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## Law's Contributions to the Mindfulness Revolution

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## LAW'S CONTRIBUTIONS TO THE MINDFULNESS REVOLUTION

Elizabeth F. Emens\*

### *Abstract*

*These are phenomenally challenging times. Mindfulness is a tool that can help lawyers support themselves, each other, their clients, and their collaborators in the hard work needed to build community and take action. For these and other reasons, mindfulness has made major inroads into law and legal institutions. Law firms, law schools, and courthouses offer training in mindfulness meditation to support the cognitive clarity and emotional self-regulation necessary for the demanding work of analyzing problems, resolving conflicts, overcoming bias, and doing justice. A growing literature, from empirical social science to legal scholarship, catalogs these and other benefits of mindfulness for lawyers, judges, and law students.*

*The encounter between law and mindfulness has been framed, to date, as one that benefits legal actors. What has been overlooked is the way that law can benefit mindfulness. This Article argues that the developing relationship between law and mindfulness has the potential to address significant problems facing mindfulness in legal and other institutional settings.*

*Two major dilemmas threaten to undermine the institutional impact of mindfulness. The first dilemma (termed here the minimizing dilemma) presents this challenge: Is mindfulness so individualistic, passive, and nonjudgmental as to be irrelevant (or worse) to the tremendous injustice and other problems plaguing our society? The second dilemma (termed here the magnifying dilemma or the mandatory mindfulness problem) cuts*

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*the other way: Is the introduction of mindfulness into mainstream U.S. institutions, such as law schools and law firms, so powerful and intrusive as to be forcing people to meditate?*

*This Article uses insights from law practice, legal pedagogy, and contract default-rule theory and research to respond to these dilemmas. Such contributions—from law to mindfulness—demonstrate that the synergies between these two seemingly disparate fields redound to the benefit of both. Recognizing the mutual benefits of this relationship helps us anticipate how law and mindfulness can both expect to grow stronger through the increasing incorporation of mindfulness programs into legal institutions.*

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## INTRODUCTION

*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?”*

*Ethan Nichtern*<sup>1</sup>

*Are we morally obligated to meditate?*

*Sigal Samuel*<sup>2</sup>

Mindfulness has penetrated the law.<sup>3</sup> Opportunities to learn meditation are offered in a growing number of law schools, law firms, and courthouses.<sup>4</sup> Members

<sup>1</sup> ETHAN NICHTERN, *ONE CITY: A DECLARATION OF INTERDEPENDENCE* 60 (2007).

<sup>2</sup> Sigal Samuel, *Are We Morally Obligated to Meditate?*, VOX (Jan. 10, 2020, 8:00 AM), <https://www.vox.com/future-perfect/2020/1/10/21013234/meditation-brain-neuroscience-moral-obligation> [<https://perma.cc/4LC6-YY6V>].

<sup>3</sup> For a definition and explanation of mindfulness, which assumes no prior knowledge, see *infra* Part I. For discussion of what law means here, see *infra* notes 205–206 and accompanying text.

<sup>4</sup> See, e.g., Scott L. Rogers, Chris McAliley & Amishi P. Jha, *Mindfulness Training for Judges: Mind Wandering and the Development of Cognitive Resilience*, 54 CT. REV.: J. AM. JUDGES ASS’N 80, 80–81 (2018), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1656&context=ajacourtreview> [<https://perma.cc/R8UY-ZSXL>] (elaborating upon the history and value of the judiciary’s adoption of mindfulness techniques); Susan Wawrose, *Mindfulness Programs in U.S. Law Schools 2020* (last updated August 2020) (unpublished manuscript) (on file with author) (demonstrating that, as of 2020, at least 20 different law schools offered courses on mindfulness and the law); Memorandum from Brett Donaldson, *Vault 100 Law Firms and Mindfulness* (last updated April 2020) (on file with author) (finding that, as of April 2020, 35 of the Vault 100 law firms offered mindfulness programming to employees); Memorandum from Brett Donaldson, *Mindfulness Offerings in Law School* (last updated April 2020) (unpublished manuscript) (on file with author) (finding that, as of April 2020, over 30 U.S. law schools offered mindfulness programming to students). As of June 2021, 212 legal employers, including law firms, universities, and

of Congress and the U.K. Parliament are meditating, as are leaders of dozens of other countries.<sup>5</sup> One member of the U.S. Congress wrote a book called *A Mindful Nation*, which advocates policies incorporating mindfulness into schools, the healthcare system, and other dimensions of public life.<sup>6</sup> In addition to state and lower federal court judges,<sup>7</sup> at least one Supreme Court Justice practices a version of mindfulness meditation.<sup>8</sup>

At a time when events have been canceled and programs stalled due to COVID-19, mindfulness programs have been thriving—and even expanding their offerings—in many law schools and law firms.<sup>9</sup> The reasons for this growth are

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companies, have signed a pledge in support of the ABA’s framework for improving attorney wellness. See *Lawyer Well-Being*, AM. BAR ASS’N, <https://www.abalegalprofile.com/lawyer-well-being/> [<https://perma.cc/V9QF-FUEF>] (last visited Sept. 24, 2021). Many prestigious law firms offer mindfulness and meditation programs, and some attorneys are permitted to count some mindfulness hours as billable hours. See Anne M. Brafford, *What’s Working Well in Law Firm Well-Being Programs?*, INST. WELL-BEING L. (May 2021), [https://lawyerwellbeing.net/wp-content/uploads/2021/05/Well-Being-Firm-Profiles\\_4-2021.pdf](https://lawyerwellbeing.net/wp-content/uploads/2021/05/Well-Being-Firm-Profiles_4-2021.pdf) [<https://perma.cc/HMQ7-4LRB>].

<sup>5</sup> See, e.g., 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/politicians-meditate-commons-mindfulness-event> [<https://perma.cc/QFG2-SYYB>] (describing an event in the British House of Commons at which U.K., U.S., Israeli, and Sri Lankan politicians planned to meditate together and noting that “[s]ince 2013, 145 UK parliamentarians have undertaken an eight-week course in the practice [of meditation]”).

<sup>6</sup> TIM RYAN, A MINDFUL NATION: HOW A SIMPLE PRACTICE CAN HELP US REDUCE STRESS, IMPROVE PERFORMANCE, AND RECAPTURE THE AMERICAN SPIRIT, at xviii-xxi, passim (2012).

<sup>7</sup> See, e.g., Rogers, McAliley & Jha, *supra* note 4, at 80–81; *Judges*, THE MINDFUL JUDGE: NON-JUDGMENTAL AWARENESS IN ACTION, <https://themindfuljudge.com/judges/index.html> [<https://perma.cc/C2KD-LZVY>] (last visited Aug. 4, 2020) (“This page serves as a resource and lists members of the judiciary who are making contributions in the area of contemplative practices in the law and legal education.”).

<sup>8</sup> See *infra* text accompanying notes 18 and 49 (quoting Justice Breyer).

<sup>9</sup> See, e.g., Roy Strom, *Arnold & Porter Partner Channels Deepak Chopra from Home for 400*, BLOOMBERG L. (Apr. 3, 2020, 11:33 AM), <https://news.bloomberglaw.com/legal-ethics/arnold-porter-partner-channels-deepak-chopra-from-home-for-400?context=search&index=8> [<https://perma.cc/S2XH-Q2AY>]; Dylan Jackson, *Amid the Pandemic, These Law Firms Are Sticking with Their Mental Health Programs*, AM. LAW. (May 12, 2020, 12:45 PM), <https://www.law.com/americanlawyer/2020/05/12/amid-the-pandemic-these-law-firms-are-sticking-with-their-mental-health-programs/> [<https://perma.cc/VK5G-4KBW>] (last visited Oct. 2, 2021); *Mindfulness Program*, COLUM. L. SCH., <https://mindfulness.law.columbia.edu/> [<https://perma.cc/8VJV-P97Z>] (last visited Oct. 7, 2021); *Mindfulness for Lawyers Workshops*, UNIV. MIAMI SCH. L., <https://www.law.miami.edu/academics/conferences-lectures/introduction-to-mindfulness-workshops> [<https://perma.cc/KT3A-8KRH>] (last visited Oct. 2, 2021); see also *Headspace and New York Governor Cuomo’s Office Team Up to Release ‘New York State of Mind,’*

grounded in the empirical and anecdotal evidence of mindfulness’s physical, emotional, intellectual, and relational benefits.<sup>10</sup> Central findings are highly relevant to lawyers: for instance, mindfulness’s salutary effects on attentional focus (the ability to focus on what we choose)<sup>11</sup> and emotional self-regulation (our ability to

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*Free Meditation and Mindfulness Content Hub Curated for New Yorkers*, BUS. WIRE (Apr. 6, 2020, 9:33 AM), <https://www.businesswire.com/news/home/20200406005487/en/Head-space-New-York-Governor-Cuomo%E2%80%99s-Office-Team> [<https://perma.cc/YC3K-6L5Y>]; *Governor Whitmer and Headspace Launch ‘Stay Home, Stay Mindful’ Website to Offer Free Mental Health Resources During COVID-19 Pandemic*, OFF. GOVERNOR GRETCHEN WHITMER (Apr. 17, 2020), <https://www.michigan.gov/whitmer/0,9309,7-387-90499-526216--,00.html> [<https://perma.cc/7FFL-N423>].

<sup>10</sup> See, e.g., John Paul Minda, Jeena Cho, Emily Grace Nielsen & Meingxiao Zhang, *Mindfulness and Legal Practice: A Preliminary Study of the Effects of Mindfulness Meditation and Stress Reduction in Lawyers*, PSYARXIV PREPRINTS, 4 (July 19, 2017), <https://psyarxiv.com/6zs5g/> [<https://perma.cc/W8QN-L7BN>] (“Clinical work has suggested that (among other things) mindfulness reduces stress and anxiety, [and] boosts immune function . . . . Mindfulness has also been shown to be useful in the management of symptoms associated with depression and post traumatic stress disorder. Of particular interest to the broader public, however, are reports that mindfulness meditation is beneficial for everyday cognitive functioning: mindfulness practice has been associated with improved attention, cognitive flexibility, insight problem solving ability, and general decision making.” (internal citations omitted)); see also, e.g., Peter la Cour & Marian Petersen, *Effects of Mindfulness Meditation on Chronic Pain: A Randomized Controlled Trial*, 16 PAIN MED. 641, 649–650 (2015) (reporting that “mindfulness meditation . . . had significant effects on the lives of patients with long-term chronic pain compared with a wait list group”); Joshua A. Rash, Victoria A.J. Kavanagh & Sheila N. Garland, *A Meta-Analysis of Mindfulness-Based Therapies for Insomnia and Sleep Disturbance: Moving Towards Processes of Change*, 14 SLEEP MED. CLINICS 209, 210–12, 224 (2019) (“[Mindfulness based-therapies (MBTs)] are significantly more effective for reducing insomnia severity compared with attention/education and waitlist controls. . . . MBTs are complimentary to behavioral and cognitive-behavioral approaches to treatment and can be used to augment existing treatments.”); Paola Helena Ponte Márquez, Albert Feliu-Soler, María José Solé-Villa, Laia Matas-Pericas, David Filella-Agullo, Montserrat Ruiz-Herrerias, Joaquín Soler-Ribauidi, 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, 246 (2019) (“The meditation group experienced a significant [blood pressure] reduction . . .”).

<sup>11</sup> See, e.g., Adam Moore, Thomas Gruber, Jennifer Derosé & Peter Malinowski, *Regular, Brief Mindfulness Meditation Practice Improves Electrophysiological Markers of Attentional Control*, 6 FRONTIERS HUM. NEUROSCIENCE, Feb. 2012, at 8–10, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3277272/pdf/fnhum-06-00018.pdf> [<https://perma.cc/C7N3-HNYM>]; Rogers, McAliley & Jha, *supra* note 4, at 84–85; Daniel Goleman, *Exercising the Mind to Treat Attention Deficits*, N.Y. TIMES: WELL, (May 12, 2014, 3:56 PM), <https://well.blogs.nytimes.com/2014/05/12/exercising-the-mind-to-treat-attention-deficits/> [<https://perma.cc/5QF8-E5RD>]; Lidia Zylowska, Deborah L. Ackerman, May H. Yang, Julie L. Futrell, Nancy L. Horton, T. Sigi Hale, Caroly Pataki & Susan L. Smalley, *Mindfulness Meditation Training in Adults and Adolescents with ADHD: A Feasibility Study*,

manage difficult emotions and stress).<sup>12</sup> Because lawyers have staggeringly high rates of depression and substance abuse,<sup>13</sup> pertinent research includes mindfulness's help with chronic depression, in particular, and with resilience and recovery from

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11 J. ATTENTION DISORDERS 737, 743 (2008); Mengran Xu, Christine Purdon, Paul Seli & Daniel Smilek, *Mindfulness and Mind Wandering: The Protective Effects of Brief Meditation in Anxious Individuals*, 51 CONSCIOUSNESS & COGNITION 157, 162–64 (2017); Catherine J. Norris, Daniel Creem, Reuben Hendler & Hedy Kober, *Brief Mindfulness Meditation Improves Attention in Novices: Evidence from ERPs and Moderation by Neuroticism*, 12 FRONTIERS HUM. NEUROSCIENCE, Aug. 2018, at 7, 15–16, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6088366/pdf/fnhum-12-00315.pdf> [<https://perma.cc/NMC8-HRPS>]; Anthony P. Zanesco, Brandon G. King, Katherine A. MacLean & Clifford D. Saron, *Cognitive Aging and Long-Term Maintenance of Attentional Improvements Following Meditation Training*, 2 J. COGNITIVE ENHANCEMENT 259, 271–73 (2018).

<sup>12</sup> See, e.g., Patricia C. Broderick, *Mindfulness and Coping with Dysphoric Mood: Contrasts with Rumination and Distraction*, 29 COGNITIVE THERAPY & RSCH. 501, 507 (2005); J. David Creswell, Laura E. Pacilio, Emily K. Lindsay & Kirk Warren Brown, *Brief Mindfulness Meditation Training Alters Psychological and Neuroendocrine Responses to Social Evaluative Stress*, 44 PSYCHONEUROENDOCRINOLOGY, June 2014, at 1, 7–8.

<sup>13</sup> See, e.g., William W. Eaton, James C. Anthony, Wallace Mandel & Roberta Garrison, *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079, 1081 (1990) (finding that roughly 10% of lawyer survey respondents meet the diagnostic criteria for major depressive disorder, more than twice the rate of the general population); G. Andrew H. Benjamin, Elaine J. Darling & Bruce Sales, *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J. L. & PSYCHIATRY 233, 234 (1990) (documenting, in one state law school, rates of depression at levels ranging from 32% to 40% for first and third year law students, respectively, compared with 3% to 9% of people in Western industrialized countries); Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED., 46, 46 (2016) (finding that attorneys experience problematic alcohol consumption patterns at higher rates than other professional populations); Debra Cassens Weiss, *Lawyer Depression Comes Out of the Closet*, AM. BAR ASS'N J. (Dec. 13, 2007, 12:13 PM), [http://www.abajournal.com/news/article/lawyer\\_depression\\_comes\\_out\\_of\\_the\\_closet/](http://www.abajournal.com/news/article/lawyer_depression_comes_out_of_the_closet/) [<https://perma.cc/WP4K-JSF7>] (stating that lawyers experience drinking problems and depression at twice the rate of the general population); Charity Scott, *Mindfulness in Law: A Path to Well-Being and Balance for Lawyers and Law Students*, 60 ARIZ. L. REV. 635, 638–43 (2018) (citing high rates of addiction and other mental health issues among lawyers and law students); see also Billie Tarascio, *Depression Among Lawyers: The Statistics*, MOD. L. PRAC. (last visited Oct. 2, 2021), <https://modernlawpractice.com/depression-among-lawyers-the-statistics/> [<https://perma.cc/44SV-7WLX>] (compiling studies about high rates of depression and substance abuse among lawyers); Maxine Sushelsky, *Secondary Trauma and Burnout in Lawyers and What to Do About It*, 19 MASS. LAWS. J., Dec. 2011, at 19 <https://www.massbar.org/docs/default-source/publications-document-library/lawyers-journal/2011/december/december2011.pdf> [<https://perma.cc/TK2N-DLRQ>] (explaining secondary trauma as an occupational stressor of lawyering that leads to burnout and other mental health issues).

setbacks and failure, in general.<sup>14</sup> Moreover, firsthand accounts dovetail with research to support the conclusion that mindfulness helps professionals during the peak of their careers, as well as during challenging periods: for example, with strategic planning, creativity, and leadership.<sup>15</sup> In long-term meditator Jerry

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<sup>14</sup> 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, 769–70 (2013); Adam Hoffman, *Can Mindfulness Help Students Cope with Failure? New Research Suggests that Mindfulness Helps College Students Bounce Back from Poor Performance and Self-Criticism*, GREATER GOOD MAG. (Apr. 5, 2016), [https://greatergood.berkeley.edu/article/item/can\\_mindfulness\\_help\\_students\\_cope\\_with\\_failure](https://greatergood.berkeley.edu/article/item/can_mindfulness_help_students_cope_with_failure) [<https://perma.cc/C3GV-NXEK>]; Tom Jacobs, *Evidence Mounts that Mindfulness Breeds Resilience*, GREATER GOOD MAG. (Oct. 12, 2015), [http://greatergood.berkeley.edu/article/item/evidence\\_mounts\\_that\\_mindfulness\\_breeds\\_resilience](http://greatergood.berkeley.edu/article/item/evidence_mounts_that_mindfulness_breeds_resilience) [<https://perma.cc/25E5-GR9V>]; NourFoundation, *Can Mindfulness Increase Our Resilience to Stress?*, YOUTUBE (Feb. 20, 2013), <https://www.youtube.com/watch?v=ALjF1yb-VLw> [<https://perma.cc/6JVS-JSTZ>] (0:00 to 2:00); Michael Ungar, *Does Mindfulness Really Make Us Resilient?*, PSYCH. TODAY (Oct. 3, 2015), <https://www.psychologytoday.com/blog/nurturing-resilience/2015/10/does-mindfulness-really-make-us-resilient> [<https://perma.cc/C98P-XXQ7>]. I thank Wendy Suh for her contributions here. For an individual account of effects of meditation on resilience, see, for example, Peter Bregman, *Try Meditation to Strengthen Your Resilience*, HARV. BUS. REV. (Dec. 7, 2012), <https://hbr.org/2012/12/try-meditation-to-strengthen-y> [<https://perma.cc/XL3B-SDDT>] (“[E]ven in failure, you’ll be able to let the part of you that did not change as a result of the failure see what it feels like to fail. Then, when you realize your Self is still intact, you’ll get up and try again.”).

<sup>15</sup> See, e.g., Emma Seppälä, *How Meditation Benefits CEOs*, HARV BUS. REV. (Dec. 14, 2015), <https://hbr.org/2015/12/how-meditation-benefits-ceos> [<https://perma.cc/3EHM-GYTD>] (“Multiple research studies have shown that meditation has the potential to decrease anxiety, thereby potentially boosting resilience and performance under stress.”); *id.* (“Research on creativity suggests that we come up with our greatest insights and biggest breakthroughs when we are in a more meditative and relaxed state of mind. . . . [M]editation encourages divergent thinking (i.e. coming up with the greatest number of possible solutions to a problem), a key component of creativity.”); Justin Talbot Zorn & Frieda Edgette, *Mindfulness Can Improve Strategy, Too*, HARV. BUS. REV. (May 2, 2016), <https://hbr.org/2016/05/mindfulness-can-improve-strategy-too> [<https://perma.cc/9AF9-865D>] (“Steve Jobs, a regular meditator, made use of mindfulness practice to challenge operating assumptions at Apple and to enhance creative insight in planning. Ray Dalio of Bridgewater Capital has likewise used mindfulness not only as a tool for increasing productivity but also enhancing situational awareness as a strategist.”); Roy Horan, *The Neuropsychological Connection Between Creativity and Meditation*, 21 CREATIVITY RSCH. J. 199, 199, 211–16 (2009) (“Sanyama, an ancient yogic attentional technique embodying both transcendence and integration, provides a unique neuropsychological explanation for extraordinary creativity.”); Izabela Lebeda, Darya L. Zabelina & Maciej Karwowski, *Mind Full of Ideas: A Meta-Analysis of the Mindfulness-Creativity Link*, 93 PERSONALITY & INDIVIDUAL DIFFERENCES 22, 24 (2016) (“Indeed, this meta-analysis showed that creativity and mindfulness are significantly related, with a ‘small-to-medium’ effect size.”); Peter H. Huang, *Can Practicing Mindfulness Improve Lawyer Decision Making, Ethics, and*



Seinfeld's words, "My wife and I have been meditating for 25 years. We're happier, healthier, we look better. . . . I was 5-foot-4 before I meditated."<sup>16</sup> Seinfeld characteristically ends with a joke about becoming taller, but it's clear from interviews with him that he makes serious use of meditation to support both creativity and resilience.<sup>17</sup>

Justice Breyer describes the value of meditation for legal professionals this way:

I started because it's good for my health. My wife said this would be good for your blood pressure and she was right. It really works. I read once that the practice of law is like attempting to drink water from a fire hose. And if you are under stress, meditation—or whatever you choose to call it—helps. Very often I find myself in circumstances that may be considered stressful, say in oral arguments where I have to concentrate very hard for extended periods. If I come back at lunchtime, I sit for 15 minutes and perhaps another 15 minutes later. Doing this makes me feel more peaceful, focused and better able to do my work.<sup>18</sup>

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*Leadership?*, 55 HOUS. L. REV. 63, 64 (2017) ("Practicing mindfulness is a form of experiential learning that provides a temporal space to pause and reflect upon more thoughtful decisions, including sustaining ethical behavior and leadership."); Hung Cao Nguyen, *Exploring How Mindful Leadership Facilitators Incorporate Mindfulness into Their Life and Leadership*, (Feb. 8, 2017), (Ph.D. dissertation, Columbia University) (ProQuest) ("The benefits of mindfulness practice can help [mindful leadership facilitators] learn to overcome such barriers as the perception of lack of time and energy, insufficient knowledge and skills, and administrative constraints."). With thanks to Michael Vatcheron for the point about creativity.

<sup>16</sup> Tod Perry, *Jerry Seinfeld Said Daily Meditation and Lifting Weights Have Completely Changed His Life*, UPWORTHY (Jan. 5, 2021), <https://www.upworthy.com/jerry-seinfeld-shared-the-two-habits-he-believes-can-solve-just-about-anyones-life> [<https://perma.cc/7DFL-GJKL>] (quoting Jerry Seinfeld). Seinfeld practices a form of meditation called *transcendental meditation*, *id.*, which is not the focus of this Article.

<sup>17</sup> See, e.g., *id.*; *Jerry Seinfeld and Howard Stern on the Joys of Meditation*, PURIST, <https://thepuristonline.com/2017/05/meditation-with-jerry-seinfeld-and-howard-stern/> [<https://perma.cc/J6ZY-USS4>] (last visited June 9, 2022); Cory Stieg, *Jerry Seinfeld: Transcendental Meditation and Weight Training Will "Solve Just About Anyone's Life,"* CNBC (Jan. 1, 2021, 9:30 AM), <https://www.cnbc.com/2021/01/01/seinfeld-meditation-and-weight-training.html> [<https://perma.cc/83BC-52EV>].

<sup>18</sup> Amanda Enayati, *Seeking Serenity: When Lawyers Go Zen*, CNN: CHART (May 11, 2011, 11:15 AM), <http://thechart.blogs.cnn.com/2011/05/11/seeking-serenity-when-lawyers-go-zen> [<https://perma.cc/JR5X-42YS>] (quoting Justice Breyer).

At a time when the relationship between law and mindfulness is expanding, the benefits seem all to flow to legal actors and institutions.<sup>19</sup> Existing legal scholarship examines the contributions mindfulness may bring to the legal world.<sup>20</sup> Powerful writings extoll the benefits of mindfulness for legal actors at the start of their careers,

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<sup>19</sup> See, e.g., Jan L. Jacobowitz, *The Benefits of Mindfulness for Lawyers*, AM. BAR ASS'N, <https://judicialstudies.duke.edu/wp-content/uploads/2019/02/Panel-6-The-Benefits-of-Mindfulness-for-Lawyers.pdf> [<https://perma.cc/U58R-R7SS>] (last visited Apr. 4, 2022).

<sup>20</sup> 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, 285–86, 312–13 (2018); Jacobowitz, *supra* note 19; Brian A. Pappas, *Mindful Mediation*, 48 SW. L. REV. 351 (2019); Teresa Kissane Brostoff, *Meditation for Law Students: Mindfulness Practice as Experiential Learning*, 41 L. & PSYCH. REV. 159 (2017); Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 UMCK L. REV. 535, 554 (2011); Rogers, McAliley & Jha, *supra* note 4; 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, 45–60 (2002); Minda et al., *supra* note 10; Huang, *supra* note 15.

for instance, as students approaching exam period,<sup>21</sup> and at the height of their careers, as judges, for instance.<sup>22</sup>

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<sup>21</sup> See, e.g., 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”); see also, e.g., Charity Scott & Paul Verhaeghen, *Calming Down and Waking Up: An Empirical Study of the Effects of Mindfulness Training on Law Students*, 21 NEV. L.J. 277, 323 (2020) (“Our study has shown positive benefits in terms of decreasing perceived stress and increasing personal well-being. These effects include increases in ability to focus attention; reappraise situations; be in a better mood; and show self-compassion, self-acceptance, and personal growth—all aspects of self-awareness and mindfulness which support the ‘soft’ skills that are as important for professional success as the intellectual skill of legal analysis (‘thinking like a lawyer’) that traditionally has been the focus of legal education.”); Clifford J. Rosky, R. Lynae Roberts, Adam W. Hanley & Eric L. Garland, *Mindful Lawyering: A Pilot Study on Mindfulness Training for Law Students* (unpublished manuscript, currently under peer review, on file with author) (“Here we present the results of a peer-reviewed pilot study of the impact of mindfulness training on the well-being of law students. Using validated measures, we observed significant decreases in anxiety, depression, stress, and disordered alcohol use, with effect sizes ranging from moderate to large. In addition, the Mindful Lawyering course was also associated with significant increases in dispositional mindfulness, which were in turn correlated with improvements in the aforementioned measures. These findings are consistent with meta-analyses of how mindfulness affects depression, anxiety, and stress. In addition, they are consistent with similar studies on how mindfulness training effects graduate and professional students.” (citations omitted)); Riskin, *supra* note 20, at 46 (“On a practical, day-to-day level, mindfulness meditation could help lawyers and law students . . . *feel better* by enhancing their capacities to relax and to deal with stress and anxiety. Such outcomes, [including] improvements in the ability to concentrate, should help them *perform better*, too, on virtually any task . . .”). Other research supports the conclusion that mindfulness can help students, more broadly, with test-taking performance. See, e.g., Jan Hoffman, *How Meditation Might Boost Your Test Scores*, N.Y. TIMES: WELL (Apr. 3, 2013, 12:05 PM), <https://well.blogs.nytimes.com/2013/04/03/how-meditation-might-boost-your-test-scores/> [<https://perma.cc/P63H-DS9R>] (“Santa Barbara researchers found that after a group of undergraduates went through a two-week intensive mindfulness training program, their mind-wandering decreased and their working memory capacity improved. They also performed better on a reading comprehension test — a section from the Graduate Record Examination, or G.R.E.”); Michael D. Mrazek, Michael S. Franklin, Dawa Tarchin Phillips, Benjamin Baird & Jonathan W. Schooler, *Mindfulness Training Improves Working Memory Capacity and GRE Performance While Reducing Mind Wandering*, 24 PSYCH. SCI. 776, 776–77 (2013) (finding, after studying 48 undergraduate students, that “[i]mprovements in performance following mindfulness training were mediated by reduced mind wandering among participants who were prone to distraction at pretesting” and that “cultivating mindfulness is an effective and efficient technique for improving cognitive function, with wide-reaching consequences”).

A growing body of work also suggests mindfulness can support outcomes demanded by law and justice. For instance, as I have explored elsewhere, recent work suggests mindfulness and other forms of meditation can have debiasing effects with regard to race, disability, and other protected classifications.<sup>23</sup> Some work also argues that mindfulness can contribute to ethical decision-making.<sup>24</sup> And other researchers and policymakers propose mindfulness training as a strategy for reducing unnecessary or excessive force by police officers.<sup>25</sup> These are just a few examples of the potential impact of what some are framing as a mindfulness revolution.

Ohio Congressman Tim Ryan and ABC News Anchor Dan Harris are among those who have predicted that mindfulness is going to transform this country.<sup>26</sup> In an entertaining short video, Harris's animated character says,

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<sup>22</sup> See, e.g., Jeremy D. Fogel, *Mindfulness and Judging*, FED. JUD. CTR., 1–2, 5–6 (2016), <https://www.fjc.gov/sites/default/files/2016/Mindfulness%20and%20Judging.pdf> [<https://perma.cc/S7FK-XL79>]; Rogers, McAliley & Jha, *supra* note 4.

<sup>23</sup> See, e.g., RHONDA V. MAGEE, *THE INNER WORK OF RACIAL JUSTICE: HEALING OURSELVES AND TRANSFORMING OUR COMMUNITIES THROUGH MINDFULNESS* (2019); RUTH KING, *MINDFUL OF RACE: TRANSFORMING RACISM FROM THE INSIDE OUT* (2018); Elizabeth F. Emens, *Mindful Debiasing: Meditation as a Tool to Address Disability Discrimination*, 54 CONN. L. REV. (forthcoming 2022) [hereinafter Emens, *Mindful Debiasing*] (on file with author); Adam Lueke & Bryan Gibson, *Brief Mindfulness Meditation Reduces Discrimination*, 3 PSYCH. OF CONSCIOUSNESS: THEORY, RSCH. & PRAC. 34 (2016); Rhonda Magee, *How Mindfulness Can Defeat Racial Bias*, GREATER GOOD MAG. (May 14, 2015), [https://greatergood.berkeley.edu/article/item/how\\_mindfulness\\_can\\_defeat\\_racial\\_bias](https://greatergood.berkeley.edu/article/item/how_mindfulness_can_defeat_racial_bias) [<https://perma.cc/2T82-AVBR>].

<sup>24</sup> See, e.g., Nicole E. Ruedy & Maurice E. Schweitzer, *In the Moment: The Effect of Mindfulness on Ethical Decision Making*, 95 J. BUS. ETHICS 73, 73–77, 81–83 (2010). I thank Janice Lee for this source.

<sup>25</sup> See, e.g., Judith P. Andersen & Harri Gustafsberg, *A Training Method to Improve Police Use of Force Decision Making: A Randomized Controlled Trial*, SAGE OPEN, Apr.–June 2016, at 1, 9–12; Michael S. Christopher, Matthew Hunsinger, Lt. Richard J. Goerling, Sarah Bowen, Brant S. Rogers, Cynthia R. Gross, Eli Dapolonia & Jens C. Pruessner, *Mindfulness-Based Resilience Training to Reduce Health Risk, Stress Reactivity, and Aggression Among Law Enforcement Officers: A Feasibility and Preliminary Efficacy Trial*, 264 PSYCHIATRY RSCH. 104, 104–05 (2018); Michael S. Christopher, Richard J. Goerling, Brant S. Rogers, Matthew Hunsinger, Greg Baron, Aaron L. Bergman & David T. Zava, *A Pilot Study Evaluating the Effectiveness of a Mindfulness-Based Intervention on Cortisol Awakening Response and Health Outcomes Among Law Enforcement Officers*, 31 J. POLICE & CRIM. PSYCH. 15, 15–17 (2015); see also Barry Yeoman, *Mindful Policing: The Future of Force*, MINDFUL (June 14, 2017), <https://www.mindful.org/mindful-policing-the-future-of-force/> [<https://perma.cc/7E6Y-PXH9>]; NBC News, *Police Officers Learn Meditation to Tackle Job Tension*, YOUTUBE (Oct. 21, 2018), <https://www.youtube.com/watch?reload=9&v=BXvGhfnSOXc> [<https://perma.cc/7YV4-LMEN>]. I thank Iliria Camaj for her thoughtful work in this area.

<sup>26</sup> See, e.g., 60 Minutes, *Mindfulness*, CBS NEWS (Dec. 14, 2014), <https://www.cbsnews.com/news/mindfulness-anderson-cooper-60-minutes/> [<https://perma.cc/7YV4-LMEN>].

I believe that meditation and mindfulness are the next big public health revolution. In the 1940s, if you [had] told someone that 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 prescribes for you.<sup>27</sup>

Similarly, Congressman Ryan told Anderson Cooper in an interview about mindfulness that “he really believes it can change America for the better.”<sup>28</sup> Ryan obtained a million dollars in federal funding to bring mindfulness to schools in his Ohio district, explaining, “I have seen it transform classrooms; I have seen it heal veterans; I have seen what it does to individuals who have really high chronic levels of stress and how it has helped their body heal itself.”<sup>29</sup>

Congressman Ryan is also bringing mindfulness to the lawmakers of this country: He reports hosting a weekly forum where members of Congress and staff can meditate collectively at the Capitol.<sup>30</sup> A former football player, Ryan knows how his high-school self would have reacted to the idea of mindfulness: “Whoa. Stay away from those guys.”<sup>31</sup> Aware of “how all this looks” to some people,<sup>32</sup> Ryan concludes, “I wouldn’t be willing to stick my neck out this far if I didn’t think this is the thing that can really help shift the country.”<sup>33</sup>

Ryan’s work bringing mindfulness to Congress is one prominent example of the many ways the mindfulness movement is affecting legal actors and legal institutions, which various writing to date has explored.<sup>34</sup> By contrast, no prior work has even asked what law brings to this growing integration of mindfulness into legal institutions. This Article asks and answers that question.

In the existing literature on law and mindfulness, the benefits all seem to flow in one direction—from mindfulness to law. This Article makes the novel argument

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cc/D3ED-SP5V]; Happify, *Why Mindfulness Is a Superpower: An Animation*, YOUTUBE (Dec. 7, 2015), <https://www.youtube.com/watch?v=w6T02g5hnT4R> [<https://perma.cc/P6LG-K9SL>]; Tim Ryan, *Toward a More Mindful Nation*, GREATER GOOD MAG. (Apr. 25, 2012), [https://greatergood.berkeley.edu/article/item/toward\\_a\\_more\\_mindful\\_nation](https://greatergood.berkeley.edu/article/item/toward_a_more_mindful_nation) [<https://perma.cc/J69G-BE44>]; RYAN, *supra* note 6.

<sup>27</sup> Happify, *supra* note 26, at 01:39. By contrast, Jon Kabat-Zinn says we should not feel guilty about not meditating; if you see it that way, he says, you are doing it wrong. For more on this, see 60 Minutes, *supra* note 26.

<sup>28</sup> 60 Minutes, *supra* note 26, at 5:52.

<sup>29</sup> *Id.* at 7:09.

<sup>30</sup> *Id.* at 6:42.

<sup>31</sup> *Id.* at 6:20.

<sup>32</sup> *Id.* at 6:14.

<sup>33</sup> *Id.* at 7:20.

<sup>34</sup> See *supra* notes 19–25.

that law has insights to offer mindfulness: Specifically, the mindfulness movement is plagued by problems that threaten to limit its impact in legal and other institutions, and these are problems that legal practice, pedagogy, and theory can help to solve.

The U.S. mindfulness movement faces two significant types of challenges, signalled by the epigraphs above, as it builds institutional prominence in law and other fields: what we might call the *minimizing* and *magnifying* challenges. The minimizing challenge contends that mindfulness teachings are too neutral, too passive, or too trivial to be relevant to a complicated world in need of resourceful action. From this vantage point, the mindfulness teacher Ethan Nichtern reports that his friends ask him how mindfulness is of use to anybody else (or in their words, quoted in the first epigraph, “how does sitting on your ass help anybody?”).<sup>35</sup>

Conversely, the magnifying challenge worries that mindfulness teachings are so powerful that introducing them impinges on people’s autonomy, particularly when offered in institutional settings. From this vantage point, an outsider might ask whether the empirical benefits of mindfulness meditation mean we are “morally obligated to meditate” (as Sigal Samuel asks in the second epigraph)<sup>36</sup>—or perhaps even whether the institutional programs supporting mindfulness meditation *are already obligating* people to meditate.

This Article argues that law—legal theory, pedagogy, and practice—offers valuable responses to both the minimizing and the magnifying dilemmas.<sup>37</sup> In response to the minimizing concern, a potent synergy can emerge when law comes into dialogue with mindfulness, requiring the practice of seeing clearly (which mindfulness supports) to extend beyond the individual level to face structural injustice (which effective legal training encourages<sup>38</sup>), for instance. In response to the magnifying dilemma, the legal domain presents a theoretical and practical framework from contract-law default-rule theory, which can be harnessed to show how a practice like mindfulness can be supported yet not mandated.<sup>39</sup>

The argument that law and legal institutions have something to teach the mindfulness movement is both timely and novel. The global mindfulness movement has grown to a \$1.2-billion dollar industry,<sup>40</sup> and this country faces an unprecedented social and political moment when widespread suffering and injustice seem to fill the news cycle. These two factors combine to make the minimizing and magnifying dilemmas more pressing than ever before, both within and far beyond the legal world. Sitting in a (Zoom) room and meditating can feel especially useless or selfish

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<sup>35</sup> See NICHTERN, *supra* note 1.

<sup>36</sup> See Samuel, *supra* note 2.

<sup>37</sup> There are strands within the mindfulness world that offer responses to these dilemmas as well, particularly the minimizing dilemmas, but those are not an easy fit with secular mindfulness offerings in this country. See *infra* text accompanying notes 96–104.

<sup>38</sup> See *infra* Part III.

<sup>39</sup> See *infra* Part IV.

<sup>40</sup> Press Release, *\$1.2 Billion U.S. Meditation Market to Grow Strongly*, MARKETDATA ENTERPRISES (Sept. 26, 2017), <https://www.marketdataenterprises.com/wp-content/uploads/2018/03/Meditation-Mkt-2017-Press-Release.pdf> [https://perma.cc/3T4U-J98T] (last visited July 25, 2020).

given the stark injustices and other challenges of this time (*minimizing*), and the increasing institutional support for meditating can make individuals feel ever more pressure to meditate (*magnifying*). The need for the contributions law brings is acute.

The prospect that a growing relationship with law could help mindfulness teachers and practitioners address these perplexing dilemmas is both surprising and promising. This prospect is surprising because law and mindfulness seem, from the outside, such disparate realms.<sup>41</sup> It is promising because the presence of these mutual benefits suggests that the fields of law and mindfulness will both grow stronger through the increasing incorporation of mindfulness programs into legal institutions.<sup>42</sup>

The Article consists of four parts. Part I offers a brief introduction to the key concepts and practices of mindfulness and mindfulness meditation. Part II sets out the minimizing and magnifying dilemmas confronting institutions offering secular mindfulness practices. Part III presents law's response to the minimizing dilemma—the questions of whether mindfulness is passive, atomistic, and neutral—in the form of active, structural, and normative strands of legal practice and pedagogy. Part IV sets out an answer to the magnifying dilemma—what we might call the problem of *mandatory mindfulness*—based in the theory and practice of default rules. The institutional design framework presented in Part IV could usefully apply to contexts beyond mindfulness—for instance, initiatives to promote skills in negotiation, a focus on racial justice, or attention to international dimensions of problems—and therefore serve to benefit not only the mindfulness movement. Parts III and IV both end by observing ways that mindfulness gives back important contributions in this interplay with law.

## I. FRAMING THE QUESTIONS: A BRIEF PRIMER ON MINDFULNESS MEDITATION

*[M]indfulness actually is a remarkably simple and universal concept . . . . In essence, it involves slowing down one's mental processes enough to allow one to notice as much as possible about a given moment or situation, and then to act thoughtfully based on what one has noticed . . . . While much of the discussion of mindfulness in relation to judges so far has focused on health and wellness, mindfulness also has obvious implications for the actual work that judges do.*

*Judge Jeremy D. Fogel*

*U.S. District Court for the Northern District of California (retired)*<sup>43</sup>

This Article assumes no prior knowledge of the practice that Judge Jeremy Fogel describes in the epigraph. This Part therefore offers a short introduction and

<sup>41</sup> See *infra* Section II.A.1.

<sup>42</sup> See *infra* Sections III.D and IV.D.

<sup>43</sup> Fogel, *supra* note 22, at 2. For another judge's perspective on the role of meditation in judging, see, for example, J. Edward Spillane, *The Meditative Judge*, U. CHI. MAG. (Spring 2018), <https://mag.uchicago.edu/law-policy-society/meditative-judge> [<https://perma.cc/HA-M5-2H6L>].

concrete description. Specifically, the first Section briefly sets out what *mindfulness* is and what mindfulness *meditation* is, and the second Section explains why people practice it (rather than just doing it) and what makes it difficult (though it sounds easy).<sup>44</sup>

### A. Introducing the Practice of Mindfulness Meditation

The word *meditation* comprises multiple practices,<sup>45</sup> but the secular type of meditation most common in this country is typically called *mindfulness meditation*.<sup>46</sup> The term *mindfulness* is used so frequently that its meaning is often opaque.<sup>47</sup>

Some people also hesitate to apply labels to their practice, as evidenced by Justice Breyer's equivocation in the passage quoted earlier.<sup>48</sup> First, he suggested some uncertainty about what the practice is, saying, "I don't know that what I do is meditation, or even whether it has a name."<sup>49</sup> In the same interview, however, where he described his practice as sitting quietly for fifteen-minute periods to increase calm and focus, Breyer also referred to the practice as "meditation—or whatever you choose to call it."<sup>50</sup> By this point in his reflections, Justice Breyer seems to be clear on what the practice is, but still reluctant to call it "meditation."

In this Article, defining terms will be useful since precise terminology facilitates communication and the exchange of ideas. The Section therefore defines terms and describes the basic practice of mindfulness meditation.

#### 1. Defining Mindfulness

Mindfulness is defined by Jon Kabat-Zinn, who began much of the research of mindfulness meditation in this country through a program he founded at the University of Massachusetts Medical School in 1979, as the "intentional cultivation

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<sup>44</sup> Note that the introduction to mindfulness in this Part overlaps significantly, in form and content, with my explanation of mindfulness in another recent article. Emens, *Mindful Debiasing*, *supra* note 23.

<sup>45</sup> For some discussion, see Matthieu Ricard, Antoine Lutz & Richard J. Davidson, *Mind of the Meditator*, 311 SCI. AM. 39, 40–45 (2014).

<sup>46</sup> 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 & ALT. MED. 316, 324–27 (2017) (discussing the prevalence of meditators among the U.S. adult population, as well as the prevalence of "mindfulness meditation" compared to "spiritual meditation").

<sup>47</sup> See, e.g., Brad Warren, *Why I Avoid Using the Word "Mindfulness,"* *HARDCORE ZEN* (Nov. 24, 2014), <http://hardcorezen.info/why-i-avoid-using-the-word-mindfulness/3196> [<https://perma.cc/53WZ-JUJT>].

<sup>48</sup> See Enayati, *supra* note 18.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*



of nonjudgmental moment-to-moment awareness.”<sup>51</sup> Though accurate, this definition is complex. A simpler version is *paying attention to whatever is happening right now without judgment*.<sup>52</sup>

Much of this definition is self-explanatory. Mindfulness means noticing right now what sounds you are hearing or what bodily sensations you are feeling. That seems clear enough. By contrast, the meaning of the phrase “without judgment” is less obvious. Note first what “without judgment” does *not* mean. It does not mean without discernment or common sense.<sup>53</sup> It does not mean that if the fire alarm went off in the building where you are sitting right now, mindfulness would dictate that you just sit there and notice the sound.

Instead, “without judgment” means without skeptical evaluation. It means without contrasting the reality of this moment, unfavorably, with some ideal. Put another way, paying attention “without judgment” means paying attention without indulging the snarky inner critic in your head. More on this idea shortly, but note that this notion of “without judgment” is therefore not inconsistent with judging or with the keen analysis and concern with justice important for lawyers.<sup>54</sup> On the contrary, being able to pause our automatic stream of negative judgments of reality can be a vital precursor to making clear-sighted judgments.

## 2. Describing Mindfulness Meditation

*People new to mindfulness often have the mistaken belief that the purpose of mindfulness meditation is to gain the capacity to eliminate all thought; that is, to “empty the mind.” To the contrary, this is not possible. Mindfulness practices involve noticing and observing the activity of the mind, not eliminating it.*

*Professor Scott Rogers, Judge Chris McAliley & Dr. Amishi Jha*<sup>55</sup>

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<sup>51</sup> 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 (Y. Haruki, Y. Ishii & M. Suzuki eds., 2007).

<sup>52</sup> Thank you to Professor Cliff Rosky for conferring on the development of this working definition. More recently, I have been including kindness within my own definition of mindfulness, as in, *paying attention to whatever is happening right now without judgment, with kindness*. For more on the significance—and the potential force—of kindness, see, for instance, *infra* note 63.

<sup>53</sup> See, e.g., Sharon Salzberg: *Breath Meditation*, INSIGHT TIMER, at 0:01–0:49, <https://insighttimer.com/sharonsalzberg/guided-meditations/breath-meditation> [<https://perm.a.cc/87UY-CGB6>] (last visited Oct. 10, 2021) [hereinafter Salzberg, *Breath Meditation*]; Fogel, *supra* note 22, at 1–6.

<sup>54</sup> See, e.g., Fogel, *supra* note 22; *infra* notes 96–98, 105–116 and accompanying text. *But cf.* Michal Tamir, *Law and Yoga*, 7 J. L. & SOC. DEVIANCE, 2014, at 3 (“[Y]oga focuses in the most extreme way on the given moment, whereas law looks to the past and the future, particularly with regard to precedents.”).

<sup>55</sup> Rogers, McAliley & Jha, *supra* note 4, at 83.

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. You could observe the raw data of perception, much the way you’d dip your hand in water to see if it feels warm or cold.<sup>56</sup> You could do these things while also reading these words.

“Mindfulness *meditation*,” in contrast just to being mindful, refers to the act of setting aside time, not during another activity, to engage in the formal practice of paying attention. 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’d 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 distracted and noticing that distraction and then beginning again with mindful awareness).<sup>57</sup>

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’d notice that fact—recognizing that the moment of noticing the mind has wandered is an instance of “mindfulness” rather than a mistake—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.<sup>58</sup>

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 “choiceless awareness” meditation because you are not directing your mind to a particular anchor but are constantly aware of what’s coming to your attention.<sup>59</sup> Because both practices cultivate the moment of noticing, we are going

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<sup>56</sup> See, e.g., Salzberg, *Breath Meditation*, *supra* note 53 (providing a 10-minute guided breath meditation).

<sup>57</sup> By contrast, what is sometimes called “informal” mindfulness practice consists of integrating moments of paying attention mindfully into the rest of one’s activities, rather than setting aside time to engage in formal meditation practice (as the exclusive focus of the allotted time). See Kelly Birtwell, Kate Williams, Harm van Marwijk, Christopher J. Armitage & David Sheffield, *An Exploration of Formal and Informal Mindfulness Practice and Associations with Wellbeing*, 10 MINDFULNESS 89, 90 (2019) (“Informal mindfulness practice involves weaving mindfulness into existing routines through engaging in mindful moments and bringing mindful awareness to everyday activities, such as mindful eating or mindfully washing the dishes.”).

<sup>58</sup> See, e.g., Ricard, Lutz & Davidson, *supra* note 45, at 41 (terming a version of this practice “focused attention”).

<sup>59</sup> See *id.* at 41 (calling this “mindfulness” or “open-monitoring” meditation); Rogers, McAliley & Jha, *supra* note 4, at 83 (calling this “open monitoring” or “choiceless awareness” practice).

to call both approaches versions of “mindfulness meditation.”<sup>60</sup> Another useful source of information about this and other forms of mindfulness meditation is the article about mindfulness training for judges quoted in the epigraph (and cited in this footnote),<sup>61</sup> for instance, and, for those interested in gaining direct experience of these practices, various resources are available online (with a few examples cited in this footnote).<sup>62</sup>

So, in short, 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. These also track the three parts of the 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’s mindfulness);
- 3) *Without judgment*: And then, instead of beating yourself up about the wandering mind, practice beginning again with kindness<sup>63</sup>: Realize that the moment you noticed that your mind had wandered was mindfulness, and gently bring your awareness back to your anchor. (Neuroscientist Dr. Amishi Jha calls that moment of noticing the wandering a “mental push

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<sup>60</sup> Some would disagree with grouping both of these practices under the label of “mindfulness meditation.” For instance, Ricard, Lutz, and Davidson would call only the latter “mindfulness” meditation, and the authors do not emphasize the moment of noticing the mind has wandered in concentration practice. Ricard, Lutz & Davidson, *supra* note 45, at 41. The interplay of mindfulness and concentration practice described herein are frequently offered by U.S. meditation teachers, such that it is useful to consider them both together as versions of mindfulness meditation practice—with different degrees of emphasis on the object of focus in a given moment, as opposed to on awareness itself.

<sup>61</sup> Rogers, McAuley & Jha, *supra* note 4, at 87–88.

<sup>62</sup> For instance, this basic free guided meditation from leading secular mindfulness teacher Sharon Salzberg provides an illuminating introduction: Salzberg, *Breath Meditation*, *supra* note 53. Apps such as Headspace introduce and explain the practice through a structured series of videos and guided meditations. HEADSPACE, <https://www.headspace.com/headspace-meditation-app> [<https://perma.cc/C4J8-3J9Q>] (last visited Oct. 8, 2021) (displaying a smart phone app that guides users through meditations and can be downloaded using the Apple App Store or Google Play).

<sup>63</sup> *Cf.* SHARON SALZBERG, THE FORCE OF KINDNESS: CHANGE YOUR LIFE WITH LOVE & COMPASSION 1–3, 41–42 (2010) (discussing the way kindness is often understood as a weak or lesser virtue, although it can be difficult to achieve and is also characteristic of esteemed leaders).

up”<sup>64</sup>; Sharon Salzberg calls it, more colorfully, “the magic moment” of mindfulness.<sup>65</sup>)

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

### B. *Explaining Mindfulness and What’s Difficult About It (Though It Sounds Easy)*

Mindfulness meditation sounds rather dull, and, in fact, it often is dull. This Section briefly discusses why people bother—and why they sometimes feel that getting themselves to meditate at all is a major accomplishment.

#### 1. *Reasons People Meditate*

*Mindfulness practices may seem incongruous to judges, who by necessity prize efficiency. Stressed and overworked judges may understandably feel they do not have the time—the luxury—of slowing down their thinking, much less sitting still in meditation, and doing “nothing.” But, the experience of many in the legal profession, and a growing body of science, suggests that by devoting some time to mindfulness practices, judges may be able to increase their cognitive capacity, in particular their capacity for clarity of thought and the regulation of emotion, and enhance their sense of well-being in ways that support their professional performance.*

*Professor Scott Rogers, Judge Chris McAliley & Dr. Amishi Jha*<sup>66</sup>

*[Mindfulness means] “not hitting someone in the mouth.”*

*Tyran Williams, fifth grader*<sup>67</sup>

Why do this? Why practice formal mindfulness meditation, rather than simply being mindful of whatever you’re doing? If you could read this Article *and* get some

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<sup>64</sup> TED Radio Hour, *Amishi Jha: How Can We Pay Better Attention to Our Attention?*, NPR (May 25, 2018, 10:28 AM), <https://www.npr.org/transcripts/614073254> [<https://perma.cc/P5DX-AEYA>].

<sup>65</sup> Sharon Salzberg, *The Magic Moment*, LION’S ROAR (Feb. 13, 2019), <https://www.lionsroar.com/how-to-meditate-sharon-salzberg-on-getting-started/> [<https://perma.cc/8LM9-BZ97>] (“The moment you realize you’ve been distracted is the magic moment. It’s a chance to be really different, to try a new response. Rather than tell yourself you’re weak or undisciplined, or give up in frustration, simply let go and begin again. In fact, instead of chastising yourself, you might thank yourself for recognizing that you’ve been distracted, and for returning to your breath.”).

<sup>66</sup> Rogers, McAliley & Jha, *supra* note 4, at 82.

<sup>67</sup> 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> [<https://perma.cc/98LF-68RG>] (quoting Tyran Williams, a fifth grader enrolled in a school-based mindfulness program).

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 backward on the past—assessing, longing, regretting. So we’re generally not so good at the “right now” part of mindfulness (a term that, you’ll recall, we’ve defined as “paying attention to whatever is happening right now without judgment”<sup>68</sup>).

Most of us are also not so good at the “without judgment” part. In Dan Harris’s words, “the voice in my head is an asshole.”<sup>69</sup> Arianna Huffington describes that inner voice as “the obnoxious roommate in your head.”<sup>70</sup> So it 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.

A central reason to practice alternatives to that harshly negative internal voice is to pursue clear thinking. Many people suffer from what researchers call a *negativity bias*.<sup>71</sup> Lawyers in particular are often expected to anticipate problems,<sup>72</sup> and this may make expecting the worst seem like realism; however, registering and dwelling on negative events disproportionate to positive events is not clear seeing.<sup>73</sup> This form of negativity is in fact the opposite of clarity; negativity bias means perception that is clouded by a bias or skew away from reality—a kind of

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<sup>68</sup> See *supra* text accompanying notes 51 and 52 (defining mindfulness in similar terms).

<sup>69</sup> 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 xiii (2014) [hereinafter HARRIS, *10% HAPPIER*].

<sup>70</sup> 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> [<https://perma.cc/4JNY-XZQ9>].

<sup>71</sup> On negativity bias, see, for example, BARBARA L. FREDRICKSON, *POSITIVITY: DISCOVER THE UPWARD SPIRAL THAT WILL CHANGE YOUR LIFE* 130, 144, 158 (2009); Roy F. Baumeister, Ellen Bratslavsky & Catrin Finkenauer, *Bad Is Stronger than Good*, 5 REV. 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/> [<https://perma.cc/S72X-5PNT>] (describing the brain as, in effect, “like Velcro for negative experiences but Teflon for positive ones”); see generally JOHN TIERNEY & ROY F. BAUMEISTER, *THE POWER OF BAD: HOW THE NEGATIVITY EFFECT RULES US AND HOW WE CAN RULE IT* (2019).

<sup>72</sup> See, e.g., Elizabeth F. Emens, *On Trust, Law, and Expecting the Worst*, 133 HARV. L. REV. 1963, 1981, 1988–89 (2020).

<sup>73</sup> Cf., e.g., Kendra Cherry, *What Is the Negativity Bias?*, VERYWELL MIND (Apr. 29, 2020), <https://www.verywellmind.com/negative-bias-4589618> [<https://perma.cc/K9KB-QYPZ>] (describing negativity bias as “our tendency not only to register negative stimuli more readily but also to dwell on these events”).

discounting of the positive in favor of the negative. In the words of one teacher, “[m]indfulness is being able to tell the difference between the story we are telling ourselves of what is taking place and what is actually taking place.”<sup>74</sup> Because negativity bias is often so engrained, overcoming it takes practice.

Other utilitarian reasons people practice meditation vary widely. Some of those reasons are supported by a growing empirical literature finding wide-ranging health benefits, physical and mental.<sup>75</sup> Two significant findings, represented by the two epigraphs to this Section, include improvements in attentional focus (learning to focus on what you want to focus on)<sup>76</sup> and emotional self-regulation (managing difficult emotions and your responses to them rather than being controlled by them).<sup>77</sup> More broadly, the burgeoning literature in this area reports benefits to both body and mind, including salutary effects on chronic depression, pain management,

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<sup>74</sup> Rogers, McAliley & Jha, *supra* note 4, at 82 (quoting SALZBERG, *infra* note 75); see also Laura G. Kiken & Natalie J. Shook, *Looking Up: Mindfulness Increases Positive Judgments and Reduces Negativity Bias*, 2 SOC. PSYCH. & 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”).

<sup>75</sup> See, e.g., SHARON SALZBERG, REAL HAPPINESS: THE POWER OF MEDITATION 18–34 (2010); HARRIS, 10% HAPPIER, *supra* note 69 (citing sources).

<sup>76</sup> 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, 745–49 (2012); Rodrigo Becerra, Coralyn Dandrade & Craig Harms, *Can Specific Attentional Skills Be Modified with Mindfulness Training for Novice Practitioners?*, 36 CURRENT PSYCH. 657, 657–62 (2017) (“These findings add to existing literature that supports the positive and beneficial effect of regular mindfulness practice for the enhancement of attentional skills and its potential application to clinical populations.”); *supra* note 11 (citing sources).

<sup>77</sup> 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. NEUROIMAGING 36, 36–42 (2011) (finding that “participation in [Mindfulness-Based Stress Reduction] is associated with changes in gray matter concentration in brain regions involved in . . . emotion regulation . . .”); 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, 215 (2019) (finding that “8 . . . weeks of a daily 13-min meditation resulted in decreased negative mood states including decreases in mood disturbance, anxiety, and fatigue scores . . .”); 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, 127 (2012) (“This study found effects of MBSR [an eight-week mindfulness training program] on a number of variables, including increased mindfulness, increased self-compassion, reduced fear of emotions, and improved emotion regulation strategies . . .”); *supra* note 12 (citing sources).

healthy sleep, working memory, heart disease, and even lifespan.<sup>78</sup> As noted earlier, according to various studies, the multifarious short-term benefits range from debiasing discriminatory impulses to improvements in test-taking anxiety and results.<sup>79</sup>

Some practice mindfulness meditation as the foundation for living and acting with clarity and compassion, at individual, interpersonal, and institutional levels. In an article about her experiential course “Mindfulness and Professional Identity: Becoming a Lawyer While Keeping Your Values Intact,” Professor Angela P. Harris has explained a transformation that took place in her own perspective on mindfulness and other meditation practices:

Taken seriously, mindfulness—not in the sense of taking certain kinds of clients or engaging in a certain kind of practice, but in the sense of seeking justice and peace—places social justice at the very heart of what it means to be a lawyer. . . . Offering the course felt like our small contribution to lawyering as peacemaking. As many have pointed out, legal education gives short shrift to the emotional, interpersonal, moral and spiritual development of students, despite the demands lawyering places on all these capacities. This seminar was a statement to ourselves, our students and the school that these things matter. We might consider turning around the slogan “No justice, no peace.” No peace, no justice.<sup>80</sup>

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<sup>78</sup> See, e.g., Khoury et al., *supra* note 14, at 769 (finding that mindfulness-based therapy showed “large and clinically significant effects in treating anxiety and depression . . .”); la Cour & Petersen, *supra* note 10, at 649 (showing “mindfulness meditation . . . had significant effects on the lives of patients with long-term chronic pain . . .”); Rash, Kavanagh & Garland, *supra* note 10, at 210–13, 224 (“Although the authors were unable to assess the effect of [mindfulness-based therapies (MBTs)] compared with other active treatments (such as cognitive behavior therapy for insomnia), the results of their meta-analysis indicated that MBTs are significantly more effective for reducing insomnia severity compared with attention/education and waitlist controls.”); Rogers, McAliley & Jha, *supra* note 4, at 84 (“Reported benefits have been quite wide-ranging, from reductions in physiological symptoms of somatic disorders such as chronic pain, fibromyalgia, and arthritis, to diminution in the severity and recurrence of psychological disorders such as depression, anxiety, and PTSD.”); Márquez et al., *supra* note 10, at 246 (identifying benefits of mindfulness training for blood pressure control); Nicola S. Schutte & John M. Malouff, *A Meta-Analytic Review of the Effects of Mindfulness Meditation on Telomerase Activity*, 42 *PSYCHONEUROENDOCRINOLOGY* 45, 45–48 (2014) (finding that “mindfulness meditation” produces a “roughly medium effect” on telomerase, an enzyme “associated with health and mortality”).

<sup>79</sup> See *supra* notes 21, 23, and accompanying text.

<sup>80</sup> Angela P. Harris, *Toward Lawyering as Peacemaking: A Seminar on Mindfulness, Morality, and Professional Identity*, 19 *RICH. J.L. & PUB. INT.* 377, 384–85 (2016), <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1372&context=pilr> [<https://perma.cc/LWG5-RVQD>].

Others have written and taught about the role mindfulness can play in cultivating compassion and clear seeing, as a foundation for social justice and social change work at individual and institutional levels, as the Article will discuss.<sup>81</sup>

## 2. *What Makes Meditation Hard*

*One afternoon, I was out by the pool, after having just finished reading yet another book about Buddhist meditation. The thought popped into my head: Should I try this? . . .*

*While my housemates clearly had a high tolerance for kitsch . . . I was not at all sure they were open-minded about meditation, and I had no desire to find out. I sneaked off to our bedroom to give it a try . . .*

*When I opened my eyes [after trying it for the first time], I had an entirely different attitude about meditation. I didn't like it, per se, but I now respected it. This was not just some hippie time-passing technique, like Ultimate Frisbee or making God's Eyes. It was a rigorous brain exercise: rep after rep of trying to tame the runaway train of the mind. The repeated attempt to bring the compulsive thought machine to heel was like holding a live fish in your hands. Wrestling your mind to the ground, repeatedly hauling your attention back to the breath in the face of the inner onslaught required genuine grit. This was a badass endeavor.*

*Dan Harris, ABC News anchor*<sup>82</sup>

Students and colleagues who try meditation are often surprised at how hard it can be. Dan Harris speaks directly to this issue in the lines from *10% Happier* quoted in the epigraph. What makes meditation hard? A fair amount of ink has been spilled on this question—including in Dan Harris's second book, *Meditation for Fidgety Skeptics*, which is dedicated to the dilemma of why everyone doesn't just do this thing that seems so simple and cheap and healthy.<sup>83</sup> (Partly composed via a cross-country road trip, in a giant Rock Safaris bus labeled "The 10% Happier Meditation Tour,"<sup>84</sup> Harris's writings on mindfulness defy stereotypes.) A few of the reasons meditation can be difficult are discussed in this Section.

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<sup>81</sup> See *infra* Part III.

<sup>82</sup> HARRIS, *10% HAPPIER*, *supra* note 69, at 99–101.

<sup>83</sup> DAN HARRIS, JEFF WARREN & CARLYE ADLER, *MEDITATION FOR FIDGETY SKEPTICS: A 10% HAPPIER HOW-TO BOOK* (2017) [hereinafter HARRIS ET AL., *MEDITATION*]; see also Anna-leila Williams, Peter Van Ness, Jane Dixon & Ruth McCorkle, *Barriers to Meditation by Gender and Age Among Cancer Family Caregivers*, 61 *NURSING RSCH.* 22, 22–26 (2012) (finding that "there are barriers [to meditation] present for a sizeable percentage of both men and women of various ages"); Carly Hunt Rietschel, *Quantifying Barriers to Meditation as a Health Behavior: Exploratory and Confirmatory Factor Analysis of the Determinants of Meditation Practice Inventory*, 26–35 (2016) (M.A. thesis, University of Maryland) (ProQuest) (discussing research to date on barriers to meditation).

<sup>84</sup> HARRIS ET AL., *MEDITATION*, *supra* note 83, at 24–25.



Some of the challenges arise from myths and misconceptions about meditation. First among these is the belief that meditation means emptying the mind.<sup>85</sup> Or, as Dan Harris's colleague Paula puts it, "I've always thought it was clearing your brain of everything."<sup>86</sup> It's understandable that people think that's what meditation is: There are some forms of meditation like that. But the beauty of mindfulness meditation—for so many of us—is that you don't have to clear your mind. You just have to notice what the mind is doing.

Second is the belief that meditation is weak, lazy, or soft.<sup>87</sup> Perhaps this is so for some people, but for most who try it, this is tough stuff. It's more like exercise than leisure. Dan Harris's epigraph about taming the mind speaks to this.

In reality, one reason meditation is hard is that it jolts us from our usual ways of living: It forces slowing down, rather than moving fast; it tends to plant us in our bodies and into uncomfortable facts about the present, rather than in speeding along in the planning or remembering mind. Meditating with other people often helps, partly because of the companionship—but also because of the gentle accountability of people around to notice whether we are checking our phone or sitting still.<sup>88</sup> But it's also a strange experience to sit in a room of people silently, not talking or interacting. It's uncommon and generally feels weird at first. And so, making the leap into those unusual and uncomfortable experiences can take courage.

And in reality, sometimes, when we pay attention to what's really going on, inside and out, we have to face things we don't want to know. Carl Jung is credited with saying, "One does not become enlightened by imagining figures of light, but by making the darkness conscious."<sup>89</sup> That may mean knowing things about our own

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<sup>85</sup> See Rogers, McAliley & Jha, *supra* note 4, at 83 ("Mindfulness practices involve noticing and observing the activity of the mind, not eliminating it."); see also *supra* text accompanying note 55 (epigraph quoting Rogers, McAliley & Jha, *supra* note 4, on this point).

<sup>86</sup> HARRIS ET AL., MEDITATION, *supra* note 83, at 43. Harris refers to Paula as his "work wife"; for a fascinating treatment of the term, concept, and more, see Laura A. Rosenbury, *Work Wives*, 36 HARV. J.L. & GENDER 345 (2013).

<sup>87</sup> HARRIS ET AL., MEDITATION, *supra* note 83, at 111 (calling this "the argument that you are a wuss if you meditate").

<sup>88</sup> See, e.g., Helané Wahbeh, Matthew N. Svalina & Barry S. Oken, *Group, One-on-One, or Internet? Preferences for Mindfulness Meditation Delivery Format and Their Predictors*, 1 OPEN MED. J. 66, 66 (2014) ("Groups can also provide motivation and synergistic learning opportunities for the participants. . . . Participants can provide encouragement and emotional support for each other instilling a sense of camaraderie."); Tara Brach, *How to Start a Mindfulness Meditation Group*, TARA BRACH, <https://www.tarabrach.com/starting-meditation-group/> [<https://perma.cc/NXF8-U87N>] (last visited May 23, 2022) ("Mindfulness meditation groups are a wonderful way of connecting with others to share and deepen your meditation practice. These groups come in many shapes and sizes and provide community, accountability and a supportive space to connect with others while steadying and enriching your practice.").

<sup>89</sup> Carl G. Jung, *The Philosophical Tree*, in 13 COLLECTED WORKS OF C.G. JUNG: ALCHEMICAL STUDIES 253, 265–266 (Gerhard Adler & R.F.C. Hull eds. 1983).

pain or suffering, emotional or physical, which we'd rather suppress.<sup>90</sup> And it may mean knowing things about the pain or suffering around us—even some that we help cause—that we'd rather not recognize.<sup>91</sup> In the words of Judge Jeremy Fogel,

Noticing as fully as possible what is occurring in the moment makes a judge more aware of his or her own physical and mental state. A judge with such awareness is more conscious of his or her emotional reactions to a lawyer, litigant or situation, and is able to choose an appropriate response rather than ignoring the reactions or losing control.<sup>92</sup>

Judge Fogel is writing about the experience of judging, but noticing those reactions can serve lawyers—and anyone—as they proceed through their professional and personal lives.

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So now we know something about how to meditate. And we've seen a glimpse of why it's not easy, which will help us understand why institutional scaffolding matters—the focus of Part IV.

## II. TOO WEAK OR TOO STRONG? LOOMING QUESTIONS ABOUT SECULAR MINDFULNESS PRACTICE

*Interviewer: I'm a 3L and when I tell people at law school I'm in a class about meditation, they kind of laugh and think that it's crazy. . . . What would you say to law students who think that there's no connection between being a law student and being someone who meditates?*

*Judge Henderson: I'd say you're really missing out on something. You're young enough to . . . get on the bandwagon early . . . I think this is the wave of the future, and the perfect antidote to the kinds of behavior in court and the kinds of stress in the legal profession . . . There is enormous pressure to produce . . . What used to take hours or days to communicate or send something can be done in minutes now, and it adds to the stress on attorneys. And I think we've got to change with the times. And*

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<sup>90</sup> This is a reason why practicing within classes or retreats with an experienced teacher can be helpful, to get guidance when working with challenging emotions that may arise, including memories of trauma. *See, e.g.,* CHRISTIANE WOLF & J. GREG SERPA, A CLINICIAN'S GUIDE TO TEACHING MINDFULNESS 75–84 (2015) (noting, for example, that “[p]atients with histories of trauma, high levels of anxiety, reactivity, poor frustration tolerance, and a history of abreaction or dissociation may need some modifications such as instructions to keep their eyes open a bit during a practice”).

<sup>91</sup> Finding it harder to ignore others' suffering is one reason that meditation leads some people to become more concerned about, and active against, injustice. *See infra* Section III.C.

<sup>92</sup> Fogel, *supra* note 22, at 4.

*meditation is the perfect addition to the kit for attorneys to help them cope with that.*

*Interview with Judge Thelton E. Henderson,  
U.S. District Court for the Northern District of California*<sup>93</sup>

These lines from Judge Thelton Henderson point to a key reason that the mindfulness revolution is sweeping the legal profession: Lawyering is a high-stress, constantly changing profession that requires tremendous cognitive and emotional capacity from lawyers at all stages of their careers. The demands of legal practice, perhaps especially for those in human rights or other social justice work, create the risk of secondary trauma and burn-out. Mindfulness enhances cognitive functioning, emotional self-regulation, and stress management, among many other benefits, and thus has much to offer lawyers and legal institutions.

The question from the student interviewer that prompts Judge Henderson's words aptly frames this Part's focus on the challenges mindfulness programs face in this country today. The interviewer is troubled by the reactions of some other law students who "laugh" or think taking a class in meditation is "crazy,"<sup>94</sup> a problematic word from a disability perspective.<sup>95</sup>

The rising tide of mindfulness programming across sectors of U.S. society, including legal institutions, faces two major concerns, which correspond to the belittling (laughter) and rejecting (denigration) attitudes the student quoted in the epigraph encounters when talking about studying mindfulness. These are not uncommon reactions within and beyond legal settings: what I'm calling the *minimizing* dilemma and the *magnifying* dilemma. The minimizing dilemma centers on whether mindfulness practices are too passive, atomistic, or nonjudgmental to have a meaningful impact in the world. The magnifying dilemma instead worries over what seems almost the opposite problem: the concern that mindfulness programs are so big and powerful that they exert a kind of mind control or otherwise impinge on people's autonomy—what we might call the *mandatory mindfulness* problem. This Part sets out the specifics of these two problems.

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<sup>93</sup> *The Honorable Thelton E. Henderson on His Meditation Practice*, THE MINDFUL JUDGE: NON-JUDGMENTAL AWARENESS IN ACTION, at 06:09, [http://themindfuljudge.com/judges/judges/thelton\\_henderson.html](http://themindfuljudge.com/judges/judges/thelton_henderson.html) [<https://perma.cc/XK96-HR6E>] (last visited Oct. 5, 2021) (currently available at <https://youtu.be/U17N7W09YcM>).

<sup>94</sup> *Id.*

<sup>95</sup> On the problems with the word "crazy" from a disability perspective, see, for example, Rachel Ewing, "*That's Crazy*": *Why You Might Want to Rethink that Word in Your Vocabulary*, PENN. MED. NEWS (Sept. 27, 2018), <https://www.pennmedicine.org/news/news-blog/2018/september/that-crazy-why-you-might-want-to-rethink-that-word-in-your-vocabulary> [<https://perma.cc/EQ5F-QNY6>].

A. *The Minimizing Dilemma: Neutrality, Passivity, and Atomism*

*Uncoupling mindfulness from its ethical and religious Buddhist context is understandable as an expedient move to make such training a viable product on the open market. But . . . [w]hile a stripped-down, secularized technique—what some critics are now calling ‘McMindfulness’—may make it more palatable to the corporate world, decontextualizing mindfulness from its original liberative and transformative purpose, as well as its foundation in social ethics, amounts to a Faustian bargain. Rather than applying mindfulness as a means to awaken individuals and organizations from the unwholesome roots of greed, ill will and delusion, it is usually being refashioned into a banal, therapeutic, self-help technique that can actually reinforce those roots.*

*Ron Purser & David Loy, Beyond McMindfulness*<sup>96</sup>

People unfamiliar with mindfulness practices may assume that mindfulness teachings are essentially the opposite of law and legal teachings. One striking example is that a key element of mindfulness—“nonjudgment”<sup>97</sup>—seems directly counter to what law involves.<sup>98</sup> People may assume that mindfulness is irrelevant to social policy or social change efforts—or is even a hindrance to that work—because these teachings have a reputation for being “mystical, indulgent, and weird.”<sup>99</sup> And even those willing to look beyond stereotypes may read a description of these practices (such as the one offered earlier<sup>100</sup>) and surmise that they are inherently passive instruments.

An image of someone sitting still, noticing the breath, watching the mind wander from it, and then returning the awareness back to the breath sounds pretty passive. One could reasonably conclude that practicing mindfulness meditation leads a person to sit quietly and ignore the wrongs or injustices of the world.

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<sup>96</sup> Ron Purser & David Loy, *Beyond McMindfulness*, HUFFINGTON POST (July 1, 2013, 10:24 AM), [www.huffingtonpost.com/ronpurser/beyond-mcmindfulness\\_b\\_3519289.html](http://www.huffingtonpost.com/ronpurser/beyond-mcmindfulness_b_3519289.html) [<https://perma.cc/LR3G-UH33>].

<sup>97</sup> See *supra* Section I.A.1 (discussing mindfulness as “paying attention to whatever is happening right now *without judgment*”).

<sup>98</sup> See Susan P. Sturm, *Lawyering Paradoxes: Making Meaning of the Contradictions*, 62 SANTA CLARA L. REV. 175, 203 (2022), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2924&context=lawreview> [<https://perma.cc/Z3YZ-HHXD>] (“Legality also explicitly invites—indeed, requires—judgment and evaluation. Adjudicatory lawyering harnesses ceremonial contest—using dialogue to get ideas or propositions to wrestle with one another so as to expose contradictions in what had been assumed.”).

<sup>99</sup> NICHTERN, *supra* note 1, at 60.

<sup>100</sup> See *supra* Section I.A.1.

Particularly during times of tremendous outrage and public protest,<sup>101</sup> these practices can seem irrelevant or worse.

Even those deeply familiar with meditation may offer a similar critique—at least of mindfulness meditation as typically taught in secular institutions in this country. These internal critics, as the epigraph suggests, parody this version of mindfulness teachings as “McMindfulness,” packaged to narrowly support individual self-interest.<sup>102</sup>

The internal critics do know something the external critics have no reason to know: that the original Buddhist context of these teachings had a substantial, and quite rigorous, ethical framework, rooted in communal values.<sup>103</sup> This ethical core has contributed to the political significance of mindfulness teachers such as Vietnamese Buddhist teacher Thich Nhat Hanh, who was nominated for a Nobel Peace Prize by Martin Luther King, Jr.<sup>104</sup>

But those attempting to respond to either the internal or external critics face a basic quandary: Since secular institutions in this country are unlikely to offer these practices with a strong Buddhist frame, a different response to these critiques is needed. Presenting a potential source for that response—through insights drawn from law practice and law teaching—is the purpose of Part III. For now, the aim is to get a more textured understanding of these concerns.

This critique of secular mindfulness teachings can be broken down into several components. Three are of particular interest here: *neutrality*, *passivity*, and *atomism*.

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<sup>101</sup> See, e.g., Jen Kirby, “*Black Lives Matter*” Has Become a Global Rallying Cry Against Racism and Police Brutality, VOX (June 12, 2020, 7:30 AM), <https://www.vox.com/2020/6/12/21285244/black-lives-matter-global-protests-george-floyd-uk-belgium> [<https://perma.cc/6X5A-BYXK>]; Chuck Todd, Mark Murray, Carrie Dann & Melissa Holzberg, *As Protests Continue, So Does Coronavirus*, NBC NEWS (June 3, 2020, 9:08 AM), <https://www.nbcnews.com/politics/meet-the-press/protests-continue-so-does-coronavirus-n1223296> [<https://perma.cc/L7MU-ATMF>].

<sup>102</sup> See, e.g., Purser & Loy, *supra* note 96.

<sup>103</sup> See, e.g., Danny Fisher, *Uncovering the Meaning of Mindfulness: A Conversation with Joseph Goldstein*, LION’S ROAR (Aug. 29, 2016), <https://www.lionsroar.com/uncovering-the-meaning-of-mindfulness-joseph-goldstein-in-conversation-with-danny-fisher/> [<https://perma.cc/7B6C-KNVU>] (“I think one of the problems is that the word ‘mindfulness’ has quite a range of meanings. What’s important from the Buddhist perspective, which may not always be apparent when the term is used in other ways, [is that] it has an ethical component; so it means more than simply recognizing what’s present. It means being aware of what’s present without greed, without aversion, without delusion. So it’s a special kind of awareness, which is a little more precise. So there’s a fine-tuning we need to do to find that place in the mind that is aware of what’s going on, and that also contains that ethical framework. I think that piece may not always be clear to people.”).

<sup>104</sup> Letter from Martin Luther King, Jr., to The Nobel Institute (Jan. 25, 1967), <http://www.hartford-hwp.com/archives/45a/025.html> [<https://perma.cc/X426-B3CE>] (“[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.”).

Together, these three minimize what mindfulness teaching has to offer, casting it as small, unimportant, impotent. This Section introduces these three components.

### 1. Neutrality

*Mindfulness is awareness that arises through paying attention, on purpose, in the present moment, non-judgmentally.*

Jon Kabat-Zinn<sup>105</sup>

The term *nonjudgment* comes up often in mindfulness teachings. Jon Kabat-Zinn, who is sometimes called the “grandfather” of the Western mindfulness movement and who founded the Mindfulness-Based Stress Reduction training course at the University of Massachusetts Medical Center in 1979,<sup>106</sup> is not unusual in defining mindfulness to include paying attention “nonjudgmentally.”<sup>107</sup>

Nonjudgment makes mindfulness look like the opposite of law and legal teachings. Adapting the words of Michal Tamir, we might say, “The practice of law involves constant judgment of others, while the [mindfulness] tradition aims to avoid judgment.”<sup>108</sup>

More generally, the emphasis on nonjudgment raises a range of concerns: for instance, the concern that mindfulness may undermine our sense of ethics or injustice. How can we call out wrongs in the world if we are supposed to approach things nonjudgmentally? (This question comes up regularly in mindfulness settings in law school and other legal contexts.) More generally, there is the concern that mindfulness is ridding us of our common sense. If we can’t make judgments, how can we choose an apt course of action?

One response to this concern is to point out that *nonjudgmentally* refers not to our common sense or our views about justice and injustice, but merely to the mental operations of meditation. That is, during formal meditation, what the mind does is

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<sup>105</sup> Mindful Staff, *Jon Kabat-Zinn: Defining Mindfulness*, MINDFUL (Jan. 11, 2017), <https://www.mindful.org/jon-kabat-zinn-defining-mindfulness/> [<https://perma.cc/K36W-7M23>].

<sup>106</sup> See, e.g., Brenda Patoine, *The Mindful Brain: Clinical Applications and Mechanistic Clues of Mindfulness Meditation Progress*, DANA FOUND. (May 30, 2019), <https://www.dana.org/article/the-mindful-brain> [<https://perma.cc/2G2L-Q4F9>].

<sup>107</sup> See, e.g., Ruth A. Baer, *Mindfulness Training as a Clinical Intervention: A Conceptual and Empirical Review*, 10 AM. CLINICAL PSYCH.: SCI. & PRAC. 125, 125 (2003) (“All suggest that mindfulness should be practiced with an attitude of nonjudgmental acceptance. That is, phenomena that enter the individual’s awareness during mindfulness practice, such as perceptions, cognitions, emotions, or sensations, are observed carefully but are not evaluated as good or bad, true or false, healthy or sick, or important or trivial.” (citation omitted)).

<sup>108</sup> Tamir, *supra* note 54, at 3 (making a similar point about the law and yoga, rather than law and mindfulness).

not good or bad; it just is. Or, as teachers will sometimes say, “there is no good or bad meditation.”<sup>109</sup>

Sometimes a meditation instruction is even more narrowly focused on a particular mental operation that becomes noticeable through meditation: As described earlier, nonjudgment means cultivating an alternative to what is variously called the snarky inner critic in our heads, “the obnoxious roommate in our head,”<sup>110</sup> or “the voice in my head [that’s] an asshole.”<sup>111</sup>

These responses may be helpful, but they are incomplete. Some of the teachings offered by mindfulness teachers do begin to sound like they are about escaping the realm of ethics more generally. For example, a quotation popular with mindfulness teachers comes from the poet Rumi:

Out beyond ideas of wrongdoing and rightdoing,  
there is a field. I’ll meet you there.<sup>112</sup>

Words like this suggest that mindfulness eliminates or evades the capacity to distinguish right and wrong—apparently encouraging people to stop judging altogether. Likewise, meditation teachers will sometimes invite the silent repetition of the phrases, “I am enough; I have enough; I do enough”<sup>113</sup>—prompting some listeners to think, *How do you know if everyone here does enough? What if the people in this room are witnesses to injustice? What if they are perpetuating injustice?*<sup>114</sup> Such phrases seem, on their face, to embrace a kind of neutrality at odds with the role of the legal system and lawyers to do justice.

Those deeply familiar with Eastern philosophy and religions, from which contemporary Western mindfulness teachings typically derive, will have a response

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<sup>109</sup> *33 of the Best Meditation Quotes*, HEADSPACE, <https://www.headspace.com/meditation/quotes> [<https://perma.cc/VZ5A-7KWG>] (last visited Apr. 28, 2020) (quoting Andy Puddicombe, Headspace co-founder). The full quotation is as follows: “There is no good or bad meditation—there is simply awareness or non-awareness. To begin with, we get distracted a lot. Over time, we get distracted less. Be gentle with your approach, be patient with the mind, and be kind to yourself along the way.”

<sup>110</sup> See Huffington, *supra* note 70.

<sup>111</sup> See HARRIS, 10% HAPPIER, *supra* note 69.

<sup>112</sup> Jalal al-Din Rumi, *A Great Wagon*, in THE ESSENTIAL RUMI 35 (Coleman Barks, Reynold Nicholson, A. J. Arberry & John Moyné, trans., 2004).

<sup>113</sup> Hannah Hutscheson, *I Am Enough & I Believe It*, ELEPHANT (Apr. 10, 2017), <https://www.elephantjournal.com/2017/04/i-am-enough-i-believe-it/> [<https://perma.cc/B3E4-MZ8F>].

<sup>114</sup> Moreover, if the three phrases in quotes are uttered in a context dominated by affluent people, the phrases may seem to assume a certain class privilege—which the costs of meditation and yoga classes also sometimes assume. The rise of free yoga in the United States, now increasingly common online, dovetails with a longstanding tradition in Buddhism of meditation teachings being offered for free (by donation). Nonetheless, free studio-based yoga is still rare. See, e.g., Dana: *The Practice of Giving*, TRICYCLE: BUDDHIST REV. (Summer 2003), <https://tricycle.org/magazine/dana-practice-giving/> [<https://perma.cc/3V24-SXG7>].

to these concerns.<sup>115</sup> Namely, as noted earlier, some strands of mindfulness teaching are imbricated with a rigorous ethical regime because they retain their connection to Buddhist or other religious traditions.<sup>116</sup> This does not help secular mindfulness teachers, however. These teachers are left to explain whether the nonjudgment message of mindfulness teachings is compatible with judgment of right and wrong, justice and injustice, in the world of actions that we and others take.

## 2. *Passivity*

*Don't Just Do Something, Sit There*

Sylvia Boorstein<sup>117</sup>

Consider the epigraph to this Section. These words form the title of a book on conducting a solo meditation retreat at home, authored by prominent American mindfulness teacher Sylvia Boorstein. Reading this title, one can begin to understand the impetus for the ribbing Ethan Nichtern says he receives, in the quotation that starts this Article: “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?’”<sup>118</sup> Nichtern’s friends seem to be responding directly to the kind of exhortation Boorstein offers: “just . . . sit there.”

Boorstein’s title, and many lines like it offered by mindfulness teachers, give the strong impression that mindfulness is a training in non-doing. And indeed, it is. Mindfulness meditation involves learning how to watch one’s feelings, thoughts, and sensations rather than avoiding them or impulsively reacting to them. For so many of us, our habit is to do, to act, and to react. And thus, learning to pause, to stop doing for a time, without going to sleep, requires practice.

People who have studied these teachings will know Boorstein does not mean that mindfulness is a training in passivity. On the contrary, many teachers and meditation practitioners have written about the kinds of actions that this form of meditation prompted them to take—to make changes in their own lives or to speak or act against injustice.<sup>119</sup> “Buddhist teachings suggest that increases in

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<sup>115</sup> The usage of “Eastern” and “Western” here is inadequate and overbroad, but helps to communicate a perceived divide in the origin of these teachings and their popularization today. See, e.g., SAM HARRIS, *WAKING UP: A GUIDE TO SPIRITUALITY WITHOUT RELIGION* 29–32 (2014).

<sup>116</sup> 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/> [<https://perma.cc/Y3S7-NNRZ>]; see also *infra* notes 305–307 and accompanying text.

<sup>117</sup> SYLVIA BOORSTEIN, *DON’T JUST DO SOMETHING, SIT THERE: A MINDFULNESS RETREAT WITH SYLVIA BOORSTEIN* (1996).

<sup>118</sup> NICHTERN, *supra* note 1.

<sup>119</sup> See, e.g., Point of View, *When Mindfulness and Racism Intersect*, MINDFUL (Mar. 21, 2018), <https://www.mindful.org/povmindfulnessforall/> [<https://perma.cc/4E2U-CQD2>];



compassionate responding should be a primary outcome of meditation,”<sup>120</sup> and compassionate action need not stem only from forms of mindfulness that are directly connected to Buddhism.<sup>121</sup> Moreover, there is quantitative research finding that training in basic mindfulness meditation makes people more likely to act to help others in need.<sup>122</sup>

The lab of David DeSteno at Northwestern conducted the first study of mindfulness meditation practice and “prosocial behavior,” which found that subjects practicing mindfulness meditation for eight weeks with a teacher were significantly more likely to take compassionate action than controls.<sup>123</sup> Subsequently, DeSteno and his coauthors have refined that work to show that only three weeks of mindfulness training through an online platform—using the app Headspace rather than a live teacher—also led meditators to take action at significantly higher rates than controls.<sup>124</sup>

The experimental design across both studies involved a waiting area with three chairs, two of them occupied by confederates of the researchers. The participant

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Luke Wreford & Paula Haddock, *Mindfulness and Social Change*, OPEN DEMOCRACY (Aug. 6, 2019, 5:54 PM), <https://www.opendemocracy.net/en/transformation/mindfulness-and-social-change/> [<https://perma.cc/EJ3S-99TV>]; Kyla Marshall, *Practicing Non-Harm: How a Buddhist Practice Can Help Fight Injustice*, SHONDALAND (July 31, 2020), <https://www.shondaland.com/live/a33417886/practicing-non-harm-how-a-buddhist-practice-can-help-fight-injustice/> [<https://perma.cc/2R4E-DEGR>]; Michelle C. Chatman, *Mindfully Disgusted with White Supremacy: Courageous Contemplative Activism for a New Era*, CTR. FOR CONTEMPLATIVE MIND IN SOC’Y (Jan. 20, 2021), <https://www.contemplativemind.org/archives/6527> [<https://perma.cc/TD9B-Z7AG>]; see also Christina Sturdivant Sani, *Think Meditation Could Help Cope with Microaggressions? There’s an App for That*, WASH. POST (Mar. 31, 2020), [https://www.washingtonpost.com/lifestyle/magazine/think-meditation-could-help-cope-with-microaggressions-theres-an-app-for-that/2020/03/31/b28ba252-5fb8-11ea-b014-4fafa866bb81\\_story.html](https://www.washingtonpost.com/lifestyle/magazine/think-meditation-could-help-cope-with-microaggressions-theres-an-app-for-that/2020/03/31/b28ba252-5fb8-11ea-b014-4fafa866bb81_story.html) [<https://perma.cc/HV2X-HKNQ>] (arguing, with support from Ruth King, that “[g]uided meditations that confront racism head-on allow for users to look inward and gain clarity before responding to hurtful acts”).

<sup>120</sup> Paul Condon, Gaëlle Desbordes, Willa B. Miller & David DeSteno, *Meditation Increases Compassionate Responses to Suffering*, 24 PSYCH. SCI. 2125, 2125 (2013).

<sup>121</sup> See, e.g., *id.*

<sup>122</sup> See, e.g., Daniel Lim, Paul Condon & David DeSteno, *Mindfulness and Compassion: An Examination of Mechanism and Scalability*, PLOS ONE, Feb. 17, 2015, at 5 (finding “participants who underwent a three-week mindfulness-based meditation program evidenced enhanced compassion”); Condon et al., *supra* note 120, at 2126 (concluding that “meditation directly enhanced compassionate responding” following an experiment in which meditators were demonstrated to “offer[] their seats to [a] sufferer more frequently than did nonmeditators”); Daniel R. Berry, Athena H. Cairo, Robert J. Goodman, Jordan T. Quaglia, Jeffrey D. Green & Kirk Warren Brown, *Mindfulness Increases Prosocial Responses Toward Ostracized Strangers Through Empathic Concern*, 147 J. EXPERIMENTAL PSYCH. 93, 107 (2018) (noting that “training in mindfulness conduces to other-oriented focus and not tempered self-focus”).

<sup>123</sup> Condon et al., *supra* note 120, at 2125.

<sup>124</sup> Lim, Condon & DeSteno, *supra* note 122.

came in and sat in the third chair to wait. After a time, another person arrived, who was a confederate of the researchers (but the participant didn't know that), described as follows:

[A] female confederate, playing the role of the “sufferer,” [came] down the hallway with the use of a large 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.<sup>125</sup>

The two other confederates, who occupied the other two chairs, were trained not to acknowledge or respond to the person who was audibly suffering. Both studies found that study participants who had engaged in mindfulness meditation training were far more likely to offer their seat to the suffering confederate within the two minutes of observation, compared to controls.<sup>126</sup>

DeSteno's studies provide contrary evidence to the suggestion that mindfulness leads to passivity, and several other studies also find that mindfulness leads to prosocial behavior under other experimental designs.<sup>127</sup> So the question of passivity seems to misapprehend aspects of mindfulness training.

But even if we accept these findings of mindfulness practice leading to compassionate action in the face of suffering, on average, an important question remains: How does one decide when to be passive and when to act? Mindfulness training is a training in learning to overcome our instinct to act impulsively; it is a training in learning to respond rather than react. But how do we know how to discern that doing *rather than non-doing* is the right path in a particular moment? And what keeps the training from listing too far in the direction of non-doing? These are the concerns we will consider in Part III through the lens of law.

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<sup>125</sup> *Id.* at 4–5.

<sup>126</sup> *Id.* (finding that 10 out of 27 meditators offered up their chair compared to 4 out of 25 controls); Condon et al., *supra* note 120, at 2126 (finding that 10 out of 20 meditation-trained participants offered up their chair compared to 3 out of 19 controls). The first study, by Condon et al., used a waiting list control group, which might have attracted people interested in mindfulness, but the second study, by Daniel Lim, Paul Condon, and David DeSteno, used an active control group, which participated in a “memory and cognitive skills training program.” Lim, Condon & DeSteno, *supra* note 122, at 2.

<sup>127</sup> See, e.g., Berry et al., *supra* note 122; see also James N. Donald, Baljinder K. Sahra, Brooke Van Zanden, Jasper J. Duineveld, Paul W. B. Atkins, Sarah L. Marshall & Joseph Ciarrochi, *Does Your Mindfulness Benefit Others? A Systematic Review and Meta-Analysis of the Link Between Mindfulness and Prosocial Behaviour*, 110 BRIT. J. PSYCH. 101, 104–5 (2019) (presenting a meta-analytic review of studies of mindfulness and prosocial behavior, finding that mindfulness enhances prosociality, and urging further empirical study of the underlying mechanisms).

### 3. *Atomism*

*Acts of generosity and kindness are the vital, day-to-day, moment-to-moment channels of transformation. We badly need more of them as this world splinters into hyper-partisanship and infectious ill will. It can also be helpful to recognize the value of thinking in terms of systems change even as we might be focused on acts of personal goodness. We rely on analysis and conscious reflection to make that distinction. When I heard of DeSteno's experiment, it made me think in terms of systems. I wondered, for example, if anyone questioned how the people running the lab were allocating resources if they were putting so few chairs in their waiting room?*

*Sharon Salzberg, Real Change*<sup>128</sup>

The DeSteno studies described in the previous Section pave the way to the question of atomism, as Sharon Salzberg's words in the epigraph highlight. The question here is this: Even if mindfulness spurs people to action to address problems in the world, does mindfulness help people think in terms of systems rather than just narrowly in terms of isolated, individual acts of kindness? Or, as Salzberg prompts us to ask, *Why didn't anyone ask about the inadequate number of chairs in the waiting room of the DeSteno studies?*

A version of this concern can be found in the McMindfulness critique, mentioned earlier, as well.<sup>129</sup> Consider these words from Ron Purser and David Loy:

Most scientific and popular accounts circulating in the media have portrayed mindfulness in terms of stress reduction and attention-enhancement. These human performance benefits are heralded as the *sine qua non* of mindfulness and its major attraction for modern corporations . . . . The result is an atomized and highly privatized version of mindfulness practice . . . .<sup>130</sup>

This rendering casts the problem as one of individualism, which overlaps with the passivity point with which we began. All three minimizing concerns are practically intertwined, and so are the law's responses to those concerns, as will become apparent in Part III. Before we turn to answers, the next Section sets out the magnifying critique.

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<sup>128</sup> SHARON SALZBERG, *REAL CHANGE: MINDFULNESS TO HEAL OURSELVES AND THE WORLD* 180 (2020) [hereinafter SALZBERG, *REAL CHANGE*] (citing Condon et al., *supra* note 120).

<sup>129</sup> See *supra* Section II.A.

<sup>130</sup> Purser & Loy, *supra* note 96.

*B. The Magnifying Dilemma: Mandatory Mindfulness*

*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 Ryan*<sup>131</sup>

The second critique relates to the rise of mindfulness programming in legal and other institutions in this country. Meditation would seem to be an activity that anyone could easily do at home, alone, for free. And in a way, this is true. Meditation does not require expensive medication or technology. And yet the epigraph from Congressman Ryan points to a challenge to that view: Starting and maintaining a practice of meditation is typically not easy, for the reasons discussed earlier.<sup>132</sup> People who try to meditate often abandon the practice.<sup>133</sup> Thus, people who are committed to practicing meditation often bolster their practice with teachers, retreats, and other scaffolding, if they have the time, knowledge, and resources to do so.<sup>134</sup>

In response to the challenges of meditation, programs to support this practice have been exploding across public and private institutions in this country and abroad.<sup>135</sup> Congressman Ryan thus argues, in his book *Mindful Nation*, that good government policy would ensure that these programs reach a diverse range of people across class lines.<sup>136</sup>

But this raises the question: *If meditation becomes part of institutional or social programs, does that mean making meditation mandatory?* Lawyers and legal scholars often pose versions of this question on hearing about mindfulness programming. Sometimes offered in earnest, sometimes as a challenge, the question is inescapable. It points to the problem that I call *mandatory mindfulness*.

The problem with making meditation mandatory is, at first glance, obvious yet trivial. How could people be forced to meditate, practically speaking? They can't, really. Someone else can't force you to pay attention to whatever is happening without judgment. It's hard to think what requiring that would even mean, outside the context of science fiction.

But the problem is more complex—and more robust. While you can't force someone to meditate, you can make someone *feel like* they are being forced to meditate.

If a law professor says at the start of a required class that everyone is going to meditate as a group for the first five minutes of every class, the professor will have no idea if the students are noticing their breath or making their grocery list. In that

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<sup>131</sup> HARRIS ET AL., MEDITATION, *supra* note 83, at 107 (quoting Congressman Tim Ryan).

<sup>132</sup> See *supra* Section I.B.2.

<sup>133</sup> See, e.g., HARRIS ET AL., MEDITATION, *supra* note 83.

<sup>134</sup> See, e.g., HARRIS, 10% HAPPIER, *supra* note 69, at 121 (describing the author's first retreat); RYAN, *supra* note 6, at 27–31 (describing the author's retreat).

<sup>135</sup> See *supra* text accompanying notes 4–5, 9.

<sup>136</sup> RYAN, *supra* note 6.

sense, he can't make them meditate. But the students may well *feel* they are being made to meditate. And if a CEO says we are all going to start our week by meditating at our desks for ten minutes on Monday at 9:00 am, with a guided meditation video live-streamed to everyone's computer screens at that time, the CEO will not know if the company's employees are paying attention to the present moment or daydreaming about their weekends. But the employees may well feel that she has made meditation a mandatory part of the workplace.

Mandatory mindfulness—even the feeling of it—is problematic. This point is discussed further below, but one reason is intuitive: Most people don't like the feeling that they are being told what to do—and perhaps especially so in a country, like the United States, that celebrates individualism.<sup>137</sup> People are therefore unlikely to respond well to a felt pressure to meditate. For this reason, the increasing support of mindfulness programming in institutions may be poised to backfire, as it simultaneously increases the felt pressure to meditate.

The mindfulness revolution therefore requires attention to this problem as well as innovative solutions. The field of law has both conceptual and practical contributions to make to this process, as Part IV will present. First, Part III addresses the minimizing dilemma.

### III. LAW'S RESPONSE TO THE MINIMIZING DILEMMA: ON JUDGMENT, ACTION, AND STRUCTURES

The field of law offers a particular combination of responses to the concerns about mindfulness as neutral, passive, and atomistic. This Part considers each of these three concerns in turn. First, and most obviously, law is a field of normativity characterized by judgments, rather than a neutral sphere. More subtly, skillful lawyering requires modulating between judgment and nonjudgment. Second, against the concern of passivity, legal education trains people to practice, to take action. In addition, skillful lawyering means knowing when to act and when to hold off, to

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<sup>137</sup> See, e.g., MICHAEL V. PANTALON, *INSTANT INFLUENCE: HOW TO GET ANYONE TO DO ANYTHING—FAST* 26–27, 41 (2011); Job M. T. Krijnen, David Tannenbaum & Craig R. Fox, *Choice Architecture 2.0: Behavioral Policy as an Implicit Social Interaction*, 3 *BEHAV. SCI. & POL'Y*, 1, 2 (2017) (reporting that, after the Dutch legislature passed a law changing the organ donation default from opt-in to opt-out, “the number of residents who registered as nondonors spiked to roughly 40 times the number observed in previous months”). As Krijnen, Tannenbaum, and Fox explain their findings, “some residents may have construed the change (or proposed change) in choice architecture as an attempt at coercion by their government. Residents may have recognized that lawmakers altered policies with the intention of increasing organ donation rates, which provoked many to rebuke that attempt by explicitly opting out.” *Id.* See also Brian L. Quick, Lijiang Shen & James Price Dillard, *Reactance Theory and Persuasion*, in *THE SAGE HANDBOOK OF PERSUASION: DEVELOPMENTS IN THEORY AND PRACTICE* 168 (2d ed. 2012) (“Psychological *reactance* is ‘the motivational state that is hypothesized to occur when a freedom is eliminated or threatened with elimination’ . . . . [There is an] assumption that humans place a high value on choice, autonomy, and control.” (internal citation omitted)).

wait, to let things pass undone or unsaid. Third, against the concern of atomism, legal pedagogy at its best is an education in structural thinking. Moreover, though particular pedagogy will vary by instructors and schools, the common law method itself—in which a decision in an individual case becomes binding precedent on future cases—constitutes a necessary relationship between particular judgments and broader change. This Part examines each of these components of law’s contribution, then concludes by briefly discussing some ways mindfulness training also contributes to skillful practice along these three dimensions.

A. *Contra Neutrality: Balancing Judgment and Nonjudgment*

*Judges, as our title implies, make judgments.*

*Judge Jeremy D. Fogel, Mindfulness and Judging*<sup>138</sup>

Law is undeniably a realm of judgment and normativity. Most obviously, as Judge Fogel observes in the epigraph, leading professionals are called *judges*, and their job is to reach judgments.<sup>139</sup> Law students are taught to think like a lawyer, which includes sifting through facts and predicting how a court will apply the law to reach a verdict.<sup>140</sup> And a characteristic feature of legal scholarship, celebrated by some and critiqued by others, is the so-called *normative upshot*—that is, the portion of a law-review article that offers a proposal or prescription for change.<sup>141</sup> This part of a legal article sets out how an author thinks the law should be different in light of the analysis therein.

The work of the lawyer also requires the exercise of judgment, as the ABA Model Rules of Professional Conduct repeatedly emphasize.<sup>142</sup> For instance, Rule 2.1 reads as follows: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and

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<sup>138</sup> Fogel, *supra* note 22, at 1.

<sup>139</sup> What exactly exercising judgment means is a contested subject. As Kathryn Judge explains, for example, “In Posner’s view, the law does not just allow, but requires, judges to exercise judgment. This does not mean ignoring text or precedent. It is about the need for law, statutory or otherwise, to be interpreted, brought to life, and given meaning by judges. It is about a legal system that relies on judges who are human and who see the humanity of those before and around them. It is about being willing to exercise judgment and being frank about those judgments.” See Kathryn Judge, *Judges and Judgment: In Praise of Instigators*, 86 U. CHI. L. REV. 1077, 1090 (2019) (discussing Judge Posner’s approach to judging).

<sup>140</sup> See, e.g., Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413, 413–14, 444 (2007).

<sup>141</sup> See, e.g., Robin West, *The Contested Value of Normative Legal Scholarship*, 66 J. LEGAL EDUC. 6, 11, 13 (2016).

<sup>142</sup> MODEL RULES OF PRO. CONDUCT (AM. BAR ASS’N. 1983).

political factors, that may be relevant to the client's situation."<sup>143</sup> In the words of Professor William Simon,

[C]onventional approaches to legal ethics are too categorical. Rather than operating within a system of formalized ethical rules, . . . lawyers should exercise judgment and discretion in deciding what clients to represent and how to represent them. In exercising this discretion, lawyers should seek to "do justice." They should consider the merits of the client's claims and goals relative to those of opposing parties and other potential clients.<sup>144</sup>

Simon's writing represents one position in a debate about whether lawyers have duties in civil cases "to concern themselves with the 'justice' of their client's cause."<sup>145</sup> More generally, though, lawyers of many stripes must make judgments on behalf of their clients, because lawyers possess legal knowledge that their clients do not.<sup>146</sup>

The centrality of judgment to law might seem to create a divide from mindfulness too wide to cross.<sup>147</sup> On the contrary, the skill-set that lawyers need to develop—of balancing judgment and nonjudgment—is highly relevant to the practice and potency of mindfulness meditation. Nonjudging is a technique that is practiced during meditation, but in life, judging and other forms of decision-making are necessary. And so, deciding when to judge and when not to judge is a critical

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<sup>143</sup> *Id.* r. 2.1; *see also id.* r. 1.6(b)(1) (granting a lawyer discretion to violate client confidentiality "to the extent the lawyer reasonably believes necessary" under several circumstances, including to "prevent reasonably certain death or substantial bodily harm").

<sup>144</sup> William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083 (1988). *But cf.* Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 96 GEO. L.J. 1909, 1939 (2006) (arguing that corporate law practice today differs from Simon's presentation of this ethical domain because corporate risk management and compliance procedures, referred to as "firm-devised risk spreading systems," are "diminishing a lawyer's *individual* responsibility for making moral choices about his role in law and society" and thus "may induce a kind of moral apathy").

<sup>145</sup> Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY, 1, 2 (1999).

<sup>146</sup> *Cf., e.g.,* Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 564–65 n.46 (1991) ("We have an extremely complicated bankruptcy structure. To help a client make a reasoned, autonomous decision about the choices available in consumer bankruptcy . . . would take about twenty hours of attorney time in a typical case. No debtor in bankruptcy can afford that. Instead, attorneys develop shorthand routes to decisions and bring an enormous amount of pressure on debtors to 'decide' things consistently with the attorney's view of how things generally ought to go. Is such an attorney morally reprehensible for stealing the client's autonomy? Of course, this attorney could develop a largely pro bono practice or send all debtors packing who don't have several thousand dollars to pay the fees, but I don't think those are realistic solutions. In effect, it seems to me, we have structured the legal system here to usurp client autonomy.") (quoting Letter from Professor Elizabeth Warren, to author (Aug. 14, 1990)).

<sup>147</sup> *Cf. Tamir, supra* note 54, at 3.

skill for meditators—who need to decide when to act, rather than just “sit there”<sup>148</sup>—even as they practice the art of nonjudging in their mindfulness training.

Effective lawyering involves balancing judgment and nonjudgment, in what Susan Sturm calls a *lawyering paradox*.<sup>149</sup> A prominent example of this comes in client representation. A lawyer must be able to use traditional legal skills and thinking to predict the judgment a court would reach in that client’s case, while at the same time approaching an individual client with the kind of open and nonjudgmental attitudes that will put a client at ease and encourage the individual to be candid and share vital information.<sup>150</sup> Clinical legal scholarship, in particular, has emphasized the importance of nonjudgment, especially when representing clients with different cultural backgrounds than the lawyer’s and clients dealing with trauma or abuse.<sup>151</sup> Effective representation therefore means the skillful balancing of judgment and nonjudgment. Thus, law creates the necessity for judgment—and for the balancing of judgment and nonjudgment<sup>152</sup>—and, at their best, legal education and practice train lawyers in that balance.<sup>153</sup>

*B. Contra Passivity: Learning Through Experience in Practice*

*Lt. Weinberg: “I strenuously object?” Is that how it works? Hm? “Objection.” “Overruled.” “Oh, no, no, no, I strenuously object.” “Oh. Well, if you strenuously object then I should take some time to reconsider.”*

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<sup>148</sup> See *supra* note 117.

<sup>149</sup> See, e.g., Sturm, *supra* note 98, at 177.

<sup>150</sup> See *id.* at 209 (“Judgment and evaluation require the input of accurate and reliable information that can only be obtained through forms of inquiry that do not prejudge or evaluate, and that employ empathy, appreciate listening, and learning.”).

<sup>151</sup> See, e.g., Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 MICH. L. REV. 901, 909 (1997) (“A less detached, less categorical, and less judgmental form of client interaction will open doors to deeper understanding for both the client and the lawyer.” (citations omitted)); Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225, 1260 (1996) (“Gently, ever so gently, the task of the practitioner advocate is to offer enough information, enough insight, and enough options to empower the client to think, to imagine, and, possibly, to act. The practitioner should hope for everything but expect nothing and then be thrilled if, and when, in the gentle (i.e., non-judgmental, interactional) space, the battered woman decides to act.”); Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019, 1034 (1997) (describing nonjudgment as vital to representing survivors of domestic violence because “[i]f the woman can experience a space within which she can examine multiple possibilities and shift among them freely without fear of being judged as unstable or indecisive, she is then better able to figure out, within the contours of that [lawyer-client] relationship, what she thinks is best for her to do”).

<sup>152</sup> To learn to balance judging and nonjudging is challenging. For more on this, and the role of mindfulness, see *infra* Section III.D.

<sup>153</sup> See, e.g., Sturm, *supra* note 98, at 178–80.



*Lt. Galloway: I got it on the record.*

*Lt. Weinberg: You also got the court members thinking we're afraid of the doctor. You object once, so they can hear us say he's not a criminologist. You keep after it the way you did, and suddenly our great cross looks like a bunch of fancy lawyer tricks. It's the difference between paper law and trial law!*

A Few Good Men<sup>154</sup>

Law is a realm of normativity and judgment, as the previous section discusses. Many other fields also entail normativity, though, like philosophy. This raises the question of whether law brings anything special to the table. The argument in this Article is that law brings a particular combination of features, which together respond to the three concerns that make up the minimizing dilemma.<sup>155</sup> Law's contribution distinct from other fields that theorize about normativity is the focus of this Section: to offer a response to the concern that secular mindfulness teachings are *passive*.

As discussed earlier, mindfulness involves practicing *non-doing*.<sup>156</sup> And so, a common question raised about mindfulness meditation is whether it leads people to inaction in the face of injustice or wrongs, large or small.

Law, by contrast, is a realm of action. It is a practice.<sup>157</sup> Law school is a training for a professional role in the world: to represent others, to advise clients, to make decisions. Longstanding debates center on the question of whether law schools adequately train law students for the actual practice of law—with the move to “experiential” requirements in law school being the latest instantiation (the merits of which are also debated).<sup>158</sup> Regardless of one's views on the best approach to

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<sup>154</sup> A FEW GOOD MEN (Castle Rock Entertainment 1992) (relevant clip at <https://www.youtube.com/watch?v=qmbwJidIS14>, 1:40); see also Aaron Sorkin, *A Few Good Men*, IMSDB (1991), <https://imsdb.com/scripts/A-Few-Good-Men.html> [<https://perma.cc/X7DM-CCF2>] (containing the Revised Third Draft of A Few Good Men script).

<sup>155</sup> Law's contribution here is distinctive if not unique; other fields could bring some version of each of these three features. For instance, social work practice likely may also bring the three together. I thank Tazuko Shibusawa for exchanges on this topic.

<sup>156</sup> See *supra* Section II.A.

<sup>157</sup> See, e.g., Robert Post, *Legal Scholarship and the Practice of Law*, 63 U. COLO. L. REV. 615, 616 (1992) (“[L]aw, as an institution inhabited by judges and lawyers, is a ‘practice’ . . . . Law is a coherent and complex cooperative form of human activity that contains within it standards of excellence. Lawyers and judges attempt to excel in the law, and when they have done so they experience that special sense of accomplishment . . . that can only arise from having excelled within a practice.” (citations omitted)).

<sup>158</sup> See, e.g., Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551, 576 (2018); James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 80–81 (1996); Brian Leiter, *‘Experiential’ Education Is Not the Solution to the Problems Facing*

legal training, there is little question that law is a training for action, not merely theory.<sup>159</sup> This is the first, most obvious level on which law offers some alternative to the mindfulness orientation toward non-doing.

More subtly, legal education and legal practice are, at their best, a training in learning to balance action and inaction, in deciding when to act and when to pause, to wait, to remain silent. The decision of whether to object during a trial is one vivid example,<sup>160</sup> captured in the epigraph from the classic courtroom drama *A Few Good Men*.<sup>161</sup> In that scene, a perpetually unsuccessful litigator (Lieutenant Commander JoAnne Galloway, played by Demi Moore) has objected repeatedly to a particular witness, and, in the empty courtroom at the end of the day, her co-counsel (Lieutenant Sam Weinberg, played by Kevin Pollak) sarcastically mimics her performance. Then he explains the problem with objecting too much: making the jury think the lawyers are afraid of a witness and prompting the judge to defend the witness's credentials. The exchange about this event concludes with the principal protagonist (Lieutenant Daniel Kaffee, played by Tom Cruise), trying to stem the critique, observing, "Sam, she made a mistake."<sup>162</sup> Her mistake was that of objecting when she should have remained silent or rested on earlier action. Deciding whether to object is not merely a problem in the movies, of course. In an article on the significance of lawyers' "strategic expertise," for example, Colleen Shanahan and coauthors use as a central example the scenario in which a lawyer knows that a question asked of her client is not relevant, and the lawyer has to weigh various considerations and decide whether to object.<sup>163</sup>

Other examples of ways lawyers need to balance action and inaction include decisions whether to move to suppress evidence;<sup>164</sup> whether to raise an insanity

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*Law Schools*, HUFFPOST (Mar. 7, 2014), [https://www.huffpost.com/entry/experiential-education-law-school\\_b\\_4542103](https://www.huffpost.com/entry/experiential-education-law-school_b_4542103) [<https://perma.cc/68MB-MUXN>].

<sup>159</sup> Martha Minow, *Marking 200 Years of Legal Education: Traditions of Change, Reasoned Debate, and Finding Differences and Commonalities*, 130 HARV. L. REV. 2279, 2296 (2017) (discussing "the continuous struggles in legal education over how to balance theory and practice, how to prepare lawyers who serve paying clients versus those who cannot pay, and how to both critique and strengthen law and the legal profession").

<sup>160</sup> See, e.g., *Barba-Reyes v. United States*, 387 F.2d 91, 93 (9th Cir. 1967) ("Why appellant's counsel failed to move to suppress the evidence, or to object to the testimony, is not discernible from the record. It may have been for any one of several reasons including trial tactics or courtroom strategy since the sole defense offered at the trial was that appellant was completely unaware of the presence of the narcotics in the automobile.").

<sup>161</sup> A FEW GOOD MEN, *supra* note 154.

<sup>162</sup> *Id.*

<sup>163</sup> Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 DENV. L. REV. 469, 510–11 (2016).

<sup>164</sup> See *Barba-Reyes*, 387 F.2d at 93; see also *supra* note 160 (quoting relevant passage).

defense;<sup>165</sup> whether to cross-examine a witness;<sup>166</sup> whether to make an opening statement;<sup>167</sup> whether to request a particular jury instruction;<sup>168</sup> whether to bring a civil suit<sup>169</sup> or criminal prosecution;<sup>170</sup> and whether to appeal a decision or defend a

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<sup>165</sup> See, e.g., *United States v. Spenard*, 438 F.2d 717, 720 (2d Cir. 1971) (“[I]t was perfectly proper for defense counsel to exercise his judgment [in deciding not to raise an insanity defense] and conclude that it would be better to play upon the jury’s possible sympathy for Spenard’s mental condition without becoming involved in a battle of doctors in which there may have been little likelihood of success.”).

<sup>166</sup> See, e.g., *People v. Aiken*, 45 N.Y.2d 394, 400 (N.Y. 1978) (“Similarly, defense counsel’s failure to cross-examine witnesses or to call witnesses of his own on behalf of appellant is again traceable to the particular facts of this case. It cannot be seriously contended that the People had anything but a strong case against appellant. From this vantage point, we cannot say that counsel erred in choosing not to cross-examine witnesses presented by either the People or codefendant Thorne. This decision may properly have been made on the theory that lacking any point of substance, counsel was best advised to forego cross-examination, rather than reinforce in the minds of the jury the witnesses’ testimony.” (citations omitted)); Joel Jay Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1097 (1973) (“[T]here may be tactical reasons for declining to cross-examine an adverse witness. Cross-examination may have no reasonable prospect of weakening the witnesses’ testimony or credibility and may have the potentially undesirable effect of reinforcing and emphasizing the harmful testimony.”).

<sup>167</sup> See, e.g., Finer, *supra* note 166, at 1093–94 (“Failure to make an opening statement to the jury . . . can usually be justified by a tactical decision not to reveal a weak hand to the court or jury at the outset, to wait and see what the government’s case will be, or not to commit the defendant prematurely to any particular line of defense.”).

<sup>168</sup> *Id.* at 1107 (“[C]ounsel’s failure to request an instruction as to a lesser offense supported by the evidence could be justified by a legitimate strategy of going for an ‘all or nothing’ verdict and by the desire not to give the jury a second chance to convict.”).

<sup>169</sup> Cf., e.g., John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677–691 (1986) (discussing the process of deciding whether to bring a securities class action lawsuit).

<sup>170</sup> See, e.g., Staff, *Preliminary Proceedings*, 33 GEO. L.J. ANN. REV. CRIM. PROC. 193, 193–95 (2004) (“Courts recognize broad discretion to initiate and conduct criminal prosecutions . . . . So long as there is probable cause to believe that the accused has committed an offense, the decision to prosecute rests within the prosecutor’s discretion. A prosecutor may also decide what charges to bring, when to bring them, and where to bring them. A prosecutor also has far-reaching authority to decide whether to investigate, grant immunity, or negotiate a plea bargain.”).

law in court.<sup>171</sup> The New York Court of Appeals summed up the need to balance action and inaction in *People v. Flores*:<sup>172</sup>

If the rule requiring the “effective assistance” of counsel at trial is to have any meaning at all, it must be premised on the notion that, in most cases, the attorney’s aim is to defeat the People’s charges or at least to minimize the client’s exposure to incarceration. Any action—or *inaction*—that could conceivably advance those goals can arguably be deemed “trial strategy.”<sup>173</sup>

These examples cover only the subfield of lawyering that is termed litigation, which involves pursuing or defending lawsuits. But legal work in all its guises presents the demand for action and the necessity for discerning when to act and when not to act. Thus, in the encounter with law, mindfulness teachings, with their emphasis on non-doing, confront a world where the need for action and deciding when to act cannot be avoided.<sup>174</sup>

### C. *Contra Atomism: Moving Beyond the Individual Through Structural Thinking*

*I have experienced over and over how mindfulness meditation brings forth compassion. Countless times, a new meditator has come up to me and said something like, “A street person asked me for money, and my automatic habit has been to give a few dollars. This was the first time I looked the street person in the eyes and realized that they were a human being.” That realization is genuine and unforced, not a result of trying to seem “spiritual” or “perfect.” The power of such a connection can’t really be overstated. And yet, this person may not go on to reflect, I wonder what the housing policy is in this city.*

*Sharon Salzberg, Real Change*<sup>175</sup>

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<sup>171</sup> Cf., e.g., Elliot Karr, *Independent Litigation Authority and Calls for the Views of the Solicitor General*, 77 GEO. WASH. L. REV. 1080, 1091 (2009) (discussing “the Solicitor General’s decision to shield a decision favorable to the DOJ from judicial review by not seeking certiorari” (citations omitted)); Edward N. Beiser, *Perspectives on the Judiciary*, 39 AM. U. L. REV. 475, 480 (1990) (presenting Solicitor General Kenneth Starr’s views on the role of the Solicitor General in “bringing greater consistency to the government’s litigating positions by controlling the government’s participation in the appellate process”); Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 559–566 (2012) (describing the reasoning behind various situations in which the DOJ declines to defend the constitutionality of a law under attack).

<sup>172</sup> 84 N.Y.2d 184 (N.Y. 1994).

<sup>173</sup> *Id.* at 191 (emphasis added).

<sup>174</sup> Again, the question arises of how lawyers learn to balance action and inaction, and here too this is something lawyers may learn through experience, and where mindfulness training may help grow or enhance that learning. See *infra* Section III.D.

<sup>175</sup> SALZBERG, REAL CHANGE, *supra* note 128, at 180–81 (emphasis added).

The final minimizing concern about mindfulness rests on its individual orientation. Sitting still and noticing one's breath sounds like an inherently isolating endeavor, with benefits redounding only to that one individual. As discussed earlier, however, empirical studies suggest that mindfulness practice can spur people to compassionate action.<sup>176</sup> Recall the waiting room study, in which the mindfulness practitioners were more likely to offer their seat to a suffering newcomer.<sup>177</sup> But even if these practices lead to individual acts of kindness, the problem of scope remains. No subjects, not even the meditators, asked the researchers to put more chairs in the waiting room.<sup>178</sup> And as Sharon Salzberg observes in this epigraph, feeling a compassionate connection to a homeless person does not lead ineluctably to pondering housing policy. "To think in that way, involving whole systems," Salzberg observes, "is often based on a certain kind of training."<sup>179</sup>

Law can provide that training. Though legal education is sometimes critiqued for narrowing students' focus to individual clients and their discrete legal problems,<sup>180</sup> many of the best law teachers and legal mentors facilitate a kind of systems thinking. Clinical law professors are one group that has embedded this focus into their legal pedagogy. For instance, Tomar Pierson-Brown describes her "systems thinking" approach to clinical pedagogy as follows:

The student learns to identify social dynamics within and outside of the attorney-client relationship, and processes outside of expressly legal institutions, to grasp the full context of a presenting problem . . . . Acknowledging that system structures can be discerned, the student does not stop at identifying the presence of a systemic problem. Rather, she investigates the elements, relationships, and purposes that create and perpetuate the identified problem.<sup>181</sup>

As another example, Meredith J. Ross discusses the "systems approach" to clinical legal education taken for the past four decades by the University of Wisconsin Law School's Frank J. Remington Center, an umbrella organization within the Law School comprising dozens of in-house clinical programs and externship projects,<sup>182</sup> which aims to help students "learn, from each inmate client's perspective, the daunting complexities of the criminal justice system and the other systems—family,

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<sup>176</sup> See *supra* text accompanying notes 122–127.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> SALZBERG, REAL CHANGE, *supra* note 128, at 181.

<sup>180</sup> See, e.g., Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 IND. L. REV. 735, 750–51 (2011) (observing that the casebook method's utilization of "decontextualized facts ignore[s] the broader societal implications of individual cases").

<sup>181</sup> Tomar Pierson-Brown, *(Systems) Thinking like a Lawyer*, 26 CLINICAL L. REV. 515, 532–33 (2020).

<sup>182</sup> Meredith J. Ross, *A "Systems" Approach to Clinical Legal Education*, 13 CLINICAL L. REV. 779, 781 (2007).

mental health, immigration and social services—with which it intersects.”<sup>183</sup> A systems perspective can also be seen in this passage from an article co-authored by clinicians Steve Wizner and Jane Aiken:

Steve found that it was not enough simply to provide students the opportunity to experience the real world through the representation of low-income clients. As a clinical teacher he needed to sensitize his students to what they were seeing, guide them to a deeper understanding of their clients’ lives and their relationship to the social, economic, and political forces that affected their lives, and help students develop a critical consciousness imbued with a concern for social justice.<sup>184</sup>

These lines highlight the role of the clinical law teacher in illuminating systems that are not in plain sight even to zealous student advocates. Wizner and Aiken describe “spend[ing] hours with students, . . . helping them understand what they are seeing in the ‘real world’”<sup>185</sup>—teaching not just “substantive law and practice,” but also “teach[ing] about systems and institutions.”<sup>186</sup> This work, they believe, is “what define[s] us as clinical teachers.”<sup>187</sup>

Though a systems approach may be foundational for many clinical law teachers, it is not unique to clinical teaching. Some doctrinal teachers also spur students to think beyond the individual client case, to consider the “teach[ing] in ways that amplify the substance of structural inequality.”<sup>188</sup> As Robert Gordon describes his doctrinal teaching, for instance,

It takes all the patience and care law teachers possess to try to show students that just learning rules is of limited use; that one has to learn also how to select the right rule for a case among conflicting rules, to apply rules to facts, to interpret rules and factual narratives and to argue contrary

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<sup>183</sup> *Id.* at 800.

<sup>184</sup> Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 *FORDHAM L. REV.* 997, 1003 (2004).

<sup>185</sup> *Id.* at 1004–05.

<sup>186</sup> *Id.* at 1004.

<sup>187</sup> *Id.* at 1005.

<sup>188</sup> Pierson-Brown, *supra* note 181, at 521; *see also* Sturm, *supra* note 98, at 223–24 (“Substantive injustice is baked into the legal system itself, even as that system offers tools to challenge an unjust status quo. . . . Legal realists, critical theorists, critical race theorists, and feminist scholars have identified this contradiction between formal justice and justice as lived experience in the world as it actually operates.” (citation omitted)).

interpretations; and that these skills in turn require some grasp of principles, policies, and the importance of contextual variation. I have found over the years that a teacher can indeed move students away and above the black-letter law and to recognize the importance of theory, social context, and policy, so long as she does so in the setting of concrete case situations.<sup>189</sup>

The aim of this Article is not to suggest that law school does enough to support this kind of thinking. Instead, as some scholars have argued, legal pedagogy frequently cuts against such a structural lens, even diminishing the critical perspective that many students bring to law school.<sup>190</sup> The first argument here is merely that legal education can and does sometimes incorporate this kind of structural lens, which significant problems require.

The second argument concerns the structure of law itself in a common law system like that of the United States. Under the common law, the decision in an individual case creates a precedent for future cases. In this way, an individual court judgment is inherently connected to a broader legal framework. For this reason, judges often worry over the next case and the wider impact of the precedent that the current case will set.<sup>191</sup> Students are trained to imagine a set of hypotheticals that are closely related to the case at hand, and law school exams often invite them to predict how a court would apply the rules they have read, the existing precedents, to new fact patterns. Doing this well involves looking from multiple perspectives, moving

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<sup>189</sup> Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 MICH. L. REV. 2075, 2107–08 (1993). Cf. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 34–35 (2008) (explaining “[t]he systematicity of law”). “The process by which courts make law involves projecting the existing logic of the law into an area of uncertainty or controversy, using devices such as analogy and reference to underlying principles. Courts would have to operate in quite a different way—and the pretense that they are really just finding the law rather than laying down new law would be much harder to sustain—were it not for the systematicity of the existing body of norms that they manipulate.” *Id.*

<sup>190</sup> See, e.g., Carasik, *supra* note 180, at 751 (“Moreover, many law students entered law school with idealistic notions about advancing social and economic justice, yet our system of ethics instructs lawyers that the broader social implications of legal work are subverted by the goals of individual representation. The repeated focus on just one client rather than the lofty ideals of systemic change can be disappointing—especially when the outcome in a particular case is adverse to a larger group of disenfranchised people—since our system privileges the absolute right of clients to dictate the goals of representation, absent ethical conflicts. Despite the very real cost of this system, students are not often invited to participate in a broader social critique about society’s preference for the glorification of individual autonomy over a collectivist ethos, or even taught that the system reflects those priorities.”).

<sup>191</sup> See, e.g., Transcript of Oral Argument at 5,14, R.G. & G.R. Harris Funeral Homes Inc. v. Equal Emp. Opportunity Comm’n (2019) (No. 18-107), <https://www.scotusblog.com/case-files/cases/r-g-g-r-harris-funeral-homes-inc-v-equal-opportunity-employment-commission/> [<https://perma.cc/U2YK-XPUU>].

beyond the individuals in the case to others tangentially related to the case.<sup>192</sup> Though students may not extrapolate from this to structural or policy thinking, some sense of interconnected systems is embedded in the underlying method they are studying.

*D. The Interplay: What Mindfulness Gives Back to Legal Actors*

The focus of this Part of the Article has been on what law offers mindfulness in response to the minimizing critiques, but this discussion also identifies some ways that the growing interplay between law and mindfulness gives back to law. Early on, the Article referenced the empirical and other scholarly work presenting wide-ranging benefits of mindfulness to individuals, in general, and law students and lawyers, in particular.<sup>193</sup> This Part points us toward ways mindfulness can offer some tailored benefits through a synergy with law around the specific concerns at issue here: neutrality, passivity, and atomism.

For each point in this Part, where law helps to overcome a minimizing challenge to mindfulness, a question remains about how to implement the insights presented. For instance, on neutrality, law is useful to mindfulness because law necessitates judgment, and requires alternating between judgment and nonjudgment,<sup>194</sup> but how does a lawyer decide when to judge and when not to judge? And on passivity, law helpfully presents the clear need for action as well as the need for discerning when to speak or act,<sup>195</sup> but how does one decide when to intervene and when to hold back? Some lawyers pick this up in practice, over time, as this Part has argued.

Learning skills in mindfulness can also help with developing the discernment needed to determine when to judge and when not to judge, when to act and when to wait or remain silent. Recall that mindfulness emphasizes paying attention to whatever is happening right now.<sup>196</sup> Mindfulness practice helps people cultivate

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<sup>192</sup> See Sturm, *supra* note 98, at 239–241; see also Jennifer Mueller, *How to Think Like a Lawyer*, WIKIHOW (May 6, 2021), <https://www.wikihow.com/Think-Like-a-Lawyer> [<https://perma.cc/TTL8-SGUU>] (explaining that this kind of perspective taking is part of “thinking like a lawyer”). The Mueller depiction of “thinking like a lawyer” includes this example: “Approach a problem from all angles . . . For example, suppose you’re walking down a street and notice a ladder leaned against a building. A worker on the top rung is reaching far to his left, cleaning a window. There are no other workers present, and the bottom of the ladder juts out onto the sidewalk where people are walking. Issue spotting involves not only looking at this situation from the viewpoint of the worker and the person walking on the street, but also the building owner, the worker’s employer, and potentially even the city where the building is located.” *Id.*

<sup>193</sup> See *supra* text accompanying notes 20–22.

<sup>194</sup> See *supra* Section III.A.

<sup>195</sup> See *supra* Section III.B.

<sup>196</sup> Note that the definition here of mindfulness also includes the phrase “without judgment”; as discussed, though, this does not mean without discernment, but rather, with a quieting of any relentlessly negative internal voice, which can often be biased in its negativity. See *supra* notes 71–74 and accompanying text (discussing negativity bias). For



*awareness*, internal and external, and thus to gather facts vital to decision-making in real-time.<sup>197</sup> In Judge Fogel’s words, “Mindfully taking a plea involves approaching each plea as a new and unique situation”—and thus taking in as much information as possible about that particular defendant.<sup>198</sup> As noted earlier, our minds so often pull ahead to the future or back to the past, rather than noticing the present moment.<sup>199</sup> Research finds that meditators perform better than non-meditators on tasks that involve noticing something subtle or brief brought into the field of awareness and on those tasks that involve absorbing information that does not readily fit a category or stereotype.<sup>200</sup>

Being able both to look inward and really see what’s happening there (i.e., to have self-awareness) and to look outward and really see what’s happening there as well (i.e., to get out of one’s own head) helps equip a person to discern, in a given instance, whether to judge or not judge, whether to act or wait, and whether to broaden the frame or focus on the individual.<sup>201</sup> In these ways, mindfulness training dovetails with effective legal training to support skillful legal practice, which is one

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more discussion of this definition of mindfulness, why it is difficult, and why practicing it is useful, see *supra* Section I.B.2.

<sup>197</sup> On internal awareness, see, for example, Fogel, *supra* note 22, at 4 (“Noticing as fully as possible what is occurring in the moment makes a judge more aware of his or her own physical and mental state.”). And on external awareness, see, for example, Fogel, *supra* note 22, at 3 (“Mindfully taking a plea involves approaching each plea as a new and unique situation. The judge notices consciously things that otherwise might tend to be noticed only in passing, if at all: the defendant’s tone of voice and body language, the way the defendant and counsel appear to be communicating (or not communicating) with each other, the defendant’s physical appearance, whether friends or family members of the defendant (or victims) appear to be in the courtroom, and so on. None of these things necessarily changes the outcome of the process, yet taken as a whole they can help the judge learn more about the defendant and assess more fully whether the defendant is entering a knowing and voluntary plea.”).

<sup>198</sup> Fogel, *supra* note 22, at 4. For the full context, see *supra* note 197.

<sup>199</sup> See *supra* Section I.B.1.

<sup>200</sup> See, e.g., Sara Schimchowitsch & Odile Rohmer, *Can We Reduce Our Implicit Prejudice Toward Persons with Disability? The Challenge of Meditation*, 63 INT. J. DISABILITY, DEV. & EDUC. 641, 643 (2016) (testing whether “meditation practice can discontinue automatic reactivity in a context of implicit activation of categorical stereotype”).

<sup>201</sup> For a thoughtful discussion of the many elements a lawyer must notice, gather, assess, and evaluate in real-time, in order to decide whether or not to object to a nonrelevant question to their client or a witness, see, for example, Shanahan, Carpenter & Mark, *supra* note 163, at 510–11 (“Thus, although an objection would be a legally and procedurally accurate choice, one that would likely have been sustained by the judge, her understanding of the human dynamics in the room, the substantive legal issues in her case, her particular client, and her strategic understanding of the choice presented led her to not object.”). On how a lawyer should think about when to engage in “movement lawyering” and when to focus on an individual client only, see, for example, Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447, 450–52 (2018).

reason for the increasing incorporation of mindfulness training into legal institutions.<sup>202</sup> The subject of integrating mindfulness training into legal institutions brings us to the magnifying dilemma at the heart of the next Part.

#### IV. LAW'S RESPONSE TO THE MAGNIFYING DILEMMA: MEDITATION DEFAULTS

*Every lawyer should be practicing mindfulness.*

*Jeena Cho*<sup>203</sup>

Lawyers who hear that meditation has various individual and societal benefits sometimes ask: *If meditation offers so many benefits for lawyers, what will we do? Make law students and lawyers meditate?* This I have called the “mandatory mindfulness” problem. And there is a simple answer to this question, as noted earlier: You cannot make people meditate.

A teacher can lead a meditation, but whether listeners' minds follow those instructions is not in the teacher's control. And yet, the richer answer to the mandatory mindfulness problem is more complex. People can be made to *feel* like they are being forced to meditate. And meditation that feels mandatory is unlikely to yield constructive results.<sup>204</sup>

But just as scholars have worked to demonstrate that law is much richer and more complex than statutes and litigation,<sup>205</sup> so too meditation can be supported and encouraged in richer and more complex ways than a mandatory regime. Empirically, we know that background rules—how we set the default rules of a legal or social regime—matter to the choices people make across a range of important domains.<sup>206</sup>

This Article therefore draws on contract-law theory and empirical study of default rules to suggest an answer to the magnifying dilemma through what might be called *meditation defaults*. In the context of meditation, where mandating the practice is neither possible nor desirable, a default regime offers the best possibility for encouraging engagement and institutional change. This Part sets out the theory

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<sup>202</sup> For further discussion of the integration of mindfulness training into legal institutions and the reasons for it, see *supra* notes 20, 21, 61.

<sup>203</sup> Jeena Cho, *Why Every Lawyer Should Be Practicing Mindfulness (Part I)*, ABOVE THE LAW (Apr. 20, 2015, 11:06 AM), <https://abovethelaw.com/2015/04/why-every-lawyer-should-be-practicing-mindfulness-part-i/> [<https://perma.cc/EJ3B-JBVL>].

<sup>204</sup> See *supra* text accompanying note 137 (discussing psychological reactance).

<sup>205</sup> See, e.g., Sturm, *supra* note 98, at 190; see also, e.g., Olatunde C.A. Johnson, *Equality Law Pluralism*, 117 COLUM. L. REV. 1973, 1978 (2017) (exploring “the use of regulatory levers including competitive grants, tax incentives, contests for labor agreements and licenses, requirements attached to land-use development, and scoring systems for public contracts that reward entities for promoting inclusion” as an innovative affirmative civil rights strategy); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 10 (1983) (positing law as the relation between “the ‘is,’ the ‘ought,’ and the ‘what might be.’” (citations omitted)).

<sup>206</sup> See *infra* Section IV.A.

and practice of meditation defaults, offering a framework with implications beyond the context of mindfulness.

The discussion is divided into three sections. Section A explains how default regimes offer a way out of the quandary of mandatory mindfulness. Section B presents a framework for designing robust regimes that emphasize horizontal breadth of offerings while preserving voluntariness on the vertical dimension. Section C develops the framework to show how specific applications of default theory can be used to emphasize the voluntariness of a mindfulness initiative; then, this Section draws on relevant empirical literature to demonstrate a range of ways to make an initiative robust, though not mandatory. The insights in this Part could be used for initiatives outside the mindfulness context; and for any context, training in mindfulness could help the program designer and the individual participant confront difficult decisions of application. Explaining this further contribution from mindfulness, and the ways the interplay between law and mindfulness serves both fields in relation to the magnifying critique, is the purpose of Section D.

#### *A. The Rationale for Defaults*

*Contractual rules are usually categorized dichotomously as mandatory or default—with the former rules unalterable and the latter alterable.*

*Ian Ayres*<sup>207</sup>

If we want to avoid the feeling of mandatory mindfulness, does this mean meditation has no place in law and institutions? The answer is no: Only the narrowest vision of law and institutional policy is confined to mandatory rules. A range of ways to help support decisions has developed over the past several decades. The theory of contract-law default rules<sup>208</sup> has been influential in this work, and a brief explanation is therefore important to this discussion of meditation defaults.

In contracts, a default rule is a legal background rule that kicks in and becomes part of the contract unless the parties speak to the contrary in the formal contract.<sup>209</sup> For example, under the Uniform Commercial Code, a warranty of merchantability becomes part of any contract for the sale of goods unless the parties opt out of it; in other words, that warranty is a default term in a contract unless the parties “contract around” the warranty by disclaiming it.<sup>210</sup>

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<sup>207</sup> Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2084 (2012) [hereinafter Ayres, *Regulating Opt-Out*].

<sup>208</sup> See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87–95 (1989); Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971–72 (1983).

<sup>209</sup> See, e.g., Ayres & Gertner, *supra* note 208.

<sup>210</sup> See U.C.C. § 2-314(1) (AM. LAW INST. & UNIF. LAW COMM’N 2020). On the phrase “contract around,” see, for example, Ayres & Gertner, *supra* note 208, at 87 (“Default rules fill the gaps in incomplete contracts; they govern unless the parties contract around them.”).

Building on the simple idea of contract-law default rules, scholars have produced several important structural variations on this theme. These alternatives include *menus*, which offer individuals a range of explicit choices (for instance, a menu of possible warranty options on a new purchase); *altering rules*, which govern what needs to be done to opt out of a default (for instance, rules about whether you have to sign a formal waiver or merely check a box to opt out of a warranty); and *framing rules*, which govern what information or language frames a particular decision (for instance, rules about the typeface or clarity of the language that must be used to tell you about the warranty options and the effect of opting out).<sup>211</sup> These specific variations will be revisited in Section C, as tools for modulating the voluntariness of an institutional initiative. These ideas also play an important role in what Cass Sunstein and Richard Thaler have called “libertarian paternalism,” “choice architecture,” or, more colloquially, “nudges.”<sup>212</sup> I refer to this conceptual and empirical work broadly as the tools of *default regimes* or, simply, *defaults*.<sup>213</sup>

Default rules are often sticky. This is true even beyond arms-length commercial matters, including in policy arenas where much more than transaction costs are at

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<sup>211</sup> See, e.g., Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3, 3–6 (2006) [hereinafter Ayres, *Menus Matter*]; Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 827–36, 840 (2007) [hereinafter Emens, *Changing Name Changing*].

<sup>212</sup> Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1159–67 (2003) [hereinafter Sunstein & Thaler, *Libertarian Paternalism*] (“We suggest that because of the likely effects of default rules, framing effects, and starting points on choices and preferences, paternalism, at least in a weak sense, is impossible to avoid.”); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (2008) (“A nudge, as we will use the term, is any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives.”); see also Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O’Donoghue & Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1221–30 (2003) (“People are much more likely to stick with existing policies, consumption bundles, legislators, and so on than normative theories would predict, even when the costs of switching are very low.”).

<sup>213</sup> Note that the framework offered by this Article partakes little of “rules” in any formal sense. The ideas presented throughout the Article concern the design of a *default regime* more than a set of *default rules*. To understand that distinction, consider that in contract law, when a contract for the sale of goods contains no price term, a background rule supplies the price term. U.C.C. § 2-305(1)(b) (2020) (supplying the price term of a reasonable price at the time of delivery). This is a formal default rule. By contrast, a default regime contains features and design elements that encourage particular choices by making them the easier option—or at least far easier than they would otherwise be. Examples of default regimes include a reputable third-party’s creation of a standard-form contract, available to all but not required by anyone; or an employer’s decision to arrange the office cafeteria so that sugary and fattening foods are kept behind the counter, although users know they can choose to ask for those items. See, e.g., Sunstein & Thaler, *Libertarian Paternalism*, *supra* note 212, at 1164–65.

stake. In areas of personal significance ranging from retirement savings to organ donation, the default option shapes outcomes.<sup>214</sup>

Mandating mindfulness is impossible, and creating the feeling of mandatory mindfulness is undesirable. A default regime therefore offers the best avenue for encouraging engagement and institutional change. The rest of this Part will set out a framework for understanding what kind of default regime best fits the meditation context and, in so doing, explain what the context of meditation can offer the study of defaults.

*B. The Framework: Vertically Optional and Horizontally Robust*

*So how should I presume? . . .  
And should I then presume?  
And how should I begin?*

*T.S. Eliot*<sup>215</sup>

The context of meditation sets into relief some important aspects of default regimes. One aspect is what we’ve just been discussing—how much the default makes an individual *feel* something is mandatory. And though important, the feeling of mandatoriness is not the same thing as a second feature: how robust an offering is. Thus, we can begin to see two distinct features of default regimes: what I call the *vertical dimension* and the *horizontal dimension*.

The first—the vertical—dimension is the degree to which a regime might *feel* mandatory, even if it is not, and the impact of that. I call this dimension *vertical* because it asks, *How much top-down pressure does the default regime seek to impose on institutional participants?*

The second aspect of default regimes that the meditation context highlights is the breadth of an intervention. This I call the *horizontal dimension* of a default regime because it asks, *How wide and broad is this default regime?* A “default rule” sounds like a binary phenomenon, an On/Off switch. But a default regime could be

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<sup>214</sup> See, e.g., Eric J. Johnson, Mary Steffel & Daniel G. Goldstein, *Making Better Decisions: From Measuring to Constructing Preferences*, 24 HEALTH PSYCH., S17, S18–S19 (2005) (finding that changing default rules of organ donation “had a dramatic impact, with revealed donation rates being about twice as high when” the default rule was that one had to opt out rather than opt in); Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. ECON. 1149, 1176 (2001) (analyzing the “dramatic” effects of automatic enrollment on retirement savings). Note that the default does not always prove sticky. For instance, the default for marital names in the United States is, formally at least, that both partners keep their premarital last names; however, the vast majority of women marrying men change their names. For more on this, and innovative defaults for this context, see Emens, *Changing Name Changing*, *supra* note 211.

<sup>215</sup> T.S. Eliot, *The Love Song of J. Alfred Prufrock*, POETRY FOUND., <https://www.poetryfoundation.org/poetrymagazine/poems/44212/the-love-song-of-j-alfred-prufrock> [<https://perma.cc/X5KH-Q8S9>].

a wide array of structures of support or merely one thin prompt to encourage a particular decision.

With these dimensions in mind, we can set them alongside each other to create a framework represented by this simple four-square:

Figure 1:  
Dimensions of Default Regimes:  
Horizontal (Breadth of Offerings) and Vertical (Feeling of Mandatoriness)

		Horizontal: Breadth of Scaffolding	
		Robust	Thin
Vertical: Depth of Perceived Coercion	Directing	I: Robust, Directing Top-down pressure with broad-based offerings	II: Thin, Directing Top-down pressure with limited offerings
	Inviting	IV. Robust, Inviting Minimal to no top-down pressure with broad-based offerings	III: Thin, Inviting Minimal to no top-down pressure with limited offerings

Each quadrant offers some advantages and some limitations or pitfalls. For instance, the Quadrant I approach (Robust & Directing) surely presents the most promising scheme for institutional change where support for social change is high stakes or widespread. Larry Lessig has written about the utility of mandatory rules for some forms of social change—for instance, requiring motorcycle helmets and banning smoking and discrimination. Similarly, in some domains, making a default regime *feel* mandatory, even if it is technically optional, may be the most effective way to make change.<sup>216</sup> For example, a workplace email encouraging donations to a holiday tipping pool for staff, sent by senior colleagues who will know who donates—stating how much each person should donate to reach the desired group goal and offering multiple ways to donate—may spur a norm of giving.

Quadrant II (Thin & Directing) brings together top-down pressure with limited offerings. This might work well for an arena in which there is just one way to do something or where resources to support an initiative are very limited. For instance, an institution that seeks to encourage composting, but had no budget to support staffing or resources for a developed program, might issue a strong message from the organization's head and no other advertising coupled with just one drop-off location where individuals could bring their compost.

For both Quadrants I and II, a primary concern or pitfall would be resistance to the highly directive manner of delivery. For Quadrant I, the breadth of the program

<sup>216</sup> Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995). And of course, some would point out that nothing is truly mandatory; rather, the costs of noncompliance are just so high that we call them mandatory.

might spark organized rebellion against the program, particularly if the proposed change is unusual or not easily absorbed into the institutional culture; for Quadrant II, the narrowness of the offering might just lead individuals to reject the prompt. Individuals generally don't like feeling they are being told what to do,<sup>217</sup> both practically and philosophically, and without changing norms to support the new regime, that resistance might well trump the value of the program for many individuals.

Quadrant III (Thin & Inviting) is a minimal intervention vertically and horizontally. There is little pressure from above, and the offering itself is spare. The upside may be that no one feels pressure, and the cost and commitment from an institution are very limited. The downside may be that no change occurs because participation is limited, and anyone who decides to participate may be disappointed by the limited offerings. An example of this might be a single flier informing people of a pre-existing program, such as health-insurance reimbursement for a fraction of the cost of a gym membership.

Lastly, Quadrant IV (Robust & Inviting) combines minimal pressure from above with a broad set of offerings to support the endeavor. The advantage of this approach is that it gives many opportunities for engagement by diverse individuals, each of whom may need different ways to find a fit. Moreover, with limited vertical pressure, resistance is unlikely to be widespread and intense. Quadrant IV therefore holds a great deal of promise in some areas, including mindfulness initiatives, as the rest of this Part will discuss.

Figure 1 (above) portrays these four quadrants, which could be usefully explored for any type of default regime—such as encouraging law students to participate in office hours or study groups; promoting pro bono work by lawyers who are members of a statewide Bar association; or implementing anti-racist education in a workplace. The appropriate quadrant for the particular context would depend on the considerations discussed throughout this Part, including the strength of the arguments for the intervention, the organization's tools and willingness to apply direct or indirect pressure in this area, and the likely resistance to perceived top-down pressure.

Figure 2 elaborates the framework through a schematic application to the context of mindfulness initiatives in institutional settings:

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<sup>217</sup> See *supra* note 137 (discussing psychological reactance and citing sources); see also Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607–08 (2000) (explaining why legislative efforts to change social norms by expanding liability often backfire at the enforcement level).

Figure 2:  
Dimensions of Default Regimes Illuminated by the Meditation Context:  
Horizontal (Breadth of Offerings) and Vertical (Feeling of Mandatoriness)

		Horizontal: Breadth of Scaffolding	
		Robust	Thin
Vertical: Depth of Perceived Coercion	Directing	<u>I: Robust, Directing</u> Example: A law firm or nonprofit policy instituting meditations at the start of all meetings; automatic live-streaming to desks; and auto-enrollment in meditation classes	<u>II: Thin, Directing</u> Example: Firm/nonprofit directors send one mass email instructing everyone to begin meditating and to participate in a one-time class
		Best case: Broad culture change	Best case: Directive spurs engagement by some, leading to change, despite limited options or investment of resources
		Worst case: Community rejection or ouster	Worst case: Individual resistance by some & limited results
	Inviting	<b><u>IV. Robust, Inviting</u></b> <b>Example: The firm/nonprofit builds a program offering many diverse options announced via a non-directive invitation (See Section IV.C for details.)</b>	<u>III: Thin, Inviting</u> Example: The firm/nonprofit human-resources department sends one mass email reporting the benefits of meditation and announcing an optional one-time class
		<b>Best case: Wide-ranging opportunities inspire meaningful engagement by many individuals and lead to gradual cultural change</b>	Best case: Exposure inspires curiosity and interest to seek out more
		<b>Worst case: Some individuals never take up the invitation and miss out</b>	Worst case: little attention garnered leading to disappointing results and no impact



Quadrant IV is highlighted in the table because its balance of robust offerings and limited top-down pressure presents the most promising approach for a mindfulness meditation initiative, even though it won't reach all potential beneficiaries and could still garner some resistance. Our next step is to drill down into the features of such a regime, so we can design a framework that considers the feeling of voluntariness alongside the strength of the scaffolding. This is the purpose of Section C.

### *C. Meditation Defaults: The Framework Applied*

What are the central elements of a default regime to support meditation that is vertically optional and horizontally robust? This is a pressing concern, not just for legal institutions but for wide-ranging public and private entities.

Programs to teach and support meditation practice can now be found in legal settings like law firms and nonprofits, courts and legislatures, and law schools, as well as most other sectors of society, including corporate offices, the military, sports teams, police departments, hospitals and psychiatric treatment programs, prisons, and public and private schools.<sup>218</sup> Thinking about how these programs should be framed and offered to support mindfulness practice while simultaneously overcoming the mandatory mindfulness problem—the magnifying dilemma—is vital for legal institutions and promises to benefit other institutional contexts.

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<sup>218</sup> See, e.g., Yeoman, *supra* note 25; NBC News, *supra* note 25; Tracy Lease, *Why Offer Mindfulness in the Nevada County Jail?*, UNION (July 22, 2019), <https://www.theunion.com/lifestyles/health/tracy-lease-why-offer-mindfulness-in-the-nevada-county-jail/> [<https://perma.cc/Q6S8-CTYY>] (discussing mindfulness programs in prisons); *Guiding Rage into Power*, GRIP TRAINING INST., <https://grip-traininginstitute.org/grip/> [<https://perma.cc/5PGR-3H4A>] (last visited Oct. 4, 2021); RYAN, *supra* note 6; HARRIS, 10% HAPPIER, *supra* note 69; 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/> [<https://perma.cc/MX5A-Y4LC>] (discussing mindfulness programs in schools); *Hospitals, Medical Centers Offering Meditation and More*, ABC NEWS (May 10, 2011, 6:13 PM), <https://abcnews.go.com/Health/world-news-hospitals-medical-centers-offering-meditation-integrative/story?id=13573736> [<https://perma.cc/5FQ3-RXS4>] (discussing mindfulness programs in medical centers); Matt Richtel, *The Latest in Military Strategy: Mindfulness*, N.Y. TIMES (Apr. 5, 2019), <https://www.nytimes.com/2019/04/05/health/military-mindfulness-training.html> [<https://perma.cc/8F35-UGRL>] (discussing the use of mindfulness in the military); Gretchen Reynolds, *To Train an Athlete, Add 12 Minutes of Meditation to the Daily Mix*, N.Y. TIMES (June 21, 2017), <https://www.nytimes.com/2017/06/21/well/live/to-train-an-athlete-add-12-minutes-of-meditation-to-the-daily-mix.html> [<https://perma.cc/32KX-27CL>] (discussing the use of mindfulness on sports teams); Luke Fox, *How Mindfulness Training Quietly Gives Elite Athletes an Edge*, SPORTSNET (June 17, 2020, 1:41 PM), <https://www.sportsnet.ca/hockey/nhl/mindfulness-training-quietly-gives-elite-athletes-edge/> [<https://perma.cc/PX6G-N6F2>] (also discussing the use of mindfulness on sports teams).

Building on Figure 2 above,<sup>219</sup> this Section develops principles and ideas for fleshing out a vertically inviting and horizontally robust default regime to support mindfulness. In other words, what follows elaborates Quadrant IV: voluntary and robust.

This Section first focuses on ways to enhance voluntariness, drawing on concepts from contract-law theory, introduced earlier, of framing rules, altering rules, and menus.<sup>220</sup> The Section next focuses on robustness and incorporates insights about defaults drawn from empirical work in behavioral law and economics.<sup>221</sup> Experimentation and sensitivity to context would, of course, be important to any default regime. These guidelines should nonetheless offer a framework using insights from default-rule theory to support mindfulness without triggering concerns about mandatory mindfulness. The analysis in this Section could apply to a wide variety of initiatives—for instance, to promote antidiscrimination norms, ethical behavior, or healthier sleep habits among lawyers—and therefore prove useful even to those who have no interest in mindfulness. Nonetheless, this Section elaborates the framework in the concrete context of mindfulness, a practice that itself has further potential to enhance the framework in action, as the next Section discusses.

### *1. Supporting Voluntariness*

Drawing on the features of contract-law theory noted earlier, we can derive specific ideas for securing and enhancing the voluntary nature of meditation defaults.

#### *(a) Framing Rules*

Mindfulness initiatives can use framing rules to emphasize explicitly that their offerings are not mandatory. Recall that framing rules are rules about what is said prior to decisions whether to opt in to or out of the default.<sup>222</sup> An example of a statutory framing rule is a New York law that requires marriage-license application forms to supply information about the basic law of marital names—that is, that either party can change their name but neither party is required to change their name—as well as the options for name change available to spouses.<sup>223</sup> A law like this attempts

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<sup>219</sup> See *supra* Section IV.B.

<sup>220</sup> See *supra* text accompanying note 211.

<sup>221</sup> See *infra* Section IV.C.2.

<sup>222</sup> See *supra* text accompanying note 211.

<sup>223</sup> See N.Y. DOM. REL. LAW § 15 (“Every application for a marriage license shall contain a statement to the following effect: NOTICE TO APPLICANTS . . . (2) A person’s last name (surname) does not automatically change upon marriage, and neither party to the marriage must change his or her last name . . . (3) One or both parties to a marriage may elect to change the surname by which he or she wishes to be known after the solemnization of the marriage by entering the new name in the space below. Such entry shall consist of one

to overcome misinformation about the decision facing a person, including about its voluntariness.<sup>224</sup>

In the mindfulness context, those who teach or introduce events in a robust and inviting (Quadrant IV) default regime should regularly mention that participation is voluntary. This may involve reminding people of the impossibility of making meditation mandatory and the fact that meditation is an internal process no one else can see. This can be done in a way that doubles as encouragement for the participant to notice what is happening in the present moment—as in, “We could also be somewhere else right now, but we’re all choosing to be here together”—or even in a humorous way—as in, “Participating in the meditation I lead is all entirely optional, of course, especially since no one else knows if you are meditating or making a grocery list.”<sup>225</sup> Moreover, teachers can emphasize that following particular instructions is merely an option—for instance, by noting that closing your eyes during meditation is optional (which it should be, for multiple reasons<sup>226</sup>).

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of the following surnames: (i) the surname of the other spouse; or (ii) any former surname of either spouse; or (iii) a name combining into a single surname all or a segment of the premarriage surname or any former surname of each spouse; or (iv) a combination name separated by a hyphen . . .”).

<sup>224</sup> See Emens, *Changing Name Changing*, *supra* note 211, at 856–59.

<sup>225</sup> Cf. Makom, *Raising Resilient Children + Creating Thriving Families: Learning from Science and Wisdom Traditions: Sharon Salzberg with Dr. Mark Bertin and Dr. Chris Willard*, MARLENE MEYERSON JCC MANHATTAN (June 5, 2018), <https://mmjccm.org/about/podcasts-videos/makom-podcasts> [<https://perma.cc/D5JH-SHBJ>] (discussing views on a mandatory approach to mindfulness, as opposed to an invitational approach) (paraphrased for clarity). For a link with audio, see [https://soundcloud.com/the-jcc-in-manhattan/raising-resilient-children-and-creating-thriving-families-learning-from-science-and-wisdom-traditions?utm\\_source=mmjccm.org&utm\\_campaign=wtshare&utm\\_medium=widget&utm\\_content=https%253A%252F%252Fsoundcloud.com%252Fthe-jcc-in-manhattan%252Fraising-resilient-children-and-creating-thriving-families-learning-from-science-and-wisdom-traditions](https://soundcloud.com/the-jcc-in-manhattan/raising-resilient-children-and-creating-thriving-families-learning-from-science-and-wisdom-traditions?utm_source=mmjccm.org&utm_campaign=wtshare&utm_medium=widget&utm_content=https%253A%252F%252Fsoundcloud.com%252Fthe-jcc-in-manhattan%252Fraising-resilient-children-and-creating-thriving-families-learning-from-science-and-wisdom-traditions), at 01:05.

<sup>226</sup> The most important reason relates to the ways that meditation can lead some fraction of people to feel unsafe or to recall past traumas. See, e.g., John J. Miller, *The Unveiling of Traumatic Memories and Emotions Through Mindfulness and Concentration Meditation: Clinical Implications and Three Case Reports*, 25 J. TRANSPERSONAL PSYCH. 169, 172–75 (1993); see generally Marjatta Moimas, *Teaching Trauma-Sensitive Meditation: Principles and Competencies* 10–16 (2018) (Master’s thesis, Lesley University) (DigitalCommons) (reviewing literature on the capacity of meditation practices to induce trauma). Keeping eyes open may help to alleviate this. *Id.* at 80. Moreover, emphasizing that participants are choosing any action they take with their bodies helps to maintain respect for each individual’s bodily integrity, especially in intimate environments in which practitioners make themselves vulnerable. See, e.g., Katherine Rosman, *Yoga Is Finally Facing Consent and Unwanted Touch*, N.Y. TIMES (Nov. 15, 2019), <https://www.nytimes.com/2019/11/08/style/yoga-touch-consent-harassment.html> [<https://perma.cc/B5UN-26Q9>]; Eliza Griswold, *Yoga Reconsiders the Role of the Guru in the Age of #MeToo*, NEW YORKER (July 23, 2019), <https://www.newyorker.com/news/news-desk/yoga-reconsiders-the-role-of-the-guru-in-the->

Individual teachers may well say any of these things on their own, and particular forms of mindfulness teacher training encourage teachers to use language that is “invitational” rather than “directive.”<sup>227</sup> Framing rules present an important innovation, however, for building voluntary and robust initiatives within institutions: They scale up these individual choices to the institutional level and help to ensure that the emphasis on voluntariness is integrated across program offerings.<sup>228</sup> So, for instance, a list of guidelines for teachers could be compiled and shared, emphasizing appropriate moments and methods for underscoring that nothing is mandatory. Administrators in charge of communicating about a program could be given guidance about what words to use in this regard. For example, the office in charge of planning orientation for incoming 1Ls or new associates could be given clear instructions that all announcements about a planned mindfulness component need to indicate, explicitly, the optional nature of the offerings.

(b) *Altering Rules*

Another way to communicate voluntariness is to make explicit the steps a person can take to opt out of the default. This is the function of altering rules: They explain how alterations to the legal consequences of a default occur.<sup>229</sup> For instance, an altering rule might govern what steps must be taken or what language invoked for a contract to opt out of certain default provisions of the governing law.<sup>230</sup>

In a mindfulness session, rather than a teacher’s saying, “close your eyes, if you like,” a teacher can explain the alternative to closing one’s eyes: “Close your eyes

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age-of-metoo [<https://perma.cc/URM5-5PDV>]; Antonia Blyth, *How #MeToo Shook the Yoga World*, ELLE (Mar. 29, 2018), <https://www.elle.com/beauty/health-fitness/a19609192/how-metoo-shook-the-yoga-world/> [<https://perma.cc/F3P7-73H5>].

<sup>227</sup> See, e.g., Elaine Miller-Karas, *Making a Practice Trauma-Informed*, GREATER GOOD IN EDUC., <https://ggie.berkeley.edu/making-a-practice-trauma-informed/> [<https://perma.cc/NY58-PLBY>] (last visited Oct. 2, 2021) (“Invitational language . . . empowers students with the underlying beliefs that their thoughts and feelings matter . . . [and] helps them to understand that individual experience may vary and is neither right nor wrong—it is simply their experience.”); see also Jon Kabat-Zinn, *Some Reflections on the Origins of MBSR, Skillful Means, and the Trouble with Maps*, 12 CONTEMP. BUDDHISM 281, 293 (2011) (writing that mindfulness practice is “invitational, and depends on the patient’s willingness to tap into those profound innate resources we all have by virtue of being human”).

<sup>228</sup> Framing rules were designed as a response to the problem of “desk-clerk law,” where local clerks fail to convey the state of the marital-naming law to individual citizens, either because they are confused or mistaken about the law or wish to present their own normative views of what the law should be. See Emens, *Changing Name Changing*, *supra* note 211.

<sup>229</sup> See Ayres, *Menus Matter*, *supra* note 211, at 6 and accompanying text; see generally Ayres, *Regulating Opt-Out*, *supra* note 207, at 2036, *passim* (“I use the term ‘altering’ not because the contractors alter the default, but because by complying with an altering rule contractors can alter the legal consequences.”).

<sup>230</sup> See, e.g., U.C.C. § 2-207 (2020); *Ionics, Inc. v. Elmwood Sensors*, 110 F.3d 184, 189 (1st Cir. 1997).

or, if that isn't comfortable for you, rest your gaze on the floor a few feet in front of you." This instruction sets up an implied default (close your eyes) while making clear how to opt out (lower your gaze instead) and explains the basis for opting out (discomfort with the default). To be more respectful of diverse preferences, the instruction could say, instead of "if that isn't comfortable," something like, "if you prefer," which would indicate that an individual's preference to keep their eyes open is sufficient.<sup>231</sup> Similarly, those organizing an orientation event related to mindfulness could be charged with explaining what participants should do if they do not want to participate in the mindfulness session (for instance, "You should feel welcome to exit the event [or Zoom room] immediately after the lunch discussion, if you prefer not to participate in the meditation session"). One small, concrete example concerns email and other announcements: Where possible, these should give clear instructions for how to opt out of future email communications.<sup>232</sup>

Paying attention to altering rules can spur ideas for different ways to strike the balance between voluntariness and robustness. For instance, "train and test" altering rules can insert a stage of providing information and confirming whether that information has been absorbed, prior to an individual's opting out of (or opting into) a default rule.<sup>233</sup> In the mindfulness context, this might mean either, in order to favor robust programming, requiring individuals to read some information about mindfulness (the basics of what it is, for instance, or some relevant research findings) before *opting out* of email announcements about events; or, alternatively, it might mean requiring parties to read some information about mindfulness before *opting into* certain events or sessions. (This might sound like two different approaches to altering rules, but it really means flipping the default: toward or against participation.) These alternative uses of defaults plus train-and-test altering rules could be different approaches to the same offering (such as being included in an email list), depending on an individual program designer's taste for more voluntariness or more robustness. Or they could be different approaches to different kinds of events (for instance, train-and-test to opt-out of a short introductory session versus train-and-test to opt-in to a more intensive event like a day- or weekend-long retreat).

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<sup>231</sup> Cf. Ayres, *Regulating Opt-Out*, *supra* note 207, at 2044 (describing dimensions of altering rules as including "necessary/sufficient").

<sup>232</sup> See, e.g., Sébastien Goutal, *Safe Unsubscribe Introduction*, VADE (May 28, 2015), <https://www.vadsecure.com/en/vade-retro-safe-unsubscribe-introduction/> [<https://perma.cc/X5DQ-FQK8>] (describing Vade's service of helping internet service providers process end user requests to unsubscribe from email lists).

<sup>233</sup> See Ayres, *Regulating Opt-Out*, *supra* note 207, at 2076 (explaining train-and-test altering rules as "requir[ing] nondrafting (and possibly even drafting) parties to pass a test before giving effect to a particular provision").

*(c) Menus*

Menus may be the strongest way to emphasize voluntariness. Menus, as the name suggests, generally serve the purpose of presenting an array of options.<sup>234</sup> Menus can be designed in multiple ways, but anytime a menu offers a clear set of choices, the chooser can be certain that no one option is obligatory. So, with the earlier example of the instruction about closing the eyes, in a menu approach, a teacher could give two specific options in a manner that asserts no hierarchy between them, as in, “You can either close your eyes or rest your eyes on the ground two feet in front of you, whichever suits you right now.” Similarly, as some people find meditating on the breath makes them feel more agitated rather than less, a teacher might offer a menu of possible “anchors” on which to rest attention, as in, “You can choose to rest your awareness on the breath, which is traditional, because it’s always with us; but so is sound or sensations in the body. Any one of these that you choose can work equally well.”<sup>235</sup> For the example of introducing mindfulness into an institutional orientation program, the schedule could plainly say that at a particular time, there are multiple options for activities, one of which is a mindfulness session.

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Framing rules, altering rules, and menus are tools. They do not decide just how voluntary a program should be made to feel. Instead, they provide innovative mechanisms for implementing that level of voluntariness—and feeling of voluntariness—once the level is decided.<sup>236</sup> They can also be used to explore diverse ways to underscore voluntariness, along the way to deciding the right level for a particular initiative. The next subject is tools for building the breadth—the robustness—of that voluntary offering.

## 2. *Building Robustness*

Developing a robust set of offerings requires breadth, depth, diversity, and fit, among other features. Moreover, research on defaults has identified particular features of initiatives that are more likely to succeed. These features have been grouped under rubrics that create the acronym EAST, thus making the model itself *easy* to remember—putting into action the first word in the acronym. Initiatives are

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<sup>234</sup> See *id.* at 2049–50 (distinguishing altering rules from menus); see also Ayres, *Menus Matter*, *supra* note 211, at 3 (“A menu . . . is a nexus of at least two simultaneous offers. This simple definition comports with common restaurant usage. You can order bacon or ham or nothing at all.”).

<sup>235</sup> The lines in the text offer an illustration from the author of how this might be done, rather than a quotation from some other source. For an example of a guided meditation that offers a similar approach, see, for example, Salzberg, *Breath Meditation*, *supra* note 53.

<sup>236</sup> On the role of mindfulness in determining how voluntary to make an initiative, see *infra* Section IV.D.

more likely to succeed if they are made Easy, Attractive, Social, and Timely.<sup>237</sup> On the surface, this acronym sounds like an advertising slogan that might rankle those who criticize contemporary secular mindfulness initiatives as “McMindfulness,”<sup>238</sup> discussed earlier. But some of the design features that EAST represents, in substance, could support effective programming that may also be deep or challenging, not merely superficial events.

This section draws on the EAST model for its memorable structure and findings, while emphasizing the *diversity* of participants as a vital element throughout. Diversity here refers first to race, gender, and other aspects of identity, in the familiar ways the term is used in institutional settings. And diversity also refers to the diverse range of ways people respond to meditation—a subject of current interest in the empirical research on mindfulness.<sup>239</sup> This section also considers other ways individuals may differ—for instance, in their relationship to screen time and technology.

It is important to note that the EAST factors are here treated as dimensions to consider in design, rather than as directives. A useful example of why the factors should be treated as design considerations concerns the dimension of “attractiveness,” which invites, as one strategy, presenting monetary rewards for behavior. Yet, as the report acknowledges, monetary rewards can also lead to crowding out of the desired behavior by replacing intrinsic with extrinsic

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<sup>237</sup> Owain Service, Michael Hallsworth, David Halpern, Felicity Algate, Rory Gallagher, Sam Nguyen, Simon Ruda, Michael Sanders with Marcos Pelenur, Alex Gyani, Hugo Harper, Joanne Reinhard & Elspeth Kirkman, *EAST: Four Simple Ways to Apply Behavioural Insights*, BEHAV. INSIGHTS TEAM, 4–6 (2014), [https://www.bi.team/wp-content/uploads/2015/07/BIT-Publication-EAST\\_FA\\_WEB.pdf](https://www.bi.team/wp-content/uploads/2015/07/BIT-Publication-EAST_FA_WEB.pdf) [<https://perma.cc/BS6C-PXEA>].

<sup>238</sup> See *supra* note 96 and accompanying text.

<sup>239</sup> Cf., e.g., Alvin Powell, *When Science Meets Mindfulness*, HARV. GAZETTE (Apr. 9, 2018), <https://news.harvard.edu/gazette/story/2018/04/harvard-researchers-study-how-mindfulness-may-change-the-brain-in-depressed-patients/> [<https://perma.cc/89AV-TSWE>] (“If researchers can identify what elements are effective, the therapy may be refined to be more successful. Shapero is also interested in using the study to refine treatment. Since some patients benefit from mindfulness meditation and some do not, he’d like to better understand how to differentiate between the two.”); Rahil Rojiani, Juan F. Santoyo, Hadley Rahrig, Harold D. Roth & Willoughby B. Britton, *Women Benefit More Than Men in Response to College-based Meditation Training*, 8 FRONT. PSYCHOL. 1, 6 (2017) <https://doi.org/10.3389/fpsyg.2017.00551> [<https://perma.cc/BX2W-MRXJ>] (finding greater decreases in negative affect among women, compared to men, in a study of a twelve-week course involving meditation); BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* 272 (2014) (reporting on a study, conducted by the author, of thirty-seven women with “severe trauma histories who had already received many years of therapy without much benefit,” which found that “yoga significantly improved arousal problems in PTSD and dramatically improved our subjects’ relationships to their bodies[. . . whereas] eight weeks of [a well-established mental health treatment, . . . which teaches people how to apply mindfulness to stay calm and in control,] did not affect their arousal levels or PTSD symptoms”).

motivation.<sup>240</sup> One could imagine parallel operations for other dimensions of EAST, for instance, “easy”: Those who come to meditation for its challenges, for the support it offers to seeing clearly hard truths—for instance of inequities in our society—may be turned off by a presentation of mindfulness that makes it seem easy or trivial. Thus, each dimension should be considered thoughtfully and in context, for which way it could cut in developing a *robust* initiative.

(a) *Easy*

A wealth of research finds that “small, seemingly irrelevant details that make a task more challenging or effortful (what we call ‘friction costs’) can make the difference between doing something and putting it off—sometimes indefinitely.”<sup>241</sup> Thus, a central idea for developing a robust initiative is to “consider how to make it easier” for someone to access the offerings.<sup>242</sup> The core application of this idea to mindfulness is to create regular access to high-quality mindfulness teachers, whose instructions are suitable for beginners but also apt for more advanced practitioners. This involves thinking about the frequency, the timing, the location, and the advertising of their teachings.

Research supports the concrete impact of reducing the “‘hassle factor’ in taking up a service”—for instance, one study finds that taking users right to a form, rather than to a webpage that contains that form, increases response rates by four percentage points.<sup>243</sup> Streamlining becomes especially important for events that are happening online—as during the COVID-19 pandemic<sup>244</sup>—where frustration with trying to find the Zoom link for the session and then trying to access the link, or trying to sign on for an event that turns out to require in-advance registration, can thwart a person’s intention to attend.<sup>245</sup>

Information about when and where the sessions will occur should also be widely available and simply presented. This both reduces the “hassle factor” to participating in a given session and can help support individuals in planning for

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<sup>240</sup> See, e.g., Service et al., *supra* note 237, at 27; see also Kristen Underhill, *When Extrinsic Incentives Displace Intrinsic Motivation: Designing Legal Carrots and Sticks to Confront the Challenge of Motivational Crowding-Out*, 33 YALE J. ON REGUL. 213 (2016).

<sup>241</sup> Service et al., *supra* note 237, at 9.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 12–13.

<sup>244</sup> See *supra* note 9 and accompanying text (discussing the increase in mindfulness programming in law schools and law firms during the COVID-19 pandemic).

<sup>245</sup> See, e.g., *12 Mistakes Made by Virtual Events Organizers, and How to Prevent Them*, WHOVA BLOG, <https://whova.com/blog/12-mistakes-made-virtual-event-organizers-prevent/> [<https://perma.cc/3RC8-4EHT>] (last visited Oct. 4, 2021) (“We know you want to protect your event, but being overzealous with your security measures can actually end up keeping out the people you want. Some companies found that, instead of experiencing security issues with unregistered attendees, they had actually added too many preventative measures, such as limiting Zoom calls to only authenticated users. The increased security actually reduced attendee participation!”).



sessions that work in their schedule. Studies have found that, during hospital discharge, clearly discussing a plan for self-care with patients, alongside other supports, lowered hospital readmission rates by 30% over the coming month.<sup>246</sup> Making any advertising straightforward and easy to read, without distracting or confusing elements, is part of decreasing hassle, as is putting information where people will see it. Providing a “single point of contact” for questions, ideally someone well-known or recognizable in the community, also contributes to ease.<sup>247</sup> Inviting optional RSVPs can be helpful, reducing one step for those who wish merely to show up, while also creating an opportunity for a precommitment device to those who wish to register their intentions by RSVP-ing.<sup>248</sup>

Though clear advertising matters, ideally the sessions themselves should simply be predictable, so people can form habits around them.<sup>249</sup> This entails regular sessions—for instance, daily, weekly, or monthly—preferably offered in the same, central (or easy to find) location at the same time. Teachers who are available to answer questions, in times and modes that work for users, are important as well.<sup>250</sup>

Diversity is as important to keep in mind, however, as simplicity, when trying to make things easy, because people differ in relevant ways.<sup>251</sup> What is easy for one person is difficult for another. Technological solutions exemplify this. For some people, high-tech sources of calendaring and invitations greatly ease their participation in events—for instance, email invites that directly interface with Outlook or Google calendars—but for others, the technology creates friction—either

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<sup>246</sup> Brian W. Jack, Veerappa K. Chetty, David Anthony, Jeffrey L. Greenwald, Gail M. Sanchez, Anna E. Johnson, Shaula R. Forsythe, Julie K. O’Donnell, Michael K. Paasche-Orlow, Christopher Manasseh, et al., *A Reengineered Hospital Discharge Program to Decrease Rehospitalization: A Randomized Trial*, 150 ANNALS OF INTERNAL MED. 178, 184 (2009); Service et al., *supra* note 237, at 16.

<sup>247</sup> Service et al., *supra* note 237, at 18.

<sup>248</sup> Research supports the conclusion that merely asking people about their intentions to do something, especially in a way that tracks the frequency or context of the event, can increase their likelihood of doing the thing. *See, e.g.*, Jonathan Levav & Gavan J. Fitzsimons, *When Questions Change Behavior: The Role of Ease of Representation*, 17 PSYCH. SCI. 207, 208–12 (2006); Anthony G. Greenwald, Catherine G. Carnot, Rebecca Beach & Barbara Young, *Increasing Voting Behavior by Asking People If They Expect to Vote*, 72 J. APPLIED PSYCH. 315, 318 (1987).

<sup>249</sup> *See, e.g.*, ELAINE SCARRY, *The Place of Habits in Acts of Thinking*, in THINKING IN AN EMERGENCY 81–98 (2011) (discussing the value of habit).

<sup>250</sup> *Cf., e.g.*, Eric P. Bettinger, Bridget Terry Long, Philip Oreopoulos & Lisa Sanbonmatsu, *The Role of Simplification and Information in College Decisions: Results from the H&R Block FAFSA Experiment 3–4* (Nat’l Bureau of Econ. Rsch., Working Paper No. 15361, 2009), <http://www.nber.org/papers/w15361.pdf> [<https://perma.cc/S2ZX-YZDK>] (finding that students who received free professional assistance with the FAFSA form were more likely to obtain financial aid, attend college, and stay in college).

<sup>251</sup> *See, e.g.*, Williams et al., *supra* note 83, at 22 (noting large gender imbalance between segments of the population that practice or do not practice mindfulness); Rietschel, *supra* note 83, at 26–35 (discussing empirical studies on different barriers to meditation); *see generally* HARRIS ET AL., MEDITATION, *supra* note 83.

because they are not tech-savvy, they lack that particular technology, or they run into tech problems in the moment.<sup>252</sup> Moreover, some people are trying to reduce their screen time or their reliance on technology.<sup>253</sup> Accordingly, advertising mindfulness resources on paper or posters, when feasible, may reach this set of individuals more readily.

This point about technology also applies to the teachings themselves; under non-pandemic conditions, offering live teachers, as well as recorded and online teachings, can support different kinds of user preferences. A diversity of teachers and teaching styles will also increase the possibilities for individuals with wide-ranging identities—along the lines of sex, race, and other dimensions—to connect with and learn well from one or more of them.<sup>254</sup> What time of day works best will also vary across individuals, a concern that must be balanced with recognizing the ease created through regular, predictable events that can support the formation of intentions and habits.<sup>255</sup> One further idea building on the insight of “easy” is to bring

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<sup>252</sup> Cf. ELIZABETH EMENS, *LIFE ADMIN: HOW I LEARNED TO DO LESS, DO BETTER, AND LIVE MORE 195–196* (2019) (discussing individuals’ diverse preferences as to technology).

<sup>253</sup> Cf., generally, CAL NEWPORT, *DIGITAL MINIMALISM: CHOOSING A FOCUSED LIFE IN A NOISY WORLD*, at xvi–xvii (2019) (proposing that each person develop a “full-fledged philosophy of technology use” and suggesting that the “key to thriving in our high-tech world . . . is to spend much less time using technology”); TIFFANY SHLAIN, *24/6: THE POWER OF UNPLUGGING ONE DAY A WEEK* (2019) (endorsing the observance of a “Technology Shabbat,” that is, of turning off technology for one day and night a week).

<sup>254</sup> The identity of the teachers can matter as well; thinking about diversity in terms of race, sex and gender, sexual orientation, and other features of identity can matter to the ease with which particular students learn, as well as how the initiative intersects with important issues and social justice concerns, internally and externally. See, e.g., KING, *supra* note 23, at 131–236 (discussing how to build more empowering and racially inclusive mindfulness practices); Tracy Cochran, *Does Race Matter in the Meditation Hall?*, *TRICYCLE* (Fall 2004), <https://tricycle.org/magazine/does-race-matter-meditation-hall/> [<https://perma.cc/JB96-J8ZU>] (interviewing Gina Sharpe, who practiced as a lawyer for many years before she began teaching mindfulness and eventually directing the New York Insight Meditation Center).

<sup>255</sup> See, e.g., Zawn Villines, *What Is the Best Type of Meditation*, *MED. NEWS TODAY* (Dec. 22, 2017), <https://www.medicalnewstoday.com/articles/320392> [<https://perma.cc/MPD7-2UPH>] (“Meditating around the same time each day can make meditation a habit that is easy to incorporate into daily life.”); *Breath Meditation: A Great Way to Relieve Stress*, *HARV. HEALTH PUBL’G*, (Apr. 15, 2014), <https://www.health.harvard.edu/mind-and-mood/breath-meditation-a-great-way-to-relieve-stress> [<https://perma.cc/Q62D-53Q2>] (“It also helps to create a meditation practice by doing it at the same time every day. To start, try for 10 minutes in the morning and evening; then gradually increase to 20 or 30 minutes.”); *Meditation for Beginners*, *HEADSPACE*, <https://www.headspace.com/meditation/meditation-for-beginners> [<https://perma.cc/2NNS-9ERS>] (last visited Aug. 2, 2020) (“The first step is to commit to a regular practice, a few times a week if possible. Be clear about the time you will carve out—10 or 15 minutes initially—and where you will sit, relatively undisturbed (a little bit of background noise is not an issue). It takes discipline and perseverance to make a habit stick, so honoring a routine—same time, same place—will help build your meditation practice. Many people pair meditation with a routine habit they already have, like brushing their teeth, to make sure they remember it.”).

meditation to where people already gather—for instance, to affinity-group or other meetings (in person or virtual), if participants are interested, being sure to underscore that participation is voluntary.

“Most of us have been in situations in which we had every intention of doing something, but never quite got around to doing it,” as the designers of the EAST model observe.<sup>256</sup> For a practice like meditation that is widely acknowledged by practitioners to be challenging, despite *seeming* to be easy,<sup>257</sup> providing robust scaffolding to teach, cue, and support those willing to take these difficult steps is vital.<sup>258</sup>

(b) *Attractive*

Studies find, not surprisingly, that uptake increases when designers of an initiative “make it attractive.”<sup>259</sup> Obvious examples include the fact that a well-chosen image or visual can draw the eye to that announcement over another.<sup>260</sup> This component may also sound superficial, even vacuous, but the underlying principle is not about conforming to norms or emptying out meaning, but about reaching people with the key message in an age of distractions<sup>261</sup>: “Fundamentally, . . . making

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<sup>256</sup> Service et al., *supra* note 237, at 9.

<sup>257</sup> See *supra* Section I.B.2. (discussing what makes meditation challenging).

<sup>258</sup> The flip side of making it easier to meditate could be to make it harder to avoid meditating—or at least to avoid meditation offerings. For instance, “impeding altering rules” could make it hard to opt out of announcements about events by burying the information about how to opt out inside a content-driven message or video. See Ayres, *Regulating Opt-Out*, *supra* note 207, at 2084 (explaining “impeding altering rules” in the context of “argu[ing] that when externalities and paternalism concerns are not sufficient to support mandatory rules, lawmakers can still at times manage and ameliorate these concerns by creating sticky defaults by using what I will call ‘impeding’ altering rules, which selectively deter opt-out by artificially increasing its difficulty”). Cf. *id.* at 2093–94 (“Computer programmers opting for ‘progressive programming’ analogously make it disproportionately difficult for less sophisticated users to opt out of certain defaults. By burying the opt-out software mechanisms in secondary and tertiary dialog boxes, programmers intend to limit such options to more sophisticated users. Analogously, the law can make opt-out mechanisms more opaque by burying the description of altering rules in common-law decisions or going even further and failing to provide safe-harbor instructions on how to achieve legally disfavored options.”). For this author, this approach would cut too much against voluntariness, but the aim here is to identify possibilities.

<sup>259</sup> Service et al., *supra* note 237, at 5, 19–27.

<sup>260</sup> See, e.g., James Balm, *The Power of Pictures: How We Can Use Images to Promote and Communicate Science*, BMC: RSCH. IN PROGRESS BLOG, (Aug. 11, 2014), <http://blogs.biomedcentral.com/bmcblog/2014/08/11/the-power-of-pictures-how-we-can-use-images-to-promote-and-communicate-science/> [<https://perma.cc/B9PY-4PT9>] (“Our love of images lies with our cognition and ability to pay attention. Images are able to grab our attention easily, we are immediately drawn to them.”).

<sup>261</sup> See generally, e.g., TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* (2016); NEWPORT, *supra* note 253; SHLAIN, *supra* note 253.

an action attractive is about two main things: drawing attention to it, and making the action more appealing.”<sup>262</sup>

Examples of ways to increase “salience”<sup>263</sup> include personalized messages and events that intersect with contemporary concerns. One study found that personalizing emails doubled the donation rate to a charitable campaign.<sup>264</sup> (Tech innovations make this kind of personalization increasingly feasible.<sup>265</sup>) Other studies find that people are more likely to make changes at certain periods of the calendar year, like around New Year’s Day.<sup>266</sup> Translating this finding to a legal setting, connecting events with the most pressing issues of the day is likely to attract attention and fuel genuine engagement.

Adding appeal can mean incorporating elements that support people’s well-being while they are learning this challenging practice of mindfulness.<sup>267</sup> An initiative that is able to serve food, or even just tea, may be more appealing—and the data support the impact of food as an incentive<sup>268</sup>—in ways that are consistent with the values of the program. (In a virtual space, or where funds are limited or nonexistent, participants can be encouraged to bring their own food.<sup>269</sup>) Moreover, the space in which a program is offered can matter—not just in terms of its aesthetics

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<sup>262</sup> Service et al., *supra* note 237, at 19.

<sup>263</sup> *See, e.g., id.*

<sup>264</sup> BEHAV. INSIGHTS TEAM, *APPLYING BEHAVIOURAL INSIGHTS TO CHARITABLE GIVING 22* (Cabinet Office Behavioural Insights Team 2013).

<sup>265</sup> *See, e.g.,* Brock Gratton, *How Email Personalization and Follow-Ups Can Boost Your Bottom Line*, BUSINESS.COM (Nov. 19, 2019), <https://www.business.com/articles/benefit-of-email-personalization/> [<https://perma.cc/W2C9-4X8M>]; Blake Miller, *Dear First Name, There Is a Much Easier Way to Personalize Emails*, SALESFORCE (July 13, 2016), <https://www.salesforce.de/blog/2016/07/email-personalization-made-easy.html> [<https://perma.cc/GH8F-JKAZ>].

<sup>266</sup> *See generally* Hengchen Dai, Katherine L. Milkman & Jason Riis, *The Fresh Start Effect: Temporal Landmarks Motivate Aspirational Behavior*, 60 MGMT. SCI. 2563 (2014).

<sup>267</sup> *Cf. supra* Section I.B.2 (discussing challenges of the practice).

<sup>268</sup> *See, e.g.,* Service et al., *supra* note 237, at 22 (finding that offering food encourages individual engagement with workplace campaigns, events, or initiatives).

<sup>269</sup> If leaders model the behavior of taking out that food and eating it, that may help others to follow suit; otherwise, people may wait politely with food under their chair, since it is often considered impolite to eat if others are not all eating or to wait for a host to begin eating. *See, e.g.,* Melissa A. Cohen, Steven G. Rogelberg, Joseph A. Allen, & Alexandra Luong, *Meeting Design Characteristics and Attendee Perceptions of Staff/Team Meeting Quality*, 15 AM. PSYCH. ASS’N 90, 101 (2011) (advising meeting leaders to permit attendees to serve themselves food before the meeting begins). This may be especially important in remote meetings. *See, e.g., also,* Brooke Lynch, *Zoom Happy Hour Not Cutting It? Try Virtual Lunch to Re-Inspire Collaboration*, CUSTOMER CONTACT WK. DIGIT. (Jan. 22, 2021), <https://www.customercontactweekdigital.com/agent-engagement/articles/zoom-happy-hour-not-cutting-it-try-virtual-lunch-to-re-inspire-collaboration> [<https://perma.cc/NA4N-S5UX>] (describing the importance of attendees actually eating in order to feel engaged in the meeting and proposing ways that meeting leaders can encourage attendees to do so).

but in terms of its esteem within the institution.<sup>270</sup> Locating meditation teachings for newcomers in a central or valued space signals their centrality and helps to counteract whatever stigma may attend these practices—or what Dan Harris has called meditation’s “towering PR problem,” which arguably still exists in some circles despite the tremendous growth in these programs.<sup>271</sup>

Corollaries in the virtual space include, where feasible, high bandwidth internet connections, the muting of participants when background noise appears, and the presence (silent or acknowledged) of prominent members of a community at the events. Moreover, the literature on “surprising validators” suggests that informing others in the institution about familiar members of the community or profession who engage in a particular practice can make a practice more appealing and help to shift norms.<sup>272</sup> This may be particularly useful in responding to people who are skeptical about its value.<sup>273</sup>

Additional ways to make an initiative more appealing include underscoring when supplies are limited<sup>274</sup>—for instance, when a workshop has only a certain number of spots or when (some element of) an offering is first-come, first-served. Gamifying activities can make an activity more attractive to some, hence the popularity of apps that track your progress—in their simplest form, at least reporting

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<sup>270</sup> Cf., e.g., Judith Resnik & Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in CITY-STATES AND DEMOCRATIC COURTROOMS* 169–74 (2011) (discussing the history and significance of the design of workplaces occupied by the federal judiciary).

<sup>271</sup> HARRIS, 10% HAPPIER, *supra* note 69, at xiv. On growth of these programs, see *supra* notes 5–9; on the need for mental health programming in the legal field, see *Lawyer Well-Being*, *supra* note 4.

<sup>272</sup> See, e.g., Pranav Dandekar, Ashish Goel & David T. Lee, *Biased Assimilation, Homophily, and the Dynamics of Polarization*, 110 PNAS 5791, 5794 (Apr. 9, 2013), (finding that “biased assimilation can be countered by surprising validators”). “Individuals are more likely to carefully consider disconfirming evidence if it is presented by a source that is otherwise similar to them.” *Id.*

<sup>273</sup> See *id.*

<sup>274</sup> See, e.g., ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* 237–72 (1993) (discussing scarcity); Service et al., *supra* note 237, at 25 (“Policy makers could point out where an offer is only available for a certain time, only open to certain people, and where there is competition amongst these people for places.”).

how many days in a row you have meditated,<sup>275</sup> or in more complex versions, allowing you to grow trees or gain points for your amount of focused time.<sup>276</sup>

Moreover, research finds that drawing attention to a person's self-image can help increase engagement. For instance, in a series of experiments, "more people voted if they were asked 'How important is it to you to be a voter in the upcoming election?' as opposed to 'How important is it to you to vote in the upcoming election?'"<sup>277</sup> Researchers observe that framing activities as expressive of one's "essential qualities" or as "symbolic of a person's fundamental character" provides a strong psychological incentive toward engagement in those activities, as potential participants see the activity as a way to "build and maintain a positive image of the self."<sup>278</sup> So, for some people, inviting them to think of themselves as meditators or members of a community of meditators may be affirming. This is also a good example for appreciating the importance of considering the diversity of individuals: though some might like to think of themselves as meditators, other people might prefer to think of meditation as an activity like exercise and avoid thinking of themselves as meditators (particularly given lingering stigma).<sup>279</sup> Although it is just one example, this point highlights again how vital it is to consider diverse individuals when applying any of these "attractiveness" components.

(c) *Social*

Drawing on the ways that humans are social beings can also help build a robust yet voluntary program.<sup>280</sup> One method is to demonstrate that others in the community are doing the activity. (Recall here the work on surprising validators, discussed earlier.<sup>281</sup>) Research has documented the impact of knowing about

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<sup>275</sup> See, e.g., Service et al., *supra* note 237, at 25 (discussing gamification and the gratification produced by activities that measure and reward participation or progress); see also, e.g., INSIGHTTIMER, <https://insighttimer.com/> [<https://perma.cc/UNK6-9HF5>] (providing a downloadable app that reports how many days in a row a user has meditated with the app). Indeed, gamifying and other strategies may warrant their own category—that of Fun—turning EAST into FEAST. See also Cass R. Sunstein, *How to Make Coronavirus Restrictions Easier to Swallow*, BLOOMBERG (May 19, 2020, 11:23 PM), <https://www.bloombergquint.com/gadfly/coronavirus-masks-and-social-distancing-can-be-made-more-fun> [<https://perma.cc/UDR7-6ZTV>].

<sup>276</sup> See, e.g., FOREST, <https://www.forestapp.cc/> [<https://perma.cc/XML6-K8AL>] (last visited Oct. 8, 2021) (displaying a downloadable smart phone app that helps users stay focused by allowing a planted virtual tree to grow only for the duration of one's period of focus).

<sup>277</sup> Christopher J. Bryan, Gregory M. Walton, Todd Rogers & Carol S. Dweck, *Motivating Voter Turnout by Invoking the Self*, 108 PNAS 12653, 12653–54 (2011).

<sup>278</sup> *Id.*

<sup>279</sup> See, e.g., HARRIS, 10% HAPPIER, *supra* note 69, at 151–55 (differentiating between engaging in Buddhist meditation and identifying as Buddhist); see also Enayati, *supra* note 18 (discussing Justice Breyer's description of his meditation practice).

<sup>280</sup> See, e.g., Service et al., *supra* note 237, at 28.

<sup>281</sup> See Dandekar, Goel & Lee, *supra* note 272 and accompanying text.

community participation on, for instance, paying taxes, giving money to charity, and reducing household energy usage.<sup>282</sup>

Helping people form new social connections, and grow their existing relationships, can also build support and commitment.<sup>283</sup> This is harder to do in a virtual environment, but some ideas include using breakout sessions; inviting community conversation where each person is gently encouraged to participate (aloud or in a chat function); and opening up the space before and after sessions for people to gather informally—or even supporting people in making dates to meet their friends by agreeing to assign them to breakout rooms of their choice just before sessions begin and bringing them back to the main room at the start of the main session (akin to going to an event together where you chat a little while waiting for it to start). Moreover, specific identity-based practice subgroups could be set up to support new social connections as well as promote diversity and other institutional values—for instance, a regular session for people of color or for alumni.<sup>284</sup>

One further approach supported by the research involves encouraging people to make commitments to one another of their intentions to practice or participate. For instance, one study tested “commitment devices between job seekers and their advisors. Job seekers were asked to write down commitments to job-seeking activities for the coming week. A randomized controlled trial showed that the intervention significantly increased [job-finding behavior].”<sup>285</sup> This can be done within an organization by offering to assign buddies who precommit to each other or by setting up a mechanism for individuals to announce their intentions more publicly.<sup>286</sup>

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<sup>282</sup> See, e.g., Michael Hallsworth, John A. List, Robert D. Metcalfe & Ivo Vlaev, *The Behavioralist as Tax Collector: Using Natural Field Experiments to Enhance Tax Compliance*, 148 J. PUB. ECON. 14 (2017); Hunt Allcott, *Social Norms and Energy Conservation*, 95 J. PUB. ECON. 1082 (2011); Ian Ayres, Sophie Raseman & Alice Shih, *Evidence from Two Large Field Experiments that Peer Comparison Feedback Can Reduce Residential Energy Usage*, 29 J.L., ECON. & ORG. 992 (2013); Service et al., *supra* note 237, at 24–30.

<sup>283</sup> Cf., e.g., Service et al., *supra* note 237, at 32–35.

<sup>284</sup> Many mindfulness programs have created practice groups or retreats specifically for people of color, to try to overcome the tendency for meditation spaces in this country to attract White participants disproportionately. See, e.g., Cochran, *supra* note 254. 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 1, 2020), <https://zora.medium.com/im-a-black-scholar-who-studies-race-here-s-why-i-capitalize-white-f94883aa2dd3> [https://perma.cc/Y3BU-KSSF].

<sup>285</sup> Service et al., *supra* note 237, at 34–35.

<sup>286</sup> See *id.* at 35 (“The Behavioural Insights Team has applied this thinking within the Team itself by introducing a commitments board. Team members can voluntarily write personal pledges on the board, with commensurate rewards or penalties if they fail. The board has so far helped team members save more money, exercise more and even eat fewer puddings in the staff canteen.”).

(d) *Timely*

Lastly, timing matters. “We respond differently to prompts depending on when they occur” and, though timing is often dismissed as among the “mere details” of implementation, those details “greatly influence how people react.”<sup>287</sup> One study found, for example, that sending a well-timed text message about court fines increased payment rates by two to three times the rate of the control group—who received a final notice of payment due but no text message.<sup>288</sup>

A robust (but still entirely nonmandatory) mindfulness initiative could incorporate these lessons about timing by, for instance, issuing announcements and event invitations with enough notice that calendars are not yet full and also issuing reminders close to the event time—including all relevant details and any links for online offerings. Offering more than one announcement option would respond to the diversity of people’s calendars and preferences. In addition, making sessions always welcoming to beginners—with basic instructions included and any jargon or terms likely to be unknown explained<sup>289</sup>—would recognize that people start meditating at different junctures. Allowing participants to personalize their own reminders can invite them to set intentions and also set up the system of notifications that best serves them.

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<sup>287</sup> *Id.* at 37.

<sup>288</sup> Laura C. Haynes, Donald P. Green, Rory Gallagher, Peter John & David J. Torgerson, *Collection of Delinquent Fines: An Adaptive Randomized Trial to Assess the Effectiveness of Alternative Text Messages*, 32 J. POL’Y ANALYSIS & MGMT. 718 (2013).

<sup>289</sup> Note that one person’s jargon is another person’s authentic presentation, and discussions of language intersect with debates about cultural appropriation by Western mindfulness teachers. Compare, e.g., Candy Gunther Brown, *Ethics, Transparency, and Diversity in Mindfulness Programs*, in PRACTITIONER’S GUIDE TO ETHICS AND MINDFULNESS-BASED INTERVENTIONS 45, 65, 45–46 (Lynette M. Monteiro, Jane F. Compson & Frank Musten eds., 2017) (critiquing the “Universalist rhetoric” of the mindfulness movement, arguing that it “privileges the perspectives of mindfulness promoters, many of whom are white and economically privileged . . .,” and endorsing a more “transparent” approach that includes the “full disclosure of all that mindfulness entails—including its Buddhist ethical foundations”), and Kendra A. Surmitis, Jesse Fox & Daniel Gutierrez, *Meditation and Appropriation: Best Practices for Counselors Who Utilize Meditation*, 63 COUNSELING AND VALUES, April 2018, at 14 (voicing concern about the possibility of mindfulness teachers “tak[ing] a culturally embedded practice . . . without first acknowledging the practice’s origins, history, intents, and possible interactions with the client”); with Rebecca S. Crane, *Implementing Mindfulness in the Mainstream: Making the Path by Walking It*, 8 MINDFULNESS 585, 588 (2017) (“A key tenet and ethic of MBPs [mindfulness-based programs] has always been that it is important to recontextualize the Buddhist teachings into a form that is equivocally not Buddhist; is free of ideology, dogma, or religious references; and is universally accessible to people of all faiths and none.”), and *id.* at 590 (“We need to develop new clarity and new ways to language understandings to maximize accessibility. In part, this is about disseminating existing understanding—integrating and developing the frameworks of psychological understanding of the mind which draw from a range of sources including Buddhism and other wisdom traditions, and contemporary theories such as those of cognitive and neuroscience.”).



Research also documents the effectiveness of supporting individuals in making plans. The previous section talked about supporting individuals through social engagement with others, but even individual plan-making can increase the chances that people will take the relevant steps. Studies have found, for instance, that encouraging people to write down the time, date, and provider of their future medical appointments (such as on a post-it note) makes them more likely to attend the appointments.<sup>290</sup>

A mindfulness initiative could invite individual lawyers or law students and faculty to write down their intentions for the coming year or semester through a survey or an exercise during an event at the start of the year. Participants could be asked to identify the challenges they foresee in pursuing those intentions—which might include getting so busy that they skip the mindfulness sessions. Anecdote and data both support the idea that when people most need to take care of themselves, they usually find it most difficult to do so.<sup>291</sup> Calling people’s attention to this problem may lead them to identify concrete plans for overcoming the challenges they can foresee. If the principles of EAST are explained to them, participants could use EAST to design their own approach: They might ask for more frequent reminders from the program (*timed* in the way that works best for them); they might make specific plans with a friend to ping each other with words of encouragement or to meet at events (bringing in the *social* as well); they might even set up a reward system to gamify their participation (drawing on the *attractiveness* element); and finally they might schedule other obligations in the same vicinity just before or after the sessions (to make it *easier* to attend). All of these elements could support a horizontally robust initiative that would remain vertically optional.

#### *D. The Interplay: What Mindfulness Gives Back to Legal Decisionmakers*

The analysis in this Part about meditation defaults could apply far more broadly to any program or initiative that aims to bring individual and collective benefits within an institution without imposing a feeling of mandatory obligations. Think, for instance, of programs to promote skills in negotiation, a focus on racial justice, interest in international dimensions of problems, or individual well-being. On the last, an institution might choose to encourage routines of better sleep or reduced alcohol intake among its law-firm associates, nonprofit lawyers, or law students. The

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<sup>290</sup> See Katherine L. Milkman, John Beshears, James J. Choi, David Laibson & Brigitte C. Madrian, *Following Through on Good Intentions: The Power of Planning Prompts* (Harv. Kennedy Sch. Faculty Rsch, Working Paper No. 12-024, 2012), [https://dash.harvard.edu/bitstream/handle/1/8830778/RWP12-024\\_Madrian.pdf?sequence=1&isAllowed=y](https://dash.harvard.edu/bitstream/handle/1/8830778/RWP12-024_Madrian.pdf?sequence=1&isAllowed=y) [<https://perma.cc/2WQ2-MTTQ>]; see also Katherine L. Milkman, John Beshears, James J. Choi, David Laibson & Brigitte C. Madrian, *Using Implementation Intentions Prompts to Enhance Influenza Vaccination Rates*, 108 PROC. NAT’L ACAD. SCI. 10415, 10415–20 (2011) (reporting on a similar study related to plans to get vaccinated).

<sup>291</sup> See, e.g., Women at Work, *How We Take Care of Ourselves*, HARV. BUS. REV. (Nov. 11, 2019), <https://hbr.org/podcast/2019/11/how-we-take-care-of-ourselves> [<https://perma.cc/B8ZJ-Y6EW>].

tools discussed above could be applied to these institutional initiatives and many more.

The challenge that drives this Part is the one termed *magnifying* here; this is the concern, raised by some who confront secular mindfulness programming in institutions, that these initiatives are effectively mandating mindfulness, that is, they are forcing people to meditate—or at least making people feel they are being forced to meditate.<sup>292</sup> As this Part has argued, the concept of defaults and the surrounding empirical and theoretical literature demonstrate the plausibility of programming that is both robust and voluntary.

Moreover, the skills gained in mindfulness training can themselves usefully inform both individual decisionmaking and the institutional design of initiatives. This Section considers each in turn. Thus, this Part of the Article concludes by showing how mindfulness training can aid decisionmaking about mindfulness programming and about other forms of institutional initiatives.

### 1. Individual Decisionmakers

Although the framework offered here could be applied to many other contexts, the mindfulness context offers something particular back to legal decision-makers. The central component of mindfulness—developing awareness of whatever is happening right now<sup>293</sup>—provides a tool for navigating default regimes. Choice is central to default regimes,<sup>294</sup> but, as empirical work reflects, more choices don't make better choosers; on the contrary, people may be less happy, and make less good choices, when presented with more options.<sup>295</sup> The EAST framework foregrounds making things “easy,” but as we all know, choosing is sometimes not easy.<sup>296</sup> Default

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<sup>292</sup> For further explanation of the magnifying concerns about mindfulness initiatives, see *supra* Section II.B.

<sup>293</sup> See *supra* Section I.A. For discussion of the role of nonjudgment here, see *supra* Section III.A.

<sup>294</sup> One might think here of titles like *Libertarian Paternalism Is Not an Oxymoron*. Sunstein & Thaler, *Libertarian Paternalism*, *supra* note 212.

<sup>295</sup> See, e.g., BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* 19–22, 103–20 (2004); see also Barry Schwartz, Andrew Ward, John Monterosso, Sonja Lyubomirsky, Katherine White & Darrin R. Lehman, *Maximizing Versus Satisficing: Happiness Is a Matter of Choice*, 83 J. PERSONALITY & SOC. PSYCH. 1178, 1193 (2002) (“[A]lthough maximizers may in general achieve better objective outcomes than satisficers (as a result of their high standards and exhaustive search and decision procedures), they are likely to experience these outcomes as worse subjectively.”); Myungkeun Song, Won Seok Lee & Joonho Moon, *Exploring Effective Price Presentation Format to Reduce Decision Difficulty and Increase Decision Satisfaction*, TOURISM MGMT. PERSPS., 2019, at 1, 1–3 (“Choice overload stands for the condition in which excessive options interfere with rational decision making.”).

<sup>296</sup> See *supra* Section IV.C.2(a). On the difficulty associated with making choices, see, for example, Jiuqing Cheng & Claudia González-Vallejo, *Unpacking Decision Difficulty: Testing Action Dynamics in Intertemporal, Gamble, and Consumer Choices*, 190 ACTA

regimes may help with this problem by giving people the best option automatically, unless they choose otherwise, but the choice still lies with the individual.<sup>297</sup> Moreover, in some default approaches, like menus, the options are expanded.<sup>298</sup> How is the individual to choose? This is where the interplay with mindfulness proves useful for the individual designing a path through the available options.

Increasing the capacity for awareness—both internal and external<sup>299</sup>—can help an individual gather facts about the world and about the self that help in making a decision. Self-awareness may assist an individual in deciding not only on the best outcome—“which is the best choice?”—but also in determining which decisions warrant “choosing” rather than merely “picking.”<sup>300</sup> Moreover, at another level, mindfulness can help a person *decide not to decide* in certain areas by simply going with whatever defaults come their way in that sphere. A program at work can offer people an easy way to opt in to that default—to put the event in the calendar and always attend, unless something else supercedes that recurring plan—and mindfulness may help a person decide whether to take that approach.

## 2. Institutional Program Designers

Moreover, and at least as significantly, mindfulness can help the institutional actor who is tasked with deciding challenging features of program design. For instance, as noted above, the framework presented here provides tools for disaggregating robustness and voluntariness, for deciding how to promote each, and for designing initiatives at that level. None of this offers a simple roadmap, however.

Thus, a level of awareness in the program designer can help with decisions about, for instance, the appropriate degree of voluntariness. As discussed earlier, specific design features also depend on recognizing a diversity of participants, along multiple dimensions—rather than relying on stereotyped assumptions—and deciding how to orient programming accordingly; mindfulness can help here too.<sup>301</sup> In addition, mindfulness of what is happening *right now* can help the program

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PSYCHOLOGICA 199 (2018); Aner Sela & Jonah Berger, *Decision Quicksand: How Trivial Choices Suck Us In*, 39 J. CONSUMER RSCH. 360 (2012); Linda Lai, *Maximizing Without Difficulty: A Modified Maximizing Scale and Its Correlates*, 5 JUDGMENT & DECISION MAKING 164 (2010); Kathleen D. Vohs, Roy F. Baumeister, Brandon J. Schmeichel, Jean M. Twenge, Noelle M. Nelson & Dianne M. Tice, *Making Choices Impairs Subsequent Self-Control: A Limited-Resource Account of Decision Making, Self-Regulation, and Active Initiative*, 94 J. PERSONALITY & SOC. PSYCH. 883, 883 (2008).

<sup>297</sup> See *supra* Section IV.A & IV.C.1.

<sup>298</sup> On menus, see *supra* Sections IV.A & IV.C.1(c).

<sup>299</sup> On internal and external awareness, see *supra* text accompanying note 197.

<sup>300</sup> Choosing involves deciding based on reasons, whereas picking proceeds without such deliberation. On the distinction, see Edna Ullmann-Margalit & Sidney Morgenbesser, *Picking and Choosing*, 44 SOC. RSCH 757, 761–62 (1977); Cass R. Sunstein, *Choosing Not to Choose*, 64 DUKE L.J. 1, 12 n.31 (2014).

<sup>301</sup> See *supra* Section IV.C.2. For research and discussion of the ways that mindfulness and other forms of meditation can help individuals move beyond stereotypes, see generally Emens, *Mindful Debiasing*, *supra* note 23 (citing sources).

designer continually respond to the present moment, rather than to some past idea of reality or to some internal emotional reaction (of which the designer may be unaware).<sup>302</sup> Consider the institutional leader who receives strongly worded or publicly prominent negative—or positive—feedback about some feature of a program. Not overweighting that feedback, relative to other inputs and judgments, is a challenge to which mindfulness can bring focus and emotional self-regulation.<sup>303</sup> Practicing awareness may also help program designers to manage their response to crises, such as a global pandemic, and to social developments, such as a groundswell of racial justice activism—and to treat those moments as opportunities to support the institution better.<sup>304</sup> This point demonstrates further ways that the growing relationship between mindfulness and law continues to build capacity in both fields.

#### CONCLUSION

*I don't know about you, but for myself, it feels like we are at a critical juncture of life on this planet. It could go any number of different ways. It seems that the world is on fire and so are our hearts, inflamed with fear and uncertainty, lacking all conviction, and often filled with passionate but unwise intensity. How we manage to see ourselves and the world at this juncture will make a huge difference in the way things unfold. What emerges for us as individuals and as a society in future moments will be shaped in large measure by whether and how we make use of our innate and incomparable capacity for awareness in this moment. It will be shaped by what we choose to do to heal the underlying distress, dissatisfaction, and outright dis-ease of our lives and of our times, even as we nourish and protect all that is good and beautiful and healthy in ourselves and in the world.*

*Jon Kabat-Zinn*<sup>305</sup>

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<sup>302</sup> This references the dimension of mindfulness that concerns awareness both internal and external. *See supra* text accompanying notes 197–199.

<sup>303</sup> *Cf. supra* notes 11–12 and accompanying text (discussing research on meditation's support of attentional focus and emotional self-regulation).

<sup>304</sup> *See supra* text accompanying note 9 (discussing, for example, the development of mindfulness programming in law schools and other legal institutions under the COVID-19 pandemic).

<sup>305</sup> JON KABAT-ZINN, *MEDITATION IS NOT WHAT YOU THINK: MINDFULNESS AND WHY IT IS SO IMPORTANT*, at xxiii (2018).

*It is a recurrent strategy of any anxiety to defuse what it considers threatening by magnification or minimization, by attributing to it claims to power of which it is bound to fall short. If a cat is called a tiger it can easily be dismissed as a paper tiger; the question remains however why one was so scared of the cat in the first place. The same tactic works in reverse; calling the cat a mouse and then deriding it for its pretense to be mighty.*

*Paul de Man*<sup>306</sup>

The lines from Jon Kabat-Zinn, scientist and grandfather of the secular mindfulness movement in this country, reflect the view that this is a vitally important and challenging moment in the history of this country and of the world. Whether optimistic, pessimistic, or realistic about the future, social justice lawyers know well the importance of the choices made at this time. Facing painful realities, building coalitions for change, healing injuries that law has created or failed to remedy, and developing resilience to keep coming back to the work—these require all the tools we can muster. As Kabat-Zinn and others have written,<sup>307</sup> mindfulness meditation is one significant tool.<sup>308</sup> In response, mindfulness programs are emerging and growing in legal and other institutions.

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<sup>306</sup> Paul de Man, *The Resistance to Theory*, in 33 THEORY AND HISTORY OF LITERATURE 3, 5 (1986).

<sup>307</sup> See, e.g., SALZBERG, REAL CHANGE, *supra* note 128, at 20 (“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/> [<https://perma.cc/NR8Z-7T5N>] (last visited Mar. 30, 2022) (urging an “engaged 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/> [<https://perma.cc/VY6A-M9A5>]; NICHTERN, *supra* note 1, at 60; Hanh, *supra* note 116.

<sup>308</sup> Cf., e.g., text accompanying note 80. As Harris writes of her co-taught law-school class, discussed briefly earlier,

Although [Professor] Stephanie [Phillips] and I originally had set aside one or two classes to examine “social justice” from a mindfulness perspective, as we moved through the semester these distinct sessions disappeared and a different understanding emerged of the relationship between mindfulness and social justice. In . . . our experiential work with the students, we sought to cultivate compassion—the active desire to end suffering—as well as the positive emotions of equanimity, “loving kindness” and sympathetic joy. Our position was that compassion for ourselves and others should infuse all our actions in the world. If compassion becomes a stable disposition in this way, shaping our professional as well as personal commitments, “social justice” as a specific career path dissolves.

The lines from Paul de Man, in the second epigraph, illuminate the structure of the resistance faced by the secular mindfulness movement at this juncture.<sup>309</sup> Though writing in a different context, de Man speaks to the way that responses to mindfulness point in two opposing directions. On the one hand, is mindfulness just self-indulgent quiescence, or could it be a potent tool for improving society? And on the other hand, is it so potent that we are being forced to do it, or could it be offered to maximize voluntary participation for the benefit of individuals and institutions? These questions sum up the minimizing and magnifying critiques that challenge the secular mindfulness movement.

Answers to these questions can be drawn from inside the source texts and teachings of meditation.<sup>310</sup> But those answers are often inapt to secular institutional offerings, such as the teaching of mindfulness in U.S. law firms, courts, law schools, hospitals, schools, and prisons. This Article suggests a surprising alternative source for answers to these dilemmas: legal practice, pedagogy, and theory.

Law provides insight into modes of judgment—and the capacity to move between judgment and nonjudgment skillfully. Law is a realm of action, and the effective practice of law involves discernment about when to exercise agency and when to pause. Moreover, legal pedagogy, in its best form, includes rigorous thinking about the broader impact of a single action; more generally, the common law method embeds in U.S. legal practice an evolution of sweeping changes through decisions in individual cases. Finally, the theory of contract-law default rules offers a way out of the mandatory-mindfulness problem: a model of institutional design that enables breadth and depth of opportunity.

Defaults support mindfulness practice and provide tools for leaving diverse individuals with the choice, and the feeling of choice, about whether and how to meditate. The internal and external awareness that mindfulness teaches works in tandem with these tools from law to support individuals and institutions in building and executing truly robust and voluntary institutional initiatives. The insights offered here for meditation defaults can be used to support not only mindfulness

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Social justice can be understood as the ultimate goal of compassion. And every lawyer, in both her human and professional capacities, should therefore seek social justice. At this point, the idea of “social justice” converges with the position of those who believe that lawyering can and should be seen as peacemaking. If lawyers are in the business of peaceful and just conflict resolution, all lawyers are social justice lawyers.

Harris, *supra* note 80, at 382. She also offers a “caveat”: “that compassion, peacemaking and healing will take different forms, depending on whether you are hammering out a merger and acquisitions deal, trying to obtain a fair plea bargain for an indigent client or writing a will.” *Id.* at 384.

<sup>309</sup> de Man, *supra* note 306. De Man suggests that critiques of an idea aim to defuse some kind of anxiety about the threat it poses. This Article makes no such claim about the response to mindfulness, but instead assumes that the challenges to the mindfulness revolution are offered in earnest, by those inside as well as outside the community of mindfulness practitioners.

<sup>310</sup> See *supra* text accompanying notes 10–25, 51–54.

offerings, but also effective institutional design in other areas. Whatever the context, mindfulness becomes an essential tool for both individual and institutional decision-makers as they discern the most beneficial path and the right balance between voluntariness and robustness with awareness of the precise timing and context.

As legal institutions across the country and the world build mindfulness programs to bring the benefits of mindfulness meditation to lawyers and law students, this Article demonstrates that the thrust of the contributions is not unidirectional. On the contrary, the mindfulness revolution has much to gain from this encounter with law. Recognizing the synergies between the two fields anticipates the ways that both will continue to be enriched by their growing interplay.