1-2010

Mindfulness, Emotions, and Mental Models: Theory that Leads to More Effective Dispute Resolution

Peter Reilly

Texas A&M University School of Law, preilly@tamu.edu

Recommended Citation

Mindfulness, Emotions, and Mental Models: Theory That Leads to More Effective Dispute Resolution

Peter Reilly*

I. Introduction

In 1908, Harvard Law School Dean Roscoe Pound suggested that the American legal system should adjust its doctrines, principles, and institutions of justice from a purely mechanical, rule-centered approach to one that considered "the human conditions they are to govern . . . putting the human factor in the central place . . . ."[1] Nearly a half century later, in April of 1955, Harvard Law School Dean Erwin Griswold put forth a rhetorical question that unfortunately still rings true today: "Many lawyers never do seem to understand that they are dealing with *people* and not solely with the impersonal law. How far is law school education responsible for this lack?"[2]

Connecting with others is a skill that can be developed and taught. I can think of few public figures in the history of the United States who were better at connecting with other people than President Franklin Delano Roosevelt. Interestingly, biographers of President Roosevelt produce a portrait of a man in his early adult years as fairly carefree—even arrogant and condescending.[3] Then, at age thirty-nine, FDR was stricken with polio. By most accounts, he transformed himself over the next seven years of his struggle into a leader of empathy, patience, and keen self-awareness.[4]

* Associate Professor, Texas Wesleyan School of Law; Harvard Law School, J.D.; Georgetown University Law Center, LL.M.

[1] Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 607, 609-10 (1908).

[2] Erwin N. Griswold, *Law Schools and Human Relations*, 37 Chi. B. Rec. 199, 203 (1956) (emphasis added).

[3] *See* Doris Kearns Goodwin, No Ordinary Time: Franklin and Eleanor Roosevelt: The Home Front in World War II 16-17 (1994).

[4] *Id.*

> [O]nce the diagnosis [of polio] was made, the battle was joined. For years [FDR] fought to walk on his own power, practicing for hours at a time, drenched with sweat, as he tried un-success-fully to move one leg in front of the other . . . .
>
> . . . After what Eleanor called his "trial by fire," he seemed less arrogant, less smug, less superficial, more focused, more complex . . . . He returned from his ordeal with greater powers of concentration and greater self-knowledge. "There had been a plowing up of his nature," Labor Secretary Frances Perkins observed. "The man emerged completely warm-hearted, with new humility of spirit and a firmer understanding of profound philosophical concepts."
>
> He had always taken great pleasure in people. But now they became what one historian has called "his vital links with life." Far more intensely than before, he reached out to know them, to understand them, to pick up their emotions, to put himself into their shoes. No longer belonging to his old world in the same way, he came to empathize with the poor and underprivileged, with people to whom fate had dealt a difficult hand.

This Article suggests that law students and lawyers can be introduced to, and even begin to master, some of the same transformational principles, skill sets, and behaviors that poured forth from FDR as a result of his intense physical and personal challenges.[5] At the core of nearly all great negotiators, mediators, lawyers, and leaders is a person who has learned to *connect* with other people, that is, to build relationships of trust, cooperation, and collaboration. Additionally, this Article argues that where people first learn a sense of self and others through both theoretical and practical knowledge and understanding of mindfulness and human emotion, connections are more likely to be made and relationships are more likely to be built.[6] Furthermore, I believe that the body of scholarship that Professor Leonard L. Riskin is producing in the areas of mindfulness and emotions in law serves an important, foundational role in heeding the calls sounded by Deans Pound and Griswold. Consequently, my focus in this Article is to use Professor Riskin's wonderful theoretical foundation to begin thinking about ways in which mindfulness and emotions can be translated into practice and manifested into actual *behaviors*. My goal, then, is to begin thinking about how one might bring mindfulness and emotions from the "mind level" to what human relations expert Mary Parker Follett[7] eloquently called the "motor level."[8]

Part II of the Article provides some background on emotional intelligence, including the different branches of emotional intelligence. Parts III and IV explore the role of emotions in behaviors, including discussion of various suggestions to teach emotional control and techniques to develop emotional range,

---

Id. (emphasis added).

[5] Professor Riskin, too, suggests that law students can be introduced to transformational experiential learning in a manner that supplements rather than supplants traditional legal training—in a manner that strengthens rather than weakens counsel's ability to act "with zeal in advocacy upon the client's behalf." MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2009). In suggesting that law students and lawyers consider learning to practice "mindfulness meditation," Riskin states:

> [M]indfulness, properly practiced, ought not exclude traditional, adversarial perspectives from a lawyer's consciousness. It should not disable lawyers from doing what is necessary to protect their clients. Instead, it should allow them to see virtually all perspectives. Thus, it can help them accept the reality and the impermanence of greed and selfishness—as well as kindness and generosity—in themselves and others. This understanding, supported by patience, wisdom, and compassion, might help lawyers maintain the clarity and delicate balance essential for making wise choices.

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, 66 (2002).

[6] *See* Diane L. Coutu, *Putting Leaders on the Couch: A Conversation with Manfred F.R. Kets de Vries*, HARV. BUS. REV., Jan. 2004, at 65, 65-66 (Kets de Vries, the Raoul de Vitry d'Avaucourt Chaired Professor of Leadership Development at Insead in Fontainebleau, France, and the director of Insead's Global Leadership Center, states during the interview that "the most effective leaders are able to both act and reflect, which prepares them to manage for the long term. These individuals not only run, they also take the time to ask themselves where they are going and why.").

[7] Mary Parker Follett, http://follettfoundation.org/mpf.htm (last visited Apr. 1, 2010) ("Mary Parker Follett (1868-1933) was a visionary and pioneering individual in the field of human relations, democratic organization, and management.").

[8] Albie Davis, *An Interview with Mary Parker Follett, in* NEGOTIATION THEORY AND PRACTICE 17, 17 (William Breslin & Jeffrey Z. Rubin eds., 1991).

maturity, and sensitivity. Emotional contagion is discussed in Part V, covering how emotions are spread and how this phenomenon can be used to increase cooperation. Next, Part VI reviews suggestions from various experts on how to develop a curriculum to teach students emotional intelligence. Subsequently, a specific mental model, the Ladder of Inference, is discussed in detail in Part VII, including examples and exercises for application. Lastly, Part VIII concludes with some final thoughts.

II.   THE INTELLIGENCE OF HUMAN EMOTION

In 1995, Daniel Goleman published *Emotional Intelligence*,[9] an immensely popular book that appeared to resonate with a wide readership. By October of that year, *Time* magazine ran a cover story on "Emotional Quotient"—with "EQ" in large red letters on the cover.[10] The opening subtitle read, "New brain research suggests that emotions, not IQ, may be the true measure of human intelligence."[11] The topic of emotions, a perpetual topic for scholars in many different academic fields, had made a grand entrance into public and popular discourse. Despite the popularity of *Emotional Intelligence* and its progeny,[12] scholars have criticized the books for making overly broad claims that may potentially hinder serious academic research into this construct.[13]

---

[9] DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ (1995).

[10] TIME, Oct. 2, 1995 (cover).

[11] Nancy Gibbs, *The EQ Factor*, TIME, Oct. 2, 1995, at 60, *available at* http://www.time.com/time/magazine/article/0,9171,983503,00.html.

[12] Since *Emotional Intelligence* was published in 1995, GOLEMAN, *supra* note 9, Daniel Goleman has worked with various colleagues to produce WORKING WITH EMOTIONAL INTELLIGENCE (1998), THE EMOTIONALLY INTELLIGENT WORKPLACE (2001), and PRIMAL LEADERSHIP (2002).

[13] *See* John D. Mayer, Peter Salovey & David Caruso, *Emotional Intelligence*, *in* HANDBOOK OF INTELLIGENCE 396-420 (Robert J. Sternberg ed., 2000). Goleman's initial approach to emotional intelligence included five components: knowing one's emotions, managing emotions, motivating one's self, recognizing emotions in other people, and handling relationships. *Id.* Three years after publishing *Emotional Intelligence*, Goleman's ideas were expanded, in *Working with Emotional Intelligence*, to include twenty-five competencies grouped into the same five basic categories (though the labels changed): (1) Self-Awareness (emotional awareness, accurate self-assessment, self-confidence); (2) Self-Regulation (self-control, trustworthiness, conscientiousness, adaptability, innovation); (3) Motivation (achievement, commitment, initiative, optimism); (4) Empathy (understanding others, developing others, service orientation, diversity, political awareness); and (5) Social Skills (influence, communication, conflict management, leadership, change catalyst, building bonds, collaboration/cooperation, team capabilities). *See also* David R. Caruso et al., *Emotional Intelligence and Emotional Leadership*, *in* MULTIPLE INTELLIGENCES AND LEADERSHIP 55, 62 (Ronald E. Riggio et al. eds., 2002) [hereinafter Caruso et al., *Emotional Intelligence and Emotional Leadership*].

It appears that the traits included in mixed models [such as Goleman's] are essentially captured by the five-factor model of personality as well as much of the existing trait research on leadership. For instance, [Gary A.] Yukl's 14 leadership behaviors are remarkably similar to mixed models of emotional intelligence: planning and organizing, clarifying, informing, monitoring, consulting, recognizing, networking, rewarding, mentoring, delegating, team building and conflict resolution, problem solving, supporting, and motivating.

This Article, therefore, will focus on the more specific conceptualization of emotional intelligence first published in 1990 by Peter Salovey, John D. Mayer, and their colleagues.[14] According to Salovey and Mayer, emotional intelligence can be divided into four branches: (1) emotional perception and expression, (2) emotional facilitation of thought, (3) emotional understanding, and (4) emotional management.[15]

A.   Emotional Perception and Expression (Identifying Emotions)

The first branch begins with the capacity to perceive and express feelings. Indeed, emotional intelligence is impossible without competencies from this branch.[16] Emotional perception involves registering and deciphering emotional messages as they are expressed in facial expressions and voice tone. An example of this capacity would be to see and understand the fleeting expression of fear in the face of another person. In particular, emotional perception and expression provides one with the ability to: (1) identify emotions in oneself, (2) identify emotions in other people, (3) express emotions accurately, and (4) discriminate between real and phony emotional expressions.[17]

B.   Emotional Facilitation of Thought (Using Emotional Intelligence)

The second branch concerns emotional facilitation of cognitive activities. While cognitive activities can be interrupted by emotion (such as fear or anxiety), emotions can also "prioritize" the cognitive system to address what is important and even to focus on what it does best in a given mood.[18] Thus, the emotional facilitation of thought focuses on how emotion affects the cognitive system and can thereby lead to more effective reasoning, decision-making,

---

Id. (citations omitted).

[14] Leading researchers have stated that "the Mayer and Salovey definition of emotional intelligence is the recognized standard for scholarly discourse." Peter J. Jordan, Neal M. Ashkanasy & Charmine E.J. Härtel, *The Case for Emotional Intelligence in Organizational Research*, 28 ACAD. MGMT. REV. 195, 196 (2003). For more detailed information on the initial Salovey/Mayer framework for emotional intelligence, including suggestions about its measurement, see John D. Mayer, Maria DiPaolo & Peter Salovey, *Perceiving Affective Content in Ambiguous Visual Stimuli: A Component of Emotional Intelligence*, 54 J. PERSONALITY ASSESSMENT 772, 772-81 (1990); Peter Salovey & John D. Mayer, *Emotional Intelligence*, 9 IMAGINATION COGNITION & PERSONALITY 185, 185-211 (1990).

[15] For more detailed information on the Four-Branch Model of Emotional Intelligence, see John D. Mayer & Peter Salovey, *What Is Emotional Intelligence?*, *in* EMOTIONAL DEVELOPMENT AND EMOTIONAL INTELLIGENCE: EDUCATIONAL IMPLICATIONS 3, 5 (Peter Salovey & David J. Sluyter eds., 1997). Some of this material first appeared in Peter R. Reilly, *Teaching Law Students How to Feel: Using Negotiations Training to Increase Emotional Intelligence*, 21 NEGOTIATION J. 301 (2005) (excerpted in Carrie J. Menkel-Meadow, Andrea Kupfer Schneider, & Lela Porter Love, NEGOTIATION: PROCESSES FOR PROBLEM SOLVING (2006).

[16] CAROLYN SAARNI, THE DEVELOPMENT OF EMOTIONAL COMPETENCE 4, 17, 18-19 tbl.1.3 (1999).

[17] *Id.* at 5 tbl.1.1, 19.

[18] Tibor P. Palfai & Peter Salovey, *The Influence of Depressed and Elated Mood on Deductive and Inductive Reasoning*, 13 IMAGINATION COGNITION & PERSONALITY 57 (1993); Norbert Schwarz, *Feelings as Information: Informational and Motivational Functions of Affective States*, *in* 2 HANDBOOK OF MOTIVATION AND COGNITION 527, 527, 540-44 (E. Tory Higgins & Richard M. Sorrentino eds., 1990).

problem-solving, and creative expression.[19] Specifically, emotional facilitation of thought provides one with the ability to: (1) use emotions to redirect attention to important events; (2) generate emotions that facilitate judgment, memory and decision making; (3) use mood swings as a way to consider, and appreciate, multiple points of view; and (4) use different emotions to encourage creativity and different approaches to problem-solving.[20]

C. Emotional Understanding

The third branch involves understanding emotion. The most fundamental competency at this level is the ability to label emotions (e.g., "annoyance," "irritation," and "rage") and then to deduce the *relationship* among these emotions (e.g., that annoyance and irritation can lead to rage if the offending stimulus is not eliminated).[21] Accordingly, a person who is able to understand the causes of emotions, how emotions blend together, how they transition from one stage to another, and how they progress over time (e.g., how, over time, envy might turn into jealousy), will be able to understand important aspects of interpersonal relationships.[22] In particular, emotional understanding provides one with the ability to: (1) understand relationships among various emotions, (2) perceive the causes and consequences of emotions, (3) understand complex feelings and emotional blends, and (4) understand transitions among emotions.[23]

D. Emotional Management

The fourth branch, emotional management, is sometimes referred to as emotional regulation. Although some believe that mastering this branch of emotional intelligence will allow them to control their emotions or even eliminate the more troublesome emotions, like envy or jealousy, Salovey and Mayer warn that "attempts to minimize or eliminate emotion completely may stifle emotional intelligence."[24] Similarly, Salovey and Mayer suggest that "the regulation of emotion in *other* people is less likely to involve the suppressing of others' emotions but rather the harnessing of them, as when a persuasive speaker is said to 'move' his or her audience."[25] Specifically, emotional management provides one with the ability to: (1) be open to one's feelings, both pleasant and unpleasant; (2) stay aware of, monitor and reflect upon emotions;

---

[19] Schwarz, *supra* note 18, at 540-44; *see also* Jeremy R. Gray, *Integration of Emotion and Cognitive Control*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 46, 46-48 (2004).

[20] Gray, *supra* note 19, at 46-48.

[21] Peter Salovey et al., *Emotional Attention, Clarity, and Repair: Exploring Emotional Intelligence Using the Trait Meta-Mood Scale*, *in* EMOTION DISCLOSURE & HEALTH 125, 126 (James W. Pennebaker ed., 1995).

[22] *Id.*

[23] *Id.*

[24] Peter Salovey, John D. Mayer & David Caruso, *The Positive Psychology of Emotional Intelligence*, *in* HANDBOOK OF POSITIVE PSYCHOLOGY 159, 162 (C.R. Snyder & Shane J. Lopez eds., 2002).

[25] *Id.* (emphasis added).

(3) engage, prolong, or detach from an emotional state; (4) manage emotions in oneself; and (5) manage emotions in others.[26]

III.   FROM FEELINGS TO BEHAVIORS

It is not enough to understand emotions and emotional intelligence through the four branches. The next step is to contemplate how emotions influence actions and behaviors in the context of negotiation. In his book *The Emotions*,[27] Nico Frijda suggests that emotions constitute "action tendencies" to engage in specific forms of behavior: "Emotions, then, can be defined as modes of relational action readiness, either in the form of tendencies to establish, maintain, or disrupt a relationship with the environment or in the form of mode of relational readiness as such."[28] Notably, Roger Fisher, William Ury, and Bruce Patton, in *Getting to Yes*,[29] suggest a similar role played by emotions:

> In a negotiation, particularly in a bitter dispute, feelings may be more important than talk. The parties may be more ready for battle than for cooperatively working out a solution to a common problem. People often come to a negotiation realizing that the stakes are high and feeling threatened. Emotions on one side will generate emotions on the other. Fear may breed anger, and anger, fear. Emotions may quickly bring a negotiation to an impasse or an end.[30]

Accordingly, if one is to control one's emotions (through perception, facilitation, understanding, and management), rather than be controlled *by* them, then one must know when (and when *not*) to express emotions, as well as how much, and in what form. As Aristotle said, "[A]nybody can become angry— that is easy . . . but to be angry with . . . the right person, and to the right amount, and at the right time, and for the right purpose, and in the right way— this is not within everybody's power and is not easy."[31]

In his book *The Deliberative Practitioner: Encouraging Participatory Planning Processes*,[32] John Forester asks how "diverse community members and the planners hoping to work with them can act more effectively in the face of political inequality, racism, turf wars, and the systematic marginalization and

---

[26] Peter Salovey et al., *Coping Intelligently: Emotional Intelligence and the Coping Process*, *in* COPING: THE PSYCHOLOGY OF WHAT WORKS 141, 141-47 (C.R. Snyder ed., 1999). Note that while the skill of reflecting upon and managing one's emotions can be difficult to develop and hone, one researcher suggests that disclosing emotional experiences in writing can assist in the endeavor, as well as lead to improved physical and mental health. *See* James W. Pennebaker, *Confession, Inhibition, and Disease*, 22 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 211, 211 (1989); James W. Pennebaker, *Putting Stress into Words: Health, Linguistic, and Therapeutic Implications*, 31 BEHAV. RES. & THERAPY 539, 539 (1993); James W. Pennebaker, *Writing About Emotional Experiences as a Therapeutic Process*, 9 PSYCHOL. SCI. 162, 162-66 (1997).

[27] NICO H. FRIJDA, THE EMOTIONS (1986).

[28] *Id.* at 71.

[29] ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed. Penguin Books 1991) (1981).

[30] *Id.* at 29.

[31] ARISTOTLE, THE NICOMACHEAN ETHICS 111 (H. Rackham trans., 1926).

[32] JOHN FORESTER, THE DELIBERATIVE PRACTITIONER: ENCOURAGING PARTICIPATORY PLANNING PROCESS (1999).

exclusion of the poor."[33] In the book's "plea for academic 'theorists' to take practice more seriously,"[34] the reader learns of "Allan Isbitz, a planner hired as executive director of a settlement house serving poor white Appalachian and African American communities."[35] Mr. Isbitz envisioned providing a credit program where low-income families could work for six months with a home buying counselor, who could then accompany the family to the bank during the loan application process.[36]

Mr. Isbitz could find only one person who was qualified for the home buying counselor position.[37] That one person was female and African American. States Mr. Isbitz, "The only thing I asked her during the job interview was: Did she mind working in an environment in which a lot of people would be prejudiced against her?"[38] After the candidate said she thought she could do it, Mr. Isbitz states:

> I left it up to good faith after that. In any environment, there are prejudices that people face. But when you start to work one-to-one, when you start really to help people who need help, and do it in a way that is not heavy-handed and maximizes their options for succeeding, the effort is appreciated. I was banking on the fact that the poor communities would appreciate what we were trying to do, even if they didn't in the beginning. A lot of people in fact wouldn't work with us in the beginning. But ultimately, they did. She was good, sensitive, and not overly aggressive. In fact, she was very quiet. In her own quiet way she plugged along, helped every-

---

[33] *Id.* at ix.

[34] *Id.* at 8. Of course, pleas to take practice or experience seriously are not new. Consider the oft-cited words of Justice Holmes that "[t]he life of the law has not been logic: it has been experience." O.W. Holmes, Jr., Book Review, 14 AM. L. REV. 233, 234 (1880) (reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES (1879); *see also* Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 595 (1994) (pointing out "the false dualism of so-called intellectual rigor in legal ideas and 'science' and the presumed 'weakness' of skills training by demonstrating that both theory and skills are 'legal science' and rigorous, and both are also incomplete and partial statements of what a lawyer needs to know"); John C. Kleefeld, *Rethinking 'Like a Lawyer': An Incrementalist's Proposal for First-Year Curriculum Reform*, 53 J. LEGAL EDUC. 254, 255 (2003). Kleefeld suggests the creation of a first-year law course that:

> in an integrated fashion, aims to instill a culture of professional competence and ethics while at the same time laying the foundation for reflective and critical thinking about law. I do not subscribe to the dichotomous view that lawyerly and scholarly competencies are vying concepts; both are important, and the development of one influences and informs development of the other. We need scholarly practitioners; we also need practical scholars. The course I envision—one that would supplement, rather than supplant, doctrinal analysis—aims to nurture both types of competency.

Id.; see Daniel Bowling & David Hoffman, *Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation*, 16 NEGOTIATION J. 5, 24 (2000) (suggesting that the "elusive qualities" of self-awareness, presence, authenticity, congruence, and integration can assist people in becoming better mediators, and that developing the qualities "is a process of time, intention, and discipline, and comes, in our view, not from intellectual inquiry or scholarship but from experience. To paraphrase Oscar Wilde, these are qualities that can be learned but they cannot be taught").

[35] FORESTER, *supra* note 32, at 49 (citation omitted).

[36] *Id.* at 50.

[37] *Id.*

[38] *Id.*

body over the two years, and became a very trusted member of the Appalachian community.[39]

To Forester, the story "suggest[s] skills and sensitivities not well cultivated in our schools."[40] He contends that the counselor's success was not solely related to her competent provision of information about bank practices. In fact, Forester believes the counselor's success also came from emotional qualities:

> [H]er persistence, her sensitivity, and her "not overly" aggressive directness—emotional qualities of attentiveness and responsiveness in practice without which she might well have failed. So [the] story suggests the importance of intellect and emotion, technical competence and affective responsiveness, as complementary if not interpenetrating aspects of practice, required of practitioners whatever their class, race, and gender.[41]

Forester seems to be suggesting that there almost needs to be a melding of emotion, intellect, and action—*all three*—in order to achieve success in sensitive work like that in which the home buying counselor was engaged. This is consistent with Professor Anthony Kronman's argument that to "deliberate well," a task central to all effective lawyering and judging, one must be able "not only to think clearly but to *feel* in certain ways as well."[42] Indeed, asserts Professor Kronman, a "person who shows good judgment in deliberation will thus be marked as much by his affective dispositions as by his intellectual powers, and he will know more than others do because he feels what they cannot."[43] As Forester puts it: "[I]n a world of difference, emotional sensitivity can be a form of moral vision, of moral attentiveness to others. It suggests too that planners lacking emotional range, emotional maturity, and capacity will likely miss a good deal of what lies before them, and they are likely to fail as a result."[44]

Interestingly, John Forester's notion of "emotional sensitivity" is similar to what Professor Carrie Menkel-Meadow calls an "ethic of care."[45] Instilling such an ethic within a person cannot take place overnight. Indeed, the competencies, skill sets, and mind-sets that must be understood and mastered are difficult and subtle. According to Menkel-Meadow, one must "learn to experience 'the other' from the values that the other holds" rather than from one's own values.[46] Furthermore, one must have "a willingness to truly apprehend the reality of the other . . . not just to understand instrumentally how to move, persuade or affect that person, but to understand what meaning the interaction has for that person in a caring and existential sense."[47]

---

[39] *Id.*
[40] *Id.* at 5.
[41] *Id.* at 53-54.
[42] Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 858 (1987) (emphasis added).
[43] *Id.* at 858.
[44] FORESTER, *supra* note 32, at 54 (citation omitted).
[45] Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75, 76 (1994); *see also* Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2665 (1993).
[46] Menkel-Meadow, *supra* note 34, at 620.
[47] *Id.*

One important step in developing "emotional sensitivity" is honing the ability to see other people without making assumptions or judgments and without leaping to (sometimes inaccurate) conclusions. Professor Carl Rogers, who revolutionized psychotherapy with his concept of "client-centered" therapy and is one of the most influential psychologists in American History, called such behavior, "listening with understanding."[48] Rogers, whose ideas will be discussed in greater depth below, suggested more than fifty years ago that the ability to listen with understanding can lead to "improved communication, to greater acceptance of others and by others, and to attitudes which are more positive and more problem-solving in nature."[49] As Rogers puts it:

> If you really understand another person in this way, if you are willing to enter his private world and see the way life appears to him, without any attempt to make evaluative judgments, you run the risk of being changed yourself. You might see it his way, you might find yourself influenced in your attitudes or your personality. This risk of being changed is one of the most frightening prospects most of us can face.[50]

Similar to Carl Rogers, Robert K. Greenleaf, who founded the Center for Applied Ethics and wrote the highly influential 1970 essay, "The Servant as Leader,"[51] emphasizes the monumental importance of listening. Specifically, Greenleaf suggests that "only a true natural servant automatically responds to any problem by listening *first*"[52] and that learning to listen attentively and effectively entails a "long arduous" process of discipline.[53] Additionally, like Rogers, Greenleaf suggests that "true listening" can effectively build strength in the person being heard.[54] In his work on servant leadership, Greenleaf states:

> Most of us at one time or another, some of us a good deal of the time, would really like to communicate, really get through to a significant level of meaning in the hearer's experience. It can be terribly important. The best test of whether we are communicating at this depth is to ask ourselves first: Are we really listening? Are we listening to the one with whom we want to communicate? Is our basic attitude, as we approach the confrontation, one of wanting to understand?[55]

---

[48] CARL R. ROGERS, CLIENT-CENTERED THERAPY: ITS CURRENT PRACTICE, IMPLICATIONS, AND THEORY 348-49, 352-53 (1951); *see generally* HOWARD KIRSCHENBAUM, LIFE AND WORK OF CARL ROGERS (2008).

[49] Carl R. Rogers & F.J. Roethlisberger, *Barriers and Gateways to Communication*, HARV. BUS. REV., July-Aug. 1952, at 46, 49.

[50] CARL R. ROGERS, ON BECOMING A PERSON: A THERAPIST'S VIEW OF PSYCHOTHERAPY 333 (1961).

[51] Greenleaf's thinking on the subject was said to be crystallized after reading Hermann Hesse's short novel *Journey to the East*. For Greenleaf, the central meaning of the story was that a great leader is first a servant to others—that leadership emerges from those whose primary motivation is to help others. Of course, the idea of "leader as servant" goes back much farther; it is even mentioned in the Bible ("Whoever wants to be a great leader must become a servant." *Mark* 10:43.).

[52] ROBERT K. GREENLEAF, SERVANT LEADERSHIP: A JOURNEY INTO THE NATURE OF LEGITIMATE POWER AND GREATNESS 31 (Larry C. Spears ed., 25th anniversary ed. 2002).

[53] *Id.*

[54] *Id.*

[55] *Id.*; *see also* STEPHEN R. COVEY, PRINCIPLE-CENTERED LEADERSHIP 123 (2003) ("Seek first to understand, then to be understood. When we're communicating with another, we

These concepts for controlling emotions and developing "emotional sensitivity" are important behaviors for connecting with others. Other scholars have developed similar strategies for negotiations, focusing on acceptance of others and listening skills.

IV. DEVELOPING EMOTIONAL RANGE, MATURITY, AND SENSITIVITY

So how does one go about building emotional maturity and sensitivity? As in building a home, it must be done one brick at a time. In *Getting Together: Building a Relationship That Gets to Yes*,[56] Roger Fisher and Scott Brown advocate the prescriptive approach of being "unconditionally constructive."[57] Specifically, they want each party to be able to say:

> In any relationship, I want to be able to take steps that will both improve our ability to work together and advance my substantive interests, whether or not you respond as I would like. In short, I am looking for guidelines I can follow that will be both good for the relationship and good for me, *whether or not you follow the same guidelines.*[58]

To this end, Fisher and Brown prescribe the "Unconditionally Constructive Strategy"[59]:

> *(1) "Rationality.* Even if they are acting emotionally, balance emotion with reason."
> *(2) "Understanding.* Even if they misunderstand us, try to understand them."
> *(3) "Communication.* Even if they are not listening, consult them before deciding on matters that affect them."[60]
> *(4) "Reliability.* Even if they are trying to deceive us, neither trust them nor deceive them; be reliable."
> *(5) "Noncoercive modes of influence.* Even if they are trying to coerce us, neither yield to that coercion nor try to coerce them; be open to persuasion and try to persuade them."
> *(6) "Acceptance.* Even if they reject us and our concerns as unworthy of their consideration, accept them as worthy of our consideration, care about them, and be open to learning from them."[61]

However, Fisher and Brown point out that these guidelines are not advice on how to be "good."[62] Rather, the guidelines derive from a "selfish, hardheaded" concern with what each party can do to make relationships work bet-

---

need to give full attention, to be completely present. . . . [U]ntil people feel that you understand them, they will not be open to your influence.").

[56] ROGER FISHER & SCOTT BROWN, GETTING TOGETHER: BUILDING A RELATIONSHIP THAT GETS TO YES (1988).
[57] *Id.* at 24.
[58] *Id.* at 37.
[59] *Id.* at 38.
[60] *See* WILLIAM URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION 56 (1993) ("If the other side is angry or upset, the best thing you can offer is a full hearing of their grievance. Don't interrupt—even if you feel they are wrong or insulting.").
[61] FISHER & BROWN, *supra* note 56, at 38; *see also id.* at 153 ("The Bible tells us, 'Love thine enemy,' but does not suggest that we should approve of his conduct. We should care, show concern, be willing to listen, and be willing to work with him in a problem-solving relationship. We need not turn a blind eye to his bad behavior. But no matter how strongly we disapprove of his behavior, we need not dismiss him as worthless.").
[62] *Id.* at 38.

ter, thereby increasing negotiation effectiveness.[63] Subsequently, they suggest that the strategy will work independent of disagreement,[64] independent of concessions,[65] independent of partisan perceptions,[66] independent of reciprocity,[67] and independent of permanent "sides."[68] Furthermore, Fisher and Brown appear to almost take for granted that an individual who pursues the "Unconditionally Constructive Strategy" will be an emotionally intelligent person who is aware of (even if subconsciously) and can exhibit the four "branches" of emotional intelligence discussed above, including the ability to perceive, express, understand, and manage emotions in the context of dispute resolution.

In advising negotiating parties on the issue of "acceptance," Fisher and Brown implore each side to "[l]ook behind the stereotype"[69] of the other side, and to "[t]reat them as equals."[70] They point to the transformative nature of these behaviors upon the actor; in particular, Fisher and Brown point out that engaging in these behaviors can change and transform the thoughts and behaviors of the person engaging in them:

> Once I begin to pursue an effective relationship *with* you, I am likely to change the way I think *about* you. If I start treating you as a worthy individual, equally entitled to your opinions, I am likely to learn that there are areas where your knowledge and skill are superior to mine and that some of your opinions are clearly worthy of respect. If I try to understand how you see things, I am almost certain to learn that my own perceptions are more subject to bias than I had previously thought. If I behave as though I were more reliable, I am likely to become more conscious of my commitments and more committed to them. If I listen more actively and behave as if I were open to persuasion, I may find, to my surprise, that I am persuaded more often than I would have expected. If I treat you as someone who matters, you will begin to matter to me . . . .
>
> . . . .
>
> . . . Changing the way we behave changes the way we think.[71]

The transformative nature of the interaction that Fisher and Brown describe dovetails nicely with the brilliant and penetrating work of Carl Rogers, introduced earlier. In his landmark book, *On Becoming a Person: A Therapist's View of Psychotherapy*, Rogers asserts that "[t]he whole task of psycho-

---

[63] *Id.*

[64] *Id.* at 36 ("[T]he more serious our disagreements, the more we need a good working relationship to cope with them.").

[65] *Id.* ("Our strategy should neither require us to give in nor demand that others do.").

[66] *Id.* ("We should take into account the extent to which we and they will see things differently.").

[67] *Id.* ("We should not wait for the other side to engage in exemplary behavior, nor should we assume that our example will be followed.").

[68] *Id.* ("Just as a neighbor may become a member of the family, so business adversaries may become joint venturers and former enemies may become military allies.").

[69] *Id.* at 154; *see also id.* at 154-55 ("We organize ideas in mental images and theories that help us interpret events and behavior. To some extent, however, this leads us to see what we expect to see and to interpret what we see according to our assumptions and understanding. Categorizing information in this way simplifies our view of the world and helps us act with confidence. But we may also ignore new ideas and behave in ways that damage our ability to work with others.").

[70] *Id.* at 158.

[71] *Id.* at 167.

therapy is the task of dealing with a failure in communication."[72] Specifically, Rogers hypothesizes "that the major barrier to mutual interpersonal communication is [the tendency for people] to judge, to evaluate, to approve or disapprove, the statement of the other person, or the other group."[73] Furthermore, he argues that the tendency to make evaluations is "heightened in situations where feelings and emotions are deeply involved."[74] Consequently, the stronger the feelings, the less likely there will be a "mutual element" in the communication.[75] In other words, "[t]here will be just two ideas, two feelings, two judgments, missing each other in psychological space."[76]

Subsequently, Rogers offers a prescription to avoid the "evaluative tendency." He calls it, "listening with understanding," which "means to see the expressed idea and attitude from the other person's point of view, to sense how it feels to him, to achieve his frame of reference in regard to the thing he is talking about."[77] Rogers claims that although the prescription may sound "absurdly simple," it is, in fact, not simple and, moreover, it is "the most effective agent we know for altering the basic personality structure of an individual, and improving his relationships and his communications with others."[78] Or as Rogers states:

> If I can listen to what he can tell me, if I can understand how it seems to him, if I can see its personal meaning for him, if I can sense the emotional flavor which it has for him, then I will be releasing potent forces of change in him. If I can really understand . . . his fear of atom bombs, or of Russia—it will be of the greatest help to him in altering those very hatreds and fears, and in establishing realistic and harmonious relationships with the very people and situations toward which he has felt hatred and fear. We know from our research that such empathic understanding—understanding *with* a person, not *about* him—is such an effective approach that it can bring about major changes in personality.[79]

Furthermore, Rogers claims that once one listens to and understands the other's point of view in an empathic manner, one's own comments will have to be "drastically revised," emotion will tend to dissipate from the discussion, differences will be reduced, and those differences that remain will be "of a rational and understandable sort."[80]

Rogers asserts that listening in such a fashion is not more widely used because it requires courage—a quality Rogers believes is not very wide-

---

[72] ROGERS, *supra* note 50, at 330; *see also* Stewart Gabel, *Mediation and Psychotherapy: Two Sides of the Same Coin?*, 19 NEGOTIATION J. 315, 327-328 (2003) (suggesting that, "depending on the individual mediator, the situation, and the case, the approaches of mediation and of psychotherapy appear, at times, to share many resonances and are, in fact, quite close." For example, the "'third party' [in both fields] is expected to be nonjudgmental and neutral. He or she uses a variety of techniques, such as support, good listening and communication skills, and appropriate questioning and clarification to foster the appropriate expression of personal feelings and emotions that are felt important to the process.").
[73] ROGERS, *supra* note 50, at 330.
[74] *Id.* at 331.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 331-32.
[78] *Id.* at 332.
[79] *Id.*
[80] *Id.* at 332-33.

spread.[81] Additionally, he says that "[i]t is just when emotions are strongest that it is most difficult to achieve the frame of reference of the other person or group."[82] Nonetheless, if parties are able to establish such a pattern of communication, Rogers asserts that: they will then "come closer and closer to the objective truth involved in the relationship"; there will be "greater acceptance of others and by others"; attitudes are likely to be "more positive and more problem-solving in nature"; and finally, there will be a decrease in exaggeration, defensiveness,[83] and in evaluative and critical behavior.[84] Moreover, like Fisher and Brown's "Unconditionally Constructive Strategy" to building and maintaining relationships, Rogers states that his "procedure" of empathic understanding can be initiated by any party "without waiting for the other to be ready."[85]

---

[81] *Id.* at 333.

[82] *Id.* at 334.

[83] *Id.* Rogers reports that defensive distortions "drop away with astonishing speed as people find that the only intent is to understand," rather than judge: "The dropping of some defensiveness by one party leads to further dropping of defensiveness by the other party, and truth is thus approached." *Id.* at 336.

[84] *Id.* at 334. Rogers adds the caveat that his findings were drawn from "small groups" and that more research and "creative thinking of a high order" needs to be conducted in order to determine if his prescription could achieve understanding "between larger groups that are geographically remote" or between "groups who are not speaking for themselves, but simply as representatives of others, like the delegates at the United Nations." *Id.* at 334-35; *see* URY, *supra* note 60, at 57 ("People derive genuine satisfaction from voicing their feelings and resentments. . . . Once you have heard the other side out, they will most likely become less reactive, more rational, and more responsive to problem-solving negotiation. It is no coincidence that *effective negotiators listen far more than they talk.*"); *see also* MARY E. CLARK, IN SEARCH OF HUMAN NATURE 365, 367 (2002) (suggesting that there is a "biological necessity" for dialogue and, further, that there is "no substitute for face-to-face dialogue in groups to resolve human conflict." Clark contends such dialogue "must occur at *many levels* between participants; they must meet *in small groups* who get to know each other, and continue meeting over a *long period of time.*"). Clark recounts a group discussion she had involving a Navajo who described how his tribe solved problems:

> Well, he told us, we talk, all of us together, men, women, kids, everybody. How long does it take, we asked? As long as it takes; up to nine days, I've experienced. How long each day? Oh, we don't stop. You mean you go nonstop, for nine days and nights? Yes. The children snooze; people leave briefly to prepare food or relieve themselves; but the talking continues until everyone has had her or his say, in full, and the whole group is now thinking with "one mind."

[85] *Id.* at 365; *see also* Edward M. Hallowell, *The Human Moment at Work*, HARV. BUS. REV. Jan.-Feb. 1999, at 58, 59 (suggesting that the "human moment"—described as "an authentic psychological encounter" requiring one's "physical presence and emotional and intellectual attention"—has "started to disappear from modern life"). Hallowell, an instructor of psychiatry at Harvard Medical School, discusses various advantages of the human moment:

> [P]ositive human-to-human contact reduces the blood levels of the stress hormones epinephrine, norepinephrine, and cortisol.
>   Nature also equips us with hormones that promote trust and bonding: oxytocin and vasopressin. . . . [T]hese hormones are always present to some degree in all of us, but they rise when we feel empathy for another person—in particular when we are meeting with someone face-to-face. It has been shown that these bonding hormones are at suppressed levels when people are physically separate, which is one of the reasons that it is easier to deal harshly with someone via e-mail than in person. Furthermore, scientists hypothesize that in-person contact stimulates two important neurotransmitters: dopamine, which enhances attention and pleasure, and serotonin, which reduces fear and worry.

Clearly, then, there is not a single path to developing and harnessing emotional range, maturity, and sensitivity. Scholars have fleshed out two paths (the "unconditionally constructive" and "listening with understanding" strategies) that are similar in approach, and there are surely other paths as well. But a core component of both paths is that the first party can engage in the negotiation process (1) whether or not the second party responds as the first party would like,[86] and (2) without even waiting for the second party to be ready to begin the process.[87] Implementing either strategy will improve the ability of the parties to work together and to advance their respective substantive interests.

V. EMOTIONAL CONTAGION

It is not enough to fully understand one's *own* emotions in the context of negotiation, or to fully understand *others'* emotions in the context of negotiation. This is because it turns out that, during negotiations, emotions can spread similar to a disease in a process known as "emotional contagion."[88] Emotions researcher Daniel Goleman and his colleagues, concluding that emotions can spread between individuals "like electricity through wires," explain that the reason for this:

> lies in what scientists call the open-loop nature of the brain's limbic system, our emotional center. A closed-loop system is self-regulating, whereas an open-loop system depends on external sources to manage itself. In other words, we rely on connections with other people to determine our moods. . . .
>
> . . . .
>
> Scientists describe the open loop as "interpersonal limbic regulation"; one person transmits signals that can alter hormone levels, cardiovascular functions, sleep rhythms, even immune functions, inside the body of another. That's how couples are able to trigger surges of oxytocin in each other's brains, creating a pleasant, affectionate feeling. But in all aspects of social life, our physiologies intermingle. Our limbic system's open-loop design lets other people change our very physiology and hence, our emotions.[89]

Id. at 63.

ROGERS, *supra* note 50, at 336. Rogers says the "procedure" can also be initiated by a "neutral third person," providing the neutral can gain cooperation from one of the parties. *Id.*

[86] FISHER & BROWN, *supra* note 56, at 37.

[87] ROGERS, *supra* note 50, at 336.

[88] Caruso et al., *Emotional Intelligence and Emotional Leadership, supra* note 13, at 64.

[89] Daniel Goleman et al., *Primal Leadership: The Hidden Drive of Great Performance, in* HARVARD BUSINESS REVIEW ON BREAKTHROUGH LEADERSHIP 25, 31-32 (2001). The authors report that "scientists have captured the attunement of emotions in the laboratory by measuring the physiology—such as heart rate—of two people sharing a good conversation. As the interaction begins, the bodies of the two people operate at different rhythms. However, fifteen minutes into the conversation, "the physiological profiles of their bodies look remarkably similar." The authors recount studies where "even completely nonverbal expressiveness can affect other people." In one such study, three strangers sat facing one another in complete silence; after facing each other for one or two minutes, it was found that the most emotionally expressive of the three transmitted his or her mood to the other two. *Id.* at 32.

Although "[e]motional contagion can enhance group cooperation and reduce group conflict,"[90] there is evidence that it can also do the opposite: people "catch" negative emotions as well as positive emotions. For example, when people talk to depressed people, they feel sad and anxious themselves.[91] In fact, one study found that in seventy work teams across diverse industries, people in meetings together ended up sharing the same mood (in some cases good moods, in some cases bad) within two hours after the meeting started.[92] As Goleman and his colleagues state, groups, "like individuals, ride emotional roller coasters, sharing everything from jealousy to angst to euphoria."[93] Interestingly, one investigator suggests that when managers have positive moods, it increases employee work performance.[94] Thus, the ability to regulate one's own emotions—a hallmark of emotional intelligence—is one of the skills that enables leaders to arrive at, and maintain, such beneficial moods.

The implications for negotiations are obvious: if one's mood and emotions can impact the mood and emotions of the other parties, then one should be mindful (and possibly strategic) concerning which emotions he or she displays during the negotiation. While there will likely be times when one wants to spread a "positive" mood and tone, there also might be times when a party desires to spread a negative mood and tone within a negotiation, perhaps even with the specific goal of coming to an impasse.

In the book *Destructive Emotions: A Scientific Dialogue with the Dalai Lama*,[95] emotions researcher Paul Ekman devises an experiment with two American university professors and a Tibetan monk named Lama Öser.[96] In this experiment, Öser had two discussions on issues that he and the person with whom he talked had fundamental disagreement.[97] "As they talked, their physiology would be measured to assess the impact of the disagreement."[98]

Öser's discussion partners were both scientists (and both professors) "dedicated to a rationalist view, and the topics were chosen to ensure disagreement: whether one should abandon science and become a monk . . . and reincarnation."[99] The first professor was described as "easygoing," whereas the second was described as someone with "an aggressive, rather confrontational style of disputation."[100] The book describes the two interactions as follows:

[90] Caruso et al., *Emotional Intelligence and Emotional Leadership*, supra note 13, at 64.

[91] Mary J. Howes, Jack E. Hokanson & David A. Loewenstein, *Induction of Depressive Affect After Prolonged Exposure to a Mildly Depressed Individual*, 49 J. PERSONALITY & SOC. PSYCHOL. 1110, 1110-13 (1985).

[92] Caroline A. Bartel & Richard Saavedra, *The Collective Construction of Work Group Moods*, 45 ADMIN. SCI. Q. 197, 209-15 (2000).

[93] Goleman et al., *supra* note 89, at 33.

[94] Jennifer M. George, *Leader Positive Mood and Group Performance: The Case of Customer Service*, 25 J. APPLIED SOC. PSYCHOL. 778, 787-88 (1995).

[95] DANIEL GOLEMAN, DESTRUCTIVE EMOTIONS—HOW CAN WE OVERCOME THEM? A SCIENTIFIC DIALOGUE WITH THE DALAI LAMA (2003).

[96] *Id.* at 3. Öser is described as a "European-born convert to Buddhism [who] has trained as a Tibetan monk in the Himalayas for more than three decades, including many years at the side of one of Tibet's greatest spiritual masters." *Id.*

[97] *Id.* at 17.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 17-18.

While the easygoing professor discussed his differences of opinion with Öser, the two were smiling, keeping eye contact, and speaking fluidly. In fact, they had such a good time exploring their disagreements that they did not want to stop.

But, said Ekman, "that was not the case with the difficult person." From the start the physiological measures of the difficult man showed high emotional arousal. Yet over the course of their fifteen-minute dispute, his arousal decreased, as talking with Öser quieted him. At the end of their talk, the typically disputatious sparring partner spontaneously volunteered, "I couldn't be confrontational. I was always met with reason and smiles; it's overwhelming. I felt something—like a shadow or an aura—and I couldn't be aggressive."[101]

Notably, Professor Ekman suggests that such a result is exactly what he had hoped might occur: that when one interacts with someone who does not return aggression or who returns aggression with loving-kindness, then it is very difficult to remain in a confrontational, aggressive mode, and, in fact, one might slowly transform his or her behavior to a style that is more open and cooperative.[102]

VI. FROM THEORY TO BEHAVIOR

As discussed above, a variety of theories and techniques have been developed to foster human relationships and connections. But how can students of mediation, law, and negotiation be trained to have increased "emotional sensitivity" or an "ethic of care"? And how can they be trained to "truly apprehend the reality of the other" and experience others from *their* values rather than from the students' own values? Scholars and practitioners have provided some answers.

In the late fall of 1928, Mary Parker Follett delivered an address at Boston University entitled *The Teacher-Student Relation* in which she argued that "[t]rue education lives in the . . . quickening of imagination, the widening of sympathy, the training of emotion."[103] Moreover, she states:

> I believe that our emotions have as legitimate an influence on our life as our thinking, but they also need the right kind of cultivating. Someone has said, "Think of a book or a symphony. It is an hour for us, but a lifetime for the author." This is not true. Our *appreciation* of a book or symphony depends not on an hour, but on our lifetime too.[104]

Furthermore, Follett states that the "aim" of education is "not to teach subjects merely, but to *develop personality*, build character and to teach men and women to live fruitfully with other men and women."[105] Additionally, Follett lectures of her:

> profound belief that man is not willfully evil so much as deeply ignorant of *how* to live with his fellows. Our teaching should be such that in after years, on Boards of Directors, at a conference with employees, at an international conference, on a civic

---

[101] *Id.* at 18.
[102] *Id.*
[103] Mary Parker Follett, *The Teacher-Student Relation*, 15 ADMIN. SCI. Q. 137, 146 (1970). This address was delivered at Boston University in late fall 1928 but was not published until 1970.
[104] *Id.* (emphasis added).
[105] *Id.* at 141 (emphasis added).

committee, on a jury, at a consultation of doctors—wherever in fact two men come together—each will have the means at his command for making the occasion give its maximum yield. If we can teach this, our students will have learned something of far greater social value than merely a subject.[106]

In 1955, Harvard Law School Dean Erwin Griswold called upon the bar and the legal academy to recognize the need for human relations training in law school.[107] Specifically, Griswold said that such training could help lawyers better understand the emotional needs of both themselves and their clients; moreover, Griswold suggested that the average lawyer spends far more time interacting with *people* than reading and arguing appellate cases.[108] Although the last three decades have witnessed a marked increase in the number and variety of law school courses offered in interviewing, counseling, mediation, and negotiation, (as well as the number and variety of case books available to assist teaching those subject areas),[109] I would nevertheless argue that far more needs to be done in this area. Moreover, I would suggest Professor Guthrie's assessment from nearly a decade ago still rings true today: "Lawyers are analytically oriented, emotionally and interpersonally underdeveloped, and as adversarial as the legal system within which they operate."[110]

---

[106] *Id.* at 143.

[107] Griswold, *supra* note 2, at 201.

[108] *Id.* at 202-04. Specifically, the Dean stated:

[L]awyers constantly deal with people. They deal with people far more than they do with appellate courts. They deal with clients; they deal with witnesses; they deal with persons against whom demands are made; they carry on negotiations; they are constantly endeavoring to come to agreements of one sort or another with people, to persuade people, sometimes when they are very reluctant to be persuaded. Lawyers are constantly dealing with people who are under stress or strain of one sort or another.

Id. at 203.

[109] *See, e.g.*, DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (2d ed. 2004); EDWARD BRUNET & CHARLES B. CRAVER, ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE CASES AND MATERIALS (2001); STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES (5th ed. 2007); G. NICHOLAS HERMAN, JEAN M. CARY & JOSEPH E. KENNEDY, LEGAL COUNSELING AND NEGOTIATING: A PRACTICAL APPROACH (2001); RUSSELL KOROBKIN, NEGOTIATION: THEORY AND STRATEGY (2d ed. 2009); CARRIE J. MENKEL-MEADOW, LELA PORTER LOVE, ANDREA KUPFER SCHNEIDER & JEAN R. STERNLIGHT, DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL (2005); LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS (1987); E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, ALTERNATIVE DISPUTE RESOLUTION: STRATEGIES FOR LAW AND BUSINESS (1996).

[110] Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 162-63 (2001). Professor Guthrie suggests that the "personalities and predispositions" of lawyers present both advantages and disadvantages in conducting a mediation practice: "Lawyers . . . are likely to skillfully exercise 'judgment, criticism, tough-mindedness, and practicality,' but to the detriment of the imagination, creativity, and 'generation of options and breakthrough ideas' necessary in facilitative mediation." *Id.* at 163 (footnotes omitted); *see also* Robert Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 611 (1973) (suggesting that in law school, "[i]magination and creativity, supreme achievements by most educational standards, seemed to have been demoted in favor of attaining legal tools, vocabulary, and skills of analysis"); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1394

Professor Carrie Menkel-Meadow has written and lectured extensively in articulating her "problem-solving" approach to legal issues. She has also worked with other legal educators[111] to develop a curriculum that can, in the words of former Attorney General Janet Reno, "create a problem-solving . . . and . . . peacemaking capacity in all . . . lawyers."[112] Professor Menkel-Meadow states that such training "would not eliminate the case method, which teaches both inductive and deductive forms of legal reasoning, but would add instruction, as so many schools do already, in counseling, interviewing, case valuation (quantitative skills in statistics and economics), negotiation, planning, meeting facilitation, mediation, decision making, and leadership."[113] According to Menkel-Meadow, "[l]egal analysis is a necessary, but not sufficient condition of good problem solving";[114] one needs both law and "a lot of other knowledge to solve problems and structure transactions."[115] Moreover, says Menkel-Meadow, problem-solving lawyers must "learn to be more effective interpersonally" as they learn to work in a more collaborative fashion.[116]

(1997) (suggesting that lawyers' unemotional, rational personalities "might explain why lawyers and their clients at times have trouble interacting with and relating to each other").

[111] *See* Center for Public Resources Commission on Problem Solving and Legal Education (funded by the Open Society Institute); Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 915 n.37 (2000).

[112] Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5, 5 (1999).

[113] Menkel-Meadow, *supra* note 111, at 915. Professor Menkel-Meadow states that "many think the business schools are already doing a better job of this than law schools, with several major business schools now requiring negotiation courses of all of their students." *Id.* Menkel-Meadow reports that when she taught negotiation using complex transactional and business disputes, where the business school students played the role of "client" and the law school students played the role of "lawyer," the "business students were far more creative in solutions to problems, including creating joint ventures, buy-outs, contingency planning, and shared financial risk solutions to complex problems." She suggested that "[b]usiness students seem[ed] better prepared to deal with dynamic, constantly-changing situations, perhaps because their case method is so much more contextual than that of law schools." *Id.* (As an aside, I have come to the same conclusion from teaching a negotiation seminar to law students. Students in my classes that have studied business in undergraduate or graduate school programs prior to entering law school have a superior ability to deal with dynamic situations, and the gap between their performance and that of other students is usually not closed during the semester-long course.) *See also* Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 82-83 (2002) ("[L]awyers who engage in such processes as neutrals will require training in meeting management and facilitation. Also important is a degree of knowledge regarding the sociology and psychology of group behavior, as well as economics, political science, the psychology of strategic voting, negotiation, mediation, bargaining behaviors, and decision science.") (footnotes omitted).

[114] Menkel-Meadow, *supra* note 111, at 912.

[115] *Id.* at 917. Menkel-Meadow suggests that "[l]awyers must learn to think of themselves in terms of experts in problem solving who draw on a wide range of disciplines"—a task that is clearly "analytic, rigorous, intellectual, interdisciplinary, and certainly more than doctrinal learning." *Id.*; *see also* Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 526-27 (2008).

[116] Menkel-Meadow, *supra* note 111, at 918. Menkel-Meadow states: "The emphasis on argument, debate, issue spotting, moot courts, and trials does, I think, encourage a culture of acrimony, or as author Deborah Tannen calls it, 'The Argument Culture.'" *Id.*

Given that today's law students become tomorrow's practicing lawyers, I believe the nation's law schools should work more diligently to: (1) moderate students' analytic orientation, (2) soften students' tendency toward being adversarial, and (3) fill in gaps when their students demonstrate shortfalls in the areas of emotional or interpersonal skills or "intelligence." I have argued previously, and I argue again today, that those who organize and run law schools should consider developing an "emotional skills training" program within their respective schools.[117] The program, which could be implemented as part of a school's "core" curriculum, would make inroads into solving all three of the above-mentioned problems. Specifically, such a program would help students learn how to *identify* emotion (i.e., give them the ability to recognize how they themselves feel, as well as how others feel, in different contexts and situations); how to *generate* emotion and then harness its power for increased abilities in the areas of reasoning and creativity; how to *understand* emotion (i.e., give them the ability to understand people's emotions, what causes them, and how they change); and how to *manage* emotion (i.e., give them the ability to harness the power of emotions in order to make effective decisions and choices). Part of the curriculum, as outlined in general form by Professor Paul Ekman,[118] should include the following:

(1) Teaching students "to be more sensitive to the subtle signs of emotions in others, in their faces, their voices, and posture."[119] Professor Ekman suggests that techniques are already known on how to effectively teach this, that it is "very learnable," and that "anybody can become quite good at it in a couple of hours."[120]

(2) Training people in the "internal sensation of emotion, so that they become more aware when emotions are beginning." Emotions feel quite different from each other physically, and people could be educated about these bodily sensations.[121] Ekman states that this is a "kind of self-awareness."[122]

(3) Training people in how to deal with emotional conflict. The key would be to provide professionally-trained "coaches" who can help people better understand the process of conflict resolution and help them practice new ways of handling it.[123]

---

[117] *See generally* Reilly, *supra* note 15, at 301-14.

[118] GOLEMAN, *supra* note 95, at 226-27. Professor Ekman, who is emeritus professor of psychology and former director of the Human Interaction Laboratory at the University of California Medical School in San Francisco, was a contributor to this book, which was based on "Mind and Life VIII," a cross-cultural dialogue sponsored by the Mind and Life Institute. The dialogue took place in Dharamsala, India, in March 2000, and brought together the Dalai Lama and other Buddhist scholars with Western scholars, scientists and philosophers. *Id.* at 390.

[119] *Id.* at 226.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] Ekman suggested the training could be based on the model first developed by the late Professor Norman Kagan called Interpersonal Process Recall. *See generally* Norman Kagan, *Influencing Human Interaction—Eighteen Years with Interpersonal Process Recall, in* PSYCHOTHERAPY SUPERVISION: THEORY, RESEARCH, AND PRACTICE (Allen K. Hess, Kathryn D. Hess & Tanya H. Hess eds., 2d ed. 2008). Ekman explains how the process might work:

This training in emotions, I suggest, is necessary to give law students a greater capacity, or any capacity at all, to *connect* with their clients—to see, hear, and understand their clients completely, thoroughly, with focus and intention. This is necessary to form a relationship of trust,[124] cooperation, and collaboration, which, in turn, is necessary to effectively—or even adequately—represent a client through litigation, mediation, facilitation, negotiation, or any other legal or quasi-legal process.[125]

Moreover, I believe this kind of training in emotions will expand the ability of future lawyers to solve the increasingly complex (and increasingly multinational and multi-party) problems in both the public and private spheres. And as problems become more complex, it is clear that, correspondingly, models of conflict resolution and negotiation will need to be developed for business and civic leaders[126] that "go beyond the 'rational'"[127] and into what Professors Jon

---

You take two people—often a husband and wife, but any two people who are already engaged with each other, who care about each other. You videotape them while they try to settle a conflict. After they have settled this conflict and come to a single agreement—that's the goal—then each of them sits with an interlocutor, someone who goes over the videotape and asks them to unpack and talk about the feelings they were having that they didn't say: the responses to the other person, what was going on when they felt they were losing control. This is done with each person separately. Then they're brought back to have the conversation again.

GOLEMAN, *supra* note 95, at 226-27; *see also* Robert C. Bordone, *Teaching Interpersonal Skills for Negotiation and for Life*, 16 NEGOTIATION J. 377 (2000). Bordone outlines an innovative exercise used by students enrolled in the Negotiation Workshop at Harvard Law School. The exercise uses role plays, videotaping, and certain aspects of psychodrama to help students practice interpersonal skills, such as saying "no" to a supervisor or parent. *Id.* at 377, 379. The exercise is said to help participants "become more aware of their own current interpersonal behavior and responses and how others might see them." *Id.* at 379.

[124] *See* CLARK, *supra* note 84, at 370 ("Trust is based on feelings, not on rational calculation, which in fact invites mistrust . . . .").

[125] *See* Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319, 343 (2003) ("The focus on 'relationships' in negotiation and conflict resolution has long been with us. . . . Recently, those in the international field have even come to adopt the full psychological terms of family therapy and mediation to note the importance of creating, sustaining, and working on 'relationships.'"); Sara Cobb, *Dialogue and the Practice of Law and Spiritual Values: Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice*, 28 FORDHAM URB. L.J. 1017, 1018 (2001) (suggesting that within conflict resolution processes such as mediation and facilitation there exists a "relational space" in which the "emergence of morality itself" can take place; indeed, concludes Cobb, "there lurks the presence of a relational process that defies our explanations as practitioners."); DEBORAH M. KOLB & JUDITH WILLIAMS, THE SHADOW NEGOTIATION 166 (2000) ("In dismissing emotional messages or frowning on them, we miss out on important ways in which people communicate. We cut ourselves off from valuable insights into someone's experience. That information is useful, of course, but something else can happen when people share emotional reactions. Emotions reveal a person in a new dimension. When we reciprocate, the exchange can build a sense of connection.").

[126] Institutions of higher education, and especially law schools, periodically pronounce that their highest aim and calling is to produce "leaders" to make the world a better place. *See, e.g.*, Candace Cooper, *Dedication to Dean Scott H. Bice*, 73 S. CAL. L. REV. 201, 202 (2000) ("The purpose of a law school . . . is not to build edifices, accumulate endowments or generate alumni support. It is to educate and train students in the law and create future leaders."). And when Lawrence Summers assumed the presidency of Harvard University in 2001, he stated: "In this new century, nothing will matter more than the education of future leaders." Harvard's "Statement of Values," published in August 2002, states that the univer-

Elster and Carrie Menkel-Meadow have called the "emotional, passionate, or spiritual (or religious) realms, which are not captured in game theoretic pictures of conflict resolution, and which seem ever more relevant to current conflicts."[128] Interestingly, both scholars and practitioners of "leadership" report that one of the most important components of effective leadership is "awareness of self and others,"[129] which emotional training directly and indirectly teaches.[130]

Mary Parker Follett once wrote that "[c]oncepts can never be presented to me merely, they must be knitted into the structure of my being, and this can be done only through my own activity."[131] Follett's remark captures the essence of "experiential learning," whose overriding principle is that some people learn more effectively by doing, by participating, by being actively involved in the learning process.[132] As a teacher of mediation and negotiation, I have come to

---

sity "aspires . . . to prepare individuals for life, work, and leadership." *See* Barbara Kellerman, *Leadership: Warts and All*, HARV. BUS. REV., Jan. 2004, at 40, 43.

[127] Menkel-Meadow, *supra* note 125, at 343.

[128] *Id.*; *see generally* JON ELSTER, ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS (1999); CARRIE MENKEL-MEADOW, DISPUTE PROCESSING AND CONFLICT RESOLUTION: THEORY, PRACTICE, AND POLICY xiv-xv (2003).

[129] Andrea Jung, CEO of Avon Products, states: "Of all a leader's competencies, emotional and otherwise, self-awareness is the most important. Without it, you can't identify the impact you have on others." Howard Book, Professor of psychiatry at the University of Toronto states that:

> Self-awareness is the key emotional intelligence skill behind good leadership. It's often thought of as the ability to know how you're feeling and why, and the impact your feelings have on your behavior. But it also involves a capacity to monitor and control those strong but subliminal biases that all of us harbor and that can skew our decision making.

And William George, former CEO of Medtronic states that:

> Authentic leadership begins with self-awareness, or knowing yourself deeply. Self-awareness is not a trait you are born with but a capacity you develop throughout your lifetime. It's your understanding of your strengths and weaknesses, your purpose in life, your values and motivations, and how and why you respond to situations in a particular way. It requires a great deal of introspection and the ability to internalize feedback from others.

Leading by Feel, HARV. BUS. REV. Jan. 2004, at 31, 31-35; *see also* Coutu, *supra* note 6, at 71 (Kets de Vries, the Raoul de Vitry d'Avaucourt Chaired Professor of Leadership Development at Insead in Fontainebleau, France, and the director of Insead's Global Leadership Center, states during the interview that "healthy leaders are very talented in self-observation and self-analysis; the best leaders are highly motivated to spend time on self-reflection.").

[130] Note that even if "emotional training" were to become a required part of a student's "core" training in law school, it need not resemble a traditional forty-plus-hour course such as property, contracts, civil procedure, or torts. There are numerous other possible models. For example, perhaps the first course at any law school in the country to apply human relations training to law was taught by Professor Howard Sacks at Northwestern Law School during the 1957-58 school year. The course, entitled "Professional Relations," was offered without credit and was given (in eight classes lasting two hours each) over the span of two weeks. Professor Sacks expressed the hope that other law teachers would join in his experiment, both in offering stand-alone courses such as Professional Relations and in integrating human relations training into the regular curriculum. Howard R. Sacks, *Human-Relations Training for Law Students and Lawyers*, 11 J. LEGAL EDUC. 316, 317, 321-22, 343 (1959).

[131] Davis, *supra* note 8, at 17.

[132] *See generally* Jennifer A. Moon, A HANDBOOK OF REFLECTIVE AND EXPERIENTIAL LEARNING: THEORY AND PRACTICE 121-26 (2007); Stephen J. Meyer, Shelley H. Billig & Linda Hofschire, *The Impact of K-12 School-Based Service Learning on Academic Achievement and Student Engagement in Michigan*, *in* NEW PERSPECTIVES IN SERVICE-LEARNING:

believe that some of the most important and fundamental concepts and principles of mediation and negotiation must be *experienced* by the students—must be felt, emotionally, by the mind and body together in addition to being understood, analytically, by the mind alone. Experiential learning can help pave the way for information to be "knitted into the structure" of a student's being—for a student to incorporate the material at the "motor level"[133] so it can be called forth and exhibited in future communication and negotiation behaviors.[134]

A useful tool in beginning to teach students of mediation, law, and negotiation how to listen *first* and how to "listen with understanding" is the "Ladder of Inference," a "mental model"[135] first developed by Professor Christopher Argyris.[136] After a brief discussion of the Ladder, below, I present two brief exercises that I believe illustrate practical applications of the Ladder. The Ladder is a useful tool in helping people think about how and why they might erroneously leap to certain conclusions, how they can become more aware of both *self* and *others*, and how they can work to become more broad-minded and open-minded in their daily lives and decision-making processes. Developing and mastering these skills is a fundamental step toward learning how to "listen with understanding," to interact with "emotional sensitivity," and to treat other human beings with an "ethic of care."

VII. THE LADDER OF INFERENCE

The "Ladder of Inference" model explores how people *think* (meaning the specific processes and actions involved in analytical thought) and why people sometimes have a tendency to leap (up the Ladder of Inference) to inaccurate

---

RESEARCH TO ADVANCE THE FIELD 61 (Marshall Welch & Shelley H. Billig eds., 2004). In this article, the authors discuss the role of "engagement" in student learning, strategies to increase engagement, and research indicating that students' interest in various subjects can decline due to the lack of active learning experiences. *Id.* at 63-64, 78-79, 82.

[133] Davis, *supra* note 8, at 17.

[134] *See generally* Reilly, *supra* note 15, at 301-14. The roots of experiential learning can be traced back to John Dewey, Jean Piaget, and even Alexis de Tocqueville, all of whom believed that "learning occurs best when students are actively involved in their own learning and when the learning has a distinct purpose." Shelley H. Billig, *Research on K-12 School-Based Service-Learning: The Evidence Builds*, 81 PHI DELTA KAPPAN 658, 659 (2000); *see generally* Robert G. Bringle, *Enhancing Theory-Based Research on Service-Learning*, *in* DECONSTRUCTING SERVICE-LEARNING: RESEARCH EXPLORING CONTEXT, PARTICIPATION, AND IMPACTS (Shelley H. Billig & Janet Eyler eds., 2002).

[135] I borrow the term "mental model" from Peter Senge, who defines such models as "deeply ingrained assumptions, generalizations, or even pictures or images that influence how we understand the world and how we take action." PETER M. SENGE, THE FIFTH DISCIPLINE: THE ART & PRACTICE OF THE LEARNING ORGANIZATION 8 (1990).

[136] *See generally* CHRIS ARGYRIS, ROBERT PUTNAM & DIANA McLAIN SMITH, ACTION SCIENCE 57 (1985) [hereinafter ARGYRIS ET AL., ACTION SCIENCE]; CHRIS ARGYRIS, FLAWED ADVICE AND THE MANAGEMENT TRAP: HOW MANAGERS CAN KNOW WHEN THEY'RE GETTING GOOD ADVICE AND WHEN THEY'RE NOT 196 (2000) [hereinafter ARGYRIS, FLAWED ADVICE AND THE MANAGEMENT TRAP]; CHRIS ARGYRIS, KNOWLEDGE FOR ACTION: A GUIDE TO OVERCOMING BARRIERS TO ORGANIZATIONAL CHANGE 57 (1993) [hereinafter ARGYRIS, KNOWLEDGE FOR ACTION]; CHRIS ARGYRIS, REASONING, LEARNING, AND ACTION: INDIVIDUAL AND ORGANIZATIONAL 171 (1982) [hereinafter ARGYRIS, REASONING, LEARNING, AND ACTION]; and Chris Argyris, *Teaching Smart People How to Learn*, HARV. BUS. REV., May-June 1991, at 99, 103.

conclusions—conclusions that can interfere with productive communication and peaceable human relations.[137] This model is a powerful tool that can reduce interpersonal conflict and misunderstandings at every stage of the communication process.[138]

The Ladder of Inference is but a symbol or metaphor representing the *process* by which people typically arrive at their conclusions—the analytical "path" they travel, usually unconsciously and quite speedily, in reaching their conclusions in a given matter.[139] The reader might imagine a ladder emanating from a pool of water. The ladder has three rungs above water level. The pool of water represents all possible "data" in the universe—meaning all information and facts, both observable and unobservable.[140] The first rung of the ladder, located just above water level, represents the subset of data that is *selected* by a person from the pool of all possible data.[141] The second rung of the ladder represents how the data, once selected, is *interpreted* by the person who selected it.[142] Finally, the third rung represents the *conclusions* that are drawn by the person from the entire process.[143] At each stage of the process of climbing the ladder (from selecting data, to interpreting it, to drawing conclusions), people are influenced by various factors, including: past experiences, assumptions, values, beliefs, feelings and emotions, and the context of the particular situation.[144]

To illustrate, the following is a hypothetical example of how quickly one can climb the Ladder of Inference. Imagine a man named Bob playing his violin in a solo recital. He looks at the audience and notices that everyone is riveted to his playing except for his sister, Jenn, who is staring into space. Bob says to himself, "Jenn is bored out of her mind. I bet she thinks I'm not advanced enough to play this complicated piece—that I'm an incompetent musician." After the recital, Bob says to Jenn, "If my playing is so bad that it bores you, then stop coming to my recitals—I don't like wasting your time."

In this scenario, Bob *selected* a specific piece of observable data: Jenn's staring into space. Then Bob *interpreted* that data to mean that "Jenn is bored out of her mind." Consequently, Bob then *concludes* that Jenn thinks he's an "incompetent" musician who plays recital pieces beyond his musical abilities.

But there could have been a different outcome—or assessment—at each rung of the ladder. First, if Bob had looked at Jenn moments earlier or moments later than he did, he would have observed that Jenn was focused intently upon him and his violin. Therefore, by glancing at Jenn more often or

---

[137] ARGYRIS, REASONING, LEARNING, AND ACTION, *supra* note 136, at 470-71.
[138] *Id.*
[139] *Id.* at 468-74; *see* Peggy Simcic Bronn & Carl Bronn, *A Reflective Stakeholder Approach: Co-orientation as a Basis for Communication and Learning*, 7 J. COMM. MGMT. 291, 294-95 (2003).
[140] ARGYRIS, FLAWED ADVICE AND THE MANAGEMENT TRAP, *supra* note 136, at 197; ARGYRIS, REASONING, LEARNING, AND ACTION, *supra* note 136, at 468-74.
[141] ARGYRIS, REASONING, LEARNING, AND ACTION, *supra* note 136, at 172, 468-74.
[142] *Id.*
[143] *Id.*
[144] *Id.*; *see generally* ARGYRIS ET AL., ACTION SCIENCE, *supra* note 136; ARGYRIS, FLAWED ADVICE AND THE MANAGEMENT TRAP, *supra* note 136; ARGYRIS, KNOWLEDGE FOR ACTION, *supra* note 136.

for a longer period of time, Bob could have enlarged his pool of data before making a selection from it. Moreover, there are numerous—perhaps countless—possible interpretations of the "data" analyzed by Bob (i.e., Jenn's staring into space). One interpretation is the one actually formulated by Bob—that Jenn is bored. A second possible interpretation is that Jenn's staring into space was a trance or dreamlike state induced by the music, where Jenn is intently concentrating on the music even though she *appears* distracted. A third possible interpretation is that Jenn's mind simply wandered and, while she liked the music well enough, her immediate attention was far removed from the recital at hand. (Of course, there would be any number of other possible interpretations of the data.)[145]

In other words, conclusions can sometimes remain largely untested—which is perhaps why experts in the field of organizational learning have called the Ladder of Inference "a common mental pathway of increasing abstraction, often leading to misguided beliefs."[146] As one commentator puts it:

> It all seems so reasonable, and it happens so quickly, that I'm not even aware I've done it. Moreover, all the rungs of the ladder take place in my head. The only parts visible to anyone else are the directly observable data at the bottom, and my own decision to take action at the top. The rest of the trip, the ladder where I spend most of my time, is unseen, unquestioned, not considered fit for discussion, and enormously abstract. (These leaps up the ladder are sometimes called "leaps of abstraction.")[147]

Professor Argyris suggests that when people arrive at the top rung of the ladder (or the "conclusions"), these conclusions, even when they are inaccurate, can become solidified as general beliefs about the world.[148] And these beliefs, in turn, can influence present and future actions, including what data will be selected (or ignored) in the future, how that data will be interpreted, and what conclusions will be drawn from those interpretations.[149]

A. Applying the Ladder

As a professor, I have taught conflict resolution skills to a broad range of students, from high school students, to college and graduate school students, to students within senior executive education programs for working professionals. I have asked these students to think of times when they, or someone else, climbed the Ladder of Inference in a manner that led to an inaccurate conclusion.

One high school student, a Hispanic female, recalled a time when she and her boyfriend babysat for a small child by taking the child on a day trip to the zoo. She said that throughout the afternoon, total strangers made comments suggesting they assumed she and her boyfriend were the child's parents. While

---

[145] *See generally* ARGYRIS ET AL., ACTION SCIENCE, *supra* note 136; ARGYRIS, FLAWED ADVICE AND THE MANAGEMENT TRAP, *supra* note 136; ARGYRIS, KNOWLEDGE FOR ACTION, *supra* note 136; ARGYRIS, REASONING, LEARNING, AND ACTION, *supra* note 136.

[146] SENGE, *supra* note 135, at 243.

[147] *Id.* at 244.

[148] *Id.* at 244.

[149] PETER SENGE ET AL., SCHOOLS THAT LEARN: A FIFTH DISCIPLINE FIELDBOOK FOR EDUCATORS, PARENTS, AND EVERYONE WHO CARES ABOUT EDUCATION 70 (2000).

she understood how easily this assumption (or conclusion) could be made, she said she felt extremely uncomfortable each time it happened.

Another student, an African American male who was in law school, said he felt uncomfortable shopping at a particular clothing store because he would be watched closely, or even physically trailed, by store clerks or security staff. The student said these individuals assumed (or concluded) that if he wasn't watched closely, he would steal, and this made him feel humiliated and angry.[150]

Finally, a student in one of my executive training programs, a high-level officer in a national non-profit organization, reported being approached by a homeless man who said he wanted to examine the executive's expensive leather dress shoes. The executive, savvy to the ways of big city streets, instantly assumed it was a ploy to delay him long enough to ask for money. As it turned out, however, the homeless man proceeded to squat down near the executive's feet, to admire the dress shoes adoringly, and to explain that before he became homeless due to addiction issues, he was a craftsman of fine leather shoes. The homeless man wistfully explained how and why the composition and construction of the shoes were of a high quality he had not seen in years. Then the homeless man quickly walked away, without asking for money.

Most of my students, no matter their age, occupation, or life experience, report they are quite surprised how often they or other people have leapt to conclusions that were (sometimes grossly) inaccurate. As a result of learning about the "Ladder of Inference," the students now had a better understanding of why such "leaps of abstraction" occurred, and how they could be prevented. In particular, the students learned the leaps were less likely to occur if they could train themselves to remain, for as long as possible, at the *bottom two rungs* of the Ladder of Inference. Staying on the bottom rungs requires that: (1) they assemble the most complete and comprehensive pool of data possible—from as many sources as possible, even from competing or conflicting sources; (2) they select the most significant, relevant, and reliable pieces of data from the pool; and (3) they interpret the data carefully and accurately before moving to the third and final "rung" of making conclusions. Essentially, the aim is to teach students how to *slow down* their thinking process, at least temporarily, thereby realizing there are specific tasks that need to occur at each rung of the ladder, and then to provide sufficient time to successfully execute each task before moving on to the next.

---

[150] Moments like this provide excellent opportunities for instructors to further illuminate the ubiquity with which Ladders of Inference pervade everyday communications. For instance, after the student relates the example of feeling targeted while shopping, the instructor might ask, "Why do you think you were targeted?" If the student responds, "Because I'm African American," the instructor might say, "Could it have been for another reason? Could it be that the store targets all *young males* for extra surveillance? Or all *teenagers*, irrespective of gender or race? Or could it be due to a case of mistaken identity—that you were targeted because you closely resemble a specific individual who shoplifted from that store in the past?" The instructor can convey that, in any communication between two or more people, everyone involved is likely climbing a Ladder of Inference at any given moment. Therefore, any party involved in the conversation could, at any time, be making false assumptions or arriving at inaccurate conclusions—and, furthermore, this could be taking place at many different times throughout the conversation or communication process.

B. Exercises

1. Close Your Eyes: A Thought Experiment

The following is an exercise in which you, the reader, can participate and upon which you can reflect. When I am in class, I instruct students to close their eyes and use their imaginations as I read the following paragraph to them:

> You are driving around in a town far away from where you live. You accidentally crash your car into the side of a building. Unbeknownst to you, the President of the United States is delivering a speech inside the building. Within moments, your car is surrounded by Secret Service vehicles. Because they believe you might be trying to harm the President, you are quickly wrestled from the car and whisked to a local jail. You are sitting on your bed in a jail-issued orange jumpsuit. You don't have a lawyer in the area, so one has been provided for you. That lawyer has stopped by the jail for a quick consultation. Your appointed lawyer is now walking down the corridor, directly toward your cell. Look closely at your lawyer—this person might make it possible for you to go home tonight and sleep in your own bed! Look at your lawyer's eyes. Now look at your lawyer's hands. Notice every detail of the hands. Now open your eyes.

As the reader, *please take thirty seconds now to close your eyes and envision the scenario you just read.* (Be mindful, if you will, of the fact that I am attempting to incorporate experiential learning techniques into this Article. Your experience, and learning, will be far more fruitful if you indulge me and play along with these instructions.)

Now let me as ask you, the reader, the following question: What was the race and gender of your imaginary attorney?

In my seven years of teaching mediation and negotiation classes, it has been my experience that, in a given group of twenty students, typically two or three students will raise their hands to indicate their "imaginary lawyer" was either female, or a person of color, or both. When I inquire as to why this is the case—why so few students see a picture of a female or minority lawyer in their "mind's eye"—the students typically report that they associate the word "lawyer" with a person who is white and male.

The Ladder of Inference can again be a useful metaphor in helping to explain how each student arrived at a particular picture of a lawyer in his or her imagination. As the instructor, I might ask the students, "How is having a particular image pop into one's mind similar to climbing the Ladder of Inference?" Or, "If this thought experiment were conducted again, is it possible to slow down one's thinking process—or slightly alter one's usual thinking process—to the point where one could envision an entire *pool* of lawyers that is much more diverse in terms of age, gender, race, etc., before one selects a *particular* lawyer from that pool to represent him or her?" A productive discussion can ensue regarding *how* and *why* images of a particular race or gender leap to one's mind when thinking of the word "lawyer."

2. Girl, Age 15: A Second Thought Experiment

In class, I will write on the board, in quotes, the following statement: "Girl, Age 15, to Marry Next Week." I tell the students this is a newspaper headline and I will provide no additional information whatsoever. Furthermore, I ask the students not to speak with each other during this portion of the

exercise. I direct the students to write down their immediate reaction to reading the headline—i.e., "What popped into your heads when you first read this headline?" After thirty seconds, I call on each student for his or her reaction.

Again, mindful reader, please take thirty seconds to write down the words, ideas, or reactions that you have to this particular headline in the newspaper.

In the past, some of the student reactions have included the following: "She is pregnant," "the guy is older," "she has her parent's permission," "she lives in a foreign country," "this is part of her religion," "she is totally crazy," and "she doesn't love the guy." Finally I tell the students the gist of the article, so they can assess whether their immediate thoughts were relevant to what was actually being discussed in the article. Here is the gist of the article: the young girl, who lives in America, is expected to die within six months from a long-standing disease and she wants to marry her boyfriend of several years so she can experience a wedding celebration with her friends and loved ones.

I explain that all the suggested scenarios listed by the class members make up a possible "pool of data." They all represent a scenario that *could potentially* explain the headline—but, of course, one would have to read the newspaper article to discover the truth, or what actually transpired (assuming the story is accurately reported). One could also ask the class members, "If a similar thought experiment were conducted, using a different headline, would you now be interested in trying to think up a *long list* of possible scenarios, just to expand the possible 'pool of data' and increase the chance that one of your scenarios turns out to be what transpired in real life?" The idea is to suggest to students that it takes time, patience, and creativity to stay at the bottom rungs of the Ladder of Inference—where pools of data, as well as the various means to interpret the data, are generated.

These two exercises are similar in that they underscore the notion that people, as they interact and communicate with other people, are constantly traveling up their respective Ladders of Inference. The students now have a mental model that helps them visualize exactly what is happening during the communication process. The model helps decrease their likelihood of leaping to inaccurate conclusions or making false assumptions that might needlessly interfere with effective communication and creative problem solving.

The approaches and exercises above can help educators teach law students how to translate Professor Riskin's theory of mindfulness into actual behavior—thereby bringing that theory to the "motor level." It is clear that more needs to be done to include these somewhat subtle but nonetheless crucial kinds of communication skills within mainstream law school curricula.[151] Once this is done, it is more likely that mindfulness will be incorporated into the actual practice and behaviors of both law students and lawyers.

VIII. CONCLUSION

The ability to truly listen to people without making assumptions and judgments—and without leaping to conclusions—is a skill that bolsters the effec-

---

[151] *See generally* Harriet N. Katz, *Evaluating the Skills Curriculum: Challenges and Opportunities for Law Schools*, 59 MERCER L. REV. 909, 909-11 (2008).

tiveness not only of mediating, negotiating, and practicing law with mindfulness, but of human interaction more broadly. It is a skill set and mind set that can be practiced and strengthened daily and, when mastered, can become ingrained into students' and lawyers' thought processes, finally becoming transferred to (or "knitted into") the "motor level" where it can become not merely a way of thinking, but also a way of *being* and interacting in the world, both personally and professionally. Ultimately, developing these competencies can fundamentally increase a person's ability to "listen with understanding" and "truly apprehend the reality of the other"—to listen to, understand, empathize with, and care for *others* while resolving disputes in a more effective manner.