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978-1-107-01226-4 - Forging Rivals: Race, Class, Law, and the Collapse of Postwar Liberalism

Reuel Schiller

Excerpt

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Introduction

Legal History and the Death of Postwar Liberalism

It was the summer of 1943 and the scene at the Atlas Shipyard in Long Beach, California, was damn near explosive.¹ Bob Jones' question to Madge had been a simple one. He needed an extra hand for a particularly difficult piece of welding that his crew was doing. As a leader-man, Jones' position entitled him to make the request, but Madge's response was harsh and instantaneous: "I ain't gonna work with no nigger." Jones didn't miss a beat. "Screw you then, you cracker bitch." Both statements hung in the air for a moment. Then Madge turned to the two mechanics sitting slack-jawed nearby. "You gonna let a nigger talk tuh me like that?" One of them started to stand, grabbing a metal bar, but he was a small, elderly man. One glance from Jones sat him back down again, and Jones stalked off.

Within hours, Jones had lost his position and the draft deferment that went with it. His boss was furious: "I'd figured you'd have sense enough to get along with the people you had to work with instead of running around with a chip on your shoulder like most colored boys. I'm not going to have you or any other colored boy in this department who can't maintain a courteous and respectful manner towards the white men and women you have to work with." Jones' response was simple – "she called me a nigger" – but it had no impact. "You know how Southern people talk," his boss had said, "how they feel about working with you colored boys."

Jones seethed with anger at the injustice of the situation, but what could he do? In World War II-era California his options were limited.

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The shipyards were fonts of economic opportunity. For thousands of workers, impoverished by a decade of economic depression, they provided high-paying, skilled jobs that, in peacetime, many of them would have been excluded from because of their race or their sex. Yet they were also cauldrons of racial tension – black and white workers, many from the South, thrown together for the first time. When faced with bigotry and discrimination, there was little an African American worker could do. There were no antidiscrimination laws, no Equal Employment Opportunity Commission to bring a case before, and no plaintiff's lawyers, enticed by the prospect of court-ordered attorney's fees, searching for clients.

Jones' response to this incident is the subject of Chester Himes' 1945 novel, *If He Hollers Let Him Go*. Over the four days following his encounter with Madge, Jones' life spins out of control as his rage builds into a tragic explosion sparked by the systemic racism that he encounters daily, and by the equally insidious misogyny with which Himes, perhaps unconsciously, imbued his protagonist. As Jones embarks on this downward spiral, however, he makes one last attempt to combat the shipyard's racism through socially sanctioned institutions. Jones appeals to his labor union.

Jones approaches a shop steward, Herbie Frieberger, to plead his case. Unfortunately, Herbie – a dismayingly anti-Semitic caricature – is not concerned with individual workers as much as with Popular Front politics. When Jones asks Herbie to get the union to sanction Madge for her racist comments, the steward demurs. The workers shouldn't be fighting each other; they should be fighting fascism. "That's the trouble with you colored people," he tells Jones. "You forget we're at war. This isn't any time for private gripes." Instead, his solution is to write up Jones' demotion as a grievance to be presented to the arbitration board the following week. For Jones, such a solution is preposterous. The systemic racism of the shipyard won't be cured by a legalistic grievance procedure. Ultimately Jones and the union go their separate ways, each searching for its own solution to the problem.

Although Himes would have never intended it, this encounter between Jones and Herbie can serve as a metaphor for the relationship between law and liberalism in the years following World War II. Each man embodies a political and ideological element of postwar liberalism. African Americans and labor union members were to become

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two of the most powerful supporters of the Democratic Party in the twenty-five years following the war. Similarly, the desire to promote prosperity by encouraging the growth of labor unions, and an increasingly vigorous defense of the civil rights of African Americans both became central attributes of the version of liberalism that shaped American politics after the war.

Yet Herbie and Jones talk right past each other. What Jones sees as an imperative plea for racial justice, Herbie sees as racial special pleading. What Herbie sees as a reasonable request for unity in the face of a war against totalitarianism, Jones sees as a demand that African Americans set aside their own interests in order to help white people who have shown them disdain, at best, and hatred, at worst. Jones comes to Herbie in the hope that the union will take direct action to rid the shipyard of racism. Herbie's reaction is to channel Jones' demand for justice into a formal, legalistic grievance procedure.

The politics of the United States in the three decades following World War II did, in fact, generate legal mechanisms for furthering the interests of both labor unions and advocates of racial egalitarianism. Like Jones and Herbie, however, these two legal regimes frequently talked past each other. Indeed, they often conflicted, rendering the political alliance between the labor movement and the civil rights movement exceptionally difficult to sustain. As America emerged from a decade and a half of depression and war, the country's dominant policy makers saw both labor law and civil rights law as tools for forging a just, equitable social order. Instead, these legal regimes forged rivals, creating a legal landscape that promoted conflict between the two groups that were indispensable to the fortunes of postwar liberalism.

The central goal of *Forging Rivals* is to explore those fortunes. For twenty-five years after the end of World War II, American liberalism flourished. The Democratic Party's political dominance resulted in a succession of heroically named policy concoctions – the Fair Deal, the New Frontier, the Great Society – that expanded the size of the American regulatory and welfare states, and committed the federal government to the elimination of racial discrimination. Starting in the late 1960s, however, liberalism went into decline, laid low by Richard Nixon, Ronald Reagan, and a resurgent Republican Party. Indeed, even the dominant Democratic president of this period, Bill Clinton – he of triangulation, of welfare reform, and of the Democratic Leadership

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Council – seemed to have had it in for the robust liberalism of Franklin Roosevelt and Lyndon Johnson.

More significant than the rightward political drift of the Democratic Party was the demise of one of the central policy goals of postwar liberalism: the promotion of a mild form of economic egalitarianism. Between 1940 and 1973, the United States experienced what economists have called the Great Compression: America as a whole became wealthier and income distribution became more egalitarian. In 1940, 18 percent of the wealth of the United States was held by 1 percent of the population. By 1973, the richest 1 percent of the population held only 8 percent of the nation's wealth. Since 1979, this trend has reversed itself. America's national wealth has continued to grow, but the distribution of that wealth has become increasingly inequalitarian. By 2009, the top 1 percent was back to holding 18 percent of the nation's wealth.² Thus, if one of postwar liberalism's goals was to promote some degree of economic egalitarianism, that goal seems to have been stymied by the end of the 1970s. While economists debate the cause of this increasing inequality, it is clear that the mechanisms that postwar liberals believed mitigated it have been weakened or destroyed. America's tax structure has become less progressive, its needs-based social programs have become less generous, its minimum wage laws have eroded, and, of particular significance to this book, the percentage of workers in labor unions has diminished dramatically.

Economic egalitarianism, however, was not postwar liberalism's only tenet, and the picture with respect to its other goal – promoting ethnic, religious, racial, and sexual equality – is less distressing. In the poetic words of David Hollinger, postwar liberalism has succeeded in "extending the circle of we."³ Indeed, one of its singular successes was the near complete eradication of prejudice against Jews, Catholics, and the descendants of immigrants from southern and eastern Europe. Similarly, the steps that the United States has made since World War II in eliminating the legal barriers and many of the social barriers that dramatically restricted the opportunities of African Americans and other people of color are substantial. The same is true of sexual equality. Gender roles, and the laws and customs that enforced them, have changed since World War II in a manner that has promoted sexual egalitarianism.

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Obviously Americans have not created a society devoid of invidious distinctions between the sexes or among races, religions, and ethnicities. Around certain issues – such as terrorism, crime, and immigration – racialized thinking is still all too frequent. Similarly, the decline of liberalism’s ability to address issues of economic inequality has had a disproportionate impact on women and people of color, thereby preventing our society’s commitment to pluralism from being fully realized. Nonetheless, that commitment and the progress that has been made toward it has been substantial. While economic inequality has returned to levels not seen since the Great Depression, Americans’ attitudes about race and gender have not regressed to their early twentieth-century forms. Nor are they likely to.

Forging Rivals is an attempt to explore how liberalism obtained its current contours. How did it lose its commitment to promoting some form of economic egalitarianism and gain its commitment to promoting ethnic, racial, and sexual equality? How did the ideology of Franklin Roosevelt become the ideology of Bill Clinton? Historians have not left these questions unaddressed by any means. Their explanations are multifold: it was World War II, it was anticommunism, it was the fear of mutually assured nuclear annihilation, it was the civil rights movement, it was the backlash against the civil rights movement, it was feminism, it was the backlash against feminism, it was suburbanization, it was a lack of state capacity, it was the globalization of the economy, it was the shifting salience of libertarian and egalitarian political ideologies. What these explanations are missing, however, is law.⁴ *Forging Rivals* argues that the legal regime that emanated from postwar liberalism was permeated with doctrinal and institutional contradictions. This regime attempted to implement the principles of democratic majoritarianism at the same time that it sought to protect the rights of minorities and individuals. It struggled to do so using both judicial and administrative mechanisms. These mechanisms came to interfere with one another, just as the contradictions between the law’s substantive goals came into conflict. The result was a fatal weakening of liberalism.

This is pretty abstract stuff (“doctrinal and institutional contradictions,” “democratic majoritarianism,” “minority rights,” “individual liberties,” “judicial and administrative mechanisms”), and the primary

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goal of this book is to inform its readers, not confuse or bore them. Accordingly, *Forging Rivals* illustrates these abstractions in a profoundly concrete fashion. It tells five stories, each on its face quite modest. One involves a strike at a shipyard during World War II; the second, the fight for a local civil rights ordinance; the third, a campaign to pass a statewide proposition to weaken labor unions; the fourth, a civil rights protest at a luxury hotel; and the fifth, a boycott of a department store. Each of these stories concerns the relationship between labor unions and civil rights activists in the San Francisco Bay Area during the three decades following World War II. To narrow the focus even more, I concentrate on the peculiarly legal aspects of each story. While these five narratives overlap to some degree – they share some characters, they take place in geographical proximity to each other, and they succeed one another chronologically – each is free-standing: a self-contained, hopefully entertaining, vignette.

Although my stories may seem parochial, they are not exercises in trivia or antiquarianism. It is not my intention “to look at little objects” for their own sake, but instead “to regard things on a small scale” for what they can teach us about the larger world we inhabit.⁵ *Forging Rivals* is premised on the belief that one can draw “conclusions about the world from our intimate knowledge of one small portion of it.”⁶ Indeed, the things I wish to regard in this way are not small at all. This book examines particular stories, but its subject is expansive: the fate of liberalism in the United States in the second half of the twentieth century. The stories illustrate liberalism’s potential for political reform, its limitations, its contradictions, and, ultimately, its downfall. They demonstrate that the version of liberalism that emerged from World War II contained contradictory legal assumptions, and that this fact placed postwar liberalism on a shaky foundation. When we examine the causes of liberalism’s decline, we find some of those causes in its legal architecture.

Although some might think it a fool’s errand to attempt to define something as protean as liberalism, that is one of the goals of this book and I will embark on that errand in Chapter 1. For now, however, allow me to give it a preliminary definition. Postwar liberalism was a political movement with the dual goals of promoting a modicum of economic egalitarianism within a dynamic capitalist economy, and of promoting ethnic, religious, racial, and sexual equality. Liberalism’s

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political successes created legal mechanisms that furthered these goals. Modest economic egalitarianism was accomplished through a variety of national programs. Some were created by the Roosevelt administration and its congressional allies during the New Deal (a minimum wage, old age pensions, unemployment insurance, for example). Others were created during the years following the war (the G.I. Bill, disability insurance, health insurance for the elderly and the poor, food stamps, federal aid for public education, for example). Of particular interest to us was the decision to promote economic egalitarianism by encouraging workers to organize themselves into labor unions in order to increase their ability to bargain for higher wages, a policy made manifest in the passage, in 1935, of the National Labor Relations Act (NLRA, also known as the Wagner Act).

The postwar period also saw many legal manifestations of the pluralist strand of liberalism. The most sweeping were the Civil Rights Act of 1964, which prohibited racial, religious, and sexual discrimination in employment and public accommodations, and the Voting Rights Act of 1965, which prohibited voting discrimination and authorized the federal government to guarantee impartial franchise throughout the United States. While these pieces of federal legislation, along with the judicial desegregation of public education, were the most famous legal mechanisms for promoting pluralism, they were not the only ones. Indeed, throughout the postwar period there were executive, legislative, and judicial actions aimed at combating racial and religious discrimination, particularly in employment. In 1941, the Roosevelt administration established the Committee on Fair Employment Practices to investigate employment discrimination in defense-related industries. During the 1940s and 1950s, many states and localities passed fair employment practices laws, prohibiting employment discrimination and empowering administrative agencies to stamp it out. In the 1960s these laws were supplemented by a new, more powerful mechanism for promoting equal employment opportunity. With the passage of Title VII of the Civil Rights Act of 1964, the federal judiciary became the predominant weapon used by civil rights litigators to fight employment discrimination.

Forging Rivals focuses on the interaction between these two signature legal regimes of postwar liberalism: labor law and fair employment practices law. Substantively, both regimes sought to limit

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employer discretion. The specifics of how employer discretion was to be reduced, however, were quite different and, in many ways, antithetical. Labor law, as embodied in the National Labor Relations Act, empowered unions that were supported by a majority of workers at a job site to negotiate collective bargaining agreements that limited managerial autonomy. Thus, labor law depended on an almost unalloyed form of workplace majoritarianism to set the boundaries of employer discretion. The law of employment discrimination, on the other hand, was profoundly antimajoritarian in nature. Title VII and a variety of similar state statutes directly prohibited employers from taking race, sex, religion, or national origin into account when making employment decisions. The desires of the majority of the employees in the workplace were irrelevant to the implementation of employment discrimination law.

The policy makers who designed these two systems did not intend to create regimes based on antithetical premises, but the effect of their doing so was ultimately disastrous to postwar liberalism. First of all, it placed liberalism on an unstable legal foundation. Even before World War II ended, courts, legislatures, and administrative agencies would have to reconcile these two regimes and it would quickly become apparent that doing so without weakening one regime or the other would be difficult. Second, as the postwar period wore on, the existence of these two conflicting legal regimes limited the ability of political actors, be they unions, civil rights organizations, or politicians, to find compromises on policies that regulated the workplace. Thus, the conflict between white and black workers developed into a clash between groups that believed they possessed absolute legal entitlements – the sanctity of collectively bargained seniority systems and the prohibition against racially motivated employment decisions, for example. By creating these two sets of expectations, the authors of both legal regimes not only created few incentives to compromise, they also fostered expectations within both groups that would be difficult to meet without undermining one another's expectations.

A similar problem existed with respect to the institutions that were used to enforce the rights that each regime created.⁷ Labor law was designed to resolve conflicts between employers and employees outside of the courts. Claims that employers or unions violated the substantive requirements of the NLRA were adjudicated before the

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National Labor Relations Board, a federal administrative agency. Disputes over the rights created in collective bargaining agreements were resolved privately before arbitrators selected by the parties to the contract. Labor unions and their allies zealously guarded these mechanisms from what they considered to be the malign influence of the courts. Advocates of fair employment practices, on the other hand, took a much more catholic attitude toward the institutions of the state that could help them eliminate employment discrimination. As the stories in this book reveal, the fight for equal employment opportunity was waged using every possible legal forum. Civil rights groups fought against employment discrimination in courts, in agencies, and in individual arbitrations. They challenged the ownership that the labor movement claimed over the institutions that interpreted collective bargaining agreements and the National Labor Relations Act. Even worse, from labor's perspective, was that with the passage of Title VII, advocates of equal employment opportunity made federal courts, the labor movement's traditional enemy, the primary legal mechanism for attacking employment discrimination.

Forging Rivals chronicles the development of these conflicts and the effect they had on American liberalism. The conflicts developed slowly during the first fifteen years following World War II. Between 1932 and 1950, liberalism's scope had dramatically narrowed from a chaotic mishmash of possible solutions for the problems of economic and racial inequality to a more coherent, if limited, set of policies. Economic inequality was to be addressed not by a dramatic remaking of capitalism, but by Keynesian fiscal policy with an emphasis on minimizing unemployment and increasing consumer spending.

The policies to promote racial egalitarianism were nowhere near as well formed by the end of World War II. Thus, the years immediately after the war were a period of experimentation. What segments of society should the civil rights movement focus on? The workplace? Schools? Public accommodations? The criminal justice system? Electoral politics? What institutions should it use to combat discrimination? Courts? Administrative agencies? Political parties? Labor unions? What was clear by the end of the war was that the most radical critiques of racism, those that linked America's racial hierarchy to its economic structure, had waned. Racism was increasingly seen as

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an individual pathology, a psychological sickness that could be cured through integration.⁸

It is against this baseline picture of postwar liberalism that *Forging Rivals* places its vignettes. In the 1940s and 1950s, Bay Area civil rights groups and labor unions worked together to further the goals of economic and racial egalitarianism. During World War II, an alliance of civil rights advocates and trade unionists fought discriminatory employment practices at Bay Area shipyards by using state and federal courts. After the war ended, these groups spent a decade working to secure passage of a fair employment practices ordinance for the City of San Francisco. That both campaigns were successful demonstrates that the alliance between unions and civil rights groups was a potent one. The limited effect of these victories, however, shows that unions were reluctant to give up their legal prerogatives, and that civil rights groups were reluctant to push them to do so. As a result, fair employment victories, both at the shipyards and before the San Francisco Board of Supervisors, were more symbolic than real. Without a firm vision of the doctrines necessary to achieve genuine workplace equality, civil rights groups capitulated to labor's vision of industrial democracy, a vision that worked to their considerable disadvantage.

By the late 1950s, the relationship between California civil rights organizations and labor unions had become strained. In 1958, California unions enlisted African Americans in a successful campaign to defeat an antiunion, right-to-work proposition on that year's ballot. Proponents of the proposition had specifically targeted black voters, hoping that continued union intransigence in meaningfully integrating workplaces would cause African American voters to support a law that weakened organized labor. This strategy failed, but these overtures from the antiunion right caused many civil rights leaders to ask what, exactly, their constituents got from their alliance with trade unions. A quid pro quo was in order, they said. If blacks were going to support unions, then unions should support civil rights more effectively than they had been.

As it turned out, the "quo" was not forthcoming. In 1964, a proposition overturning recently enacted fair housing legislation passed in a landslide. Civil rights groups implored labor unions for assistance in defeating it, but the union leadership's opposition was lukewarm, and white labor union members voted for it overwhelmingly. Yet, even