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#### The ongoing legacy of the Korematsu Era presidential war powers authority cases should be repudiated and ended.

#### Contention 1: The Ruins of Law

#### We start in the ruins of democratic law. These ruins are legal remainders of past struggles against tyrannies and, as such, material for an archive of democratic remains.

Paul **PASSAVANT** Poli Sci @ Hobart and William Smith Colleges **’12** “Democracy’s ruins, democracy’s archive” in *Reading Modern Law: Critical Methodologies and Sovereign Formations* eds. Buchanan et al p. 49-50

Giorgio Agamben's work condemns sovereignty and aspires to found a new politics, or a 'coming community', beyond sovereignty and law. He describes sovereign power as determining, unitary, and absolute. This sovereign must be overcome by its equally absolute or all-encompassing other. This other to sovereignty has been conceptualized as pure potentiality, pure singularity, belonging itself, contingency, creativity, excess, or absolute democracy (Agamben 1993: 2, 67; Hardt and Negri 2000). I argue that Peter Fitzpatrick's work on sovereignty and law shows that absolute sovereignty is not capable of existing as such. Nor, for that matter, is absolute democracy capable of existing as such. 'Sovereignty' and 'democracy' are not absolutely opposed to each other. Instead, politics takes place in the torsion or these impossibilities. Many postmodernists today are allergic to anything with a whiff of sovereignty (Hardt and Negri 2000). Unfortunately, this has the consequence of asking those with democratic sensibilities to give up on the project of popular sovereignty at the exact moment that the right in the United States is seeking to ruin democracy by asserting sovereign prerogatives under various theories of **absolute** and **uncheckable** **presidential powers**.' We are faced, presently, with the **ruins of a law** opposed to **unchecked** **presidentialism**, torture, and **camps**.2 Fitzpatrick's attention to sovereignty's paradoxical requirements, and to its near-mythic reliance upon law for temporary resolution of these contradictory demands, teaches us that law, and hence democracy, is always vulnerable to ruin of this sort. Instead of sharing the hopes of messianic postmodernists for a final resolution to these challenges, Fitzpatrick indicates where we must begin our political labours: **among democracy's ruins**. These ruins are **legal remainders** of past struggles against tyrannies and, as such, material for an **archive** of **democratic remains**. I contend that our political work should be mindful of **law as democracy's archive**. These reminders can help us to recollect the persistence necessary to take down or overcome tyrannies, to recall the fidelity necessary to keep a commitment to popular sovereignty. If we fail to labour on behalf of the future this archive anticipates, then the scriveners of George W. Bush's administration will continue to consign us to a dwelling among democracy's ruins.

#### We return to the failure of the American judiciary in the face of camps for incarcerating *Issei* and *Nisei*. Conservatives archive this story as an aberration in American policy, or as justifiable military necessity. Liberals teach it as a lesson in Japanese cultural stoicism (and the striving of a model minority).

#### Silence on the enduring trauma of America’s concentration camps continues the strategy of its organizers – that the spectacular display of war powers authority could shock the population into passive spectatorship.

#### Coverage by mass media, judicial oversight, and all the trappings of American democracy were brought to bear to emphasize the distinction between the U.S. and its totalitarian enemies. This process of threat construction is founded on racialized binaries

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After the closure of the World War II internment camps and the "relocation" of former internees to new postwar homes, many observed the remarkable silence and stoic rebounding with which most first- and second-generation Japanese Americans (Issei and Nisei) closed that chapter of their lives. It was this silence and stoicism that contributed in large part to their designation, along with other Asian Americans, as the "model minority." 3 Conservative critics claimed this apparent lack of bitterness as proof that the internment camps were not unjust after all, that even their former inmates tacitly approved the **"military necessity"** that stripped them of civil liberties and segregated them from their fellow Americans after the Japanese Empire attacked Pearl Harbor. Liberal scholars have mostly chalked up this stoic silence to a diasporic retention of the Japanese cultural logic of shikata ga nai, or "it can't be helped"- a fatalistic philosophy that negates the efficacy of resistance or other political action. Although silence has been used to justify and minimize the impact of the internment, outside this context the concept of silence circulates widely as a telltale symptom of **trauma**. Shoshana Felman resurrects Walter Benjamin's term "expressionless" (das Ausdruchslose) in order to describe "the silence of the persecuted, the unspeakability of the trauma of oppression" experienced by "those whom violence has deprived of expression; those who, on the one hand, have been historically reduced to silence, and who, on the other hand, have been historically made faceless, deprived of their human face " 4 This seems an apt judgment of how historical events left Japanese Americans silent and then the historiography of these events rendered this silence expressionless and inhuman, as epitomized in the stereotype of the automaton-like "model minority." Americans have allowed the **symptoms** of wartime injustice **to stand as apology** for the injuries themselves. So what if- instead- we reinterpret former internees' silence not as a culturally conditioned response to adversity but rather as the structural outgrowth of the particular trauma of this particular internment? I emphasize the structure of the internees' silence because the recent wave of trauma scholarship makes clear that traumatized responses cannot be wholly explained by the catalyzing event or by "a distortion of the event, achieving its haunting power as a result of distorting personal significances attached to it." Rather than some inherent atrociousness adhering to the event or some inherent psychosocial predisposition causing an individual or group to react in a certain way, trauma should be understood in structural terms. The pathology of trauma, Cathy Caruth insists, consists "solely in the structure of the experience or reception: the event is not assimilated or experienced fully at the time, but only belatedly, in its repeated possession of the one who experiences it. To be traumatized is precisely to be possessed by an image or event." 5 I emphasize the particularity of the Japanese American internment because those who have written on the trauma of this experience have, by and large, bypassed these structural aspects, instead comparing the internment event with other more widely recognized atrocities such as the Nazi genocide of ]ews and other minorities, the experiences of U.S. soldiers during and after the Vietnam War, and generalized sexual abuse against women. By accessing Japanese American trauma through these other atrocities-none of which directly implicates the racist domestic policies of the U.S. government as the internment does-these "American concentration camps" inevitably find themselves subordinated once again in **hierarchies of suffering** that always **privilege the point of comparison** 6 Such strategies of **comparative analysis** end up posing the internment as a **debased** **mimicry** of unquestioned traumatic events. No genocide occurred against the Japanese American "evacuees" imprisoned in the "assembly centers" and "relocation centers," euphemistically named and controlled by the U.S. military's Wartime Civilian Control Agency (WCCA) and the U.S. government's War Relocation Authority (WRA), so when former internee Raymond Okamura wrote that "the linguistic deception fostered by the United States government" in regard to the internment "bears a striking resemblance to the propaganda techniques of the Third Reich," the comparison might have been instructive, but Japanese American trauma inevitably paled in comparison to the Holocaust.7 The material losses of $200 million in Japanese American property, homes, and businesses become profane concerns when juxtaposed with the Nazi genocide8 Likewise, Chalsa Loo recognized the posttraumatic stress disorder (PTSD) that plagued many former internees but only did so by discussing "parallels" with the symptoms of trauma widely associated with Vietnam War veterans who had witnessed, perpetrated, and suffered horrifying violence in Vietnam and returned home to find an American public that considered them "baby killers" and did not honor their military serviceY Although violent events did occur in many of the Japanese American camps and several internees were murdered both by U.S. soldiers guarding the camps and by fellow internees-and despite the fact that internees also experienced virulent prejudice and even violence when they returned to their prewar communities the scale of this emotional and physical violence cannot compete (nor should it have to) with the PTSD of Vietnam veterans. Another common trope is the metaphoric equation of the violation inflicted upon internees by their own government with the experience of rape; this analogizing to the suffering of rape victims is most often voiced by male scholars of the internment and by male former internees, but the comparison also emanates from Amy Uno Ishii's oft-quoted statement: "Women, if they've been raped, don't go around talking about it. ... This is exactly the kind of feeling that we as evacuees, victims of circumstances, had at the time of evacuation." 10 Since sexual abuse was not a systemic part of the camps, comparing the trauma of Japanese Americans to that of rape victims belittles the wartime internment and renders invisible the more subtle but no less insidious violations that made up the everyday lives of internees, such as the total lack of privacy that plagued every aspect of camp life, including toilet facilities, and the utter degradation resulting from assigning inmates numbers and lining them up in dehumanized masses for every conceivable purpose. In this book I posit the importance of understanding the structural trauma of the internment as located in the spectacularization imposed upon Japanese Americans by the U.S. government and mass media. Unlike the Holocaust, the evacuation and internment of Japanese Americans was perpetrated in full view of the public by capitalization upon the propaganda possibilities of the U.S. "free press." Unlike the abject treatment of Vietnam veterans, who were mostly drafted into war, the Federal Bureau of Investigation (FBI) and WRA coerced Japanese Americans into "voluntary" participation with their abjection from the rest of society, demanding that they cooperate with authorities and put on a happy face for reporters and other visitors to the barbed-wire-encircled camps11 And unlike the sexist contract of victim-shaming that protects rapists, American politicians and pundits broadcast far and wide the violations enacted during the mass evacuation and internment, leveraging-for an audience at home as well as in the European and Pacific theatres of war-the supposedly benign captivity of ethnic japanese as absurd proof of U.S. racial tolerance and, at the same time, melodramatically posing these "suspect" Americans as antagonists against the many heroes and heroines of the American home front. By thus spectacularizing the disenfranchisement and imprisonment of nearly 120,000 Japanese Americans, the U.S. government and mass media denied the gravity of what was taking place and disavowed the psychological suffering and material violence perpetrated against a persecuted ethnic minority. Thankfully, much has been written about the fictitiousness of the "military necessity" placed around the evacuation and used to justify the internment of all West Coast japanese Americans, regardless of citizenship status, for the duration of U.S. hostilities withjapanY But in this book I argue that an equally seductive framing device justified the camps for the wartime American public and continues to be uncritically deployed by conservative analysts like Michelle Malkin in her recent book, In Defense of Internment. 13 By framing the evacuation and internment as spectacles, the United States positioned the American public as passive spectators to the unconstitutional treatment of their ethnic japanese neighbors and, simultaneously, cast the public as heroic "patriots" opposite Japanese Americans, who were cast in one of two thankless roles: expressionless automata or melodramatic villains. So in the case of the internment, theories of trauma and theories of spectacle intersect and converge. Both trauma and spectacle are haunted by visuality, a visual scene/seen that inscribes its image deeply within one's psyche precisely to the extent that it alienates the subject from any comprehension of the material underpinnings of the transpired event. 14 On the side of trauma, Shoshana Felman finds that "the unexpectedness of the original traumatizing scene" is replayed in the compulsive repetitions that characterize traumatic symptoms 5 On the side of spectacle, Guy Debord finds that the images offered up by commodity culture violently foreground the presence of the visual realm in order to absent spectators' awareness of their own exploitation and disenfranchisement under advanced capitalism. In his classic book, The Society of the Spectacle, Debord claims that "The spectacle's function in society is the concrete manufacture of alienation," and he describes the means of this alienation as precisely visual: "Understood on its own terms, the spectacle proclaims the predominance of appearances and asserts that all human life, which is to say all social life, is mere appearance." For Debord, "spectacle's essential character" consists in "a negation of life that has invented a visual form for itself." 16 The refuge taken in the visual as a means to negate life leads performance theorist Diana Taylor to warn of spectacle's potential as an arrangement of events that rewards **passive** **spectatorship** and denies the need for **active witnessing**. Writing of the terrifying political spectacles staged by the Argentine government during the Dirty War (1976-1983), Taylor claims that "The onlookers, like obedient spectators in a theatre, were encouraged to suspend their disbelief. Terror draws on the theatrical propensity simultaneously to bind the audience and to paralyze it. Theatrical convention allows for splitting of mind from body, enabling the audience to respond either emotionally or intellectually to the action it sees on stage without responding physically." 17 Likewise, the failure to respond physically on the part of both the onlooker and the victim-causes psychoanalyst Dori Laub to characterize trauma as a "**collapse of witnessing**." He defines the corrective to this visual refuge as an **active listening**; as Taylor points out, Laub defines the witness as a listener rather than a see-er, if only in the post-traumatic setting of psychoanalytic therapy or testimony-taking1 8 In addition to listening, the engaged witness refuses the visual refuge of spectacle by resisting the objectification of the other that characterizes spectacular images. As Caruth (as well as Felman) emphasizes, the mute isolation of trauma can be redressed only by engaging the other as a subject of address in order to witness how "history, like trauma, is **never simply one's own**, that **history** is precisely the way we are **implicated in each other's traumas."** 19 My theoretical intervention comes at this convergence of trauma and spectacle: the spectacular structure of the japanese American internment removed the public-as-spectator from any participation, empathy, implication, or complicity in the dramatic disenfranchisement of racialized citizens that was taking place in full view. The political spectacles staged by the U.S. government and broadcast by the American media framed the internment event in visual terms that objectified the Japanese American other within an economy of Debordian "mere appearance" that was based on a racialized understanding of Japan as a culture of artifice and surfaces 20 But the most important sense in which the spectacle became the trauma of japanese Americans consisted in the demand placed on internees to comply with this spectacularization so as to provide "proof" of their loyalty to the United States-a command performance that actually prevented internees from fully processing the material violence enacted against them by the internment policy. Whether called upon to "voluntarily" relocate to internment camps under intense media scrutiny or, later, asked to offer their interned bodies (and those of their sons and brothers) up to military service on behalf of a nation that impugned their loyalty, many Japanese Americans found that the only way to prove the internment policy's baselessness was to comply with the terms of its spectacularization. Caruth's insights into trauma as a "missed" event (missed insofar as "the event is not assimilated or experienced fully at the time, but only belatedly") thus illumi- nate the experience of internees21 Japanese Americans "missed" the impact of their forced evacuation and imprisonment after Pearl Harbor because their persecution was staged-over and over again for the more than three years of the Pacific War-as a series of political spectacles that denied the psychological violence and material underpinnings of what was taking place. Every aspect of the U.S. government's (and its "fourth branch," the mass media's) framing of these events prevented those involved from fully grasping the injustice of what was taking place and from preparing to deal with a cataclysmic change. Caruth calls this aspect of trauma "the inability to fully witness the event as it occurs," so that the traumatic event carries within it "an **inherent forgetting** ." 22 The compulsion to forget was built into the government's overhasty institution of the internment policy from its first moments, as the U.S. military posted euphemistically devastating evacuation notices throughout West Coast communities. On these notices, "aliens and non-aliens" of Japanese descent were told to report to assembly stations, taking only what they could personally carry to the camps, sometimes with as little as forty-eight hours' notice. Not only were Japanese Americans rushed through the material and psychological processing of their forced evacuation as they quickly packed up their lives and boarded a bus or train to unknown destinations for an indeterminate duration, but the harsh glare of media attention and political rhetoric spectacularized the process in a way that encouraged fellow Americans to sit back and watch in **passive awe and silence**. Although trauma has been most easily associated with bodily injury, Caruth reminds us that in Freud's foundational Moses and Monotheism, the trauma "is first of all a trauma of leaving, the trauma of verlassen." 23 In their own forced leaving, Japanese American "evacuees," it should be clear, have a distinct claim on trauma.

#### Our treatment of the Japanese during World War II was the culmination of mythic tropes surrounding savage warfare and the noble settler. This pervasive ideology conceives of war as a necessary cycle of cleansing and regeneration, so unless we eradicate it from our culture and legal system the ongoing racial genocide will accelerate to complete extermination.

SLOTKIN 1985 (Richard, Olin Professor of American Studies @ Wesleyan, *The Fatal Environment,* p. 60-61)

This ideology of savage war has become an essential trope of our mythologization of history, a cliche of political discourse especially in wartime. In the 1890s imperialists like Theodore Roosevelt rationalized draconian military measures against the Filipinos by comparing them to Apaches. Samuel Eliot Morison, in his multivolume history of naval operations in the Second World War, recounts the posting of this slogan at fleet headquarters in the South Pacific: "KILL JAPS, KILL JAPS, KILL MORE JAPS!" Suspecting that peacetime readers may find the sentiment unacceptably extreme, Morison offers the following rationale; This may shock you, reader; but it is exactly how we felt. We were fighting no civilized, knightly war . . . We were back to primitive days of fighting Indians on the American frontier; no holds barred and no quarter. The Japs wanted it that way, thought they could thus terrify an "effete democracy"; and that is what they got, with the additional horrors of war that modem science can produce.17 It is possible that the last sentence is an oblique reference to the use of the atomic bomb at the war's end. But aside from that, Morison seems actually to overstate the extraordinary character of the counterviolence against the Japanese (we did, after all, grant quarter) in order to rationalize the strength of his sentiments. Note too the dramatization of the conflict as a vindication of our cultural masculinity against the accusations of "effeteness." **The trope of savage war thus enriches the symbolic meaning of specific acts of war, transforming them into episodes of character building, moral vindication, and regeneration**. At the same time it provides advance justification for a pressing of the war to the extreme point of extermination, "war without quarter": and it puts the moral responsibility for that outcome on the enemy, which is to say, on its predicted victims. As we analyze the structure and meaning of this mythology of violence, it is important that we keep in mind the distinction between the myth and the real-world situations and practices to which it refers. Mythology reproduces the world with its significances heightened beyond normal measure, so that the smallest actions are heavy with cosmic significances, and every conflict appears to press toward ultimate fatalities and final solutions. The American mythology of violence continually invokes the prospect of genocidal warfare and apocalyptic, world-destroying massacres; and there is enough violence in the history of the Indian wars, the slave trade, the labor/management strife of industrialization, the crimes and riots of our chaotic urbanization, and our wars against nationalist and Communist insurgencies in Asia and Latin America to justify many critics in the belief that America is an exceptionally violent society.

#### Contention 2: Counter-Archives

#### The trauma of incarceration haunts war powers authority. Marking that trauma demands we re-activate the democratic potential of law against the camps.

#### Contributing to a democratic archive of equal protection and due process prevents the law from becoming nothing more than John Yoo’s tool.

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Here is where we can dramatically contrast Derrida's and Fitzpatrick's attention to law with Agamben's aversion to the concept of responsibility because of its relation to the juridical (Agamben 2002: 20ff.; Mills 2008: 102-4). If one is motivated by justice, if one wants to give force to the requirements of justice or make the powerful more just, then one must calculate, with a spirit of justice, what decision to make.9 One cannot simply maintain the point of suspense. Not if one wants to prevent the **awful possibility** of **camps**. Therefore, the experience of passivity, this openness to innumerable possibilities described by Agamben, is like the infinite responsiveness required by considerations of justice in the suspended moment prior to a legal decision. To leave matters at this suspended point is consistent with Agamben 's **antijuridicism**, since responsiveness is only one dimension of the law; **pure receptivity** would be **vacuous** and **ultimately nothing**. The demands of justice, however, mean that we must make a determination - one that admittedly will come too late. Consequently, to leave matters at a moment of passivity or receptivity, as Agamben does with his embrace of pure potentiality, is to do neither law nor the work ofjustice. The categories of **ontology** in themselves do not enable us to address the **most pressing injustices** in contemporary law and politics today, such as the **revival of camps**. To translate our terms of political theory into the terminology of ontology, as the new ontologists do, leads to significant confusions. To embrace pure, infinite, or **unthinkable possibilities** for their own sake gives us **no normative grounds** on which to resist camps. To contend that the opposite of sovereignty is contingency or potentiality does not suggest another force or capacity of greater normative value than sovereignty. Furthermore, if pure sovereignty is 'determinant', for example, then it cannot be described ontologically as 'absolute necessity'. Absolute democracy, exterior to sovereignty, is also an impossibility. 10 In contrast to Agamben, though, let us give credit to the achievements of the people in the centuries of struggle against the tyranny of absolute monarchy, and consider the quest for popular sovereignty. Democracy is already an articulated concept - an articulation of demos or people, and kratos (or kratein), which refers to having power, the force of law, rule, or to have or to be right (Derrida 2005: 22). That is, 'democracy' itself refers to popular sovereignty, a situation where people are sovereign, or where people govern themselves. In a democracy, people give themselves laws, and share power equally. By referring to popular sovereignty, I emphasize the normative element of democracy: it is right that the people should rule, the people have a right to rule. This is the rule or law of democracy. A new beginning is always both less and more than democratic. A new beginning must borrow its terms. Likewise for a democratic beginning: the people of popular sovereignty do not invent the language of their self governance out of nothing. Indeed, the possibility of democracy is given by language, and the many discourses of democracy, with meanings attributed to these words, rules of grammar, and discourses that the people did not give to themselves. The beginning of democracy cannot be absolutely democratic. When we begin - even a project of democracy - we begin from a place or a position already given to, or imposed upon, us (Derrida 2000, 2002b) . Our beginnings are always less than democratic as they have been legislated in advance of us. Additionally, because we must borrow our terms, the 'people' of popular sovereignty are always more than themselves. The 'people' of popular sovereignty share their power with others who preceded them. Furthermore, democratic acts are oriented to the future, to keeping democracy that is, they are oriented towards future incarnations of democratic subjects. Moreover, because democracy opens itself to others, the 'anyone' of democratic participation may include those who lack a commitment to democracy. Therefore, the 'people' of democracy are always more than themselves. There is never just democracy here. There is always democracy plus something else. The 'people' of popular sovereignty are also always less than themselves. Never fully present, and defying origins, democracy reaches out to others in order to be. These others are past and future. Because we must begin somewhere, on some **haunted grounds**, using terms the meaning of which has, to some extent, been previously determined by others, democratic beginnings are always less than democratic. Concrete democratic acts are necessary to fulfil promises or claims for democracy. But, like considerations regarding justice, there is always a limit to our knowledge, or a finite limit to our accounting of a problem, or our memory. In these ways, democracy is always lacking. There is never just democracy here. Because popular sovereignty is lacking at any moment, it requires a supplement. This is law. When we take a position - such as a position for democracy - we rely on law to recall the commitments necessarily implicated within this position. To bring our (democratic) selves back to ourselves. Law occupies the area of a-position, in between the determinate commitments necessary to making life more democratic or more just, and the infinitely responsive dimension of democracy, of justice; in between our democratic position and that to which we must respond if we are to maintain our democratic position. Like 'law', democracy's condition is always unresolved, calling for incessant decisions and judgements. Demacracy also persists through a relation of negativity - in condemning and addressing manners of tyranny. Democracy takes a position - comes from a position- as law 'comes from and returns to a position'. Law is where we keep our commitments to democracy, **reinstituting** and **re-sending** these commitments in the **moments of decision**, when, as always, our commitment to democracy seems to be dissipating and we must respond to a different challenge. Democracy must be open, but in this opening it risks becoming something other than democracy. Alternatively, democracy risks being trapped by past determinations in the face of new and different challenges - an enclosure that would render democracy less than democratic in its lack of responsiveness. Law resolves, for the time being, these paradoxical dimensions of popular sovereignty. 11 In sum, displacing inquiry from politics to the categories of ontology will not resolve pressing injustices. Moreover, both absolute sovereignty and absolute democracy are impossibilities. While sovereignty must take on certain democratic attributes to achieve extension- like sharing power through institutional assemblies and assemblages - democracy always begins in a place with terms in some way legislated for it by an other in advance. Both sovereignty and democracy must contain paradoxical, if not contradictory, attributes in order to be. And both rely on law for temporary and unstable resolution of these ambivalent tendencies. That which enables either the absolute sovereignty of a tyrant or a recording of a democratic success, however, makes these forms of power vulnerable to ruin. Tyranny requires the assistance of scriveners. Likewise, democratic struggles produce victories that can never be absolute as its plural institutional assemblages create opportunities for ruinous resistance to democracy's commitments. Democratic victories are always partial - succeeding in one place or another, while remaining vulnerable to the **John Yoos of the world** who remain embedded deep within the bureaucracies of the modern state or who remain in its assemblies. They will come with remainders and they will be lacking in some way. Camps, or democracy's ruins In his book The Powers of War and Peace, which finds that the president is not bound by international law, John Yoo, a member of the Office of Legal Counsel (OLC) between 2001 and 2003 in George W. Bush's administration, and the author of the infamous 'torture memo' of August 2002, justifies the internment of Japanese Americans in concentration camps during the Second World War by the US government (Yoo 2005). He does this in the context of illustrating a distinction he makes between 'total war', in which Congress augments executive war powers with a public declaration of the [actual existence of hostilities, and other wars that are conducted without such a public declaration by Congress. He finds internment camps to be constitutional when they are created under the **'pressing public necessity'** of a **'total' war**. Nevertheless, Yoo is typically ambiguous about whether the wholesale round-up of Americans or others would still be constitutional without such a congressional declaration. He says, 'one doubts' whether 'courts' would have allowed 'wholesale internment' of 'Panamanian Americans', 'Yugoslavs', or 'Iraqis Americans [sic]', in reference to recent conflicts conducted without the benefit of a congressional declaration of war, although he does not clearly rule out the possibility that courts might have upheld such actions. Moreover, his speculations are on the subject of court action; he does not clearly state whether he believes such an action to be properly constitutional even if he is clear that internment should be considered permissible when there is a congressional declaration of war (ibid.: 151, 333). To support this position he cites favourably in a singular endnote the repudiated, though **never overruled**, Supreme Court decision Korematsu v. United States (1944), which sustained Fred Korematsu's conviction for refusing to abide by the military's internment order applicable to 'all persons of Japanese ancestry', and remaining in a prohibited area: his hometown (Yoo 2005; Irons 1983) . During the 1940s the United States fought a war against the Nazis' camps. Today, however, the United States maintains a camp at a military base in Guantanamo Bay, Cuba, and another at the Baghram airbase in Afghanistan. 12 In these camps, hundreds of people have been subjected to executive detention, and many have been tortured (ICRC 2007). Every law is a sending, and this deeply worried a dissenter from the majority's opinion in Korematsu, Justice Jackson, who was concerned that the validation of racial discrimination would lie around like a 'loaded weapon', to be picked up by a future tyrant claiming 'urgent need'. Law, Jackson realized, has a 'generative power of its own', and every repetition of the principle of 'racial discrimination in criminal procedure' and the 'transplanting' of 'American citizens' would embed the principle more deeply in Americans' 'law and thinking', enabling its expansion to 'new purposes' (Korernatsu v. United States, with Justice Jackson dissenting at 246). These, as Jackson recognized, would be ruinous repetitions. Legal struggles, or democracy's archive Bow are we to resist the ruinous aspects of tyranny and keep faith with democracy? Messianic postmodernism would have us abandon law to oppose absolute and total sovereignty in the name of absolute democracy, for Hardt and Negri, or to experience pure potentiality, for Agamben . 1 have shown, however, that neither absolute sovereignty nor absolute democracy can exist as such. The perfect absence of democracy and its pure presence are both foreclosed by the force of necessary iteration, iteration that enables both democracy and tyrannical sovereignty to be, spectrally. Moreover, pure potentiality gives us no position from which to oppose the particularities of tyranny, such as camps. Drawing from Fitzpatrick, I have also indicated that law facilitates the resolution of (popular) sovereignty's - of democracy's - paradoxical dimensions for the time being: the determinate political position of democracy with democracy's openness and responsiveness, for example. Law subjects political power to sharing. It is where democracy is claimed, permitted, and promised. Even as law is always already 'ruined, in ruins, ruinous', law also provides for democracy being posited and preserved (Derrida 2002a: 273). Law is where sovereignty is divided or shared, and it is how we (re )send democracy (Derrida 2005: 34). It is where we enact our fidelity to democracy where we cut into history and take a position on democracy (Derrida 2002a: 289). Law is where we take a position on democracy. Law must come from a position, and there must be a position, or a place, to which law can then return. Law is how we enact our commitment or responsibility to democracy and to justice, the commitments and responsibilities we have made here to those impossibly necessary tasks. In this, law assists our memory and acts as a resistance to forgetting even as law's repetitions are generated by the fact that we have always already forgotten some of these commitments. We cannot keep such infinite responsibilities in mind at once. In this **resistance** to a **forgetting** that constantly tracks us, **law is like an archive** (Derrida 1995: 76, fn. 14). An archive is where archives, and archiving, take place (Derrida 1995: 2). There where a social order is exercised. Archive, deriving from the Greek arkhe, articulates a principle of beginning, a law according to which a practice was begun, a place of depositing, and the question of who exercises legitimate **hermeneutic authority**- who has the 'right to make or represent the law' (ibid.: 1-3). The notion of an archive implies a particular region of thought or place, as well as a law - no archiving without law (ibid.: 40). An archive both conserves and generates. It gathers in preparation for a future. It is a promise to others, to our legatees (ibid.: 36). On the one hand, when one interprets an object of an archive, one's interpretation becomes inscribed into the archive. The archive is a spectral corpus that never closes since the archivist produces more archive: the archive opens out to the future (ibid.: 67- 8). Yet, on the other hand, an archive must also exclude: 'No archive without outside' (ibid.: 11 , emphasis removed). The laws of an archive - principles of value and classification will regulate not only that which has been included and how it is to be included, but also that which should be excluded to conserve this trust, so we know how to go on in the future (ibid.: 40). Nevertheless, as Derrida points out, even that ':h.ich we exclude shapes our laws as its phantom continues to haunt us (Ibid .: 61). By thinking of law as where we take a position, for democracy, for example, and by thinking of law as an archival practice, we cross a conceptual argument with an ontological one. The conceptual argument that we share our powers, our law-making, with others indicates the impossibility of either the pure absence of democracy or democracy's pure presence. Therefore, even if law and politics do not have in essence a tendency towards democracy (which is implicated in the conceptual argument) , there remains an ineradicable democratic element. 13 Law as archive meets this conceptual argument with on tic and ontological principles. An archive takes place. It is deposited somewhere. There is no archive without substance: there is no archive without a trace (Derrida 1995: 26-7). Could the claim of popular sovereignty, could a democratic beginning or performative speech act, could the exercise of self-government, could politics take place where the people, there, decide to give themselves laws, and could this democratic sending or legacy disappear without a trace? Could the struggles against tyranny disappear, totally, without a trace? Would it be responsive or responsible to democracy or to justice to try to make these things disappear in order to constitute an absolutely new ontology? Such a beginning, like any beginning, would have to take place somewhere and therefore it would have to account for what had given place to such a beginning. This is the paradox of a democratic beginning: it is never equal to itself, it is never just democracy. It begins in ruins. This is where and how we begin, even if we want to begin democratically. But this is not all bad. Not if there is a resistance to forgetting these struggles against tyranny as we begin again. We are constituted by democracy's archive, by democracy's remainders. By its echoes. We are not totally foreign to democracy. Not now, and perhaps not ever. Our contemporary politics takes place within the echoes of languages (some even dead? Or would that be an impossibility?), making possible our constitution as political subjects and even as subjects capable of democracy in ways beyond or perhaps behind our ability to comprehend (Heller-Roazen 2005). Constitutional law in the United States bears the impression of confronting fascism nowhere more disturbingly than in the internment of Japanese Americans, and the Supreme Court's infamous decision Korematsu v. United States upholding the conviction of Korematsu for violating the Order, which Yoo cites favourably. How has this case been archived previously? The dissenters in Korernalsu recognized at the time that the decision had fallen into the 'ugly abyss of racism' , that the ' legalization of racism' plays no justifiable part in a 'democratic way of life' (with Justice Murphy dissenting at 233, 242). One of the dissenters expressed concern regarding the decision's dangerous repetitive potential, as I have already mentioned. Peter Irons is the author of the definitive study of the law and politics around the internment of Japanese Americans. Discussing his sources, Irons notes that the decision faced immediate and scathing criticism in major law review articles published as early as 1945. Writing in 1983, Irons finds that in the 'years since the publication of these articles ... not a single legal scholar or writer has attempted a substantive defense of the Supreme Court opinions' (1983: 371). Aside from the fact that this legal decision found that courts must apply 'strict scrutiny' (a legal term of art meaning that the classification in question must be subjected to the most searching inquiry and that there is the greatest presumption against the constitutionality of the governmental policy at issue) to racial classifications, legal scholars do not view this legal opinion as 'good law'. The decision was made at a time when racial segregation was still allowed in the United States, but the Supreme Court found racial segregation to be unconstitutional in Brown v. Board of Education (1954). Law students and others who study constitutional law are taught how the racial classification in Korernatsu cannot stand up to the most basic forms of equal protection analysis (because the classification is underinclusive by failing to include German or Italian Americans, and because it is also over-inclusive by including both loyal and disloyal Japanese Americans; all of this lets us see that the governmental policy is motivated less by security concerns and more by racism) .14 The conviction of Korematsu has been overturned because the government was found to have committed misconduct through the suppression of evidence and the inclusion of misinformation. And the United States has both apologized and paid reparations to those interned or their families (Sullivan and Gunther 2004: 668- 9, fn. 3). As matters of law and policy, everything about Korematsu, except the notion that there is the strongest presumption against racial classifications, has been repudiated and apologized for. The democratic narrative of Korematsu, based on this archive, is shame and a sense of responsibility for overcoming the outcome of the case, while maintaining the strongest presumption against invidious racial classifications. The ruling was represented as a failure in the struggle against tyranny when it was issued, and in the manner it has been archived since. Yoo's legal opinions attempt to eviscerate the narrative archiving the outcome of Korematsu as wrong, and the principle of racial discrimination as wrong for a democratic society. These, as Justice Jackson recognized, are ruinous iterations. The ideas that a president's word is law or that racial guilt is an acceptable premise for government must be excluded to keep democratic commitments or to send the possibility of a legacy hospitable for democracy. Any archive must have an outside. But an archive also constitutes resources to be drawn upon- at present, and for the future.

Taking a position No wonder, then, that messianic postmodernists - those who wait for being alien to law - wind up invoking law either to denounce present injustices or to seek a better, more just, or indeed a more democratic and Jess tyrannical future. If these are our purposes - if we are taking a position against tyranny- then being passively open to infinite possibilities or potentialities will not actively further those commitments. This is why, when we have specific purposes or commitments to which we are faithful, such as taking a position for democracy, or when we critique a process of repetition sedimenting the tyranny of camps in order to open the space for their rejection , we invoke the law and draw from democracy's archive. Likewise, when Agamben seeks to preserve a community of the faithful who will think the 'relation of every instant to the Messiah', who will 'strain forward' towards salvation, he puts aside the antinomialism of Homo Sacer to embrace 'messian ic law', or the law of faith (2005b: 76-8, 95). There would be an infinite number of actions (not) to do if the faithful are to make messianic potential become active or operative, if they are to live exclusively in the joyful announcement ( euaggelion). To be sure, these infinite actions and inactions implicated in pistis (faith) would exceed any finite list of dos and don 'ts exemplified by the Mosaic law of the Ten Commandments, and messianic law, or nornos pisteos, refers to this excessive aspect. How can the faithful know or remember what is required of them at each moment to dwell within messianic law iflaw is not textualized? Agamben explains, ' [I]t is not a letter written in ink on tables of stone; rather, it is written with the breath of God on hearts of flesh'. It is 'not a writing but a form of life ... ''You are our letter"' (2005b: 122, quoting 2 Cor. 3:2, emphasis in original). This privileging of the spirit over the letter of the law attempts to make calculable, measured law identical to incalculable, immeasurable life by emphasizing the excessive aspect of law, and maintaining law's openness or responsiveness to the future. Through infinite openness, law and life are one, with no ruins or remainders. If, however, 'law' is not to be merely vacuous, infinitely open to anything and everything, hence no law at all, then we must not forget what it means to be faithful to the rnessiah. Appropriately, then, Agamben does not fully forgo textualizing law, citing St Paul 's recapitulation of the entirety of God's law with the formula 'Love your neighbor as yourself.' It helps to learn, to know, to remember what is required of the faithful, to recall the messianic. To this end, Agamben refers to law as a '"pedagogue" leading to the messiah' (2005b: 76, 120, citing Gal. 3:24, emphasis added). Law is an archive even for those faithful to the messianic. Similarly, in State of Exception Agamben critiques recent practices in the United States, such as the camps at Guant<inamo Bay and the USA PATRIOT Act of 2001. He argues, 'At the very moment when it would like to give lessons in democracy to different traditions and cultures, the political culture of the West does not realize that it has entirely lost its canon' (2005a: 18). Here, Agamben denounces the United States, among others, for having lost its law. He condemns people in the United States for forgetting their law and losing their archive, their aide-memoire. Indeed, Agamben rightly denounces them - us - for it. His denunciation - accusing them, us - for forgetting our law pays homage, as Jean Baudrillard would have noted, to the law (1988: 173). His denunciation relies on recalling a law, an archive, and its presently forgotten, suppressed, or repressed democratic commitments. Thus, to the extent that messianic postmodernists are actually concerned with specific principles of justice, democracy, or even the messianic, as opposed to whatever, they contradict their postmodern antinomialism and invoke law. When we take a position against the abusive exercise of tyrannical sovereign power, as Agamben does, **we invoke law**. Coming from a position, law combines determinate political commitment with a responsiveness to future circumstances. This paradoxical, if not impossible, combination of determinacy with responsiveness required by popular sovereignty is 'resolved', as we can understand in light of Fitzpatrick's work, by law. The paradoxical co-implication of determination and responsiveness, necessary for popular sovereignty to be, is why democracy relies on law. The sense of pure whatever potentiality Agamben promotes corresponds with the dimension of law as infinite openness tending to vacuity. If law is figured solely as **vacuous**, then it is open to anything, even to Yoo. Law, however, comes from and returns to a position, and understanding law as democracy's archive is an attunement to the determinate place and commitments from which we begin, again. Any archival practice supplementing our memory of positive commitments to democracy, of re-calling our (democratic) selves to our selves, of re-calling society's commitment to democracy or principles of justice to society, must necessarily have an outside. So, an **archive** of **democratic** **commitments**- a law dedicated to democracy- must also be constituted through exclusions if we seek faithfully to keep or to promise the prospect of democracy. This legal archive is animated through a **negative relation to tyrannies**. As we enumerate tyrannical mentalities and deeds, we will be engaged, in part, with the project of constituting an archive for democracy, a law to keep democracy for the future. When we labour, in our fidelity to resisting tyranny, among democracy's ruins, we are engaging in a practice of re-calling and re-sending democracy, faithful to its coming, labouring for its return. Perhaps. Therefore, when we engage in **critique of camps**, and the way that some legal thought reintroduces this potentiality, we re-send our archived commitments against this tyranny as a faithful pledge to the future. In other words, the constituent force of law may indeed generate the 'very social bond of modernity, the means of our relation and being-with each other' (Golder and Fitzpatrick 2009: 85). But what manner of sociality, of 'being-with each other', shall we endure, share, or aspire to? What manner of being are we starting from, orienting towards, or have we vowed to keep for the time being? If our position is a democratic resistance to camps, then we will not be content to remain open to all potentialities, including camps- not when we have commitments to which we must remain faithful. Law as democracy's archive is our resistance to forgetting these commitments. An archive is a 'pledge' of the future (Derrida 1995: 18) . Likewise, law as democracy's archive is a pledge of and for the future, a future we have no certain grounds for knowing will keep this pledge, much as we have no certain grounds to count on just democracy ourselves, not as we begin again among democracy's ruins. There is, however, no democracy 'without an act offaith' (Derrida 2005: 48). Much as we must begin our labours among democracy's ruins, John Yoo has been hard at work already. Yoo's numerous legal memos written on behalf of the Bush administration, many of which remain secret as of this writing, constitute a warp. As geological layers evidence a protrusion, or another force repressed by layers of sediment, so too do these memos. Even their very numerousness serves to remind us of the doubts they are intended to cover over, the democratic doubt they are meant to contain. Yoo is also currently at work writing books, publishing law review articles, uploading SSRN (Social Science Research Network) papers, crafting op-eds, presenting congressional testimony, giving interviews, teaching law school courses, and responding to government reports questioning his faithfulness to the law. He is an archivist as well, seeking to **invent the legal archive** that will have **justified his earlier work**. This is why we must persist in our faithful labours among democracy's ruins. Otherwise, democracy's archive will be put to a 'new use' and will be 'play[ed] with just as children play with disused objects'. It will become like the dead letter Agamben's 'new attorney' reads bemusedly, but without attachment, 'leafing through "our old books"' (2005a: 63-4) . Conclusion In this chapter I have argued that recent postmodern aversions to law and sovereignty, such as the work of Agamben, which favours the coming of a new ontology - a messianic preoccupation with the absolute arrival of new being exterior to law or sovereignty- is not helpful in addressing present tyrannies and injustices. Fitzpatrick's work on sovereignty, emphasizing its tension between finite determination and extensive, encompassing responsiveness, indicates a more productive post-structuralism. Rather than a picture of absolute determination, Fitzpatrick shows how sovereignty must also be determinate. The impossibility of pure sovereignty elucidates the vulnerabilities popular sovereignty faces - the way that democracy is vulnerable to ruin. Any beginning, such as a democratic beginning, must commence on terms not of its own making. Therefore, the re is never just democracy here. Fitzpatrick's understanding of sovereignty, and the way that a fraught combination of d eterminacy and responsive ness takes place through law, allows us to comprehend, then, the dual impossibilities of absolute sovereignty and absolute democracy. Contemporary law and politics take place within the torsion of these impossibilities. Law, which is where popular sovereignty undergoes continual constitution, must come from a position, and it must also return to a position or a place. It is where we take a position on democracy, and it is where we archive democracy's ruins in resistance to the necessary finitude of our being forgetful human beings. If an archive is a pledge to the future, then considering law as democracy's archive means that it is with-in law that we recall principles of democracy and justice to ourselves, and send, again, this legacy to the future. In other words, we do not begin our struggles against the camps with a vacuous receptivity to pure potentiality that cannot take a position. We begin, again, in democracy's archive, with democratic remains. It is there that we find the legal principles that gave place to us, those of **equal protection**, **due process**, and that political leaders must take care that those laws are faithfully executed that are anathema to the camps. We can find these determinate commitments in democracy's archive, **recall them**, and **extend** these determinations faithfully as a response to the tyrannies of today, for the future. It is with-in democracy's archive where democracy undergoes a process of 'continual constitution'. What is the fate of law and democracy after Yoo? Rather than a messianic aversion to law or politics, Fitzpatrick's work points us in the direction of recommencing our labours among democracy's ruins. It points us to the **persistence** of law, the possibility of democracy, and the faithful labours necessary to resist tyranny. We cannot expect a messianic blow to replace, totally, a non-existent absolute sovereignty, without ruin or remainder. Because of the impossibility of absolute democracy and absolute sovereignty, we must start where we are, in the torsion of politics, labouring among democracy's ruins, reconstructing its archive, if we want better than Yoo gives us. Democracy is never just here. It is n ever just here. This is the urgency of law and of politics.

#### Appearing as friends-of-the-court on behalf of detainees counteracts a cycle of revenge and exclusion.

#### Fred Korematsu’s contribution of amicus brief in the Padilla case demonstrates that war powers law should recognize even those deemed inimical to national security.

Ian **BAUCOM** Professor of English and director of the John Hope Franklin Humanities Institute @ Duke **‘9** [““Amicus Curiae”: The Friend, the Enemy, and the Politics of Love” *PMLA* 124.5 p.1714-1717]

Let me take as my point of departure a question of genre, one raised in the realm of jurisprudence by the **amicus brief**—that is, the brief of the amicus curiae, or friend of the court: one who is not a party to a case but holds a pressing interest in it. I was drawn to the genre, most immediately, by a reading of the amicus briefs filed in the case of Lakhdar Boumediene et al. v. George W. Bush, which came before the United States Supreme Court on 5 December 2007 and raised the question of whether the detainees held at Guantánamo Bay, Cuba, possessed the habeas corpus rights guaranteed by the United States Constitution. My attraction to the genre extends beyond the question of how one who had (or has) some interest in this urgent matter might have been afforded standing to speak before and to the court. (One gains this standing by attesting a willingness to adopt a subject position— “friend”—and a kind of friendship: for the court, for the law the court exists to uphold, or for the law enshrined in the United States Constitution.) More broadly, my reading of these briefs has left me wondering how their generic conventions might animate, or depart from, other extrajuridical modes of expressing an interested relation to this case, the world-historical situation emblematized in it, and an opposition to the logic and discourse of “enmity” on which the conduct of the Bush administration’s war on terror so long depended. Even after the transition to a new administration, even after President Obama’s promise to close the Guantánamo Bay prison, the question has persisted. Is there a dissenting speaking position, other than that of the friend, for a matter or a case such as this? Is there an alternative to the language of enmity other than the language of friendship?

Let me approach these questions from a different starting point. In Theory of the Partisan, Carl Schmitt writes: In discussing the world-political context it was clear that the interested third party played an essential function in providing the link for the [political] irregularity of the partisan to a regular [state actor] so that he [the partisan] remains within the realm of the political. The core of the political is not enmity per se but the distinction of friend and enemy: it presupposes both friend and enemy. The powerful third party who is interested in the partisan . . . functions as [a] political friend . . . and [expresses] a kind of **political recognition**, even if it is not expressed in terms of public and formal recognition as a warring party or a government. (91) Schmitt’s concerns in this text are multiple. Most crucial, however, is his belated determination to account for a figure he had sought (not entirely successfully) to hold extraneous to the theoretical framework of his earlier Concept of the Political: a figure repeatedly haunting the long archive of modern international law and appearing in the late sixteenth and seventeenth centuries as the inimicus, in the eighteenth century as the unjust enemy, in the twentieth century (Schmitt here indicates) as the partisan, and in the twenty-first century as a figure I understand as the **unlawful enemy combatant**. The problem this figure occasions for Schmitt’s political theology arises, centrally, from his inability to think of it as bearing anything but a criminal character. The inimicus, the unjust enemy, the partisan, the unlawful enemy combatant is not (in the terms of The Concept of the Political) the “real” enemy, the “public” enemy, the “sovereign” enemy that a properly political entity (a state) is obliged to recognize and hold within the boundaries of the law (28). Lacking sovereign personality, the partisan threatens to undo the carefully balanced system of mutual recognition through which, Schmitt contends, the European state system in the “modern” (postWestphalian) period of public law had managed to bracket and contain war by decriminalizing the adversary (Nomos 140–92). If the sovereign is the one who is able to decide on the friend-enemy distinction, by Schmitt’s reasoning the paradox of the partisan is not simply that this figure lacks reciprocal sovereign standing but that (precisely because a sovereign state cannot formally recognize the partisan as a proper enemy) no properly political decision can be made regarding this figure. In the presence of such an enemy, the sovereign state fails its own normative test of sovereignty, and war, Schmitt argues, thus risks shifting from the political to the criminal domain, from a practice predicated on recognition to one predicated on the “annihilation” of the “worthless” (Theory 93). Or it almost fails. For by Schmitt’s terms politics entails a decision not only on enmity but on **friendship**. And it is here that the interested third party comes to the rescue of his system. For the third, he argues, can recognize the partisan, can draw this figure’s political “irregularity” within the bounds of the “regular” through an expression of interest: a sovereign act of friendship. That friendship, it is worth noting, is bidirectional—it attaches itself to the partisan on one side and a regular sovereign order on the other; it returns the partisan to the domain of the political not by standing outside the sovereign sphere of politics but by **expanding the reach of sovereignty**. That at least is the formula for **sovereign** **friendship**, which plays itself out in the **amicus briefs** I have mentioned. The Brief of Legal Historians as Amici Curiae in Support of Petitioners, written in support of the Guantánamo petitioners, for example, rests one of its fundamental arguments on a legal history that, from the seventeenth century onward, “demonstrates the gradual expansion of the territorial ambit of habeas corpus” (Wishnie et al. 8). The brief takes pains to sketch that history because President Bush’s solicitor general had argued that Guantánamo Bay falls outside the sovereign territorial domain of the United States and that, therefore, United States constitutional law had no binding application in that territory. By way of counterargument, the legal historians insisted that sovereignty exceeds territoriality, for two reasons. First, because under “common law habeas attaches to the wrongs of the jailer, not the rights of the petitioner” (5). Where the jailer is, the brief argued, so too is the law. And second, because the law is a **law of subjects**, **not citizens**. The brief advances that second argument since, as all the parties to the case seem to have agreed, the application and reach of habeas corpus is (and long has been) governed under United States constitutional law by the meaning of the Great Writ as it existed in 1789. Citing Sir Matthew Hale’s The Prerogatives of the King, the legal historians’ brief noted Hale’s insistence that according to this understanding “the goals are all in the king’s disposal . . . for the law has originally trusted none with the custody of the bodies of the king’s subjects . . . but the king or such to whom he deputed it”; they then proceeded to explain, “The term ‘subject’ as used by Hale and his contemporaries, arises in a specific historic context and cannot be equated with modern notions of a nation’s ‘citizens.’ . . . Subjecthood was a more fluid and permeable category than present-day American citizenship: mere physical presence within territory under de facto English control could subject a person to the King’s authority” (Wishnie et al. 4–5). To the degree that the law attached to the wanderings of the king’s jailers and the bodies of the subjects over whom the king possessed de facto sovereign authority, so the writ of habeas corpus applied (then) to the king’s subjects and so too do the sovereign authority of the court and the sovereign stipulations of United States constitutional law apply (now) to the detainees in Guantánamo Bay. What are we to make of the paradoxes of a case in which the Bush administration was strenuously arguing against its own sovereignty and an eminent collection of legal historians, writing, bidirectionally, on behalf of the detainees and as friends of the court, were arguing for the expansion of sovereignty and a return to the notion of the subject (rather than the citizen) as the fundamental object of law? First, that there might be some virtue in discriminating among our conceptions of sovereignty and in not assuming that sovereignty is anywhere and everywhere a **bankrupt** thing. In the terms I have adapted from Schmitt, the amicus brief represents a generic articulation of a practice of **friendship sovereignty**, one capable of **strategically deploying** the notion of **sovereignty** to **limit the power of the state**. Antonio Gramsci’s conception of the war of positions has some relevance here, as does his general understanding that, at each point of its unfolding, **hegemonic power** contains the grounds and **speaks the grammar** of its **own potential opposition**. But second, and conversely, a case such as this indicates that we might also wish to continue to seek a concept of the political that is not predicated on the Schmittean discrimination between friend and enemy. Bearing in mind the late-Renaissance provenance of the partisan and of the unlawful enemy in the figure of the inimicus, let me cite a potential alternative code for politics, one that Schmitt’s Concept of the Political was insistent we not adopt: “The enemy is solely the public enemy. . . . [T]he enemy is hostis, not inimicus in the broader sense. . . . The often quoted ‘Love your enemies’ reads ‘diligite inimicos vestros’ . . . and not diligite hostes vestros. No mention is made of the political enemy. . . . [I] n the private sphere only does it make sense to love one’s enemy” (28). To which my response is: why? Or, alternatively: if in place of the friendship enmity distinction we were to take **love for the inimical**—or, more accurately, for what has been named inimical—as a ground of politics, what would that politics look like? Is there a political language and a genre for it? That question is not my own. It is one that Jacques Derrida, among others, has taken up in the course of a discussion of this very passage in Schmitt: When Jesus says “Ye have heard that it hath been said, Thou shalt love thy neighbor, and hate thine enemy [but I say to you, love your enemies],” he refers in particular to Leviticus 19: 15–18, at least in the first part of the sentence (“Thou shalt love thy neighbor”) if not the second (“hate thine enemy”). Indeed, there it is said, “Thou shalt love thy neighbor as thyself.” But in the first place, vengeance is already condemned in Leviticus and the text doesn’t say “thou shalt hate thine enemy.” In the second place, since it defines the neighbor in the sense of fellow creature [congener], as a member of the same ethnic group (’amith), we are already in the sphere of the political in Schmitt’s sense. It would seem difficult to keep the potential opposition between one’s neighbor and one’s enemy within the sphere of the private. . . . If one’s neighbor is here one’s congener, someone from my community, from the same people or the same nation (’amith), then the person who can be opposed to him or her (which is not what Leviticus but indeed what the Gospel does) is the non-neighbor not as private enemy but as foreigner, as member of another nation, community, or people. That runs counter to Schmitt’s interpretation: the frontier between inimicus and hostis would be more permeable than he wants to believe. At stake here is the conceptual and practical possibility of founding politics or of forming a rigorous conception of political specificity by means of some dissociation: not only that between public and private but also between public existence and the passion or shared community affect that links each of its members to the others. . . . (103–04) From this, Derrida takes as minimal **starting points** for a renovated conception of the political both an injunction against vengeance and a determinate refusal to banish not only the “private” but also “shared community affect” from the domain of the political. If, following Derrida’s lead, love, or love’s affects, are rigorously to be included as grammatical to that refounded language and concept of politics, then the challenge is not only to derive from the affects of neighborly love (and the rich ethical tradition of the imperative to love the neighbor) but from the affects derived from the imperative to **love the enemy**, in all its inimical guise, a political specificity and a political language appropriate to the moment we have recently been living through and with whose consequences we are still living. Or perhaps those are not separate forms of love. In either case, one of love’s core affects is what Judith Butler has identified as an experience of **precariousness**, of **insecurity**, of knowing that we cannot secure ourselves from being undone. Perhaps a politics of love (whether of the neighbor or of the inimical) begins with a willingness to experience what Butler describes, to live with a fear of having our own subjectivity radically, inimically, extraneously undone by what might threaten us. In living so, in seeking to frame a language of living so, the first word of a politics of love might be to refuse an obligation to seek to expel or contain the fearsome by contracting our shared passions (as a still-dominant Hobbesian “modern” political theory instructs us to do) to a commonwealth, or state, or other sovereign power that pledges to deliver us from fear so long as we accede to its **reasons of state**. To put things another way, perhaps the opening articulation of a politics of love is to refuse that offer of exchange, through which our various states, commonwealths, and sovereign authorities make us safe from fear if we will **license** them to quarantine (or **annihilate**) all that we have been instructed to hold inimical to ourselves. This politics asks that we refuse to abandon love as, itself, a **fearsome thing**— something, in all its urgent capacity to undo us, more than capable of reminding us that in our lives as subjects and as citizens we are, and must continue to be, “fluid and permeable.”

#### A democratic legal archive links us in an ongoing constitutional struggle against subordination to racialized national security narratives.

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National Security Law” Villanova Law Review, Vol. 50, Iss. 4 [2005], Art. 20 p. 1131-1133

V. CONCLUSION: THE SECURITIZATION OF RACE "The tradition of the oppressed teaches us that the 'emergency situation' in which we live is the rule."298 The Japanese **internment** constitutes a thematic **common denominator** in practically all post-September 11 legal analyses of state security powers. This is actually somewhat surprising since the internment jurisprudence had not been viewed as a precedential centerpiece in the sub-discipline of national security and foreign affairs prior to September 11.299 The internment, however, has become important for the ways it symbolizes a trauma or an evil that the nation as a whole somehow acknowledges (as past), survives and transcends. 300 Viewing the internment as symbolic of a **nationally transcended** **evil** parallels the **dominant constitutional** "**survivor story**" that **legal** **liberalism** in the United States tells with regard to slavery.301 Such survivor stories, according to which everyone within the nation is equally a "victim" and survivor of the past evil, along with related regimes of "survivor justice," assume a strategic role in moving the "nation" forward in the aftermath of systemic evil, while also in purging the state of accountability. Unsurprisingly, the winners under conditions of survivor justice are not the real victims of the past or present evils, but rather those who benefit under the hegemonic conditions of such systemic injustice. 302 Under the logic of survivor justice, equal protection principles can be interpreted as being void of **anti-subordinationist** **commitments** such that would legitimate robust substantive and effects-based "victim justice."303 Indeed, just as Lincoln viewed demonization of the defeated South as an evil in itself, attempts to rectify injustices at the expense of "innocent" beneficiaries-cum-victims of that injustice can be viewed as evil under survivor justice. 304 In the immediate context of the war on terrorism, treating the internment as transcended/survived has the effect of de-historicizing the current repression of Muslims, Arabs and South Asians, disconnecting it from the ongoing related national traumas of racist psychologization of security and threat, reactionary assertions of white national identity and the attendant subjection of liberal democratic values to the paranoidic closures of the **security state**. 305 When the internment is instead taken to **symbolize** an **imperative** of **political accountability** toward **racial injustices**, it underwrites a model of **constitutional justice** as a continuation of the various justice struggles that Japanese Americans and their supporters have waged, from the "no-no" movement and other resistance efforts in the internment camps themselves, to the reparations and redress campaign of the 1980s and 90s. 306 Viewing the "**internment this time**" as **rooted** in these **ongoing traumas** puts into play strategies and models of constitutional justice that form part of an **unbroken** **chain**-call it a **constitutional** **solidarity**-with **anti-internment justice struggles**. Under such models of justice the state in distinction from the security state with its racialized friend-enemy logic, overweening assurance imperative, legitimation issues, etc.-links the present with the past, in Benjamin's terms, messianically. Accountability is insured in a present that is "shot through" with the traumatic past. Contemporary institutions and actions are rooted in a-temporal solidarity with anti-subordinationist struggle. There can be no easy redemption through "transcendence" of past evil, a notion premised on a positivist view of history that Benjamin rejects. Past and present form a constellation, and grasping that constellation is a redemptive act that itself necessarily transcends positivist management of the past. As ambitious as such an anti-subordinationist vision may sound under current conditions, it seems entirely in sync with the spirit of Justice William Brennan's pragmatic security jurisprudence, summed up in a speech he gave at the Law School of Hebrew University in 1987: A jurisprudence capable of braving the overblown claims of national security must be forged in times of crisis by the sort of intimate familiarity with national security threats that tests their bases in fact, explores their relation to the exercise of civil freedoms, and probes the limits of their compass. This sort of true familiarity cannot be gained merely by abstract deduction, historical retrospection, or episodic exposure, but requires long-lasting experience with the struggle to preserve civil liberties in the face of a continuing national security threat.30 7 Though framed literally in the familiar terms of individual civil liberties, Brennan's jurisprudence entails a substantive and processual pre-commitment to combat security-induced injustices, especially in light of "overblown" national security claims. Brennan also incorporates a critical understanding of the constructedness of security threats themselves and an awareness of the complex linkages between the realm of national security and threat construction and the realm of social freedom. Brennan's vision, then, comprises substantive and processual commitments as well as conceptual complexity in a way that appears wholly in accord with the primacy afforded here to group-based dimensions of state security overreach. The record from the new war on terror makes it abundandy clear that in order to be effective now our venerated liberal democratic tradition of resisting and containing state security overreach must be nurtured by our "long-lasting experience" and "intimate familiarity" with the subordinationist, group-based effects of national security law. Otherwise, we will fail to engage the central crisis of the time, involving at once the various devils the state tells us it knows and the sort of subordinationism that our society knows all too well.

## \*\*\* 2AC

### AT: Next Level/Performance Prior

#### They cordon off the performative—legal rituals, language, and demands are a key site of the everyday performance of resistance to oppressive racialization.

Joshua Takano **CHAMBERS-LETSON** Communications @ Northwestern **’13** *A Race so different: The Making of Asian Americans in Law and Performance* p. 3-7

A Race So Different is a study of the making of Asian American subjectivity. I argue that this process occurs through the intersection between law and performance in and on the Asian American body. As Robert S. Chang once wrote, “To bastardize Simone de Beauvoir’s famous phrase, one is not born Asian American, one becomes one.”10 But what are the mechanisms by which this process takes place? In order to answer this question, this book takes seriously Michael Omi and Howard Winant’s contention that “race is a matter of both social structure and cultural representation” but does so in a fashion that does not maintain the divide between the two.11 A central contention of this book is that formations such as the law, politics, history, nation, and race are structured by and produced through overlapping and often contesting narrative and dramatic protocols akin to aesthetic forms of cultural production, representation, and popular entertainment. This book submits that aesthetic practices directly contribute to the shaping of these formations by serving as vessels for the mediation of legal, political, historical, national, and racial knowledge. A Race So Different analyzes racial formation through the lens of performance in order to historicize and explicate the legal and cultural mechanisms responsible for the production of racial meaning in and on the Asian American body. Bringing a performance studies perspective to bear on the study of Asian American racial formation, I suggest that it is in the places where “social structure” (the law) and “cultural representation” (performance aesthetics) become most deeply entangled on the body that they assume their greatest significance. **Interdisciplinary** **scholarship** about **law and performance** has, to date, often distinguished the realm of legal ritual from the domain of aesthetic practices. Legal scholarship about performance traditionally focuses narrowly on First Amendment jurisprudence, copyright, or entertainment contract law, while theater and performance scholarship usually frames the law as either a narrative theme or part of the social**/ historical background** **against** **which performance occurs**.12 This book joins an emerging body of performance studies literature that focuses on the intersection between state politics, law, and performance, most recently in the pathbreaking work of Tony Perucci and Catherine Cole.13 Perucci’s study of Paul Robeson’s testimony before the House Committee on Un-American Activities demonstrates the ways in which performance can be mobilized by the state as “the field upon which politics is enacted” as well as the means by which a figure such as Robeson can deploy performance in order to disrupt “the containment of the theatrical frame secured and held at bay by” the government.14 While the relationship between aesthetics and the performance of politics is important to Perucci’s analysis, his primary focus is on the staging and disruption of political power, rather than the law as such. In turn, Cole observes that theater and performance scholars have generally approached the study of legal phenomena, such as South Africa’s Truth and Reconciliation Commissions, by focusing “on theatrical or aesthetic representations of the commission rather than on the commission itself as performance.”15 She calls on performance studies scholars to bring their expertise to the study of law as performance in order to open up a more robust understanding of legal procedure’s social function. At the same time, by doing so, Cole largely (and understandably) moves away from the analysis of aesthetic objects.16 The present study insists that partitioned critical approaches that focus on either legal ritual or aesthetic practices cannot adequately account for the fact that (1) there is an aesthetics to the law, including performance conventions and theatricality, and (2) performance, theater, and art often function as agents of the law. Because performances are embodied acts that occur in quotidian and aesthetic arenas, regularly blurring the spaces between them, the performance studies approach of A Race So Different allows us to understand the process of legal racialization without privileging the law over cultural production, or vice versa. That is, through the lens of performance theory, we can begin to see how racialization occurs in the critical space where law and performance coexist across the individual subject’s body and in the cultural bloodstream of the body politic. As such, this book demonstrates how a performance studies approach to racial formation that accounts for the concurrence of law, politics, and performance aesthetics can contribute to a more robust understanding of the construction of social and racial realities in the contemporary United States. In the remainder of this introduction, I articulate the key terms and concepts that frame this study. I show how the law is (1) performative, (2) structured by acts of performance, and (3) mediated through aesthetic performance pieces. Like Bashir, Asian Americans are interpellated into a form of legal subjectivity that is figured as simultaneously included within and excluded from the normative application of the law. I describe this as a state of racial exception. I show how the law does more than project this curious juridical status onto Asian American bodies; it calls on the Asian American subject to perform in a fashion that confirms his or her exceptional racial subjectivity. To be clear, this book does not aim to prove the existence of racial exception. Theories of a simultaneously interior and exterior national subjectivity have already been established in the previous literature on Asian American racialization. 17 Rather, I take the racially exceptional status of Asian Americans as a point of departure in order to demonstrate the mutually implicated role of law and performance in the making of Asian American subjectivity as such. In doing so, I hope to show how the lens of performance can help us to better understand Asian American racial formation in three key ways: (1) it gives us a frame for the historicization of the process of Asian American racialization; (2) it provides us with tools for complicating and contesting Asian American subjectification and subjection; and (3) it highlights the critical role that the racialization of Asian and Asian American subjects continues to play in the racial, political, and legal order of the United States. Performance Variations Throughout what follows, I use the term performance in an expansive fashion to describe embodied acts of self-presentation. This use is aligned with Erving Goffman’s definition of performance as “all the activity of a given participant on a given occasion which serves to influence in any way any of the other participants.”18 This broad definition allows us to think of a wide range of presentational and communicative behaviors as performance. This is particularly useful in a study of the law, given the law’s reliance on forms of ritual or legal habitus. Of course, the law is also performative, which is to say that the law is structured by series of speech acts that produce a doing in the world. But this doing ties the performativity of the law to performance insofar as legal performativity is given form when the law manifests itself in and on the body through expressive acts. The spaces of everyday life are stages on which people perform for the law and, as such, become subject to the law. But if we are to think of performance in such a broad fashion, how can we differentiate between specific modalities of performance? How can we account for the difference between the representational acts of a lawyer before a military tribunal in Guantánamo and Cowhig’s fictional representation of one Guantánamo detainee’s life? Even in the expansive use of the term performance, it carries a trace of its commonsense root: dramatic or theatrical aesthetics. This book does not set out to clarify the difference between quotidian forms of performance and aesthetic forms. Rather, it shows how the confusion between the two plays a significant role in the exercise of the law and in the making of legal and racial subjectivity. For definitional clarity, I describe everyday acts of self-presentation, including legal habitus, with the term quotidian performance. In turn, performances that are characterized by their nature as aesthetic works of cultural production are referred to as aesthetic performances. This includes theatrical works such as Lidless as well as performance art and popular music. The term is also used to discuss objects normally assessed within the frame of visual culture, such as a website or a series of photographs. Such objects may serve to document past performances or function as performances in their own right. Aesthetic performances are usually a step removed from everyday forms of self-presentation and are often self-consciously representational in nature. Audiences and spectators are meant to encounter them as aesthetic experiences. This book is made up of a series of critical cross-maneuvers, navigating through various phenomena including legal performatives and legal rituals, acts of political and legal self-presentation by Asian American subjects, and Asian American aesthetic practices. In moving between and across these spaces, the reader will note that the distinction between quotidian performance and aesthetic performance is at times muddied and collapses entirely at other times. A Race So Different emphasizes the points at which the distinction between the legal and the aesthetic break down, pushing against the strict division or opposition of the two that is sometimes maintained by traditional disciplinary approaches in both the humanities and the social sciences. By organizing my study under a broad definition of performance, while attending to the specific impact of different modalities of performance, I aim to demonstrate not simply that the law has both a performative and an aesthetic dimension but that aesthetic performances often take on a legal function by serving as agents of the law. Before I can move forward with a discussion of the intersection of law and aesthetics (or performativity and performance) in the making of Asian American subjectivity, it is important first to articulate the specific conditions that define Asian American racialization.

### AT: Whitewash/Cooptation (AT Process Focus)

#### Status quo archive coopts Korematsu for narrative of progress that absolves the judiciary. Overturning Korematsu precedent challenges structural denial of trauma.

Jerry **KANG** Visiting Professor of Law, Harvard Law School; Professor of Law, UCLA School of Law **‘4** “DENYING PREJUDICE: INTERNMENT, REDRESS, AND DENIAL” 51 UCLA L. Rev. 933 2003-2004 p. 997-1002

It appears, thus, that the function of institutional and collective apologies has more to do with putting things on the public record, to set matters straight.25 At the center of my critique, then, is a call for truth, a truthful accounting of what a branch of the federal government did during one of the largest civil rights crises of the century."6 There is value to truth. After all, that is what a truth commission seeks in the context of redress. As Martha Minow has well stated: A truth commission is charged to produce a public report that recounts the facts gathered, and render moral assessment. It casts its findings and conclusions not in terms of individual blame but instead in terms of what was wrong and never justifiable. In so doing, it helps to frame the events in a new national narrative of acknowledgment, accountability, and civic values.327 In this sense, the CWRIC was acting in the capacity of a truth commission. But its report shied away from exacting scrutiny of the Judiciary; perhaps there was so much more patent blame to place elsewhere. The coram nobis litigation was also part truth commission, creatively leveraging Article III courts.328 Although the litigation was successful in providing individual relief, it only half-succeeded in affirming truth. As regards the truth of judicial culpability, the coram nobis cases tragically failed. Here, it is important not to **misframe** the issue as one between a **narrow party-focused dispute resolution** view of litigation **versus** a **broad public regarding** **norm articulation** view.329 Framed this way, one might view my critique as based on a commitment to the latter view of litigation. But I take no general stand on the point. It turns out that in these coram nobis cases, individual **dispute resolution** (vacation of wrongful convictions) was intricately tied to a **public articulation** of norms (convictions are wrongful because of **governmental racism**); accordingly, the courts could not choose "**merely**" to **resolve a dispute** without saying anything grander.33 Certainly, that is not what the Ninth Circuit did. It publicly trumpeted an official history about the wartime Supreme Court and its functionings. Too bad that the story was a lie. B. Consequence What are the consequences of a Ninth Circuit "truth commission" adopting an official story that leads to individual relief but denies the truth? Numerous problems surface. For example, the Japanese American redress movement generally has been highlighted as a critical precedent for similar redress movements, ranging from African slavery to Hawaiian self-determination.33' But, before other movements embrace at least the judicial aspects of the Japanese American redress, they ought to know what in fact they are lauding. In addition, the social meaning of the Japanese American redress movement is still in the making. As Eric Yamamoto and Chris lijima each point out, there are potential dark sides to winning reparations.332 We must be careful of what we wish for. My commentary exposes another dark side, this time to the coram nobis victories. More worrisome is that because the truth has been officially denied, the **wartime precedents** may have **more** **potency** than they would have had otherwise. In granting the Korematsu coram nobis petition, Judge Patel proclaimed: Korematsu remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting 333 constitutional guarantees But we have good reason not to be complacent about Judge Patel's claims. We cannot be so confident when Seventh Circuit Court of Appeals Judge Richard Posner has publicly stated "I actually think Korematsu was correctly decided.""34 If Posner is willing to take that lead, surely judges keen on defying "political correctness" will follow. Worse, the sitting Chief Justice has essentially praised Korematsu with what Alfred Yen calls faint damnation."' Incredibly, in his book he omits any discussion of the coram nobis cases or the suppressed evidence underlying them. He also seems complacent about forcing racial minorities into impossible situations. Recall that the wartime Court accepted the claim that previous legal racial discrimination against the Japanese made them more likely to be disloyal. Rehnquist is not oblivious to the "irony" here, but explains that "in time of war a nation may be required to respond to a condition without making a careful inquiry as to how that condition came about."3'36 Further, as Eric Muller points out, the Chief Justice rejects the notion that racism, fueled by economic competition, was the true basis for the internment. For Rehnquist, "The Court's answer... seems satisfactory-those of Japanese descent were displaced because of fear that disloyal elements among them would aid Japan in the war.037 Therefore, suppose that in the near future, the evidence of military exigencythis time with nothing suppressed-approximates what the wartime Court thought to be the case during World War II.I need not point out that there have already been numerous arrests and convictions of aliens and citizens in the United States suspected of espionage and terrorism (what was labeled fifthcolumn activity during the internment),3 8 whereas in World War II, not a single Japanese American had been arrested and convicted on these grounds. If and when the next shoe drops, how will the political branches react? By the Chief Justice's lights, they will react the same way they have in the past; in his historical study of law during war, he sees "no reason to think that future wartime presi- dents will act differently from Lincoln, Wilson, or Roosevelt."" 3 9 How will the Judiciary respond? The above quotation continues to explain that there is also no reason to think "that future Justices of the Supreme Court will decide questions differently from their predecessors. ' 3 ° Rehnquist further encourages courts to adopt the minimalist judging strategies we have dissected. He notes that, whether we like it or not, courts do hesitate to decide cases against the government during wartime. Echoing Justice Jackson's dissent in Korematsu, he writes: "If, in fact, courts are more prone to uphold wartime claims of civil liberties after the war is over, may it not actually be desirable to avoid decision on such claims during the war?'3 41 This strategy invites the massive sacrifice of civil liberties of a racial or ethnic minority, by delay and segmentation, until the bad business is done, at which point everything "bad" will be declared "bad" and a few military officials will be blamed. This is the return of the **Korematsu mindset**. And according to the official line, this would be normatively justified. After all, the Supreme Court itself made no error in its reasoning during World War II. If truth, not denial, had been written in the Ninth Circuit Hirabayashi coram nobis opinion, then things might be different. Not only would the factual bases of the wartime decisions be invalid, the legal precedents themselves would be further stripped of legitimacy. Instead of an epic **whitewash**, we would have had an Article III court finding, in the context of a live case or controversy, that the 1940s Supreme Court was sufficiently racist that even this suppressed evidence would not have altered its decisions. No law review article, no rhetorical flourish, no worn passage about history's lessons would have had this impact. For every citation of the wartime cases, there would follow a "but see" signal with an excoriating parenthetical explaining that the military necessity calculation made by the Supreme Court was racially biased. This would have been the closest any lower court could have come to overruling Korematsu. The coram nobis cases cannot be relitigated. What remains, then, is a **fight** over how the wartime cases are **understood as historical precedent** and as lessons learned from the complicated consequences of the coram nobis litigation. Specifically, we must appreciate the passive vices a court can employ. This is not a global argument against judicial minimalism. It is instead a specific, detailed articulation of the hidden harm that judicial minimalism can sometimes wreak, especially with regard to racial minorities. This analysis also suggests that minimalist virtues may become vices in contexts in which the Judiciary is engaged in self-criticism. We must also publicly recognize that the Judiciary has engaged in revisionism to deny its own responsibility for internment. Through **public critique**, we can help deter what **denial** otherwise permits--a **self-mystifying** blindness on the part of the Judiciary to its own fallibility, its own prejudice. Such critique must not only be backward-looking, but must also apply to the cases and controversies that headline today's war.

### 2AC Perm

#### Archival strategy acknowledges the dangers of law but provides resources for resistance.

Patrick **GUDRIDGE** Law @ Miami **‘5** “The Constitution Glimpsed from Tule Lake” Law and Contemporary Problems, Vol. 68, No. 2 p. 81-85

The accumulated texts that supply the working materials of constitutional law are not only written records of responses to problems of government organization and claims concerning the rights of individuals. They are also an **archive**, an accessible collective memory, means for readers (persons who choose to read later as well as writers in the process of writing) to re-experience controversies and their conclusions, to consider and to accept, reject, or revise explanations for conclusions, and to become, in the process, more or less participants (more or less complicit) in those controversies and conclusions. If constitutional law is therefore a version of **purgatory** and **not hell**, it may be because its readers and writers are able to imagine a terminus, an "end" to "[t]he **consequences**" of "those **transgressions**" in which they are implicated. Korematsu as Justice Black wrote it seems to have supposed a short stay indeed: whatever wrong this decision did would be undone in Ex Parte Endo only a few pages further in the United States Reports.2 If Justice Black was wrong, if neither he nor his readers are as yet purged of Korematsu's "transgressions," if Endo is not "absolution" (Jerry Kang's freighted term),3 it may be because "the consequence" of Korematsu for the persons who were forcibly evacuated into concentration camps could not be declared "at end" in 1944 and cannot even now. Perhaps Endo did not?could not?accomplish what Black seemed to have hoped it would. Perhaps "the con sequence" fell also upon Justice Black himself and now falls upon his readers. Reading Endo always requires remembering Korematsu, just as reading Korematsu always sets the stage for reading Endo. There is no "end" (it would have seemed to Yeats). Korematsu and Endo are not, however, the only pertinent texts.4 This Article begins by sketching something of the content of The Spoilage, one of two principal publications issued after an ambitious contemporary study of what its organizers called "Japanese American Evacuation and Resettlement," under taken by University of California social scientists and funded by the Columbia, Giannini, and Rockefeller Foundations.5 The Spoilage is a complex and controversial record of the efforts of camp residents, chiefly at Tule Lake, to identify and put to use effective forms of political action notwithstanding the resistance of camp administrators, sometimes dramatic and sometimes confoundingly passive.6 These political efforts conclude?in The Spoilage at least?with mass renunciation of American citizenship by thousands of Tule Lake residents after Endo issued and after announcement of the closing of the camps.7 The legal af tereffects of this renunciation and The Spoilage account of it soon became subjects of decisions by the United States Court of Appeals for the Ninth Circuit, in Acheson v. Murakamf and its implementing successor McGrath v. Abo.9 In many ways remarkable if today largely forgotten, Murakami and Abo substantially blocked official enforcement of the Tule Lake renunciations. These decisions and their constitutional context are explored at some length in this Article?like Endo, along with Korematsu, confronting and testing readers and writers caught in constitutional purgatory. Chief Judge Denman's opinions in Murakami and Abo, it will become clear, may be grouped with Justice Douglas's effort in Endo and Judge Goodman's decision in Kuwabara10 blocking draft resistance prosecutions of Japanese American internees. In their several ways, however cautious or seemingly idio syncratic their arguments, these cases all reach results that Korematsu would not have signaled. Korematsu still looms large, of course, and hardly stands alone. There is also Hirabayashi?the Supreme Court's initial approval of the curfew enforced against Japanese Americans in the months after Pearl Harbor. There are still other decisions of the period?in the district courts and courts of appeals?that reach results similar to those in Korematsu and Hirabayashi. Even so, Murakami and Abo, along with Endo and Kuwabara, surely constitute too much work to ignore, too many decisions to be classed simply as outliers. The question of what to make of these latter cases is not easy. In consider ing why this is so, it may be helpful to begin dialectically, by considering the eloquent recent work of Jerry Kang, deploying a jurisprudence within which Endo?and quite probably also Kuwabara, Murakami, and Abo?indeed figure at most as ironic counterpoints.11 Professor Kang writes to judge?to enforce "corporate responsibility"?to demand that the Supreme Court hold itself ac countable as an institution for Korematsu and its companion cases.12 He means to seek out, identify, and explode efforts at evasion. Obviously, he undertakes this effort not to re-fight sixty-year-old controversies, but to introduce (or to re inforce) what he takes to be an important note within contemporary twenty first century politics. He means to mark Korematsu (especially) as wrong in or der to mark as wrong (or at least highly questionable) government actions today including (especially) court decisions that in any way resemble Korematsu and Japanese American internment. More precisely, he means to associate Korematsu with official racism including judicial complicity in (or tolerance of) that racism. Korematsu becomes a "moral parable."13 In order to do what he means to do, Kang needs to read Korematsu as clear-cut: there can be no doubt that Justice Black was evasive and complicit. He also needs to show that Endo is of a piece even though it reaches an opposite result. It, too, must appear evasive to this end, Professor Kang depicts Justice Douglas's opinion as itself an exercise in avoidance, to be therefore Korematsu's adjunct.14 This is a too summary summary, of course. Still, something at least of the force of Kang's argument should be evident: Why not encourage judges to acknowledge institutional sin, the risk of recurring wrong-doing, and thus the need to put Korematsu and its companions off limits? Kang recognizes that something like this has occurred regarding Korematsu itself, but he fears that the quarantine is too narrowly drawn that Endo (and presumably other like cases) read in too celebratory a way will put judges off their guard. There is, however, another twenty-first century politics. The adversary is now the notion that in war law is silent. "Korematsu is wrong," some might say, but what can you do? If we proceed similarly today, it's just proof that war is hell." On this view, Korematsu is recalled in order to reiterate Justice Jackson's famous (and famously equivocal) dissent. If Jackson was wrong, if we want Jackson to be wrong, Endo, Kuwabara, Murakami, and Abo (among other cases) become more central. They show at least some judges working hard to identify some times obscure resources in American constitutional law available for purposes of criticizing officials and vindicating individuals. Acknowledging their efforts reveals that **constitutional law** is **not a collection of settled rules**, but rather a collection of conflicting perspectives a setting for dissent as well as acquiescence. The internment cases, within this approach, fit with other examples of war time constitutional innovation, with decisions like Learned Hand's in Masses Publishing Co. v. Patten15 and the several Warren Court Cold War free speech improvisations16?and also, it may yet appear, Hamdi and Padilla.11 To be sure, there is within this approach a certain methodological naivete, a willful refusal to recognize that, at any particular moment, much in constitutional law is treated either as though it were well-settled or as though it were simply a set of easily manipulated categories. This is not, however, Pangloss redux there is **no inconsistency** in also **acknowledging** that **positive** **elements**, as a matter of fact, were and are often swamped. Rather, this alternative approach, insisting on **contingency**, means to be a **demonstration of resources**, a call to the individual responsibility of judges and advocates, and a suggestion that the moral politics of adjudication works with exemplars as well as with horrors.

### Perm (Slavery/Reparations)

#### Overturning Korematsu is a roadmap for rethinking who we are as a people. The aff puts the legacy of structural injustice on trial. Strategically using the need of the U.S. to appear democratic to advance social justice

Eric **YAMAMOTO** Law @ Hawaii **AND** Susan **SERRANO** Project Director, Equal Justice Society **ET AL** **‘3** “American Racial Justice on Trial -- Again: African American Reparations, Human Rights, and the War on Terror” Michigan Law Review, Vol. 101, No. 5, Colloquium: Retrying Race p. 1324-1337

What are the dynamics of the legal fulcrum? Professor Sidney Harring observes that successful reparation movements have a common history of extensive legal posturing that shapes public opinion and creates the moral climate necessary for reparations.280 Indeed, the legal process plays a critical role in the "posturing" that shapes public opinion about racial justice generally and reparations specifically. According to Professor Yamamoto, [f]rom one view, courts are simply deciders of particular disputes.... From another view, courts are also integral parts of a larger communicative process. Particularly in a setting of hotly contested racial controversies, courts tend to help focus cultural issues, to illuminate institutional power arrangements, and to tell counterstories in ways that assist in the reconstruction of intergroup relationships and aid larger social-political movements.28' In these situations, the broader litigation process can be seen as a "cultural performance." In a society, there are specific places where most major aspects of social life simultaneously are presented, contested, and framed. Courts are such places.282 The interactions among parties, attorneys, judge, court personnel, community, specialinterest groups, and the general public through the media and court hearings themselves, contribute to the phrasing of narratives and competing counternarratives for public consumption.283 The narratives that predominate, like the "stealing from the victims" Swiss banks narrative, in turn form the basis for political action. For example, the litigation of the Korematsu coram nobis and Hohri cases, along with the Congressional Commission's investigative report,284 brought the legal injustice of the Japanese American internment into the national spotlight. In doing so, the litigation, with extensive media coverage, helped dramatically **change the narrative** of the internment: from an understandable government mistake during wartime to the egregious abuse of government power under the **false mantle of national security**. This new narrative facilitated the reframing of Japanese American reparations as a moral imperative and laid the foundation for legislative action.285 There are many competing cultural narratives at play in the African American reparations suits filed in different courts in cities across the country. Judging from media commentaries, those narratives include: the endurance of racial disparities between African Americans and whites; the continuing racial discrimination against African Americans; African Americans playing the "victim card"; the inadequacy of affirmative action and the need for reparations; the already level playing field and the immorality of "racial preferences"; the unacknowledged significance of slavery to American history; the need for healing so that American society can move forward; and many others.286 In the next Section, we explore one particular cultural narrative: the linkage of African American reparations claims, international human rights, and America's moral standing in the war on terror. C. Reparations and the War on Terror As discussed in Part II, continuing racial inequalities coupled with the sustained attacks on civil rights and affirmative action give traction domestically to the current African American reparations movement. 287 After the United Nations Durban Racism Conference and government responses to 9/11, African American reparations claims also resonate internationally. 1. The Moral High Ground: Recognizing Slavery as a Form of Terrorism The African American reparations movement, like the Farmer Paellmann complaint and the forthcoming Reparations Coordinating Committee suit, grounds reparations claims on a history of racial terror and ensuing segregation and discrimination. At the same time, the current movement, with its supporting lawsuits, bears new rhetoric, rests partially on new claims and targets a far wider audience.288 To generalize broadly, the earlier movements tied reparations claims to the idea of equality rooted in American law and aimed at domestic audiences - American legislators and judges and the mainstream public. The current movement internationalizes African American redress. It does so explicitly by asserting international human rights claims and by linking African American redress to reparations efforts around the world.289I t does so implicitly by broadly articulating and staunchly pressing internationalized African American reparations claims in multiple forums at the same time the United States is struggling for the moral high ground in its preemptive war on terrorism. Indeed, a wide range of civil rights organizations have charged that the John Ashcroft-led Justice Department is putting itself above the law domestically through its broad-scale civil liberties abuses under the mantle of national security.29T0 hose alleged abuses include: racial and religious harassment under the guise of security investigations;29' incarceration of citizens and immigrants indefinitely without charges, hearing, or access to counsel;292 "special registration" of immigrants from largely Arab and Muslim countries;293 indefinite detentions of citizens deemed by the Justice Department to be "enemy combatants," with no right of judicial review;294 and state and local police crackdowns on lawful protestors of the government's war policies.295 The Bush administration declared that its war on terror aims to rid the world of evil.296 The war, the administration also said, is a fight for democracy from the "highest moral plane."297 Yet, many in the United States and leaders from other countries remain skeptical at best. Mounting protests across America,298 Europe,299 and the Middle East300 charge that while the United States should defend its people and institutions, the administration's expanding war is driven by larger political goals - achieving American hegemony worldwide.30' Those critics also assert that an expansive war threatens world stability, undermines human rights, and ultimately generates resistance and backlash against the United States and democracy.302 In this setting, the United States' own civil and human rights practices grow in importance. By justifying its military actions abroad as preemptive attacks on terrorism, America invites scrutiny of its own history of government-sanctioned terror within its borders. If terrorism is the use of violence or threat of violence to sow panic to achieve political ends,303 then slavery and Jim Crow segregation, backed by law and enforced by whippings, lynchings, and murder, were part of a racial system that terrorized a segment of the American polity for economic and political ends. As the Farmer-Paellmann complaint describes, slavery "fueled the prosperity" of America.304 Forced, unpaid labor supported southern agriculture, eastern banking, northern industries, and westward expansion, as well as private universities.305 Human bondage and terror maintained an American racial hierarchy that privileged whites economically and socially at the expense of the freedom, dignity, and economic well-being of African Americans.36 Two-hundred years of slavery, eighty years of legalized segregation backed by violence, and forty more years of varying forms of invidious and institutionalized discrimination have enduring consequences: among them, the average net worth of an African American family in 1999 was $7,000; the average net worth of a white family was twelve times greater, over $84,400.307 In short, while focusing on domestic relief to materially benefit African Americans in need, the new face of African American reparations is globalized. This internationalization of reparations places the United States amid other nations searching for peace through justice in the face of unredressed claims of historic terror and injustice. 2. The Cold War and the War on Terror: Interest Convergence This internationalization of reparations is also generating an increasingly potent American self-interest in African American redress. Broadly speaking, this self-interest can be framed as two strong observations emerging from the current African American redress movement and the reparations suits, and from another epochal race trial fifty years earlier, Brown v. Board of Education30(8a s well as the original Korematsu litigation ten years before Brown). The first observation is that, in the short run, the United States will lack unfettered moral authority and international standing to sustain a preemptive worldwide war on terror unless it fully and fairly redresses the continuing harms of its own historic government-sponsored terrorizing of a significant segment of its populace. The second observation is that, in the long term, unity and peace within its borders and the United States' international standing will be jeopardized by the government's exercise of military and economic power for larger nondefensive political ends in a manner that subverts civil liberties at home and human rights abroad. Professor Mary Dudziak describes a political climate during Brown v. Board of Education that in some important respects parallels the climate of today's war on terror.309In the early 1950s, in the thick of the Cold War, the United States waged its war against communism by promoting democracy worldwide while repressing civil rights (racial segregation) and liberties (McCarthyism) at home.310Under the glare of global media, state-sponsored systemic oppression of African Americans raised the hard question of whether American democracy inhibited, rather than promoted, freedom and equality. International critics of America's global attempt to spread democracy seized on the United States' own civil rights and human rights record.311 To elevate the struggling Civil Rights movement, the National Association for the Advancement of Colored People ("NAACP") also strategically linked America's fight against world communism with racial injustice at home by predicating genuine democracy on racial equality.312T he Justice Department framed its amicus brief in Brown in just these terms: "[t]he United States is trying to prove to the people of the world, of every nationality, race and color, that a free democracy is the most civilized and most secure form of government yet devised by man."313 Indeed, in the face of heightening criticism on the world stage, the United States needed to characterize democracy as the morally superior, "most civilized" form of governance. To do so, America had to deal with what at least one group called government-sanctioned terror. In 1951 an African American organization, the Civil Rights Congress, filed with the United Nations a pathbreaking human rights petition titled "We Charge Genocide."314T he petition charged the United States with widespread government-sanctioned terror that amounted to "genocide" of the African American race.315F iled in the early stages of the Cold War, the petition's domestic genocide claims linked America's moral authority to wage war abroad in the interest of democracy with its treatment of African Americans at home. As one observer noted: "[T]he test of the basic goals of a foreign policy is inherent in the manner in which a government treats its own nationals and is not to be found in the lofty platitudes that pervade so many treaties or constitutions. The essence lies not in the form, but rather, in the substance."316 Over the next several years American officials responsible for international affairs mounted a campaign to clean up America's tarnished image abroad, targeting among others the Supreme Court.317 As Professor Dudziak's extensive historical research reveals, the government's position in Brown was not driven primarily by a commitment to equality or fairness but by Cold War imperatives.318 Professor Richard Delgado aptly summarizes that research: "[d]ocument after document and [press] release after release inexorably converge on the same point - the United States needed to do something large-scale, public and spectacular to reverse its declining fortunes on the world stage."319 And the Supreme Court responded. In 1954, the Court unanimously decided Brown, overruling Plessy's separate-but-equal doctrine and outlawing overt state-sponsored segregation. Seen in this light, Brown is at least partially explainable by Derrick Bell's interest-convergence thesis - that "gains for blacks coincide with white self-interest and materialize at times when elite groups need a breakthrough for African Americans, usually for the sake of world appearances or the imperatives of international competition."320 Bell described this interest-convergence phenomenon as a dilemma. On the one hand, advancing whites' self-interest - in improved international standing to promote democracy, for example - might result in civil rights reforms that meant significant material gains for African Americans - as happened in Brown. On the other hand, white or government self-interest might also favor continuing an overall racial hierarchy so that reforms deliver far less than publicly promised - as also happened in Brown.32' Bell's interest-convergence thesis, or dilemma, triggers important inquiries into the possible link age of African American reparations claims to human rights and the war on terror.322 The Cold War and the war on terror share rhetoric about America fighting for the survival of democracy. During both wars, international as well as domestic organizations raised sharp concerns about civil rights and challenged American goals and moral standing. Brown followed by a mere decade another epochal race trial – Korematsu////

. Legal observers had labeled Korematsu a civil liberties disaster.32 The Supreme Court in Brown thus faced not only intense international criticism of the United States' harsh subjugation of African Americans, but also growing condemnation of its racist incarceration of Japanese Americans under the mantle of national security.32 Two key dimensions of American racial justice were therefore placed on public trial: America's racial laws and practices generally and the government's willingness to misuse "national security" as the cover for major civil liberties violations during times of national fear and stress. Brown's recognition of African American civil rights during the Cold War therefore served dual purposes. It responded to domestic and international criticism of domestic racial laws and policies.325I t also appeared to quell worries about America's willingness to trample civil rights while fighting a war for democracy. The coinciding epochal retrials of African American reparations for slavery and Korematsu's national security/civil liberties tension are heightening post-Durban worldwide scrutiny of American racial justice. American self-interest in these trials, of course, will be affected by myriad shifting, oftentimes unpredictable, political events. The open-ended question today, therefore, is this: How will the government's handling of African American reparations claims influence and be influenced by its apparent attempt to resurrect "old Korematsu" as well as the increasing domestic and international peace protests and growing human rights and civil liberties criticism of the manner in which the United States is pursuing its war on terror? 3. Reparations Principles At this juncture, a caveat is in order. The African American reparations movement, particularly when viewed through an interest convergence lens, should not be misunderstood as lending moral credence to the war on terror. Rather, the reparations suits and movement, at this stage in their evolution, can best be viewed as teasing out preliminary reparations lessons-learned in two realms. The first realm is reparations strategy. If, as the interest convergence thesis predicts, reparations will be conferred only when mainstream American political and economic interests are also served, then African American reparations proponents need a political and legal strategy that primarily serves African Americans but also delivers a vision of broad-scale domestic benefits. Japanese Americans, for instance, achieved redress only after the Reagan administration shifted positions on reparations to bolster its moral authority on human rights as the United States intensified the end stages of its war against world communism.326 One salient dimension of this vision is the connection between the United States' moral authority to fight its war on terror and America's response to African American redress claims for state-sponsored terror at home, and the linkage of both to what the Korematsu coram nobis litigation and Japanese American redress highlighted - the fundamental importance of protecting civil rights and liberties precisely when America is engaged in an international war for democracy. This vision provides a strategic **interest-convergence roadmap** for public education, political organizing, and lobbying about the significance of reparations both for African Americans most in need and for American society more generally. The second realm of lessons-learned encompasses reparations principles. If African Americans, or any group, were to achieve reparations in exchange for touting America's moral authority to fight a war that actually heightens human suffering and derogates the civil and human rights of others, then in that instance reparations would be a sell-out - receiving reparations in exchange for silence or, worse, complicity. Indeed, Professor Yamamoto has cautioned Japanese Americans that their legacy of reparations remains "unfinished business" 327- they must support the civil and human rights struggles of others, or forfeit part of the moral foundation of Japanese American reparations. No one is suggesting that African Americans or Japanese Americans are doing this. But in theory the possibility remains. This possibility speaks to the need for reparations principles. In light of the "Age of Reparations," the time is ripe for broadly articulating and justifying those principles. That encompassing task is beyond the scope of this Essay. For now we identify for further discussion one proffered reparations principle relevant to African American redress: both in redressing its own injustices and in its present-day treatment of citizens and immigrants during times of national stress and fears over security, America's long-term interests are best served when it pays careful heed to domestic civil rights and international human rights. As Professor Harring observes, the purpose of reparations is not to attempt to make victims whole, for that is impossible.328 Instead, through reparations, a government commits itself and its people to civil and human rights by acknowledging responsibility for transgressions, by making amends, and by preventing future abuses under the false or merely expedient guise of necessity.329In following this principle a government, such as the United States, need not forgo strong defensive measures to protect freedom and equality. It means that in taking those measures, however, the government and its people must take special care to preserve those values on the ground, where they count most. Only then can the government claim, in Colin Powell's words, the "high moral ground."330 V. CONCLUDING THOUGHTS: REPARATIONS AS "REPAIR" The African American reparations claims and their increasingly internationalized framing signal the **retrying** of **who "we" are as a people** - in our own eyes and, as the government fights the war on terror, in the eyes of the world communities as they struggle to rectify historic colonial and wartime injustices. Indeed, pressed by the rising tide of public criticism about his administration's apparent disdain for civil liberties, President Bush implicitly acknowledged the linkage of the government's moral authority to wage a war on terror to its approach to civil rights in his pre-9/11 anniversary news conference statement that "in order to reject the evil done to America on September the 11th, we must reject bigotry in all its forms."331 To reject bigotry in all its forms, we submit, the United States must repair the lasting wounds of historic American terror. Especially at a time when conservative politicians, lawyers, and judges have largely succeeded in dismantling the 1960s civil rights edifice, rejecting bigotry means reparation not only in the abstract but also as it is experienced. That kind of reparation, particularly when long overdue, offers the nation its best, if not only, prospect of ascending to the highest moral plane. Reparations as "repair" aims for more than temporary monetary salve for those hurting. It is more than just compensation for past debts. Rather, it is a vehicle for groups in conflict to rebuild their relationships through attitudinal changes and **institutional restructuring**.332 Avoiding the traps of the individual-rights and -remedies paradigm, reparations as repair is potentially transformative. Grounded on group rights and responsibilities and providing tangible benefits to those wronged by those in power, this repair paradigm targets substantive barriers to liberty and equality. Reparations as repair is also symbolic - it condemns exploitation and adopts a vision of a more just world.333 This repair paradigm is rooted in the international jurisprudential idea of restorative, rather than compensatory, justice.334 Restorative justice entails acknowledging the wrongs committed and taking positive steps toward not only the prevention of future abuses, but also the healing of communal wounds and the repairing of damage to community social structures.335 Restorative justice is reflective of the African notion of "ubuntu" - the notion of interconnectedness and the idea that no one can be healthy when the community is sick.336 Characterizing justice as community restoration, particularly the rebuilding of the community to include those harmed or formerly excluded,337 ubuntu says "I am human only because you are human. If I undermine your humanity, I dehumanize myself."338 In other words, ubuntu shapes healing efforts through notions of co-responsibility, interdependence, and enjoyment of rights by all.339 Ultimately, "reparations as repair," based on restorative justice, aims to heal social wounds by bringing back into the community those wrongly excluded, essentially healing through the restoration of the polity.340 Cast in this international light, the pending and impending African American reparation suits, and the political movement supporting them, may well emerge as an epochal American race trial. First, they articulate a moral case for African American reparations in compelling justice terms - terms the American public has yet to fully engage and cannot ignore. They speak cogently not only of the human horrors of slavery and the lasting economic benefits derived by whites in America, but also of the continuing social and economic harms to African Americans. Second, with the backlash against affirmative action and ameliorative race-based programs, the reparations movement asks the United States to make good, rather than renege again, on its **second promise** of a **genuine Reconstruction**.34 Third, the multifaceted political and economic African American redress movement targets American government and business not just for a debt due but also for redress for the long-term systemic terrorizing of Americans of African descent. It demands that the United States rectify its own historic injustices at a time when it attempts to claim the moral high ground through the war on terror under the dual mantles of democracy and human rights. Finally, in addition to seeking to improve the material living conditions of African Americans most in need, the reparations movement aims to repair the lasting harms to American society itself.342 "Underlying this movement is a unifying principle we can't continue to ignore. This is about making America better, by helping the truly disadvantaged." 343 In attempting in part to repair-the-nation, the African American reparations suits place American racial justice on trial again. As with Sisyphus, that this trial recurs is not reason for despair. What matters now is how our government and we, its people, engage the struggle.

### Internal Kritik v. External K

#### External/indigenous critique supplements immanent kritik of U.S. policy on its own terms.

Natsu Taylor **SAITO** Law @ Georgia St. **‘6** “Reflections on Homeland and Security” *New Centennial Review* 6 (1) p. 261

This attempt to point out the contradictions inherent in the status quo and its methods of preserving itself is not a critique based on morals or ethics, or on natural rights, indigenous law, or even international law, except to the extent the United States explicitly relies on the latter. Such analyses can be, have been, and should be made. But it is **not necessary** to do so to see that the current U.S. paradigm is unsustainable on its own terms, according to its **stated values** and its **own laws**. And this means that far from being unrealistic, engaging in an **internal critique** of any **particular** practice, **policy**, or **law** is quite feasible. Each individual piece can be readily tied to the larger whole if those of us engaging in the critique are willing to question our own fundamental assumptions honestly and confront their implications.

### AT: Speak for Others

#### Justice demands we perform in the place of those who cannot represent themselves. This outweighs the potentially distancing effects of representation.

Joshua Takano **CHAMBERS-LETSON** Communications @ Northwestern **’13** *A Race so different: The Making of Asian Americans in Law and Performance* p. 20-23

The theatricality of the law is distinctly important in the case of the US justice system, an importance intensified by the historical events that inspired Lidless. The US political and legal system is, for better or worse, representative: politicians and lawyers act as representatives of their constituents or clients. So if Hobbes observed a blurring between the theatrical and the legal forms of representation, the lawyer’s art as a performer becomes a key means for countering forms of critical injustice. Take for example Guantánamo advocates Mark P. Denbeaux and Jonathan Hafetz’s introduction to a volume of interviews with Guantánamo lawyers: “[The detainees] were all held in secret and denied communication with their families and loved ones. Most, if not all, were subjected to extreme isolation, physical and mental abuse, and, in some instances, torture. Many were innocent; none was provided an opportunity to prove it. These are their stories. The stories are told by their lawyers because the prisoners themselves were silenced.”74 The prisoners, who are “silenced” by the US state, have no immediate recourse to speak their own stories to the general public, to their families, or even in a court of law. The situation necessitates the imperfect solution of **having others perform in their stead,** revealing representational advocacy to be a limited form of artificial personage that might realize **greater conditions of justice** for the detainees. That Denbeaux and Hafetz conceive of the lawyer’s art in the language of narrative storytelling is important because they seem to suggest that the narrative conventions employed by the advocates are equally important to their job as the factual record that they are presenting to both the public and the courts. In this sense, aesthetic practices (narrative, dramatic structure, character) can play powerful roles in a representative act meant to intervene in and reformat the conditions produced within the law. This power is not only the province of the lawyer, who adopts aesthetic traditions in the execution of his or her representative act, as the artist can deploy/wield it as well. A Race So Different distinguishes itself from previous interdisciplinary approaches to law and aesthetics that commonly note that the primary difference between the two is that the law has a “real” impact on the world, while aesthetics registers as less impactful. For example, in Juana María Rodríguez’s otherwise beautiful analysis of an asylum hearing in a US court, she argues, “Both law and literature are intrinsically concerned with language, interpretation, and reception. . . . Put succinctly, literary criticism and legal treatises are both involved with constructing credible subjects, narratives, and readings. Yet law is discourse with a difference; the stories and characters are real and the interpretations have long-lasting consequences.”75 Rodríguez correctly observes that the events that inspire legal cases are drawn from realworld events. However, anyone who has ever been represented by a lawyer will tell you that by the time one’s experiences are translated into legal discourse and entered into a court record, they feel as foreign as would be a fictionalization of their story in a “ripped from the headlines” episode of Law and Order. This casts a dubious shadow on the notion that the stories and characters translated into the law are necessarily more consequential (or real) than those that are translated onto the dramatist’s stage. Nor am I convinced that the law is especially imbued with a capacity to produce more “long-lasting [real-world] consequences” than are dramatic and literary narratives or other forms of aesthetic production. After all, most people have probably gleaned more legal knowledge from a show such as Law and Order than they have from reading actual legal texts. Culture shapes reality, sometimes confirms it, and at times supplants it. After all, people generally believe that Julius Caesar was killed in the Roman Senate, where Shakespeare placed the act, rather than in a side chamber of the Theater of Pompey, where he was actually assassinated. Mass forms of cultural production including, and especially, theater, film, popular music, and TV often function as thinly veiled ideological state apparatuses. These “culture industries” are thus what Max Horkheimer and Theodor Adorno called “instrument[s] of domination.” 76 Aesthetic narratives can have “long-lasting consequences” that become real over time. As an aesthetic medium that gives embodied form to narrative, representational modes of performance (such as theater, performance art, or even film and TV) lend legal discourse an embodied verisimilitude that helps to transform a “statement of law” into a “statement of fact” within the popular consciousness of the audience. Popular aesthetic performances function as agents of the law, circulating legal narratives through the bloodstream of popular culture. At the same time, in making a case for the power of aesthetics as legal agents, I do not want to idealize aesthetic practices over the law. In a discussion of the role of tribunals in response to the trauma of the Holocaust, Shoshana Felman seems to do as much when she writes, “Law is a discipline of limits and of consciousness. We needed limits to be able both to close the case and to enclose it in the past. Law distances the Holocaust. Art brings it closer. We needed art—the language of infinity— to mourn the losses and to face up to what in traumatic memory is not closed and cannot be closed.”77 Felman acknowledges a need for the law but figures the law as that which “encloses” a traumatic event in the past. She suggests that art’s function is to provide a closer proximity to such events, arguing that it is in the “slippage between law and art” that traumatic memory is negotiated. On this latter point, we are in agreement— it is in the slippage between law and aesthetics that real cultural work can be done to rectify past injustices. But to accept a definition of the law as “a discipline of limits and of consciousness” is to displace the slippery, “situational,” and performative nature of the law. This ignores the familiar resemblance and formal relationship between law and performance and sidesteps the fact that both, being equally reliant on the “independently determining moment” of embodied action, give way to the “language of infinity.” As such, while the law and aesthetic performances may both serve to “distance us” from the truth of a historical injustice, they also have the fecund potentiality to open up and rethink these injustices as we rehearse and stage the possibility of a more just future.

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### Trauma Competition (AT: Slavery O/W)

#### Trauma competition. Their impact analysis pits victims against each other.

A. Dirk **MOSES** History @ Sydney **‘8** in *Empire Colony and Genocide* Ed. Moses p. 34-35

Fanon himself was ambivalent about who was the greater victim of this system, Jews or blacks—at one point likening the persecution and extermination of the Jews to “little family quarrels” (among Europeans), at another proclaiming his indignation and empathy because he could not disassociate himself “from the future that is proposed for my [Jewish] brother.” Even the latter formulation is an undialectical equation of experiences that he may have learned from older, diasporic black intellectuals like Olive Cox and W.E.B. Du Bois, who associated Nazism with slavery and white racism. Du Bois, for instance, wrote in *The World and Africa* in 1947 that “there was no Nazi atrocity—concentration camps, wholesale maiming and murder, defilement of women or ghastly blasphemy of children—which the Christian civilization of Europe had not long been practicing against coloured folks in all parts of the world in the name of and for the defense of a Superior Race born to rule the world.” This kind of thinking, while understandable in a context when Europeans still ruled most of Africa, and African Americans were being lynched, participates in the phallic logic of trauma competition mentioned above and is not particularly helpful for understanding complex historical processes.