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Mindful Ethics-A Pedagogical and Practical Approach to Teaching Legal Ethics, Developing Professional Identity, and Encouraging Civility

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ARTICLE

Jan L. Jacobowitz | Scott Rogers

Mindful Ethics—A Pedagogical and Practical Approach to Teaching Legal Ethics, Developing Professional Identity, and Encouraging Civility

Abstract. Aristotle spoke of virtue and ethics as a combination of practical wisdom and habituation—an individual must learn from the application of critical reasoning skills to experience. Perhaps one of the earliest proclamations of the value of experiential learning, the Aristotelian view, reappears throughout history and is captured once again by the Carnegie Foundation’s Report on Legal Education, which includes a call for instruction that provides practical skills and ethical grounding to complement the teaching of legal analysis. The Carnegie Report continues to play a role in the ongoing discussion of the need to reform legal education; a debate that is currently driven by market demand and a legal profession in the midst of dramatic realignment. This debate has given rise to suggestions for reform in the areas of legal ethics and professional identity that are supported by reference to theories of moral psychology, cognitive psychology, and various innovative educational strategies. Mindful Ethics is an innovative approach to teaching legal ethics; the short-term goal is to better prepare law students to deal with the reality of practice, to assist in the development of their professional identity, and to provide lawyers with additional tools for responding to the ethical challenges inherent in the practice of law. The long-term, overarching goal is to impact the manner in which the legal profession functions and plays its critical role in society as protectorate of the rule of law. This Article will discuss the methodology by which Mindful Ethics integrates professional responsibility and mindfulness such that lawyers and law students gain a broader insight into their own ethical decision-making. It will also explore recent neuroscience findings concerning the influences of mindfulness

practices on the brain. Finally, it will conclude that Mindful Ethics serves as both a life skill and a tool for legal practice that has the potential to dramatically assist one in anticipating and avoiding the ethical pitfalls of legal practice and maintaining civility and professionalism, especially in light of the increasing pace of the practice owing to rapidly evolving technologies. Indeed, Mindful Ethics may provide an individual with the ability to “entertain a thought without accepting it” and to modulate and channel emotions in a civil manner towards a productive outcome.

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ARTICLE CONTENTS

I. Introduction	201
II. Aristotle's Ethics: Practical Wisdom for Legal Education?	203
III. Legal Education, Experiential Learning & Ethics . .	206
IV. Contemporary Theories of Learning and Ethical Decision-Making	211
V. Mindfulness	220
VI. Mindfulness in Law	221
VII. Mindfulness, Neuroscience and Ethical Decision- Making	225
VIII. Mindful Ethics in the Classroom	228
IX. Mindful Ethics Course Curriculum	230
A. The Ethics Component—The Professional Responsibility Rules Analysis Form	230
B. The Mindfulness Component—Mindfulness Exercises and Assignments	231
C. The Meeting of the Minds Journal & Class Role Play	231
D. Mindfulness Practices	233
E. Classroom Mindfulness Demonstrations	234
F. The Course Final Project	237
X. Conclusion	238

*“Anybody can become angry—that is easy, but to be angry with the right person, and to the right degree, and at the right time, and for the right purpose, and in the right way—that is not within everybody’s power and is not easy.”*¹

*“It is the mark of an educated mind to be able to entertain a thought without accepting it.”*²

Aristotle

I. INTRODUCTION

Aristotle spoke of virtue and ethics as practical wisdom, which one may develop by acquiring knowledge and engaging in habituation—an individual gains wisdom only after he combines his knowledge with personal experience.³ Perhaps one of the earliest proclamations of the value of experiential learning, the Aristotelian view, reappears throughout history and is captured once again by the Carnegie Foundation for the Advancement of Teaching’s Report, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Report), which includes a call for instruction that provides practical skills and ethical grounding to complement the teaching of legal analysis.⁴

The Carnegie Report continues to play a role in the ongoing discussion of legal education reform; a debate that is currently driven by market demand and a legal profession in the midst of dramatic realignment.⁵ The debate has given rise to suggestions for educational reform in the area of legal ethics that are supported by reference to theories of moral psychology,

* Thanks to Danielle Singer, research assistant extraordinaire, for her assistance with this article.

1. ARISTOTLE, NICOMACHEAN ETHICS bk. II, at 123 (St. Thomas Aquinas ed., C. I. Litzinger trans., Dumb Ox Books rev. ed. 1993) (restating the original).

2. *Id.* at 11 (paraphrasing the original).

3. THE ETHICS OF ARISTOTLE 10–11 (Jim Manis ed., J.A. Smith trans., Pa. St. Univ. The Electronic Classics Series 2004), available at <http://www2.hn.psu.edu/faculty/jmanis/aristotl/Ethics-Aristotle.pdf>.

4. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 12–14 (2007). Referred to hereinafter as the Carnegie Report, this is one among many articles from various organizations calling for reform, but it captures much of the discussion and therefore is being cited here as a focal point for the discussion on reforming legal education.

5. See Kyle McEntee, *What’s Driving Change in Legal Education and Why You Should Care*, A.B.A. J. (May 30, 2013, 8:01 AM), http://www.abajournal.com/legalrebels/article/whats_driving_change_in_legal_education_and_why_you_should_care (listing three main drivers of change in legal education as cost, demands from practitioners, and changes in the structure of the legal profession).

cognitive psychology, and various innovative educational strategies.⁶

Mindful Ethics, a class that we teach at the University of Miami School of Law, which integrates mindfulness and professional responsibility, is an innovative approach to legal ethics. The short-term goals of Mindful Ethics are to better prepare law students to deal with the reality of practice, to assist in the development of professional identity, and to provide lawyers with additional tools for responding to the ethical challenges inherent in the practice of law.⁷ The long-term, overarching goal is to impact how the legal profession functions and plays its critical role in society as protectorate of the rule of law.

This Article will briefly explore the relevancy of Aristotle's work on ethics to legal education. Next, the Article will trace the development of legal education and the early role of experiential learning in the United States. Then, the Article will note some of the current legal education literature, which seeks to apply psychological theory to legal education. Finally, the Article will discuss and demonstrate the methodology by which Mindful Ethics integrates professional responsibility and mindfulness to help law students and lawyers gain a broader insight into their own ethical decision-making. The discussion will include neuroscience research to explore the decision-making process and the role of mindfulness on decision-making. This research suggests that when embraced both as a life skill and a legal-practice skill, Mindful Ethics dramatically assists an individual to anticipate and avoid the ethical pitfalls of legal practice and maintain civility and professionalism—especially in light of the increasing pace of the practice owing to rapidly evolving technologies. Indeed, Mindful Ethics may provide an individual with the ability to “entertain a thought without accepting it” and to modulate and channel emotions in a civil manner towards a productive outcome.

6. See generally Maksymilian Del Mar, *Beyond Text in Legal Education: Art, Ethics, and the Carnegie Report*, 56 LOY. L. REV. 955, 992–93 (2010) (advocating the use of art in legal education to “move beyond the perennial temptations of the text as the glorious and well-lit stage upon which to understandings of law, legal work and legal order are constructed”). Del Mar further suggests that “[i]nstead, what we need more of is a lingering in the dark, the silent, the ephemeral and opaque, the anxious, the inarticulate—all that we are so often so keen to sweep under the carpet of the text. However, for that we need to slow down, look, and come face to face with the limitations of our ways of seeing.” *Id.*

7. SCOTT ROGERS & JAN L. JACOBOWITZ, *MINDFULNESS AND PROFESSIONAL RESPONSIBILITY: A GUIDEBOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM* 29 (2012).

II. ARISTOTLE'S ETHICS: PRACTICAL WISDOM FOR LEGAL EDUCATION?

Aristotle's discussion of ethics explores the fundamental concepts of knowledge and practical experience as guideposts on the pathway to practical wisdom and ethical decision-making. The tenets of his work provide valuable insight for contemporary legal ethics education and thus justify a journey back to a time before the legal profession existed in its current iteration.⁸

Aristotle proposes a moral philosophy based upon an exploration of the virtues that define a "good life."⁹ His philosophical inquiry posits universal questions; therefore, it is no surprise that not only do his writings on ethics continue to be widely studied and debated, but also they may offer insight into how legal ethics may be effectively taught today.¹⁰

Aristotle defines human excellence as a combination of the intellectual and moral characteristics of an individual.¹¹ He discusses the intellectual in terms of the rational and irrational mind, and explores the virtues that comprise moral character. Aristotle advocates that learning about virtue, while necessary, is not enough to develop the character and the practical wisdom that is required to evaluate a situation and successfully choose an ethical pathway. He explains that character is formed by habituation—"the repeated doing of acts which have a similar or common quality."¹²

8. In fact, ancient Greece evidences one of the earliest forms of legal advocacy where, for example, an individual who came before the court might have had an advocate who was a friend or neighbor not formally trained in the law nor permitted to accept a fee. This type of "non-legally trained" advocacy continued in ancient Rome, where eventually fees were permitted and a group of individuals referred to as jurists began to study the law to advise the judges, who remained untrained in the law along with the advocates. However, these jurists did not represent individuals before the courts. Advocates were not generally students of the law, but rather constructed arguments based upon the facts of the situation and the use of rhetorical methods of persuasion. Aristotle and Cicero both wrote about rhetoric and its relationship to seeking truth as opposed to relying on emotion, thus implicating a discussion of the relationship of virtuous ethics to rhetoric that, while provocative, is beyond the scope of this paper. R. BLAIN ANDRUS, *LAWYER: A BRIEF 5,000 YEAR HISTORY* 101, 103, 106–18, 139 (2009); Michael Frost, *Ethos, Pathos & Legal Audience*, 99 *DICK. L. REV.* 85, 86–87 (1994).

9. *THE ETHICS OF ARISTOTLE* 9 (Jim Manis ed., J.A. Smith trans., Pa. St. Univ. The Electronic Classics Series 2004), available at <http://www2.hn.psu.edu/faculty/jmanis/aristotl/Ethics-Aristotle.pdf>.

10. An in-depth study of Aristotelian philosophy, which as noted continues to be the subject of study and debate by philosophy scholars, is beyond the scope of this Article, which seeks rather to comment on the relevance of Aristotle's ideas about developing practical wisdom, through the combination of knowledge and practical experience, to innovation in legal education.

11. *THE ETHICS OF ARISTOTLE* 42 (Jim Manis ed., J.A. Smith trans., Pa. St. Univ. The Electronic Classics Series 2004), available at <http://www2.hn.psu.edu/faculty/jmanis/aristotl/Ethics-Aristotle.pdf>.

12. *Id.* at 10.

Aristotle concedes that habituation may result in good or bad character and therefore asserts that an individual must be guided and disciplined in the ways of good character. "Virtue then is assumed to be that habit which is such, in relation to pleasures and pains, as to effect the best results, and Vice the contrary."¹³ He further explains:

[The process of habituation] cannot be entrusted to merely intellectual instruction. The process is one of assimilation, largely by imitation and under direction and control. The result is a growing understanding of what is done, a choice of it for its own sake, a fixity and steadiness of purpose. Right acts and feelings become, through habit, easier and more pleasant, and the doing of them a "second nature."¹⁴

Aristotle describes virtue as "a state [of being] apt to exercise deliberate choice, being in the relative mean, determined by reason, and as the man of practical wisdom would determine."¹⁵ Moral virtue is the apt state from which to make a moral choice, which in turn is driven by deliberation and the application of reason to determine the right course of action.¹⁶ In elaborating on a man who is "Good in Counsel," Aristotle notes:

Nor again does Practical Wisdom consist in a knowledge of general principles only, but it is necessary that one should know also the particular details, because it is apt to act, and action is concerned with details: for which reason sometimes men who have not much knowledge are more practical than others who have; among others, they who derive all they know from actual experience . . . [may] have a much better chance of [a positive outcome] . . . [O]ne ought to have both kinds of knowledge, or, if only one, the knowledge of details rather than of Principles.¹⁷

Thus, the discussion comes full circle; to obtain practical wisdom, an individual must be taught principles and have practical experience. Practical experience involves the development of judgment stemming from both intuitive reason and practical wisdom. While these two concepts are related, Aristotle distinguishes intuition as "a type of perception that informs our actions based on our experiences."¹⁸ In other words, it is not overtly deliberative, but rather a judgment that may occur instantaneously

13. *Id.* at 45.

14. *Id.* at 10.

15. *Id.* at 51.

16. *Id.* at 133.

17. *Id.* at 136.

18. Lorie M. Graham, *Aristotle's Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 J. LEGAL PROF. 5, 17 (1996).

based upon general life experience.¹⁹ On the other hand, practical wisdom involves conscious focus upon a particular situation based on a more universally acquired knowledge.²⁰

This acquired knowledge includes an understanding of general principles; however, Aristotle does not subscribe to a rigid set of ethical principles, but rather concludes that universal principles are a starting point from which ethical standards may be modified based upon relevant shared experiences.²¹ In fact, Lorie M. Graham, writing about Aristotle and his relationship to legal ethics, quotes Professor Martha Nussbaum to explain that the “man of practical wisdom” is “the most flexible among us, his moral sensibility the least ossified by obedience to the universal.’ He is able to scrutinize keenly the complexities of a situation . . . ‘perhaps even modifying, or further specifying, that picture in the light of a new discovery.’”²² The ethics rules remain a critical starting point and provide guidance for those who have not achieved practical wisdom. Students seeking practical wisdom may follow these principles as they gain experience and reflect upon their own experience to eventually achieve practical wisdom.

The person possessing practical wisdom may evaluate a situation and agilely apply general principles to particular facts to discern all of the relevant considerations and thereby develop a strategic solution, attributes that might also be used to describe a thoughtful, skilled lawyer. Thus, it seems to follow that if legal education strives to produce graduates who may be deemed “Good in Counsel,” then legal education may benefit from

19. While Aristotle acknowledges intuition as one of the faculties that contribute to attaining truth, he seems to distinguish it as a process that “takes in those principles which cannot be proved by reasoning, while Practical Wisdom is concerned with” overt, deliberate reasoning. *THE ETHICS OF ARISTOTLE* 138 (Jim Manis ed., J.A. Smith trans., Pa. St. Univ. The Electronic Classics Series 2004), available at <http://www2.hn.psu.edu/faculty/jmanis/aristotl/Ethics-Aristotle.pdf>.

20. Lorie M. Graham, *Aristotle’s Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 *J. LEGAL PROF.* 5, 18 n.53 (1996). Note also that Aristotle’s distinction between intuitive reasoning and the deliberation called for in practical wisdom is perhaps reflected in contemporary psychology as the need to recognize cognitive bias for more effective decision-making. See JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION AND DECISION MAKING* 85–86 (2012) (discussing factors influencing decision-making); DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 415 (2011) (“The investment of attention improves performance in numerous activities . . . and is essential to some tasks, including comparison, choice, and ordered reasoning.”).

21. Lorie M. Graham, *Aristotle’s Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 *J. LEGAL PROF.* 5, 24–25 (1996).

22. *Id.* at 20–21 (quoting Martha Craven Nussbaum, *Practical Syllogisms and Practical Science*, in *ARISTOTLE’S DE MOTU ANIMALIUM* 215–16 (1978)).

the application of some of Aristotle's work.²³ Specifically, law school curriculum may be enhanced when it is attentive to innovations that provide law students with the opportunity to gain not only legal knowledge and analytical ability, but also the opportunity to develop practical wisdom through guidance, discipline, and experiential learning that provides the requisite habituation.²⁴

III. LEGAL EDUCATION, EXPERIENTIAL LEARNING & ETHICS

The idea of teaching law students practical wisdom or judgment was highlighted in the Carnegie Foundation for the Advancement of Teaching's Report, *Educating Lawyers: Preparation for the Profession of Law*, which focuses on the importance of teaching professional judgment and practical skills. The Carnegie Report was published in 2007 and is highly critical of law schools' current reliance on the case method of teaching.²⁵

23. Michael Carroll and Elisabeth Shaw suggest that if Socrates and Aristotle were asked for their top ten tips to guide us in the teaching and development of ethical maturity in the helping professions (law among them), Socrates and Aristotle would offer the following:

1. Know how little you know. . . . Uncertainty is the beginning of wisdom.
2. Be open minded. . . . Continue to be curious and inquisitive—even after you have made decisions.
3. Contemplation takes time; good decisions are not judged by the speed by which they are made.
4. Keep talking to others. . . . Consider what is said or known in the dialogue, and what is not yet said or known in the conversation.
5. Ethical responsibility remains ultimately with you. . . . [It] is important in delivering authentic action and living with yourself later.
6. Use your power wisely. . . . Create an atmosphere of trust, where it is safe to be curious and challenging of each other.
7. Above all, don't be afraid. Fear is the enemy of ethical excellence.
8. Given particular relationships, context and timing, there will be times when you choose to obey rules and regulations, even when not of your making and even when you disagree with them. It is important you do this thoughtfully and in a reasoned way, being conscious of why you have chosen to do this as the best option in the circumstances.
9. Take the ethical initiative—don't wait for others to do things.
10. Live the ethical stances you believe in. Why make ethical statements if you don't practice them as best you can?

MICHAEL CARROLL & ELISABETH SHAW, ETHICAL MATURITY IN THE HELPING PROFESSIONS: MAKING DIFFICULT LIFE AND WORK DECISIONS 84 (2013).

24. While many law schools now offer the opportunity for experiential learning, there exists great disparity among schools and varying opportunity for students throughout the country. See Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 356–60 (2012) (“Legal education . . . lacks sufficient opportunities for would-be lawyers to explore the moral, social, cultural and ethical boundaries and effects of the law and lawyering.”).

25. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 12–14 (2007).

The Report notes that knowledge, skill, and ethical judgment are interdependent components of lawyering. Therefore, it suggests that “this is a propitious moment for uniting, in a single educational framework, the two sides of legal knowledge: (1) formal knowledge and (2) the experience of practice.”²⁶ The Report contends that this combination would provide a law student with knowledge, skill, and moral discernment such that the student would acquire “the capacity for judgment guided by a sense of professional responsibility.”²⁷

The formula suggested sounds much like Aristotle’s methodology for moral education. So, query, why in the thousands of years between Aristotle’s teaching and the Carnegie Report have most law schools failed to combine analytical reasoning with practical experience to offer students an enhanced opportunity to develop practical wisdom or professional judgment? The answer to the question may lie in a brief review of the history of legal education in the United States.

A. Benjamin Spencer provides an insightful historical perspective for critiquing contemporary law school education, in which he explains that aspiring Pre-Revolutionary lawyers served an apprenticeship in a law office—which consisted of reading English common law texts and assisting a practicing attorney to gain practical experience.²⁸ While this approach to legal training may have provided the practical experience that Aristotle valued, the apprenticeship lacked the instruction in knowledge and analytical skill that are the other components for developing practical wisdom, which translates into professional legal judgment.

William Blackstone emphasized the perceived deficiency of the apprenticeship program of that time: “If practice be the whole that [the aspiring apprentice] is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and the first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him”²⁹ Thus, Blackstone seems to be suggesting that the lawyer who trains only through an apprenticeship will not have the knowledge to gain authentic practical wisdom and will be lacking “flexibility” in his approach to problem solving and the development of professional judgment.

26. *Id.* at 12.

27. *Id.*

28. A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1960–62 (2012); see also Susannah Furnish, *The Progression of Legal Education Models: Everything Old Is New Again*, 6 NE. U. L.J. 7, 8 (2013) (noting that legal training was primarily through apprenticeships until the 1870s).

29. 1 WILLIAM BLACKSTONE, COMMENTARIES *32.

In response to Blackstone's suggestions, the first law professorship was established in 1779 at William and Mary College and other professorships were to follow.³⁰ However, these faculty positions resided within a general university, rather than a law school, and provided only a broad foundation in the law that was designed to be a precursor to the mandatory apprenticeship requirement.

In fact, the first law school, the Litchfield Law School, was founded in Connecticut, outside of the university system, and was essentially an extension of the law office of Tapping Reeve.³¹ The school, in existence from 1784–1833, attempted to teach legal principles to apprentices while they were being exposed to the daily practice of law.³² The reading of cases was discouraged until the general principles of various areas of law were mastered,³³ suggesting that fundamental knowledge and practical experience would allow the apprentice to acquire professional judgment or practical wisdom.

There were also other less known private law schools, and eventually universities moved from offering professorships in law to creating graduate schools of law within the university system.³⁴ Initially, the university-based law schools did not obtain the reputation of the Litchfield School, and remained adjunct to the apprenticeship model. Students primarily learned the law by reading a textbook that summarized the law and then attending a lecture in which the professor further elaborated on that

30. A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1965–66 (2012). Interestingly, Benjamin V. Madison III, in reference to the historical period of legal education, that is, from the founding of the nation through the 1870s, writes:

The early legal academy realized that to mold well-rounded lawyers with the capacity for wise judgment, law students needed to be exposed to readings in moral and ethical philosophy. These law schools also recognized the need to help students form their professional values as they studied law. Through this process, students learned how to exercise practical wisdom in everyday practice.

Benjamin V. Madison III, *Professional Identity Formation—Legal Education's Early Emphasis on Character, the Evisceration of This Priority, and What the First Law Schools Can Teach Us* 11–13, (Aug. 16, 2013) (footnotes omitted), available at <http://ssrn.com/abstract=2311492>. He contends that although many individuals became lawyers through the apprenticeship method without attending school, the early pioneers in legal education were focused on a holistic approach to professional development and experiential learning, which was discarded as the traditional law school came into being from the 1870s through today. *Id.*

31. A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1966–67 (2012).

32. *Id.* at 1968.

33. *Id.* at 1967.

34. *Id.* at 1968–69.

particular area of law.³⁵

Interestingly, despite the advance in available legal education, the state bars were reluctant to require educational prerequisites to admission, as it was thought that formal legal education requirements made law practice “accessible to only elites.”³⁶ Thus, early formal legal education evolved without regard to the requirements of bar admission or to the development of practical skills training, which was provided by apprenticeships. Legal education also progressed into the late nineteenth century without much regard to teaching legal ethics despite the fact that outside bar organizations began to develop codes of ethics and demanded, rather unsuccessfully, that legal ethics be included in the law school curriculum.³⁷

The legal education evolution reached a pinnacle with the innovations of Christopher Langdell, Dean of Harvard Law School—the case method, the Socratic method, and the expansion of law school to three years. Langdell viewed the study of law as a scientific pursuit; therefore, legal ethics was not viewed as central to the curriculum. “Principles of ‘morality’ were either presupposed or too anti-intellectual for this type of law school study.”³⁸ Moreover, in a speech in 1886, “Langdell remarked that ‘[w]hat qualifies a person . . . to teach law is not experience in the work of a lawyer’s office, not experience in dealing with men, not experience in the trial or argument of causes—not experience, in short, in using law, but experience in learning law.’”³⁹

Thus, by the end of his tenure at Harvard in 1895, the so-called Langdellian law school methodology taught by professors who were not legal practitioners had emerged. This model of legal education, which emphasizes the theoretical over the practical, has prevailed for more than a

35. *Id.* at 1973.

36. *Id.* at 1977 (citing ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 137 (1953)).

37. Lorie M. Graham, *Aristotle’s Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 J. LEGAL PROF. 5, 28 (1996); see also Benjamin V. Madison III, *Professional Identity Formation—Legal Education’s Early Emphasis on Character, the Evisceration of This Priority, and What the First Law Schools Can Teach Us* 22–26 (Aug. 16, 2013), available at <http://ssrn.com/abstract=2311492> (discussing how the Enlightenment Period and theories of relativism, positivism, and instrumentalism impacted the legal academy, causing it to abandon the pursuit of legal philosophy in favor of a more “scientific” approach to legal education).

38. Benjamin V. Madison III, *Professional Identity Formation—Legal Education’s Early Emphasis on Character, the Evisceration of This Priority, and What the First Law Schools Can Teach Us* 27 (Aug. 16, 2013), available at <http://ssrn.com/abstract=2311492>.

39. CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 361 (1908) (quoting a speech made by Dean Langdell at the dinner of the Harvard Law School Association on November 5, 1886).

century despite consistent calls to include practical training and legal ethics in legal education that began in the late nineteenth century from organizations such as the Carnegie Foundation and the American Bar Association (ABA).⁴⁰ In fact, the history of legal ethics reveals that although both legal theorists and practitioners were adamant in expressing the need for legal ethics education, it was not until 1974, after the Watergate scandal and the resignation of President Nixon, that the legal academy began to address legal ethics.⁴¹

There have been significant innovations throughout the years, such as the development of clinical education and other courses offering more practical experience, but the mainstream legal curriculum has remained largely resistant to change:

What makes change possible now is that the unprecedented confluence of disintermediation in the legal profession, the stagnation of incomes in the

40. See A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1976–77 (2012) (“With this vision [for reform], the career legal professoriate was born, purely academic in character and divorced from the practicing bar.” (citing CHARLES WARREN, *HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA* 361 (1908))); see also Susannah Furnish, *The Progression of Legal Education Models: Everything Old Is New Again*, 6 NE. U. L.J. 7, 7 (2013) (“The irony, of course, is that the prevailing approach to legal education, housed in a university setting and employing the case method in large classes, evolved in the late 1800s as a reaction to an apprenticeship model focusing on skills, ethics, and competencies.”). A lack of knowledge and facility with real time legal problems led Roscoe Pound, Dean of Harvard Law School shortly after the turn of the century, to fault the apprenticeship model on different grounds. Pound was concerned that lawyers were not equipped to deal with the growing complexity of society brought about by the industrial age and the consequent need for lawyers to have a “deeper and wider” legal education. Roscoe Pound, *The Law School and the Professional Tradition*, 24 MICH. L. REV. 156, 159 (1925); see AM. BAR ASS’N, *LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS* 8 (1979) (“Chief Justice Berger and others have spoken, in recent years, of a serious problem of ‘incompetency’ among those lawyers trying cases before the federal courts and among the trial bar generally.”); see also JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING*, BULLETIN NO. 8, at 3–6 (1914) (“[L]et me note that the essential problem before me has been to pass judgment upon the nature and success of the so-called case method.”); WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 12–14 (2007) (proposing a change from the current method of legal instruction toward one that integrates both knowledge and practice); E. Eugene Clark, *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 4 LEGAL EDUC. REV. 201, 202 (1993) (noting that the purpose of the ABA Task Force on legal education is to study, in-depth, the “range of skills and values” necessary for a lawyer to assume responsibility for handling a legal matter). See generally ALFRED Z. REED, *TRAINING FOR THE PUBLIC PROFESSION OF LAW: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING*, BULLETIN NO. 15 (1921) (reporting on the development of legal education as well as its problems).

41. Lorie M. Graham, *Aristotle’s Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 J. LEGAL PROF. 5, 29 (1996).

legal job market, a bubble in law school tuition and attendant student borrowing, and the prospect of a decline in law school applications and enrollments that will require all but perhaps the most elite and secure law schools to innovate or die.⁴²

A. Benjamin Spencer recommends fundamental change to law school curriculum and suggests that the contemporary legal academy employ teaching strategies based upon what we now know about how people learn. He asserts, “[P]rofessional legal education must give more attention to transmitting the skills and values that are essential compliments to doctrinal instruction. Mastering the cognitive, practical, and ethical dimensions of legal practice are what professional legal education must be about; focusing largely on the law in books cannot do the job.”⁴³ Furthermore, he suggests that the “full range of abilities gained through experiential learning is what law schools should strive to deliver if their goal is to produce competent attorneys. Students need to learn how to ‘work like a lawyer,’ not just how to ‘think like a lawyer.’”⁴⁴

IV. CONTEMPORARY THEORIES OF LEARNING AND ETHICAL DECISION-MAKING

Spencer is not alone in suggesting that the legal academy explore the contemporary understanding of how people learn, much of which is rooted in psychological studies.⁴⁵ Interestingly, the current thinking on effective teaching methodologies reveals strategies that align with Aristotle’s views on moral education; that is, a student will become skilled in practical reasoning and obtain practical wisdom if that student is provided with knowledge, analytical reasoning, and guided, disciplined experiential

42. A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 2062–63 (2012) (footnote omitted); see also RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 6 (2008) (“Lawyers, like the rest of humanity, face the threat of disintermediation (broadly, being cut out of some supply chain) by advanced systems . . .”).

43. A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 2061 (2012).

44. *Id.* at 2062 (citing David E. Van Zandt, *Foundational Competencies*, 61 RUTGERS L. REV. 1127, 1133–34 (2009)).

45. See, e.g., Alan M. Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible Choices*, 23 QUINNIPIAC L. REV. 643, 656 (2004) (suggesting that law professors use recent scientific discoveries on learning to present more effective teaching styles); Andrew M. Perlman, *A Behavioral Theory of Legal Ethics* 2 (Suffolk University Law School Research Series, Research Paper No. 13–31, 2013), available at <http://ssrn.com/abstract=2320605> (“[B]ehavioral research can inform the foundational legal ethics debate in ways that have not been fully explored.”).

learning.

For example, in 2004, Alan Lerner wrote an innovative article entitled *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible, Choices*.⁴⁶ He queried whether the “prevailing [law school] curriculum [may fail] to support, or may actually impede students’ development as both effective, and professionally responsible, ethical lawyers,” and also asked whether law schools might be able to be more effective.⁴⁷ Lerner suggested that one of the reasons that law schools have persisted to primarily teach the case method is that law school curriculums have failed to incorporate “scientific discoveries over the past two or three decades about how people learn, what inhibits and enhances their effective use of what [law schools] teach, and the effective use of learning to address emerging problems, particularly when those problems are professionally threatening to them.”⁴⁸

Lerner acknowledged the legal literature that predates his article, which contains examples of experiential pedagogy employed in the area of professional responsibility and the explanations for its effectiveness.⁴⁹ He also acknowledged the critics who believe that the character make up of a law student is fully formed upon arrival; and therefore, there is no significant opportunity for law school to have an impact on the ethics of law students.⁵⁰ However, Lerner proposed, “[T]here is . . . evidence that professional school may be an ideal place to teach ethical decision-making.”⁵¹

Lerner supported his proposition with psychological research relevant to the brain and decision-making. Interestingly, his description of how the

46. Alan M. Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible Choices*, 23 QUINNIPIAC L. REV. 643 (2004).

47. *Id.* at 656; see also PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT—A GUIDE FOR LAWYERS AND POLICY MAKERS 481 (2010) (“[L]awyers’ behavior may be influenced by how well they believe the case or transaction is going compared to an assumed baseline. ‘When things appear to be going well (gains), risky ethical violations will seem unattractive; when things appear to be going poorly (losses), however, those same ethical violations will hold more appeal.’” (citation omitted)).

48. Alan M. Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible Choices*, 23 QUINNIPIAC L. REV. 643, 656 (2004).

49. See *id.* at 656–57 (“The legal literature contains a number of examples of experiments with teaching professional responsibility using experimental methods.”).

50. *Id.* at 657.

51. *Id.* (footnote omitted).

brain creates memories that impact decision-making is reminiscent of Aristotle's theory of the necessity of habituation to develop practical wisdom. Lerner explained:

The more we repeat experiences that create the same or similar patterns of neural connection, the stronger the pattern becomes, and the more likely we are to trigger its recall later.

This system of creating memory through the patterns of connections among neurons, and the tendency of repetition to strengthen the pattern and its likely recall, gives rise to several powerful tools, including the ability to correct errors in the perceived data, to conceptualize, and to create meaning from discordant data.⁵²

In other words, the similar patterns of neural connection created by habituation exist as memories that contribute to an individual's ability to make sense of data arising in particular circumstances, which ultimately enables the individual to decide upon a course of action.

Memory is generally categorized as explicit or implicit. Explicit memory results from intentional learning and involves repetition and memorization. Once created, explicit memory may be seamlessly called upon as in the example of the athlete who automatically employs his skills to hit a ball traveling towards him at ninety miles per hour in a tennis match or during a baseball game. On the other hand, implicit memory "arises out of our participation in our environment, without regard to our conscious intention to remember it Since our engagement with our environment is continuous, it is related to, and builds upon, knowledge that already exists in memory. . . . It does not require repetition or memorization."⁵³ In fact, it is suggested that implicit memory develops without conscious reflection and virtually without notice, but creates a person's internal sense of reality and manner of viewing the world.⁵⁴

Lerner contended that the case-method succeeds at providing students both explicit learning of legal principles and implicit coding of how to analyze a legal issue—after three years of law school, students confronted with a legal case may analyze the relevant issues without really thinking about the intellectual process that has become inherent in their thinking.

However, Lerner pointed out that in all that case method training there has not generally been much explicit or implicit learning as to whether or how to handle the case from a value standpoint. Students do not have the

52. *Id.* at 662.

53. *Id.* at 665 (footnote omitted).

54. *Id.* at 667.

training in ethics or professional judgment, but rather are studying legal analysis from an appellate opinion. Why a lawyer took the case, what the client desired, or the impact of the outcome upon all the players are all considerations that are omitted from the case method. Students have engaged in little explicit or implicit learning in professional responsibility and do not have a memory bank of experience from which to form professional judgment—students have not acquired practical wisdom in the area of legal ethics. In fact, many students have only been provided with the general principles of legal ethics and professionalism in one professional responsibility course; they likely have not even engaged in the repetition and memorization necessary for long-term recall of the rules, and have not “experienced” the rules in any meaningful way, nor created an implicit memory data bank to employ in decision-making.

This data or memory bank is described as a collection of “stock stories” by Kristen Holmquist,⁵⁵ who explains that stock stories depend upon a person’s experience, both individual and cultural, and assist a person in ordering and navigating in the world, including the specialized problem solving required in the legal profession. Holmquist agrees that law students depart from law school with a memory bank of stock stories that reflect complex doctrinal theories applied to appellate case facts, which provide crucial analytical tools; however, her concern is that these stock stories lack context. Such context can be described as “a manifestation of larger social and cultural forces” and the aspect of lawyering that is “a version of human problem-solving and persuasion accomplished through a whole constellation of competencies.”⁵⁶

Holmquist recommends that legal curriculum be infused with factual,

55. See Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 369 (2012) (“In order to make . . . decisions . . . we rely on stock stories, or schemas, familiar stories and arguments that act as heuristics and allow us to create meaning through narrative. Individuals develop mental databases of stock stories through experiences direct and indirect, individual and cultural. These stock stories become categorizing and ordering tools.”); see also PAUL BREST AND LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT—A GUIDE FOR LAWYERS AND POLICY MAKERS* 29 (2010) (“[P]rofessional expertise involves the development and deployment of an information-rich, schematically organized mental database, which enables the expert to extract key elements from a complex informational array and to match those elements with an existing expert schema stored in memory. Once this match has occurred and the relevant schema has been activated, the schema supplies the expert with a great deal of substantive and procedural information. This information can then be used either intuitively, or through a more deliberative approach, to identify problem-relevant goals and objectives, generate alternative courses of action, accurately predict the consequences associated with those courses of action, and select and then implement the course of action most likely to realize the identified interests and goals.”).

56. Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 373 (2012).

normative, and empirical content beyond appellate cases and that law students be exposed to the psychology related to decision-making. “The promise of cognitive theory lies precisely in its ability to make explicit the unconscious criteria and cognitive operations that structure and constitute our judgment.”⁵⁷ In other words, legal curriculum should not only include experiential learning to develop stock stories related to professional judgment and values to be filed in the students implicit memory bank, but also should provide students with insight as to what variables, conscious and unconscious, may influence their decision-making. “Legal problem-solving skills . . . can be learned in the classroom . . . so long as the classroom is designed to give students experiential chunks and to help them develop the ‘habits of thought inherent in the formal model [that improve] subsequent problem solving done at the naturalistic end of the spectrum.’”⁵⁸

Similarly, Alan Lerner suggests that problem-based learning provides the experiential component that would provide students with more of a framework for decision-making.⁵⁹

If law students are placed in realistic, though simulated, situations involving ethical dilemmas comparable to those faced by lawyers, supported in their efforts to solve the problem, given the opportunity to reflect on their work, individually, among their peers, and with supervision, so that they can see what worked, what did not, and why, and what other options might have been considered, actively encouraged to consider multiple perspectives and the ethical dimensions throughout the process, and called on to repeat that process . . . the implicit messages will be (1) that seeking and applying ethically correct answers is important for lawyers; (2) that these problems are soluble; and (3) that they are competent to solve them. They will have felt the intellectual, emotional, and moral challenge of the problem. Likely, they will have experienced trial and error, without dire consequences, but rather the opportunity for reflective consideration of their process and others that they might have pursued. . . . They will understand the relevant concepts, in the contexts in which they arise, and have a bank of experience to call on in addressing moral and ethical problems when they arise in “real life.”⁶⁰

Clark D. Cunningham and Charlotte Alexander offer similar

57. STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* xiii (2001).

58. Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 372–73 (2012) (citing Paul Brest & Linda H. Krieger, *Lawyers As Problem Solvers*, 72 TEMP. L. REV. 811, 827–28 (1999)).

59. Alan M. Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible Choices*, 23 QUINNIPIAC L. REV. 643, 695 (2004).

60. *Id.* at 700.

observations based upon a consideration of the application of moral psychology to legal education designed to develop professional judgment.⁶¹ They review Lawrence Kohlberg's work on the development of moral judgment and James Rest and Muriel Bebeau's subsequent development of models of moral reasoning for professional education, concluding that "a reformed law school curriculum would require students to spot issues and develop ethical sensitivity; would then require them to engage in moral reasoning, in role; and finally would require them to take on the professional identity of attorney and implement their moral judgment" in a carefully supervised setting.⁶²

Other authors have focused more on the importance of educating law students as to the myriad of cognitive processes that may distort their thinking as they find themselves in both these experiential learning environments and in the real world practice of law. Jennifer K. Robbennolt and Jean R. Sternlight's recent book, *Psychology for Lawyers*,⁶³ devotes several chapters to describing the cognitive processes involved in determining how we perceive the world, formulate judgments, and engage in decision-making. They explain how various cognitive biases and emotions influence both judgment and decision-making. They advise that

61. Clark D. Cunningham & Charlotte Alexander, *Developing Professional Judgment: Law School Innovations in Response to the Carnegie Foundation's Critique of American Legal Education*, in THE ETHICS PROJECT IN LEGAL EDUCATION 7-9 (Michael Robertson et al. eds., 2010). Cunningham and Alexander's article provides Kohlberg's stages of morality, asserted to occur over the life span of an individual, and Rest's Four Component Model for analyzing how cognition, affect, and social dynamics influence moral behavior, which provide four capacities necessary for moral action:

1. Moral sensitivity that can interpret the need for moral decision.
2. Clear ethical reasoning that can reach a morally defensible decision.
3. Identify formation that will support the prioritization of the moral decision over competing interests.
4. Competence to implement the moral decision.

Id. at 7. The article then provides a summary of Bebeau's subsequent work, which builds on Rest's work to provide four components to design a curriculum focused upon professional behavior:

1. Create sensitivity to ethical issues likely to arise in practice.
2. Build capacity for reasoning carefully about conflicts inherent in the practice.
3. Establish a sense of personal identity that incorporates professional norms and values.
4. Develop competence in problem solving including necessary interpersonal skills.

Id. at 8.

62. *Id.* at 15.

63. JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* (2012).

lawyers who are aware of the underlying variables that influence judgment and decision-making may use that knowledge not only to enhance professional judgment, but also to be more effective as a result of gaining insight into the decision-making of their clients.⁶⁴

Andrew Perlman focuses on partisanship bias, the distortion arising from being placed on one side of a dispute and other related heuristics, and proposes a behavioral theory of legal ethics to address partisanship and other cognitive processes that negatively impact a lawyer's decision-making process, especially when he is confronted with ambiguous legal and factual questions.⁶⁵ He suggests not only teaching law students to develop an awareness of these components of decision-making, but also the inclusion of methods to develop debiasing tactics so that as lawyers they may employ these tactics to “make more objective and effective decisions.”⁶⁶

64. *Id.* at 85. Interestingly, Aristotle, writing about the value of self-control, acknowledges the influence of emotion on decision-making, and, for example, notes:

[I]t seems that Anger does in a way listen to Reason, but mishears it Anger, by reason of its natural heat and quickness, listening to Reason, but without having heard the command of Reason, rushes to its revenge. That is to say, Reason or some impression on the mind shows there is insolence or contempt in the offender, and then Anger, reasoning as it were that one ought to fight against what is such, fires up immediately

THE ETHICS OF ARISTOTLE 159 (Jim Manis ed., J.A. Smith trans., Pa. St. Univ. The Electronic Classics Series 2004), available at <http://www2.hn.psu.edu/faculty/jmanis/aristotl/Ethics-Aristotle.pdf>.

65. Andrew M. Perlman, *A Behavioral Theory of Legal Ethics* 2 (Suffolk Univ. Law Sch. Research Series, Research Paper No. 13–31, Sept. 4, 2013), available at <http://ssrn.com/abstract=2320605>.

66. *Id.* at 30; see also JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION AND DECISION MAKING* 111–12 (2012) (suggesting not only debiasing strategies, but also advising individuals to formulate specific “implementation intentions” to counteract some of the influences that may prevent a decision from being fully implemented). Robbennolt and Sternlight go on to add:

An implementation intention is an if-then statement that specifies how we will behave in a future situation. In particular, the statement anticipates and articulates a specific triggering circumstance or feeling followed by a detailed statement of what we will do on that occasion. . . . [W]e might say, “When I feel myself under pressure to make a concession, I will tell Joe that I need to make a phone call and take a five-minute break.”

JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION AND DECISION MAKING* 111–12 (2012). “When the trigger occurs the response is automatic. Specifying the trigger as well as the specifics of the behavioral response in this way has been shown to be effective in furthering the desired goal-directed behavior.” *Id.* at 112. Implementation strategies may be introduced as part of simulated legal ethics exercise where the legal ethics event is a typical one that the student will likely confront in practice, such as unreasonable behavior on the part of a client, opposing counsel, or a judge. See SCOTT L. ROGERS & JAN L. JACOBOWITZ, *MINDFULNESS AND PROFESSIONAL*

Perlman suggests that reforms to legal education might include exposing “students to social science research on objectivity and impartiality,” stories of well-intentioned lawyers who suffered the repercussions of ethical missteps, and the “urging of students to retain their moral intuitions instead of only engaging in the relativism-promoting exercise of seeing the other side of every legal argument.”⁶⁷ He also suggests teaching professional responsibility using simulation exercises: “By putting students in realistic situations where they have to resolve an ethical issue presented to them, they are more likely to learn how to identify ethical quandaries when they arise in practice.”⁶⁸

Perlman notes that teaching “people about cognitive distortions does not” necessarily produce objective decision-making.⁶⁹ In fact, Daniel Kahneman explains that correcting errors that originate in our intuitive, implicit thinking is simple in principle, but in actuality requires a considerable investment.⁷⁰ The simple principle is to “recognize the signs that you are in a cognitive minefield, slow down, and ask for reinforcement”⁷¹ from the conscious, deliberate aspect of your mind—the slow thinking system:

Unfortunately, this sensible procedure is least likely to be applied when it is needed most. We would all like to have a warning bell that rings loudly whenever we are about to make a serious error, but no such bell is available The voice of reason may be much fainter than the loud and clear voice of an erroneous intuition, and questioning your intuitions is unpleasant when you face the stress of a big decision. More doubt is the last thing that you want when you are in trouble. The upshot is that it is much easier to identify a minefield when you observe others wandering into it than when you are about to do so.⁷²

Thus, much of the recent literature discussing the relationship of

RESPONSIBILITY: A GUIDEBOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM 29 (2012) (explaining how the authors implement mindful ethics in their classroom at the University of Miami School of Law).

67. Andrew M. Perlman, *A Behavioral Theory of Legal Ethics* 36 (Suffolk Univ. Law Sch. Research Series, Research Paper No. 13-31, Sept. 4, 2013), available at <http://ssrn.com/abstract=2320605>.

68. *Id.*

69. *Id.* at 30.

70. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 417 (2011).

71. *Id.*

72. *Id.* The mindful ethics curriculum seeks to have the student observe others wandering into these minefields while at the same time participating in the “wandering” through role play as will be seen below.

cognitive psychology and legal ethics education supports experiential education as a method for creating an internal, implicit frame of reference for ethical decision-making, as well as education about the cognitive processes involved in making judgments and formulating decisions. Moreover, teaching professional judgment and ethical decision-making should provide tools that enable a student to develop a heightened awareness of the warning signs of an ethical minefield and the ability to engage in conscious, deliberate thought that acknowledges the distorting influence of emotion and cognitive bias.⁷³

Essentially, the idea is that once armed with knowledge, the path to practical wisdom or professional judgment and effective decision-making involves not only knowledge and experience, but also an awareness of the thoughts, feelings, and bodily sensations influencing your thinking.⁷⁴ In other words, it involves *thinking about your thinking*, or an automatic *awareness of awareness*, referred to as a state of “meta-awareness.”⁷⁵ By pausing to gain insight into what is influencing your thought process, you may be able to reflect and more consciously deliberate to thoughtfully decide upon a response rather than quickly react in a regrettable manner.

Mindfulness is a cognitive tool for slowing down the process and recognizing internal cues that may assist in sounding an alarm to warn of a cognitive or ethical minefield. “Applying mindfulness to decision-making leads to clearer thinking and to staying connected to your core values, which is crucial to your peace of mind.”⁷⁶ Not surprisingly, mindfulness is gaining popularity in law schools and legal communities throughout the country for both its ability to enhance well-being and to increase the attentive qualities and focus that promote effective and more ethical decision-making.

73. See Jan L. Jacobowitz, *Mindfulness and Professionalism*, in *THE ESSENTIAL QUALITIES OF A PROFESSIONAL LAWYER* 229, 233 (2013) (illustrating the importance of meditation for developing more aware, and therefore more ethical, lawyers).

74. See DANIEL J. SIEGEL, *THE MINDFUL BRAIN: REFLECTION AND ATTUNEMENT IN THE CULTIVATION OF WELL-BEING* 326 (2007) (suggesting that mindfulness “can readily inspire students to become engaged participants” if they are consciously aware of their mindset).

75. See *id.* at 327 (“We observe our selves and attain equanimity through active awareness These are active reflective engagements with the wild flows of our own unpredictable mind in an uncertain world. Embedded within these active reflections is our meta-awareness, the automatic awareness of awareness that creates a deep knowing of the ebbs and flows of our mind’s activities . . .”).

76. PHILLIP MOFFITT, *EMOTIONAL CHAOS TO CLARITY: HOW TO LIVE MORE SKILLFULLY, MAKE BETTER DECISIONS, AND FIND PURPOSE IN LIFE* 106 (2012).

V. MINDFULNESS

An overview of mindfulness is helpful for laying a foundation for the discussion of Mindful Ethics⁷⁷ and providing a fuller understanding of the integration of mindfulness into the law school curriculum. Because mindfulness is an experiential practice, it is not easy to define. Still, definitions provide context and several definitions of mindfulness have found their way into legal discourse. Professor Leonard Riskin, drawing upon the writing of Jon Kabat-Zinn,⁷⁸ describes mindfulness as “paying attention deliberately, moment by moment, and without judgment, to whatever is going on in the mind and body.”⁷⁹ In the context of ethical decision-making, the most important word in this definition may be “deliberately,” and indeed, the intentional attending to our moment-to-moment experience is fundamental to mindfulness. It also highlights what may well be the most challenging aspect of mindfulness practice—namely, maintaining one’s attention on an object and noticing when attention wanders. This focus, as we shall see, is relevant to our ability to conduct ourselves with integrity amid challenging, stressful, and emotionally reactive situations.

As a practice, mindfulness involves placing one’s attention on an object—most commonly the breath—and when one realizes that attention has wandered, gently guiding it back to the object.⁸⁰ The breath, as the object of attention, serves a variety of purposes. As a designated focal

77. See MIAMI LAW MINDFULNESS IN LAW PROGRAM, www.mindfulness.law.miami.edu (last visited Mar. 21, 2014) (providing an example of the popularity of mindfulness training in the legal community). Mindful Ethics is a mindfulness approach for exploring ethical decision-making that we developed in 2010 and which forms the basis for the professional responsibility class we teach at Miami Law. *Id.*

78. Leonard L. Riskin, *The Place of Mindfulness in Healing and the Law*, in SHIFTING THE FIELD OF LAW & JUSTICE 99–120 (2007). Jon Kabat-Zinn developed Mindfulness-Based Stress Reduction (MBSR), an eight-week mindfulness program that has been the focus of much medical and scientific research over the past fifteen years. While mindfulness is an ancient practice with roots in many contemplative, spiritual and religious traditions, most notably Buddhism, much of the attention it is receiving can be traced to MBSR. As scientific inquiry and popular sentiment for mindfulness grows, the form mindfulness practice takes is expanding—both to embrace the breadth of its historic roots, and to capture a modern day adaptation that is accessible and carries evidence-based support. Scott Rogers, *Mindfulness in Law*, in THE WILEY-BLACKWELL HANDBOOK OF MINDFULNESS (Amanda Ie et al. eds., forthcoming 2014).

79. Leonard L. Riskin, *The Place of Mindfulness in Healing and the Law*, in SHIFTING THE FIELD OF LAW & JUSTICE 99–120 (2007).

80. JON KABAT-ZINN, MINDFULNESS FOR BEGINNERS 11 (2012); see also SUSAN L. SMALLEY & DIANA WINSTON, FULLY PRESENT: THE SCIENCE, ART AND PRACTICE OF MINDFULNESS 38 (2010) (stressing that breathing is the central focus of practicing mindfulness).

point, it helps one realize when the mind has wandered, thereby creating the opportunity to direct attention back to the breath.⁸¹ Though the traditional practice of mindfulness involves much more than this mental exercise, the scientific research on mindfulness that is conducted most frequently (and the conversations about mindfulness taking place within the legal profession and across much of society) looks to this straightforward, yet challenging exercise, as a primary vehicle for the practice and cultivation of mindful awareness.⁸²

VI. MINDFULNESS IN LAW

In the past twenty years, mindfulness has become popular in Western culture across areas as diverse as education, medicine, leadership, psychology, art, spiritual life, therapy, management and business, prison systems, sports, and the military.⁸³ The legal profession has also begun to embrace mindfulness.⁸⁴ Mindfulness programs have been included in state and national bar conferences and events⁸⁵ and mindfulness has been infused into legal discussions on topics ranging from family law,⁸⁶ mediation,⁸⁷ negotiation,⁸⁸ client services, ethics,⁸⁹ trial practice,⁹⁰

81. Important to the experiential aspect of the exercise, both as an insight and learning tool, is that even with awareness that the mind has wandered, it is not always so easy to bring attention back to the breath. So, too, in the decision-making context, as one can be aware that they are deviating from their intentions yet still proceed to deviate.

82. See Amishi P. Jha, *Being in the Now*, SCI. AM. MIND, Mar./Apr. 2013, at 26, 26–28, available at <http://www.themindcentre.com.au/wp-content/uploads/2013/03/Scientific-American-article.pdf> (noting the broad appeal of breathing exercises to practice mindfulness).

83. See Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness, Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 3–7 (2002) (providing examples of some of the many social, governmental, and educational areas that mindfulness influences); see also TIM RYAN, A MINDFUL NATION: HOW A SIMPLE PRACTICE CAN HELP US REDUCE STRESS, IMPROVE PERFORMANCE, AND RECAPTURE THE AMERICAN SPIRIT 45–47 (2013) (discussing the practical changes that can be made to the military, education, and healthcare through mindfulness study and practice).

84. See generally Charles Halpern, *The Mindful Lawyer: Why Contemporary Lawyers Are Practicing Meditation*, 61 J. LEGAL EDUC. 641, 641 (2012) (noting the participation of members of the legal profession at mindfulness conferences).

85. Scott Rogers, *Mindfulness in Law*, in THE WILEY-BLACKWELL HANDBOOK OF MINDFULNESS (Amanda Ie et al. eds., forthcoming 2014).

86. See Barry Nobel, *Meditation and Mediation*, 43 FAM. CT. REV. 295, 295 (2005) (examining the benefits of introducing mindfulness into family law mediation techniques).

87. See Evan M. Rock, *Mindfulness Meditation, the Cultivation of Awareness, Mediator Neutrality, and the Possibility of Justice*, 6 CARDOZO J. CONFLICT RESOL. 347, 348–49 (2005) (expanding on the benefits of using mindfulness to increase the effectiveness of mediation).

health and well-being, professional identity,⁹¹ civility,⁹² and judicial decision-making.⁹³ Law firms and legal organizations are bringing in mindfulness teachers to introduce lawyers and legal staff to mindfulness practices that can be integrated into their professional and personal lives. Law schools and faculty are introducing students to mindfulness, infusing it into the curriculum, and integrating it across the law school

88. See generally Van M. Pounds, *Promoting Truthfulness in Negotiation: A Mindful Approach*, 40 WILLAMETTE L. REV. 181, 182–83 (2004) (discussing the possibility of using mindfulness to increase negotiation effectiveness); Leonard L. Riskin, *Knowing Yourself: Mindfulness*, in THE NEGOTIATOR'S FIELDBOOK 239 (2006) (investigating the intersection of mindfulness and negotiation strategies).

89. See Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 UMKC L. REV. 535, 537 (2011) (arguing that “contemplative practice” can reduce stress in lawyers and lead to “professionally consistent ethics”); Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 S. TEX. L. REV. 493, 494 (2009) (asserting that mindfulness can increase ethical decision-making in lawyers).

90. See J. Patton Hyman, *The Mindful Lawyer: Mindfulness Meditation and Law Practice*, 33 VT. BUS. J. 40, 46–47 (2007) (analyzing the ability to overcome the anxiety of advocating in court by practicing mindfulness); Jan L. Jacobowitz, *The Benefits of Mindfulness for Litigators*, A.B.A. LITIG. J., Spring 2013, at 27, 28–29, available at http://www.americanbar.org/publications/litigation_journal/2012_13/spring/benefits-mindfulness.html (advocating mindfulness for trial lawyers and judges); Robert Zeglovitch, *The Mindful Lawyer*, 70 TEX. B.J. 234, 234–35 (2007) (commenting on the benefits of mindfulness on trial lawyers).

91. See Angela P. Harris, *Toward Lawyering As Peacemaking: A Seminar on Mindfulness, Morality, and Professional Identity*, 61 J. LEGAL EDUC. 647, 649–50 (2012) (summarizing the positive effects that mindfulness can have on lawyers health and professional lives); Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 UMKC L. REV. 535, 538–40 (2011) (examining and explaining the benefits that mindfulness training and practice can have on the health and professional identity of lawyers).

92. See Jan L. Jacobowitz, *Mindfulness and Professionalism*, in THE ESSENTIAL QUALITIES OF A PROFESSIONAL LAWYER 229, 230–32 (2013) (suggesting that civility and professionalism within the legal community can be enhanced through mindfulness); Alan S. Gold, *Mindfulness: A Challenge for Our Times*, DADE CNTY. B. ASS'N BULL., May 2012, at 1, available at <http://miamifrp.com/wp-content/uploads/2012/05/Article-ABCS-DCBA.pdf> (opining that civility in the legal profession can be enhanced by mindfulness).

93. See Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 S. TEX. L. REV. 493, 501–02 (2009) (discussing the legal process that mindfulness achieves, further fostering effective decision-making); 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, 33–65 (2002) (noting that a lawyer will be better able to make decisions and help his clients make decisions if the lawyer is aware of his thoughts). See generally Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 UMKC L. REV. 535, 589 (2011) (providing anecdotal evidence of a mindful class participant's ability to make better decisions through mindfulness).

experience.⁹⁴ There have been two national “mindfulness in law” conferences: one for all members of the legal profession,⁹⁵ and another for legal educators.⁹⁶ Even organizations that offer bar review courses are exploring how mindfulness might be an important component of bar preparation.⁹⁷

The heart of much of the legal profession’s interest in mindfulness rests in the ways that mindfulness practices have been found to be helpful for working with stress,⁹⁸ avoiding depression relapse,⁹⁹ improving focus and concentration, and enhancing overall well-being.¹⁰⁰ A growing body of research is exploring these effects among students in higher education.¹⁰¹

94. See Scott Rogers, *The Mindful Law School: An Integrative Approach to Transforming Legal Education*, 28 *TOURO L. REV.* 1189, 1189–90 (2012) (detailing the University of Miami School of Law’s mindfulness teaching approach, and its growing popularity); Angela P. Harris, *Toward Lawyering As Peacemaking: A Seminar on Mindfulness, Morality, and Professional Identity*, 61 *J. LEGAL EDUC.* 647, 647 (2012) (discussing experiences in teaching a mindfulness-based law school class); MIAMI LAW MINDFULNESS IN LAW PROGRAM, www.mindfulness.law.miami.edu (last visited Mar. 21, 2014) (noting the mindfulness program at the University of Miami School of Law); see also BERKELEY INITIATIVE FOR MINDFULNESS IN LAW, www.law.berkeley.edu/mindfulness.htm (last visited Mar. 21, 2014) (educating members of the legal practice in mindfulness training).

95. See generally Charles Halpern, *The Mindful Lawyer: Why Contemporary Lawyers Are Practicing Meditation*, 61 *J. LEGAL EDUC.* 641, 641 (2012) (noting the national legal conference on mindfulness at Berkeley Law School).

96. *Id.*; SCOTT ROGERS & JAN L. JACOBOWITZ, *MINDFULNESS AND PROFESSIONAL RESPONSIBILITY: A GUIDEBOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM* (2012); see also Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 *UMKC L. REV.* 535, 553 (2011) (discussing the Center for Contemplative Mind’s conference).

97. See *Barbri Offers Mindfulness Training*, *THE MINDFUL LAW BLOG* (June 25, 2013, 5:18 PM), <http://themindfullawyer.com/mindful%20law%20blog/index.php?id=7298120309294628225> (noting a mindful training course by Barbri Bar Review).

98. Amishi P. Jha, Scott L. Rogers & Alexandra B. Morrison, *Mindfulness Training in High Stress Professions: Strengthening Attention & Resilience*, in *MINDFULNESS-BASED TREATMENT APPROACHES: A CLINICIAN’S GUIDE* (Ruth A. Baer ed., 2d ed., forthcoming).

99. ZINDEL V. SEGAL, J. MARK G. WILLIAMS & JOHN D. TEASDALE, *MINDFULNESS-BASED COGNITIVE THERAPY FOR DEPRESSION: A NEW APPROACH TO PREVENTING RELAPSE* 63 (2d ed., 2001) (discussing mindfulness training as an option for depression therapy).

100. See Amishi P. Jha, *Being in the Now*, *SCI. AM. MIND*, Mar./Apr. 2013, at 26, 29–33, available at <http://www.themindcentre.com.au/wp-content/uploads/2013/03/Scientific-American-article.pdf> (noting that a person who practices mindfulness has “the ability to voluntarily focus attention, narrowing [one’s] thoughts to keep out distractions” and possibly alleviate medical conditions).

101. Alexandra B. Morrison et. al., *Taming a Wandering Attention: Short-Form Mindfulness Training in Student Cohorts*, in *FRONTIERS IN HUMAN NEUROSCIENCE* (forthcoming 2014); Shauna Shapiro, Hooria Jazaieri & Philippe Goldin, *Mindfulness-Based Stress Reduction Effects on Moral Reasoning and Decision Making*, 7 *J. POS. PSYCH.* 504, 506 (2012). See generally Shauna Shapiro, G. Schwartz, & G. Bonner, *Effects of Mindfulness-Based Stress Reduction on Medical and*

In fact, the ongoing attention being given to mindfulness—at the highest echelons of industry, education, and government—is largely the product of the vast and growing body of neuroscience research exploring the ways that mindfulness practice may change the very structure and function of the brain—in areas associated with wellbeing and performance.¹⁰² Amishi Jha, a cognitive neuroscientist who researches the influence of mindfulness practices on the brain, defines mindfulness as “a mental mode of being engaged in the present moment without evaluating or emotionally reacting to it.”¹⁰³ Her research, as well as the research of many neuroscientists, is adding to the growing body of findings that mindfulness practices may lead to structural and functional changes to the brain.¹⁰⁴ In this regard, mindfulness has been found to be associated with thicker regions in the prefrontal cortex¹⁰⁵ relevant to our ability to, among other things, focus and engage in reflection prior to taking action. Mindfulness has been found to lead to greater neural gyrification¹⁰⁶ (think crinkles and folds in the cortex that allow for a greater surface area, and with it speed of information processing), increased gray matter density¹⁰⁷ (brain cells), a

Premedical Students, 21 J. BEHAV. MED. 581 (1998) (examining the short-term effects of a meditation-based stress reduction program on premedical and medical students).

102. See SHAUNA L. SHAPIRO, LINDA E. CARLSON & JON KABAT-ZINN, *THE ART AND SCIENCE OF MINDFULNESS: INTEGRATING MINDFULNESS INTO PSYCHOLOGY AND THE HELPING PROFESSIONS* 93 (2009) (exploring the relationship between mindfulness training and reasoning). See generally Amishi P. Jha et al., *Examining the Protective Effects of Mindfulness Training on Working Memory and Affective Experience*, 10 EMOTION 54, 54 (2010) (examining the psychological benefits of mindfulness training).

103. Amishi P. Jha, Scott L. Rogers & Alexandra B. Morrison, *Mindfulness Training in High Stress Professions: Strengthening Attention & Resilience*, in *MINDFULNESS-BASED TREATMENT APPROACHES: A CLINICIAN'S GUIDE* (Ruth A. Baer ed., 2d ed., forthcoming); Amishi P. Jha, *Being in the Now*, SCI. AM. MIND, Mar./Apr. 2013, at 26, 28, available at <http://www.themindcentre.com.au/wp-content/uploads/2013/03/Scientific-American-article.pdf>.

104. See Amishi P. Jha et al., *Examining the Protective Effects of Mindfulness Training on Working Memory and Affective Experience*, 10 EMOTION 54, 55 (2010) (discussing changes in brain regions due to mindfulness training).

105. Sara W. Lazar et al., *Meditation Experience Is Associated with Increased Cortical Thickness*, 16 NEUROREPORT 1893, 1893–97 (2005).

106. Eileen Luders et al., *The Unique Brain Anatomy of Meditation Practitioners: Alterations in Cortical Gyrification*, FRONTIERS HUMAN NEUROSCIENCE, Feb. 29, 2012, at 1, 1–3.

107. See B. Hölzel et al., *Mindfulness Practice Leads to Increases in Regional Brain Gray Matter Density*, PSYCHIATRY RESEARCH: NEUROIMAGING, Jan. 30, 2011, at 36, *passim* (discussing the benefits of meditation to brain activity and development).

thicker insula¹⁰⁸ (sensory input from the body to the brain), and a thinning of the amygdala (fear activation).¹⁰⁹ Not surprisingly, research is finding that mindfulness practices are associated with improved focus, the capacity to regulate emotions, and enhanced working memory capacity.¹¹⁰ This research is animating a great deal of national and international conversation on the merits of mindfulness practice across many domains, and the law is no exception.

VII. MINDFULNESS, NEUROSCIENCE AND ETHICAL DECISION-MAKING

Because mindfulness is an awareness practice, ethicists exploring the connection between mindfulness and ethics frequently look to the role of awareness on ethical decision-making.¹¹¹ Various ethical decision-making models posit that it is only after one is aware of an ethical dilemma that “moral reasoning [can be brought] to bear on the issue.”¹¹² So too, one’s tendency to get away with minor ethical breaches—especially when no one is looking—is reduced when moral benchmarks are made salient.¹¹³ In their research, Ruedy and Schweitzer investigated the relationship between mindfulness and ethical conduct.¹¹⁴ They found that persons scoring high in mindfulness place more importance on upholding a high moral standard and were less likely to report a willingness to engage in unethical

108. See Sara W. Lazar et al, *Meditation Experience Is Associated with Increased Cortical Thickness*, 16 NEUROREPORT 1893, 1893–97 (2005) (examining the effects of meditation on the brain).

109. See B. Hölzel et al., *Mindfulness Practice Leads to Increases in Regional Brain Gray Matter Density*, PSYCHIATRY RESEARCH: NEUROIMAGING, Jan. 30, 2011, at 36, 41 (denoting that “changes in perceived stress” from mindfulness practice “were correlated with structural changes in the amygdala”).

110. See Amishi P. Jha, *Being in the Now*, SCI. AM. MIND, Mar./Apr. 2013, at 26, 26–33, available at <http://www.themindcentre.com.au/wp-content/uploads/2013/03/Scientific-American-article.pdf> (reviewing the broad benefits of mindfulness techniques).

111. See Thomas M. Jones, *Ethical Decision Making by Individuals in Organizations: An Issue-Contingent Model*, 16 ACAD. MGMT. REV. 366, 366–95 (1991) (examining the effect of mindfulness on ethical thinking and actions).

112. Nicole E. Ruedy & Maurice E. Schweitzer, *In the Moment: The Effect of Mindfulness on Ethical Decision Making*, 95 J. BUS. ETHICS 73, 73 (2010).

113. See Ellen Waldman, *Mindfulness, Emotions and Ethics: The Right Stuff?*, 10 NEV. L.J. 513, 527 (2010) (asserting that ethical decision-making can be improved by making people aware and accountable for ethical guidelines).

114. See generally Nicole E. Ruedy & Maurice E. Schweitzer, *In the Moment: The Effect of Mindfulness on Ethical Decision Making*, 95 J. BUS. ETHICS 73 (2010) (detailing the parameters of a study that demonstrates a correlation between mindfulness and ethical behavior).

behavior.¹¹⁵ Moreover, in a paper and pencil task in which most people cheated, those scoring high in trait mindfulness did so to a lesser degree.¹¹⁶ Shapiro and her colleagues explored the effects of Mindfulness-Based Stress Reduction (MBSR) training on ethical decision-making, finding that mindfulness training led to improvements in moral reasoning and decision-making.¹¹⁷

So too, legal commentators identify awareness as fundamentally important to promoting ethical behavior. Riskin notes that mindfulness practices lead to greater awareness of thoughts, the intentions underlying conduct, and the “emotions, body sensations and behaviors they precipitate.”¹¹⁸ He suggests that as “we observe these phenomena at a psychological distance, their strength or power or influence tends to diminish and we [then] have a chance to consider their merit.”¹¹⁹ He sums this up with the observation that “mindfulness allows us to insert a ‘wedge of awareness’ before we act.”¹²⁰

The connection between mindfulness and ethics is one that interests not only ethicists and lawyers, but also mindfulness practitioners and scientists. For example, ethics plays a central role in a traditional Buddhist mindfulness practice,¹²¹ and thus, the philosophical conversation within this community of practitioners has become especially spirited, as

115. *See id.* at 78 (discussing a study that demonstrates a correlation between mindfulness and ethical behavior).

116. *Id.* at 82.

117. Shauna Shapiro, Hooria Jazaieri & Philippe Goldin, *Mindfulness-Based Stress Reduction Effects on Moral Reasoning and Decision Making*, 7 J. POSITIVE PSYCH. 504, 504 (2012). Interestingly, results were not obtained immediately after training, but two months later, leading Shapiro and her colleagues to postulate that these results may be due to the developmental nature of ethical behavior and moral maturity. *Id.* at 509–10.

118. Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 S. TEX. L. REV. 493, 499 (2009).

119. *Id.*

120. *Id.* (quoting MATTHEW FLICKSTEIN, *SWALLOWING THE RIVER GANGES: A PRACTICE GUIDE TO THE PATH OF PURIFICATION* 28 (2001)). Professor Scott Peppet, who agrees that “a more mindful person will likely become a more ethical person,” cautions that the expectations placed on lawyers to win at all costs may well come into conflict with an attorney’s developing sense of ethics roused through mindfulness practice. Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83, 84 (2002).

121. *See* JOSEPH GOLDSTEIN, *MINDFULNESS: A PRACTICAL GUIDE TO AWAKENING* 271–72 (2013) (discussing the Buddhist teaching of ethical conduct, known as “sila”); *see also* Ran Kuttner, *What Does It Mean to Do the Right Thing?*, 10 NEV. L.J. 407, 408 (2010) (connecting Buddhist teachings to the practice of law and legal ethics).

mindfulness has been introduced into the military.¹²² Neuroscientists, using brain-scanning technologies that allow for the real-time measurement of brain activity when subjects are engaged in decision-making scenarios, are finding that different areas of the brain may be involved depending upon whether an individual has a meditation practice and the nature of the moral or ethical decision at hand.¹²³ One of these studies found that, when treated unfairly, the decision-making of meditators was more rational and less influenced by emotional reactivity than was the decision-making of those who did not meditate.¹²⁴

122. See Elizabeth A. Stanley & Amishi P. Jha, *Mind Fitness: Improving Operational Effectiveness and Building Warrior Resilience*, JOINT FORCE Q., Oct. 2009, at 144, 144–46 (proposing that mindfulness training may help with the stress of military service); see also Greg Breining, *Boot Camp for the Brain*, MIAMI MAG., Fall 2012, at 1, available at <http://miami.univmiami.net/boot-camp/> (stating that mindfulness training is becoming increasingly popular for improving military readiness).

123. Ulrich Kirk et al., *Interoception Drives Increased Rational Decision-Making in Mediators Playing the Ultimatum Game*, FRONTIERS IN NEUROSCIENCE, Apr. 18, 2011, at 1, 1, available at <http://labs.vtc.vt.edu/hnl/articles/Read/fnins-05-00049.pdf>.

124. For example, a 2011 study found that experienced meditators use different brain regions than control subjects when making decisions in a “fairness” game. *Id.* at 5. Researchers scanned the brains of meditators and control subjects while they played the “ultimatum game,” in which the first player proposes how to divide a sum of money and the second either accepts or rejects the proposal. They found that the two groups engaged different parts of the brain when making these decisions. Controls, when presented with an unfair offer, showed increased activity in the anterior insula (involved in disgust and emotional reactions to unfairness and betrayal), whereas meditators showed higher activity instead in the posterior insula (involved in interoception and attention to present moment experience). The study also reported that meditators were less influenced by emotional reactivity when treated unfairly. *Id.* at 1. Another example is found in cognitive neuroscientists, Joshua Greene’s research using the “trolley problem,” a moral dilemma involving a runaway trolley about to kill five people. See Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395, 1395 (1985) (explaining the “trolley problem”). Using fMRI brain scanning equipment, Greene examined brain activity while subjects grappled with the question of whether to sacrifice one person in order to save the lives of five. As it turns out, the answer varies depending on how the question is framed. A majority of individuals deem it moral to pull a switch that reroutes the train along another track and into an unlucky person. Joshua D. Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 SCI. 2105, 2107 (2001). But few regard it as moral to push a person off a ledge and into the path of the trolley, killing the one and saving the five. *Id.* Greene’s research finds that different neural systems respond differently to these two dilemmas. In the first, the dorsolateral prefrontal cortex, a part of the brain associated with “cognitive control” and reasoning, seems to call the shots. However, when assessing whether it is okay to push a person on the tracks, a strong negative emotional state is aroused along with the increased activity in the anterior cingulate cortex, a brain region associated with “response conflict.” See *id.* (providing an example, through experimentation, of brain activity when making morality based decisions). The traditional discussion of utilitarian versus deontological moral judgments moves to a new level of insight (and intrigue) as

Thus, mindfulness practices offer the promise of playing an important role in how students relate to challenging situations, and how they recognize and respond to ethical dilemmas. As Daniel Goleman observes:

Self-awareness, then, represents an essential focus, one that attunes us to the subtle murmurs within that can help guide our way through life. And, . . . this inner radar holds the key to managing what we do—and just as important, what we don't do. This internal control mechanism makes all the difference between a life well lived and one that falters.¹²⁵

VIII. MINDFUL ETHICS IN THE CLASSROOM

William James, the father of modern psychology, penned a phrase that is among the most widely repeated amid mindfulness circles, especially those oriented around education. It is a phrase that speaks to one of the primary aspects of mindfulness practice and links it directly to ethics. He wrote, “the faculty of voluntarily bringing back a wandering attention over and over again is the very root of judgment, character, and will.”¹²⁶

The practice of mindfulness, in the form that is taught today and the subject of much scientific research, involves little more than following James's instruction. James is explicit in linking this simple (to articulate, challenging to practice), exercise to our ethical fiber—“judgment, character, and will”—and, with an anticipatory nod to the Carnegie Report, further states: “No one is *compos sui* if he have it not. An education which should improve this faculty would be *the education par excellence*.”¹²⁷

Mindful Ethics, one of the first law school courses in the country to integrate mindfulness, is responsive to James's call to action. It also draws upon Aristotle's insights in fashioning a curriculum to help develop a law student's capacity for practical wisdom and the intuition that allows him or her to “assess situations correctly and act appropriately.”¹²⁸ Mindful Ethics first appeared in the Miami Law curriculum in Spring 2010 and has

we begin to glimpse and better understand the roles of brain systems on influencing ethical decision-making.

125. DANIEL GOLEMAN, FOCUS: THE HIDDEN DRIVER OF EXCELLENCE 63 (2013).

126. WILLIAM JAMES, PSYCHOLOGY: THE BRIEFER COURSE 95 (Gordon Allport ed., Univ. of Notre Dame Press 1985) (1892).

127. *Id.*

128. Ran Kuttner, *What Does It Mean to Do the Right Thing?*, 10 NEV. L.J. 407, 428 (2010) (citing ARISTOTLE, NICOMACHEAN ETHICS, bk. II, at 25 (Terrence Irwin trans., 2d ed. 1999)).

been offered every semester since.¹²⁹ Two attributes of the course are worth noting at the outset. The first is that mindfulness is a core component of the class, as opposed to a stand-alone element introduced periodically to enrich the overall student learning experience. The second is that while students are taught mindfulness exercises, the primary exploration of mindfulness in the classroom is as an element embedded in the ethics conversation. Importantly, a decision was made to not use a casebook, but instead to create an integrated curriculum with class readings and assignments so that the mindfulness and ethics components would be more finely woven together.¹³⁰

The idea of teaching mindfulness with professional responsibility was essentially an academic experiment.¹³¹ The hypothesis was that if students could infuse a heightened sense of awareness into an engaged application of the rules of professional conduct then implicit learning might occur; much like Alan Lerner suggested, students might internalize a contextual application of the rules as opposed to just memorizing the rules for an exam.¹³² Because of the natural link between mindfulness and ethical decision-making,¹³³ a professional responsibility class offered an ideal laboratory.¹³⁴ Additionally, the semester-long exposure offered an ideal environment for learning mindfulness, as it is a skill that is developed through regular and ongoing practice.

The class, titled “Mindful Ethics: Professional Responsibility for Lawyers in the Digital Age,” not only includes mindfulness exercises, but also has students draw upon mindfulness practices and insights in their analysis of a legal hypothetical—in other words, an applied mindfulness curriculum.¹³⁵ The context of ethics for “lawyers in the digital age” focuses on cutting-edge issues involving the impact of technology and social media upon the legal profession.¹³⁶ These issues lend themselves to

129. SCOTT L. ROGERS & JAN L. JACOBOWITZ, *MINDFULNESS AND PROFESSIONAL RESPONSIBILITY: A GUIDEBOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM* xi (2012).

130. *Id.* at 30.

131. *Id.* at 29.

132. *Id.*

133. *See id.* at xi (finding a natural connection between the fields of mindfulness and professional responsibility).

134. *See id.* at 29 (hypothesizing that the inclusion of mindfulness in a professional responsibility course could improve the ability to recall and apply the rules when necessary in a professional context).

135. *Id.* at 31–32.

136. *Id.*

an appreciation of the relevance of mindfulness given that digital technologies often trigger very quick, sometimes unfortunate impulsive reactions.¹³⁷

IX. MINDFUL ETHICS COURSE CURRICULUM

*“The challenge for us all is to see life as a verb, not a noun. We cannot hold on to the fluid river of life, guarantee the certainty of facts, the universality of rules. We need not only tolerate ambiguity, but learn to treasure its secrets”*¹³⁸

Daniel J. Siegel

The course curriculum consists of a series of weekly vignettes, an annotated version of the ABA Model Rules of Professional Conduct, the book, *Mindfulness for Law Students*,¹³⁹ and a collection of cases, ethics opinions, and other supplemental readings.¹⁴⁰ The vignettes follow the legal careers of two attorneys, beginning with their first jobs out of law school though mid-career.¹⁴¹ They are friends and their stories overlap.¹⁴² Each week's vignette focuses on one of the attorneys and the ethical dilemmas, containing elements of ambiguity and uncertainty, which come their way.¹⁴³ Although the ethics and mindfulness components of the class are interwoven, for ease of discussion, the various components are separated in the sections that follow.

A. *The Ethics Component—The Professional Responsibility Rules Analysis Form*

Each week students complete a Vignette Analysis Form (VAF), which asks them to identify the situations that raise potential ethical concerns, the rules, ethical opinions, and case law implicated, and whether they believe a violation occurred.¹⁴⁴ Class discussion addresses not only these issues, but

137. *Id.* at 32.

138. DANIEL J. SIEGEL, *THE MINDFUL BRAIN: REFLECTION AND ATTUNEMENT IN THE CULTIVATION OF WELL-BEING* 328 (2007).

139. SCOTT L. ROGERS, *MINDFULNESS FOR LAW STUDENTS: USING THE POWER OF MINDFUL AWARENESS TO ACHIEVE BALANCE AND SUCCESS IN LAW SCHOOL* (2009).

140. SCOTT L. ROGERS & JAN L. JACOBOWITZ, *MINDFULNESS AND PROFESSIONAL RESPONSIBILITY: A GUIDEBOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM* 33, 35–36 (2012).

141. *Id.*

142. *Id.* at 31.

143. *Id.*

144. *Id.* at 37.

also underlying policy aspects of the rules and whether the students agree that the legal profession should be governed by the particular rules at issue that week.¹⁴⁵ The students, over the course of the semester, are introduced to most of the rules and work repeatedly, in various contexts, with some of the more fundamental rules.¹⁴⁶ The repetition of the rules in the vignettes and on the VAF assignment, along with the opportunity to discuss and explore the application of the rules in the classroom, provides the students with a solid foundation and practical understanding of the rules of professional responsibility. Additionally, a collection of mindfulness elements that strengthen the learning experience is woven throughout the vignettes, facilitating a deeper integration and retrieval of the professional responsibility course material.¹⁴⁷ The course material and discussion, in turn, strengthen the students' understanding and practicing of mindfulness, as well as the insights it offers.¹⁴⁸

B. *The Mindfulness Component—Mindfulness Exercises & Assignments*¹⁴⁹

The mindfulness component of the course is provided through in-class mindfulness demonstrations and exercises, classroom discussion connecting mindfulness insights with the ethical and interpersonal dilemmas set forth in the vignettes, journaling of “first person” accounts of these dilemmas, and the out-of-class practice of various mindfulness exercises.¹⁵⁰

C. *The Meeting of the Minds Journal & Class Role Play*

Through the stories of the vignette's two main characters, Pedro Respono and Mindy Fuller, students read about and connect with two legal career paths that twist and turn while hitting legal ethics speed bumps along the way.¹⁵¹ Each week, the students are asked not only to identify the professional responsibility issues contained within the hypothetical

145. *Id.* at 37–38.

146. *Id.* at 35.

147. *See id.* at 31 (explaining that mindfulness contributes to the vignette character, enabling the vignette to link mindfulness to the professional responsibility course).

148. *Id.* at 41–44.

149. A comprehensive treatment of the mindfulness exercises and assignments used in the course is included in SCOTT L. ROGERS & JAN L. JACOBOWITZ, *MINDFULNESS AND PROFESSIONAL RESPONSIBILITY: A GUIDEBOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM* (2012).

150. *Id.* at 35, 38, 43.

151. *Id.* at 35.

vignette, but are also asked to integrate mindfulness and step into the shoes of Pedro and Mindy.¹⁵² In other words, students do not experience the same real-world ethical dilemmas nor are they threatened by the adverse consequences that lawyers face; however, students do place themselves in the position of the lawyers and identify the inner experiences that may accompany these situations in addition to a traditional evaluation of these ethical dilemmas.¹⁵³ This is accomplished through the “Meeting of the Minds” (MOM) home assignment where, in advance of class, students read the weekly vignette and write a first person account of the experience, attending to the thoughts, feelings, and sensations that arise as they mentally simulate the experience.¹⁵⁴ Doing so, the students become increasingly attentive to inner experiences that become part of the larger mindfulness discussion and practice.¹⁵⁵ This exercise feels strained and awkward to many students at first—as indeed many of us are not accustomed to noticing and attending to these interior phenomena as an end in itself—but over the course of the semester it feels more natural. The students express a full range of emotions concerning the ethical dilemmas presented.¹⁵⁶ The journals reflect the anxiety that arises when confronted with professional uncertainty or inexperience. For example, the students express anger when being placed in uncomfortable ethical situations and disgust with the unsavory behavior of others. On the other hand, the journal entries also convey relief, excitement, and confidence while posing credible questions about the purpose and validity of some of the rules.

At the beginning of each class, three or four students are chosen to role-play the vignette in front of the class, enacting the vignette and expressing the thoughts, feelings, and sensations that arise as they grapple with the various issues, much as they did in the MOM exercise.¹⁵⁷ In pausing and applying mindfulness as the characters Pedro and Mindy, the students enact ethical dilemmas, glimpse into how they may react (or overreact) to these scenarios, and begin to explore ways to resolve challenging situations in a responsive and responsible manner.¹⁵⁸ Thus, the in-class role play

152. *Id.* at 38.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 38–39.

158. *See id.* at 38–40 (“This format allows the students to follow the process they experienced in doing assignments.”).

provides students with another chance to experience the ethical dilemmas and to witness and discuss how their classmates responded to the ethical challenge presented.

This engaged grappling with real-world ethical dilemmas is designed to create a frame of reference or set of “emotional memories” that the students may be able to intuitively access in the future. In other words, the goal is implicit, internalized learning resulting from experience as opposed to the explicit rote memorization of rules that often only remains barely long enough to take an exam. Harkening back to Aristotle, recent literature explains that “[t]he process of having made ethical decisions is itself fertile ground for learning from that experience, in terms of how to make future ethical decisions, and how to learn from those experiences in order to continue to build moral character.”¹⁵⁹ Essentially, “Learning from experience means that: data becomes information, information becomes knowledge, knowledge becomes wisdom, wisdom becomes practical action, [and] practical knowledge becomes embedded in who we are.”¹⁶⁰ Mindfulness is a key to experiential learning because it allows us to “give attention deliberately and intentionally to what has happened . . . or is happening . . . in order to learn from that experience. . . . In holding our ethical decisions up to reflective light, we learn from what we have done and create new habits of ethical excellence.”¹⁶¹

D. *Mindfulness Practices*

The mindfulness practices offered in the class are also oriented around the principles of habituation and experience. Each class begins with a short, guided mindfulness sitting.¹⁶² These few moments focus the students on being in the class together and offer an opportunity for them to reinforce the mindful practice exercises that they are practicing at home. The mindfulness exercises that students are assigned to practice outside of class offer them the opportunity to practice, and through repetition, to cultivate ways of relating more effectively and with greater insight to challenging situations.¹⁶³ Throughout the course of the semester,

159. MICHAEL CARROLL & ELISABETH SHAW, *ETHICAL MATURITY IN THE HELPING PROFESSIONS: MAKING DIFFICULT LIFE AND WORK DECISIONS* 261 (2013).

160. *Id.*

161. *Id.* at 275.

162. SCOTT L. ROGERS & JAN L. JACOBOWITZ, *MINDFULNESS AND PROFESSIONAL RESPONSIBILITY: A GUIDEBOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM* 39 (2012).

163. *Id.* at 43.

students practice several different mindfulness exercises—and report in writing on their observations. Initially, students are given the seemingly simple task of coming to a complete “stop” at a stop sign and noticing the thoughts, feelings, and sensations that arise as they do.¹⁶⁴ This exercise proves more difficult than the students imagined and facilitates an understanding of what it means to tend to one’s inner experience.¹⁶⁵ The students report various degrees of discomfort, annoyance, insight and, in some cases, awe at what they had not previously noticed both inside themselves and in the physical environment around them.¹⁶⁶

The outside-of-class assignments progress to include other practical experiences (e.g., not answering your cell phone in the car) and then move to basic breath awareness practices, as well as related practices that provide students with the opportunity to find a practice that resonates. These assignments serve two primary purposes. First, they allow students to deepen their experience of mindfulness, perhaps inspiring them to establish a daily practice for themselves. Second, they are directed to bringing the practice into their daily lives at school and in their relationships with others.¹⁶⁷ This aspect of integrated mindfulness prepares students to translate their insight and experience practicing mindfulness as students into their lives as lawyers.

E. *Classroom Mindfulness Demonstrations*

Classroom mindfulness demonstrations offer students a deeper connection to the heart of many mindfulness insights and of the value of practice. An example is the “Spiral” demonstration¹⁶⁸ in which an everyday experience (e.g., being stuck in traffic) offers the foundation for a more penetrating examination of the ways we relate to unwanted, undesirable, and unpleasant events. As students identify and give voice to the various thoughts, feelings, and body sensations that arise when one is cut off in traffic, the connection is made between these inner experiences (e.g., hostile thoughts, feelings of anger and fear, and sensations in chest, increased heart rate, sweating) and the “overreactions” that tend to follow (e.g., yelling, honking, speeding up).¹⁶⁹ The students’ suggestions as to what they may think, feel, and experience are placed in different colors on

164. *Id.* at 61.

165. *Id.* at 63.

166. *Id.* at 62–63.

167. *Id.* at 45.

168. *Id.* at 52.

169. *Id.* at 55.

a spiral, which is drawn on the board. A lit match is drawn and as it is shown traveling around the spiral, the question is posed as to how and when the “fire” fueling the spiral might be extinguished. Students are reminded that thoughts, feelings, and sensations are always arising, yet we tend not to notice them (until they become extreme) and instead turn our attention to “fixing” our problems vis-a-vis the various overreactions that can result—and often make matters worse.¹⁷⁰

The Spiral provides a visual demonstration of the value of attending to one’s inner experiences. Noticing these inner experiences as they arise, and not getting lost in reactive thinking and impulses, can lead to a greater appreciation for what is actually taking place in the moment, this in turn supports the cultivation of wisdom and compassion.¹⁷¹ In other words, the sooner a person is able to identify that he is “stuck” in a spiral of reactivity, the sooner the person may “jump off” of the spiral and increase the chance of thoughtfully responding to a situation. Students also see that one person’s spiral of reactivity may fuel another person’s spiral causing an interpersonal exchange to “spiral out of control” rather than to reach a productive conclusion.¹⁷² Students are reminded that these inner experiences are the object of their mindful sitting practice, and they are invited to begin to notice the thoughts, feelings, and sensations that arise throughout the day especially when things do not go as expected.¹⁷³

This demonstration and the mindfulness exercises that flow from the Spiral lead to rich classroom conversations about various students’ experiences and how awareness of the spiral may improve ethical decision-making. The traffic example is replaced with a legal practice example (e.g., unsavory behavior by an opposing counsel) or an example from one of the vignettes and the analysis begins anew. The term “Spiral” becomes a part of the class jargon for the remainder of the semester and is shorthand for when a person (or a character in the vignette) becomes lost in agitation and reactivity (e.g., “that really got my spiral going”).

The Spiral resonates with many of the students, as does another class demonstration referred to as the “Snow Globe.” Students are asked to pick

170. *Id.* at 52.

171. *Id.* at 55–56.

172. SCOTT L. ROGERS & JAN L. JACOBOWITZ, MINDFULNESS AND PROFESSIONAL RESPONSIBILITY: A GUIDEBOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM 56 (2012).

173. Jan L. Jacobowitz, *The Benefits of Mindfulness for Litigators*, A.B.A. LITIG. J., Spring 2013, at 27, 29, available at http://www.americanbar.org/publications/litigation_journal/2012_13/spring/benefits-mindfulness.html.

up and shake an imaginary snow globe. The snowflakes clouding the view of the snow “person” within the globe is analogized to how emotional reactivity clouds a person’s thinking and hinders the clarity required for effective decision-making. The students enjoy this analogy and often refer to how a person or event really shook their snow globes. Once again a student may realize the interpersonal downside of reacting without clarity and the benefit of not only recognizing that his snow globe has been shaken, but also that perhaps another person’s has been shaken as well.¹⁷⁴ The events that occur in the vignettes present Pedro, Mindy, and the students with an ample opportunity to see the spirals and snow globes; therefore, enabling them to see the impact of such events to both their personal and professional ethical decision-making.

The Spiral and the Snow Globe demonstrations¹⁷⁵ also connect mindfulness practice to the science of ethical decision-making, which has revealed that emotional reaction may inhibit or negatively impact optimal decision-making.¹⁷⁶ Neuroscience research is exploring the ways that mindfulness practices may attenuate brain activity associated with erroneous assessments of fear amid emotionally charged moments.¹⁷⁷ Moreover, mindfulness practices allow one to more clearly notice the telltale signs (found in thoughts, feelings, and body sensations) of wandering into a minefield, such that one “notices” herself doing so, and thereby sounds the proverbial alarm to prevent the emotional explosion that results in a poor decision. The Spiral and the Snow Globe are tools that enhance the students’ understanding of mindfulness and its connection to ethical conduct. For example, contrasted against a scenario in which an attorney is not mindfully engaged, Riskin explains:

If [the attorney] were in a mindful state, . . . he would observe these emotions, thoughts, and bodily sensations with equanimity, *as if from a distance*; such awareness would diminish the power of such emotions,

174. SCOTT L. ROGERS & JAN L. JACOBOWITZ, MINDFULNESS AND PROFESSIONAL RESPONSIBILITY: A GUIDEBOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM 50–51 (2012).

175. *See id.* at 45–95 (detailing the mindfulness demonstrations developed by Scott Rogers).

176. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 417 (2011) (explaining that the automatic response of the mind leads to biases in judgment, such as overconfidence, anchoring, and others).

177. *See* Adrienne A. Taren et al., *Dispositional Mindfulness Co-Varies with Smaller Amygdala and Caudate Volumes in Community Adults*, PLOS ONE (May 22, 2013), <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0064574> (exploring the neurological impact of mindfulness practice in light of studies connecting the practices to emotional reactivity and processing).

thoughts, and bodily sensations, and foster calmness, which in turn would allow [the attorney] to think clearly and thereby respond more skillfully, in ways that would further his interests or those of his client.¹⁷⁸

F. *The Course Final Project*

Studies have shown that we do not necessarily discern a dramatic difference between mentally practicing skills and physically performing them.¹⁷⁹ A frequently referenced University of Chicago study using basketball players revealed that the increase in free throw shooting percentages were virtually the same for the players that merely visualized themselves shooting as for those who actually practiced shooting the ball on the basketball court.¹⁸⁰

In our classroom, we take it one step further—we ask students not only to visualize themselves as attorneys, but to “touch and feel” the rules and connect to pitfalls that may come their way, while in the safety of a classroom setting.¹⁸¹ Students spend time each week thinking, feeling, and writing about the rules while applying mindfulness exercises and then have the opportunity to discuss and debate their feelings and thoughts in an interactive, guided classroom exchange. The course also provides students with education about the neuroscience underpinnings of mindfulness, psychological insight into decision-making, and the policies underlying the professional responsibility rules. Students have stated in course evaluations that mindfulness enhanced both the class and their lives in general.¹⁸² Students also express that they acquire not only a greater facility with the ethics rules, but a keener understanding of the dynamics

178. Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 S. TEX. L. REV. 493, 495 (2009) (emphasis added).

179. Dan Huff, *Creative Visualization to Enhance Sports Performance*, DAN HUFF (Feb. 1, 2011, 1:30 PM), <https://web.archive.org/web/20130823092127/http://danhuff.info/creative-visualization-to-enhance-sports-performance/>. Huff referenced Dr. Blaslotto of the University of Chicago: “As your brain conceives of an act, it generates impulses that prompt neurons to ‘perform’ the movement being imagined by transmitting those impulses from the brain to the muscles. This in turn creates a habit [to] the brain, programming your body’s actions as if you physically performed the activity.” *Id.*

180. *See id.* (reporting a study showing 24% improvement was recorded for players who practiced on court and 23% improvement was recorded for players employing only visualization techniques).

181. SCOTT L. ROGERS & JAN L. JACOBOWITZ, *MINDFULNESS AND PROFESSIONAL RESPONSIBILITY: A GUIDEBOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM* 38 (2012).

182. *Id.* at 99.

of the law practice, and of their personal needs as they relate to entering the legal profession.¹⁸³

The course final project is designed to reinforce these outcomes. The student evaluates a final vignette that includes the actions of Mindy and Pedro, but this time the student plays the role of a new associate in Pedro and Mindy's firm, which requires the student to engage in his own personal projection of his feelings and thoughts about being a new lawyer, anxious to succeed despite ethical challenges thrown in his path.¹⁸⁴

It appears upon reading the students' final submissions, that many develop an implicit knowledge of both mindfulness and the ethics rules. Students discuss the how and why of better decision-making in their answers. Rather than just citing an appropriate rule, they describe their initial impulses, which sometimes are to avoid or ignore the rules; their application of mindfulness exercises to understand their reactions; and their final decisions once imbued with an awareness of themselves and the long term repercussions of a decision made with a lack of awareness and a disregard for the rules.¹⁸⁵

X. CONCLUSION

Mindful Ethics seeks to provide students with an engaged, interactive, and interconnected learning experience that brings together professional responsibility readings, mindfulness discussions, and exercises that allow for a deeper exploration and absorption of the material. Owing to this integration, which we find to be especially apropos in the context of professional responsibility, students report that they cannot pinpoint where the ethics portion ends and the mindfulness portion begins and that they seemed to learn the rules almost without trying.¹⁸⁶ They also comment that the class had real world application, both at school, in their work, and at home.¹⁸⁷ And indeed, we are continually experiencing events in our day to day lives, personally and professionally, that raise ethical, moral, and a host of other important and consequential issues. As mindfulness is a practice and tool that offers us greater awareness of these events, and a greater facility to work with them more effectively, it offers

183. *Id.* at 41.

184. *Id.* at 44.

185. *Id.*

186. *See id.* at 100 (displaying the comments of Fall 2010 student Jonathan Cohn who felt he learned the rules "almost without realizing that I was learning them").

187. *See id.* at 56 (showing comments from Spring 2011 student Courtney Daniels who explained that mindfulness has benefited her in her practice and personal life).

an important skill and set of insights that hopefully prove meaningful and consequential to the lives of our students, to their legal careers, and to our profession.

The integration of mindfulness and professional responsibility works in our classroom. Although we have taught the course ten times to almost three hundred students, the course remains a work in progress as we continue to update the vignettes with new issues and in response to student feedback. Perhaps one of the best aspects of the course from both our and students' points of view is that it is incredibly dynamic, high energy, meaningful, and fun. The students are immersed in the subject matter, work both independently and collaboratively on real world problems, and are mentored, guided, and encouraged to express themselves in a safe space. All of these elements are designed to support implicit learning that hopefully will leave the students with a long-term data bank of information upon which to draw as they enter their professional lives and are called upon to make professional judgments. The students have acquired knowledge and have engaged in habituation by working through weekly experiential assignments specially crafted for that purpose. Mindfulness has hopefully provided them with a deeper insight into the processes at play amid challenging, stressful, and ambiguous situations to help them navigate more effectively when confronting ethical minefields. As one of our students recently reflected:

[M]indfulness fits in perfectly with the legal profession . . . and especially with the legal profession in the digital age, because the profession is riddled with fast-paced, high-energy, controversial and impactful decisions that beg for deliberate awareness. Mindy and Pedro saw this firsthand. And if law school has taught me anything so far, it has taught me that gone are the days of black and white (or did they ever even truly exist?). Everything is grey. There is no more right or wrong, good or bad, yes or no—now the answer is usually “maybe this” or “maybe that” or “it depends.” To get clarity when the situation is grey, when our vision is blurred, when our spiral keeps winding, when our snow globe keeps shaking, why can't we just

s t o p ?

[I]n law school and in the legal profession, we experience high-stress, high-pressure dilemmas on a daily basis. The profession requires fast response times and quick solutions to pressing issues that arise. As I write this, I cannot help but think of an incessant clicking of a metronome at a piano that keeps time and reminds us that we cannot slow down the pace once we've set the tempo to our song. I imagine the clicking metronome is exactly why Mindy and Pedro made some of their knee-jerk reactions or

snap judgments—for fear of s l o w i n g d o w n. But the beauty of mindfulness is that our lives and our professions are not dictated by a metronome. We *can* slow down, even if only for a moment, to just breathe or think or smell or look or listen or sit still or notice what is right in front of us.

I know that mindfulness will impact my decision-making in both my personal and professional life. I have seen it impact me already, for example, with the snow globe exercise. I have become contemplative and immersed in the big picture, *less* fazed by the minutia of the everyday. I have become more comfortable with silence and stillness, and I have learned to appreciate the present moment for what it is. My impulses to act fast have transformed into a desire to slow down a little and just consider. And I intend to carry that cognitive awareness with me as I make important decisions that require that little thing we call perspective.¹⁸⁸

Practical wisdom is no doubt on the horizon.

188. Jacqueline Frisch, Weekly Reflection Paper 1–2 (2013) (unpublished student assignment) (on file with author). Jacqueline Frisch is a 2015 J.D. Candidate at University of Miami School of Law.

2014] *Mindful Ethics—A Pedagogical and Practical Approach* 241