SENTI ALTERAM PARTEM: RIGHTS, INTERESTS, PASSIONS, AND EMOTIONS IN JUDICIAL MEDIATION

Archie Zariski*

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* Professor, Legal Studies, Athabasca University.

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ABSTRACT

Judicial mediators should pay attention to, and work with, passions and emotions as well as rights and interests, for both principled and practical reasons. In principle passions and emotions are inextricably linked to law; they are not incompatible phenomena as is commonly assumed. Practically speaking, passions and emotions are powerful motivating forces which judicial mediators may enlist to facilitate understanding and accommodation between the parties.

This paper advocates a holistic view of rights, interests, passions and emotions based on the view that rights and obligations in public law overlap significantly with social morality which has an emotional foundation. Correspondingly, private law reflects the interests of influential sectors of society; such interests are also underpinned by passions and emotions. Indeed, this paper argues that integrating emotions and passions into the practice of judicial mediation is essential in order to properly acknowledge the parties' claims and to help them advance their interests.

Exploring passions and emotions in judicial mediation is also useful as a technique which may help to build understanding, trust, and cooperation amongst the parties thus resulting in better substantive solutions.

Keywords: mediation; emotion; interests; passions; judges

RÉSUMÉ

Au cours des procédures de médiations, les médiateurs judiciaires doivent prendre en considération les passions et les émotions sous-jacentes des particuliers, veiller aux «droits» et «intérêts» des parties en cause, et agir en conséquence, et cela par principe aussi bien que pour des raisons pratiques. En fait il existe un lien étroit et indissociable entre le domaine du droit et les émotions qu'il suscite et nous reconnaissons que ces deux éléments vont souvent de pair. Les médiateurs judiciaires peuvent axer leurs procédures sur des forces émotives puissantes (comme la passion et l'émotion), ce qui leur permettra d'obtenir une bonne entente entre les parties adversaires et des résultats bien concrets.

Dans cet exposé, nous préconisons une approche globale et holistique concernant les droits, les intérêts, les passions et les émotions des parties adversaires. Cette approche correspond à la notion que les droits et les obligations dans le droit public sont étroitement liés à une moralité de groupe qui, elle, est fondée sur des bases émotionnelles. Quant au droit privé, il s'assure de l'intérêt des secteurs importants dans la société, un intérêt qui est soutenu par les émotions et les passions des particuliers. Nous tenons à démontrer, dans cet exposé, que l'intégration de ces deux critères (passions et émotions) dans les procédures de médiation aide à reconnaître les revendications des parties opposantes et à promouvoir leurs intérêts.

L'examen des passions et des émotions dans les procédures de médiation pourrait donc s'avérer un outil très important. Il s'agit d'une technique qui encourage la compréhension, la confiance et la coopération entre les parties opposantes, assurant ainsi une meilleure solution aux problèmes encourus par les deux parties qui s'affrontent.

Mots-clés : Médiation, émotion, intérêts, passions, juges

INTRODUCTION

Senti alteram partem: "feel for the other party" is an unusual variation of the familiar injunction *audi alteram partem* for those who seek to do justice. I use the new phrase here to emphasize the importance of attending to, and working with, litigants' emotions, particularly in the context of judicial mediation. To feel for a party is to seek to understand and appreciate the person not only for the thoughts he or she expresses but also for the emotions they are experiencing.

This paper is an attempt to explain why emotions are important for law, justice, and judicial practice. What has been called the "affective turn" in recent research and scholarship has drawn attention to the role of emotions in guiding human behaviour and some of that knowledge has been applied to law. Maroney has formulated a working taxonomy of law and emotions scholarship that helps to clarify the scope of the topic to be discussed here.[1] The taxonomy identifies six distinct, although related, topical areas that may be addressed in the nexus of law and emotion. My focus here will be principally on one of them: the "emotion-centered" approach which entails inquiry into how emotions become reflected in law. My thesis is that to the extent emotions do become so reflected they represent a potential resource for use in legal dispute resolution that should not be ignored.

At this point it may be helpful to state what this paper is not about. The bulk of scientific work in the field of law and emotions has: (1) explored the influence of emotion on the behaviour of legal decision makers or other legal actors (what Maroney calls the "legal actor approach");[2] (2) considered the impact of emotions on theories of rationality and choice embedded in the legal system ("theory of law approaches" in Maroney's taxonomy);[3] or, (3) considered how emotions are treated as an explicit subject matter of law (Maroney's "legal doctrine

1. Maroney (2006).
2. See for instance Schwarz (2000); Wiener *et al.* (2006); Feigenson & Park (2006); Blanchette & Richards (2010); and Angie *et al.* (2011).
3. This area is largely the province of behavioural economics research. See for instance Loewenstein (2000); Elster (2006); and Rick & Loewenstein (2007).

approach").[4] Here, however, I take a different tack in exploring how emotions are interstitial and unavoidable in the working of law.

The first step in my argument is to assert that as a matter of observation much public law (constitutional, criminal, family laws for example) appears to reflect many tenets of prevailing social morality. It is inconceivable that any established, persistent legal system would be otherwise. The legitimacy of law depends in large part on the perception that it is generally consistent with widely held social norms. Accordingly, within the conception of many legal rights or obligations there will be a core understanding which is moral in character.[5] This assertion will not be further explored or defended here.

The second step in my argument is to assert that social morality is grounded in emotions and it is for this reason that emotions become inescapable as part of the very fabric of public law. This part of the argument will be pursued in the next section of the paper.

A further step to be taken is to assert that private law (contracts and corporate law for example) appears to further the interests of powerful actors within society. Such an outcome may be the result of political activities such as lobbying or intervention in electoral processes, but that primary fact will not be further explored or supported here. However, I also assert and will defend the proposition that what are commonly labelled interests mask emotions such that private law also is infused with emotional motivations. The argument from interests to emotions is dealt with in the section of the paper titled "Passions and Interests".

The final part of my argument is that once the presence and importance of emotions are recognized in all branches of law they should be employed as a resource to be used in resolving legal disputes through informal processes such as mediation. In such a setting judges are freed from following binding rules and may look beyond them into the emotional heart of law as expressed in the hearts of the parties. For judges who mediate, therefore, *senti alteram partem*.

THE MORAL EMOTIONS

There is an emerging scientific and philosophical consensus that emotion and cognition are interwoven in the human experience of emo-

4. Criminal law, which expressly takes some emotions into account, is a common focus in this area of scholarship. See for instance: Solomon (1999).
5. This assertion is supported by other scholars; see for instance Green (2008), (2013a); Webber (2013).

tions.[6] In other words, emotions are now acknowledged to be more than mere sensations (although they are often associated with physiological effects) or the result of cognitive processes (although they are often tied to ideas). Thus: "Cognitions and perceptions inform and modulate the emotion system; they are not synonymous with it."[7] One consequence of this insight has been the rebirth of a theory of morality tied to the emotions.[8]

I say "rebirth" because an elaborate argument for the source of morality in the "moral sentiments" was advanced by none other than Adam Smith in the eighteenth century. For Smith, the shared experience of a variety of emotions arising from social situations led to common norms of approbation and disapprobation for behaviour – social morality. In this way sentiments were tied with judgments to provide a guide for future action, thereby unifying emotion and cognition. Smith insisted that the moral sentiments, not reason, were the source of morality:

> But though reason is undoubtedly the source of the general rules of morality, and of all the moral judgements which we form by means of them; it is altogether absurd and unintelligible to suppose that the first perception of right and wrong can be derived from reason, even in those particular cases upon the experience of which the general rules are formed. These first perceptions, as well as all other experiments upon which any general rules are founded, cannot be the object of reason, but of immediate sense and feeling.[9]

Smith, often considered the patron saint of selfish material interest, actually criticized avarice as a misguided attempt to satisfy vanity through seeking attention.[10] Far from being an apologist for unbridled self-love, Adam Smith was truly a believer in the strength of moral sentiments to bind people together in communities of mutual respect and cooperation.

Smith was not the only precursor of the contemporary theory of norms and morals based on emotions. Gabriel Tarde, an early twentieth century French sociologist, advocated a view of society driven by the twin engines of belief and desire. According to Tarde, ideas and norms

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6. See for instance Leventhal & Scherer (1987); Haidt states: "moral intuitions (including moral emotions) come first and directly cause moral judgments.": Haidt (2001), 814.
7. Bretherton *et al.* (1986), 530.
8. See for instance Haidt (2003).
9. Smith (1759, 2009), 376-77.
10. *Ibid.*, 63.

were the basic goods exchanged in society according to values originating in an economy of desire. Thus:

> All the force of our belief and our desire, which flows – albeit with leakage – into our behavior and thoughts, is produced or rather provoked by the continual experience of our senses. [...] the moralist, too proud of having eradicated all his passions, becomes inert and calls himself a quietist.[11]

For Tarde emotions were the most contagious element of social exchanges and thus helped to spread and consolidate moral attitudes within a community which satisfy the "imperative needs of the heart".[12]

The well-known judge and economist Richard Posner can also be counted as a supporter of the view that morals have an emotional foundation. He states outright: "I claim that the bedrock of many of our moral rules is emotion, not emotion-evaluating reason."[13] Posner goes on to note that the proper consideration of some legal issues benefits from moral insight and feeling and their absence may lead to injustice.

Today, scholars have built upon Smith's insight to elaborate an understanding of the "moral emotions," those which have regard for the welfare (or just deserts) of others and for the appropriateness of our interactions with them. As with Smith, modern researchers agree that such emotions represent an indissoluble mix of feeling and thought. Thus, the experience and expression of emotions are the foundation of a shared sense of justice within culturally homogeneous communities, and of conflicts of value and "principle" in heterogeneous ones.[14]

Because morality pervades public law it is justified to take emotions seriously for the insight they provide into parties' understanding of what law is for, and what justice requires in the conflict that is before the court.

Emotions are also salient in cases involving private law which mirrors the interests of influential actors in society, because interests also arise out of emotions. We have grown accustomed to thinking that the word "interest" identifies only rational motivations which do not share much in common with emotions; this assumption is challenged in the next section through examining the relationship of passion and interest.

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11. Tarde (1969), 203.
12. *Ibid.*, 227.
13. Posner (1999), 322.
14. As De Cremer and van den Bos state: "the issue of determining justice or injustice is often a matter of intuition and feeling": De Cremer & van den Bos (2007), 2. See also Pasquetti (2013).

PASSIONS AND INTERESTS

"Passion" is one of those words which can be used both for praise and for reprobation. Applied to judges it is an admiring term – a "passion for justice".[15] In politics to be a "passionate ideologue" is not usually considered a positive character trait.[16] A passion for revenge is a counterexample to a passion for equality. "Interest", however, seems a much milder term, with a meaning that is reassuringly more oriented towards rationality, which is frequently used today in many situations to describe a person's motivation. "Interest based" negotiation for instance is the touchstone of the widely respected Harvard approach to dispute resolution. It would be considered distinctly eccentric, perhaps even subversive, to talk approvingly today about "passion based" negotiation. How interest came to be preferred over passion is an interesting and illuminating historical tale told by Hirschman.[17]

According to Hirschman the term "passion" was once associated largely with the upper classes of society, including rulers such as princes and kings. Passion was considered an overmastering emotional condition thought to drive great acts of courage, daring, aggression, and sometimes love. The personal passions of a sovereign, in the absence of democracy and the strong rule of law, could become state policy which might cause turmoil and suffering to all inhabitants of the territory and beyond. As the middle classes gained in wealth and influence through trade and commerce such upheavals became even less tolerable; passion accordingly became less acceptable as good reason for government action. In opposition to passionate rule the doctrine of the spread of civilization, peace, and harmony through trade and other economic relations gained ground. The beneficial effects of *doux commerce* as it was called were ascribed to people shifting their attention to financial "interest" rather than the unruly passions as a better guide for action. Thus:

> [...] one set of passions, hitherto known variously as greed, avarice, or love of lucre, could be usefully employed to oppose and bridle such other passions as ambition, lust for power, or sexual lust.[18] (Emphasis in original)

As Hirschman notes, it was recognized early on that the interest in wealth had somehow overshadowed other human interests such as con-

15. For instance great depth of feeling and compassion has been linked to great judging: Reich (2010).
16. See for instance the articles on the topic of the passions in politics in the November 2002 issue of the journal *Philosophy & Social Criticism*; and Rip *et al.* (2012).
17. Hirschman (1977). See also Hirschman (1982).
18. Hirschman (1977), 41.

science, honour, and health.[19] Thus, interest as a concept had an association with economics and material gain from the beginning of its modern usage in politics and law. Material interest, a "calm passion,"[20] was expected to liberate society from the ill effects of troublesome emotions by suppressing "the full human personality"[21] in exchange for economic expansion and growing wealth for all.[22] Unger describes this shift in socio-political terms as the decline of an aristocratic ethic of chivalry and emergence of a bourgeois ethic centered on devotion to hard work and material reward.[23]

Mathiowetz has pointed to an alternative etymology of interest in law.[24] Under the Roman law of obligations a remedy could be had for impairment of property rights such as suffered by a purchaser who found that someone other than his vendor had a superior claim to ownership. One remedy was a claim *in quod interest*. Under such a claim a judge was required to investigate the real value of the property to the disappointed plaintiff considering the specific context of the purchase including its intended use and this estimate would form the basis of money damages to be awarded.[25] Such a conception of interest emphasized the careful weighing of all circumstances in order to reach a sound conclusion concerning the value of the property to the person claiming. Interest thus came to be identified with the cool exercise of analysis and judgment in order to secure what was of real value to a person given specific circumstances; in Mathiowetz's words interest connotes "calculating self-regard."[26] A person's interest could therefore be visualized as a shopping list of preferences, mainly for material goods.[27] Notably, interest is principally associated with property and wealth.

It does not matter here whether Hirschman's or Mathiowetz's account of the ascendancy of interest over passion is considered more persuasive. Today we see the effects of the elevation of interest in medi-

19. This example Hirschman takes from a French publication dating to 1661: Hirschman, *ibid.*, 39.
20. *Ibid.*, 66.
21. *Ibid.*, 133.
22. Thus: "In short, interest became synonymous with the notion of the love of or desire for money, and increasingly, the interest in gain and profit came to be seen as an innocent and harmless passion.": Hess (1999), 342.
23. Unger (1984), 69.
24. Mathiowetz (2007).
25. Zimmermann explains the origin of the Latin term and concludes that it means something very much like the modern expression "what's in it for me": Zimmermann (1990), 826.
26. Mathiowetz (2011), 205.
27. *Ibid.*, 25.

ation theory and practice. Although Moore, for instance, speaks of "procedural" and "psychological" interests the principal focus of his influential treatise are "substantive" interests which usually come down to expectations of material gain of one sort or another. It goes unnoticed that such a conception of interest can also be linked to the emotions of avarice, acquisitiveness, and desire to consume. These are eminently middle class "bourgeois" emotions, not grand passions in the classical sense, but emotions nonetheless. It is easier to see the emotional foundation of procedural and psychological interests such as desires for respect, fair treatment, and retribution but this should not blind us to the realization that all interests are accompanied by emotions. Using the language of interest in mediation does not excuse us for ignoring or minimizing the role of emotions in conflict.

Latour and Lépinay[28] have surveyed the thought of Gabriel Tarde in order to draw attention to links between the suppression of emotions in social thought and the rise of neoclassical economics which prizes the market as a rational calculating machine serving society's material needs. Because emotions (apart from the supposedly "natural" desire for material accumulation) were considered unquantifiable they have been neglected as a vital factor in society. However, social relationships measured in differentials of quantifiable wealth may be studied mathematically through economics.[29] Latour and Lépinay note Tarde insisted that all human desires should play a part in the study of society which new technologies and methods would eventually make fully measureable. With social media Tarde's vision of a fully quantifiable economy of desire may be coming true. Think of a market for "likes" on Facebook or the growth of social movements via Twitter. These media function like the "valuemeters" described by Latour and Lépinay.[30]

Other twentieth century thinkers have criticized the eclipse of desire and emotion as subjects for serious attention and study by sociologists and economists. Amartya Sen, in his Introduction to the 250th anniversary edition of Adam Smith's *Theory of Moral Sentiments* calls the prevailing theories of economic rationality which claim Smith as a foundational figure "cramped and simplistic".[31] Herbert Marcuse has described the contemporary "one dimensional man" whose life represses many of the goals and dreams inspired by passion and instead privileges "false" needs for the products of the modern econ-

28. Latour & Lépinay (2009).
29. *Ibid.*, 14.
30. *Ibid.*, 16.
31. Sen (2009), x.

omy.[32] For Marcuse the effect of modern scientific rationality has been to banish everything connected to the senses of morality and justice to the merely subjective or ideal realm where they are considered harmless:

> Humanitarian, religious, and moral ideas are only "ideal"; they don't disturb unduly the established way of life, and are not invalidated by the fact that they are contradicted by a behaviour dictated by the daily necessities of business and politics.[33]

Passions are associated with personal goals and also those which go beyond satisfying individual interests. We need to transcend the unhelpful conflict analysis which assumes dichotomy between "substantive" issues which involve "interests" (connected to material wellbeing) on the one hand, and "relationship" or "psychological" issues which are merely subjective (because connected to emotions) on the other. Rather we should recognize the existence of "passionate interests" (some of which may be altruistic) in many conflicts and disputes. Such interests require emotional understanding and response and should be considered "substantive" in their own right.

WORKING WITH PASSIONS AND EMOTIONS

Working with emotions as an end in itself is clearly outside the bounds of mainstream mediation theory and practice today. Beginning with the "Bible" of modern dispute resolution, *Getting to Yes*,[34] scholars and practitioners have focussed on emotions as unfortunate roadblocks, detours, and storms on the road to effective negotiation and mediation. Fisher, Ury and Patton, for instance, speak of emotions becoming "entangled with the objective merits of the problem"[35] and therefore advocate separating the people from the problem. In *Getting to Yes* the emotions that are mentioned are invariably "negative" such as frustration and anger which are to be defused (and diffused) through "letting off steam."[36] The best practice is to disentangle substantive issues from relationship issues involving emotions.[37] There is little understanding that perspectives on relationships involving strong emotions associated with moral judgments may be the real substance in dispute.

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32. Marcuse (1964), 5.
33. *Ibid.*, 148.
34. Fisher, Ury, & Patton (1991).
35. *Ibid.*, 11.
36. *Ibid.*, 21.
37. *Ibid.*, 158.

Christopher Moore is another leading mediation theorist who gives emotions a merely supporting role in the drama of dispute resolution. Moore's advice is that "for rational discussions on substantive issues to occur, the impact of negative emotions must often be managed and minimized by either the disputants themselves or an intervenor."[38] Although he does speak of fostering positive feelings the prevailing view in his writing is that emotions are usually detrimental to constructive conflict resolution. Moore treats emotions as the products of conflict rather than part of its genesis. Accordingly he advocates intervention to unearth how emotions have been generated by an event so that people "will be better able to manage or change their emotions and develop a course of action to modify their situation."[39] Although Moore recognizes the contagiousness of emotions (along with Tarde), he treats this effect as a problem to be avoided lest negative emotions contaminate rational discussion.[40] These are just two examples of the leading approach to emotions in dispute resolution which treats them as essentially exogenous influences to be managed, set aside, or suppressed. In contrast to that approach this paper suggests the potential of passions and emotions to become *both part of the substance of a dispute, and part of its resolution.* Although they are a minority some scholars agree that emotions should be integrated in, rather than segregated from, the study of law and justice.[41]

We now turn to some concrete suggestions for actions and techniques which may help judicial mediators to uncover and legitimise passions and emotions suppressed through the transformations disputes undergo when litigated. I do so in an attempt to encourage and empower judges to look beyond rights and material interests for possible solutions which are emotionally satisfying because they quench the parties' thirst for justice. Just as *Getting to Yes* became a bestseller, so did Daniel Goleman's book *Emotional Intelligence*.[42] However, in neither case have the messages of those authors spread far and deep enough to make mediators superfluous. Goleman's dream of emotional education for all[43] has not led to a decline in conflicts and disputes tied to passions large and small.

38. Moore (2003), 168.
39. *Ibid.*, 170.
40. Moore envisages contagion through the psychological processes of transference and restimulation: *ibid.*, 171-172.
41. For example Bandes (1999); Jones & Bodtker (2001); Jameson *et al.* (2009); and Abrams (2011).
42. Goleman (1995).
43. *Ibid.*, 285-286.

A judicial mediator enters a dispute only after litigation has been commenced, and often after a number of preliminary steps have been taken. First, we should recognize that most litigation processes are neither intended nor designed to elicit passions and emotions on the part of disputants. Rather, it has been found that the usual effect of recourse to law is suppression of the emotional element of conflicts. This phenomenon has its origin in the "transformation" or "translation" by lawyers of disputes and conflicts into legal claims and defences for routine processing according to standard legal categories.

The literature on the legal transformation and reframing of disputes is large and I will only focus on two examples which are particularly relevant to the question of emotions. Tamara Relis has documented how plaintiffs' desires for apology, retribution, and prevention of further harm are essentially ignored by their own lawyers and the other parties to their legal proceedings.[44] Although parties often use the language of "principle" to explain their needs, it is clear that many of these demands are based on emotions engendered by the circumstances prompting legal action. Meili has investigated the goals and objectives of named plaintiffs in large class actions involving thousands of claimants.[45] Many of them expressed desires that were not related to personal financial gain, and in this context that suited the lawyers who encouraged them to stick with the litigation in spite of offers to "buy them off." Such studies clearly substantiate the existence of "passionate interests" in addition to commonly assumed selfish motivations.

How then should judicial mediators deal with emotions? Fisher and Ury admonished us to "separate the people from the problem" and concentrate most of our energy on satisfying people's more substantial, material interests. When "the people are the problem" they gave little guidance beyond encouraging "venting" of emotions.

Most practitioners of dispute resolution are taught to treat emotions as negative forces in disputing, but cultivate in and for themselves positive emotional states such as confidence, benevolence, even love for human beings embroiled in their messy conflicts.

Abrams and Keren offer a helpful conceptual model for true engagement with emotions and passionate interests in the legal context.[46] Although they had in mind research and scholarship concerning

44. Relis (2007).
45. Meili (2011).
46. Abrams & Keren (2010).

emotions their approach may also be adopted by interveners such as judicial mediators. According to these scholars engagement should proceed in three steps: investigation, illumination, and integration.[47] Let's examine what those might look like in judicial dispute resolution.

Investigation of the emotional underpinnings of disputes should be more than just allowing parties to "vent" and then move on to more "constructive" rational dialogue. Truly understanding emotions requires both imagination and open mindedness. The judicial mediator must model both when eliciting expressions of the parties' emotions and passionate interests. It involves being open and receptive to life experiences that may be quite foreign which might prompt the mediator's own emotional reactions. The careful mediator will attempt to disentangle their own emotions from those the parties seek to express, and encourage everyone present to try to do the same. Cultural norms and expectations regarding the expression of emotions will always be present and these might also enter into discussion in order not to obscure insight into the underlying emotions. Anger may be loud and it may also be quietly voiced with clenched teeth.

Illumination of the emotions and passionate interests involved in a dispute should be the next goal of a judicial mediator for herself and for all parties involved. This need not take the form of a flash of insight, but more commonly may be achieved by coming to see a person in a new light as a multi-dimensional human being with familiar emotions. The plaintiff is replaced by a person who has been impelled by strong feeling and conviction to embark on the time consuming and costly adventure of litigation. A defendant is replaced by the person who finds themself in a situation they regret getting into but who can't see what else they might have done to avoid it. Conviction and regret can be understood by both and this may serve to motivate an attempt to make the future better for each.

Integration is the term used by Abrams and Keren to describe how investigation and illumination of emotions may result in legal change. In mediation this activity will mean helping the parties to see common ground in aid of seeking solutions that will be mutually acceptable. The judicial mediator may engage in some coaching or educating so as to increase what has been called the "emotional intelligence"[48] of the parties so that they can respond more constructively to each other. Integra-

47. *Ibid.*, 2033.
48. Goleman, *supra* note 38.

tion of viewpoints may more readily occur when disputants acknowledge they have similar emotions, although they may express them differently and draw different conclusions about what should be done. Recognition of differing emotional responses amongst the parties may lead to identification of complementary needs for actions which can be compatible in some circumstances. Passions may be acknowledged as strongly felt convictions which need to be taken seriously when their emotional foundation is laid bare honestly and sincerely in a non-judgmental forum. Despite all of these efforts integration of desires may not be possible, but engaging with emotions and passionate interests is a necessary if not sufficient, condition for success.

CONCLUSION

What may be gained through engaging with emotions in judicial mediation? Doing so may lead to constructive intervention and possibly resolution where formal adjudication of claims would be ineffective or counterproductive. This may be the case in the following types of disputes amongst others:

Where a claim has been brought based on strong moral belief (often called "principle") but the law either does not recognize a right or obligation in the situation or does not provide an effective remedy.

The relationship between morality and law is a complicated one with many political implications and vigorous philosophical debates. Whether or not one's view is that law should always echo morality, the mediation moment provides a respite from such arguments and an opportunity to engage with people's moral senses directly and constructively. As Posner notes "it is often difficult to give a persuasive *rational* account of a moral rule, including a moral rule to which the law has annexed a sanction for violation."[49] Mediation is not designed or intended to reform the law, but it can provide a forum for moral views to be aired and better understood in the context of their emotional foundation.

Engaging with the emotions and passions associated with a claim based on a perception of "principle" may lead to alternative ways of recognizing the strength and propriety of a party's feelings which law is not capable of providing. The example of an apology for conduct perceived as contemptuous or belittling is just one of many which may be envisaged. Adam Smith believed that the true aim of resentment, for instance,

49. Posner, *supra* note 8, 322.

is repentance and acknowledgement of unjust behaviour,[50] but resentment becomes unjust when pushed to the point of revenge.[51] Investigating in order to understand the emotional motivation of a supposedly "frivolous" or "ill conceived" claim may yield solutions that are more lasting and effective than dismissal through adjudication or even an award of nominal damages.

Where both (or some) parties to litigation have similar passionate interests arising out of the disputing situation only one of which might be furthered by an adjudicated decision.

Sharing the same passions may provide the motivation necessary to find ways of satisfying all parties' desires in an acceptable way. Competition may give way to connection and insight such that new ways out of impasse open up.

Discovering a common feeling can be deeply satisfying for someone who thereby gains new connections with others. A judicial mediator can work to encourage such recognition which is indeed one of the foundations of community.

Where the parties have dissimilar moral views and the law does not provide clear cut criteria for deciding the proper course of action.

Researchers have found that some emotions and their structure in relation to one another seem to be shared across demographic lines including race, culture, and socioeconomic levels.[52] However, it has also been noted that the expression and social effects of emotion are greatly dependant on culture and social norms. Rosenwein[53] suggests that different "emotional communities" may coexist within a larger culture. In addition, nobody has claimed that similar emotions will always call forth similar universal moral principles, although this was probably Adam Smith's view arising out of his Christian faith.

Where a clash of moralities is the basis for legal impasse the judicial mediator may attempt to draw out the underlying emotions associated with the moral views presented. If the emotions appear similar this is a basis for common ground between the parties which might lead to compromise or accommodation. Even if the emotional underpinnings of

50. Smith, *supra* note 4, 115.
51. *Ibid.*, 93.
52. See for instance MacKinnon & Keating (1989); Robinson & Kurzban (2007).
53. Rosenwein (2002).

the opposing positions are dissimilar it will be advantageous for both parties to better understand the reasons for their differences.

Where the course of action prescribed by law appears to be inconsistent with moral views shared by the parties.

Law is not coextensive with morality. Sometimes law may be perceived to lag behind social morality, and sometimes it may be considered to be in advance of it.[54] One example of such a mismatch is the area of "good Samaritan" behaviour which has received a variety of disparate treatments in law. Another instance may be the law's low estimation of the value of promises of gifts. In such cases the legal result may not conform to an outcome which would be obtained by the application of morality. Mediation offers an opportunity for parties to achieve their preferred non-legal solutions, so long as these do not offend the law or public policy.

Investigation of the parties' emotional commitments to specific outcomes may result in illuminating insights into the moral values and principles implicated in those positions. To the extent that disputants have similar emotions this may motivate them to seek non-legal outcomes that can be integrated with their compatible values. Resolving disputes in that way may be described as norm-making in mediation. In time it may contribute to social change.

This paper has presented an argument that emotions are integral to the moral values and principles which disputants often seek (unsuccessfully) to legitimize and vindicate through law. Law does not always provide the desired recourse or remedy because it is not coextensive with social morality, and parties may have idiosyncratic moral views. Attending to, and working with, the underlying emotions of the parties in mediation is the best approach for a judge faced with such disputes. *Senti alteram partem* complements the judicial mantra of *audi alteram partem* by calling attention to the feelings embedded in thought and speech. Focussing on motivating emotions allows judicial mediators to respond more appropriately to litigants' intense desire for justice.

54. See Green (2013b).

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