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### Can Practicing Mindfulness Improve Lawyer Decision-Making, Ethics, and Leadership?

Peter H. Huang

*University of Colorado Law School*

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# ARTICLE

## CAN PRACTICING MINDFULNESS IMPROVE LAWYER DECISION-MAKING, ETHICS, AND LEADERSHIP?

PETER H. HUANG\*

### ABSTRACT

Jon Kabat-Zinn, the founder of mindfulness-based stress reduction, defines mindfulness as paying attention in a curious, deliberate, kind, and non-judgmental way to life as it unfolds each moment. Psychologist Ellen Langer defines mindfulness as a flexible state of mind actively engaging in the present, noticing new things, and being sensitive to context. Langer differentiates mindfulness from mindlessness, which she defines as acting based upon past behavior instead of the present and being stuck in a fixed, solitary perspective, oblivious to alternative multiple viewpoints. Something called mindfulness is currently very fashionable and has been so for some time now in American

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\* Professor and DeMuth Chair of Business Law, University of Colorado Law School. Visiting Scholar, Loyola Los Angeles Law School. J.D., Stanford Law School; Ph.D., Harvard University; A.B., Princeton University. I dedicate this Article to my applied mathematics Ph.D. thesis advisor 1972 economics Nobel laureate, Ken Arrow, who exemplified, studied, and taught me about decision-making, ethics, and leadership. I also dedicate this Article to my beloved Aunt Margaret Soong Meow Lee, a bilingual educator who exemplified happiness through mindfulness. Ken Arrow and Aunt Margaret passed away this year and will continue to live on in their teachings and my memories. Thanks for helpful conversations with and suggestions from S. James Anaya, Debra S. Austin, Anne M. Brafford, Paul Lee Huang, Rebecca Huss, Jan Jacobowitz, Kate Mayer Mangan, Susan Nevelow Mart, Len L. Riskin, Scott L. Rogers, Jason Voss, students in my spring 2017 section of the course *Legal Ethics and Professionalism: Business Law Issues*, the audience of a presentation at the 2017 University of Colorado Law School faculty scholarship retreat *Making a Difference: Impactful Legal Scholarship*, participants of the Boulder summer 2017 conference *Positive Lawyering, Mindfulness, and Humane Games*, the audience of the panel *Ethical Curricula* at the 24th International Learner conference, the audience of a Southwestern law school visiting speaker series presentation, and the 2020 class of Colorado law school during my presentation about mindfulness at their orientation.

business, education, media, medicine, popular culture, and sports. Many business, legal, and medical organizations are considering how mindfulness can help alleviate stress, improve productivity, reduce mistakes, and resolve conflicts. Many people from Hollywood, Silicon Valley, and Wall Street practice some form of mindfulness. Much of the widespread popularity of mindfulness stems from (popular media coverage about) empirical, experimental research data in psychology and neuroscience about how practicing mindfulness improves emotional, mental, and psychological health by boosting attention, concentration, immune response, and positive affect, while reducing mind wandering, distress, emotional reactivity, and negative affect. Practicing mindfulness is a form of experiential learning that provides a temporal space to pause and reflect upon more thoughtful decisions, including sustaining ethical behavior and leadership. This Article draws upon various novel interdisciplinary and multidisciplinary approaches, ranging from biology, decision theory, financial economics, management science, medicine, neuroscience, psychology, and psychiatry to analyze how practicing mindfulness can improve the decision-making, ethics, and leadership of non-lawyers. To date, there is little empirical or experimental research about how practicing mindfulness affects law students, lawyers, or law professors. There is a large and growing body of empirical or experimental research about how practicing mindfulness affects people who are not in the legal profession. Based on this research, this Article makes three recommendations. First, law professors and lawyers should team up with neuroscientists and psychologists to conduct multi-methods waitlist controlled research studies involving law students, lawyers, and law professors to determine if practicing mindfulness improves legal decision-making, ethics, and leadership. Second, law students, lawyers, and law professors should try practicing mindfulness to see if they improve their legal decision-making, ethics, and leadership. Third, law schools, law firms, and bar associations should try offering voluntary mindfulness training and supporting mindfulness practice to see if doing so improves legal decision-making, ethics, and leadership.

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## I. INTRODUCTION: A PRIMER ABOUT MINDFULNESS IN CONFLICT RESOLUTION AND LAW

There is much current interest and popularity, both in the United States<sup>1</sup> and worldwide, about being (more) mindful among many, including (amateur, elite, professional, and Olympic) athletes,<sup>2</sup> businesses<sup>3</sup> (such as Google<sup>4</sup>), clinical law professors,<sup>5</sup> correctional facilities,<sup>6</sup> doctors,<sup>7</sup> entertainment celebrities<sup>8</sup> (such as Katy Perry<sup>9</sup>), K–12 educators,<sup>10</sup> financial

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1. See, e.g., FETZER INSTITUTE, CONTEMPLATION NATION: HOW ANCIENT PRACTICES ARE CHANGING THE WAY WE LIVE (2011); JEFF WILSON, MINDFUL AMERICA: THE MUTUAL TRANSFORMATION OF BUDDHIST MEDITATION AND AMERICAN CULTURE 40 (2014).

2. See, e.g., Lori Hasse et al., *A Pilot Study Investigating Changes in Neural Processing After Mindfulness Training in Elite Athletes*, 9 FRONTIERS IN BEHAV. NEUROSCIENCE, Aug. 2015, at 8; *The Lakers Meditate?*, MINDFUL (Apr. 15, 2011), <http://www.mindful.org/the-lakers-meditate/> [https://perma.cc/2VCZ-5CL6]; Christine Yu, *Mindfulness for Athletes: The Secret to Better Performance?*, DAILY BURN, (June 10, 2014), <http://dailyburn.com/life/fitness/mindfulness-techniques-athletes/> [https://perma.cc/GQG6-ECMB]. See generally GEORGE MUMFORD, THE MINDFUL ATHLETE: SECRETS TO PURE PERFORMANCE (2015) (providing guidance for athletes on how to improve performance by being mindful).

3. See, e.g., Antonia Macaro & Julian Baggini, *Businesses on the Mindfulness Bandwagon*, FIN. TIMES MAG. (Mar. 13, 2015), <http://www.ft.com/cms/s/0/ee65c5e4-c82f-11e4-8fe2-00144feab7de.html>.

4. CHADE-MENG TAN, SEARCH INSIDE YOURSELF: THE UNEXPECTED PATH TO ACHIEVING SUCCESS, HAPPINESS (AND WORLD PEACE) 55, 60 (2012).

5. See, e.g., Deborah Cantrell, *The Role of Equipose in Family Law*, 14 J.L. & FAM. STUD. 63, 85–86 (2012); Tamara L. Kuennen, *The M Word*, 43 HOFSTRA L. REV. 325, 330 (2014).

6. Edo Shonin et al., *Mindfulness and Other Buddhist-Derived Interventions in Correctional Settings: A Systematic Review*, 18 AGGRESSION & VIOLENT BEHAV. 365, 368 (2013).

7. See, e.g., Terry Byrne, *Prevention Priority: Emphasis on Wellness Grows*, MASS. GEN. HOSP.: MASS. GEN. MAG. (June 2, 2016), <https://giving.massgeneral.org/disease-prevention-as-priority/> [https://perma.cc/ZZQ3-JPNK] (reporting that “Paul Huang, MD, PhD, a Mass General clinician-researcher, studies the links between diabetes and heart disease and leads the CDCPC Cardiac Metabolic Syndrome Program, which launched in 2005” and offers patients a 12-week program called “Learn to be Lean,” that includes meditation, yoga, guided imagery, breathing, and relaxation exercises to help participants learn to manage and reduce stress); RONALD EPSTEIN, ATTENDING: MEDICINE, MINDFULNESS, AND HUMANITY 13 (2017); Paul Huang, *Learn to be Lean Course Materials*, on file with author; SAKI SANTORELLI, HEAL THY SELF: LESSONS ON MINDFULNESS IN MEDICINE (1999).

8. See, e.g., Korin Miller, *Scientists: This Type of Meditation Can Actually Change Your Brain*, GLAMOUR (Feb. 19, 2016, 7:15 AM), <http://www.glamour.com/story/meditation-changes-your-brain> [https://perma.cc/CFL6-TRYN].

9. See, e.g., Jennifer Kim, *Why Mindfulness Matters in Marketing to Women*, ADVERT. AGE (June 18, 2015), <http://adage.com/article/agency-viewpoint/mindfulness-matters-marketing-women/299087/> [https://perma.cc/4JSY-PALV].

10. See, e.g., SUSAN KAISER GREENLAND, MINDFUL GAMES: SHARING MINDFULNESS AND MEDITATION WITH CHILDREN, TEENS, AND FAMILIES (2016); PATRICIA A. JENNINGS, MINDFULNESS FOR TEACHERS: SIMPLE SKILLS FOR PEACE AND PRODUCTIVITY IN THE CLASSROOM (2015); Patricia A. Jennings, *Early Childhood Teachers’ Well-Being, Mindfulness, and Self-Compassion in Relation to Classroom Quality and Attitudes Towards Challenging Students*, 6 MINDFULNESS 732, 735–36 (2015); Anya Kamenetz, *When Teachers Take A Breath, Students Can Bloom*, NPR ED. (Aug. 19, 2016, 6:00 AM ET), <http://www.npr.org/sections/ed/2016/08/19/488866975/when-teachers-take-a-breath-students-can-bloom>; DANIEL J. RECHTSCHAFFEN, THE WAY OF MINDFUL EDUCATION: CULTIVATING

advisors,<sup>11</sup> golf players,<sup>12</sup> judges,<sup>13</sup> law professors,<sup>14</sup> law schools,<sup>15</sup> law students,<sup>16</sup> lawyers,<sup>17</sup> legal ethics professors,<sup>18</sup>

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WELL-BEING IN TEACHERS AND STUDENTS 124–25 (2014); Cory Turner, *Teachers Are Stressed, and That Should Stress Us All*, NPR: ED. (Dec. 30, 2016, 4:59 AM ET), <http://www.npr.org/sections/ed/2016/12/30/505432203/teachers-are-stressed-and-that-should-stress-us-all>. See generally HANDBOOK OF MINDFULNESS IN EDUCATION: INTEGRATING THEORY AND RESEARCH INTO PRACTICE (Kimberly A. Schonert-Reichl & Robert W. Roeser eds., 2016); TEACHING MINDFULNESS SKILLS TO KIDS AND TEENS (Christopher Willard & Amy Saltzman eds., 2015).

11. See generally MARIA GONZALEZ & GRAHAM BYRON, *THE MINDFUL INVESTOR: HOW A CALM MIND CAN BRING YOU INNER PEACE AND FINANCIAL SECURITY* (2010); CRAIG VERDI, *MINDFUL MONEY: HOW TO OVERCOME THE NUMBER-ONE ENEMY OF FINANCIAL SUCCESS: YOUR BRAIN* (2017); JONATHAN K. DEYOE, *MINDFUL MONEY: SIMPLE PRACTICES FOR REACHING YOUR FINANCIAL GOALS AND INCREASING YOUR HAPPINESS DIVIDEND* (2017) (providing guidance from a Certified Private Wealth Advisor on managing finances mindfully).

12. See generally STEPHEN ALTSCHULER, *THE MINDFUL GOLFER: HOW TO LOWER YOUR HANDICAP WHILE RAISING YOUR CONSCIOUSNESS* (2015); PHILIP CHESTERS, *MINDFULNESS GOLF: INTO THE ZONE* (2016).

13. See JEREMY D. FOGEL, *MINDFULNESS AND JUDGING*, FED. JUD. CTR., at 2 (2016).

14. See, e.g., Jan L. Jacobowitz, *Mindfulness and Professionalism*, in *ESSENTIAL QUALITIES OF THE PROFESSIONAL LAWYER* 229, 236 (Paul A. Haskins ed., 2014); NATHALIE MARTIN, *LAWYERING FROM THE INSIDE OUT: LEARNING PROFESSIONAL DEVELOPMENT THROUGH MINDFULNESS AND EMOTIONAL INTELLIGENCE* (forthcoming); Peter H. Huang & Corie Rosen Felder, *The Zombie Lawyer Apocalypse*, 42 PEPP. L. REV. 727, 750–55 (2015); Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 U. MO. KAN. CITY L. REV. 535, 554 (2011); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 30 (2002).

15. See e.g., *Meditation and Mindfulness Resources for Harvard Law Students*, HARV. L. SCH. (Nov. 20, 2014), <http://hls.harvard.edu/meditation-and-mindfulness/> [<https://perma.cc/W2SH-EKJQ>]; Institute for Mindfulness Studies, *Law Schools Involved in Mindfulness and the Law*, MINDFULNESS IN LAW (2011), [http://mindfulnessinlaw.com/Law\\_Schools.html](http://mindfulnessinlaw.com/Law_Schools.html) [<https://perma.cc/SC4N-UQKM>].

16. See, e.g., *The Mindful Law Student: Finding Balance & Success in Law School*, INSTITUTE FOR MINDFULNESS STUDIES, <http://themindfullawstudent.com/> [<https://perma.cc/9BT4-LCJX>] (last visited Aug. 29, 2017); Jan. L. Jacobowitz, *Cultivating Professional Identity & Creating Community: A Tale of Two Innovations*, 36 U. ARK. LITTLE ROCK L. REV. 319, 325–26 (2014); Scott L. Rogers, *The Role of Mindfulness in the Ongoing Evolution of Legal Education*, 36 U. ARK. LITTLE ROCK L. REV. 387, 393, 400 (2014). See generally SCOTT L. ROGERS, *MINDFULNESS FOR LAW STUDENTS: USING THE POWER OF MINDFUL AWARENESS TO ACHIEVE BALANCE AND SUCCESS IN LAW SCHOOL* (2009) (providing tips for law students about using mindfulness in elements of their education).

17. F. GREGORY COFFEY & MAUREEN C. KESSLER, *THE REFLECTIVE COUNSELOR: DAILY MEDITATIONS FOR LAWYERS* (2008); Jacob Gershman, *Lawyers Go Zen, With Few Objections*, WALL ST. J. (June 18, 2015), <http://www.wsj.com/articles/lawyers-go-zen-with-few-objections-1434586250>; Jan L. Jacobowitz, *The Benefits of Mindfulness for Litigators*, 39 LITIG. J., no. 2, Spring 2013 at 27, 27–28; SCOTT L. ROGERS, *THE SIX-MINUTE SOLUTION: A MINDFULNESS PRIMER FOR LAWYERS* 71 (2009).

18. See generally SCOTT L. ROGERS & JAN JACOBOWITZ, *MINDFULNESS AND PROFESSIONAL RESPONSIBILITY: A GUIDE BOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM* (2012).

legal writing professors,<sup>19</sup> laypeople in the public,<sup>20</sup> legal profession consultants,<sup>21</sup> managers,<sup>22</sup> management scholars,<sup>23</sup> military members,<sup>24</sup> nurses,<sup>25</sup> organizations,<sup>26</sup> organization scholars,<sup>27</sup> parents,<sup>28</sup> police departments,<sup>29</sup> trainers,<sup>30</sup> psychologists,<sup>31</sup> psychotherapists,<sup>32</sup> and tennis players.<sup>33</sup> Thinking mindfully can benefit decision-making in professional business

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19. See generally HEIDI K. BROWN, *THE MINDFUL LEGAL WRITER: MASTERING PREDICTIVE AND PERSUASIVE WRITING* (2015); HEIDI K. BROWN, *THE MINDFUL LEGAL WRITER: MASTERING PERSUASIVE WRITING* (2016); HEIDI K. BROWN, *THE MINDFUL LEGAL WRITER: MASTERING PREDICTIVE WRITING* (2015).

20. Frances Weaver, *The Mainstreaming of Mindfulness Meditation*, *THE WEEK* (Apr. 5, 2014), <http://theweek.com/articles/448250/mainstreaming-mindfulness-meditation> [<https://perma.cc/DS5C-V48U>].

21. See generally ANNE BRAFFORD, *POSITIVE PROFESSIONALS: CREATING HIGH-PERFORMING, PROFITABLE FIRMS THROUGH THE SCIENCE OF ENGAGEMENT* (forthcoming Nov. 2017); RANDALL KISER, *SOFT SKILLS FOR THE EFFECTIVE LAWYER* 129-35 (2017).

22. See, e.g., David Gelles, *The Mind Business*, *FIN. TIMES* (Aug. 24, 2012), <https://www.ft.com/content/d9cb7940-ebea-11e1-985a-00144feab49a>.

23. See, e.g., Andrew C. Hafenbrack, *Mindfulness Meditation as an On-The-Spot Workplace Intervention*, 75 *J. BUS. RES.*, at 118, 118-19, 126 (2017).

24. See, e.g., Douglas C. Johnson et al., *Modifying Resilience Mechanisms in At-Risk Individuals: A Controlled Study of Mindfulness Training in Marines Preparing for Deployment*, 171 *AM. J. PSYCHIATRY* 844, 849 (2014); Alena Hall, *How Mindfulness Practices Can Help Prepare Military Members for Future Combat*, *HUFFINGTON POST* (Mar. 10, 2015, 10:20 AM ET), [http://www.huffingtonpost.com/2015/03/10/mindfulness-in-the-military\\_n\\_6833402.html](http://www.huffingtonpost.com/2015/03/10/mindfulness-in-the-military_n_6833402.html).

25. See generally CARMEL BERNADETTE SHERIDAN, *THE MINDFUL NURSE: USING THE POWER OF MINDFULNESS AND COMPASSION TO HELP YOU THRIVE IN YOUR WORK* (2016).

26. Jacqueline Carter, *Mindfulness as a Foundation for Organizational Effectiveness*, *HUFFINGTON POST* (Jan. 17, 2014, 4:58 PM ET), [http://www.huffingtonpost.com/jacqueline-carter/corporate-based-mindfulness\\_b\\_4597952.html](http://www.huffingtonpost.com/jacqueline-carter/corporate-based-mindfulness_b_4597952.html).

27. See, e.g., *MINDFULNESS IN ORGANIZATIONS: FOUNDATIONS, RESEARCH, AND APPLICATIONS* 11 (Jochen Reb & Paul W. B. Atkins eds., 2015); Jochen Reb et al., *Leading Mindfully: Two Studies on the Influence of Supervisor Trait Mindfulness on Employee Well-Being and Performance*, 5 *MINDFULNESS* 36, 39 (2014).

28. See, e.g., Bobby Azarian, *The Mindful Child*, *N.Y. TIMES: HEALTH* (May 10, 2016, 6:00 AM), <https://nyti.ms/2jRJeVa>; KJ Dell'Antonia, *The Mostly Mindful Parent*, *N.Y. TIMES: HEALTH* (Jan. 16, 2014, 4:12 PM), <https://nyti.ms/2k48ck4> <https://nyti.ms/2p7R3Wq>.

29. See e.g., Michael S. Christopher et al., *A Pilot Study Evaluating the Effectiveness of a Mindfulness-Based Intervention on Cortisol Awakening Response and Health Outcomes Among Law Enforcement Officers*, 31 *J. POLICE PSYCHOL.* 15, 17-18 (2016); David Schimke, *Taking Mindfulness to the Streets: Neuroscientists Explore Whether Resilience Training Can Help Cops in Crisis*, *CHRON. HIGHER EDUC.* (Jan. 27, 2017), at B8 (reporting on this research).

30. See George Pitagorsky, *Mindfulness: A Critical Success Factor*, 9 *TRAINING INDUSTRY MAG.*, issue 4, Fall 2016, at 20, 20-23.

31. See generally, ELISHA GOLDSTEIN, *UNCOVERING HAPPINESS: OVERCOMING DEPRESSION WITH MINDFULNESS AND SELF-COMPASSION* (2015).

32. See generally NANCY COLIER, *THE POWER OF OFF: THE MINDFUL WAY TO STAY SANE IN A VIRTUAL WORLD* (2016).

33. See generally Dejan Stankovic, *Mindfulness Meditation Training for Tennis Players* (2015) (unpublished Ph.D. dissertation, Boston University School of Education) (on file with OpenBU, Boston University Libraries), <http://hdl.handle.net/2144/16094> [<https://perma.cc/C8S2-PTBN>].

contexts<sup>34</sup> and personal retirement planning.<sup>35</sup>

A reason that mindfulness is so popular as of late stems from the profuse media coverage of empirical and experimental data from psychology and neuroscience research studies finding that mindfulness produces many benefits. Mindfulness improves attention and sensorimotor control,<sup>36</sup> cognitive abilities,<sup>37</sup> emotional regulation,<sup>38</sup> focus and productivity,<sup>39</sup> inner peace,<sup>40</sup> life satisfaction,<sup>41</sup> psychological health,<sup>42</sup> self-esteem,<sup>43</sup> self-perception,<sup>44</sup> sleep quality,<sup>45</sup> well-being,<sup>46</sup> working memory capacity, and reading comprehension scores on the GRE.<sup>47</sup> Research indicates that mindfulness also cultivates emotional

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34. See generally MATT TENNEY & TIM GARD, *THE MINDFULNESS EDGE: HOW TO REWIRE YOUR BRAIN FOR LEADERSHIP AND PERSONAL EXCELLENCE WITHOUT ADDING TO YOUR SCHEDULE* (2016).

35. Peter H. Huang, *Achieving American Retirement Prosperity by Changing Americans' Thinking About Retirement*, 23 STAN. J.L. BUS. & FIN. (forthcoming).

36. Veena Kumari et al., *The Mindful Eye: Smooth Pursuit and Saccadic Eye Movements in Meditators and Non-Meditators*, 48 CONSCIOUSNESS & COGNITION 66, 71–72 (2017).

37. See, e.g., Alberto Chiesa et al., *Does Mindfulness Training Improve Cognitive Abilities? A Systematic Review of Neuropsychological Findings*, 31 CLINICAL PSYCHOL. REV. 449, 462 (2011); Adam Moore & Peter Malinowski, *Meditation, Mindfulness and Cognitive Flexibility*, 18 CONSCIOUSNESS & COGNITION 176, 184 (2009); Fadel Zeidan et al., *Mindfulness Meditation Improves Cognition: Evidence of Brief Mental Training*, 19 CONSCIOUSNESS & COGNITION 597, 603 (2010).

38. See, e.g., Jacqueline R. Bullis et al., *The Benefits of Being Mindful: Trait Mindfulness Predicts Less Stress Reactivity to Suppression*, 45 J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY 57, 64 (2014); Alberto Chiesa et al., *Mindfulness: Top-Down or Bottom-Up Emotion Regulation Strategy?* 33 CLINICAL PSYCHOL. REV. 82, 93 (2013).

39. See generally Peter H. Huang, *Happiness Studies and Legal Policy*, 6 ANN. REV. L. & SOC. SCI. 405, 420–22 (2010) (analyzing benefits of mindfulness meditation and loving-kindness meditation).

40. See Xinghua Liu et al., *Can Inner Peace be Improved by Mindfulness Training: A Randomized Controlled Trial*, 31 STRESS & HEALTH 245, 249 (2013).

41. See Feng Kong et al., *Dispositional Mindfulness and Life Satisfaction: The Role of Core Self-Evaluations*, 56 PERSONALITY & INDIVIDUAL DIFFERENCES 165, 168 (2014).

42. See Shian-Ling Keng et al., *Effects of Mindfulness on Psychological Health: A Review of Empirical Studies*, 31 CLINICAL PSYCHOL. REV. 1041, 1052 (2011).

43. See Christopher A. Pepping et al., *The Positive Effects of Mindfulness on Self-Esteem*, 8 J. POS. PSYCHOL. 376, 383–84 (2013).

44. Erika N. Carlson, *Overcoming the Barriers to Self-Knowledge: Mindfulness as a Path to Seeing Yourself as You Really Are*, 8 PERSP. PSYCHOL. SCI. 173, 176 (2013).

45. See, e.g., David S. Black et al., *Mindfulness Meditation and Improvement in Sleep Quality and Daytime Impairment Among Older Adults with Sleep Disturbances: A Randomized Clinical Trial*, 175 J. AM. MED. ASS'N.: INTERNAL MED. 494, 498–99 (2015).

46. *Benefits of Mindfulness*, HELPGUIDE.ORG, <http://www.helpguide.org/harvard/benefits-of-mindfulness.htm> [https://perma.cc/3LNB-JNBE]

47. Michael D. Mrazek et al., *Mindfulness Training Improves Working Memory Capacity and GRE Performance While Reducing Mind Wandering*, 24 PSYCHOL. SCI. 776, 780 (2013).



intelligence,<sup>48</sup> reduces aggressive behavior,<sup>49</sup> reduces anxiety and stress,<sup>50</sup> reduces a biomarker of systemic inflammatory disease risk,<sup>51</sup> reduces loneliness and pro-inflammatory gene expression in older adults,<sup>52</sup> slows cellular aging,<sup>53</sup> and treats mental disorders<sup>54</sup> and insomnia.<sup>55</sup> So, just what is this fantastic, wonderful, amazing thing called mindfulness and how does it work?<sup>56</sup> Practicing mindfulness is just simply “a way of *being*—a capacity for moment-by-moment awareness—which doesn’t belong to any one culture or tradition”<sup>57</sup> and “means becoming more aware of what’s going on—right here, right now.”<sup>58</sup> Mindfulness can be practiced in such forms of physical movement as qigong,<sup>59</sup> tai chi,<sup>60</sup> and

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48. Carolyn Gregoire, *Why Mindfulness is the Foundation of Emotional Intelligence*, HUFFINGTON POST (Oct. 31, 2014, 8:48 AM ET), [http://www.huffingtonpost.com/2014/10/31/search-inside-yourself\\_n\\_6061586.html](http://www.huffingtonpost.com/2014/10/31/search-inside-yourself_n_6061586.html).

49. Rebecca L. Fix & Spencer T. Fix, *The Effects of Mindfulness-Based Treatments for Aggression: A Critical Review*, 18 AGGRESSION & VIOLENT BEHAV. 219, 223 (2013).

50. Debra S. Austin, *Killing Them Softly: Neuroscience Reveals How Brain Cells Die from Law School Stress and How Neural Self-Hacking Can Optimize Cognitive Performance*, 59 LOYOLA L. REV. 791, 838–42 (2013) (discussing the benefits of mindfulness).

51. J. David Creswell et al., *Alterations in Resting-State Functional Connectivity Link Mindfulness Meditation with Reduced Interleukin-6: A Randomized Controlled Trial*, 80 BIOLOGICAL PSYCHIATRY 53, 59 (2016).

52. J. David Creswell et al., *Mindfulness-Based Stress Reduction Training Reduces Loneliness and Pro-Inflammatory Gene Expression in Older Adults: A Small Randomized Controlled Trial*, 26 BRAIN, BEHAV. & IMMUNITY 1095, 1099 (2012).

53. Marta Alda et al., *Zen Meditation, Length of Telomeres, and the Role of Experiential Avoidance and Compassion*, 7 MINDFULNESS 651, 655–56 (2016); Quinn Conklin, et al., *Telomere Lengthening After Three Weeks of An Intensive Insight Meditation Retreat*, 61 PSYCHONEUROENDOCRINOLOGY 26, 26–27 (2015); Elissa Epel et al., *Can Meditation Slow Rate of Cellular Aging? Cognitive Stress, Mindfulness, and Telomeres*, 1172 ANNALS N.Y. ACAD. SCI., Aug. 2009, at 34, 47–48.

54. Julieta Galante et al., *Effects of Mindfulness-Based Cognitive Therapy on Mental Disorders: A Systematic Review and Meta-Analysis of Randomised Controlled Trials*, 18 J. RES. NURSING 133, 152 (2012).

55. See, e.g., Jason Ong & David Scholtes, *A Mindfulness-Based Approach to the Treatment of Insomnia*, 66 J. CLINICAL PSYCHOL. 1175, 1183 (2010).

56. Britta K. Hölzel et al., *How Does Mindfulness Meditation Work? Proposing Mechanisms of Action from a Conceptual and Neural Perspective*, 6 PERSP. PSYCHOL. SCI. 537, 539 (2011).

57. TESSA WATT, INTRODUCING MINDFULNESS: A PRACTICAL GUIDE 1 (2012).

58. *Id.*

59. See, e.g., *What is Qigong?*, NATIONAL QIGONG ASSOCIATION, [http://www.nqa.org/index.php?option=com\\_content&view=article&id=41:what-is-qigong-&catid=20:site-content&Itemid=118](http://www.nqa.org/index.php?option=com_content&view=article&id=41:what-is-qigong-&catid=20:site-content&Itemid=118) [https://perma.cc/FMV4-G272].

60. See, e.g., *Tai Chi: A Gentle Way to Fight Stress*, MAYO CLINIC, <http://www.mayoclinic.org/healthy-lifestyle/stress-management/in-depth/tai-chi/art-20045184> [https://perma.cc/YCR6-8VZK].

yoga.<sup>61</sup> Everyday simple acts can become forms of mindfulness practice and meditation,<sup>62</sup> including eating<sup>63</sup> and showering.<sup>64</sup>

Mindfulness, although related to meditation, differs from meditation. Mindfulness meditation is a way to practice mindfulness. There are other forms of meditation, such as transcendental meditation.<sup>65</sup> We can be organically mindful or we can be mindful as the deliberate result of practicing meditation. Dispositional mindfulness, which is also known as trait mindfulness, although related to, differs from, deliberate, or intentional, mindfulness meditation.<sup>66</sup> Additionally, both the state and trait of mindfulness, although related to, differ from practicing mindfulness as an on-the-spot intervention.<sup>67</sup> Finally, mindfulness meditation can entail physical awareness, which directs attention to such physical sensations as your breath and bodily sensations, or intrapsychic awareness, which directs attention to such internal phenomena as your feelings and thoughts.<sup>68</sup>

The best way to have a sense of what mindfulness, which is derived from Eastern philosophical and religious traditions, entails is to directly experience and feel mindfulness firsthand. This can be accomplished by listening to these three-minute guided meditations: the Body Scan Meditation<sup>69</sup> and the Body and Sound Meditation<sup>70</sup> are part of a free collection of guided meditations<sup>71</sup> that the UCLA Mindfulness Awareness Research

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61. See generally, HALLIE NEUMAN LOVE & NATHALIE MARTIN, *YOGA FOR LAWYERS: MIND-BODY TECHNIQUES TO FEEL BETTER ALL THE TIME* (2014).

62. See generally INBAR SHAHAR, *MEDITATION TASTING FOR BEGINNERS AND CONNOISSEURS* (2015).

63. See, e.g., Jeff Gordinier, *Food for Thought*, N.Y. TIMES (Feb. 8, 2012), <https://nyti.ms/2jRsJCF>.

64. See, e.g., David Gelles, *How to Be Mindful While Taking a Shower*, N.Y. TIMES (May 10, 2017), <https://nyti.ms/2pwXxhm>.

65. Eviana Hartman, *What Is Transcendental Meditation? Katy Perry's Teacher Explains Hollywood's Favorite Pathway to Inner Peace*, VOGUE (Apr. 14, 2017, 2:29 PM), <http://www.vogue.com/article/what-is-transcendental-meditation-katy-perry-lena-dunham-benefits-differences-cost-anxiety> [<https://perma.cc/7J3N-AMWQ>].

66. See generally Yi-Yuan Tang et al., *Traits and States in Mindfulness Meditation*, 17 NATURE REV. NEUROSCI. 59 (2015).

67. Hafenbrack, *supra* note 23, at 119.

68. *Id.* at 119–20.

69. *Body Scan Meditation*, UCLA MINDFUL AWARENESS RESEARCH CENTER (2017), <http://marc.ucla.edu/mpeg/Body-Scan-Meditation.mp3> [<https://perma.cc/X89M-C9DU>].

70. *Body and Sound Meditation*, UCLA MINDFUL AWARENESS RESEARCH CENTER (2017), <http://marc.ucla.edu/mpeg/Body-Sound-Meditation.mp3> [<https://perma.cc/FHK6-9ZZ6>].

71. *UCLA Mindful Awareness Research Center—Free Guided Meditations*, UCLA HEALTH, <http://marc.ucla.edu/mindful-meditations> [<https://perma.cc/R8LJ-AEWG>].

Center provides on its website.<sup>72</sup> Another brief guided mindfulness practice is called 3 Minute Breathing Space,<sup>73</sup> which is part of a free collection of guided mindfulness practices<sup>74</sup> that the University of Missouri Mindfulness Practice Center, which offers students, faculty and staff “a non-sectarian approach to mindfulness that draws on contemplative practices from a variety of . . . traditions,”<sup>75</sup> provides on its website. This guided mindfulness practice asks you to notice your “thoughts as mental events passing across the sky of the mind,”<sup>76</sup> notice “what feelings are present: are you feeling happy or sad, maybe you are feeling content or restless,”<sup>77</sup> and “then noticing what sensations are present in the body, is there tension, relaxation, is there a sense of ease or is there a sense of discomfort?”<sup>78</sup> This guided mindfulness practice also suggests “using the breath as an anchor to bring you into the present.”<sup>79</sup>

My personal introduction to practicing mindfulness was from observing as a kid my grandma’s daily Buddhist meditative mindfulness,<sup>80</sup> utilizing a set of mala beads.<sup>81</sup> The Chinese character for mindfulness is “nian,” itself made up of two characters, with a top character meaning now and bottom character meaning heart and mind. Thus, the composite character means experiencing and engaging the present moment-by-moment fully with all of your heart and mind.<sup>82</sup> My grandma taught me to slow down, be thoughtful of how my choices impact others, and become more calm and at peace with life through practicing mindfulness. Her example of being serene in the face of challenges remains a source of perennial inspiration.

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72. UCLA Mindful Awareness Research Center, UCLA HEALTH, <http://marc.ucla.edu/https://perma.cc/V4B9-NSCA>

73. Strata Commun, *Three Minute Breathing Space*, YOUTUBE (Mar. 4, 2016), <https://youtu.be/1oK0IbKT05Y> [<https://perma.cc/RGM9-N8V4>].

74. *Guided Mindfulness Practices*, UNIV. OF MO. SYS., [https://www.umsystem.edu/totalrewards/wellness/mindfulness/mindfulness\\_practices](https://www.umsystem.edu/totalrewards/wellness/mindfulness/mindfulness_practices) [<https://perma.cc/6LEG-CAUY>].

75. *Mindfulness Homepage*, UNIV. OF MO. SYS., [https://www.umsystem.edu/totalrewards/wellness/mindfulness/mindfulness\\_index](https://www.umsystem.edu/totalrewards/wellness/mindfulness/mindfulness_index) [<https://perma.cc/3YMQ-9NV7>].

76. Guided Mindfulness Practices, *supra* note 74.

77. *Id.*

78. *Id.*

79. *Id.*

80. Peter H. Huang, *Tiger Cub Strikes Back: Memoirs of an Ex-Child Prodigy about Legal Education and Parenting*, 1 BRIT. J. AM. LEGAL STUD. 297, 311 (2012) (describing how my grandma’s example influenced me).

81. Nathalie Martin, *Mindful Lawyering*, in THE BEST LAWYER YOU CAN BE (Stewart Levine ed., forthcoming).

82. See, e.g., Karl Duffy, *Bring Your Heart to Each Moment Today*, MINDFUL BALANCE (May 13, 2011), <https://mindfulbalance.org/2011/05/13/being-mindful-today/> [<https://perma.cc/E2K8-7RAN>].

She was born in 1898 and immigrated to America to help raise me. She passed in 2003 and continues to live on in my heart and mind through memories of her teachings and lessons about mindfulness.

The introduction of this Article provides a very brief primer about mindfulness in conflict resolution and law. Another introduction to mindfulness in conflict resolution and law is the podcast of an American Bar Association program titled, *Mindfulness: A Pathway to Success, Happiness, and Conflict Resolution*.<sup>83</sup> Yet another introduction to mindfulness in legal education analyzes mindfulness, how mindfulness can help law students engage in positive personal and professional transformation, and explains how mindfulness offers new hope for creating and sustaining thriving legal practices.<sup>84</sup> A final introduction to how practicing mindfulness improves lawyer well-being is a section of a report by the National Task Force on Lawyer Well-Being.<sup>85</sup> I also recently wrote a very candid and personal memoir discussing my experiences in higher education as student and professor, openly sharing how practicing mindfulness helped to reduce fears, rumination, and worry in facing adversity, disappointment, and setbacks.<sup>86</sup> I and many people I know struggled with anxiety, depression, and chronic stress in law school and law practice. It is natural that all of us will feel down, lost, and overwhelmed at various points in our personal and professional lives. Law students and lawyers often are overly critical of others and themselves. Practicing mindfulness provides a helpful sense of perspective, compassion, and self-compassion.

An introduction to mindfulness designed for law students and young lawyers is a webinar presentation by Cory Muscara, an attorney who also holds a master's degree in applied positive

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83. AM. BAR ASS'N SECTION OF SCI. & TECH. LAW (SciTECH), BEHAVIORAL AND NEUROSCIENCE LAW COMM. & MEMBERSHIP AND DIVERSITY COMM., *Mindfulness: A Pathway to Success, Happiness, and Conflict Resolution* (Mar. 24, 2016), [http://www.americanbar.org/content/dam/aba/events/science\\_technology/2016/2016mindfulness.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/science_technology/2016/2016mindfulness.authcheckdam.pdf) [<https://perma.cc/D3ES-TSNU>].

84. See Peter H. Huang, *Meta-Mindfulness: A New Hope*, 19 RICHMOND J.L. & PUB. INT. 303, 324 (2016); see also UNIV. OF COLO. LAW SCH., *Mindfulness and Thriving Legal Practices*, <http://www.colorado.edu/law/mindfulness-and-thriving-legal-practices> [<https://perma.cc/7GEW-DFG2>].

85. AM. BAR ASS'N NATIONAL TASK FORCE ON LAWYER WELL-BEING, THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE, 52–53 (2017), <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf> [<https://perma.cc/S5LR-QNTE>].

86. See Peter H. Huang, *Adventures in Higher Education, Happiness, and Mindfulness*, 7(2) BRIT. J. AM. LEGAL. STUD. (forthcoming 2018); UNIV. OF COLO. LAW SCH., *Professor Huang's Workshop Targets Stress, Anxiety in Legal Field*, <http://www.colorado.edu/law/2017/06/05/professor-huang-workshop-targets-stress-anxiety-legal-field>

psychology, about how to manage stress and shift from just surviving to flourishing and thriving.<sup>87</sup> The National Task Force on Lawyer Well-being recently issued a report about lawyer well-being, which includes a section about mindfulness meditation.<sup>88</sup> A recent PBS documentary provides an introduction to mindfulness and features the singer Jewel, Jon Kabat-Zinn, ABC reporter Dan Harris, and several of the leading figures in and psychology and neuroscience researchers about mindfulness.<sup>89</sup> Principal Analyst at DecisionSet® in Palo Alto, California, Randall Kiser's one-of-a-kind, multi-disciplinary, practice-based book introduces law students to these important so-called soft skills: self-awareness, self-development, social proficiency, wisdom, leadership, and professionalism.<sup>90</sup> Practicing mindfulness helps to foster and sustain all of these soft skills.

People often do not want to be where and when they presently are, as evidenced by ubiquitous car bumper stickers that begin with the phrase "I'd rather be" and conclude with some verb such as "biking, gaming, quilting, skiing, texting" or anything besides a phrase that effectively states "driving this car that I'm presently driving" or, more succinctly, just "here now." A desire to be somewhere and sometime else is the antithesis of mindfulness and the source of much anxiety, regret, and human suffering. Often, we are not mindful of the present because we are ruminating over what already happened in the past or worrying about what might happen in the future. Popular culture in the form of movies, songs, and television shows often remind us of the importance of staying in the present. We all can benefit from Queen Elsa's advice to herself in the song *Let It Go* from the film *Frozen* in its original version: "I'm never going back. The past is in the past. Let it go. Let it go."<sup>91</sup> Or the more simplified pop version of the song: "Standing frozen in the life I've chosen, you won't find me. The past is so behind me buried in the snow. Let it go. Let it go."<sup>92</sup>

We also can benefit from the advice in a hypothetical

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87. AMERICAN BAR ASSOCIATION LAW STUDENT DIVISION AND YOUNG LAWYER DIVISION, *Mindfulness Meditation: Managing Stress and Shifting from Surviving to Thriving*, Mar. 31, 2016 (available at [https://www.youtube.com/watch?v=\\_so1P482XGc](https://www.youtube.com/watch?v=_so1P482XGc)).

88. AM. BAR ASS'N NATIONAL TASK FORCE ON LAWYER WELL-BEING, *supra* note 85.

89. *Mindfulness Goes Mainstream* (PBS broadcast Aug. 2017), <http://pressroom.pbs.org/Programs/m/MINDFULNESS-GOES-MAINSTREAM>.

90. KISER, *supra* note 21.

91. FROZEN, LET IT GO (Idina Menzel Theatrical Recording) (Walt Disney 2013) (available at <https://www.youtube.com/watch?v=L0MK7qz13bU>).

92. FROZEN, LET IT GO (Demi Lovato Single) (Walt Disney 2013) (available at <https://www.youtube.com/watch?v=kHue-HaXXzg>).

commencement speech by columnist Mary Schmich,<sup>93</sup> that Mark Anthony “Baz” Luhrman made famous in a spoken word song: “Don’t worry about the future, or know that worrying is as effective as trying to solve an algebra equation by chewing bubblegum.”<sup>94</sup> There is a recurring joke in the movie *Bridge of Spies*<sup>95</sup> that whenever the lawyer James Donovan (played by Tom Hanks) asked his client Rudolph Abel (played by Mark Rylance, who won the 2016 Academy Awards for Best Supporting Actor for this role<sup>96</sup>) if Abel is worried, Abel replies: “Would it help?”<sup>97</sup> Engaging in worry is not directly helpful, usually stressful, and can even interfere with decision-making processes. However, worrying may indirectly help a person if worrying motivates that person to proactively undertake actions to avoid whatever that person is worried about from coming to fruition. Any proactive actions taken are potential benefits from the motivational, underlying stressful act of worrying.

#### A. Two Definitions of Mindfulness

In common parlance, the word “mindfulness” has been defined as “the quality or state of being conscious or aware of something.”<sup>98</sup> A straightforward and pragmatic definition of mindfulness is as “the ability to know what’s happening in your head at any given moment without getting carried away by it.”<sup>99</sup> At least two more technical notions of mindfulness exist in conflict resolution and law.<sup>100</sup> The first and more familiar concept of mindfulness within the field of conflict resolution and the law has Eastern metaphysical and philosophical roots and is often associated with Buddhist and other spiritual and religious traditions.<sup>101</sup> The

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93. Mary Schmich, *Advice, Like Youth, Probably Just Wasted on the Young*, CHI. TRIB. (June 1, 1997), <http://www.chicagotribune.com/news/columnists/chi-schmich-sunscreen-column-column.html>.

94. Baz Luhrmann - *Everybody’s Free to Wear Sunscreen*, YOUTUBE (May 24, 2007), <https://www.youtube.com/watch?v=sTJ7AzBIJoI>.

95. BRIDGE OF SPIES (Amblin Entertainment 2015).

96. Jim Donnelly, *Mark Rylance is a 2016 Oscar Winner for Actor in a Supporting Role for Bridge of Spies* (Feb. 28, 2016), <http://oscar.go.com/news/winners/mark-rylance-is-a-2016-oscar-winner-for-actor-in-a-supporting-role> [<https://perma.cc/A3FY-ZCAK>].

97. Angie Han, *‘Bridge of Spies’ Reduces a Murky Gray World to Black and White*, <http://www.slashfilm.com/bridge-of-spies-review/> (Oct. 5, 2015), (reviewing the movie and noting the running joke within the film) [<https://perma.cc/7PFJ-8X4B>].

98. *Mindfulness*, DICTIONARY.COM, <http://dictionary.reference.com/browse/mindfulness>.

99. Happify, *Why Mindfulness Is a Superpower: An Animation*, Dec. 7, 2015 (available at <https://www.youtube.com/watch?v=w6T02g5hnT4>).

100. Leonard L. Riskin, *Two (or More) Concepts of Mindfulness in Law and Conflict Resolution*, in THE WILEY-BLACKWELL HANDBOOK OF MINDFULNESS 471, 471 (Amanda Le et al. eds., 2014).

101. JON KABAT-ZINN, COMING TO OUR SENSES: HEALING OURSELVES AND THE WORLD

second and less familiar concept of mindfulness within the field of conflict resolution and the law is quite familiar in the field of psychology and is due to well-known Harvard University social psychologist Ellen Langer.<sup>102</sup>

Law professor Leonard Riskin and attorney mediator Rachel Wohl define the Eastern-derived notion of mindfulness that they teach as being aware, conscious, or mindful “in a particular way—deliberately, moment to moment, and without judgment or attachment to whatever passes through the five senses or the mind. Mindfulness, as we generally use the term, means paying attention, with equanimity, to our present experience as it unfolds.”<sup>103</sup> As they note, their definition of mindfulness is an elaboration of a definition by Jon Kabat-Zinn.<sup>104</sup> Clinical psychologist Shauna Shapiro states this about the first notion of mindfulness:

It is important to remember that mindfulness is both an outcome (mindful awareness) and a process (mindful practice): (1) *Mindful awareness*: an abiding presence or awareness, a deep *knowing* that manifests as *freedom of mind* (e.g., freedom from reflexive conditioning and delusion), and (2) *Mindful practice*: the systematic practice of intentionally attending in an open, caring, and discerning way, which involves both *knowing* and *shaping* the mind.

A definition that captures both aspects of mindfulness is as follows: The awareness that arises through intentionally attending in an open, accepting, and discerning way to whatever is arising in the present moment.<sup>105</sup>

Psychologist Ellen Langer states this about her notion of mindfulness: “[w]hen we are mindful, we implicitly or explicitly (1) view a situation from several perspectives, (2) see information presented in the situation as novel, (3) attend to context in which we are perceiving the information, and eventually (4) create new categories through which information may be understood.”<sup>106</sup> It should be clear to law professors that such a definition of mindfulness is closely related to what good lawyering entails and captures what many law professors often have in mind when they

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THROUGH MINDFULNESS 24–26 (2005).

102. ELLEN J. LANGER, MINDFULNESS 62–74 (1989) (advocating mindfulness in general based on psychological research).

103. Leonard L. Riskin & Rachel Wohl, *Mindfulness in the Heat of Conflict: Taking STOCK*, 20 HARV. NEGOT. L. REV. 121, 131 (2015).

104. *Id.* at 131 n.26. See KABAT-ZINN, *supra* note 101, at 107.

105. Shauna L. Shapiro, *The Integration of Mindfulness and Psychology*, 65 J. CLINICAL PSYCHOL. 555, 556 (2009) (internal citations omitted).

106. ELLEN J. LANGER, THE POWER OF MINDFUL LEARNING 111 (1997).

state that law professors teach the capabilities of thinking like a lawyer, including the skill of being able to “identify legal issues in unfamiliar or new scenarios.”<sup>107</sup> Langer’s research analyzes how mindfulness relates to charisma, focus, innovation, leadership, management, and self-acceptance.<sup>108</sup>

### *B. Mindfulness in Conflict Resolution and Negotiations*

Riskin and Wohl analyze how Eastern-derived mindfulness and Langer’s mindfulness both can help lawyers and law students more effectively negotiate and resolve conflicts by reducing attention to self-centered concerns; reducing the strength of negative emotions; developing awareness of and freedom from emotions, thoughts, habitual perceptions and behaviors; fostering sensitivity of others’ emotions; and increasing concentration and enhancing social skills.<sup>109</sup> Riskin and Wohl co-developed three tools of awareness to implement mindfulness that are summarized by these mnemonics: STOP, STOPSi, and taking STOCK,<sup>110</sup> and collectively by this mnemonic: SSITS.<sup>111</sup> All three tools are based upon a common foundation, known as the Triangle of Awareness, namely what Riskin and Wohl call “BETs,” which stands for Bodily sensations, Emotions, and Thoughts.<sup>112</sup> BETs are what we can be aware of when practicing mindfulness and in so doing choose to have our behavior respond mindfully instead of react mindlessly.<sup>113</sup>

The first of the three tools that Riskin and Wohl developed to help people establish and maintain mindfulness in the heat of conflict is the STOP tool: Stop; Take a breath; Observe as a compassionate witness your BETs; and Proceed by continuing what you were doing or doing something else.<sup>114</sup> The second tool is STOPSi, which is STOP plus the step of Setting Intentions, where an intention concerns how you would like to be during this activity or time.<sup>115</sup> So an intention is not a substantive goal of the conflict resolution. Instead, an intention is a goal about your moment-to-moment experience and behavior. Examples of intentions are

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107. Kate E. Bloch, *Cognition and Star Trek™: Learning and Legal Education*, 42 J. MARSHALL L. REV. 959, 964 (2009).

108. *Mindfulness in the Age of Complexity*, HARV. BUS. REV., Mar. 2014, at 68, 70–72 (reporting on a wide-ranging interview of Ellen Langer conducted by Allison Beard).

109. Riskin & Wohl, *supra* note 103 at 140, fig. 1.

110. *Id.* at 141.

111. *Id.* at 124 (citation omitted).

112. *Id.* at 141–42, fig. 2.

113. *Id.* at 143, fig. 3.

114. *Id.* at 144–46, fig. 4.

115. *Id.* at 146–48, fig. 5.



being attentive, balanced, calm, caring, courageous, kind, mindful, polite, or even ruthless.<sup>116</sup> The third tool is taking STOCK: Before the activity, set an intention by utilizing STOPSi; and then during the activity, Stop; Take a breath; Observe BETs; and Consider whether you have been following your intention and whether you would like to change it; and keep going after you make possible adjustments.<sup>117</sup>

Once upon a time, one of my nieces, K, and her brother, S, were arguing during a car ride. Their aunt said to them you should learn about something called conflict resolution that helps people to resolve their conflicts. K immediately volunteered that she had already learned recently in her elementary school all about conflict resolution. We were very curious about what K had learned and so we asked her to explain to us what exactly is conflict resolution. K said that conflict resolution is best explained by this example. Suppose that person 1 wants the outcome to be something that we will call A. Suppose that person 2 wants the outcome to be something different that we will call B. Then conflict resolution is when person 1 and person 2 both end up with the outcome being a third something that we will call C that differs from both A and B. Part of how mindfulness helps conflict resolution is to allow participants to pay attention to reality as it unfolds moment-by-moment instead of just focusing their attention on their desired outcomes.

Part of successful lawyering, negotiating, and living involves the art of effective communication<sup>118</sup> and positive communication,<sup>119</sup> both of which entail practicing mindfulness. Psychologist Mihaly Csikszentmihalyi, who is well-known for the concept of flow, which is a mental state of complete absorption that nothing else matters (“being in a zone” or “being in a groove”), stated in his seminal book, *Flow: The Psychology of Optimal Experience*, his belief that “[t]he main function of conversation is not to get things accomplished, but to improve the quality of experience.”<sup>120</sup>

The rest of this Article consists of three sections that analyze

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116. *Id.* at 147–48, 150.

117. *Id.* at 148–52, figs.6 &7 (explaining in detail a basic and an advanced version of this mindfulness tool); Katherine Larkin-Wong, *A Newbie's Impression: One Student's Mindfulness Lessons*, 61 J. LEGAL EDUC. 665, 667 (2012) (describing from a law student's perspective the taking STOCK tool).

118. Susan Brooks, *Using a Communication Perspective to Teach Relational Lawyering*, 15 NEV. L.J. 477, 479, 498, 502 (2014).

119. JULIEN C. MIRIVEL, *THE ART OF POSITIVE COMMUNICATION* (2014).

120. MIHALY CSIKSZENTMIHALYI, *FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE* 129 (First Harper Perennial Modern Classics ed. 2008) (1990).

how practicing mindfulness can improve, respectively, decision-making, ethics, and leadership in general and therefore also suggest a set of possible theories about how and why practicing mindfulness can improve decision-making, ethics, and leadership in particular for law students, lawyers, and law professors.

## II. CAN PRACTICING MINDFULNESS IMPROVE DECISION-MAKING?

Emerging research in the field of human Judgment and Decision Making (JDM) studies the dynamic nature of JDM and how people can learn to improve their JDM.<sup>121</sup> For example, research studies find evidence that playing video games can increase cognitive flexibility,<sup>122</sup> improve probabilistic inference,<sup>123</sup> and improve children's problem-solving ability.<sup>124</sup> Additionally, playing serious games designed to mitigate cognitive biases can improve decision-making.<sup>125</sup>

This part of the Article analyzes how practicing mindfulness can improve people's decision-making processes through a number of routes, including: (1) reducing anxiety, negative affect, stress, and threat perception, (2) increasing positive affect, (3) improving cognitive functioning, (4) reducing fatigue, (5) improving self-knowledge, (6) improving decision framing, (7) improving information gathering, (8) improving information processing, (9) improving the drawing of conclusions, (10) improving learning from feedback, (11) improving decision readiness, (12) increasing single-tasking, (13) decreasing attempted multi-tasking, (14) reducing substance abuse, (15) improving sleep quality,

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121. JUDGMENT AND DECISION MAKING AS A SKILL: LEARNING, DEVELOPMENT AND EVOLUTION (Mandeep K. Dhami et al., eds., 2013).

122. Brian D. Glass, W. Todd Maddox, & Bradley C. Love, *Real-Time Strategy Game Training: Emergence of a Cognitive Flexibility Trait*, 8 PLOS ONE, issue 8, Aug. 2013, e70350, at 1, 1, available at <http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0070350&type=printable>.

123. C. Shawn Green, Alexandre Pouget, & Daphne Bavelier, *Improved Probabilistic Inference as a General Learning Mechanism with Action Video Games*, 20 CURRENT BIOLOGY 1573, 1573 (2010).

124. Agne Suziedelyte, *Media And Human Capital Development: Can Video Game Playing Make You Smarter?*, 53 ECON. INQUIRY 1140, 1140 (2015).

125. Carey K. Morewedge, *How a Video Game Helped People Make Better Decisions*, HARV. BUS. REV. (Oct. 13, 2015), <https://hbr.org/2015/10/how-a-video-game-helped-people-make-better-decisions>; Carey K. Morewedge et al., *Debiasing Decisions: Improved Decision Making with A Single Training Intervention*, 2 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCI. 129, 129 (2015); Rebecca E. Rhodes et al., *Teaching Decision Making With Serious Games: An Independent Evaluation*, 12 GAMES & CULTURE 233, 233 (2017); Carl Symborski et al., *The Design and Development of Serious Games Using Iterative Evaluation*, 12 GAMES & CULTURE 252, 264–65 (2017).

(16) improving discernment about what choices are most important, (17) reducing the influence of cognitive biases, (18) reducing the influence of affective biases, and (19) reducing burnout.

Based on existing research about practicing mindfulness, many organizations currently offer or are considering offering voluntary mindfulness training to their leaders and employees. Practicing mindfulness appears to ameliorate many challenges organizations face about multi-tasking, attention overload, and incessantly more stressors due to a workplace culture of 24/7 accessibility and the plethora of ever more complicated workplace arrangements. The popularity of mindfulness among those in Silicon Valley and on Wall Street raises concerns about whether rich and powerful Americans have privileged access to mindfulness from their employers. Research about practicing mindfulness at work is in an embryonic stage. There are many crucial unanswered questions about how mindfulness is being practiced, marketed, and utilized in American workplaces today. Professors Jochen Reb, Tammy Allen, and Timothy Vogus raise a number of unresolved questions as guest editors of a special issue titled “*Mindfulness at Work: Pushing Theoretical and Empirical Boundaries*” of the journal *Organizational Behavior and Human Decision Processes* in their call for article submissions.<sup>126</sup> Because much of the research about mindfulness occurs in clinical settings, how much of this research applies to workplace contexts is unclear. What significant differences and implications, if any, are there about mindfulness in clinical environments versus mindfulness at work? Is there contagion of mindfulness across domains, individuals, and organizations? Can empirical research connect or combine the perspectives about mindfulness attributed to Jon Kabat Zinn with those attributed to Ellen Langer? Do increased levels of individual mindfulness aggregate to collective mindfulness? What are the cognitive and emotional regulation mechanisms by which mindfulness impacts collective and individual outcomes? How do measures of mindfulness at work relate to ratings by others about mindfulness? Because studies about collective mindfulness most frequently occur in high-reliability organizations, such as nuclear power plant control rooms, or reliability-seeking organizations, such as hospital intensive care units, prioritizing safety, does collective mindfulness affect other variables of interest, such as productivity? And does it affect more routine settings, such as

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126. E-mail from Jochen REB, Associate Professor of Organisational Behaviour & Human Resources, Singapore Management University, to author (Apr. 18, 2017) (on file with author).

everyday service work? Do similar practices and processes stimulate collective mindfulness in such environments? Which, if any, cultural variables are important for the practice and outcomes of mindfulness at workplaces? In workplaces, do factors besides meditation, such as workplace design and layout, correlate with higher mindfulness? How can organizations foster mindfulness by individuals, teams, and organizations? What are some of best practices for mindfulness training in organizations regarding delivery mechanisms, dosage, and timing? Who benefits from workplace mindfulness training and who does not? What outcomes can result from workplace mindfulness training and what outcomes cannot or do not? Who is attracted to workplace mindfulness training programs and who is not?

An ever-increasing number of law professors, law firms, and legal organizations provide some type of voluntary mindfulness training. Northwestern University law professor Leonard Riskin<sup>127</sup> teaches *Conflict Management in Legal Practice*.<sup>128</sup> Riskin and Rachel Wohl also teach as part of the annual professional skills program at Pepperdine Law School's Straus Institute for Dispute Resolution a two-day course *Practical Mindfulness: Calm and Clear in the Heat of Conflict*.<sup>129</sup> Professor Charles Halpern, author of a book exploring how meditation can foster inner wisdom and cultivate mindful social activism, *Making Waves and Riding the Currents: Activism and the Practice of Wisdom*,<sup>130</sup> is the inaugural director of the Berkeley Initiative for Mindfulness in Law and teaches *Effective and Sustainable Law Practice: The Meditative Perspective*.<sup>131</sup> Professor Rebecca Ann Simon,<sup>132</sup> co-creator and inaugural executive director of the national *Mindfulness In Law Society*,<sup>133</sup> co-creator and inaugural

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127. Leonard L. Riskin, *Faculty Page*, NW. PRITZKER SCH. OF LAW, <http://www.law.northwestern.edu/faculty/profiles/LeonardRiskin/> [https://perma.cc/8R4P-LT6T].

128. *Course Details: Conflict Management in Legal Practice*, NW. PRITZKER SCH. OF LAW, <http://www.law.northwestern.edu/academics/curricular-offerings/coursecatalog/details.cfm?CourseID=1210> [https://perma.cc/QM6J-DFJN].

129. *Course Details: Practical Mindfulness: Clear and Calm in the Heat of Conflict*, PEPPERDINE SCH. OF LAW, <https://law.pepperdine.edu/straus/training-and-conferences/professional-skills-program/malibu/mindfulness-conflict.htm> [https://perma.cc/SJ9N-EENQ].

130. CHARLES HALPERN, *MAKING WAVES AND RIDING THE CURRENTS: ACTIVISM AND THE PRACTICE OF WISDOM* 4–7 (2008).

131. Stephany Tlalka, *Legally Mindful*, MINDFUL (Oct. 10, 2012), <http://www.mindful.org/charlie-halpern-mindfulness-is-growing-in-the-legal-field/> [https://perma.cc/SLM9-RZ8N].

132. Rebecca Ann Simon *Faculty Page*, SW. LAW SCH., <http://www.swlaw.edu/faculty/full-time/rebecca-simon> [https://perma.cc/6Q8L-YN8J].

133. *Id.*

co-director of the *Mindfulness, Stress Management, and Peak Performance Program* at Southwestern Law School, leads classes about mindfulness for law school and bar exam success. University of San Francisco law professor Rhonda Magee,<sup>134</sup> a fellow and member of the Steering Committee of the Mind and Life Institute, teaches a course titled *Contemplative and Mindful Law and Law Practice*. University of Miami law professors Jan L. Jacobowitz,<sup>135</sup> director of the professional responsibility and ethics program, and Scott L. Rogers,<sup>136</sup> director of the mindfulness and law program, co-teach *Mindful Ethics: Professional Responsibility for Lawyers in the Digital Age*.<sup>137</sup> Rogers also teaches *Mindfulness in Law: Cultivating Tools for Effective Practice*.<sup>138</sup> Rogers analyzes how the University of Miami law school creatively infused mindfulness throughout its law school community and integrated mindfulness into the curriculum.<sup>139</sup> University of Miami law professor William Blatt<sup>140</sup> teaches a course titled *Emotional Intelligence*.<sup>141</sup> Brooklyn University director of legal writing and law professor Heidi K. Brown has written three books about mindful legal writing.<sup>142</sup> University of Missouri law Professor Richard C. Reuben, who founded the Mindfulness Affinity Group of the Association of American Law School's Section on Balance in Legal Education and co-founded the Mindfulness in Law Society, teaches *Conflict and Conflict Management* and *Emotional Intelligence for Lawyers*.<sup>143</sup>

Some judges also talk about awareness, anxiety and

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134. Rhonda Magee Faculty Page, UNIV. OF SAN FRANCISCO SCH. OF LAW, <https://www.usfca.edu/law/faculty/rhonda-magee> [<https://perma.cc/C46V-DSGQ>].

135. Jan L. Jacobowitz Faculty Page, UNIV. OF MIAMI SCH. OF LAW, <http://www.law.miami.edu/faculty/jan-l-jacobowitz> [<https://perma.cc/26LB-CX5G>].

136. Scott L. Rogers Faculty Page, UNIV. OF MIAMI SCH. OF LAW, <http://www.law.miami.edu/faculty/scott-l-rogers> [<https://perma.cc/AKM2-B266>].

137. Course Details: *Mindful Ethics: Professional Responsibility for Lawyers in the Digital Age*, UNIV. OF MIAMI SCH. OF LAW, [https://lawapps2.law.miami.edu/clink/course.aspx?cof\\_id=2669](https://lawapps2.law.miami.edu/clink/course.aspx?cof_id=2669) [<https://perma.cc/22RS-2GEJ>].

138. Course Details: *Mindfulness in Law: Cultivating Tools for Effective Practice*, UNIV. OF MIAMI SCH. OF LAW, [https://lawapps2.law.miami.edu/clink/course.aspx?cof\\_id=2531](https://lawapps2.law.miami.edu/clink/course.aspx?cof_id=2531) [<https://perma.cc/PTP6-UZT2>].

139. Scott L. Rogers, *The Mindful Law School: An Integrative Approach to Transforming Legal Education*, 28 TOURO L. REV. 1189 (2012).

140. William Blatt Faculty Page, UNIV. OF MIAMI SCH. OF LAW, <http://www.law.miami.edu/faculty/william-s-blatt> [<https://perma.cc/7L5B-8ACF>].

141. Course Details: *Emotional Intelligence*, UNIV. OF MIAMI SCH. OF LAW, [https://lawapps2.law.miami.edu/clink/course.aspx?cof\\_id=43](https://lawapps2.law.miami.edu/clink/course.aspx?cof_id=43) [<https://perma.cc/PXZ5-77YP>].

142. See generally HEIDI K. BROWN, *THE MINDFUL LEGAL WRITER: MASTERING PREDICTIVE AND PERSUASIVE WRITING* (2016); HEIDI K. BROWN, *THE MINDFUL LEGAL WRITER: MASTERING PERSUASIVE WRITING* (2016); HEIDI K. BROWN, *THE MINDFUL LEGAL WRITER: MASTERING PREDICTIVE WRITING* (2015).

143. Richard C. Reuben Faculty Page, UNIV. OF MO. SCH. OF LAW, <http://law.missouri.edu/about/people/reuben/> [<https://perma.cc/LT7E-89P2>].

mindfulness. For example, federal judge Michael A. Ponsor advised: “Keep tabs on your body. . . . If you are nervous, just be nervous. Do not make it worse by getting upset about it.”<sup>144</sup> Judge Supreme Court Justice Stephen Breyer stated he pauses for ten to fifteen minutes twice daily:

I don’t know that what I do is meditation, or even whether it has a name. For 10 or 15 minutes, twice a day I sit peacefully. I relax and think about nothing or as little as possible. And that is what I’ve done for a couple of years.

. . . .

And really I started because it’s good for my health. My wife said this would be good for your blood pressure and she was right. It really works. I read once that the practice of law is like attempting to drink water from a fire hose. And if you are under stress, meditation—or whatever you choose to call it—helps. Very often I find myself in circumstances that may be considered stressful, say in oral arguments where I have to concentrate very hard for extended periods. If I come back at lunchtime, I sit for 15 minutes and perhaps another 15 minutes later. Doing this makes me feel more peaceful, focused and better able to do my work.<sup>145</sup>

Chair of the American Bar Association’s Commission on Lawyer Assistance Programs, Terry Harrell, observed how “the benefits of mindfulness have become a big topic of discussion and education among professional responsibility groups”<sup>146</sup> because “mindfulness practice makes us better decision-makers, better ethical decision-makers. And that translates into better lawyering.”<sup>147</sup> while “[s]tressed-out lawyers make poor decisions, leaving them open to liability.”<sup>148</sup> Acting director of the State Bar of California’s Lawyer Assistance Program, Richard Carlton, observed that a “mindfulness practice can be as simple as closing your eyes and counting backward from 100.”<sup>149</sup> A white paper of the American Judges Association advocated that judges practice mindfulness to make better decisions.<sup>150</sup>

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144. Michael A. Ponsor, *Playing to the Bench*, A.B.A. J., Jan. 1995, at 70, 71–72.

145. Amanda Enyati, *Seeking Serenity: When Lawyers Go Zen*, CNN: HEALTH (May 11, 2011, 11:15 AM ET), <http://thechart.blogs.cnn.com/2011/05/11/seeking-serenity-when-lawyers-go-zen/> [<https://perma.cc/ANK7-T86C>].

146. Leslie A. Gordon, *How Lawyers Can Avoid Burnout and Debilitating Anxiety*, A.B.A. J. (July 1, 2015), [http://www.abajournal.com/magazine/article/how\\_lawyers\\_can\\_avoid\\_burnout\\_and\\_debilitating\\_anxiety](http://www.abajournal.com/magazine/article/how_lawyers_can_avoid_burnout_and_debilitating_anxiety) [<https://perma.cc/9U83-S8YA>].

147. *Id.*

148. *Id.*

149. *Id.*

150. Pamela Casey et al., *Minding the Court: Enhancing the Decision-Making Process*,

A. *Cognitive Economics, Mindful Lawyering, and Robot Attorneys*

Economist Miles Kimball defines cognitive economics as “the economics of what is in people’s minds.”<sup>151</sup> Kimball observes that cognitive economics “is a vibrant area of research”<sup>152</sup> and that “a key theme of cognitive economics is finite cognition (often misleadingly called ‘bounded rationality’).”<sup>153</sup> Kimball explains that “[f]inite cognition “means something more than just imperfect information: it means finite intelligence, imperfect information processing, and decision-making that is costly.”<sup>154</sup> Kimball notes “the claim that human intelligence is finite and that finite intelligence matters for economic life (scarce cognition) is not really controversial.”<sup>155</sup> Kimball explains that people hire and pay lawyers due to finite cognition:

As for lawyers, even if one considers talking in a courtroom a special skill that is not just a matter of intelligence, people pay a lot of money to lawyers who merely read law books and extract the relevant information. If everyone had infinite intelligence, it would be easy to understand the law books on one’s own, and paying someone else to do it would only make sense if one’s wage rate was higher than the lawyer’s wage rate, or if one was a slow reader for physiological reasons. If everyone had infinite intelligence, even finite reading speeds would not give trained lawyers enough of an edge for them to charge the fees they do.<sup>156</sup>

Certainly, law schools educate law students about how to read and extract legal information from judicial opinions, regulations, and statutes. Good legal education, though, involves more than just simply a transfer of knowledge or information about case law, regulations, and statutes. Law professors teach law students “how to think like lawyers,” a skill that includes particular habits of thought, because practicing law is partly a cognitive profession. Practicing law is also an affective profession in the sense that emotional intelligence is an important part of being a successful attorney.<sup>157</sup> Law students and lawyers who learn to mindfully

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49 CT. REV. 76, 93–94 (2013).

151. Miles Kimball, *Cognitive Economics*, 66 JAPANESE ECON. REV. 167, 168 (2015).

152. *Id.* at 167.

153. *Id.* at 167, 172.

154. *Id.* at 172.

155. *Id.* at 173.

156. *Id.*

157. See, e.g., MARJORIE CORMAN AARON, CLIENT SCIENCE: ADVICE FOR LAWYERS ON COUNSELING CLIENTS THROUGH BAD NEWS AND OTHER LEGAL REALITIES 92–94 (2012); NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW

think and feel can also choose wisely. Lawyers have to make decisions all day. The reason that people hire and pay lawyers is that lawyers have the legal expertise to advise their clients to make wise decisions in conflict resolution, deal making, litigation, mediation, and negotiation.

The specter of automated robot lawyers with artificial intelligence displacing and replacing human attorneys is a scenario that is being seriously discussed and contemplated today by many lawyers and consultants to law firms.<sup>158</sup> Advancements in computing technology are inherently unpredictable in their pace, scope, and nature. Machines increasingly perform cheaply, quickly, and more efficiently many tasks previously requiring expensive, slow, and fallible human labor. It might seem obvious that lawyers are currently an endangered profession and will in the not too distant future inevitably become obsolete. Cognitive scientists Philip Fernbach and Steven Sloman cogently point out how machines as of now do not share intentionality with people.<sup>159</sup> Fernbach and Sloman explain that humans possess the skills to form intentions, reflect, observe and evaluate their own thoughts, engage in self-control, and modify actions based upon our abilities for self-awareness, which contrasts with machines that must always follow their programming.<sup>160</sup> Practicing mindfulness improves our abilities for self-awareness and in so doing also improves our skills to form intentions, reflect, observe and evaluate our thoughts, engage in self-control, and modify actions if necessary. Attorneys who practice mindfulness differentiate themselves from, and so are less likely to be replaced by, artificially intelligent machine lawyers.

### *B. Mindfulness About Decision-Making Processes*

Because mindfulness and the decision sciences “both focus on attention to thought processes and the exploration of the roots of these cognitions”<sup>161</sup> it should not be surprising that practicing mindfulness is related to improving decision-making processes. In

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(2010); DOUGLAS O. LINDER & NANCY LEVIT, *THE GOOD LAWYER: SEEKING QUALITY IN THE PRACTICE OF LAW* (2014); PAMELA BUCY PIERSON, *THE BUSINESS OF BEING A LAWYER 2* (2014); MARJORIE A. SILVER, *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION* (2007).

158. See, e.g., BRUCE MACEWEN, *TOMMORROWLAND: SCENARIOS FOR LAW FIRMS BEYOND THE HORIZON* 174–93 (2017).

159. STEVEN SLOMAN & PHILIP FERNBACH, *THE KNOWLEDGE ILLUSION: WHY WE NEVER THINK ALONE* 139 (2017).

160. *Id.* at 145–46.

161. Greta B. Raglan & Jay Schulkin, *Decision Making, Mindfulness, and Mood: How Mindfulness Techniques can Reduce the Impact of Biases and Heuristics through Improved Decision Making and Positive Affect*, 4 J. DEPRESSION & ANXIETY 168, 168 (2014).



particular, many studies find that people's mood states can affect their decision-making, "with negative affect and anxiety increasing a person's tendency toward decision making biases."<sup>162</sup> Mindfulness practice entails viewing from an accepting and open perspective one's thoughts, feelings, and bodily sensations.<sup>163</sup> In so doing, mindfulness has been linked to positive affect and helps to reduce negative affect and anxiety.<sup>164</sup> Therefore, one route by which mindfulness can improve people's decision-making is by improving people's moods and reducing their anxiety. Learning to become more mindful is a valuable skill that cultivates better mood regulation and self-acceptance.<sup>165</sup>

A way that mindfulness meditation can improve decision-making is by allowing people to practice and get better at being mindful, which in turn can improve decision-making for all the reasons above. Another way that mindfulness meditation can improve decision-making is if mindfulness meditation reduces anxiety and stress.<sup>166</sup> This is because there is evidence that "anxiety increases threat perception, which, in turn, results in self-interested unethical behaviors."<sup>167</sup> There is also empirical evidence that just four days of mindfulness meditation training for twenty minutes per day can improve the ability to sustain attention, executive functioning, working memory, and visual-spatial processing of undergraduates,<sup>168</sup> perhaps as a consequence of reducing self-reported anxiety and fatigue.<sup>169</sup> Another experiment involving subjects with no meditation experience found that a three-day (one-hour total) mindfulness meditation intervention reduced subjects' anxiety, confusion, depression, fatigue, heart rate, negative mood, and tension compared to a control group and also a sham mindfulness group.<sup>170</sup>

People have a tendency for making flawed self-assessments

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162. *Id.*

163. *Id.*

164. *Id.*

165. Peter H. Huang, *Torn Between Two Selves: Should Law Care More About Experiencing Selves or Remembering Selves?* 17 S.M.U. SCI. & TECH. L. REV. 263, 321–22 (2014).

166. Madhav Goyal et al., *Meditation Programs for Psychological Stress and Well-being: A Systematic Review and Meta-Analysis*, 174 J. AM. MED. ASS'N. INTERNAL MED. 357, 357 (2014).

167. Maryam Kouchaki & Sreedhari D. Desai, *Anxious, Threatened, and Also Unethical: How Anxiety Makes Individuals Feel Threatened and Commit Unethical Acts*, 100 J. APPLIED PSYCHOL. 360, 360–61, 369 (2015).

168. Zeidan et al., *supra* note 37, at 597, 600–04.

169. *Id.* at 599, 601, 603.

170. Fadel Zeidan et al., *Effects of Brief and Sham Mindfulness Meditation on Mood and Cardiovascular Variables*, 16 J. ALTERNATIVE & COMPLEMENTARY MED. 867, 867, 869–72 (2010).

regarding their skills and character,<sup>171</sup> with deleterious impacts on their health, education, and wealth.<sup>172</sup> Practicing mindfulness can improve self-knowledge about personality, emotions, thoughts, and behavior.<sup>173</sup> It appears that mindfulness directly addresses the pair of key barriers to self-knowledge, namely informational barriers, in terms of the quality and quantity of information people have regarding themselves, and motivational barriers, in terms of processing of information people have of themselves motivated by protecting their egos.<sup>174</sup> Improved self-knowledge should in turn improve decision-making.

### C. Mindfulness Throughout Decision-Making Stages

Decision sciences professor Natalia Karelaia and organizational behavior and human resources professor Jochen Reb recently explore how and when mindfulness can improve people's decision-making.<sup>175</sup> They divide up the process of decision-making into these stages:<sup>176</sup> (1) Decision Framing, (2) Information Gathering and Processing, (3) Making Conclusions, and (4) Learning from Feedback.

In the first stage of decision-making—decision framing—mindfulness helps people realize there is an opportunity to make a decision in the first place, as opposed to behaving according to some pre-established script, simply reacting out of habit, or proceeding with the status quo.<sup>177</sup> Being mindful can mitigate premature, narrow framing of the decision problem. Having an open and curious beginner's mind can lead people to initially consider more possible options.<sup>178</sup> Rather than passively choosing between just some option that happens to be presented and the status quo, mindfulness facilitates the proactive generation of multiple possible options to achieve one's authentic goals. Instead of choice being driven merely by whatever options happen to be

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171. Travis J. Carter & David Dunning, *Faulty Self-Assessment: Why Evaluating One's Own Competence Is an Intrinsically Difficult Task*, 2 SOC. & PERSONALITY PSYCHOL. COMPASS 346, 346–47 (2008); David Dunning, *We Are All Confident Idiots*, PAC. STANDARD, Nov./Dec. 2014, at 58–59; James Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments*, 77 J. PERSONALITY & SOC. PSYCHOL. 1121, 1122, 1131 (1999).

172. David Dunning et al., *Flawed Self-Assessment: Implications for Health, Education, and the Workplace*, 5 PSYCHOL. SCI. PUB. INT. 69, 79, 85, 90 (2004).

173. Carlson, *supra* note 44, at 176–78.

174. *Id.* at 176–77.

175. Natalia Karelaia & Jochen Reb, *Improving Decision Making through Mindfulness*, in Reb & Atkins, *supra* note 27, at 163.

176. *Id.* at 165 fig.7.1.

177. *Id.* at 166–67.

178. *Id.* at 167–68.

available, mindfulness fosters clarity about one's underlying values that assists in creating and considering novel options and so those values driving choices.<sup>179</sup> People who practice mindfulness are more inclined to perceive more choice and sense greater freedom and self-determination.<sup>180</sup> People who are mindful about their core values and fundamental goals react less to temporary, situational cues.<sup>181</sup>

In the second stage of decision-making—information gathering and processing—mindfulness can affect both the quantity and quality of information that people collect and process.<sup>182</sup> Mindfulness likely increases the quality of information utilized to make choices because the open-minded awareness and observation that mindfulness entails implies that mindful people will process information in a neutral, unbiased fashion as opposed to filtering information through lenses that are biased by past experiences, cognitive biases, and motivational biases. Mindfulness also reduces negativity bias, which is the tendency to weigh negative information more heavily than positive information.<sup>183</sup> Karelaia and Reb hypothesize that mindfulness reduces confirmation seeking and overconfidence by making people less attached to their thoughts, feelings, and self-images.<sup>184</sup> Another way that mindfulness may increase the quality of information utilized in making choices is by letting people discern relevant from irrelevant information. A final way that mindfulness may increase the quality of information utilized in making choices is by making it more likely that people realize important information is missing and then proactively search for such information.<sup>185</sup>

In the third stage of decision-making—making conclusions—mindfulness can help people reconcile analysis and intuition by helping people be more aware of when their intuition leads to a choice different from their analysis and evaluating if their

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179. RALPH L. KEENEY, VALUE-FOCUSED THINKING: A PATH TO CREATIVE DECISIONMAKING (1992).

180. Kirk Warren Brown & Richard M. Ryan, *The Benefits of Being Present: Mindfulness and Its Role in Psychological Well-Being*, 84 J. PERSONALITY & SOC. PSYCHOL. 822, 824, 836–39 (2003) (discussing and presenting results of a supporting study).

181. Kirk Warren Brown et al., *Mindfulness: Theoretical Foundations and Evidence for Its Salutary Effects*, 18 PSYCHOL. INQUIRY 211, 223–24 (2007).

182. Karelaia & Reb, *supra* note 175, at 172.

183. Laura G. Kiken & Natalie J. Shook, *Looking Up: Mindfulness Increases Positive Judgments and Reduces Negativity Bias*, 2 SOC. PSYCHOL. & PERSONALITY SCI. 425, 425, 427–30 (2011) (presenting experimental evidence).

184. Karelaia & Reb, *supra* note 175, at 173–74.

185. *Id.* at 174.

intuition should be followed.<sup>186</sup> Because a part of mindfulness is emotional self-awareness, the ability to recognize emotions and view them as information helps people make choices that involve making emotionally difficult trade-offs.<sup>187</sup> Emotional intelligence is effectively knowledge and mindfulness about one's and others' emotions.<sup>188</sup> Mindfulness also helps people regulate emotions that arise from conflicts due to making trade-offs.<sup>189</sup> Finally, at this stage of the decision-making process, mindfulness can help people implement their choices by translating their intentions into actions by increasing their perceived behavioral control, strengthening their abilities to control their cognition and emotions that are counter to their intentions, reducing the rigidity of their behavior, and heightening their attention and awareness to inner feelings, internal experiences, and situational cues.<sup>190</sup>

In the final stage of decision-making—learning from feedback—mindfulness can help people recognize when their decision-making environment is not conducive to learning.<sup>191</sup> Karelaia and Reb propose that people who are mindful should be more open to positive and negative feedback and proactively seek feedback because their egos will be less threatened by negative feedback and they should view all facts as being “friendly” information.<sup>192</sup> Karelaia and Reb also believe that people who are mindful should process feedback in an unbiased manner because mindfulness should promote humbleness and reduce cognitive defensiveness, particularly self-serving attribution biases, and overconfidence.<sup>193</sup> Karelaia and Reb hypothesize that “mindful decision makers are more likely to *learn from feedback* and, importantly, learn the right lessons.”<sup>194</sup>

A final example of how mindfulness may improve decision-

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186. *Id.* at 176–77.

187. *Id.* at 177–78; Mary Frances Luce, *Choosing to Avoid: Coping with Negatively Emotion-Laden Consumer Decisions*, 24 J. CONSUMER RES. 409 (1998); Mary Frances Luce et al., , *Choice Processing in Emotionally Difficult Decisions*, 23 J. CONSUMER EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION, 384, 388 (1997).

188. *See, e.g.*, William S. Blatt, *Teaching Emotional Intelligence to Law Students: Three Keys to Mastery*, 15 NEV. L.J. 464, 465 (2015); Randall Kiser, *The Emotionally Attentive Lawyer: Balancing the Rule of Law with the Realities of Human Behavior*, 15 NEV. L.J. 442, 442 (2015).

189. Karelaia & Reb, *supra* note 175, at 178.

190. *Id.* at 178–79; Nikos L. D. Chatzisarantis & Martin S. Hagger, *Mindfulness and the Intention-Behavior Relationship within the Theory of Planned Behavior*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 663, 666 (2007) (demonstrating this in the context of leisure-time physical activity).

191. Karelaia & Reb, *supra* note 175, at 179.

192. *Id.* at 180.

193. *Id.* at 180–81.

194. *Id.* at 182.

making is this algorithm (that can be remembered with the acronym DEAL) to decide between a pair of choices: (1) Define the choices in terms of feelings, images, and words; (2) Explore both sides of each choice in a balanced and complete way; (3) Allow yourself to be open to information that comes from your feelings, images, and words; and (4) Launch yourself into (a) step (1) again to redefine the decision, or (b) realizing the need for additional information, determine how and when to get such information, and getting that information, return to step (1), or (c) stopping the decision process emphasizing equanimity.<sup>195</sup> The website that describes this mindful decision-making technique notes that about half of the people who were taught this process had self-reported making a decision that they judged to be good within a single practice session and that almost everyone who used this method found that it made decision-making more fun and meaningful.<sup>196</sup> It would be interesting to empirically investigate the efficacy of this and other decision-making processes that involve mindfulness.

#### *D. Mindfulness Facilitates Decision Readiness*

Decision researchers and business school professors, Jack B. Soll, Katherine L. Milkman, and John W. Payne, coined the phrase decision readiness to refer to “whether an individual is in a position to make a good decision in a particular situation.”<sup>197</sup> They describe a person as being decision-ready when a person’s slow, or system 2 thinking,<sup>198</sup> is ready to monitor a person’s fast or system 1 thinking,<sup>199</sup> suspend wrong judgments, and correct wrong decisions. Soll, Milkman, and Payne emphasize three determinants of decision readiness: (1) fatigue and distraction effects that limit capacity, (2) visceral influences related to one’s physical and emotional state, and (3) individual differences in ability and thinking style.<sup>200</sup> Being mindful addresses each of these aspects of decision readiness because practicing mindfulness should lead people to be aware of fatigue or distraction, be aware of visceral influences upon them, and be more likely to adopt a more reflective thinking style. The problem of being

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195. Soryu Teal Scott, *Making Mindful Decisions*, SORYUFORALL, <http://soryuforall.budsa.org/decision/> [<https://perma.cc/3XSM-KPZN>].

196. *Id.*

197. Jack B. Soll et al., *A User’s Guide to Debiasing*, in II WILEY-BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 924, 927 (Gideon Keren & George Wu eds., 2015).

198. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 13 (2011).

199. *Id.* at 13.

200. Soll et al., *supra* note 197, at 929–30.

distracted while making decisions has become more pervasive in today's cyber-centric world.<sup>201</sup>

By practicing mindfulness to utilize both system 1 and system 2 thinking, lawyers can avoid being silly, like a recurring fictional character that comedian Phil Hartman portrayed on the television show *Saturday Night Live* who was named Keyrock, the unfrozen caveman lawyer.<sup>202</sup> Keyrock was a caveman who fell into some ice, was preserved well enough so that scientists in 1988 could thaw him out, and he could attend law school.<sup>203</sup> In one scene, a flight attendant refuses to serve Keyrock any more alcohol.<sup>204</sup> Outraged, Keyrock drunkenly shouts "Listen, I'll sue you and your whole crummy airline!"<sup>205</sup>

My colleague, Nicole Drane, jokes about suggesting to some people that they should "go on a thinking too fast diet" to engage in more single-tasking,<sup>206</sup> instead of inefficiently serially tasking in an attempt at multi-tasking.<sup>207</sup> Whether to ban laptops in classrooms depends ultimately on empirical data about whether students, Millennials in particular,<sup>208</sup> are capable of utilizing digital technology mindfully,<sup>209</sup> instead of having distracted minds.<sup>210</sup> Professors can also have a classroom dialogue or discussion with students about whether they should keep smartphones on in classrooms as an exercise in mindful student self-governance.<sup>211</sup> Learning to pay attention and be engaged is an

201. MAGGIE JACKSON, *DISTRACTED: THE EROSION OF ATTENTION AND THE COMING DARK AGE* 18–19 (2008).

202. *Saturday Night Live: Season 17, Episode 5 "Unfrozen Caveman Lawyer"* (NBC television broadcast Mar. 14, 1992) (available at <https://vimeo.com/133414453>).

203. *Id.*

204. *Id.*

205. *Id.*

206. DEVORA ZACK, *SINGLETASKING: GET MORE DONE—ONE THING AT A TIME* 28–29 (2015).

207. DAVE CRENSHAW, *THE MYTH OF MULTITASKING: HOW "DOING IT ALL" GETS NOTHING DONE* 11 (2008).

208. LARRY D. ROSEN, *REWired: UNDERSTANDING THE iGeneration AND THE WAY THEY LEARN* 16 (2010).

209. Darren Rosenblum, *Leave Your Laptops at the Door to My Classroom*, N.Y. TIMES (Jan. 2, 2017), <https://nyti.ms/2k1gTJ9>.

210. Adam Gazzaley & Larry D. Rosen, *THE DISTRACTED MIND: ANCIENT BRAINS IN A HIGH-TECH WORLD* 143–49 (2016); James M. Lang, *The Distracted Classroom: Is It Getting Worse?* CHRON. HIGHER EDUC. (Apr. 17, 2017), <http://www.chronicle.com/article/The-Distracted-Classroom-Is/239785>.

211. Simon Bates & Alison Lister, *Acceptable Technology in the Classroom: Let Students Decide*, PEDAGOGY UNBOUND, (Sept. 23, 2013), <http://www.pedagogyunbound.com/tips-index/2013/9/23/acceptable-technology-in-the-classroom-let-students-decide> [<https://perma.cc/8N4E-9AT2>]; David Gooblar, *Smartphones in the Classroom? Let Students Decide*, CHRONICLE VITAE (Jan. 23, 2014), <https://chroniclevitae.com/news/289-smartphones-in-the-classroom-let-students-decide?cid=articlepromo> [<https://perma.cc/2ZGR-PZX2>]

important legal and life skill.<sup>212</sup> Nicole Drane also shared the helpful advice of setting a quota before you start on your daily commute about how many of life's annoyances must happen during your drive before you snap. For instance, I have decided to set a quota of 100 annoyances per day.

A familiar example of a visceral influence related to an individual's physical and emotional state is the temporary state of hunger. The deleterious effects of hunger on decision-making are related to a glucose model of self-control and willpower.<sup>213</sup> The well-known fact that hunger causes low decision readiness is the humorous basis for a recent Snickers® advertising campaign,<sup>214</sup> consisting of several brief television spots. The first 30-second television commercial, titled "Recovery Room,"<sup>215</sup> opens with a physician, who is dressed in turquoise scrubs, trying to apologize for what he did while sitting next to his patient's bed in a post-operative recovery room. The surgeon hesitantly says "I'm very sorry."<sup>216</sup> A female hospital administrator, who is dressed in a grey "power" suit says "[a]nd we're gonna [sic] get the phone, his phone out of you. . . ."<sup>217</sup> The phone rings with a distinctive tone from inside the patient's abdomen area.<sup>218</sup> The doc says "I have to . . . I have to take this. Just a little pinch."<sup>219</sup> The doctor hurriedly says "Sweetheart, I left the phone inside. I'm having phone issues. Bye," hangs up, and says "Uh, we're going to fix this. Needless to say."<sup>220</sup> Siri answers "Ok, resuming play" and starts playing Toni Basil singing this line from her song *Mickey*, "Oh Mickey, what a pity you don't understand."<sup>221</sup> The commercial ends with these words captioned onscreen: "You're careless when you're hungry" and with a voiceover saying this line that also is onscreen "Snickers® Satisfies."<sup>222</sup>

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212. R. Lisle Baker & Daniel P. Brown, *On Engagement: Learning to Pay Attention*, 36 U. ARK. LITTLE ROCK L. REV. 337 (2014).

213. Roy F. Baumeister et al., *The Glucose Model of Mediation: Physiological Bases of Willpower as Explanations for Common Mediation Behavior*, 15 PEPP. DISP. RESOL. L.J. 377, 383–95 (2105).

214. Alexandra Jardine, *Does Hunger Ever Make You 'Dimpatient?' Snickers' Ads for Crisper Warn of Combined Symptoms*, CREATIVITY (Jan. 11, 2016), <http://creativity-online.com/work/snickers-crisper—internship/45017> [<https://perma.cc/92RU-DQQ2>].

215. *Snickers®: Recovery Room*, MARS, INC. (available at <https://www.ispot.tv/ad/Avd7/snickers-recovery-room>).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. TONI BASIL, *Mickey*, on WORD OF MOUTH (Chrysalis 1981).

222. *Snickers®: Recovery Room*, ISPOT.TV, <https://www.ispot.tv/ad/Avd7/snickers-recovery-room> (last visited July 25, 2017).

A second commercial, titled “the News,”<sup>223</sup> shows a Midwestern local television station’s Metro news at 6 broadcast with an African-American male anchor, Caucasian male reporter, and Caucasian female meteorologist all incoherently saying what seems like a long string of just Ah’s, eh’s, or A’s. The commercial ends by revealing that an employee is asleep on the job and inadvertently his arm is repeatedly pressing the letter A, causing a long string of A’s to appear on a teleprompter screen.<sup>224</sup> The commercial ends with these words captioned onscreen: “You’re sleepy when you’re hungry” and with a voiceover saying this line that also is onscreen “Snickers® Satisfies.”<sup>225</sup>

A third commercial depicts a young Asian male intern during a job interview showing off several drunken social media posts and his calling to follow up on this interview while he is still present in the room.<sup>226</sup> An off-screen announcer warns viewers about not being ‘dimpatient’ or dim and impatient.<sup>227</sup> A fourth commercial features a young Caucasian model going through several poses in a chemistry laboratory he confuses with an advanced figure drawing class and ends when he splashes himself with an unknown chemical that he mistakenly believes is a cologne.<sup>228</sup> An off-screen announcer warns viewers about not being ‘confulish’ or confused and foolish.<sup>229</sup>

A fifth commercial features a woman catching her daughter coming home at 11 P.M..<sup>230</sup> The daughter thinks that she will be busted for staying out too late.<sup>231</sup> Instead, the mother scolds the daughter for not staying out and disappointing her father before cleaning her living room floor with a lawn mower.<sup>232</sup> An off-screen announcer warns viewers about not being “bloopy,” or having bad judgment and being loopy.<sup>233</sup>

We all know that we are not ready to make decisions and therefore should not make decisions when we are hungry, sleepy, distracted, angry, excited, jealous, sad, or in any visceral state. Yet, to our detriment, we often and repeatedly *do* make decisions

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223. *Snickers®: The News*, MARS, INC. (available at [https://www.youtube.com/watch?v=N7xKyR\\_Z-wk](https://www.youtube.com/watch?v=N7xKyR_Z-wk)).

224. *Id.*

225. *Id.*

226. Jardine, *supra* note 214.

227. *Id.*

228. *Snickers® Crisper: Figure Drawing*, MARS, INC. (available at <http://creativity-online.com/work/snickers-crisper-figure-drawing/45018>).

229. *Id.*

230. *Snickers® Crisper: Curfew*, MARS, INC. (available at <https://youtu.be/NcDAEneuvkQ>).

231. *Id.*

232. *Id.*

233. *Id.*



when in such altered, temporary states. People are more likely to engage in unethical and unprofessional behavior if they are not decision-ready because of they are under (chronic) stress and other visceral influences. Trial attorney, Nick Badgerow, argued that alcohol, drugs, depression, and gambling compromise the lives of many lawyers and their clients.<sup>234</sup> People who are depressed or under the influence of alcohol, drugs, or a gambling addiction are not likely to be ready to make decisions or aware of their being decision-impaired. Mindfulness about being in such a temporary, visceral state and facing an important decision can help an individual to become more decision-ready. There is also growing evidence the mindfulness-based interventions can significantly improve sleep quality<sup>235</sup> and reduce insomnia and sleep disturbances.<sup>236</sup>

Of course, not all decisions are (equally) important.<sup>237</sup> Being able to discern which decisions really matter is another benefit of mindfulness. Being mindful can also help people discern the difference between important and necessary versus unimportant and unnecessary decisions.<sup>238</sup> Such discernment allows people to prioritize the choices they face and spend limited attentional, cognitive, and economic resources on consequential choices instead of wasting effort, time, and energy on micro-managing their lives. Judiciously focusing on choices that matter also lowers anxiety from being overwhelmed by having to make too many choices or choice overload. An example of a common important choice is whether to seek<sup>239</sup> or avoid information.<sup>240</sup>

### *E. Mindfulness in Physician Decision-Making*

Being mindful about one's thinking alerts one to being influenced by cognitive biases.<sup>241</sup> Professor Pat Croskerry, an

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234. J. Nick Badgerow, *Apocalypse at Law: The Four Horsemen of the Modern Bar—Drugs, Alcohol, Gambling and Depression*, 18 PROF. LAW. issue 3, 2007, at 2.

235. See Black, *supra* note, 45 at 498–99.

236. Sheila N. Garland et al., *The Quest for Mindful Sleep: A Critical Synthesis of the Impact of Mindfulness-Based Interventions for Insomnia*, 2 CURRENT SLEEP MED. REP. 142, 148 (2016).

237. Aner Sela & Jonah Berger, *Decision Quicksand: How Trivial Choices Suck Us In*, 39 J. CONS. RES. 360, 361 (2011).

238. Karelaia & Reb, *supra* note 175, at 168–69.

239. See, e.g., George Loewenstein, *The Psychology of Curiosity: A Review and Reinterpretation*, 116 PSYCHOL. BULL. 75, 75 (1994).

240. Russell Golman et al., *Information Avoidance*, 55 J. ECON. LITERATURE 96 (2017); Gerd Gigerenzer & Rocio Garcia-Retamero, *Cassandra's Regret: The Psychology of Not Wanting to Know*, 124 PSYCHOL. REV. 179 (2017).

241. Pat Croskerry, *From Mindless to Mindful Practice—Cognitive Bias and Clinical Decision Making*, 368 NEW ENG. J. MED., 2445, 2447 (2013).

expert in emergency medicine safety, explains how cognitive biases cause diagnostic errors and incorrect treatment plans in clinical decision-making.<sup>242</sup> Croskerry explains how some cognitive dispositions to respond (CDRs) to patients and some affective dispositions to respond (ADRs) to patients can lead to diagnostic failures.<sup>243</sup> Croskerry classifies the action that results from CDRs into a trichotomy of possibilities: flesh and blood decision-making that involves less than ideal thinking on one's feet and relies on intuition; a Casablanca strategy that "rounds up the usual suspects" and also avoids committing oneself to gain time; and a formal work-up involving iterative hypothesis testing and refinement towards a definitive diagnosis.<sup>244</sup> Factors that determine CDRs include affective states, fatigue, sleep debt, and sleep deprivation.<sup>245</sup> There are many cognitive and affective debiasing strategies to reduce diagnostic error.<sup>246</sup> Reflective practice by physicians and hospitals may reduce diagnostic errors.<sup>247</sup>

An alternative perspective<sup>248</sup> to clinical physician reasoning argues that diagnostic errors do not just result from cognitive biases or undue reliance on system 1 fast (non-analytical) reasoning.<sup>249</sup> This perspective contends that diagnostic errors can be associated with both system 1 fast (non-analytical) reasoning and system 2 (analytical) reasoning.<sup>250</sup> There is evidence that encouraging both system 1 and system 2 reasoning, that is dual-process reasoning, can improve diagnostic accuracy.<sup>251</sup> Therefore, mindfulness about utilizing dual process reasoning can improve diagnostic accuracy.

Several studies have investigated the impacts of mindfulness on physicians and their patients. One study found that an

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242. *Id.* at 2445; Pat Croskerry, *Achieving Quality in Clinical Decision Making: Cognitive Strategies and Detection of Bias*, 9 ACAD. EMERGENCY MED. 1184, 1184, 1186–1200, tbl. 4 (2002).

243. Pat Croskerry, *Diagnostic Failure: A Cognitive and Affective Approach*, 2 ADV. PATIENT SAFETY: FROM RES. TO IMPLEMENTATION 241, 241, 243, fig. 1, 246, tbl. 1, 247–49 (Agency for Health Care Research and Quality ed., 2005).

244. *Id.* at 243–45.

245. *Id.* at 243, 246–49.

246. *Id.* at 250, tbl. 3.

247. Silvia Mamede et al., *Diagnostic Errors and Reflective Practice in Medicine*, 13 J. EVALUATION CLIN. PRAC. 138, 138 (2006).

248. Geoffrey R. Norman & Kevin W. Eva, *Diagnostic Error and Clinical Reasoning*, 44 MED. EDUC. 94, 94, 98 (2010).

249. KAHNEMAN, *supra* note 198, at 13.

250. Norman & Eva, *supra* note 248, at 94, 98.

251. *See, e.g.*, Kevin W. Eva et al., *Teaching from the Clinical Reasoning Literature: Combined Reasoning Strategies Help Novice Diagnosticians Overcome Misleading Information*, 41 MED. EDUC. 1152, 1152, 1157 (2007).

intensive eight-week mindfulness continuing medical educational program was associated with short-term and sustained improvement in primary care physicians' burnout, capacity for relating to patients, psychological distress, and well-being.<sup>252</sup> Another study found that clinician physician self-rated mindfulness was associated with more patient-centered communication and have more satisfied patients.<sup>253</sup> A pilot study found that an abbreviated mindfulness intervention was associated with reductions in anxiety, depression, job burnout, and stress and increased job satisfaction, quality of life, and compassion among primary care clinician physicians.<sup>254</sup>

A number of studies "consistently demonstrate that anxiety, depression, burnout, and general psychological distress are common among medical students."<sup>255</sup> As of 2014, 79% (to be precise, 111 of 140) of the medical schools accredited by the Association of American Medical Colleges offered mindfulness-related activities to medical students, patients, or health care staff.<sup>256</sup> Several studies have investigated the impacts of mindfulness on premedical students, medical students, and residents. One study found the short-term effects of medical and premedical students taking an eight-week mindfulness-based stress reduction elective course included less self-reported state and trait anxiety, less reported overall psychological distress including depression, higher scores on overall empathy levels, and higher scores on a measure of spiritual experiences, with all of these observations during the students' final examination period.<sup>257</sup> Pilot mindfulness-based wellness programs during resident physician training have found improved burnout, empathy, resilience, self-compassion, and stress reactions among residents at several medical schools, including Duke University,<sup>258</sup>

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252. Michael S. Krasner et al., *Association of an Educational Program in Mindful Communication with Burnout, Empathy, and Attitudes Among Primary Care Physicians*, 302 J. AM. MED. ASSOC. 1284, 1284 (2009); Howard B. Beckman et al., *The Impact of a Program in Mindful Communication on Primary Care Physicians*, 87 ACAD. MED. 815, 815 (2012).

253. Mary Catherine Beach et al., *A Multicenter Study of Physician Mindfulness and Health Care Quality*, 11 ANNALS FAM. MED. 421, 421 (2013).

254. Luke Fortney et al., *Abbreviated Mindfulness Intervention for Job Satisfaction, Quality of Life, and Compassion in Primary Care Clinicians: A Pilot Study*, 11 ANNALS FAM. MED. 412, 412 (2013).

255. Lisa J. Merlo, *Healing Physicians*, 316 J. AM. MED. ASSOC. 2489, 2489 (2016).

256. Nicholas Barnes et al., *An Examination of Mindfulness-Based Programs in US Medical Schools*, MINDFULNESS 489, 491 (2016).

257. Shauna L. Shapiro et al., *Effects of Mindfulness-Based Stress Reduction on Medical and Premedical Students*, 21 J. BEHAV. MED. 581, 596–97 (1998).

258. Brian E. Goldhagen et al., *Stress and Burnout in Residents: Impact of Mindfulness-Based Resilience Training*, 6 ADVANCES MED. EDUC. & PRAC. 525, 531 (2015).

the University of Massachusetts,<sup>259</sup> the University of Toledo,<sup>260</sup> and the University of Wisconsin, Madison.<sup>261</sup> These promising studies are important because another recent study found that 60.3% of American residents and fellows, across all specialties, experience burnout, defined as meeting these three criteria: exhaustion upon merely thinking about work, physical symptoms of fatigue and sleeping difficulties; depersonalization, or losing empathy in interpersonal relationships; and decreased sense of personal achievement.<sup>262</sup> Increased physician resilience is associated with improved quality of patient care, reduced errors and less physician attrition.<sup>263</sup> High daily stress,<sup>264</sup> burnout,<sup>265</sup> and turnover<sup>266</sup> are also problems for many K–12 teachers. Mindfulness-based professional development programs have been found in a randomized control trial to “reduce stress and improve teachers’ performance and classroom learning environments.”<sup>267</sup>

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259. Christine Runyan et al., *Impact of a Family Medicine Resident Wellness Curriculum: A Feasibility Study*, 21 MED. EDUC. ONLINE, 2016, at 4–5, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4901506/pdf/MEO-21-30648.pdf>.

260. Julie Brennan & Angele McGrady, *Designing and Implementing a Resiliency Program for Family Medicine Residents*, 50 INT’L J. PSYCHIATRY MED. 104, 107 (2015).

261. Department of Family Medicine and Community Health, School of Medicine and Public Health, UNIV. OF WIS.: DEP’T OF FAMILY MED. AND PUB. HEALTH, *Madison Residency Pilots New Mindfulness-Based Resident Wellness Curriculum*, <http://www.fammed.wisc.edu/madison-residency-pilots-new-mindfulness-based-resident-wellness-curriculum/> [<https://perma.cc/QXZ6-DZZP>].

262. Liselotte N. Dyrbye et al., *Burnout Among U.S. Medical Students, Residents, and Early Career Physicians Relative to the General U.S. Population*, 89 ACAD. MED. 443, 445, 447 (2014).

263. Ronald M. Epstein & Michael S. Krasner, *Physician Resilience: What It Means, Why It Matters, and How to Promote It*, 88 ACAD. MED. 301, 301–03 (2013).

264. MARK T. GREENBERG ET AL., PA. STATE UNIV., *TEACHER STRESS AND HEALTH: EFFECTS ON TEACHERS, STUDENTS, AND SCHOOLS*, (2016), [http://www.rwjf.org/content/dam/farm/reports/issue\\_briefs/2016/rwjf430428](http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2016/rwjf430428). [<https://perma.cc/G6NH-YV6V>].

265. Rachel Abenavoli et al., *The Protective Effects of Mindfulness Against Burnout Among Educators*, 37. PSYCHOL. EDUC. REV. no. 2, Autumn 2013, at 57, 57; A. Katrin Arens & Alexandre J. S. Morin, *Relations Between Teachers’ Emotional Exhaustion and Students’ Educational Outcomes*, 108 J. EDUC. PSYCHOL. 800, 800 (2016).

266. Matthew Ronfeldt et al., *How Teacher Turnover Harms Student Achievement*, Nat’l. Bureau of Econ. Res. Working Paper No. 17176 at \*1, June 2011.

267. Patricia A. Jennings et al., *Improving Classroom Learning Environments by Cultivating Awareness and Resilience in Education (CARE): Results of a Randomized Controlled Trial*, 28 SCH. PSYCHOL. QUART. 374, 374 (2013). See also Patricia A. Jennings, *CARE for Teachers: A Mindfulness-Based Approach to Promoting Teachers’ Social and Emotional Competence and Well-Being*, in Schonert-Reichl & Roeser, *supra* note 10, at 144; Patricia A. Jennings et al., *Improving Classroom Learning Environments by Cultivating Awareness and Resilience in Education (CARE): Results of Two Pilot Studies*, 46 J. CLASSROOM INTERACTION 37, 37 (2011); Jennifer L. Frank et al., *Mindfulness-Based Interventions in School Settings: An Introduction to the Special Issue*, 10 RES. HUM. DEV. 205, 206 (2013); Linda Lantieri et al., *Cultivating Inner Resilience in Educators and Students: The Inner Resilience Program*, in Schonert-Reichl & Roeser, *supra* note 10, at 120; Robert W. Roeser et al., *Mindfulness Training and Teachers’ Professional*

Dr. Luke Fortney and his colleagues at the Department of Family Medicine and Community Health, School of Medicine and Public Health, University of Wisconsin have created an accessible and practical website,<sup>268</sup> with links to short audio podcasts and videos about mindfulness,<sup>269</sup> research articles about mindfulness,<sup>270</sup> a video presentation about evidence-based mindfulness,<sup>271</sup> and other helpful mindfulness resources.<sup>272</sup> The website suggests incorporating three mindfulness steps in one's daily life and practice: Pause,<sup>273</sup> Presence,<sup>274</sup> and Proceed.<sup>275</sup> On the Pause webpage,<sup>276</sup> under the heading of Resources, there is a link titled SOLAR practice table, that downloads a two-page handout about how to start mindfulness meditation practice utilizing these two mnemonic acronyms: SOLAR and TIES. SOLAR stands for Stop, Observe, Let it be, And Return. TIES stands for Talk/Thoughts, Images, Emotional feelings, and physical Sensations. The handout provides more details about each step in SOLAR and each component of TIES. On the Presence webpage,<sup>277</sup> under the heading of Resources, there is a link titled 6 Point Body Scan Practice, that downloads a one-page handout about

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*Development: An Emerging Area of Research and Practice*, 6 CHILD DEV. PERSP. 167, 167 (2012); Ellen Skinner & Jeffrey Beers, *Mindfulness and Teachers' Coping in the Classroom: A Developmental Model of Teacher Stress, Coping, and Everyday Resilience*, in Schonert-Reichl & Roeser, *supra* note 10, at 99; Shauna Shapiro et al, *Mindfulness Training for Teachers*, in Schonert-Reichl & Roeser, *supra* note 10, at 83.

268. *Mindfulness in Medicine—Improving Clinician and Community Health*, UNIV. OF WIS. SCH. OF MED. AND PUB. HEALTH, DEP'T OF FAMILY MED. AND CMTY. HEALTH, <http://www.fammed.wisc.edu/mindfulness/> [https://perma.cc/KSL7-8GJW].

269. *Mindfulness*, UNIV. OF WIS. SCH. OF MED. AND PUB. HEALTH, DEP'T OF FAMILY MED. AND CMTY. HEALTH, <http://www.fammed.wisc.edu/category/media/mindfulness/> [https://perma.cc/UAQ6-94JF].

270. *Research Articles*, UNIV. OF WIS. SCH. OF MED. AND PUB. HEALTH, DEP'T OF FAMILY MED. AND CMTY. HEALTH, <http://www.fammed.wisc.edu/mindfulness/research/> [https://perma.cc/LF9A-RXA9].

271. *Presentation on Evidence-Based Mindfulness*, UNIV. OF WIS. SCH. OF MED. AND PUB. HEALTH, DEP'T OF FAMILY MED. AND CMTY. HEALTH, <http://www.fammed.wisc.edu/mindfulness/research/#presentation> [https://perma.cc/6YWV-KHG9].

272. *Mindfulness Resources*, UNIV. OF WIS. SCH. OF MED. AND PUB. HEALTH, DEP'T OF FAMILY MED. AND CMTY. HEALTH, <http://www.fammed.wisc.edu/mindfulness/resources/> [https://perma.cc/3862-KYBE].

273. *Pause (Practice in Your Practice)*, UNIV. OF WIS. SCH. OF MED. AND PUB. HEALTH, DEP'T OF FAMILY MED. AND CMTY. HEALTH, <http://www.fammed.wisc.edu/mindfulness/pip-pause/> [https://perma.cc/H5D6-KYW2].

274. *Presence (Practice in Your Practice)*, UNIV. OF WIS. SCH. OF MED. AND PUB. HEALTH, DEP'T OF FAMILY MED. AND CMTY. HEALTH, <http://www.fammed.wisc.edu/mindfulness/pip-presence/> [https://perma.cc/S9MU-22QF].

275. *Proceed (Practice in Your Practice)*, UNIV. OF WIS. SCH. OF MED. AND PUB. HEALTH, DEP'T OF FAMILY MED. AND CMTY. HEALTH, <http://www.fammed.wisc.edu/mindfulness/pip-proceed/> [https://perma.cc/JF8V-2Q6J].

276. *Pause*, *supra* note 273.

277. *Presence*, *supra* note 274.

how to practice a six-point body scan of one's feet, knees, hips, belly/lower back, heart center, and face. On the Proceed webpage,<sup>278</sup> under the heading of Resources, there is a link titled Take the Valued Living Questionnaire, that downloads a two-page handout consisting of a Valued Living Questionnaire Self-Care Assessment in two parts, and another link titled Contemplative Writing Exercise, that downloads a three-page handout consisting of a part about reflection and awareness and another part about creating kind intention.

#### *F. Mindfulness in Lawyer Decision-Making*

Lawyers make decisions that are analogous to physicians' diagnostic and treatment decisions. Litigators decide on a theory of the case and litigation strategy. Transactional lawyers decide on a theory of the deal and implementation strategy. Negotiators and mediators decide on a theory of the conflict and resolution strategy. Collaborative lawyers decide on a theory of the collaboration and realization strategy. In fact, "sound decision making actually is the essence of effective lawyering."<sup>279</sup> The decisions lawyers make are influenced by CDRs to clients and ADRs to clients.<sup>280</sup> Some of these CDRs and ADRs can lead to legal errors.<sup>281</sup>

There are many possible solutions to reduce legal decision-making errors.<sup>282</sup> Reflective practice by lawyers and legal organizations may reduce legal decision-making errors. Mindfulness about utilizing dual process reasoning may also improve legal decision-making. The practice of law involves many psychological processes including legal categorization, legal narrative, and legal rhetoric.<sup>283</sup> Being mindful should help lawyers improve their ability to determine if a specific case falls into the scope of a legal category, rule, or precedent; tell narratives to refute or support legal claims; and craft language to be rhetorically persuasive of a particular viewpoint.

An open question is whether lawyer mindfulness is associated

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278. *Proceed*, *supra* note 275.

279. RANDALL KISER, BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS 1 (2010).

280. *Id.* at 89–195, 283–308, 367–75; RANDALL KISER, HOW LEADING LAWYERS THINK: EXPERT INSIGHTS INTO JUDGMENT AND ADVOCACY 229–51 (2011).

281. See e.g., Randall L. Kiser et al., *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. EMPIRICAL LEGAL STUD. 551, 551 (2008).

282. KISER (2010), *supra* note 279, at 309–66, 376–96; KISER (2011), *supra* note 280, at 265–75.

283. See generally ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW: HOW COURTS RELY ON STORYTELLING AND HOW THEIR STORIES CHANGE THE WAYS WE UNDERSTAND THE LAW—AND OURSELVES. (2000).

with more client-centered communication, lawyer compassion, and satisfied clients. Another open question is whether taking an elective, eight-week mindfulness-based stress reduction course would reduce law students' anxiety, depression, and stress in addition to increase law students' compassion, empathy, and subjective well-being. In July 2016, two attorneys Jenna Cho and Karen Gifford published a book written for lawyers *The Anxious Lawyer: An 8-Week Guide to a Joyful and Satisfying Law Practice Through Mindfulness and Meditation*.<sup>284</sup> An anonymous law professor explains why one should read this book.<sup>285</sup> A related behavioral study of 46 lawyers recruited from a book club hosted by the National Association of Women Lawyers, a gender inclusive group dedicated to advancement of women lawyers in United States, who participated in an 8-week, mindfulness program based on Cho and Gifford's book, *The Anxious Lawyer*,<sup>286</sup> found significant reductions in anxiety, depression, and stress in addition to significant increases in mindful cognition, perceived effectiveness, positive mood, and resiliency.<sup>287</sup> A study of experienced mediators found a strong correlation between self-reported mindfulness and well-being.<sup>288</sup>

### III. CAN PRACTICING MINDFULNESS IMPROVE ETHICS?

This part of the Article analyzes how practicing mindfulness can improve people's ethical reasoning and in so doing, their ethical conduct via these various alternative, complementary paths: (1) providing engagement, meaningfulness, and purpose; (2) improving ethical decision-making and reducing racially discriminatory behavior; (3) reducing affective forecasting biases; (4) reducing cognitive biases; (5) increasing intrinsic motivation; (6) decreasing extrinsic motivation; (7) increasing autonomy;

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284. JEENA CHO & KAREN GIFFORD, *THE ANXIOUS LAWYER: AN 8-WEEK GUIDE TO A JOYFUL AND SATISFYING LAW PRACTICE THROUGH MINDFULNESS AND MEDITATION* (2016).

285. LAWPROFBLAWG, *The Many Reasons Why This Law Professor Thinks You Should Read 'The Anxious Lawyer'*, ABOVE THE LAW (May 24, 2016, 2:00 PM), <http://abovethelaw.com/2016/05/the-many-reasons-why-this-law-professor-thinks-you-should-read-the-anxious-lawyer/> [<https://perma.cc/CWM8-R456>].

286. CHO & GIFFORD, *supra* note 284.

287. Emily Grace Nielsen et al., *The Mindful Lawyer: Mindfulness Meditation Improves the Emotional Well-Being of Lawyers*, Poster Presentation at the Association for Psychological Science, 29<sup>th</sup> Annual Convention, May 25–28, 2017, <https://psychologicalscience.confex.com/psychologicalscience/2017annual/poster/papers/index.cgi?username=5446&password=145446> [<https://perma.cc/MJ4T-K527>] (presenting results of the study).

288. Fredrik Falkenström, *Studying Mindfulness in Experienced Meditators: A Quasi-Experimental Approach*, 48 PERSONALITY & INDIVIDUAL DIFFERENCES 305, 308 (2010).

(8) increasing competence; (9) increasing relatedness; (10) increasing positive Subjective Well-Being (SWB); (11) decreasing negative SWB; (12) increasing moral awareness; (13) improving moral judgment and reasoning; (14) increasing moral motivation; (15) strengthening moral implementation; (16) reducing or offsetting the affective benefits from experiencing a cheater's high; (17) reducing biological and hormonal bases of unethical conduct; (18) reducing addictions and cravings; and (19) providing real options to respond thoughtfully instead of reacting mindlessly. This part of the Article analyzes theoretical, empirical, and experimental research that shows or suggests how practicing mindfulness can improve people's ethical thinking and consequently their behavior through each of the above changes.

Kenneth Arrow, a 1972 economics Nobel laureate, started his reply to a modest question from Kristen Renwick Monroe, Director of the Interdisciplinary Center for the Scientific Study of Ethics and Morality at the University of California, Irvine, "[h]ow did you come to be interested in ethics?"<sup>289</sup> with this fascinating response:

To say that I'm interested in ethics is probably just to say that I'm a human being. You're brought up full of ethical concerns; these things are part and parcel of life. The real issue is whether you think about ethical concerns rather than just accept them. Will you raise the level of consciousness?<sup>290</sup>

Practicing mindfulness can raise awareness about and consciousness of ethical concerns by focusing attention at and cultivating reflection about ethical issues.

#### *A. Mindfulness Can Provide Engagement, Meaningfulness, and Purpose*

A recent positive psychology theory about mindfulness proposes that practicing mindfulness can lead to greater engagement, meaningfulness, and eudaimonic well-being.<sup>291</sup> This mindfulness-to-meaning theory (MMT) advances the perspective that mindfulness enhances interoceptive attention, expands cognitive scope that facilitates reappraisal of adversity and savoring of positive experience, introduces flexibility of cognitive

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289. Chance Favors et al., *Introduction to KENNETH J. ARROW ET AL., ON ETHICS AND ECONOMICS: CONVERSATIONS WITH KENNETH J. ARROW 2* (2017).

290. KENNETH J. ARROW ET AL., *ON ETHICS AND ECONOMICS: CONVERSATIONS WITH KENNETH J. ARROW 89* (2017).

291. Eric L. Garland et al., *Mindfulness Broadens Awareness and Builds Eudaimonic Meaning: A Process Model of Mindful Positive Emotion Regulation*, 26 *PSYCHOL. INQUIRY* 293, 304–06 (2015).



appraisals, and ends with deepened capacities for creating meaning and more engaged living.<sup>292</sup> A diagrammatic presentation of the MMT depicts a cycle of stages unfolding over time with mindfulness evolving into meaning: stress appraisal, decentering, metacognitive awareness, paying broadened attention to context, positive reappraisal, paying attention to contextual features that support reappraisal, experiencing positive emotions, savoring hedonic experiences and implied meanings, taking adaptive or prosocial actions, and having a greater sense of meaningfulness or purpose in life.<sup>293</sup> A number of psychologists commented on the MMT in a special issue of *Psychological Inquiry* devoted to this theory,<sup>294</sup> resulting in a response by the developers of the MMT.<sup>295</sup> Recent social genomics research found that people with eudaimonic well-being in terms of being meaningfully engaged with life, having a sense of purpose, and who were flourishing, were more likely to exhibit decreased inflammation and increased antiviral response, which is the opposite gene profile of those who suffer from social isolation.<sup>296</sup> It is crucial to emphasize this research finds a correlation, and not a causal link, between thriving and favorable gene expression.<sup>297</sup>

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292. *Id.* at 293.

293. *Id.* at 299 fig. 1.

294. See generally Fred B. Bryant & Jennifer L. Smith, *Appreciating Life in the Midst of Adversity: Savoring in Relation to Mindfulness, Reappraisal, and Meaning*, 26 PSYCHOL. INQUIRY 315 (2015); Linda E. Carlson, *The Mindfulness-to-Meaning Theory: Putting a Name to Clinical Observations*, 26 PSYCHOL. INQUIRY 322 (2015); Todd B. Kashdan et al., *Lumping and Splitting in the Study of Meaning in Life: Thoughts on Surfing, Surgery, Scents, and Sermons*, 26 PSYCHOL. INQUIRY 336 (2015); Emily K. Lindsay & J. David Creswell, *Back to the Basics: How Attention Monitoring and Acceptance Stimulate Positive Growth*, 26 PSYCHOL. INQUIRY 343 (2015); Yoshio Nakamura & S. Shaun Ho, *A Causal Versus Enabling Impact of Mindfulness on the Genesis of Meaning*, 26 PSYCHOL. INQUIRY 358 (2015); Francesco Pagnini & Ellen Langer, *Mindful Reappraisal: Comment on "Mindfulness Broadens Awareness and Builds Eudaimonic Meaning: A Process Model of Mindful Positive Emotion Regulation"*, 26 PSYCHOL. INQUIRY 365 (2015); Yi-Yuan Tang & Rongxiang Tang, *Rethinking Future Directions of the Mindfulness Field*, 26 PSYCHOL. INQUIRY 368 (2015); Richard G. Tedeschi & Cara L. Blevins, *From Mindfulness to Meaning: Implications for the Theory of Posttraumatic Growth*, 26 PSYCHOL. INQUIRY 373 (2015).

295. See generally Eric L. Garland et al., *The Mindfulness-to-Meaning Theory: Extensions, Applications, and Challenges at the Attention—Appraisal—Emotion Interface*, 26 PSYCHOL. INQUIRY 377 (2015).

296. Barbara Fredrickson et al., *A Functional Genomic Perspective on Human Well-Being*, 110 PROC. NAT'L ACAD. SCI. 13684 (2013) (presenting this research); Barbara Fredrickson et al., *Psychological Well-Being and the Human Conserved Transcriptional Response to Adversity*, 10 PLoS ONE e0121839 (2015) (confirming and following up on this research); Barbara Fredrickson et al., *Correction: Psychological Well-Being and the Human Conserved Transcriptional Response to Adversity*, 11 PLoS ONE e0157116 (2016) (presenting a corrected version of the follow-up research). See also Will Storr, *A Better Kind of Happiness*, THE NEW YORKER, July 7, 2016 (reporting on this research).

297. Dan Pouliot, *Mind Over Genetics, and Inaccuracy in Journalism* (Sept. 28, 2013), <http://danpouliot.com/blog/2013/09/mind-over-genetics-and-inaccuracy-in-journalism/>

The MMT introduces a process by which mindfulness may lead people to have greater meaning and purpose in their lives. People are perpetual “meaning-making machines.”<sup>298</sup> We crave and create meaning as we constantly and continually rewrite our life stories. We tell others and ourselves narratives to make sense of and have meaning in our lives. The search for meaning can be a very powerful motivator in our behavior.<sup>299</sup> Having a sense of meaning and purpose can itself sustain people behaving ethically in the face of life’s inevitable, numerous, and random hardships, inequities, and misfortunes. In *Darmok*,<sup>300</sup> episode two from season five of the science fiction television series, *Star Trek: The Next Generation*, senior members of the starship Enterprise have trouble understanding the alien race of Tamarians (also known as the Children of Tama) that communicate only by allegory. The mutual communication difficulty is due to a lack of shared, common stories. Some commentators and viewers believe this episode to be one of the best<sup>301</sup> or most profound of the series.<sup>302</sup>

During his closing remarks of the 2017 University of Colorado Law School faculty scholarship retreat: *Making a Difference: Impactful Legal Scholarship*, Dean S. James Anaya offered a top-five list of why professors do research: (5) pride, (4) tenure, (3) camaraderie, (2) impact, and (1) joy.<sup>303</sup> The joy or happiness or eudaimonic well-being that professors experience from crafting scholarship is related to creating meaning and purpose in academic life. University of Richmond law school professor Shari Motro writes from her heart about law professors putting our hearts in our legal scholarship.<sup>304</sup>

I lead several in-class discussions about mindfulness and career fulfillment or satisfaction in my section of *Legal Ethics and*

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[<https://perma.cc/2BRD-QM6X>].

298. Niklas Karlsson, George Loewenstein, & Jane McCafferty, *The Economics of Meaning*, in EXOTIC PREFERENCES: BEHAVIORAL ECONOMICS AND HUMAN MOTIVATION 33, 35 (George Loewenstein ed., 2007).

299. See generally VIKTOR E. FRANKL, MAN’S SEARCH FOR MEANING (2006); EMILY ESFAHANI SMITH, THE POWER OF MEANING: CRAFTING A LIFE THAT MATTERS (2017).

300. *Star Trek: The Next Generation: Darmok* (Paramount syndication television broadcast Sept. 28, 1991).

301. Scott Thill, *Best Star Trek: The Next Generation Episodes, According to You*, WIRED (Oct. 19, 2012), <https://www.wired.com/2012/10/star-trek-tng-readers-best-worst/> [<https://perma.cc/387E-J9ZM>].

302. Jordan Hoffman, *One Trek Mind: Deciphering “Darmok”*, Star Trek™ Website (Nov. 20, 2013), <http://www.startrek.com/article/one-trek-mind-deciphering-darmok> [<https://perma.cc/AZB8-BPWU>].

303. Dean S. James Anaya, University of Colorado Law School, Closing Remarks at the University of Colorado Law School Faculty Scholarship Retreat: *Making a Difference: Impactful Legal Scholarship* (2017).

304. Shari Motro, *Scholarship Against Desire*, 27 YALE J.L. & HUMAN. 115, 142 (2015).

*Professionalism: Business Law Issues.* We place mindfulness into a broader context in our discussions by considering how mindfulness can help lawyers to find and sustain passion, meaning, and purpose in their careers. We talk about how mindfulness enables us to utilize our character strengths daily at work, home, and play.<sup>305</sup> We analyze how our jobs, careers, and callings differ from each other.<sup>306</sup> We think about how mindfulness can help us craft positive identity and meaning professionally.<sup>307</sup> We ask how a sense of the bigger picture and keeping in mind perspective relates to mindfulness by viewing and having a conversation about a film titled *Happy*,<sup>308</sup> a nine-minute cinematic video titled *This is Water*,<sup>309</sup> based on an essay by David Foster Wallace entitled *This Is Water: Some Thoughts, Delivered on a Significant Occasion, about Living a Compassionate Life*,<sup>310</sup> and a three and a half minute video of Carl Sagan reading an excerpt from *Pale Blue Dot*.<sup>311</sup>

### B. Mindfulness Facilitates Debiasing

Mindfulness can help us acknowledge and alter the way that we see the world through filters of unconscious bias.<sup>312</sup> Some unethical decisions are the result of racially discriminatory animus,<sup>313</sup> overestimating the affective impacts of positive and negative events,<sup>314</sup> implicit biases against groups of people,<sup>315</sup> the sunk-cost bias or fallacy,<sup>316</sup> and seeking revenge or vengeance to

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305. See, e.g., Peter H. Huang, *Authentic Happiness, Self-Knowledge and Legal Policy*, 9 MINN. J. L. SCI. & TECH. 755, 764–65 (2008).

306. See, e.g., Amy Wrzesniewski et al., *Jobs, Careers, and Callings: People's Relations to Their Work*, 31 J. RES. PERSONALITY 21 (1997).

307. See, e.g., Amy Wrzesniewski et al., *Job Crafting and Cultivating Positive Meaning and Identity In Work*, 1 ADVANCES POSITIVE ORG. PSYCHOL. 281 (2013).

308. HAPPY (Wadi Rum Films 2011).

309. David Foster Wallace, *This is Water* (THE GLOSSARY 2013) (available at <https://vimeo.com/188418265>).

310. DAVID FOSTER WALLACE, *THIS IS WATER: SOME THOUGHTS, DELIVERED ON A SIGNIFICANT OCCASION, ABOUT LIVING A COMPASSIONATE LIFE* (2009).

311. CARL SAGAN, *PALE BLUE DOT: A VISION OF THE HUMAN FUTURE IN SPACE* 6–7 (1994) (available at <https://www.youtube.com/watch?v=p86BPM1GV8M>).

312. SARA TAYLOR, *FILTER SHIFT: HOW EFFECTIVE PEOPLE SEE THE WORLD* (2017).

313. Joerg Dietz & Emmanuelle P. Kleinlogel, *Employment Discrimination as Unethical Behavior*, in OXFORD HANDBOOK OF WORKPLACE DISCRIMINATION (Adrienne J. Colella & Eden B. King eds., 2015).

314. Barbara L. Fredrickson & Daniel Kahneman, *Duration Neglect in Retrospective Evaluations of Affective Episodes*, 65 J. PERSONALITY & SOC. PSYCHOL. 45, 54 (1993).

315. Daniel A. Yudkin et al., *Reflexive Intergroup Bias in Third-Party Punishment*, 145 J. EXPERIMENTAL PSYCHOL.: GEN. 1448, 1453 (2016).

316. Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 ORG. BEHAV. & HUM. DECISION PROCESSES 124, 126–28 (1985).

rectify perceived injustice or unfairness.<sup>317</sup> Recent research finds that practicing mindfulness can decrease racially discriminatory behavior,<sup>318</sup> the affective impact bias also known as duration neglect,<sup>319</sup> implicit age/race bias,<sup>320</sup> and sunk-cost bias,<sup>321</sup> in addition to increasing the willingness to accept inequitable or unfair outcomes.<sup>322</sup> University of San Francisco law school professor Rhonda V. Magee adapted contemplative practices to cultivate awareness of racial bias,<sup>323</sup> known as Mindfulness-Based ColorInsight Practices.<sup>324</sup>

Further sources of decision-making bias and unethical behavior are feelings of arrogance, hubris, invincibility, overconfidence, and understanding that spring from an illusion of knowledge.<sup>325</sup> Many people often believe and feel they know more than they actually do because they experience an Illusion of Explanatory Depth (IoED).<sup>326</sup> We often confuse the information that we personally know with the information that other people around us know,<sup>327</sup> information that resides, and is stored, in the world around us,<sup>328</sup> or the information that we can easily find by searching the internet.<sup>329</sup> Such lack of information separation that is due to economically efficient communities of knowledge and learning, distributed cognition, and cognitive division of labor causes many of us to assume that we know (much) more than we do and consequently “make decisions—even very consequential

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317. Francesca Gino & Lamar Pierce, *Dishonesty in the Name of Equity*, 20 PSYCHOL. SCI. 1153, 1157–59 (2009).

318. Adam Lueke & Bryan Gibson, *Brief Mindfulness Meditation Reduces Discrimination*, 3 PSYCHOL. CONSCIOUSNESS: THEORY, RES. & PRAC. 34, 39 (2016).

319. Amber S. Emanuel et al., *The Role of Mindfulness Facets in Affective Forecasting*, 49 PERSONALITY & INDIVIDUAL DIFFERENCES 815, 816–18 (2010).

320. Adam Lueke & Bryan Gibson, *Mindfulness Meditation Reduces Implicit Age and Race Bias: The Role of Reduced Automaticity of Responding*, 6 SOC. PSYCHOL. & PERSONALITY SCI. 284 (2015).

321. Andrew C. Hafenbrack et al., *Debiasing the Mind Through Meditation: Mindfulness and the Sunk-Cost Bias*, 25 PSYCHOL. SCI. 369, 374 (2014).

322. Ulrich Kirk et al., *Interoception Drives Increased Rational Decision-Making in Meditators Playing the Ultimatum Game*, 5 FRONTIERS NEUROSCI., Apr. 2011, Art. 49, 49 (2011); Ulrich Kirk et al., *Mindfulness Training Increases Cooperative Decision Making in Economic Exchanges: Evidence from fMRI*, 138 NEUROIMAGE 274, 281 (2016).

323. Rhonda Magee, *How Mindfulness Can Defeat Racial Bias*, GREATER GOOD MAGAZINE (May, 14, 2015), [http://greatergood.berkeley.edu/article/item/how\\_mindfulness\\_can\\_defeat\\_racial\\_bias](http://greatergood.berkeley.edu/article/item/how_mindfulness_can_defeat_racial_bias) [https://perma.cc/59AX-AFTU].

324. Rhonda V. Magee, *The Way of ColorInsight: Understanding Race and Law Effectively Through Mindfulness-Based ColorInsight Practices*, 8 GEO. L.J. MOD. CRIT. RACE PERSP. 251, 253 (2016).

325. SLOMAN & FERNBACH, *supra* note 159.

326. *Id.* at 21.

327. *Id.* at 121.

328. *Id.* at 105.

329. *Id.* at 131.

decisions—without deep understanding.”<sup>330</sup> The solution, as Sloman and Fernbach explain in detail, is not more information.<sup>331</sup> In addition, a growing body of economic and psychological research documents that many people avoid information when that information affects their beliefs, happiness, or identities, even if that information is free and useful.<sup>332</sup>

Because lawyers are by definition experts about law and legal matters, our legal expertise often leads us to mistakenly believe that we also have expertise about non-legal matters, including ethics. The American Bar Association (ABA) requires that for law schools in the United States to be accredited, they must “offer a curriculum that requires each student to satisfactorily complete at least the following: (1) one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values, and responsibilities of the legal profession and its members . . . .”<sup>333</sup> Additionally, admission to the bar in all but three U.S. jurisdictions, Maryland, Wisconsin, and Puerto Rico, requires passing the Multi-State Professional Responsibility Examination (MPRE) (Connecticut and New Jersey also will accept successful completion of a law school course about professional responsibility instead of a passing score on the MPRE).<sup>334</sup> The MPRE is a two-hour, 60-question multiple-choice examination and tests whether one has effectively memorized the ABA Model Rules of Professional Conduct<sup>335</sup> and ABA Model Code of Judicial Conduct.<sup>336</sup> The MPRE does not test if one has even a modicum of personal ethics or moral values.<sup>337</sup> Because most law students develop sufficient expertise to successfully complete the ABA required law school course about legal ethics and professionalism in addition to receive a passing score on the MPRE, law students have a tendency to experience an illusion of ethical knowledge that leads to unethical behavior. Practicing mindfulness can help law students and lawyers realize they experience such an ethical knowledge illusion.

Two laboratory studies found that people who were mindful were more likely to care about such internal rewards as integrity, moral identity, and honesty, instead of such external rewards as

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330. *Id.* at 247.

331. *Id.* at 240–44.

332. Russell Golman et al., *supra* note 240, at 179–80.

333. ABA Standard 303(a)(1) (2017).

334. *The Multi-State Professional Responsibility Examination (MPRE)*, NAT’L CONF. BAR EXAMINERS, <http://www.ncbex.org/exams/mpre/> [<https://perma.cc/DE5W-CR2W>].

335. MODEL RULES OF PROF’L CONDUCT (1983).

336. MODEL CODE OF JUDICIAL CONDUCT (2011).

337. Huang, *supra* note 84, at 308.

monetary gains.<sup>338</sup> Psychologists Edward L. Deci and Richard Ryan expanded on research about intrinsic versus extrinsic motivation by proposing Self-Determination Theory (SDT).<sup>339</sup> SDT predicts, and a large body of empirical research has documented, that intrinsic rewards are associated with SWB, extrinsic rewards are associated with negative SWB, and that people thrive when they experience autonomy, competence, and relatedness.<sup>340</sup> Recall that practicing mindfulness can improve self-knowledge of personality, emotions, thoughts, and behavior.<sup>341</sup> Such greater self-knowledge can in turn increase autonomy, competence, and relatedness, and in so doing increase positive SWB. Empirical research utilizing data the World Values Survey found that “greater happiness results in improved ethical judgments, after correcting for bicausality and controlling for income and other factors.”<sup>342</sup> Other empirical evidence that life satisfaction is correlated with risk avoidance<sup>343</sup> also suggests that happier people will avoid the risks of unethical behavior.

Anne Brafford,<sup>344</sup> as chairperson of the Attorney Well-Being Committee of the American Bar Association Law Practice Division, wrote a letter representing the position of the ABA Law Practice Division commenting on the ABA’s proposed MCLE Rule and advocating that it should be expanded to provide CLE credit for well-being topics,<sup>345</sup> including mindfulness (meditation).<sup>346</sup> Brafford also recently wrote a related tour-de-force book, *Positive Professionals: Creating High-Performing, Profitable Firms Through the Science of Engagement*,<sup>347</sup> that explains how law firms and other legal organizations can utilize the insights of positive psychology and well-being research to foster sustainable, thriving cultures.

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338. Nicole E. Ruedy & Maurice E. Schweitzer, *In the Moment: The Effect of Mindfulness on Ethical Decision Making*, 95 J. BUS. ETHICS 73, 76–77 (2010).

339. See generally RICHARD RYAN & EDWARD L. DECI, SELF-DETERMINATION THEORY: BASIC PSYCHOLOGICAL NEEDS IN MOTIVATION, DEVELOPMENT, AND WELLNESS (2017).

340. *Id.* at 3–25; Huang & Felder, *supra* note 14, at 744–45 and references therein.

341. Carlson, *supra* note 44, at 176.

342. Harvey S. James, Jr. & Athanasios G. Chymis, *Are Happy People Ethical People? Evidence from North America and Europe*, University of Missouri Agricultural Economics Working Paper No. AEWP 2004-8, July 29, 2004, [https://papers.ssrn.com/soL3/papers.cfm?abstract\\_id=570181](https://papers.ssrn.com/soL3/papers.cfm?abstract_id=570181).

343. Robert J. B. Goudie et al., *Happiness as a Driver of Risk-Avoiding Behavior* (Ctr. for Econ. Performance, CEP Discussion Paper No. 1126, 2012) (providing empirical evidence that happier people are less attracted to riskier behavior).

344. Anne Brafford, ASPIRE, <http://aspire.legal/about-us/anne-brafford/> [<https://perma.cc/4263-LTFC>].

345. Anne Brafford, AWBC’s comments to the ABA’s Model MCLE Rule Draft.

346. *Id.* at 9-10.

347. BRAFFORD, *supra* note 21.

*C. Mindfulness Facilitates Moral Development*

Psychologist James Rest developed a “four component model”<sup>348</sup> that identified four possible reasons to explain why people may unintentionally act immorally: moral unawareness,<sup>349</sup> inadequate moral reasoning,<sup>350</sup> deficient moral motivation,<sup>351</sup> and unsuccessful moral implementation.<sup>352</sup> Rest viewed moral development as entailing developing proficiency in these corresponding four processes: moral sensitivity, moral judgment and reasoning, prioritizing moral decision-making, and effective moral implementation.<sup>353</sup> Ultimately, whether mindfulness leads to more ethical behavior depends upon one’s precise definition of mindfulness and exactly what one is mindful about. If mindfulness is defined as paying attention in a caring, discerning, and open-hearted way, with kind curiosity to ourselves, others, and our environment (instead of just paying bare attention), then such a definition contains an intention of caring about ourselves, others, and our environment. People can be narrow or wide in the scope of what they are mindful about.<sup>354</sup> If the scope of what people are mindful about is wide enough to include others, then practicing mindfulness can nurture moral development by fostering increased moral awareness and sensitivity, improved moral judgment and reasoning, more moral motivation and prioritization, and sustained moral implementation.

Six experimental studies found that despite predicting they will feel guilty and suffer greater negative affect after behaving unethically, people who cheated consistently felt higher positive affect than those who did not.<sup>355</sup> The researchers concluded that cheating (on solving anagrams under time pressure) was associated with feelings of self-satisfaction,<sup>356</sup> as opposed to

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348. James R. Rest, *A Psychologist Looks at the Teaching of Ethics—Moral Development and Moral Education*, 12 HASTINGS CTR. REP. 29, 29 (1982).

349. See e.g., Eugene Soltes, *Why It’s So Hard to Train Someone to Make an Ethical Decision*, HARV. BUS. REV. (Jan. 11, 2017), <https://hbr.org/2017/01/why-its-so-hard-to-train-someone-to-make-an-ethical-decision> (discussing the problem of identifying ethical dilemmas in real-time).

350. *Id.* (discussing the problems of intuitive, quick decision-making and failing to consider alternative viewpoints).

351. *Id.* (discussing the problems of motivated reasoning and groupthink).

352. *Id.* (discussing the problem of designing effective organizational structures).

353. Rest, *supra* note 348, at 29.

354. Peter H. Huang, *How Improving Decision-Making and Mindfulness Can Improve Legal Ethics and Professionalism*, 21 J.L. BUS. & ETHICS 35, 64–65 (2015).

355. Nicole E. Ruedy et al., *The Cheater’s High: The Unexpected Affective Benefits of Unethical Behavior*, 105 J. PERSONALITY & SOC. PSYCHOL. 531, 531 (2013) (presenting details of the six studies).

356. *Id.* at 542 fig. 5.

rationalizing unethical behavior or self-deception.<sup>357</sup> The researchers observed how their finding that study participants “mispredicted the affective consequences of unethical behavior”<sup>358</sup> exemplifies an affective forecasting bias or error. This observation suggests that practicing mindfulness may mitigate this error. The researchers also make the suggestion that “prompting individuals to ruminate about their actions may increase the negative affect that individuals experience from engaging in unethical behavior.”<sup>359</sup> Perhaps mere mindfulness as opposed to rumination about one’s actions is enough to reduce unethical behavior.

#### *D. Mindfulness Mitigates Biological Bases of Unethical Behavior*

Extending the above research, a pair of studies found that more cheating is associated with larger decreases in cortisol and negative affect,<sup>360</sup> and elevated cortisol and testosterone levels are associated with unethical behavior.<sup>361</sup> This research suggests that people may cheat in order to cope with, and to reduce, anxiety and stress.<sup>362</sup> If this is the case, then practicing mindfulness by reducing anxiety and stress can reduce cheating to relieve physiological and psychological distress.

Two of the above researchers found in five other experimental studies evidence that emotional suppression and reappraisal to regulate aversive effective responses encourages utilitarian as opposed to deontological choices in emotionally charged decision-making situations.<sup>363</sup> This research suggests that practicing mindfulness by reducing the need to conceal emotions can reduce the preference for utilitarian over deontological choices.<sup>364</sup>

Two researchers found in four experimental studies evidence of a morning morality effect, in which “undergraduate students and a sample of U.S. adults engaged in less unethical behavior (e.g., less lying and cheating) on tasks performed in the morning than on the same tasks performed in the afternoon.”<sup>365</sup> Later,

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357. *Id.* at 541–42.

358. *Id.* at 543.

359. *Id.* at 544–45.

360. Joao Julia Lee et al., *Hormones and Ethics: Understanding the Biological Basis of Unethical Conduct*, 144 J. EXPERIMENTAL PSYCHOL.: GEN. 891, 891, 893–94 (2015).

361. *Id.* at 891–93.

362. *Id.* at 894–96.

363. Joao Julia Lee & Francesca Gino, *Poker-Faced Morality: Concealing Emotions Leads to Utilitarian Decision Making*, 126 ORG. BEHAV. & HUM. DECISION PROCESSES 49, 58–59 (2015).

364. *Id.* at 49, 56–59.

365. Maryam Kouchaki & Isaac H. Smith, *The Morning Morality Effect: The Influence*



three researchers found in two experimental studies evidence of “a *chronotype morality effect* in which the fit between an individual’s chronotype and time of day predicts the individual’s ethicality.”<sup>366</sup> This research qualifies and suggests a boundary condition on the morning morality effect.<sup>367</sup> The main takeaway of this research is to be aware of, embrace, and understand your chronotype and if possible, align your chronotype and work schedule to better engage in ethical decision-making.<sup>368</sup> Practicing mindfulness about your chronotype and work schedule can and should lead to increased opportunities to make decisions ethically.

### *E. Mindfulness in Buddhism and Buddhist Economics*

The current American version of mindfulness is explicitly agnostic concerning the intentions and motivations that people may have for desiring to practice mindfulness.<sup>369</sup> Hamilton College sociology professor Jamie Kucinkas conducted a fascinating project involving ethnographic studies and semi-structured in-depth interviews with contemplative leaders to explain how mindfulness transformed from venerable Buddhist-inspired meditation into commodified secular panacea.<sup>370</sup> The core, fundamental, and historical roots of mindfulness include a radical, egalitarian, political, philosophical, and social critique, message, movement, project, and vision about an artificial separation of self and other sentient beings.<sup>371</sup> Some Zen practitioners believe the current American secular incarnation of mindfulness is problematic for its amorality.<sup>372</sup>

Robert Meikyo Rosenbaum, a neuropsychologist and psychotherapist, cogently discusses how neuroscience and psychology research about the efficacy of practicing mindfulness

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of Time of Day on Unethical Behavior, 25 PSYCHOL. SCI. 95, 95 (2014).

366. Brian C. Gunia et al., The Morality of Larks and Owls: Unethical Behavior Depends on Chronotype as Well as Time of Day, 25 PSYCHOL. SCI. 2272, 2272 (2014).

367. *Id.* at 2273.

368. Maria Konnikova, *No, Mornings Don't Make You Moral*, NEW YORKER (Feb. 25, 2015), <http://www.newyorker.com/science/maria-konnikova/moral-mornings>.

369. *See generally* JEFF WILSON, MINDFUL AMERICA: THE MUTUAL TRANSFORMATION OF BUDDHIST MEDITATION AND AMERICAN CULTURE (2014).

370. Jaime Kucinkas, *Change without Confrontation: The Making of Mainstream Meditation* 266–70 (July 2014) (unpublished Ph.D. dissertation, Indiana University), <http://pqdtopen.proquest.com/doc/1562698150.html?FMT=ABS>.

371. *See, e.g.*, Daniel M. Choi, *Radical Mindfulness*, BROOKLYN Q. (Mar. 23, 2017), <http://brooklynquarterly.org/radical-mindfulness/>; *see also* Paul Singer, *Since Election, Yoga Rises Off the Mat to Take on Donald Trump*, USA TODAY (May 29, 2017, 12:50 PM), <https://usat.ly/2rg5lsq>.

372. *See generally* WHAT'S WRONG WITH MINDFULNESS (AND WHAT ISN'T): ZEN PERSPECTIVES (Barry Magid & Robert Rosenbaum eds., 2016).

compared to alternatives (such as cognitive behavioral therapy, medication, and relaxation) distracts us and misses far more crucial issues (such as motivation to practice mindfulness, socioeconomic status, and the relationship between a mindfulness student and a mindfulness teacher).<sup>373</sup> Some religious scholars question whether a secular form of mindfulness is even possible.<sup>374</sup> Some scholars defend the popularity and spreading of the many contemporary versions of mindfulness,<sup>375</sup> while others do not.<sup>376</sup> Others are concerned over the possible misappropriation of modern, secularized, self-help, and ethics-free mindfulness training into techniques, tools, and strategies to pacify employees, reproduce oppressive corporate or institutional power hierarchies, and sustain toxic organizational cultures.<sup>377</sup> There are multiple versions of mindfulness today differing in multiple dimensions.<sup>378</sup> Part of the difficulty in writing about mindfulness is there are many related yet distinct concepts of mindfulness. Many scholarly disciplines analyze mindfulness, including economics, neuroscience, philosophy, psychology, and religion. Even within each of the disciplinary fields that engage mindfulness, there is disagreement about mindfulness.

A number of scholars have observed that a standard definition of mindfulness as present-centered non-judgmental awareness ignores crucial features of mindfulness in classic Buddhist accounts.<sup>379</sup> Jon Kabat-Zinn distinguishes between being judgmental and being discerning:

I am also making a big distinction between judging which, in the way I am using the term, has to do with . . .—I like this and I don't like that, that's good, this is bad—and

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373. Robert Rosenbaum, *Mindfulness Myths: Fantasies and Facts*, in *id.* at 53, 63-68.

374. See, e.g., Candy Gunther Brown, *Can "Secular" Mindfulness Be Separated from Religion?* in HANDBOOK OF MINDFULNESS: CULTURE, CONTEXT, AND SOCIAL ENGAGEMENT 75, 90-91 (Ronald E. Purser et al., 2016).

375. See, e.g., Rick Repetti, *Meditation Matters: Replies to the Anti-McMindfulness Bandwagon!*, in HANDBOOK OF MINDFULNESS: CULTURE, CONTEXT, AND SOCIAL ENGAGEMENT 473 (Ronald E. Purser et al., 2016).

376. See, e.g., Glenn Wallis, *Criticism Matters: A Response to Rick Repetti*, in HANDBOOK OF MINDFULNESS: CULTURE, CONTEXT, AND SOCIAL ENGAGEMENT 495 (Ronald E. Purser et al., 2016).

377. Norman A. S. Farb, *From Retreat Center to Clinic to Boardroom? Perils and Promises of the Modern Mindfulness Movement*, 5 RELIGIONS 1062, 1066 (2014); Ronald E. Purser & Joseph Milillo, *Mindfulness Revisited: A Buddhist-Based Conceptualization*, 24 J. MGMT. INQUIRY 3, 9 (2015).

378. Farb, *supra* note 377, at 1067.

379. See, e.g., George Dreyfus, *Is Mindfulness Present-Centred and Non-Judgmental? A Discussion of the Cognitive Dimensions of Mindfulness*, 12 CONTEMP. BUDDHISM 41, 43-44 (2011); Ronald Purser, *The Myth of the Present Moment*, 6 MINDFULNESS 680, 685 (2015).

discernment, which is what you are talking about, which is more the kind of operation of wisdom where you can see the subtleties—the thousand shades of grey . . .—you know that kind of thing, which is absolutely essential to and part and parcel of the cultivation of mindfulness.<sup>380</sup>

Kabat-Zinn states this about being non-judgmental: “[Y]ou could say, if you wanted a reason for doing it, it’s in the service of self-understanding and the cultivation of wisdom and compassion.”<sup>381</sup> A recent study found that participating in a smartphone-based compassionate meditation program increased real-money charitable donations.<sup>382</sup>

Buddhist scholar B. Alan Wallace cautions that “it’s incorrect to equate bare attention with mindfulness.”<sup>383</sup> He also distinguishes between right mindfulness and wrong mindfulness or what one might also call mindless mindfulness:

A sniper hiding in the grass, waiting to shoot his enemy, may be quietly aware of whatever arises with each passing moment. But because he is intent on killing, he is practicing wrong mindfulness. In fact, what he’s practicing is bare attention without an ethical component. Generally speaking, right mindfulness has to be integrated with . . . introspection involving clear comprehension—and it is only when these two work together that right mindfulness can fulfill its intended purpose. Specifically . . . right mindfulness has to occur in the context of the full Noble Eightfold Path: For example, it must be guided by right view, motivated by right intention, grounded in ethics, and be cultivated in conjunction with right effort. Without right view or right intention, one could be practicing bare attention without its ever developing into right mindfulness. So bare attention . . . represents only the initial phase in the meditative development of right mindfulness.<sup>384</sup>

In Buddhism, practicing mindfulness occurs within the context of the Middle Way, which “refers to the Noble Eightfold Path, a pan-Buddhist principle (common in all major Buddhist traditions), but a non-theistic and non-faith-dependent

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380. *This is not McMindfulness by Any Stretch of the Imagination*, PSYCHOLOGIST, BRIT. PSYCHOL. SOC., <https://thepsychologist.bps.org.uk/not-mcmindfulness-any-stretch-imagination> [<https://perma.cc/QHN5-NYZU>].

381. *Id.*

382. See generally Yoni K. Ashar et al., *Effects of Compassion Meditation on a Psychological Model of Charitable Donation*, 16 EMOTION 691 (2016).

383. *A Mindful Balance: What Did the Buddha Mean by “Mindfulness?”*, TRICYCLE, Spring 2008, at 60, 62, [http://www.sbinstitute.com/sites/default/files/spr08wallace\\_comp-4.pdf](http://www.sbinstitute.com/sites/default/files/spr08wallace_comp-4.pdf) [<https://perma.cc/K3JZ-APVA>].

384. *Id.* at 62–63.

contemplative practice guideline for overcoming suffering and achieving happiness in life.”<sup>385</sup> In turn, the Middle Way itself

is part of the Four Noble Truths that are the heart of Buddhist teachings: (1) Suffering is ubiquitous, (2) Suffering is a consequence of psycho-spiritual ignorance resulting from a distorted perception of realities in life, (3) The cessation of suffering is possible, and (4) The path to the cessation of suffering is the Middle Way or Noble Eightfold Path.<sup>386</sup>

The Noble Eightfold Path consists of these eight interdependent, interrelated, nonlinear, overlapping, and simultaneous practice guidelines: right view, right intention, right speech, right action, right livelihood, right effort, right mindfulness, and right concentration.<sup>387</sup> There is a lot of academic discussion and commentary over the precise meaning of the adjective “right” in front of each of the above eight areas of the Noble Eightfold Path.<sup>388</sup> Many scholars believe that “right” is better translated as “skillful” or “wholesome” with a particular connotation of non-harm.<sup>389</sup> The nonlinearity and interconnectedness of the eight areas of the Noble Eightfold Path is perhaps best illustrated by the fact that “Right Mindfulness and Right Intention go into all parts of the path.”<sup>390</sup> Thus, “Right Mindfulness is the term used in Buddhism to highlight the fact that mindfulness skill when developed with a wrong intention, e.g., creating more violence in the world, cannot be considered the proper kind of mindfulness that leads to the alleviation of existential suffering.”<sup>391</sup> A sniper who practices mindfulness with the intention of being more accurate in killing is not an example of right mindfulness.<sup>392</sup>

A core Buddhist idea that modern scientific research substantially corroborates is that people misperceive their world and their misperceptions can cause them and others to suffer.<sup>393</sup>

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385. Cheng-Kar Phang & Tian Po S. Oei, *From Mindfulness to Meta-Mindfulness: Further Integration of Meta-Mindfulness Concept and Strategies into Cognitive-Behavioral Therapy*, 3 MINDFULNESS 104, 107 (2012).

386. *Id.*; see also Sameet M. Kumar, *An Introduction to Buddhism for the Cognitive Behavioral Therapist*, 9 COGNITIVE & BEHAV. PRAC. 40, 41 (2002).

387. See, e.g., Dana Nourie, *What is the Eightfold Path?*, SECULAR BUDDHIST ASS'N (May 3, 2013), <http://secularbuddhism.org/2013/05/03/what-is-the-eightfold-path/> [<https://perma.cc/DR7B-SZSD>].

388. *Id.*

389. *Id.*

390. *Id.*

391. Phang & Oei, *supra* note 385, at 107.

392. TRICYCLE, *supra* note 383, at 62–63; Huang, *supra* note 354, at 64–65 (2015) (discussing a related example).

393. ROBERT WRIGHT, WHY BUDDHISM IS TRUE: THE SCIENCE AND PHILOSOPHY OF

Buddhist philosophy views cravings and addictions as the root causes and sources of all suffering.<sup>394</sup> From a Buddhist perspective, practicing mindfulness has just one purpose: to end suffering.<sup>395</sup> British economist Ernst Friedrich Schumacher introduced the phrase “Buddhist economics” in a widely-read essay that is reprinted in a book collection of his essays.<sup>396</sup> Schumacher stated that “Buddhist economics must be very different from the economics of modern materialism, since the Buddhist sees the essence of civilization not in a multiplication of wants but in the purification of human character.”<sup>397</sup> University of California, Berkeley economist Clair Brown extends Schumacher’s vision of Buddhist economics and reminds us:

Buddha noted that people suffer needlessly because they are disconnected from their true nature, and people can end their suffering by giving up their sense of separateness and their delusions. Being in touch with our true nature, we can be happy and enjoy material things and activities without becoming attached to them.<sup>398</sup>

Brown observes in her new book how “Buddha taught that all people suffer from their own mental states, with feelings of discontent that come from desiring more and more . . . . In this endless cycle of desire, we are continuously left wanting more without ever finding lasting satisfaction.”<sup>399</sup> American psychologist Tim Kasser is a well-known advocate of a more inwardly richer lifestyle than consumerism and materialism offer.<sup>400</sup>

### *F. Mindfulness Facilitates Non-Addiction*

Neuroscientist and psychiatrist Richard Brewer “has

MEDITATION AND ENLIGHTENMENT 269–70 (2017).

394. Farb, *supra* note 377, at 1064; see Peter Morrell, *A Buddhist View of Addiction*, <http://www.homeoint.org/morrell/buddhism/addict.html/> [https://perma.cc/YZ5W-DUGJ](discussing cravings and addictions as sources of suffering).

395. Phillip Moffitt, *The Mindfulness of the Buddha*, TRICYCLE (May 24, 2016), <https://tricycle.org/trikedaily/the-mindfulness-of-the-buddha/> [https://perma.cc/T75L-2D2Z]; see also PHILLIP MOFFITT, EMOTIONAL CHAOS TO CLARITY: MOVE FROM THE CHAOS OF THE REACTIVE MIND TO THE CLARITY OF THE RESPONSIVE MIND (2013). See generally PHILLIP MOFFITT, DANCING WITH LIFE: BUDDHIST INSIGHTS FOR FINDING MEANING AND JOY IN THE FACE OF SUFFERING 9 (2012).

396. E. F. SCHUMACHER, SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED 56–66 (Reprint ed., Harper Perennial 2010) (1973).

397. *Id.* at 59.

398. Clair Brown, *Buddhist Economics: An Enlightened Approach to the Dismal Science*, 58 CHALLENGE 23, 28 (2015).

399. CLAIR BROWN, BUDDHIST ECONOMICS: AN ENLIGHTENED APPROACH TO THE DISMAL SCIENCE x (2017).

400. TIM KASSER, THE HIGH PRICE OF MATERIALISM 103–04 (2002).

developed and tested novel mindfulness programs for habit change, including both in-person and app-based treatments (e.g. [www.goeatrightnow.com](http://www.goeatrightnow.com), [www.cravingtoquit.com](http://www.cravingtoquit.com)).<sup>401</sup> Brewer summarizes his research about neurobiological and psychological mechanisms of habit formation, addiction, and mindfulness-based recovery<sup>402</sup> in a book about reducing cravings and recovering from addictions through mindfulness.<sup>403</sup>

A recent study<sup>404</sup> surveying 12,825 employed, licensed attorneys found that “alcohol use disorders and mental health problems are occurring in the legal profession at higher rates than in other professions and the general population”<sup>405</sup> and “younger lawyers are the segment of the profession most at risk of substance abuse and mental health problems.”<sup>406</sup> A 2014 study surveying the well-being of over 11,000 law students at fifteen law schools found that 17% screened positive for depression, 37% screened positive for anxiety, 14% used prescription drugs without a prescription in the prior year, 53% drank enough to become drunk at least once in the prior thirty days, 43% binge drank at least once in the prior two weeks, and 22% binge drank more than two times in the prior two weeks.<sup>407</sup> The survey also found that only 4% of students had sought help for alcohol and drug problems, about 23% sought help for mental health problems, and over 60% expressed concern that seeking help is a potential threat to bar admission or finding a

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401. CENTER FOR MINDFULNESS IN MEDICINE, HEALTH CARE, AND SOCIETY, *Judson Brewer, MD, PhD, Faculty Page*, UNIVERSITY OF MASSACHUSETTS MEDICAL SCHOOL, <http://www.umassmed.edu/cfm/about-us/people/meet-our-research-team/brewer-judson/> [<https://perma.cc/Z4VC-CGF6>].

402. See, e.g., Judson A. Brewer et al., *Craving to Quit: Psychological Models and Neurobiological Mechanisms of Mindfulness Training as Treatment for Addiction*, 27 PSYCHOL. ADDICTIVE BEHAV. 366, 373–75 (2013); Judson A. Brewer et al., *Mindfulness-Based Treatments for Co-Occurring Depression and Substance Use Disorders: What Can We Learn from the Brain?*, 105 ADDICTION 1698, 1700–02 (2010); Judson A. Brewer et al., *Mindfulness Training and Stress Reactivity in Substance Abuse: Results from a Randomized, Controlled Stage I Pilot Study*, 30 SUBSTANCE ABUSE 306, 313 (2009).

403. JUDSON BREWER, *THE CRAVING MIND: FROM CIGARETTES TO SMARTPHONES TO LOVE – WHY WE GET HOOKED AND HOW WE CAN BREAK BAD HABITS* 25–26 (2017).

404. Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46, 52 (2016). See also Patrick R. Krill, *If There Is One Bar a Lawyer Cannot Seem to Pass: Alcoholism in the Legal Profession*, BRIEF, Fall 2014 Vol. 44 No. 1, at 46, 48.

405. James Podgers, *Younger Lawyers Are Most at Risk for Substance Abuse and Mental Health Problems, A New Study Reports*, A.B.A. J. (Feb. 7, 2016, 11:15 AM CST), [http://www.abajournal.com/news/article/younger\\_lawyers\\_are\\_most\\_at\\_risk\\_for\\_substance\\_abuse\\_and\\_mental\\_health\\_prob](http://www.abajournal.com/news/article/younger_lawyers_are_most_at_risk_for_substance_abuse_and_mental_health_prob).

406. *Id.*

407. Jerome M. Organ et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 127–38 (2016).

job.<sup>408</sup>

The above statistics are disturbing and tragic in terms of the prevalence of emotional, mental, and physical suffering by too many attorneys and law students. These statistics also should be troubling even for people who are not in the legal profession because lawyers who suffer from substance abuse are likely to be unable to effectively represent clients,<sup>409</sup> thereby violating professional norms and the model rules of professional conduct about lawyer competence<sup>410</sup> and diligence,<sup>411</sup> and are also more likely to engage in unethical representation because one-half to three-quarters of the disciplinary actions against attorneys involve substance abuse.<sup>412</sup> Substance abuse is a destructive form of self-medication that offers a temporary, unsustainable way to deal with anxiety, depression, and stress.<sup>413</sup> Practicing mindfulness is a constructive form of self-medication<sup>414</sup> that offers an ongoing, sustainable way to deal with anxiety, depression, and stress.<sup>415</sup> Mindfulness meditation has also been found to relieve pain.<sup>416</sup>

A way that mindfulness can help lawyers behave more ethically is by offering a practice that does not involve substance abuse to cope with and reduce anxiety, depression, and stress. Another way that practicing mindfulness can help lawyers behave more ethically is to reduce their cravings and addictions. Many lawyers (and non-lawyers) are addicted to mobile computing technology in the form of their smartphones.<sup>417</sup> Some lawyers may self-medicate by craving and becoming addicted to many things, including: alcohol, antidepressants, opiates, stimulants,

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408. *Id.* at 140–42.

409. *See generally* Debra S. Austin, *Drink Like a Lawyer: The Neuroscience of Substance Use and Its Impact on Cognitive Wellness*, 15 NEV. L.J. 826 (2015).

410. MODEL RULES OF PROF'L CONDUCT r. 1.1 (1983).

411. MODEL RULES OF PROF'L CONDUCT r. 1.3 (1983).

412. Betty Reddy & Ruth Woodruff, *Helping the Alcoholic Colleague*, 3 PROF. LAW., May 1992, at 1, 4.

413. Dr. Tian Dayton, *Why We 'Self-Medicate' Our Own Depression or Anxiety*, HUFFINGTON POST: THE BLOG (May 9, 2013, 2:34 PM), [http://www.huffingtonpost.com/dr-tian-dayton/self-medication\\_b\\_3236724.html](http://www.huffingtonpost.com/dr-tian-dayton/self-medication_b_3236724.html).

414. *See generally* Laura Buchholz, *Exploring the Promise of Mindfulness as Medicine*, 314 J. AM. MED. ASS'N 1327, 1328 (2015).

415. Madhav Goyal et al., *Meditation Programs for Psychological Stress and Well-being: A Systematic Review and Meta-Analysis*, 174 JAMA INTERNAL MED. 357 (2014).

416. Fadel Zeidan et al., *Mindfulness Meditation-Based Pain Relief Employs Different Neural Mechanisms Than Placebo and Sham Mindfulness Meditation-Induced Analgesia*, 35 J. NEUROSCIENCE 15307 (2015); Mary Brophy Marcus, *Can Mindfulness Meditation Offer Drug-Free Pain Relief?*, CBS NEWS (Mar. 15, 2016, 6:22 PM), <http://www.cbsnews.com/news/mindfulness-meditation-drug-free-pain-relief/>.

417. LARRY D. ROSEN, *IDISORDER: UNDERSTANDING OUR OBSESSION WITH TECHNOLOGY AND OVERCOMING ITS HOLD ON US* (2013).

sedatives, hallucinogens, sugars, fats, carbohydrates, and nicotine.<sup>418</sup> Some corporate lawyers may also crave and become addicted to money, prestige, status, and wealth through conspicuous consumption, executive loans, golden handcuffs, McMansion lifestyles, and perks.<sup>419</sup> Some trial attorneys may also crave and become addicted to the adrenaline of high-stakes litigation.<sup>420</sup> Some lawyers may also have been law students who became addicted in law school to sometimes unhealthy habits of mind and speech, such as legalese,<sup>421</sup> thinking like a lawyer,<sup>422</sup> wielding the power of legal discourse,<sup>423</sup> pessimism,<sup>424</sup> defensive pessimism,<sup>425</sup> or worrying.<sup>426</sup> Lawyers are after all people and some lawyers, like some people, can be addicts that can function somewhat effectively in society while hiding their addictions until their addictions overwhelm them. Law students and lawyers can become addicted to the drama, stress, and pain of law school and law practice in the same way that people can become addicted to the drama, stress, and pain of a dysfunctional personal relationship.<sup>427</sup>

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418. Austin, *supra* note 409, at 843–68. See also BRIAN CUBAN, *THE ADDICTED LAWYER: TALES OF THE BAR, BOOZE, BLOW, AND REDEMPTION* (2017).

419. Jennifer Alvey, *The Golden Handcuffs Excuse*, LEAVING THE LAW: FIND WORK AND A LIFE BEYOND THE BILLABLE HOUR (Feb. 21, 2011), <https://leavinglaw.wordpress.com/2011/02/21/the-golden-handcuffs-excuse/> [<https://perma.cc/D84V-X5C3>]; see also M. Todd Henderson & James C. Spindler, *Corporate Heroin: A Defense of Perks, Executive Loans, and Conspicuous Consumption*, 93 GEO. L. J. 1835 (2004).

420. MELODY A. KRAMER, *WHY LAWYERS SUCK!: HACKING THE LEGAL SYSTEM*, PART 1 70 (2016); See also Melody A. Kramer, *Confessions of An Adrenaline Addict and Trial Lawyer*, RETHINKING THE LEGAL SYSTEM (Mar. 13, 2013), <https://lawyersforabetterlegalprofession.wordpress.com/2013/03/13/confessions-of-an-adrenaline-addict-and-trial-lawyer/> [<https://perma.cc/KB9N-AP9T>].

421. See, e.g., Jose Manuel I. Diokno, *The Legalese Disease*, RAPPLER (Feb. 11, 2012, 1:41 PM), <http://www.rappler.com/thought-leaders/1456-the-legalese-disease> [<https://perma.cc/NB3G-ZWLR>]; Pete Mackey, *Mobile Bar Association President Pete Mackey's May Comments*, BURNS, CUNNINGHAM & MACKEY, P.C. (May 1, 2016), [http://www.bcmlawyers.com/mobile-bar-association-president-pete-mackeys-may-comments/?no\\_redirect=true](http://www.bcmlawyers.com/mobile-bar-association-president-pete-mackeys-may-comments/?no_redirect=true) [<https://perma.cc/ZQ5Z-GT4T>].

422. ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* (2007).

423. JOHN M. CONLEY & WILLIAM M. O'BARR, *JUST WORDS: LAW, LANGUAGE, AND POWER* (2d ed. 2005).

424. Jason M. Satterfield et al., *Law School Performance Predicted by Explanatory Style*, 15 BEHAV. SCI. & L. 95, 95 (1997).

425. Corie Rosen Felder, *The Accidental Optimist*, 21 VA. J. SOC. POL'Y & L. 63, 63, 93–99 (2014).

426. Margaret Paul, *You Can Heal a Worry Addiction!*, HUFFINGTON POST: THE BLOG (Jan. 31, 2015), [http://www.huffingtonpost.com/margaret-paul-phd/you-can-heal-a-worry-addi\\_b\\_6211218.html](http://www.huffingtonpost.com/margaret-paul-phd/you-can-heal-a-worry-addi_b_6211218.html).

427. See, e.g., Louis Tomlinson and Bebe Rexha with Digital Farm Animals performing the song *Back to You* on *The Tonight Show Starring Jimmy Fallon*, NBC television



I teach students in my section of the course *Legal Ethics and Professionalism: Business Law Issues* that they can and should be mindful over their finances and retirement planning.<sup>428</sup> I do this for these reasons. First, the class session exemplifies how mindfulness can improve decision-making about financial matters. Second, the heuristics about mindful decision-making spill over to non-financial matters. Third, if law students learn to be mindful enough to live sustainably below their means, they will have the freedom to quit or be fired instead of doing something unethical merely to maintain an exorbitant and lifestyle. Law students come to appreciate why and understand how practicing financial mindfulness and retirement planning helps them be able to say no thank you to becoming entangled in unethical career-ending professional disasters. Finally, discussing how mindfulness and financial decision-making are interdependent provides a pragmatic example of how mental health and financial health can affect each other.<sup>429</sup>

### G. Saints Can Negotiate

If mindfulness leads some attorneys to behave more ethically,<sup>430</sup> this raises an intriguing question of whether such attorneys will be as zealous advocates as lawyers who do not practice mindfulness.<sup>431</sup> One response is that maximizing zealousness is neither mandated by the rules of professional conduct nor necessarily even effective. Another response is that being ethical does not mean being less zealous, nor does being zealous mean being unethical. A third response is that mindfulness and the authentic happiness that comes from mindfulness can foster creativity and improve lawyers' capabilities to make wise decisions

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broadcast, Aug. 4, 2017, available at <https://www.youtube.com/watch?v=yIe5KBLnjMY>.

428. See, e.g., Huang, *supra* note 35, at 5–6; Pamela Bucy Pierson, *Economics, EQ, and Finance: The Next Frontier in Legal Education*, 65 J. LEGAL EDUC. 864 (2016); PAMELA BUCY PIERSON, *THE BUSINESS OF BEING A LAWYER* 99–159 (2014).

429. Peter Dunn, *Pete the Planner: How Mental Health Impacts Financial Health?*, 10 USA TODAY (Aug. 26, 2017, 7:00 AM), <https://usat.ly/2xBs6qx>.

430. Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 S. TEX. L. REV. 493, 495, 499 (2009); see also Brian C. Gunia et al., *Contemplation and Conversation: Subtle Influences on Moral Decision Making*, 55 ACAD. MGMT. J. 13, 13, 16, 22–23, 23 fig.1, 25, 28 (2012) (providing experimental evidence supporting the hypothesis that contemplation leads to more ethical decisions (telling the truth) as compared to immediate choice). But see Ellen Waldman, *Mindfulness, Emotions, and Ethics: The Right Stuff?*, 10 NEV. L. J. 513, 528–29 (2010) (questioning how much practicing mindfulness by itself can lead to ethical behavior).

431. Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83, 84–90, 96 (questioning if the practice of mindfulness conflicts with being a partisan advocate).

and solve complex problems.<sup>432</sup> A final response is that all fifteen participants in a study of lawyers who self-identified as having a Buddhist practice “concluded that they are better lawyers because of their Buddhist practices.”<sup>433</sup>

The question of whether practicing mindfulness and practicing meditation helps lawyers improve professionally is an important and unanswered empirical question. It also is a difficult question because what makes a lawyer good or better is hard to define.<sup>434</sup> Mindfulness and meditation may always remain at the fringes of the legal profession, practiced primarily by individuals who are already suffering, or at least aware of their suffering. Though applicable to every area and aspect of law practice<sup>435</sup> and legal education,<sup>436</sup> mindfulness thus far has blossomed in specific proper subsets of law practice and legal education, including conflict resolution,<sup>437</sup> clinical practice,<sup>438</sup> community lawyering,<sup>439</sup> social justice lawyering,<sup>440</sup> and trial advocacy.<sup>441</sup> Mindfulness is now a part of business and finance, yet is not part of business law.<sup>442</sup> Mindfulness and meditation may not become accepted in or part of the mainstream of the legal profession unless and until empirical research proves that practicing mindfulness and practicing meditation make attorneys better professionals, or at least do not cause lawyers to lose their edge or suffer competitive

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432. Peter H. Huang, *Positive Institutions: Organizations, Laws, and Policies* (Feb. 20, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2735616](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735616).

433. Deborah J. Cantrell, *Can Compassionate Practice Also Be Good Legal Practice?: Answers from the Lives of Buddhist Lawyers*, 12 RUTGERS J. L. & RELIGION 1, 5 (2010). *See also* Ran Kuttner, *What Does It Mean to Do the Right Thing?*, 10 NV. L.J. 407, 407 (2010) (exploring how mindfulness practice and Buddhist philosophy relate to ethical decision-making).

434. *See generally* LINDER & LEVIT, *supra* note 157 (attempting to define what makes a good lawyer).

435. STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* 68–70 (1999).

436. *See generally* Richard C. Reuben, *Bringing Mindfulness into the Classroom: A Personal Journey*, 61 J. LEGAL EDUC. 674, 678 (2012).

437. Riskin & Wohl, *supra* note 103, at 136.

438. Cantrell, *supra* note 5, at 85–86 (discussing how mindfulness can affect clinical law professors).

439. Angela Harris et al., *From “The Art of War” to “Being Peace”: Mindfulness and Community Lawyering in a Neoliberal Age*, 95 CAL. L. REV. 2073 (2007).

440. Thalia Gonzalez, *Root to Rise: Mindful Lawyering for Social Justice*, 41 N.Y.U. REV. L. & SOC. CHANGE 91 (2017).

441. David M. Zlotnick, *Integrating Mindfulness Theory and Practice into Trial Advocacy*, 61 J. LEGAL EDUC. 654 (2012).

442. *See* David Gelles, *The Mind Business*, FINANCIAL TIMES (Aug. 24, 2012), <https://www.ft.com/content/d9cb7940-ebea-11e1-985a-00144feab49a?mhq5j=e1>. *But see* *Business Law Section Mindfulness Series*, PHILA. BAR ASS’N, <http://www.philadelphiabar.org/page/BLSMindfulness?appNum=4> (showing how mindfulness is a part of business law).

or professional disadvantages. What constitutes effective lawyering is debatable. Traditional measures as books of business, hours billed, or profits per partner dominate the legal profession, especially in so-called “Big Law.”<sup>443</sup> These familiar measures all have recognized gender equity, incentive, reliability, and work-life balance issues.<sup>444</sup>

What constitutes effective lawyering is also multi-dimensional. Professors Marjorie Shultz and Sheldon Zedeck conducted an empirical research study from 1999 to 2008 involving over 2,000 graduates from Berkeley Law School to develop 26 lawyer effectiveness factors.<sup>445</sup> More recently, Alli Gerkman,<sup>446</sup> director of Educating Tomorrow’s Lawyers,<sup>447</sup> and Logan Cornett,<sup>448</sup> senior research analyst of the University of Denver Institute for the Advancement of the American Legal System,<sup>449</sup> co-authored a report,<sup>450</sup> based on a survey in 2014-15 of more than 24,000 lawyers in all fifty states with different backgrounds, practice areas, and work settings. This report found that new lawyers required such characteristics as common sense, integrity, resilience, and work ethic, in addition to emotional, interpersonal, and cognitive intelligence.<sup>451</sup> Other possible novel metrics of lawyer effectiveness include simulated negotiations or panels of judges and legal scholars reviewing simulated work products of meditators and non-meditators.

The multi-dimensional nature of attorney effectiveness means that interpersonal and even intertemporal comparisons of lawyers

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443. See LATERAL LINK, *Calculating Your Value as a Lateral Partner*, ABOVE THE LAW (Nov. 21, 2013, 3:35 PM), <http://abovethelaw.com/2013/11/calculating-your-value-as-a-lateral-partner/> [https://perma.cc/CSZ3-DQMT].

444. Kate Mayer Mangan, *How the New Science of Self-Compassion Could Patch the Leaky Pipeline*, 101 WOMEN LAWYER’S J., No. 2, 2016, at 12–13 (2016).

445. Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 L. & SOC. INQUIRY 620, 630 (2011) (listing factors for lawyer effectiveness in table 1).

446. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, *Alli Gerkman, Faculty Page*, UNIVERSITY OF DENVER, <http://iaals.du.edu/profile/alli-gerkman> [https://perma.cc/UJ4N-SBA2].

447. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, *Educating Tomorrow’s Lawyers*, UNIVERSITY OF DENVER, <http://iaals.du.edu/educating-tomorrows-lawyers> [https://perma.cc/G4AP-76TR].

448. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, *Logan Cornett, Faculty Page*, UNIVERSITY OF DENVER, <http://iaals.du.edu/profile/logan-cornett> [https://perma.cc/4KM7-W383].

449. *Id.*

450. Alli Gerkman & Logan Cornett, *The Whole Lawyer and the Character Quotient*, FOUNDATIONS FOR PRACTICE 1 (July 26, 2016), [http://iaals.du.edu/sites/default/files/reports/foundations\\_for\\_practice\\_whole\\_lawyer\\_character\\_quotient.pdf](http://iaals.du.edu/sites/default/files/reports/foundations_for_practice_whole_lawyer_character_quotient.pdf) [https://perma.cc/5Z2R-C9VM].

451. *Id.*

will be difficult. Anytime there is more than one dimension on which to compare people, there is the possibility that individual A is better on some dimension(s), while individual B is better on some other dimension(s). A and B can represent different people or the same person at different points in time. A major question in managerial decision-making and operations research is how to make comparisons if there are multiple criteria involved.<sup>452</sup> This open problem is naturally related to a celebrated and famous impossibility theorem from social choice theory about how to aggregate diverse individual preferences into a collective or social preference,<sup>453</sup> that is attributed to 1972 economics Nobel laureate Kenneth J. Arrow.<sup>454</sup> This conundrum is also related to many other logical paradoxes in law.<sup>455</sup>

#### *H. Mindfulness Provides Real Options to Act Ethically*

Riskin cogently describes practicing mindfulness as providing an opportunity to, before acting, insert a “wedge of awareness”<sup>456</sup> that can provide “the time and resources to make a wise decision.”<sup>457</sup> By pausing and assessing a situation before acting,<sup>458</sup> mindfulness effectively creates valuable flexibility by allowing its practitioners to exercise what financial economists call “real options”<sup>459</sup> (which entail real assets and are analogous to such well-known financial options as stock options) to consider more carefully the consequences of making different choices. The central idea of a real options perspective to mindfulness is that mindfulness permits its practitioner to make decisions that alter

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452. KENNETH J. ARROW & HERVE RAYNAUD, SOCIAL CHOICE AND MULTICRITERION DECISION-MAKING 6–15 (1986).

453. KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 7, 10–11 (3d ed. 2012).

454. NOBELPRIZE.ORG, *Kenneth J. Arrow – Facts*, [http://www.nobelprize.org/nobel\\_prizes/economic-sciences/laureates/1972/arrow-facts.html](http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1972/arrow-facts.html) (last visited July 23, 2017).

455. LEO KATZ, WHY THE LAW IS SO PERVERSE 2, 57 (2011). *See also* Peter H. Huang, *Book Review of Leo Katz, Why the Law is So Perverse*, 63 J. LEGAL EDUC. 131, 131–33, 135, 150, 155–56, 159–60 (2013).

456. MATTHEW FLICKSTEIN, SWALLOWING THE RIVER GANGES: A PRACTICE GUIDE TO THE PATH OF PURIFICATION 28 (2001).

457. Riskin, *supra* note 14, at 30.

458. ELISHA GOLDSTEIN, THE NOW EFFECT: HOW A MINDFUL MOMENT CAN CHANGE THE REST OF YOUR LIFE (2012).

459. Huang, *supra* note 354, at 65–68 (offering a primer about real options); Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1272–75 (2006) (discussing real options); Peter H. Huang, *A New Options Theory for Risk Multipliers of Attorney’s Fees in Federal Civil Rights Litigation*, 73 N.Y.U. L. REV. 1943, 1951–52 (1998) (presenting numerous examples of real options); Peter H. Huang, *Lawsuit Abandonment Options in Possibly Frivolous Litigation Games*, 23 REV. LITIG. 47, 87–99 (2004) (providing another primer about real options).

awareness of information about BETs. In so doing, mindfulness provides its practitioner with opportunities to make decisions after seeing how events in life unfold. The value of delaying to act until there is more information available and utilizing that information before acting can be very large.<sup>460</sup> In the language of system 1 fast thinking and system 2 slow thinking,<sup>461</sup> mindfulness provides its practitioner with real options to let system 2 check, monitor, and possibly correct system 1. In other words, mindfulness allows one to respond thoughtfully instead of react automatically.<sup>462</sup> In the language of simple heuristics, mindfulness provides its practitioner with real options to determine if the decision heuristics being employed are appropriate for the environment one is facing and if not to employ other more appropriate decision heuristics.<sup>463</sup> In both the language of system 1 versus system 2 and that of simple heuristics, mindfulness grants its practitioner options to be free from habitual ways of thinking and behaving. In this way, exercising the real options that mindfulness provides enables people to exercise their free will. In the language of Buddhism:

A central teaching of Buddhism is that suffering arises from habitual ways of reacting. Indeed, if we pay attention, it is possible to observe how often our experiences are followed by automatic reactions, thoughts, or actions. . . . Informed by mindfulness, we are granted the option to choose a healthier or more constructive response. When we are able to see clearly beyond our first instincts and automatic reactions, an appropriate response is more likely to arise.<sup>464</sup>

There are several qualitative (in the sense of providing the direction or sign, as opposed to quantitative in the sense of the amount or magnitude) conclusions (technically known as comparative statics results because they compare how changes in the exogenous parameters of an economic model will result in changes in the endogenous variables of that model) concerning how the value of the real option that mindfulness provides its practitioner changes as underlying parameters change.<sup>465</sup> A fundamental qualitative result about real options is that the more

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460. FRANK PARTNOY, WAIT: THE ART AND SCIENCE OF DELAY 25, 126–27, 246 (2012) (presenting case studies of how delay can improve the quality of decision-making).

461. KAHNEMAN, *supra* note 198, at 13.

462. *Id.*

463. *Id.*; Huang, *supra* note 354, at 89.

464. Shauna L. Shapiro et al., *What is Mindfulness, and Why Should Organizations Care About It?*, in MINDFULNESS IN ORGANIZATIONS: FOUNDATIONS, RESEARCH, AND APPLICATIONS 17, 33 (Jochen Reb & Paul W. B. Atkins eds., 2015).

465. Huang, *supra* note 354, at 68–71.

uncertainty that people face, the more valuable are real options.<sup>466</sup> For example, as the variance of the longevity risk and other risks that retirees face increases, the value of the real options that mindfulness provides in retirement planning increases. Uncertainty and a person's ability to respond to uncertainty accordingly and flexibly are two key sources of value of the real options that mindfulness provides.<sup>467</sup> The real options that mindfulness provides are less valuable the fewer alternative decisions that a person can make, the less risk that a person faces, and when the consequences of the risk that a person faces can be ignored. Conversely, the real options that mindfulness provides are more valuable the more alternative decisions that a person can make, the more risk that a person faces, and when consequences of the risk that a person faces cannot be ignored. In the context of (legal) ethics and professionalism, people face many possible choices, a lot of risk (about many variables), and important consequences. All of this just means that the real options to choose wisely are most valuable in making decisions about (legal) ethics and professionalism.

Mindfulness practice can improve people's processes of making choices by providing real options in any situation to consciously, deliberately, and thoughtfully respond instead of automatically, reflexively, and unconsciously react. Riskin, in a contemplative review<sup>468</sup> of a book about improvisation and negotiation,<sup>469</sup> connects improvisation with mindfulness by noting that "mindfulness means essentially saying 'Yes' to what is actually happening, rather than denying or suppressing or rationalizing it."<sup>470</sup> Several scenes from the musical film, *La La Land*,<sup>471</sup> depict improvisational jazz.<sup>472</sup> The important roles that improvisation can play in jazz and negotiation are just special instances of the more universal proposition, namely the important role that improvisation can play in life generally. One way to formally conceptualize what improvisation entails is by taking account of available current information and judiciously choosing

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466. *Id.* at 66, 71; Peter H. Huang, *Lawsuit Abandonment Problems in Possibly Frivolous Litigation Games*, 23 REV. OF LITIG. 47, 89 (2004).

467. Shapiro, *supra* note 464, at 40, 45, 68; Huang, *supra* note 466, at 89.

468. Leonard L. Riskin, *Beginning with Yes: A Review Essay on Michael Wheeler's the Art of Negotiation: How to Improvise Agreement in a Chaotic World*, 16 CARDOZO J. CONFLICT RESOL. 605, 620–22 (2015).

469. MICHAEL WHEELER, *THE ART OF NEGOTIATION: HOW TO IMPROVISE AGREEMENT IN A CHAOTIC WORLD* 13–14 (2013).

470. Riskin, *supra* note 468, at 620.

471. See, e.g., *LA LA LAND* (Summit Entertainment 2016).

472. See also Howard Bellman, *Review Essay: Improvisation, Mediation, and All that Jazz*, 22 L NEGOT. J. 325, 325–27, 329–30 (2006).

to exercise certain real options. Successful improvisation requires accepting the current situation (whatever that may be) and then making choices about how to proceed in light of information about that current reality. The more variance there is, the more valuable the real options that mindfulness provides to improvise accordingly.

In a poignant scene from the movingly striking movie *Never Let Me Go*,<sup>473</sup> based upon a novel of the same name,<sup>474</sup> a British boarding school teacher asks her class if they know what happens to children when they grow up. She answers that they do not because nobody knows. Children may grow up to become actors who move to America, supermarket employees, school teachers, athletes, bus conductors, race car drivers, or in fact do just about anything they choose. Notice that the more volatility there is about future labor market conditions, educational opportunities, macroeconomic conditions, and financial market conditions, the more valuable are the real options that mindfulness offers people in their choice of work, careers, or professions. She then explains that no such uncertainty exists about what her students are growing up to become. This is because of their destiny of having been created to become donors of their vital organs. In other words, her students lack the many real options that people usually have over who they become.

In an article that applies the internal family systems model (IFSM) of psychotherapy<sup>475</sup> to conflict resolution, Riskin explains how practicing mindfulness allows one to choose to have “the Self, a center of awareness, compassion, and clarity . . . lead the Parts and to make decisions,”<sup>476</sup> where one’s sub-personalities or parts of one’s personality are “areas of the personality that are partly-autonomous and resemble and act as if they were individual human beings, having an age, beliefs, interests, perspectives, and the capacity to learn, negotiate, and change.”<sup>477</sup> In the language of real options theory, mindfulness allows its practitioner to exercise the real option to have the Self lead “even though a Part or Parts often take over one’s consciousness, essentially, though temporarily, restricting the influence of the Self and other Parts.”<sup>478</sup> The more variability there is in how a person’s sub-personalities differ from each other and a person’s Self, the

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473. NEVER LET ME GO (Fox Searchlight Pictures 2010).

474. KAZUO ISHIGURO, NEVER LET ME GO (2005).

475. See generally RICHARD C. SCHWARTZ, INTERNAL FAMILY SYSTEMS THERAPY (1995).

476. Leonard L. Riskin, *Managing Inner and Outer Conflict: Selves, Subpersonalities, and Internal Family Systems*, 18 HARV. NEGOT. L. REV. 1, 65 (2013).

477. *Id.*

478. *Id.*

more valuable are the real options that mindfulness provides to have the Self lead and make decisions instead of having a particular sub-personality do so. Riskin also wrote a poem about negotiation, the IFSM, and mindfulness.<sup>479</sup>

Once upon a time, one of my nephews, D, was misbehaving, so one of his aunts said to him that he should take a time out. D immediately said that D learned about this in school and that D should and would go hesitate. D meant meditate of course. D's misremembering the word meditate as hesitate captures a crucial aspect of meditating, or just taking a few deep breathes and pausing, namely that such a space in time and moment of hesitation provides opportunities to exercise real options to first be more aware of one's thoughts, feelings, and bodily sensations and then possibly change one's behavior and in so doing, also change one's thoughts, feelings, and bodily sensations.<sup>480</sup> The more variability that one has in one's repertoire or portfolio of possible behaviors, the more valuable are the real options that mindfulness provides to reflectively choose a particular course of behavior that is the most appropriate in the moment and situation over many other possible courses of behavior that are less appropriate in the moment and situation.

#### IV. CAN PRACTICING MINDFULNESS IMPROVE LEADERSHIP?

Many lawyers are leaders in American government,<sup>481</sup> private for-profit and nonprofit organizations,<sup>482</sup> and law firms.<sup>483</sup> In a recent survey of over 24,000 lawyers in all fifty states from a range of backgrounds and practice settings, 76% viewed leadership as necessary for new lawyers in the short or long-term.<sup>484</sup> Ben W. Heineman Jr., a Senior Fellow at the Harvard Kennedy School, Belfer Center for Science and International Affairs,<sup>485</sup> advocates "graduates of law schools should aspire not just to be wise counselors but wise leaders; not just to dispense 'practical wisdom'

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479. Leonard L. Riskin, *Negotiation, Outside-In and Inside-Out: On the Level or Thereabout*, 43 OHIO N.U. L. REV. 399, 403–04 (2017).

480. See FRANK J. SILEO & JENNIFER ZIVOIN, *A WORLD OF PAUSABILITIES: AN EXERCISE IN MINDFULNESS* (2017).

481. Neil W. Hamilton, *Ethical Leadership in Professional Life*, 6 U. ST. THOMAS L.J. 358, 361, 362 (2009).

482. *Id.* at 362–63.

483. *Id.* at 363.

484. Alli Gerkman & Logan Cornett, *The Whole Lawyer and the Character Quotient*, FOUNDATIONS FOR PRACTICE 20 (July 26, 2016), <http://iaals.du.edu/foundations/reports/whole-lawyer-and-character-quotient> [<https://perma.cc/A6MP-FNSW>].

485. CENTER FOR SCIENCE AND INTERNATIONAL AFFAIRS, *Ben Heineman, Faculty Page*, HARVARD BUSINESS SCHOOL, <https://www.belfercenter.org/person/ben-heineman> [<https://perma.cc/77X5-QN3H>].



but to be ‘practical visionaries’; not just to have positions where they advise, but where they decide.”<sup>486</sup> Deborah Rhode, the Ernest W. McFarland Professor of Law at Stanford Law School, director of the Stanford Center on the Legal Profession, and director of the Program in Law and Social Entrepreneurship,<sup>487</sup> observes that leadership development “is largely missing in legal education.”<sup>488</sup> Rhode outlines how law schools can teach law students to develop many of the capabilities and skills that are characteristic of ethical leaders.<sup>489</sup> A recent law school (and business school) graduate observes there is “a lack of appreciation that leadership, in legal education or the profession, is vital to wellbeing.”<sup>490</sup> Business law professor George Siedel discusses why there should be leadership education for business lawyers.<sup>491</sup> Siedel believes “[t]here is a great opportunity for a law school to gain a first mover advantage by developing a third year capstone course on leadership.”<sup>492</sup>

Frederick W. Smith, who is the chairman and CEO of the FedEx Corporation, recently stated in the foreword to a book about leadership that:

The concept of leadership is not a difficult one to understand. It’s simply about taking care of others and treating them fairly, communicating in a way that lets others know what they must do to be successful, and passing along praise for a job well done. It’s that straightforward, but it’s by no means intuitive. It must be learned and practiced.<sup>493</sup>

Many scholarly disciplines have developed various theories of leadership.<sup>494</sup> A recently completed ten-year empirical research

486. Ben W. Heineman, Jr., *Lawyers as Leaders*, 116 YALE L.J. POCKET PART 266, 266 (2007), <http://yalelawjournal.org/forum/lawyers-as-leaders>.

487. Deborah L. Rhode, *Faculty Page*, STANFORD LAW SCHOOL, <https://law.stanford.edu/directory/deborah-l-rhode/> [<https://perma.cc/8GL4-R5BU>].

488. DEBORAH L. RHODE, *LAWYERS AS LEADERS* 1 (2013).

489. *Id.* at 25–108. See also Donald J. Polden, *Symposium on Leadership Education for Lawyers and Law Students*, 52 SANTA CLARA L. REV. 685, 685–88 (2012); Donald J. Polden, *Leadership Matters: Lawyers’ Leadership Skills and Competencies*, 52 SANTA CLARA L. REV. 899, 900, 907, 911, 914, 919–20 (2012); Deborah Rhode, *Lawyers as Leaders*, 2010 MICH. ST. L. REV. 415, 415–22 (2010); Deborah L. Rhode, *Lawyers and Leadership*, 20 PROF. LAW no. 3, 12–15 (2010).

490. Andrea Naccache, *Leadership in Law Firms: Who Are We Recruiting? How Do We Build Our Army? How Can We Come Out on Top? A Glimpse into the World of Leadership in the Law*, 23 J.L. BUS. & ETHICS 85, 85 (2017).

491. George Siedel, *Leadership Competencies for Business Lawyers: Using a Framework that Links Strategy, Law, and Ethics*, unpublished manuscript.

492. E-mail from George Siedel, Williamson Family Professor of Business Administration and Thurnau Professor of Business Law, University of Michigan, to author, Mar. 28, 2017 at 8:51 A.M., on file with author.

493. ANGIE MORGAN, ET AL., *SPARK: HOW TO LEAD YOURSELF AND OTHERS TO GREATER SUCCESS* xi (2017).

494. See, e.g., Jessica E. Dinh et al., *Leadership Theory and Research in the New*

study based on a database about 17,000 C-suite executives (including 2,000 CEOs), the CEO Genome Project,<sup>495</sup> identified these behavioral tendencies as characteristic of high-performing CEOs: (1) making decisions quickly, (2) adapting to change proactively, (3) engaging stakeholders impactfully, and (4) delivering reliability relentlessly.<sup>496</sup> This part of the Article analyzes how practicing mindfulness can improve people's leadership via these five complementary pathways: (1) mitigating several biases that impair leadership, (2) changing a group's collective hormonal profile to improve group performance, (3) improving professionalism via being a reflective practitioner and/or double-loop learning, (4) improving people's capabilities to become cognitive architects or translational leaders who help organizational members reimagine the meaning of their day-to-day work from simply many discrete, small tasks into their organization's long-term core, unifying aspiration, and (5) improving people's capabilities to become adaptive leaders who can mobilize others to undertake tough challenges and thrive.

#### A. *Mindfulness Facilitates Debiasing Leaders*

One way that practicing mindfulness might be able to improve leadership is by helping leaders to be more aware of and not believe in false myths about management,<sup>497</sup> such as the success bias due to organizational inertia.<sup>498</sup> There are numerous trade books about management,<sup>499</sup> leadership,<sup>500</sup> mindful leadership,<sup>501</sup> and even the leading brain.<sup>502</sup> Jennifer Mueller, who is a developmental and social psychologist in addition to a management scholar, recently wrote a book about creative change

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*Millennium: Current Theoretical Trends and Changing Perspectives*, 25 LEADERSHIP Q. 36, 55 (2014).

495. The CEO Genome Website, <http://ceogenome.com/> [<https://perma.cc/9VAH-ZZB8>].

496. Elena Lytkina Botelho et al., *What Sets Successful CEOs Apart*, HARV. BUS. REV., May–June 2017, <https://hbr.org/2017/05/what-sets-successful-ceos-apart>. See also ELENA BOTELHO & KIM POWELL, *THE CEO NEXT DOOR: WHAT IT TAKES TO GET TO THE TOP, AND SUCCEED, BASED ON THE WORLD'S MOST COMPREHENSIVE LEADERSHIP STUDY* (forthcoming).

497. See Jerker Denrell, *Vicarious Learning, Undersampling of Failure, and the Myths of Management*, 14 ORG. SCI. 227 (2003) (explaining what causes myths about management and how these myths are problematic to effective management).

498. See generally William P. Barnett & Elizabeth G. Pontikes, *The Red Queen, Success Bias, and Organizational Inertia*, 54 MGMT. SCI. 1237 (2008).

499. See, e.g., ROGER E. ALLEN, *WINNIE-THE-POOH ON MANAGEMENT: IN WHICH A VERY IMPORTANT BEAR AND HIS FRIENDS ARE INTRODUCED TO A VERY IMPORTANT SUBJECT* (2011).

500. See, e.g., CHARLES SCHULZ, *YOU'RE A LEADER*, CHARLIE BROWN (2016).

501. See, e.g., JULIET ADAMS, *MINDFUL LEADERSHIP FOR DUMMIES* (2016).

502. See, e.g., FRIEDERIKE FABRITIUS & HANS W. HAGERMANN, *THE LEADING BRAIN: POWERFUL SCIENCE-BASED STRATEGIES FOR ACHIEVING PEAK PERFORMANCE* (2017).

and creative leadership, emphasizing that a crucial aspect of leadership is fostering creativity in oneself and others.<sup>503</sup> Mueller also highlights that another important component of leadership is mitigating the bias against creativity that she and others have documented in a number of experimental studies.<sup>504</sup> It is possible, though it remains an open question, that practicing mindfulness can overcome the creativity bias and creatively discriminative behavior,<sup>505</sup> perhaps in a way similar to how practicing mindfulness can reduce the implicit age/race biases<sup>506</sup> and racially discriminative behavior.<sup>507</sup>

It is well-known that females,<sup>508</sup> minorities,<sup>509</sup> and minority women<sup>510</sup> attorneys are and have been leaving law firms in droves. Much of this exodus is likely because of cultural and structural biases in the practice of law, especially at so-called big law firms. Unfortunately, the pace and scope of cultural and structural reforms in the legal profession has been gradual and limited.<sup>511</sup> The above research suggests how law firm leaders practicing mindfulness may reduce implicit racial bias and racially discriminative behavior.

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503. JENNIFER MUELLER, *CREATIVE CHANGE: WHY WE RESIST IT . . . HOW WE CAN EMBRACE IT* (2017).

504. *Id.*; Jennifer Deal, *Leaders Say They Want More Creativity. But They Really Don't*, WALL ST. J. BLOG, Sept. 18, 2016, 10:00 P.M. ET, <http://blogs.wsj.com/experts/2016/09/18/leaders-say-they-want-more-creativity-but-they-really-dont/>; Laura Huang & Jone L. Pearce, *Managing the Unknowable The Effectiveness of Early-stage Investor Gut Feel in Entrepreneurial Investment Decisions*, 60 ADMIN. SCI. Q. 634 (2015); Jennifer S. Mueller et al., *The Bias Against Creativity: Why People Desire But Reject Creative Ideas*, 23 PSYCHOL. SCI. 13 (2012); Jennifer Mueller, *Managers Reject Ideas Customers Want*, HARV. BUS. REV., July–Aug. 2014, <https://hbr.org/2014/07/managers-reject-ideas-customers-want>; Jennifer Mueller, *What's Blocking Corporate Creativity?*, INNOVATION, KNOWLEDGE@WHARTON, Feb. 20, 2017, <http://knowledge.wharton.upenn.edu/article/whats-blocking-corporate-creativity/>; Jonathan Vehar, *Three Ways You Are Killing Innovation in Your Organization*, Center for Creative Leadership White Paper, 2015, <https://www.ccl.org/wp-content/uploads/2015/09/How-Managers-Kill-Innovation.pdf> [<https://perma.cc/TDF4-AKXY>].

505. MUELLER, *supra* note 503, at 90.

506. Lueke & Gibson, *supra* note 320, at 39.

507. *Id.*

508. *See, e.g.*, Linda S. Fang, *Keeping Women Lawyers in the Profession: Why it Rocks! (and Sometimes Doesn't) to Be a Woman in Law* (Apr. 11, 2016), <http://www.banyancounsel.com/single-post/56250f0f0cf2c6c6437cffc1> [<https://perma.cc/ZF9B-JTT8>].

509. *See, e.g.*, Renwei Chung, *NYC Bar Report Reveals Minorities Have A 60% Higher Attrition Rate; Asian Attorneys Leaving at an Alarming Rate*, ABOVE THE LAW, Oct. 21, 2016, <http://abovethelaw.com/2016/10/nyc-bar-report-reveals-minorities-have-a-60-higher-attrition-rate-asian-attorneys-leaving-at-an-alarming-rate/> [<https://perma.cc/YU3L-EAMT>].

510. *See, e.g.*, Liane Jackson, *Minority Women Are Disappearing From BigLaw—and Here's Why*, A.B.A. J. (Mar. 1, 2016, 12:15 A.M. C.S.T.), [http://www.abajournal.com/magazine/article/minority\\_women\\_are\\_disappearing\\_from\\_biglaw\\_and\\_heres\\_why/](http://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why/).

511. Mangan, *supra* note 444, at 13.

Attorney Kate Mangan advocates that instead of leaving the legal profession, attorneys who feel isolated, lonely, and ostracized may practice self-compassion to help them survive and thrive in a male-centric, and predominantly Caucasian, workplace culture.<sup>512</sup> University of Texas, Austin psychologist and self-compassion expert Kristen Neff<sup>513</sup> defines the three interrelated components of self-compassion to be: “(1) self-kindness, (2) recognition of our common humanity, and (3) mindfulness.”<sup>514</sup> Mangan explains how people can learn rather swiftly to practice significantly more self-compassion;<sup>515</sup> why becoming more self-compassionate tends to lead to change, growth, and learning, instead of laziness, self-indulgence, or self-pity;<sup>516</sup> and how practicing self-compassion leads to more confidence, proactivity, resilience, risk-taking, satisfaction, and social connectedness;<sup>517</sup> while reducing anxiety, depression, fear, suffering, and unhappiness.<sup>518</sup> All of these consequences of practicing self-compassion may repair the currently leaky pipeline and increase diversity in the legal profession by helping attorneys to cope better with problematic and slow-changing law firm cultures.<sup>519</sup> Practicing mindfulness as part of self-compassion complements other policies to increasing attorney diversity, such as diversifying the legal educational pipeline,<sup>520</sup> or behavioral design.<sup>521</sup>

### *B. Mindfulness Improves a Group’s Collective Hormonal Profile*

A different way that practicing mindfulness can improve leadership is to reduce the stress hormone cortisol,<sup>522</sup> and in so

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512. *Id.* at 13. See also Jazmin L. Brown-Iannuzzi et al., *Discrimination Hurts, But Mindfulness May Help: Trait Mindfulness Moderates the Relationship Between Perceived Discrimination and Depressive Symptoms*, 56 PERSONALITY & INDIV. DIFFERENCES 201, 203 (2014).

513. *About Dr. Kristin Neff*, SELF-COMPASSION.ORG, <http://self-compassion.org/about/> [<https://perma.cc/TJ7Y-E4S6>]; KRISTEN NEFF, SELF-COMPASSION: THE PROVEN POWER OF BEING KIND TO YOURSELF (2015).

514. Mangan, *supra* note 444, at 13–14.

515. *Id.* at 14.

516. *Id.* at 15.

517. *Id.* at 16–17.

518. *Id.* at 16.

519. *Id.* at 15–17.

520. See generally Cielo Fortin-Camacho, *Plugging the Diversity Leak and Strengthening the Legal Profession: Examining the Importance of Targeting Underrepresented Minorities on the Educational Pipeline to Law*, Mar. 29, 2017, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2943191](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2943191).

521. See generally IRIS BOHNET, WHAT WORKS: GENDER EQUALITY BY DESIGN 103–292 (2016).

522. See generally Yaxin Fan et al., *Cortisol Level Modulated by Integrative Meditation*

doing, improve a group's performance.<sup>523</sup> Whereas previous research demonstrated that "an individual's hormonal profile can influence the individual's social standing within a group,"<sup>524</sup> more recent research shows that a group's collective hormonal profile is related to its performance.<sup>525</sup> A study where 370 individuals were randomly assigned to work in groups of three to six people found group-level concentrations of cortisol and testosterone predicted a group's relative standing.<sup>526</sup> In particular, groups that had a collective hormonal profile of low cortisol and high testosterone had the highest performance,<sup>527</sup> with these results remaining "reliable when controlling personality traits and group-level variability in hormones."<sup>528</sup> These results "support the hypothesis that groups with a biological propensity toward status pursuit (high testosterone) coupled with reduced stress-axis activity (low cortisol) engage in profit-maximizing decision-making."<sup>529</sup> This research "extends the dual-hormone hypothesis to the collective level and provides a neurobiological perspective on the factors that determine who rises to the top across, not just within, social hierarchies."<sup>530</sup> An implication of this research is that leaders of groups can improve the relative performance of their group by practicing mindfulness and encouraging all of their group members to practice mindfulness.

### C. Mindfulness Facilitates Reflective Practice and Double-Loop Learning

Another part of being a successful leader is being a successful professional. Part of being a successful professional is being a reflective practitioner. Donald Schon, who was the Ford professor of urban studies and education at the Massachusetts Institute of Technology, analyzed in his book, *The Reflective Practitioner: How Professionals Think in Action*, how professionals actually solve problems by studying these five professions: architecture,

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in a Dose-Dependent Fashion, 30 STRESS & HEALTH 65 (2014); Tonya L. Jacobs et al., *Self-Reported Mindfulness and Cortisol During a Shamatha Meditation Retreat*, 32 HEALTH PSYCHOL. 1104 (2013); Yi-Yuan Tang et al., *Short-Term Meditation Training Improves Attention and Self-Regulation*, 104 PROC. NAT'L. ACAD. SCI. 17152 (2007).

523. Modupe Akinola et al., *Collective Hormonal Profiles Predict Group Performance*, 113 PROC. NAT'L. ACAD. SCI. 9774 (2016).

524. *Id.*

525. *Id.*

526. *Id.*

527. *Id.*

528. *Id.*

529. *Id.*

530. *Id.* at 9774, 9777.

engineering, management, psychotherapy, and urban planning.<sup>531</sup> Schon advocated teaching people to be like jazz musicians who can improvise and “think[] on [one’s] feet”<sup>532</sup> and believed that people can continually improve their work through a feedback loop of experience, learning, and practice to become a “reflective practitioner.” Practicing mindfulness helps people become reflective practitioners by helping people stay in the present, focus on their experience, learn from their experience, and practice doing so continually and repeatedly.

Donald Schon in collaboration with Chris Argyris, who was a former Harvard business school professor emeritus of education and organizational behavior, analyzed in their three co-authored books, *Theory in Practice*,<sup>533</sup> *Organizational Learning*,<sup>534</sup> and *Organizational Learning II*,<sup>535</sup> to what extent human reasoning, in addition to behavior, can be the basis for diagnosis and action in individual and organizational learning. They developed a theory of double-loop learning, in contrast with single-loop learning, which entails repeated attempts at solving a problem, without ever changing the attempted solution method or considering alternative possible objectives.<sup>536</sup> The distinction between single-loop learning and double-loop learning is nicely captured by a simple analogy:

A thermostat that automatically turns on the heat whenever the temperature in a room drops below 68 degrees is a good example of single-loop learning. A thermostat that could ask, “Why am I set at 68 degrees?” and then explore whether or not some other temperature might more economically achieve the goal of heating the room would be engaging in double-loop learning.<sup>537</sup>

Although, and ironically because many professionals are good at single-loop learning, those same professionals are not good at double-loop learning.<sup>538</sup> Moreover, some professionals who are bad

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531. DONALD A. SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983).

532. *Id.* at 54–55.

533. CHRIS ARGYRIS & DONALD A. SCHON, *THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS* (1974).

534. CHRIS ARGYRIS & DONALD A. SCHON, *ORGANIZATIONAL LEARNING: A THEORY OF ACTION PERSPECTIVE* (1978).

535. CHRIS ARGYRIS & DONALD A. SCHON, *ORGANIZATIONAL LEARNING II: THEORY, METHODS, AND PRACTICE* (1995).

536. ARGYRIS & SCHON, *supra* note 533, at 18–19. *See also* Chris Argyris, *Teaching Smart People How to Learn*, 69 HARV. BUS. REV. May–June 1991, at 99.

537. Argyris, *supra* note 536, at 100. *See also* ARGYRIS & SCHON, *supra* note 533, at 18–19.

538. Argyris, *supra* note 536, at 100.

at double-loop learning “become defensive, screen out criticism, and put the ‘blame’ on anyone and everyone but themselves. In short, their ability to learn shuts down precisely at the moment they need it the most.”<sup>539</sup> Importantly, “effective double-loop learning is not simply a function of how people feel. It is a reflection of how they think—that is, the cognitive rules or reasoning they use to design and implement their actions.”<sup>540</sup> Many professionals react defensively when experiencing strong feelings of being threatened, embarrassed, guilty, incompetent, ashamed, or vulnerable.<sup>541</sup> These defensive reactions can very quickly lead to a doom loop of despair.<sup>542</sup>

Argyris believes that “everyone develops a theory of action—a set of rules that individuals use to design and implement their own behavior as well as to understand the behavior of others. Usually, these theories of actions become so taken for granted that people don’t even realize they are using them.”<sup>543</sup> Interestingly and paradoxically, people do not behave according to their theories of action.<sup>544</sup> Argyris calls how people actually behave their “theory-in-use.”<sup>545</sup> Argyris sees people as “unaware of the contradiction between their espoused theory and their theory-in-use, between the way they think they are acting and the way they really act.”<sup>546</sup> Argyris concludes the following:

[M]ost theories-in-use rest on the same set of governing values. There seems to be a universal human tendency to design one’s actions consistently according to four basic values:

1. To remain in unilateral control;
2. To maximize “winning” and minimize “losing”;
3. To suppress negative feelings; and
4. To be as “rational” as possible—by which people mean defining clear objectives and evaluating their behavior in terms of whether or not they have achieved them.<sup>547</sup>

The above theory in use makes it difficult, if not impossible, for people to learn.<sup>548</sup> Argyris advocates teaching people to

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539. *Id.*

540. *Id.*

541. *Id.* at 101–03.

542. *Id.* at 103–04.

543. *Id.* at 103.

544. *Id.*

545. *Id.*

546. *Id.*

547. *Id.*

548. *Id.*

“identify the inconsistencies between their espoused and actual theories of action”<sup>549</sup> as well as “face up to the fact that they unconsciously design and implement actions that they do not intend”<sup>550</sup> and “learn how to identify what individuals and groups do to create organizational defenses and how these defenses contribute to an organization’s problems.”<sup>551</sup> In particular, Argyris recommends teaching people how to go about “collecting valid data, analyzing it carefully, and constantly testing the inferences drawn from the data.”<sup>552</sup>

An implication of Argyris’ research is that leaders can improve leadership by practicing mindfulness and encouraging all members of their organizations to practice mindfulness. By practicing mindfulness, leaders and members of their organizations can improve their awareness of strong negative emotions, capabilities to not react defensively, and recognition of when their theories in use differ from their theories of action, all of which improve their likelihood of engaging in double-loop learning. Success depends critically on individuals and organizations being able to engage in double-loop learning. Organizations in which leaders and members fail to engage in double-loop learning and adaptation usually will only survive by luck.

#### *D. Mindfulness Facilitates Translational Leadership*

Wharton management professor Andrew Carton’s recent and playfully titled article, *I’m Not Mopping the Floors, I’m Putting a Man on the Moon: How NASA Leaders Enhanced the Meaningfulness of Work by Changing the Meaning of Work*,<sup>553</sup> analyzes what President John F. Kennedy said in his memorable “Address at Rice University on the Nation’s Space Effort” (better known as his “We Choose to Go to the Moon” speech)<sup>554</sup> and what NASA leaders did and said in the 1960s during America’s space race.<sup>555</sup> President Kennedy’s charismatic, eloquent, powerful, and

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549. *Id.* at 106.

550. *Id.*

551. *Id.*

552. *Id.*

553. Andrew Carton, *I’m Not Mopping the Floors, I’m Putting a Man on the Moon: How NASA Leaders Enhanced the Meaningfulness of Work by Changing the Meaning of Work*, ADMIN. SCI. Q. (2017).

554. President John F. Kennedy, Address at Rice University on the Nation’s Space Effort (Sept. 12, 1962) (available at <https://er.jsc.nasa.gov/seh/ricetalk.htm> [<https://perma.cc/Y43T-9ABX>]).

555. *Meaningful Work: What Leaders Can Learn from NASA and the Space Race*, KNOWLEDGE@WHARTON, Mar. 16, 2017, <http://knowledge.wharton.upenn.edu/article/what-leaders-can-learn-from->



stirring delivery of speechwriter Ted Sorenson's inspirational rhetoric masterfully reframed "the moonshot as being instrumental for U.S. security reasons."<sup>556</sup> In the speech, President Kennedy states:

We meet at a college noted for knowledge, in a city noted for progress, in a State noted for strength, and we stand in need of all three, for we meet in an hour of change and challenge, in a decade of hope and fear, in an age of both knowledge and ignorance. The greater our knowledge increases, the greater our ignorance unfolds.

Despite the striking fact that most of the scientists that the world has ever known are alive and working today, despite the fact that this Nation's own scientific manpower is doubling every 12 years in a rate of growth more than three times that of our population as a whole, despite that, the vast stretches of the unknown and the unanswered and the unfinished still far outstrip our collective comprehension.

....

Surely the opening vistas of space promise high costs and hardships, as well as high reward.

So it is not surprising that some would have us stay where we are a little longer to rest, to wait. But this city of Houston, this State of Texas, this country of the United States was not built by those who waited and rested and wished to look behind them. This country was conquered by those who moved forward—and so will space.

....

The exploration of space will go ahead, whether we join in it or not, and it is one of the great adventures of all time, and no nation which expects to be the leader of other nations can expect to stay behind in the race for space.

Those who came before us made certain that this country rode the first waves of the industrial revolutions, the first waves of modern invention, and the first wave of nuclear power, and this generation does not intend to founder in the backwash of the coming age of space. We mean to be a part of it—we mean to lead it. For the eyes of the world now look into space, to the moon and to the planets beyond, and we have vowed that we shall not see it governed by a hostile flag of conquest, but by a banner of freedom and peace. We have vowed that we shall not see space filled with weapons of mass

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nasa/?utm\_source=kw\_newsletter&utm\_medium=email&utm\_campaign=2017-03-21.

556. Douglas Brinkley, *50 Years Ago, Kennedy Reached for Stars in Historic Rice Address*, HOUSTON CHRON. (Sept. 10, 2012, 7:08 AM), <http://www.chron.com/news/nation-world/article/50-years-ago-Kennedy-reached-for-stars-in-3852085.php>.

destruction, but with instruments of knowledge and understanding.

Yet the vows of this Nation can only be fulfilled if we in this Nation are first, and, therefore, we intend to be first. In short, our leadership in science and in industry, our hopes for peace and security, our obligations to ourselves as well as others, all require us to make this effort, to solve these mysteries, to solve them for the good of all men, and to become the world's leading space-faring nation.

We set sail on this new sea because there is new knowledge to be gained, and new rights to be won, and they must be won and used for the progress of all people. For space science, like nuclear science and all technology, has no conscience of its own. Whether it will become a force for good or ill depends on man, and only if the United States occupies a position of pre-eminence can we help decide whether this new ocean will be a sea of peace or a new terrifying theater of war.

. . . .

There is no strife, no prejudice, no national conflict in outer space as yet. Its hazards are hostile to us all. Its conquest deserves the best of all mankind, and its opportunity for peaceful cooperation may never come again.<sup>557</sup>

In probably the most famous paragraph from that well-known speech, President Kennedy states these iconic words:

We choose to go to the moon. We choose to go to the moon in this decade and do the other things, not because they are easy, but because they are hard, because that goal will serve to organize and measure the best of our energies and skills, because that challenge is one that we are willing to accept, one we are unwilling to postpone, and one which we intend to win, and the others, too.<sup>558</sup>

Carton conducted an inductive study to conclude that President Kennedy and NASA leaders succeeded as meaningfulness architects who built cognitive schemas that outlined core connections between employees' daily work and their organization's ultimate aspiration.<sup>559</sup> Carton's research redirects leadership research by viewing leaders as architects who create structural blueprint mapping connections between an organization's ultimate aspirations and everyday work. Carton's novel idea departs from the more traditional view of leaders as visionaries who showcase an organization's ultimate

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557. Kennedy, *supra* note 554.

558. *Id.*

559. See generally Carton, *supra* note 553.

aspirations.<sup>560</sup> In Carton's view, leaders can and should engage in translational leadership that assists employees in transforming their daily work's meaning from simply many low-level discrete actions to their organization's ultimate high-level aspiration.<sup>561</sup> This essentially cognitive type of leadership fosters employees re-construing, redefining, and reframing their everyday work as their organization's ultimate aspiration.<sup>562</sup> Practicing mindfulness enables leaders to become more aware of how to help employees "mentally assemble" the strong connections between their daily work and their organization's ultimate aspiration.<sup>563</sup>

Carton's idea of leaders as cognitive architects of meaningfulness is related to another idea known as thinking architecture that behavioral economists Shlomo Benartzi and John Payne define as "a structured process that allows us to break down a complex problem . . . into a series of manageable thinking steps, so as to improve outcomes."<sup>564</sup> Cognitive leaders essentially constitute, craft, and create thinking architecture that employees can utilize to build memorable, robust, and sustainable connections between their concrete, day-to-day, immediate, short-term tasks and their organization's abstract, long-term, timeless, ultimate aspiration. In so doing, cognitive leaders are meaningfulness connection entrepreneurs.

#### *E. Mindfulness Facilitates Adaptive Leadership*

In a Supreme Court opinion, Justice William Rehnquist wrote this about private litigation alleging securities fraud violating § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission: "[W]e deal with a judicial oak which has grown from little more than a legislative acorn."<sup>565</sup> This quote provides a striking metaphor for and visual imagery of how things can often change over time. Sometimes the change is predictable as with the development of a tiny acorn into a mighty oak tree. Other times, the change is unpredictable as with the many plans that people make and then have to revise. Paul "Bear" Bryant, the legendary head college football coach who during a twenty-five year tenure at the University of Alabama led

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560. *Id.* at 30–31

561. *Id.* at 33

562. *Id.* at 30

563. *Id.*

564. SHLOMO BENARTZI WITH ROGER LEWIN, THINKING SMARTER: SEVEN STEPS TO YOUR FULFILLING RETIREMENT. . . AND LIFE 5 (2015).

565. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1974) (holding that only those directly suffering losses from the actual purchase or sale of securities have standing to sue under the federal securities laws).

his teams to thirteen conference titles and six national championships, famously said: “Have a plan. Follow the plan, and you’ll be surprised how successful you can be. Most people don’t have a plan. That’s why it’s easy to beat most folks.”<sup>566</sup> Michael Gerard “Mike” Tyson, the controversial boxer who successfully defended the world heavyweight championship nine times, notoriously stated: “Everybody has a plan ‘til [sic] they get punched in the mouth.”<sup>567</sup> Leaders (and others) who succeed not only plan; they also plan to adapt,<sup>568</sup> in light of unforeseen circumstances or conditions and unplanned changes or developments.

Leadership scholar Ronald Heifetz<sup>569</sup> introduced the concept of adaptive leadership, defined as “the practice of mobilizing people to tackle tough challenges and thrive.”<sup>570</sup> Thriving entails developing new capabilities and strategies to address environmental changes and realize strategic vision and goals. Adaptive leadership views the most common failure of leadership as mistaking adaptive challenges for technical challenges.<sup>571</sup> Adaptive leadership contrasts technical challenges with adaptive challenges.<sup>572</sup> Adaptive leadership theory also incorporates ethics into leadership.<sup>573</sup>

Technical challenges are challenges that are easily identified, involve clearly defined problems with known solutions that are clear to implement, and can often be solved by an expert or authority. Examples of technical challenges are taking medication to lower blood pressure, implementing electronic dispensing and ordering of hospital medications to lower drug interactions and mistakes, and raising the penalties for drunk driving to reduce car accidents involving drunk drivers. Adaptive challenges are challenges that are difficult to identify (and so,

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566. H. JAMES HARRINGTON & FRANK VOEHL, *THE ORGANIZATIONAL MASTER PLAN HANDBOOK: A CATALYST FOR PERFORMANCE PLANNING AND RESULTS* 22 (2012).

567. Susan Enlow, *What Mike Tyson and Epictetus can teach us about back-up plans*, KLEENMARK UNIV., <http://www.kleenmark.com/university/cleaning-program-back-up-plans-mike-tyson-epictetus/> [https://perma.cc/MB6R-WWDC].

568. REID HOFFMAN & BEN CASNOCHA, *THE START-UP OF YOU: ADAPT TO THE FUTURE, INVEST IN YOURSELF, AND TRANSFORM YOUR CAREER* 47 (2012).

569. JOHN F. KENNEDY SCH. OF GOV’T, *Ronald Heifetz, Faculty Page*, HARVARD UNIV., <https://www.hks.harvard.edu/faculty/ronald-heifetz> [https://perma.cc/W4LB-KYK3].

570. RONALD A. HEIFETZ ET AL., *THE PRACTICE OF ADAPTIVE LEADERSHIP: TOOLS AND TACTICS FOR CHANGING YOUR ORGANIZATION AND THE WORLD* 14 (2009). *See generally* RONALD A. HEIFETZ, *LEADERSHIP WITHOUT EASY ANSWERS* 26 (1994).

571. HEIFETZ ET AL (2009), *supra* note 570, at 19.

572. HEIFETZ (1994), *supra* note 570, at 8, 35, 73–76. *See also* MARTIN LINSKY & RONALD A. HEIFETZ, *LEADERSHIP ON THE LINE: STAYING ALIVE THROUGH THE DANGERS OF LEADING* 13 (2002); HEIFETZ ET AL. (2009), *supra* note 570, at 69.

573. Hamilton, *supra* note 481, at 378, 380–82, 387–88.

easy to deny), involve unclearly defined problems and unclearly defined solutions that are not clear to implement, and require discovery or experimentation by many people to learn the solution. Examples of adaptive challenges are changing lifestyles to eat healthy, exercise more, and lower stress; encouraging nurses and pharmacists to question and, if necessary, challenge dangerous or unclear prescriptions; and raising public awareness concerning the dangers and consequences of drunk driving, targeting, particularly with teenagers.

Management scholar Jeremy Hunter<sup>574</sup> and social entrepreneur Michael Chaskalson<sup>575</sup> propose that mindfulness provides an operational and potent way for leaders to respond to adaptive challenges because adaptive challenges are difficult and hence stressful, often require complex coordination with others and so quality relationships matter, and call for leaders to consciously avoid habitual reactions and deal with a changing reality in creative, novel, and nuanced ways.<sup>576</sup> Practicing mindfulness enables leaders to effectively manage their stress, manage their emotional reactions and interpersonal skills, and manage their perceptual skills and innovation abilities.<sup>577</sup> Hunter and Chaskalson believe

[A] critical skill for adaptive leaders is the capacity to be mindful—to be present and aware of themselves, others, and the world around them; to recognize in real time their own perceptions (and their potential biases), their emotional reactions, and the actions they need to take to address current realities more effectively.<sup>578</sup>

Hunter and Chaskalson observe that mindfulness training offers leaders real-world ways to improve their attention and awareness,<sup>579</sup> and in turn develop the possibility of “adaptive action and self-management.”<sup>580</sup> Hunter and Chaskalson explain how mindfulness addresses these interrelated problems that interfere with adaptive leadership: the pervasiveness of

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574. DRUCKER SCH. OF MGMT., *Jeremy Hunter, Faculty Page*, CLAREMONT GRADUATE UNIV., <http://drucker.cgu.edu/faculty/jeremy-hunter/> [<https://perma.cc/38AB-WJBP>].

575. *Michael Chaskalson*, MICHAEL CHASKALSON, <http://www.michaelchaskalson.com/MichaelChaskalson.php> [<https://perma.cc/3L4P-UJC9>].

576. Jeremy Hunter & Michael Chaskalson, *Making the Mindful Leader: Cultivating Skills for Facing Adaptive Challenges*, in THE WILEY-BLACKWELL HANDBOOK OF THE PSYCHOLOGY OF LEADERSHIP, CHANGE AND ORGANIZATIONAL DEVELOPMENT 195, 197 (H. Skipton Leonard et al. eds., 2013).

577. *Id.*

578. *Id.*

579. *Id.*

580. *Id.* at 197–98.

mindlessness, automaticity, and survival instincts.<sup>581</sup> Hunter and Chaskalson discuss recent neuroscience studies that suggest how mindfulness training can help people manage their stress,<sup>582</sup> manage reactive emotions,<sup>583</sup> improve attention and working memory,<sup>584</sup> perceive “reality beyond one’s blinders,”<sup>585</sup> cultivate empathy,<sup>586</sup> make better decisions,<sup>587</sup> and be more creative and innovative.<sup>588</sup> Hunter and Chaskalson suggest mindfulness training is effective via these three principal mechanisms: changing what minds process, changing how minds process, and changing views or perspectives about what minds process.<sup>589</sup>

Leadership scholars Megan Reitz,<sup>590</sup> Chaskalson, Sharon Oliver,<sup>591</sup> and Lee Waller<sup>592</sup> conducted the first study of a multi-session mindfulness training program involving (business) leaders.<sup>593</sup> They found in a sample of fifty-seven senior business leaders, taking an eight-week mindfulness training program, without accounting for how much time participants engaged in formal mindfulness practice at home, significantly increased self-reported resilience and abilities to describe internal experiences.<sup>594</sup> The more time participants engaged in formal mindfulness practice at home, the higher increases in self-reported resilience, self-reported collaboration, self-reported agility in complexity, an overall mindfulness measure, and empathetic tendencies of perspective taking (ability to adopt others’ psychological viewpoints) and fantasy (ability to transpose oneself

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581. *Id.* at 199–202.

582. *Id.* at 202–04.

583. *Id.* at 204–05.

584. *Id.* at 205.

585. *Id.* at 205–06.

586. *Id.* at 206–07.

587. *Id.* at 207.

588. *Id.* at 207–08.

589. *Id.* at 210–13; John D. Teasdale & Michael Chaskalson, *How Does Mindfulness Transform Suffering? II: The Transformation of Dukkha*, 12 CONTEMP. BUDDHISM 90, 90–92 (2011).

590. Megan Reitz, *Faculty Page*, ASHRIDGE EXEC. EDUC., <https://www.ashridge.org.uk/faculty-research/faculty/megan-reitz/> [https://perma.cc/TPW5-ZA7N].

591. Sharon Oliver, *Faculty Page*, ASHRIDGE EXEC. EDUC., <https://www.ashridge.org.uk/faculty-research/faculty/sharon-olivier/> [https://perma.cc/8HR9-GUN2].

592. Lee Waller, *Faculty Profile*, ASHRIDGE EXEC. EDUC., <https://www.ashridge.org.uk/faculty-research/faculty/lee-waller/> [https://perma.cc/E6NU-25TL].

593. Megan Reitz et al., *The Mindful Leader: Developing the Capacity for Resilience and Collaboration in Complex Times Through Mindfulness Practice*, Nov. 2016, <http://mbsr.co.uk/website4/userfiles/Publications/Ashridge-Mindful-Leader-for-web-low-res.pdf> [https://perma.cc/DQL7-JXE8].

594. *Id.* at 13.

imaginatively into others' feelings) in addition to decreases in personal distress.<sup>595</sup>

Reitz *et al.* propose the following theory of mindful leadership:<sup>596</sup> practicing mindfulness develops three meta-capacities: metacognition, curiosity, and allowing.<sup>597</sup> These three meta-capacities in turn help develop these five cognitive and emotional skills: emotional regulation, perspective taking, empathy, focus, and adaptability.<sup>598</sup> These five cognitive and emotional skills in turn lead to improved collaboration, resilience, and capacity to lead in complexity.

In the language of the real options perspective to mindfulness discussed earlier,<sup>599</sup> practicing mindfulness provides a portfolio of compound or nested options (meaning options on options) to develop the meta-capacities of metacognition, curiosity, and allowing; that in turn deliver options to develop the five cognitive and emotional skills of emotional regulation, perspective taking, empathy, focus, and adaptability; that in turn make available options to improve the three capacities of collaboration, resilience, and leading in complexity. All of these options are more valuable when leaders face greater environmental volatility. It is a well-known result in options theory that a portfolio of options on assets is more valuable than an option on a portfolio of assets.<sup>600</sup> In the Reitz *et al.* theory of mindful leadership, practicing mindfulness provides leaders a portfolio of three compound or nested options, each of which provides another portfolio of five compound or nested options, each which provides a final portfolio of three options.<sup>601</sup> The importance of mindfulness providing portfolios of options rather than options on portfolios is the greater flexibility and hence value in developing those three meta-capacities, five cognitive and emotional skills, and three leadership capacities that a leader decides is appropriate for the environment she faces.<sup>602</sup> For different environmental conditions, or as environmental conditions change, a leader can make different choices about which of her many real options to develop different meta-capacities, cognitive and emotional skills, and

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595. *Id.* at 13–14.

596. *Id.* at 21 fig. 2.

597. *Id.* at 16.

598. *Id.* at 17.

599. See discussion *supra* Part II, notes 459, 460, 463, and accompanying text.

600. See, e.g., RICHARD M. BOOKSTABER, OPTION PRICING AND INVESTMENT STRATEGIES 26 (3d ed. 1991) (“Property 13: The price of a portfolio of options will be at least as great as an option on a portfolio.”).

601. See *supra* notes 593–598 and accompanying text.

602. *Id.*

leadership capacities she can exercise. Different leadership strategies can be viewed as different portfolios of real options.<sup>603</sup>

Based on the findings of their study, Reitz and Chaskalson offer seven recommendations for how companies can successfully design a mindfulness program for leadership.<sup>604</sup> First, those interested to do so should develop their own mindfulness practice.<sup>605</sup> Second, invite a mindfulness trainer with considerable experience in the corporate context to speak with interested employees in a “taster session.”<sup>606</sup> Third, provide a mindfulness program with sustained training over a period of time, e.g. the well-known eight-week mindfulness-based stress reduction course.<sup>607</sup> Fourth, provide a private and quiet space for employees to practice mindfulness.<sup>608</sup> Fifth, encourage and facilitate employees practicing together.<sup>609</sup> Sixth, begin corporate meetings by having employees take a minute of mindfulness, e.g. by bringing their attention to their breaths by counting them.<sup>610</sup> Seventh, role model mindfulness practice, talk about mindfulness practice, and promote employees who practice mindfulness.<sup>611</sup> Interested legal organizations, including law firms, law schools, and bar associations, can adapt each of these suggestions to legal practice, legal education, and continuing legal education.

#### *F. Mindfulness as Experiential Education*

Reitz and Chaskalson emphasize the findings of their study, highlighting the importance of at least ten minutes of formal mindfulness practice to achieve the benefits of resilience, the capacity for collaboration, and the ability to lead in complex conditions.<sup>612</sup> I personally learned the importance of having students engage in actual formal experiential practice. In the autumn of 2009, professor Dan Kahan<sup>613</sup> and I co-taught a Yale

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603. See, e.g., Timothy A. Luehrman, *Strategy as a Portfolio of Real Options*, HARV. BUS. REV., Sept.–Oct. 1998, at 89.

604. Reitz et al., *supra* note 593, at 24.

605. *Id.*

606. *Id.*

607. *Id.*

608. *Id.*

609. *Id.*

610. *Id.*

611. *Id.*

612. Megan Reitz & Michael Chaskalson, *Mindfulness Works but Only If You Work at It*, HARV. BUS. REV., Nov. 4, 2016, <https://hbr.org/2016/11/mindfulness-works-but-only-if-you-work-at-it>; Reitz et al., *supra* note 593, at 13.

613. Dan Kahan, *Faculty Page*, YALE LAW SCH., <https://www.law.yale.edu/dan-m-kahan> [<https://perma.cc/PBL9-RDRX>].



law school seminar titled neuroscience and law.<sup>614</sup> At that time, there was no law school course casebook about law and neuroscience as there now is,<sup>615</sup> so we put together a weekly reading list of law review articles and peer-refereed journal articles. The topic of the last week of our seminar was the neuroscience of well-being, including a number of neuroscience studies about various benefits of mindfulness. Some of our students expressed concern about proposals that advocated teaching mindfulness in elementary school.<sup>616</sup> Their concerns were due to neuroscience research findings that mindfulness changes people's brain structures and functioning.<sup>617</sup> We answered that learning also changes people's brain structures and functioning.<sup>618</sup> They were not persuaded by our analogy. In fact, anything that we do changes our brains, such as closing our eyes, practicing the piano, laying bricks,<sup>619</sup> or being exposed for a single twenty-minute

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614. Seminar on Neuroscience & Law, Cultural Cognition Project at Yale Law School, <http://www.culturalcognition.net/teaching/> [<https://perma.cc/TS74-R2AL>].

615. OWEN D. JONES ET AL., LAW & NEUROSCIENCE (2014).

616. Emily Holland, *Can 'Mindfulness' Help Students Do Better in School?*, WALL ST. J. (Feb. 16, 2015), <http://www.wsj.com/articles/can-mindfulness-help-students-do-better-in-school-1424145647>; Amanda Machado, *Should Schools Teach Kids to Meditate?*, ATLANTIC (Jan. 27, 2014), <http://www.theatlantic.com/education/archive/2014/01/should-schools-teach-kids-to-meditate/283229/>; Amy Saltzman, *Mindfulness: A Teacher's Guide*, <http://www.pbs.org/thebuddha/teachers-guide/>; Katrina Schwartz, *Low-Income Schools See Big Benefits in Teaching Mindfulness*, KQED NEWS, (Jan. 17, 2014) <http://www.kqed.org/mindshift/2014/01/17/low-income-schools-see-big-benefits-in-teaching-mindfulness/> [<https://perma.cc/HE34-RQ62>]; MINDFUL LIFE PROJECT, <http://mindfullifeproject.org/> [<https://perma.cc/G33W-XRA6>]; MINDFUL SCHOOLS, <http://www.mindfulschools.org/resources/room-to-breathe/> [<https://perma.cc/MTK8-RS7F>].

617. See, e.g., Christina Congleton et al., *Mindfulness Can Literally Change Your Brain*, HARV. BUS. REV. (Jan. 8, 2015), <https://hbr.org/2015/01/mindfulness-can-literally-change-your-brain> (discussing some of these neuroscience studies and their implications for the business world); Britta K. Hölzel et al., *Mindfulness Practice Leads to Increases in Regional Brain Gray Matter Density*, 191 PSYCHIATRY RES.: NEUROIMAGING 36, 36–42 (2011) (presenting study details); Rafal Marciniak et al., *Effect of Meditation on Cognitive Functions in Context of Aging and Neurodegenerative Diseases*, 8 FRONTIERS BEHAV. NEUROSCI. Art. 17, at 1, 4, 5 tbl.1 (2014) (discussing seven MRI studies finding brain structure changes associated with meditation).

618. See, e.g., Bogdan Draganski et al., *Temporal and Spatial Dynamics of Brain Structure Changes during Extensive Learning*, 26 J. NEUROSCI. 6314, 6314–16 (2006) (finding that learning a large body of highly abstract information was associated with increased gray matter in specific brain areas of medical students); Johan Mårtensson et al., *Growth of Language-related Brain Areas after Foreign Language Learning*, 63 NEUROIMAGE 240, 240 (2012) (finding structural changes in brain regions of interpreters during three months of intensively learning a foreign language); Alexander Schlegel et al., *The Artist Emerges: Visual Art Learning Alters Neural Structure and Function*, 105 NEUROIMAGE 440, 440 (2015) (finding that learning artistic skills in a three-month introductory course in drawing or painting changed students' brain structures and functioning and boosted creativity).

619. Rosenbaum, *supra* note 373, at 55–56.

session in a tanning salon to ultraviolet rays.<sup>620</sup>

Our students' concerns exemplify a more general backlash towards mainstreaming and marketing a secularized version of mindfulness that is decoupled from its ethical context and Buddhist sources.<sup>621</sup> There also are and have been for a while various concerns over the choice of control groups, research protocols, sample sizes, and other details in some of the neuroscience studies about mindfulness.<sup>622</sup> Psychiatrist Sally Satel and psychologist Scott O. Lilienfeld critique a "neurocentric" view of the human mind that reduces subjective experiences to biology alone.<sup>623</sup>

Psychologists Miguel Farias and Catherine Wikholm critically examine research about mindfulness and meditation, cautioning that both practices may have unexpected consequences for some people.<sup>624</sup> Risks of practicing mindfulness include triggering untreated traumas from the past and possible ineffectiveness with more acute mental health conditions.<sup>625</sup> There are several potential costs of increased trait mindfulness including problems with avoidance, creativity, critical thinking, groupthink, learning, meaning, and motivation.<sup>626</sup> Several laboratory experimental studies found that mindfulness increased the

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620. *Id.*, at 59 n.6. See also Cynthia R. Harrington et al., *Activation of the Mesolimbic Reward Pathway with Exposure to Ultraviolet Radiation (UVR) vs. Sham UVR in Frequent Tanners: A Pilot Study*, 17 ADDICTION BIOLOGY 680 (2012).

621. See, e.g., Adam Grant, *Can We End the Meditation Madness?*, N.Y. TIMES (Oct. 9, 2015), <http://nyti.ms/1jjiKrY>; Virginia Heffernan, *The Muddled Meaning of 'Mindfulness'*, N.Y. TIMES MAG. (Apr. 19, 2015), at MM13, <http://www.nytimes.com/2015/04/19/magazine/the-muddled-meaning-of-mindfulness.html?smid=pl-share&r=0>; Anna North, *The Mindfulness Backlash*, N.Y. TIMES (June 30, 2014, 5:55 PM), <https://op-talk.blogs.nytimes.com/2014/06/30/the-mindfulness-backlash/?mcubz=2&r=0>; Ron Purser & David Loy, *Beyond McMindfulness*, HUFFINGTON POST (July 1, 2013), [http://www.huffingtonpost.com/ron-purser/beyond-mcmindfulness\\_b\\_3519289.html](http://www.huffingtonpost.com/ron-purser/beyond-mcmindfulness_b_3519289.html); Elissa Strauss, *Being Mindful About Mindfulness*, SLATE, Mar. 2, 2016, [http://www.slate.com/articles/double\\_x/family/2016/03/teaching\\_mindfulness\\_meditation\\_in\\_schools\\_a\\_skeptic\\_s\\_investigation.html](http://www.slate.com/articles/double_x/family/2016/03/teaching_mindfulness_meditation_in_schools_a_skeptic_s_investigation.html); Ruth Whippman, *Actually, Let's Not Be in the Moment*, N.Y. TIMES (Nov. 27, 2016), <https://www.nytimes.com/2016/11/26/opinion/sunday/actually-lets-not-be-in-the-moment.html>.

622. See, e.g., Adam Frank, *Does Mindfulness Mean Anything?*, NPR 13.7 COSMOS & CULTURE BLOG (July 21, 2015), <http://www.npr.org/sections/13.7/2015/07/21/424948567/does-mindfulness-mean-anything>.

623. SALLY SATEL & SCOTT O. LILIENFELD, *BRAINWASHED: THE SEDUCTIVE APPEAL OF MINDLESS NEUROSCIENCE* (2015).

624. MIGUEL FARIAS & CATHERINE WIKHOLM, *THE BUDDHA PILL: CAN MEDITATION CHANGE YOU?* (2015).

625. MARK WILLIAMS & DANNY PENMAN, *MINDFULNESS: AN EIGHT-WEEK PLAN FOR FINDING PEACE IN A FRANTIC WORLD* (2012).

626. David Brendel, *There Are Risks to Mindfulness at Work*, HARV. BUS. REV. Feb. 11, 2015, <https://hbr.org/2015/02/there-are-risks-to-mindfulness-at-work>; Hafenbrack, *supra* note 23, at 119–20, 125–26.

susceptibility to false recollection in the form of memory distortions.<sup>627</sup> Although research finds that mindfulness improves individual decision-making and performance in face-to-face negotiations, two experimental studies found that induced mindfulness detrimentally impacted computer-mediated group decision-making performance and dyads negotiation, though mindfulness increased attention to interpersonal and social relations.<sup>628</sup> One recent experimental study found that a five-minute mindfulness exercise was insufficient for building empathetic responding and even decreased empathy among people with narcissistic traits.<sup>629</sup>

A 1992 study found that after participating in a mindfulness-based meditation retreat, most reported positive benefits, while seventeen reported at least one adverse effect, and two reported suffering profound adverse effects, such as loss of motivation and panic attacks.<sup>630</sup> A 2009 article summarized adverse effects documented in twelve published case studies and reviews of mindfulness meditation.<sup>631</sup> The authors of that article classified these adverse effects into three categories: mental health,<sup>632</sup> such as anxiety, hallucinations, and temporary depersonalization; physical health,<sup>633</sup> such as double vision, pain, and risk of seizures; and spiritual health, in particular, religious delusions.<sup>634</sup> A 2012 article warned there is little research about who may be vulnerable to potential adverse effects of mindfulness meditation resulting from the possible surfacing of long-held body tension, critical or judgmental thoughts, and grief.<sup>635</sup>

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627. Eyal Rosenstreich, *Mindfulness and False-Memories: The Impact of Mindfulness Practice on the DRM Paradigm*, 150 J. PSYCHOL. 58 (2016); Brent M. Wilson et al., *Increased False-Memory Susceptibility After Mindfulness Meditation*, 26 PSYCHOL. SCI. 1567 (2015).

628. Johannes Grapendorf et al., *Mindfulness is Detrimental to Performance in Computer-Mediated Interdependent Tasks*, 74 COMPUTERS HUM. BEHAV. 1 (2017).

629. Anna Ridderinkhof et al., *Does Mindfulness Meditation Increase Empathy? An Experiment*, 16 SELF & IDENTITY 251, 260, 264 (2017).

630. See generally Deane H. Shapiro, Jr., *Adverse Effects of Meditation*, 39 INT'L J. PSYCHOSOMATICS 62 (1992).

631. M. Kathleen B. Lustyk et al., *Mindfulness Meditation Research: Issues of Participant Screening, Safety Procedures, and Researcher Training*, 24 ADVANCES 20, 22–23 tbl. 1 (2009).

632. *Id.* at 21, 23–25.

633. *Id.* at 24–25.

634. *Id.* at 25–26; see also Deane H. Shapiro, Jr., *Examining the Content and Context of Meditation: A Challenge for Psychology in the Areas of Stress Management, Psychotherapy, and Religion/Values*, 34 J. HUMANISTIC PSYCHOL. 101 (1994); Deane H. Shapiro, Jr., *A Preliminary Study of Long-Term Meditators: Goals, Effects, Religious Orientations, Cognitions*, 24 J. TRANSPERSONAL PSYCHOL. 23 (1992).

635. Patricia L. Dobkin et al., *For Whom May Participation in Mindfulness-Based Stress Reduction Program be Contraindicated?* 3 MINDFULNESS 44, 47 (2012).

An exploratory study, in which organizational behavior students attended a lecture about mindful awareness including a brief meditation exercise, found no statistically significant change in students' mindful awareness,<sup>636</sup> as measured by a self-reported questionnaire. This preliminary research suggests that effortful, rigorous, and systematic practice may be required to yield statistically significant changes in mindfulness.<sup>637</sup> Practicing mindfulness is not a panacea for all ailments and ills. Practicing mindfulness is a life-long way of living that some people will find easy and natural, while others will find hard and unnatural.

I only realized about eleven months later in October 2010, during the Mindful Lawyer Conference,<sup>638</sup> that although Dan and I had assigned our students to read neuroscience articles about mindfulness (meditation), we did not actually lead and help our students to personally experience mindfulness in our seminar. I can only wonder now if our students would have reacted differently to proposals for teaching mindfulness if they had even very briefly experienced practicing mindfulness. In every class since then in which I have spoken about mindfulness, I have played at least one brief audio of a guided mindfulness practice to allow students to experience mindfulness for themselves and in real-time. After experiencing even just such a brief taste of mindfulness, many students express interest about and receptiveness towards learning more about mindfulness.

University of Pittsburgh School of Law professor Teresa Kissane Brostoff explains how practicing mindfulness is a form of experiential learning,<sup>639</sup> that when “learned and paired with essential skill-building such as deep listening, reflective and compassionate negotiation, and positive interpersonal professional interactions” satisfies the new ABA requirement for experiential learning.<sup>640</sup> South Texas College of Law Houston professor Katerina P. Lewinbuk and law student Christy Gilbert explain in detail how a law school mindfulness-based skills course

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636. Jo Ann Heydenfeldt et al., *Mind Fitness Training: Emerging Practices & Business Applications: Applied Neuroscience*, 1 INT'L J. HUMAN. & SOC. SCI. 150, 150, 153–54 (2011) (presenting study details).

637. *Id.* at 150, 154. See also Jo Ann Heydenfeldt et al., *Cultivating Mind Fitness Through Mindfulness Training: Applied Neuroscience*, 50 PERFORMANCE IMPROVEMENT J. 21, 21, 24 (2011) (same).

638. The Mindful Lawyer: Practices & Prospects for Law School, Bench, and Bar Conference, University of California, Berkeley, <http://www.mindfullawyerconference.org/> [<https://perma.cc/QCD6-FF72>].

639. See Teresa Kissane Brostoff, *Meditation for Law Students: Mindfulness Practice as Experiential Learning*, 41 L. & PSYCHOL. REV. 159 (2017).

640. *Id.* at 162.

can benefit law students<sup>641</sup> and provide samples of such in-class exercises as client interviews<sup>642</sup> and mindful mediation.<sup>643</sup> Ohio State Moritz College of Law professor Katrina June Lee recommends that law schools link mindfulness training and legal technology education to help law students become more balanced, more compassionate, and more empathetic.<sup>644</sup> University of New Mexico Law School professor Nathalie Martin proposes incorporating mindfulness, professional identity, and emotional intelligence into the first year law school curriculum.<sup>645</sup> Professor Martin has written a wonderful book that is based on such a course and illustrates how mindfulness, resilience, emotional intelligence, empathy, cultural competence, and creativity are “tools to deal with a challenging profession that could be doing so much more to make the world a better place, causing transforming one lawyer at a time, and not from normal to depressed and alcoholic but from citizen and child to STEWARD OF SOCIETY’S potential.”<sup>646</sup>

## V. CONCLUSION

There is now little empirical or experimental research about how practicing mindfulness affects law students, lawyers, or law professors. This Article presented some of the already-substantial and still-mushrooming body of empirical, experimental, and theoretical research about how practicing mindfulness affects people who are not in the legal profession.<sup>647</sup> Practicing mindfulness appears to have numerous benefits and some genuine risks for most people who are not law students, lawyers, or law professors.

Based upon this existing, already-voluminous and yet ever-growing research about how practicing mindfulness affects non-lawyers, this Article makes three recommendations. First, this Article advocates the following research agenda for

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641. Katerina P. Lewinbuk & Christy Gilbert, *Law Student Heal Thy Self: Teaching Mindfulness as a Legal Skill*, 41 J. LEGAL PROF. 37, 37, 41–48 (2017). See also Katerina P. Lewinbuk, *Lawyer Heal Thy Self: Incorporating Mindfulness into Legal Education & Profession*, 40 J. LEGAL PROF. 1, 7–11 (2015).

642. *Id.* at 49–51, 53–63.

643. *Id.* at 51–52, 64–80.

644. Katrina June Lee, *A Call for Law Schools to Link the Curricular Trends of Legal Technology and Mindfulness*, 48 U. TOLEDO L. REV. 55 (2016).

645. Nathalie Martin, *Think Like a (Mindful) Lawyer: Incorporating Mindfulness, Professional Identity, and Emotional Intelligence into the First Year Law Curriculum*, 36 U. ARK. LITTLE ROCK L. REV. 413 (2014).

646. See generally MARTIN, *supra* note 14.

647. See *supra* Part II.

mindfulness practice by law students, lawyers, and law professors. Interdisciplinary teams of law professors, lawyers, psychologists, and neuroscientists can and should conduct waitlist-controlled research studies to measure the short-term and long-term impact of brief and sustained mindfulness training program on law students from a number of law schools that differ in law school culture, demographics, diversity, location, ranking, and size. This research can and should measure pre- and post- levels of such variables as academic performance, adaptability, agility in complexity, allowing, anxiety, attention, bar passage, character development, charitable donation behavior, collaborative problem-solving, cognitive control, compassion, cortisol, curiosity, depression, empathy, decision-making, emotional intelligence, emotional regulation, ethical reasoning, focus, metacognition, motivation, mood, perspective taking, pro-social behavior, resilience, sleep, stress, subjective well-being, substance use, values, and working memory. This research can and should also track cohorts of law students into their legal practice careers. The author of this Article, law professor Debra Austin,<sup>648</sup> legal profession consultants with master's degrees in applied positive psychology, Martha Knudson<sup>649</sup> and Anne Brafford,<sup>650</sup> psychology and neuroscience professor Tor Wager,<sup>651</sup> and other colleagues are applying to fund such research. Similar research can and should also study attorneys and law professors at organizations that differ in culture, demographics, diversity, location, doctrinal areas, and size. Finally, the above proposed research can and should include such technologically-mediated mindfulness extensions as biofeedback,<sup>652</sup> mobile apps,<sup>653</sup> social networking,<sup>654</sup> embodied experiences,<sup>655</sup> and video games.<sup>656</sup>

My own personal experience and other anecdotal evidence from law students, lawyers and law professors suggests that at

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648. STURM COLL. OF LAW, *Debra Austin, Faculty Page*, UNIV. OF DENVER, <http://www.law.du.edu/index.php/profile/debra-austin> [https://perma.cc/PLK3-NEN2].

649. *Martha Knudson*, ASPIRE, <http://aspire.legal/about-us/martha-knudson/> [https://perma.cc/R5KU-ZGE5].

650. *Anne Brafford*, *supra* note 344.

651. COGNITIVE AND AFFECTIVE NEUROSCIENCE LAB, *Tor Wager, Faculty Page*, UNIV. OF COLO., BOULDER, <http://wagerlab.colorado.edu/people> [https://perma.cc/BA6N-WY4Z].

652. RAFAEL A. CALVO & DORIAN PETERS, POSITIVE COMPUTING: TECHNOLOGY FOR WELLBEING AND HUMAN POTENTIAL 189 (2014).

653. *Id.* at 190.

654. *Id.* at 190–91.

655. *Id.* at 191–92.

656. *Id.* at 192–93. See also Robin Pogrebin, *In Walden Video Game, the Challenge is Stillness*, N.Y. TIMES (Feb. 25, 2017), at A1; *Walden, a Game*, USC GAME INNOVATION LAB, <http://waldengame.com/> [https://perma.cc/RT59-PGGF].

least some of the positive impacts of practicing mindfulness found in studies involving people who are not in the legal profession also hold for law students, lawyers, and law professors. If even some of these positive impacts are not found to hold for many law students, lawyers, and law professors, then that would raise a number of additional research questions, including these: Do people who choose to enter the legal profession differ from the population at large in some ways that alter the beneficial impacts of mindfulness? Does legal education change the brain structure and/or the brain function of law students and law professors in some ways that alter or nullify the beneficial impacts of mindfulness, through, for example, the language of law school?<sup>657</sup> Does legal practice change brain structure and brain function in some ways that alter the beneficial impacts of mindfulness, through, for example, the chronic stress of lawyering?<sup>658</sup> Does learning to think like a lawyer change brain structure and brain function in some ways that alter the beneficial impacts of mindfulness, through, for example, law students and lawyers learning to become primarily or exclusively analytical, overly argumentative, excessively critical of self and others, hyper-vigilant, compulsively obsessively detail-oriented, perfectionist, too literal, and unbalanced? Do law students, lawyers, and law professors who are defensive pessimists,<sup>659</sup> utilizing anxiety to motivate themselves, benefit less from on-the-spot mindfulness meditation?<sup>660</sup> Does the well-known<sup>661</sup> and persistent<sup>662</sup> innumeracy among some law students and lawyers possibly alter how mindfulness practice affects lawyers?<sup>663</sup> Former First Lady Michelle Obama, while speaking at the National Science Foundation, described why she chose law to be her career by saying: “I know for me, I’m a lawyer because I was bad at [science and math]. All lawyers in the room, you know it’s

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657. MERTZ, *supra* note 422.

658. AMIRIAM ELWORK, STRESS MANAGEMENT FOR LAWYERS: HOW TO INCREASE PERSONAL & PROFESSIONAL SATISFACTION IN THE LAW (2007); Maeda Riaz, *The Healthy Lawyer: Stress Management*, MS. JD WEBSITE, <http://ms-jd.org/blog/article/healthy-lawyer-stress-management> [<https://perma.cc/K2N8-28VW>].

659. Felder, *supra* note 425.

660. Hafenbrack, *supra* note 23, at 126.

661. See generally Lisa Milot, *Illuminating Innumeracy*, 63 CASE W. L. REV. 769 (2013).

662. See generally Edward K. Cheng, *Fighting Legal Innumeracy*, 17 GREEN BAG 2D 271 (2014).

663. Arden Rowell & Jessica Bregant, *Numeracy and Legal Decision Making*, 46 ARIZ. ST. L.J. 191 (2014) (exploring how numeracy can affect students’ susceptibility to cognitive bias and the correlation between numeracy and legal decision-making).

true. We can't add and subtract, so we argue."<sup>664</sup>

If there are differences in the benefits and risks of mindfulness between those in the legal profession and those who are not, do these differences vary by such demographic variables as birth order, educational background, ethnicity, family size, gender, income, location, race, or sexual orientation and if so, how? Many lawyers and non-lawyers believe in a type of lawyer exceptionalism in the sense that lawyers think in special ways that differ from how non-lawyers think. Some law professors firmly believe, without any supporting empirical basis, that the only pedagogically effective way to teach all doctrinal courses in law school is the Socratic dialogue method of instruction. If and when pressed as to why they have this persistent belief, some law professors will respond that the practice of law entails a special kind of analytical, deliberative, dispassionate, and logical thinking most non-lawyers are not equipped to do because of tendencies non-lawyers have to engage in emotional, fallacious, illogical, and sentimental reasoning.

Indeed, many law professors often repeat a common refrain stating the purpose of law school is to teach law students how to think like lawyers. Interestingly, medical school professors typically do not say the purpose of medical school is to teach medical students how to think like physicians. Similarly, business school professors typically do not say the purpose of business school is to teach business students how to think like businesspeople. Likewise, nursing school professors usually do not say the purpose of nursing school is to teach nursing students how to think like nurses. Unsurprisingly, veterinary school professors typically do not say the purpose of veterinary school is to teach veterinary students how to think like veterinarians. In fact, there is not another professional school whose professors would typically say the purpose of their school is to teach their students how to think like those in their profession. Instead, most professional school professors would most likely say the purpose of their professional school is to teach their students to be or become professionals. In other professions, there is teaching and research about non-cognitive aspects of being a successful professional. For example, there is a time-honored tradition about physicians developing calm, compassionate, empathetic, humane, and supportive "bedside manner" that might be described better as interpersonal dynamics.<sup>665</sup> So in addition to helping law students

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664. Michelle Obama, Remarks by the First Lady at the National Science Foundation Family-Friendly Policy Rollout (Sept. 26, 2011).

665. See, e.g., Barry D. Silverman, *Physician Behavior and Bedside Manners: The*



learn to think like a lawyer, law professors also should help law students learn to feel like a lawyer. The negative and positive feelings that lawyers have self-reported in surveys encompass a full spectrum of emotions, including anger, anxiety, boredom, exhilaration, fear, hate, love, relief, and terror.<sup>666</sup>

Does the belief summarized by the mantra that law professors and law schools teach law students “how to think like a lawyer” explain why so many law professors, law students, and lawyers view the practice of law as predominantly, if not exclusively, a cognitive profession? Cognitive competence is certainly vital in legal practice and many other areas, such as executive-branch decision-making.<sup>667</sup> Yet, teaching law students only “how to think like a lawyer” and excluding discussing “how to feel like a lawyer” risks crowding out law students developing active listening, compassion, effective communication, emotional intelligence, empathy, humanity, and humility. The current sad landscape of law practice has many clients fearing, and some even hating, their lawyers and the whole legal system. Many non-lawyers find the American legal system intimidating and lawyers, including their own, to be arrogant, condescending, egotistical, impersonal, self-important, and uncaring jerks. Practicing mindfulness helps lawyers to mitigate and reduce these disconcerting, offensive, and undesirable occupational tendencies and traits. The practice of mindfulness can also help lawyers realize the paralyzing confusion and overpowering panic that many non-lawyers feel towards the American legal system. Most Americans only find themselves parties in our legal system if they caused and/or suffered harm, injury, loss, and/or legal wrong. Those who have chosen voluntarily to avail themselves of the American legal system often feel a loss of control and the odds to be stacked against them in terms of their inexperience and unfamiliarity with a bureaucratic, impersonal, and scary legal system. Others are often involuntarily dragged into our bewildering, byzantine, and complicated legal system.

People who sue or are being sued often feel anger, fear, frustration, humiliation, and loss of control during and from the litigation process or the underlying situation that precipitated a

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*Influence of William Osler and The Johns Hopkins School of Medicine*, 25 PROC. BAYLOR UNIV. MED. CENTER 58 (2012).

666. See, e.g., Deborah J. Cantrell, *Love, Anger, and Lawyering*, 19 RICHMOND J.L. & PUB. INT. 283 (2016); Deborah Cantrell, *What's Love Got to Do With It?: Contemporary Lessons on Lawyerly Advocacy From the Preacher Martin Luther King, Jr.*, 22 ST. THOMAS L. REV. 296 (2010).

667. See generally Anna Bradley Spain, *Cognitive Competence in Executive-Branch Decision Making*, 49 CONN. L. REV. 713 (2017).

lawsuit.<sup>668</sup> Parties in lawsuits often feel their lawyers are more interested in litigation strategy than how bewildering, frightening, and stressful being a party in a lawsuit can be. Businesspeople who hire transactional attorneys often feel their lawyers say no, way too often, about apparently profitable business decisions and are also too cautious about potentially rewarding opportunities when those lawyers play the roles of gatekeepers and managers of legal, reputational, and financial risks. Non-lawyers find legalese to be an impenetrably dense foreign language. Many non-lawyers view the law and its many legal procedures, rules, and regulations as constricting, burdensome, and stifling technicalities. Lawyers who practice mindfulness can become more aware of how their clients feel in-the-moment and how they as both lawyers and humans can help their clients more successfully navigate the inherent complexities and uncertainties of litigation<sup>669</sup> and negotiations.<sup>670</sup> To the uninitiated, legal process appears arcane and mysterious.

Lawyers are often advisors, counselors, decision-recommenders, and problem-solvers for their clients.<sup>671</sup> Many lawyers lament about how law used to be a noble, respected profession and now is just another profit-driven business. The billable hour model of law firm compensation creates perverse incentives for lawyers to unethically drag out and pad legal billing. Empirical studies find putting a price on time can instigate impatience during unpaid time and in so doing impair people's ability to enjoy happiness from pleasurable experiences.<sup>672</sup> Related research finds that how people choose to spend time impacts their happiness.<sup>673</sup> For economic reasons, modern law firms choose to have as their clients, businesses and wealthy individuals. Derek Bok, a former Harvard University President and past Harvard law school dean famously commented that "[t]here is far too much law for those

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668. Peter H. Huang & Ho-Mou Wu, *Emotional Responses in Litigation*, 12 INT'L REV. L. & ECON. 31 (1992).

669. MARJORIE CORMAN AARON, CLIENT SCIENCE: ADVICE FOR LAWYERS ON COUNSELING CLIENTS THROUGH BAD NEWS AND OTHER LEGAL REALITIES (2012).

670. ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE (2006); SHIRLI KOPELMAN, NEGOTIATING GENUINELY: BEING YOURSELF IN BUSINESS (2014).

671. See generally PAUL BREST & LINDA HAMILTON, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS (2010).

672. Sanford E. DeVoe & Julian House, *Time, Money, and Happiness: How Does Putting a Price on Time Affect Our Ability to Smell the Roses*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 466 (2012).

673. Jennifer L. Aaker, Melanie Rudd, & Cassie Mogilner, *If Money Does not Make You Happy, Consider Time*, 21 J. CONS. PSYCHOL. 126 (2011).

who can afford it and far too little for those who cannot.”<sup>674</sup> There is an excess supply of lawyers for corporate America and no shortage of lawyers for those who can afford expensive legal representation. It should not be surprising that markets for legal services work well for those with money and not so much for those without money. Many Americans feel that laws, firms, and corporate cultures more generally, privilege accounting profits, economic efficiency, employee productivity, stock market value, and other financial measures over fairness, equality, equity, justice, people, and human dignity. Yet, dignity is crucial to resolving conflicts.<sup>675</sup> Practicing mindfulness can help lawyers become more aware of the crucial role that dignity plays in people’s lives and their interpersonal conflicts.

People hire lawyers to do many things that at least appear to require legal knowledge and expertise. Practicing mindfulness can help lawyers become more aware of how to succeed in the various challenging, demanding, and stressful roles that lawyers take on to serve their clients. My colleague, Violeta Chapin,<sup>676</sup> describes at least these three legal and extra-legal roles that many lawyers often take on at some point during their careers: social worker, movement builder, and warrior. Mindfulness can help lawyers appreciate when and which role to play and how to do so effectively for their clients. My colleague, Christopher McKee,<sup>677</sup> points out how mindfulness can help lawyers to sustain their passion and practice when tackling often challenging roles in the face of difficult obstacles and possible burnout.

Second, this Article advocates that law students, lawyers, and law professors try practicing mindfulness to learn if doing so improves their legal (and personal) decision-making, ethics, and leadership. Ideally, parents and societies will one day teach children in daycare and elementary schools about mindfulness<sup>678</sup> and then continue teaching adolescents in middle and high schools

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674. Derek Bok, *A Flawed System*, HARVARD MAGAZINE, May-June 1983, at 38, reprinted in 55 N.Y. ST. B. J., Oct. 1983, at 8.

675. See generally DONNA HICKS, DIGNITY: ITS ESSENTIAL ROLE IN RESOLVING CONFLICTS (2013).

676. COLO. LAW, Violeta Chapin, *Faculty Page*, UNIV. OF COLO. BOULDER, <http://lawweb.colorado.edu/profiles/profile.jsp?id=373> [<https://perma.cc/CBE6-P6Y3>].

677. COLO. LAW, Christopher McKee, *Faculty Page*, UNIV. OF COLO. BOULDER, <http://lawweb.colorado.edu/profiles/profile.jsp?id=378> [<https://perma.cc/JTV5-CBKE>].

678. For example, MindUP has already started teaching children the importance of mindfulness. GOLDIE HAWN, 10 MINDFUL MINUTES: GIVING OUR CHILDREN—AND OURSELVES—THE SOCIAL AND EMOTIONAL SKILLS TO REDUCE STRESS AND ANXIETY FOR HEALTHIER, HAPPY LIVES (2012); THE HAWN FOUND.: MindUP™, <http://thehawnfoundation.org/mindup/>.

more in-depth about mindfulness.<sup>679</sup> Until that day and possibly even after then, students in colleges, professional schools, and continuing professional education programs can and should try learning about how to apply mindfulness in their particular areas of specialization and professional decision-making domains.<sup>680</sup>

Third, this Article advocates that law schools, law firms, local, state, and national bar associations, and other legal organizations try offering voluntary mindfulness training and supporting mindfulness practices to see if doing so improves legal decision-making, ethics, and leadership.<sup>681</sup> Practicing mindfulness offers lawyers an empirically-validated, potentially sustainable process to improve their decision-making,<sup>682</sup> ethical behavior,<sup>683</sup> and leadership.<sup>684</sup> Doing so can improve the lives of lawyers, their clients, and the public. Because many lawyers also serve as the gatekeepers to public policy in America and other countries, practicing mindfulness by lawyers may convince those lawyers to also advocate and promulgate public policies that encourage more practice of mindfulness in America<sup>685</sup> and other countries.

Mindfulness is an experience that anybody can have, decide for themselves if mindfulness is right for them, and if so, when, where, and how to practice mindfulness. This Article simply presents a large body of empirical and experimental evidence concerning the many benefits and some risks of practicing mindfulness, and raises the question of whether these findings apply to law students, law professors, and lawyers. This Article also considered multiple frameworks, theories, and models of how and why mindfulness has the benefits or promises and the risks or perils that it does.

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679. For an example of how to teach adolescents about mindfulness see *Room to Breathe*, MINDFUL SCH.'S, <http://www.mindfulschools.org/resources/room-to-breathe/> [<https://perma.cc/AB48-W627>]; see also Amy Saltzman, *Mindfulness: A Teacher's Guide*, The Buddha, PBS, <http://www.pbs.org/thebuddha/teachers-guide/>.

680. See, e.g., Deborah J. Cantrell & Kenneth Sharpe, *Practicing Practical Wisdom*, 67 MERCER L. REV. 331, 331 (2016) (providing a set of processes and capacities to develop practical wisdom including mindfulness).

681. See, e.g., Debra S. Austin, *Positive Legal Education*, 77 MD. L. REV. (forthcoming) (suggesting that mindfulness can help with heal lawyers and law students who suffer from depression and anxiety associated with the practice and study of law).

682. Peter H. Huang, *Empowering People to Choose Wisely by Democratizing Mindfulness and Thinking Tools* (Nov. 1, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2639953](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2639953).

683. See generally Huang, *supra* note 354.

684. MARIA GONZALEZ, MINDFUL LEADERSHIP: THE 9 WAYS TO SELF-AWARENESS, TRANSFORMING YOURSELF, AND INSPIRING OTHERS (2012).

685. See, e.g., CONTEMPLATION NATION: HOW ANCIENT PRACTICES ARE CHANGING THE WAY WE LIVE (Mirabai Bush ed., 2011); TIM RYAN, A MINDFUL NATION: HOW A SIMPLE PRACTICE CAN HELP US REDUCE STRESS, IMPROVE PERFORMANCE, AND RECAPTURE THE AMERICAN SPIRIT (2013).