

WHAT DOES IT MEAN TO DO THE *RIGHT* THING?

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“No Dharma was taught by the Buddha
At any time, in any place, to any person.”

(Nāgārjuna, second century AD)¹

“Doing no evil,
Engaging in what’s skillful,
And purifying one’s mind:
This is the teaching of the Buddhas.”

(Shakyamuni, fourth century BC)²

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I. INTRODUCTION

Leonard Riskin emphasizes in his opening article that cultivating mindfulness can help negotiators enhance their ability to relate to the core concerns that underlie one’s emotions.³ In an earlier article, Riskin emphasized that cultivating mindfulness can help promote compliance with the ethical precepts that derive from the Golden Rule that we should treat others as we would have them treat us, from which a significant portion of the rules of ethical conduct seem to derive.⁴ Riskin goes beyond the concept of ethics as an adoption of rules of conduct. Instead, he suggests that the cultivation of mindfulness can help develop inner skills (e.g., calmness, equanimity) and awareness of our intercon-

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¹ NĀGĀRJUNA, *THE FUNDAMENTAL WISDOM OF THE MIDDLE WAY* 76 (Jay L. Garfield trans., 1995). When introducing Buddhist terms, I will use the Sanskrit writing, unless otherwise noted. As it is not a study on Buddhism, I will ignore the macrons that are part of the original Sanskrit spelling.

² SIDDHARTA GAUTAMA, *THE DHAMMAPADA* 49 (Gil Fronsdal trans., Shambhala Press 2005). Shakyamuni is also called Siddhārtha Gautama and is related to as the Buddha.

³ Leonard L. Riskin, *Annual Saltman Lecture: Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation*, 10 *NEV. L.J.* 289 (2010).

⁴ Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 *S. TEX. L. REV.* 493 *passim* (2009).

nectedness.⁵ Such awareness, he explains, may lead to ethical behavior that complies with the Golden Rule.⁶

In this Commentary, I wish to follow this perspective, and to add a complimentary layer that may assist in clarifying *why*, and in what *way*, the cultivation of mindfulness and wisdom as understood within the Buddhist worldview can promote ethical conduct. As mindfulness is a Buddhist concept that is part of a larger Buddhist system of thought, a better understanding of the Buddhist worldview and the context in which the concept of mindfulness emerged may help us go further in understanding how Buddhist philosophy and practice can help foster ethical behavior. It will allow us to create new synthesis between the Buddhist worldview and the quest for ethical conduct in Western traditions, including in the legal profession. I will suggest that Buddhist mindfulness and wisdom should not be considered helpful only in terms of compliance to ethical rules, but from a more foundational perspective, of cultivating a mindset, a being-in-the-world that sees clearly the nature of being and brings one to spontaneously act in an ethical manner as well as to manage emotions in negotiation in a skillful manner.

It may sound in various parts of this Commentary as if I am suggesting that we can dispense with ethical rules. This is not the case, as I will explain in the coming pages. It is my concern that referring to the Buddhist concept of mindfulness without the larger context of the Buddhist worldview limits the possibility of understanding the Buddhist worldview's added values to mastering the ethical conduct.

There exists a long-standing debate in the history of philosophy of whether moral behavior is the outcome of adopting and following a certain set of prescribed norms or, rather, the outcome of a mindset or disposition that could be cultivated, and out of which ethical behavior emerges. Likewise, this debate applies to the internal discourse within the Buddhist tradition: Does moral conduct and following certain ethical rules lead to the cultivation of wisdom (*prajna*), as understood in the Buddhist tradition, or is the right action derived from the cultivated wisdom, which is the source of ethical behavior?⁷ One insight that emerges from that debate is that, regardless of which is the chicken and which is the egg, the cultivation of mindfulness and wisdom as understood in the Buddhist tradition plays an important role in the cultivation of behavior that we may also consider as ethical. The aim of this Commentary is to show that if we wish to explore to what extent mindfulness can help us find improved ways to relate to each other in an ethical manner, we can gain

⁵ *Id.* at 498, 501-02.

⁶ *Id.* at 498. In this Commentary, I will follow Riskin's usage of the term *rules* to describe what Dworkin may regard as *principles*. Dworkin emphasizes that principles have more weight and importance than rules and sees them as background standards against which acts should be judged and decided upon, beyond the more functional rules of law. He explains: "'A will is invalid unless signed by three witnesses' is not very different in form from 'A man may not profit from his own wrong', but one who knows something of American law knows that he must take the first as stating a rule and the second as stating a principle.'" RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 27 (1977). It is important to note that the Golden Rule and other ethical rules that will be mentioned later fall more under the category of principles and that compliance to principles is different from compliance to legal rules.

⁷ See, e.g., BERNIE GLASSMAN, *INFINITE CIRCLE: TEACHINGS IN ZEN* 7-8, 29-30 (2002).

from showing the extent to which ethical conduct is derived from the cultivation of a mindset that is identified in the Buddhist philosophy as “wisdom.” I suggest that ethical conduct acquired through Buddhist practice should be viewed as part of a larger scope of being-in-the-world, an existential (mental, physical, and spiritual) condition in which perceived ethical behavior resonates. By gradually cultivating the aforementioned mindset, a lawyer or conflict resolution specialist will cultivate conduct that leans less on rules of conduct, and more on a new awareness of her relations to others.

This discussion somewhat resembles the manner in which Lon Fuller saw mediation as helping question the source of social order. When laying out his vision of mediation back in 1971, Fuller stated that one of the important features of this newly born court-connected procedure was that it could

offset the tendency of modern thought to assume that all social order must be imposed by some kind of “authority.” When we perceive how a mediator, claiming no “authority,” can help the parties give order and coherence to their relationship, we may in the process come to realize that there are circumstances in which the parties can dispense with this aid, and that social order can often arise directly out of the interactions it seems to govern and direct.⁸

If this is the case, my mediative role in this Commentary is to explore how to offset the tendency to assume that ethical action is a derivation of some kind of authoritative rules of ethical behavior or of the Golden Rule presented above. Instead, this Commentary explores whether there are circumstances in which, through the realization of the Buddhist underpinnings, we can dispense with this aid and claim no ethical authority, instead allowing order and coherence to arise directly out of the interaction. I will try to show how the internal logic of the Buddhist worldview, as will be described in later sections, may take us in that direction, as it is the interpersonal interaction itself from which, according to the Buddhist worldview, our ethical behavior, as well as our emotions, draw their unique internal logic. Both mindfulness and wisdom are necessary conditions for realizing that logic.⁹ Fuller adds:

[T]he central quality of mediation [is] its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.

This quality of mediation becomes most visible when the proper function of the mediator turns out to be, not that of inducing the parties to accept formal rules for the governance of their future relations, but that of helping them to free themselves from the encumbrance of rules and of accepting, instead, a relationship of mutual respect, trust and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions¹⁰

In resemblance to the practice of *mediation* as described by Fuller, Buddhist practice and the Buddhist teaching, when aimed at the interpersonal level, do just that, i.e., help people achieve a new and shared perception of their relation-

⁸ Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 315 (1971).

⁹ I use the term *realize* to note both the understanding of, and the making concrete presence of, that unique logic, as the Buddhist worldview does not offer us an intellectual analysis that needs to be mastered (being, in itself, a set of rules), but invites us, through practice, to examine that logic through direct, existential experience.

¹⁰ Fuller, *supra* note 8, at 325-26.

ship via the non-imposition of rules, and, according to some interpretations, address ethics in a similar manner.¹¹ I will argue that the added value of mindfulness practice to conflict resolution specialists and lawyers lies in the realization of Buddhist wisdom.

I believe that this is consistent with Riskin's statement, when describing the "lawyer's standard philosophical map" over a quarter of a century ago, that the legal profession should revisit its reliance on the application of general rules of law for resolving disputes.¹² In particular, Riskin explains there that this governing assumption should be challenged by a focus on the unique characteristics of the situation, as each situation cannot be governed by any general principle except to the extent that the parties accept it.¹³ I will suggest in this Commentary that the very same challenge applies also to lawyers' use of ethical rules, if a thorough reexamination of the *ethical* philosophical map is sought.

This Article will explore how the practice of mindfulness and the cultivation of wisdom as understood in the Buddhist philosophy can help develop a mindset that will assist lawyers and conflict resolution specialists to make conscious ethical decisions and to do the "right thing" in different situations. It will draw a distinction between the two central terms, "mindfulness" and "wisdom," clarify the philosophical underpinnings of "wisdom," introduce foundational concepts in Buddhist philosophy, and suggest that in order to cultivate the aforementioned mindset, it is important to go beyond "mindfulness" and meet the challenges that the cultivation of "wisdom" pose. Part II, Being-in-the-World, will explain what it means to cultivate a mindset and acquire what Buddhist thought relates to as "wisdom." Part III, titled Dharma, which stands for the teachings of the Buddha, will present basic notions of Buddhist philosophy to help understand what the unique transformation and cultivation of that new mindset involves, and what the applications of the Buddha's teachings to conflict resolution contexts may be. Part IV—Right Speech, which is one of the aspects of the Eightfold Path that the Buddha presented to help cultivate "wisdom"—will present a concrete example that can help lawyers and conflict resolution specialists cultivate wisdom, and consequently act rightfully and ethically. Part V will discuss the implications of adapting the ideas from previous sections to the lawyer's and conflict resolution specialist's "right conduct" in practice. Part VI will offer a perspective on what it takes to become skillful in the manner suggested in this article, using the Buddhist notion of "Skillful Means." Part VII will offer some concluding remarks.

II. BEING-IN-THE-WORLD

It is important to note that the ideas laid out in the succeeding pages do not hint towards a nihilistic view or call for subjective evaluation of ethical behavior. Indeed, both the nihilistic and the subjectivist conclusions would miss the lesson taught within the Buddhist framework. The conclusion that annihilates

¹¹ See BHANTE HENEPOLA GUNARATANA, MINDFULNESS IN PLAIN ENGLISH 23-24 (Wisdom Publ'ns 2002) (1991).

¹² See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43, 45 (1982).

¹³ *Id.* at 45.

ethical standards or any kind of relevant teaching would be erroneous, just as a literal reading of Nagarjuna's quote at the outset to this Commentary¹⁴ would miss the wisdom of the Buddhist framework. Such conclusion will also fail to do justice to the Buddha's teaching quoted above,¹⁵ or to the five basic precepts that the Buddhist practitioner is encouraged to observe: to abstain from killing, from taking things not freely given, from sexual misconduct, from false speech, and from intoxicating drinks and drugs causing heedlessness.¹⁶ In addition, the idea that it is up to each person to decide what ethical standards to follow, if any, or that there is no *right* thing to do—as a lawyer, in negotiations, or in any other human situation—is somewhat contradictory to the realization of the Buddhist core principles. However, the word *right* will be newly defined in the pages to come.

It is also important to note at this point that the different concepts of “mindfulness” and “wisdom,” as used above, are both central to the Buddhist framework. There are three major integral factors in Buddhist practice: morality (*sila*), concentration (*samadhi*), and wisdom (*prajna*), each one influencing the other. Mindfulness is usually considered to be a practice of cultivating concentration, a necessary condition that makes it possible to cultivate wisdom and compassion, the proximate cause to the obtainment of wisdom. “The method is mindfulness, the expression is compassion and the essence is wisdom,” explains Joseph Goldstein, a leading meditation teacher and author of various influential books on Buddhism. He adds that, “Wisdom sees the impermanent, ephemeral nature of experience and the basic unreliability of these changing phenomena. Wisdom opens our minds to the experience of selflessness, the great liberating jewel of the Buddha's enlightenment. This understanding, in turn, engenders a compassionate engagement with the world.”¹⁷ Therefore, while mindfulness practice can lead us to better compliance with the ethical rules and to improved management of the core concerns throughout a negotiation or other conflict resolution processes, cultivation of wisdom may help us move beyond mindfulness to a realization of the nature of experience, of which compassion and ethical behavior is a derivation: “When you have the wisdom to truly understand a situation, compassion toward all parties involved is automatic . . . thus, your behavior is automatically moral.”¹⁸

¹⁴ See NĀGĀRJUNA, *supra* note 1, at 76.

¹⁵ See GAUTAMA, *supra* note 2, at 170.

¹⁶ See WALPOLA RAHULA, *WHAT THE BUDDHA TAUGHT* 47 (2d ed. Grove Press 1974) (1959).

¹⁷ Joseph Goldstein, *Three Means to Peace*, SHAMBHALA SUN, Mar. 2004, at 30, available at http://www.shambhalasun.com/index2.php?option=com_content&task=view&id=1489&Itemid=0. Andrew Olendzki explains:

Mindfulness leads to insight and insight leads to wisdom. The kind of insight referred to in this context is not the conceptual insight into one's personal narrative, but a more visceral and intuitive glimpse of the conditioned, constructed, changeable and impersonal nature of our mental and physical life.

. . . Eventually, recurring episodes of insight will contribute to more lasting alterations of the mind, a process the Buddhists refer to as the *deepening of wisdom*. This sort of insight changes us profoundly.

Andrew Olendzki, *The Roots of Mindfulness*, in *MINDFULNESS AND PSYCHOTHERAPY* 241, 259 (Christopher K. Germer, Ronald D. Siegel & Paul R. Fulton eds., 2005).

¹⁸ GUNARATANA, *supra* note 11, at 23. He adds:

Cultivating wisdom is the embodiment of a mindset, a philosophy, a way of being-in-the-world, which goes beyond the adoption of certain rules of conduct.¹⁹ An important aspect of the “institutionalization process” that conflict resolution, as a discipline, is undergoing, is the shift from “best practices” and concern with techniques, to focusing on the need to see the conflict resolution specialist’s proficiency in more holistic terms, as part of a wider state of being, and exploring the philosophical foundations accordingly.²⁰ In recent decades, many legal writers have aspired for this same shift with regard to the legal profession. Among these authors is Riskin, who challenges the field through his view of the lawyer’s standard philosophical map, and moreover in his work on mindfulness and the law. “The traditional mind-set,” he writes while relating to mindfulness practice’s added value, “provides a constricted vision of legal problems and human relations that rests on separation and autonomy, on rights and rules. Thus, it contrasts with mind-sets grounded on connection, relationship, and duty. And mind-sets can affect a lawyer’s understanding and performance in virtually any task.”²¹

This Commentary presents similar ideas: I suggest seeing the cultivation of mindfulness and the aspiration to cultivate wisdom as part of a more holistic Buddhist system of thought and of its existential view of being-in-the-world. The Buddhist cultivation of wisdom and the realization of its underpinnings shed light on, among other things, ethical actions and their partaking in a larger gestalt of being-in-the-world, applicable to conflict resolution specialists, as well as to lawyers.

III. DHARMA

Buddhist wisdom, as mentioned above, involves a deep realization of the foundations of the Buddha’s teachings, the Dharma. These include the realization of emptiness, of impermanence, and of dependent co-arising, that is, the

[T]here are levels of morality. The lowest level is adherence to a set of rules and regulations laid down by somebody else. . . .

The next level of morality consists of obeying the same rules even in the absence of somebody who will smack you. You obey because you have internalized the rules. You smack yourself every time you break one. This level requires a bit of mind control. . . .

There is a third level of morality, which might be better termed “ethics.” This level is a quantum leap up the scale from the first two levels, a complete shift in orientation. At the level of ethics, a person does not follow hard and fast rules dictated by authority.

Id. at 23-24.

¹⁹ Avalokitesvara, the Bodhisattva of Compassion (i.e., the figure that symbolizes the highest level of compassion in the Buddhist tradition), for example, is not a being that acts compassionately, but rather is the *embodiment* of compassion, a being whose entire existence is compassionate—in mind, in body and in spirit.

²⁰ “It is about *being* a mediator, rather than simply *doing* certain prescribed steps dictated by a particular mediation school or theory.” BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 16 (Daniel Bowling & David Hoffman eds., 2003). This treatise goes on to apply a famous quote by Ghandi to the context of mediation by stating, “Be the change you wish to create in the world.” *Id.* at 272.

²¹ 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, 16 (2002).

realization that it is illusive to ascribe characteristics of inner-self, having a firm, fixed, and independent core or essence, to any presumably independent and delimited object. All entities, according to the Buddhist worldview, are empty of such inner core or essence, and can only completely be realized through the relational manner in which they, and their characteristics, dependently co-arise within a given context.

Contrary to that, according to common Western, Aristotelian principles, knowing an object's essence means exposing its self-identity, its unchanging inherent, essential characteristics, which are not affected by, and are thus independent of, outside variables or the inner-characteristics of other objects.²²

This *essentialist* worldview:

sees on both the 'subjective' and 'objective' sides of the $s \rightarrow o$ type of situation self-subsistent substances, the boundaries of each of which are inalterably fixed and determined by its 'essence.' Here o , say, an apple, is a self-subsistent substance with a more or less strictly delimited ontological sphere, the delimitation being supplied by its own 'essence,' i.e. apple-ness. In the same manner, the ego which, as the subject, perceives the apple is an equally self-subsistent substance furnished with an 'essence' which, in this case, happens to be its I-ness.²³

As mentioned above, the Buddhist worldview offers different philosophical foundations, based on a relational system of thought that is couched in the notion of *dependent co-arising (pratityasamutpada)*:

The position of *pratityasamutpada* stands definitely against this view. Such a view, Buddhism asserts, does nothing other than reflect the phenomenal surface of reality. According to the Buddhist view, it is not the case that there does exist in the external world a substance with a certain number of qualities, called 'apple.' The truth is rather that Something phenomenally appears to the subject as an 'apple.' The phenomenal appearance of the 'apple' as an 'apple' depends upon a certain positive attitude on the part of the subject. Conversely, however, the very fact that 'apple' phenomenally appears as such to his eyes, establishes man as the perceiving ego, the subject of cognition.²⁴

The idea of a "thing," an entity or object with internal unchanging characteristics or conditions, is an illusion, according to the Buddhist worldview. First, there are no unconditional entities: All "things" are causally dependent, or rather, dependently co-arise. Second, everything is in a never-ending, ceaseless motion, and nothing is permanent.²⁵

In order to understand the Buddhist departure from nihilistic conclusions, it is important to better understand the notion of emptiness (*sunyata*), and the

²² Descartes, in his book, *Meditations on First Philosophy*, which is considered to be one of the foundational essays of modernity and of the enlightenment era, follows the Aristotelian system of thought and lays out one of the rules that governs modern thinking, claiming that knowledge is obtained when an entity is perceived in its distinctness: "[E]verything that we clearly and distinctly understand is true in a way which corresponds exactly to our understanding of it" RENE DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* 9 (John Cottingham ed. & trans., Cambridge Univ. Press 1996) (1641).

²³ TOSHIHIKO IZUTSU, *TOWARD A PHILOSOPHY OF ZEN BUDDHISM* 23 (Prajna Press 1977).

²⁴ *Id.* at 23-24.

²⁵ In Western philosophy Heraclites, the fifth century BC Greek philosopher is known for holding a similar view. He claimed that everything is changing and flowing ("panta rei"). However, his view was not accepted, and the essentialist Pythagorean-Aristotelian view prevailed.

way in which it helps avoid the conclusion that the self is non-existent. The allegation that “nothing exists as an independent substantial entity” may lead to the conclusion that things are empty of inner nature or essence. Therefore, the Buddhist worldview concludes that things *do* exist, but with no firm form as finite, separate entities; “things” are empty, and this emptiness leads to the inability to define them or to grasp them as having a determinate form. “Things” are empty of the characteristics of finitude, substantivity, and separateness.

However, such conclusion is only a partial conclusion, for it still contains the presupposition that things exist, as “things,” even if empty of inner essence. It is important to realize (existentially, not as an intellectual exercise) that “they” are also empty of the conclusion invited by their emptiness, the conclusion that “they” exist, even if “they” are empty of self, because “things” have a form. “Things” are ungraspable, not as existent nor as non-existent, but in a different, “middle” way: as dependently co-arising.²⁶ Therefore, the real nature of “things” is neither existent nor non-existent. Their “real nature” is an empty notion, empty in the strong sense of the word, empty in the sense that not only do they lack “real nature,” but they also lack a self-existence that is capable of lacking “real nature.” T.P. Kasulis explains: “Emptiness—the logical inter-dependence of opposing terms—lies at the basis of all philosophical distinctions.”²⁷

When distinguishing between “party A” and “party B” in a negotiation, and when a lawyer focuses on a client’s concerns, it is therefore important to realize the manner in which the parties’ separate existence dependently co-arises in the particular context in which the distinction is made. Furthermore, it is important to realize that clinging to, or zealously advocating for, a fixed and firm image of the “thing” (e.g., the client, a certain position, a line of argumentation, etc.), which one then craves to preserve and on which one fixates, does not do justice to the unfolding complex situation. The Dalai Lama explained to an audience of conflict resolution trainees that, from the perspective of Dharma:

We say that the root causes [of suffering] are hatred and attachment, and separation of ‘we’ and ‘others.’ Building this strong notion of “self” and “others” is based on ignorance, or not knowing reality. All these problems are caused by ignorance of the concrete grasping of the self, which is diametrically opposed to the comprehen-

²⁶ “The middle way” or “path” is one of the central Buddhist principles. See RAHULA, *supra* note 16, at 45.

²⁷ T.P. KASULIS, *ZEN ACTION ZEN PERSON* 24 (1981). For an elaboration on Nāgārjuna’s view of emptiness and dependent co-arising and the non-existence of “things,” see also HSUEH-LI CHENG, *EMPTY LOGIC: MĀDHYAMIKE BUDDHISM FROM CHINESE SOURCES* (1991); Ewing Chinn, *Nāgārjuna’s Fundamental Doctrine of Pratītyasamutpāda*, 51 *PHILOSOPHY E. & W.* 54 (2001); Jay L. Garfield & Graham Priest, *Nāgārjuna and the Limits of Thought*, 53 *PHILOSOPHY E. & W.* 1, 1-2 (2003); Jay L. Garfield, *Dependent Arising and the Emptiness of Emptiness: Why Did Nāgārjuna Start with Causation?*, 44 *PHILOSOPHY E. & W.* 219 (1994).

sion of selflessness. This is a very profound discussion of the Buddhist philosophy.²⁸

In their book *Beyond Winning*, Robert Mnookin, Scott Peppet, and Andrew Tulumello describe the common occurrences that we experience when we face a conflict:

When faced with conflict, we tend to either advocate forcefully—often too forcefully—our own view *or* focus on the other side’s view . . . We each assert our own story and listen to the other side only for the purpose of constructing a “Yes, but” response. We cycle through argument and counter-argument, never demonstrating understanding or really communicating very effectively.

. . . Either I can listen and try to understand your point of view, or I can assert my own. . . Once I understand your view—and show you I understand—holding on to my own perspective will become too difficult. After all, if I agreed with *your* view I wouldn’t have *mine*! . . . Our views are just fundamentally different. If I advocate for mine, I can’t also advocate for yours. It’s one or the other, not both.²⁹

When the parties or their representatives arrive at the negotiation table with a distributive mindset and argumentative mode, their inclination is to present firm and secured positions, clear and distinctive, clarified in separation, to which they cling firmly and which they advocate zealously. The realization of dependent co-arising is necessary for uprooting these tendencies and for acting in a manner that is in line with mindfulness and wisdom, and which is *also*—among other things—ethical.³⁰

It is this realization of “self” and “other” that allows overcoming suffering that humans impose on themselves as well as on other humans. “Suffering” (*duhkha*), also translated as “discomfort,” is a central term in the Buddhist framework; it is what the Buddhist practice is aimed at transforming. Duhkha is caused by an illusory mindset, by not-seeing the true nature of reality, i.e., from being ignorant (*avidya*). Avidya literally means non-sight, which means lacking the ability to see the true nature of things, and which is the opposite of being with wisdom, that is, with the realization of the Buddhist tenets. Suffering, therefore, is caused by the non-realization of the emptiness of “self” and of the dependent co-arising nature of “self” and “other.”

IV. RIGHT SPEECH

Let us now move to a concrete example in order to better understand the difference between a behavior that follows ethical rules and a behavior that is

²⁸ The XIV Dalai Lama, *All These Problems are Caused by Ignorance*, in ELSE HAMMERICH, MEETING CONFLICT MINDFULLY 1, 2 (2001) available at http://www.konfliktloesning.dk/files/Bog_Meeting_Conflicts_Mindfully_2001_0.pdf.

²⁹ ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 50-51 (2000).

³⁰ [B]roader orientations toward lawyering . . . respond to problems associated with the dominance of the Lawyer’s Standard Philosophical Map. . . Mindfulness can help lawyers expand their focus to include . . . broader perspectives and to carry out the aspirations associated with them. It can do this by helping them learn to observe their mind-sets, habitual reactions, and beliefs without being attached to them. Such awareness can allow them to entertain other perspectives. Mindfulness practices also can produce compassion, generosity, and new understandings of self and others.

Riskin, *supra* note 21, at 48-49.

the realization of the principles described above. More specifically, it is the manner in which we speak to each other that we will examine from both perspectives.

The Buddha's Fourth Noble Truth, in which he lays out the path that leads to the transformation of suffering, is a composition of eight awarenesses, that is, eight aspects or flavors of enlightenment, which should be practiced.³¹ One of the eight components of the Buddha's Fourth Noble Truth is "right speech" (*samma vaca*).³² The fourth Buddhist precept, as mentioned above, is the abstinence from "false speech." One may ask how we should understand the notion of "right speech." What does it mean abstinence from "false speech?"

It is common to describe "right speech" as a normative moral order, to tell people what kind of speech they should and should not use while addressing their fellow beings. For example, when describing "Key Points For Mindfulness of Skillful Speech," and while choosing to translate the term commonly translated into "right" as "skillful," Gunaratana writes:

Here are the key points for preventing unhappiness by way of Skillful Speech:

- Skillful speech requires that you abstain from lying, malicious words, harsh language, and useless talk.
- Lying by omission is still lying.
- Malicious talk is speech that destroys other people's friendships or damages their reputations.
- Verbal abuse, profanity, sarcasm, hypocrisy, and excessively blunt or belittling criticism are all examples of harsh language.
- Harsh language hurts others and debases you.
- Gossip and idle talk lead to quarrels and misunderstandings, waste your time, and create a confused state of mind.
- All unnecessary speech not motivated by generosity, loving-friendliness, and compassion is harmful.
- The test of Skillful Speech is to stop and ask yourself before you speak: "Is it true? Is it kind? Is it beneficial? Does it harm anyone? Is this the right time to say something?"
- Using mindfulness to strengthen your resolution to say nothing hurtful and to use only soft, well-chosen words can bring harmony to any difficult situation.³³

In this example, the teaching of "right speech" supplies some rules that one should follow; practicing mindfulness should draw one's attention to those rules.

However, different interpretations of the term "right speech" would tie its explication to the ontological underpinnings, the ways of being in the world, described earlier, and would call for a different kind of awareness. Maezumi

³¹ See RAHULA, *supra* note 16, at 45.

³² The other components are Right Understanding (*Samma ditthi*), Right Thought (*Samma sankappa*), Right Action (*Samma kammanta*), Right Livelihood (*Samma ajiva*), Right Effort (*Samma vayama*), Right Mindfulness (*Samma sati*), and Right Concentration (*Samma Samadhi*). It is important to note that each of the eight components encompasses the other seven, and cannot be realized without the qualities of the other seven, for example, attaining Right Speech demands the attainment of right livelihood, or understanding. In fact, these components are eight different manifestations of the very same realization. *Id.* at 45-46.

³³ BHANTE HENEPOLA GUNARATANA, EIGHT MINDFUL STEPS TO HAPPINESS: WALKING THE BUDDHA'S PATH 107-08 (2001).

and Glassman, when addressing the different manners by which the eight awarenesses (which for our purpose are the Eightfold Path, the Fourth Noble Truth) are interpreted, write: “On one level, then, the eight awarenesses are a description of how our practice actually proceeds. But more fundamentally, how should we relate to the eight awarenesses? Are they moral or ethical guidelines, or are they actually aspects of the enlightened nature or a description of the Buddha himself?”³⁴

Before moving to an interpretation that emphasizes the latter, it is important to clarify the term “right,” which is a translation of the Pali term *samma* (Sanskrit: *sayag*). The translation of *samma* into *right*, does not capture the full meaning of the term. The word *samma* has the prefix “sam,” which means “to be with,” accurately tuned, in a wholesome way. The centrality of the notion of dependent co-arising in the Buddha’s teaching is manifested through the centrality of the notion of *samma*, which describes the actualization of wisdom in everyday aspects of life, speech included, if done in a wholesome manner, i.e., accurately tuned with whatever arises with it.

Bringing the quality of *right* to every category of daily life calls for moment-to-moment realization of dependent co-arising, in every deed. The Zen Master Bernie Glassman explains:

The word *right*, which precedes all these aspects, is not used in the usual dualistic sense of right as opposed to wrong. In this context right means “non-,” as in nonconcept or nonview. . . .

What do “right words or right speech” mean? . . . [S]peaking spontaneously without the filters constructed by the mind, speaking with the whole being, just speaking—that’s right speech.

Similarly, right effort means noneffort. If I separate myself from what I am doing, or if I see myself as doing anything at all, it’s not right effort. Totally doing what has to be done without separation from the deed is noneffort—nothing is being done!³⁵

Nothing is being done and nothing is being said in the sense that a separately perceived self is saying something to a separate person ($s \rightarrow o$) in a manner that is not consistent with their co-dependent situation. The quality of “right speech” allows participants in a negotiation to realize the elusive and deluded state of grasping at the independent and firm concepts or notions that encompass separate, unchanging meaning. This view is different from the perception of a self who brings into the conversation firm positions, well-established argumentations, pre-conceived notions and pre-suppositions, or input from past memories. It also differs from the pre-negotiation preparation that one clings to in the dynamics of the negotiation, and tries to impose on the separately and firmly perceived “other.” The Dalai Lama explains:

[E]ven from the perspective of the transient nature of phenomena there is often a big disparity between the way in which we perceive things and the way things really are.

For instance, when we meet someone we say, ‘Oh, this is the very same person I’ve known for a long time.’ Again, when you see an object, you think, ‘Oh, this is the same object which I saw two days ago.’ This is a very crude way of talking about

³⁴ HAKUYU TAIZAN MAEZUMI & BERNARD TETSUGEN GLASSMAN, *THE HAZY MOON OF ENLIGHTENMENT* 79 (1977).

³⁵ GLASSMAN, *supra* note 7, at 49-50.

reality. What is actually happening here is a kind of a conflation between an image or a concept of entity and the actual reality of the moment. . . .³⁶

If we follow the Dalai Lama's explanation, we would want to come to negotiations with a mindset that allows us not to cling to pre-conceived images of the "other" party as well as one's own goals and positions. That may assist in conducting negotiations that are inherently more constructive. The challenge of the lawyer, however, is his fundamental obligation to "abide by a client's decision concerning the objectives of representation."³⁷ The lawyer reading this Article, who may be cultivating mindfulness and wisdom, or intending to do so, may rightfully ask: What if my client's positions are such that they will not enable me to come to the negotiation table with such a mindset? What if he has strict positions and goals that are entirely inflexible? The challenge, I believe, would be in the pre-negotiation meetings between the lawyer and the client. The lawyer who cultivates mindfulness and wisdom, would educate his client, by deeds and speech, that changing the mindset may be beneficial for him. That does not happen overnight. In many cases, the practical advantages of such mindset may need to be stressed more than any other aspect.

The image or entity that one grasps is the attachment in need of transformation. "Right speech" is possible when one lets go of that attachment. "Right speech" emerges or arises through and within the interaction, as opposed to a firm and separately formed "right thing to say," formed in advance. In this context, the speech and speakers co-arise dependently with whatever is spoken.

Elaborating on the notion of "right speech," Dwight Goddard writes:

The processes of the mind are an ever-flowing stream that, from the angle at which we are now considering it, is comparatively inert until the mind attempts to stop it and isolate particular ideas, feelings, and appearances. Then follows discrimination, desires, grasping and action. It is in this discrimination of the sense-concepts of ideas and of egoism that trouble begins and is seated.³⁸

The quality of "right speech" is particularly important, as speech is often used to isolate, discriminate, and form permanent and independent non-contextual meanings.³⁹ Thus, speech used unwisely contributes to the formation of dis-

³⁶ HIS HOLINESS THE XIV DALAI LAMA, THE POWER OF COMPASSION 95-96 (Geshe Thupten Jinpa trans., 1995).

³⁷ MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009).

³⁸ DWIGHT GODDARD, THE BUDDHA'S GOLDEN PATH: A MANUAL OF PRACTICAL BUDDHISM BASED ON THE TEACHINGS AND PRACTICES OF THE ZEN SECT, BUT INTERPRETED AND ADAPTED TO MEET MODERN CONDITIONS 33 (London, Luzac & Co. 1930).

³⁹ Nietzsche, for example, draws a comparison between music and words. Music in its unrestricted form has the Dionysian power to access to the innermost core of things, having no need for the image and the concept; although "the word, the image, the concept seeks an expression analogous to music," FRIEDRICH NIETZSCHE, THE BIRTH OF TRAGEDY 40 (Douglas Smith trans., Oxford Univ. Press 2000) (1872), it belongs to the realm of the Apollonian power and acts only as dead symbols that cannot convey the vividness of Dionysus and access that "innermost core of things" of which Nietzsche is craving. Dionysus and Apollo, two gods from the Greek mythology, present in Nietzsche's early work two complementary powers and tendencies in the human psyche and the world. Writes Nietzsche:

Apollo stands before me as the transfiguring genius of the *principium individuationis*, through which alone true redemption in appearance can be attained, while under the mystical cry of exultation of Dionysus the spell of individuation is burst apart and the path to the Mothers of Being, to the innermost core of things, lies open.

crimination and categorization. One will then cling to discrimination and categorization, which are the sources of suffering and unwholesome or unskillful actions according to the Buddhist worldview. Speech used unskillfully or unwisely—either directed towards others or as inner speech—disrupts that flow and creates the mindset and behavior described above. Peter Harvey stated:

Overall, one can say that an ‘unwholesome’ action . . . contributes to more unwholesome states arising and liberating wisdom being weakened. ‘Wholesome’ actions have the opposite characteristics. They arise from a virtuous motive, are free of all direct harm to self and other, contribute to the improvement of the character of the person who performs them, and thus assist in moving a person along the Path . . .⁴⁰

The unwholesome action disrupts both oneself and the other from realizing emptiness, impermanence, and dependent co-arising, and has the potential to also be unethical. It may lead to clinging to the firm, fixed positions of a party and to further entrenchment in one’s narrow perspective, followed by willingness to do all that one can do to get the most for him or herself. When the desire to get the most for oneself becomes the main goal, truthfulness and the abstinence from deception and harming others may become secondary in priority.⁴¹ With the awareness of the process of dependent co-arising, a lawyer may gradually transform not only the standard adversarial win-lose philosophical map, but also the emphasis of the standard lawyer’s ethical map on zealous advocacy,⁴² which implies a focus on one’s client’s positions at the expense of a more integral vision of the situation at hand and the process in which the parties co-arise.

Id. at 86.

Max Weber, following Nietzsche’s criticism of Socrates and his use of language to find absolute truth, defined and claimed to be definite through conceptualization, addresses Greek philosophy by claiming:

[F]or the first time the *concept*, one of the great tools of all scientific knowledge, has been consciously discovered. . . . In Greece, for the first time, appeared a handy means by which one could put the logical screws upon somebody so that he could not come out without admitting either that he knew nothing or that this and nothing else was truth, the *eternal* truth that never would vanish as the doings of the blind men vanish. . . . And from this it seemed to follow that if one only found the right concept of the beautiful, the good, or, for instance, of bravery, of the soul—or whatever—that then one could also grasp its true being.

MAX WEBER, *Science as Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 129, 141 (H.H. Gerth & C. Wright Mills eds. & trans., Oxford Univ. Press 1946).

⁴⁰ PETER HARVEY, AN INTRODUCTION TO BUDDHIST ETHICS: FOUNDATIONS, VALUES AND ISSUES 48 (2000).

⁴¹ Van M. Pounds explains:

[W]hat can be done to reconcile the lawyer’s responsibility to provide “zealous” representation of her client’s interests with the competing, if not conflicting, desire that she participate in negotiation in a candid manner? Some commentators believe the answer lies in a modification and modernization of the rules of professional conduct for the lawyer-negotiator. . . .

. . . [However] the solution to finding a more truthful course in negotiation may lie in the practice of mindfulness.

Van M. Pounds, *Promoting Truthfulness in Negotiation: A Mindful Approach*, 40 WILLAMETTE L. REV. 181, 182-83 (2004).

⁴² According to the Model Rules of Professional Conduct, “As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.” MODEL RULES OF PROF’L CONDUCT preamble ¶ 2 (2009).

For example, if a client describes a dispute and seeks advice, instead of referring solely to legal claims and the likely court outcome, or swiftly building one's case or side of the story in a cohesive and firm manner that stands in opposition to the other disputant's case, an alternative course of action may be to explore with the client the manner by which his perspective, understanding, and assumptions on that case have been formed gradually in dependency with the interaction of the actions and assertions of the other disputant. Such exploration may enable another level of awareness to arise in the interaction between the lawyer and the client and provide new meaning to both the lawyer-client co-arising process, as well as the client-other-party co-arising process. When hearing a new client, a mindful lawyer may be able to notice when she is drawing too quickly from her past experience in "similar cases," offering advice that may mask certain needs and nuances of her client. Such conduct may also prevent her from delving in further with the client to see together the co-arising elements in his story—both in the present-moment interaction with the lawyer and in the context of the effect that the other party's actions had. In a co-arising interaction between a lawyer and a client, they may jointly construct an understanding of the occurrences and creative ideas regarding the pursuit of the matter. This will also allow the lawyer and client to explore, among other things, the possibility of joint-action with the other party and his lawyer to solve the case collaboratively.

By cultivating wisdom and "right speech," one can learn to let go of the illusive firm and fixed "self," which clings to pre-conceived notions and craves to preserve their firm existence, while holding also to a firm and fixed view of the "other." By cultivating "right speech," one lets go of that clinging, realizes dependent co-arising, and the underpinnings that lead to adopting polarizing either/or, right/wrong, and you/me patterns are transformed.⁴³

Other concepts were used in the Buddhist tradition to describe "right speech." Describing the sixth century central Buddhist philosopher Dogen's notion of intimate words, which are words spoken in wisdom, Hee-Jin Kim writes: "Intimate words were those spoken and acted out by us in such a way that there was no hiatus between words and referents, thought and reality, mind and body"⁴⁴ Intimate words are free from discursiveness, and are empty

⁴³ Gregory Kramer writes:

[W]e seek to know things as they actually are. When mindfulness is touched by any level of activity, the experience is known as it is, clean and simple. In that moment we stop building the world. There is no past or future, no mine or yours, no breaking or fixing. Knowing exists side by side with the mind's fabrications. We know these constructions as changing and insubstantial, and we recognize the constructing nature of the mind.

GREGORY KRAMER, *INSIGHT DIALOGUE: THE INTERPERSONAL PATH TO FREEDOM* 118 (2007). Surrendering into the flux, lying is no longer an option. Wetlaufer defines lying "to include all means by which one might attempt to create in some audience a belief at variance with one's own." Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 *IOWA L. REV.* 1219, 1223 (1990). The mindset that undergirds lying thus defined creates a separation between one's own beliefs and the beliefs one wishes to transplant in others. Wetlaufer explains that his definition of lying "does not rely upon the distinction between what is 'true' and what is 'false,'" but "is drawn instead in terms of 'beliefs at variance with one's own.'" *Id.* at 1224.

⁴⁴ HEE-JIN KIM, *EIHEI DÖGEN: MYSTICAL REALIST* 86 (2004).

of separate, permanent, and independent meaning. Gay Watson explains that “[e]mptiness is used to see through the conceptual diffusion and differentiation (*prapanca*) of language,”⁴⁵ thus allowing participants in a conversation/negotiation to realize the meaning of utterances, not from an understanding imposed on the speech from previous knowledge, but through the mutual meaning that co-arises at the particular present moment, as it is co-arising spontaneously within the flow of the conversation. The realization of the parties in the dependent co-arising process as “a dynamic field of power in its entirety and wholeness . . . which is neither exclusively subjective nor exclusively objective, but comprehending both the subject and the object in a peculiar state prior to its being bifurcated into these two terms,”⁴⁶ allows the parties to view the client–lawyer as well as the client–client interaction in a new way, in accordance with the Buddhist understanding of wisdom and while interacting with “right speech.”

If mindful of the moment-to-moment co-arising nature of the thoughts and ideas in conversation, speech will be realized as emerging, always in relation to the occurrences in the conversation. Then one will be fully aware of the “other” person, not from one’s own egocentric perspective, but from a realization of the process of dependent co-arising. Mindful of the process of “right speech,” one may be aware of moments in which gaps and divides are created, and private languages—separate systems of making meaning—are used. One is then aware of the importance of clarifying the speech–acts that are misunderstood and of explaining how certain assertions emerge from the conversation. One then makes the effort to create a shared understanding, thus avoiding discrimination or categorization, in order to maintain “right speech.”

As the Buddha utters in his very last teaching before his death:

Having realization and being free from discrimination is what is called “avoiding idle talk.” To totally know the true form of all things is the same as being without idle talk.⁴⁷

“Idle talk,” therefore, is the opposite of “right speech,” describing utterances, or speech acts, which instead of being dependently co-arising, are uttered by a subject who imposes himself on the inter-action. Thus, “idle talk” is speech that discriminates, excludes, and filters whatever is inconsistent with one’s own perspective and in accordance with one’s fixed, firm pre-contextual notions that are being verified. Such talk is idle because no effort is made to create meaning together with the alleged other. Instead, effort is made to impose a pre-conceived notion on the other. Such interpretation of “idle talk” or unwholesome/unskillful speech is different from the explanation provided by Gunaratana as described above.⁴⁸ While Gunaratana’s explanation refers to content that is unwholesome, in this context, talk that is unwholesome or unskillful refers to the non-realization of the Buddhist principle of dependent co-arising, i.e., not being in a mindful state and the realization that comes with wisdom.

⁴⁵ GAY WATSON, *THE RESONANCE OF EMPTINESS: A BUDDHIST INSPIRATION FOR A CONTEMPORARY PSYCHOTHERAPY* 204 (1998).

⁴⁶ See IZUTSU, *supra* note 23, at 24-25.

⁴⁷ MAEZUMI & GLASSMAN, *supra* note 34, at 151.

⁴⁸ See GUNARATANA, *supra* note 11 and accompanying text.

Suffering thus understood is not created by the content of the words that harm, but by the lack of “right speech,” alongside right effort, right understanding/view, right concentration and right mindfulness, which are some of the other components of the Eightfold Path that compound the Buddha’s Fourth Noble Truth. As connoted above, all of the components of the Eightfold Path are needed in order to maintain a mindset from which non-divisive, skillful speech and deeds emerge.

Causing harm and behaving unethically result from that lack of attainment of the Eightfold Path. Addressing the notion of “idle talk” and what is required to transform it, Maezumi and Glassman write:

Being aware of what we say, we can avoid unnecessary talk, or talk that creates a sense of a gap or separation from others. In a positive way, we can talk in a way which is not idle. This again relates to eliminating the fundamental dichotomy of subject and object.⁴⁹

Doing the right thing or saying the right words, therefore, involves the realization of the existential overcoming of the ontological subject/object divide. With that overcoming, the Golden Rule, according to which “one” should not do to the “other” what one does not want “others” to do to “oneself,” is revisited. With the cultivation of the being-in-the-world that the Buddhist wisdom presents, one naturally refrains from unethical deeds, realizing that they: 1) come from ignorance and divisiveness; 2) perpetuate that unwholesome mindset and unskillful dichotomization; and 3) are harmful to “oneself” as well as to “the other.”⁵⁰ Moreover, on the positive side, one knows what the “right speech” and right action may be.⁵¹ When wisdom is absent, unwholesome and divisive, speech is taking the place of right-speech. But, with right understanding/view and right mindfulness, speech is wholesome and arises from whatever is taking place in the flow of dependent co-arising occurrences. The un-mediated, non-dualistic flow of co-arising is different from a situation composed by a speaker which he tries to manipulate. Dogen says:

When speech is uttered ordinarily, there is no immediate hearing (*sokumon*) at all. . . . [T]he true looking-on lies in the very hearing-immediately. At the time of hearing immediately, speech is not removed from its own place to another location.

⁴⁹ MAEZUMI & GLASSMAN, *supra* note 34, at 153.

⁵⁰ Wetlaufer claims, “[W]e cannot say as a general matter that honesty is the best policy for individual negotiators to pursue if by ‘best’ we mean most effective or most profitable.” Wetlaufer, *supra* note 43, at 1230. Within the framework suggested in this Commentary, effectiveness and profitability are defined differently. Contributing to more suffering and increased ignorance to both “oneself” and “others” is neither effective nor profitable. While within an individualistic framework, “ethics is different from self-interest and . . . the former will sometimes require us to sacrifice a measure of the latter.” *Id.* at 1234. According to the philosophical map described above, this sacrifice is not considered.

⁵¹ Rule 4.1 in the Model Rules of Professional Conduct states, “Truthfulness in Statements to Others,” for example, emphasizes only what shall not be done, but does not elaborate on the affirmative aspects of “truthfulness” in professional legal life. MODEL RULES OF PROF’L CONDUCT R. 4.1 (2009). Also the rules of conduct that deal with “fairness” (Rule 3.4) only elaborate on what a lawyer should *not* do, without asserting any affirmative guidance at all. *See id.* R. 3.4.

Truthfulness from a Buddhist perspective would mean seeing reality as it is, i.e., the realization of emptiness, impermanence, and dependent co-arising. In addition, see *infra* note 56 for Riskin’s distinction between “minimal” and “aspirational”/positive applications.

At the time of speech, hearing immediately does not resound after being hidden in the bosom of speech.⁵²

The immediacy of “right speech” and the non-dualistic mindset allows one to recover human spontaneity and fraternity, “the ‘glue’ or ‘cement’ that holds people and societies together,” as stated by Bohm,⁵³ replacing the tendency of fixation and entrenchment with a flow of collaborative engagement and involvement.

V. RIGHT CONDUCT

Cultivating the mindset suggested above, may allow conflict resolution specialists and lawyers to evoke a dynamic at the table in which cooperation is deeply rooted. With that mindset, commitment to relationally-based collaboration is perceived not as an ethical commitment, but as an ontological commitment, a way of being-in-the-world. Cultivating mindfulness and wisdom in the spirit of the Buddhist worldview means, as described above, developing a deep conviction in, and commitment to, the premises of dependent co-arising. Given the philosophical and ontological foundations of Buddhist philosophy, my claim is that such commitment is not a moral commitment, but rather a deep conviction that is part of one’s being-in-the-world, the realization that there is no other possible way open to human beings who wish to carry out their humanness in its fullness except through the relational inter-action and dialogic approach.

The attachment to self-substantive entities and the development of an adversarial mindset and style of managing conflicts is not, therefore, an immoral or unethical act, but an act of ignorance, as understood within the Buddhist framework. Ignorance (*avidya*), or lack of wisdom, which is manifested also by ignoring the dependent co-arising interaction and replacing it with an urge to manipulate the interaction—generates suffering and dis-ease. While from a pragmatic, or—“instrumental effectiveness” perspective, it is possible to speak of “particular distributive advantages” that may lead to ethical misconduct,⁵⁴ from a perspective of wisdom—realization within the Buddhist framework they are understood to be disadvantages, as they are seen as unwholesome actions that create more ignorance and suffering.

A focus on prescriptive rules to control ethical conduct is somewhat limited; however, a focus on cultivating wisdom, mindfulness, and the application of the Buddhist principles opens new possibilities for effectively assisting a lawyer to behave ethically and often times reaches more effective results for her client. Under the title, “Maintaining the Integrity of the Profession,” Rule

⁵² KIM, *supra* note 44, at 87.

⁵³ DAVID BOHM, ON DIALOGUE 6 (Lee Nichol ed., 1996).

⁵⁴ Wetlaufer, *supra* note 43, at 1230. He argues:

Effectiveness in negotiations is central to the business of lawyering and a willingness to lie is central to one’s effectiveness in negotiations. Within a wide range of circumstances, well-told lies are highly effective. Moreover, the temptation to lie is great not just because lies are effective, but also because the world in which most of us live is one that honors instrumental effectiveness above all other things.

Id. at 1272.

8.4 (“Misconduct”) of the Model Rules of Professional Conduct specifies that it would be an act of misconduct to “violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another,” or “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”⁵⁵ Following the rationale presented thus far and Riskin’s aspiration to see a wide interpretation of the Golden Rule,⁵⁶ I suggest that there can indeed be no prescriptive rule with regard to the affirmative aspect of truthfulness, or fairness, or for “right conduct.” However, the cultivation of wisdom and the realization of the described principles, developed through mindfulness practices, would help the lawyer to behave ethically, as well as to develop the practice beyond its current state and to improve the law, a goal to which Riskin aspires. It would allow the lawyer to act in a manner that includes, among other things, fairness to what is no longer perceived as “opposing party and counsel,” truthfulness towards one who is no longer seen as an “other.” Rather, the lawyer will handle the situation with skillful conduct, whatever that means in the particular situation.⁵⁷ That does not mean an automatic adoption of a cooperative response regardless of the style of bargaining that the other party practices at the negotiation table. In fact, such automatic and non-contextual adoption of a negotiation style contradicts the relational awareness to which the Buddhist worldview aspires. If, for example, the lawyer representing the other party is clinging to fixed and separately constructed views of the situation and employs a tough bargaining style, one may make some effort to change the dynamics through skillful conduct. If that does not transform the dynamics, one may rightfully decide to employ a more competitive style of bargaining. However, by employing such conduct a mindful lawyer still maintains awareness of co-arising and does not fall to the divisive us/them apprehension of the affairs but a more complex understanding of the state of affairs.

When deceiving or misleading the other party, or when advocating for one’s own party while not taking the other side into account, negotiators do not put their *ethical* standards in jeopardy, according to Buddhist thought, but rather their *realization of humanness* and its virtues. That lack of realization only increases when solidifying one’s line of argumentation prior to, and regardless of, the dynamics of the negotiation’s interaction. Such attitude

⁵⁵ MODEL RULES OF PROF’L CONDUCT R. 8.4 (2009).

⁵⁶ Riskin draws a distinction between minimal and aspirational ethical standards. While the former’s focus is limited to the least that we can do, that is to avoid behaving unethically, he explains that the latter goes beyond the minimal to suggest that our ethical standards should include how we ought to behave in relation to others. Both sets of standards are a derivation of the Golden Rule that we should treat others as we would have them treat us. *See* Riskin, *supra* note 4, at 496.

⁵⁷ Under Rule 1.3, titled “Diligence,” for example, “A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2009). This zealotry, read not through the standard philosophical map with its zero-sum underlying premises, but through the philosophical map suggested above, does not only imply that “[t]he lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect,” but requires openness and appreciation of all persons involved as they jointly partake in the process of co-arising. *See id.*

intensifies the polarizing mindset and behavior, creates further attachment to one's own firm and fixed positional self, and intensifies one's ignorance (*avidya*) and suffering or dis-ease (*duhkha*). One is then unable to see the complexities of the unfolding dynamics and take part in the dialogue as described above.

Cultivating wisdom (*pranya*) and realizing the described tenets, enables one to meet the challenge posed by Professor Gerald Wetlaufer, who states that "the claim that opportunities for integrative bargaining make good behavior a simple matter of rational, pecuniary self-interest is not nearly as strong as is sometimes claimed [T]he case for good behavior cannot rest entirely on pecuniary self-interest."⁵⁸ In fact, delving into the philosophical tenets of the Buddhist worldview may add ontological rather than ethical support: Collaborating is not about behaving well, but about living up to what it means to be human. The ethical behavior coincides with and serves as a concrete realization of this ontological truth. A negotiator or anyone taking part in a conflict resolution process who cultivates mindfulness and wisdom cultivates a mindset aware of the fact that continuous embodiment of these understandings in one's deeds is an important aspect of the ongoing realization of them. One's negotiation style and one's management of emotions are then outcomes of one's wisdom; the choices made throughout the negotiation process are in accordance with the co-arising dynamics and flow rather than from the need to advocate for a particular clear and distinct standpoint or follow a particular ethical precept, as the Cartesian ethos calls for.⁵⁹

In his article, *Can Saints Negotiate?*, Scott Peppet claims that practicing mindfulness may lead to developing deep ethical commitment.⁶⁰ He argues that a person who develops mindfulness is "a 'saint' because she adopts a more conscientious stance toward her relations with the world and others than most of us will ever achieve."⁶¹ A human being that acts in the spirit of wisdom as perceived by Buddhist philosophy, I suggest, is not a saint. He does not sacrifice "himself" or give up on this "self." He does not deny his personal needs in favor of others' needs.⁶² Rather, he continues to be inclusive and to allow room for all needs, being mindful of their co-arising and acting in a non-divisive manner. That kind of commitment is not ethically based and does not include the act of blindly following imperative categories and ethical demands, as Peppet suggests.⁶³ His being-in-the-world should not be valued through eth-

⁵⁸ Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369, 372 (1996).

⁵⁹ See generally DESCARTES, *supra* note 22.

⁶⁰ Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83, 83-84 (2002) [hereinafter Peppet, *Can Saints Negotiate?*]; accord Scott R. Peppet, *Mindfulness in the Law and Alternative Dispute Resolution*, in CARRIE MENKEL-MEADOW & MICHAEL WHEELER, WHAT'S FAIR: ETHICS FOR NEGOTIATORS 440 (2004).

⁶¹ Peppet, *Can Saints Negotiate?*, *supra* note 60, at 86.

⁶² That perception is based on the premise of a zero-sum game, which is part of the foundation of adversarial perception.

⁶³ "[A]t the extreme, a diligent mindfulness practitioner might eventually reach a state of complete dedication to an ethical life." Peppet, *Can Saints Negotiate?*, *supra* note 60, at 86.

ical standards,⁶⁴ but rather should be seen as realization and embodiment of ethical behavior.⁶⁵ With that realization, one is not imposing upon oneself a duty of respect to “others” or preventing oneself from lying due to its inadequacy with ethical rules, principles, or policy. As opposed to commitment to ethical demands and imperatives, I suggest, a different kind of commitment is developing through the cultivation of mindfulness and wisdom, which resides with the beliefs, aspirations, and wishes to utterly change the adversarial game—a commitment to mutuality and to dialogue.

While an adversarial philosophical map may lead to unethical behavior, a change in mindset and realization of the suggested philosophical map may lead to doing the right action, which is also an ethical deed. In his book *Beyond Neutrality*, Bernard Mayer writes:

Probably the biggest obstacle we face in confronting the challenges to our field lies in our own belief systems. We can contend with the challenges of use, resistance, rejection, and suspicion only if we overcome the limits we impose on ourselves by the constraints of our own thinking.

Surrounding some of the guiding insights and principles of conflict resolution are many operational norms, constructs, and assumptions that we need to examine, broaden, and in some cases let go of. . . . These are beliefs that we need to examine and challenge if we are to grow beyond the existing limits on our work.⁶⁶

Cultivating mindfulness and wisdom may offer an important challenge to the field of negotiation and conflict resolution as well as to lawyers representing their clients, by helping to do just that—to challenge our belief system and to offer the rethinking of some of our most sacred insights on the theoretical and practical levels, as well as to overcome the limits that constrain our thinking. It is a challenge of developing a being-in-the-world whose deeds should not be considered in terms of ethical behavior, but rather in terms of “right action/speech” as described above, which is interdependent with having right mindfulness and right understanding.

In order to practice right action, one must understand the harmfulness of actions that are “un-right.” Acting in a manner that is un-right should be per-

⁶⁴ As Peppet suggests when praising her ethical standards, “she adopts a more conscientious stance toward her relations with the world and others than most of us will ever achieve. Our saint would also have to be sufficiently strong-willed to live up to her moral commitments.” *Id.*

⁶⁵ Pounds suggests that “[t]hrough mindfulness, the lawyer may experience a more meaningful merger of the roles of adversarial advocate and integrative problem-solver.” Pounds, *supra* note 41, at 219. However, he concludes that the interests of truthfulness in negotiation would be best promoted by ethical principles, but stresses that these principles are nurtured from within and that mindfulness provides a key to such internal ethical growth. He advocates for the Golden Rule and other ethical rules (e.g., “the principle of veracity” and “the reciprocity rule”) as the ethical principles that are nurtured through mindfulness, claiming that, “[t]o the extent that mindfulness promotes a heightened sense of interconnectedness and a broader interpersonal perspective, it accentuates the effects of the ‘Golden Rule.’” *Id.* at 209. I suggest that he is right to claim that mindfulness “is a way of seeing and being that transcends the traditional barriers to truthfulness in negotiation,” *id.* at 198, though my claim is that it is not truthfulness consistent with ethical rules, but wisdom based on the realization of the ontological premises described above—truthfulness and ethical behavior being only one of its manifestations.

⁶⁶ BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* 115 (2004).

ceived from a perspective that does not follow the subject–object divide and the ethical rules that follow. An action or speech that further solidifies the separate self, and divides the acting subject and the affected other, leads to one’s attachment to one’s narrow perspective and to craving for one’s gains while cultivating a polarizing state of mind and dividing the world to wins and losses, oneself, and others. Such a mindset can open the door for unethical deeds. As mentioned, the internal logic of right action or “right speech” does not coincide with following prescriptive ethical rules. The next section will examine what can serve as an affirmative, non-relativistic, or nihilistic alternative to following such rules.

VI. ON BEING SKILLFUL

Central to the Mahayana stream in Buddhism, a later stream that was formed in the second century and which challenged some understandings of the Buddha’s teachings common at the time, is the concept of “skillful means” (*upaya*), according to which one should be able to find the right means in every context to manifest the wisdom of the Dharma, wisdom that is not correlated with what is written in the texts, as these are provisional and should be left behind like a raft discarded after crossing a river.⁶⁷ One is therefore to skillfully articulate or do what is right in the situation in order for it to be a means to realizing wisdom in that situation by using one’s own techniques and methods.⁶⁸

With all the differences between Buddhism and Aristotelian ontological theory of substance, it seems that when describing the notion of wisdom in its highest degree and the performance of a wholesome action, the Buddha’s and Aristotle’s teachings share similar insights. Aristotle, when discussing “the just” and “the good” in his *Nicomachean Ethics*, does not provide a firm definition of these terms. He encourages a thorough inquiry into the nature of the good, claiming that being educated with regard to the nature of the good involves gradual cultivation and refined understanding of it.⁶⁹ One may ask, “what is the nature of the inquiry suggested?” Aristotle sees *the good* as a state of mind and as something acquired by practice: “[W]e learn a craft,” he explains, “by producing the same product that we must produce when we have learned it; we become builders, for instance, by building, and we become harpists by playing the harp. Similarly, then, we become just by doing just

⁶⁷ See MICHAEL PYE, *SKILFUL MEANS: A CONCEPT IN MAHAYANA BUDDHISM I* (2d ed. Routledge 2003) (1978).

⁶⁸ Gunaratana, when describing the third level of morality in Buddhism, explains:

A person chooses to follow a path dictated by mindfulness, wisdom, and compassion. This level requires real intelligence, and an ability to juggle all the factors in every situation to arrive at a unique, creative, and appropriate response each time. Furthermore, the individual making these decisions needs to have dug him- or herself out of a limited personal viewpoint. The person has to see the entire situation from an objective point of view, giving equal weight to his or her own needs and those of others.

GUNARATANA, *supra* note 11, at 24.

⁶⁹ See ARISTOTLE, *NICOMACHEAN ETHICS* 1094(b)24-25 (Terence Irwin trans., 2d ed. Hackett Publishing Co., Inc. 1999) (located on page 2).

actions”⁷⁰ It is *practical wisdom* (in Greek—*phronesis*), gained through practice.⁷¹ Very much like in the Buddhist worldview, there cannot be a fixed prescription as to what form the right action should hold, but rather, it is determined contextually: “[T]he type of accounts we demand should accord with the subject matter; and questions about actions and expediency, like questions about health, have no fixed answer.”⁷²

What, then, is a good action? What should one do in any given situation? This knowledge, as mentioned, is attained through practice, through which one gradually cultivates the virtuous state of mind, in the words of Aristotle, which enables one to choose the right action in any given situation.

As noted, cultivating this mindset has many parallels in Aristotle’s and the Buddha’s teachings. The first teaching the Buddha taught after his awakening in the deer park in Bodgaya (India) is the “Middle Path” (*Majjhima Patipada*, the “Eightfold Path” being its elaboration).⁷³ Avoid all extremes, teaches the Buddha: [F]ind the *right* path between either affirming or denying, approving or negating, between indulging in the pleasures of the senses and asceticism or self-mortification.⁷⁴ Avoiding extremes leads to peace and wisdom, manifested in right speech, action, mindfulness, livelihood, etc. Therefore, doing the right thing involves an understanding of the Middle Path and the avoidance of any extremes.

It seems that Aristotle has a similar notion to the Buddhist worldview regarding cultivating ethical qualities, or “virtuous states of mind”:

First, then, we should observe that these sorts of states naturally tend to be ruined by excess and deficiency. . . . For both excessive and deficient exercise ruin bodily strength, and, similarly, too much or too little eating or drinking ruins health, whereas the proportionate amount produces, increases, and preserves it.

The same is true, then, of temperance, bravery, and the other virtues.⁷⁵

The principle is that, in each situation, one should act in the right measure in that circumstance, avoiding any extremes with regard to the specific situation. If one avoids extremes and does what is right or just for the situation, one is acting virtuously. Virtue of character, as defined by Aristotle, is the ability to assess situations correctly and act appropriately.⁷⁶ The choices made for action are between excess and deficiency, and these can be determined only within each particular context, relative to the unique circumstances. A virtuous man would be able to deliberate, choose correctly, and act well. A virtuous character is that of one who possesses a stable disposition, which allows for such deliberations and choices. In other words, a man with virtuous character has the ability to do what is right contextually.⁷⁷ After sufficient practice, the right action becomes one’s spontaneous manner of action, as arises within a specific context, and arising from the right state of mind. Individuals should cultivate

⁷⁰ *Id.* at 1103a33-b1 (located on page 19).

⁷¹ *Id.* at 1140a25-26 (located on page 89).

⁷² *Id.* at 1104a3-5 (located on page 19).

⁷³ See RAHULA, *supra* note 16, at 45.

⁷⁴ See *id.*

⁷⁵ ARISTOTLE, *supra* note 69, at 1104a13-20 (located on page 20).

⁷⁶ *Id.* at 1107a1-4 (located on page 25).

⁷⁷ The word for “Virtue” in Hebrew is “Mida Tova,” which literally means “good measure.”

this state of mind, “for actions in accord with the virtues to be done temperately or justly it does not suffice that they themselves have the right qualities. Rather, the agent must also be in the right state when he does them.”⁷⁸

It is the development of skillful means, the skill to be in the right state and to do the right thing that the Buddhist practice of mindfulness and wisdom helps advance, ethical conduct being one of its manifestations. The cultivation of a mindset that embodies the wisdom of emptiness, impermanence, and dependent co-arising will thus help the negotiator, lawyer, or participant in a conflict resolution process make informed choices and to do the right thing.

VII. CONCLUDING REMARKS

Riskin draws a distinction between minimal and aspirational ethical standards, both situated in the shadow of the Golden Rule,⁷⁹ that we should treat others as we would have them treat us. In this Commentary I have offered a different distinction, between ethical standards at large, and what may be seen as far more aspirational—the cultivation of wisdom and of “right conduct” in action and speech.

The aspiration in this Commentary goes beyond the ethical rules to suggest a different ontological awareness. The realization of the different ontology that the Buddhist worldview offers us undergirds the ethical behavior and ethical rules, as well as our management of emotions. In fact, following the Buddhist line of thought, we are left with no objective, fixed, or firm ethical rules to which we can cling.

However, this does not lead us to hold on to the “subjective” as the alternative to the lack of objective, or to the dismissal of both objective rules and subjective intentions in the name of some nihilistic perspective or an “anything goes” stance. Such conclusion may be either naïve or dangerous, dismissive of any form of rule of conduct or of ethical standards. However, if one follows the logic of emptiness dependent co-arising described above and applies it to the relations between the objective rules of conduct and the subject use of them—these relations should be seen in a new and different light. I suggest that the Buddhist framework offers us a system of thought and of being in the world that is radically different in its foundations from the common western thinking, and from which a different ethical vision arises. In his Nobel Prize Acceptance Speech in 1964, Martin Luther King Jr. said, “I believe that what self-centered men have torn down men other-centered can build up.”⁸⁰ His vision is of a shift from self-centeredness to placing the “other” at the center of moral judgment. Dr. King further asserted that, “An individual has not started living until he can rise above the narrow confines of his individualistic concerns”⁸¹

⁷⁸ ARISTOTLE, *supra* note 69, at 1105a29-32 (located on page 22).

⁷⁹ See *supra* note 56 and accompanying text.

⁸⁰ Martin Luther King, Jr., Noble Peace Prize Acceptance Speech (Dec. 10, 1964), available at http://nobelprize.org/nobel_prizes/peace/laureates/1964/king-acceptance.html.

⁸¹ MARTIN LUTHER KING, JR., THE WORDS OF MARTIN LUTHER KING, JR. 3 (Jean Highland ed. 1987).

However, his vision is still formed within the individualistic framework, calling for a shift from one's own fixed and firm self to the "other's" selfhood as the primary concern. The ethics that are offered by Dr. King are consistent with the Golden Rule and are grounded in individualistic principles. The realization of the different ontological foundation that the Buddhist thought offers allows a shift to a different ethical system of awareness and mindfulness. This ethical system offers a different vision with regard to ethical conduct.

Similar to Riskin's aspiration that one's ethics will include the means to go beyond the particular benefit to help improve the legal profession or the conflict resolution profession, and to better serve people in conflict, so does the usage of skillful means: It is aimed at helping the people involved to improve their realization of emptiness of self and of dependent co-arising, and may step in where no affirmative aspect of truthfulness, or fairness, or of "right conduct" is possible. It may also step-in in situations where there is no clear-cut observation regarding what is appropriate ethical conduct. In the professional lives of lawyers, there are "grey areas" to which ethical rules and principles do not directly relate, and it is for each lawyer's interpretation to decide on whether a particular act is considered ethical or unethical. When one confronts such dilemmas with a mindset as described in this Commentary, a lawyer may choose to do the *right thing*, as defined in this article, while realizing emptiness, impermanence, and dependent co-arising. His deeds will also be ethical, without the need to comply with certain ethical rules. There are also "grey areas" in which "a great number of arguments . . . are offered in support of the claim that the lies we tell are not ethically reprehensible."⁸² With the right mindset, this kind of argumentation-rationalization is transformed.

Furthermore, with the right mindset, better management of our emotions and a decrease in the obstacles described by Riskin is possible.⁸³ In addition, as Riskin stresses, better awareness of the governing concerns that underlie our emotions can help in the process of cultivating mindfulness. Emotional destruction and the lack of awareness of participants' predominant concerns intensify ignorance and may prevent negotiators from bringing wisdom into the room and from doing the *right thing*.

Doing the *right thing* demands a long process of cultivating right mindfulness and "right speech" as described in this Commentary. There is no fast-food description that would allow one to acquire the "right conduct" through reading, but rather demands a long-term process of cultivating wisdom. Through

⁸² Wetlaufer, *supra* note 43, at 1236. He lists various "distinctions, excuses and justifications" that allegedly make lawyers' lying permissible: "I didn't engage in the requisite act of omission;" "I didn't have the requisite intent;" "my statement was literally true;" "I was speaking on a subject about which there is no truth;" "I lied, if you insist on calling it that, but it was an omission of a kind that is presumed to be ethically permissible;" "I lied but it was legal;" "I lied but it was on an ethically permissible subject;" "I lied but it had little or no effect;" "I lied but it was justified by the very nature of negotiations;" "lying is within the rules of the game;" "I lied but it was justified by the nature of my relationship to the victim;" "I lied but it was justified under the special ethics of lawyering (the duty of zealous advocacy/ the duty to preserve confidence);" "I lied but it was ethically permissible because of the bad conduct or the incompetence of my adversary;" "I lied but it was justified by the good consequences it produced," etc. *See id.* (providing the basis for these arguments).

⁸³ *See Riskin, supra* note 3 *passim*.

practicing mindfulness and the ethical behavioral aspects that reside with mindfulness, one gradually cultivates clarity as to what is the “right conduct” in certain situations.

A deep problem in this area, which this Article does not fully address, is how to reconcile Buddhist wisdom with the explicit demands of some of the Model Rules of Professional Conduct or other codes that might apply to a particular lawyer or mediator. As Katherine Kruse describes in her contribution to this issue,⁸⁴ the lawyer’s role and duties can be defined differently.⁸⁵ I believe that without that shift from an adversarial image of the lawyer’s duty, and without making the effort to become more mindful, and to consciously pursue a context larger and more complex than the client’s immediate interests, it is impossible to reconcile the lawyer’s “role morality,” as characterized by the partisan pursuit of the *client’s* objectives,⁸⁶ and the Buddhist wisdom and descriptions of the right mindset discussed above. There is a need for transformation in legal education to help move away from “the lawyer’s standard philosophical map” and the adversarial mindset that lies in the center of it, as described by Riskin over two decades ago.⁸⁷ This is what mindfulness practice, as described by Riskin in his work in the last decade, aims at achieving. The practice of mindfulness, and moreover, the cultivation of wisdom, would allow an individual to develop an understanding that dialogue and inclusiveness are not only ethical, but are also the only way open for us to practice our humanness. A second possible answer to this deep problem may be that the reconciliation between real life and “Buddhist wisdom” belongs to the realm of practical wisdom—i.e., taking place through practice and within the practice, and that we should refrain from the ambition to analytically solve what may appear as an unsolvable problem.

It is important to note that one does not need the metaphysical analysis and the intellectual understanding of the ideas presented in this Article, but rather the practical realization, the cultivation of a being-in-the-world who rightly realizes and concretizes the dependent co-arising described above, through speech, actions, livelihood, etc. Otherwise, as Riskin notes with regard to the implementation of the core concerns system, a gap opens between the understanding and the actual implementation.⁸⁸ These principles should also not be perceived as rules that one should follow: Their internal logic can be realized only through their concrete manifestation. From a pragmatic standpoint this seems to create a problem, as it does not meet the need for an agreed-upon set of ethical rules and behavioral standards that a lawyer should follow, or for measurable criteria to help evaluate negotiators behavior. As mentioned, it calls for making the necessary effort for gradual cultivation of mindfulness and wisdom. However, it does not legitimize nihilistic conclusions, or belief in subjective measures. Through the practice of “right understanding,” “right

⁸⁴ Katherine R. Kruse, *Lawyers in Character and Lawyers in Role*, 10 NEV. L.J. 393(2010).

⁸⁵ Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS (forthcoming 2010).

⁸⁶ *See id.*

⁸⁷ *See supra* note 12 and accompanying text.

⁸⁸ Riskin, *supra* note 3; *see also* ARISTOTLE, *supra* note 69, at 1103a33-b1 (located on page 19).

mindfulness,” “right action,” “right speech,” etc., one can become more skillful and virtuous, with regard to realizing the right thing to do, as tautological as it may sound.