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## Judging and Mindfulness: How to Use Mindfulness to Improve Judging and Reduce Bias

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**Judging and Mindfulness:***How to Use Mindfulness to Improve Judging and Reduce Bias*Clark Freshman<sup>1</sup>

Judge Jeremy Fogel, Director of the Federal Judicial Center, recently published “Mindfulness and Judging” on the Center’s official website.<sup>2</sup> This further confirms the growing embrace of mindfulness in law.<sup>3</sup> Yet some still doubt mindfulness and the science behind its effectiveness. At a recent conference on mindfulness and legal education, a professor at one top-twenty law school revealed that his dean suggested that his course proposal on mindfulness not use “mindfulness” in the title, lest other professors be provoked. Perhaps a similar sentiment motivated Justice Breyer; when asked about his meditation practice, he replied, “I don’t know that what I do is meditation, or even whether it has a name. For 10 or 15 minutes, twice a day, I sit peacefully. I relax and think about nothing or as little as possible.”<sup>4</sup>

Judge Fogel’s piece addresses judges specifically. But mindfulness can benefit all of our judging, including our evaluations of clients, friends, rivals, and even judges. And anyone can become more mindful *right now*. Until very recently, researchers only looked at studies of those who meditated even more than Justice Breyer. New research, however, shows people benefit from the very first time that they try even a few minutes of mindfulness practice. A constellation of research now shows physiological benefits not just from sitting peacefully, as Justice Breyer does, but also from different kinds of yoga and physical movements like tai chi. In addition, although the “mind” in “mindfulness” implies a hard and dispassionate quality, research shows that practices emphasizing friendliness and compassion also yield similar benefits—and even distinct benefits in reducing bias.

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1. Summarized and excerpted from Clark Freshman, Shauna Shapiro & Sarah DeSousa, *Mindful “Judging” 1.5: The Science of Attention, “Lie Detection,” and Bias Reduction – With Kindness*, 2017 J. DISP. RESOL. 282.

2. Jeremy D. Fogel, *Mindfulness and Judging*, FED. JUDICIAL CTR. (2016).

3. Clark Freshman et al., *Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support*, 7 HARV. NEGOT. L. REV. 67 (2002).

4. Amanda Enayati, *Seeking Serenity: When Lawyers Go Zen*, CNN.COM (May 11, 2011).

*Mindfulness Increases Attention and Optimizes Emotion*

Mindfulness confers two interconnected but distinct benefits: enhancing attention and optimizing emotion.

One peer-reviewed study showed students who took a mindfulness class for a few hours a day for two weeks did sixteen percentile points better on the graduate-school equivalent of the LSAT!<sup>5</sup> Like physical fitness, fitness at attention involves several related skills. Mindfulness decreases mind wandering, increases the ability to keep a sustained focus on a narrow set of inputs, such as a particular question, and a broad awareness of potential other important inputs. At any given time, of course, some aspects of attention may be more or less optimal. Together, all this research readily suggests that mindfulness classes for law-school applicants, law students themselves, and bar applicants could boost their chances of admission to law school, better grades in law school, and bar passage. It also suggests judges, lawyers, and all those with law degrees could bring better focus to all of their work.

In a seemingly distinct set of research, mindfulness also enhances emotion. From a negative point of view, mindfulness practices reduce the anxiety and depression that haunt so many in the legal profession. Mindfulness practitioners show less activity in parts of the brain largely associated with negative emotion, such as the amygdala.<sup>6</sup> On the positive and more surprising side, brain research also shows those who took a single eight-week course in mindfulness also show greater activation in parts of the brain associated with happiness.<sup>7</sup>

In a broader perspective, attention and emotion interact. Recent positive-psychology research shows that directing attention at qualities like gratitude and awe reduce negative emotion and increase positive emotion. From the flip side, when negative emotion is present, our vision literally narrows and becomes less attuned to visual images in our periphery.<sup>8</sup>

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5. Michael D. Mrazek et al., *Mindfulness Training Improves Working Memory Capacity and GRE Performance While Reducing Mind Wandering*, 24 *PSYCHOL. SCI.* 776 (2013).

6. E.g., Gaelle Desbordes et al., *Effects of Mindful-Attention and Compassion Meditation Training on Amygdala Response to Emotional Stimuli in Ordinary, Non-Meditative State*, 6 *FRONTIERS IN HUMAN NEUROSCIENCE* 292 (2008).

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

8. *ADVANCES IN POSITIVE ORGANIZATIONAL PSYCHOLOGY* 55 (Arnold B. Bakker ed., 1st ed. 2013).

*Mindfulness Helps Us Catch "Lies" and Uncover Deeper Truths*

Both the attentional and emotional qualities of mindfulness improve lie detection. As I have taught lie detection and mindfulness to groups like JAMS, federal administrative judges, investigators, and negotiators, lie detection means becoming better aware of the actual facts and motivations that affect our success and happiness. We might readily label a witness statement a lie when we think the witness intended to deceive us, but a witness may also supply inaccurate information due to misunderstanding or common defects in memory. Although many of us rely on "intuition" and commonly believed "tells," such as lack of eye contact, research across the globe debunks these myths. Nearly everyone tested does only slightly better than chance at detecting lies.<sup>9</sup> Many beliefs about eye contact are both wrong and especially inaccurate with certain cultures.

Mindfulness helps by directing our attention to the areas that research shows matter more. Recall that mindfulness enhances our positive emotion and therefore increases our ability to pick up clues in a wider area than just our eyes. That includes, for example, very reliable signs of distress in the eyebrows and the contradictions between certain statements and the uncertainty that brief shrugs in a witness's shoulders may betray.

Mindfulness also gives us the flexibility to interpret more accurately the clues that we do see. Such flexibility partly comes from the neuropsychology of emotion: lack of dopamine, including from lack of positive emotion, reduces measures of cognitive flexibility. When I consulted on a murder case, for example, prosecutors charged an Armenian man with murdering his wife in part because they thought he showed no negative emotion when reporting he found her body. When I reviewed the videotaped interview, however, I recognized clear signs of distress in his eyebrows when police left him alone. The lack of emotion that they saw was partly a lack of attention to his eyebrows and partly the lack of flexibility in considering his particular culture.

Finally, mindfulness helps us detect lies by helping us control our responses to clues. When we perceive we have been lied to, research shows our brain registers this as if it were physical pain. We naturally have a tendency to lash out and accuse the liar. Such accusations, however, can become self-validating. When we are accused of something, as when Othello accused his wife Desdemona of infidelity in

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9. Paul Ekman et al., *A Few Can Catch a Liar*, 3 PSYCHOL. SCI. 10 (1999).

Shakespeare's play, we can show fear and anger. Like Othello, others may think we are lying, but we may simply be afraid of being disbelieved. Mindfulness gives us the "wedge of awareness"<sup>10</sup> to keep our minds open and our mouths closed.

### *Mindfulness Reduces Bias*

The discussion above tracks our usual lawyerly self-concept of how we might reduce bias: we focus on getting more accurate information and do not jump to conclusions. More recent research on bias instead suggests that we may jump to conclusions without conscious awareness. Researchers call this implicit bias, such as an association between people being older and less competent or between being homeless and less worthy. Harvard researchers test this various "implicit attitude tests" available online. (Test yourself, and be aware, with compassion, when you may start judging yourself!) Although confined to only a few studies, research suggests that two distinct types of mindfulness practices reduce bias in different ways.

First, people who listened to a ten-minute guided meditation were less likely to make negative associations with African Americans and with older people. Indeed, those who engaged in ten minutes of mindfulness meditation seemed less likely to notice race and age in general.<sup>11</sup>

Second, other types of meditation seem to increase positive feelings about others unlike ourselves. In one study at Yale, some students took a six-week course in friendliness meditation, sometimes known as "lovingkindness" or by the Pali word "metta." Students repeated general friendly phrases, such as "May you be safe" for those they loved, those they liked, those they had no particular attachment to, and even for "difficult people" or "enemies." Students that practiced the friendliness lowered their implicit bias of both African Americans (from neutral to positive) and of the homeless (from quite negative to neutral). This occurred even though the students were never directed to think about homeless or African Americans.<sup>12</sup> This research meshes with brain research that shows those who practice such meditations regularly have

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10. MATHEW FLICKSTEIN, *SWALLOWING THE RIVER GANGES: A PRACTICE GUIDE TO THE PATH OF PURIFICATION* 28 (2001).

11. See Adam Lueke & Bryan Gibson, *Mindfulness Meditation Reduces Implicit Age and Race Bias*, 6 *SOC. PSYCHOL. & PERSONALITY SCI.* 284, 287-88 (2014).

12. Yoona Kang & Jeremy R. Gray, *The Nondiscriminating Heart: Lovingkindness Meditation Training Decreases Implicit Intergroup Bias* 143 *J. EXPERIMENTAL PSYCHOL.* 1306, 1311 (2013).

greater activation of parts of the brain associated with empathy when they are shown pictures of people suffering.<sup>13</sup>

*How Can I Get Started With Mindfulness Right Now?*

To get started with mindfulness, start simple. Are you breathing right now? Do you *know* you are breathing? This knowing can be an intellectual and conceptual knowing, and it can also be a felt *sense*, a knowing with your whole being. This deep *knowing* is mindfulness: As you breathe in, *knowing* with your whole being “breathing in.” As you breathe out, *knowing* with your whole being, “breathing out.” Take a moment and try it.

Now you might apply mindfulness to your overall experience and emotions: How are you relating to things now? How is your mind? Is it clear and interested? Is it dull and fatigued? Is it concentrated? Is it calm or a bit racy? Is it collected or is it scattered and jumping from idea to idea and impulse to impulse? *Knowing* the state of your mind in this moment, without judging it, evaluating it or trying to change it out of some habitual impulse, is mindfulness. From a relatively clear awareness, we may then make skillful decisions about how to act. Knowing your emotional state in the moment—is there joy, sadness, fear?—is mindfulness. It involves being truly awake and alive to our moment-to-moment experience.

And it very well could make you happier, better focused, better able to sense the truth, and escape from the biases that otherwise could cloud your world.

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13. Kristin D. Neff, *The Science of Self-Compassion*, in COMPASSION AND WISDOM IN PSYCHOTHERAPY 79, 87 (C. Germer & R. Siegel eds. 2012).

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