

Lie Detection and the Negotiation Within

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PROLOGUE: THREE NEGOTIATIONS WITHIN AND WITHOUT

Consider first three tales and the negotiations within as I tried to understand the unspoken¹ thoughts and feelings of others: a student who might kill himself; a negotiation with a dean over my salary offer; a student who cries. As you'd expect, I've changed names and certain identifying details.

Prologue One: The Suicidal Student

Depression is epidemic among students, and for many years, I share information in class with students about this.² In this particular

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1. I use “unspoken” rather than “hidden” or “unconscious” deliberately. “Hidden” suggests others make some deliberate decision to conceal their thoughts or emotions. Instead, others may simply be unaware of their thoughts or emotions. In addition, what I treat as “their thoughts” or “their emotions” are useful to me mostly as they affect how I interact with them. It is not necessary that they be accurate or “true” so long as my estimations of their thoughts and their emotions help predict their behavior and help us reach agreement that serves the relevant interests. (What’s relevant depends on whether you’re concerned with yourself, with a party you represent, etc.) Unconscious also doesn’t capture my approach because it, too, implies that there is some actual thought or emotion there that is somehow knowable. Unconscious also annoys me because it is associated at least in part with the smug, manipulative techniques of psychoanalysis.

2. See generally, e.g., William Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079 (1990) (one study found lawyers to have the highest rate of major depressive disorder among 104 occupational groups); Susan Diacoff, *Lawyer Know Thyself: A Review of Empirical Research on*

year, I handed out information on signs of suicide. I also spoke of the depression that killed my mother and haunted me many times in my life. Many e-mailed me about how much the information helped. Weeks later, one student asked me to lunch. I expected him to talk about classes or jobs, but he eventually said he wanted to discuss “the other thing.” He noticed the handout emphasized changes—changes in weight, changes in interest. He hadn’t noticed any changes. *But*. “I’ve always felt kind of low,” he went on.

As I replayed the conversation in my head late at night, I remembered he added, “And I wonder if life is worth living.” How had I not picked up on that? Was he thinking of killing himself? When? Should I call him now, in the middle of the night? Wouldn’t that seem creepy? I replayed the images from the conversation. Nothing. But it was the dog that didn’t bark, as Sherlock Holmes taught. I couldn’t recall any signs of distress on his face. I e-mailed him in the morning and spoke to him in class. He said he meant the comment in an existential way—what is the point of life? Eventually, he got medical help, and he later organized a sports outing for people in our large class. Years later, he looked better and happy—even without a job! As I write this, I’m not happy with the story. It turned out fine, but it wasn’t clear it would. I wish I had picked up on his language and said something right away. As it turns out, by the way, Paul Ekman, one of the foremost scholars on lie detection, began some of his early research looking for signs of suicidal potential among patients who said they were fine.³

Attorney Attributes Bearing on Professionalism, 46 AM. U. L. REV. 1337, 1378 (1997); Clark Freshman, Adele Hayes & Greg Feldman, *Efficient Emotion: How Emotions Affect First Year Law Grades, Negotiation Performance, and Mental Health* (May 24, 2010) (unpublished manuscript, on file with author) (empirical study finding high rates of symptoms of depression among law students).

3. Paul Ekman’s own mother committed suicide when he was an early teen. Interview with Paul Ekman, Professor of Psychology, Emeritus, Univ. of Cal., S.F., Sch. of Med., & Clark Freshman, Professor of Law, Univ. of Cal., Hastings College of Law, Univ. of Cal., Hastings College of Law Center for Negotiation & Dispute Resolution Symposium: Lie to Me?! How Emotions Matter in Negotiation (Oct. 22, 2010). Predicting suicide remains one of the areas of research with the system of facial coding that Paul developed. Michael Heller & Véronique Haynal, *Depression and Suicide Faces*, in WHAT THE FACE REVEALS 496 (Paul Ekman & Erika L. Rosenberg eds., 2d ed. 2005).

Prologue Two: The Salary Negotiation

It was a classic example of what we all think of as a negotiation: The dean had to give me an offer. (I say “had to” because I can’t be sure if he really wanted me to come, could care less, cared a little He said he was pleased, but was he lying?) A key point was salary. That always matters, and it mattered a lot then. I had some interest in the job, but my biggest interest was getting an offer that I could use to persuade my own dean and other potential schools to offer me more money.⁴ A key point was salary: the dean insisted that I was being paid “as much as nearly anyone we’ve got.” I looked at him carefully as he spoke. I noticed no movement of his body. I listened. Voice the same calm drone I’d heard many times. Language the same folksy words many liked. Face barely moved. I noticed some flowers, and we talked about that. And I looked and listened. No change. Somewhat later, I asked again about how he considered the “pay” and how it might include other items like “summer salary” or “grants” or “bonuses”—was that all part of the equality? He talked, and I looked and listened again. Nothing. I brought up fundraising, and how he found that. I expected a bit of animation—I imagined some deans loved it, and some . . . not so much. Still no change.

I’d almost given up. I mentioned salary one last time. Oops! I dropped my pen. As I bent to pick it up, there it was. *His leg was shaking*. I pushed back a bit from the table and kept listening. Everything else was still the same. I continued to watch him. This time he changed the topic to my thoughts about moving.

Soon enough we were at the door. We were shaking goodbye. I looked him in the eye and said, “Thanks so much for your time. I know you have lots to do. I’m definitely interested, but I couldn’t even think about other issues unless we were ten percent higher on the salary.” *Done*, he said quickly, pumped my hand, and the door closed. *Damn*, I thought, *I could have gone for twenty*.

4. From a competitive perspective, this is leverage. See, e.g., G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATIONS STRATEGIES FOR REASONABLE PEOPLE* 101-13 (2d ed. 2006). From a cooperative, problem-solving, win-win or similar perspective, this might be an “objective criterion.” See, e.g., ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 81-91 (2d ed. 1992).

Prologue Three: The Crying Student

Pat came into my office nearly every week of Civil Procedure. She showed me what she'd written in her outline of the week. It was almost always very complete. Sometimes she asked questions. That week was different. I noticed marked distress cross her face in a fraction of a second. Distress is one of the most reliable facial expressions. It is very hard to fake since it involves pushing up only the inner eyebrows.⁵ Darwin first discovered it, and Paul Ekman documented how it was a universal emotion among people from many different cultures. As we talked about some difficult technical doctrine, I saw it several times. But it wasn't the doctrine. She was getting it right. And I complimented her. Finally, after seeing the distress several more times, I said, "You know, you're doing great. But, you know, it's so funny how many first-year students get distressed this time of the semester."

She burst out crying. After a while, she "confessed" that she'd just been diagnosed with attention deficit disorder and feared she was not fit for law school.

Footnote: I witnessed a similar event recently. This time, we were on break from my law school class on emotion, lie detection, and negotiation. I was rushing to the bathroom. From the side, I thought I saw distress on one of my happiest students. She was a "repeat customer" from two other negotiation classes, and I knew her usual demeanor. But I wasn't sure it was distress from the side – it's only recently that Paul Ekman and others developed training tools to recognize emotions from the side. I crouched down and said, "How is everything?"

She thrust her cell phone at me. Her boyfriend had just broken up with her by text!

How have you judged me so far? Or rather: be mindful *how* you have judged "me" so far.⁶ If you're human, we know you probably form lasting judgments from first impressions. And, if you're a

5. PAUL EKMAN & WALLACE V. FRIESEN, UNMASKING THE FACE 148 (2003) ("The fear brow/forehead configuration may never be shown by some people. Although many people show it when they are actually afraid, it is difficult to simulate, because it is not easy to make voluntarily.")

6. For a perspective on the ubiquity of judgments from a meditative perspective, see JOSEPH GOLDSTEIN, INSIGHT MEDITATION: THE PRACTICE OF FREEDOM (2003).

psychologist, you know this as the recency effect, one of the predictable ways that the way nearly all of us think differs from the way rational economists posit.⁷ If you're one of the truth wizards—one of the sixty or so people out of over 30,000 judged best at detecting deception—then you're probably thinking something else.⁸ You may be thinking: he could be X or he could be Y. I'm not sure yet. And that was just one of the negotiations within about writing about the negotiation within: do I start by writing about an example of compassion, such as the suicidal student, or with one about, as one famous negotiation book puts it, bargaining for advantage? (Of course, I could also commit to negotiation as most do, just by "spontaneity" or "authenticity" and choose whatever story most came to mind.⁹ That might feel great at the time. But it's also not especially "authentic" —whether I have in mind the example of compassion or competition might depend, for me, on what I'd been doing just before I wrote. If I were meditating on friendship for my dog, I would likely lean to compassion. If I were reviewing my financial planning, I might lean to competition.)

I'd invite you now to commit to the Wizard Way. This is the Wizard Way because it is typical of the way many of those very best at lie detection think. Suspend your judgment as best you can. If you even remember much of what I say, no doubt someday you'll conclude some of it was utterly foolish, or worse. But I suspect some of you will also find it opens up your eyes, ears, and mind to a new way of approaching the world, a world better informed by truth. Beware the tendency, so entrenched in law, to make all-or-nothing assessments, such as "Freshman really gets it," or "Freshman

doesn't have a clue." This is the danger of what my friends Dan Shapiro and Roger Fisher call status spillover, the tendency to let your respect for someone's expertise in one realm spill over into your assessment of her knowledge in another.¹⁰ (Beware even that last

7. See, e.g., MAX H. BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING 18-19 (7th ed. 2008) (recency effect is tendency to give disproportionate weight to recent events).

8. See generally Paul Ekman, Maureen O'Sullivan & Mark G. Frank, *A Few Can Catch a Liar*, 3 PSYCHOL. SCI. 10 (1999) (describing how only tiny number of people do better than chance at detecting lies); Interview with Maureen O'Sullivan (June 2007) (those who do well at lie detection often go back and forth between several hypotheses). In contrast, most people simply look at information to confirm what they think they already know. See, e.g., BAZERMAN, *supra* note 8.

9. On authenticity and spontaneity, see generally BRAD BLANTON, RADICAL HONESTY: HOW TO TRANSFORM YOUR LIFE BY TELLING THE TRUTH (2005).

10. See ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 108 (2006) (using "status spillover" to describe the "constant risk

sentence and the use of “she”—does it mean I’m a feminist or sensitive to editors?¹¹ That I’m a feminist and worthy of trust or a feminist and hopelessly deluded?)

As you must now realize, I spend a lot of time wondering what people are thinking and feeling, when they’re lying, and mostly, how to dodge lies, uncover truth, and make deals. This worries people sometimes. That’s not too bad because people may tell the truth more when they think I’ll figure it out anyway. But the view of lie detection, emotional awareness and negotiation often is a wrong one. And that *is* bad: people think dodging lies, uncovering truth, and making deals is some combination of unpleasant, overwhelming, and evil. It makes people worry about negotiation, and worry itself is a bad thing. It also is too bad because people who worry feel bad, and people who feel bad often make worse deals—not just for themselves, but for everyone around them.¹²

If you want to master dodging lies and making deals, you need to understand several types of negotiations within. First, there is the set of negotiations over how one pays attention to clues to emotion and lies. Recall my focus not just on what the dean said in my salary negotiation but his voice itself, his face, his language patterns, his upper body and, of course, his tell-tale leg. Second, there is the negotiation over how one engages with other parties—often a negotiation within between such parts of you that want to share whatever you see (the spontaneous self) and the more restrained parts

that the opinions of a person who has high social status, either socially or in some substantive area, will be given undeserved weight on a subject to which their status is irrelevant”).

11. See, e.g., Clark Freshman, *Re-visioning the Dependency Crisis and the Negotiator’s Dilemma: Reflections on the Sexual Family and the Mother-Child Dyad*, 22 LAW & SOC. INQUIRY 97, 98 (1997) (reviewing MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995)) (discussing how feminist Martha Fineman described him as a Mother for taking care of his own mother when she was older and ill).

12. See, e.g., Joseph P. Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies*, 74 J. PERS. & SOC. PSYCHOL. 565, 570 (1998) (those induced to be sad did less well at negotiation for themselves). For a review of the effects of even very mild changes in emotion on success from both expanding the pie and dividing the pie perspectives, and for the potential differences in application to lawyers, see Clark Freshman, Adele Hayes & Greg Feldman, *The Lawyer-Negotiator as Mood Scientist: What We Know and Don’t Know About How Mood Relates to Successful Negotiation*, 2002 J. DISP. RESOL. 1, 12-14 (2002). For an empirical study of the effect on law student negotiations, see Freshman, Hayes & Feldman, *supra* note 3 (showing that self-reported rates of negative emotion were associated with less success at negotiation by law students).

of yourself. Third, whether you engage another or not, there is the negotiation within over how you interpret what you see (was the dean lying?) and how you act (I asked for more). As with much you've read about other negotiation approaches, the negotiations within may take place in different orders.¹³ When you see some soft spot, it may seem the first question is how to interpret it. What do I make of the dean's leg moving? Other times it may be to decide how to engage with another person in order to help with the interpretation. If you think someone is feeling something, you might just ask, as I did with my "suicidal" student. Even the first step of how you pay attention may arise again and again. Once I notice that someone does something suspicious, like the dean's leg, I may want to pay closer attention—closer attention perhaps just to one set of clues, like his legs, or even closer attention to other clues.

THE BASIC MODEL OF EMOTIONAL AWARENESS AND LIE DETECTION

To get "my" model of negotiation within, it helps to understand my sense of negotiation, emotion, and lie detection a bit more generally. I say "my" a bit sheepishly. I owe a huge debt to many wonderful teachers, so I don't want to suggest my approach is entirely original or a tribute to my own abilities to master such a daunting subject through my own special merit.¹⁴ I owe special thanks to Paul Ekman, now most famous perhaps as the inspiration for television's *Lie to Me* and its scientific advisor. I've taught material he developed to Homeland Security, and I've used his published research as one of the major

13. On other nonlinear cycles in negotiation, see, e.g., the circle chart for brainstorming in *Getting To Yes*, where people may go from general interests, such as financial security, to specific options, such as summer salary and research money, back to other general interests, such as making a difference in the world or a sense of importance. FISHER, URY & PATTON, *supra* note 5.

14. Again, the writing raises a series of negotiations within. The scare quotes around "my" could easily suggest my sympathy with the idea of non-self, associated with Buddhism and perhaps other spiritual traditions. It is tempting just to leave that in: many Buddhist and Buddhist admirers might read about an issue like "negotiation within" and feel good that I "get it." But that doesn't make me comfortable. After years of interest in meditation, I have come to appreciate the benefits of mindfulness and practices like loving-kindness meditation. But I am not a big fan of much of the other ideas that often get taught by Buddhist teachers. See Clark Freshman, *Yes, and: Core Concerns, Internal Mindfulness, and External Mindfulness for Emotional Balance, Lie Detection, and Successful Negotiation*, 10 NEV. L.J. 365, 385 (2010) (appreciating meditation techniques developed by others and popularized by Buddhist teachers but rejecting prohibitions against intoxicants as historical artifact).

starting points for my own writing and teaching.¹⁵ I do say “my” because the mix does reflect something of my own mix of research, technical observations, and as will become clear by the end, ethical and moral values about the role of the negotiator, the scholar of negotiation, and the teacher of negotiation. And I therefore don’t want to implicate those who were kind enough to share their expertise with the burden of what I now write, teach, and otherwise do. I imagine each of you has your own approach to these topics that you could rightfully and accurately call yours.

Let me share two bits of background. First, consider below what steps one might take to dodge lies and make better deals. Next consider in a bit more detail why I think those steps matter.

Here are the basic steps. Before a negotiation begins, I consider various emotional and information goals. Usually, I try to pick an appropriate emotional environment. Most of the time, people get better results when they have more positive emotion and less negative emotion. (In some instances, negative emotion may work better, and I occasionally choose environments and media that I know may risk—or even foster—negative emotion, such as e-mail.) That positive set-up is also key to dodging lies and getting at the truth.

That’s because of the second step of looking for *soft spots*. I define “soft spots” as signs of emotion and/or heightened thinking and/or deception. Paul Ekman speaks of “hot spots,” and that’s the language we used to train security officials with Homeland Security and other agencies.¹⁶ But “hot spots” connotes the kind of jumpiness and wariness you’d want in security officials. “Soft spots,” in contrast, suggests the range of responses that the negotiator and lawyer has. Apropos of therapeutic jurisprudence, soft spots can be a chance for empathy or compassion. Or, as with the dean in my salary negotiation, they can be a chance to press for advantage. From research, I know

15. I say “starting points” for a number of reasons. At a very superficial level, we sometimes disagree about language: Ekman prefers to note certain clues to deception as “hot spots” and I, for reasons described here, describe them instead as soft spots. See Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot*, 4 PSYCHOL. PUB. POL’Y & L. 901, 903 (1998). At a deeper level, he has sometimes expressed published suspicion that his methods do not apply well either to negotiation or law. See Clark Freshman, *After Basic Mindfulness Meditation: External Mindfulness, Emotional Truthfulness, and Lie Detection in Dispute Resolution*, 2006 J. DISP. RESOL. 511, 520 (2006) (describing disagreement with Ekman over negotiation). I, on the other hand, have found a variety of ways in which they are helpful, some of which are described here.

16. See generally note 15, *supra*.

the most reliable soft spots involve very fast changes in the face that reveal concealed emotions.¹⁷ The distressed students, for example, both showed signs of agony in the way that their eyebrows drew together and the inner eyebrows pushed up, forming a kind of horseshoe patterns. When these emotions are concealed, consciously or automatically, they often appear as fast as one-thirtieth of a second.

Step three *often* involves interpreting soft spots. When I see a soft spot, I generally know that there is an emotion there because it fits with one of the seven universal facial expressions of emotion. But there's much I don't know. I don't know how long it will last. And I don't know why it's there. Some research suggests that, when people lie, they show microexpressions of emotion seventy percent of the time. But people show microexpressions of emotions for many other reasons. That brings us back to step one. If I haven't set up a calm enough environment, I may see fear simply because the person isn't comfortable. I therefore have far less of an idea whether they are lying or just uncomfortable.

I say step three *often* involves interpretation for several reasons. Sometimes the emotion itself tells me enough. If I'm interviewing someone to sit with my dog, and I see anger, I can stop there. I don't want anger around my dog. (Others may disagree. They might view "anger" as a "normal" part of life, sometimes even appropriate.)¹⁸ A strong negative emotion may tell me that the time is simply not ripe for creative problem-solving, and I may just move to a different topic or take a break.

Step four involves action. Often steps three and four cycle back and forth. In order to interpret someone's anger, I "act" by forming a hypothesis. For example, when I get contempt or anger as I'm explaining a most favored nations clause, I might hypothesize the person either won't agree to such a clause *or* doesn't understand it. So I might *act* by saying something. The response would then help me

17. See generally PAUL EKMAN, *TELLING LIES* (3d ed. 2002) (comparing various types of clues to deception and concluding that facial clues are the most reliable).

18. Some go so far as to suggest that emotions should not be seen as negative or positive in general but as helpful or less helpful in particular contexts. See DALAI LAMA & PAUL EKMAN, *EMOTIONAL AWARENESS: OVERCOMING THE OBSTACLES TO PSYCHOLOGICAL BALANCE AND COMPASSION* 17-29 (Paul Ekman ed., 2008). There is a lot of sentimentality and romanticism about negative emotions such as anger, but I am not aware of systematic research that suggests anyone can manage to use anger to their advantage, let alone to the advantage of those around them, in the long run. See Freshman, *supra* note 15, at 373 n.42 (suggesting one is no more likely to know when to deploy anger in the long-run than to pick winning stocks in the long-run).

form a clearer interpretation. This in turn would help me act differently. If I couldn't get the clause, I would consider my alternative deals. If this deal looked attractive, I might then consider different arguments for the clause, check out the deal further, or press on other points.

Often there's a final compliance check. I want to make sure the person leaves with the impression I want, usually meaning a sense that our deal or our interaction is fair. That is often strategic in part. I know many people drag their feet on deals or just break them.¹⁹ In wrapping up, I will often summarize how well the deal has gone. For example, with less sophisticated negotiators, I will note how we may have moved towards the middle. "We started far apart. I wanted you to pay me \$15,000, and you wanted \$90,000. We ended up at about \$35,000, and that's in the middle, but a bit closer to where you started." I don't try this with more sophisticated parties since they know "meeting in the middle" is just arbitrary given that the starting points are often arbitrary.

My fairness concern is also partly a feature of my own preferences, needs, or interests. I care about others, and sometimes their joy is partly my joy, and their sorrow is partly mine as well. The idea that I only care about my physical body is particularly Western and particularly twentieth-century male.²⁰ When my partner says he doesn't mind doing the dishes everyday if I just manage the taxes, I really do want to know that this feels okay to him. It helps that our therapist and he both say they find washing dishes therapeutic—and I don't see any signs of deception from either.

Now let's consider these four steps in the context of my broader take on emotion and negotiation. If I were watching you read this, I'd have another negotiation within by now. If I saw you were agreeing earlier, or at least not showing negative emotion, then I might very well skip this "deeper" or "broader" explanation. It's enough to know how to manage emotion and detect lies without having to know why it

19. See, e.g., Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 L. & SOC'Y REV. 323, 324 (1995) (surveying studies that parties are more likely to comply with agreements they reach in mediation than with those ordered by courts).

20. On the feminist perspective, see, e.g., FINEMAN, *supra* note 12 (feminists may say that society should subsidize the metaphorical "mother" who cares for others, whether a biological mother or a child who cares for an ill parent). For the idea that particular characteristics of masculinity, like certainty and toughness, are only historical, see, e.g., Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1713-14 (1989-90).

matters. And there's the chance some of you who liked the mechanical steps may feel less enthused about my broader take—or might just find it less well-written! But here goes.

Consider what I suggest you do, and then consider below why I think this will be a very good payoff. By very good payoff, I don't mean you will, as one rather overselling author put it, "you'll never be lied to again." Nor do I mean that you'll get everything that you want, or even everything you "need." Rather, I offer the kind of modest promise that Vanguard and other passive funds offer their investors. Remember Vanguard doesn't claim you do better every year. They say, and they're right: they just claim investing in one of their broad, passive funds rather than trusting the next Warren Buffett wannabe or even the ever-aging Warren Buffett himself, is more likely to yield higher returns based on past performance.²¹ They just say that you'll be better off overall in most instances.²² In a parallel way, if you follow the emotional awareness and lie detection model I teach, most of you will do better over the course of all your negotiations. Neither Vanguard nor I are right for every play or every player. After all, some research suggests that those investing in local businesses will do better than the local market. And, with emotional awareness and lie detection, some of you will be hopeless in a technical sense. Not many—even those with autism and schizophrenia can improve.²³ And some of you may find it too messy along the way, perhaps being flooded by all of the emotions you become aware of. One student told me, after I taught a version of nonverbal recognition of emotion: "You may notice I show a lot of contempt." I was expecting him to say, "I was thinking of someone else." But instead they said, "I feel that way about a lot of people."

Apart from these four steps to dodging lies, there are also many reasons to be aware of emotions themselves. Indeed, I often teach "lie detection" as "emotional truth." Awareness of emotion is core to negotiation. This is true from several different perspectives or, to use a

21. For a recent update of the classic claim that active investors rarely beat passive investors over the long term and that few can pick stocks that "beat the market," see BURTON G. MALKIEL, *A RANDOM WALK DOWN WALL STREET: THE TIME-TESTED STRATEGY FOR SUCCESSFUL INVESTING (COMPLETELY REVISED AND UPDATED)* (2007).

22. *Investing Truths*, VANGUARD, <https://personal.vanguard.com/us/insights/investingtruths> (last visited Feb. 22, 2011).

23. For the best summary of the success in training people in emotion recognition and lie detection, see Mark G. Frank et al., *Improving the Ability to Recognize Micro Expressions of Emotion* (2008) (unpublished manuscript, on file with author).

useful but sometimes overused word, “paradigms.” When we’re feeling competitive, emotion matters because even small changes in emotion seem to track significant changes in outcome.²⁴ When we’re feeling like “solving a problem” or “creating value,” emotion matters because that’s easier when there is more happiness and pleasant emotion and harder when there is more anger or other generally unpleasant or negative emotion. In most cases, then, we want to be aware of the emotions of others so we can try to increase positive emotion and decrease negative emotion. (We might also try to correct for the effects of less than ideal emotion even if we can’t change it.)

Awareness of emotion matters in letting us prioritize our “arguments” or “benchmarks,” when we’re feeling competitive, or our “principles” and “objective criteria” and “needs,” when we’re feeling more collaborative, or principled, or problem-solving. In almost every interaction, we have multiple justifications for why someone might act in a certain way. Think of all the reasons why you might imagine you want, say, the right to take time off from work. Really think! Can you be sure which would work with a given decisionmaker? For me, I might have said: “to recharge my batteries”; “to work on a book”; “to develop a new class”; “to do empirical research.” But the reason I gave, which was entirely true, was that my sister had been diagnosed with cancer, and she was the only other survivor of our nuclear family. I needed to be there for her. It was authentic, and it worked in my particular context with a dean who had lost a sibling. But imagine other contexts where other arguments might not work. Would a man really feel comfortable saying that “I want to help raise my child” to another party, or perhaps a complete stranger? With some decisionmakers the answer is yes, and with others, no.²⁵

This prioritizing goes far beyond a particular concrete “negotiation.” As Lax and Sebenius note, we often make the mistake of focusing solely on tactics, like the amount of our offer, in buying a particular product.²⁶ Instead, our “negotiation” may include a long

24. See generally note 12, *supra*.

25. In this specific instance, one’s comfort level might depend on whether the listening party thought it was right for a man to take care of someone else. See Freshman, *supra* note 12. For the general idea that we must tailor our pitch to the way someone with the power to help us sees the world, see, e.g., G. RICHARD SHELL & MARIO MOUSSA, *THE ART OF WOO: USING STRATEGIC PERSUASION TO SELL YOUR IDEAS* 115 (2007) (suggesting we “tune to the other person’s channel”).

26. DAVID A. LAX & JAMES K. SEBENIUS, *3D NEGOTIATION: POWERFUL TOOLS TO CHANGE THE GAME IN YOUR MOST IMPORTANT DEALS* 10 (2006).

“set-up” and design of potential deals.²⁷ This kind of set-up may include recognizing which decisionmakers seem to respond nonverbally to which kinds of arguments and values.

Finally, of course, you might reject my four steps and the cold language of “lie detection” and connect better with the seemingly softer ideas of “emotion” or “fuller sense of truth” or “emotional truth.” Notice I say “fuller sense of truth.” This partly means that we get a sense of factual information. With videotaped real estate negotiations at Harvard Business School, Professor Michael Wheeler and I learned signs when people were “lying” about having another offer for a property.

But “fuller sense of truth” often involves learning about the complex and shifting thoughts and feelings that any of us may have at any given moment. Freud once famously remarked, “Dogs love their friends and bite their enemies, quite unlike people, who are incapable of pure love and always have to mix love and hate in their object relations.”²⁸

Often this kind of knowledge of the complexity of human emotion is unsettling. Consider Barack Obama. During the heated primary campaign, a video of Obama reveals him “giving her the finger” seemingly unconsciously while he speaks.²⁹ Yet he appointed Hillary Clinton to be Secretary of State, and one might find evidence that he has some respect for her as a person, her technical abilities, or even both, or perhaps that he changed his mind.

Or maybe not: maybe there are still only negative feelings since people do business with those they don’t like for many reasons. It was not just Mario Puzo’s *Godfather* who thought, “Keep your friends close, and your enemies closer.” Consider the response of Secretary of Defense Robert M. Gates to fears that leaks of rather unflattering cables by U.S. diplomats would hurt the United States:

Now, I’ve heard the impact of these releases on our foreign policy described as a melt-down, as a game-changer, and so on. I think those descriptions are fairly significantly overwrought. The fact is, governments deal with the United States because it’s in their interest, not because they like us, not because they trust us, and not

27. *Id.*

28. JEFFREY MOUSSAIEFF MASSON, *Recognizing the Emotions of Dogs*, in *DOGS NEVER LIE ABOUT LOVE* (1997), available at THE N.Y. TIMES ON THE WEB, <http://www.nytimes.com/books/first/m/masson-dogs.html> (last visited Feb. 22, 2011).

29. *Obama Gives Hillary the Finger*, YOUTUBE, Apr. 17, 2008, <http://www.youtube.com/watch?v=DyBj4Zw6No>.

because they believe we can keep secrets. Many governments – some governments – deal with us because they fear us, some because they respect us, most because they need us.³⁰

As with the complex and changing feelings of others, your internal mindfulness may teach you how your own motivations morph from moment to moment. When you negotiate, you try to get someone else to do what you want. Along the way, of course, you may change your sense of what you want. Meditation teachers and Freudian psychoanalysts alike often think of our less conscious emotions as negative, but they don't have to be.³¹ Remember my student whose boyfriend dumped her by text? When I took the break from class, I just wanted people not to bother me so I could get to the bathroom. But, when I saw a favorite student distressed, my needs changed. At any given point, though, one is often trying to persuade someone to do something. With my "salary negotiation" with the Dean, someone else might have learned that they really want to be head of a program and shape their field, and they would have wanted to know more than just a salary or other component of compensation. (Perhaps this means I'm one of those people who just like money, or perhaps I'm writing this in case some future dean tries to avoid paying me more by giving me some other title!)

To be clear, then, you may use what follows as a guide for many reasons. If you're just interested in dodging lies and doing better for yourself, the steps and negotiations within will help you do better. If at least sometimes, you also want to help others, then you will find the steps sometimes help with that as well. Regardless of what you feel about others, you may also find that the steps and negotiations within let you see how your own goals, the goals of others, or both, change as you negotiate.

NEGOTIATION WITHIN, LEVEL ONE: WHERE TO FOCUS

The first negotiation within is easier than it seems. It can look very hard if one wonders how to juggle all of the potential clues to concealed emotions and other clues to lying. There are hundreds of

30. Elisabeth Bumiller, *On Disclosures, Gates Takes the Long View*, N.Y. TIMES, Dec. 1, 2010, <http://query.nytimes.com/gst/fullpage.html?res=9C04E5D71E3CF932A35751C1A9669D8B63>.

31. A teacher at a retreat once quoted Ruth Dennison as saying, "Darling, self-knowledge is never a good thing."

“theories” of emotion, and some parse emotion into many categories. This led those as skilled as *Getting to Yes* co-authors Roger Fisher and Dan Shapiro to suggest it was “too hard” to track emotions and emotional clues themselves: “Dealing directly with every emotion as it happens would keep you very busy. As you negotiate, you have to look for evidence of emotions in yourself and in others. Are you sweating? Are their arms crossed? You would have to infer the many specific emotions taking place in you and in them.”³²

That could be said just as easily about clues to deception. Consider just a few of the many candidates for general clues to deception: watch their eyes, see if they scratch themselves, look for fidgeting, and so on, and so on, and so on And that’s just the detail level. Imagine if you wanted to follow the siren call of those who believe you must master an entire universe of disparate techniques, such as those who sell neurolinguistic programming or psychoanalysis or Ouija boards. How do you negotiate with yourself about which of these clues really matter? And how do you balance your attention to these clues along with your attention to all the other things that may affect your outcome in a given negotiation or otherwise matter to you, such as how you look in front of colleagues and clients?

The negotiation within can be much easier once we focus only on the clues most likely to matter. Decades of research on negotiation suggest that the best evidence supports only a very small number of foci. This is not unlike the general truth about negotiations: although we could focus on any number of microtechniques, and choose from many different books and paradigms, much of our success turns on a small number of factors. Much research suggests our goals and first offers have an extraordinary effect on the outcomes.³³

The face deserves the most attention for many reasons. First, research shows that certain very fast facial expressions are present in most lies!³⁴ Second, we can pay attention to the face and still fit within the norms and abilities of many negotiations. Looking at the whole body, including the dean’s legs in my salary negotiation, can provide

32. FISHER & SHAPIRO, *supra* note 11, at 12.

33. Clark Freshman & Chris Guthrie, *Managing the Goal-Setting Paradox: How to Get Better Results from High Goals and Be Happy*, 25 NEGOT. J. 217, 218 (2009). Indeed, although it is often said one should set high but realistic goals, there is no systematic research to support this. LEIGH THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 49 (4th ed. 2009). Alas, much as those who set high goals do better at everything from negotiation to sports to weight loss, they *feel* less happy. *Id.*

34. PAUL EKMAN, *TELLING LIES* 28 (3d ed. 2002).

some information. But it's much harder to arrange a negotiation where one can see the person's entire body. Third, *much* of the information on the face cuts across cultures: there are at least seven universal emotions that generally show up the same in all cultures.³⁵ Fourth, research shows that merely learning to better recognize emotions is associated with better accuracy in detecting lies.³⁶ Fifth, learning to recognize the seven basic emotions that cut across cultures is quite doable—research suggests keeping track of seven things is within the range of our attention span.³⁷ Hence, there are seven elements to the Harvard Project on Negotiation,³⁸ six steps to Shell's more competitive primer on negotiation,³⁹ seven habits of highly effective people,⁴⁰ and so on.

To review then, your negotiation about what to study within may *seem* hard, but it's easy. It may seem hard because there are lots of details cited about what clues, such as eye contact may matter, and there are many systems, such as, say, neurolinguistic programming. But most of these systems don't actually work. Instead, you can focus instead on improving your knowledge of facial clues of emotion.

But there is one sense in which this first negotiation within over attention may be harder than it seems. That's because it takes *some*

35. EKMAN & FRIESEN, *supra* note 6, at 23-28.

36. Gemma Warren et al., *Detecting Deception from Emotional and Unemotional Cues*, 33 J. NONVERBAL BEH. 59, 59-69 (2009). The study showed that training in so-called subtle expressions was associated with an increase in accuracy at detecting lies. Subtle expressions involve only part of the full movements associated with an expression, such as just the nose of disgust but not the mouth, and are typically somewhat slower than microexpressions. The finding on microexpressions did not reach statistical significance, however. In other words, under generally accepted scientific principles of statistics, there was an unacceptably high chance that the results on microexpressions could come from chance. Paul Ekman believes that the study suffers from two flaws that may understate the significance of microexpressions for detecting lies. First, the study included a small number of people, and a larger study may well have included enough people that the findings would become statistically significant. Interview with Paul Ekman, Professor of Psychology, Emeritus, Univ. of Cal., S.F., Sch. of Med., in San Francisco, Cal. (Oct. 2009). Second, the study did not use a regression analysis to test whether the training in microexpressions had a benefit above and beyond the training in subtle expressions. *Id.*

37. George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 PSYCHOL. REV. 81, 90-93, 96 (1956).

38. *Glossary: "seven elements,"* PROGRAM ON NEGOTIATION AT HARVARD LAW SCHOOL, <http://www.pon.harvard.edu/glossary/> (last visited Feb. 22, 2011).

39. See SHELL, *supra* note 5, at 1-113.

40. See generally STEPHEN R. COVEY, *THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE* (2004).

degree of knowledge and practice prior to an actual negotiation. That *some* degree needed is relatively small. Only an hour of practice improves the ability of most people to recognize fast expressions of emotion called microexpressions or subtle expressions.⁴¹

With too little background understanding (or worse, a wrong understanding), one can actually do worse in negotiation. Here's a cautionary tale, and helpful, practical information if you go to Canada. Someone came up to me at a class I was giving on lie detection. He'd been told, as many have, that one can tell someone is lying by the direction in which they look up. He had been told this in training for the Canadian border patrol. "Which direction means you're telling the truth?" I asked. He couldn't remember and then asked if I knew. "Well, that claim has been shown to simply be untrue. But, if you can't remember which direction means you're telling the truth, then what do you do? He paused a moment. "Here's what we were told: 'If someone looks up, and you can't remember, just pull them over and search their things!'" So at least you know not to look up going into Canada!

Should you try even more than one hour? Here's where things get less precise. The data is quite clear, from a number of studies, that an hour of training leads to significant improvement. There are also longer and more elaborate ways to learn to recognize facial expressions, but the data is not out yet on how well they work.⁴² If you get the same results as people in other studies of lie detection training, then longer and more elaborate training is also likely to help you.⁴³ That involves not just learning to notice clues to emotion but also, as I discussed in the summary method above: how to generate hypotheses for what might generate the clues you see, how to test those clues by speaking with those you observe, with other people, or by other means. That extra training can also involve attention to other types of clues. These include large categories, particularly various aspects of voice, body movement or body language, verbal style, and verbal content. At this point, you may want to skip to the next section. After all, the face is the most reliable and fairly easy to learn. As one turns to these other foci, there may be greater cost (much more detail to learn) and much less benefit. For example, in many methods of Criterion-Based

41. See, e.g., Warren et al., *supra* note 37 (describing brief training).

42. Ekman's microexpression training tool is available at *Training*, F.A.C.E. TRAINING, <http://face.paulekman.com/productdetail.aspx?pid=21> (last visited Feb. 22, 2011).

43. See Frank et al., *supra* note 24.

Content Analysis, there are dozens of criteria to track.⁴⁴ I'd like to think it also helps to combine these insights on emotion and truth into a negotiation paradigm, but so far, there's no hard evidence that tests if that works.

Once you settle on the medium term negotiation within—how much to develop skills—you then face over and over the short-term negotiation within of what you do with your skills. Should you be looking at clues to emotion and deception, such as the face, voice, the kinds of words, or should you be focusing on the content itself? Of course, this negotiation within partly depends on the conventions of the external negotiations. It may involve some talk with your own team. You may need to explain why you need a second person there to take notes, so you can look for clues. You may need to explain how you can gather intelligence about the normal, baseline behavior of those with whom you meet, such as small talk in a negotiation, or observing them in other contexts. And this too may involve layers of external and internal negotiation. Do you want those on your own team to know that you're looking at evidence of "lies" and "emotion" during the negotiation process? That raises an internal negotiation as well: Do you want to tell them what you're doing? Do you want to tell them what you're doing and why? We will see more about that in the next sections. For myself, I suspect some audiences find it more appealing for me to speak of what I think of today as softer topics of "emotion" and "relationship" or "mindfulness." Other times, I speak of "lie detection" and "emotional science." I'm not very confident I make the right call on that, but for myself, I'm happy to frame something as one topic, such as emotional awareness, even if I'm also teaching about another, such as lie detection; I'm also happy to say I'm teaching about lie detection and slip in information about why emotion alone matters, including cultivating pleasant emotions for oneself and others. But I acknowledge that others will find this negotiation harder. Some of you will want to believe that you are "transparent" with others or cultivate "horizontal relationships" that make it hard to spin what you do.

It gets harder when you realize, as you probably do, that your roles with others change: when I share nonverbal techniques with the dean's fundraising team, as I have, it may dilute my ability to deploy them when I negotiate with him over my salary, or teaching load, and so on.

44. See, e.g., Aldert Vrij & Sam Mann, *Criteria-Based Content Analysis: An Empirical Test of its Underlying Processes*, 12 *PSYCHOL. CRIME & LAW* 337-49 (2006).

A SECOND NEGOTIATION WITHIN:
HOW WE TALK TO OTHERS ABOUT SOFT SPOTS

The second set of negotiations within involves how we talk to others about soft spots. This is tricky territory. Recall our prologue examples. With the distressed student diagnosed with ADD, I asked a question in quite general terms (“How are things going?” with a very neutral, general statement (“Many people feel something at this point in the first year.”). With the student with the recent breakup, I asked a general question (“How is everything?”). With the dean, I made no comment about feelings or emotions at all. I gambled from his demeanor that he was being deceptive about his ability to raise my salary, and I simply made a strong counteroffer. It’s tempting to say that the appropriate response “varies with context.” That’s because it does. But there are certain predictable features of context that will often matter.

We can look at some of those features shortly, but you should always remember one thing: you can’t be sure what will work in advance, but you *can and should* assess continually. The same soft spots that alert you to a person’s emotions, possible deception, and so on are also the ones that alert you that your way of interacting may not be working. Consider what one of my fastest learners reported. “I must have gotten something wrong,” she began. “I was talking with my boyfriend and saw that sign in his eyebrows and forehead of sadness and distress.” She paused. “So, I asked, ‘Why are you sad?’ And he *yelled* at me, ‘I’m not sad—I’m angry!’⁴⁵ Of course, I thought, from my study of depression: men don’t like to talk about their sadness and may mask their vulnerability with anger.

This technique of continual evaluation is one of the most generally applicable and useful features of tracking soft spots for emotional truthfulness—even if you can’t, or don’t, use them to get at factual truth. You don’t necessarily need to say or do anything with that information. In negotiations, and in any interaction, it can often tell you if you’re saying something that substantively doesn’t persuade the other person (too high a price, for example) or doesn’t fit what they want in terms of process (such as active listening). The process of external mindfulness to soft spots lets you know something is happening. In that way, it may complement other theories, such as

45. See generally, e.g., TERRENCE REAL, I DON’T WANT TO TALK ABOUT IT: OVERCOMING THE SECRET LEGACY OF MALE DEPRESSION (1997) (suggesting that men with symptoms of depression often display anger).

theories about what kinds of process people generally like, such as active listening or brainstorming. As I've suggested elsewhere, we may overgeneralize how much people like either, and external mindfulness to soft spots lets us know when these strategies—quite welcome by some—may backfire. Introverts may not want to brainstorm, and many people may find active listening patronizing or manipulative. Indeed, I know of one co-author of a prominent law school negotiation book who yelled at his co-author: "What! You're doing active listening on me!"

If you want to go beyond emotional truthfulness to detect factual and other lies, you should consider several factors. That brings us to our first factor: the more we want to be alert to lies, the more that we may refrain from sharing directly what we see. When we "share" or "check in" in this way, we run risks in relationships, lie detection, and negotiation. If saying what we see provokes fear or any other emotion, then we can't tell if that emotion—and much of what follows—flows from deception or reaction to us. This is Othello's error: Othello accused his wife of infidelity; when she showed fear, he concluded that she was lying.⁴⁶ But she was only afraid understandably because Othello had wrongly accused and executed others. In a far less dramatic way, when my student asked her boyfriend about "his sadness," her quite good intentions may have made it hard to connect with her boyfriend's underlying sadness.

Even if we are not concerned with truth, our sharing runs the risk of creating an emotion that wouldn't be there but for our observation. Analytic psychologists might call this mutually projective identification: when we act as if a person is a certain way, we may start off merely by projecting, but then our behavior triggers the person in a way that makes them fit our projection. A classic example involves the suspicious psychiatrist who misinterprets a shy or private person as paranoid. The more the psychiatrist tries to "test" the hypothesis by asking more questions, the more the patient actually does become suspicious.⁴⁷

This first factor of seeking deception has a counterpoint to the extent we are committed to authenticity or transparency or horizontal relationships. Some kinds of transparency principles suggest we should be honest about what we notice. Some even advocate "radical

46. EKMAN, *supra* note 35, at 170-73.

47. PETER D. KRAMER, SHOULD YOU LEAVE?: A PSYCHIATRIST EXPLORES INTIMACY AND AUTONOMY – AND THE NATURE OF ADVICE 209-11 (1997).

honesty.”⁴⁸ So, too, those who advocate horizontal relationships may feel that one person should not “manipulate” the other person by using various techniques, be they a Socratic dialog where someone feigns ignorance, or the kind of structured interaction often used in detecting lies. (Notice a little negotiation within in that last sentence. I switched to passive tense to avoid committing to how much I use one or the other!)

Before you view this lie detection versus authenticity as another intractable case of competing values, take a breath and reconsider authenticity. Really, take a few breaths, and see what happens in your thoughts. If you’re like most of us, you’ll have many thoughts and many feelings. We often have many different impulses. We don’t need to act on all of them or share all of them. In fact, we probably don’t have time! You can understand this insight in many ways. Recall the truth wizards. Many of them have one observation and one hypothesis after another, and it is hard enough to keep up with them when they are just sharing what they see. It would be quite challenging to see what happened if they shared every observation with someone they suspected!

You can also step back from the false negotiation within between your authentic self and your strategic self in many other ways. I understand this from one of the most meaningful passages I ever read from my first meditation teacher, Joseph Goldstein. He suggested we often confuse acting on one of the many countless thoughts that go through our head with acting spontaneously or authentically.⁴⁹ Some psychoanalytic or depth psychologists would suggest the metaphors of conflict between our child-like id and our internalized curmudgeon, the superego.⁵⁰ This symposium features the metaphor of internal family systems.⁵¹

This brings us to our second general factor: the nature of the soft spot you see. In particular, you should consider how likely the person knows that you may have seen some behavior. The more likely the person is to not be aware you saw something, the more that your

48. See generally, e.g., BRAD BLANTON, *RADICAL HONESTY: HOW TO TRANSFORM YOUR LIFE BY TELLING THE TRUTH* (1996).

49. See GOLDSTEIN, *supra* note 7.

50. In addition to the usual classic psychoanalytic sources, see generally BYRON BROWN, *SOUL WITHOUT SHAME: A GUIDE TO LIBERATING YOURSELF FROM THE JUDGE WITHIN* (1999).

51. See generally RICHARD C. SCHWARTZ, *INTRODUCTION TO THE INTERNAL FAMILY SYSTEMS MODEL* (2001).

comment may provoke them – risking contaminating the relationship and foiling your attempt to get the truth and, if negotiating, make a deal. Paul Ekman casts this as an almost ethical dilemma with superfast microexpressions. When we notice a microexpression, he says we have taken information that others did not intend to share with us. By his definition, these microexpressions are either suppressed (the person knows the feeling, but doesn't want us to know) or repressed (the person does not even know about the feeling).⁵² After listing his own variety of considerations, Ekman writes, "Be cautious. Don't make the other person feel that they have no privacy."⁵³ My student with ADD may have had no idea that she was broadcasting her emotions in the tiny movements in her forehead. Recall the prologue. With the dean, once I noticed what I saw, I *acted*, but I didn't tell him why. All else being equal, it's easier to remark directly on what you notice when it is likely that the person knows you may have seen something. Indeed, sometimes the person may have *wanted* you to see something. At some level of consciousness, my student's microexpressions of distress may have been an attempt to call out for recognition and empathy. With the student diagnosed with ADD, it may also have been a call for more practical advice.

When we share the hidden emotions we see, we may sometimes build connection and rapport, and other times undermine or even destroy it. Contrast some economic approaches and therapeutic jurisprudence. Economists Ian Ayres and Barry Nalebuff apply the common knowledge problem to negotiation. In some instances, they say, it destroys relationships if one negotiator knows something about a second negotiator, and the second negotiator also knows about this knowledge.⁵⁴ They use various examples of threats. Someone may be willing to concede in light of what they think might be a "threat" — such as reducing output to drive up prices—but would feel *bad* about the relationship if it were obvious that he was "caving" to a threat.⁵⁵ And, indeed, the party making the implicit threat might *feel* bad as well. (Often parties making threats may *think* it is bad to make a clear threat because certain threats may be illegal or unethical!)

Consider a story by my late colleague, Maureen O'Sullivan, one of the world's leading lie detection experts and an expert on

52. PAUL EKMAN, EMOTIONS REVEALED 214-16 (2d ed. 2007).

53. *Id.* at 230.

54. Ian Ayres & Barry J. Nalebuff, *Common Knowledge as a Barrier to Negotiation*, 44 UCLA L. REV. 1631, 1631-59 (1997).

55. *Id.* at 1651.

microexpression.⁵⁶ She was in what she thought was a routine-ish meeting with a university official. She suggested that they might discuss something with a higher-up official. When Maureen did, she noticed that the person showed fear on her face. Maureen considered many possible explanations. One was that the official was afraid of speaking to this higher official. Should Maureen mention this? Should she ask, “Is there some problem with Official Y?” She chose not to. The common knowledge problem suggests that may have been wise. The mid-level official may indeed have been afraid. Perhaps Maureen’s question exposed his or her limited authority. For her to mention this might make the mid-level official feel powerless and exposed.

Or consider the kind of pervasive ambiguity between people of different status levels, such as tenured and untenured faculty, or equity and income partners in a firm. I’ve often given half-joking advice about how to get tenure: “One by one, make your colleagues feel they are *just a bit* brighter than you. Pick an argument over a nontrivial but not fundamental question—not bluebooking but not the nature of truth either. After some time, concede but apparently based on the strength of the other person’s argument.” In the midst of such a ritual, though, imagine the senior person sees contempt on the junior’s face. Does she really want to ask why? It could be that the junior feels contempt for his initial “mistake,” but it could be contempt that the senior would accept this kind of ritual. Or suppose the senior sees happiness: it could be the junior’s happiness at learning the right way. Alas, it could also be duping delight: the thrill that a person gets when having fooled another person, such as convincing someone that they really agree!⁵⁷

But therapeutic jurisprudence *might* counsel otherwise. Therapeutic jurisprudence has its own use of the term “soft spot” to denote an area when an attorney notices that a client may have some emotion.⁵⁸ Therapeutic jurisprudence teaches that attention to this soft spot may help build a relationship between the lawyer and the client.⁵⁹

56. See, e.g., Ekman, Sullivan & Frank, *supra* note 9.

57. Maureen O’Sullivan et al., *Police Lie Detection Accuracy: The Effect Of Lie Scenario*, 33 LAW & HUM. BEHAV. 530, 535 (2009) (describing the variety of ways liars may act, including by guilt at deceiving or pleasure at “putting one over” on someone else, i.e., “duping delight”).

58. Winick, *supra* note 16.

59. *Id.* (noting that attention to soft spots may “produce (*or reduce*) anxiety, distress, anger, depression, hard or hurt feelings”) (emphasis added).

A third general factor involves how likely we are to deal with a particular person with a particular issue in the future. Recently, on vacation, my sister was upset that we might spend “too much” time with my ex, with whom I’d been together for twelve years. She talked heatedly about how much she felt uncomfortable with him in the past. “But,” she said, “if you want to get back together with him, I’d be okay with it.” As she said it, though, there was a clear and significant soft spot: she made a quick shrug with one shoulder. This kind of disagreement between what one says in words and what one’s body says—the “it’s okay” and the shrug meaning “I don’t know” —was significant. But I chose not to say anything. As I write this, I’m preparing to move in with someone else I’ve known for over a year, and my ex is over two thousand miles away—getting ready to move in with someone else.

This conversation echoes a familiar unspoken negotiation many lawyers and others face. Many lawyers and negotiators “know” that they may deliberately avoid mentioning a potential issue if they think the burdens of discussing it—including potentially rupturing a deal—outweigh the benefits of discussing it. Many people choose not to discuss prenuptial agreements in intimate relationships or dispute resolution clauses in business transactions because they may believe disputes are unlikely to arise.⁶⁰ Of course, as these examples suggest, such negotiations within may represent naïve miscalculations by our present selves in the blush of love with the hard reality that many relationships, business and otherwise, end in divorce or dissolution.⁶¹

A fourth general factor affecting whether we mention the soft spots we see involves our relationship with a particular person. Relationship covers intimate and tactical decisions. As with so many changes, a

60. See, e.g., Clark Freshman, *Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1689 (1997) (why parties in intimate relationships may not use prenuptial agreements); *Posik v. Layton*, 695 So. 2d 759, 760 (Fla. Dist. Ct. App. 1997) (enforcing a “support agreement much like a prenuptial agreement” between two women who were, as the court coyly noted, “close friends and more”); Clark Freshman, *Tweaking the Market for Autonomy: A Problem-Solving Perspective to Informed Consent in Arbitration*, 56 U. MIAMI L. REV. 909, 939 (2002) (why commercial parties may “choose” not to include dispute resolution provisions).

61. This is an example of yet another general psychological problem with how we decide: we make decisions based on a limited universe of information, such as friends we know who have been divorced, rather than wider statistics. See Anne C. Dailey, *Imagination and Choice*, 35 LAW & SOC. INQUIRY 175, 206 (2010) (suggesting that it may be unclear if there is a lack of available information or some other problem, such as signaling others that one anticipates problems).

change depends partly on changing our relationships with others in our organization or our family.⁶² It's useful to think of our negotiation within as an internal family system, but it's also useful to remember our external systems as well!

At a minimum, you may find it necessary to explain to people on your own side why you might try to negotiate in ways that let you read emotions and lies better. You know by now that you're likely to get better information getting to know someone first and having an opportunity to see them. But others may think it is more "efficient" to have negotiation by e-mail, by conference call, or by phone. So, too, you probably know by now that there are so many clues—and especially so many fast clues—that you may often want someone with you at a negotiation. That means getting understanding from those in your organization—as well as your clients and other constituencies that you *need* to take a bit longer at meetings, bring someone else, and meet in person, whenever possible.

You may or may not decide how much more you want to share. Sharing everything you know about emotional awareness and lie detection may be helpful. You can get others to learn skills, and you can get them to help you interpret clues. But it may also easily put them on guard around you. And, yes, they might "use" those techniques with you.

Before you reject a wider openness to sharing what you and others see, though, remember that such discussions can, as we saw in the prologue, engender compassion and caring action. Of course, as with my student, it may not be necessary to say what you've seen if the person responds to a question like, "Is everything okay?" And, in other relationships, you may want to be up front about why you're saying what you do.

More friendly relationships and intimate relationships may trigger special concerns. Telling people that you see things that they haven't shared can easily turn them off. At a presentation at the Mindful Lawyer conference at Berkeley, I commented when someone showed a kind of verbal shrug that suggested they weren't completely committed to what they just said. Someone said out loud, "I wonder what kind of friend you'd make!" Fortunately, my friend and colleague, Bill Blatt, said, "A very good one." Someone commented on a YouTube

62. See HALLUM MOVIOUS & LAWRENCE SUSSKIND, *BUILT TO WIN* 7-8 (2009) (individuals who attend negotiation trainings often cannot change unless their organization is aligned to support such change).

interview with me about lie detection, “His wife must not get away with anything.” It’s tempting therefore to conclude that one should not voice directly what one observes.

However someday, with someone, you might consider an advanced technique. You might imagine that you could collaborate with others to raise directly the emotions that you might observe in others. Tara Goleman, the wife of Daniel Goleman, the author of *Emotional Intelligence*, suggests that you might commit with a romantic partner to try to notice when the other might be caught up in some distorting emotional schema.⁶³

From time to time, I’ve found these discussions useful with my friend, Paul Ekman. One time, I thought I saw him show a microexpression of contempt when he commented on what many might see as a young woman’s Freudian slip. I imagined that it revealed his own contempt for analysis. He said that it instead was his compassion for her and the way many would confuse her general anxiety with lying.

Finally, of course, a part of your negotiation within may involve how much you share about what you suspect others might see. I still remember my first meeting with Paul Ekman. At a certain point, there I was in his huge office, and I realized I was talking fast, sweating, and a bit out of sorts in general. “You know,” I said, “I’m glad you’re the expert on lie detection. Because you must notice I’m sweaty and out of breath. But you know that could be for many reasons.” He was looking at me. “There’s a lot,” I said. “I thought I knew San Francisco, but really I just went to law school down at Stanford. So I didn’t realize I’d be late with the train. And I forgot about the hills.” I imagine now he must have wondered, “Anything else?” There was. “And,” as I walked in, “I thought you said some Yiddish word, and that reminded me of my father. He also spoke Yiddish, and he was very abusive.” As it turned out, Paul’s father was also very abusive. It was one of the many things we bonded over.

At this point, although I’ve said “finally,” you probably think I’m “missing” at least two factors: “personality” and “culture.” That’s deliberate because both personality and culture can lead us astray in negotiations for related reasons. With personality, we often mistake some fixed personality with some set of patterns that is far more contingent. For most people, even transient emotions can change their

63. See TARA BENNETT-GOLEMAN, *EMOTIONAL ALCHEMY: HOW THE MIND CAN HEAL THE HEART* 118-24 (2002).

bargaining approach. Research shows that very mild shifts in emotion from things as simple as a funny film, a pleasant scent, or a small gift can change behavior. In one study, for example, most people induced to be in a slightly negative mood were more likely to make threats and more likely to make deals.⁶⁴

Alas, there's at least one aspect of personality that may inform your choice of what to share: the person's emotional profile. As it turns out, some people get upset and can't return to normal very quickly; others recover quickly. People may vary as well by how intense their emotional reactions are and how long they last. When you face someone who may take a while to recover from an emotion, you might be especially wary from saying something that might trigger that reaction—such as saying what you “saw.”

There's still another set of reasons to hesitate to react based on “culture” or personality.” Even if a person had a stable culture, or a stable personality, we might easily get it wrong. Take personality first. We might easily pigeonhole ourselves in one negotiation personality or another, like “competitive” or “accommodating.”⁶⁵ But at least one study shows that there is little agreement between the way we think we negotiate and the way others would describe us.⁶⁶

So, too, we can easily get wrong someone's “culture.” Think back a few sentences ago when you read my critique of personality. Some of you might have thought it sounded reminiscent of some notion of social psychology that emphasizes the context over the person; some of you may have thought it sounded vaguely postmodern or pragmatist; some of you may have thought it sounded Buddhist. From any of these notions of “my” culture, you might have been wrong in one or more ways. First, you might have just gotten it totally wrong: I cite a lot of social psychology, but never got trained in social psychology and so may very well lack some of its cultural traits (such as keen statistical reasoning!); I've cited postmodern theory, but there, too, received no formal education; I do Buddhist meditation, and did lots of study of Buddhist theory, but disclaim many of its key teachings. Second, even

64. Forgas, *supra* note 13. I say “for most people” because the study shows Machiavellian types tend to always behave competitively and those high on social desirability traits tend to always behave cooperatively. *Id.* at 570.

65. See, e.g., SHELL, *supra* note 5 (suggesting we find our negotiation style as the first of six foundations of negotiation and quoting a proverb that “[y]ou must bake with the flour you have”).

66. Clark Freshman, *Identity, Beliefs, Emotion, and Negotiation Success*, in THE HANDBOOK OF DISPUTE RESOLUTION 99, 103 (Michael L. Moffitt & Robert C. Bordone, eds., 2005).

if you were right about my background, you might be wrong about what it might mean. A seasoned meditator often speaks quite slowly and deliberately. If you saw me talking fast, you might think that this must be a soft spot since you imagine I must speak slowly like many meditators.

In short, as much as many contexts do matter, I think personality and culture may often matter quite a bit less. Still don't believe me? You can find out more in the section after next: the negotiation within when teaching lie detection and negotiation.

A THIRD NEGOTIATION WITHIN: INTERPRETING SOFT SPOTS

The third set of negotiations within involves interpreting soft spots. Its importance cannot be underestimated. Emotions and other soft spots may reveal an entire range of meanings. Remember, even if we see a very distinct sign of an emotion, we cannot be sure what the source of the emotion is, and we cannot be sure how long it has lasted.⁶⁷ And, most importantly, we cannot be sure that the emotion reveals a lie. We often feel emotions when we lie, but we often feel emotions when we tell the truth.

The negotiation within over interpretation is so important because we must also decide whether we worry more about "being lied to" or "falsely accusing someone." Some cases are easy. There are many potential dog walkers. I ask one how often he's had complaints. I see fear in his face. He might be afraid because he's been falsely accused, or because he thinks I won't believe him, or because he now might lose my business unfairly, and so on. But I might easily decide it's not worth it. I'm less concerned that he get a fair shake than that my dog be safe. I'm told many people feel the same way about their children.

Other cases of interpretation easily trigger competing values. Take those who investigate allegations of sexual harassment. If a person is too quick to believe the allegations, then someone innocent may lose their job. If the person is too slow, then at least one victim goes unhelped, and other victims may be hurt in the future.

These competing values and other less valuable tendencies create the *opportunity* for a negotiation within. I say *opportunity* because we often may mindlessly neglect an opportunity to get clues to deceit or incomplete information.

67. EKMAN, *supra* note 53.

Of course, there are plausible reasons to trust others and refrain from pathological paranoia. At a more abstract level, some negotiation scholars like to speak of the importance of trusting others and forgiving easily. Many cite the computer simulation of a negotiation game by Thomas Schelling that showed that the optimum strategy in a simple game was to trust someone until they lied, but then forgive easily.⁶⁸

Many find just *thinking* about the possibility that someone is lying is disruptive. My late colleague, Maureen O'Sullivan, was one of the foremost authorities on lie detection in the world. But she was cheated out of money at least once! She said she simply preferred to think the best of people. Tragically, we may find it most tempting to ignore possible deceit of those who can harm us the most. With loved ones, even if we know the statistics about adultery and infidelity, we may neglect the possibility in those around us. As with our families of intimacy, so too with our other organizational families. The FBI once launched its own internal investigation to find a Soviet spy within the FBI, but it trusted the investigation to the mole himself!⁶⁹

Alas, our refusal to *think* that others may be lying can come at a heavy price. Some research suggests that, when two people meet, each lies an average of three times!⁷⁰ And that cost is not borne by ourselves alone. Sometimes one person overlooks a lie that hurts a third person, as with a parent who gives up child support from another parent because that parent lies about otherwise wanting custody.⁷¹ More broadly, when people lie about what they want, negotiations can take longer and reach less efficient results. One meta-analysis showed that people often miss opportunities for joint gain *half the time*,⁷² and that is often because one side fakes an interest that it doesn't have. As you might expect, at least one study clearly shows that, when people are

68. See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 162-72 (1981).

69. See generally DAVID A. VISE, *THE BUREAU AND THE MOLE: THE UNMASKING OF ROBERT PHILIP HANSEN, THE MOST DANGEROUS DOUBLE AGENT IN FBI HISTORY* (2002) (a detailed account of the way the FBI put a double agent in charge of finding the double agent).

70. See ROBERT FELDMAN, *THE LIAR IN YOUR LIFE: THE WAY TO TRUTHFUL RELATIONSHIPS* 14 (2009) (when two strangers met, each made an average of three inaccuracies).

71. See generally Scott Altman, *Lurking in the Shadows*, 68 S. CAL. L. REV. 493 (1995) (an empirical study of the claim that fathers often try to pay less alimony by contesting custody and finding that this appeared to happen less frequently than feared).

72. Leigh Thompson & Dennis Hrebec, *Lose-Lose Agreements in Interdependent Decision Making*, 120 PSYCHOL. BULL. 396, 406 (1996).

angry, they become even less likely to know what other parties want.⁷³ In part, this is because parties lie about what they want to get credit for a “concession” on an issue they never really valued.

In between the extremes of paranoia and complacency—or even collusion—we may find different solutions of how to interpret different soft spots and potential lies. In part, this involves a variation of the familiar truism on context we saw above. When we really want to be safe, we may, when we can, screen those who may harm us. At other times, we may not screen away but instead deploy more resources to verify facts more carefully.

Alas, it’s worth noting why this negotiation within over interpretation is often not so satisfying. Part of the strain of the negotiation within regarding lie detection is that it can seem so imprecise. It would be great to have Perry Mason moments when people break down and tell us the truth. Or even moments of great connection, as when my student admits she was distressed. But, like so much of negotiation, the negotiation within often involves uncertainty. I may act on my interpretation and never know what might have turned out. ADR Europe President Giuseppe Di Paulo teaches law students, lawyers, and businesspeople with the same clip from the Tom Hanks film, *The Road to Perdition*. Hanks’ son asks for some money for a certain task. Hanks asks him to name his price. The son does. Hanks accepts. A moment later, the son says, “I could have gotten more.” Hanks replies, “You’ll never know.” The same is true of my salary negotiation above: had I asked for even more money, might I have gotten that? And, as the collaborators among you might ask, even when I got more money in one year, I will never know for sure whether I might have gotten more value in some other way if I didn’t push so hard. And maybe even more money: a friend at one school tells of a professor who got a higher starting salary only to have colleagues find out and be jealous. A colleague told me of a junior faculty member who got a “lighter” teaching load, but then faced a tenure committee chair who thought the lighter load should have meant that the junior person would produce even more scholarship than otherwise required.

I wonder how this negotiation within differs for principals, like clients, and agents, like attorneys. One can imagine that the agent

73. Keith G. Allred et al., *The Influence of Anger and Compassion on Negotiation Performance*, 70 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 175, 181 (1997).

doesn't mind asking the tough questions. But that's giving attorneys both too little credit (they, too, may want to believe the best) and too much credit (they, too, may feel pain when they realize they've been lied to). Or one can also imagine that lawyers do a worse job catching lies because the lies hurt their clients more than they hurt the attorneys. Of course, in principle, an attorney could sometimes be liable for the lies of a client, as when the lawyer does not investigate the client's claims before filing in court.⁷⁴

THE NEGOTIATION WITHIN ON WHAT TO TEACH

If this were a movie, the credits might roll now, but there's at least one more negotiation within. What should I share with you? And, if you teach in one way or another, what should you share? This involves at least three dilemmas or negotiations within. In each instance, one part of us may simply want to share the truth—or at least the best that research has to share. But, if we share that truth, we run the risk of promoting very bad consequences. That includes more lying and more discrimination involving already disadvantaged groups in society.

The first dilemma involves what you share about the success of lies. Remember that an entire constellation of research over decades suggests that people do incredibly badly at detecting lies.⁷⁵ Indeed, people generally do no better than chance!⁷⁶ And yet, if we teach people this, you can imagine some very bad outcomes. People might lie more because they think they will get away with it.

This same kind of negotiation parallels the dilemma we face in teaching about different outcomes or discrimination in negotiation. Much research suggests that women and African-Americans may do worse in many kinds of negotiations.⁷⁷ Indeed, Ian Ayres' famous studies of discrimination in car negotiation show very strong differences in outcomes for African-Americans and whites even when they use similar strategies.⁷⁸ We may be tempted to share this "truth,"

74. FED. R. CIV. P. 11.

75. See, e.g., Ekman, Sullivan & Frank, *supra* note 9.

76. See, e.g., *id.*; see also FELDMAN, *supra* note 71 (other than secret service agents, no group did much better than chance).

77. For a review of the research on women and negotiation, see LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* 130 (2008).

78. See IAN AYRES, *PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* 108 (2001).

but then it may reinforce discrimination in at least two ways. Those shown in general to do worse, like African-Americans, may do worse when they hear this.⁷⁹ And everyone may face the temptation to give African-Americans and women worse deals if they think others are doing that already. In the most basic language of negotiation, such outgroups simply have worse feasible alternatives or Best Alternatives to Negotiated Agreements (BATNA).⁸⁰

Indeed, there is also a second specific problem in teaching about lie detection and differences such as race and "culture." We might be tempted to teach about variations in culture. Eye contact is not universal, and some sets of individuals may display less eye contact for quite good historical reasons. African-American men, for example, were punished in the old South for the "crime" of reckless eyeballing if they looked at a white woman.⁸¹ So too, research suggests that Japanese show similar universal emotions, but are more likely to try to mask those emotions.⁸² In one famous experiment, different groups of Japanese people and Americans saw gruesome films. Sometimes there was someone else present. Both groups showed similar emotions. When there was someone else present, however, the Americans exaggerated their facial expressions, but the Japanese people tried to mask them.⁸³

At one very important level, scientific approaches to lie detection undermine discrimination. African-Americans or others might face suspicion for lack of eye contact, but the science of lie detection undermines this. In a parallel way, Japanese people might face discrimination in certain professions for a lack of feeling, but the evidence would suggest Japanese people may face similar feelings. (When I taught a continuing legal education class on lie detection to lawyers, one related the following story. He was in Malaysia and said nothing during a daylong meeting. But he suspected people were laughing at him. He asked a few women later. They hesitated, but

79. See Laura J. Kray et al., *Stereotype Reactance at the Bargaining Table: The Effect of Stereotype Activation and Power on Claiming and Creating Value*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 399, 400-01 (2004) (showing that women do worse on negotiation when stereotypes are primed, even if women are not mentioned).

80. FISHER, URY & PATTON, *supra* note 5.

81. See, e.g., Harlan Dalton, "Disgust" and Punishment, 96 YALE L.J. 881, 905 (1987).

82. See EKMAN & FRIESEN, *supra* note 6, at 23-24; see generally DAVID R. MATSUMOTO, UNMASKING JAPAN: MYTHS AND REALITIES ABOUT THE EMOTIONS OF THE JAPANESE 42-72 (1996).

83. MATSUMOTO, *supra* note 83, at 57.

said eventually, “You didn’t say anything but we could see everything on your face. You Americans are so funny.”)

Still, the very notion of noticing these differences may perpetuate discrimination. Any time we make a category more salient, we run the risk that it becomes more embedded in the way we view the world.⁸⁴ We therefore may unconsciously engage in stereotyped views of others and otherwise limit their opportunities.⁸⁵ You may find different ways to resolve these dilemmas. When I raised this issue about Ayres’ evidence of discrimination in negotiation, he suggested we teachers and researchers might share different bits of information with different audiences.⁸⁶ We might share research about discrimination with those who might solve such problems, for example, but not teach them to those who might end up disadvantaging various outgroups.

These final concerns may sound noble, but of course there is a more base concern as well: if we teach about lie detection and negotiation, will you be better off? That partly depends on how well you think that people can use knowledge of lie detection to tell better lies. The jury isn’t even out on that question. There is little research on whether such countermeasures work.

Instead, you may find that people become more honest with you because they *perceive* that you will know when they are lying or sharing incomplete information. Of course, that still raises the question of how much you share. When he did research with students on lies, Paul Ekman told pointed to his book on lie detection and said he’d know if they were lying. But notice he didn’t tell them *how*.

And, if you reread this article carefully, you may realize things that I didn’t tell you. As I said, people may be more honest if they think you teach lie detection. But they also may test you. One of my closest friends, for example, recently started feigning a contempt expression when he spoke at times. He’d never done this before. I noticed that it was fake. But I said nothing. Partly I didn’t want to make him feel self-conscious. And, partly, I didn’t want to tell him how I knew.

If you’re not wondering this sort of thing already, consider the advice a senior diplomat once gave me. He described this as the wisest

84. See generally Clark Freshman, *Prevention Perspectives on “Different” Kinds of Discrimination: From Attacking Different “Isms” to Promoting Acceptance in Critical Race Theory, Law and Economics, and Empirical Research*, 55 STAN. L. REV. 2293, 2303 (2003) (if we teach about discrimination, however noble our intentions, we may perpetuate that discrimination in various ways).

85. *Id.*

86. See Ian Ayres, *Is Discrimination Elusive?*, 55 STAN. L. REV. 2428-32 (2003).

advice he ever got from a very senior diplomat. “When someone tells you something, don’t take the information as true. Instead ask yourself why he might be telling you this.” He told me this many times over many years. Finally, I asked him: “Why are *you* telling me *this*?” He laughed. *Oh no, as I’m editing this, I wonder: were we laughing together or was that duping delight? Do I want to know?*

CONCLUSION

Emotional awareness and lie detection are crucial to our success as negotiators. As we’ve seen though, success at that truth is a complex interplay of negotiations within and without. The science of detecting lies is relatively simple. How we go about applying that science in our negotiations with others depends first on resolving our own internal conflicts: negotiations between that part of us that wants to pay attention to clues to emotion and to deceit versus parts of us that want to track other information or goals; between parts of us that want to be authentic with others and the parts of us that know we can often best get what we want, including the truth, through more deliberate interactions with others; negotiations between the part of ourselves that wants to get at the truth and that part of ourselves that wants freedom from the complexity that lie detection often demands. And, of course, there is the constant negotiation between the parts of ourselves that want to show compassion for ourselves and others and the parts of ourselves that want to win, for our clients and for ourselves.