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STRICT SCRUTINY | THE TRAGEDY OF CONSTITUTIONAL LAW

The close-up discloses a deprecation of the subject, an emptying out of personality. The face, then, withdraws from the represented space, retreats into an “other dimension”.

Joan Copjec, *Imagine There's No Woman* (2002)

In 1995, the U.S. Supreme Court's decision, *Adarand Constructors Inc., v. Peña*, required all federal race-based policy to be subject to strict scrutiny – the highest level of constitutional review. The ruling effectively forced federal affirmative action policies into a defensive posture – as the court granted that such policies in education, contracting, and public hiring were forms of reverse discrimination against white applicants. Despite, or perhaps because of, this reality, the court accompanied its ruling to treat all race-based policies equally with a “wish to dispel the notion that strict scrutiny is “strict in theory, but fatal in fact.”¹

The Supreme Court's wish in *Adarand* designates the work of a forbidden desire.² While the ruling is made in the name of reviewing all race-based policies equally, it also expresses a desire to abolish legal remediation of racial inequality. Formal equality, prioritized over the vision of racial equality animating post-1965 civil rights policy, is wrapped in both deathly language and deadly effects. In *Adarand*, we see that the relationship between the ideal of strict scrutiny and the constitutional guarantee of equal protection is both the bane of contemporary racial jurisprudence, as well as, in my view, the condition of possibility for the relationship to be critically examined and reformed.

Thus, this article is a critique of strict scrutiny doctrine in racial jurisprudence, and the legal history of *Korematsu v. US* (1944) and Japanese American internment from which the doctrine originates. It takes the post-civil rights maxim that the doctrine is not “strict in theory, but fatal in fact” as an admission of sorts, and argues that we should understand the doctrine's “fatality” through the structure of tragedy. To do this, I marshal methodological support from cinematic representations of Japanese American internment in the film, *Snow Falling on Cedars* (1999). Understanding strict scrutiny through tragedy, and more specifically, the relationship tragedy poses between the feminine and law, allows us to discover new ways of interpreting and utilizing the doctrine in racial jurisprudence.

Part I examines how *Snow* stages a relationship between race, law, and the feminine in order to outline an alternative method of reading *Korematsu*. Part II uses this method to offer a critique of *Korematsu*'s legal history and scholarly interpretations, which have all mistakenly disaggregated race and nation despite the fact that the logic of strict scrutiny poses race as a condition of nation. Part III provides a more detailed

¹ 515 U.S. 200 (1995) 237 (quoting *Fullilove v. Klutznick*, 448 U.S. 448 (1980) 518).

² Sigmund Freud, *THE INTERPRETATION OF DREAMS* (A. A. Brill trans., New York: Gramercy Books 1996).

analysis of what I call the 'conditional logic of strict scrutiny' as it is imagined in the language of the case. Part IV moves beyond the tendency to read internment within the terms of political philosophy, and demonstrates how the force of sexuality is related to internment by bringing *Snow*'s cinematic representations of the feminine in Part I to bear on *Korematsu*'s conditional logic of strict scrutiny. Finally, Part V elaborates *Snow* as *Korematsu*'s aesthetic dimension, and reads the conditional logic of strict scrutiny as a representation of the tragic structure of pain and beauty in constitutional judgments of racial discrimination.

I. Race, Law, and the Feminine – a cinematic example

In the film, *Snow Falling on Cedars* (1999), a young white World War II veteran, Ishmael Chambers, returns to his island hometown in the Puget Sound to begin working as a journalist for a local newspaper he inherited from his father. As the newspaper's lone employee, Ishmael covers the criminal trial of Kazuo Miyamoto, who is accused of killing Carl Heine, one of the town's white fishermen. During his investigation, Ishmael negotiates traumatic memories of his relationship with Hatsue Miyamoto and his battles at war before he finally comes forth with the necessary information for Kazuo's acquittal.

Organized by the temporality of what turns out to be a criminal trial occasioned by the accidental death of a fisherman at sea one foggy night, *Snow* braids together three major dramas: the drama of World War II that leads to the internment of the Japanese American community on the West Coast and the conscription of young men to the Pacific and Western Fronts; the legal drama of a Japanese American criminal defendant railroaded through a murder trial for his race, culture, and economic exclusion; and the romantic drama of coming of age as a Japanese American girl and a white boy through an illicit interracial love affair. Although these dramas, disparate in time and place, come together nicely through the course of Ishmael's restoration from scorn and bigotry to innocence and virtue, one immediate impression *Snow* offers in its attempt to span war and peace, race and nation, and politics and experience, is the current of sexuality underwriting all three dramas.³

War stigmatizes the purportedly equal Japanese American population, who fished and farmed as all the others in the provincial town, and the countless young men (including Ishmael), who returned home from war dead, maimed, mute. The scenes of war make boys into men, and Japanese into Americans, through an unspoken but shared experience of castration.⁴ Though omitted from the film, the novel details the private thoughts of the mortician charged with determining Carl's cause of death. Enviously observing Carl's naked and virile – though dead – body, he wonders how it is that the life

³ This analysis is of the film version, Scott Hicks (dir.), *SNOW FALLING ON CEDARS* (Universal Pictures 1999), unless otherwise indicated (hereinafter "*Snow*"). The film's narrative is almost identical to the narrative constructed by David Guterson in the original novel, even as their respective aesthetics and points of emphasis diverge in interesting ways. See David Guterson, *SNOW FALLING ON CEDARS* (New York: Vintage Books 1995). For an introductory comparison of the two versions of *Snow*, see Jennifer Anne Haytock, *DAVID GUTERSON'S SNOW FALLING ON CEDARS: A READER'S GUIDE* (New York: Continuum International Publishing Group 2002).

⁴ Both the novel and the film's aesthetic qualities rely heavily on subtle looks and terse comments between men regarding this thematic – Japanese and white, at work and at war, in public and in private.

of such a robust man could be taken so easily.⁵ Though the mortician concludes that Carl died by drowning, he is fixated on a wound to Carl's head – of mysterious and indeterminable cause – which would become the occasion Kazuo's criminal prosecution. Unlike the mortician's sterile examination of death, we are allowed to see how Kazuo, Carl, and Ishmael are each separately faced with the fragility of their own mortality as witnesses of soldiers, dismembered and paralyzed at battle. Each must painfully negotiate family life after war through guilty memories of killing someone else, indescribable and secret.

These memories of war embedded in the film's scenes of justice, both civil and criminal, work towards the traditional anchor of family life – the husband and wife's earnest labor, their investments in the home. Ishmael and Kazuo have in common their tendency towards emotional fixation on family in the chaos of their war-torn worlds – the former on Hatsue as the lost object of an interrupted and ultimately unrequited love, the latter on farmland as the lost territory of a confiscated family inheritance. Ishmael's love for Hatsue is never codified by the legal status of marriage. The two are first separated by Hatsue's physical removal from San Pedro to Camp Manzanar; and later, her marriage to Kazuo, with whom she hoped to recover the possibility of a respectable life while they were both imprisoned. Kazuo, who had negotiated a prior deal with Carl's family to circumvent the Alien Land Laws, is denied this land and the dreams of self-sufficiency and capitalization associated with it when he is sent to the internment camps. The bodily inscription of resentment on his face regarding this reneged contract is introduced by the prosecution as key evidence establishing suspicion for Carl's death. For both, family becomes the referent for the good life, while at the same time, the cause of each man's potential demise.

Amidst these scenes of justice, the scenes of interracial love provide the most pointed gestures towards *Snow*'s unifying narrative. The site of sexuality – poetic, intimate, and dangerous – allows the film's three dramas to come together not only through the pain and death of natural disaster, but the sweetness and plenitude of nature's beauty. Indeed, it is in the cradle of nature that Ishmael and Hatsue come to know, to consummate their desire for each other despite the ugly cynicism of the world. Child's play in the liminal spaces of forest and beach becomes a deep-seated, essential beauty, an attraction to which drives *Snow* to make sense of otherwise unresolved, mysterious, and unknowable flaws of human character and condition.

In fact, it is in this beauty that the diverse critics of *Snow* – both novel and film – find a point of agreement. The feminine figures of woman and land contain in their image the historical potential for mass human destruction and the secret of human life. Both women in Ishmael's life, his mother and Hatsue, at key moments on his road to personal redemption, attempt to reveal to him this secret. However, their words fall on his ears as nagging or cruel advice to settle, marry, have children. Be happy, they plea, or command, as Ishmael's cloud of resentment and helplessness overwhelms him, as the memory of that moment in his life when all seemed lost returns. A variety of cinematic images illustrates this quite clearly as this memory returns to Ishmael, again and again, in the taste of strawberries, Hatsue's letter, her face, his amputated arm, fish out of water, the smell of cedar – all of which serve to reference a time with Hatsue now lost. Against

⁵ Guterson 49-50.

this feminine beauty, its promise of bliss or, at the very least, deliverance from terror, the law is cast as the agent of war, castration, and racial inequality.

Thus, despite the fact that *Snow*'s temporal logic follows Kazuo's criminal trial, it is Hatsue and Ishmael's illicit affair, and within this, the haunting of feminine beauty, that brings together the three dramas – scattered as this feminine beauty might be through pieces of Ishmael's memory triggered at various stages in the mystery of war and murder. The love affair is presented as a subplot to the criminal investigation that establishes unjust suspicion or personal prejudice in what is supposed to be fair and systematic legal procedure. The love affair is also symbolic of the triangulated sexual relation between the white man, Asian woman, and Asian man structuring the history between Asia and the West.⁶ At the end of the film, however, we find that the love affair functions in both these respects, and with an additional function of developing Ishmael's character and all that he represents as a former soldier, a free speech journalist, and a white man capable of interracial sexual desire. The question repeated over and over again in *Snow*: Will Ishmael make sense of this interracial love, lest it consume his being and life?

Ishmael ultimately ends up rejecting principles of fairness, familial devotion, legality, morality, or nature as satisfactory answers to this variously articulated question. At the end of Ishmael's catharsis and his short-of-heroic exposé of key evidence for Kazuo's defense, Ishmael finds peace in knowing that while tragic "accidents" do occur in the realm of politics, justice, subsistence, and family relations (i.e., Carl's death, Japanese internment, war atrocities), they do not occur in the realm of love. Recall the conversation between Ishmael and Gudmundsson, Ishmael's mentor and surrogate father figure, the night before the introduction of new evidence in court. Gudmundsson reflects, "Accident rules every corner of the universe. Except maybe the chambers of the human heart." And Ishmael affirms this by reviving childhood memories of their love without the anguish and resentment underwriting his every look at Hatsue in previous scenes, and especially during Hatsue's testimony on the witness stand. Made whole as a white man in love with an Asian woman, he is able to deliver on his civic duties as a journalist and make human his acts of war.

This revival plays as a miracle of sorts, after viewing the entanglement of image and emotion that makes up Ishmael's traumatic experience at war. Ishmael, alone in his house after watching Hatsue testify and then rescuing her and her father stranded on the roadside in the middle of a snow storm, finds Hatsue's break-up letter, written to him while she was imprisoned and first read by him while he was away at battle. The scene is comprised of a complex montage of images stitched together by Hatsue's voiceover reading of the letter and the sounds of gunshots and exploding artillery. There are images of Ishmael re-reading the letter in real time, shot through with Ishmael's memories of reading it while in his barrack, Ishmael remembering himself remembering it during his near death experience, Ishmael remembering himself remembering him and Hatsue as children stumbling upon a fish at the beach. There are also images of Hatsue addressing the letter at the camp, reading it to her mother, reading it to Ishmael in the abstract darkness of his imagination. Throughout, there are flashed images of dead white male bodies on the beachfront battlefield, nighttime bombings, Ishmael's recognition of his injured body, and dead fish washed up onto shore.

⁶ See generally, Gina Marchetti, *ROMANCE AND THE "YELLOW PERIL": RACE, SEX, AND DISCURSIVE STRATEGIES IN HOLLYWOOD FICTION* (Berkeley: University of California Press 1993).

Amid Ishmael's confusion of sound and voice, memory and event; amid Hatsue's ambivalence towards her affirmations of love and its impossibility; and amid her indecision toward whom she reads and writes – Ishmael finds his voice at the precise moment that he remembers his amputated arm. An inverted image of Ishmael's pained and maligned face as he lies helplessly and less one limb on the operating table, he fires back, "Fucking Jap bitch." The emotive force with which Ishmael directs his trauma (his war injury and rejected affection) against Hatsue, contrasted against the cold indifference with which Hatsue expresses her trauma (her false imprisonment and racial stigma) against Ishmael—Ishmael's and Hatsue's speech acts overlaid with the sound of gunfire are equated and conflated as Ishmael struggles to regain a sense of self from the chaos of his memories. Given that no other scene significantly references World War II, and given that in Ishmael's economy of reminiscences he equates the back and forth between Japan and America at war with him and Hatsue in quarrel, we are left to assume that when Ishmael is later able to discern reason and intention in his love for Hatsue, he was able to find the same in his involvement in the war. We are led to understand Ishmael, and the construction of his emotional prison, from the equality of offensives that he and Hatsue, the United States and Japan, launched against each other as embittered and embattled lovers.

This balance is delicate: it remains sexual love only to the extent that it is not tainted by both the tradition of US race-based imprisonment on false pretenses and the culmination of World War II in the US nuclear attack on Hiroshima and Nagasaki. These two elements are necessarily invisible, repressed, and disavowed as a matter of history and geography in the film – and more importantly, as a matter of sexual relation between Ishmael and Hatsue. Neither finds expression in history as foreign policy, judicial procedure, and personal memory; nor in space as the place of the battle scenes are unnamed and unidentifiable, and legal adjudication adheres strictly to boundaries between criminal, property, and civil rights law. Thus, there is a curious inequality at the level of representation that traverses *Snow's* three dramas. In contrast to the permanent and literal representation of emotional and psychological injury – the amputation of Ishmael's arm – on the white masculine body,⁷ the Asian feminine body remains expressionless as a signifier of pain.

Returning to the scene of Ishmael's reverie induced by Hatsue's rejection letter – where the film inscribes the pain of Hatsue's speech act (her break-up letter) on Ishmael's body (his injured, amputated arm) – we find no similar inscription of pain on Hatsue's body by Ishmael's speech act, "Fucking Jap bitch." Hatsue's quivering face, washed-out skin, teary eyes, classic red lips – they are the features of the white feminine ideal, but one without the powers to invoke masculine protection from injury. She was, after all, not a real princess. She was, as described by Guterson, San Piedro's Strawberry Princess, "a virginal Japanese maiden dressed in satin and dusted carefully across the face with rice powder." Crowned in a public ceremony by the town's mayor the day before the

⁷ The inscription of injury on the Asian masculine body, represented by Kazuo, still has a sort of presentness that the Asian feminine body does not. Kazuo's time as an American soldier on the Western front allows him to bear witness to the masculine castration that *Snow* depicts as the trauma experienced by those in wartime battle. In this respect, it is this experience that allows Kazuo and Carl to find common ground and negotiate the overdue land deal before Carl's accidental death at sea.

Japanese would begin harvesting the town's berries, she was the necessary but "unwitting intermediary between two communities, a human sacrifice."

It is this inequality at the level of representation of injury – traumatic and irreparable loss – that speaks to the value of *Snow* for a contemporary understanding of the meaning of internment in the United States. Internment marks less an inequality of inclusion in the nation, and more an inequality of injury necessary to becoming culturally recognizable. This inequality registers starkly in the film, where Ishmael's body is literally partial, missing, in pain, and Hatsue's body remains, like all the others, the other Japanese. In a film that uses the resolution of racial tension at the level of criminal and civil adjudication to attempt to resolve the tragedy of war, it is the interracial sexual desire between Ishmael and Hatsue that belies the ideal of equality Ishmael imputes onto *Snow's* social world. Their sexual relation, the traumatic memory of it, its impossible representation, spills over into the law – a law which carries with it a narrative of racial equality through legislation, redress through historical revision, and ultimately, compassion towards human suffering.

II. *Korematsu: the conditional logic of strict scrutiny*

On this reading of *Snow*, the historical scene of internment insists that we consider the force of sexuality in the field of law, politics, and adjudication.⁸ This is not to say that using sexuality to analyze internment as a legal phenomenon would not benefit from studies of individual sexual motivations, social patterns of interracial marriage, or even studies of sex-based economies. Rather, a consideration of the force of sexuality

⁸ The post-war historical scene provides an important point of departure, in which we witness the emergence of Japan and other industrial Asian countries on the global scene as major economic players. Cinema, over law, has better represented the geopolitics of the US-Japan relation, as one of cooperation and competition between (admittedly hierarchical) colleagues in the global market place. Take for example, the nearly replicated representations of the American relationship to post-World War II Tokyo in the two films, Stuart Heisler (dir.), *TOKYO JOE* (Columbia Pictures 1949) and Sofia Coppola (dir.), *LOST IN TRANSLATION* (Focus Features 2003).

In *Tokyo Joe*, a retired World War II veteran returns to Tokyo to make a living, and in the midst of navigating the corrupt Japanese economy and the bureaucracy of American military occupation, he is reunited with his long-lost white wife and child. In *Lost in Translation*, two Americans, both caught in their respective joyless and dead-end family lives, find each other and revitalize their investments in their families as they revel in the comic and excessive culture of a fully industrialized Tokyo. Both films set up a racialized contrast between the cityscape of Tokyo and the private life of a white family, however, this difference is negotiated and managed by the white protagonists' ability to form a mutual relationship with Tokyo and in the process find a resolution for white familial trouble.

The former film turns on the protagonist's ability to maintain a personal relationship of respect and honor with his former Japanese business partner; the latter film turns on the protagonists' ability recognize a shared sense of cosmopolitanism with Japanese culture. Establishing these mutual relationships, the white family splintered by the horrors of war is able to rebuild itself, and the white family repressed by the mundane of commodified life is able find enjoyment in such security. Through economic partnership and cultural exchange, life in Tokyo is economically and culturally meaningful for America and Tokyo embraces America's gesture of recognition despite the trauma of Hiroshima and Nagasaki. These two representations of US-Japan post-war relations represent what David Palumbo-Liu describes as the "interpenetration" and "flexibility" characteristic of the modern post-war "crisis management" relationship between Asia and America. David Palumbo-Liu, *ASIAN/AMERICAN: HISTORICAL CROSSINGS OF A RACIAL FRONTIER* (Stanford: Stanford University Press 1999) 2-8. See, especially, his chapter, *Pacific America: Projection, Introjection, and the Beginnings of Modern Asian America*, 17-42.

troubles approaching the question of internment as a matter resolved by rational reforms to legal doctrine or policy. For it is the force of sexuality, as seen in *Snow*, that presents itself as the unrepresentable underside from which the textuality of law and law-making emerge as the rule of law. This underside of the law is best outlined through an attention to the feminine – how its presence is felt in the various texts that comprise the mainstream discourse on internment, how it erupts despite its repression in the dominant political terms shaping legal debate, and how it can, or cannot be, seen.

Korematsu v. United States (1944)⁹ remains good law in two divergent fields of law: Fourteenth Amendment anti-discrimination jurisprudence, commonly known as ‘civil rights law’ concerning race-based state action and inequality; and executive wartime jurisprudence, commonly known as ‘national security law’ concerning the regulation of executive power during times of emergency. The first branch of *Korematsu*’s legacy, which establishes the constitutional foundation for outlawing race-based state action through the rule of “strict scrutiny”, has been rendered void to the extent that the rule has provided little or no relief for racial minorities. The second branch of *Korematsu*’s legacy, which defers constitutional protection of American civil liberties to the constitutional mandate for executive action to protect the nation, is however, a mainstay of authority for various legal reforms made during times of war, including the present moment.

This bifurcated legal history of *Korematsu* tells a story about Japanese American internment that sets the law’s treatment of race and nation down two separate doctrinal paths. However, exactly how is “strict scrutiny” – which reasons that if the state has a compelling objective for racially discriminatory action, and the course of action compelled is narrowly tailored to achieve this objective, that the state’s action is not based on racial animus and thus constitutional – entangled with national defense? Is national defense ever anything other than compelling, necessary, urgent? And how does the either/or relationship that *Korematsu*’s legacy presents between national security and racial discrimination compare to the way the two are related in the rhetoric of the case, in which the presence of the need for the former signals the absence of the latter?

Further, does this non-coincidence push us to think further about the relationship between race, nation, and sexuality? Where do we locate the work of compulsion (within and/or beyond the nation), in the structure of justification *Korematsu* sets for the development of contemporary civil rights law? Despite the historical inconsistencies and inaccuracies that attend any treatment of the two poles of race and nation separately in American constitutional law, does this very legal formation not reveal a certain necessary omission at the heart of anti-discrimination jurisprudence – an omission of a relationship with the feminine, the invisibility of the feminine within law and its production of a nation defined as fraternal, and thus sexually repressive, in its politics?

Like the scenes of criminal justice and war in *Snow* and Ishmael’s imputed ideal of equality on both counts, the strict scrutiny logic of *Korematsu* holds out the possibility for balance between the defensive excesses of sovereign power and the subjection of racial minorities under the *nomos* of the nation. In so doing, the logic limits the law’s capacity to recognize the nuances of racism: if racism is rational, justifiable, and calculated (thus constitutional), then it is not naked, compulsory, and emotive (thus unconstitutional). The logic’s flaw is not that the law can only recognize two as opposed

⁹ 323 U.S. 214 (hereinafter “*Korematsu*”).

to multiple types of racial subjection, or that it privileges remediation for the former and not the latter, but rather the conditional relationship the law poses between the two – if one, then not the other. If the law can, at best, only approximate an equal relationship between state action that protects itself during times of national emergency and that protects its racial minorities from racism, then why did *Korematsu* pose *this* particular relationship between the two? What do we make of this overconfidence in the law – which insists that emergency obviates animus, that need eliminates passion, that justification negates compulsion?

There are two major sources of discontent towards *Korematsu*, neither of which actually takes issue with the fact that *Korematsu* stands for a logic that makes a finding of racism conditional to the state of national security. In one instance, *Korematsu* stands for the adjudication of apparently contradictory constitutional principles which cannot entirely mask the injustice of suspending the civil rights of a racial minority in the interest of providing for more expansive executive powers necessary to protect the nation against its warring enemy. On this reading, whether opinion sways toward a condemnation of targeting American citizens based on racial identity for any reason, or a total defense of expansive executive powers that use racial identities during national emergencies, the opinions grant that there is an essential tension between protection of the nation and protection of racial minorities, and that the law can find a just way to negotiate this tension.¹⁰

In another instance, the problem of racial discrimination in *Korematsu* is subsumed under a prevailing and more fundamental legal tension between the civil rights of citizens and the executive powers of the nation representing these citizens. Race, here, is understood as tangential or inessential to *Korematsu*. This suggests that *Korematsu* is more a case about conflict between nations, and less about conflict between races; that internment is more about the violence of war between nations, than it is about the violence of peace between intra-national racial groups; and that biopolitics is more about the obscenity of sovereign power, than it is about the perversion of race. In both instances – one in which *Korematsu* correctly took race into constitutional consideration, and the other in which the issue of racial discrimination is overshadowed by general constitutional issues – can be argued within the terms of the ‘if-one-then-not-the-other’ logic of strict scrutiny. The ‘other’ of the strict scrutiny logic is either justified in the former instance, or disavowed in the latter; but both justification and disavowal appear as two sides of the same coin.

The problem with the logic of strict scrutiny is the fact that it poses a *conditional* – ‘if-one-then-not-the-other’ – relationship between race and nation. This conditional logic of strict scrutiny should not be confused with an either/or, or disjunctive, logic. In adjudications of the constitutionality of race-based deprivations of civil rights, the conditional logic makes the denial of racism dependent on the affirmation of a national interest, but not the reverse (in which case it would then be properly disjunctive). In other words, the strict scrutiny logic says that a positive finding of a need for national defense negates the presence of racial animus. However, it does not say that a positive finding of racial animus negates a finding of a need for national defense.

¹⁰ The terms of debate surrounding *Korematsu* are, interestingly enough, reproduced in the common refrain heard since 9/11 about balancing “security” and “freedom.”

If strict scrutiny posed a disjunctive relationship between nation and race, it would then make sense to argue that *both* national exclusivity and racial animus worked together to produce the legal outcome of *Korematsu*. This would ground the concept of “racial foreignness,” as developed within critical race theory. Racial foreignness describes particular forms of racialization, including Japanese American internment, in the historical context of Asian (immigrant) exclusion from the *polis* and culture of the nation.¹¹ Within this historical context, internment as an example of racial exclusion based on national foreignness is a mode of exclusion in line with policies prohibiting immigration from Asian countries, the marginalization of Asian American communities from equal participation in the economy, and the social representation of Asian cultures as outside or counter to Western values. Notwithstanding the fact that determining racial foreignness through a general experience of national formation based on exercises of sovereignty and legislations of formal national belonging captures a limited range of racial exclusions at the heart of American democracy, the concept of racial foreignness does not entirely capture the critical pulse of *Korematsu*'s logic and what its legacy allows us to understand about the hydraulics of race in the United States. For this understanding, we now turn to a closer look at the conditional logic of *Korematsu* through the language of the case.

III. Korematsu: a closer look at the conditional logic of strict scrutiny

In 1984, Fred Korematsu was granted a writ of *coram nobis*, which set aside his criminal conviction for violating a local law excluding people of “Japanese ancestry” from remaining in particular areas of the West Coast, including his city of residence, San Leandro, California.¹² Finding forty years after internment that Korematsu's conviction was based on a grave and unconstitutional deprivation of due process, the court reflected on the meaning of the 1942 case:

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 constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It 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.¹³

¹¹ See, for example, Neil Gotanda, *Other Non-Whites in American Legal History: A Review of Justice at War*, 85 COLUMBIA LAW REVIEW 1186 (1985); and *The Story of Korematsu: The Japanese-American Cases* in CONSTITUTIONAL LAW STORIES, (M. Dorf ed., New York: Foundation Press 2004) 249-295.

¹² Civilian Exclusion Order No. 34 was issued by the Commanding General of the Western Defense Command under authority of Executive Order No. 9066 and the Act of March 21, 1942. It directed the exclusion after May 9, 1942 from a described West Coast military area of all persons of Japanese ancestry. Other orders, also pursuant to Executive Order No. 9066, provided for their mandatory reporting to assembly centers, and their detention in assembly centers and interment camps.

¹³ *Korematsu v. United States*, 584 F. Supp. 1406 (1984) 1420.

The court's memory of *Korematsu* here is striking. It is focused on the lesson *Korematsu* taught the nation: that no amount of military necessity and international hostility should lead the nation astray in protecting its citizens.

Yet, in its articulation of this lesson, *Korematsu* is couched in two disavowals. First, as legal precedent, *Korematsu* has limited application despite its permanent mark on legal history. And second, the "petty fears and prejudices that are so easily aroused" against minority groups during times of international and national emergencies are not shared by and do not emanate from the government and its various institutions, which are presumed instead to "protect all citizens".

While admitting in opinion that Korematsu's conviction was the result of a severe miscarriage of justice – that the government violated his right to due process – it simultaneously retracts this admission by denying the law as an agent and agency of racism. The way that the court's memory betrays its opinion, displaying here the court's profound ambivalence with respect to the law's racist past, begs the question of what terrible truth this ambivalence negotiates. This question is especially pressing given the fact that *Korematsu* has had far-reaching applicability in civil rights law by ratifying the "strict scrutiny" standard of review for race-based state action; and that it is the government which has been "so easily aroused" by "petty fears and prejudices", leaving minority groups completely exposed, in perpetual lack, no due process mediating their encounters with the government.

The fact that the strict scrutiny standard of reviewing race-based state action originates in *Korematsu* and is the case's lasting application to civil rights law is no simple matter.¹⁴ When the court is faced with circumstances in which the state explicitly uses racial categories in its enactment of law and this type of state action deprives this racial group of its civil rights, then the court will review this action with "strict scrutiny" to determine its constitutionality. The government must show that its action is justified by a "pressing public necessity,"¹⁵ or "compelling state interest"¹⁶ in contemporary language; and that the action is "commensurate with the threatened danger,"¹⁷ or "narrowly tailored."¹⁸ If these two conditions are shown, then the court will find that the race-based government action is not motivated by "racial antagonism,"¹⁹ or expressed another way later in the opinion, "racial prejudice."²⁰ Stated in Black's words:

¹⁴ Justice Clarence Thomas, in his dissenting opinion in *Grutter v. Bollinger*, 539 U.S. 306 (2003), 351, notes that the court first articulated strict scrutiny as a standard of reviewing racial discrimination in *Korematsu*. Interestingly, he uses this historical fact as a way to negate the compelling governmental interest of diversity at issue in affirmative action cases by contrasting it to the one at issue in *Korematsu*, namely national security during a time of war. Other key civil rights cases using and citing *Korematsu* as authority on strict scrutiny include: *Bush v. Vera*, 116 S. Ct. 1941 (1996); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967); and *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁵ *Korematsu* (1944) 216.

¹⁶ *Grutter* 325.

¹⁷ *Korematsu* (1944) 220.

¹⁸ *Grutter* 326.

¹⁹ *Korematsu* (1944) 216.

²⁰ *Korematsu* (1944) 223.

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. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.²¹

In conversation with Black, a dissenting Murphy writes, “Yet no reasonable relation to an ‘immediate, imminent, and impending’ public danger is evident to support this racial restriction”.²² In other words, there is no evidence showing a “pressing public necessity” that would “support,” *justify*, the race-based government action.

Murphy’s dissenting argument with Black here is not about which level of judicial scrutiny should be applied in this case, or about the effectiveness of strict scrutiny in regulating racial discrimination, but about whether the facts support the majority’s finding of justification that a strict scrutiny analysis is supposed to provide for race-based state action. Murphy, then, concluding that the evidence does not demonstrate a finding of justification for the race-based action, warns that the internment “falls into the ugly abyss of racism.”²³ The conversation between the two justices regarding the law is rather simple, and their two opinions regarding the persuasiveness of the evidence remains their most significant point of departure. In order to register his disagreement with the outcome reached by the majority, Murphy emphasizes the racism that remains – evil, void, immeasurable, and unsightly, troubling, embarrassing.

Despite their disagreement over the persuasiveness of the evidence, the two justices share a similar theory of race. Although Murphy provides a more detailed framework for analyzing whether a group’s racial characteristics have some “demonstrable relationship” to a particular “dangerous trait,” Murphy’s theory of race is, like Black’s, based on a notion of race as ancestry and descent. Both Murphy and Black use the language of blood to describe Japanese Americans as a racial group, diverging in their theories about what implication this has for determining that group’s capacity to be loyal to the nation. Murphy states, “All residents of this nation are kin in some way by *blood* or culture to a foreign land,”²⁴ even as he goes on to reject internment advocates’ “charge[s] relative to race, religion, culture, geographical location, and legal and economic status.”²⁵ The point here is that whether or not Murphy is convinced of actual disloyalty among Japanese Americans, he is still concerned about and grants racial difference, both biological and cultural.

The two justices also share a theory of justification for race-based state action. Strict scrutiny as a mode of legal analysis designed to ensure that racial discrimination is adequately justified goes unquestioned by the dissenting voice. That is, by centralizing constitutional inquiry around the issue of justification, the logic of strict scrutiny preempts the question of whether racial discrimination can be justified in the first instance. This presumption then leads to all sorts of inconsistencies regarding the relationship between race and nation. For example, Black accepts the idea that placing a

²¹ *Korematsu* (1944) 216.

²² *Korematsu* (1944) 235.

²³ *Korematsu* (1944) 233.

²⁴ *Korematsu* (1944) 242 (my emphasis).

²⁵ *Korematsu* (1944) 140 (Murphy, J., dissenting).

selective burden on some for the good of the nation is justified by conditions of warfare, at the same time that he elides the logic's presumptive correlation of race and national threat – or discrimination of Americans by race – by referring to Japanese Americans as “a large group of American citizens.”

[W]e are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.²⁶

At another point in the opinion, Black invokes the context of warfare to justify internment and defend it against the racial charge that it is a form of a concentration camp. First he disagrees that internment camps are concentration camps, a correlation he finds, apparently, unjustifiable.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers – and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies – we are dealing specifically with nothing but an exclusion order.²⁷

Black then immediately disagrees that only race was at work, and instead claims that both race and nation were used to provide a justifiable explanation for imprisoning Japanese Americans, by referring to them as “citizens of Japanese ancestry.”

To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily.²⁸

²⁶ *Korematsu* (1944) 219-220.

²⁷ *Korematsu* (1944) 223.

²⁸ *Korematsu* (1944) 223.

I quote these passages at length so that we can better see how the presumption that racial discrimination can be justified inconsistently treats Japanese Americans as American citizens or a type of American citizen, while adamantly disavowing that Japanese Americans are treated solely as a racial group. Because strict scrutiny grants that race can be subsumed under nation, it obscures this presumption. And the obscurity of this presumption is troubling because the correlation between race and nation – “all citizens of Japanese ancestry” – remains unsubstantiated, arbitrary and wholly illogical with respect to its difference from the racial “prejudice” and “hostility” Black so adamantly denounces. The only difference, as Black would have it, seems to be that state action premised on race and nation is justifiable, and state action premised solely on race is not. He tellingly concludes his opinion with an attempt to protect the doctrine of strict scrutiny and its presumption by writing out the use of context to reevaluate the Supreme Court’s affirmation of internment: “We cannot – by availing ourselves of the calm perspective of hindsight – now say that at that time these actions were unjustified.”²⁹

IV. Internment Reframed

How does the distinction between only-race-based state action and race-and-foreign-relations-based state action bear on our understanding of internment? First, internment marks a synchronous relationship between race and nation, at the same time that it points to a form of racial subjection outside the imperatives of nation. This we saw in the text and logic of *Korematsu*. Second, this other form of racial subjection is not immediately discernable in any one type of enactment of law since a court’s analysis of racial discrimination will presume this other form when its strict scrutiny analysis fails. According to the conditional logic of strict scrutiny, this other form of only-race-based state action is both there and not, whether or not the court is dealing specifically with immigrant or native racial groups. Internment in this way becomes part of the American history of race, even as it designates a particular group’s experience.

Third, and the one most closely explored in this section, is the point that the only-race-based form of racial subjection contained in the strict scrutiny logic – its particular obscurity and unrepresentability – suggests a sexual economy of the law, a realm of juridical discourse that is underwritten by the force of sexuality. This point is drawn out by bringing the previous discussion on the cinema and law of internment to bear on internment as a political phenomenon.

The tension between the majority and dissenting opinions about the constitutionality of internment – about the persuasiveness of the evidence supporting a correlation between race and national disloyalty – is mirrored in *Snow*’s criminal trial. Like the way *Snow* restores the criminal justice principle of ‘innocent until proven guilty’ from the taint of racial prejudice through the recovery of evidence, the logic of strict scrutiny is able to restore as well the constitutional principle of due process through evidence. At the same time, we also know from *Snow* that it is not evidence, or lack thereof, that thwarts the justice of criminal procedure. The exculpating evidence Ishmael held in secret only entered into the trial record after he was able to negotiate his sexual relationship to Hatsue. Similarly, in the now publicized archive of official records related

²⁹ *Korematsu* (1944) 224.

to Japanese American internment, it was not a shortage of evidence which left the court vulnerable to racial prejudice.³⁰ The retraction of Korematsu's criminal conviction, and more broadly, reparations made to the Japanese American community for internment, came after long and hard-won legal battles and political organizing.³¹ *Snow* and *Korematsu*, when read alongside each other, point toward the domains of the sexual and political, each pressing on the rationality of justification at the heart of criminal procedure and constitutional analysis.

With respect to the obscurity of the other form of racial subjection internment implies, the racial minority emerges as a sort of limit to American constitutional law. Internment is inscribed cinematically in Hatsue and Ishmael's narratives of sexual desire, the experience of which renders Hatsue unable to love Ishmael. Hatsue does not at any time say that she loves Ishmael – during and after her internment, she only claims love for him in the past, claiming simultaneously that she did not love him. Love for her is only rendered in the in past tense, or claimed to have never existed at all.

Similarly, *Korematsu* inscribes the position of racial subjection by racist state action as a logical impossibility as strict scrutiny is presumed to render such action justified. As much as strict scrutiny and its development since *Korematsu* has attempted to make the analysis more exacting and thorough, the impossible is still present in its logic because absent evidence, or when the evidence simply fails to persuade, strict scrutiny affirms the default: “the ugly abyss of racism.”³² Incapable of being offset by any context of foreign or national crisis, racism persists when justification falters. *Korematsu*, disabused of the history of its context, reveals the logically unmanageable position of the racial minority in legal discourse, a position prior to the hypothetical proposition a strict scrutiny analysis imposes on it. It is a position for which the law is incapable of offering any justification, even if the law offers nominal protection or reparation.

The preoccupations at the heart of *Snow* and *Korematsu*, including security, disloyalty, and racial prejudice, capture the feelings which exceed *Korematsu* when read for its lessons on civil rights, citizenship, and war – and, more generally, sovereignty, discipline, equality, and freedom. The political terms are a basic but insufficient part of how the law imagines the possibilities of life in a multiracial society, implicated historically in producing the modern aspirations of not only “nation,” but also “international community.” While such terms appear now with a certain novelty and urgency, by returning to *Korematsu* via the literary and cinematic, we can clearly see that the rhetoric of the logic of strict scrutiny is actually a gloss that cannot completely resolve certain paradoxes of race and sexuality within the broader constellation of political terms the case invokes.

Perhaps the most immediate example of *Korematsu*'s implication in contemporary political philosophy is Black's adamant rejection of Murphy's description of the interment camps as concentration camps. For Giorgio Agamben, who takes the

³⁰ See Peter Irons, *JUSTICE AT WAR* (New York: Oxford University Press 1984). See also, J. Murphy's arguments related to the lack of evidence to impute disloyalty on all Japanese Americans. *Korematsu* (1944) 235-240.

³¹ See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 323 (1987).

³² *Korematsu* (1944) 233 (Murphy, J., dissenting).

same historical moment to think about the political significance of the geography of the Nazi concentration camps, “the camp” is the paradigmatic space of biopolitics. It is the “*nomos* of the political space in which we are still living.”³³ The camp is the space in which the modern world witnesses the politicization of life *per se*; it is a manifestation of the paradoxical function of the sovereign between a diffuse rule of law and total domination, and, borrowing from Walter Benjamin, between the violence instantiating law and the violence enforcing it. Between these two poles of the sovereign, we observe the space through which humans are divided into those with the capacity to bear life and those who simply are bare life.

Historically, Agamben claims that the camp is “a state of emergency linked to a colonial war [that] is extended to an entire civil population. The camps are thus born not out of ordinary law (even less, as one might have supposed, from a transformation and development of criminal law) but out of a state of exception and martial law.”³⁴ The camp is first and foremost a history of the nation, a violent legal geography broaching a nation and its citizens. The paradigmatic space of the camp grounding the contemporary concept of biopolitics and its translation in American history is, specifically, the Japanese American internment camp and its subsequent permutations such as Camp X-Ray, immigration detention centers, and military prisons.³⁵

However, Agamben’s own discussion of the Japanese American internment camp as a spatial metaphor for “the state of exception as a paradigm of government” in the United States conspicuously marks the absence of the history of race in the paradigm of the camp: “The most spectacular violation of civil rights (all the more serious because of its solely racial motivation) occurred on February 19, 1942, with the internment of seventy thousand American citizens of Japanese descent who resided on the West coast (along with forty thousand Japanese citizens who lived and worked there).”³⁶ Based on the discussion above, however, the American internment camp described by Agamben here was not only an exercise in executive and martial law, but was as well, a remarkable judicial interpretation of civil rights law in a by then well-developed and systematized tripartite constitutional democracy.

Two notable historical problems are discernable in Agamben’s attempt to bring Japanese American internment into the paradigm of the camp, and thereby to bring race into biopolitics. First, there is the problem of race’s historicity. Japanese American internment occurred simultaneously in the United States with Jim Crow segregation and the ghettoization of Black Americans. The state of exception to which Japanese Americans were subject – violations of civil rights by executive order and martial law – occurred against a more “mundane” state of exception – violations of civil rights by both federal laws and omissions, and local state Jim Crow laws. Interpreting internment as “the most spectacular violation of civil rights” pushes the history of black segregation outside the concept of the camp and biopolitics. In fact, the imposition of executive law in cooperation with congressional legislation at this moment in United States history –

³³ Giorgio Agamben, *HOMO SACER* (D. Heller-Roazen trans., Stanford: Stanford University Press 1998) 166.

³⁴ Agamben, *HOMO SACER* 166-167.

³⁵ Giorgio Agamben, *STATE OF EXCEPTION* (K. Attell trans., Chicago: University of Chicago Press 2005) 21.

³⁶ Agamben, *STATE OF EXCEPTION* 21.

the dawn of the civil rights movement – would become the primary legal strategy by which Jim Crow segregation would be abolished, despite the resistance of state and local powers. If the state of exception is produced for Agamben, through an aporetic tension between executive and congressional powers in a constitutional democracy, then racial deprivations of civil rights in segregated America rewrite this fundamental tension as one between multiple aporias of law – between executive and congressional, federal and state, enforcement and interpretation, and political and civil rights – on which the Supreme Court intervenes as a third term of governmentality the camp fails to represent.³⁷ The problem that the history of race poses for the concept of the camp is perhaps seen most succinctly in Agamben's reliance on the transitory Weimar Constitution to demonstrate the function of the camp, in contrast to the centuries-long elaboration of the American Constitution by the Supreme Court – both of which codify the legality of the state of exception.³⁸

Second, there is the interpretation of Japanese American internment. For Agamben, Japanese American internment and the categorical judgment of a civilian population by martial law as disloyal indicate a state of exception in which racial discrimination only adds to its spectacularity. For all intents and purposes according to *Korematsu*, internment was not motivated solely by race, but by race and ethnic association with foreign nationality. It was, rather, African American segregation that was motivated by a singularly racial motivation untempered by justifications provided by exigent foreign relations.³⁹ Racial segregation of African Americans as a form of only-race-based discrimination, again, falls outside of the exceptionality through which biopolitics works. Agamben's interpretation surely overlaps with the way in which the conditional logic of strict scrutiny engages discrimination based on race and nation. However, it does not reach the other form of racial discrimination – the “ugly abyss of racism” – the conditional logic of strict scrutiny obscures.

More problematically, though, biopolitics and its motivating concern about executive law is not able to account for the default condition of racial animus American

³⁷ Prominent theories of race and law, as well as feminist theories of law, have all pointed out the fact that it is impossible to apprehend the state's racist and sexist projects within the boundaries of legal forms, jurisdictions and doctrine. Slave codes, and then the Black codes – which stretched across such boundaries to construct the institution of slavery and Jim Crow – required theories of race and law to think across multiple legal aporias. See generally, Derrick Bell (ed.), *RACE, RACISM AND AMERICAN LAW* (4th edition, New York: Aspen Publishers 2000). Feminist theories of law have also been committed to thinking across multiple legal aporias to discern how the law relegates women to the private sphere. See generally, D. Kelly Weisberg (ed.), *APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION* (Philadelphia: Temple University Press 1996); *FEMINIST LEGAL THEORY: FOUNDATIONS* (Philadelphia: Temple University Press 1993).

³⁸ Agamben, *HOMO SACER* 167-168. My critique can be extended to Judith Butler's recent work to the extent she shares Agamben's concern for the use of extra-legal power in the current War on Terror. See generally, Judith Butler, *PRECARIOUS LIFE: THE POWER OF MOURNING AND VIOLENCE* (New York: Verso 2004).

³⁹ Point of fact, during World War II, federal legislation dismantled segregation in a number of public employment contexts due to a shortage of white male labor, however, federal desegregation did not reach the many spheres of segregation over which states had jurisdiction. See Daniel Kryder, *DIVIDED ARSENAL: RACE AND THE AMERICAN STATE DURING WORLD WAR II* (Cambridge: Cambridge University Press 2001). Thus, even if it is possible to argue that individual segregated institutions were influenced by exigent foreign relations, as many have argued in explaining the outcome in *Brown v. Board of Education*, 347 U.S. 483 (1954), it did not categorically change the African American social position.

law works to disavow. (We might appropriately call this a state of *racial* exception). A biopolitics which takes the juridical nature of constitutional law to the exclusion of its key *judicial* nature in tripartite constitutional democracies only presents a partial picture of governmentality. Further, and more importantly, it excises the relationship of law to race, as the fundamental relationship between state racism and democratic principles is most intimately drawn in American judicial interpretations of law.

Based on these two problems, an important question that must be put to Agamben's camp: What are we to make of the erasure of the judicial in political philosophies of biopower? What to make of the disappearance of the third term of constitutional democracy – the judicial, its most literary, visual, indeed, rhetorical, sphere of legal production?

Returning to *Korematsu*, if we track its impact following the paradigm of the camp, then race in biopolitics is organized according to fluctuations of power between martial or executive law and congressional legislation. The paradigm then speaks only to one aspect of *Korematsu*'s legal legacy – namely, its impact in national security law. However, if we track *Korematsu*'s racial significance in American civil rights law as the translation of the logic of strict scrutiny into post-civil rights culture, then we find a compelling reason for why focusing on race requires thinking beyond biopolitics: the representation of race in legal judgment exceeds the concerns of biopolitics, the *nomos* of the camp, the modern state of exception. Race remains unrepresentable.⁴⁰ That is, *Korematsu* challenges not only paradoxical distinctions in legislative and executive forms of law in modernity, but the ideal of constitutional civil rights *tout court*.

The disappearance of the judicial as the third term of constitutional democracy suggests the difficulty of describing in juridico-political terms a position of suffering for which there is no justification – being subject to state action motivated solely by race, subjection under racial animus. In American constitutional law, it is the experience of racial subjection under a *network* of formal enactments of sovereign power that is outside the realm in which justice and injustice, humanity and inhumanity, morality and immorality are distinguished. Interestingly enough, this network is most clearly represented through the judicial opinion – judges charged with interpreting multiple and conflicting forms of laws, even as they disavow the productive force of this hermeneutics. The judicial opinion does not recognize that it imagines the people of its docket as characters in the mythical story of a nation birthed by the letter of the Constitution, even as it is charged with the duty to judge whether the multiplicity of legal enactments abide by the universal mandate of the Constitution. This mythical status of the Constitution begs inquiry, and who the protagonist of *Korematsu* is remains a central question.

Andrew Norris's discussion of contemporary medical experimentation and corporal punishment in the American criminal justice system notes that Agamben's work on the *homo sacer* is reminiscent of the Greek myth of Antigone, at the same time

⁴⁰ Jacques Derrida, *Force of Law and the 'Mystical Foundations of Authority'* in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE, (D. Cornell, M. Rosenfeld & D. G. Carlson eds., New York: Routledge, 1992) 27.

recognizing that she is absent from Agamben's discussion.⁴¹ She is both present and not – like a double. On Norris's reading of Antigone's relevance for thinking about biopolitics, he finds that the liminal position of the U.S. prisoner in such circumstances – as living dead – resonates with Antigone's sentence by Creon to be buried alive in a tomb for burying her dead brother contrary to the city's rules which prohibited its members from honoring the disloyal. For Norris, Antigone is one in a diverse line of figures that resemble the juridical figure of the *homo sacer*. While this surely is an accurate reading, the question remains why such a prominent character of Western legal history is omitted from the question of biopolitics. Does Antigone's relegation to mythical form preclude her from the juridical form of the *homo sacer*? If so, why? How does Antigone's death relate to the inside-outside life of the *homo sacer*?

Two reasons for an affirmative answer are available: one historical and one formal. First, Agamben's biopolitics is not concerned with criminal transgressions of law, but martial executions of law, despite the centrality of the prison and its genealogy to Foucault's work. As indicated above, "The camps are [...] born not out of *ordinary law* (even less, as one might have supposed, from a transformation and development of *criminal law*) but out of a state of exception and *martial law*."⁴² In moving away from the spatial metaphor of the city to the space of the camp as the locus of sovereign power, Antigone's relationship to law and her punishment by law as an ordinary criminal of ordinary law is precisely that which Agamben is attempting to displace, even if her criminal punishment resembles those forms of terror to which the *homo sacer* is subject. The difference between the *homo sacer* and Antigone is that the former's criminality is relatively inconsequential for understanding sovereign power; and the latter's (and her family's) willful disobedience of the law and, further, desire for transgression of law is intimately tied to sovereign power.

Although Agamben notes that the *homo sacer* is a criminal – "The sacred man is the one whom the people have judged on account of a crime. It is not permitted to sacrifice this man, yet he who kills him will not be condemned for homicide"⁴³ – it is the nature of his killing between sacrifice and homicide that defines him as a victim of sovereign power. Thus, the ordinary criminals of Norris's American prison subject to medically administered disease and death do not toil because of the terror of the camp, but because a prior act inflamed the sovereign's wrath (whether or not the severity of punishment for this act is justified). In the camp, one is terrorized under martial law; in the city and its prison, one is punished through criminal law.

Second, beyond the historical difference between criminal and martial law is the formal reason presented by Lacan's discussion of tragedy in *Antigone*. On this reading, while the *homo sacer* and Antigone might resemble each other, they are fundamentally different types of characters. The *homo sacer* is juridical, subject to the abstraction and contextualization of the jurist, while Antigone is mythical, subject to the desire and passion of the audience.⁴⁴ The former locates the politicization of the individual under

⁴¹ Andrew Norris, *Introduction: Giorgio Agamben and the Politics of the Living Dead* in *POLITICS, METAPHYSICS, AND DEATH: ESSAYS ON GIORGIO AGAMBEN'S HOMO SACER* (A. Norris ed., Durham: Duke University Press 2005) 13, 26.

⁴² Agamben, *STATE OF EXCEPTION* 166-167 (my emphasis).

⁴³ Agamben, *HOMO SACER* 71 (quoting Pompeius Festus's *On the Significance of Words*).

⁴⁴ Lacan distinguishes between the function of the spectator and the auditor in tragedy, arguing that the style and action of tragic forms is experienced in reality more through what is heard than seen. Jacques

sovereign law, while the latter locates the elocution of the individual through sovereign law. The juridical marks legal processes after judgment, while the literary casts the act of judgment across legal processes.

If we take Lacan to provide an implicit theory of biopolitics – his “second death” – through his reading of Antigone, then it allows us to restore the judicial in relationship to the juridical. In fact, attention to the judicial form of law reflects with more accuracy the historical relationship between the individual and the rule of law in contemporary society. For the judicial form in American constitutional democracy works through both the legal and literary, the political and the visual, the juridical and tragic.

Like the *homo sacer* hovering between life and death, Antigone is described by Lacan as “the advent of the absolute individual.”⁴⁵ Prohibited by Creon to bury her brother, not simply by a sentence to death, but by a sentence to suffer, Antigone is said to represent the peculiar existence of this individual. The tragic hero is fearless, pitiless – one who relates to sovereign law through both a fierce love and hate.⁴⁶ The position of the tragic hero is “the situation or fate of a life that is about to turn into certain death, a death lived by anticipation, a death that crosses over into the sphere of life, a life that moves into the realm of death.”⁴⁷ This “second death” denotes Antigone’s crossing over into the realm of *Até*, a sphere beyond the realm of the human. At this moment, she is likened to a bird, a lonely mother, both for whom their cries and moans over lost children signify the metamorphosis of the human into something beyond.⁴⁸ Beyond the “fascinating image of Antigone herself,” beyond “Antigone in her unbearable splendor,” is the sound of this second death which is the limit allowing for the emergence in the first instance of sovereign power, municipal regulation, and moral good.

However, Lacan is interested in how the passion of Antigone’s attachment to her dead brother, absolutely singular and criminal, goes untempered by the laws under which she lives – remains untouched by the doubt, measurement, or rationalization of her community and family. If in various and fleeting moments we all experience this second death – a consequential suffering we know will come by a certain action – Lacan asks how (not why) we, nonetheless, take that action? This question arises, on Lacan’s reading, by asking what about this “terrible, self-willed victim” we cannot stand? What is it about *Antigone* that remains absent from conventional readings of the myth, that exceeds the rhetoric of Antigone the martyr? The justification she offers but we do not want to hear – that she loves her brother because he is her brother?

It is the relationship between Antigone’s image of beauty and her point of view on life as “that place [in which] she can see it and live it in the form of something already lost”⁴⁹ – the aesthetics of the second death – that provides an answer. The blinding effect of Antigone’s image, the “violent illumination, the glow of beauty”⁵⁰ halts the audiences’ analysis of Antigone’s situation; it structurally positions them in “essential blindness” to

Lacan, *THE ETHICS OF PSYCHOANALYSIS* (1959-1960), (D. Porter trans., New York: W. W. Norton 1992) 252. This resonates with the scene of the modern courtroom, in which elocution in rhetoric is the driving force of persuasion, even as the use of visual aides is becoming a more common practice in litigation.

⁴⁵ Lacan 278.

⁴⁶ Lacan 263.

⁴⁷ Lacan 248.

⁴⁸ Lacan 264-265.

⁴⁹ Lacan 280.

⁵⁰ Lacan 281.

Antigone's criminal being.⁵¹ Contrary to conventional readings of Antigone's criminal being – which locate it in her civil disobedience and the moral conscience that brings on her punishment – Lacan locates it in her desire for her family. This desire for her family, the absolutely singular and irreplaceable relation establishing her association with her brother – two children “born of the same father and of the same mother”⁵² – is the equivalent of what Lacan refers to as her desire for death, since it is a certain consequence of failing to relinquish this association by law.

In offering this prohibited relation as *Antigone's* justification for her criminal act, knowing that it is this very justification that makes her act criminal, Lacan writes, “Yet she pushes to the limit the realization of something that might be called the pure and simple desire of death as such. She incarnates that desire.”⁵³ Death is the starting point of modernity, not its culmination. Death is the aim of desire, not its satisfaction – setting out Lacan's project to outline how desire works. Thus does Lacan place Antigone's image between *two* deaths: the “second death” discussed above and, referencing Freud, the “death instinct.”⁵⁴ Situated between two deaths, Antigone's being suggests a relationship between biopolitics and the unconscious.

That is, Antigone poses a relationship between the psychoanalytic and juridical – turning on the problem of judgment. Medicalized psychoanalysis and the rule of law attempt to traverse the impossibility of knowing that secret motivating human action, a knowledge about which both fields presume will provide for happiness and racial equality. In much the same way psychoanalysis is supposed to guarantee happiness through curative techniques, such as catharsis, the law is supposed to guarantee an anti-racist society through various mode of legal analysis such as strict scrutiny. However, Lacan's return to Antigone is occasioned by a need to think beyond the medical definition of catharsis in the field of psychoanalysis, wherein a genealogy of catharsis provides that the literary effect of catharsis occurs through tragedy's play on pain and beauty. The kind of catharsis that strict scrutiny provides the law – its promise to purify the law of racial animus – would benefit from similar inquiry, specifically through *Snow's* reflection of and on *Korematsu*.

Ultimately, the significance of Lacan's reading of Antigone for legal studies and its bearing on biopolitics is the deeper understanding of the function of justification – and, more generally, judgment – in post-civil rights political culture. Justification and judgment do not operate in an economic relation to desire in the sense that they separate good from evil, norm from taboo, and order from transgression, distinctions between which the legal subject will be enabled to choose the former over the latter. Rather, Antigone's justification – the incarnation of desire – only reveals an underlying tautology of reasoning, the threshold of the signifying chain of meaning and its inscription in the human experience, a space wherein its inhabitants are categorically criminal, unrepresentable, invisible, blinding.

⁵¹ Lacan 281-283. Beyond the formal distinctions between *ius divinum*, *ius humanum*, and mythology in classical times and how those distinctions bear on our contemporary understanding of law and sovereign power, it seems here that those distinctions also bear on our understanding of law and criminality. That issue is beyond the scope of this chapter, thus my discussion of Lacan does not address his reading of Kant with Sade.

⁵² Lacan 255 (quoting *Antigone*).

⁵³ Lacan 282.

⁵⁴ Lacan 281 (referencing Freud).

Opening up the death instinct as a realm of inquiry for legal analysis is particularly relevant for the post-civil rights era in which strict scrutiny has caused state action to repress racial language and motivation in order to circumvent judgment by the courts. To that end, we return to the Supreme Court's admission that strict scrutiny is not "strict in theory, but fatal in fact."⁵⁵ Rendering the racial motivation of state action today a literal secret, the clearest cases of racial discrimination do not even see the light of day. However, its non-expression is nonetheless audible through the tragic in *Snow* as a reflection of *Korematsu's* judicial reasoning. If it is possible to propose that Antigone is the *homo sacer's* double based on the analysis of biopolitics above, then it might also be possible to propose that Hatsue is *Korematsu's* double. This analogy hinges on the function of beauty for the rule of law. Beauty provides an entry point for thinking about the relationship between race and sexuality, and their relationship to the law.

V. Snow: a closer look at tragedy

The tragic play of beauty and pain is illustrated in the case of Japanese American internment by Hatsue's character and Ishmael's encounter with it. On first blush, it appears that Hatsue is the calm center of Ishmael's hurricane of reasoning, that her practical position is what drives Ishmael from the craziness of sexual passion to the sanity of love. However, in contrast to Ishmael's consistent vacillations between passion and righteousness, it is Hatsue who is actually driven by love and hatred. It is the ferocity of this love and hatred that is the undercurrent of disavowal in Ishmael's attempts to bring human good and human desire in line. From the confines of racial condemnation – the internment camp and her mother's home – she writes a letter to Ishmael explaining to him why she can no longer talk to him. Before Ishmael receives the letter, Hatsue decides that she will disclose her interracial relationship and her sexual foray with Ishmael to her mother. In the final shot of Hatsue's reading, the ambivalent addressee of her love letter is represented by her face – floating as the representational space around her begins to empty out (Image 1.1).



Image 1.1 Still from *Snow*, Hatsue a fantasm.

⁵⁵ Grutter 326 (quoting Adarand).

In contrast to the darkening background of the shot, her face is illuminated as her voice travels out from the prison of her mother's home, to the internment camp, and finally to Ishmael's emotional economy. Her voice repeats:

Dear Ishmael,

I can't think of anything more painful than writing this letter to you. I feel I have to tell you the truth. When we met the last time in the cedar tree, and I felt your body move against mine, I knew with certainty that everything was wrong. I knew that we could never be right together, and that soon I would have to tell you so. And now, with this letter, I am telling you. This is the last time I'll write to you. I'm not yours anymore. I don't love you, Ishmael. I can think of no more honest way to say it. When I heard your heart beating as we lay together, I felt closer to you than I had ever been to anyone, and I knew with certainty that everything was wrong. I loved you, and I didn't love you at the same moment. I'm going to move on with my life the best I can. And I hope that you will, too. I don't love you, Ishmael. Whenever we were together, I knew it. I loved you, and I didn't love you at the same moment. I must say good-bye to you. I know you will do great things in this world. You have a gentle heart. A good heart. I will never forget you, and the time we spent together.

This letter – addressed to Ishmael and read to her mother – was a long time coming, as Hatsue had been commanded to reject Ishmael's demand for love less by a legal division between her race and the white nation than by a familial association through blood and tradition to her race. The first scene in which Hatsue and Ishmael talk about their relationship as children, Hatsue asks whether Ishmael thinks their relationship is wrong. When Ishmael answers that Hatsue's friends and father would disapprove – notably, evading Hatsue's question to him about what he personally feels, as well as the larger question of white racism and anti-miscegenation – Hatsue responds, "My mom is the problem." She would later give in to the maternal command, not because she is under duress, but because she does not love Ishmael. "I'm not yours anymore. I don't love you, Ishmael. I can think of no more honest way to say it." Further, relinquishing herself to the maternal command is not done out of affection for her family. Hatsue consistently expresses a deep-seated resentment toward her mother and father, finding intimacy with a Japanese boy already her mother's adoptive son, caring for sisters who walk the tradition of Japanese womanhood. Despite these reasons to hate her family and its 'racial curse', she nonetheless loves it. She cries continuously for her family even as she explodes "I don't want to be Japanese!"

Here we see the parallel between Hatsue's letter and Antigone's claim. The very justification Hatsue offers Ishmael for her distance from him – that she does not and never did love him – is the very reason why Ishmael continues to torment her and her family. Hatsue's refusal becomes a way for Ishmael to manage that unannounced ambivalence about the rightness/wrongness of their relationship by projecting and recasting his racist repulsion as her unprincipled rejection of him. Ishmael is able to

pursue his harassment – and his hatred – with the vindicating narrative of colorblind love.⁵⁶

And Ishmael, in the throes of his fascination with Hatsue's beauty, continually fails to do the right thing. He remains silent about her incarceration, demands love from her despite her protests, and lashes out at her for his castration. And he is justified in his silence, his demands, his pain – after all, he endures all of this because she means the world to him. It is in the name of his love for her that he remains in a constant state of doubt, fear, cynicism about the world. He wishes for the lost colorblind fantasy of their childhood, searching for ways to make this colorblind fantasy a reality for his town and country divided by race and war.⁵⁷ If only Hatsue would see my pain, he demands.

In the sequence of memories that gives Ishmael his sense of duty to come forth with the key evidence, he recalls an encounter he had with Hatsue soon after returning from war. Stumbling after Hatsue, his balance thrown off by the absence of his left arm, he pleads, "Please. I know you'll think this is crazy. But all I want to do is hold you and I think that if you let me do that just for a few seconds, I can walk away and never speak to you again. Hatsue, can you please look at me?" Perhaps up until that moment he had only remembered her words, "I did a terrible thing, Ishmael. But you have to hear this. I can never touch you. You have to let go. That's the way things are. Things end, Ishmael. They do." This time, however, he remembered that Hatsue had looked at him – had in fact given into his demand: "Hatsue, can you please look at me?" – as she spoke those words.

All the while, not a thought about his hatred for Hatsue's race enters Ishmael's mind. He feels shame (looking at her as the Strawberry Princess), curiosity (her emotionlessness) and betrayal (her unavailability because of her new family) – but he does not feel racial animus. In fact, he is silent as to her race and internment. When asked as a boy whether he thought their relationship was wrong, he spoke not of himself, but of Hatsue's Japanese family and friends. When Hatsue, panicking about the first arrest made of a Japanese man after news of Pearl Harbor broke, Ishmael offered only promises that everything would be alright, kissed her in the safety of the cedars, and watched in silence along with the rest of the white residents, as Hatsue, in line with the rest of the Japanese American community, boarded a ferry to the camps. Even when he exclaimed in delusion, "Fucking Jap bitch!", it expressed more his pain and fear, than revulsion and enmity.

In other words, Ishmael has no reason to feel hatred towards her race because he is attracted to her, he wants to know her, and ultimately he wants to marry her. However, in Ishmael's emotional economy, Hatsue unfairly denies him all of this. At the end of the story, when Ishmael comes forth with the exculpatory evidence – for all intents and purposes, saving Hatsue and her children from a life of suffering upon Kazuo's execution – his purportedly heroic act is the result of reasoning that is silent as to his own feelings about his love's race, his love's internment.

⁵⁶ This relationship between Ishmael and Hatsue would be the national security equivalent in the intimate sphere.

⁵⁷ Analogizing Ishmael to Joan Copjec's reading of Creon, Ishmael might be read to be driven by his superego which causes a "fixation on dissatisfaction." Joan Copjec, *The Tomb of Perseverance: On Antigone*, IMAGINE THERE'S NO WOMAN: ETHICS AND SUBLIMATION (Cambridge, Mass.: MIT Press 2002) 46.

The beautiful, as an aesthetic, is by definition transmitted not by the object, but by its example. The beautiful is the appearance of the exemplar, a judgment about which considers both the appearance of the exemplar and its coincidence with something beyond it. Ishmael seems to sense this about beauty as he is completely infatuated with Hatsue's beauty, while simultaneously searching for something else he feels lies beneath it (Image 1.2). He claims to want to know what she hides, what is behind her beauty, her body, her face.



Image 1.2 Still from *Snow*, the tragic structure of beauty.

Lacan takes the tragic structure of beauty as a model for understanding how desire works: desire is produced so long as a gap is maintained between the object and the *object a*. Thus, as much as Ishmael claims to want to know Hatsue – the object of his love – he must maintain a separation between her image and her person in order to sustain his desire for her. Indeed, Hatsue reveals her person to Ishmael – the realities of her impending incarceration, her alienation from both her Japanese American and white peers, all the dreams she does not dream – only to fall on deaf ears, or blind racist eyes. Ishmael's refusal to recognize Hatsue is matched only by the absence of racist thought in his emotional angst. Ishmael's desire is sustained, despite Hatsue, through an ideal love.

Ishmael's ideal love is not, however, the sublimation that an encounter with beauty effects. The sublimation involved in judging a thing to be beautiful, or holding a beloved person, according to Joan Copjec, "ought to be thought not as the substitution of a culturally valorized object for one that is immediately gratifying sexually, but as a *changing of the object itself*. The object of the drive is never identical to itself."⁵⁸ Hatsue demonstrates this, as the object of Ishmael's desire.⁵⁹ The metamorphoses Hatsue characterizes as lies – the pain and anguish of which she endures because of her love for

⁵⁸ Copjec 39. Copjec further notes that this particular structure of desire is analytically demonstrated by Alenka Zupančič as the "splitting of appearance from itself." See Copjec, footnote 37, 237.

⁵⁹ Guterson 204-208. In this particular passage, Hatsue is thinking to herself about the conflict of Japanese tradition and interracial love determining her life of thinly disguised lies – which as lived were not lies, but the truth of her existence. "She felt a sickness overtake her. Her late-afternoon walks had not concealed her meeting with a boy her mother had long had intuition of. Hatsue knew she had not fooled anybody, she had not fooled herself, as it turned out, either, she had never felt completely right." Guterson 206.

her family – are a series of split appearances. Her life is, she tells Ishmael, layer upon layer of appearances – all of which are contrary to the law of San Piedro, their families, and the nation. She is a fantasm to herself.

Thus, when Lacan observed that tragedy already revealed the flaw in a Kantian identity between modern law and reason,⁶⁰ *Snow*, as the aesthetic dimension of *Korematsu* and its legal history, reveals this to be similarly true with respect to American constitutional law. Extending Lacan's observation into an analysis of contemporary American constitutional law has less to do with any intersection between race and gender than with its stark absence, and what this absence suggests about the force of sexuality in law. Hatsue, a fantasm to herself, suggests that the deaestheticization of constitutional law through strict scrutiny is a disavowal of its limit in racial subjection. The obscurity of the "ugly abyss of racism" to which *Korematsu* refers is in fact precisely the blinding effect of an encounter with Hatsue's beauty, that which must remain invisible in order to encounter feminine sexuality. The inhabitants of internment – of this ugly abyss of racism – are less the *homo sacer* and more the racial fantasms of feminine sexuality.

Cinema provides the occasion to reexamine the significance of strict scrutiny in American constitutional law. Specifically, the centrality of interracial love in *Snow*'s narrative allows us to read how sexuality figures into the politics of Japanese American internment, and to interrogate the flawed bifurcation of the legal history of Japanese American interment through the *Korematsu* case. Looking closely at the relationship posed between race and law through the case's strict scrutiny logic, *Snow* again proved important for analyzing the particular obscurity of race. Situated within the broader terms of biopolitics, *Korematsu* reveals that biopower does not fully explain the history of race and the force of sexuality as they are implicated in the Japanese American interment camp. Bringing Lacan's reading of Antigone and her tragic figure to bear on the modern project of the rule of law – and the function of strict scrutiny in post-civil rights culture – the feminine figure of race is located with respect to American constitutional law. By wrenching constitutional democracy away from the juridical and towards the judicial – at once literary, juridical, and political – a reading of the sexuality of race is opened up.

VI. Conclusion

Black's Law Dictionary defines "internment" as follows: "The government-ordered detention of people suspected of disloyalty to the government, such as the confinement of Japanese Americans during World War II." Clearly this definition invokes President Roosevelt's Executive Order 9066, and the constitutionality of the order's enforcement affirmed by *Korematsu*. As much as the public image of these laws has focused on the false accusation made against Japanese Americans of being foreigners and potential saboteurs, what is striking about this definition is the idea of a class of people who are imprisoned, not for being outside of the nation, but precisely, for being inside of it. One must be of the nation – one must fall within the presumption of loyalty in order for a transgression to be found – and consequently, to be imprisoned through the specific form of internment.

⁶⁰ Lacan 259.

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Taking the force of sexuality into account, according to this dictionary definition, one might read this presumption of loyalty as an indication of the nation's desire to include, a desire for, Japanese Americans – even as this desire is simultaneously murderous and tender, punitive and sentimental, aggressive and kind. Ishmael loved Hatsue, and yet her ideal made her person feel like a transgression he would use as both cause and effect of his injury. As well, the dictionary's use of Japanese American confinement as an exemplar providing a general definition of internment invokes the problematic that race and sexuality imposes on the juridical. It suggests that the question of exclusion from national belonging based on race endures as much through inequalities in social legislation as it does through the intimacies of contact rehearsed by those charged with judging the law – sexual contracts wished for and broken.

[more on what it means to reveal this conditional logic of strict scrutiny...]