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# RIGHT SCHOLARSHIP AND THE GODDESSES OF COMMERCIAL LAW

NATHALIE MARTIN\*

## INTRODUCTION

Sometimes scholarship is just scholarship. I am referring to the type of scholarship that is often written but barely read, the type written to impress someone or get a promotion rather than because there is a burning need or desire to say what needs to be said. Other times, scholarship flows from the heart, as a result of desire to share a discovery that could change the law, or to share a thought or series of thoughts that could change the world. I call this scholarship of the heart “right scholarship,” a phrase taken from the Buddhist concept of right livelihood. Right scholarship reflects real passions and concerns of the heart that permeate its author’s existence on an almost cellular level. This Essay examines examples of right scholarship in works of two commercial law “goddesses”: Jean Braucher and Elizabeth Warren.<sup>1</sup>

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1 Neither of these women has consented to being called a goddess and at least one might even be offended by the term. I do not intend to offend, as for me this is the highest compliment. A goddess is, among many other things, “a woman who is loved or admired very much by other people.” *Goddess*, OXFORD LEARNER’S DICTIONARIES, <http://www.oxfordlearnersdictionaries.com/us/definition/english/goddess> [https://perma.cc/87CW-U7ZC] (last visited Apr. 29, 2016). Here, I use the term mostly in the colloquial sense of a female person who has mastered a skill or life in general, but also whimsically, in reference to the goddesses of Eastern mysticism, such as in Hinduism. Of course there are many others in mythology, including Greek mythology. I by no means mean to offend the religious sensibilities of anyone, or suggest that there is more than one God, but only to demonstrate how Eastern philosophies, mythology, and religions from both the East and the West can inspire us to become more engaged scholars. I also by no means suggest that Professors Braucher and Warren

This Essay combines many topics about which I am deeply passionate, including religion, sex, yoga philosophy, and the influential works of two women I admire greatly. Hopefully, this brief Essay does not try to do too much at the expense of all of these topics.<sup>2</sup> In Part I of this Essay, I describe the concept of right scholarship through various religious traditions and yoga philosophy's principles for living known as the *yamas*. I then describe, through the works of young scholar Shari Motro, scholarship that has gone wrong. Finally, through the psychological concept of flow, I describe how we know when scholarship has gone right. In Part II, I provide some background information and brief excerpts from right scholarship written by the commercial law goddesses, both of whom were intensely passionate about their work. Their work is scholarship from the heart that has changed the world.

I conclude this Essay with a few thoughts on what the rest of us legal scholars can take away from the work of the goddesses. One such takeaway is that we should not waste our valuable time. Every breath (and every word) counts. Though much legal scholarship makes little difference to the world, when we find our passion, we can make a difference. Using passages from the work of the goddesses as our muse, we can each find passion, flow, and meaning, and can develop the deep optimism that comes from believing legal scholarship can make a difference in the world.

### **I. What is Right Scholarship?**

I wonder how different the world would be if legal scholars lived by the following *mantra*:<sup>3</sup> I will never again write about something I do not care about deeply.

I also wonder what it would take for each of us to keep this promise, to ourselves, our schools, our students, and society. If we each took this *mantra* seriously, what would change for us and for others? How would our collective impact on the world change? How would our service to the world be enhanced? Finally, how fundamentally would our lives be enriched if we spent the time and effort to find out what we are passionate about?

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are the most influential female scholars in commercial law and consumer law, only that they are uniquely inspirational to young scholars wishing to produce work from the heart that makes a difference in the world.

2 I make no attempt here to write a traditional law review article and have not footnoted my every thought. This is by design and to facilitate flow. See Part I.D. I hope the reader can understand.

3 *Mantra* originally meant, in Hinduism and Buddhism, a word or sound repeated to aid concentration in meditation. THE OXFORD DICTIONARY OF PHRASE AND FABLE (Elizabeth Knowles ed., 2014).

There are additional questions embedded in these initial questions. On a micro or individual level, those questions include: “How will each of us make the difference *we’d like to make* in the scholarly arena during the rest of our careers? How will we each choose what to write about?” On a more macro level, these questions include: “What is the future of legal scholarship? How will legal scholarship stay relevant in the modern world?”<sup>4</sup> Combining these inquiries, we can each ask how we can individually stay relevant not for the sake of fame but to help answer the eternal question: “What am I doing here on this earth? What is my purpose?”

There is a concept in every major religious tradition in the world suggesting that we should use our limited time on this earth to do something meaningful and helpful. Indeed, most of us wish to make a difference in the world, and of course to do no harm. If possible, most of us wish to leave the world a better place than we found it. Buddhists call this concept of making a real difference in our work “right livelihood,” and this Essay asks what right livelihood means in the context of legal scholarship. It also asks how we can help recognize the passion underlying meaningful scholarship in the works of ourselves and others, so that these meaningful endeavors can multiply, and change the world in which we live.

Right scholarship is not about what is right versus wrong. It is scholarship with purpose, scholarship that derives from passion about a particular issue or cause. At its essence, right scholarship requires that we pick projects carefully, recognizing that every space on the

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4 For some fabulous examples of scholarship that is relevant to today’s popular culture, see Caleb Mason, *Jay-Z’s 99 Problems, Verse 2: A Close Reading with Fourth Amendment Guidance for Cops and Perps*, 56 ST. LOUIS L.J. 567 (2012) (containing a line-by-line analysis of the second verse of the song from a constitutional criminal procedure perspective); Lance McMillian, *Drug Markets, Fringe Markets, and the Lessons of Amsterdam*, 69 WASH. & LEE L. REV. 849 (2012) (using the television show *The Wire* to demonstrate the difficulty of mustering political will to reform fringe markets). The *New Mexico Law Review* published an entire issue based upon the locally filmed television show *Breaking Bad*. See Armen Adzhemyan & Susan M. Marcella, “Better Call Saul” If You Want Discoverable Communications: The Misrepresentation of the Attorney-Client Privilege on *Breaking Bad*, 45 N.M. L. REV. 477 (2015); Holly Jeanine Boux & Courtenay W. Daum, *Stuck Between a Rock and a Meth Cooking Husband: What Breaking Bad’s Skyler White Teaches Us About How the War on Drugs and Public Antipathy Constrain Women of Circumstance’s Choices*, 45 N.M. L. REV. 567 (2015); Greg Goelzhauser, *The Political Geography of Plea Bargaining in Federal Death Penalty Cases*, 45 N.M. L. REV. 641 (2015); Elizabeth N. Jones, *The Good and (Breaking) Bad of Deceptive Police Practices*, 45 N.M. L. REV. 523 (2015); Michael C. Mims, *Don’t Bake—Litigate! A Practitioner’s Guide on How Walter White Should Have Protected His Interests in Gray Matter, and His Litigation Options for Building an “Empire Business” Through the Courts, Not the Cartel*, 45 N.M. L. REV. 673 (2015); Max Minzner, *Breaking Bad in the Classroom*, 45 N.M. L. REV. 301 (2015); Jennifer W. Reynolds, *Breaking BATNAs: Negotiation Lessons From Walter White*, 45 N.M. L. REV. 611 (2015); Bidish J. Sarma, *Why We Would Spare Walter White: Breaking Bad and the True Power of Mitigation*, 45 N.M.L. REV. 429 (2015).

page is like a breath expended. We only have so many breaths<sup>5</sup> so we need to make each exhale worth it.

In other words, everything we choose to write is taking up space that could be used to write or do something else, so we need to think carefully before taking on a project. This is true throughout our careers but perhaps most importantly at mid-career, when we are often asked to do many things about which we may not be passionate. Every article, every book, every study, is an opportunity taken and thus an opportunity lost on something else. We need to be planners and determine how best to make our mark.

### A. Religion and Right Scholarship

As Vietnamese Zen Buddhist teacher Thich Nhat Hanh once wrote, “To practice Right Livelihood (*samyag ajiva*), you have to find a way to earn your living without transgressing your ideals of love and compassion.”<sup>6</sup> The concept of right livelihood in legal education

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5 MICHAEL FRANTI & SPEARHEAD, *Life in the City*, on ALL REBEL ROCKERS (Concord Music Group 2008). The entire stanza goes:

Some say you only get so many breaths, when they're gone you'll meet your maker,  
Some people always try to cheat their death but when it comes you just can't shake it.  
Some people try to make a deal to get a little bit more but they try to take it.  
Some of them end up in debt, when [they're] called they try to fake it,  
But one morning the clock will chime and no more birds come flying by and temperatures  
keep rising higher, 16 bullets come flying by.

Ai yi yi put your hands up high coz' you never know how long you're gonna live 'til ya die  
They hit you with a missile, hit you with a bomb, hit you with the law try to take your  
home.

Break into your house in the middle of the night, track you on a cell phone by satellite,  
Stopped any time you're in your car, search your body search your home an' listenin' in  
on your phone calls.

Still no politician got enough balls, lining the people up against the wall.  
When the truth comes out all hell will call and someday Guantanamo will fall, until that  
day we all will ride on.

Ai yi yi put your hands up high coz' you never know how long you're gonna live 'til ya die.

*Life in the City Lyrics*, METROLYRICS, <http://www.metrolyrics.com/life-in-the-city-lyrics-michael-franti.html> [<https://perma.cc/8T35-TUME>] (last visited June 5, 2016).

6 *Right Livelihood: The Ethics of Earning a Living*, ABOUT RELIGION (Dec. 14, 2014), <http://buddhism.about.com/od/theeightfoldpath/a/rightlivelihood.htm> [<https://perma.cc/CDL2-BAHW>].

has been explored by at least one legal academic,<sup>7</sup> who believes that good law teaching comes from the identity and integrity of the teacher and the teacher's "ability to weave a concrete web of connections among themselves, their subject [matters]."<sup>8</sup> This, Professor Laurie Morin explains, allows students to learn to "weave a world for themselves."<sup>9</sup>

In general, seeking right livelihood involves using one's full capacities "to make a genuine contribution to not only one's personal development but also to the well-being of humanity,"<sup>10</sup> which places the goal of spiritual health on equal footing with the material well-being that goes along with being employed. Fulfilling right livelihood means finding work that makes a meaningful contribution to our lives and the lives of others.<sup>11</sup>

Right livelihood is one step on the Buddhist eight-fold path. Simplifying greatly, under Buddhist teachings, in order to remove suffering, it is necessary to overcome craving and delusion by following an "Eightfold Path" of right view, right intention, right speech, right action, right livelihood, right effort, right mindfulness, and right concentration.<sup>12</sup> As the modern and Western world has become more familiar with this idea of right livelihood,

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7 Laurie A. Morin, *Reflections on Teaching Law as Right Livelihood: Cultivating Ethics, Professionalism, and Commitment to Public Service from the Inside Out*, 35 TULSA L.J. 227 (1999).

8 *Id.* at 229 (citing PARKER J. PALMER, *THE COURAGE TO TEACH: EXPLORING THE INNER LANDSCAPE OF A TEACHER'S LIFE* 10 (1998)). According to Palmer:

[A]s I teach, I project the condition of my soul onto my students, my subject, and our way of being together. The entanglements I experience in the classroom are often no more or less than the convolutions of my inner life. Viewed from this angle, teaching holds a mirror to the soul. If I am willing to look in that mirror and not run from what I see, I have a chance to gain self-knowledge—and knowing myself is as crucial to good teaching as knowing my students and my subject.

*Id.* (citing PALMER, *supra*, at 10). Palmer also claims that good teachers have a strong sense of personal identity that infuses their work, and that bad teachers "distance themselves from the subject they are teaching—and in the process, from their students. Good teachers join self and subject and students in the fabric of life." *Id.* (citing PALMER, *supra*, at 11).

9 *Id.*

10 Lewis D. Solomon, *Local Currency: A Legacy and Policy Analysis*, 5 KAN. J.L. & PUB. POL'Y 59, 67 (1996). *See also* Morin, *supra* note 7, at 231 (stating that Buddha's right livelihood translates into avoiding work that might hurt others or the environment).

11 Solomon, *supra* note 10, at 67.

12 Mahasattipassana Sutta, *The Greater Discourse on the Foundations of Mindfulness*, in *THE LONG DISCOURSES OF THE BUDDHA: A TRANSLATION OF THE DIGHA NĪKAYA* 348 (Maurice Walshe trans., 1995).

right livelihood has expanded to mean finding work that is personally fulfilling, that helps rather than harms people (or is neutral), and that can change the world for the better.<sup>13</sup>

The notion of work that links people to a higher purpose can be found in nearly every religious, cultural, and spiritual tradition in the world.<sup>14</sup> For example, in one speech at an international law symposium, C.G. Weeramantry, former Judge and Vice President of the International Court of Justice at The Hague, presented a speech on his book *The Lord's Prayer, Bridge to a Better World*. In the speech, he asks "whether there is the possibility to nourish our legal systems from the reservoirs of morality that are contained within the world's great religions,"<sup>15</sup> and then suggests that much could be accomplished by looking carefully at the meaning of the Christian Lord's Prayer.<sup>16</sup> As he explains:

The Lord's Prayer has this advantage, every day it is recited by hundreds of millions of people across the world. Hundreds of millions of people know it. That is a good base from which to begin. Unfortunately, it tends to be a mere ritual repetition, a thoughtless recitation, rather than a contemplative reflection. What we want is a contemplative reflection of the principles of the Lord's Prayer.

If we can make individuals more sensitive to these aspects, since there are millions of individuals involved, that can make a very real impact upon the world's situation today. So that is very important from the standpoint of Christianity. Likewise one can do the same for the scriptures of all the religions of the world, Buddhism, Hinduism, Judaism, Islam, all of them are rich reservoirs of moral conduct which can guide human conduct in the next millennium. The Christian himself can draw a lot of inspiration from the minute analysis of human conduct contained in those religions.

To give you just one example, Buddhism talks of right conduct, the sort of conduct that a good human being should follow. It divides it into eight categories: there is right action, right speech, right livelihood, right

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13 Morin, *supra* note 7, at 231.

14 *Id.*

15 C.G. Weeramantry, *The Lord's Prayer: Bridge to a Better World*, 6 TULSA J. COMP. & INT'L L. 87, 89 (1988).

16 *Id.* at 96.

thought, right concentration and so forth analyzing it in very great detail. Anyone reading those scriptures can gain a very great amount of inspiration from them. Even in regard to a better understanding of Christian conduct. Likewise, all the religions have concepts that would be of very great value to the law of the future.<sup>17</sup>

Indeed, the more one studies the religious traditions of the world, the more one sees similarities among them, as well as connections to the legal world around us.<sup>18</sup>

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17 *Id.* at 96–97. Judge Weeramantry goes on to add:

Islam for example has the concept of trusteeship of earth resources. Under the common law system we have the idea that we are the owners of property. If I buy a piece of land, I can do with it what I will. The Islamic concept of land is that all property belongs to God. Whoever buys it is only the trustee of that property. As a trustee, you owe a duty to those who are going to come and enjoy it after you. If we had a principle like that, probably we would not have the environmental problems that we have today.

In fact, African customary religion has got that concept deeply embedded in it. The African traditional view of the human community was that it's not only those who are alive here and now, but those who were before us and those who are yet to come; all three together, the three segments of the human community, together form an entity. The law must look at all those three before it makes a decision.

Every religion has this. Hinduism for example has beautiful descriptions of the nature of divinity, which would suit very well the Christian scriptures, and, in fact, some of them are referred to from time to time. You might remember Oppenheim, who contributed to the development of the nuclear weapon. He spoke of the Hindu scriptures as drawing his attention to the nature of God and the enormous beauty in the concept of God, and so on.

The descriptions of divinity and of righteous conduct in Hinduism, the idea of dharma, what is righteous conduct, is minutely analyzed in Hindu scripture, to the extent of volumes being written analyzing what are the constituent elements of righteous conduct. So in a world that is going to be one world, where everyone is going to be brother and sister to each other, where there will be a great deal of cultural exchange in the future, we can draw great inspiration from other religions, just as other religions can draw great inspiration from Christianity. All of these would be an important fertilizing source for the laws of the future.

*Id.* at 97–98.

18 Neil Hamilton et al., *Professional Formation/Professionalism's Foundation: Engaging Each Student's and Lawyer's Tradition on the Question "What Are My Responsibilities to Others?"*, 12 U. ST. THOMAS L.J. 271, 336–37 (2016) ("It is important for law students and lawyers to understand that there is very extensive common ground among nearly all the [faith and secular traditions] analyzed here on the question whether each individual student or lawyer should grow over a lifetime from high degrees of self-interest toward the



## B. Yoga Philosophy and Right Scholarship

Yoga philosophy provides another Eastern example of these universal principles. Yoga philosophy is not a religion but a philosophy first practiced by gurus or spiritual leaders in ancient India. Early yoga texts, thought to be written by the scholar Patanjali, contain a “ten commandments” of sorts, comprised of five restraints or ethical principles by which to live, and five personal observances.<sup>19</sup> These principles are universal in many respects and reflect the teachings of most of the major world religions. They also apply quite directly to practicing and teaching law. For legal academics, these principles apply to the three pillars of work life: teaching, scholarship, and service.

Yoga philosophy (again, along with most major religious traditions in the world) includes five principles of ethical standards, or *yamas*, through which people can strive for the deepest and most intense integrity in all their activities, be they professional or private.<sup>20</sup> These five *yamas* are 1) *ahimsa* or “nonviolence,” 2) *satya* or “truthfulness,”

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internalization of responsibilities to others.”).

19 See Nehal A. Patel, “Renounce and Enjoy”: *The Pursuit of Happiness through Gandhi’s Simple Living and High Thinking*, 13 SEATTLE J. FOR SOC. JUST. 319, 331–32 (2014) (discussing Patanjali and the *yamas*, as they relate to Gandhi’s use of the *yamas*). See also Nehal A. Patel, *Mindful Use: Gandhi’s Non-Possessive Property Theory*, 13 SEATTLE J. FOR SOC. JUST. 289 (2014) [hereinafter Patel, *Mindful Use*]. As Professor Patel explains:

To help him live the doctrine of *anasaktiyoga*, Gandhi practiced the principle of *aparigraha* (non-possession), which appears in an authoritative text written by Patanjali called the *Yoga Sutras*. In the *Yoga Sutras*, Patanjali discussed five methods of self-control (*yamas*) to help an individual nurture constructive thoughts and actions: *ahimsa* (non-violence, non-injury, or non-harm), *satya* (truthfulness), *brahmacharya* (continence), *asteya* (non-stealing), and *aparigraha* (non-possession, non-covetousness, or non-hoarding). Gandhi practiced all five *yamas*, and although modern commentators widely associate him with his use of *ahimsa*, his use of *aparigraha* deserves attention when addressing theories of property.

Patel, *Mindful Use*, *supra*, at 293–94 (citations omitted).

20 In choosing a philosophy with which to frame the work of the goddesses, I wanted to discuss an Eastern philosophy or religion rather than a Western one, consistent with the concept of commercial law “goddesses.” I ultimately chose to focus on yoga philosophy in writing this Essay, rather than another Eastern tradition such as the Buddhist Eightfold Path, in part because I am much more familiar with yoga philosophy, and in part because the principles of yoga philosophy apply so easily and directly to the scholarship of the goddesses. The Buddhist Eightfold Path would seem more relevant, given that I am describing “right scholarship” as a take-off of Buddhist principles. However, the principles of the Buddhist Eightfold Path (right understanding, right mindfulness, right speech, right living, right effort, right attentiveness, and right concentration) are difficult to

3) *asteya* or “non-stealing,” 4) *brahmacharya* or “continence,” and 5) *aparigraha* or “non-covetousness/envy.”<sup>21</sup> These are essentially the same principles that come out of the Christian golden rule, and are the equivalent in some ways to the New Testament verse proclaiming that “to those who are given much, much is required.”<sup>22</sup> In Judaism, my own tradition, we practice *bein adam la-havero* or “norms between man and his fellow-man,”<sup>23</sup> as well as *mishpat* or “justice,” *tzedakah* or “righteousness,” *hesed* or “kindness,” and *rahamim* or “compassion.”<sup>24</sup>

### 1. *Ahimsa*

*Ahimsa* is consideration for all living things, particularly those who are innocent, in difficulty, or worse off than we are.<sup>25</sup> *Ahimsa* or non-harming is not about simple ideas, such as “do not kill people” or “do not eat animals.” *Ahimsa* is much subtler and might include handling colleagues and students with compassion rather than contempt, and avoiding gossip and other hurtful nonproductive words.

### 2. *Satya*

Practicing *satya* or truthfulness is more than avoiding outright lies.<sup>26</sup> *Satya* literally means “right communication,” through our speech, our writings, our gestures (eye rolls included), and our other non-verbal communications. In everyday life, it might mean avoiding exaggeration and overstatement, and in scholarship, it means not fabricating,

apply to the written word.

21 There also are five rules to live by or *niyamas* that do not involve restraints or things to avoid, but things to actually do. These include *sauca* or “cleanliness”, *santosha* or “contentment”, *tapas* or “self-discipline”, *svadhyaya* or “self-examination”, and *isvara pranidhana* or “enlightenment.” META CHAYA HIRSCHL, VITAL YOGA: A SOURCEBOOK FOR STUDENTS AND TEACHERS 57 (2011).

22 Luke 12:48 (King James).

23 Matthew 7:12 (King James).

24 *Jewish Ethics: Some Basic Concepts and Ideas*, MY JEWISH LEARNING, <http://www.myjewishlearning.com/article/jewish-ethics-some-basic-concepts-and-ideas> [<https://perma.cc/URF4-TERJ>] (last visited Apr. 29, 2016).

25 HIRSCHL, *supra* note 21, at 56.

26 The concept of *satya* (truth) is central to Hindu philosophy, and speech is one way in which truth is spread. In the *Manusmriti* and in Patanjali’s text, truth is related to *ahimsa* or non-harming. Arpan Banerjee, *Political Censorship and Indian Cinematographic Laws: A Functionalist-Liberal Analysis*, 2 DREXEL L. REV. 557, 570 (2010).

cutting corners, or exaggerating. It also means exposing the world to the truths we may not wish to see, such as power imbalances, white privilege, and simple unfairness, as well as outright fraud.

### 3. *Asteya*

*Asteya* means not stealing, and being strong enough to resist a desire to take things that do not belong to us. It can include avoiding envy. In the context of law schools' teaching, scholarship, and service, it requires giving credit where credit is due, being careful not to use other people's ideas without attribution, and taking care not to take credit for other people's work.

### 4. *Aparigraha*

Avoiding greed involves the ability to accept only what is appropriate, at the same time that one is aware of the abundance and fulfillment already in our lives. This is so much harder than it sounds and can be advanced through gratitude practice.

### 5. *Brahmacharya*

Finally, we come to *brahmacharya* or continence, which is discussed directly or indirectly throughout the rest of this piece. In literal translation, *brahmacharya* means restraint. In many translations, it means restraint in sexual activity or colloquially, "not sleeping around." In other traditions, it means exercising moderation in all things. Translations are always tricky, but my interpretation of this in the context of scholarship—and again, these principles apply to scholarship, teaching, and service alike—is not doing so much scholarship that none of it really matters, or none of it says anything. Continence in this context also means avoiding writing scholarship on topics about which you do not care deeply. Again, every breath counts.

## C. Recognizing Scholarship Gone Wrong

While it may not be easy to recognize right scholarship or scholarship that is consistent with the *yamas*, scholarship that is inconsistent with the *yamas* is easy to spot. It is uninspiring and does not speak to us. In *Scholarship against Desire*,<sup>27</sup> Professor Shari Motro argues that we, as legal academics, have a duty to our students (without whom we

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27 See Shari Motro, *Scholarship against Desire*, 27 YALE J.L. & HUMAN. 115 (2015).

have no job, purpose, or essential grounding), to our communities local to global, and to ourselves, to dedicate our own scholarly efforts to things we care deeply about, to not just “go along,” writing just about anything we can to get the job done, to get a job, to get a promotion, to get famous, etc.<sup>28</sup>

To bring her point to light, she likens “going along” to certain forms of heterosexual sex from the female point of view. Namely, she describes that kind of sex where you have the sex and it is not offensive, and may even be interesting and enjoyable on some level, but it is not something you actually desire. From this concept of no desire comes the name of her article, *Scholarship against Desire*.<sup>29</sup> She describes in detail the ways in which she crafted her articles leading up to tenure, why she wrote them, how she found the hook that would lead to a “good placement,” and the feeling of emptiness she felt upon recognition that the work did not have ultimate meaning for her.<sup>30</sup>

When Professor Motro describes “going along” scholarship, she is not talking about the really bad, harmful scholarship, such as poorly done empirical work that threatens the value of well-done work in the same field. She is addressing the scholarship that is just okay, decent if not particularly useful or inspiring, work in which yes, you did the work, but it was not particularly meaningful even to you, let alone anyone else.<sup>31</sup> This “meh,” just okay, not great scholarship, she argues, creates a sort of global intellectual interference, not adding anything, but taking up valuable bandwidth or airspace.<sup>32</sup> Doing this type of scholarship, she claims, can make us numb as well as dishonest in the eyes of our students.<sup>33</sup>

Professor Motro would include scholarship borne out of external motivators in “going along” scholarship. Perhaps scholarship which was written because the author has expertise in the field and is asked to write it. Or the author is up for a promotion and needs to produce something for that promotion. Or he or she simply thought of a clever hook or twist on an already narrow path upon which his or her work was traversing.<sup>34</sup>

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28 *Id.*

29 *Id.*

30 *Id.* at 122–26.

31 *Id.*

32 *Id.*

33 Motro, *supra* note 27, at 144–51.

34 *Id.* at 139–42.

Speaking now for myself and not Professor Motro, I use the word “traversing” purposefully, rather than progressing, because the work is primarily fueling ego, or pushing through a crisis of career identity, with no real independent purpose. I have experienced each of these reasons for writing myself and have spoken to many others who have as well, particularly since circulating Professor Motro’s article to my faculty this past summer. Beautiful scholarship can spring forth, even when the work is undertaken for these reasons, but a lot of not-so-beautiful work also comes out of these externally-driven motives.

An external motivation is one directed at pleasing the outside world, in one way or another. The work created in response to this type of motivation is not very satisfying for most of us. Conversely, an internal motivation is directed at satisfying one’s deepest passions, perhaps by helping others or doing other positive things for the world at large. Work that springs from this well of enthusiasm and inspiration feels genuine, and is designed from the heart to change society in important ways, to unleash information that can be used to look critically at the condition of the law, or to educate people about a problem or a solution that the law has caused or can fix. This is right scholarship, and coming from internal motivation, it feels right on an almost cellular level.

#### **D. Recognizing Scholarship Gone Right**

Besides the feeling of “rightness” on a cellular level, one can recognize right scholarship in other ways. Some legal scholarship literally flows, meaning that the words roll off the page and into the consciousness of the reader. This form of flow can result from another form of flow, namely that state of mind one experiences when becoming so engrossed in a task that the time slips away and the person virtually becomes the task. Sometimes described as being “in the zone,” this state of mind can be experienced almost as a “high,” or as one in which the task at hand completes itself.<sup>35</sup> The actor almost disappears. Flow involves harnessing the emotions so that they are “in service” to the task, channeling all positive energy to the task. When a person is in flow, he or she achieves singular focus on the task.<sup>36</sup> For writers, including legal scholars, the author in flow becomes the written work. There is no separation between the author, the work, the words, or ultimately, the reader.

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35 See DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* 91 (1995); Jeanne Nakamura & Mihaly Csikszentmihalyi, *Flow Theory and Research*, in *OXFORD HANDBOOK OF POSITIVE PSYCHOLOGY* 18, 195–206 (Shane J. Lopez & C.R. Snyder eds., 2009).

36 GOLEMAN, *supra* note 35, at 91.

Flow was discovered, or at least named, by modern psychologist, Mihaly Csikszentmihalyi.<sup>37</sup> Csikszentmihalyi studied flow in surgeons, artists, mountain climbers, and other high achievers, noting the relationship between effectiveness and this magical state of focused concentration. In studying flow, Csikszentmihalyi found that this state of mind could be so enjoyable that the mind becomes completely absorbed in the task.<sup>38</sup> He also found that flow could release otherwise dammed-up solutions into consciousness.

According to Csikszentmihalyi, flow is achievable “only when we understand the ultimate goals involved, when the task is challenging but not beyond our skills or capacity to grow, and when we believe that the situation will respond to the quality of our actions.”<sup>39</sup> Tedium or anxiety are a buzz kill or “flow kill,”<sup>40</sup> as are external motivations that focus only upon pleasing others.<sup>41</sup> This “antiflow” includes all activity that is “meaningless, tedious [and] offers little challenge; is not intrinsically motivating; and creates a sense of lack of control.”<sup>42</sup>

Law Professor Stefan H. Krieger describes this flow state, which Krieger claims is associated with creativity, as follows:

Artists, athletes, composers, dancers, scientists, and peoples from all walks of life, when they describe how it feels when they are doing something that is worth doing for its own sake, use terms that are interchangeable in their minutest details. This unanimity suggests that order in consciousness produces a very specific experiential state, so desirable that one wishes to replicate it as often as possible. To this state, we have given the name

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37 Mihaly Csikszentmihalyi, *The Flow Experience and Its Significance for Human Psychology*, in OPTIMAL EXPERIENCE: PSYCHOLOGICAL STUDIES OF FLOW OF CONSCIOUSNESS 15 (Mihaly Csikszentmihalyi & Isabella Selega Csikszentmihalyi eds., 1988) [hereinafter OPTIMAL EXPERIENCE].

38 Richard K. Neumann Jr., *Donald Schön, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401, 422 (2000) (citing MIHALY CSIKSZENTMIHALYI, FLOW (1990)); MIHALY CSIKSZENTMIHALYI, BEYOND BOREDOM AND ANXIETY (1975).

39 *Id.* (citing Mihaly Csikszentmihalyi, *The Flow Experience*, in OPTIMAL EXPERIENCE, *supra* note 37, at 15, 29–35).

40 *Id.*

41 *Id.* (citing Mihaly Csikszentmihalyi, *The Future of Flow*, in OPTIMAL EXPERIENCE, *supra* note 37, at 364, 374).

42 *Id.* at 422–23 (citing Maria T. Allison & Margaret Carlisle Duncan, *Women, Work, and Flow*, in OPTIMAL EXPERIENCE, *supra* note 37, at 118, 120).

of “flow,” using a term that many respondents used in their interviews to explain what the optimal experience felt like.

Flow—the enjoyment that comes from surpassing ourselves, from mastering new obstacles, from making new discovery—motivates us to creative activity.

To experience flow, Csikszentmihalyi found, a person must become totally immersed in the activity. Flow transports us to a “new reality,” to a more complex self. To accomplish this transformation, a person must pay close attention to her actions so she can monitor feedback and concentrate on achieving her goals.

Moreover, she needs to enjoy herself by staying close to the “boundary between boredom and anxiety.” When there are too many demands, options, and challenges to handle, a person feels anxious and becomes paralyzed; when there are too few, she becomes bored. That point between boredom and anxiety allows for “convergent” thinking (conventional intelligence oriented to finding the one “correct” answer) but also “divergent” thinking (the ability to produce a number of possible answers based on the available information). The tension between these types of thinking evolves into a creative idea: holding on to what is accepted but being open to new viewpoints and ideas.<sup>43</sup>

As Krieger notes, strong domain or substantive knowledge is needed in order to be in flow. Otherwise anxiety takes over and makes the right frame of mind impossible.<sup>44</sup>

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43 Stefan H. Krieger, *Domain Knowledge and the Teaching of Creative Legal Problem Solving*, 11 CLINICAL L. REV. 149, 173–74 (2004).

44 *Id.* at 175. See also HUMAN FACTORS INT’L, CRAFTING FUN USER EXPERIENCES: A METHOD TO FACILITATE FLOW: A CONVERSATION WITH OWEN SHAFFER 3–4 (2013), <http://web.cs.wpi.edu/~gogo/courses/imgd5100/papers/FlowQuestionnaire.pdf> [<https://perma.cc/WZD8-Q2XD>]. Owen Shaffer claims that these seven conditions create flow:

1. Knowing what to do;
2. Knowing how to do it;
3. Knowing how well you are doing;
4. Knowing where to go (if navigation is involved);
5. High perceived challenges;

## II. The Passion Behind the Persons and the Products: Braucher, Warren and Right Scholarship

Having described purposeful, right scholarship as that scholarship that is important to us and that results from flow, it is finally time to look at some examples of inspired scholarship, created in flow and in the yogic traditions of the *yamas*. Examples of internal motivation, nonviolence, truthfulness, non-greed, non-envy, and continence appear throughout the work of the goddesses.

Before we begin, note that the fields of contracts, bankruptcy, and consumer protection—the academic purview of the goddesses—were originally occupied almost exclusively by men. The giants in the fields included people like Grant Gilmore, Vern Countryman, Lawrence Friedman, Stewart Macaulay, and William Whitford. Their rising protégés included the goddesses. From an all-male revue, we began to hear female voices speak out. In some cases, those voices followed those of their mentors, in others they diverged significantly.

### A. Background: One Recipe for Right Scholarship

After saying a bit below about each goddess's background, I provide just a few examples of these concepts from the literally hundreds that are available in their work. In these passages, we witness one by-product of inspired scholarship: the deep optimism that comes from believing legal scholarship can make a difference in the world.

Right scholarship can derive from any field. One need not be a consumer law advocate (though the goddesses were), nor need one be an advocate at all. One need only care deeply about the subject of his or her scholarship and believe that it can make a difference.<sup>45</sup>

### 1. Empiricism and the Goddesses

One ingredient in the recipe for right scholarship that both goddesses share is a desire

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6. High perceived skills; and
  7. Freedom from distractions.

*Id.*

<sup>45</sup> While the goddesses write in the areas of contract law, bankruptcy, and consumer law, among others, I do my best to avoid discussing substantive law here, instead focusing on those qualities that promote right scholarship.



to know how society actually lives and experiences life before assessing and reforming the law.<sup>46</sup> Both goddesses were talented empirical scholars, believing that the law should serve society, not vice versa, and also that we need facts about how people actually behave in order to create and perfect a meaningful legal system. While the need for real facts in assessing and creating legal rules sounds obvious, using empirical research in law is actually quite new.<sup>47</sup>

## 2. The Goddesses and the Underdog

Though I have met her, I do not know Senator Warren well. I did know Professor Braucher well, as she was a mentor and friend.<sup>48</sup> I am drawn to the work of both goddesses because of their shared, unflagging desire to make a difference and to protect the underdog. While Professor Warren's work focuses primarily on protecting the middle class from big banks and others with more power than they have, Professor Braucher often dips down to protection of the working poor in her work. From each of their unique vantage points, both goddesses embody the principles of non-harming and non-greed.

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46 For an extensive discussion of Professor Braucher's "Law in Action" approach to teaching and scholarship, see William C. Whitford, *Jean Braucher's Contracts World View*, 58 ARIZ. L. REV. 13 (2016). For a discussion of Elizabeth Warren's very extensive empirical work, see David A. Skeel, *Vern Countryman and the Path of Progressive (and Populist) Bankruptcy Scholarship*, 113 HARV. L. REV. 1075 (2000).

47 Skeel, *supra* note 46, at 1079–80 (noting that the rise of realism and empiricism started with corporate and commercial law).

48 To finish this Essay, I sequestered myself deep in the Jemez Mountains of New Mexico, where I carefully read the two memorial pieces written by her closest collaborators and mentors, Stewart Macaulay and William Whitford. To say that Professor Braucher adored these two gentlemen would be a tremendous understatement. It was wonderful to see that the feeling was mutual. See Stewart Macaulay, *I Remember Jean*, 58 ARIZ. L. REV. 3 (2016); Whitford, *supra* note 46. The two pieces made me cry and moved me down the journey of coming to terms with this loss of a friend and mentor. The only silver lining that came from Professor Braucher's early and senseless death was that I got to see these two wonderful and generous men at a memorial service sponsored by her school. I was able to meet Professor Macaulay for the first time, and I can see why Jean felt as she did about both of them. Professor Macaulay stated in his article about Jean that:

Jean applauded *Contracts: Law in Action*. In the same article, she also defended me from Grant Gilmore's attack in his *The Death of Contract* where he found my work completely without interest. She said that he had badly misread my writing. Gilmore's dismissal and contempt had hurt. I was grateful that she had defended me so strongly.

Macaulay, *supra*, at 5. This comment by Macaulay says as much about him as it does about her. This kind of humility and grace is not often found in pages like this and it goes to show that one need not be a woman (goddess) to demonstrate the qualities of *ahimsa*, *satya*, *asteya*, *brahmacharya*, and *aparigraha*.

### 3. Important but Not Self-Important

Professors Braucher and Warren are scholarship goddesses because they write and speak only about issues about which they are internally motivated and about which society cares, wasting no airspace or bandwidth on the trivial or the self-important. In that way, they both practice *brahmacharya* or continence in scholarship. For both, it starts and ends with passion. Below, I discuss where that passion might have come from, along with a few passages themselves.

As you read the passages below, see if you can identify the enduring themes of yoga philosophy. The work of the goddesses is critical to creating a just society, demonstrating *brahmacharya* or continence in scholarship. Topics like fraud, misrepresentation, unequal bargaining power, and all other ways in which we as a society either condone or directly participate in taking advantage of those less fortunate are problems for all of society, making these topics of deep importance across all races, income levels, and religions. These conditions hurt our economy and thus punish us all. The goddesses—in their lives and their work—demonstrate *satya* or truthfulness by saying what needs to be said about injustice. It is much simpler and more lucrative to stay quiet because it ruffles no feathers. Speaking of lucre, both goddesses eschewed higher paying jobs and expert witness engagements from powerful corporations and banks in order to spend countless hours championing the underdog, thus demonstrating non-stealing or *asteya*,<sup>49</sup> and non-greed or *aparigraha*. Finally, the work of the goddesses demonstrates non-harming or *ahimsa* because it seeks to uncover and then counteract financial harms being exacted on those with the least ability to endure them. Their scholarship is *ahimsa* embodied, as are their lives.

## B. Braucher's Gifts

### 1. Braucher's Background and Body of Work

The daughter of a Harvard Law professor, Professor Braucher was humble, kind, and a great mentor to junior colleagues and students alike. She mentored well in part because she was mentored well, particularly by Professors Stewart Macaulay and William Whitford, two other giants in the field of contract law, among other fields. Professor Braucher put on no airs, openly questioned the high salary demands of law professors in public institutions,

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49 In a sense, every form of societal privilege, be it white privilege, class privilege, wealth privilege, status privilege, or educational privilege to name a few, if not counterbalanced through right action, is a form of stealing from those less fortunate. As members of society, we owe duties to one another and we need to fight back against privilege by helping others.

and saw the sheer power of the law in the hands of whoever could access it. She was also a balanced individual with an active family, personal, and outdoor life.<sup>50</sup>

She was the Roger C. Henderson Professor of Law at the James E. Rogers College of Law, until she died of cancer at age sixty-four. She was revered for many things, but had remarkably diverse scholarly interests, ranging from staid contract law to modern bankruptcy and consumer law, all the way to cutting-edge post-modern international payment systems, software law, and the law of cyberspace.<sup>51</sup> In all topics, she sought justice for the little guy—in real life, not just in books and appellate court decisions.<sup>52</sup> She stood up against the powerful, and came to the aid of anyone unjustly harmed, including the working poor, students, junior colleagues, and even senior colleagues.<sup>53</sup>

While she was not much for labels or dualism, Professor Braucher was a realist

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50 She and her husband David Wohl were true soulmates, which I related to because my husband and I are the same way.

51 She was particularly fascinated with and disgusted by the power wielded by software companies versus regular people. See Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons For Policing of Standard Form Contracts*, 7 J. SMALL & EMERGING BUS. L. 393 (2003); Jean Braucher, *Rent-Seeking and Risk-Fixing in the New Statutory Law of Electronic Commerce: Difficulties in Moving Consumer Protection Online*, 2001 WIS. L. REV. 527, 529 (2001). She studied international payments systems, including Uniform Computer Information Transfer Act, commonly called UCITA, which she said she preferred to pronounce the Italian way, “YOU-CHEAT-A.”

52 Jean Braucher, *Amended Article 2 and the Decision to Trust the Courts: The Case against Enforcing Delayed Mass-Market Terms, Especially for Software*, 2004 WIS. L. REV. 753, 764–65 (2004) (noting that few consumers can police the marketplace). Indeed, she thought appellate courts often did not get it right and even when they did, that the impact of these decisions on the average person was slight. See Jean Braucher, *Deception, Economic Loss and Mass-Market Customers: Consumer Protection Statutes as Persuasive Authority in the Common Law of Fraud*, 48 ARIZ. L. REV. 829, 833 (2006) [hereinafter Braucher, *Deception*] (noting that consumers rarely sue when taken advantage of).

53 See Macaulay, *supra* note 48, at 5 (citing Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 52–55 (1995) [hereinafter Braucher, *Afterlife*]). He notes that when he was dismissed as unimportant by senior contracts scholar Grant Gilmore, Professor Braucher wrote in an article that followed:

Gilmore also could be bafflingly obtuse. He utterly failed to appreciate the power of Stewart Macaulay’s sociological research and practical realism as a perspective on late twentieth century law in action. Gilmore willfully misunderstood Macaulay, who deserves the last laugh.

*Id.* at n.12.

through and through, as described by William Whitford in his memoir article about her, *Jean Braucher's Contracts World View*:

She wanted to know how, if at all, common law doctrines, statutes, and administrative regulations affected that behavior, as well as what other, nonlegal, factors influenced that behavior. She wanted to know how judicial decisions affected legislative and administrative decision-making, and vice versa. And she wanted to know about all the influences—legal and nonlegal—impacting decision-makers, whether judicial, legislative, or administrative.<sup>54</sup>

In all areas, Professor Braucher carefully studied how people actually behaved, instead of relying on expected behaviors taught by doctrinal theories. In the realm of contract scholarship, she was a proponent of the relational theory of contracts, which espouses that the relationship of parties to a contract necessarily embodies more than just their contract terms, and includes all sorts of social relations and customs, including moral norms.<sup>55</sup> While these ideas might seem beyond obvious to most of society, they were radical when first espoused by Braucher's mentor, Stewart Macaulay, in the 60s.<sup>56</sup> She advocated for the inclusion of forgiveness as an important principle within contract law,<sup>57</sup> recognizing that contracts are more than private law between parties, but a reflection of humanity at its most fundamental.

In the realm of debtor-creditor law, Professor Braucher researched the shortcomings of bankruptcy laws, and published articles suggesting changes to make bankruptcy more effective. She was a true maverick in her recognition that lawyers wield massive power—for example, in personal bankruptcy, where lawyers can easily steer consumers into high-

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54 See Whitford, *supra* note 46, at 14.

55 See *id.* at 16; see also Jean Braucher, *Cowboy Contracts: The Arizona Supreme Court's Grand Tradition of Transactional Fairness*, 50 ARIZ. L. REV. 191, 197 (2008) (discussing the importance of morality in contracts).

56 See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Stewart Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812 (1961); Stewart Macaulay, *Contract Law and Contract Research (Part II)*, 20 J. LEGAL ED. 460 (1968). See also Whitford, *supra* note 46, at 16.

57 See generally Jean Braucher, *The Sacred and Profane Contracts Machine: The Complex Morality of Contract Law in Action*, 45 SUFFOLK U. L. REV. 667 (2012) [hereinafter Braucher, *Sacred and Profane*] (advocating for a general contract theory that is flexible and recognizes the need for adjustment, release, and forgiveness among good faith parties to a contract).

cost, low-value Chapter 13 bankruptcy filings that may not best meet their needs.<sup>58</sup> She and her co-authors built on this work in a ground-breaking piece, *Race, Attorney Influence, and Bankruptcy Chapter Choice*.<sup>59</sup> They found that low income people and people of color file the more expensive Chapter 13 cases more often than middle class white people, despite the fact that they have fewer assets to protect and thus have less need for this type of bankruptcy.<sup>60</sup> She was also way ahead of the curve in recognizing the student loan bubble crisis and also the massive proliferation of low-value, high-cost, for-profit university degrees.<sup>61</sup> She saw consumer protection, another specialty, as a matter of “minimum decency.”<sup>62</sup>

While others justifiably call Professor Braucher a “giant” in many fields,<sup>63</sup> I prefer goddess for her grace and dedication to the principles, if not the practices, of yoga.<sup>64</sup> In

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58 See Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993).

59 Jean Braucher et al., *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393 (2012) [hereinafter Braucher et al., *Race and Bankruptcy*].

60 *Id.* at 397. See also A. Mechele Dickerson, *Racial Steering In Bankruptcy: Bankruptcy and Race: Is There a Relation?*, 20 AM. BANKR. INST. L. REV. 623, 647–50 (2012). Using Professor Braucher’s article on race in bankruptcy as a jumping-off point, Professor Dickerson asks lawyers to ask themselves if they are being racially biased in their advice. *Id.* at 647. She then thanked the authors of this groundbreaking piece for not running away from race and concluded with,

I hope more legal scholars and empirical researchers will explore how race affects bankruptcy and commercial law outcomes. Turning a blind eye to race has never helped eliminate racism. And, pretending that the consumer bankruptcy system is colorblind will not give bankruptcy lawyers the motivation they need to overcome any implicit racial biases they might have.

*Id.* at 650.

61 See generally Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. 439, 441–42 (2012).

62 Braucher, *Deception*, *supra* note 52, at 833.

63 See Bob Lawless, *Jean Braucher in Memoriam*, CREDIT SLIPS (Nov. 26, 2014), <http://www.creditslips.org/creditslips/2014/11/jean-braucher-in-memoriam.html> [https://perma.cc/X5HX-WDGN]; Jeremy Telman, *On the Passing of Jean Braucher*, CONTRACTSPROF BLOG (Nov. 28, 2014), [http://lawprofessors.typepad.com/contractsprof\\_blog/2014/11/on-the-passing-of-jean-braucher.html](http://lawprofessors.typepad.com/contractsprof_blog/2014/11/on-the-passing-of-jean-braucher.html) [https://perma.cc/N92E-CBNZ]; *In Memoriam, Jean Braucher*, U. ARIZ. (Dec. 5, 2014), <https://uaatwork.arizona.edu/lqp/memoriam-jean-braucher-0> [https://perma.cc/29TS-BCT9].

64 She told me that hiking was her “meditation.”

addition to her fifty or so published articles, she was not afraid to get her hands dirty dealing with real people, particularly in the mortgage clinic she co-founded. Professor Braucher sought truth through education and a good close look behind the curtain.<sup>65</sup> As she herself explained, “for the sake of the integrity of the system as a whole, we need to know if there is a problem and if so, go about fixing it.”<sup>66</sup>

Her emphasis on the law’s role in the lives of real people made her a strong advocate for the underdog. She was especially motivated in this regard because the current state of the law does so little to protect the lower class. As she explained,

If there is a problem with consumer protection law . . . it is that it is seldom enforced, with the poor bearing the brunt of the ease with which con artists and slick operators can get away with their scams. The result is not only inefficiency but redistribution from the relatively worse off to the relatively better off.<sup>67</sup>

As further articulated by long-time friend and collaborator William Whitford:

There remain the questions of why Jean was so passionate about studying contracts law in action, and how she proposed to go about doing so. Respecting the why question, I believe the basic reason is that Jean was ultimately a very practical person who was committed to making the world a better place. And she did not believe that the best way to have impact was usually to debate or change doctrine, and certainly one needed to study more than doctrine to have any idea when a doctrinal change might make a difference. What Jean needed in order to formulate reform proposals that might actually make a difference was much more information about how parties actually behaved and for what reasons—the law “in action.”<sup>68</sup>

As explained above, Professor Braucher’s scholarship on the plight of the underprivileged shows deep signs of *ahimsa* or nonviolence, *satya* or truthfulness, *asteya*

65 Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP)*, 52 ARIZ. L. REV. 727 (2010); Braucher et al., *Race and Bankruptcy*, *supra* note 59, at 37.

66 Braucher et al., *Race and Bankruptcy*, *supra* note 59, at 37.

67 Braucher, *Deception*, *supra* note 52, at 833.

68 Whitford, *supra* note 46, at 1.

or non-stealing, *brahmacharya* or continence, and *aparigraha* or non-covetousness/envy throughout. Her views on wealth distribution demonstrate these *yamas* in action, as this passage shows:

It is hard to tolerate . . . extreme contractual advantage-taking by those rich in entitlements in their dealings with the relatively poor, so long as we fail to redistribute sufficiently through taxes and transfer payments. This is a reason for contract law to take wealth disparities into account.<sup>69</sup>

She eschewed modern, middle class consumeristic excess in her own life<sup>70</sup> and her papers consistently feature protections for the working poor. One can't help but wonder if her position safe and square among the middle, if not upper-middle, class gave her the luxury of looking down the social ladder to those less fortunate from an early point in her career. She was willing to leverage her position of security and privilege to advocate for low-income people, even when it meant making more unorthodox arguments in the law.

## 2. Passages of Perseverance and Playfulness

Part of producing right scholarship, or any work with meaning, is enjoying the work. For some people, this means having fun and injecting a degree of whimsy into their work. Professor Braucher was a serious scholar, but she also liked to have fun.<sup>71</sup> She once described the United States Supreme Court's deeply troubling ruling in *Morales v. Trans World Airlines*,<sup>72</sup> which prevented states from protecting their consumers from false advertisement, as "uninspiring."<sup>73</sup> Her frequent use of song lyrics, movies, and literature

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69 See *id.* at 23 (citing Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 709–11 (1990)).

70 She told me that even in her comfortable family station, as a child her family went out to eat only a couple or a few times a year. She did not spend money on herself easily, but was generous with others.

71 For a fabulous, fun, ride into law as it relates to literature and popular film, see Braucher, *Sacred and Profane*, *supra* note 57. See also Macaulay, *supra* note 48, at 7–8 (Macaulay's detailed account of the ways in which he and Professor Braucher discussed the plot from Harriet Beecher Stowe's book, *The Minister Wooing*, as well as the plot for *Casablanca*, for Braucher's article about situations in which one might be morally obligated to release another from a promise).

72 504 U.S. 374 (1992).

73 See Braucher, *Afterlife*, *supra* note 53, at 75. To elaborate, she explained:

The greatest error was made in the earlier *Morales* case, when the Court cut off state public enforcement against airlines under state unfair and deceptive practices legislation.

in her law review articles has been noted in detail by her mentors, Professors Macaulay and Whitford.<sup>74</sup> Not always so highbrow, she was also known to cite the band the Talking Heads in her footnotes.<sup>75</sup> As a fellow fun lover, I was heavily influenced by her work and voice in developing my own career and scholarly voice. Professor Braucher always let her mentees, both junior faculty and students, know that they could be regular or even deeply unconventional<sup>76</sup> people who need not put on airs in scholarship. In her own work, she built a legacy of continuing impact through junior colleagues, and also carefully modelled true enjoyment, even whimsy and humor, in her scholarship. For example, describing the conclusion of Grant Gilmore's book, *The Death of Contract*—that free market extremism had killed contracts—she said:

In *The Death of Contract*, Gilmore struck a musty and slightly stodgy pose. He wistfully looked back to “the idea of unrestricted freedom of contract, which was surely one of the master concepts of nineteenth century thought.” He was confident that we had moved beyond such thinking, perhaps too far beyond.<sup>77</sup>

Going on and describing Gilmore's critique of the traditional way in which contract is taught, she says:

State attorneys general have been an important resource for consumer protection. Federal inaction in consumer protection enforcement in recent years has left the states as virtually the only means of public enforcement. A private consumer fraud cause of action is less effective than public enforcement as a means of consumer protection. Least effective of all is the theory the Supreme Court preserved—a simple contract action, unsupported by attorneys' fees and multiple or punitive damages to make litigation worth the time and trouble when small amounts are in controversy. The Supreme Court's lack of sophistication concerning consumer law in action is uninspiring.

*Id.*

74 Macaulay, *supra* note 48, at 7–11; Whitford, *supra* note 46, at 30–31.

75 See Braucher, *Afterlife*, *supra* note 53, at n.1.

76 Professor Braucher was herself deeply unconventional in some ways. At one time she, tongue in cheek but with honest curiosity, questioned whether appellate cases should even appear in *Contracts: Law in Action*, the contract casebook she co-edited (2014). As she said in an email to her mentors Macaulay and Whitford, commenting on an article describing the origins and philosophy behind the casebook's approach, “[T]he reported, fully litigated case is a freak, often atypical of disputes in general . . . Why keep the appellate cases? If they are not representative, maybe they just mislead.” Whitford, *supra* note 46, at 31.

77 See Braucher, *Afterlife*, *supra* note 53, at 49 (quoting GRANT GILMORE, *THE DEATH OF CONTRACT* (Ronald K.L. Collins ed., 2d ed. 1995)).



Despite Gilmore's expressed admiration for Friedman's *Contract Law in America*, he ignored not only Friedman's main point, but his related observations about contracts teaching, which were scathing: ". . . the common-law approach to law in the schools and in legal literature at its worst could be compared to a zoology course which confined its study to dodos and unicorns, to beasts rare or long dead and beasts that never lived." This, alas, was just the kind of study Gilmore could not resist—he loved those dear dead dodos too much.<sup>78</sup>

Describing the now much-maligned 2005 Bankruptcy Abuse and Consumer Protection Act in another article, she mentions that soon after enactment, bankruptcy experts began to refer to the new law "by the fanciful acronym BARF (perhaps for "BANKruptcy ReForm Act" or "Bankruptcy Abuse Reduction Fiasco")."<sup>79</sup> She called this slang name for the law a "sure sign of the enterprise's distress."<sup>80</sup> The law itself, Braucher claims, "commits two counts of intentional fraud in its name alone: one, because it does not do a good job of preventing abuse and two, because it does not protect consumers."<sup>81</sup>

In a paper that proposes a single chapter or portal for consumer bankruptcy debtors, she tells it like it is, asserting that Chapter 13 has lost its luster, but never had much to begin

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78 *Id.* She goes on to honor Professor Gilmore with her own take on his enticing, if not overdramatized, idea that rational contract doctrine might actually be dead:

Contracts can seem like a field where nothing ever happens, which indeed would make it a dead subject. We sometimes appear condemned to rehearse dualisms—classicism versus romanticism, independence versus interdependence—ad infinitum and ad nauseam. Lecturing in 1970, Grant Gilmore had the good fortune to believe that something had happened, although he named the event a "Death." He at least pretended to believe that classical contract doctrine had died with laissez-faire thinking. He also professed to think that an ethos of interdependence had prevailed in law as in economics. If so, one might think some modest celebration appropriate, rather than mourning, but that would have spoiled the drama of Gilmore's title, and what he believed in most of all was the value of telling a good story.

*Id.* at 49.

79 Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: A Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1296 (2006).

80 *Id.*

81 *Id.*

with, since most Chapter 13 debtors do not finish their repayment plans and so never get their bankruptcy discharge. She explains:

Although many well-meaning and optimistic debtors entered into Chapter 13 to try to do the right thing, two-thirds did not complete their plans. Now, Chapter 13 is less voluntary and, for several reasons, even less promising as a way for debtors to deal effectively with their problems. As a result, perhaps Chapter 13 will wither away, or better yet, future reform legislation could deliver the coup de grace.<sup>82</sup>

In perhaps my own favorite passage, she refers to the Republican Party's "Contract with America" as an unenforceable contract of adhesion.<sup>83</sup> Again not afraid to tell us how she really feels, words like "outrageous"<sup>84</sup> or "outlandish" are fair game in her scholarship, as in this passage on fraud theory:

Part I of this article will explain why the question whether to bar a fraud theory in a contractual context is not close. The answer should clearly be no. It will further explain why it is outlandish to suggest that consumer protection statutes were intended to be limited to cases in which the consumer did not enter into a contract with the deceiver or the fraud did not directly concern the subject-matter of the contract.<sup>85</sup>

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82 *Id.* at 1298.

83 See Braucher, *Afterlife*, *supra* note 53, at 53. For some context on what this "Contract with America" was, see Whitford, *supra* note 46, at 19–20. He explains,

Jean lamented the neoclassical revival clearly occurring in academia in 1995, and she associated that revival with the seeming popularity (at the time) of Newt Gingrich's political rhetoric about a "Contract With America" in the 1994 election campaign. The Republicans had just won a substantial victory in the 1994 congressional elections, becoming the majority party in the House of Representatives, and Gingrich's rhetoric (he called it a program) was given some credit.

*Id.*

84 "An even more outrageous development is the extension of an economic loss rule to statutory consumer protection claims." Braucher, *Deception*, *supra* note 52, at 855.

85 *Id.* at 834.

It is no wonder Professor Braucher's collaborator, Professor Whitford, describes her as a "zealot in promoting the study of the law in action, particularly with respect to the study of contracts."<sup>86</sup> As she explained in an email to Whitford and Macaulay,

The law does not march forward so much as stumble on. If common law decisions matter much to powerful interests, statutes are likely to be employed, and even then, unintended consequences—or less charitably, tolerated injustices—are a common result. Law is about social struggle, and we never get neat, perfect conclusions.<sup>87</sup>

### C. Warren's Gifts

#### 1. Warren's Background and Body of Work

Professor Warren, who is now a United States Senator for the state of Massachusetts, had a taste of the squarely middle class life enjoyed by Professor Braucher, but it was taken away at an early age. Speaking about her own background, Professor Warren explained:

Like a lot of you, I grew up in a family on the ragged edges of the middle class. My daddy sold carpeting and ended up as a maintenance man. After he had a heart attack, my mom worked the phones at Sears so we could hang on to our house.<sup>88</sup>

In her memoir, *A Fighting Chance*,<sup>89</sup> one can learn more about this financially-precarious upbringing, but the brief quote above demonstrates two things: first, the ease with which Professor Warren can communicate her ideas to almost anyone, and second, why she might be most passionate about helping the middle class hang on to its station in life. She was ahead of her time in living the drop in economic prosperity that many Americans have faced over the past two decades due to rising expenses and needs, flat wages, and the 2008 financial crisis. Professor Warren is watchful, no doubt in part because she knows exactly what it feels like to lose a lot and fear losing it all. She has seen first-

86 See Whitford, *supra* note 46, at 14.

87 *Id.* at 31.

88 Jody Kantor, *Behind Consumer Agency Idea, a Tireless Advocate*, N.Y. TIMES, Mar. 24, 2010, at A1; see also *Elizabeth Warren on Families & Children*, ON ISSUES, [http://www.ontheissues.org/Social/Elizabeth\\_Warren\\_Families\\_+\\_Children.htm](http://www.ontheissues.org/Social/Elizabeth_Warren_Families_+_Children.htm) [<https://perma.cc/2DGX-WRZU>] (last visited May 1, 2016).

89 ELIZABETH WARREN, *A FIGHTING CHANCE* 5–10 (2014).

hand how easily one can slip out of the middle class. She has said that she “learned early on what debt means, how vulnerable it makes people, what the security of owning a home means.”<sup>90</sup> Her background has given her the aura of a fierce warrior, a tough exterior with vision, and no fear of expressing herself.<sup>91</sup>

Like Professor Braucher, Professor Warren publishes and researches in many fields. She is most known at this point for her research regarding the need for more consumer credit regulation in mortgages, credit cards, and other financial products, but also has done extensive studies regarding how bankruptcy affects families,<sup>92</sup> and what modern-day factors contribute to an increased number of bankruptcies.<sup>93</sup> The impact of her work is exemplified by an article she co-wrote that led to the creation of the Consumer Financial Protection Bureau (“CFPB”), the first federal administrative agency with the authority to examine large creditors to ensure compliance with consumer protection laws.<sup>94</sup> As such, the creation of the CFPB is arguably the single largest consumer law development in history.<sup>95</sup>

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90 *Id.*

91 *Id.*

92 Skeel, *supra* note 46, at n.84.

93 *Id.* at 1094.

94 Whitford, *supra* note 46, at 27.

95 This conclusion is my own, but the power of the CFPB is summarized in some of Professor Braucher’s work as follows:

The Dodd-Frank Act gives the CFPB five structural features that increase the likelihood of the Bureau engaging in significant consumer protection. First, it has a broad statutory mandate to protect consumers from a plethora of financial-product risks, including unfair, abusive, deceptive, and discriminatory practices, as well as regulatory authority over nineteen federal consumer-protection statutes. Equally as important, this is the CFPB’s sole mission. Thus, it does not face the perceived internal conflict of a dual mission that also includes prudential regulation of the safety and soundness of financial institutions. Prudential regulators often consider consumer protection to conflict with bank safety and soundness, because protecting consumers from harmful yet profitable products could hurt banks’ bottom lines. This conflict may be overstated; one potential lesson from the recent financial crisis is that a lack of consumer financial protection may lead to underwriting practices that are not sustainable in the long run. But regardless of the true extent of this conflict, the lack of a prudential mission means that there is no potential counterpoint to the Bureau’s consumer protection goals. Moreover, an agency whose *raison d’être* is consumer protection is unlikely to abandon its consumer protection mission because doing so would leave it with no purpose, and it is a rare regulatory body that wants to eliminate the justification for its existence.

Professor Warren has a colloquial charm in her writing that makes it very accessible and relevant. Besides the clear importance and relatability of the topics she writes about—topics we all care about on almost every level, including debt, families, fraud deception, fairness, equality, and society as a whole—Professor Warren’s writing is plainspoken and direct, as the excerpts below demonstrate. She writes in short, simple sentences that are easy to follow, and at a reading level that the average person, rather than the average scholar, can access.<sup>96</sup> She eliminates repetition by underutilizing transition sentences and tells stories through accessible structure, familiar language, and short paragraphs. It is some of the best legal writing in existence, in my opinion.

## 2. Warren’s Work by Example

In her article, *Stewart Macaulay: A Few Personal Reflections*, Professor Warren described a contracts conference as a “highbrow knock-off of the Indy 500.”<sup>97</sup> At the same conference, Professor Stewart Macaulay presented influential empirical data proving that business realities and practices are “far more influential on business relationships than legal remedies such as damages.”<sup>98</sup> Given the extent to which the traditional doctrinal contracts professors were attached to their doctrine and threatened by challenge, Professor Warren explains that Professor Stewart Macaulay and his groundbreaking work were “the skunk at the picnic.”<sup>99</sup> Professor Warren, like Professor Braucher, has expressed deep gratitude for the work and mentorship of Professor Macaulay. In *Stewart Macaulay: A Few Personal Reflections*, which recounts the many things for which Professor Warren is indebted to Macaulay, she repeats what we all now know, namely that “law isn’t free and that most people don’t know the law.”<sup>100</sup> Describing her own work in this tribute to Professor Macaulay, she explains:

When I got into an argument with someone over how deeply unfair it was

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Jean Braucher & Angela Littwin, *Examination as a Method of Consumer Protection*, 87 TEMPLE L. REV. 807, 821 (2015).

96 When running her text from *Making Credit Safer*, for example, through grade-level software, her text is written at approximately a college sophomore reading level. Oren Bar-Grill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008).

97 Elizabeth Warren, *Stewart Macaulay: A Few Personal Reflections*, 2013 WIS. L. REV. 1295, 1296 (2013).

98 *Id.*

99 *Id.*

100 *Id.* at 1296 (citations omitted).

to use contract law to enforce lopsided and unreadable terms in a credit card agreement or how bankruptcy laws should be expanded to offer more protection for people facing medical hardships, Stewart would cheerfully mock my passion to change the world, calling me “Sister Elizabeth.”<sup>101</sup>

She credits Macaulay with provoking “a deep hunger in me to find out how law really works and, in the process, to find out more about how the world works—and ultimately to learn for whom the law works.”<sup>102</sup>

In an article describing her most influential work to date, *Making Credit Safer*,<sup>103</sup> she wrote that due to governmental regulation: “It is impossible [in the United States] to buy a toaster that has a one-in-five chance of bursting into flames and burning down your house,” but “innovation in financial products has produced incomprehensible terms and sharp practices that have left families at the mercy of those who write the contracts.”<sup>104</sup>

Later, during the financial crisis, Professor Warren highlighted how before the subprime mortgage crisis the mortgage lenders’ fraudulent and deceptive practices had already stripped \$9.1 billion in equity from homeowners and in 2008 alone cost lenders nearly \$2.5 billion in losses.<sup>105</sup>

Professor Warren demonstrates bravery and several of the yoga principles in calling out these frauds. Clearly there is non-greed at work, as well as truthfulness. Professor Warren is now a politician and by being more moderate she could clearly garner a higher paying job, one that might be unavailable to someone who speaks the truth in terms as plain as these. Professor Warren also demonstrates non-envy in not reaching for these jobs. She is clearly qualified but does not strive for that kind of fame. She would rather speak the truth than allow it to be shoved under the rug. She has put others who are less fortunate ahead of herself in sharing these views in such vehement ways.

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101 *Id.* at 1297.

102 *Id.* at 1296.

103 Bar-Gill & Warren, *supra* note 96.

104 Elizabeth Warren, *Making Credit Safer*, HARV. MAG. (May-June 2008), <http://harvardmagazine.com/2008/05/making-credit-safer-html> [<https://perma.cc/PXC2-9PK3>] (last visited May 1, 2016).

105 Marvin N. Bagwell, *Can't Live Without Air: Title Insurance and the Bursting of the Real Estate Bubble*, 30 PACE L. REV. 180, 224 (2009) (citations omitted).

Being provocative and selfless, and speaking the truth, is nothing new for Professor Warren. She expressed unpopular views long before she became a United States Senator. For example, in *Financial Collapse and Class Status: Who Goes Bankrupt?*, Professor Warren explains her counterintuitive but resoundingly clear conclusion that bankruptcy is a middle class phenomenon, stating,

The data presented here make it clear that, whatever their current economic circumstances, the families in bankruptcy share many of the same educational, occupational, and home buying experiences as other middle-class Americans. Their deep financial distress suggests a growing reason for concern about these families, who make up the heart of America.<sup>106</sup>

There is no doubt that being female is a defining part of her being and a core part of her scholarly perspective. She has said: “The word’s out: I’m a woman, and I’m going to have trouble backing off on that. I am what I am. I’ll go out and talk to people about what’s happening to their families, and when I do that, I’m a mother. I’m a grandmother.”<sup>107</sup> In *Families Alone: The Changing Economics of Childrearing*, she explains:

Families with children are under assault. The assault is quiet, attracting no newspaper headlines, no congressional investigations, no knowing conversations at dinner parties. The assault is stealthy, but no less dangerous to the financial survival of these families and their children—and ultimately to the survival of the middle class itself.<sup>108</sup>

She further explains that “[h]aving a child is now the single best predictor that a woman will end up in financial collapse.”<sup>109</sup> Warren attributes this remarkable conclusion to rising education costs and the financial sacrifices parents make to meet those costs, as well as rising health care costs for families.<sup>110</sup>

106 Elizabeth Warren, *Financial Collapse and Class Status: Who Goes Bankrupt?*, 41 OSGOODE HALL L.J. 114, 149 (2003).

107 Elizabeth Warren on Families & Children, *supra* note 88 (citing Samuel P. Jacobson, *Warren Takes Credit for Occupy Wall Street*, DAILY BEAST (Oct. 24, 2011), <http://www.thedailybeast.com/articles/2011/10/24/elizabeth-warren-i-created-occupy-wall-street.html> [https://perma.cc/P484-XED7]).

108 Elizabeth Warren, *Families Alone: The Changing Economics of Rearing Children*, 58 OKLA. L. REV. 551, 551 (2005).

109 *Id.* at 552.

110 *Id.*; see also Melissa B. Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior: An Alternative*

Professor Warren produces right scholarship, not so much through the whimsy Professor Braucher expressed, but through vivid imagery, as this passage from *Bankrupt Children* demonstrates:

To capture your attention, I might start this Essay with photographs of people in the bankruptcy court. Instead of anxious women and angry men, I would flash up pictures of small babies in oversized plastic car seats and toddlers trying to wiggle off their mothers' laps. There would be photos of older children, studiously avoiding eye contact with anyone, and teenagers charged with corralling their younger siblings. Images are powerfully important to shaping our attitudes toward everything from cornflakes to life insurance, and bankruptcy is no exception.<sup>111</sup>

This is right scholarship because it speaks to us on issues we care about deeply. In *Bankrupt Children*, Professor Warren goes on to say:

If I showed you photographs of these children, you might come to understand bankruptcy differently. You might be more sympathetic to families in financial trouble. You might have a newfound appreciation for the impact of legal policies that affect whether these babies' mothers will compete with credit card companies when they try to collect child support from their ex-husbands or whether third graders will have to change schools because their daddies did not see the traps in mortgage refinancing.<sup>112</sup>

Describing the fate of American families, no doubt from her research but also her life experiences, she claims that "the answer to the question of greater support for families is not obvious. It requires a shared vision about our collective responsibility to support

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*Account of Medical-Related Financial Distress*, 100 NW. U. L. REV. 535 (2006). For a further discussion of the ramifications of this work, see Angela P. Harris, *Loving Before and After the Law, Loving Before and After the Law*, 76 FORDHAM L. REV. 2821, 2844-45 (2008).

111 Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. 1003, 1004 (2002).

112 *Id.*



children.”<sup>113</sup> Finally, she says that “the data are relentless: Married or single, families with children are in crisis.”<sup>114</sup>

In one of my favorite articles by Professor Warren, she demonstrates *satya* (truthfulness), *asteya* (non-stealing), *aparigraha* (non-greed), and *ahimsa* (non-harming) in calling out banks on some very controversial findings. By using hard data, she shows that even when adjusted for income, bankruptcy and predatory lending hit people of color harder than white people.<sup>115</sup> When explaining the problems with race and predatory lending she is direct and cuts right to the truth of the matter:

The connection between predatory mortgage lending and race is unmistakable: Predatory lenders target black and Hispanic homeowners. They are, of course, glad to take a subprime mortgage from anyone, but they redouble their efforts to saddle families they see as vulnerable with burdensome mortgages, and that includes black and Hispanic families. In 2002, Citibank’s subprime lending subsidiary was prosecuted for deceptive marketing practices, and the company paid \$240 million to settle the case—at the time, the largest settlement of its kind. A former loan officer testified about how she marketed the mortgages: “If someone appeared uneducated, inarticulate, was a minority, or was particularly old or young,

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113 *Id.* at 1024.

114 Elizabeth Warren, *The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401, 408 (2003).

115 See Elizabeth Warren, *The Economics of Race: When Making It to The Middle Is Not Enough*, 61 WASH. & LEE L. REV. 1777, 1787 (2004). As she explains:

The data also suggest that problems that drive families into bankruptcy—jobs, medical, and family breakups—are hitting some racial groups harder than others. The data show that among the filers, whites, Hispanics, and blacks are all likely to be in bankruptcy because of jobs losses in about the same proportions. But dividing the data by their proportions in the population demonstrates that Hispanics are filing for bankruptcy because of job problems about twice as often as non-Hispanic whites, and blacks are filing for job reasons at about three times the rate of their white counterparts. The same is true for medical problems and family breakups. Similar problems seem to drive families of all racial groups into bankruptcy, but those problems trigger far more bankruptcies among Hispanic and black families than among white families. The data strongly support the inference that economic stress related to race is not concentrated solely among the chronically poor. Instead, middle class families of color are under substantial pressure—pressure that is pushing substantial numbers into bankruptcy every year.

*Id.*

I would try to include all the [additional costs] CitiFinancial offered.” In other words, lending agents routinely steered “minority” families to higher cost loans whenever they thought there was a chance they could get away with it.

Such steering hits minority homeowners with particular force. Several researchers have shown that minority families are far more likely than white families to get stuck with subprime mortgages, even when the data are controlled for income and credit rating. According to one study, black borrowers are 440% more likely than white borrowers to end up with a subprime rather than a prime mortgage. In fact, residents in high-income, predominantly black neighborhoods are actually more likely to get a subprime mortgage than residents in low-income white neighborhoods—more than twice as likely.<sup>116</sup>

Even though she was one of the first to call out these racial inequalities with real empirical research, she is humble in her approach, demonstrating *asteya* by giving credit to others, and brave in expressing her truth through *satya*:

Minority rights groups are well aware of the dangers of the predatory lending industry. There is, however, an important question of how high economic issues should rank in their list of priorities. When Senator Trent Lott seemingly expressed his nostalgia for a segregated America, minority groups around the country barraged the talk shows and newspapers, and Senator Lott was ultimately stripped of his powerful position as Majority Leader of the Senate. Similarly, when Texaco executives were accused of using racial slurs to refer to blacks, the company was boycotted, sued for millions of dollars, and forced to adopt new practices to ensure that its black employees had better opportunities. But when a Citibank official said in sworn affidavits that she regularly added extra fees to a home mortgage “[i]f someone . . . was a minority,” there was little response. Citibank quietly agreed to a cash settlement with the FTC, and there were no press releases from the NAACP, no extended discussions on Hispanic radio stations, no interviews on the evening news, and no calls for Citibank’s highly visible CEO Sandy Weill to resign.<sup>117</sup>

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116 *Id.* at 1794–95.

117 *Id.* at 1798. She further explains that:

Thus far, we have focused on Professor Warren's style and way of reaching people as a legal scholar. Now there is a postscript to school life that can be seen in her work as a public servant and United States Senator. As she says, "I know what I am in Washington to do: I'm here to fight for hardworking families."<sup>118</sup> She explains our social responsibility to one another in the same plainspoken terms: "Now look, you built a factory and it turned into something terrific or a great idea, God Bless, keep a big hunk of it. But part of the underlying social contract is you take a hunk of that and pay forward for the next kid who comes along."<sup>119</sup>

Continuing the theme, she has said, "I hear all this, you know, 'Well, this is class warfare, this is whatever.' No. There is nobody in this country who got rich on his own—nobody."<sup>120</sup> As to the bankers who find her to be thorny, she says, "I made it real clear to the business community—if your plan for innovation is to trick people, is to fool them, is not to tell them the truth about the price, then you're right: I'm going to be right in the way."<sup>121</sup> She can still talk to all of us, not just the scholars, as this quote about a complex topic shows:

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There are other signs that homeownership does not represent the same wealth accumulation for black and Hispanic families as for their white counterparts. Among white homeowners, median mortgages were about 56.9% of the median value of their homes. Nonwhite and Hispanic families carried larger median mortgages relative to the value of their homes—66.3%. This suggests that across the board, whether they have been ensnared by predatory lenders or not, nonwhite and Hispanic homeowners are taking on more mortgage debt relative to the value of their homes. This mortgage debt leaves them with less equity in their homes and relatively larger debts that must be paid even during times of financial reversals.

*Id.* at 1786.

118 Noam Scheiber, *Hillary's Nightmare? A Democratic Party That Realized Its Soul Lies with Elizabeth Warren*, NEW REPUBLIC (Nov. 10, 2013), <https://newrepublic.com/article/115509/elizabeth-warren-hillary-clintons-nightmare> [<https://perma.cc/HXW9-AR67>].

119 Lucy Madison, *Elizabeth Warren: "There is Nobody in This Country who Got Rich on His Own"*, CBS NEWS (Sept. 22, 2011), <http://www.cbsnews.com/news/elizabeth-warren-there-is-nobody-in-this-country-who-got-rich-on-his-own> [<https://perma.cc/KE2Q-NW2X>].

120 *Id.*

121 Deirdre Fulton, *"Did You Have Your Eyes Stitched Closed?" Warren Blasts Former Official*, COMMON DREAMS (Apr. 6, 2016), <http://www.commondreams.org/news/2016/04/06/did-you-have-your-eyes-stitched-closed-warren-blasts-former-fed-official> [<https://perma.cc/B6NM-FSWQ>].

Markets work when people can evaluate the prices and risks of different products, then pick the ones that work best for them. But when the terms of the deal are hidden, competition doesn't work. And customers aren't the only ones who are hurt.<sup>122</sup>

Finally, in one of the best quotes flowing from the 2008 financial crisis, Senator Warren questioned claims by regulators that they had insufficient data to conclude that the 2008 meltdown was tied to loose 2005–2006 mortgage practices. Dubious, she asked, “Did you have your eyes stitched closed?”<sup>123</sup> Like Professor Braucher, Elizabeth Warren embodies a fierce warrior for the underdog and the principles of non-harming, truthfulness, non-envy, non-greed, and continence.

### CONCLUSION

One needn't be a deity to produce meaningful scholarship but one does need optimism, perseverance, a sense of what it means to do the right thing, as embodied in the yoga *yamas* and in every major religious tradition in the world, and above all, passion. We can all learn from commercial law goddesses Jean Braucher and Elizabeth Warren, and can all benefit from the path they forged for us in the tradition of right scholarship. Given what each has accomplished for the world at large, we can also all share in their deep optimism that legal scholarship can make a difference in the world. In short, Jean Braucher and Elizabeth Warren have lived the principles of the *yamas* in all the best ways, and we can only strive to do the same. In other words, we only have so many breaths.<sup>124</sup> We must choose carefully and make every one count.

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122 Elizabeth Warren, *Tricks, Traps, and Accountability*, HUFFINGTON POST (Jul. 23, 2012), [http://www.huffingtonpost.com/elizabeth-warren/cfpb-anniversary-consumer-protection\\_b\\_1695547.html](http://www.huffingtonpost.com/elizabeth-warren/cfpb-anniversary-consumer-protection_b_1695547.html) [https://perma.cc/UG28-QDNN].

123 Siri Bulusu, *Republicans Chide CFPB, as Warren Takes on Former Fed Officials*, MARKET WATCH (Apr. 25, 2016), <http://www.marketwatch.com/story/republicans-chide-cfpb-as-warren-takes-on-former-fed-official-2016-04-05> [https://perma.cc/K5E7-NMAZ].

124 See FRANTI, *supra* note 5.