THE SHERMAN ANTITRUST ACT AND THE JUDICIARY

Democracy Betrayed

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On February 3, 1908, The New York Times reported that the United States Supreme Court banned boycotts by trade unions. According to the article, a hat manufacturer, Dietrich Loewe & Company of Danbury, Connecticut, had sued Martin Lawlor and over 200 other members of the United Hatter of [North] America for damages under section 7 of the Sherman Antitrust Act. The article described the Court's ruling as

> the most damaging blow organized labor has received, and, carried to its full import, means that hereafter any union which undertakes a boycott renders every one of its members personally liable for threefold damages to the firm or individual boycotted.[1]

The Court's decision seemed straight forward enough - boycotts by trade unions were now illegal - but inherent in the decision was an apparent anomaly. If a trust is "a combination of firms or corporations for the purpose of reducing competition and controlling prices throughout a business or an industry,"[2] then how could an act that was, according to its title, anti-**trust**, be applicable to a labor union?

To answer this question, the Sherman Antitrust Act must first be discussed. This act, which was signed into law by President Benjamin Harrison on July 2, 1890, consists of eight sections. The preamble to the act states that it is "An act to protect trade and commerce against unlawful restraints and monooplies." Section 1 of the act states:

> Every contract, combination in the form of trust or other wise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 3 of the act states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce...is hereby illegal.

Section 7 of the act states:

> Any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared unlawful by this Act, may sue therefor in any circuit court of the United States ... and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney fee.

Section 8 of the act states:

> That the word "person" or "persons," ... shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Sections 2, 4, 5, and 6 set forth the penalties for violation of the act and establishes the jurisdiction of the federal courts "to prevent and restrain violations of this Act." Terms such as "boycott," "trade unions," "labor organizations" or any other references to labor do not appear in the act. However, terms such as "monopolies," "trust," "trade" and "commerce" are included in the act, suggesting that the act was intended to prohibit certain business practices deemed to be improper.

Nonetheless, despite the wording of the act, the United States Supreme Court, in a unanimous decision, ruled that the act was applicable to labor boycotts. In the opinion of the Court, which was delivered by the Chief Justice, Melville W. Fuller, the boycott was found to be a "combination in restraint of commerce," illegal under the Sherman Antitrust Act, and that

therefore the defendants were liable for threefold damages under section 7 of the act. Fuller argued that

> Any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business, is within the inhibition of the anti-trust act of July 2, 1890 against combinations "in restraint of trade or commerce among the several states."[4]

Fuller explained how the boycott constituted a "combination in restraint of trade":

> The combination charged [fell] within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination impose[d] ....[5]

Fuller also asserted that the boycott was not a constitutionally protected right, and bolstered his argument by quoting Associate Supreme Court Justice Oliver Wendell Holmes who, according to Fuller, said:

> When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied .... The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.[6]

The Court also rejected the argument that the act did not apply to the defendants because they were not engaged in interstate commerce. In his opinion, Fuller wrote:

> Nor can the act in question be held inapplicable because defendants were not themselves engaged in interstate commerce. The act made no distinction between classes. It provided that "every" contract,

> combination, or conspiracy in restraint of trade was illegal.[7]

Fuller further argued that Congress had intended to include labor organizations under the act.

> The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act, and that all these efforts failed, so that the act remained as we have it before us.[8]

Therefore, according to Fuller, the act applied to combinations of laborers.

> It is true this statute has not been much expounded by judges, but, as it seems to me, its meaning, as far as relates to the sort of combinations to which it is to apply, is manifest, and that it includes combinations which are composed of laborers acting in the interest of laborers.[9]

The Court condemned the tactics employed by the defendants, the United Hatters of North America and the American Federation of Labor, in their boycott of Loewe's business. Fuller charged the United Hatters of North America

> ...with the intent...to control the employment of labor in the operation of said factories...in a manner extremely onerous and distasteful to such owners, and to carry out such scheme, effort, and purpose by restraining and destroying the interstate trade and commerce of such manufacturers, by means of intimidation of and threats made to such manufacturers and their customers in the several states, of boycotting them, their product, and their customers, using therefore all the powerful means at their command as aforesaid, until such time as, from the damage and loss of business resulting therefrom, the said manufacturers should yield to the said demand to unionize their factories.[10]

Fuller also incorporated into his opinion substantial

portions of Loewe's complaint which alleged that

> ...the defendants...[intended]...[t]o cause by means of threats and coercion, and without warning or information to the plaintiffs, the concerted and simultaneous withdrawal of all makers and finishers of hats then working for them, who were not members of their said combination, the United Hatters of North America....[11]

Thus, according to Fuller, the union boycott was a form of economic extortion which obstructed interstate commerce and therefore was subject to sanctions under the Sherman Antitrust Act.

The Supreme Court's ruling reversed a lower court ruling which had rejected Loewe's complaint against the union. The lower court was not convinced that the Sherman Antitrust Act applied to labor unions. On December 6, 1906, District Court Judge James P. Platt, in his opinion, wrote:

> It is not yet perceived that the Supreme Court has as yet so broadened the interpretation of the Sherman act that it will fit such an order of facts as this complaint presents. What it may do, if the matter comes before it, is, in my judgment, very uncertain.[12]

The application of the Sherman Act against labor unions was criticized by many prominent political and labor leaders. Richard Olney, the United States Attorney General during the Pullman Strike, believed that the Sherman Act should not be used against labor. On May 12, 1893, Olney wrote that to employ the act would unfairly place

> the whole power of the federal government on one side of a civil controversy, of doubtful merits, between the employers of labor on one hand and the employed on the other.[13]

Samuel Gompers, president of the American Federation of Labor, also felt that the Sherman act should not be applied to labor unions. Gompers asserted that "the labor union is not a trust" and that there was no way that a union could be "confounded with the pernicious and selfish activities of...a trust."[14] And President Theodore Roosevelt criticized the Sherman act itself because, according to Roosevelt, what the act did was to "forbid all combinations."[15]

The debate on the legality of union boycotts was not a mere academic discussion. By the late nineteenth century boycotts by labor unions had become a common occurrence. From 1885 to 1892 there were 1,352 boycotts in New York State.[16] In 1886 there were fifty boycotts in Illinois, twenty-five by the Knights of Labor and twenty-five by the American Federation of Labor.[17]

Boycotts were called by trade unions for a number of reasons. One reason was to lend support to other striking workers, such as when the American Railway Workers Union voted to boycott all trains carrying Pullman cars during the Pullman Strike of 1894. Other major causes of boycotts were disputes over employment of non-union workers; demands for higher wages; enforcement of union rules; reduction of hours; and maintenance of present wages.[18]

Boycotts were exceedingly effective weapons in gaining union demands. A boycott could devastate an employer whose economic survival depended on being able to sell merchandise to customers. This happened in the Loewe case. After Dietrich

E. Loewe refused to recognize the United Hatters of North America and put the union label on all his hats, the union, on August 20, 1902, called on Loewe's workers to strike. Several months later, after Loewe had replaced the striking workers, the hatters union organized a boycott of Loewe by putting Loewe on the American Federation of Labor's list of companies "We Don't Patronize." Then the union struck at Loewe's distribution network by dissuading retailers and wholesalers throughout the United States from carrying Loewe's hats. As a result, Loewe lost more than $33,000 in 1902 and 1903.[19]

Loewe chose to fight the boycott, but in many cases employers acceded to union demands. In 1885, 72 percent of the boycotts actually decided throughout the United States (excluding boycotts against the Chinese) were declared successful.[20] From 1885 through 1892 in New York State, of 686 cases reported as having succeeded or failed, 461, or about two-thirds, were said to have succeeded.[21] In the hat industry, by 1902 only twelve out of 190 hat manufacturers in the United States were still non-union.[22]

Boycotts could be dirty, brutal affairs, involving elements of coercion, force, intimidation, and extortion. For instance, in 1885, during a strike against a hat manufacturer, F. Berg & Company, in Orange, New Jersey, the union reinforced their strike by organizing a boycott. The union called on neighbors and friends to ostracize all those who went to work for Berg. Furthermore, they asked supporters not to shop at stores that continued to do business with Berg and its nonunion employees.

The Orange hatters also resorted to physical force to bring some small proprietors into line. On the evening of April 11, 1885,

> a committee of hatters patrolled in front of the various stores that [had] been placed on the hatters' black list....A committee which had been placed in front of [some] stores, and some members of which were intoxicated, carried on their work in a most high-handed manner, going so far as to enter the stores of both Walter Vandell and Thomas Jones, and dragging customers out by main force....Several women, wives of Berg's hands, complained that they had been followed around by men who had prevented them from trading in stores by pointing them out to the proprietors.[23]

Similar coercive measures were used by hatters during a strike in South Norwalk, Connecticut, December 1884 to April 1885. This strike began after employers cut wages from 2 to 45 percent.[24] Within weeks of the beginning of the strike, striking hatters began visiting local merchants, demanding that they cease doing business with the owners of the factories, and their employees, if they wanted to retain the strikers' patronage.[25] In one case a barber, after being told by the strikers that "he could take his choice between the trade of a half dozen rich customers or 200 or more strikers," refused to serve an employer who had entered the barbershop for a shave. The strikers also threatened to withdraw from the congregation of a church whose pastor had made remarks supportive of the struck employers.[26]

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their struggle to improve conditions for union workers.[27]

One form of boycott that the Supreme Court made special note of was the use of the "We Don't Patronize" list.[28] This was a list of firms, which from the standpoint of trade unionists, were unfair to labor. These lists were published in trade union periodicals or posted in trade union headquarters. The American Federation of Labor published a "We Don't Patronize" list which the United Hatters of North America used to boycott Dietrich Loewe & Company.[29]

To combat unions, employers organized boycotts of their own. One kind of employer boycott targetted other firms or institutions which showed too favorable an attitude toward labor. An example of this type of boycott occurred when the National Founders' Association, the Metal Trades' Association and the Board of Directors of the National Association of Manufacturers requested their members to refuse contributions to the Lincoln Farm Association, which was formed for the purpose of securing a Memorial National Park in commemeration of Abraham Lincoln. This was requested because the American Federation of Labor's union label was used on the association's printing. Letters were also sent to the Memorial Committee protesting against the label. The union label subsequently disappeared from the letterhead of the Association.[30]

Another type of boycott organized by employers was known as the blacklist. A blacklist was

> an agreement of employers to refuse employment to certain workermen obnoxious to them, generally on account of their activities in behalf of labor.[31]

Many workers were refused employment or were suddenly discharged as a result of the secret use of this weapon. In the garment industry, a card index system was used by one of the employers' associations to trace "undesirable" employees.[32] And in the railroad industry, "there were thousands of instances of blacklisting, far too numerous to specify," wrote an official of one of the railroad unions.[33]

But while the Supreme Court banned the labor union boycott, the blacklist was protected by the courts. In New York City Street Railway Co. v. Schaffer (Ohio, 1902) the court ruled that railroads could not be sued for agreeing not to employ men who had been on strike; in Boyer v. Western Union Telegraph Company (C.C.E.D., Mo., 1903) the court decided that an employer could not be sued for discharging a worker because he was a union man; and in Wabash Railroad Co. v. Young (Ind., 1904) the court ruled that it was not actionable for one railroad to inform other railroads, on request, that a former employee had been a labor agitator. Finally, in Adair v. U.S. (1908), the United States Supreme Court declared unconstitutional that part of the Erdman law which made it illegal to discharge a workman because of his union affiliations.[34]

The courts clearly were antagonistic towards organized labor.[35] But was this attitude shared by Congress? In the Senate there were repeated calls for legislation to outlaw trusts. On December 4, 1889, during the first session of the 51st Congress, John Sherman, Republican Senator from Ohio, introduced a bill "to declare unlawful trusts and combinations in restraint

of trade and production."[36] The bill was then referred to the Senate Committee on Finance which later reported the bill to the Senate with amendments. The amended bill declared "unlawful, and void,"

> all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view which tend to prevent full and free competition in the importation, transportation, or sale of articles...and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed or which tend to advance the cost to the consumer of any such articles.[37]

The intent of the bill reported out by the Senate Finance Committee was unmistakable - to outlaw trusts and other monopolistic combinations.

Debate on the bill then began on the floor of the Senate. On March 21, 1890, Sherman explained the purpose of his bill:

> Now, Mr. President, what is this bill? A remedial stautue to enforce by civil process in the courts of the United States the common law against monopolies.[38]

Sherman also explained the purpose of a "combination":

> The sole object of...a combination is to make competition impossible. It can control the market, raise or lower prices, as well as best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will when competition does not exist. Its governing motive is to increase the profits of the parties composing it.[39]

It is clear from these statements that Sherman wanted to outlaw trusts.

Other Senators joined with Sherman in attacking trusts. James Z. George, Democrat from Mississippi, said: "These trusts

and combinations are great wrongs to the people. They have invaded many of the most important branches of business."[40] John H. Reagan, Democrat from Texas, asserted that the bill "is limited to business in international or interstate commerce."[41] David Purpie, Democrat from Indiana, said that "The purpose of the bill of the Senator from Ohio is to nullify civilly the agreements and obligations of the trusts of these fraudulent combinations."[42] James L. Pugh, Democrat from Alabama, said: "I have no doubt Congress has the power to make such trusts and combinations criminal and punishable by fine and imprisonment."[43] By "combinations", Pugh was referring to corporate monopolies. Henry M. Teller, Democrat from Colorado, said that "The only question seems to be just how the trusts can be controlled."[44] Orville H. Platt, Republican from Connecticut, said: "The people who are suffering from the unlawful acts of associated corporations are asking relief...."[45] Zebulon D. Vance, Democrat from North Carolina, said "We are all enemies to these illegal combinations of capital which devour the substance of the people and grind the faces of the poor."[46] George Gray, Democrat from Delaware, said: "...combinations of capital have been enabled to secure to themselves undue advantages over those who were not possessors of capital in the same degree."[47]

On May 1, 1890, debate on the bill began in the House of Representatives. The tone of the debate was much the same as in the Senate. There were repeated calls for action to outlaw trusts. David B. Culberson, Democrat from Texas, said:

> The States are powerless unless Congress will take charge of the trade between the States and make unlawful traffic that operates in restraint of trade and which promotes and encourages monopoly. Persons, corporations, or associations should be prevented from carrying into the several States products covered by trusts.[48]

Joseph D. Sayers, Democrat from Texas, said that "the purposes of the bill are, first, to suppress trusts...."[49] Ezra B. Taylor, Republican from Ohio, said "I am opposed to trusts...."[50] Benton McMillin, Democrat from Tennessee, said "that I think it is the duty of Congress to extert every legitimate power for the prevention of the organization of these trusts which are so detrimental to trade...."[51] William E. Mason, Republican from Illinois, said: "We propose now to strike down these 'trust'...."[52] John T. Heard, Democrat from Missouri, said: "We [are].... animated by a desire to secure for our people relief from the most odious despotism of monopoly...."[53] John H. Rogers, Democrat from Arkansas, said that "all the States must act on the premises if they would be freed from the oppression of trusts."[54] George W. Fithian, Democrat from Illinois, made references to "the evil of trusts."[55] Elijah H. Morse, Republican from Massachusetts, said that the purpose of the bill was "to regulate transactions in restraint of trade between citizens of different States."[56]

During the debate, concerns were also raised that the law could be applied against combinations of workers. In the Senate, Frank Hiscock, Republican from New York, said:

> Every organization which attempts to take the control of the labor that it puts into the market to advance its price is interdicted by this bill. Sir, I am one of those who believe in labor organizations.

> I believe the only safety to labor rests in the power to combine against capital and assert its rights and defend itself.[57]

Senator Teller from Colorado believed that the bill would interfere with organizations which he thought were "absolutely justifiable by the remarkable conditions of things" in the country.[58] Teller was referring to "the organizations of labor [and] the organizations of farmers...."[59] William M. Stewart, Republican from Nevada, said that [the bill] "would be particularly oppressive upon the struggling masses who are making combinations to resist accumulated wealth."[60] Stewart also said that the bill was "on the wrong basis" and would "cut in the wrong direction if it [passed]."[61] John T. Morgan, Democrat from Alabama, asked a question which began: "If we pass a law here to punish men for entering into combination and conspiracy to raise the price of labor...."[62]

In response to these concerns, on March 25, 1890, Senator Sherman offered an amendment to his bill. The amendment stated:

> That this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers made with the view of lessening the number of hours of labor or increasing their wages....[63]

The amendment was passed by the Senate that same day.[64]

Then on March 27, 1890, the Senate, by a vote of 31 yes to 28 no, voted to refer the bill to the Committee on the Judiciary which was chaired by George F. Edmunds, Republican from Vermont.[65] Edmunds believed that the bill in its present form would give labor an unfair advantage over capital and likened the relationship of labor and capital to an equation

in which one side cannot be disturbed without disturbing the other.[66] Edmunds elaborated on this point:

> I say that to provide on one side of that equation that there may be a combination and on the other side that there shall not, is contrary to the very inherent principle upon which such business must depend. If we are to have equality, as we ought to have, if the combination on the one side is to be prohibited, the combination on the other side must be prohibited or there will be certain destruction in the end.[67]

When the bill was reported out of the Judiciary committee, Sherman's amendment was missing. In addition, the bill was changed to include "conspiracies in restraint of trade." Why the Senate Committee on the Judiciary introduced these changes to the bill can only be speculated as no report of the committee is available.[68] But Senator Edmunds did offer an explanation for the committee's action. According to Edmunds, the committee wanted to "leave it to the courts...to say how far they could carry it [the bill] or its definitions as applicable to each particular case as it might arise."[69] David Culberson, Democratic Representative from Texas, concurred with Edmunds regarding the role of the courts:

> Now, just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of trade or commerce mentioned in this bill will not be known until the courts have construed and interpreted this provision.[70]

Nonetheless, although the law would be subject to judicial review, Edmunds had apparently already formed his own opinion concerning the scope of the act. Referring to the Sherman Act, Edmunds was reputed to have said:

> It is intended and I think will cover every form of combination that seeks to in any way interfere with or restrain free competition, whether it is capital in the form of trusts, combinations, railroad pools or agreements, or labor through the form of boycotting organizations that say a man shall not earn his bread unless he joins this or that society. Both are wrong; both are crimes, and are indictable under the Anti-Trust [sic] laws.[71]

If this is what Senator Edmunds said, then Edmunds, who, according to Alpheus T. Mason, "played a very important part in the framing of the bill,"[72] considered trade unions, in "the form of boycotting organizations," to be criminal entities. It is therefore not surprising that the Judiciary Committee, which Edmunds chaired, would have changed the wording of Sherman's bill to make it applicable to labor organizations.

The Senate knew what would happen to the bill in the Judiciary Committee. Amid laughter from the other Senators in the chamber, Senator Vance told about a bill referred to the Judiciary Committee which the Senate had thought "mighty good" and "mighty proper". The bill came back, Senator Vance said,

> but, alas, it did not come back in the same body in which it went. It was Greece, but living Greece no more. It came back mangled and mutilated until its parent knew it not and disclaimed its paternity. [Laughter.][73]

On April 8, 1890, the "bill to protect trade and commerce against unlawful restraints and monopolies" was passed in the Senate by a vote of 52 yes to 1 no.[74] After conferencing with the Senate, the House, on June 20, 1890, adopted, by a vote

of 242 yes to 0 no, the conference report,[75] and on July 2, 1890, after a long, arduous legislative journey lasting almost seven months, President Harrison signed the Sherman Antitrust Act into law.

The Supreme Court's decision in the Danbury Hatter case marked the beginning of a new era in the government's effort to crush the power of organized labor. In the years following the decision, the Sherman Act was invoked repeatedly by the courts to enjoin unions from striking. Irving Bernstein writes that "between 1908 and 1914, fifteen to twenty cases arose in inferior federal courts in which the Sherman Act was invoked against labor."[76] And during the decade 1919-1929, there were, according to Bernstein, "seventy-two recorded cases in which unions, their officers, or members were defendants under the Sherman Act."[77] What had started out as a glimmer of hope for banning trusts became a weapon to break the power of labor unions.

Court edicts were enforceable through the military power of the federal government. The President of the United States was given statutory authority to "employ such parts of the land or naval forces of the United States as he may deem necessary" to enforce these court orders.[78] One instance when the President used this authority was in 1894 during the Pullman Strike. On July 3, 1894, President Grover Cleveland ordered out federal troops to enforce a federal court injunction forbidding interference with rail traffic to and from Chicago.[79] Illinois Governor John Altgeld protested Cleveland's action, claiming

that it was unconstitutional and unnecessary.[80] The Knights of Labor denounced the government's use of force as an attempt "to assist the railroad kings to coerce their striking employees into submission."[81] Objections were even expressed in the Senate over the government "making war upon labor"[82] and "quelling every little disturbance by force."[83] Nonetheless, on July 11, 1894, the Senate endorsed President Cleveland's action;[84] five days later, on July 16, the House of Representatives joined the Senate in endorsing the President's action.[85]

The Sherman Antitrust Act was a travesty. Under the guise of wanting to break up trusts, Congress produced, through devious means, a contrived piece of legislation that would permit the courts, through application of common law, to "resolve" labor problems. Thomas Jefferson wrote:

> All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government.[86]

By permitting the courts to decide how the Sherman Act would be applied, Congress abdicated its constitutional responsibility to provide for the general welfare, and upset the system of checks and balances upon which the federal system was founded. With the federal system out of balance, Jefferson's definition of despotic government was proven to be correct.

Armed with the power to issue writs of injunctions, and unrestrained by the other two branches of government, the courts, backed by the military power of the Executive branch, were quick to, in the words of Chief Justice William Howard Taft, "hit"

labor "every little while."[87] Court ordered injunctions were issued with great frequency to break up strikes, rendering unions almost powerless. This was exercise of governmental power in its most repressive and arbitrary form.

But this was to be expected. During the Constitutional Convention in 1787, several delegates warned that the courts should not be allowed to interpret or make law. Nathaniel Gorham said: "As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures."[88] Luther Martin said: "A knowledge of mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature."[89] Charles Pinckney "opposed the interference of the Judges in the Legislative business."[90] John Francis Mercer "thought that laws ought to be well and cautiously made, and then to be uncontroulable [sic]."[91] Gouverneur Morris said: "Encroachment of the popular branch of the Government ought to be guarded against. The Ephori at Sparta became in the end absolute."[92]

As the final votes on the bill in the Senate and the House of Representatives show, these warnings were disregarded by Congress. Even Senator James Z. George's objection to the bill on the ground that the courts could misconstrue the intent of the act[93] and Senator Henry M. Teller's concern that the bill could be used to attack the Knights of Labor[94] went unheeded, and democracy was replaced with rule by judicial decree. The wealthy could now use the courts to protect their privileged status and maintain their control over the country. Greed had

triumphed over virtue.

Such an outcome was predicted over one hundred years earlier by Luther Martin, who was one of the delegates to the Constitutional Convention. In 1788 Martin wrote:

> I most sacredly believe [that the] object [of some of the principal framers of the Constitution] is the total abolition and destruction of all state governments, and the erection on their ruins of one great and extensive empire, calculated to aggrandize and elevate its rulers and chief officers far above the common herd of mankind, to enrich them with wealth, and to encircle them with honours [sic] and glory, and which according to my judgment on the maturest reflection, must inevitably be attended with the most humiliating and abject slavery of their fellow citizens, by the sweat of whose brows, and by the toil of whose bodies, it can only be effected.[95]

If, as Martin contends, the framers of the Constitution wanted to create a society dominated by a small elite, whose wealth and power would be perpetuated through exploitation of the mass of the people, then the real objective of the Sherman Antitrust Act becomes readily apparent - to benefit those already in power.

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5. Ibid. at 294.
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MORALITY AND THE BUILDING

OF

THE ATOMIC BOMB

Phillip W. Weiss
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On August 6, 1945, the United States dropped an atomic bomb on Hiroshima, and President Harry S. Truman warned the Japanese of a "rain of ruin"[1] if they did not surrender. Three days later, on August 9, 1945, the United States dropped a second atomic bomb on Nagasaki; five days later, on August 14, 1945, Japan decided to accept the Allies' surrender terms, and on September 2, 1945, Japan formally surrendered, ending World War Two.

Use of the atomic bomb is credited with having brought the war to a swift conclusion.[2] Yet the decision to use the atomic bomb has generated controversy. Did the bomb have to be used, and was its use morally right?

The atomic bomb was a weapon of mass death and destruction. The bomb dropped on Hiroshima exploded with a force equivalent to twenty thousand tons of TNT; it totally destroyed an area extending three thousand meters in all directions and destroyed sixty thousand of ninety thousand buildings within five thousand meters; between 63,000 and 240,000 people were killed.[3] Similar results were produced by the Nagasaki bomb.[4]

Among the first to express misgivings over the use of the bomb were the scientists who helped create it. In <u>By the Bomb's Early Light</u>, Paul Boyer writes that

> time and again in contemporary accounts and later reminiscences, one finds evidence that for many scientists involvement in the Manhattan Project was a traumatic experience that turned their lives inside-out. Some were dismayed that the bomb had been used; others reluctantly approved. Nearly all shared an intense fear of what lay ahead. Out of fear, and in some cases, guilt, came activism. Many scientists

> concluded after August 6, 1945, that it was their urgent duty to try to shape official policy regarding atomic energy.[5]

Instead of feeling elation and pride over their role in the development of the atomic bomb, these nuclear scientists felt fear, guilt and alarm. But this presents a paradox. If this how they felt about the atomic bomb, then why did they stay with the Manhattan Project? And how could they continue participating in such a project when, according to Boyer, their participation was a traumatic experience? These questions underscore the moral dilemma that confronted the nuclear scientists who had to choose between duty to the state and their conscience.

In 1939 the need to build an atomic bomb became a matter of great urgency to a small group of nuclear scientists as war in Europe seemed to be inevitable. Finally, in October 1939, after the war had started, this group of nuclear scientists, led by Dr. Leo Szilard, a refugee from Nazi Germany as were all the scientists in this group, convinced President Franklin D. Roosevelt of the need to build an atomic device. They pushed for this weapon out of fear that Germany would build such a weapon first.[6]

Three years later the Manhattan Project was formed to build the atomic bomb. However, for the nuclear scientists involved in this project, building the atomic bomb was more than just a job. It was the research opportunity of a lifetime. As scientists, they could now study a new process for releasing energy on a scale that was entirely unprecedented. In

Oppenheimer, Victor F. Weisskopf writes:

> Many physicists were drawn to this work by fate and destiny rather than enthusiasm. A threat hung over us - the frightening possibility of finding this new and incredibly powerful weapon in the hands of the powers of evil - but there was no doubt that we were also attracted by the unique challenge of dealing with nuclear phenomena on a large scale, with taming an essentially cosmic process.[7]

It was under these circumstances that work on building the atomic bomb proceeded.

Work on the bomb continued even as Germany's surrender became imminent. But if Germany was out of the war, would the bomb still be used? On April 25, 1945, when Germany's collapse was almost complete, President Truman approved the appointment of an ad hoc Interim Committee, consisting of leaders in government, industry and education, to advise him on "various questions" relating to the use of the atomic bomb, which had yet to be tested.[8] Assisting this committee was a Scientific Panel whose members were Enrico Fermi, Ernest O. Lawrence, J. Robert Oppenheimer, and Arthur H. Compton - all of whom had actively participated in the development of the atomic bomb. On May 31 and June 1, 1945, the Interim Committee decided that the atomic bomb would be used against Japan and asked the Scientific Panel to consider an alternative to military use. The Scientific Panel concurred with the Interim Committee's recommendation that the atomic bomb be used against Japan and concluded:

> We can propose no technical demonstration likely to bring an end to the war; we see no acceptable alternative to direct military

use.[9]

Thus the leading members of the scientific community involved with the development of the atomic bomb agreed that the bomb should be used.

Not every scientist involved with the Manhattan Project agreed with Scientific Panel's opinion. On June 11, 1945, James Franck and six other scientists submitted a report to Secretary of War Henry M. Stimson advocating a demonstration shot; Stimson never saw the report.[10] And Niels Bohr warned that "X [atomic energy] might be one of the greatest boons to mankind or might become the greatest disaster."[11] But such concerns were generally the exception, not the rule, among the nuclear scientists. According to Boyer, Bohr had "to prod the social consciousness of his fellow scientists."[12] And Leo Szilard's petition calling upon the President of the United States not to use the atomic bomb on Japan unless the Japanese refused all terms of surrender gained little support among the other scientists who felt that the atomic bomb should be used.[13]

Yet the possibility of the bomb being used remained a source of concern for some. One member of the Scientific Panel, Arthur H. Compton, found the possibility of the bomb being used troubling. Barton J. Bernstein writes that Compton "raised profound moral and political questions about how the atomic bomb would be used."[14] According to Bernstein, Compton said:

> It introduces the question of mass slaughter, really for the first time in history. It carries with it the question of possible radioactive poison over the area bombed. Essentially, the question of use...of the new weapon carries much more serious implications than the introduction of poison gas.[15]

But despite Compton's concerns, he and other nuclear scientists with similar misgivings continued to work on building the bomb. How were they able to reconcile this contradiction between how they felt and what they were doing? Perhaps this question can be answered by examining the behavior of the Germans during World War Two. Dr. G.M. Gilbert writes of "the blindness of so many Germans (and others) to inhuman behavior they could not have possibly condoned,"[16] and asks:

> How could such men [the comparatively "normal" and respectable members of Hitler's entourage - the diplomats, businessmen, militarists, Junkers, and such identification groups] have participated in a movement which violated some of their own basic values?"[17]

Gilbert attributes the paradoxical behavior of the Germans to "a conflict between hostile-ethnocentric and humanitarian ego involvements"[18] which was evident by the reaction of the German leaders when confronted with the consequences of their acts. Gilbert writes:

> A man like Ribbentrop, who freely emulated Hitler in verbalized aggression that amounted to collusion in murder,...broke down when the full realization of actual extermination finally penetrated his consciousness. Similar reactions were found on the part of Von Papen and Schacht, who blamed their lack of insight into Hitler's warlike intentions on the fact that Hitler was "a pathological liar"; while General Keitel claimed that a "veil has suddenly been taken away from my eyes." Economic Minister Walther Funk kept repeating, "We were blinded - not blind, but blinded!" after evidence had been presented that bags of gold teeth and wedding rings had been deposited in his banks. Hans Frank described it best: "Don't let anybody tell you that they had

> no idea. Everybody sensed that there was something horribly wrong with this system, even if we didn't know all the details. They didn't want to know! It was too comfortable to live on the system, to support our families in royal style, and to believe that it was all right.
> After the deluge - insight."[19]

The bombing of Hiroshima and Nagasaki provoked similar reactions from the nuclear scientists. After learning of the death and destruction caused by the weapon they had worked so hard to build, the nuclear scientists attempted to repudiate what they had created and in the process revealed their own sense of guilt. Leo Szilard likened the use of the atomic bomb to mass murder. Szilard talked about the role of the scientists "in constructing a doomsday weapon that killed more than one hundred thousand people"[20] and said:

> It is remarkable that all these scientists...should be listened to. But mass murders have always commanded the attention of the public, and atomic scientists are no exception to this rule.[21]

Other scientists organized lectures warning of the dangers of atomic energy. One lecture by the Federation of American Scientists included a cartoon filmstrip which, according to Boyer, showed "the world's statesmen...happily [shaking] hands above a fresh grave where the atomic bomb lies safely buried."[22] Perhaps the most dramatic reaction to the use of the atomic bomb occurred in November 1945 when J. Robert Oppenheimer told President Truman: "Mr. President, I have blood on my hands."[23]

But even before the bomb was dropped, there were other signs of discontent. Just as the Germans used various euphemisms such as "the final solution," "special treatment,"

and "relocation" when referring to the extermination of the Jews, so did the nuclear scientists use cryptic terms when discussing the atomic bomb. This was dramatized in the movie Fat Man and Little Boy, in which the scientists at Los Alamos were ordered not to make any direct references to the atomic bomb when discussing the project. This obscuring of language was utilized at the highest levels of government. Lifton and Mitchell write that

> even for the knowledgeable scientists and political and military leaders, the weapon quickly brought about considerable degress of psychological numbing. It was infinitely more comfortable to focus on the bomb's technical requirements and strategic military use than to permit oneself to imagine the awesome grotesque effects it would have on other human beings. In his diary, Stimson [Secretary of War Henry L. Stimson] referred to the weapon as "the thing," "the gadget," "the dire," "the dreadful," "the terrible," "the awful," "the diabolical," or "S1" (its sometime code name) or "the secret."[24]

Perhaps the use of code words was required to protect the secrecy of the project, but still, for the nuclear scientists and high government officials to use these words among themselves indicates that they were not totally comfortable with what they were building.

But let us examine the behavior of the nuclear scientists from another angle. Maybe they were not two-faced hyprocrites who went along with a program which would mean instantaneous death for hundreds of thousands of people. Maybe the building of the atomic bomb was a courageous act. It can be argued that the nuclear scientists, putting aside their personal convictions,

did what had to be done to help end a vicious war and save American lives, even if it meant building a weapon of mass destruction.[25] This argument has some merit. Using the fighting that took place in the Pacific as a guide,[26] an invasion of Japan would have probably resulted in the biggest bloodbath in the history of warfare, especially since the Japanese seemed unwilling to surrender.[27] Secretary of War Henry L. Stimson wrote that

> the Allies would [have been] faced with the enormous task of destroying an armed force of five million men and five thousand suicide aircraft, belonging to a race which had already amply demonstrated its ability to fight literally to the death.[28]

Under these circumstances, use of the atomic bomb seemed to be a plausible option which would shorten the war and forestall the bloodshed that would have resulted if the war had continued.

This argument can be taken one step further. Not only did the nuclear scientists help to end the war, they were instrumental in insuring world peace by giving the world a weapon which made another world war untenable. But here the argument falters. Instead of making the world a safer place to live, the introduction of nuclear weapons exacerbated international tensions and left the world with a pervasive sense of doom fed by the possibility of a nuclear disaster occurring, especially without warning. Such a disaster would not necessarily have to be caused by a nuclear explosion. There are hundreds of nuclear reactors in operation around the world, and a defective nuclear reactor could cause widespread enviromental damage and threaten human life through the escape of radioactive materials

into the earth, water or atmosphere. Such disasters have already occurred, with Three Mile Island and Chernobyl perhaps being the most well known.[29] There is also the problem of the disposal of nuclear waste.[30]

What conclusions can be drawn from the involvement of the nuclear scientists in the building the atomic bomb? The nuclear scientists who helped build the atomic bomb participated in the development of a weapon system which culminated in what Lifton and Mitchell describe as "an atrocity-producing situation."[31] Yet as scientists presumably dedicated to improving conditions for mankind, they had a responsibility to question the morality of what they were doing and to act on their convictions if they felt that what they were doing was wrong. Merely speaking out against the use of the atomic bomb, or debating among themselves whether the bomb should be used, was not enough, for if actions speak louder than words, then the nuclear scientists, by helping to develop the atomic bomb, demonstrated their commitment to the project.

Maybe it is unfair to compare the nuclear scientists to Nazi medical doctors who perpetrated barbaric criminal acts under the guise of medical research and wartime necessity, but there are some similarities which warrant consideration. Both groups consisted of members of the scientific community who were interested in conducting scientific research; both groups were involved in research which was fully sanctioned by the state; the research activities of both groups were fully endoresed by eminent members of their respective scientific

communities; both groups were active during time of war; and both groups engaged in research that was harmful to the health and safety of others.[32] This not to suggest that the nuclear scientists had Nazi mentalities, that is, a depraved attitude to human life and a callous indifference to the consequences of their acts. Rather, this comparison shows how easily a group of presumably refined, thoughtful and honorable people who were working to rid the world of the scourge of Nazism could become part of a project which could make them seem as bad as the Nazis. In Oppenheimer, Victor F. Weisskopf writes that

> Obviously, scientists such as those at Los Alamos would be deeply concerned with the ominous implications of their work. Long before the great test, the political and moral implications of the bomb were in the foreground of interest. Oppenheimer and Bohr started many discussions about the dangers of atomic weapons and about ways and means of turning this new discovery into a constructive force for peace.[33]

That the nuclear scientists were able to appreciate the political and moral issues associated with the development of the atomic bomb clearly set them apart from the Nazi medical doctors who were hardly troubled by such thoughts. Nevertheless, the nuclear scientists still built the bomb.

The holocaust is arguably the most egregious example of genocide in history, but the Nazis were not the only group capable of committing such a crime. In Indefensible Weapons, Robert Jay Lifton writes:

> There [referring to the example of the Nazi doctors] one could observe (in a very different kind of situation to be sure) how very ordinary men and women who were in no way inherently demonic could engage

> in demonic pursuits; how professionals with pride in their professions could lend themselves to mass murder; how in fact the killing process itself depended on an alliance between political leaders putting forward particular policies and professionals making available not only technical skills but intellectual and "moral" justifications.[34]

This statement can be used to describe the behavior of the nuclear scientists as well. As private individuals the nuclear scientists were essentially decent individuals, but once that "alliance" was forged between the scientific community and the government in pursuit of "particular policies," these decent individuals became galvanized, with far-reaching consequences that pose a threat to the survival of mankind to this day.

Although the nuclear scientists who helped build the atomic bomb may not have been emotionally stilted misanthropes like Felix Hoenikker, the scientist in Kurt Vonnegut's novel, Cat's Cradle, who invents a substance called ice-nine which instantly freezes anything that comes into contact with it, including human beings, they can be compared to another character in the story, Frank Hoenikker, Felix's son, who recklessly peddles the ice-nine to satisfy his craving for power and wealth, and in the process destroys the world. Frank seeks to avoid responsibility for his acts by duping the narrator of the story into becoming President of the Republic of San Lorenzo which frees Frank, who is Minister of Science and Progress, to do whatever he wants while the President assumes all the responsibility. The narrator finally realizes what Frank is up to when he seeks Frank's advice. But Frank refuses to give the new President advice, telling the narrator: "However you

want to handle people is all right with me. That's your responsibility." The narrator then

> realized with chagrin that my agreeing to be boss had freed Frank to do what he wanted to do more than anything else, to do what his father had done: to receive honors and creature comforts while escaping human responsibilities. He was accomplishing this by going down a spiritual oubliette.[35]

The same thing can be said for the nuclear scientists who, like Felix Hoenikker, abdicated their moral responsibility in favor of fame and glory.

This abdication of moral responsibility is an indication of the degree to which ethical standards governing the behavior of scientists had eroded over the years. In the late eighteenth century men of science would have been appalled to learn that their fellow scientists were aiding the forces of destruction;[36] in 1813 the Comte de Saint-Simon[37] spoke out on this issue. Addressing a group of French mathematicians, Saint-Simon said:

> All Europe is cutting its throat; what are you doing to stop this butchery? Nothing. What am I saying? It is you who perfect the means of destruction; you who direct their use in all the armies.[38]

One can only speculate what Saint-Simon would have said to the nuclear scientists, and indeed to all the scientists around the world who permitted their knowledge to be used for destructive purposes during World War Two.

Yet the nuclear scientists cannot be held solely responsible for the way their knowledge was put to use. This was ultimately a political decision. But the decision-making process which led to the deployment of the atomic bomb was flawed. Although

the United States government spent two billion dollars to build the atomic bomb, Congress was excluded from having any say in the matter. Instead, formulation of policy was limited to the President and a few advisors, none of whom were elected.[39]

Building the atomic bomb represented the application of scientific knowledge to achieve a political goal - winning the war. The nuclear scientists knew that this weapon would cause death and destruction on a massive scale, and with this grim knowledge they built the bomb. To build such a weapon, the nuclear scientists must have experienced a blocking of feelings, such as that ascribed by Susan Griffin to Heinrich Himmler in A Chorus of Stones.[40] Otherwise, how could they have possibly proceeded to build such a horrendous weapon? Under such circumstances, questions of right and wrong must have blurred as the trappings of "duty" and "mission" took precedence over any other considerations. But regardless of how they may have felt or what may have motivated them to act, it was only a matter of time before the nuclear scientists would have to confront the morality of their involvement in the building of the atomic bomb.

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