[Bonus] AFD Ep 349 Links and Notes - State-level labor law part 2: Early history
[Bill/Rachel] - Recording Feb 9
Historical origins of state labor law: Hunt v. Commonwealth 1842

- Today on the bonus episode we're talking more about state-level labor law, the rise of unions in the early United States, and the original gig economy. Our specific lens for exploring these topics will be the influential Hunt v. Commonwealth ruling by the Massachusetts Supreme Court in 1842.
- One thing we have not emphasized much on the show so far, because it's much less recognizable to us in the 21st century economy, is that there wasn't really a "US economy" per se during much of early US history and the first Industrial Revolution. The United States grew out of the several original colonies that had decided to form a confederation and then a union and for a long time, these states retained pretty separate economies separated by vast distances with poor interior transportation and communications. Companies would often end their activity at the state lines. And for much of the pre-Civil War period, we wouldn't really recognize modern currency and banking systems. These transformations have a lot to do with the Civil War and are likely topics for future episodes. The interstate commerce that became such a massive force in the middle of the 19th century and the post-Civil War period took a long time to develop. We talked in 2020 in our five-part series on Standard Oil about how unprepared the government was at the federal and state levels to deal with interstate corporate monopolies like Standard Oil or the growing conglomerations of railroads, simply because they really hadn't seen that kind of thing before. They had to pass much more extensive legislation to deal with interstate commerce activities by new interstate companies, and these laws unfortunately also became the genesis for early and typically hostile federal labor laws focused against emerging interstate organized labor unions. Before that era, in the pre-Civil War period, labor law was almost by definition based in state law because labor organizations were based at the state or local level, since interstate companies were unusual or very limited in scale. There was also a transitional phase between Old World guilds of skilled piece work producer shops and the new craft unions of skilled and semi-skilled workers in specific occupations like factories or railroads, before the later rise of the industrial unions for labor on an industry-scale. Part of that transition, as we will discuss today, has to do with the difference between a guild's regulation of the entire profession from the owners or masters down to the apprentice workers before the advent of full capitalism versus a union representing skilled piece workers for hire by those masters in the era before piece work was replaced by factories and mass production. In the profession or industry we will cover today, that conversion to factories happened on the later end of the first industrial revolution, so we're essentially looking at this transitional era of labor organization in the final phase of proto-capitalism and proto-industrialization, although other industries had already fully industrialized and capitalized decades earlier.
- To give a sense for how far into the economic development of the United States we have to go to see something approaching labor law that we can even recognize as being from an industrializing economy, we are talking about the 1840s in Massachusetts in the state Supreme Court ruling Commonwealth v. Hunt (1842, Massachusetts [for comparison, a couple years before Karl Marx began writing communist theory in Europe], written by Chief Justice Lemuel Shaw): Found it was not an illegal conspiracy to form a guild or union to apply pressure for higher wages
    - http://masscases.com/cases/sjc/45/45mass111.html: Proto-Closed shop concept - Journeymen bootmakers formed a club (the Journeymen Boot-makers' Society) with a rule that said no member would perform piece work for any master craftsman or merchant who did not hire journeymen from the club. (A journeyman

at the time would have meant a skilled and trained wage laborer working for someone else but free to leave unlike an indentured worker.) Typically, the boot-sellers would need several journeymen boot-makers to fulfill orders for boots, so this was pretty effective at pressuring them to hire only members.

- Seven members of the Society had been indicted for conspiracy: *"on the first Monday of September 1840, at Boston, being workmen and journeymen in the art and manual occupation of boot-makers, unlawfully, perniciously and deceitfully designing and intending to continue, keep up, form, and unite themselves into an unlawful club, society and combination, and make unlawful by-laws, rules and orders among themselves, and thereby govern themselves and other workmen in said art, and unlawfully and unjustly to extort great sums of money by means thereof, did unlawfully assemble and meet together, and, being so assembled, did then and there unjustly and corruptly combine, confederate and agree together, that none of them should thereafter, and that none of them would, work for any master or person whatsoever, in the said art, mystery or occupation, who should employ any workman or journeyman, or other person, in the said art, who was not a member of said club, society or combination, after notice given him to discharge such workman from the employ of such master; to the great damage and oppression, not only of their said masters employing them in said art and occupation, but also of divers other workmen and journeymen in the said art, mystery and occupation; to the evil example of all others in like case offending, and against the peace and dignity of the Commonwealth."*
- It also seems there was alleged to be a bit of a shakedown element where the club would force owners to pay fines to the club for violations of the club's rules for its members (which I take to mean rules about wages & working conditions). One specific angle of attack was that the club had sanctioned one of its own members for doing a bit of extra work on some boots without properly charging for it. This was considered to be "impoverishing" that laborer.
- They were tried on a bunch of conspiracy charges for extortion and restraint of profits in late 1840 for activities dating from late 1839. (Per wikipedia: They had been acting as a combination in Boston since 1835 but were not targeted for prosecution until after the financial panic of 1837. They also had not threatened any kind of strike or other disruptive activity when the charges were brought. There was no known threat to labor peace at the time.)
- Astonishingly to us today, as noted in the Massachusetts Supreme Court case, the charges were based on English common law, because Massachusetts (like many states at the time) did not actually have a written statute prohibiting such conspiracies to restrain trade or profits, and it was still up for debate as to whether or not common law should fill gaps not yet legislated on. To the extent that England itself had written laws on the subject before the American Revolution, these mostly dated to the Black Death era wage and price control laws attempting to contain the exploding power of wage labor following the mass death of a huge percentage of the workforce in the 1300s. (This is cited in the court ruling, but also see Patrick Wyman's "Tides of History" episodes on this topic.) The court also observed that many of the labor market challenges of late medieval and early modern England not only did not have anything in common with 1830s and 1840s Massachusetts labor markets but were also different enough to the situation in colonial Massachusetts that many of the laws that could have been imported to the colonies never were.
- The Massachusetts Supreme Court ruled in 1842 that it was improper to charge or convict the journeymen boot-makers for having formed a club for higher wages

because they were not conspiring to commit "unlawful acts" but simply conspiring to commit at worst a civil injury and had never been accused of anything else. Moreover, they noted that each individual worker had every right to demand higher wages, so it logically followed that forming a club to do so in a joint manner was also their right: *The means which they proposed to employ, as averred in this count, and which, as we are now to presume, were established by the proof, were, that they would not work for a person, who, after due notice, should employ a journeyman not a member of their society. Supposing the object of the association to be laudable and lawful, or at least not unlawful, are these means criminal?* ***The case supposes that these persons are not bound by contract, but free to work for whom they please, or not to work, if they so prefer. In this state of things, we cannot perceive, that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests.***

- A conspiracy was only an unlawful conspiracy if it was undertaken to do something else that is otherwise illegal individually or to do something that is not illegal but use means to achieve it that are illegal under any circumstances, including individually. (A conspiracy to destroy property or commit murder or a conspiracy employing tactics like lying and cheating would still not be allowed, but a conspiracy to demand higher wages or else withhold labor would be fine.) The court ruled that the judge in the original trial had been in error when he instructed the jury that the labor combination was itself an illegal conspiracy by its very existence, whereas the defense attorneys had asked that the jury be instructed that the indictments never alleged any illegal objective or illegal means that the conspiracy had been formed to pursue. The prosecution had framed the indictment as to suggest that a labor club forming to demand higher wages in concert was automatically unjust extortion "of great sums."
- ***The manifest intent of the association is, to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful.*** *It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged. Such an association might be used to afford each other assistance in times of poverty, sickness and distress; or to raise their intellectual, moral and social condition; or to make improvement in their art; or for other proper purposes. Or the association might be designed for purposes of oppression and injustice. But in order to charge all those, who become members of an association, with the guilt of a criminal conspiracy, it must be averred and proved that the actual, if not the avowed object of the association, was criminal.*
- The court further wrote that it was absurd to suggest that an association of people lowering the profits of a business by merely influencing supply and demand was automatically illegal, because then it would be illegal for a group of people to form to open a new business near an existing business in the same line of work, thereby reducing its profits.
- The court did not comment on the defense's argument that professional associations like the Bar Association were prevalent among professional Bostonians and involved similar sanctions against working with non-members.
- One interesting point in the 1842 court case, given the modern day disputes around so-called "independent contractors" who are treated like day labor even if they work for an employer for many years, is how many times the court emphasizes or differentiates the concept of free wage labor as opposed to

contract labor, meaning indentured apprentice labor for a defined term of service of some years or other formalized contracts for extended employment terms with business owners, such as a landowner hiring farm labor for an entire year instead of seasonally. The court treats the free wage laborers as essentially sole proprietor businesses selling skilled labor to larger business enterprises or craft masters looking to sell goods at market. A retail customer seeking to purchase a pair of boots would buy from the boot business, which in turn would have paid a skilled boot-maker to make the boots and supplied the materials needed. (This is known as the putting-out system and was prominent in the Boston area: https://www.encyclopedia.com/history/dictionaries-thesauruses-pictures-and-press-releases/boot-and-shoe-manufacturing) But typically, an 1830s boot-maker would not have been permanently employed by a boot seller, as differentiated from a boot factory with an assembly line for mass production of boots, which emerged after 1850. In 1899, this would consolidate into the giant United Shoe Machinery Company monopoly based in the Boston area, which evolved into a major defense contractor, and which was broken up by the federal government in the late 1960s after multiple antitrust cases. (Future episode?) https://en.wikipedia.org/wiki/United_Shoe_Machinery_Corporation

- https://en.wikipedia.org/wiki/Commonwealth_v._Hunt The Wikipedia article on the Hunt case notes that pre-American Revolution labor unrest among non-slave labor was typically relatively disorganized wildcat incidents that weren't considered illegal in their own right (setting aside any resulting property damage) and there was not much pressure to make them illegal because they were not viewed as part of a broader pattern or trend. Additionally, colonial era laborers had typically been indentured and apprenticed to masters who would contract to produce outside work essentially as a small business vendor to mercantile interests, which is a different relationship vs an independent wage laborer (journeyman) selling his labor from one producer or master craftsman to the next. The wage laborers began to outnumber these master craftsmen as the first Industrial Revolution gained momentum and factories began to replace artisanal shops in the cities and cottage production in the countryside. A few states tried to prosecute labor combinations in the early 19th century but not very vigorously, and the significance of the Hunt case law (which is also not a written law, of course) is that it spelled out that such combinations were actually explicitly legal, not illegal, at least in Massachusetts.
    - Chief Justice Lemuel Shaw who issued the decision was normally not pro-worker, but we can see in this decision a consistent worldview because of his framing in this case of wage laborers as independent businessmen selling their labor. Just before his ruling in Hunt v. Commonwealth, he had ruled that a railroad company was not liable if the actions of a rail worker injured another worker because the liability falls to the worker. The other possible explanation for his Hunt ruling, as theorized by some legal scholars, is that Shaw as a prominent Whig merely wanted to uphold labor peace in Boston to avoid angry workers mobilizing in support of the Democratic Party.
    - Significance: Almost no labor conspiracy cases were brought anywhere in the US for decades after Hunt because it was viewed as such a strong precedent even outside of Massachusetts. During and after the Civil War, with the rise of interstate unionism, labor militancy, interstate commerce laws, and federal antitrust laws, prosecutions eventually ramped up again. But some states in this period, like Pennsylvania, took action to pass laws explicitly legalizing unions at the state level. The Hunt ruling also had made clear that labor conspiracies would be unlawful if they used unlawful means to achieve their goals, which served as a

precedent for future prosecutions around specific labor actions that were unlawful or illegal, even if a labor organization's existence was often considered legal by default.

- Some relevant quotes on the process of proletarianization from Karl Marx's Communist Manifesto (1848, so he is looking at a stage of industrial development that was further along than in the boot-making industry of the 1830s & 1840s, which as noted earlier did not yet have factory mass-production):
    - *The feudal system of industry, in which industrial production was monopolised by closed guilds, now no longer sufficed for the growing wants of the new markets. The manufacturing system took its place. The guild-masters [Engels 1888 footnote: i.e. "that is, a full member of a guild, a master within, not a head of a guild"] were pushed on one side by the manufacturing middle class; division of labour between the different corporate guilds vanished in the face of division of labour in each single workshop.*
    - *In proportion as the bourgeoisie, i.e., capital, is developed, in the same proportion is the proletariat, the modern working class, developed — a class of labourers, who live only so long as they find work, and who find work only so long as their labour increases capital. These labourers, who must sell themselves piecemeal, are a commodity, like every other article of commerce, and are consequently exposed to all the vicissitudes of competition, to all the fluctuations of the market. [...] Modern Industry has converted the little workshop of the patriarchal master into the great factory of the industrial capitalist. Masses of labourers, crowded into the factory, are organised like soldiers. As privates of the industrial army they are placed under the command of a perfect hierarchy of officers and sergeants. Not only are they slaves of the bourgeois class, and of the bourgeois State; they are daily and hourly enslaved by the machine, by the overlooker, and, above all, by the individual bourgeois manufacturer himself. The more openly this despotism proclaims gain to be its end and aim, the more petty, the more hateful and the more embittering it is.*
    - *The lower strata of the middle class — the small tradespeople, shopkeepers, and retired tradesmen generally, the handicraftsmen and peasants — all these sink gradually into the proletariat, partly because their diminutive capital does not suffice for the scale on which Modern Industry is carried on, and is swamped in the competition with the large capitalists, partly because their specialised skill is rendered worthless by new methods of production. Thus the proletariat is recruited from all classes of the population.*
    - *The growing competition among the bourgeois, and the resulting commercial crises, make the wages of the workers ever more fluctuating. The increasing improvement of machinery, ever more rapidly developing, makes their livelihood more and more precarious; the collisions between individual workmen and individual bourgeois take more and more the character of collisions between two classes. Thereupon, the workers begin to form combinations (Trades' Unions) against the bourgeois; they club together in order to keep up the rate of wages; they found permanent associations in order to make provision beforehand for these occasional revolts.*
    - *The essential conditions for the existence and for the sway of the bourgeois class is the formation and augmentation of capital; the condition for capital is wage-labour. Wage-labour rests exclusively on competition between the labourers. The advance of industry, whose involuntary promoter is the bourgeoisie, replaces the isolation of the labourers, due to competition, by the revolutionary combination, due to association.*