

2016

Mindful “Judging” 1.5: The Science of Attention, “Lie Detection,” and Bias Reduction – With Kindness

Clark Freshman

Shauna Shapiro

Sarah de Sousa

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>

 Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Clark Freshman, Shauna Shapiro, and Sarah de Sousa, *Mindful “Judging” 1.5: The Science of Attention, “Lie Detection,” and Bias Reduction – With Kindness*, 2016 J. Disp. Resol. (2016)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2016/iss2/4>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository.

Mindful “Judging” 1.5: The Science of Attention, “Lie Detection,” and Bias Reduction – With Kindness

*Clark Freshman**

*Shauna Shapiro***

*Sarah de Sousa****

I. INTRODUCTION

Federal Judge Jeremy Fogel, Director of the Federal Judicial Center, recently published “Mindfulness and Judging” on the Center’s official website.¹ From one view, this further confirms the growing embrace of mindfulness in law.² Yet some still doubt mindfulness and the science behind its effectiveness. At a recent confer-

* Clark Freshman, Professor of Law & Center For Negotiation and Dispute Resolution, University of California, Hastings College of Law. B.A., Harvard College; M.A. University College, Oxford; J.D., Stanford Law School. As with so much of my legal career, I’m especially grateful to Carrie Menkel-Meadow, for whom I was a teaching assistant when she taught at Stanford. Carrie first picked up on my interest in mindfulness, and connected me with Len Riskin, for whom I am grateful for introducing me to the mindfulness and law retreats developed by Charlie Halpern. I owe an incalculable debt to Paul Ekman for his help with learning to read and study emotions and to his daughter, Eve, who first motivated Paul to explore mindfulness and meditation during their meeting with the Dalai Lama. For reading earlier drafts, helpful comments, and helpful conversations, I’m grateful to Hiro Aragaki, Daniel Bowling, Dana Curtis, Peter Huang, Carol Izumi, Lee Robbins, Michael Stonebreaker, and Gary Shuster. For impeccable research assistance and guidance, thanks to Hilary Hardcastle of the Hastings Law Library and, for research assistance and editing, to Madeline Landry, Charlie Fagan, and Amy Depuy. I am grateful to Lesley King and Stephen Lothrop, G.A., for providing kind and attentive faculty support and to Hastings for a generous summer research grant to support this and related research on emotion, mindfulness, and lie detection. Finally, I am grateful to many students in my classes on negotiation, lie detection, and mindfulness who have contributed in many ways to this and my ongoing work.

** Professor of Psychology, Santa Clara University.

*** Sarah de Sousa, Educational Counselor, Insight Education, Stanford University, B.A., Santa Clara University, M.A.

1. Jeremy D. Fogel, *Mindfulness and Judging*, FED. JUDICIAL CTR., (2016), <http://www.fjc.gov> (search starting point field for “Mindfulness and Judging 2016”).

2. See, e.g., Clark Freshman et al., *Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support*, 7 HARV. NEGOT. L. REV. 67 (2002); MINDFULNESS AND THRIVING LEGAL PRACTICES, <http://www.colorado.edu/law/research/mindfulness-and-thriving-legal-practices> (last visited Sept. 2, 2016) (exploring mindfulness through means of brain imaging and its relationship to positive psychology, communication, and other fields); Peter H. Huang, *How Improving Decision-Making and Mindfulness Can Improve Legal Ethics and Professionalism*, 21 J.L. BUS. & ETHICS 35 (2015); cf. William S. Blatt, *What’s Special About Meditation? Contemplative Practice for American Lawyers*, 7 HARV. NEGOT. L. REV. 125 (2002) (mindfulness may be valuable, and other emotional intelligence approaches may also be equally or more valuable).

ence on mindfulness and legal education, a professor at one prestigious school revealed that his dean suggested his course proposal on mindfulness . . . not use “mindfulness” in the title, lest other professors be provoked. Perhaps a similar sentiment motivated Justice Breyer: when asked about his meditation practice, he replied, “I don’t know that what I do is meditation, or even whether it has a name. For 10 or 15 minutes, twice a day I sit peacefully. I relax and think about nothing or as little as possible.”³

This article addresses two overlapping audiences. We’ve written this article partly as a kind of manual like Mindfulness 1.0 for those who suspect⁴ they know little and as a resource to convince skeptical others, and the curious or even skeptical parts of ourselves, that mindfulness deserves its newfound, albeit shaky, respect. What is mindfulness and how can mindfulness help us judge, advocate, and negotiate?⁵ Judge Fogel’s writing and his position carry weight with many. This Article adds some of the latest research, including brain imaging and carefully controlled studies. We highlight multiple types of data from dramatic increases in working memory and scores of the Graduate Records Exam for admission to graduate school

3. Amanda Enayati, *Seeking Serenity: When Lawyers Go Zen*, CNN: THE CHART, (May 11, 2011, 11:15 AM) <http://thechart.blogs.cnn.com/2011/05/11/seeking-serenity-when-lawyers-go-zen>.

4. We use lawyer, judging, and negotiating rather than referring to roles, such as lawyers, judges, and negotiators. We do so because a key part of mindfulness involves recognizing the implicit patterns and habitual reactions that often dilute and pollute when we carry those habits past their useful areas. For a perspective on the ubiquity of judgments from a meditative perspective, see generally JOSEPH GOLDSTEIN, *INSIGHT MEDITATION: THE PRACTICE OF FREEDOM* (2003) (teaching practices to be aware of the many judgments and evaluations that we may often make – but may not recognize as judgments and evaluations). When Clark litigated, friends often said, “Don’t cross-examine me.” When he became more of a negotiation teacher, his sister said, “Don’t try that active listening crap on me.” On the flip side, we may often neglect to invoke mindfully the proper role and attitude. Perhaps there is a heated controversy about how to deal with a law that has the effect of limiting access to abortion. As a lawyer, we may just slip into sending a demand letter, and neglect the possibility of working out a compromise with those enforcing the law. As a judge, we might feel the need to issue an up or down ruling rather than, as the Supreme Court recently has, chosen to encourage others to think of an agreement that might meet the needs of all parties. In a life populated with Yelp, Tripadvisor, retweets, and emoticons, we habitually judge and evaluate. This judging and evaluating mode often distances us from others – as well as distancing us from underused and underutilized parts of ourselves. Practicing mindfulness offers the opportunity to develop a less reactive and more intentional mode of being, wherein we are free to choose creative, skillful responses to the circumstances, events and demands of our work and lives.

5. The author of the article on which we write is a federal judge, but his article is more in the mode of educator or negotiator: he is attempting to get other judges to engage in more mindfulness. Judges, for example, often negotiate with parties. See generally Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981) (contrasting traditional role of judge in simply ruling on legal issues with the modern role in working with lawyers and parties more actively to resolve cases through various ways to facilitate agreement). Trial lawyers, too, often find that they engage in some mix of negotiation and mediation since nearly all disputes get resolved other than by a binding decision. See generally Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDU. 268 (1984) (describing how much even those who think of being trial lawyers actually resolve many aspects of cases through some form of negotiation). In a less obvious way, many of as lawyers and negotiators also act as judges. We often decide whether we find the statements others make as “true” or “false.” Law teachers, too, often make judgments about whether statements are “smart” or not. (Applicants to be law teachers and law teachers seeking good student evaluations instead often identify every set of words spoken by an interlocutor as “a very good question.”) These every day judgments sometimes manifest in words and often in judgments. Women, for example, often find themselves ignored and their ideas devalued. People of color and sexual minorities often find several daily microaggressions. See generally Peggy C. Davis, *Popular Legal Culture: Law as Microaggression*, 98 YALE L.J. 1559 (1989).

to changes in the structure and activation patterns of the brain.⁶ Such research readily suggests that mindfulness classes for law school applicants, law students themselves, and bar applicants could boost their chances of admission to law school, better grades and opportunities, and bar admission.⁷ Skeptical administrations and boards could also see a powerful boost in bar passage,⁸ a key factor in the perennial attention to law school rankings.

In addition to research on boosting test scores, more than three thousand articles published over the last thirty years use *mindfulness* in the abstract and keywords.⁹ Brain scans now verify what psychologists and mindfulness teachers have long observed in their students: if we practice mindfulness repeatedly, then brain images actually show changes in our brains. Consider research by Lazar. She and colleagues matched individuals for similar backgrounds and then compared the relevant pairs of images; compared to their matches who did not meditate, meditators showed increased cortical thickness in the prefrontal cortex and right anterior insula, areas of the brain associated with executive function, self-awareness, and emotional processing.¹⁰ Recent studies have shown that mindfulness practice changes brain activity during a given session of mindfulness meditation or practice and baseline brain structure after practice over time. Together, these studies show that mindfulness practice increases positive emotions, intelligence, empathy, cognitive flexibility, and other important indicators of psychological health.¹¹ This Article describes this further below.

Our second audience knows (or thinks they know) more. With such research from multiple methods, why not call this Mindfulness 2.0 instead of Mindfulness 1.5? The .5 in Mindfulness 1.5 indicates two things. First, Mindfulness 1.0 had huge success and some limitations. That success is well documented in the experiences of many lawyers and the many publications on basics of mindfulness in law

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

7. *Id.* Law school admissions, law school grades, and bar exams draw at least in part on the kind of ability to reduce mind-wandering and improve memory that the research suggests. Many have also suggested that meditation may improve such performance. *See, e.g.*, SCOTT L. ROGERS, MINDFULNESS FOR LAW STUDENTS: USING THE POWER OF MINDFULNESS TO ACHIEVE BALANCE AND SUCCESS IN LAW SCHOOL (2009).

8. For a time, BarBri, the nation’s leading bar preparation educator, offered guided meditations for free on its website. *BarBri Offers Mindfulness Training*, THE MINDFUL LAW BLOG (June 25, 2013), <http://themindfullawyer.com/mindful%20law%20blog/index.php?id=7298120309294628225>.

9. *AMRA Database*, AMRA, <https://goamra.org/resources/mindfo-database/> (last visited Oct. 22, 2016).

10. Sara W. Lazar et al., *Meditation Experience Is Associated with Increased Cortical Thickness*, 16 NEUROREPORT 1893 (2005); B. Tomasario & F. Fabbro, *Increases In The Right Dorsolateral Prefrontal Cortex And Decreases The Rostral Prefrontal Cortex Activation After-8 Weeks Of Focused Attention Based Mindfulness Meditation*, 102 BRAIN AND COGNITION 46 (2016) (participants in eight week mindfulness class showed improvements in brain scans of regions associated with better attention and with less mind-wandering and activation of the default mode associated with rumination and negative emotion).

11. *See, e.g.*, Britta K. Hölzel et al., *How Does Mindfulness Meditation Work? Proposing Mechanisms of Action from A Conceptual and Neural Perspective*, 6 PERSPECTIVE ON PSYCHOL. SCI. 537 (2011) (reviewing theories of how mindfulness may work on the brain and current evidence); Richard J. Davidson et al., *Alterations in Brain and Immune Function Produced by Mindfulness Meditation*, 65 PSYCHOSOMATIC MED. 564 (2003) (a frequently cited landmark study showing those who did eight week meditation class showed better response to flu vaccine and better activation of regions of brain associated with happiness).

and law schools. Furthermore, some overlooked Mindfulness 1.0 for several reasons, and some understood it only as stress-reduction.

Mindfulness 1.5 instead connects mindfulness to better judging, negotiating, and lawyering. Simply put, this article documents why mindful judges, lawyers, and negotiators would do better for *themselves*, their clients, and any others they happen to value.¹² Second, and perhaps more significantly, mindfulness had some of the defects that Oscar Wilde found in socialism: it took too many evenings. The early studies in mindfulness required participants to meditate 45 minutes a day, 6 days a week.¹³ Often, that is too large a request for the modern professional. Fortunately, more recent studies have demonstrated that even 5 minutes of mindful practice a day makes a difference, and further, incorporating the themes and teaching of mindfulness moment by moment through “informal practice” also has a significant effect.¹⁴

On a plane to a conference on mindfulness and law, Clark’s seatmate was an experienced long-term therapist reading the manual to teach classes on dialectical behavioral therapy, an astonishing class shown to help people with borderline personality disorder.¹⁵ That therapy includes mindfulness, but the therapist said she

12. We use any others “they happen to value” deliberately. As a matter of principle, we distinguish mindfulness from its religious or philosophical roots that sometimes emphasized choosing to help all others without showing any preferences. SHARON SALZBERG, *LOVINGKINDNESS* 96 (1995) (“The division between self and other is the degradation of our highest human potential.”); JON KABAT-ZINN, *COMING TO OUR SENSES* 11 (2005) (mindfulness – at least to “function effectively on every level” for individual to nation to organization “does require that we be motivated to realize who we actually are and to live our lives as if they really mattered, not just for ourselves, but for the world.”). But we express no views here on that question, and people might plausibly often think they would favor one person or another. Emphasizing individual autonomy to choose different goals and to favor some more than others fits most negotiation scholarship. See, e.g., ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 3d. ed. 2011); MARGARET NEALE & THOMAS LYS, *GETTING MORE OF WHAT YOU WANT: HOW THE SECRETS OF ECONOMICS & PSYCHOLOGY CAN HELP YOU NEGOTIATE ANYTHING IN BUSINESS & LIFE* (2016); but compare, e.g., Carrie Menkel-Meadow, *Whose Dispute is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) (individuals may choose to pursue their own values in negotiation), and Michael Moffitt, *Three Things To Be Against (“Settlement” Not Included)*, 78 FORDHAM L. REV. 1203 (2009) (advocating ability of parties to settle as they like in accordance with own values), with David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (private settlements may undermine public values that affect more than mere parties to a dispute or case). On the other hand, we also deliberately emphasize that readers of this article might help “any others they happen to value” rather than “any others they *choose* to value.” As discussed in the section on bias, one of the most frequent phenomenon of future decision making is the way many people value some, overlook others, and devalue others without any obvious choice.

13. See, e.g., Jon Kabat-Zinn, *Mindfulness-Based Stress Reduction (MBSR) Standards of Practice*, CTR. FOR MINDFULNESS MED., HEALTH CARE, & SOC’Y, at 1, 2 (Feb. 2014), https://www.umass-med.edu/contentassets/24cd221488584125835e2eddce7dbb89/mbsr_standards_of_practice_2014.pdf (manual by the creator of the widely studied Mindfulness-Based Stress Reduction program states student participation “requires a significant time commitment (in our clinic 45 minutes a day, six days a week minimally).”).

14. Several well-studied protocols for Mindfulness-Based Stress Reduction include both formal practice of meditations with briefer periods of informal practice. See, e.g., Shauna L. Shapiro et al., *The Efficacy of Mindfulness-Based Stress Reduction in the Treatment of Sleep Disturbance in Women With Breast Cancer: An Exploratory Study*, J. PSYCHOSOMATIC RES. 85 (2003).

15. See, e.g., MARSHA M. LINEHAN, *COGNITIVE-BEHAVIORAL TREATMENT OF BORDERLINE PERSONALITY DISORDER* (1993) (discussing the foundational role of what Linehan understands as mindfulness); Dianne L. Chambless & Thomas H. Ollendick, *Empirically Supported Psychological Interventions: Controversies and Evidence*, 52 ANN. REV. PSYCHOL. 685, 693 (696); Kelly Koerner & Linda A. Dimeff, *Further Data on Dialectical Behavior Therapy*, 7 CLINICAL PSYCHOL.: SCI. & PRAC. 104 (2000).

couldn't “get through mindfulness.” She tried the well-studied Mindfulness Based Stress Reduction class, but found weekly classes for eight weeks a stretch, and the prescribed forty-five minute daily sessions for six days a week unbearable. More recent research shows some benefits from even a single instruction in mindfulness.

Mindfulness 1.5 attempts to debug some such limits. We say “attempts to debug” since debugging is a process, and anyone reading this knows apps and operating systems often get upgrades that work – until another is needed.¹⁶ We mean this debugging as an open-source and invite others to offer their own features in the online discussion of this article and elsewhere.¹⁷

Apart from debugging, Mindfulness 1.5 offers some additional features. In part, that means adding attention to features like motivation (called by non-lawyers “intent”) and attitude (of acceptance rather than judging) may enhance mindfulness. We also make more striking and concrete additions. We add a focus on mindfulness not just of our internal thoughts, feelings, and so on, but also awareness of the thoughts and feelings of others. Among other things, this includes the science of reading facial expressions of emotion in others.

For both internal and external mindfulness, we underscore the importance of how we pay attention by emphasizing kindness and acceptance. Like many versions taught to lawyers, Judge Fogel's definition of mindfulness is simplified. “In essence,” he writes, “it involves slowing down one's *mental* processes enough to allow one to notice *as much as possible* about a given moment or situation, and then to act *thoughtfully* based on what one has noticed.”¹⁸ This definition is a powerful aspiration and tool. We call such approaches Mindfulness 1.0 because they describe mindfulness as it has largely been introduced in law school classes and texts. Mindfulness 1.0 emphasizes *thinking* in a better way. Charlie Halpern, the former CUNY dean, and a powerful force behind mindfulness in judging and law, describes this common approach in contrast to the style of another teacher: “Short on equanimity, most of my teachers had taught with a hard-edged, assertive intellectual style and a single-minded focus on technique and subject-matter mastery, lessons that I found congenial at the time. They encouraged us to live in our heads.”¹⁹ Mindfulness 1.5 suggests we might do better by paying attention with a less severe approach. That might include some qualities of affection, care, curiosity, and playfulness.

Overall, we prefer to begin with a broader definition of mindfulness, using it as an umbrella term for a variety of practices. Mindfulness refers to the awareness that is cultivated through a constellation of skills and practices that reshape our brain and habits toward greater clarity and health. We focus not only on attention, but

16. See generally S.C. MOATTI, MOBILIZED: AN INSIDER'S GUIDE TO THE BUSINESS AND FUTURE OF CONNECTED TECHNOLOGY (2016) (describing why apps may change not merely because of individual bugs and defects but to keep pace with general changes, such as current standards in payment acceptance).

17. One such valuable resource is the website developed by Stanford Law School Professor Joe Bankman, a longtime tenured tax professor and tax reformer, see *Law School Wellness Project*, STAN. L. SCH., <https://law.stanford.edu/directory/joseph-bankman/wellness-project/> (last visited Aug. 10, 2016). Together with renowned law and economics scholar Ian Ayres, he developed and tested a set of two sessions of one hour each to help students cope with anxiety. See Ian Ayres et al., Anxiety Psychoeducation for Law Students (Sept. 4, 2015) (unpublished manuscript) (on file with author).

18. Fogel, *supra* note 1, at 2 (emphasis added).

19. CHARLES HALPERN, MAKING WAVES AND RIDING THE CURRENTS: ACTIVISM AND THE PRACTICE OF WISDOM 275 (2008).

also the power of our motivation or *intention*²⁰ and our attitude. For the moment, we set aside those other components to make clear how much scientific research and personal experience suggests people may reap many of the gains that Judge Fogel promises without necessarily committing to any other values, including kindness or a particular kind of motivation, such as enlightenment, stress reduction, or weight loss. We return to explore kindness and intention below.

We also highlight *external mindfulness*. There is evidence that mere internal mindfulness also may strengthen our external mindfulness.²¹ Simply put, your internal mindfulness means awareness of your own sensations, thoughts, and emotions, and so on, as well as practices that generally increase that awareness. External mindfulness includes your awareness of such things in others, such as facial clues to their emotion or movements associated with their anxiety, as well as practices to increase such awareness generally.²² We suggest why it is important to also practice deliberate and specific external mindfulness. Such research-based external mindfulness may do even better at meeting some core goals identified by Judge Fogel, especially judging credibility and reducing bias.²³

Like Judge Fogel, we also mean to avoid confusing mindfulness with particular cultures or worldviews. As he says:

Perhaps because of its popular association with meditation, yoga, and other traditional ways of developing and sustaining it, some may think of mindfulness as an element of a particular cultural style or worldview. But looking at mindfulness in this way misapprehends its nature. Its purpose is not to tell one what to think and do but rather to help one think and act as one chooses with the benefit of deeper reflection and more fully conscious intent. For judges, whose judgments can have profound effects on others, it can be both an enormously effective tool and a key to a more satisfying professional life.²⁴

A broad definition reflects the reality, sometimes lost in Mindfulness 1.0, that different people may find some practice, or set of practices, better help them reap

20. Many use the term intention, and Shauna has used this as a core part of her teaching. For a legal audience, intention may be too readily confused with the more specific use of intent in legal doctrine. For those familiar with negotiation and negotiation research, such as the readers of this journal, motivation may seem the more familiar term. See, e.g., Peter J. Carnevale & Carsten K. DeDreu, *Motive: The Negotiator's Raison D'etre*, in *FRONTIERS OF SOCIAL PSYCHOLOGY: NEGOTIATION THEORY AND RESEARCH* 55 (Leigh Thompson ed., 2006).

21. See *infra* text accompanying notes 59-65 (reviewing recent evidence of increased attention to fast changing phenomena and increased ability to suppress irrelevant phenomena).

22. Clark has explored such external mindfulness based partly on his work with Paul Ekman, a key figure in facial recognition of emotion, and through his own study of sources of mindfulness in Buddhist psychology. See Clark Freshman, *Yes, and: Core Concerns, Internal Mindfulness, and External Mindfulness for Emotional Balance, Lie Detection, and Successful Negotiation*, 10 *NEV. L.J.* 365 (2010).

23. See *infra* text accompanying notes 149-163 (discussing how various meditation practices of mindfulness and friendliness, a.k.a. "lovingkindness" or "metta," are associated with less negative bias against outgroups and more positive associations).

24. Fogel, *supra* note 1, at 6. Shauna has often linked a variety of qualities related to mindfulness, including qualities like forgiveness. Shauna L. Shapiro & Gary E.R. Schwartz, *Intentional Systemic Mindfulness: An Integrative Model for Self-Regulation and Health*, 16 *ADV. IN MIND-BODY MED.* 128, 129 (1999) (describing a variety of qualities including forgiveness).

the benefits of mindfulness.²⁵ This partly reflects a long-standing thread of mindfulness teachers.²⁶ It also partly reflects the reality found in scientific studies. Researchers including Herbert Benson, the medical school professor who popularized the relaxation response, has found that potentially distinguishable methods of meditation lead to similar benefits of a Relaxation Response (“RR”) marked by changes in genetic expression:

Overall, similar genomic pattern changes occurred in practitioners of a specific mind body technique (Qi Gong²⁷) as well as in long-term practitioners who utilized different RR [Relaxation Response] practices including Vipassana²⁸, mantra, mindfulness or transcendental meditation, breath focus, Kripalu²⁹ or Kundalini Yoga,³⁰ and repetitive prayer. This indicates there is a common RR state regardless of the techniques used to elicit it.³¹

Simply put, we may get many of the benefits of mindfulness through any single practice below or many combinations of such practices:

- Focus on the breath and simply return to the breath whenever you realize you are thinking of something else;
 - Focus on a single word, such as peace, and repeat it;
 - Focus on a single phrase and repeat it, returning to the phrase as soon as you realize you may have started paying attention to something else;
 - Focus broadly on the present moment and whatever seems to be arising;
- or

25. This is true within the category we might construct or curate as mindfulness. Clark Freshman et al., *Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support*, 7 HARV. NEGOT. L. REV. 67 (2002) (discussing distinctions between mindfulness versus concentration practices, and how each may reinforce the other).

26. See, e.g., JOSEPH GOLDSTEIN, ONE DHARMA: THE EMERGING WESTERN BUDDHISM (2003) (describing how varieties of meditation techniques simply represent different “skillful means” to teach us not to cling). Although some mindfulness teachers embrace such a big tent approach, others have the usual preferences associated with any skill or ideology; to those who share any given preference, it may seem anywhere from insightful and crucial to pedantic and obsessive. See, e.g., *id.* (describing controversy over whether awareness of the breath must be at the nostrils, as many taught for years, or could include focus on the abdomen).

27. Chinese Qigong “is based on the theories of traditional Chinese medicine and has influenced the training and practice of martial arts.” HH Shan, *Culture-bound psychiatric disorders associated with Qigong Practice in China*, 10 H.K. J. PSYCHIATRY 12, 12 (2000).

28. Vipassana refers generally to an aspect of mindfulness as derived from Theravadan Buddhist practices of being aware of various phenomenon, such as the body, the breath, concepts, and the experience of any phenomenon as pleasant, unpleasant, or neutral. See generally Leonard L. Riskin, *The Contemporary Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1, 3 (2002) (for an accessible introduction to mindfulness and its various origins).

29. Jennifer Lovas, *Perceived benefits of Yoga Participants Enrolled in Different Yoga Styles* (Mar. 2011) (unpublished dissertation, Cal. Polytechnic St. U.), available at <http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1016&context=rptasp> (“[a] more meditative form of yoga . . . [that] focuses on breathing and then moves into stretches and positions.”).

30. Kundalini yoga refers to a series of movements, breath exercises, and repetition of phrases that were historically thought to release energy called Kundalini, which is now conceived of as a kind of unconscious and powerful force of energy and intelligence. Ghanghav Shradha & Dalvi Prachi, *Awakening of Kundalini Throgh Muladhara Chakra*, 5 GLOBAL J. RES. ANALYSIS 49, 49 (2016).

31. Jeffrey A. Dusek et al., *Genomic Counter-Stress Changes Induced by the Relaxation Response*, 7 PLOS ONE, (July 2, 2008), available at <http://dx.doi.org/10.1371/journal.pone.0002576>.

- Focus on the sensations in the body going from one part of the body systematically through much if not all of the body.

Compared to other writing on mindfulness for lawyers, Mindfulness 1.5 may be both harder and softer than Mindfulness 1.0. Mindfulness 1.5 makes more explicit the *potential* upgrade of attitude and motivation. Mindfulness 1.5 also emphasizes the potential to meet many different motivations, not just, for example, stress reduction. On what might seem the harder side, this explores how mindfulness helps us better “judge credibility” or “catch lies.”³² On what might be a softer side, and in a related way, it also explores how mindfulness helps overcome bias, whatever its category. Ironically, perhaps, a general bias for things gendered masculine may explain why Mindfulness 1.0 emphasized thinking and thoughts rather than the potential of positive emotion, empathy, and connection.

Shauna, Clark, and Sarah bring complimentary perspectives. Shauna, a psychology professor, draws on her years immersed in research, clinical experience, and teaching mindfulness. Clark, a law professor, draws on his own research and teaching on negotiation, mindfulness, and lie detection, including teaching to judges, arbitrators, lawyers, and negotiators. Sarah, a practitioner and mindfulness teacher, works with students in the hyper-competitive world of elite college admissions, drawing on her experience with mindfulness both as an intervention for stress reduction and as a vehicle for connecting students to a deeper sense of meaning and purpose in their lives.

Section Two surveys the explosion of science of mindfulness and its potential to enhance how we judge, lawyer, and negotiate. This includes core research on how mindfulness reshapes the brain, makes people happier, healthier and more attentive. The goal of the first part of Section Two is to convince busy people who do not cultivate mindfulness to devote time to it – and to explain to those who do cultivate mindfulness, why they should continue and how they might find upgrades to practice helpful. Of course, you may start with one motivation, such as a better working memory or better sleep, but discover another along the way, such as feeling more connected with others. Section Two also includes some further exploration of ways to define or upgrade mindfulness, including the role of intention (or motivation) and attitude. Section Three explores mindfulness, judging credibility, and detecting lies. Section Four explores more broadly how mindfulness may reduce bias. Section Five introduces some practices under-emphasized in Mindfulness 1.0, including practices designed to develop compassion and friendliness. Section Five also includes material rarely cited in law about the emerging study, including neuropsychology, of how mindfulness meditation and other practices may work on different parts of the brain to produce complimentary effects, such as reducing different sources of bias and inequality in hiring and other areas.

II. THE SCIENCE OF MINDFULNESS

A. A Good Enough Understanding of Mindfulness

Mindfulness is an innate human capacity of awareness, and it is a technical skill that can be strengthened through practice. This is easily confusing because the same

32. For an overview of an earlier version of this approach, see Clark Freshman, *Lie Detection and the Negotiation Within*, 16 HARV. NEGOT. L. REV. 263 (2011).

word mindfulness both refers to a skill and to a set of practices (“mindfulness meditation”) thought to enhance that skill.³³ To make language matters a bit more complicated, types of meditation and other practices categorized differently may also increase the skill of mindfulness. Though it is seductive to define mindfulness in words, mindfulness is largely experiential, so you may get a better sense of mindfulness through a combination of reading what we’ve written and experiencing the exercises in the remaining paragraphs of this subsection.

We first define mindfulness simply and then add complexity. Try this experience of bare awareness of simple breathing.

This paragraph leads you through mindfulness of breathing. Are you breathing right now? Do you *know* you are breathing? This knowing can be an intellectual and conceptual knowing, and it can also be a felt *sense*; a knowing with your whole being. This deep *knowing* is mindfulness: as you breathe in, *knowing* with your whole being “breathing in.” As you breathe out, *knowing* with your whole being, “breathing out.”³⁴

Now you might apply mindfulness to your overall experience and emotions: How are you relating to things now? How is your mind? Is it clear and interested? Is it dull and fatigued? Is it concentrated? Is it calm or a bit racy? Is it collected or is it scattered and jumping from idea to idea and impulse to impulse? *Knowing* the state of your mind in this moment, without judging it, evaluating it or trying to change it out of some habitual impulse, is mindfulness. From a relatively clear awareness, we may then make skillful decisions about how to act. Knowing your emotional state in the moment -- is there joy, sadness, fear? -- is mindfulness. It involves being truly awake and alive to our moment-to-moment experience.³⁵

Mindfulness can be a way of being: a way of inhabiting our bodies and minds, in each moment of our lives. It is a deep awareness; a *knowing* and *experiencing* of life as it arises and passes away each moment. Mindful awareness is a way of relating to all experience -- positive, negative and neutral -- in an open, receptive way. Mindfulness is about seeing clearly without our conditioned patterns of perceiving clouding our awareness.³⁶ The judge sees each party as a fresh individual without stereotyping or otherwise pigeonholing the person or the type of claim.³⁷

Teasdale, who helped develop a group class to reduce depression and relapses of depression, calls this awareness of thinking *metacognitive awareness*. A person with depression might be caught up in a delusion that she or he is worthless, but metacognition means viewing negative thoughts (“I’m worthless”) not as the “reality by which I am condemned” but simply “passing thoughts and feelings that may or may not have some truth in them.”³⁸ Those afflicted by depression might label some thoughts as “cognitive distortions” or more specifically, such as “overgeneralization” or “catastrophizing.” In different settings, we might find different labels for the way we view things. In negotiation, for example, we might note how we are

33. SHAUNA L. SHAPIRO & LINDA CARLSON, *THE ART AND SCIENCE OF MINDFULNESS* 7 (2009) (“What can be confusing is that mindfulness is both a process (mindful practice) and an outcome (mindful awareness).”).

34. *Id.* at 4.

35. *Id.* at 5.

36. *Id.*

37. *Id.*

38. John D. Teasdale, et al., *Metacognitive Awareness and Prevention of Relapse in Depression: Empirical Evidence*, 70 *J. CONSULTING & CLINICAL PSYCHOL.* 275, 276 (2002).

viewing things in a “fixed pie” or “competitive” way rather than as “collaborative” or “win-win.”³⁹

It is important to learn to see with clarity and discernment because how we perceive and frame each moment generates our “reality” – including our emotional reality. We might say hi to a colleague across the street, and we don’t see the person say or do anything. We might feel slighted seemingly without any thought. We might start to feel sad or angry and imagine that *all our colleagues* don’t appreciate us. If we are mindful, we might notice our two-step assumption. We first imagined the person must have noticed us, but perhaps they did not hear or see us. We also imagined this reflected what many colleagues must feel, but perhaps did not remember it was a busy season when many people do not say hi to each other. We almost certainly would not notice a choice to break the spiral with a deliberate action: we could call the person and ask how they are.⁴⁰ So, too, we may create our own reality in negotiation because even small changes in our moment-to-moment emotion seem to affect the way we perceive and act in negotiations.

B. The Logic and Science of the Benefits of Mindfulness

We reverse the usual order of definitions and benefits. With the good enough version of mindfulness above, we canvass here the core benefits of mindfulness. Judge Fogel’s case for mindfulness seemingly lists several distinct benefits, including better attention to routine tasks, emotional balance, emotional awareness of others, and greater equality through reduction of bias.⁴¹ Later, we examine some of these benefits directly, such as showing data that mindfulness meditation is associated with less automatic stereotyping of others, often known as implicit bias. To begin with, though, it’s useful to see how many of the benefits flow from two sets of larger benefits: better focus or attention and better emotional skills. We cover the general data for each of these in turn. For each of these core tasks, Mindfulness 1.5 adds two important upgrades:

the addition of external mindfulness of the thoughts and emotions of others, and a more do-able notion of the “dose” necessary to reap at least some benefits from mindfulness practice.⁴²

39. Clark Freshman et al., *Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support*, 7 HARV. NEGOT. L. REV. 67 (2002).

40. The example in this paragraph draws on common examples used to teach both cognitive therapy and mindfulness for depression – as well as the hybrid mindfulness based cognitive therapy for depression. For a popular and accessible introduction, see MARK WILLIAMS ET AL., *THE MINDFUL WAY THROUGH DEPRESSION* 47 (2007).

41. Fogel, *supra* note 1 (listing a variety of benefits).

42. We use scare quotes around “minimum effective dose” for the same reasons that discussion of “intent” or “motivation” is described as problematic later. When we focus on benefits, we may enjoy mindfulness less. And, if we enjoy it less, then we may do it less – which might further limit the benefits and create a downward spiral.

At least we’d like to think that’s why the phrase “minimum effective dose” turns us off. Perhaps we simply are enacting a mindless sense of identity as more spiritual or creative or less mechanical, or perhaps we are simply reacting to the way that people who promote such notions seem sometimes to have corrupted Northern California. Consider what someone who studied meditation as a student in India writes of the attempt by some at Google to teach mindfulness with such ideas in mind:

1. *Benefits From Attention*

The ability to stay focused and notice key signals is core to several of the benefits promised by Judge Fogel. In particular, Judge Fogel mentions the importance of paying attention during seemingly routine and repetitive tasks (such as judging if a defendant knowingly enters a guilty plea) and staying focused on a range of clues that help judge credibility.⁴³

Evidence that mindfulness bolsters attention includes direct studies of outcomes, including better test scores. Anyone ever taking the bar or any exam would be impressed that a two week mindfulness course had dramatic results: those who took the mindfulness training for only two weeks got *sixteen percentile better test scores* on the Graduate Records Exam than those randomly assigned to take a class on nutrition instead.⁴⁴ Although judges and lawyers may not take exams that often, the study further showed mechanism that would apply to lawyers and many of the routine tasks identified by Judge Fogel and others. Those in the two-week mindfulness class did better on tests of attention, including a standard measure of working memory and tests of mind-wandering.⁴⁵ Individuals in the class also themselves reported less mind-wandering.⁴⁶

Although Mindfulness 1.0 may help judges pay attention, it may alone fall short of its promise to convey that sense of attention to others. Judge Fogel mentions, “perhaps just as importantly [as changing the outcome of a case], the attentiveness shown by the judge is communicated to the defendant and everyone else who is present.”⁴⁷ This claim is certainly consistent with the general idea that people who felt heard feel better and view the process more favorably. It is even more important for the many people who feel invisible and overlooked, including people of color, LGBT people, older people, people of different abilities, and those experienced as less attractive. Indeed, this explains much of the benefit of mediation, where people may speak freely and often feel heard. As we discuss below, however, the success of this strategy depends in part on skills in *external* mindfulness. For example, while some people in court may like someone simply listening and looking, others may prefer signals of attention, such as asking questions or making verbal or non-verbal signals.

There’s growing evidence that even short bursts of mindfulness practice can have a big impact. Boston University researchers showed that as little as three and a half hours of mindfulness was enough to make substantive changes in the structure of the brain. ‘We’re iterating,’ [Google employee] Fernandez said. ‘We’re trying new things out. ‘It’s typical Silicon Valley thinking,’ Gelles continues, ‘efficiency and speed even when it comes to enlightenment. Training your mind and changing your brain may take serious time and effort. But if there are shortcuts, leave it to the folks at Google to find them.’

DAVID GELLES, MINDFUL WORK: HOW MEDITATION IS CHANGING BUSINESS FROM THE INSIDE OUT 246-47 (2015).

Stop. Be mindful. Does it change your thoughts and feelings about Gelles when you learn that he did study meditation in India . . . and now is a business reporter for the *New York Times* covering mergers and acquisitions? *Id.* at 256 (referring to himself as a mindful M&A reporter).

43. Fogel, *supra* note 1, at 3-4 (noting how many judges may view lack of eye contact as indicating dishonesty but reporting that many cultures encourage people to have less eye contact in at least some circumstances).

44. See Mrazek et al., *supra* note 6, at 778.

45. *Id.*

46. *Id.*

47. Fogel, *supra* note 1, at 3.

2. *Mindfulness 1.5 Upgrades to Attention*

The first important upgrade of Mindfulness 1.5 is the evidence that even relatively short courses improve important aspects of performance. The gold standard of early research had been an eight-week course with 45 minute sessions of home practice six of seven days per week and a three-hour class. The course studied for improving GRE scores was much more manageable being two rather than eight weeks.⁴⁸ Indeed, Shauna's own research shows benefits from even five minutes.⁴⁹ On the other hand, we also emphasize that other studies have shown that the amount of practice at home may predict better outcomes.⁵⁰ Mindfulness 1.5 also upgrades the concept and practice of attention in Mindfulness 1.0 by giving us a better and scientific map for where we pay attention to ourselves – and to others (external mindfulness).

In terms of ourselves, this includes a rich map of our own brains. For some purposes, it may be worth digging a little deeper into different ways one might categorize attention and the brain systems associated with each. Studying the brain images associated with different types of attention gives us another lens to understand how different types of mindfulness practices work. In addition, related research on imaging may explain which types of techniques work: do mere references to mindfulness trigger benefits as shown on brain images or are other factors required? Also, brain images may help confirm our intent to cultivate mindfulness through certain practices. Such images may also help skeptical deans and curriculum committees to give mindfulness practices institutional support. In another way, imaging studies that show a variety of practices may change the brain may help support our moment by moment attitude of acceptance and enjoyment, letting us know that a variety of practices may lead to similar changes.

With that in mind, some context on the neuroscience of mindfulness makes sense. Authors often make a distinction between “concentrative” and “receptive” attention in the context of meditation.⁵¹ Focusing on the breath or a phrase would seem to be more concentrative,⁵² and opening up in a mindful way to all the different

48. See Mrazek et al., *supra* note 6, at 777 (classes met for only 45 minutes for only four days a week and for only two weeks).

49. See, e.g., Shauna L. Shapiro et al., *supra* note 14, at 90.

50. See *infra* note 200.

51. See, e.g., Amishi Jha et al., *Mindfulness Training Modifies Subsystems of Attention*, 7 COGNITIVE, AFFECTIVE, & BEHAV. NEUROSCIENCE 109, 110 (2007).

52. *Id.* (defining concentrative practices as when “attention is restricted to a specific focus, such as the breath”).

sights and sounds etc., in a kind of “choiceless awareness” would be more receptive.⁵³ Within the cognitive sciences, attention has similarly been divided into functionally distinct cognitive networks.⁵⁴ These networks are responsible for the functions of alerting, orienting, and conflict monitoring.⁵⁵ Alerting is defined as achieving and maintaining a vigilant or alert state of preparedness.⁵⁶ A judge with that state might begin to notice when a defendant seemed confused at a hearing or when a witness seemed deceptive. Orienting is a process that directs and limits attention to a subset of possible inputs.⁵⁷ A negotiator might be listening for clues that someone would be willing to settle for a better price or in a more creative way. If that negotiator read this article about external mindfulness of emotion, for example, then she would know to look at the inner eyebrows for signs of sadness and at the nose for signs of disgust. Conflict monitoring prioritizes among competing tasks and responses. These functions have been mapped on to specific brain areas and systems. The dorsal system is involved in voluntary, top-down orienting, and the ventral system implicated in stimulus-driven (bottom-up) attention.⁵⁸ It is possible to map the dorsal top-down functions onto the ability to maintain concentrative attention, whereas ventral system functions may be analogous to receptive attention. Hence, scientists have been able to take attention as described and practiced within traditional mindfulness training and look at the development of specific attentional abilities that result from these practices, further confirming their importance. As Jha and colleagues have shown, different mindfulness practices may enhance different cognitive functions:

- Long term meditators (namely those from the retreat group) with experience at concentration meditation had greater performance at conflict monitoring;⁵⁹
- The longer that the meditators had been practicing meditation (in terms of months of experience) the better they improved in their attentional capacity of alerting;⁶⁰
- Although one might expect the eight-week class labeled “mindfulness based stress reduction” to emphasize the open aspects of receptive attention, the first four weeks actually emphasized concentration;⁶¹

53. *Id.* (defining receptive practices as when “the goal is simply to keep attention fully ‘readied’ in the present moment of experience without orienting, directing, or limiting it in any way. . . . receptive to the whole field of awareness . . . in an open state so that it can be directed to currently experienced sensations, thoughts, emotions, and memories.”).

54. Elizabeth R. Valentine & Philip L. G. Sweet, *Meditation and Attention: A Comparison of the Effects of Concentrative and Mindfulness Meditation On Sustained Attention*, 2 MENTAL HEALTH, RELIGION & CULTURE 59 (1999); Michael I. Posner & Steven E. Petersen, *The Attention Systems of the Human Brain*, 13 ANN. REV. NEUROSCIENCE 25 (1990).

55. Jin Fan et al., *Testing the Efficiency and Independence of Attentional Networks*, 14 J. COGNITIVE NEUROSCIENCE 340, 340 (2002).

56. *Id.*

57. *Id.*

58. For a useful review, see Simone Vossel et al., *Dorsal and Ventral Attention Systems: Distinct Neural Circuits but Collaborative Roles*, 20 THE NEUROSCIENTIST 150 (2014).

59. Jha et al., *supra* note 51, at 116.

60. *Id.*

61. *Id.* at 109.

- The month long silent retreat in principle emphasized concentration, but involved such little guidance that participants may well have shifted to more open awareness over the course of the retreat;⁶²
- The experienced meditators indeed showed greater attention in terms of conflict monitoring before their retreat but after years of practice;⁶³
- The participants in the eight-week meditation course improved in their orienting attention;⁶⁴
- The results on how well different types of meditation improve conflict monitoring are mixed, but possibly because of the limits to measurements of conflict monitoring.⁶⁵

Thus, evidence shows that many types of mindfulness training may improve various aspects of our ability to focus on known phenomenon. That is a substantial success for Mindfulness 1.0. As detailed further in the sections on credibility and bias, Mindfulness 1.5 may help by adding science-based guidance on objects of attention for particular tasks. Consider another perspective on attention.

Although we might strengthen attention, we may notice what we *think* matters to our task, such as clues to the understanding or credibility of others, but be mistaken about what those clues mean. Many of us may know when we stop paying attention to eye contact, but we may not realize that we would be better off paying closer attention to other clues. Judge Fogel notes how one might learn to be aware of one such mistake, namely judging someone lying because they break eye contact, but remembering that eye contact varies from culture to culture.⁶⁶ Furthermore, particular cultures may place vastly different meanings on seemingly identical gestures sometimes classified as emblems.⁶⁷ Clark studies credibility and has taught credibility findings to the top gathering of federal administrative law judges, the Academy of Labor Arbitrators, and JAMS, the leading domestic arbitration provider. Credibility and mindfulness get their own section below. To sum up, internal mindfulness *may* help reduce some forms of bias, but real progress with credibility requires a careful set of both internal and external mindfulness.

In terms of others, Mindfulness 1.5 also includes external clues that others may be thinking harder. For thousands of years, some have believed that internal mindfulness of our own thoughts and emotions might lead to awareness of the thoughts and emotions of others. In one early text on mindfulness, for example, the language refers to each facet of mindfulness internally and externally.⁶⁸ In a footnote in one

62. *Id.* at 116. Although the retreat emphasized concentration, there was so little instruction that retreatants may have switched to receptive attention once they perceived they had mastered holding their attention in a concentrated way.

63. *Id.*

64. *Id.*

65. Jha et al., *supra* note 51, at 116.

66. Fogel, *supra* note 1, at 3-4. See David Matsumoto & Hyi Sung Hwang, *Cultural Influences on Nonverbal Behavior*, in *NONVERBAL COMMUNICATION: SCIENCE AND APPLICATIONS* 97, 113 (David R. Matsumoto, Mark G. Frank, & Hyi Sung Hwang eds., 2012) for more data by a leading expert on culture and emotion.

67. PAUL EKMAN, *TELLING LIES* 101-02 (2009) (“Emblems have a very precise meaning, known to everyone within a cultural group.”).

68. See *Sattipathana Sutta, The Foundations of Mindfulness*, in *THE MIDDLE LENGTH DISCOURSES OF THE BUDDHA* 145, 1190 n.143 (Bhikku Nanamoli & Bikkhu Bodhi trans., 2d ed. 2001) [hereinafter *Mindfulness*] (translator defining “internally” as “in . . . [one’s] own body” and “externally” as “the body of another.”). In some traditions, the distinction between internal and external is itself problematized, and teachers speak of a nondual awareness.

early text, the translator nonchalantly notes that this external awareness was thought to develop from intense internal concentration that would lead to . . . psychic powers.⁶⁹

More recent research suggests we may direct attention to identify clues that people think harder (heightened cognitive load) even if we cannot divine the exact content of their thoughts. Such clues to extra thinking include changes in the amount of blinking.⁷⁰ Such external mindfulness would strongly bolster our confidence, for instance, that a defendant understands a guilty plea. When a judge saw a change in the blink rate, she might explain the plea differently, ask the defendant a question, or ask the defendant to repeat back how the defendant understood what was said. For a lawyer, it would also bolster our confidence that a client understands how he will be charged or what types of documents she must produce in response to requests by another party to a lawsuit. For a time, one prominent lawyer faced discipline because a court believed he did not do enough to realize a client was not turning over the relevant documents in discovery.⁷¹

3. *Benefits From Emotion and Emotional Skills*

Multiple studies from many methodologies, including self-reports and brain scans, show mindfulness increases positive emotion and reduces negative emotion. A randomized, wait-list controlled study by Shauna and colleagues showed decreased symptoms of anxiety and depression and increased levels of self-reported empathy in medical and premedical students following an eight-week mindfulness program.⁷² Similar studies have demonstrated positive effects of mindfulness training in reducing nurse stress and burnout.⁷³ Brain imaging of participants in an eight-week course in mindfulness showed greater activation of regions of the brain associated with greater positive emotion – regions generally thought difficult to alter.⁷⁴ As a form of self-care and as a possible intervention for the work-related stress and trauma endured by legal professionals, mindfulness offers a promising path to greater wellbeing. In terms of professional effectiveness, research demonstrates that mindfulness helps to balance and optimize our emotions, as well as clarify our cognitive processes.⁷⁵ As a direct result, mindfulness helps to improve emotional and cognitive well-being, as well as make us more functional in fulfilling our roles

69. *Id.* (“[U]nder the contemplation of feeling, mind, and mind-objects, the contemplation externally, apart from those possessing telepathic powers, must be inferential.”).

70. See, e.g., Mark G. Frank & Elena Svetieva, *Deception*, in *NONVERBAL COMMUNICATION: SCIENCE AND APPLICATIONS* 121, 127 (David R. Matsumoto, Mark G. Frank, & Hyi Sung Hwang eds., 2012).

71. Brendan Pierson, *Qualcomm Sanctioned \$8.6M; 6 Lawyers Sent to Bar*, LAW360 (Jan. 8, 2008, 12:00 AM), <http://www.law360.com/articles/43412/qualcomm-sanctioned-8-6m-6-lawyers-sent-to-bar>; Christopher Norton, *Qualcomm Atty Discovery Sanctions Overtuned*, LAW360 (Apr. 6, 2010, 7:38 PM), <http://www.law360.com/articles/160182/qualcomm-atty-discovery-sanctions-overtuned>.

72. Shauna L. Shapiro et al., *Effects of Mindfulness-Based Stress Reduction On Medical and Premedical Student*, 21 J. BEHAV. MED. 581 (1998).

73. See Joanne Cohen-Katz et al., *The Effects of Mindfulness-Based Stress Reduction On Nurse Stress and Burnout: A Quantitative and Qualitative Study*, 18 HOLISTIC NURSING PRAC. 302 (2005).

74. See Davidson et al., *supra* note 11, at 566.

75. See, e.g., Kirk W. Brown & Richard M. Ryan, *The Benefits of Being Present: Mindfulness and Its Role in Psychological Well-Being*, 84 J. PERSONALITY & SOC. PSYCHOL. 822 (2003).

and achieving our goals.⁷⁶ From a positive perspective, mindfulness helps increase the positive emotion associated with success; from a harm reduction perspective, it also reduces the risk of pathologies like depression, anxiety, and substance abuse that weigh down lawyers, law students, and law teachers.

The increase in various established aspects of emotional fitness ties directly into the core work of judges, lawyers, and negotiators. Decades of research show that even mild increases in positive emotion and mild decreases in negative emotion have powerful effects on performance.⁷⁷ For example, Stanford Business School students saw a five-minute funny video; they were only slightly happier but did better than groups that saw a five-minute video that did not affect emotion.⁷⁸

As if this were not enough benefit of emotional wellness for lawyers, judges, and negotiators, evidence shows lawyers and judges show increased levels of depression and anxiety.⁷⁹ If not checked by mindfulness or other intervention, such negative emotion hurts law students and the lawyers they become, and it prevents their mindfulness of the emotions and other aspects of others.

Here the emotional benefits and attention benefits overlap. It is not merely that one may become better aware of one's existing emotions and those of others. When we have less negative emotion, we may be more likely to accurately perceive the emotions and thoughts of others. At least three pathways explain this.

First, from a purely physical point of view, when we have negative emotion, we often have less peripheral vision.⁸⁰ In a multiparty negotiation or a spread-out courtroom, that means we cannot pick up on the unfolding emotions of others. In a bankruptcy proceeding, for example, a lawyer may maintain close eye contact with a "key player" – but neglect to pick up on clues of brewing negative emotion from "lesser players" that can block a deal. In terms even of mere security, a judge tightly

76. For a recent review, see Sharon L. Shapiro et al., *Mindfulness and Positive Psychology*, in OXFORD HANDBOOK OF POSITIVE PSYCHOL. 13 (C.R. Snyder & Shane J. Lopez eds., 2016).

77. For a review, see Clark Freshman, Adele M. Hayes & Greg C. Feldman, *The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know About How Mood Relates to Successful Negotiation*, 2002 J. DISP. RESOL. 1; Alice M. Isen, *On the Relationship Between Affect and Creative Problem Solving*, in AFFECT, CREATIVE EXPERIENCE, AND PSYCHOLOGICAL ADJUSTMENT 3 (Sandra W. Russ ed., 1999).

78. Roderick Kramer et al., *Self-enhancement Biases and Negotiator Judgment: Effects of Self-esteem and Mood*, 56 ORG. BEHAV. & HUM. DECISION PROCESSES 110 (1993).

79. William Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079 (1990) (finding in one study that lawyers have the highest rate of major depressive disorder among 104 occupational groups); Susan Diacoff, *Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1378 (1997); Clark Freshman, Adele Hayes & Greg Feldman, *Efficient Emotion: How Emotions Affect First Year Law Grades, Negotiation Performance, and Mental Health* (August, 2016) (unpublished manuscript) (on file with author) (finding high rates of symptoms of depression among law students); G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 11 AM. BAR FOUND. RES. J. 225, 246 (1986) (finding that as many as 40% of law students exhibit "significantly elevated" anxiety and depression); SUSAN S. DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* (2004). Those engaged in community law and whose work involves ongoing engagement with at-risk populations such as asylum seekers, victims of domestic violence, and victims of other violent crimes may be at increased risk for symptoms of stress, burnout, anxiety and depression. See, e.g., Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245 (2003).

80. ARNOLD B. BAKKER, *ADVANCES IN POSITIVE ORGANIZATIONAL PSYCHOLOGY* 55 (Arnold B. Bakker ed., 1st ed. 2013) ("Consistent with the broaden hypothesis, studies demonstrated that positive emotions lead to a wider scope of attention and memory of peripheral (vs. central) details of events."); Fabien D'Hond et al., *Explicit and Implicit Emotional Processing in Peripheral Vision: A Saccadic Choice Program*, 119 BIOLOGICAL PSYCHOL. 91, 91 (2016).

focused on one witness may miss the sounds and sights that alert her to potential violence from others in the courtroom.

A second set of evidence points in the same direction. Based on outcomes, we know that those with less negative emotion get a better sense of what others want. When students in a simulated negotiation were led to believe that their counterpart did not value them, or felt overly entitled, students got worse results.⁸¹ In addition, the angrier students reported less accurate estimates of what parties wanted. One might infer that the anger then created a downward spiral: anger led to less accurate expectations; such expectations can lead to negative emotion about the likelihood of agreement; that agreement can lead to even more negative emotion.

Third, in yet another example of creating our own reality, when we are in a better mood, we are more likely to behave cooperatively and keep our agreements.⁸²

4. Mindfulness 1.5 Upgrades From External Mindfulness

For emotion, this external mindfulness now is a well-established science. Researchers generally agree on the facial patterns that reveal five distinct emotions: happiness, sadness, disgust, anger, and fear.⁸³ The markers for these emotions often are not intuitive, such as the clear association between a quick raise of the inner eyebrows that reveals intense sadness.⁸⁴ In addition, many researchers also believe in distinct emotions of contempt and surprise.⁸⁵

Accurate awareness of emotions of others helps with one of the promises of mindfulness that Judge Fogel suggests: managing one’s emotions and making appropriate note of the emotions of others.⁸⁶ Like many judges, he shares a relatively cramped view of emotion that Clark and his collaborators on the study of emotion and negotiation have described elsewhere.⁸⁷ In particular, for Judge Fogel, as with most lawyers and judges, emotion is seen only as strong emotion. So, too, emotion is seen only as the subset of negative emotion, and such emotion is always seen as dysfunctional. For these aspects of the usual narrow view, witness his exact words:

Noticing as fully as possible what is occurring in the moment makes a judge more aware of his or her own physical and mental state. A judge with awareness is more conscious of his or her emotional reactions to a lawyer, litigant or situation, and is able to choose an appropriate response

81. Keith Allred et al., *The Influence of Anger and Compassion on Negotiation Performance*, 70 *ORG. BEH. & HUM. DECISION PROCESSES* 175 (1997).

82. Joseph P. Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies*, 74 *J. PERS. & SOC. PSYCHOL.* 565, 565 (1998).

83. See, e.g., David Matsumoto & Hyi Sung Hwang, *Facial Expressions*, in *NONVERBAL COMMUNICATION: SCIENCE AND APPLICATIONS* 28-29 (David R. Matsumoto, Mark G. Frank, & Hyi Sung Hwang eds., 2012) (describing six core emotions); *Atlas of Emotions*, PAUL EKMAN GROUP, <https://www.paulekman.com/atlas-of-emotions> (last visited Dec. 1, 2016).

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

85. Matsumoto & Hwang, *supra* note 83, at 27–34. Some people question whether contempt is a universal emotion. *Id.* at 28–29.

86. Fogel, *supra* note 1, at 4 (suggesting that mindfulness helps a judge notice her own emotions and those of others and to make an appropriate response).

87. See Freshman et al., *supra* note 77.

rather than ignoring the reactions or losing control. Often the optimal response will be to set one's feelings aside, but sometimes an intentional, considered expression of emotion may be exactly what is needed to show that a judge is engaged and respectful.⁸⁸

In contrast, Clark, his collaborators in studies of law students, and many psychology researchers agree that the narrow emphasis on negative emotion matters, but they also emphasize that positive emotion and even small amounts of any emotion make a very real and significant difference in both lawyering better, negotiating better, and performing nearly every task better.⁸⁹

On either the narrower or broader frame of emotion, internal mindfulness of emotion is an important first step. External mindfulness gives us the tools to judge two other things. First, to continue Judge Fogel's scenario, it can tell us if what we *think* is an appropriate expression of emotion seems appropriate to someone else. We might very well feel, quite authentically, that we feel sad at a victim's situation, such as cancer, and we might express our feeling in a way that alienates others. Trina Grillo, for example, was dying of cancer, and felt slighted when a nurse said she "understood" because the nurse, pregnant, had "morning sickness."⁹⁰ Second, apart from saying the wrong thing, we may simply not notice when there is a need to say or do something. Also, external mindfulness may tell us when the emotions of others might benefit from our acknowledgement – be it in words or a well-timed break.⁹¹ So, too, we can check whether what we imagine would help someone actually does help them; if we mention a break, we might see genuine happiness flash on the face, or we might see a glimpse of anger in a quick downward movement of the eyebrows and glare of the eyes.⁹²

Although accurate external awareness of emotions matters critically to accurate credibility determination, including detection of lies, external awareness of emotions matters to our own mental health as well. When we are aware of the emotions of others, we may act in ways that benefit both others and ourselves. For example, if we simply notice negative emotions and postpone relatively complex tasks with them, then we can avoid needless conflicts. When we see someone with more happiness on the other hand, we may be aware of a special opportunity to address more difficult problems or ones that simply warrant greater creativity. Of course, you can imagine how you would feel better in such a moment. Over time, with such repeated moments, you might also develop more of a sense of your own resilience, including your ability to overcome obstacles. This might lead to an overall increase in this kind of optimism. In Clark's own research with law students, this kind of optimism predicted better success at negotiation as well as better mental health at the end of the first year of law school.⁹³

This kind of accurate emotional skillfulness also might change your social relationships over time. When you felt the need, this reservoir of good will and trust

88. Fogel, *supra* note 1, at 4.

89. For a review, see Freshman et al., *supra* note 77.

90. Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -Isms)*, 1991 DUKE L.J. 397, 409.

91. Freshman, *supra* note 22, at 375-76.

92. *Id.* at 377-78.

93. Clark Freshman et al., When "Not Too Bad" May Not Be Good Enough: A Theoretical And Empirical Exploration Of Efficient Emotion And Law Student Success At Grades, Negotiation, And Mental Health 18 (Aug. 2016) (unpublished paper, University of Miami) (on file with author).

– or at least of lack of ill will and mistrust – could create resources for you to get what psychologists call emotional support and instrumental support.⁹⁴ In Clark’s study of law students, those first-year students who said that they seek such support had better mental health and more: such students got better grades than their LSAT and GPA would have predicted.⁹⁵

5. Mindfulness 1.5 and Upgrades From Definitions, Intention and Attitude

To make the case for mindfulness, we began with a flexible and approachable definition tied to multiple and rather conventional scientific methods (controlled studies and brain imaging) to show benefits to relatively conventional goals (focus and emotional skillfulness) that would appeal to people of many different political views, sensibilities, and backgrounds. We shift now to what could be a more nuanced set of terms that you might find useful. You may find them useful in simply *thinking* about mindfulness, and you may find them useful in *practicing* techniques and ways that fit your life for your commitment to mindfulness.

a. Defining Mindfulness as Skill vs. Practice

In one understanding, mindfulness is inherent in everyone, but it is often covered over by deep conditioning – our parents, teachers, relationships, and society have influenced us in ways known and unknown. Our patterns have become so ingrained that we may not realize we are engaging in them. We often live on automatic pilot,⁹⁶ being pushed and pulled by patterns dictated by our choices, experience, and surrounding communities and society, not fully awake and alive and free to the possibilities of the present moment. To counteract this conditioning, we can train our mind in the ability to be with and *know* our experience as it arises and passes. Many find sustained mindfulness practice helpful.

Mindful practice refers to the conscious development of skills, such as greater ability to direct and sustain our attention, less reactivity, greater discernment and compassion, and enhanced capacity to be “objective” or see multiple points of view.⁹⁷ Mindful practice involves “practicing” or cultivating the skills of mindfulness, namely intentionally attending with an open, accepting and discerning attitude. Mindful practice can be categorized into *formal* and *informal* practice. Formal practices involve systematic meditation practices geared toward cultivating mindfulness skills, such as sitting meditation, body scan meditation, and walking meditation. In the Tibetan tradition, this can also include the lucid dreaming done during what others think of as sleep.⁹⁸ Formal practice can involve relatively brief

94. *Id.*

95. Freshman et al., *supra* note 93, at 30-33.

96. JON KABAT-ZINN, FULL CATASTROPHE LIVING: USING THE WISDOM OF YOUR BODY AND MIND TO FACE STRESS, PAIN, AND ILLNESS 26 (1990).

97. *See generally, e.g.*, Shapiro & Schwartz, *supra* note 24, at 129.

98. THE DALAI LAMA, SLEEPING, DREAMING, AND DYING 124 (Francisco J. Varela ed. & trans., 1997) (“In addition to practicing during the waking state, if you also use your consciousness during sleep for wholesome purposes, then the power of your spiritual practice will be all the greater. Otherwise at least a few hours each night will be just a waste.”).

daily meditation practice woven into one's day or can be practiced as part of intensive retreat involving numerous hours of formal sitting and walking meditation in silence each day for a week, a month and longer.

Informal practice deliberately brings an open, accepting, and discerning attention to everyday activities, e.g., mindful reading, mindful driving, and mindful eating.⁹⁹ This helps generalize to everyday life what is learned during the formal practice. In addition, informal practice strengthens some of the habits of attention, emotional skills, and cognitive flexibility.

b. *Mindfulness and Intentions*

Although intention can have a quite precise and consequential meaning in law, meditation teachers use intention to mean knowing why we are practicing mindfulness, that is, our aspiration and motivation. As Kabat-Zinn writes, "Your intentions set the stage for what is possible. They remind you from moment to moment of why you are practicing in the first place."¹⁰⁰ He continues, "I used to think that meditation practice was so powerful . . . that as long as you did it at all, you would see growth and change. But time has taught me that some kind of personal vision is also necessary."¹⁰¹

This personal vision, or intention, is often dynamic and evolving. For example, a lawyer may begin a mindful practice to decrease her own stress. After you read how mindfulness seems to increase working memory and test scores, you might take up a meditation practice. Over time, though, you might notice how you feel less slighted by your busy colleagues and manage to notice and empathize when colleagues seem especially busy. For his part, Clark began yoga after a minor shoulder injury. He feared, quite reasonably,¹⁰² that if he did not continue to work out, then his entertainment industry friends would take less interest in him. His physical therapist suggested yoga to prevent future injuries, and that was his sole motivation. After the first class, he felt deeply relaxed and inspired with new writing ideas. Years later, at a yoga center, one of his teachers offered a beginning mindfulness class, and he continued to chase the feelings of relaxation. Over time, he came to learn of mindfulness retreats for lawyers. Exposed to ideas of ethics sometimes taught at such retreats, he toyed with ideas like aspiring to help all beings or giving up all alcohol. He also came to reject those ideas in favor of (typically) moderate drinking and devoting himself to helping himself and those closest to him.¹⁰³

Ironically, for example, the goal of "calming down" may make it harder to calm down – and less enjoyable even if we do. For example, when it comes to yoga, researchers found that those who might be focused on a narrow goal came to enjoy yoga less and leave a class less motivated to come back.¹⁰⁴ Indeed, in the yoga

99. CHRISTOPHER K. GERMER, RONALD D. SIEGEL, & PAUL R. FULTON, *MINDFULNESS AND PSYCHOTHERAPY* 14 (Christopher K. Germer et al. eds., 2005).

100. KABAT-ZINN, *supra* note 96, at 32.

101. *Id.* at 46; SHAPIRO & CARLSON, *supra* note 33, at 9.

102. See generally DEBORAH RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* (2010) (reviewing research that those deemed beautiful often attract more friends, attention and success).

103. See Freshman, *supra* note 22, at 385 (appreciating meditation techniques developed by others and popularized by Buddhist teachers but rejecting prohibitions against intoxicants as historical artifact).

104. Ayelet Fishbach & Jinhee Choi, *When Thinking About Goals Undermines Goal Pursuit*, 118 *ORG. BEH. & HUM. DECISION PROCESSES* 99, 105 (2012).

research, it was the mere presence of a yoga journal cover listing the benefits of yoga that was associated with less enjoyment and meditation compared with the same yoga photo but without the headlines of benefits!¹⁰⁵

An example from the then present moment of writing this article illustrates this. When Clark was at a conference on Mindfulness and Thriving in Legal Education, he excitedly made notes as neuroscientists showed such things as how even small mindfulness instructions changed brain function or how merely sitting and hearing a reference to mindfulness did not trigger changes in the brain compared to those given mindfulness instructions. As Clark started to write the last paragraph, however, and wondered how more conventional readers would view a reference to yoga, he felt a tad deflated and less enthused to continue writing. So, too, a judge thinking of her commitment to making parties feel heard and the lawyers feel respected might feel motivated and focused quite differently from the judge strategizing about how a judicial appointment committee or a governor might receive her latest draft of an opinion. The judge might find herself less motivated to get the opinion done, leaving the lawyers and parties starved of resolution.

c. Mindfulness and “Attention” or “Kindness”

Whenever we pay attention, we do so with a certain attitude or filter. In our default mode, for example, we may be constantly assessing ourselves and criticizing ourselves. *How* we pay attention often affects results. One leading neuroscientist of mindfulness, Daniel Siegel, uses an acronym to highlight certain qualities of warm attention: COAL for Curiosity, Openness, Acceptance, and Love.¹⁰⁶

Many teachers and writers do not address the quality of attention. However, the qualities, or attitude, one brings to the act of paying attention are crucial. For example, attention can have a cold, critical quality, or it can include an openhearted, compassionate quality.

Especially through repeated and regular practice, persons can learn to attend to their own internal and external experiences, flexibly and with kindness and openness - even when people encounter experiences that run contrary to deeply held wishes or expectations. Mindfulness may be enhanced when this attitudinal dimension of mindfulness is explicitly introduced as part of the practice in a way that resonates with a person or audience. The quality of attention involves a curious, open, even playful context for whatever arises. When Clark spoke to the national conference of administrative law judges, the organizing judges themselves encouraged him to use the word compassion in a talk on external mindfulness and lie detection. On the other hand, when he spoke to a largely twenty something and male audience at an online gaming company, they asked that PowerPoint slides refer to “connecting” rather than “compassion.”

Attending without bringing the attitudinal qualities into the practice may result in practice that is judgmental and shaming of inner (or outer) experience. Such an approach may well undermine the intentions of the practice; for example, cultivating patterns of judgment and striving instead of equanimity and acceptance.

^{105.} *Id.*

^{106.} DANIEL J. SIEGEL, THE MINDFUL BRAIN: REFLECTION AND ATTUNEMENT IN THE CULTIVATION OF WELL-BEING 128 (2007).

When many first become mindful, they are shocked at the untidy and sometimes unwelcome nature of their thoughts. “In my first years of daily practice and retreats starting in my early twenties,” the meditation teacher Donald Rothberg writes, “I was struck, as are many beginning meditators, by how ‘out of control’ my mind and attention were, despite my educational achievements.”¹⁰⁷ Contrast two reactions: “Incredible – there’s a lot going on here” vs. “Oh no! What is wrong with me? How long has it been this bad?”

If we continually practice meditation with a cold, judgmental, and impatient attention, these are the pathways that will get stronger. Our intention instead is to practice with an attitude of open, caring attention. The attitudinal qualities do not add anything to the experience itself, but rather infuse the frame of attention with qualities such as acceptance, openness, caring, curiosity, affection, love and friendliness. For example, if while practicing mindfulness impatience arises, the impatience is noted with acceptance and kindness. These qualities are not meant to be substituted for the impatience or to make the impatience disappear, they are simply the container. These attitudes are an essential part of the mindful practice. As Kabat-Zinn states, “[t]he attitude with which you undertake the practice of paying attention . . . is crucial” and “[k]eeping particular attitudes in mind is actually part of the training itself.”¹⁰⁸ The attitudes are not an attempt to make things be a certain way; they are an attempt to relate to whatever *is* in a certain way.¹⁰⁹

The values of flexibility, emotion, and kindness partly reflect values gendered feminine these days.¹¹⁰ They contrast with the notion of a kind of mindfulness “muscle” popularized in some efforts to bring mindfulness into law. We are acutely aware of our deliberate choice to list the values of emotion and kindness after the colder and more concrete values of test scores and negotiation results; we are also acutely aware of our choice to make references to studies and brain images rather than descriptions of our own mindfulness practices or the changes our own students might describe. We hope that those, like we, who share many of these “softer” values still feel valued and motivated, and those who have read this far past the harder aspects will not merely skip ahead to find out how mindfulness helps people catch lies and avoid bias. At the same time, much as we hope we have accurately described our intent, we understand that our ordering may indeed further inscribe the marginalizing of “softer” virtues. We imagine the student or more junior scholar might well instead think, “[w]ell, I guess that’s how it is. Not even tenured professors of law and psychology in the San Francisco area can start with kindness.”¹¹¹

107. DONALD ROTHBERG, *THE ENGAGED SPIRITUAL LIFE* 57 (2006).

108. KABAT-ZINN, *supra* note 96 at 31-32.

109. *Id.*

110. We say “these days” because exactly which traits in which cultures track which gender varies from time to time. *See generally* Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990) (explaining that what was considered hard and soft thinking varied at different times in the history of United States); Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (arguing that what a given culture at a given times values may often just reflect occupations and roles occupied by men in that given culture at a given time).

111. Scholars of color and women especially report fear that their perspectives and methodologies, such as Critical Race Theory, will not be treated seriously. One scholar report:

Alicia, a Latina, also says that it is common at her institution for her white faculty colleagues to act friendly towards the faculty of color to their faces, but “behind closed doors” there is the “[d]enigration of the person’s work, their scholarship or their teaching.” In fact, the existing literature suggests that Critical Race Theory, feminist legal scholarship, and

We turn next to a core promise of mindfulness for judging, negotiating, and lawyering: How do we “judge credibility” better – and, more generally, understand the thoughts, feelings, and future actions of counterparts, opponents, lawyers, and clients? Judge Fogel gives us two important examples of judging credibility: Does a person pleading guilty, and therefore giving up a trial that might set them free, understand what he is doing?¹¹² Is a person in any kind of trial telling true and accurate information?¹¹³ There is often a third important question of future conduct. Will the person who says they will pay child support really pay it? Lawyers and negotiators have parallel questions, such as, “Does this person understand this agreement?,” “Am I getting the information I need to craft a good deal for myself or my client?,” and, of course: “Will this client pay me?,”¹¹⁴ and “Will this client fire me?” As we’ll see, Mindfulness 1.0 may well improve such determinations, and Mindfulness 1.5 can help more.

III. MINDFULNESS 1.5, EMOTIONAL AWARENESS, AND CREDIBILITY: THE GOOD NEWS

To start with, we have two sides of the coin. Do you think you’re good at judging truthfulness? Good news: you are probably not worse than average. Bad news: the average ability to judge credibility is almost as bad as you can get. A statement is generally true or untrue. If you just flipped a coin, and thought heads were true, you would get the answer about fifty percent of the time. In fact, research shows that nearly everyone does little better than fifty percent on average.¹¹⁵

other social justice-oriented research is often devalued by many faculty colleagues at legal institutions, though many women and people of color gravitate toward that work as central to and validating of their own experiences.

Meera E. Deo, *The Ugly Truth About Legal Academia*, 80 BROOKLYN L. REV. 943, 971 (2015). In a related way, Clark has long had hesitations about sharing evidence that African-Americans do worse in negotiation and/or show less knowledge about negotiation; although this may “raise awareness” of a “problem,” it may also invite those who deal with African-Americans to take advantage of worse alternatives – after all, those selling cars to African-Americans might think it is acceptable to charge African-Americans higher prices and effective as well since African-Americans would face higher prices at most dealers. Clark Freshman, *Prevention Perspectives on “Different” Kinds of Discrimination: From Attacking Different “Isms” to Promoting Acceptance in Critical Race Theory, Law and Economics, and Empirical Research*, 55 STAN. L. REV. 2419, 2423-24 (2003); see Ian Ayres, *Is Discrimination Elusive?*, 55 STAN. L. REV. 2419, 2431 (2003) (arguing that researchers might choose to reveal findings of discrimination only to some people but withhold from others when disclosing might promote discrimination).

112. Fogel, *supra* note 1, at 2-3.

113. Fogel, *supra* note 1, at 3-4 (describing a “core competency” of judges as “assessing credibility”).

114. Failure to pay as promised is standard operating procedure for the Trumps of the world. Lizzie Widdicombe, *Family First*, THE NEW YORKER 24, 26 (Aug. 22, 2016) (“[H]e had Trumpian qualities, such as a tendency to withhold payment from vendors like contractors, cleaners, and architects, forcing them to accept a fraction of their fee.”). When lawyers discuss fees openly with clients, and judge their understanding and comfort, the process satisfaction of the client may make them more likely to pay. See, e.g., Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, L. & SOC’Y REV. 323, 324 (1995) (explaining that a variety of studies show parties pay more when they reach agreements in mediation rather than by court order).

115. See generally Paul Ekman, Maureen O’Sullivan & Mark G. Frank, *A Few Can Catch a Liar*, 3 PSYCHOL. SCI. 10 (1999) (describing how only a tiny number of people do better than chance at detecting lies).

More good news, and some pretty good news: scientific research suggests why Mindfulness 1.0 increases accuracy in judging credibility and getting better information. In addition, Mindfulness 1.5 via some tailored mindfulness and related practices offers even more. It may help¹¹⁶ to think of credibility as a step-wise process.¹¹⁷ We can then review how mindfulness helps with each:

- We set an environment that encourages others to be truthful¹¹⁸ and gives us the state of mind and other resources to better know when others are not.¹¹⁹
- We identify clues to truthfulness versus partial truths or deception (so-called “hot spots” or “soft spots”).¹²⁰
- We consider potential other sources for these clues rather than jumping to a conclusion that, e.g., fear necessarily means guilt.¹²¹
- We investigate, such as reviewing other testimony or asking questions.¹²²

116. Although Judge Fogel notes that deliberate thinking, as in this step-wise procedure, works better for many tasks, some expert decisions do better when they simply involve pattern recall. Alas, the evidence for this and lie detection is generally poor since those one might expect to do better, such as judges, generally do not. On the other hand, there is some evidence that those *some* of those who have taken an interest in doing better *and* have the opportunity for feedback. *See id.*

117. For an overview of an earlier version of this approach, see Clark Freshman, *Lie Detection and the Negotiation Within*, 16 HARV. NEGOT. L. REV. 263 (2011).

118. Lie detection expert Paul Ekman advises parents of teenagers:

“During these years parents can firmly establish the importance of trust in telling the truth that they have hopefully introduced in earlier years, and try to move away from fear and punishment. A parent may say . . . ‘Nothing is more important than the trust between us. If you have done something that you know I will disapprove of, don’t be afraid to tell me. Remind me not to get angry. You may have to do something to make up for it, but I will be very proud of you for telling me the truth.’”

Paul Ekman et al., *Why Kids Lie* 129 (1989).

119. *Cf.* DAVID A. LAX & JAMES K. SEBENIUS, 3D NEGOTIATION: POWERFUL TOOLS TO CHANGE THE GAME IN YOUR MOST IMPORTANT DEALS (2006) (emphasizing that many focus only on negotiation tactics when actually dealing with others rather than the importance of setting up the interaction appropriately).

120. Law enforcement may see every concealed emotion as a danger signal, but judges, lawyers, and negotiators can view them as an opportunity to build relationship. For a classic perspective on soft spots generally, see Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot*, 4 PSYCHOL. PUB. POL’Y & L. 901 (1998).

121. Paul Ekman first coined the catchy term “Othello’s Error” to describe the way that we police might think someone was guilty when a suspect acts afraid, but the suspect might simply fear being treated badly. PAUL EKMAN, *TELLING LIES* 170-73 (3d ed. 2002). This error also reflects and perpetuates implicit racial bias: many men of color quite reasonably fear that police will treat them badly, as the recent rash of police killings of unarmed people of color attests. *See, e.g.*, Timothy Williams, *Official Apologies for Police Role in Mistrust by Minorities*, N.Y. TIMES (Oct. 17, 2016), http://www.nytimes.com/2016/10/18/us/official-apologizes-for-police-role-in-mistrust-by-minorities.html?_r=0;

Quoctrung Bui & Amanda Cox, *Surprising New Evidence Shows Bias in Police Use of Force but Not in Shootings*, N.Y. TIMES (July 11, 2016), <http://www.nytimes.com/2016/07/12/upshot/surprising-new-evidence-shows-bias-in-police-use-of-force-but-not-in-shootings.html>; *The New York Times, Here’s How Racial Bias Plays Out in Policing*, N.Y. TIMES (Aug. 10, 2016), <http://www.nytimes.com/2016/08/11/us/heres-how-racial-bias-plays-out-in-policing.html>.

122. *See, e.g.*, Scott Brownell, *Nonverbal Behavior in the Courtroom*, in NONVERBAL COMMUNICATION: SCIENCE AND APPLICATIONS 183-85 (David Matsumoto et al. eds., 2013) (explaining that a judge trained by deception expert and psychology professor, Maureen O’Sullivan, “recalled that one single event of leakage does not establish deception with certainty, but it does suggest that more questions should be asked.”).

We make conclusions. In some instances, our conclusions include an assessment of our confidence, as reflected in different burdens of proof like beyond a reasonable doubt or clear and convincing evidence.¹²³

Imagine how mere Mindfulness 1.0 would help a lawyer or judge in a standard malpractice case. The surgeon performed an appendectomy, and the patient ended up with a brain infection. The lawyer for the doctor’s malpractice company meets the surgeon and wants to figure out if an early settlement offer might avoid a large verdict. The defense lawyer knows from talks with the patient’s lawyer about one key set of questions: Did the surgeon do enough to identify any infection and let the patient and the patient’s other doctors know enough to respond? Contrast the typical attorney, the mindful attorney schooled in Mindfulness 1.0, and the value of Mindfulness 1.5.

The typical attorney sends an email: “Do we have anything to worry about on this?” The surgeon replies by email, “Just a vulnerable patient with bad luck. I did what I could.” The attorney sets the file aside. An attorney schooled in Mindfulness 1.0 might have made different choices. He might have paid full attention as he drafted the email. Maybe he would choose slightly different language. When he got the return email, his mindfulness practice might have made him more aware of the potential feelings of the doctor and the patient. He might send an email of empathy: “I hope you’re doing okay. It’s hard for me to hear how someone could get such bad luck and nearly die. I can only imagine how hard it might be on you, and I do wonder how a jury might respond to this if it gets to trial.” This would reflect the kind of empathy that Judge Fogel mentions, and that some research suggests comes from mindfulness.¹²⁴

Mindfulness 1.0 might help more in other situations. If the lawyer happened to see the doctor, then he would have the opportunity to register more clues. As discussed more below, even if a lawyer practiced formal mindfulness with his eyes closed, this might well increase the awareness of emotions in others. So, too, the reduced negative emotion from mindfulness practice might give the lawyer better peripheral vision and more awareness of other clues, such as inconsistent movements of the body or changes in the amount of body movements during certain statements.¹²⁵ Although this awareness would help with paying more attention, it would be hard to know where to look for clues, what clues might matter, and how to interpret them.

For most of you, consider this: do you see the risk of bicycles when you drive? In London, the risks are many: a bicycle might go in front of the car – and you might hit a bicycle when you open your door. You’re not a bad person; you just didn’t realize that bicycles might be there.

123. There is no clue to deception that perfectly tracks deception only; rather various indications of things such as negative emotion, heightened cognitive load, physiological arousal and other events make deception a more likely conclusion. Whether we choose to infer and conclude a statement is untruthful will depend, therefore, on the relative risks of believing a lie or disbelieving the truth. *See generally*, e.g., EKMAN, *supra* note 67 (applying how one might respond differently to clues given the alternatives in therapy, police investigations, and politics).

124. *See, e.g.*, Shapiro et al., *supra* note 72, at 589-90 (showing that medical and premedical students who engaged in mindfulness program showed greater empathy; empathy was correlated with a decrease in anxiety, which in turn was associated with increased minutes of meditation).

125. *See, e.g.*, Frank & Svetieva, *supra* note 70, at 125 (discussing changes in rates of movement as potential clue to deception).

London officials devised a nifty ad campaign to awaken us to the risk. The viral video simply says “Whodunit?” and asks you to focus on who might have committed a murder at an old English manor house. Most people pay attention to faces, and therefore miss the nearly dozen changes in the set that go on. The funny ad ends with a reminder that it’s hard to pay attention if one doesn’t know where to look.¹²⁶

Now contrast an attorney schooled in Mindfulness 1.5, including external awareness. At the very first move of *setting the stage*, the Mindfulness 1.5 lawyer might reach out on Skype to get some sense of the voice and facial expressions of the doctor. That would allow the lawyer to see the facial expressions (discussed below) that might reveal the doctor’s emotions, relatively heightened cognitive load, and changes in voice, language, and movement. If he had time, he might set the stage further by seeing the doctor in a comfortable coffee shop. That would help if the lawyer sees more clues, such as changes in breathing in the chest. If you doubt the value of such clues, spend some time watching speakers sitting in chairs before they go up to the podium. Also, the comfortable setting would help the lawyer understand the clues. Over the phone, if the lawyer noticed a change in voice, he wouldn’t know if the doctor had feelings or thoughts about a crucial statement (“I told his doctor about the infection when I ran into him”) or because the doctor saw a nagging email, or an impatient patient, or spilled some coffee. Based on what he saw and heard, the lawyer might follow-up in different ways. Because he knows that people often misremember things or say some untrue thing, he would stay calmer than most people who felt lied to. Of course, the lawyer skilled in Mindfulness 1.0 might indeed have a kind of “wedge of awareness”¹²⁷ of his urge to act or of the “spark before the flame” of negative emotion, but the more detailed and specific understanding or mindfulness of others from Mindfulness 1.5 holds more promise. Instead he might make a note to himself to follow up later by looking at the correspondence and files more. Or he might ask a gentle question, “You know I can’t believe how many patients you must see,” he might say. “What do you think are the chances that maybe the record won’t back you up that you told the other doctors?”

A. Setting the Stage

Setting the stage includes both setting the stage for inner mindfulness and outer mindfulness. When we deliberately take some time to practice formal sitting practice, we know to find a comfortable place with the correct balance of silence and ambient noise. So, too, we may learn over time that putting our phone away or turning off email alerts may promote better attention when doing everyday tasks, such as writing an article on mindfulness.

As with internal mindfulness, we may need to set the physical stage. Lack of attention, sleepiness, and hunger may all make it hard to make consistent judgments. We may also be mindful of our overall tendency to be too trusting (“gullible”) or

126. *Test Your Awareness: Whodunit*, YOUTUBE, <https://www.youtube.com/watch?v=ubNF9QNEQLA> (last visited Sept. 3, 2016).

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

too suspicious. Over time, if we track this, we may learn that we have certain patterns of too much trust in some scenarios and too little trust in others. As we will see in the bias section next, this can sometimes involve particular types of people, including people with whom we tend to have too much trust and those with whom we have too much suspicion. It is also worth being mindful of the contexts that tend to trigger too much or too little trust. For example, based on outcomes, many of us may place too much trust in health care providers. Based on a range of research, many of us will die needlessly early because a doctor or nurse made a medical error; indeed, the most recent peer reviewed research identifies medical error as the third leading cause of death.¹²⁸

Setting the stage also includes setting the stage for others. People lie more and break more agreements when they have negative emotion.¹²⁹ Mindfulness helps us set the stage for truthfulness in two ways. First, as we’ve seen above, those who practice some form of Mindfulness 1.0 tend to have more positive emotions and fewer negative emotions. Because our own emotions can affect the emotions of others, the mindful judge or lawyer can expect others in the courtroom, or any room, to “catch” some of their emotions and feel more comfortable telling the truth and keeping their commitments, including, in court, to tell the truth.

Second, the mindful judge can set the stage for people to be truthful in other ways. This generally includes letting people know that they may “supplement” or “correct” their initial answers. A law clerk for a judge or an attorney may present work and then realize other possibilities; if the supervising judge has set a harsh atmosphere, the person may be afraid to share that information. In an analogous way, Paul Ekman, the world’s leading authority on lie detection, emphasized a related point in advising parents on how to get their children to be more truthful. Rather than emphasizing the kinds of techniques that he might teach police, he instead emphasized how parents could better understand why children might lie and create a home where children felt comfortable sharing the truth.¹³⁰

Notice that the key to creating such an atmosphere is not *internal* mindfulness. We may intend to create a comfortable atmosphere but create one that leaves people fearful. This may be cultural. A judge or lawyer with East Coast sarcasm may intend to be funny but leave subordinates fearful or anxious. External mindfulness gives her the ability to see the flashes of fear in the stretched mouth or eyebrows with inner parts raised. These are tell-tale signs of fear and distress across cultures.¹³¹

128. Martin A. Makary & Michael Daniel, *Medical error—the third leading cause of death in the US*, BMJ (May 3, 2016), <http://www.bmj.com/content/353/bmj.i2139>.

129. See, e.g., Joseph P. Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies*, 74 J. PERS. & SOC. PSYCHOL. 565, 565 (1998).

130. PAUL EKMAN ET AL., WHY KIDS LIE 4-5 (1989) (discussing how to make it easier for children to tell the truth by such means as explaining why they might have broken something because the parents might have placed it in a precarious place). In a related way, states encourage employees to be truthful about the illegal activities of their employers by making it illegal for employers to retaliate against them for reporting wrongdoing. See, e.g., CAL. LAB. CODE § 1102.5(a) (Deering 2016) (“An employer . . . shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency . . . who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation . . .”).

131. See Matsumoto & Hwang, *supra* note 83, at 29.

In Northern California, one judge made mindfulness a part of his courtroom. He initially simply spoke of wanting some time to settle in himself. He then closed his eyes and encouraged others to do so. Of course, although he felt better, and people asked a successor judge to continue . . . what might open eyes and external mindfulness have revealed and what might happen in courtrooms in other areas?

Part of the stage for truth may be more specific. It might include letting people feel comfortable telling the truth – even if that means correcting oneself later. There is a common misperception that people are truthful if they are slavishly consistent in all of their statements. Instead, German research on content analysis shows that people who correct themselves and then go back to what they were saying are more *likely* to be truthful.¹³²

Third, the mindful lawyer can notice when the stage needs adjustments. This can be physical. For example, Clark has taught many factfinders about judging credibility better, including the Conference of Federal Administrative Law Judges, the Academy of Labor Arbitrators, and the Judicial Arbitration and Mediation Service. On a call with someone from one state administrative law judge group, he was discussing ways to improve credibility determinations, including the facial clues discussed below. The judge then realized that her courtroom often did not let her see witnesses faces head on, and she made a note to consider ways to change that.

B. Noticing Clues: the Positive Promise of Mindfulness

On its own, Mindfulness 1.0 helps in several ways with the first task of noticing clues. On our own, our minds often drift. We can know this from two perspectives. First, we have our experience. If you close your eyes for a minute and simply try to follow your mind from breath to breath, your mind will often drift. Second, as with our general limited ability to identify the truth, we generally get distracted – nearly half the time.

Here, then, it would seem mindfulness has some of its strongest support in several ways. As we saw, evidence suggests that mindfulness improves our ability to pay attention.¹³³ In addition, the research above suggests that meditation practice improves our ability to notice very fast changes, and this ability increases with the number of months of practice.

This awareness of fast changes is crucial for increasing emotional awareness credibility because awareness of microexpressions of emotion helps improve credibility. Although we are not aware of any studies that show mindfulness or any meditation alone increases the ability to recognize microexpressions, this is a logical extension of the research above that mindfulness improves ability to recognize

132. The association of spontaneous correction with truthfulness is one of many factors included in criterion-based content analysis; although spontaneous corrections on their own explain less than other characteristics, they are statistically significant in a recent meta-analysis. Barbara G. Amado et al., *Un-deutsch Hypothesis And Criteria Based Content Analysis: A Meta-Analytic Review*, 7 EUR. J. PSYCHOL. APPLIED TO L. 1, 4 (included in criteria) & 8 (relative support) (2016); *see generally* Aldert Vrij & Sam Mann, *Criteria-Based Content Analysis: An Empirical Test of its Underlying Processes*, 12 PSYCHOL. CRIME & LAW 337 (2006) (reviewing theoretical and empirical support for criteria based content analysis generally).

133. *See, e.g.*, Mrazek et al., *supra* note 6, at 778 (students who took a two week class in mindfulness scored better on GRE and showed less mind-wandering on a widely recognized scale for measuring attention).

other very fast visual changes. Microexpressions of emotion refer to very fast patterns in the face that reveal one of the five to eight universal emotions, including fear, anger, disgust, sadness, and happiness. Research shows these patterns show up across every culture ever studied, including countries, such as Papa New Guinea, which had not contact with the West at the time.

Microexpressions present the best prospect for improving not just our ability to judge credibility but also to understand others more fully. First, although some controversies remain, such microexpressions help distinguish a large share of false from true information.¹³⁴ One recent study showed that, compared to the usual success rate of fifty percent, the presence of negative facial emotion could detect truth at a vastly improved rate of 72%.¹³⁵ Those who learn the expressions in less than a few hours recognize emotions better and better distinguish true from false statements. Second, research shows that most people may readily improve their ability to detect emotion.¹³⁶ Even those on the autism spectrum or schizophrenia show improvement in training that takes less than an hour.¹³⁷

This training does underscore the need for Mindfulness 1.5. Research showed that the ability to distinguish emotions improved in part because people were looking not just in the eyes but in other parts of the face.¹³⁸ It is relatively unlikely that mere paying attention would get people to recognize the correct areas to find clues of emotion in others.

Mindfulness may also strengthen another important clue to credibility and truth: are people acting differently from usual? Experts classify this as change from baseline.¹³⁹ When people are less accurate, they may change from their own baseline in several different ways. For example, people often move less when they are telling less of the truth. Some theorists think this reflects people’s attempt to make people believe them. Others think it is a merely physiological byproduct of people using too much of their limited cognitive abilities on trying to remember something false. Judges can evaluate this better, however, if they know how often a person moves in general. Unlike awareness of the exact facial movements that distinguish individual emotions, the idea that people may act differently when talking about different topics is more widely shared and intuitive.

To the extent mindfulness helps judges see the baseline of others, it improves accuracy and sidesteps two problems. First, it reduces the risk of cultural unfairness. If we pay attention to notice that a person has relatively little eye contact even describing basic facts, such as education clearly established in the records, then we are less likely to accuse them falsely of lying when they have that same low level of eye contact when discussing what they saw at an accident. Second, it reduces

134. Gemma Warren, Elizabeth Schertier & Peter Bull, *Detecting Deception from Emotional and Unemotional Cues*, 33 J. NONVERBAL BEHAV. 59 (2009).

135. Frank & Svetieva, *supra* note 70, at 130.

136. *Id.*

137. See generally Tamara A. Russell et al., *Remediation of Facial Emotion Perception in Schizophrenia: Concomitant Changes in Visual Attention*, 103 SCHIZOPHRENIA RES. 1 (2008) (persons diagnosed with schizophrenia given brief training with recognizing fast changes in universal expressions of emotion for less than an hour associated with increased ability to recognize emotion).

138. *Id.*

139. See, e.g., Mark G. Frank et al., *Synthesis and Conclusions*, in NONVERBAL COMMUNICATIONS: SCIENCE AND APPLICATIONS 259, 279 (David R. Matsumoto, Mark G. Frank, & Hyi Sung Hwang eds., 2012) (“Baseline means that practitioners must take account of the environmental, situational, and behavioral norms of given persons and situations.”) (emphasis in original).

the risk of simply misjudging those who usually act different. Even fast talking New Yorkers might mistrust the fast talker in *Seinfeld*, but they would be less suspicious if they realized that the person often spoke fast.

Mindfulness 1.0 also helps by expanding our field of vision through its effect on emotion and emotional awareness. As we saw above, when we are angry, for example, neurological changes make us less able to see things in our periphery. This means we miss out on important clues. With enhanced peripheral vision, for example, we can notice that someone shrugs his or her shoulder. This shrug may make it more likely they have some ambivalence or imperfect knowledge. Another clue to deception or imperfect information involves a variety of body movements, such as the overall rate of such movements we saw above. For some, certain specific gestures, such as an unexpected nonverbal signal of contempt – e.g., an extended middle finger – may indicate someone has anger or contempt when their words deny it.

C. Interpreting Clues

On its own, Mindfulness 1.0 helps us interpret clues through awareness of our own emotions and through regulation of our emotions. When we are angry, we are less able to recognize the true information about others.¹⁴⁰ Through basic mindfulness, we may recognize such emotions. When we “get a feeling” someone is untruthful, and we recognize that anger, the mindfulness may give us pause. We may look for reasons why we mistrust someone. Even if we identify a clue, such as a sign of fear, we might consider other explanations for that fear, such as someone’s fear of testifying. Existing research on Mindfulness 1.0 shows that mindfulness helps improve cognitive flexibility.

D. Responding to Clues

As a judge, of course, we may use this awareness to test our hypotheses. If we think the fear may come from testifying in court, we may try to reduce that fear. Perhaps that means acknowledging the emotion in the room. As Judge Fogel mentions, “sometimes an intentional, considered expression of emotion may be exactly what is needed . . .”¹⁴¹ Of course, Judge Fogel limits that expression to times when that a judge is engaged and respectful.”¹⁴² In addition, therapists and mediators alike often learn that normalizing an emotion as understandable in a context helps some people relax.¹⁴³

While Mindfulness 1.0 may help, the external awareness of emotion of Mindfulness 1.5 can also be helpful. In part, that means simply testing whether our attempt to comfort someone works. Maybe a judge says, “Just in general, for all of the witnesses, and for the jury to know, it’s very common for people to find being up here a little scary. Frankly, it even scares me sometimes.” When a judge does that, she might see the witness laugh and relax. Or the opposite: some people do

140. See Allred et al., *supra* note 81, at 183-84 (angry negotiators were less accurate in identifying the incentives of their counterparts in a simulated negotiation).

141. Fogel, *supra* note 1, at 4.

142. *Id.*

143. See generally, e.g., PAUL EKMAN, EMOTIONS REVEALED (2d ed. 2007) (illustrating various responses to recognizing facial expressions of emotions in others, including normalizing).

not like to hear observations of emotion, especially of weakness. Some theorists label such people as authoritarian personalities. Such people might then show flashes of fear or even anger on their face. Clark still recalls a student who reported in class. “I don’t know what I did wrong. I scored high on recognizing emotions last week in class. I saw my boyfriend had that sign of distress in his eyebrows. I wanted to help and asked, “Why are you feeling sad?” He didn’t appreciate it. He said, “I’m not sad, I’m angry.”¹⁴⁴

Consider yet another common example: when deciding how to punish someone, does the perpetrator show genuine remorse? Will they act differently again? Here, too, our intuitions may do better with some proper training. Consider the person who says they know domestic violence is wrong, and they will never hit their wife again. A judge may be quite mindful and focused, but miss important clues without further training. For example, a judge tightly focused on the person’s eyes may miss the shoulder area; and the shoulder area may reveal the kind of shrug that tells us ambivalence. Someone who notices that kind of shrug as a clue might follow up in several different ways. Consider, for example, three general ways to respond. One might ask a general question, such as, “How confident are you of that?” Or one might ask a more specific question that might normalize the situation. “When do you find it most difficult to control your violence?” Or, in a more aggressive way, one might even test a provocative statement: “I imagine it’s going to be a lot harder for you to stick with this commitment if you lose your job again.” Confronted with such a statement, some people may remain silent but nod the head slightly as if to say yes.

E. “Hindrances” and Antidotes

Many mindfulness teachers advise we become aware of hindrances to mindfulness.¹⁴⁵ Sometimes, this mere labeling itself may reduce the hindrance. For example, if we are feeling restless, the mere labeling may focus our energy a bit that we become less restless. In other instances, the label of a hindrance may suggest a remedy or antidote. If we are sleepy, for example, we might simply stand up or take a walk. Even with all the correct setup, awareness of clues, and follow-up, we often make mistakes in credibility due to a set of predictable errors. We review these and consider where Mindfulness 1.0 may help, and where it may need some upgrading. From research, we know several distinct obstacles.

In negotiation and decision-making, these errors are often labeled as cognitive distortions. For example, most who negotiate know the powerful tendency just to split the difference between the first offer on each side. The dealer wants 11,000 for a car; we want to pay \$10,000. It seems tempting to settle midway. But this bias obscures the undue power of the dealer’s choice of the starting point. Elsewhere, Clark suggested that mindful negotiators could learn to label other distorting tendencies such as the competitive mind-set that teaches we can only win if some-

144. See generally TERRANCE REAL, I DON’T WANT TO TALK ABOUT IT: OVERCOMING THE SECRET LEGACY OF MALE DEPRESSION (1998) (describing how men find it hard to express sadness and depression but may display anger and aggression).

145. See, e.g., JACK KORNFELD & JOSEPH GOLDSTEIN, A PATH WITH HEART (1993) (describing the help of “naming the demons” of traditional hindrances of desire, aversion, sloth and torpor, restlessness, and doubt); JOSEPH GOLDSTEIN, INSIGHT MEDITATION: THE PRACTICE OF FREEDOM (2003).

one loses, or the avoiding mindset that teaches that conflict is needlessly and hopelessly painful.¹⁴⁶ Indeed, many attempts to tailor mindfulness to particular contexts have adopted this kind of enhanced vocabulary. In programs to manage drug use, for example, counselors suggest clients label their urge to “use” as “craving.”¹⁴⁷ More traditional concepts of mindfulness might treat them instead as “desire” or “wanting.”

When we judge credibility, we run into several predictable hindrances. We now consider these hindrances and how mindfulness relates.

1. *The Liar Myth*

We imagine that some people lie, and the rest of us tell the truth. In fact, partial truths are quite commonplace. In one line of research, when two people meet, each of them says three untruths. If we remember this, we may be vigilant that even quite likeable and moral people may still be sharing some inaccurate information. So, too, though we may be tempted to disregard the testimony of some people, we may find that some things they say may be true.

2. *The Pinocchio Error*

We imagine that some clue perfectly reveals someone lies, such as Pinocchio’s nose getting larger. In a more familiar vein, many believe that looking up in one direction reveals true memories, and the other, constructed lies. Research disproves this “tell.” In this sense, only correct knowledge of the meaning of clues may provide a complete antidote to the problem.

3. *Othello’s Error*

When someone seems afraid, we imagine they must be lying – rather than considering other causes, such as anxiety about testifying. Here Mindfulness 1.0, by increasing empathy and compassion, may make us remember how we, too, might feel in stressful situations, including testifying in court.

4. *Confirmation Bias*

We often make our snap judgments of liar quickly and then only look for confirming information. In one very general sense, Mindfulness 1.0, in principle, should act as an antidote. At its best, mindfulness approaches each moment in a fresh way. In classic research by Daniel Goleman, for example, most people who hear a bell repeatedly seem to stop registering it in their brain waves; experienced

146. Freshman et al., *supra* note 2, at 77-78 (describing how negotiators trained in mindfulness can label their tendencies and mindsets with phrases that track negotiation orientations described in Thomas-Kilman inventory such as labels of “competing” or “avoiding”).

147. See Gordon Allan Marlatt, *Cognitive Assessment and Intervention Procedures for Relapse Prevention*, in RELAPSE PREVENTION: MAINTENANCE STRATEGIES IN THE TREATMENT OF ADDICTIVE BEHAVIORS 241 (Gordon Allan Marlatt & Judith R. Gordon eds., 1985) (explaining that the key ingredient in this intervention process is to teach the client to accurately label the urge when it occurs; one practical method is to suggest that the client make a brief mental notation whenever the response occurs (i.e., note to oneself, “craving response” or “urge response”).

meditators, however, seem to continue to register. In other words, they do not shift to automatic pilot, but remain aware and focused.

Finally, we have the major hindrance of “bias” with where Mindfulness has both much promise and much potential through Mindfulness 1.5.

IV. MINDFULNESS AND BIAS

Research offers great news about Mindfulness 1.0 and bias generally. Think of bias as any inaccurate or unfair influence over any perception, judgment, or behavior. That might mean hiring equally qualified males before females, or giving raises more readily to those perceived as straight, and so on. Bias also includes cognitive biases that have long plagued negotiation, such as placing too much weight on an initial offer by a counterpart, known as the anchoring bias.¹⁴⁸ In part, such relative cognitive flexibility may come from the way that mindfulness affects emotion since, for example, those with negative emotion show more effects from some cognitive distortions. At a very high level of generality, a series of studies show even brief practices of mindfulness many such biases by a common set of effects. Mindfulness reduces the hold of what we saw and felt in the past over what we are seeing now – and *doing next*. We visit next the direct research on Mindfulness 1.0 and bias and then research and prospects for Mindfulness 1.5.

One recent key study showed that a single ten minute guided mindfulness meditation reduced one key measure of bias against African-American: scores on the implicit association test (“IAT”).¹⁴⁹ In general, such scores predict when people move away from outgroups such as African-Americans or tend to hire such outgroups less.¹⁵⁰ Many of us think of bias as conscious hostility to want to hurt others, and research certainly supports this as a source of unequal opportunities and unequal outcomes.¹⁵¹ Many now believe that discrimination can be modeled as an implicit bias: our memory may more readily recall positive traits for ingroups and more readily recall negative traits for outgroups.¹⁵² This type of bias is called implicit bias.¹⁵³ At one point, many researchers thought that people acted as if they were biased even though they did not have any conscious bias. As a rhetorical

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

149. See, e.g., Adam Lueke & Byron Gibson, *Mindfulness Meditation Reduces Implicit Age and Race Bias*, 6 SOC. PSYCHOL. & PERSONALITY SCI. 284, 285 (2014).

150. See generally, *id.* at 285 (those who score higher on implicit negative attitudes toward a particular group, even if they disavow conscious negative views of that group, are more likely to treat those perceived as members of that group badly).

151. On the distinction between theories that disadvantaged groups face unequal opportunities and outcomes because people intend to harm them rather than because people simply overlook them but favor some other group, see Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between “Different” Minorities*, 85 CORNELL L. REV. 313 (2000) (reviewing historic and contemporary legal and psychological theories and research). Research does indeed support conscious and deliberate intent, such as research by Yale’s Ian Ayres that showed African-American men pay far more for cars – even when they use the exact same bargaining strategy. See generally, Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 112 (1995) (statistical evidence suggesting car salespeople had an intent to hurt African-American males, but merely tried to make more money off African-American women because they believed African-American women were less comfortable with bargaining).

152. Lueke & Gibson, *supra* note 149, at 285.

153. *Id.*

matter, such a description of “normal” bias may make such discussions more agreeable to those who display biases. More recent thinking and research, however, suggests that implicit biases may also be conscious generally, but people may be unaware of how they affect their behavior in any given instance.¹⁵⁴ In any event, as at least some economists recognize, the palpable harm to those who do not get jobs is identical whether the bias is conscious or unconscious, whether reflecting a deliberate intent to harm or simply mindless overlooking of the value of outgroups.

As much as evidence that mindfulness reduces implicit bias is itself encouraging, how mindfulness reduces such bias makes it more promising than many other alternatives. In the research, mindfulness seemed to have several distinct effects. First, people who listened to a ten-minute guided meditation were less likely to make negative associations with African-Americans and with older people.¹⁵⁵ Second, there was a kind of Colbert effect: those who engaged in ten minutes of mindfulness meditation first seemed less likely to notice race and age in general.¹⁵⁶ Also in some research different biases operate more powerfully in some people.¹⁵⁷ In the mindfulness and bias study, for example, there was no correlation between negative association with older people and negative associations with African-Americans.¹⁵⁸ For other people, bias may be quite general, such as general dislike of anyone not like oneself or a general preference for those like oneself.¹⁵⁹

This kind of Mindfulness 1.0 has distinct advantages over other attempts to overcome bias. Other common attempts to reduce prejudice include exposing people to positive interactions with a particular outgroup, such as taking a class with an African-American professor.¹⁶⁰ This is a relatively time-consuming antidote not just because the classes and interactions take longer than a ten-minute meditation. When attempting to undermine a particular outgroup bias, such approaches require interventions for each particular bias, such as exposure to both African-Americans and older people. In addition, such targeted attempts sometimes backfire, either or both by producing conscious backlash or by making outgroup categories more available and more the basis for stereotyping.¹⁶¹ On the other hand, the mindfulness intervention seemed to undermine both race and age biases by the common twin effects of reducing awareness of certain characteristics (such as age and race) and the association of such characteristics with particular traits, such as darker race with more criminality or older age with less competence.¹⁶²

154. *Id.* (“Note that even though current conceptualizations of implicit attitudes suggest that they are not necessarily unconscious in nature, they could still affect people in ways in which they are unaware.”).

155. *Id.* at 287-88 (addressing race and age, respectively).

156. *Id.* at 288 (“In the case of the race and age ... [implicit attitude tests], it may be that reducing the automatic activation of Black-bad and old-bad could have made race and age less detectable ...”).

157. For example, different individuals have a range of scores on implicit bias involving race and age that correspond to different likelihoods that they would treat African-Americans and older people in a worse way. *Id.*

158. Lueke & Gibson, *supra* note 149, at 4 (race and age implicit attitude scores not correlated for the group as a whole, nor for those put in the control group, nor for those put in the experimental mindfulness group).

159. *See generally* Freshman, *supra* note 151.

160. Lueke & Gibson, *supra* note 149, at 2.

161. *See generally, e.g.*, Clark Freshman, *Prevention Perspectives on “Different” Kinds of Discrimination: From Attacking Different “Isms” to Promoting Acceptance in Critical Race Theory, Law and Economics, and Empirical Research*, 55 STAN. L. REV. 2293, 2294 (2003).

162. Lueke & Gibson, *supra* note 149, at 2.

Although this kind of Mindfulness 1.0 holds great promise, it also has several limitations. First, although mindfulness reduced negative associations, it did not have a statistically significant on reducing positive association with ingroups.¹⁶³ Second, although the mindfulness had an effect on the group as a whole, mindfulness meditation does not appeal to everyone equally much as different people may like different types of exercise. Third, the different appeal of different meditation techniques matters because of open questions about how long any given meditation has lasting effects. This matters because, though arising without malice, positive associations between whiteness and youth with good qualities would still mean whites and younger people would, for example, get better jobs.

Considering these limitations, relevant Mindfulness 1.5 would:

- Increase positive association between desirable traits and outgroups;
- Offer different types of meditation practices to increase the numbers who would take up meditation; and
- Offer different types of practices to increase the numbers who might maintain meditation continuously enough to maintain or even strengthen its de-biasing effects.

V. MINDFULNESS 1.5 AND OTHER PRACTICES: FRIENDLINESS (LOVINGKINDNESS), SELF-COMPASSION, AND COMPASSION

A. *A Mindfulness Exercise*

Try this: notice where you are now. In a moment, set a timer, and scan your body. Simply note the physical body. Then, ask: what emotion might be here? Then read the first of three stories and pause after each to do this same exercise of scanning the body and noting emotions. Better yet, if you’re reading this online, go to the hyperlink mindful recording on this:

Take Two: Meditators at Work: Justice Breyer; Blackrock Masters of the Universe; Yale and Columbia Professors

Let’s begin again with another experience of mindfulness while reading the vignettes below or listening to the hyperlink of them read here. Why do so many busy and important people take serious time out to meditate?

1. *The Supreme Court Justice*

Twice a day, Justice Breyer turns from his draft opinions and cert petitions and closes his eyes.¹⁶⁴ He meditates. Some minutes later, he opens his eyes and goes back to the public life we know so well.

163. *Id.* at 2, 4, 5 (explaining that the mindfulness group trended toward less association of good with youth, but was not statistically significant; the mindfulness group trended toward less association with whiteness and good but results were not statistically significant).

164. Amanda Enayati, *Seeking Serenity: When Lawyers Go Zen*, CNN (May 11, 2011, 11:15 AM), <http://thechart.blogs.cnn.com/2011/05/11/seeking-serenity-when-lawyers-go-zen>.

2. *The Columbia and Yale Professors*

Picture postcard perfect fall foliage; hear sounds of the occasional bird and smell whiffs of fresh bread and scallop sauté from the scratch kitchen. It's the official retreat site of the Episcopal parish for Wall Street. The dozens of people slowly walking back and forth for twenty paces include those marked as the best and brightest legal minds of several generations: a few dozen Yale and Columbia law professors, dozens of Yale and Columbia students and a few others, including me, then a University of Miami law school professor and Adele Hayes, my dear friend, psychology professor and research collaborator.¹⁶⁵

3. *The Wall Street Elite*

The rest of the day, the well-dressed men and women manage more money than any organization in the world. They are the professionals and staff at Blackrock. For that one hour, though, they gather in New York and at conference sites around the world to do . . . meditation. Sometimes their former professional Golbie says a few words and leads them in her melodious voice through a guided meditation.

4. *The Burned Out Public Interest Lawyers*

From a distance, you'd see people walking almost as slowly as zombies, many with their eyes averted. Nearly all would be in sweats or shorts, depending on the weather. You might never imagine that they took cars, and planes, and trains to get to this retreat in New Mexico from the trenches of public interest law firms and advocacy groups. Grove Barnett, the founder and frequent teacher, might look like just another meditation teacher, albeit a bit taller and with longer hair. But he's actually a prominent environmental lawyer with a string of significant court victories and settlements.¹⁶⁶

What did you notice as you read these stories? What happened when you paused? Did you notice that you had not paused? Now do stop. In a moment, close your eyes, scan your body, and see if you recognize any emotions. There may now be a more complete story. You may not feel the need to make your experience perfect. Mindfulness 1.0 focuses, as does Judge Fogel's pamphlet, on a relatively narrow set of skills, including "focus" and "concentration" and on a core concern of Mindfulness 1.5: bias. Did you notice your bias in reading the stories? Some of you might: you might have noticed senses of annoyance, disgust, contempt or just generic judgment or judging mind when you imagined all these fat cats and robber barons and Or you might just have felt more comfortable with some rather than others. What you may very well not have noticed is instead the subtle liking

165. For an account of that retreat, see Clark Freshman, *After Basic Mindfulness Meditation: External Mindfulness, Emotional Truthfulness, and Lie Detection in Dispute Resolution*, 2006 J. DISP. RESOL. 511, 511-12 (describing how my collaborator and I attended a retreat partly in silence where I thought we should avoid eye contact, but she got offended I was ignoring her, and it turned out that I had been unmindful since the avoiding eye contact instruction, often given . . . had not been given at that retreat!).

166. HALPERN, *supra* note 19, at 229-30. For an earlier account of part of that retreat, see Freshman, *supra* note 165, at 512.

and ease and confidence you felt reading about professors at fancy schools, businesses, and resorts (however much fashioned as retreat centers). Or it may have been the comfort of public interest lawyers out in nature.

B. Evidence for Other Practices

As we did with mindfulness, we reverse the usual order and begin with the benefits of other practices and then describe those practices in greater detail. In lovingkindness or friendliness meditation, one spends some time saying three or four well wishes for someone you already like and then, after some time, move to less likeable people or beings. Compassion, and related practices of self-compassion, work in similar ways but connect with caring about the challenges and misfortunes of oneself and others.

Although the research is far less extensive than with mindfulness,¹⁶⁷ what research there is on lovingkindness and compassion suggests an important role. Lovingkindness and compassion meditations address some of the exact limitations of mindfulness in reducing bias. As we saw above, mindfulness reduces the automatic association of outgroups with negatives, but it did not affect the way we associate positives more with ingroups than outgroups. Compassion and lovingkindness instead lead more directly to more positive associations with outgroups.

Mindfulness and these other practices may work in quite distinct ways to reduce bias. Research shows that mindfulness reduces emotional reactivity generally, across pleasant, unpleasant, and neutral objects of attention; brain imaging confirms this by showing decreased activation in the amygdala, a primitive emotional center of the brain.¹⁶⁸ In contrast, those trained in compassion meditation show increased activation of the brain in response to images of human suffering.¹⁶⁹ “These results suggest,” as another researcher explained, “that in the context of social relations, benefits of mindfulness meditation may be the increased cognitive control over negative emotional reactivity, whereas lovingkindness meditation may cultivate feelings of connectedness by creating new positive association.”¹⁷⁰

167. Lest the lack of research be confused with some inherent limitation in these other practices, remember that mindfulness originally drew scientific and popular interest from the generally negative paradigm of both law and of psychology. Within law, and negotiation, emotion remains largely viewed only as a negative to be avoided. For a review of the effects of even very mild changes in emotion on success from both expanding the pie and dividing the pie perspectives, and for the potential differences in application to lawyers, see Freshman, *supra* note 77. Psychology, too, often focused on pathology rather than the development of positive states. As a result, the focus of mindfulness research for the past four decades has looked at reducing pathology stress reduction, symptom relief for physical and mental health conditions, and attention and affect regulation. During the last decade, the influence of mindfulness research in mainstream psychology and healthcare, and an incipient shift in emphasis in psychology from curing psychopathology to the cultivation of flourishing and psychological wellbeing have opened space for contemplative practices that, although incorporating mindfulness, are fundamentally geared towards the generation of positive mental and emotional states and traits, such as loving-kindness and compassion.

168. See generally Gaelle Desbordestion and Compassion Meditation Training on Amygdala Response to Emotional Stimuli in Ordinary, Non-Meditative State, 6 FRONTIERS HUM. NEUROSCIENCE 292 (2008) (showing decreased responses of amygdala, associated generally with strong emotional processing, after people had been trained in mindfulness and compassion).

169. *Id.*

170. Yoona Kang & Jeremy R. Gray, *The Nondiscriminating Heart: Lovingkindness Meditation Training Decreases Implicit Intergroup Bias* 143 J. EXPERIMENTAL PSYCHOL. 1306, 1311 (2013).

In one study at Yale, a six-week lovingkindness meditation course was associated with significant drops in negative views of the homeless and African-Americans. In this well-designed study, researchers contrasted those who took a class that practiced lovingkindness meditation with one group that merely discussed lovingkindness and another that was waitlisted for the study.¹⁷¹ The class that practiced lovingkindness was the only one with improvements: participants lowered their implicit bias of both African-Americans (from neutral to positive) and of the homeless (from quite negative to neutral).¹⁷²

Other research on compassion and self-compassion studies offer less direct support for reducing bias. On the one hand, several studies suggest that participants rate themselves as being more compassionate about others.¹⁷³ On the other hand, research shows that people's rating of their own attitudes about group members is distinct from tests of implicit attitudes.¹⁷⁴ Further tests of those implicit attitudes often better predict whether a given person will treat outgroup members differently. Still, these studies remain promising because their success on other measures may suggest they would indeed reduce implicit bias and acts of bias.

V. COMPASSION AND LOVINGKINDNESS PRACTICES

Enough of mindfulness: consider now a distinct set of practices: the practice of friendliness or lovingkindness meditation, mindful self-compassion, and compassion.

A. Friendliness or "Lovingkindness"

Consider first friendliness or lovingkindness practice.¹⁷⁵ Go back to the groups above (law professors at prestigious schools; Justice Breyer; Wall Street masters of the universe; public interest lawyers). In this kind of exercise, one starts by repeating certain well-wishes for someone quite easy. This could be yourself, an animal companion, or anyone else. Such phrases might be:

May I be safe

May I be happy

May I be healthy

May things go easily

In this practice, one simply repeats these phrases repeatedly for some time. That time might be a minute or two – or it might even be an entire day. At a certain point, one moves on to a somewhat less easy being, such as perhaps a close friend or a mentor. One says similar phrases for some time for this person. Eventually one follows a similar process for a neutral person, someone for whom you do not

171. *Id.* at 1306.

172. *Id.*

173. *See infra* note 185.

174. This is a general problem with self-reports and a related general problem with any theory of any of us having a fixed trait across different contexts and times. For example, people may say they accommodate others in negotiation, but observers may rate them as quite competitive. Clark Freshman, *Identity, Beliefs, Emotion, and Negotiation Success*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 99, 103-04 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

175. For the best introduction to lovingkindness and related practices, *see* SALZBERG, *supra* note 12.

have many strong feelings. After some time, one then wishes well for ever more difficult people.

Such practices have at least four kinds of common effects. First, as with focusing on many objects to the exclusion of others, you may simply feel the benefits of heightened attention, well-being, and even the qualities of mindfulness. Second, as you might expect, you might have warmer feelings and better associations with each of the groups you include in this practice. Third, physiological brain scans show that those who practice greater friendliness meditation tend to have physical markers in brain scan of empathy for others; such people have greater activation of parts of the brain associated with empathy when shown pictures of others suffering.¹⁷⁶ Fourth, it may be the opposite: you may become acutely aware of just how much you do not like some difficult person or just how hard it is to focus on some neutral.

In law and work practice, one might work with these in different ways. First, one might imagine that a more direct approach might work. Daniel Bowling, one of the country’s most respected mediators, says friendly phrases for each party, and each party’s attorney, before any mediation session. Though this may be logical, it may be worth remembering that the research on friendliness meditations and bias took a distinct path. There, people said phrases about different people in general, and this was associated with less implicit bias involving the homeless and African-Americans. Apart from some of our own experience with the backlash effect of meditating for some difficult people, research generally shows that attempts to inhibit negative associations may enhance the bias.¹⁷⁷ For that reason, many successful attempts at reducing bias instead focus on making people see outgroups as part of some larger group. For example, people at stadiums may be less likely to give directions to African-Americans, but far more likely if those same African-Americans wear clothes with the same school affiliation.

Like the friendliness meditations, meditations on compassion focus less on seeing a current situation as developing a new set of feelings. Some understand this differently by saying that we naturally have an open and caring heart, but that it may be obscured by other circumstances. Several long-standing practices focus on compassion generally, and one recent practice focuses on mindful self-compassion.

B. *Mindful Self-Compassion (MSC)*

Psychologists and meditation teachers Kristin Neff and Christopher Germer developed MSC by fusing mindfulness skills and self-compassion practices. Neff and Germer proposed that “self-compassion involves being touched by one’s own suffering, generating the desire to alleviate one’s own suffering and treat oneself with understanding and concern.”¹⁷⁸ The cultivation of self-compassion depends, in this framework, on cultivating its three components: *kindness towards oneself* (the tendency to be caring and understanding with self), *common humanity* (seeing

176. Kristin D. Neff, *The Science of Self-Compassion*, in COMPASSION AND WISDOM IN PSYCHOTHERAPY 79, 87 (C. Germer & R. Siegel eds., 2012).

177. See Kang & Gray, *supra* note 170, at 1308.

178. Kristin D. Neff & Christopher K. Germer, *A Pilot Study and Randomized Controlled Trial of the Mindful Self-Compassion Program*, 69 J. CLINICAL PSYCHOL. 28, 28 (2013).

one's failures and inadequacies as part of the shared human experience), and *mindfulness* (here understood as being aware of one's experiences without over-identification with them as one's own distinct experience).¹⁷⁹

Early research shows MSC improves various physical and mental health measures and outcomes,¹⁸⁰ and this in turn increases its potential power to reduce bias. Since the Yale study showed that friendliness meditation reduced implicit bias partly through its effect on measures of psychological stress, these various measures support the potential of self-compassion in reducing bias as well.¹⁸¹ Previous correlational studies have found that greater self-compassion predicts lower levels of anxiety and depression,¹⁸² lower levels of the stress hormone cortisol, and better heart-rate variability (an indicator related to the ability to self-soothe when stressed, which is associated with mental and physical health).¹⁸³

Self-compassion has correlated with less rumination, perfectionism, and fear of failure.¹⁸⁴ At the same time, self-compassionate people report they acknowledge their negative emotions more as valid and important and show less thought suppression.¹⁸⁵ Self-compassionate individuals also have improved relationship functioning and report more empathetic concern, altruism, perspective taking and forgiveness.¹⁸⁶ To test whether self-compassion is trainable, Neff and Germer recently developed a workshop designed for clinical and non-clinical populations that consists of eight two-hour weekly meetings in which formal (sitting meditation) and informal self-compassion exercises are taught.¹⁸⁷ Each class combines experiential exercises and discussion periods, which are complemented with homework practices designed to cultivate a self-compassionate attitude.¹⁸⁸ One session in the eight-week course is exclusively devoted to teaching foundational mindfulness skills.¹⁸⁹

The first published report on a randomized controlled trial of MSC showed promising results.¹⁹⁰ Participants were randomly assigned to the MSC or a Wait-List control group.¹⁹¹ The intervention (n=24) and waitlist control (n=27) participants were highly similar in terms of age, education, race, gender, and experience with meditation.¹⁹² The authors hypothesized that the MSC would produce significant increases in self-compassion, mindfulness, other-focused compassion, social connectedness, happiness, and life-satisfaction, as well as a decrease in depression,

179. *Id.*

180. Throughout, when we say some intervention like mindfulness "improves" some outcome, we simplify from the wordier conclusion that a given intervention is associated statistically with some change; we can rarely be sure that one thing causes another because any given result might be explained by some other feature.

181. Kang & Gray, *supra* note 170, at 1311.

182. Neff, *supra* note 176, at 84.

183. *Id.* at Helen Rockliff et al., *A Pilot Exploration of Heart Rate Variability and Salivary Cortisol Responses to Compassion-Focused Imagery*, 5 CLINICAL NEUROPSYCHIATRY 132, 132 (2008).

184. Neff, *supra* note 176, at 85; Kristin D. Neff, *The Development and Validation of a Scale to Measure Self-Compassion*, 2 SELF & IDENTITY 223, 228-29 (2003).

185. Mark R. Leary et al., *Self-Compassion and Reactions to Unpleasant Self-Relevant Events: The Implications of Treating Oneself Kindly*, 92 J. PERSONALITY & SOC. PSYCHOL. 887, 901 (2007).

186. Neff & Germer, *supra* note 178, at 29.

187. *Id.* at 28, 30.

188. *Id.* at 30.

189. *Id.*

190. *Id.* at 36-38.

191. *Id.*

192. Neff & Germer, *supra* note 178, at 36-38.

anxiety, stress, and avoidance¹⁹³ Pre-, post-, and 6-month and 1-year follow-up measures were used to assess changes in these variables.¹⁹⁴ The reported results indicate that the MSC group demonstrated improvements on all the predicted outcomes ($p < .05$).¹⁹⁵

Compared to controls, the MSC group showed significantly greater gains in self-compassion, mindfulness, compassion for others, and life satisfaction, as well as decreases in depression, anxiety, stress, and avoidance (medium to large effects size in all variables, except from stress reduction, which showed small effect size).¹⁹⁶ Group differences were not significant for social connectedness and happiness. All positive changes in the intervention group were maintained after 6 months and one year.¹⁹⁷ Using a series of hierarchical regression analyses that assessed the contribution of pre-post residual change in self-compassion in the other variables, the authors showed that self-compassion was significantly associated with wellbeing gains for every outcome except avoidance, which was predicted by increased mindfulness.¹⁹⁸ Finally, increases in self-compassion were significantly related to the number of days a week that participants meditated as well as the number of times per day they formally practiced self-compassion ($p < .05$).¹⁹⁹ This correlation between reported practice time and benefits obtained from the program has become a trend in meditation research in general, and in compassion and loving-kindness meditation research, in particular.²⁰⁰

Despite some important limitations in this study (e.g., use of a homogenous sample mostly composed of middle-aged highly-educated women with previous experience with meditation), the reported results suggest that self-compassion is an emotional skill that can be trained in a relatively short time and can be stabilized as an attitude that is sustained over time.²⁰¹ The increasing amount of research that points that self-compassion is a strong predictor for individual and interpersonal

193. *Id.* at 34.

194. *Id.* at 35.

195. *Id.* at 37.

196. Neff & Germer, *supra* note 178, at 36.

197. *Id.*

198. *Id.* at 37-38,

199. *Id.* at 38.

200. *Id.* at 40; Hooria Jazaieri, et al., *Enhancing Compassion: A Randomized Controlled Trial of a Compassion Cultivation Training Program*, 14 J. HAPPINESS STUD. 1113, 1123 (2013) (finding amount of meditation correlated only with compassion for others); Barbara L. Fredrickson et al., *Open Hearts Build Lives: Positive Emotions, Induced Through Loving-Kindness Meditation, Build Consequential Personal Resources*, 95 J. PERSONALITY SOC. PSYCHOL. 1045, 1052 (2008) (reporting that hours of time spent meditating correlated with different degrees of change in various positive emotions); Thaddeus W. Pace et al., *Effect of Compassion Meditation on Neuroendocrine, Innate Immune and Behavioral Responses to Psychosocial Stress*, 34 PSYCHONEUROENDOCRINOLOGY 87, 93-94 (2009) (finding that statistically significant improvement in physiological markers only existed between those in the top half of the amount of meditation versus the controls; those in the bottom half in terms of amount of meditation did not show improvement); Thaddeus W. Pace et al., *Innate Immune, Neuroendocrine and Behavioral Responses to Psychosocial Stress do not Predict Subsequent Compassion Meditation Practice Time*, 35 PSYCHONEUROENDOCRINOLOGY 310, 312 (2010) (showing a difference in outcomes for some measures of positive emotion, but not for cortisol levels, between those who tended to meditate somewhat more and those who meditated somewhat less than others in the study); Desbordes et al., *supra* note 168, at 310 (“This raises the possibility that the ... [compassion] participants who practiced less showed only the effect of the mindful-attention aspect of the training, and that the specific effects of compassion training only appeared in the subjects who practiced more”).

201. See Neff & Germer, *supra* note 178, at 39 (showing strong effect size in increases in compassion and lingering effects even after one year).

wellbeing and the association between self-compassion and compassion for others, confirm the theoretical assumptions about the centrality of cultivating a self-compassionate stance within the context of cultivating compassion for others.

C. Compassion Cultivation Training (CCT)

Thupten Jinpa, a former lama and Tibetan scholar, developed the Compassion Cultivation Training (CCT) in collaboration with psychologists at Stanford's Center for Compassion and Altruism in Research and Education.²⁰² This program, informed by Tibetan Buddhist teachings, aspires to shift participants from a self-centered to one that includes care for all beings.²⁰³ CCT views compassion as a multidimensional process whose main components are: awareness of the suffering of others (cognitive aspect); sympathetic concern related to being moved by suffering (affective aspect); a wish to see the suffering relieved (intentional aspect); and a responsiveness or readiness to help relieve that suffering (motivational aspect).²⁰⁴ Consequently, the cultivation of compassion in CCT involves a multidimensional approach that uses a variety of didactic and experiential components to gradually incline the participants' minds toward compassion.²⁰⁵ The CCT structure involves six steps spread throughout eight weeks.²⁰⁶ Participants meet once a week for two hours, and in each session the instructor introduces a new formal meditation that participants practice during the following week with the help of audio recordings.²⁰⁷ Besides the meditation practice, each session normally includes didactic on the key concepts introduced that week, relational exercises, a review of the previous week's homework, and a new home assignment, including formal (sitting meditation) and informal practices (applying the course ideas in everyday life).²⁰⁸

So far only one study has been published on the effects of CCT.²⁰⁹ The research design consisted of a randomized controlled trial with healthy adults from San Francisco Bay Area (ages 21-68, mostly Caucasian, female and with postsecondary education). Participants were recruited through web-based online community listings throughout the Palo Alto, San Francisco, and Berkeley Bay Area, email listservs, and advertisements on community bulletin boards.²¹⁰ Potential participants had to pass a screening procedure that excluded individuals who endorsed bipolar, major depressive disorder, psychosis, or active suicidal ideation.²¹¹ Participants were randomly assigned to an experimental group that went through a nine week version of CCT, or to a waitlist control group.²¹² To evaluate changes in compassion,

202. Jazaieri et al., *supra* note 200, at 1117; THUPTEN JINPA, A FEARLESS HEART: HOW THE COURAGE TO BE COMPASSIONATE CAN TRANSFORM OUR LIVES (2015).

203. Jazaieri et al., *supra* note 200, at 1118 ("Although the formal meditations are derived from Tibetan Buddhist contemplative practices and some of the experiential exercises from Western psychology, CCT is taught as an entirely secular approach to enhancing compassion.").

204. Jazaieri et al., *supra* note 200, at 1118-19.

205. *Id.*: JINPA, *supra* note 202, at xxvii (explaining how the creator of CCT found that meditation did not work as well for some participants and how and other co-creators of CCT therefore included more interactive exercises).

206. Jazaieri et al., *supra* note 201, at 1118-19.

207. *Id.*

208. *Id.*

209. Jazaieri et al., *supra* note 200.

210. *Id.* at 1116-17.

211. *Id.*

212. *Id.* at 1116.

Neff’s Self-Compassion Scale and Gilbert’s Fears of Compassion Scales were used at baseline and after the intervention ended.²¹³ Compared to baseline, CCT group exhibited significant improvements on all three aspects of compassion measured after the 9-week CCT course.²¹⁴ The waitlist group did not show significant improvement in any of these measures.²¹⁵ Similarly to CBCT studies, this trial showed a significant correlation between amount of formal practice and a decrease in fears of compassion for others.²¹⁶ Despite the anticipated limitations of the design (homogeneous sample, lack of active control group, exclusive use of a few self-report measures), this study offers initial evidence that compassion can be trained in a relatively short period of time.

Clark has also taught two other practices that may offer parallel benefits to Mindfulness 1.0. This involves a variation on the practice of “friendliness,” often known by its Pali name, metta, or approximate translations like “lovingkindness” or “friendliness.”²¹⁷ One practice involves using some phrases for everyone one encounters in a certain setting. Students sometimes say something quite simple like “may you be happy and well” to everyone who passes by. In a variation, we may notice something we like about everyone we encounter. Sometimes students get imaginative: “That person must make everyone happy when this person leaves a room.” As they say this, they may readily find two benefits. In part, they may find a kind of commonality that reduces bias. In addition, they may find less psychological stress, thereby reaping the benefits of less stress for their own performance and for the reduction in bias.

Another exercise draws on the less familiar practice of sympathetic joy. In this practice, as with friendliness meditations, one says a series of phrases for one relatively easy individual and proceeds to less easy individuals. There are two important differences. First, one chooses individuals who have had some success or happiness. Second, one then uses different phrases, such as:

May your happiness and well-being continue.

May they grow.

May they endure for all time.

As with the friendliness practice, there can be several outcomes. First, one may feel much happier oneself. Since we’ve seen that better mental health may reduce bias, the practice may have similar effects. Second, the practice may very well clarify difficult or dysfunctional attitudes. For example, one might uncover a sense of resentment at the success of a colleague, a party to a case, or even a client. By unearthing this, one may then consider appropriate steps. In some instances, that might involve one’s own examination of the thoughts, and in others it might even involve changing one’s relationship with the person.

213. *Id.* at 1119.

214. *Id.* at 1122-23.

215. Jazaieri et al., *supra* note 200, at 1121.

216. *Id.* at 1122 (more time meant greater compassion for others, but not greater capacity to receive compassion from others nor to show greater compassion for oneself).

217. For the best introduction, see SALZBERG, *supra* note 12 (describing history and practices of lovingkindness and related practices of equanimity, sympathetic joy, and compassion). Of the few articles that emphasize this practice in law and negotiation, see Daniel Bowling & David Hoffman, *Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation*, 16 NEG. J. 5 (2000).

VI. CONCLUSION: THE INSTITUTIONS OF MINDFULNESS

So far we've reviewed many reasons why each of us individually may improve our judging through mindfulness. At the same time, it is vital to acknowledge the institutional limits on mindfulness. If we find mindfulness difficult because of conditions, it is easy to have mindfulness become another occasion for beating ourselves up. "Why can't *I* be more mindful? What's wrong with *me*?"

It therefore makes sense to acknowledge how institutional conditions may make it easier for us to improve our mindfulness, including how we might improve such core areas as credibility judgments and bias reduction.²¹⁸ Whether one focuses on obstacles, as we did with hindrances to credibility, or on opportunities and possibilities, as with the additional practices of Mindfulness 1.5, there are many potential areas. We highlight only a few.

First, countless studies show positive contact with outgroups reduces bias.²¹⁹ At the same time, we also know that from the revolutionary changes in the last few years. We have gone from a country with large degrees of violence and legal discrimination against LGBTQ people to one in which many embrace equality for people of many different backgrounds. (We wrote this before the election.) Attitudes and laws, including marriage equality, have changed dramatically. That comes in large part from the openness of many people about their sexual orientation, including to those in their own family. In the case of transgendered people, that includes contact with celebrity through Caitlyn Jenner, the former Olympic athlete.

Second, we might learn from dog parks. It may be relatively easy to intend to have a dog play with other dogs. That becomes easier when there is the public space to do so. In a similar way, we can create diverse places to practice different kinds of mindfulness practices in our schools, courthouses, and homes. In many instances, that includes in-person groups. In other instances, it may include virtual spaces – including the space for comments on line that accompanies this very article.²²⁰

218. See generally HALLUM MOVIUS & LAWRENCE SUSSKIND, BUILT TO WIN (2009) (individuals who attend negotiation trainings often cannot change unless their organization is aligned to support such change).

219. See, e.g., Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751 (2006) (suggesting general support that positive contact with outgroups is associated with reduction in bias).

220. For a review of how many institutions do this, see GELLES, *supra* note 42.