

A NARRATIVE ANALYSIS OF KOREMATSU V. UNITED STATES

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This thesis studies the Supreme Court decision, *Korematsu v. United States*, 323 U.S. 214 (1944) and its historical context, using a narrative perspective and reviewing aspects of narrative viewpoints with reference to legal studies in order to introduce the present study as a method of assessing narratives in legal settings. The study reviews the Supreme Court decision to reveal its arguments and focuses on the context of the case through the presentation of the public story, the institutional story, and the ethnic Japanese story, which are analyzed using Walter Fisher's narrative perspective. The study concludes that the narrative paradigm is useful for assessing stories in the law because it enables the critic to examine both the emotional and logical reasoning that determine the outcomes of the cases.

TABLE OF CONTENTS

Chapter

1. INTRODUCTION	3
Statement of the Problem	
Scope of the Study	
Significance of the Study	
Review of Literature	
Methodology	
Plan of Study	
2. NARRATIVE AND THE LAW	22
3. THE KORMATSU SUPREME COURT CASE	43
4. NARRATIVE ANALYSIS	67
The Public Story	
The Institutional Story	
The Story of the Nikkei	
The Narrative Analysis	
5. CONCLUSIONS AND IMPLICATIONS	117
Questions for Further Research	
BIBLIOGRAPHY	128

CHAPTER ONE

INTRODUCTION

In the midst of World War II, shortly after Japan bombed Pearl Harbor, over 120,000 Japanese residents (non-citizens) and Japanese-Americans (American-born citizens) were ordered by the United States military to evacuate the West Coast area and report to Assembly Centers for indefinite internment. An Executive Order and Congressional Act in 1942 sanctioned a series of military proclamations, which were encompassed in a program intended to remove all of the people of Japanese ancestry from the West Coast. These proclamations effectively ordered a curfew, evacuation, exclusion and internment of any persons born of Japanese ancestry living in the areas of California, Washington, Oregon, Idaho, Montana, Nevada, Utah and the southern portion of Arizona (*Korematsu* 227). The people of Japanese ancestry, mostly residing on the West Coast at the time, were considered a security risk for sabotage and espionage against the United States (Myer xiii).

Fred Korematsu, a United States-born citizen, was convicted of violating one of the military exclusion orders in California. He physically altered his appearance in order to disguise himself and avoid detention in an internment camp. Fred Korematsu followed neither the exclusion order to leave the area, nor the subsequent and mandatory order to relocate to a designated camp. He was found, arrested, and then detained by the military in an internment camp. Korematsu was charged and prosecuted only for violating the military exclusion order. He was not charged with violating the order to relocate to a camp, though it too was mandatory and had been issued before his arrest. He appealed the conviction, and the Supreme Court reviewed the case in *Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944) and the Court upheld his conviction. The Court sided with the Government's arguments that the exclusion

order was of military necessity because the U.S. was at war with Japan, and therefore those of Japanese ancestry were suspects of espionage and sabotage (Irons 457). The Court refused to rule on the question of the relocation camp, reasoning that the conviction stood only on the exclusion order.

This study recognizes that the *Korematsu* Supreme Court case is one of the most universally condemned decisions, and is often referred to and studied as such. In retrospect, the case and its context is viewed as a disturbing incident in American history. In 1984, the case was reopened in a lower California court in *Korematsu v. United States* 584 F. Supp. 1406 (N.D. Cal. 1984), and succeeded in reversing Fred Korematsu's conviction; however this case has no bearing on the Supreme Court precedent that still stands as the rule of law. The idea that the constitutional civil liberties of Americans were stripped without due process, even in a time of war, is especially disconcerting when one examines the stories that encompass the arguments and justifications.

Statement of the Problem

The Supreme Court of the United States embodies a mystique that is centered on the last hope and promise of justice for all citizens. As the highest Court, it represents the final interpretation of the cases it selects and of the law that determines their outcome. The importance of the Supreme Court's checks and balances function fosters a public belief in the utmost fairness and integrity in its decision-making process. Notable court cases that are highly criticized and questioned by many become valuable reminders of the vulnerability of the process. To this end, rhetorical critics can provide valuable insights by studying the rhetoric of such cases in the broader context of the communication environment that encompasses the decision rather than confining analysis exclusively to the arguments of law. This study seeks to gain a more

complete understanding of the *Korematsu* case using the narrative paradigm in order to illuminate the different stories that make up the context of the case and the prevalent stories that direct the outcome of the case. This study will explain the public moral arguments and the differing value systems to gauge the narratives and ultimately examine why the dominant story prevailed at the time.

The study will address and answer the following questions:

- 1) How does the narrative paradigm explain the decisions in *Korematsu v. U.S.*? How do the main story lines that contribute to the evolution of the case compete? What are the determinant factors in the prevalence of one story over another?
- 2) Is racial discrimination the only conclusion that serves as a determinant for the outcome of the case or did multiple determinants contribute to the Supreme Court decision? Can the narrative paradigm be more useful in explaining cases where many contributing factors may exist?
- 3) What value-based judgements did the Supreme Court adhere to in *Korematsu* as the prevalent reasoning? How does the narrative paradigm explain this phenomenon?
- 4) What does a narrative analysis of the *Korematsu* case reveal about narrative theory? What is the role of the narrative paradigm in terms of legal studies? Which insights from this analysis might shed light on the narratives in contemporary public argument?

Scope of the Study

The primary focus of the study will be on the Supreme Court case of *Korematsu v. U.S.* and its evolution in the context of its time period. In order to reveal the motives and rationale of the Court, the study will examine the case itself including the arguments found in the majority, concurring, and dissenting opinions. The study will then examine activities leading up to the

case in narrative form. The context will be divided into separate narratives, which will contain available background information not directly found in the decision, but relevant to the circumstances of the case. The background information prior to the case will be the focus of the narrative analysis as the vital contributor to the culmination of the case.

This study will examine the actions and values of individuals directly involved in the case, as well as the movement of the larger groups to which the individuals belonged. These groups will be analyzed as competing interests that determined the outcome of the *Korematsu* case. The analysis of the narratives making up the case will employ Walter Fisher's narrative paradigm focusing on his conception of the logic of good reasons.

Significance of the Study

The importance of this study rests in a rhetorical critic's ability to examine milestone legal decisions that shape U.S. history through the domination of particular value systems promoted by our government. Perhaps the only way to justly review the actions of the *Korematsu* Court is to focus on the stories inherently built into the substance of the case. *Korematsu v. U.S.* stands for far more than is portrayed in the deciding arguments supported by the majority Justices. The case represents possibility - a possibility for irrational and unconstitutional action that many United States citizens would never conceive of as possible. The only way to prevent unwelcome possibilities in a democratic society is through an understanding of how misjudgments can occur and how gross misjudgments and their consequences are only widely recognized through hindsight. "Our nation's ability to honor democratic values even in times of stress depends largely upon our collective memory of lapses from our constitutional commitment to liberty and due process" (Irons 460).

Traditionally, communication scholars have focused on freedom of speech decisions because of their obvious relationship to the variety and validity of all discourse in a democratic society; however, freedom of speech could not reside without liberty and equal protection under the law. Understanding Supreme Court discourse is an important element in understanding the communication process in the United States. The way that controversies are communicated and resolved at the highest level serves as an example that filters down into other settings in society. The values that are promoted and denied in the communicative process of the Supreme Court is perhaps the most important gauge of how values will be weighed and measured in other settings. The Supreme Court has the power to change attitude and behavior in society through its rulings. The Court can stifle valuable arguments as one may see in *Korematsu v. U.S.* or it can promote and enforce values of tolerance and freedom as one may see in *Roe vs. Wade*.

The historical significance of the *Korematsu* case is a direct result of the values of the time period provoking particular communicative actions and responses during wartime. *Korematsu's* heuristic value lies in its ability to impart to future generations with an understanding of the discourse and actions that led to the decision so that more informed decisions result from previously accumulated knowledge. Knowledge and understanding of past experiences are especially useful when overwhelming circumstances surround an argument. Using a narrative analysis to study the communication that surrounded the *Korematsu* case will deepen the understanding of how an expert system can rule through misguided motives and how the system can incorporate narrative values to avoid a recurrence of past mistakes.

Narrative analyses can be found in many disciplines and is generally thought of as able to provide a unique perspective that can serve to incorporate not only scholars and leaders, but also those not traditionally involved in public argument. This study seeks to further the development

of narrative by suggesting the use of Fisher's narrative paradigm, used in the communication discipline, as a method of analysis for the legal scholarship that seeks to include a narrative point of view. Legal scholars interested in narrative study have expressed a strong need for narrative theory as well as methods of analyzing legal narratives and selecting among competing stories (see Baron and Epstein; Brooks; Gewirtz; Minow; Posner). Scholars have considered literary theory as a possible fit, but it has also been criticized as "more likely to undermine than to reinforce the success of [a court] opinion in meeting its judicial obligations" (Baron and Epstein 144). The scholars interested in narrative as a way to improve upon the legal field "face the specter of warring stories with no methods for testing them or for resolving disputes that they reflect" (Minow 31). Paul Gewirtz summarizes the sentiments in the following statement:

To move from story to action, we need theories too, theories that help us to assess the representativeness of a particular story, to choose among competing stories, to decide which facts are relevant. So, too, we need to appreciate the value of general rules as well as particular stories, for general rules, in spite of their imperfections, can protect against favoritism and unequal treatment. (6-7)

This study will promote the use of Fisher's narrative paradigm as one way of examining competing stories in a legal case by exploring its utility through an analysis of *Korematsu v. United States*.

Review of Literature

The review of literature consists of three sections. The first section examines relevant communication studies that focus on legal issues and also includes a few studies that have a direct topical link to this project. The second section describes important books in the area of

Japanese evacuation and internment during World War II. Finally, the third section examines the important law review articles covering of *Korematsu v. United States*.

Communication Articles

Communication scholars have studied legal argument in many ways. The technique and subject matter of legal communication studies focus on important communication aspects that either give rise to or take place in the court cases. Communication studies, like this one, provide a unique perspective and allow for more leeway in critiquing the historical and peripheral context as opposed to analyzing the more detailed and regimented points of law in a given case. In this way, communication studies can lead to more complete and satisfactory conclusions about Supreme Court decisions. The studies incorporated into this review, although not all alike, contribute to a more effective communication analysis of the *Korematsu* case.

Many of the Supreme Court cases studied in communication are in the First Amendment arena, and like this case, many of the First Amendment decisions that deny freedom of speech are supported by the rationale of national security. Several studies examine speech freedoms during upheavals or wartime and its effects on the U.S (Casey and Jordan; Siegel). Hosoon Chang examines the First Amendment during the Cold War and press reactions to the Communist Party leader trials. The article contends that the Supreme Court denied free speech rights due to Cold War hysteria (Chang 67). The press reactions, like those in *Korematsu*, supported the Supreme Court decisions even though prior to the increased chaotic atmosphere they had not (81).

Dale Herbeck's analysis of Justice Brennan's influence over *New York Times v. Sullivan* paints a vivid picture of how Justices are able to create a "fictional account of legal history" (51). "When the Court reasons from its own values, or suggests principles but follows its own

predilections, the Court violates the postulates of the constitutional model that justifies its power” (Herbeck 37).

Other legal communication studies use trials and cases as artifacts. These studies draw valuable conclusions, from political response, to trial criticism, to judges’ influence on outcomes, to narrative techniques used by lawyers (Francesconi; Gerland; Olson and Olson). The method used for legal analyses in communication journals generally take the form of a critical essay that convey the author’s perspective on the situation without employing any particular methodological approach. The area of legal communication studies would benefit from more studies with definitive methodical applications of communication theory.

Finally, three important communication articles by Gordon Nakagawa examine the Japanese internment period. The first two articles examine the discourse used to negate the Japanese people, particularly in addressing them, which he argues was a practice that became embedded in current discourse (“No Japs”; “What Are”). The last article examines the narratives of surviving internees (“Deformed Subjects”). This article is particularly relevant to the narrative analysis of the *Korematsu* case and context because it represents the individual internees’ narratives in terms of the power and social control the military had over them. The study uses Foucault to examine the internees as subjects of power. In addition to the analytical aspect, the study manages a human feel that the legal studies do not, revealing the gross indignities and humiliation suffered by the oppressed people forced into the isolated detention camps.

Books

The books that describe the experience of Japanese-Americans during the World War II period serve as the most substantial and in-depth body of literature contributing to this study.

This study relies heavily on these books for their original research of events, government documents, press stories, court records and more. The compilation of the large volume of material that makes up the entire story surrounding the *Korematsu* case is an invaluable contribution to newly evolving perspectives and updated analyses. Newer studies, like this one, are enriched by the information from previous studies, and can use them in order to pass on lessons learned to younger generations so that the nation is given continual reminders of how the permanence of past misjudgments foster the attitudes of today.

The first group of books was written before the lower federal courts' reversal of the Japanese-American cases in 1983. The earliest compilation was initiated by a group of social scientists at the University of California in early 1942. Aware of the impact the potential evacuation would have, the authors began to collect information. This work resulted in *Prejudice, War and the Constitution*, which divides the event into three dimensions: 1) historical prejudice against the Japanese-Americans that evolved before the war; 2) the war itself including the military actions in the United States, and the political environment during the war; 3) and, lastly, the Constitution, which guides the Court cases and legal implications of the events (Barnhart, tenBroek, and Matson).

Roger Daniel's book, *The Decision to Relocate the Japanese Americans*, focuses solely on the government and military decision making process that led up to the evacuation. The first half of the book discusses the decision making process in detail, while the second half, consisting of military and government documents and phone conversations, is referenced as the artifacts that reveal the decision making process.

Dillon S. Myer, as the Director of the War Relocation Program, gives an insider's perspective on the program, including how and why it was implemented. *Uprooted Americans*

is a more objective recounting of occurrences and rationale used by authorities during and after the war. Although Myer does not explicitly make judgments about particular details, as other books do, the information contained within his pages is enough to make an impact on the reader.

An important development in the case, albeit four decades later, was the motion by Peter Irons to reverse the decision in a writ of error to the U.S. District Court for the Northern District of California in *Korematsu v. United States* 584 F. Supp. 1406 (N.D.Cal. 1984). Irons' books are referenced repeatedly as information sources for more recent law reviews and articles. While studying the case for research purposes, Irons found important evidence that the government's prosecution purposely stifled pertinent information. *Justice at War* gives a detailed account of the developments in the area of Japanese evacuation and internment from the beginnings of World War II through the three Japanese-American Supreme Court cases. He then compiled *Justice Delayed*, which gives an account of the Supreme Court cases and their mistakes with the published petitions and arguments of the lower court reversal cases in 1983.

As a testament to the continued interest in and importance of this period of history, The Civil Liberties Public Education Fund and the University of Washington republished in 1997 *Personal Justice Denied*, which is the report by the government commission appointed to study the wartime relocation and internment of civilians. Its renewal is a reminder that, "They happened during World War II, and could happen again, not just to citizens and permanent resident aliens of Japanese ancestry but to any other group, for an arbitrary reason, if we fail to learn the lessons of history" (*Personal Justice* ix).

Legal Journal Articles

The numerous legal journal articles that cover and incorporate *Korematsu* offer a wide variety of perspectives on the case and the era. Articles too numerous to name cite *Korematsu* as

support for reviews about discriminatory cases and discrimination in general. Many recent articles use the case as a critical gauge or parallel for more contemporary arguments, while others solely review the case again or offer a critical analysis of a particular function within the case. The articles mentioned in this review offer a particularly important account or perspective that contributes in some way to the analysis in this study.

The earliest law reviews were written during the Japanese case trials and directly after the *Korematsu* case. Although leadership and public sentiment at the time, especially on the West Coast, were generally in favor of the ethnic Japanese removal, law scholars removed from the situation took a far more critical approach and condemned the mass evacuation and then the decision (Alexandre and Wilson; Dembitz; Rostow). Dembitz's and Rostow's articles are extremely critical of the *Korematsu* decision. They both call attention to the inherent racial discrimination and the Supreme Court's complete reliance on the judgement of military authorities without exploring the evidence for their actions beyond their word.

Some of the more recent law articles discuss the Japanese-American Supreme Court cases in view of the law and court decisions during their wartime context (Comiskey; Currie; Grossman; Simpson). These reviews are crucial to this project because they build contexts for the entire phenomenon. Together this group of articles gives a broader historical context that only hindsight can provide. The articles pinpoint the racial atmosphere as a result of the longstanding racism on the West Coast towards the Japanese and/or being at war with the Japanese at the time. Grossman's review offers the most complete case coverage discussing only the Japanese cases in conjunction with wartime. He even includes specifics on the political actors involved and their particular political pressures and debts (see also Comiskey).

In 1984, when Peter Irons won the writ of coram nobis (reversal due to error) for the Japanese-American cases in the lower federal court, there was a renewed interest in the cases, especially with Irons' published detailed account. Legal journals reviewed *Justice at War* and took the opportunity to condemn the cases, again (Gotanda; Karst; Morris). Unlike the other accounts, Gotanda criticizes Irons' book as ultimately failing to view the events in a broader scope (1186). A broader scope, he offers, is an exploration of race and American law within the realm of other non-Whites (besides the "legal condition of Blacks"). Relative to this study is the criticism that Irons "presents history only as a product of individual's actions, describing these events exclusively in terms of the action of lawyers and judges," rather than acknowledging a more complete recognition of the persistent view that even American born citizens, like Korematsu, were somehow "foreign" (1187).

Saito offers an insightful explanation of the more contemporary expansion of the "other non-white" idea. Saito states that "wartime hysteria overlaid on prejudice does not adequately explain the historical course taken" (75). Another approach invoking a more contemporary argument is Mendenhall's article that parallels the Japanese exclusion and the ban on gays and lesbians in the military. A particularly important perspective to this study is Mendenhall's examination of the use of "rational basis" legal reasoning in both the *Korematsu v. U.S.* argument and the *Steffan v. Perry* argument (upholding the military ban). The rational basis as opposed to a strict scrutiny of the information is a useful parallel for the rational world paradigm vs. the narrative paradigm. Mendenhall claims that rational basis scrutiny is the traditional standard used to evaluate the military decisions including the ban of gays from the military and the exclusion of the Japanese (though the majority purported to use strict scrutiny). Mendenhall explains that,

The traditional rational basis test generally presumes that the government's policy is constitutional, and the Court will uphold it if the classification drawn by the statute or policy is rationally related to a legitimate state interest. Under this standard of review, the Court defers to the judgment of the government policymaker if at all possible. (225)

The military states legitimate goals, and therefore does not have to further justify its decisions, so the Supreme Court avoids careful scrutiny of all the information that potentially applies to the stories being told, like the underlying prejudice in both the gay ban and the Japanese exclusion. The denial of strict scrutiny, like the denial of the narrative paradigm in traditional rational standards of argument, illustrates a conspicuous void and further legitimizes the need for a narrative perspective in argument analysis. Although all of the aforementioned reviews are useful, it is with these last two contemporary perspectives in mind that the analysis in this study will seek to enhance the understanding of this case in a unique way.

Methodology

Theory

The *Korematsu v. U.S.* case is complex in that the context encompasses much more than the case reading itself describes; therefore, the critical tool used to analyze the case must have a broad base that can accommodate all of the factors that comprise the entire communicative event. Walter Fisher's narrative paradigm is such a tool, because it is sufficiently broad and welcomes multiple interpretations, while at the same time provides a technique for evaluation that can clarify the narratives themselves, the reasons people accept them, and their positions in society.

The narrative paradigm is based on a "philosophy of reason, value, action" (Fisher 47). Deriving from Kenneth Burke's definition of man, Fisher's paradigm promotes the idea that

human beings use symbols to create and tell stories (Fisher 63). *Homo narrans* is introduced as the metaphor for humans as storytellers. The narrative paradigm is operationalized through narrative rationality. Narrative rationality tests the stories by evaluating narrative probability, which is whether a story is coherent and narrative fidelity, whether a story is truthful and reliable (Fisher 47). The narrative paradigm encompasses what Fisher terms as the rational world paradigm, which is the more narrow convention for testing logic. The difference between the two is the basis for justifying the existence of the narrative paradigm. The narrative, unlike rational world logic, “is not restricted to clear-cut argumentative forms,” it places value and good reason ahead of traditional argument rules, and even allows that these subsume logical argument. Naturally, the most neglected form of validation is considered to be the narrative that persons create and use to interpret aspects of the world (Fisher 48-49). The narrative paradigm recognizes and values the everyday argument used by the layperson, or by Aristotle’s label the “untrained thinker,” in terms of traditional, rational, and logical argument. The narrative paradigm is not confined to logic, but encapsulates the dialectical nature of the world, the “fact-value, intellect-imagination, reason-emotion” (Fisher 68).

Narratives are based in value-driven ideas and moral codes. People persuade, account and recount from their cultural background that has fostered their value system of reasoning. A particularly important perspective of the narrative paradigm deals with “resolving the problems of public moral argument” (Fisher 71). Fisher points out that public moral argument is distinct from reasoned discourse used in specialized fields of knowledge like the Supreme Court arguments (71). Public moral argument is unfairly dominated by experts and their arguments in the rational world paradigm, making it difficult for others to put forth and validate their reasoning. Narrative paradigm allows the layperson to test stories, even those of experts (Fisher

72). Stories can then be compared and judged against one another through probability and fidelity.

Narrative probability's test of story coherence is similar to the traditional way of assessing logical argument because it reveals the argumentative structure and the positioning or omission of factual evidence. Fisher's addition of testing a story's fidelity is more unique to the narrative paradigm because the goal is to address the logic of good reasons while explicitly differentiating logical reasons from good reasons. Fisher's article "Toward a Logic of Good Reasons" specifically addresses the idea that values are inherent in all reasons and argument warrants. The assessment of good reasons literally and figuratively imports the concept of value into the traditional components of the logic of reasons. In order to determine the most contextually sound reasons, some values must be recognized as more salient than others; however, Fisher does not suggest that there is an absolute hierarchy of values to which all persons adhere.

Communication studies have implemented the narrative paradigm or portions of the theory in a variety of ways. For example, Hollihan and Riley studied the rhetoric of a "Toughlove" parental support group employing narrative to determine the story lines of the actors in the group based upon actions of their children. Hollihan and Riley used narrative fidelity to analyze the recurring themes of the stories, and in turn the parents' use of good reasons for the justification of toughlove. Narratives allowed members of the group to identify with others in their situation and vindicate one another from typical expert condemnation of their parental failures.

A second useful study by Andrew Leslie examines the issue of morality in public debate by extracting what he deems as the most heuristic and useful points of Fisher's narrative theory.

First, he focuses on narrative as a process that is inseparable from rationalizing; and second, he focuses on Fisher's use of Burke's concept of identification to link narrative to argumentation (Leslie 158). Relative to this study of *Korematsu*, identification is a key element that separates the institutional arguments from the oppressed individuals. Leslie states that, "Identification provides a powerful mechanism by which individuals and institutions reciprocally interact, for in order to identify with a group it is necessary to share the values of that group" (161).

In order to apply the narrative paradigm to the *Korematsu* case, the study will examine the multiple stories and how they determined the outcome of the case. The use of narrative in this study will examine the reasons behind the whole event through the interplay of narratives employing Fisher's logic of good reasons inherent in his test for narrative fidelity. The function of narrative fidelity in the stories will foster an understanding of the motivating values concentrated in the competition of the stories within the *Korematsu* context. The logic of good reasons will explain the prevalence of the rational world paradigm in denying the true context of *Korematsu* found in the narrative paradigm that encompasses it. The study will explore the power structure's denial of the narrative reasoned arguments and its lasting implications.

Procedures

The study will begin by examining communication legal studies in terms of narrative and the law. An in-depth examination of how narrative connects to the law using relevant literature will be incorporated to provide explanation and examples.

The second step will be to examine the *Korematsu* case and its context. The study will provide a brief time sequence for clarification, and a brief overview of the relevant precedent cases. This preliminary information will segue to the recounting the *Korematsu* Supreme Court decision, which will review the majority, concurring and dissenting opinions.

The study will then narrate three broad stories that will reveal the context of the case. The public story will focus on the atmosphere, which produced the case, briefly describing pre-war conditions for the ethnic Japanese in America, and concentrating on the war period and its effects on the sentiments of the time. The institutional story will illuminate the activities of leaders in the military, government, and Supreme Court, which were directly instrumental in the internment program and case decision. The Japanese story will relay their experiences briefly before the war and more importantly on their experiences during the war. Fisher's narrative paradigm will then be used to evaluate the rhetoric and values in the stories. The analysis will focus on the competition of stories within the power structure that directed the course of actions.

The final stage of the study will make a judgement on the analysis and discuss answers to the questions posed. This section will draw conclusions and discuss implications of the study itself and how it contributes to the development of narrative studies. The study will conclude with recommendations for examining legal cases through a narrative perspective.

Plan of Reporting

Chapter II will focus on the study of law from the narrative perspective and how it can serve to enhance legal communication studies. Chapter III will present the *Korematsu* case opinions. Chapter IV will narrate the stories and analyze them through an application of Fisher's narrative theory. Chapter V will draw conclusions and implications from the study and make recommendations on using narrative theory in legal communication studies.

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CHAPTER TWO

NARRATIVE AND THE LAW

The study of narrative and the law is a contemporary interest of many legal scholars. This recent area of interest has been developed from the earlier scholarly movement termed as “law and literature” (Gewirtz 3). Law and literature scholarship is diverse in its makeup and has come to a point that it now comprises various subdisciplines (Posner 737). The following are some of the predominant ways that legal scholars study law and literature. They: 1) analyze legal issues in traditional works of literature (Gerwirtz); 2) examine the form, structure, and rhetoric of legal texts and arguments (Hollander); 3) examine law and legal texts as narrative by using literary critical method (West); 4) explore legal texts as narratives that inherently contain fictional elements (LaRue); and 5) promote narrative as a way to recognize and incorporate the voices traditionally considered as “outsiders” (Fajer). The studies in these different areas are somewhat distinct in focus; however, many times the analyses will convey commonalities within the movement that overlap in some manner. The law and literature movement is beginning to rely heavily on the concept of narrative as its basis. The purpose of introducing narrative and law to this study becomes clear in this chapter through the visions and insights of legal scholars who have become champions and critics of this new legal interest.

This chapter will first discuss the meaning and positioning of narrative and the law in legal scholarship. The chapter will then go into greater detail by exploring particular functions of narrative in the law with varied points of view relevant to this study. Next, in order to provide a more complete picture of the issue as a whole, existing criticisms of narrative and law will be discussed and new concerns and insights will be presented. Finally, the chapter will segue into

an explanation of how existing scholarship in the area of narrative and the law will provide a springboard for the current narrative analysis of the *Korematsu* case.

What is the study of narrative and law?

Baron and Epstein claim that some communicative activity in law takes the form of storytelling (141). One of the ways stories are told is through the construction of cases by lawyers, witnesses, and judges that are communicated at trial (Gerwitz 7). Baron and Epstein define the term story, with regards to law, as, “an account of an event or set of events that unfolds over time and whose beginning, middle, and end are intended to resolve (or question the possibility of resolving) the problem set in motion at the start” (147). They view narrative as a broader category in which stories are encompassed (147). The answer to whether the law is narrative, as the title of their article questions, implies more than the mere existence of stories or storytelling in the law. Stories, according to Baron and Epstein, are the “ ‘what of narrative’ to which other elements such as character, setting, point of view and so on, remain subservient” (147). Their point of view on particular stories as part of a larger narrative is evident in this study of the *Korematsu case* because many stories, characters, settings and points of view make up the entire narrative that will be analyzed here. According to Baron and Epstein, one of narrative’s roles in the law is to organize problems into a form that makes both the problems and solutions culturally meaningful (148).

Why then is there a desire to put judicial problems into a culturally meaningful light? This question speaks to a desire to put legal facts and evidence into a social context and background, just as many legal practitioners do in presenting cases. Moreover, providing a social context allows for the persuasive power of a story that strings together the so-called “facts” of a case. The court, in presenting opinions, “must attempt to present their opinions as

seamless webs of argument and narrative” (Brooks 21). The court relies on precedent and rules to weave the story, so that the outcome is made to seem inevitable (Brooks 21). Although the use of stories in law has always been present, only lately have legal scholars become interested in studying its function and power within the law. Paul Gewirtz describes the turn to narrative as a reflection of the sense “that traditional modes of legal analysis are linked to the preservation of the political status quo, and are insufficiently responsive to the interest and concerns of certain social groups, particularly minorities and women” (12). Narrative and law is also said to be a reaction against the law and economics movement, as a more scientific approach, and also to the critical legal studies movement, as an abstract form of analysis (Gewirtz 13). In a scholastic context beyond the law, the rise of narrative and law has been said to coincide with the rise of postmodernism. “The turn to narrative is a clear offshoot of the further loss of faith in the idea of objective truth and the widespread embrace of ideas about the social construction of reality. Narrative, in other words, is seen *as* the social construction of reality” (Gewirtz 13).

How Is Narrative and the Law Studied?

There are two primary ways narrative study can function in the field of law. Scholars can study and critique existing narratives within the different facets of law. Also, narrative study can play a more active role in jurisprudence itself to supplement the use of abstract theory and also to rectify silenced voices (LaRue 2). This section will discuss the first function by examining the role of that fiction plays in legal narratives. The recognition that fictional elements help create narratives used in a court of law runs contrary to the idea that legal decisions are determined strictly by facts and evidence that fall into the clear-cut rule of law. Most legal cases are not able to bridge all the gaps between factual evidence except by probability scenarios, and many cases have two or more sides with different stories to fill in the missing links. In addition to the

evidential makeup of the cases themselves, the existing law is often in an abstract or unclear form that is void of application guidelines, which in turn calls for interpretation by lawyers and judges, who build cases by precedent.

Lewis LaRue claims that judicial opinions are rhetorical because they contain fictions (2). The word fiction is most likely used for greater impact, but his contention is nonetheless a viable explanation. LaRue takes the denotative meaning of fiction as based on imagination, not necessarily fact, and purports that this meaning implies a dichotomy of fact and fiction that may not exist (13). LaRue then concludes that all stories told are in part fictional by questioning whether we can produce stories without imagination and if it is possible to have stories based solely on fact (13-14). His thesis is stated as,

...the proud towers of the law are built not on the level bedrock of 'fact' but on the perplexed terrain of 'fiction,' that judicial opinions are filled with 'stories' that purport to be 'factual' but that instead are 'fictional,' and furthermore, that these 'fictions' could not be eliminated without crippling the legal enterprise. (LaRue 8).

In order to support his thesis, LaRue examines Supreme Court opinions such as *Everson v. Board of Education*, authored by Justice Black, throughout his book in order to exemplify a common storytelling pattern found in opinions to illustrate the thesis of "law as fiction" (9). In *Everson v. Board of Education*, the state of New Jersey is petitioned for reimbursing school transportation fees with taxpayer money to a private catholic school. The opinion begins with the "procedural history," or summary of what has happened in trial court, and an "event history" that describes how the case came about, and then a summary of the issues (9-10). LaRue warns that these descriptions seem like a "technical enterprise," but that one should "listen for the moment in legal discourse when a story is told" (11). Next, Justice Black's opinion upholds the

actions of the school board and interprets the meaning of the establishment clause, separating church and state, through his story of the early American settlers desire for religious freedom that brought them here (LaRue 17-20). The argument is that this story is Black's perspective not only on the case, but also on the desires of the American settlers, and thus brings in fictional elements, created from his perspective, to persuade. Black interpreted the action to reimburse transportation as a "public welfare" action for all (LaRue 28). At the same time, the dissenters tell a completely different and more modern story to illustrate their point of view. Their story focuses on the events at hand, arguing that aid was only extended to Catholic schools, part of the religious school systems, which are set up to 'indoctrinate' (LaRue 28). Regardless of the outcome, LaRue purports only to illustrate the use of fiction in interpretation, not evaluate it.

LaRue acknowledges that not all stories are equal, including the ones judges tell, and that some will be better than others (14). "Judges tell us these stories to persuade us that the path of the law should run one way, not another, and we may be persuaded on some occasions but not on others" (LaRue 14). The form of persuasion used does not necessarily have anything to do with the "truth" of a story: "just as a mass of facts need not guarantee a true story, imagination need not generate falsity" (LaRue 14). Some opinions of the Supreme Court are celebrated and others are condemned, but in either case, their story's persuasive power is many times only partially based in reality, while the rest is based on perspective and/or imagination.

A second approach to studying and critiquing narrative form in law relative to this study is the employment of literary critique to legal narratives. This approach is the most methodologically-based focus in the area of narrative and law. Unlike LaRue's approach, Robin West approaches the narrative critique in law as a way to incorporate a moral point of view. West argues that criticizing law from a moral point of view is difficult, due to the pervasiveness

of legal authority in society that we obey not only in fear of sanction, but because we tend to agree with many of its moral precepts (1-2). West believes that a traditional humanities approach, in response to narratives, is a partial answer to the critical dilemma that arises when examining the laws morality when the law itself influences that morality (6). West claims that a set of criteria taken from a “description of our shared human nature” is needed in order to criticize law from a sensibility that is independent of its influence (6). In reference to West’s dilemma, it is important to note that a broad conception of narrative theory, such as Walter Fisher’s narrative paradigm, can submit to the idea that a moral construction may have legal influence without allowing this knowledge to disrupt the process of the storytelling.

West claims that moral criticisms of law should be based in a humanistic approach and that literature should be that basis; that listening to narrative voice triggers empathy, thereby changing the way we assess law; and that law’s stories can be read as literature to illuminate both the role of its authority in our lives and our analytic assessments of it. (11). As with other studies of narrative and law, West first strikes down the notion that law stems from objective knowledge:

Adjudication [commonly referred to as interpretation of law through the judicial process] is the creation of law backed by force, not the interpretation of a pre-existing legal text guided by reason. Adjudication is an act of power, not of cognition. It is a branch of politics, not a branch of knowledge. (West 91).

West then points out that there are no objective values with which to criticize law, just as there are no objective ways to adjudicate cases (158):

Value like law is a product of history...Our critical inclinations, like all our interpretive choices, are functions of our historical contingency. Values, far from being the bases for

criticism of the powerful acts of others, are themselves nothing, but disguised or not so disguised grabs at power and influence (West 159).

Therefore, criticism must be grounded in a different area, one more able to criticize the power that adjudicates. West claims that one should turn to the motivations and effects to criticize rather than the rationality, coherency or integrity (175).

West contends that, since legal practitioners have failed to come up with a way to criticize law outside of traditional reasoned arguments of legal authority, in order to meet this “postmodern challenge” one must look to other disciplines, such as literary theory (268). Hence West promotes Northrop Frye’s four myths of narrative to serve as the critical tool for which law has been deficient. Frye delineates four categories in which a narrative can fall into. The narrative can also be a combination of two complimentary categories. He represents his categories of comedy, tragedy, romance, and irony through a diagram of a quadrant. The four squares of the quadrant allows the each of the categories to blend with the one next to, above or below it, illustrating that the narrative is a combination of the two categories. The diagonal categories in the quadrant contrast or are in opposition to one another. For example, comedy and tragedy are diagonal, as well as are romance and irony (Frye 147-158). A brief explanation of the quadrant’s significance to legal theory follows; however due to subject and space constraints, this project is not able to provide a fully detailed explanation of each category for Frye’s quadrant and the corresponding legal theories.

West parallels the meanings in Frye’s quadrant with the philosophical and empirical questions of legal scholarship. The philosophical dimension in legal scholarship illustrates the analytical and methodological issues (West 252-253). West contends that Frye’s romance category corresponds to the analytic method of legal naturalism and Frye’s irony category

corresponds to the analytic method of legal positivism (West 352-353). In plainer terms, the romantic ideal of a moral criteria for law based on faith and reason is in opposition to the ironic necessity for a realistic legal theory based on experiences of truth or fact. Conversely, the empirical dimension questions the historical relationship between law and morality through liberalism and statism. The liberal legal theorist, in accordance with comic view, believes that legal systems tend to improve morality over time; while statist, in accordance with the tragic view, believe that the legal system responds to humanity's natural propensity for violence and oppression (West 353-354). Frye's theory of narrative categories illuminates the debates within the four jurisprudential traditions that dominate legal literature (West 409). Although West applies Frye's myths to legal theory, she does draw out some insights to examine the use of narratives by the Supreme Court Justices in their 1990 term decisions on death penalty cases.

The last point of view relevant to this section is the recommendation of narrative theory in law as a way to recognize or rectify the silenced voices of "outsiders" (usually referring to women and minorities within any given community). Marc Fajer defends the use of outsider narratives in legal scholarship, stating that, "members of more privileged groups always have pre-understanding about outsiders but often are not exposed to the outsider's own stories" (1849). This point of view defends against critics (to be discussed later in this chapter) who would question the authority and credibility of particular stories as representative of their silenced group. Fajer conveys that those who question the credibility and authority of outsider narratives many times rely on their own presumptions to question the stories rather than from any direct knowledge, which the stories themselves would introduce. The credibility of the outsider narratives are often challenged, and in many cases, discarded. Korematsu is a good example of an outsider whose narrative was rejected in favor of a narrative belonging to a more

privileged status group. “Faced with a conflict between deep-seated beliefs and a contradicting story, some people may adjust their beliefs, but others are likely to reject the story as untrue” (Fajer 1855).

Martha Nussbaum views the outsider narrative in a more direct relationship to hierarchy. She advocates judges taking a more active role in looking at outsider narratives. “Without a cultivation of thought and imagination as that offered by narratives, judges deprive themselves of an understanding of hierarchy that is essential to good judgment in cases involving inequalities of race and sex” (Nussbaum 337). Nussbaum examines *Loving v. Virginia* (the case that challenged the prohibition of interracial marriages) as a justification for the study and use of narratives to make better and more informed judgments. Much of the legal scholarship found that advocates the use of narrative, and employs a narrative point of view, does so through examples of repressed or overlooked stories in court cases (see also Eskridge, Ferguson, Minow).

“To summarize,” according to Nussbaum, “we have great difficulty seeing the lives of those who are different from ourselves. We easily see laws as neutral when they are in fact highly discriminatory” (345). The narrative analysis of the *Korematsu* case will most appropriately fit in aforementioned body of literature that deals with silenced narratives in the law; however, it will also draw on insights from the fictional view of law and the literary methodological point of view. This study strives to build on the existing studies by using a method of analysis from the field of communication, which hopefully will bring an additional benefit for the study itself and for the field of study as a whole. Before delving into an explanation of why Fisher’s narrative paradigm is one appropriate method for a narrative study of legal cases, criticisms of the movement of a whole should be expressed.

Criticisms of the Narrative and Law Movement

Criticisms of the narrative and law movement are diverse in form, coming from scholars who are against the turn entirely to those who are trying to further its development. Thus, this study will show the broad sweeping criticisms and then look at more particular points that may be improved upon through more research. One of the broader claims against narrative is that of the random chaos theory. Cited often for his critical view of narrative, Alan Dershowitz claims that narrative is misleading because real life events do not necessarily have the organization of a fictional story (Dershowitz 99-100). He asserts that,

Events are often simply meaningless, irrelevant to what comes next; events can be out of sequence, random, purely accidental, without purpose. If our universe and its inhabitants are governed by rules of chaos, randomness, and purposelessness, then many of the stories—if they can even be called stories—will often lack meaning. Human beings always try to impose order and meaning on random chaos, both to understand and to control the forces that determine their destiny (Dershowitz 100).

For example, a jury is prone to believe that a story must obey rules of coherence, and this often can lead to a wrong conclusion. Just because spousal abuse occurs prior to the death of someone's spouse does not always indicate that the spouse was the killer (Dershowitz 100-102). Brooks expounds on Dershowitz's criticism by illustrating a common contention among critics, which says that narrative, "really starts at the end of a story, which is there from the beginning, transforming events into indicia of their finality, their making sense in terms of their outcome" (Brooks 19). The rebuttal to these charges would most likely call for a thesis on its own along with an admission that there is probably room for both theories depending on the circumstances. In any case, this study has the benefit of reflecting on a historical case and events.

Stemming from the chaos theory is the problem of causality. Richard Posner, a recognized critic of the law and literature movement, expresses this concern in a review of the collection of essays in *Law's Stories*. He claims that stories are implicitly used to identify causes that may be irrelevant, such as a defendant telling his/her life story before the event of the crime (Posner 742). Posner desires concrete proof, as opposed to implicit assertions of cause that appeal to mere "sentimental intuition" (742). The emotional argument is exactly what narrativists try to embody, as there may be no available concrete proof, rejected or purposefully overlooked concrete proofs, or different perceptions of concrete proof altogether.

This "sentimental intuition" is a major concern to critics of narrative. Legal practitioners and theorists who have based their work on rational legal reasoning involving claims and proofs are immediately suspect of emotion in argument. Posner further expresses this concern,

... it would be dangerous to deny the risk that emotionality poses to law. Evidence is regularly excluded from jury trials on the ground that it would unduly inflame the jury, and jury verdicts are sometimes set aside because the verdict shows that the jury was carried away by passion or prejudice. The legal narratologists know all this and do not, as far as I know, question it. But they have had difficulty specifying the appropriate role of emotion in trials and other legal settings. (Posner 744-745)

As critics of narrative, Farber and Sherry note that some advocates of narrative contrast rational argument and the emotive power of stories, while others question any distinction between the two at all (43). They seek to intertwine legal storytelling and critical legal theory into a "coherent whole," offering that both find emotive and nonrational language more persuasive than rational argument (Farber and Sherry 43, 52). Harlon Dalton's reaction to their criticisms appropriately states that,

Whatever the weaknesses of the genre and its current manifestations, it cannot be fairly faulted for failing to accomplish that which it does not set out to do. Yet Farber and Sherry continue to criticize storytelling, and in this essay the entire critical theory enterprise, for not satisfying the tests laid down for traditional scholarship and for failing to engage it on its own terms. (Dalton 59)

Robin West, although an advocate of storytelling, illustrates a fuller picture of the nonobjectivity criticism of narrative. She describes a tension between the roles of lawyers as both rights arguers and storytellers competing in ways of organizing society and the conflicts of social living. She questions whether there is a moral difference in the two, and argues that rights and argument are “romanticized” at the expense of storytelling and vice versa (West 422). Storytelling “fails to guard against” and “positively invites the risk of non objectivity” (West 423). West asserts that the dominant view in this culture is that “rights express a superior and more mature conception of human community” whereas stories are an acceptable but “decidedly inferior, mechanism for ordering social relations” especially for moral purposes (West 422).

Conversely, in West’s point of view,

The dissident, but at least arguable ascendant, view in the legal community is that rights and rights talk rest on a decidedly inferior, and even impoverished, understanding of the human community and of the best ways to resolve conflict within it, and storytelling by contrast, presupposes and facilitates a morally richer form of social organization. (424)

Both rights talk and storytelling are necessary, but a “regime of rights” unsupported by stories alienates the legal community (West 226). Therefore, “literary, race, feminist, and critical legal theorists are right to be wary of a glorification of rights that totally eschews stories and denigrates the narrative voice” (West 427).

Other more common critical points directly attack the function of narrative as a way to include outside or silenced voices. Critics question the authority and credibility of outsider stories (Fajer). Authority is questioned because of the possibility that stories are “atypical, inaccurate, or incomplete” (Farber and Sherry 38). Speaking in reference to outsider narratives, there are concerns that the narrator might not be considered typical of their group especially since outsider groups are most often very diverse (Fajer 1850). Another common concern associated with authority is how much weight is to be given to the narrative (Fajer 1850). Credibility, especially in first-person narrative, is a question of truth in the narration (Fajer 1857). Fajer claims that rejecting or limiting first-person narrative, as Farber and Sherry have suggested, is a much broader silencing at a greater cost to the legal system (1857). Outsider stories, the stories that narrative seeks to include, are those that suffer most from the silencing of first-person narratives. The stories in narrative theory are based on perception of truth and question the possibility of objective truth so that a denial of the first person would be a denial of that perception, thereby possibly excluding one of the only ways to gain understanding. According to Fajer, “Farber and Sherry never acknowledge that credibility issues are a natural expected response to outsider narratives. Credibility issues arise because the tension between the outsider storyteller’s sense of identity and the common pre-understanding of these groups” (1863).

Even advocates of narrative and the law admit that there is still ground to cover in establishing and developing a well rounded technique for assessing stories within the law (see Baron and Epstein; Minow; Nussbaum). The storytelling mode alone does not provide guidance or suggestions for selecting which stories to tell, features to discuss, or examples to use (Minow 31). The best remedy for this is another story or counter-story; however there is still the

selectivity problem. “If the counter or alternative stories are simply those told in response to an initial story, we face the specter of warring stories with no methods for testing them or resolving disputes that they reflect” (Minow 31). Robin West illustrates the use of Frye’s myths to illuminate legal theoretical insights, but this is only one suggested method that may not be as practical for assessing all instances of storytelling in the law. One of Posner’s chief arguments is that the majority of the best legal scholarship on narrative “owes little” to other fields outside of law itself (741). He attacks the essays in the *Law’s Stories* symposium volume on the methodological issue. “Particularly conspicuous by its absence from the volume is any sustained consideration of the methodological issue—by what means is one to study the story element in the law?” (Posner 741).

Narrative and Law’s Emphasis on this Study

The movement of narrative and law provides a timely rationale for a narrative analysis of a court case based on communication theory. The movement also provides a sound basis from which to start the analysis of *Korematsu v. United States*; however, there is still the need for an appropriate theoretical base applicable to law and its unique rules and goals. According to Gewirtz, “To move from story to action, we need theories too, theories that help us to assess the representativeness of a particular story, to choose among competing stories, to decide which facts are relevant” (6). There are so many different story forms within the law that varied methods for different situations may be called for.

This study seeks to promote Walter Fisher’s narrative paradigm as a viable option for assessing law’s stories. The case and context of *Korematsu v. U.S* is a complex narrative with many stories to tell. This study will demonstrate that Fisher’s paradigm allows those stories to be told and examined in and of themselves, in addition to being examined as competing stories

that were determinative of an outcome. As the *Korematsu* case is a historical event, the analysis will hopefully avoid any of the technical and theoretical controversies that arise in examining a story or deciding upon a legal conflict in its progression.

Fisher's rational world paradigm is a term consistent with the traditional rational argument that legal scholars employ. This is the same rational argument that has garnered so much criticism from legal narrative advocates as being too stifling and hierarchical (Nussbaum 339). Fisher devises his conception of narrative paradigm to encompass this rational argument, which is a natural way to alleviate the constraints of the rational world paradigm without forgoing its existence and merit altogether. In the words of Fisher,

The narrative paradigm can be considered a dialectical synthesis of two traditional strands that recur in the history of rhetoric: the argumentative persuasive theme and the literary, aesthetic theme. The narrative paradigm as situational, as stories or accounts competing with other stories or accounts purportedly constituted by good reasons, as rational when the stories satisfy the demands of narrative probability and narrative fidelity, as inevitably moral inducements. (*Human* 58)

The two constructions of rationality that Fisher promotes are narrative coherence and narrative fidelity. Narrative coherence is most consistent with the traditional rational argument in that it is a test for the structure, material facts or lack thereof, and credibility, while narrative fidelity focuses on the truthfulness and reliability of the story by comparing it with other stories (*Human* 47). In terms of a narrative analysis, the fidelity is the more useful of the two, because it deals more with the nature of the reasoning in the stories themselves and the values that lead each story to its outcome.

Narrative fidelity is tested by Fisher's logic of good reasons. This logic of good reasons differs from the traditional logic of reasons in that it infuses the rational argument, provided for with traditional logic of reasons, with an assessment of values contained in the reasons. With the addition of the logic of good reasons, Fisher's purpose is to explore how good reasons can be assessed in a rhetorical discourse or transaction ("Toward a Logic" 376). His assumptions about rhetorical communication are that it is full of values, which inevitably make up reasons, and that these ideas call for a scheme that can identify values and critically consider their implications in non-traditional argument forms such as narrative ("Toward a Logic" 376). Fisher's assumptions about the inevitable existence of values found in reasoned narrative argument are the basis of his proposed assessment of good reasons. These assumptions about narrative move one beyond the debate of postmodernism still found in recent narrative and law material and into the next stage offering a method of assessment for the narratives.

Without negating the logic of reasons, Fisher transforms them into the logic of good reasons. The logic Fisher refers to in the logic of good reasons he describes as "a systematic set of procedures designed to aid in the analysis and assessment of elements of reasoning in the rhetorical interaction" ("Toward a Logic" 377). The good reasons are "conceived of as those elements that provide warrants [that which authorizes or justifies beliefs, attitude and action] for accepting or adhering to the advice fostered by any form of communication that can be considered rhetorical" ("Toward a Logic" 378). Fisher offers the logic of reason and the logic of good reasons each as having five components that deal with the facts, relevance, consequence, consistency and transcendent issues of the message. Narrative fidelity is used to test rationality within the narrative paradigm, and can be viewed as the measure of the logic of good reasons. Narrative fidelity is the unique aspect of the narrative paradigm that explores values and their

salience in particular narratives, as this study will do from the perspective of three broad stories that develop into the *Korematsu* case and decision.

Fisher transforms the logic of reasons into the logic of good reasons in order to incorporate a method of assessing value that are inherent in all the reasons (“Toward a Logic 379). Fisher’s criteria for assessing good reasons are fivefold. First, one must examine the facts of the narrative by considering what implicit and explicit values are embedded in the message. What values are clearly pronounced and what values are underneath the words and actions in the narrative? The second component assesses relevance of values by asking if the values are appropriate to the nature of the decision that the message bears upon. In other words, are the values adhered to in the narrative in direct relation to the outcome of the message or have values been omitted, misrepresented or distorted. The next assessment in the logic of good reason weighs the consequences of the values. What are or would be the results of adhering to the values to oneself, to others, and to the rhetorical situation itself? Fisher’s fourth criterion of good reason considers whether the values in the message are consistent with one’s personal experience, if the values are consistent with those whom one admires, respects, and finds credible, and if the values are consistent with the best audience with which one can conceive. The final component of the logic of good reason, and according to Fisher, the most important, is the question of transcendence. If a burden of proof has been established, presumably by traditional logic, are the values the message offers those that, in the estimation of the critic, constitute the ideal basis for human conduct? (“Toward a Logic 379-380)

The transformation of assessing reasons as good rather than merely justifiable is the cornerstone of assessing narrative. A narrative, which is a rhetorical, will not necessarily contain the argument structure traditionally deemed proper for building a case based on facts and

evidence. A narrative analysis recognizes itself as perspective, which by its nature is considered subjective. A person's or a group's perspective will contain different facts, better termed as truths, about the same rhetorical event, therefore creating the reality of competing stories and values. The logic of good reasons does not deny the values of a certain person or group because it may have the disadvantage of not being able to compete in the traditional rhetorical arena. The narrative paradigm validates the outsider stories referenced in the narrative legal scholarship.

The narrative paradigm in essence can bring into law a method of recognition for what is already there in the first place, rational argument and story. Fisher's paradigm can supplement the use of Frye's literary theory for legal scholarship in that it supplies a practical application for judging competing stories. Frye is helpful in recognizing and constructing schemas for theoretical law, but may fall short in the circumstantial gauging of stories. Fisher's paradigm examines the narratives themselves rather than having to fit situational stories into particular categories.

The Narrative paradigm's assumptions can be found in many places in the law, especially in previous court cases and opinions. According to Fisher the paradigm's base assumptions are that humans are storytellers who make decisions through good reason. This good reason derives from history, biography, culture, and character. A person's rationality results from humans as narrative beings who naturally and habitually test probability and fidelity of stories by gauging them against their own and choosing among them (Fisher 64-65). These assumptions underlie the analysis and help to provide focal points for the analysis.

The context of the *Korematsu v. United States* has more than two competing stories that will be laid out and explored as the value-based determinants of Supreme Court case itself. Fred Korematsu and the United States represent much more than themselves as presented in the court

case; they represent different groups, interests, and stories of the time. Moreover, the heuristic value of this case and its parties expands far beyond the time and the particular situation into a dynamic model of demonstration for other outsider stories that become embedded in the United States legal system. The focus on and exploration of narratives in the law can increase understanding beyond the story at hand, even though each narrative is unique with its own details.

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CHAPTER THREE

THE KOREMATSU SUPREME COURT CASE

This chapter will provide an account of *Korematsu v. United States*, 323 U.S. 214 (1944) and its context as a preface to the narrative analysis to be conducted in the following chapter. To begin, this chapter will provide a sequence of dates that is necessary to understand the arguments in the Supreme Court Justices' opinions. Next, a summary of the two relevant cases that served as precedent in *Korematsu* will be discussed. Finally, the chapter will recount the Supreme Court case itself, including the majority, concurring and dissenting opinions that reveal the facts and arguments of the case.

The sequence of events and military orders directly related to the case is imperative to provide an adequate background and a clear explanation of the arguments on which the Justices' based their decision and opinions. Almost all of the following sequenced dates are explicitly included in the opinions of the case, with the exception of a few documented supplements inserted for clarity. The pertinent events leading up to the decision are as follows:

December 7, 1941: Japan attacks Pearl Harbor.

December 8, 1941: Congress declares war on Japan.

February 19, 1942: President Roosevelt signs Executive Order 9066 authorizing the Secretary of War or any designated military commanders to establish military zones and exclude 'any or all persons' from them.

March 2, 1942: General DeWitt establishes military zones 1 and 2 including all of California, Washington, Oregon, Idaho, Montana, Nevada, Utah and the southern portion of Arizona.

- March 18, 1942: President Roosevelt issues Executive Order 9102 establishing the War Relocation Authority to assist in the relocation of citizens evacuated under Order 9066.
- March 21, 1942: Congress passes (Public Law 503), which provides military authority over military zones regarding any entry, presence, or actions in those zones with a \$5,000 fine, a year imprisonment or both for each offense.
- March 24, 1942: General DeWitt issues curfew order to become effective on March 27, directing German and Italian aliens and all persons of Japanese ancestry, alien or citizen, to remain in their homes from 8:00 p.m. - 6:00 a.m.
- March 27, 1942: General DeWitt issues a military order prohibiting all those of Japanese ancestry from leaving Military Area No. 1 after March 29th until further notice. This is accompanied by first series of exclusion orders requiring Japanese Americans to report to Civilian Control Centers for processing (Irons 132).
- May 3, 1942: General DeWitt issues Exclusion Order No. 34, in question in *Korematsu*, directing all those of Japanese ancestry to leave the military zone effective on May 9 before 12 noon.
- May 9, 1942: Effective date of exclusion. Military authorities had already ordered that upon evacuating, the Japanese resident aliens and Japanese Americans should report to a designated assembly center to “insure orderly evacuation and resettlement.”

- May 19, 1942: A military order provides for the indeterminate detention of those already in the assembly or relocation centers.
- May 30, 1942: Fred Korematsu is arrested in the prohibited exclusion area of San Leandro, CA, his hometown, and taken to jail followed by the designated relocation center.
- September 8, 1942: Korematsu is found guilty of violating Exclusion Order 34 and sentenced to five years probation and sentence suspended (Irons 133).
- April 18, 1943: Korematsu's appeal argued in the Ninth Circuit Court of Appeals and certified to the Supreme Court without opinion.
- May 10 & 11, 1943: Supreme Court hears oral arguments in *Korematsu, Hirabayashi*, and *Yasui*.
- June 1, 1943: The Supreme Court remands *Korematsu* back to the Ninth Circuit Court.
- December 2, 1943: The Circuit Court sustains Korematsu's conviction, relying on the Supreme Court's *Hirabayashi* opinion decided June 21, 1943.
- March 27, 1944: Supreme Court grants certiorari petition for Korematsu.
- December 18, 1944: Supreme Court upholds Korematsu's conviction. The Court also unanimously rules in *Ex parte Endo* that Congress had not authorized the continuing detention of a loyal citizen.

Precedent Cases

The Supreme Court case of *Kiyoshi Hirabayashi v. United States*, 320 U.S. 81 (1943), provides the precedent upon which *Korematsu v. United States* rests. Hirabayashi, an American citizen of Japanese ancestry, was charged on May 9, 1942 with violating a military curfew order requiring all German and Italian aliens and all those of Japanese ancestry, alien and citizen, to

remain in their homes from 8:00 p.m. to 6:00 a.m. He was also charged with failing to report to the Civil Control Station in his area on May 11 or 12 to register for evacuation. He was convicted on both counts, but the Supreme Court only considered and sustained the curfew count “since the sentences of three months each imposed by the district court on the two counts were ordered to run concurrently” (*Hirabayashi* 82). The Supreme Court decision was unanimous, with Justice Harlan Stone writing the lead opinion of the Court while Justices Douglas, Murphy, and Rutledge authored concurring opinions. Justice Murphy originally wrote his opinion as a dissent, but then changed it to a concurring opinion under the influence of Justice Frankfurter, who suggested that to dissent amounted to “playing into the hands of the enemy” (Irons 49; see also Grossman).

The decision of *Ex Parte Mitsuye Endo vs. United States*, 323 U.S. 283 (1944), issued on the same day as *Korematsu*, was used by the Majority in *Korematsu* as an example of the proper path for being released from detention and was used by the dissenters in *Korematsu* as support for their opinions that *Korematsu* should be reversed. Mitsuye Endo was excluded under Order No. 52 on May 7, 1942 and evacuated to the Sacramento Assembly Center on May 15, 1942. The War Relocation Authority (WRA) had authorization from the military to issue leave permits for those who were found to be loyal. A procedure for the granting of leave permits was established when evacuees met certain criteria. On February 19, 1942, Endo applied for leave clearance, which was finally granted on August 16, 1943, but she had failed to apply for “indefinite leave” (*Endo* 293). Endo petitioned that she was a loyal and law-abiding citizen being detained under guard against her will (294). The War Relocation authority conceded that it had no legal grounds to hold a citizen found to be law abiding, but protested that additional

detention after leave clearance had been granted “is an essential step in the evacuation program” (295).

The Supreme Court unanimously decided to reverse Endo’s conviction and set her free; however, the Majority refused to rule on the constitutional question. “In reaching that conclusion we do not come to the underlying constitutional issues which have been argued” (*Ex Parte Endo* 297). They argued that any implied power granted to the WRA or the military “must be narrowly confined to the precise purpose of the evacuation program,” thereby freeing Endo from detention as a law-abiding citizen who applied for and was granted leave. Justice Murphy and Justice Roberts authored concurring opinions, which supported the ruling, but for different reasons. They both criticized the Court for not passing on the constitutionality of the program.

Korematsu v. United States Case Summary

Toyosaburo Korematsu v. United States, 323 U.S. 214 (1944), is considered to be the most important of the Japanese-American cases because it upheld the forced exclusion of loyal citizens (Comiskey 1052). The case was decided by a 6 to 3 majority vote by the Justices to sustain Korematsu’s conviction for exclusion order violation. Justice Hugo Black authored the majority opinion and Justice Felix Frankfurter authored a concurring opinion. The other four included in the majority vote were Justice Harlan Stone, Justice William O. Douglas, Justice Wiley Rutledge and Justice Stanley Reed. The dissenters in the decision were Justice Owen Roberts, Justice Frank Murphy and Justice Robert Jackson, all of whom authored separate opinions. The initial conference vote was 5 to 4, with Justice Douglas dissenting and Justice Rutledge in the majority “deeply troubled by the decision” (Comiskey 1052). The following opinions of the Court fully explain the facts of the case.

Majority Opinion

Justice Black, considered at the time to be the civil libertarian of the Court, delivered the majority opinion in *Korematsu v. United States*, upholding the conviction of Fred Korematsu. He began by stating that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect” (*Korematsu* 216). He then qualified this statement by asserting that not all such restrictions are unconstitutional, but that they should be subject to the most rigid scrutiny (216). Black then laid the legal groundwork for the case by reciting the Congressional Act, which Korematsu is accused of “knowingly and admittedly” violating. Korematsu is convicted of violating the Congressional Act sanctioned via Executive Order No. 9066, requiring ‘every possible protection against espionage and sabotage’ through national defense, and then applied via military Exclusion Order 34, requiring the exclusion of all those of Japanese ancestry from designated military zones (216).

Justice Black then revealed the case context by explaining the precedent on which *Korematsu* would rely. In the series of military orders, the first violation was the curfew order. The Supreme Court upheld this conviction in the preceding case of *Kiyoshi Hirabayashi v. United States*, 320 U.S. 81 (1944). Black explained that the both the Hirabayashi conviction and the Korematsu conviction are upheld by the same Act of Congress, aimed at protection against sabotage and espionage. The Act was disputed as unconstitutional by the petitioner in *Hirabayashi* because it was beyond the war powers of the government, and that the curfew order was aimed at only citizens of Japanese ancestry, and therefore discriminatory (217). Justice Black contended that these arguments were seriously considered, but that the curfew order was upheld as necessary government prevention of sabotage and espionage threatened by Japanese attack (217).

Acknowledging that exclusion is a “far greater deprivation” than the curfew, Black remained supportive of the military authorities because the Court was unable to prove that exclusion of those of Japanese ancestry was beyond the war power “at the time” that it occurred (218). He claimed the exclusion “has a definite and close relationship” with the prevention of sabotage and espionage (218). The petitioner disputed the assumptions on which the *Hirabayashi* opinion rested and contended that by May, when the exclusion was ordered, there was no longer danger of invasion (218).

Black flatly rejected these contentions, reciting *Hirabayashi*, “ ‘...we cannot reject as unfounded the judgement of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained’ ...most of whom we have no doubt were loyal to this country” (218-219). To the petitioner’s charge of group discrimination, Black answered that the Court sustained exclusion of the whole group because it could not reject the military’s contention that immediate separation of the loyal from disloyal was impossible (219). Black cited a finding that there were 5,000 Japanese-Americans who refused to swear unqualified allegiance to the United States. Black sympathized that the Court understood the hardships of the citizens, but declared that war brings hardships and citizenry has its “responsibilities as well as privileges” (219). Black explained that exclusion from homes is inconsistent with our governmental system, “except under circumstances of direst emergency and peril” (220).

The next portion of the majority opinion speaks to the petitioner’s and dissenters’ arguments against the government by giving an account and explanation of the pertinent dates that were in question as ill-fitting of the military’s assertions and the decision of the court. One of the counter arguments to the Majority opinion was that on May 30, 1942, when Korematsu

was charged with remaining in the prohibited area, there were conflicting orders forbidding him both not to leave and to remain in the area (220). Justice Black refuted this argument by stating that the March 27, 1942 order stated that it was in effect until further direction from a subsequent order. The exclusion order was that subsequent order, which was given on May 3, 1942 and was to be enacted by May 9.

Citing more important information concerning the dates, Justice Black explicitly conceded that before the exclusion was to take place on May 9, an instruction to report to an assembly center upon evacuation was issued, “ ‘ to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from military area No. 1 to restrict and regulate such migration’ ” (221). On May 19, 1942, before Korematsu was arrested, the military issued an order that “provided for detention of those of Japanese ancestry in assembly or relocation centers,” and so it was argued that the exclusion order could not be considered separately from the detention order (221). Justice Black refuted the notion that the Court must pass on the “whole detention program” when only the exclusion charge is before them (221). He states that,

The lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. (221-222)

The majority asserted that since Korematsu was not convicted of failing to report to or remain in an assembly center, that they could not determine the validity of the separate order (222).

Speaking on the issue, Black stated that, “ It will be time enough to decide the serious

constitutional issues which [the] petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him and we have its terms before us” (222).

Justice Black’s opinion spoke to the argument of racism in consideration of the fact that there had been no evidence of Korematsu’s disloyalty. Black denied that the order was based on racial prejudice. He implied a more complex situation, due to wartime, by stating that the Court’s task would be “simple” and its “duty clear were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice.” Black added that, “regardless of the true nature of the assembly and relocation centers...we are dealing specifically with nothing but an exclusion order.” (223).

Finally, the majority opinion ended with the issue of military deference. Due to the military’s fear of invasion, “they [the military] decided” that the situation demanded segregation of the citizens of Japanese ancestry, and Congress determined that “they should have the power to do this” (223). Ironically Black stated that, “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...” (223). Black ended by asserting that from the “calm perspective of hindsight,” the Court cannot “say that at that time these actions were unjustified” (223).

Concurring Opinion

Justice Felix Frankfurter wrote a concurring opinion that supported the majority, but also felt it necessary to respond to Justice Jackson’s dissent, in which the constitutional positioning of the decision is raised (Grossman 679). Justice Frankfurter reinforced the majority opinion by stating that the same legal reasoning being applied in this case was applied in *Hirabayashi* (224). Frankfurter argued that actions taken in wartime must only be judged within that context, and that just because the action may be “lawless” in a time of peace does not mean that it is “lawless”

in wartime (224). He believes that sanctioned military orders are constitutional. Frankfurter expressed this by arguing that, “To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as ‘an unconstitutional order’ is to suffuse a part of the Constitution with an atmosphere of unconstitutionality” (224-225). Frankfurter directly quoted phrases from Jackson’s dissent to refute Jackson’s idea that deciding on the constitutionality of the exclusion order would amount to constitutionally endorsing such orders. Frankfurter stated that to recognize military orders as reasonable precautions in war and at the same time deny them constitutional legitimacy “makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war” (225).

Since the Constitution grants the power to “prosecute war effectively,” nothing in the Constitution denies Congress the right to enforce military orders and make violation of those orders a triable offense (225). Frankfurter finalized his Constitutional claims by relinquishing responsibility from the Court. “To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business not ours” (225).

Dissenting Opinions

Justice Owen Roberts wrote the first dissent, citing a “clear violation of constitutional rights” (225). Roberts directly challenged the merits of the case by offering that this case was much more extensive than keeping people off the streets at night or excluding people from an area for their safety or that of the community (225-226). Justice Roberts asserts that,

On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his

ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States (226).

Justice Roberts disputed the Government's and Majority's argument that the exclusion and detention orders were separate, declaring that they were "single and indivisible" (226). This opinion also referenced the sequence of the military orders and events leading up to the internment of those of Japanese ancestry. Roberts began with the declaration of war against Japan and recited the Executive, Congressional and military orders that followed, along with the establishment of military zones (226-227).

The opinion then directly described the sequence relevant to Fred Korematsu's involvement. Korematsu had notice, as of March 2, 1942, that in order to prevent espionage and sabotage, the Military was authorized to exclude him from areas and prevent him from entering or leaving certain areas without permission (228). His home city, San Leandro, was in Military Area No. 1 (228). Roberts recites that the petitioner was charged under the following Congressional Act,

March 21, 1942, Congress enacted that anyone who knowingly 'shall enter, remain in, leave, or commit any act in any military area or military zone prescribed...by any military commander...contrary to the restrictions applicable to any such area or zone or contrary to the order of...any such commander' shall be guilty of a misdemeanor. (228)

Roberts continued his argument by citing that the petitioner, included by the criteria of all Japanese aliens and those of Japanese ancestry, was prohibited from leaving Military Area No. 1 on March 29, 1942 until a future proclamation was issued (229). Roberts contended that on May 3, 1942, General DeWitt issued the order providing that all those of Japanese ancestry were to be excluded from Military Area No. 1 (229). The dates Justice Roberts cited as that of the

exclusion order and its implementation differ slightly from those in the Majority opinion. This may be due to the fact that different areas were notified at different times. The start of the series of exclusion orders was on March 23, 1942 (Myer xxiv). Nevertheless, Roberts' argument rested on the fact that the issued exclusion order included direction for the recipients to report to a Civil Control station for further instruction on reporting to an assembly center.

The order required a responsible member of each family and each individual living alone to report [at] a time set, at a Civil Control Station for instructions to go to an Assembly Center, and added that any person failing to comply with the provisions of the order who was found in the described area after the date set would be liable to prosecution under the Act of March 21, 1942.

Justice Roberts notes that the "obvious purpose of the orders" was to "drive all citizens of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution" (229).

Roberts pointed to General DeWitt's report to the Government, which itself referred to the "programme of evacuation and relocation" saying that an Assembly Center was a euphemism for prison because no persons were allowed to leave the centers (230). Roberts noted the irony of having no choice between the exclusion and detention. "In the dilemma that he dare not remain in his home, or voluntarily leave the area, without incurring criminal penalties, and that the only way he could avoid punishment was to go to an Assembly Center and submit himself to military imprisonment, the petitioner did nothing" (230).

The petitioner was tried under a plea of not guilty and convicted. His sentence was suspended and he was placed on probation for five years (230). Immediately after the conviction, however, he was taken into military custody and placed in an Assembly Center

(230). Justice Roberts further builds his case that the order was part of one program by indicating that the War Relocation Authority was established on March 18, 1942, before the exclusion order (230). Roberts then cited the *Endo* Supreme Court case (also decided that day) as proof that Korematsu was “illegally held in custody” after his conviction and sentence suspension (230).

Justice Roberts criticized the Government for arguing the case as if the only outstanding order at the time that the petitioner was arrested was the exclusion order. He agreed that authorities must often take temporary measures in the face of sudden danger as they did in *Hirabayashi*, but this case was not of the same nature as *Hirabayashi* (231).

[In this case] the exclusion was part of an over-all plan for forcible detention. This case cannot, therefore, be decided on any such narrow ground as the possible validity of a Temporary Exclusion Order under which the residents of an area are given an opportunity to leave and go elsewhere in their native land outside the boundaries of a military area. To make the case turn of any such assumption is to shut our eyes to reality. (232)

Justice Roberts contended that the petitioner was denied due process of law because of the conflicting orders to remain in the area, and then evacuate the area, should have invalidated one of the orders (232). The two conflicting orders were, “nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp” (232). The only way Korematsu could have avoided prosecution would have been to follow the exclusion order and report to the Civil Control Center (232). Justice Roberts indicted the Court for ignoring the larger picture by remarking,

We know that [the exclusion order directed him to an Assembly Center] is the fact. Why should we set up a figmentary and artificial situation instead of addressing ourselves to the actualities of the case? These stark realities are met by the suggestion [in the Majority opinion] that it is lawful to compel an American citizen to submit to illegal imprisonment on the assumption that he might, after going to the Assembly Center, apply for his discharge by suing out a writ of habeas corpus, as was done in the Endo case, *supra*. (233).

Roberts reemphasized the ironic situation, referring to it as a “new doctrine of constitutional law” that one who believes a law to be invalid cannot defend on the grounds that the statute is invalid, but is expected to obey it “after he has suffered the disgrace of conviction and lost his liberty by sentence then, and not before, seek from within prison walls, to test the validity of the law” (233). This argument was Justice Roberts’ response to the Majority opinion, which suggested that Korematsu must go to the Assembly Center before challenging that order. Of course, he was held in the Assembly center after the conviction, but in order to challenge it, he would have to had been charged and convicted of not going, which he was not, even though the order was outstanding when he was arrested.

The next dissenting opinion is that of Justice Frank Murphy. Justice Murphy’s opinion is often referred to as the most scathing criticism of the three dissents, with his argument based on the charge of racism (Dembitz; Grossman). First, Justice Murphy mentioned that the plea of military necessity for the exclusion came “in the absence of martial law,” and so should have been approved (233). He asserted that such exclusion goes beyond constitutional power into “the ugly abyss of racism” (233).

Justice Murphy acknowledged the need to consider the reasoning of Military authority during war, and stated that their judgements should “not be overruled lightly” by those who may not have access to all of the military intelligence (233). He believed, however that there should be limits where martial law has not been declared (233). He claimed that individuals could not be stripped of their rights by “military necessity that has neither substance nor support” (233). Murphy explicitly reserved the right of the judicial branch to judge the validity of military discretion.

Murphy cited the traditional judicial test of military discretion in depriving rights in various Court precedents: “Whether the deprivation is reasonably related to a public danger that is ‘so immediate, imminent, and impending’ as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger” (234). He then pointed to the verbiage of the exclusion order having used the phrase ‘all person of Japanese ancestry, both alien and non-alien,’ and declared it insufficient to meet the immediate danger criteria, calling it “obvious racial discrimination” (234).

The order deprived those within its scope of their Fifth Amendment rights of equal protection (235). The order also deprived them of due process, because it excluded them without hearings and deprived them of being able to live and work where they choose and move about freely (235). Justice Murphy found no correlation between the exclusion and immediate danger, citing it as a “racial restriction” that brought about more “sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law” (235).

Justice Murphy conceded that there was a fear of invasion, sabotage and espionage at the time on the Pacific Coast, and that reasonable military action would have been appropriate; however, the “exclusion, either temporarily or permanently, of all persons with Japanese blood in

their veins has no such reasonable relation” (235). The military reasons, he states, relied on the assumptions that all those of Japanese ancestry have “a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways” (235). Justice Murphy’s opinion specifies the incongruent relationship of military necessity and immediate danger by reviewing the text of General DeWitt’s final report. He found that the report erroneously assumes “racial guilt” rather than military necessity. Murphy used as an example the words of DeWitt, who “refers to all individuals of Japanese descent as ‘subversive,’ as belonging to an ‘enemy race’ whose ‘racial strains are undiluted,’ and as constituting ‘over 112,000 potential enemies...at large today’ along the Pacific Coast” (236).

In the report, Murphy found no reliable evidence of disloyalty, using either general or menacing conduct of the Japanese aliens and citizens (236). Murphy claimed that “justification is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgement” (236-237). He proceeded to cover and dispute the evidence provided by General DeWitt. According to Justice Murphy,

[The Japanese ancestors] are condemned because they are said to be [as stated in General DeWitt’s report] ‘a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion.’ They are claimed to be given to ‘emperor worshipping ceremonies’ and to ‘dual citizenship.’ Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty, together with acts as to certain persons being educated and residing at length in Japan. It is intimated that many of these individuals deliberately resided ‘adjacent to strategic points,’ thus enabling them to carry into execution a tremendous program of

sabotage on a mass scale should any considerable number of them have been inclined to do so.’ (337-338)

Justice Murphy’s opinion continued with more “unverified” information used in the General’s report to the Government. He methodically included footnotes behind each of DeWitt’s assertions, which cited studies that refuted assimilation claims, clarified reasons for dual citizenship and other claims, and also pointed out statements made that were based on pure speculation. Justice Murphy thereby disproved a “reasonable relation between the group characteristics of Japanese-Americans and the dangers of invasion, sabotage and espionage” (239).

Acknowledging the long-standing racial discrimination of the group, Murphy stated that,

The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices – the same people who have been among the foremost advocates of the evacuation. (239)

He chastised the military for having based its decision on racial and sociological judgements when “every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters” (240).

Justice Murphy then directed his opinion to a discussion of individual guilt, which is recognized by the United States, as opposed to group guilt. He stated that there are some disloyal individuals who are among those of Japanese ancestry, just as there are among those of German and Italian ancestry, but to cite examples of individual disloyalty as indicative of group

disloyalty is discriminatory (240). This process, he continued, denies our legal system that is based on deprivation of rights for individual guilt (240). Justice Murphy directly charged that,

[This group discrimination] “at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case...is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow (240).

There were no “adequate reasons” given by the military not to treat Japanese-Americans like German-Americans and Italian-Americans, and hold investigations and hearings on an individual basis in order to separate the loyal from the disloyal (241). Murphy cited the inconsistency between the claim that “ ‘time was of the essence,’ ” and the time period it took for the enactment of orders. The exclusion order was issued four months after Pearl Harbor, the last order was issued eight months later, and the “last of these ‘subversive’ persons was not actually removed until almost eleven months had elapsed” (241). “Deliberation” was more “of the essence than speed” (241). Murphy emphasized the suspect representation of urgency when “conditions were not such as to warrant a declaration of martial law” (241). Murphy held that within this time period and in these circumstances it would have been possible to hold loyalty hearings for at least the 70,000 American citizens “especially when a large part of this number represented children and elderly men and women” (242). As evidence to this, Murphy cited the fact that during a six-month period the British set up hearing boards and summoned and examined 74,000 Germans and Austrians (*Korematsu* Footnote 16; see also Simpson).

Finally, Justice Murphy ends his opinion in a declaration of dissent:

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. (242)

The last of the three dissenting opinions is that of Justice Robert Jackson. This opinion is heavily based on the merits of presiding over the constitutionality of military orders during a time of war. Unlike Justice Frankfurter, Jackson did not want the Court to sanction the order. Justice Jackson began by acknowledging the racial discrimination. He confirmed Korematsu's American citizenship, based on his being born on United States soil, and confirmed the fact that his loyalty has not been disputed (243). Korematsu had been a law-abiding citizen up to the point when "he has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived" (243).

Jackson considered the series of military orders that made his conduct a crime as "even more unusual," commenting that they forbade him to both remain and to leave, allowing only the prospect of giving himself up to military authority and the detention camp (243). A citizen's presence was only a crime "if his parents were of Japanese birth" (243). If there had been a German or Italian citizen convicted of treason, but out on parole, Jackson sarcastically remarked that "only Korematsu's presence would have violated the order" (243). Innocence had no bearing; the conviction resided "only in that he was born of different racial stock" (243). "Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable" (243). As support of this statement, Jackson cited Article 3, 3, cl.2 of the constitution saying that "no Attainder of Treason shall work Corruption of Blood, or Forfeiture

except during the Life of the Person attained' ” (243). In peacetime, the Court would have refused to enforce the order (244).

Jackson then discussed the constitutionality of the order itself. He claimed that the ‘law’ under which Korematsu was convicted is not actually found in an act of Congress, but was found in a military order. The Act of Congress and the Executive Order would not “afford a basis for this conviction,” meaning it rests only on General DeWitt’s order. “And it is said [in the Majority opinion] if the military commander had reasonable military ground for promulgating the orders, they are constitutional and become law, and the Court is required to enforce them. There are several reasons why I cannot subscribe to this doctrine” (244).

Justice Jackson supported this by saying that it would be “dangerous” to “expect or insist” that each military order “conform to conventional tests of constitutionality” (244). The primary consideration in wartime is that the measures successfully protect society rather than concern itself with legality (244). Jackson interestingly positioned his argument, stating that, “Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting” (244). Even though these orders have military authority, “they may be very bad as constitutional law” (244). The point on which Jackson’s opinion turns is that, “if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient” (244).

Jackson found that he could not have ruled on the expediency of the military actions given the information that was before them, but believed that even if they were valid expedient actions, it does not follow that they are constitutional (245). This case exemplifies the problems

and limitations the Court will always have in examining military necessity (245). How does the Court know if there is military necessity, he questioned with the confirmation that “there is sharp controversy as to the credibility of the DeWitt report” (245). Jackson shed light on the Court’s precarious position: “So the Court, having no real evidence before it, has no choice but to accept General DeWitt’s own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable” (245). Jackson claimed that military decisions are not “susceptible of intelligent judicial appraisal,” and that the courts have little alternative than to defer to military authority (245).

Justice Jackson was concerned with the danger to liberty that the United States Army had brought forth through the deportation and detention of those of Japanese ancestry (245). Therefore, he concluded that a judicial decision sustaining the order “is a far more subtle blow to liberty than the promulgation of the order itself (246). Justice Jackson argued that military orders, even the unconstitutional, last no longer than the emergency; however, his concern was for the long-term effects of ruling on the orders, stating:

Once judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. (246)

Jackson continued in this vein to describe the danger of passing on the order as constitutional. If a military commander oversteps boundaries it is deemed an “incident,” but if the Court reviews

and passes on the incident it becomes “the doctrine of the Constitution” with a “generative power of its own” (246).

The Court yielded in the *Hirabayashi* case to sustain the conviction only as a curfew order and only as they had carefully ‘defined it’ (246). Jackson chided the Majority Court for incorrectly relying on the *Hirabayashi* decision:

However, in spite of our limiting words we did validate a discrimination on the basis of ancestry for mild and temporary deprivations to indeterminate ones...The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said [by the majority] we must require them to leave home entirely; and if that, we are told they may also be taken into custody for deportation; and if that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know. (247)

Justice Jackson returned to the inappropriateness of ruling on the military order at the end of his dissent. He noted that the Exclusion Order rested on a violation of liberty, and expressed that the people should not rely on the Court to review on an issue that seems “wholly delusive” (248). “If people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint” (248).

Conclusion

Korematsu vs. United States is one of the best examples of the Supreme Court deferring to military and government authority, even under conditions that the Court itself realizes are suspicious. The Majority Court purposely avoided ruling on the whole process of exclusion,

evacuation, and internment set by the military and sanctioned by the government before Fred Korematsu's arrest. The narrow parameters in which they ruled were highly questionable because Fred Korematsu along with the rest of the ethnic Japanese were mandated to abide by the whole process intended by the military and the government to be a program. The Majority and concurring opinion make it clear that they do not intend to question the reasoning of the government and military, but only to suppose that they have one and therefore that the order is valid. The Majority leans on the context of war to legitimize their decision.

The dissenting opinions all target distinct and relative issues. They collectively comment on the racial nature of the decision while focusing separately on the indivisibility of the exclusion order from the program, the lack of evidence to back the military's report, and the danger of constitutionally endorsing the Majority decision.

The next chapter will provide the background stories that led up to this decision. Chapter four will include the public's part in the decision to begin the internment program, the institutional politics that influenced both the internment program and the Supreme Court decision, and the experiences of the ethnic Japanese during leading up to the Court decision. After relaying the stories that produced the *Korematsu* case, there will be an analysis of each of those stories and how they affected the others by employing Fisher's logic of good reasons.

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CHAPTER FOUR

NARRATIVE ANALYSIS

Much like other Supreme Court opinions, *Korematsu v. United States*, 323 U.S. 214 (1944) reflects as well as fosters the sentiments of the time. The *Korematsu* opinion discussed in detail in Chapter three can be understood more completely in terms of the surrounding circumstances. Insight into the entire narrative develops through an examination of meaning in a context. The arguments put forth in favor of curfew, evacuation, and internment of the ethnic Japanese during World War II are doomed to fail by traditional standards of rational argument, especially in the absence of its context. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D.Cal. 1984), the California lower court reversal of Fred Korematsu's conviction provides the evidence that disproved the arguments contained in the original Supreme Court case; however, the Supreme Court decision and its precedent upholding Korematsu's conviction still stands.

Systematically disproving the evidence in the Supreme Court case is an unnecessary repetition of the numerous books and law reviews on that score, thereby allowing this project to turn to an analysis of the narrative from which the case derives. First, the chapter will present a separate construction of three stories that greatly contributed to the *Korematsu* case issues. These stories will be relayed with the objective of including the most crucial incidents and examples, as a full historical account is impossible. After telling the stories, an analysis will examine and compare the values that contributed to the rationale of the stories by employing Walter Fisher's conception of narrative fidelity, explained through the logic of good reasons. The comparison of narratives reveals the essential constructions that contribute to the salience of one story over another that ultimately affects the outcome of the *Korematsu* decision.

The first story develops an understanding of the public sentiments toward the ethnic Japanese people beginning with the early days of Asian immigration through the ethnic Japanese internment, focusing on the incredulous events that occurred during that time period. The second story, largely succeeding the first, explores the higher institutional level of government where crucial decisions and decision-makers approved and enforced the ethnic Japanese internment in the United States. The last and most poignant story attempts to portray the experience of the ethnic Japanese at that time, with as much representation of the experience as is feasible in this forum.

The Public Story

The collective public sentiment on the West Coast fueled the decisions to evacuate and intern the Japanese-American citizens and residents during World War II. The Report by the Commission on Wartime Relocation and Internment of Civilians asserts that, “the hostile reception and treatment of Japanese immigrants on the West Coast are the historical prelude to the exclusion and evacuation” (*Personal* 28). With this in mind, this story will explore the period when hostile feelings first began to be directed towards those of Asian decent on the West Coast of the United States, up through the time of the Japanese-American Supreme Court cases. Naturally, it is impossible to account for every perspective, incident, and event during those years, but the following story attempts to recreate a collective feeling generated during those years by the general population of the West Coast.

Hostile attitudes towards Asians on the West Coast began with the Chinese in the 1860s and 70s (Myer 10). Many of the Chinese in the region worked as railroad laborers. One of the defining developments that commenced the feelings of hostility against the Chinese occurred when the transcontinental line was finished in 1869, and about 10,000 Chinese were left

unemployed, causing the labor market to become depressed. The white union laborers blamed the lack of work on the “cheap Mongolian labor” and they protested against the Chinese and their employers (*Personal 29*). As a result, labor interest groups pressured Congress to pass the Chinese Exclusion Act in 1882, suspending all Chinese immigration to the United States (*Personal 29*). Not until 1884, when the Japanese Emperor allowed citizens to emigrate to find work, did the Japanese start to immigrate to Hawaii, and then to the mainland (*Personal 30*). At first, they were welcomed as inexpensive labor that had been curtailed by the Chinese Exclusion Act. At this time, neither the Chinese nor Japanese could become naturalized citizens in the U.S. due to the Naturalization Act of 1790, which only allowed free “white” aliens to be naturalized (*Personal 29*).

Between 1900 and 1910 the anti-Japanese campaign intensified (Myer 11). In May of 1900, labor groups organized a major anti-Japanese protest in San Francisco in order to urge a congressional act excluding the Japanese, as had been done for the Chinese 18 years earlier (Myer 11). During this meeting, Mayor James Phelan of San Francisco spoke:

The Japanese are starting the same tide of immigration which we thought we had checked twenty years ago...The Chinese and Japanese are not bona fide citizens. They are not the stuff of which American citizens can be made...Personally we have nothing against Japanese, but as they will not assimilate with us and their social life is so different from ours, let them keep at a respectful distance. (*Personal 32*)

This statement foreshadowed things to come and helped to foster a popular conception of the Japanese-Americans as permanently foreign, which led to the rampant myths about their race during World War II.

In 1905, when Japan defeated Russia, the anti-Japanese rhetoric increased, creating fear that the “Yellow Peril” would come in droves to take over the Pacific Coast (*Personal 37*). According to the Commission on Wartime Relocation and Internment, this “creature of propaganda” fueled the fire for subsequent anti-Japanese actions by the public (*Personal 37*). In February of 1905, the *San Francisco Chronicle* began a series of anti-Japanese articles that, with the exception of some clergy members and the Japanese themselves, the public largely supported (*Personal 32*). By March 1905, both houses in the California legislature had passed anti-Japanese resolutions to limit and diminish Japanese immigration (*Personal 32*). In May 1905, delegates from 67 organizations, mainly labor groups, met to form the Japanese Exclusion League, and by 1908 there were 100,000 members and 238 affiliated groups (*Personal 32*).

In 1906, politicians and labor groups pressured the San Francisco school board to issue an order barring Asian children from white primary schools, professing a need to protect the white children’s “youthful impressions” from “association with pupils of the Mongolian race” (*Personal 33*; see also Myer 11). At the time there were only 93 Japanese students in the entire San Francisco public school system, but all were transferred to a Chinatown school (*Personal 33*). President Roosevelt found out about the segregation from reports originated in Tokyo, and in addition to his embarrassment at finding this out from overseas, he was concerned for diplomatic relations between the U.S. and Japan (*Personal 33*). He prevailed upon the San Francisco school board to stop the segregation order, and in return he would negotiate with Japan to restrict immigration (*Personal 33*). This led to an executive order barring any Japanese in Hawaii, Mexico, and Canada from entering the U.S. and a 1907 “Gentleman’s Agreement” that Japan would not issue any more passports to laborers (Myer 11; *Personal 33*).

Popular culture, including films, novels, and newspapers, promoted fear of the Yellow Peril throughout the West Coast (see *Personal* 37). This amplified myths and stereotypes about the rapid birthrate of the Japanese and issues about their inability to assimilate that perpetuated hostility until long after World War II (Myer 14; *Personal* 37-38). The false rumors were so widespread and damaging that during World War II, the War Relocation Authority (WRA) in charge of evacuating and interning the Japanese-Americans issued a pamphlet entitled *Myths and Facts* to offset the propaganda (Myer 14).

In 1913, the California Alien Land Act was passed, making it illegal for aliens ineligible for citizenship to buy agricultural land or lease it for more than three years (Myer 12). During the years of World War I, since Japan was an ally of the U.S. and citizens were occupied with the war, the anti-Japanese activity died down to an extent, but after the war, activity resumed with “new vigor and new recruits” (Myer 12). In 1919, The American Legion, in its first convention, passed a resolution recommending exclusion of the Japanese from the United States, and in 1920 the Joint Immigration Committee was formed to work towards this goal (Myer 12). The Joint Immigration committee was directed by V.S. McClatchy, publisher of the *Sacramento Bee*, and consisted of officers of the California American Legion, the Federation of Labor, the California State Grange, the Native Sons of the Golden West, and the Associated Farmers, including the California attorney general (Myer 12).

In 1921, McClatchy filed a brief on behalf of these groups to lobby for a congressional exclusion act. In 1924, the Exclusion Act was passed, which denied any additional immigrants to the U.S. who would not otherwise be eligible for U.S. citizenship under the existing law. In plainer terms, all non-whites were barred from U.S. entry, including anyone of Asian decent. This Act was not repealed for the Japanese until 1952 (Myer 12). There were repeated efforts,

thereafter, in California to ban those ineligible for citizenship from employment by the government or any public works projects (*Personal 36*). According to the Commission on Wartime relocation, “Anti-Japanese agitation and sentiment continued to be part of the public life of the West Coast” (*Personal 36*). The events of World War II would soon be detrimental to the ethnic Japanese residing on the West Coast.

Immediately after Japan attacked Pearl Harbor on December 7, 1941, there was surprisingly little agitation (Myer 15; Irons 6; tenBroek 74). A *Los Angeles Times* editorial the next day said that most of the Japanese in the U.S. were “good Americans, born and educated as such” (Irons 6). The *Times* told the public, “let’s not get rattled,” and quoted the Japanese American Citizens League as offering the full cooperation and facilities of the ethnic Japanese (Irons 6). Within six weeks, “the tide of public opinion shifted abruptly” and the *Los Angeles Times* reversed its position (Irons 7). Pearl Harbor became the perfect justification for effecting more drastic measures against the Japanese-Americans. During January and February of 1942, many organizations and leagues, along with newspaper publications, began to call for action ranging from army surveillance to evacuation or internment (Myer 15; *Personal 28*). Along with all the other publicity, the Secretary of Navy made an inaccurate press statement about fifth column activity on the part of the local population in Hawaii that spread rapidly through numerous newspaper reports (Myer 16).

Letters to the editor and newspaper commentaries called for radical government action. Many private employers threw Japanese workers out of their jobs and refused to do business with them (*Personal 71*). The press both reflected and stimulated the cry for immediate action against the ethnic Japanese, and “by the end of January the clamor for exclusion fired by race hatred and war hysteria was prominent in California newspapers” (*Personal 71*). Walter

Lippman, an influential nationally-syndicated political columnist, wrote a piece entitled “The Fifth Column of the Coast,” which advocated setting aside the civil liberties of those of Japanese ancestry (Myer 22). The column explained that even though there had been “no important sabotage on the Pacific Coast,” this should not be taken as “a sign that there is nothing to be feared. It is a sign that the blow is well organized and that it is held back until it can be struck with maximum effect” (Myer 22). A Scripps-Howard national columnist, Westbrook Pegler, then interpreted Lippmann’s column into his own, declaring on February 16, 1942 that,

The Japanese in California should be under guard to the last man and woman right now and to hell with habeas corpus until the danger is over...Do you get what [Lippmann] says?...The enemy has been scouting our coast...The Japs ashore are communicating with the enemy offshore and...on the basis of what is known to be taking place there are signs that a well organized blow is being withheld only until it can do the most damage...We are so dumb and considerate of the minute constitutional rights and even of the political feelings and influence of people whom we have every reason to anticipate with preventive action. (tenBroek 86)

Another popular writer, sportswriter Henry McLemore, was brought to the West Coast specifically to write columns for the Hearst papers covering the Japanese situation on the coast. The *Los Angeles Times* and all the Hearst papers began to carry on a daily campaign to evacuate the Japanese (Myer 18). McLemore criticized the lack of government intervention in the *San Francisco Examiner* on February 5, 1942, and then went on to say:

I am for the immediate removal of every Japanese on the West Coast to a point deep in the interior. I don’t mean a nice part of the interior either. Herd ’em up, pack ’em off and give ’em the inside room in the badlands. Let ’em be pinched, hurt, hungry and dead

up against it...Personally, I hate the Japanese. And that goes for all of them.

(tenBroek 77)

The Mutual Broadcasting Company had a month-long series hosted by John Hughes that attacked the Japanese and spread rumors of sabotage and espionage (*Personal* 71). “The calculated purpose of the Hughes campaign, like others which followed it in the press and on the air, was to persuade the public to demand a policy of action toward the local Japanese” (tenBroek 74). The Un-American Activities Committee released a report called the “Yellow Report” in February, after authorization of evacuation, that supplied material for many newspaper scare stories (Myer 19). Another address that attempted to sway the public was spoken by radio from Mayor Bowron of Los Angeles for the occasion of Lincoln’s birthday. The radio address to the people of Los Angeles and surrounding areas promoted patriotism by taking the liberty to speak on Lincoln’s behalf:

If Lincoln were alive today, what would he do...to defend the nation against the Japanese horde...the people born on American soil who have secret loyalty to the Japanese Emperor. There isn’t a shadow of a doubt that Lincoln, the mild-mannered man whose memory we regard with almost saint-like reverence, would make short work of rounding up the Japanese and putting them where they could do no harm. The removal of all those of the Japanese parentage must be effected before it is too late. (Myer 21-22)

Members of the Native Sons and Daughters of the Golden West received *The Grizzly Bear* newsletter that continually berated the Japanese. In one issue, the editor blamed the war with Japan and the attack on Pearl Harbor on the federal and state authorities who had not heeded all their warnings against the Japanese (*Personal* 68). They could have avoided Pearl Harbor, and in turn the war, by “rigidly” enforcing exclusion laws, denying citizenship to

Japanese offspring born in the United States, denying “Jap-dollars” to businesses, denying the use of California as a “breeding ground for dual-citizens,” etc. (*Personal* 68). All of the aforementioned government lobby organizations involved in anti-Japanese campaign began to call for the evacuation. After the evacuation had begun, The Grower-Shipper Vegetable Association answered the charge of wanting to get rid of the ethnic Japanese for economic reasons in the *Saturday Evening Post* article entitled “The People Nobody Wants”: “We’re charged with wanting to get rid of the Japs for selfish reasons. We might as well be honest. We do. It’s a question of whether the white man lives on the Pacific Coast or the brown man...And we don’t want them back when the war ends, either” (*Personal* 69). According to the Wartime Commission on Relocation, there was “no vigorous, widespread defense” of the Japanese resident aliens or even the Japanese-Americans on the West Coast, “those concerned with civil liberties and civil rights were silent” (*Personal* 69). To make things worse, The Northern California Civil Liberties Union chapter was in favor of the evacuation (*Personal* 69).

The Justice Department conducted raids in conjunction with the evacuation program to uncover “contraband.” These raids made newspaper headlines stressing certain questionable items, which any household could have had (tenBroek 82). The public heard about the cameras, short wave radio sets, binoculars, telescopes, rifles, revolvers, knives, maps, etc. that were found in houses of the ethnic Japanese (tenBroek 82). In one instance, officials found 70,000 rounds of rifle and shotgun ammunition, 12 rifles and shotguns, a public address system, cameras, film, books of Japanese propaganda and a radio operators handbook, all possessed by the Japanese operator of a sporting goods store (tenBroek 82).

The public was inundated with all of these accounts by the press. One San Diego resident wrote to the U.S. attorney general asking, “How much longer are we going to let these

traitorous barbarians strut among us seeking every means of destroying us” (tenBroek 83).

During the time of the evacuation, the Office for Emergency Management polled public opinion about aliens in the population. Germans were considered most dangerous among those in the east United States and the Japanese in the west United States (*Personal* 112). There was almost a consensus opinion that the government had acted correctly in moving the Japanese aliens, and a majority agreed with the move of the Japanese-Americans (*Personal* 112). According to this poll, people in the South were “particularly prone to treat Japanese harshly” (*Personal* 112). Citizens and politicians just east of the Pacific Coast, such as Wyoming and Idaho opposed accepting any ethnic Japanese, on the grounds that their war industries needed protection from sabotage, as did the Pacific Coast (*Personal* 49).

Protests against the evacuation were generally found among the clergy and academics (*Personal* 113). The Federal Council of Churches and the Home Missions Council called the evacuation a waste of national resources (*Personal* 113). The Provost of the University of California, Monroe Deutsch, sent a letter of protest to Justice Felix Frankfurter. From February 21 to March 12, 1942, hearings were held regarding the evacuation, and various interest groups testified. The majority of people who appeared before the House Select Committee on National Defense Migration favored the evacuation, but there were a few voices of opposition (Myer 24).

Louis Goldblatt, secretary of the California State Industrial Union Council, an affiliate of the Congress of Industrial Organization, spoke against it, saying that “a good deal of the problem has gotten out of hand” (Myer 24). He further stated that the attack against the native-born Japanese was “whipped up” from a basis of “racial suspicion” on the Pacific Coast, “which has been well fostered, well bred, particularly by the Hearst newspapers over a period of 20 to 25 years” (Myer 24). Mike Masaoka, secretary of the Japanese American Citizens League, offered

that they would cooperate if this was a step that secured the nation; but, he continued, if the evacuation is a “surface urgency [that] cloaks the desires of political or other pressure groups who want us to leave merely from motives of self-interest, we feel that we have every right to protest” (Myer 23). Protests did occur, although few, through individual resistance and legal action by some Japanese-Americans, including Fred Korematsu.

The Institutional Story

The following story’s relevance to the *Korematsu* case derives from higher government’s perspective with regards to crucial decisions about the evacuation and internment made by the executive and military, congress, and judicial branches. The government acts prior to Pearl Harbor, explained in the public story, are also an important prelude to the more immediate government choices discussed here. The story presents particulars that expand on the sequence of events in Chapter three covering the time period from Pearl Harbor through the *Korematsu* Supreme Court decision. In addition, the present perspective will illustrate how the public sentiments pervaded the more crucial decision-making entities.

The top government officials were by no means unimpressed by the hysteria of the public on the West Coast. Their deliberations were in large part a reaction to the immense pressure that was building, rather than a sole concern for safety from espionage and sabotage. General DeWitt, the West Coast military commander, played the most immediate role in the actions to evacuate and intern individuals of Japanese ancestry. Being in the center of the war hysteria in California, he was particularly subject to its concerns. According to the Wartime Relocation Committee, “It was the voices of organized interests, politicians, and the press on the West Coast that DeWitt heard most clearly” (*Personal* 67). Roger Daniels, a prominent historian on the subject of the Japanese internment period, describes General DeWitt as the military instigator for

the evacuation idea (14-15). “It was from this amateurish, panic-ridden headquarters [DeWitt’s] that the first military proposal for mass evacuation was developed less than seventy-two hours after the attack on Pearl Harbor” (Daniels 15). DeWitt had a racist attitude that was evident in his many remarks about “Japs” on the West Coast (Daniels 14). “The racism exhibited by the general and his staff was blatant and unmistakable, and clearly corresponded to (if it did not surpass) that of articulate public opinion along the Pacific Coast in the early months of war” (tenBroek 208). More lasting evidence of DeWitt’s feelings towards the Japanese race was found in his final report to the government justifying the evacuation. The same report was formally admonished in Justice Murphy’s dissenting opinion in *Korematsu*.

After Pearl Harbor, DeWitt released several false reports of Japanese sabotage and espionage off the coast to the point that his subordinate officer, Joseph Stilwell, became agitated. Shortly thereafter when the reports were proven false, Stilwell noted that “I believed it, like a damn fool,” and two days later Stilwell refused to act on another false alarm given by DeWitt (Daniels 14-15). In his diary, Stilwell described DeWitt as a ‘jackass’ and called the whole West Coast department ‘amateur’ (Daniel 14-15).

In January of 1942, West Coast U.S. Congress members and Senators began to express favorable views toward evacuation and internment (*Personal 70*). Congressman Ford of Los Angeles wrote the Secretaries of War and Navy and the Federal Bureau of Investigation (FBI) Director informing them that the California mail he had been receiving was heavily in favor of evacuation and internment (*Personal 70*). His recommendation was that “all Japanese, whether citizens or not, be placed in inland concentration camps” (*Personal 70*). Congressman Clarence Lea, the senior West Coast Representative, later wrote directly to President Roosevelt with a

signed resolution on behalf of the entire Pacific Coast congressional delegation endorsing an immediate evacuation plan for all those of Japanese ancestry (Daniels 48; *Personal* 81-82).

After pressure from Congress members, on behalf of their political interest groups and resident constituents, the War Department formally received the imminent military recommendations. On February 14, 1942, General DeWitt submitted his recommendations in a formal report to Secretary of War Stimson requesting permission to designate military areas,

for the exclusion...in his discretion, of the following classes of persons, (a) Japanese aliens, (b) Japanese American citizens, (c) alien enemies other than Japanese aliens, (d) any and all other persons who are suspected, for any reason by the administering military authorities to be actual or potential saboteurs, espionage agents, fifth columnists or subversive persons (Myer 23).

Shortly thereafter, on February 19, President Roosevelt signed Executive Order No. 9066, which was the authorization to begin the long process of curfew, exclusion, evacuation and internment. Order No. 9066 authorized the Secretary of War “and the military commanders whom he may from time to time designate...to prescribe military areas in such places and of such extent as he or the appropriate military commander may determine from which any or all persons may be excluded” (Myer 23).

During the time of the aforementioned executive and congressional decision making process, the War Department was conferring with the Justice Department about the serious legal issues of evacuation. The Justice Department was clearly against the evacuation plan, believing that it was an unnecessary infringement on constitutional rights, and that the internal security situation was under control (Myer 19-20). In early February, before the Executive Order was issued, the Justice Department debated with both the War Department and General DeWitt on

the necessity of mass evacuation. U.S. Attorney General Biddle negatively responded to General DeWitt's recommendation, commenting that, "No reasons were given for this mass evacuation" (Myer 20). Biddle and others in the Justice Department were not at all persuaded by the need for mass evacuation, and tried to detach themselves from the decisions and actions for the evacuation plan (Daniels 34). In one instance, Biddle responded to the War Department's request for action:

The proclamations directing the Department of Justice to apprehend, and where necessary, evacuate alien enemies, do not, of course include American citizens of the Japanese race. If they have to be evacuated, I believe that this would have to be done as a military necessity in these particular areas. Such action therefore, should in my opinion be taken by the War Department and not by the Department of Justice (Myer 21).

FBI Director J. Edgar Hoover was also against the mass evacuation, instead advocating surveillance on an individual basis (*Personal* 55). He wrote to Attorney General Biddle with his opinion of evacuation:

The necessity for mass evacuation is based primarily upon public and political pressure rather than of factual data. Public hysteria and in some instance, the comments of the press and radio announcers, have resulted in a tremendous amount of pressure being brought to bear on Governor Olson and Earl Warren, Attorney General of the State, and on the military authorities...Local officials, press and citizens have started widespread movement demanding complete evacuation of all Japanese, citizen and alien alike.

(*Personal* 73)

With Hoover's objections in mind, Attorney General Biddle wrote a letter to President Roosevelt on February 17, 1942, in a last attempt to express his concern for the situation, citing the press as the motivator for the baseless evacuation:

It is extremely dangerous for the columnists, acting as 'Armchair Strategists and Junior G-Men,' to suggest that an attack on the West Coast and planned sabotage is imminent when the military authorities and the F.B.I. have indicated that this is not the fact. It comes close to shouting FIRE! in the theater; and if race riots occur, these writers will bear a heavy responsibility. (*Personal* 84)

Secretary of War Stimson was in favor of action, but was reluctant about the scope of the evacuation and consulted Roosevelt for approbation of the military's desired mass evacuation (*Personal* 79). He revealed the following in his diary:

This is a stiff proposition. General DeWitt is asking for some very drastic steps, to wit: the moving and relocating of some 120,000 people including citizens of Japanese descent. This is one of those jobs that is so big that, if we resolved on it, it just wouldn't be done; so I directed them to pick out and begin with the most vital places of army and navy production and take them on in that order as quickly as possible...I arranged for a telephone call [with President Roosevelt]...I took up with him the west coast matter first and told him the situation and fortunately found that he was very vigorous about it and told me to go ahead on the line that I had myself thought the best. (*Personal* 79)

When Secretary of War Stimson consulted President Roosevelt in a telephone meeting, because Roosevelt had no time to meet the War Secretary face to face, he asked questions that he along with Assistant Secretary McCloy and General Tom Clark had put together in a memorandum to guide the meeting (Irons 57). The most important question written and asked

was “Is the President willing to authorize us to move Japanese citizens as well as aliens from restricted areas?” (Irons 57). If Roosevelt answered yes, then a series of questions about the extent of evacuation were to follow (Irons 57). Stimson received no direct answer to any of the questions, Roosevelt told him to do what he thought best, and so the President’s approval was assumed (*Personal* 79). Assistant Secretary McCloy called the West Coast Presidio and reported that “we have carte blanche to do what we want as far as the President’s concerned” (Irons 58).

In spite of the protest by the FBI and the Justice Department, the order had the green light from the President and was issued, and so the plan was implemented. Furthermore, after the President signed the order, Attorney General Biddle reversed his position and decided to support the will of the government. He sent Roosevelt a memo justifying the legality of the order by referring to the broad power that the President was authorized to exercise under his general powers of war (*Personal* 86). “Even the most dedicated of the Justice Department’s warriors for human decency subordinated that cause to their intra-agency loyalties” (Karst 1154).

On February 20, 1942, DeWitt was formally designated the Military Commander for the Western Defense Command. Before General DeWitt gave any orders, curfew or otherwise, on February 27, the cabinet created a civilian directed War Relocation Authority (WRA) responsible for handling the resettlement of the evacuees (Daniels 52). A division of labor was organized, putting the army in charge of rounding up the persons to be evacuated and bringing them to the Assembly Centers. The WRA was responsible for the operation and maintenance of the camps (Daniels 52).

The U.S. House of Representatives Select Committee Investigating National Defense Migration was formed to investigate the evacuation issues. The Committee held hearings in February and March, in which testimony was overwhelmingly in favor of evacuating the

Japanese regardless of citizenship (Daniels 52). The two key recommendations, according to Daniels, were that the “Japanese should not be allowed to run loose and German and Italian aliens should be examined individually” (52).

Even though Germans and Italians were more vast in number and more heavily concentrated around the strategic areas of the West Coast than were the Japanese, the National Defense migration committee’s recommendations influenced General DeWitt to exempt German and Italian nationals from the exclusion. There were 56 people arrested for espionage by the FBI in 1941 and 1942, none of whom were Japanese (Grossman 652). In battling the lack of incriminating evidence against the Japanese residents and citizens, General DeWitt and the War Department argued that mass evacuation was inevitable because determining individual loyalty was impossible, not because of the time factor, but because of positive determinations could not be made (Irons 208). In answer to the FBI and the Office of Naval Intelligence (ONI) on this point, DeWitt responded that “there isn’t such a thing as a loyal Japanese and it is impossible to determine their loyalty by investigation” (Irons 269). In the first draft of General DeWitt’s final report to the government on internment, which was altered by Assistant Secretary of War McCloy before it reached the Supreme Court, DeWitt wrote “that an exact separation of the ‘sheep from the goats’ was unfeasible” (Irons 208).

The series of General DeWitt’s military proclamations began on March 2, 1942 in the designation of military zones. On March 9, after the military notified the War Department that there were no legal penalties to enforce their orders, the War department drafted a statute creating the new federal crime and sent it to Congress (Daniels 53). Quickly, Congress worked to pass an uncontested act on March 21, making it a federal offense to violate any order issued by a designated military commander, under the authority of Executive orders, punishable by fine

or imprisonment (Myer 26). Senator Robert A. Taft was the only congressional member who informally remarked on the new law, calling it the “sloppiest criminal law” he had ever seen, and asserting that even though it would be enforced during wartime, it could never convict anyone in peacetime “because the court would find that it was so indefinite and so uncertain that it could not be enforced under the Constitution” (Daniels 53).

After the executive order and congressional act, the series of military orders began the drastic process of depriving the ethnic Japanese of their liberties. The curfew, exclusion, evacuation, and internment were all part of an overall plan to rid the West Coast from those of Japanese ancestry. When the exclusion process began, DeWitt first issued a proclamation for “voluntary” movement from the barred military zones. The military command sponsored the “voluntary” movement of 2,100 Japanese from Los Angeles to the Manzanar Assembly Center on March 21 (Daniels 118). The voluntary evacuation was prior to the first curfew order issued on March 24. The different dates of exclusion and evacuation were a result of the vast area the military command were covering. General DeWitt moved an estimated 120,000 ethnic Japanese, about 70,000 of which were American born citizens, without charges or trial (Personal 150; Myer xiii).

General DeWitt turned in a final report to the government on the necessity of the evacuation program, which was used in the *Korematsu* Supreme Court case. Before that time, the report was given to the Assistant Secretary John McCloy in the War Department to prepare for the *Hirabayashi* case, well before the briefs were due (Morris 856). After reviewing the report, McCloy was concerned about General DeWitt’s position, which stated he did not want the Japanese on the coast “irrespective of loyalty” (Irons 208). McCloy was also disturbed at DeWitt’s racist remarks in the section discussing the need for evacuation (Irons 208). After

hearing that only ten copies of the report were dispersed, McCloy changed the questionable wording of the report, and told DeWitt to resubmit the second version and if the first had not existed (Irons 210). The Justice Department requested the report, but McCloy did not provide either version, which had the “confidential” security label, until seven months after the *Hirabayashi* decision (Irons 211).

Four of the twelve Japanese-Americans who protested the military orders and sought recourse in the legal system were granted certiorari by the Supreme Court through the process of appeals in the lower California court system. The Supreme Court had three chances to declare the evacuation process unconstitutional in *Hirabayashi*, *Ex Parte Endo* and most decidedly in *Korematsu*, but the Court left the process untouched (Daniels 56-57). The Court was unwilling to rule in hindsight on the military necessity of the evacuation at the time, having already conceded the probable unconstitutionality of the actions in peacetime (*Korematsu* 220; 224). Justice Black, on behalf of the Court, stated that, “We cannot-by availing ourselves of the calm perspective of hindsight-now say that at that time these actions were unjustified” (*Korematsu* 224).

The Justices were both part of and susceptible to the forces working against the Japanese-Americans at that time. President Roosevelt took special consideration to enlist the Justices in the war effort (Grossman 673; see also Comiskey). He gave them duties as informal advisors, and asked them to sit on committees and to speak with audiences about the importance of sticking together in the war effort (Grossman 673).

It drew them personally into the prosecution of the war and gave them a personal stake in insuring its success, while using them to legitimate wartime policies.

This compromising of judicial independence and objectivity, and undermining of the separation of powers doctrine, would Roosevelt knew, make it more difficult for the Justices to vote against him when legal challenges to war measures reached the Court. (Grossman 673)

The lines that separate the balance of power in the United States government were blurred in the interest of friendships as well as in the interest of a united government front in the war effort. The intermingling of public officials was such that each had personal and professional stakes in remaining under the influence of others. For instance, Justice Black had known General DeWitt since 1930, and they and their wives were friends (Grossman 673). Justice Black's former messenger also worked for General DeWitt during the war (Grossman 673). Other strong ties existed between the Secretary of War, Henry Stimson, and Justice Frankfurter, who were old friends (Grossman 673). Justice Frankfurter had extensively lobbied President Roosevelt to appoint Henry Stimson to the position of Secretary of War, as well as lobbying for the Assistant Secretary of War appointment for one of his former students, John J. McCloy (Grossman 673). As Assistant Secretary of War, John McCloy played a considerable role in defending and implementing the internment policy about which he briefed Justice Frankfurter on a regular basis (Grossman 673).

Justice Murphy later said that when the *Korematsu* case came to the Supreme Court, the Court "blew up." Chief Justice Stone assigned the majority opinion authorship to Justice Black, a known libertarian, who became furious because writing it might compromise his reputation. Justice Stone recognized that Black's authorship might help legitimize the exclusion policy and the Court's decision. (Grossman 677)

Even though Justice Black was the most liberal in the majority of *Korematsu*, he was a strong believer in military deference. Black's first draft of the majority opinion stressed this military deference and the Court's minimal oversight of military actions, especially during wartime. Justice Stone then wrote a concurring opinion, which stressed the validity of the exclusion order without having to recognize the internment process. Black wrote a second draft incorporating Stone's remarks, and Stone withdrew his concurrence (Grossman 678). Justice Douglas, originally in dissent, reversed to join the majority after Black added the remarks regarding the separateness of the exclusion and internment orders. Justice Douglas was not in favor of the military necessity argument, but was able to rest on the validity of only the exclusion order (Grossman 678).

In theory, the Supreme Court may be an ivory tower, the Justices detached and objective agent of the law. What we find here, however is a Court charged with assessing the means to achieve ends to which all the Justices were intensely committed. There is no better example of the importance of environment and context, and the frailty of judicial independence, in Supreme Court decisionmaking. (Grossman 673)

The Story of the Nikkei

The third story focuses on the repressed group of individuals that make up the most compelling piece of the *Korematsu* case context. Beneath all the public and political strife were the afflicted individuals, who were most affected by decisions which were not their own. This group of outsiders is known as the Nikkei. The Japanese term Nikkei refers to any ethnic Japanese person in the United States, regardless of citizenship or generation. Other references to the ethnic Japanese to be used throughout this story are the Issei, which refers to the first-generation immigrants who came to the United States, and the Nisei, which refers to the second-generation U.S.-born citizens (Nakagawa 161).

Most of the Issei who emigrated from Japan to the United States did so after the Emperor allowed them to leave Japan to find work elsewhere (*Personal* 30). Japan was characterized by pride, strong moral conviction and community cohesiveness, and the Issei transferred those cultural patterns to their new life in the United States (*Personal* 38). In the years prior to the major turmoil that took place with evacuation and internment, the Nikkei endured the abundant prejudice and suspicion against them. The Issei were criticized for being clannish and unable to assimilate into U.S. culture, and so they responded by raising their children, the Nisei, in two cultures (*Personal* 38). The Issei expected their children to be able to live amongst both cultures, fearing that discriminatory laws might eventually prevent the Nisei from remaining in the U.S. (*Personal* 38). As a result, the Nisei felt the pull of the traditions of their ancestors, while at the same time identifying more with American life (*Personal* 38).

The Issei greatly stressed education and the betterment of their society in the United States (*Personal* 39). Many gave up their Buddhist religion, believing that joining the Christian church would open doors of employment and social acceptance (*Personal* 40). By 1930, over

half the Nisei were Christian (*Personal 40*). Since the Issei were excluded from political and social life by the “white” settlers, the Issei formed many ethnic organizations, the strongest of which were formed specifically to combat the anti-Japanese organizations (*Personal 41*). Known as the Yellow Peril with aspirations for taking over the Pacific Coast, the Japanese did not even reach three percent of California’s population from the time they immigrated through World War II (*Personal 37*).

The heights of racial hostility against the Nikkei before WWII came during periods of economic recession (*Personal 42*). The Issei were farmers and manual laborers who were forced to work for much less than the European settlers, but quickly moved up to become independent farmers and highly skilled laborers (*Personal 43*). In 1917, the average rate of production for California’s farmland overall was \$42 per acre compared with the production from the Issei crops, which was \$141 of production per acre (*Personal 43*). During WWI the value of the Issei crop was at the highest rate of \$55 million (*Personal 43*). Others who did not farm or labor on railroads were shopkeepers serving their community. Few were white-collar professionals due to the discrimination that prohibited their entering (*Personal 44*). “By 1940, racial segregation by law was still widespread and racial discrimination by custom and practice was found everywhere, largely accepted as part of American life” (*Personal 44*).

In the midst of the increasing racism up to and during WWII, the Nikkei were not only offended socially, but increasingly physically. Pearl Harbor gave a new vigorous life to the rumors and racism against the Japanese (tenBroek 68). The prejudices manifested into forms of violence and physical assaults against the Nikkei (Mendenhall 203). Japanese places of business, mostly restaurants, were assaulted by mobs that drove away their customers (Mendenhall 203). The Secretary of State in California attributed these attacks to the newspaper

accounts of anti-Japanese meetings (Mendenhall 204). They watched and listened as the campaign for evacuation gained momentum all around them in the newspapers and on the radio advocated by authority figures in their communities on the West Coast. One Nisei expressed what many of them felt at the time:

There seems to be a movement to make this present conflict a war between races...and some people are theorizing that this is a war to end the yellow menace...thousands of them [Japanese] live in the United States...and are wholeheartedly for the U.S. and democracy—yet they are or may be singled out for special attention if this racial war movement gathers momentum. (tenBroek 81)

One of the only group efforts against evacuation took place on February 19, 1942, in Los Angeles. More than a thousand members of The United Citizens Federation, which represented pro-Nisei interests, met and laid plans to persuade the press, the politicians, and the government that their attacks on the Nikkei were unfounded; however it was already too late. Unfortunately, the meeting occurred the same day as Roosevelt signed the Executive Order 9066 (*Personal* 85). One of the only other voices heard was that of the Secretary of the Japanese American Citizen League, Mike Masaoka, who spoke against the evacuation at the hearings, reminding the committee of the rights of the Japanese Americans (Myer 23).

The Nikkei felt the weight of General DeWitt's restrictive orders that led up to the evacuation. One Nisei account of this time is as follows:

Prior to the actual removal, the Army issued many directives that controlled and restricted the daily lives of the Japanese Americans. The directives had [an] oppressive effect, especially on my mother. My mother was against war—any war. But somehow, she remarkably accepted my brothers' serving the U.S. Army. There was a curfew,

pulling down of shades at night, many ordinary household items were considered contraband (cameras, flashlights, etc.)...In a frenzy, believing books were dangerous, especially ones written in Japanese, she...burned them all. Among them was a book of Shakespeare's plays, written in Old English on one page and in Japanese on the other. I miss that book. (Nakagawa 148)

The Nikkei were allowed less than a month to prepare for evacuation, which included time for the disposal of their property. This painful experience was recounted in the Wartime Commission on Relocation through the words of the Nikkei: "We had about two weeks to do something, either lease the property or sell everything ... Final notice for evacuation came with a four day notice ... We were given eight days to liquidate our possessions ... I remember how agonizing was my despair to be given only about six days in which to dispose of our property and personal possessions" (*Personal* 121).

They were allowed to bring only what they could carry, and were forced to sell most of their belongings for next to nothing (*Personal* 132). "Droves of people came to purchase goods and to take advantage of the availability of household furnishings, farm equipment, autos and merchandise at bargain prices" (*Personal* 132). One Nisei describes the injustice:

It is difficult to describe the feeling of despair and humiliation experienced by all of us as we watched the Caucasians coming to look over our possessions and offering such nominal amounts knowing we had no recourse but to accept whatever they were offering because we did not know what the future held for us. (*Personal* 132)

Others described the anger they felt at the "people who were like vultures," and reacted by striking back. One man put a false address in the paper for a car with brand new tires so that the white people would chase after it, and others contemplated destroying their property altogether

(*Personal* 132-133). Larger properties like stores and nurseries also needed to be disposed of because of the uncertainty of return. Mary Ishizuka describes their dilemma:

He [her father] had 20 acres of choice land...and customers...But wealth and standing did not save my father from being arrested on the night of December 7, 1941. When...9066 mandated that all Japanese were to evacuate, we were faced with the awesome task of what to do. And my mother on her own without father...was not able to consult him...You cannot get rid of large nurseries—nursery stock—at this short notice. So what did she do but she gave all the nursery stock to the U.S. Government, the Veterans Hospital which was adjoining the nursery. (*Personal* 125)

The exclusion was expected to cause a serious disruption in the economy of California since Japanese farmers were to produce 40 percent of the truck crops (*Personal* 126). Therefore, the government expected the Nikkei farmers to continue tending their land until the last possible moment, citing that crop neglect or damage could be elevated to an act of sabotage (*Personal* 126). The substantial economic loss suffered by the Nikkei during this time was estimated by the Federal Reserve Bank of San Francisco to be around \$400 million (*Personal* 119).

The evacuation started on March 31, 1942 and continued through August 7, 1942. The Nikkei were first sent to Assembly Centers, where they remained anywhere from one to eight months, averaging about three (*Personal* 138). Afterward, they were all transferred to the Relocation Centers for an indefinite stay. The Nikkei had little choice but to go along rather than resist since both compliance and resistance inevitably led to internment (Irons 75). Once evacuation was posted, one member of each family was to report to the control center for instructions (*Personal* 135). Each family was registered, issued a number, told when and where to report and what items they could bring (*Personal* 135). One evacuee recalls, “Henry went to

the Control Station to register the family. He came home with twenty tags, all numbered 10710, tags to be attached to each piece of baggage, and one to hang from our coat lapels. From then on, we were known as Family #10710” (*Personal* 135).

Rather than submit to this process, Fred Korematsu decided to follow another path. Unlike Hirabayashi, who demanded to be arrested as a conscientious protester, Korematsu chose to try and hide himself from authorities, as did 15 others according to FBI record (Irons 96). Korematsu took the following course, as he explained himself after his arrest:

I have lived all my life in Oakland...with my folks until four weeks before we had to evacuate. Then I left home telling them I was going to Nevada. Then instead I stayed in Oakland to earn enough money to take my girl with me to the Middle West. Her name is Miss Ida Boitano. She is a different nationality—Italian. Between the time I left home and the date before evacuation I lived 2 wks in San Francisco during an operation on my face and 2 wks in Oakland with a friend. The operation was for the purpose of changing my appearance so that I would not be subjected to ostracism when my girl and I went east. (Irons 95)

On May 30, 1942, Korematsu was picked up as he was walking down the street with his girlfriend in San Leandro. He told police he was of Spanish-Hawaiian origin and produced a fake draft card. Several hours after his detainment, he revealed his identity and underwent hours of questioning (Irons 93).

A few days after Korematsu’s arrest, Ernest Besig, the director of the San Francisco ACLU office, came looking for a test case volunteer after reading about several arrests in the paper (Irons 97). Before Korematsu willingly accepted, two other citizens had declined help

from Besig and pleaded guilty (Irons 97). Korematsu was sent to Tanforan Assembly Center to await trial (Irons 98).

There were 16 assembly centers—all but three of which were located in California (*Personal* 137). The assembly centers were hurriedly and flimsily constructed as temporary residences until more permanent locations were secured. Evacuees frequently recalled the first sight of armed guards, barbed wire and searchlights (*Personal* 136). One internee described the conditions the Nikkei encountered:

The fact that our isolation was total from the mainstream of society became crystal clear at this time. The facilities, as such, were the most primitive as far as I could determine. The outhouse had no partition, just a board and holes cut into them. The shower was just that—a long pipe with many shower heads lined up but no partition for dressing rooms. For an individual or group of people who prided themselves on cleanliness and a deep sense of modesty and courtesy, this was the epitome of human degradation. You learned quickly that in order to survive, you must adapt to the standard as set by the Army, that to adhere to your social mores and code of ethics, you would be left with nothing, not even your individuality...The lack of privacy in the barracks made our daily living very stressful, particularly in trying to interact as a family unit. (Nakagawa 154)

There were standards set by the Wartime Civil Control Administration (WCCA), but evacuees described conditions that were far below the standards that had been established (*Personal* 138). The Nikkei were confined to very small spaces that had cracks in roofs, and also weeds growing through the cracks in the floors (*Personal* 138-139). They also lived in stockyards and horse stables with no furniture, save cots or bags of hay for bedding (*Personal*

139). They were to be moved eventually to the relocation centers, which had better conditions, but equal confinement and disgraceful procedures. The move has been described as follows:

Before leaving Tule Lake Center, we were forced to strip naked to see whether we had any concealed weapon on us. Even our safety razors and mirrors were taken away...In March, 1946, we reached Crystal City, Texas. At Crystal City all our letters were censored. I wrote numerous letters to the Justice Department but received no reply as to the reason for my detainment. Upon arriving by train with people under quarantine, we were subjected to the same routine of a military shakedown. The soldiers and civilians alike searched our luggage for contraband. Through it all our older sisters had to suffer the indignities and humiliation of having their flannel undergarments waved in front of hundreds of people. The comments and insults made by the soldiers who were conducting the inspections are still very vivid in my mind today. (Nakagawa 150)

To the prisoners, the differences in the assembly centers and the permanent relocation camps were welcome, but not before their dignity had been stripped:

The individual during this time in the assembly centers lost in many respects his self-esteem, pride, and the ability to aggressively assert his will. Despite the inconveniences of the new centers...the fact that one did not have to feel like an animal just to relieve themselves and to keep themselves clean made you look upon your captors as 'angels,' so to speak. (Nakagawa 157)

Over 120,000 Nikkei were in custody of the War Relocation Department after having been released from military custody of the assembly centers, although there were still armed guards in attendance (*Personal* 149-152). Mike Masaoka, Secretary of the Japanese American Citizens League, sent the WRA director a lengthy list of recommendations for policies at the

camps on behalf of the evacuees. The basis of the recommendations came from the standpoint that the Nikkei had been cooperative in submitting to the process and deserved the same treatment (*Personal* 154). The WRA cooperated as much as possible, being in the precarious dual position of permanent jailer and advocate for the evacuees (*Personal* 157). The Nikkei set up permanent living areas in the camps. The Nikkei, with some help from the WRA, organized communities with education, employment, health care, etc. Although there were numerous problems, especially with health care (*Personal* 161-165). The following episodes were described by one of the Nisei born in a camp:

At the time of my birth, my mother's physician in camp performed a tubal ligation of her. She never gave her consent and was totally unaware of it until 10 years ago...She is not the only one who bears physical scars as a result of our incarceration. I'm married to another victim. He is permanently disfigured due to burns over one-third of his body. Because the barracks we were assigned to had no running hot water, warm water for bathing purposes had to be heated over a fire. At the age of three, my husband fell into a tub of this boiling water and nearly died. Skin grafts were taken from his pregnant mother's thighs. She miscarried her child from the shock. (Nakagawa 159-160)

Overall the Nikkei did the best that they could with what they were given. An internee described the remarkable adjustment they had achieved, "When we entered camp, it was a barren desert. When we left camp, it was a garden that had been built up without tools, it was green around the camp with vegetation, flowers, and also with artificial lakes, and that's how we left it" (*Personal* 161).

By the end of 1942, the WRA was trying to work on resettlement of the Nikkei through some type of leave process (*Personal* 186). A process to receive leave was first initiated for

those Nisei who might want to serve in the U.S. armed forces (*Personal* 191). President Roosevelt declared that, “No loyal citizen of the United States should be denied the democratic right to exercise the responsibilities of his citizenship, regardless of ancestry” (*Personal* 191). With this, the first step was taken to register the internees for service. The method for registering and testing loyalty was through a questionnaire (*Personal* 192). A controversy surrounded the questionnaire used in the process. One question that was interpreted by the internees in numerous ways read as follows:

Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attack by foreign or domestic forces, and forswear any form of allegiance or obedience to the Japanese emperor, or any other foreign government, power or organization? (*Personal* 192)

The question was problematic due to many emotional and practical considerations. Among the more practical considerations was the fact that the Issei could not be United States citizens under the law and if they gave up all allegiance to Japan, they would then have no citizenship at all. They were also unaware of the consequences of answering “no,” but most did. Out of 10,000 eligible to enlist, 1,028 volunteered to do so (*Personal* 195).

Next came the debate about the loyalty hearings and how to let the prisoners go. No one in the government, including Roosevelt, advocated mass release because of the resettlement problem, the public reaction, and the idea that it was contrary to their internment in the first place (*Personal* 232). The loyalty confirming process was also thought also to be contrary to DeWitt’s first claim that separating the loyal from the disloyal was impossible (*Personal* 201-201). The military finally gave up the loyalty processes after reviewing 39,000 cases and recommending leave for 25,000 (*Personal* 202). The WRA took over the procedures and implemented a two-

step process. The first step was a leave clearance, which could be obtained after the evacuee had been determined not to be a threat to national security. The second step involved granting a leave permit (*Personal 202*). The process was long and the time between clearance and permission to leave was lengthy (see *Ex Parte Endo v. United States*, 323 U.S. 283 (1944)). Each person granted leave was assisted by \$25 plus transportation (*Personal 203*).

Once the Nikkei started slowly leaving the camps, they were eventually faced with the reality that they were not wanted anywhere. Mayor LaGuardia of New York tried unsuccessfully to have them banned from New York City (*Personal 203*). Dillon Myer, WRA director, wrote Attorney General Biddle, saying that the best thing would be for the Supreme Court to overturn the convictions of the upcoming cases so that the WRA would have a legal reason in the eyes of the public for the release of the Nikkei (*Personal 204*).

Once released, the former prisoner had the following to say regarding resettlement: “We could not get housing. It is critical for anyone, but for Japanese and someone with a child—we have walked miles and miles every day, dragging Linda here and there, snatching a few hours for a nap here, carrying her there, looking for a place to stay” (*Personal 204-205*). They encountered “jeering remarks” and were treated badly by many (*Personal 205*). The WRA did a survey in mid-1943 to gauge the reasons for the reluctance of some of the Nikkei to leave the camps and found the reasons to be, “uncertainty about public reaction; lack of funds or information about conditions; fear of inability to support oneself and family; and fear of failing to find adequate housing” (*Personal 204*). Many, especially among the older Issei, preferred to stay, knowing that their basic needs were met (*Personal 204*). The feelings after being told to leave the camp were described by the dependence upon the situation that had lasted for up to two years:

We had adjusted, and become dependent, and probably not wanting any change.

Therefore, when the war ended, and we were told to leave camp, I felt unprepared and unable to put myself into going. It seemed to be a combination of the shock of the war ending and the fear of going out into or back to the real world...It took me quite a while to come out of my immobilized state. (Nakagawa 157)

After Roosevelt's reelection, at the first Cabinet meeting on November 10, 1944, it was decided that the exclusion should be lifted, although it was not announced until December 17, 1944 (*Personal* 232-235). The next day, the Supreme Court announced its decisions in the *Korematsu* case and the *Ex Parte Endo* case, which had been purposely held until mass release (Irons 344). The remaining internees were forced to leave the camps and venture into the unknown. Throughout 1945, after the exclusion order was ended, many evacuees returned to the West Coast. Suicides were reported, especially among elderly bachelors (*Personal* 241). They went to temporary shelters, many of the elderly were sick and infirm (*Personal* 241). During the first six months, violence against the ethnic Japanese was common (*Personal* 242). Churches and "liberals" helped provide shelter, essentials and moral support to the Nikkei as they began to rebuild their lives (*Personal* 243).

Analysis of the Stories

This analysis will explain the rhetorical situation in the stories and comparatively examine them in terms of their values in accordance with Walter Fisher's logic of good reasons, which explores the narrative message, relevance, consequence, consistency and transcendence. The analysis will define the rhetorical situation by taking into account three of Fisher's criteria that allows one to look upon a rhetorical situation as a story: 1) A focus on the sequences of actions and their meaning; 2) a recognition that no text is devoid of historical, situational and biographical context; and 3) a recognition that the meaning and value of a story are always influenced by how the story stands with or against other stories known to an audience or observer (*Human* 144). The values in each story will be compared and assessed in terms of the motives and actions of those involved. Finally, the analysis will explore the salient values of the interwoven stories that determined the course of the action in the grand narrative.

The Rhetorical Situation

The *Korematsu* case was a plea for justice by an individual American citizen of Japanese descent after many years of accumulated anti-Japanese sentiment on the West Coast. After Pearl Harbor, those feelings culminated into the most drastic action against the people of Japanese ancestry. Rhetorical critics may ponder without pinpointing any one definite determinant of whether the public story caused the evacuation action, or rather if the public story was induced by people in influential positions who advocated evacuation. The variables and levels of influence in the public sector were multi-directional and resulted from the collective choice of individuals. In reviewing the stories, it is clear that the anti-Japanese rhetoric that had festered for many years resulted in a collective fear by the population. The economic fears of those

residing on the West Coast controlled the public sentiments about Japanese immigration from its beginning, and the war with Japan induced the additional fears for security.

In deference to those who experienced the stories first hand, however, it is important to reflect on their views of the rhetorical situation at the time. Naturally, some of the perspectives of that time will coincide with contemporary views. The difference in contemporary and experiential perspectives lies in the reality that persons at the time could not benefit from the reflection of a more complete picture while the contemporary critic does not have the experience of being part of a story. Hence, the narrative paradigm prompts the rhetorical critic to view the rhetorical situation through the eyes of the story.

Upon their arrival to the United States, the Issei were already targets for the public because their appearance was different than that of the European settlers who had arrived before them. Generally speaking, one group of European settlers in the United States were likely to have been agitated by the financial infringement of another group of European settlers, but those feelings were not as intense or long-lasting as the agitation caused by the Asian settlers. The Asian settlers were portrayed as the “other non-whites” or permanent foreigners, designated by their physical traits (Gotanda 1186-1190). Many of the Caucasian Americans were actively campaigning against the “yellow menace,” fearing that they may overtake their land and livelihood. Since the United States was at war with the homeland of this yellow menace, a sense of duty to protect America and the “stuff of which American citizens can be made” prevailed upon the European settlers (*Personal* 32). This feeling infiltrated the West Coast population through negative and frightening remarks made by authority figures and credible society members.

The rhetorical situation from the standpoint of the decision-makers is twofold. First, the decision-makers may have shared the outlook of the public, and thus instigated or joined in the anti-Japanese campaign, like General DeWitt. Second, the decision-makers could have been aware of the misdirection in the public's outlook, but failed to dispel it for whatever reason, like Attorney General Biddle. The different roles of the high level decision makers makes the determination of blame a difficult one. The Supreme Court, being the last government checkpoint where good reason might be expected to prevail, decided to honor the will and authority of the military and government officials. They, as well as others, fell prey to and participated in the rhetorical situation whether through ignorance, reluctance to disturb power or complete agreement.

Finally, the Nikkei saw the rhetorical situation during all the hysteria from the perspective of an oppressed group of citizens. After having experienced years of resentment and hostility against them and their people, there is little doubt that they recognized and moreover, strongly felt, the power of rhetorical situation. Many of the Nikkei allowed themselves to succumb to the situation. Many volunteered to cooperate with the evacuation knowing it was inevitable and hoping that their cooperation would express their understanding of the situation and loyalty to the United States.

The rhetorical situations found in the three stories present perspectives that are perhaps limited, but prevalent enough to display the overwhelming rhetorical event that was occurring at the time. This condensed interpretation of the events is intended to shed light on the intense information that members of society were grappling with during that time, and perhaps clarify a motive for the endorsement of evacuation, misguided as it may have been. The analysis will

now turn to the components of Fisher's logic of good reasons to examine and compare the values of the narratives.

The Values in Narrative Message

The traditional logical question of whether fact was indeed fact is easily disproved by the lack of factual evidence for the necessity of exclusion. To go beyond and study the good reasons behind the action, according to Fisher, one must examine the implicit and explicit values that guided the message. The public story explicitly reveals the importance of economic wealth indicated by the ongoing protests of labor organizations. The desire for economic dominance by the "white" Americans was undeniable. Driven by fear of the unknown intruders, white Americans felt a strong need to protect their dominant influence, money, and space. Unfortunately, the war provided an ideal scapegoat for a more popularly acceptable and understandable motive and value, safety.

The fear for safety was a reality for numerous Americans who heard press reports and state leaders sound the anti-Japanese alarm. The traditional value of maintaining the American way of life and protecting the shores from the threat of the Yellow Peril easily transformed into a patriotic appeal, as ironically exemplified by Mayor Bowron's radio address for the occasion of Lincoln's birthday, relayed in the public story. Members of West Coast society listened to and believed the plethora of negative information about the ethnic Japanese. The anti-Japanese messages conjured images of suspicious looking and sneaky people, sabotage activity, and traitor contraband. The white Americans' prejudice and concern for economy ushered in the insecure feelings that metamorphosed into active movement against the ethnic Japanese. From the public's perception, ridding themselves of this dangerous plague of people was the best course of action. The value inherent in the public's message was racial dominance, but the value that was

“valuable” enough to warrant exclusion of the group was the need to secure the Americans from the danger facing the West Coast (“Toward” 381). Unfortunately, the propaganda was forceful enough to drown out and silence members of the public who may have spoken up about the unjustness of the situation.

The values of the government and military officials coincide in large part with the implicit and explicit values of the public. The difference in position, however, made the government officials responsible for procuring the safety of the hysterical public, even if the danger was only perceived. From the President down, officials wanted to appease the public and lobbying groups on the West Coast. A powerful example was the political maneuvering that occurred between the President and the Supreme Court to coordinate timing for the Presidential election, release of internees, and the announcements of Supreme Court decisions in the *Ex Parte Endo* and *Korematsu* cases (Grossman 681; Irons 344). “Roosevelt himself, undoubtedly hoped to blunt criticism” (Irons 344). Explicitly, they wanted to protect the frightened public, and implicitly, they wanted to maintain their positions by giving the public what it wanted.

The Nikkei also valued the protection of their families, though they could do little to secure it. They were forced from their homes, but the Nikkei felt that freedom would come from cooperation. Citizenship and loyalty to the United States were very important to them (tenBroek 81). They even had Fourth of July celebrations in the camps; one internee talked of this as one of the happy events that occurred in the camp:

Perhaps one of the highlights was the yards and yards of paper chains we made from cut up strips of newspaper which we colored red, white, and blue for the big Fourth of July dance...It was our Independence Day celebration, though we were behind barbed wire, military police all around us... (*Personal* 145)

Though there were few Nikkei who rebelled against the order, those who did ended up championing the American values of freedom, civil liberty, and due process for all citizens regardless of race. Hirabayashi and Yasui overtly placed faith of retribution in the legal system by demanding to be arrested for disobedience. Korematsu in particular valued his freedom above all, enough to try and surgically change his Japanese features. The values of the Nikkei were not important to the United States at the time, and government officials did not reveal any recognition of the Japanese American values at all.

The Relevance of the Values

The question of relevance is important especially to the *Korematsu* case because the omission of relevant facts in the government's presentation to the Supreme Court was the reason the lower court of California granted the writ of error and reversed Korematsu's conviction in 1984. The logic of good reasons allows us to further investigate the omission, distortion, and representation of facts, and to assess whether the values contained in the decision were appropriate to the outcome. Had the Majority of the Supreme Court questioned these values as did Justice Murphy, who noted the lack of evidence in DeWitt's final report and attributed its contents to racism, the decision may have had a different outcome. The values behind the message to banish the ethnic Japanese were completely irrelevant to the military security situation, since no evidence of sabotage or espionage on the part of the Nikkei was ever found. The availability of this information is most convincing in hindsight, but the information was also available at the time to those in high level military and government positions, as illustrated by some of the remarks in the institutional story.

Through the perspective of the public who were experiencing the anti-Japanese hysteria, the feelings of insecurity were not at all irrelevant whether warranted or not. By the time the public would have time to consider or reflect upon the fact that the value of the anti-Japanese

messages could be misrepresented, it would be too late to change the fate of the Nikkei. Certain factions of the public, however, did openly boast the values that were behind the removal of the ethnic Japanese. The Grower-Shipper Vegetable Association, for instance, chose to be “honest” regarding the fact that they wanted to “get rid of the Japs for selfish reasons” (*Personal* 69).

Many of the press reports contained only racial remarks.

Enough people on the West Coast promoted the bigotry that contributed to the salience of those “selfish” values over the values of freedom and civil liberty for each American citizen. Many West Coast citizens supported the overturn of civil libertarian values and promoted protection and security—“to hell with habeas corpus” (tenBroek 86). Would a self-examination of prevalent values by the public at the time have been enough to cause them to reconsider the relevance of their attitudes and actions against the ethnic Japanese?

Even if the public was not capable of such reflections at the time, it seems that the Majority Court Justices would have been. Natsu Taylor Saito rightly argues that the historical treatment of the Asians as “other non-whites” indicates that even if the *Korematsu* Justices had had the benefit of the complete information that later reversed the decision in the lower court, the Court would have maintained its decision anyway (74-75). Natsu’s unique perspective of the circumstances places the discussion of the misjudgment of law right back into its proper context:

It is not clear to me that the internment and the judicial decisions upholding it were aberrations, or a ‘tragic mistake.’ They are a quite logical extension of history of law that tended, on the whole, to exclude those of Asian descent from mainstream society...They also comport with a social history of discrimination, segregation, exclusion and race-based violence against Asian Americans. Yet this history is rarely discussed in the legal

analyses of the internment cases. Wartime hysteria overlaid on prejudice does not adequately explain the historical course taken. (74-74)

Natsu's argument is an appropriate introduction of Fisher's question of relevance put to the Supreme Court. Were the values that the Supreme Court considered in *Korematsu* "appropriate to the nature of the decision that the message bears upon?" ("Toward" 379). The values that the Supreme Court supported in its majority opinion were not at all appropriate to the Japanese Americans, or in other words, to those who the decision directly affected. As a result of adhering to the predominant public values, the Court unjustly oppressed the most relevant group in question; however, the Majority of the Court obviously did not view the Japanese citizens as the most relevant group in question. The Supreme Court instead sanctioned the dominant values of society at the time, which was racial prejudice under the guise of national security.

If an actual security problem was relevant to the government decisions, before reaching the Court, one might argue that the security problem was most likely for the Nikkei, who were in danger of public backlash. The idea of racial riots concerned Attorney General Biddle enough to warn the President that the press would bear the responsibility if such an event were to occur (*Personal* 84). Perhaps this may have reinforced the idea that the Nikkei should be removed from the rest of society, and may have conveniently relieved any guilt that it was an action against Japanese American citizens. The Nikkei could have been safer as prisoners than as free people subject to the physical harm of a frightened and angry public, but they did not have free choice in the matter anyway. There was nothing to protect the Nikkei from the emotional turmoil they endured.

The Consequences of the Values in Message

The third question imbedded in Fisher's logic of good reasons is the question of consequence. Fisher asks, "What would be the effects of adhering to the values in regard to one's concept of oneself, to one's behavior, to one's relationships with others and society, and to the process of the rhetorical transaction?" ("Toward" 379). This question can be assessed through multiple perspectives that contribute to the overall narrative. This analysis will examine those perspective in terms of immediate consequences and then in terms of future consequences. The section begins by comparing the direct effects of adhering to the public sector values, including the public officials and military, during the period before the *Korematsu* case. Next, the section looks at the more lasting consequences through the perspective of the Supreme Court decision in *Korematsu*.

The actions by the public, press, military, and government against the ethnic Japanese during World War II had grave consequences for the Nikkei. More tragically, the consequences the Nikkei endured at the hands of society were unprovoked. Since the people of the West Coast hated and feared the ethnic Japanese, they saw the consequences of exclusion and internment in terms of how it would affect themselves. Those living on the West Coast at the time probably felt justified by the result of their actions. Remarks by the authorities and press revealed the hatred and wishes for the Japanese to leave the West Coast forever. The remarks illustrate that many in the general public thought nothing of the consequences to the Japanese people.

There was some concern for the Nisei in theory, since the actions against them disregarded their civil liberties as Americans, but that fact did not dissuade the public or government officials. For example, Attorney General Biddle showed the Justice Department's concern for the legalities, as it was its duty to do; however, no one discussed the consequences on the physical, financial and emotional well being of Nikkei. For the West Coast public, the

military and the government, the only important consequence of adhering to the values they held highest was sadly one of gratification and comfort. The question of reviewing the consequences in context becomes altogether irrelevant because the public sector placed more emphasis on their own values of security and “white” dominance than they did on civil liberties for a group of outcasts.

Since the Supreme Court decided the ultimate question of what values were most important, one must consider the long term effects of the Court’s adherence to the prevalent values of the dominant group. The Supreme Court itself is known as a great untouchable entity protected from punishment for its decisions. The Court endures short-term and long-term criticisms after some decisions, but the institution and its decisions remain unharmed. The possession of this great power to decide ultimate conclusions in law helps explain society’s fixation on certain landmark decisions that can change the course of history. Therefore, consequences to the Court itself were few.

The Majority of the Court in *Korematsu* saw itself as deferring to a greater power in a time of crisis. Public opinion would have to support the decision after the intense ordeal that they had helped create. The public and government officials were not ready to stare themselves and their actions in the face, especially since for all practical purposes the episode was over. The government, military, and public needed justification that they had done the right thing, and the Court obliged with little to no scrutiny of the facts or values behind the military orders.

The Court packaged the decision in a manner that attempted to divert the rule of law away from the issue of internment, but that action had no credibility with opponents of the opinion, as evidenced by the condemnation of the decision in law reviews directly after and up to present day. An influential law review written directly after the opinion noted the Court’s

“peculiar disregard of the realities of the action under review; and rather than remedying the weaknesses of the prior opinion [Hirabayashi], [the Court] abandoned the safeguards against arbitrary official action which that decision had created” (Dembitz 182-183). The Court willingly ignored the consequences, not only for the Japanese Americans, but for the future of civil liberty and due process for all citizens. Most disturbing is that the Court, unlike the public, had access to more complete information, but chose not to investigate or acknowledge it. “Despite its declared use of ‘strict scrutiny,’ the Court, as in Hirabayashi, declined to question seriously the military’s conclusions” (Mendenhall 209; see also Grossman 669).

The dissenters recognized the long-term consequences of the Court sanctioning such actions by the military. Justice Jackson was worried about the dangers of constitutionally recognizing the military’s action, especially during war. He sums up perfectly the vexation caused by the *Korematsu* case, saying: “The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need” (*Korematsu* 246).

The Consistency of the Values in the Message

The question of consistency is probably the most limited interpretation when assessing someone else’s story. Consistency in the logic of good reasons refers to whether “the values are confirmed or validated in one’s own personal experiences, in the lives or statements of others whom one admires and respects, and/or in a conception of the best audience that one can conceive?” (“Toward” 380). The values embraced by the public may or may not have been confirmed and validated in individual experiences. Most likely, public validation occurred through reinforcement by the authorities, to whom they listened to repeatedly. The Commission on Wartime Relocation and Internment of Civilians established that, “The government has conceded at every point that there was no evidence of actual sabotage, espionage or fifth column

activity among people of Japanese descent on the West Coast in February 1942” (*Personal* 50). Given this evidence, there is no confirmed consistency between the charges against the ethnic Japanese and personal danger for members of the public. The personal experiences of danger cannot be validated, although experience many times is as much perceived reality as actual reality, especially when enhanced by “credible” authority.

The information that was given to the public by credible sources through the media was, in Fisher’s terms, the statements of others that the public respected (“Toward” 380). Were the public, military and government values consistent to the best audience that one could conceive? No, in fact, the values of the public were wholly unsubstantiated except by word of authority; moreover, the values held by the authority were also unsubstantiated and inconsistent with the warrants being used to persuade the public.

The values the Supreme Court upheld were consistent with the values of the government and military. The Supreme Court Justices chose to value a precedent of military deference, and government support. They were well aware of the racial implications, even beginning the opinion of the Court by acknowledging as much (*Korematsu* 216). The Court clearly chose the values most consistent with the feelings of the period, whether owned by them personally or not. In the Supreme Court, the strongest of values compete with one another, and one is forced to give way. One value alone does not prevail over another, but the arguments of the authorities result in the assignment of greater weight to one or the other.

The *Korematsu* Court, acting as final judge of the entire episode, allowed those with power to decide the prevailing value in its ruling. Their decision was not consistent with their duty. Justice Black, in the majority opinion, makes two strong references that reveal the Court’s intent not to question the values of those in power. In the first reference, they reject *Korematsu*’s

arguments and rest on precedent by quoting Hirabayashi: “ ‘...we cannot reject as unfounded the judgement of the military authorities and of Congress that their were disloyal members of the population...’” (*Korematsu* 218). The Court never answers why they cannot reject the military’s assertions, which were weak and lacking in any concrete evidence. In the second statement, Justice Black says on the Court’s behalf that, “we cannot-by availing ourselves of the calm perspective of hindsight-now say that at that time these actions were unjustified” (*Korematsu* 224). Again, no plausible explanation was provided. The nature of trials is such that many times they are conducted in the calm perspective of hindsight and their duty and purpose is to determine whether or not there is justification for the actions of those involved. Justice Murphy dutifully reviewed the military findings, and in doing so found:

No reliable evidence is cited to show that such individuals were generally disloyal, or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group. (*Korematsu* 236)

The Transcendental Issues of the Message

Fisher claims that the transcendental issues are clearly paramount to the others (“Towards” 380). The logic of good reasons finally asks, “Even if a prima facie case exists or a burden of proof has been established, are the values the message offers those that, in the estimation of the critic, constitute the ideal basis for human conduct?” (“Towards” 380). This question, can be conceived with Fisher’s conception of coherence in the traditional logic of reasons, which asks whether a story directly addresses the real issues on which the judgment should turn (“Toward” 379). Discussion of the values inherent in the good reasons up to this point hopefully indicate that the question here is central to the analysis of this case because this question is more capable of considering the neglect of the Nikkei better than any other. If the

majority of the Court and the President, as well as other government authorities, had considered this question, the outcome should have favored the Nikkei.

The values found in the public's reasoning do not, "in the estimation of the critic, constitute the ideal basis for human conduct," nor do the values espoused by the public address the "real issues" on which the judgement of evacuation and internment should have turned ("Toward" 379-380). The extreme influence of a vehement public, in this analysis of its story, has been allowed to escape some of the blame due to its collective nature, the information it was given on the whole, and its inability to directly preside over the issues.

The government, however, cannot escape blame, even though it may cater to public desires. The government's duty was to assess the all of the information that it had in its possession, and make a decision that was based upon the real issues of the situation. No effort was made to dispel the public's hysteria, though it was recognized to be out of control by some key officials such as FBI Director J. Edgar Hoover. President Roosevelt scarcely thought about the evacuation and internment when the decisions were being made. This point is illustrated in the institutional story by the phone meeting between Secretary of War Stimson and President Roosevelt that authorized the process (Irons 57). Peter Irons states that, "Temperament and timing both militated against the display of any special sensitivity on Roosevelt's part to the problems of a small, isolated, and feared minority" (57).

The President's failure to consider not only the serious legal implications of the issue, but also the humanistic issues set an example to the rest involved, who had the authority of the President behind their decisions. "Despite his basic humanitarian impulses, President Roosevelt's record reflects 'a limited awareness of and attention to the plight of racial minorities'" (Morris 848). When the decisions were challenged in the Supreme Court, it too

overlooked the real issues in favor of an acceptable alternative that supported the decisions of the hierarchy. When the wrong values are adhered to as they were here, it is resoundingly felt by many for years to come. Had the security situation been real, the exclusion and internment, although not justifiable, would be more palpable. Justice Douglas would later say of *Korematsu*, “I have always regretted that I bowed to my elders and withdrew my opinion” (Grossman 686).

The values examined in this analysis, by Fisher’s logic of good reasons, exemplify the premise that values steer decisions and arguments, and thus stories. The issues of transcendence contain the assessment of basic human decency or morality. Fisher claims that the public moral argument is overwhelmed by privileged argument (*Human* 71). The analysis supports this idea because it was the arguments of the privileged that repressed the story and claims of the Nikkei. Comparing the three stories reveals how the one story that should have had the most consideration received the least. Fisher’s narrative paradigm claims that the world is a set of stories to be chosen among, and that humans must realize and respect it by recognizing the reason and value of all stories (*Human* 58). In looking back on a group of stories that compete in and make up a grand narrative, one can see that failing to recognize the values in certain stories, even if they do not have the same advantages with which to argue, can lead to a disastrous end.

The next Chapter will expand on the discussion of conclusions and implications derived from the *Korematsu* case. The chapter will also examine the ramifications of employing Fisher’s narrative paradigm, examining merits and limitations. The discussion will then address Fisher’s paradigm in terms of its usefulness in assessing legal cases such as *Korematsu*, and its contributions to the scholarship of narrative and law.

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CHAPTER FIVE

CONCLUSIONS AND IMPLICATIONS

The narrative analysis in Chapter four examined three stories by using Walter Fisher's logic of good reasons set forth in his narrative paradigm. The stories were examined as part of the dynamic that comprised the historical context for *Korematsu vs. United States*, 323 U.S. 214 (1944). The purpose of this chapter is to first discuss the conclusions and implications derived from the *Korematsu* case and its context analyzed in the previous chapter. Next, the chapter will discuss the implications of employing Fisher's paradigm, focusing on its contributions to the analysis as well as its limitations. Finally, the narrative paradigm will be reviewed in terms of its ability to act in the future as an appropriate method for analyzing legal communication.

In Chapter four, the analysis divided the *Korematsu* case context into three broad stories that focused on the perspectives of the public, the institutional entities and decision makers, and the ethnic Japanese in the United States during World War II. Because the *Korematsu* case was so reliant on its historical context, a narrative analysis was the most suitable means of illustrating the values and arguments inherent in the entire narrative. Interpreting the arguments of the Supreme Court in this case would have only offered a partial explanation of an episode that resulted from competing interests not completely represented in the Court case alone. One can surmise the verdict as a case of racial discrimination, but without examining the emergence of this conclusion, one slights the stories and their reasoning, while losing the chance to learn from the narrative.

The three main story lines ironically worked together to influence the decision, rather than in competition, even though the interests portrayed in each story were at odds. The story of the Nikkei was largely unheard at the time because many citizens did not care to hear it, and

furthermore, the nature of the Nikkei themselves was such that a massive protest against their country was not an option for most in resource or character. The predominant values of the time were easily able to override any rights of the Japanese Americans, especially because many of the European-Americans did not really think of the Nisei as Americans. The security issue became a perfect way to usurp the individual liberties of the Japanese-Americans provided for in the United States Constitution. Some of the decision-makers during that time may have imagined that the underlying racial discrimination would appear unimportant in the face of a security threat. Therefore, the majority values and opinions were able to overwhelm the minority values and opinions without much opposition, and so the powerful were able to dominate the powerless. The reasoning of the public and decision makers may have been different, but their goal of excluding the ethnic Japanese was more or less the same.

Public opinion and political pressure were the initiators of the government actions, however, government and military officials were the ones who made the decisions to act on those pressures. More deeply disturbing than the public's fear and hatred is the government's awareness of the reasons and its refusal to try and redirect the public's feelings with facts that may have absolved their fear for safety at least. Instead of addressing the problems, the government catered to the misguided feelings. Worse yet, in the face of this influence and power, the 1944 Supreme Court displayed the same negative value of racism as the populace by shamefully failing in their duty to remain impartial and pass judgement based on the constitutionality of the individual's conviction.

The decision set one of the gravest precedents in history for the United States. Since then, efforts at redress have been made in the form of minimal monetary compensation, congressional acts allowing Asian immigrants to become naturalized citizens, and Presidential

apologies (Grossman 664). Fred Korematsu received the Presidential Medal of Freedom in January of 1998 for his courage in standing up to an unjust deprivation of liberty. The *Korematsu* case is a constant reminder to Americans that civil liberties for all citizens must be especially protected under adverse conditions, even in the face of public opposition and wrongful government action.

Fisher's narrative paradigm is a sound basis for analyzing the Japanese interment episode. The paradigm allows the stories within a larger narrative to become an argument in a form that respects not only the sequence of occurrences that affect the outcome, but also the emotional issues that are inherent in the value-laden arguments that form the outcome. From the perspective of the Majority of the 1944 Supreme Court, the issues involved in the *Korematsu* case were based purely on their own and the government's motives. The Supreme Court Majority completely lacked consideration for the value of the Nikkei perspective. For this reason, recounting a narrative reveals insights that traditional argument, such as that of the *Korematsu* Majority, cannot. The narrative can then be examined in terms of its underlying values supporting its course. The values that direct a story can be assessed on their merits alone or in comparison to the other stories that may have impact on the outcome of an entire narrative. A critic must take all of the values of each story under consideration.

Analyzing the stories in terms of Fisher's logic of good reasons reveals core values that consciously or unconsciously preside over people's perspectives and interpretations of actions and events. The public's emotional reaction to the ethnic Japanese people reflected a deep-seeded belief that the white race is superior to "non-white" race. The public also reacted to the different cultural practices of the ethnic Japanese questioning the Japanese way of life in comparison to their own in important cultural areas. The religious beliefs and practices of the

European-Americans and the Japanese immigrants were very different, which had to present a profound contradiction in values for many people. European-Americans also valued individual freedom and were suspicious of an extremely collective group that may have once “worshipped” an emperor as the sole director of all his people.

Other deeply held values were illustrated in the institutional story in which public officials placed the importance of their friendships and obligations above anything else that may have caused them to question their part in the internment episode. The people in government positions were committed to the value of a united front during wartime. Authority figures support of one another was a key element in this time of crisis, relying on the notion that “together we stand, divided we fall.” Unity was especially important to the highest authority figure, President Roosevelt, who took special care to enlist officials and decision-makers in the war effort.

Lastly, the cultural values of the ethnic Japanese played directly into the hand of those that planned their fate in the United States during the war, but at the same time allowed them to remain supportive of one another as a group. The Japanese people were conditioned to be loyal, and as the United States was now the home of immigrants and their American-born children, they were anxious to display their loyalty through cooperation with the government. They collectively submitted to the internment program with very few exceptions. The Nikkei remained together and depended on each other for support, illustrating that family cohesiveness was of the utmost value to their lives, so much so that, for the most part instead of wallowing in despair, they built communities in the camps. These core values that lay underneath the actions of stories are important in understanding any phenomenon with competing interests. Fisher’s

logic of good reasons provides the opportunity to examine these values that may otherwise be overwhelmed by “factual” information.

Before discussing Fisher’s narrative paradigm in terms of legal analyses, some of its criticisms and drawbacks must be considered. Critics of Fisher often disagree with his conception of the rational world paradigm, claiming among other things that his conception is “ambiguous” (Warnick 174). In conjunction with its ambiguity, critics are also concerned with the dichotomous nature of the relationship between the rational world paradigm and the narrative paradigm (McGee and Nelson 139). Fisher’s incorporation of the rational world paradigm into the domain of the narrative paradigm is sometimes perceived as an argument for the “superiority of narrative rationality” over traditional rationality (Warnick 175). Either way, the analysis of this study argues that a narrative point of view would most decidedly have determined a more truthful basis for the *Korematsu* decision.

The traditional forms of reason sometimes allow an avoidance of value judgements that stories more readily reveal. For example, the 1984 lower court reversal, *Korematsu v. United States* 584 F. Supp. 1406 (N.D.Cal. 1984), of Fred Korematsu’s conviction was based on the distortion and omission of facts by the United States government (the lack of military necessity and the revising of DeWitt’s original report). The 1984 lower court opinion that granted the writ of error noted that the *Korematsu* Supreme Court precedent still stands, and that the “new” information then acknowledged may or may not have changed the Supreme Court’s decision in 1944 (*Justice Delayed* 242-243). From this premise, select contemporary *Korematsu* reviews argue that had the 1944 Supreme Court reasoning been privy to the complete information, it would by no means have guaranteed a different decision (see Gotanda; Mendenhall; Saito). The reasoning that governed the 1984 reversal was therefore able to rule on the conviction without

directly addressing the underlying values as the warrants for the reversal of the conviction; instead the lower court reversal turns on failure of the government to follow proper legal procedures. Legal situations can easily deny the stories of particular defendants or groups by soliciting only the information necessary to make their legally reasoned arguments, thereby keeping the parameters of logic as narrow as possible.

Another notable criticism of Fisher, aside from the dichotomy of narrative and traditional rationality, is one that arises in this analysis. William Kirkwood references Fisher's claim that stories 'should be validated in personal experience,' and claims that this criteria may "leave little room for rhetors to suggest unfamiliar ideals which exceed people's beliefs and previous experience" (30). As this analysis has shown, when one assesses consequence, or consistency as Kirkwood's criticism incites, from the point of view of the story in its context, the validation for negative values are often found in the experiences of those living out the story. Moreover, the consequences of the negative values may in fact be welcome. In hindsight of the context, however, a rhetorical critic can condemn the misguided values more easily, and in this case many of the decision makers, who were armed with more complete knowledge of the situation could have done so as well. When these negative or misguided values are viewed in comparison to those that "ring more true" to the situation, an introduction of more humanistic ideals is possible.

The contributions of Fisher's logic of good reasons to the analysis of the *Korematsu* case outweigh its limitations. The narrative point of view is useful in recognizing and incorporating disadvantaged stories, such as that of the Nikkei. The narrative analysis can serve as a way to assess values both in the midst of and in hindsight of the stories. The narrative analysis should take special care to include stories that may be, or that have already been, unjustly ignored in the

decision making process. This forces one to consider the perspective of the other story(s), which contributes to a better understanding of the entire context and may improve decision making at the time or in the future. In this area, the Fisher's narrative paradigm can contribute to the legal field, which has indicated a need for a narrative method.

Many legal scholars have argued that that law should do more to take the stories of outsiders into account (Baron and Epstein 145). Paul Gewirtz describes the legal decision maker as having to choose among competing stories, and questions how this choice is to be made (6). Gewirtz claims that just because a story is told by an outsider does not make it more true or complete than a story by an insider, and so there must be some method of choosing between competing stories (6). In order for one to judge between or among competing stories in contemporary arguments, rather than just in an historical analysis, one needs first to be willing to recognize and consider all interests of the stories that are involved without slighting any one point of view. Second, one needs to make sure that they have as much of the relevant information as possible in order to construct the most representative stories. If situations arise in which legal reasoning overrides the value of a narrative, it may be time for the decision makers to reformulate the law. The Justices in *Korematsu*, for example, in making their decision had the authority to use the law as they did, but they also had the authority to go the other direction and strike down the wrongful actions of the government.

Fisher's narrative paradigm offers a method for conceptualizing stories and selecting among them both through rational and narrative reasoning. Baron and Epstein, like many communication scholars, claim a need for the incorporation of both rational and narrative views. "Reason as much as emotion controls the domain of stories, because interpretation itself is a rational process in which factors such as credibility, plausibility, coherence, consistency, and so

on determine conclusions, just as such factors affect outcomes in the law” (145). Legal professionals and scholars cannot be expected to give up the traditional tests of logic that have successfully governed the discipline; however, in order to expand and improve on this discipline, a new dimension of storytelling can be officially acknowledged. Fisher’s narrative rationality can amply fulfill the need to take the narrative reasoning into account with its narrative fidelity, as well as the traditional reasoning with its narrative coherence.

The purpose of this study was to employ Fisher’s method to focus on narrative fidelity and the values that governed it in the *Korematsu* case, but it is clear that there is an intermingling between rational argument and narrative argument. The analysis included the outsider story as well as examining the values behind the narrative as a whole. Had space and time permitted, the study may have also applied Fisher’s narrative coherence to find the shortcomings of the 1944 Supreme Court case, as many legal scholars have already done. Adding the traditional logic of reasons to the value considerations of the logic of good reasons is one of the ways Fisher suggests implementing the criteria he offers (“Toward” 380).

This study has shown the narrative paradigm to be a viable option for examining legal narratives. In terms of the critic, a method for examining narratives can reveal many insights, and perhaps lend more consideration to present events or future ones with the same qualities. Reflection, however, only accomplishes so much, and in order to change any future miscarriages of justice, consideration of the narrative perspective must happen at the time decisions are made.

Questions for Further Research

The study of legal cases from the standpoint of narrative theory presents the possibility of developing more critical legal studies in this area. Walter Fisher’s narrative paradigm provides a new methodological direction for analyzing legal cases. The narrative paradigm can serve as a

useful tool, however this does not negate the possibility of exploring and expanding narrative theory specifically designed for legal cases and legal issues. More studies are needed that use the narrative paradigm as a method for studying legal narratives as well as studies that develop and mold narrative criticism to fulfill specific needs in the legal field. The development of narrative and the law is emerging as an important area in legal studies as evidenced by the recent literature in the area. More studies in the area of communication and law could be instrumental in developing narrative theories and methods that would be used by both disciplines. Narrative and the law would benefit from a theoretical framework that takes the discipline of the law into account as it incorporates a narrative point of view.

Since few communication studies have emerged that are based solely on narrative and the law, more studies that narrowly focus on the two are needed to build on existing ideas and foster new insights that would reveal themselves in other contexts. Future studies on outsider narratives and their treatment in legal systems could expand on existing speculation in the area and strive to arrive at solutions or to change any misperceptions. Other studies could focus on how the courts, attorneys, witnesses, and etc., presently use narrative as a function.

Narratives serve multiple functions in the legal system. A study that organized the narrative functions into genres and/or reconciled the relationship of narrative and legal reasoning, structure, and procedure would greatly progress the area of study. Enhancing this area of study into a profound body of literature is likely to contribute to a more open recognition and care with all the narratives that function within the legal system.

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