

5-1-2010

Remembering and Repairing The Error Before Us, In Our Presence

Margaret Chon

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/sjsj>

Recommended Citation

Chon, Margaret (2010) "Remembering and Repairing The Error Before Us, In Our Presence," *Seattle Journal for Social Justice*: Vol. 8: Iss. 2, Article 8.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol8/iss2/8>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized editor of Seattle University School of Law Digital Commons.

Remembering and Repairing: The Error Before Us, In Our Presence

Margaret Chon¹

All legal restrictions which curtail the civil rights of a single racial group are immediately suspect and must be rigidly scrutinized, though not all of them are necessarily unconstitutional.²

INTRODUCTION

Purely legal approaches toward reparations suffer from theoretical limitations, which range from the technical requirements of framing successful claims to the assumption that monetary damages are fully commensurate with human loss associated with historical injustices. The Japanese American reparations experience teaches us about the capacity as well as the limits of law to address injustice, not only for this particular group, but also for all groups that have been, and continue to be, harmed by group discrimination. Moreover, it provides a window into other avenues for reparations. One of these areas is the production of historical memory through the law in conjunction with other sociocultural processes, such as education.

If the primary purpose of reparations is to repair past harm, then reparations should first include a backward-looking mechanism to remember the harm accurately from the point of view of those harmed³ and then a forward-looking mechanism to correct past harm that has “hardened” into present everyday practices. That is, reparations should affect long-term structural change both through the excavation of historical memory and the advocacy of social change. Barriers do exist to both steps. For example, the durability of certain racial imagery and racial tropes can be analogized to cultural viruses that keep circulating no matter how many attempts are made

to set the record straight. The 1982 Report of the Commission on the Wartime Relocation and Internment of Civilians⁴ carefully examined the evidence and concluded that no justification existed for the internment of West Coast Japanese Americans. Nonetheless, this official government document is minimized and ignored in revisionist defense of the internment in popular thinking and in widely circulated texts.⁵

Built into the Civil Liberties Act of 1988,⁶ however, was a public education fund that resulted in a proliferation of educational content, including curriculum for kindergartens through law schools, as well as creative works for educational use in other public venues. These efforts have not completely inoculated the national body from the viruses of racism, xenophobia, and the other pathologies that persist, including those that led to the internment in the first place. However, they have partially transformed the ideational landscape in ways that are dynamic, unexpected, and adaptable to unfolding events. This educational component of reparations is an overlooked aspect that can and should be extrapolated to other reparations efforts.

The launch of the Fred T. Korematsu Center for Law and Equality at Seattle University School of Law in the spring of 2009 provides a historic opportunity to expand upon this reparations component across racial and other significant social categories.⁷ Through its three pillars of advocacy, education, and research, the center produces knowledge toward its stated mission of striving toward greater equality in law. Doing so requires a contextualized approach to law, one that appreciates the people, politics, and passion for justice (three “Ps”) that must infuse any social, including legal, movement toward structural reform. Fred T. Korematsu, for whom the center is named, was a courageous individual who symbolizes for all Americans this critical context for connecting law to justice.⁸ In this essay, I expand upon these three “Ps” in the two parts necessary for a complete reparations effort: one looking to the past and one toward the future.

I. REMEMBERING THE PAST

Coram nobis is often characterized as an obscure and infrequently invoked writ, albeit one that allows courts to re-open final judgments long after they have been rendered. Even the legal experts who comprise the advisory committee to the Federal Rules of Civil Procedure refer to the exact contours of the relief afforded by *coram nobis* as “shrouded in ancient lore and mystery.”⁹ And what this tells us is that no one really knows how *coram nobis* originated. Like other prerogative writs such as *habeas corpus*, whose origins have been traced to the period of the Magna Carta of 1215,¹⁰ a petition for writ of error *coram nobis* (roughly translated to the error “before us” or “in our presence”) compels a court of law to review possible errors despite the fact that it is procedurally irregular to do so. As a procedural device or remedy, *coram nobis* is rarely taught anymore in law school, although some, including me, have continued to teach it because it was so integral to the re-opening of the deeply discredited, and yet still significant 1944 Supreme Court decision, *Korematsu v. United States*.¹¹ In this case, as most students of constitutional law know, the United States Supreme Court sustained the military order excluding all persons of Japanese ancestry from a designated area on the West Coast of the United States. Despite a legal challenge at the time based on both due process and equal protection grounds, a majority of the Court found that “[t]here was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.”¹²

Coram nobis is used to correct errors of fact when they have resulted in manifest injustice. The grant of a writ of error *coram nobis* means that there was a foul so bad that the final outcome merits second guessing long after a case is closed. It is axiomatic that one is not entitled to a perfect trial, only a fair trial. Thus, a finding of injustice pursuant to *coram nobis* flies against the strong policy of finality that underlies procedural doctrines such as the

harmless error rule, law of the case, preclusion, and so on. In *U.S. v. Morgan*, a divided U.S. Supreme Court wrote that *coram nobis* can still be had in federal courts, but that it is an “extraordinary remedy [available] only under circumstances compelling such action to achieve justice” to address errors “of the most fundamental character.”¹³

One of our nation’s most terrible episodes of ethnic profiling was the internment of the West Coast Japanese Americans in ten different concentration camps during World War II. As historian Greg Robinson recently documented, this mass detention of a group based on ethnicity without individualized due process, charges, or trial was preceded by years of government surveillance.¹⁴ A few principled individuals resisted their incarceration in these internment camps and challenged the government’s laws through the court system. Though these legal challengers ultimately lost their constitutional arguments, they laid the foundation for significant decisions in the area of ethnic profiling as it relates to national security. Their cases—*Hirabayashi v. U.S.*, *Korematsu v. U.S.*, *Yasui v. U.S.*, and *Ex parte Endo*—were decided by the Supreme Court of the United States.¹⁵ In particular, the original *Korematsu* decision has come to be iconic, one in which Mr. Justice Black famously began his analysis for the Court’s majority by stating, “It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”¹⁶ These somewhat opaque words have been distilled into the so-called “strict scrutiny” review of racial classifications. However, in a twist that foreshadows today’s ethnic profiling dilemmas, the Court applied this ground-breaking principle so as to uphold the constitutionality of the laws excluding Japanese Americans from the West Coast, essentially driving them into the camps.¹⁷

The centrality of *coram nobis* in reopening this decision in the early 1980s is an example of the co-evolution of this ancient remedy with an

increasingly robust substantive due process throughout the twentieth century in American criminal procedure.¹⁸ As Judge Marilyn Hall Patel's opinion made clear in 1984,

the government acknowledged the exceptional circumstances involved and the injustice suffered by petitioner and other Japanese Americans. Moreover, there is substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court [in 1944. . . . Thus, *Korematsu*] stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive, and judicial must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.¹⁹

Through the vehicle of *coram nobis*, the original trial court can consider facts that may have been missing in its initial adjudication of a case. And by teaching the *coram nobis* coda to *Korematsu*, a law professor can bring to the classroom a contextualized approach to law, one that highlights the *people, politics, and passion* for justice that must infuse any legal movement toward structural reform. This approach to teaching is a type of reparations work because educational and curricular content can inject counter-narratives to dominant models and stories in circulation. Educational materials can also address the absence of certain important variables. This kind of teaching repairs past harm in the sense of addressing structural damage resulting from the incorporation of such harm into or the omission of important narratives from present everyday practices.

When I teach *coram nobis*, I do so to bring the context that is often stripped out of the law school curriculum so that we can teach our students to “think like lawyers.” By “thinking like lawyers,” law professors usually mean that we want our students to hone their legal analytical skills. It is generally accepted that the best way to do this is to strip all but the logic from the law. Demanding that our students see law in a very narrow sense—one that is divorced from other ways of knowing, seeing, acting in,

within, and on the world, legal education becomes a process of making our students more ignorant rather than less. Law in this way can be extraordinarily focused on the manipulation of text in the pursuit of logical doctrinal consistency rather than focused on its function within social context. This dominant pedagogical approach has withstood successive waves of insight by the legal realists, critical theorists, and others who have tried to connect law to other disciplines. By re-contextualizing law, the people, politics, and passion for justice can be highlighted in ways that show that law's reason is not divorced from the act of striving toward equality, which is the focus of the Korematsu Center.

Coram nobis is a wonderful reminder that despite the analytical demands of the law, we humans make very human mistakes. **People** often make errors of judgment, apparent not only in the final judgment of courts, or in the process of getting to that judgment, but also in the course of getting on with the everyday business of life. *Korematsu v. U.S.* is a thick description of people not making the best of choices when wartime fears are allowed to drive decisions. Evidence can be deliberately hidden, as it was in Fred Korematsu's original case. Ethics can be ignored, as were the warning signals sent out by some of the Justice Department lawyers in that original case.²⁰ Errors may be made, and perhaps corrected, even then perhaps only after a long time. But nonetheless, public accounting and atonement *can* happen with enough persistence and vision—along with the tools, such as *coram nobis*, that the law provides. Bearing witness as he did to the constitutional wrongs during World War II, Mr. Korematsu's courage, memory, and never-dampened sense of right and wrong have become templates for all people who challenge errors rising to the level of great injustice. The failures of people did not deter *this* particular person from doing what he thought was right.

And other people from various backgrounds are important in this narrative of advancing right over wrong. Eric Fournier's film *Of Civil Wrongs and Rights* depicts a young Fred Korematsu and a young ACLU

lawyer, Ernest Besig, both determined to fight what they perceived at the time to be a betrayal of the ideals of this country.²¹ The idealism of these young men still resonates today. The magnificent *Korematsu* dissents of Justices Roberts (not to be confused with the current Chief Justice), Jackson (from western New York, like me), and especially Murphy (who is much revered at the University of Michigan Law School, our common alma mater) tell us in retrospect that we may recognize our fallibility and our mistakes even as we make them.²²

In his account of the Seattle redress community's activities, Robert Shimabukuro documents how the Seattle roots of the reparation movement appeared in the form of Boeing engineers who thought that the internment was wrong.²³ The local lawyers initially told them that they didn't have a case. Like Mr. Korematsu, each of these engineers was the proverbial everyman who argued against the majority view at the time to advocate what was initially an unpopular stance. They led the way eventually to justice. But at first, all of these courageous *people* were told that they were wrong or at least up against very bad odds.

The idealistic lawyers who formed the *coram nobis* legal team described their reactions to the original case this morning for the opening of the Korematsu Center.²⁴ In the Densho Visual History Collection loop that is playing below in the court level of the law school, Dale Minami remembers his reaction to studying the original *Korematsu* in law school:

I kinda thought, half of me was like, "Oh, I guess this is the way things are." The other half was, "This is bullshit. We should do something about this." But the other half says, "Well, we can't, it's 1943, '44, how are you ever gonna do anything like this?" . . . what I came away with is that the law is, the rule of law as absolute justice or absolute values is a total myth. The rule of neutral impartial arbitrators, like judges, is a myth and that there are values beyond law that drive justice.²⁵

Yasui *coram nobis* team leader Peggy Nagae states:

I chose to attend law school because I believed in justice and equity. Much to my surprise and disappointment, I do not recall a single discussion about justice in law school, even when discussing the *Korematsu* case. Professors talked more about how much to charge a client for a name change than achieving justice by harnessing and focusing our passion. Five years after graduation and after becoming Minoru Yasui's attorney, while working as assistant dean for academic affairs under then dean Derrick A. Bell, Jr., my passion for justice came sharply back into focus and galvanized into a lifetime commitment.²⁶

And why? *Politics* are often siphoned out of the legal curriculum because they are feared too controversial and lacking in academic substance. Before I attended law school, I taught the Asian American Experience, one of the first ethnic studies courses at the University of Michigan, first with Scott Wong (now a history professor at William College), then Tsiwen Law (now a "Philadelphia lawyer"). Our syllabus was constructed in 1980, several years before Mr. Korematsu's *coram nobis* victory in San Francisco. Our class discussed the internment, but through the texts of community organizing materials such as pamphlets asking people to attend teach-ins and demonstrations. In 2009, we can teach the *coram nobis* cases in law school as published judicial opinions from law texts, sanctified in legitimacy by their availability in the federal reporters or emblazoned within textbooks.²⁷ But back then, almost thirty years ago, this material was seen as tainted possibly with too much politics and not enough academic respectability or intellectual rigor. We must not forget, however, that politics precede law, imbues law with potential, and can constrain law's possibilities to reach justice as well. We often conflate law with justice, but too often politics separate them.

With this lesson in mind, the *coram nobis* lawyers embraced a dual political-legal strategy. According to Korematsu legal team member Eric Yamamoto, the "teams aimed to re-try the internment's justification simultaneously in the courts of law and public opinion—and to thereby link

the lawsuit's intense public educational potential to the larger political redress movement."²⁸ And this strategic approach "infused the otherwise dry legal process with the passion for justice."²⁹

Thus, *passion* disciplines law to contribute meaningfully to the long arc of justice. This gathering attests to the truth that catalyzing and encouraging a passion for justice is one of Mr. Korematsu's enduring legacies. This combined felt sense of injustice, community education, political activism, and social change, all leading to legal victories, in turn has fostered further advocacy and education through the Korematsu Center's activities. This virtuous circle connecting law to justice can lead us out of the aridity of legal education and indeed legal practice, both of which too rarely systematically examine the distance between doing law and doing justice.

In recognizing this lesson of Mr. Korematsu's, we should keep in mind that the Japanese American community in the 1940s and especially the late 1970s was not monolithic. Mr. Korematsu was shunned by his own community in the 1940s: the Japanese American Citizens League, which represented most of the Japanese American community had decided to abide by the government's internment policy.³⁰ By the late 1970s, this community was crisscrossed and even scarred with political differences (the draft resisters versus the veterans of the 442nd Regimental Combat Team); generational differences (the Nisei versus the Sansei);³¹ geographical differences (the West Coast Japanese versus others who had not experienced or did not even know of the internment such as many in Hawai'i); differences of nationality (U.S. versus Peruvian or Canadian); differences in reparation strategy: those in favor of class action damages litigation, *coram nobis*, legislative avenues, and many more who were initially skeptical of all of these efforts.³² There was also the silence borne of shame, of stigma, and of feeling that one's community did not have the power or the right to challenge the accepted narratives. The silence around this historical injustice was so thick that it wasn't until they reopened his case that Kathryn and Fred Korematsu's kids—Karen and Ken—knew

about their father's challenge to powerful political forces.³³ Mr. Korematsu, and other unsung heroines and heroes—draft resisters such as eighteen-year-old Yosh Kuromiya and seventeen-year-old Gene Akutsu—chronicled by Associate Center Director and Professor Lorraine Bannai in her 2005 article in the *Seattle Journal for Social Justice*,³⁴ and Mitsuye Endo, who brought a successful *habeas corpus* challenge to the detention, were the first responders in a community confronted with a constitutional crisis.³⁵

Many law professors, law students, as well as others outside of legal education have connected profoundly to Mr. Korematsu's story over the last thirty years, even during this center's founding year of 2009. This is a day to recognize together that Mr. Korematsu's story still has a tremendous power to affect that proverbial paradigm shift in one's way of thinking about identity, community, and difference—and it still has the ability to ignite a *passion for justice*.

II. REPAIRING PAST HARM

In reaching for justice, so much inequality remains to be addressed through advocacy, education, and research. Governmental misconduct and governmental cover up are still with us. And we still have an urgent need to develop a nuanced vocabulary of community building, framed across multiple differences and alliances. As the late Professor Jerome McCristal Culp—whose book collection was gifted to Center Director Robert Chang and then to this law school—once said,

We have to build a theory that recognizes our differences and builds coalitions for change. At the same time, this new theory has to avoid falling prey to the temptation to become complicit in the description of the other. We will not build a theory for change if we replicate the structures of the other created by society.³⁶

The Korematsu Center's focus on equality rather than inequality can shift our perspectives to how we can work together to create and empower lasting movements in the service of social justice. However, equality is not

a self-evident term, and there are many debates as to what it means and how it can best be achieved. What will it take to reach equality in today's increasingly unequal, global, and pluralistic world? People, politics, and passion for justice are signposts for this center as it engages in advocacy, education, and research in pursuit of equality. The center provides an institutional space for re-affirming that dual consciousness insight: law is not only a weapon for injustice, but also a vehicle—making justice conform more closely with law.

Professor Lisa Lowe's description of Asian America as composed of "heterogeneity, hybridity, and multiplicity"³⁷ is apt of any twenty-first century coalition, not just one composed of Asian Americans. For example, the center has already joined amicus briefs in the areas of marriage equality, voting rights, language access in education, employment discrimination, and immigration, including an amicus brief filed with the California Supreme Court to address the constitutionality of Proposition 8,³⁸ which attempted to nullify same-sex marriage.

These amici or amicae curiae—"friends of the court"—briefs are critical interventions. Amica/Amicus briefs can often advance arguments that the principal lawyers may decide not to make because of their pragmatic and strategic quest to reach a majority of the judges of any given court. However, these additional briefs can remind the courts not only of principles of justice underlying the technical legal arguments, but also of the political context of their decision-making role, outside of narrow doctrinal frames. Indeed, in Fred Korematsu's original case, the Japanese American Citizens League eventually filed a so-called "Brandeis Brief"—an amicus brief in the U.S. Supreme Court citing to three hundred academic works rather than relying mostly on technical, legal arguments.³⁹

Just as the three *coram nobis* teams understood the wisdom of filing in three separate trial courts, having three bites at the apple rather than taking one big but risky bite in the U.S. Supreme Court, the Korematsu Center plans to prepare the ground for law reform by incremental and broadly

distributed social justice interventions with judges who are more inclined to understand the direction toward which law needs to move in order to keep abreast of social change. This strategy takes advantage of our pluralistic legal environment and the multiple opportunities for local experimentation that exist.⁴⁰

In its inaugural year, the center has already committed to research initiatives, such as Lutie A. Lytle Black Women Faculty Writing Workshop, held every summer at different law schools. The center's range of participation in advocacy, education, and research illustrates concretely what Center Director, Professor Robert Chang, has theorized in his scholarship: that social justice activists need to move from identity politics to *political identities*.⁴¹ According to Professor Chang, political identities are based more on explicit political commitments rather than narrowly defined views of who is inside and who is outside the circle of friends or amici.⁴² These broad-based efforts also keep sight of the interplay between individual versus structural sources of equality as well as the mutual construction of racism with other forms of "isms," such as class-based oppression, gender-based oppression, and other inequalities based on religion, sexual orientation, immigration status, and so on—what is sometimes called intersectionality,⁴³ or simultaneity.⁴⁴ Without a deep understanding that each of these axes of injustice are part and parcel of an overall system and structure of power, in which some groups are systematically favored and others disfavored, any efforts at social change will only end up repeating the hierarchies but in slightly disguised ways.

In addressing inequality, we also need to be wary of unwarranted utopianism or premature racial redemption,⁴⁵ for example, in the form of post-racialism. Critical theorists have often pointed out the conflation of the "is" and the "ought" in colorblindness.⁴⁶ While we all strive toward a society where race and other distinctions do not systematically result in inequality, we are still in the "is" stage—race and other social categories do still matter.⁴⁷ It is tempting to posit that before we circle the board to "Go,"

we no longer have to go through “Race Place.”⁴⁸ But it’s not so simple, unfortunately. In the post-9/11 context, and as many Asian American law professors have noted, however, racialized religious discrimination has run rampant both within and outside the United States. While the majority of Muslims worldwide live in Asia,⁴⁹ in the United States this kind of discrimination has been manifested primarily against people of Middle Eastern descent or people who look “Middle Eastern.” Unmistakable historical parallels can be drawn to the prejudice and discrimination experienced by Japanese Americans during World War II.⁵⁰

As advocates, educators, and scholars, we have a lot of work to do to make these and other links visible, to re-frame dominant narratives so as to better address the heterogeneous nature of our identity politics as well as our political identities, and to interrupt the circulation and re-circulation of toxic cultural memes. This is a social justice full employment act. Perseverance is a key trait throughout these various social justice efforts. Some successes are still incipient.⁵¹ Mrs. Kathryn Korematsu has said:

I would like to tell [students] to . . . get an education primarily. Learn as much as you can about . . . your past, the past history of Japanese Americans in the United States, especially the internment. . . . To always guard, be on guard, to protect their rights, to stand up for their rights. [Becomes emotional] Sorry. That one person can make a difference, even if it takes forty years.⁵²

As one of my mentors, Judge A. Leon Higginbotham, would tell his clerks, “At some points in history some people just have to keep the flame burning, and that’s as much [as] you can do.”⁵³

February 19, 1942, is the day that President Franklin Roosevelt signed Executive Order 9066, setting in place the legal framework for persons of Japanese ancestry to be sent to internment camps.⁵⁴ As Hirabayashi team leader Rod Kawakami recalls, the early Days of Remembrance, held on February 19 each year to mark this notorious event, helped push the

reparations movement forward in Seattle.⁵⁵ With the launch of the Korematsu Center for Law and Equality at Seattle University School of Law, we remember past injustices and are fortunate in being able to blow on the flame, perhaps to light fires of justice, so that future generations will still have a living legacy of Fred T. Korematsu, the everyman who believed in the equality and liberty promised by law. Today, with our friends—our amici and amicae—we witness a significant feature emerging in this institution’s distinctive stamp of standing for excellence and reaching for justice. Taking our cue from the obscure procedural device of *coram nobis*—before us, in our presence—we can actively seek to bear witness to and then rectify the past errors that have led to inequality, and move together toward a future of greater equality through law.

¹ Donald and Lynda Horowitz Professor for the Pursuit of Justice, and Associate Dean for Research and Centers, Seattle University School of Law. This essay is adapted mostly from a keynote speech originally given at the launch of the Fred T. Korematsu Center for Law and Equality, held on April 18, 2009. Its introduction is taken from a presentation made at the conference on Taking Reparations Seriously at the Thomas Jefferson School of Law, held on March 16–17, 2006. The keynote address is dedicated to the Korematsu family. Therese Norton (Seattle Univ. School of Law, class of 2010) provided stellar research support, as always. All mistakes are those of the author.

² *Korematsu v. United States*, 323 U.S. 214 (West headnote 1) (1944).

³ See generally Rebecca Tsosie, *Acknowledging the Past to Heal the Future: The Role of Reparations for Native Nations*, in REPARATIONS: INTERDISCIPLINARY INQUIRIES 43 (Jon Miller & Rahul Kumar eds., 2007).

⁴ U.S. COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS (1997).

⁵ Michelle Malkin, *HOW NOT TO TEACH JAPANESE INTERNMENT*, MICHELLE MALKIN.COM, Jan. 19, 2005, <http://michellemalkin.com/2005/01/19/how-not-to-teach-japanese-internment-2/>. Professor Eric Muller and Professor Greg Robinson both went online to refute her unsubstantiated allegations. See Muller and Robinson on Malkin, www.isthatlegal.org/Muller_and_Robinson_on_Malkin.html (last visited March 21, 2010).

⁶ Pub. L. No. 100-383, 102 Stat. 904 (codified as 50 App. U.S.C. § 1989b et seq. (1988)).

⁷ Fred T. Korematsu Center for Law and Equality, http://law.seattleu.edu/Centers_and_Institutes/Korematsu_Center.xml.

- ⁸ Lorraine Bannai, *Taking the Stand: The Lessons of Three Men Who Took the Japanese American Internment to Court*, 4 SEATTLE J. SOC. JUST. 1 (2005).
- ⁹ FED. R. CIV. P. 60 Advisory Committee Notes to the 1946 amendment (subdivision b).
- ¹⁰ Several modern commentators trace the origins of *coram nobis* to the sixteenth century. See, e.g., ELI FRANK, *CORAM NOBIS: COMMON LAW, FEDERAL, STATUTORY: WITH FORMS 2* (1953), whereas habeas corpus has a longer apparent pedigree (depending on the commentator), either to the fourteenth century, Brian Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 NW. U. L. REV. 1413, n.237, or the Magna Carta of 1215.
- ¹¹ *Korematsu v. United States*, 323 U.S. 214 (1944). I have taught this obscure device for about a decade, starting with civil procedure students at Seattle University School of Law around 1999 using draft materials and most recently in 2009 at the University of Michigan Law School.
- ¹² *Korematsu*, 323 U.S. at 223–24.
- ¹³ *U.S. v. Morgan*, 346 U.S. 502, 511–12 (1954).
- ¹⁴ See generally GREG ROBINSON, *A TRAGEDY OF DEMOCRACY: JAPANESE CONFINEMENT IN NORTH AMERICA* 32–33, 47–56 (2009).
- ¹⁵ *Hirabayashi v. United States*, 320 U.S. 81 (1943), *Korematsu v. United States*, 323 U.S. 214 (1944), *Yasui v. United States*, 320 U.S. 115 (1943) and *Ex parte Endo*, 323 U.S. 283 (1944).
- ¹⁶ *Korematsu*, 323 U.S. at 216 (same as epigraph).
- ¹⁷ See *Korematsu*, 323 U.S. at 224.
- ¹⁸ William G. Wheatley, *Coram Nobis Practice in Criminal Cases*, 18 AM. JUR. TRIALS 1 §§ 7, 11–22 (2009).
- ¹⁹ *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).
- ²⁰ ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* 306–09, 312–16 (2001) (containing a reproduction of memoranda sent by Department of Justice members to the Solicitor General and Attorney General).
- ²¹ Eric P. Fournier, *P.O.V.: Of Civil Wrongs and Rights* (PBS television and National Asian-American Telecommunications Association (NAATA) co-broadcast July 10, 2001).
- ²² *Korematsu*, 323 U.S. at 225–48 (Roberts, J., dissenting), (Murphy, J., dissenting), (Jackson, J., dissenting).
- ²³ See generally ROBERT S. SHIMABUKURO, *BORN IN SEATTLE: THE CAMPAIGN FOR JAPANESE AMERICAN REDRESS* (2001).
- ²⁴ Interview with Dale Minami in Seattle, Wash. (Feb. 8, 2003), *Feeling anger upon reading Korematsu v. U.S. in law school (Dale Minami Interview Segment 16)*, DENSHO DIGITAL ARCHIVE, <http://archive.densho.org> (last visited Jan. 26, 2010).
- ²⁵ *Id.*
- ²⁶ Email on file with author.
- ²⁷ YAMAMOTO ET AL., *supra* note 20.
- ²⁸ Email on file with author. See generally ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (2000).
- ²⁹ *Id.*

³⁰ Taunya Lovell Banks, *Outsider Citizens: Film Narratives about the Internment of Japanese Americans*, 42 SUFFOLK U. L. REVIEW 769, 786 (2009).

³¹ Nisei is the Japanese American term for second generation; Sansei is the Japanese American term for third generation.

³² See, e.g., YAMAMOTO ET AL., *supra* note 20 at 279–80 (2001); Emiko Omori, *P.O.V.: Rabbit in the Moon* (PBS television broadcast July 6, 1999); Fournier, *supra* note 21; see generally JOHN OKADA, *NO-NO BOY* (Combined Asian American Resources Project 1976).

³³ Interview with Fred Korematsu, in Seattle, Wash. (May 14, 1996), *Children find out about World War II case in school (Fred Korematsu–Kathryn Korematsu Interview Segment 21)*, DENSHO DIGITAL ARCHIVE, <http://archive.densho.org> (last visited Jan. 26, 2010).

³⁴ Bannai, *supra* note 8.

³⁵ *Ex parte Endo*, 323 U.S. 283 (1944).

³⁶ Jerome M. Culp, Jr., *Latinos, Blacks, Others, and the New Legal Narrative*, 2 HARV. LATINO L. REV. 479, 479 (1997).

³⁷ LISA LOWE, *IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS* 60 (1996).

³⁸ Proposition 8 (California Marriage Protection Act), Nov. 2008. Proposition 8 is now Cal. Const. art. I, § 7.5.

³⁹ Brief for Japanese American Citizens League as Amicus Curiae Supporting Appellant, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 22), 1944 WL 42852.

⁴⁰ As Center Director, Robert Chang has additionally written that amicus briefs can also be “effective tools to engage and educate community-based organizations and their constituencies . . . to democratize the courts.” Robert S. Chang & Karin Wang, *Democratizing the Courts: How an Amicus Brief Helped Organize the Asian American Community to Support Marriage Equality*, 14 ASIAN PAC. AM. L.J. 22, 23 (2008).

⁴¹ ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW AND THE NATION-STATE*, 32, 45 (1999).

⁴² *Id.*; Chang & Wang, *supra* note 40 at 23.

⁴³ See KIMBERLÉ CRENSHAW, *DEMARGINALIZING THE INTERSECTION OF RACE & SEX* (Richard Delgado ed., 2003) (1989); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics & Violence Against Women of Color*, 43 STAN. L. REV. 1241–99 (1994).

⁴⁴ See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 879–80 (1997).

⁴⁵ Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73 (1998) (reprinted in 19 B.C. THIRD WORLD L.J. 73 (1999)).

⁴⁶ See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 6–9 (2001); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind*, 44 STAN. L. REV. 1, 1–5 (1991) (Gotanda explains in his description of colorblindness: “Racism is irrational because race is seen as unconnected from social reality, a concept that describes nothing more than a physical presence”).

⁴⁷ CORNEL WEST, *RACE MATTERS* (1993).

⁴⁸ Lonnae O'Neal Parker, *WHITE GIRL?; Cousin Kim is passing. But Cousin Lonnae doesn't want to let her go.*, WASH. POST, Aug. 8, 1999 at F01.

⁴⁹ Pew Research Center, *Mapping the Global Muslim Population: A Report on the Size and Distribution of the World's Muslim Population 1* (2009) (finding that while Muslims are found on all five inhabited continents, more than 60 percent of the global Muslim population is in Asia and about 20 percent is in the Middle East and North Africa).

⁵⁰ Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215 (2005).

⁵¹ One example of incipient successes is H.R. 40 (named after the failed reparations bill passed by Congress and vetoed by President Andrew Johnson, which guaranteed each newly freed slave forty acres and a mule). H.R. 40 was first introduced in 1989 by Representative John Conyers and reintroduced in every Congress since then:

To acknowledge the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the thirteen American colonies between 1619 and 1865 and to establish a commission to examine the institution of slavery, subsequently de jure and de facto racial and economic discrimination against African-Americans, and the impact of these forces on living African-Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes.

Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 111th Cong. (1st Sess. 2009).

⁵² Interview with Fred and Kathryn Korematsu, in Seattle, Wash. (May 14, 1996). *Thoughts for future generations: "one person can make a difference"* (Fred Korematsu-Kathryn Korematsu Interview Segment 21), DENSHO DIGITAL ARCHIVE, <http://archive.densho.org> (last visited Jan. 26, 2010).

⁵³ Margaret Chon, *A Symposium Tribute to A. Leon Higginbotham Jr.: The Mentor and His Message*, 33 LOY. L.A. L. REV. 973, 974 (2000).

⁵⁴ Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942), *repealed by* Proclamation No. 4417, 3 C.F.R. § 8 (1976).

⁵⁵ Telephone interview with Rod Kawakami, in Seattle, Wash (May 4, 2010). Mr. Kawakami succeeded Kathryn Bannai, who was the first Hirabayashi team leader.