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## MINDFULNESS, LAW AND RECIPROCAL PRACTICE

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331

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The legal profession is embracing mindfulness—an avenue of personal and professional growth and development. In so doing, lawyers, law students, judges, law faculty, and other members of the legal profession are reporting meaningful changes to their health and wellbeing, the quality of their social relationships, and their effectiveness and productivity at school and work.<sup>1</sup> These reports corroborate the experience of a great many mindfulness practitioners and is consistent with medical and neuro-scientific research exploring the cognitive, physical, and emotional benefits associated with mindfulness practice.<sup>2</sup> While mindfulness is often discussed in the context of feeling less stressed and being better able to focus, the mindfulness practice (and living a mindful life) is not really aimed at these changes—or any change, for that matter. Mindfulness is about much more—it’s about relating more effectively to challenging situations without needing people and circumstances *to change* in order to be okay—and the practice of mindfulness can help bring about these useful, even transformative shifts.<sup>3</sup> Below I offer a brief overview of mindfulness, explore the larger aspiration of the integration of mindfulness into our day by exploring “reciprocal practice,” a term I coined to illuminate this important insight and opportunity, and offer practical examples by which one may engage reciprocal practice.

#### MINDFULNESS PRACTICE

Mindfulness is “paying attention to present-moment experience in a manner that is engaged and unassuming.”<sup>4</sup> It involves paying attention in a

<sup>1</sup> See generally 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 (2002); Scott Rogers, *Mindfulness in Law*, in THE WILEY-BLACKWELL HANDBOOK OF MINDFULNESS, (Amanda Ie, Christelle Ngoumen & Ellen Langer, eds. 2014); Richard C. Reuben, *Bringing Mindfulness into the Classroom: A Personal Journey*, 61 J. LEG. EDUC. 674 (2012); Katherine Larkin-Wong, *A Newbie’s Impression: One Student’s Mindfulness Lessons*, 61 J. LEG. EDUC. 665 (2012); Jeremy D. Fogel, *Mindfulness and Judging*, Federal Judicial Center (2016); Harley Tropin, *Meditation and Controlling the Inner-Mongo*, DCBA BULLETIN (June 2012); Jan L. Jacobowitz, *The Benefits of Mindfulness for Litigators*, A.B.A. LITIG. J., Spring 2013, at 27–28; Charles Halpern, *The Mindful Lawyer: Why Contemporary Lawyers Are Practicing Meditation*, 61 J. LEG. EDUC. 641 (2012).

<sup>2</sup> Amishi P. Jha, *Mindfulness can Improve your Attention and Health*, SCI. AM. MIND 26 (2013); Alexandra B. Morrison, Merissa Goolsarran, Scott L. Rogers & Amishi P. Jha, *Taming a wandering attention: short-form mindfulness training in student cohorts*, 7 FRONTIERS IN HUM. NEUROSCIENCE 897 (2014); Madhav Goyal, et al., *Meditation programs for psychological stress and well-being: a systematic review and meta-analysis*. 174(3) JAMA INTERN MED. 357 (2013); Shailini J. George, *The Cure for the Distracted Mind*, 53 DUQ. L. REV. 215 (2015).

<sup>3</sup> Scott Rogers, *Mindfulness in Law and the Benefits of Practice*, 90 FLA. B. J. 10 (Apr. 2016).

<sup>4</sup> Scott Rogers, et. al., *Mindful Ethics and the Cultivation of Concentration*, 15 NEV. L. REV. 730, 731 (2015); Scott Rogers, *The Role of Mindfulness in the Ongoing Evolution of Legal Education* 36 U. OF ARK. LITTLE ROCK L. REV. 382, 389 (2014).

particular way.<sup>5</sup> While we are always paying attention to something, it is rare that our attention is purposeful or that the object of our attention is present in the here and now, or if it is, that it remains so. Research indicates the mind wanders about 47% of the time.<sup>6</sup> As such, we all spend a great deal of time lost in thoughts about the past, where doubt, guilt, and regret creep in, and absorbed in thoughts about the future, where worry and distress prevail. Mindfulness invites us to direct our attention to what's actually arising in the present moment and to sustain that focus by attending to it in a manner that is interested in what is taking place and open to the mystery of its natural unfolding. This calls on us to set aside preferences over the mundane, and override the impulsive and habitual tendency to meddle in matters for a short-term gain.

Below is instruction for a basic mindfulness exercise you can practice in the span of a few moments—even now.

1. Bring yourself into a posture that is upright and stable.
2. Lower or close your eyes.
3. Bring attention to your breathing, following the in-breath, following the out-breath.
4. Rest your attention on the flow of the breath, with the intention of keeping it there, noting the sensations of the body breathing.
5. When you realize your mind had wandered/is wandering, bring your attention back to the breath.
6. Do this for a few moments; then lift your gaze or open your eyes.

The above traditional mindfulness practice of sitting in a quiet space, resting and refocusing attention on the breath, is often taken to mean that mindfulness needs to be practiced in a quiet place, removed from the action, and that its objective is to feel better. This belief can lead to the tendency, when things get chaotic and confusing, to look to mindfulness as *a way out* of an uncomfortable and undesirable state. While this is understandable, such an effort may be more in the service of relaxing. There is much that has been written about the relationship between mindfulness and relaxation exercises, and of the role of tranquility as part of mindfulness practice.<sup>7</sup> But because the fullness of traditional mindfulness practice is often truncated,

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<sup>5</sup> JON KABAT-ZINN, *WHEREVER YOU GO, THERE YOU ARE* (1994); Leonard L. Riskin & Rachel Wohl, *Mindfulness in the Heat of Conflict: Taking STOCK*, 20 HARV. NEGOT. L. REV. 121, 131 (2015).

<sup>6</sup> Matthew A. Killingsworth, et. al., *A Wandering Mind is an Unhappy Mind*, 12 SCI. 932 (2010).

<sup>7</sup> TRALEG KYABGON, *MIND AT EASE: SELF-LIBERATION THROUGH MAHAMUDRA MEDITATION* 143 (2004).

people introduced to mindfulness may misconstrue this subtle, yet very important distinction.<sup>8</sup>

Circumstances that prompt law students to turn to mindfulness might include:

A. Sitting in class during 1L year after having answered a question that seemed to elicit snickering from classmates and the professor's disappointment.

B. Approaching the close of law school with thoughts turning to the rigors of bar prep while overwhelmed with work at a local firm and getting through finals.

Among legal practitioners, circumstances might include:

A. Attending a hearing with opposing counsel who is grossly misrepresenting the facts, and calling you a liar before a judge who seems to be unable to tell who to believe.

B. Working in the office on a project long after you promised family you'd be home, having been continuously distracted with phone calls, e-mails, texts and office interruptions.

Scenarios, like the above, offer practical examples of when stress and a sense of being overwhelmed can take over and relief is sought. They also offer important opportunities to shift our relationship to what is taking place and to respond in ways that serve our larger interests. As is discussed below, rather than regard these situations purely as moments to fix and get past as quickly as possible, they may offer what are among the most important moments to pay attention to and experience.

## RECIPROCAL PRACTICE

"Reciprocal practice," refers to the ways that *our professional lives serve as perhaps the greatest vehicle for the application of mindfulness practice*, as opposed to looking outside of our professional lives to practice mindfulness.<sup>9</sup> Implicit in this insight is that there is something inherently potent

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<sup>8</sup> Scott Rogers, *Mindfulness in Law and the Benefits of Practice*, 90 FLA. B. J. (Apr. 2016); Scott Rogers, *The Role of Mindfulness in the Ongoing Evolution of Legal Education*, 36 U. ARK. LITTLE ROCK L. REV. 227 (2014).

<sup>9</sup> See e.g., Scott Rogers, *Mindfulness and Civility*, 12(3) THE PROF.: A PUB. OF THE HENRY LATIMER CENTER FOR PROFESSIONALISM 10 (2015) (noting "[w]hereas the value of mindfulness is often discussed in the context of an attorney who finds it increasingly distressing to practice in an uncivil and

and important about the challenging aspects of the work we do, the people with whom we interact, and the ways we resist so many of the undesirable and unpleasant aspects of our professional lives. We tend to believe that if we can change our circumstance—externally (e.g., the annoying person stops being annoying) or internally (e.g., feel less anxious)—things will be better. And, it is true that we can often effect change to feel better. But, more often than not, these changes are short lived, the pleasant circumstance is fleeting. The unpleasant, even if eliminated, eventually resurfaces, and we can spend much of our lives bouncing around amid this cyclical state of push and pull. Even more, sometimes the change we effect does not, in fact, serve our or our client's interests. Because our effort is motivated in large measure by a desire to feel better, it offers a short term benefit that can delay or complicate the larger interests at stake.<sup>10</sup>

A helpful story explored in the mindfulness tradition is of the king whose daughter stubbed her toe against a root while playing out in the kingdom. Upon her return, cries of pain and plea that something be done, the king became intent on it never happening again. He called together his engineers and asked that they cover the kingdom in leather so that his daughter's foot could never again be injured. His wise aides suggested that instead of covering the kingdom in leather, a leather pouch be crafted that could wrap around the princess's foot.<sup>11</sup>

The metaphor regards mindfulness as well crafted shoes we can wear *everywhere* we find ourselves. In a world where so many are quick to fix, change, or avoid anything that may be a source of pain, mindfulness proffers another way. It is grounded in the wisdom that life will have its ups and downs, that the unpleasant is sometimes unavoidable (and frequently short lived) and that taking action is not always the wisest course of action. The four scenarios for law students and lawyers above depict commonplace experiences that are unpleasant, be they frustrating, intimidating, overwhelming, or anxiety/anger provoking. To think that they should not be unpleasant or should not be happening is to deny reality. The mindful approach appreciates the moment for what it is—pleasant, unpleasant, neither—and inclines us to chart a steadier course through challenging terrain. Navigating this course involves the practice of mindfulness and the cultivation of a more mindful way of attending to these experiences. The focused-attention exercise (set out above) of observing the breath and upon noticing the mind

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hostile environment, I will explore the value of an uncivil and hostile environment to an attorney practicing mindfulness.”).

<sup>10</sup> Scott Rogers, *What Do We Want: Mindfulness in Law*, 62 LA. B. J. 268 (Dec. 2014/Jan. 2015).

<sup>11</sup> JON KABAT-ZINN, *COMING TO OUR SENSES: HEALING OURSELVES AND THE WORLD THROUGH MINDFULNESS* (2005).

wandering, returning attention to the breath, helps to establish a quality of focus and concentration that enables a more sustained engagement with our experiences. Then, when difficulties arise—and with them a host of agitated thoughts, feelings, and body sensations that historically have led to impulsivity and overreaction—we find ourselves better able to hold steady and see more clearly what is actually taking place. As a result, we emerge more effective, more intact, and we reinforce a more optimal way of responding in the future. The insight of *reciprocal practice*—*which is quite hopeful and a source of resilience*—encourages looking to our stressful and challenging work as a pivotal, and perhaps even cherished, opportunity for practice.<sup>12</sup>

#### APPLYING RECIPROCAL PRACTICE

The notion of “reciprocal practice”—that we may practice mindfulness—or naturally and spontaneously be mindful—in the midst of the chaos and agitation is not a new idea as much as it is an opportunity to *intentionally alter* the way we view challenging moments and thereby shift our attitude and perspective.<sup>13</sup> We become more inclined to move into the “unpleasant” as a means to take wise and compassionate action—for ourselves and others—and cultivate a deeper insight into what is actually taking place. Doing so we are better equipped to discern what, if anything, needs to be done. There is an important connection between reciprocal practice and professional identity, as discussions of professional identity are becoming more frequent—and urgent—owing to a growing disconnect between intrinsic values and professional attitudes and conduct.

The question of professional identity is one with far reaching consequences.<sup>14</sup> It speaks to our conception of ourselves as professionals, to our beliefs about the work we do and our personal connection to that work, and ultimately to our values and understanding of who we are as human beings.<sup>15</sup> Within the legal profession, we are observing many law students and

<sup>12</sup> That both law and mindfulness modify the term “practice” itself suggests that “practice” might mean more than we imagine—and overarching embrace of life, whatever form it takes, moment by moment.

<sup>13</sup> TRALEG KY ABGON, *THE PRACTICE OF LOJONG: CULTIVATING COMPASSION THROUGH TRAINING THE MIND* (2007).

<sup>14</sup> Susan Brooks, *Meeting the Professional Identity Challenge in Legal Education through a Relationship-Centered Experiential Curriculum*, 41 U. BALTIMORE L. REV. 395 (2012); *See, e.g.*, E. SCOTT FRUEHWALD, *DEVELOPING YOUR PROFESSIONAL IDENTITY: CREATING YOUR INNER LAWYER* (2015); PETER HUANG, *TEACHING (ABOUT) MINDFULNESS: A TALE OF TWO COURSES* (2016), <http://ssrn.com/abstract=2771578>; Jan L. Jacobowitz, & Scott Rogers, *Mindful Ethics—A Pedagogical and Practical Approach to Teaching Legal Ethics, Developing Professional Identity, and Encouraging Civility*, 4 ST. MARY’S J. MALPRACTICE & LEGAL ETHICS 198 (2015); Lawrence Krieger, *The Inseparability of Professionalism and Personal Satisfaction*, 11 CLINICAL L. REV. 425 (2005).

<sup>15</sup> *See, e.g.*, FRUEHWALD, *supra* note 13; Jan L. Jacobowitz, *Cultivating Professional Identity & Creating Community: A Tale of Two Innovations* 36 U. ARK. LITTLE ROCK L. REV. 319 (2014).

lawyers losing touch with their core values and beliefs, experiencing unprecedented levels of anxiety and depression, and engaging in substance abuse. Many attorneys who are finding themselves unfulfilled in the practice of law—or even if fulfilled, find something lacking in the larger aspect of their lives.<sup>16</sup> Because “reciprocal practice” is embedded in the fabric of our professional life, it is especially potent as an agent of reflection and insight regarding professional identity. The insights gained from practicing mindfulness *in the midst of* professional angst and confusion can serve to provide clarity regarding false views and assumptions, and make possible a more refined recalibration and, when helpful, course correction. The practice opens the door to more thoughtful and direct communication at the very time and place most needed, and ultimately can serve as a vehicle for greater fulfillment and satisfaction in the life of the law.

#### CLOSING THOUGHTS

An appreciation that mindfulness practice is directed toward seeing more clearly what is taking place, moment by moment, as opposed to feeling better, moment by moment, speaks to mindfulness as a path for the courageous among us—and we all have our moments of courage. It invites us to turn toward the conflict and unease, but with a mind and heart open to learning more about ourselves, each other, and the conflicts and problems we are helping to resolve. Mindfulness practice has been likened to going to a mental gym and each time we notice the mind wandering and resume present moment attentiveness, we exercise the “muscle of attention.”<sup>17</sup> The metaphor is helpful in a variety of ways, one being that *the more* agitated and distracted the mind, the heavier the weight, and therefore the greater the opportunity to grow and develop. So too, as most good fitness trainers will remind us, it is important to know our limits and take care not to take on more than we can bear, as there are many tools and approaches for achieving and maintaining our well-being.

The opportunities for *reciprocal practice* are many. In the very moment we are thrown off by what is transpiring, mindfulness is available to reclaim balance. Sitting in class, thinking about the bar exam, listening to opposing counsel, still at the office—we can generate powerful stories of dreaded outcomes, evil people, and helplessness. And, in those very moments that

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<sup>16</sup> See WILLIAM M. SULLIVAN, ET.AL., THE CARNEGIE REPORT FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); see also Rhonda V. Magee, *Legal Education and the Formation of Professional Identity: A Critical Spirituo-Humanistic - 'Humanity Consciousness' – Perspective* 31 N.Y.U. REV. OF L. & SOC. CHANGE 467 (2007).

<sup>17</sup> Amishi P. Jha, *Mindfulness can Improve your Attention and Health*, SCI. AM. MIND 26, 33 (Mar. 2013).



the mind begins to wander, emotions run wild, and the body begins to tremble, we can notice our interior experience, steady ourselves (if only a little) by attending to the breath, and see more clearly what is actually at play. Sharon Salzberg writes that mindfulness is being able to tell the difference between what is happening and the stories we tell ourselves about what is happening.<sup>18</sup> When better to revisit the story, than in the moment of its telling.

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<sup>18</sup> SHARON SALZBERG, *REAL HAPPINESS: THE POWER OF MEDITATION* (Workman Publishing Company, 2010).