not the best time to act, or even to take our thoughts too seriously.<sup>138</sup>

The same meditation traditions that promote mindfulness meditation also employ a set of practices specifically intended to produce certain positive states of mind, such as loving-kindness, compassion, sympathetic joy, and equanimity.<sup>139</sup> In the West, the most widely used of such meditative practices is loving-kindness, which involves sending certain good wishes—for example, “May you be free from danger,” “May you have mental happiness,” “May you have physical happiness,” and “May you have ease of well-being”<sup>140</sup>—first to your-

<sup>133</sup> See SEGAL & WILLIAMS, *COGNITIVE THERAPY*, *supra* note 99, at 244-68.

<sup>134</sup> Richard J. Davidson and his colleagues gave a *Mindfulness-Based Stress Reduction* course to high tech executives with no previous experience in meditation. One result was an increase in neural activity in the left prefrontal cortex, which is associated with happiness. Richard J. Davidson et al., *Alterations in Brain and Immune Function Produced by Mindfulness Meditation*, 65 *PSYCHOSOMATIC MEDICINE* 564, 569 (2003).

Happiness has received a good deal of attention in recent scholarly and popular publications. See generally DANIEL GILBERT, *STUMBLING ON HAPPINESS* 215-32 (2005) (reviewing research that shows that people are not good at predicting what will make them happy); TAL BEN-SHAHAR, *HAPPIER: LEARNING THE SECRETS OF DAILY JOY AND LASTING FULFILLMENT* (2007). Some of this scholarship concerns the legal profession. See, e.g., Peter H. Huang, *Authentic Happiness, Self-Knowledge and Legal Policy*, 9 *MINN. J.L. SCI. & TECH.* 755 (2008); Peter H. Huang & Rick Swedloff, *Authentic Happiness & Meaning at Law Firms*, 58 *SYRACUSE L. REV.* 335 (2008); see also Jeffrey L. Harrison, *Happiness, Efficiency, and the Promise of Decisional Equity: From Outcome to Process*, 36 *PEPPERDINE L. REV.* 935 (2009) (describing different ways to understand happiness and arguing that we should focus on the process of decision-making rather than the outcome).

<sup>135</sup> Shapiro et al., *supra* note 104, at 22-23.

<sup>136</sup> *Id.* at 21-22.

<sup>137</sup> See *id.* at 22-23 (proposing, *inter alia*, that meditation practice over an extended period of time may sensitize the brain's limbic circuitry, which is essential to empathy and compassion).

<sup>138</sup> Clark Freshman, *After Basic Mindfulness Meditation: External Mindfulness, Emotional Truthfulness, and Lie Detection in Dispute Resolution*, 2006 *J. DISP. RESOL.* 511, 515.

<sup>139</sup> See SALZBERG, *supra* note 99.

<sup>140</sup> *Id.* at 60. Writers have formulated the loving-kindness phrases in many ways. See, e.g., Leonard L. Riskin, *Awareness in Lawyering: A Primer on Paying Attention*, in *THE AFFEC-*

self and then, in sequence, to others, ranging from a mentor or someone for whom you have great affection, to a close friend, a “neutral” person,” a “difficult” person, and then to all persons or all beings.<sup>141</sup>

In negotiations, the development of compassion and other positive emotions toward others can make it more likely that the negotiator will *want to* benefit his counterpart.<sup>142</sup> For that reason, the negotiator may be more likely to try to find opportunities to address the interests of the person with whom he is negotiating, an essential element of the Core Concerns System as well as of other interest-based approaches to negotiation.<sup>143</sup>

*c. Awareness, Distance, and Freedom Regarding Ways of Thinking, Feeling, and Behaving*

As I indicated above, mindful awareness involves a particular relationship (moment-to-moment and without judgment) to thoughts, emotions and bodily sensations. A simple heuristic device, the “Triangle of Awareness”—developed at the Stress Reduction Clinic at the University of Massachusetts Medical School at Worcester—helps illustrate this idea. It appears as Figure 3.

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TIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 447, 460-63 (Marjorie Silver ed., 2007).

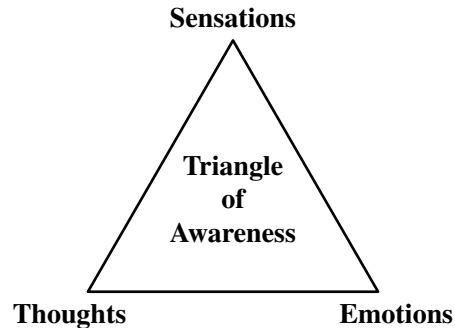
<sup>141</sup> SALZBERG, *supra* note 99, at 18-100. Loving-Kindness meditation resembles the Tibetan Buddhist practice known as “Pure Compassion,” which neuroscientists have studied extensively. *See, e.g.,* Antoine Lutz et al., *Regulation of the Neural Circuitry of Emotion by Compassion Meditation: Effects of Meditative Expertise*, 3 PLoS ONE e1897 (2008), available at <http://psyphz.psych.wisc.edu/web/pubs/2008/LutzRegulationPLoSONE.pdf> (stating that “the mental expertise to cultivate positive emotion alters the activation of circuitries previously linked to empathy and theory of mind in response to emotional stimuli”); SHARON BEGLEY, TRAIN YOUR MIND, CHANGE YOUR BRAIN: HOW A NEW SCIENCE REVEALS OUR EXTRAORDINARY POTENTIAL TO TRANSFORM OURSELVES 233-40 (2007).

<sup>142</sup> *See* BEGLEY, *supra* note 141, at 238-40.

<sup>143</sup> For other interest-based approaches to negotiation, see *supra*, notes 10-15 and accompanying text.

Researchers have documented benefits of happiness to performance in a wide variety of activities. *See* Huang & Swedloff, *supra* note 134, at 335-37 (briefly surveying the research and citing studies); *see also* BARBARA L. FREDERICKSON, POSITIVITY: GROUNDBREAKING RESEARCH REVEALS HOW TO EMBRACE THE HIDDEN STRENGTH OF POSITIVE EMOTIONS, OVERCOME NEGATIVITY, AND THRIVE (2009); *see generally*, MARTIN E.P. SELIGMAN, AUTHENTIC HAPPINESS: USING THE NEW POSITIVE PSYCHOLOGY TO REALIZE YOUR POTENTIAL FOR LASTING FULFILLMENT (2002).



FIGURE 3. THE TRIANGLE OF AWARENESS<sup>144</sup>

The points of the triangle are Thoughts, Emotions, and (Body) Sensations. These three kinds of phenomena interact, and each can either strengthen or weaken the other. A thought, for instance, can precipitate an emotion or a body sensation. Any of these phenomena can play a role in precipitating behavior. Attending to thoughts, emotions, and body sensations with kindly curiosity<sup>145</sup> and without judgment is the essence of mindfulness; and it is part of extensive instructions on “choiceless awareness.”<sup>146</sup>

Once one is aware of these phenomena without judging them, one can achieve a certain “distance” from them, seeing them simply as objects of awareness rather than part of one’s identity. In other words, one can see the thoughts as “just thoughts,” body sensations as “just body sensations,” and emotions as “just emotions.” In this way, a person can mentally acknowl-

<sup>144</sup> Prepared by teachers at the Stress Reduction Program at the Center for Mindfulness in Medicine, Health Care and Society at the University of Massachusetts Medical School, Worcester, Mass. Used with permission of the Stress Reduction Clinic, Univ. Mass. Med. Sch.

<sup>145</sup> See SEGAL & WILLIAMS, *COGNITIVE THERAPY*, *supra* note 99, at 322-23 (“[I]n mindfulness practice, a person’s attention is opened to admit whatever enters experience, while at the same time, a stance of kindly curiosity allows the person to investigate whatever appears, without falling prey to automatic judgments or reactivity.”).

<sup>146</sup> See KABAT-ZINN, *FULL CATASTROPHE LIVING*, *supra* note 109, at 71, 74. One way to foster mindfulness of these phenomena is the practice of “noting” or “labeling”:

Noting should be done very softly, like a whisper in the mind, but with enough precision and accuracy so that it connects directly with the object. For example, you might label each breath, silently saying *in, out* or *rising, falling*. In addition, you may also note every other appearance that arises in meditation. When thoughts arise, note *thinking*. If physical sensations become predominant, note *pressure, vibration, tension, tingling*, or whatever it might be. If sounds or images come into the foreground, note *hearing* or *seeing*.

The note itself can be seen as another appearance in the mind, even as it functions to keep us undistracted. Labeling, like putting a frame around a picture, helps you recognize the object more clearly and gives greater focus and precision to your observation.

Mental noting supports mindfulness in another way, by showing us when awareness is reactive and when it is truly mindful. For example, we may be aware of pain in the body, but through a filter of aversion. Without the tool of noting, we often do not recognize the aversion, which may be a subtle overlay on the pain itself. The tone of voice of the mental note reveals a lot about our minds. . . . [S]imply changing the tone of the note can often change your mind state. Noting refines the quality of mindfulness, that very particular, nonreactive awareness.

JOSEPH GOLDSTEIN, *INSIGHT MEDITATION: THE PRACTICE OF FREEDOM* 35-36 (1994).

edge—or notice—the presence of these phenomena, but not be “attached” to or identified with them.

Being mindful in this way requires a little equanimity, and produces even more of it. By welcoming, or acknowledging the presence of, particular thoughts, emotions, and body sensations, one gains a measure of freedom from their power.

As Shauna Shapiro and Linda Carlson explain:

[R]eceiving [the product of mindfulness practice] interrupts automatic maladaptive habits. People become less controlled by particular emotions and thoughts that arise, and in turn are less likely to automatically follow them with habitual reactive patterns. For example, if anxiety arises, and a person strongly identifies with it, there will be a greater tendency to react to the anxiety unskillfully and subsequently regulate it by some behavior such as drinking, smoking, or overeating. Receiving allows a person to step back from the anxiety, to see it clearly as simply an emotional state that is arising and will in time pass away. Thus, this knowledge of the impermanence of all mental phenomena allows a higher level of tolerance for unpleasant internal states.<sup>147</sup>

This ability to step back from thoughts, emotions, and body sensations also explains why mindfulness has proved useful in treating obsessive-compulsive disorder (OCD)<sup>148</sup> and why, in conjunction with cognitive-behavioral therapy, it has reduced the rate of relapse among people with depression who had had three or more relapses.<sup>149</sup> In a more general sense, this ability to step back also explains the quality of “non-anxious presence” that often is associated with mindfulness.<sup>150</sup>

#### *d. Sensitivity to Emotions of Others*

In the common experience of mindfulness meditators, the practice develops sensitivity to one’s own emotions. It also tends to develop sensitivity to the emotions of others, an aspect of what Clark Freshman calls “external mindfulness.”<sup>151</sup> This sensitivity could develop from other features or outcomes of mindfulness: a curiosity about the other person, an ability to be “present” to the suffering of another, an acceptance of one’s own reactions to the emotions of others, and positive emotions, including compassion, for the other. In addition, the ability to observe one’s own thoughts, emotions and body sensations, with-

<sup>147</sup> See SHAPIRO & CARLSON, *supra* note 100, at 99.

<sup>148</sup> See JEFFREY M. SCHWARTZ & SHARON BEGLEY, *THE MIND AND THE BRAIN: NEUROPLASTICITY AND THE POWER OF MENTAL FORCE* 139-41, 150-51 (2002).

<sup>149</sup> See SEGAL & WILLIAMS, *COGNITIVE THERAPY*, *supra* note 99, at 321.

<sup>150</sup> “NAP [Non-Anxious Presence] is a person’s ability to remain internally calm, flexible, and appropriately responsive during moment-to-moment interpersonal interactions in the midst of high levels of tension associated with cognitive, emotional, and behavioral demands.” Elizabeth B. Strand, *Enhanced Communication by Developing a Non-anxious Presence: A Key Attribute for the Successful Veterinarian*, 33 *J. VETERINARY MED. EDUC.* 65, 65 (2006). For a discussion of NAP’s association with mindfulness see *id.* at 67-69. The term was elaborated by Edwin H. Friedman, a rabbi and family therapist. EDWIN H. FRIEDMAN, *GENERATION TO GENERATION: FAMILY PROCESS IN CHURCH AND SYNAGOGUE* 27, 38-39, 46-47, 208-210 (1985).

<sup>151</sup> See Freshman, *supra* note 138, at 516-20.

out judgment, may help develop a sensitivity to these phenomena as they arise in others.<sup>152</sup>

*e. Social Skills*

I have written elsewhere that mindfulness tends to develop “emotional intelligence.”<sup>153</sup> The idea of Emotional Intelligence, as proposed and popularized by Daniel Goleman, entails five “basic emotional and social competencies”: self-awareness, self-regulation, motivation, empathy, and social skills.<sup>154</sup> Emotional self-awareness is the most basic of such competencies. “Lacking that ability,” as Daniel Goleman puts it,

we are vulnerable . . . to being sidetracked by emotions run amok. Such awareness is our guide in fine-tuning on-the-job performance of every kind, managing our unruly feelings, keeping ourselves motivated, tuning in with accuracy to the feelings of those around us, and developing good work-related social skills, including those essential for leadership and teamwork.<sup>155</sup>

Mindfulness meditation can help develop emotional self-awareness, self-regulation, motivation, and empathy;<sup>156</sup> these, in turn are likely to help produce the fifth emotional intelligence competency—social skills.<sup>157</sup>

*f. The Ability to Focus*

The ability to concentrate develops when one practices mindfulness meditation.<sup>158</sup> Of course, concentration enhances any activity—playing the trombone, tap dancing, or reading this Article. William James, widely considered the father of American psychology, described the importance of this skill:

[T]he faculty of voluntarily bringing back a wandering attention, over and over again, is the very root of judgment, character, and will. . . . An education which should improve this faculty would be *the education par excellence*. But it is easier to define this ideal than to give practical directions for bringing it about.<sup>159</sup>

<sup>152</sup> See SIEGEL, *supra* note 28, at 157-58.

<sup>153</sup> See Riskin, *Contemplative Lawyer*, *supra* note 70, at 47-48.

<sup>154</sup> The term “emotional intelligence” was first used in Peter Salovey & John D. Mayer, *Emotional Intelligence*, 9 IMAGINATION, COGNITION & PERSONALITY 185 (1990). Daniel Goleman developed a particular version of emotional intelligence, which he popularized in DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* (1995) and DANIEL GOLEMAN, *WORKING WITH EMOTIONAL INTELLIGENCE* (1998) [hereinafter, GOLEMAN, *WORKING WITH*]. In 2006, he developed the idea of “Social Intelligence,” which he divided into “Social Awareness” and “Social Facility.” DANIEL GOLEMAN, *SOCIAL INTELLIGENCE: THE NEW SCIENCE OF HUMAN RELATIONSHIPS* 84 (2006). In this Symposium, Peter Reilly explains the “four branches” of Salovey and Mayer’s notion of emotional intelligence. Peter Reilly, *Mindfulness, Emotions, and Mental Models: Theory that Leads to More Effective Dispute Resolution*, 10 NEV. L.J. 433, nn. 15-26 (2010) and accompanying text.

<sup>155</sup> GOLEMAN, *WORKING WITH*, *supra* note 154, at 55 (1998).

<sup>156</sup> See Riskin, *Contemplative Lawyer*, *supra* note 70, at 46-47.

<sup>157</sup> See *id.* at 48; see also Shapiro et al., *supra* note 104, at 20-21 (discussing research findings on the impact of meditation on interpersonal skills).

<sup>158</sup> See Amishi P. Jha et al., *Mindfulness Training Modifies Subsystems of Attention*, 7 COGNITIVE, AFFECTIVE & BEHAV. NEUROSCI. 109, 116-17 (2007) (using performance-based measures of cognitive functions); Shapiro et al., *supra* note 104, at 9-12.

<sup>159</sup> 1 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 424 (Henry Holt & Co. 1918) (1890).

Mindfulness practices provide the directions that James sought. And concentration is the foundation of all mindfulness. Among other things, the ability to concentrate, or to achieve freedom from distractions and from the wandering mind (a.k.a. “monkey mind”), can help the negotiator to avoid being distracted and to remember to use the Core Concerns System, and to keep using it.<sup>160</sup>

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Figure 4 provides a graphic summary of the foregoing explanation of how, in theory, mindful awareness could help a negotiator overcome obstacles to employing the Core Concerns System when it is appropriate to do so.

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<sup>160</sup> Meditation promotes a thickening of portions of the brain associated with complex cognitive and perceptual functions. See Katherine L. Narr et al., *Relationships Between IQ and Regional Cortical Gray Matter Thickness in Healthy Adults*, 17 *CEREBRAL CORTEX* 2163, 2167 (2007); see also Sara W. Lazar et al., *Meditation Experience is Associated with Increased Cortical Thickness*, 16 *NEUROREPORT* 1893 (2005). Mindfulness Meditation may be useful for persons with ADHD. See Lidia Zylowska et al., *Mindfulness Meditation Training in Adults and Adolescents with ADHD: A Feasibility Study*, 11 *J. ATTENTION DISORDERS* 737, 737 (2008) (concluding that “[m]indfulness training is a feasible intervention in a subset of ADHD adults and adolescents and may improve behavioral and neurocognitive impairments” and recommending a controlled study).

FIGURE 4. HOW MINDFULNESS CAN HELP ADDRESS OBSTACLES TO USING THE CORE CONCERNS SYSTEM.

<i>Obstacles to Using Core Concerns System</i>	<i>Mindfulness may help</i>	<i>By fostering</i>
Excessively self-centered focus	Decrease the prominence of self-centered focus and foster the strength of other-centered focus	-Understanding of and compassion for others -Recognition of interconnectedness -Insights about the nature of the self -Ability to notice and let go of self-centered perceptions and intentions -Curiosity about self and other
Strong negative emotions (SNE)	Reduce the power of SNE	-Non-judgmental awareness of SNE, which may <sup>161</sup> lead to -Distance & freedom from SNE -Calm -Insight and understanding of self and other -Compassion & other positive emotions toward other and self
Automatic, habitual ways of thinking, feeling, and behaving	Promote freedom from automatic, habitual ways of thinking, feeling and behaving	-Non-judgmental awareness of habitual ways of thinking, feeling, and behaving, the ability to notice and interrupt these patterns, which may lead to distance and freedom from them <sup>162</sup>
Insensitivity to emotions	Foster sensitivity to emotions of self and other	-Non-judgmental awareness of emotions and the ability to cope with them
Insufficient social skills	Improve social skills	-Emotional Intelligence: self-awareness, self-regulation, motivation, empathy
Inadequate focus	Strengthen concentration	-The ability to notice when the mind has wandered and to bring it back to the desired focus of attention - Equanimity

2. *In Phil's Negotiation with Jack*

I have explained how, in theory—and in general—mindfulness could help a negotiator overcome a series of specific obstacles to using the Core Concerns System. Now let us get down to specifics. How might mindfulness help Phil use the Core Concerns System, as appropriate, in his negotiation with Jack? To address this question, I begin with an overview and then analyze a specific incident in the negotiation.

Imagine that, in addition to learning about the Core Concerns System, Phil takes a training program in mindfulness meditation and practices rigorously for some time. Add the heroic (and problematic) assumption that Phil becomes

<sup>161</sup> In her comments on a draft of this article, Melissa Blacker, Senior Teacher at the Stress Reduction Clinic at the University of Massachusetts Medical School, offered a more nuanced explanation that is difficult to reflect in a graphic: “[M]indfulness practice can help increase awareness of, and then, perhaps, help to reduce the power of, SNE.” E-mail from Melissa Blacker, Senior Teacher, Stress Reduction Clinic, Univ. of Mass. Med. Sch., to author (June 11, 2009) (on file with *Nevada Law Journal*).

<sup>162</sup> Melissa Blacker also offered a more nuanced explanation of this idea in her comments on a draft of this article: “[M]indfulness may reveal and bring awareness to automatic, habitual ways of thinking, [feeling and behaving] and perhaps ultimately promote freedom from these habitual patterns.” *Id.*

adept at developing and sustaining mindful awareness.<sup>163</sup> He then readies himself to negotiate with Jack, intending to use the Core Concerns System to prepare for, conduct, and review the negotiation.

In general, this is how mindfulness might help Phil address the obstacles to using the Core Concerns System.

*a. Obstacle: Excessively Self-Centered Perspectives*

Imagine that Phil is too focused on himself to listen to, or care about, Jack.

Mindful awareness, developed through extensive meditation practice, should bring about relative deactivation of this self-centered focus. The accompanying enhancement of the other-centered focus<sup>164</sup> could help Phil direct more attention to Jack and less attention to himself. At the very least, mindfulness would make it easier for Phil to maintain non-judgmental awareness of the manifestations of *both* of the neural circuits, rather than being dominated by the manifestations of the self-centered circuit. Thus, he should be able to notice and distinguish the thoughts, impulses, and intentions that are associated with greed from those that are associated with curiosity about, and generosity toward, others. Furthermore, as Phil becomes more aware of the manifestations of his “problem self,”<sup>165</sup> such as an intention to harm Jack or to inappropriately benefit himself, he may deliberately chose to reject such thoughts and impulses, or to just “let them be.” Also, greater activity in the allo-centric circuit naturally produces curiosity about Jack, as well as compassion and kindly behavior toward him; thus, Phil could become more inclined to really listen to Jack, making it easier for Phil to recognize Jack’s core concerns and to want to help him.

*b. Obstacle: Strong Negative Emotions*

Phil is overcome by strong negative emotions toward Jack, such as anger or disgust (or similar feelings toward himself).

Mindful awareness can help Phil by fostering non-judgmental awareness of such emotions, and distance and freedom from them, as well as calm, insight, and positive emotions.

*c. Obstacle: Automatic, Habitual Ways of Thinking, Feeling, and Behaving*

Phil succumbs to automatic, habitual patterns of thoughts, emotions, and behaviors that are negative.

Mindfulness should enable him to achieve a distance and freedom from these phenomena. (I discuss this concept extensively in connection with a specific example below).

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<sup>163</sup> The extent of practice experience has a linear correlation with changes in awareness and related neuroplastic changes in the brain. For an overview of this issue, see BEGLEY, *supra* note 141, at 233-39. See also Narr et al., *supra* note 160.

<sup>164</sup> See *supra* notes 118-24 and accompanying text.

<sup>165</sup> See *supra* notes 121-27 and accompanying text.

*d. Obstacle: Insensitivity to Emotions*

Phil simply does not notice emotions in Jack or in himself.

Mindfulness enhances sensitivity to emotions. Thus, with mindfulness—especially what Clark Freshman calls “external mindfulness”<sup>166</sup>—Phil may more readily notice Jack’s fear, anger, and frustration, as well as his own, and therefore feel impelled to look for their causes, which could be core concerns.

*e. Obstacle: Insufficient Social Skills*

He knows what to do, but lacks the judgment and interpersonal skills to do it well.

Mindfulness enhances Phil’s social skills, so if Phil decides to use Jack’s core concern for appreciation as a lever, he would be more likely to do so skillfully.

*f. Obstacle: Inability to Focus*

Phil cannot pay attention well enough to follow the conversation or to remember his commitment to use the Core Concerns System.

Mindfulness should help Phil continue to pay attention to what is going on in the negotiation, rather than getting distracted. It also should help him remember his commitment to use the Core Concerns System (his “Espoused Theory”), to notice when he abandons it in favor of a different “Theory-in-Action,”<sup>167</sup> and then to return to it. Thus, if he tells Jack that he is “a lazy bum and deserves no role in the business,” mindfulness can help him notice that he is not being faithful to his intention. This gives him an opportunity to reconsider his behavior—and his decision to employ the Core Concerns System in this negotiation.

#### A SPECIFIC INCIDENT IN THE NEGOTIATION

Phil would have the least trouble working with the Core Concerns System in preparing for and reviewing the negotiation because, although any of the obstacles described above might arise, physical separation from Jack provides a space that could allow Phil to assume an appropriate state of mind. In addition, he can bring mindful awareness to these efforts. He may already be in a mindful state. And he may deliberately induce—or strengthen—this state by formal mindfulness or loving-kindness meditation<sup>168</sup> or an informal method.<sup>169</sup>

While actually conducting the negotiation, however, Phil could face his greatest challenges to applying the Core Concerns System. Even if he uses the Core Concerns System to prepare for the negotiation, Phil would face a risk that, during the negotiation, Jack would “push his buttons” or otherwise do something that knocks him off balance. For instance, Jack might express negative emotions and judgments toward Phil, through gestures or through state-

<sup>166</sup> See Freshman, *supra* note 138; Freshman, *supra* note 47, n. 6 and accompanying text.

<sup>167</sup> See *supra* notes 82-85 and accompanying text.

<sup>168</sup> See *supra* notes 140-42 and accompanying text.

<sup>169</sup> See *supra* text following note 104.

ments such as those set forth in Part II.<sup>170</sup> If Phil were able to use the Core Concerns System appropriately, he might be able to avoid a deterioration in the relationship and handle the situation so as to produce positive emotions.

For the sake of simplicity, in analyzing this situation, I will focus on the third obstacle—automatic, habitual ways of thinking, feeling, and behaving.<sup>171</sup>

In the situation I described previously, Phil makes a proposal, and immediately picks up a carafe of coffee to fill Jack's cup. Jack responds quickly, calling Phil a "pompous, self-satisfied, arrogant jerk" and casting aspersions on Phil's competence and his devotion to the firm. At that point, Phil likely would experience developments on all three interacting dimensions of the triangle of awareness<sup>172</sup>: thoughts, emotions, and body sensations.

Thoughts: Phil's reaction or response would depend largely on his thinking—how he interprets or appraises Jack's behavior. Negative thoughts about Jack, such as the following, might arise: "What a rotten, bumbling *fool!* And he's completely *wrong*; I *fully* understand marketing and sales and I've always supported him. I'm not *pompous*, I am *competent*." Phil also might have negative thoughts about himself: "Maybe Jack is right. Perhaps I've always stayed in the office because I think I'm too good to go on the road as a salesman. Maybe I'm a *fraud*."

Emotions: Negative thoughts of this nature about Jack could precipitate negative emotions, such as anger or hatred, and reactive behaviors, such as retaliation. Negative thoughts about himself could trigger self-hatred or despair and perhaps prompt Phil to withdraw from discussions with Jack. Phil might thereby lose his balance through suffering an "identity quake," which Bruce Patton, and Sheila Heen tell us, arises from an internal "identity conversation" that struggles with the questions "Am I competent?", "Am I a good person?", and "Am I worthy of love?"<sup>173</sup>

Body sensations: Emotions arise in combination with physical sensations. Anger and hatred, for instance, might be associated with tension in certain muscles (e.g., in the neck or hands), increased heart rate, and puffing of the chest. Likewise, energy depletion and a slumping posture might accompany despair or self-hatred.

I have shown how negative thoughts can precipitate negative emotions, which in turn can produce unpleasant body sensations. Of course, all three of

<sup>170</sup> See *supra* text following note 51.

<sup>171</sup> In some sense, this obstacle to appropriately using the Core Concerns System may embrace all the other obstacles, and the means of addressing this obstacle—non-judgmental awareness of thoughts, emotions, and body sensations—constitutes mindfulness itself. See *supra* Figure 4. How Mindfulness Can Help Address Obstacles to Using the Core Concerns System.

<sup>172</sup> See *supra* Figure 3, The Triangle of Awareness, notes 144-46 and accompanying text.

<sup>173</sup> [I]t is what this conversation seems to be saying about us that rips the ground from beneath our feet.

Getting knocked off balance can even cause you to react physically in ways that make the conversation go from difficult to impossible. Images of yourself or of the future are hardwired to your adrenal response, and shaking them up can cause an unmanageable rush of anxiety or anger, or an intense desire to get away. Well-being is replaced with depression, hope with hopelessness, efficacy with fear. And all the while you're trying to engage in the extremely delicate task of communicating clearly and effectively.

STONE ET AL., *supra* note 14, at 113.



these elements can interact, in many ways. The negative emotions, for example, prompt more negative thoughts, and the negative thoughts can produce still more, or stronger, negative emotions. Unpleasant body sensations also can produce more negative thoughts and emotions. In this way, the three elements of the triangle of awareness can combine to escalate tension and self-centeredness in Phil.

Fortunately, a state of mindful awareness can interrupt the escalation of the thoughts-sensations-emotions-behavior cycle. Here, it could heighten Phil's ability to attend to these thoughts, emotions, and body sensations as if at a distance, with some equanimity. In other words, he could observe the three elements of the triangle as "objects" rather than as part of himself; he may observe his emotions as "just emotions," the sensations as "just sensations," the thoughts as "just thoughts" (and therefore subject to the currently popular saying, "Don't believe everything you think"). From such a perspective, he could simply "let them be," or he might choose to observe or examine these phenomena more carefully. He might, for instance, examine these thoughts and to decide whether they were true or significant and whether to act upon them. He might look for the causes of the emotions, for example, in his own core concerns. He might be able to observe his behavioral impulses or intentions and consider whether they would foster his real interests. In this way, he secures a degree of freedom from his habitual, automatic thoughts, emotions, and behaviors, a freedom that would enable him to respond skillfully to Jack (which, in our hypothetical, means using the Core Concerns System, rather than reacting reflexively). Thus, for instance, Phil could "express appreciation" in a way that Jack could perceive as genuine.<sup>174</sup>

Figure 5 illustrates the process I have just outlined.

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<sup>174</sup> Recall that, in this hypothetical, using the Core Concerns System would include figuring out which core concerns had precipitated Jack's angry statement and trying to address them. If Phil gains such insights, they could undercut or weaken his assumption that Jack was a "mean jerk." Stone, Patton, and Heen describe a similar process when they recommend that you "negotiate with your feelings":

What does it mean to negotiate with our feelings? Fundamentally, it involves a recognition that our feelings are formed in response to our thoughts. Imagine that while scuba diving, you suddenly see a shark glide into view. Your heart starts to pound and your anxiety skyrockets. You're terrified . . . .

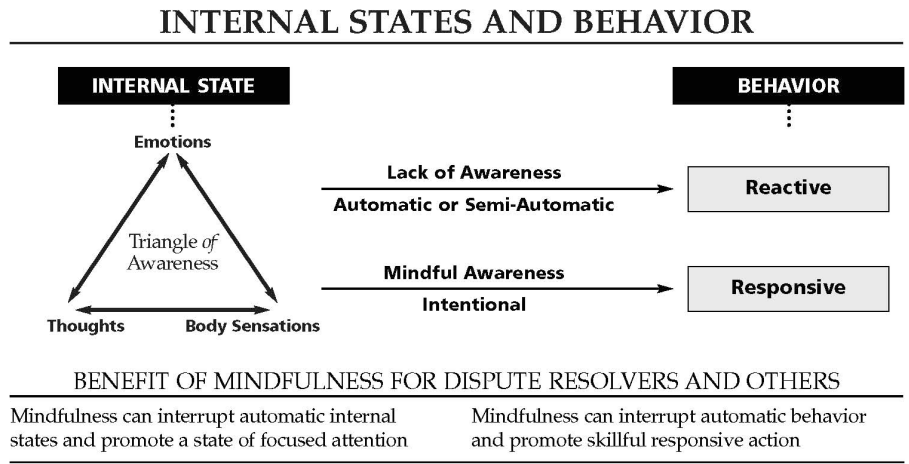
Now imagine that your marine biology training enables you to identify it as a Reef Shark, which you know doesn't prey on anything as large as you. Your anxiety disappears. Instead you feel excited and curious to observe the shark's behavior. It isn't the shark that's changed; it's the story you tell yourself about what's happening. In any given situation our feelings follow our thoughts.

This means that the route to changing your feelings is through altering your *thinking*.

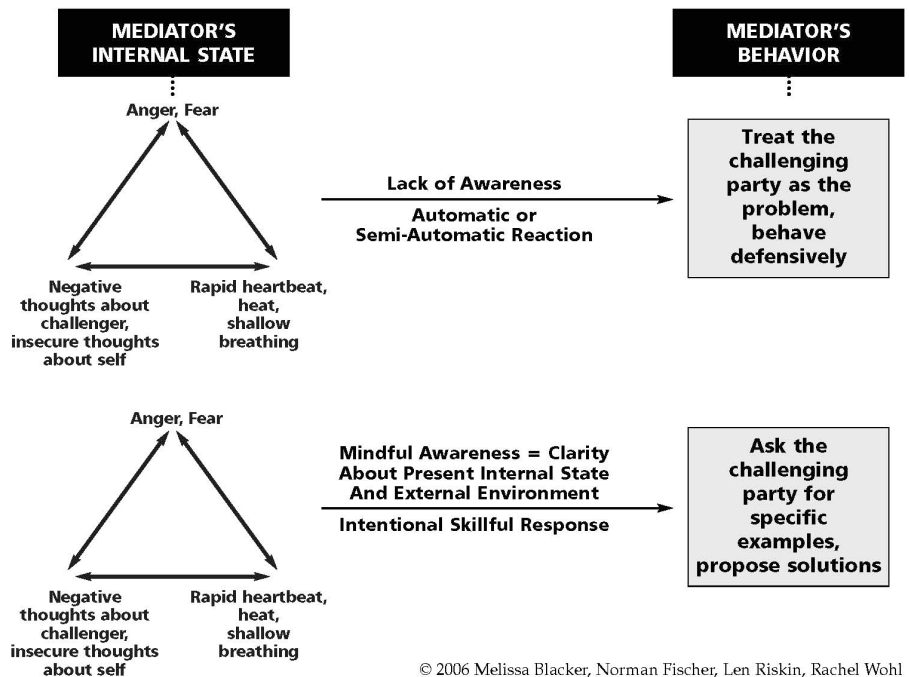
*Id.* at 100.

In this situation, Phil's realization that Jack's angry outburst was precipitated by Jack's Appreciation and Autonomy core concerns probably would undercut or weaken Phil's assumption that Jack is a bad person, or a "jerk," which likely resulted from what psychologists call the "fundamental attribution error." See *supra* notes 59, 78 and accompanying text.

FIGURE 5. INTERNAL STATES AND BEHAVIOR IN NEGOTIATION



**FOR EXAMPLE:** a party challenges a mediator’s competence and neutrality



If Phil has practiced mindfulness sufficiently, it may have become enough of a trait—or he may have developed enough skill at remembering to be mindful—that he will be in a mindful state when Jack makes his negative comment. If he is not in such a state, he may nonetheless recall a technique for inducing it. One such method is the so-called “STOP” exercise, also developed by the Stress Reduction Clinic at the University of Massachusetts Medical School:

- Stop
- Take a breath

Open your awareness to body sensations, thoughts and emotions (the Triangle of Awareness)  
Proceed<sup>175</sup>

With practice, Phil could learn to employ it in such a fashion that no one would notice.

In Part IV, I have explained how mindfulness can make it easier for a negotiator to use the Core Concerns System. Next, in Part V, I speculate about other ways in which mindfulness and the Core Concerns System can interact, focusing primarily on how the Core Concerns System can reinforce mindfulness.

#### V. HOW THE CORE CONCERNS SYSTEM CAN REINFORCE MINDFULNESS

Just as mindfulness can help one use, and want to use, the Core Concerns System, the Core Concerns System can enhance a negotiator's mindfulness. Most of the obstacles to using the Core Concerns System that I identified above—particularly, excessively self-centered perspectives; strong negative emotions; automatic, habitual ways of thinking, feeling, and behaving; and inadequate focus—also threaten our ability to develop or sustain mindful awareness. If one is sufficiently mindful and skillful, one can essentially disarm, deflect, or disregard these threats—by treating them simply as objects of awareness.

Sometimes, however, such phenomena are too strong or too fast for one's skill level. This same difficulty can arise in other realms of activity. For instance, I once jokingly asked a very gifted martial arts instructor (I will call him Todd), whether he could "take Arnold Schwarzenegger." Todd, who stands 5'7" and weighs about 140 pounds, replied, in all seriousness, that he could "easily" take Schwarzenegger, and that his first concern would be "to avoid hurting him." Then he paused and added, "Unless Schwarzenegger managed to get his arms around me. His grip might be too strong for me to escape."<sup>176</sup> Similarly, in specific circumstances, one or more potential threats

<sup>175</sup> This technique was developed in the Stress Reduction Clinic at the University of Massachusetts Medical School. A longer version appears as the "3-Minute Breathing Space" in SEGAL & WILLIAMS, *COGNITIVE THERAPY*, *supra* note 99, at 173. Scott Rogers, Director of the Institute for Mindfulness Studies, has created a series of exercises, based on using the hands, to develop present moment mindful awareness. See SCOTT ROGERS, *MINDFULNESS FOR LAW STUDENTS: USING THE POWER OF MINDFUL AWARENESS TO ACHIEVE BALANCE AND SUCCESS IN LAW SCHOOL* 92-94 (2009); SCOTT L. ROGERS, *THE SIX-MINUTE SOLUTION: A MINDFULNESS PRIMER FOR LAWYERS* 82-84 (2009).

<sup>176</sup> When I asked Todd to review this statement, he responded as follows:

I think it's fine to use as it is, especially since it illustrates your point. Nevertheless, allow me to amend my statement. If the Governor, or any large guy, were to get his arms around me, his grip might be too strong for me to escape WITHOUT hurting him badly. I could still escape, but because of his extreme strength, I might need to resort to more devastating (or even deadly) techniques.

But I think that your analogy still holds. In the world of high-level martial arts, it is understood that, no matter what your skill level, there is always someone (or something) at a higher level. By constantly raising your skill level, you lower your chances of encountering something that can overwhelm you. But the learning curve is asymptotic—you can never reach a level of invulnerability.

to mindfulness might be too strong for a person to overcome it. Just as specific martial arts skills might help Todd avoid Schwarzenegger's grip, and other skills (such as those of more advanced martial arts masters) might help him escape, knowledge of the Core Concerns System—and skill in deploying it—could help a negotiator deflect or disarm or disregard these obstacles and maintain mindfulness.

Challenges to mindful awareness (and the kindness and equanimity that are essential aspects of it) confront not only novices, like Phil, but also experienced practitioners. Several years ago, for instance, a member of a group of mindfulness and loving-kindness meditation teachers proposed that the group gather the night before an important election to send loving-kindness<sup>177</sup> to a candidate toward whom they all felt hostility. Most of them said that they “just could not” do that, even while recognizing the irony inherent in an expression of that view by person who teaches loving-kindness meditation.<sup>178</sup> I assume that they felt overwhelmed by negative thoughts and emotions about the politician.<sup>179</sup> I suspect that this occurred partly because they did not consider the causes of the behaviors that they so distained. Awareness of the core concerns framework—in that moment—could have made it more likely that they would have recognized some such causes. This *might* have reduced their hostility and even generated compassion for the politician, and allowed them to recognize that, if these good wishes manifested in this politician, perhaps he would not engage in the kinds of behaviors to which they objected. In addition, knowledge of the candidate's core concerns could have enhanced their interest in him, enabling them to sustain their focus on him, in much the same way that taking a course in herpetology might help me carefully watch that alligator near the path where I walk in the Paynes Prairie Preserve—rather than running away at top speed.<sup>180</sup>

Knowledge of the Core Concerns System might have helped for another reason: Some of these meditation teachers' own core concerns could have played a role in their declarations of unwillingness to act as suggested. For instance (and this is pure speculation for the sake of illustration), they might have worried—consciously or subconsciously—about whether their willingness to send loving-kindness to this politician could diminish the extent to

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E-mail from “Todd,” a martial arts instructor, to author (Oct. 4, 2009) (on file with *Nevada Law Journal*).

<sup>177</sup> See *supra* notes 140, 142 and accompanying text.

<sup>178</sup> There are at least two ironic aspects of this situation: (1) Teachers of loving-kindness provide their students with techniques for developing their ability to send loving-kindness to persons they dislike; and (2) If the “enemy” actually reaped the benefits of such good wishes—traditionally, safety, happiness, health, and peace of mind (see SALZBERG, *supra* note 99, at 30) they would be less likely to behave in ways that cause harm to others.

<sup>179</sup> Many practitioners of loving-kindness meditation have difficulty sending good wishes toward persons whom they dislike. See *id.* at 79-80.

<sup>180</sup> Paynes Prairie Preserve State Park is a wildlife preserve near Gainesville, Florida, and host to many, many alligators. See Paynes Prairie Preserve State Park, <http://www.floridastateparks.org/paynesprairie/> (last visited May 28, 2010). Of course, knowledge of the core concerns while negotiating, like knowledge of herpetology in Paynes Prairie, also affects *what* one sees. See Mark Twain, *Life on the Mississippi* (1883), reprinted in JAMES B. WHITE, *THE LEGAL IMAGINATION* 10-12 (1973) (explaining how knowledge of the Mississippi River that Twain acquired as a river boat pilot affected his perceptions of the river).

which other members of the group Appreciate them, or whether it would weaken the bonds of Affiliation.<sup>181</sup> Other core concerns also might have affected their perceptions and behavior. If they could have recognized the presence of their own core concerns, they might be able to treat them mindfully, and decide whether and how to address them. Such understanding could reduce the dominance of these core concerns and allow for the possibility of less attention to self, which could foster more attention to the politician, which could make it easier for them to send good wishes to him.

As this example shows, habitual thoughts, emotions, bodily sensations, and the behaviors they produce, can be both causes and manifestations of core concerns. For that reason, awareness of one's own core concerns can help bring these phenomena into bolder relief, thus making it easier to treat them mindfully and gain some distance from them.

In a similar fashion, knowledge of the Core Concerns System can help a negotiator, such as Phil, maintain mindful awareness. When Jack makes a nasty comment, Phil's knowledge of the Core Concerns System could help him realize that Jack's statement was motivated by Jack's core concerns for appreciation and affiliation. Such a realization should reduce Phil's anger toward Jack, as I have explained above; this is the same anger that might have derailed Phil's mindful awareness. Similarly, as Phil recognizes that his own core concern for appreciation is sparking anger toward Jack, this anger diminishes. As Deborah Calloway puts it, "Emotions explode into confrontation because people are blind to the pathways that lead to strong emotions. . . . By working with our *own* emotions, we can learn not to identify with our clients' emotional reactions. Seeing our *own* hidden pathways makes it possible to see what is happening when others react emotionally."<sup>182</sup> Such insights about Jack could further soften Phil's focus on himself, which could allow for a greater focus on and compassion for Jack to arise.<sup>183</sup> Knowledge of the core concerns also makes Jack seem more interesting to Phil (just as a course in herpetology could enhance my interest in alligators), which makes it easier for Phil to maintain a focus on Jack, which in turn further reduces his focus on self. Phil's ability to recognize the role of certain of his own core concerns could also help him notice the habitual thoughts, emotions, and behaviors that are associated with the core concerns—both as causes and manifestations. Such insights could give him an additional distance from these phenomena, which would enhance mindfulness.

In these ways, the Core Concerns System could help Phil maintain mindful awareness by helping him address challenges to it, such as excessively self-centered perspectives; strong negative emotions; habitual thoughts, emotions, and behaviors; insensitivity to emotions, and inability to focus.

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<sup>181</sup> Most devoted practitioners would consider it a sign of spiritual maturity to be able to send loving-kindness in such a situation. They also would recognize that if the recipient actually had the good things you wished for him he likely would not done the kinds of acts to which you object.

<sup>182</sup> Deborah Calloway, *Using Mindfulness Practice to Work with Emotions*, 10 NEV. L. J. 388 and accompanying text (2010).

<sup>183</sup> See *supra* Part IV.D.1.a.

## CONCLUSION

Having said all that, I can condense it as follows: Fisher and Shapiro tell us, and I generally agree, that negative emotions can interfere with good interest-based negotiation. (I think they also can impede good adversarial negotiation.) Fortunately, the Core Concerns System can sometimes help a negotiator understand and address the causes of some negative emotions and promote positive emotions, thereby enhancing the prospects for good interest-based (or good adversarial) negotiation. But here is the problem: Not infrequently, negotiators who have mastered the Core Concerns System, and intend and prepare to use it in a particular negotiation, fail to do so; sometimes, looking back, they wish that they had used the Core Concerns System because they believe it would have produced a better process and outcome. When this happens, it typically results from deficiencies in present-moment mindful awareness. Mindfulness can remedy these deficiencies in awareness and thereby help a negotiator carry out the Core Concerns System appropriately. Reciprocally, the Core Concerns System can help a person maintain mindfulness. Through such mutual reinforcement, mindfulness and the Core Concerns System could do more together than they could separately to reduce self-centered thoughts, emotions, and behaviors and encourage more other-centered thoughts, emotions, and behaviors—and thus foster good negotiation.

Beyond all that, I believe that such developments are likely to promote more ethical negotiation behavior. This is a complex issue, however, especially in connection with negotiations conducted by lawyers or other agents,<sup>184</sup> and I intend to devote more attention to it in future writing.

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<sup>184</sup> Two commentators have previously considered the impact of mindfulness on professional ethics, and both emphasized the importance of concern for others. Professor Scott Peppet wrote that:

[A] more mindful person will likely become a more ethical person. Second, she will become more ethical in a particular way—that is, by committing to a less partisan, more universal perspective. In the negotiation context this change will likely lead her at least to commit (a) not to deceive or manipulate others, given that she would not want to be deceived or manipulated, and (b) to try to respect and take others' interests into account as she would expect others to take her interests into account.

Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83, 89 (2002).

Attorney Van Pounds has described ways in which mindfulness is likely to contribute to increased truth-telling;

[T]he lawyer's choice to be more truthful will be affected by two principal mindfulness factors: (1) an enhanced awareness of interconnectedness with others; and (2) an enhanced self-awareness. As the lawyer becomes more mindful of her interdependence with clients, opposing parties and counsel, she will be induced to be more truthful. In addition, as the lawyer becomes more aware of her thoughts and feelings, she will find it more difficult to avoid the adverse effects of a less truthful course.

Van M. Pounds, *Promoting Truthfulness in Negotiation: A Mindful Approach*, 40 WILLAMETTE L. REV. 181, 205 (2004).

In a recent publication, I touched upon this issue especially as it applied to lawyer-negotiators and to mediators. Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 S. TEX. L. REV. 493 (2009) (luncheon address at symposium on ethics in dispute resolution). I suggested that many rules of professional ethics derive from the Golden Rule: do unto others as you would

I close with some reservations and qualifications.

First, the explanations and proposals I offer are highly theoretical. In addition, they rest on simplified fact patterns and simplifying assumptions about human interaction and behavior and negotiation theory. Thus, much of the discussion in this article addresses the ways in which the core concerns and mindfulness can help a negotiator skillfully use interest-based negotiation. I adopted that focus because that is the thrust of *Beyond Reason*. However, in real life, most negotiations contain both interest-based and position-based elements, and negotiators need to be aware of the tension between them.<sup>185</sup> And both the Core Concerns System and mindfulness—alone or together—can help a negotiator carry out position-based or distributive strategies and tactics by enhancing awareness and an ability to maintain balance and focus.

Second, I have described the potential benefits of mindful awareness in negotiation with little attention to the immense difficulties of actually developing and sustaining it. Practicing mindfulness meditation does not guarantee the

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have them do onto you. The specific rules fall into two categories: (1) those that set minimum standards of conduct toward others and (2) those that reflect aspirations based on generosity. I argued that mindfulness would tend to incline lawyer-negotiators and mediators to follow both kinds of rules, relying in part on the concern for others that mindfulness tends to develop. *Id.* at 496-97.

Several qualities or outcomes of mindfulness increase the likelihood that the mediator, lawyer, or negotiator will choose not to violate the minimal standard. First, through mindfulness, we become more aware of our own thought processes and the intentions behind our acts. We more easily notice the habitual self-centered thoughts and the emotions, body sensations, and behaviors they precipitate. When we observe these phenomena at a psychological distance, their strength or power or influence tends to diminish, and we have a chance to consider their merit. Mindfulness allows us to insert a “wedge of awareness” before we act. In particular, mindfulness helps us notice the intentions that impel our behavior. When we consider or form an intention to behave in a way that would unduly benefit ourselves at the expense of another (e.g., to lie about a material fact to a negotiation counterpart), if we are mindful we . . . might observe cautionary thoughts that flash through our minds, such as the realization that we are violating an ethical precept or that the contemplated act would cause suffering in others (and in ourselves) . . . . And the calm associated with mindfulness enhances our ability to reflect on the intention and associated warning signals.

Second, mindfulness helps us see interconnections with others. Mindful awareness allows us to more easily observe our own suffering, which helps us be aware of the suffering of others . . . . And often such awareness produces compassion, and a desire to reduce suffering in ourselves and others.

*Id.* at 498-500.

In this symposium, Professor Ellen Waldman has expressed reservations about the potential impact of mindfulness in fostering ethical behavior in negotiation. *See* Ellen A. Waldman, *Mindfulness, Emotions, and Ethics: The Right Stuff?*, 10 NEV. L.J. 513 (2010) (arguing that we should have modest expectations about its potential contributions). Professor Katherine Kruse seems to share my appreciation of the potential value of mindfulness in fostering ethical behavior, and recommends that I connect mindfulness with a larger theory of justice in dispute resolution. *See* Katherine R. Kruse, *Lawyers in Character and Lawyers in Role*, 10 NEV. L.J. 393 (2010). Professor Ran Kuttner has raised deeper questions about sources of ethical behavior and illustrated the potential that mindfulness holds for cultivating “wisdom” in the Buddhist sense of the term. *See* Ran Kuttner, *What does it Mean to Do the Right Thing?*, 10 NEV. L.J. 407 (2010). Had I the time, I would have responded to each and incorporated many more of their insights.

<sup>185</sup> *See* LAX & SEBENIUS, *supra* note 13, at 33-35.

development of mindful awareness, either “on the cushion” or in daily life. Indeed, cultivating and sustaining mindfulness has much in common with cultivating and sustaining other skills, such as performing a root canal or playing the flugelhorn or hacky-sack. Nearly everyone knows the joke about the tourist in New York City who stops a local on the street and asks, “How do I get to Carnegie Hall?” The New Yorker replies, “Practice.” Similarly, for most people, enormous amounts of practice are necessary, but sometimes not sufficient, to develop and maintain the attentional skills that form the basis of mindfulness. In addition, being mindful requires more than meditation practice. It also helps to show kindness and compassion toward others, live a moral life,<sup>186</sup> eat well, and get a good night’s sleep. Even with all that, there will be times when a negotiator’s present moment mindful awareness, especially the equanimity aspect, will vanish. Pir Vilayat Khan, leader of the Sufi Order in the West,<sup>187</sup> made a similar point when he said: “Of so many great teachers I’ve met in India and Asia, if you were to bring them to America, get them a house, two cars, a spouse, three kids, a job, insurance, and taxes . . . they would all have a hard time.”<sup>188</sup> Still—and most importantly—extensive and sustained mindfulness practice can increase the proportion of time when we can behave skillfully, in the same way that practice improves Albert Pujols’s batting average.<sup>189</sup> And even if one fails to negotiate skillfully because of a loss of mindfulness, once mindfulness returns, it can incline the negotiator to clean up the mess.

Third, and last, both mindfulness and the Core Concerns System—and their interactions—offer more profound possibilities than those I have discussed. Some of the commentators in this Symposium have elaborated or revealed glimpses of such possibilities. I wish I had time to bring all such insights into this article. I believe that mindfulness and the core concerns have the potential to bring people together in ways that I cannot express in words. Rumi, however, points in the right direction:

Out beyond ideas of wrongdoing and right doing,  
there is a field. I’ll meet you there.  
When the soul lies down in that grass,  
the world is too full to talk about.

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<sup>186</sup> One way to understand this is through the idea of the Noble Eight-Fold Path set forth by the Buddha as a way to end the suffering associated with craving and delusion: Right View, Right Thought, Right Speech, Right Action, Right Action, Right Livelihood, Right Mindfulness, and Right Concentration. See FLICKSTEIN, *supra* note 113, at 113-43. For a contemporary rendering of the Buddha’s original explanation of these ideas, see *Mahasattipassana Sutta*, *supra* note 113, at 348.

<sup>187</sup> Sufism is a mystical branch of Islam. See generally IDRIES SHAH, *THE SUFIS* (1964).

<sup>188</sup> KORNFIELD, *supra* note 110, at xxi (quoting Pir Vilayat Khan). It is also possible that attempts at cultivating mindfulness can make one too self-indulgent. See Judith Warner, *Being and Mindfulness*, OPINIONATOR, Mar. 5, 2009, <http://opinionator.blogs.nytimes.com/2009/03/05/the-worst-buddhist-in-the-world/> (last visited May 28, 2010).

<sup>189</sup> Albert Pujols is a member of the St. Louis Cardinals, a major-league baseball team. For his batting record, see Albert Pujols Statistics and History, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/p/pujolal01.shtml> (last visited May 28, 2010). I am grateful to Jeffrey L. Harrison for technical assistance in connection with this footnote.



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Ideas, language, even the phrase *each other*  
doesn't make any sense.<sup>190</sup>

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<sup>190</sup> Rumi, *Out Beyond Ideas of Wrongdoing*, in THE ESSENTIAL RUMI, *supra* note 98, at 36.