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## **Inclusion, Exclusion, and the Politics of Rights Mobilization: Reflections on the Asian American Experience<sup>1</sup>**

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Michael W. McCann<sup>2</sup>

### I. INTRODUCTION

Without a doubt the greatest honor of my professional life has been my serendipitous association with the legacy of Gordon Hirabayashi, a man whom I met only once. For over a decade, I have held the professorship at the University of Washington that was named to honor Dr. Hirabayashi, and made possible by the financial generosity and love of many people. Few days go by that I do not consciously acknowledge to others the great honor bestowed on me by this title, which then authorizes me to talk a bit about Gordon and his place in the historic pursuit of equality. This honorary association with Gordon's legacy is humbling and daunting for me, and I value greatly the ceaseless challenge that it presents.

In these brief comments, I reflect on the broader significance and lessons of Gordon's struggles for equal rights. The first part of this exposition

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<sup>1</sup> This article originates in Michael W. McCann's February 2012 presentation at The 25th Anniversary of the *United States v. Hirabayashi* Coram Nobis Case: Its Meaning Then and Its Relevance Now, a conference hosted by Seattle University School of Law's Fred T. Korematsu Center for Law and Equality. The author is grateful to the conference organizers who invited him to join in the marvelous event.

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engages in a theoretical reflection on what Gordon's legacy tells us about legal *rights* in general—what they are, how they function, and how they can work for good, and for bad. In the second part of this piece, I also expand the generalization empirically by connecting Gordon and the history of Japanese Americans to another group of Asian Americans in the twentieth century that I am presently researching for a book: *Filipino Americans*. More specifically, my research focuses on those Filipino American workers in the salmon cannery industry who first organized a small union and then later affiliated with the International Longshoremen's and Warehousemen's Union (ILWU) Local 37.<sup>3</sup> Finally, in the third part of this piece, I examine the politics associated with struggles for rights and what we may learn from the Asian American experience. By drawing parallels and also highlighting differences, my hope is that reflections on the two histories can magnify the light they together shine on rights and the politics of rights mobilization.

## II. RIGHTS, EXCLUSION, AND STRUGGLES FOR INCLUSION: A GENERAL FRAMEWORK

My theoretical interpretation of historical experience is somewhat unusual in that it suggests that rights conventions are complicit in excluding certain persons from full citizenship and protecting social hierarchy, as well as in advancing the causes of inclusion and formal equality.<sup>4</sup> The basic logic at stake is that citizen rights in every polity are grounded in general criteria defining the deserving person, or legal subject, who qualifies for rights.<sup>5</sup>

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<sup>3</sup> MICHAEL MCCANN & GEORGE LOVELL, *A UNION BY LAW: FILIPINO CANNERY WORKERS AND THE TRANSPACIFIC STRUGGLE FOR EQUAL RIGHTS, 1929-1989* (working title) (the research for this book is funded by an NSF grant (SES-1060698)) [hereinafter MCCANN, *A UNION BY LAW*].

<sup>4</sup> See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (2d ed. 2004); MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994) [hereinafter MCCANN, *RIGHTS AT WORK*]. The potential for social rights to advance social equality is arguably greater outside the US, especially in the Global South. The record so far is mixed, at best. In any case, my comments in this article refer to the US experience.

<sup>5</sup> See JUDITH SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* (1989).

That constructed image of the qualified or deserving individual subject is often reflected in nationalist ideals<sup>6</sup> of heroic virtue. It is also manifest in the construction of aliens as the dangerous “Other” that, as a negative mirror image, reinforces national ideals and conceptions of virtue or merit.<sup>7</sup> In short, at various historical moments, dominant groups—working both through the sovereign power of the state<sup>8</sup> and in civil society—extend rights to people whom they view as like themselves, and deny some or all rights to others in turn.

In most modern constitutional republics, the general legitimating criteria for rights qualification usually emanate from individual capacities to demonstrate disciplined, rational self-governance. Dominant or insider groups rely on a variety of ascriptive markers—for example, race, ethnicity, nationality, gender or sex, religion, and education—as well as personal behavior to justify such assessments of deserved inclusion or exclusionary “Other-ing,” although these markers are often viewed through the stereotypical lens shared by insiders.<sup>9</sup> From the start, the default standard for the disciplined rights-bearing individual in the United States, for example, has been the propertied white male. Every claim of rights thus raises the question, at least implicitly, about whether claimants actually qualify by this norm as members of the community of rights-bearing subjects.

Qualification for rights in the United States has entitled people to expect and demand treatment according to principles of “liberal” law, including

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<sup>6</sup> CARL STYCHIN, *A NATION BY RIGHTS: NATIONAL CULTURES, SEXUAL IDENTITY POLITICS AND THE DISCOURSE OF RIGHTS* (1998).

<sup>7</sup> PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* (2007).

<sup>8</sup> By definition, sovereign authority is the capacity to determine who is, and who is not, entitled to basic rights, as well as the exceptional conditions for the suspension of rights generally. See GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Werner Hamacher & David E. Wellbery eds., Daniel Heller-Roazen trans., 1998).

<sup>9</sup> See ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997); MARK S. WEINER, *AMERICANS WITHOUT LAW: THE RACIAL BOUNDARIES OF CITIZENSHIP* (2006).

due process, equal protection, freedom of civic and political participation, humane treatment, and the other rights we often identify with our Bill of Rights and “rule of law” generally. Those who are deemed as entitled to less than full citizen status, by contrast, are vulnerable to treatment that is more discretionary, arbitrary, coercive, and even brutally violent: what often is called “repressive law”<sup>10</sup> or lawless “social abandonment.”<sup>11</sup>

We know those subjugated Others by different labels at different times: slaves, indentured and other types of servants, indigenous peoples, dependent women, and others treated as forms of “property”; immigrant aliens from Asia, Mexico, and the Global South for the last century, continuing today, and still lingering for subsequent generations; and the ubiquitous labels of un-American, subversive, and/or dangerous criminals.<sup>12</sup> Periods of anxiety or fear often exacerbate exclusionary actions and the denial of rights privileges for specific groups (as well as, to a certain degree, for all persons) in the name of security or life.<sup>13</sup> This point is well illustrated by the post-civil rights legacy of the domestic mass incarceration state, and the recent War on Terror’s campaign against dangerous Others, such as enemy combatants. This recent experience is hardly unique, however; periods of division, anxiety, and fear over dangerous Others at home and abroad have been more the norm in American life than the exception.<sup>14</sup>

At the same time, liberal rights traditions provide those persons and groups denied full citizen status potential discursive and institutional

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<sup>10</sup> See PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 29 (2001).

<sup>11</sup> Joao Biehl, *Vita: Life in a Zone of Social Abandonment*, SOCIAL TEXT, Fall 2001, at 131–49.

<sup>12</sup> Colin Dayan provocatively identifies the criminal and other “Others” as inherently like rights-less slaves—not just analogous to slaves, but a continuation of historical practices developed through the experience with slavery. See COLIN DAYAN, THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS (2011).

<sup>13</sup> AGAMBEN, *supra* note 8.

<sup>14</sup> Mark Neocleous, *The Problem with Normality: Taking Exception to “Permanent Emergency,”* ALTERNATIVES: LOCAL, GLOBAL, POLITICAL Apr.–June 2006, available at [http://findarticles.com/p/articles/mi\\_hb3225/is\\_2\\_31/ai\\_n29276867/?tag=content;col1](http://findarticles.com/p/articles/mi_hb3225/is_2_31/ai_n29276867/?tag=content;col1).

resources that can be mobilized to challenge, exclusion, hierarchy, and subjection to repressive law. In the US, such mobilization of rights has usually required people marked as Others to attempt to demonstrate the discipline, virtue, and merit associated with the “white standard” of insiders in order to qualify for rights as full citizens.<sup>15</sup> Sometimes the equality principle of liberalism can even be pushed beyond its formal abstract terms to demands for more substantive social justice, often called social or positive rights. Very often, efforts to overcome repressive exclusion or to advance social rights fail. And, while they sometimes succeed, even then success is limited and entails a long process of struggle. In any case, rights “cut both ways”—routinely fortifying as well as sometimes facilitating challenges to exclusion, repression, and hierarchy.<sup>16</sup>

### III. THE ASIAN AMERICAN EXPERIENCE: A QUICK, SELECTIVE COMPARISON

The Japanese American experience, which has been the focus of the symposium honoring Gordon Hirabayashi’s legacy, generally illustrates how this logic of rights has worked through history. We can begin with the 1940s, where panic amidst war and long-time racism toward Asian Americans combined to support mass internment and a denial of basic rights to Japanese American citizens who were perceived as alien, dangerous Others.

In that context, Gordon Hirabayashi and several others, all citizens by birth to immigrant parents in the US, challenged such denials of basic freedoms and lost before the highest courts in the land, thus condemning them to a choice between internment in specialized prisons or incarceration in conventional prisons with other “criminals.” In an all too familiar story, our legal traditions denied rights to many good people, primarily on the

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<sup>15</sup> DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE* (2005).

<sup>16</sup> SCHEINGOLD, *supra* note 4; MCCANN, *RIGHTS AT WORK*, *supra* note 4.

basis of nationality and race, in a context marked by widespread fear among dominant groups. Decades later—with the passing of war, a national struggle to abolish racial segregation, and advances for rights of many excluded groups—the campaign to overturn the earlier convictions of Gordon and others, to affirm the once denied rights status of these individuals, and to grant reparations for unconstitutional wrongs committed against Japanese Americans eventually realized success.<sup>17</sup> The same legal system that took away rights restored them in a later era.

A similar logic was evidenced in the parallel experiences of another Asian immigrant group: Filipino immigrants and Filipino Americans. The first waves of Filipinos immigrated in the 1920s, amidst American colonial rule over the Philippines; many of those first immigrants took over jobs in the agricultural and salmon cannery industries that had previously been held by Japanese immigrant workers.<sup>18</sup> Prior to WWII, Filipino immigrants experienced even more brutal treatment as racially stigmatized Others than did most Japanese American immigrants, partly because of the bloody colonial legacy of American rule in the Philippines, and partly due to the active Leftist organizing in unions by many immigrants. As Carlos Bulosan, the gifted chronicler of Filipino immigrant experiences in that first generation, wrote: “I am an exile in America . . . I feel like a criminal running away from a crime I did not commit. And this crime is that I am a Filipino in America.”<sup>19</sup> Somewhat ironically, WWII was a positive turning point for many Filipino Americans, as immigrants enlisted in the war against the Japanese state, which posed an imperial threat to both the Philippine homeland and mainland America. Even though much of the

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<sup>17</sup> *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). For a historical narrative account by a key player in this drama, see PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* (2d ed. 1993).

<sup>18</sup> CHRIS FRIDAY, *ORGANIZING ASIAN AMERICAN LABOR: THE PACIFIC COAST SALMON INDUSTRY, 1870–1942* (1994).

<sup>19</sup> Carey McWilliams, *Introduction* to CARLOS BULOSAN, *AMERICA IS IN THE HEART*, vii (1946) (quoting Carlos Bulosan).

Filipino American community made concerted efforts to display conformist “whiteness” in this period of patriotic display, however, many immigrant workers continued to be deported, incarcerated, and otherwise harassed or brutalized for Leftist democratic political activity.

This harassment of Filipino workers as subversives or undeserving Others and criminals increased in the years after WWII, as activists were threatened, incarcerated, and subjected to deportation actions in an effort to crack down on progressive union organizing. During the same period as the mass internment of Japanese Americans, including Gordon Hirabayashi, we know that Carlos Bulosan and his fellow Filipino workers were subjected to continuous investigation and harassment by the Federal Bureau of Investigation, although agents never found any evidence of active Communist affiliation and advocacy.<sup>20</sup>

Such a complex mix of inclusionary and exclusionary rights politics played out again in the 1970s and 1980s, although somewhat differently for disparate groups and individuals. Gordon Hirabayashi and his advocacy team attained dramatic success in overturning previous convictions for defiance of repressive legal action, extracting apologies, and winning reparations for treatment during WWII through liberal rights claims. Meanwhile, just a few years before, Filipino American activists and their allies used federal lawsuits and other legal mobilization tactics to challenge continued racially exploitive work conditions in canneries and imperialist American policies abroad that supported the despot Ferdinand Marcos. Like Japanese Americans, the activists affiliated with ILWU 37 were met with mixed success. On the one hand, two of the latter’s lawsuits challenging employment discrimination fared well in initial hearings, settled, produced substantial improvements in workplace conditions, and catalyzed democratic reform of the union. On the other hand, a third lawsuit ended

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<sup>20</sup> See Emil Guillermo, *Hounded to Death: the FBI File of Filipino Author Carlos Bulosan*, ASIAN WEEK, Nov. 8, 2002, available at [http://asianweek.com/2002\\_11\\_08/opinion\\_emil.html](http://asianweek.com/2002_11_08/opinion_emil.html).



when an increasingly conservative Supreme Court denied the minority workers' claims and substantially limited the potential for civil rights challenges under federal law.<sup>21</sup> Even more tragic, local thugs, corrupt labor leaders, and the US-supported Marcos, conspired to murder the two young Filipino American union reformers who took rights seriously and pushed legal entitlements beyond formal equality toward social justice.<sup>22</sup> Struggling for abstract liberal rights of citizenship can be a slow, uneven, difficult endeavor for marginalized groups, but pushing beyond formal equality to social justice can provoke reprisals that are even harsher.

These are just some of the complex ways that the politics of rights have figured to be both exclusionary and inclusionary, debilitating and empowering, and virtually always a fragmenting force for these two groups of Asian Americans over the last century.

#### IV. THE POLITICS OF RIGHTS: LEARNING FROM THE ASIAN AMERICAN EXPERIENCE

It is tempting to draw from my comments so far a fairly cynical view of law and rights. In short, law and rights simply reflect contests over power, at any moment just registering the ongoing trench war over who gets what and, specifically, who is included and excluded from full protection by the legal agents of dominant groups.

I think there is much truth in such a skeptical view, but I also think it is simplistic. Framing struggles over power, position, and interest as claims of rights can impart a historically grounded ethical dimension to struggle. This framework can then open the possibility for changing relationships of power, in part by mobilizing the official legal establishment, but even more by potentially mobilizing citizens and organizations in civil society who

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<sup>21</sup> *Wards Cove Packing Co. v Antonio*, 40 U.S. 642 (1989).

<sup>22</sup> Our forthcoming book will document this history at length, *see* MCCANN, *A UNION BY LAW*, *supra* note 3. *See also* THOMAS CHURCHILL, *TRIUMPH OVER MARCOS* (1993); RON CHEW, *REMEMBERING SILME DOMINGO AND GENE VIERNES: THE LEGACY OF FILIPINO AMERICAN ACTIVISM* (2012).

stand up to challenge either the abuses of rights or the uses of rights to justify abuse, as in these two historical cases. Rights are words, often written on paper, but they become materially powerful when people, ordinary and extraordinary, invest in them meaning and faith through action to challenge the unjust and often arbitrary practices of dominant groups through and beyond states. And that is just the message preached and exemplified by Gordon Hirabayashi: rights must be mobilized and demanded routinely for them to matter in guiding governmental and social power. “As fine a document as the Constitution is,” Gordon Hirabayashi famously told a reporter, “it is nothing but a scrap of paper if citizens are not willing to defend it.”<sup>23</sup>

Such mobilization of rights in the cause of justice is hardly easy or natural, however, and Gordon’s legacy exemplifies what the struggle takes. For one thing, rights mobilization requires personal virtues of *courage and willingness to make personal sacrifices*. Gordon displayed such selfless bravery in his refusal to accept the order of internment, a defiant challenge to the illegitimate government denial of basic rights to him and other Japanese Americans. In waging his campaigns against criminalizing subjugation, he also had to resist the pressures of others in his community who discouraged “rocking the boat” and making a bad situation worse by challenging government injustice. Gordon made a “lonely stand” in his initial resistance.<sup>24</sup> Young Filipino American activists in the 1970s, including Silme Domingo and Gene Viernes, displayed that same type of independent courage and persistence in the face of many obstacles and dangers. Indeed, they not only challenged powerful corporations and the American legal establishment that protected their unjust practices, but the

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<sup>23</sup> This was perhaps Gordon’s most often quoted line in obituaries. See, e.g., Elaine Woo, *Gordon Hirabayashi Dies at 93; Opposed Internment of Japanese Americans*, L.A. TIMES, Jan. 5, 2012, <http://articles.latimes.com/2012/jan/05/local/la-me-gordon-hirabayashi-20120105>.

<sup>24</sup> *Id.*

young activists boldly opposed a dictator (who declared martial law) as well as his elite supporters in the American government.<sup>25</sup> The young reformers also persisted when other workers, especially senior *manongs*,<sup>26</sup> were wary about defiant challenges to the status quo. Gordon was willing to go to prison; Gene and Silme lost their lives to assassins. Defiant action to demand rights can be risky business, and often requires such commitment and willingness to make sacrifices for larger causes.

Personal courage and persistence alone are rarely sufficient. Struggles for rights also require *organizational support, financial resources, and allied experts, usually including cause-oriented lawyers*. Indeed, struggles for rights typically require movements that enlist many forms of organized support. The struggle for the ruling on coram nobis and legislated reparations during the 1980s, in particular, illustrates the important role of committed lawyers, community mobilization, and organizational alliance, both within and beyond the Japanese American communities. The Filipino Americans workers who initially fought for citizenship and workplace organizing rights, and later for workplace justice and democracy in the Philippines, likewise understood the political imperative to build a movement within the union, as well as within the broader Filipino community and beyond, including among diverse progressive organizations.

Finally, each of these legacies illustrates that *struggles for rights must be willing to go beyond exclusive reliance on litigation to produce change*. In each campaign, efforts to mobilize media support, to influence public opinion, and to lobby members of government, the business community, and the academy were critical to success. Struggles over rights are most productive when they can convince dominant groups that it is both a matter of public principle and in the political interest of the majority, including the

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<sup>25</sup> See CHURCHILL, *supra* note 22; CHEW, *supra* note 22.

<sup>26</sup> *Manong* is a Llocano term referring to senior and much respected Filipino males. For the young activists in the 1970s, the term refers specifically to the first generation of immigrant male Filipino workers in the canneries.

dominant group, to do the right thing.<sup>27</sup> As Gordon put it, “I never look at my case as just my own, or just as a Japanese American case. It is an American case, with principles that affect the fundamental human rights of all Americans,” and, I might add, all peoples.<sup>28</sup>

One tragedy of the campaigns by Silme Domingo, Gene Viernes, and their allies was that their aspiration to advance rights in the workplace for all minority and female workers found only limited success in winning over the mass public and, especially, dominant elites. In particular, the workers’ campaign linking civil rights to social rights and human rights—what eventually came to be called a “Third Reconstruction”—gained little traction. In this regard, however, it is notable that Gordon Hirabayashi also became an advocate for “human rights,” finding both more expansive substantive grounds for justice and potential leveraging power in internationally accepted conventions. All of these activists understood that advances in egalitarian justice and social rights entail a slow, uneven process in which short-term defeats or failures still serve the larger cause of keeping democratic visions alive and inspiring future generations to continue the struggle.<sup>29</sup>

These are the lessons regarding how rights have mattered for Asian American groups who have been marginalized, excluded, and oppressed in American history. Rights guarantee nothing, but in some historical circumstances they can be a useful resource for building a politics of legal mobilization that includes, but usually transcends, mere litigation and reliance on courts. We can learn a great deal from these courageous actors no longer with us—from Gordon Hirabayashi, and from Silme Domingo

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<sup>27</sup> See Derrick A. Bell, Jr., *Brown v Bd. of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

<sup>28</sup> Richard Goldstein, *Gordon Hirabayashi, WWII Internment Opponent, Dies at 93*, N.Y. TIMES, Jan. 3, 2012, <http://www.nytimes.com/2012/01/04/us/gordon-hirabayashi-wwii-internment-opponent-dies-at-93.html>.

<sup>29</sup> JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* (2003).

and Gene Viernes. Struggles for rights can make a huge difference for many people. These three individuals were giants whose struggles must be remembered, an enduring inspiration for all seeking human rights and social justice.