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# The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth

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*Last April, Professors Daniel Farber and Suzanna Sherry published a critique in these pages of the legal storytelling movement. Their legal position has been the subject of several responses, including an essay by Professor William Eskridge in this issue. In reply, Professors Farber and Sherry challenge their critics' reliance on postmodern views such as social constructionism. Social constructionism, according to Farber and Sherry, embraces forms of community that would be destructive to the scholarly enterprise. It also risks conflating scholarship with politics in ways harmful to both. More generally, Farber and Sherry contend, postmodernism lacks any clear lessons for legal scholarship and possesses at best a contingent connection with progressive change.*

Genuine critique requires taking opposing claims seriously and engaging those views with as much intellectual honesty as possible.<sup>1</sup> In an article appearing in these pages last spring, we made an effort to provide such a critique of the legal storytelling movement, which de-emphasizes conventional analytical methods in favor of "stories from the bottom."<sup>2</sup> Rejecting foundationalism in favor of legal pragmatism and practical reason,<sup>3</sup> we concluded that "stories from the bottom" can improve our understanding of law. We found no basis,

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\*\* Earl Larson Professor of Civil Rights and Civil Liberties Law, University of Minnesota Law School. We thank Jane Baron, Paul Edelman, Dianne Farber, Phil Frickey, and Susan Wolf for their comments. In the interest of full disclosure, we should mention that we regard ourselves as personal friends of Professor Eskridge; indeed, one of us (Farber) shares a relationship with him that under current social conditions is statistically more durable than marriage, namely, casebook coauthorship.

1. As a caustic exchange recently demonstrated, disagreement can easily degenerate into intellectual fratricide, even among colleagues and allies. See Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313, 331 (1992) (responding to Mark Tushnet's criticism of legal storytelling by asserting that "even within his own grid of meaning, Tushnet should be understood to lack integrity to the extent that he takes 'integrity' to mean 'self-awareness' about the 'contingency of one's views'"); Mark Tushnet, *Reply*, 81 GEO. L.J. 343, 349-50 (1992) (stating that criticisms like Peller's are to be expected from "people . . . who know (at some level) that their contributions as scholars . . . are not as substantial as they believe (or fantasize) them to have been").

2. Daniel A. Farber and Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993). "Stories from the bottom" are stories by particular disadvantaged groups about their oppression. Our previous article discussed two of the most prevalent types of stories, by women and by people of color. *Id.* at 808.

3. In a nutshell, foundationalism argues that epistemology can provide a single analytical foundation for formulating unassailably certain beliefs. We use pragmatism as the generic name for the movement away from abstract, deductive reasoning associated with foundationalism. For a further explanation of these terms, see *id.* at 820-22.

however, for a retreat from conventional standards of truthfulness and typicality in assessing stories.<sup>4</sup> Nor did we find cause for abandoning the expectation that legal scholarship contain reason and analysis as well as narrative.<sup>5</sup>

Our article has evoked several spirited and thoughtful replies, including William Eskridge's essay in this issue,<sup>6</sup> as well as critical commentaries by Jane Baron,<sup>7</sup> Jerome Culp,<sup>8</sup> Richard Delgado,<sup>9</sup> and Marc Fajer.<sup>10</sup> It is fair to say that in general these critics eschew polemic in favor of intellectual engagement. Rather than viewing their criticisms as attacks to be repelled, we consider them an invitation to move the debate another step forward. In reply, we will focus on what we believe to be the most fundamental and therefore most interesting challenges to our pragmatist perspective on storytelling.<sup>11</sup>

At the heart of our appraisal of legal storytelling is a vision of scholarship. We envision legal scholarship as an effort to discover truths about the legal system (broadly construed) and to communicate those truths to the scholarly community. As our critics correctly point out, that vision of scholarship rests on contestable assumptions.<sup>12</sup> Perhaps the key assumption is that the truth to which scholars aspire is objective in the sense that it is independent of our heartfelt desires or political commitments—though possibly also subjective in the sense that we each may have only a partial vision of truth.<sup>13</sup> We also assume that scholars speak primarily as (and to) members of a general community rather than simply on the basis of their gender, race, or sexual orientation; that the scholar's first duty is to speak the truth to the best of her understanding; and that scholarship as so understood is among the most important goals of the legal academy.<sup>14</sup> Invoking postmodernist theory to contest these assumptions,

4. *Id.* at 854.

5. *Id.*

6. William N. Eskridge, Jr., *Gaylegal Narratives*, 46 *STAN. L. REV.* 607 (1994).

7. Jane B. Baron, *Resistance to Stories*, 67 *S. CAL. L. REV.* 255 (1994).

8. Jerome McCristal Culp, Jr., *Telling Tales in School: Black Legal Scholarship, Race, and Authenticity* (1993) (unpublished manuscript on file with the *Stanford Law Review*). Culp presented a version of this paper at the 1993 meeting of the Association of American Law Schools.

9. Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 *VAND. L. REV.* 665 (1993).

10. Marc A. Fajer, *Finding Substance in Form: Some Thoughts on Outsider Narratives as Legal Scholarship*, 82 *GEO. L.J.* (forthcoming 1994).

11. This focus excludes some subsidiary areas of disagreement, as well as many points on which we agree with our critics. We agree with Eskridge, for example, in his belief that gaylegal narratives have much to contribute to legal scholarship—a point he brilliantly illustrates with his narratives about Perry Watkins. See Eskridge, *supra* note 6.

12. Because of space limitations, we are unable to explore in any detail the differences among our critics. The description in the text is a composite, meant to highlight the most fundamental critiques of our work. We should also make clear that we are here talking about meta-storytelling: We focus on the literature *about* storytelling rather than on the narratives themselves.

13. We do not mean, in stressing the search for truth, to limit legal scholarship to the recitation of verifiable facts. Much of the best legal scholarship analyzes existing doctrine and argues for its reconceptualization. Our insistence on truth means only that any descriptive portions of the scholarship must be accurate and complete, and that the normative portions cannot rely on inaccuracies. See Farber & Sherry, *supra* note 2, at 832-35.

14. We wish, again, to make clear that we do not view truth as abstract and universal in the Platonic sense. See *id.* at 833. But truth is also more than individual perception; it is perception that can be verified by others. For once, we agree with Richard Epstein:

the critics suggest that truth may be socially constructed rather than objective,<sup>15</sup> that scholarship cannot necessarily be separated from personal identity and group membership,<sup>16</sup> and that legal scholarship sometimes should be judged by its ability to change the world rather than as an attempt simply to understand it.<sup>17</sup> Although the full implications of these ideas may go beyond the intentions of our critics, they pose a basic challenge to conventional conceptions of scholarship.

Because these issues are so fundamental, they are also difficult to address, for it is hard to frame an argument without relying on the very concepts that are in dispute.<sup>18</sup> As a partial response to this dilemma, we will call upon not only conventional analysis but also postmodern techniques<sup>19</sup> such as deconstruction and storytelling. In Part I, we will consider the implications for scholarship of our critics' version of social constructionism (the view that reality is socially constructed rather than objective). We have serious reservations about the idea that scholarship should be judged primarily on the basis of its relationship with particular social groups or communities.<sup>20</sup> Those concerns are heightened because of the way constructionism seemingly portrays those communities. In Part II, we turn to the philosophical issues and suggest that our critics' efforts to use postmodernist philosophy are problematic. We also contend that the relationship they apparently assume between postmodernism and social transformation is at best contingent.

We will focus primarily on Eskridge, though we will attempt to place his views in the context of our other critics. Consequently, a brief reprise of Eskridge's essay may be useful. *Gaylegal Narratives* builds upon a three-part framework connecting philosophical perspectives with political stances. He starts with a view that he calls "conservative pragmatism" and attributes to us.<sup>21</sup> Conservative pragmatism defines truth as coherence with other beliefs and experiences, and so leads only to incremental change. Another view, "prophetic pragmatism," places more emphasis on the role of creativity and imagi-

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[Scholars should search for] objective truth—modestly conceived and with a small "r"—that could be understood, tested, challenged, and confirmed by scholars of all political viewpoints and persuasions. To deny truth at this level is to insist that all academic discourse is a disguised use of power. To insist on truth with a capital "T" is to impose a rigid orthodoxy that will surely stifle intellectual advances and the free inquiry on which such advances depend.

Richard A. Epstein, *Legal Education and the Politics of Exclusion*, 45 STAN. L. REV. 1607, 1611 (1993).

15. Culp, *supra* note 8, at 22-24.

16. See Baron, *supra* note 7, at 256-59 (describing but expressing strong reservations about identifying storytelling with particular groups).

17. See Delgado, *supra* note 9, at 673-74; Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413-15 (1989) (examining the use of stories in the struggle for racial reform).

18. See Scott Brewer, *Introduction: Choosing Sides in the Racial Critiques Debate*, 103 HARV. L. REV. 1844, 1850 n.20 (1990).

19. For an accessible introduction to postmodernism as the foundation of the critical legal studies movement, see Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987).

20. See Farber & Sherry, *supra* note 2, at 809-19.

21. Eskridge, *supra* note 6, at 613. In the background is a prior stage, foundationalism, which he (like us) has rejected in prior work. See William N. Eskridge, Jr., & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324-45 (1990).

nation in transforming current beliefs. Eskridge attributes this more transformative brand of pragmatism to Richard Rorty.<sup>22</sup> More transformative still is social constructionism, an approach he views with enthusiasm and connects with Michel Foucault.<sup>23</sup> We turn first to social constructionism and its implications for legal scholarship.

### I. SCHOLARSHIP AND COMMUNITY

In our view, a scholar's primary duty is to discover and communicate the truth, if necessary at the expense of personal or political commitments. It is the primacy of that duty that distinguishes scholarship from politics. As Robert Post has remarked, following Hannah Arendt, "truth cannot remain truth and yield to expediency; truth demands resistance to the blandishments of this world. And, conversely, governance cannot yield to truth without losing the forms of interaction that constitute politics."<sup>24</sup>

Although we may be overreacting to the implications of our critics' arguments, we are concerned at what seems to be a tendency to subject scholarship to the demands of politics. We see indications of such a tendency in Delgado's insistence that the scholar's duty is to change (rather than to understand) law,<sup>25</sup> as well as in Eskridge's remark that community-building is the highest form of legal scholarship.<sup>26</sup> Both seem to risk conflating the enterprise of scholarship with that of advancing the interests or perspective of a particular community.

The forms of community that social constructionism seems to contemplate heighten our concerns. Depending on how one conceptualizes the relevant communities, the implications for scholarship vary, though we find none of the alternatives palatable. We will begin by sketching social constructionist conceptions of community. We will then consider the implications of those conceptions for scholarship.

22. Eskridge, *supra* note 6, at 622-23.

23. *Id.* at 634. Summing up these various views, Eskridge remarks that the prophetic pragmatist wishes to add new chapters to the book of belief, while the social constructionist wants to tear up the book and start over—leaving the conservative pragmatists, one supposes, with little to do but citecheck the footnotes. *Id.* at 643-44.

24. Robert Post, *Lani Guinier, Joseph Biden, and the Vocation of Legal Scholarship*, 11 CONST. COMMENTARY (forthcoming 1994). We take Post's observation to refer to the overriding goals of political and scholarly activity, rather than as a suggestion that politics should rest on disregard for truth. Nor do we find his view inconsistent with the hopes of many scholars (including ourselves) that deeper understanding of the political system will assist beneficial change. Those hopes play a legitimate role in the selection of topics for research.

25. See Delgado, *supra* note 9, at 673-74 ("[O]utsider scholarship is often aimed not at understanding the law, but at changing it."); Delgado, *supra* note 17, at 2413-15. Fajer similarly suggests that storytelling is useful for defeating stereotypes or "pre-understandings," Fajer, *supra* note 10, at 3, creating empathy, *id.* at 10-12, and "convey[ing] to members of particular privileged groups the realities of living without their privileges," *id.* at 18. Notably, he does not seem enthusiastic about stories, even first-person stories, that instead confirm such pre-understandings. *Id.* at 9 n.28.

26. Eskridge, *supra* note 6, at 625. We should note that while our critics do not view political effects as a necessary condition of good scholarship, they do seem to find such effects sufficient. They also seem to believe that harmful political effects should count against a work of scholarship. Thus while we do not reject, and they do not demand, that scholarship be political, the fact that it is political is important to our critics' evaluation of scholarship in a way that it is not to our own.

Esckridge's theory of homosexuality provides a good illustration of social constructionism. In his view, homosexuality is not an innate or natural characteristic. Rather, it is constructed by society, which designates some individuals as homosexual for its own purposes.<sup>27</sup> In general, such social categories oppress some group to serve the ego or other needs of the powerful.<sup>28</sup> Esckridge seems unsure, however, about the extent to which the occupants of these categories have uniform interests, experiences, and viewpoints. Resolving that uncertainty is critical to understanding what kind of community is envisioned by social constructionism, and therefore what kinds of scholarship will be considered appropriate exercises in "community-building." For example, serving a community with uncertain boundaries and diverse views may have different implications for scholarship than serving one with sharp boundaries and a more unitary viewpoint. Which kind of community does Esckridge have in mind?

Although he remarks that gayness may interact with other characteristics,<sup>29</sup> Esckridge seems somewhat inclined to an interpretation of social constructionism that posits a rather homogenous and sharply defined community. For example, he repeatedly uses the first person plural to refer to himself and all other gays collectively, and he speaks of the core stories told by gays, which suggests that if gays are distinguishable in their experiences, there is still clearly a typical gay experience.<sup>30</sup> Implicit in this form of constructionism is a communitarian orientation, for members of the group are held together not merely by personal or utilitarian ties but also by deep similarities in viewpoint.<sup>31</sup> This form of social constructionism verges on essentialism, which posits that members of an oppressed group share at least a core set of distinctive, uniform characteristics.<sup>32</sup> Essentialism is unpopular among outsider scholars,<sup>33</sup> but seems implied by this form of social constructionism.

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27. See Esckridge, *supra* note 6, at 634 (citing Mary McIntosh, *The Homosexual Role*, 16 Soc. Prob. 182 (1968), and HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT, BEYOND STRUCTURALISM AND HERMENEUTICS (1982).

28. In contrast, Foucault was apt to view power as suffusing all groups and institutions, rather than simply as the instrument of one group against another. Mark Philp, *Foucault on Power: A Problem in Radical Translation?*, 11 POL. THEORY 29, 34 (1983). Esckridge's own account intriguingly suggests that the military's ban on gays and lesbians is primarily designed, not to oppress those groups, but to help channel the homoerotic impulses of straight military personnel into ritualized social activities. See Esckridge, *supra* note 6, at 627-28.

29. Esckridge, *supra* note 6, at 645-46.

30. Fajer, on the other hand, rejects this view, and considers gays to be basically assimilationist. Fajer, *supra* note 10, at 22.

31. Although his views are complex, Jerome Culp also seems to lean toward this form of essentialism when he notes that to be an authentic "representative" (or speak in an authentic "voice") is "to be a participating member of a community that defines itself and is seen as a community." Culp, *supra* note 8, at 9.

32. See, e.g., Daniel Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1848 (1993).

33. See Angela P. Harris, *Race and Essentialism in Feminist Theory*, 42 STAN. L. REV. 581 (1990) (gender essentialism results in silencing some voices, especially the voices of black women, in order to privilege other women); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. Fajer notes that "essentialism clearly is a danger in narrative scholarship," although he believes it can be overcome. Fajer, *supra* note 10, at 8.

An alternate interpretation of community, based on victimization, may avoid essentialism but creates other problems. If the homosexual label is socially constructed as a means of oppression, then in some sense what all gays have in common may be their status as victims, targets of homophobia. This characterization is not necessarily essentialist because various responses to victimhood exist, including rebellion, and the modality of victimhood itself might also vary in individual cases. Nevertheless, a community founded on victimhood poses problems. As Martha Minow has recently observed, it may divert attention from the political to the therapeutic, as in the current recovery movement.<sup>34</sup> Victimhood also has "passive and helpless connotations" that can be disempowering,<sup>35</sup> and can encourage people to define their identities on the basis of single traits.<sup>36</sup> Indeed, Minow observes, the very idea of privileging the victim's perspective "requires a ranking of oppressions that is itself rendered problematic by the asserted authority of subjective experience."<sup>37</sup> Because the community of victimhood is based on the subjective experience of pain, it is more frail than the essentialist community, which is based on an externally observable structure of oppression.

These different views of community are reflected in varying ideas about the significance of individual stories. Our own view is that stories are significant only when they are shown to be typical.<sup>38</sup> Eskridge also sometimes seems to note the need for typicality when he states, after describing Perry Watkins' real—as opposed to sanitized—story, that "[h]is experience is a prevalent phenomenon."<sup>39</sup> That is exactly why, from our perspective, Watkins' story is relevant; were he the only one—or were we to doubt his typicality—we would find the story intriguing but rather irrelevant. From our perspective, then, typicality is normally an empirical question. In contrast, for the essentialist-oriented constructionist, typicality is not a matter of empirical frequency but of authenticity: Does the story reflect the true experiences of the group? For the victim-oriented constructionist, the story is typical to the extent that the portrayal of pain exemplifies the suffering of group members.

Typicality aside, both the essentialist-oriented and the victim-oriented views of community can undermine scholarship in the sense of a reasoned search for truth. In a victim-oriented community, in which pain or oppression is the index of membership, scholarship can become more a form of therapy than an effort to understand the world, or even to change it. Although stories about pain and victimhood may be intended to change the beliefs and behaviors

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34. Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411 (1993).

35. *Id.* at 1427.

36. *Id.* at 1433.

37. *Id.* at 1437. For a somewhat similar critique of recent trends in cultural politics, see HENRY LOUIS GATES, JR., *LOOSE CANONS: NOTES ON THE CULTURE WARS* 173-93 (1992).

38. Farber & Sherry, *supra* note 2, at 838-40. We agree with Marc Fajer that the metaphor of "voice" has probably lost its usefulness. Fajer, *supra* note 10, at 8-9. We also agree with other critics that typicality and representativeness are subject to varying interpretations, but we do not find this criticism serious, since the storyteller is always free to explain the relationship between the story and the experiences of the group. Our demand for typicality is essentially a call for explicitness on this score.

39. Eskridge, *supra* note 6, at 627.

of mainstream society, the centrality of victimhood to group membership makes it all too likely that the point of the scholarship will instead become the portrayal of victimization itself. As Martha Minow says, "in the victim talk world, people exchange testimonials of pain in a contest over who has suffered more."<sup>40</sup> Similarly, Henry Louis Gates has recently commented on the contrast between, on the one hand, some recent scholarship in Critical Race Theory that echoes the recovery movement,<sup>41</sup> and on the other, social scientists "who, whatever their differences, are attempting to discover how things work in the real world, never confusing the empirical with the merely anecdotal."<sup>42</sup>

Although we do not look with enthusiasm upon the conversion of scholarship into a form of group therapy, it may be less ominous than the implications of essentialist community-building for scholarship. Our greatest concern is not so much with endorsements of community-building as scholarship, but with their converse. If community-building is the highest form of legal scholarship,<sup>43</sup> then presumably the *worst* form of legal scholarship would be divisively undermining or disrupting the community. The same concerns apply to statements that claim the purpose of scholarship is to change rather than understand law. If so, the test of scholarship is not truth but political effect, and politically undesirable scholarship would be disdained.<sup>44</sup>

What these views potentially may imply, we fear, is an expectation that scholars refrain from publishing what they believe to be true when their works would undermine community or otherwise prove politically counterproductive. Some have been willing to make this next step explicit, as is illustrated by efforts of some African-American scholars to suppress dissenting ideas of other

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40. Minow, *supra* note 34, at 1430.

41. Henry Louis Gates, *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37, 46.

42. *Id.* at 48.

43. Eskridge, *supra* note 6, at 625. Eskridge states that "community-building not only increases understanding of law, but provides the best understanding of law." *Id.*

44. This view of scholarship was not, it would seem, Foucault's. Among his complex and enigmatic views were some strong opinions about scholarship as a search for truth rather than political influence. DIDIER ERIBON, MICHEL FOUCAULT 292, 294, 329 (1991).

We do not deny, of course, that one effect—and perhaps one purpose—of legal scholarship is to change the law. But on our view of scholarship, the political effect of a work is not relevant to the central question of whether it increases understanding. We interpret at least some of our critics, on the other hand, to be judging scholarship primarily on the basis of its political effect. See text accompanying notes 25 & 26 *supra*; see also Robert S. Chang, *Toward An Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243, 1284-86 (1993) (arguing that poststructuralism makes scholarship nothing but "a question of power").



scholars of color.<sup>45</sup> If this is community-building, then, as Cornel West suggests, it is the wrong kind of community that is being built.<sup>46</sup>

Advocacy scholarship is not new in the legal academy. Historians decry lawyers' selective use of historical materials as "law office history,"<sup>47</sup> and all too many doctrinal articles are merely disguised appellate briefs. These abuses are no more attractive garbed in postmodernist dress. In the name of subverting the existing order, we may face a new mode of scholarship that safeguards against even the possibility of subverting the views of the author or her political allies. This is an unappealing prospect, and an abandonment of the highest purposes of independent universities and scholarship.

It can also be dangerous. Because we are so accustomed to an institutional setting in which scholars are insulated from political pressures, it may be difficult to grasp the implications of subordinating scholarship to perceptions of community interest. Perhaps the following story, drawn from a very different institutional and cultural world, may help illuminate the risks of merging politics and scholarship.

Our protagonist, General Dimitri Antonovich Vokogonov, was assigned the task of supervising the official Soviet history of World War II. Although he had previously shown mild resistance to pressures toward ideological conformity, he had not achieved his distinguished position by leading a life of heroic dissidence—on the contrary, he was very much a man of the system. As director of the military's main historical institute, he had access to the major archives of the Communist Party, the KGB, and the military. What he found in those archives could not be squared with the party's version of history. In late 1990, he submitted a manuscript that candidly assessed Stalin's wartime failings, thereby depriving the regime of its only remaining claim to honor, that of defeating Hitler. Vokogonov was then shunted aside by some of the same men

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45. See Brewer, *supra* note 18, at 1845-47 (discussing condemnation by nonwhite legal scholars of Randall Kennedy, a black Harvard law professor who published an article criticizing the value of critical race scholarship); Charles Rothfeld, *The Law: Minority Critic Stirs Debate on Minority Writing*, N.Y. TIMES, Jan. 5, 1990, at B6 (discussing Randall Kennedy and his critics); see also Thomas Haskell & Sanford Levinson, *Academic Freedom and Expert Witnessing: Historians and the Sears Case*, 66 TEX. L. REV. 1629 (1988) (discussing social sanctions against a feminist historian when she testified for the defendant in a major sex discrimination suit). In this regard, consider also the frequent resistance by blacks to public criticism of other blacks, a resistance which is criticized in CORNEL WEST, RACE MATTERS 23-24 (1993) (criticizing the silence of the black community regarding Clarence Thomas' mediocrity and lack of qualifications for the Supreme Court), and BELL HOOKS, YEARNING: RACE, GENDER AND CULTURAL POLITICS 65-77 (1990) (arguing against suppression of works reflecting black male sexism).

46. As West puts it:

The interplay of individuality and unity is not one of uniformity and unanimity imposed from above but rather of conflict among diverse groupings that reach a dynamic consensus subject to questioning and criticism. As with a soloist in a jazz quartet, quintet or band, individuality is promoted in order to sustain and increase the *creative* tension with the group—a tension that yields higher levels of performance to achieve the aim of the collective project. This kind of critical and democratic sensibility flies in the face of any policing of borders and boundaries of "blackness," "maleness," "femaleness," or "whiteness."

WEST, *supra* note 45, at 105; see also *id.* at 26. For some similar thoughts about the need for debate and criticism within the feminist community, see Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 881-84 (1990).

47. See Alfred Kelly, *Clio and Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 156.

who would later attempt a right-wing coup.<sup>48</sup> Vokogonov was not a heroic rebel against the system, but merely a scholar of ordinary integrity in a society where that had become unusual. Although his world was far different than ours, there may be something to be learned from his story: Confusing scholarship with politics is not always transformative; sometimes it can be merely tragic.

## II. TRUTH AND THE POSTMODERN CRITIQUE

In Part I, we deliberately set aside a crucial aspect of the storytelling debate: its philosophical context. The debate about storytelling takes place against the backdrop of a generation of postmodern ferment. Postmodernism, at least as received in law schools, casts a pall over the traditional scholarly enterprise and seemingly disputes the notion of objective truth, finding it incoherent if not politically oppressive. Without the philosophical patina of postmodernism, we doubt that the arguments against traditional scholarly norms would have seemed so attractive. Our critics seem to assume the existence of some relatively clear philosophical “lessons” of postmodernism, which they can apply to issues such as the appropriate uses of storytelling. They also seem to assume that this philosophical movement has clear implications with respect to social change. We question both assumptions.

It would be wildly presumptuous (even for law professors!) to attempt to resolve here the deep philosophical issues posed by various forms of postmodernism. More modestly, we simply try to expose the difficulty of incorporating postmodernist philosophical insights into legal scholarship, as our critics have attempted to do. We will attempt to deconstruct the philosophical views of Eskridge and our other critics by showing that their own methods and rhetoric undermine their substantive positions. We find reinscribed in them, to use Jack Balkin’s term, a series of nested oppositions.<sup>49</sup> Inside their pragmatic and social constructionist arguments against objectivity, we find reinscribed the very foundationalism and belief in objectivity that they reject.

Many of those who reject objective truth exhibit a contradictorily high level of confidence when engaged in the task of interpretation. Consider Patricia Williams’ story about her exclusion from a Benetton store where she attempted

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48. The Minister of Defense denounced the draft as a source of “great harm” which would have “undermin[ed] the integrity of our country and the socialist choice.” DAVID REMNICK, *LENIN’S TOMB: THE LAST DAYS OF THE SOVIET EMPIRE* 401-02 (1993). Later, though dying of cancer, Vokogonov remained unrepentant:

The generals in the army reproach me for being a chameleon. They say I am a traitor or a renegade. But personally I think it is a more courageous stance to abandon honestly something which has been devalued by history instead of carrying it to the end in your soul.

*Id.* at 410.

49. See J.M. Balkin, *Nested Oppositions*, 99 *YALE L.J.* 1669 (1990). Baron identifies the tension within the work of storytellers between what one could call constructionist and objectivist views of truth. See Baron, *supra* note 7, at 280-85. We want to emphasize that we do not intend to “show up” Eskridge and our other critics by embarrassing them with inconsistencies; rather, we aim to suggest the immense difficulty of sustaining their philosophical positions. Postmodernists are notoriously hard reading, and for good reason, because the powerful acid of postmodernist thought threatens to dissolve not only other philosophies but also itself.

to buy a sweater for her mother.<sup>50</sup> Like many stories, this one could be read in many ways. For example, in criticizing a draft of our original article, one of our colleagues vehemently insisted that the Benetton story was a deep critique of the public/private distinction. One could also see the story as an example of how badly blacks are treated in our society.<sup>51</sup> Yet Delgado, who rejects objectivity, insists that such interpretations “would miss Professor Williams’ point.” The story, he says firmly, “is intended to prompt consideration of a new legal category, namely spirit-murder.”<sup>52</sup> Apparently, the meaning of this text is simply *there*, an objective fact to which no one can demur. In general, the interpretive stance of our critics seems to ignore ambiguity in the same way.<sup>53</sup>

*Gaylegal Narratives* provides a striking example of interpretive self confidence despite denials of the possibility of objectivity. One of the attractions of Eskridge’s essay is his singular ability to encapsulate philosophical works in lucid nuggets. He has a dazzling ability to synthesize the works of Rorty and Foucault. But his method undercuts the postmodern message, for what could be less postmodern than the attribution of crystalline meanings to texts? Indeed, Eskridge himself has pioneered exploring the pitfalls and complexities of interpreting statutes.<sup>54</sup>

Rorty and Foucault present, if anything, much greater interpretative difficulties than those of a statute. Rorty’s prose seems deceptively accessible. In discussing the “oft-noted frustrations of Rorty’s prose,” one sympathetic reader refers to Rorty’s “constant tacking in the face of counterevidence,” his “agile but also disconcerting transitions from one analogy to another,” and his “constant and always slightly altered redescriptions of central points.”<sup>55</sup> Foucault’s works present even greater interpretive difficulties. His works are more disturbing and go far beyond the cogent observations about sexuality cited by Eskridge. Foucault’s remarks that biology didn’t exist until the last few centuries, that the individual is merely a “rift in the order of things,” and that Man is

50. PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44-51 (1991).

51. Williams’ language supports another reading of her account. This reading suggests that the story is “really” about the relationships between generations, notably, between Williams and her mother, and between Williams and the insolently youthful clerk who excludes her. The youth motif figures prominently in the description of Benetton itself as “Soho’s most glitzy boutique” and in the repeated descriptions of the clerk as young (and blowing bubble gum). Williams also reminds us of her purpose in visiting the store and attributes (obviously without evidence) the same purpose to other shoppers. *Id.* at 44-48. Notably, Delgado’s rendition of the story also mentions Williams’ mother and the youth of the clerk, even though he eliminates most other details. Delgado, *supra* note 9, at 675 n.82.

52. Delgado, *supra* note 9, at 675. For another, equally confident interpretation of the same story, see Jerome McCristal Culp, Jr., *You Can Take Them to Water But You Can’t Make Them Drink: Black Legal Scholarship and White Legal Scholars*, 1992 U. ILL. L. REV. 1021, 1031-32 (interpreting Williams’ experience as relating to the social credibility of black stories).

53. Lest someone accuse us of similar inattention to ambiguity, we should note that one could interpret Eskridge’s essay in ways different from the one we provide in the text. Rather than seeing it as a reply to the views about the search for truth of “conservative pragmatists” such as ourselves, one could read it as a reply to neo-republicans about the role of debate and deliberation in the political process. Unfortunately, lack of space prevents us from exploring this interpretation.

54. See Eskridge & Frickey, *supra* note 21.

55. GILES GUNN, *THINKING ACROSS THE AMERICAN GRAIN: IDEOLOGY, INTELLECT, AND THE NEW PRAGMATISM* 99 (1992). For further discussion of interpretive issues regarding Rorty, see John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 338-45, 379, 392-94 (1986).

extinct typify the broader aspects of his thought.<sup>56</sup> Little wonder that the implications of his views remain unclear.<sup>57</sup>

If we understand Foucault to protest categories that confine subversive individuals, dangerous ideas, and disruptive experiences, Eskridge's treatment of Foucault is ironic. For Eskridge himself reifies categories and distinctions in just the way that postmodernists such as Foucault and Rorty criticize: The conceptual backbone of *Gaylegal Narratives* is a series of oppositions between outsiders and insiders, conservative and prophetic pragmatism, and pragmatism and social constructionism.<sup>58</sup> Even the essay's opening sentence boldly and categorically claims that "[l]egal scholarship is inevitably narrative."<sup>59</sup> Ironically, the word "inevitably" harkens back to foundationalism, although it introduces a work of postmodernism. Because Eskridge's version of Foucault eschews deconstruction, its return to foundationalism is not self-contradictory. Instead, what it contradicts is the linearity implied by his sequence of conservative pragmatism, pragmatic pragmatism, and social constructionism. For the first two in the series are progressively more antifoundationalist, while the third seems to be a stark reversion to foundationalist methods.

These are deep and treacherous waters, and we have little confidence in our own ability to emerge intact from a discussion of these philosophical issues. We do not intend to demolish the philosophical views of our critics, still less to establish a philosophical theory of our own. Rather, we wish only to warn legal scholars of the need to exercise the utmost caution in foraging within the philosophers' domain.<sup>60</sup> Careful but selective citations to leading philosophers do not form a secure basis for advocating major changes in current legal or academic practices.

In addition to philosophical dilemmas, the legal application of postmodernism presents serious practical problems, especially from the perspective of the progressive goals that we believe we share with our critics. The primary attraction of postmodern philosophy for legal scholars often seems to lie in its transformative potential. Scholars fear that conventional categories, established beliefs, and traditional methods of investigation—the attributes that comprise

56. See Alan Ryan, *Foucault's Life and Hard Times*, N.Y. REV. BOOKS, Apr. 8, 1993, at 12.

57. See *id.* at 15 (noting the "striking absence of consensus on the political implications of Foucault's work"); JOHN RAJCHMAN, MICHEL FOUCAULT: THE FREEDOM OF PHILOSOPHY 1-2 (1985); Philp, *supra* note 28, at 30. Moreover, Foucault was equally difficult to fathom as a person, given his shifting political allegiances, his exploration of sado-masochist experiences, his meticulous historical scholarship, and his enigmatic death. See generally JAMES MILLER, THE PASSION OF MICHEL FOUCAULT (1993); ERIBON, *supra* note 44; Ryan, *supra* note 56.

58. These oppositions seem questionable, however, when one notes that Eskridge is both gay and white, and thus an insider as well as an outsider; that he finds both conservative and prophetic pragmatism in the writings of the same philosopher, William James; and that the strongest argument given for social constructionism is a "pragmatic" one: "It works."

59. Eskridge, *supra* note 6, at 607. The most dedicated social constructionists have to start somewhere. As a leading authority on African-American literature has observed, it is one thing to deconstruct theories of evaluation, but it is quite another to discontinue the practice of evaluation. GATES, *supra* note 37, at 187-88.

60. See Martha C. Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 STAN. L. REV. 1627, 1644 (1993) (questioning capabilities of "legal academics who pick up a bit of philosophy and do a thing or two in that field").

what we can call "common sense," and what Eskridge labels "conservative pragmatism"—all implicitly weigh in favor of the powerful. Only by what Eskridge calls a "rupture" can we break free of these bonds and establish a just society.<sup>61</sup>

Clinging too avidly to common sense can stifle creativity and innovation. But abandoning common sense in favor of social constructionism has its own risks. Moreover, common sense itself can sometimes subvert oppressive structures. Or, to resume our postmodernist vocabulary, the alleged connection identified by the critics between objectivity and oppression is at best historically contingent. Although our critics may recognize this contingency, they appear unaware of its implications for legal scholarship.

*Gaylegal Narratives*, for example, only intimates the risks of implementing a postmodern epistemology, which has the potential to endanger the viability of the rule of law. Eskridge applies his postmodernism to legal doctrine by denying that *Bowers v. Hardwick*<sup>62</sup> is "law," because it and some other cases "deny [some people] citizenship and because they subject [those people] to violence."<sup>63</sup> It is one thing to say that some judicial decisions are morally wrong, perhaps so wrong that we should disobey them. It is quite another thing to deny, as jurisprudential postmodernism seems to do, that the losing side has any obligation to respect a judicial decision with which it strongly disagrees. What is missing is any notion of the significance of submitting legal disputes to independent forums for resolution. In the context of *Bowers v. Hardwick*, the implications of Eskridge's position may seem innocuous to progressive readers, but they may seem less so when the opponents of *Roe v. Wade*<sup>64</sup> decide that the decision authorizes murder, and so forcibly resist the implementation of this "non-law."<sup>65</sup>

In addition to this potentially disintegrative implication, social constructionism may also have hierarchical aspects. Eskridge argues that law is made, not from the top by court decisions (let alone immoral decisions like *Bowers*), but rather from the bottom when outsiders rebel against their position and present insiders with a *fait accompli*.<sup>66</sup> Faced with these changed worlds, insiders have little choice but to revise their webs of belief to accommodate the new realities.

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61. Some of his earlier work sympathized with what Eskridge now calls conservative pragmatism. See William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 674-81 (1990). Conservative pragmatism also has a long and honorable history in the academy. See Judith Jarvis Thomson, *Ideology and Faculty Selection*, in FREEDOM AND TENURE IN THE ACADEMY 155, 160 (William W. Van Alstyne ed., 1993) ("new fields, indeed, new ideas generally, have the burden of proof").

62. 478 U.S. 186 (1986).

63. Eskridge, *supra* note 6, at 639.

64. 410 U.S. 113 (1973).

65. Eskridge's charge about *Bowers* could be made by those with different political views against *Roe v. Wade*. The case is not law, the argument would go, because it excludes from citizenship and subjects to violence those in utero. Lest we be misunderstood: We both strongly believe that *Roe* reached the right result and *Bowers* did not. Nevertheless, a social constructionist view of the world makes it exceedingly difficult to differentiate between these situations. Given its broad implication, this form of postmodernist jurisprudence seems in need of much stronger support than Eskridge offers.

66. Eskridge, *supra* note 6, at 643. Our comments should not be taken as criticisms of Truman's action.

But Eskridge's main example of "law from the bottom"—the desegregation of the armed forces—undermines his argument. In this instance, "law from the bottom" took the form of President Truman's decree, imposed on the most hierarchical of organizations and enforced under threat of military discipline. Thus, Eskridge's "law from the bottom" turns out to come from the top, and transformative politics seems to acquire an authoritarian tinge.

Some postmodern writers, seeking to avoid such authoritarianism, have longed for examples of truly "bottom up" transformations, unmediated by formal institutions. Yet this romantic vision of social change has sometimes led postmodern jurisprudence to nightmarish extremes. For example, during his Maoist phase in the early 1970s, Foucault criticized the idea of "popular tribunals," on the ground that popular justice should be unmediated by such institutions as courts.<sup>67</sup> He wrote in the context of events in China, which he seemed to applaud rather than merely to condone. Roberto Unger, who also believes in transformational politics, has also leaned favorably toward the Chinese Cultural Revolution.<sup>68</sup> Of course, in retrospect, many political positions may seem badly misguided. Still, the fact that this perspective on politics has led important thinkers at least briefly to condone one of this century's great crimes against humanity indicates its potential risks.

We can make no such claim against Richard Rorty, a staunch believer in democracy and the rule of law. But even his version of transformational politics presents grounds for concern. In his discussion of Unger's work he says admiringly that Unger "offers a wild surmise, a set of concrete suggestions for risky social experiments, and a polemic against those who think the world has grown too old to be saved by such risk-taking."<sup>69</sup> Rorty then speculates about an experiment, in which a government completely equalizes incomes but does not impair the desire of people to work hard and contribute to society. Only such an exercise of "imagination in the Third World," he believes, can expose the "contingency, poverty, and insignificance" of current economic thought.<sup>70</sup>

It is a charming vision, particularly when coupled with Rorty's attachment to political democracy. It does illustrate, however, the risk that transformational politics can subordinate memory to imagination: An exclusive focus on the power of the imagination to envision potential futures can lead us to forget lessons of the past. History is littered with failed utopian experiments of the kind Rorty envisions, from benevolent communes to grimly repressive collective farms.<sup>71</sup> As Hilary Putnam has said: "Just as no sequence of experiments will do any good, no matter how wonderful some of the theories under test,

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67. Foucault praised the massacres of 1792 as "at least an approximation to an act of popular justice; a response to oppression, strategically effective and politically necessary." He lamented the addition of tribunals that provided hearings and thereby deformed popular justice. ERIBON, *supra* note 44, at 244.

68. See William Ewald, *Unger's Philosophy: A Critical Legal Study*, 97 YALE L.J. 665, 745-748 (1988). We should make it clear that our concern is with the responses of Foucault and Unger to specific events, not with whether their work has Marxist elements.

69. 2 RICHARD RORTY, *ESSAYS ON HEIDEGGER AND OTHERS: PHILOSOPHICAL PAPERS* 187 (1991).

70. *Id.* at 192.

71. See, e.g., Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993).

unless we pay attention to the outcomes, so no sequence of social experiments will do any good, no matter how wonderful some of the ideals involved in the struggle, if attention is not paid to 'the cries of the wounded.'"<sup>72</sup> What is worrisome about Rorty's utopianism is not his openness to imaginative possibilities, but his inattention to experience. If as careful a thinker as Rorty ignores the lessons of experience, average politicians may be even less eager to measure their aspirations against reality. Would Rorty's utopian government abandon its experiment if it fails, or would the government redouble its efforts, seeking what Eskridge calls a "rupture," to remake social reality more in accordance with its plan? If we cannot judge ideas based on their connection with reality, the alternative is to judge their ideological soundness, and the temptation then is to dismiss opponents as suffering from untransformed worldviews.<sup>73</sup>

Let us return to gay rights as the context of Eskridge's argument. Eskridge believes that gays have found only limited utility in pragmatism (whether conservative or prophetic).<sup>74</sup> Instead, genuine progress has often required violent ruptures in the existing fabric of beliefs, symbolized by the "Stonewall riot," which inaugurated gay liberation by forcefully protesting a raid on a gay bar.<sup>75</sup> Similar disruptive tactics led to the crucial decision by psychiatrists to delist homosexuality as a mental disorder.<sup>76</sup> Although Eskridge has not given up hope for pragmatist tactics, social constructionism seems to have greater appeal for him. Eskridge may well be right that social constructionism and the corresponding politics of identity "worked" for gays at Stonewall and elsewhere. But he fails to acknowledge that they carry risks of their own, especially if they become the foundations of intellectual systems. When we accept the invitation of social constructionism to approach all issues as ideological, the consequences can be dismaying rather than transformative.

A uniquely painful and sensitive story conveys the point. By the summer of 1982, five hundred AIDS cases had been diagnosed in the United States.<sup>77</sup> Physicians in San Francisco and New York sought to discourage the use of bathhouses, only to face fierce resistance from segments of the gay community.<sup>78</sup> Leftist gays attacked New York's most prominent gay doctor as a "mo-

72. HILARY PUTNAM, *REALISM WITH A HUMAN FACE* 224-25 (1990).

73. Describing his experiences as a radical during the Vietnam War, Hilary Putnam recalls finding within his own group "contempt for genuine discussion," "manipulation," and "hysterical denunciation of anything that attempted to be principled opposition." *Id.* at 189-90. The dogmatic obsessions of small oppositional groups need not carry over to governments that pursue transformational politics. Still, the risk is evident.

74. Eskridge, *supra* note 6, at 621.

75. *Id.* at 611 & n.14, 632 & n.120.

76. *Id.* at 633-34.

77. RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* 181 (1987).

78. *Id.* at 180-81. Although space constraints prevent a full exploration of this history, we should mention some other aspects. First, the issue of gay bathhouses generated serious disputes within the gay community. See RONALD BAYER, *PRIVATE ACTS, SOCIAL CONSEQUENCES: AIDS AND THE POLITICS OF PUBLIC HEALTH* 29 (1989). Second, much of the resistance to closing or regulating the bathhouses was based on a fiercely libertarian opposition to regulation of *any* aspect of sexuality, regardless of its health

nogamist" who was "stirring panic" and an "epidemic of fear."<sup>79</sup> That winter, gay critics lampooned concerns about the risks of multiple sex partners as the product of "sexual Carrie Nations." One response, entitled "In Defense of Promiscuity," argued that a gay man was more likely to be killed in a car crash than by AIDS.<sup>80</sup> By the following summer, it was clear that "[c]ommon sense dictated that bathhouses be closed down,"<sup>81</sup> but some in the gay community castigated those who raised the issue as sufferers from "internalized homophobia."<sup>82</sup> Only in the spring of 1984 did the gay community as a whole begin to accept the idea of closing the bathhouses.<sup>83</sup> According to later medical estimates, the disease might not have spread as widely if the bathhouses had been closed sooner.<sup>84</sup>

We recount this story not to impute blame, for there is more than enough to go around among public health officials and straight politicians, and it would be perverse to focus on gay leaders who themselves often became tragic victims of the epidemic. Because the pain and horror of the AIDS epidemic mandate the most honest possible inquiry, however, we must ask whether social constructionism and transformative politics "worked" for the gay community. Common sense might have stood the community in better stead than approaching a public health issue as a locus of ideological struggle.

We do not argue that transformational politics is inevitably antidemocratic, repressive, or unwarranted. Nor do we mean to argue against social reform or to identify our critics with antidemocratic forces. We only suggest that transformational politics carries risks, and those risks render any connection between those politics and the cause of human liberation uncertain.

Indeed, because of those risks, human liberation can come from the most traditional attachment to objective facts rather than from transformational politics or postmodern epistemologies. Under those circumstances, "historical accuracy," as one of our critics calls it,<sup>85</sup> can take on a form of moral heroism. We close with the story that provided our title.<sup>86</sup>

This story took place, once upon a time, in a land where the social construction of reality was official dogma.<sup>87</sup> The subject of our story, a file clerk

effects. *Id.* at 27, 30, 82, 195. For that reason, NOW and the ACLU also opposed closing the bathhouses and other health measures. *Id.* at 45, 55, 82, 190.

79. SHILTS, *supra* note 77, at 182.

80. *Id.* at 210.

81. *Id.* at 306.

82. *Id.* at 317.

83. *Id.* at 441-48.

84. See CHARLES PERROW & MAUR GUILLÉN, *THE AIDS DISASTER: THE FAILURE OF ORGANIZATIONS IN NEW YORK AND THE NATION* 31-32 (1990). The risk of identity politics is now being sadly illustrated by a resurgence of unsafe sexual practices among some San Francisco gay men. A particularly distressing example is the recently infected man who explained, "I thought if I was H.I.V.-positive I'd be so much gayer." Jane Gross, *Second Wave of AIDS Feared by Officials in San Francisco*, N.Y. TIMES, Dec. 11, 1993, at 1, 8.

85. Fajer, *supra* note 10, at 12.

86. The story comes from REMNICK, *supra* note 48, at 31.

87. See Michael Dobbs, *An Explosion in the Soviet Lab: The Drive to Create a Nation of True Believers Gave Birth to a Generation of Cynics*, WASH. POST, Sept. 27-Oct. 3, 1993 (Nat'l Weekly Ed.), at 12.



named Dimitri Yurasov, compiled a remarkable collection of index cards. Yurasov's career began at the Historical Archives Institutes, where he organized boxes of documents, counted pages, and sorted files. He secretly took time away from these assigned tasks to add to his card collection. After completing his military service, he began work at the Supreme Court archive, where he covertly continued his collection. Ultimately, his collection grew to 200,000 cards filled with the driest of reportorial data: name, date, background, facts of arrest, etc. As it turns out, the cards often contained the only available information about imprisoned or executed individuals whose lives had ceased to have any official existence—in short, the “disappeared.”

Those who doubt the transformative power of mere reportage might consider one woman's remarks about Yurasov's work:

In his catalog, Dima found my father's name. He named the place of his imprisonment and, evidently, his death. Dima showed me that one of the investigators into my father's rehabilitation had said my father was a librarian. Was this some arbitrary thing he did in his camps or his real profession, I don't know. But something changed inside me. From that anonymous gray mass of pea jackets, my father had emerged as a particular man, a special man. Not all were called librarians. A father! I have a father!<sup>88</sup>

To feel the weight of Yurasov's “stories” takes neither prophecy nor a rupture with common sense. If that is what “conservative pragmatism” means, we don't mind being associated with it.

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88. REMNICK, *supra* note 48, at 31.