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Abstract
During the first half of the nineteenth-century American workers who went on strike were often charged with or indicted for criminal conspiracy. Wythe Holt attributes their convictions to the bias of the judges, who openly sided with the employers. This example of class identification and class conflict should be taken note of by non-Marxists.

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LABOUR CONSPIRACY CASES IN THE UNITED STATES, 1805-1842: BIAS AND LEGITIMATION IN COMMON LAW ADJUDICATION

BY WYTHE HOLT*

During the first half of the nineteenth-century American workers who went on strike were often charged with or indicted for criminal conspiracy. Wythe Holt attributes their convictions to the bias of the judges, who openly sided with the employers. This example of class identification and class conflict should be taken note of by non-Marxists.

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* Professor of Law, University of Alabama. This essay was given in a previous form, as a paper at the Fifth Annual North American Labor History Conference in Detroit on Oct. 13, 1983. Research was funded in part by a grant from Dean Charles W. Gamble and the University of Alabama School of Law. The author wishes to express his thanks to Fred Konefsky and James Atleson, who have generously contributed bibliographic and moral support to this project; to his colleague Tony Freyer, who made several helpful suggestions; and to Robert Glennon and especially Harry Glasbeek and Sandra vanBurkleo, all of whom gave crucial substantive and moral aid.
I. INTRODUCTION

Judges found . . . criminal conspiracy entirely too convenient an instrument for enforcing their own individual notions of justice to be lightly discarded. It enabled judges to punish by criminal process such concerted conduct as seemed to them socially oppressive or undesirable, even though the actual deeds committed constituted of themselves no crime, either by statute or by common law.¹

On November 1, 1805, the journeymen shoemakers of Philadelphia went on strike for higher wages.² Strikes were relatively novel in the United States, but work stoppages had begun to occur during the twenty-odd years since independence with a frequency which was frightening to employers and their social allies.³ What is more, the strikes were usually successful.⁴ In mid-November, at the instance of

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¹ Sayre, Criminal Conspiracy (1922), 35 Harv. L. Rev. 393 at 406.
² The record of this case [hereinafter the Philadelphia Cordwainers case] has been preserved in Commons & Gilmore, eds., 3 Documentary History of American Industrial Society (1910) at 59-248 [hereinafter Documentary History]. “Cordwainers” is an old name for certain shoemakers. Volumes 3 and 4 of the Documentary History contain the records or citations of most of the cases discussed herein (see infra Appendix). Commons and his associates did not, however, track down all of the labour conspiracy cases which occurred during the period 1805-1842. See, e.g., Wallace, Rockdale: The Growth of an American Village in the Early Industrial Revolution (1978) at 364-65, 373-74.
⁴ In Philadelphia, for example, the testimony and other evidence presented in Philadelphia Cordwainers at 93-94, 72 indicates that the journeymen shoemakers had been organized since at least 1794 and had been successful in at least three, but probably five strikes between 1794 and 1798 (the date of 1798 given in Logan’s testimony in the case appears to be in error from internal evidence and probably should read “1794”). In 1799, the employers confederated and tried to lock out the shoemakers, but the latter prevailed again in “a most obstinate turn-out [strike] on both sides . . . [which] went on for a considerable time” (id. at 113)(testimony of union president James Geoghan), as the employers were unsuccessful in forcing wages down (id. at 77, 113-15, 125). A short strike in 1804 continued the string of union victories (id. at 123-87), but the employers were able unilaterally to lower wages during the winter of 1804-1805 (id. at 121, 123-24), thus precipitating the November 1805 walkout. For a similar pattern of employee victories before an 1814 strike which led to the first labour conspiracy arrest in Pittsburgh, see Pittsburgh Cordwainers at 30-34, 63-66, 68.
the employers and much to the chagrin and surprise of the workers, eight members of the shoemakers' union were arrested and charged with the common law crime of conspiracy. The strikers capitulated within days of the arrests and, after a heated trial the succeeding March, the shoemakers were convicted.

There had been sporadic labour conspiracy arrests in the colonies and states before November 1805, and conspiracy charges were routinely brought against labour organizations in contemporary England pursuant to a series of statutes regulating labour and prices. The concept of the transformation of co-operative economic pressure by workers into a common law crime was thus in the air. Nevertheless, the indictment and conviction of working people for conspiracy seemed arbitrary, unfair and class-oriented when all they had done was to attempt to exert the same kind of collective pressure against employers that employers' organization, with their massive control of capital and

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6 [Philadelphia] Aurora [and] General Advertiser, Nov. 27 & 28, 1805. The fees of the prosecuting attorneys were paid by the complaining employers, not by the government (see Philadelphia Cordwainers at 98).

7 Id. at v-vii. See, generally, Sayre, supra note 1.

8 However, Philadelphia Cordwainers is probably the first reported case in the Anglo-American legal community of a conviction of organized workers for conspiracy at common law [see, e.g., Manchester, A Modern Legal History of England and Wales 1750-1950 (1980) at 329 (there is no reported English conviction before 1825)]. Although the workers in Philadelphia Cordwainers and the other early American cases argued strenuously that workers' economic organizations and activity did not constitute a crime at the common law (see infra notes 52-55 and accompanying text), the existence of both indictments and informations attempting to criminalize such activity during the late 1700s and dicta in judges' opinions castigating concerted activity by worker organizations as illegal [R. v. Mawbey, [1796] 6 Term Rep. 619 at 636 per Grose J.; Holdsworth, 14 A History of English Law (1938) at 447-98] indicates that such a view of the law is too narrow. The common law is what the judges and the prosecutors say it is, and they act upon what their culture, education, experience and interests dictate to them to be in the interests of their community.

A similarly narrow focus is found in a recent discussion of early labour conspiracy indictments in Toronto. Paul Craven's study of the record in Toronto during the period 1854-1872 "demonstrates that prosecutions for conspiracy were launched much more frequently in circumstances of employer-worker conflict than was formerly thought," indicating that prosecutors firmly believed labour concert to be conspiracy. However, Craven also "argues that the courts did not view workers' combinations to raise wages as criminal conspiracies" at that time [Craven, Workers' Conspiracies in Toronto, 1854-72: A Re-examination (unpub. 1983) at 1]. What, then, was "the law"? Ought we to join in Manchester's conclusion, that "[c]learly the legal position was confused," (id. at 330) or ought we to take a broader view of the nature of law? The workers in Toronto during the twenty years studied by Craven, and the workers in the United States during the period covered by my study, were not confused: they knew both that the law was against them and that, as a result, the law had an illegitimate bias [see the statement made by labour leader Frederick Robinson in 1834 at the text accompanying infra note 21; in addition, see Holt, Morton Horwitz and the Transformation of American Legal History (1982), 23 Wm. & Mary L. Rev. 663 at 707-715; Gabel, "Reification in Legal Reasoning," in Beirne & Quinney, eds., Marxism and Law (1982) 262].
the marketing process, exerted against workers. "[T]he prospect is a very sad one . . . [indeed] the name of freedom is but a shadow," the Philadelphia shoemakers proclaimed to the public, when "the association of men to regulate the price of labour is to be converted into a crime, and labeled with the same reproachful terms as a design against the freedom of the nation." Through able and sympathetic counsel the workers laid their protest before the court, arguing that enlarging common law conspiracy would import a foreign class-bias into American law, thus promoting employers' interests while ignoring those of workers. The judge brushed aside all such claims and adopted in whole the employers' argument that union activity interfered with the good of the community. It violated "the natural course of things," said Recorder Levy. "It is impossible that any man can carry on commerce in this way."

The success of the employers in obtaining the aid of the state in breaking the strike, in convicting the workers, and thus in giving themselves control over wages was to lead to a wave of similar indictments throughout the industrializing northeastern United States in the next thirty-five years. While developments in Great Britain and Canada followed somewhat different paths, until at least the 1880s charges of criminal conspiracy would prove to be the most frequently used "nonviolent" method of suppressing or curtailing labour organization in the Anglo-American world.

The focus of this essay is upon the rhetoric used by the judges to justify their actions in the earliest United States cases, from Philadelphia Cordwainers in 1806 to Commonwealth v. Hunt in 1842. Despite their advancement by competent and usually eminent counsel, the workers' arguments were disregarded in case after case by judges who sounded very much like Recorder Levy. Contrary to the notions of precedent and internal logical consistency which are supposed to be intrinsic to modern judicial discourse, and contrary to the fundamental notion of fairness at the heart of the concept of the rule of law, the judges used biased rhetoric. They "openly sided against the journeymen" in

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9 Philadelphia Aurora [and] General Advertiser, Nov. 28, 1805 (statement of James Ghegan (sic; see supra note 4), president, and George Keamer, secretary of the union, the latter of whom was one of the eight arrested and convicted).

10 Philadelphia Cordwainers at 228-29.

11 Compare Manchester, supra note 8, at 329-44 (English developments), with Craven, supra note 8, and Arthurs et al., Labour Law and Industrial Relations in Canada (2d ed. 1982) at 36-40 (Canadian developments).

12 For the United States, see Witte, Early American Labor Cases (1926), 35 Yale L. J. 825 at 828-36; Turner, The Early American Labor Conspiracy Cases: Their Place in Labor Law (1967) at 68-71.
favour of the employers.\textsuperscript{13} The Philadelphia \textit{Aurora} was outraged by the partisanship displayed against the shoemakers:

A man who did not know the purposes for which the law contemplated the appointment of a \textit{recorder} to preside in the mayor's court, would questionably have concluded that Mr. Recorder Levy had been paid by the master shoemakers for his discourse . . . — never did we hear a charge to a jury delivered in a more prejudiced and partial manner. . . .\textsuperscript{14}

Although at times the rhetoric would seem milder and more restrained, in each instance a pro-employer, pro-entrepreneurial bias was built into the language of the law used by the judges. The economic advantages which the employers possessed (and about which the workers complained) were ratified by the acceptance of entrepreneurship, profits and commercial growth as necessary, beneficent, unquestionable, normal. The appearance of justice was restored to the law of labour conspiracy by Chief Justice Shaw's sophisticated opinion on appeal in \textit{Commonwealth v. Hunt}. The workers won for the first time under a judicial opinion, but the opinion hid the same pro-entrepreneurial normality inside a much more complicated, seemingly fair set of legalistic propositions. In this way, what is bias from the standpoint of one party — the workers — becomes unrecognizable as bias from the standpoint of legal culture, since the viewpoint of the other side — the employers — has become normal, obvious, the epitome of "consensus".

Perhaps more curious than the partisanship of early nineteenth-century American judges is the blindness demonstrated by twentieth-century American legal scholars to that partisanship. Of the eight legal historians who have studied these cases in depth in this century, only one has, even hesitatingly, come to face the fact of open judicial bias.\textsuperscript{15}

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\textsuperscript{13} Saposs, \textit{supra} note 3, at 151.

\textsuperscript{14} Philadelphia \textit{Aurora} [and] \textit{General Advertiser}, March 31, 1806 (emphasis in original). William Duane, the outspoken Anglo-Irish expatriate who edited the \textit{Aurora}, espoused the cause of the workers so zealously that one of the first acts of the prosecuting counsel in \textit{Philadelphia Cordwainers} was to warn the jurors that the \textit{Aurora} "teemed with false representations and statements" about the conspiracy charges, uttering "the most insolent abuse of the parties . . . with a view (if not with declared intention), to poison the public mind, to obstruct the pure streams of justice flowing from the established courts of law" (\textit{Philadelphia Cordwainers} at 67). The existence of judicial bias so frightened the counsel for the workers that, in closing, they felt impelled to urge the jury to ignore the \textit{Aurora} and "decide upon the facts and the law" (thus attempting to establish a scapegoat) (\textit{id.} at 173).

\textsuperscript{15} Turner, \textit{supra} note 12, at 56:

Without claiming any mathematical certainty where so much information is lacking, [Turner's rough] scale [of judicial hostility to workingmen's organizations] nevertheless does a better job of explaining the \textit{differences} between the outcomes of the various conspiracy trials than alternative explanations advanced. These are hard words, for in them is the latent suggestion that judicial prejudice rather than "law" in some other sense was the key to understanding the early conspiracy cases. This extreme view does not imply motivation on the part of the judges, but it does imply that the outcome of the early conspiracy cases,
Most of these commentators have spent their efforts attempting to for-
tify and justify one or another legalistic position; that is, they have at-
ttempted to show that the “law” really did matter, and really did make
some sort of neutral, non-partisan, non-economic and non-political
sense in the early labour conspiracy cases. For the most part, they have
accepted the rhetoric of the judges as being normal. By failing to get
beneath the surface, the commentators have joined the biased position
of the judges: by playing the internal word-games of the law, they elim-
ninate the real-world truths of political, social and economic inter-rela-
tionship which comprise legal cases and problems. The confederation
of the judicial and academic ideologues may have been unwitting, but,
by promoting certain economic interests, by manufacturing or ratifying
the supposed worker conspiracies (under the cover of a presumed neu-
tral consensus), the confederation is literally a conspiracy under the
common law definition of that term. Since the effect of their actions
has been to promote the interests of a group defined by their relation to
the means of production, their supposedly neutral rhetoric is class bias.

The implications of this story for Canadian readers may seem
clear enough, since Canadian judges similarly espouse neutral consen-
sus and adherence to precedent, while using rhetoric which, perhaps
unwittingly, has been developed from the point of view of entrepre-
neurs, employers and their culture. As capitalism emerged into its en-
trepreneurial moments, the raw nature of the conflict between employ-
ers and workers created difficulties for all Anglo law and legal
functionaries similar to those first encountered in the United States
from 1800 to 1840. Moreover, the labour-conspiracy manoeuvre was

albeit usually jury trials of “peers,” [sic] were largely dependent on the views of the judges
regarding law and society and not upon some inexorable or natural law or any other “pre-
vailing” principle . . . . In my opinion, then, an examination of the cases reveals judicial
hostility as being the most powerful explanatory factor yet advanced to explain the varia-
tions among the decisions of the early conspiracy cases. The “mistaken law” thesis is more
than anything a means of saving face by the legal profession which is ultimately responsi-
ble for having permitted judges to have substituted their own opinions for predictable law
[see also, Holt, Tilt (1984), 52 Geo. Wash. L. Rev. 280 at 282-83].

Other 20th-century treatments by legal historians are, listed chronologically, as follows:
Sayre, supra note 1 (who, as the quote shows, came close at times to stating the judicial bias
thesis); Witte, supra note 12; Nelles, The First American Labor Cases (1931), 41 Yale L. J. 165
and infra note 112; Landis, “Historical Introduction,” in Cases on Labor Law (1936) 1-18, 28-36;
Teller, 1 Labor Disputes and Collective Bargaining (1940) at 31-33, 47, 62-66; Levy, The Law of
the Commonwealth and Chief Justice Shaw (1957) at 183-206; Forkosch, The Doctrine of Cri-
minal Conspiracy and Its Modern Application to Labor (1962), 40 Tex. L. Rev. 303 at 473. It must
be noted that I have been unable to obtain a copy of Quimby, The Cordwainers Protest: A Crisis
in American Labor Relations (1967), 3 Winterthur Portfolio 83, and so make no comment upon
it.

used in Canada, at a somewhat later period and somewhat more hesi-
tantly, to accomplish approximately the same purposes with approxi-
mately the same results. While the experience in Great Britain was
somewhat altered by the existence of a medieval framework of statu-
tory regulation of production, after the elimination of this framework
and the substitution of a generally-phrased and ambiguous statute in
1825 "there was a tendency to regard trade union strikes as criminal
. . . within the meaning of the 1825 Act or at common law." Economic activity by labour organizations was harassed and interdicted by
nineteenth-century English courts, under various theories including
conspiracy, similarly using class-biased rhetoric (a rhetoric spuriously
promoting "individualism"), and adding the element of severely limit-
ing or even misreading the sometimes clumsy attempts of Parliament to
give aid to the workers. The lessons of the early American cases thus
apply both generally and specifically to the Canadian experience.

II. THE WORKERS' ARGUMENTS

The judiciary in this state, and in every State where judges hold their office
during life, is the headquarters of the aristocracy . . . . What then ought we to
think of the man who, being a member of the secret trades union of the bar, calls
upon the jury to indict the members of the open Trades Union of the people, who
join not for the purpose of injuring others, but for the enjoyment of their most
inestimable right [to fix the price of their own labour], to be deprived of which
must always keep them in want, ignorance, and slavery? . . . Of all the reforms
which we have pledged ourselves to accomplish[,] the reform of the judiciary and
of the laws is the most important.

During the momentous thirty-five years from Philadelphia Cord-
wainers to Commonwealth v. Hunt, counsel for the workers often made
strong, even brilliant arguments on behalf of their clients. Just as con-
sistently (until Hunt), the courts ignored or curtly dismissed these ar-
guments. It is important to understand their substantive strength, both
to emphasize that the courts were acting one-sidedly in rejecting them

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17 See authorities cited, supra note 11.
18 Portus, The Development of Australian Trade Union Law (1958) at 34.
20 Orth, "The Law of Strikes, 1847-1871," in Guy & Beale, eds., Law and Social Change in
British History (1984) at 126-44.
21 Robinson, "An oration before the Trades' Union of Boston and Vicinity, July 4, 1834," in
Blau, ed., Social Theories of Jacksonian Democracy (1954) at 328, 329, 332. The "call upon the
jury" mentioned by Robinson was apparently one delivered by Judge Peter Oxenbridge Thacher
in an unreported 1832 case. As we shall see, infra notes 209-19 and accompanying text, Thacher
was later to exhibit the same view of the economic rights of union members when he was the trial
judge (and reporter) in Commonwealth v. Hunt (1840), Thacher 609 [hereinafter Hunt; see Ap-
pendix for citation form used herein].
and to obtain additional insight into the views the workers took of themselves and their economic conditions. While we must greatly discount for the fact that the positions taken by the workers in these arguments have been filtered through the minds and mouths of lawyers — with their lack of continuing first-hand acquaintance with workers' conditions, an equally obvious baggage of professional ideology, and their catering to the neutralizing, harmonizing conventions and decorums of legalism and of law courts\textsuperscript{22} — the workers' self-awareness was nevertheless acute, sophisticated and clear.

For the sake of making a point to the modern reader, I have attempted to split off the "purely" legal arguments made by workers' counsel from their social, political and economic arguments (grouped together below as "economic arguments"). Counsel in the cases did not so understand the nature of their task, and what we would today term legalistic argument was strewn with references to politics, economics and social position, perhaps more noticeably in the earlier cases. In many ways the separation of these two categories (as we now think of them) cripples the force and thrust of the workers' position. They were fighting against a loss of cohesion and wholeness in their world; moreover, they understood the politics innate to law, seeing no need to equivocate. Nevertheless, such a division emphasizes the clarity and strength of the workers' vision. Further, it will be seen that this attempt at separation ultimately does not "work", thus demonstrating the falseness of liberal particularism.

A. Legal Arguments

In ten of the conspiracy cases (six of which involved cordwainers and all of which were from the "industrializing" states of Pennsylvania, New York, Connecticut and Massachusetts), there is a sufficiently thorough account to discern the specific arguments made by counsel.\textsuperscript{23}

\textsuperscript{22} The sorts of economic and social arguments at the heart of the workers' cases were precisely the matters which the "harmony" demanded by court convention and decorum were designed to neutralize or ignore, so counsel for the workers constantly walked a tightrope. At times they breached the ground rules, as when a frustrated William Sampson accused the court of bias in the \textit{New York Cordwainers} case (see text accompanying infra notes 173-76).

\textsuperscript{23} The ten cases, in chronological order, were: \textit{Philadelphia Cordwainers} (1806); \textit{New York Cordwainers} (1809); \textit{Pittsburgh Cordwainers} (1815); \textit{New York Hatters} (1832); \textit{Buffalo Tailors} (1824); \textit{Philadelphia Tailors} (1827); \textit{Geneva [N.Y.] Shoemakers} (1835); \textit{Hudson [N.Y.] Shoemakers} (1836); \textit{Thompsonville [Conn.] Carpet Weavers} (1836); and the Boston shoemakers, \textit{Hunt}.

I have chosen to work with the lower court report of worker counsel Robert Rantoul's argument in \textit{Hunt}, since it is more elaborated than the appeals court report. It appears that Rantoul changed nothing of his argument upon the appeal, with one exception (see infra note 112 and accompanying text). All there is of the \textit{Buffalo Tailors} case is a newspaper report reproduced in
In two cases, the workers' counsel went to extraordinary lengths to buttress their arguments with research into medieval and early modern English statutory and case law,\textsuperscript{24} while in these and three others the arguments made on behalf of the workers were extremely thorough, ingenious and capable.\textsuperscript{25} All five of the lawyers who made these arguments — Caesar Rodney, William Sampson, Walter Forward, John W. Edmonds and Robert Rantoul — were prominent politicians or partisans on the Democratic side of the American two-party system.\textsuperscript{26} It was evident to all in the courtrooms that these "legal" problems were political in nature.

\textit{Documentary History}, and it does not give more than a terse summary of the arguments made by counsel; therefore, it is possible other legal and economic arguments were made therein.

\textsuperscript{24} See \textit{New York Cordwainers} at 257-95, 305-307, 309; \textit{Hunt} at 623-34.

\textsuperscript{25} See \textit{Philadelphia Cordwainers} at 162-206 [and at 107-113, 143-62 (remarks of workers co-counsel Walter Franklin)]; \textit{New York Cordwainers} at 256-310, 336-60, 372-74; \textit{Pittsburgh Cordwainers} at 56-71; \textit{Hudson Shoemakers} at 288-309; \textit{Hunt} at 622-34.

\textsuperscript{26} Rodney had just served a term as one of the most prominent Jeffersonian Democrats in the federal House of Representatives (1803-1805); he was to be appointed United States Attorney General later in 1806 by President Thomas Jefferson and then reappointed by President James Madison; he was President James Monroe's inaugural ambassador to Argentina; and he was to be re-elected to the House of Representatives in 1820 and elected to the United States Senate in 1822 [see Malone et al., eds., \textit{15 Dictionary of American Biography} (1935) at 82-83 (hereinafter \textit{DAB})]. Rodney was from Delaware since it proved difficult to find a lawyer of prestige in the overwhelmingly Federalist Philadelphia bar who would oppose the eminent Federalist lawyers (Jared Ingersoll, the son of a loyalist, and Joseph Hopkinson) who appeared for the prosecuting employers (see Nelles, \textit{supra} note 15, at 168-73).

Sampson was a notorious supporter of Irish freedom. He had been reared in Ireland and became a fugitive from British justice because of his acts in support of his homeland. He had for that reason been denied the right to emigrate to the United States by President John Adams and the pro-British Federalists who governed the United States from 1797-1801. Coming to New York only in 1806, Sampson soon made a name for himself as an outspoken and erudite spokesman for the radical elements of the Democratic Party [see 15 \textit{DAB} 321; also Bloomfield, \textit{American Lawyers in a Changing Society, 1776-1876} (1976) at 59-90]. Walter Forward, only 29 at the time of the Pittsburgh trial, was the fiery editor of the Democratic newspaper \textit{Tree of Liberty} as well as a rising trial lawyer; he would serve two terms as a Democratic Congressman in the 1820s before mellowing to become a founder of the Whig Party in the mid-thirties (he would later be Whig Comptroller of the Currency, Secretary of the Treasury and Ambassador to Denmark) [see 6 \textit{DAB} (1931) at 357-358].

John W. Edmonds, 37 at the time of the Hudson trial, had studied law with the prominent Democratic politician (and later President) Martin van Buren, was editor of the local Democratic newspaper, and was serving in the New York legislature as well as practicing law, later becoming a more prominent attorney in New York City. Democratic President Andrew Jackson appointed him an Indian Commissioner later in the year of the Hudson trial, and he thereafter was well-known as a reform inspector in the New York prison system, and as a trial and appellate judge (see 6 \textit{DAB} at 23-24).

Robert Rantoul, 35 at the time of the trial in \textit{Hunt}, was a Democratic member of the Massachusetts legislature and a prominent reformer; he later represented some of the Dorr rebels from Rhode Island, was federal District Attorney for Massachusetts under Democratic President James K. Polk, and had the unusual honour of being elected to both the United States Senate and to the House of Representatives in 1851, shortly before his death (see 15 \textit{DAB} at 381-82).

There were two lawyers for the workers in most of these cases, but one of the two was usually the more prominent and usually handled the brunt of the argumentation.
1. Legal Technicalities

In at least four of the cases it was argued (probably correctly on my reading of the documents) that portions of the indictments failed technically as being too vague and indefinite. "It is a rule of the common law of Pennsylvania," Rodney noted in the Philadelphia Cordwainers case, "that every indictment shall contain a certain and precise allegation," for otherwise defendants would not be informed of the charges against them; supposedly a crucial technicality in a democratic republic, and one which is the rule today. The state had alleged in the indictment that the wages desired by the shoemakers were greater than either what was usual or what was customary.

What are the usual rates and prices? [Rodney queried.] Ought they not to have been stated before we were made to answer to a criminal accusation, for not adhering to them?... If it be contended on the part of the prosecution, that the rates and prices of such work, are so fixed and settled by usage and custom, that they cannot be altered: that usage and custom ought to be clearly and explicitly proven. In civil cases, where a custom is relied upon, it must be proved or attempted to be proved. In fact, none exists. Neither custom nor law, has fixed the price of this or any other kind of work.

Similarly, in three of the cases it was forcefully argued that the prosecution had failed to prove some of its key charges.

2. Constitutional Claims

The kinds of constitutional argument heard in the United States today were by and large not made in these cases, largely because extension of the protections against state action afforded to citizens by the Bill of Rights had not yet occurred (via the passage of the Fourteenth Amendment and its painfully slow judicial enlargement in the twentieth-century).

However, some constitutional arguments were put forward. In the Philadelphia Cordwainers case, the workers ingeniously claimed that the Pennsylvania constitution's guarantee of the right to assemble

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27 Philadelphia Cordwainers at 143-44; New York Cordwainers at 301-303; Philadelphia Tailors at 216; Hunt at 634.
28 Philadelphia Cordwainers at 143-44.
29 Philadelphia Cordwainers at 144; and see New York Cordwainers at 304 (Sampson).
30 Philadelphia Cordwainers at 148; New York Cordwainers at 356; Philadelphia Tailors at 221. It was also argued in one case that the criminal law already provided a complete and adequate remedy for any threats or violence which could be proved in the activities of the workers (Philadelphia Cordwainers at 147-48).
31 Nevertheless, arguments were made that today would be recognized as involving equal protection claims about the underinclusiveness of the crime as stated in the indictments (see, e.g., Philadelphia Cordwainers at 148-49, 153-54).
peacably protected their union meetings. In two cases, counsel made separation-of-powers arguments, urging that the legislature and not the judiciary (either through juries or by the judge) had the constitutional power to regulate prices or wages. In six of the cases, mostly the later ones, counsel argued that the workers had the right to decide at what prices and for which employers they might choose to work, although in none was this claim bottomed upon a specific constitutional provision.

3. Definition of “Conspiracy”

Very similar to this latter claim of right was the argument that the crime of conspiracy had never been defined to include the combining by several persons to accomplish only what each of them had the plain right to accomplish individually. As Walter Forward put it in the <i>Pittsburgh Cordwainers</i> case:

None can deny the right of every man to affix his own price to his own labor; it is a right with which no court nor jury nor even the legislature ever dared to interfere; on what principle shall an act, lawful and innocent in one, become criminal from the concurrence of another? The defendants might, as individuals, demand what price they pleased for their work; is it a crime to agree that their prices shall be uniform?

The novelty, absurdity and broad ranging consequences of such a loose definition of conspiracy as the prosecution urged was argued in at least five of the cases. That such a loosely defined crime as labour conspiracy was no law at all, but was a discriminatory dragnet designed to catch only certain sorts of economic actors at the instance of others who were being economically hurt, was brought home clearly by the redoubtable William Sampson, arguing on behalf of the New York cordwainers:

The notion that confederating to do anything indirectly tending to impoverish a

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32 Id. at 158.
33 Id. at 201; <i>Pittsburgh Cordwainers</i> at 76.
34 <i>New York Cordwainers</i> at 261, 278-79, 293, 299, 304; <i>Pittsburgh Cordwainers</i> at 64, 74; <i>Philadelphia Tailors</i> at 216; <i>Geneva Shoemakers</i> at 14; <i>Thompsonville Carpet Weavers</i> at 112; <i>Hunt</i> at 634.
35 <i>Pittsburgh Cordwainers</i> at 56.
36 Id. at 56, 70; <i>Philadelphia Cordwainers</i> at 110, 145, 155-56, 181-85; <i>New York Cordwainers</i> at 295-301; <i>Hudson Cordwainers</i> at 292; <i>Hunt</i> at 619, 634. Two closely related arguments were also made often: first, that all indictments for conspiracy at common law had alleged some element of fraud, deceit or wrongdoing on the part of the defendants, whereas none was alleged in the instant case (<i>New York Cordwainers</i> at 288-89, 345; <i>Pittsburgh Cordwainers</i> at 57-58; <i>Hunt</i> at 617, 633-34); and secondly, that all definitions of conspiracy at common law included either illegal ends or illegal means, whereas no such illegality was or could be charged in the instant case (<i>Philadelphia Tailors</i> at 200; <i>Thompsonville Carpet Weavers</i> at 111; <i>Geneva Shoemakers</i> at 14; <i>Hunt</i> at 617).
third person, is indictable at common law, is so puerile a mistake, that I feel distressed to be under the necessity of exposing it. Surely, if men were indicted for conspiring to build a steam boat, which would indirectly impoverish some third person, for instance, the master of a passage vessel, the absurdity would be very glaring. . . . Shall all others, except only the industrious mechanic, be allowed to meet and plot; merchants to determine their prices current, politicians to electioneer, sportsmen for horseracing and games, ladies and gentlemen for balls, parties, and banquets; and yet these poor men be indicted for combining against starvation?37

This chimera-like legal definition of conspiracy, as applied to the workers, ought to have been a very disturbing legal proposition to a court genuinely interested in upholding democratic life under the rule of law. I shall show that it was the problem of legitimacy, and not that of the applicability of the common law crime of conspiracy to American workers, which proved to be the crux of the appellate decision in Commonwealth v. Hunt.

4. Applicability of Conspiracy

Counsel for the workers placed their primary hope in an interlocking set of four arguments which collectively made the point that, however criminal conspiracy might be defined, no such crime was applicable per se to labour organizations in their jurisdiction. First, it was argued, the legislature had not enacted a statutory crime of conspiracy.38 (In New York, which did have such a statute, it was argued that the statute did not by its terms extend to workers and was not intended to extend so far.39) Second, counsel urged that the several British statutes making labour organizations per se criminal conspiracies had never been adopted in any of the colonies or the United States, and that such statutes did not apply to American situations after the declaration of independence unless specifically accepted by a post-Revolutionary legislature.40

Third, in case after case, counsel argued that, apart from the statutes and prosecutions founded upon them, the common law of England had never made a conspiracy of workers to raise wages a criminal of-

37 New York Cordwainers at 279, 296, 301. Edmonds argued similarly: “It must be a conspiracy then for two or more to form a partnership, though the end be to make money and the means be a union of their funds or their labor!” (see Hudson Shoemakers at 293).

38 See Philadelphia Cordwainers at 159, 192, 196; New York Cordwainers at 257; Buffalo Tailors at 94; Hudson Shoemakers at 308; Hunt at 617, 622.

39 See New York Cordwainers at 257-60; Geneva Shoemakers at 13-14; Hudson Shoemakers at 304-306.

40 Philadelphia Cordwainers at 192; New York Cordwainers at 257, 279, 295; Pittsburgh Cordwainers at 76; Buffalo Tailors at 94; Hunt at 623.
They argued that every reported English case which antedated 1776 (except one) and which held labourers to the doctrine of conspiracy had either been founded upon a statute or blindly followed the aberrational case. That single case, the 1721 *Journeymen Tailors of Cambridge* prosecution — which did contain expansive statements in favour of a *per se* common law doctrine — was found in a report notorious for its errors, was quite confused in its reasoning and was essentially *dictum* since an applicable statute upon which the prosecution could be viewed as founded (and which was mentioned in the case) had been enacted the previous year. A 1716 treatise which seemed to make the same point as the 1721 case was discounted on the legal ground that the words “wrongfully” and “indirectly” used by its author as a part of his definition of labour conspiracy eliminated any *per se* quality from that definition by requiring a court to find either illegal ends or means before conviction could be entered.

More expansive and less legal was the closely related fourth point of the workers: even conceding that at English common law a workers’ confederation was a conspiracy *per se*, that portion of the English common law had never been adopted in America and it should not be adopted. Counsel in the first few American conspiracy cases noted that there was no evidence of American labour conspiracy prosecutions prior to 1805. Indeed, as Rodney adroitly pointed out, the prosecution’s own evidence adduced in the *Philadelphia Cordwainers* case showed that there had been several previous combinations of both master and journeymen shoemakers in Philadelphia during the previous fifteen years, as well as strikes in other trades, but not a single instance of indictment for criminal conspiracy could be demonstrated.

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41 *Philadelphia Cordwainers* at 156, 186-88, 190-96, 200; *New York Cordwainers* at 257, 260-72, 305; *Pittsburgh Cordwainers* at 62; *Buffalo Tailors* at 94; *Thompsonville Carpet Weavers* at 111; *Hunt* at 623-33. Authority today appears to agree with the legal point made by the workers (see, e.g., Manchester, *supra* note 11, at 331-33), but the argument was then and remains today excessively legalistic (see *supra* note 8).

42 *R. v. Journeymen Tailors of Cambridge* (1721), 8 Mod. 10 (K.B.).

43 See *Philadelphia Cordwainers* at 192-95; *Pittsburgh Cordwainers* at 59; *Hudson Shoemakers* at 299.

44 *Philadelphia Cordwainers* at 196; *New York Cordwainers* at 281-83; *Hunt* at 628.

45 *Philadelphia Cordwainers* at 156-59, 188-90; *New York Cordwainers* at 257, 272-76, 279, 307-309; *Pittsburgh Cordwainers* at 63-64; *Hunt* at 619, 622.

46 Were the prosecuting officers of the state asleep all this time? Have they and the grand jury been slumbering at their posts, and suffered a flagitious, a notorious offence to be repeated with impunity, and to continue its operation without notice or check? . . . If this had been an offence against the law of the land, it could not have escaped notice till this time. . . .

(Philadelphia Cordwainers at 164-65). There *had* been a few conspiracy indictments, but no
Even more forcefully, counsel for the workers argued that the English common law of *per se* labour conspiracy had no place in the democratic freedom of America. "The English law, as to acts in restraint of trade, is generally local in nature, and not suited to our condition," Rantoul declaimed to the Massachusetts courts. Walter Forward elaborated the point:

These Statutes with many others . . . develop in the clearest light, the absurd and tyrannical policy of the British government, in relation to the poor and labouring classes of the community. It is a policy, incompatible with the existence of freedom, and prostrates every right which distinguishes the citizen from the slave. . . . Hence, the enormous inequality in the distribution of property in Great Britain, presenting the perpetual and disgusting contrast of equipage and rags, of luxury and starvation. I ask whether you are prepared to introduce the policy of the British government into Pennsylvania!48

Professor Sayre, in 1922, attempted to demonstrate that the workers' conspiracy arguments were essentially correct.49 Several years later, Professor Landis in an equally erudite passage attempted to establish the notion that labour conspiracy had long been a common law crime in England because "common law" meant the policy of the government (expressed in its statutes as well as its cases).50 Both authors missed the workers' point since both legalistically focused upon the third argument of the workers while ignoring the more rounded, policy-centred, crucial fourth point. If the common law grows — that is, if

known convictions (see *supra* note 6 and accompanying text) and no instance was reported or notorious.

47 *Hunt* at 623.
48 *Pittsburgh Cordwainers* at 62; see also *New York Cordwainers* at 261-63. Interestingly, the blunt rhetorical force of arguments used by counsel in contrasting the difference between the unequal British conditions of oppression and the supposed equality of American conditions had considerably softened by the time of the *Hudson Shoemakers* case in 1836. In that case, Edmonds made a most vigorous and forceful argument (see text accompanying *infra* notes 97, 99, 102, 108). Although the general policy of British law was to oppress the working classes (as had been claimed by Forward), in Edmonds' discourse, he seemed to argue there was a peculiar policy of oppression which specifically arose from disorder surrounding the accession of a foreigner, George I, when it was claimed people were "compelled . . . to surrender freedom for safety" [*Hudson Shoemakers* at 296-98 (quote is from 298), 303]. Rantoul, in *Hunt*, despite the power of his words (see text accompanying *supra* note 47), undermined the argument by urging that the oppressive labour conspiracy statutes were essentially feudal in nature, not modern, and that "every-one of these statutes had a local and temporary cause" (see *Hunt* at 629), implying that the social reasons for labour oppression had disappeared in England too. Even as fierce an opponent of the common law as Rantoul (either by the ideology then acceptable in the courtroom or by the strictures of an early 19th-century American upbringing, which had emphasized equality of opportunity to such a degree that Rantoul was unable to perceive the history, permanence and widespread diffusion of the policy of oppression of workers) was forced to flatten and enervate the basic "discriminatory-British-conditions-don't-apply-here" argument of the workers so as to make it almost unrecognizable. It was now much more difficult even to argue class bias openly.

50 Landis, *supra* note 18, at 3-13; see also George, *The Combination Laws Reconsidered* (1927), 1 Econ. Hist. 214.
common law courts are free to accept or reject new common law theories of liability based upon their judicious estimation of the social worth of those theories\textsuperscript{51} — then the workers' legal position rested on the applicability of the prosecution's \textit{per se} labour conspiracy theory to the merits of the "incompatible-with-American-egalitarian-democratic-conditions" class-oriented policy arguments of their counsel. In the Jacksonian Age of the Common Man, the courts of the United States rejected those policy arguments. Apparently, what the workers called the oppressive policy of the British common law was quite compatible with local conditions. The issue of class bias was clearly joined. Whether or not the courts "consciously" accepted the workers' argument that conspiracy only furthered employer oppression,\textsuperscript{52} their adoption of a \textit{per se} labour conspiracy theory openly "subserve[d] the interest of the capitalist and employer."\textsuperscript{63}

B. Economic Arguments

1. The Historical Condition of the Workers

The social, political and economic arguments made by the workers derived more or less directly from their increasingly deteriorating socio-economic situation.\textsuperscript{64} Most of those indicted for criminal conspiracy in

\textsuperscript{51} "It is enough for me that our judges are free to determine what parts of the common law shall be adopted, and what rejected" [\textit{New York Cordwainers} at 274 (Sampson)].

\textsuperscript{62} See infra note 268.

\textsuperscript{63} \textit{Pittsburgh Cordwainers} at 62.

this period were journeymen artisans in the shoemaking and clothemaking trades in which traditions of craft and skill existed, ragged and incomplete compared to those in Europe, but craft traditions nevertheless. Apparel-makers, traditionally literate, politically conscious and politically active but among the lowest-ranking of artisans on both social and economic scales, were also among the first to organize themselves into protective and benevolent associations (which soon became unions) and among the first and foremost to support an increase in political power for the lower sort during the Revolutionary era.56

Several factors brought about wrenching and revolutionary changes in the social organization of these and other sectors of work: urbanization and the consequent disappearance of most home industry in the cities; an expanding if relatively inflexible local market; the burgeoning of an Atlantic market economy with the advent of its concomitants, the wage relationship and periodic downsides or depressions; the in-migration of a frustrated and marginalized farm populace; emigration from overseas; the periodic cut-off of European supply to consumers in the western and southern United States during periods of international tension or war followed by reintroduction of vigorous European competition; and the widespread dissemination of an ethos of proprietary and entrepreneurial commercialization.56

Within these and other trades, master and journeyman had formerly worked and lived together in relatively communal and mutual harmony, producing what was needed on what we would think of as an erratic work schedule for a known and proximate market. This lifestyle began to change drastically, first in the eastern American seaboard commercial entrepôts about the time of the Revolution and, then, spreading throughout the industrializing northeast by the onslaught of

For an engaging and penetrating radical macroeconomic historical treatment, see Gordon et al., Segmented Work, Divided Workers: The Historical Transformation of Labor in the United States (1982) esp. at 54-78. These authors, however, place too little emphasis on ideology and consequently adopt an overly economic definition of "capitalism". Compare id. at 55-56 ("capitalism was a revolution yet to come" before the 1820s) with, e.g., Holt, supra note 8, at 704-707 ("capitalism... was the dominant mode of socio-political relations long before 1800") and Nash, supra note 3, at 161-62 ("by the late seventeenth century... political economists were writing about the emerging market economy in which individuals responded to economic opportunities as private persons and operated outside of traditional moral restraints").

56 Smith, supra note 54; Nash, supra note 6, at 324, 369.

the Civil War in 1860. Masters who rose on the social ladder became merchants and employers, cutting themselves from the life of work and from the workers; some masters and many jours\(^7\) descended, being transformed into outworkers, factory hands or sweatshop workers.\(^8\)

Moreover, what had largely been an integrated, holistic and symbiotic work process jointly engaged in by master and journeyman was stratified relatively suddenly and grindingly. The rising master arrogated to himself control of the production process — overall direction, design and marketing became “his”. The tasks of cutting, piecing and sewing were divided and parcelled out to different tiers of workers. Children and women were brought from outside the craft and thrust into those newly excised and truncated tasks, which required the lowest skills of the trade. Strangers without skill (such as free blacks, rural in-migrants and foreign immigrants) were also introduced by employers into the production process, largely in competition with jours, who consequently believed that the newcomers were damaging the reputation of their craft with shoddy work as well as taking bread from their mouths.\(^9\)

Masters began to emphasize quantity and supervisory control in place of quality and co-operation. Labour was slowly being transformed from a “lifestyle” into a “cost”. Real wages began to fall for many artisans. Journeymen began to come face-to-face with a routine and regularized work life of subordination, which offered little hope of advancement to the status of master, and which was without the prospect of building up a “competency” (savings) for their old age. Not only had work in the stitching trades become segmented, with task-confined workers massed together and sometimes away from the presence of their employer, but by the end of the period, journeymen no longer lived with or close by masters: one class had become two, mutual interests had been sundered, lifestyles had diverged. Even as early as 1789, in the great parade of the citizenry of Philadelphia to celebrate the new

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\(^7\) “Jours” is short for “journeymen”. Originally, “journeyman” was the middle stage in the medieval artisan hierarchy of skill levels (preceded by apprenticeship and followed, if one were good enough, by “master”) and the term had little or nothing to do with the way in which work or access to markets was organized. After the transformation of their lifestyles, “jours” meant those artisans to whom employers (many perhaps still called “masters”) paid wages.

\(^8\) Bruce Laurie provides a succinct and useful distinction between “outworkers”, factory hands and “sweaters” — and gives other definitions necessary to obtain a better understanding of the work situation of artisans and mechanics between 1790 and 1860 (see Laurie, supra note 54, at 15-27; note particularly the conclusions that can be drawn about workers in the “clothing” and “shoes” categories in Tables 1, 2 & 3, id. at 14, 16, 17).

\(^9\) Thus, the sexism, racism and ethnocentrism which characterized the labour movement in general in this period had a socio-economic component.
Constitution, journeymen marched separately from masters in two trades. The rapid development of distant markets, as was made clear by the testimony of the employer John Bedford in the 1806 Philadelphia Cordwainers case, exacerbated and accelerated the processes of industrialization, worker impoverishment, labour division and class division.

While complete data is difficult to discover, it is likely that urban shoemakers and clothesmakers in the northeastern United States participated to some extent in the increased commercial prosperity of the middle and late 1790s. Emerging workers at that time at least seemed to have an economic strength roughly equal to that of their emerging bosses; the Philadelphia journeymen cordwainers were quickly victorious in several 1790s strikes for higher wages and, in a more lengthy and bitter dispute in 1799, they were able to prevent the masters from combining to reduce wages. However, these successes did not mean that the jours were obtaining a "fair share". Relative equality of strength in struggle did not mean something approaching relative equality of per capita wealth among masters and jours, nor that wealth differentials were stable or narrowing, nor that victory brought even minimal ease, much less plenty.

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60 Foner, supra note 54, at 280n.

61 Bedford's shop was boycotted by the journeyman cordwainers union long after the termination of the strike/lockout of 1799 (see supra note 4), because Bedford refused to fire his two journeymen who had "scabbed". Bedford's workforce was thereby decimated, but with that peculiar stubbornness of well-off anti-union people he continued to employ the two scabs for at least eighteen months, despite being forced to move his shop to Trenton temporarily. Bedford testified: [T]hey scabbed [boycotted] my shop . . . . From having twenty-four journeymen, I was now reduced to four or five . . . . Some time afterward, my little capital being laid out in stock, and no way of vending it at home, an idea struck me of going to the southward and endeavour there to force [sic] a sale. I went to Charleston at the risque of my life . . . . I put my articles at an extremely low price, by which I had but little profit, in order to induce people to deal with me. I got two customers at Charleston, from there I went to Norfolk, Petersburg, Richmond, and Alexandria; and in all of those places I obtained customers . . . . Business became a little brisk, and the journeymen turned out [struck] again; on which account I was forced to raise the price of the work I had stipulated to perform. I did not want to make any profit on the rise, but yet I was obliged to raise my price to the same extent: by this I lost two customers . . . . [Philadelphia Cordwainers at 100-101; see also id. at 73-81, 94-95 (testimony of the two scabbing journeymen)]. Laurie states that the second job action against Bedford (the "turn out") occurred because the journeymen were not invited to share wage increases in the profit derived from the new southern trade (see Laurie, supra note 54, at 6-7).

62 For the evidence of the increased prosperity, see, e.g., Gordon et al., supra note 54, at 49. "[C]ordwainers' actual and real wages [in Philadelphia] . . . more than doubled in 1793 and remained relatively high [until at least 1800]" (Smith, supra note 54, at 194).

63 See supra note 4.

64 Prices had also begun to rise, and one master testified that, on each pair of "fancy boots", he received an amount of profit equal to or greater than the wages he gave to the jour to who made them. Philadelphia Cordwainers at 125-26.
"Late colonial Philadelphia was hardly an egalitarian paradise," Bruce Laurie has concluded.65 "Unskilled workers and journeymen in the 'lesser' crafts in Philadelphia often encountered very serious difficulties in meeting their families' basic needs," echoes Billy G. Smith, whose careful study focused explicitly upon cordwainers, among other crafts.66 "Only in the best of times, [such as] the late 1790s, could male heads of [cordwainer] household[s] . . . earn enough money to pay for basic necessities." As with the official poverty statistics of today, Smith's calculations are based upon a minimal, spartan standard of living. Many journeys lived on the brink of economic disaster, even in the relatively prosperous late 1790s.67

Hard-pressed families ate more grains, doubled or tripled up in houses, went without essential clothing, shivered through winters with insufficient fuel, forewent smallpox inoculation but were unable to flee the city in [the frequent] times of epidemic. . . . The specter of poverty and deprivation haunted their lives. . . . If this were the best poor man's country for urban laboring people at the time (and that remains a disputed question), it still was a world requiring constant vigilance and struggle to survive.68

Since "master cordwainers . . . enjoyed a more comfortable existence" thanks to the upswing of the 1790s,69 the journeymen vigilantly used their combined economic strength to attempt to re-allocate some of that prosperity to themselves. At least in the beginning of their struggle with the masters, they held their own.

Around the turn of the century (if, again, we can take the story of the Philadelphia cordwainers as indicating a pattern in at least these two apparel-producing industries), economic conditions became considerably worse for workers. The journeymen shoemakers of Philadelphia struck only once between 1799 and 1805, and they waited more than nine months to retaliate after the masters rolled wages back during the winter of 1804-1805 (in contrast to the quick job action taken against the masters' rollback-and-lockout of 1799).70 Even then, the decision to strike made in October 1805 was uncharacteristically opposed by a substantial minority of the membership, despite the fact that the majority proposed to ask only for the wages currently being paid in Balti-

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66 Smith, supra note 54, at 201.
67 Id.
68 Id. at 201, 202. For the extraordinary unhealthiness of Philadelphia even by 18th century standards, see Smith, Death and Life in a Colonial Immigrant City: A Demographic Analysis of Philadelphia (1977), 37 J. Econ. Hist. 863 at 870-80, 887-89.
69 Smith, supra note 54, at 201.
70 See supra note 4.
more and New York; and upon the strike vote a large portion of the dissenters left the union.\(^7^1\) While the economic position of the jours was never solid, it had apparently rapidly weakened, probably because of the many new distant markets, and perhaps because of the beginning of the temporary eclipse of Philadelphia in favour of Baltimore and New York as commercial and entrepreneurial centres. Also, masters had greater strength.

Capitalist producers . . . had certain inherent advantages. Unlike the conservative, slow-to-change craftsmen, the new capitalists were intent upon exploiting the possibilities opened up by social change. . . . [I]n shoemaking, it was the capitalists who saw the possibilities in producing heavy boots for the western miners and cheaper shoes for the Southern market, and their control over these markets gave them much leverage to force journeymen shoemakers to accept their terms.\(^7^2\)

Following the loss of their bitter November 1805 strike, the cordwainer jours angrily retaliated by establishing co-operative shoemaking arrangements in an attempt to compete with their "masters".\(^7^3\) This venture failed,\(^7^4\) unfortunately drowned without another trace in the current of capitalist development. Thirty years later, in 1835, shoemaking conditions in Philadelphia were pathetic, wages had been decimated, hours of work had increased, factory conditions under the control of the "cunning men of the East" (merchant-capitalists) had emerged, and production had become geared to cheap work, stockpiling and complete employer control.\(^7^5\) Union organization, so strong in the 1794-1806 period, had apparently disappeared at some point in the interim.

With the increasing divorce of skilled workers from the creative and co-operative control of their whole endeavour, and with the contin-

\(^7^1\) In a series of close votes in Oct. 1805, the Philadelphia Cordwainers were determined not only to get back the substantial 12\(\frac{1}{2}\) per pair of shoes they had lost the previous winter, but also to have a general advance of wages up to the scale then prevailing in Baltimore and New York. Apparently about forty dissenting members left the union after the vote to strike (Philadelphia Cordwainers at 81, 82, 90, 117, 122, 124, 129, 138).

\(^7^2\) Gordon et al., supra note 54, at 57-58; see also supra note 61.

\(^7^3\) The workers founded the co-operative (the second workers' co-operative in Philadelphia) after the unprecedented trial which issued in their conviction, as well as [because of] the unfortunate circumstances in which they found themselves after so long a contest. . . . They have been compelled to resort to this undertaking as the only expedient left them to maintain themselves and families from the most abject dependence. (Philadelphia Aurora [and] General Advertiser, Apr. 28, 1806; see Saposs, supra note 3, at 127-30). Rodney (in argument) had hinted that such a venture might ensue if the workers were convicted (Philadelphia Cordwainers at 199).

\(^7^4\) For its failure, see Philadelphia Pennsylvanian, Apr. 4, 1835; Commons, "Introduction to Volumes III and IV," in 3 Documentary History at 40.

\(^7^5\) Id. at 39-41 (the quote is from Philadelphia Pennsylvanian, Apr. 4, 1835).
uring destruction of their artisan way of life, there came a distinct downturn in an already insecure economic position. This contrasted harshly with the huge fortunes and lavish way of life which many in the commercial, professional, financial and manufacturing elite were able to amass and display. Once proud and quasi-independent journeymen cordwainers and tailors had been steamrolled into wage-earners, who had control over nothing but the sale of their own labour. The introduction of advanced technology — the sewing machine — into these trades in the early 1850s merely completed this devastating conversion of craftsmen into cogs of an industrial machine.

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7 See Ware, The Industrial Worker 1840-1860 (1924) at 26-55 (“The Degradation of the Worker”); Gordon et al., supra note 54, at 66: “Prices” — that is to say, the craftsman's piece rate — fell in real terms. Pressure to increase output and [to] cut corners in production increased. The independent producers and small shops had difficulty keeping afloat. Pauperism spread, and the specter of poverty confronted tradesmen who lost their means of support.

Further, consider Ken Foster's comment on the theoretical question of the appropriate label to place upon the sale of the workers' labour into an employment bondage (in the guise of an employment contract):

The “employment contract” in the nineteenth century did not refer to a specific series of contractual relationships nor to a set of known principles which governed the mutual rights and liabilities of the parties to the contract. It was a fiction, in its modern sense, which when used, and distinguished from other contracts by the element of control of a worker by an employer, was used to determine external rights and duties of third parties and not of the contracting parties themselves. . . . The internal relationship between employer and worker was governed by a concept of “service”, sometimes specifically personal service, which denoted a relationship freely entered into by contractual agreement but which thereafter was a unilateral and hierarchical relation . . . .

“Served” is a passive verb emphasizing the workers' action in offering themselves as being of use to the employer. Additionally, “service” . . . implies the acceptance of authority and discipline together with a degree of self-sacrifice or recognition of higher values rather than a narrow self-interested instrumentalism. . . .

[T]he obligations of the worker are open-ended and diffuse. It is not possible usually to define with any specificity the nature of the tasks to be performed, the level of the intensity of the work, nor the general adequacy of the worker with the degree of precision that Victorian judges would have required in order to translate the worker's general diffuse obligations into specific contractual terms . . . . It is undoubtedly accepted that a worker is under the control and command of the employer, and judges have always been prepared to imply a duty on the worker to obey orders.

["The Legal Form of Work in the Nineteenth Century: The Myth of Contract?" (unpub. paper delivered at the Conference on Law, Labour and Crime held at the University of Warwick [U.K.], Sept. 1983)]. Foster notes that “employment contracts” in the nineteenth-century contradicted each of three fundamental attributes of classically-defined contract law: “a voluntary and mutual acceptance of obligations by two parties”; “reciprocity”; and the notion that “contractual obligations are specified and limited by the agreement”. Foster concludes that English courts’ “continuing . . . use of the term 'contract of service' . . . emphasized the voluntary acceptance by workers of a subordinate role within an unquestioned system of discipline and authority in industry” ([id.]). Of course, such acceptance was “voluntary” only in the sense that workers had the option to starve, if they chose not to accept one or another such “contract” or if they chose not to be docile and inert after such “acceptance".
The journeymen, of course, did not accept such a revolution in their lives meekly and easily. In the 1770s and 1780s, wages, conditions of work and relations with masters were added to the other social problems they undertook to deal with through mutual benefit societies (called "unions" herein). Beginning in the 1790s, strikes, boycotts and other job actions became more frequent as skilled labour was still scarce. In the latter part of the period under consideration, labour organization had periods of dramatic growth, and one of the cycles culminated in the National Trades Union Society of the 1830s which figured prominently in three of the conspiracy cases.78

2. Ideological Divisions Among the Workers

Worker rhetoric protesting the changes in their condition contained mixed and somewhat contradictory strains, reflecting the contradictory attitudes, history and conditions of these working people. At the time of the Revolution, artisan ideology had been an amalgam of republicanism, laissez-faire liberalism and radical millenarism.79

Labour historians Paul Faler, Alan Dawley and Bruce Laurie perceive a rough division of urban American skilled workers during the 1820s and for several decades thereafter into three types: "traditionalists", who tended to accept hierarchy but to reject laissez-faire liberalism and to whom the erratic and marginal but communal craft culture of their recent past now seemed like a golden age; "loyalists" or "revivalists", who accepted and internalized the new capitalist work ethic with its promise of upward mobility, but who would fight for their share of the pie; and "rebels" or "radicals" who wished to apply communalistic solutions to many of the hierarchical problems produced by what we now know to be the advent of entrepreneurial and industrial capitalism but who, as children of the Enlightenment, accepted a rationalist outlook which approved of technological development.80 Not yet socialists,

these [radical] dissenters were not neophytic factory hands or proletarians, but veteran artisans who shaped an independent culture in the autonomy accompany-

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78 See Hudson Shoemakers at 285-86; New York Tailors at 317, 319, 330-32; Philadelphia Plasterers at 339-40 (all decided in 1836); and infra notes 168, 172, 193, 200, 207 and accompanying text. On the trade union movement of the 1830s, see generally Mittelman, Trade Unionism (1833-1839), in Commons et al., supra note 3, at 333-484; Laurie, supra note 54, at 85-104.


80 Dawley & Faler, "Workingclass Culture and Politics in the Industrial Revolution: Sources of Loyalism and Rebellion," in American Workingclass Culture, supra note 54, at 61-75; Laurie, supra note 54, at 33-83 et passim.
ing handicraft production. Nor were they upwardly mobile workers or "expectant capitalists" clamoring for greater opportunity in the name of radicalism. . . . They aimed for a competency, and seemed less riled over narrowing opportunities than over growing inequality and the steady decrement of artisanship and independence.\footnote{1}

The radical workers were ardent republicans, full of a sense of dignity and relatively well-educated. They were "repelled by the horrors of poverty and the intellectual deadening produced by overwork . . . [and] endorsed any form of collective action that might alleviate these conditions."\footnote{2}

As rationalists and practitioners of a discrete way of life, they recognized the cultural side of industrialism and distinguished, but did not separate, the cultural and the material. Their touchstones were economic and cultural, and they employed both in putting forward a holistic critique of emerging industrial society.\footnote{3}

They took this view since their whole of working life, and not merely the terms and conditions of work, was being disrupted and revolutionized.\footnote{4}

Radicals had no qualm about private property, but they did object to excessive accumulation on the part of individuals and corporate entities and to the concentration of power at the top of society; they despised economic individualism and proposed to redress the growing maldistribution of wealth and power through collective worker action at the polls and at workplaces.\footnote{5}

By and large it was the rhetoric and position of the radicals who were the leaders of the unions and generally the force behind organized protest and job actions until the 1840s, which was advanced before the courts.

3. Themes in the Workers' Arguments

Loss of worker independence, the draining of self-esteem, the lowering of communal estimation of their worth, and a refusal to be subjected to the arbitrary control of their bosses were the primary themes of the workers' counsel throughout the labour conspiracy cases. The masters "are grinding down the men whom they employ, to little more than nothing, and pocketing their services," counsel for the Philade-
phia Tailors argued.\textsuperscript{86}

The master assumed the right of limiting those whom they employed, at all times, and under all circumstances... without consulting the interests, or wishes of the workmen, or permitting them to have a voice upon the question. To this state of slavish subordination, the journeymen refused to submit. They conceived that every man being the sole owner, and master of his own goods and labour, had a right to affix the price of them... \textsuperscript{87}

"[T]he masters here," said Sampson, "seem to think the journeyman bound to serve them through life, for whatever wages they choose to grant them... Who are the defendants' masters?... [The defendants] are poor, honest workingmen, it is true, but not slaves."\textsuperscript{88} Rodney, speaking to the Philadelphia Cordwainers jury, emphasized through hyperbole the degrading degree of control over their whole lives which the workers encountered and abhorred in the new relations of work:

The masters, I suppose, will then select at pleasure the houses in which we must board... They may fix our diet... If they can determine the quality, they can determine the quantity and I expect we shall have our food weighed out to us like a soldier's rations... \textsuperscript{89}

At the core of the workers’ position in the cases, just as it was the core of radical workers’ thought,\textsuperscript{90} was the labour theory of value. They believed that the hard work of those who toiled with their hands produced all the value in the world, and that employers illicitly pried some of that value away from workers by arrogating the right to establish wages without worker concurrence. "[T]he principle is undeniable, that labour constitutes the real wealth of a country," said Rodney.\textsuperscript{91} The workers’ consternation was heightened by their republican ideology: they supposedly lived in a country “founded on the equal rights of men,”\textsuperscript{92} where a golden age which recognized true worth was finally not only possible but actually in existence. Yet, the oppressive and avaricious policies of the employers, which tended to intrude dangerously into and to destroy that egalitarian scheme of things, were about to gain acceptance in the law. The masters, they were certain, wanted to

\textsuperscript{86} Philadelphia Tailors at 204.
\textsuperscript{87} Philadelphia Cordwainers at 111 (Franklin) (reporter’s paragraphing disregarded).
\textsuperscript{88} New York Cordwainers at 293, 310.
\textsuperscript{89} Philadelphia Cordwainers at 197.
\textsuperscript{90} See Laurie, supra note 54, at 76.
\textsuperscript{91} Philadelphia Cordwainers at 180; see also Pittsburgh Cordwainers at 62 (Forward), quoted in text accompanying infra note 106.
\textsuperscript{92} New York Cordwainers at 279 (Sampson).
introduce British tyrannies of class inequality.\textsuperscript{93} As the country gained independence and freedom, workers paradoxically lost theirs.

The primary themes did not emerge slowly over the course of the period under study; rather, they were a constant for the workers, against which the revolutionary "progress" of the age could be sadly judged. They were set forth in the "vindication", which the Philadelphia Journeymans' Cordwainers Society published during their strike in November 1805,\textsuperscript{94} and the same chords were struck by labour leader Frederick Robinson in his Independence Day address to the workers of Boston in 1834.\textsuperscript{95}

The concomitant rise in employer wealth and worker poverty, and the disparity of power thereby produced, was another theme of the workers' counsel, but here a tension emerged in their analysis. To what extent were these wealth and power differentials curable, to what extent were they permanent in the existing economic system? To what extent were they recent and sudden developments, perhaps British imports, to what extent were they the extrusions of tendencies embedded in the American economic heritage of \textit{laissez-faire} capitalism itself?

On the one hand, workers' counsel took the position that an equitable balance between worker and employer could be achieved if, and only if, judges, juries and the law were fair, refusing to side with one party in a controversy. "Leave the regulation of these things to the open market," Rodney pleaded in 1806; "there every article, like water, acquires its natural level."\textsuperscript{98} A ruling in favour of the defendants, their counsel Edmonds urged upon a jury in 1836, "will leave trade to regulate itself by the mutual freedom from partial restraints of both employer and the workmen."\textsuperscript{97} Rantoul's co-counsel noted that "it has

\begin{itemize}
\item \textsuperscript{93} \textit{Pittsburgh Cordwainers} at 62 (Forward), quoted in text accompanying \textit{supra} note 50, and \textit{infra} note 107.
\item \textsuperscript{94} The Master Shoemakers, as they are called after the slavish style of Europe, but who are only the retailers of our labor and who in truth live upon the work of our hands, are generally men of large property, to whom the suspension of business, though it is a loss, is not so great a loss as the total suspension of the means of subsistence, is to us who obtain our income from week to week. These masters . . . who would be masters and tyrants if they could . . . suppose that they have a right to limit us at all times, and whatever may be the misfortune of society, the changes in the value of necessaries, the increase or decrease of trade, they think they have the right to determine for us the value of our labor; that we have no right to determine ourselves, what we will or what we will not take in exchange for our labor . . . .
\end{itemize}
been the custom of the people of this country to combine for any and every purpose not criminal or forbidden by law,”

and Edmonds pointed out that the combination of capital was the very means by which American prosperity was being accelerated. Indeed, as several counsel emphasized, the whole purpose of union was to defend workers against the strength which combination gave to the employers. "What would have been the condition of the journeymen, had their association never been formed?" Forward queried. Answering his own question, he concluded that the formation of the union "enabled them to meet the employers on a footing of equality." Only by combination could the workers realistically participate in the marketplace and help conditions achieve that balance which liberal economic theory represented to be necessary both for contract-making and for prosperity. After a lengthy and quite modern-sounding argument that labour strife produced essentially no net economic loss to the community (viewed as a whole), and that economic foolhardiness by workers would be punished by severe economic harm to them through the normal workings of the market, Edmonds concluded: "The mischief is . . . that you will attempt to keep any one class down to old values and thus exclude them from a just participation in the general prosperity." Little hint of permanent imbalance or immiseration emanated from such laissez-faire notions, which indeed were much more in keeping with liberal economic theory than were the paternalistic, domineering and arrogant arguments of the employers. It ought to have been a mystery to twentieth-century legal historians why the courts failed to accept, or at least failed to give reasonable credence to, such well-ordered, apposite, forward-looking and danger-free laissez-faire argumentation.

On the other hand, the actual imbalance which existed between employers and the urban craft workers' increasingly powerless and mis-

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88 Hunt at 619.

90 Hudson Shoemakers at 293.

100 Philadelphia Cordwainers at 147 (Franklin); New York Cordwainers at 371; New York Hatters at 146; Philadelphia Tailors at 147-48; Hudson Shoemakers at 303.

101 Pittsburgh Cordwainers at 65, 68.

103 See Turner, supra note 12, at 21-28, 36-39. It is impossible to attribute these laissez-faire notions wholly to either the contradictory amalgam of beliefs espoused by radical labour leaders (see text accompanying supra note 85), or to the ideology of the lawyers themselves, or perhaps to a strain of "loyalist" or "revivalist" worker ideology (see text accompanying supra note 80) which might have been advanced in litigation strategy sessions. It must be remarked upon that very few Americans in the period 1805-1842 perceived laissez-faire liberalism and free-market growth to be radically contradictory to egalitarian human freedom.
erable position also found its way into counsel's arguments. It was noted that the American economy, as perceived by economically weaker participants rather than by observers or bosses, resembled warfare rather than harmony. Since the first cordwainer strike in Pittsburgh "six or seven years ago," Forward said, "there has been a perpetual conflict between the two parties."\(^{104}\) "The masters have been completely triumphant" in winning the 1805 strike, Rodney observed. "They have already accomplished all they asked, what can they desire more? Is it their wish to alarm, terrify, and persecute us, until they reduce us to the servile state of vassals?"\(^{105}\) Counsel in *Philadelphia Tailors*, speaking three decades after Rodney, found a clear and hierarchical division between boss and employee, one which harboured permanent marginality for the latter:

> [A] combination of master workmen, men of high character and credit, with all the influence which their patronage gives them, will be irresistible. . . . [T]heir workmen . . . , with means and resources in every way inadequate to such a contest, will soon be compelled to retract demands however just, and submit to injuries however galling. . . . The law should be more severe with masters than with men, and that in proportion to the means of individuals to encroach upon its sacred limits. The masters are more dangerous than the men. . . . Every journeyman expects to become a master . . . but few masters expect again to become journeymen. . . . [W]hen the masters form a combination, they have no regard to the situation of their journeymen, because they never expect to share with them in their perils, or pains . . . .\(^{106}\)

The permanence and horrors of class division in England were seeping into America. "[W]hen comes this recent dread of associations among the laboring classes?" Forward asked.

> Do the master manufacturers in our cities and large towns begin to feel that spirit which pervades the same class of men in Great Britain? . . . [The British policy] may subserve the interests of the capitalists and employers, but [it] grinds to the earth a numerous class of people from whose toil their wealth is obtained.\(^{107}\)

By about 1842, it had begun to appear to many workers that the new conditions of work in urban America were lowering them into a second-class status of poverty, ignorance and discontent. Edmonds forcefully argued to the jury that, with a conviction,

> You will condemn the journeyman to such incessant toil, merely for his daily bread, . . . you will deprive him of the means and the opportunity of learning the rights and duties which he is to exercise, as a citizen, for your welfare and

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\(^{104}\) *Pittsburgh Cordwainers* at 65.

\(^{105}\) *Philadelphia Cordwainers* at 202.

\(^{106}\) *Philadelphia Tailors* at 148, 203-204.

\(^{107}\) *Pittsburgh Cordwainers* at 62, 64-65. But see *supra* note 48.
mine, as much as for his own. How can you expect him to love the country, which does not afford him adequate protection?\(^{106}\)

In the first decade of the century, these lawyers advanced feisty arguments that the workers, who viewed themselves to be at least the moral equals of their employers, were being deprived of their just rewards. By the 1830s, their arguments had become transmuted into shrill pleas to grant redress for workers who, shaken and lacking self-esteem but still grasping at it, had been forced to the edge of hopelessness.\(^{306}\) An undercurrent of immiseration and of class warfare pervades the arguments throughout the period, becoming increasingly plaintive and intense.

Moreover, at times it appeared that judges were considered, by the lawyers, as being members of the same oppressive class as masters. Sampson went so far as almost to accuse the court of siding with the opposition,\(^{310}\) and further pointedly noted that judges in England, drawn from the rich, the noble and the powerful, were "justices who never laboured [but had become] the judges of the poor man's labour."\(^{311}\) Rantoul read to the trial judge several pages from that part of his *Oration at Scituate* which condemned the arbitrariness and inevitably "aristocratical" nature of the judicial legislation which constitutes the common law process. Included was the following: "Judge-made law is special legislation. The judge is human, and feels the bias which the coloring of the particular case gives."\(^{312}\)

Perhaps the judges were put off by the threatening undercurrents

\(^{106}\) *Hudson Shoemakers* at 303.

\(^{109}\) Concomitantly, a social distance appeared between workers and their counsel. In his rhetoric in 1806, Rodney had declared himself to be a worker, speaking in terms of the positions "we" take and the oppression done to "us" (see, e.g., text supra note 89). Sampson, responding to a thrust that the shoemakers of New York in 1809 might be earning too much, replied warmly: 

I do not think any man a good witness to that point but one who has himself laboured. If either of the gentlemen who opposed to us will take his situation in the garret or cellar of one of these industrious men, get a leather apron and a strap, a last, a lap-stone and a hammer, and peg or stitch from five in the morning till eight in the evening, and feed and educate his family with what he so earns, then if he will come into court and say upon his corporal oath that he was, during that probation, too much pampered or indulged, I will consider whether these men [defendants] may not be extortioners.

(*New York Cordwainers* at 279-80). But in a later case, by contrast, Edmonds closed by telling the jury almost literally how some of his best friends were workers, while Rantoul's lengthy oration (reported to us by an extremely anti-labour judge, it is true) appears entirely impersonal and abstracted from the world of intersubjective relations (see also supra note 48).

\(^{110}\) See *New York Cordwainers* at 372-73.

\(^{111}\) *Id.* at 270.

\(^{112}\) Rantoul, "*Oration at Scituate,*" in Howe, *Readings in American Legal History* (1952) 472 at 475 (delivered July 4, 1836). For its inclusion in Rantoul's argument in *Hunt* (since such is not indicated by the reported case, in which a prejudiced judge was the reporter), see Nelles, *Commonwealth v. Hunt* (1932), 32 Colum. L. Rev. 1128 at 1143n. Rantoul apparently did not argue this on appeal.
of class consciousness in the workers' arguments, but it is more likely that, given their cold-shoulder treatment of the laissez-faire portions of those arguments, they were uninterested in whatever the workers had to say. However, the judges certainly gave evidence by the tone and import of their rulings, their charges and their opinions, that the class arguments of workers' counsel were correct and that the class of employers included themselves. The reported opinions in the conspiracy cases (at least through the trial court's decision in *Hunt*) were more severe on the men than on the masters. The law was partial, and this favouritism put the reputation of the law into disrepute.

III. THE BIAS OF THE JUDGES

Every dispute, whether it originates through a failure to deliver goods, or a robbery, or . . . a trespass on "private" land, creates a danger to the social order as a whole. Class conflict lies beneath every discrete dispute and the social order cannot tolerate overt class conflict . . . . The role of the law is to prevent such conflict from becoming overt, and to assure that if a dispute does break out, it will be interpreted and resolved according to a system of thought which reisstates, in the realm of thought, the apparent necessity and legitimacies of normal practice.

A. Overview

Commons' *Documentary History* lists seventeen indictments of labourers for conspiracy in the United States before 1842, and one additional case in which an employer brought a civil (tort) action founded upon the same theory of conspiracy. In each of thirteen instances, we can perceive enough of the judge's views on the law and the evidence to form an opinion about his fairness. In these, the judge displayed a bias in favour of the employers, their profits, entrepreneurship and property rights or, perhaps more precisely, a bias opposed to the exertion of economic pressure by workers' organizations. In another four cases, it is impossible to ascertain what the judges' views were. In
the eighteenth case there is a similar uncertainty about the judge's views, but the judge may have acted fairly.\textsuperscript{117} It is difficult to imagine that any person, who knew of the workers' plight and heard their arguments, could have drawn the conclusion from the courts' treatment of workers that the law was evenhanded and neutral.\textsuperscript{118} The judges in case after case went noticeably out of their way to declare that the law was fair and unbiased, perhaps as a reaction to the undercurrents and overtones of class analysis embedded in the counsel's arguments, though more likely in order to rebut and repel the intimations of class bias that wafted up to them from common talk. The judges who were the most obviously biased were often those who made the loudest claims of fairness.

The partiality exhibited by the judges was not all of the same intensity or visibility. Three judges were vigorously and almost nastily opposed to workers' organization,\textsuperscript{119} while three more remained relatively gentle but displayed an equally clear and strong bias for the employers' side of the case.\textsuperscript{120} Three more judges were biased against labour organization, but the report of the case does not readily reveal how vigorously it was displayed.\textsuperscript{121} Only four of the judges were restrained and cautious in their favouritism and, in each instance, the restraint can be explained by the circumstances of the case.\textsuperscript{122} The paradigm instance is probably the attitudes and behaviour of Recorder Levy in \textit{Philadelphia Cordwainers}, which will be discussed separately. Most of the other cases were either from New York or Pennsylvania; and in each jurisdiction, a peculiar twist renders it useful to collect those cases for group discussion. This segment of the essay will end with Judge Thacher's handling of the trial in \textit{Hunt}, which leads to the ideological significance of Chief Justice Shaw's considerations on ap-

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\textsuperscript{117} See \textit{Baltimore Weavers} at 269.

\textsuperscript{118} Horwitz, \textit{The Transformation of American Law, 1780-1860} (1977) at 186-88 (differential handling by state courts of labour contract cases and building contract cases before 1850 "seems to be an important example of class bias").

\textsuperscript{119} Levy, discussed in text accompanying \textit{infra} notes 123-46; Savage, discussed in text accompanying \textit{infra} notes 192-99.

\textsuperscript{120} Radcliff, discussed in text accompanying \textit{infra} notes 173-78; Roberts, discussed in text accompanying \textit{infra} notes 147-53; and Thacher, discussed in text accompanying \textit{infra} notes 209-19.

\textsuperscript{121} Riker, discussed in text accompanying \textit{infra} notes 179-82; King, discussed in text accompanying \textit{infra} notes 167, 171; and Williams, discussed in \textit{infra} note 208.

\textsuperscript{122} Gibson, discussed in text accompanying \textit{infra} notes 154-66; Reed, discussed in text accompanying \textit{infra} notes 167, 169-70; Wilcoxson, discussed in text accompanying \textit{infra} notes 202-204; and Bouvier, discussed in text accompanying \textit{infra} notes 167, 172.
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peal in that same case.

B. The Philadelphia Cordwainers Case

From the beginning, Recorder Levy left little doubt as to his prejudices. The prosecution's first witness, Job Harrison, was relating how he had decided to become a scab when a member of the audience in the packed and tense courtroom was heard to say: "A scab is a shelter for lice." On the spot, Levy hauled the spectator before the bench and fined him ten dollars (perhaps a week's income for a fully employed jour) and ordered him "to pay the money immediately or be committed." A short while later, the judge plied Bedford, one of the stubborn anti-labour employers who had instituted the conspiracy indictments, with some friendly leading questions: "Considering this business [cordwaining] on a large scale, as it operates on the city and port of Philadelphia, is it not a very essential injury, to raise the prices of such necessary articles on the citizens; and does it not tend to diminish the exports?" Levy looked down his nose at a worker who used the word "damned" in his testimony, even though the worker was reporting a conversation; he badgered the defence lawyers because a copy of the Journeymen Cordwainer Society's constitution was not produced, but then declined to order its production; and he joined in the examination of a master who testified favourably for the workers, attempting to denigrate his testimony.

Levy gave the defence attorneys a hard time; he attempted to cut off their opening remarks when reference was made to the vagueness of the indictment. He twice asked Rodney to argue a crucial legal point, but gave little indication that he listened to Rodney's response. As evidence, he allowed enormous amounts of prosecution testimony about events of past strikes and controversies between the master and journeymen cordwainers; he became unsettled when the defence attorneys attempted to point out the legal irrelevance of this testimony to an 1805 strike, then he contradictorily threw in his own objection on

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123 Philadelphia Cordwainers at 82-83.
124 Id. at 202.
125 Id. at 115, 116-117, 126-27.
126 Id. at 144.
127 See id. at 191, 196, 200.
128 See id. at 76.
129 The workers' attorneys said that much of the evidence which dealt with events prior to 1805 was legally "irrelevant to the subject," and should thus have been eliminated after objection. After the court ruled against them, they did not continue to object, putting the best face on their disappointment by claiming to desire "not to suppress a single instance . . . [so] that the whole
grounds of irrelevance when the defence tried to prove that a master cordwainers' association had been in existence since 1789.130 Rodney's closing argument to the jury drew another biased interruption from the bench.181 Rodney then reminded the jury most forcefully that they, not the court, were the judges of law as well as of fact. "You are bound by the most solemn and sacred obligations, to guard and to watch with vestal vigilance your privileges."132

In Levy's charge to the jury, there was heightened awareness that the room was filled with workers, that he was in an uncomfortably distinct minority, but that he must retain control over the proceedings; he urged the jury to ignore Rodney's class arguments:

We live in a country where the will of no individual ought to be, or is admitted to be, the rule of action. . . . The moment courts of justice lose their respectability, from that moment the security of persons and of property is gone. The moment courts of justice have their characters contaminated by a well founded suspicion, that they are governed by caprice, fear or favour; from that moment they will cease to be able to administer justice with effect. . . . It is immaterial to our consideration whether the defendants are employers or employed, poor or rich. . . . If [the jury] decide one way when one man is implicated, and another when twenty [are implicated] the rights, the liberties and privileges of man in society, can no longer be protected within these hallowed walls. Numbers would decide all questions of duty and property. . . .

truth should be disclosed" (Id. at 76).

130 See id. at 129.

181 [Rodney declaimed: . . . The employers] grasp at too much! They are not satisfied with the rapid rate at which they are at present amassing wealth. . . . They may destroy the source from whence the golden streams flow. They may, and I believe, will banish every good workmen from this city, if they continue this system of persecution with success. You, gentlemen, may stop their career. . . . If you do not protect us by your verdict, the court must and will punish us. . . . Those workmen who are not chained to the spot will fly the city; and we who are bound, like victims to the altar, would prefer banishment, to a sentence that may consign us to a prison for years, and deprive us of credit and character for life!

MR. RECORDER. . . . If the jury listen to the fact and the law, and are satisfied to find a verdict of guilty, they are not to consider the punishment. That is the province of the court. . . . If the masters are criminal for a combination, as has been intimated, they are equally liable upon conviction to punishment. The law is equal to all, rich and poor. The right of association is also equal. You ought not to address their passions on a point of law.

MR. RODNEY. Sir, I am incapable of touching the feelings, or exciting the passions of the jury. . . . It is not my interest, nor would it comport with my character . . . to stir up any opposition against the due course of proceedings, or the legal, settled practice of the court. . . . I have a right to expatiate on the extreme hardships of my clients' case, of which you must be sensible. The court listened to the mournful tale of Mr. Bedford's losses, and the melancholy story of Mr. Harrison's distresses [the two prosecution witnesses mentioned above]. If it were not regular to permit the jury to hear these doleful ditties, why was the counsel suffered to recite them? . . . I must be permitted to reply, that they lose a little money and we lose our living.

(Id. at 202-203).

132 Id. at 204.

133 Id. at 224-25.
While telling jurors not to listen to their feelings or prejudices, the judge indulged in his own. The warning of Rodney that the court would attempt to take the decision on the law away from the jury was fulfilled.\textsuperscript{134}

Rodney's view, that the common law crime of labour conspiracy was "an attack upon the rights of man", was peremptorily ruled "unnecessary and improper."\textsuperscript{135} The judge praised the common law's rules as "the result of the wisdom of the ages . . . [which] regulates with a sound discretion most of our concerns in civil and social life."\textsuperscript{136} Somehow magically cleansed of any implication of bias toward the rich or unfairness toward the worker, this neutral common law, "the will of the whole community,"\textsuperscript{137} was nevertheless unintelligible to laypersons, such as jurors. Only those who have "devoted years to its study" could understand it; "[n]o other persons are competent judges of it."\textsuperscript{138} Levy proceeded to instruct the jury that the fair and neutral common law said precisely and unequivocally what the prosecutors alleged it said.

Levy charged that the English \textit{per se} rule of labour conspiracy — that the mere desire of combining workers to raise their wages was criminal — was the law, despite the lack of American precedent, the shakiness of English precedent and the arguments of the defence that it was not the American rule, nor ought it to be. Moreover, all of this was to be blindly accepted as law by the jury:

If the rule be clear, we are bound to conform to it even though we do not comprehend the principle upon which it is founded. We are not to reject it because we do not see the reason of it. It is enough, that it is the will of the majority. . . . [I]f it is law, there may be good reasons for it though we cannot find them out.\textsuperscript{139}

Levy quickly found "good reasons" for the English rule — its ability to divide and terrorize workers, and thus to smash costly labour protests.

The reason may be this. . . . In the turn-out of last fall, if each member of the body had stood alone, fettered by no promises to the rest, many of them might have changed their opinion as to the price of wages and gone to work; but . . . they were bound down by their agreement, and pledged any mutual engage-

\textsuperscript{134} Id. at 226.
\textsuperscript{135} Id. at 225.
\textsuperscript{136} Id. at 232.
\textsuperscript{137} Id. at 225 (emphasis added).
\textsuperscript{138} Id. at 232; see also Pittsburgh Cordwainers at 80.
\textsuperscript{139} Philadelphia Cordwainers at 233. Levy then cited as controlling authority the treatise he had twice asked Rodney to explain, without adverting to any of Rodney's several distinctions and arguments, or even to the possibility that its authority might be questioned (see text accompanying supra note 127).
ments, to persist in it, however, contrary to their own judgment. The continuance in improper conduct may therefore well be attributed to the combination. The good sense of those individuals was prevented by this agreement, from having its free exercise.  

Like many of his successors on the bench in labour conspiracy cases, Levy defined the conduct of the strikers to be “improper”. Those who wished to continue to strike were acting contrary to the (paternalistically defined) good of the community; there was no question about the illegality of their action. Recorder Levy was unable to view either the law or the facts from the defendants’ standpoint; their activity was completely unacceptable. The masters, the community and the law were essentially the same thing in his mind.

For Levy, it was unnatural for workers to organize to demand higher wages. “The usual means by which the prices of work are regulated,” he postulated, “are the demand for the article and the excellence of the fabric. . . . Much will depend, too, upon . . . whether the materials are plenty or scarce. . . .” Ignoring the degree of partiality and artificiality in masters’ establishing prices, and prefiguring an argument which most of his successors would also rely upon, Levy found the workers’ attempts “an artificial regulation . . . dependent on the will of the few who are interested; this is the unnatural way of raising the price of goods or work.” Rodney’s laissez-faire argument that workers were also a natural part of the market, and that they combined naturally to offset the power of masters, was ignored. The employers’ view defined what was “normal”. The parade of horribles, which Levy thought would flow from allowing the workers to unite, was explicitly and solely concocted from an elitist standpoint.

Levy paternalistically noted that journeymen who opposed strikes and who had families to maintain would be hurt too. He ignored the needs and interests of striking workers and the economic and social reasons which produced strikes.

The root of the difficulty, for Levy and for succeeding judges, was loss of social control. Completely unperturbed about the workers’ com-

140 Id. at 234.
141 Id. at 228.
142 Id. (emphasis added).
143 Id. at 229.
plaint that the masters were taking away their privileges, freedom and "living", Levy thought that the workers' potentially threatened the independence of the community. "[W]e shall have, besides our state legislature a new legislature consisting of journeymen shoemakers." Levy had crossed that dividing line between public and private (supposedly the central boundary in liberal political thought), but had confused the attempt by the journeymen to exert economic power with an attempt by the masses to capture political power. As well, he feared their success.

The merging of the judge and the law with one of the two sides in the controversy was complete; the fairness of the law, not only despite but also because of Recorder Levy's protestations to the contrary, had disappeared. His was more blatant and stark than would be the opinions in succeeding cases; the later judges found mellower and more acceptable legal language to express an economic bias and class identification, although they may not have been fully "conscious" of it. Levy's pronouncements, nevertheless, set the tone and the pattern. The result was a major problem for the rule of law in a supposed democracy. He was determined that the working class should not become "the governors of the community." Yet in a democracy they were supposed to have that chance, which was neither to be overtly impeded or denied by the law.

C. The Pennsylvania Cases, 1815-1836

Presiding Judge Roberts echoed most of Levy's sentiments nine years later in the Pittsburgh Cordwainers case. He had no trouble accepting the prosecution's view of the applicable law, since he found the English statutes declaratory of, and actually having weakened a common law of labour conspiracy. Moreover, he warned the jury not to see the case as a class battle between poor journeymen and employers, some of whom are represented as wealthy... [T]he attention of the jury is invariably drawn to this point; as if the true question were whether the journeymen were the oppressed, and the masters the oppressors — whether the profits of the one class be not too great, and the remuneration of the other inadequate.

The defendants had not been indicted for attempting to raise their

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144 Id. at 235.
145 See infra note 268.
146 Philadelphia Cordwainers at 235.
147 Pittsburgh Cordwainers at 77-79.
148 Id. at 81.
wages, Roberts noted. (This apparently was an attempt by the prosecutor to avoid the outrage and consternation with which the working class had greeted Levy's blunt legal ruling.) Rather, the crime charged was raising a combination "unlawful or prejudicial to the community."¹⁴⁰ Such a retreat into the very legalistic vagueness and doubletalk which Roberts said did not characterize the common law, was an attempt to mask the fact that the per se conspiracy rule of Philadelphia Cordwainers really had not changed, either in terms of the proof adduced or in terms of the judge's attitude toward the law and the defendants. If the jours exerted any economic power by acting in concert — if they went on strike to obtain those wages, for example, or enforced their anti-scab rules to maintain wages — they acted illegally.¹⁶⁰ Roberts viewed such matters from the standpoint of the master, identifying the master's needs with those of the whole community, ignoring the interests and claims of the union. It was "prejudicial to the community," he ruled, for a labour organization to "menace" an employer with threats of "the total destruction of his trade, and the means of subsistence,"¹⁶¹ but apparently it was not prejudicial for masters to threaten workers with ever-lessening income and loss of power over their trade. Only one sort of economic power was illegal.¹⁶²

Or was it? Roberts claimed that he would enforce freedom neutrally: "Such combinations, whether formed by master workmen, by journeymen, or others, are unlawful and impolitic."¹⁶³ Ignoring social and economic facts — the heavy cost of supporting a prosecution, and the difficulty of obtaining indictments from any prosecutorial agencies which shared his own bias — Roberts asserted that the law would punish masters who conspired against free enterprise, if only such a case

¹⁴⁰ Id. at 77; see also id. at 81.
¹⁶⁰ Id. at 81, 83-86.
¹⁶¹ Id. at 81, 83-86.
Confederacies of this kind have a most pernicious effect, as respects the community at large. They restrain trade: they tend to banish many artizans [sic], and to oppress others. It is the interest of the public, and the right of every individual, that those who are skilled in any profession, art, or mystery, should be unrestrained in the exercise of it . . . Without it, trade and manufacture cannot flourish . . .
(Id. at 81).
¹⁶² Id. at 83.
¹⁶³ "The reporter of the decision certainly saw the ruling as intentionally and usefully anti-labour:
The verdict of [the] jury is most important to the manufacturing interests of the community; it puts an end to those associations which have been so prejudicial to the successful enterprize [sic] of the capitalists of the western count[ry] . . . [M]anufacturers . . . are bound by their interests as well as the duties they owe to the community, to . . . prosecute to conviction . . . conspiracies so subversive to the best interests of their country.
(Id. at 16-17).
¹⁶⁴ Id. at 82.
would appear. Of course, only journeymen had been prosecuted.

Apparently, some workers decided to take the law up on its claim of neutrality; for twelve years later, the next case in Pennsylvania was founded upon an information against an alleged conspiracy of Philadelphia master shoemakers. Significantly, it was the only conspiracy prosecution successfully brought against employers by workers in the United States during the period 1805-1842 (or at any time, so far as I have been able to determine). Although it had the effect of softening Pennsylvania’s harsh rules, the results only seemed fairer. A pattern was emerging which Shaw’s opinion in Hunt would replicate for the whole field of labour conspiracy law.

After the masters were jailed on the information, their petition for habeas corpus was heard by Pennsylvania Supreme Court Justice Gibson, sitting at a special trial court. The masters admitted that they “had agreed with each other not to employ any journeyman who would not consent to work at reduced wages.” It was now the masters who raised the legal defences and arguments which, in all the other cases, had been or were to be made by the journeymen. This time the court, interestingly enough, began to listen. The blunt per se ruling in Philadelphia Cordwainers suddenly became obscure (”there was no general principle distinctly asserted” in that case, Gibson said) and was to be limited “to its particular circumstances” which mysteriously (and unexplainedly) “materially differed” from those Gibson faced. Unlike the clarity which Levy and Roberts had found, the common law of conspiracy was “unsettled” to Gibson; and where it had been extended to cover lawful acts performed by lawful means (as in labour conspiracy cases), it “instantly involved . . . distinctions as complicated and as various as the relations and transactions of civil society.” Agreeing with arguments previously ignored, Gibson felt that it might be dangerous to import British policies directed against artisans, and concluded that if combination alone were held to be criminal, “it would necessarily impart a criminality to the most laudable associations.”

This new-found appearance of fairness, however, did not enable Gibson to formulate a clearer definition of what conduct had to be added to a combination to make it illegal. His statement of the rule

154 Commonwealth v. Carlisle, Brightly (1821) at 36. An information would have to have been laid by citizens, not by a prosecutor. Habeas corpus allows the reviewing judge to test the legality of a detention, and is heard summarily and expeditiously.

155 Id. at 36.
156 Id. at 37.
157 Id. at 38.
158 Id. at 39.
was essentially in the vague *per se* language used by Roberts: combination became criminal "where there is direct intention that injury shall result from it . . . [or] wherever the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of the confederates." This language settles nothing. What sort of injury would be actionable? What would count as oppressive or prejudicial? What is unjust? Common law courts would, of course, make such decisions, and they would continue to do so within the parameters of what they considered to be "normal".

Gibson adopted an individualistic market view of what was natural and usual, in which capitalism was exempted from any conspiracy test:

\[\text{[T]he increase of power by combination of means . . . may be . . . not only oppressive to individuals, but mischievous to the public at large. . . . The combination of capital for purposes of commerce . . . although it may in its consequences indirectly operate on third persons, is unaffected by this consideration, because it is a common means in the ordinary course of human affairs, which stimulates to competition and enables men to engage in undertakings too weighty for an individual.}\]

Combination of either labour or bosses was "artificial" and thus "criminal when its object is to depress the price of labour below what it would bring, if it were left . . . to take its chance in the market." Gibson carried his notions to their logical conclusion, but introduced the novel and potentially dangerous notion of causation. He ruled that since *competition* itself was not an illegal combination, the only acceptable defence for the indicted masters would be for them to demonstrate that the object of their combination was "to foil their antagonists in an attempt to assign to it [labour], by surreptitious means, a value which it would not otherwise have." The masters would have to demonstrate that they were attempting to defend themselves against a prior conspiracy by the workers. Gibson apologized to the masters for such an evenhanded rendition of legal principles, but assured them that it would in fact work to their benefit:

As I was necessarily led into an examination of principles that might have an unfavourable operation on the relators [masters], I owed it to them, particularly as there was some evidence of combination on the part of the journeymen who prosecute, to state also those principles that may possibly operate in their fa-

\[109\] Id. at 39, 40.
\[110\] Id. at 41.
\[101\] Id. at 42. Gibson accepted the argument (also to be accepted by Shaw) that combinations of labour would eventually force employers to accept reasonable wages, and thus he understood the market in terms of groups and not, as did many of his contemporaries (as shall be seen in the subsequent Pennsylvania cases) as a matter of competition between individuals (see *Id.* at 41).
\[112\] Id. at 42.
The law of labour conspiracy in Pennsylvania had been made to appear more fair and evenhanded, though what its development might have been had the people in jail not been respectable masters is unknown. In other states, reference to a pre-existing confederacy of masters, causing a combination on the part of the workers, was not even admissible, much less a complete defence for an indicted union. However, the effects of Judge Gibson’s supposed even-handedness were all one-sided. The master shoemakers in the case before him presumably raised their now-valid defence and escaped criminal liability. No more prosecutions were brought against masters, as the sudden “fairness” exhibited by the courts in addition to the economic difficulties of going to court may have discouraged workers, whose economic position was deteriorating. No other jurisdiction adopted Judge Gibson’s rule, and there is no case in Pennsylvania where a union successfully raised the defence of a prior employer conspiracy. This was probably because Gibson had left a giant loophole: he ruled that combinations which “intended to coerce not only the employers but also third persons,” were still illegal (unless, of course, such coercion was the indirect effect of a combination of capital).

While it was neither followed nor widely cited outside Pennsylvania, Gibson’s decision established the parameters of the three subsequent conspiracy cases within that jurisdiction. Each of the three cases fit within the loophole Gibson had left, since each involved a conspiracy indictment of a union for attempting to influence non-union journeymen through boycott or exhortation. In each of the cases the judges ruled that such activity was illegal. However, in the final case, in the National Trades Union summer of 1836, the jury refused to follow the direction of the court and returned a not guilty verdict.

The three judges made it clear that they disfavoured labour organizations. In the mildest of the three opinions, Recorder Reed in 1827

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163 Id. at 43.
164 See text accompanying infra notes 173, 179, 202. One of these cases, New York Cordwainers, antedated Carlisle and was known to Gibson when he wrote his opinion: see Table II in the Appendix, infra. Gibson did not note its contrary ruling on this point.
165 Thus, we will never know whether any journeymen would have been allowed to show that the origins of a dialectic of combination and counter-combination lay in an original combination of masters, or in the amassing of capital.
166 Carlisle at 36, 42.
167 See Philadelphia Tailors at 258-60; Philadelphia Spinners at 267; Philadelphia plasterers at 336.
168 See supra note 78 and infra note 172 and accompanying text; Mittelman, supra note 78, at 395-412, 424-37, 442-44.
denounced the admittedly legal activities of the union (striking in retaliation against the employers) as “the height of folly and imprudence.”169 In reviewing the testimony on “the most important charge, and by far the most exceptionable and illegal part of the defendants’ conduct,” that is the count indicting the workers for attempting to influence others, Reed’s language left no doubt where he stood:

To suffer young unmarried men, as the defendants or some of them probably are, unrestrained by the care of a family, . . . at the head of their professions, who can come and go, and command the highest wages, to tyrannise over and oppress others with families and less ability to support them, cannot have the semblance of law or reason . . . . [C]ases of individual suffering frequently occur which considered as a public offense, ought not to pass unredressed and unpunished. The old and infirm would be placed in the power of the young and healthy; the one might be enjoying comforts, and even his pleasures, while the other could scarcely give bread to his family.170

This partial view of the suffering which occurs during a strike or boycott — from the standpoint of those not in the union — is also evident in the little which is reported of Presiding Judge King’s statement in the 1829 Philadelphia Spinners case.171 Similarly, Recorder Bouvier, in his grand jury charge in the Philadelphia Plasterers case in 1836, focused on the “arbitrary” and “extravagant” nature of the journeymen’s wage demands rather than upon either the needs of the workers or the sufficiency of any wage offer by the bosses. Characteristically, he found such a combination “at variance with the principles of free exertion, free use of capital, and free competition . . . [which] blasts individual exertions, which are the very soul of trade.”172

169 Philadelphia Tailors at 252.
170 Id. at 258-59.
171 Philadelphia Spinners at 267-68 (the court believed the testimony of all of the prosecution witnesses, but discounted the testimony of all of the witnesses for the defence, most of whom were unemployed cotton spinners).
172 Philadelphia Plasterers at 336-37. It must be conceded that Recorder Bouvier gave the most realistic description of the economic dominance of the masters (who were not indicted, of course) that appears in a judicial statement in any of the conspiracy cases of the 1805-1842 period. Since there were fewer masters than journeymen, he noted that their agreements were only more easily made, and more easily enforced; and while their wealth enables them to wait the effect of their combination, the poverty of those against whom it is directed, obliges them, generally, soon to yield to the dictates of the employer, be they ever so oppressive. (Id. at 337). The Recorder delivered himself of these sparse remarks, however, soon after a frightening, tremendous labour protest in New York City against recent anti-labour conspiracy decisions of Judges Savage and Edwards (discussed in the next subsection) at which both judges had been burned in effigy. The protest occurred during the height of the National Trades Union movement in 1836, when labour power in eastern cities was to some surprisingly evident and when caution was judicious (see Mittelman, supra note 78, at 409-11). As noted in the text accompanying supra note 168, the plasterers were acquitted by the jury.

Interestingly, Laurie’s thorough and stirring account of the General Trades Union of Philadelphia of 1834-1838 (especially including the first general strike in the United States in 1835)
Labour Conspiracy

Restrained in his expression of distaste for labour organization by Gibson's opinion in *Carlisle*, each Pennsylvania judge was able nevertheless to get across his anti-labour feelings to the jury. The Pennsylvania law of labour conspiracy appeared to be more fair than the law in the earliest cases or the law in other states, and it anticipated the heralded fairness (and legal theory) of Shaw in *Hunt*; this ensued from the lone indictment of masters in the 1805-1842 period, and the resulting stress placed on one-sided doctrine.

D. The New York Cases, 1809-1836

The labour conspiracy jurisprudence of New York presents an instructive contrast to that in Pennsylvania. No indictments of masters were obtained in New York, and opinions there throughout the period retained much of the flavour of the *Philadelphia Cordwainers* decision. In the face of arguably ameliorative action by the legislature, the judges construed the new conspiracy statute as adopting their own existing *per se* rule.

Mayor Radcliff's preliminary rulings in the 1809 *New York Cordwainers* case established a distinctly anti-labour pattern. The shoemakers proffered evidence to sustain three defences: (i) their combination was only retaliatory because of a prior confederacy of the masters; (ii) their wage demands were reasonable; and (iii) the masters were making excessive profits. Radcliff refused to accept any of this evidence, ruling it irrelevant. That effectively cut off the shoemakers' strike from its real-world context and indicated an acceptance of a doctrine of *per se* conspiracy in New York. During a long day of prosecution testimony, punctuated by wearying legal arguments about the evidence, Mayor Radcliff harassed the workers when he ruled "that [he] would sit till twelve o'clock, rather than adjourn," forcing the defendants to make their arguments to the jury quite late that night.

William Sampson, the workers' lawyer, saw the handwriting on the wall, observing to the court "that the difficulties under which he laboured, were beyond his force, and that he was conscious [that] entering upon an argument of such a nature, under such disadvantages was a forlorn endeavour." Sampson did not give up, however, and urged the jury to disregard any bias they might have detected in the judge:

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fails to mention the *Plasterers* case (Laurie, *supra* note 54, at 87-104).

173 *New York Cordwainers* at 371-72.

174 *Id.* at 372.

175 *Id.* at 372-73. It must be noted that Sampson himself was the reporter in this case.
The single question would be [he reports himself as having argued] . . . whether the law of England was to govern this case. He was aware how far the doctrines of the English law upon this head, had unfortunately given a bias to the judgment of many individuals; and no doubt, some of those whom chance had arrayed to sit in judgment on this case, must be presumed, however honourable and intelligent, to have imbibed more or less of that opinion. The jury, it is true, are judges of fact and law in criminal cases . . . 176

Sampson predicted correctly. Radcliff instructed the jury that the common law (minus what he chose to call its absurdities, which mysteriously were no longer in force) applied to the case, and that the anti-scab and boycott rules of the society “were arbitrary and unlawful” under that common law of conspiracy. The absence of New York precedents for him to cite was due (he alleged) to the failure to preserve the records of prior conspiracy convictions.177 The economic circumstances and Sampson’s argument that the policy behind the English law of conspiracy was discrimination against workers were completely ignored. After the jury had dutifully pronounced the defendants guilty, the judge paternalistically assured the workers

[that they had equal rights with all other members of the community was undoubted, and they had also the right to meet and regulate their concerns, and to ask for wages, and to work or refuse; but that the means they used, were of a nature too arbitrary and coercive, and which went to deprive their fellow-citizens of rights as precious as any they contended for.178

Therefore, strikes, boycotts or any effective means of exerting their “equal rights” would be illegal.

Twelve years later, Judge Riker followed suit in the New York Hatters case. He disallowed defendants’ evidence “offered to prove a conspiracy among the master hatters not to employ any journeymen who left his last place on account of wages, in order to prove that the meeting of the journeymen hatters was for a lawful purpose,”179 despite the fact that, two years earlier in Pennsylvania, Justice Gibson had ruled that a conspiracy was a justifiable defence to another conspiracy.180 In his short jury charge, Riker accepted all of the prosecution’s views on the law, including the inapplicability of an unreported case where a New York court had apparently allowed a combination of grocers and hardware merchants to refuse to purchase from auctioneers,
since that boycott "was, or was supposed to be, for the general advantage of the community." The workers' confederacy, a boycott over the hiring of a jour who worked for less than the agreed wages, was held to be not for the common good since "the object of the conspiracy [before the court] was directed to the prosecutor alone." The New York legislature elaborated upon its statutory definition of conspiracy in 1829. In abrogating the common law, the amended statute expressly restricted conspiracy indictments to those instances falling within its language. The legislature rejected a provision which would have made criminal a conspiracy "to defraud or injure any person in his trade or business". This could have been taken as an indication of legislative intent to abolish the per se labour conspiracy rule. However, language was included which criminalized conspiracies "injurious to the public health, to public morals, or to trade or commerce." This vague standard was probably used with the intent to leave it open to the courts to decide whether labour organizations or their activities were injurious to trade or commerce. Three cases arose in the mid-1830s in which the question could be answered.

Shoemakers in Geneva, New York, were indicted in 1834 on facts similar to those in the Hatters case: the formation of a union to raise wages and the execution of a boycott against an employer who paid lower than union rates to one of his jours. The indictment was dismissed by the trial court on grounds that the facts alleged did not fall within the statute. Perhaps the judge concluded that the legislature had intended to abolish per se conspiracy, or perhaps the judge believed such strikes were not "injurious . . . to trade or commerce."

The district attorney appealed the dismissal to New York's Supreme Court of Judicature and won a reversal in 1835. Chief Justice Savage made it clear that in his opinion the statute had not changed the law in New York. A confederation to raise wages was, he decided, per se a conspiracy at common law. Then, he queried rhetorically: "journeymen bootmakers, by extravagant demands for wages, so enhance the price of boots made in Geneva, for instance, that boots made elsewhere . . . can be sold cheaper, is not such an act injurious to

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181 New York Hatters at 148-49.
182 Id. at 149.
183 See Geneva Shoemakers at 14.
184 See Hudson Shoemakers at 305-306 (quote at 306).
185 See Geneva Shoemakers at 14.
186 Id.
187 Id.
trade?” Once again, the interests of the employers had become the “interests of society” while the interests of the union and the workers were ignored. “Trade” and “commerce” were not seen from the employee’s standpoint, and union organization itself was ruled to be

. . . a monopoly of the worst kind. The journeymen mechanics might, by fixing their own wages, regulate the prices of all manufactured articles, and the community would be enormously taxed. . . . Competition is the life of trade. If the defendants cannot make coarse boots for less than $1 per pair, let them refuse to do so; but let them not directly or indirectly undertake to say that others shall not do the work for a less price.

Worker organizations were “artificial”. Savage understood that “the wages of mechanics will be regulated by the demand for the manufactured article, and the value of that which is paid for it,” but failed to see that the journeymen shoemakers of Geneva were attempting to be intimately involved in establishing the “demand for” and the “value of” their own “article” — their labour.

The next year the journeymen tailors of New York City struck to raise wages and to enforce other work rules, including a full-employment rule (that is, no jour would get a second job until each jour had been offered one). They were indicted for conspiracy after a long and bitter turn-out. Judge Edwards echoed the fiercely anti-labour sentiments of Recorder Levy in his charge to the jury and in his speech delivered upon sentencing. Edwards charged the jury “against all such lawless combinations, as violations of law, destructive of the rights of employers, and others not associated, who were employed; detrimental to the public interests generally, and injurious to trade and commerce.” He thought the charges were “fully sustained by the evidence . . . [and] . . . spoke in very strong terms against all combinations.”

In the midst of labour’s muscle flexing in 1836, the judge was worried that the jury would “turn its back upon the Supreme Court [Savage’s opinion] and say that an offence was lawful which they declared to be illegal.” The court instructed that “the prisoners were indubitably guilty” and concluded that

it was impossible that the acts of the defendants could escape with impunity.

188 Id: at 15, 18 (quote at 18).
189 Id. at 18.
190 Id. at 19.
191 Id at 18 (comma omitted).
192 Id at 19 (comma omitted).
194 See supra note 172 and text accompanying supra notes 78, 172.
195 New York Tailors at 322.
196 Id. at 324.
unless the court and the jury violate their duty in order to take them out of the operation of law. . . . [T]he present question was not to be considered a mere struggle between the masters and journeymen. It was one upon which the harmony of the whole community depended. Let these societies only arise from time to time and they would at last extend to every trade in this city and we should have as many governments as there were societies.196

Upon sentencing, during a lengthy peroration against labour unions, Edwards reminded the jury (ironically) that “every American knows, or ought to know, that he has no better friend than the laws, and that he needs no artificial combination for his protection.”197 The judge felt at a loss “to know what degree of severity may be necessary to rid society of them [unions],”198 so he imposed what he chose to call “very mild” fines totalling the stupendous sum of $1150 (although Levy, for example, had imposed fines of $8 each), ordering each defendant “to stand committed until paid. . . . The different individuals immediately . . . paid their fine, and were discharged.”199

Union organization in 1836 was at a high point; though a protest failed to materialize at the time of the tailors’ sentencing,200 a week later a crowd of more than 25,000 people gathered. Among other things, they burned Judges Savage and Edwards in effigy and called for the formation of a workingman’s party to counteract the political power of the employers.201 Meanwhile, a conspiracy trial of journeymen shoemakers in Hudson, New York, was coming to a close. There, Judge Wilcoxson refused to accept defendants’ proffered evidence showing the masters conspiring to reduce wages in winter to a level so low that workers would have been unable to live.202 His view of the evidence and the judge’s charge reflected the masters’ viewpoint to the same extent as in the other New York cases. Wilcoxson’s tone was much more constrained and even-tempered,203 probably due to the contemporaneous labour uprising in New York City against the unfairness of the labour conspiracy doctrine. Interestingly, the jury acquitted the defendants.204

196 Id.
197 Id. at 330-31.
198 Id. at 332.
199 Id. “While the defendants were paying their fines, a worker in the courtroom stepped up and handed over his wages to the fund. Later, unions in other cities sent contributions to the tailors” (Foner, supra note 3, at 155).
201 See Mittelman, supra note 78, at 410-11, 462-64; Foner, supra note 3, at 155-62, 167-68.
202 Hudson Shoemakers at 283.
203 See id. at 310-12.
204 It was the first such acquittal (in a criminal case where enough of the judge’s opinion is reported to know his bias), but was soon to be followed by another jury acquittal in the Philadel-
A committee report to the March 1836 convention of the National Society of Cordwainers gave a clear indication of the workers' cognizance of the bias contained in these conspiracy decisions:

The judge [Savage] has forgot . . . the conspiracies and the combinations of the rich against the poor. . . . The only difference is that the poor have not the means nor the power to prosecute successfully those pirates upon the products of labor.205

The one-sidedness of the law was emphasized again when the New York City grand jury refused to indict the master tailors for conspiracy upon a bill of charges presented by the already-indicted journeymen, despite the language of apparent fairness in the law.206 The courts and the law remained staunchly and overtly on the side of the employers: in a period of widespread labour organization such as the mid-1830s, massive labour protest (terminated only by the Panic of 1837)207 was one of the results.208

E. Commonwealth v. Hunt at the Trial Level

Judge Peter Oxenbridge Thacher, who sat at the trial of the Boston bootmakers, had already become known among Boston labourers as an anti-labour judge.209 He did not change his stripes during the trial; his bias was visible even though he wrote the report of the case. He opined that those authorities which had found a criminal conspiracy in a labour organization intent upon establishing a rate of wages “have

phia Plasterers case (see supra note 172; Foner, supra note 3, at 157).

205 “Proceedings of the Convention of Cordwainers Holden in the City of New York in March 1836,” quoted in Nelles, supra note 112, at 1160n. (a pamphlet found in the Hunt file in Rantoul's papers).

206 Mittelman, supra note 78, at 409.

207 The importance of the catastrophic Panic of 1837 in stifling and smashing the already marginal ability of unions to maintain strength and organization is emphasized in Laurie, supra note 54, at 103-33.

208 The only conspiracy incident emanating from Connecticut during the period under study is unique in several ways and will be treated in a footnote rather than in the text. It was a civil case, a suit for damages; it was brought not by masters but by a corporate employer; it concerned events in a small company town; it did not involve workers who made apparel; and there were three trials of the issue, none of which eventuated in the employer’s favour. The third trial, presided over by the state’s Chief Justice Williams for unknown reasons, is the one we have a report of. While the record lacks the heat and fervour exhibited in the other conspiracy trials, Williams’ bias was demonstrated by his rulings (1) that a continuing conspiracy (as alleged by plaintiffs) need not have actually been proved (he held that only a single day’s existence of the conspiracy needed to be shown), and (2) that the evidence presented tended to show that a conspiracy existed on that day (see Thompsonville Carpet Weavers at 114-15). The workers admitted to having combined to set wages, which Williams ruled legal, but to conspire to interrupt and destroy the plaintiff’s business (which means to attempt to put their wage combinations into effect) Williams found to be illegal (id. at 115). The jury found for the workers.

209 See supra note 21 and accompanying text.
always been held in great respect."\(^{210}\) He did not have to decide the applicability of the blatant anti-union *per se* rule, since the prosecution (unlike almost all others previously discussed here)\(^{211}\) concerned not wages, but only the operation of union rules amounting to a closed shop. He used this distinction as an excuse to prevent the workers from introducing evidence of current prices in order to demonstrate how much they needed to protect themselves from employers who would not accept union standards.\(^{212}\) However, Thacher later recognized a connection between wages, prices and the closed shop from the employers’ point of view, when he instructed the jury to “judge, whether they [the workers] do not propose . . . to compel the people of the commonwealth to pay for their boots and shoes whatever price this society shall set.”\(^{213}\) He smoothed the way for conviction by ruling that combination itself, without any overt act in furtherance thereof, would be sufficient to constitute conspiracy.\(^{214}\) He commented, prejudicially, that the workers had not produced their constitution because to have done so would probably have damaged their cause.\(^{215}\)

The workers introduced evidence that their union had raised the moral standards of workers and had improved the quality of work. They also found masters (among others) willing to testify that the union had neither impoverished the bosses nor oppressed non-member jour\(^{s}\).\(^{216}\) Thacher ignored this evidence, given his single-minded identification of the employers’ interests with those of the community. He instructed the jury (contrary to the law) that the judge was to be the

\(^{210}\) *Hunt* at 638.

\(^{211}\) The 1809 Baltimore shoemakers’ strike, and the resulting conspiracy trial, concerned a closed-shop issue (see Steffen, *supra* note 54, at 222).

\(^{212}\) *Hunt* at 638. The case did not arise from a strike. Indeed, during the period after the Panic of 1837 labour was quiescent in Boston as elsewhere, and labour-management relations were relatively peaceful; the bosses clearly held the upper hand when times were tough. The *Hunt* prosecution occurred not through labour strife, but because of the zeal of the prosecutor (a disgruntled employee, Jeremiah Horne) and Boston’s anti-labour District Attorney Samuel D. Parker (see Nelles, *supra* note 112, at 1131-33).

\(^{213}\) *Hunt* at 647. Nelles notes that Thacher’s permission (given despite the objection of the workers’ attorney Rantoul) that employers might state their conclusions as to the coerciveness of the union’s rules was prejudicial to the workers (Nelles, *supra* note 112, at 1137-38). The bootmakers claimed on appeal that Thacher’s evidentiary rulings erred both on this point and on the exclusion of evidence of economic conditions, but Chief Justice Shaw found it unnecessary to decide these questions (*id.* at 1147n.).

\(^{214}\) *Hunt* at 641.

\(^{215}\) *Id.* at 646.

\(^{216}\) *Id.* at 619-20. Interestingly, the workers also tried to demonstrate that the local bar association had a rule which read precisely like their purportedly illegal closed-shop requirement (*id.* at 620-21). Thacher was of the opinion that the bar’s rule “was evidently beneficial to the community . . . and has tended, without doubt, greatly to elevate the members of the profession in the confidence and esteem of their fellow-citizens” (*id.* at 652).
sole source of applicable law. Further, he thundered that a rejection of his charge "may . . . do an act of injustice to the whole community." Thacher then attempted to deflect the jury’s attention from the economic and social facts:

The question is not whether the society [that is, the union] have used their power to the extent of mischief of which it is capable, but rather, whether they have not assumed a power not derived from the law, but repugnant to it, which in the hands of irresponsible persons, is liable to great abuse. . . . Let them use their liberty freely, but carefully abstain from infringing the rights of others.

Any doubts about the judge’s position would have been dispelled by his closing attack, which echoed the entrepreneurial ethos of Levy, Savage and Edwards in adopting a new *per se* rule:

I am of opinion, and it is my duty to instruct you, as a matter of law, that this society of journeymen bootmakers . . . is an unlawful conspiracy against the laws of this commonwealth. It is a new power in the state, unknown to its constitution and laws, and subversive of their equal spirit [sic!]. If such associations should be organized and carried into operation through the varying grades, professions and pursuits of the people of this commonwealth, all industry and enterprise would be suspended, and all property would become insecure. It would involve in one common fatal ruin both laborer and employer, and the rich as well as the poor. It would tend directly to array them against each other, and to convulse the social system to its centre. Nothing but the force of government can put down a general spirit of misrule.

The jury had no alternative but to deliver a guilty verdict in order to “put down” an attempt by “irresponsible persons” to gain social control, to stop social revolution, to save the property, commerce and “liberty” of the commonwealth from “misrule”; in short, to prevent class warfare.

Labour law had returned to the openly pro-employer position taken by Levy in 1806, not that the intervening rulings in labour conspiracy cases had much strengthened the foundations of fairness upon which the Rule of Law presumably rests. On the appeal of Hunt, it became the task of one of the nineteenth-century’s most brilliant common law judges and propounders of *laissez-faire* law, Massachusetts’ Chief Justice Lemuel Shaw, to solve this ideologically crucial paradox.

IV. CHIEF JUSTICE SHAW, THE WORKERS AND THE RULE OF LAW

[Chief Justice] Shaw [in *Commonwealth v. Hunt*] was sufficiently objective to
take into account what any realist must understand, that in the normal relations between employers and employees, bargaining inevitably involves restraints and pressures of a sort, as did competition itself, the force which all respectable men believed responsible for progress in industry. . . . In so doing, he reconciled the standing law with the needs of a free society.\textsuperscript{220}

A. The Puzzle of Hunt

Shaw’s seemingly pro-labour opinion in \textit{Hunt} has puzzled many perceptive writers.\textsuperscript{221} How could this bastion of banking and investment, this said Boston High Federalist, this epitome of entrepreneurial sentiment,\textsuperscript{222} bring himself even partially to favour the very workers who, one week before the decision in \textit{Hunt} was announced, had been severely damaged by his own anti-labour ruling in \textit{Farwell v. Boston and Worcester Railroad Company}?\textsuperscript{223} Moreover, Shaw’s words in

\begin{itemize}
\item \textsuperscript{220} Levy, \textit{supra} note 15, at 188, 190-91.
\item \textsuperscript{221} “Commonwealth v. Hunt \textit{[was]} a seeming victory of Jeffersonianism in a Tory State and in a court dominated by the great but far from Jeffersonian Chief Justice Shaw.” Nelles, \textit{supra} note 112, at 1130; see also, e.g., Levy, \textit{supra} note 15, at 192. See generally Turner, \textit{supra} note 12, at 58-65.
\item \textsuperscript{222} Richard Henry Dana described Shaw as “a man of intense and doting biases in religious, political, and social matters.” [Chase, \textit{Lemuel Shaw} (1918) at 216] quoted in Nelles, \textit{supra} note 112, at 1152]. “The constituency to which his sense of obligation was keenest comprised State Street and Beacon Hill, the bankers, the textile-manufacturers, the railway builders” (id.). For Shaw’s political, economic and social background and outlook, see generally Levy, \textit{supra} note 15, at 9-18, 27; Nelles, \textit{supra} note 112, at 1152-54. For particular evidence of Shaw’s entrepreneurial and pro-business attitudes in his judicial decisions, see Levy, \textit{supra} note 15, at 118-82.
\item \textsuperscript{223} 45 Mass. (4 Metc.) 49 (1842). Shaw’s most recent biographer who, in explicating Shaw’s opinions, “proceed[ed] from the assumption that [Shaw] expounded and configured the common law conscientiously, to the best of his understanding and without overt bias”. Levy, \textit{supra} note 15, at 178, explains the meaning and impact of \textit{Farwell} as follows: Stripped of qualifications, the [fellow-servant] rule [in the \textit{Farwell} case] was that a servant, or employee, injured through no fault of his own by the negligence of a fellow servant, could not maintain a claim for damages against his master, or employer. By this rule American capitalism, at a critical stage of its development, was relieved of an enormous financial burden for industrial accidents which it would otherwise have incurred. The losses from injury on the job were sustained by the workers themselves. . . . [The case] was tough on accident victims, particularly of the working class. (Id. at 166, 182). For a recent treatment of the growth of the fellow servant rule remarkable primarily as an exemplar of the need for scholars to adopt the kind of broad class analysis used in this essay (so that there is an escape from the toils of the supposed dichotomy between overtly instrumental decisions and those “motivated primarily by intellectual norms within the legal community”), see Comment, \textit{The Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1860} (1984), 132 U. Pa. L. Rev. 579. A more useful approach to the same problem can be found in Tucker, \textit{The Law of Employers’ Liability in Ontario, 1861-1900: The Search for a Theory} (1984), 22 Osgoode Hall L. J. 211. Tucker’s insistence upon base-superstructure distinctions, “relative autonomy” and other two-dimensional concepts closely tied to the false liberal-capitalist split between subjectivity and objectivity tends to make his analysis too rigid, abstract and ahistorical. Nevertheless, his emphasis on socio-economic interaction, on the contradictions fundamental to a capitalist society, and on the primacy of the wage-labour contradiction; his insistence that “from a Marxist perspective, it is impossible to treat legal development either as a simple reflection of more fundamental forces, or as something that takes place independently of those forces” (id. at 275); in short, his presentation of a dialectical class analysis of the legal relations in society is a
Hunt have achieved an apparently instant and long-lasting aura of greatness, despite demonstration of their actual legal worthlessness.\textsuperscript{224} The apparent even-handedness in Hunt has been heralded as a paradigm of judicial fairness in a time of legal uncertainty.

Perhaps the solution to the puzzle is reasonably simple — Shaw’s opinion was not really pro-labour. Shaw did not stray from his class leanings, in intention, legal meaning or effect. Rather, he brilliantly solved a problem of ideology and legitimacy in the time-honoured common law tradition, using supposedly neutral rules to make labour law seem fair and evenhanded.

Shaw’s opinion for a unanimous appellate court, delivered after “considerable time had elapsed since the argument”,\textsuperscript{225} reversed Thacher’s decision. The indictment of the journeymen bootmakers was ruled legally insufficient, because it did not set forth an allegation either of an agreement to use illegal means, or of an agreement to use legal means to reach unlawful ends. Shaw ruled that it was not unlawful for workers to agree “to induce all those engaged in the same occupation to become members of” their union, nor was it unlawful for them to agree “that they would not work for a person, who, after due notice, should employ a journeyman not a member of their society.”\textsuperscript{226}

Finally, it was not unlawful for the union to have as an object the impoverishment of Horne (the non-union jour the union wanted fired) because competition itself might impoverish someone, “and yet it is through that competition, that the best interests of trade and industry are promoted.”\textsuperscript{227} Whether the union engaged in criminal acts to impoverish, therefore, would “depend upon the means to be used,” and illegal means had not been alleged.\textsuperscript{228} The per se labour conspiracy doctrine — embraced by Recorder Levy in the Philadelphia Cordwainers case, by Chief Justice Savage and Judge Edwards in the relatively recent Geneva Shoemakers and New York Tailors cases and by Judge Thacher at trial in Hunt — was discarded by these words. In its place, an amorphous ends-means test was adopted, which seemed to be fairer and which acquitted the Boston bootmaker jour.

Praise for Shaw’s effort has been extravagant. Walter Nelles felt that Shaw’s Hunt opinion essentially adopted all the legal positions
contended for by Rantoul, especially the points that "special unlawfulness peculiar to labor organizations was not to be transplanted from England, and . . . whatever one person may lawfully do, any number may lawfully undertake, even if the result is to maintain the closed shop." Shaw’s most recent biographer, Leonard Levy, went so far as to place the fair-minded and beneficial Hunt decision close to the core of his interpretation and evaluation of the man, calling it Shaw’s "best known and most widely praised opinion . . . [and] . . . the Magna Charta of American trade unionism, for it removed the stigma of criminality from labor organizations." The eminent American labour historian, Richard Morris, termed the opinion a "forward-looking . . . landmark" because it was founded upon the realization "that the threat of criminal prosecutions had little or no effect upon strike activity." An even more critical observer, James Landis, later Dean of the Harvard Law School, who understood that "little in substantive legal doctrine was contained in the opinion," concluded that "the case is still outstanding" because of its awareness "of the growing demand for the recognition of the legality of the common objectives of trade unions."

The value of the opinion seems more modest if scholarly legal comment and case law over the seventy-five years after the decision is assessed. An early compiler of judicial statements about labour unions found in it "the first judicial appreciation of the possible good in labor organizations." A Massachusetts attorney in 1887 called it "one of the most masterly" of Shaw’s opinions, one which was cited only with approval in subsequent Massachusetts cases. Another Massachusetts attorney writing contemporaneously, however, surveyed the field of labour conspiracy and called Hunt merely Massachusetts’ "chief case", finding little pre-eminence or extraordinariness in it. No other writer

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229 Nelles, supra note 112, at 1148, 1151.
231 Id. at 183.
232 Morris, supra note 6, at xi.
233 Landis, supra note 15, at 33.
234 Groat, Attitudes of American Courts in Labor Cases (1911) at 50. A treatment of conspiracy law in the United States termed Hunt "well known" and said that it contained the most common definition of conspiracy found in American cases [Carson, “The Law of Criminal Conspiracies and Agreements as Found in the American Cases,” in Wright, ed., The Law of Criminal Conspiracies and Agreements (1887) at 110-11, 157].
235 Selfridge, American Law of Strikes and Boycotts as Crimes (1888), 22 Am. L. Rev. 233 at 237, 247. It will be seen, however, that at least one subsequent relevant Massachusetts case did not cite Hunt at all (see text accompanying infra note 250). Selfridge did not cite any Massachusetts authority in support of his assertion.
236 Brigham, Strikes and Boycotts as Indictable Conspiracies at Common Law (1887), 22 Am. L. Rev. 41 at 66.
gave the case any particular distinction, much less calling it a leading case, and several ignored it completely.

Prosecutors and courts seemed to be even less aware of the significance of Hunt. No labour conspiracy opinions have been discovered for the post-Hunt decade (1842-1852). Three indictments were brought in the next decade, despite Hunt, and at least twenty-five peppered the labour-turbulent 1860s, 1870s and 1880s. The actual "leading case" in these times was not Hunt, but proved to be an 1867 case from New Jersey, State v. Donaldson, in which the workers were convicted of conspiracy despite the fact "the conduct of the defendants . . . did not differ from that of the indicted shoemakers in" Hunt. Chief Justice Beasley was able to "distinguish" Hunt facilely in Donaldson, because the New Jersey indictment alleged what he determined to be an illegal object of the union. Another important conspiracy decision of these years, Master Stevedores v. Walsh, misread Hunt as standing for the proposition that labour organizations (here, masters) could legally coerce their own members but were barred from attempting to coerce those who had not joined; in Hunt the bootmakers' activity had been directed at a non-union jour, Horne. In other labour conspiracy cases, Hunt was miscited, or (as in Donaldson) was cited to support convictions because of the loopholes it contained, or was ignored, even in

337 See, e.g., Burdick, Conspiracy as a Crime, and as a Tort (1907), 18 Harv. L. Rev. 444. Smith, Crucial Issues in Labor Litigation (Pis. 1-3) (1907), 20 Harv. L. Rev. 253, 345, 429. Smith could easily have cited Hunt, for example, in his discussion (id. at 347) of the realization then dawning among advanced laissez-faire ideologues that labour combinations ought to be allowed to balance "combinations of capital" in order to avoid civil war, a realization which Levy puts at the core of the praiseworthiness of Shaw's opinion (Levy, supra note 15, at 203-206).

338 Thus, more indictments for labour conspiracy were brought after Hunt than before it. This count of criminal conspiracy cases between 1842 and 1890 is derived from Witte, supra note 12, at 829; Landis, supra note 15, at 35; Turner, supra note 12, at 68-71. Witte, who performed exhaustive research on the subject, noted in addition: "The great majority of the conspiracy cases of the eighties . . . are unreported and can be traced only through the newspapers and through the reports of state labor departments." The same is likely true of the period 1842-1879.

339 32 N.J.L. (3 Vroom) 151 (1867).

340 Landis, supra note 15, at 34.

341 See id. at 34n.; text accompanying infra notes 258-67.

342 Master Stevedores Ass'n v. Walsh, 2 Daly 1, 9 (C.C.P.Cy. N.Y.) (1867). Master Stevedores receives adulatory treatment in Petro, Unions and the Southern Courts: III — The Conspiracy and Tort Foundations of the Labor Injunction (1980), 60 N. C. L. Rev. 543 at 547, 551 passim, in which an individualistic and essentially unsupportable distinction between individual interests and group interests is elevated into something approaching a religious tenet. Petro manages to completely ignore Hunt, probably thinking it a closet Marxist opinion.

343 People v. Wilzig, 4 N.Y. Crim. 403 at 413 (O. & T.C. Cy. N.Y.) (1886), where Hunt is cited for the proposition that "formerly a conspiracy of workingmen to raise the rate of wages was criminally condemned as an act injurious to trade or commerce."

an instance where the conspiracy charge was dismissed. In civil conspiracy cases arising out of labour disputes in Massachusetts the same pattern ensued: *Hunt* was cited to support liability, or was cited to allow businessmen to avoid liability because of its expansive language in favour of competition, or was ignored. Only Justice Holmes' famous dissent in *Veigelahn v. Gunther* seemed to give it due regard. But as a landmark of the law — directing litigants and the administrators of justice toward a modern, balanced, competitive, liberal view of labour organization and labour interests — *Hunt* left a great deal to be desired.

B. *Shaw's True Colours in Hunt*

Courts were able to use *Hunt* to support employers because it is only the import, and not the law, of the opinion which embodies a sense of balance. Full of technical distinctions, vagueness and loopholes, *Hunt'*s seemingly pro-labour holding was easy to avoid. As Nelles "curiously" put it, "Shaw was careful to leave open various doors through which, should occasions arise, [the] law could move to break effective labor organizations."
Shaw left four such “doors” ajar. First, he ruled that the common law of labour conspiracy was in force in Massachusetts, contrary to the primary argument of defence counsel, including that of Rantoul, in most of the previous cases. Moreover, under Shaw’s version of the law (echoing Thacher), no overt act in furtherance of the conspiracy need be shown by the prosecution. Therefore, a combination itself, if an illegal goal or illegal means were agreed upon, would be sufficient for conviction. This was in fact a startling step backward. Furthermore, “acts not punishable by indictment,” if contemplated as the goal of a “combination by numbers . . .[,] would be an unlawful conspiracy,” so it was still possible for legal acts within the rights of individuals to be illegal merely because those individuals combined together. Given the vagueness with which the contours of illegality and labour conspiracy were defined, many activities of labour organizations (and even plans not acted upon) could still be indictable as conspiracies. Thus, in Commonwealth v. Hilton a Virginia court instructed the jury that Hunt stood for the proposition that the common law of labour conspiracy was still in force in the United States. Almost any labour conduct except that specifically approved of in Hunt could, because of the slipperiness inherent in common law rule making, be legitimately found conspiratorial under Hunt.

Second, these broad and loose common law bounds of illegality, in addition to the tone of Shaw’s opinion, permitted and encouraged courts to persist in identifying the good of the community with laissez-faire ideology, or with the interests of entrepreneurs. Labour combinations which, in the opinion of the judge, had “dangerous and pernicious” goals, or which might be banded together for what the judge found to be open or secret “purposes of oppression or injustice”, would still be indictable. Thus, in the Massachusetts civil case of Carew v. Rutherford, Hunt’s “oppression or injustice” rubric was used to hold illegal an attempt by a union to fine an employer for violating the union’s rules. Any means by labour which, in a court’s judgment,
amounted to "coercion, or duress, by force or fraud . . . [or] . . . falsehood or force" could, under Hunt, be termed unlawful means. Thus, in State v. Stewart, a strike and a boycott were held to be illegal coercion while a closed shop and a black listing arrangement were found in Crump v. Commonwealth to be within the "falsehood or force" rubric. The facts in neither case seem to be broadly distinguishable from those in Hunt. As Marjorie Turner has aptly put it, "[t]he law thus stated in Hunt puts the judiciary fully in charge." Hunt might stand for anything; the apparently fair legal rulings proved to be nothing but phantasms, subject to the prejudices of judges to an even greater extent than legal rules usually are. To one historian this was "obviously intentional". Another has concluded: "[R]ather than upholding the closed shop or the right to strike, Shaw was really providing the rationale for their [judicial] control."

Third, Shaw explicitly excepted from the ambit of protection those union members who were subjected to contracts by their employers. "If a large number of men, engaged for a certain time, should combine together to violate their contract, and quit their employment together . . . [i]t would surely be a conspiracy to do an unlawful act. . . . It

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263 Hunt (on appeal) at 132, 134.
265 Crump v. Commonwealth, 84 Va. 927, 6 S.E. 620 (1888).
266 Turner, supra note 12, at 66.
267 Landis, supra note 15, at 33.
268 Turner, supra note 12, at 68. Authors have imputed to Shaw a "consciously" duplicitous purpose — the intention noted by Landis, see text accompanying supra note 267, or the care remarked upon by Nelles, see text accompanying supra note 229, or the purposiveness to be inferred from Turner's remark quoted in the text accompanying this footnote — must be understood in a complicated fashion. Shaw intended to write a good common law legal opinion — which meant carefully giving judges the leeway appropriate for further interpretation and adumbration of a necessarily loosely-defined common law crime. He would have fought to suppress any of his own biases he might have noticed expressly intruding themselves, but he would have failed to understand the way that his entrepreneurial interests and High Federalist upbringing organically molded his entire thrust of thought and patterns of activity; and he certainly would have failed to notice that those biases were to a large extent inherent both in the substantive law of labour conspiracy and in the common law method of adjudication.

The substantive flexibility of Hunt is a reflection of the vagueness of the common law crime of conspiracy itself, and of the extreme leeway thought to be necessary to the judicial role in interpretation. As Shaw admitted, it was difficult to frame "any definition or description, to be drawn from the decided cases, which shall specifically identify this offense [conspiracy] — a description broad enough to include all cases punishable under this description, without including acts which are not punishable" [Hunt (on appeal) at 123].

I do not say that Shaw intended to fool the world, but I do say that the structures of liberal thought and common law judicial decision-making are such that they allow the intelligent ideologue to express an apparent concession in a manner which actually negates that concession and, in the end, keeps the ideologue's deep economic interests intact, all entirely "unconsciously" (see text accompanying notes infra 281-96).
would be a case very different from that stated. . . ." Mill labour was more important economically than artisan shoemaking in Massachusetts in 1842 (at least insofar as concerned Shaw and his circle of friends), and mill hands were invariably worked under contract. Here Shaw's judicious neutrality wears very thin. Not only was he apparently "at pains . . . to convey to textile interests that they need not fear increased danger of labor organization in the mills as a result of his decision," but the language he used ensured that it would be applied to ever-increasing numbers of workers subject to contracts.

These contracts were presumed by Shaw and by contemporary theory to have been fairly entered into, even though they were in fact contracts of adhesion without the possibility of negotiation when made (as usual) on an individual basis. In an age of contractarianism, when the usual form of labour oppression was rapidly becoming that fiction of freedom and individualism embodied in the notion of contract, and when contracts were actually becoming much more useful in an economy increasingly concerned with commodities futures and with time and distance — an economy which the Boston merchants and industrialists like Shaw were intimately in contact with and part of — Shaw had quite naturally sensed the organic needs of his culture. He thus attempted to provide for them in an appropriate way, even if he was "unconscious" of having done so, and even if other resolutions might also have served those interests. The seeming fairness and balance of Shaw's refuguration of the labour conspiracy doctrine was paralleled by the seeming fairness of the notion of labour contracts.

Fourth, Shaw supported balance and fairness only in the abstract. He rendered it impossible for anyone to be foolish enough to conceive of the labour conspiracy doctrine being applied to entrepreneurially competitive situations. He ruled that it would be "highly meritorious and public spirited" for a combination to "have a tendency to impoverish another" if that tendency be caused by competition. He further stated:

It is scarcely necessary to allude to the familiar instances of opposition lines of

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268 Hunt (on appeal) at 131.
269 Nelles, supra note 112, at 1162.
270 In this paragraph, the statements on the contractual basis for mill employment are founded upon Dublin, supra note 56 passim; Ware, The Early New England Cotton Manufacture (1931) at 260-68. See also Sullivan, The Industrial Worker in Pennsylvania, 1800-1840 (1955) at 34-38, 47-49; supra note 69.
271 See Holt, supra note 8, at 671-72.
272 See id. at 707-15.
273 Hunt (on appeal) at 134.
conveyance, rival hotels, and the thousand other instances, where each strives to
gain custom to himself, by ingenious improvements, by increased industry, and
by all the means by which he may lessen the price of commodities, and thereby
diminish the profits of others.\textsuperscript{274}

No less than historian Leonard Levy and Justice Oliver Wendell
Holmes have supposed that this language was an attempt by Shaw to
detoxify class struggle idealistically, by transmuting it into the familiar,
socio-economically bland category of “free competition”. Holmes, cit-
ing Shaw’s “good sense”, mused that “the policy [of free competition]
is not limited to struggles between persons of the same class, competing
for the same end. It applies to all conflicts of temporal interests.”\textsuperscript{275}
Levy agreed: “Shaw founded his decision on the belief that benefits to
the public might accrue from the contest between unions and employ-
ers.”\textsuperscript{276} It is difficult, however, to understand Shaw as approving or pro-
moting producer’s co-operatives,\textsuperscript{277} although he probably was “subcon-
sciously” gripped by a sense that the fundamental struggle between
competing social interests (as represented by the dispute before him)
ought to be described in terms which did not tend to provoke danger. A
less tendentious reading than that of Holmes and Levy concludes that
Shaw sensed (as the workers’ attorneys had argued in the conspiracy
cases) that impoverishment for many was the natural “tendency” for
many in the unceasing fight for a competitive edge, which constituted
the perceived Utopia in his social context. Chief Justice Shaw saw that
the “sauce for the goose” notion inherent in legal fairness might lead
either to the acquittal of workers in a future labour conspiracy case or
to the attempted indictment for conspiracy of one employer by another,
unless the situations were distinguished. Shaw was separating workers
from employers, not joining them together.

\textit{Hunt} was, of course, a real victory for the Boston bootmakers. The
decision was also a moral victory for labour since it was the first deci-
sion in which the law was not stated in such a way as to favour the
masters. Nevertheless, what seemed to be a major labour triumph was
actually vague, slippery, equivocal, cautious. Its neutrality was only ap-

\textsuperscript{274} \textit{Id.} Courts got this part of Shaw’s message (see supra note 249 and accompanying text).
\textsuperscript{275} Vegelahn, supra note 251, at 1081-82.
\textsuperscript{276} Levy, supra note 15, at 204-05.
\textsuperscript{277} Producers’ co-operatives were a feature of the contemporary scene, being a common re-
action by workers to the economic strength of employers. For example, on June 28, 1794, during a
strike, Baltimore’s shoemakers “organized a cooperative undertaking, the first in what would be-
come a long line of such collective enterprises” (Steffen, supra note 54, at 116). The tailors of
Baltimore followed suit in 1799 (\textit{Id.} at 118). The defeated Philadelphia journeymen shoemakers
did the same in 1806 (as already noted) (see supra note 73, and accompanying text). See gener-
ally Mittelman, supra note 78, at 466-69; Foner, supra note 3, at 178-81; Faler, supra note 54, at
182-85, 201.
parent. It did not provide the basis for a continuing series of union wins. Given the simple deterministic biases of our time — biases which seem embedded in both liberal and Marxist thought — scholars have concluded either that Shaw intended this duplicitous result or that he should be thought of as having intended nothing at all, being merely a conduit for the operation of social and economic forces.278 Nelles and Leonard Levy, for example, have indicated several contemporary political and economic pressures which they thought tended to impel the Massachusetts court to rule for the workers.279 Other scholars have become livid at the suggestion that such an excellent judge might have rendered a judgment due to purely external considerations. Roscoe Pound found Hunt to be a natural development in the law of conspiracy, its author having been a conscientious and upright jurist “acting in the light of the received [legal] ideals of the times.”280

Pound’s idealism must be rejected because it abstracts the law from its context and gives it an autonomous and ethereal reality all its own, contrary to experience; it would deny the law’s connection to any socio-economic factors. Socio-economic pressures were (and are) not “purely external” to the law; however, the method by which Shaw and his colleagues became legally aware of these factors was by no means as simple or as direct as is implied by the economic determinism of Nelles and Levy in the “mirror” metaphor, or the “conscious-subconscious” dichotomy. Context, culture and connections must be taken into account in a more complex and sophisticated theory of determinism which recognizes that limits of consciousness and intentionality are provided by an intuitive understanding of what is “normal”. This in turn derives from the process of acculturation which has (with complications due to each individual’s unique experience) produced the human subject under scrutiny. The acculturation process is itself biased and par-

278 See Comment, supra note 223.

279 Nelles argued that the contemporary political situation in Massachusetts was important: since the competing parties were apparently of equal strength, the votes of the workers might have made a difference, and Shaw would have desired to attract those votes to his conservative side (see Nelles, supra note 112, at 1153-62). Levy “pooh-poohed” Nelles’ “crude theory of judicial decision in which considerations of law are completely ignored” (Levy, supra note 15, at 196). Levy also rejected Pound’s idealistic legalism (see text accompanying infra note 281), which was based solely on “the taught legal tradition” (Levy, id. at 202) and thus omitted all socio-economic context. Levy adopted two theories of Hunt which seem to me to be just as crudely determinist as that of Nelles. First, he thought that Shaw was attempting to rebut those anxious to codify the law by showing that “the common law was liberalism itself” in its concern for workers (id. at 199); second, Levy alleged that “Shaw regarded combinations, whether by entrepreneurs or workers, as inherent in a free competitive society, and he saw a social gain in the competition between interests” (id. at 203). On codification, see Gordon, Book Review (1983), 36 Vand. L. Rev. 431.

tial; it is a product and thus reflective of the interests, by and large, of those who are in the process of producing the culture. A norm derives from the pressure that concrete economic forces exert both on the external organization of the social structure (producing a "normal" arrangement of interlocking economic functions) and on the internal organization of the social structure (producing a "normal" intersubjective life-world of abstract social roles).

The *Hunt* opinion was written within a general context of awareness of "labour unrest" and within the specific context of the conditions of the labour market in urban New England. Shaw, a banker and investor, was aware of business' needs and desires. As a result, some socio-economic pressures probably directly impinged upon the decision. Nelles' claim that Shaw's exception for labourers under contract was a message to New England mill owners is likely accurate; and Landis was similarly correct in concluding that Shaw was aware of the manner in which the decision would legitimate trade unionism. The publication of the opinion in *Hunt* was apparently delayed for a long time, only to be issued soon after the anti-labour *Farwell* opinion. Moreover, as Nelles noted, Shaw dealt with the notoriously slippery common law of conspiracy "with an old-style technical rigour which was not always characteristic of him."

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This sense of the normal movement of the total "factual" context, without which it would be impossible to apply the law to any discrete situation, has been interiorized by the judge during the course of his conditioning. It is a dialectical common-knowledge or common-sense that each of us possesses by virtue of having been raised within the same culture, as that culture is mediated through concretely experienced social collectives, such as the family, the school, and the workplace, and through social collectives that are experienced more abstractly, such as one's social class and the media. And this common-knowledge or common-sense is itself alienated to the extent that these collectives which communicate the "real" through terror and coercion are themselves alienated reciprocities, reciprocities passivized within the roles that bear a functional relationship to the system's total functioning. 

The judge interiorizes his class which is itself defined and constituted as the collective interior negation of the class against which it struggles, within an intersubjective totality that is given its organization by certain determinate economic pressures. Thus, it is accurate to say that the judge knows himself and is "self-conscious" by virtue of this knowledge of the whole. He has what one might call an historical sense of the normal that must be a commonsense among all those to whom the same law applies. (Gabel, *supra* note 8, at 267). See generally Gabel, *The Social Psychology of Law and Legal Process* (unpub. Ph.D. dissertation, 1981). See also, e.g., Tushnet, *The American Law of Slavery 1810-1860: Considerations of Humanity and Interest* (1981) at 31-32.

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See text accompanying *supra* note 223.

See text accompanying *supra* note 225. For an explanation of the *Farwell* decision, see *supra* note 223.


The infrequent use of citation — often its total absence — was habitual with Shaw. Al-
Nevertheless, it is unlikely that Shaw considered himself to have been overtly responding to socio-economic pressures external to the law, even in an age of instrumental adjudication and even though he was an instrumental judge. Pound correctly reminds “Marxian economic determinists” to understand that Shaw was “trained in the common law tradition” and was an “honest man” who stubbornly refused to be swayed by the democratic prejudices of others. The Massachusetts court in Hunt, and indeed all the men who sat as judges in the labour conspiracy cases of the previous three decades, had been acculturated within approximately identical proto-bourgeois and legal contexts. In the first half of the nineteenth-century, labour cases probably presented class conflict and social distension to American courts though he was duly respectful of the value of old formulas, he was more often compelled to make them serviceable. He often explained principles in terms of public policy or social advantage, and placed his decisions on the broadest possible ground.

(Levy, supra note 15, at 24).

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Shaw’s associates, who concurred in the “liberal” decision in Commonwealth v. Hunt were Samuel S. Wilde, an old line Federalist, who had been a member of the Hartford Convention, Charles Dewey, who had been brought up in the office of that obstinate Federalist and aristocrat Theodore Sedgwick, and Samuel Hubbard, an appointee of the Federalist-Whigs.

(Id. at 88.)

“Class” and “class conflict” are, for most purposes relevant to this essay, interchangeable terms and concepts. For many non-Marxists the terms often used by Marxists seem to be vague and imprecise, now meaning one thing and now seemingly used to refer to something different with even an opposite meaning. “The most formidable hurdle facing all readers of Marx is his ‘peculiar’ use of words,” Bertell Ollman states in the opening of his book which attempts, in over 300 pages, to explain Marx’s idiosyncratic usages. “Vilfredo Pareto provides us with the classic statement of this problem when he asserts that Marx’s words are like bats: one can see in them both birds and mice” [Ollman, Alienation (2d ed. 1976) at 3]. I recommend a close and serious reading of Ollman’s book before deciding that Marxists mean nothing, or everything, or something essentially irrelevant or incomprehensible when their key concepts are used in discussion.

Marx’s useful theories and views depend upon a dialectical theory of perception; Marxist concepts are “like bats” because the fundamental units of experience are Relations. Elements of reality are defined not in isolation, not by separating them from everything else, but by their connections and relationships. The irreducible unit of perceptive experience is a Relation, a core of meaning understood in large part by, from, and within its historic, social, multi-dimensional context. In this view, individuals cannot meaningfully be divorced from their social and temporal environs. People are defined by their relationships. The most fundamental of human relationships, as Marxists read history, are connections amongst humans and the means of production — connections which enable the continuance of life and the satisfaction of the most fundamental of human needs and desires. Since those means are apparently scarce and are actually inequitably distributed, the interests of people in having access to them are opposed one to another. “Class” is a complex clash of interests, not simply of people or groups. “Class conflict” can at times meaningfully be seen as revolving around the interests of a relatively large group of “have-nots” opposing those of a small elite (sometimes quite openly, but usually partially subtly and insidiously), all concerning access to the means of production largely controlled by the latter. Just as often, this opposition is submerged, apparently hidden within the
more directly and bluntly than did other legal disputes. Indeed, the labour conspiracy judges constantly referred to the problem. Consequently, the social fabric of legalistic behaviour, belief and thought (developed in part to neutralize such stresses by normalizing, sublimating or ignoring them) would naturally show signs of strain when confronted with such cases. For Shaw, however, the fabric only stretched and buckled; it did not break. If anything, Shaw probably saw himself in Hunt as ironing out dangerous and unseemly wrinkles in the fabric of the law, restoring its legitimacy.

Shaw and his colleagues genuinely believed in the developmental *laissez-faire* notions with which they “generously larded their opinions in labor-conspiracy cases,” and that the needs and future of their community were bound up in “growth”, entrepreneurship and the interests of employers. That was entirely “normal” for them. Rantoul, in polite rhetoric, told Shaw about the class bias of judges and the bias inherent in the law of labour conspiracy itself. But Shaw’s education, training and social environment prevented him from being able to realize fully the truth in what Rantoul was saying. What Shaw likely understood was that the law of conspiracy appeared to have been often unfairly propounded, not that it was unfair. The Massachusetts judges probably did not understand themselves to be acting in a partial, uncritical and one-sided fashion as class oppressors. They did not perceive how one-sidedness was built not only into their attitudes, but also into the substantive law of conspiracy and the common law judicial process itself. They could not have reached such a conclusion without rejecting their heritage, their context, their culture, their grasp on reality; in short, their class position and class interests.

We must not, however, misperceive the function of the system of
common law adjudication by focusing too narrowly upon rules or results. The most important function of ideology (and of ideology-producers, such as judges) in a hierarchical social system (where direct force often cannot be utilized) is the “manipulation of symbols, images, and ideas . . . to legitimize a social order that most people find alienating and inhumane.”

By its open bias, the prior trend in the labour conspiracy decisions seemed to become a threat to the legitimacy of the system itself.

Judicial opinions play an important part in this process of legitimation because the rules which they enunciate assert that existing social norms are the consequence of rights and obligations established through legitimate or just political processes. And one means of reinforcing this appearance of legitimacy is through applying these rules in a more-or-less even-handed way. Since the rules express (and help to constitute) existing hierarchical norms, it is the relatively neutral application of these rules that best serves to reinforce the apparent legitimacy of the existing social order in people's minds.

Shaw was restoring the common law to an appearance of fairness, and in this he was supremely successful, as is demonstrated by the continuing high praise for Hunt. Moreover, the decision “fits”. The contractarian core of the emerging laissez-faire culture demanded the appearance of an approximation of equality between bargainers. The “received ideals” of Pound’s beloved common law system naturally brought the able and intelligent Shaw to a doctrinally sound, culturally resonant, apparently legitimate and utterly “normal” resolution.

Shaw thus made the law of labour conspiracy seem more fair, by cabining it into rules with associated exceptions. This painstakingly-formulated but murky legalism retained the possibility of misuse and one-sided application, but that was the “expected” result of the vagueness inherent in common law adjudication. Moreover, the rules looked even-handed, and its misuse would occur, if it ever did, through application of the usual common law process of interpretation (or through the application of the notion of contract, that quintessentially capitalist doctrine, which encapsulates the contradiction of the seeming fairness and the actual unfairness of capitalist life). Workers’ lawyers had for years argued that the common law was class biased, and although Shaw’s decision was not particularly addressed to the workers, they had nevertheless received a windfall from it. The case was addressed to

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284 Id. at 369-70; see also text accompanying supra note 3.

285 See text accompanying supra note 272.
those who read legal opinions: lawyers, judges and other rising, middling or eminent people who needed to be reassured about the legitimacy of the system. As Leonard Levy has put it, using terms containing the same apparent class-neutrality as does most mainstream ideology, Shaw "reconciled the standing law with the needs of a free society."286

V. CONCLUSION

A. Going Too Far

Too much can be made of the history of labour law examined in this essay. First, it must be emphasized that only elite aspects of the problems presented by the early labour conspiracy cases were given a solution by Chief Justice Shaw. While evidence does not readily present itself, it is unlikely that the workers were convinced by Hunt of the essential fairness and evenhandedness of American law or of American judges. Those who were willing to suspend their disbelief after Hunt were likely driven back to their previous view by the re-emergence of conspiracy law as a means of labour control in the 1860s, and by its growth into the law of injunctions and equitable receivership which, after the 1880s, proved an even more effective method of labour suppression.287

Second, it must also be emphasized that the solution which Shaw propounded to the elite was not immediately accepted into the prevailing ideology.288 Prosecutors, judges and legal commentators in the remaining decades of the nineteenth century did not seize upon Hunt as presenting a solution which properly balanced the interests of labour and management against the legitimacy needs of the rule of law. Workers' needs and protests were handled after Hunt, in general, by identifying the needs of the whole community with the needs of burgeoning capital to the same extent as had, for example, Recorder Levy or Chief Justice Savage. Laissez-faire arguments were still essentially unquestioned by judges until the rise of Progressivism late in the nineteenth-century. Even then the Legal Realist movement of the 1920s and 1930s was only a step in the right direction. There never was, in

286 Levy, supra note 15, at 188 (also quoted in text accompanying supra note 220).
288 As one commentator put it, Shaw's opinion "foreshadows clearly the doctrine of a later day that the legality of a strike is to be made to depend upon the end sought to be obtained" (Landis, supra note 15, at 33)
of the United States, that critical wing of the establishment represented in Europe by socialist professors and workers’ political parties. (When one seemed to be developing in the first decades of the twentieth-century, it was bludgeoned by the Great Red Scare of 1919-1920.) It has only been in the twentieth century that Hunt has come to be acclaimed.

Third, the solution propounded by Shaw was by no means a just one. It took the real needs and interests of labourers into account to approximately the same extent as did the “doctrine” it attempted to replace. The divisions between elite and workers were real, deep, widening, but essentially and substantively ignored by elites, especially in the nineteenth-century. Proposals for radical renovation came from representatives of the working classes, but many were problematic and all were ignored. Shaw’s solution merely made it appear that the law was fair; it did almost nothing toward actually rendering the law fair.

Fourth, my conclusions have been approached by previous scholars such as Nelles, Landis, Leonard Levy and Turner. I have attempted by profuse and sometimes extensive quotation not only to demonstrate that Marxist scholarship treats the same phenomena in much the same ways as does non-Marxist scholarship, but also to exhibit the great debt which I owe to those who came before me. The essential difference between us is their unwillingness to assume the existence of class conflict, their inability to see (in the socio-economic context of the law which some do try to take into account) the evidence of oppressive, malignant and disjunctive gaps between the point of view of the employers and that of the workers. They are unwilling to admit that, like early nineteenth-century judges, they retain a modified form of the employers’ viewpoint. My own experience and my reading of history urge me to start from the assumption that class differences exist. While


300 See, e.g., Skidmore, The Rights of Man to Property! (1829); Foner, supra note 3, at 167-218.

301 Acceptance of the fact of class conflict is only one of the characteristics of Marxist thought which differentiate it from liberal thought. Other characteristics include, for example, rejection of a radical “in-here” versus “out-there” dichotomy and acceptance of a dialectical, holistic, integrative world-view (see, supra note 292 and works cited therein; Holt, supra note 8, at 669n., 801n.) This is neither to say that Marxist thought has always agreed upon these matters, nor to deny that even the best strands of existing Marxist thought need enrichment [see Holt, supra note 15, esp. at 286n., 287n.; Holt, A Law Book for All Seasons: Toward a Socialist Jurisprudence (1983), 14 Rutgers L. J. 915 at 943-49].
an acceptance of class analysis ultimately does impel one to take either
the employers' position or the workers', it also assumes the ability to
recognize the existence and the arguments of the other side, the inextric-
cable interrelationships between the two sides, that the other side
thinks its arguments are unimpeachably valid and that the positions of
each side are based ultimately upon its own socio-economic needs and
interests. Class unites as well as separates, as the dialectical point of
view demonstrates.

Fifth, the early labour conspiracy cases present an extreme rather
than a typical example of class bias in the law. While I believe that law
tends to embody class needs and interests rather than universal social
needs and interests, and that labour law demonstrates elite bias more
openly than does other law, most case law derives from situations in
which fundamental social conflict is either less direct or apparently not
present at all. In such situations, the shifting factions and alliances
among various elite segments and sometimes between and among elites
and non-elite segments, it becomes more difficult and perhaps less use-
ful to engage in a full-blown class analysis of the law. In today's soci-
ety, class ordinarily may be a matter of the fragmentation of personal-
ity within individuals, simply another way of viewing the skew,
oppression and bias of the complex socio-economic interpenetrations
comprising today's social formation. The more fragmented we are, the
more interconnected portions of us become. However, I do not mean to
urge that the sort of class analysis which can be done of this mass of
data can be easily transferred to operate upon all cases or all law.

B. The Strengths of Class Analysis

Too little can also be made of the conclusions reached in this es-
say, especially in light of the above. First, it is crucial to understand
the nature, indeed the very existence, of the point of view advanced by
the workers. They were the underdogs and the losers, those trampled
upon in the name of democracy and prosperity for all; but they pro-
tested perceptively, vigorously and mightily, to no apparent immediate
avail. Only by actually understanding matters from the point of view of
the jour, and of the jour's comrades-in-arms, can we sustain hope for
genuine progress.

Further, it is important to recognize that the law rarely recognizes

the point of view of the worker. Class bias does exist in the law. At
times, the bias has been open and blatant; however, the source of that
bias, at least in some instances, was the direct and troublesome clash
between employers and employees at a time when the socio-economic
system was undergoing novel, stressful, excruciating change.\textsuperscript{303} Moreover, class bias exists even in neutral legal rules. It is quite important
to understand the class-biased nature of apparently benign, universal
notions of “growth” and modernization, and of the liberal democracies
and legal systems supposedly linked to them.

The judges who disregarded the arguments and the increasingly
desperate plight of workers in these conspiracy cases were reared in
and retained an important place in a culture which, however insular
and partial it may have been within American society in 1800, found
the values of entrepreneurial, individualistic, competitive capitalism to
be good, obvious and true. The arguments made by the employers reso-
nated with that world view. Some arguments made by the workers
might seem to have fit within that world view too, at least if one ac-
cepted the surface logic and apparent fairness of contractualism. How-
ever, the underlying power relationships in the central concept of pri-

tate property, which in effect placed control of the means of production
in the hands of the entrepreneurs while concomitantly disregarding the
collective nature of their exercise of power, proved to be the real truth,
as the result of the indictment of the employers for conspiracy in \textit{Commonwealth v. Carlisle} demonstrates. Justice Gibson’s words bear
repetition:

\begin{quote}
The combination of capital for purposes of commerce, or to carry on any other
branch of industry, although it may in its consequences indirectly operate on
third persons, is unaffected by this consideration [the illegality inherent in labour
combination], because it is a common means in the ordinary course of human
affairs, which stimulates competition and enables men to engage in undertakings
too weighty for an individual.\textsuperscript{304}
\end{quote}

The epigraphs to this essay tell the same tale.

One normal liberal-capitalist mode of deflection of the argument
that the judges and the law were biased is to argue that judges could
not have been biased, since there was little or no “conscious” discrimi-
nation against the workers. As noted above,\textsuperscript{305} the requirement of “con-
sciousness” focuses too sharply on the individual judges and ignores the
cultural envelope within which they spoke, acted and understood them-

\begin{footnotes}
\item \textsuperscript{303} See also Holt, \textit{supra} note 15, at 281-82.
\item \textsuperscript{304} \textit{Carlisle} at 41; also quoted in text accompanying \textit{supra} note 159.
\item \textsuperscript{305} See \textit{supra} notes 268 and 281-96 and accompanying text.
\end{footnotes}
selves. It postulates a "self" which is somehow isolated from its surroundings, a self whose awareness conveniently dictates the boundaries of its being, a self suited to life in the marketplace. It is, in short, a rationale utterly within the cultural discourse of capitalism, having the same source as the judges' argument that competition is good and normal. Thus, it is subject to the same attack of partiality.

A second normal liberal-capitalist deflection is to turn to legalistic abstractions. One postulates a "law" of criminal conspiracy or a "law" of labour conspiracy; the focus is on doctrine, rules, exceptions and logic rather than on the quality of the context or on the social referents of the elements of argument. Legal education, for example, proclaims the truth of such an approach to law, institutionalizing the neutrality of these sanitized verbal meshes and reinforcing the cultural smoke-screen which has erased the politics as the source of legal discourse. By accepting the neutral rhetoric of the judges at face value, one forgoes the chance of getting behind its built-in blinders. It is not difficult to demonstrate, however, that the entire cluster of rules is nothing more than a highly articulated collection of contradictions.

The collapse of the liberal-capitalistic universe of normality has generated a number of alternative theories and constructs, though only one will be taken into account here. It is the one recently developed by the irrationalists within the Critical Legal Studies movement, comrades in our "party of humanity," who have convinced themselves that the indeterminacy of liberal legalism is a characteristic that fatally infects all attempts to construct a social theory. In this view,

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307 This has been the task of those in the Critical Legal Studies movement (see, e.g., Holt, supra note 302, at 917-26; Freeman, *Truth and Mystification in Legal Scholarship* (1981), 90 Yale L. J. 1229). The best statement of the position is Tushnet, *An Essay on Rights* (1984), 62 Tex. L. Rev. 1363 at 1363-94.


310 Tushnet, *supra* note 307, at 1364 passim.

311 See, e.g., Gordon, "New Developments in Legal Theory", in Kairys, ed., *supra* note 16, at
capitalism exists, producing alienation, but the legal ideology of those living within the culture of capitalism cannot usefully be described as exhibiting class bias because all ideology is too indeterminate. "Law is merely an instance of social mythologizing," the irrationalist-indeterminists assert; the class bias argument fails because it is all in our minds and there is no way that domination can break into our minds unless we let it do so. "What we experience as 'social reality' is something that we ourselves are constantly constructing," they argue.

"There is no 'true' analysis that comports with the way things really are, because there is no hard social reality separate from our social construction of meaning." The irrationalist-indeterminist argument ends at a position surprisingly like that of the liberal deflectionists just criticized. The difficult apparent problem of the relationship between "out there" and "in here" is solved idealistically, by refusing to emerge from "in here"; the most important thing in the world is a series of mental constructs, which both browbeat humanity and free it. Browbeating occurs when we accept the picture of reality that capitalists create and force upon us; or when we attempt to co-operate with the powerful in legal ways which seem to give us more living space but which, by giving us that apparent space, causes us to sink back, refreshed but snookered. We are freed (on this view) when we decide to see ourselves "as in the process of continuous creation" in our own minds, when we concomitantly focus upon "the smallest, most routine, most ordinary interactions of daily life in which some human beings dominate others and they acquiesce in such domination." An internal notion of mental constructs, a series of isolated monads full only of their own all-important consciousnesses; it seems just like the liberal world view that both the irrationalist-indeterminasts and we fellow-travellers have grown to understand and thus to despise.

But where did the capitalists, those mysterious "elites who have thought they had some stake in rationalizing their dominant power positions," come from in the first place? The position of the irrational-

281.

813 Gordon, *supra* note 312, at 287.
817 Id. at 288.
ist-indeterminast is static, ahistorical, (as Anthony Chase shows) cut-off from life, from social history itself.\textsuperscript{318}

This essay has attempted to demonstrate the reality of “class bias” in law by embedding that law within the social history of protesting workers, as recently described by a rising, hopeful generation of labour historians.\textsuperscript{319} The mysterious “black box” of causation\textsuperscript{320} (just what constitutes the connection between entrepreneurial capitalism and the neuron paths of the monadic judges who sat in these conspiracy cases anyway?) seems much less problematic. In reality, judges sided with employers and adopted and espoused the capitalistic world view which enveloped those employers securely, and left the workers in the mire and dust of “progress in industry”. The judges fulfilled “the needs of a free society”\textsuperscript{321} The early labour conspiracy cases in the United States demonstrate a one-sidedness that is the very definition of class bias, written in the language of normalcy, part and parcel of that bias.\textsuperscript{322}

APPENDIX

Despite Turner’s claim to the contrary,\textsuperscript{323} there is some confusion about which cases should be included in a study like this one. I have decided to confine myself to the seventeen prosecutions for conspiracy recorded in Commons, 3 and 4 Documentary History\textsuperscript{324} and one of the two civil cases also included therein. These are the eighteen cases listed and partially analyzed in Table I, below.

Some explanation of the selection criteria ought to be made. I

\textsuperscript{318} Chase, \textit{Workers' Rights}, supra note 316, at 680-85. Another radical scholar who agrees that the alleged radical dichotomy between passions and reason is a recent political invention is Allan Hutchinson: “[T]he crucial historical relation of power and knowledge” cannot be deconstructed, he implies; “[t]hey are mutually generative and inseparable. . . . A complex web of forces that continually disaggregate and coalesce, it is a pervasive and dynamic feature of all relations” (see Hutchinson, \textit{From Cultural Construction to Historical Deconstruction} (1984), 94 Yale L. J. 209 at 231). Of course, to view creation in terms of Relations is precisely the “method” of Marx's dialectic. Although radically to separate “method” from substance, as this formulation implies, is itself undialectic and anti-Relational (see supra note 292). At least Hutchinson \textit{seems} to agree most of the time; at another point, he postulates: “Determinacy is contrived, superficial, and ephemeral. . . .” (Hutchinson, \textit{supra}, at 235). This returns us to the Klein bottle of nihilism or ethical relativism.

Yet another radical scholar, who has understood all of this for years, and who insists that the ancient philosophers did too, and did so better than any of their successors, is L. H. LaRue. See, \textit{e.g.}, LaRue, \textit{Politics and the Constitution} (1977), 86 Yale L. J. 1011.

\textsuperscript{319} See works cited, \textit{supra} note 54.

\textsuperscript{320} Tushnet, \textit{Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies} (1979), 57 Tex. L. Rev. 1307.

\textsuperscript{321} Levy, \textit{supra} note 15, at 188, also quoted in text accompanying \textit{supra} note 220.

\textsuperscript{322} See generally Tushnet, \textit{supra} note 321; Tushnet, \textit{supra} note 308, at 1394-98.

\textsuperscript{323} Turner, \textit{supra} note 12, at 1.

\textsuperscript{324} \textit{Documentary History}, \textit{supra} note 2.
have attempted to include only those cases about which more is known than the fact of their existence. Therefore I have excluded the 1836 Philadelphia Coal Heavers prosecution and the 1842 Rockdale Textile Workers prosecution.\(^2\) (I have, however, included the 1814 Pittsburgh prosecution of the cordwainers, although little is known about it, since it was clearly the prelude for the 1815 prosecution of which there is a full report.) I have also excluded Taylor v. Thompsonville Carpet Mfg. Co.\(^3\) even though it has been included in the Commons collection, since it was a civil (tort) action for false arrest, not a conspiracy case (though it clearly represented the workers' retaliation for the owners' prior action in tort for conspiracy), and because the outcome is unclear. Finally, two scholars have included Boston Glass Manufactory v. Binney\(^4\) in their compilations of early conspiracy cases,\(^5\) but that was a labour contract case and is not considered here since it did not concern conspiracy.

I was unable to choose a uniform method of citation. I usually cite by an appellation indicating the city or town where the case arose and the type of union which was prosecuted for conspiracy (indicated in the second column of Table I). However, two of the cases (Carlisle and Hunt) are sufficiently well known by their proper citation. Commons reprinted New York Cordwainers in his collection because the pamphlet published by Sampson was so much more thorough than the reports of the case in the law books. However, other conspiracy decisions found in reporters (the two in Hunt, and those in Carlisle, New York Hatters and Geneva Shoemakers) were not reprinted in Commons' collection and I therefore used the reporters for citations to these cases, with resulting inconsistencies amongst my citations to the primary sources for this essay. I hope that Table I will help to dispel any resulting confusion.

While many of these conspiracy cases remained totally obscure until Commons and his associates resuscitated them, others were sufficiently well known to counsel to be cited in subsequent instances. Philadelphia Cordwainers, the first prosecution, was cited by either counsel or court, or both, in five subsequent cases, including two in New York. New York Cordwainers was cited in six subsequent cases including three in Pennsylvania and Hunt. Hunt also cited Geneva Shoemakers,

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325 For the 1836 Philadelphia Coal Heavers case, see Mittelman, supra note 78 at 337. For the 1842 Rockdale Textile Workers case, see Wallace, supra note 2, at 364-65, 373-74.

326 4 Supp. Documentary History, supra note 2, at 126.

327 4 Pick. (Mass.) 425 (1827).

328 Turner, supra note 12, at 2-3; Nelles, supra note 112, at 1167.
which had in turn contained references to *New York Hatters* and *Philadelphia Cordwainers*. The important precedents among the early conspiracy cases were, it may be concluded, available to and known by lawyers and courts, whether or not (as Tony Freyer suggests) *stare decisis* was not honoured in those times in the same fashion or to the same extent as it appears to be now.\(^{329}\)
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Sources: John Commons et al., eds., Documentary History of American Industrial Society (1910), volumes 3 and 4; reports of cases mentioned herein; Nelles, Commonwealth v. Hunt, 22 Colum. L. Rev. 1128, 1166 (1932); M. Turner, The Early American Labor Conspiracy Cases: Their Place in Labor Law 2, 3 11 (1958) (Tables I & III).

Notes:
1. Listed in this column are the judges who rendered the opinions in the cases, or whose jury charges are reported. In at least the instances marked with asterisks next to the judge's name, other persons also sat as members of the court. It must also be noted that Gibson and Williams were justices of the Supreme Courts of their respective states, but were sitting alone in lower courts by special arrangement.
2. This case is known only from the testimony of Adam Moreland, a prosecuting witness in the second Pittsburgh Cordwainers case.
3. The masters brought a habeas corpus petition to seek discharge from custody on bond (full). The court denied discharge, and remanded them to custody, but they were subsequently released on bond.
4. The defendant journeymen sought release from their recognizances, that is, discharge from custody. The court denied such a discharge, continuing their custody.
5. The trial court had dismissed the defendants' conspiracy indictment. The appeals court reversed this dismissal, ordering the indictment to stand.
6. Further information may be found in C. Steffen, The Mechanics of Baltimore 222-23 (1934).


**TABLE II**

Citation Records of the Conspiracy Cases

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Source: Commons et al., Documentary History, volumes 3 and 4; reported cases (as mentioned in Table I).