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Citation Information

Peter H. Huang, *How Improving Decision-Making and Mindfulness Can Improve Legal Ethics and Professionalism*, 21 J.L. Bus. & Ethics 35 (2015), available at

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HOW IMPROVING DECISION-MAKING AND MINDFULNESS CAN IMPROVE LEGAL ETHICS AND PROFESSIONALISM*

*Peter H. Huang***

ABSTRACT

*Lawyers who behave unethically and unprofessionally do so for various reasons, ranging from intention to carelessness. Lawyer misconduct can also result from decision-making flaws. Psychologist Chip Heath and his brother Dan Heath, in their best-selling book, *Decisive: How to Make Better Decisions in Life and Work*, suggest a process to improve decision-making. They introduce the acronym WRAP as the mnemonic for these decision-making heuristics: (1) Widen your options; (2) Reality-test your assumptions; (3) Attain distance before deciding; and (4) Prepare to be wrong. The WRAP process mitigates these cognitive biases: (1) narrow framing of a decision problem; (2) confirmation bias of seeking only supportive information; (3) temptation of short-term emotions; and (4) overconfidence in predicting the future.*

This Article applies the WRAP process to analyze how lawyers can improve their ethical and professional decision-making. This Article thus proposes teaching law students about improving their ethical and professional decision-making in general and the

* The inspiration for this Article was the presentation titled *Adventures in Decision Coaching* by Chip Heath as the Distinguished Lecturer in the 2013-2014 Decision Processes Colloquia, Wharton Marketing Department (April 21, 2014). Thanks for helpful comments, discussions, and suggestions to Rebecca Huss, Scott Moss, members of the audience of the Works-in-Progress Colloquium at the University of Colorado Law School, students in Legal Ethics and Professionalism: Business Law Issues at the University of Colorado Law School, students during 1L orientation week at Syracuse Law School, and students in Positive Conflict Resolution and Negotiation at IE School of Social and Behavioral Sciences, Executive Master in Positive Leadership and Strategy program.

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WRAP process as a particular method of doing so. This Article also offers primers on mindfulness and real-options theory before applying real-options theory to develop eight properties of the values of two complementary real options that mindfulness provides: namely, (1) the real option to engage in ethical or professional behavior, and (2) the real option to engage in unethical or unprofessional behavior.

This Article is novel in being the first to apply real-options theory from modern financial economics to analyze the value of mindfulness in legal ethical and professional decision-making. Finally, this Article analyzes some interrelationships among the WRAP process, mindfulness, and positive psychology. By explaining how mindfulness and the WRAP process are related, this Article also connects mindfulness with behavioral economics.

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INTRODUCTION

Why do some lawyers behave unethically or unprofessionally? This is ultimately an empirical question with many possible answers.¹ Potential sources of lawyer misdeeds include a conscious and deliberate desire to be villainous,² incremental misconduct,³ and wrongful obedience.⁴ The neoclassical law-and-economics approach to deterring lawyer misconduct is to increase the probability of being caught, the magnitude of the punishment upon being caught, or both. Such an approach assumes that lawyers engage in a cost-benefit analysis in deciding whether to behave unethically or unprofessionally. Another approach to discouraging unethical or unprofessional behavior by lawyers is to better educate lawyers about ethical rules. This approach assumes that ethical misconduct is due to lawyers being ignorant of the relevant ethical rules of professional conduct.

A large body of empirical evidence suggests that much of lawyer misconduct happens “unconsciously and unintentionally, even when the attorney has basic knowledge of the relevant ethical rules.”⁵ This Article proposes ways to prevent lawyer misconduct that is unintentional by improving the decision-making process that lawyers employ in ethical and professional settings. This Article also explains the value of being more mindful in legal practice to avoid lawyer misconduct that is unconscious. Underlying causes of both unintentional and mindless lawyer behavior include the staggeringly high caseloads of some lawyers and other structural aspects of lawyering that individual lawyers may not be able to easily change. This Article

1. Jennifer K. Robbenolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1111 (2013) (providing some possible answers). See also James Moliterno & John Keyser, *Why Lawyers Do What They Do (When Behaving Ethically)*, 4 ST. MARY’S J. LEGAL MALPRAC. & ETHICS 2, 10-21 (2014) (presenting the results of a survey of members of the bars of Florida and Virginia regarding a complementary question of why some lawyers behave ethically).

2. See, e.g., *DESPICABLE ME* (Universal Pictures 2010) (presenting the animated story of a super-villain who desires to shrink and steal the moon).

3. See generally Patrick J. Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 916-17 (discussing how lawyers become unethical “a little bit at a time. . . by cutting a corner here, by stretching the truth a bit there”); Manuel A. Utset, *A Model of Time-Inconsistent Misconduct: The Case of Lawyer Misconduct*, 74 FORDHAM L. REV. 1319, 1319 (drawing on economic models of time-inconsistent preferences to explain such lawyer misconduct as nibbling opportunism).

4. Catherine Gage O’Grady, *Wrongful Obedience and the Professional Practice of Law*, 19 J.L. BUS. & ETHICS 9, 9 (2013) [hereinafter *Wrongful Obedience*] (drawing on social psychological research about obedience to authority and conformity to perceived norms to explain why new lawyers may engage in unethical and unprofessional behavior); Catherine Gage O’Grady, *Behavioral Legal Ethics, Decision-Making, and the New Attorney’s Unique Professional Perspective*, 15 U.N.L.V. L. REV. (forthcoming 2015) [hereinafter *Behavioral Legal Ethics*] (discussing how new lawyers are more likely than experienced attorneys to engage in wrongful obedience when directed by superiors to do something ethically questionable); Andrew M. Pearlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 451 (2007) (drawing on social psychology literature about conformity and obedience to explain why subordinate lawyers comply with the illegal or unethical directives of their deep-pocketed clients or senior partners).

5. Robbenolt & Sternlight, *supra* note 1, at 1156.

focuses on two things that individual lawyers can change: namely, improving their decision-making and becoming more mindful.

A large body of empirical and experimental research by (behavioral) economists and psychologists finds that in making decisions humans exhibit predictable cognitive biases and systematically use heuristics.⁶ The new field of behavioral ethics applies this research to explain how unethical behavior can result from such psychological factors as how people think and situational factors.⁷ The new field of behavioral legal ethics applies this research to explain how unethical legal behavior can result from these same factors.⁸ Just as teaching about behavioral ethics can help students to behave more ethically,⁹ teaching about behavioral legal ethics can help law students to behave more ethically. Two famous experimental studies demonstrate the power of contextual and situational factors to induce unethical or unprofessional behavior despite people's best intentions and regardless of their individual personalities. Psychologist Stanley Milgram's research demonstrated that some individuals are surprisingly willing to obey authority about administering electric shocks to other people,¹⁰ and psychologist Philip G. Zimbardo's research demonstrated how surprisingly easy it was for some people who played the role of prison guards to mistreat other people who played the role of prisoners.¹¹

How (well) people think affects how (well) people make decisions and how (well) people make decisions affects the outcomes and consequences of those decisions. Thinking includes both System 1: fast thinking that is associative, automatic, effortless, intuitive, and unconscious; as well as System 2: slow thinking that is analytic, cognitively demanding, deliberate, conscious, and effortful.¹² A memorable scene from the famous movie *Indiana Jones and the Last Crusade* vividly depicts the all-too-deadly consequence suffered by a villain who

6. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 109-265 (2011) (surveying this research).

7. See, e.g., Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 ANN. REV. L. & SOC. SCI. 85, 85 (2012) (surveying the field of behavioral ethics).

8. Robbenolt & Sternlight, *supra* note 1, at 1107-82 (providing a comprehensive survey of how psychological research informs legal ethics); see also *Behavioral Legal Ethics*, *supra* note 4, (explaining how behavioral ethics analysis of new attorneys differs from behavioral ethics analysis of experienced lawyers); Andrew M. Pearlman, *A Behavioral Theory of Legal Ethics*, 90 INDIANA L.J. (forthcoming 2014) (drawing on social psychology research to conclude that ambiguity and situational factors, particularly a lawyer having a partisan role, can adversely affect professional objectivity).

9. See, e.g., Robert Prentice, *Teaching Behavioral Ethics*, 31 J. LEGAL STUD. EDUC. 325, 357-65 (2014) (providing details).

10. See generally STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (2009) (describing details about these experiments and variations upon them).

11. See generally PHILIP G. ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL (2008) (discussing the similarities between his prison experiment and the Abu Ghraib abuses).

12. KAHNEMAN, *supra* note 6, at 13-14, 20-24 (analyzing the two systems of thinking); AsapSCIENCE, *Brian Tricks - This Is How Your Brian Works*, YOUTUBE (Jan. 31, 2013), <https://www.youtube.com/watch?v=JiTz2i4VHFw> (illustrating engagingly the two systems of thinking).

exemplified how thinking poorly can lead to choosing poorly.¹³ Many of the tragedies in fictional and real-life books, films, and television programs are the consequence of poor thinking and poor decision-making.

Psychologist Chip Heath and his brother Dan Heath propose in their recent best-selling book¹⁴ a process to help improve people's thinking and decision-making. They introduce the acronym WRAP as the mnemonic for (1) Widen your options, (2) Reality-test your assumptions, (3) Attain distance before deciding, and (4) Prepare to be wrong.¹⁵ Each of these steps counteracts a common cognitive bias¹⁶ namely: (1) narrow framing of a decision; (2) confirmation bias of collecting skewed and supportive information; (3) temptation from short-term emotions; and (4) overconfidence about the ability to predict how the future will unfold. The Heath brothers demonstrate the applicability and power of their WRAP process by applying the WRAP process to numerous business and personal decisions, including litigation,¹⁷ mergers,¹⁸ optimal pricing,¹⁹ romantic break ups,²⁰ and relocation.²¹ Lawyers can apply each of the prescriptions that form the steps of the WRAP process to help them generally improve how they make decisions in their practice.²² This Article analyzes how lawyers can apply each of the steps in the WRAP procedure to help them particularly improve their ethical and professional decision-making.

Another source of lawyer misconduct is mindlessness. Experimental research suggests that the practice of mindfulness can improve ethical decision-making. For example, one study found that people who were high in mindfulness reported a higher likelihood to act ethically, were more likely to value the upholding of ethical standards, were more likely to use a principled approach to ethical decision-making, and cheated less than people who were low in mindfulness.²³ Another experimental study found that ethical decision-making and moral reasoning improved two

13. See, e.g., Internationalcatlady, *Indiana Jones and the Last Crusade: Choose Wisely, Chose Poorly*, YouTube (Mar. 23, 2013), <https://www.youtube.com/watch?v=0H3rdffl28s0> (displaying edited video-clip from *INDIANA JONES AND THE LAST CRUSADE* (Paramount Pictures 1989)).

14. CHIP HEATH & DAN HEATH, *DECISIVE: HOW TO MAKE BETTER CHOICES IN LIFE AND WORK* 23-24 (2013).

15. CHIP HEATH & DAN HEATH, *DECISIVE: THE WRAP PROCESS* (2013), http://heathbrothers.com/ot/wp-content/uploads/2013/03/The_WRAP_Process_one_pager.pdf.

16. HEATH & HEATH, *supra* note 14, at 18.

17. *Id.* at 257-60.

18. *Id.* at 35-36, 279-80.

19. *Id.* at 264-66.

20. *Id.* at 32-33, 279.

21. *Id.* at 261-63.

22. Mark Lewis, Esq., *Make Better Decisions: "WRAP" Your Mind Around the Problem* (Feb. 9, 2013), LAWYERTHINKS.COM, <http://lawyerthinks.com/2013/02/09/make-better-decisions-wrap-your-mind-around-the-problem/>.

23. Nicole E. Ruedy & Maurice E. Schweitzer, *In the Moment: The Effect of Mindfulness on Ethical Decision Making*, 95 J. BUS. ETHICS 73, 78, 80-81 (2011).

months after training in mindfulness-based stress reduction.²⁴ Such experimental studies suggest integrating mindfulness into the teaching of legal ethics.²⁵

A central and novel insight of this Article is that mindfulness is able to facilitate ethical and professional behavior because the practice of mindfulness provides its practitioner with what financial economists call “real options.”²⁶ Real options are analogous to such well-known financial options as stock options. The adjective “real” in “real options” refers to real as opposed to financial assets over which the real options provide their owner flexibility. In the context of ethical or professional behavior, mindfulness creates real options over such real assets as a lawyer’s reputation, a client’s goodwill, and the market value of a lawyer’s business. This Article will focus on a specific pair of complementary real options that mindfulness provides in the context of ethical or professional behavior, namely the real option to engage in ethical or professional behavior and the real option to engage in unethical or unprofessional behavior.

Having incomplete and/or inaccurate information about facts and probabilities is a precondition for the persistence of cognitive biases. Two ineffective and unrealistic prescriptions for how to deal with cognitive biases are to (1) teach people about cognitive biases and (2) tell people to acquire more and/or better information. This Article analyses how to teach law students and lawyers decision-making skills and mindfulness practices that help them process their limited information in ways that are less prone to cognitive biases even while holding fixed people’s (a) susceptibility to cognitive biases and (b) quantity and quality of information. It just so happens that WRAP and mindfulness are also likely to reduce susceptibility to cognitive biases and improve the quantity and quality of information that people have to make decisions.

The rest of this Article is organized as follows. Part I provides a nutshell synopsis of the WRAP process and explains how you can utilize the WRAP process to systematically improve your decision-making in general. Part II details how you can apply the WRAP procedure to improve your decision-making about legal ethics

24. Shauna L. Shapiro, Hooria Jazaieri, & Philippe R. Goldin, *Mindfulness-Based Stress Reduction Effects on Moral Reasoning and Decision Making*, 7 J. POS. PSYCHOL. 504, 509 (2012) (presenting study details).

25. Jan. L. Jacobowitz & Scott Rogers, *Mindful Ethics – A Pedagogical and Practical Approach to Teaching Legal Ethics, Developing Professional Identity, and Encouraging Civility*, 4 ST. MARY’S J. LEGAL MALPRAC. & ETHICS 198, 228-40 (2014) (presenting details about such a course); Jan L. Jacobowitz, *Cultivating Professional Identity & Creating Community: A Tale of Two Innovations*, 36 U. ARK. LITTLE ROCK L. REV. 319, 326-29, 333-34 (2014) (describing the course and student feedback); Scott L. Rogers, *The Role of Mindfulness in the Ongoing Evolution of Legal Education*, 36 U. ARK. LITTLE ROCK L. REV. 387, 403-05 (2014) (same); SCOTT ROGERS & JAN L. JACOBOWITZ, *MINDFULNESS AND PROFESSIONAL RESPONSIBILITY: A GUIDEBOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM* 29-44 (2012) (describing the course and student feedback in more detail).

26. 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) (discussing examples of real options); Peter H. Huang, *Lawsuit Abandonment Options in Possibly Frivolous Litigation Games*, 23 REV. LITIG. 47, 87-99 (2004) (providing an introduction to real options); Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1273-74 (2006) (describing real-options approach to litigation).

and professionalism in particular. Part III offers primers about mindfulness and real-options theory before applying real-options theory to analyze the value of the real options that mindfulness provides in improving lawyer decision-making about legal ethics and professionalism. Part III also considers some of the interrelationships among the WRAP process, mindfulness, and positive psychology.

I. WHAT IS THE WRAP DECISION-MAKING PROCESS?

In a perfect-decision world, people would make perfect decisions. Ours is not a perfect-decision world. Many people fail to have a systematic process for making decisions or use a process that is likely to result in decisions that they later will regret or lament because they come to realize that they could have made better (as defined by them) decisions with a better decision-making process. The rationale for having a decision-making process is that knowing or even understanding one's cognitive biases is not enough to overcome those biases.²⁷ Debiasing people is difficult²⁸ and requires a considerable investment of effort.²⁹

The WRAP process to make decisions is by its very design intended to counteract four decision traps that people typically encounter and often fall prey to.³⁰ All of these (and many other) cognitive biases result from a principle that people tend to use and that economics Nobel Laureate³¹ and psychologist Daniel Kahneman described as What You See Is All There Is (Kahneman introduced the abbreviation WYSIATI for the above phrase).³² Kahneman explained how the WYSIATI principle systematically results in narrow framing,³³ confirmation bias,³⁴ temptation from short-term emotions,³⁵ and overconfidence.³⁶ The WRAP process offers a set of systematic ways to redirect one's attention from the things that one tends to automatically focus on to those one may otherwise miss. Individuals tend to automatically focus on obvious options, supportive information, visceral emotions, and their own predictions of the future.³⁷ Individuals may otherwise miss nonobvious options, disconfirming information that they may resist, longer-term

27. HEATH & HEATH, *supra* note 14, at 7. See generally Baruch Fischhoff, *Debiasing, in* JUDGMENT UNDER HEURISTICS AND BIASES 422 (Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1982).

28. HEATH & HEATH, *supra* note 14, at 22.

29. KAHNEMAN, *supra* note 6, at 417.

30. HEATH & HEATH, *supra* note 14, at 18.

31. *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2002*, NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2002/ (last visited July 12, 2014).

32. KAHNEMAN, *supra* note 6, at 86.

33. *Id.* at 87.

34. *Id.* at 80-84.

35. *Id.* at 402-06.

36. *Id.* at 87-90, 199-201.

37. *Id.* at 24.

considerations, preparations for scenarios that they may not predict, and the awareness of the necessity to make or revisit a decision they have already made.³⁸

A number of scholarly disciplines have proposed answers to the question of how to help people avoid a cognitive bias. A classic answer from psychology is to teach people about cognitive biases, though another classic answer from psychology is that debiasing is difficult and demands a lot of cognitive effort.³⁹ Economics's classic answer is to realign or repair people's motivations by getting their incentives right. Decision technology's classic answer is to create a mathematically complicated, statistically sophisticated, and technologically advanced decision-support system. A classic answer from a skeptic is that cognitive biases are overblown or cannot be fixed.

The answer that the WRAP process offers is a set of repairs to what is often broken or biased in many people's decision-making. The WRAP process is eye-opening for psychologists because it does not require training people about cognitive biases. It is eye-opening for economists because it does not require any change in the incentives that people face. The WRAP process is eye-opening for decision technologists because it is a low-technology process. It is eye-opening for skeptics because cognitive biases are real problems that requiring fixing and the WRAP process is often able to fix a number of particular cognitive biases.

A successful answer to the question of how to repair a cognitive bias has to not only improve people's decision-making (the decision-repair problem); it must also cause decision-makers to want to and actually utilize that answer to improve their decisions (the adoption or diffusion problem).⁴⁰ Effective cognitive repairs have the desirable characteristics of being simple, concrete, and social.⁴¹ The following table provides examples of cognitive repairs that are complex versus simple, abstract or general versus concrete or specific, and individual versus social. As will become clear later, all of the examples of simple, concrete, and social cognitive repairs illustrate the WRAP process in action.

38. *Id.* at 26.

39. *Id.* at 7, 22; Fischhoff, *supra* note 27; KAHNEMAN, *supra* note 6, at 417.

40. Chip Heath, Richard P. Larrick, & Joshua Klayman, *Cognitive Repairs: How Organizational Practices Can Compensate for Individual Shortcomings*, 20 RES. ORG. BEHAV. 1, 23-24 (1998) (discussing these two aspects of an effective cognitive repair).

41. *Id.* at 24-30 (providing a taxonomy of cognitive repairs and their associated tradeoffs along six dimensions).

TYPE OF COGNITIVE REPAIR	EXAMPLES
Complex	(1) Teaching people about cognitive biases; (2) Teaching people how to perform (statistical) decision analysis of a problem.
Simple	(1) Having people ask themselves how they would feel about a decision in 10 minutes, 10 months, and 10 years; ⁴² (2) Having people ask themselves what they would recommend that a friend to do in their situation. ⁴³
Abstract or General	(1) Admonishing people to beware of being overconfident in their ability to predict the future; (2) Remembering base rates.
Concrete or Specific	(1) Adding buffer times to estimated project completion times and building safety factors into engineering designs; ⁴⁴ (2) The adage of Wall Street traders' to not confuse brains with a bull market. ⁴⁵

42. HEATH & HEATH, *supra* note 14, at 160.

43. *Id.* at 172, 174.

44. *Id.* at 208-09; Heath, Larrick, & Klayman, *supra* note 40, at 4, 21.

45. Heath, Larrick, & Klayman, *supra* note 40, at 6.

Individual	Advising individuals to ask disconfirming questions.
Social	(1) The devil's advocate's role in the Catholic Church's canonization decision process to build a case against sainthood; ⁴⁶ (2) The Pentagon's "murder boards" that consist of experienced officers who are tasked to kill off ill-conceived missions. ⁴⁷

A. *Widen Your Options*

A common decision-making villain is the narrow framing of a decision problem.⁴⁸ A study of how 105 teenage girls in Eugene, Oregon and Pittsburgh, Pennsylvania made actual decisions found a prevalence of "whether or not" type of decisions, in which the decision is whether or not to do just a single option, such as whether or not to break up and whether or not to smoke cigarettes.⁴⁹ A study of 168 decisions by businesses, non-profit organizations, and government agencies found that 71% considered just a single alternative.⁵⁰ This study also found that the failure rate of "whether or not" decisions was 52%, compared to 32% of decisions with at least two alternatives.⁵¹ "Whether or not" type of decisions are problematic because they are likely to lead decision-makers to become vested in just one alternative and not even consider the possibility of other and possibly better alternatives.⁵² Anytime you find yourself facing a "whether or not" type of decision, a bright red flashing warning light should go off before your eyes that you are likely engaged in too narrow a framing of the decision that you are facing.

One way to widen your options is to consider the opportunity cost of a particular alternative: the value of the next best alternative that you are giving up by choosing that particular alternative.⁵³ This consideration focuses your attention on foregone alternatives. People have a tendency to focus only on out-of-pocket costs

46. *Id.* at 29; HEATH & HEATH, *supra* note 14, at 96, 286.

47. HEATH & HEATH, *supra* note 14, at 96; Heath, Larrick, & Klayman, *supra* note 40, at 22, 29.

48. HEATH & HEATH, *supra* note 14, at 18; Richard P. Larrick, *Broaden the Decision Frame to Make Effective Decisions*, in HANDBOOK OF PRINCIPLES OF ORGANIZATIONAL BEHAVIOR 461, 461-65 (Edwin A. Locke ed., 2d ed. 2009).

49. Baruch Fischhoff, *The Real World: What Good Is It?* 65 ORG. BEHAV. & HUMAN DECISION PROCESSES 232, 234, 235 tbl.1 (1996).

50. Paul C. Nutt, *The Identification of Solution Ideas During Organizational Decision Making*, 39 MGMT. SCI. 1071, 1079 tbl.4 (1993).

51. *Id.* (comparing sustained adoption rates).

52. HEATH & HEATH, *supra* note 14, at 37; *see also* Paul C. Nutt, *Surprising but True: Half the Decisions in Organizations Fail*, 13 ACAD. MGMT. EXECUTIVE 75, 78 (1999).

53. HEATH & HEATH, *supra* note 14, at 42.

and historical costs as opposed to opportunity costs because out-of-pocket costs and historical costs are typically more salient than opportunity costs. The greater salience of out-of-pocket costs and historical costs results from having to pay those costs to some other party. The lower salience of opportunity costs results from the fact that people usually do not obviously pay opportunity costs to another party. Instead people incur opportunity costs from not engaging in the next best-foregone alternative that they gave up.

Another way to widen your options is to engage in the Vanishing Options Test, in which you ask what else you can do if all of the current options that you are considering simply vanish.⁵⁴ This test forces you to move your attention or widen your mental spotlight to what other options you could face by taking away the options that you have already considered. This test acknowledges the tendency to apply the WYSIATI principle when you consider just a single alternative by making you see other alternatives that are different from the sole alternative that you saw initially. It is easier to see other alternatives when you darken your mental spotlight on or stop paying attention to the one alternative that you initially focused on.

A third way to widen your options is to multi-track, meaning to consider several options at the same time.⁵⁵ One simple way of multi-tracking is to simultaneously consider what you could do if you scale up or down your budget of time, money, or some resource by, for example, 10%. Multi-tracking may also have these additional benefits: it combats a tendency to become vested in and become stuck trying to salvage a particular option;⁵⁶ it results in faster decisions than otherwise;⁵⁷ it causes better understanding of possibilities, more flexible responses, and more principled choices;⁵⁸ it increases confidence;⁵⁹ and it provides a built-in fallback option.⁶⁰

A fourth way to widen your options is to alternate between these two mindsets: a promotion mindset focusing on pursuing positive outcomes and a prevention mindset focusing on avoiding negative outcomes.⁶¹ A fifth way to widen your options is to consider “this and that” instead of “this or that.”⁶² Finally, a general method you can employ to generate additional options is to consult with people who have solved the decision problem that you face,⁶³ including competitors,⁶⁴

54. *Id.* at 46.

55. *Id.* at 51.

56. *Id.* at 55.

57. *Id.* at 55; Kathleen M. Eisenhardt, *Making Fast Strategic Decisions in High-Velocity Environments*, 32 ACAD. MGMT. J. 543, 556, 557 tbl.4 (1989) (presenting supporting evidence).

58. HEATH & HEATH, *supra* note 14, at 54; Eisenhardt, *supra* note 57, at 557-58.

59. HEATH & HEATH, *supra* note 14, at 54.

60. *Id.* at 55-56; Eisenhardt, *supra* note 57, at 558.

61. HEATH & HEATH, *supra* note 14, at 61.

62. *Id.* at 65.

63. *Id.* at 68.

64. *Id.* at 68-69.

industry best practices,⁶⁵ your own past successes,⁶⁶ a decision playlist of “questions to ask, principles to consult, ideas to consider,”⁶⁷ and the use of analogies.⁶⁸ Several economists have recently suggested that many economists view economic models as being simple theoretical cases that serve as analogies to much more complicated real-world problems.⁶⁹

A possible concern with the process of widening your options is that it could lead to a plethora of too many alternatives that results in choice paralysis.⁷⁰ While this is of course a possibility if you widen your options too much, a meta-analysis of 50 experimental studies involving over 5,000 subjects found that the average effect of increasing the number of choice options on motivation to choose and satisfaction was close to zero, with considerable variance among studies.⁷¹ Additionally, more choices were better in terms of satisfaction when people had well-defined preferences or already had expertise.⁷² The Heath brothers are not advocating that you have to consider a plethora of alternative options, simply that you consider more than one alternative. A study found that when the board of executives of a medium-sized German private technology firm considered more than one alternative in their deliberations, they were more than six times more likely (40% versus 6%) to reach a very good decision as rated later by that board of executives.⁷³

B. *Reality-Test Your Assumptions*

Another decision-making villain is confirmation bias,⁷⁴ the natural tendency that most people have to seek out information that confirms their initial and possibly biased or self-serving beliefs, ideologies, or preconceived worldviews. People like to believe that their first impressions are correct because such a belief generates a positive self-image. Most people are motivated to search for information that proves that they were right, and in so doing they consequently feel good about themselves. A meta-analysis of 91 field and laboratory studies involving

65. *Id.* at 70.

66. *Id.* at 73.

67. *Id.* at 74.

68. *Id.* at 80-86.

69. Itzhak Gilboa, Andrew Postlewaite, Larry Samuelson, & David Schmeidler, *Economic Models as Analogies*, 124 *ECON. J.* F513, F513 (2014).

70. See generally BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* (2005) (discussing problems that an overabundance of decision alternatives can cause and supporting laboratory and field evidence).

71. HEATH & HEATH, *supra* note 14, at 281-82; Benjamin Scheibehenne, Rainer Greifeneder, & Peter M. Todd, *Can There Ever Be Too Many Options?: A Meta-Analytic Review of Choice Overload*, 37 *J. CONS. RES.* 409, 409 (2010) (presenting details).

72. HEATH & HEATH, *supra* note 14, at 282; Scheibehenne, Greifeneder, & Todd, *supra* note 71, at 421.

73. HEATH & HEATH, *supra* note 14, at 57-58; Hans Georg Gemünden & Jürgen Hauschildt, *Number of Alternatives and Efficiency in Different Types of Top-Management Decisions*, 22 *EURO. J. OPERATIONAL RES.* 178, 178 (1985).

74. HEATH & HEATH, *supra* note 14, at 18.

just under 8,000 participants⁷⁵ found that people are more than twice as likely to favor confirming as opposed to disconfirming information⁷⁶ and that the confirmation bias is stronger when strong emotions are involved (for example politics and religion), if there is a strong underlying motivation for a belief (such as monetary compensation), or if the decision-maker has already invested a lot of effort or time on some issue.⁷⁷

One set of ways to reality-test your assumptions involve diligence about how you collect information.⁷⁸ A way to reality-test your assumptions is to explicitly consider the opposite of what you initially assumed or believed.⁷⁹ An extreme method of considering the opposite of your assumptions is to do what you believe will be a deliberate mistake, meaning to purposely do something that should fail if your assumptions are true.⁸⁰ A direct way to reality-test your assumptions is to ask questions that are likely to produce disconfirming information.⁸¹ Another way to reality-test your assumptions is to make it easier for others to disagree with you.⁸²

A second set of ways to reality-test your assumptions involves looking for the right types of information.⁸³ Two complementary ways to reality-test your assumptions are to zoom out from and to zoom into your specific decision-making situation.⁸⁴ Zooming out from a particular decision-making situation means to take an “outside view” of a situation that considers the averages or base rates of how others did in similar decision-making situations.⁸⁵ This contrasts with an “inside view” of a situation that focuses on the information in your mental spotlight, which likely consists of overly optimistic assessments, evaluations, and impressions of that situation.⁸⁶ A way to zoom out is to consult experts.⁸⁷ Zooming into a particular decision-making situation means to get a close-up of that situation by seeking out nuanced and textured information from people’s stories and personal experiences.⁸⁸ Both zooming out and zooming in counteract a tendency to take only an “inside

75. *Id.* at 95; William Hart, Dolores Albarracín, Alice H. Eagly, Inge Brechan, Matthew J. Lindberg, & Lisa Merrill, *Feeling Validated Versus Being Correct: A Meta-analysis of Selected Exposure to Information*, 135 *PSYCHOL. BULL.* 555, 559 (2009).

76. HEATH & HEATH, *supra* note 14, at 95; Hart et al., *supra* note 75, at 579.

77. HEATH & HEATH, *supra* note 14, at 95; Hart et al., *supra* note 75, at 576-77.

78. HEATH & HEATH, *supra* note 14, at 151.

79. *Id.* at 109, 287-88; Katherine L. Milkman, Dolly Chugh, & Max H. Bazerman, *How Can Decision Making Be Improved?* 4 *PERSPECTIVES PSYCHOL. SCI.* 379, 381 (2009) (discussing how considering the opposite mitigates these cognitive biases: anchoring, hindsight bias, and overconfidence).

80. HEATH & HEATH, *supra* note 14, at 110-12; PAUL J. H. SCHOEMAKER, *BRILLIANT MISTAKES: FINDING SUCCESS ON THE FAR SIDE OF FAILURE* (2011).

81. HEATH & HEATH, *supra* note 14, at 100-03.

82. *Id.* at 94-95.

83. *Id.* at 151.

84. *Id.* at 134.

85. *Id.* at 116-17.

86. *Id.*

87. *Id.* at 119-20.

88. *Id.* at 127-32.

view” of a particular decision-making situation that is idiosyncratic and internal to you.⁸⁹

A final way to reality-test your assumptions is to do what the Heaths call “ooching,” meaning conducting small-scale experiments, pilot programs, or trial runs that sample alternatives to generate real-world experiential data.⁹⁰ By testing the waters, ooching permits you to discover instead of forecast, know instead of guess, and test instead of predict.⁹¹ Ooching is consistent with an entrepreneurial mindset of proactively trying out new ideas.⁹² Ooching also permits you to exercise the real options⁹³ to scale up a decision if ooching resolves uncertainty by revealing positive information or to scale down or even abandon a decision if ooching resolves uncertainty by providing negative information. Ooching can take the form of a sequence of real options that produce useful and perhaps unexpected information.⁹⁴

C. *Attain Distance Before Deciding*

Another decision-making villain is the bias to place too much weight on your short-term emotions in making decisions.⁹⁵ This bias may lead you to make rash decisions under the powerful sway of visceral emotions.⁹⁶ The advice to sleep on a decision is often given because of the temporary nature of emotions.⁹⁷ Getting enough quality sleep also helps people learn better by consolidating their memories,⁹⁸ while sleep deprivation causes people to have less working memory capacity, diminished attention, losses in their cognitive skills, reduced executive capacity, decreased quantitative reasoning skills, and worse logical reasoning ability.⁹⁹ The bias of placing too much weight on short-term emotions may also cause you to agonize over making a decision because of conflicting emotions that will not dissipate with sleep.¹⁰⁰

89. *Id.* at 133-34.

90. *Id.* at 135-40, 153.

91. *Id.* at 145, 151.

92. *Id.* at 144-46.

93. Peter H. Huang, *Lawsuit Abandonment Options in Possibly Frivolous Litigation Games*, 23 REV. LITIG. 47, 87-99 (2004) (providing more detailed information about real options).

94. HEATH & HEATH, *supra* note 14, at 138-39.

95. *Id.* at 15, 18, 172.

96. *Id.* at 157-58.

97. *Id.* at 160.

98. TRACEY TOKUHAMA-ESPINOSA, MIND, BRAIN, AND EDUCATION SCIENCE: A COMPREHENSIVE GUIDE TO THE NEW BRAIN-BASED TEACHING 26, 123, 219 (2010).

99. 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, 836-37 (2014).

100. HEATH & HEATH, *supra* note 14, at 179; MARY FRANCES LUCE, JAMES R. BETTMAN, & JOHN W. PAYNE, EMOTIONAL DECISIONS: TRADEOFF DIFFICULTY AND COPING IN CONSUMER CHOICE (2001).

Of course, not all short-term emotions are visceral. A subtle short-term emotion of liking what is familiar can result from merely being exposed to something.¹⁰¹ Another subtle short-term emotion of discomfort can result from loss aversion, the tendency to feel a loss as more unpleasant than the pleasure from an equivalent-size gain.¹⁰² Both of these forms of subtle short-term emotions generate a status quo bias¹⁰³ or the related notion of an endowment effect.¹⁰⁴

One way to attain distance before deciding is to apply the 10/10/10 rule,¹⁰⁵ which asks you to consider how you will feel about some decision in 10 minutes, 10 months, and 10 years. These three time frames provide three temporal perspectives from which to analyze the consequences of any decision. In particular, the 10/10/10 heuristic balances your current emotions with your anticipated emotions in the near and far future. The 10/10/10 principle also forces you to consider whether over time there will be different outcomes and whether you will have different objectives. A number of psychological theories and experimental research studies suggest that engaging in 10/10/10 thinking broadens your decision frame,¹⁰⁶ makes you consider abstract and general goals in addition to consider concrete and practical goals,¹⁰⁷ and can reduce the impact of your immediate feelings by making you aware of those feelings.¹⁰⁸ A diverse range of people have responded very well to utilizing the 10/10/10 heuristic in a wide range of decision-making situations: “Heartfelt emails and letters soon poured in” from those who applied 10/10/10 “in decisions large and small and in-between, at home and at work, and in love, friendship, and parenting.”¹⁰⁹

Another way to attain distance before deciding is to ask what you would recommend that your best friend do in such a situation¹¹⁰ or in a professional context ask what your successor would likely do.¹¹¹ These questions shift your perspective away from a focus on the complicated idiosyncratic personal intricacies

101. HEATH & HEATH, *supra* note 14, at 164, 292.

102. *Id.* at 165-66, 292-93.

103. *Id.* at 165, 174.

104. *But see* Kathryn Zeiler & Charles R. Plott, *The Willingness to Pay—Willingness to Accept Gap, the “Endowment Effect,” Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 101 AM. ECON. REV. 1012, 1012 (2011) (presenting experimental evidence against an endowment effect); Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 U.C.L.A. L. REV. 2, 2 (2013) (explaining weakness of experimental evidence supporting endowment effect).

105. HEATH & HEATH, *supra* note 14, at 160; SUZY WELCH, *10-10-10: A FAST AND POWERFUL WAY TO GET UNSTUCK IN LOVE, AT WORK, AND WITH YOUR FAMILY* (2009).

106. Larrick, *supra* note 48, at 461, 463.

107. Yaacov Trope & Nira Liberman, *Temporal Construal*, 110 PSYCHOL. REV. 403, 405-07 (2003) (explaining how temporal distance changes people’s construal of events).

108. Norbert Schwarz & Gerald L. Cole, *Mood, Misattribution, and Judgments of Well-Being: Informative and Directive Functions of Affective States*, 45 J. PERSONALITY & SOC. PSYCHOL. 513, 518 (1983) (presenting related experimental evidence).

109. WELCH, *supra* note 105, at 19.

110. HEATH & HEATH, *supra* note 14, at 172, 174.

111. HEATH & HEATH, *supra* note 14, at 14, 169, 174.

of your situation to provide you with a more objective and more streamlined perspective of the decision problem that you are facing.¹¹² In several studies, people found it was easier to focus on the single most important aspect of a decision when they gave decision-making advice to others, but weighed numerous aspects of a decision more uniformly in making the same decision for themselves.¹¹³

A final set of ways to attain distance before deciding is to identify, reflect upon, and enshrine your personal core (meaning in part, long-term) priorities.¹¹⁴ One way to honor your core priorities is to create an annual “stop-doing list” of what you will concretely give up doing so as to create the additional time that is required for you to devote to your core priorities.¹¹⁵ Another way to honor your core priorities is to set a timer to beep hourly and when it beeps to ask yourself these two questions: (1) are you currently doing what most needs to be done, and (2) are you currently being who you most want to be.¹¹⁶

D. *Prepare to be Wrong*

A final decision-making villain is overconfidence in your predictions about how the future will turn out.¹¹⁷ One way to prepare to be wrong about your predictions of the future is to realize that from the perspective of the present, the future is not a single point or event.¹¹⁸ Instead, from the perspective of the present, the future is a range or continuum of possible outcomes or scenarios.¹¹⁹ This realization suggests that you bookend the future by anticipating a lower bookend of a disastrous bad outcome and a higher bookend of a successful good outcome.¹²⁰ Neither of these future bookends are the most extreme scenarios that you can possibly imagine.¹²¹ Your bookends are merely very negative and very positive scenarios based upon realistic assumptions.¹²² Your bookends are thus knowable (from the perspective of the present) contingencies. To prepare for the lower bookend, conduct a pre-mortem analysis employing prospective hindsight to assume that a terrible outcome has already happened for certain and ask what could have caused the dire outcome to occur.¹²³ Then you can think of how to address

112. *Id.* at 170-71.

113. *Id.* at 170; Laura Kray & Richard Gonzalez, *Differential Weighting in Choice versus Advice: I'll Do This, You Do That*, 12 J. BEHAV. DECISION MAKING 207, 207 (1999) (presenting three studies).

114. HEATH & HEATH, *supra* note 14, at 179, 186, 192.

115. *Id.* at 187-88, 192, 294.

116. *Id.* at 190, 192, 294; PETER BREGMAN, EIGHTEEN MINUTES: FIND YOUR FOCUS, MASTER DISTRACTION, AND GET THE RIGHT THINGS DONE 134, 138, 146 (2012); Daniel H. Pink, *The Power of an Hourly Beep*, DANIEL H. PINK, <http://www.danpink.com/2011/10/the-power-of-an-hourly-beep/> (last visited July 19, 2014) (interviewing Peter Bregman).

117. HEATH & HEATH, *supra* note 14, at 17-18.

118. *Id.* at 201.

119. *Id.* at 201.

120. *Id.* at 196, 217.

121. *Id.* at 196.

122. *Id.* at 196.

123. *Id.* at 202; GARY KLEIN, STREETLIGHTS AND SHADOWS: SEARCHING FOR THE KEYS TO ADAPTIVE DECISION MAKING 63, 235-36 (2009) (introducing PreMortem technique); Deborah J.

those causes. To prepare for the upper bookend, conduct a pre-parade that assumes that a rosy outcome happened and ask how you can be prepared for such a fortunate outcome.¹²⁴

A second way to prepare to be wrong is to prepare against unknowable contingencies by simply assuming that you are going to be overconfident and correct for that overconfidence by providing yourself with a generous built-in cushion or margin of error.¹²⁵ Examples of this type of preparing to be wrong are the safety factors that engineers build into their designs of airplanes, bridges, dams, elevators, ladders, and space shuttles.¹²⁶ Other examples of this kind of preparing to be wrong are the buffer times that software companies add to developers' overconfident underestimates about how long projects will take to complete or the buffer amounts that accounting firms add to accountants' overconfident underestimates about the amount of time, money, and other resources that projects will take to complete.¹²⁷

A third way to prepare to be wrong is to mentally rehearse or simulate not only what could go wrong, but also how you would respond to such difficulties.¹²⁸ Such a technique is part of cognitive behavioral therapy.¹²⁹ This idea also underlies the notion of using realistic job previews to help convince some people that a job is not right for them and to vaccinate other people against dissatisfaction in that job.¹³⁰

A final way to prepare to be wrong is for you to set a tripwire to snap you out of being in an automatic pilot mode and warn you to pay attention because something is amiss.¹³¹ A famous example of a tripwire is Article 126 of the 1970s and 1980s rock band Van Halen's touring contract, forbidding "brown M&M's in the backstage area, upon pain of forfeiture of the show, with full compensation."¹³² This clause was buried in a lengthy contract with the purpose of easily revealing to the band whether a concert venue's stagehands had read the contract and complied with its numerous safety requirements and technical specifications.¹³³ The mere presence of a single brown M&M backstage would signal to the band that there were potential problems and that a complete safety check was in order.¹³⁴

Mitchell, J. Edward Russo, & Nancy Pennington, *Back to the Future: Temporal Perspective in the Explanation of Events*, 2 J. BEHAV. DECISION MAKING 25 (1989) (defining prospective hindsight).

124. HEATH & HEATH, *supra* note 14, at 206-08, 217.

125. *Id.* at 208, 217.

126. *Id.* at 208-09; Heath, Larrick, & Klayman, *supra* note 40, at 4.

127. HEATH & HEATH, *supra* note 14, at 209; Heath, Larrick, & Klayman, *supra* note 40, at 21.

128. HEATH & HEATH, *supra* note 14, at 213, 217.

129. *Id.* at 213-15; MATTHEW MCKAY, MARTHA DAVIS, & PATRICK FANNING, *THOUGHTS AND FEELINGS: TAKING CONTROL OF YOUR MOODS AND YOUR LIFE* 105-14 (4th ed. 2011).

130. HEATH & HEATH, *supra* note 14, at 210-13.

131. *Id.* at 222.

132. *Id.* at 27-28.

133. *Id.* at 27-28, 278.

134. *Id.* at 28.

II. APPLYING WRAP TO LEGAL ETHICS AND PROFESSIONALISM

This part of the Article applies each of the steps in the WRAP process to ask what you can do to improve your decision-making when you face the prospect of engaging in unethical or unprofessional behavior. A client or supervising attorney may direct you to consider such a prospect. This prospect can also be the idea of a colleague or even your own idea. Regardless of the source of this prospect, the WRAP process offers a sequence of steps that can help you think through what you can and should do.

Applying the WRAP process to legal ethics and professionalism is an approach that is designed to repair cognitive biases or address decision-making process issues. In doing so, the WRAP process supplements a number of suggestions that are based upon insights from behavioral legal ethics to improve individual lawyer ethics¹³⁵ and organizational ethical cultures.¹³⁶ The WRAP process also complements approaches to legal ethics and professionalism that are designed to address motivational issues by repairing incentive problems.¹³⁷ The WRAP process complements more traditional and philosophical approaches to legal ethics and professionalism that are designed to build people's characters or improve people's moral reasoning and for which empirical research has found only limited success.¹³⁸ Finally, the WRAP process updates and complements the advice that a former practitioner offered about being happy, healthy, and ethical based on his experience and early studies about subjective well-being.¹³⁹

The Heath brothers' book¹⁴⁰ includes many stories about people who improved their decision-making by applying one or more of the steps of the WRAP process in a variety of situations. These success stories concerning the WRAP process in action suggests that law students would benefit generally from learning about the WRAP process in some of their courses. The detailed explanation in the rest of this section of the Article about how to apply the WRAP process to legal ethics and professionalism suggests that law students would benefit particularly from learning about the WRAP process in the course that most American law schools require and that is usually called Legal Ethics and Professionalism. The American Bar

135. Robbennolt & Sternlight, *supra* note 1, at 1156-65.

136. Robbennolt & Sternlight, *supra* note 1, at 1165-81.

137. See, e.g., Nancy B. Rapoport, "Nudging" Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms, 4 ST. MARY'S J. LEGAL MALPRAC. & ETHICS 42, 42 (2014).

138. JOHN M. MORRIS, LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR 2 (2002) (stating that experimental research has found that situational variables predict unethical behavior better than personal variables do); CORDELIA FINE, A MIND OF ITS OWN: HOW YOUR BRAIN DISTORTS AND DECEIVES 73 (2012) (emphasizing the importance of circumstances and context rather than personality in explaining unethical behavior); JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 89, 106 (2012) (concluding that moral-reasoning ability does not necessarily translate into moral behavior).

139. Schlitz, *supra* note 3, at 920-50 (providing "big picture" and "little picture" advice).

140. See generally HEATH & HEATH, *supra* note 14.

Association (ABA) accreditation standards for law schools require that a law school provide each student with “substantial instruction in: . . . (5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.”¹⁴¹

The ABA has interpreted this requirement to include “instruction in matters such as the law of lawyering and the Model Rules of Professional Conduct of the American Bar Association.”¹⁴² This Article suggests that law students would benefit from learning about behavioral legal ethics in general¹⁴³ and the WRAP process in particular.¹⁴⁴ Teaching law students about how to apply the WRAP decision-making process to legal ethics and professionalism settings complements efforts to help them develop greater self-confidence and better internalize feedback.¹⁴⁵ Teaching law students about how to apply the WRAP process to legal ethics and professionalism situations also complements teaching them about problem solving¹⁴⁶ and planning for their legal careers.¹⁴⁷ Finally, the WRAP process is fun to teach because students appreciate its universal applicability to not only professional but personal decisions, such as who to date, what to eat, when to sleep, and how to balance school and life.

A. *More Than Unethical or Not*

A person may engage in unethical or unprofessional behavior due to perceiving the decision that the person faces as being a binary choice of whether or not to engage in unethical or unprofessional behavior. Such a narrow frame precludes the

141. *ABA Standards and Rules of Proc. for Approval of Law Sch. 2013-14* at 21-22, (setting out Standard 302(a)(5)), 2013 A.B.A. Sec. Legal Educ. & Admissions to Bar.

142. *Id.* at 23, (setting out Interpretation 302-9).

143. See generally Robbennolt & Sternlight, *supra* note 1; Prentice, *supra* note 9.

144. 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, 305-09 (discussing in detail how to reimagine the legal ethics and professionalism course to include teaching about decision-making, emotions, and happiness).

145. Deborah L. Borman, *Instilling Confidence and Receiving Feedback: Creating Opportunities for Improved Success in Law School and Satisfaction in Legal Practice*, Nov. 15, 2014, (unpublished manuscript presented at Stanford University Law School as part of the Western Regional Legal Writing Conference, September 20, 2014) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533746) (adapting to legal education and legal practice suggestions from these two books: KATY KAY & CLAIRE SHIPMAN, *THE CONFIDENCE CODE: THE SCIENCE AND ART OF SELF-ASSURANCE—WHAT WOMEN SHOULD KNOW* (2014) and DOUGLAS STONE & SHEILA HEEN, *THANKS FOR THE FEEDBACK: THE SCIENCE AND ART OF RECEIVING FEEDBACK WELL* (2014)).

146. PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS* (2010) (providing a textbook for teaching creative problem solving, effective decision-making, and wise professional judgment to lawyers and public policy makers); Kathleen Elliott Vinson, *What's Your Problem?*, STETSON L. REV. (forthcoming) (advocating and detailing explicit instruction of a problem-solving methodology in law schools).

147. R. Lisle Baker, *Planning for Law as a Career and an Enterprise* (Suffolk University Law School Legal Studies Research Paper No. 13-16, 2014) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271200).

possibility of achieving some goal through ethical or professional behavior. This narrow focus also draws attention to unethical or unprofessional behavior, which can make it harder to resist the temptation to engage in unethical or unprofessional behavior. In a set of famous experiments that have become known as the marshmallow studies,¹⁴⁸ psychologist Walter Mischel and his colleagues found that cognitive and overt self-distractions from temptation increased the amount of time children were able to delay before succumbing to a temptation, while enhancing the salience of a temptation decreased the amount of time the children were able to delay before succumbing to a temptation.¹⁴⁹ By redirecting your attention to ethical or professional alternatives, you will be able to effectively disrupt fixating on unethical or unprofessional behavior and in doing so distract yourself away from the temptation of unethical or unprofessional behavior.

Explicitly considering the opportunity costs of engaging in unethical or unprofessional behavior may help a person see that there are other possible ethical or professional courses of action. Applying the vanishing options test removes the option of unethical or unprofessional behavior and forces individuals to think of alternatives that involve ethical or professional behavior. Multi-tracking options that include ethical or professional alternatives reduce the tendency to become vested in unethical or unprofessional behavior. Recall that multi-tracking can also lead to more principled decision-making.

A promotion mindset, focusing on pursuing positive outcomes, can lead a person towards ethical or professional alternatives if the person's notion of positive is that of being ethical or professional or the honor, pride, and self-respect from being so. A prevention mindset, focusing on avoiding negative outcomes, can lead a person away from unethical or unprofessional alternatives if the person's notion of negative is that of being unethical or unprofessional or the guilt, humiliation, and shame from being so. A final set of ways to generate additional ethical or professional alternatives, is to consult with others who have dealt with this or similar ethical or professional dilemma, including colleagues, confidants, law firm or legal area best practices, and hypotheticals in commentaries to the Model Rules of Professional Conduct¹⁵⁰ and the various state versions of the rules of professional conduct. All of the above ways to widen one's options are examples of what psychologist Angela Duckworth terms situational strategies for self-control: proactively choosing or changing one's situation to facilitate self-control.¹⁵¹

148. See, e.g., FloodSanDiego, *The Marshmallow Experiment - Instant Gratification*, YOUTUBE (Apr. 29, 2010), <http://www.youtube.com/watch?v=Yo4WF3cSd9Q>.

149. Walter Mischel, Ebbe B. Ebbesen, & Antonette Raskoff Zeiss, *Cognitive and Attentional Mechanisms in Delay of Gratification*, 21 J. PERSONALITY & SOC. PSYCHOL. 204, 217 (1972).

150. MODEL RULES OF PROF'L CONDUCT (2013).

151. Angela Duckworth, Associate Professor of Psychology, University of Pennsylvania, Presentation, Decision Processes Colloquia, Marketing Department, Wharton School of Management, University of Pennsylvania, Mind Over Mind: Situational Strategies for Self-Control (Dec. 1, 2014) (abstract) https://marketing.wharton.upenn.edu/mktg/assets/File/Abstract-%20Angela%20Duckworth_12_1_14.pdf.

B. *Are You Sure That You Are Unlikely to Get Caught?*

You are likely to make a number of implicit assumptions when you believe that engaging in unethical or unprofessional conduct is a good idea. Such assumptions include these: you are unlikely to get caught, it will not be so bad if you get caught, you will more than compensate for it later by engaging in exemplary or meritorious conduct, and your expected value of personal and professional benefits from unethical or unprofessional conduct exceeds your expected personal and professional costs of unethical or unprofessional conduct.

The second step in WRAP asks you to reality-test the above types of assumptions. Explicitly considering the opposite of the above assumptions may convince you that believing in the above assumptions is a form of motivated reasoning or wishful thinking. Most of the lawyers who end up being caught, disbarred, disciplined, sanctioned, or sued for malpractice did not think that it would happen to them. You can zoom out from your personal and likely overly optimistic perspective to consider the averages or base rates about engaging in unethical or unprofessional conduct. You can zoom in by learning about the sad stories of lawyers who deeply regret engaging in unethical or unprofessional conduct.

The probability of getting caught depends on many factors, only some of which are under one's control. The downside of getting caught includes not only externally imposed punishment, but also self-imposed punishment, such as reduced self-respect and the negative emotions of anxiety, guilt, remorse, and shame.¹⁵² The assumption that you will make up for engaging in behavior that you find morally troubling by acting more ethically later on in time, is known as moral compensation.¹⁵³ Even when moral compensation occurs, there is no guarantee that any of your later ethical behavior will occur in the domain of your legal practice or even if it does happen to be in your legal practice that it is for the same client or for the same matter. Another problem with the assumption that you will engage in moral compensation is that you may not do so, especially over time due to legal loopholes,¹⁵⁴ organizational cultures,¹⁵⁵ self-deception,¹⁵⁶ or situational factors.¹⁵⁷

152. George Loewenstein & Ted O'Donoghue, "We Can Do This the Easy Way or the Hard Way": *Negative Emotions, Self-Regulation, and the Law*, 73 U. CHI. L. REV. 183, 185-87 (2006) (discussing negative emotions).

153. Robert A. Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosure*, 6 WISC. L. REV. 1059, 1094-99 (2011) (discussing the notion of moral compensation and supporting experimental studies).

154. Peter H. Huang, *Book Review: Why the Law is So Perverse*, 63 J. LEGAL EDUC. 131, 138-48 (2013) (analyzing legal loopholes).

155. Peter H. Huang & Ho-Mou Wu, *More Order without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J.L. ECON. & ORG. 390, 390 (1994) (analyzing the role of organizational cultures by applying psychological game-theoretic models).

156. Ann Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 223 (2004) (discussing the role of self-deception in unethical behavior).

157. Schlitz, *supra* note 3, at 917-20 (explaining how, over time, moral compensation can fail to

The next section (II.C) of this Article examines in detail the assumption that the expected benefits of unethical or unprofessional behavior exceed the expected costs.

Behavioral studies have found that people often behave unethically because they have blind spots regarding their own ethical behavior.¹⁵⁸ In particular, people experience temporal ethical mirages in which they believe they will be more ethical than they are and remember themselves as having been more ethical than they were.¹⁵⁹ Professors Robbennolt and Sternlight recently explained how the general problem of ethical mirages is exacerbated in the particular setting of legal practice due to a number of factors:¹⁶⁰ ambiguity, conflicts, and gaps in the rules and standards that govern attorney conduct;¹⁶¹ the nature of the lawyer-client agency relationship,¹⁶² including conflicts of interests¹⁶³ and behaving unethically on behalf of and through others;¹⁶⁴ having the role of a zealous advocate in an adversarial system;¹⁶⁵ the tolls of law practice;¹⁶⁶ the power and status of lawyers;¹⁶⁷ the social environment of law firms;¹⁶⁸ and having to respond to the unethicity of others.¹⁶⁹ Reality-testing your assumptions about how ethical your behavior is going to be in the future and how ethical your behavior was in the past are ways to mitigate the likelihood that ethical mirages persist.

C. *Is It Really Worth It?*

People often fade away the ethical aspects of a decision so that their ethical awareness is not even triggered and instead visceral concerns dominate.¹⁷⁰ Lawyers with passion can get into ethical and professional trouble because of their passion. When considering unethical or unprofessional conduct, you may experience anxiety and conflict over doing the right thing. If you have been ethical or professional thus far in your practice, then familiarity and loss aversion reinforce the inertia to continue to do so. On the other hand, if you have been unethical or unprofessional,

happen despite the best of intentions).

158. MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT 72-76 (2011).

159. Ann E. Tenbrusel, Kristina A. Diekmann, Kimberly A. Wade-Benzoni, & Max H. Bazerman, *The Ethical Mirage: A Temporal Explanation as to Why We Are Not as Ethical as We Think We Are*, 30 RES. ORG. BEHAV. 153, 160-62 (2010).

160. Robbennolt & Sternlight, *supra* note 1 (providing details); *see also* JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING 385-416 (2012) (same).

161. Robbennolt & Sternlight, *supra* note 1, at 1125-28.

162. *Id.* at 1128-29.

163. *Id.* at 1129-34.

164. *Id.* at 1134-36.

165. *Id.* at 1137-40.

166. *Id.* at 1140-43.

167. *Id.* at 1143-45.

168. *Id.* at 1145-49.

169. *Id.* at 1149-52.

170. Tenbrunsel & Messick, *supra* note 156, at 224 (introducing the phrase "ethical fading").

then familiarity and loss aversion reinforce the inertia to be unethical or unprofessional. A pair of recent experimental studies found that people predicted that they (and others) would experience more negative affect upon behaving dishonestly than after behaving ethically.¹⁷¹ Such predictions about more negative affect associated with unethical behavior may be enough to make you avoid being unethical. On the other hand if you have been unethical or unprofessional, then you may have realized that such affective predictions may be wrong.

Five recent experimental studies found that engaging in unethical behavior can generate positive affect.¹⁷² Such a psychological “cheater’s high” occurred for types of unethical behavior that do not entail direct harm to a salient victim.¹⁷³ Many instances of lawyer misconduct such as tax evasion, insider trading, insurance fraud, and securities fraud involve dishonesty and theft that are clearly unethical yet entail diffuse harms and lack identifiable victims. Two possible sources of a cheater’s high are the delight from duping or pulling something over (possibly smart or wealthy) others and partaking in forbidden fruit.¹⁷⁴

Applying the 10/10/10 question can lead you to consider whether any cheater’s high you may experience is ephemeral, whether the financial or professional gains from unethical or unprofessional behavior are short-term, and whether the costs to yourself and others from choosing to behave unethically or unprofessionally will last a long time. Many studies have found that most people adapt to many things, including higher status and increased wealth.¹⁷⁵ The costs of unethical or unprofessional behavior include penalties and reputational harms if you are caught or exposed in addition to psychic and self-integrity harms even if you are not caught or exposed.

Asking what you would recommend that a friend do in your situation may lead you to unequivocally counsel that your friend engage in ethical or professional behavior. You may make such a recommendation because your recommendation is the “right” thing to do, because you would not be willing to say aloud that you recommend unethical or unprofessional behavior, or because the subjective personal and professional benefits to unethical or unprofessional behavior appear small and temporary when compared to the more objectively measurable and verifiable large and permanent personal and professional costs to unethical or unprofessional behavior. Two cognitive neuroscience studies found that when people perceived an ethical dilemma as being personal and direct, their brain regions associated with emotion showed more relative activation and when people perceived an ethical dilemma as impersonal and indirect, their brain regions

171. Nicole E. Ruedy, Celia Moore, Francesca Gino, & Maurice Schweitzer, *The Cheater’s High: The Unexpected Affective Benefits of Unethical Behavior*, 105 J. PERSONALITY & SOC. PSYCHOL. 531, 534-36 (2013) (presenting details of this pair of studies).

172. *Id.* at 533-34, 536-44 (presenting details of these five studies).

173. *Id.* at 532, 544.

174. *Id.* at 532-33.

175. Daniel Kahneman, Alan B. Kruger, David Schkade, Norbert Schwarz, & Arthur A. Stone, *Would You Be Happier If You Were Richer? A Focusing Illusion*, 312 SCI. 1908, 1909-10 (2006).

associated with reflective cognition and stored memory showed more relative activation.¹⁷⁶ You may also be experiencing a focusing illusion¹⁷⁷ when you focus on the personal benefits that you expect from unethical or unprofessional behavior. Asking what your successor would do may also lead you to the answer of behaving ethically or professionally, especially if you envision that your successor replaced you because you acted unethically or unprofessionally.

Reflecting upon, identifying, and enshrining your core priorities is likely to lead you to behave ethically or professionally because it is unlikely that you would choose as one of your core priorities behaving unethically or unprofessionally. Figuring out your core priorities and keeping them handy is thus likely to provide you with a long-term perspective to help remind you of why you should behave ethically or professionally, namely in the service of your core priorities. Asking yourself the two questions of whether behaving unethically or unprofessionally is (1) what most needs to be done now, and (2) consistent with you being who you most want to be now, are likely to lead you to behave ethically or professionally.

D. *What Happens If You Get Caught?*

The final step in the WRAP process of preparing to be wrong is “not primarily a tool designed to help people decide which option to pick.”¹⁷⁸ Instead it is a primarily a tool designed to help people live with their choice once they have made a choice.¹⁷⁹ Nonetheless, it can be a tool to help some people decide that a certain choice is not for them by realistically scaring them away.¹⁸⁰ Before you decide to engage in unethical or unprofessional behavior, considering the lower bookend of doing so may convince you that such a negative disastrous outcome is so personally or professionally bad that you are not willing to even risk it (regardless of how unlikely it is). You may also decide to not even get close to crossing the line of unethical or unprofessional behavior by making sure that you have a healthy margin of error or safety cushion of distance from that (often shifting and judged with hindsight) line. Mentally rehearsing or simulating details about getting caught or being exposed or other things that can go wrong when engaging in unethical or unprofessional behavior may also be enough to convince you that behaving unethically or unprofessionally is a bad idea.

Finally, to remind you about ethical or professional issues, you may set a tripwire of becoming suspicious whenever you hear euphemisms and language that conceal ethical considerations.¹⁸¹ Examples of phrases that should set off a red flag

176. Joshua D. Greene, R. Brian Sommerville, Leigh E. Nystrom, John M. Darley, & Jonathan D. Cohen, *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 *SCI.* 2105, 2106-7 (2001).

177. Kahneman et al., *supra* note 175, at 1908.

178. HEATH & HEATH, *supra* note 14, at 213, n.*.

179. *Id.* at 18.

180. *Id.* at 212 (describing how realistic job previews can “succeed by scaring away people who couldn’t have handled the job”).

181. Robbennolt & Sternlight, *supra* note 1, at 1122.

are collateral damage, creative accounting, creative time-keeping, and strategic misrepresentation.¹⁸² Other examples of tripwires are identifying specific behaviors beforehand that you might engage in that should immediately raise a red flag or warning light. Examples include backdating a document, blaming others for your mistakes, and drawing up documents for deals you do not understand.¹⁸³

Because this part of the Article considered many different strategies and techniques to implement the WRAP process in legal ethics and professionalism settings, it is helpful to conclude this section with three hypotheticals to very briefly illustrate how WRAP can reduce the odds of ill-conceived unethical behaviors. First, instead of destroying incriminating documents in litigation, a litigator should think about options to defend his or her client against incriminating documents rather than merely whether or not to destroy those documents. Second, rather than advising a client to litigate instead of settle when settlement is in the client's best interest, a lawyer should pause, given that this is rarely an emergency time-pressing decision, to consider the wider lower bookend for the client of continuing unpredictable litigation. Third, when faced with the temptation due to greed of overbilling clients or padding timesheets, apply the 10/10/10 heuristic.

III. MINDFULNESS AND REAL-OPTIONS THEORY

A reason that some lawyers behave unethically or unprofessionally is that they, like most people, often behave mindlessly on autopilot and without much awareness of their behavior or motivations. This reason suggests that having more awareness and greater mindfulness could help lawyers avoid or mitigate unethical or unprofessional behavior.¹⁸⁴ The subject of mindfulness has received a lot of attention in the popular press.¹⁸⁵ In 2012 alone, 477 articles about mindfulness were published in scientific journals.¹⁸⁶ The vast majority of recent scientific articles about mindfulness are neuroscience studies and psychology studies that investigate the effects of mindfulness and mindfulness training.¹⁸⁷ This Article is novel in being the first to apply real-options theory from modern financial economics to analyze the value of mindfulness. By analyzing how the WRAP process and mindfulness are related, this Article also connects mindfulness with behavioral economics.

182. *Id.* at 1122.

183. *Id.* at 1163 (providing these and other examples).

184. Ellen Waldman, *Mindfulness, Emotions, and Ethics: The Right Stuff?*, 10 NEV. L.J. 513, 527 (2010).

185. *See, e.g.*, Maria Konnikova, *An Antidote for Mindlessness*, NEW YORKER.COM (Jan. 29, 2014), <http://www.newyorker.com/online/blogs/elements/2014/01/an-antidote-for-mindlessness.html> (reporting on how mindfulness training improved students' cognitive performance and protected against stress); Kate Pickert, *The Art of Being Mindful*, TIME, Feb. 3, 2014, at 40 (reporting about mindfulness, its benefits, and the public's growing interest in mindfulness).

186. Pickert, *supra* note 185, at 45.

187. *See, e.g.*, Richard J. Davidson, *Empirical Explorations of Mindfulness: Conceptual and*

A. *A Primer about Mindfulness*

Two bumper sticker aphorisms capture the essence of mindfulness: “Don’t Believe Everything You Think”¹⁸⁸ and “Meditation, It’s Not What You Think.”¹⁸⁹ In other words, we are not our thoughts and not everything that we think is necessarily true. Elements of mindfulness include the abilities to regulate attention, have awareness of bodily sensations, regulate emotions, and change self-perspective.¹⁹⁰ There are at least two notions of mindfulness:¹⁹¹ one that is derived from Eastern religious and spiritual traditions,¹⁹² and one that psychologist Ellen Langer developed.¹⁹³ The first type of mindfulness involves nonjudgmental, moment-to-moment, open-hearted, non-reactive awareness that is cultivated by paying focused attention in a particular way. Psychiatrist Daniel Siegel defines such mindfulness to entail “an awareness of awareness” and an attitude towards moment-to-moment experience that is based on “curiosity, openness, acceptance, and love.”¹⁹⁴ Ellen Langer describes her notion of mindfulness in this way: “[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.”¹⁹⁵

Law professor Leonard Riskin has explained how Eastern-derived mindfulness and Langer’s mindfulness 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.¹⁹⁶

Methodological Conundrums, 10 EMOTION 8 (2010); Steve Paulson, Richard Davidson, Amishi Jha, & Jon Kabat-Zinn, *Becoming Conscious: The Science of Mindfulness*, 1303 N.Y. ACAD. SCI. 87 (2013).

188. Meg Selig, *Manage Emotional Pains with RAINS*, PSYCHOLOGY TODAY BLOG: CHANGEPOWER (Feb. 6, 2012), <http://www.psychologytoday.com/blog/changepower/201202/manage-emotional-pains-rains>.

189. Tracy Saenger, *Mindfulness: An Alternative to Multitasking, and More*, THE LEARNING CURVE, Spring 2008, at 8.

190. KaWai Leong, Peter Chan, Andrea Grabovac, Michael Wilkins-Ho, & Maria Perri, *Changes in Mindfulness Following Repetitive Transcranial Magnetic Stimulation for Mood Disorders*, 58 CAN. J. PSYCHIATRY 687, 687 (2013) (listing these components of mindfulness).

191. Leonard L. Riskin, *Two (or More) Concepts of Mindfulness in Law and Conflict Resolution*, in 1 THE WILEY-BLACKWELL HANDBOOK OF MINDFULNESS 471, 471 (Amanda Ie, Christelle T. Ngoumen, & Ellen J. Langer eds., 2014).

192. JON KABAT-ZINN, COMING TO OUR SENSES: HEALING OURSELVES AND THE WORLD THROUGH MINDFULNESS 23 (2005).

193. ELLEN A. LANGER, MINDFULNESS 62-74 (1989).

194. DANIEL J. SIEGEL, THE MINDFUL BRAIN: REFLECTION AND ATTUNEMENT IN THE CULTIVATION OF WELL-BEING 1-13 (2007).

195. ELLEN A. LANGER, THE POWER OF MINDFUL LEARNING 111 (1989).

196. Riskin, *supra* note 191, at 482; Leonard L. Riskin, *Further Beyond Reason: Mindfulness, Emotions, and the Core Concerns in Negotiation*, 10 NEV. L.J. 289, 321 fig.3 (2010) [hereinafter *Further Beyond Reason*]; see also Stephanie West Allen, *A Better You: Becoming a Mindful Lawyer*,

The Stress Reduction Clinic University of Massachusetts Medical School developed a technique to practice mindfulness known as STOP,¹⁹⁷ which stands for Stop; Take a breath or breaths; Observe what is happening in terms of your bodily sensations, emotions, and thoughts, and Proceed. Building upon the STOP technique, Professor Riskin and mediator attorney Rachel Wohl introduced two helpful ways to implement mindfulness that are summarized by the mnemonics of STOPSI and taking STOCK. To practice STOPSI, you Stop; Take a breath or breaths; Observe your bodily sensations, emotions, and thoughts, Proceed to Set a clear and simple Intention. An intention is not a goal or outcome. An intention reflects values. Examples of intentions are to be present and mindful, to be calm, to be courageous, and to be kind. The rationale for setting and following intentions is that although you cannot always control what happens to you, you can always intentionally control your response to what happens to you. In doing so, you live your life intentionally instead of mindlessly. To practice taking STOCK, you Stop; Take a breath or breaths; Observe and be open to your experience in terms of your feelings, mindsets, and thoughts; Consider your intention and whether you want to keep it or change it, and Keep going with awareness after making possible adjustments.¹⁹⁸

Mindfulness meditation is a type of inner exercise of the mind that strengthens the ability to behave mindfully. Various forms of meditation include the following:¹⁹⁹ concentration or controlled-focus meditation (focusing your attention on a particular object, such as your breath, your emotions, an image, an idea, such as compassion or loving-kindness, or a phrase), open-monitoring or open-awareness or bare-attention meditation (non-judgmental awareness of and paying attention to whatever is present), automatic self-transcending meditation (transcendental meditation), movement meditation (qi gong, tai chi, and yoga), devotional meditation (using mantras or prayers), and combinations of the above. Mindfulness meditation includes both of these forms of meditation: concentration meditation (where you focus your attention on a specific thing) and open-awareness monitoring meditation (where you are receptive to whatever arises).²⁰⁰ You can

THE DOCKET (Jan. 22, 2014), <http://www.dbadocket.org/work-life-balance/a-better-you-becoming-a-mindful-lawyer/> (discussing the benefits of mindfulness to lawyers and their clients).

197. See, e.g., Leonard L. Riskin, *Knowing Yourself: Mindfulness, in THE NEGOTIATOR'S FIELDBOOK* 239, 247 (Christopher Honeyman & Andrea K. Schneider eds., 2006) (describing STOP); Saenger, *supra* note 189, at 8 (same).

198. Katherine Larkin-Wong, *A Newbie's Impression: One Student's Mindfulness Lessons*, 61 J. LEGAL EDUC. 665, 667 (2012) (describing this exercise).

199. Jeanne Ball, *How Meditation Techniques Compare—Zen, Mindfulness, Transcendental Meditation and More*, HUFFINGTON POST BLOG: HEALTHY LIVING (Sept. 22, 2010, 4:50 PM, updated 11/17/11, 9:02 AM) http://www.huffingtonpost.com/jeanne-ball/how-meditation-techniques_b_735561.html.

200. R. Lisle Baker & Daniel P. Brown, *On Engagement: Learning to Pay Attention*, 36 U. ARK. LITTLE ROCK L. REV. 337, 359-63 (2014) (defining concentration meditation and distinguishing it from open-awareness meditation).

practice mindfulness meditation while you are sitting or walking or eating²⁰¹ a raisin²⁰² or even playing.²⁰³

There are many compelling reasons for people generally and lawyers particularly to be more mindful in the Eastern-derived sense, including being healthier and happier;²⁰⁴ cultivating emotional intelligence;²⁰⁵ reducing anxiety and stress;²⁰⁶ improving working memory capacity and performance in standardized testing;²⁰⁷ learning to pay attention better;²⁰⁸ increasing productivity;²⁰⁹ and cultivating more focus, emotional stability, personal autonomy, and resilience.²¹⁰

Professor Riskin has explained why mindfulness is also likely to promote more ethical behavior.²¹¹ Riskin observed that many of the ethical standards that govern lawyers and mediators fall into one of these two categories:²¹² (1) minimal standards that prohibit inappropriately benefitting oneself at the expense of others,²¹³ and (2) aspirational standards to help others, possibly at seeming risk to

201. See generally THICH NHAT HANH & LILIAN CHEUNG, *SAVOR: MINDFUL EATING, MINDFUL LIFE* (2011) (describing mindful eating); BRIAN WANSINK, *MINDLESS EATING: WHY WE EAT MORE THAN WE THINK* (2010) [hereinafter Wansink, *MINDLESS EATING BOOK*] (presenting case studies and findings of psychological experiments demonstrating that people eat mindlessly and suggesting that people become more mindful of their eating habits); Brian Wansink, *Why We Eat More than We Think*, <http://mindlesseating.org/> [hereinafter Wansink, *MINDLESS EATING WEBSITE*] (providing a video clip and other resources explaining same and assisting consumers) (last visited July 30, 2014).

202. See, e.g., Saenger, *supra* note 189, at 8 (describing the well-known mindfulness raisin exercise).

203. Mindful Cloud Entertainment, *1st Planting Seeds: The Power of Mindfulness Film Trailer*, YOUTUBE (Apr. 21, 2012), https://www.youtube.com/watch?v=aS_RdghyX0E (discussing playing mindful); THICH NHAT HANH, *PLANTING SEEDS: PRACTICING MINDFULNESS WITH CHILDREN* (2011) (describing fun activities to teach kids about mindfulness).

204. See generally 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).

205. 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, 416-27 (2014) (relating mindfulness and emotional intelligence generally and in legal education particularly). See generally CHADE-MENG TAN, *SEARCH INSIDE YOURSELF: THE UNEXPECTED PATH TO ACHIEVING SUCCESS, HAPPINESS (AND WORLD PEACE)* (2012).

206. Austin, *supra* note 99, at 838-42 (2014) (discussing the benefits of mindfulness).

207. Michael D. Mrazek, Michael S. Franklin, Dawa Tarchin Phillips, Benjamin Baird, & Jonathan W. Schooler, *Mindfulness Training Improves Working Memory Capacity and GRE Performance While Reducing Mind Wandering*, 24 PSYCHOL. SCI. 776, 776 (2013) (presenting results of research).

208. Baker & Brown, *supra* note 200, at 365-76 (detailing how the practice of concentration meditation improves attentional skills).

209. TIM RYAN, *A MINDFUL NATION: HOW A SIMPLE PRACTICE CAN HELP US REDUCE STRESS, IMPROVE PERFORMANCE, AND RECAPTURE THE AMERICAN SPIRIT* 137-58 (2013).

210. 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).

211. 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).

212. *Id.* at 496-98.

213. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2013) (prohibiting lawyers from charging unreasonable fees); *Id.* R. 1.1 (mandating attorney competence); *Id.* R. 1.3 (mandating attorney diligence); *Id.* R. 1.6 (mandating attorney confidentiality); *Id.* R. 1.7-1.11 (prohibiting attorney conflicts

apparent and possibly short-term self-interest.²¹⁴ Because mindfulness leads to greater awareness from a psychological distance of your bodily sensations, feelings, intentions, and thoughts, mindfulness helps you to become more aware of the self-centered nature of thoughts and intentions that motivate the violation of minimal ethical standards and the possibly negative bodily sensations and emotions that are associated with such violations.²¹⁵ Mindfulness also helps you to see how you are interconnected with others, which makes it more likely that you will not exploit others,²¹⁶ and more likely that you will help them in accordance with aspirational ethical standards. Additionally, mindfulness increases your tendency to adopt such universal norms of desirable behavior as fairness and honesty.²¹⁷ Finally, mindfulness provides you with a calmness and clarity to remember your core values and the formal ethical rules that you are bound to uphold as a professional.²¹⁸

Riskin memorably stated²¹⁹ that mindfulness gives its practitioner an opportunity to, before acting, insert a “wedge of awareness”²²⁰ that can provide “the time and resources to make a wise decision.”²²¹ This wedge of awareness is how mindfulness can help us to become more ethical. After attending a presentation about mindfulness and ethics, many law students and legal practitioners stated that “they found this [to be] the first time anyone talked about HOW to actually become more ethical, as opposed to WHAT ethics ‘is’ or what the rules are.”²²² Professor Jacobowitz suggested that mindfulness is also likely to promote civility and professionalism among lawyers because mindfulness allows you to pause before responding to an event instead of reacting instantaneously to an event.²²³

An additional rationale for why mindfulness can lead to ethical behavior is that one correlational study and three experimental studies²²⁴ found that increased

of interest); *Id.* R. 1.15 (mandating attorney safekeeping of clients’ property); *Id.* R. 4.1 (mandating attorneys be truthful in statements towards others); *Id.* R. 3.3 (mandating attorney candor towards a tribunal).

214. See, e.g., MODEL RULES OF PROF’L CONDUCT pmbl., para. 6 (2013) (stating that lawyers should seek to improve the law, legal access, administration of justice, and quality of legal services).

215. Riskin, *supra* note 211, at 498-500.

216. *Id.* at 501.

217. *Id.* at 501; Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83, 89 (2002).

218. Riskin, *supra* note 211, at 501.

219. *Id.* at 499.

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

221. 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).

222. E-mail from Scott R. Peppet, Professor of Law, Univ. of Colo. Law Sch. to Peter H. Huang, Professor and DeMuth Chair of Bus. Law, Univ. of Colo. Law Sch. (July 31, 2013, 11:34 MST) (on file with author).

223. Jan L. Jacobowitz, *Mindfulness and Professionalism*, in *THE ESSENTIAL QUALITIES OF THE PROFESSIONAL LAWYER* 229, 230-32 (2013).

224. Andrew C. Hafenbrack, Zoe Kinias, & Sigal G. Barsade, *Debiasing the Mind Through Meditation: Mindfulness and the Sunk Cost Bias*, 25 PSYCHOL. SCI. 369, 369 (2014) (presenting these

mindfulness reduced the sunk-cost effect,²²⁵ in which people continue a course of action because of prior unrecoverable expenditures in effort, money, or time. The sunk-cost effect explains why people sometimes escalate their behavior, including unethical or unprofessional behavior. Recall that one reason that lawyers engage in misdeeds is that of incremental misconduct, in which earlier and smaller misdeeds seem to justify and rationalize later and greater misdeeds. The finding that mindfulness reduced the sunk-cost effect implies that mindfulness may break the escalation of later unethical behavior due to prior unethical behavior.

There is also neuroscience evidence that Buddhist meditators are better able to regulate their emotional processes and therefore are more likely to accept unfair offers in ultimatum games (where another player proposes a division of money and a player has to accept or reject that offered division) as compared to control subjects.²²⁶ In other words, Buddhist meditators can ignore the emotional and social considerations of fairness and can evaluate a monetary reward based solely on its intrinsic financial qualities. Feelings of being slighted, taken advantage of, or treated unfairly can lead people to respond in turn by engaging in unethical or unprofessional behavior. Evidence that mindfulness can mitigate short-term emotions implies that lawyers who practice mindfulness may be better able to serve their clients' and their own financial interests.

Another experimental study found that people who had completed an eight-week meditation course as compared to people who did not complete that meditation course offered their seat more frequently to a person who audibly sighed in discomfort, visibly winced while they walked on crutches in a walking boot, and leaned against a wall.²²⁷ This suggests that meditation can enhance compassionate responding to suffering. Such increased compassion might lead one to behave more ethically and professionally.²²⁸

Mindfulness can be applied narrowly or widely. A soldier may apply mindfulness narrowly to the task of how to most effectively achieve some desired objective by employing military solutions that involve violence. That same soldier may apply mindfulness widely to the task of how to most effectively achieve that same desired objective by utilizing non-military solutions that involve non-violence, such as diplomacy or negotiation. Narrow versus wide applications of mindfulness differ in the focus and scope of actors and activities about which one is mindful. A sufficiently narrow mindfulness can concentrate on constraints or means, while a sufficiently wide mindfulness can include goals or objectives.

studies).

225. Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 *ORG. BEHAV. & HUMAN DECISION PROCESSES* 124, 124 (1985) (presenting a field study and questionnaire studies finding the sunk-cost effect).

226. Ulrich Kirk, Jonathan Downar, & P. Read Montague, *Interoception Drives Increased Rational Decision-Making in Meditators Playing the Ultimatum Game*, 5 *FRONTIERS NEUROSCI. ART.* 49, 49 (2011).

227. Paul Condon, Gaelle Desbordes, Willa Miller, & David DeSteno, *Meditation Increases Compassionate Responses to Suffering*, 24 *PSYCHOL. SCI.* 2125, 2125 (2013).

228. *But see* Peppet, *supra* note 217, at 84-90, 96 (exploring whether mindfulness conflicts with partisanship).

Narrow enough mindfulness can focus just on means while holding ends fixed and therefore be agnostic over ends.²²⁹ Wide enough mindfulness can pay attention to ends in addition to means to accomplish those ends. Different degrees of mindfulness are akin to concentric circles around the practitioner of mindfulness that include more or less of the world around that practitioner. This quotation attributed to Albert Einstein captures the idea of how an expansive kind of mindfulness leads to greater compassion:

A human being is part of a whole, called by us the ‘Universe,’ a part limited in time and space. He experiences himself, his thoughts and feelings, as something separated from the rest—a kind of optical delusion of his consciousness. This delusion is a kind of prison for us, restricting us to our personal desires and to affection for a few persons nearest us. Our task must be to free ourselves from this prison by widening our circles of compassion to embrace all living creatures and the whole of nature in its beauty.²³⁰

B. A Primer about Real-Options Theory

The underlying idea of real options is that you should often delay making a decision until you learn valuable information to help you make a more informed and hopefully better decision. How long you should delay varies with the particular scenario that you face and the costs versus the benefits of waiting to decide.²³¹ This perspective on the often unappreciated or at least underappreciated value of delay is a useful antidote to a common tendency that many people have to make decisions as quickly as possible and without much deliberative thought.

To appreciate the relevance of real options to mindfulness, it is helpful to introduce some terminology about financial options and real options.²³² A financial option provides its owner with the option (not the obligation) to buy or sell some specified amount of an underlying financial asset. Call options provide the option to buy, while put options provide the option to sell. A European option can only be exercised on its expiration date, which is specified in the option contract, while an American option can be exercised any time up to and including its date of expiration. To exercise an option, its owner must pay the exercise price or strike

229. Baker & Brown, *supra* note 200, at 376 (explaining the importance of not viewing concentration meditation in a moral vacuum).

230. Nikki, *Einstein on Being Human {sayings}*, LIBERATOR MAGAZINE, <http://weblog.liberatormagazine.com/2010/10/einstein-on-being-human-sayings.html> (last visited Dec. 20, 2014).

231. See generally FRANK PARTNOY, *WAIT: THE ART AND SCIENCE OF DELAY* (2013) (providing insights about optimal delay across a wide range of various contexts).

232. Huang, *supra* note 93, at 87-99 (providing much more detailed information about real options).

price that is specified in the option contract. The price that one has to pay to acquire an option is called the option premium.

The Black-Scholes-Merton option pricing model (BSMOPM)²³³ derives the premium of a European call option written on a stock. It is a much celebrated success story in modern financial economics.²³⁴ The BSMOPM is famous in part because its pricing formula does not depend on such unobservable variables as the expected return of the underlying stock and heterogeneous risk preferences of investors. The BSMOPM formula depends only on these five variables: the exercise or strike price of the option, the underlying stock price, the time to expiration of the option, the risk-free interest rate, and the variance of stock returns. Of these five variables, all are observable except for the last one, which is often stable and thus can be estimated based on time-series data. There are several other models that also derive closed-form quantitative pricing formulae, such as the binomial options pricing model.²³⁵

Even when it is not possible to derive a closed-form quantitative option valuation formula, it is possible to prove qualitative properties about option values. Some of these properties are what are known in economics as comparative statics results that specify the direction in which the value of an option will change when the value of a parameter changes while holding everything else fixed. There are eight basic properties about call-option values:

- (1) A call option has non-negative payoff value,²³⁶ which follows from the definition of a call option.
- (2) Holding everything else fixed, the value of a call option increases or stays the same when the expiration date of the call option increases.²³⁷
- (3) Holding everything else fixed, the value of a call option increases or stays the same if the exercise price of the call option decreases.²³⁸

233. Fisher Black & Myron Scholes, *The Pricing of Options and Corporate Liabilities*, 81 J. POL. ECON. 637, 640-44 (1973) (developing the famous Black-Scholes options-pricing model to price stock options under certain assumptions); Robert C. Merton, *Theory of Rational Option Pricing*, 4 BELL J. ECON. & MGMT. SCI. 141, 162-78 (1973) (providing alternative derivation of and generalizations of the Black-Scholes model).

234. Robert A. Jarrow, *In Honor of the Nobel Laureates Robert C. Merton and Myron S. Scholes: A Partial Differential Equation That Changed the World*, 13 J. ECON. PERSP. 229, 234-44 (1999) (explaining the importance of the Black-Merton-Scholes option-pricing formula to financial economics, financial industry practice, and society).

235. John C. Cox, Stephen A. Ross, & Mark Rubinstein, *Option Pricing: A Simplified Approach*, 7 J. FIN. ECON. 229, 232-41 (1979) (deriving the mathematically simpler binomial-options pricing model to price stock options under alternative assumptions).

236. Merton, *supra* note 233, at 143, equation (1).

237. *Id.* at 143, equation (4).

238. *Id.* at 143, equation (6).

- (4) If the underlying stock does not pay dividends, then an American call option that is written on that stock will never be exercised prior to expiration.²³⁹
- (5) Holding everything else fixed, the value of a call option increases or stays the same if the risk-free interest rate increases.²⁴⁰
- (6) If k is a positive constant and V stands for the value of a call option that is written on a stock price S with exercise price E , the value of a call option with a strike price of k times E written on a new asset whose value is k times S will be k times V .²⁴¹ In other words, if the payoff and premium of a stock option are both scaled up or down by the same constant factor of k , then the value of the new scaled up or down stock option also scales up or down by the same constant factor of k .
- (7) The value of a call option written on a portfolio of stocks is less than or equal to the value of the portfolio (with the same weights as the original portfolio) of call options written on the individual stocks.²⁴²
- (8) Holding everything else fixed, the value of a call option increases or stays the same when the riskiness of the underlying asset on which that option is written increases.²⁴³

A real option provides its owner with the option (not the obligation) to do something about some underlying real asset. Examples of real options include options to abandon, build, defer, expand, grow, shrink or switch some underlying project.²⁴⁴ It is straightforward to draw analogies between many of the key variables that determine the value of real options and financial options.²⁴⁵ The cost of exercising a real option is analogous to the exercise or strike price of a financial option. The length of time that a real option is viable is analogous to the time to expiration of a financial option. The present discounted value of the future cash flows from an underlying real asset is analogous to the underlying stock price of a financial option written on a stock. The riskiness of the underlying real asset, as measured by the variance of the probability distribution over the interval bounded above by the best possible case scenario and bounded below by the worst possible

239. *Id.* at 144, Theorem 2.

240. *Id.* at 143.

241. *Id.* at 147, Theorem 6.

242. *Id.* at 148, Theorem 7.

243. *Id.* at 149, Theorem 8.

244. Huang, *supra* note 93, at 90-91 n.187 (providing a large number of examples of real options).

245. *See, e.g.*, MARION BRANCH, REAL OPTIONS IN PRACTICE 43 fig.2.6 (2003).

case scenario, is analogous to the variance of stock returns for a financial option written on a stock.

C. *Applying Real-options Theory to Value Mindfulness*

Mindfulness permits one to pause and carefully assess a situation before acting.²⁴⁶ In this way, mindfulness provides a valuable pause, space, or “wedge of awareness” before responding to something as opposed to having a knee-jerk reaction to something or reacting to something merely out of habit, inertia, or strong negative emotions.²⁴⁷ The best-selling motivational author Stephen Covey wrote that he was staggered to the core and that his life was profoundly changed upon reading in a book that he found in a library during a sabbatical in Hawaii these three sentences: “Between stimulus and response there is a space. In that space lies freedom and power to choose our response. In those choices lies our growth and our happiness.”²⁴⁸ This passage has been widely misattributed to psychiatrist Victor Frankl in his famous book *Man’s Search for Meaning*.²⁴⁹ Regardless of who is the real author of these sentences, the space to which this passage refers is what mindfulness allows you to create, enlarge, and utilize before making a decision. The pause or the space or the “wedge of awareness” that mindfulness provides effectively creates valuable flexibility by allowing you to exercise real options about your behavior after you consider and reflect upon the consequences of making different choices. These real options allow you to access information about your bodily sensations, feelings, impulses, intentions, and thoughts.²⁵⁰ Awareness of such information allows you to consider what you would like to do in light of that information.

The real options that mindfulness provides its practitioner include these: abandoning some particular course of behavior; maintaining ongoing behavior; engaging in ethical or professional behavior; engaging in unethical or unprofessional behavior; scaling back or scaling up the level of some behavior; speeding up or slowing down some behavior; or even compound options, which are options written on another option. The simple yet powerful observation that mindfulness provides its practitioners with real options has a number of implications based upon applying real-options theory to analyze the value of these real options. For concreteness, this Article focuses on the values of two complementary real options; namely, the real option to engage in ethical or professional behavior and the real option to engage in unethical or unprofessional behavior.

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

247. *Further Beyond Reason*, *supra* note 196, at 321 fig.3; Jacobowitz, *supra* note 223, at 232.

248. STEPHEN R. COVEY, *THE EIGHTH HABIT: FROM EFFECTIVENESS TO GREATNESS* 42 fig.4.3 (2004).

249. VIKTOR E. FRANKL, *MAN’S SEARCH FOR MEANING* (1946).

250. Riskin, *supra* note 211, at 495, 499; Jacobowitz, *supra* note 223, at 236.

First, the values of the real option to engage in ethical or professional behavior and the real option to engage in unethical or unprofessional behavior are both non-negative before taking into account the cost of those real options. In particular, because the real option to engage in unethical or unprofessional behavior does not have to be exercised, it will not be exercised when exercising that real option would lead to a negative payoff value. As the cost of this real option is the cost of practicing mindfulness, that cost may be quite low: a couple of minutes of your time.

Second, holding everything else fixed, the values of the real option to engage in ethical or professional behavior and the real option to engage in unethical or unprofessional behavior both increase or stay the same the more time there is before having to make a decision about whether to engage in ethical or professional behavior or to engage in unethical or unprofessional behavior. This options property means that mindfulness will provide more value if it is practiced earlier rather than later in considering legal ethics and professionalism issues. Such advice reinforces the importance of Professors Sternlight and Robbenolt's suggestion to plan ahead in thinking about legal ethics and professionalism.²⁵¹

Third, holding everything else fixed, the value of the real option to engage in unethical or unprofessional behavior that mindfulness provides increases or stays the same when the costs of engaging in such behavior decreases. In most decisions involving unethical or unprofessional behavior, one component of the costs of engaging in such behavior decreases the more that you engage in this behavior; namely, the psychological costs of anxiety, discomfort, guilt, and remorse from doing so. This options-property implies that mindfulness will be more valuable to you the more accustomed you are, and the less psychologically costly you find it, to engage in unethical or unprofessional behavior. In the limit, if you feel no psychological costs from unethical or unprofessional behavior, then mindfulness provides a most valuable real option; namely, the countervailing force to reconsider whether you really want to engage in unethical or unprofessional behavior.

Fourth, if engaging in unethical or unprofessional behavior does not produce any benefits before the date a decision must be made, then you should not exercise the real option to engage in unethical or unprofessional behavior that mindfulness provides before the date a decision has to be made. This options property implies that you should not rush prematurely into unethical or unprofessional behavior and you should instead take your time to mindfully consider what you should do when there are no benefits from making a decision earlier than you have to.

Fifth, holding everything else fixed, the value of the real option to engage in unethical or unprofessional behavior that mindfulness provides increases or stays the same when the risk-free interest rate increases. The intuition underlying this property is that when the risk-free interest rate is higher, the holder of a real option to engage in unethical or unprofessional behavior earns more interest from placing money in a risk-free interest rather than spending it on engaging immediately in

251. Robbenolt & Sternlight, *supra* note 1, at 1162-64.

unethical or unprofessional behavior. As current interest rates are at their historical lows, this property means that the value of the option to engage in unethical or unprofessional behavior that mindfulness provides is going to rise or stay constant once interest rates begin to rise.

Sixth, if all of the costs and benefits of engaging in unethical or unprofessional behavior are scaled up or down by the same factor of a constant k , then the value of the real option to engage in unethical or unprofessional behavior that mindfulness provides also scales up or down by the same factor of k . One way of describing this options property is that if there are no economies of scale or diseconomies of scale connected to the total costs and benefits of engaging in such behavior, there also will be no economies of scale or diseconomies of scale in the value of the mindfulness real option. Notice though that this proposition assumes that aggregate costs and total benefits of engaging in unethical or unprofessional behavior are scaled up or down by one common scaling factor of k .

Seventh, if you are considering engaging in a multiplicity of unethical or unprofessional acts, then the value of the real option that mindfulness provides for considering all at once to engage in all of those acts is less than or equal to the sum of the values of the real options mindfulness provides for considering individually to engage in each of those of acts. In other words, when it comes to the real-option values that mindfulness provides, there are no benefits due to diversification by forming a portfolio across unethical or unprofessional acts. This options property implies that you receive more optionality value by separately considering engaging in each of these unethical or unprofessional acts individually rather than considering all at once to engage in all of these acts. So if you face a scenario involving more than just a single unethical or unprofessional act (which is likely to describe most scenarios involving such behavior), then in order to maximize the value of the real options that mindfulness provides you should *individually* consider engaging in each act separately instead of simultaneously consider engaging in all of the acts at once.

Eighth, holding everything else fixed, the value of the real option to engage in unethical or unprofessional behavior that mindfulness provides increases or stays the same when the riskiness of the underlying decisions being contemplated increases. In most decisions involving legal ethics and professionalism, the interval of possible outcomes with the endpoints of that interval being the best possible case and worst possible case scenarios is quite large by the nature of the possible costs and benefits involved. The higher the variance of the probability distribution over that interval the more riskiness there is over which actual outcome will realize. This options property implies that mindfulness will be more valuable to you the more there is at risk in the unethical or unprofessional behavior that you are considering. In particular, the greater the downside risk of a very negative outcome, the more valuable is the real option that mindfulness provides. Because mindfulness provides you with the pause, space, and wedge of awareness to not exercise the real option to engage in unethical or unprofessional behavior, the more dire and negative the consequences of engaging in unethical or unprofessional, the more valuable it is to avoid the real option that can lead to such bad outcomes. As is true of all options, the asymmetric nature of the payoff means that you will decide to avoid a course of action when pursuing it leads to negative payoff values.

The above eight properties of the value of mindfulness in legal ethics and professionalism illustrate how mindfulness provides its practitioner with real options and leads to novel and perhaps unexpected conclusions about the value of mindfulness based upon applying the qualitative theory of real options. More importantly, mindfulness effectively implements a real-options perspective to legal ethics and professionalism decision-making. Practicing mindfulness facilitates the reflective and wise exercise of individual autonomy.²⁵²

One of the main insights of this Article is that engaging in unethical or unprofessional behavior extinguishes valuable real options. Engaging in unethical or unprofessional behavior often leads to professional suicide and possibly even physical suicide. Those who commit professional or personal suicide permanently foreclose on desirable real options to continue with their professions or lives and wait to see if things improve as they often do.²⁵³

Taking a real-options approach to legal ethics and professionalism decision-making helps you realize that you own both the real option to engage in ethical or professional behavior and the complementary real option to engage in unethical or unprofessional behavior. Further, you realize that you can choose to exercise either option, and that you do not have to exercise either option. Both of these real options can be quite valuable and the cost of these real options is to practice mindfulness. That cost is quite low, and empirical evidence suggests that it likely decreases over time with practice. In other words, mindfulness provides you real options whose premia are likely to fall over time with continued mindfulness practice.

D. Mindfulness, WRAP, and Positive Psychology

The self-reflection that mindfulness cultivates may prompt you to behave more ethically and professionally than otherwise by offsetting each of the four cognitive villains that the WRAP process is designed to mitigate: (1) narrow framing of a decision problem; (2) confirmation bias of seeking only supporting information; (3) temptation from immediate emotions; (4) and overconfidence in your ability to predict the future. Mindfulness can help you develop the habit, practice, space, and way to recursively do the WRAP process. The widen-your-options step of the WRAP process is facilitated by mindfully asking yourself what else you could do in addition to or besides the option(s) you are considering already. The reality-test-your-assumptions step is helped by mindfully asking yourself what reality you are facing and whether your assumptions correspond to that reality. The attain-distance-before-deciding step is more likely to be accomplished by mindfully asking to what you should pay attention. The prepare-to-be-wrong step is assisted by mindfully

252. Arnould W.A. Boot & Anjan V. Thakor, *The Economic Value of Autonomy*, (Univ. of Amsterdam, UvA-DARE Working Paper No. uvapub:94962 2003) available at <http://dare.uva.nl/document/2/94962> (presenting a real-options theory of autonomy).

253. AVINASH K. DIXIT & ROBERT S. PINDYCK, INVESTMENT UNDER UNCERTAINTY 24-25 (1994) (discussing the application of a real-options perspective to suicide).

considering the many possible ways that you can be wrong about your predictions of the future. Tripwires may act as bellwethers to help to trigger mindfulness.

A more detailed example of the relationship between the (attain-distance-before-deciding step of the) WRAP process and mindfulness is illustrated by a particular mindfulness technique, known by the acronym “RAIN,” that helps people move away from negative emotions.²⁵⁴ The acronym RAIN stands for the following steps: (1) Recognize your negative emotion(s); (2) Allow it to be or happen just as it is; (3) Investigate your inner experience with kindness; and (4) Non-identify or Not attach yourself to those negative emotions. Thus, RAIN provides a step-by-step way to attain some distance from your temporary negative emotions by being mindful of both those negative emotions and the notion that you are not defined by or equated with your negative emotions or their related sensations and thoughts. Because you would apply the RAIN process to someone that you care about, the RAIN process is a form of self-compassion and can lead to self-forgiveness. The reason to allow your negative emotions to just be as they are is that it is a waste of time to fight reality or lament that it differs from your expectations. To allow your negative emotions to be does not mean that you agree with them or their associated thoughts. It just means that you accept feeling those negative emotions at this time. In fact, feeling or experiencing your emotions more fully and completely allows you to be able to detach from them and leave them behind you so that they have less power over you.²⁵⁵ Thus, the RAIN process can help lower one possible cost of mindfulness, namely (at least, initially) painful awareness.

Another detailed example of the relationship between the (attain-distance-before-deciding step of the) WRAP process and mindfulness is illustrated by a mindfulness technique to disarm strong emotions, impulses, and thoughts by breaking them into their component or constituent parts.²⁵⁶ This mindfulness technique helps you realize that pain and other negative physical and mental sensations are distinct from their related emotions, impulses, and thoughts. Your emotions, impulses, and thoughts are what make up aversion or craving and can cause suffering. By mindfully observing them, you are able to realize their impermanent nature and such a realization allows you to be more likely to accomplish step three of the WRAP process, namely, attain distance from your emotions before making a decision.

The real-options perspective to legal ethics and professionalism decision-making that mindfulness provides allows you to realize that you own many real options to do or not to do many different possible things. The real-options approach permits you to incorporate possibly disconfirming information that you learn before

254. Selig, *supra* note 188; Tara Branch, *Feeling Overwhelmed? Remember “RAIN,” MINDFUL* (Aug. 2014), <http://www.mindful.org/mindful-magazine/tara-brach-rain-mindfulness-practice> (describing the RAIN process); TARA BRANCH, *TRUE REFUGE: FINDING PEACE AND FREEDOM IN YOUR OWN AWAKENED HEART* 62 (2013).

255. 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, 28 (2002) (explaining in more detail how detaching from emotions is related to experiencing emotions fully).

256. *Id.* at 28-30 (describing and analyzing this mindfulness technique).

making a decision about whether to engage in unethical or unprofessional behavior. The real-options perspective facilitates your ability to shift from your “subjective, personal perspective to a more objective, witness-like perspective.”²⁵⁷ This perspective is one that is humble about your ability to correctly forecast values of the future benefits and costs of engaging in unethical or unprofessional behavior.

The WRAP process and mindfulness are both also related to certain aspects of positive psychology. The widen-your-options step of the WRAP process will be facilitated by your being in a positive mood according to the broaden-and-build theory of positive emotions, which posits that positive moods broaden momentary thought-action repertoires and mindsets, and in so doing, promote discovering creative and novel actions.²⁵⁸ Psychological research has found that a wandering mind is associated with unhappiness²⁵⁹ and that even just a two-week long training course in mindfulness reduces mind wandering.²⁶⁰ Psychological research has also found that mindfulness promotes positive affect.²⁶¹ Neuroscience research has also found that mindfulness promotes positive affect.²⁶²

The reality-test-your-assumptions step of the WRAP process as exemplified by keeping a marriage diary of things that your spouse does that please you²⁶³ is a special case of applying to marriage the more general²⁶⁴ and empirically validated²⁶⁵ positive psychology intervention of regularly keeping a gratitude journal of good things that happen to you and their causes. The attain-distance-before-deciding step of the WRAP process asks you to consider longer-term meaning and purpose instead of just focusing on short-term emotions. In so doing, this advice is related to positive psychological research about the differences between happiness and meaningfulness,²⁶⁶ the differences in perceived meaning in

257. Shapiro, Jazaieri, & Goldin, *supra* note 24, at 511.

258. Barbara L. Fredrickson, *The Broaden-and-Build Theory of Positive Emotions*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y B 1367, 1369-70 (2004) (reviewing empirical evidence supporting the broaden-and-build theory).

259. Matthew A. Killingsworth & Daniel T. Gilbert, *A Wandering Mind is an Unhappy Mind*, 330 SCI. 932, 932 (2010).

260. Mrazek et al., *supra* note 207, at 776.

261. 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, 829, 830 tbl.4 (2003).

262. Richard J. Davidson et al., *Alterations in Brain and Immune Function Produced by Mindfulness Meditation*, 65 PSYCHOSOMATIC MED. 564, 565 (2003).

263. HEATH & HEATH, *supra* note 14, at 107-08; AARON T. BECK, LOVE IS NEVER ENOUGH: HOW COUPLES CAN OVERCOME MISUNDERSTANDINGS, RESOLVE CONFLICTS, AND SOLVE RELATIONSHIP PROBLEMS THROUGH COGNITIVE THERAPY 245-46, 248 (1989).

264. Robert A. Emmons & Michael E. McCullough, *Counting Blessings Versus Burdens: An Experimental Investigation of Gratitude and Subjective Well-Being in Daily Life*, 84 J. PERSONALITY & SOC. PSYCHOL. 377, 377 (2003).

265. Martin E. P. Seligman, Tracy A. Steen, Nansook Park, & Christopher Peterson, *Positive Psychology Progress: Empirical Validation of Interventions*, 60 AM. PSYCHOL. 410, 416-18 (2005) (describing the exercise of writing down three good things and their causes every night for a week and reporting on experimental results).

266. Roy F. Baumeister, Kathleen D. Vohs, Jennifer Aaker, Emily N. Garbinsky, *Some Key Differences between a Happy Life and a Meaningful Life*, 8 J. POS. PSYCHOL. 505, 505 (2013).

life between poorer and wealthier nations (higher in poorer countries and lower in wealthy nations),²⁶⁷ and the difference life-purpose has on longevity (having a purpose in life promotes longevity in adults by reducing mortality risk, even controlling for affective and psychological well-being markers).²⁶⁸

The prepare-to-be-wrong step of the WRAP process is illustrated by the large body of affective forecasting research which has found that most people have a tendency to overestimate the duration and intensity of their future emotions.²⁶⁹ Because of this tendency, most people believe that they can achieve lasting happiness by satisfying their cravings and avoiding their aversions. Mindfulness helps people realize the impermanent nature of cravings, aversions, and manifestations of them in terms of associated bodily sensations, emotions, impulses, and thoughts.²⁷⁰

Finally, it is already well-known that mindfulness is related to positive psychology.²⁷¹ The real-options approach to mindfulness provides an additional connection to research in positive psychology about differences between our experiencing selves as opposed to our remembering selves.²⁷² By helping you to be present in the moment, mindfulness can improve your experiences moment to moment because it allows you to have a wider-angle lens and a more distanced perspective from which to live through and view your experiences.²⁷³ Mindfulness provides real options to notice and pay attention to what will matter from the viewpoint of the future about current experiences. Mindfulness facilitates paying attention to and provides real options to focus on positive aspects of current

267. Shigehiro Oishi & Ed Diener, *Residents of Poor Nations Have a Greater Sense of Meaning in Life Than Residents of Wealthy Nations*, 25 PSYCHOL. SCI. 422, 422 (2014).

268. Patrick L. Hill & Nicholas A. Turiano, *Purpose in Life as a Predictor of Mortality Across Adulthood*, 25 PSYCHOL. SCI. 1482, 1482 (2104).

269. See, e.g., Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 35 ADV. EXPERIMENTAL SOC. PSYCHOL. 345, 349-402 (2003) (analyzing experimental findings about affective forecasting errors).

270. Riskin, *supra* note 255, at 27, 29 (analyzing the nature of craving and suffering, and the ways mindfulness can help alleviate craving and suffering).

271. See, e.g., Killingsworth & Gilbert, *supra* note 259, at 932; Brown et al., *supra* note 261, at 829, 830 tbl.4; Davidson et al., *supra* note 262, at 565. See generally DONALD ALTMAN, POSITIVELY MINDFUL (2013) (presenting concepts, skills, and research connecting mindfulness and positive psychology); MINDFULNESS, ACCEPTANCE, AND POSITIVE PSYCHOLOGY: THE SEVEN FOUNDATIONS OF WELL-BEING (Todd B. Kashdan & Joseph Ciarrochi eds., 2013) (exploring connections between positive psychology and mindfulness-based acceptance and commitment therapy); RYAN M. NIEMIEC, MINDFULNESS AND CHARACTER STRENGTHS: A PRACTICAL GUIDE TO FLOURISHING (2013) (integrating mindfulness and positive psychology's character strengths into a Mindfulness-Based Strengths Practice program).

272. See, e.g., KAHNEMAN, *supra* note 6, at 377-410 (analyzing differences between experiencing selves and remembering selves); see also 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. (forthcoming 2014) (providing two conditions under which law and policy should care more about a person's experiences than a person's memories of the person's experiences).

273. See, e.g., Dawn Klingensmith, *Bored with Your Long Commute? Spice It Up with These Tips*, PHILLY.COM, http://www.philly.com/philly/jobs/Tips_for_making_that_long_commute_more_enjoyable.html?c=r (Apr. 23, 2014) (suggesting that mindfulness as a practice can change the nature of your commuting experience from that of road rage or boredom to awe or laughter).

experiences instead of just focusing on how experiences might be falling short of what are likely to be unrealistic expectations, expectations that are based partly and potentially upon rose-colored memories of other similar experiences. Mindfulness helps people avoid dwelling on being temporarily annoyed by momentary and ultimately unimportant details of experiences that were missing in their overly optimistic and incomplete anticipations of their experiences, and that are going to be missing in their selectively constructed positive memories of their experiences.²⁷⁴ Mindfulness thus allows people to have the real option to enjoy and savor the important essence or true gestalt of their experiences.

CONCLUSIONS

This Article focused on how you can deal with two categories of reasons that explain why some lawyers act unethically or unprofessionally, namely cognitive biases and mindlessness. This Article analyzed how a decision-making process that is known by the acronym WRAP is able to repair or at least mitigate specific cognitive biases and in doing so improve your decision-making in general and your legal-ethics and professional decision-making in particular. The acronym WRAP stands for these decision-making heuristics: (1) Widen your options, (2) Reality-test your assumptions, (3) Attain distance before deciding, and (4) Prepare to be wrong. The WRAP process mitigates these specific cognitive biases: (1) narrow framing of a decision problem, (2) confirmation bias, (3) temptation of short-term emotions, and (4) overconfidence in your ability to predict the future.

This Article also applied real-options theory to analyze the value of the practice of mindfulness and how it can improve lawyers' ethical and professional decision-making. This Article developed eight properties concerning the values of two complementary real options that mindfulness provides its practitioner, namely the real option to engage in ethical or professional behavior and the real option to engage in unethical or unprofessional behavior. Finally, this Article considered some of the interrelationships among the WRAP process, mindfulness, and positive psychology. By explaining how mindfulness and the WRAP process are related, this Article also connected mindfulness with behavioral economics.

274. Huang, *supra* note 272 (explaining how and analyzing why expectations and memories tend to converge and be more positive than actual experiences); Robert I. Sutton, *Feelings About a Disneyland Visit: Photography and the Reconstruction of Bygone Emotions*, 1 J. MGMT. INQUIRY 278, 279-80 (1992) (hypothesizing that taking photographs and experiencing several psychological factors likely cause visitors to Disneyland to remember and report positive bygone feelings that they experienced during their visits, yet forget and fail to report negative bygone feelings that they experienced during their visits).

This Article did not deal with substance abuse,²⁷⁵ which can be a cause of as well as a consequence of unethical and unprofessional behavior. One reason that this Article did not deal with substance abuse is that people engaging in substance abuse are likely to have more difficulties than other people do with improving their decision-making or being more mindful. Ironically though, people who succeed at improving their decision-making or being more mindful are likely to discontinue or never begin to engage in substance abuse. This irony provides yet another reason to teach law students about how to improve their decision-making and about mindfulness in some of their courses, particularly legal ethics and professionalism. Practicing mindfulness may not only improve decision-making, but in doing so can also improve the lives of lawyers and their clients.

275. Debra S. Austin, *Drink Like a Lawyer: The Neuroscience of Substance Use and Its Impact on Cognitive Wellness*, 15 NEV. L.J. (forthcoming 2015) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2503021 (discussing causes and consequences of substance abuse by lawyers and making neuroscience-based recommendations on how law schools, law students, lawyers, judges, and law firms can optimize brain health and lawyer wellness).