

# Mindfulness in the Heat of Conflict: Taking STOCK

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## ABSTRACT

*People who study and practice well-established tools for managing conflict, even those who master them, frequently fail to use these tools when and as appropriate. Often, such failures result from certain deficiencies in awareness, which we call “The Six Obstacles”: an excessively self-centered focus; strong negative emotions; automatic, habitual ways of thinking, feeling, and behaving; insensitivity to emotions (too much or too little); insufficient social skills; and inadequate focus. Mindfulness can help overcome these obstacles and improve decision-making in conflict-related situations. But mindfulness is difficult to establish and maintain, especially in proximity to conflict. To address this problem, this Article sets forth three tools of awareness — which we call STOP, STOPSi, and Taking STOCK — that can quickly establish and sustain mindfulness and foster appropriate behavior in conflict-related situations.*

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## INTRODUCTION

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“You can observe a lot just by watching.”

Yogi Berra<sup>1</sup>

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The modern world overflows with advice about how to understand and deal with conflict. Out of this chaotic flood of theories, models, strategies, and tactics, a few have gained widespread recognition and are widely available in books, videos, courses at all levels of education, and training programs for audiences from every walk of life. Many people study, practice, and achieve a degree of mastery over such major conflict management ideas and practices. . You might think that, as a result, they would routinely deal skillfully with difficult conflicts in their personal or professional lives. But you would be mistaken.

Even people who understand and know how to use well-established tools for managing conflict sometimes fail to employ them appropriately — or at all — in the moment. Such failures often result from certain deficits in awareness, which we call the “Six Obstacles”:

- (1) Excessively self-centered perspectives;
- (2) Strong negative emotions;
- (3) Automatic, habitual ways of thinking, feeling, and behaving;
- (4) Sensitivity to emotions (too much or too little);
- (5) Insufficient social skills; and
- (6) Inadequate focus.<sup>2</sup>

Mindfulness — a certain way of paying attention — can help overcome these obstacles and improve decision-making in negotiations and other conflict-related situations. But mindfulness is difficult to establish and maintain, especially in proximity to conflict. For that reason, this Article introduces three “Tools of Awareness” that can quickly establish and sustain mindfulness and foster skillful, appropriate behavior in relation to conflict. We call the individual tools

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1. *Things People Said: Yogi Berra*, RINKWORKS, <http://rinkworks.com/said/yogiberra.shtml> (last visited May 13, 2015).

2. See Leonard L. Riskin, *Annual Saltman Lecture: Further Beyond Reason: Mindfulness, Emotions, and the Core Concerns in Negotiation*, 10 NEVADA L.J. 289, 304–07 (2010) [hereinafter *Further Beyond Reason*].

STOP, STOPSi, and Taking STOCK, and refer to them collectively as SSITS.<sup>3</sup>

Part I describes the problem — the frequent failure to skillfully use appropriate tools for managing conflict — and some of its causes. Part II sets out the nature, benefits, and uses of mindfulness and how it can help us reduce or transcend the six obstacles to skillful use of tools for managing conflict. Part III presents and explains the three tools of awareness that can help us quickly establish mindfulness and thereby deal with conflict more effectively.

#### I. THE PROBLEM: NOT USING TOOLS FOR MANAGING CONFLICT WHEN AND AS APPROPRIATE.

*A friend of ours (let's call him Lester) is (or was) an accomplished though still junior associate with a large commercial law firm. About nine months ago, he brought the firm a new client, a large business called Zogat Industries. The law firm has already billed Zogat for nearly \$1,500,000 in litigation-related fees, which Zogat recently paid. Lester was able to bring in Zogat because he had become acquainted — through mutual friends — with the firm's inside general counsel. Both were opera buffs, and they became good friends. Lester worked on the case to a limited degree and kept the client informed, but other lawyers did most of the work. The case settled one month ago, and Zogat is pleased with the law firm's work. Shortly after the case came into the firm, the partner to whom Lester reported, Elaine, promised Lester a bonus equal to fifteen percent of the fees from the client. However, at Lester's annual review meeting, the managing partner, Helga, told Lester that he had had a "good" year, and that his raise and his bonus would be the same as the other twenty members of his "class" — the group of new lawyers who joined the firm at about the same time. That bonus was "five percent" of his \$250,000 annual salary, or \$12,500. Lester was shocked and upset. "What about the*

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3. In our teaching, and in Len's co-teaching with Daniel Shapiro, we use two categories, "Tools for Managing Conflict" and "Tools of Awareness," and we work to integrate them. Tools for Managing Conflict include conflict resolution processes, such as negotiation, mediation, and adjudication; and models for understanding and addressing conflict (such as position-based and interest-based models of negotiation). Tools of Awareness include ideas, practices and procedures that can improve — or at least affect — our awareness and thus our ability to skillfully use the Tools for Managing Conflict. For purposes of this Article, we present mindfulness, STOP, STOPSi, and Taking STOCK as Tools of Awareness. A full explanation of the Tools for Managing Conflict and the Tools of Awareness and how they interact will appear in LEONARD L. RISKIN, DON'T BELIEVE EVERYTHING YOU THINK: MANAGING INNER AND OUTER CONFLICT THROUGH MINDFULNESS (forthcoming, 2015–2016).

*Zogat bonus that Elaine promised me?” he said. “That would be about \$225,000! I deserve that money . . . and you have an obligation to fully pay what you owe me.”*

*“That’s ludicrous, Lester,” Helga replies. “If Elaine actually made that promise, which is not clear to me, she had absolutely no authority to do so, and you should have realized that. Besides, the standard origination bonus in this firm is ten percent, not fifteen percent, and even that is limited to equity partners. And, as I was about to tell you, the firm decided just last week that we cannot afford any more partners.”*

*After a long pause, Helga said, “Well, under the circumstances, maybe we could give you an additional \$10,000 bonus, but it would have to be strictly confidential.”*

*She was poised to continue, when Lester, seething with anger and disgust, stood up, looked around the room, and said, “You cheap, conniving barbarians. You never could have gotten Zogat without me, because no one in this room has the social or cultural background to do it. I cannot stand your greed and deception. Go to hell. I quit, effective right now.” Lester stormed out of the room and went to his office, where he began to write an email to everyone in the firm, announcing and explaining his resignation.*

*However, before Lester could finish, Helga knocked on his door, accompanied by a security guard, whom she instructed to immediately confiscate Lester’s cell-phone, firm identification cards, and keys, and to escort him out of the building without any firm property.*

*Lester had been aware that if he had delayed his resignation by five weeks, he would have reached the end of the fiscal year and would have been entitled to one or both of the bonuses — and, of course, would have received his salary during that time — all of which would have helped cover the down payment on the condominium that he and his fiancé fancied.*

*Lester realizes that he behaved badly and does not like the outcome; he is certain that he has alienated the partners to whom he spoke so rudely. Furthermore, he still thinks he is right and they are wrong about the bonus.*

The irony is that Lester knew better. He understood the difference between positions (what you say you want or are entitled to) and

interests (the motives or goals that underlie a position) and had studied and practiced interest-based negotiation.<sup>4</sup> Yet, in this situation, Lester did not deviate from his position that he deserves and would get the entire \$225,000 bonus. Helga stuck with her positions, mainly, although she offered a small compromise.

Here are some interests of Lester and Helga and the other partners.

***Lester's interests:***

*A good reputation.*

*Good professional prospects.*

*Financial security.*

*Buying a condominium that he and his fiancé want. This interest might have rested on deeper interests, such as shortening their commuting time, impressing his fiancé, or solidifying their relationship.*

*Paying off student loans.*

*Demonstrating that he can negotiate skillfully.*

Of course, all of Lester's interests are related.

***Helga's and other partners' interests:***

Keeping the other associates (as well as Lester) happy.

*Maintaining the firm's long-standing policy of giving the same salary increases and annual bonuses to everyone in a particular "class," (those who joined the firm at the same time).*

*Maintaining the firm's policy about giving origination bonuses only to equity partners.*

*Conserving money for the partners.*

*Maintaining Decorum: avoiding a messy emotional conflict.*

*Efficiency: from one perspective, this could be a deeper interest underlying some of those above.*

*(Helga may also have had personal interests concerning her new position as managing partner.)*

Had Lester paid attention to his interests and those of Helga and the law firm, he probably would have wound up with a better outcome.

Lester or the partners in the room might have generated options,<sup>5</sup> such as a bonus higher than \$10,000; an agreement about future origination bonuses for Zogat or other clients that Lester might

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4. The central pillar of interest-based negotiation is to emphasize interests rather than positions, see ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* *passim* (2d ed. 1995) [hereinafter "GETTING TO YES"], which popularized interest-based negotiation.

5. See *GETTING TO YES*, *supra* note 4, at 56–80.

bring in; an expanded client development role; more desirable assignments; a better office; the full bonus in exchange for his resignation; a low-interest loan or a housing supplement to help Lester buy a condo; and help with paying off Lester's student loans. And they might have included some of these options in a final agreement.

Lester's conduct was extreme, of course. Yet most of us can recall — sometimes with embarrassment, regret, or humor — instances of our own unwise behaviors or choices, when we “knew” better. Such lapses frequently result from certain deficiencies in our awareness or state of mind, which we call the “Six Obstacles”: excessively self-centered perspectives; strong negative emotions; automatic, habitual ways of thinking, feeling, and behaving; sensitivity to emotions (too much or too little); insufficient social skills; and inadequate focus.<sup>6</sup>

### A. *Fast and Slow Thinking*

It will be easier to understand how these obstacles arise and operate, and how mindfulness can help address them, if we first consider psychologist Daniel Kahneman's ideas about two forms of thinking in the context of decision-making under conditions of uncertainty. He calls them fast (or System 1) and slow (or System 2). System 1 thinking is automatic and intuitive. It “includes both variants of intuitive thought — the expert (when you know something so well, you do not need to think) and the heuristic (using short-cut rubrics or rules of thumb) — as well as entirely automatic mental activities of perception and memory, the operations that allow you to know there is a lamp on your desk or retrieve the name of the capital of Russia.”<sup>7</sup>

System 2 or slow thinking is deliberate and effortful. System 2 has ultimate control over decision-making, but usually defers — out of “laziness” — to the recommendations or proposals from System 1.<sup>8</sup> For this reason, System 1 thinking essentially makes most of our decisions. And the bulk of which are useful and helpful. The problem is that System 1 thinking is especially susceptible to a number of illusions, and biases — among the most notable of which is the phenomenon that Kahneman calls WYSIATI (“what you see is all there is”), an example of the availability bias — any of which can lead to errors.<sup>9</sup> System 2, is “the control that keeps you polite when you are angry and alert when you are driving at night. System 2 is mobilized to

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6. See *Further Beyond Reason*, supra note 2 at 3–7.

7. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 13 (2012).

8. *Id.* at 20–30.

9. *Id.* at 85–88.

increased effort when it detects an error about to be made.”<sup>10</sup> In sum, “most of what you (your System 2) think and do originates in your System 1, but System 2 takes over when things get difficult, and it normally has the last word.”<sup>11</sup>

In Lester’s interaction with the managing partner, System 1 (fast, intuitive) thinking governed his decision-making and behavior. System 2 accepted the recommendations of System 1. “There is no simple way,” says Kahneman, “for System 2 to distinguish between a skilled and a heuristic response. Its only recourse is to slow down and attempt to construct an answer on its own, which it is reluctant to do because it is, indolent.”<sup>12</sup>

Had Lester been able to slow down and deploy System 2 slow thinking, he could have considered long-term interests — his and those of the partners — and likely would have made better decisions about how to behave. And as we will show in Part II, mindfulness helps us address some or all of the six obstacles, in part, by enabling us to deliberately shift from fast to slow thinking.

## B. *The Six Obstacles to Skillfully Using Interest-Based and Position-Based Negotiation*

Here are brief explanations of how the six obstacles might have impaired Lester’s negotiation performance.

### 1. *Excessively Self-Centered Perspectives*

Lester was concerned entirely about himself and what he wanted. He did not think about whether Helga’s positions might have some merit. He did not care about Helga or other members of the firm. So he did not consider their interests or want to foster them.

### 2. *Strong Negative Emotions*

Strong negative emotions get in the way of clear thinking and encourage a narrow, positional focus.<sup>13</sup> (Positive emotions are much

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10. *Id.* at 24–25.

11. *Id.* at 25.

12. *Id.* at 416–17.

13. See Alice Isen & Peter Carnivale, *The Influence of Positive Affect and Visual Access on the Discovery of Integrative Solutions in Bilateral Negotiations*, 37 *ORG. BEHAV. & HUM. DECISION PROCESSES* 1 (1986); Alice Isen, *Positive Affect and Decision Making*, in *HANDBOOK OF EMOTIONS* at 417 (M. Lewis & J. Haviland-Jones eds., 2d ed.2000); Clark Freshman & Adele Hayes, *The Negotiator as Mood Scientist: What We Know and Don’t Know About How Mood Relates to Successful Negotiation*, 2002 *J. DISP. RESOL.* 1, 14–15 (2002).



more conducive to interest-inclusive negotiation.)<sup>14</sup> As soon as Helga said that the firm would not give him the full bonus, Lester experienced strong negative emotions, such as anger and hatred toward her and the other partners, as well as fear.

### 3. *Automatic, Habitual Ways of Thinking, Feeling and Behaving*

Lester's ability to notice and use his own and others' interests was impaired by System 1 fast "top-down,"<sup>15</sup> automatic, habitual ways of thinking, feeling, and behaving, which, in this situation, did not take interests into account. Some of these habits — such as thinking of his own positions first and exclusively, becoming angry when he perceives a threat to his sense of identity, and acting out his anger — might overlap with the excessively self-centered perspectives described above. Lester also might have been influenced by other habitual ways of thinking, which might include common cognitive barriers to wise negotiation, such as (1) the "fundamental attribution error," i.e., assuming that certain behaviors of a person (such as Helga or the other partners) resulted from her character rather than circumstances; (2)<sup>16</sup> "reactive devaluation" — a tendency to negatively evaluate a proposal that comes from an untrustworthy source;<sup>17</sup> and (3) "optimistic overconfidence" — a tendency to overvalue the strength of one's own position.<sup>18</sup>

### 4. *Sensitivity to Emotions: Too Much or Too Little*

Lester may have a deficit in sensitivity or skill to recognize or acknowledge emotions, his own or those of others. This awareness deficit would have impeded his ability to care about interests on both sides and to skillfully deal with others. Or he may be so sensitive to emotions that he feared being overwhelmed if he acknowledged them.

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14. See Freshman et al., *supra* note 13, at 20–24.

15. Neuro-psychiatrist Daniel Siegel defines "top down" to mean, "how engrained brain states can impinge on emerging neural circuit activations and thus shape our awareness of ongoing experience in the present moment." DANIEL SIEGEL, *THE MINDFUL BRAIN* (2007). The term is used in various ways. See *id.* at 134–37.

16. See JEAN R. STERNLIGHT & JENNIFER K. ROBBENNOLT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION AND DECISION MAKING* 18 (2013).

17. See ROBERT H. MNOOKIN, ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 165–66 (2004).

18. See STANFORD CENTER ON CONFLICT & NEGOTIATION, *BARRIERS TO CONFLICT RESOLUTION* 46–50, 59–60 (Kenneth J. Arrow et al., eds., 1995).

### 5. *Insufficient Social Skills*

Lester's social skills were not sufficient to withstand the challenges emanating from the obstacles listed above or the obstacle listed below, inadequate focus. Even if Lester had known what to do or say, in the moment, he might not have been able to do so effectively.

### 6. *Inadequate Focus*<sup>19</sup>

The neuropsychologist Richard identifies "attentional style" as one of the six traits of a person's "emotional brain." It is determined in part by one's DNA,<sup>20</sup> but can be changed by experience, and by mindfulness meditation practice.<sup>21</sup> A person's attentional style can sit any place along a continuum from "focused" to "unfocused." Davidson describes two forms of attention — "selective attention" and "non-judgmental" awareness.<sup>22</sup> Selective attention means screening out distractions so that you can focus on one thing. Non-judgmental awareness is "the capacity to remain receptive to what might pass into your thoughts, view, hearing, or feeling and to do so in a non-critical way."<sup>23</sup> Strong emotions can interfere with both of these, so one's ability to deliberately focus often depends on being able to deal skillfully with emotions.

Even if Lester had decided to consider interests and, say, listen carefully, he may have been unable to do so. Under the circumstances, he was so angry that he automatically kept his focus narrow — on getting the \$225,000 bonus. He did not have sufficient awareness of his attention to be able to direct it so that it would be more expansive. In addition, regardless of his intention, he might have succumbed to distractions, such as thoughts (including thoughts about positions and interests), body sensations, and emotions.

## II. ADDRESSING THE PROBLEM: MINDFULNESS

In this Part, we present the good news: that mindfulness could have helped Lester deal with these obstacles and to shift, as appropriate, from fast to slow thinking.

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19. See *infra*, Figure 1; see also *Further Beyond Reason*, *supra* note 2, at 325.

20. RICHARD J. DAVIDSON WITH SHARON BEGLEY, *THE EMOTIONAL LIFE OF YOUR BRAIN: HOW ITS UNIQUE PATTERNS AFFECT THE WAY YOU THINK, FEEL AND LIVE — AND HOW YOU CAN CHANGE THEM* 93–94 [hereinafter *THE EMOTIONAL LIFE OF YOUR BRAIN*].

21. See *id.* at 95–102.

22. See *id.* at 59.

23. *Id.*

A. *Mindfulness: Meaning, Nature, Benefits, and Uses*

The word “mindfulness” carries many meanings.<sup>24</sup> In common parlance, to be mindful means to be “conscious or aware of something,”<sup>25</sup> as in, “Mind the banana peels outside the clown school.” This is one component of the form of mindfulness we teach, which derives from ancient Eastern practices. In the approach we use, the minding happens in a particular way — deliberately, moment to moment, and without judgment or attachment to whatever passes through the five senses or the mind.<sup>26</sup> Mindfulness, as we generally use the term, means paying attention, with equanimity, to our present experience as it unfolds.

Psychology professor Ellen Langer, who has developed a different but overlapping concept of mindfulness, offers a very useful explanation of its opposite, mindlessness. When then we are *mindless*, she says, it is as if “the light is on, but nobody is at home.”<sup>27</sup> She also describes mindlessness as:

an inactive state of mind characterized by reliance on distinctions/categories drawn in the past. Here (1) the past over-determines the present; (2) we are trapped in a single perspective but oblivious to that entrapment; (3) we’re insensitive to context; and (4) rules and routines govern rather than guide our behavior. Moreover, mindlessness typically comes about by default not by design. When we accept information as if unconditionally true, we become trapped by the substantive implications of the information. Even if it is to our advantage in the future to question the information, if we mindlessly processed it, it will not occur to us to do so. . . The same rigid relationship results from mindless repetition.<sup>28</sup>

Using Langer’s definition, Lester was mindless during the bonus meeting: (1) Lester put total faith on a past commitment by Elaine;

24. See Leonard L. Riskin, *Two (or More) Concepts of Mindfulness in Law and Conflict Resolution*, in *I THE WILEY-BLACKWELL HANDBOOK OF MINDFULNESS* (Amanda Ie, et al., eds., 2014) (distinguishing and comparing meanings in common parlance, “Eastern-Derived Mindfulness” and “Langer’s Mindfulness”). For other treatments of similar issues, see *THE WILEY-BLACKWELL HANDBOOK OF MINDFULNESS* (Amanda Ie, et al., eds., 2014).

25. OXFORD DICTIONARIES, *OXFORD DICTIONARY OF THE ENGLISH LANGUAGE*, (Catherine Soanes & Angus Stevenson, eds., 2nd ed. Oxford Univ. Press) 2010. Oxford, UK: Oxford University Press.

26. This is an elaboration of a definition by Jon Kabat-Zinn. See JON KABAT-ZINN, *COMING TO OUR SENSES: HEALING OURSELVES AND THE WORLD THROUGH MINDFULNESS* 107 (2005).

27. ELLEN A. LANGER, *MINDFULNESS* 9 (1989).

28. Ellen J. Langer, *Mindfulness Forward and Back*, in *I THE WILEY-BLACKWELL HANDBOOK OF MINDFULNESS*, *supra* note 24, at 7, 11.

(2) he was “trapped in a single perspective” that was based entirely on his position, with no awareness of interests; (3) he was insensitive to the context, i.e., that he was talking with the managing partner and other senior partners who had abundant power and authority and interests of their own and who could dramatically influence his future; (4) he relied on one of his own “implicit rules”<sup>29</sup> about how he “should” behave when someone mistreats him.

In the Eastern-Derived Mindfulness that we teach, which is the focus of this Article, one cultivates mindfulness skills principally through silent meditation, then brings them into daily life, including work activities. A vast array of research studies document or suggest a wide range of potential benefits of mindfulness meditation,<sup>30</sup> including enhanced emotional intelligence (self-awareness, self-regulation, motivation, empathy, and social skills);<sup>31</sup> sharpened attention acuity;<sup>32</sup> increased activity in the brain regions associated with happiness;<sup>33</sup> improved immune response; a more positive outlook;<sup>34</sup> enhanced ability to deal with some illnesses;<sup>35</sup> (5) enhanced ability to

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29. See Doug Stone et al., *Difficult Conversations: How to Discuss What Matters Most* 34–36, 38–39, 94 (2000).

30. It is beyond the scope of this Article to review the many potentially relevant studies, a task that would be daunting regardless of the pages available. The studies vary in many ways, including the definition of mindfulness; the length, nature and scope of training and testing; the populations; the use of control groups; the perspectives of the research. See generally THE EMOTIONAL LIFE OF YOUR BRAIN, *supra* note 20; SHAUNA SHAPIRO & LINDA CARLSON, *MINDFULNESS IN EDUCATION: INTEGRATING MINDFULNESS INTO PSYCHOLOGY AND THE HELPING PROFESSIONS* (2009); SIEGEL, *supra* note 15; *MINDFULNESS RESEARCH MONTHLY*, AND *MINDFULNESS RESEARCH GUIDE*, [www.mindfulexperience.org](http://www.mindfulexperience.org) (last visited May 13, 2015).

31. See DANIEL GOLEMAN, *FOCUS: THE HIDDEN DRIVER OF EXCELLENCE* 204–05, 224–25 (2013); 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, 46–48 (2002); Google sponsors a mindfulness-based emotional intelligence program for its employees, which is the focus of CHADE-MENG TAN, *SEARCH INSIDE YOURSELF: THE UNEXPECTED PATH TO ACHIEVING SUCCESS, HAPPINESS (AND WORLD PEACE)* (2012).

32. Katherine A. MacLean et al., *Intensive Meditation Training Leads to Improvements in Perceptual Discrimination and Sustained Attention*, 21 PSYCHOL. SCI. 820 (2010).

33. Richard J. Davidson et al., *Alterations in Brain and Immune Function Produced by Mindfulness Meditation*, 65 PSYCHOSOMATIC MED. 564 (2003).

34. *Id.* For an extensive explication and analysis of this study, see THE EMOTIONAL LIFE OF YOUR BRAIN, *supra* note 20, at 200–05.

35. For a review of studies on the efficacy of a number of meditation techniques, including mindfulness, in dealing with illness, see Albert J. Arias et al., *Systematic Review of the Efficacy of Meditation Techniques as Treatments for Medical Illness*, 12 J. ALTERNATIVE & COMPLEMENTARY MED. 817 *passim* (2006).

deal with stress;<sup>36</sup> (6) improved cognition (e.g., in Graduate Record Examination performance;<sup>37</sup>) reduced mind-wandering;<sup>38</sup> increased resistance to at least one common cognitive error — the sunk-cost bias;<sup>39</sup> and increased gray matter density.<sup>40</sup> In many ways, mindfulness meditation changes the brain — as do other experiences, thoughts, and intentions.<sup>41</sup> Most of the research deals with intensive and extensive mindfulness training, but significant effects also can result from brief exercises.<sup>42</sup>

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36. John J. Miller, et al., *Three-year Follow-up and Clinical Implications of a Mindfulness Meditation-Based Stress Reduction Intervention in the Treatment of Anxiety Disorders*, 7 GEN. HOSP. PSYCHIATRY 192 (1995).

37. See Michael D. Mrazek et al., *Mindfulness Training Improves Working Memory Capacity and GRE Performance While Reducing Mind Wandering*, 20 PSYCHOL.SCI. 1, 5 (2013).

38. *Id.*

39. The “sunk cost bias” is the “tendency to continue an endeavor once an investment in money, time, effort or time has been made.” H. Arkes & C. Blumer, *The Psychology of Sunk Cost*, 35 ORGANIZATIONAL BEH. AND HUMAN DECISION PROCESSES 124, 124 (1985). The sunk cost bias might explain some incidents of escalation in war; continuation of public-works projects that have gone over budget; and Rachel and Len’s reluctance to delete — or even change — language in the early manuscripts for this Article. See *id.* at 125. In a series of studies, Andrew Hafenbrack, Zoe Kinias, and Sigal G. Barsdale found that mindfulness (as a trait and as a state induced by a fifteen-minute meditation) positively correlated with a tendency to resist the sunk-cost bias. They attributed causation to a greater focus on the present, rather than on the past or future and to a reduction in negative affect, both of which resulted from mindfulness. See Andrew Hafenbrack et al., *Debiasing the Mind Through Meditation: Mindfulness and the Sunk-Cost Bias*, 25 PSYCHOL. SCI. 369 *passim* (2014).

40. Britta Holzel, et al., *Mindfulness Practice Leads to Increases in Regional Brain Gray Matter Density*, 191 PSYCHIATRY RES. 36, 36–42 (Jan. 30, 2011).

41. See THE EMOTIONAL LIFE OF YOUR BRAIN, *supra* note 20, *passim*.

42. See Hafenbrack et al., *supra* note 39. Professors Jochen Reb and Jayath Narayanan conducted four studies using undergraduate students in Singapore, to measure the effects of “mindful attention” on distributive negotiations i.e., negotiation in which the task was negotiate a monetary settlement within a prescribed range, although the participants did not know that range. In all four studies, students who had done an exercise to create mindfulness awareness captured fifty-seven percent of the zone of possible agreement, and the control group, which did not conduct an exercise to establish present-moment mindful attention got forty-three percent.

One of the studies found that participants who had established mindful attention were more satisfied with their negotiation process and outcome. The method for establishing mindful awareness was a six-minute recording of the instructions for the widely-used “raisin-eating” exercise. See Jochen Reb & Jayanth Narayanan, *The Influence of Mindful Attention on Value Claiming in Distributive Negotiation: Evidence from Four Laboratory Experiments*, SINGAPORE MANAGEMENT UNIVERSITY, available at [http://ink.library.smu.edu.sg/llkcsb\\_research/3540](http://ink.library.smu.edu.sg/llkcsb_research/3540) (last visited May 13, 2015).

Mindfulness derives from — and, in many presentations remains — intricately interconnected with ancient Buddhist philosophy, psychology,<sup>43</sup> ethics,<sup>44</sup> and related meditative practices.<sup>45</sup> In our teaching, we draw upon these sources, but we treat Buddhism as a system of psychology and philosophy rather than a religion.<sup>46</sup> One of the Buddha's principal goals in teaching was to reduce suffering, by leading a person to overcome the causes of suffering — craving, aversion, and the delusion of a continuous, separate self, from which craving and aversion spring.<sup>47</sup> Those causes derive from the delusion that a person can achieve lasting contentment by satisfying her cravings and aversions. Mindfulness practice can help a person achieve these insights, that is, to see things as they actually are — and thereby reduce suffering. One's goals in meditation practice can range from spiritual enlightenment to mental/emotional freedom to just lightening up. In both ancient and modern times, some scholars and teachers emphasize certain kinds of outcomes, such as enhanced

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43. See ANDREW OLENDZKI, UNLIMITING MIND: THE RADICALLY EXPERIENTIAL PSYCHOLOGY OF BUDDHISM (2010).

44. The most important set of ideas in Buddhist thought are the Four Noble Truths, which we paraphrase as

(1) Life is suffering (or unsatisfactory);

(2) The cause of such suffering is craving and aversion, which derives from the delusion of a separate self;

(3) There is a way to end suffering.

(4) The way to cure suffering is the Noble Eight-Fold Path.

See JOSEPH GOLDSTEIN, MINDFULNESS: A PRACTICAL GUIDE TO AWAKENING 287–323 (2013). Mindfulness is part of the Noble Eight-Fold Path, see *id.*, *passim*, which Goldstein explores with great sophistication. For another interesting and accessible explanation of the Four Noble Truths and a way to work with them, see PHILLIP MOFFITT, DANCING WITH LIFE: BUDDHIST INSIGHTS FOR FINDING MEANING AND JOY IN THE FACE OF SUFFERING (2008).

45. See Andrew Olendzki, *From Early Buddhist Traditions to Western Psychological Science*, in THE WILEY-BLACKWELL HANDBOOK OF MINDFULNESS, *supra* note 24, at 58, 59–61. Meditation, in various forms, is part of many religious traditions, including Christianity, see Thomas Keating, *Appendix: The Method of Centering Prayer*, in CENTERING PRAYER IN DAILY LIFE AND MINISTRY 129, 130–31 (Gustave Reininger ed., 1998) and Judaism, see ALAN LEW, ONE GOD CLAPPING: THE SPIRITUAL PATH OF A ZEN RABBI *passim* (1999); DAVID A. COOPER, GOD IS A VERB: KABBALAH AND THE PRACTICE OF MYSTICAL JUDAISM (1997).

46. The Buddha was not teaching a religion, but rather philosophy and psychology. See STEPHEN BATCHELOR, BUDDHISM WITHOUT BELIEFS: A CONTEMPORARY GUIDE TO AWAKENING 16–20 (1998).

47. See Bhikkhu Bodhi, *What the Buddha Never Said*, TRICYCLE 88 (2003) (claiming that most many commentators, including himself in previous writings, had misinterpreted the Buddha's statements on this matter).

satisfaction, peace of mind, concern for others, ethical behavior, health, and enhanced performance.<sup>48</sup>

Such benefits — along with others described below — explain why mindfulness meditation has spread rapidly and widely in the West.<sup>49</sup> Mindfulness programs or courses appear in corporations (e.g., Google),<sup>50</sup> government agencies (including the U.S. military);<sup>51</sup> non-profit, religious, health care, and athletic organizations;<sup>52</sup> educational institutions at all levels; psychotherapy;<sup>53</sup> and leadership programs.<sup>54</sup>

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48. A large number of studies have focused upon the impact of mindfulness on students. See Shauna L. Shapiro, et al., *Toward the Integration of Meditation: A Review of Research Evidence*, 113 *TEACHERS COLLEGE RECORD* 493 (2011). A recent study found that two weeks of mindfulness training significantly improved the subjects' Graduate Record Examination scores. Michael D. Mrazek, et al., *Mindfulness Training Improves Working Memory Capacity and GRE Performance While Reducing Mind Wandering*, 20 *PSYCHOLOGICAL SCIENCE* 1 (2013), available at <http://pss.sagepub.com/content/early/2013/03/27/0956797612459659>.

Neuroscientist Emiliana Simon-Thomas gathered evaluative data on two courses involving mindfulness at the University of California-Berkeley School of Law, both of which were taught by Charles Halpern, Director of the Berkeley Initiative for Mindfulness in Law: Fall 2012: Introduction to Mindfulness in Law: A Course for First-Year Students (non-credit, fall 2012) and Effective and Sustainable Law Practice: The Meditative Perspective (for credit, pass/fail, spring 2013). In her words, "we never really did research per se, we just evaluated the impact of [these courses] by administering pre and post surveys to students that enrolled, and comparing those to students who were not enrolled." E-mail from Emiliana Simon-Thomas, Science Director, Greater Good Science Center, University of California-Berkeley to Leonard Riskin (Feb. 12, 2015). Students in Introduction to Mindfulness in Law showed improvement on before and after questionnaires on five factors associated with mindfulness. Emiliana Simon-Thomas, et al., *Is Mindfulness Good for Lawyers?*, PowerPoint presentation, Slide 18 (Mar. 2014). Students in Effective and Sustainable Law Practice reported better results on the five factors, and in subjective happiness and resilience, than students in the control group (who did not meditate). *Id.*

49. See Kate Pickert, *The Mindful Revolution: The Science of Finding Focus in a Stressed-Out, Multitasking Culture*, *TIME*, Feb. 3, 2014, at 43.

50. See CHADE-MENG TAN, *SEARCH INSIDE YOURSELF: THE UNEXPECTED PATH TO ACHIEVING SUCCESS, HAPPINESS (AND WORLD PEACE)* (2012) (a guide as well as an explanation of the Google program); see also Schumpeter, *The Mindfulness Business*, *ECONOMIST*, Nov. 16, 2013, <http://www.economist.com/news/business/21589841-western-capitalism-looking-inspiration-eastern-mysticism-mindfulness-business>.

51. See Dan Hurley, *Breathing Out v. Spacing Out*, *N.Y. TIMES MAG.*, Jan. 19, 2014 at 14 (describing a mindfulness program for the U.S. Marines).

52. For a listing of most of these, see <http://mindfulnessinlaw.org/Resources/resources/scholarly%20articles.html> (last visited May 13, 2015).

53. See SHAUNA L SHAPIRO & LINDA E. CARLSON, *THE ART AND SCIENCE OF MINDFULNESS: INTEGRATING MINDFULNESS INTO PSYCHOLOGY AND THE HELPING PROFESSIONS* (2009).

54. See Riskin, *Awareness and The Legal Profession: An Introduction to the Mindful Lawyer Symposium*, 61 *J. LEGAL EDUC.* 634 (2012).

B. *Mindfulness in Law and Conflict Resolution Education, Training and Practice*

About forty U.S. law schools currently offer mindfulness instruction and practice opportunities, many in for-credit courses.<sup>55</sup> Law firms, legal departments, and bar associations also support mindfulness programs. U.S. law reviews have published about thirty articles on mindfulness in law or dispute resolution.<sup>56</sup> And mindfulness shows up commonly in programs for mediators, negotiators, lawyers, and law professors. Major national conferences on mindfulness in law or legal education have taken place at Harvard Law School<sup>57</sup> and at the University of California-Berkeley.<sup>58</sup>

1. *Learning to Meditate*

We (Len and Rachel) offer courses and workshops that integrate the Tools of Awareness and Tools for Managing Conflict.<sup>59</sup> We use a number of methods to do this, including meditation and other exercises, journaling, and demonstrations. One principal method is to lead participants to use mindfulness while conducting dispute resolution role-play exercises, which typically feature interviewing, negotiation, mediation, or adjudication hypotheticals. We also ask participants to use mindfulness and other Tools of Awareness (such as loving-kindness meditation<sup>60</sup> and qigong<sup>61</sup>) in their daily lives.

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55. See *Mindfulness Symposium*, 61 J. LEGAL EDUC. 634 (2012).

56. See, e.g., articles listed in Scott Rogers, *Mindfulness in Law*, in THE WILEY-BLACKWELL HANDBOOK OF MINDFULNESS, *supra* note 24, at 487, 501.

57. Symposium, *Mindfulness in Law and ADR*, 7 HARV. NEGOT. L. REV. 1 (2002).

58. THE PROCEEDINGS OF THE MINDFUL LAWYER CONFERENCE, <http://www.mindfullawyerconference.org/> (last visited May 13, 2015).

59. Singly or together, we have taught such courses or workshops at numerous U.S. law schools and in continuing education programs for lawyers, mediators, and executives. They range from two hours to four days. Each of us also co-teaches such courses with others. For one law student's experience in and after such a course at Northwestern University School of Law, see Katherine Larkin-Wong, *A Newbie's Impression: One Student's Mindfulness Lessons*, 61 J. LEGAL EDUC. 665 (2012).

60. For an explanation of loving-kindness meditation, see SHARON SALZBERG, *LOVING-KINDNESS: THE REVOLUTIONARY ART OF KINDNESS* (1997).

61. The name of this "internal martial art" enjoys several spellings in the U.S., such as chi kong and qi gong. For background on qigong, see Anthony Korahais, *Flowing Zen: Qigong and Tai Chi for the 21st Century* (Mar. 3, 2014), [www.flowingenzen.com](http://www.flowingenzen.com).



The principal method for cultivating mindfulness is practicing silent mindfulness meditation (a.k.a. insight meditation<sup>62</sup> and vipassana meditation<sup>63</sup>), and then deliberately bringing mindfulness into daily life. So, in order to prepare students to create, maintain, and re-establish mindfulness at will in relation to heated conflict, we must first teach basic mindfulness meditation skills and have students practice them, in and out of class.

Space does not allow us to present these practices in detail.<sup>64</sup> Below, however, we present abbreviated instructions for the four fundamental concentration practices. Mastering these skills helps develop the mental muscles you need in order to be mindful when you are not meditating.

We believe that these four basic practices are best learned in a disciplined step-by-step fashion. Many mindfulness meditation teachers use instructions that are similar to the ones set out below, and some of the terms used are mindfulness terms of art. We encourage you — the reader — to follow these instructions. The four fundamental practices involve concentrating on your breath, body sensations, emotions, and thoughts.

To prepare, sit in a chair or cushion, with your back erect, and expand your chest, which will bring your shoulders back a bit. Loosen your abdominal muscles, let the expression slide from your face and let your hands rest comfortably on your thighs or in your lap. Close your eyes or cast them down in an unfocused manner.

**1. Awareness of Breath:** First find a specific point on your body, such as the tip of the nostrils or the belly or chest rising and falling, where you can best notice your breath coming and going. Then, focus your attention on that point, noticing the breath as it comes and goes. Observe closely, notice the temperature, the ease (or

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62. See JOSEPH GOLDSTEIN, *INSIGHT MEDITATION: THE PRACTICE OF FREEDOM* (1993).

63. *Id.* at 123.

64. Fortunately, teachers, sitting groups, books and online resources are widely available and we highly recommend these kinds of support.

For other meditation instructions that are similar to those we use in teaching, see Leonard L. Riskin, *Awareness in Lawyering: A Primer on Paying Attention*, in *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION* 447, 454–60 (Marjorie Silver, ed., Carolina Academic Press, 2007); Leonard L. Riskin, *Knowing Yourself: Mindfulness*, in *THE NEGOTIATOR'S FIELDBOOK* 239, 242–46 (Christopher Honeyman & Andrea K. Schneider, eds., American Bar Association 2006). For audio instructions, go to: [http://www.law.ufl.edu/\\_media/faculty/riskin/meditation\\_instructions/SittingMeditation08Jan11.mp3](http://www.law.ufl.edu/_media/faculty/riskin/meditation_instructions/SittingMeditation08Jan11.mp3) [http://www.law.ufl.edu/\\_media/faculty/riskin/meditation\\_instructions/SittingMeditation08Jan11.mp3](http://www.law.ufl.edu/_media/faculty/riskin/meditation_instructions/SittingMeditation08Jan11.mp3) Click on Meditation Instructions, then click on “Sitting Meditation” or “Body Scan.”

lack of ease), and the rhythm of the breath coming and going. Notice your body breathing. Although the breath may seem boring, it is a profound and vital medium for receiving and giving life. We oxygenate every cell in our bodies and brains by breathing in oxygen. The carbon dioxide we breathe out carries toxins out of our cells. Our out-breath, is then breathed in by plants and trees, which hold on to the carbon and breathe out the oxygen that we inhale. Breathing is a continual dance with life. As you continue to practice observing your breath, you will learn to use it as an ever available anchor and connection to the present moment. You cannot take a past breath, and you cannot take a future breath; each time you notice your breath it is always “this breath,” in this present moment, now. The quality of our breathing may change, but as long as we are alive there will always be an in-breath and an out-breath. And when you notice the mind wandering away from breathing or notice you are lost in thought, as will continually happen, return your awareness to the breath, gently, with kindly curiosity, without self-censure. . It is not “wrong” to have wandering thoughts; thinking is what the mind does. It is noticing and refocusing that is the mindfulness.

**2. Awareness of Body Sensations:** Begin with a brief breath meditation to stabilize your attention. Move the focus of your awareness to concentrate briefly on sensations in every part of your body, starting with the crown of your head and moving down, or starting with the tips of your toes and moving up observing, without judgment, sensations in particular areas of the body. If you begin at the top of your head, for example, you would notice sensations in your scalp, eyebrows, eyes, nose, cheekbones, hollows under the cheekbones, and so forth. You will notice that the sensations change and that they come and go. The power of your concentration affects each body part as you move your focus, and can be very relaxing, but do not fall asleep (unless you are trying to do so). Once you have surveyed the various areas of the body step-by-step, open your awareness to the entire body at once and scan to notice sensations in any part of the body.

**3. Awareness of Emotions:** We tend to call some emotions positive and others negative. In developing the skill of mindfully observing emotions, do not seek out positive ones or try to squelch negative ones. The skill is in letting your emotions or moods “be” just as they are and, without judgment, watch them arise, change and disappear. Notice the separation between you and the emotions you feel. It may be helpful to locate the emotion in your body by observing associated sensations. It may be easier to observe your anger when you notice it,

for example, associated with a gripping or clenching in the chest. While emotions are real, when you allow them to be what they are, and observe them with kindly curiosity, you will find that you can experience them, both those we call positive and negative, without them controlling you or tossing you hither and thither.

**4. Awareness of Thoughts:** We often assume that our thoughts are “who we are.” This is not so. A simple way to illustrate this is, to repeat something — e.g., “Thank you,” silently, over and over, in your mind. Go ahead, do it. You will notice that there is a “you” who “heard” yourself repeating “Thank you” in your mind. That “you” is the one who notices; it is your expanded awareness. It takes a subtle, though not unfamiliar, shift in awareness to witness your own mind thinking, rather than being inside your thoughts or being lost in thought. Thinking is a wonderful means of differentiating, analyzing, categorizing, and much, much more. It also can be a jumble of compulsive narration. As you become aware of your thoughts, you will notice that they usually deal with the past or future and make judgments about nearly everyone and everything. Our thoughts contain negative self-talk and a lot of meaningless chatter. People often think that they cannot meditate because their minds are too active, when that is not an impediment at all. It is not wrong to be thinking. Thinking is what the mind does.

In meditation we just notice what the mind does, and it is the “noticing” that is mindful. In observing thinking we should not try to eliminate thinking. It may help you notice the mind thinking to imagine that you are looking at a wide blue sky and each thought is a little cloud that is coming and going. Observe them with an attitude of kindly curiosity, allowing them to be what they are. You may find that, with practice, your “monkey mind” slows down a little and there’s more room for clarity in the moment.

We teach these four concentration practices, first one at a time and then, after practicing them separately, we sit, breathe, and just observe whatever arises, which we call “bare attention” or “nonjudgmental awareness.” Of course, this is not quite as simple as we have depicted it. Meditation instructions seem clear, but they may not be easy to follow. The best way to learn how to induce a mindful state at will — or to develop mindfulness as a trait — is through sustained and regular mindfulness meditation practice, ideally with a good teacher.<sup>65</sup>

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65. And turning that “state” into a “trait” requires even more practice and is well beyond the short-term expectations for our programs.

## 2. Mindfulness and the Six Obstacles

Mindfulness meditation and mindfulness itself offer a range of benefits, many of which we mentioned above.<sup>66</sup> Some of these can help a person, such as Lester, deal skillfully with the obstacles to appropriately using conflict resolution skills and methods, which we described above.<sup>67</sup> Figure 1 presents an overview of how this works.

FIGURE 1. HOW MINDFULNESS CAN HELP ADDRESS THE SIX OBSTACLES TO APPROPRIATELY USING TOOLS FOR MANAGING CONFLICT<sup>68</sup>

<i>Obstacles to Appropriately Using Tools for Managing Conflict</i>	<i>Mindfulness May Help</i>	<i>By Fostering</i>
Excessively self-centered focus	Decrease the prominence of self-centered focus and foster the strength of other-centered focus.	-Understanding of and compassion for others. -Recognition of interconnectedness. -Insights about how our minds work. -Ability to notice and let go of self-centered perceptions and intentions. -Curiosity about self and other.
Strong negative emotions	Reduce the power of strong negative emotions.	-Non-judgmental awareness, which may lead to -Distance & freedom from negativity -Calm -Insights and understanding about self and other -Compassion & other positive emotions toward other and self
Automatic, habitual ways of thinking, feeling, and behaving	Promote freedom from automatic, habitual ways of thinking, feeling and behaving.	-Non-judgmental awareness of habitual ways of thinking, feeling, and behaving, the ability to notice and interrupt these patterns, which may lead to distance and freedom from them. -The ability to shift from fast to slow thinking.
Insensitivity, or oversensitivity to emotions	Foster sensitivity to emotions of self and other.	-Non-judgmental awareness of emotions coming and going and the ability to cope with them.
Insufficient social skills	Improve social skills.	-Emotional Intelligence: self-awareness, self-regulation, motivation, empathy.
Inadequate focus	Strengthen both forms of attention — selective attention and non-judgmental awareness.	-Non-judgmental awareness. -The ability to notice when the mind has wandered and to bring it back to the desired focus of attention -Equanimity, which fosters focus.

66. See *supra* notes 29–40 and accompanying text.

67. See *supra* Part I.B.

68. This is an extended version of Figure 4, *How Mindfulness Can Help Address Obstacles to Using the Core Concerns System in Further Beyond Reason*, *supra* note 2, at 325. For a fuller explanation of these points, see *id.* at 308–31.

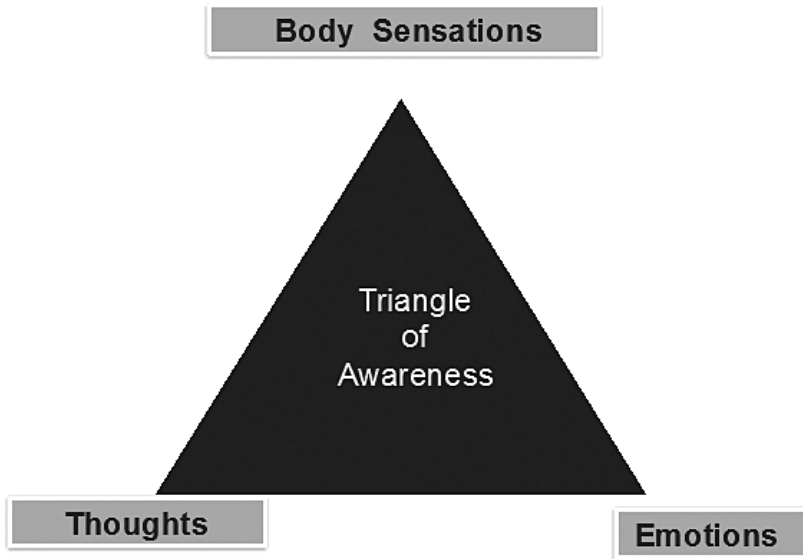
III. MINDFULNESS: THE TRIANGLE OF AWARENESS AND THE STOP, STOPS<sub>I</sub>, AND TAKING STOCK TOOLS.

Mindfulness and mindlessness are deeply connected. Each depends upon and is vulnerable to the other. Each can overcome the other, and each yields to the other, sometimes automatically and sometimes deliberately. Thus mindfulness is not constant. A person may enter a conflict-related situation in a state of mindful awareness and with a clear intention to maintain it, and shortly thereafter, lose both mindful awareness and the intention to be mindful. In order to address these challenges, we present below three tools of awareness: STOP, Taking STOCK, and STOPS<sub>I</sub>. They prompt us to check-in on our own inner landscape, continually anchor us to the present, establish mindfulness, help us behave intentionally and improve our ability to deal with conflict.

A. *The Foundation: The Triangle of Awareness*

All three tools rest on the same foundation: the Triangle of Awareness, developed by the Stress Reduction Clinic at the University of Massachusetts Medical Center and used in its training programs. As shown in Figure 2, the Triangle of Awareness depicts the relationships between three components of our consciousness — body sensations, emotions, and thoughts — which we (the authors) call “BETs,” and proffer as fundamental objects of mindful awareness.

FIGURE 2. THE TRIANGLE OF AWARENESS



[This is a slightly modified version of the Triangle of Awareness developed by the Stress Reduction Clinic at the University of Massachusetts Medical School and used in its training programs.]

The Triangle of Awareness rests on the idea that body sensations, emotions, and thoughts interact and can prompt, enhance, or diminish one another. For instance, when Helga told Lester that the big bonus was not happening, he probably experienced something like the following BETs:

**Body sensations:** Heat, sweating, heart pounding, muscle tightness.

**Emotions:** Anger, anxiety, fear, and hatred.<sup>69</sup>

**Thoughts:** Negative thoughts about Helga and the other partners, as well as negative and insecure thoughts about himself.

It may be difficult to know the order in which the BETs arise, and multiple interactions can occur. The sequence might have begun with thoughts, which precipitate body sensations, which precipitate emotions. The emotions probably created even more difficult thoughts and body sensations, which impaired Lester's cognitive abilities, and pushed him toward automatic (habitual, intuitive, reactive) System 1 thoughts and behaviors. As a consequence, he could not maintain awareness of his underlying interests<sup>70</sup> (e.g., financial security, job stability)<sup>71</sup> and therefore could not endeavor to address them.<sup>72</sup> These BETs combined to elicit a "fight, flight or freeze" response<sup>73</sup> — and Lester acted out the first two with angry words and a hasty departure.

Had Lester been mindfully aware, he might have experienced the same or similar body sensations, thoughts and emotions, but been able to manage them more effectively. Mindfulness can insert a

69. The New York Times paraphrased Nelson Mandela's response to a question about how he was able to avoid hating his captors: "Hating clouds the mind. It gets in the way of strategy. Leaders cannot afford to hate." Bill Keller, *Nelson Mandela, South Africa's Liberator as Prisoner and President, Dies at 95*, N.Y. TIMES, Dec. 6, 2013, at A1, [http://www.nytimes.com/2013/12/06/world/africa/nelson-mandela\\_obit.html](http://www.nytimes.com/2013/12/06/world/africa/nelson-mandela_obit.html).

70. The idea of focusing on interests rather than positions is a pillar of interest-based negotiation, popularized by Roger Fisher, William Ury & Bruce Patton. See generally GETTING TO YES, *supra* note 4.

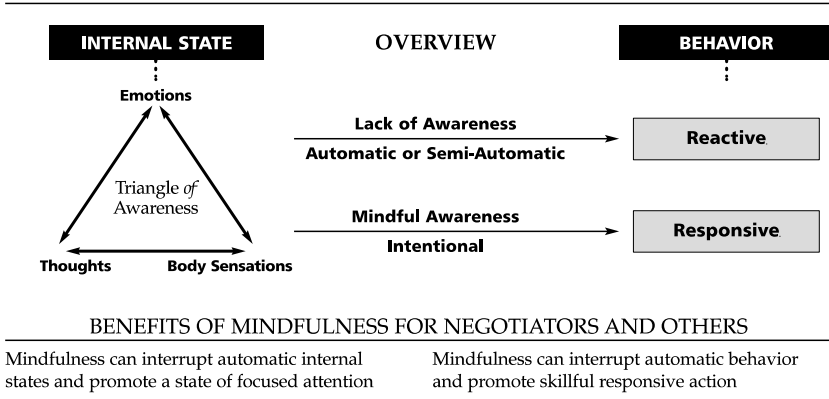
71. For a discussion of the core concerns construct for understanding and addressing the emotional dimension of negotiation, articulated in ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 25–140 (2005).

72. For methods of addressing the core concerns see Fisher & Shapiro, *supra* note 71, at 142.

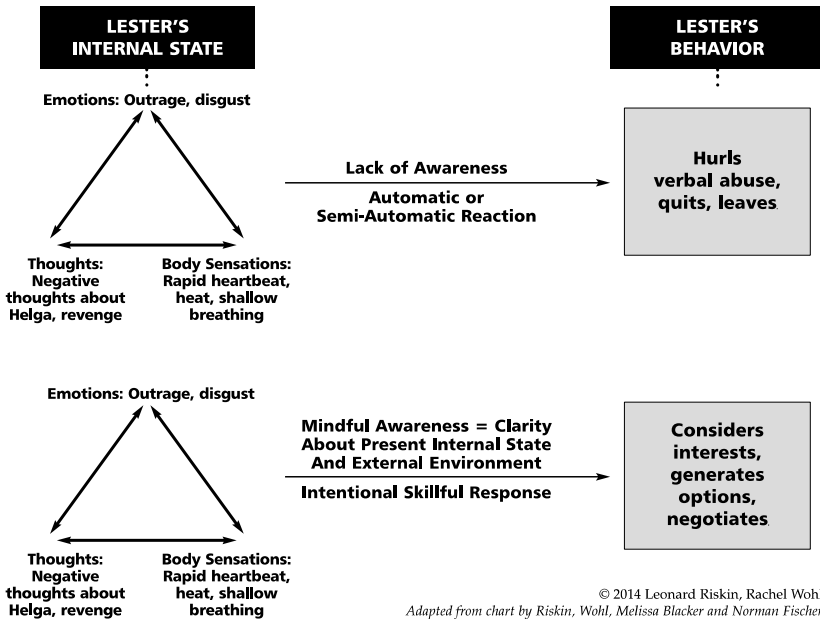
73. See DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ 60, 136 (1995).

“wedge of awareness”<sup>74</sup> between BETs and behavior. With such awareness, Lester could have recognized and acknowledged the presence of BETs, which would have afforded some freedom from them, as Figure 3 illustrates.

FIGURE 3. INTERNAL STATES AND BEHAVIOR IN NEGOTIATION<sup>75</sup>  
INTERNAL STATES AND BEHAVIOR



FOR EXAMPLE: Helga tells Lester he’s not getting the promised bonus.



74. See MATTHEW FLICKSTEIN, SWALLOWING THE RIVER GANGES: A PRACTICAL GUIDE TO THE PATH OF PURIFICATION 28 (2001).

75. Figure 3 was first prepared with colleagues Melissa Blacker and Norman

## B. *The Three Tools*

Over the past decade — in the course of our work to integrate mindfulness into conflict resolution training, teaching, writing, and professional practice — we have adapted and developed three tools that can help people quickly establish and maintain mindfulness in, or near, the heat of conflict. We believe that these tools can enhance people’s performance in connection with conflict and in a wide variety of other situations.

These tools — and mindfulness in general — help to establish a state of consciousness that some have termed “witness awareness.”<sup>76</sup> This witnessing is done without judgment, resistance or grasping and with compassion for self and an attitude of kindly curiosity. From witness awareness we can notice our thoughts rather than getting caught-up or lost in them. We can notice our muscles tensing and acknowledge our emotional state. By shifting into witness awareness, we can experience some freedom from our internal state and habitual responses. In that freedom we find the clarity and compassion to use our skills wisely.

### 1. *STOP*

The STOP tool helps to establish mindful awareness quickly and to arrest or slow the development or escalation of inner and outer conflict. In brief, by paying non-judgmental attention to BETs, one quickly establishes present moment awareness, calmness of mind and body, and an enhanced ability to think clearly. The STOP tool appears in Figure 4.

FIGURE 4. THE STOP TOOL

#### **The STOP Tool**

**Stop** (i.e., stop doing whatever you were doing)

**Take a Breath**

**Observe Body Sensations, Emotions and Thoughts (BETs)**

**Proceed** (i.e., continue with whatever you were doing).

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Fischer for another purpose, and the authors have altered it for this Article. It illustrates the difference between *reacting* mindlessly and *responding* mindfully.

76. For discussions of “witness awareness,” see Daniel Goleman, *Five Key Steps to Habit Change, Step 2* (Sept. 8, 2014), <https://www.linkedin.com/pulse/20130616203532-117825785-five-key-steps-to-habit-change>. Interview by Charles T. Tart, Senior Research Fellow, Institute of Noetic Sciences with Shinzen Young, *available at* <http://www.shinzen.org/Articles/artMedcons.htm>.



[This is a modified version of the STOP Exercise developed by the Stress Reduction Clinic at the University of Massachusetts Medical School and used in its training programs.]

Let's do a practice run right now:

**Stop.**

Stop doing whatever you are doing. If you are holding a pen, put it down. If you are looking at anything, stop looking.

**Take a breath**

**Observe**

Observe, without judgment,

Body Sensations (about 30 seconds)

Emotions (about 30 seconds)

Thoughts (about 30 seconds)

Say "O.K." mentally to whatever you notice. You are simply recognizing and acknowledging what is happening in the current moment. Do *not deliberately think* about what you observe. That is, as best you can, observe the thinking but do not take part in it.

**Proceed.**

Continue with whatever you were doing, or do something else.<sup>77</sup>

How might this tool have helped Lester? Let's say that, right after Helga tells Lester that the firm might be able to give him an additional \$10,000, on a confidential basis (which he did not appreciate at all) — and just as Lester is about to launch the verbal screed that

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77. These instructions for STOP ask you to make observations in a certain order: body sensations, emotions, and thoughts. Why? For most people, it is easiest to notice body sensations, and doing so brings you into the present moment and fosters a calmness that enhances your ability notice the next two components — emotions and thoughts. On the other hand, thoughts are the most ephemeral of the BETs. Sometimes, if you do not observe them first, they may disappear, fade or change, before you can get to them. So once you have experience with the STOP tool, you might decide, STOP-by-STOP, the order in which you attend to the BETs.

How much time you should devote to the STOP exercise depends upon your purposes, the circumstances, and time available. When you are principally trying to develop your skill with the tool — rather than use it functionally — you probably should take one to two minutes and in the beginning, close your eyes. In our role-play exercises, we begin using the tools slowly with eyes closed, and then with practice go faster with eyes open, slightly cast down, so it appears to others that you are pausing briefly to think. In daily life, especially in the heat of conflict, you can adjust the amount of time to the circumstances. As you practice using STOP, you will become adept at doing it quickly, perhaps in just a few seconds. This may be especially appropriate when you do not want others to notice your behavior.

would end with his resignation — he remembers to do a STOP, and has practiced the skill so that he can actually do it.

He takes a breath, which interrupts his progress toward the verbal explosion. He drops his awareness into his body, which “brings him into the present moment.” He may observe tightness in his jaws, a rapid pulse, pressure in his head, and widespread tension, especially in the abdominal area. Next, he senses his emotions — anger, hatred, and fear. He quickly switches to thoughts and notices: “Those greedy barbarians are screwing me. I hate them. I am in big trouble. I will quit. I deserve that bonus. No one else in the firm could have gotten that client. I always get taken.” He also notices an impulse to retaliate.

Observing these phenomena as a compassionate witness, without judgment, weakens their force and Lester’s sense of identification with them. As the meditation teacher Tara Brach puts it, “Non-identification means that your sense of who you are is not fused with or defined by any limited set of emotions, sensations, or stories.”<sup>78</sup> This quickly established mindfulness also allows Lester to shift rapidly to System 2 slow thinking, i.e., to really consider what to do next, even though planning is not a formal part of the STOP tool.<sup>79</sup>

## 2. *STOPSi (STOP and Set Intentions)*

The “Observe” step of the STOP tool directs you to simply *observe* body sensations, emotions and thoughts, *not to think about or judge* them. This important distinction is sometimes hard to grasp and implement, though developing a meditation practice helps a lot. As we said above, the goal of STOP is to establish mindful awareness of the BETs, which weakens their force. This creates a calmness of mind and body, which promotes wise decision-making or clear thinking.

We noticed, however, that many of our students often would skip, or give short shrift, to the “only observe” instruction. They slipped into their default, judging mind and ignored their breath and BETs. In other words, they did not establish mindfulness (and the accompanying freedom from BETs) before they proceeded. We developed the STOPSi and Taking STOCK tools, in part, to forestall this tendency.

STOPSi is the same as STOP, except that it adds a step: setting a clear and simple intention. It would have been ideal for Lester to

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78. See Tara Brach, *Finding Peace and Freedom in Your Own Awakened Heart*, TRICYCLE MAG. (Spring 2013), <http://www.tricycle.com/practice/finding-true-refuge>.

79. It is part of Taking Stock, which appears *infra* p.32–34.

have done STOPSi before his annual review meeting. But one also can do it during a difficult situation. Figure 5 sets out the version of STOPSi in which you set an intention that concerns how you want “to be” as you go forward.

FIGURE 5. THE STOPSi TOOL

### **STOPSi**

**Stop**

**Take a breath**

**Observe BETs (Body Sensations, Emotions, Thoughts)**

**Proceed to**

**Set a clear and simple**

**Intention (for how you would like “to be” during this activity or time period)**

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What does it mean to set an intention for how you want “to be”? The meditation teacher Phillip Moffitt always holds the intention “to be kind.”<sup>80</sup> He explains:

I’ve chosen this because of the sense of well-being that kindness bestows in all situations. Even when I have to be firm with someone or go against their wishes, I am very clear that I wish to be as kind as possible. I am indiscriminate in my kindness . . . . Nor is my intention of kindness based on pity or wanting to be liked. What happens when I am not kind in a particular moment? I simply start over, learning from my mistakes as much as possible so that I can be more capable of kindness in the next moment.<sup>81</sup>

The goal that you would initially like to achieve is distinct from how you would like “to be” while working towards that goal; how you “are” can determine the quality of your moment-to-moment experiences, regardless of what happens. You may or may not achieve your goals, but following intentions such as being kind or calm or courageous can lead to more satisfaction and a greater sense of meaning. Deliberately setting an intention helps us to conduct ourselves in a manner that is consistent with our values and that fosters skillful behavior. In other words, it encourages us to deliberately create the

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80. *Id.* at 37 For other writings on the importance of kindness, or setting an intention to be kind, see PIERO FERRUCI, *THE POWER OF KINDNESS: THE UNEXPECTED BENEFITS OF LEADING A COMPASSIONATE LIFE* (2007). See generally GEORGE SAUNDERS, *CONGRATULATIONS, BY THE WAY: SOME THOUGHTS ON KINDNESS* (2014).

81. *Id.* (emphasis added).

quality of our moment-to-moment experience, rather than to rely heavily on habits.

We set “clear and simple” intentions because, later, when we Take STOCK, we want to quickly see whether we have been following our intention and possibly change it. This would be less feasible if the intention is unclear, complex, or multi-faceted.

Although people often cannot control what happens to them or to those they love, they can respond to what happens in the manner in which they intend. Simply setting an intention, for instance, intending to “be attentive,” to listen deeply in the present moment, takes us off of auto-pilot, and helps us to consciously respond as we choose. If Lester had been able to set — and follow — an intention to “be kind,” he would not have launched his attack. The intention might even have fostered and brought to his awareness glimmers of kindly thoughts—about the partners (and himself) and he might have somehow expressed them in his behavior. This in turn might have helped him feel better and think more clearly, which could have helped him consider underlying interests.<sup>82</sup>

But Lester did not deliberately set an intention for how he wanted “to be” — either during the meeting or generally. In the absence of such a specific intention, he reacted in automatic ways to the body sensations, emotions, and thoughts that were prompted by the situation. He might have set other intentions about being — e.g., calm or balanced — that were related to having positive interactions. In contrast, he also might have set quite different kinds of intentions about being. For instance, he might have decided to “be ruthless.” By taking a step back, Lester could have made a deliberate decision.

### 3. *Taking STOCK*

Taking STOCK begins with a STOPSi and adds two more steps: The first is analytical: consider whether you have been following the intention you set and whether you want to change it. Having an intention serves as a guide for monitoring ourselves. The second is strategic: make a plan by deciding “What next?”

#### a. *Taking STOCK: Basic*

The basic version of Taking STOCK begins with doing STOPSi to set a clear and simple intention for how you choose to be, which you

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82. Being mindful does not equate with behaving like a Pollyanna or a doormat. It does increase the odds of making appropriate decisions.

can do at the beginning of a day, before a project or a potentially difficult activity — such as a negotiation, mediation, or trial (regardless of your role in these) — or before an important meeting or class (whether you are a student or teacher). A person's state of mind or awareness is constantly in flux. Thus, you could be in a mindful state when you read *this* clause, and in a mindless state when you read *this* clause. In short, Taking STOCK during an activity allows you to establish, or re-establish, mindfulness by witnessing your internal state, and considering whether you have been following your intention and whether you want to change it. Next, the tool prompts you to deliberately decide on your immediate next step — not longer-range planning — and then to Keep Going.

FIGURE 6. THE TAKING STOCK TOOL: BASIC

1) **Before** the Activity (e.g., a negotiation, a hearing, or a difficult meeting):

**Set an intention using STOPSi:**

Stop

Take a breath

Observe Body Sensations, Thoughts, Emotions

Proceed to

Set a clear and simple

Intention (or two)<sup>83</sup>

2) **During** the Activity Take STOCK:

Stop

Take a Breath

Observe

Body Sensations, Emotions, Thoughts (BETs)

Consider

a) Have you been following your intention?

Do you want to change it?

b) What Next?

Keep Going

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83. When we teach these tools by having students use them during role plays, we sometimes ask them to set two intentions: One for how they will “be”, as themselves, playing a role; the other for how they intend to play their assigned role in the exercise. Without setting two intentions some role-players experience confusion about whether the intention they set should be for themselves or the character they are pretending to be. When we lead such role-players in Taking STOCK, we ask them to consider whether they are following or want to change their “awareness” intention, and then ask the same for their role-play behavior intention. In some role-play exercises, students are instructed to play themselves, i.e., behave as if they were actually in the assigned role in the role-play situation. In such situations, whether the students — whether in the role of a lawyer, judge or party — need not set two intentions.

If Lester had had some experience with mindfulness and wanted to use basic Taking STOCK, he would have deliberately set his intention before the meeting with the managing partner. Let us assume that he set an intention to remain calm, no matter what happens, and that he remembered to Take STOCK immediately after he learned that the bonus would not come through, and just before his first angry and obscene verbal attack. He would take a breath and then observe his body sensations, emotions, and thoughts. This would release some of his reactivity. Then he would consider whether he had been following his intention to remain calm and whether it might suit his interests to change this intention, perhaps to something like “being polite” or “being courageous.”

Considering “What next,” he might decide to express his anger, but in a manner that honors his intentions. For instance, rather than acting out his anger, as he did in the actual meeting, Lester could tell Helga that, when she announced that he would not get the bonus he expected, he felt a lot of anger. In other words, he is describing his anger, rather than enacting it. Or he might develop a different plan for what to do or say next. Perhaps he would buy time by saying something like, “This is totally unexpected and I’d like to take a few minutes to think it through before responding.”

As you can see, using Taking STOCK; Basic would have enhanced the likelihood that Lester would have a more peaceful inner experience, behave more skillfully, and achieve an outcome that would better serve his purposes. At least the real-life Lester thinks so, after the fact.

b. *Taking STOCK: Advanced*

The advanced Taking STOCK tool adds a new element to the “Consider” step: Deliberately using a particular conflict management lens to understand the situation. Here, for instance, Lester might decide to use the lens of interests. The understanding derived from that process might lead him, in the What Next? Step, to consider addressing interests in ways that are familiar in interest-based negotiation, e.g., separating the people from the problem, focusing on interests rather than positions, and generating options before deciding what to do.<sup>84</sup> He might choose other lenses. In this fashion, the advanced Taking STOCK tool functions as a template into which you can insert

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84. See GETTING TO YES, *supra* note 4, at 15–80.

various models, concepts, and ideas for understanding and addressing conflict. In our teaching, in addition to the position-based and interest-based models of negotiation, we also have used elements of the core concerns<sup>85</sup> and three conversations models.<sup>86</sup>

Figure 7 depicts the Advanced Taking STOCK tool.

FIGURE 7. THE TAKING STOCK TOOL: ADVANCED

1) *Before* the activity in question (e.g., a negotiation, a hearing, or a difficult meeting): SET AN INTENTION USING STOPSi

Stop

Take a breath

Observe Body Sensations, Thoughts, Emotions

Proceed to

Set a clear and simple

Intention(s)

2) *During* the Activity Take STOCK:

Stop

Take a Breath

Observe

Body Sensations, Emotions, Thoughts (BETs)

Consider

a) Have you been following your intention?

Do you want to change it?

b) What are the positions and interests of the key person or persons?

What are your own positions and interest?

c) What Next?

Keep Going

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If Lester had used the version of advanced Taking STOCK that considers the situation through positions and interests, it is quite likely that the process and outcome would have been dramatically

85. See Fisher & Shapiro, *supra* note 71 at 122–40.

86. Stone et al., *supra* note 29, *passim*. For the past few years, we have been teaching the “internal family systems” (“IFS”) model of the mind, developed by psychologist Richard C. Schwartz, and using elements of it in versions of Taking STOCK. For explanations of how the IFS model connects with conflict resolution, see Leonard L. Riskin, *Managing Inner and Outer Conflict: Selves, Subpersonalities, and Internal Family Systems*, 18 HARV. NEGOT. L. REV. 1 (2013); see also David A. Hoffman, *Mediation, Multiple Minds, and Managing the Negotiation Within*, 16 HARV. NEGOT. L. REV. 297 (2011).

different. By understanding his own interests and Helga's interests, he could have negotiated a deal that met his needs.<sup>87</sup>

Although we teach Taking STOCK as an orderly, step-by-step process, people who develop a facility with it (or other SSITS tools), often will abridge it. When time is short, in a matter of seconds, you can stop and observe whatever arises (be it a thought, a body sensation or an emotion), check-in on intention, analyze the situation quickly, and determine immediate next steps that are consistent with your intention and goals.<sup>88</sup>

#### IV. A SUMMARY, A LITTLE NAGGING, AND A CONCLUSION

We have said that (1) students and practitioners of conflict resolution often are unable to appropriately use their knowledge and skills because of certain deficiencies in awareness, such as an excessively self-centered perspectives; strong negative emotions; automatic, habitual ways of thinking, feeling, and behaving; insensitivity to emotions; insufficient social skills; and inadequate focus or concentration; (2) mindfulness can help people overcome such deficiencies in awareness; (3) however, mindfulness is difficult to establish and maintain, in the face of those very obstacles, especially in proximity to heated conflict; and (4) the three tools that we introduce — STOP, STOPSi, and Taking STOCK — can help one to quickly establish, sustain, and reestablish mindfulness and thereby feel and perform better in relation to conflict.

Now we need to add another qualification: The three tools also are vulnerable to the six obstacles they are intended to address. For nearly all of us, sometimes the present moment — full of thoughts, body sensations, and emotions, especially negative ones — can overpower our ability to remember or execute the elements of these tools. So, as is true with any difficult skill, we need to practice and prepare. It is one thing to read this Article, which might be vaguely analogous to attending a concert, but, we repeat, mastering conflict resolution, mindfulness, and the SSITS tools of awareness requires a lot of practice in the same sense as mastering the violin or tennis, computer programming, snowboarding, or Zumba dancing.

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87. Such an agreement might have included some of the elements we mention above. *See supra*, text accompanying notes 4, 5.

88. Studies have shown that using checklists instead of intuition — even intuition based on extensive experience — can substantially improve prediction accuracy in medical and many other kinds of decision-making. *See Kahneman, supra* note 7, at 222–33; *see also* ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT passim* (2010).



To develop skill with STOP, STOPSi, and Taking STOCK in the heat of conflict, it is invaluable to build competence in establishing and sustaining mindfulness through meditation; to bring mindfulness into daily life as much as possible in a variety of circumstances; and to work with these tools frequently, on your own. The Appendix include suggestions on when and how to practice using these tools on your own.

Of course, no one can become expert at all of the above in a three-day workshop or even a one-semester course.<sup>89</sup> But we have found that even a little training can produce useful skills and set the groundwork for more practice. Many participants in our courses and workshops, including those with little or no experience with conflict resolution ideas or meditation, have told us of significant benefits from using the three tools. Here are some high points. Katherine Larkin-Wong, now an associate at Latham & Watkins in San Francisco, describes her experience with mindfulness, STOP and Taking Stock (which she learned in Len's 2010 course at Northwestern Law) as follows:

I continue to use STOP exercises to prevent a wandering mind when reading case law. I find that I no longer read multiple pages before realizing that I have not absorbed any of it. STOP exercises help me refocus. Taking STOCK exercises have also been useful in many situations. I use them when going into a tough conversation or sometimes before attending a class where I have struggled to pay attention. I will formulate the intention to stick with it through the entire class and then take STOCK throughout to make sure I am following my intention.<sup>90</sup>

Some students have developed meditation practices (which we encourage) that they say have improved all aspects of their personal and professional lives. Many of our law students report that they frequently use one or more of these tools while preparing for and taking exams. This, they say, has helped them calm down and achieve a distance from their body sensations, emotions and thoughts so that they can think more clearly. Similarly, they have used these tools in planning for and conducting a variety of other activities, such as job interviews; moot court or trial practice arguments; negotiation or

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89. Malcolm Gladwell reports on the general consensus that it takes 10,000 hours of practice to excel at any complex activity. See MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS passim* (2008).

90. See Katherine Larkin-Wong, *A Newbie's Impression: One Student's Mindfulness Lessons*, 61 J. LEGAL EDUC. 665, 667 (2012).

mediation competitions; interpersonal conflicts; or other class activities. Colleagues at the Center on Negotiation and Mediation at Northwestern Law employ Taking STOCK to open their weekly meetings and when they have to handle difficult situations or issues.

Finally, in this Article, we have emphasized the benefits of these tools of awareness in heated conflict contexts, because the two of us study, teach, train, practice, and write about conflict resolution. But we and our students have used these tools in many aspects of ordinary daily life and professional practice. And what conflict resolution professionals call “cases” or “disputes” or “conflicts” can fit into the more encompassing category of “problematic situations.”<sup>91</sup> The writer Elbert Hubbard tells us that “[l]ife is just one damn thing after another.”<sup>92</sup> Mindfulness meditation and mindfulness itself can help us manage these “damn things”; increase our awareness of and compassion for self and other; be clearer, more focused and more skillful; develop freedom from our habitual automatic thinking, feeling and behaving, and experience more compassion for ourselves and for others.

#### APPENDIX: SUGGESTIONS FOR WORKING WITH STOP, STOPS<sub>I</sub>, AND TAKING STOCK ON YOUR OWN:

1. Find a good meditation teacher and develop a daily meditation practice. You can begin with five minutes and gradually increase the amount of time per sit.

#### 2. STOP.

Practice using the STOP tool in a variety of situations, for instance:

- Any time, just to practice.
- When you are about to begin a new activity. So, you might try it just before a class starts (whether you are a student or the teacher) or just before an important meeting or other event, such as a negotiation, mediation, trial, or an exam.
- As you transition from one activity to another.
- During important activities when you feel a need to calm your mind and body.
- When you feel emotionally uncomfortable, stressed, confused or distracted.

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91. See JOHN DEWEY, PROBLEMS IN LOGICAL THEORY, 50, 124, 164, 209 (1903).

92. Quotation by Elbert Hubbard, DICTIONARY.COM, [http://quotes.dictionary.com/Life\\_is\\_just\\_one\\_damned\\_thing\\_after\\_another](http://quotes.dictionary.com/Life_is_just_one_damned_thing_after_another) (last visited May 13, 2015).

For starters, make a commitment to do the STOP exercise at least once a day for two weeks.

### 3. STOPSi.

After you feel comfortable working with STOP, move on to STOPSi. You can use it in the same variety of situations that we listed under STOP.

### 4. Taking STOCK.

Once you become comfortable with setting your intentions using STOPSi, Take STOCK whenever you can during the activity for which you did STOPSi. Begin with the basic version of Taking Stock, and when you are comfortable using it, add a conflict management tool that you know how to use.

