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## Jonah Lehrer, How We Decide

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## JONAH LEHRER, HOW WE DECIDE

ALAN M. WEINBERGER\*

Trial court judges are accustomed to a steady diet of emotionally charged cases in normal economic times. But the inevitable by-product of the current financial crisis will be a flooding of dockets with cases of personal hardship involving loan and lease defaults, evictions and foreclosures.<sup>1</sup> Trial judges will face the considerable challenge of drawing upon their emotional intelligence to enhance decision-making, while simultaneously keeping their emotions in check. Would studying the experience of chess grandmasters, NFL quarterbacks, professional poker players, and airline pilots make trial judges better decision-makers? If so, each judge's chambers deserves its own copy of Jonah Lehrer's *How We Decide*, which became affordable for bulk purchase by court administrators with its winter 2010 release in paperback.<sup>2</sup>

Lehrer's thesis is that anyone who makes difficult decisions can benefit from a more emotional thought process.<sup>3</sup> He acknowledges the conventional wisdom that simple decisions of everyday life (like choosing what to have for dinner) are suitable for emotions, while difficult decisions require an analytically rigorous process of consciously considering alternatives and carefully weighing pros and cons.<sup>4</sup> But he goes on to state that "the conventional wisdom about decision-making has got it exactly backward."<sup>5</sup> According to Lehrer, the reality is counter-intuitive. It is the easy decisions that are best suited to the rational brain.<sup>6</sup> Deciphering more complex problems overwhelms the prefrontal cortex (PFC).<sup>7</sup> Such decisions "require the processing powers of the super-computer of the mind": the emotional center of the brain known as the anterior cingulate cortex (ACC).<sup>8</sup> The hardest calls,

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1. Editorial, *This Year's Housing Crisis*, N.Y. TIMES, Jan. 5, 2010, at A20.
2. JONAH LEHRER, HOW WE DECIDE (2009).
3. *See id. passim*.
4. *See id.* at 237.
5. *Id.*
6. *Id.*
7. LEHRER, *supra* note 2, at 237.
8. *Id.* at 40, 238.

says Lehrer, benefit from the most feeling.<sup>9</sup> The more complex the decision, the greater the risk that too much conscious reflection will inundate the PFC with more data than it is capable of processing.<sup>10</sup> The better strategy is to use the conscious mind to acquire the relevant information but then shift mental gears to a more emotional thought process for actual decision-making.<sup>11</sup> “It might sound ridiculous, but it makes scientific sense: Think *less* about those items that you care a lot about. Don’t be afraid to let your emotions choose.”<sup>12</sup> Lehrer’s advice in complex situations is to “always listen to your feelings. They know more than you do.”<sup>13</sup>

The reason the emotional brain is so intelligent is that it has the capacity to turn mistakes into learning opportunities.<sup>14</sup> The surprising wisdom of our emotions is a function of the spindle neuron, a highly flexible brain cell only found in humans and great apes, and only in the ACC.<sup>15</sup> The interaction of these cells with dopamine neurons gives us the ability to learn from mistakes.<sup>16</sup> The constant adjustment of spindle neurons every time we make a mistake is the scientific basis for the process by which “teachable moments” occur.<sup>17</sup> Bad outcomes can happen when a complex decision-maker fortifies himself against human emotion. Consider the high-profile 2007 Colorado case involving a vacant parcel of land in Boulder with a magnificent Rocky Mountain view owned by Don and Susie Kirlin.<sup>18</sup> Richard McLean, a retired judge and former Boulder mayor, and his wife, Edith Stevens, an attorney, filed suit to acquire title through adverse possession to enough of the Kirlins’ property to thwart its ever being developed and impairing the view from their home next door.<sup>19</sup> Finding that McLean and Stevens had crossed the Kirlins’ land to access their own backyard, kept a woodpile on the disputed property, and used the property to throw summer parties throughout the eighteen-year period of Colorado’s statute of limitations for trespass, District Court Judge James Klein awarded Plaintiffs one-third of the defendants’ land.<sup>20</sup>

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9. *Id.* at 237.

10. *Id.* at 236.

11. *See id.* at 230–32.

12. LEHRER, *supra* note 2, at 245.

13. *Id.* at 238.

14. *Id.* at 249.

15. *Id.* at 40.

16. *Id.* at 41.

17. LEHRER, *supra* note 2, at 41.

18. Plaintiffs’ Verified Complaint at 1–2, *McLean v. DK Trust*, No. 06CV982 (Boulder Dist. Ct., Oct. 4, 2006).

19. *Id.* at 4.

20. Order at 1, 9, *McLean v. DK Trust*, No. 06CV982 (Boulder Dist. Ct., Oct. 17, 2007).

The intense public outcry following the decision, including well-publicized protest rallies on the disputed property, attracted national media coverage.<sup>21</sup> Song parodies reminiscent of Tom Lehrer appeared on the Internet.<sup>22</sup> Bloggers even called upon bar officials to probe Stevens' conduct for possible breach of the canons of professional responsibility.<sup>23</sup>

A bill to prevent future bad faith land-grabs, enacted by the Colorado legislature with wide bipartisan support and signed into law by Governor Bill Ritter within a year of the decision, left Colorado with what may be the country's most restrictive adverse possession law.<sup>24</sup> An adverse possessor in Colorado will now have to prove by clear and convincing evidence that he believed in good faith that the land was actually his own.<sup>25</sup> If this occurs, the judge in the case still has discretion to award the losing party damages and reimbursement for any property taxes paid during the eighteen-year period of adverse possession.<sup>26</sup>

Could this train wreck have been avoided? Where was Judge Klein's little voice-inside-the-head to ask, "Must the common law lack common sense?" First-year property students would know how to finesse the decision: Award McLean and Stevens a prescriptive easement on these facts—but not title by adverse possession. Their conduct fell well short of the substantial cultivation, improvement or enclosure required to establish the "actual" possession element under adverse possession doctrine in many states.<sup>27</sup> In other jurisdictions, their conduct would also fall short of the common law good faith belief requirement that sometimes exists.<sup>28</sup>

As further proof that American culture celebrates second chances, Judge Klein received 65.8% of the vote when he appeared on the ballot for retention in 2008.<sup>29</sup> If Lehrer is correct about how the brain accumulates wisdom through error, Judge Klein will be a better decision-maker in the future.

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21. See, e.g., DeeDee Correll, *This Land is Now Their Land-So a Judge Rules*, L.A. TIMES, Dec. 3, 2007, at A8.

22. Mark Frauenfelder, *Songs Making Fun of Land Grab Case in Boulder, Colorado*, BOING BOING (Jan. 9, 2008, 4:52 PM), <http://boingboing.net/2008/01/09/songs-making-fun-of.html>.

23. Tom McGhee, *Panel Won't Probe Boulder Land Ruling*, DENVER POST (Nov. 21, 2007, 11:39 AM), [http://www.denverpost.com/breakingnews/ci\\_7519098?source=pkg](http://www.denverpost.com/breakingnews/ci_7519098?source=pkg).

24. Act of Apr. 25, 2008, ch. 190, 2008 Colo. Sess. Laws 668 (codified at COLO. REV. STAT. § 38-41-101 (2008)).

25. COLO. REV. STAT. at § 38-41-101(3).

26. *Id.* § 38-41-101(5).

27. See, e.g., *Walsh v. Ellis*, 883 N.Y.S.2d 563, 565–56 (N.Y. App. Div. 2009) (finding occasional planting activities, minor repairs, and use of driveway was insufficient; regular cultivation, improvement, or substantial enclosure was required).

28. See, e.g., *Halpern v. Lacy Inv. Corp.*, 379 S.E.2d 519, 521 (Ga. 1989) ("[T]he correct rule is that one must enter upon the land claiming in good faith the right to do so.").

29. COLO. SEC'Y OF STATE, OFFICIAL PUBLICATION OF THE ABSTRACT OF VOTES CAST FOR THE 2008 PRIMARY 2008 GENERAL 132 (2008). Voters may have been influenced by the

In deciding cases of first impression, judges often use their rational brain, searching in vain for precedent where none exists, before ultimately resorting to reasoning by analogy.<sup>30</sup> This has led to bad outcomes.<sup>31</sup> When faced with a problem for which there is no obvious answer, according to Lehrer, it is time for the decision-maker to use the emotional brain and let feelings come into play.<sup>32</sup>

Consider the case of *Popov v. Hayashi*.<sup>33</sup> Had he engaged in reasoning by analogy, Judge Kevin McCarthy almost surely would have awarded ownership of Barry Bonds' single-season homerun record baseball to Patrick Hayashi, in whose hands (and then pocket) the loose ball came to rest in the right-field stands at San Francisco's PacBell Park on October 7, 2001.<sup>34</sup> But first in time, the ball had briefly been in the webbing of a glove worn by Alex Popov, who had tried to catch the ball in flight only to lose it after being tackled, roughly jostled and kicked, and perhaps bitten in the ensuing scrum.<sup>35</sup> It undoubtedly occurred to Judge McCarthy that a baseball hit outside the field of play is very much like a wild animal, eligible for capture only by one who is ultimately able to deprive it of its natural liberty.<sup>36</sup> But Judge McCarthy concluded that a

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recommendation of the Colorado Commission on Judicial Performance that Judge Klein, a fourth-generation Coloradan, be retained, although his was the lowest margin of any of the district court judges on the ballot. *Twentieth Judicial District, District Judges: Honorable James C. Klein*, COLO. OFFICE OF JUDICIAL PERFORMANCE EVALUATION, <http://www.coloradojudicialperformance.gov/retention.cfm?ret=204> (last visited Apr. 9, 2011). See also COLO. SEC'Y OF STATE, *supra*, at 127–33.

30. See Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 959 (1996).

31. See, e.g., *Hammonds v. Cent. Ky. Natural Gas Co.*, 75 S.W.2d 204, 206 (Ky. 1934) (comparing natural gas to wild animals, both by their nature of being wild and migratory). Judge Osslo Stanley's analogy in *Hammonds* earned "violent adverse criticism by many authors and law review writers." *Tex. Am. Energy Corp. v. Citizens Fid. Bank & Trust Co.*, 736 S.W.2d 25, 27–28 (Ky. 1987) (quoting *Lone Star Gas Co. v. Murchison*, 353 S.W.2d 870, 876 (Tex. 1962)).

32. See LEHRER, *supra* note 2, at 231–32. Inability to obtain accurate and reliable feedback may impair judges' capacity to use intuitive thinking successfully. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 32 (2007) ("Unlike chess grandmasters, judges operate in an environment that does not allow them to perfect their intuitive decision-making process."). Judges only receive external validation or invalidation in the rare instances when their rulings are challenged on appeal. Considerable time has elapsed by the time a judge reads a reversal or law review article criticizing an opinion, as Judge Richard Posner observed in a conversation about his recent book, *How Judges Think*, with students in David Levi's and Mitu Gulati's Duke Law School class. Interview, *A Conversation With Judge Richard A. Posner*, 58 DUKE L.J. 1807, 1813 (2009).

33. No. 400454, 2002 WL 31833731, at \*1 (Cal. Super. Ct. Dec. 18, 2002).

34. *Id.*

35. *Id.* at \*1–2.

36. See *id.* at \*5 n.25 (recognizing in Popov's argument language rejected by *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805) regarding the capture of wild animals).

zero-sum decision awarding the ball to either party on these facts would simply be unfair to the other.<sup>37</sup>

“The first part of solving a mystery,” Lehrer writes, “is realizing that there is no easy solution.”<sup>38</sup> Judge McCarthy convened a session of court at the University of California, Hastings College of the Law to hear a panel of four law professors participate in a forum on the law of possession.<sup>39</sup> The professors predictably disagreed about the definition of possession.<sup>40</sup> “We are, therefore, left with something of a dilemma,” Judge McCarthy wrote.<sup>41</sup> According to Lehrer, more rational thought will not help in these situations. “This is where feelings come into play. When there is no obvious answer, . . . [m]ysteries require more than mere rationality.”<sup>42</sup> Judge McCarthy used his equitable discretion to craft a somewhat novel but satisfying remedy: ordering that the baseball be sold and the proceeds divided equally between the competing claimants.<sup>43</sup> Through this decision, Judge McCarthy secured a place in first-year property casebooks for his opinion<sup>44</sup> and the sobriquet of Solomon-like for himself.<sup>45</sup>

Of course, the problem with emotions is they have a tendency to run amok. “Whenever someone makes a decision, the brain is awash in feeling, driven by its inexplicable passions. Even when a person tries to be reasonable and restrained, these emotional impulses secretly influence judgment.”<sup>46</sup> This is why self-awareness, the capacity to recognize feelings as they occur, is the cornerstone of emotional intelligence.<sup>47</sup> To avoid mistakes, a trial judge needs

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37. *Popov*, 2002 WL 31833731, at \*8.

38. LEHRER, *supra* note 2, at 231.

39. *Popov*, 2002 WL 31833731, at \*3 & n.17.

40. *Id.* at \*3.

41. *Id.* at \*7.

42. LEHRER, *supra* note 2, at 231.

43. *Popov*, 2002 WL 31833731, at \*8.

44. *See, e.g.*, R. WILSON FREYERMUTH ET AL., PROPERTY AND LAWYERING 85–89 (2d ed. 2006); SANDRA H. JOHNSON ET AL., PROPERTY LAW: CASES, MATERIALS AND PROBLEMS 49–55 (3d ed. 2006); GRANT S. NELSON ET AL., CONTEMPORARY PROPERTY 34–43 (3d ed. 2008).

45. Dean E. Murphy, *Solomonic Decree in Dispute Over Bonds Ball*, N.Y. TIMES, Dec. 19, 2002, at A24. Whether the decision would have survived appellate review will never be known. The presumed “million dollar ball” sold at auction for only \$450,000. NICK TASLER, THE IMPULSE FACTOR: WHY SOME OF US PLAY IT SAFE AND OTHERS RISK IT ALL 97 (2008).

Popov’s share was insufficient to pay his legal fees to date, let alone finance an appeal. Attorney Martin Triano sued his former client to collect \$473,530 in unpaid legal fees. *Id.* Hayashi’s lawyer presumably agreed to take the case on a contingency fee basis. *Id.*

46. LEHRER, *supra* note 2, at xi, xv.

47. *See generally* HOWARD GARDNER, FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES (1983) (proposing the theory of eight different types of intelligences, including intrapersonal intelligence, or self-awareness).

to always be aware of how he is thinking.<sup>48</sup> “[T]hinking about thinking . . . helps us steer clear of stupid errors.”<sup>49</sup>

The emotional brain should not always be trusted,<sup>50</sup> as Judge Kevin Duffy discovered. Judge Duffy presided over a bench trial of a lawsuit filed by Penthouse International against Dominion Federal Savings & Loan for breaching a commitment to participate in a loan of \$35 million to finance a casino-hotel project in Atlantic City.<sup>51</sup> Dominion’s share of the loan was twice the maximum amount it could lend to a single borrower by federal regulation.<sup>52</sup> When a sub-participant backed out of the deal too late to find a replacement,<sup>53</sup> Dominion desperately needed a way out of its commitment without incurring liability.<sup>54</sup> “In this plot they found a willing tool in [attorney Phillip] Gorelick.”<sup>55</sup> Judge Duffy found that Gorelick was retained to serve as “Dominion’s hatchet man,” who worked to “bully and intimidate” Penthouse by making an endless series of unreasonable demands until the commitment expired and Dominion was released from its obligation.<sup>56</sup>

Judge Duffy found simply incredible Gorelick’s testimony that he could not have acted in bad faith for the purpose of destroying the deal because his client had never made him aware of its dilemma.<sup>57</sup>

Gorelick took the stand and attempted brazenly to lie to the court. During cross-examination, the crucible of truth, Gorelick continuously shifted uneasily in the chair, sweated like a trapped liar, and the glaze that came over his shifty eyes gave proof to his continuing perjury. His total lack of veracity was shown not only by his demeanor but by the shady practices he seemingly reveled in. . . . The inferences to be drawn from Gorelick’s outrageous perjury are often the exact opposite of what he said.<sup>58</sup>

Judge Duffy *sua sponte* held the members of Gorelick’s law firm jointly and severally liable for damages caused by their partner’s fraudulent conduct in the sum of \$130 million, the lion’s share of which represented lost future profits from a hypothetical Penthouse casino-hotel.<sup>59</sup> However, all of Judge

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48. LEHRER, *supra* note 2, at 241.

49. *Id.* at 250.

50. *Id.* at 249.

51. Penthouse Int’l, Ltd. v. Dominion Fed. Sav. & Loan Ass’n, 665 F. Supp. 301, 302 (S.D.N.Y. 1987).

52. *Id.* at 303.

53. *Id.* at 309.

54. *See id.* at 306.

55. *Id.*

56. *Penthouse Int’l, Ltd.*, 665 F. Supp. at 307–08.

57. *Id.* at 306.

58. *Id.* at 306 n.1, 306–07.

59. *Id.* at 312.

Duffy's factual findings were categorically reversed on appeal as clearly erroneous, together with all of his conclusions of law.<sup>60</sup>

Hardship cases spawned by the current economic crisis will test trial judges' self-awareness of the effect of outrage and indignation on their decision-making. In order to come up with the right answer, decision-makers will need to regulate their emotions which, as Lehrer writes,<sup>61</sup> and Judge Duffy learned,<sup>62</sup> can be impulsive.

Self-awareness failed Miami-Dade County Circuit Court Judge Valerie Schurr in the summer of 2009, when for no good reason she granted a request by Joseph and Blanca Doyle for continuance of Republic Federal Bank's residential mortgage foreclosure of their 8,300 square foot, \$2.6 million home.<sup>63</sup> Judge Schurr explained in her opinion:

I was trying to make everybody happy. We have so many foreclosures here and I give continuances on these sales. I just do. . . . [Y]ou know, people are having a hard time now. They are having a difficult time. Everybody knows it. Businesses are failing. People are losing money in the stock market. You know, unemployment is high. It's just everybody knows that we are in a bad time right now and I hate to see anybody lose their home.<sup>64</sup>

The Florida Court of Appeal rebuked Judge Schurr for "abuse of discretion in the most basic sense of that term."<sup>65</sup> Although granting continuances generally is within the trial judge's discretion, "no judicial action of any kind can rest on such a foundation."<sup>66</sup> The sternly worded unanimous opinion quoted Justice Cardozo's admonition that a judge "is not to yield to spasmodic sentiment, to vague and unregulated benevolence."<sup>67</sup>

Similarly, a Long Island couple was left debt-free, and a Suffolk County judge was left without adjectives, after the court heard testimony from the regional manager for IndyMac Bank in a foreclosure matter.<sup>68</sup> The lender's intransigent refusal to restructure the couple's sub-prime loan, or otherwise

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60. *Penthouse Int'l, Ltd. v. Dominion Fed. Savings & Loan Ass'n*, 855 F.2d 963, 975-87 (2d Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989). Perhaps proving how the brain learns from mistakes, Judge Duffy went on to preside ably over the high-profile criminal trial of the four principal perpetrators of the 1993 World Trade Center bombing. Judge Duffy sentenced each defendant to more than 100 years in prison. *See United States v. Salameh*, 152 F.3d 88, 108 (2d Cir. 1998).

61. LEHRER, *supra* note 2, at 89.

62. *See generally Penthouse Int'l, Ltd.*, 855 F.2d 863.

63. *Republic Fed. Bank v. Doyle*, 19 So. 3d 1053, 1054 (Fla. Dist. Ct. App. 2009).

64. *Id.* at 1054 n.1.

65. *Id.* at 1054.

66. *Id.*

67. *Id.* at 1054-55 (quoting BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921)).

68. *IndyMac Bank v. Yano-Horoski*, 890 N.Y.S.2d 313, 315, 320 (N.Y. Sup. Ct. 2009).

cooperate in avoiding foreclosure was, according to Judge Jeffrey Spinner, not only “harsh, repugnant, shocking and repulsive,” but also “inequitable, unconscionable, vexatious and opprobrious.”<sup>69</sup> Noting that “Suffolk County is in the yawning abyss of a deep mortgage and housing crisis with foreclosure filings at a record high rate,”<sup>70</sup> Judge Spinner *sua sponte* invoked his equitable jurisdiction to void the mortgage, erasing the \$292,500 principal balance and an additional \$235,000 in accrued interest and penalties.<sup>71</sup>

Lehrer suggests strategies to compensate for a failure of self-awareness. The technique, familiar to crossword puzzle solvers, of setting complex decisions aside while the decision-maker goes on holiday—or gets some sleep—distracts the unconscious mind and affords it time to digest the information gathered by the conscious mind.<sup>72</sup> Decision-making also benefits from an environment in which competing hypotheses are entertained.<sup>73</sup> Lehrer suggests picking a fight with yourself (or, better yet, your law clerk) to create inner dissonance and overcome the “certainty trap.”<sup>74</sup>

Described elsewhere as a thinking man’s *Blink*,<sup>75</sup> *How We Decide* is reminiscent of Malcolm Gladwell’s bestseller<sup>76</sup> in tone and literary style. Lehrer’s book is better annotated, with a complete bibliography and citations to psychology and neuroscience literature. Both feature riveting stories (Lehrer’s include dramatic accounts of surviving a forest fire and the total loss of hydraulic control in a DC-10 cockpit)<sup>77</sup> and fascinating experiments (some

69. *Id.* at 319.

70. *Id.* at 317.

71. *See id.* at 316–17, 320. It is ironic that the sub-prime mortgage crisis itself is the result of lenders taking advantage of a failure of self-awareness on the part of borrowers whose emotions caused them to respond impulsively to artificially low “teaser” interest rates. LEHRER, *supra* note 2, at 87–89.

72. LEHRER, *supra* note 2, at 237.

73. *Cf. id.* at 217.

74. *Cf. id.* Lehrer calls attention to famous reports that Abraham Lincoln understood the benefits of intellectual diversity and selected his cabinet members to ensure vigorous debate and discussion. *Id.* at 218 (citing DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN*, *passim* (2005)). Lehrer also recounts that General Motors Chairman Alfred P. Sloan once adjourned a board meeting early.

“Gentlemen,” Sloan said, “I take it we are all in complete agreement on the decision here.

... Then I propose we postpone further discussion of this matter until our next meeting to give ourselves time to develop disagreement and perhaps gain some understanding of what the decision is all about.”

*Id.* at 218 (alteration in original).

75. *See, e.g.*, David Dobbs, “*How We Decide*”—*The Thinking Person’s “Blink”*, SCIENCE BLOGS.COM (Jan. 25, 2009, 10:45 PM), [http://scienceblogs.com/neuronculture/2009/01/how\\_we\\_decide\\_-\\_the\\_thinking\\_p.php](http://scienceblogs.com/neuronculture/2009/01/how_we_decide_-_the_thinking_p.php).

76. MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005).

77. LEHRER, *supra* note 2, at 93–96, 122–27.

of which have been reported elsewhere, though not as well).<sup>78</sup> If there is a flaw in *How We Decide*, it is the author's failure to acknowledge his considerable debt to pioneering work in the field of emotional intelligence by psychologists Howard Gardner and Daniel Goleman.<sup>79</sup>

This remarkably insightful book deserves to be widely read and certainly deserves to be consulted before making any further decisions.

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78. For example, the famous Stanford "marshmallow" longitudinal study of delayed gratification in children was previously reported, among others, by Daniel Goleman. DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* 80–83 (1995).

79. See, e.g., GARDNER, *supra* note 47; GOLEMAN, *supra* note 78.

