THE JAPANESE AMERICAN CORAM NOBIS CASES: EXPOSING THE MYTH OF DISLOYALTY

INTRODUCTION

During World War II, Japanese Americans fought for the United States in Europe and the Pacific[1] while the United States imprisoned their families in concentration camps. One hundred and twenty thousand persons of Japanese descent were forcibly removed from the West Coast.[2] They suffered income and property losses of between 810 million and 2 billion in 1983 dollars.[3] The Supreme Court upheld the internment, basing its decision on the government's claim that harsh measures were necessary to protect the national security from espionage and sabotage by the ethnic Japanese.[4] The Supreme Court's acceptance of the government's proffered justification for the internment thus imposed upon the Japanese American community a stigma of disloyalty that no other group of Americans has faced.[5]

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1. Composed mostly of volunteers from the concentration camps, the all-Japanese American (except for high ranking officers) 442nd Regimental Combat Team fought in the battlefields of Europe to become the most decorated combat unit for its size and length of service in American military history. Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied 253-60 (1982) [hereinafter CWRIC]. Japanese American intelligence units shortened the war in the Pacific by at least two years and prevented hundreds of thousands of American casualties. Id. at 256; F. Chuman, The Bamboo People: The Law and Japanese-Americans 180-81 (1976).

2. The most authoritative account of the circumstances leading to the internment, and of the internment itself, is found in the report of the CWRIC, note 1 supra. For a brief discussion concerning the establishment of the Commission, see note 37 infra. See also R. Daniels, Concentration Camps USA: Japanese Americans and World War II (1972); R. Daniels, The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion (1962); M. Grodzins, Americans Betrayed: Politics and the Japanese Evacuation (1949); J. tenBroek, E. Barnhart & F. Matson, Prejudice, War and the Constitution (1954); M. Weglyn, Years of Infamy: The Untold Story of America's Concentration Camps (1976).

3. CWRIC, Study Estimates Economic Loss of Japanese Americans, Resident Aliens During World War II at $810 Million to $2 Billion in 1983 Dollars (June 15, 1983)(press release)(on file at New York University Review of Law & Social Change).

4. Korematsu v. United States, 323 U.S. 214 (1944); Yasui v. United States, 320 U.S. 115 (1943); Hirabayashi v. United States, 320 U.S. 81 (1943).

The government's official military historian of the internment, Stetson Conn, published an account of the internment in which he found "little support for the argument that military necessity required a mass evacuation." S. Conn, R. Engelman & B. Fairchild, The United States Army in World War II, The Western Hemisphere: Guarding the United States and Its Outposts 147 (1964).

John J. McCloy, Assistant Secretary of War during World War II, has stated that the internment had been adopted "in the way of retribution for the attack that was made on Pearl Harbor." P. Irons, Justice at War 353 (1983).

5. In comparison, the United States government took an individualized approach to determining the loyalty of Italian and German Americans. This approach was applied to Germans "despite visible, active pro-Nazi operations among German Americans before the outbreak of war." CWRIC, supra note 1, at 283-93.

Today this seemingly intangible injury fuels the Japanese American community's drive for redress.[6] The search for justice by the Japanese American community has taken a variety of forms, including coram nobis lawsuits which seek to vacate the World War II convictions of three Japanese Americans who defied the military orders that mandated the mass incarceration.[7] Though narrowly stated in terms of the interests of three individuals, these suits aim to destroy the myth of disloyalty that has maligned not only these individuals but the entire Japanese American community. Thus, the metamorphosis of emotion to legal action cannot be accurately stated without accounting for the interests of all Japanese Americans. This Note will describe the Japanese American community's interest in removing the stigma of disloyalty and suggest a basis for viewing stigma as a legally recognizable injury.

I
HISTORICAL BACKGROUND

This unfinished chapter in American history had its genesis in the long and ugly history of anti-Japanese agitation and legislation on the West Coast.[8] Japanese immigrants were barred from becoming naturalized citizens,[9] alien land laws in many states forbade them from purchasing land,[10] and the Japanese Exclusion Act of 1924[11] put an end to Japanese immigration altogether.[12]

In a nation which showed itself to be predisposed to discriminate against persons of Japanese ancestry, the internment of Japanese Americans during World War II is probably more correctly viewed as an historical consistency rather than an aberration. This pervasive racial bias affected the decisionmaking of General John L. DeWitt, Commanding Officer of the Western Defense Command, who was responsible for the security of the West Coast and whose military orders directed the internment of the Japanese American community. In recommending to the Secretary of War that Japanese Americans be interned, General DeWitt said:

> The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized," the racial strains are undiluted. To conclude otherwise is to expect that chil-

6. See text accompanying notes 30-46 infra.

7. Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); Yasui v. United States, Civil No. 83-151-BE, slip op. (D. Or. Jan. 26, 1984); Hirabayashi v. United States, No. C83-122V (W.D. Wash. filed Jan. 31, 1983). For a comprehensive analysis of the factual basis for these coram nobis lawsuits, see P. Irons, supra note 4.

8. See note 38 infra.

9. Ozawa v. United States, 260 U.S. 178 (1922). Japanese immigrants were not allowed to become naturalized citizens until passage of the Walter-McCarran Act in 1952. See generally F. Chuman, supra note 1, at 308-13.

10. See generally F. Chuman, supra note 1, at 73-89. Not until 1952 was the California Alien Land Law declared unconstitutional. Id. at 89.

11. Quota Immigration Law, 43 Stat. 153 (1924).

12. See generally F. Chuman, supra note 1, at 91-103.

> dren born of white parents on Japanese soil sever all racial affinity and become loyal Japanese subjects, ready to fight and, if necessary, to die for Japan in a war against the nation of their parents . . . . It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today.[13]

Facing mounting pressure from General DeWitt, officials of the War Department, and West Coast politicians and pressure groups,[14] President Franklin D. Roosevelt issued Executive Order 9066,[15] authorizing the military to exclude persons endangering the national security from military areas. Under the authority of Executive Order 9066, General DeWitt issued a series of orders designating all of California, Oregon, Washington, and Arizona as military areas.[16] Although these military orders did not refer to any specific ethnic group, Japanese Americans were warned that they would be required to leave these military areas, and were encouraged to "voluntarily" relocate.[17]

To strengthen Executive Order 9066, Congress enacted Public Law 503,[18] imposing criminal sanctions upon any person who knowingly violated military orders made pursuant to Executive Order 9066. With compliance to his military directives assured through the threat of criminal penalties, General DeWitt promulgated a step-by-step program of military orders aimed at the eventual removal and internment of persons of Japanese ancestry.

One of the first such orders imposed a curfew restricting the movements of Japanese Americans residing in military areas.[19] The next series of orders directed Japanese Americans to leave their homes and report to assembly centers established within the military areas.[20] At the same time, other orders

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13. J. DeWitt, Final Report: Japanese Evacuation from the West Coast, 1942, 33-34 (1943).
14. See generally CWRIC, supra note 1, at 47-92.
15. Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942), provided in pertinent part:
> [T]he successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense . . . NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas . . . from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.

16. P. Irons, supra note 4, at 65.
17. Id.
18. Pub. L. No. 503, 56 Stat. 173 (1942), provided in pertinent part:
> [W]hoever shall enter, remain in, leave or commit any act in any military area . . . contrary to the restrictions applicable to any such area . . . shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

19. P. Irons, supra note 4, at 70.
20. Id.

forbade Japanese Americans from leaving military areas without permission.[21] Consequently, Japanese Americans could not leave the military area in which they resided and could not remain in such areas unless they were in an assembly center.[22] Finally, the military orders called for their mass imprisonment in concentration camps scattered throughout the deserts of the western United States.[23]

Three United States citizens of Japanese descent, Fred Korematsu, Minoru Yasui, and Gordon Hirabayashi, resisted, choosing to violate various aspects of DeWitt's program which would have eventually led to their imprisonment in concentration camps. Each was arrested and convicted of violating Public Law 503 for disobeying military orders made under the authority of Executive Order 9066.[24] The personal loyalty of these individuals to the United States was never the issue; the Supreme Court sustained their convictions based on a perceived threat from the ethnic group in general.[25] In support of its military orders, the government argued that there existed disloyal citizens of Japanese descent, whose number and strength could not be readily ascertained.[26] Furthermore, the government contended that this disloyal element was prone to engage in sabotage and espionage, and thus constituted a menace to the national defense.[27] In light of the facts and circumstances before it, the Supreme Court upheld the military orders mandating the evacuation of all Japanese Americans and resident Japanese aliens[28] from the West Coast. By upholding the military orders, the nation's highest arbiter of justice condoned and ratified the mass imprisonment of an entire ethnic group.[29]

II
REDRESS CAMPAIGNS

Soon after their release in 1944, Japanese Americans began their efforts to obtain redress for the wrongs done them during the war. These efforts gave rise to tangible but inadequate results in 1948 with the passage of the Evacua-

21. Id.

22. *Korematsu*, 584 F. Supp. at 1409.

23. P. Irons, supra note 4, at 73.

24. *Korematsu*, 323 U.S. 214; *Yasui*, 320 U.S. 115; *Hirabayashi*, 320 U.S. 81. For a full discussion of these cases, see generally P. Irons, supra note 4.

25. *Korematsu*, 323 U.S. at 218-19; *Yasui*, 320 U.S. at 116; *Hirabayashi*, 320 U.S. at 96-98.

26. See note 46 infra.

27. *Korematsu*, 323 U.S. at 218; *Yasui*, 320 U.S. at 116; *Hirabayashi*, 320 U.S. at 99.

28. See note 9 supra.

29. *Korematsu* and *Hirabayashi* were cited repeatedly in defense of Nazi war criminals at the Nuremberg Tribunal. The Nazi defendants claimed "military necessity" in the "evacuation" of the Jews. M. Weglyn, supra note 2, at 75.

Critical analyses of the Supreme Court's Japanese American internment decisions can be found in Dembitz, Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions, 45 Col. L. Rev. 175 (1945); Rostow, The Japanese American Cases—A Disaster, 54 Yale L.J. 489 (1945); J. tenBroek, E. Barnhart & F. Matson, supra note 2, at 211-321.

tion Claims Act.[30] Symbolic forms of redress, through the repeal of Title II of the Internal Security Act of 1950 and of Executive Order 9066 itself, were obtained in 1971[31] and 1976.[32]

Recently, redress campaigns on the West Coast have successfully obtained monetary and symbolic forms of redress at the local and state levels for some former internees. Several state and local governments, for example, have enacted legislation which compensates Japanese Americans who were dismissed from their government jobs during World War II because of their ancestry.[33] Other communities have placed memorials at the sites of the concentration camps and assembly centers or have taken other steps to commemorate this chapter in American history.[34]

The national redress effort focuses on obtaining remedies through Congress and the federal judiciary. The Japanese American community, through

30. American-Japanese Evacuation Claims Act, 62 Stat. 1231 (1948)(codified at 50 U.S.C. app. § 1981-1987 (1982)). The Act gave persons the right to claim from the government "damages to or loss of real or personal property" which occurred as a "reasonable and natural consequence of the evacuation or exclusion." The Act did not compensate for stigma, psychological impact, deprivation of liberty, personal inconvenience, physical hardship or injury, or loss of anticipated profits or earnings. CWRIC, supra note 1, at 118.

Claims amounting to 148 million dollars were filed under the Act; a total amount of 37 million was paid by the government, an amount which did not fairly compensate for economic hardship and suffering. Id. at 118, 121. It is estimated that uncompensated income and property losses alone fall between 810 million and 2 billion in 1983 dollars. See note 3 supra.

31. In 1971, President Nixon signed into law a bill, 85 Stat. 347 (1971), which repealed Title II of the Internal Security Act of 1950, 64 Stat. 987 (1950). That Act, using the Japanese internment cases as precedent, had authorized the President to apprehend or detain persons who might engage in espionage or sabotage during an "Internal Security Emergency." Such persons were to be "confined in such places as may be prescribed." Japanese Americans had lobbied vigorously for the repeal of Title II. Chuman, supra note 1, at 327-31.

32. In 1976, lobbying efforts led to President Ford's signing of Proclamation No. 4417, which formally rescinded Executive Order 9066. 41 Fed. Reg. 7741 (1976).

33. Each bill calls for the payment of up to $5,000 to each employee who had been dismissed during World War II. The typical bill provided for payment of $1,250 each year for four years. The Washington state bill, ESSB 3163, paid $2,500 each year for two years. The city of Los Angeles paid a lump sum of $5,000. Generally, the bills compensated only the individual who had actually lost his or her job, not the surviving spouse. The Los Angeles ordinance was the most liberal; it provided for payment to the surviving spouse and heirs. See Seattle to Compensate Employees, Pacific Citizen, Mar. 16, 1984, at 1, col. 1; City of Los Angeles to Compensate WW2 Nisei Employees, Pacific Citizen, Feb. 24, 1984, at 1, col. 3; Washington Governor Signs State Worker Reparations Bill, Pacific Citizen, May 27, 1983, at 1, col. 1; S.F. Mayor Feinstein Signs Redress Bill for City Workers, Pacific Citizen, Feb. 4, 1983, at 1, col. 3; Payment for Fired Nikkei L.A. County Workers Passes, Pacific Citizen, Nov. 19, 1982, at 1, col. 5; California Legislature Passes Compensation Bill for Nisei, Pacific Citizen, Aug. 20, 1982, at 1, col. 5.

34. Memorials have been placed at the sites of some of the concentration camps and assembly centers. See, e.g., $8,000 Raised for Amache Camp Shrine, Pacific Citizen, Apr. 1, 1983, at 1, col. 3; Puyallup Fair Will Get Monument, Pacific Citizen, Mar. 18, 1983, at 2, col. 3. "Day of Remembrance" legislation has been passed by some local governments to commemorate February 19, 1942, the day President Roosevelt signed Executive Order 9066. See, e.g., California Legislature Issues Day of Remembrance Resolution, Pacific Citizen, Mar. 9, 1984, at 2, col. 1. Other local governments have adopted resolutions to commemorate Public Law 503. See Nine Local Governments Adopt Resolution to Remember PL 503, Pacific Citizen, Mar. 30, 1984 at 2, col. 1.

the efforts of the Japanese American Citizens League (JACL),[35] the National Coalition for Redress/Reparations (NCRR)[36] and other organizations, is pressing for legislation which generally conforms to the recommendations made by the Commission on Wartime Relocation and Internment of Civilians (CWRIC)[37] in 1984. After an eighteen-month study, CWRIC concluded that the internment was the result of "race prejudice, wartime hysteria and a failure of political leadership."[38] It recommended, among other things, a national apology and monetary compensation.[39]

In addition, a class action was filed in the District Court for the District of Columbia by the National Council for Japanese American Redress

35. The Japanese American Citizens League, the oldest and largest national Japanese American organization, has been a major force in the redress movement. The JACL lobbied for the establishment of a congressional commission which would investigate the reasons for the internment and publicize its findings. The JACL believed it was necessary for public education to precede its redress campaign in Congress because Congress, largely ignorant of the internment issue, would have summarily dismissed any petition for redress. JACL Position Statement: Merit of Commission Approach to Redress Shows Strong Promise, Pacific Citizen, December 21-28, 1979, at 60, col. 1.

36. The National Coalition for Redress/ Reparations was formed in 1979 to facilitate the redress movement.

37. CWRIC was established by Congress in 1980 to:

> [1] review the facts and circumstances surrounding Executive Order 9066, issued February 19, 1942, and the impact of such Executive Order on American citizens and permanent resident aliens;
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> [2] review directives of United States military forces requiring the relocation and, in some cases, detention in internment camps of American citizens, including Aleut civilians, and permanent resident aliens of the Aleutian and Pribiloff Islands; and
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> [3] recommend appropriate remedies.

Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96-317, 94 Stat. 964 (codified at 50 U.S.C. app. § 1981 (1982)). CWRIC, supra note 1, at 18.

38. According to the CWRIC report, the internment culminated a long history of West Coast anti-Japanese agitation and legislation. CWRIC, supra note 1, at 27-46. See text accompanying notes 8-12 supra.

Anti-Japanese sentiment fed upon economic competition, CWRIC, supra note 1, at 4, 42-44; race prejudice, id. at 36-42; J. tenBroek, E. Barnhart & F. Matson, supra note 2, at 11-68; R. Daniels, The Politics of Prejudice, supra note 2, at 65-78; and the fear of a militaristic Japan, CWRIC, supra note 1, at 37. The public also feared sabotage and espionage by Japanese Americans in Hawaii and on the West Coast. False rumors of sabotage and espionage committed during the Pearl Harbor attack by Japanese Americans in Hawaii had wide circulation. The government knew that these rumors were false, but took no effective measures to disabuse the public of the belief that disloyalty by Japanese Americans had contributed to American losses at Pearl Harbor. CWRIC, supra note 1, at 55-60. The CWRIC concluded that the "hostile reception and treatment of Japanese immigrants on the West Coast are the historical prelude to the exclusion and evacuation." Id. at 28.

39. CWRIC, Federal Commission Recommends $1.5 Billion, Formal Apology to Redress Injustice to Japanese Americans in World War II (undated press release)(on file at New York University Review of Law & Social Change). Professor Alan Dershowitz of Harvard Law School has stated that a "substantial" amount of money should be paid to each internee, but like payments by the German government to Jewish Holocaust survivors, any money must be considered "token." Professor Lawrence Sager of New York University School of Law agreed on the need for monetary compensation: "We must vaccinate ourselves to prevent a recurrence of this tragedy." Statements made at hearing before the CWRIC in Cambridge, Massachusetts, Dec. 9, 1982. Legal Experts Discuss Redress for Japanese American Internees, Pacific Citizen, Jan. 1-8, 1982, at 1, col. 3.

(NCJAR)[40] on behalf of interned Japanese and their descendants.[41] The lawsuit sought almost three billion dollars in damages for numerous constitutional and tortious injuries suffered during the evacuation and incarceration. The court dismissed the action as time barred, though it expressed doubt about the government's "military necessity" justification for the incarceration.[42] NCJAR has appealed this decision.[43]

A second major litigation effort aims to erase the stigma of suspected disloyalty which has plagued the Japanese American community ever since the federal judiciary held that the internment was necessary to protect national security. The effort consists of three separate actions which seek the extraordinary writ of coram nobis to vacate the convictions of Japanese Americans who were convicted of violating military curfew and exclusion orders that paved the way for the internment.[44] This campaign is based on newly-discovered evidence which undermines the government's justification for the internment.[45] The crucial evidence casts an unfavorable light upon the methods used by the Department of Justice in defending the position that "military necessity" warranted the internment.[46]

40. The National Council for Japanese American Redress (NCJAR) was formed in 1980 by members of the Japanese American community who felt that it was unnecessary to conduct a study to determine whether wrongs had been committed. As an alternative to the Commission approach, see note 37 supra, NCJAR supported legislation which would provide monetary compensation to internees and their heirs. After Congress chose the alternative approach of fact finding by the Commission over immediate monetary compensation, NCJAR decided to bring this class action lawsuit.

41. Hohri v. United States, 586 F. Supp. 769 (D.D.C. 1984).

42. Judge Louis F. Oberdorfer ruled that the evidence which indicates that the internment was not justified by military necessity was available in the late 1940's and, therefore, the case was barred by a six-year statute of limitations. The evidence consisted of intelligence reports that contradicted the government's allegations of Japanese American disloyalty. Although Judge Oberdorfer did not reach the question of whether the internment was required by "military necessity," he said that the new information which relates to a conspiracy to deprive plaintiffs of their rights "fully justif[ies] the condemnation of the wartime Department of Justice. . . . voiced by the Commission and the plaintiffs." Id. at 790.

43. Hohri v. United States, 586 F. Supp. 769 (D.D.C. 1984), appeal docketed, No. 84-5460 (filed July 24, 1984).

44. *Korematsu*, 584 F. Supp. 1406; *Yasui*, Civil No. 83-151-BE; *Hirabayashi*, No. C83-122V. The definitive account of this effort is found in P. Irons, supra note 4.

45. This campaign rests heavily upon the CWRIC's conclusion that the "record does not permit the conclusion that military necessity warranted the exclusion of ethnic Japanese from the West Coast." CWRIC, supra note 1, at 8.

46. Internal memoranda of the Justice Department indicate that the Justice Department and General John L. DeWitt knew that the claim of "military necessity" was without foundation. P. Irons, supra note 4, at 186-218.

The Justice Department eventually inserted a footnote in its *Korematsu* brief discrediting the facts in DeWitt's Final Report, supra note 13, which allegedly justified the evacuation. However, under pressure from the War Department, the Justice Department eliminated this footnote and requested the Court to take judicial notice of facts it knew to be false. *Korematsu*, 584 F. Supp. at 1417. See also P. Irons, supra note 4, at 284-92.

III
WRIT OF CORAM NOBIS

The writ of coram nobis calls belated attention of the court to facts which, for valid reasons, were not before it in the original trial.[47] "[One] purpose of coram nobis is to allow a defendant to attack a conviction notwithstanding the fact that he has completed his sentence."[48] In the foremost coram nobis case, *United States v. Morgan*,[49] the defendant had been convicted of a violation of federal law and had completed his sentence. Subsequently he was convicted on a state charge and sentenced to a longer term because of his prior federal conviction. He then attacked the federal conviction on the ground that he had lacked counsel. The Supreme Court held that:

> [a]lthough the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties; civil rights may be affected. As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that his conviction was invalid.[50]

The Court, however, cautioned that coram nobis relief is to be granted sparingly: "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice."[51] A mere technical error will not suffice; the error must be so fundamental as to render the legal proceeding invalid.[52] On review of the defendant's claim that he had been tried and convicted without competent and intelligent waiver of counsel, the Court affirmed the Second Circuit's decision to remand the case for an evidentiary hearing to clarify the record with respect

47. See generally Annot., 38 A.L.R. Fed. 617 (1978). The power of the federal courts to grant the writ comes from the All Writs Act, 28 U.S.C. § 1651 (1982). The Act provides in pertinent part: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1982). Although Federal Rule of Civil Procedure 60(b) abolishes the writ for civil proceedings, the writ is available in criminal actions. United States v. Morgan, 346 U.S. 502, 505 n.4, 506 (1954). Unlike a petition for habeas corpus, which is the beginning of a separate civil proceeding and where relief is sought in a separate case and record, coram nobis is a step in the original criminal case. *Morgan*, 346 U.S. at 505 n.4.

The petition for coram nobis is heard in the court that rendered the original conviction. Sinclair v. Louisiana, 679 F.2d 513, 514-15 (5th Cir. 1982); Hensley v. Municipal Court, 453 F.2d 1250, 1252 n.2 (9th Cir. 1972), rev'd on other grounds, 411 U.S. 345 (1973). Appellate leave is not required for the trial court to correct error occurring before it. *Korematsu*, 584 F. Supp. at 1412. The petitioner must overcome the presumption that the original proceedings were correct. *Morgan*, 346 U.S. at 512; Ybarra v. United States, 461 F.2d 1195, 1198 (9th Cir. 1972).

48. Holloway v. United States, 393 F.2d 731, 732 (9th Cir. 1968)(citing *Morgan*, 346 U.S. at 512).

49. 346 U.S. 502.

50. Id. at 512-13.

51. Id. at 511.

52. Id. at 512 (citing United States v. Mayer, 235 U.S. 55, 69 (1914)). See also United States v. Addonizio, 442 U.S. 178, 186 (1979).

to the waiver issue. In searching beyond the deficient trial record, the Court demonstrated its commitment to act to secure justice on a "record that makes plain a right to relief."[53]

The Ninth Circuit has demonstrated a similar willingness to search beyond the trial record in order to scrutinize charges of governmental misconduct. In *United States v. Taylor*,[54] the defendant, convicted of wire fraud, challenged the basis for his conviction with facts assailing the veracity of the government's allegations. The court noted that "prosecutorial misconduct may so pollute a criminal prosecution as to require a new trial, especially when the taint in the proceedings seriously prejudices the accused."[55] Moreover, the court noted that coram nobis is not limited to instances of great prejudice to the petitioner, but "is designed to maintain also public confidence in the administration of justice."[56]

The defects alleged in coram nobis petitions must be of constitutional proportion.[57] Therefore, the criminal justice system's interest in maintaining public confidence warrants special consideration in such actions. It is disturbing for law-abiding citizens to find that the outcome of a criminal prosecution may depend upon the extent to which government law enforcement officials misbehave. When misconduct results in a conviction which abridges a fellow citizen's right to a fair trial, the public's confidence is undermined.

However, defects which do not completely undermine the reliability of a judgment of conviction may be tolerated.[58] For example, a district court in California held that a finding of a fundamental error would not disturb the conviction of one whose guilt was conclusively established.[59] In another case, the government had suppressed evidence during petitioner's trial, but the court refused to grant relief because this alleged act of prosecutorial misconduct, in light of the total record, failed to undermine the validity of the original judgment of conviction.[60]

Prosecutorial misconduct impairs the integrity of the judicial process and

53. 346 U.S. at 505.

54. 648 F.2d 565 (9th Cir. 1981).

55. Id. at 571.

56. Id.

57. Byrnes v. United States, 408 F.2d 599, 602 (9th Cir. 1969). Coram nobis petitions generally allege fundamental errors of fact from which constitutional violations arise. See, e.g., Napue v. Illinois, 360 U.S. 264, 265 (1959) (knowing use of false testimony violates fourteenth amendment). District courts in the Ninth Circuit, however, have shown a willingness to use coram nobis to correct "legal errors of a constitutional or fundamental proportion." United States v. Wickham, 474 F. Supp. 113, 116 (C.D. Cal. 1979)(misapplication of federal statute resulting in conviction may be fundamental error); United States v. Danks, 357 F. Supp. 193 (D. Hawaii 1973)(conviction for not answering 1970 census violates first amendment). Contra, *Korematsu*, 584 F. Supp. at 1420 (coram nobis used only to correct errors of fact).

58. See United States v. Scherer, 673 F.2d 176, 178 (7th Cir. 1982), cert. denied, 457 U.S. 1120 (1982); Willis v. United States, 654 F.2d 23, 24 (8th Cir. 1981); United States v. Keogh, 391 F.2d 138, 148 (2d Cir. 1968); Bateman v. United States, 277 F.2d 65, 68 (8th Cir. 1960).

59. *Wickham*, 474 F. Supp. at 116.

60. In re Alger Hiss, 542 F. Supp. 973 (S.D.N.Y. 1982), cert. denied, 104 S. Ct. 232 (1983).

provides grounds for vacating a conviction through the use of coram nobis, though it does not automatically do so.[61] The Supreme Court has declared that the "touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."[62] Where, for example, the prosecutor suppresses evidence at trial, fairness is determined by the character of the suppressed evidence.[63] Thus, there is no due process right to all the evidence in the government's possession which might conceivably assist in the preparation of the defendant's defense, although there is a right to all exculpatory evidence known only to the government.[64]

The petitioner has the burden of proof with respect to the materiality of the suppressed evidence which she has specifically requested.[65] This burden is satisfied if the evidence "might" have affected the outcome.[66] In view of petitioner's light burden, the government's failure to respond to a specific request for evidence is rarely excusable.[67]

Absent a specific request, however, the prosecutor has a duty to voluntarily disclose evidence "so clearly supportive of a claim of innocence" that it gives her "notice of a duty to produce."[68] Failure to disclose such evidence constitutes fundamental error where the suppressed evidence, evaluated in light of the total record, "creates a reasonable doubt that did not otherwise exist."[69] If the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.[70]

A second category of prosecutorial misconduct concerns the prosecutor's use of false evidence at trial. A conviction may be vacated if the prosecutor presented either testimony known to be perjured[71] or false testimony bearing on the credibility of a key witness,[72] or if she failed to correct unsolicited false testimony.[73] As in the suppression of evidence case, the test for fundamental error is the fairness of the trial, determined by looking at the character of the

61. *Keogh*, 391 F.2d at 148.

62. Smith v. Phillips, 455 U.S. 209, 219 (1982).

63. United States v. Agurs, 427 U.S. 97, 110 (1976).

64. United States v. LeRoy, 687 F.2d 610, 619 (2d Cir.), cert. denied, 459 U.S. 1174 (1982).

65. See *Agurs*, 427 U.S. at 106.

66. Id. at 104 (citing Brady v. Maryland, 373 U.S. 83 (1963)).

67. Id. at 106; United States v. Blasco, 702 F.2d 1315, 1317 (11th Cir. 1983).

68. *Agurs*, 427 U.S. at 107, 110.

69. Id. at 112, 113. See *Keogh*, 391 F.2d at 148 (no duty to disclose unrequested evidence which is not likely to have changed the verdict).

70. Id. at 113; Cannon v. Alabama, 558 F.2d 1211, 1216 (5th Cir. 1977), cert. denied, 434 U.S. 1087 (1978); United States v. Stassi, 544 F.2d 579, 584 (2d Cir. 1976).

71. Mooney v. Holohan, 294 U.S. 103, 112-13 (1934).

72. *Napue*, 360 U.S. at 269.

73. Id. at 265, 269; see United States v. Giglio, 405 U.S. 150, 153 (1972).

evidence, not the culpability of the prosecutor.[74] A conviction must be vacated upon the establishment of a "reasonable likelihood" that the false evidence or testimony could have affected the outcome of the trial.[75]

IV
THE JAPANESE AMERICAN CORAM NOBIS CASES

More than forty years after their convictions were affirmed by the Supreme Court, the three American citizens of Japanese ancestry who were convicted in 1942 uncovered new evidence indicating that they had been the victims of unfair trials. They had been tried for violating the military orders which led to the incarceration of all Japanese Americans on the West Coast. Specifically, they charged that the allegations of disloyalty and treason by the ethnic Japanese were intentional falsehoods designed to mislead the courts into believing that "military necessity" justified the racially discriminatory military orders. Invoking the All Writs Act,[76] each individual filed an identical petition[77] for a writ of coram nobis[78] to vacate their convictions and to have the court make findings of governmental misconduct. The petitions were identical because the legal and constitutional issues raised in the three cases were virtually identical; the newly uncovered evidence was relevant to each case; and the interrelated pattern of alleged governmental misconduct impacted on each petitioner's case.[79]

A. Korematsu v. United States

On May 30, 1942, Fred Korematsu was arrested for being in a place where no persons of Japanese descent were allowed, pursuant to Civilian Exclusion Order No. 34 issued by General DeWitt.[80] On September 8, 1942, Korematsu was convicted for violating Public Law 503, which imposed criminal sanctions upon any person who knowingly violated any military order made under the authority of Executive Order 9066. His conviction was affirmed by the United States Supreme Court.[81]

More than forty years after his conviction in the District Court for the Northern District of California, Korematsu filed a petition with that same court for a writ of coram nobis to overturn his conviction and to make findings of governmental misconduct.[82] Petitioner alleged, inter alia, that officials of

74. Id. (citing Savvides v. New York, 1 N.Y.2d 554, 557, 136 N.E.2d 853, 854-855, 154 N.Y.S.2d 885, 887 (1956)).

75. *Agurs*, 427 U.S. at 103.

76. 28 U.S.C. § 1651 (1982). See note 47 supra.

77. Petition for Writ of Error Coram Nobis 3, Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) [hereinafter Petition for Writ of Error, *Korematsu*].

78. See text accompanying notes 47-75 supra.

79. Petition for Writ of Error, *Korematsu*, at 4.

80. Id. at 13.

81. *Korematsu*, 323 U.S. 214.

82. *Korematsu*, 584 F. Supp. at 1409.

the War Department and the Department of Justice suppressed evidence indicating the loyalty of Japanese Americans and the absence of any acts of espionage carried out by them.[83] In addition, Korematsu alleged that government officials failed to advise the Supreme Court of the falsity of the government's allegations that Japanese Americans were disloyal and that they committed acts of espionage.[84] Finally, the petitioner claimed that he was entitled to relief on the ground that his conviction was based upon governmental orders that violate current constitutional standards.[85]

The government requested and was granted an extension on its reply to the coram nobis petition, pending the release of the report of the Commission on Wartime Relocation and Internment of Civilians.[86] This report was the product of an eighteen-month investigation into the facts and circumstances surrounding the evacuation and incarceration, and the government believed that it would have a substantial impact on the proceedings.[87]

Following the issuance of the CWRIC report, the government filed a countermotion under Federal Rule of Civil Procedure 48(a), to vacate the conviction and to dismiss the underlying indictment.[88] The government's objective, however, was not to make an admission of wrongdoing, but rather to avoid an independent assessment of the factual and constitutional issues raised in the petition. In essence, the government wanted the court to set aside Korematsu's conviction without consideration of the record in an effort to forget "this unfortunate episode in our country's history."[89]

Thus the court had before it an unusual posturing of opposing parties: both wanted to vacate petitioner's conviction, but for different reasons. The government's rationale was that the military orders under which Korematsu had been convicted were simply a "mistake" which should be forgotten.[90] On the other hand, the petitioner argued that he had been subjected to a deliberate and calculated plan to exclude and imprison him and other Japanese Ameri-

83. Petition for Writ of Error, *Korematsu*, at ii.

84. Id.

85. Id. at iii.

86. *Korematsu*, 584 F. Supp. at 1410.

87. For a discussion of the CWRIC and its findings, see text accompanying notes 35-39 supra.

88. *Korematsu*, 584 F. Supp. at 1410.

89. Id. at 1413.

90. Transcript of Hearing on Motion to Vacate Conviction and Dismiss Indictment of Fred T. Korematsu 17, Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) [hereinafter Transcript of Hearing, *Korematsu*]. In opposing the government's motion, petitioner's counsel, Dale Minami, said:

> The government's approach turns the idea of public interest on its head. The government, in effect, is advocating letting the guilty go free and keeping the innocent imprisoned in the shame and suffering they endured for [forty] years.
>
> It is advocating keeping the public imprisoned in the ignorant notion that this was an "unfortunate" incident as the government describes.
>
> Even the government's motion to vacate indicates an unwillingness to face the facts and the constitutional issues.

Id. at 24-25.

cans.[91] Therefore a reconsideration of his case required a judicial declaration of the grounds for vacating the conviction.[92] The court decided to focus less on whether the conviction should be vacated than on whether the appropriate ground for relief should be the government's countermotion or petitioner's coram nobis petition.[93]

The court first considered the government's countermotion. It noted that Rule 48(a) allows the prosecutor to terminate, with leave, an indictment, information or complaint. The prosecutor may not, however, invoke this rule after a person has been subject to conviction, final judgment, or exhaustion of all appeals. Nor may the prosecutor invoke Rule 48(a) if judgment has been imposed and the sentence served, at which point "there is no longer any prosecution to be terminated."[94] Since this point had been reached long ago in Korematsu's case, the court held that the government's motion was unavailable.[95]

The court next turned to petitioner's coram nobis petition, finding it to be the appropriate vehicle for relief.[96] After examining the evidence before it, the court determined that the CWRIC report provided ample support for its decision that coram nobis must be granted to prevent manifest injustice and to serve the public interest.[97]

The court then determined whether due process warranted vacating Korematsu's conviction. It addressed the question of whether the judiciary in 1944 had before it all the facts known by the government at that time.[98] Based on the evidence of newly-discovered internal government documents and letters, the court answered in the negative, finding that the government had deliberately withheld and falsified relevant evidence in its papers before the court:

> The facts which the government represented it relied on and provided to the courts were those contained in a report entitled "Final Report, Japanese Evacuation from the West Coast" (1942), prepared by General DeWitt. His evaluation and version of the facts informed the courts' opinions.
>
> . . . .
>
> Omitted from the reports presented to the courts was information possessed by the Federal Communications Commission, the Department of the Navy, and the Justice Department which directly con-

91. Id. at 25-26.
92. Id.
93. *Korematsu*, 584 F. Supp. at 1410.
94. Id. at 1411.
95. Id.
96. Id. at 1411-12.
97. Id. at 1419. The government neither opposed any of the allegations made in the coram nobis petition, nor did it confess error. Noting the government's position, the court said: "The government has . . . while not confessing error, taken a position tantamount to a confession of error." Id. at 1413.
98. Id. at 1419.

> tradicted General DeWitt's statements. Thus, the court had before it a selective record.[99]

The court concluded that the pervasive nature of the government's misconduct seriously impaired the judicial process, and thus satisfied the compelling circumstances requirement contemplated by the Supreme Court in *Morgan*. Although there was no question that Korematsu had violated the law, the court vacated his conviction in an attempt to restore public confidence in the administration of justice.[100]

After having undermined the factual basis of the military orders, the court expressly declined to go one step further by questioning the law under which Korematsu had been convicted. The court explained that it had no power to correct legal errors because coram nobis is used only to correct errors of fact.[101] Although it is not mentioned in the opinion, even if the district court had found that it did have the power to correct legal errors, the fact that the Supreme Court had upheld the exclusion and internment on the basis of "military necessity" would have rendered dubious any attempt by the district court to declare it otherwise.

In limiting its inquiry to the correction of factual errors, the district court removed the factual justification for the incarceration, but not the legal precedent.[102] Thus, the danger that the doctrines of "military necessity" or national emergency will be used again to legitimize racism looms as a future possibility. Courts today, however, might be more likely to scrutinize the factual basis for such claims in order to safeguard against the recurrence of fraud.[103]

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99. Id. at 1418-19.

100. Id. at 1419-20.

101. Id. at 1420.

102. The CWRIC believes that "today the decision in *Korematsu* lies overruled in the court of history." CWRIC, supra note 1, at 238. Judge Patel said: "As a legal precedent it is now recognized as having very limited application." *Korematsu*, 584 F. Supp. at 1420. But see note 103 infra.

103. Ironically, although the Supreme Court in *Korematsu* held the incarceration constitutional, the case is cited as the Court's first explicit reference to race as a "suspect" criterion. L. Tribe, American Constitutional Law, §§ 14-16 at 1013 (1978). Since *Korematsu*, the legal doctrine has evolved so that laws based on racial classifications trigger a rigorous standard of judicial review that almost always invalidates racially discriminatory laws. Gunther, The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

In reference to this legal development, the CWRIC has suggested that *Korematsu* has been implicitly overruled in the court of history, and is therefore not a precedent on questions of racial discrimination. CWRIC, supra note 1, at 238-39.

Other authorities point out that without the development of a body of constitutional principles protective of minority rights during periods of crisis, the *Korematsu* decision's groundless reference to military necessity could be invoked to imprison an entire racial group during a national emergency. See P. Irons, supra note 4, at 365-66; testimony of Professors Alan Dershowitz and Lawrence Sager, note 39 supra.

Justice Jackson's dissent from the majority opinion in *Korematsu* prophetically characterized that decision's legalization of racial discrimination as a "loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need." 323 U.S. at 246.

Although the court restricted its inquiry to the examination of factual errors, the outcome of the case represents judicial recognition that the injustice foisted upon Japanese Americans in 1944 has not faded with the passage of time. It was not too late for the court to try to relieve Fred Korematsu, and the Japanese American community, of some of the stigma of suspected disloyalty which they had carried for four decades.

B. Yasui v. United States

On March 23, 1942, Minoru Yasui was arrested for violating Public Proclamation No. 3, a curfew order which General DeWitt issued against persons of Japanese descent.[104] Yasui was subsequently convicted for a violation of Public Law 503, as Korematsu had been. Yasui's conviction was affirmed by the Supreme Court.[105]

Several months after Korematsu had filed his petition for a writ of coram nobis, Yasui filed his with the district court in Oregon.[106] Yasui's petition requested the court to vacate his conviction, dismiss the underlying indictment, make findings of governmental misconduct, and declare unconstitutional the military orders under which he had been convicted.[107] The government's opposition to this petition conformed to its position in *Korematsu*: it asked the court to vacate the conviction and dismiss the petition without determining the merits of the claims of governmental misconduct.[108]

Although the issues presented in *Yasui* were identical to those decided in *Korematsu*, the *Yasui* decision produced a curiously different outcome. Judge Belloni vacated Yasui's conviction, but granted the government's motion to dismiss the coram nobis petition.[109] In a tersely worded opinion, the judge stated:

> I decline to make such findings [of fact] forty years after the events took place. There is no case nor controversy since both sides are asking for the same relief but for different reasons. The Petitioner would have the court engage in fact finding which would have no legal consequences. Courts should not engage in that kind of activity.[110]

The court apparently agreed with the government's argument that any finding of fact could only be of historical or legislative interest, without any

104. *Yasui*, 320 U.S. 115.

105. Id.

106. The *Hirabayashi* coram nobis case will not be discussed in this Note, as it is not scheduled for an evidentiary hearing until the summer of 1985.

107. *Yasui*, Civil No. 83-151-BE, at 2.

108. Id. at 1. At oral argument, the government said that it was not clear that misconduct had occurred. Transcript of Motions Before the Honorable Robert C. Belloni 15, Yasui v. United States, No. 83-151-BE (D. Or., Jan. 26, 1984) [hereinafter Transcript of Motions, *Yasui*].

109. *Yasui*, Civil No. 83-151-BE, at 2.

110. Id.

legal consequences.[111] Noting that several Presidents had hoped that there would never be another internment, the government agreed to vacate the conviction and dismiss the indictment because of the symbolic importance of such an act.[112] The government, however, declined to admit that it had violated any of Yasui's rights.[113] In effect, the government viewed its concession as an act of forgiveness. A cloud of suspected disloyalty would thus still linger over Yasui, and, by implication, over the Japanese American community.

The court's conclusion that fact finding would have no legal consequences may be attributed to an erroneous view of the case as involving only the interests of one individual. This view is tenable only if one ignores the severe stigma of suspected disloyalty that has attached to Japanese Americans ever since the wartime *Yasui*, *Korematsu*, and *Hirabayashi* decisions. As will be explained in Section V the entire Japanese American community has a profound interest in obtaining a judicial opinion that would correct the record with respect to their loyalty to the United States during World War II. A case or controversy beyond the vacating of petitioner's conviction exists, and its resolution requires fact finding concerning the allegations of governmental misconduct.

V
SOCIAL STIGMA

Japanese Americans regard the judicial finding of governmental misconduct to be as significant as the vacating of Korematsu's conviction. This broad concern of the Japanese American community developed in the aftermath of the 1944 Japanese internment decisions, which had lent credence to the claim that the national security required the internment of all persons of Japanese ancestry. The entire community has a stake in the coram nobis lawsuits since favorable opinions would diminish the stigma attached to it by the suspicion of wartime disloyalty.

In a real sense, the coram nobis lawsuits are analogous to a class action waged on behalf of all former internees. Viewed is such terms, the relief sought required more than the vacating of one person's conviction. The simple vacating of a conviction, without reference to the government's misconduct, could be erroneously interpreted to mean that a kind-hearted government had forgiven a blameworthy Japanese American community.[114] Thus the vacating of the convictions, without more, would provide insufficient relief from the stigma which affects the entire community. A meaningful remedy requires no less than written opinions explicitly stating that the gov-

111. Transcript of Motions, *Yasui*, at 9-10.
112. Id. at 13-14, 16.
113. Id. at 15.
114. Similarly, the CWRIC recommendation, that those who violated the 1942 military orders be "forgiven" or pardoned by the government, suffers from the same ambiguity of interpretation. See CWRIC, supra note 39, at 10.

ernment's misconduct, not its benevolence, compelled the courts to vacate the convictions. For this reason, each Japanese American coram nobis case presents the judiciary with a case or controversy that extends beyond the mere vacating of the convictions. Justice requires the judicial declaration of facts which would set the record straight with respect to the loyalty of Japanese Americans to the United States during World War II.

A. The Traditional View

Article III of the Constitution limits the subject matter jurisdiction of the federal courts to cases which present a "case or controversy."[115] In order for there to be a case or controversy sufficient to avoid dismissal of a coram nobis action on grounds of mootness, the petitioner must have a substantial stake in the judgment of conviction which survives satisfaction of the sentence imposed on her.[116] In this context, mootness may be "stated in terms of whether petitioner, who has already fully served his sentence, suffers any collateral consequences such that he should be permitted to apply for a writ of coram nobis."[117]

The Supreme Court in *Lane v. Williams*[118] noted that a "criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."[119] Examples of collateral legal consequences held to present a "case or controversy" in a post-conviction proceeding include the loss of the right to vote and the loss of the right to engage in certain businesses.[120] Since courts recognize as "an obvious fact of life" that collateral consequences flow from a criminal conviction,[121] the burden of proof with respect to showing the existence of such consequences is minimal.

In the Ninth Circuit, the situs of the coram nobis cases, the resolution of mootness questions in post-conviction proceedings gives considerable weight to the merits of petitioner's claim. In *Holloway v. United States*,[122] for example, the petitioner, after serving his sentence for two felony convictions, petitioned for coram nobis relief, alleging that his guilty plea was induced by a bargain made and subsequently broken by the United States Attorney. By granting coram nobis relief, the Court of Appeals reversed the District Court's judgment that there was no "case or controversy" and that it lacked jurisdiction because the sentences had been completed. The court said that "[c]oram nobis must be kept available as a post-conviction remedy to prevent 'manifest injustice' even where the removal of a prior conviction will have little present

115. U.S. Const. art. III, § 2.
116. *Korematsu*, 584 F. Supp. at 1419.
117. Id.
118. 455 U.S. 624 (1982).
119. Id. at 632 (quoting with approval Sibron v. New York, 392 U.S. 40, 57 (1968)).
120. See Carafas v. LaVallee, 391 U.S. 234, 237 (1968).
121. See, e.g., *Sibron*, 392 U.S. at 55.
122. 393 F.2d 731 (9th Cir. 1968).

effect on the petitioner."[123]

This prevention of manifest injustice approach prevailed in *United States v. Danks*,[124] where the petitioner had already paid a fine for refusing to answer questions for the 1970 census. The District Court for the District of Hawaii presumed the existence of collateral legal consequences following from petitioner's misdemeanor conviction. By acknowledging the availability of coram nobis as a post-conviction remedy,[125] the court in effect rejected the government's mootness argument and assumed jurisdiction over petitioner's first amendment claim.

B. A More Expansive View

Generally, the petitioner's interest in removing the social stigma that results from a criminal conviction does not give rise to a case or controversy in the absence of an unrebutted presumption of collateral legal disabilities.[126] However, fundamental concerns of justice should elevate social stigma to the status of a legal disability where, as in the case of the Japanese Americans, individuals have been branded as potential traitors based upon their membership in an ostracized minority group.[127] This should hold particularly true where the label results in the banishment of the branded group by the state. The odious nature of such a stigma should present a case or controversy sufficient to avoid dismissal on grounds of mootness.

The dissenting opinions in *Parker v. Ellis*[128] recognized the concrete and substantial stake of the petitioner in a post-conviction proceeding to remove the taint upon her reputation in society. The *Parker* majority dismissed, on

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123. Id. at 732.

124. 357 F. Supp. 193 (D. Hawaii 1973).

125. Id. at 195.

126. See The Supreme Court 1967 Term, 82 Harv. L. Rev. 63, 297-98 (1968), and cases cited therein.

127. The CWRIC report concludes that the most devastating loss due to the incarceration was:

> the loss of liberty and the personal stigma of suspected disloyalty for thousands of people who knew themselves to be devoted to their country's cause and to its ideals but whose repeated protestations of loyalty were discounted . . . . The wounds of the exclusion and detention have healed in some respects, but the scars of that experience remain painfully real in the minds of those who lived through the suffering and deprivation of the camps.

CWRIC, supra note 1, at 3.

128. 362 U.S. 574 (1960)(per curiam)(overruled in Carafas v. LaVallee, 391 U.S. 234, 240 (1968)(holding that under the federal habeas corpus statute, once the federal jurisdiction has attached in the District Court, it is not defeated by release of the petitioner prior to completion of proceedings on such application)).

In noting the substantial stake the petitioner retained in pursuing his habeas corpus application even after his release from prison, thus rendering his case not moot, the *Carafas* court spoke of "disabilities or burdens" flowing from his conviction, such as being prohibited by New York law from engaging in certain businesses, serving as a labor union official for a specified period, voting in any election held in New York State, and serving as a juror. Although the *Carafas* opinion did not mention damage to reputation as a consequence of conviction, in general it cited approvingly the reasoning of the *Parker* dissents. Id. at 238-39.

the ground of mootness, a writ of certiorari to review dismissal of the petitioner's habeas corpus application because the petitioner, who had been convicted of a felony, was released from prison prior to the Supreme Court's hearing on the matter. The four dissenting Justices criticized the resolution of mootness questions based upon the existence or nonexistence of a legal disability.[129] The Justices favored an expansive interpretation of what constitutes a case or controversy:

> Conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions . . . but which also seriously affects his reputation and economic opportunities . . . . There is, after all, such a thing as rehabilitation and reintegration into the life of a community . . . . Five years of law-abiding life in a new community give [petitioner] a significant enough stake in the outcome of this adjudication to preclude a finding of mootness.[130]

C. Reputation for Loyalty

In limited situations, the judiciary may treat social stigma as a legal disability. The determination hinges upon the nature of the stigma. The stigma of real or suspected disloyalty to one's country has drawn special consideration from the courts.[131]

In particular, the judiciary has acknowledged the damaging effect a court martial conviction or dishonorable discharge from the military has upon the reputation of an individual. Such an individual is effectively branded by the government as disloyal, and, by implication, less of an American than other citizens. In *McAliley v. Birdsong*,[132] for example, the petitioner, who had been undesirably discharged "for the good of the service,"[133] sought to have his record expunged and his discharge upgraded to conscientious objector. The court concluded that petitioner's claim was not moot. It stated that while the disability from an "actual conviction in civilian or military court may be more pronounced than those accruing with an undesirable discharge from the Army, it is common knowledge that a discharge . . . can seriously jeopardize an individual's prospects for future employment as well as his general reputation."[134]

In light of the debilitating social and psychological impact upon one branded as disloyal, it is not surprising that Japanese American soldiers court-martialed in 1944 for protesting the internment of their families successfully argued in 1983 that the Army Board for the Correction of Military Records

129. *Parker*, 362 U.S. at 592-94.
130. Id. at 593-94.
131. See Homcy v. Resor, 455 F.2d 1345, 1349 (D.C. Cir. 1971); Grubb v. Birdsong, 452 F.2d 516, 517-18 (6th Cir. 1971); Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961).
132. 451 F.2d 1244 (6th Cir. 1971).
133. Id. at 1246.
134. Id.

should expunge their dishonorable discharges and the years of imprisonment from their records.[135] Clearly, dishonorable discharges and court-martial convictions adversely impact upon the reputation and psychological well-being of the individual. The enduring stigma of dishonorable discharges and court-martial convictions is evidenced by the persistent efforts that an individual will take to vindicate herself in remedial proceedings long after the sentence has been served.

The stigma associated with the crime of treason is even more lasting in effect than the stigma resulting from a court-martial conviction. Treason is the most serious crime that may be committed against the United States.[136] An act of treason is perpetrated when one "owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort."[137] The magnitude of this crime may be inferred from the fact that it is the only offense defined by the Constitution.[138] Treason may be punishable by death.[139]

One stamped with the label of "traitor" has an even greater stake in the outcome of a proceeding which could cleanse her reputation among her peers than someone labeled as disloyal. Therefore, a person convicted of treason retains a strong interest, even after serving her sentence, in showing that her conviction was invalid. Thus, an individual's petition for a post-conviction proceeding to cleanse her name from an undeserved stain of treason presents the judiciary with a "case or controversy" and precludes dismissal on grounds of mootness.

D. Racial Segregation

As with challenges to an individual's national loyalty, governmental discrimination on the basis of race has a severely damaging effect on one's reputation. A minority group alleged to have a propensity for committing acts of treason must live cautiously among neighbors who may not trust them during a national emergency. The accused group is subject to the whims of society's prejudices and fears; thus restrictions of liberty based on suspicion of un-American activities, disloyalty, or inferiority are easily justified.

When prejudice forms the basis for state-enforced racial exclusion, the federal judiciary has responsibly acknowledged and sought to eliminate the intangible effects of the discrimination.[140] The Supreme Court has been par-

135. See Army Clears Records of 11 Nisei Court-Martialed in 1944 Protest, Hokubei Mainichi, Sept. 8, 1983, at 1, col. 6.

136. Stephan v. United States, 133 F.2d 87, 90 (6th Cir.), cert. denied, 318 U.S. 781 (1943).

137. 18 U.S.C. § 2381 (1982).

138. Charge to Grand Jury, 30 F. Cas. 1024, 1025 (D. Mass. 1851)(No. 18269).

139. 18 U.S.C. § 2381 (1982).

140. See, e.g., Johnson v. Virginia, 373 U.S. 61 (1963)(per curiam)(courtrooms); New Orleans City Park Improvement Assoc. v. Detiege, 252 F.2d 122 (5th Cir. 1958), 358 U.S. 54 (1958) (per curiam)(parks); Browder v. Gayle, 142 F. Supp. 707, 710-12 (M.D. Ala. 1956), 352 U.S. 903 (1956)(per curiam)(buses).

ticularly sensitive to the social and psychological impact racial exclusion has upon the excluded. In the landmark case of *Brown v. Board of Education*,[141] the Supreme Court concluded that state-enforced segregation of Black children "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[142] Constitutional law scholar Laurence Tribe states that the most plausible justification for *Brown* is that "racial separation in our society conveys strong social stigma and perpetuates both the stereotypes of racial inferiority and the circumstances on which such stereotypes feed."[143]

In school desegregation cases, therefore, the minority children's interest in removing the odious stigma that results from state-enforced racial segregation has independent legal significance which courts seek to mitigate or eliminate. As a legally cognizable fact of life, this type of stigma arguably acquires the status of a legal disability; one's interest in removing it should generate a "case or controversy" within the meaning of article III of the Constitution.

E. The Japanese American Situation: Reputation for Loyalty Based on Race

One branded by the government as either disloyal or racially excludable suffers from a stigma which festers until all institutional approval is removed.[144] Both of these categories of social stigma are present in *Korematsu*. First, Korematsu was branded as potentially dangerous to the national security and was therefore suspected of disloyalty. Second, he was excluded by the government from the rest of society because of his race.

Today, this stigma continues to weigh upon the shoulders of the entire Japanese American community, because the controversy over whether the internment was justified remains alive.[145] The argument continues in the wake of

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141. 347 U.S. 483 (1954).

142. Id. at 494.

143. L. Tribe, supra note 107, § 16-15 at 1020-21 (1978).

144. The most common social and psychological response of second generation Japanese Americans to their imprisonment is:

> [1] Attempting to deny or avoid the experience and refusing to acknowledge the significance of the losses . . . .
>
> [2] Losing faith in white America; maintaining a general distrust or hatred toward white society and choosing to associate only with Japanese Americans.
>
> [3] Turning aggressions inward, as rape victims do, by blaming themselves for something over which they had little control. Anger is internalized as feelings of guilt, shame, and racial inferiority; and energy is focused on attaining economic success in order to prove that one is not inferior . . . .
>
> [4] Identifying with the aggressor by refusing to associate with other Japanese Americans and proudly proclaiming ignorance of Japan, its language and culture . . . . This denial of who one was and how one looked bred ethnic hate and, ultimately, self-loathing.

CWRIC, supra note 1, at 299-300.

145. John J. McCloy, Assistant Secretary of War under President Franklin D. Roosevelt, continues to maintain that "military necessity" justified the incarceration. See, e.g., P. Irons, supra note 4, at 351-54; Repay U.S. Japanese?, New York Times, April 10, 1983, at E21, col. 1.

the report of the Commission on Wartime Relocation and Internment of Civilians, which concluded that the internment was due not to military necessity but to "race prejudice, wartime hysteria and a failure of political leadership."[146] It continues despite the documentary evidence uncovered by Korematsu's attorneys, which shows that the government, in prosecuting the wartime internment cases, had falsified evidence and suppressed relevant information in order to prevent the courts from rendering an informed decision.[147]

The inescapable fact is that the reputation of the Japanese American community remains at issue, and the injury persists. The stigma to be erased through the coram nobis cases has rarely been equalled and should generate a case or controversy sufficient to preclude dismissal on grounds of mootness.

CONCLUSION

Though often viewed as nothing more than a somber chapter in American history, the Japanese American internment remains a source of humiliation and frustration to its victims, many of whom died waiting for their government to confess its deliberate deception to the American people. The survivors and their descendants continue to witness the irony of the government's belligerent refusal to accept its responsibility to the ethnic community it left paralyzed and crippled. Three of the victims, unwilling to wait forever, brought the coram nobis lawsuits in an effort to vindicate their reputations and that of the Japanese American community in the courts. This Note has described the damage done to their reputation and articulated a basis for elevating social stigma to the status of a legally cognizable injury. The remedy for the community-wide injury can hardly be the mere vacating of Korematsu's, Yasui's, and Hirabayashi's convictions. Justice requires the courts to engage in fact finding which would expose the myth of disloyalty as the unethical scheme of high government officials. Only a community-wide remedy will relieve the psychic burdens and remove the stain on the reputation of Japanese Americans caused by this tragic episode in American history.

Notwithstanding the narrow focus of this Note, the full significance of these lawsuits transcends the interests of the Japanese American community. All Americans should be concerned, for at stake is the capacity of the Constitution to protect individuals, particularly those who are members of minority

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He has stated, "There is, I submit, nothing whatever for which the country should atone." P. Irons at 354.

James Currieo, National Commander-in-Chief of the Veterans of Foreign Wars (VFW), declared there should "never be reparation paid or an apology offered" to former internees. He blamed the suffering by the Japanese Americans on the military government of World War II Japan. Statement by VFW Chief Condemned by Congressman, Pacific Citizen, July 22, 1983, at 1, col. 1. Currieo later apologized. VFW Nat'l Chief Meets with Nisei Posts, Pacific Citizen, Aug. 12, 1983, at 1, col. 1.

146. CWRIC, supra note 1, at 18.

147. See note 46 supra.

groups, in times of national crisis. At this broader level, the coram nobis cases have fallen short of their goal of vanquishing the legal precedent of the internment cases, for the courts have thus far refused to question the constitutionality of the evacuation and internment orders. Though modern legal principles minimize the possibility of another internment, minorities who feel secure in this "protection" may someday find their complacent delusion shattered.

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