Betrayal on Trial: Japanese-American Treason in World War II

Eric L. Muller
BETRAYAL ON TRIAL: JAPANESE-AMERICAN "TREASON" IN WORLD WAR II

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This Article tells the story of the federal treason trial of three Japanese-American sisters for helping their paramours, two German soldiers, to flee from a Colorado prisoner-of-war camp in October of 1943. At the time, the story seemed to confirm the suspicion of national disloyalty that had forced the sisters and tens of thousands of other Japanese Americans from their West Coast homes in the spring of 1942. But a careful review of the record of the case reveals that the women were disloyal only to their husbands, not to their country. The government presented the jury with no evidence that the sisters intended to advance the cause of the Axis Powers or to betray the United States. The jury convicted them of conspiracy to commit treason nonetheless.

Reviewing the leading literature on law and loyalty, this Article concludes that the story of this wartime treason trial illustrates the dangers of stereotype and xenophobia that lurk in the law of treason.

INTRODUCTION: OF LOYALTY AND THE JAPANESE-AMERICAN INCARCERATION ................................................................. 1760

I. THE TREASON TRIAL OF THE SHITARA SISTERS, DENVER, 1944 ................................................................. 1764
   A. Escape from Camp Trinidad ..................................... 1764
   B. The "Japanazi Romance" ........................................ 1766
   C. The Stool Pigeon and the Tunnel ............................. 1769
   D. Turning Romance to Treason .................................. 1772
   E. Criminal Intent Vanishes on the Road to Trial ......... 1776
   F. "Benedict Arnolds in Skirts" ................................... 1780

II. LAW, LOYALTY, AND THE "PERMANENT SOURCE OF MORAL DANGER" ...................................................... 1787

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INFORMATION: OF LOYALTY AND THE JAPANESE-AMERICAN INCARCERATION

In early 1942, when the federal government decided to evict every person of Japanese ancestry from the West Coast, Japanese-American guilt was universally assumed. Every man, woman, and child was a potential saboteur. "The Japanese race is an enemy race," explained General John DeWitt, the commander of the Western Defense Command, who ordered their eviction. Citizenship meant nothing: Japanese-American citizens were as suspect as aliens because, in the military's view, "the racial strains [were] undiluted" in the second and third generations. Factual innocence also meant nothing. "The very fact that no sabotage has taken place to date," DeWitt explained as the program of repression began, "is a disturbing and confirming indication that such action will be taken."

We know now that the military got this colossally wrong. Mari Matsuda calls it "the lie of military necessity," and that is an apt description. The military overestimated the security risks that Japanese Americans posed by orders of magnitude. This is not just a historical fact; it is also now a legislative one. When Congress capped a multi-year historical investigation with the Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903, 903 (1988) (codified as amended at 50 U.S.C. app. § 1989b-5 (2000)).
Act of 1988, it concluded that the "evacuation, relocation, and internment of civilians [of Japanese ancestry] during World War II [had been] ... carried out without adequate security reasons and without any [documented] acts of espionage or sabotage."

This last point—that there were no documented instances of disloyal conduct by Japanese Americans in the United States during the war—has become something of a mantra in the modern account of the Japanese-American wartime experience. On this point the modern account has an almost reactive feel: it is as though we are seeking to atone for the outrage of presumed disloyalty and monolithic suspicion by hinting at a story of uncomplicated loyalty and monolithic innocence.

Intriguingly, this all-or-nothing dynamic, a stark distinction between heartfelt loyalty and abject disloyalty, persists in popular discussion within the Japanese-American community itself about its incarceration experience. Consider the tortured sixty-year-long...

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8. Id.

9. See Proclamation No. 4417, 3 C.F.R. 8 (1976) ("We now know what we should have known then—not only was that evacuation wrong, but Japanese-Americans were and are loyal Americans."); COMM’N ON WARTIME RELOCATION AND INTErnMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 475 (1997) (stating that Japanese Americans were evicted from their homes and forced into assembly centers "despite the fact that not a single documented act of espionage, sabotage, or Fifth Column activity was committed by an American citizen of Japanese ancestry or by a resident Japanese alien on the West Coast"); DAVID COLE, ENEMY ALIENS 97 (2003) ("[T]here was never any evidence to support the concern that the Japanese living among us posed a threat. None of the interned Japanese was ever charged with, much less convicted of, espionage, sabotage, or treason."); Victor Bascara, Cultural Politics of Redress: Reassessing the Meaning of the Civil Liberties Act of 1988 After 9/11, 10 ASIAN L.J. 185, 202 (2003) ("Japanese Americans proved not to be a security threat; no instances of espionage or sabotage ever surfaced."); Neil Gotanda, The Story of Korematsu, in CONSTITUTIONAL LAW STORIES 262 (Michael C. Dorf ed., 2004) ("Notwithstanding ... lurid reports, actual incidents of espionage among Japanese-American residents on the West Coast were nonexistent after Pearl Harbor."). One popular website on the incarceration experience sums it up this way: "The mass removal of persons of Japanese ancestry ordered by the President, supported by the Justice Department, implemented by the Army and sanctioned by the Supreme Court, was based on the pretext of 'military necessity,' a justification which later proved groundless and without evidence." National Asian American Telecommunications Association, Executive Order 9066, available at http://www.jainternment.org/ww2/eo9066.html (last visited Apr. 28, 2004) (on file with the North Carolina Law Review).

debate about military service by the internees.\textsuperscript{11} Some Japanese-American veterans still insist that all those who resisted the draft from inside the camps were unpatriotic;\textsuperscript{12} their fervor on the issue is matched only by those who insist that each young man who refused to comply with his draft notice was a patriotic "resister of conscience."\textsuperscript{13} Or consider the discomfort that still can arise when a person admits that his family was at Tule Lake, the camp to which the government sent most of those from the other camps who "failed" the written loyalty test that it administered to all camp residents early in 1943. To some, Tule Lake is still the "bad" camp, the camp of the "no-no's,"\textsuperscript{14} and nothing will persuade them otherwise.

The story I tell in this Article does not sit comfortably in the conventional narrative of Japanese-American patriotism. It is the story of the Shitara sisters, three American women of Japanese ancestry who helped two German war prisoners escape from their POW camp in eastern Colorado in the fall of 1943. They gave the prisoners civilian clothing, some maps, and a nighttime lift south toward Mexico. There is no question that they did this. They were not framed. It was not an imagined event.

There is also no question that theirs was a case of disloyalty, even betrayal. After all, the three Shitara sisters were all married,\textsuperscript{15} although the dislocation of the incarceration experience had temporarily separated them from their husbands. The German soldiers were their lovers, and their car trip into New Mexico included some back-seat romance.

Had the government accused the sisters of the crime of betraying their husbands, their story would have been of little, if any, historical

\begin{footnotesize}
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\item \textsuperscript{11}  See Eric L. Muller, Free to Die for Their Country 183-86 (2001).
\item \textsuperscript{14}  The phrase "no-no" refers to the negative answers that some internees gave to two questions about their loyalty on a questionnaire that the government administered in the relocation centers in early 1943. See Chizu Omori, The Loyalty Questionnaire, in GUILT BY ASSOCIATION: ESSAYS ON JAPANESE SETTLEMENT, INTERNMENT, AND RELOCATION IN THE ROCKY MOUNTAIN WEST 277 (Mike Mackey ed., 2001) [hereinafter GUILT BY ASSOCIATION]. The questions asked whether an internee was willing to serve in the armed forces and whether he would foreswear allegiance to the Emperor of Japan. See id.
\item \textsuperscript{15}  Shitara was the maiden name the sisters shared. Each had a different married name—Wallace, Otani, and Tanigoshi. See infra note 49.
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importance. But the government accused them instead of the crime of betraying their country, bringing treason charges against them early in 1944. After one of the most headline-grabbing trials of World War II, a jury convicted the sisters of conspiracy to commit treason, and a federal district judge sentenced them to two years in prison. From all appearances, their case was the one that was not supposed to exist—a documented act of disloyalty by Japanese Americans on the U.S. mainland during World War II.

As notorious as the case was in its day, this treason prosecution against the three Japanese-American sisters barely appears in the voluminous literature on the wartime experiences of Japanese Americans. Perhaps part of the reason for this absence is precisely that it appears to clash with the narrative of Japanese-American loyalty that prevails in scholarship on the Japanese-American incarceration. But while the story may not at first seem to have a comfortable home in that literature, I will argue that it does have a home in the literature on law and loyalty. That literature has captured well the danger of xenophobic repression that lies in government efforts to use law to enforce bonds of national identity. The treason trial of the Shitara sisters is a classic and clear illustration of that danger. The Shitara sisters were guilty of a foolish, and serious, indiscretion. Although married women, they allowed themselves to be seduced by enemy soldiers, and offered their lovers help in escaping captivity. Their motive was romantic. But because they looked like the enemy, their motive became political and their serious indiscretion became treason in the eyes of federal prosecutors.

Part I of this Article tells the story of the Shitara sisters' wartime affair, and how it became the treason case of its day. Part II offers a brief summary of the leading accounts of the law's interaction with loyalty, and shows how the Shitara sisters' case confirms a central danger that inheres in efforts to use the law to enforce national loyalty. This Article concludes that the experience of the Shitara sisters should play a prominent and unashamed role in illustrating the civil rights tragedy we call the Japanese-American incarceration.

I. THE TREASON TRIAL OF THE SHITARA SISTERS, DENVER, 1944

A. Escape from Camp Trinidad

In October of 1943, 167,748 prisoners of war were incarcerated in the United States, of whom 119,401 were German and 48,252 were Italian. While our post-war television culture depicted Allied war prisoners as clever and their Axis captors as incompetent, the reality was otherwise: German and Italian war prisoners were a crafty bunch, and Americans were not especially skillful captors. During the course of the war, 2,222 German prisoners escaped from prisoner-of-war ("POW") camps in the United States. Ten percent of the Germans who escaped remained at large for at least three days, and somewhat incredibly, seventeen escaped German war prisoners were still at large in November of 1947. The circumstances of these escapes were often deeply embarrassing to the U.S. Army, which had responsibility for guarding the war prisoners. In one typical instance, FBI Director J. Edgar Hoover reported to Attorney General Francis Biddle that a military sentry at a camp a mile and a half from the Rio Grande River was caught on guard duty at 1:30 in the afternoon "sitting on an oil can so drunk he couldn't walk straight," telling those in his charge that they could go "wherever [they] want[ed]."

Security at the Trinidad POW camp in eastern Colorado was particularly lax in the second half of 1943. Camp Trinidad housed more than three thousand German soldiers, most of them prisoners taken in North Africa. Escapes by twos and threes occurred throughout the month of September, 1943. On the morning of October 18, 1943, six German prisoners were discovered missing all at

17. See KRAMMER, supra note 16, at 271.
18. I refer, of course, to the television show "Hogan's Heroes," in which Colonel Hogan and his American, British, and French co-captives routinely outsmarted Colonel Klink, Sergeant Schultz, and the rest of their German captors.
20. See id.
21. See Memorandum from J. Edgar Hoover, Director, FBI, to Francis Biddle, Attorney General (Oct. 27, 1943) (on file with the National Archives, Record Group 60, Entry 114BK, Box 2, File 146-16-13).
22. See Memorandum from Lieut. Col. Birge Holt, to the Inspector General (Jan. 12, 1944) (on file with the National Archives, Record Group 159, Entry 26E, Box 724, "Prisoner of War Camp, Trinidad, Colorado").
23. See Memorandum from J. Edgar Hoover, Director, FBI, to Francis Biddle, Attorney General (Sept. 7, 1943) (on file with the National Archives, Record Group 60, Entry 114BK, Box 2, File 146-16-5); Memorandum from J. Edgar Hoover, Director, FBI, to Francis Biddle, Attorney General (Sept. 15, 1943) (on file with the National Archives, Record Group 60, Entry 114BK, Box 2, File 146-16-7).
once. Two of them, Heinrich Haider and Hermann Loescher, were picked up late that night in a beer hall eighty-seven miles away from Camp Trinidad in the town of Watrous, New Mexico, drinking and carousing with some local women after trying to buy train tickets. They told the arresting officer that they had escaped on their own, by cutting through a wire fence, hopping a southbound freight train, and buying the civilian clothing they were wearing with a small amount of American money that they had smuggled into camp with them from North Africa. They reportedly explained that they were planning to "go to Mexico and board any Spanish ship for Germany." Haider and Loescher would eventually have a good deal more to say about their escape and their plans, but this was the last time they ever mentioned a plan to return to Germany, or, for that matter, to do anything to support Germany.

When asked about the other four escapees, Haider and Loescher said that they believed the others had escaped days earlier, possibly as early as October 11. A check with the commander of Camp Trinidad confirmed that it was possible that "all of the prisoners could have escaped on October 11th, 12th, or 14th and their escapes not have been discovered until the FBI was advised on October 18th." FBI Director J. Edgar Hoover sounded the alarm in a memorandum to Attorney General Francis Biddle on October 23. "[O]bviously," Hoover wrote, "an extremely dangerous condition is being permitted to exist." "Such laxity not only renders it more difficult to apprehend the escapees," warned Hoover, "but of more importance, it seriously endangers the nation's security." It was not until October 21 that the rest of the escapees were caught.

27. See id.
28. See infra text and accompanying notes 131–74.
30. See id.
32. Id.
B. The "Japanazi Romance"

Haider and Loescher were searched when they were arrested, and the search turned up some of the ordinary tools of escape—road maps of New Mexico and Arizona, and about twelve dollars in change. But something a good deal stranger emerged from their pockets as well. They had photographs of themselves in various poses with several young women. Some of the poses looked just friendly, but one of them looked downright amorous: it showed the prisoner Haider with his arms around one of the young women, their lips locked in a passionate kiss. Most importantly, as it would turn out, the women all looked Japanese.

At first, the photographs seemed little more than a curiosity to the state and federal law enforcement officers who were interrogating Haider and Loescher. The police chief of Las Vegas, New Mexico, decided to keep them as souvenirs, and he showed them around to his friends. One of his friends, however, showed them to the editor of the local newspaper, and he, in turn, gave them to the Denver Post. On Sunday, October 24, 1943, the Post ran three of the photographs on the front page under the headline "German Prisoners Spooned with Jap Girls in Trinidad." The Associated Press then picked up the photos, and within days the story of the "Japanazi Romances" was in newspapers across the country. The military's embarrassment mounted.

The publication of the photographs led the FBI to send an agent from its Denver office to question the Germans further. After extensive questioning, Heinrich Haider finally admitted that a few weeks earlier he had met several Japanese-American women on a farm where he and other war prisoners had been harvesting onions, that he had gone into the house where the Japanese-American women lived, that he had asked them for civilian clothes, and that one

33. See Letter from D.A. Bryce, to J. Edgar Hoover, Director, FBI (Nov. 4, 1943) (on file with the North Carolina Law Review).
34. See id.
35. See id.
36. See id.
37. See id.
of them had responded, "We will see." Three days later, Haider said, several of the women passed by on the farm, and one of them—he could not say which—had said, "there is something for you . . . in the bushes." Haider checked and found a package with civilian clothing in it.

The women to whom Haider referred were sisters, all of them with the maiden name Shitara. As was fairly common among the children of early twentieth-century Japanese immigrants, the Shitara sisters had Japanese surnames, but they went by Anglo nicknames—Toots, Flo, and Billie. The Shitara sisters had grown up on a farm in Inglewood, California, but had never lived among other Japanese Americans, and as a result, even their earliest memories were tinged with prejudice and discrimination. They were ostracized and had few friends. Neighborhood children called them "slant-eye" and "skibby." In 1922, they huddled together praying in the fields behind their home while hooded members of the Ku Klux Klan raided their neighborhood. Even law enforcement victimized the family: a police officer found one of the sisters home alone when she was ten and tried to rape her.

Their experiences as adults were no less bitter. Each of them married, but, flaunting the conventions of the times, two married across racial lines, which subjected them to scorn. At the time of the

40. See FBI REPORT (Oct. 30, 1943), supra note 26, at 12.
41. See id.
42. See id.
43. See German’s Testimony Stuns Treason Trial Court, ROCKY MTN. NEWS (Denver, CO), Aug. 8, 1944, at 5.
44. Interview with Misao Billie Tanigoshi, at 6 (Sept. 8, 2003) [hereinafter Tanigoshi Interview] (on file with the North Carolina Law Review).
45. See id.
46. Id. at 11.
47. See id. at 5–6. In a particularly violent confrontation that took place next door to the Shitara home, a Klansman was shot. See id. When his hood was removed, people saw that the Klansman was a local police officer. See id. at 5; see also DAVID M. CHALMERS, HOODED AMERICANISM: THE FIRST CENTURY OF THE KU KLUX KLAN 119–22 (1965) (describing the Inglewood KKK raid); THE INGLEWOOD RAIDERS: STORY OF THE CELEBRATED KU KLUX CASE AT LOS ANGELES AND SPEECHES TO THE JURY (1923) (same); Cecilia Rasmussen, Klan’s Tentacles Once Extended to Southland, L.A. TIMES, May 30, 1999, at B3 (same).
48. See Tanigoshi Interview, supra note 44, at 37–38.
49. Tsuruko “Toots” Shitara married a white man named Virgil Wallace. See FEDERAL BUREAU OF INVESTIGATION, FBI REPORT 29 (Nov. 9, 1943) [hereinafter FBI REPORT (Nov. 9, 1943)]. Misao “Billie” Shitara married William Tanigoshi, whose father was Japanese and whose mother was white. See Tanigoshi Interview, supra note 44, at 12–13. Another Shitara sister, Lily, married an African American. See FEDERAL BUREAU OF INVESTIGATION, FBI REPORT 2 (July 7, 1944). Yet another, Kazumi, married a
attack on Pearl Harbor, the two older sisters, Toots and Flo, lived on Terminal Island near Los Angeles, which was the first location along the West Coast from which Japanese Americans were evicted in February of 1942. They were given just days to clear out. In the spring of 1942, the entire Shitara family was ordered to report to the assembly center at the Santa Anita racetrack, and many of them spent that summer living in the horse stables. In the fall of 1942, they were all put on a train with darkened windows and transported for indefinite incarceration in the custody of the federal War Relocation Authority at the Amache Relocation Center on the wind-swept prairie of southeastern Colorado. Less than a year later, in the late spring of 1943, the sisters were granted leave from Amache to live as laborers on an onion farm. All three of the sisters, however, went to the farm without their husbands: Toots’s husband, who was white, remained on Terminal Island, working in a cannery; Flo’s husband had left Amache to serve in the army; and Billie’s husband had left camp for a job in Cleveland in order to support her and their young daughter.

Following up on Heinrich Haider’s story, FBI agents questioned the Shitara sisters about the German war prisoners’ escape, but each of them denied knowing anything about it. They admitted that Flo had taken the photographs on the farm early in October and that they had given the photographs to the Germans as souvenirs, but claimed—falsely—that they had given the Germans no clothing and had never talked with them about an escape.

While the FBI and the local United States Attorney tried to

Korean American. See FBI REPORT (Nov. 9, 1943), supra, at 26.
50. See Tanigoshi Interview, supra note 44, at 12.
51. See ROGER DANIELS, PRISONERS WITHOUT TRIAL 50 (1993).
52. See Tanigoshi Interview, supra note 44, at 12.
53. See id. at 13–14.
54. See id. at 14–15. Amache was also known as the Granada Relocation Center. See J. BURTON ET AL., CONFINEMENT AND ETHNICITY: AN OVERVIEW OF WORLD WAR II JAPANESE AMERICAN RELOCATION SITES, Ch. 5, available at http://www.cr.nps.gov/history/online_books/anthropology74/ce5.htm (last modified Sept. 1, 2000) (on file with the North Carolina Law Review).
55. See FBI REPORT (Nov. 9, 1943), supra note 49, at 26.
57. See FBI REPORT (Oct. 30, 1943), supra note 26, at 15.
58. See id. at 18.
59. See id. at 14–18.
60. See id.
figure out what to do with the Shitara sisters, the War Relocation
Authority weighed in with a report on the Shitara family.61 James
Lindley, the director of the Amache Relocation Center, knew the
Shitara family from the months the family had spent at the camp, and
while he conceded that the sisters were “a bit on the wild side,” he
stated confidently that there was “[n]othing subversive or disloyal
about this family.”62 “I believe,” Lindley reported, “that the girls
were having a bit of fun and taking their pleasure where they found
it.”63 He pointed the finger of blame directly at the military: “As it is
my understanding that these prisoners work under guard, I should
think the guards would be able to give an explanation as to how and
why this apparently loose conduct was countenanced.”64

C. The Stool Pigeon and the Tunnel

On November 5, 1943, almost three weeks after the Germans
were captured and almost two weeks after the photographs appeared
in the nation’s newspapers, Attorney General Francis Biddle
reviewed the file on the Shitara sisters and did not see much that
concerned him.65 A note to Tom C. Clark, the Chief of the Justice
Department’s Criminal Division,66 explained that although Biddle
was prepared to defer to Clark’s judgment, he felt, “at first blush, that
there is probably no violation here.”67 Biddle preferred that the case
be closed with a simple deal: the sisters “would be returned to the
relocation center on the agreement that no action be taken—or the
like.”68 Clark, however, was suspicious. On the back of the Attorney
General’s memo he scribbled his own note to James McInerney, the
lawyer who headed the Criminal Division’s National Defense Section:
“I bet 30¢ these Jap gals did get the clothes and help these boys
escape. I think a thorough investigation should be made.”69

61. See FBI REPORT (Nov. 9, 1943), supra note 49, at 27.
62. Id.
63. Id.
64. Id.
65. Memorandum from Francis Biddle, Attorney General, to T.C. Clark, Assistant
   Attorney General (Nov. 5, 1943) [hereinafter Biddle Memorandum] (on file with the
66. Clark would go on to serve as an Associate Justice of the U.S. Supreme Court
    from 1949 to 1967. See Members of the Supreme Court, 1789 to Present, at
    www.supremecourt.us.gov/about/members.pdf (last visited Apr. 28, 2004) (on file with the
67. See Biddle Memorandum, supra note 65.
68. Id.
69. Note from T.C. Clark, Assistant Attorney General, to James McInerney,
As it happened, the investigation in Colorado was ongoing even as Clark was writing his comment about the “Jap gals.” And it was turning up something extraordinary: another of the six escapees from Camp Trinidad, Julio E. Hofmann, had begun cooperating with military and law enforcement authorities. On November 3, two days before the Attorney General recommended against prosecuting the Shitara sisters, Hofmann approached officials at Camp Trinidad and dangled before them some valuable information both about the escape of Haider and Loescher and about security at Camp Trinidad. He said, however, that he would share his information only for a price. He wanted, first, for the military to move him to a different prison camp and promised to try to help with the second. With that, Hofmann started to talk.

Hofmann first revealed to the authorities that as early as mid-August of 1943, the prisoners at Camp Trinidad had managed to dig a one-hundred-fifty-foot-long, five-foot-deep, thirty-inch-wide tunnel from beneath the officers' compound all the way to a point sixty-five feet beyond the perimeter fence. Even more astonishing, the tunnel was braced with lumber and fitted with electric lighting. Hofmann said that he had told guards at Camp Trinidad about the tunnel months earlier, but that they had done nothing about it. A search of the grounds at Camp Trinidad revealed a tunnel exactly where Hofmann said it would be. This was yet another major

70. See FBI REPORT (Nov. 9, 1943), supra note 49, at 13.
71. See id.
72. See id.
73. Id.
75. See id.
76. See id.
77. See id.
78. See Memorandum from J. Edgar Hoover, Director, FBI, to Francis Biddle, Attorney General (Nov. 17, 1943) [hereinafter Hoover Memorandum] (on file with the North Carolina Law Review).
79. See Nicholson Letter, supra note 74.
80. See Hoover Memorandum, supra note 78.
81. See id.
embarrassment for the military. The FBI instructed Camp Trinidad’s commander not to say a word in public about the tunnel, so as not to compromise either the camp’s security or the FBI’s investigation. The commander, grasping at the chance to deflect some criticism for the thirteen escapes that had happened on his watch, defied the FBI’s instructions and immediately gave an extensive interview to the press in which he took credit for discovering the tunnel after “an investigation [that] ha[d] been in progress for some time.” The commander boasted that his supposed “discovery” of the tunnel had “frustrated the escape of a large number of Germans.”

This bogus “discovery” undoubtedly went a small way toward polishing the military’s severely tarnished security record at its POW camps. But Hofmann offered the government an even more tempting target for this purpose—the three Shitara sisters. He told the FBI that once he got back to Camp Trinidad after being recaptured, he struck up a friendship with Heinrich Haider and asked Haider about his escape. Haider tried to maintain that he and Loescher had hopped a freight train into New Mexico, but Hofmann insisted that that was not possible. The next day, Hofmann said, Haider softened and opened up to him about “the Jap girls.” Hofmann’s statement is worth quoting at length:

I ask him if he f____ with the Jap girls and he said “In the car it was very warm with the Jap girls”.... Haider was sitting in front with the Jap girl Toots and he said Loescher was in back with a girl I think he said Billie. . . . I do not know if Flo was there. . . . Also before he escaped he told me he had clothes from the Jap girls. He said these were civil [sic] clothes. After I returned to camp he told me that the Jap girls came on the street with the car with no lights and he and Loescher went in the car with them.... He said he had $14.00 from the Jap girls.

Hofmann then volunteered proof of the Shitara sisters’ intent, with a detail or two about the drive to New Mexico that no witness would later confirm or even mention, either before or during the sisters’ eventual trial:

82. See id.
83. *Escape Tunnel Found at War Prisoners’ Camp at Trinidad*, DENVER POST, Nov. 8, 1943, at 1.
84. *Id.*
86. See *id.*
Haider said the Jap girls told him their father had a farm in California but that their father has not given this farm to America but they took it from him. She said that American papers said German soldiers were not good but that she saw Haider and knew Germans were good. She said she thought Germans were barbarious but after she met Haider she knew this was not true.  

This was the story that Julio Hofmann told so that he might be removed from Camp Trinidad and not returned to Germany at war's end. His gambit worked. A few days after making his statement, Hofmann was transferred to Camp McCain, Mississippi.  

When his fellow German prisoners were sent back to Germany, Hofmann was allowed to go to Chile. After spending a number of years there as a commercial pilot, he immigrated to the United States and settled in the Miami area, where he recently died. Obviously, Julio Hofmann talked his way to a better life.

D. Turning Romance to Treason

Armed with Hofmann's allegations, an FBI agent questioned Heinrich Haider again. Seeing that it would be impossible to conceal the sisters' role, Haider began to talk about Toots, Flo, and Billie. He explained that he had met them on the onion farm early in October, told them of his desire to escape, and asked them to help by giving him civilian clothing. The women tried to dissuade him from escaping. They argued that it was foolish because the war would be over soon and the chances were high that he would be caught. Haider said that the women also maintained that he would never be able to make it to Germany, but he told them he just wanted to go to Los Angeles. In any event, the women said, they could not

87. Id.
89. See Prisoner of War Information Bureau Form No. 6 (Julio Edwin Hofmann) Deutsche Dienstelle (WAST) (on file with the North Carolina Law Review).
91. See Obituaries, MIAMI HERALD, July 31, 2003, at 4B.
92. See FBI REPORT (Nov. 9, 1943), supra note 49, at 14–15.
93. See id.
94. See id.
95. See id.
96. See id. at 17.
97. See id.
help him because they had no money.\textsuperscript{98}

He talked with the women over the next few days and reiterated his intent to escape.\textsuperscript{99} Finally, some ten days after he first asked for the women's help, they left a package of civilian clothing for him in one of the onion fields.\textsuperscript{100} Emboldened by this first offer, Haider sent a note to them announcing that he and Loescher would be escaping on Saturday, October 16th.\textsuperscript{101} Toots responded, also by note, with an offer to pick them up on the highway outside the camp that evening and drive them south.\textsuperscript{102}

On the appointed evening, Haider explained to the FBI, he and Loescher cut their way through the fence at Camp Trinidad and made their way to a nearby highway.\textsuperscript{103} After a while, Toots, Billie, and Flo pulled up in a big Buick and dimmed their headlights.\textsuperscript{104} Toots was at the wheel. Haider and Loescher got in the car and they drove south into New Mexico.\textsuperscript{105} At around 1:30 in the morning, the car developed water pump trouble, so the women left the two Germans by the side of the road with the civilian clothing, the road maps, and, fatefuly, the photographs.\textsuperscript{106}

Interestingly, the interrogating agent did not pursue Hofmann's claim about the women's dissatisfactions with the United States and their admiration for Germany. In fact, only one element in Haider's new story even implied anything about the women's intent in helping them, and that element pointed toward innocence, not guilt, of treason:

HAIDER admitted that he had had intimate relations with subject [TOOTS] in the car during this trip but asked that no mention be made of this matter in public or in any trial of the case. He stated that he would give his word he would testify to the above facts which he stated are the truth but asked that if possible no mention be made of his having had intimate relations with [TOOTS].\textsuperscript{107}

The interrogating agents told Haider they would bring that request to

\textsuperscript{98} See id.
\textsuperscript{99} See id.
\textsuperscript{100} See id.
\textsuperscript{101} Id.
\textsuperscript{102} See FBI REPORT (Dec. 10, 1943), supra note 88, at 8.
\textsuperscript{103} See FBI REPORT (Nov. 9, 1943), supra note 49, at 18.
\textsuperscript{104} See id.
\textsuperscript{105} See id.
\textsuperscript{106} See id.; FBI REPORT (Dec. 10, 1943), supra note 88, at 8.
\textsuperscript{107} See FBI REPORT (Nov. 9, 1943), supra note 49, at 19.
the attention of the United States Attorney.108

The interrogating agent now had a story implicating Toots, Flo, and Billie in a plot to help the prisoners. So eager was he to corroborate it that he immediately did something that was either extraordinarily unprofessional or downright malicious: he brought Loescher into the interrogation room and—with Haider sitting right there—told Loescher the whole story that Haider had just told him.109 He then asked Loescher to confirm that the story was true, and Loescher did. Naturally this interrogation technique did nothing but let Loescher know exactly what he needed to say in order to conform his story to Haider's—a convenient strategy for preparing a treason case, which requires proof of an overt act by two witnesses.110

Loescher then sat down with the agent to tell his story and, of course, it matched Haider's factual account precisely.111 Loescher repeatedly emphasized that the women were not willing participants in the episode and that he and Haider had "had to urge the girls with every argument at their command to convince them that the plan could be successful."112 Loescher also admitted to "having had intimate relations with BILLIE," and asked "that this matter not be made public and that no mention of it be made in court."113 The agent assured Loescher, as he had assured Haider, that he would bring the request to the attention of the United States Attorney.114

The agent did ask Loescher one question that he had not asked Haider: "whether the affair was a romantic escapade on the part of the Japanese girls."115 Given the photographs, the women's reluctance, the Germans' efforts at persuasion, and the sex in the car, this was certainly a reasonable question. But Loescher told the agent that he was "convinced that they did it to help Germany."116 How did Loescher know this? He said that "the girls are definitely Japanese and probably have not been accepted by Americans and he knows

108. See id.
109. A lawyer in the Justice Department, reviewing the FBI report's description of this exchange, was so shocked by the agent's technique that he marked the passage and then scrawled in the margin "What a Dope!" See FBI REPORT (Nov. 9, 1943), supra note 49, at 19.
110. See U.S. CONST. art. III, § 3 ("No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.").
111. See FBI REPORT (Nov. 9, 1943), supra note 49, at 20.
112. See id.
113. See id.
114. See id.
115. See id.
116. See id.
that they feel allegiance to Japan and to its ally Germany." That is, he did not tell the agent anything that any of the women actually said or did; he simply ventured his opinion that the American citizens who helped him were “definitely Japanese” who “probably” felt like outsiders. The agent asked Loescher whether he was willing to testify to that at a trial, and Loescher said that he would, “see[ing] no reason to deny the truth.”

Loescher’s conscience, however, must have been nagging at him, because at the end of his interrogation, he asked for permission to send a letter to the judge who would try the case against the Shitara sisters. His letter is worth quoting at length because of the light it sheds on the sisters’ intent:

Sir! As you now have got my statement I profit by the opportunity to give the following to your notice: When my comrade Haider spoke to the two Japanese women (Toots and Billie) for the first time about our escape plans they both objected vividly. “There is no good in escaping for you”, they said. “Wait for the war’s end; be patient; keep your health; don’t play with your life,” was their advice. They pointed out a lot of dangers and circumstances making a flight nearly impossible. But being regardless resolved to realize the escapade we tried to persuade the women. We had to take many troubles by words and by letters to change their mind. Finally we succeeded. I think it therefore reasonable to consider us the more guilty party, not the seduced women. Without our urgent persuasions they never would have agreed.

At the time Loescher wrote this letter, the sisters were charged with nothing. Indeed, the day that Loescher wrote his letter to Judge Symes was the same day that Attorney General Francis Biddle shared his view with Tom Clark that there was probably nothing to the case. But with Haider’s and Loescher’s statements, the Justice

117. See id.
118. See id.
119. FBI REPORT (Nov. 9, 1943), supra note 49, at 20. A different, and far likelier version of the truth was circulating in the rumor mill at Camp Trinidad. A German officer related to the FBI that “he had gathered the impression from conversation among officers that the entire affair was in the nature of a romantic weekend and that he understood the girls to be in love with the German Prisoners of War.” See FBI REPORT (Dec. 10, 1943), supra note 88, at 11.
120. See FBI REPORT (Nov. 9, 1943), supra note 49, at 18.
121. See Letter from Hermann Loescher, German Prisoner of War, to J. Foster Symes, United States District Judge (Nov. 5, 1943) (on file with the North Carolina Law Review).
122. See supra notes 66–67 and accompanying text.
Department now had three faces—Japanese faces—on which to pin responsibility for the embarrassing security problems at Camp Trinidad. That was the day that the treason prosecution of the Shitara sisters began in earnest.

E. Criminal Intent Vanishes on the Road to Trial

It was also the last day that anyone in the government gave more than fleeting thought to what the actual intent of the Shitara sisters might have been. In order to prove the sisters guilty of treason, the government would have to prove beyond a reasonable doubt that in helping Haider and Loescher escape from Camp Trinidad, they intended to give aid and comfort to an enemy of the United States. In late 1943 and early 1944, the law was clear that a person who helps an enemy of the United States must intend more than to help an individual; she must intend for her help to injure the United States or assist the enemy's cause. That is, she must not merely "play the part of a traitor"; she must also be a "traitor at heart."

Six months would pass between the day when Haider and Loescher implicated Toots, Flo, and Billie in their escape and the day when a federal grand jury returned an indictment charging them with treason. Those six months were filled with bitter intra-governmental squabbling over the case—between the Justice Department's Criminal Division and the FBI, between the Justice Department and the State Department, between the Justice Department and the FBI, and between the Justice Department

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123. See United States v. Stephan, 133 F.2d 87, 92 (6th Cir. 1943) ("Although not explicitly set forth in either the constitutional or statutory provisions, an intent to give aid and comfort to the enemy is an essential element of the crime of treason.").
124. See Haupt v. United States, 330 U.S. 631, 641-42 (1947) (recognizing a distinction between acts intended to assist a person and acts intended to advance an enemy's cause); United States v. Fricke, 259 F. 673, 676 (S.D.N.Y. 1919). The Fricke court stated:
   If not satisfied beyond a reasonable doubt that the defendant's intention and purpose in acting as he did was evil—that is, if not satisfied beyond a reasonable doubt that he intended to aid and comfort the enemies of the United States—and if not satisfied that that was his object, the defendant must be found not guilty.
Fricke, 259 F. at 676.
126. This was a battle primarily over who would receive public credit for handling the case. The Criminal Division, for its part, wanted control over the case, insisting that it was "one of the best publicity cases [the] division ha[d] ever had." See Memorandum from J.K. Mumford, to D.M. Ladd, Assistant Director, FBI (Dec. 8, 1943) (on file with the North Carolina Law Review). The FBI, on the other hand, very much wanted the public to see the FBI's involvement in the case at every step—especially the most visible step, the sisters' arrest. See Memorandum from L.B. Nichols, Assistant Director, FBI to C. Tolson, Associate Director, FBI (May 10, 1944) (on file with the North Carolina Law Review).
127. This resulted from a request by the State Department to postpone the trial...
and the War Relocation Authority. But in the midst of it all, as prosecutors and the FBI prepared the case for trial, the issue of the Shitara sisters’ intent simply vanished.

On December 4, 1943, Tom Clark wrote to J. Edgar Hoover that the Justice Department's Criminal Division needed additional information before making a final decision about a treason prosecution. He listed fourteen inquiries, both general and specific, that he wanted the FBI to undertake. Only one specific inquiry had anything to do with intent: Clark wanted to know whether Haider had told the women “that he wanted to get back to Germany to fight again.”

Hoover responded on January 6, 1944. Upon further questioning, Haider had made clear that he never told Toots, Flo, and Billie that he wanted to go back to Germany to fight. Instead, he told them that he “planned to go to Mexico, from there to South America[]], and probably to Chile,” where he hoped he might meet indefinitely so as not to complicate its efforts at trading Japanese nationals in the United States for American nationals in Japan. See Letter from T.C. Clark, Assistant Attorney General, to Cordell Hull, Secretary of State (Mar. 9, 1944) (on file with the North Carolina Law Review).

Struggles between the Justice Department and the War Relocation Authority first arose when suspicion fell on the Shitara sisters. The Justice Department wanted the sisters returned to the security of the Amache Relocation Center, but the War Relocation Authority did not want them in camp, mixing with the other internees. See Memorandum from D.M. Ladd, Assistant Director, FBI, to E.A. Tamm, Assistant Director, FBI (Nov. 9, 1943) (on file with the North Carolina Law Review); Memorandum from J.K. Mumford to D.M. Ladd, Assistant Director, FBI (Nov. 8 1943) (on file with the North Carolina Law Review). The second conflict came in May of 1944, when the Justice Department announced the indictment of the Shitara sisters. The War Relocation Authority was, at that time, trying to persuade the military to reopen the West Coast states to Japanese Americans, and its leaders feared that a treason indictment against Japanese Americans would upset that effort. See Memorandum from E.J. Ennis, Head of the Alien Enemy Control Unit, to Francis Biddle, Attorney General (May 11, 1944) (on file with the North Carolina Law Review). Ennis stated:

Both Abe Fortas and Dillon Myer called me yesterday about the possibilities of adjourning the breaking of this case in view of the current important administrative plans for Japanese-Americans in the West... I recommend that in the interest of the whole program the trial be adjourned and the risk of sensational press treatment be avoided so far as possible at this crucial point in the Japanese relocation program.

See id.

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See id.
some of Julio Hofmann’s relatives.\textsuperscript{133} Haider also said he had mentioned the possibility of going to California.\textsuperscript{134} Loescher, for his part, said that he had told the women that he “hoped to obtain work,” but had never told them that he “hoped to return to Germany and again enter the fight.”\textsuperscript{135}

At about the same time, obviously in anticipation of a trial in the case, the FBI case agent filed a Summary Report in which he listed the likely government witnesses, summarized their likely testimony, and listed the trial subpoenas that should issue.\textsuperscript{136} The agent’s review of Haider’s expected testimony did not include a single word about the women’s intent.\textsuperscript{137} And Loescher, the agent wrote, would testify only “that he is convinced the girls assisted in the escape not entirely from a romantic motive but actually believing they were helping Germany against this country.”\textsuperscript{138} This was a far cry from Loescher’s original statement in early November that he was “convinced they did it to help Germany” and knew their allegiance was to Japan.\textsuperscript{139}

In mid-February of 1944, Assistant Attorney General Tom Clark was finally ready to ask the Attorney General for permission to file treason charges against the Shitara sisters.\textsuperscript{140} He gave Biddle a two-page synopsis of the evidence.\textsuperscript{141} It detailed the chronology of the events, specified the overt acts that the government thought it could prove, and briefly summarized which witnesses could testify to which acts.\textsuperscript{142} Clark included not a whit of evidence of the sisters’ criminal intent, though he speculated that “[i]t would have been possible for the escaping prisoners to have committed acts of sabotage such as train wrecking or destroying a bridge or other strategic locations after the escape had been made.”\textsuperscript{143} “I do not believe,” he told the Attorney General, “that we can assume that these women did not contemplate such actions by the prisoners when they assisted them in

\begin{itemize}
  \item \textsuperscript{133} See id.
  \item \textsuperscript{134} See id. at 3.
  \item \textsuperscript{135} Id.
  \item \textsuperscript{136} See \textit{Federal Bureau of Investigation, FBI Report (Jan. 1, 1944)} [hereinafter FBI Report (Jan. 1, 1944)] (on file with the North Carolina Law Review).
  \item \textsuperscript{137} Id. at 3.
  \item \textsuperscript{138} See id.
  \item \textsuperscript{139} See supra text accompanying notes 116–17.
  \item \textsuperscript{140} See Memorandum from T.C. Clark, Assistant Attorney General, to Francis Biddle, Attorney General (Feb. 17, 1944) [hereinafter Memorandum from Clark (Feb. 17, 1944)] (on file with the North Carolina Law Review).
  \item \textsuperscript{141} See id.
  \item \textsuperscript{142} See id.
  \item \textsuperscript{143} FBI Report (Dec. 28, 1943), supra note 132, at 2.
\end{itemize}
making their escape." And then Clark volunteered the larger agenda that was driving the prosecution: "I believe that prosecution in this case will serve to discourage other persons from rendering assistance to prisoners of war." "This factor is extremely important in view of. . . the fact that a number of the[m] have escaped from custody within the past few months." Clark could not have summarized the case more accurately. Apart from the unadorned fact that the woman offered help to prisoners who were German, the government had no proof of treasonous intent. Indeed, its proof tended to show innocence. Yet, the government was going to ask a jury to find intent beyond a reasonable doubt on the basis of an assumption. Furthermore, the government was planning to charge the three women with the capital offense of treason in order deflect attention from the military's share of the blame for the escapes of prisoners it was supposed to be guarding.

The Attorney General authorized prosecution of Toots, Flo, and Billie on March 2, 1944. A federal grand jury sitting in Denver indicted them on May 9, 1944, for treason and conspiracy to commit treason. The indictment specified four overt treasonous acts: two acts of providing road maps to the prisoners, one act of notifying the Germans that the civilian clothing was waiting for them in the onion field, and one act of driving the Germans south into New Mexico. On the day the indictment was returned, an agent from the United States Marshals Service went to their barracks at the Amache Relocation Center and placed them under arrest. He drove them to Denver and deposited them in a county jail to await trial.

144. Id.
145. Id. at 3.
146. Id. at 3.
147. See infra note 176 and accompanying text.
148. See Memorandum from Clark (Feb. 17, 1944), supra note 140, at 1 (handwritten note on cover page).
150. See id.
151. The FBI argued for the right to make the arrest, but when the Justice Department would not agree to displacing the Marshals Service, the FBI relented. "[I]t would look ridiculous for our office and the Marshals Office to apprehend three girls," said a top FBI official. Memorandum from R.H. Cunningham, to D.M. Ladd, Assistant Director, FBI (May 5, 1944) (on file with the North Carolina Law Review).
152. See Teletype, FBI Denver, to J. Edgar Hoover, Director, FBI (May 10, 1944) (on file with the North Carolina Law Review).
F. "Benedict Arnolds in Skirts"

Trial began on Monday, August 7, 1944, in the courtroom of Federal District Judge J. Foster Symes, the only United States District Judge for the District of Colorado. Symes was a veteran of World War I and a twenty-two year veteran of the federal bench, with a reputation of being stern but fair. The defense attorney, appointed by Judge Symes and serving without compensation, was Kenneth Robinson, universally respected at the Denver bar as one of the best trial lawyers in the city. The prosecutor was Colorado’s United States Attorney, Thomas Morrissey, aided by an Assistant U.S. Attorney named Ivor Wingren, who had been Judge Symes’s law partner in the early 1920s before Symes became a judge.

Judge Symes quickly seated a jury of twelve men and an alternate, excusing for cause only one potential juror who announced on voir dire that he “didn’t like Japanese,” as well as a handful of others who had relatives in the service in the Pacific Theater. Because the sisters never filed an appeal, there is no surviving transcript of trial testimony. But the trial was one of the most dramatic of World War II, and lengthy newspaper accounts make it fairly easy to reconstruct the proceedings. To the eyes of the reporters who covered it, the trial was scrupulously fair—“a remarkable demonstration of American justice,” in the words of the Denver Post. In hindsight, this is not so clear. The prosecutors decided to honor the German soldiers’ request not to reveal their sexual intimacies with the sisters, which meant that the prosecutors suppressed the most powerful evidence of the sisters’ innocent intent. Also suppressed—not just by the prosecutor, but by Judge Symes himself—was Loescher’s letter to the judge explaining how hard it had been to persuade “the seduced women” to help him and Haider.

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155. See Swanson Interview, supra note 154, at 2–3.
156. See J. Foster Symes Retires as Federal Judge, ROCKY MTN. NEWS (Denver, CO), Sept. 21, 1949.
157. See German’s Testimony Stuns Treason Trial Court, supra note 43.
158. Sketchy notes in the judge's handwriting can be found in the case file in the National Archives. See United States v. Wallace (D.Colo. May 9, 1944) (No. 10387) (on file with the North Carolina Law Review).
160. See Jack Foster, 2d Nazi Describes Aid by U.S.-Jap Girls, ROCKY MTN. NEWS, (Denver, CO), Aug. 9, 1944, at 5.
escape.\footnote{161} In these ways, the case that ultimately went to the jury was racked with reversible error.\footnote{162}

The government’s case took just two days to present, and consisted primarily of the constitutionally required two eyewitnesses to the overt acts of treason charged in the indictment. Those eyewitness—the eyewitnesses on whose word Toots, Flo, and Billie stood to be convicted—were the two German soldiers they had aided, Heinrich Haider and Hermann Loescher. But just as their stories had changed repeatedly between their arrests and their various pre-trial interrogations, their stories changed again at trial. And they changed dramatically.

Haider was the first of the two to testify.\footnote{163} The prosecutor asserted in his opening statement that Haider and Loescher would testify that they had told the sisters that they wanted to escape in order to return to Germany and rejoin the fight against the Allies.\footnote{164} It is not clear why the prosecutor ventured that prediction; the investigative files reveal that neither of the soldiers had ever actually said that to an investigator in the case. But to the astonishment of everyone in the courtroom, Heinrich Haider vividly disputed the prosecutor’s prediction.\footnote{165} “I object to the [prosecutor’s] statement that I escaped from the Trinidad prison camp so that I might go back and fight for Germany,”\footnote{166} Haider volunteered on direct examination. “I escaped so that I might join the Austrian or Czechoslovakian Legion and fight against the Hitler gang.”\footnote{167} Haider, an Austrian, explained that he had publicly opposed Hitler’s annexation of his country in 1938, and, for his outspokenness, he had been sent to a concentration camp in Bavaria for two years and then impressed into military service.\footnote{168} As an anti-Nazi at Camp Trinidad, he explained, he was victimized by pro-Nazi prisoners; thus, he said, he “told Toots

\footnote{161}{See supra text accompanying notes 120–21.}
\footnote{162}{This is unquestionably so under today’s law, which condemns the suppression of material exculpatory and impeachment evidence as a violation of the defendant’s due process rights. See generally Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963). It was also most likely true even under the law in 1944. See Pyle v. Kansas, 317 U.S. 213, 215–16 (1942) (condemning the knowing suppression of “favorable evidence” by the prosecution).}
\footnote{163}{Foster, supra note 160.}
\footnote{164}{See German Says Japs Aided His Escape as Anti-Nazi, DENVER POST, Aug. 8, 1944, at 3. [hereinafter German Says Japs Aided His Escape].}
\footnote{165}{German’s Testimony Stuns Treason Trial Court, supra note 43.}
\footnote{166}{Id.}
\footnote{167}{Id.}
\footnote{168}{Id.}
I wanted to escape because life there in the camp was unbearable.\textsuperscript{169} Not a single word that Haider spoke from the witness stand even hinted that the sisters intended to help the enemy.

Hermann Loescher followed Haider to the witness stand.\textsuperscript{171} His testimony was a bit less stunning, but equally unhelpful to the government's theory of treasonous intent. Loescher did not depict himself as anti-Nazi, as Haider had done. But he made clear that his days of fighting for Germany were behind him. He had been severely wounded in battle in North Africa; \textquoteleft\textquoteleft[s]hell splinters pierced [his] lung,\textquoteright\textquoteright and he \textquoteleft\textquoteleft was buried under a bombshell for four hours, and this affected the joints of [his] hips and shoulders.\textsuperscript{172} \textquoteleft\textquoteleftI was wounded,\textquoteright\textquoteright Loescher explained, \textquoteleft\textquoteleftand I could not fight again. I ha[d] no interest in renewing the fight again. I just wanted my freedom.\textsuperscript{173} Loescher, who in one of his interrogations had claimed that he was \textquoteleft\textquoteleft convinced that [the sisters] did it to help Germany\textquoteright\textquoteright and that he knew \textquoteleft\textquoteleft the girls [were] definitely Japanese and . . . f[elt] allegiance to Japan and to its ally Germany,\textquoteright\textquoteright mentioned none of this from the witness stand. And even though the prosecutor had the FBI report that contained those earlier assertions, he permitted Loescher to leave the stand without ever calling them to his attention.

The government called other witnesses to the stand in order to establish other elements of the crime of treason;\textsuperscript{175} but, on the element of intent, the testimony of the Germans was the entirety of the government's case. And it amounted to nothing—not a single word that tended to show that Toots, Flo, and Billie intended to injure the United States or to advance the cause of Nazi Germany or Imperial Japan. It is difficult to fathom how a case this thin survived a defense motion for a directed verdict at the close of the government's case,\textsuperscript{176} but Judge Symes did deny the motion without

\begin{itemize}
  \item \textsuperscript{169} See German Says Japs Aided His Escape, supra note 164.
  \item \textsuperscript{170} See German's Testimony Stuns Treason Trial Court, supra note 43.
  \item \textsuperscript{171} Foster, supra note 160.
  \item \textsuperscript{172} Id.
  \item \textsuperscript{173} Id.
  \item \textsuperscript{174} See supra text accompanying notes 116-18.
  \item \textsuperscript{175} See German Says Japs Aided his Escape, supra note 164.
  \item \textsuperscript{176} The only way for the jurors to find an intent to aid the German Reich from the evidence before them was to disregard all of it except for the simple fact that Haider and Loescher were German soldiers. It was, of course, true in 1944 (and it remains so) that criminal intent can be proven entirely through circumstantial evidence. See Estep v. United States, 140 F.2d 40, 45 (10th Cir. 1943). But it was also the case in 1944 that evidence of criminal intent had to be clear, not equivocal. See id. The government's proof had to meet the standard of proof beyond a reasonable doubt. See Minner v. United States, 310 F.2d 548 (2d Cir. 1962). The facts presented by the government in this case did not prove the intent beyond a reasonable doubt.
\end{itemize}
Defense attorney Robinson then put on a case for the sisters that included two character witnesses—white friends of the Shitara family from California—who testified that the sisters were loyal Americans. Toots, Flo, and Billie themselves declined to testify, which meant that the jury never heard any evidence directly from them about their innocent intent. But it also meant that the jury never heard any evidence from them that implied a culpable intent either.

As absent as the issue of intent was from the evidentiary portion of the trial, it was nearly as absent from prosecutor Ivor Wingren's opening summation to the jury. What, after all, could he say? His witnesses had not offered a word of testimony to show that Toots, Flo, and Billie had intended to help the German Reich. Wingren could argue only that it made no difference that Haider had described himself as anti-Nazi and Loescher had said he would never fight again. All that mattered, he said, was that the sisters knew the men they were helping were German soldiers. "They're both citizens of the German Reich," Wingren said, "and true to the German Reich." That, in the government's view, was sufficient to establish a capital crime.

Defense attorney Robinson then responded. He argued powerfully to the jury that the case was about love, not treason. His clients, he said, were fools—fools who allowed their hearts to be swept away by manipulative men. He showed the jury the photographs that had gotten the whole case started, and asked, "How

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177. See Directed Verdict is Denied Jap Girls in Treason Trial, DENVER POST, Aug. 9, 1944, at 1.
178. See Jack Foster, Treason Trial Defense Closes; None of Jap-U.S. Sisters Testifies, ROCKY MTN. NEWS, (Denver, CO), Aug. 10, 1944, at 5.
179. A lawyer who assisted Robinson in the sisters' defense believes that they did not testify because they never came to trust anyone—even their own lawyers—fully. See Swanson interview, supra note 154, at 13-14. One of the sisters, however, remembers that it was the lawyers who decided that they should not testify. See Tanigoshi interview, supra note 44, at 23.
180. See Jap Girls' Fate Put Up to Jury As Treason Arguments End, DENVER POST, Aug. 10, 1944, at 4 [hereinafter Jap Girls' Fate].
181. See Jack Foster, Denver Treason Trial Jury Returns a Sealed Verdict, ROCKY MTN. NEWS (Denver, CO), Aug. 11, 1944, at 5.
182. See id.
183. See Jap Girls' Fate, supra note 180.
far did this go? None has said. But it is indicated it went pretty far." Playing off age-old gender stereotypes, Robinson argued:

But what, gentlemen of the jury, does any woman do who finds herself in this condition? Why, that heart of hers—that heart of woman—that big heart of this woman foolishly responded and unthinkingly she helped take him away. It is, I say, the old, old story of woman. It is the old, old story of what a man can do to a woman who likes him. For as it has been said, there are . . . four . . . things that passeth understanding. They are the way of the bird in the air, the way of the serpent upon the rock, the way of a ship at sea—and the way of a man with a maid.

Robinson concluded in the same vein, conceding the women's adultery but urging the jurors to see that it was not treason:

Oh, I know these women were married. I am not a judge of morals—I have lived too long for that. But you know, gentlemen, the way of a woman. I say to you, gentlemen, "Frailty, thy name is woman." It was frailty that motivated these women in whatever wrong they committed, and I do not say to you they did not commit wrong. But they did not commit treason. They did not act in "adherence to the government of the German Reich."

United States Attorney Thomas Morrissey gave the government's rebuttal summation, and responded to Robinson's intent-based defense. "Love—love!" shouted Morrissey. "Fie on love! I say these women are traitors—traitors! I say fie on love and fie on sympathy." The prosecutor then made explicit what until then had only been implicit: "These were married women. If this be American love, God help us—God help our democracy." Morrissey put a finer point on the argument moments later: "These

184. See id.
185. Kathleen Kennedy has shown how the government's framing of various sedition charges during World War I derived from stereotyped understandings of femininity. See KATHLEEN KENNEDY, DISLOYAL MOTHERS AND SCURRILOUS CITIZENS: WOMEN AND SUBVERSION DURING WORLD WAR I passim (1999); Kathleen Kennedy, Manhood and Subversion During World War I: The Cases of Eugene V. Debs and Alexander Berkman, 82 N.C. L. REV. 1653 passim (2004). At the trial of the Shitara sisters, the government and the defense both deployed gender stereotypes, the defense to depict the women so swept away by love as to be incapable of controlling their behavior or forming criminal intent, and the government to depict the women as disabled by passion from forming loyalty of any sort.
186. Jap Girls' Fate, supra note 180.
187. Id.
188. Id.
189. Id.
are traitors—little Benedict Arnolds in skirts. They were not true to their husbands,” Morrissey thundered, “nor, gentlemen of the jury, were they true to the United States of America.” The form of legal argument here was familiar—the greater entails the lesser. But the content of the argument was truly stunning: a wife who will betray her husband is a woman who will betray her country.

And with that, the case went to the jury. The twelve men deliberated on the sisters’ fate for five and a half hours and then sent out a question to Judge Symes: Did the charge of conspiracy to commit treason require proof of the same intent as the charge of treason itself? Judge Symes answered the question—correctly—in the affirmative. The jurors resumed deliberations for another two and a half hours, and reached their verdict late that night. The next morning, with Toots, Flo, Billie, and a courtroom full of spectators and reporters on the edges of their chairs, the jury foreman read the verdicts: not guilty of treason, but guilty of conspiracy to commit treason.

Judge Symes told the jurors he was satisfied with their verdict. But his words revealed the gaping hole at center of the case, and, indeed, at the center even of the conspiracy conviction that the jury had returned. “Personally, I think the verdict is a very fair one and a proper one in this case,” the judge told the jurors in open court. “After listening to all the evidence, I did not believe the defendants had any intent to harm the United States or help the German government.” “For that reason,” Symes concluded, “I had made up my mind the defendants were not guilty of treason on the first count.” The judge’s reasoning, however, did not make much sense to the defendants. “How come they can find us guilty of conspiracy?” asked Billie under her breath. “We didn’t do that because we didn’t do treason.”

Billie certainly had a point. If not flatly inconsistent, the jury’s verdicts were certainly in deep tension with each other. Some
speculated that the verdict was a compromise, and that may be true. But given that both counts of the indictment—treason and conspiracy—required proof of intent to betray the United States, and given that there was no such evidence before the jury, it was a compromise at the Shitara sisters’ expense.

In light of Judge Symes’s frank statement that he saw no evidence of intent to betray the United States, he might have been expected to grant defense counsel Robinson’s motion for a new trial. The absence of evidence of intent was the centerpiece of the motion. But Symes denied it without comment. And on the same day, he sentenced Toots Wallace to a two-year sentence and a $1,000 fine, and Flo and Billie to twenty-month sentences and $1,000 fines. They served their time uneventfully, if sadly, at the federal prison for women at Alderson, West Virginia, and returned to their husbands and children on the West Coast in 1946.

199. See Jack Foster, Three Jap-U.S. Sisters Convicted of Plotting Treason to Ask Retrial, ROCKY MTN. NEWS (Denver, CO), Aug. 12, 1944, at 5.

200. Similarly, one might say that the acquittal on the substantive treason count was an instance of jury leniency. That is, after all, one of the most common explanations for inconsistent jury verdicts. See United States v. Powell, 469 U.S. 57, 65 (1984) (noting that inconsistent verdicts “often are a product of jury leniency”); Eric L. Muller, The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts, 111 HARV. L. REV. 771, 783–86 (1998). But the verdicts in the treason trial of the Shitara sisters are actually a perfect illustration that what appears to be jury leniency might actually be something considerably darker. In the Hobgoblin article, I argued that an inconsistent verdict is not, as the courts assume, necessarily an instance of jury leniency; it is rather an instance of jury discretion, and that discretion can harm the defendant just as easily as it can harm the government. See id. at 803–06. In other words, an inconsistent verdict might consist of a justified conviction and an acquittal against the weight of the evidence, or it might consist of a justified acquittal and a conviction against the weight of the evidence. The verdict in the Shitara case must be an example of the latter: there was no evidence to support a conviction on either count of the indictment, but the jury—undoubtedly wishing to punish the sisters for their foolishness and their adultery—convicted them of conspiracy anyway.


202. See id.


204. See id.

205. The sisters decided against filing an appeal, wishing to get the whole episode behind them. See Tanigoshi Interview, supra note 44, at 26.

II. LAW, LOYALTY, AND THE "PERMANENT SOURCE OF MORAL DANGER"

The treason trial of the Shitara sisters in 1944 is admittedly but one episode in the American legal history of treason.\textsuperscript{207} It is dangerous to reach for broad conclusions about treason law from a sample size of one.\textsuperscript{208} As it happens, however, the leading theoretical work on law and loyalty identifies the precise dangers of error and oppression that plagued the prosecution of the Shitara sisters. This theoretical work has largely been done by two philosophers—Alisdair MacIntyre and George P. Fletcher.

A. Alisdair MacIntyre: Loyalty as a Dangerous Moral Virtue

Alisdair MacIntyre provided a compelling account of loyalty in his 1984 lecture \textit{Is Patriotism a Virtue}?\textsuperscript{209} MacIntyre's specific concern was the question of whether patriotism, not loyalty, is a moral virtue, but MacIntyre located patriotism in "a class of loyalty-exhibiting virtues . . . other members of which are marital fidelity, the love of one's own family and kin, friendship, and loyalty to such institutions[] as schools and cricket or baseball clubs."\textsuperscript{210} Admittedly, patriotism and national loyalty are not the same thing: patriotism implies a degree of celebratory devotion that national loyalty does not require.\textsuperscript{211} Still, MacIntyre's basic observations about the moral status of patriotism are sufficiently general that they also apply to national loyalty.

MacIntyre's most powerful insight is that loyalty can be a virtue only in a moral framework that stands apart from the ordinary framework of liberalism in which most Western moral theory resides. The hallmarks of liberal moral theory, MacIntyre explains, are impersonality, neutrality, and even-handedness.\textsuperscript{212} This is so regardless of whether the liberal theory is utilitarian or Kantian. A utilitarian says that the moral actor should treat another in the way

\begin{itemize}
  \item \textsuperscript{207} The leading legal history of treason in the United States is J. WILLARD HURST, \textit{THE LAW OF TREASON IN THE UNITED STATES} (1971).
  \item \textsuperscript{208} A fuller canvassing of the historiography of treason law might suggest additional confirming examples. The most prominent would be the treason trial and conviction of Iva Toguri d'Aquino, popularly known generally as "Tokyo Rose." \textit{See infra} notes 266–71 and accompanying text.
  \item \textsuperscript{209} Alasdair MacIntyre, \textit{Is Patriotism a Virtue?}, in \textit{PATRIOTISM} 43–58 (Igor Primoratz ed., 2002).
  \item \textsuperscript{210} \textit{Id.} at 44.
  \item \textsuperscript{211} \textit{See GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS} 62–63 (1993).
  \item \textsuperscript{212} MacIntyre, \textit{supra} note 209, at 45–47.
\end{itemize}
that produces the greatest good for the greatest number.\textsuperscript{213} A Kantian says that the moral actor must treat a person consistently with his uniquely human capacity for reason.\textsuperscript{214} Both, however, insist that the person making a moral judgment must do so dispassionately and even-handedly. In neither moral framework does it matter whether the actor’s conduct affects his own child or a complete stranger.

In the moral framework of loyalty, whether someone else is my child or a stranger is decidedly relevant. Patriotism, MacIntyre explains, “requires me to exhibit peculiar devotion to my nation and you to yours.”\textsuperscript{215} Virtuous action in a framework of loyalty “requires me to regard such contingent social facts as where I was born and what government ruled over that place at that time, who my parents were, who my great-great-grandparents were, and so on, as deciding for me the question of what virtuous action is.”\textsuperscript{216} From this fact, MacIntyre concludes—quite reasonably—that liberal and loyalty-based moralities are “systematically incompatible.”\textsuperscript{217}

Does this conflict between loyalty and liberal morality mean that loyalty is a moral vice? Not at all, says MacIntyre. Morality is neither a hard-wired feature of human neurology nor a free-floating agent that we inhale at birth. It is, instead, something that we learn from specific people and practice in a specific community.\textsuperscript{218} The definition of the good life will therefore always have a local, particularized inflection, as will the rules of how to behave in order to attain it. More importantly, because it is hard for people to live morally, they

\begin{thebibliography}{99}
\bibitem{215} MacIntyre, supra note 209, at 45.
\bibitem{216} Id.
\bibitem{217} Id. Two cases substantiate this claim: cases of conflict between societies over scarce resources needed by both (such as water needed by two desert nations), and cases of conflict between societies over the right way to live (such as a clash over control of a border region contested by both a conquering power and an indigenous people). In both of these hard cases, MacIntyre contends, the liberal is obliged to be neutral and the patriot to be partisan. See id. at 46–47. This is, however, a claim that others powerfully contest. See Marcia Baron, \textit{Patriotism and “Liberal” Morality}, in PATRIOTISM, supra note 209, at 59, 65–69 (arguing for an intermediate position that would allow the patriot to compare his own society’s needs with those of the other); Stephen Nathanson, \textit{In Defense of “Moderate Patriotism,”} in PATRIOTISM, supra note 209, at 87, 92–95 (arguing for a form of “moderate patriotism” in which those in one society take into account the humanity and well-being of another).
\bibitem{218} See MacIntyre, supra note 209, at 48–49.
\end{thebibliography}
need the support of others to keep them on the path, and that crucial support will also be locally inflected.\textsuperscript{219} Thus, MacIntyre concludes, “\textit{[i]t is in general only within a community that individuals become capable of morality.}”\textsuperscript{220} Deprived of a community, people are “unlikely to flourish as ... moral agent[s].”\textsuperscript{221} From this, MacIntyre concludes that “allegiance to the community and what it requires of me ... c[an] not meaningfully be contrasted with or counterposed to what morality require[s] of me.”\textsuperscript{222} Loyalty is therefore not a vice, but a “prerequisite for morality”—“not just [a] virtue[] but [a] central virtue[].”\textsuperscript{223}

That loyalty is a virtue does not mean it carries no risks. MacIntyre concedes an important one—the risk of a certain kind of blindness. He notes that loyalty to nation will sometimes require a person to exempt it or one of its actions from criticism.\textsuperscript{224} Plainly history has shown us many patriots who have opposed—even violently—some set of their governments’ policies. Loyalty thus leaves space for robust criticism.\textsuperscript{225} But what is exempt from criticism, MacIntyre argues, is “the nation conceived as a project.”\textsuperscript{226} By this he means “a particular way of linking a past which has conferred a distinctive moral and political identity upon him or her with a future ... which it is his or her responsibility to bring into being.”\textsuperscript{227} Only to the extent that a particular government or form of government advances this national project is allegiance a virtue.

This means that there is a line that loyalty will not allow a person to cross on behalf of his nation—a point where the particular agencies of government have so defected from the nation’s project that the true moral traditions of the community will lead a citizen to abandon allegiance to those agencies. But here is the rub: the very fact that those agencies of government have emerged from the community that transmits and shapes its citizens’ loyalty will put those citizens in a bad position to spot the defection.\textsuperscript{228} Loyalty will blind them to the

\textsuperscript{219} See id. at 49.
\textsuperscript{220} Id.
\textsuperscript{221} Id. at 50.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} See id. at 51–52.
\textsuperscript{225} This is the central point that is lost on pundit Ann Coulter, whose tragically bestselling book \textit{TREASON} equates membership in the Democratic Party with betrayal of the United States. \textit{See ANNA COULTER, TREASON passim} (2003).
\textsuperscript{226} MacIntyre, \textit{supra} note 209, at 52.
\textsuperscript{227} Id. at 53.
\textsuperscript{228} See id. at 54.
government's violation of the national project. More often than not, they will just miss it. And so, concludes MacIntyre, national loyalty turns out to be not just a virtue, but also "a permanent source of moral danger."

B. George P. Fletcher: Loyalty as Actualizing the "Historical Self"

MacIntyre's qualified praise of what might be termed nationalism has been countered with a powerful internationalist critique. Martha Nussbaum's essay *Patriotism and Cosmopolitanism* typifies the response. For Nussbaum, nationality and ethnicity are mere accidents of birth, and therefore can have no significance in a moral theory. She argues that we should see ourselves not as citizens of any particular nation, but as citizens of the world connected with one another by universal values that transcend national borders.

It was to this sort of position that George P. Fletcher responded to in his 1993 book, *Loyalty.* At the level of moral theory, Fletcher's book owes a great debt to MacIntyre; Fletcher has little patience for the claim that community bonds should not figure in a theory of morality. "There is no easy response," he argues, "to the idealist who insists that all five billion people constitute one community, with one cause." Rather, Fletcher contends, a theory of morality "must begin with an understanding of how we as human beings are constituted and what our natural limits of sympathy may be."

Those "natural limits of sympathy," for Fletcher, are found at the boundaries of certain of our basic relationships with others. These relationships are "collectives" such as "families, tribes, and nations" that are in some sense larger than the individual participants themselves. Precisely because these collectives precede the arrival

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229. Id.
231. See id. at 7.
232. See id. at 8–17.
233. See FLETCHER, supra note 211, at 25. The book is the only major consideration in the literature of the relationship between law and loyalty.
234. Id. at 21.
235. Id.
236. See id. at 15. Marriage, as Fletcher notes, does not seem to fit this model. See id. This is a significant problem for Fletcher's theory, since marriage is where most people commonly experience loyalty—a loyalty that is sometimes tested. It is also a practical problem for his book, which, on the foundation of his definition of loyalty, makes a strong case for the spousal evidentiary privilege. See id. at 79–82.
of each new member and survive his demise, Fletcher argues, they help form each member’s identity. They “enter[] into our sense of who we are.” In their particular national, cultural, linguistic, political, and religious commitments, they form what Fletcher calls a person’s “historical self.”

For Fletcher, this aspect of our humanity—the fact that our history helps form our identity—entails moral obligations. Just as for a utilitarian the central human capacity for pleasure and pain gives rise to the duty to maximize the former and minimize the latter, and just as for a Kantian the central human capacity for reason gives rise to a duty to treat others with the respect and dignity that their autonomy demands, so does the central fact that we are formed by historically grounded relationships entail obligations. Those obligations are “duties of loyalty toward the families, groups, and nations that enter into our self-definition.”

Although the loyalty duties of the historical self run to other people and to collectives of people, it is the historical self who reaps the moral benefit of performing them. On Fletcher’s view, obligations of loyalty to others do not really serve others; because they derive from the role of others on each person’s sense of self, performing these duties is “an expression of self-esteem and self-acceptance.” If a person is to love himself, he “must respect and cherish those aspects of [him]self that are bound up with others.” The path to self-actualization is, for Fletcher, the path of loyalty to the historical self.

Fletcher faults moral theory for not taking sufficient account of the importance of the historical self and its obligations of loyalty. He does not dispute that the various prevailing liberal theories of morality—those of Bentham, Kant, and Rawls—accurately describe genuine moral imperatives of fair and equal treatment. But he maintains that those liberal theories are only intelligible within the

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237. Id. at 16. Fletcher here aligns himself with Carol Gilligan in her famous assertion that the emphasis on individuation in the study of children’s moral development slights a different, and more typically female, path of moral development that depends on the child’s place in, and care for, her human relationships. See id. at 15 (citing CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982)).
238. Id. at 17.
239. Id. at 16.
240. Id.
241. Id.
242. Id.
243. Id. at 18.
244. Id. at 18–19.
constraints of a relationship-based theory of moral obligation.\textsuperscript{245} It is here that Fletcher extends MacIntyre's work most helpfully. Loyalties "circumscribe communitarian circles" within which the liberal norms of impartiality and equality govern.\textsuperscript{246} Loyalty "to the group and its purposes provides the basis ... for counting some people in and others out, for believing that insiders count for more and outsiders less."\textsuperscript{247} This "insider/outsider" image might seem uncomfortable, but it describes something quite real: Which parent believes that because she gives an allowance equally to her own two children, she must give that same amount (or, for that matter, \textit{any} amount) to the neighbor's kids? Which adult believes that if she chooses to care for her parents at home in their old age, she must support \textit{everyone}'s parents?

Again, it bears emphasis that Fletcher describes a moral system that is based in the "natural limits" of human sympathy.\textsuperscript{248} Those natural limits correspond to the concentric boundaries of our historical selves. It is within those boundaries that we are able to "grasp the humanity of [our] fellow citizens and ... treat them as bearers of equal rights."\textsuperscript{249} Thus loyalty is for Fletcher, as it is for MacIntyre, "a critical element in a theory of justice," because it provides us with our basis for "group cohesion, for caring about others, for seeing them not as strangers who threaten our security but as partners in a common venture."\textsuperscript{250}

Of course, therein also lies the danger. Because a shared history sets the boundary between partners in the national enterprise and strangers to it, loyalty would seem to carry with it a risk that we will sometimes misperceive that boundary. This was an aspect of what MacIntyre meant when he tempered his defense of patriotism with the admission that it is a "permanent source of moral danger." For MacIntyre, this danger was central and inevitable: so confident was he of his claim about the ever present moral danger of loyalty that he asserted that the claim "could not in fact be successfully rebutted."\textsuperscript{251} To the extent that MacIntyre found the danger tolerable, it was only because he was confident that a regime of liberal (as contrasted to loyalty-based) morality carries a corresponding permanent danger to

\textsuperscript{245} Id. at 20.
\textsuperscript{246} See id. at 20.
\textsuperscript{247} Id.
\textsuperscript{248} Id. at 21.
\textsuperscript{249} Id.
\textsuperscript{250} Id.
\textsuperscript{251} MacIntyre, \textit{supra} note 209, at 54.
social cohesion. This is where Fletcher and MacIntyre appear to part company. Fletcher concedes the danger. He notes that one recurring meaning of loyalty has been a demand for what he calls “political reliability.” He observes that “[i]n questions of loyalty and fidelity to the national cause, questions are often raised about people who stand slightly outside the mainstream, those to whom the insiders can attribute dual loyalties.” He lists Jews, Catholics, gays and lesbians, and Communists as examples. But Fletcher treats this facet of loyalty as something apart from loyalty itself: it is a “tangent[] off [the] core meaning of loyalty,” a “deviation from the central ethic of loyalty.” And thus defined away, the troublesome tendency of loyalty to heap suspicion on outsiders largely disappears from Fletcher’s work.

C. Loyalty and the Shitara Sisters

These two leading theorists of loyalty, MacIntyre and Fletcher, both acknowledge the dangers of a moral theory grounded in the affinities of insiders and their natural limits. MacIntyre embraces those dangers, recognizing that they are inevitable. His endorsement of loyalty is therefore rather muted and conflicted; he recognizes that patriotism is both essential to the national project and in constant danger of excess. Fletcher, on the other hand, sees the dangerous facets of loyalty as tangents—deviant phenomena that do not infect loyalty at its core. As a result, Fletcher is able to endorse loyalty more unambiguously as a virtue.

252. See id. at 56.
253. FLETCHER, supra note 211, at 22.
254. Id.
255. See id. at 21–22. Racial and ethnic groups are a curious omission from Fletcher’s list.
256. Id.
257. A version of this more dangerous meaning reappears briefly in Fletcher’s book when he expresses his unwillingness to sign a loyalty oath that his employer requires. See id. at 65–68. It also makes a brief appearance in the book’s final pages, when Fletcher concedes the risk that loyalty will devolve into Balkanization in our current multicultural society. See id. at 172–75. But nowhere in the book does Fletcher return in a sustained way to the problematic “tangential” version of loyalty that he notes but sets aside at the book’s beginning. In Fletcher’s interesting diagnosis of the disappearance of the crime of treason from the legal landscape that is published in this volume, the dangerous “political” meaning of loyalty also plays no role. See George P. Fletcher, Ambivalence About Treason, 82 N.C. L. REV. 1605, 1606–07 (2004).
258. Fletcher does not, of course, suggest that the communitarian virtue of loyalty can or should entirely supplant norms of impersonal, liberal morality. He suggests that the two moral systems—the morality of loyalty and liberal morality—are ultimately irreconcilable with one another, and that our task is to live our lives in a way that meets
The treason trial of the Shitara sisters tends to confirm MacIntyre's relative ambivalence toward national loyalty more than Fletcher’s relative enthusiasm for it. Fletcher is, of course, absolutely correct when he explains that a universalist theory of morality, which insists on like treatment of all six-billion-plus humans on the planet, ignores how “we as human beings are constituted” and exceeds our “natural limits of sympathy.” But the Shitara sisters’ experience reminds us that our “natural limits of sympathy” tend to contract in times of pressure and crisis, and that at those times “we as human beings are constituted” to misperceive threats and alliances.

Looking back at the trial from our vantage point sixty years later, where is the proof that Toots Wallace, Flo Otani, and Billie Tanigoshi intended to betray the United States and to support the Axis Powers when they drove Heinrich Haider and Hermann Loescher to New Mexico? We find it in a few simple facts: they looked Japanese, they were of Japanese ancestry, and they were unfaithful to their husbands. That is all there was. The government’s proof was not that they actually intended treason. It was that, given their ethnicity and gender, they must have intended treason—they could not have intended anything but betrayal. As Japanese people (even though American citizens), their sympathies must have run to Japan and its ally, Germany. As women adulterers, they must have been incapable of national loyalty. The prosecutor could not have made it any clearer in his rebuttal summation: a woman who would betray her husband would not think twice about betraying her country.

The value of loyalty, George Fletcher argued, is that it is the practice by which we develop and actualize our “historical selves,” those parts of our own identities that we share with others in our family, community, religious, cultural, and national groups. But whose “historical self” did this deployment of the law of treason bolster? Which shared or communal components of American identity did the Shitara treason case confirm and reenforce?

There were two such components: whiteness and maleness. It is not a distortion of the historical record to say that the conviction of the Shitara sisters was the product of an alliance of white men. I refer here not just to the white men in law enforcement—the FBI agents and the lawyers in Washington and in Denver—who crafted the

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259. See id. at 21.
260. See supra note 190 and accompanying text.
261. See supra notes 236–38 and accompanying text.
JAPANESE-AMERICAN "TREASON" charges. I refer not just to the judge, or to the jurors—twelve white men, in keeping with the jury selection practices of the time—who adjudicated the charges. I refer also to the sisters' most immediate victims—their cuckolded husbands, one of whom (Virgil Wallace) was white, and the other of whom, while half-white, drew attention for the daughter he had by his side, a daughter who, in the words of a newspaper reporter, "had the pale eyes and the brownish hair of [her father's] Anglo-Saxon blood." And I refer also, and perhaps most emphatically, to the enemy soldiers, Heinrich Haider and Hermann Loescher, whose cooperation and testimony led to the Shitara sisters' conviction. This trial was quite a spectacle because it presented a constitutional curiosity: Article III requires proof of treason by two witnesses, and here, the two witnesses were enemy soldiers who themselves owed no allegiance to the United States. They were, however, white soldiers. They were Axis soldiers, but for the purposes of calling into question the loyalty of three American women of Japanese ancestry they were safe allies. Only in this cadre of white men could the prosecutor's insinuations about the loyalties of Japanese-American women so powerfully resonate.

In sum, the Shitara treason trial is no ringing endorsement of the use of the crime of treason to actualize the American "historical self." The trial suggests that, at least at a time of conflict and crisis, Americans defined their "historical self" too narrowly, and ascribed mistaken meanings to, and suspect motives for, the actions of those who seemed not to be within the boundaries of that self. This was a lesson that would be repeated six years later, in a case that again grabbed the headlines, when the government brought treason charges against Iva Toguri d'Aquino, or "Tokyo Rose," as she was mistakenly called. D'Aquino was an American citizen of Japanese ancestry who got caught in Japan when the war began and worked for a time

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263. Foster, supra note 199.
265. This odd arrangement also occurred in the treason trial of Max Stephan. See Stephan v. United States, 133 F.2d 87, 95 (6th Cir. 1943) (reasoning that enemy eyewitnesses were eligible to testify in the trial of an American citizen charged with treason).
266. See Stanley I. Kutler, Forging a Legend: The Treason of "Tokyo Rose," 1980 Wis. L. REV. 1341, 1377–82 (1980). The name "Tokyo Rose" was a misnomer because there was no such broadcaster; "Tokyo Rose" was a generic name that American servicemen created to refer to all female broadcasters for Radio Tokyo. See id. at 1343.
as an English-language disc jockey on Radio Tokyo, spinning records on a program broadcast to American troops in the Pacific Theater.267 A rabid press made her out to be a Mata Hari at the heart of Japan's propaganda machine.268 The evidence, however, barely supported even a single treasonous utterance. A jury nonetheless convicted her of treason.269 Throughout her lengthy incarceration, she maintained her innocence and her loyalty to the United States; President Ford pardoned her in 1977.270 The leading chronicler of her trial saw her as a scapegoat, a "symbolic sacrifice" to the ambitions and fears of a handful of bureaucrats and their "stringent, politically expedient meaning of loyalty."271 The d'Aquino case implies that what happened to the Shitara sisters was no freak occurrence, but a reflection of a risk underlying efforts to enforce national loyalty through the crime of treason. Altering slightly the words of Alisdair MacIntyre,272 we might say that the crime of treason poses a permanent (and not merely a tangential)273 risk of moral danger.

CONCLUSION: A JAPANESE-AMERICAN STORY

The trial of the Shitara sisters deserves a prominent place in the literature on law and loyalty, because it shows with rare clarity how the urge to punish for betrayal can stem from unhealthy and mistaken needs to draw false boundaries. For this reason, however, the Shitara treason trial should also safely emerge from the shadows and occupy a prominent place in the literature on the wartime incarceration of Japanese Americans. The prosecution of the Shitara sisters indicates the overpowering force of the xenophobic presumption at the heart of the government's entire wartime program. One of the grievous flaws

267. See id. at 1342–52.
268. See id. at 1356–57.
269. See United States v. d'Aquino, 192 F.2d 338, 347 (9th Cir. 1951).
271. Kutler, supra note 266, at 1382; see also LESLIE BOW, BETRAYAL AND OTHER ACTS OF SUBVERSION: FEMINISM, SEXUAL POLITICS, AND ASIAN AMERICAN WOMEN'S LITERATURE 7 (2001) ("The story of Tokyo Rose speaks to a belief in the power of sexual alliances to disrupt other collective alliances, specifically loyalty to nation and comrades-in-arms.").
272. See MacIntyre, supra note 209, at 43–58.
273. See FLETCHER, supra note 211, at 22. In his contribution to this Symposium, George Fletcher offers an explanation for the disappearance of treason from our legal landscape. See Fletcher, supra note 257, at 1606. Fletcher argues that treason is at its core a crime that depends on a feudal relationship between sovereign and subject that no longer exists. See id. passim. Fletcher's account of the disappearance of treason is entirely plausible. I add here a normative reason why we may be better off without the crime of treason.
of the eviction and incarceration program was, of course, the absence of legal process.\textsuperscript{274} There was no notice, there were no hearings, there was no judge, and there was no appeal. Everyone just had to leave and submit to detention. But it is also important to notice that the program of eviction and incarceration had no legal standard, no defined offense, and no burden of proof. The substantive attribution of disloyalty to Japanese Americans in early 1942 was therefore vague, shadowy, and impossible to quantify.

At the treason trial of the Shitara sisters, by contrast, all the standards were clear and precise. To brand the sisters as traitors and take away their liberty, the prosecutor had to prove that they acted with the specific intent to hinder America's cause and advance that of its enemies.\textsuperscript{275} And he had to prove this not just by a preponderance of the evidence, or by clear and convincing evidence. He had to prove it beyond a reasonable doubt.\textsuperscript{276}

Justice Department lawyers went to the jury on that issue with nothing. They had no testimony, no documentary proof, no admissions, not even a plausible theory. They had only the unadorned facts that Toots, Flo, and Billie were born to Japanese parents and that they were adulterers. On the basis of that evidence, twelve jurors found an intent to betray the United States beyond a reasonable doubt, and a judge upheld their finding. In the eyes of the twelve white men who judged them, it was their female susceptibility to seduction that unmoored them from their loyalty to America. But it was their ethnicity—the "undiluted racial strains" of affinity to Japan, as General DeWitt had called them\textsuperscript{277}—that reattached their displaced loyalty to the cause of the Axis Powers. And it did that beyond a reasonable doubt. This, then, shows in sharp relief the extraordinary probative force of the simple fact of Japanese ancestry during World War II. It equated with the highest quantum of proof known to our legal system.

Seen in this light, the Shitara sisters' treason trial deserves a secure place in the literature on the wartime incarceration of Japanese Americans. To be sure, it is a tale of foolishness and misbehavior. As a purely technical matter, it is the case that the literature says should not exist: a conspiracy to commit treason by


\textsuperscript{275} See United States v. Stephan, 133 F.2d 87, 92 (6th Cir. 1943).


\textsuperscript{277} See DeWitt Memorandum, \textit{supra} note 2.
Japanese Americans on the United States mainland. But in truth it is not a tale of disloyalty to America, the decision of twelve white jurors in 1944 Denver notwithstanding. It is rather a tale of presumed disloyalty. And that presumption touched not just Toots, Flo, and Billie. It touched every American citizen of Japanese ancestry alive in the United States when the bombs fell on the ships at Pearl Harbor.