"Amicus Curiae": The Friend, the Enemy, and the Politics of Love

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LET ME TAKE AS MY POINT OF DEPARTURE A QUESTION OF GENRE, one raised in the realm of jurisprudence by the amicus brief—that is, the brief of the amicus curiae, or friend of the court: one who is not a party to a case but holds a pressing interest in it. I was drawn to the genre, most immediately, by a reading of the amicus briefs filed in the case of *Lakhdar Boumediene et al. v. George W. Bush*, which came before the United States Supreme Court on 5 December 2007 and raised the question of whether the detainees held at Guantánamo Bay, Cuba, possessed the habeas corpus rights guaranteed by the United States Constitution.

My attraction to the genre extends beyond the question of how one who had (or has) some interest in this urgent matter might have been afforded standing to speak before and to the court. (One gains this standing by attesting a willingness to adopt a subject position—"friend"—and a kind of friendship: for the court, for the law the court exists to uphold, or for the law enshrined in the United States Constitution.) More broadly, my reading of these briefs has left me wondering how their generic conventions might animate, or depart from, other extrajuridical modes of expressing an interested relation to this case, the world-historical situation emblematized in it, and an opposition to the logic and discourse of "enmity" on which the conduct of the Bush administration's war on terror so long depended. Even after the transition to a new administration, even after President Obama's promise to close the Guantánamo Bay prison, the question has persisted. Is there a dissenting speaking position, other than that of the friend, for a matter or a case such as this? Is there an alternative to the language of enmity other than the language of friendship?

Let me approach these questions from a different starting point. In *Theory of the Partisan*, Carl Schmitt writes:

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> In discussing the world-political context it was clear that the *interested third party* played an essential function in providing the link for the [political] irregularity of the partisan to a regular [state actor] so that he [the partisan] remains within the realm of the political. The core of the political is not enmity *per se* but the distinction of friend and enemy: it presupposes *both* friend *and* enemy. The powerful third party who is interested in the partisan . . . functions as [a] political friend . . . and [expresses] a kind of political recognition, even if it is not expressed in terms of public and formal recognition as a warring party or a government. (91)

Schmitt's concerns in this text are multiple. Most crucial, however, is his belated determination to account for a figure he had sought (not entirely successfully) to hold extraneous to the theoretical framework of his earlier *Concept of the Political*: a figure repeatedly haunting the long archive of modern international law and appearing in the late sixteenth and seventeenth centuries as the *inimicus*, in the eighteenth century as the unjust enemy, in the twentieth century (Schmitt here indicates) as the partisan, and in the twenty-first century as a figure I understand as the unlawful enemy combatant. The problem this figure occasions for Schmitt's political theology arises, centrally, from his inability to think of it as bearing anything but a criminal character. The *inimicus*, the unjust enemy, the partisan, the unlawful enemy combatant is not (in the terms of *The Concept of the Political*) the "real" enemy, the "public" enemy, the "sovereign" enemy that a properly political entity (a state) is obliged to recognize and hold within the boundaries of the law (28). Lacking sovereign personality, the partisan threatens to undo the carefully balanced system of mutual recognition through which, Schmitt contends, the European state system in the "modern" (post-Westphalian) period of public law had managed to bracket and contain war by decriminalizing the adversary (Nomos 140–92). If the sovereign is the one who is able to decide on the friend-enemy distinction, by Schmitt's reasoning the paradox of the partisan is not simply that this figure lacks reciprocal sovereign standing but that (precisely because a sovereign state cannot formally recognize the partisan as a proper enemy) no properly political decision can be made regarding this figure. In the presence of such an enemy, the sovereign state fails its own normative test of sovereignty, and war, Schmitt argues, thus risks shifting from the political to the criminal domain, from a practice predicated on recognition to one predicated on the "annihilation" of the "worthless" (*Theory* 93).

Or it almost fails. For by Schmitt's terms politics entails a decision not only on enmity but on friendship. And it is here that the interested third party comes to the rescue of his system. For the third, he argues, *can* recognize the partisan, can draw this figure's political "irregularity" within the bounds of the "regular" through an expression of interest: a sovereign act of friendship. That friendship, it is worth noting, is bidirectional—it attaches itself to the partisan on one side and a regular sovereign order on the other; it returns the partisan to the domain of the political not by standing outside the sovereign sphere of politics but by expanding the reach of sovereignty.

That at least is the formula for sovereign friendship, which plays itself out in the amicus briefs I have mentioned. The *Brief of Legal Historians as Amici Curiae in Support of Petitioners*, written in support of the Guantánamo petitioners, for example, rests one of its fundamental arguments on a legal history that, from the seventeenth century onward, "demonstrates the gradual expansion of the territorial ambit of habeas corpus" (Wishnie et al. 8). The brief takes pains to sketch that history because President Bush's solicitor general had argued that Guantánamo Bay falls outside the sovereign territorial domain of the United States and that, therefore, United States constitutional law had no binding application in that territory. By way of counterargument,

the legal historians insisted that sovereignty exceeds territoriality, for two reasons. First, because under "common law habeas attaches to the wrongs of the jailer, not the rights of the petitioner" (5). Where the jailer is, the brief argued, so too is the law. And second, because the law is a law of subjects, not citizens. The brief advances that second argument since, as all the parties to the case seem to have agreed, the application and reach of habeas corpus is (and long has been) governed under United States constitutional law by the meaning of the Great Writ as it existed in 1789. Citing Sir Matthew Hale's *The Prerogatives of the King*, the legal historians' brief noted Hale's insistence that according to this understanding "the goals are all in the king's disposal . . . for the law has originally trusted none with the custody of the bodies of the king's subjects . . . but the king or such to whom he deputed it"; they then proceeded to explain, "The term 'subject' as used by Hale and his contemporaries, arises in a specific historic context and cannot be equated with modern notions of a nation's 'citizens.' . . . Subjecthood was a more fluid and permeable category than present-day American citizenship: mere physical presence within territory under de facto English control could subject a person to the King's authority" (Wishnie et al. 4–5). To the degree that the law attached to the wanderings of the king's jailers and the bodies of the subjects over whom the king possessed de facto sovereign authority, so the writ of habeas corpus applied (then) to the king's subjects and so too do the sovereign authority of the court and the sovereign stipulations of United States constitutional law apply (now) to the detainees in Guantánamo Bay.

What are we to make of the paradoxes of a case in which the Bush administration was strenuously arguing against its own sovereignty and an eminent collection of legal historians, writing, bidirectionally, on behalf of the detainees and as friends of the court, were arguing for the expansion of sovereignty and a return to the notion of the subject (rather than the citizen) as the fundamental object of law? First, that there might be some virtue in discriminating among our conceptions of sovereignty and in not assuming that sovereignty is anywhere and everywhere a bankrupt thing. In the terms I have adapted from Schmitt, the amicus brief represents a generic articulation of a practice of friendship sovereignty, one capable of strategically deploying the notion of sovereignty to *limit* the power of the state. Antonio Gramsci's conception of the war of positions has some relevance here, as does his general understanding that, at each point of its unfolding, hegemonic power contains the grounds and speaks the grammar of its own potential opposition. But second, and conversely, a case such as this indicates that we might also wish to continue to seek a concept of the political that is not predicated on the Schmittean discrimination between friend and enemy. Bearing in mind the late-Renaissance provenance of the partisan and of the unlawful enemy in the figure of the *inimicus*, let me cite a potential alternative code for politics, one that Schmitt's *Concept of the Political* was insistent we not adopt: "The enemy is solely the public enemy. . . . [T]he enemy is *hostis*, not *inimicus* in the broader sense. . . . The often quoted 'Love your enemies' reads 'diligite inimicos vestros' . . . and not *diligite hostes vestros*. No mention is made of the political enemy. . . . [I]n the private sphere only does it make sense to love one's enemy" (28). To which my response is: why? Or, alternatively: if in place of the friendship-enmity distinction we were to take love for the inimical—or, more accurately, for what has been *named* inimical—as a ground of politics, what would that politics look like? Is there a political language and a genre for it?

That question is not my own. It is one that Jacques Derrida, among others, has taken up in the course of a discussion of this very passage in Schmitt:

> When Jesus says "Ye have heard that it hath been said, Thou shalt love thy neighbor, and

> hate thine enemy [but I say to you, love your enemies]," he refers in particular to Leviticus 19: 15–18, at least in the first part of the sentence ("Thou shalt love thy neighbor") if not the second ("hate thine enemy"). Indeed, there it is said, "Thou shalt love thy neighbor as thyself." But in the first place, vengeance is already condemned in Leviticus and the text doesn't say "thou shalt hate thine enemy." In the second place, since it defines the neighbor in the sense of fellow creature [*congener*], as a member of the same ethnic group (*'amith*), we are already in the sphere of the political in Schmitt's sense. It would seem difficult to keep the potential opposition between one's neighbor and one's enemy within the sphere of the private. . . . If one's neighbor is here one's *congener*, someone from *my* community, from the same people or the same nation (*'amith*), then the person who can be opposed to him or her (which is not what Leviticus but indeed what the Gospel does) is the non-neighbor not as private enemy but as foreigner, as member of another nation, community, or people. That runs counter to Schmitt's interpretation: the frontier between *inimicus* and *hostis* would be more permeable than he wants to believe. At stake here is the conceptual and practical possibility of founding politics or of forming a rigorous conception of political specificity by means of some dissociation: not only that between public and private but also between public existence and the passion or shared community affect that links each of its members to the others. . . . (103–04)

From this, Derrida takes as minimal starting points for a renovated conception of the political both an injunction against vengeance and a determinate refusal to banish not only the "private" but also "shared community affect" from the domain of the political. If, following Derrida's lead, love, or love's affects, are rigorously to be included as grammatical to that refounded language and concept of politics, then the challenge is not only to derive from the affects of neighborly love (and the rich ethical tradition of the imperative to love the neighbor) but from the affects derived from the imperative to love the enemy, in all its inimical guise, a political specificity and a political language appropriate to the moment we have recently been living through and with whose consequences we are still living. Or perhaps those are not separate forms of love. In either case, one of love's core affects is what Judith Butler has identified as an experience of precariousness, of insecurity, of knowing that we cannot secure ourselves from being undone. Perhaps a politics of love (whether of the neighbor or of the inimical) begins with a willingness to experience what Butler describes, to live with a fear of having our own subjectivity radically, inimically, extraneously undone by what might threaten us. In living so, in seeking to frame a language of living so, the first word of a politics of love might be to refuse an obligation to seek to expel or contain the fearsome by contracting our shared passions (as a still-dominant Hobbesian "modern" political theory instructs us to do) to a commonwealth, or state, or other sovereign power that pledges to deliver us from fear so long as we accede to its reasons of state. To put things another way, perhaps the opening articulation of a politics of love is to refuse that offer of exchange, through which our various states, commonwealths, and sovereign authorities make us safe from fear if we will license them to quarantine (or annihilate) all that we have been instructed to hold inimical to ourselves. This politics asks that we refuse to abandon love as, itself, a fearsome thing—something, in all its urgent capacity to undo us, more than capable of reminding us that in our lives as subjects and as citizens we are, and must continue to be, "fluid and permeable."

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