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Lysander Spooner, Part 2

by Wendy McElroy

The right of people to defend themselves against the usurpation of government was the central theme of Spooner's next major work, *An Essay on the Trial by Jury* (1852), which some consider his masterpiece. Benjamin Tucker stated the gist of *Trial by Jury*: "No man should be punished for an offence unless by the unanimous verdict and sentence of twelve men chosen by lot from the whole body of citizens to judge not only the facts but the law, the justice of the law, and the extent of the penalty"; and "The gradual encroachment of judges upon the rights of juries" renders "the latter practically worthless in the machinery of justice."

Spooner believed that a jury should judge the justice of laws as well as the facts of cases and then base its verdict on either judgment. Juries should also determine the extent of punishment or penalties. If a guilty verdict required unanimity from 12 randomly chosen people, then the jury system would be more likely to serve as an effective brake upon unjust laws because it was unlikely that 12 disinterested people would agree to act unjustly against a stranger or neighbor.

Spooner's *Trial by Jury* allows a minority of one to veto the verdict of the majority. Although this may seem like minority rule, the minority can only negate law, not enact it. The single juror can only prevent a guilty verdict, not enforce one. Thus, the single juror is able to prevent legal damage, not inflict it.

The prospect of a juror's veto particularly appealed to Spooner, who had written on the unconstitutionality of laws regarding slavery, the mail, currency, and capital punishment. On these matters, public opinion often differed significantly from the law. Thus, the jury could constitute a much-needed "court of conscience" that expressed the common sense and decency of the ordinary person. Of course, judges would never support the transfer of power from their hands into those of the people. Accordingly, Spooner turned his focus away from "authorities" and toward the common man.

He also turned away from a single-minded focus on the Constitution. Instead, he looked at the broader tradition of codified natural law into which the Constitution fell as merely one

example. He turned to the common law. In doing so, he searched for a form of justice not based on authority but on universal truths.

Thus *Trial by Jury* draws heavily on the Magna Carta, an early 13th-century document signed by King John, which acted as a charter of liberties through which the English nobility protected itself against the power of the Crown. The document is widely viewed as a milestone in the evolution of human liberty. One of the protections established by the Magna Carta was trial by jury. Spooner stated,

That the trial by jury is all that has been claimed for it ... is proved both by the history and the language of the Great Charter of English Liberties, to which we are to look for a true definition of the trial by jury, and of which the guaranty for that trial is the vital, and most memorable, part.

Slavery and the Civil War

As with economic theory, Spooner's approach to justice extended beyond analysis into practice. In October 1859, the abolitionist John Brown and several followers seized the U.S. Armory and Arsenal at Harper's Ferry and were captured after a gun battle in which people were killed. Spooner suggested that supporters of Brown kidnap the governor of Virginia and trade him for the imprisoned abolitionist. The unrealized plan not only expressed Spooner's contempt for politicians but also his lack of confidence that the judicial system would render justice. Brown was hanged.

In 1861, the Civil War erupted. Spooner's hatred of slavery did not lead him to join with most abolitionists, who supported the North. Even William Lloyd Garrison abandoned his pacifist views. Garrison later became critical of Lincoln's clear desire to preserve the Union at almost any cost; he believed the focus should be on abolishing slavery. By contrast, Spooner never thought the war was being fought for freedom or justice.

In a later essay, *No Treason No. 1* (1867), Spooner commented,

On the part of the North, the war was carried on, not to liberate slaves, but by a government that had always perverted and violated the Constitution, to keep the slaves in bondage; and was still willing to do so, if the slaveholders could be thereby induced to stay in the Union.

Spoooner also offered an economic analysis of the war in which he argued that Northern business interests supported the conflict in order to control Southern markets.

No Treason — which competes with *Trial by Jury* as Spooner's magnum opus — undoubtedly sprang from the soul-searching that was occasioned by the Civil War. The world as Spooner knew it had been turned on its head. The historian Joseph Stromberg observes that Spooner "grew up in a largely free society whose constituent republics were united on the basis of

consent. By the time he died in 1887, he had seen the central state strengthened by fire and sword, 1861–1865, and the union shifted to a basis of naked force.”

The naked force did not end with the war. The reconstruction of the South crushed individual rights and stifled dissent. To Spooner, the war and its aftermath constituted the crushing of the very idea of “government by consent.”

Government by consent means that every person who pays taxes or provides a service to the state must render his consent in order for the exchange to be just. Without such consent, the “exchange” is actually brute force that the government imposes upon the individual. Otherwise stated, if people pay taxes or offer a service because they fear the consequence of not doing so, then the state is no better than a robber who says, “Your money or your life.” Or, as Spooner phrased it, government becomes “a mere conspiracy of the strong against the weak.”

Consent and the Constitution

Until the Civil War, Spooner had labored to integrate the principles of the Constitution with those of natural law. *No Treason* abandoned that attempt. He now rejected the idea that anyone was obliged to respect the Constitution. Such an obligation arose only from consent that only free persons could render, and no one living person had consented to the Constitution.

The first *No Treason* — subtitled *The Suppression of the Rebellion Finally Disposes of the Pretence That the United States Government Rests on Consent* — was intended as the first of six pamphlets. But only two more appeared: *No. II: The Constitution* (1867), and *No. VI: The Constitution of No Authority* (1870). In introducing VI, Spooner noted that Nos. III, IV, and V did not exist but he did not explain their absence.

The brief “Introductory” to the series ends with a pointed observation. Before the war, there had been some grounds for claiming that — in theory, at least — government rested on the principle of consent. “But nothing of that kind,” Spooner wrote, “can be said now.”

He claimed that, because of the war, the principle on which the government and the Constitution rested was “the principle on which the war was carried on by the North,” namely, that “men may rightfully be compelled to submit to, and support, a government that they do not want”:

If that principle be *not* the principle of the Constitution, the fact should be known. If it *be* the principle of the Constitution, the Constitution itself should be at once overthrown.

Thus, the series aimed at nothing less than overthrowing the moral and legal authority of the Constitution.

No Treason No. 1 asks what government by consent implies. Spooner first analyzes the most common form of consent on which governments rest: that is, the consent of the strong or the

majority through which power is imposed on the weak or the minority. He raises several objections to this process, the most basic one being,

A man's natural rights are his own, against the whole world; and any infringement of them is equally a crime, whether committed by one man, or by millions; whether committed by one man, calling himself a robber, ... or by millions, calling themselves a government.

The "principle that the majority have a right to rule" merely divides government into "two bodies of men" — masters and slaves — and, so, cements constant conflict into society.

Why was the series entitled *No Treason*? No. II repeats the only definition of that word offered by the Constitution: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Spooner concludes that the definition should be interpreted "like all other criminal laws, in the sense most favorable to liberty and justice." He examines the word's "true and legitimate meaning in our mother tongue." Treason means a breach of allegiance that "necessarily implies treachery, deceit, breach of faith. Without these, there can be no treason."

The so-called crime of treason makes sense only if the accused lives within a government's claimed jurisdiction and only if he has rendered allegiance to be governed. If not, then the charge is specious because it is impossible to breach a loyalty that has never been given. Moreover, Spooner argues that the government properly assumes the burden of proving that consent has been rendered and is still in effect: that is, not withdrawn or expired. He observes, "Even those who actually voted for the adoption of the Constitution, did not pledge their faith *for any specific time*; since no specific time was named ... during which the association should continue."

No Treason No. VI is subtitled *The Constitution of No Authority*. It opens, "The Constitution has no inherent authority or obligation. It has no authority or obligation at all, unless as a contract between man and man." But the current Constitution does not even purport to fit that description. "It purports, at most, to be only a contract between persons living eighty years ago." Spooner concludes,

If, then, those who established the Constitution, had no power to bind ... their posterity, the question arises, whether their posterity have bound themselves? If they have done so, they can have done so in only one or both of these two ways, viz. by voting, and paying taxes.

Spooner now explains why voting cannot collectively bind "the people" or even a particular individual to the Constitution. A rough listing of the points in his argument is as follows:

- The act of voting can bind only those who vote.
- Most people do not vote in any given election; many people never vote. Therefore, they have not consented.
- To be binding, a vote must be “perfectly voluntary” yet a “very large number” vote in self-defense.
- Taxation is compulsory and many vote only to prevent their money from being used against them.
- Votes for unsuccessful candidates cannot be binding.
- A secret vote provides no legal evidence by which to bind any particular voter to the Constitution.

Of voting Spooner concludes, “So far, therefore, as voting is concerned, the Constitution, legally speaking, has no supporters at all.” Of taxes, he observes, “The payment of taxes, being compulsory, of course furnishes no evidence that any one voluntarily supports the Constitution.” Therefore, he concluded,

Inasmuch as the Constitution was never signed, nor agreed to, by anybody, as a contract, and therefore never bound anybody, and is now binding upon nobody; and is, moreover, such an one as no people can ever hereafter be expected to consent to, except as they may be forced to do so at the point of the bayonet, ... it is unfit to exist.

Spoooner completes his journey from defending the Constitution to dismissing it.

Spoooner’s legacy

Spoooner’s legacy was preserved largely by younger radicals of the day who viewed him as a mentor, especially Benjamin Tucker. Upon Spoooner’s death, Tucker purchased his printed pamphlets and unpublished manuscripts from the estate. Thereafter, he offered the pamphlets for sale in his periodical *Liberty* (1881–1908) and donated the proceeds to the Spoooner Publication Fund that he established to print and promote his Nestor’s manuscripts.

Tucker’s influence on Spoooner and his legacy cannot be overstated. He set the context that allowed Spoooner’s ideas to be preserved. Prior to the 1870s, radical individualism did not exist as a movement. While he was a student at M.I.T. in the early 1870s, Tucker acted as a focal point

around which a group of radicals including such “veterans” as Spooner, Josiah Warren, William B. Greene, and Ezra Heywood gathered. Tucker’s first periodical appeared in 1877; *The Radical Review* lasted through four issues and included three essays by Spooner. A full-blown movement emerged with the publication of Tucker’s second periodical, *Liberty*.

More than any other outside influence, Spooner set the original anti-statist tone for *Liberty*. During the periodical’s first years, Tucker published Spooner’s classic but lengthy work on natural rights, “A Letter to Grover Cleveland, on His False, Absurd, Self-contradictory, and Ridiculous Inaugural Address,” in 19 installments.

Liberty also ran original pieces by Spooner, sometimes under a pseudonym, sometimes under his own name, for example, his short essay entitled “A Letter to Thomas F. Bayard: Challenging His Right — And That of All the Other So-Called Senators and Representatives in Congress — To Exercise Any Legislative Power Whatever over the People of the United States.” Tucker’s occasional co-editor, Victor Yarros, prepared what he called “an abridgement and rearrangement” of *Trial by Jury*, which ran in serialized form under the title “Free Political Institutions: Their Nature, Essence, and Maintenance.”

The main disagreement Tucker had with Spooner concerned intellectual property, that is, copyright and patent. Tucker considered Spooner’s lengthy, though never-completed, “Law of Intellectual Property; or an Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas” (1855) to be “fundamentally foolish.” For Spooner, intellectual property was a natural right. He wrote, “So absolute is the author’s right of dominion over his ideas that he may forbid their being communicated even by human voice if he so pleases.” Tucker believed intellectual property could be properly secured only through contract and not as a natural right. By the time this disagreement reached the stage of open debate in the pages of *Liberty*, however, Spooner had died and his position was argued by others.

Spooner’s life revolved around “the political” — pounding out theory and its implementation — and there seemed to be little room left for “the personal.” He never married and his personal life is something of a mystery or a blank. Consider the issue of women. Politically, Spooner was a sort of early feminist; he argued that the rights of women derive from the same source as the rights of a man — a shared humanity — and are identical to those of a man. But, personally, he seemed to display little interaction with or interest in women; perhaps an early romance and engagement that ended badly had made him a confirmed bachelor. Whatever the reason, Spooner had no children. He accumulated no wealth other than devoted friends and the ideas that were his constant companions.

Tucker, who was present, described his mentor’s final moments: “He died at one o’clock in the afternoon of Saturday, May 14, [1887] in his little room ... surrounded by trunks and chests bursting with the books, manuscripts, and pamphlets which he had gathered about him in his active pamphleteer’s warfare over half a century long.” Spooner was 79 years old.

In his loving obituary entitled “Our Nestor Taken From Us” (*Liberty*, May 28, 1887), Tucker wrote that the name Lysander Spooner would be “henceforth memorable among men.” His prediction has not come to pass in a wide sense. But neither have Spooner’s name and work been forgotten. Recent years have seen a revival of interest in Spooner, including publication of *The Lysander Spooner Reader* and the flowering of websites dedicated to reprinting his work.

In the excellent biographical essay that opens *The Collected Works of Lysander Spooner* (1971), Charles Shively observes of Spooner,

In our time, both his example and his ideas concerning the absolute inadequacy of force and of government remain relevant. The liberation movements of our day are particularly concerned to end coercion and dominance.... In place of these slave-master relationships, there is a search for forms of cooperation among equals. In this search Spooner was a pioneer and a prophet.

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