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Mindful Debiasing: Meditation as a Tool to Address Disability Discrimination

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Mindful Debiasing: Meditation as a Tool to Address Disability Discrimination

ELIZABETH F. EMENS

Antidiscrimination law is at a critical juncture. The law prohibits formal and explicit systems of exclusion, but much bias nonetheless persists. New tools are needed. This Article argues that mindfulness meditation may be a powerful strategy in the battle against disability discrimination. This Article sets out eight reasons that disability bias is particularly intractable. The Article then draws on empirical, philosophical, and scholarly sources to identify mechanisms through which mindfulness meditation can address these dynamics. The Article concludes by presenting concrete doctrinal implications of bringing mindfulness to bear on disability discrimination. This Article thus contributes to the established fields of antidiscrimination law in general and disability law in particular, as well as the emerging domain of mindfulness and law.

ARTICLE CONTENTS

I. THE TOOL OF MEDITATION: THE DEBIASING RESEARCH AND THE BASIC PRACTICE	846
A. DEBIASING THROUGH MEDITATION: THE STUDIES	847
B. MINDFULNESS MEDITATION: THE TOOL.....	855
II. DYNAMICS OF DISABILITY DISCRIMINATION	860
A. EMOTIONAL DYNAMICS.....	862
B. COGNITIVE DYNAMICS	868
C. BEHAVIORAL DYNAMICS.....	873
D. EXISTENTIAL DYNAMICS	875
III. MECHANISMS OF DEBIASING.....	880
A. EMOTIONAL MECHANISMS	881
B. COGNITIVE MECHANISMS.....	886
C. BEHAVIORAL MECHANISMS	889
D. EXISTENTIAL MECHANISMS.....	892
E. CHART OF MECHANISMS AND DYNAMICS OF DISCRIMINATION	898
IV. DOCTRINAL INTERSECTIONS.....	901
A. EMOTIONAL: THE ASSESSMENT OF “DIRECT THREAT” UNDER THE ADA.....	902
B. COGNITIVE: THE COST-BENEFIT ANALYSIS OF “REASONABLE” ACCOMMODATION.....	903
C. BEHAVIORAL: THE “INTERACTIVE PROCESS” OF DETERMINING ACCOMMODATIONS.....	904
D. EXISTENTIAL: THE GLOBAL VIEW OF THE ADA AS SPECIAL RIGHTS FOR “THEM” OR UNIVERSAL INSURANCE FOR “US ALL”	905
V. CRITIQUES AND LIMITS	906
A. IN PRINCIPLE.....	906
B. IN PRACTICE	909
CONCLUSION	911



Mindful Debiasing: Meditation as a Tool for Addressing Disability Discrimination

ELIZABETH F. EMENS*

A provocative empirical literature proposes a remarkable finding: Meditation can reduce discriminatory bias. This growing body of research reports similar findings across a range of dimensions of identity protected by antidiscrimination law—including disability, as well as race, ethnicity, and age—and axes that typically fall outside the scope of antidiscrimination law, such as homelessness.¹

If this is true, if meditation can reduce disability and other forms of bias, then this finding is profound and important. At present, however, these studies are new, few, and small-scale, particularly with regard to disability discrimination, which is the focus of this Article.² These studies need to be expanded, improved, and replicated. It is therefore too soon to make bold claims.

These intriguing studies nonetheless invite us to ask a series of questions about discrimination, disability, well-being, workplace dynamics, and law. Definitive answers are beyond the horizon at this point, but the questions are urgent and inspire important insights.

Analysis of discrimination and antidiscrimination law typically starts with race, at least in this country, and with sex and gender in many other

* Isidor and Seville Sulzbacher Professor of Law, Columbia Law School. For helpful comments and conversations, I thank Samuel Bagenstos, Emily Benfer, Mathilde Cohen, Yaron Covo, Daniel Del Gobbo, J. Richard Emens, Jens Frankenreiter, Bert Huang, Olatunde Johnson, Kathryn Judge, Sarah Lawsky, Ana Lenard, Karen Reitman, Russell Robinson, Clifford Rosky, Kelsey Ruescher-Enkeboll, Sharon Salzberg, Ilan Stein, Michael Stein, Susan Sturm, Cass Sunstein, Kiana Taghavi, Karen Tani, Kristen Underhill, Rachael Wells, and Patricia Williams, as well as participants in workshops at the AALS Annual Meeting Section on Employment and Labor Law, the Symposium on Personhood and Civic Engagement by People with Disabilities at Cardozo Law School, University of Massachusetts Medical School's Center for Mindfulness MBSR Practicum, the Mindful Lawyering Retreat, the Columbia Law School Mindfulness and Racism Discussion Group, and my classes on Law, Justice, and Reflect Practice and Lawyer-Leadership: Leading Self, Leading Others, Leading Change. And for excellent research assistance, my gratitude goes to David Beizer, Ariel Blask, Molly Bodurtha, Rivky Brandwein, Iliria Camaj, Noah Foster, Yashvi Ganeriwala, Daniel Harper, Joshua Jorgensen, Karen Kadish, Adam Katz, Stephany Kim, Megan Liu, Brett Mead, Ian Miller, Maeghan Murphy, Andrea Metz, Ian Miller, Julia Nelson, Charlene Ni, Yuna Park, Ravi Shah, Larissa Speak, and Rebecca Yergin.

¹ See *infra* Part I (discussing studies of meditation and bias). On states' lack of antidiscrimination protections for unhoused persons, with the notable exception of Rhode Island, see Michael F. Drywa, Jr., *Rhode Island's Homeless Bill of Rights: How Can the New Law Provide Shelter from Employment Discrimination?*, 19 ROGER WILLIAMS U. L. REV. 716, 716–17 (2014).

² This Article focuses specifically on disability discrimination for several reasons, including that relatively little has been written about it and that particular synergies between disability and mindfulness are worth examining in their own right.

places.³ This Article instead places disability at the center. How might meditation help reduce disability bias? And if it did so, what would that mean for law? This Article addresses those questions.

The fields of antidiscrimination law in general and disability law in particular demand new strategies and new tools to tackle pressing and, thus far, insoluble problems. In recent decades, antidiscrimination-law scholarship has been wrestling with the problems of implicit bias and other forms of second-generation discrimination.⁴ Susan Sturm offered this classic formulation:

The project of pursuing workplace equity has reached a new stage. . . . Smoking guns—the sign on the door that “Irish need not apply” or the rejection explained by the comment “this is no job for a woman”—are largely things of the past. Many employers now have formal policies prohibiting race and sex discrimination, and procedures to enforce those policies. Cognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality.⁵

Sturm goes on to distinguish these older and newer forms of discrimination as *first-generation* and *second-generation discrimination*, respectively, observing that “[t]he complex and dynamic problems inherent in second generation discrimination cases pose a serious challenge for a first generation system that relies solely on courts (or other external governmental institutions) to articulate and enforce specific, across-the-board rules.”⁶

The late Adrienne Asch vividly described problems of second-generation disability discrimination in her writing. Reflecting on the way her blindness shaped others’ attitudes, Asch wrote in the *Ohio State Law Journal*, “[t]he ADA may prevent a local health club or public pool from turning me away if I go to exercise or swim, but it will do nothing to help me persuade a group of

³ See, e.g., MARIE MERCAT-BRUNS, *DISCRIMINATION AT WORK: COMPARING EUROPEAN, FRENCH, AND AMERICAN LAW* 146–47 (Elaine Holt trans., 2016) (stating that racial discrimination “largely served as an antidiscrimination model in the United States for all antidiscrimination norms . . . while sex discrimination served as the model for antidiscrimination in Europe via the Treaty-enshrined principle of equal pay for women and men”).

⁴ See, e.g., Susan P. Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 992–94 (2006); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008); Jasmine E. Harris, *Processing Disability*, 64 AM. U. L. REV. 457 (2015).

⁵ Sturm, *supra* note 4, at 459–60 (footnotes omitted).

⁶ *Id.* at 461.

new friends that I could join them for a carefree afternoon at a lake.”⁷ Asch’s focus here is bias beyond the reach of legal prohibition, in domains such as friendship and intimate relations.⁸ But her point dovetails with the concerns raised by Sturm and others: What, if anything, can be done about subtler forms of bias and the ways they intersect with individual and institutional decision-making about disability and other features of our identities?

This question is made only more urgent by the recent upsurge in explicit expressions of bias, which, as Sturm pointed out in her foundational article, coexist and collaborate with second-generation discrimination.⁹ When apparent public mockery of a disabled reporter does not derail a presidential campaign,¹⁰ the research documenting pervasive implicit bias against people with disabilities becomes even more vivid and unsettling.¹¹

⁷ Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391, 395–96 (2001).

⁸ On the indirect ways that law shapes race and disability discrimination in intimate domains, see, for example, SHERYLL D. CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004); Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1379–400 (2009) [hereinafter Emens, *Intimate Discrimination*]. The law indirectly shapes race and disability discrimination in intimate domains, however, through the de facto segregation of neighborhoods and schools that is the legacy of racial redlining and other practices of racial discrimination; through the exclusions that result from the failure to enforce laws prohibiting race and disability discrimination in public accommodations and private housing; and through the lack of any legal requirements of basic “visitability” standards in most jurisdictions in this country. See *id.* at 1380–90 (footnotes omitted).

⁹ See Sturm, *supra* note 4, at 468 (“First generation discrimination . . . often operates in tandem with or is supplanted by subtle, interactive, and structural bias.”). On the recent upsurge, see, for example, the uptick in hate crimes against people with disabilities, Shaun Heasley, *Disability-Related Hate Crimes up Sharply, FBI Data Shows*, DISABILITY SCOOP (Nov. 14, 2019), <https://www.disabilityscoop.com/2019/11/14/disability-related-hate-crimes-up-sharply-fbi-data/27454/>, as well as prominent expressions of bias, like the remarks by then-candidate Trump referenced in the next sentence, *infra* text accompanying note 10.

¹⁰ Callum Borchers, *Meryl Streep Was Right. Donald Trump Did Mock a Disabled Reporter*, WASH. POST (Jan. 9, 2017, 9:25 AM), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/09/meryl-streep-was-right-donald-trump-did-mock-a-disabled-reporter/>. Trump has repeatedly denied an intention to mock, but his gestures bear a striking resemblance to the physical disability of Serge Kovalski, a reporter he had known for years. *Id.*; Jessica Taylor, *11 Times Donald Trump Looked Like He Was Done For*, NPR (Dec. 28, 2016, 6:00 AM), <https://www.npr.org/2016/12/28/506342901/11-times-donald-trump-looked-like-he-was-done-for>.

¹¹ See, e.g., Tessa E. S. Charlesworth & Mahzarin R. Banaji, *Patterns of Implicit and Explicit Attitudes: I. Long-Term Change and Stability From 2007 to 2016*, 30 PSYCH. SCI. 174, 175, 186–88 (2019) (finding, in a sample of 4.4 million subject responses collected between 2004 and 2016, that “[e]xplicit disability attitudes changed [from negative] toward neutrality by approximately 24%. However, no change was observed in implicit disability attitudes (changing by approximately 2%),” and observing “stability in implicit disability attitudes . . . for all respondents, regardless of disability status or generational cohort”); Tessa E. S. Charlesworth & Mahzarin R. Banaji, *Do Implicit Attitudes and Beliefs Change over the Long Term?*, in WHAT WORKS? EVIDENCE-BASED IDEAS TO INCREASE DIVERSITY, EQUITY, AND INCLUSION IN THE WORKPLACE 7, 12 (reporting, based on “data from nearly 6 million respondents,” that while “implicit (and explicit) attitudes/beliefs about some minority groups can and do improve over the long term,” “some implicit attitudes (about age and disability) have remained stagnant”); Johannes Rojahn, Kristi G. Komelasky & Michelle Man, *Implicit Attitudes and Explicit Ratings of Romantic Attraction of College Students Toward Opposite-Sex Peers with Physical*

Disability bias also presents fascinating and unique challenges, in addition to sharing some features with racism and other forms of bias.¹² Central among these is the puzzle of how widespread disability bias can coexist with humans' universal vulnerability to disability.¹³ Discrimination is often assumed to arise from insularity.¹⁴ But 25% of the U.S. population lives with some kind of disability,¹⁵ and everyone else could become disabled.¹⁶ It is therefore surprising that people with disabilities are so frequently subjected to emotional distance rather than pervasive empathy.¹⁷

Disability is also a provocative area for study because of the gap between law in the books and law in action.¹⁸ In this country, disability law has reached out ahead of cultural norms, and the Americans with Disabilities Act (ADA) therefore met a substantial backlash in the courts.¹⁹ This sweeping antidiscrimination law did not comport with widespread "common

Disabilities, 20 J. DEVELOPMENTAL & PHYSICAL DISABILITIES 389, 395 (2008) (finding, in an experimental study, that participants' explicit assessments of romantic attractiveness were unaffected by the presence of physical disability, but observing that "[i]mplicit attitudes, on the other hand, reflected a prejudice against disability"); Carli Friedman, *Family Members of People with Disabilities' Explicit and Implicit Disability Attitudes*, 64 REHAB. PSYCH. 203, 207 (2019) (concluding, from a study reporting on over 180,000 participants, that "[m]ost family members of people with disabilities explicitly reported having no negative attitudes, yet, implicitly, frequently had negative attitudes toward people with disabilities").

¹² By "bias," I mean the stereotypes and attitudes that contribute to discrimination. And by "discrimination," I mean the behaviors that systematically disadvantage one group. For a nuanced discussion of definitions, see, for example, DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* 13 (2008). On the distinction in social psychology between stereotypes (thoughts and beliefs) and attitudes (feelings), see, for example, Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4, 6 (1995).

¹³ See *infra* Section II.D.

¹⁴ See *infra* notes 196–97 and accompanying text (discussing theory and doctrine based on discrete, insular minorities).

¹⁵ Catherine A. Okoro, NaTasha D. Hollis, Alissa C. Cyrus & Shannon Griffin-Blake, *Prevalence of Disabilities and Health Care Access by Disability Status and Type Among Adults—United States, 2016*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 17, 2018), <http://dx.doi.org/10.15585/mmwr.mm6732a3>.

¹⁶ Many disabilities arise suddenly through "natural" causes or accidents, affecting one individual or many. See, e.g., CDC: *1 in 4 US Adults Live with a Disability*, Centers for Disease Control and Prevention (Aug. 16, 2018), ("At some point in their lives, most people will either have a disability or know someone who has [] one.").

¹⁷ See *supra* notes 11–12.

¹⁸ See generally Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15–21, 35–36 (1910).

¹⁹ See, e.g., BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (Linda Hamilton Krieger, ed., 2003) (collecting sources discussing narrow judicial constructions of the ADA following its passage); Michael Waterstone, *Backlash, Courts, and Disability Rights*, 95 B.U. L. REV. 833, 844–45 (2015) ("Academics and advocates have linked many of the ADA's shortcomings to the narrow ways courts have interpreted the law, and have suggested that the lower courts and Supreme Court have not been partners in creating the social change envisioned by the ADA."); SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 1* (2009) ("In all federal courts, ADA plaintiffs lose their cases at astounding rates—the only litigants less successful than ADA employment plaintiffs are prisoner plaintiffs, who are rarely even represented by counsel.").

sense” beliefs that disability is an individual personal tragedy that, in the absence of a medical solution, seriously hinders a person’s potential for happiness, professional success, and social integration.²⁰ After courts narrowed the scope of the ADA, Congress acted again—passing the ADA Amendments Act of 2008 (ADAAA)—to reassert broad coverage for the statute. Courts continue to struggle with the application of these laws,²¹ and some recent work suggests that courts began applying the ADAAA less faithfully in the second five years after enactment than in the first five years.²² What is clear from the arc of disability law in this country, which has been explored deeply elsewhere,²³ is that law alone is not enough. Attitudes to disability also need to change in order for the laws to fulfill their purposes and for integration to be meaningful.²⁴ Scholars, lawyers, and activists therefore turn again and again to a most perplexing question: *What can actually change attitudes to disability?*

One classic answer to the question builds on the idea of the *contact hypothesis*. Drawing on the work of Gordon Allport, a sizable body of research has developed to support the idea that contact across difference—including disability as well as race and other categories—helps reduce bias.²⁵ Meta-analyses and other studies of contact show that contact under

²⁰ See Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMPAR. L. 205, 207–08 (2012) [hereinafter Emens, *Disabling Attitudes*] (explaining the “common sense” belief about disability as a belief that “disability is unfortunate, even tragic, costly for employers and for society, to be avoided at most costs and accommodated only at a very limited cost”).

²¹ See, e.g., generally Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2027–28, 2071 (2013) (discussing the results of an empirical study examining the “continuing judicial unease with disability discrimination” demonstrated by a comparison of federal decisions before and after the enactment of the ADAAA).

²² Nicole Buonocore Porter, *Explaining “Not Disabled” Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL’Y 383, 392–93, 409, 411 (2019) (concluding that over 200 ADAAA cases were incorrectly decided from 2014 to 2018, whereas only a handful of cases were incorrectly decided from 2009 to 2013).

²³ See, e.g., Waterstone, *supra* note 19; BAGENSTOS, *supra* note 19; Krieger, *supra* note 19; see also Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 629 (2000) (“Since people with disabilities were empowered with civil rights absent the necessary political tools and organization for inducing a general elevation in social consciousness, it is not entirely surprising that popular opinion about people with disabilities . . . has yet to conform to the goals underlying passage of the ADA.”).

²⁴ Law may play a role, directly or indirectly, in changing attitudes; the claim here is not that law and attitudes are completely separate, but merely that, if attitudes do not change, then legal change will not suffice. For more discussion of what may change attitudes, including law, see, for example, Elizabeth F. Emens, *Getting It: The ADA After Thirty Years*, 71 SYRACUSE L. REV. 638 (2022).

²⁵ GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 261–82 (1954); see also, e.g., Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 23–29 (2000) (applying Allport’s “contact hypothesis” to workplace settings); Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1385–87 (discussing social contact as a means to reduce prejudice).

the right conditions does help.²⁶ That is, working side-by-side under conditions of collaboration rather than competition, with institutional support for integration, leads to reduced bias across difference.²⁷ But that research also finds that contact alone is not solving the problem²⁸—and indeed, contact may at times even exacerbate it.²⁹

As Jasmine Harris has argued, the integration presumption and the faith in the ameliorative power of contact rely on an assumption that more reliable information about disability will reduce bias, discrimination, and exclusion.³⁰ But as the distinction in social psychology between stereotypes (beliefs) and attitudes (feelings) highlights, the cognitive and the affective are different relational dimensions. Both need to change—and the affective dimension, including the aesthetic, may be the more intractable.³¹

Disability discrimination forces us to confront questions about the limits of law—or, at least, of law as we typically conceive of it: as legislation and judicial opinions. These limits require us to ask what other tools exist to

²⁶ See, e.g., Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCH. 751, 751–52 (2006) (“With 713 independent samples from 515 studies, the meta-analysis finds that intergroup contact typically reduces intergroup prejudice.”); Jeanne A. Novak & Patricia M. Rogan, *Social Integration in Employment Settings: Application of Intergroup Contact Theory*, 48 INTELL. & DEVELOPMENTAL DISABILITIES 31, 44–45 (2010) (finding that the “context and structure of contact between employees with disabilities and their nondisabled coworkers predicted not only employee’s levels of social participation and feelings of social support but also coworkers’ attitudes toward the employees with disabilities”); see also Margaret Denny, Suzanne Denieffe & Majda Pajnkihar, *Exploring Community Attitudes to People with Learning Disabilities: Using a Micro-Neighbourhood Design*, in LEARNING DISABILITIES: AN INTERNATIONAL PERSPECTIVE 185, 185–88, 201–02 (Carolyn S. Ryan ed., 2017) (finding that the “type and quality of contact” matter in diminishing bias, and that “proximity to a group home does not necessarily imply neighbourly contact”).

²⁷ See, e.g., Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 843–44, 844 n.55 (2003) [hereinafter Bagenstos, *Rational Discrimination*] (“According to the time-honored “contact hypothesis,” bringing people of different races together to work on common projects in circumstances of relative equality can reduce prejudice and stereotyping.”); Estlund, *supra* note 25, at 22–24 (“The research has yielded a broad consensus that intergroup contact “will reduce prejudice . . . when (a) there is equality of status among the individuals in contact, (b) they meet in a situation of cooperative interdependence, and (c) . . . there is normative support for friendly intergroup relations.” (citations omitted)); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1101–03 (2006) (“Since the 1950s when the social contact hypothesis was first proposed, social psychologists have distilled the conditions that contribute to a debiasing environment. People must be: (1) exposed to disconfirming data; (2) interact with others of equal status; (3) cooperate; (4) engage in non-superficial contact; and (5) receive clear norms in favor of equality.” (citations omitted)).

²⁸ This is true both because the research finds that contact leads only to partial remedying of attitudes, see, e.g., Pettigrew & Tropp, *supra* note 26, at 751–52, and because contact itself is only partial until integration is successful, which is the outcome being sought—so in the meantime, other strategies are also necessary.

²⁹ See Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 895 (2019) (“Contact and engagement with the aesthetics of disability . . . may trigger negative affective responses that may stunt the very normative change sought through antidiscrimination law.”).

³⁰ *Id.*; *id.* at 898–99.

³¹ *Id.* at 897.

combat disability discrimination, to supplement formal legal prohibitions and other debiasing strategies such as contact.

This Article explores the possibility that meditation could help address the disheartening degree of disability bias and structural injustice. Mindfulness meditation has begun to enter the legal and professional arena for reasons independent of antidiscrimination efforts. Law firms, law schools, and courts, as well as other mainstream institutions—ranging from corporate workplaces to professional sports teams to schools to the military—have begun embracing meditation as a technique for helping individuals and communities perform at their best and recover from challenges, to name two of the many reasons.³²

Nonetheless, meditation still has a “towering PR problem,” to quote news anchor Dan Harris.³³ For some, this new application to debiasing will make meditation no less weird or inapt for legal or professional settings. But

³² For legal sources, see, for example, Jeremy D. Fogel, *FED. JUD. CTR., MINDFULNESS AND JUDGING 2–6* (2016) (describing the benefits of mindfulness in the context of judging); Richard C. Reuben & Kennon M. Sheldon, *Can Mindfulness Help Law Students with Stress, Focus, and Well-Being?: An Empirical Study of 1Ls at a Midwestern Law School*, 48 *SW. L. REV.* 241, 242–43 (2019) (finding that first-year law students who took an eight-week mindfulness training in the period leading up to their fall exams were “less stressed, more focused, and happier heading into exams than when they started the training in the middle of the first semester”); Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 *UMKC L. REV.* 535, 531 (2010) (reporting that “mindfulness trainings have been increasingly offered among continuing legal education programs for lawyers and mediators”); Susan Wairose, *Mindfulness Programs in U.S. Law Schools* (Aug. 2018) (unpublished manuscript) (on file with author) (last updated August 2018) (listing information on law school classes that involve mindfulness); Peter H. Huang, *Can Practicing Mindfulness Improve Lawyer Decision-Making, Ethics, and Leadership?*, 55 *HOUSTON L. REV.* 63, 78 (2017) (“Part of successful lawyering, negotiating, and living involves the art of effective communication and positive communication, both of which entail practicing mindfulness.”). For other kinds of institutions, see, for example, Yolanda Lau, *Increasing Mindfulness in the Workplace*, *FORBES* (Oct. 5, 2020), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2020/10/05/increasing-mindfulness-in-the-workplace/?sh=4db387406956> (regarding corporate workplaces); Ian Begley, *Knicks Reflect on Mindfulness Training*, *ESPN* (March 9, 2015), https://www.espn.com/blog/new-york/knicks/post/_id/61424/knicks-reflect-on-mindfulness-training (regarding sports teams); Lauren Cassani Davis, *When Mindfulness Meets the Classroom*, *ATLANTIC* (Aug. 31, 2015), <https://www.theatlantic.com/education/archive/2015/08/mindfulness-education-schools-meditation/402469/> (regarding schools); Matt Richtel, *The Latest in Military Strategy: Mindfulness*, *N.Y. TIMES* (April 5, 2019), <https://www.nytimes.com/2019/04/05/health/military-mindfulness-training.html> (regarding the military); SAKI SANTORELLI, *HEAL THY SELF: LESSONS ON MINDFULNESS IN MEDICINE 1–2* (1999) (regarding the medical field); Barry Yeoman, *Mindful Policing: The Future of Force*, *MINDFUL* (June 14, 2017), <https://www.mindful.org/mindful-policing-the-future-of-force/> (regarding the police). More generally, see, for example, TIM RYAN, *MINDFUL NATION*, *infra* note 34, at xx (“It’s incredibly moving to see children finding ways to become happier and better at learning, teachers discovering ways to have a better classroom atmosphere . . . , health-care providers developing low-cost means to improve their patients’ health . . . , our troops and police and firefighters learning to perform better and with more awareness and intelligence, and our veterans receiving highly effective care for the stress and trauma they brought home with them.”), and discussion and sources cited *infra* text accompanying notes 321–27.

³³ DAN HARRIS, *10% HAPPIER: HOW I TAMED THE VOICE IN MY HEAD, REDUCED STRESS WITHOUT LOSING MY EDGE, AND FOUND SELF-HELP THAT ACTUALLY WORKS—A TRUE STORY*, at xiv (2014) [hereinafter HARRIS, 10% HAPPIER].

the problem of discrimination is so intractable and significant that we need to examine every available tool.

Congressman Tim Ryan and ABC News Anchor Dan Harris have both argued for mindfulness meditation as the next public-health revolution.³⁴ In an entertaining short video, Harris says:

I believe that meditation and mindfulness are the next big public health revolution. In the 1940s, if you told somebody you were going running, they would have said, “Who’s chasing you?” But then what happened next? The scientists swooped in; they showed that physical exercise is really good for you; and now all of us do it. And if we don’t, we feel guilty about it. And that’s where I think we’re headed with mindfulness and meditation. It’s [going to] join the pantheon of no-brainers, like brushing your teeth, eating well, and taking the meds your doctor prescribed for you.³⁵

Imagine the societal impact if a practice that supports individual well-being could also contribute even a small piece to the puzzle of addressing the widespread bias, discrimination, and systemic injustice in our society.³⁶

Despite a groundswell of important thinking and writing about the potential for meditation to address racial bias and injustice,³⁷ very little work examines disability discrimination through the lens of meditation—and no

³⁴ See, e.g., TIM RYAN, *A MINDFUL NATION: HOW A SIMPLE PRACTICE CAN HELP US REDUCE STRESS, IMPROVE PERFORMANCE, AND RECAPTURE THE AMERICAN SPIRIT*, at xvii (2012) (describing mindfulness as a quiet, peaceful “revolution, being led by ordinary citizens”); See also *60 Minutes: Mindfulness* (CBS Television Broadcast Dec. 14, 2014) (interviewing Congressman Ryan).

³⁵ Happify, *Why Mindfulness Is a Superpower: An Animation*, YOUTUBE (Dec. 7, 2015), <https://www.youtube.com/watch?v=w6T02g5hnT4>.

³⁶ On the tensions that may arise between a public health perspective and an antidiscrimination perspective on disability, see Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1385 [hereinafter Emens, *Framing Disability*].

³⁷ See, e.g., RHONDA V. MAGEE, *THE INNER WORK OF RACIAL JUSTICE: HEALING OURSELVES AND TRANSFORMING OUR COMMUNITIES THROUGH MINDFULNESS* (2019) [hereinafter MAGEE, *INNER WORK*]; Rhonda V. Magee, *The Way of ColorInsight: Understanding Race and Law Effectively Through Mindfulness-Based ColorInsight Practices*, 8 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 251, 268–81 (2016) [hereinafter Magee, *The Way of ColorInsight*]; Rhonda Magee, *How Mindfulness Can Defeat Racial Bias*, GREATER GOOD (May 14, 2015) [hereinafter Magee, *How Mindfulness Can Defeat Racial Bias*], http://greatergood.berkeley.edu/article/item/how_mindfulness_can_defeat_racial_bias; Clark Freshman, Shauna Shapiro & Sarah de Sousa, *Mindful “Judging” 1.5: The Science of Attention, “Lie Detection,” and Bias Reduction—with Kindness*, 2016 J. DISP. RESOL. 281, 313–16 (2016); RESMAA MENAKEM, *MY GRANDMOTHER’S HANDS: RACIALIZED TRAUMA AND THE PATHWAY TO MENDING OUR HEARTS AND BODIES* (2017); RUTH KING, *MINDFUL OF RACE: TRANSFORMING RACISM FROM THE INSIDE OUT* (2018); ANGEL KYODO WILLIAMS, *BEING BLACK: ZEN AND THE ART OF LIVING WITH FEARLESSNESS AND GRACE* (2000); ANGEL KYODO WILLIAMS, LAMA ROD OWENS & JASMINE SYEDULLAH, *RADICAL DHARMA: TALKING RACE, LOVE, AND LIBERATION* (2016). The first three sources come from the legal field, though their implications reach beyond law and legal institutions.

legal scholarship does so.³⁸ This Article therefore undertakes the tasks of bringing empirical and other sources on meditation to bear on the problem of disability discrimination and using this analysis to identify legal implications. Particular dynamics surrounding disability discrimination warrant close attention, so they are the focus of this Article. Because disability and race discrimination entail distinct contexts and histories,³⁹ this Article makes no claim to be speaking to both contexts, though some arguments will apply to both, and this Article is indebted to the growing body of work and teaching on racism and mindfulness.

This Article comes in five parts. Part I presents the new lines of research on meditation and bias and introduces the practice, central to these studies, of mindfulness meditation. Part II identifies eight challenging dynamics that underpin disability discrimination, rendering it particularly ripe for new tools. Part III analyzes the mechanisms by which meditation may debias disability discrimination and concludes with a chart showing how these mechanisms correspond with the specific dynamics set out in the previous Part. Part IV applies this analysis to disability doctrine, to demonstrate how mindfulness practice by those who interpret and apply disability law could have practical debiasing effects. Part V addresses potential objections. The Article ends by considering the subject of hope, and the significance of what we say to ourselves and to each other, during challenging times.

* * *

A note on how to read this Article concludes this Introduction. Experiential education has grown increasingly central to law teaching in recent years.⁴⁰ This Article is an exercise in what might be called *experiential legal scholarship*: academic articles that invite readers to reflect on the research and ideas presented in relation to their own experience and observations.⁴¹ Here, the experiential component includes not only

³⁸ The one law review article that touches on disability in relation to meditation mentions “people of different abilities” in a long list of “people who feel invisible and overlooked” who might benefit if mindfulness practices increased the attentional focus of judges and others in and beyond the courtroom, but the article otherwise focuses on other topics and orients its discussion of bias to other categories. Freshman et al., *supra* note 37, at 291.

³⁹ See, e.g., KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 303–07 (2019) (arguing that drawing analogies between racism and disability discrimination erases those whose identity places them at the intersection of both). *But cf.* Kimani Paul-Emile, *Blackness as Disability?*, 106 *GEO. L.J.* 293, 298–99 (2018) (arguing that blackness should be considered a disability for various purposes).

⁴⁰ For an explanation of experiential legal education and its rise, see, for example, Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 *DICK. L. REV.* 551, 567 (2018); James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 *WM. & MARY L. REV.* 71, 80–81 (1996).

⁴¹ Work that could be understood as engaging in *experiential legal scholarship*, though without theorizing it as such, includes Daniel Del Gobbo, *Feminism in Conversation: Campus Sexual Violence and the Negotiation Within*, 53 *U.B.C. L.R.* 591, 601 (2021) (presenting arguments about the use of consensual dispute resolution approaches to campus sexual violence through a dialogic form that invites the reader to occupy different positions); Freshman et al., *supra* note 37, at 289, 315–17 (inviting the

reflecting on ideas about what animates disability discrimination, but also, to the extent the reader is willing and interested, experimenting with the practices of mindfulness described herein to see which, if any, of the mechanisms for debiasing resonate.⁴² No experiential engagement is necessary to read or evaluate the ideas in this Article, but doing so is likely to yield a more generative, challenging, and meaningful experience.

I. THE TOOL OF MEDITATION: THE DEBIASING RESEARCH AND THE BASIC PRACTICE

The voice in my head is an asshole.

— Dan Harris, ABC News anchor⁴³

The epigraph to this Part captures both the problem of this Article and its proffered solution. Disability bias is rampant, studies suggest, both explicitly and implicitly.⁴⁴ Thus, most of us have a problematic voice in our heads—a biased voice. This troubling fact lies at the heart of this Article.

Harris’s line is also pointing us, however, to a salutary fact. There may be something we can do about that voice. Mindfulness meditation is a tool that may help us better address that problematic voice in our heads—and the discriminatory actions that voice may spur.⁴⁵

Disability is particular, if not unique, among protected categories, in several ways, which this Article will discuss. Among these is the fact that

reader to try informal practices of meditation while reading); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1094–97 (2008) (introducing the central empirically documented phenomenon of the article through an anecdote that reveals information gradually, leading readers to experience the diverse perceptual reactions to an ambiguous scenario of bias while reading); Emens, *Intimate Discrimination*, *supra* note 8, at 1357–62 (articulating an individual ethical self-inquiry approach to discrimination beyond the scope of legal prohibition). While I have seen the term “experiential legal scholarship” used by one scholar to refer to legal scholarship about experiential learning, I have not seen anyone use the term to refer to scholarship that is itself experiential. *Cf., e.g.*, Christine Coughlin, In Defense of Practical, Clinical, and Experiential Legal Scholarship, Presentation at the Wake Forest School of Law Symposium: Revisiting Langdell: Legal Education Reform and the Lawyer’s Craft (Oct. 23, 2015), <http://wakeforestlawreview.com/2015/08/2015-fall-symposium-revisiting-langdell-legal-education-reform-and-the-lawyers-craft/> (advocating for more legal scholarship that emphasizes experiential learning).

⁴² This invitation here is, most obviously, to try out the specific practices described in this Article, especially in Section I.B. More generally, this Article includes epigraphs and other quotations that contain insights worth reading carefully and considering. This asks readers to read differently than the way the law review format, with its frequent signposting and repetition, typically encourages. The presentation here does contain roadmaps and summaries for the reader who is skimming, but it especially aims to reward the reader willing to slow down enough to absorb, integrate, and even reflect upon the multidisciplinary forms of knowledge and aesthetic modes.

⁴³ HARRIS, 10% HAPPIER, *supra* note 33, at xiii (capitalization and italics removed).

⁴⁴ See *supra* notes 10, 11 (citing sources).

⁴⁵ Some studies and promise may arise from other forms of meditation as well; this Article focuses principally on mindfulness meditation, however, largely because it is the most widely taught and the most studied. See *infra* Section I.B.

disability implicates us all personally. Whether or not we are currently disabled in any way, each of us could become disabled at any time in ways we currently are not. Our relationship to disability is inescapable. And yet our vulnerability does not necessarily make talking and thinking about disability easier; on the contrary, for many people, our very vulnerability seems to make that engagement harder. Tools for developing greater awareness of the reality of vulnerability, disability, and disability bias—in oneself and in others—may therefore be useful for anyone.⁴⁶

In addition, with disability law we cannot even pretend that willful ignorance of the category of disability will constitute apt remediation.⁴⁷ Disability law explicitly requires accommodation, which means changing our norms, structures, habits, and architecture—not just once but repeatedly—which requires paying attention. We must pay attention to disability and to the world around us. The need to look at the category is certainly not unique to disability, but law’s recognition of this is unusual here.

This Part will begin by describing the empirical studies that suggest mindfulness meditation could contribute to debiasing disability discrimination. The next Part will dig deeper into key dynamics of disability discrimination that make it particularly appropriate for the tool of mindfulness meditation. The purpose of this Part is to frame that deep dive. As noted in the Introduction, the empirical research on debiasing disability through meditation is at an early stage, too early to be conclusive. The studies nonetheless prompt an inquiry into what mindfulness meditation is, so we can begin to examine how it might help with debiasing. This Part will therefore conclude with a brief explanation of the tool of mindfulness: what it is, how it is practiced, and why it is difficult. That Section especially invites the experiential approach to reading discussed earlier.⁴⁸

A. *Debiasing Through Meditation: The Studies*

The empirical work on debiasing disability discrimination through meditation is so provisional that this Section begins by briefly discussing debiasing research focused on other axes of identity. Note, in addition, that

⁴⁶ Note that people with disabilities are often intensely aware of disability and used to talking about it; however, becoming aware of one disability, even having that disability, does not necessarily entail comfort with another. A person who uses a wheelchair could be uncomfortable interacting with someone who is HIV positive and, while engagement with disability as a category and identity might counteract that, the mere fact of having an impairment need not.

⁴⁷ Whether so pretending constitutes apt remediation in any other area is fiercely debated. I believe the lessons from disability can be applied to other areas, where willful ignorance in the name of “colorblindness” is unlikely to help, and will likely harm, the project of racial justice. But this topic, on which others have written well and much, is beyond the scope of this Article. *See, e.g.*, Paul-Emile, *supra* note 39, at 293, 296 (arguing that “[t]raditional race jurisprudence...promotes the impractical norm of colorblindness,” which hinders efforts to remedy past discrimination); *see generally* David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99; *see also* text accompanying note 166.

⁴⁸ *See supra* text accompanying note 42.

nothing in this Article depends on finding the empirical work convincing. These studies are a jumping-off point for the rest of the inquiry.

Moreover, beyond the quantitative studies, important work has been examining and exploring the ways mindfulness and other forms of meditation can help to combat race discrimination and racial injustice. Important books by Rhonda Magee,⁴⁹ Ruth King,⁵⁰ Reverend angel Kyodo williams,⁵¹ Lama Rod Owens,⁵² and Resmaa Menakem,⁵³ among others,⁵⁴ have powerfully argued for the role of mindfulness in tackling racial injustice and healing racial trauma. No books have focused on the intersection of disability rights and mindfulness, but Joan Tollifson, who was among the disability activists who occupied the San Francisco Federal Building in the late 1970s to protest the non-release of implementing regulations for the Rehabilitation Act,⁵⁵ has written a powerful essay on the uses of meditation for changing hearts and minds around disability;⁵⁶ this essay is quoted throughout this Article.

This Section focuses on quantitative empirical literature, emphasizing the work on disability after a brief introduction to studies of race and other axes of identity. But later Sections are informed by, and present opportunities for reflection on, writing in modes beyond the quantitative.

1. *Introducing the Research on Debiasing Through Meditation*

Consider this experimental study by Adam Lueke and Bryan Gibson:⁵⁷ Subjects in the experimental condition, who were new to meditation, were given a ten-minute “dose” of guided mindfulness meditation; by contrast, the control group listened to a ten-minute description of the English countryside.⁵⁸ Following the listening stage, all subjects participated in a

⁴⁹ MAGEE, *INNER WORK*, *supra* note 37. Magee has also written foundational articles on the subject—see, for example, Magee, *The Way of ColorInsight*, *supra* note 37.

⁵⁰ KING, *supra* note 37.

⁵¹ WILLIAMS, *supra* note 37; WILLIAMS ET AL., *supra* note 37.

⁵² LAMA ROD OWENS, *LOVE AND RAGE: THE PATH OF LIBERATION THROUGH ANGER* (2020); WILLIAMS ET AL., *supra* note 37.

⁵³ MENAKEM, *supra* note 37.

⁵⁴ See, e.g., *BUDDHISM AND WHITENESS: CRITICAL REFLECTIONS* (George Yancy & Emily McRae eds., 2019).

⁵⁵ See Susan Merrill Squier, *Meditation, Disability, and Identity*, 23 *LITERATURE & MED.* 23, 28 (2004) (describing Tollifson’s evolution as an activist and journey to practicing Zen Buddhism); see also Ruth Colker, *The Power of Insults*, 100 *B.U. L. REV.* 1, 38 (2020) (“[T]he disability rights community held a twenty-eight-day sit-in at a San Francisco federal building to force the federal government to issue regulations to enforce Section 504 of the Rehabilitation Act . . .”).

⁵⁶ Joan Tollifson, *Imperfection Is a Beautiful Thing: On Disability and Meditation*, in *STARING BACK: THE DISABILITY EXPERIENCE FROM THE INSIDE OUT* 105 (Kenny Fries ed., 1997).

⁵⁷ Adam Lueke & Brian Gibson, *Brief Mindfulness Meditation Reduces Discrimination*, 3 *PSYCH. CONSCIOUSNESS: THEORY, RESEARCH, & PRACTICE* 34 (2016).

⁵⁸ *Id.* at 37. An attentional control group heard the same description of the countryside, but first received a prompt to listen for the word “parish” and make a checkmark when they heard it; they were

trust game.⁵⁹ The goal of the game was to end up with the most game money.⁶⁰ A subject had to decide how much game money to give each of 150 counterpart “participants” (i.e., photos of faces of varying races), knowing that the counterpart would receive quadruple the amount given, and that the counterpart had already decided whether to give half of it back to the giver.⁶¹ The subjects, who were White undergraduate students,⁶² all showed more trust of White than of Black faces—that is, they gave more game money to White than Black counterparts, suggesting that they expected the White counterparts would be more likely to be giving them back half of it.⁶³ However, the subjects who listened to the ten-minute mindfulness meditation showed significantly less bias toward White counterparts than did the controls.⁶⁴

Though the study has limitations and requires replication,⁶⁵ this is a very interesting finding. Experimental subjects who participated in a short guided mindfulness meditation made less racially biased decisions about their behavior in a trust game than a control group who listened to a short narration. These were not people who sought out meditation for personal reasons, but participated only as part of the experiment, and the dose was just one short meditation.

There have been a range of other studies on the potential of mindfulness and other forms of meditation to reduce bias along various axes of identity.⁶⁶ For instance, in another study by Lueke and Gibson, White participants

also told they would be tested on the content later. *Id.* There was no difference in results between the attentional control group and the pure control group, so my textual discussion is focused on the pure control. *Id.* at 38.

⁵⁹ *Id.* at 36.

⁶⁰ *Id.*

⁶¹ *Id.* at 36–37. They started with \$50 in game money, and they could give between \$0 and \$10 to each of the 150 counterparts in the photos. *Id.* They were told that the participant who ended with the most money would win twenty actual dollars. *Id.* at 36.

⁶² *Id.* at 35. On my reasons for capitalizing White as well as Black, see Eve L. Ewing, *I’m a Black Scholar Who Studies Race. Here’s Why I Capitalize ‘White,’* MEDIUM (July 2, 2020), <https://zora.medium.com/im-a-black-scholar-who-studies-race-here-s-why-i-capitalize-white-f94883aa2dd3>.

⁶³ *Id.* at 38.

⁶⁴ *Id.* at 39.

⁶⁵ The study has several limitations in addition to a small sample size. First, the study looks only at attitudes of Whites to non-Whites. In addition, although the 150 faces in the photos of the alleged counterparts included fifty faces of Whites, fifty of Blacks, and fifty of Middle Eastern and Asian descent, the study reported only the result with regard to Blacks and Whites. Moreover, the study does not report whether any of the participants had prior experience with mindfulness—though they did test for “trait mindfulness” before the study and found no significant differences between groups. *Id.* at 36. The authors speculate that perhaps a larger dose of mindfulness, or a different test for state mindfulness, would bring out a relationship between state mindfulness scores and behavior in the trust game, but this is speculation. *Id.* at 40–41.

⁶⁶ In addition to the studies discussed here, see, for example, Jason Lillis & Steven C. Hayes, *Applying Acceptance, Mindfulness, and Values to the Reduction of Prejudice: A Pilot Study*, 31 BEHAV. MODIFICATION 389, 391 (2007) (studying “acceptance and commitment therapy,” a mindfulness-building practice, as a tool for “reducing racial and ethnic prejudice”).

showed less biased implicit attitudes toward Black people and older people after a ten-minute guided mindfulness meditation.⁶⁷ In a different study, akin to Lueke and Gibson's on age bias, Edwards and colleagues found that a meditation involving concentration on the breath reduced racial bias more than an instruction for participants to let their minds wander.⁶⁸ And in a study by Ellen Langer and colleagues, an exercise in what the authors call "mindfulness" led to less evidence of implicit bias toward older people.⁶⁹

Some studies explicitly invoke other types of meditation to reach conclusions about debiasing. For example, a study by Kang and her colleagues found that a different form of meditation—called *lovingkindness meditation*⁷⁰—led to lower levels of implicit bias toward Black people and homeless people, among a subject pool of non-Black subjects.⁷¹ A very

⁶⁷ Adam Lueke & Bryan Gibson, *Mindfulness Meditation Reduces Implicit Age and Race Bias: The Role of Reduced Automaticity of Responding*, 6 SOC. PSYCH. & PERSONALITY SCI. 284, 287 (2015) (reporting on a study of seventy-two White college students finding that, for White participants, listening to a ten-minute instruction in mindfulness meditation, involving non-judgmental awareness of breath and heartbeat, led to higher levels of "state mindfulness" and lower scores on measures of implicit bias towards Black and older people).

⁶⁸ Darren J. Edwards, Cierra McEntegart, Yvonne Barnes-Holmes, Rob Lowe, Nicky Evans & Roger Vilardaga, *The Impact of Mindfulness and Perspective-Taking on Implicit Associations Toward the Elderly: A Relational Frame Theory Account*, 8 MINDFULNESS 1615, 1619 (2017).

⁶⁹ Maja Djikic, Ellen J. Langer & Sarah Fulton Stapleton, *Reducing Stereotyping Through Mindfulness: Effects on Automatic Stereotype-Activated Behaviors*, 15 J. ADULT DEV. 106, 106 (2008).

⁷⁰ This form of meditation involves silently repeating a set of phrases of well-wishing, directly toward oneself and specific others, typically a benefactor (someone for whom it is easy to feel kindness); a friend; a neutral person (someone about whom one feels neither good nor ill, which can be rather difficult to find, and therefore need not be a perfect exemplar of neutrality); a difficult person (though traditionally called "the enemy," this person need not be the most difficult person, but just someone slightly annoying or difficult); and all beings everywhere. The silent phrases become the "anchor" or object of focus, much like the breath can be the anchor, and when the mind wanders from the phrases, similar opportunities are presented to practice kindness and beginning anew. See, e.g., SHARON SALZBERG, *LOVINGKINDNESS: THE REVOLUTIONARY ART OF HAPPINESS* (1995) [hereinafter SALZBERG, *LOVINGKINDNESS*] (offering a comprehensive, engaging, and practical guide to lovingkindness meditation); see also Toni Bernhard, *Lovingkindness Practice*, PSYCH. TODAY (Feb. 17, 2012), <https://www.psychologytoday.com/us/blog/turning-straw-gold/201202/lovingkindness-practice> (providing, inter alia, brief instructions on how to practice lovingkindness meditation). The aim is not to feel anything special while sending out these phrases of well-wishing, but just to send them out repeatedly. Some understand the purpose of lovingkindness meditation to be overcoming so-called negativity bias (i.e., the human tendency to hear one bad thing and several good things and yet focus on the bad thing). See, e.g., *Ask Dr. Rick About: Negativity Bias*, RICK HANSON, <https://www.rickhanson.net/ask-dr-rick/negativity-bias/> (last visited Feb. 18, 2021) (stating that evolution has wired human beings to learn from negative experiences, resulting in "most positive experiences flow[ing] through the brain like water ... while negative ones are caught every time"); *infra* note 113 and accompanying text (discussing and citing further sources on negativity bias).

⁷¹ Yoona Kang, Jeremy R. Gray & John F. Dovidio, *The Nondiscriminating Heart: Lovingkindness Meditation Training Decreases Implicit Intergroup Bias*, J. EXPERIMENTAL PSYCH. 1, 1–2 (2013) (finding that a six-week practice of "lovingkindness" meditation by 101 healthy, non-Black subjects with no prior experience with lovingkindness meditation led to reductions in implicit bias against "Blacks" and "homeless people," and that discussions of lovingkindness for a comparable time period did not lead

recent study found that a nine-week training combining lovingkindness and mindfulness meditation reduced implicit race bias among a predominantly White group of teacher trainees, a result that persisted to the six-month follow-up.⁷²

Other studies look at different dimensions of the potential impact of meditation on bias and discrimination. For instance, one study found that an eight-week mindfulness-based stress reduction course led Jewish-Israeli university students, compared with controls, to express less negative emotion, less perceived threat, and greater support for compromise with Palestinians living in Israel.⁷³ Other studies, like the Lueke and Gibson trust-game study described above, specifically find that mindfulness and other forms of meditation affect behavior or behavioral correlates.⁷⁴

A recent review of the prejudice-reduction literature described mindfulness-based approaches as a “promising direction in prejudice reduction research,” amidst a field that has struggled to generate compelling evidence to establish the effectiveness of any particular intervention.⁷⁵ Comparing types of interventions, the authors observe that “the application of mindfulness to the area of prejudice reduction is still in its infancy, [but] there are some indications that it can be effective.”⁷⁶

2. *Studies Focused on Debiasing Disability Discrimination*

A small set of studies has begun to find a relationship between meditation and reduced stereotyping or less negative attitudes to disability, though these studies require even more development. Recall that the aim of reviewing these quantitative studies is not to persuade the reader that their

to such reductions, nor were such reductions seen in a waitlist control; and finding that reductions in stress levels mediated the finding for attitudes to homeless people but not for attitudes to Black people).

⁷² Matthew Hirshberg, Lisa Flook, Evan Moss, Robert Enright & Richard Davidson, *Integrating Mindfulness and Connection Practices into Preservice Teacher Education Results in Durable Automatic Race Bias Reductions*, 91 J. SCH. PSYCHOL. 50, 58–62 (2022).

⁷³ Alon Alkoby, Eran Halperin, Ricardo Tarrasch & Nava Levit-Binnun, *Increased Support for Political Compromise in the Israeli-Palestinian Conflict Following an 8-Week Mindfulness Workshop*, 8 MINDFULNESS 1345, 1345–46 (2017).

⁷⁴ See *supra* notes 57–65 and accompanying text; see also, e.g., Lillis & Hayes, *supra* note 66, at 406 (writing that “focusing mindfully and nonjudgmentally on the process of thinking instead of the products of thinking reduces the impact of cognitive content and loosens its behavior regulatory power”, resulting in “decategorization” of people and “experiential contact with common aspects of humanity”); Daniel R. Berry, *Bridging the Empathy Gap: Effects of Brief Mindfulness Training on Helping Outgroup Members in Need* 87–89 (Apr. 2017) (Ph.D. dissertation, Virginia Commonwealth University) (finding that “even brief mindfulness training increased post-intervention helping frequency in a staged scenario,” although more sustained mindfulness training was required to increase long-term, routine altruism).

⁷⁵ William Somerville, Sophia Williams Kaptan, Iris Yi Miao, Jordan J. Dunn & Doris F. Chang, *Identifying and Remediating Personal Prejudice: What Does the Evidence Say?*, in PREJUDICE, STIGMA, PRIVILEGE, AND OPPRESSION: A BEHAVIORAL HEALTH HANDBOOK 179, 189 (Lorraine T. Benuto, Melanie P. Duckworth, Akihiko Masuda & William O’Donohue eds., 2020).

⁷⁶ *Id.*

results support a conclusion about mindfulness and disability discrimination, but to highlight this new field of study and frame the discussion that follows.

In 2016, Sarah Schimchowitsch and Odile Rohmer published a study comparing meditators and non-meditators on an “evaluative priming task” to measure implicit disability bias.⁷⁷ The task primed participants by presenting them with symbols that did or did not represent disability—quickly enough that participants were not conscious of seeing the symbols—and then measured how quickly participants identified positive and negative valence of words.⁷⁸ This priming tool was designed to prevent subjects from recognizing that their responses might be revealing bias toward a particular group by keeping all reference to the target population outside of conscious awareness.⁷⁹ The subjects consisted of a group of forty experienced meditators (with at least one year’s experience) contrasted with a group of thirty-four individuals with no background in meditation.⁸⁰

Schimchowitsch and Rohmer found results consistent with generalized disability prejudice in the non-meditator group, but not in the meditator group. More specifically, after being exposed to the disability prime, the non-meditators more readily identified negative items and less readily identified positive items; in other words, the finding suggests they implicitly associate disability with negativity. By contrast, the meditator group was no less able to identify positive items after being exposed to the disability prime.⁸¹ The authors concluded that the “prejudice effect was attributable solely to [the] disability prime.”⁸² The study had a number of limitations, as the authors acknowledged,⁸³ in addition to the small sample size, which is pervasive in the extant research on mindfulness and bias thus far; most notably, the study could not disaggregate correlation and causation.⁸⁴

⁷⁷ Sarah Schimchowitsch & Odile Rohmer, *Can We Reduce Our Implicit Prejudice Toward Persons with Disability? The Challenge of Meditation*, 63 INT’L J. DISABILITY, DEV. & EDUC. 641, 641 (2016).

⁷⁸ *Id.* at 643–44.

⁷⁹ *Id.* at 643.

⁸⁰ *Id.* at 643–44. The authors described the meditator group as having been “recruited from local yoga centers offering sessions of attentional meditation practice focused on breath and bodily sensory perception. These participants practice together at least once a week and regularly alone at home. They were assessed directly after a meditation session.” The authors described the non-meditator group as “recruited in respect to age and gender of meditators” and recruited “among meditators friends and colleagues [sic], [who] reported having no experience in any kind of meditation, yoga or relaxation techniques.” All subjects were, like the authors of the study, French. *Id.* at 643.

⁸¹ *Id.* at 645.

⁸² *Id.* This result reached statistical significance at the level of $p < .10$, which is not quite statistical significance by most conventional measures, as noted below. *Id.*; see also *infra* note 84.

⁸³ *Id.* at 647.

⁸⁴ *Id.* First, the result reaches statistical significance only at a level slightly short of standard measures, *id.* at 645; *supra* note 82. Second, as noted in the text, nothing in the study proves that meditation *causes* rather than merely correlates with less disability bias. The meditating subjects consisted entirely of people who had voluntarily chosen to pursue meditation practice; as the authors note, it is possible that those people have less disability bias to begin with. Schimchowitsch & Rohmer,

Another study that has specifically found mindfulness to debias disability discrimination in particular bears a stronger relationship to behavior, though it has other limitations. In a paper provocatively titled, *Decreasing Prejudice by Increasing Discrimination*, Langer and her colleagues at Harvard report that prompting subjects to attend to more details led to less stereotyping of people with disabilities.⁸⁵ The authors operationalized what they called “mindfulness” by, for instance, asking subjects to write down four reasons—rather than just one reason—why a person in a picture (with or without a disability) might be good (or bad) at his or her profession.⁸⁶ In the high-mindfulness condition, subjects were asked for more reasons; in the low-mindfulness condition, subjects were asked for one reason.⁸⁷ The hypothesis was that training subjects to pay attention to details would lead them to pay more attention to the diverse features of people with disabilities—not just their impairment.⁸⁸

The authors conclude that the results confirmed their hypothesis.⁸⁹ For instance, subjects in the high-mindfulness condition were more likely to report an interest in going on a picnic planned by a boy with a visible disability.⁹⁰ They were also more likely to report a willingness to play sports with children with particular disabilities—where the particular disabilities would help or not hinder their ability to play the particular sport (for instance, wheelchair races for a child pictured in a wheelchair)—but not where those disabilities would apparently hinder the disabled child’s ability to play the sport (for instance, soccer for a child in a wheelchair).⁹¹ The authors interpret this to suggest that subjects in the high-mindfulness condition are paying attention to specifics about the individual and his disability, rather than applying a blanket stigma or stereotype.⁹²

This study also had a small sample size: forty-seven sixth grade students,⁹³ and so the subjects were children.⁹⁴ The results here were statistically significant, though in one instance pointed in the opposite

supra note 77, at 647 (“Notably, this research focused on people who deliberately chose an approach of personal development and might be more open to others and less prejudiced than the mainstream population.”). In addition, the study measures only attitudes and not behavior. *Id.* Finally, the study does nothing to disentangle any effects from regular meditation practice as opposed to meditation practice immediately before the attitudinal measure—since the measure was taken just after a meditation practice among people who had practiced for at least a year.

⁸⁵ Ellen J. Langer, Richard S. Bashner & Benzion Chanowitz, *Decreasing Prejudice by Increasing Discrimination*, 49 J. PERSONALITY & SOC. PSYCH. 113, 113 (1985).

⁸⁶ *Id.* at 115.

⁸⁷ *Id.* at 114.

⁸⁸ *Id.* at 115.

⁸⁹ *Id.* at 117.

⁹⁰ *Id.* at 118.

⁹¹ *Id.*

⁹² *Id.* at 119.

⁹³ *Id.* at 115 (reporting a subject pool of forty-seven sixth grade students).

⁹⁴ *Id.*

direction of the hypothesis, at least initially.⁹⁵ Most notably, the authors referred to this as a study of mindfulness, but they were not studying mindfulness meditation. Rather they offered a conception of mindfulness that seems to mean something more like discernment—the opposite of *mindlessness*.⁹⁶ (The next Section will discuss what is meant in this Article by mindfulness and mindfulness meditation.)

A recent unpublished undergraduate thesis found no effect on implicit disability bias of an intervention using mindfulness meditation similar to the Lueke and Gibson study discussed first (involving the trust game); however, the study did find significant effects of a lovingkindness meditation intervention.⁹⁷ Another recent study found that a ten-minute mindfulness meditation did not directly improve the explicit attitudes of pre-service teachers toward including students with autism, but did improve the teachers' basic psychological needs satisfaction—which the authors argue can indirectly affect teacher attitudes toward students with disabilities.⁹⁸ These studies are examples of the increasing attention to these intersections, which should lead to more revealing empirical findings in the coming years.

One further study bears mention here. The focus of this study was not disability discrimination *per se*,⁹⁹ but “prosocial behaviors meant to benefit others,” namely, compassion-based behavior toward people who appeared to be injured.¹⁰⁰ The study examined the waiting-room behavior of subjects who had participated in a three-week, self-guided mindfulness meditation training (using the meditation app Headspace) versus controls who engaged in a three-week, self-guided “cognitive training program” (using www.lumosity.com).¹⁰¹ Subjects entered a waiting room with three chairs, two already occupied.¹⁰² The following then took place, for each participant:

After a participant had been sitting for 1 minute, a female confederate, playing the role of the “sufferer,” appeared from around the corner down the hallway with the use of a large

⁹⁵ *Id.* at 117–18.

⁹⁶ *Id.* at 113–14.

⁹⁷ Tai Bendit-Shtull, *Combating Implicit Bias with Meditation* 51–52 (May 2017) (Undergraduate thesis, University of Pennsylvania) (on file with Scholarly Commons, University of Pennsylvania), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1149&context=wharton_research_scholars.

⁹⁸ Chunxiao Li, Ngai Kiu Wong, Duo Liu & Ying Hwa Kee, *Effects of Brief Mindfulness Meditation on Pre-service Teachers' Attitudes Towards Including Students with Autism: The Role of Basic Psychological Need Satisfaction*, *INT'L J. DISABILITY DEV. & EDUC.* 1, 8–10 (2020).

⁹⁹ On the complexity of attitudes that could be characterized as “pity” or “charity” toward disabled people, see, for example, JOSEPH P. SHAPIRO, *NO PITY* 4–5 (1994); Elaine Makas, *Positive Attitudes Toward Disabled People: Disabled and Nondisabled Persons' Perspectives*, 44 *J. SOC. ISSUES* 49, 58–59 (1988).

¹⁰⁰ Daniel Lim, Paul Condon & David DeSteno, *Mindfulness and Compassion: An Examination of Mechanism and Scalability*, 10 *PLOS ONE* 1, 1 (2015).

¹⁰¹ *Id.* at 3.

¹⁰² *Id.* at 4.

walking boot and a pair of crutches. She walked with some difficulty and expressions of mild pain (i.e., wincing). Upon arriving in the waiting area, the suffering confederate stopped beside the seat furthest away from the participant, let out an audible sigh of discomfort, and leaned against the wall as if she were also waiting for an experiment.¹⁰³

The researchers found that those subjects who had completed the three-week mindfulness program were two and a half times more likely to offer their seat to the suffering entrant.¹⁰⁴ We will return to this study.

B. *Mindfulness Meditation: The Tool*

The instructions were reassuringly simple:

1. Sit comfortably. . . .

2. Feel the sensations of your breath as it goes in and out. Pick a spot: nostrils, chest, or gut. Focus your attention and really try to feel the breath. . . .

3. This one, according to all of the books I'd read, was the biggie. Whenever your attention wanders, just forgive yourself and gently come back to the breath. You don't need to clear the mind of all thinking; that's pretty much impossible. . . . The whole game is to catch your mind wandering and then come back to the breath, over and over again.

– Dan Harris¹⁰⁵

This Article assumes no prior knowledge of meditation among readers, so this Section offers a short introduction. There are many forms of meditation and many ways to describe the forms people practice.¹⁰⁶ The whole idea of meditation is off-putting to some, which may be why some people decline labels.¹⁰⁷ Justice Breyer, for instance, has said, “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.”¹⁰⁸ Labels are nonetheless helpful to communicating ideas

¹⁰³ *Id.* at 4–5.

¹⁰⁴ *Id.* at 5.

¹⁰⁵ HARRIS, 10% HAPPIER, *supra* note 33, at 100.

¹⁰⁶ For some discussion, see, for example, Matthieu Ricard, Antoine Lutz & Richard Davidson, *Mind of the Meditator*, 311 *SCI. AMER.* 39, 40–42 (2014).

¹⁰⁷ See, e.g., Freshman et al., *supra* note 37, at 281–82.

¹⁰⁸ 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>. In the same interview, Justice Breyer elsewhere referred to what he does as meditation before abandoning the label again:

and translating experience into usable form for others, so this Section defines terms and explains practices.

Of the many types of meditation, the secular type most practiced in this country—and particularly promising for addressing disability bias for reasons I will discuss—can be called *mindfulness meditation*.¹⁰⁹ This Section will briefly explain what mindfulness is, what *mindfulness meditation* is, why people practice it (rather than just doing it), and how people practice it.

1. *Defining Mindfulness*

Mindfulness is defined by Jon Kabat-Zinn, who began much of the Western research of mindfulness meditation through a program he founded at the University of Massachusetts Medical School in 1979, as follows: “intentional cultivation of nonjudgmental moment-to-moment awareness.”¹¹⁰ Though accurate, this definition is complex. A simpler version is *paying attention to whatever is happening right now without judgment*.

Much of this definition is self-explanatory. Mindfulness means noticing what sounds you hear now or what bodily sensations you feel. The aim is not to *think about* those sensations, but just to notice or feel them. The aim is to take in the raw data of perception.

The meaning of the phrase “without judgment” is less obvious—and it sounds like it might directly contradict legal training or practice.¹¹¹ “Without judgment” does not mean without discernment or common sense, however. It does *not* mean that if the fire alarm went off wherever you are sitting right now, mindfulness would lead you just to sit there and notice the sound.

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

Id.

¹⁰⁹ See, e.g., Adam Burke, Chun Nok Lam, Barbara Stussman & Hui Yang, *Prevalence and Patterns of Use of Mantra, Mindfulness and Spiritual Meditation Among Adults in the United States*, 17 BMC COMPLEMENTARY AND ALT. MED. 316, 316 (2017) (describing “mindfulness meditation” as “involv[ing] ongoing, non-reactive awareness or monitoring of the present moment, of one’s phenomenological experience”); Natalia E. Morone, Charity G. Moore & Carol M. Greco, *Characteristics of Adults Who Used Mindfulness Meditation: United States, 2012*, 23 J. ALT. & COMPLEMENTARY MED. 545, 545 (2017), <https://www.liebertpub.com/doi/10.1089/acm.2016.0099> (estimating that 2,029,720 adults practiced mindfulness meditation in the United States in 2012).

¹¹⁰ Jon Kabat-Zinn, *Mindfulness Meditation: What It Is, What It Isn’t, and Its Role in Health Care and Medicine*, in COMPARATIVE AND PSYCHOLOGICAL STUDY ON MEDITATION 161, 161 (Y. Haruki, Y. Ishii & M. Suzuki eds., 2007).

¹¹¹ For more discussion of this issue, see Elizabeth F. Emens, *Law’s Contributions to the Mindfulness Revolution*, UTAH L. REV. (forthcoming 2022) [hereinafter Emens, *Law’s Contributions to Mindfulness*].

Rather, “without judgment” means without indulging the snarky inner critic in your head,¹¹² who tends to suffer from a kind of “negativity bias” (which is not clear seeing, but instead, as its name suggests, a bias or skew away from reality).¹¹³ More on this idea shortly, but note that this notion of “without judgment” is therefore not inconsistent with judging or with the keen analysis often required of lawyers.¹¹⁴ On the contrary, mindfulness is a training to support clear seeing of reality and unbiased assessment.

2. *Describing Mindfulness Meditation*

You can be mindful anytime. Like right now: You can notice the feeling of your feet on the ground. You can pay attention to the feeling of taking one breath. Rather than think about the concept of breathing, you could notice how breathing feels in the body, like how you would dip your hand in water to see if it feels warm or cold.¹¹⁵ You could do these things while also reading these words.

“Mindfulness *meditation*,” in contrast to just being mindful, refers to the act of setting aside time to engage in the formal practice of paying attention, without doing anything else at the same time. For instance, you could decide to take five minutes or twenty minutes or one minute to do nothing other than pay attention to whatever is happening right now. If you chose to practice formal meditation of this sort, you would stop reading and put aside this Article; you would either close your eyes or take a soft gaze on the floor; and your sole purpose for that time would be mindful awareness (and getting

¹¹² See *infra* Section I.B.3 (discussing that harshly critical inner voice and citing sources).

¹¹³ On negativity bias, see, for example, Roy F. Baumeister, Ellen Bratslavsky & Catrin Finkenauer, *Bad Is Stronger Than Good*, 5 REV. OF GEN. PSYCH. 323, 324, 354 (2001) (“The principle that bad is stronger than good appears to be consistently supported across a broad range of psychological phenomena.”); Rick Hanson, *Stephen Colbert: We Don’t Need to “Keep Fear Alive”*, DR. RICK HANSON’S BLOG (Oct. 3, 2010), <https://www.rickhanson.net/stephen-colbert-we-dont-need-to-keep-fear-alive/> (last visited Mar. 15, 2022) (describing the brain as, in effect, “like Velcro for negative experiences but Teflon for positive ones); Kendra Cherry, *What Is the Negativity Bias?*, VERYWELL MIND (Apr. 29, 2020), <https://www.verywellmind.com/negative-bias-4589618> (describing negativity bias as “our tendency not only to register negative stimuli more readily but also to dwell on these events”); see also Laura G. Kiken & Natalie J. Shook, *Looking Up: Mindfulness Increases Positive Judgments and Reduces Negativity Bias*, 2 SOC. PSYCH. AND PERS. SCI. 425, 429 (2011) (concluding from an empirical study of 175 undergraduate psychology students that “mindfulness can reduce negativity bias and increase positive judgments”); see generally Roy F. Baumeister & John Tierney, *THE POWER OF BAD: HOW THE NEGATIVITY EFFECT RULES US AND HOW WE CAN RULE IT* (2019).

¹¹⁴ See, e.g., Fogel, *supra* note 32, at 2–4 (explaining, based on his experience as a judge, the benefits of mindfulness meditation to judges); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 3 (2002). *But cf.*, e.g., Michal Tamir, *Law and Yoga*, 7 J.L. & SOC. DEVIANCE 1, 3 (2014) (arguing that “yoga focuses in the most extreme way on the given moment, whereas law looks to the past and the future, particularly with regard to precedents”).

¹¹⁵ This metaphor for mindful awareness of sensation—of feeling your hand in water to sense the temperature—comes from a meditation by Sharon Salzberg. See Sharon Salzberg, *Breath Meditation*, INSIGHT TIMER, <https://insighttimer.com/sharonsalzberg/guided-meditations/breath-meditation> (last visited Mar. 8, 2022).

distracted and noticing that and beginning again).

You might choose a central object of focus, like the breath or sound, and rest your awareness gently on it. And then, when your mind wanders, you would notice that fact—recognizing that that moment of noticing the mind has wandered is “mindfulness”—and bring your mind back to that anchor. This is sometimes called a “concentration” or “focused attention” meditation because you are aiming your concentration at something: the anchor of breath or sound.¹¹⁶

Alternatively, you might decide just to notice, moment to moment, whatever feeling, thought, sound, or sensation enters your awareness, one after the next, without tethering yourself to one input as an anchor. This is sometimes called “open awareness” or “open monitoring” meditation because you are not directing your mind to a particular anchor but are constantly aware of what is coming to mind.¹¹⁷ Though some would debate this choice, this Article calls both approaches versions of “mindfulness meditation” because both practices cultivate the moment of noticing.¹¹⁸

In sum, the practice of mindfulness meditation includes the three parts of the definition: (1) paying attention; (2) to whatever is happening right now; and (3) without judgment. And these track the three parts of these basic instructions:

- 1) *Pay attention*: Stop doing whatever else you are doing (it may help to close your eyes or lower your gaze) and rest your awareness on an anchor (like the breath, sound, or bodily sensations).
- 2) *To whatever is happening*: When you realize your mind has wandered, notice that (that is mindfulness).
- 3) *Without judgment*: And then, instead of beating yourself up about the wandering mind, practice kindness: Realize that minds wander—that’s what they do—and the moment you noticed that your mind had wandered was mindfulness. And that moment also provided an opportunity to practice gently bringing your awareness back to your anchor. (Dan Harris calls that moment of noticing the wandering a

¹¹⁶ See, e.g., Ricard et al., *supra* 106, at 41 (terming a version of this practice “focused attention”).

¹¹⁷ See, e.g., *id.* at 41 (calling this “mindfulness” or “open-monitoring meditation”).

¹¹⁸ For instance, Ricard et al., *id.* at 41, would call only the latter “mindfulness” meditation, and they do not emphasize the moment of noticing the mind has wandered in concentration practice. The interweaving of concentration and open awareness practice described herein is frequently offered by U.S. meditation teachers. Following this approach, this Article treats both the practice of resting awareness on an anchor and noticing when the mind has wandered, on the one hand, and the practice of letting go of an anchor and noticing whatever enters awareness, on the other, as forms of mindfulness meditation practice.

“mental pushup”¹¹⁹; Sharon Salzberg calls it, more ethereally, “the magic moment” of mindfulness.¹²⁰)

Practicing mindfulness is, simply, doing that over and over and over . . .

3. *Explaining Mindfulness Meditation*

Why do this? Why practice formal mindfulness meditation, rather than simply being mindful of whatever you are doing? If you could read this Article *and* get some mindfulness done at the same time, that might seem preferable. It certainly seems more efficient.

The difficulty is that, while we *could* be mindful at any moment, most of the time most of us are not. We are lost in thought. We are rushing forward into the future—planning, hoping, fearing—or looking backwards on the past—assessing, longing, regretting. So, we are generally not so good at the “right now” part of mindfulness (which, you will recall, we have defined as “paying attention to whatever is happening right now without judgment”).

Most of us are also not so good at the “without judgment” part. As Dan Harris told us at the start, “the voice in my head is an asshole.”¹²¹ Arianna Huffington describes that voice as “the obnoxious roommate living in our head.”¹²² It therefore takes practice to replace that voice, or dilute the impact of that voice, with a kinder one. The first step is quieting things down enough even to hear our inner voice—the one that is typically very critical (of ourselves, of other people, or both)—so that we can begin to offer up an alternative.

This explains how practicing mindfulness meditation helps with being mindful.¹²³ Other utilitarian reasons people practice meditation vary widely. Two significant empirical findings include improvements in attentional focus (learning to focus on what you want to focus on)¹²⁴ and emotional

¹¹⁹ *Ten Percent Happier with Dan Harris*, ABC NEWS (Mar. 6, 2018), <https://www.globalplayer.com/podcasts/episodes/7DrZ58u/>.

¹²⁰ SHARON SALZBERG, *REAL HAPPINESS: THE POWER OF MEDITATION* 49 (2011) [hereinafter SALZBERG, *REAL HAPPINESS*].

¹²¹ HARRIS, *supra* note 33, at xiii (uppercase and italics removed).

¹²² Arianna Huffington, *Evicting the Obnoxious Roommate in Your Head*, MEDIUM (Nov. 30, 2016), <https://medium.com/thrive-global/evicting-the-obnoxious-roommate-in-your-head-1848db7c9d75>.

¹²³ This point represents the distinction between “formal” and “informal” mindfulness practice—where formal practice is setting aside dedicated time just to meditate, without doing anything else at the same time; and informal practice is just invoking mindfulness (or another practice) while going through the day doing other things. For discussions and examples of some informal practices, see, for example, Freshman et al., *supra* note 37, at 287–88, 299–300; Magee, *How Mindfulness Can Defeat Racial Bias*, *supra* note 37. The question of how long one needs to meditate to get the benefits is a subject of ongoing research. Some claim that five minutes or even shorter periods suffice. See, e.g., Freshman et al., *supra* note 37, at 292 (citing study by one coauthor). Regardless of the shortest period possible to see any effects, various work supports the idea that more time than the minimum leads to more benefits. See, e.g., *id.*

¹²⁴ See, e.g., Elisa H. Kozasa, João R. Sato, Shirley S. Lacerda, Maria A.M. Barreiros, João Radvany, Tamara A. Russell, Liana G. Sanches, Luiz E.A.M. Mello & Edson Amaro Jr., *Meditation Training Increases Brain Efficiency in an Attention Task*, 59 *NEUROIMAGE* 745, 745 (2012); Rodrigo Becerra, Coralyn Dandrade & Craig Harms, *Can Specific Attentional Skills Be Modified with Mindfulness Training for Novice Practitioners?*, 36 *CURRENT PSYCH.* 657, 657 (2017).

self-regulation (managing your emotions and responses to them rather than being controlled by them).¹²⁵ More broadly, the burgeoning literature in this area reports wide-ranging health benefits to body and mind, for instance, improvements with regard to chronic depression, pain management, healthy sleep, heart disease, and even lifespan.¹²⁶

* * *

So now we know something about how to meditate. And we also know the contours of the relevant research on debiasing through meditation. The limited research that exists on debiasing disability discrimination tells us little about the mechanism by which debiasing may be occurring, and even the studies of debiasing along other identity axes are thin as to how this occurs. Exploring that question is the challenge of the next two Parts.

II. DYNAMICS OF DISABILITY DISCRIMINATION

The existential anxiety triggered by disabilities occasionally may become the subject of conscious attention. Sometimes these concerns are evident in the silent thought that “there, but for the grace of God (or luck or fate or other fundamental beliefs), go I.” At other times, these worries may be verbalized in statements such as, “I would rather be dead than live as a paraplegic (or as blind, deaf, or immobilized).” In fact, the threat of a permanent and debilitating disability, with its

¹²⁵ See, e.g., Britta K. Hölzel, James Carmody, Mark Vangel, Christina Congleton, Sita M. Yerramsetti, Tim Gard & Sara W. Lazar, *Mindfulness Practice Leads to Increases in Regional Brain Gray Matter Density*, 191 PSYCHIATRY RSCH. 36, 36 (2011); Julia C. Basso, Alexandra McHale, Victoria Ende, Douglas J. Oberlin & Wendy A. Suzuki, *Brief, Daily Meditation Enhances Attention, Memory, Mood, and Emotional Regulation in Non-Experienced Meditators*, 356 BEHAV. BRAIN RSCH. 208, 208–09 (2019); Clive J. Robins, Shian-Ling Keng, Andrew G. Ekblad & Jeffrey G. Brantley, *Effects of Mindfulness-Based Stress Reduction on Emotional Experience and Expression: A Randomized Controlled Trial*, 68 J. CLINICAL PSYCH. 117, 117, 127 (2012); see generally SALZBERG, REAL HAPPINESS, *supra* note 120, at 18–34.

¹²⁶ See, e.g., Bassam Khoury, Tania Lecomte, Guillaume Fortin, Marjolaine Masse, Phillip Therien, Vanessa Bouchard, Marie-Andrée Chapleau, Karine Paquin & Stefan G. Hofmann, *Mindfulness-Based Therapy: A Comprehensive Meta-Analysis*, 33 CLINICAL PSYCH. REV. 763, 763, 769 (2013); Peter la Cour & Marian Petersen, *Effects of Mindfulness Meditation on Chronic Pain: A Randomized Controlled Trial*, 16 PAIN MED. 641, 641, 649 (2015); Joshua A. Rash, Victoria A.J. Kavanagh & Sheila N. Garland, *A Meta-Analysis of Mindfulness-Based Therapies for Insomnia and Sleep Disturbance: Moving Toward Processes of Change*, 14 SLEEP MED. CLINICS 209, 209, 224 (2019); Paola Helena Ponte Márquez, Albert Feliu-Soler, Maria José Solé-Villa, Laia Matas-Pericas, David Filella-Agullo, Montserrat Ruiz-Herrerias, Joaquim Soler-Ribaudi, Alex Roca-Cusachs Coll & Juan Antonio Arroyo-Díaz, *Benefits of Mindfulness Meditation in Reducing Blood Pressure and Stress in Patients with Arterial Hypertension*, 33 J. HUM. HYPERTENSION 237, 237, 244 (2019); Nicola S. Schutte & John M. Malouff, *A Meta-Analytic Review of the Effects of Mindfulness Meditation on Telomerase Activity*, 42 PSYCHONEUROENDOCRINOLOGY 45, 45 (2014).

resulting problems, can even outrank the fear of death, which is, after all, inevitable.

– Harlan Hahn¹²⁷

Disability discrimination is complex and multi-faceted. The forms of bias familiar from the study of racism and sexism are present here—including animus, disgust, irrational stereotyping, and other forms of irrational as well as economically “rational” bias.¹²⁸ In some ways, then, this is familiar terrain, and the wider body of research on race discrimination applies to disability discrimination. This is good news since, while we have a long way to go in remedying race discrimination, more research and thinking has been done in this area, which can be applied to disability discrimination. In other ways, though, disability discrimination presents particular dynamics that invite additional tools.

This Part will briefly sketch eight of the central dynamics of disability discrimination. Some of these points apply more to some disabilities than to others, since disabilities vary along many dimensions—including, for instance, whether particular disabilities require workplace accommodations or involve suffering.¹²⁹ Nonetheless, the cultural experience of disability has many common elements.¹³⁰ This list presents a picture of important features of disability discrimination, with two central aims: first, to offer a contribution to the study of disability discrimination and its remedies; and second, to lay the groundwork for an analysis in the next Part of how meditation could play some part in addressing these puzzles.

The Sections that follow organize these dynamics under the rubrics of emotional, cognitive, behavioral, and existential types. Note that, although the distinction commonly drawn between thinking (cognitive) and feeling (emotions) is inadequate if not entirely artificial,¹³¹ the distinction between the cognitive and the emotional serves as a useful heuristic to organize and discuss this vast terrain. These four rubrics will also be used to sort the

¹²⁷ Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. SOC. ISSUES 39, 42–43 (1988) (brackets changed to parentheses to clarify that the text of Hahn’s original was not altered).

¹²⁸ For a discussion of these categories applied to psychiatric disability, see Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 406, 409, 414, 418 (2006) [hereinafter Emens, *Sympathetic Discriminator*].

¹²⁹ See, e.g., *infra* Section II.B.2; (referencing the diversity of disabilities in a discussion of “the spread effect”); Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 896–98 (2006) (explaining that perceptions of disability’s heterogeneity frustrate efforts to achieve justice for the class and stymie the application of lessons learned in other discrimination contexts to disability discrimination).

¹³⁰ See, e.g., Stein & Waterstone, *supra* note 129, at 897–99, 901 (citing sources and discussing how a “pandisability theory” would allow “us to once more capture the commonality of class interest”).

¹³¹ See, e.g., MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 1–5 (2001) (arguing for a “cognitive/evaluative theory of emotions” that regards “emotions as part and parcel of the system of ethical reasoning”).

mechanisms by which meditation may contribute to debiasing in this sphere. A chart at the end of Part III brings the dynamics and the mechanisms together.

A. Emotional Dynamics

1. *The Quandary of Fear, Rational and Irrational*

*It is an essential function of a job that a production manager be able to handle stressful situations (here, requests for overtime work and routine disagreements) without making others in the workplace feel threatened for their own safety.*¹³²

Fear looms large in responses to disability. The category of fears we have just been discussing—under the heading of *existential anxiety*—involves the fear of one’s susceptibility to becoming disabled, whether physically or mentally, in ways one is currently not disabled.¹³³

Another category of fears involves concerns about being harmed by the other person—harmed from without rather than through one’s own pre-existing vulnerability. For instance, *contagion* might mean you “catch” what the other person has. Some forms of contagion are merely imagined—like fear of “catching” Down Syndrome—and so the fear is just irrational. By contrast, some disabilities—like HIV—actually are contagious, and so the fear might have some rational basis. Even then, the contagiousness is often exaggerated in the public imagination through media and other sources.¹³⁴

There is also a form of contagion—what psychologists called “emotional contagion”—whereby we absorb the emotions of nearby others under certain circumstances. Emotional contagion does not mean that a disability like depression is literally contagious.¹³⁵ But some related

¹³² *Calef v. Gillette Co.*, 322 F.3d 75, 86 (1st Cir. 2003).

¹³³ In principle, existential anxiety of this sort could affect anyone, whether currently disabled or nondisabled, because no person has every possible disability, so every person could have existential anxiety about acquiring (new) disabilities. In reality, people who have already “claimed disability” in their lives in some way have experiential and identity-based reasons to be less generically fearful of the prospect of acquiring another disability, *cf.*, *e.g.*, SIMI LINTON, CLAIMING DISABILITY; Katie Eyer, *Claiming Disability*, 101 BU L. REV. 547 (2021), whereas people who consider themselves nondisabled may carry a fear of crossing over into what they perceive as “other” and what they assume (mistakenly, on average) is a far less happy life than life without disability, *see infra* Section II.A.3 (discussing the hedonic misforecasting involved in the “disability paradox”).

¹³⁴ *See, e.g.*, Bagenstos, *infra* note 171, at 449, 491–95 (discussing stereotypes and stigma surrounding HIV); Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1467–68, 1468 n.15, *passim* (2009) (discussing gaps and double standards surrounding the fears of HIV among Black men who have sex with men and especially among Black men understood to be living on the “down low”).

¹³⁵ There is, however, work to suggest that depression itself may be passed, for instance, to roommates; on closer examination, however, it seems that in some circumstances, the depression is helped rather than passed along, and gender may be one mediating factor. *See, e.g.*, Daniel Eisenberg, Ezra Golberstein, Janis L. Whitlock & Marilyn F. Downs, *Social Contagion of Mental Health: Evidence from College Roommates*, 22 HEALTH ECON. 965, 973 (2013).

emotions may be passed along; for instance, a short conversation with a person dealing with clinical depression may lead to absorbing some sadness or anxiety.¹³⁶

Emotional contagion sets up challenges for the integration of people with psychosocial or psychiatric disabilities.¹³⁷ One such challenge relates to the finding that emotional contagion is increased when you like someone; that is, you are more likely to absorb their emotions if you like them better.¹³⁸ For instance, some research shows that emotional contagion is stronger in friendship relationships than between mere acquaintances.¹³⁹ This may mean that, in the context of emotional contagion, an impulse to discriminate—to avoid working with someone, for example, by not hiring them—might arise not so much because you do not like someone as because you do.¹⁴⁰ So, in contrast to our sense, with animus or irrational dislike, that simple contact through integration will reduce discriminatory impulses, emotional contagion in the context of psychiatric disability could raise the concern of an increased impulse to discriminate after more contact.¹⁴¹ This concern could be alleviated, however, if emotional *regulation*—for instance, via meditation—could short-circuit emotional contagion.¹⁴²

¹³⁶ See, e.g., James C. Coyne, *Depression and the Response of Others*, 85 J. ABNORMAL PSYCH. 186, 188–89 (1976) (reporting that “[p]erceived sadness, weakness, discomfort, passivity, and low mood” in individuals tested via an experiment “were significantly correlated with” the “mood[s]” of the depressed individuals to whom they spoke). Research on the mechanism is ongoing, but one theory is that facial mimicry leads listeners to mirror the facial expressions of a speaker, and then—through a process called afferent feedback—to infer their own emotions from their facial expressions. For discussion, see, for example, Emens, *Sympathetic Discriminator*, *supra* note 128, at 432–34 (citing sources), and for recent analysis and competing theories, such as those involving social appraisal and context, see, for example, Monika Wróbel & Kamil K. Imbir, *Broadening the Perspective on Emotional Contagion and Emotional Mimicry: The Correction Hypothesis*, 14 PERS. SOC. PSYCHOL. REV. 437, 444–47 (2019); Ursula Hess & Agneta Fischer, *Emotional Mimicry as Social Regulation*, 17 PERS. SOC. PSYCHOL. REV. 142, 145–46 (2013).

¹³⁷ The question of terminology is deeply contested throughout disability studies, and perhaps nowhere more so than in the realm of what are sometimes called *psychosocial disabilities*, *mental illness*, or *psychiatric impairment*. I move between these terms, on the basis that each has something to offer. For discussion, see MARGARET PRICE, *MAD AT SCHOOL: RHETORICS OF MENTAL DISABILITY AND ACADEMIC LIFE* 17–20 (2011).

¹³⁸ See, e.g., Hwee Hoon Tan, Maw Der Foo & Min Hui Kwek, *The Effects of Customer Personality Traits on the Display of Positive Emotions*, 47 ACAD. MGMT. J. 287, 292–93 (2004) (finding that “the trait of agreeableness in customers was positively associated with an increase in the display of positive emotions by service providers”).

¹³⁹ See, e.g., Masanori Kimura, Ikuro Daibo & Masao Yogo, *The Study of Emotional Contagion from the Perspective of Interpersonal Relationships*, 36 SOCIAL BEHAV. & PERSONALITY 27, 38 (2008); see also Wróbel & Imbir, *supra* note 136, at 439–41, 446–47 (discussing research on the role of friendship and affiliative goals in emotional contagion).

¹⁴⁰ Emens, *Sympathetic Discriminator*, *supra* note 128, at 401, 429.

¹⁴¹ *Id.* at 445–47.

¹⁴² When I was writing about emotional contagion and the ADA in the past, colleagues would ask if there were solutions—ways to intercept the emotional contagion by making nearby others less susceptible to it. I had no answers at the time, but, as the next Part discusses, it now appears that meditation could be one such tool. See *infra* Sections III.A.1 & III.A.3.

Fear also entails the more routine concerns about being physically injured, directly or indirectly, because of another person's disability. This includes fears that people with psychosocial disorders are dangerous, although the relevant data provide little empirical support for these fears.¹⁴³ Fear of injury also includes fear that people with physical or mental disabilities will occupy positions that affect public safety and fail to perform those jobs well enough. Several of the key cases in the backlash against the ADA—in which courts interpreted the ADA narrowly despite the statute's broad mandate—involve occupations implicating public safety, such as airline pilots and truck drivers, as other scholars have noted.¹⁴⁴

Legal intervention in disability discrimination therefore prompts the challenging question: What should the public do with their fears? How should they handle them? Or to personalize it more, how should each of us (whether currently disabled or “not yet disabled”¹⁴⁵) deal with our fears related to injury and contagion, real or imagined?

¹⁴³ See, e.g., Ann Hubbard, *The ADA, the Workplace, and the Myth of the “Dangerous Mentally Ill,”* 34 U.C. DAVIS L. REV. 849, 52–53 (2001) (stating that “[c]ontrary to popular belief, current research demonstrates no more than a ‘weak’ or ‘modest’ association between mental disorders and the risk of violence”, indicating that “‘public fears are way out of proportion to the empirical reality’”); Patrick W. Corrigan & David L. Penn, *Lessons from Social Psychology on Discrediting Psychiatric Stigma*, 54 AM. PSYCH. 765, 766 (1999) (describing, in an article about dangerousness and other stereotypes associated with mental illness, that the “[s]tigmatas about mental illness seem to be widely endorsed by the general public” but the “negative stereotypes are not warranted and are overgeneralized”); JOHN WESTON PARRY, MENTAL DISABILITY, VIOLENCE, AND FUTURE DANGEROUSNESS: MYTHS BEHIND THE PRESUMPTION OF GUILT 1–12 (2013) (observing that “impressions about future dangerousness” are “unreliable and discriminatory”).

¹⁴⁴ See, e.g., *Sutton v. United Air Lines*, 527 U.S. 471, 493–49 (1999); *Murphy v. United Parcel Serv.*, 527 U.S. 516, 525 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 577 (1999); see also Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479, 1479–80 (2001) (providing examples of how “[m]uch...disability based discrimination occurs because of the discriminator’s fears of safety risk”).

¹⁴⁵ The term “not yet disabled” rather than “nondisabled” captures the ways that all of us, whether or not we currently have a disability, will likely acquire one or more disabilities if we live long enough. See, e.g., Arlene S. Kanter, *The Law: What’s Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 449–50 (2011) (“[I]t may be said that we are all ‘temporarily-able-bodied’ or ‘T.A.B.’ because sooner or later most of us will be disabled at some point in our lives; whether it comes sooner or later varies depending upon one’s circumstances.”); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 332 (2009) (observing that “‘Us’ and ‘Them’ Are Really ‘We’”); Eyer, *supra* note 133, at 585 (“Thus, many if not most individuals will at some juncture fall within the ADAAA’s expansive definition of disability. If even some fraction of those individuals perceived their own self-interest in disability rights—and acted accordingly as movement participants in politics, or even in everyday life—many of the disability rights movements’ objectives would become immeasurably more likely.”); see also MICHELLE R. NARIO-REDMOND, ABLEISM: THE CAUSES AND CONSEQUENCES OF DISABILITY PREJUDICE 341 (2020) (discussing the “open enrollment” aspect of disability and framing disability bias as “a response to unwanted fears of death, the meaninglessness of life (social death), and the body’s vulnerability to damage and decline” because disabled people “serve as unwanted reminders of the indefinite frailties of life, and our vulnerability to decline, dismemberment, and deterioration”); Elizabeth F. Emens, *The Art of Access: Innovative Protests of an Inaccessible City*, 47 FORDHAM URB. L.J. 1359, 1391 (2020).

The Americans with Disabilities Act provides a mechanism—the “direct threat” analysis—that requires an objective inquiry into whether an individual with a disability “pose[s] a direct threat to the health or safety of other individuals in the workplace.”¹⁴⁶ But, in practice, this demand for an objective inquiry can get swallowed up by the fears of those interpreting the statute, as happened in the *Calef* case quoted in the epigraph.¹⁴⁷ There, in a case involving a production manager with ADHD,¹⁴⁸ the First Circuit never reached the direct threat analysis, but instead turned the question of dangerousness into a question of fear. The court decided that it was an “essential function” of the job of “production manager” to “handle stressful situations (here, requests for overtime work and routine disagreements) without making others in the workplace feel threatened for their own safety.”¹⁴⁹ Using this approach, the court determined that the plaintiff, who had ADHD, failed to make out a prima facie case of being otherwise qualified for the job.¹⁵⁰

Whether or not one agrees with the outcome in that case, one may be troubled that the court dodged the objective inquiry of the threat required by the ADA. This dynamic—of fear dictating a legal analysis intended to be objective—is one challenge facing the implementation of the ADA.

2. *Tensions Surrounding the Aesthetic Responses to Disability and the Contact Hypothesis*

The aesthetics of disability trigger affective processes, however, and some emotions, such as fear or disgust, make it hard to recognize, respect, adjudicate, and enforce the rights of people with disabilities.

— Jasmine E. Harris¹⁵¹

The integration presumption and the contact hypothesis—the idea that contact under certain conditions improves attitudes—have played an important role in disability law and advocacy. But, as noted earlier, contact alone is not solving the problem of bias and discrimination.¹⁵² Recent work from Jasmine Harris argues that the advantages of contact are in tension with

¹⁴⁶ 42 U.S.C. § 12113(b); *see also* *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002) (describing the requirements for invoking the direct threat defense).

¹⁴⁷ *See Calef v. Gillette Co.*, 322 F.3d 75, 88 (1st Cir. 2003) (Bownes, J., dissenting) (commenting on how the majority’s reasoning allows fear to enter a determination about whether a person is “otherwise qualified”).

¹⁴⁸ ADHD is the acronym for Attention-Deficit/Hyperactivity Disorder. *Attention-Deficit/Hyperactivity Disorder (ADHD): The Basics*, NAT’L INST. MENTAL HEALTH, <https://www.nimh.nih.gov/health/publications/attention-deficit-hyperactivity-disorder-adhd-the-basics/index.shtml> (last visited Feb. 17, 2021).

¹⁴⁹ *Calef*, 322 F.3d at 86.

¹⁵⁰ *Id.* at 86–87.

¹⁵¹ Harris, *supra* note 29, at 897 (footnote omitted).

¹⁵² *See supra* notes 25–29 and accompanying text.

the potential disadvantages of contact for disability rights.¹⁵³ Earlier writings by Harlan Hahn had identified an “aesthetic anxiety” in responses to disability—that is, “the fears engendered by persons whose appearance deviates markedly from the usual human form or includes physical traits regarded as unappealing”¹⁵⁴—but legal scholarship had not reckoned with the aesthetic dimension of disability bias until Harris published “The Aesthetics of Disability” in 2019.¹⁵⁵ In Harris’s words, “[c]ontact triggers aesthetic-affective responses to disability that make it hard for nondisabled people—unaccustomed to the broad spectrum of capabilities of people with disabilities—to overcome deeply rooted and seemingly intuitive aesthetic judgments.”¹⁵⁶ She argues that scholars have focused on the cognitive dimensions of changing stereotypes, but neglected the emotional and aesthetic responses to disability, which are “sticky norms” that are hindering the ameliorative effects of contact.¹⁵⁷

3. *Misperceptions of Suffering*

It is remarkable but true that paraplegics are only modestly less happy than other people Young people who have lost a limb as a result of cancer show no less happiness than similarly situated young people who have not had cancer. Moderately disabled people recover to their predisability level after 2 years. Kidney dialysis patients do not show lower levels of happiness than ordinary people. Colostomy patients report levels of happiness that are about the same as people who have not had colostomies. . . .

From this evidence, it is fair to conclude that healthy people systematically overestimate the adverse effects of many physical problems. . . .

Just as people overestimate the hedonic harm of many physical losses, such as kidney dialysis and colostomies, so too

¹⁵³ Harris, *supra* note 29, at 895.

¹⁵⁴ Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. SOC. ISSUES 39, 42 (1988).

¹⁵⁵ Harris, *supra* note 29.

¹⁵⁶ *Id.* at 931.

¹⁵⁷ *Id.* at 940 (citation omitted).

people underestimate the hedonic effect of adverse effects, such as depression and chronic pain.

– Cass R. Sunstein¹⁵⁸

Outsiders to disabilities often misperceive the suffering involved.¹⁵⁹ Well-known to researchers in the field of hedonics is a phenomenon called the *disability paradox*, reflected in the first paragraph of the epigraph above. People significantly overestimate the suffering they would experience if they had a physical disability that they do not currently have—even something as serious as paraplegia.¹⁶⁰

In other words, someone without paraplegia is likely to estimate that his life would be far worse with paraplegia; yet people who develop paraplegia report little to no reduction in happiness after an initial period of adjustment. The same goes for people who start dialysis to support kidney dysfunction, for example, and for people with a range of other disabilities.¹⁶¹

This is a misperception of suffering. Interestingly, though, not all disabilities are misperceived in the same direction. For a few impairments, including depression and chronic pain, outsiders tend to *underestimate* the

¹⁵⁸ Cass R. Sunstein, *Illusory Losses*, 37 J. LEGAL STUD. S157, S165–67 (2008) (citations omitted). For critiques of these studies of hedonics, see, for example, Matthew D. Adler, *Happiness Surveys and Public Policy: What's the Use?*, 62 DUKE L.J. 1509, 1542–44 (2013); W. Kip Viscusi, *The Benefits of Mortality Risk Reduction: Happiness Surveys vs. The Value of a Statistical Life*, 62 DUKE L.J. 1735, 1737 (2013).

¹⁵⁹ See Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation* 86 WASH. L. REV. 709, 712–13 (2011) (critiquing “[t]ort litigation’s blindsight”, namely, its “assumption that the lives of people with disabilities are tragic”); John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516, 1536 n. 106 (2008) (writing “[w]hen awarding compensation for hedonic damages, jurors tend to focus inordinately on the limiting effects of a disability and, as ostensibly healthy people, fail to recognize how well most disabled people adapt”); Richard A. Epstein, *Happiness and Revealed Preferences in Evolutionary Perspective*, 33 VT. L. REV. 559, 563–64 (2009) (writing “[t]he hedonic losses that loom large to the outsider are always smaller than they appear”); Cortney E. Lollar, *Punitive Compensation*, 51 TULSA L. REV. 99, 130–31 (2015) (writing that juries engage in inaccurate “emotional forecasting” because of a tendency “to realize that the intensity and duration of a difficult emotional experience will be less than our intuition or belief tells us”)

¹⁶⁰ See, e.g., Peter A. Ubel, George Loewenstein, Norbert Schwarz & Dylan Smith, *Misimagining the Unimaginable: The Disability Paradox and Health Care Decision Making*, 24 HEALTH PSYCH. S57, S57 (2005) (finding that “healthy people also mispredict the emotional impact that chronic illness and disability will have on their lives”); Philip Brickman, Dan Coates & Ronnie Janoff-Bulman, *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. PERSONALITY & SOC. PSYCH. 917, 917 (1978) (finding that happiness levels, after a period of adaptation, were similar between accident victims and lottery winners). *But cf.* Andrew J. Oswald & Nattavudh Powdthavee, *Does Happiness Adapt? A Longitudinal Study of Disability with Implications for Economists and Judges*, 92 J. PUB. ECON. 1061, 1072 (2008) (estimating the degree of hedonic adaptation after disability to be approximately 30% to 50%).

¹⁶¹ See, e.g., Jason Riis, George Loewenstein, Jonathan Baron & Christopher Jepsen, *Ignorance of Hedonic Adaptation to Hemodialysis: A Study Using Ecological Momentary Assessment*, 134 J. EXPERIMENTAL PSYCH.: GEN. 3, 3 (2005) (concluding, from a study following a study comparing hemodialysis patients to healthy non-patients, that “healthy people fail to anticipate hedonic adaptation to poor health”).

suffering involved.¹⁶² That is, people without depression or chronic pain typically imagine the suffering involved in those impairments to be less than what is reported by those actually experiencing the conditions.

Though they point in opposite directions, both misperceptions—the assumption of greater suffering and lesser suffering—are gaps in emotional understanding. They are part of a social distance, a lack of felt connection, between people who are disabled and those who are not, along a particular dimension of ability. People with psychiatric impairments, along with other invisible disabilities, often report being disbelieved; imagine being in incredible pain but having others believe you are doing just fine.¹⁶³ People with physical disabilities often report feeling pitied when their lives include richly satisfying elements and when the challenges of life are often created by the social distance and lack of accommodations of a world that treats them as “other.”¹⁶⁴ These misperceptions of suffering lie on the cusp between emotional dynamics and cognitive dynamics, the next subject.

B. Cognitive Dynamics

1. *Integrating People with Disabilities Requires a Practice of Seeing Disability*

Indeed, contrary to Chief Justice Roberts’s declaration of colorblindness that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race” is Justice Ginsburg’s pronouncement that inclusion under the ADA “would

¹⁶² See, e.g., Edie Greene, Kristin A. Sturm & Andrew J. Evelo, *Affective Forecasting About Hedonic Loss and Adaptation: Implications for Damage Awards*, 40 L. & HUM. BEHAV. 244, 245–46, 252–54 (2016); Sunstein, *Illusory Losses*, *supra* note 158, at S167.

¹⁶³ See, e.g., Susan Stefan, “Discredited” and “Discreditable”: *The Search for Political Identity by People with Psychiatric Diagnoses*, 44 WM. MARY L. REV. 1341, 1344 (2003) (“In the absence of unmistakable problems in social functioning, an individual’s self-report of psychiatric disability is likely to be discredited, disbelieved, or minimized.”); TONI BERNHARD, *HOW TO BE SICK: A BUDDHIST-INSPIRED GUIDE FOR THE CHRONICALLY ILL AND THEIR LOVED ONES* 12 (“Everyone I saw at work assumed I’d fully recovered. After all, I didn’t look sick to them.”). Cf., e.g., Liz Crow, *Including All of Our Lives: Renewing the Social Model of Disability*, in *ENCOUNTERS WITH STRANGERS: FEMINISM AND DISABILITY* 206–210 (Jenny Morris ed., 1996) (“The experience of impairment is not always irrelevant, neutral or positive. How can it be when it is the very reason used to justify the oppression we are battling against? How can it be when pain, fatigue, depression and chronic illness are constant facts of life for many of us?”).

¹⁶⁴ See, e.g., Harriet McBryde Johnson, *Unspeakable Conversations*, N.Y. TIMES MAG. (Feb. 16, 2003), <https://www.nytimes.com/2003/02/16/magazine/unspeakable-conversations.html> (“Are we ‘worse off’? I don’t think so. Not in any meaningful sense. There are too many variables. For those of us with congenital conditions, disability shapes all we are. Those disabled later in life adapt. We take constraints that no one would choose and build rich and satisfying lives within them. We enjoy pleasures other people enjoy, and pleasures peculiarly our own. We have something the world needs.”).

sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation.”

– Kimani Paul-Emile¹⁶⁵

Colorblindness is a common metaphor for our race discrimination jurisprudence. Trenchant critiques have been offered of the idea that, as rendered by Chief Justice Roberts, “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁶⁶ In the context of disability, the “blindness” metaphors are multiply problematic. For starters, applying the metaphor of blindness to the disability context highlights its shortcomings—as is often the case with metaphors of disability¹⁶⁷—since no one means in invoking colorblindness that people literally cannot see race.¹⁶⁸

Rather, the entire structure of disability law requires seeing disability. This is true in two main ways. First, disability-based protections depend on

¹⁶⁵ Paul-Emile, *supra* note 39, at 354 (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007); *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring)).

¹⁶⁶ *Parents Involved*, 551 U.S. at 748. Critiques of colorblindness include, among many others, Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind”* 44 STAN. L. REV. 1 (1991); David A. Strauss, *The Myth of Colorblindness*, SUP. CT. REV. 99–134 (1986); Keith E. Sealing, *The Myth of a Color-Blind Constitution* 54 Wash. U. J. Urb. & Contemp. L. 157 (1998); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006); Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253 (2011); Matthew J. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, 75 U. CIN. L. REV. 87 (2006); Mary Kathryn Nagle, *Parents Involved and the Myth of the Colorblind Constitution*, 26 HARV. J. RACIAL & ETHNIC JUST. 211, 215 (2010); Uma M. Jayakumar and Annie S. Adamian, *The Fifth Frame of Colorblind Ideology: Maintaining the Comforts of Colorblindness in the Context of White Fragility*, 60(5) SOCIOLOGICAL PERSPECT. 912 (2017); Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600 (2020).

¹⁶⁷ Liz Bowen, *Learning to Read Ecologically: Disability, Animality, and Metaphor in Toni Morrison’s A Mercy*, 88 ENG. LIT. HIST. 527 (2021) (“In disability studies, disability-as-metaphor has long been viewed as one of the bedrocks of casual ableism . . .”); Christopher Shinn, *Disability Is Not Just a Metaphor*, ATLANTIC (July 23, 2014), <https://www.theatlantic.com/entertainment/archive/2014/07/why-disabled-characters-are-never-played-by-disabled-actors/374822/> (observing that “[p]op culture’s more interested in disability as a metaphor than in disability as something that happens to real people”). On the question more generally of whether metaphors involving disability are always problematic, see, for example, Elizabeth F. Emens, *What’s Left in Her Wake: A Tribute to Adrienne Asch*, HASTINGS CTR. REP., Feb. 2014, at 20 [hereinafter Emens, *What’s Left in Her Wake*]; Bowen, *supra*, at 528 (“In short, while disability and animal metaphors and their attendant critical interpretations tend to subordinate atypical/nonhuman bodies to their figurative meanings, *A Mercy* shows that bodies don’t have to cease being bodies when they become figures.”); see also *Disability as Metaphor*, HASTINGS CTR. (June 17, 2021), <https://www.thehastingscenter.org/news/disability-as-metaphor/> (discussing Liz Bowen’s work on how disability metaphors can “reinforce damaging associations between disability and undesirable states of being like confusion, suffering, and ignorance” but how “there may still be a use for disability metaphors if we’re willing to invest in new ones”).

¹⁶⁸ See, e.g., Destiny Peery, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J.L. & SOC. POL. 473, 484 (“People are not, after all, colorblind and wishing that were the case does not make it so.”); cf. Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 409 (2012) (describing the “judiciary’s mottled practice of racial recognition”).

determinations of whether someone is in the protected class of persons with disabilities. The ADA, the Fair Housing Act (FHA), and the Individuals with Disabilities Education Act (IDEA) are not symmetrical; they do not protect everyone along the axis of ability. Instead, they protect a subset of the population that qualifies as disabled, according to the statutory definition.¹⁶⁹ Courts, employers, landlords, and school administrators therefore must know whether someone is disabled within the meaning of the relevant statute to know whether someone is protected.

Second, disability-based protections generally involve accommodation requirements.¹⁷⁰ Accommodation requires recognizing disability and perceiving how it operates in interaction with the environment.

Neither of these forms of “seeing” disability is likely to be an isolated event. Instead, accommodations need to be adjusted as disabilities and contexts change. So, disability law requires a practice of repeatedly perceiving a person’s impairment in interaction with the environment. These small moments accrete to a larger practice of paying attention to disability. This runs contrary to a central idea governing antidiscrimination thinking in U.S. law and norms: the notion of individual “good actors” who have crossed the finish line toward nondiscrimination and never have to think about a protected category again.

2. *Tension Between the “Spread Effect” and the Failure to Recognize Disability as a Class*

Individuals with physical and mental impairments frequently experience a “spread effect,” in which people assume that an impairment that affects particular life functions also indicates a more general disability. Thus, “[p]eople with disabilities often report that people will raise their voice to speak to someone in a wheelchair, or who is blind—even though there is no obvious reason for doing so.”

– Samuel R. Bagenstos¹⁷¹

A typical outsider mistake is to treat a person with one disability as if she has some other unrelated disability. Speaking loudly to a person who is

¹⁶⁹ See 42 U.S.C. § 12102 (for the definition of “disability” under the ADA); 42 U.S.C.A. § 3602(h) (for the definition of “handicap” under the Fair Housing Act); 20 U.S.C.A. § 1401(3)(A) (for the definition of “child with a disability” under the Individuals with Disabilities Education Act).

¹⁷⁰ See ADA of 1990, 42 U.S.C. §§ 12101–213; FHA of 1968, 42 U.S.C. §§ 3601–31; IDEA of 1975, 20 U.S.C. §§ 1400–82.

¹⁷¹ Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 423–24 (2000) (quoting Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1308 and citing, inter alia, U.S. COMM’N ON C.R., ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 25 (1983)).

blind as if she were also deaf, or speaking slowly to someone in a wheelchair as if he were cognitively impaired—these are classic examples of what is called the *spread effect*.¹⁷²

What spurs the spread effect is not clearly understood. But one plausible theory draws on Erving Goffman’s work on stigma. Goffman argued that people with certain traits are “discredited” by society; members of these stigmatized groups may be seen as so outside the favored community as to be not quite human.¹⁷³ Relegation to a class of stigmatized people is an imprecise operation, which may involve blurring the distinctions between particular impairments. Outsiders may thus leap to the assumption that having one impairment means having another. Other research suggests that people of higher status tend to notice and know less about people of lower status—they are less perceptive and observant of their realities—than is true in reverse.¹⁷⁴ This dimension of status differentials in awareness and attention to detail may also contribute.

The spread effect is problematic for obvious reasons: This stereotyping leads to individuals with disabilities being misperceived and viewed as less capable than they actually are. Moreover, the spread effect is part of a troubling dynamic whereby the imaginative blurring of disabilities does not seem to work *for* persons with disabilities, only *against* them. When disabled plaintiffs try to bring a class action antidiscrimination lawsuit, courts

¹⁷² See, e.g., Bagenstos, *supra* note 171 (defining the “spread effect” as consisting of “overbroad generalizations about the limiting effects of [disabled individuals’] impairments” and writing that such “stereotypes...contribute substantially to the systematic disadvantage experienced by people with disabilities”); Samuel Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability* 60 VANDERBILT L. REV. 745, 779 (2007) (using the “spread effect” as an example of social circumstances that deprive people with specific disabilities of opportunities); U.S. COMM’N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 25 (1983) (“Some nonhandicapped people believe that disabled people differ from others in many respects beyond their specific disabilities. Generalizing from an impairment to the whole person has been termed the ‘spread effect.’”). For the authors often credited with first using the term “spread” for this effect, see Tamara Dembo, Gloria Ladieu & Beatrice A. Wright, *Adjustment to Misfortune—A Problem of Social-Psychological Rehabilitation*, 3 ARTIFICIAL LIMBS 1956, at 26 (republished as Tamara Dembo, Gloria Ladieu Leviton & Beatrice A. Wright, *Adjustment to Misfortune: A Problem of Social-Psychological Rehabilitation*, 22 REHAB. PSYCH. 1975) (writing that the “[s]pread or the exaggeration of negative effects of an injury, may provide the noninjured with an excellent reason for excluding the injured from participation in activities”); see also BEATRICE A. WRIGHT, PHYSICAL DISABILITY—A PSYCHOSOCIAL APPROACH 32–36 (2d ed. 1983) (exploring the meaning and origin of various forms of the spread effect).

¹⁷³ See, e.g., ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY, 10–12 (1986) (discussing how stigmatized attributes serve to discredit the holder of those attributes); see also Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992, 1053–57 (2008) (discussing the relevance of “[s]tigmatized impairments,” which given the spread effect “tend to be regarded as more limiting than they in fact are,” to a particular doctrinal quandary under the ADA of 1990); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004) (articulating an important stigma-based theory of discrimination).

¹⁷⁴ See, e.g., Daniel Goleman, *Rich People Just Care Less*, N.Y. TIMES (Oct. 5, 2013, 2:25 PM), <https://opinionator.blogs.nytimes.com/2013/10/05/rich-people-just-care-less/> (discussing the public policy implications of the research finding “that people with the most social power pay scant attention to those with little such power”).

frequently conclude that people with disabilities lack sufficient typicality to form a class.¹⁷⁵ Internal diversity of groups can impair litigation efforts in other areas, such as race discrimination, as Crenshaw and others have described.¹⁷⁶ But in the context of disability, the diversity internal to the category seems to defy recognition of any legally cognizable group at all—despite the spread effect that blurs disabilities in individual interactions across various types of disabilities.

3. *The Neglect of Benefits—of Accommodation and of Disability*

What the ADA does not remedy—and indeed may even aggravate—is the problem of neglected benefits. By this I mean that courts and agencies frequently fail to notice the benefits of disability accommodation—beyond those to the individual for whom they were designed. Accommodations can have many and varied benefits to third parties . . . and yet those entities that oversee the implementation of the ADA neglect to include such benefits in their analyses.

– Elizabeth F. Emens¹⁷⁷

The last several points culminate in another problematic dynamic. Disability law requires paying attention to disability, but the *costs* of disability are typically most salient. Benefits—of accommodation or of disability—are neglected by legal and social actors alike.

Disability accommodations can spur innovation and create a range of benefits for individuals beyond the particular individual for whom the accommodation is designed. Think of curb cuts, which benefit those with wheeled suitcases, strollers, and bikes, as well as those who travel on wheels. Or of closed captions for hearing-impaired individuals, which are now used in noisy airports and gymnasiums. In the workplace, voice-to-text software and ergonomic furniture are just two examples of the many that have been described elsewhere.¹⁷⁸

¹⁷⁵ See, e.g., Stein & Waterstone, *supra* note 129, at 883–86 (observing that courts’ “denials of class certification” to disabled plaintiffs in employment discrimination cases have been largely “predicated on the notion that the remedies granted, if any, were based on individualized inquiry into disability and the accommodation needed, and thus lacked typicality”).

¹⁷⁶ See, e.g., Crenshaw, *supra* note 166.

¹⁷⁷ Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 867 (2008).

¹⁷⁸ *Id.* at 870–72, 884, 907, 916; Michael Ashley Stein, *Same Struggle, Different Difference: Americans with Disabilities Act Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 642–43 (2004) (“[T]echnological developments that originally were developed to assist people with disabilities but which have become useful to the general population . . . include the telephone, the typewriter, the Jacuzzi, and closed-captioning.”).

Nonetheless, employers, administrators, and other decisionmakers tend to overlook these and other benefits of disability in conducting the cost-benefit analyses that are required or spurred by law and policy. For instance, in the workplace, court interpretations of the ADA require balancing costs and benefits to determine the “reasonableness” of proposed accommodations, as well as whether accommodations pose an “undue hardship,” but courts have discussed third-party costs without even mentioning the possibility of third-party benefits.¹⁷⁹ And under the IDEA, courts neglect the potential benefits a disabled child may bring to the classroom, viewing the transfer of benefits to go only one way.¹⁸⁰ The way people commonly think about disability as so profoundly and universally negative seems to limit courts’ capacity to see the potential benefits of accommodation and of disability to the integrated setting.¹⁸¹

A parallel phenomenon may be operating in the tendency of institutional diversity initiatives to leave disability out. Disability is understood more in terms of compliance with regulatory requirements, rather than as a category ripe for improving the workplace culture through integration.¹⁸² Again, decisionmakers are neglecting the potential for benefits.

C. Behavioral Dynamics

1. Legal and Social Demands for Explicit Dialogue within a Culture of Silencing

The peculiar drama of my life has placed me in a world that by and large thinks it would be better if people like me did not

¹⁷⁹ Emens, *supra* note 177, at 869–72.

¹⁸⁰ See, e.g., Sacramento City Unified School District v. Rachel H., 14 F.3d 1398, 1400–01 (9th Cir. 1994); Yaron Covo, *Reversing Reverse Mainstreaming*, 75 STAN. L. REV. (forthcoming 2023) (documenting how legal decisionmakers have systematically upheld educational practices that are built on the premise that disabled students benefit from exposure to nondisabled peers, without recognizing the ways in which disabled students and disability culture may benefit nondisabled students).

¹⁸¹ The focus on the costs of disability and accommodation likely contributes to the perspective of those who read the ADA’s Title I as doing something wholly different from Title VII of the Civil Rights Act of 1964, despite the overlap (which Christine Jolls and Michael Stein have so deftly demonstrated). See Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 666–68 (2001); Stein, *supra* note 178, at 636–38.

¹⁸² See, e.g., Lauren Shallish, “Just How Much Diversity Will the Law Permit?”: *The Americans with Disabilities Act, Diversity, and Disability in Higher Education*, Vol. 35 DISABILITY STUD. Q., No. 3 (2015) (discussing how discourse surrounding disability of university campuses centers on legal compliance rather than on diversity, equity, and inclusion); Lennard Davis, *Why Is Disability Missing from the Discourse on Diversity?*, CHRON. HIGHER EDUC. (Sept. 25, 2011), <https://www.chronicle.com/article/why-is-disability-missing-from-the-discourse-on-diversity/> (writing that “colleges rarely think of disability when they tout diversity”); Emens, *Disabling Attitudes*, *supra* note 20, at 228 (arguing that “the persistence of a clear hierarchy of nondisabled over disabled also contributes to the frequent omission of disability from corporate and academic ‘diversity’ initiatives”)

exist. My fight has been for accommodation, the world to me and me to the world.

– Harriet McBryde Johnson¹⁸³

Not only do law and policy require *perceiving* disability; they also require *talking* about disability. And yet, in this culture, social norms discourage speaking about disability—even deeming it a shameful topic to be avoided. Disability scholars and other writers describe the way children are shushed by their parents when they try to ask questions about disability.¹⁸⁴ The message conveyed by such silencing of a child’s curiosity is that talking about disability is wrong, even shameful, in some way.

This culture of silence surrounding disability runs headlong into the demands of the law: for instance, under the ADA, of an “interactive process” around disability accommodations in the workplace;¹⁸⁵ and, under the IDEA, of meetings of parents with teachers, administrators, therapists, and others to devise Individual Education Programs for children with disabilities.¹⁸⁶ Conversations about disability may also be necessary in social settings, for instance, to facilitate access to a private home for someone who uses a wheelchair, given how often private homes lack basic accessibility features.¹⁸⁷

One reason that, in contrast to the curiosity of children, nondisabled adults are often reluctant to talk about disability is they may well get things wrong. This brings us to the next dynamic.¹⁸⁸

2. *The Irony Attempts to Do Right by Disability*

Nondisabled individuals may actually be perceived by disabled people, therefore, as expressing negative attitudes when, in fact, the nondisabled persons are trying hard to express what they consider to be positive attitudes. . . . Thus

¹⁸³ Harriet McBryde Johnson, *Unspeakable Conversations*, N.Y. TIMES MAG. (Feb. 16, 2003).

¹⁸⁴ See, e.g., Tollifson, *supra* note 56, at 105–06 (“I’m missing my right hand and half of my right arm. . . . People swallow their curiosity and conceal their discomfort One of the central memories of my childhood is of children asking me what happened to my arm and the adults instantly silencing them: ‘ssshhhhhh!’ Taboo.”); SIMI LINTON, MY BODY POLITIC 29–30 (2007).

¹⁸⁵ 29 C.F.R. § 1630.2(o)(3) (1991); U.S. EQUAL EMP. OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, Notice No. 915.002, (Oct. 17, 2002).

¹⁸⁶ Individuals with Disabilities Education Act, 20 U.S.C. § 1414(d)(1)(A) (2016).

¹⁸⁷ The so-called “visitability movement” advocates for basic features of accessibility in private homes. See, e.g., *Visitability*, NAT’L COUNCIL ON INDEP. LIVING, <http://www.visitability.org> (last visited Feb. 14, 2021); accord Jordana L. Maisel, Eleanor Smith & Edward Steinfeld, *Increasing Home Access: Designing for Visitability*, AARP PUB. POL’Y INST. (2008), http://assets.aarp.org/rgcenter/il/2008_14_access.pdf; Emens, *Intimate Discrimination*, *supra* note 88, at 1394–96.

¹⁸⁸ Another example of how outsiders get disabilities wrong arises in the earlier Section on the misperception of suffering. See *supra* Section II.A.3.

the paradox of well-intentioned liberalism is that the recipient frequently experiences the interaction as offensive.

– Elaine Makas¹⁸⁹

Perhaps even more remarkable is this final dynamic: nondisabled people often get it more wrong when they are trying to get it right around disability. In a fascinating study of attitudes to disability, Elaine Makas compared a general sample of nondisabled people with a group of nondisabled people identified as having “good attitudes” towards disability by their disabled peers.¹⁹⁰ Subjects reported their attitudes to disability in general and under “fake well” conditions. (The fake-well condition was created by telling them to answer as if they were entering a contest with a prize for the most disability-positive answers.) Makas also asked disabled respondents the same questions to find out what attitudes they deemed positive.

What was most striking was that the general pool of nondisabled people sometimes did *worse* in the fake-well condition.¹⁹¹ When they were trying to impress someone with their positive attitudes to disability, these nondisabled people demonstrated less positive attitudes—by the lights of the disabled participants. For example, in the fake-well condition, these nondisabled subjects were even more inclined to favor attitudes that Makas calls “Give the Disabled Person a Break” (such as agreeing with the statement, “Generally, it’s a good idea not to try to win a game when competing with a physically disabled person”) and the “Disabled Saint” perspective (such as agreeing with the statement, “Disabled people are generally easier to get along with than nondisabled people”).¹⁹²

This suggests that we need something more than good intentions. Though reasonable minds could disagree about the best attitudes toward disability, it is significant that nondisabled people’s answers got *further* from the responses that disabled individuals, on average, thought were best on multiple items. Making an effort to get it right is not enough and, without more, may even be counterproductive.

D. *Existential Dynamics*

1. *Existential Anxiety in the Face of Universal Vulnerability*

[V]ulnerability is—and should be understood to be—universal and constant, inherent in the human condition. . . . Our embodied humanity carries with it the ever-constant

¹⁸⁹ Makas, *supra* note 99, at 58.

¹⁹⁰ *Id.* at 53–54.

¹⁹¹ *Id.* at 54–55.

¹⁹² *Id.* at 55.

possibility of dependency as a result of disease, epidemics, resistant viruses, or other biologically-based catastrophes.

– Martha Albertson Fineman¹⁹³

We all could become disabled, in an instant or a few long months, in ways that we are not currently. If we are able-bodied, a car accident could change that in a moment. If we are able-minded, a traumatic event could leave us with flashbacks. And more mundane events, or non-events, could form the transition into living with disabilities that we do not presently have. More generally, all of us who are lucky enough to live that long will eventually acquire disabilities new to us—hence some nondisabled people’s embrace of the identity “not yet disabled.”¹⁹⁴ No one lives entirely apart from disability; vulnerability is universal.

Given our common vulnerability, why is disability law not widely understood as a social insurance policy for everyone? Why does everyone not feel a profound stake in building a deep and welcoming integration of people with disabilities into the mainstream of workplaces and homes and public and private institutions of every sort? If everyone could potentially benefit from that integration sooner or later, in concrete and obvious ways as disabled persons, then why does everyone not readily support disability rights and integration?¹⁹⁵

This is a puzzle. It is a puzzle with implications for important questions in law and policy, as well as our individual interactions. This question of course intersects with the question of who is a discrete and insular minority, following footnote 4 of *Carolene Products*,¹⁹⁶ and John Hart Ely, who suggested that people with disabilities should not need heightened constitutional protection because they should be able to secure empathy from others because of commonalities of circumstance.¹⁹⁷ These commonalities may well have helped get the Americans with Disabilities Act passed, but they were not enough to get the statute implemented

¹⁹³ Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9 (2008).

¹⁹⁴ See, e.g., *supra* note 145 (citing sources) and accompanying text.

¹⁹⁵ The argument that nondisabled people should support disability rights out of self-interest, rather than moral imperative, has been critiqued in important ways, which are beyond the scope of this Article. For discussion, see Emens, *Integrating Accommodation*, *supra* note 177, at 916–19.

¹⁹⁶ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see also Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 500–03 (2004) (explaining the evolution of the term “discrete and insular minorities” through our jurisprudence).

¹⁹⁷ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 150 (1980) (suggesting that people in general, including “elected officials,” are likely “to feel sorry for a person disabled by something he or she can’t do anything about”). For a response to Ely’s characterization of disability as meriting pity, see Elizabeth F. Emens, *Against Nature*, 52 NOMOS 293, 322 (2012) (noting the pervasiveness in the legal scholarship of the hasty “assumption” that disability is “an unappealing category that one necessarily wants out of” and that one would “cure” if one had the choice).

effectively; instead, the law met backlash in the courts.¹⁹⁸ These commonalities may also have helped the passage of the ADA Amendments Act (ADAAA), but they have not been enough to increase employment for people with disabilities, even with the ADAAA in place. Instead, employment rates for people with disabilities have remained stable and, by some measures, even dropped.¹⁹⁹

This puzzle is one that disability scholars have long been studying. A core concept emerging from that work is *existential anxiety*. This term, coined by Harlan Hahn, quoted in an earlier epigraph,²⁰⁰ refers to the anxiety sparked by the presence of a disabled person because, for the outsider who does not have that disability, the disabled person represents “the threat of potential loss of functional capabilities by the nondisabled.”²⁰¹ Existential anxiety, as conceived by Hahn, is typically unconscious, but Hahn’s account of the internal monologue that represents its conscious form limns the underlying logic: “[T]here, but for the grace of God (or luck or fate or other fundamental beliefs), go I” and “I would rather be dead than live as a paraplegic (or as blind, deaf, or immobilized).”²⁰² This notion of “better dead than disabled” effectively captures the stakes of the anxiety that disabled people may spark in people without that disability.²⁰³

The impact of this may be social distancing and the negative attitudes to disability documented in the empirical literature.²⁰⁴ It may also fuel the “selective sympathy and indifference” that helps us understand why markets

¹⁹⁸ See, e.g., Waterstone, *supra* note 19, at 844–48.

¹⁹⁹ See, e.g., Jennifer Bennett Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 MINN. L. REV. 1099, 1111 n.56 (2017) (citing sources); Bagenstos, *supra* note 171, at 455–56.

²⁰⁰ See Hahn, *supra* note 127 and accompanying text.

²⁰¹ *Id.* at 42.

²⁰² *Id.*

²⁰³ This overlaps also with psychodynamic theories of prejudice and the idea that dominant groups distance themselves from what they most dislike or feel ashamed of in themselves by locating it on other groups; for instance, Delgado et al. write,

Some theorists assert that the differences most disliked by the prejudiced person are those he unconsciously recognizes as potential characteristics of himself. This is particularly true of “sins of the flesh”—lechery, laziness, aggression and slovenliness, traits prejudiced individuals often ascribe to the Black. Similarly, the sins of pride, deceit, unsocialized egotism and grasping ambition are often ascribed to the Jew. The traits ascribed to blacks reflect our “id” impulses; the traits ascribed to Jews, violations of our “superego,” or conscience. Thus, “our accusations and feelings of revulsion against both groups symbolize our dissatisfaction with the evil in our own nature.”

Delgado et al., *supra* note 25, at 1377 (citing ALLPORT, *supra* note 25, at 199; LEONARD BERKOWITZ, *AGGRESSION: A SOCIAL PSYCHOLOGICAL ANALYSIS* 142, 145–47 (1962); John Harding, Harold Proshansky, Bernard Kutner & Isidor Chein, *Prejudice and Ethnic Relations*, in 5 *HANDBOOK OF SOCIAL PSYCHOLOGY* 1, 35 (Gardner Lindzey & Elliot Aronson eds., 1969); T.W. ADORNO, ELSE FRENKEL-BRUNSWIK, DANIEL J. LEVINSON & R. NEVITT SANFORD, *THE AUTHORITARIAN PERSONALITY* (1969); NATHAN W. ACKERMAN & MARIE JAHODA, *ANTI-SEMITISM AND EMOTIONAL DISORDER: A PSYCHOANALYTIC INTERPRETATION* (1950)).

²⁰⁴ See *supra* notes 11–12 and accompanying text.

will not simply stop disability discrimination on their own even if many disability accommodations are cost-justified.²⁰⁵ Selective sympathy is a term to describe the way that employers and others may inadvertently disfavor employees with disabilities, in the absence of a disability accommodation requirement, by granting special requests for nondisabled employees (say, to leave early for a child's sports event) while refusing to grant the requests of disabled employees related to a disability (say, to leave early for therapy). Feeling distance and anxiety, rather than kinship and connection, around the fact of vulnerability may support such differential identification.

The epigraph from Martha Fineman, like the earlier one from Harlan Hahn, emphasizes anxiety about physical disability—through words like “embodied” and “biologically based.”²⁰⁶ Fear of our vulnerable minds, however, is possibly even more intense than fear of our vulnerable bodies, as Sander Gilman has argued. In Gilman's words,

[T]he most elementally frightening possibility is the loss of control over the self, and loss of control is associated with loss of language and thought perhaps even more than with physical illness. Often associated with violence (including aggressive sexual acts), the mad are perceived as the antitheses to the control and reason that define the self. Again, what is perceived is in large part a projection: for within everyone's fantasy life there exists . . . an incipient madness that we control with more or less success.²⁰⁷

This fear of the madness within, according to Michael Perlin, fuels the “sanism” so prevalent in our society.²⁰⁸ (To take in one measure of sanism, think of how often the epithet “crazy” is used, when few people would think of using parallel epithets for race or even for physical disability.²⁰⁹) Sanism,

²⁰⁵ Cf. Bagenstos, *Rational Discrimination*, *supra* note 27, at 853–54 (explaining “selective sympathy and indifference” as “when the decisionmaker would not engage in the same action, however rational, were the racial identity of the disadvantaged class different. This holds true whether or not the decisionmaker knows that he is being racially selective”); Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 SOC. PHIL. & POL'Y 22, 29 (1991) (arguing that, even in the absence of employer animus, discrimination may persist in free markets); Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 88, 108–09 (2003) (dividing accommodations into categories based on the production of “hard” and “soft” net costs and benefits); Helen A. Scharztz, D.J. Hendricks & Peter Blanck, *Workplace Accommodations: Evidence Based Outcomes*, 27 WORK 345, 348 (2006) (finding in a study of employers that contacted the Job Accommodation Network about accommodations that in almost half of the cases “employers reported that there was zero direct cost associated with the accommodation”).

²⁰⁶ See *supra* text accompanying note 193.

²⁰⁷ SANDER L. GILMAN, *DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE, AND MADNESS* 23–24 (1985).

²⁰⁸ Michael L. Perlin, *On “Sanism,”* 46 S.M.U. L. REV. 373 (1992).

²⁰⁹ E.g., Rachel Ewing, *“That's Crazy”: Why You Might Want to Rethink That Word in Your Vocabulary*, PENN. MED. NEWS (Sept. 27, 2018), [Error! Hyperlink reference not](#)

in this understanding, operates much like homophobia, in that a fear of one's own vulnerability spurs a resistance to a person who represents that vulnerability.²¹⁰ The analogy to homophobia may also be helpful in understanding existential anxiety more generally.

Existential anxiety is typically understood in terms of nondisabled people's reactions to disability. But this dynamic may also underpin the reluctance of some people with disabilities to identify as disabled. The ethicist Adrienne Asch was particularly interested in the problem of this disidentification, because, *inter alia*, the coalition of disabled people would be huge were everyone to show up for it.²¹¹ She wanted work in disability studies "to emphasize the '95 percent' of people with disabilities whose impairments were 'nonstatic,' 'intermittent,' and 'associated with disease' or 'age'—impairments like diabetes, hypertension, emphysema, and back problems."²¹² As Katie Eyer has importantly argued, elaborating and theorizing this theme of "claiming disability," given that at least 25% of people have disabilities,²¹³ that is a big tent.²¹⁴ And yet that coalition is elusive—and people without disabilities often keep their distance from disabled folks—leaving everyone with less of a safety net surrounding our universal human vulnerability.

* * *

The epigraph at the start of this Part not only explains the particular phenomenon of existential anxiety; Hahn's words also illuminate the complex interplay of conscious and unconscious beliefs and fears that contribute to the social distance nondisabled people often create around people with disabilities. The classic formulation he invokes—"I would rather be dead than [disabled]"—points us toward a fundamental resistance embedded in the response to disability: our desperate struggle to un-know some basic realities of life, change, and death.²¹⁵ As Hahn writes, facing

valid. <https://www.pennmedicine.org/news/news-blog/2018/september/that-crazy-why-you-might-want-to-rethink-that-word-in-your-vocabulary>.

²¹⁰ Perlin, *supra* note 208, at 388–98.

²¹¹ Emens, *What's Left in Her Wake*, *supra* note 167, at 20.

²¹² *Id.*

²¹³ Okoro et al., *supra* note 1515.

²¹⁴ Eyer, *Claiming Disability*, *supra* note 133, at 564–65. Eyer measures the prevalence of "impairment," as defined in 29 C.F.R. § 1630.2(h)(2020), in American society at meaningfully higher rates:

Impairment is ubiquitous in our society. 60% of American adults have a chronic physical or mental condition, such as diabetes, heart disease, or depression. 42% have multiple chronic conditions. Approximately 46% of Americans will experience mental illness in their lifetime, 38% will experience cancer, and 40% will experience diabetes. Mobility, hearing, vision, and cognition impairments all affect significant numbers of American adults. By the numbers, those with impairments are no minority but are likely the majority of the American population.

Id. (sources omitted).

²¹⁵ Hahn, *supra* note 127, at 43.

those facts, “[i]n fact, the threat of a permanent and debilitating disability, with its resulting problems, can even outrank the fear of death, which is, after all, inevitable.”²¹⁶ An enhanced capacity for facing the inevitable is a fundamental part of what meditation offers us, in life and in debiasing. This brings us to our discussion of the possible mechanisms by which meditation may help to combat discrimination.

III. MECHANISMS OF DEBIASING

Adrienne [Asch] spoke in recent years about writing a book based on interviews with nondisabled people who “get it” with regard to disability. . . . Over the years, she gave glimpses into what she thought prepared a nondisabled person to get it: Such a person has to be comfortable enough not knowing all the answers and not being in control at all times. A person who gets it responds to his own confusion or ignorance about the ways of a disabled person by thinking, “I don’t actually know how X is going to do Y, but I’ll take his word for it that he can and see what happens.” A person who gets it, as Adrienne portrayed him or her, is inclined to “see life as an adventure.”

– *What’s Left in Her Wake: In Honor of Adrienne Asch*²¹⁷

If meditation does decrease bias, why might that be? What might be the mechanism for debiasing? This Section draws on research and writing in disability studies and mindfulness studies to identify the most promising mechanisms. Though the extant literature points to some possible mechanisms, we are far from zeroing in on any one driver. This Part is therefore exploratory and experimental, inviting the reader to imagine and to test out the possibilities offered, for their fit with reason and experience, throughout.

The mechanisms are again organized under the rubrics of Emotional, Cognitive, Behavioral, and Existential. As noted earlier, the distinctions between these categories—particularly between cognitive and emotional—are somewhat artificial, as these mechanisms often operate at the intersection.²¹⁸ But the rubrics are nonetheless helpful to create order out of complexity, an effort further supported by a chart at the end of this Part showing connections between the dynamics and the mechanisms. The typology of possible mechanisms herein lays the groundwork for an examination of the implications for law and society in Part IV.

²¹⁶ *Id.*; see *infra* note 288 (quoting Tollifson on death and disability).

²¹⁷ Emens, *What’s Left in Her Wake*, *supra* note 167, at 19–20.

²¹⁸ See *supra* note 131 and accompanying text.

A. *Emotional Mechanisms*

White people in this country will have quite enough to do in learning how to accept and love themselves and each other, and when they have achieved this—which will not be tomorrow and may very well be never—the Negro problem will no longer exist, for it will no longer be needed.

– James Baldwin²¹⁹

What James Baldwin writes about racism in the epigraph casts a light on the relevance of self-love and universal love in the problem of discrimination. This is no less true of disability than of race. Indeed, the *self-love* piece may be even more resonant in the context of disability, where we could all become people with disabilities that we currently do not have—so disability bias may be, in an even more direct sense, bias against ourselves.

Emotions toward others are also important here, and this Section begins by examining mechanisms that involve compassion and feelings of interconnectedness with others. The Section ends by considering some feeling states that meditation may influence, for instance, by reducing stress or fear.

1. *Emotions Toward Others: Increased Outward Compassion and Openness*

By identifying and creating personal, interpersonal and systemic teachings and practices which increase and deepen experiences of interconnection across lines of real and perceived difference, Mindfulness-Based ColorInsight Practice increases our actual capacities not only for acting in less biased ways, but also for making more authentic, positive and effective cross-race relationships in these re-segregated times.

– Rhonda Magee²²⁰

The emotions toward others that meditation may help to cultivate, which could help reduce disability discrimination, encompass multiple elements. As noted earlier, the distinctions drawn in this Part of the Article—between emotional and cognitive or behavioral mechanisms, for instance—are in many ways artificial. The epigraph from Rhonda Magee nicely displays that point, since her understanding of how mindfulness can help to debias along race lines brings together components of insight (cognitive), actions that are less biased and relationship-building across race (behavioral), and authentic and positive feelings of interconnectedness (emotional). This Section will

²¹⁹ James Baldwin, *Letter from a Region in My Mind*, NEW YORKER (Nov. 10, 1962), <https://www.newyorker.com/magazine/1962/11/17/letter-from-a-region-in-my-mind>.

²²⁰ Magee, *How Mindfulness Can Defeat Racial Bias*, *supra* note 37.

nonetheless emphasize and attempt to parse the outward-directed emotional elements of how meditation could help with debiasing around disability.²²¹

a) *Feelings of interconnectedness.* One possible emotional mechanism is to increase feeling of interconnectedness through meditation. Many mindfulness teachers talk about the emotional experience of connection that can come through meditation.²²² Ethan Nichtern contrasts the typical way we go through our lives in Hobbesian terms—“scared, separate, and selfish”—with the emotional orientation he suggests is possible through meditation—of feeling “courageous, compassionate, and connected.”²²³

As discussed, disability discrimination is subject to a puzzling dynamic whereby we could all become disabled at any time in ways we are not currently, and yet this seems not to bring us together but to push us apart.²²⁴ Recognizing our interconnectedness, not just in an intellectual sense but in a felt sense, could be an avenue to overcoming that dynamic.²²⁵ This might help overcome the “Us” and “Them” that divides people across the lines of stigma,²²⁶ fear,²²⁷ and “aesthetic anxiety.”²²⁸

The type of meditation that might first come to mind for increasing feelings of interconnectedness, among those who study meditation, is so-called lovingkindness meditation. This meditation is a concentration practice in which the practitioner, rather than focusing on the breath or some other anchor, focuses on a series of phrases of well-wishing to near or far others, as well to oneself, and all people.²²⁹ And some research does support the intuition that lovingkindness practice improves positivity toward neutral strangers and enhances feelings of interpersonal connection.²³⁰ But there is also research suggesting that the basic mindfulness meditation practice can

²²¹ Freshman and colleagues draw a useful distinction between internal and external mindfulness. See Freshman et al., *supra* note 37, at 286.

²²² See, e.g., JON KABAT-ZINN, *Interconnectedness*, in *WHEREVER YOU GO THERE YOU ARE: MINDFULNESS MEDITATION IN EVERYDAY LIFE*, at xv (10th anniversary ed. 2005); SHARON SALZBERG, *REAL LOVE* 3–4 (2017) [hereinafter SALZBERG, *REAL LOVE*].

²²³ ETHAN NICHTERN, *THE ROAD HOME: A CONTEMPORARY EXPLORATION OF THE BUDDHIST PATH* 183–90 (2015). On the Hobbes reference, see THOMAS HOBBS, *LEVIATHAN* 97 (Oxford 1909) (1651) (classifying human life as “solitary, poore, nasty, brutish, and short”).

²²⁴ See *supra* Section II.D.1.

²²⁵ Cf. Harris, *supra* note 29, at 940–41 (discussing the tendency in disability law to focus on cognitive mechanisms and overlook the emotional and aesthetic dimensions that may constitute “sticky norms”).

²²⁶ See *supra* note 173 and accompanying text.

²²⁷ See *supra* Section II.A.1.

²²⁸ See *supra* Section II.A.2.

²²⁹ It takes many forms, and often involves all beings—thus including animals and perhaps plants—but this is a general description of a basic practice. For discussion and sources, see *supra* note 70.

²³⁰ Cendri A. Hutcherson, Emma M. Seppala & James J. Gross, *Loving-Kindness Meditation Increases Social Connectedness*, 8 *EMOTION* 720, 723 (2008) (finding that lovingkindness meditation increases implicit and explicit positivity toward neutral strangers); Kang et al., *supra* note 71, at 1306 (citing Hutcherson et al., *supra*, and other studies).

increase feelings of empathy or interconnectedness, even without any specific instructions or phrases targeting affective affinities.²³¹

b) Compassion. A related in-road is the cultivation of compassion. In one striking study, described earlier, new practitioners of mindfulness meditation were more than twice as likely as non-meditators to offer their seat in a waiting room to a person apparently struggling on crutches.²³²

Empathy is often touted as a positive step toward intergroup relations, but affective empathy—in the sense of feeling what the other person is feeling—can have some downsides. For instance, over time, burnout can accompany sharing the emotions of those in great distress; this can be an occupational hazard for those in frontline jobs like firefighting, healthcare, or human rights work.²³³ Research suggests that meditation can help to cultivate compassion rather than empathy, enhancing a person’s ability to be present for another person’s emotions without being overcome with feeling them directly.²³⁴

The distinction between compassion and empathy is not simple to understand or describe. It seems to lie in the difference between being fully present to another person’s feelings with a desire to help (whether or not that is possible), which is compassion, as opposed to feeling the other’s feelings, which is empathy.²³⁵ Ricard, Lutz, and Davidson explain the distinction in this way:

If a child is hospitalized, the presence of a loving mother at his side holding his hand and comforting him with tender words will no doubt do that child more good than the anxiety of a mother overwhelmed with empathetic distress who, unable to

²³¹ See, e.g., Paul Condon, Gaëlle Desbordes, Willa B. Miller & David DeSteno, *Meditation Increases Compassionate Responses to Suffering*, 24 PSYCHOL. SCI. 2125, 2127 (2013) (reporting on an experimental study finding that “meditation directly enhanced compassionate responding” and those “participants practicing mindfulness meditation were as likely to aid the sufferer as were those practicing compassion meditation”).

²³² See, e.g., Lim et al., *supra* note 100 (noting that 37% of meditating participants gave up their seats compared to 16% of the passive control group).

²³³ See, e.g., Sarah Knuckey, Margaret Satterthwaite & Adam Brown, *Trauma, Depression, and Burnout in the Human Rights Field: Identifying Barriers and Pathways to Resilient Advocacy*, 49 COLUM. HUM. RTS. L. REV. 267, 279–88 (2018) (summarizing studies on PTSD and mental health issues in people regularly exposed to trauma at work).

²³⁴ See, e.g., Ricard et al., *supra* note 106, at 44 (explaining that experienced lovingkindness practitioners were better at sharing other peoples’ feelings without becoming subsumed or overwhelmed by them); see also SALZBERG, REAL LOVE, *supra* note 222, at 214–17 (citing Tania Singer); Lim et al., *supra* note 100, at 6 (finding that regular meditation increased prosocial behavior without necessarily increasing empathy).

²³⁵ See Ricard et al., *supra* note 106, at 44 (describing a study finding that subjects who practiced meditation centered on compassion for a week experienced “more positive and benevolent feelings” in response to “video clips showing suffering people,” whereas subjects who “devoted a week to an experimental regimen that just cultivated empathy” also “experienced emotions that resonated deeply with others’ sufferings” but in addition this group “experienced more distress, sometimes to the point of not being able to control their emotions”).

bear the sight of her sick child, paces back and forth in the hallway. In the latter case, the mother may then end up with the common experience of burnout, which, in one U.S. study, beset about 60 percent of the 600 caregivers surveyed.²³⁶

The cultivation of the feeling of compassion may enable connections and emotional presence even in the face of suffering or, as is sometimes the case with disability, *perceived* suffering.²³⁷

2. *Emotions Toward Oneself: Increased Compassion and Acceptance*

In the course of my practice, my biggest lesson has been how to open my heart and be aware of how I am feeling. I have learned to allow my pain to be what it is, honor it, and be gentle with myself and whatever faults I perceive. From that place, my world—my capacity for compassion, gentleness and clarity—has opened itself up before me.

– angel Kyodo williams²³⁸

*I am larger, better than I thought,
I did not know I held so much goodness.*

– Walt Whitman²³⁹

These lines from williams and Whitman assert the power and significance of generosity toward oneself, of inward compassion and acceptance. The earlier lines from James Baldwin, in the epigraph at the start of this whole Section, make the leap from that power to the battle against discrimination: In Baldwin’s words, the problem of discrimination against African-Americans will end when “White people in this country . . . learn[] how to accept and love themselves and each other.”²⁴⁰ Baldwin does not suggest this will be easy or quick; rather he suggests that “White people . . . will have quite enough to do” and that their “achieve[ment]” of this “will not be tomorrow and may very well be never.”²⁴¹ Self-love is not easy—and, by extension, neither is love of one’s own kind—Baldwin tells us. And its absence causes us to create hierarchies and put others down. Baldwin is writing about race, but these points could be applied to the various status

²³⁶ *Id.* at 44.

²³⁷ *See supra* Section II.A.3.

²³⁸ WILLIAMS, *supra* note 37, at 8.

²³⁹ Walt Whitman, *Song of the Open Road*, POETRY FOUND., <https://www.poetryfoundation.org/poems/48859/song-of-the-open-road> (last visited Mar. 14, 2021); *see also* SHARON SALZBERG, THE FORCE OF KINDNESS: CHANGE YOUR LIFE WITH LOVE & COMPASSION 15 (2005).

²⁴⁰ Baldwin, *supra* note 219.

²⁴¹ *Id.*

hierarchies we create as humans, including of nondisabled over disabled.

Another way that increasing self-compassion and self-acceptance could help reduce discrimination would be by helping us to become more *willing* to see our own biases. Mindfulness “allows one to focus on the present moment: noticing thoughts, bodily sensations, and environmental cues in a nonjudgmental and compassionate way,” which “is critical to managing implicit bias as it increases contact with thoughts and sensations that are often fleeting and unnoticed.”²⁴² Becoming aware of one’s internal experience can be aversive; knowing that you think thoughts or have feelings that are discriminatory can feel terrible. Unless people have the emotional resources to face those inner truths, they will have a hard time recognizing the fact of discrimination. This is likely to be true for disability, which hits close to home for most people,²⁴³ as well as for race.

These points taken together may be why one study finds that mindfulness meditation paired with perspective-taking exercises—in which younger people try to inhabit the perspective of an older person—more effectively reduces old-age bias than perspective-taking alone.²⁴⁴ The mindfulness may help a person live with the feeling of seeing the world—and seeing themselves—through the other person’s eyes.

3. *Feeling States: Decreased Stress, Anger, and Fear*

Meditation could also reduce negative emotions that contribute to negative attitudes or behavior toward people with disabilities. Stress, anger, and fear are negative emotional states that may fuel discrimination and, research suggests, can be reduced by mindfulness meditation.²⁴⁵

²⁴² Jovonnie Esquierdo-Leal, Nicole Jacobs & Shanna Strauss, *Prejudice in the Health Care System: Remediation Strategies*, in PREJUDICE, STIGMA, PRIVILEGE, AND OPPRESSION: A BEHAVIORAL HEALTH HANDBOOK 337, 348 (2020) (“Moreover, the nonjudgmental treatment of these thoughts can promote productive behavior (e.g., identifying how those thoughts came about and what can be done to ensure they are not harmful) and reduce less productive behavior (avoidance and negative thought suppression).”).

²⁴³ See Okoro et al., *supra* note 15 (citing statistics on the prevalence of disability).

²⁴⁴ Edwards et al., *supra* note 68, at 1619–20; see also Lillis & Hayes, *supra* note 66, at 406–07 (finding that an “acceptance” approach, emphasizing acceptance of one’s own difficult emotions, worked better than traditional race-bias classroom training).

²⁴⁵ See, e.g., Gunes Sevinc, Britta K. Hölzel, Jonathan Greenberg, Tim Gard, Vincent Brunsch, Javeria A. Hashmi, Mark Vangel, Scott P. Orr, Mohammed R. Milad & Sara W. Lazar, *Strengthened Hippocampal Circuits Underlie Enhanced Retrieval of Extinguished Fear Memories Following Mindfulness Training*, 86 BIOLOGICAL PSYCHIATRY 693, 700 (2019) (citations omitted) (“The current results, together with previously reported morphological differences between meditators and nonmeditators, suggest hippocampal-dependent changes in contextual retrieval as one plausible mechanism through which mindfulness-based interventions regulate affective response, foster stress resilience, curtail susceptibility to anxiety, and improve emotion regulation, while also advocating a novel way to enhance fear extinction.” (citations omitted)); Yi-Yuan Tang, Britta K. Hölzel & Michael I. Posner, *The Neuroscience of Mindfulness Meditation*, 16 NATURE REV. NEUROSCIENCE 213, 218 (2015) (reporting, in a literature review, on findings of “various positive effects of mindfulness meditation on emotional processing, such as a reduction in emotional interference by unpleasant stimuli, decreased physiological reactivity and facilitated return to emotional baseline after response to a stressor

Schimchowicz and Rohmer hypothesize that a more positive affect state coupled with a present-moment orientation (discussed above under cognitive mechanisms) could help reduce negative responses to disability.²⁴⁶ Specific negative emotions might also dovetail with particular responses to disability, and thus their reduction could help in particular ways. For instance, reduced stress might make room for more patience to notice particular features of a person’s abilities and impairments—and thus counteract the totalizing assessments associated with stereotypes and the spread effect.²⁴⁷ Reduced fear might help ameliorate social distancing and stigma, particularly for disabilities that suffer from stereotypes of dangerousness, such as mental illness,²⁴⁸ or aesthetic-based fear responses.²⁴⁹ And reductions in anger might help enable constructive dialogue and interactions that build relationships.²⁵⁰ This final point connects to Section C on behavioral mechanisms, but first we turn to an important set of cognitive mechanisms.

B. Cognitive Mechanisms

1. *Clearer Seeing of Others: Increased Attention to Current Facts Rather than Stereotypes or Past Frames*

We are all in such pain, trying to do the right thing, trying not to ask the wrong questions, trying to pretend everything is okay. If we need anything in this world, it’s honest seeing and

film, and decreased self-reported difficulties in emotion regulation. Consequently, lowered intensity and frequency of negative affect and improved positive mood states are reported to be associated with mindfulness meditation. . . .” (citations omitted)); Kang et al., *supra* note 71, at 6 (“Previous research has revealed that [Implicit Association Test] scores can be artificially elevated by stress and anxiety. Thus, one way that practicing lovingkindness meditation might reduce implicit bias is by diminishing stress. Indeed, decreases in stress mediated the effect of lovingkindness meditation on implicit bias toward the homeless people.” (citations omitted)).

²⁴⁶ Schimchowicz & Rohmer, *supra* note 77, at 646 (“[C]onsequently meditators could use affects as heuristics to deal with the present moment. Then, the generalised positive affective disposition of meditation practitioners could reduce the strength of past automatic association between disability and negativity. In addition, recent neuroimaging research evidenced that meditation practitioners exhibit significantly different neural responses in cognitive and affective brain circuitry than non-meditators.” (citations omitted)).

²⁴⁷ Kang et al., *supra* note 71, at 196; *see also* Diana Burgess, Michelle van Ryn, John Dovidio & Somnath Saha, *Reducing Racial Bias Among Health Care Providers: Lessons from Social-Cognitive Psychology*, 22 SOCIETY OF GENERAL INTERNAL MEDICINE 882, 884 (2007) (arguing that “stress and negative emotions may increase stereotyping” and “when time and circumstances allow, the use of stress-reducing techniques to enhance emotional well-being before patient encounters may help reduce racial bias”).

²⁴⁸ *See, e.g.*, Perlin, *supra* note 208; David DeSteno, Nilanjana Dasgupta, Monica Y. Bartlett & Aida Cajdric, *Prejudice from Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 PSYCH. SCI. 319, 323 (2004); Alkoby et al., *supra* note 73.

²⁴⁹ Harris, *supra* note 29; *supra* Section II.A.2.

²⁵⁰ *See, e.g.*, DeSteno et al., *supra* note 248, at 323; Alkoby et al., *supra* note 73.

speaking, and the ability to be with the actual truth (including flawed bodies, and flawed responses). That, to me, is love, and the heart of what meditative living is all about: realizing what actually is instead of being caught up in and entranced by what we think would be better.

– Joan Tollifson²⁵¹

Meditation helps us to attend more accurately to what is happening in the present moment.²⁵² Rather than rapidly assimilating new information to pre-existing categories or assumptions drawn from the past, the meditating mind perceives a more nuanced present-moment reality. In more technical terms, meditation has been found to “discontinue automatic inference processing shown in priming and stereotyping”²⁵³ or at least “minimise the impact of priming and the biased influence of past experience on thoughts and behaviour.”²⁵⁴ Though no study has definitely proven that this mechanism is driving debiasing,²⁵⁵ studies have found that mindfulness can inhibit automatic evaluations in other contexts²⁵⁶—for instance, “mindfulness reduced dieters’ automatic responses to attractive food, reduced problem solvers’ reliance on automatic solutions, and reduced the correlation between implicit alcohol attitudes and drinking behavior.”²⁵⁷

For disability discrimination, enhanced awareness of the present could mean the difference between viewing a disabled person through discrediting stereotypes and viewing the person with realistic attention to her strengths and limitations. In the words of Langer and colleagues,

If mindfulness became the more typical state, whereby the “normal” person were typically seen mindfully, it would prevent one characteristic from dominating the characterization of the individual. As such, global characteristics such as “disabled” could become more differentiated and may come to be specific such as “a person who cannot do X.” Context-specific competencies, and not only incompetencies, could become more apparent. For example, if one mindfully

²⁵¹ Tollifson, *supra* note 56, at 106.

²⁵² See, e.g., Peter H. Huang, *Boost: Improving Mindfulness, Thinking, and Diversity*, 10 WM. & MARY BUS. L. REV. 139, 173–82 (2018) (explaining that mindfulness decreases cognitive biases and improves decision-making); SALZBERG, *supra* note 70, at 11 (“Transformation comes from looking deeply within, to a state that exists before fear and isolation arise.”); Ricard et al., *supra* note 106, at 42 (“[F]ocused-attention meditation ... aims to tame and center the mind in the present moment while developing the capacity to remain vigilant to distractions.”).

²⁵³ Schimchowitsch & Rohmer, *supra* note 77, at 646 (citation omitted).

²⁵⁴ *Id.* (citations omitted).

²⁵⁵ Lueke & Gibson interpret their results in this way, but as noted, the study has several limitations. See *supra* note 65.

²⁵⁶ See Lueke & Gibson, *supra* note 67, at 284 (citation omitted).

²⁵⁷ *Id.* (citations omitted).

considered (or considered at all) a noisy environment, one would be more likely to realize that of several potential workers, a worker who is deaf would probably be the better job candidate. Similarly, if sitting for extended periods of time were of consequence, one confined to a wheelchair may be a more appropriate employee than one who needs to exercise his or her limbs. Undifferentiated global distinctions now mask these subtleties.²⁵⁸

Langer tendentiously refers to this as reducing prejudice by increasing discrimination.²⁵⁹ Whether one finds the rhetoric useful (and Langer's use of the phrase "confined to a wheelchair" is itself problematic²⁶⁰), the notion that perceiving more accurate details rather than assimilating information to preexisting categories speaks directly to some of the dynamics of disability discrimination discussed in Part II.

For instance, attending to the nuances of an individual disabled person's reality, rather than a pre-existing category of "disabled person" or "blind person," should reduce the spread effect—both because outsiders would do less generalizing from the category "disabled" and because they would see more clearly the reality of what the person could do and not do. This attention to present-moment reality should also facilitate a more accurate perception of others' suffering, whether it is greater or less than we might otherwise imagine it would be.²⁶¹ Moreover, seeing more clearly should also make it more possible to perceive the benefits of accommodation and of disability. The bias of perceiving disability through the lens of loss and cost leads to inaccurate views of disabilities and disabled individuals. As noted earlier, the cognitive and the affective are not so easily separated, and the epigraph highlights their interconnectedness in this sphere.

2. *Clearer Seeing of Oneself: Improved Awareness of One's Own Thoughts and Feelings*

The practice of watching the mind—of seeing clearly the operations of

²⁵⁸ Langer et al., *supra* note 85, at 114.

²⁵⁹ *Id.* at 119.

²⁶⁰ Note that the phrase "confined to a wheelchair" is generally disfavored as inaccurate by disability advocates, since wheelchair users do not stay in their wheelchairs constantly (contrary to the confinement of prisoners) and wheelchairs tends to create possibilities of mobility (rather than confinement) for their users. *See, e.g.*, Karin Willison, *Please Stop Saying "Wheelchair Bound,"* FREE WHEELIN' TRAVEL BLOG, <https://www.freewheelintravel.org/please-stop-saying-wheelchair-bound/> (last visited Mar. 1, 2021); *People First—Ensuring Equal Access for People with Disabilities*, 60 WASH. ST. B. NEWS 14 (2006) ("Use people first language: 'he uses a wheelchair.' Do not use 'wheelchair bound,' 'confined to a wheelchair'. Avoid negative or sensational descriptions of a person's disability.").

²⁶¹ For a discussion of the kinds of disabilities for which outsiders tend to underestimate, as opposed to overestimate, the associated suffering, *see supra* Section II.A.3.

one's own thoughts and feelings²⁶²—can reveal the stereotypes and attitudes that lurk within.²⁶³ Without appreciating our own biases, we can far too easily assume that problems of bias belong to someone else or belong in the past.²⁶⁴ Recognizing one's own biases—the fact that the voice in one's head can be different than we might hope, to paraphrase Dan Harris²⁶⁵—may be the first step to a willingness to make change at the individual, relational, or structural levels,²⁶⁶ but, at the very least, such recognition makes it harder to assert that such bias does not exist. Behavioral change may be more likely if awareness is coupled with tools for managing the difficult emotions that may accompany such awareness, which brings us to the next Section.

C. Behavioral Mechanisms

Between stimulus and response, there is a space. In that space lies our freedom and our power to choose our response. In our response lies our growth and our happiness.

– Attributed to Viktor Frankl²⁶⁷

The small body of empirical work finding meditation to have debiasing effects reports an impact not only on stereotypes and attitudes, but also on

²⁶² Perceiving one's emotions could be understood as an emotional process or a cognitive process; this is a fine example of the ways that the emotional and the cognitive are intertwined. This point is included under cognitive mechanisms because the emphasis here is on the mental faculty of perceiving thoughts as well as emotions; other Sections will discuss the experience of feeling emotions.

²⁶³ See Yoona Kang, June Gruber & Jeremy R. Gray, *Mindfulness and De-Automatization*, 5 EMOTION REV. 192, 194, 194–96 (2013) (explaining “[a]wareness is contrasted with automatized mental reactions. . . . Implicit stereotyping, for example, is a phenomenon in which automatized reactions occur outside of one's awareness. . . . A mindful individual may be more likely to notice when implicit stereotyping takes place, having accurate awareness of the nature of the bias. . . .”).

²⁶⁴ See, e.g., ROBIN DIANGELO, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM 3 (2018) (describing the author's experiences of White people who “simplistically reduced racism to a matter of nice people versus mean people” or who “appeared to believe that racism ended in 1865 with the end of slavery”).

²⁶⁵ See *supra* text accompanying note 43.

²⁶⁶ See, e.g., Jerry Kang, Hon. Mark W. Bennett, Devon W. Carbado, Pamela Casey, Nilanjana Dasgupta, David Faigman, Rachel D. Godsil, Anthony G. Greenwald, Justin D. Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1174 (2012) (“[L]earning about nonconscious thought processes can lead people to be more skeptical about their own objectivity.”); Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin & William T.L. Cox, *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCH. 1267, 1270 (2012) (finding reductions in implicit bias through an intervention that included increasing awareness of implicit bias as one mechanism).

²⁶⁷ This quotation is widely attributed to Frankl, author of *Man's Search for Meaning* (1946), but further investigation suggests it is probably not from him. See VIKTOR FRANKL INSTITUT, *Alleged Quote*, https://www.univie.ac.at/logo/therapy/quote_stimulus.html (last visited Mar. 23, 2022) (citing STEPHEN R. COVEY, *Foreword*, in PRISONERS OF OUR THOUGHTS: VIKTOR FRANKL'S PRINCIPLES FOR DISCOVERING MEANING IN LIFE AND WORK, at vi (2004)).

behavior and behavioral correlates. This Section considers what mechanisms might contribute to meditation's debiasing through behavioral change.

1. *Inserting a Pause: Reducing Reactive Speech and Actions*

A news article about one of the first school-based mindfulness programs reported on this definition of mindfulness from a young practitioner: Mindfulness means “not hitting someone in the mouth.”²⁶⁸ This quotation, coupled with the line attributed to Frankl in the epigraph, captures the idea of mindfulness as reducing reactivity and increasing self-control.²⁶⁹ Rhonda Magee refers to mindfulness practice as “Practicing ‘The Pause.’”²⁷⁰

The opportunity to pause before acting from instinct may present the possibility of making decisions—at work and elsewhere—based more on facts than stereotypes or negative attitudes about disability. This is a behavioral outgrowth of increased capacity for emotional self-regulation.²⁷¹ Another way of thinking about this is through the dual-process model of cognition. On this model, slowing down helps support decisionmaking through deliberative “System 2” cognition rather than the instinctive “System 1.”²⁷²

In practice, more deliberative decision-making could mean noticing an impulse not to choose a worker with a disability for a challenging assignment and making a different choice. Or it could mean recognizing selective sympathy in response to requests for flex time—and leveling the playing field.²⁷³ Or it might mean realizing that the disability bias in your own mind probably reflects a broader problem that requires structural responses in the workplace or other institutions.²⁷⁴

²⁶⁸ Patricia Leigh Brown, *In the Classroom, a New Focus on Quieting the Mind*, N.Y. TIMES (June 16, 2007), <https://www.nytimes.com/2007/06/16/us/16mindful.html> (quoting fifth grader, Tyran Williams).

²⁶⁹ Magee, *The Way of ColorInsight*, *supra* note 37, at 274 (quoting JON KABAT-ZINN, FULL CATASTROPHE LIVING: USING THE WISDOM OF YOUR BODY AND MIND TO FACE STRESS, PAIN, AND ILLNESS 49–50 (1990)).

²⁷⁰ MAGEE, INNER WORK, *supra* note 37, at 16–17.

²⁷¹ See *supra* note 125 and accompanying text.

²⁷² DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20–21 (2011); see also Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 39–42 (2007) (describing ways that judicial systems can be reformed to help judges make more deliberative decisions); Fogel, *supra* note 32, at 6 (offering his explanation of how mindfulness practice may help judges).

²⁷³ Cf. *supra* note 205 and accompanying text (describing selective sympathy and indifference).

²⁷⁴ On structural solutions, see generally Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1 (2004). For a critique of the limits of structural insight through meditation alone, see *infra* Section V.B.3.

2. *Instilling the Practice of Practice: Developing a Habit of Beginning Again*

The pause before action just described could lead to another step forward. The practice of meditation is also, however, the practice of beginning again. This means a willingness to start over, to go back to where you were, and to do so again and again. This is what prompted news anchor (and former war correspondent) Dan Harris to call meditation “a badass endeavor” and “a rigorous brain exercise: rep after rep of trying to tame the runaway train of the mind.”²⁷⁵ There is no one-time moment of enlightenment, but instead a slow process of repeated effort. This fits the recurring process of unlearning biased responses in general, and the particular work of accommodation, which can involve an “interactive process” of multiple conversations to find what works and then to adapt it with changing circumstances of the impairment or of the workplace over time.²⁷⁶

3. *Slowing Down: Making More Time to Absorb Details and Build Relationships*

The contemporary world makes it a badge of honor to be “busy,”²⁷⁷ and empirical work suggests that rushing makes us less inclined to notice and help others in need.²⁷⁸ Meditation is a practice of stillness, which may offer a pathway to greater responsiveness to the facts of the present moment and the needs of others.²⁷⁹ In the context of disability, this form of slowing down may work together with the cognitive mechanisms described earlier to facilitate noticing the competencies (as well as the needs) of a particular individual with a disability or the benefits of accommodations under consideration. It may also help to create the space for building relationships in place of social distance across difference. More broadly, making more room for stillness or slowing down may support greater acceptance of some

²⁷⁵ HARRIS, 10% HAPPIER, *supra* note 33, at 99–101.

²⁷⁶ On the interactive process, see *infra* Section IV.C.

²⁷⁷ See, e.g., BRIGID SCHULTE, OVERWHELMED: WORK, LOVE, AND PLAY WHEN NO ONE HAS THE TIME 21–23 (2014); ARIANNA HUFFINGTON, THRIVE: THE THIRD METRIC TO REDEFINING SUCCESS AND CREATING A LIFE OF WELL-BEING, WISDOM, AND WONDER 5–6 (2014); Erin Griffith, *Why Are Young People Pretending to Love Work*, N.Y. TIMES (Jan. 26, 2019), <https://www.nytimes.com/2019/01/26/business/against-hustle-culture-rise-and-grind-tgim.html>.

²⁷⁸ See, e.g., John M. Darley & C. Daniel Batson, “From Jerusalem to Jericho”: A Study of Situational and Dispositional Variables in Helping Behavior, 27 J. PERSONALITY & SOC. PSYCH. 100, 104 (1973) (finding that subjects who were told they were running late were less likely to help a stranger in distress along their route); C. Daniel Batson, Pamela J. Cochran, Marshall F. Biederman, James L. Blosser, Maurice J. Ryan & Bruce Vogt, *Failure to Help When in a Hurry: Callousness or Conflict?*, 4 PERSONALITY & SOC. PSYCH. BULL. 97, 99 (1978) (conducting a similar study with the added factor that participants were told either that their presence was or was not vital to the person waiting and finding that the subjects who were told their presence was “less important” to the person waiting were more likely to offer help the distressed stranger).

²⁷⁹ See, e.g., Freshman et al., *supra* note 37.

people with disabilities, namely those whose disabilities lead them to move at a slower pace.²⁸⁰

4. *Escaping the Talking Head: Increased Bodily Awareness*

Mr. Duffy . . . lived at a little distance from his body.

– James Joyce, *Dubliners*²⁸¹

This line from Joyce’s *Dubliners* captures a common feeling, not just of a fictional character, but for many whose work centers on their mental production:²⁸² the feeling of being disembodied, like a “head on a stick,” as one new meditator put it.²⁸³ Getting quiet to pay attention to what is happening in the present moment often includes noticing what is happening in the body—both because bodily sensations can be one anchor for mindfulness, and because bodily sensations may be harder to ignore when everything goes quiet and still. Paying attention to our own bodies and what is happening in the moment may also mean noticing change in the body and beginning to tap into physical vulnerability.

Matthew Sanford, who wrote a memoir about how his spinal cord injury eventually led him to yoga and to understanding his body differently, uses these words to compare his body’s decline with the normal process of aging:

This silence that I perceive within my body came upon me abruptly through a spinal cord injury. For most people, however, the process is slower. It develops through aging. Over time, the body becomes slower to respond, more likely to sit at rest, more content to observe rather than act.²⁸⁴

Seeing the connection between our not-yet-disabled bodies and a currently disabled body may be a pathway into connection rather than distance. This brings us to existential mechanisms.

D. *Existential Mechanisms*

Next we hear about a sculptor. A large, powerfully built man who fabricates and welds metal, building huge and sometimes

²⁸⁰ Cf., e.g., SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 37–40 (Annette Junemann ed., 1996) (arguing that the “pace of life” today is a social factor that contributes to the construction of disability).

²⁸¹ JAMES JOYCE, DUBLINERS 134 (B.W. Huebsch, Inc. 1916).

²⁸² Cognition-heavy work is just one reason a person might feel removed from their body; others include, for example, past trauma or painful experiences. See, e.g., Bessel van der Kolk, THE BODY KEEPS THE SCORE (2014).

²⁸³ SUSAN BÖGELS & KATHLEEN RESTIFO, MINDFUL PARENTING: A GUIDE FOR MENTAL HEALTH PRACTITIONERS 312 (2014).

²⁸⁴ MATTHEW SANFORD, WAKING: A MEMOIR OF TRAUMA AND TRANSCENDENCE 60 (2006).

towerlike structures. We find out that this sculptor lost his leg some years ago, is unable to wear a prosthesis, and continues to sculpt with one leg He has sculpted a sphere out of stone, perhaps marble or granite. We are told that it was perfect, with an uninterrupted, smoothly polished surface. After the sphere was completed, the artist smashed it, then put it back together with bolts, metal fasteners, and bonding agents. Now—full of fractures—it is sitting in the middle of the gallery, in the middle of America, labeled SHATTERED BUT STILL WHOLE....

This is every person's story.

– Saki Santorelli²⁸⁵

Disability implicates our human vulnerability, our ideas of physical and mental perfection, and our sense of control over what happens to us. For these reasons, our beliefs and understandings about life may affect our attitudes to disability as well. This Section therefore offers several mechanisms that might be called “existential,” though they also involve cognitive, emotional, and behavioral elements.

1. *Facing Our Own Vulnerability—and Everyone Else's*

We do not know exactly how or when we will die, but we do know for certain that we will die. It really makes no sense, then, to make death our enemy. We would only be fighting a losing battle with the inevitable, diverting precious energy away from the opportunities that await us in every moment of the time that remains.

– Sharon Salzberg²⁸⁶

In the epigraph, the meditation teacher Sharon Salzberg invites her readers to face the fact of their own eventual death. The aspect of meditation that involves slowing down and simply facing the facts of reality—trying to clear one's mind to see reality as it arises—may involve confronting truths that we commonly try to ignore.²⁸⁷ These include our changing bodies and minds with age and our eventual death.²⁸⁸

As part of trying to avoid apprehending our own vulnerability, we may wish to avoid witnessing other people's vulnerability. We may wish to avoid

²⁸⁵ SANTORELLI, *supra* note 32, at 80–81 (1999) (referencing the work of artist Terry Karpowicz).

²⁸⁶ SHARON SALZBERG & ROBERT THURMAN, *LOVE YOUR ENEMIES* 121 (2013).

²⁸⁷ See, e.g., *Namaste: Seeing the Truth of Who We Are*, TARA BRACH (Feb. 24, 2021), <https://www.tarabrach.com/namaste-truth-who-we-are/>.

²⁸⁸ Cf., e.g., Tollifson, *supra* note 56, at 106 (“Perhaps we fear disability because we fear death. We fear imperfection, loss of control, disintegration.”).

knowing or truly taking in someone else's disability. This dynamic may underpin the existential anxiety surrounding disability discussed earlier.²⁸⁹

We may also wish to avoid other people's suffering, whether physical or mental, because it reminds us of either our own current or past suffering—or of the possibility of suffering we might face. Salzberg elsewhere writes: “It is easy to turn suffering into the enemy. In the throes of emotional or physical pain, we want to be anywhere but where we are, smack up against our human condition. We tend to fight against suffering when it assails us, which only brings more pain.”²⁹⁰ She links this point to our reactions to others: “When suffering approaches us in other people's lives, we may do our best to avoid it. Though we have a natural impulse toward empathy and a wish to behave benevolently toward those in need, this is sometimes harder than it sounds.”²⁹¹ This point intersects with the earlier discussion of how often people get it wrong when they try to imagine the suffering of people with unfamiliar disabilities or when they try to say the right thing:²⁹² “We don't always know how to relieve others' suffering; often we can't, in fact. Then our only recourse is to be present and attend to the fact of the suffering, which can be difficult.”²⁹³

Some would say that we keep busy in order to avoid facing these realities. Meditation stops the cycle of busyness and can disrupt that avoidance. Slowing down also may mean becoming more aware of the body, as discussed in relation to behavioral mechanisms.²⁹⁴ That may contribute to a different kind of embodied appreciation of the suffering that can accompany being human, and thus a less guarded response to those who are currently suffering—or whose current state makes us think that they have suffered in the past. In the words of Jasmine Harris, there is “a collective preference that emphatically denies vulnerability, mortality, and uncertainty.”²⁹⁵ By giving people tools to become more at ease with their own vulnerability and mortality and more “comfortable with uncertainty,”²⁹⁶ mindfulness may be able to help unstick these sticky norms and support the realization of contact's full benefits.

²⁸⁹ See *supra* Section II.D.

²⁹⁰ SALZBERG & THURMAN, *supra* note 286, at 43.

²⁹¹ *Id.*

²⁹² See *supra* Sections II.B.2 & II.C.2.

²⁹³ SALZBERG & THURMAN, *supra* note 286, at 43.

²⁹⁴ See *supra* Section III.C.

²⁹⁵ Harris, *supra* note 29, at 957.

²⁹⁶ Pema Chödrön has a book by this name. PEMA CHÖDRÖN, COMFORTABLE WITH UNCERTAINTY (Emily Hilburn Sell ed., 2018).

2. *Not Knowing It All: Integrating Mistakes and Losses into an Understanding of Life and Growth*

Mr. Sai lost his horse. His neighbors say, "Poor Mr. Sai." Mr. Sai just says, "Could be good, could be bad; who knows?"

Then the horse comes back, leading another wild horse. His neighbors rejoice for him, saying how lucky he is now that he has two horses. He replies again, "Could be good, could be bad; who knows?"

While riding one of the horses, his son falls off and becomes permanently disabled, and again the same. The villagers say, "Poor Mr. Sai." And he says, "Could be good, could be bad; who knows?"

Then the army comes to town, but the son cannot be pressed into service because of his disability.

Could be good, could be bad. Who knows?

– Chinese parable²⁹⁷

This parable captures several ideas. The first is the observation that sometimes things that look bad turn out to be good (and vice versa). The second is the view that we typically do not have the perspective in the present moment to assess the meaning or significance (or even the eventual valence) of what is happening to us. This idea is captured more baldly in a passage from a commencement address by the writer Mary Karr: “[A]lmost every time I was super afraid it was of the wrong thing. And stuff that first looked like the worst, most humiliating thing that could ever happen almost always led me to something extraordinary and very fine.”²⁹⁸

It is not obvious how recognition of the possibilities of not knowing the *meaning* of what is happening now stems from a practice of paying attention to what is actually *happening* now. One way to understand this goes back to the earlier discussion of our tendency toward automatic categorization—in the examination of cognitive mechanisms²⁹⁹—and the way that present-moment awareness may allow us to take in new facts about the reality as they are, rather than simply assimilating new information to an existing mental formation rooted in the past. Once this process of taking in new information more slowly and clearly (through meditation) occurs again and again, a person may begin to loosen the belief in the rightness of those

²⁹⁷ Chinese parable adapted from various retellings, *see, e.g.*, ARTHUR H. SMITH, PROVERBS AND COMMON SAYINGS FROM THE CHINESE, TOGETHER WITH MUCH RELATED AND UNRELATED MATTER INTERSPERSED WITH OBSERVATIONS ON CHINESE THINGS-IN-GENERAL 92 (1914) (dating it to the “Sung Dynasty,” tenth to thirteenth century). Since writing this Section, I discovered Joan Tollifson’s lovely rendering of the parable. Tollifson, *supra* note 56, at 110.

²⁹⁸ Mary Karr, Commencement Address at Syracuse University (May 10, 2015).

²⁹⁹ *See supra* Section III.B.1.

expectations, of those preexisting notions, including the expectations of what is for the best and what is for the worst.

This may, in turn, help to undermine a certain perfectionism. If we cannot know what the ideal is, or how things are going to turn out based on our plans, then we may be more able to integrate mistakes into our understanding of growth and a “good” life. This kind of good life, filled with apparent mistakes that turn out to be opportunities, is a life that seems more able to embrace the fact of disability and vulnerability to it—and the specter of it represented by people currently living with disabilities.³⁰⁰ In the words of Joan Tollifson, “Imperfection is the essence of being organic and alive. Organic life is vulnerable; it inevitably ends in disintegration. This is part of its beauty. True meditation delves into this mystery of life and death”³⁰¹ Recognizing the beauty in imperfection may in turn help create greater ease for nondisabled people in interactions with disabled people. This greater ease with uncertainty and imperfection may also reduce stress, and thus feed back in to the emotional mechanisms discussed earlier.³⁰² More ease with mistakes brings us to the final point.

3. *Showing Up for Life as an “Adventure” with Humor and Curiosity*

The last story. The setting is an amusement park, a carnival, or a street fair, I don’t remember which. A late summer evening. . . .

In the midst of the merry-go-round, the arcade, and the fun house, a round-faced little girl of four or five emerged from the crowd. She let go of her mother’s hand and ran straight over to me. Her big saucer eyes looked me up and down. She took in a big swallow of the night air, raised up on her toes to

³⁰⁰ On the power of vulnerability, see, for example, Brené Brown, *Embracing Vulnerability*, YOUTUBE (Jan. 7, 2013), <https://www.youtube.com/watch?v=AO6n9HmG0qM>. Cf. ROBERT MCRUER, *CRIP THEORY: CULTURAL SIGNS OF QUEERNESS AND DISABILITY*, at xv (2006) (explicitly “inverting” the tradition in acknowledgements sections by humbly crediting others with any “defects” to the work and accepting responsibility “for the moments when crip energies and ideas are contained or diluted in what follows”).

³⁰¹ Tollifson, *supra* note 56, at 106. As Tollifson has written, this approach to perfectionism and imperfection may also be useful to disabled people: “I am grateful for this koan of one arm, even though it is not always pleasant or easy. It teaches me to appreciate the miracle of what is, to feel affection for my actual life. Cardboard ideals of perfection are flat and pale by comparison.” *Id.* at 112.

³⁰² See, e.g., SHARON SALZBERG, *REAL LOVE*, *supra* note 222, at 66 (2017) (“Perfection is a brittle state that generates a lot of anxiety, because achieving and maintaining unwavering standards—whether they’re internal or external—means we’re always under threat. We become focused on avoiding failure, and love for the self cannot be a refuge because it has become too conditional, too dependent on performance.”).

*bring her face close to mine, and asked:
“Are you a ride?”*

– Simi Linton³⁰³

These words from the writer Simi Linton, whose bright red power wheelchair adorns the cover of her memoir, *My Body Politic*, portray a child approaching disability with wide-eyed curiosity—even excitement. In contemporary U.S. culture, as noted earlier, children typically learn that asking questions about disability, or even talking about it, is embarrassing and to be avoided.³⁰⁴ A message of shame may be conveyed to children through these interactions, as various disabled scholars have written.³⁰⁵

The silencing of their questions seems to be the opposite of the gentle curiosity that Adrienne Asch associates with “getting it” around disability. In the epigraph to this Part of the Article, these words were used to describe Asch’s view of what makes a nondisabled person a disability insider:³⁰⁶

Such a person has to be comfortable enough not knowing all the answers and not being in control at all times. A person who gets it responds to his own confusion or ignorance about the ways of a disabled person by thinking, “I don’t actually know how X is going to do Y, but I’ll take his word for it that he can and see what happens.” A person who gets it, as Adrienne portrayed him or her, is inclined to “see life as an adventure.”³⁰⁷

That comfort with lack of control and with the absence of total information, coupled with curiosity about the present-moment facts, seems to represent cognitive and emotional mechanisms that we have been discussing. But the last sentence—viewing life “as an adventure”—brings us more fully into the realm of the existential: How does a person view life, and what kind of life does a person want to live?

The idea of “adventure” seems to encompass an openness to taking risks, to making mistakes. One emotional component that might go along with adventure, missing in the Asch account, is implied in the Linton excerpt: a sense of humor, an ability to laugh even in challenging moments.

Disability is a realm in which no one has all the answers; no one is a total insider. A blind person has no special knowledge about how to shake

³⁰³ LINTON, *supra* note 184, at 246.

³⁰⁴ See, e.g., Tiffany Carlson, *Disability Awareness: 10 Things Parents Should Teach Their Kids about Disabilities*, HUFFPOST (Aug. 2, 2013, 06:07 PM), https://www.huffpost.com/entry/disability-awareness-parents-teach-kids_n_3696279 (“From telling their child to always look away or giving them a generic viewpoint of people with disabilities, mistakes on how to talk about [people with disabilities] are abound.”).

³⁰⁵ See, e.g., *id.*; see also *supra* Section II.C.1.

³⁰⁶ Cf. Emens, *Framing Disability*, *supra* note 36, at 1386 (distinguishing an “inside” and an “outside” view of disability).

³⁰⁷ Emens, *What’s Left in Her Wake*, *supra* note 167, at 20.

hands with someone who has quadriplegia. So in a diverse community of disabled people, mistakes are common, and everyone lives with that—and even may find humor in that.³⁰⁸ The genre of comedy internal to the disability community, characterized by *laughing with* rather than *laughing at*, has burgeoned in recent years, perhaps in part for that reason.³⁰⁹ This offers an antidote to the silencing shame foisted upon children curious about disability in mainstream culture, which shuts down the sense of humor and sense of adventure.

Mindfulness might just have the capacity to recall some of the curiosity and playfulness of childhood.³¹⁰ The practice of paying attention to every moment, of realizing and knowing intimately the ridiculous twists and turns of our minds, may well lead a person to a kindly familiarity with one's own foibles. Meditation teachers indeed speak of “beginner's mind,” of approaching each new breath, and each new moment, with the curiosity and openness of a child.³¹¹ Perhaps this tool can help with responding to disability in new—or forgotten—ways.

E. *Chart of Mechanisms and Dynamics of Discrimination*

The dynamics of disability discrimination and the mechanisms by which meditation could help with debiasing are complicated. No symmetrical fit neatly governs their relationship. One reason is that some of the mechanisms are likely to help with most, if not all, of the dynamics. For instance, greater awareness of present-moment details—rather than assimilation of new information to preconceived notions—seems like a promising tool for seeing disabilities more accurately;³¹² for overcoming the spread effect, while also appreciating commonalities among disabled people;³¹³ for appreciating benefits of accommodations and of disability that might be neglected due to

³⁰⁸ Cf. Halley Bondy, *Why Haben Girma, a Deafblind Lawyer & Activist, Thinks Humor Is Such a Valuable Tool*, BUSTLE (Aug. 13, 2019), <https://www.bustle.com/p/why-haben-girma-a-deafblind-lawyer-activist-thinks-humor-is-such-a-valuable-tool-18552417> (“‘A lot of nondisableds feel nervous, uncomfortable, worried about saying the wrong thing,’ she says. ‘When I tell a joke, though, the resulting laughter allows people to relax a bit.’”).

³⁰⁹ See, e.g., Zaineb Mohammed, *Laughing with the Disabled*, E. BAY EXPRESS (Sept. 11, 2013), <https://www.eastbayexpress.com/oakland/laughing-with-the-disabled/> (describing a comedy troupe composed of comedians with disabilities).

³¹⁰ On the value of curiosity, see, e.g., Judson Brewer, *Curiosity: Our Superpower for Everything from Breaking Bad Habits to Discovering Life*, DR. JUD (Sept. 24, 2019), <https://drjud.com/curiosity-superpower>; see also Elizabeth F. Emens, *On Trust, Law, and Expecting the Worst*, 133 HARV. L. REV. 1963, 1996–98 (2020).

³¹¹ See, e.g., Yvonne Rand, *Cultivating Beginner's Mind*, TRICYCLE (Spr. 2003) (“I want to talk about practices that are conducive to cultivating Beginner's Mind—the mind fresh and awake to many possibilities. . . . How can I be a beginner in each moment, even in those situations where I am doing something that I have done many times before?”).

³¹² See *supra* Section III.B.1.

³¹³ See *supra* Section III.B.1.

stereotypes;³¹⁴ and for noticing if attempts to say the right thing are misfiring.³¹⁵ As another example, enhanced feelings of interconnectedness should help reduce fear³¹⁶ and misperceptions of suffering,³¹⁷ supporting constructive dialogue about disability.³¹⁸ More broadly, a pause that permits the choice to respond rather than react, or learning a practice of beginning again, could help with any of the dynamics.

The chart in Figure 1 nonetheless provides an overview of some of the key relationships among them—highlighting two in particular for each dynamic and grouping them according to the rubric of the primary mechanism. Following the chart, we turn in Part IV to the relevance of debiasing through meditation to law and policy.

³¹⁴ See *supra* Section III.C.3.

³¹⁵ See *supra* Section III.C.1.

³¹⁶ See *supra* Section III.A.3.

³¹⁷ See *supra* Section III.B.1.

³¹⁸ See *supra* Section III.C.2.

FIGURE 1 – Dynamics of Disability Discrimination and Meditation’s Mechanisms of Debiasing³¹⁹

Disability Discrimination Dynamic	Rubric	Meditation’s Corresponding Debiasing Mechanisms
The Quandary of Fear, Rational and Irrational	Emotional	<ul style="list-style-type: none"> • Reducing fear • Learning to pause to enable a choice to respond not react
Misperceptions of Suffering		<ul style="list-style-type: none"> • Developing greater compassion for others’ suffering (which may reduce burnout associated with affective empathy) • Paying attention to present-moment reality and nuance
Integrating People with Disabilities Requires a Practice of Seeing Disability	Cognitive	<ul style="list-style-type: none"> • Increasing awareness of present-moment realities over stereotypes • Learning a practice of beginning again—unlearning biased responses and developing an unbiased understanding of disability
Tension Between the “Spread Effect” and the Failure to Recognize Disability as a Category or Class		<ul style="list-style-type: none"> • Increasing awareness of present-moment realities over stereotypes • Building a sense of interconnectedness
The Neglect of Benefits—of Accommodation and of Disability		<ul style="list-style-type: none"> • Increasing awareness of present-moment realities over stereotypes • Appreciating how “mistakes” or non-idealized forms can have benefits
Legal and Social Demands for Explicit Dialogue about Disability Alongside a Culture of Silencing	Behavioral	<ul style="list-style-type: none"> • Learning to pause to enable a choice to respond not react • Learning a practice of beginning again – using facts and not stereotypes to make decisions
The Irony of Attempts to Do Right by Disability		<ul style="list-style-type: none"> • Developing self-compassion to tolerate one’s own mistakes • Learning a practice of beginning again—trying again after mistakes or awkward moments
Existential Anxiety in the Face of Universal Vulnerability	Existential	<ul style="list-style-type: none"> • Approaching life as an adventure and with curiosity • Developing self-compassion to enable facing realities of one’s own and thus of other people’s vulnerability or suffering

³¹⁹ The dynamics listed in the first column are the eight named in Part II, grouped according to the rubric in the second column. *See supra* Part II. The mechanisms in the third column are drawn from the previous sections of this Part, *see supra* Sections III.A–D, and are matched to the rubric of the first mechanism listed for each.

IV. DOCTRINAL INTERSECTIONS

Why is it just wealthy people who can afford to go on a retreat who have this? To me, this is a social justice issue.

– Congressman Tim Ryan³²⁰

The practice of meditation has been making its way into legal institutions in recent years, both in this country and abroad, as documented by other scholars.³²¹ Individual judges report engaging in forms of meditation—most prominently, Justice Breyer.³²² More broadly, teaching judges to meditate has become part of efforts to promote and support diversity and institutional citizenship.³²³ And teaching global lawmakers to meditate has been part of efforts to “focus . . . awareness and increase compassion” among leaders on the national and international stages.³²⁴ In 2017, senior Labour and Conservative UK parliamentarians hosted an international summit on mindfulness, joined remotely by Congressman Tim Ryan of Ohio, author of the book *A Mindful Nation*,³²⁵ quoted in the epigraph. According to the coverage of that summit, Congressman Ryan “has said meditation guides his response to Donald Trump, whose reactive tweeting may seem to many as being the opposite of mindful.”³²⁶

While reducing anyone’s disability bias would be salutary, debiasing those who create, interpret, and apply the law, if possible, seems especially useful. Judges and prosecutors, as well as employers and administrators and the lawyers who advise them, are among those who warrant a particular

³²⁰ DAN HARRIS, JEFF WARREN & CARLYE ADLER, MEDITATION FOR FIDGETY SKEPTICS: A 10% HAPPIER HOW-TO BOOK 108 (2017).

³²¹ See, e.g., Riskin, *supra* 114, at 3; Freshman et al., *supra* note 37, at 315; MAGEE, *supra* note 37, at 5.

³²² See Freshman et al., *supra* note 37, at 315 and accompanying text (describing Justice Breyer’s meditation practice); see also, e.g., Fogel, *supra* note 32, at 4 (describing the benefits of judges engaging in meditation).

³²³ See, e.g., Susan Sturm, Chairman, 2021 Columbia Law School Access to Justice Conference: Fighting Systemic Racism: Law School and Community Partnerships (June 2, 2021) (describing the use of mindfulness to achieve greater justice in Massachusetts courts); see also Susan Sturm, *Designing the Architecture for Integrating Accommodation: An Institutional Commentator*, 157 U. PA. L. REV. PENNUMBRA 11, 13 (2008) (discussing “institutional mindfulness”).

³²⁴ Robert Booth, *‘Way Ahead of the Curve’: UK Hosts First Summit on Mindful Politics*, GUARDIAN (Oct. 13, 2017, 9:17 AM), <https://www.theguardian.com/lifeandstyle/2017/oct/13/politician-s-meditate-commons-mindfulness-event> (“British and Sri Lankan government ministers and an MP for Israel’s Likud party are among politicians from 15 countries due to meditate together at the House of Commons next week in an event to explore whether mindfulness can help reset the conduct of national and international politics. . . . Since 2013, 145 UK parliamentarians have undertaken an eight-week course in the practice.”).

³²⁵ RYAN, *supra* note 34.

³²⁶ Booth, *supra* note 324.

focus.³²⁷ The bias of judges may seem inevitable,³²⁸ but the tool of mindfulness holds some promise for debiasing judges as well as other actors. This Part focuses on several doctrinal areas where greater mindfulness by legal decisionmakers could help produce better outcomes.

A. *Emotional: The Assessment of “Direct Threat” Under the ADA*

Fear arguably plays a significant role in responses to disability by employers as well as judges and other legal actors. Fears of dangerousness, as some scholars have discussed, surrounds responses to psychiatric and psychosocial disability,³²⁹ and, as I have written elsewhere, fear of emotional contagion may underpin some of the doctrinal confusion surrounding these forms of disability under the ADA.³³⁰ Physical disability also can provoke fears, whether of literal contagion,³³¹ lack of safety,³³² or unfamiliar rules and regimes.³³³

The ADA presents a legal framework for addressing fearful responses to disability within the workplace setting. The statute provides that “‘qualification standards’ may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”³³⁴ The direct threat analysis must be objective; an employer’s good faith belief in an employee’s dangerousness will not suffice.³³⁵ Nonetheless, as discussed earlier, courts at times end-run around this

³²⁷ See, e.g., Sturm, *supra* note 323; Lauren B. Edelman, Linda H. Krieger, Scott R. Eliason, Catherine R. Albiston & Virginia Mellema, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AMER. J. SOCIO. 888 (2011). Cf., e.g., Jasmine E. Harris, *Sexual Consent and Disability*, 93 N.Y.U. L. REV. 480, 490 (2018) (“Does a person with a disability’s decision to testify bias capacity determinations because factfinders cannot see beyond the existence of a disability?”).

³²⁸ See, e.g., Jason D. Vendel, Note, *General Bias and Administrative Law Judges: Is There a Remedy for Social Security Disability Claimants*, 90 CORNELL L. REV. 769, 770 (2005) (arguing that “few” Administrative Law Judges adjudicating social security disability claims “will deny that bias inevitably seeps into their decisionmaking process”); see also Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1221-22 (2008-09) (finding, in an empirical study of implicit bias among judges, that “most of the judges—white and black—showed a moderate-to-large degree of implicit bias in one direction or the other” and “that implicit biases *can* translate into biased decisionmaking under certain circumstances, but they do not do so consistently”).

³²⁹ See *supra* note 143.

³³⁰ Emens, *Sympathetic Discriminator*, *supra* note 128, at 470.

³³¹ See, e.g., Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 287 (1987) (rejecting a fear-based approach to interpreting the ADA in response to fears of HIV contagion).

³³² Emens, *Sympathetic Discriminator*, *supra* note 128, at 454.

³³³ See, e.g., PGA Tour, Inc. v. Martin, 532 U.S. 661, 699–703, 705 (2001) (Scalia, J., dissenting).

³³⁴ 42 U.S.C. §§ 12113(b), 12111(3) (2009) (defining “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation”).

³³⁵ See, e.g., Ann Hubbard, *Understanding and Implementing the ADA’s Direct Threat Defense*, 95 NW. U. L. REV. 1279, 1336–45 (2001).

objective inquiry, finding ways to defer to “common sense” fears rather than requiring that objective analysis of risk.³³⁶

This example highlights how mindfulness might be useful. For instance, mindfulness could lead to a direct reduction in the feeling state of fear.³³⁷ In addition, mindfulness could help enhance a feeling of interconnectedness, to replace “us” and “them” othering that leads to shortcutting the legal framework. Finally, meditation could assist a legal interpreter with applying cognitive focus to present-day facts rather than falling prey to pre-existing stereotypes (which is also the mechanism at the heart of the next Section). Each of these could help employers and courts apply the direct threat inquiry in the objective manner that the law requires.

B. *Cognitive: The Cost-Benefit Analysis of “Reasonable” Accommodation*

Under the ADA, covered employers are required to make “reasonable accommodations” for employees with disabilities, unless those accommodations would impose an “undue hardship” for the employer.³³⁸ Key court decisions have interpreted “reasonable” to depend on some rough comparison of costs and benefits.³³⁹ That analysis has often neglected a whole category of the potential benefits of accommodation.³⁴⁰

Such analyses are far from systematic. Indeed, in the words of one scholar, the framework for determining the reasonableness of accommodations in the foundational case *Vande Zande v. Wisconsin* consists of “cost-benefit balancing . . . without seriously analyzing either costs or benefits.”³⁴¹ The lack of rigor makes the neglect of benefits no less significant. A loose comparison of costs and benefits may be shaped even more by a missing category on one side of the ledger.

For instance, imagine that an employee wants to telecommute—an accommodation the plaintiff sought in *Vande Zande*³⁴²—and the court considers only the benefit to the plaintiff, the cost to the employee, and the cost to any coworkers who might have to pick up the extra slack at work for an employee working from home. Now imagine instead that the judge takes into account the potential benefits to coworkers of the employer’s

³³⁶ See *supra* Section II.A.1.

³³⁷ See *supra* Section III.A.

³³⁸ 42 U.S.C. § 12112(b)(5)(A) (2009). The employment title of the ADA prohibits “discriminat[ing] against a qualified individual” with a disability because of the disability of such individual. *Id.* § 12112(a). The ADA’s definition of disability raises many complicated issues, but these complications are not important to my discussion here. *Id.* § 12102(1). To fail to accommodate a disability is to “discriminate,” definitionally, under the ADA. See *id.* § 12112(b)-(b)(5)(A).

³³⁹ *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538 (7th Cir. 1995); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131 (2d Cir. 1995); *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

³⁴⁰ See *supra* Section II.B.3.

³⁴¹ Cass R. Sunstein, *Cost-Benefit Analysis Without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms*, 74 U. CHI. L. REV. 1895, 1896 (2007).

³⁴² *Vande Zande*, 44 F.3d at 544 (describing the plaintiff’s request “to work full time at home”).

experimenting with telecommuting and discovering associated advantages to extending the policy to nondisabled employees. (This is not an unlikely outcome, given the research on cost savings, improved morale, and other benefits that may stem from telecommuting initiatives—and especially after remote work arrangements became far more regular during the pandemic.³⁴³) The individual employee’s request looks rather different—and more likely to prevail—under this more complete cost-benefit accounting.

A cognitive corrective through mindfulness—to focus more on present details than on stereotypes and assumptions formed in the past—could help to broaden the frame and thus create a more accurate assessment of the reasonableness of accommodations.³⁴⁴

C. Behavioral: The “Interactive Process” of Determining Accommodations

In light of the challenging dynamics of disability discrimination, the legal demand that parties engage in an interactive process of dialogue about disability accommodation in the workplace and children’s Individual Education Programs at school is not a trivial requirement.³⁴⁵ This requires individuals—workers with disabilities and their employers on the one hand, parents and school administrators and other representatives on the other—to speak explicitly about a subject that the culture pressures us to silence.³⁴⁶ To be successful, these processes necessitate clear listening and speaking about what may be heated matters. Such dialogue also involves complex problem solving, often through repeated iterations of experimentation, information gathering, and redesign.³⁴⁷

³⁴³ For studies of telecommuting, see, for example, Kristen M. Ludgate, Note, *Telecommuting and the Americans with Disabilities Act: Is Working at Home a Reasonable Accommodation?*, 81 MINN. L. REV. 1309, 1321–22 (1997). *But cf.* Michelle A. Travis, *Telecommuting: The Escher Stairway of Work/Family Conflict*, 55 ME. L. REV. 261, 265–66 (2002) (describing some of the downsides of telecommuting for women). For more recent analysis, in light of the large-scale experiment with remote work during the COVID-19 pandemic, see for example, Arlene S. Kanter, *Remote Work and the Future of Disability Accommodations*, CORNELL L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3895798.

³⁴⁴ See *supra* Section III.B.1.

³⁴⁵ See *supra* Section II.C (citing provisions).

³⁴⁶ See *supra* Section II.C.

³⁴⁷ See, e.g., Seth D. Harris, *Disabilities Accommodations, Transaction Costs, and Mediation: Evidence from the EEOC’s Mediation Program*, 13 HARV. NEGOT. L. REV. 1, 5–10 (2008) (discussing particular challenges in mediating negotiations over accommodations, including “a wider gap between the parties’ expectations regarding the negotiation’s results,” employer “bias[] against accommodation claims,” “particularly significant” degrees of “bilateral asymmetric information” requiring gathering and divulging sensitive information on both sides, and the “vastly . . . complex undertaking” of “finding an effective and efficient accommodation”); Lizz Schumer, *How to Disclose a Disability to Your Employer (and Whether You Should)*, N.Y. TIMES (July 10, 2019), <https://www.nytimes.com/2019/07/10/smarter-living/disclose-disability-work-employer-rights.html> (providing advice on how to discuss disability and accommodation with an employer, highlighting the importance of “preparation” and “communication,” and “recommend[ing] thinking creatively to come up with solutions that will carry minimal or no cost”).

The elements of meditation described herein could assist with these challenging processes. For instance, these practices could help the actors involved in such dialogue to notice with curiosity the present-moment facts about the other person and the situation; to pause before reacting and respond more thoughtfully; to recognize and have compassion for their own biases; to have access to some feeling of interconnectedness; to get past fear; to take risks in designing creative solutions; and to accept mistakes as part of the process and begin again (and again and again).³⁴⁸

D. *Existential: The Global View of the ADA as Special Rights for “Them” or Universal Insurance for “Us All”*

For all actors who interpret or apply the ADA, overcoming existential anxiety and replacing it with a keener sense of shared human vulnerability would seem a helpful corrective to the commonly stigmatizing reaction to disability.³⁴⁹ The backlash against the original ADA seemed a reaction to the far-reaching rights granted by the law, which defied the common sense of disability understood on an individual medical model.³⁵⁰ Increasing not only the feeling of interconnectedness, but the existential understanding of lives worth living, might well help to avoid future backlash.³⁵¹

* * *

This Part concludes with a point drawn from contract law. Under the light shed by this Article, we can now see that the doctrine of “impossibility” in contract law resonates with Harlan Hahn’s conception of existential anxiety. The excuse of impossibility of performance is traditionally permitted to a contracting party when death or disability interferes with performance.³⁵² The implication of the doctrine is that no one should have anticipated the death or disability of a central actor to the contract.³⁵³

³⁴⁸ See *supra* Part III.

³⁴⁹ See *supra* Section III.D.

³⁵⁰ See *supra* notes 19–24 and accompanying text.

³⁵¹ On the ongoing challenges to courts in interpreting the ADA, see *supra* notes 21–22 and accompanying text.

³⁵² See, e.g., *Taylor v. Caldwell* (1863), 122 Eng. Rep. 309, 314; 3 B. & S. 827, 838–39 (“The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.”); RESTATEMENT (SECOND) OF CONTS. § 262 (1981) (“Death or Incapacity of Person Necessary for Performance: If the existence of a particular person is necessary for the performance of a duty, his death or such incapacity as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.”); U.C.C. § 2-615 (1951) (“Delay in delivery or non-delivery . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made . . .”).

³⁵³ See, e.g., RESTATEMENT (SECOND) OF CONTS. § 261 cmt. a (1981) (“Even though a party, in assuming a duty, has not qualified the language of his undertaking, a court may relieve him of that duty if performance has unexpectedly become impracticable as a result of a supervening event. . . . traditionally [including] . . . supervening death or incapacity of a person necessary for performance”);

This elegantly captures the ways that individuals, and the legal system that surrounds us, steel ourselves against the knowledge of our own vulnerability: Death and disability are so remote from our minds that we do not even need to think about them; we can be excused from failing to foresee them and allocate the risk of their occurrence in an arms' length commercial contract. An inquiry into debiasing through meditation invites us to ask what the world might look like, were we instead to face the fact of our eventual death, as well as those disabilities that we will eventually acquire, beyond any we may currently have, if we are lucky enough to live that long.

V. CRITIQUES AND LIMITS

My friends, especially those who are interested in helping the world, say things like “So, remind me: how does sitting on your ass help anybody, exactly?” From the outside, meditation can seem mystical, indulgent, and weird.

– Ethan Nichtern³⁵⁴

This Part briefly addresses key critiques of this Article's argument that mindfulness meditation might have some role to play in debiasing disability discrimination. As discussed earlier, the empirical studies supporting a link between meditation and debiasing disability discrimination are thus far still small, few, and limited in power, which is why this Article merely uses them as a starting point for asking why such a link might exist and what it would mean if so.³⁵⁵ This Part discusses several other critiques of the arguments offered throughout.

A. *In Principle*

1. *Meditation Is Politically Quiescent*

As seen in the epigraph, some regard meditation as politically quiescent. Under this view, enlisting meditation in the work of social change is contrary to engaging in a practice organized around the idea of just being.

But alongside these stereotypes—which sometimes do have a basis in reality³⁵⁶—there exist important traditions and teachers who are deeply

RESTATEMENT (SECOND) OF CONTS. § 261 cmt. b (1981) (noting that “application is simple enough in the cases of the death of a person or destruction of a specific thing necessary for performance. The continued existence of the person or thing (the non-occurrence of the death or destruction) is ordinarily a basic assumption on which the contract was made . . .”).

³⁵⁴ ETHAN NICHTERN, ONE CITY: A DECLARATION OF INTERDEPENDENCE 60 (2007).

³⁵⁵ See *supra* Part I.

³⁵⁶ Books in the mindfulness world do include titles like *Don't Just Do Something, Sit There.* SYLVIA BOORSTEIN, DON'T JUST DO SOMETHING, SIT THERE: A MINDFULNESS RETREAT (1996).

engaged with the social and political realities of the world.³⁵⁷ In these traditions, the practice of clear seeing is foundational to recognizing inequalities and injustices in the world and taking skillful actions in response.³⁵⁸ For these teachers, compassion for others' suffering is a motivation for action; and compassion also serves as a tool for resilience and persistence in the face of frustration, disappointment, and error. For example, Dr. Martin Luther King, Jr. nominated the Vietnamese meditation teacher Thich Nhat Hanh for the Nobel Peace Prize for "offer[ing] a way out of th[e] nightmare [of war], a solution acceptable to rational leaders."³⁵⁹ In King's words, Hanh "has traveled the world, counseling statesmen, religious leaders, scholars and writers, and enlisting their support. His ideas for peace, if applied, would build a monument to ecumenism, to world brotherhood, to humanity."³⁶⁰

2. *Meditation Is a Religious Practice*

The epigraph also gets at the concern that mindfulness meditation is a religious practice—and a weird one at that. This is part of the reason for Dan Harris's concern that mindfulness has "a towering PR problem."³⁶¹

Western mindfulness meditation practices have roots in Buddhist teachings.³⁶² But a meaningful tradition of secular teachings in mindfulness and other forms of meditation has developed—and been subject to empirical study along many dimensions.³⁶³ This Article focuses on the empirical work related to disability discrimination, among other forms of discrimination, which is small, but there is a vast field of empirical studies of mindfulness

³⁵⁷ See, e.g., Thich Nhat Hanh, *The Fourteen Precepts of Engaged Buddhism*, LION'S ROAR (Apr. 12, 2017), <https://www.lionsroar.com/the-fourteen-precepts-of-engaged-buddhism/>; SHARON SALZBERG, REAL CHANGE: MINDFULNESS TO HEAL OURSELVES AND THE WORLD 20 (2020) ("In the face of struggles for social justice, for making the world a better place even when the times feel daunting, mindfulness and lovingkindness practice can help provide us with the tools we need to navigate the emotional and conceptual terrain that comes with seeking to make change."); *Engaged Spirituality*, TARA BRACH, <https://www.tarabrach.com/engaged-spirituality/> (last visited Mar. 30, 2022) (urging an "[e]ngaged spirituality" involving "the active engagement of our heart and awareness in service of the greater, collective good" and collecting resources on the subject); Tara Brach, *Dharma for Times of Global Trauma*, LION'S ROAR (Mar. 24, 2022), <https://www.lionsroar.com/dharma-for-times-of-global-trauma/>; NICHTERN, *supra* note 354, at 60.

³⁵⁸ See, e.g., *id.* ("Do not avoid contact with suffering or close your eyes before suffering. . . . Do not accumulate wealth while millions are hungry. . . . Do not live with a vocation that is harmful to humans and nature. Do not invest in companies that deprive others of their chance to live."); NICHTERN, *supra* note 354, at 60.

³⁵⁹ Letter from Martin Luther King, Jr. to the Nobel Inst. (Jan. 25, 1967), <http://www.hartford-hwp.com/archives/45a/025.html>.

³⁶⁰ *Id.*

³⁶¹ HARRIS, 10% HAPPIER, *supra* note 33, at xiv.

³⁶² See, e.g., Jane F. Compson, *Is Mindfulness Secular or Religious, and Does It Matter?*, in PRACTITIONER'S GUIDE TO ETHICS AND MINDFULNESS-BASED INTERVENTIONS 23, 23–43 (Lynette M. Monteiro, Jane F. Compson & Frank Musten eds., 2017).

³⁶³ See, e.g., SAM HARRIS, WAKING UP: A GUIDE TO SPIRITUALITY WITHOUT RELIGION 1–15 (2014); *supra* Section I.B.3.

meditation more generally.³⁶⁴ The work of Jon Kabat-Zinn, mentioned earlier, who founded the Center for Mindfulness at the University of Massachusetts Medical Center, was a starting point for much of this research.³⁶⁵

After his words quoted just above, Dan Harris goes on to say that mindfulness's "PR problem" arises "largely because its most prominent proponents talk as if they have a perpetual pan flute accompaniment."³⁶⁶ He proposes this alternative: "If you can get past the cultural baggage, though, what you'll find is that meditation is simply exercise for your brain."³⁶⁷ While this flattens out the history and context for mindfulness practice—a choice debated among mindfulness teachers³⁶⁸—Harris here taps into an important thread in the Western development of mindfulness meditation as a secular practice.

3. *Meditation Is Thought Control*

Some might object to trying to change attitudes and behavior in response to disability through meditation as objectionable "thought control." These concerns are not unique to the context of debiasing through mindfulness offerings. This type of critique has been lodged at antidiscrimination laws and efforts more generally, which may attempt a culture change to alter implicit or explicit bias as well as discriminatory actions.³⁶⁹ Thorough treatment of this issue may be found elsewhere, but several points are worth noting briefly. First, the government frequently attempts to change people's minds, in routine ways, anytime it provides information—for instance, nutritional information or labeling on foods.³⁷⁰ Second, some debiasing is simply correcting mistaken factual impressions about other people; this idea is embedded in the very concept of debiasing.³⁷¹ Third, mindfulness programs cannot be mandatory, even if they try to be, since it is not possible to make people meditate.³⁷²

³⁶⁴ See *supra* Section I.A.

³⁶⁵ See, e.g., Jon Kabat-Zinn, *Some Reflections on the Origins of MBSR, Skillful Means, and the Trouble with Maps*, 12 CONTEMP. BUDDHISM 281, 283–86, 294 (2011).

³⁶⁶ HARRIS, 10% HAPPIER, *supra* note 33, at xiv.

³⁶⁷ *Id.*

³⁶⁸ See, e.g., Ron Purser & David Loy, *Beyond McMindfulness*, HUFFPOST (Aug. 31, 2013), www.huffingtonpost.com/ron-purser/beyond-mcmindfulness_b_3519289.html]; *Tricycle Talks: On McMindfulness*, TRICYCLE (July 30, 2019), <https://tricycle.org/podcast/mcmindfulness/>.

³⁶⁹ Jolls & Sunstein, *supra* note 4, at 992–94.

³⁷⁰ *Id.* at 992.

³⁷¹ *Id.* at 993.

³⁷² Nonetheless, programs that offer mindfulness in institutional settings, such as workplaces or schools, should aspire to make sure that meditation offerings *feel* voluntary as well. See Emens, *Law's Contributions to Mindfulness*, *supra* note 111.

B. *In Practice*

1. *Meditation as a Tool Will Backfire Because of Resistance*

Telling people that meditation will help reduce bias may give interested individuals one more reason to meditate, but that additional utilitarian element could backfire. For some, an attractive feature of mindfulness meditation for people is the idea of a space free of striving—a place to “just be.”³⁷³ Piling on reasons or potential benefits, including benefits to others, could backfire for some people.³⁷⁴ And for some subset of people, debiasing may not sound like a benefit; they may want to keep their biases.

There is no complete solution to this concern. That some people will be turned off by the hope of debiasing through meditation, should the evidence build and become known, may be an unavoidable cost. Other people will presumably find the prospect of debiasing salutary, particularly people for whom their own implicit biases run contrary to their explicit views and values.³⁷⁵ In addition, for people who find taking action to care for themselves difficult because they value caring for others more highly, the prospect that meditation could do both may be particularly attractive.³⁷⁶ Lastly, explicit reminders of these practices as a voluntary choice may help to subdue the resistance.³⁷⁷

2. *Meditation Will Make People Happier and Therefore More Solipsistic*

Some work suggests that increasing happiness can lead people to be more biased, to make less refined distinctions.³⁷⁸ If meditation makes people happier, then we might worry it will lead them to be more biased rather than less.³⁷⁹ In addition, we might worry that the orientation toward the self will lead to selfishness.³⁸⁰ Interestingly, though, some research finds that only

³⁷³ See, e.g., HARRIS, WARREN & ADLER, *supra* note 320, at 148–53.

³⁷⁴ Cf., e.g., Freshman et al., *supra* note 37, at 300–01 (citing research finding that yoga had fewer benefits when advertised through explicit reference to its utilitarian benefits).

³⁷⁵ Cf. Jolls & Sunstein, *supra* note 4, at 994 (proposing that “some people engage in biased behavior inadvertently or despite their own ideals. Such people want, in a sense, to be debiased Many normative objections to debiasing strategies . . . are weakened to the extent that such strategies help people to remove implicit bias that they themselves reject on principle”).

³⁷⁶ See, e.g., F. Diane Barth, *Self-Care Is Important: Why Is It So Hard to Practice?*, PSYCH. TODAY (May 13, 2019), <https://www.psychologytoday.com/ca/blog/the-couch/201905/self-care-is-important-why-is-it-so-hard-practice>.

³⁷⁷ See Emens, *Law’s Contributions to the Mindfulness Revolution*, *supra* note 111.

³⁷⁸ See, e.g., Jaihyun Park & Mahzarin R. Banaji, *Mood and Heuristics: The Influence of Happy and Sad States on Sensitivity and Bias in Stereotyping*, 78 J. PERSONALITY & SOC. PSYCH. 1005, 1017–19 (2000) (finding that experimentally induced happy moods led to increased grouped-based stereotyping, but sad moods did not).

³⁷⁹ *Id.*

³⁸⁰ See, e.g., John A. Powell, “Healing Across Divides: Building Bridges to Challenge Systemic Injustice,” Keynote Address, Bioneers 2020 Conference, <https://bioneers.org/john-a-powell-creating-conditions-belonging-breathing-toxic-environment-zstf2101/> (observing that “some practice involving

some happy emotions increase bias (such as anticipatory enthusiasm and amusement) while other happy emotions (such as awe and nurturant love) tend to decrease bias,³⁸¹ and the latter forms of happiness might seem more likely responses to meditation. More research is needed, however:³⁸² to understand which positive emotions lead to more, rather than less, bias; to understand the mechanisms involved; and to clarify the potential connections to meditation.

In the meantime, it is important to recognize that the primary form of meditation presented in this Article—mindfulness meditation—is not the same thing as positive thinking.³⁸³ Indeed, these practices of mindfulness—of paying attention to whatever is happening right now without judgment—aspire to clear seeing. And sometimes what one sees, inside or out, is painful or unhappy. That is a part of these practices, and it is why, as discussed earlier, meditation is compatible with social action rather than quietism for many people. Moreover, combatting disability discrimination requires more accurate perceptions and more comfort with reality,³⁸⁴ both of which are aims of mindfulness practice.

3. *The Voluntary and Individual Orientation of Mindfulness Makes It Inadequate to the Task of Structural Change*

The critique of mindfulness as inadequate to the task of structural change is apt.³⁸⁵ The argument of this Article is, however, that mindfulness meditation is one additional tool in the arsenal, not that it can solve the problem. In

mindfulness [is] critical in order to heal ourselves and heal each other, but I also want to push us to go beyond that, because what we found at the Institute is that while people gravitate towards bridging and belonging, they tend to do it in such a way that it becomes a very individualized practice”).

³⁸¹ See, e.g., Vladas Griskevicius, Michelle N. Shiota & Samantha L. Neufeld, *Influence of Different Positive Emotions on Persuasion Processing: A Functional Evolutionary Approach*, 10 *EMOTION* 190, 203 (2010) (finding that “the positive emotions of anticipatory enthusiasm, amusement, and to a lesser degree attachment love appeared to enhance heuristic processing” whereas “when individuals were in an emotional state of awe (e.g., seeing a breathtaking panorama for the first time) or of nurturant love (e.g., seeing a cute, vulnerable child), they were less persuaded by weak arguments than were people in an emotionally neutral state”).

³⁸² *Id.* at 303–04.

³⁸³ JON KABAT-ZINN, *WHEREVER YOU GO, THERE YOU ARE: MINDFULNESS MEDITATION IN EVERYDAY LIFE* 93–95 (rev. ed. 2005).

³⁸⁴ Cf. Emens, *What’s Left in Her Wake*, *supra* note 167, at 20 (describing Adrienne Asch’s preference for talking about increasing “accurate attitudes” or “comfortable attitudes” to disability rather than “positive attitudes”).

³⁸⁵ Note that this critique particularly applies to the Western secular mindfulness tradition, rather than to the tradition of community-based meditation with a deep ethical grounding. For more on this, see, for example, Purser & Loy, *supra* note 368 (“But mindfulness, as understood and practiced within the Buddhist tradition, is not merely an ethically-neutral technique for reducing stress and improving concentration. Rather, mindfulness is a distinct quality of attention that is dependent upon and influenced by many other factors: the nature of our thoughts, speech and actions; our way of making a living; and our efforts to avoid unwholesome and unskillful behaviors, while developing those that are conducive to wise action, social harmony, and compassion.”); *supra* Section V.A.1.

particular, the individual orientation of meditation may be particularly ill-equipped to illuminate people as to structural bias—though it may open them up to reality and thus make them more open to learning about this. But something else is likely needed here, which is a topic for another day.³⁸⁶

CONCLUSION

*It is hard to have hope. It is harder as you grow old,
for hope must not depend on feeling good . . .*

*and hope is harder when it cannot come by prediction
any more than by wishing. But stop dithering.
The young ask the old to hope. What will you tell them?
Tell them at least what you say to yourself.*

– Wendell Berry, “A Poem on Hope”³⁸⁷

*[When white people ask, “Where can we find our hope?”], I
think what people want is, “Tell us that we’re going to get past
this.” . . . “Tell us it’s going to be OK.” . . . But there’s a
different kind of hope. There are people in the world who
accept that their life ends in death, and that’s bad, but that’s
what’s gonna happen. And then within that, they find joys and
hopes in between*

– Ta-Nehisi Coates³⁸⁸

All hands-on deck, the saying goes, for great obstacles and for challenging times. Disability discrimination in the present moment presents a great obstacle and faces a challenging time. We therefore need every tool that might serve the work toward change.

The focus in this Article has been on disability, which has some distinctive features. But one final aspiration of this study is that closely examining the impact mindfulness may have on disability may lead us to further insights about other protected classes. As one example, the Article has been discussing the clear need to pay attention to the protected classification (disability) and to the surrounding social environment in order to tackle disability discrimination and enable accommodation. As another example, the Article has identified the importance of developing a practice of taking steps to remediate the problem, to begin again, over and over, in this domain.

Do we not also need these approaches in the realm of race discrimination

³⁸⁶ Emens, *Law’s Contributions to Mindfulness*, *supra* note 111.

³⁸⁷ WENDELL BERRY, *LEAVINGS: POEMS* 91 (2010).

³⁸⁸ Interview by Krista Tippet with Ta-Nehisi Coates, *ON BEING* (Nov. 16, 2017), <https://onbeing.org/programs/ta-nehisi-coates-imagining-a-new-america/>.

or gender discrimination? Looking closely at the problem, being willing to discuss it and to examine the surrounding social environment, to engage in this practice of awareness again and again: these are promising strategies for working toward race and gender justice, as others have discussed,³⁸⁹ among other areas. These strategies sound more promising than imagining or expecting some flash of insight and deliverance into a race/gender-free and bias-free enlightenment—and certainly more promising than believing we are already there.³⁹⁰

Following Wendell Berry in the epigraph, may we share the news of whatever we tell ourselves about what works or might work, about what holds out some promise for the future. May we have aspirations rooted in facts and awareness of this moment, for all its obstacles and all its possibilities. May we develop some clear-sighted reasons for collective hope in challenging times.

³⁸⁹ See, e.g., ANNELIESE A. SINGH, *THE RACIAL HEALING HANDBOOK 2* (2019) (discussing “healing from racism” as “a process of proactive individual actions and strategies you can practice throughout your lifetime” including “learn[ing] to recognize the wounds that racism creates in you, whether you are White or a person of color” and “open[ing] your eyes to the costs of racism, which are pretty much everywhere”); DERALD WING SUE, *RACE TALK AND THE CONSPIRACY OF SILENCE: UNDERSTANDING AND FACILITATING DIFFICULT DIALOGUES ON RACE 5–6* (2015) (discussing, inter alia, the importance of “race talk” and the challenges involved in engaging in it successfully); see also Rebecca M. Price, *Starting Conversations about Discrimination against Women in STEM*, COURSESOURCE, https://qubes.hub.org/community/groups/coursesource/publications?id=2686&tab_active=about&v=1 (last visited Mar. 29, 2021) (encouraging individual reflection, group discussion, and collective brainstorming to problem solve case studies about gender discrimination).

³⁹⁰ Cf., e.g., DIANGELO, *supra* note 264, at 9 (“White progressives can be the most difficult for people of color because, to the degree that we think we have arrived, we will put our energy into making sure that others see us as having arrived. None of our energy will go into what we need to be doing for the rest of our lives: engaging in ongoing self-awareness, continuing education, relationship building, and actual antiracist practice. White progressives do indeed uphold and perpetrate racism, but our defensiveness and certitude make it virtually impossible to explain to us how we do so.”).