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Scholarship Against Desire

Shari Motro*

Most scholarship in law is rather like the “old math”: static, stable, formal—rationalism walled against chaos. My writing is an intentional departure from that.

*Patricia Williams*¹

INTRODUCTION

“Where is your heart in this work?”

I often pose this question to faculty candidates I’m interviewing after they share their scholarly agenda. A depressing proportion seems baffled by the question. One refreshingly honest candidate answered: “It’s not.” He had started his career writing about a topic he was passionate about, but had concluded that it hurt his marketability. So he switched, and his stock went up. “Now I’m just solving an intellectual puzzle,” he said. And in the same breath: “It’s business.”²

Legal scholarship—like legal education—stands at a crossroads. The most visible causes are the recent economic downturn and its effects on the legal employment market, but the pressures to prove our relevance or prepare for extinction are part of a broader phenomenon that is shifting priorities in all of higher education: the rise of the corporate university.³ The corporate ethos prizes detachment over empathy, economics over humanities, practice over theory, and external success over the love of good work for its own sake,⁴ while marginalizing those who speak in a

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1. PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 7 (1991).

2. I later reached out to the person who said this and we had a rich conversation on these themes. He was comfortable with my sharing our exchange here.

3. See Frank Pasquale, *The Corporate University: Recent Developments*, BALKINIZATION (June 17, 2012), <http://balkin.blogspot.com/2012/06/corporate-university-recent.html>.

4. Cf. PETER GABEL, *ANOTHER WAY OF SEEING* 17-65 (2013) [hereinafter GABEL, *ANOTHER WAY*] (articulating a vision of law school that links the personal, the spiritual, and the socio-political); PETER GABEL, *THE BANK TELLER AND OTHER ESSAYS ON THE POLITICS OF MEANING* 157 (2000)

different voice.⁵ It dovetails with an orientation that has dominated legal scholarship and teaching for decades: a veneration for the detail-oriented, linear rationalism of the left side of the brain coupled with a distrust of the right hemisphere's knack for drawing connections, thinking creatively, and seeing the big picture.⁶

Until recently, I didn't question this reality. As a student, I quickly bought in to what Williams calls the "crisp, refreshing, clear-headed sensation that 'thinking like a lawyer' purportedly endows."⁷ When other modes competed for my attention, I shunned them like a child exposed by embarrassing relatives. In law practice, I continued to internalize the message that heart-centered wisdom is irrelevant to law, that people with highly developed intuitive and creative skills don't belong in the law. At best, these qualities are "icing on the cake"; at worst, they are the label we dread most of all: "soft."

This sensibility followed me into academia. As an aspiring law teacher on the academic job market and then as an assistant professor on the tenure track, I quickly learned that I would stand a better chance of being taken seriously if I talked law-and-economics rather than law-and-literature, if I asked questions I could solve rather than ones that merely invited a conversation, if I wrote about tax law rather than feminist theory. No one spelled this out explicitly; my institution didn't tell me what to write about and it supported many of my non-traditional experiments. But it is part of a world, a world in which law review placement is the coin of the realm. I wanted to do a good job, so I wrote in the mode most valued in this world.

[hereinafter GABEL, BANK TELLER]; ROBIN WEST, *NORMATIVE JURISPRUDENCE* 166-76 (2011) ("Scholarship that is seemingly aimed at making the world better . . . is now routinely derided as 'mere advocacy' at worst or embarrassingly normative at best: nonanalytically rigorous, slipshod, overly emotional, and sentimental."); Robin West, *The Anti-Empathic Turn* 2, 8-9 (Georgetown Pub. Law Research Paper, No. 11-97, 2011), available at <http://ssrn.com/abstract=1885079> (explaining the importance of "empathic excellence" to judicial decision-making and lamenting the rise of a new paradigm—"scientific judging"—which privileges economic and sociological data and "has virtually no need for a judge who is capable of emphatic engagement with litigants."); Peter Gabel, *Law and Hierarchy*, 19 *TIKKUN* 23 (2004) [hereinafter Gabel, *Hierarchy*] (emphasizing the importance of empathy and compassion in reversing law schools' role in legitimizing the injustices of society).

5. Carol Gilligan's *In a Different Voice* (1982) focused on psychological trends prevalent in women to reveal a difference between two modes, modes that often but not always track sex differences. My intention here is to refer to legal academics of any sex whose authentic mode of expression departs from the dominant discourse.

6. See BETTY EDWARDS, *DRAWING FROM THE RIGHT SIDE OF THE BRAIN* (1999); Gregory N. Mandel, *Left-Brain Versus Right-Brain*, 44 *U.C. DAVIS L. REV.* 283, 316-19 (2010); Graham B. Strong, *The Lawyer's Left Hand: Nonanalytical Thought in the Practice of Law*, 69 *U. COLO. L. REV.* 759 (1998); Jill Bolte Taylor, *My Stroke of Insight*, TED (Feb. 2008), http://www.ted.com/talks/jill_bolte_taylor_s_powerful_stroke_of_insight. Though recent research suggests the left/right brain distinction may be over-simplified, its use persists and serves as useful metaphor. See Tania Lombrozo, *The Truth About The Left Brain/Right Brain Relationship*, NAT'L PUB. RADIO (Dec. 2, 2013, 2:25 PM), <http://www.npr.org/blogs/13.7/2013/12/02/248089436/the-truth-about-the-left-brain-right-brain-relationship>; *Right Brain, Left Brain? Scientists Debunk Popular Theory*, HUFFINGTON POST (Aug. 19, 2013, 8:20 AM), http://www.huffingtonpost.com/2013/08/19/right-brain-left-brain-debunked_n_3762322.html.

7. WILLIAMS, *supra* note 1, at 12.

In the beginning, making these choices didn't feel like a compromise. I enjoyed solving puzzles. I enjoyed writing about tax. And I enjoyed the benefits that came along with publishing in top law reviews.

Then I made tenure, and something shifted. I began to see more clearly the subtle ways in which external pressures and incentives had skewed my work. I also discovered that despite the unparalleled security that came with my new title, these influences didn't disappear. I understood the deal: If I continued to produce within the mold that got me tenure I could stay in the game—I could continue to attract prestigious speaking invitations, queries from hiring committees, and rising-star-type awards. If I tried something new, I risked squandering the platform I'd worked so hard to build. I would dilute my brand.

These personal considerations paralleled institutional ones. If I kept hitting top reviews, my school would be better positioned to continue to rise in the rankings and I would continue to enjoy the warm inner glow that comes when we score for the home team. If I went alternative, what value would I bring? Could I justify pursuing my passion as anything other than selfish?

When I began this article, I didn't know the answer to these questions. Indeed, spending time exploring them seemed indulgent in itself, and I tried, multiple times, to abandon this project. Over the course of the writing, however, I've come to believe that legal academics are not only justified in investing in the work we love; we have a responsibility to do so.

Teacher-scholars have a responsibility to follow our deepest sense of calling because when we give up or delay indefinitely we contribute to the cynicism that plagues many of our students. Former dean of Yale Law School Anthony Kronman believes that students grow cynical through their encounter with advocacy—a discipline that views “truth as, at most, an instrumental good.”⁸ Cynicism is dangerous, Kronman believes, because it breeds callousness. Why do we, as a society, link the training of lawyers with the academic study of law? Why allow intellectuals to shape the next generation of counselors? Because intellectuals value truth as an end in itself, and truth matters—to our students, and ultimately, to our profession. To be a lawyer is to be entrusted with nothing less than the survival of our civilization. A less cynical, more honest bar is more likely to help us step away from the brink of self-destruction; a less cynical bar is more likely to steward us toward the “more beautiful world our hearts know is possible.”⁹ When law professors allow instrumental, egoic considerations to drive our scholarship, we fail to honor our mission. Instead of modeling integrity, we model something quite dark for our

8. Anthony T. Kronman, *Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 964 (1981).

9. See CHARLES EISENSTIEN, *THE MORE BEAUTIFUL WORLD OUR HEARTS KNOW IS POSSIBLE* (2013).

students. We model fear.¹⁰

The compromised academic also jeopardizes the intellectual mission of the university. Truly creative ideas are often dismissed as wild or impractical. This is one of the reasons we give people tenure. Those of us who have it are duty-bound to use it to explore and deliver the ideas that come through us, regardless of the accolades they may or may not bring our way.

And inauthenticity in scholarship undermines community. When idealistic scholars—like other minorities—withhold or dilute their radical visions, they squander an opportunity to chip away at the isolation that plagues other colleagues at the margins. When eccentrics try to blend in they squander the chance to demonstrate that *we* are not the problem, that the droves of law students, lawyers, and law professors who crave something else might have something valuable to say to the profession, that our choices are not limited to assimilating or slinking away in shame.

There is another way, there is another story—a story in which we not only belong, we're critical. True diversity requires not only that insiders accept "others" as guests; it requires an openness to the possibility that change can enrich everybody, an openness to a different kind of conversation. It's up to those of us who think differently to begin this conversation. Or rather, it's up to us to *continue* the conversation that our own heroes began for us, a conversation that at its heart is about broadening law's tent.

The scholarship I admire most reminds us that the law is always a work in progress, that every lawyer is both reader and co-author. It deepens our relationship with the law as something alive, something that is not "out there" ruling over our small insignificant lives, but is a part of us, something that each of us can not only tweak but fundamentally reimagine.¹¹ It encourages us to position legal rules and the clever ways

10. Duncan Kennedy's *Legal Education and the Reproduction of Hierarchy* (1983) articulated one of the most scathing condemnations of the political implications of the culture of legal education. For a friendly critique see Gabel, *Hierarchy*, *supra* note 4. See also GABEL, ANOTHER WAY, *supra* note 4; Peter Gabel, *Critical Legal Studies as a Spiritual Practice*, 36 PEPP. L. REV. 515 (2009). Cf. Peter Huang, *Tiger Cub Strikes Back* 1 BR. J. AM. LEG. STUD. 297 (2012) (drawing connections between mainstream legal education and tiger parenting and discussing how they can be improved by fostering life-long learning about character strengths, emotions, and ethics); John J. Osborn, *Bleak House: Narratives in Literature and Law School*, 52 N.Y.L. SCH. L. REV. 339 (2008) (suggesting that law students hate law school because it robs them of their personal narrative); Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741 (1997), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485065 (describing the author's journey from the "blood-sucking, soul-draining, tenure-chasing, article-writing hell" of his early days as the lone Indian American law professor on his faculty to a mode of teaching and practicing law that honors storytelling and community).

11. As one colleague put it,

I remember how horribly bad I was when I started teaching. . . . I was essentially teaching some law that was "out there" . . . and my sense was that I was outside of it, and I was deeply unhappy because I was kept in the frame that was given to me by cases, by books, by doctrinal work that I took extremely seriously. . . . I have become a more compassionate and perhaps more human and interesting [teacher]. . . I've become more bearable as I grew to accept that what's out there

we can manipulate them within a context, a context each of us must discern and choose. Great scholarship models a sense of purpose that stems from a different source than the drive toward personal advancement; it models courage.¹²

Alongside the drive to make legal education more responsive to market demands there is a parallel movement toward making it more responsive to *human* demands. Razor sharp analysis is important, but if not combined with a tolerance for uncertainty, with humility in the face of forces we cannot understand or control, with a type of intelligence that cannot be grasped through intellectual argumentation alone, it can be dangerous. People are waking up to the devastating effects of a legal paradigm rooted exclusively in adversarial, dialectic reasoning. People are dreaming of a new chapter in which a *juris doctor* is a degree that prepares us to diagnose and treat the illnesses of society, in which the law is a healing profession.¹³

Like Kierkegaard's knight of faith hiding within the body of a tax collector,¹⁴ some of these dreamers are conventional lawyers with conventional law practices who bring what good lawyers always brought to the table—a knack for details and logic as well as Atticus Finch-like emotional intelligence, integrity, and compassion. Others are pioneers of alternative lawyering streams like restorative justice, transformative

is not out there, it's what I'll make of it, it's what I will read into it that will make it interesting to people. Once I became able to laugh or take my distance or to mimic a legal construct . . . to just be emotional about it, to put some blood into a legal problem—then things started working much better. . . . One has to accept that dealing with law is ultimately dealing with oneself.

Writing law review articles is an extremely personal . . . experience.

Telephone Interview with Franz Werro, Professor of Law, Georgetown Law and Faculté de droit of the Univ. of Fribourg (Switzerland) (July 10, 2013, 11:22AM) (on file with author); *see also* GABEL, BANK TELLER, *supra* note 4, at 157 (“[L]egal reasoning . . . aspires to be a kind of disembodied thought. The training that lawyers undergo draws them toward becoming primarily technical analysts who learn how to ‘make arguments’ as if their thought process were simply a function of the law as an external and authoritative discourse. . . . [L]egal reasoning should not aspire to the kind of analytic rationality that places the reasoned at a distance from the world and that relies upon the ‘logical application of the law to the facts’ to resolve human problems.”); *id.* at 158 (“[E]xisting legal discourse reinforces . . . collective denial . . . through the reification of legal categories [P]eople believe the law to be a something outside and above us that acts upon us when ‘it’ is ‘applied’ to our situations.”).

12. For a discussion of the relationship between scholarship and law teaching, see Kronman, *supra* note 8, at 967 (“To a significant degree, law teaching is training in advocacy Advocacy entails an indifference to truth, which in turn encourages a cynical carelessness about the truth [The] law teacher[] [has] a moral responsibility to prevent this cynicism from taking root . . . through the way in which he brings his scholarship into the instructional process I do not mean by this simply reporting what he has discovered in this scholarly work, but something that is more appropriately described as a type of comportment, a way of presenting oneself as a bearer of distinct values.”).

13. *See, e.g., Recommendations of the Justice System Reform Council for a Justice System to Support Japan in the 21st Century*, Justice System Reform Council (Japan) (June 12, 2001), <http://japan.kantei.go.jp/judiciary/2001/0612report.html> (“As in the case of medical doctors who are indispensable for people’s health-care services, the legal profession should play the role of the so-called ‘doctors for the people’s social lives.’”).

14. *See* SØREN KIERKEGAARD, *FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH* 49 (Walter Lowrie trans., 1954).

mediation, integrative lawyering, collaborative law, comprehensive law, mindful lawyering, and the Project for Integrating Spirituality, Law, and Politics.¹⁵ Some are academics who see teaching and writing not only as a career, but as a calling. Champions of the turn can also be found on the bench. “Lawsuits, like wars,” said Chief Justice Warren Burger,

often occur because lawyers and statesmen fail in their role as healers and peacemakers. This healing function ought to be the primary role of the lawyer in the highest conception of our profession.¹⁶

“*Lawyers are healers and peacemakers. . .*” Notwithstanding the cover I get from quoting Justice Burger, this all sounds so grandiose, so earnest that seeing the words on the page makes me feel vulnerable. I think this vulnerability is one of the reasons many of us give up. It’s also a necessary ingredient of the authenticity and connection I want to invite.

“Vulnerability is the characteristic that positions us in relation to each other as human beings,” writes Martha Fineman.¹⁷ Those of us who have felt pressured to produce scholarship that is out of alignment with our deepest sense of purpose cannot begin to break away from this pattern without a willingness to be vulnerable. We cannot find and support each other without a willingness to be really seen, to ask for something that may or may not be available, to “invest in a relationship that may or may not work out.”¹⁸

15. See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (1994); DAVID HALL, *THE SPIRITUAL REVITALIZATION OF THE LEGAL PROFESSION* (2005); STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* (1999); KIM WRIGHT, *LAWYERS AS PEACEMAKERS* (2010); Daniel Bowling & David A. Hoffman, *Bringing Peace Into the Room: The Personal Qualities of the Mediator and Their Impact on Meditation*, 16 *NEGOTIATION J.* 5 (2000); Angela Harris, *Toward Lawyering as Peacemaking*, 61 *J. LEGAL EDUC.* 647 (2012); Susan J. Stabile, *The Practice of Law as Response to God’s Call*, 32 *SEATTLE U. L. REV.* 389 (2009); see also Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement,”* 6 *PEPP. DISP. RESOL. L.J.* 1, 1-2 (2005) (“Beginning in the last decade of the twentieth century, partially in response to widespread dissatisfaction within the legal system and among lawyers, a new movement in law emerged. This movement takes an explicitly comprehensive, integrated, humanistic, interdisciplinary, restorative, and often therapeutic approach to law and lawyering.”); Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?*, *N.Y. TIMES*, Jan. 4, 2013, <http://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html>; *PISLAP Mission*, PROJECT FOR INTEGRATING SPIRITUALITY, LAW & POLITICS <http://www.spiritlawpolitics.org/pislap-mission> (“The Project for Integrating Spirituality, Law, and Politics . . . is a nationwide network of lawyers, law professors, law students, legal workers, and others who are seeking to develop a new spiritually-informed approach to law and social change.”) (last visited March 2, 2015).

16. Warren Burger, *Dedication of Notre Dame London Law Centre: The Role of the Lawyer Today*, 59 *NOTRE DAME L. REV.* 1, 2 (1983); see also Abraham Lincoln, *Fragment Notes for a Law Lecture (July 1, 1850?) in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN* 81, 81 (Roy P. Basler ed., 1953) (“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.”); Emily Fowler Hartigan, *The Power of Language Beyond Words: Law as Invitation*, 26 *HARV. C.R.-C.L. L. REV.* 67, 80 (1991) (“Legal language kills, but the words of law can also give life. Law separates, but it can also join. Law is force, but it is also translation.”).

17. Martha Fineman Albertson, *The Vulnerable Subject and the Responsive State*, 60 *EMORY L.J.* 251, 255 (2010).

18. See Brené Brown, *The Power of Vulnerability*, TED (June 2010),

This article uses my own experience navigating the law review placement process to reflect on the dynamics that shape intellectual life at American law schools. My recent work focuses on the legal relationship between unmarried lovers who conceive. At its heart, it is about the law's role in shaping the precursor to pregnancy—heterosexual sex. When I began researching this topic what I was most curious about was how law and culture might conspire to foster connections that are more loving and less violent, more authentic and less alienated. Pursuing this topic—which would entail exploring big existential questions to which I still don't have clear answers—seemed risky before tenure.

Part I recounts the turn I took instead: a proposal for incentivizing and rewarding “preglimony” through tax reform. Currently, ex-spouses get a deduction when they pay alimony. In my last article before tenure, I argued that the same treatment should extend to men who support their pregnant lovers.

Part II turns back the clock and revisits the lead I would have followed had I not been focused on producing a law review article within the conventional mold. This “road not traveled” explores a category of sex at the margins of mainstream definitions of what counts as “law”: sex that is consensual but not mutually desired, “sex against desire.”

Why describe the thread I abandoned here? Why include so much detail about a category of sex at the margins of what generally counts as “law” in a paper about authenticity in legal scholarship? Because the personal is political. Because like intimate partners who agree to sex they don't truly desire, professors who adhere to conventions that don't serve their deepest relationship with truth engage in a compromise that ultimately hurts not only them. It hurts students by breeding cynicism and depression.¹⁹ It hurts the practice of law by producing foot soldiers instead of visionary stewards. Ultimately, our compromise hurts all of society. Part III concludes with my vision of what a more authentic ethos might bring to faculty and students, to the profession, and to the world we help shape.

I. PLACING *PREGLIMONY*

The dean's office at my law school paid for several hundred reprints of my last two articles, *The Price of Pleasure*²⁰ and *Preglimony*²¹, so I could

http://www.ted.com/talks/brene_brown_on_vulnerability.

19. 40% of students are clinically depressed by graduation despite being no more depressed than the general public (about 8%) when they begin as 1Ls. See Brian Clarke, *Law Professors, Law Students and Depression . . . A Story of Coming Out (Part 1)*, FACULTY LOUNGE (Mar. 31, 2014) (citing a study by Professor Andy Benjamin, *The Role of Law School in Producing Psychological Distress Revisited*, FLORIDA STATE U., http://www.law.fsu.edu/academic_programs/humanizing_lawschool/images/benjamin.pdf (last visited Dec. 9, 2014)), <http://www.thefacultylounge.org/2014/03/law-professors-law-students-and-depression-a-story-of-coming-out-part-1.html>.

20. Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917 (2010).

21. Shari Motro, *Preglimony*, 63 STAN. L. REV. 647 (2011).

send them to other law professors to promote my work and our school. The reprints sit in unopened boxes in my office—blocking my bookcase, jamming my file cabinets, crowding the space under my desk.

Why haven't I sent them out? *The Price of Pleasure*, published first, alternates between two voices. One voice uses conventional law review-speak to introduce the problem, analyze it, and offer a solution. Under current law, if the woman has an abortion, the man owes her nothing. If she takes the pregnancy to term, the man must reimburse her only after he's deemed to be the father, and only for prenatal and birthing medical expenses. He has no responsibility to share in the woman's "personal" expenses such as maternity clothes, birthing classes, or lost wages. *The Price of Pleasure* critiques this paradigm. It argues that the law should recognize that unmarried lovers who conceive are not complete strangers. They're not spouses either. They're something in between.

The second voice in *The Price of Pleasure* is angry. "A fundamental gender imbalance," I wrote in the Introduction, "hovers in the background of heterosexual sex: Women get pregnant, men do not."²² Part I of the article is devoted to a graphic parade of pregnancy horrors—from gestational diabetes, to bowel disease after complicated cesareans, to chronic vaginal infections after botched episiotomies. Later in the paper, sprinkled between the cost-benefit analysis and theoretical reframing of the issue, are MacKinnon-inspired passages that betray the fire that drove me to write the piece:

By trivializing the asymmetry in sexual risk—celebrating the pill as the great equalizer and framing abortion as a privilege—the current paradigm creates a cognitive dissonance . . . in women's lived experience. The slogans tell women they are free, but they are still vomiting through their pregnancies, hemorrhaging through their abortions, losing their libido under the pill.²³

When I presented this article to law faculties, people shifted in their seats and avoided eye contact. I'm sure they wondered: What has this woman been through?

And I had a hard time placing it. I knew it was getting to final rounds

22. Motro, *supra* note 20, at 921.

23. *Id.* at 969; *see also id.* at 969-70 ("[Catherine] MacKinnon and [Andrea] Dworkin associate sexual intercourse with violence because it involves penetration, subjugation, and lack of control. But perhaps women who associate intercourse with violence also do so, perhaps *primarily*, because intercourse makes women pregnant and unwanted pregnancy is violent. Unwanted pregnancy is violent, effective contraception is violent, and abortion is violent. A sexually active woman who doesn't want to be a mother gives something up in sex that men never have to put on the line. . . . Sex is complicated. Men and women who don't want babies choose to have sex anyway for a variety of reasons—sometimes wholeheartedly, sometimes with ambivalence and fear. The critical difference is that when women choose sex they are choosing something fundamentally different from what men are choosing when they choose sex. Women are choosing something that, along with whatever benefits they hope to gain from it, has a much higher chance of hurting their bodies. Men and women are unequal in sex because for women, sex is tinged with something else, a biological difference that adds a sacrificial layer.").

because I spoke with some of the secretaries at the reviews, but *The Price of Pleasure* was being rejected again and again.

Finally one of my Richmond colleagues got an offer from *Northwestern University Law Review* after he'd already accepted with another journal, so he slipped in a plug for me when he turned *Northwestern* down.

"At the risk of being presumptuous," he wrote, "let me point you to another possibility."²⁴ He said nice things about my piece, then offered this: *The Price of Pleasure* is "the kind of article that the less sophisticated journals will be scared of, but that smart journals like yours will recognize as a real contribution to the literature."²⁵

It worked. *The Price of Pleasure* was accepted with the proviso that some of the language be toned down.²⁶

Over the following months I came to understand why so many journals had turned it down. Although original, the article was bursting at the seams with more ideas than I could possibly do justice to in a 50-page article.²⁷ Nevertheless, my *Northwestern* editors were courageous enough to allow the quirky spark of the piece to trump the usual preference for the straight-shooting arrow. They understood why my first foray into the question I had posed produced a complex and unwieldy cascade. *Northwestern* honored that, and together we worked to fit the dragon into a pen built for a different animal.

By the time this process was complete, I had less than a year before my tenure review. I had to produce my next paper fast. Initially I circled back to the parts of *The Price of Pleasure* that felt incomplete—which had to do with the murky, often unconscious assumptions, desires, and fears with which people come to physical intimacy. I had a couple of threads to start pulling on, but distilling them into a law review article in less than six months seemed impossible. What was my thesis? What was my "law hook"? (One prolific senior scholar recounts several conversations with female colleagues who confessed that part of their writing process, after they identify a topic they care about, is to find a "law hook."²⁸)

24. E-mail from Jim Gibson, Assoc. Dean for Academic Affairs, Univ. of Richmond Sch. of Law, to author (Sept. 9, 2009, 12:53 EST) (on file with author).

25. *Id.*

26. Williams recounts a similar experience. She writes:

Weeks later, I received the first edit. From the first page to the last, my fury had been carefully cut out. My rushing, run-on-rage had been reduced to simple declarative sentences. The active personal had been inverted in favor of the passive impersonal. My words were different; they spoke to me upsidedown. I was afraid to read too much of it at a time—meanings rose up at me oddly, stolen and strange.

WILLIAMS, *supra* note 1, at 47.

27. These included a detailed exposition on the risks of pregnancy; a survey of current law; a comparison of individualistic and communitarian legal philosophies; the question of whether a woman should be required to notify her lover of the fact of a pregnancy, abortion, or the birth of a child; asymmetries in risk surrounding contraception and STDs; sadomasochism as an extreme example of formal agreements around sex against desire; the history of marriage in regulating reproduction; and a menu of practical solutions evaluated through a cost-benefit analysis.

28. E-mail from Anonymous Source No. 1 to author (Feb. 15, 2014, 4:21 EST) (on file with

At that early stage, I had only vague answers to these questions. This did not bode well for my main aspiration—which was to avoid repeating the heartache I went through trying to find a home for *The Price of Pleasure*. (Of course every writer knows that being rejected is part of the job; at this point, I’ve stopped counting the pieces I’ve written that never made it into print. Still, if there was anything I could do about it, I wanted to play this one safe.)

Then I had the idea of framing the project through tax reform—proposing that men who already support their pregnant lovers be rewarded and encouraged through a deduction, just like the deduction we now give ex-spouses who pay alimony. I scribbled the idea on a yellow pad and tacked the page onto my bulletin board. *Alimony. Palimony. Preglimony!* Yes. That’s it. I remember the rush.

I knew as soon as I had the idea that it was gold—at least for placement purposes. For one, I could see from the start how I would build the article. It was, to use tax lawyers’ favorite cliché, like a puzzle. I couldn’t see every move in advance, but the overall logic of the article was more or less predetermined.

I also knew that law review editors would be more comfortable dealing with this issue from the safe distance of an equity, efficiency, and simplicity analysis. (Articles about “women’s issues” devoid of economic jargon do of course place in top journals. But all things being equal, my experience moving articles that combine gender with tax has been markedly easier.²⁹) *Preglimony* was a sexy topic with a sexy name, but the cloak was totally straight, totally traditional, with scientific-looking diagrams to boot. It got to its moderate conclusion from a polite, cool distance. Conceding that requiring men to support their pregnant lovers would be complicated and requires further study, the article proposed a gentle nudge: giving guys who do the right thing a gold star from the government. The nightmare pregnancy scenarios that in *The Price of Pleasure* spanned seven pages became one unobtrusive line: “When a woman who isn’t prepared to be a mother discovers she’s pregnant, the weeks and months that follow can be extremely difficult.”³⁰

My gambit paid off. I wrote *Preglimony* in a sprint, my workshop audiences didn’t wince or stare, and I placed it in the *Stanford Law Review*, the first and only journal to which I submitted.

So this story has a happy ending. I published, I made tenure, and I consider myself supremely fortunate to be a member of this club. I’m also happy with how *Preglimony* turned out. I enjoyed the tax research it

author).

29. On incentives that skew scholarship in another field, constitutional law, see Suzanna Sherry, *Too Clever by Half: The Problem with Novelty in Constitutional Law*, 95 NW. U. L. REV. 921, 926 (2001).

30. Motro, *supra* note 21, at 653.

involved and I love the graphics³¹—both of which have enriched my classroom teaching. I also dig the pointy-headed analysis; I think a preglimony deduction is an idea worth thinking about, and my article offers a framework for this conversation. Like the revelatory experience that was taking tax in law school,³² *Preglimony* helped me see the issue from new angles, and my work with the *Stanford* editors heightened my appreciation for the genre—for the razor-sharp argument, the dialectic pirouette, the delights of cool-headed reason. As an added bonus, *Preglimony* also made it possible for me to talk about my work (which is really about sex) with people like my father.

Nonetheless, I'm not ready to mail out the reprints. *Preglimony* and *The Price of Pleasure* are both incomplete. *The Price of Pleasure* is filled with half-opened kernels, and some passages seem unhelpfully sharp to me today. *Preglimony* and the op-ed version of the idea³³ veer too far in the opposite direction. They are tight, distant, impersonal.

"[T]he object of [impersonal writing] is to empower," writes Patricia Williams,

to empower beyond the self, by appealing to neutral, shared, even universal understandings. In a vacuum . . . there's nothing wrong with that attempt to empower: it generates respect and distance and a certain obeisance to the sleekness of a product that has been skinned of its personalized complication. But in a world of real others, the cost of such exclusive forms of discourse is empowerment at the expense of one's relation to those others; empowerment without communion.³⁴

When I look back at *Preglimony*, this is what I feel—empowerment without communion.

"The other thing contained in assumption of neutral, impersonal writing styles," Williams continues,

31. Designed by Jonathan Corum.

32. My first tax prof not only made tax fun and modeled an unparalleled commitment to students, she also dispelled the myth that tax is a man's subject. "That's nonsense of course," she said at a recent symposium on the intersection of tax, gender, and sexuality. Deborah Schenk, *Reflections on Women in Tax Law Academia*, 13 *GEO. J. GENDER & L.* 47, 56 (2012); *see also id.* ("Many of my best students have been women. Nevertheless too many women treat tax as akin to venturing into an NFL locker room.").

33. Shari Motro, Op-Ed., *Responsibility Begins at Conception*, N.Y. TIMES, July 7, 2012, <http://www.nytimes.com/2012/07/07/opinion/time-for-pregnancy-support-alimony.html>.

34. WILLIAMS, *supra* note 1, at 92-93; *see also* Fred Rodell, *Goodbye to Law Reviews*, 23 *VA. L. REV.* 38, 39 (1936) ("One of the style quirks that inevitably detracts from the forcefulness and clarity of law review writing is the taboo on pronouns of the first person. An 'I' or a 'me' is regarded as a rather shocking form of disrobing in print. To avoid nudity, the back-handed passive is almost obligatory:—'It is suggested—,' 'It is proposed—,' 'It would seem—.' Whether the writers really suppose that such constructions clothe them in anonymity so that people cannot guess who is suggesting and who is proposing, I do not know."); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 *WIS. WOMEN'S L.J.* 149, 158 (2000) [hereinafter West, *Hedonic*] ("[T]he key to moral decision-making lies in our capacity to empathize with the pain of others, and thereby resist the source of it, and not in our capacity for abstraction, generalization, or reason.").

is the lack of risk. . . . [T]he personal has fallen into disrepute as sloppy because we have lost the courage and the vocabulary to describe it in the face of the enormous social pressure to “keep it to ourselves”—but this is where our most idealistic . . . politics are lodged, and are revealed.³⁵

Writers I revere use their experience—the anger, shame, joy, bliss—in combination with the meta awareness we access through words to shine a light on truths that are knowable *and* to intimate something ineffable. By finding a sweet spot between raw emotion and cleverness, they build a bridge from self to other.

The Price of Pleasure and *Preglimony* don’t do this. Something is missing—in these pieces and also in the professional identity I’ve stepped into. Speaking with like-minded colleagues in hushed conversations that feel like an illicit affair, I know I’m in the minority, but I am not alone.

II. SEX AGAINST DESIRE

The fault line I began to tap before I turned to explore preglimony via tax reform is, at bottom, about the relationship between our species’ woundedness around sex and our propensity for violence. It springs from a desire to help heal this wound. It is a tiny piece of a vast story I cannot possibly do justice to yet, and if I were focused on playing the game I would continue to delay it. What I have to say about it is still in formation, and I suspect I will be working on it for years to come. But in order to do justice to *this* project I must at least point in the direction of that other project, the road not taken.

I concluded *The Price of Pleasure* with a concession that the proposal it introduces needs further study before it can be implemented. But in the meantime, I suggested,

we don’t need the law to start changing our lives. Each one of us—as individuals and lovers, siblings and friends, teachers and parents—can start now by asking: what is our own personal law of conception? What do we want it to be? Have we chosen the rules that govern our love lives deliberately, or have we adopted them passively, unreflectively? These are difficult questions to ask. Going along without asking is easier. Going along doesn’t ruin the moment, but each time we put on the blinders we drift further from our intuitive capacity to listen and to feel for the answers. Going along distances us; it distances us from ourselves and it distances us from our lovers.

Asking these questions and talking about them openly will not merely clear the air of misunderstandings. The process of asking and sharing has the potential itself to begin to sensitize us to our own and to our lovers’ true desires. It may help us to identify what inspires and what

35. WILLIAMS, *supra* note 1, at 93.

deadens, what lifts and what oppresses, what heals and what injures.
And it may lead us to be more mindful about our choices.³⁶

By the time I completed *The Price of Pleasure*, I realized that my fascination with the lovers-as-strangers paradigm stemmed less from an interest in pregnancy and more from an interest in the law's role in shaping heterosexual sex. It grew from experience, experience I'm a little uncomfortable revealing. It's private, plus I am aware of how tricky it is to use personal narrative well. As a reader, I don't appreciate the distanced faux revelation—the personal so stripped of complicating detail it loses the vibrancy of an actual life. I find the opposite extreme—the confessional that collapses into solipsism—even more off-putting.

But I've come to believe that writing without naming the source of my intuitions withholds something important from the reader. Our personal stories are always part of *the* story as we understand it. They are the lens through which we view the world, including the legal issues we study. Every scientific publication includes a disclosure about hypotheses, methods, and conflicts of interest. Shouldn't legal scholarship do the same?

A. *The Personal*

So. . . what *has* this woman been through?

I've never been pregnant. I've never had an abortion. I've never dated a man who would have left me had I gotten pregnant (I don't think). But I did come of age in a time and a place where physical intimacy happened faster than I was ready for.

During my first experiences, I was "going along" more often than I like to admit. I wasn't pressured (most of the time). I wasn't coerced. I certainly never felt assaulted. My "yes" was clear and unambiguous, but it wasn't always wholehearted. It came from a place that I have since learned cannot possibly lead to the bliss that can unfold through touch.

Many of my early "yesses" were strategic—conscious decisions to do what girls my age did or risk being dumped for another. It's not that I wasn't interested at all, I was interested in different things; the things that sent me to the moon and back left my boyfriend bored or frustrated, which in turn made me feel like a prude. I didn't want to be a Sandra Dee, and I knew better than to fall as low as Rizzo, so I drew my lines somewhere in between, somewhere that didn't have a whole lot to do with me. As a result, my introduction to sex was as a spectator sport, a sport I came to enjoy. Through it I learned about vicarious pleasure, about the thrill and satisfaction of taking care of someone you love. Did I recognize the lack of reciprocity? Yes. It was a compromise, a compromise I was basically okay with. In the context that was my reality, it made sense. It was normal.

36. Motro, *supra* note 20, at 976-77.

When it became time for my first visit to a gynecologist, my doctor gave me free packets of the pill without my even asking, and he reassured me, as had the sex-ed teacher who'd come to my school and countless doctors and nurses after him that in addition to being the best way to prevent pregnancy, hormonal contraception is safe and even healthy. Once I went on it, I happily discovered that it freed me of the inconvenience of needing to shift gears on a monthly basis. Among my cohort, being on the pill was empowering; it was cool. So when I fell in love with a boy I trusted, I said another "yes"—another conscious decision born of my assessment of what was appropriate, not of what my body was ready for.

Eventually, I found my way to reciprocity and the world went from black and white to color. Had that been the end of the story, I probably would never have thought about preglimony.

What woke me up years later was my discovery that the pill was making me sick. This led to a process that involved getting really precise about what my body wants and what it doesn't. I understood that the disconnect between sex and pleasure that had colored my formative experiences had continued to inform my behavior over the years in less obvious ways, including after I turned from spectator to active participant.

This eventually led me to feminism, a field I had looked down on during my years studying physics, philosophy, and tax law. I had looked down on it because I branded the girls and women who were drawn to it as weak or angry or both. I didn't want to be associated with them. When I woke up to the micro-compromises that had shaped my sexuality, I saw feminism's lessons everywhere. I came to understand my own relatively minor struggles within a larger context.

Most of my boyfriends were both intelligent and considerate. Somewhere along the way they had figured out that the fantasy-world peddled not only by the porn industry,³⁷ but also by mainstream Hollywood films³⁸—a world in which "normal" sex equals quick arousal

37. See MARCIA DOUGLASS & LISA DOUGLASS, *THE SEX YOU WANT: A LOVERS' GUIDE TO WOMEN'S SEXUAL PLEASURE* 110, 114-15 (2002) ("Pornography is only pop porn's more flamboyant, renegade cousin. Pop porn shuns the images . . . one sees in pornography, yet because it is impossible to escape, it ultimately has a stronger impact Sex is typically symbolized by a beautiful, young woman's body and a man's unruly desire. Movies play it safe and ensure box-office success by using only this tried-and-true formula and the standard conventions about gender. A man who acts without control of his passions is 'sexy.' A woman is 'sexy' when she first resists and then succumbs to him."); Laurie Abraham, *Teaching Good Sex*, N.Y. TIMES MAG., Nov. 16, 2011, <http://www.nytimes.com/2011/11/20/magazine/teaching-good-sex.html> ("Pornography 'gives boys the impression that the girl is there to do any position [they] want, or to please [them], or to . . . role-play to [their] liking.'").

38. See Susan Appleton, *Toward a "Culturally Cliterate" Family Law?*, 23 BERKELEY J. GENDER L. & JUST. 267, 271 (2008) ("[P]opular culture remains notoriously androcentric, sexualizing even young girls in the interest of men, reinforcing traditional gender hierarchies, and creating dangers (including exposure of young persons to sexually transmitted disease)."); Barbara Dafoe Whitehead, *The Failure of Sex Education*, ATLANTIC (Oct. 1994), <http://www.theatlantic.com/past/politics/family/failure.htm> ("While parents withhold information, the media and the marketplace spew sexual misinformation. It is this peculiar American combination of repressiveness and permissiveness that leads to sexual wrong thinking and poor sexual decision-

followed by a race to the finish line—is a world that leaves many women cold. But not all men get the memo or know how to implement it if they do, and many women lack the wherewithal to step outside of the standard script.³⁹ It turns out that my own story is a tame version of a fairly widespread phenomenon. Studies of hookup culture on college campuses routinely reveal an “orgasm gap” between men and women,⁴⁰ and sexual dissatisfaction among adults along gendered lines is so commonplace that jokes on the subject have the ring of hackneyed old news.⁴¹ The sad truth is that stories about asymmetry in desire and satisfaction are utterly banal.

B. *The Political*

What does any of this have to do with the law? At first glance, not much. A closer look, however, reveals that the law is deeply implicated in our sexual scripts.

1. *Historical Influences*

Let’s step back. For much of our history the law attempted to channel all sex into marriage—which never worked (people always had sex outside of marriage) and denying this reality produced untold suffering.⁴²

For those who did comply, marriage was an institution that for centuries suspended “the very being or legal existence of the woman . . .

making, and thus to high rates of teenage pregnancy and STDs.”)

39. Appleton, *supra* note 38, at 308 (“[The American Psychological Association reports that] “contemporary culture sexualizes girls, teaching them that their primary value lies in pleasing men, in turn resulting in a host of physical and emotional problems, including self-objectification, damaged self-esteem, body dissatisfaction, and appearance anxiety.”).

40. See DOUGLASS & DOUGLASS, *supra* note 37, at 3 (“Seventy-five percent of men have orgasm in partner sex on a regular basis, but only 29 percent of women do. . . . The 29/75 gap continues today in a social environment that appears to be more open than ever about sex. Intimate details of sexual activity are now discussed in safer sex instruction, on television and radio talk shows, and explicit sex acts are regularly portrayed in the popular media. But the orgasm gap is rarely discussed. It is simply accepted as the way sex is.”); Natalie Kitroeff, *In Hookups, Inequality Still Reigns*, N.Y. TIMES BLOG (Nov. 12, 2013, 3:35 PM), <http://well.blogs.nytimes.com/2013/11/11/women-find-orgasms-elusive-in-hookups/>; see also Appleton, *supra* note 38, at 307-308 (“In investigations of the hooking up culture, what stands out is *not* the prevalence of casual sexual encounters among youth, but rather the fact that the female participants report peer pressure as the underlying explanation and *little or no sexual pleasure or satisfaction for themselves*. According to one study of hooking up that uses orgasm as ‘one good barometer of sexual pleasure,’ ‘[m]en’s sexual pleasure seems to be prioritized,’ and men have a strikingly disproportionate number of orgasms on hook ups.”).

41. See, e.g., ANNIE HALL (MGM 1977) ([Alvy and Annie are seeing their therapists at the same time on a split screen]:

Alvy Singer’s Therapist: How often do you sleep together?

Annie Hall’s Therapist: Do you have sex often?

Alvy Singer: [lamenting] Hardly ever. Maybe three times a week.

Annie Hall: [annoyed] Constantly. I’d say three times a week.);

Barbara Smaller, *Worse than a Headache—I Have Three Kids and a Full-time Job*, NEW YORKER, Aug. 12, 2013, at 59 (cartoon); Eric Lewis, “*To You it was Fast*,” NEW YORKER, Nov. 13, 2000, at 118 (cartoon).

42. See STEPHANIE COONTZ, MARRIAGE, A HISTORY (2006); NANCY COTT, PUBLIC VOWS (2002).

incorporate[ing] and consolidate[ing it] into that of the husband.”⁴³ By marrying, a woman was assumed to have agreed to be sexually available for the duration of the marriage. As the frequently-cited seventeenth century Lord Hale put it, “[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”⁴⁴ As late as 1984, over 40 states retained some form of marital exemption for rape.⁴⁵ Since that time, all states have revised these provisions, though differences in the treatment of rape within and outside of marriage remain, with some codes “criminaliz[ing] a narrower range of offenses if committed within marriage, subject[ing] the marital rape they do recognize to less serious sanctions, and/or creat[ing] special procedural hurdles for marital rape prosecutions.”⁴⁶

Even if all vestiges of the marital exemption were abolished, we would still be living in its shadow. After so long, how could we not? How could the patterns of the old law *not* be habit forming? They are the backdrop against which we have all come of age. Of course the exemption never meant that all husbands routinely raped their wives; but it was their prerogative to do so. This fact shaped the dynamic, it was part of the deal, part of what marriage meant—for millions of men and women, for generation upon generation.

A similar shadow hangs over non-marital sex. Though we no longer stone or burn people for it, “fornication”—a term etymologically associated with brothels⁴⁷—remained a crime in some states until *Lawrence v. Texas*⁴⁸ effectively deemed such laws unconstitutional in 2003. In my own state, despite the prohibition against non-marital sex being declared unconstitutional nine years ago, it remains unchanged in the Virginia Code.⁴⁹

43. 1 WILLIAM BLACKSTONE, COMMENTARIES *430.

44. LORD MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (Sollom Emlyn ed., 1778).

45. *People v. Liberta*, 474 N.E.2d 567, 572 (N.Y. 1984). *But see* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000) (dispelling the myth that marital rape exemptions were largely unchallenged until the 1970s).

46. Hasday, *supra* note 45, at 1375.

47. *Fornication*, ONLINE ETYMOLOGY DICTIONARY, www.etymonline.com/index.php?term=fornication (last visited Dec. 9, 2014).

48. 539 U.S. 558 (2003).

49. *See* *Martin v. Zihler*, 607 S.E.2d 367, 370 (Va. 2005) (“We find no principled way to conclude . . . that the Virginia statute criminalizing intercourse between unmarried persons does not improperly abridge a personal relationship that is within the liberty interest of persons to choose. Because Code § 18.2-334, like the Texas statute at issue in *Lawrence*, is an attempt by the state to control the liberty interest which is exercised in making these personal decisions, it violates the Due Process Clause of the Fourteenth Amendment.”); VA. CODE ANN. § 18.2-344 (2014) (“Fornication: Any person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication, punishable as a Class 4 misdemeanor.”). *Cf.* Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 116 (2014) (“The stigmatization of even unenforced criminal law is not trivial, as discussed in the *Lawrence v. Texas* decision striking down sodomy laws that were seldom enforced.”).

The combination of these legacies—marital rape exemptions and laws criminalizing “fornication”—sends the message that a woman has three options: she can be a sexual slave, she can be a slut, or she can be celibate. Of course this isn’t literally true, but wisps of this old order continue to float in and out of our consciousness in subtle and not so subtle ways.⁵⁰

2. Contemporary Influences

Today instead of marriage, we rely on consent as the main prerequisite for legitimate sex⁵¹ (though plenty of pressures to marry persist). This shift represents progress—it recognizes diverse relationships, and condemns types of assault previously unrecognized—marital rape, intimate partner rape, date rape, acquaintance rape.⁵²

But the focus on consent has a dark underside. Consent tells us little about whether a given encounter is desired or supports human flourishing. Marcia and Lisa Douglass—a sociologist and an anthropologist who happen to be sisters—use the term “sex against desire (SAD)” to refer to

sex that both partners agree to, but only one partner enjoys. . . . Sex against desire occurs whenever the timing of sex, its frequency, or the sexual activities involved are on the man’s terms. It is SAD, for example, when a wife has sex with her husband every night simply because he wants it. It is SAD when a woman gives her partner sex just to avoid confrontation or to keep him from straying. SAD also occurs when a woman feels obligated to have intercourse every time she has sex with her partner. Sex against desire is sex that is limited to slam-bam-thank-you-ma’am intercourse, with no attention to either a woman’s readiness or her orgasm.⁵³

“Sex against desire” or “consensual unwanted sex”⁵⁴ (Robin West’s term) is different from rape. The category suggests that while the line

50. See e.g., MICHAEL KIMMEL, GUYLAND 197 (2008) (“[H]ooking up enhances [a guy’s] reputation whereas it damages [a girl’s]. Guys who hook up a lot are seen by their peers as studs; women who hook up a lot are seen as sluts who ‘give it up.’”).

51. See SEXUALITY, GENDER, AND THE LAW 1239 (William N. Eskridge, Jr. & Nan D. Hunter, eds., Foundation Press 2d ed. 2004) (“It is commonly believed that ‘consent’ is or should be the main arbiter of the legality of sexual activity.”). But see Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 809 (2010) (“The state has long attempted to regulate sexual activity by channeling sex into various forms of state-supported intimacy. Although . . . such regulation is declining . . . courts have extended legal protection to consensual sexual acts only to the extent such acts support other state interests, including marriage, procreation, and, most recently, the development of enduring intimate relationships.”).

52. For a discussion of efforts by the American Law Institute to revise the Model Penal Code, including possibly establishing an affirmative consent standard, see Deborah Tuerkheimer, *We Preach “No Means No” for Sex, but That’s Not What the Law Says*, GUARDIAN (Jan. 12, 2014, 8:30 AM), <http://www.theguardian.com/commentisfree/2014/jan/12/rape-definition-use-of-force>. See also Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 780 (1988) (“[U]nder the emerging doctrine, a superficial appearance of nonresistance is no longer sufficient to demonstrate consent . . . it is becoming unacceptable to induce sexual compliance by the use of physical force, economic pressure, or deception.”).

53. DOUGLASS & DOUGLASS, *supra* note 37, at 148.

54. See Robin West, *Desperately Seeking a Moralist*, 296 HARV. J.L. & GENDER 1, 23 (2006).

between consensual and non-consensual sex may be useful in distinguishing non-criminal from criminal sex, it is not especially usefully in helping us distinguish behaviors that are healthy or neutral from ones that are harmful.⁵⁵

The SAD/consensual unwanted category recognizes a continuum of consent. On one end we have consent that is full-blown, enthusiastic, unambiguous. On the other, we have consent that is just on the line separating consent from *non*-consent. Between the two there is a range that includes a fair number of troubling situations.

What exactly is the harm? The occasional compromise between mutually respecting partners may not be harmful at all. Every long-term couple goes through a period when asymmetries in desire need to be negotiated, and compromises arrived at through a process that respects everybody's wellbeing may ultimately restore a more harmonious, organic connection. But when one-sided sex is given from a place of numbness or resentment, when authentic intimacy has eroded to a point at which SAD is not acknowledged as such, when unpleasurable sex is routine, "particularly if multiplied over years or indeed over an entire adulthood . . . [its harms] may be quite profound."⁵⁶

Specifically, in heterosexual relationships in which it is the woman who is submitting to sex against desire, she may be hurt physically—whether because she submits to painful positions, because she is not aroused enough to lubricate, or because it may expose her to pregnancy, life-threatening disease, or bouts of urinary tract- and yeast infection.⁵⁷ On a psychological level, West warns that sex that is consensual but not wanted damages a woman's capacity for self-assertiveness, self-possession, autonomy, and integrity.⁵⁸ And SAD harms women indirectly by taking

55. As West explains, Americans have a "deep-seated . . . cultural tendency to equate the legal with the good." Robin West, *The Harms of Consensual Sex*, in *THE PHILOSOPHY OF SEX* 317-19 (Alan Soble ed., 4th ed. 2002) [hereinafter West, *Harms*]. By focusing on non-consensual sex as bad, there is a danger that law might implicitly cast all consensual sex as good, or at least harmless. Notwithstanding its obvious benefits, the rise of mutual consent almost inevitably valorizes, celebrates, or legitimates consensual sexual encounters. "If rape is bad because it is non-consensual . . . then it seems to follow that consensual sex must be good because it is consensual." *Id.* at 320.

56. West, *id.*, at 318-19.

57. See DOUGLASS & DOUGLASS, *supra* note 37, at 150-51.

58. West, *Harms supra* note 55, at 318-19 (West explains these four categories of harm experienced by women who engage in unpleasurable, undesired, consensual sex as follows: "First they may sustain injuries to their capacities for self-assertion: the 'psychic connection' . . . between pleasure, desire, motivation, and action is weakened or severed. *Acting* on the basis of our own felt pleasures and pains is an important component of forging out own way in the world Consenting to unpleasurable sex—acting in spite of displeasure—threatens that means of self-assertion. Second, women who consent to undesired sex may injure their sense of self-*possession*. When we consent to undesired penetration . . . we have . . . constituted ourselves as . . . 'giving selves'—selves who cannot be violated, because they have been defined as (and define themselves as) being 'for others.' . . . Third, when women consent to undesired and unpleasurable sex because of their felt or actual dependency upon a partner's affection or economic status, they injure their sense of autonomy And fourth, to the extent that these unpleasurable and undesired sexual acts are followed by . . . claims that they enjoyed the whole thing . . . women who engage in them do considerable damage to their

the place of the other kind of sex—sex that celebrates life force, sex that inspires, sex that restores, sex that heals.

Despite the harms, many women soldier on. Why? To protect a man's ego, to gain love and approval, to avoid conflict, to sustain a relationship, to maintain economic stability, to get it over with so as to get some sleep.⁵⁹ West suggests that women in particular go along because of the circular, self-reinforcing nature of the psychic harms that come along with agreeing to sex that is neither desired nor pleasurable. “[T]he deeper the injury to [a woman's] self-assertiveness, self-possession, autonomy and integrity,” writes West,

the greater the likelihood that [she] will indeed *not* experience [the] harms [of consensual unwanted sex] as harmful, or as painful. A woman utterly lacking in self-assertiveness, self-possession, a sense of autonomy, or integrity will not experience the activities in which she engages that reinforce or constitute those qualities *as harmful*, because she, to that degree, lacks a self-asserting, self-possessed self who *could* experience those activities as a threat to her selfhood.⁶⁰

These psychic harms are not erased by the incidental benefits a woman might reap from going along. They also persist even if she doesn't fake her way through every step of the experience—if her attempts to catch up with the man ultimately succeed. (In a different but related context, the trauma of rape isn't negated if the victim is physically aroused during the assault.⁶¹)

Are sexual compromises any worse than other types of compromises that occur in intimate relationships? Certainly not always, and some scholars object to the implication that sex should be viewed as a special category, what they call “sex exceptionalism.”⁶² Critics also object to

sense of integrity.”). For additional discussions of the harms of consensual unwanted sex, see Robin West, *Sex, Law, and Consent*, in *THE ETHICS OF CONSENT* 221, 237 (Franklin G. Miller & Alan Wertheimer eds., 2010) [hereinafter West, *Sex*]; and Alyson Spurgas, *Embodied Invisible Labor and Sexual Carework: Women's Roles in Sexualized Social Reproduction within Intimate Relationships* (Nov. 18, 2014) (unpublished manuscript) (on file with author).

59. See DOUGLASS & DOUGLASS, *supra* note 37 at 154-55 (“Most women still do the bulk of the housework. This seems justified because many couples still go into marriage with the unspoken expectation that the man will earn the family wage and, if she works, her job will supplement it. A wife's lower income and lesser work status ensures that she will feel obliged to be responsible for the ‘second shift’—child care and housework At the end of a day of doing it all, a woman crawls into bed with her partner, where she faced the ‘third shift.’ To a woman who is tired and who may be pissed off that her partner has not done his fair share of work, sex can seem like just one more chore.”).

60. West, *Harms supra* note 55, at 319.

61. See Susan Frelich Appleton, *Reproduction and Regret*, 23 *YALE J.L. & FEMINISM* 255, 333 (2011) (explaining that a woman's orgasm is irrelevant to a legal inquiry regarding rape); see also *Curtis v. State*, 223 S.E.2d 721, 723 (Ga. 1976) (“The trial court did not err in refusing to allow Curtis' attorney to ask the prosecutrix [the victim] whether she experienced orgasm during these acts of intercourse; the answer would have been legally irrelevant to the issue of consent.”).

62. Rosenbury & Rothman, *supra* note 51, at 858. Cf. Elizabeth F. Emens, *Compulsory Sexuality*, 66 *STAN L. REV.* 303, 304 (2014) (arguing that “[o]urs is . . . a sexual law, casting asexuals on the outside in a range of ways” and considering “our culture and laws through the lens of asexuality.”).

West and others' focus on heterosexual sex.⁶³ And some object to portrayals of women as the main victims of SAD.⁶⁴ The implication that women are more prone to agree to things they do not want is unhelpful, the argument goes, because it infantilizes women, potentially reinforcing the very dynamics it seeks to reverse.

Ultimately I believe that one's views on these questions are necessarily influenced by experience. The main purpose of this piece is not to defend a position about what is or isn't true for all or most women. My goal is to honestly contextualize my political views within the personal experiences that have shaped them with the hope that others engaged with this issue will do the same, opening the possibility for richer dialogue.

Is sex special? In my own experience yes, it is. This has certainly been my experience of sex that could lead to a pregnancy, including when I'm using precautions. It's also been true, though to a lesser degree, of other sexual acts. When I feel that my body is being used as a means to an end, even if I've agreed to everything that is happening, my sense of violation is deeper than when I make other types of sacrifices.

Are heterosexuals more susceptible to a dynamic that includes SAD than gays and lesbians? I don't know. My impression from living in the world is that lots of people agree to things they don't want every day, including things supposedly offered for their own benefit. I would suspect that the SAD category has salience in all relationships,⁶⁵ but LGBT sex is not something I can speak to from experience, nor is it something I have researched. My intention in focusing on hetero relationships is not to exclude; it is to stick to what I know.

Is SAD something that women submit to more often than men? From my own experience and from my conversations with other women the answer would be yes, I think it is. It's also true that sometimes the roles are reversed.⁶⁶ I have at times approached men with an acquisitive

63. See e.g., Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 201 (1989-90) ("One might expect cultural feminists . . . who engage in legal scholarship . . . to acknowledge the relevance of lesbian experience in their writings. It is particularly surprising to discover the invisible lesbian problem in the work of cultural feminists. . . . Robin West's article, *Jurisprudence and Gender*, is a prime example of the problem.").

64. See Janet Halley, *The Politics of Injury: A Review of Robin West's Caring for Justice*, 1 UNBOUND: HARV. J. LEGAL LEFT 65, 68 (2005) ("West . . . is clearly happiest when she can say that what is true for women is true also, exactly but in reverse, for men. I . . . call this her drive to diametricality."); see also KATIE ROIPHE, *THE MORNING AFTER* (1993) (critiquing campus date-rape prevention programs for infantilizing women).

65. See H. Alan Scott, *I'm Not Sure If I Was Sexually Assaulted or Not: On Men and Date Rape*, HUFFINGTON POST (Oct. 21, 2014, 4:56 PM), http://www.huffingtonpost.com/h-alan-scott/im-not-sure-if-i-was-sexu_b_6022108.html.

66. See Emily A. Impett & Letitia Anne Peplau, *Why Some Women Consent to Unwanted Sex with a Dating Partner: Insights From Attachment Theory*, 26 PSYCHOL. WOMEN Q. 360, 360 (2002) ("Several studies have shown that both men and women consent to unwanted sexual activity. In one study, college students were asked if they had ever indicated to a sexual partner that they wanted to engage in sexual intercourse when they really did not want to do so Among nonvirgins in the United States, 55% of women and 35% of men reported consenting to unwanted sexual intercourse. In a daily diary study of college students in dating relationships, 50% of women and 26% of men

intention, without being sensitive to their needs, fears, and desires. And I have hurt men in many other ways, all of which I regret. I don't see myself as a victim of men. But my honest estimation is that most of the damage I inflicted did not involve pressuring men into sex they didn't want. When it comes to SAD, I think there was an asymmetry, and the feminist scholarship I have read in this area has helped me interpret my experiences.

3. *Looking for the Law Hook*

Again, what does this have to do with the law? Can the law mandate good sex?⁶⁷ Should it criminalize SAD? Most people don't think so and I am inclined to agree.⁶⁸ On the heels of *The Price of Pleasure*, this felt like a dead end; I didn't see how any of this might add up to a law journal article.

I feel differently today. I now believe that understanding the ways in which law has jeopardized the prospects for authentic, mutual intimacy by painting women's sexuality into the "madonna/whore" corner is critical to current debates surrounding sexuality. I suspect that our lamentable history can help explain why we are so confused today. Naming the role that *manmade* law has played in the seemingly intractable prevalence of sexual violence and distress might help disabuse us of the notion that one-sided sex reflects *nature's* law.⁶⁹

reported consenting to unwanted sexual activity during a two-week period.”).

67. For attempts to support female sexual pleasure through Jewish law see MISHNAH BERURAH, HOW A PERSON SHOULD ACT AS REGARDS HIS MARITAL RELATIONS § 240 (1989) (detailing a husband's conjugal obligations toward his wife, including the obligation to understand and honor her heart's desires and to make sure she is satisfied. This text also includes prohibitions against approaching one's wife drunk, angry, or while thinking of another woman) (I thank Rabbi Chaim Moskowitz for introducing me to this text). For other examples of attempts to address women's sexual pleasure, see Daniel Schweimler, *Sex on Ecuador's Political Agenda*, BBC NEWS, May 3, 2008, <http://news.bbc.co.uk/2/hi/americas/7382010.stm> (“A woman from the governing party in Ecuador has proposed that a woman's right to enjoy sexual happiness should be enshrined in the country's law.”); MIRANDA SHAW, *PASSIONATE ENLIGHTENMENT* (1994) (a work of path-breaking feminist scholarship describing Tantric Buddhist practices linking sacred sexuality, the worship of women, and the path to enlightenment); Miranda Shaw, *Worship of Women in Tantric Buddhism: Male Is to Female as Devotee Is to Goddess*, in *WOMEN AND GODDESS TRADITIONS* 111, 130 (Karen L. King ed., 1997). Cf. Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 316 (1995) (“[T]he enormous variability of sexual pleasure and its status as an affirmative good . . . [makes] it difficult to imagine . . . how it could be programmatically promoted by legislative or judicial officials.”); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 183 (2001) (“Can law protect pleasure?”).

68. *But see* SUSAN M. SHAW & JANET LEE, *WOMEN'S VOICES, FEMINIST VISIONS* 550 (2015) (“Women are often victims of *altruistic* sex (motivation for consent involves feeling sorry of the other person, or feeling guilty about resisting sexual advances) and *compliant* sex (where the consequences of not doing it are worse than doing it). Neither of these forms of sexual intimacy involve complete consent.”). *See also* OREGON STATE UNIV., *Consent Is Sexy*, <http://studenthealth.oregonstate.edu/consent-is-sexy> (last visited Dec. 9, 2014) (implying that for sex to be consensual, the consent must be “enthusiastic.”).

69. *See* West, *Sex*, *supra* note 58, at 240-41 (“[T]he harms of unwelcome consensual sex . . . are almost entirely invisible to law . . . We don't regulate against them, we don't attempt to deter them, and we don't compensate for them when they occur. . . . Now of course, law isn't the whole story With the sexual liberation and women's liberation movements . . . expectations regarding unwelcome

Susan Appleton points to opportunities for reform in a range of areas, including family law, tort law, and commercial regulation.⁷⁰ Appleton and others also suggests that the law's disregard for female sexual pleasure may be corrected by rethinking sex education curricula that focus on abstinence, the mechanics of reproduction, and the dangers of rape, disease, and early pregnancy to the exclusion of meaningful information on how to navigate one's way toward a positive relationship with sex.⁷¹ Between the lines, by focusing on heterosexual intercourse these programs perpetuate a myth that "naturalizes anorgasmic sexual experiences for women,"⁷² stigmatizes LGBT sexuality, and ignores erotic experience that is not fixated on genital orgasm (female *or* male), leading to dissatisfaction and frustration for all.

sex have shifted somewhat: Many women are now more likely to regard . . . their sovereignty over their bodies as something not to be foresworn lightly in the absence of desire. Nevertheless, the cultural expectation that wives will submit to husbands' sexual advances and that girls and women outside of marriage will likewise comply to some unknown degree remains in place for large swaths of the population. Law has done nothing to interrupt this expectation. These harms simply have no legal salience."). Cf. Ian Ayres & Katherine Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599 (2006) (proposing a new crime of reckless sexual conduct); Kaplan, *supra* note 49 (exposing and challenging the law's unspoken assumption that sexual pleasure has negligible or negative value).

70. Appleton exposes several areas in which the law's "preoccupation with penile-vaginal penetration—not the usual route to orgasm for women—communicates the irrelevance of female sexual pleasure, or even its pathology." Appleton, *supra* note 38, at 286. Family law in some states, for example, counts heterosexual intercourse as "the only relevant sexual conduct in annulment cases or in adultery-based divorce cases." *Id.* at 285-86. Appleton suggests that since impotence and the "unjustifiable persistent refusal of sexual intercourse" have long played a role in divorce cases, perhaps a husband's "'unjustifiable persistent refusal' to attend to a wife's interest in clitoral stimulation should . . . be accorded equal weight." *Id.* at 319-20. Turning to tort law, Appleton exposes the fact that medical malpractice lawsuits seeking recovery for botched episiotomies—which can impair sexual pleasure by irreversibly injuring clitoral muscles—rarely detail the sexual consequences of the procedure. *Id.* at 323-25. And in the realm of commercial regulation, Appleton juxtaposes the availability and visible marketing of Viagra with bans on the distribution of vibrators. *Id.* at 327-30.

71. See JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX (2003); Linda McClain, *Some ABCs of Feminist Sex Education (in Light of the Sexuality Critique of Legal Feminism)*, 15 COLUM. J. GENDER & L. 63 (2006); Susan Ekberg Stiritz & Susan Frelich Appleton, *Sex Therapy in the Age of Viagra: "Money Can't Buy Me Love,"* 35 WASH. U. J.L. & POL'Y 363, 364-65 (2011); Abraham, *supra* note 37.

72. Appleton, *supra* note 38, at 286; see also KITROEFF, *supra* note 40 ("Roughly one-quarter of women reliably experience orgasm through intercourse alone Another third of women rarely or never have orgasms from intercourse."); Anne Koedt, *The Myth of Vaginal Orgasm* (1970), U. ILL., <http://www.uic.edu/orgs/cwluherstory/CWLUArchive/vaginalmyth.html> (last visited June 27, 2014). The message of Koedt's manifesto made its way into the work of educators like Betty Dodson, whose efforts to rehabilitate self-pleasuring (also known as "masturbation," which means "self-pollution") have helped many women wake up sexually and many men practice the type of control that is a prerequisite for being a decent lover. Other teachers have worked to dispel the focus on direct genital stimulation as the only road to pleasure, encouraging awareness of erotic potential throughout the entire body.

Susan Appleton has called for "a type of official affirmative action to counter deep-seated assumptions . . . concerning women and pleasure. Consider as an example," she writes, "the sea change over the past 30 years or so in response to domestic violence . . . even though state intervention was once considered beyond the purview of the law because of the imagined impenetrability of family privacy and the supposed immutability of gender norms. State intervention is now not just tolerated but generally expected in such cases Is it possible to imagine a similar change in attitude so that the knowledge necessary for pleasurable, rather than objectifying, sexual relationships could break free from the constructs of privacy and gender to become a suitable topic for teaching and learning?" Appleton, *supra* note 38, at 309-310.

Did I have a unique contribution to make to this conversation? The beating heart of the work I began with *The Price of Pleasure* and veered away from with *Preglimony* centers on the subtle, under-the-radar ways in which law whitewashes sex against desire. After all, what are these projects really about? They're about what happens when a man and a woman who aren't married discover that she is carrying the gestating seed of their physical union, a potential human being that is a mixture of them both—their looks, their personalities, their ancestors. Whatever happened during the sex, however the pregnancy ends, this situation is as existentially complex as they get. When parties' understanding of the baseline responsibilities it triggers diverge, the gap can create deep suffering for everybody. It represents a breakdown in relationship under extraordinarily stressful circumstances. For some, the situation is so incomprehensible, so terrifying, that the prospect of engaging in a healing process around it can seem utterly out of reach. It is out of reach for the same reason that healing sex often remains elusive—because we are not practiced in the art of empathic listening, because we are not committed to authenticity, because we are averse to the implication that SAD is so ubiquitous in the scripts we have inherited that we all participate in it, on both sides, literally and metaphorically, in small and large ways, every day.

Perhaps *preglimony's* absence from the law books is most instructive as a symptom of this larger narrative, of our denial? The lovers-as-strangers default—which gives parties the freedom to choose their own *preglimony*-type arrangements, if any—may seem more reasonable if we assume that parties relate as equals and that the sex that produced the pregnancy was mutually desired. If instead we picture the sex as inhabiting the unhappy spectrum between non-consensual and consensual unwanted, we might see things differently. What if the majority of unmarried pregnant women would have preferred *not* to have the sex that produced the pregnancy?⁷³ Would our intuitions about the proper default change? Might we then see *preglimony* as an indirect way of getting at an issue too murky and fraught for the law's crisp, rational scalpel? Perhaps and perhaps not . . . *Preglimony* comes along with its own problems. My point is simply that these are questions we ought to spend more time deliberating about, using *multiple* modalities, before we start drafting and defending solutions.

The tricky part is that if West is right about the self-reinforcing dynamics at play, generating reliable statistics on the prevalence of

73. Relatedly, the Douglass sisters argue that sex against desire contributes to the high rate of unwanted pregnancy. Teenage girls may have little power to resist SAD intercourse because their partners are older boys or men. Two-thirds of the babies born to girls under twenty are now fathered by adults. A man who is in his twenties or older typically has more social power than a teenage girl, and this inequality can affect how they have sex.

DOUGLASS & DOUGLASS, *supra* note 37, at 151.

undesired sex is inherently difficult, and the question itself is unlikely to receive much attention. Women *and* men whose capacity for self-assertion, self-possession, autonomy, and integrity has been so thoroughly eroded that they do not experience their lack of desire as harmful will eschew discussion of the issue. Women and men who sense but are not prepared to acknowledge that their *partners* are going along with sex they don't want will also resist focusing on the phenomenon. The jokes about asymmetries in desire betray a dynamic that has devastating consequences for both genders. Few men enjoy sex that their partners do not want, the temporary release tinged with loneliness. More commonly, the unspoken gap in desire hurts both partners—leading to feelings of inadequacy, frustration, anger, depression, and shame. But often, people who don't see a way out of the situation would rather not acknowledge it.

So the most compelling threads I discovered while writing *The Price of Pleasure* involved an inherently unpopular, untestable hypothesis about a category that some legal academics would dismiss as not really law. Could I have woven these threads into a paper before tenure? My research didn't solve a recognized legal problem. It posed a series of questions, a scatterplot of dots some of which I still don't know how to connect. It grew from glimpses I've seen of the potential for growth and healing through authentic intimate connection—potential I believe, but cannot prove, has been thwarted by law as we have known it for centuries.

I believe, but cannot prove, that this thwarted potential is at the root of our addiction to violence.⁷⁴ It also, in my estimation, explains our limited capacity to make peace. Making peace, like making love, requires a radical surrender of the egoic self, an ability to listen to another human being with a quality of attention that embodies complete respect. Of the professional mediators and negotiators I met during my own limited foray into the “peace business”⁷⁵—lawyers, politicians, military officers, and businessmen—some were talented strategists, some were hard-working bureaucrats, some were creative problem solvers, some were kind. None impressed me as masters in the art of surrender. I think there's a connection between the dearth of men and women who model this quality in the ranks of official “peacemakers” and the prevalence of non-consensual and consensual unwanted sex in our societies.

This type of speculation would not have served me well on the tenure track. Law professors are supposed to be experts, or at least act like experts.⁷⁶ How does a lady law professor present her intuitions about an

74. See, e.g., JALAJA BONHEIM, *APHRODITE'S DAUGHTERS: WOMEN'S SEXUAL STORIES AND THE JOURNEY OF THE SOUL* (1997).

75. See Shari Motro, *Lessons from the Swiss Cheese Map*, *LEGAL AFFAIRS*, Sept.-Oct. 2005, at 46, available at <http://ssrn.com/abstract=947151>.

76. For inspiration on how to avoid self-sabotaging perfectionism among academics, see Ian Ayres et al., *Crafting a Scholarly Persona: A Panel Discussion* 27 (Mar. 3, 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=998015 (Carol Sanger: “[W]e get in the bad habit of thinking the piece isn't good enough. ‘I've got to wait. I've got to do more research.’ Then,

untestable hypothesis to a faculty workshop audience without getting laughed out of the room? Pregnancy, by contrast, is “real.” Pregnancies that result from consensual sex between unmarried lovers—this is a legally cognizable category, a category I needed in order to feel safe on the road to tenure. It was my “law hook.”

III. GETTING TO YES

In a sense, *Preglimony* was like consensual unwanted sex. No one forced me to write it, and I did benefit from it. I enjoyed it. But compared with the high I hit when I marry the dissecting, categorizing part of my brain with the spacious, intuitive part, *Preglimony* was . . . well, it was “fine.” It was familiar. It was closing my eyes and thinking of England.⁷⁷

If my story is not unique—if there are others who experience traditional legal scholarship as a shadow of a deeper, more searching engagement with fundamental questions about what law is and can be—then the consensual unwanted framework may help us understand why we go along and at what price. It may also offer some clues on a way out.

A. *Why We Go Along*

Why would a woman consent to sex she doesn’t want? Often, it’s because she’s given up on true intimacy. She goes along because the alternative—naming her true desires, asking for the touch or the space that she craves—is unlikely to shift the dynamic. At best, she imagines, nothing will change. At worst, raising the issue could disrupt a delicate balance, causing needless heartache, maybe even destroying the relationship, which might mean financial ruin, social death, the loss of family and home.

A similar calculus motivates the compromised academic. She writes to impress, to please, because she’s afraid. She’s afraid that inviting the conversation she has been craving, asking the questions that are most compelling to her and naming the answers she discovers will jeopardize her livelihood, her status, her friendships.

One of my colleagues describes law school as a utilitarian hell. Nothing is valued as an end in itself, only as a means to some other end.⁷⁸ As the

someone said to me about six months ago, ‘Give yourself tenure.’ So I said, ‘What?’ They said, ‘You have tenure.’ And the message wasn’t ‘be lazy.’ It was ‘be confident.’ And that’s something I’ve taken to heart. I shouldn’t be timid about my work or about the progress of it. So there is this shift. You may have tenure but you still act as though everybody is looking for your mistakes. So that’s the more senior version of how to keep reforming how you work.”)

77. (A British phrase referring to wives who submit to unwanted sex for the benefit of the nation.) The utilitarian ethos is so common in academia (and not just in legal academia) naming it feels banal. It’s a cliché; we call it “jumping through a hoop,” as if we were poodles in the circus. The verb we use to describe what we do to sell our articles to the editors is “pimping.” We call the glossy postcards and magazines our schools send out advertising our top placements “law porn.” See Doug Litowitz, *Law Porn and Its Discontents*, 6 CRIT: CRITICAL STUD. J. 14, 15 (2012).

78. Conversation with Christopher Cortis, Assistant Professor of Legal Writing, Univ. of

hopeful candidate prepares for the AALS hiring conference—the “meat market”—she writes to get a job. As she finds her bearings as a new law teacher, she writes to keep her job. During that first chapter, tenure can seem like the ultimate finish line. She imagines that when she breaks that ribbon, she will finally be free to chart her own course. This is one of the things tenure is *for*; we believe that society will be healthier if we make it safe for a cadre of scholars to ask unpopular questions, to name uncomfortable truths, to invest in experiments that might not yield commercially viable products.

But tenure isn't enough. Tenure takes care of the dread over material survival. It doesn't address the other source of academics' anxiety: the fear of isolation. Peter Gabel thinks the reason law professors are so attached to their “alienated networks of passive role-performance” is that “maintaining their allegiance to these modes of alienation is their only apparent source of social identity and self-worth.” Indeed, “bowing to this alienation is even the seemingly necessary condition of group membership.”⁷⁹

Making tenure takes a lot of work, work that results in a measure of competence in a particular genre. By the time we make tenure, we've become good at something. Shifting gears means starting over.⁸⁰ Not entirely, but at least to some extent it means going back to that wobbly colt we were when we began. For anyone who cares about her reputation—that is, for anyone who is human—that's a scary proposition.

But fear is not the only reason we go along. Fear explains why I avoided following the consensual unwanted line of inquiry I'd discovered as I was writing *The Price of Pleasure*. The rush that coursed through me when I

Richmond School of Law (2013).

79. Gabel, *Hierarchy*, *supra* note 4; *see also* GABEL, *ANOTHER WAY*, *supra* note 4, at 9 (“The denial of the desire for mutual recognition is not merely something that is transmitted between two persons . . . but is rather a vast, rotating social field, in which every furtive glance and blank gaze and nonpresent (elusive) role-performance is taken as what's real Or to put this slightly differently, every such act of flight from each other, every false way of being designed to conceal our true longing, is coupled with an implicit meta-statement that ‘this is who I really am’ and ‘this is who you must recognize me as and who you really should and must be yourself.’ Pre-reflectively and more or less instantly, we are each perpetually internalizing the social reality and necessity of what the other is transmitting to us, and we then—in what I am calling a ‘rotating’ fashion—re-externalize toward others as real what we have internalized from the others passing us or surrounding us emerging in and out of our social field, from infancy forward, because the social field of the whole of existence, of the life-world in which we coexist, forms a mutually influencing circle that is our conditioning. I call this aspect of our social reality the ‘circle of collective denial’ that keeps us spiritually imprisoned in our separation, a circle that each of us co-creates because as social beings actually constituted by each other, we cannot but externalize what we have internalized even as we long to and struggle to transcend it.”).

80. The very possibility of making this choice presupposes that the compromised academic is aware enough to recognize what Heidegger called the “downward plunge . . . away from the projecting of authentic possibilities.” MARTIN HEIDEGGER, *BEING AND TIME* 223 (1962); *see also id.* (“Dasein plunges . . . into the groundlessness and nullity of inauthentic everydayness. But this plunge remains hidden from Dasein . . . so much so, indeed, that it gets interpreted as a way of ‘ascending’ and ‘living concretely’.” This downward plunge . . . tears the understanding away from the projecting of authentic possibilities, and into the tranquilized supposition that it possesses everything, or that everything is within its reach.”).

hit on the idea for a preglimony deduction came from another, diametrically opposed but somehow also closely related impulse—hubris.

Preglimony would mean a chance to rack up on the goodies that come with stardom in the legal academe: awards, salary bumps, recruiting calls from more prestigious schools, a ticket to by-invitation-only gatherings. It would mean power.

Here the SAD metaphor comes in handy again, but with a new twist. How does a woman who has been going along break the cycle? Often, her first step will be to reverse roles, to shift from object to subject, from giver to taker, from conquered to conqueror. Before she can find her way to loving communion, she will say: *Okay, you want to play this game? I can play this game too.*

Was *Preglimony* “putting out”⁸¹ or getting on top? Was it putting out *by* getting on top? It was a jujitsu move, and pulling it off was exhilarating. It fed my ego—the part of my psyche that identifies as a separate self and that regards others as potential friends or foes, constituencies to be cultivated or enemies to be defended against. Presenting *Preglimony* at faculty workshops I felt that I was finally hitting my stride, manifesting the potential that my mentors saw in my job talk, my insecurities finally receding to the background.

But when more invitations followed, I delayed accepting them, using a sabbatical abroad as my excuse. The truth was that I didn’t want to commit to an appearance that might corral my creative process within the usual mold. I sensed that what I had to say needed to be incubated in a different setting.

The typical faculty workshop takes place in a classroom or faculty lounge. The arrangement is frontal—the audience is seated, the speaker stands at a podium. This gives her the “first serve”; going into the match she has the power, it’s hers to lose. She presents her work—which she has already distributed to the faculty in a “draft” (often quite polished because “we don’t want to be caught with our pants down”)—then the floor opens for “questions.” In rare cases they’re thinly veiled attempts to trip up or humiliate the speaker. More often they are well-intentioned rallies. It’s the marketplace of ideas, the invisible hand. The underlying assumption is that if I slam the ball with everything I’ve got, if I make my opponent scamper back and forth until she’s sucking air, if I perfect my top spin, that will make things interesting and ultimately improve everybody’s game. Even at schools with a kinder culture (of which my own is the best I have seen), workshops tend to follow a modified, if friendlier version of this script. The friendliness is genuine, but it’s still rooted in the dialectic paradigm

81. AsimJ, *Putting Out*, URBAN DICTIONARY (Apr. 17, 2008), <http://www.urbandictionary.com/define.php?term=putting%20out> (“[T]o engage in sexual intercourse (usually penile-vaginal) when expected to, according to social conventions such as dating. *It was already the second week they were going out and Chris was starting to lose interest in Ashley because she wasn’t putting out.*”).

for seeking truth.

I've tasted the high that can come from playing this game. In small doses I still enjoy it. It gets me to work up a healthy sweat, it takes my work to the next level (as defined by the dominant paradigm), and it bonds me with colleagues the way that sports can bond players on a field. After a good "game" on another team's turf, I return to my hotel room buzzing with new ideas. Too wired to sleep, too exhausted to work, I turn on the TV and check out as the adrenaline subsides and my heartbeat returns to normal.

Before I'd experienced the alternative—with small groups of like-minded colleagues, at conferences explicitly devoted to mindful inquiry,⁸² in meetings of the Richmond Contemplative Law Group,⁸³ and in writing workshops where peer reviews follow a nontraditional format⁸⁴—I assumed that the flushed pride I felt after doing the left-brain-on-steroids thing was as good as it gets.

Now I know that there is so much more. I find the insights and human connection that emerge when people gather with the intention of doing another type of dance with ideas infinitely more meaningful. When we are a part of a circle in which ego is suspended, in which people listen to each other without simultaneously dissecting, judging, or planning a response, in which people speak without grasping for approval—the wisdom of the group goes up a notch. Instead of arguments that fray into a dizzying mess of tangents, something coalesces, something that enables a collective reckoning with the core integrity of the project. I leave refreshed and renewed, a part of something larger than myself, something that embodies the highest mission of our profession as I see it.

Can academics come together in this mode? Yes. In small groups that share a baseline level of trust, it's not uncommon. In larger groups it's rare, but I have seen it happen. Still, the circle is not our profession's preferred form, and voicing my dismay over that can feel pointless, or worse—bad manners. So I often take the easier route: I go along.

82. *E.g.*, the 2010 Mindful Lawyer conference and the 2013 Mindfulness in Legal Education Workshop. Both were held at the University of California at Berkeley School of Law.

83. A group I founded together with transformative mediator Millie Cain and trial lawyer Aubrey Ford.

84. In my own seminars, before opening the floor to a free-flowing conversation, I ask workshop readers to answer the following questions:

1. Of what you read, what most captured your attention? What do you think this paper wants to be about? What's its beating heart? What's its core?

2. What did you want to hear more about?

3. Was there anything in this paper that resonated with an experience or an interest of yours?

I've found this structure helps the author identify the core message she is trying to convey and the main problems with her draft. It prevents the conversation from being railroaded by tangential criticism and it encourages people to be transparent about their points of reference. It also tends to foster an encounter that is enriching for everyone in the room.

B. The Price of Compromise

What is the price of “scholarship against desire”? In personal relationships, habitual compromise—sex that routinely ignores one partner’s desire—exact an emotional price on both parties. The disconnect in the intimate relationship often bleeds into other realms of partners’ lives as well—their family, their work, their broader circle of connections. An academic culture that pressures those who speak in a different voice to either assimilate or resign to second-class status poses similar dangers—to outliers themselves, to the joint enterprise (intellectual inquiry), and to the life of the community.

1. The Psychic Price

During my first few years in the legal academe, I felt like an impostor. I didn’t belong. I still held the ideals that led me to go to law school—I was still passionate about the rules that shape our society, I still wanted to change the world, and I wanted to do it through words, through writing. But I assumed that writing in the voice that felt natural to me had no place in a law school. So I pushed myself to assimilate, to stamp out the aspect of my identity that couldn’t play the part. When the stress of this exercise threatened to overwhelm me, I blamed myself. I imagined, as minorities often do, that my pain was my well-deserved punishment for trying to “pass.”⁸⁵

Few academics who feel this way are willing to say so publically, so it’s hard to gauge how widespread the crisis of authenticity is. My intuition tells me that its proportions are large enough to merit concern, and not only because academics themselves are suffering. Students are suffering too. A shocking number of law students and lawyers devote much of their mental and emotional resources battling depression, anxiety, alcoholism, and drug abuse.⁸⁶

Faculty members who are concerned about law student morale tend to focus on the teaching we do in the classroom or clinic, on grades, on career counseling, on mental health resources. These efforts—which span

85. “An injury uniquely sustained by a disempowered group will lack a name, a history, and in general a linguistic reality,” writes West. “Consequently, the victim as well as the perpetrator will transform the pain into something else, such as, for example, punishment, or flattery, or transcendence, or unconscious pleasure.” West, *Hedonic*, *supra* note 34, at 153. Even after I gave up on passing, I’ve continued to feel pressured to “cover”—to tone down my difference. For a discussion of covering, see *infra* note 104.

86. See Clarke, *supra* note 19 (“Lawyers, as a group, are 3.6 times more likely to suffer from depression than the average person. . . . [T]he rate of death by suicide for lawyers [is] nearly six times the suicide rate in the general population. . . . What is worse is the state of our students. According to a study by Prof. Andy Benjamin (U. Wash.), by the spring of their 1L year, 32% of law students are clinically depressed, despite being no more depressed than the general public (about 8%) when they entered law school. By graduation, this number had risen to 40%. While this percentage dropped to 17% two years after graduation, the rate of depression was still double that of the general public.”). See also Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112 (2002).

many disciplines and approaches—are invaluable and have helped countless students. Nonetheless, I find myself wondering whether in locating the problem with the students we resemble parents who send their child to therapy or who read up on parenting strategies without dealing with their internal relationship issues. Just as parents’ model of intimate partnership influences their child at least as much as the explicit lessons they convey, I suspect that the culture of legal scholarship trickles down to our students regardless of whether they are directly exposed to it. This culture is part of the teaching we do, part of the ethos we impart. As Parker Palmer puts it, “we teach who we are.”⁸⁷

Our students’ reality is different from our own in many critical ways; but there are aspects of their world that mirror our own. The coin of our realm is publishing in top tier law reviews; theirs is making it into the top tier of their class. When we fail, we pretend to be fine, unbruised. They do the same. Some of us keep trying; others give up. They do the same. When we succeed, we are pleased, but soon the attention we receive from the stamp of approval overwhelms the ideas that elicited it. *Preglimony* becomes “your *Stanford* piece,” and *Stanford* becomes the new bar. Our top students—the rising stars, those anointed for success—do the same. They’re pleased to have made it onto law review, but what about the managing board? The Supreme Court? The White House? Each accomplishment feeds their compulsion to scale the next peak.⁸⁸

In the process, few find opportunities to develop and cultivate a larger sense of purpose, to ask the most important questions: *Why am I here, and where am I going?* These are the questions students explore in a seminar I teach integrating mindfulness and creative writing to guide students through a career visioning process. For the first meeting, I assign an essay by John J. Osborn (author of *The Paper Chase*) about the place of personal narrative in the law school experience.

87. PARKER PALMER, *THE COURAGE TO TEACH* 2 (1998) (“Teaching, like any truly human activity, emerges from one’s inwardness, for better or worse. As 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. In fact, knowing my students and my subject depends heavily on self-knowledge. When I do not know myself, I cannot know who my students are. I will see them through a glass darkly, in the shadows of my unexamined life—and when I cannot see them clearly, I cannot teach them well. When I do not know myself, I cannot know my subject—not at the deepest levels of embodied, personal meaning. I will know it only abstractly, from a distance, a congeries of concepts as far removed from the world as I am from personal truth.”).

88. The law review editors who rejected *The Price of Pleasure* were only doing their job as defined by us law pros—the people who also happen to hold the keys to their future in the profession. See Rodell, *supra* note 34, at 45 (“[E]verybody connected with the law review has some sort of bread to butter, in a nice way of course, and all of them—professors, students, and practicing lawyers—are quite content to go on buttering their own and each other’s bread. It is a pretty little family picture and anyone who comes along with the wild idea that the folks might step outside for a spell and take a breath of fresh air is likely to have his head bitten off. It is much too warm and comfortable and safe indoors.”).

“[L]aw students are told something about their narrative when they come to law school,” writes Osborn.

They are told that they are entering a completely different world. Everything that they have done up to law school is irrelevant. They’re going to think in a different way. They’re going to think like lawyers. They’re going to participate in class in a different way. They’re going to be called on rather than raise their hand when they have something to say. They’re even going to sit in a different way. They’re going to sit according to a seating chart. Their narrative has been taken away from them. Their narrative has been stolen.⁸⁹

One of my missions as a law teacher—not only in my seminars but also in classes like Federal Income Tax—is to empower students to take back their narrative. I want to help my students find tools to quiet the often contradictory voices around them, to look within, and to start crafting a professional identity that is in harmony with who they are as human beings.

Anthony Kronman believes that a defining characteristic of advocacy—which is perhaps the most central skill to be learned in law school—is an indifference to truth. This indifference, he says, tends to have a damaging effect on practitioners’ character, and law professors have a responsibility to counter this effect. “Law teachers . . . have a special responsibility,” he writes,

because the craft they teach not only tolerates an indifference to truth, but actively encourages it by making its ultimate goal something altogether different from truth seeking

The indifference to truth that all advocacy entails is likely . . . to affect the character of one who practices the craft Because it requires its practitioner to think of truth as, at most, an instrumental good, not as something valued for its own sake, advocacy encourages what can only be described as a kind of cynicism regarding efforts to discover and to state the truth about the wide range of human matters with which the law is concerned.⁹⁰

Why should we care whether our students turn into cynics? “Cynicism . . . is destructive,” according to Kronman,

because the truth . . . represents the idea of a convergence in our independent personal experiences of the world. The truth is a common meeting ground. It is necessarily the same for all of us, and the affirmation of its value is, in an important sense, an affirmation of

89. Osborn, *supra* note 10 at 342-43.

90. Kronman, *supra* note 8, at 964. *See also* HALL, *supra* note 15, at 138 (“Because lawyers are uniquely aware of the ambiguous nature of facts, rules and policies, they often embrace the notion that truth cannot be the goal of the adversarial process because the legal system is not equipped to obtain it. . . . To participate in . . . this type of moral reasoning slowly depletes one’s moral well. The entire process begins to feel like a game, and the lawyer begins to feel like a gamester. It is at this point that disillusionment, depression and more serious personal disorders begin to set in.”).

the ideal of community.⁹¹

For Kronman, legal scholarship can serve as a bulwark against cynicism. How? “What is essential” is that law professors bring “the spirit of [their] work” into the classroom. “Every teacher . . . must find a way to make it clear that he cares for the truth.”⁹² Kronman’s approach is rooted in the assumption that “[t]he defining characteristic of scholarship is its preoccupation with the discovery of truth.”⁹³ Indeed, “[t]o understand the world as it truly is—this, and nothing else, is the goal of scholarship.”⁹⁴

If our scholarship is skewed by egoic considerations,⁹⁵ the special function of scholarship as a ballast against cynicism vanishes. If law schools continue down this path, we might vanish too.

If, instead, we invest more in scholarship that explores the author’s deepest questions, that embodies her deepest, most probing loyalty to seeking truth, we might do a better job at inspiring a more conscious, more joyful way of being a lawyer. At a time when becoming a lawyer is literally a life-threatening proposition,⁹⁶ modeling a relationship with the law that waters the seeds of joy and passion shouldn’t be something we regard as secondary. Identifying and honoring a sense of purpose in our scholarship isn’t decoration to the real work; it *is* the real work.

2. *The Intellectual Price*

The other casualty of academic compromise is ideas. Part of law schools’ mission is to incubate ideas. Incubators should be safe and warm. Environments dominated by an ambient egoic tension covered over by a veneer of nervous good humor are not.

Is that really true to my experience? I have described my school as warm and nurturing countless times and I wasn’t lying. My conversations with Richmond faculty, staff, and students have generated lots of ideas I’ve been excited about, but when I look back at those that turned into presentations and eventually law review articles, each one involves a compromise like the one I have been describing here.

Is that so bad? Did these articles cause any harm? After all, it’s true that all things being equal, I think the world would be a better place if we

91. Kronman, *supra* note 8, at 966.

92. *Id.* at 968.

93. *Id.* at 967.

94. *Id.* at 968.

95. See Rodell, *supra* note 34, at 44 (“[I]t is not surprising that the law reviews are as bad as they are. The leading articles, and the book reviews too, are for the most part written by professors and would-be professors of law whose chief interest is in getting something published so they can wave it in the faces of their deans when they ask for a raise, because the accepted way of getting ahead in law teaching is to break constantly into print in a dignified way.”).

96. See Rosa Flores & Rose Marie Arce, *Why are Lawyers Killing Themselves?*, CNN (Jan. 20, 2014), <http://www.cnn.com/2014/01/19/us/lawyer-suicides/> (according to “[t]he Centers for Disease Control and Prevention . . . [l]awyers ranked fourth when the proportion of suicides in that profession is compared to suicides in all other occupations in the study population”).

collectively considered mandating or at least incentivizing preglimony. I do believe that the justifications for the deductibility of alimony logically extend to payments from a man to his pregnant lover. And I think my preglimony analysis introduces a hypothesis about tax law that's worth thinking about (that the true reason for marriage-based benefits is that we see marriage as a proxy for reproduction).

Yet there is something about my law review articles that worries me. Beneath my belief in the nominal truth of their claims, I also believe that they don't begin to scratch the surface of the infinitely complex existential questions they purport to solve.⁹⁷ The mode in which they are written does not lend itself to this type of exploration; it may even preclude it. Can we do this work—the work of dreaming up new laws—without deep existential analysis of the human relationships they shape? Is it responsible?

Sometimes in our rush to solve the problem we skip over the crucial step of surrendering to *not* knowing the answer. Sometimes instead of modeling our scholarship on the legal brief, our most meaningful (though less glamorous) contribution may be limited to articulating a question.⁹⁸ Sometimes our deepest insights emerge from leaning into conflict instead of beginning by trying to resolve it.⁹⁹

Preglimony isn't "wrong," but in my estimation, if I were to devote the rest of my career to projects in the same vein I would be squandering my particular talent—which is to ask big, unwieldy questions that integrate the personal with the political. I'm not as strong when it comes to devising detailed plans.

"Normally, when you challenge the conventional wisdom," writes anthropologist David Graeber,

. . . the first reaction you are likely to get is a demand for a detailed architectural blueprint of how an alternative system would work. . . . Next, you are likely to be asked for a detailed program of how this system will be brought into existence. Historically, this is ridiculous. When has social change ever happened according to someone's blueprint?¹⁰⁰

97. See HALL, *supra* note 15, at 140 ("If we focus solely on 'truth as outcome,' we will trample much truth along the way. Truth must define and give shape to every aspect of our . . . engagement with the legal processes [sic]. This is not truth in the narrow sense of whether something conforms with the facts, though this is very important. This is truth in the broadest sense of whether our actions and attitudes spring from a place of sincerity and integrity.").

98. For a discussion of the intellectual loss that results when scholarship resembles the legal brief rather than an investigation with no predetermined outcome see Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803 (2009).

99. See HALL, *supra* note 15, at 153 ("The traditional legal approach to conflict resolution does not empower us to see inside conflict and observe . . . the positive consequences which can flow from it, or contemplate what role we play with respect to them.").

100. David Graeber, *A Practical Utopian's Guide to the Coming Collapse*, BAFFLER (Nov. 22, 2013), http://www.thebaffler.com/past/practical_utopians_guide.

Graeber believes that this attitude is detrimental to the intellectual enterprise across the university. Whereas academia used to be “society’s refuge for the eccentric, brilliant, and impractical . . . [i]t is now the domain of professional self-marketers.”¹⁰¹

Is this true of law professors? No. Eccentric, brilliant, impractical writing does occasionally get published in law journals. Certainly compared to the state of the art thirty years ago, the landscape reflects an extraordinary range both in style and in content.

My point is more subtle. In the age of information overload, it’s no longer necessary to silence dissent. It’s enough to marginalize it. When this article is published, *wherever* it is published, it will be seen as “icing on the cake” to my “real” scholarship rather than the product of a discipline in itself, of a set of skills that can be refined and deepened.

Getting good at this type of writing, at this type of thinking is no less demanding than other modes. Sometimes it takes longer than we can justify to promotion committees or deans (though mine have been supportive). Sometimes it requires us to step out of the official workshop circuit where reputations are made and maintained. Sometimes it entails creating an entire alternative network of off-the-beaten track co-conspirators, people who are helpful to the work but not necessarily to one’s official career. All of these moves are risky. For those who are positioned to climb the ladder it can be hard to make choices that are likely to result in a failure to meet expectations.

The loss is everybody’s.

3. *The Communal Price*

The skew away from authenticity also undermines community by threatening a robust culture of diversity, which is an essential aspect of how we can practice not only justice but also excellence. One reason universities care about diversity is that they want to correct discrimination; they want to make the world a fairer place. That’s just one part of the story. Diversity also matters because including heterogeneous voices in the conversation makes us wiser. Teams do better work if they include left *and* right brain thinkers, extroverts *and* introverts,¹⁰² bureaucrats *and* eccentrics, people who hail from privilege *and* those who do not. But this

101. David Graeber, *Of Flying Cars and the Declining Rate of Profit*, BAFFLER (Nov. 19, 2012), http://www.thebaffler.com/past/of_flying_cars/print. Cf. J.S. Mueller, S. Melwani & J. A. Goncalo, *The Bias Against Creativity: Why People Desire But Reject Creative Ideas* (2011), <http://digitalcommons.ilr.cornell.edu/articles/450/> (proposing that when people are motivated to reduce uncertainty they develop a bias against creativity. This bias—which may not be overt—interferes with people’s ability to recognize a creative idea and forms a concealed barrier hampering the acceptance of novel ideas).

102. See Susan Cain, *The Rise of the New Group-Think*, N.Y. TIMES, Jan. 13, 2012, http://www.nytimes.com/2012/01/15/opinion/sunday/the-rise-of-the-new-groupthink.html?pagewanted=all&_r=1&; Susan Cain, *The Power of Introverts*, TED (Feb. 2012), http://www.ted.com/talks/susan_cain_the_power_of_introverts.

better work manifests only if minorities show up with their authentic selves, if they are prepared to sit out the awkwardness that their true voice may introduce. If they feel like guests at the party—welcome only as long as they conform to the rules of the house—they are unlikely to deliver their highest gifts.¹⁰³

Universities are no longer homogeneous bastions of privilege, and few minorities feel compelled to “pass”—to guard their true identity as one guards a dangerous secret. But according to Kenji Yoshino, a more subtle demand to “cover”—to tone down aspects of our identity that do not conform to the norms of the dominant culture¹⁰⁴—has become “the civil rights issue of our time.”¹⁰⁵

When gays feel pressured not to “flaunt,” blacks feel pressured to “act white,” and women to “put on a suit” everybody is hurt. The person doing the covering is hurt because living behind a mask “gives an individual a sense of being unreal, a sense of futility.”¹⁰⁶ The group is hurt because homogeneity makes us less creative, less wise, less effective collectively.

The same is true in situations in which people feel pressured to “reverse cover”¹⁰⁷—to act according to scripts associated with their assumed affiliation.

The point is that true authenticity is subtle and personal. Fostering it at an institutional level requires patience, sensitivity, and courage.

103. See Shari Motro, *Americans Are “International” Too*, INSIDE HIGHER ED (Nov. 17, 2014), <https://www.insidehighered.com/views/2014/11/17/we-should-stop-calling-students-outside-us-international-essay>.

104. See KENJI YOSHINO, *COVERING* 18 (2006) (referencing ERVING GOFFMAN, *STIGMA* (1963)) (“After discussing passing, Goffman observes that ‘persons who are ready to admit possession of a stigma . . . may nonetheless make a great effort to keep the stigma from looming large.’ He calls this behavior ‘covering.’ Goffman distinguishes passing from covering by noting that passing pertains to the *visibility* of a particular trait, while covering pertains to its *obtrusiveness*. He relates how Franklin Roosevelt always stationed himself behind a table before his advisers came in for meetings. Roosevelt was not passing, since everyone knew he used a wheelchair. He was covering, down playing his disability so people would focus on his more conventionally presidential qualities.”).

105. *Id.* at 23; see also *id.* at 24 (“When I lecture on covering, I often encounter what I think of as the ‘angry straight white man’ reaction. A member of the audience, almost invariably a white man, almost invariably angry, denies that covering is a civil rights issue. Why shouldn’t racial minorities or women or gays have to cover? These groups should receive legal protection against discrimination for things they cannot help, like skin color or chromosomes or innate sexual drives. But why should they receive protection for behaviors within their control—wearing cornrows, acting ‘feminine,’ or flaunting their sexuality? After all, the questioner says, *I* have to cover all the time. I have to mute my depression, or my obesity, or my alcoholism, or my schizophrenia, or my shyness, or my working-class background, or my nameless anomie Why should my struggle for an authentic self matter less?”)

I surprise these individuals when I agree. Contemporary civil rights has erred in focusing solely on traditional civil rights groups, such as racial minorities, women, gays, religious minorities, and individuals with disabilities. This assumes those in the so-called mainstream—those straight white men—do not have covered selves. . . . Civil rights must rise into a new, more inclusive register. That ascent begins with the recognition that *the mainstream is a myth*. With respect to any particular identity, the word ‘mainstream’ makes sense, as in the statement that straights are more mainstream than gays. Used generically, however, the word lacks meaning. Because human beings hold many identities, the mainstream is a shifting coalition, and none of us is entirely within it.”).

106. *Id.* at 185.

107. *Id.* at 136.

The demand to cover applies not only to groups traditionally ascribed minority status. We *all* feel pressured to check a part of our identity at the door.¹⁰⁸ Sometimes doing so is necessary and skillful. But we often overshoot. The trick is learning to distinguish healthy adaptive behavior from compromises that hurt both individual and community.

Referencing D. W. Winnicott, Yoshino explains that the reason why the quest for authenticity is so important is that

The True Self is the self that gives an individual the feeling of being real, which is “more than existing; it is finding a way to exist as oneself, and to relate to objects as oneself, and to have a self into which to retreat for relaxation.” . . . The False Self, in contrast, gives an individual a sense of being unreal, a sense of futility.¹⁰⁹

But the False Self is not all bad.

“The False Self has one positive and very important function: to hide the True Self, which it does by compliance with environmental demands.” Like a king castling behind a rook in chess, the more valuable but less powerful piece retreats behind the less valuable but more powerful one. Because the relationship between the True Self and the False Self is symbiotic, Winnicott believes both selves will exist even in the healthy individual.¹¹⁰

The personas we adopt with students and colleagues serve a function. They enable us to survive when bringing our full being to a situation would burn us.

“Nonetheless,” explains Yoshino, “Winnicott defines health according to the degree of ascendancy the True Self gains over the False one.”¹¹¹ Health is maximal authenticity.¹¹² By stepping into an identity more fully aligned with her True Self, the teacher-scholar can set an example for the type of equilibrium, deep wisdom, and compassion that is essential to excellent lawyering.¹¹³

108. *Id.* at 24-25.

109. *Id.* at 185.

110. *Id.*

111. *Id.*

112. *Id.* (“At the negative extreme, the False Self completely obscures the True Self, perhaps even from the individual herself. In a less extreme case, the False Self permits the True Self ‘a secret life.’ The individual approaches health only when the False Self has ‘as its main concern a search for conditions which will make it possible for the True Self to come into its own.’ Finally, in the healthy individual, the False Self is reduced to a ‘polite and mannered social attitude;’ a tool available to the fully realized True Self.”).

113. See HALL, *supra* note 15, at 158 (“Before we can be the dispenser of healing energies, we must work to be in a place where we have experienced and dealt with those same forces in our own lives. This is not an easy part of our calling. It is certainly not something that all lawyers can provide based on their present training and orientation toward the practice of law. This perspective of the practice of law challenges us to rethink the way in which we train lawyers to assume their role in society, and how bar associations cultivate and promote the profession. [Lawyers’] role as healer[s] [is] fundamental to and intertwined with the work the client has asked the lawyers to do. We cannot separate a person’s emotional and spiritual state from his legal situation. They are there, staring us in the face, crying out for attention. When we ignore them or pretend that they are . . . marginal . . . we

C. *The Promise of Authenticity*

The ethos that leads us to see our jobs as “business” is a recipe for misery—for us, for our students, for the profession.¹¹⁴ Is there another way? Yes, I believe there is.

How does a woman who has squelched her true desires begin a different kind of conversation? In relationships, unleashing my anger (as I did in parts of *The Price of Pleasure*)¹¹⁵ or turning problem-solver (as I did in *Preglimony*) tends to backfire. It hurts; it threatens; it emasculates. In response my partner may lash out or he may withdraw.

There is no magic recipe, but the better strategy begins with honesty—a type of honesty that uses the head *as well as* the heart. It begins with checking in with myself, acknowledging my “yes,” my “no,” and my “maybe,” and speaking it without judgment towards myself *or* towards the other person. The key is to feel and to communicate *without attaching to outcomes*.

For people who share my sensibility, bliss doesn’t arise through Hollywood-style miracles of synchronicity. It unfolds, eventually, from a series of mini course-corrections approached with curiosity and humility. It comes unbidden once I accept that my partner might not be able to meet me, that I might not be able to meet him. I recognize this, and I’m prepared for the messy, potentially devastating conversation. I’m prepared to spend the night alone.

I wasn’t always able to do this. As a younger woman, my desire to be liked, not to offend, or to get what I wanted often ran the show. I’ve gotten better at tuning in, asking for what I want, listening to what others want, and working with the burn of disappointment when these desires don’t match—in sex, in life, in my dance with the law.

In my own case, the most noticeable turning point in my ability to do this came from my deepening mindfulness practice. The mindful lawyering movement in particular has helped me connect the dots between my personal path and my professional one.¹¹⁶

still are affecting the person and negatively contributing to his unhealthy state. Every person who interfaces with the person during this period of brokenness is either contributing to his healing or contributing to his present state of disequilibrium.”).

114. For an illustration of the price writers pay when we allow the market to shape our work, see JACK LONDON, *MARTIN EDEN* (1909).

115. Cf. Franke, *supra* note 67, at 181 (2001) (“[Legal feminists] have done a more than adequate job of theorizing the right to say *no*, but we have left to others the task of understanding what it might mean to say *yes*.”); see also *id.* at 197 (“Implicitly installing Lysistrada [sic] as the patron saint of feminism, for many feminist legal theorists, saying no to sex has been understood as one of the principal ways of saying yes to power.”). For a discussion of the negative, avoidable consequences of angry choices in domestic violence advocacy, see Deborah Cantrell, *Re-Problematising Anger In Domestic Violence Advocacy*, 21 AM. U. J. GENDER SOC. POL’Y & L. 837 (2013).

116. See *The Meditative Perspective*, CTR. FOR CONTEMPLATIVE MIND IN SOC’Y, http://www.contemplativemind.org/admin/wp-content/uploads/2012/09/The_Meditative_Perspective-4_09.pdf (last visited Mar. 6, 2014); Center for Contemplative Mind, *Presentation by Jack Kornfield: Reflections on Empathy and Mindfulness*, VIMEO (Dec. 20, 2011), <http://vimeo.com/18036791>; Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 UMKC L. REV. 535 (2011); Leonard L.

Though it is widely known as a tool for reducing stress, mindfulness—commonly defined as non-judgmental present moment awareness¹¹⁷—can also lead to fundamental shifts in perspective. For me, cultivating this type of awareness through meditation and mindful communication practices has begun to undo some of the conditioning I absorbed throughout my early life, conditioning that was reinforced when I started law school. Mindfulness has replaced my addiction to external signs of success with a greater awareness of when and how my ego takes over.¹¹⁸ It has helped me shift from experiencing my separation from the world as primary to a felt sense¹¹⁹ of interconnectedness.¹²⁰ And mindfulness has replaced my anxiety-laden attachment to outcomes with a more focused and effective ability to do my best and waste less time worrying about things I cannot control.¹²¹

As a scholar, this last lesson has been critical. The corollary of being prepared to spend the night alone for the academic who has squelched her true voice is writing without needing to publish. Writing professionally

Riskin, *The Contemplative Lawyer: On The Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002); Scott L. Rogers, *The Mindful Law School: An Integrative Approach to Transforming Legal Education*, 28 Touro L. REV. 1189 (2012); TIM RYAN, MINDFUL NATION (2012); David Zlotnick, *Integrating Mindfulness Theory and Practice into Trial Advocacy*, 61 J. LEGAL EDUC. 654 (2012); Harris, *supra* note 15.

117. See JON KABAT-ZINN, COMING TO OUR SENSES: HEALING OURSELVES AND THE WORLD THROUGH MINDFULNESS 108 (2005).

118. See Elizabeth Gilbert, *Your Elusive Creative Genius*, TED (Feb. 2009), http://www.ted.com/talks/elizabeth_gilbert_on_genius; Elizabeth Gilbert, *Success, Failure and the Drive to Keep Creating*, TED (Mar. 2014), http://www.ted.com/talks/elizabeth_gilbert_success_failure_and_the_drive_to_keep_creating.

119. See EUGENE GENDLIN, FOCUSING 51-62 (1988).

120. See SHARON SALZBERG, *Being with the World: Facing Our Interconnectedness*, on UNPLUG (Sounds True, Inc. 2007); THICH NHAT HANH, ESSENTIAL WRITINGS 55 (2001) (discussing “interbeing”). Cf. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (identifying the dominant paradigm that has shaped American jurisprudence as rooted in a view of human beings as separate from one another, and proposing an alternative paradigm based on a “connection thesis.”). There are, of course, many other paths. Isn’t “mindful lawyering” the same thing as being a good lawyer?—asked one participant at the 2010 Mindful Lawyer Conference. Aren’t these the same ideas that animated the women’s movement in 1970? I suspect other alternative lawyering streams—like restorative justice, transformative mediation, integrative lawyering, lawyers as peacemakers, collaborative law, comprehensive law, law as a healing profession, and the project for integrating spirituality, law, and politics—share similar narratives, as do lawyers in traditional legal practices who bring a more humane orientation without affiliating with a particular movement. See *supra* note 15.

121. See TARA BRACH, RADICAL ACCEPTANCE (2004); PEMA CHODRON, START WHERE YOU ARE (2001); James Jacobson-Maisels, Remarks at the Univ. of Richmond (June 28, 2013) (on file with author) (“Acceptance does not mean all is for the best in the best of all possible worlds Acceptance is not saying that this is okay. Acceptance is saying that I can acknowledge the truth and be with the fact that this is the way that it is at this moment [instead of resisting it]. Which is totally different from the question of wisdom, which is: Given that this is the case in this moment, and I can open to it and see that, what do I now do about it? What I . . . do about it might be: I go out and protest. Or I stop this person from doing damage Acceptance is not about being passive. It’s not about sitting back and just letting things happen. It is about saying: I can see and accept and acknowledge that this is what is actually happening to me And then it’s a second piece, and this is crucial, especially if you’re working in social justice, or any kind of work . . . which is adversarial. Acceptance is acknowledging the difference between saying: ‘I want the world to be a certain way because it’s the best way the world could be and I’m going to work as hard as possible to make that a reality,’ versus ‘the world *has* to be this way.’ As soon as we believe the world *has* to be this way, we’re in big trouble. Because we just don’t control that.”).

requires a certain degree of hubris, of faith that the words that come through us will be of use to others. But surviving the stream of rejections that writing for publication inevitably comes along with also requires that we accept that the work *we* find most compelling may find no audience, or it may find an audience far smaller than we'd imagined, or an audience we will never know about, an audience that does little to earn us awards or raise our school's US News ranking. The question then becomes: how far are we prepared to bend to keep playing with the big dogs?

Sometimes compromise is the best option. Sometimes there's nothing wrong with being strategic, with wanting another body in your bed. I don't regret *Preglimony*. I do, after all, operate in a profession that has excluded women for *thousands of years*, a profession that is still, at the top, predominantly male, and I write about issues that have been dismissed as trivial.¹²² I'm glad I used my left-brain to get in the door; I'm glad I listened when my big sister on the faculty¹²³ mentored me in how to write a law review article; I'm glad I followed the advice of my no-nonsense Bosnian colleague—"Don't be another woman who martyrs her career on sword of authenticity," she said.¹²⁴

I'm also glad that on the other side of tenure I stepped off the train and took stock. "Women in legal academia," writes West,

have bridged the gulf that . . . separates us from male discourse by assimilating. . . . We must begin to . . . change the discourse with our presence, instead of . . . changing ourselves to fit the discourse.¹²⁵

I don't know if the voice I assumed in *Preglimony* feels alien because it is masculine, because in presenting it I shifted into what one legal

122. Cf. Rosa Brooks, *What the Internet Age Means for Female Scholars*, 116 YALE L.J. POCKET PART 46, 46 (2006) ("[T]he top-tier American law schools remain, on the whole, male preserves. The latest issue of [The Yale] Journal is emblematic: of sixteen authors, only one is female. Men occupy more than eighty percent of law school deanships and three-fourths of tenured professorships. Although nearly half of American law students are women, elite schools still hire twice as many men as women into tenure and tenure-track positions, and there is some evidence that female law faculty are paid and tenured at lower rates than their male counterparts.").

Around the time I had my eureka moment about preglimony, I came across a clip that made me wonder whether law reviews, like movies, need a male protagonist to sell. The clip introduces Alison Bechtel's litmus test for the presence of women in movies. To pass the test, a movie has to include (1) at least two women with names, (2) who talk to each other (3) about something other than a man. The proportion of movies that don't pass this test is quite extraordinary. See Feminist frequency, *The Bechdel Test for Women in Movies*, YOUTUBE (Dec. 7, 2009), <http://www.youtube.com/watch?v=bLF6sAAMb4s>; see also Tad Friend, *Funny Like a Guy: Anna Faris and Hollywood's Woman Problem*, NEW YORKER, April 11, 2011, http://www.newyorker.com/reporting/2011/04/11/110411fa_fact_friend#ixzz1OPz8ZT3B

("[S]tudios, as they release fewer films, are increasingly focused on trying to develop franchises. Female-driven movies aren't usually blockbusters, and studio heads don't see them as repeatable. Men predominate in Hollywood, and men just don't write much for women. Ideas for female-driven comedies are met with intense skepticism.").

123. Corinna Lain, Assoc. Dean for Faculty Development, Univ. of Richmond School of Law.

124. Conversation with Tanja Softic, Professor of Art, Univ. of Richmond (2011).

125. West, *Hedonic*, *supra* note 34, at 158-59; see also Hartigan, *supra* note 16, at 69-70 ("Law is an invitation to fuller life, more deeply than it is force, violence, death. . . . This sense of Law as inviting is in part the neglected feminine face of the world.").

academic calls “law review boy” mode.¹²⁶ My sense is that the gender lens is both useful and frequently misunderstood, and parsing this issue is not my goal in this article. I do know that had I succeeded in suppressing the compulsion to write this article I would have felt incomplete.

The turn I’ve taken instead feels like bungee jumping; it’s thrilling, and terrifying, and if nothing else, utterly alive. Patricia Williams likens writing against the status quo to a boundary crossing, a crossing “from safe circle into wilderness.”¹²⁷ It requires a willingness “to spoil a good party.”¹²⁸ It’s risky. It’s lonely. But it’s also other things.

The transgression is dizzyingly intense, a reminder of what it is to be alive. It is a sinful pleasure, this willing transgression of a line, which takes one into new awareness, a secret, lonely, and tabooed world . . . to survive the transgression is terrifying and addictive. To know that everything has changed and yet that nothing has changed; and in leaping the chasm of this impossible division of self, a discovery of the self surviving, still well, still strong, and, as a curious consequence, renewed.¹²⁹

Early in the process I realized that telling this story in a way that was faithful to my deepest intentions would require me to step out of the conversation, to unlearn the habits of mind and heart we absorb at the typical faculty workshop and academic conference. So I have absented myself, I have criticized, I may have offended; that has felt both hard and necessary. Sharing my perspective in rooms ruled by law-and-economics-speak can seem futile, not to mention exceedingly uncomfortable. But sometimes this is what is required. As Anne Lamott counsels in her classic advice manual for writers:

Don’t worry about appearing sentimental. Worry about being unavailable; worry about being absent or fraudulent. Risk being unliked. Tell the truth as you understand it. If you’re a writer, you have a moral obligation to do this.¹³⁰

126. E-mail from Laura Rosenbury, Professor of Law, Washington Univ. of Law, to author (Feb. 13, 2014, 1:50 PM) (on file with author). Cf. Simon Baron-Cohen, *The Male Condition*, N.Y. TIMES, Aug. 8, 2005, <http://www.nytimes.com/2005/08/08/opinion/08baron-cohen.html> (“[W]hen performing language tasks, women are likely to activate both hemispheres, whereas males (on average) activate only the left hemisphere. . . . Males on average have a stronger drive to systemize, and females to empathize. . . . For example, on the first day of life, male and female newborns pay attention to different things. On average, at 24 hours old, more male infants will look at a mechanical mobile suspended above them, whereas more female infants will look at a human face. . . . According to what I have called the ‘extreme male brain’ theory of autism, people with autism simply match an extreme of the male profile, with a particularly intense drive to systemize and an unusually low drive to empathize.”).

127. WILLIAMS, *supra* note 1, at 129.

128. *Id.* at 129.

129. *Id.* at 129-30; see also DAVID WHYTE, CONSOLATIONS (2014) (“The fear of loss, in one form or another, is the motivator behind all conscious and unconscious dishonesties. . . . Every human being dwells intimately close to a door of revelation they are afraid to pass through.”).

130. ANNE LAMOTT, BIRD BY BIRD 226 (1995).

In my dreams, there is no conflict; telling the truth as I understand it doesn't have to come with these risks. In my dreams I can cross from safe circle into wilderness and I can also come back and connect both worlds.

In one sense, this paper has already created a bridge. If nothing else, writing it has warmed me up to the contents of those unopened boxes cluttering my office. *The Price of Pleasure* and *Preglimony* are incomplete; but on its own, so is this article. When it is published, I'll send all three in the same envelope.

CONCLUSION

Is scholarship against desire rare, or is it common? It's hard to know; like sex against desire, scholarship against desire isn't something people tend to talk about. For good reason.

When this article started percolating, I knew that investing in it was imprudent. Even now as I near the end of the process, I have doubts. But a stronger voice within me believes that those of us who think that a culture of fear and hubris is undermining the core mission of higher education need to tell our stories. This is especially true for those of us with job security—both because speaking honestly is the *reason why* we've been given this security, and because if *we* experience academia as a place where true inclusivity remains elusive, surely other members of our community who cannot speak as freely must feel this way too.

The students who edit the journals we're all fighting to get into end up running this country. Law students are the future of the profession, a profession that shapes our world, a world that's teetering on the verge of self-destruction. We desperately need our students to bring their highest gifts to the table; our survival is in their hands. When the words we send their way are born of fear or hubris, our compromise ripples out and right back at us.

When we are oblivious to glory, writing is a process of listening. When I'm in the zone, I imagine not a critic who will praise or condemn me, but a friend, a collaborator. I imagine *you*, a human being with a head *and* a heart. I imagine someone who is prepared to join me in what Martin Buber called the I-Thou¹³¹—in a space in which connection trumps separation, in which disagreement does not equal war, in which we are all always learning and growing.

This is the promise. This is the type of engagement I want to model to my students. This is the type of collaborative, open-ended dialogue I dream of seeing in courtrooms and in Congress. I dream of a world in which law is not wielded as an instrument of power, not donned as protective armor, but rather approached with humility and care as one of several tools for mitigating the damage we have wreaked on each other

131. See MARTIN BUBER, I AND THOU (1923).

and on the planet. I dream of a legal academe that regards law as an art, the art of using words to make peace.

I know I am not alone. I know there are others who share my vision of the law as a healing profession. I know I have allies, but relative to our synergistic potential, we remain siloed from one another. This article is my attempt to reach out, to chip away at the fear that separates us.

Will I succeed? Will this project broaden and deepen the communion I've begun to find with fellow travelers, or will it jeopardize my professional standing? Will it invite the dialogue I envision, or will it have a chilling effect? I don't know. The only way I've found to manage the pendulum swing between hope and fear is by cultivating nonattachment.

Communion would be nice, but it can't be the prize—at least not communion with flesh and blood human beings. The prize is communion with something else, with a quality fundamentally different from the accolades that come with successfully playing the game. The prize is doing good work for its own sake. The prize is the freedom that comes when we let go of chasing after prizes.