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**Litigation for the People**

Samuel R. Bagenstos

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Can anti-discrimination litigation be a tool for social change? For many years, a contingent on the academic left contended that the answer is no. The Critical Legal Studies movement (CLS) of the 1970s and ‘80s argued that using litigation to enforce rights privileged lawyers, fed an alienating and individualized discourse, and ultimately had a depoliticizing effect. CLS adherents believed that anti-discrimination laws often legitimated, rather than challenged, the fundamental inequalities of society.

Although CLS is no longer a presence in law schools, its ideas live on. Its critique of rights litigation has been bolstered by the opposition to identity politics from some on the left. In the words of Nancy Fraser, today’s neoliberals “[talk] the talk of diversity, multiculturalism, and women’s rights, even while preparing to walk the walk of Goldman Sachs.” A commitment to anti-discrimination “charge[s] neoliberal economic activity with a frisson of excitement,” she writes, and allows it to take on the mantle of “the forward-thinking and the liberatory, the cosmopolitan and the morally advanced.”

A remarkable new book by Michael McCann and George Lovell offers a different view. In Union by Law: Filipino American Labor Activists, Rights Radicalism, and Racial Capitalism, McCann and Lovell, professors of political science at the University of Washington, trace the history of Filipino workers in the United States through the last decade of the twentieth century, starting from the U.S. occupation of the Philippines following the Spanish-American War. This review will not spend much time on McCann and Lovell’s engaging treatment of U.S. imperialism before and after the Second World War. Rather, it will focus on the implications of their argument for how anti-discrimination law can be a useful political tool and not simply written off as elitist, alienating, and supportive of the status quo.
the belief that “racism is dead.” Law professor Alan Freeman contended that legal rules took a narrow “perpetrator perspective” in seeking to identify discrimination. By focusing on discrete, identifiable acts of wrongdoing undertaken by specific, blameworthy individuals, the law failed to provide a meaningful response to structural or institutional discrimination that cannot be attributed to the fault of a particular racist or sexist.

These arguments generalized into a harsh indictment. Anti-discrimination law highlights a particular criterion of justice: that of meritocracy. It focuses on a particular understanding of meritocracy: one rooted in economic rationality. And it draws attention to a particular set of threats to meritocracy: the discrete, individual acts of particular defendants. It thus sends the message that if we can just get rid of discrimination, we will have solved the fundamental problem.

Legal theorists such as Patricia Williams, Mari Matsuda, and Kimberlé Crenshaw have observed that the rights critique failed to account for the ways in which civil rights law and litigation offer racial minority groups an organizing and rallying point for challenging the status quo. Their argument was powerful, and the rights critique had largely dropped out of the legal academic discourse by the late 1990s. Events, however, were moving in the direction of the critics. The rhetoric and apparatus of inclusion along racial, gender, and other identity lines was expanding in governments and workplaces across the nation. By the 2010s, the ideal of diversity—or at least the view that businesses should visibly pledge allegiance to that ideal—had become deeply entrenched across corporate America. Economic inequality was exploding, but businesses used the language of diversity to legitimate their own accumulation of money and power.

Meanwhile, the courts increasingly enforced constitutional rights to thwart democratically adopted efforts at progressive change. During the Obama era alone, the Supreme Court hobbled the Affordable Care Act’s expansion of Medicaid, invalidated a key part of the Voting Rights Act, and declared limits on corporate electoral spending to be unconstitutional. In this context, the rights critics of the 1970s and ’80s appear as dishonored prophets. It is hardly a surprise that many on the left have warmed to the critique of legal rights in recent years.

That is what makes Union by Law such a timely book. McCann and Lovell fully appreciate the limits of legal rights, and of anti-discrimination law in particular. They note that “the civil rights and due process revolutions” exemplified by the Warren Court and the Civil Rights Act “provided few ideological or institutional resources for leveraging redistribution of economic, social, and political power denied for centuries to racialized, gendered, poor, and other exploited persons.” Notwithstanding those legal developments, they acknowledge, “extreme socioeconomic inequality and material marginalization persisted and even worsened in various ways.” And the apparent successes of the civil rights era “reinforced innocence among dominant groups about the continuing role of law in coercively sustaining systematic race, class, gender, sexual and religious hierarchies.”

“Subaltern groups,” according to McCann and Lovell, “concurrently suffer from both a deficit of resources to access liberal legal rights and an excess of violent, illiberal law regulating their lives.” The violent, illiberal law governing the workers who are the subjects of Union by Law includes not only the repressive practices of employers, backed by the American legal principle of employment at will, but also the harshness of the U.S. immigration system, which treated “imported, commodified laborers” as effectively disposable. And it includes official repression perpetrated by the United States and the Philippines during the Ferdinand Marcos era, bolstered by the geopolitics of the Cold War.

Yet the authors are not prepared to give up on legal rights mobilization. In their view, “law still provides one of the most important institutionalized sites . . . for subaltern group resistance to . . . hegemonic policies, practices, and relationships in both state and society.” They note that “legions of leftist activists in and beyond
the United States have embraced the liberal principle of egalitarian citizenship to challenge the proprietary, profit-based principles of capitalism.”

Legal contests, they conclude, “often generate ‘forums of protest’ that can keep alive alternative ideas and ideals, inspire and hotwire mobilization for new forms
of advocacy, keep pressure on dominant groups to reassess their interests in conceding changes that benefit marginalized people, and thus sometimes alter at least slightly the balance of power among social groups.” That may not be much, but it is something to celebrate in the ongoing battle for social change.

In their century-spanning discussion, McCann and Lovell highlight Filipino-American workers’ “persistent, creative struggles to challenge many forms of institutionalized hierarchy and to advance institutional change in more egalitarian, democratic, and even socialist directions.” Although the workers lost in Wards Cove, the 1989 Supreme Court case that is the focus of the book—as they lost at many points on the road to that decision—they also won significant and persistent victories along the way. A review of these successes and failures shows the uses and limits of rights and anti-discrimination. It also offers lessons for future organizing.

Filipino laborers began to migrate to the West Coast of the United States to work in agricultural jobs during the period of formal colonial rule following the Spanish-American War. McCann and Lovell’s history reveals that many of these workers brought with them a belief in American ideals of equality and freedom. As with many other oppressed groups in the United States, the gap between those ideals and practical realities inspired a rights consciousness. By the 1920s, grassroots organizations were stoking that rights consciousness and reinforcing a sense of community among Filipino migrants.

From the beginning, these workers and their advocates used law as a crucial tool to organize and to achieve concrete gains. Early cases involved efforts to obtain citizenship for Filipinos who had been honorably discharged from the U.S. military, which had some success in federal district courts before being codified in a 1918 statute. Less successful were challenges to the application of state laws that barred noncitizen Asian migrants from leasing land, until the Second World War altered the political landscape.

In the 1930s, Filipino communities in California and Washington state deployed the law in very different ways to attack bans on interracial marriage. In California, where clerks repeatedly denied marriage licenses to Filipinos who sought to marry whites or Mexican Americans, these individuals took the clerks to court and argued that the legislature did not intend to include Filipinos among the groups who were barred from marrying members of different races. Their claims met with only occasional success. In Washington, by contrast, Filipinos worked with “a broad-based, multiracial, labor-based coalition” to head off the adoption of any ban on interracial marriage. This victory helped to draw more Filipinos—and other people of color—to Seattle, thus reinforcing efforts to build community organizations. And it directly supported “class-based struggles for fundamental change in capitalist economic as well as racial relations.”

By that decade, Filipinos, many of whom were recruited from Seattle, were heavily concentrated in seasonal jobs in the Alaskan salmon canneries. The work was dangerous, the terms of employment were exploitive, and the workplace was highly segregated along racial lines. Filipinos worked in the worst and riskiest jobs, were packed into the worst and least sanitary housing in the remote facilities, and received the worst and most inadequate food. With the assistance of New Deal legislation (the National Industrial Recovery Act and then the National Labor Relations Act), these workers formed a union, which came to be “involved in nearly every struggle over civil rights by Filipinos in the Pacific Northwest during the 1930s and years beyond.” Through the union, they fought for both racial and class justice.

Throughout the Second World War and the early part of the Cold War, the union faced severe state repression. Laws adopted during the McCarthy era authorized the denaturalization of leftist labor leaders and supported “highly discretionary, even arbitrary state violence against alleged political dissidents and their organizations.” Yet, as McCann and Lovell note, “the growing harshness of US state repression, through both law and
lawlessness, only solidified and intensified Filipino activist appeals to basic constitutional rights and liberties," with even "self-identified socialists and communists" embracing the "ideals and legal constructions of the revolutionary fathers."

The cannery workers and their union frequently went to court during this period, but their invocations of legal rights tended to be largely defensive. A particularly striking example came in their response to the years-long effort by the Immigration and Naturalization Service (INS) to deport "subversive" members of the union. Beginning in 1949, John Boyd, the director of the Seattle immigration district, ordered the arrest of the union's business agent, Ernie Mangaoang, on at least four occasions, and several of those times singled him out for deportation for having been a past member of the Communist Party. But union lawyers took the INS to court, and the Ninth Circuit Court of Appeals repeatedly overturned the deportation orders. Before the court issued a ruling in 1955 that finally ended Boyd's campaign, the INS had interrogated 2,000 Filipino cannery workers, jailed over a hundred of them, and sought to deport over a dozen. In the end, although they suffered severely during the process, no leftist Filipino cannery workers were deported. The use of law thus headed off an existential threat to militant unionism, even as it could not stop the "chilling effect on political speech, organization, and advocacy of novel rights claims and visions."

Politically conservative forces took over the union in the 1960s (no doubt aided by the effects of the government's anti-leftist campaigns). By the 1970s, however, a new generation of Filipino Americans began to assert themselves. They had been raised as American citizens and gone to work, as their parents had, in seasonal cannery jobs, often during college breaks from campuses where the activism of the 1960s had taken hold. They found that conditions remained oppressive, unsafe, and racially segregated. Workers of Asian descent continued to work in the harshest jobs, live in substandard quarters, and be blocked, informally if not by explicit rule, from advancement into better positions.

These new activists framed a multifaceted legal and organizing strategy to challenge those work conditions. The workers teamed up with Tyree Scott, an African-American activist who had undertaken numerous direct-action protests challenging racial discrimination in Seattle and was beginning to organize workers nationwide, and Michael Fox, a white attorney in Seattle who had represented the United Farm Workers, among others, and had set up an innovative organization known as the Northwest Labor and Employment Law Office (LELO). LELO sought to ensure that "movement goals would be guiding the lawyers rather than the other way around." Working with LELO, the young Filipino-American activists formed a new nonprofit group, the Alaska Cannery Workers Association (ACWA), which was independent from the cannery workers' union but had membership that overlapped with it.

The mission of the ACWA was to sue the canneries under Title VII of the Civil Rights Act for racial discrimination. Members carefully investigated the conditions at the facilities (including by going undercover as University of Washington business students to gain access), identified a set of plaintiffs that spanned the generations of Filipino Americans in Seattle to facilitate organizing within the community, and filed complaints with the Equal Employment Opportunity Commission and the courts. They brought three major Title VII cases in the mid-1970s: one against the New English Fish Company, which resulted in a $6 million damages award; one against the NEFCO–Fidalgo cannery, which resulted in a settlement that gave substantial compensation to the plaintiffs and made significant changes at the plant; and one against the Wards Cove Packing Company, which failed in the Supreme Court fifteen years later.

The ACWA activists used their lawsuits as an organizing tool. They brought their cases as class actions, which meant that the suits, if successful, would not just benefit the individual plaintiffs but all of the workers who had experienced discrimination. The class-action device thus facilitated organizing among the cannery workers. The lawsuit also served as
a rallying point for the activists’ effort to seek democracy within the union. They obtained a major victory in 1980, when a reform slate swept the election for union officers.

These activists also developed connections with opponents of Ferdinand Marcos in the Philippines and organized within their international union to challenge his repressive regime. These alliances led to tragic violence in 1981, when two key reform leaders in the canny workers’ union were shot dead in Seattle. The ACWA activists responded by carrying out a multipronged strategy—including a civil suit against Marcos himself—to hold the regime accountable for its apparent connection with the killings. Marcos was held liable for $15 million in damages, and the trial served as “an essential vehicle for uncovering numerous unsavory aspects of Marcos’s operations in the United States and clandestine U.S. support for its repressive client state,” McCann and Lovell write.

The book culminates with the Wards Cove case. Wards Cove was the most prominent of a series of anti–civil rights opinions issued by the Supreme Court in its 1988–89 term under the leadership of William Rehnquist, whom Ronald Reagan had named chief justice in 1986. Although Congress overturned Wards Cove in part of the Civil Rights Act of 1991, the decision marked the end of the era in which disempowered groups looked to the courts to overturn practices of systemic discrimination.

The litigation challenging discrimination in the Alaska canneries ended in a historic loss for the Filipino-American workers. By the time the Supreme Court ruled, the number of cannery jobs had also dropped dramatically, thanks to overfishing in the waters around Alaska, competition from producers in other countries, and changes in consumer tastes.

But the question remains: did the workers who brought lawsuits like Wards Cove do worse by using litigation—and by framing their claims in terms of discrimination—than they would have had they used other political tools? The simple fact is that the workers were up against forces much larger and more powerful than they were: those of class, race, and ecological destruction. The likelihood of prevailing against these forces through any path was not high.

But McCann and Lovell show that, far from depoliticizing them, the litigation helped to advance organization among the Filipino-American workers and to build connections between them and other workers, labor organizers, and political activists, both in Seattle and in the anti-Marcos movement in the Philippines. The anti-discrimination litigation facilitated organizing that led to the displacement of conservative union leadership by a reform slate that campaigned on challenging capitalist repression at home and abroad.

Nor did the civil rights lawsuits rest on arid talk of diversity or meritocracy. On the contrary, they were explicitly framed as challenges to oppression that was both race- and class-based. No doubt this framing resulted in significant part from the fact that the litigation remained driven by the community instead of by its attorneys. That was due in part to the vision of Scott and Fox, who worked to invert the lawyer-dominated paradigm of much public-interest law practice. It was also due to the rights consciousness of the Filipino-American workers themselves, who internalized the radical implications of the long-expressed American ideal of equality.

Although the eventual outcome in Wards Cove was a disappointment, the law provided significant benefits to the community along the way. The financial awards in the other two discrimination cases against the canneries helped many of the workers and their families to live more comfortable lives. The anti-discrimination law thwarted the attempted deportations of radical union leaders during the Red Scare. In 1981, when the union leaders were murdered, civil litigation gave activists both the tools to connect those murders to the Marcos regime and a forum to widely publicize their links to U.S. government activities.

The law was no savior for the Filipino-American workers in Seattle and Alaska. But it did provide a tool that could be used
opportunistically to secure concrete gains, organize along race and class lines, and help to advance political goals. Rather than simply writing off anti-discrimination law as inherently neoliberal, we should recognize the important though limited role it can play as one of many tools to achieve more radical ends.

Samuel Bagenstos is a civil rights lawyer and the Frank G. Millard Professor of Law at the University of Michigan Law School.