ESSAYS

Gaylegal Narratives

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Storytelling, a form of narrative legal scholarship describing events of legal significance from the perspective of "outsider" writers, is fast becoming a fixture in the pages of law reviews and on the shelves of law libraries. The rapid rise in the popularity of narrative scholarship has led some critics to question its value, while prompting others, most notably Professors Daniel Farber and Suzanna Sherry in last April's Stanford Law Review, to call for objective standards to evaluate the merit of narrative works. Intended in part as a response to Professors Farber and Sherry, this essay asserts that storytelling's value is in expanding legal debate and driving social transformation by illuminating legal issues from the perspectives of nomic groups frequently excluded from political and academic debate, particularly gays and lesbians. To illustrate his thesis, Professor Eskridge draws heavily on stories culled from the controversy surrounding the armed forces' policy of excluding gays and lesbians from their ranks, arguing that stories recounting travails encountered by lesbians, gays, and women service members can advance political debate and ameliorate unfounded prejudice and discrimination. The tenets of social constructionism would accord storytelling even greater value, Professor Eskridge contends: By recounting episodes of social transformation produced by the defiant resistance of oppressed individuals or groups to continued subordination or exclusion, storytelling can provide a catalyst for the destruction of repressive policies such as the military's gaylesbian exclusion.

Legal scholarship is inevitably narrative. Traditional scholarship tells stories about the parties to a lawsuit and their experiences in appellate court; the way in which judicial opinions interrelate with one another; the creation and implementation of statutes; the tug-of-war among interest groups, administrators, and legislators accompanying agency adjudications and rulemaking; the history of various legal institutions and their respective leaders; and the history of legal scholarship itself. The stories told in traditional scholarship focus on issues important to legal elites and are told from their point of view, which is often presented as the consensus or neutral perspective. Since these elites have been overwhelmingly white, male, affluent, and ostensibly heterosexual, one

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might wonder whether their stories really reflect social consensus or neutral values.

"Outsider" scholarship posits that law's traditional stories reflect neither neutrality nor consensus. Outsider work generally consists of writings of authors who are female, nonwhite, and/or gay. Outsider scholars usually have a different view of the law than do their traditionalist colleagues: From the outsider's perspective, the law not only makes errors of deduction or fact (in that it operates from factually erroneous premises or draws erroneous conclusions from uncontested premises), as traditional scholars often argue, but also makes errors arising out of bias and global ignorance. Outsider scholarship seeks to challenge the law's agenda, its assumptions, and its biases.

Like traditional scholars, outsiders rely on a narrative methodology to express their ideas. But, unlike those of traditional scholars, outsider narratives are stories "from the bottom," retellings of law from the point of view of women, people of color, lesbians, gay men, bisexuals, and other suppressed groups. These stories often reflect the writers' personal experiences; telling these stories supplements the other consciousness-raising methodologies employed by outsider communities.


2. Of course, a scholar can be an outsider in some of her work, but an insider in other work. Though I am a gay man, most of my scholarship has been traditional, analyzing issues of statutory and constitutional interpretation under different assumptions of political theory and jurisprudence. Many of my articles use examples from "gaylaw"—the body of law that addresses sexual orientation. But those articles are not works of outsider scholarship, as I am using the term, and as I believe Mary Coombs uses the term. See Coombs, supra note 1. This article and a few of my others might be considered outsider scholarship, because I reject the point of view of traditional law and offer a gaylegal perspective that I argue has legal value.

3. See generally Derrick Bell, And We Are Not Saved (1987) (using narratives to offer alternative perspectives on racism in the United States); Symposium, Legal Storytelling, 87 Mich. L. Rev. 2073 (1989); Scheppele, supra note 1.


Outsider scholarship is blooming brightly like azaleas in April. Many legal scholars find it unusually exciting, law reviews compete to publish it, and the media have given it wide exposure. In the academic tradition, any approach to scholarship this successful is inevitably subjected to scrutiny and demands for "standards." Several notable scholars have weighed in with such demands, including Professors Daniel Farber and Suzanna Sherry in this law review.  

Their article evaluates the claims of outsider scholarship against norms that they base on a pragmatic philosophy of practical reasoning. Drawing from pragmatic criteria, Farber and Sherry conclude that outsider groups (primarily feminists and critical race theorists) have not yet demonstrated that they are entitled to a "special voice" in legal scholarship, but that stories from the bottom may nonetheless be "beneficial" to the extent that they can speak to audiences with mainstream experiences and values. Farber and Sherry further contend that stories from the bottom must meet traditional scholarly standards of truthfulness, typicality, and quality to be considered useful legal scholarship.

I find Farber and Sherry's analysis engaging, insightful, and impressively wide-ranging, but also incomplete. I am surprised by the virtual absence of references to gaylegal narratives in their piece, particularly in light of the broad range of gaylegal narrative literature published as of 1992 (when their article was in draft). Our invisibility in the Farber and Sherry article is lam-
entable, for gaylaw provides a particularly attractive field for narratives, even under the conservative criteria laid out by Farber and Sherry.

Part I of this essay constructs a conservative pragmatic case for gaylegal narratives, drawing on gaylegal narratives from the current discourse over the military’s exclusion of lesbians, gay men, and bisexuals. I suggest, however, that this sort of respectable storytelling, while useful, is not sufficient. If pragmatic storytelling cannot deter policies like “Don’t ask, don’t tell,”13 we might question its value.

Gaylegal narratives have more value than Farber and Sherry’s conservative pragmatics would recognize. Part II of this essay argues that Farber and Sherry’s critique of narrative jurisprudence rests on a partial account of pragmatism, and that a different type of pragmatics is more receptive to gaylegal (and other outsider) narratives. In particular, a “prophetic” pragmatism may better explain the ways in which gaylesbian storytelling contributes to the debate over the military’s exclusion of gays. My analysis, while suggesting that this may be so, also offers reasons for doubt. Even understood prophetically, pragmatism may not be a sufficient way to conceptualize gaylegal narratives. The history of our struggle for gaylesbian rights has only partially been a history of persuasion, reform, and assimilation of alternative scripts—the usual

13. After months of political skirmishing and congressional hearings, the Clinton Administration in July, 1993, directed the armed forces to revise their regulations to permit “homosexuals” to serve, so long as they “don’t tell” anyone about their sexual orientation; the Administration also directed the armed forces, “don’t ask” recruits about their sexual orientation. Memorandum from Les Aspin, Secretary of Defense, to the Army, Navy, and Air Force, and the Chairman of the Joint Chiefs (July 17, 1993) (on file with the Stanford Law Review).

The Administration’s directive has been superseded by statute. Section 546 of the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, adds new 10 U.S.C. § 654(b), which codifies a more antihomosexual version of the “don’t tell” part of the administration’s policy.
hallmarks of pragmatism. Pragmatic approaches did not produce many of the milestone events in our struggle.

Our big breakthrough came with the Stonewall riots of June, 1969, during which we created a confrontational rather than pragmatic challenge to our persecution: We fought back.\textsuperscript{14} Though I was not at Stonewall, the drag queens, dykes, and fags who were there represented my generation and created a story of rupture and resistance that remains a part of the foundational mythology of gaylesbian liberation. Stonewall is not a pragmatic story; it is better understood through the philosophy of social constructionism, which Part III briefly describes. Social constructionism posits that society creates categories such as sexual orientation and that certain social groups support or acquiesce in these categories so as to isolate and suppress other groups. By acknowledging and reinforcing such categories, the law contributes to social subordination. When or if the victims of suppression rebel against their subordination, as did the Stonewall rioters, society is often forced to accommodate them. Given that law plays a major role in most such social accommodations, lawyers ought to listen to stories from the bottom. Such narratives not only evoke sympathy from mainstream society (as pragmatists argue); they also help avoid social dislocation and accommodate shifting group dynamics (as social constructionists maintain).

The theories supporting the use of gaylegal narratives explored in this article make me sympathetic to feminist and critical race narratives. Prophetic pragmatism and social constructionism, for example, support claims by critical race and feminist theorists that their genre of legal scholarship offers a distinctive and socially valuable voice. Gaylaw is supportive of other outsider writers' desire for recognition. Our genre not only offers supportive illustrations and theory, but itself stands or falls on similar criteria.

I. A CONSERVATIVE PRAGMATIC CASE FOR GAYLEGAL NARRATIVES

Perry J. Watkins was drafted into the Army in 1967 at the age of nineteen.\textsuperscript{15} The enlistment form asked whether he had any "homosexual tendencies," to which Watkins responded "yes."\textsuperscript{16} Despite its announced policy of not inducting or retaining "homosexuals," and despite the fact that Watkins truthfully responded to questions about his homosexual orientation and history, the Army

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\textsuperscript{14} See generally MARTIN DUBERMAN, STONEWALL (1993) (recounting the experiences of six different gay men and lesbians during Stonewall). On June 26, 1969, the New York City police, as they had done many times before, raided a popular Greenwich Village gay hangout, the Stonewall Inn. Instead of fleeing and melting into the streets as they were accustomed to doing, the gays and drag queens fought back, leading to days of violent protest. The Stonewall riots are generally considered to represent the birth of the modern gay rights movement, and are commemorated each year with marches and rallies in communities big and small throughout the country—and indeed the world.

\textsuperscript{15} The narrative that follows is based on Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988), aff'd en banc, 875 F.2d 699 (9th Cir. 1989), cert. denied, 498 U.S. 957 (1990); see also the earlier opinions in the case, 551 F. Supp. 212 (W.D. Wash. 1982), rev'd, 721 F.2d 687 (9th Cir. 1983). The narrative is comprised of the facts stipulated by Watkins and the Army, and accepted by both the panel and en banc opinions of the Ninth Circuit.

\textsuperscript{16} Watkins, 847 F.2d at 1330-31.
assigned him to a three-year tour of duty as a chaplain’s assistant, personnel specialist, and company clerk. In 1968, the Army conducted a criminal investigation of Watkins’ sexual activities, during the course of which Watkins signed an affidavit declaring his homosexuality and admitting intimacy with two male soldiers since his enlistment.\footnote{17} The Army dropped its investigation, however, after the two soldiers refused to corroborate Watkins’ declaration.

Watkins left the Army in 1970, but reenlisted in 1971 and in 1974 without difficulty. Even though his Army career progressed successfully during this period, the fact that Watkins was openly gay to his co-workers and superiors subjected him to a continued risk of discharge because of the military’s official policy of excluding gay men, lesbians, and bisexuals. At a discharge proceeding in 1975, Captain Bast, his commanding officer who had initiated the proceedings, testified that Watkins was “the best clerk I have known”; that he did a “fantastic job—excellent”; and that his open homosexuality was accepted with no ill effects.\footnote{18} The board of review voted against discharge, after concluding that there was “no evidence suggesting that [Watkins’] behavior [had] had either a degrading effect upon unit performance, morale or discipline, or upon his own job performance.”\footnote{19}

In 1977, Watkins was granted the necessary security clearance but was turned down for a job in the nuclear surety program because of his homosexuality. His commanding officer, Captain Pastain, requested reconsideration, arguing that Watkins was both well qualified and “one of our most respected and trusted soldiers.”\footnote{20} Watkins was given the assignment, and he reenlisted in 1979. But his security clearance was revoked in 1980 because of evidence in his file that he was gay; and, in 1982, another Army board voted to discharge Watkins, citing a 1981 Army policy mandating discharge of all “homosexuals” regardless of merit.\footnote{21} Watkins challenged this decision, and the courts eventually enjoined the Army from discharging him.\footnote{22}

I understand Farber and Sherry to say that Perry Watkins’ story, and similar stories of decorated lesbian, gay, and bisexual veterans, might contribute to legal debates on the social and constitutional implications of the military’s exclusion policy because such narratives are relevant to the practical reasoning that guides such policy discussions. Farber and Sherry’s conception of “practical reasoning” posits that we do not discover truth by logical deduction from grand theoretical premises, but rather create truth as we devise ideas to make sense of our experiences.\footnote{23} In explaining this conception of truth, they specifi-
cally invoke the philosophy of American pragmatism. Pragmatist philosopher William James illuminated this approach in his explanation of how people form "new opinions":

The individual has a stock of old opinions already, but he meets a new experience that puts them to a strain. Somebody contradicts them; or in a reflective moment he discovers that they contradict each other; or he hears of facts with which they are incompatible; or desires arise in him which they cease to satisfy. The result is an inward trouble to which his mind till then had been a stranger, and from which he seeks to escape by modifying his previous mass of opinions. He saves as much of it as he can, for in this matter of belief we are all extreme conservatives. So he tries to change first this opinion, and then that (for they resist change very variously), until at last some new idea comes up which he can graft upon the ancient stock with a minimum of disturbance of the latter, some idea that mediates between the stock and the new experience and runs them into one another most felicitously and expeditiously.

This new idea is then adopted as the true one. It preserves the older stock of truths with a minimum of modification, stretching them just enough to make them admit the novelty, but conceiving that in ways as familiar as the case leaves possible.

Jamesian philosophy suggests that we change our views slowly in response to new experiences that unsettle prior understandings, rather than immediately in response to abstract arguments. Similarly, Farber and Sherry endorse legal storytelling insofar as legal narratives may provide new facts and concrete situations for testing hypotheses and beliefs. Theirs is a qualified endorsement, however. Guided by the tenets of conservative pragmatism, they emphasize (much as my quotation from James does) the conventional constraints on changing one's opinion and the outsider's need to accommodate her arguments to the preexisting "stock of old opinions" and experiences of her audience.

This qualification is substantial, and Farber and Sherry rely on it to challenge narrative scholarship written by feminist and critical race theorists. Nonetheless, a conservative pragmatic framework ought to be receptive to a wide range of narratives—including gaylegal narratives. Accepting conservative pragmatism as normatively attractive (an assumption relaxed in the next two Parts), I maintain that gaylegal narratives have at least three substantial values, which I discuss in turn in the next three sections.

24. Farber & Sherry, supra note 6, at 820-21.

25. WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING (1907), reprinted in THE WRITINGS OF WILLIAM JAMES: A COMPREHENSIVE EDITION 376, 382-83 (John J. McDermott ed., 1967) (hereinafter THE WRITINGS OF WILLIAM JAMES); see also id. at 418-19 (offering an analogy between knowledge acquisition and the spread of grease spots).

26. Farber & Sherry, supra note 6, at 822-24.

27. Farber and Sherry rely on modern cognitive psychology studies that seem to make basically the same point that James did in 1907. Id. at 821-22, 826-27.
A. **Informational Value**

Gay legal narratives have important informational value. Narratives emphasize that we are here, there, and everywhere, a fact that the military once tried to deny. Because most bisexual, lesbian, and gay soldiers reside "in the closet," the military traditionally claimed that there were no gays in the armed forces, and that any gay people who slipped in were quickly processed out. In light of the Perry Watkins case, and the hundreds of others Mary Ann Humphrey and Randy Shilts have documented, the armed forces now admit that gay personnel have long served and continue to serve in the military. This admission advances the discussion, albeit modestly.

Moreover, the individual stories reveal the substantial social costs of the exclusionary policy, and also put a human face on the policy’s victims. Hearing these victims’ stories makes abstract prejudice more difficult to justify. Psychological studies suggest that people who actually know an openly lesbian or gay person are less likely to be homophobic or to accept homophobic stereotypes. Captain Bast, Watkins’ one-time commanding officer, apparently accepted the military’s exclusionary policy and its slogan that “homosexuality is incompatible with military service.” But when confronted with a concrete case rather than an abstract principle, and a human being rather than a statistic, Bast ultimately provided testimony that undermines the military’s stereotypes about both gay people (“they’re irresponsible and will prey on others”) and straight people (“they’re too immature to cope with sexual difference”).

According to the Kinsey Institute’s dynamic model of antihomosexual feelings, group stereotypes are often used to generate indiscriminate hostility towards all members of the stereotyped group. The recent House and Senate

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28. Id. at 829 n.119.


30. This admission was first made by a member of the Joint Chiefs of Staff in a house committee hearing. See Fiscal Year 1993 Defense Budget: Hearing Before the House Budget Comm., 102d Cong., 2d Sess. 45 (1992) (statement by General Colin L. Powell, Chair of the Joint Chiefs of Staff, to Rep. Barney Frank, in which Powell conceded that many gay and lesbian service members serve in the armed forces and that their service has been tolerable so long as “they have kept, so called, in the closet”). By July 1993 this observation was commonplace in the Joint Chiefs’ testimony. See Hearings on Gays in the Military Before the Senate Comm. on Armed Services, 103d Cong., 1st Sess. (July 20, 1993), available in LEXIS, Nexis Library, Fednew File [hereinafter July 1993 Senate Hearings] (statement of General Colin L. Powell) (“[h]omosexuals over history who have been willing to keep their orientation private have been successful members” of the armed forces); id. (statement of Secretary of Defense Les Aspin) (“homosexuality” itself is not consistent with military service, despite the fact “homosexuals have served with distinction in the Armed Forces”).

31. See Gregory M. Herek, Beyond “Homophobia”: A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men, in BASHERS, BATTERERS & BIGOTS: HOMOPHOBIA IN AMERICAN SOCIETY 1, 13-15 (John P. DeCecco ed., 1985) (summarizing results of prior studies demonstrating that heterosexuals’ stereotypes of gays and lesbians change as a result of interaction with gays and lesbians).

hearings on lifting the military’s ban on gays and lesbians repeatedly illustrated this phenomenon. For instance, military witnesses arguing in favor of the current policy often characterized gays as selfish and sexually predatory, despite empirical studies repeatedly contradicting these stereotypes. The process of stereotyping was a surrogate for open displays of prejudice. The line was “homosexuals are irresponsible” rather than “I hate homosexuals,” though the underlying message was remarkably similar.

The most powerful refutation of such stereotyping may come not from empirical studies, but from personal testimonials and stories. For example, Colonel Lucian K. Truscott, III, an openly heterosexual fourth-generation Army man, testified during the hearings that the many “homosexuals” with whom he worked in Korea and Vietnam were good soldiers, excellent team members, and completely uninterested in “preying” on their colleagues. “I have never, ever heard of any trouble in any unit caused by gay soldiers. Ever,” he testified. “I don’t know of anyone who has.” Those gay and lesbian veterans who testified impressed many in Congress as exemplary soldiers who showed no less regard for unit cohesion or their colleagues’ privacy than any other kind of soldier. Such stories, now in the open, have forced the military high command to abandon arguments based on the stereotype of the “narcissistic homosexual” who preys on heterosexuals.

Under conservative pragmatism, stories from the bottom that identify connections between the victim’s experience and the audience’s experience are the most effective at changing attitudes based on inaccurate stereotypes. The story Watkins’ attorneys relayed to the federal courts portrays a rule-abiding, unusually competent, willing, and patriotic serviceman. In return for almost fifteen years of service, he was hounded out of the military by a soulless bureaucracy that had routinely reenlisted him during the Vietnam War, notwithstanding his open Declarations of homosexuality. While many people may not have the same military experience as Watkins, most can appreciate his patriotism and are grateful for his service to our country. Moreover, we can relate to

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33. See Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services, 103d Cong., 1st Sess. 89 (1993) [hereinafter May 1993 House Hearings] (testimony of Colonel John Ripley) (“Homosexuals constantly focus on themselves. Their so-called needs, what they want, their entitlements, their rights. They never talk about the good of the unit. It is this constant focus on themselves, the inability to subjugate or subordinate their own personal desire for the good of the unit, this is an instant indicator of trouble in combat, and frankly, even not in combat.”).

34. Id. at 94-105 (testimony of Brigadier General William Weise).

35. See id. at 247-61 (testimony of Dr. Gregory Herek, for the American Psychological Association, the American Psychiatric Association, and others).

36. Id. at 5 (testimony of Colonel Lucian K. Truscott, III).

37. See, e.g., July 1993 Senate Hearings, supra note 30 (testimony of Chairman of the Joint Chiefs of Staff General Colin L. Powell, Army Chief of Staff General Gordon R. Sullivan, Chief of Naval Operations Admiral Frank B. Kelso II, Marine Corps Commandant General Carl Mundy, and Air Force Chief of Staff General Merrill McPeak) (emphasizing effect on “unit cohesion” and indicating that straight personnel would be uncomfortable serving with gay personnel, but carefully refraining from any negative characterizations of homosexuals).

his anger because we all have experienced some form of tyranny or hypocrisy perpetuated by a government, or perhaps corporate, bureaucracy. These features of Watkins’ narrative may have struck a chord with the majority of judges on the Ninth Circuit; it ordered Watkins reinstated.39

B. Evaluating Policy in Concrete Cases

Practical reasoning allows us to derive the right answers in concrete cases even when we lack a general theory of rightness.40 Accordingly, a second practical use of narratives is to test general, abstract propositions in the context of concrete cases. In effect, this means that policymakers and theorists can draw on Watkins’ narrative, and others like it, to evaluate the underpinnings of the military exclusion policy.

Since 1981, the military’s ban has been based on the threat that openly bisexual, lesbian, and gay personnel allegedly represent to unit cohesion and morale. Unsurprisingly, then, congressional hearings on the military’s exclusion policy held during the spring of 1993 explored the practical wisdom of experienced military officials and the stories of enlisted personnel relating specifically to the nature of the homosexual threat to cohesion and morale.41 Accounts of individual gay servicemen, like the Watkins story, can help negate the general proposition that gay soldiers undermine military cohesion and morale. Although Watkins was openly gay, officer after officer testified that his sexual orientation caused no problems with his superiors, peers, or subordinates.42 If real soldiers in real situations are not troubled by a colleague’s homosexuality, can the morale-based justification be generally valid?

Other gaylegal narratives turn the military’s morale justification on its head: These stories suggest that it is the enforcement of the military exclusion policy, rather than the sexual orientation of military personnel, that is most disruptive. The story of Captain Michelle Benecke is illustrative. Benecke served in the Army between 1983 and 1989 and is now a lawyer. Together with coauthor Kirstin Dodge, she retells the stories of servicewomen who were the victims of military “witch hunts.”43 Consider the story of the USS Grapple.44 Petty Officer Mary Beth Harrison, a senior female officer on ship, recalls that male

42. Watkins, 847 F.2d at 1331 (testimony of Captain Bast); id. (describing testimony of a sergeant and the findings of an Army board of officers).
sailors could harass women with impunity by threatening to label them “lesbians” if they complained.45 Harrison confronted at least one of the harassers and spoke with her superiors about filing a complaint, which they discouraged. When another woman rebuffed the advances of several male sailors, the men accused her and Harrison of being lovers. No investigation of the sexual harassment charges ensued; instead, Harrison and two other women were investigated for alleged homosexual activities. The women were presumed guilty, apparently because of a spurned male harasser’s accusations, but were assured lenient treatment if they would provide names of “other” lesbians. To this day no legally cognizable evidence exists that any of the accused women was lesbian, yet Harrison was cashiered out of the Navy.46 The Grapple story is a recurring one.47

In addition to the useful information the Grapple story provides, it suggests an irony—if not hypocrisy—in the military exclusion policy’s operation: What harms morale may not be the presence of lesbians or gay men so much as the terrorizing witch hunts, which prey upon people arbitrarily, encourage an atmosphere of snitching, and threaten to transform productive human behavior (e.g., rebuffing inappropriate sexual advances or befriending people of the same sex) into criminal behavior. This irony was not lost on the pragmatists in the Joint Chiefs of Staff and the Clinton Administration who defended the proposed “don’t ask, don’t tell” policy before Congress by emphasizing that it would end the “witch hunts” of the past.48

C. Demonstrating Connections and Interrelationships Among Separate Policies

Practical reasoning assumes that human decisionmaking is weblike, in that one value or line of thinking is connected to and reinforced by many other values or lines of thought.49 The connections and reinforcing features of thought are not systematic, and for that reason they are hard to conceptualize in the abstract. Concrete narratives of actual interactions and histories can illustrate these interconnections, however. Gaylegal narratives prove useful in this regard.

45. One crewman accused a female sailor of being a lesbian when she rejected his advances, and another threatened his female lover with that accusation if she did not abort their fetus. Shirts, supra note 29, at 594.

46. Benecke & Dodge, supra note 43, at 223 n.54.

47. See, e.g., May 1993 House Hearings, supra note 33, at 16-17 (testimony of Tanya Domi, former company commander) (all military women face the Hobson’s choice of acquiescing to sexual harassment or standing up to it and being labeled a “lesbian”; reporting her own experiences with lesbian-baiting); see also Shirts, supra note 29, at 326-30, 470-71 (Ruth Voor, while a student at the Naval Academy, did not report a rape attempt against her by a fellow student because of the threat that he would “expose” her as a lesbian); id. at 352-55 (Tangela Gaskins, a petty officer on the Norton Sound, was frivolously accused of being a lesbian because she rebuffed male sailors’ advances; Gaskins was acquitted); id. at 558-61 (discussing other examples as well as an armed services report that 70% of the women in the armed services said they had been sexually harassed).

48. See July 1993 Senate Hearings, supra note 30 (testimony of General Powell) (emphasizing that the new policy will stop “witch hunts”).

Benecke and Dodge’s study of lesbian-baiting in the armed forces identifies connections between antihomosexual rules (which the military officially favors) and sexual harassment (which the military officially condemns). The same military that drummed out Perry Watkins because he was gay, labeled Mary Beth Harrison a lesbian—and then discharged her—because she was a woman asserting her right not to be harassed. The statistics further illustrate this relationship between the military’s sexism and its homophobia: In recent years the military has discharged women at a much greater rate than men. Although women constituted only 10 percent of the armed forces during the 1980s, 23 percent of those discharged for homosexuality during that period were women. This disparity was most pronounced in the Marines, the service most resistant to women. One hopes that the Tailhook scandal—itself a striking narrative that has transformed some people’s attitudes—will impel the military to curtail its hostility towards women.

Perry Watkins’ story suggests a further cultural phenomenon. One mystery about his case is why, given the military’s exclusion policy, Watkins was allowed to sign up in 1967, notwithstanding his openness about his gay orientation, and why, a year later, the military found insufficient evidence of homosexuality to discharge him, notwithstanding his declaration that he had engaged in sex with two men, including another serviceman. While bureaucratic whimsy or inertia may supply an explanation, Watkins believes otherwise. He thinks the Army accepted him in 1967 because he was a nineteen-year-old black man, whom the Army doctor and enlistment officer assumed would be killed in Vietnam—one less black guy for the country to worry about. He is less certain about why his 1968 declaration did not lead to a discharge; however, he notes that one serviceman with whom he had sex was a white man who strenuously denied any sexual activity. Thus, the military either believed the white man over the black, or again felt its manpower needs were too great to discharge a soldier ready to serve in Vietnam.

52. National Security & International Affairs Division, U.S. General Accounting Office, DOD’s Policy on Homosexuality 20-21 (1992) [hereinafter GAO Report]. Part of the disparity in rates of discharge could be attributed to the fact that the proportion of women in the military who truly are lesbian is greater than the proportion of gay men amongst male soldiers. In the absence of statistics on the actual number of gays and lesbians in the military, it is impossible to isolate the effect of misogyny on rates of discharge.
53. Id.
54. See text accompanying note 17 supra.
55. Shilts, supra note 29, at 60. Watkins made this observation years later, based on the experience of a black friend who received similar treatment, and that of a white friend, who was immediately barred from military service when he declared on his enlistment form that he was gay. Id. at 64. He elaborated on this point at a conference on the military exclusion I helped organize at the Georgetown University Law Center, and I have talked with him informally about it since then.
56. See Humphrey, supra note 29, at 252.
Watkins’ story suggests that antihomosexual attitudes might relate to racist attitudes. Watkins perceived that the military mindset that excluded him as a queer was first cousin to the military mindset that segregated blacks a generation ago. The armed forces then defended racial apartheid on the ground that racial integration would disrupt troop morale, precisely the same ground on which it now defends the apartheid of the closet.\footnote{57} In both cases, military policy can be faulted for unduly valorizing—and reinforcing—social prejudice and a narrow vision of citizenship.\footnote{58}

Retired General Colin Powell rejects the analogy drawn between the armed services’ past experiences with blacks, that culminated in forced desegregation in 1948, and its experience with lesbian and gay servicepeople today. Powell, an African-American, argues that “[h]omosexuality is not a benign . . . characteristic, such as skin color . . . . It goes to one of the most fundamental aspects of human behavior.”\footnote{59} But so long as the military defers to the bigot’s perspective, as it did before 1948 on the issue of racial segregation and as it does today on the issue of the gaylesbian exclusion, both race and sexual orientation are “fundamental” and neither is “benign,” as Powell is using these terms. Opponents of desegregation in the 1940s relied on a general belief that whites made better soldiers than blacks, “due to the inherent psychology of the colored race and their need for leadership.”\footnote{60} Military leaders supporting racial segregation in the 1940s viewed race as a “fundamental aspect of human behavior” no less than those supporting the gaylesbian exclusion view sexual orientation today. Only after President Truman stood up to racist arguments, and successfully desegregated the troops during the Korean War, was skin color revealed to be
"benign." Watkins' story indicates that some of the same people who would bash him for being gay, as the military encourages, would just as gladly bash him for being black, if the military did not officially censure such behavior.

The foregoing account suggests some of the ways in which narratives contribute to legal discourse on the military exclusion, even under Farber and Sherry's relatively conservative conception of legal scholarship. A similar case could be made for the relevance of narratives for other legal issues, including state recognition of same-sex marriages; adoptions by lesbians and gay men; the selective and violent operation of sodomy laws against gays; and employment and other private forms of discrimination against gay, lesbian, and bisexual workers. In all of these instances, narratives can provide useful information to the pragmatic decisionmaker, revealing the inaccurate stereotypes and ignorance that underlay the old arguments used to exclude us.

Legal scholars are not conservative pragmatism's only takers. Many gay, lesbian, and bisexual activists have adopted a conservative pragmatic philosophy in formulating their strategies for social and political change. By "marketing" gay people as "the same" as straight people in relevant respects, and by emphasizing the impracticality of and concrete hurt attendant to discrimination, these activists aspire that "America [w]ill [c]onquer [i]ts [f]ear and [h]atred of [g]ays in the '90s." The Campaign for Military Service, formed to support President Clinton's promise to end the military ban, followed a variant of this pragmatic strategy in 1993: Present stories of mediagenic gay and lesbian military superstars. Emphasize their "militariness," their similarity to straight soldiers. Present horror stories of the harassment of heterosexual as well as homosexual personnel perpetuated by the ban. Stress the bureaucratic waste

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61. See note 57 supra; see also text accompanying notes 170-180 infra.
62. Kenneth Karst cogently argues that the military policies of discriminating against blacks and gays and lesbians, as well as against women, grew out of a narrow vision of "manhood" and sexuality held by the top brass and inculcated into recruits. See Kenneth L. Karst, The Pursuit of Manhood and the Desegregation of the Armed Forces, 38 UCLA L. Rev. 499 (1991).
63. See Nitya Duclos, Some Complicating Thoughts on Same-Sex Marriage, 1 LAW & SEXUALITY 31 (1991); Dunlap, supra note 12; William N. Eskridge, Jr., A History of Same-Sex Marriage, 79 VA. L. Rev. 1419 (1993).
64. See Polikoff, supra note 12.
65. See Thomas, supra note 12.
67. MARSHALL KIRK & HUNTER MADSEN, AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE '90s (1989). The authors offer eight strategic precepts for gay activism that are "straight" out of the pragmatists' primer:
   1. Don't just express yourself: communicate!
   2. Appeal to the Ambivalent Skeptics.
   3. Keep talking about gayness.
   4. Keep your message focused: the issue is homosexuality.
   5. Portray gays as victims, not as aggressive challengers.
   6. Give potential protectors a just cause.
   7. Make gays look good.
   8. Make victimizers look bad.

Id. at 191.
and monetary costs of the exclusionary policy. Tell stories of how thousands of openly gay and lesbian personnel have been tolerated, even honored, by their colleagues in combat and other situations. Remind decisionmakers that the armed forces resisted racial desegregation for the same reason (morale) that it now uses to rationalize the gaylesbian ban, and that desegregation proceeded smoothly despite preexisting prejudice. Testify as to how other western countries have allowed gays in the military without significant problems.

From my perspective as a footsoldier, the Campaign was brilliantly run based on pragmatist principles. What we got for our effort was “don’t ask, don’t tell”: Discreet homosexuals can serve, with a suggestion that the witch hunts and dirty investigative tactics will let up.68 Brokered by the shrewdest pragmatists in the business (General Colin Powell, President Bill Clinton, Senator Sam Nunn), this compromise under a Jamesian psychology “preserves the older stock of truths with a minimum of modification, stretching them just enough to make them admit the novelty, but conceiving that in ways as familiar as the case leaves possible.”69 It may improve the lot of gay, lesbian, and bisexual military personnel a little bit; in combination with the public reaction to Tailhook, it may even improve the lives of heterosexual women in the armed forces. However, like most other lesbian and gay people, I reject the compromise as institutionalizing the apartheid of the closet, which is as objectionable to us as racial apartheid is to African-Americans. Also, I remain skeptical about how well the compromise will work in practice. For illumination, I await the next round of gay narratives and their accompanying lawsuits.

II. A PROPHETIC PRAGMATIC CASE FOR GAYLEGAL NARRATIVES

The story I told about Perry Watkins in Part I was for the most part taken from the official record of Watkins’ lawsuit and reflects the sort of narrative a conservative pragmatist would most likely appreciate (and to which conservative decisionmakers responded when crafting the “new” version of the military exclusionary policy). It projects a man whom mainstream society can identify with and respect, who performs his job with distinction, who is honest, imaginative, and responsible. This version of the Watkins story is the truth and nothing but the truth, but it is not the whole truth. Watkins’ story as told by Watkins—and not filtered through pragmatic lawyers, judges, and spin doctors—may not meet the accommodationist standards Farber and Sherry establish for narrative scholarship. Cultural insiders are not likely to respond intuitively to those parts of Watkins’ story that reveal him as an irreverent drag queen who consistently violated the military’s antisodomy laws.70

69. JAMES, supra note 25, at 382-83.
70. The story that follows draws from HUMPHREY, supra note 29, at 248-57 (Interview with Watkins), SMILTS, supra note 29, and from a presentation by Perry Watkins at a conference that I chaired on the military ban, which was held at the Georgetown University Law Center in March, 1993.
Watkins says that he never "preyed" on heterosexual servicemen. Quite the opposite occurred. Because Watkins was openly gay, other servicemen constantly approached him for sex, according to his account. He had sex with numerous military men, many of them straight, some of them high-ranking.\textsuperscript{71} Although most of Watkins' sexual partners were secretive, some spoke openly about their good times with him. One machissimus "straight" Marine openly defended their regular sex, claiming that Watkins gave better oral service than the Marine's female partners.\textsuperscript{72} However, not all of Watkins' encounters with straight servicemen were so pleasant. At least once, a group of straight servicemen tried to rape him. When Watkins learned that his superiors had no interest in pursuing an investigation into the attempted rape, he announced in frustration that he would acquiesce the next time—and then retaliate in the future. No one bothered him after that.\textsuperscript{73}

Between the end of his first enlistment in 1970 and his reenlistment in 1971, Watkins made a living as a female impersonator, borrowing his mother's wigs and dresses and taking the stage name "Simone."\textsuperscript{74} This proved to be his calling. After Watkins' first reenlistment, he worked up a drag show for his unit in Korea. The act was favorably reviewed in the \textit{Army Times}.\textsuperscript{75} Later, while he was stationed in Germany, Army personnel specifically requested Watkins' services in drag. Watkins performed as Simone at Army recreation centers, officers' clubs, and noncommissioned officers' clubs all over Germany. Simone even entered a female beauty pageant—and won.\textsuperscript{76}

I believe a solid pragmatic case exists for telling this side of the Perry Watkins story, although Farber and Sherry's pragmatism is skittish about stories that might alienate mainstream audiences (who might not identify with drag queens, for example).\textsuperscript{77} As I suggested above, Farber and Sherry's approach is solidly rooted in American pragmatic philosophy. However, their approach is not the best that pragmatism has to offer. A more progressive, prophetic understanding of pragmatism would value stories from the bottom even if they fail to reach mainstream audiences.

Like Farber and Sherry, I draw my understanding of pragmatism from the work of William James, but in my case James as interpreted by Richard Rorty and Cornel West.\textsuperscript{78} James' best developed insight was that "all our theories [of truth] are \textit{instrumental}, are mental modes of \textit{adaptation} to reality, rather

\begin{footnotes}
\item[71] Humphrey, supra note 29, at 251.
\item[72] Id. at 252-53.
\item[73] Shilts, supra note 29, at 83.
\item[74] Id. at 155-56.
\item[75] See Humphrey, supra note 29, at 253.
\item[76] Id. at 253-54.
\item[77] See Farber & Sherry, supra note 6, at 826-27. Hostility to drag queens is not limited to mainstream audiences. Some lesbians and heterosexual feminists consider drag queens an affront to women.
\end{footnotes}
than revelations or gnostic answers to some divinely instituted world-
enigma." A progressive reading of James, beyond that of Farber and Sherry's
conservative pragmatism, would privilege each individual's "human contribu-
tion" to her understanding of reality. As James said,

In our cognitive as well as in our active life we are creative. We add, both to
the subject and to the predicate part of reality. The world stands really mallea-
ble, waiting to receive its final touches at our hands. Like the kingdom of
heaven, it suffers human violence willingly. Man engenders truths upon it.

Under a more progressive interpretation of James, humans are active agents of
their own truth enterprise. From these Jamesian conceptions, Rorty argues for
the contingency of our truth choices. Rorty postulates that we choose, rather
than accede to, our starting point in our search for truth. Even if we choose a
conservative or conventional starting point, we are free to abandon it and start
anew if its anomalies render it unproductive. What might be persuasive and
productive for you might not be so for me, but your conventionality does not
constrain my truthseeking.

Expanding on this reading in light of subsequent authors (particularly
Wittgenstein and Nietzsche), progressive thinkers have rejected or deem-
phasized the accommodationist features of Jamesian pragmatism and have de-
veloped instead the contours of what Cornel West terms "prophetic pragmatism." Under this view, truth is merely a language game that people
play. Each individual is a dynamic player in this game and makes her own
choices about which script to follow and what metaphors to employ. While
most individuals make conventional choices and accept the descriptions handed
down to them, the triumphant player seeks escape from inherited descriptions
and formulates a cognitive framework of her own. This redescription is valua-
able insofar as it is productive for her life; it is momentous if it also proves
productive for other players, and persuades them to discard old descriptions in
favor of the new; it is revolutionary if it displaces old descriptions for the cul-
ture generally.

A prophetic rather than conservative understanding of pragmatism has im-
lications for assessing the value of narrative jurisprudence. If the world stands
malleable at the hands of each individual, their personal narratives are their
personal truths. Lawyers should find such narratives useful for the insight they
provide into the law's operation on people in the world and into the subterra-
nean social shifts that have tremendous ramifications for the law's evolution.
These implications of prophetic pragmatism are especially crucial for lesbian

79. James, supra note 25, at 428. Many quotable formulations are found in James' work. For
example, he maintained that "the true is the name of whatever proves itself to be good in the way of
belief, and good, too, for definite assignable reasons." Id. at 388. "True ideas are those that we can
assimilate, validate, corroborate and verify. False ideas are those that we can not." Id. at 430.
80. James, supra note 25, at 456.
81. Rorty, Consequences, supra note 78, at 165-66.
82. Rorty, Contingency, supra note 78, at 3-43; Mari J. Matsuda, Pragmatism Modified and the
False Consciousness Problem, 63 S. Cal. L. Rev. 1763 (1990); Margaret Jane Radin, The Pragmatist
and the Feminist, in PRAGMATISM IN LAW AND SOCIETY, supra note 23, at 127; Cornel West, The Limits
of Neopragmatism, in PRAGMATISM IN LAW AND SOCIETY, supra note 23, at 121.
and gay narratives. The paradigmatic gay narrative, the coming out story, recounts the typically painful process by which the lesbian or gay individual creates an account of her personhood. In this Part, I argue that such lesbian and gay stories are significant not only at the personal level, but at the social and legal levels as well.

A. Redescribing Practice: Law from the Bottom Up

Gay, lesbian, and bisexual people who grew up in the middle of this century learned a powerful moral language from our parents, teachers, and classmates and from television. The language generally reflected nervousness about sexuality and frequently expressed hysteria about homosexuality. It spoke of homosexuality in mimed fey or butch gestures (a limp wrist for men, a deep voice for women), whispered euphemisms ("she's reputed to be 'that way'"), condescending expressions of mock sympathy ("it's such a tragedy for the family"), insulting names (you know most of them), more esoteric and supposedly witty put-downs ("asshole buddies" was for generations a Southern favorite), and cat-calls threatening violence ("a good man'll set ya straight!"). The effect of this language was to force us to retreat into the closet, where we resided emotionally and spiritually, even while continuing to participate in the community that put us down.

For the individual, the decision to come out of the closet involves first determining one's sexual orientation, then internally valorizing it in some way, and finally telling others. This process involves a language game, as the individual develops a vocabulary for expressing her sexuality and, relatedly, her personhood. To a greater extent than most straight people, gays must start from scratch in devising our vocabularies, because the language we inherit either ignores or condemns our concerns. Narratives can play a crucial role in introducing gay-friendly language into currency: Not only is an individual's vocabulary often generated or influenced by books she has read and conversations she has shared, but the coming out stories and the vocabularies of the thousands of individuals narrating those stories ultimately feed back into a communal language that is gay-friendly.

A gay-friendly language connotes a gaylesbian consciousness, and helps define gaylesbian communities. In our language, Perry Watkins is not a "homosexual," a category created by the modern medical profession that has incarnated and tortured us pitilessly. Instead, he is a "gay man," our chosen nomenclature which, aside from its identifying function, connotes acceptance of one's sexuality. Watkins was also a drag queen, a category we have created and vested with our own cultural significance: A drag queen acts out a dramatic fantasy of gender plasticity. While most people in the dominant commu-

83. On coming out generally, see DENNIS ALTMAN, COMING OUT IN THE SEVENTIES (1979); BARBARA PONSE, IDENTITIES IN THE LESBIAN WORLD: THE SOCIAL CONSTRUCTION OF SELF (1978).
nity, and not a few in the lesbian and gay community, are horrified by drag queens, a minority of us appreciate and esteem them as gender critics. And although Watkins has had more sex partners than most other Americans, some of us would not consider his behavior "promiscuous" (the term we were taught by mainstream culture) any more than we would consider someone who formed dozens of close friendships "libertine." Our language game simultaneously redescribes the world in terms that we find friendlier and creates the "us" to whom this brave new world relates.

To feminist and critical race narrative scholars who assert the importance of stories in transforming language, and thereby help build new communities, Farber and Sherry respond: "Community-building may be valuable, but it is an enterprise quite distinct from increasing understanding of the law." In other words, law review narratives are not legitimate legal scholarship if their sole intended purpose is to contribute to community-building. I (literally) don't understand Farber and Sherry's position. If community-building "may be valuable," why shouldn't law professors contribute to it? Doesn't community-building "increase understanding of the law"?

I believe that community-building not only increases understanding of law, but provides the best understanding of law. My work in statutory and constitutional interpretation has led me to view law from the bottom up—as a dynamic struggle for description among different linguistic and normative (nomic) communities. Admittedly, this is not the traditional viewpoint, which analyzes law from the top down, and conceives of law in terms of rules and standards delivered to an amorphous populace by duly established lawgivers. It is, however, the view of prophetic pragmatism, and indeed of most philosophies that take cultural pluralism seriously. The traditional "top down" perspective accepts the military exclusion of lesbians and gay men as "law" because the officials at the top handed it down in a procedurally correct way. In contrast, the "bottom up" perspective views rules from the vantage point of their objects. Thus, a policy that subordinates and trivializes a class of productive, worthy citizens might not be viewed as "law," or might be viewed as "law" that has a limited lifetime.

85. For dissent, see, e.g., KIRK & MADSEN, supra note 67.
86. See, e.g., Milner S. Ball, The Legal Academy and Minority Scholars, 103 HARV. L. REV. 1855 (1990); Delgado, supra note 1.
87. Farber & Sherry, supra note 6, at 824.
89. See text accompanying notes 159-162 infra.
B. Destabilizing Conceptions of the Status Quo

Many nomic communities, such as the Amish, prefer insularity and do not desire that others adopt their redescriptions of reality.90 Other nomic communities do have transformational goals, however.91 Under a conservative pragmatism, the absorption of new information into people's stock of facts and experiences is a slow process, and only gradually yields new webs of opinions. Prophetic pragmatism is more aggressive about seeking to transform people's opinions, in part by offering new and revolutionary redescriptions, and in part by undermining and shaking up the existing stock. Narratives play a role in this paradigm-shifting process.

Narratives can contribute to law's transformation by aggressively upsetting stereotypes. As emphasized in Part I, stereotypes are challenged when people are confronted with living examples of individuals who do not possess stereotypical traits (e.g., gay people who are like straight people). A different strategy for attacking stereotypes is to show that the traits at issue are not limited to the stereotyped group (e.g., that straight people possess many of the characteristics allegedly differentiating gays). Consider, for example, the stereotype that gay men are "promiscuous," as the military argued in trying to establish the sexually predatory nature of gay personnel. Although gay men have traditionally had more sexual partners than lesbians or straight women, the stereotypical trait of promiscuity may be less a consequence of homosexuality and more a consequence of either situational factors or male culture generally.92 In Perry Watkins' experience in the homosocial (sex-segregated) armed forces, the straight men in his units were sexually active, often approached him for sex (and not vice versa), and, on occasion, tried to "prey" on him.93

Watkins' narrative not only challenges the exclusive applicability of the promiscuity stereotype to gay men, it is also generally corrosive to the military's posture regarding homosexuality. Historically, the military's slogan has been "Homosexuality is incompatible with military service." The furor in 1993 pushed the Department of Defense, with a fair amount of footdragging, to change the slogan to "Homosexual conduct is incompatible with military service."94 Some members of Congress, as well as several Joint Chiefs of Staff, found this language game confusing.95 Watkins' narrative mocks the government's verbal game-playing, since it illustrates that a practicing homosexual

91. See Cover, supra note 88, at 26-40 (contrasting insular and "redemptive" constitutionalism).
93. See text accompanying note 73 supra.
94. See July 1993 Senate Hearings, supra note 30 (testimony of Defense Secretary Les Aspin and General Colin Powell).
95. Senator Dan Coats (R-Ind.) quizzed Secretary Aspin, "So we're saying you can be a homosexual, but you can't act like a homosexual?" Aspin acceded to this characterization. Then Coats took a poll of the Joint Chiefs: "The question is do you believe that homosexuality is compatible or incompatible with military service?" Some Chiefs responded that it was "incompatible"; General Powell and two others said that "open homosexuality" was incompatible. Id.
can be a decorated soldier, and indeed can conform with the Army's straight ideal. Even more significantly, the narrative reveals the ostensibly straight Army was much "like" the gay Watkins, in that the service itself has engendered, and thrived on, males sucking and fucking, camping, and cross-dressing.

On this second point, recall that Watkins not only cross-dressed while he was in the military, but was also solicited by Army officers all over Germany to perform as "Simone." The armed forces in this century have had a rich tradition of entertaining troops with drag shows satirizing traditional sex roles. For instance, soldiers serving in World War II, whether suffering in prison camps or enjoying leave, responded warmly to drag shows, even organizing their own when their superiors did not. Integral to drag shows is "camping," whereby people flaunt gender roles not only by cross-dressing, but also by open (if parodied) same-sex flirting, exaggerated gestures and outrageous costumes, and the invocation of old words in new contexts (e.g., the flaming drag queen becomes the "mother superior"). For gays, camping has long been a survival technique for maintaining sanity in an insanely homophobic world. In the military environment, camping provides entertainment and fosters bonding among straight men.

A number of other colorful military rituals involve cross-dressing and camping. Consider, for example, the "shellback" ceremony traditionally observed on naval ships when new sailors ("polliwogs" or "wogs") first cross the equator. Common features of these ceremonies include the coronation of Neptune and his (cross-dressed) "queen" the night before the crossing; soaking the wogs in slime and running them through a mock-sadistic gauntlet during which their frenzied half-dressed shipmates whack them on their buttocks; requiring the wogs to kiss the navel of a protuberant male belly and/or a man's groin; simulating anal intercourse with the greased wogs; and mass disrobing, by veterans and wogs alike. Gay men watching such rituals marvel at their farcical but profound homoeroticism.

Perry Watkins reported that plenty of ostensibly heterosexual men desired intercourse with him. His experience is a prevalent phenomenon in the largely sex-segregated military. During periods of relative isolation from women and intense association with other men typical of combat situations, even males with low Kinsey numbers (i.e., strongly heterosexual orientations) will pair off with other men. Thus the irony: During war and combat—when morale

96. See text accompanying notes 74-76 supra.
98. On camping generally, see ESTHER NEWTON, MOTHER CAMP: FEMALE IMPERSONATORS IN AMERICA (1979); SUSAN SONTAG, AGAINST INTERPRETATION 277-92 (1966); see also MICHAEL BRONSKI, CULTURE CLASH: THE MAKING OF GAY SENSIBILITY (1984).
99. See SHILTS, supra note 29, at 400-01. For tamer versions of "crossing the line," see also LELAND P. LOVETTE, NAVAL CUSTOMS: TRADITIONS AND USAGE 42-47 (1936); WILLIAM P. MACK & ROYAL W. CONNELL, NAVAL CEREMONIES, CUSTOMS, AND TRADITIONS 181, 184-92 (1980).
100. The concept of situational homosexuality is set forth in ALFRED C. KINSEY, WARED B. POMEROY & CLYDE E. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 289 (1948). The famous
must be highest and unit cohesion strongest—the military not only allows service by openly gay men, but also turns a blind eye towards intercourse between gay men and straight men. The military’s current position—that “homosexual conduct” is incompatible with military service—contrasts strikingly with military practice.

The Navy, especially, is a hotbed of same-sex intimacy—even during peacetime. When ships and submarines remain at sea for long periods of time, many men naturally take sexual solace in one another. Yet the Navy is the most militantly antihomosexual branch of the armed forces, discharging proportionately more alleged male and (especially) female homosexuals than the Army or Air Force.

These statistics suggest a striking irony: While the military’s top brass once denounced “homosexuality” as incompatible with unit cohesion and morale, they nonetheless tolerated it in times of war and combat when unit cohesion and morale were of the utmost importance. The top brass now maintains that it is homosexual conduct that is incompatible with military service, yet the military tolerates boatloads of homosexual conduct, so long as it is private. In the end, it is the hypocritical military policy and not its objects that might be described as “perverted.”

C. Speaking to the Future: Gaylegal Narratives as a Redescription of America

Progressive pragmatism allows, and indeed invites, a victim-based redescription of social practice. A redescription of the military’s exclusion of gays and lesbians which draws on gaylegal narratives might look something like the following: The American military has traditionally thrived on a cult of manhood and the institution of male bonding. The cult begins to form in boot camp, which breaks green recruits and reduces them to the same miserable level. This process has traditionally involved sexual humiliation and a denigra-
tion of whatever traits differentiate one recruit from another.106 Wallowing in their complete commonality, the recruits bond with one another, creating unit cohesion, and with the command structure, creating command cohesion. As this cohesion grows, the recruits develop new pride, first in their group, and then in themselves. At some level, the pride-inspiring process valorizes the recruits' manhood and, specifically, the virility attendant to being their country's protectors. Although this script is changing as more women go to boot camp, the segregation of the sexes permits much of the old script to remain intact.

The combination of the military's sex segregation, its hypermasculine breaking-down and bonding process, and its valorization of manhood, make the top brass defensive about the presence of gay men and lesbians in barracks and shower rooms.107 In a homophobic society such as ours, homosocial institutions—from the Boy Scouts and Girl Scouts, to convents and the priesthood, to high school softball teams—are automatically suspected of harboring perversion. Such suspicion is potentially deadly to these groups, because it threatens to undermine their standing in the conventional middle-class community. To protect themselves against possible taint, homosocial institutions, especially male ones, tend to be more vocally antihomosexual than other institutions.108

Since the military is not only homosocial, but in fact exploits the buddy system and male bonding for its own ends, it is under pressure to condemn homosexuality most visibly and vocally—which it does. Individual soldiers engage in fag-bashing jokes, antigay rhetoric, and sometimes violence to reassure themselves that the gut-slap-ping, towel-snapping, ass-grabbing, shellbacking, and cock-sucking they engage in have no homoerotic dimensions. If the military publicly acknowledged the gay presence in this male subculture, the shower room camaraderie might shatter, and the boot camp game might lose its zip. The next step might be a military that is not predominantly heterosexually male at all, but rather one with substantial female and gay contingents. Though the military leadership fears this result, I think it would be terrific. A shift away from a boys' club atmosphere could be good for the military, in that it would allow a more mature approach to dealing with juvenile anxiety about male sexuality, and might create unit cohesion through an emphasis on common humanity and goals rather than on exclusions and put-downs.

I believe the above redescription is "true," in the pragmatic sense that it accounts for the current situation better than other descriptions. Yet it was not even offered to the House or Senate committees in 1993, for the practical rea-

106. Thus, the rich recruit will be the butt of drill sergeants' derision for being too pampered "to be a man." The recruit from Oklahoma will be asked whether it is true that "they only grow queers in Oklahoma" (the appropriate answer is "No, SIR!"). The recruit who appears smart will be derided for being a smart-ass, and therefore a "faggot." And so on.

107. See KENDALL THOMAS, SHOWER/CLOSER (forthcoming 1993) (arguing that part of the anxiety over lifting the military ban stems from fears of gay ocular invasion in the shower).

son that the committee members (and the home audience watching on T.V.) would have found it incomprehensible, if not offensive. Even the conservative assimilationist stories told at the hearings changed no minds, as Representative Marilyn Lloyd observed. Senator James Exon spoke for most of his colleagues when he announced early on that he did not approach the issue with a completely open mind. Presumably, Senator Exon’s preexisting stock of opinions and experiences are dominated by regard for the judgment of military officials and by unfamiliarity with “homosexuals.” Under such circumstances, perhaps the most we could hope for on Exon’s part would be acceptance of some version of “don’t ask, don’t tell.” This is one lesson of conservative pragmatism. But this is not all that pragmatism teaches.

A more positive lesson of pragmatism is that in the longer run, opinions are more plastic. One’s “stock of old opinions” and experiences is itself dynamic. If one’s opinions adjust a little for every story detailing persecution of responsible, patriotic gay and lesbian or straight military personnel by unreasoning or underhanded investigators, the cumulative change over a number of years might be substantial. One’s related experiences, such as interaction with openly gay and lesbian professionals, might facilitate this transformative process.

This notion of how opinions evolve over time raises a generational issue. The “stock of old opinions” brought to the military exclusion issue by someone of Senator Exon’s generation will be systematically more antihomosexual than the opinions of members of his children’s generation, the generation of Bill and Hillary Clinton. The latter are more likely to have openly lesbian and gay friends, to work with lesbian and gay colleagues, and to be well-informed about sexual orientation issues. As new generations of Americans grow up surrounded by more and more “out” lesbians, gay men, and bisexuals, their collective stances on gaylegal issues will become more favorable. A prophetic pragmatism recognizes that every generation—not just every person—will reformulate the stories it inherits. Consequently, my redescription of the military (as an unbalanced hypermale environment that would be stabilized were

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109. In my discussions with Senate staff personnel and one of the witnesses scheduled to testify on the first day of the Senate hearings on the military exclusion, I concluded that gay and lesbian witnesses were not welcome, because Senator Nunn’s staff considered us “biased.” I was repeatedly told that Nunn wanted to make the first day “impartial” and “objective” (aspirations belied by the record of that first day, in my view), and that testimony by “homosexuals” ran the risk of not being impartial. The Campaign for Military Service had sponsored a constitutional law expert for that first day, but he withdrew the week before the hearing. In considering a substitute, we operated under the staff’s suggestion that an openly gay or lesbian witness would not be welcome.

110. See May 1993 House Hearings, supra note 33, at 68-69 (remarks of Rep. Lloyd, D-Tenn.). Representative Lloyd observed: “I was sitting here for the last 3/4 hours listening to the testimony and looking at the audience, and I don’t think anybody is going to come away from this panel or the next panel with a change of opinion . . . I think that people pretty much have their mind made up on this issue.” Id.


112. Even Farber and Sherry seem to acknowledge the potential transformative power of narratives, although they question the magnitude of any such power. See Farber & Sherry, supra note 6, at 824-27.
women and openly gay men welcomed) is one that will appeal more broadly to the next generation, or so I hope.

III. SOCIAL CONSTRUCTIONISM AND GAYLEGAL NARRATIVES

Prophetic pragmatism offers an enticing possibility of purposeful—yet peaceful—change. It suggests that the gay and lesbian community can change mainstream attitudes without causing serious social rifts. But the gaylegal experience makes me doubt whether pragmatism, even the prophetic variety, can transform the military culture. The history of gay activism suggests that only a less restrained approach can effect change in such monolithic social institutions. Gay activist theory, recognizing the need for a more transformative approach, has embraced social constructionism as its governing paradigm. The narratives I present in this Part selectively trace events in the development of the modern gay community and its activist theory. The stories that follow combine incremental progress with moments of social rupture; they exhibit a multifarious dynamic that only a social constructivist theory can begin to explain.

World War II contributed to the growth of gay subcultures in America by throwing women together with one another and men together with one another under conditions where emotional bonding was likely, and by alerting these women and men to the possibility of their being attracted to one another through the military's then-new campaign to quiz and thereby provoke recruits to think about their sexuality. Additionally, as the military disposed of gay and lesbian personnel through dishonorable discharges, they flocked to large cities, most notably San Francisco, to avoid the censure and rejection awaiting them at home. The growth of visible subcultures spawned a vicious reaction during the McCarthy era. Homophile organizations formed in the 1950s to combat antihomosexual attitudes. Notwithstanding internal disagreements, the early homophile organizations such as the Mattachine Society and the Daughters of Bilitis followed the prescriptions of conservative pragmatism: Show mainstream society that lesbians and gay men are just like everyone else; conduct studies and tell stories refuting homophobic stereotypes; assimilate into the great American melting pot. These efforts seem somewhat pathetic in retrospect because mainstream society was not listening and was completely uninterested in being educated on the topic.

A new and more militant form of gay activism appeared in the 1960s when the assimilationist vision of the homophile movement gave way to a prophetic

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114. See id. at 40-53; Lillian Faderman, Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America 139-58 (1991). It is ironic that the two most notorious gay-bashers have been a man who was clearly gay (Roy Cohn), and another who probably was (Joe McCarthy). See David M. Oshinsky, A Conspiracy So Immense: The World of Joe McCarthy 310-11 (1983); Nicholas von Hoffman, Citizen Cohn 185-87, 227-33 (1988).

redescription, captured by Dr. Franklin Kameny’s slogan, “Gay is Good.” Inspired by the African-American civil rights movement, Kameny proposed to reconfigure gay political activities around the following themes: Take definite, unequivocal positions on controversial issues; embrace aggressive, direct action until gay people achieve their rightful place in society; and develop a positive vision of gay people rather than a plea for toleration and assimilation. The subtext was: Transform law from the bottom up. Expressed in this fashion, Kameny’s approach resembles prophetic pragmatism; Kameny, like Rorty, was an “ironist,” realizing that redescription can make anything look good or bad.

Unlike Rorty, Kameny was neither a “liberal” nor a “pragmatist,” because he doubted that the free flow of stories could transform middle-class society into one that fully accepts lesbians and gay men. Instead, Kameny believed that only confrontation and exercise of gay power could shake loose mainstream society’s fixation on oppressing us. According to a 1964 Kameny speech, the prejudiced mind “is NOT penetrated by information, and is not educable.” The lesson of the civil rights movement, for Kameny, was that information and persuasion will be unavailing unless backed up by power and protest.

The history of gay rights provides some support for Kameny’s viewpoint. The obvious example is the June 1969 Stonewall riots, in which gay people fought back against the shocked police. But I also want to invoke a different story of a struggle fought in the convention halls of the American Psychiatric Association (APA). It begins with the common twentieth century stereotype that lesbians and gay men are neurotic, afflicted with mental disease, or otherwise psychologically disturbed. The American medical establishment accepted the stereotype of the “sick homosexual” for most of the century; medical authorities in the 1950s and early 1960s expressed the stereotype in particularly negative terms. The evidence supporting their suppositions consisted for the most part of narratives of doctors’ interactions with patients. Doctors uncritici-
cally accepted narratives in which the homosexual patient purportedly admitted that "[h]omosexuals are destructive people, even in the actual sex act."122 They rejected the narratives of Dr. Evelyn Hooker, who conducted blind testing of randomly selected homosexual and heterosexual subjects and submitted the results to other psychologists for evaluation: These experts could not distinguish one profile from another.123 Even though Hooker's studies adopted the most ostensibly "scientific" approach to the issue and were widely read, they had little impact on medical opinion—until after Stonewall.

After a decade of marginalization, Hooker's redescription of homosexuality suddenly became psychiatric orthodoxy.124 In 1970, during the first spring after Stonewall, gay activists confronted their tormentors at the APA's annual convention in San Francisco.125 They wanted to remove the characterization of homosexuality as a psychiatric disorder from the APA's diagnostic manual, the profession's standard reference work. Dr. Irving Bieber, then the leading anti-gay psychiatrist, was laughed off the stage by gay protesters. "'I've read your book, Dr. Bieber,'" yelled one protester, "'and if that book talked about black people the way it talks about homosexuals, you'd be drawn and quartered and you'd deserve it.'"126 A paper on electroshock treatment for sexual deviation met with shouts of "torture" and "Where did you take your residency, Auschwitz?"127 The crowd erupted in pandemonium at the conclusion of the paper, with much carrying on by both queers and shrinks. Some psychiatrists clamored for airfare refunds while others called on police to shoot the protesters.128

One psychiatrist, Dr. Kent Robinson, believed that the protesters' claims had possible merit and negotiated with the APA for a panel at the 1971 APA convention in Washington, D.C., that would include gay representatives.129 Robinson contacted Kameny to organize the panel. But despite securing an official panel at the 1971 convention, the activists continued to organize street protests, not wanting to appear mollified by limited participation.130 On May 3, gay activists stormed the stately Convocation of Fellows, and Kameny seized

Like all psychic masochists, they are subservient when confronted with a stronger person, merciless when in power, unscrupulous about trampling on a weaker person.” EDMUND BERGLER, HOMOSEXUALITY: DISEASE OR WAY OF LIFE? 28-29 (1956); see also OTTO FENichel, THE PSYCHOANALYTIC THEORY OF NEUROSIS 324-41 (1945) (characterizing homosexuality as a perversion resulting from abnormal psychological development); CHARLES W. SOCARIDES, THE OVERT HOMOSEXUAL 90-102 (1968) (suggesting that all homosexuals are either schizophrenic or neurotic, or have personality disorders).

122. SOCARIDES, supra note 121, at 6.
125. Id. at 102.
127. BAYER, supra note 124, at 103. Like many readers, I find the Auschwitz parallel overdrawn.
128. Id.
129. Id. at 103-07.
130. Id. at 104-05.
the microphone to deliver a bitter diatribe against the profession: "Psychiatry is the enemy incarnate. Psychiatry has waged a relentless war of extermination against us. You may take this as a declaration of war against you."\(^1\)

Gay activists later went on to conduct their panel discussion without opposition. At the end of the convention, Kameny and his fellow panelists demanded that the APA revise its diagnostic manual to delete references to homosexuality as a psychiatric disorder.\(^2\) Two years later, after continued pressure from gay activists and from members of the profession, including gay psychiatrists, the APA's Nomenclature Committee voted to make the change.\(^3\)

The tactics displayed at Stonewall and at the 1971 APA Convention are a far cry from the pragmatism of William James or Richard Rorty. At the same time that lesbians, gay men, and bisexuals angrily confronted oppression in American law and institutions, feminist and gay theoreticians were at work developing a philosophy that would reflect our frustrations with pragmatism. Social constructionism was developed by Mary McIntosh\(^4\) and Michel Foucault\(^5\) at least in part as a theory of homosexuality. These authors argued that sexual orientation is not a natural category, biologically fixed across time, but rather has been constructed as a category by the modern West. Thus, the "homosexual" is a creation not of biology, but of history (the term itself is only a hundred years old).\(^6\) The process of social construction is neither directed nor linear, but rather sprawling and weblike: As one strand of human experience changes, so do others. The "homosexuality" category is related to other social constructions, such as traditional lines of gender demarcation, and the conception of sexuality as essential to personhood.\(^7\)

Thus described, social constructionism resembles pragmatism, especially as articulated by Rorty, for both philosophies assume the fluidity and interconnectivity of human institutions and opinions. However, the two philosophies approach the web of human institutions with different attitudes and emphases. While pragmatism optimistically emphasizes the adaptability of human opinions and institutions, social constructionism pessimistically emphasizes their

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131. Id. at 105.
132. Id. at 107.
133. Id. at 137.
134. See Mary McIntosh, The Homosexual Role, 16 Soc. Probs. 182 (1968).
137. See, e.g., Margaret Jane Radin, Market Inalienability, 100 HARV. L. REV. 1849 (1987) (analyzing the threat to personhood represented by prostitution, surrogacy, and other practices that commodify sexuality).
tendency to create exploitive power arrangements. According to social constructionists, the human mind is not open to new experiences and ideas (as pragmatists believe), but rather is encrusted with idées fixes that reflexively organize the world through "dividing practices" and "scientific classifications," like the division of plants and animals into phyla and kingdoms. Although the divisions created might have little justification beyond convention and their connection with other institutions, they are also linked to people's conceptions of themselves and of the good society, and thus are very hard to change through rational argument. The intractability of dividing practices is problematic because these cultural categories arbitrarily demarcate winners and losers, and may crush whole classes of people.

Social constructionism is the primary philosophy of gay and lesbian intellectuals, though it is a philosophy we share with radical feminists and critical race theorists. Its implications for gaylegal narratives differ from those of pragmatism, as the next section explains.

A. Developing Group Identity and Resistance

Social constructionists study and support the liberatory countermovements created by people marginalized by dividing practices. Such groups must first identify the practices oppressing them, then come to understand that the practices are socially constructed rather than natural, and finally create their own consciousness of resistance. Narratives help the objects of dividing practices resist being set apart. This may, in fact, be the most valuable use of gaylegal narratives.

Social constructionists add their own spin to the core gaylegal narrative, the coming out story, which is traditionally viewed as a "discovery" narrative—the individual discovers her identity. The social constructionist interprets the coming out story instead as a narrative about the contingency of dividing practices. In constructing homosexuality, modern western society has created a stigmatizing classification, a dividing practice with potentially brutal implications for "homosexuals," the group isolated from the rest.

Nested in the dividing practices' operation on gay people are the seeds of personal triumph and collective revolution. Sexual orientation usually is not apparent to the ordinary observer; the "homosexual" can often reside, perhaps peacefully, in the closet for life. Her decision to come out is not merely an


141. While many gay and lesbian theorists work under a belief in social constructionism, some do not; in fact, it might not be the primary philosophy of gays outside of the academic community. See Andrew Sullivan, *The Politics of Homosexuality*, NEW REPUBLIC, May 10, 1993, at 24; see also text accompanying note 67 *supra*.


143. See note 83 *supra*. 
individual assertion of identity, but also a risky act of social defiance. "I acknowledge that your category includes me, but deny your ability to shame me by it." Coming out denies the power of the dividing practice—it is a great cry of "So what?" The defiance is familial and social as well as political, for coming out challenges one's family, friends, colleagues: "You must choose me or the dividing practice."

Coming out is not just an act of individual resistance, however. It is also a social act—a choice to align oneself with other "out" lesbians, gay men, and bisexuals in a community of resistance. Coming out is a process by which the closeted pragmatist becomes a constructive activist.

The evolution of Perry Watkins into a litigant and media figure illustrates this dynamic at work. Although Watkins describes himself as "not an activist" and "not a militant person," his experience in the military angered him into activism. That anger impelled him to resist. Relying on the Army's regulations prohibiting gay men from serving, Watkins asked to be released from service three times early in his career. He was obviously ambivalent about being in the Army. But when Captain Bast tried to use the prior requests (and accompanying admissions) to cashier him out in 1974, Watkins resisted. When the Army finally decided to discharge him in 1982, Watkins recalls that "it made me mad, so I took the Army to court." Although he is largely apolitical, Watkins' lesson from his fifteen-year love-hate relationship with the Army was social constructionist in nature:

The message seems to be that as long as we continue to hide in the closet, we'll have to put up with this shit. . . . Those high-ranking military members, ones that I met personally, need to stand up and be counted. . . .

It's sad that we need to demand that. Unfortunately, if we don't, because of the way the laws are written, we're shooting ourselves in the foot. So let me reiterate that as long as we continue to stay in the closet, we give them credibility. . . .

I contend that if that gay general I met in Korea can succeed, it is obvious that he has not been limited by his gayness. However, in order to survive, he has had to maintain a very secretive and highly protected private lifestyle, but my point here is, why the hell should he or anyone else who is gay have to go to such extensive measures? Straight soldiers get a chance to prove whether they're good or not, and they're judged on their performance. Gay soldiers aren't. Whether you're good or not, if you're gay you're gone. No other reason necessary. And there is absolutely no basis in fact for any of the military's opposition to gays in the armed forces. When is this ruse going to be exposed as pure bullshit?

It has been already, but no one was listening.

Do such stories have a place in legal scholarship? Social constructionism would argue that they do have a place, perhaps a central place, because they

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145. See text accompanying notes 15-22 supra.
147. Id. at 256-57.
deepen our understanding of ‘law.’ If law changes from the bottom up, then it is useful for the legal system to understand the process by which social and economic movements challenge old rules to justify themselves anew. Are there others in the armed forces like Perry Watkins, who are so fed up they won’t take it anymore? How intense is their opposition to the military exclusion? To what extent are lesbians, bisexuals, and gay men outside the military angry about the policy, and how much will they sacrifice to oppose it? These are the questions to which narratives can supply insight, and which scholars must consider if they are to understand law as experienced by those at the bottom.

B. Reconsidering “Law”

Perry Watkins’ story suggests another way in which gaylegal narratives are relevant to our understanding of law, according to social constructionism: The stories call into question the legitimacy of what is considered “law” in the United States.

The new “don’t ask, don’t tell” policy was adopted against the backdrop of judicial decisions evaluating the lawfulness of the prior military ban. In most adjudications, the courts have upheld the ban as constitutional. Operating under social constructionist philosophy, gaylegal narratives can illuminate the reasoning—and lawfulness—of these decisions.

The primary theme of the decisions upholding the ban is deference to military expertise. Narratives expose this deference to expertise as mere tolerance of military hypocrisy. To begin with, the official account of homosexuality’s threat to military cohesion is contradicted by the military’s own “expert” studies, especially a telling report issued by the Department of Defense’s Personnel Security Research and Education Center (PERSEREC). The PERSEREC study concluded that gay and lesbian soldiers can serve openly without harmful consequences. The military suppressed the PERSEREC studies, just as it did studies compiled in the 1940s showing that white soldiers in practice were comfortable fighting alongside African-Americans. In characteristic Washing-


149. See GAYS IN UNIFORM, supra note 104 (reprinting the PERSEREC study, which the military unsuccessfully attempted to suppress); see also GAO REPORT, supra note 52, at 31-35.
ton fashion, the studies only saw the light of day through an unofficial "leak."¹⁵⁰

Furthermore, those toeing the party line may often be in private dissent. General Norman Schwarzkopf, for instance, was a lead witness supporting the exclusionary policy during the Senate hearings.¹⁵¹ This was not the first time Schwarzkopf had expressed an opinion on the topic. When Michael Asen, an ACLU attorney, took Schwarzkopf's deposition in 1982, Schwarzkopf testified that homosexuality is incompatible with military service. Shilts then reports:

After the deposition, Asen and the general went to lunch. Asen recalls that they talked more about the case, off the record. . . . Over lunch, Schwarzkopf confided that although he would deny ever saying it if asked in court he really did not care whether or not gays ended up serving in the Army. He had known homosexuals who were fine soldiers. The policy was something that he had inherited, and it was a policy he had to enforce and defend. That was his job, but if the policy were thrown out tomorrow, he said, it would be fine with him.¹⁵²

Thus, according to Shilts' account, General Schwarzkopf's public statements on this issue have not corresponded with his personal beliefs. Furthermore, there surely have been a number of closeted high-ranking military leaders who have compounded the military's institutional hypocrisy by testifying in favor of a policy that would exclude them if their true sexual orientation were known.¹⁵³

The military's suppression of the PERSEREC study and the hypocrisy of various military officials speaking out in support of the ban recall another parallel from the 1940s: the military's complicity in the internment of Japanese Americans during World War II. At that time, General John DeWitt, the Commander in the Western United States, justified the internment by citing incidents of Japanese-American disloyalty.¹⁵⁴ Despite the fact that the Department of Justice soon realized that the incidents recited in the DeWitt report were fabrications,¹⁵⁵ the Supreme Court upheld the internment policy in Korematsu v. United States,¹⁵⁶ deferring to military judgment. Korematsu was an unprincipled and lawless decision—a reminder that an unreviewed military is as prone to prejudiced judgments as any other part of American society and perhaps is even more prone to homophobia because of its tradition of homosocial male bonding.

¹⁵⁰. But for action by gay and gay-sympathetic congresspeople, the military would have been successful in its effort to suppress the reports. See GAYS IN UNIFORM, supra note 104 (foreword by Rep. Gerry Studds).
¹⁵². Shilts, supra note 29, at 426 (quoting the General's admission).
¹⁵³. Id. at 313-14 (hinting at sexual liaisons carried on by high-ranking military officials); Michalangelo Signorele, Queer in America: Sex, the Media, and the Closets of Power 97-122 (1993).
¹⁵⁵. Id.
¹⁵⁶. 323 U.S. 214 (1944).
Korematsu is also relevant in light of another theme of the judicial decisions upholding the military’s gaylesbian ban. This theme can be expressed in the following syllogism: (1) lesbians and gays, by definition, commit sodomy (oral and anal sex), or at least have the propensity to do so; (2) the Code of Military Justice prohibits sodomy, a prohibition which Bowers v. Hardwick held constitutional; (3) therefore, gay men and lesbians—as de facto sodomites—may be constitutionally excluded, even without evidence that they actually committed unlawful acts. Consistent with Hardwick, military policy brands gay men and lesbians as a permanent class of “outlaws” based upon sexual orientation, just as Japanese Americans in the 1940s were imprisoned as “outlaws” based upon race. In this status, lesbians and gays are literally “out”side of the “law’s” protection. This reading is confirmed by the judicial decisions lifting Hardwick from its due process context and shoehorning it into the first amendment and equal protection context of the military exclusion cases. Most people accept the legitimacy of these decisions because they are handed down by the duly established institutions and are accompanied by the appurtenances of judicial legitimacy (complete with cites to cases, analysis of precedent, and so forth).

One who has been declared an outlaw, literally beyond the Constitution’s protection, is less likely to ascribe legitimacy to decisions that condemn her. To us, Hardwick and the military exclusion cases are no more legitimate than Dred Scott was for pre-Civil War slaves or Korematsu was for Japanese Americans. These decisions are not law because they deny us our citizenship and because they subject us to violence. Professor Kendall Thomas suggests that the most lawless features of Hardwick are its explicit authorization for state police to commit violence against us and its implicit authorization for private individuals to do the same.

The congressional hearings on the military exclusion offer vivid reminders of the anti-gay violence attendant to the policy. Testifying in favor of the ban, Colonel John Ripley relied on what he termed the “Queers, Cowards, and Thieves Rule”: Anytime a “queer,” coward, or thief is identified on a ship, a prudent commanding officer should place the man in the brig for his own protection; otherwise the crew will find their own way of disciplining him, typi-

158. This syllogism could also justify excluding admitted heterosexuals from the armed forces, since most heterosexuals have engaged in oral sex. See Philip Blumstein & Pepper Schwartz, American Couples: Money, Work, Sex 236 (1983) (over 70% of heterosexual couples have engaged in oral sex); Morton Hunt, Sexual Behavior in the 1970s 199 (1974) (over 90% of married couples under age 25 have done so). Many heterosexuals, but apparently only a minority, have engaged in anal sex. See id. at 204 (nearly a quarter of married couples under age 34); June Machover Reinisch, Stephanie A. Sanders & Mary Ziomba-Davis, The Study of Sexual Behavior in Relation to the Transmission of Human Immunodeficiency Virus: Caveats and Recommendations, 43 Am. Psychologist 921, 922 (1988) (18% of heterosexual men, 39% of heterosexual women).
159. See Robson, supra note 12.
162. See Thomas, supra note 12.
cally by throwing him overboard. As Representative Ronald Dellums remarked, Ripley's Navy is nothing more than a state of nature for gay men, whose sexual orientation not only subjects them to official discharge, but also to the potentially lethal assaults that are encouraged by the official policy. What kind of an institution is this, asked Dellums.

Colonel Fred Peck provided the most poignant moment of the hearings when he testified that his son, Scott, had come out to him the preceding week. Although Peck expressed love for his gay son, he also used the occasion to support the policy banning his son from serving in the military. This spectacle of an antihomosexual military official outing his own son before a national television audience had more than a touch of irony, as Colonel Peck explained that he supported the gaylesbian exclusion notwithstanding his love for Scott, indeed, that his policy position was indeed inspired by his paternal love. He did not want his son in the armed forces because he was afraid that soldiers would kill or maim Scott because of his homosexuality.

Peck's testimony reflects the Pentagon's new "kinder, gentler" homophobia, which now justifies the gaylesbian exclusion as at least in part designed to protect lesbians and gay men. But beneath this perhaps sincere parentalism is the intimation that the armed forces cannot or will not control or regulate the violent impulses of their own troops. A gaylegal perspective contributes the insight that the violence Peck predicts is a self-fulfilling prophecy, a result of the military's own policies.

Adult men do not grope women, and heterosexuals do not toss gay men out the portholes, unless they believe their conduct will be tolerated by the authorities. This is especially true in the military, where detection and punishment of wrongdoing is typically swift and severe. The exclusion of lesbians and gay men from the armed services is one of many signals sent by the top brass which unmistakably encourage violence against women and gay men. In the wake of Tailhook and the documentation of lesbian baiting as sexual harassment, the Administration is at least paying lip service to opposing violence against...
No similar effort has been made to oppose and punish violence against lesbians and gay men.

From a gaylesbian point of view, law cannot condone a state of unrelenting violence perpetuated by state policies. Our law is a redescription of a Constitution that respects the citizenship of Michelle Benecke, Perry Watkins, and me. This law protects our right to intimacy and prevents us from being treated unfairly on account of our sexual orientation or consensual sexual activities. Gaylegal narratives can promote acceptance of this redescription by building solidarity among gay, lesbian, bisexual, and other sympathetic readers. The more people for whom these stories resonate, and the more intensely and openly they express their feelings, the greater the chance that a minority redescription will displace what the majority had previously considered to be law.

C. Creating Ruptures in Society and Law

Pragmatism considers change in the law, like change in society, to be an incremental process in which people assimilate new experiences and information and gradually form new opinions and develop new frameworks. Social constructionism understands change in the law and in society to be a process of rupture by which the orthodoxy struggles to cope with rebellious victim groups in an escalating conflict which inevitably ends either with suppression of the rebellion or with an overthrow of the old framework. Gaylegal stories can demonstrate the feasibility of nonpragmatic rupture and can suggest strategies for its accomplishment.

Coming out stories provide numerous examples of parents, friends, and colleagues whose views about homosexuality are transformed by knowing openly gay or lesbian people. Similarly, stories drawn from the Army’s archives show how racist attitudes changed virtually overnight when people of different races started working together during World War II. At the time, the Army supported its segregation policy with statistics from polls taken in 1942 and 1943 reporting that 88 percent of white soldiers and 38 percent of the black soldiers favored segregated units.\(^\text{170}\) The social scientists conducting the surveys cautioned that these statistics did not prove that integration would undermine efficiency. Instead, they suggested that many soldiers viewed segregation not as a moral principle but rather as a matter of expediency. The poll takers also noted that responses to hypothetical survey questions do not necessarily predict people’s behavior in situations they have not yet encountered.\(^\text{171}\)

Although the Army suppressed these words of caution, they were validated when the Army, on a test basis, created racially integrated units near the end of

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169. The Administration is sending mixed signals. Even as the Clinton Administration admonishes the Pentagon to end sexual harassment of women, its vacillation on the gaylesbian exclusion sends countersignals to the military. Weakness and indecision on one issue often undermine more decisive orders on related issues. For an example of the military’s tendency not to take nuanced signals seriously, see Shilts, supra note 29, at 710-11.


171. Id. at 40.
World War II. The perceptions of soldiers in integrated units changed radically, according to the Army’s own surveys: While only a third of the white soldiers in the integrated units were comfortable having blacks in their units before the experiment, 77 percent reported more favorable feelings after serving with blacks. Few, if any, felt less favorably. More than 80 percent of the officers in charge of the integrated units reported that integration worked well.\textsuperscript{172} The Army again suppressed these polling results and declined to follow up on this experiment after the War.\textsuperscript{173}

The Army’s top brass were intransigent until President Truman ordered the service to desegregate.\textsuperscript{174} Once the Army agreed to integrate in 1950, and actually did so during the Korean War, it conducted further studies of the troops’ adjustment to integration. The Army’s own G-1 study reported that integration of black soldiers into white combat units in Korea occurred generally “without undue friction and with better utilization of manpower.”\textsuperscript{175} Combat commanders “almost unanimously favor[ed] integration.”\textsuperscript{176} Outside consultants also reviewed the situation, under the code name Project CLEAR. They reported that while integration had not lowered white morale in any significant way, it had greatly increased black morale. Virtually all black soldiers supported integration, while white soldiers were not overtly hostile and on occasion were even supportive. Furthermore, most whites’ attitudes toward integration became more favorable once they experienced integration first-hand.\textsuperscript{177} These findings confirmed the predictions of the Army studies conducted during World War II.

The experience in the other military services was similar. The Air Force found that integration was progressing “rapidly, smoothly and virtually without incident” by the middle of 1950.\textsuperscript{178} Integration reportedly all but eliminated the stream of discrimination complaints and racial incidents that had plagued the Air Force previously.\textsuperscript{179} E.W. Kenworthy, executive secretary of the Fahy Committee (which Truman appointed to negotiate desegregation in each branch), reported in 1950: “The men apparently were more ready for equality of treatment and opportunity than the officer corps had realized.”\textsuperscript{180}

\begin{itemize}
  \item \textsuperscript{172} Id. at 54.
  \item \textsuperscript{173} Id. at 54-55.
  \item \textsuperscript{174} Exec. Order No. 9981, 13 Fed. Reg. 4313 (1948).
  \item \textsuperscript{175} MACGREGOR, supra note 57, at 441 (quoting DA PERSONNEL RESEARCH TEAM, A PRELIMINARY REPORT ON PERSONNEL RESEARCH DATA (1951)).
  \item \textsuperscript{176} Id.
  \item \textsuperscript{177} Id. at 442 (citing OPERATIONS RESEARCH OFFICE, UTILIZATION OF NEGRO MANPOWER S4-S6 (ORO-T-99, 1951)).
  \item \textsuperscript{178} MACGREGOR, supra note 57, at 405 (quoting an Air Force memorandum).
  \item \textsuperscript{179} Id. at 405 (quoting E.W. Kenworthy’s report to the Fahy Committee).
  \item Reporter Lee Nichols interviewed members of all the services in 1953. He found that blacks and whites were amazed at how smoothly integration actually proceeded once the armed services decided to implement it. LEE NICHOLS, BREAKTHROUGH ON THE COLOR FRONT 124 (1954). Nichols noted that blacks and whites continued to have different attitudes about military policy and practice, however.
\end{itemize}
The story of the military’s racial desegregation illustrates the possibility of rupture in old thought patterns. The dynamic that makes rupture possible is relevant to the military’s gaylesbian ban and, more generally, to broader struggles for civil rights. The same argument that worked for a time in the 1940s to defeat desegregation, the potential threat to military cohesion, retains its potency to this day. All that has changed is the group against whom the argument is invoked. In General Colin Powell’s terms, while race is now “benign” in that it is not thought to disrupt unit cohesion, sexual orientation remains “fundamental,” in that it is perceived to be disruptive. But Powell’s distinction between “benign” and “fundamental” is socially created rather than natural; after all, race was considered “fundamental” less than fifty years ago.

Social constructionism teaches that what was once fundamentally divisive can become benign. More importantly for lesbians and gay men, it suggests that rejection of prior divisive factors can occur immediately when there is a rupture in the status quo, as occurred when President Truman issued his desegregation order in the face of the military’s massive resistance. Finally, what is constructed as “fundamental” is often nothing more than an arbitrary dividing practice, created as a component in a web of beliefs that exploit an identifiable group. Such constructions are not legitimate. They should have no place in the law.

Admittedly, constructed dividing practices permeate society. Indeed, some such practices may be legitimate. As pragmatism teaches, we rely on reasons of coherence and social practice to justify a variety of personal and social activities, and we could not operate without deferring to such reasons most of the time. Pragmatism and social constructionism converge on the view that narratives aid in distinguishing productive or neutral practices from oppressive ones. With respect to the military’s exclusionary policy, the thoughtful pragmatist and the thoughtful constructionist can agree that the policy is a destructive dividing practice.

Where the pragmatist and the constructionist may still diverge is in their strategies for action: The former tries to create new and better stories that fit safely within the system of prior narratives, while the latter tears up the old manual and starts writing anew. Even that divergence should not be overstated, however. On the one hand, pragmatism can and should take account of the possibility of rupture suggested by constructionism. Although he acted against

Whites tended to expect blacks to “prove themselves” in their assignments, while blacks were often skeptical that equal opportunities were really available to them. Id. at 131.

See, e.g., May 1993 House Hearings, supra note 33, at 265-70 (testimony of Colonel William Darryl Henderson); see also text accompanying notes 41-62 supra.

See text accompanying note 59 supra.

Defending its segregation of African-Americans, the Army argued in 1949:

The soldier on the battlefield deserves to have, and must have, utmost confidence in his fellow soldiers. They must eat together, sleep together, and all too frequently die together. There can be no friction in their every-day living that might bring on failure in battle. A chain is as strong as its weakest link, and this is true of the Army unit on the battlefield.

DALFUSE, supra note 57, at 189 n.38 (quoting a letter from the Department of the Army to the Secretary of Defense).
the advice of every military leader he consulted, President Truman was acting pragmatically in 1948 when he ordered desegregation of the armed forces, in part because he was ending a dividing practice that had become severely counterproductive. On the other hand, constructionists should understand that rupture needs to be followed by reintegrating new and old scripts. Desegregation was successful in part because officials such as Charles Fahy (chair of the implementing committee) and Stuart Symington (Secretary of the Air Force) plotted the course of the desegregation effort with a combination of pragmatic accommodation and understated persistence.

CONCLUSION

Gaylegal narrative jurisprudence is related to the narrative jurisprudence of radical feminism and critical race theory, most obviously because it speaks to many of the same professional issues. If most legal discourse involves narratives of some sort, what “counts” as good narrative? What criteria should be applied to legal scholarship that consists only of narratives? Is narrative scholarship a separate genre or a new subdiscipline? Do racial, ethnic, gender, or sexual orientation minorities have a special voice that ought to be accommodated in narrative jurisprudence? These questions are not just about technical issues of “standards” in legal scholarship, as Farber and Sherry characterize them. Rather, narrative jurisprudence also implicates issues of identity politics, and that is keenly true for lesbians, gay men, and bisexuals.

I have lived most of my life according to the premises of Farber and Sherry's conservative pragmatism—and in the closet. I felt that if I were discreet about my sexual orientation and pursued standard academic projects (such as statutory interpretation), I could lead a placid and successful professional life in law teaching. This seemed to me like a rational strategy, but it proved to be an ironic one. A number of minor signaling incidents (which I pragmatically chose to ignore) culminated in my being denied tenure at the University of Virginia School of Law, where I started teaching. In my view, that school's decision was crazy, and most of the people involved (including me) acted unprofessionally at every point in the process.

My immediate relocation to the Georgetown University Law Center rescued my professional career, but the tenure-denying experience impressed upon me the limits of an acquiescent pragmatism: I was bashed notwithstanding my willingness to be cooperative, and my martyrdom didn't even stand for anything because of my willingness to be discreet. The decision to come out of the closet professionally—and to write articles like this one—reflects my commitment to a more prophetic academic role, in which I might not only make a better contribution to gaylaw, but bear some kind of personal witness to the irrationality of both the closet and the homophobia that keeps us there. On the


185. Farber & Sherry, supra note 6, at 830-54.
whole, I remain pragmatic, hopeful that our nomic community can change public attitudes over time, without disrupting my sedate middle class life. Yet my most recent research and activism have led me to some skepticism about even a prophetic kind of pragmatism.

While writing the first draft of this article (in July 1993), I was participating in, as well as studying, some of the events described in this article. The process of writing the article and reading the gaylesbian history discussed above contributed to my decision to participate in the Campaign for Military Service’s protest against the Clinton Administration’s “don’t ask, don’t tell” policy, a protest in front of the White House that led to my arrest on July 30, 1993. Although the nicely prenegotiated arrest was hardly the sort of rupture that Stonewall was, it did express the commitment of our group of gaylesbian activists and disappointed Clinton supporters, to protest our exclusion from the rights of full citizenship.

As Kenneth Karst has argued, the exclusion of lesbians, gay men, and bisexuals from the armed forces is related to the military’s historical segmentation of people of color and its continued exclusion of women from combat roles. In a parallel way, people of color, women, and gay people have been formally or functionally excluded from the legal academy for most of American history. These two exclusions are connected. So far as I am able to discern, scholars on all-white law school faculties failed to question the military’s racial segregation in the 1940s, and no one lifted a pen to protest the segregation of Japanese-Americans in combat units during World War II. In much the same way, the exclusion of women from combat was not challenged until women joined elite law school faculties in greater than token numbers. No law review article questioned the longstanding gaylesbian exclusionary policy until Professor Rhonda Rivera started writing about constitutional issues from a gaylesbian perspective, at least so far as I could find.

African and Native Americans, women and gay men, Latinos and Latinas are now encouraged to attend law schools. Feminist, race, and gaylesbian scholars now insist on an appropriate place in the academic hierarchy for our different perspectives—in the law reviews, on law school faculties, and in legal administration. Because legal education is implicated in the nation’s power structure, this process of representation and validation is political on many levels. At the very least, we can hope that, as we achieve positions of influence and authority, our voices will help the discourse on difficult legal issues achieve balance. Stories similar to the ones that I have described in this essay could be told about sexual harassment, accent and language discrimination, and the “double bind” that women of color often

186. See Karst, supra note 62.
The law would not even know about these problems if outsider voices did not insist upon their being on law's agenda.

However characterized, nontraditional perspectives are necessary and useful. Legal scholars help set law's agenda. In a pluralistic society, along with that privilege comes the responsibility to explore the complexities that identity politics introduces into legal discourse. The multiplication of voices may threaten American law with cacophony, but it also challenges scholars to orchestrate a richer legal symphony.