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Introduction

Today, the limited number of people who recognize the name Lysander Spooner chiefly recall him as a nineteenth-century abolitionist. We no longer remember him as an attorney who challenged Massachusetts law so that he himself could join the profession; or as a legal theorist, analyzing the Magna Carta, who argued in favor of jury nullification; or as a land speculator who demanded an alternative, more solvent system of banking; or as an enthusiast of entrepreneurial capitalism with a keenly developed theory of intellectual property; or as a leading American Anarchist who completely rejected the United States Constitution as a bulwark of democratic government. Although some people may know that he was an opponent of involuntary servitude, they will probably not have read any of his original arguments that challenged the abolitionist leadership of Wendell Phillips and others, insisting they take a less constitutionalist, and more radical, violent approach toward ending the abomination of slavery. Moreover, what is known about Spooner's personality and life derives invariably, as Alexander (1950, 200) notes, from the same few sources, which are themselves chiefly based on published obituary notices, as well as collections of letters that Spooner wrote and received.

Spooner's work has received some renewed attention in recent years due to his interest in the concept of jury nullification. Following the acquittal of O. J. Simpson in a murder case, hundreds of scholarly articles on the topic[1] have appeared in law journals, and a few authors (Conrad 1998, Ostrowski 2001, Parmenter 2007, Shone 2004b) have traced the practice and its validation back to Spooner.

Lysander Spooner was born in Athol, Massachusetts, where he grew up on the family farm of his parents, Asa and Dolly Spooner. One of Spooner's ancestors was William Spooner, who arrived in Plymouth, Massachusetts in 1637. Lysander Spooner was the second of nine children (Martin 1970, 167; Reichert 1976, 117; Shively 1971a, 15; Smith 1992, viii). Shively (1971a, 15) speculates that their father, who as a Deist disliked Christian names, purposely named his two oldest sons, Leander and Lysander, after pagan and Spartan heroes respectively.

While a trainee lawyer in Worcester, Massachusetts, Spooner was employed by two of the best-known attorneys in the state, first by John Davis and then by Charles Allen (Reichert 1976, 117; Martin 1970, 167; Tucker 1887, 2). Both were abolitionists, and Davis would become the governor of Massachusetts and later a U.S. senator, while Allen would serve as a state senator, and then in the U.S. House of Representatives as a member of the Free Soil Party (Shively 1971a, 17).

Amazed by the inefficiency of the post office, Spooner set up a mail delivery service, the American Letter Mail Company, which competed in several large Northeastern cities, while charging the customer substantially less. After the post office forced the closure of Spooner's company and other similar operations, he produced his 1844 monograph, *The Unconstitutionality of the Laws of Congress Prohibiting Private Mails* (Martin 1970, 170; Spooner 1850c, 24).

Spooner next briefly became a land speculator in Ohio, where he bought property hoping it would turn out to be the spot where a town developed, a location where people would transfer from canal travel to horseback. However, the canal route was diverted, and he lost his investment. In this process, he campaigned to prevent the state legislature from draining the Maumee River (*Dictionary of American Biography* 1935, 466) and then sued in the hope of getting back his money after the completion of the drainage project made certain that his land investment would fail (Alexander 1950, 201). Unsuccessful in this speculative venture, he failed also to secure any compensation from the state. Later in life, Spooner provided legal assistance to "Millerite" workers who, having stopped working because they believed the world would soon end, quit their jobs and were arrested for violating a law against vagrancy (*Dictionary of American Biography* 1935, 467).

At the time of his death, Spooner lived in a room at 109 Myrtle Street in Boston. He spent a lot of time reading at the nearby Boston Athenaeum, and would arrange to meet colleagues in bookstores (Reichert 1976, 137; Shively 1971a, 56, 60; Tucker 1887, 1). Spooner was relatively well-known in his time, a fact readily attested to by the collections of letters written to him that can be browsed today in the Boston Public Library and at the New

York Historical Society. He knew the abolitionists John Brown, Gerritt Smith, and Wendell Phillips, and he wrote articles for *the Radical Review* and *Liberty*, publications of another of the leading American Anarchists, Benjamin N. Tucker, although some of Spooner's contributions appeared under the pseudonym "O" (Brooks 1994). However, based in Boston, where he would sometimes get together with visiting intellectuals, Spooner's input was not always heard, and could sometimes be overlooked. For example, Martin (1970, 127) notes that the monetary theories of William B. Greene, which were disseminated in a series of newspaper articles published in Worcester, Massachusetts, became rather better known, even though "Spooner had previously stated the position of the free money decentralist in Greene's home area." Others who came across his works simply considered his proposals too radical. Furthermore, although he earned some income from his work as a trial attorney, he was not a wealthy man. In his eulogy of Spooner, which is still read today, Tucker ([1887] 1971, 6) points out that some of Spooner's writings were never completed, and notes that, unable to afford to publish an entire work at once, he often printed a chapter at a time.

At first glance, Spooner looks to be inconsistent, to agree with thinkers of both the left and right, or even to defy categorization. Indeed, in *Partisans of Freedom: A Study in American Anarchism*, Reichert (1976, 138) criticizes Alexander (1950, 216) for calling Spooner "a bundle of contradictions." Reichert himself (1976, 119) describes Spooner as "[c]hampioning the poor and propertyless worker," and explains the thinker well when he writes:

> Although Spooner's sympathies were predominantly with the working classes as against the rich, he did not allow himself to be led into a doctrinaire defense of labor in support of a general program of leveling property rights. No economic communist, Spooner did not condemn the private ownership of property itself; what he opposed was the injustice meted out by the government when it interfered with the natural laws of economics. (Reichert 1976, 120)

Was Lysander Spooner an anarchist or a libertarian? Today, adherents of both ideologies proudly claim him as a collaborator. That is not surprising because, as an American Anarchist, Spooner is partly a leftist, and partly a libertarian, and it is surely much to Spooner's credit that both camps can find much in his ideas that they admire.

Anarchism proper might be satisfactorily defined as an ideology that seeks as little government as possible, one of the grounds for this being the inability, from an anarchist perspective, to justify the power of the state in terms of consent. As will be seen in chapter 3, this key element of anarchism is entirely in keeping with the ideas of Spooner. Even so, Martin (1970, iii) notes

that it is difficult to classify anarchism, a problem that cannot be completely overcome: "In view of such a situation, it is not peculiar that the study of anarchism involves the necessity of escaping the limits of the world itself" (iii). Calling anarchism a "cluster of ideas, attitudes and beliefs, Carter (1971, 1) argues that "anarchist political theory sounds like a contradiction in terms." Similarly, Horowitz (1964, 15) concludes that "anarchists are theorists and terrorists, moralists and deviants, and above all, political and antipolitical."

Nonetheless, Horowitz (1964, 28–55) is able to categorize eight distinct forms of anarchism, of which "individualist anarchism" is one. He includes in this type the ideas of Spooner, Tucker, Greene, and Josiah Warren; the latter is often considered to be the first American Anarchist. All four knew each other, and, for example, they were able to confer when they attended the annual convention of the New England Labor Reform League, which met in Boston in 1872 (Madison 1943, 444, 452; McElroy 2003, 2; Tucker 2008). Along with Max Stirner, the German anarchist who had a profound influence upon Tucker's later writings, Horowitz (48) calls Spooner, Warren, and Tucker "the leading figures of individualist anarchism." Martin (1970, 201) speaks of "Spooner's contributions to American anarchism" and of "[t]he flowering of American anarchism under the leadership of Benjamin Tucker" (201), while LeWarne (1975) writes about "the anarchist Benjamin R. Tucker" (131) and declares him "the leading American individualist anarchist" (8). The subtitle of James J. Martin's book (1970), which includes a chapter on Spooner and two chapters about Tucker, is "The Expositors of Individualist Anarchism in America, 1827–1908." Elsewhere, Martin (1958, x) points out that the German scholar, Paul Eltzbacher, picked Tucker to write about because he considered him an "example of American anarchist thought." Avrich (1988, 81) says that "Kropotkin exerted an increasing influence on American anarchists," and notes that the Russian revolutionary himself included Spooner, Warren, and Tucker in his *Encyclopaedia Britannica* article about "anarchism." In fact, although he said little about Spooner, Peter Kropotkin did describe the latter's *Natural Law* as being "full of promise" (Kropotkin 1910). In sum, it seems reasonable to take the view that Spooner was an American Anarchist, and both words are capitalized in this book to signify that Spooner belonged to a particular cohort whose output is perhaps best understood as a distinctive ideology in its own right.

As noted above, Spooner wrote for both of Tucker's publications, the short-lived *Radical Review* and then for *Liberty*, which Tucker produced firstly from Boston and then from New York City over a span of almost three decades, a newspaper to which Avrich (1978, 47) refers as "the leading anarchist journal of the day." Without question, Tucker considered himself

to be an anarchist, and he proclaimed that "[a]narchism means absolute liberty, nothing more, nothing less" ([1897] 2005, 389–390). Hiskes (1982, 84) writes that "Certainly more extreme positions are imaginable, but none takes individualism's principles of personal liberty and noninterference to their final and logical end as does the theory of anarchism. This is particularly true in the anarchist theory presented by Benjamin R. Tucker." Although Spooner did not categorize his own thought in this way, by referring to himself as an anarchist, Tucker said the following about him:

> Whatever he may have called himself or refused to call himself, he was practically an Anarchist. His leanings were Anarchistic from the first." (Tucker [1887] 1971, 7)

Today, happily, there is interest in Spooner among the libertarian community, and hopefully this will add to the usefulness of the present study. Part of the reason for this is that "anarchism" and "libertarianism" are used interchangeably, and many political perspectives—in particular, the emphasis on individual liberty and skepticism about government—are shared by both groupings. It is consequently not surprising, then, to note that Carter (1971, 8) refers to Tucker as both an "exponent of individualist anarchism" and, in the same paragraph, as an "important figure in the American libertarian tradition." Likewise, DeLeon (1978, 75) talks of "[a]narchists like Tucker" but he also lists "the Anarcho-Individualism of Spooner and Tucker" among what he refers to as "the old libertarian right."

Marsh defines the importance of *Liberty* as follows:

> Individualist ideology, as crystallized in *Liberty* in the early 1880s, included the following beliefs: abolition of the state; the creation of a society in which each person would choose freely how to live, with the single proscription against interfering with the liberty of others; acceptance of the costs and consequences of individual actions; the retention of a system of private property that restricted ownership to the amount of land which an individual would both occupy and use. (1981, 11)

Looked at this way, with only the last element that is identified, the restriction on property ownership, being incompatible with libertarianism, it is not hard to understand the sharing of American Anarchist ideals. However, there are other components of Spooner and Tucker's philosophies that do not fit very well with contemporary libertarianism either.

For example, Murray N. Rothbard is considered one of the most important libertarian thinkers and advocates of *laissez faire* economics. Yet, although

he was himself influenced by both Spooner and Tucker, and despite the fact that Rothbard calls Spooner a "libertarian figure" (2000, 302) and says that "Spooner and Tucker advanced libertarian individualism" (205–206), he nevertheless goes on (207–218) to explain how he disagrees with them about land, banking, and money, a distinction that is surely a *de facto* admission of the anarchist elements in Spooner and Tucker's thought, and perhaps a reason why they are perhaps best described not as libertarians but as American Anarchists. After all, Rothbard himself says that:

> I am . . . strongly tempted to call myself an "individual anarchist," except for the fact that Spooner and Tucker have in a sense preempted that name for their doctrine and that from that doctrine I have certain differences. (207)

Constitutional scholar and libertarian, Randy E. Barnett, dedicates his book, *Restoring the Lost Constitution* (2004, xiv) to Spooner and to James Madison; in neither that book, nor in Barnett's article about Spooner's arguments against the constitutionality of slavery (Barnett 1997) does the author commit Spooner to any ideological position, never calling him a libertarian or an anarchist, but preferring to portray him simply as an attorney who made good arguments. Although the approach of the present author is to favor the attribution of American Anarchism to Spooner, there is much to be said for just going ahead and reading the thinker's works, rather than prioritizing the various categorizations prized by political philosophers.

To complicate such theoretical questions further, today there are "left-libertarians" (see for example, Roark 2007; Vallentyne 1999; Vallentyne, Steiner, and Otsuka 2005; Van Parijs 1992). Just as committed to liberty as the American Anarchists and conventional libertarians (or "right-libertarians") such as Barnett and Rothbard, the left-libertarians (like Tucker, but unlike Rothbard) seek to attain more equality through limits on land ownership, and have argued for the provision of a "basic income" for all people (a different approach to poverty than Spooner's, which is described in chapter 2, yet it is one that seeks the same outcome). Clearly, there are many similarities between American Anarchists and left-libertarians.

Moreover, chiefly among philosophers, there exist also "philosophical anarchists," an idiom that was often attributed to Tucker, which he sometimes used himself, which he also claimed to dislike, and which was sometimes employed by more community-oriented anarchists to criticize Tucker, Spooner, and their allies for being somewhat bourgeois and inadequately committed to change (Brooks 1994, 8–9; Shone 2009, 18–19). Today, philosophical anarchists are usually identified with the viewpoint that it is impossible to

justify political obligation, which is the citizen's duty to obey the state (see, for example, Smith 1973; Stilz 2009; Wolff 1976). Although he was writing many decades earlier, such an outlook lies at the center of Spooner's thought.

A related issue is the fact that American Anarchism does not fit well upon a left-right continuum of political ideologies. For Spooner, it is clear that, while we all share certain needs with other people, the group solidarity and decision-making that this entails will always conspire to oppress the individual. The paradox of aggregation is that group strength requires the sacrifice of personal goals and ambitions on the part of members of the same association upon whose support it relies. For Reichert (1976, 118), the genesis of the leftist half of Spooner's thought lies in his personal losses battling big government. Specifically, Reichert cites the failure to obtain compensation from Ohio following the state's draining of the Maumee River, as well as the federal government's refusal to allow Spooner's private mail service to exist in competition with the post office. From this perspective, Spooner is a capitalist who was unsuccessful at making money. Although there is some truth to this observation, it is more accurate to view Spooner, and American Anarchists in general, not as inconsistent thinkers, but as bearers of a distinctive ideology that calls into question the routine left-right scheme of classification.

This book is the first full-length work devoted to the ideas of Lysander Spooner. Some research exists about the American Anarchists in general. For example, as was pointed out earlier, Martin's *Men Against the State* (Martin 1970) contains a chapter on Spooner, as well as longer discussions of Warren and Tucker, and information about a number of other, lesser figures. About the inadequate attention so far paid to American Anarchism, Martin notes:

> [T]he contributions of the American-born [anarchists] have either been almost wholly neglected, or have been attached to the tail of the European comet. (Martin 1970, 279)

As for writing a book about a single anarchist of Spooner's era, he continues:

> Biographical work of definitive quality on any of the nearly fifty individual anarchists whose published works appeared during the period 1825–1925 has yet to be done. William Bailie's uncritical *Josiah Warren: The First American Anarchist*, remains the only full-scale attempt of the kind. (1970, 285)

Yet the originality of American Anarchism is such that it deserves to be treated as a creed in its own right. It contains a collection of ideas that form a

consistent whole, and which are significantly different from anarchism from other lands. For example, the American Anarchists are much less hostile to capitalism and property ownership than their brethren. This partially explains the contemporary libertarian interest in Spooner, and it is surely why today the most likely source for a volume about Spooner or one of the other American Anarchists would be a libertarian bookshop. Yet to view American Anarchists as creatures of the right is to miss their concern for ordinary workers and families, their skepticism about the aims and accomplishments of liberal democracy, and their undying hostility toward a government that serves a small elite.

Because Spooner contributed to *Liberty*, there is, in *Benjamin R. Tucker and the Champions of* Liberty: *A Centenary Anthology*, a work crafted around the activities and influences of that journal, a chapter about Spooner written by Charles Shively, and discussions about many of the other American Anarchists of the time (Coughlin, Hamilton, and Sullivan 1982). There are also many references to Spooner in *The Debates of* Liberty, Wendy McElroy's account of the themes of debate that raged within the pages of *Liberty* from 1881 until the paper's demise in 1908 (McElroy 2003). The complete text of *Liberty* has now been scanned by Shawn P. Wilbur and can be located at travellinginliberty.blogspot.com/2007/08/index-of-liberty-site.html.

The purpose of the present book is to argue that Lysander Spooner should be taken much more seriously as a political theorist. This is because he addresses many of the same topics that form the groundwork of the mainstream tradition of political philosophy that is identified with Plato, Aristotle, Hobbes, Locke, Rousseau, Hume, J. S. Mill, and others. For example, he discusses and rejects social contract theory, he has a theory of property that includes a detailed analysis and defense of the rights of intellectual product ownership, and he bases almost all of his arguments in natural law and natural rights (an approach that he shared with Tucker until the editor of *Liberty*, under the sway of Stirner's writings, came to reject it). He argues for greater self-employment as a solution to the problems of the workplace. He takes seriously questions of political obligation debated by most of the other writers. He has a healthy distrust of government and politicians, and he makes a masterly destructive attack on the value and purposes of the United States Constitution. He is a passionate defender of individual liberty, and he is concerned about the meaning and promotion of justice. Spooner also transports his political philosophy to areas seldom explored by others much revered within the tradition. He presents a long and sophisticated justification of jury nullification, seeing it as an important component of a genuine democracy. As an anarchist, he is concerned with the relationship between

obedience to authority and the consequent limitations imposed on people's ability to achieve intellectual development. He has a great awareness of the destruction caused by poverty, which is to some extent based on his own experience, as well as an interest in using access to credit as a means to improve human circumstances. He is a supporter of free trade, characterizing economic protectionism in the most original of manners, as a fraud designed to benefit employers at the expense of labor.

From the previous paragraphs, it will be apparent to the reader that *Lysander Spooner: American Anarchist* is a work of political theory—not a history book, and certainly not a biography. As was noted earlier, the limited number of sources available to any chronicler of Spooner's life would make that task exceedingly difficult to execute, a situation that stands in sharp contrast to the plethora of political writings and letters about political topics such as slavery that are available to the political theorist. In fact, the difficulties inherent in having to rely on the same few primary sources for information about the American Anarchist's personal life quite possibly goes some way to explain the failure of any scholar to produce a biography about him so far. Although he perhaps overstates the case, because the letters that have been preserved give glimpses of Spooner's character and personal life, Alexander comments on the dearth of materials that are available:

> We do not know what kind of person he was, what his home life was like, why he developed a rebellious streak, what books he read, or even who his friends—with one or two exceptions—were. (1950, 200–201)

Virtually everything written by Spooner is contained in the six volume compilation, *The Collected Works of Lysander Spooner* edited by Charles Shively (Spooner 1971). The most notable exception is *Vices Are Not Crimes*, which, as Smith (1992, xvii) notes, was not widely known until its republication in 1977. References are made to the editions contained in *The Collected Works*, with the exception of *Vices Are Not Crimes*, for which citations are given to *The Lysander Spooner Reader*. Benjamin Tucker's essay written at the time of Spooner's death, "Our Nestor Taken From Us," is also contained in *The Lysander Spooner Reader*, and citations are made to that source.

Today, new additions of Spooner's works materialize from time to time. For example, *Let's Abolish Government*, a paperback collection of Spooner's writings originally selected by Rothbard, who died in 1995, appeared in 2008. Additionally, the reader alluded to above (Spooner 1992) is a particularly useful sourcebook, but its introduction by George H. Smith runs a mere fourteen pages, so while it is true that readers continue to find Spooner's

writings stimulating, there is still no book-long analysis of his handiwork, and this is the deficiency that the current project seeks to address.

An earlier version of chapter 2 was presented at the 2007 annual meeting of the Southern Political Science Association in New Orleans. Alternate versions of chapter 3 were presented at the 2003 meeting of the Pacific Northwest Political Science Association in Vancouver, British Columbia, and published in *Anarchist Studies* in 2007 (Shone 2007). Earlier versions of chapter 4 were presented at the 2001 meeting of the Northeastern Political Science Association in Philadelphia, and published in the 2004 *Quinnipiac Law Review* (Shone 2004b). Thanks are due to the editors of the *Quinnipiac Law Review* and *Anarchist Studies* for permission to publish revised renderings here.

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Note

1. Conrad (1998, xix) counted almost four hundred as of 1998.

CHAPTER ONE

Natural Law, Private Mail, and Property

Natural Law

At the center of many of the positions that Spooner takes is a commitment to natural law in several forms, including natural right, natural justice, and an extensive number of natural rights. *Natural law* is a system of law that applies in all locations and cultures at all times, and is accessible to human reason. Within such a system, *natural right* prevails: some things are right by nature, and others are by the same token naturally wrong. Spooner refers frequently to *natural justice*, believing that the application of natural law and natural right to the law and justice leads to axioms that are straightforwardly knowable. Additionally, he claims that no human law may disagree with natural law without violating natural justice:

> [L]aw is an intelligible principle of right, necessarily resulting from the nature of man; and not an arbitrary rule, that can be established by mere will, numbers, or power. (Spooner 1860b, 5)

The connection between natural law and *natural rights* is that natural law permits the exercise of certain enumerated natural rights. In different places, Spooner refers to the following: the right to work, the right to make contracts, the right to equal treatment, the right to individual sovereignty, the right to revolution, the right to own property, the right to trade, the right to engage in commerce, the right to life and to subsistence, and the right to happiness (Spooner 1855, 28–29; 1864, 55, 56; 1867a, 13; 1877a, 12; 1880,

10; 1882b, 4–5; 1886, 44, 86). Natural law allows people to form governments, because people have the right to contract. Nonetheless, Spooner (1860b, 7–8) maintains, a constitution may not violate natural justice or any of the other natural rights. Spooner believed that natural rights were given to human beings by God. He rebuked the Earl of Dunraven, who as Shively notes (1971j, 3), had attempted to justify British colonization of Ireland using William Graham Sumner's Social Darwinist theories, with the claim that "the Almighty saw fit to create other men and give them rights equal to your own" (Spooner 1880, 10). Although Spooner was just as strong an advocate of individual freedom as Sumner, his perspective lauded the ordinary man, including the unsuccessful man, rather than just the thriving "Forgotten Man" prized by Sumner ([1883] 1986; see also Shone 2004a), and, what was more, Spooner was also a supporter of Irish nationalism (Shively 1971j, 4).

For Spooner, in a perfect world, written constitutions can improve upon the protections that all people naturally possess, and those improvements are also binding on people because they have been instituted by contract (1860b, 7–8). In practice, of course, as will be discussed in chapter 3, constitutions such as the U.S. Constitution are not valid contracts for him, because people have not given consent to them, and thus the governments they institute are not legitimate.

Spooner considers the argument that natural law may not yet be fully known, rejecting that position, even if true, as a reason for failing to ground legislation in natural law. The laws of mathematics, he points out, are not completely understood, but that is no reason to avoid using numbers to count. If the government were to step in and regulate the field of mathematics, on the basis of some kind of rationalization, what kind of improvement would be likely? He quips that, if mathematics were directed by the government, addition would no longer add up. Natural justice, Spooner argues, resembles mathematics because its axioms are fixed. Its properties must be discovered, and cannot be crafted in response to circumstances by humankind (Spooner 1846, 62–63):

> It is also, at all times, and in all places, the supreme law. And being everywhere and always the supreme law, it is necessarily everywhere and always the only law. (Spooner 1886, 3)

Spooner distinguishes between human beings and the other animals, believing that this distinction holds true also in natural law. While natural law gives human beings dominion over their own lives and precludes the

existence of slavery, which would violate natural law by designating people as property, animals are naturally chattel, and as soon as they are born, they are the possession of the person who owns their maternal parent, or, if they do not yet belong to anyone, may be appropriated by another person at any time without there being a violation of natural law (Spooner 1860b, 130).

In making this distinction, Spooner avoids any consideration of intelligence or capacity to suffer pain. An adult gorilla may function in the world with much greater sophistication than a human baby, yet the baby is a master from birth, and the ape is forever a slave. It is not clear why natural law should give freedom in this fashion to human beings and not to animals. Not surprisingly, leading animal rights activists would demur. For example, Tom Regan (1983, 16, 28) points out that the fact an animal lacks the capacity to speak does not mean it also lacks consciousness; human babies cannot speak either, but no one suggests they are not conscious beings. Similarly, Peter Singer (2002, 14) points out that the capacity to feel pain is possessed by many creatures, even though they have no linguistic skills. Why ought natural law, as conceived by Spooner, allow creatures that are aware of their surroundings, can articulate rational goals, and can feel pain, to be designated as property, to be bought and sold by human beings at will?

Like other natural law theorists, Spooner believes that its principles can be easily divined and that they are reasonable to human beings. However, it is far from certain that justice lies in giving all power to humans and nothing to other animals. New Zealand's 1999 ban on experiments involving most higher apes, and the September 30, 2002 Chimpanzee Collaboratory's Legal Committee conference at Harvard University to attempt to designate the legal rights of chimpanzees (Motavalli 2003) each suggest that human beings do not and will not always view animals in the same way across the centuries, just as people's views about the morality of slavery, the rights of women, and the use of torture have changed. This creates a problem for natural law theorists such as Spooner, who believe that what is just remains constant regardless of the era.

Spooner believed that man-made law should mirror natural justice, which he called "an immutable, natural principle" (Spooner 1886, 3) and "a natural, inherent, inalienable right" (1886, 7), likening it to other scientific laws regulating gravity, light, heat, and electricity (Spooner 1882a, 4). To the extent that it differs, then man-made law is unjust and people no longer have any obligation to obey it. The underlying explanation—in addition to the simple fact that, for Spooner, natural justice *exists* and therefore must be obeyed—is that, if law were not based on justice, then it would be based on

power, and then it would not be possible to validate obedience to it (Spooner 1860b, 145; 1882a, 12). Natural justice, for Spooner, is both uncomplicated in its form, and easily known and recognized by everyone—even by "simple minds." Unlike David Hume, who believed in both natural and man-made, conventionalist justice, Spooner will not accept the possibility of any society-based, artificial sort of justice (Spooner 1882a, 8). Far from it, for he argues that laws made by lawmakers "have no color of authority or obligation" (Spooner 1886, 3).

Citing Spooner's *Natural Law*, David Miller writes:

> Lysander Spooner spoke of the immutable laws of justice which everyone must obey and contrasted them with the moral (i.e., voluntary and unenforceable) duties of care owed to our fellows. (Miller 1984, 67)

Natural justice creates obligations—it gives us "legal duties"—which are not optional. Specifically, people are obliged to live honestly and not to harm others. Additionally, as Miller observes above, Spooner feels that people have "moral duties," although whether or not we obey them is up to us. The latter includes helping the unfortunate and providing education for others (Spooner 1882a, 6). Although Spooner believes association with our cohorts in civil society is a desirable development to ensure protection, justice, and judicial due process, nonetheless people have a right to opt out of any social cooperation whatsoever, and this right should be tolerated by others (7–8):

> If he chooses to depend, for the protection of his own rights, solely upon himself, and upon such voluntary assistance as other persons may freely offer to him when the necessity for it arises, he has a perfect right to do so. (Spooner 1882a, 7)

Voluntary assistance could be quite extensive—it would likely include neighbors helping you when your house is on fire, but it could be as expansive as belonging to a mutual insurance company, a cooperative, a credit union, or the freemasons.

For Spooner, the concepts of law and human rights actually derive from natural law and natural rights, a fact that he claims is conceded by the limited extent to which man-made law has been developed in practice. One of the advantages of using natural law is that, unlike man-made law, which results from the political process, it is not biased in favor of one or other party (Spooner 1860b, 6–7; 1886, 7). Here again is his recognition that man-made politics and law will resolve themselves according to the allocation of power, which is frequently not the way that justice would decide.

Why can all people, despite the various differences in their backgrounds, comprehend the teachings of natural law? For Spooner, it is because the necessities of basic living force everybody to consider ethical dilemmas. Everyday issues concerning people's expectations, desires, and possessions force all citizens to mull questions of justice and property, which are matters of natural law. Consequently, the mind gives even average persons answers as they recognize the teachings of the universe (Spooner 1882a, 8–9). On the other hand, societal rules imposed on people are artificial and may run contrary to natural justice. Law is a perversion of true, natural justice, which is simple and easily recognizable by ordinary folk (Shively 1971f, 8–9).[1] Here, Spooner's argument is similar to, but not exactly the same as that of the Russian anarchist thinker, Peter Kropotkin ([1927] 1970, 212–13), who contrasts oppressive man-made laws, which exist to protect unfair allocations of property, with socially-sanctioned use of land by a family, such as to build personal housing and provide for other reasonable, basic needs. While Kropotkin contrasts mores and laws, Spooner distinguishes between natural and artificial justice. Otherwise, the point is the same, that human beings can easily see what degree of appropriation is acceptable, so an artificial system of laws regulating property must serve some other, more sinister purpose. For both Spooner and Kropotkin, that purpose is the unjust and unnatural taking of excessive acreage by a small elite, at the expense of everyone else. Man-made law, then, exists to allow the ruling class to rob and yoke everyone else (Spooner 1882a, 18). It is designed to benefit "bands of robbers," who have "plundered and enslaved" their fellow men (12), and it necessarily becomes a barrier to the attainment of a system based on natural justice. Since man-made law either differs from or duplicates natural law, it is always superfluous, either because it redundantly repeats what is already a higher law, or because it contradicts the higher teaching by illegitimately authorizing or forbidding a practice (Spooner 1886, 5).

Although government is supposed to be based on natural justice, Spooner believes the United States government does much injustice, because many of the laws that Congress and state legislatures make are designed to preserve and perpetuate the power of the small elite who own most of the property. The price that is paid is that millions of people, denied natural justice by this system of government, live in a condition of poverty (6). Government, then, is controlled by "the boldest, the strongest, the most fraudulent, the most rapacious, and the most corrupt" (17), and, for Spooner, "lawmaking" then becomes "the business of abolishing justice, and establishing injustice in its place" (16). The influence of special interests on

Congress, Spooner argues, will be, and has already been since the American Revolution, so great that:

> [E]very senator and representative—probably without an exception—will come to the congress as the champion of the dominant scoundrelisms of his own State or district. (Spooner 1886, 18–19)

It is not difficult to find contemporary examples that support Spooner's view. For example, a 2004 report from the federal General Accounting Office revealed that 60 percent of U.S. corporations and 70 percent of foreign companies operating in the United States paid no federal taxes at all during the period 1996 to 2000 (McKinnon with Wells 2004). A reasonable inference is that the effect of declining revenue from corporations means that ordinary people must pick up a greater percentage of the tax burden as politicians beholden to business special interests craft loopholes to benefit corporations at the expense of citizens.

On the other hand, the majority, Spooner argues, is no more likely than the minority to achieve or be able to recognize justice (Spooner 1867a, 8). The simple fact of being the "more numerous party" (Spooner 1852, 207) confers no presumption of wisdom. In fact, they may be less able, rather than more, for the people who constitute the majority tend to be overwhelmingly "ignorant, superstitious, timid, dependent, servile, and corrupt" (Spooner 1867a, 8).

Private Mails

In one of the most adventurous moments in a long and highly original life, on 23 January 1844, Spooner set up the American Letter Mail Company, an operation that would soon be delivering mail between New York, Philadelphia, Baltimore, and Boston (Spooner 1850c, 24). This mail service was efficient, turning a profit on a much cheaper fee of five to ten cents per letter. However, it competed with the post office, which viewed it as an illegal operation, and eventually shut it down (Martin 1970, 170).

In his pamphlet, *The Unconstitutionality of the Laws of Congress Prohibiting Private Mails* (1844), Spooner attempts to justify his company and private mail services in general, making use here, as in other places, of his commitment to natural law and natural rights (Shively 1971k; Spooner 1844, 3). Spooner points out that the constitutional authority for the existence of the post office is merely Article I, section 8 of the U.S. Constitution and its brief proclamation that "the Congress shall have power to establish post-offices and post roads" (1844, 5). Spooner argues that this phrase should be under-

stood discretely as only allowing Congress to establish its own post offices and post roads; it does not, however, claim that anyone else is barred from setting up their own post offices and post roads (Martin 1970, 170; Reichert 1976, 119; Spooner 1844, 5).

Spooner's argument is interesting because he accepts the necessary and proper clause, i.e., that Congress has the implied powers that are necessary to be able to set up post offices and post roads. But creating a monopoly by banning other mail systems is not only *not* an enumerated power, but it cannot be an implied power either, he argues, because a ban is not needed to bring government postal services into operation. There is nothing *necessary* about prohibiting competition, says Spooner (1844, 5–6). Consequently, the federal government has taken unnecessary powers under the guise of permitted implied powers, at the expense of private business and the natural right to engage in commerce.

Here, Spooner's argument is quite similar to those made by Madison and Jefferson during the debate over the constitutionality of the First Bank of the United States. Madison and Jefferson asserted that, while the federal government might benefit from the *convenience* of such an institution, during peacetime there could be no *necessity* that would make the creation of such a bank constitutional (Farber 2004, 34–40). However, by the time that Spooner was writing, in 1844, that argument had already been discarded in *McCulloch v. Maryland*,[2] by a Supreme Court on which a majority of the justices were Jeffersonian Republicans (Farber 2004, 52). By 1844, the United States was already set on course for a system of federalism with national, not state, supremacy.

Perhaps surprisingly, Spooner accepted the decision a few years later in *Gibbons v. Ogden*.[3] He agreed with the Court that the Constitution gave Congress the authority to regulate commerce, and that, in consequence, the state of New York could not limit the operation of steamboats within its waters. For Spooner, the overriding factor was that commerce constituted a distinct object, control over which could be assigned to the national government. However, applying this principle of "unity" to the issue of the post office monopoly led Spooner to the opposite conclusion, for, he argued, "there is no *unity* in the term 'post offices'" (1844, 19). As the Supreme Court further refined the meaning of the Commerce Clause, it came substantially close to Spooner's sentiments as it determined that states retained the power to interfere in the insurance and manufacturing industries, which were not to be considered commerce. However, on the question of another New York law, one concerning bankruptcy, when the Court ruled against the application of the Contract Clause, Spooner felt the decision went the wrong way

because he believed that the protections the law gave to a person filing for bankruptcy violated the rights of creditors. That case, *Ogden v. Saunders*, is discussed in chapter 3.[4]

As usual, Spooner grounds his arguments against the post office monopoly in language that stresses natural law. Spooner argues that there is a *natural right* to perform labor for other people. Thus, by prohibiting private mail services, Congress has put itself in violation of this natural right:

> The power granted to Congress, on the subject of mails, is, both in its *terms*, and in its *nature, additional to*, not destructive of, the pre-existing rights of the States, and the natural rights of the people. (1844, 7)

Since letters entrusted to a private mail service have by definition *not* been given to the post office, Spooner contends that Congress has no authority over them (8). He makes use of the Articles of Confederation, which say "The United States . . . shall have the sole and exclusive right and power of . . . establishing and regulating post offices." He points out that the "sole and exclusive" stipulation was not carried over to the U.S. Constitution. This, he concludes, must have been an intentional decision on the part of the Framers. Similarly, he argues, despite containing many different prohibitions on the activities of the states—against coining money and *ex post facto* legislation, for example—no provision says that a state may not set up a mail service (11–12). Additionally, referring to *Federalist* 42, Spooner concludes that the Founders had no expectation of the federal government being the sole entity running post offices (15).

An analysis of *Federalist* 42 provides support for Spooner's point of view. Its author, Madison, argues that the Commerce Clause should apply to bankruptcy as follows:

> The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question. (*Federalist* 42)

In *Federalist* 42, Madison discusses federal government regulation of commerce with other nations and with Native Americans, the desirability of homogenizing naturalization regulations, and the need for a common currency and uniform weights and measures standards throughout the United States. He also elaborates on the problems caused by tariffs that states had

been allowed to impose under the Articles of Confederation, arguing that Switzerland has benefited from a prohibition of such restrictions on trade, and contending that the United States under the Constitution will similarly profit from such a ban. But, as Spooner points out, Madison says nothing at all about the new power of the federal government to regulate commerce and standardize trade having anything to do with the post office.

Additionally, Spooner argues that the First Amendment implies the protection of "communication of ideas." In the light of this stipulation, you should be able to choose your own medium by which you express yourself, which implies that you should be able to select your own mail service (1844, 15–16). By failing to respect the right of private mail companies, the government threatens the First Amendment, because it opens the door to censorship of materials of which the government or post office does not approve (Martin 1970, 171; Spooner 1844, 16). During Spooner's time, anti-slavery publications, including his own anonymously published Circular (discussed in chapter 5), were seized by the post office and not delivered to addressees. Similar actions have taken place since then; for instance, the post office refused to mail issues of the radical magazine, *The Masses*, which opposed United States involvement in the First World War (Baran 2003).[5]

In response to the criticisms from Spooner and others, the postmaster general had spoken of "*the* power . . . to establish post offices," but Spooner points out that the Constitution refers only to "Power . . . To Establish Post Offices." The postmaster, he contends, has quietly added the word "the" to imply exclusivity, thereby begging the question of the federal government's monopoly (1844, 21–22).

If private mails were allowed, Spooner contends that service would be both faster and cheaper (1844, 24). In practice, there seems little doubt of this since, at the time Spooner started the American Letter Mail Company, the post office was charging 25 cents to send an ordinary letter from Boston to Washington (Goodyear 1981). Spooner's mail service was able to cut the rate to less than seven cents. Moreover, Spooner's company focused on profitable routes between major northeastern cities. From Spooner's perspective, the post office unfairly makes people who live in the city subsidize "those who have voluntarily gone . . . beyond the limits of civilization" (1844, 23). However, this raises the question whether private mail services ought to serve all residents, or only routes that are profitable. Is mail delivery a right to which everyone has an entitlement, regardless of the cost, or a business that is designed to make a profit, if necessary by denying service to persons

in far-flung areas? Contemporary telephone service providers have declined to do business in outlying parts of California, arguing that they do not choose to cater to those locations (Regional Alliance for Information Networking N. d.). Following federal government deregulation of transportation, Greyhound buses now only serve around 5,000 locations, down from 11,000 in the early 1970s (U. S. Department of Transportation 2000), no longer catering to many rural areas that they were previously mandated to include in their routes. To what extent does this violate ordinary people's rights? For someone who is normally very solicitous of the average person struggling to survive in an ever more complex society, Spooner is unusually silent about such concerns. When Curti (1943, 474–75) calls him "Lysander Spooner, a Massachusetts lawyer whose devotion to *laissez faire* had once led him to combat singlehanded the United States post office," he is not wrong that, on this issue, as well as on matters of intellectual property, which will be discussed later in this chapter, we find Spooner at his most capitalistic, most like Sumner, and least like an anarchist. However, it needs to be pointed out that the same Spooner is far from an advocate of *laissez-faire* when it comes to the rights of ordinary workers in the United States, Ireland, or anywhere else in the world. The critic of Anglo-Saxon culture described in chapter 3, the abolitionist who will be encountered in chapter 5, these refer to a Spooner who is one of the fiercest critics of capitalist government who ever lived. Yet here we find him not no nearly concerned about the situation of folks who have moved out into the sticks.

When the post office subsequently reduced the price of postage—Spooner argues, thereby making competition impossible—he asked for some kind of reward from the government for the public service his arguments had performed (1850c, 5–6). In this endeavor, as was usually the case in financial matters, he was unsuccessful.

That people read and were influenced by Spooner's writings on private mails does not mean that all were easily persuaded. Some of the Spooner correspondence now housed in the Boston Public Library collection was at one time, shortly after Spooner's death, given to the Boston postmaster, C. W. Ernst, who wrote a note identifying the letters, in which he lambasted Spooner's accomplishments as follows:

> Spooner was an amateur, who doubted the Constitutionality of the Government monopoly in postal affairs (he forgot that a fact is more powerful than a doctrine), attempted a private mail line (which failed), and then fancied that he ought to have a reward because he had "coerced" Congress to reduce postage in 1845. It is all very odd, and rather worthless. There is also a strange let-

> ter of Spooner to the woman who had sense enough not to marry him. (C. W. Ernst, "Introduction to Papers," Swampscott, Mass., 28 August 1892. Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library).

Property

For Spooner, an important distinction concerning property was the division between owned and unowned wealth. For him, as with animals, any other form of natural wealth not possessed by anyone else remains available for someone to take and turn into their own property. Once they procure it, it is removed from the pool of available assets (Spooner 1855, 16–17). Once again, also, the theory is undergirded by reference to natural law and natural rights:

> Of the wealth in the ocean . . . for example, only an infinitesimal part ever becomes property. Man occasionally takes possession of a fish, or a shell, leaving all the rest of the ocean's wealth without an owner. (Spooner 1855, 15)

For Spooner, the rationale for this is the same as that of John Locke (1965, 329–30), that a person "bestows labor" on a thing—Locke (1965, 329, 331) says both "hath mixed his *Labour* with" and "hath bestowed his labour on it," at which point it becomes his or her property. Even if a person only picks up a stone or removes a piece of fruit from a tree, there is nonetheless labor expended (Spooner 1855, 23). To deny a person the right to control property that has been acquired in this way, through the expenditure of toil, however minimal, is to deny a person the increased value that has been added to the property. Often, the labor may be insignificant but, in other cases, for example, a statue may have been made from a block of marble. Thus, the craftsperson should keep it, so long as he or she is the owner of the marble. On the other hand, for Spooner, a person who merely labors on the stone, but is not the owner, is not entitled to the wealth that is added to the value of the stone by his or her own labor (25).

Reichert (1976, 120) points out that Spooner's argument here is "[o]bviously influenced by the economic theories of John Locke." What Spooner and Locke share here is, to give it one name that is nonetheless problematic, a labor theory of value rooted in natural law. Locke writes:

> For 'tis *Labour* indeed that *puts the difference of value* on every thing . . . if we will rightly estimate things as they come to our use, and cast up the several Expenses about them, what in them is purely owing to *Nature*, and what to

> *labour*, we shall find, that in most of them 99/100 are wholly to be put on the account of *labour*. (Locke 1965, 338)

The fact that Spooner presents a labor theory of value is interesting because, as Shively points out, Spooner had a problem with the labor theory of value advanced by Adam Smith and Marx:

> The most interesting part of Spooner's conclusion is his rejection of the labor theory of value—a cornerstone of both Adam Smith's and Karl Marx's economic analysis. "Labor," Spooner writes, "is worth nothing of itself. Its value depends wholly upon what it produces." . . . Machinery and skill, not increased labor, produce greater wealth. Interesting as this theory is, its implications are not explored. (Shively 1971o, 4)

Shively seems to be referring to:

> But the man who makes this objection does not take into account all the facts upon which the rise in prices depends. He does not take into account the fact that the market price of any commodity, whether produced in less or greater quantity, or by less or more labor, depends only very slightly, if at all, upon the greater or less amount of labor it costs the producer, *but mainly, if not wholly—as has already been explained—upon the power and disposition of other men to buy it, and give him something equally desirable in exchange for it.* The producer of any particular commodity, however desirable a one it may be, can get no just compensation for it, except for those who are themselves producing something equally desirable, which they are willing to give in exchange. (Spooner 1879, 18)

One way to resolve this apparent contradiction is by distinguishing between a labor theory of value, which Spooner and Locke use to justify the acquisition of natural property, and a labor theory of prices, which Spooner disavows in the quoted passage from *Universal Wealth* above. An alternative allocation of appellations that would fix the problem would be to follow Lemos (1978, 144) and Sreenivasan (1995, 32), who define Locke's theory as "a labor theory of property." We could then say that Spooner, too, is advancing a labor theory of property, understanding that term, following Lemos, as an attempt to justify the taking of unowned property. If Spooner and Locke are designated as advocates of a labor theory of property, then it is no longer necessary to make a distinction between a labor theory of value and a labor theory of prices. Lemos understands Locke's labor theory of property as a moral or political device, rather than an economic explanation. He continues:

> Locke's theory of property . . . rather than being compatible with *laissez faire* capitalism . . . is in fact incompatible . . . his theory constitutes at least the beginning of a philosophical justification of . . . governmental intervention in the economic process through legislation to insure that no person in society is deprived of a decent standard of living as a consequence of the unfettered flow of economic forces. (Lemos 1978, 159)

An application of such a reading to Spooner appears to be constructive, because the nineteenth century thinker is ever mindful of a need to restrain elites who, he believes, have monopolized property and business opportunities, at the expense of the middle class, as well as the governments who serve those elites.

If Locke and Spooner are to be viewed as making, via their labor theories of value/property, a more left-leaning type of argument than has often hitherto been accepted, then this tends to dilute the impact of one criticism of Locke (and, by implication, of Spooner). This is the view of the editor of one edition of Locke's *Two Treatises of Government*, Thomas I. Cook (1947, xxvii), who argues that Locke's labor theory is inseparable from an individualistic explanation of why the economy is the way it is. Shively (1971i, 6–7) makes a similar criticism of Spooner in his introduction to *Poverty: Its Illegal Causes and Legal Cure*, saying that he "failed even more than Proudhon to take historical change into account." Shively quotes Marx from *The Poverty of Philosophy*, which is a book-long reply to Joseph-Pierre Proudhon, one of the leading European anarchists:

> They all want the impossible, namely the conditions of bourgeois existence without the necessary consequences of those conditions. None of them understands that the bourgeois form of production is historical and transitory, just as the feudal form was . . . they cannot imagine a society in which men have ceased to be bourgeois. (Marx, quoted by Shively 1971i, 7)

However, from an anarchist, rather than a socialist or Marxist perspective, the ills of capitalism *can* be explained in individualistic terms, and this is what Spooner attempts to do. Spooner was not a Marxist by any stretch of the imagination. Moreover, today, how many people still believe the age of socialism is anon? Ironically, contemporary historical change has reduced the explanatory power of Marxist explanations.

Another justification given for Spooner's view of property—a familiar one—is its relationship to the natural rights to life and (the pursuit of) happiness. If we have such rights, he contends, then it follows that we have the right to accumulate property in order to be able to stay alive and become

happy. Without property, we would not be able to secure these natural rights (Spooner 1855, 28–29).

Where, then, does God fit into this theory of property? God is not subject to the same physical restraints as mortals, argues Spooner, and this accounts for the availability of potential property that humans can acquire for free. Spooner argues that it is God who has made these unpossessed natural products that cover the Earth. If men had made the oceans, the trees, or the air, then the inventors would have been able to charge others for using them. However, God, "their maker and owner, is not, like man, dependent upon the products of his labor for his subsistence and happiness; he therefore offers them freely to all mankind; neither asking nor needing any compensation for the use of them, nor for his labor in creating them" (Spooner 1855, 88–89). God lies outside the rules of property for Spooner, because God is not defined as a laboring animal. Man, however, is, which is surprising, because Spooner defines human beings not as natural entities, as might be expected from the ubiquitous references to natural law and natural rights that we find in his writings, but rather as a laboring creature, just like Marx[6] (Spooner 1855, 89).

Once a person has appropriated property, he or she assumes also the right to make decisions concerning this property, while other persons, including collections of persons, such as governments, give up the right to participate in any decision-making concerning the aforesaid property. It follows that a person who chooses to cut down a tree in his yard, or decides to paint his house pink, is free to do so, without regard to the opinions of his or her neighbors. There is no consideration of the rights of other members of the community. Spooner lists "[l]and, trees, gold, iron, diamonds" as being commodities that, since they are naturally unappropriated, can be taken by people and turned into private property. Once taken, the new owner has an absolute right of private property over them (Spooner 1855, 226–27). Moreover, as Roark (2008) notes, privatization of resources in this way lessens the rights of others, who must now obtain permission to utilize any entity that has been appropriated.

Spooner does not consider the potential dangers caused by individuals pursuing their own personal advantage at the expense of any naturally unappropriated bank of resources. What if an individual seeks to take not just resources that he or she personally needs, but, for example, to acquire all the gold and diamonds that have not yet been taken by someone else? In other words, are there no limits to appropriation? This problem, anticipated by John Locke (1965, 343; see also Macpherson 1962, 203–4), is often posed today in the form of "the tragedy of the commons," a multi-person game theory problem first given this title by Garrett Hardin in 1968, though it was actually formulated by mathematician William Forster Lloyd in 1833

(Hardin 1968). The problem in the tragedy of the commons is how to stop farmers who share use of common land from allowing their herds to overgraze, which damages the pooled resources, when more limited use, which is not in the farmers' personal interest, would instead sustain the commons and benefit the community as a whole. An anarchist perspective is likely to take the position of Matt Ridley (1997, 229–35), that people who own property communally (such as contemporary Maine lobstermen and Kenyan goat herders) will also be able to behave communally. For Ridley (1997, 237), "sustainability without Leviathan" is quite possible, a sentiment with which Spooner would likely have agreed. However, Spooner does not address this issue adequately. His answer is that people have a natural right to do whatever they wish up until the point at which they violate someone else's natural rights. This is the moment at which appropriation offends natural justice. Unfortunately, negative social consequences may occur from excessive appropriation well before someone complains that resources held in common have been mined to excess.

Intellectual Property

Property can derive not only from the pool of untaken physical objects and the labor that is added to them, but also through the creation of property that did not previously exist. For Spooner (1855, 21), although ideas are artificial in character, rather than natural, they still retain many of the characteristics of physical property. They are also a form of wealth, intellectual property being as potentially valuable as any physical object (12–13). Spooner notes that the idea of property even in a physical sense is actually an "abstraction" that has to be reasoned and argued for, and thus there is no significant excuse for distinguishing between the latter and property in the form of ideas (38). Ideas, like physical possessions, accrue only to their creator, who has labored on them, and who therefore owns them. As with physical property, others are not allowed any influence on the manner in which they are used. Just because people may frequently give away ideas for free does not mean that anyone has abandoned the principle that owners of ideas have a right to charge for their thoughts if they so wish (18, 20).

Spooner's views here do not sound like those of his fellow-anarchists. Spooner disagreed with Josiah Warren, Benjamin Tucker, and Kropotkin about the value of inventions and intellectual property. Shively, for example, situates Warren's position on ideas within his goal of crafting a more reasonable system of exchange. In his book, *Equitable Commerce*, Warren (1852, 43) argues that, in order to lessen the negative consequences experienced by

ordinary workers living in a capitalist economy, where prices go up and down in response to demand—a system he calls "civilized cannibalism" (42)—the basis for determining prices should instead be a seller's costs, most surplus value being taken out of the equation. Although, for Warren, some workers' skills may be better than those of others, they nonetheless frequently "*cost* nothing" to acquire, and thus "like the water, land, and sunshine, should be accessible to all without price" (Shively 1971k, 10; Warren 1852, 45). Intellectual property is no exception, for "patents give to the inventor or discoverer the power to command a price based upon the value of the thing patented" (Warren 1852, 45).

Spooner's position is quite different. He takes the opposite side to Warren concerning patents, and he would no doubt also quarrel with Kropotkin's ([1927] 1970, 212–13) contention, written after Spooner's death, that expensive house prices in Paris, rather than being attributes of the properties themselves, depend on the community activity and opportunities of the great city itself, and therefore constitute illegitimate appropriation. Spooner (1855, 62) asks whether participants hastening to California to look for gold, and being successful, should have no right to the riches they discover because the "course of events" and "general progress of knowledge," have enabled the profits of the Gold Rush. He rejects this view, because the same argument, applied to agriculture, would mean that the farmer had no entitlement to the fruits of his land since the scientific knowledge of others had enabled his or her husbandry (63).

Similarly, he anticipates and rejects another argument of Kropotkin (1970, 56–57), who claimed that inventors are merely people who happen to find themselves in the right place at the right time in history, arguing instead that inventors should not be denied an eternal property right in the things they developed simply because, if they had not succeeded, someone else would have done so soon. This line of reasoning fails, Spooner (1855, 64) claims, because it could in turn be used by another person, and another, so that in the end, we would be left with no property rights at all:

> [I]f A, as first producer, is to be deprived of the fruits of his labor, merely for the reason that B would have produced the same things, if A had not, then B certainly, as second producer, ought to have no property in them, for the reason that, if he had not produced them, C would have done so. Admitting that B would have produced the same things that A has done, he could have no better right to them that A now has. (Spooner 1855, 65)

Rather, a perpetual right to enjoy the fruits of one's inventions would, Spooner believed, be of significant benefit to society. As far as intellectual

property was concerned, it would encourage people to work on and disseminate inventions and other superior products of thought (48–49). A person using a new idea would not share in its inventor's compensation, but the ability to employ the invention would give that person the ability to work on another discovery; society would profit because technology is laborsaving and benefits society as a whole (68). A perpetual right means that a person's heirs would inherit the patent in question.

Earlier in the chapter, it was noted that Spooner and Kropotkin share a belief that one of the functions of man-made law is to protect unreasonable ownership of property and the power of the elites who possess it, a position endorsed also by Warren (1852, 49). By rejecting the legitimacy of the extra value that makes housing, inventions, and other things more expensive, Kropotkin and Warren seem to display greater consistency than Spooner who, on the one hand, blasts excessive accumulations of property, yet, on the other hand, argues for an intellectual property right for inventors and their heirs. With Spooner, however, constancy can be found in his position by uniting the view that elites, and the governments that serve them, own and control most of the property, to the detriment of everyone else, along with the position that those same elites and governments have excised most potential for profit from innovation, also at the expense of others—both potential inventors and the mass of society who might have benefited from additional discoveries.

In addition to Spooner's position on inventions being unacceptable to Kropotkin and Warren, Reichert (1976, 121) notes that such an idea was rejected by the other great American Anarchist, Benjamin Tucker, who wrote in the newspaper of the American Anarchists, *Liberty*, that Spooner had gone too far in arguing for descendents to be able to inherit control of intellectual property. Tucker (1887, 6) said of *The Law of Intellectual Property* that it was "the only positively silly work which ever came from Mr. Spooner's pen," and McElroy (2003, 99, fn 13) notes that Tucker also, on another occasion, described the book as "fundamentally foolish." Tucker's own position will be explored later in the chapter.

In *The Law of Intellectual Property*, Spooner also responds to Thomas Jefferson's view that ideas should be free and to his allegory about candles (Shively 1971k, 11). Jefferson had argued that nothing is lost in sharing an idea with other people; rather, it is like using a candle to light other candles. Intellectual property, for Jefferson, is not like physical property, and should not be regulated in the same way (McElroy 2003, 89; Spooner 1855, 91–92). Spooner, however, responds that intellectual property is a commodity that requires the investment of labor—thus, it should be treated like material

property, which is, similarly, property that has been generated by the use of labor (95–96). Elsewhere, he writes:

> [S]cientists and inventors have the same right of *perpetual* property in the products of their brain labor, that other men have in the products of their hand labor. (Spooner 1884, 9)

Spooner is unsure that the lighting a candle analogy makes very much sense. As a service, he contends that the effort involved is in fact trivial—too trivial for the donor to be able to make a charge. However, the underlying original invention, the ability to make fire or light, was a considerable one that must have once required significant investment of thought and labor. That invention belonged to someone, and they were under no obligation to dispense it to others for any less compensation than they considered adequate (Spooner 1855, 98). Here, again, we can note the presence of a labor theory of value or property. We might speculate about whether this theory applies to new drugs. A medicine that would cure AIDS might require the investment of a considerable amount of labor. Would the inventor of such a medicine be entitled to withhold it until someone was willing to pay the required price? What if the price the inventor wanted was a trillion dollars? The fact that much intellectual property, though useful, is of no monetary value because the experience needed to generate it is familiar to many people, does not affect Spooner's view that saleable ideas should always bring profit to their inventors and their heirs (Spooner 1884, 6). But, we might ask, how much profit is too much?

Spooner rejects the belief that society has a right to intellectual property to which it has already been exposed, referring to that as confiscation (Spooner 1855, 102). If people are not to be compensated for their intellectual creations, and are to have them taken away from them by the government, then Spooner believes they will tend to hide them, or worse, not even develop them in the first place. This will actually hurt society much more than the professed gain, which is to save some ideas from being hidden from society (104–5). In a corollary to this argument, we find the justification for Spooner's insistence that intellectual property rights should never expire, which is his comparison of expiration of these rights to "[t]he fabled folly of starving the hen, that laid the golden eggs" (145). Greater rewards will lead to more innovation.

In fact, Spooner notes, he has seen it written "that the steam engine had quadrupled the wealth of the United States" (Spooner 1855, 151). But have the inventors of the steam engine received their fair share of this bounty?

Hardly, with the effect that those same inventors have seen no incentive to create more such inventions, which would be of similar benefit to society. The use of steam would likely have been superseded by now, Spooner suggests, if its founders had been adequately compensated (151–52). For Spooner, the discoverer of a great invention should become wealthy, increasing the chances that society would also benefit from the creation of more significant things (158). Applying this argument to literary works, Spooner suggests that a lack of protection for the author will result in a literature "mostly of a superficial, frivolous, and ephemeral character; such as ministers to the appetite of the hour, and finds a rapid, but temporary sale—as, for example, romances and other works, which naturally have a short life, and which it requires but little thought or labor to produce" (162). He laments the fact that there are few works of science and philosophy produced, books that take longer to write, but which attract a smaller audience. To encourage the production of more serious tomes, he argues that a more valuable copyright protection might allow intellectuals to take the time to produce their works (162–63).

Expanding this argument into a more far-reaching critique of government, Spooner asks why most people have benefited so little from scientific inventions, why so many live in "poverty, ignorance, and slavery" (Spooner 1884, 16). Once again referring to governments as "bands of robbers" (16), he argues that they have sought the opposite of that which would benefit society, namely they have attempted to appropriate all the wealth that people—workers in ideas and with their hands alike—have produced, to take all the profit out of people's endeavors, and this is why so many people achieve nothing more than subsistence. But this is to violate natural law, the right of each person to enjoy the profits that he or she has generated. Having fleeced people of the wealth to which they are entitled, the band of robbers then allocates the confiscated resources in ways that violate equity (Spooner 1846, 7).

The foregoing leads Spooner to one of his most interesting conclusions, in which he identifies the production of surplus value:

> In order that each man may have the fruits of his own labor, it is important, as a general rule, that each man should be his own employer, or work directly for himself, and not for another for wages; because, in the latter case, a part of the fruits of his labor go to his employer, instead of coming to himself. (Spooner 1846, 8)[7]

While, as was noted earlier in the chapter, Warren sees patents and other benefits for inventors as contributing to the generation of surplus value,

which in turn makes life unpredictable and generally difficult for ordinary people, Spooner instead sees the problem of surplus value lying in the fact that it accrues to an employer, rather than to the inventor him or herself. In the ideal world of Spooner's form of American Anarchism, individuals would likely rise and fall on their skills and merits, whereas, in Warren's utopia, notwithstanding his considerable commitment to promoting the widest possible range of individuality (Warren 1852, 15–40), the right of an individual to profit from his or her industry or talents would be severely circumscribed.

Given that he sees governments as actively keeping people poor, laws that purport to protect citizens from unfair, exploitative interest rates are going to be appraised quite differently by Spooner. What they do, he argues, is deny poor people access to capital, which they could use, despite the high cost of the money they would receive, to facilitate self-employment. Denied access to money by cruel usury laws enacted by robber governments, many people have no choice but to sell their labor to someone else (presumably a capitalist—here, Spooner swims close to Marx), which is, he observes, a far greater exploitation (Spooner 1846, 12).

Spooner notes that, in a system where access to capital is restricted, those who can obtain it will also dominate society (47). Is this theory true today, we might wonder, in a world of credit cards at 20 percent annual interest and a federal minimum wage? Certainly, big corporations enjoy access to great amounts of capital, and this gives them power. However, much has changed too. People who can qualify for mortgages (admittedly, less than half of workers in the United States today) suddenly no longer pay rent, may get an interest deduction on their federal taxes, and can sublet to renters; overnight, qualification for a housing loan makes life much better for millions of people—even though most may not use their access to capital to help them develop new inventions—while millions of others are forever shut out by qualification rules, which have recently been tightened. A credit-based caste system still exists, even though the parameters of access to money have changed. Thus, although the world of the twenty-first century is much altered from the time when Spooner was writing, he captures well the fate of the class that cannot prosper under capitalism, a system that continues to:

> divide society into *castes*; set up barriers to personal acquaintance; prevent or suppress sympathy; give to different individuals a widely different experience, and thus become the fertile source of alienation, contempt, envy, hatred, and wrong. But give to each man all the fruits of his own labor, and a comparative equality with others in his pecuniary condition, and *caste* is broken down; education is given more equally to all; and the object is promoted of placing

> each on a social level with all; of introducing each to the acquaintance of all; and of giving to each the greatest amount of that experience, which, being common to all, enables him to sympathize with all, and insures to himself the sympathy of all. And thus the social virtues of mankind would be greatly increased. (Spooner 1846, 46–47)

As was noted above, Tucker, like Warren, had a diametrically opposite view of intellectual property to the one developed by Spooner. For Tucker, this is because a fundamental difference exists between physical and intellectual property, a difference that is not accepted by Spooner. Physical property attains value, Tucker claims, because it is not possible to utilize it in more than one place at the same time. For a person to use such "concrete property," they must deny others the same right; it is this that makes the legal protection of ownership a necessity. In the case of music, novels, theories, formulae, and other "abstract" property, Tucker argues, this is not true, for many people can enjoy them in different places without denying the inventor the use of them. Thus, he argues, owners of abstract things should not enjoy the same protections as those who possess physical property (Tucker [1899] 1972, 31–33; see also McElroy 2003, 88).

An interesting issue here concerns whether a work of art should be considered material or intellectual property. When a picture or sculpture or piece of jewelry is sold, the creator loses possession of it, unlike the situation with sheet music, books, etc. It would seem that a painting by a famous artist is both physical and intellectual property: it is an investment, but it is also a source of inspiration and education. In Tucker's terminology, such works of art are both "concrete" and "abstract" at the same time. When an artist sells a painting, or a thief steals it, the owner is denied its use. No such loss of physical property applies to a playwright, novelist, inventor, software designer, or songwriter, who can sell their work, or have it copied or pirated, and still retain what they have created and make use of it.

When Tucker does appear to accept a right to intellectual property, Wendy McElroy (2003, 87) points out that it is restricted to ideas that remain in a person's head, that have not yet been revealed to others. In other words, she argues, they do not actually constitute a right of intellectual property, but are merely coincidental to people's natural right to control their own bodies, within which the ideas currently reside.

Comparison of Spooner's and Tucker's views of intellectual property suggests that perhaps each was conceptualizing a different type of property. In Tucker's mind, maybe he is thinking about paintings by great masters, handmade musical instruments, clothing by famous designers, racehorses of noble

lineage, houses with unique views, and rare bottles of wine. It is visions like these that best personify the notion of "concrete property," because a house in Bel Air that used to belong to a famous movie star can only be owned by one person at a time and, in fact, the ancestry of persons who own the house itself contributes to the value of the property. In the mind of Spooner, on the other hand, a man who always struggled to make a living, houses seem more likely to refer to rudimentary structures that afford shelter, furniture to any utility that adds to a family's comfort, and horses to creatures that facilitate transportation.

Spooner's notion of caste, his sense that many Americans, however hard they work, are perpetually locked out of participation in the economic system at any greater level than one leading to subsistence, is relevant to this distinction between Spooner and Tucker on the issue of intellectual property. For it perhaps needs to be said, in favor of Spooner's side of the argument, that the physical property owned by most people in the world lacks the defining aspect of Tucker's "concrete property," since its custody does not prevent others from obtaining an identical form of ownership. Clothing from The Gap, furniture from Slumberland, an automobile from the Ford Motor Company, a Thomas Kincaid painting purchased at the mall, stationery supplies from Office Depot—the kind of property that defines what most people today actually own, is not in any sense unique. It is utterly replaceable; indeed, outlets to facilitate immediate replacement exist in almost every city and suburb in the United States, and in many other countries, as well as on the Internet. Since most physical property *can* be used in different places at the same time, its very lack of concreteness means that the basis for Tucker's distinction between physical and intellectual property is undermined, and thus its validity as a potential criticism of Spooner's theory is diluted. Most physical property is only distinctive in the sense that it is currently located at a specific locality. For example, a lithograph of a drawing may come with a certificate identifying it as number 345 of an issue of 500. Each of the 500 lithographs is identical and presents the same aesthetic properties, and, for the most part, investment opportunities for the owner, save for the identifying number on each certificate. Number 345 is unique and constitutes "concrete property" in Tucker's sense only in matters related to numbering, ownership, and physical location. It is possible that someone interested in astrology might seek out number 345, and be willing to pay more for it than for one with a different number due to the imagined significance of its defining numerals. However, in all other respects, for most people most of the time, the lithographs are absolutely interchangeable, and thus, in most significant ways in which they might be regarded as pieces of physical property, they

are not fundamentally different from intellectual property. Consequently, Spooner's formulation, that there is no intrinsic difference between physical and intellectual property, and that both are better understood in terms of their capacity to generate wealth for their owners, who are presumed have endowed labor upon them, is the sounder hypothesis, even if it disagrees with a greater body of anarchist theory penned by Tucker, Warren, and Kropotkin.

At first sight, taxation may not seem to the reader to be directly related to this effort to define property. However, for Spooner, the problem at the heart of taxation is that it is exacted without a person's consent, and thus another area of government involvement in society falls vulnerable to criticism in the light of his doctrine of natural law and natural rights. Specifically, if people have not agreed to being taxed, but they are nevertheless, then the government must be violating their natural right to property. Similarly, in the case of tariffs and other protectionist measures, the fact that a person is purchasing products made in another nation is no excuse: taxing such a purchase is still, for Spooner, a violation of the natural right to property (Shively 1971h, 8; Spooner 1886, 43).

Spooner believed in free trade, but his reasons for that determination are quite original. The excuse that is often advanced, that tariffs protect domestic manufacturers, is for him a sham (Spooner 1886, 44), for he believes the natural right of commerce applies globally, across all national boundaries:

> Every human being has the same natural right to buy and sell, of and to, any and all other people in the world, as he has to buy and sell, of and to, the people of his own country. And none but tyrants and robbers deny that right. And they deny it for their own benefit solely, and not for the benefit of their laborers. (Spooner 1886, 45)

Furthermore, if the government is able to procure the citizen's money without his or her permission, then it can use it for other purposes, for example, to pay soldiers who can then be employed to further take away people's liberty (Spooner 1886, 10). Spooner does not mention it in this context, but, as will be seen in chapter 5, even though he was a leading abolitionist, he believed this is what had happened to the South in the Civil War, the cost being a significant one, the total loss of whatever legitimacy the U.S. government still retained.

It is not hard to imagine what Spooner would have made of life in the United States of the twenty-first century. He would likely protest what he saw as an exceedingly excessive rate of taxation, the justification for which he would still wholeheartedly refuse to accept. The War on Drugs, the War

on Terrorism, and various other contemporary measures that might seem reasonable to most Americans would surely emerge as Orwellian nightmares in the mind of the nineteenth century anarchist. He would brand them as even bolder examples of a dishonest government that pilfers individuals' possessions through illegal excise, using the proceeds to broaden its assault on people's rights in a process of unending, ever escalating, and completely unwarranted tyranny. As Spooner grew older, less and less did he approve of the federal government or of its claims and abilities to serve the citizenry. His reasons for rejecting the authority of the U.S. Constitution will be explored in detail in chapter 3.

Notes

1. However, as Williams (2004, 3) argues, citing Aristotle, young people lack experience, which would seem to dilute their ability to reason from familiarity with subjects in order to decide what is right or just.

2. *McCulloch v. Maryland*. 1819. 4 Wheat. 316.

3. *Gibbons v. Ogden*. 1824. 9 Wheat. 1.

4. *Paul v. Virginia*. 1869. 8 Wall. 168; *Kidd v. Pearson*. 1888. 128 U.S. 1; *Ogden v. Saunders*. 1827. 12 Wheat. 213.

5. *Masses Publishing Co. v. Patten*. 1917. 244 F. 535 (S.D.N.Y.).

6. For accounts of the Marxian definition of human beings as laboring animals, see O'Rourke 1974, 23; Rader 1967, 238–9.

7. Spooner's desire for greater levels of self-employment is explored in chapter 2.

CHAPTER TWO

Poverty and Economics

Poverty

In *Poverty: Its Illegal Causes and Legal Cure*, Spooner offers a sociological, deterministic explanation of the causes of crime, rooting them in economic need. When so many people are forced to live their lives close to indigence, he contends, people will engage in property crimes, either (1) because they need food or other possessions just to survive, or (2) because the ostentation of others they come into contact with drives them to steal things they will never be able to afford, or (3) because the hopelessness of their position turns them against society and its oppressive laws. At the root of this predicament lies the government's violation of people's natural rights to keep what they earn and to borrow capital (Spooner 1846, 47). Once again, Spooner's explanation is rooted in natural law and natural rights. He denies that human beings have any natural inclination to take advantage of others: people are intrinsically good. Crime is a product of life in a challenging environment, and in particular a society with considerable downward social mobility, which means there is a great difference between the opportunities available to winners and losers. Breaking the rules by stealing or engaging in fraud, he argues, becomes a rational alternative given the vast rewards available to those who prosper at "the wheel of fortune" (Spooner 1846, 49).

Instead of having most of the population live exposed to such a vulnerable predicament, he argues it would be better to have a greater degree of social equality, where no one would be pressured by necessity to cheat others (54). It is worth noting that, as in chapter 1, Spooner's position is conspicuously

different to that of another American individualist, the conservative sociologist and Social Darwinist, William Graham Sumner ([1883] 1986, 36, 39; 1927, Vol. I, 176), who saw the precariousness caused by capitalism as the price we pay for freedom. Spooner and Sumner agree about some issues, particularly about the rights of individuals and families to be left alone and not be bothered by the government. But here, once again, the other side of Spooner reveals itself, the anarchist side. On this issue, Spooner is much more like the Russian anarchist, Peter Kropotkin ([1927] 1970, 70), who laments the nature of work at the bottom of society, where "it means to be always under the menace of being thrown tomorrow out of employment," continuing:

> Three quarters of all the acts which are brought before the courts every year have their origin, either directly or indirectly, in the present disorganized state of society with regard to the production and distribution of wealth—not in the perversity of human nature. (Kropotkin [1927] 1970, 71)

In similar fashion, Spooner stresses how the need to earn a wage by working for someone else causes people to stay quiet when they see injustice:

> The mental independence of each individual would be greatly promoted by his pecuniary independence. Freedom of thought, and the free utterance of thought, are, to a great degree, suppressed, on the part of a large portion of the poor in all countries, by their dependence upon the will and favor of others, for that employment by which they must obtain their daily bread. (Spooner 1846, 54)

Like Kropotkin, Spooner sees the drudgery of work as being detrimental to challenging people to do their best, and thereby enabling them to fulfill the true potential of humankind (Shone 2000). Spooner identifies the dangers to society that are caused by so many people's routine poverty and dependency for survival on an employer other than themselves. Intellectual development, he claims, is just as much a victim of poverty when people must stay quiet and not criticize in order to eat and feed their families. His solution, however, is one not supported by Kropotkin.[1] Spooner believes that if more people were self-employed, they could pursue their own ideas, proceeding in whatever direction was of interest to them personally, and the community would be the richer for the resulting greater innovation that would appear in every conceivable area of life (Spooner 1846, 55). Although Kropotkin ([1899] 1968 211–12; 1970, 54; [1906] 1990, 192) also wants people to have the ability to pursue whatever vocations and hobbies they desire, he envisages them, only as younger adults, perhaps just from the age of twenty-five to

forty-five, working a few hours each day for the community. With businesses no longer earning profit on this enterprise, people's lifetime hours of work would be substantially reduced.

The conversation that is engaged in here by Spooner and Kropotkin brings to mind the example of the mathematician, Srinivasa Ramanujam, whose life is discussed by Jawaharlal Nehru in *The Discovery of India*. Ramanujam grew up in poverty, and his formidable mathematical skills were almost lost. He had the misfortune to be born in a poor country, and it was only because his intellectual work was brought to the attention of scholars at Cambridge University in England that he had any opportunity to contribute to human knowledge (Nehru [1946] 1989, 221). The chaos of global capitalism takes no account of the aspirations of children growing up in poorer countries. It is likely that the majority of the greatest minds that were available throughout history for the pursuit of human development remained uneducated. Perhaps they dropped out of school because their parents could not afford to pay tuition any longer, or they spent their lives in a refugee camp, or doing subsistence farming, or they were killed in a war over some parochial issue rooted in tribal, political, or religious differences. Even Ramanujam, rescued from poverty and allowed to make his contribution for the benefit of humankind, remained a victim of his circumstances, dying a couple of years later of tuberculosis (221).

In his 1861 book, *A New System of Paper Currency*, Spooner argues that the solution to poverty is self-employment, the corollary being that ordinary people must have greater access to borrowed capital.[2] As noted in the previous chapter, an additional advantage to greater self-employment would be that it resolves issues relating to the production of surplus value. James J. Martin writes:

> The "economical propositions" he set forth to establish hinged on the proposition that it was a principle of natural law that every man was entitled to "all the fruits of his own labor." That this might be feasible, it was necessary that every man be his own employer or work for himself in a direct way, since working for another resulted in a portion being diverted to the employer. To be one's own employer, it was necessary for one to have access to one's own capital or to be allowed to obtain it on credit. (Martin 1970, 172)

Spooner's opinion about the appropriate role for the government in the economy is that it should stay neutral, allowing individuals to participate and compete without partiality or protection, beyond safeguarding their natural rights (Spooner 1886, 15). Consequently, seeing it as a violation of those natural rights (Spooner 1873, 50–51), he opposes the monopoly of money by

the government and its big business allies. For him, government has become merely the "tool" of major banks and other companies, who stifle ordinary people and their economic aspirations (Spooner 1886, 42). In both Europe and the United States, Spooner laments the fact that industrial revolutions have created great fortunes, yet ordinary workers remain in much the same condition afterwards, forced to sell their labor to others as employees. Control of capital, which is difficult for ordinary people to borrow, guarantees that few people can improve their economic condition, even at a time of great growth and prosperity (Spooner 1886, 47). In his concern about the monopoly of the money supply, Spooner mirrored other anarchists such as Tucker, Warren, and Proudhon (Tucker 1926, 10–11).

Economics

Spooner believed that there was a natural right to engage in banking, both as an individual, and collectively as a partner with other interests. Thus the act of a state chartering a bank appears to him, by definition, to be a violation of natural law because it suggests that banking is a privilege that Congress or a state legislature can take away from people. Bank charters typically provide limited liability, which Spooner views as not only a violation of natural law, but as unethical (Shively 1971e, 8):

> This constitutional right of men to enter into all obligatory contracts, is a natural, inherent, inalienable right. . . . It is an original right of human nature, like the right of speech—the right to enjoy life, liberty, and religion—the right to keep and bear arms—and the right of self-protection. And it is *as an original right*, existing prior to the constitution, that the clause quoted from the constitution, recognizes and guarantees it. (Spooner 1843, 4)

Furthermore, Spooner believes that the natural right to own property entails the natural right to contract, otherwise the ownership of property that is acquired by sale will not be adequately safeguarded (Spooner 1843, 4, 18). Since most state constitutions specifically refer to private property rights being protected from the powers of government, it follows, he believes, that the right to contract is thus implied in almost every state (5).

As will be seen in chapter 3, Spooner does not believe that contracts should be overridden by what is *legal*:

> This whole doctrine, that the law is part of the contract, is a mere fiction, invented or adopted by English courts to uphold the supremacy of their govern-

> ment over the natural rights of the people to make their own contracts. And it has been acted upon in this country only in obedience to arbitrary precedent, and in defiance of our fundamental law, which provides that the natural right of the people to make their own contracts, shall *set limits* to the power of their governments. But suppose, for the sake of the argument, that the law were a part of the contract, the result would still be the same—for then the *constitution* would be a part of the contract—for that is the fundamental law. And the intrinsic obligation of the contract would still have to prevail over any law that was inconsistent with it. (Spooner 1843, 14–15)

What does this mean in practice? A California statute permits residents of trailer parks to opt out of legal protection against discrimination. Currently, such laws are rare. Spooner, however, would allow people to include as a part of a contract any provision that does not violate natural law. This would appear to sanction a range of contract agreements that would customarily be prohibited. For example, a person could agree to work for an employer for free for the first six months, agreeing not to be bound by federal and state minimum wage requirements. It might even be possible to make a contract of the type that a person borrows money with a proviso that they lose a limb if they fail to make payments on time. Although one of Spooner's most important goals is to free up the right of contract from government regulation so that ordinary people who lack access to credit are better able to finance their projects, including setting themselves up in self-employment, it seems that allowing such contracts to violate legal protections would open workers who availed themselves to great risk and exploitation. Yet Spooner does not appear to care about such consequences.

For him, an unfettered right to contract—including the right to borrow money on usurious terms, unprotected by government limits on interest—is absolutely necessary to allow more people to escape the bondage of working for someone else (Spooner 1846, 59). Additionally, it is important to Spooner that people be obliged to deliver on any contract they signed, with the only rider being that the contract must not violate natural law (1846, 59). This is because, properly understood, the regulation of commerce by government is an attack on the most enjoyable of natural rights, the ability to trade and acquire possessions with others (Spooner 1864, 55, 56). Regulation of commerce violates natural law in almost every circumstance, the exceptions being when it protects people from fraud or any other practice that itself violates natural law (57). Spooner also believes that there is a natural right to work, and that this right, in addition to the property right, requires the recognition of the ability to make contracts (Spooner 1846, 59).

An important concern for Spooner is the right of private parties to be able to issue money. He believes that abolishing the monopoly of money by the government and its protégé, the banking industry, will do more for the economic condition of wage laborers in the United States and Western Europe than protectionism, which, as we saw in chapter 1, he is convinced helps only the factory owners (McElroy 2003, 126; Spooner 1886, 45, 46, 48). Alexander sums up Spooner's position as follows:

> Each individual possessing capital ought to have the free right to issue promissory notes to the amount of capital that he owned, and charge whatever interest he wanted. Competition would keep the rate down; the great amount of capital in the United States would provide an adequate amount of currency. (Alexander 1950, 212)

For Spooner, an additional 25 to 50 billion dollars worth of capital was available to be lent to people who were currently forced to work as employees (Spooner 1886, 48–49). This suggested that the economy produced only a fifth of what it could actually generate. However, people, and particularly women, lacked access to "science, skill, implements, machinery, and capital necessary to make his or her industry most effective" (Spooner 1873, 53–54). For Spooner, regulation and control of the money supply, as well as the ensuing denial of access to credit, also violates both the natural rights to trade and engage in commerce (1873, 92) as well as a natural right to subsistence (Spooner 1877a, 12). Since the banks and others who control money and access to credit cannot be expected to willingly relinquish their stranglehold on the economy, and thence control of all the people held in the bondage of wage labor by this system, he argues that they should be forced to comply (1873, 48). It is in the interest of society to compel such a change, because lack of access to credit condemns many people to do manual labor, which is an inefficient use of human capital (Spooner 1862, 16). Agriculture requires few infusions of capital, so it is not surprising that those who lack access to loans are often, in Spooner's time, to be found engaged in subsistence farming; however, it surely does not benefit the United States that so many should occupy themselves so, even during an industrial revolution that could potentially engage and enrich many more people (Spooner 1873, 28):

> The *abundant* currency makes manufacturers various, abundant, and cheap, from increased production; while it raises the prices of agricultural commodities, by withdrawing laborers from the production of them, and also by creating a body of purchasers and consumers, to wit, the manufacturers. On the other hand, a *scanty* currency drives men from manufactures into agriculture, and

> thus causes manufactures to become scarce and dear, from non-production; and, at the same time, causes agricultural commodities to fall in price, from over-production, and want of a market. (Spooner 1873, 30)

When Spooner's correspondent, John A. Thomson, read *A New System of Paper Currency*, he wrote the author to praise its recommendations as being "infinitely superior" to any alternative.[3] However, for many contemporary readers, including Shively (1971b, 6), the expansion of self-employment and access to capital, is a proposal that was already obsolete at the time Spooner was writing, and which thus must be considered completely unrealistic as a contemporary solution. Many industries—banking, insurance, retailing, journalism, transportation, even agriculture—today require organization on a large-scale and possibly global basis. Far from allowing greater self-employment, the argument goes, many businesses operated by individuals and families will increasingly find it more and more difficult to survive. Nonetheless, Spooner's argument maintains much relevance to current problems. For instance, we might wish to ask how many people currently "qualify" for the American Dream. Why should banking credit requirements—especially those that were retightened in 2009—prevent so many people from owning a home? It is not as if the mortgage industry is unable to operate differently, providing fair rather than predatory terms and allowing a much greater percentage of people to "qualify" to borrow capital to buy a home. In the United States, Fannie Mae has portrayed itself as being "a vital component of the most effective housing finance system in the world" (Howard 2004), but there is little evidence that this is true (Chiuri and Jappelli 2001).

Viewing the situation a hundred and fifty years ago, Spooner contends that a monopoly controlled by an elite of a hundred thousand persons, which also dominates the government, manipulates a banking system that, like the U.S. government itself, works to the benefit of the cartel, rather than on behalf of U.S. workers (Spooner 1873, 74; Martin 1970, 179). Industry, Spooner protests, operates in the interests of the ruling elite, with conditions fixed so that the people who do most of the work can never prosper, but only survive. This is another of Spooner's arguments that casts light on the modern economy and those entrusted with managing it. Moreover, it is a theory that has long been advanced by other prominent theorists, including Alexis de Tocqueville, Karl Marx, Gabriel Tarde, and Gaetano Mosca, the most well-known modern version being found in sociologist C. Wright Mills' book, *The Power Elite* (Mills 1956). A contemporary example might illustrate Spooner's perspective. Following the September 11, 2001 terrorist attacks on Washington, D.C. and New York City, the U.S. government supplied plenty of capital

to the airlines to avoid potential bankruptcies caused by fewer people being willing to board airplanes, yet it offered little for displaced airline workers, and Congress made a point of replacing airport security personnel who were not U.S. citizens (Cleland 2002). The interests of those most vulnerable to the economic downturn caused by the attacks were essentially neglected by the politicians responding to the situation, while the airlines, who were best able to survive, found their well-being was uppermost in the minds of the government, which announced a $15 billion bailout plan (Scottish Executive 2001). Interviewed on NBC's "Meet the Press," Vice President Dick Cheney said that the president had decided that, if any of the hijacked airplanes were still in the air, they would be shot down, sacrificing the lives of the passengers (Babington 2001). The reason for this decision would appear to be that, from the White House's perspective, protecting people in government is much more important than the lives of the citizens who elect them. A similar point can be made when one considers that most of the security measures taken in response to the attack seem designed to protect government buildings, big business, and any airplanes that might be purloined for use in attacking the national establishment. A number of people have asked why measures to protect power plants, trains, port cargo facilities, and other potential targets that do not appear to put government officials at risk have at the same time been neglected. In these other areas of infrastructure, it appears that the ability to continue operating businesses with normal speed and efficiency trumps the safety of ordinary individuals.[4] Under the economic system of his day, Spooner laments the fact that employees are regarded as "tools," rather than "human beings" with rights and aspirations of their own. Part of Spooner's solution, an end to the monopoly of capital, would, he believes, replace "the competition of pauper labor with pauper labor" with "the competition of free labor with free labor" (Spooner 1886, 50). Today, despite the façade that citizens of many countries enjoy life in sophisticated democracies in which they choose their leaders and make the laws, status has a considerable role to play in determining the extent to which any person's claim on the elected government will be taken seriously. Spooner's recognition of the power and role of the United States' ruling elite, and of the economic difficulties faced by millions of people who have no realistic hope of ever escaping the poverty of wage labor, remains valid today, and constitutes a political problem of ever-growing urgency.[5]

In order to guarantee the solvency of banks, Spooner's financial system distinguished between invested and specie dollars, i.e., between loans backed by real estate (with "real" values) such as land, and loans backed by precious

metals such as gold (which has "artificial" value). He believed that, to avoid financial collapse, all currency should be backed by actual invested currency, for example, in railroads, and particularly by mortgages, which he considered to be safe and guaranteed to provide a satisfactory return. That safety, in turn would make government financial assistance and regulation unnecessary (Martin 1970, 175; Spooner 1861, 9; 1873, 9):

> The banks would be so universally solvent, and so universally known to be solvent, that no runs would ever be made upon them for specie, through fear of their insolvency. They could, therefore, maintain specie payments with much less amounts of specie, than the old specie paying banks (so called) could do. (Spooner 1873, 12)

Moreover, Spooner considers government involvement in banking to be unconstitutional as well as undesirable and unnecessary if a different financial system were to operate (Spooner 1861, 9, fn *). Under his system, banks would be solvent and local. They would know the people with whom they did business, and they would stay in the black however well their individual customers were doing, regardless of downturns, politics, and war (Spooner 1862, 11). The real estate being used to back loans could be utilized at the same time for other purposes, commercial or otherwise, which would be more efficient. The system would undermine existing banking oligarchies, while opening up the lending market to a much greater percentage of the population, allowing them to keep more of their profits, lowering interest rates, increasing technology usage, and stimulating the economy (Spooner 1873, 6–7). Just as his plan for greater access to capital would stimulate the creation of small businesses, so the proposed change in banking practices would promote the success of smaller banks. Presenting "scarcely an exaggerated picture," Spooner (1873, 18–19) gives the reader a hypothetical example in which wealthy American families such as "the Astors, and Stewarts, and Vanderbilts" issue currency that is backed by their substantial personal real estate holdings. The advantage is that everyone knows the names and recognizes the wealth of these families, so there are never any doubts about the sturdiness of the money that bears their names. Consider then the "notes of Sam Jones, and Jim Smith, and Bill Nokes," ordinary Americans who have no resources with which they can guarantee the bills that they issue. Their notes can have value only, Spooner argues, if they benefit from an unconstitutional government-imposed monopoly that creates inflation, limits access to credit, and closes the currency market to people who could issue solvent money that could be instantly redeemed on demand.[6]

Defenders of the current, specie system of currency have argued that banknotes should only be issued up to the value of gold that is held by the banks. However, Spooner contends, in practice, less than 1 percent of people would actually want their money redeemed in coin. The system, therefore, needlessly restricts access to capital (1878, 20). Runs on the banks have happened only, Spooner contends, when depositors have believed the banks were broke. For example, this has happened in both the United States and England, but it did not happen in Scotland from 1765 to 1845, he points out, where banking was not specie-based. Rather, the banks had stockholders, personally liable for the debts of the bank, who in turn owned land; the banks possessed very little gold, but they did not, generally, fail when the economy slumped (Spooner 1877a, 13–14; 1878, 21).

Spooner estimates the value of capital and therefore currency that could be generated by real estate and railroads as being $20 billion, which could always, in the final analysis, be redeemed on demand (Spooner 1873, 15). However, in so doing, as Shively (1971c, 5) points out, Spooner sees, but probably does not recognize the extent of, the danger of property speculation, which could potentially undermine the stability of a capital system based on land ownership.

On the larger issue of who benefits from economic protectionism—a nation's workers, as is usually assumed, or a nation's manufacturers, as Spooner contends, Cordato and Gable (1984, 284) argue that Spooner has anticipated the modern position of public choice theorists such as James Buchanan and Gordon Tullock (1965). Cordato and Gable say that Spooner's analysis of tariffs in *A Letter to Grover Cleveland* is essentially describing "rent-seeking," which is to derive illicit extra revenue due to government interference in the market.

Certainly, Spooner sees his theory of capital as the simple application of the more general rule (Adam Smith's) that unfettered competition leads to the best aggregation of outcomes for society. Banking, itself of recent origin, is not yet perfect, and thus—just as we welcome innovation in agriculture and other industries, we should be willing to change the rules of banking when improvements are proffered (Spooner 1877a, 17). For him, welfare, unemployment, and charity are expensive ways of providing relief to the poor, because they use bureaucracies to deliver aid. Greater access to credit could reduce the numbers of people who find themselves destitute at certain times when the economy contracts. To the extent that Spooner resembles Smith, there is a further linkage here with the modern thinkers, for Cordato and Gable (1984, 285) note that the ideas of Smith have also been coupled with, and found consistent with public choice theory. For Shively (1971b,

6–7), though, this interrelationship between the ideas of Spooner and Smith is unfortunate because Spooner's analysis thus becomes infected with a "*laissez-faire* philosophy" that cannot account for the negative consequences of industrialization. Although Spooner can identify the problems caused by capitalism, Shively argues, his individualistic theory, influenced by Smith, cannot suggest remedies for troubles such as growing stratification. However, as we have seen both in this chapter and in the previous one, while Spooner is consistently an individualist, his prognoses often differ from those of writers advancing a *laissez-faire* ideology. With respect to the current issues, far from being an advocate of *laissez-faire*, Spooner displays Keynesian concerns about the dangers caused to ordinary people by unregulated market cycles. His faith in loans that are advanced on the basis of trust and knowledge of one's neighbors is a quite typically anarchist approach, because it achieves social control and cooperation through norms and voluntary association, rather than law and government. Furthermore, Shively is incorrect because Spooner does in fact offer two solutions to lessen stratification: greater access to capital and greater diversity in bank ownership and control.

To what extent do those solutions seem valid today? Following the global economic downturn of 2008, people may feel that credit is extended only to those who do not really need it, while millions of people in the contemporary United States cannot "qualify" for a mortgage, even with interest rates at rock-bottom prices. Extending credit to those who are not currently eligible might be justified, in Spooner's fashion, by presenting access to loans as a basic right, but—since more people would then undoubtedly fail to pay back the money—this raises the issue of whether such a right makes sense for a polity. If the assertion of a right to credit makes banking a risky industry, what happens to the rights of bank shareholders, including the natural right to contract (or not to) that Spooner also advances? Of course, similar issues have been debated in the past, though the recent explosion in foreclosure rates is surely an atypical situation that was heavily influenced by the usage of exploitative mortgage products and practices that were far from ideal. Life insurance companies in the United States once had higher rates for African Americans, because on aggregate they have shorter life spans than whites, but eventually classifying policy applications on such a basis became politically unacceptable, and, though not every company decided to change its procedures in response, presumably the practice violated the 1964 Civil Rights Act once it was passed (Jackson 2002, Strom Law Firm 2001). By making the change, the great majority of the companies paid a price in terms of their profits, because they were forced to adopt less precise underwriting procedures, but greater social equity and public confidence in

the way the firms do business was achieved. Banks have already been successfully pressured to open branches in less affluent areas, for example through the Community Reinvestment Act of 1977 (Federal Financial Institutions Examination Council 2004), and they have come to accept that change. In California, for example, Union Bank of California found that opening check-cashing branches in lower income areas is quite profitable (Caskey 2002). Laws that opened up mortgage opportunities to most Americans (on a fair rather than predatory basis) would likely reduce corporate earnings, but they would engender substantial benefits to society as a whole. Such laws would not precisely follow Spooner's plan, but they would adequately serve his goal of a more egalitarian country with rules that are based on natural rights.

Spooner does not expressly address the inequality of power that exists between people making contracts. For example, many agreements are actually adhesion contracts, where one of the entities who is "negotiating," often an individual who is making a deal with an institution, only effectively has two choices: sign the form that we give you, or go somewhere else. For example, a customer at a chain store realistically only has the option of agreeing to purchase something at the posted price, and the employees on hand may not even have the company's permission to alter the conditions of sale under any circumstances. A person being hired by a human resources office has no real ability to say, "If you'll give me another dollar an hour and excuse me from the drug testing requirement, you've got a deal." In fact, if a job applicant so much as behaved in that way, his or her desirability as a potential employee would immediately evaporate. In attempting to feed the family, a person who was fired from his or her last job is expected to reveal this fact to potential employers even though they may have policies of not hiring anyone who has ever been dismissed. If the applicant fails to disclose the firing, he or she may later be let go by the new employer, when the deception comes to light. In other words, the inaccurate ideology of free contracting misrepresents the fundamental weakness that most people must endure when dealing with institutions. Even though he does not discuss such details specifically, Spooner's recognition of the role that a power differential can make in employment "contracts" is a key underlying factor in his thought.

At the root of Spooner's faith in increased self-employment is the hope that contracting to provide labor should not have to involve the giving up of liberty, the virtue most prized by anarchists and Americans alike. When a person takes a job, suddenly insubordination becomes grounds for immediate dismissal. Why is this? Does it not fly in the face of the very liberty that is promoted everywhere, by politicians and even on coinage? Why must citi-

zens of a democratic nation be serfs when they go to work? Spooner's insistence on the value of self-employment implies rather that labor contracts be signed by *equals*—not by a subordinate and a boss. For this to be workable as an alternative system of employment, surely there would have to be significant government regulation of contracts to make sure that strong signatories did not continue to exploit the weak.

Clearly, there is a difference between a contract between, on the one hand, a self-employed landscaper, who agrees to perform some specified task for a property holder, and, on the other hand, a homeowner simply hiring a person to cut the grass. In the latter case, the employee is maybe told what the rate of pay will be, when the work will be done, and even shouted at and told to work harder. In the former, somewhat equal parties negotiate, with the provider of the labor most likely saying what the price will be, and when the job will be done, and insisting that extra work will receive additional remuneration. The fact of self-employment changes the power relationship, necessarily leading to a more egalitarian structure that improves conditions for the person doing the work, and this is a major strength to Spooner's approach. However, even if self-employment protects the gardener negotiating with a homeowner, that person's goal will likely not be to spend the rest of his or her life mowing lawns. If higher pay from better deal making leads to success, the landscaper may seek to employ others to do the actual work. Undocumented immigrants present the ideal potential employees precisely because of their lack of ability to incorporate, negotiate, or refuse to work in order to advance their interests. So the exploitation may continue, albeit at a different level. Nonetheless, despite its various potential drawbacks, Spooner's imaginative scrutiny of such topics is thought provoking.

Notes

1. Kropotkin ([1927] 1970, 173–74) rejects the position that he attributes to Spooner and Tucker, which he characterizes as a law "of minding one's business," saying that life in society makes it "*impossible* to act without thinking of the effects which our actions may have on others."

2. This is a situation better recognized today, with widespread use of credit cards in developed countries and the 2006 award of the Nobel Peace Prize to micro-credit pioneers Muhammad Yunus and Grameen Bank (Moore 2006).

3. Letter from John A. Thomson to Lysander Spooner dated March 18, 1871, from Summit Point, W.Va., Lysander Spooner manuscripts collection, New York Historical Society, www.lysanderspooner.org/letters_new.htm (accessed July 25, 2009).

4. Some would say the failure of government in the United States to address the many problems caused by Hurricane Katrina in the New Orleans, Louisiana area

exceeded the mistakes made in response to the attacks of September 11, 2001 (Hsu 2006).

5. The unsuccessful 2003–2004 Democratic Party presidential primary bid of Sen. John Edwards was considered unusual, precisely because he attempted to talk about the problems faced by the "working poor" (Bolinger 2004). Edwards continued to focus on these issues when he ran again in 2007–2008.

6. Proudhon (1846, 45) makes a similar point, that the attractiveness of using specie to back currency lies not, as is assumed, on its supposed utility, but rather on "above all, the intervention of public authority."

CHAPTER THREE

Political Obligation

In this chapter, I address Spooner's writings about political obligation, i.e., the justification of obedience to the government, a question that, throughout the history of political theory, has concerned liberals and anarchists in particular.[1] I describe Spooner's unhappiness with social contract theory, the similarities and dissimilarities between the ideas of Spooner and David Hume in this respect, and Spooner's ultimate conclusion that it is impossible to rationalize the government of the United States.

Spooner was strongly opposed to slavery, and an ally and confidant of John Brown. He may have had some knowledge of Brown's unsuccessful 1859 attack on the federal government armory at Harpers Ferry, and he even petitioned the Governor of Virginia, Henry A. Wise, to spare Brown's life.[2] Nonetheless, as was noted in chapter 1, Spooner believed the North had unfairly imposed its will on the South. His viewpoint is unique, to say the least. With the passage of time, he became more and more skeptical about the legitimacy and value of the United States government. In his earlier writings, such as *The Unconstitutionality of Slavery*, Spooner argued that the U.S. Supreme Court should ban slavery outright, or that Congress should outlaw it; he was no fan of the Constitution, but he believed that it should be obeyed until it was amended or replaced. Gradually, his views changed. In later works, such as the *No Treason* series, written after the ending of slavery, he continued to rail against a government that he thought had been imposed without the people's consent, focusing much more on the need to transform the political system of the United States, arguing persuasively that government and consent are

incompatible, that the U.S. government cannot be justified, and that the U.S. Constitution is a sham.

Alexander (1950, 212, fn 52) reports being able to find copies only of *No Treason* numbers I, II, and VI. Despite the curious sequencing of the numbers, it is likely that no other volumes ever existed. In an 1871 letter, Spooner wrote that these three were "the only copies yet published."[3] The first two parts were published in 1867, and part VI appeared in 1870. In them, Spooner explores the meaning of government by consent, the topic of the present chapter.

One of the first issues Spooner attempts to dispose of in the first volume of *No Treason* is the issue of majority rule, which he conceives of as the tyranny of the majority. One way to understand the will of the masses might be in terms of strength. However, government by consent, he says, cannot mean just "consent of the *strongest party*" (Spooner 1867a, 6). Tyrants all over the world could meet that test. This is a familiar starting point: for example, rejecting Trotsky's conclusion that "Every state is founded on force," the great German sociologist, Max Weber (1970, 78), defined government as the body that possesses "the monopoly of the *legitimate* use of physical force." Adding the requirement of legitimacy seems to strengthen the definition considerably. And how would legitimacy be obtained? Perhaps, in this day and age, by winning an election. Thus we come close to considering what Spooner is aiming for, government by consent. However, he takes pains to point out that, for him, government by consent does not mean "consent of the *most numerous party*" (Spooner 1867a, 7). For many people, of course, majority rule, conceived as numbers rather than strength, is what democracy is all about. But minorities also have entitlements, argues Spooner. Men have "natural rights" that cannot be taken away by one person or a group—just because they happen to win an election. This applies regardless of whether the usurpation is "committed by one man, calling himself a robber . . . or by millions, calling themselves a government" (7). The American Revolution, after all, was a case of a minority taking back power from the control of the majority; if that was justified then, as most Americans believe, minority freedom is similarly justified now (8).

Focusing now on the central issue of political obligation, Spooner asks on what authority the U.S. government rules. He decides that the right of a nation to rule can only be established on the basis of consent. Government is justified not by strength, not by majoritarianism (the consent of the majority), but by the consent of all (9–10). Thus legitimate government requires "the separate, individual consent of every man who is required to contribute, either by taxation or personal service, to the support of the government. All

this, or nothing, is necessarily implied, because one man's consent is just as necessary as any other man's" (11). Not only must consent be universal, but it can never be assumed: "for if a man has never consented or agreed to support a government, he breaks no faith in refusing to support it" (11). This understanding of the meaning of consent was implied by the Declaration of Independence. Here, Spooner resembles the modern writer, Robert Paul Wolff, in his book, *In Defense of Anarchism* (Wolff 1976). Wolff argues that any polity is deficient unless it is based on unanimous direct democracy—i.e., unless everyone individually consents to every law that is passed:

> Unanimity is clearly thought to be the method of making decisions which is most obviously legitimate; other forms are presented as compromises with this ideal, and the arguments in favor of them seek to show that the authority of unanimous democracy is not fatally weakened by the necessity of using representation or majority rule. (Wolff 1976, 27)

For Spooner, however, less direct forms of democracy *are* "fatally weakened." While Wolff's argument is heuristic, the purpose of his academic book being to contemplate what ideal democracy might denote, Spooner's perspective is not philosophical at all. Although, like Wolff, he concedes (Spooner 1852, 132) that it is impossible for each person to consent to every law, nonetheless he insists that consent to government must be unanimous and direct.

Even if everyone were to vote in favor of a government, Spooner still has several problems with the possibility of consent. Firstly, even if a person agrees to government, Spooner argues, that submission is not a permanent undertaking. Secondly, future generations are never bound by their ancestors' consent. The U.S. Constitution at most obligated the people who were alive at the time. Thirdly, just because you vote does not mean you consent to the government. Finally, the liberal idea of a social contract between ruler and ruled is not valid if everyone did not get to sign the document.

When Spooner talks of exercising natural rights, as he does repeatedly, this phraseology sometimes seems to fulfill the function of a state of nature in other theories. That is because, for Spooner, the foundation of consent lies in natural justice, not in a social contract at all. He speaks of the "natural rights of property, liberty, and life" (Spooner 1882b, 7), "all men's rights being immutably fixed" (Spooner 1886, 22), "that natural, inherent, inalienable, *individual* right to liberty—with which it has generally been supposed that God, or Nature, has endowed every human being" (Spooner 1886, 30), and "*natural* rights . . . that . . . are the gift of God, or Nature, to him, *as an individual*, for his own uses, and for his own happiness" (Spooner 1886, 30). Moreover, "[t]his right of personal liberty is inalienable. No man

can sell it, or transfer it to another; or give to another any right of arbitrary dominion over him" (32). Yet, "the government does not even recognize a man's natural right to his own life" (31), and "[t]he government recognizes no such thing as any *natural* right of property, on the part of individuals" (32). In practice, all government, including that of the United States, lacks legitimacy, and all government violates natural law.

This pessimistic conclusion causes Spooner to reject the sovereignty of governments, for the idea of a sovereignty of nations implies that the government has trampled on the natural rights of the people. European governments at the time of the American Revolution relied not on constitutional authorization to justify their rule, but on the theory of the Divine Right of Kings. Judicial interpretation of the U.S. Constitution has brought back that immoral rationalization, he contends, and applied it to the apparently republican government of the United States. Supreme Court justices, Spooner laments, would appear never to have encountered the Declaration of Independence, nor to have divined its consequence, that Americans are a free people (Spooner 1886, 81, 84).

For Spooner, there is a natural right of sovereignty, which refers instead to the liberty of individuals to run their own lives and control their own property, subject only to the restriction that they respect the natural sovereignty of others.[4] As a leading abolitionist, he rejects slavery on this and other grounds. Yet governments, some of which, in Spooner's time continued to allow slavery, also generally deny citizens the opportunity to subsist—for example, the right to take land and work it so that they can survive. The government claims to own unallocated land, and prosecutes those who attempt to make use of it for their own subsistence. We live, consequently, in a polity that not only denies our natural rights, but usurps our property (Shively 1971b, 8; Spooner 1882b, 4–5; Spooner 1886, 33, 86).

In fact, Spooner seems to have anticipated the predicament of many marginal individuals, a condition more common today than in the nineteenth century when he was writing. Today, in the United States, there are hundreds of thousands of people deemed unqualified for welfare or public housing, and/or unable to work due to prior criminal acts, nonconformist behavior, or unpopular personal habits, yet these people are unable to exercise their natural right to subsist. On urban streets, they are harassed by police. Vagrancy laws, and ordinances against public camping, sleeping, sitting, urinating, and panhandling combine to make their public existence untenable, yet they have no way of escaping to a private domicile. They can live lawfully only in a kind of hell. All that is open to such persons is crime, a violation

of the one obligation Spooner argues that everyone owes to his or her neighbors, which is to treat them fairly within the bounds of natural justice:

> In asserting its right of arbitrary dominion over that natural wealth that is indispensable to the support of human life, it asserts its right to withhold that wealth from those whose lives are dependent upon it. In this way it denies the *natural* right of human beings to live on the planet. It asserts that the government owns the planet, and that men have no right to live on it, except by first getting a permit from the government. (Spooner 1886, 34)

Like Locke, Marx, and Kropotkin, Spooner describes the antisocial consequences of the development of capitalism, for now we have a class of people who live beyond the uses and protection of government. They are outcasts, living lives that are circumscribed by allegedly democratic governments, ensuring that they cannot function as productive citizens. Liberals' hope that modern government would provide a safety net for all, aiding the least advantaged members of society, is shown to be a hollow pledge. Actually, many people in modern industrial society have lost the important protection that they hitherto enjoyed, one to which, for Spooner, they were entitled by natural law—the right to survive, a claim that, ironically, is better tolerated in developing nations, even as the United States and other modern governments urge its abandonment in favor of the norms of globalization.

For Spooner, such governments are "a mere cabal of ignorant, selfish, ambitious, rapacious, and unprincipled men, who know very little, and care to know very little, except how you can get fame, and power, and money, by trampling upon other men's rights, and robbing them of the fruits of their labor" (Spooner 1886, 24). They know no limits to their power. For example, in an argument presented in a publication of the Massachusetts State Senate, Spooner attempts to defend his friend, Thomas Drew, who refused to testify before a joint committee of the Massachusetts Legislature (Shively 1971n, 4). In that journal, Spooner attacks governmental hearings in general, viewing them as violating natural justice. From what authority, he asks, do legislatures derive the power to summon individuals to "tell everything they may know of their neighbors and fellow-citizens" (Spooner 1869, 18)? A government that compels such tale telling, in the absence of any kind of consent to the practice, can only be "a thoroughly infamous and detestable one" (18).

Liberty is inalienable, Spooner tells readers of *A Letter to Grover Cleveland*, and people can never give up their right to enjoy it, even voluntarily. Thus there can be no such thing as a social contract, because liberty is personal and inalienable, and can never be surrendered under any circumstances

whatsoever. Consequently the claims of others that liberty has somehow been delegated to the government are nothing but lies (Spooner 1886, 27). A social contract is impossible, according to Spooner, because it would violate natural law:

> [A]ll *lawmaking* governments whatsoever—whether called monarchies, aristocracies, republics, democracies, or by any other name—are all alike violations of men's natural and rightful liberty. (Spooner 1886, 28)

Indeed, such a contract would inevitably be a fraudulent one:

> To say, as the advocates of our government do, that a man must give up *some* of his natural rights, to a government, in order to have the rest of them protected—the government being all the while the sole and irresponsible judge as to what rights he does give up, and what he retains, and what are to be protected—is to say that he gives up all the rights that the government chooses, *at any time*, to assume that he has given up; and that he retains none, and is to be protected in none, except such as the government shall, at all times, see fit to protect, and to permit him to retain. This is to suppose that he has retained no rights at all, that he can, at any time, claim as his own, *as against the government*. It is to say that he has really given up every right, and reserved none. (Spooner 1886, 13)

In his history of American anarchism, James J. Martin says of Spooner's rejection of social contract theory:

> Spooner in a prominent sense was engaged in reviving the stand of the critics of Thomas Hobbes and the social contract theory, who held that the only persons bound to such an agreement were those actually participating in a pact of submission to a ruler. (Martin 1970, 194)

Although Spooner does not mention Hobbes or Locke, the modern reader is bound to associate them with social contract theory. As Martin appears to recognize, Spooner's criticisms hit Hobbes hard; however, whether or not they apply fully to Locke, who had a much greater influence on the thought underlying the American Revolution than did Hobbes, is a different question.

For Hobbes ([1651] 1981, 185–86), the state of nature is a condition of permanent war against other people, even at times when war is not literally taking place. To end this conflict, he argues that people should agree to sacrifice some rights, in order to put an end to the uncertainty and conflict. Government thus becomes a tonic for constant suspicion, anxiety and war,

as Hobbes explains its development as a transition from a state of nature, via a social contract, toward a more ordered form of civilization.

In the simple society that is represented by the state of nature, people are responsible for themselves. If they need food and clothing, they go out and try to find something appropriate that can serve this function. Maybe this involves killing deer, or gathering apples, or discovering a source of water. Maybe it involves taking something from a neighbor. Following Hobbes' compact, people lay down their rights to live in this unfettered way, to just go out and appropriate what they can. Upon signing the covenant, the people make themselves subjects of the sovereign. A social contract will not work unless it is enforced, so the signers give up their power to the state, who is to be Leviathan, a frightening brute, who will scare the citizenry into obedience. Although Hobbes believed in monarchy, the theory works just as well with any other type of government. Moreover, although the sovereign will possess all the power, it is to be used to establish and maintain security and peace on behalf of the citizens. Hobbes recognizes there is going to be a problem if the sovereign turns out to be a tyrant. But he is equally sure that the results of despotism will be better than life during the English Civil War that he has lived through (238).

Not so John Locke, who, in *Two Treatises of Government*, describes Hobbes' medicine as being worse than the disease it seeks to cure:

> This is to think that Men are so foolish that they take care to avoid what Mischiefs are done to them by Pole-Cats or Foxes, but are content, nay think it Safety, to be devoured by Lions. (Locke 1965, 372)

For some writers, the state of nature in Hobbes is "hypothesized" (Macpherson 1962, 18–20) or "a methodological device" (Lemos 1978, 3). Alternatively, both Hobbes and Locke may be thinking about genuine Native American societies when they visualize it. Locke (1965, 397), like Hobbes, desires to leave "an ill condition." However, he does not believe that the state of nature is necessarily a state of war. He is more optimistic, trusting that even banks and other economic institutions could operate prior to the contract. Locke, like Hobbes, considers it acceptable that we give up our liberty when we enter into organized society. For Locke, like Hobbes, the process can be understood as involving *two* contracts, the first to associate and leave the state of nature, the second being an agreement between the government and the citizens that consents to the new regime. Goldsmith (1966, 140) points out that this is a structure common to the social contract theorists, including Pufendorf and Rousseau, as well as Locke. However, it

can be argued that the framework does not fit Hobbes' theory so well, for, in his model, the sovereign is not actually a party to the second contract.

As was noted above, Locke, unlike Hobbes, does not identify the solution with the rule of a single sovereign. For Locke (1965, 369), the existence of a tyrant would imply people were still living in the state of nature. For, unlike Hobbes, Locke sees people as desiring not only security but also property and felicity, and a contract that will promote these goals too. Unlike, Hobbes, Locke is going to emphasize consent as the basis of all legitimate government.[5]

In recent years, political theorists have been giving more attention to the political ideas of the Scottish philosopher, David Hume. Central among these is Hume's rejection of social contract theory. Interestingly, Hume's ideas, recently reemphasized, somewhat resemble those of Spooner, which are not well known.

In his essay called "Of the Original Contract," Hume argues that social contract theory exaggerates the idea that government is based on consent. Recent governments may have originated with consent, but that concurrence was surely limited. He talks about the Glorious Revolution of 1689, which Locke and others tried to effect, and notes that most of the ten million people in Britain at that time took no part in the decision to bring in new monarchs, William and Mary. Other governments, however, do not even make a claim to consent:

> Were you to preach, in most parts of the world, that political connexions are founded altogether on voluntary consent or a mutual promise, the magistrate would soon imprison you as seditious. (Hume 1994, 189)

In fact, Hume says, in the past, many governments were probably set up in time of war, to organize resistance to an outside enemy. Furthermore, even if the English monarchy of 1689 did happen to be based on consent, that does not mean that any contemporary government is so formulated.

> Obedience or subjection becomes so familiar, that most men never make any inquiry about its origin or cause. (189)

This is particularly true in the Persia, China, France, and Spain of his day, says Hume. Maybe even in more liberal nations such as England and Holland, it is true also. The preponderance of examples shows that consent cannot be an important foundation for government (189).

Rather, Hume says, democracy is an idealistic framework. It assumes that all people have the ability to decide what is best for them, what is in their

interest. But it may not be apt, for most citizens may not want to be involved in political decision-making:

> When we assert, that all lawful government arises from the consent of the people, we certainly do them a great deal more honour than they deserve, or even expect and desire from us. (Hume 1994, 194)

So Hume concludes that if we ground government in consent, a very low bar will have to suffice to be able to justify contemporary regimes. For example, we might have to argue that the fact a person did not flee a country somehow obliges him or her to accept its laws and rulers. Actually, Hume points out, the real nature of political power is such that nobody even has the ability to leave without a note from the government, otherwise known as a passport (193).

Ultimately, Hume's solution to the question of political obligation is that people should obey authority because, if they do not, society may be hurt, or the government may even break down. As Sir Ernest Barker (1960, xlii) has observed, that is "hardly a satisfactory answer," at least for many political theorists.

Cordato and Gable (1984, 282) note that Spooner resurrects a criticism that Hume has made of social contract theory. In fact, Spooner's arguments both resemble and differ from those of Hume. Spooner applies social contract theory to U.S. historical circumstances, arguing that even if the American Revolution and U.S. Constitution were based on consent, the U.S. Civil War has taught us something else—that the U.S. government no longer enjoys such popular assent, for the North has conquered the South. Mirroring Hume's historical examples of the absence of consent in contemporary nations, Spooner (1882b, 7) points out that Congress does not require people to read all the many volumes of laws that it has passed—just, "at the point of a bayonet, to obey."

For Spooner, nevertheless, unlike Hume, it is wrong to obey the government in order to prevent society from breaking down. Rather, everyone must behave in accordance with natural justice, and this involves respecting the natural rights of other people to live their lives as they see fit. Any government that fails to obey natural law lacks legitimacy. And since governments today, including the United States government, do not rule in accordance with natural justice, they should be disobeyed. Furthermore, since, for Spooner, sovereignty is an attribute of individuals, not of groups, the breaking down of society becomes irrelevant. What matters is that individuals be able to keep their liberty.

Spooner maintains that if you never consented to support a government, then you are doing nothing wrong by refusing to back it. He contends that the Declaration of Independence establishes the reasonableness of this view, because even liberals and conservatives accept the validity of that document. Here, we see further divergence from Hume. Like Locke, and unlike Hume, Spooner insists that government must be based on consent. However, like Hume, Spooner points out that it never really is.

In Spooner's writings, the social contract theorist who is criticized by name is not Hobbes or Locke, but John Marshall. As was noted earlier, Spooner was a defender of the Contract Clause, the part of Article I, Section 10 of the Constitution that says, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." He is critical of Marshall's opinion in *Ogden v. Saunders*,[6] in which the Court ruled that a New York state bankruptcy law was legal and not violative of the constitutional protection of contracts when it granted relief to debtors who had agreed, in a contract, to reimburse those who had lent them money.

In this opinion, we find the social contract as understood by Marshall, who contends that, in the state of nature, a need to enforce an agreement to split an animal carcass or barter food for clothing, necessitates the ability to use force. The justification for bolstering contracts thus lies in ancient history, before society was organized, as does the obligation for there to exist a contract that was violated in order to be permitted to utilize violence. As Marshall notes, "The rightfulness of coercion must depend on the preexisting obligation to do that for which compulsion is used." Following a social compact, living in society, Marshall argues, people retain an "intrinsic" right to contract, but the concomitant permission to enforce agreements is something they have now surrendered to the government or to the courts. Similarly, the state also now enjoys the power to regulate or prohibit contracts, for laws are passed by states, and states enjoy sovereignty, unless they violate the Constitution.

Whereas, prior to society, individuals were "free agents," with a right to enforce the terms of broken contracts to which they were a party, Marshall contends that members of an organized society can no longer preserve this right, because to do so would undermine the peace that a social contract has produced. "Obligation and remedy, then, are not identical," says Marshall, because "the first is created by the act of the parties, the last is afforded by government." Article I, Section 10, he argues, protects the right of individuals to make a contract, but not the right to enforce it, which is today a matter for the government.

As might be expected, Spooner emphatically rejects Marshall's social contract theory as expressed in *Saunders*. For him (Spooner 1886, 64), leaving contract enforcement to the state and to state laws is to deny that agreements between people entail "natural obligation." If that is correct, he insists, and people do not have to do what they promise to do, Marshall's thesis is self-contradictory, because what then would be the rationale for state interference? Additionally, Spooner argues that Marshall has opened a door that will ultimately undermine the original purpose of the Contract Clause, the right to protect private property from government meddling, which is "a natural right of individuals," that can never be taken away (Spooner 1875, 30). As a member of the Virginia delegation to the Constitutional Convention, Marshall was familiar with the disagreements that led to the Bill of Rights being added to the Constitution following ratification. Yet, Spooner contends, as the leader of the Supreme Court for decades and its great organizing force, the Chief Justice ignored and violated the same natural rights that are alluded to in the first eight amendments to the Constitution. Indeed, in none of the cases that were heard in the thirty-four years of the Marshall Court, was any mention ever made of the Ninth Amendment.[7]

For Spooner (1886, 93), Marshall's theory implies that the safety promised by the social contract obligates the surrender of property rights. The position has thus become the following: "now that these governments have, *by your own consent*, got possession of all your natural rights, they have an '*unquestionable right*' to withhold them from you forever" (95), meaning that the government of the United States has violated people's natural rights. In fact, Spooner (58) notes that *none* of the seven U.S. Supreme Court justices participating in *Saunders* wrote in favor of an unfettered natural right to contract as visualized in the Contract Clause. In the following passage, where "A" stands for society and "B" for a person signing a social contract, he concludes:

> This is as much as to say that, if A can but induce B to intrust his (B's) property with him (A), for safekeeping, under a pledge that he (A) will keep it more safely and certainly than B can do it himself, A *thereby acquires an "unquestionable right" to keep the property forever, and let B whistle for it!* (Spooner 1886, 94–95)

This raises the question of under what circumstances a social contract might be dissolved. For Hobbes ([1651] 1981, 230), the framework is something like the A and B situation that Spooner describes above—even if the sovereign violates the obligation to rule in the interest of his or her subjects,

there is no way to return to the state of nature (Hinnant 1977, 66; McNeilly 1968, 231, 241). For Locke, however, whose influence is more keenly felt on the U.S. Declaration of Independence, this is precisely the sort of situation in which a society might revert to the state of nature, when the letter of a constitutional protection of individuals is ignored to promote the interest of a state government. So, we are bound to ask, is it a Hobbist straw man that is being attacked here in the guise of Marshall, because what influence did Hobbes, rather than Locke, have on the American Revolution? For Locke, a government that no longer rules on the basis of consent can be overthrown. This is the philosophical basis for the American Revolution, after all. In fact, Spooner himself relies on this theory when, looking to the American Revolution to make his argument, he asserts a natural right to revolution that can never be rescinded. In the following passage, from *No Treason, No. 1*, Spooner interprets the American Revolution as a Lockean vehicle, not a Hobbesian one.

> Thus the whole Revolution turned upon, asserted, and, in theory, established, the right of each and every man, at his discretion, to release himself from the support of the government under which he had lived. And this principle was asserted, not as a right peculiar to themselves, or to that time, or as applicable only to the government then existing; but as a universal right of all men, at all times, and under all circumstances. (Spooner 1867a, 13)

Nonetheless, the social contract theory expounded by Marshall in *Ogden v. Saunders* is surely the view of Hobbes, and not that of Locke. For Hobbes believed that, once the covenant has been enacted, individuals are no longer the judge of what is right or wrong, or true or false. Moreover, for Hobbes, sovereignty is forever. And, for Spooner, the problem is that once you have a government, you cannot stop it behaving like Leviathan, taking away constitutional protections in the way that Marshall does in *Saunders*—which was Locke's reason for making his quip about polecats and lions, a concern that Hobbes considered, but failed to adequately address. So the irony lies in the fact that Spooner is criticizing social contract theory using an argument made by Locke and contemplated by Hobbes. Despite his stated opposition to basing government on a social contract, Spooner accepts the part of Locke's argument that says that, if the government does not rule by consent, it is legitimate for the people to seek to replace it. If Spooner is correct in his characterization of the federal government, as personified by Marshall in *Saunders*, the U.S. government is no longer based on consent. In fact, he goes even further than this, arguing that no government could ever be based

on consent, for it is "naturally impossible" (1886, 104). Clearly, this an anarchist position, for, although anarchism and classical liberalism start with a similar skepticism about the possibility of political obligation, liberals tend to find modern governments justified by consent, whereas anarchists remain unconvinced. As Reichert points out in his history of American Anarchism:

> If the state, which is to say, government, has the ultimate power to reverse or veto any decision made by an individual even when acting in accordance with his own rational judgement, the Liberal is forced to admit that individual rights and power are not in fact inalienable but very definitely subject to limitation by a superior sovereign force . . . anarchism, unlike liberalism, cannot be criticized on the grounds that it accommodates its dedication to the principle of individual freedom to the demands of power and public order. (Reichert 1976, 3–4)

Similarly, the anarchist Rudolf Rocker contrasts the two ideologies as follows:

> Anarchism has in common with Liberalism the idea that the happiness and the prosperity of the individual must be the standard in all social matters. And, in common with the great representatives of Liberal thought, it has also the idea of limiting the functions of government to a minimum. Its supporters have followed this thought to its ultimate logical consequences, and wish to eliminate every institution of political power from the life of society. When Jefferson clothes the basic concept of Liberalism in the words: "That government is best which governs least," then Anarchists say with Thoreau: "That government is best which governs not at all." (Rocker 1989, 23)[9]

How *might* consent be manifest in the U.S. Constitution? In *No Treason, No. II*, Spooner opens a different line of attack. By starting with a reference to "We, the People," the document implies the necessity of consent, or else, Spooner says, the Constitution itself would have no authority. Moreover, such an agreement clearly could have no relevance, except as between those who actually sanctioned it. So, Spooner asks, who did get to approve the Constitution? Not women, not children, not black men, certainly. And, since most states had property qualifications for voting, the majority of white men were not given an opportunity to participate either. Finally, of those few Americans who could partake in the process, some significant number declined to do so (Spooner 1867b, 3–4). The people, notwithstanding the Constitution's opening salvo, mostly have not read, and do not understand, the document that binds their lives and actions. Anyway, nobody who is

alive today signed it (Spooner 1882b, 9). Nevertheless, the American people are "presumed" to have read and understood the document, to know what George Washington and the other founders intended, and to possess knowledge of constitutional law that even scholars cannot agree about (Spooner 1860b, 225–26; 1870, 22; 1886, 9).

The U.S. Constitution makes no claim to be a contract. If it were a contract, Spooner argues, it would be binding only on those who were alive when it was written, whereas, in fact, all of the people alive at that time are now dead. Therefore, the Constitution is also dead—its allotted time has expired (Spooner 1870, 3):

> [F]or what is the Constitution? It is, at best, a writing that was drawn up more than ninety years ago; was assented to at the time only by a small number of men; generally those few white male adults who had prescribed amounts of property; probably not more than two hundred thousand at all; or one in twenty of the whole population. Those men have been long since dead. (Spooner 1882b, 8)

The brevity and simplicity of the U.S. Constitution is often seen as a strength, but such qualities cause the document to be interpreted differently. Spooner turns this advantage around, making the very malleability of the Constitution a disadvantage, because it must (and does) lead to disagreement about its meaning. A lot is resting on the determination of the Constitution's authority. For Spooner continues by arguing that, since the Constitution is not, and never was, a contract, leaders of the United States have no legitimacy either (Spooner 1870, 26).

Leaving aside the question of people who were alive at the time the U.S. Constitution was ratified, Spooner turns to the question of those who were not. The document is surely much less binding on succeeding generations of Americans. Of the Founders, Spooner remarks: "They had no natural power or right to make it obligatory upon their children" (Spooner 1870, 3). Even though the preamble speaks of "our Posterity," the Founders had no intention of compelling their progeny to live by the dictates of the Constitution. Not only did the people who were personally involved in the adoption of the Constitution fail to indicate a time period for which their assent to being governed by the Constitution would be effective and perhaps bind others (Spooner 1867b, 4–5), but the Constitution gave dominion to a small, wealthy elite, while enslaving "the poor, the weak, and the ignorant" (Spooner 1882b, 9).

For Spooner, the philosophical anarchism that he takes to the limit here is literally "no treason." Someone like Benedict Arnold is correctly viewed as a traitor, Spooner argues, because he claimed to be a friend of the United

States, even though he was not. However, the Founding Fathers cannot be described as betrayers. They told the King that they rejected his authority. Similarly, the South announced that it was seceding; southerners were enemies, not traitors. And if people today disavow their allegiance to the government, they are not disloyal either (Spooner 1867b, 8).

The 1790 federal law that set hanging as the penalty for treason, and which determined that people "owing allegiance to the United States of America" commit treason by fighting against their country begs the question, Spooner argues, because the law fails to say how allegiance comes about (Spooner 1867b, 10–11). Surely, this cannot be from the happenstance of being born on United States soil? Since the Constitution purports to rest wholly on popular consent, people cannot be held accountable for allegiance unless they have themselves signed a contract. Interestingly, foreigners become citizens by making a pact of this sort. Thus, the government's understanding of loyalty makes the native's predicament under the U.S. Constitution more precarious than that of the foreign-born citizen (Shively 1971h, 4; Spooner 1867b, 11).

Nor does the authority of the document rest on its having been signed, for no one ever signed the Constitution. For it to have been viewed as a contract, copies of the Constitution would have to have been given to the signatories, and this did not happen Moreover, no one witnessed the (non-) signing of the Constitution in the way that important contracts are notarized or otherwise guaranteed by neutral parties. The Constitution, therefore, obligates nobody (Spooner 1870, 18–19, 22; 1882b, 8).

What is a nation, asks Spooner, and what is the "United States"? Surely there is nothing to which this appellation refers. People who belong to legal entities can produce the papers that show they are members or representatives, but where are the membership cards for nations? What are the insignia of incorporation into the United States (Spooner 1870, 40–41)? In response, it might be argued that a passport achieves this purpose, for it identifies a person as a member of a country. For Spooner, however, this will not do. For his point, again, is one of legitimacy. And the nation, he believes, is necessarily a counterfeit institution. There is no such thing as a country, argues Spooner, for there has never been a contract by which the people living in any particular area got together and authorized monarchs, ambassadors, or other leaders to represent them as a distinctive group. Nations, like other governmental organizations, lack legitimacy. They are names, they are myths, but they are never polities (42).

Spooner also attacks governments from the perspective of history. The ruling classes in the United States, England, Ireland, and France owe their

power to illegitimate land grabs (Shively 1971j, 4). In particular, he characterizes Anglo-Saxons as the enemies of the rest of humanity, siding instead with ordinary people in Ireland. Just as we saw in chapter 1 that Spooner referred to the U.S. elite as "bands of robbers," so, opposing the British Empire, he considers its government likewise to be a "confederacy of robbers and tyrants." European landlords, he argues, are not the real owners of their land. Their ancestors mostly acquired their property by force from the rightful possessors. Just because the land theft happened a long time ago does not excuse the crime (Spooner 1880, 4, 6, 8). Consequently, he recommends reparations for victims of colonial appropriation:

> [T]hese conspirators have, *as a government*, oppressed, robbed, enslaved, and made war upon, everybody, indiscriminately—in England, Ireland, and throughout what you call "the British Empire"—whom they could oppress, plunder, or subdue. *In this* way, then, as well as through the original robberies of the lands, they have incurred a liability to everybody, who has, *in any way*, suffered at their hands. Whenever, then, the day of settlement comes, there will be some two hundred and fifty millions of people, who will be entitled to satisfaction for the wrongs you have inflicted upon them. (Spooner 1880, 7)

In any form of indirect democracy, the social contract fails, for when Congress makes laws "of their own device," they are by definition assembling rules that violate natural justice. Why, Spooner asks, should Congress members possess "the right of arbitrary dominion" (Spooner 1882b, 3)? Such a power has never been delegated. To give Congress this facility—even voluntarily—is to turn the U.S. citizen into a slave, for people can never justifiably give up their "natural right to liberty" (Spooner 1882b, 4) or cede dominion over themselves to others (Spooner 1886, 11):

> I cannot delegate to another man any right to *make* laws—that is, laws of his own invention—and compel me to obey them. Such a contract, on my part, would be a contract to part with my natural liberty; to give myself, or sell myself, to him as a slave. Such a contract would be an absurd and void contract, utterly destitute of all legal and moral obligation. (Spooner 1886, 103)

The failure of social contract theory, and of one such contract in particular—the U.S. Constitution, to justify political obligation, leads Spooner to consider the meaning of voting. As David Miller comments:

> Spooner challenged the contractual theorists to point to the relevant acts. Voting in elections could not count, since voters' motives were many and

> varied, but virtually never consisted in a wish to affirm support for the Constitution; payment of taxes could not count, because it was compulsory; and so forth. (Miller 1984, 37)

For Spooner, the act of voting is never proof that a person has given consent to the government. Rather, he views voting as a chore by virtue of which an individual might try and alleviate some of the oppression of "a government that forces him to pay money . . . under peril of weighty punishments." People, Spooner argues, start out with a government to which they never gave consent; voting is merely a minor tinkering device with which they may try to undermine the usurper's power (Spooner 1867b, 5–6). By voting, Spooner writes in *No Treason, No. VI*, a person is absolutely *not* pledging to support the Constitution. Electing a person is only giving sanction to rule for the term of office (Spooner 1870, 6–7). The right to vote does not a democracy make: "A man is none the less a slave because he is allowed to choose a new master once in a term of years" (Spooner 1870, 24).

Spooner's fellow-American Anarchist, Benjamin R. Tucker, admired Spooner's analysis of the Constitution. Referring to *A Letter to Grover Cleveland*, he wrote:

> That masterly document will tell him what the United States constitution is and just how binding it is on anybody. (Tucker 1926, 56)

Spooner's argument can be just as equally convincing for the contemporary reader. For example, in the preface to his book, *Restoring the Lost Constitution: The Presumption of Liberty*, constitutional law scholar and Spooner admirer Randy E. Barnett (2004, ix) credits Spooner's *No Treason No. VI* with implanting "the first seed of doubt" in his mind about the U.S. Constitution when Barnett read the piece as an undergraduate:

> When Spooner's argument on legitimacy was combined with the practice of the Supreme Court, there was nothing left to take seriously. (Barnett 2004, x)[9]

Spooner also has a problem with the secrecy involved in modern balloting. The fallacy of relying on any private vote to justify the U.S. government, he writes, is that it does not obligate the person who is elected to serve the electorate. There is no mandate. Far from it, for the ensuing contract is anonymous in nature, the justification for a person's election being that certain unknown people have cast a ballot in his or her favor. How can a politician legitimately make a pledge to anonymous voters about whom he or she knows only that they have voted? Just exactly what is the nature of

the contract that is thereby made, and how can the representative commit him or herself to the electorate by such a process? Resembling a "conspiracy" rather than an election, secret ballots are not "authentic," and they bestow no legitimacy upon whomever is chosen (Spooner 1870, 32–33, 1882b, 5–6, 1886, 10, 21).

Here, Spooner perhaps refines observations about the meaning of voting that were made by another of the leading American Anarchists, Josiah Warren, who wrote:

> Blackstone and other theorists are fatally mistaken when they get "one general will" by a concurrence of vote. Many influences may decide a vote contrary to the feelings and views of the voters; and, more than this, perhaps no two in twenty will understand or appreciate a measure, or foresee its consequences alike, even while they are voting for it. There may be ten thousand hidden, unconscious diversities among the voters which cannot be made manifest till the measure comes to be put in practice; when, perhaps, nine out of ten of the voters will be more or less disappointed, because the result does not coincide with their particular, *individual*, expectations. (Warren 1852, 24–25)

Why do people vote for candidates who are unlikely to win? A lot of citizens vote for losers. This, Spooner argues, suggests that they are worried about the danger of election victors imposing tyranny "under color of the Constitution" (Spooner 1870, 9). Some of those votes are protest votes—people opting for candidates who have no possibility of winning. Why would people vote for obvious also-rans? Because, Spooner says, they are dissatisfied with the political system, not because they have any desire to indicate their support for it by voting (10).

As was noted in chapter 1, Spooner understood property as an inalienable right, the sole exception to which was that assets could be forfeited to compensate another person for damage done to him or her or to their possessions (Spooner 1886, 33). Thus, any attempt by governments to interfere in the allocation of resources violates natural justice. As was indicated earlier, the inclusion of the Contract Clause in the U.S. Constitution is, from Spooner's perspective, proof that the Founders intended to preserve a natural right to make contracts. These two natural rights are clearly interconnected, since contracts are the means by which property is bought, sold, and otherwise transferred (54–55, 58–60).

Spooner argues that people should be able to make contracts before they reach twenty-one years old, not as states restrict them in this way, because he believes that many people are intellectually capable of making decisions before they reach states' artificially high ages of majority. He protests the fact

that married women have been denied by state laws the ability to make contracts, because this also violates the natural rights of property and contract, not to mention the Constitution. The Constitution being gender-neutral, the appropriate standard of natural justice to be applied here is whether or not a person is mentally competent to make an assessment of circumstances (Spooner 1886, 61). Nevertheless, individual rights might be limited if they cause undesirable societal consequences. For example, he suggests that a person who becomes violent when he or she drinks alcohol could legitimately be refused a beer (Spooner 1875, 34–35).

Since the government of the United States lacks legitimacy, the exploits of its officers are without authority, and the people are entitled to resist their actions. For Spooner, resigning oneself to the deeds of an illegitimate government would violate the spirit of the Constitution, of which the Second Amendment anticipates the need for the populace to stand firm. What sense would it make, he asks, to give citizens the right to bear arms, but not allow them to use them against an immoral government? It may often be possible to overcome corrupt leadership without violence, but this will not always be the case, and the Second Amendment recognizes this reality. People who insist that unconstitutional laws be resisted only at the ballot box, and in the meantime be obeyed, cede to the government all effective power, with the consequence that the United States does not really have limited government at all (Spooner 1850a, 27–29). Given human nature, few politicians would give up power just because they had lost an election, and their term of service had come to an end. It is only fear of the power of the people, Spooner argues, and their right to bear arms, which makes politicians in the United States willing to withdraw. Without such a deterrent, they would likely focus their intentions on enriching themselves and transforming the electorate into slaves, for "the temptations of avarice and ambition, to which they are exposed, are too great for the mere virtue of ordinary men" (30).

Spooner's writings on political obligation confer little authority on the government of the United States, or, indeed, on any government that has ever existed. Denying that people have consented to many of the laws that have been enacted, and rejecting both social contract theory and the authority of the U.S. Constitution, Spooner seeks to justify a more limited political obligation instead by reference to natural law, including the natural rights to make contracts and own property, and the right to resist a government that recognizes no bounds to its ever-increasing power. Spooner also suggests a potential, albeit partial, solution to the political weakness of most Americans: he advocates jury nullification, which is the topic of chapter 4.

Notes

1. As I note later on in the chapter, liberals tend to conclude that government can be justified, while anarchists prefer to remain skeptical.

2. Brown's exploits are commemorated in the song, *John Brown's Body*. For the petition, see Lysander Spooner, writing anonymously as "The Author of the Circular," letter to Henry A. Wise, Governor of Virginia, November 2, 1859. Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library. Spooner's writings on slavery are the topic of chapter 5.

3. Letter from Lysander Spooner to the Hon. B. F. Perry dated May 5, 1871, Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library.

4. This is a key point in the ideas of Benjamin Tucker, Spooner's American Anarchist ally. Although Tucker ([1897] 2005, 62–63) came to reject the natural rights approach utilized here by Spooner, he outlined a governing principle of "equal liberty" whose single prohibition was against violating someone else's freedom.

5. Of course, the precise meaning of consent for Locke is the subject of intense argument; see, for example, the debate published in *Anarchist Studies* between Call (1998) and Morland and Hopton (1999).

6. *Ogden v. Saunders*. 1827. 12 Wheat. 213.

7. The Ninth Amendment says: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

8. This essay was also published as an appendix to Eltzbacher 1958, with a slightly different title, "Anarchism and Anarcho-Syndicalism."

9. However, Barnett (2007, 77) says in response to criticism of the same book that his approach today "is about the world of 'second best' in which . . . I . . . live." Similarly, Barnett's former student, Helen Knowles (2009) makes an interesting argument that, notwithstanding Spooner's ubiquitous and vehement criticisms of government and the Constitution's authority, ultimately he remained committed to having a document that would be able to overcome all these many failings.

CHAPTER FOUR

Jury Nullification

Spooner's musings on jury nullification are mainly to be found in his 1852 work, *An Essay on the Trial by Jury*. Surprisingly, they have received little attention, a fact that is somewhat hard to believe given that nullification has become a major issue in recent years among students of the law. This chapter contains a detailed account of nullification as a contemporary issue, followed by an explanation of Spooner's position—the suggestion throughout being that the current debate would benefit greatly from some consideration of the nineteenth century writer's many pertinent observations.

The 1995 trial of O. J. Simpson for the killing of Nicole Brown Simpson and Ron Goldman brought the issue of jury nullification to the attention of the general public. In the following years, there was a surge in the number of articles on this topic appearing in the law reviews. In his book on nullification, Conrad (1998, xix) notes that almost four hundred articles in law journals discuss the practice. He is nonetheless unhappy about the quality of many of these papers, contending (xx) that a substantial number make uncorroborated claims. Either the authors' opinions "would stand unsupported in the vast majority of articles or cases, or the same cases would be cited again and again—often with no analysis justifying the conclusions" (xx).

Today, there are even more law journal articles to contribute to the debate. The following works, all published since 1995, have each made a significant addition to the literature. Among those opposed to nullification, Weinstein (1998) argues that, rather than sanctioning the occurrence, we should view high rates of nullification as a sign that citizens in those jurisdictions have lost

respect for due process and the rule of law. As possible solutions, he suggests treating jurors more courteously and not prosecuting weak cases, thereby removing some potential causes of jury anger and frustration that might prompt nullification. Oliver (1997) thinks that nullification should not be allowed in trials for violent crimes, and that instruction about the right to nullify should never be given, whatever the type of case. Other writers take the opposite viewpoint. For example, Brown (1997) contends that nullification often supports, rather than undermines the law—Simpson's criminal trial, he argues, is an example of this because it is clear that some of the Los Angeles Police Department officers involved in the case were racist. Paul Butler has argued that the U.S. criminal justice system is controlled by white people, who use it to preserve their own dominance. In consequence, he (1995, 1997) has called for juries to start from a premise of nullification in some non-violent cases, when African Americans are the accused (Horowitz 2008). He (1997, 912) points out the likelihood that by 2010, the majority of African American males aged eighteen to forty will be incarcerated. Seeing such statistics as evidence of discrimination, he views nullification as an antidote to the systemic racism that exists in the criminal justice system. Do (2000) also discusses this controversial view that nullification is a way that juries can remedy bigotry against minorities, arguing that judges should not dismiss potential jurors simply because they believe police are biased against African Americans. However, he makes a distinction between "race-conscious reasonable doubt," which he considers acceptable, and nullification that is simply based on the race of the defendant, which, he contends, is not. Ostrowski (2001) complains that people who oppose nullification, who are often judges, are elitist. After all, jurors are the people, the voters, and thus, in a republic, they *should* be making the political decisions. In contrast to such opinions, King (1998) argues that recent institutional responses to nullification that include removing jurors or potential jurors who intend to nullify are acceptable and constitutionally valid. Fernandes (1997) looks at California civil trials. He points out that a 1997 tort reform law limits some plaintiffs' damages to $250,000. When juries award more, the figure is routinely reduced to that amount, but jurors are not told about the cap, which denies them the motivation to nullify, in the false belief that they can award as much as they wish. Former Arizona judge B. Michael Dann (2007, 15, 19) maintains that the Sixth Amendment requirement of "an impartial jury" renders attempts by judges to steer juries toward guilty verdicts unconstitutional and that, instead, they should trust the ordinary citizens who have been empanelled to make the decision. Accordingly, he proposes a jury instruction sanctioning nullification, but warning that it should be used "with great caution" in the case of likely factual guilt (19). In response to Dann, Diamond (2007, 21, 24-25; Horowitz

2008, 440, 451) suggests that defense attorneys, rather than judges, should be the ones to tell jurors that they have a right to nullify.

There have been a number of high profile cases in which jury nullification has featured, or has at least been alleged, and many of the articles have made reference to them. These include *People v. Simpson* (1995), the O. J. Simpson trial (Conrad 1998, xx; Clark 2000, 39; Crispo, Slansky, and Yriarte 1997, 36; Do 2000, 1845–46; Marder 1999, 287–94). Also prominent is the Marion Barry case, where the mayor of Washington, D.C., was tried on drug and perjury charges, but, despite the existence of surveillance videotapes and other overwhelming evidence, he was convicted only of cocaine possession (Clark 2000, 53; Crispo, Slansky, and Yriarte 1997, 33; Do 2000, 1845–46; Oliver 1997, 49). Another case is *People v. Powell* (1991), the Simi Valley, California trial of four LAPD officers (Stacey Koon, Laurence Powell, Theodore Briseno, and Timothy Wind) for the March 3, 1991 beating of Rodney King that resulted in acquittal (Clark 2000, 54; Crispo, Slansky, and Yriarte 1997, 34–35; Do 2000, 1860; Marder 1999, 294–301). In addition, authors refer to the second and third trials of Jack Kevorkian for assisted suicide (Clark 2000, 54; Conrad 1998, 149), and the criminal trial of New York City officers accused of attacking Haitian immigrant, Amadou Diallo (Do 2000, 1845–46). Clearly, juries in the United States practice nullification. One of the underlying issues, however, is whether or not juries have a *right* to nullify, or whether it is just an illegal tradition that is tolerated. Though writers such as Fernandes (1997, 123), talk of "the ancient right of the jury to nullify the law," Morgan (1997, 1127) writes: "The issue is not nullification itself, but whether our judicial system should legitimize a jury's power to nullify by having judges instruct juries that they are entitled to nullify the law." This "entitlement" that Morgan finds would come from the *practice* of jury nullification, not from any specific permission. For while, as Morgan (1128) comments, "[i]t is axiomatic in the American justice system that a jury's role at trial is limited to 'finding the facts,'" since juries deliver their verdicts without explaining their reasons, nullification can be done in practice even in states where juries are told they must not do it (1128). Consequently, since nullification is a *practice*, and it is *practiced*, many authors refer to case law, rather than to constitutional or legislative permission to nullify.

In search of precedents, many writers have looked to well-known cases. For example, some (Clark 2000, 41; Conrad 1998, 23–24; Crispo, Slansky, and Yriarte 1997, 4–5), talk about the 1649 trial in England of one of the leaders of the dissident Levellers, Lt. Col. John Lilburne, who was accused of treason for publishing pamphlets that criticized the government. Lilburne successfully sought jury nullification.

Many authors (Barnet 1993, 40; Clark 2000, 41–42; Conrad 1998, 24–28; Conrad 1999, 30; Crispo, Slansky, and Yriarte 1997, 5–6; Fernandes 1997, 103–6; King 1998, 446; Morgan 1997, 1129–30; Oliver 1997, 50; O'Neill 1997, 907–8; Ostrowski 2001, 91) cite *Bushell's Case* (1670), in which the Pennsylvania founder, William Penn, and another man, William Mead, were tried in England for the "seditious" public preaching of Quaker beliefs on Grace Church (or Gracechurch) Street in London, and the jury was fined for acquitting them. The judge, Sir Samuel Starling, who was also at the time serving as the Lord Mayor of London, imprisoned the jurors for two days without food, water, or access to a bathroom, in an unsuccessful attempt to persuade them to convict. Edward Bushell was the jury foreman who filed a writ of *habeas corpus* regarding his treatment. On appeal, it was ruled that juries could not be punished for their verdicts; the decision, by Chief Justice Sir John Vaughan, is often referred to as a model opinion.

The 1735 case of printer John Peter Zenger, in the United States, is much mentioned (Barnet 1993, 40–41; Clark 2000, 43; Crispo, Slansky, and Yriarte 1997, 7–8; Conrad 1998, 32–38; Fernandes 1997, 106–7; Morgan 1997, 1130; Oliver 1997, 51; O'Neill 1997, 908; Ostrowski 2001, 92). *The New York Weekly Journal,* Zenger's New York newspaper, criticized the state's governor, and Zenger was tried for seditious libel. As Conrad (1998, 32) observes, some articles claim that Alexander Hamilton served as Zenger's attorney; however, Alexander Hamilton was not born until 1755 (or 1757, depending on the source). The attorney who represented Zenger was actually the prominent attorney, Andrew Hamilton; unable to win by recourse to the law, he appealed to the jury to use nullification, which they did.

Some researchers (Barnet 1993, 41; Conrad 1998, 52–53; Crispo, Slansky, and Yriarte 1997, 8–9; Oliver 1997, 50; O'Neill 1997, 908) quote Chief Justice John Jay's instructions in a jury trial in *Georgia v. Brailsford* (1794).[1] Jay said:

> It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.

Barnet (1993, 40, 43) mentions Chief Justice John Marshall's instructions to a jury in the 1807 treason trial of Aaron Burr, that the "court may give general instructions on this as on every other question brought before me, but the jury must decide on it as compounded of fact and law."[2]

State constitutions are also looked to as sources for justifying the practice. Both Maryland and Indiana authorize nullification in their constitutions,

and require jury instructions in criminal trials telling the jury that it is allowed. The Maryland Constitution says that "[i]n the trial of all criminal cases, the Jury shall be the Judges of the Law, as well as fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." The jury instruction begins: "Members of the Jury, this is a criminal case and under the Constitution and the laws of the State of Maryland in a criminal case the jury are the judges of the law as well as of the facts in the case" (Conrad 1998, 89; Crispo, Slansky, and Yriarte 1997, 57–58; Fernandes 1997, 113; Morgan 1997, 1134; Oliver 1997, 66; O'Neill 1997, 908; Ullman 2005, 1104). Morgan (1997, 1134–35) mentions the case of *Wyley v. Warden* (1967),[3] in which a convicted person challenged the right of Maryland's juries to nullify, claiming that the practice violated the due process and equal protection clauses of the 14th Amendment. However, the Fourth Circuit Court of Appeals ruled that the ability of judges to overturn a verdict meant that defendants' rights were not being violated.

The Indiana Constitution and that state's jury instructions are also referenced. The Indiana Constitution says that "[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts." Directives to the jury also emphasize this constitutional grant of power (Conrad 1998, 89–90; Crispo, Slansky, and Yriarte 1997, 58; King 1998, 467; Oliver 1997, 66; Ullman 2005, 1104).[4]

Some sources discuss nullification in runaway slave cases, often as a response to the Fugitive Slave Act of 1850, which made it difficult for people in the Northern states to assist slaves who were running away from their masters, while at the same time making it easy to take into custody any black person, and accuse him or her of being a runaway slave. (Brown 1997, 1179; Butler 1997, 917–18; Clark 2000, 43–44; Do 2000, 1845; Oliver 1997, 51). Others write about Southern white juries who used nullification to excuse violence against African Americans (Butler 1997, 918; Conrad 1998, 171–181). Some discuss nullification of 1920s liquor laws during Prohibition (Conrad 1998, 108–115; Butler 1997, 918; Clark 2000, 44; Do 2000, 1849). Some refer to 1960s and 1970s. Vietnam era protest cases in which nullification was used (Clark 2000, 44; Conrad 1998, 124–141; Crispo, Slansky, and Yriarte 1997, 12–19; Do 2000, 1849).

Many writers talk about the major jury nullification case decided by the U.S. Supreme Court, *Sparf v. US* (1895),[5] in which two sailors on the ship *Hesper,* Sparf and Hanson, killed the second mate, Fitzgerald. Jurors were not told they could return a verdict of manslaughter, and, later, when they queried the trial judge, they were told that the circumstances of the case ruled out the possibility that it was manslaughter. Sparf's appeal of the subsequent murder convictions was based on the instructions to the jury. Justice John Harlan

wrote the majority opinion, and Justice Horace Gray the dissent. Gray argued that judges are not always fair; indeed even the motive of patriotism can cause a judge to be prejudiced against a defendant. For the majority, Justice Harlan ruled that the jury does have the power to nullify, but not the right to be instructed by the judge that the power exists. While Harlan denied that juries have the right to determine the law, i.e., to be "a law unto themselves," and argued that nullification was morally wrong, he also conceded that it could not, in practice, be stopped. Harlan could find no fault with the trial judge's decision because "[t]he trial was conducted upon the theory that it was the duty of the court to expound the law, and that of the jury to apply the law as thus declared to the facts as ascertained by them" (Barnet 1993, 42–43; Brown 1997, 1160; Butler 1997, 917; Clark 2000, 44; Conrad 1998, 105–6; Crispo, Slansky, and Yriarte 1997, 10–11; Fernandes 1997, 108–9; King 1998, 444–45; Morgan 1997, 1131–32; Oliver 1997, 52; O'Neill 1997, 908; Parmenter 2007, 387–89); Rubenstein 2006, 965–66). The decision in *Sparf* referred to the Fifth Amendment's double jeopardy clause—this is where some of the *power* to nullify comes from, because, in an instance of nullification, the Fifth Amendment would prevent a retrial as a remedy (Oliver 1997, 52).

In one of the Vietnam era cases, *US v Dougherty* (1972),[6] the District of Columbia Circuit Court of Appeals reaffirmed the *Sparf* decision that there is no right of the jury to be told that they can nullify. During the Vietnam War, nine Catholic protesters known as the "D.C. nine" broke into Dow Chemical Company and vandalized the premises because the company was making napalm, which the United States was using in Vietnam. The jury asked if they could be told about the right to nullify, but the judge refused. The Circuit Court of Appeals said that the jury *can* nullify, but that there is no right to instruction. In his majority opinion, Judge Leventhal argued that encouraging nullification by instructing juries that there is a right to do it would "invite chaos," and be "inevitably anarchic" (Brown 1997, 1200; Oliver 1997, 55). On the other hand, Chief Judge Bazelon's dissent contended that juries should be given the right to nullify, that they enjoy it anyway, because they hear of it from other sources, and that the judge should instruct them that it is a right they possess (Conrad 1998, 125–27). In another Vietnam era case, *US v. Spock* (1969),[7] the Court said that "the jury, as conscience of the community, must be permitted to look at more than logic" (Brown 1997, 1170). In *US v. Thomas* (1997),[8] the Court said that a trial judge can evaluate a juror's intention to nullify, and, if necessary, remove him or her from the proceedings. In this drug case in Albany, New York, jurors complained to the judge that one of their number intended to nullify, regardless of the evidence. The judge then removed the juror from the case. Although the ap-

peals court rejected the trial court's subsequent conviction of the accused by the remaining eleven jurors, it upheld the right of judges to remove someone who intends to nullify (King 1998, 441–42).

Some commentators have sought the justification for nullification in the U.S. Constitution. Some contend that the Fifth Amendment's double jeopardy clause gives a right to nullify (Butler 1997, 917; King 1998, 436, 446), for, as was noted above, to overturn a verdict that nullified a law would be double jeopardy. Additionally, there is the jury clause of the Sixth Amendment. In *Duncan v. Louisiana* (1968),[9] the U.S. Supreme Court said that the Sixth Amendment gives defendants a right to a jury's independent assessment of the facts; by implication, some believe this permits nullification. Brown (1997, 1170) says that, in *Duncan*, the Court ruled that one function of the jury is to guard against government deviation from the law (see also Dann 2007, 14). Still others refer to the Jury Clause of Article III (section 2, clause 3) of the Constitution (King 1998, 436, 454–57, 474–76), which gives the jury the power to "check" the other branches of government.

Few authors refer explicitly or in any detail to the Magna Carta and to common law. Clark (2000, 40) says that "[t]he power of the jury" goes back to Magna Carta. Do (2000, 1845) and Engle (2008, 510–11) refer briefly to English common law. Barnet (1993, 40, 44) says that a right to nullification existed "at common law," and that the Magna Carta included this right. Conrad (1998, 13) writes that the practice "has an ancient history within the common law."

Conrad (1999, 30) writes of "[t]he power to nullify, protected as it is in the Constitution." However, he cites the First, Fifth, and Sixth Amendments and Article III, Section 2, none of which specifically say there is a right to nullification. Could there be a better approach, one that makes it clear that such a right exists? It was noted above that the law journals have produced hundreds of articles on this topic. In recent years, political theorists, however, have not written about the concept. This is perhaps surprising, because the writings of Spooner contain a spirited defense of the practice that is well developed and extremely relevant. He uses a detailed analysis of the U.S. Constitution to argue that slavery was unconstitutional. In the works on nullification discussed above, only Conrad 1998 and Ostrowski 2001 refer to Spooner. Yet, in contrast to the modern articles, Spooner's approach is original, uses logic, focuses on the Magna Carta, and is ultimately compelling.

The contemporary situation with respect to nullification gives much cause for concern. When Judge Leventhal, in *Dougherty*, finds it necessary to rule that the people may not have their right to nullify explained to them because it would lead to anarchy, surely it is time for some better resolution of the

issue. With that concern in mind it is time to examine Spooner's defense of jury nullification. I argue that Spooner gives a more satisfying justification of the right to nullification that is based on logic and history, and which is to be preferred to the piecemeal, haphazard, and contradictory precedents and constitutional sources described above. Spooner gives us clear, rational reasons for having nullification, and a strong argument for the existence of the right that is based on Magna Carta and the common law that the United States inherited from England. Spooner believed that juries had the right to be judges of the law as well as of the facts of a particular case.

In *Trial by Jury*, Spooner presents six theoretical arguments for supporting jury nullification. He argues that the practice is a deterrent to the power of the government; that it is a part of direct democracy, which improves the quality of governance; that it allows the people to determine the boundaries of that democracy; that it adds to the legitimacy of the elected government; that it constitutes an additional, juridical level of validation for laws; and that it is a viable and legal way for the citizenry to resist tyranny.

At the beginning of that work, Spooner maintains that juries have a right to determine whether or not a law under which a person is tried is just. The logic of this, he argues, is that, without the jury possessing such power, there is no effective deterrent to the government's power to imprison citizens (Conrad 1998, 85). The jury system exists to protect the accused, and if the jury cannot throw out the law, then rules of evidence and other procedures can easily compel it to convict. Juries would surely become "mere tools" (Spooner 1852, 5) of the government—a situation that has happened in practice. For example, Spooner points out that, in capital crimes, Massachusetts asked prospective jurors "whether they had any conscientious scruples against finding verdicts of guilty" (8). Those who did (as is the practice today in states, unlike Massachusetts, that still have the death penalty), and those who had scruples with enforcing laws against fugitive slaves, were excluded from jury service. Spooner asks, "What is such a jury good for, as a protection against the tyranny of the government" (9)? The government is excluding from the panel those who disagree with it, and thus what is really taking place is "a trial by the government itself—and not a trial by the country" (9).

Clearly, for Spooner, the purpose of the jury system is *not* to do the government's business. Far from it, for one of the virtues of the selection of ordinary citizens is that it is possible for opponents of the government to participate in the trials of those whom the government may wish to punish. For Spooner, jury service becomes an active part of direct democracy, for, in invalidating or not invalidating a law, juries "determine their own liberties

against the government" (6). In doing this, they are inspired by the ideal of freedom, which stirs them to take for the citizen the liberties they desire. If, instead, the government had the authority to do this, Spooner contends that its power would be absolute (Spooner 1850a, 37; 1852, 10, 12; 1860a, 27).

Moreover, the random selection of a group that is representative of the country as a whole, rather than just of those who support the government, creates a higher standard for law enforcement. Because of the existence of a system that allows the jury to nullify laws, the government can only enforce rules that enjoy the support of the vast majority of the citizenry (Spooner 1852, 7). For Spooner, democracy is seen as entailing jury participation:

> [T]heoretical accuracy would require that every man, who was a party to the government, should individually give his consent to the enforcement of every law in every separate case. But such a thing would be impossible in practice. The consent of twelve men is therefore taken instead. (1852, 132; see also Barnett 1997, 984, 1002)

Thus, if the right to nullification is taken away, trials become politicized: the accused are no longer being tried by the nation, but by the government. The government will then also be deciding the extent of democracy. As Spooner writes, "the standard, thus dictated by the government, becomes the measure of the people's liberties" (9). The power to punish cannot be held by the government, for any government can "compel obedience and submission" (12), and is of necessity tyrannical. Reading this makes it quite clear that Spooner is a philosophical anarchist, and, as was noted in chapter 3, his understanding of democracy in principle as being unanimous direct democracy resembles that of Robert Paul Wolff (1976). Thus it is difficult to give much credence to the argument of Conrad (1998, 85) that "Spooner was not an anarchist" because he "makes it explicit that government has a role—albeit a constitutionally limited one—to play in the administration of justice and social affairs." Conrad seems to be relying on the dictionary definition of "anarchy," rather than the political philosophy of anarchism.[10] No, Spooner was not the straw man anarchist, the person who believes in no government at all, for which actual anarchist ever advocated that?

Furthermore, a true jury system, Spooner (1852, 15) contends, one that allows a jury to negate a law, thereby allows the individual citizen to challenge the authority of a law and that of the government that made it. Giving the jury the last word adds to the legitimacy of the government because the government is letting justice be defined by the people, in terms that they can understand, rather than allowing elite groups within society to define it in a way that ordinary people do not understand (130–31). If we were to say that

only learned people possess adequate understanding of legal concepts, then surely we should not have a jury system at all (132).

Spooner argues that the existence of an extra level of approval for laws is quite compatible with the U.S. Constitution and the operation of indirect democracy. In a sense, the jury is just another body representative of the public will. However, looked at differently, the jury is *the people* in a way that Congress and the president are not, and thus these other governmental "servants and agents of the people" ought to welcome the involvement of the jury, which is "a tribunal more fairly representing the whole people." (Spooner 1852, 12; see also Martin 1970, 189)

In an age when democracy is often simplistically equated with voting, it is refreshing to see Spooner point out its inadequacies. He notes that electing officials affords no opportunity for the people to pass judgment on existing or future laws (12). Spooner says: "The right of suffrage, therefore, and even a change of legislators, guarantees no change of legislation—certainly no change for the better" (13). Moreover, voting is an infrequent form of political participation. Of course, Spooner was not thinking of modern innovations such as the initiative and recall, or the activities of contemporary tabloids and television. He laments the fact that elected representatives can not be "removed from their office, nor called to account while in their office" (14). But even if politicians today must fear greater pressures to be accountable, few modern commentators would disagree with Spooner's summing up: "Who ever heard that succeeding legislatures were, on the whole, more honest than those that preceded them" (13)? Without a jury that can nullify legislation, Spooner asks what is to stop the government from ending or postponing elections. This is something that many "democratic" governments have done in the years since *Trial by Jury* was written. Spooner sees that one possible response would be to say that a government must obey the Constitution. But Spooner points out that governments can violate such protections by claiming that what they do is, in fact, constitutional. Consequently, he argues that jury nullification is the only way that governments can be forced to obey the social contracts they have signed, including the Constitution (14, 216–18). All governments view an act of rebellion as treason. In doing so, Spooner argues, they condemn the natural right that humankind has to overthrow a tyrant. Since this right, then, is generally of no practical use in redressing wrongs, so there is even more need to rely upon an alternative form of "forcible resistance" (Spooner 1852, 16; see also Martin 1970, 189), i.e., jury nullification, which has the advantage over revolution because it can (and should) be legal.

In addition to these theoretical arguments for the necessity of jury nullification, Spooner (1852, 17) also claimed that the practice has long been authorized. For example, he insists it is part of the common law, and was sanctioned

by the Magna Carta. The Fifth Amendment to the U.S. Constitution, Spooner points out, provides for jury trials. Its requirement of due process before a person's natural rights can be violated implies that it was "framed on the same idea" as the ancient charter (46). From this, and from the Second Amendment's endorsement of citizen ownership of weapons, Spooner concludes that "[t]he constitution, therefore, takes it for granted that the people will judge of (sic) the conduct of the government, and that, as they have the right, they will also have the sense, to use arms, whenever the necessity of the case justifies it" (17–18). However, this seems unlikely. The Constitution's contemplation and approval of jury trials says nothing about juries being able to nullify laws, although admittedly it says nothing about judicial review either. The reference to the Second Amendment is even more distantly speculative.

In his discussion of state constitutions (18), Spooner similarly claims to find a right to "resistance" in laws allowing jury trials, possession of weaponry, and the natural rights to life, liberty, and property, but again the connection between "resistance," and jury nullification as a specific, sanctioned form of that resistance, on the one hand, and the enumerated rights of citizens is highly tenuous. In the Maryland Constitution, Spooner also finds documented support for the tradition of juries being able to block a law. Here, as he seeks out more recent precedents, Spooner resembles the modern writers. However, his use of the Magna Carta to justify the practice of nullification shows great originality.

In the Magna Carta, the document by which King John ceded rights to his subjects, Spooner searches for an understanding of what was originally meant by "trial by jury" (chaps. II, XI). He understands that document as a compact between the people and the kings of England, something that thus has "constitutional authority," a charter ratified by John's successors on more than thirty occasions (192). Although Magna Carta was a contract between the lords and the monarch, the subsequent acceptance by governments that they were bound by the charter's terms was presented to all citizens as evidence of the government's legitimacy. Moreover, Spooner points out, the Magna Carta restated existing laws, and has been seen by various commentators, including one of the kings, Edward I, to be a formalization of the common law; to some extent, the charter embodied a reversion to Saxon law (201, 203). In the Magna Carta, Spooner notes that the lords forced the king to agree to a provision that no free person could be convicted of breaking the law without the assent of "the peers—that is, the equals—of the accused" (23). He points out that the barons of the day had it in their power to remove the king from the throne. He asks, in saving the monarchy in return for the pledge to adopt jury trials, is it likely that the barons would have agreed to a jury system in which the jury was subservient to the king (23)? Surely the lords expected

the jury members to actively consider the matters on trial, rather than do "senseless work." Could they really have desired "an entire farce" (23)? After all, John resisted signing the charter, and protested that it would strip him of his power. Here, Spooner presents a logical argument, although, of course, it relies upon the validity of his inferences; he does not claim, for example, that the Magna Carta specifically includes a right of jury members to evaluate the wisdom of a law under which an accused is being tried. Rather, he relies on quotations from authorities that appear to agree with his interpretation (66–76). Citing Blackstone's *Commentaries* and many other sources, he argues that English courts were "*courts of conscience, in which the juries were sole judges, administering justice according to their own ideas of it*" (78). According to his thinking, this interpretation applies also in Spooner's own time, where improperly binding jurors to rely on written law in reaching their verdicts now violates "the principles of justice" (85).

Spooner points out that the oath sworn by the monarchs of England from William the Conqueror in 1066 to James I in 1603, and perhaps even until 1688, includes the affirmation of the following question: "Do you concede that the laws and customs, *which the common people have chosen,* shall be preserved?" (Spooner 1852, 104; see also Conrad 1998, 17)

The Magna Carta was written in Latin, and Spooner devotes considerable attention to the translation of relevant phrases. Of particular importance is the meaning of "*per judicium parium suorum*." He notes that others have translated "*per*" as "by," rendering the whole phrase as "*by* the judgment (or sentence) of his peers." However, Spooner argues that the correct translation of "*per*" is "according to." If the phrase is interpreted as "according to the sentence of his peers," then there seems to be greater anticipation of jury nullification, whereas the substitution of "by" perhaps implies that the jury must be bound by the law. He points out that the phrase is followed by another, "*per legem terrae*," where "*per*" must "obviously" be translated as "according to." The whole phrase means "according to the law of the land," and the substitution of "by" would make the phrase sound strange (Spooner 1852, 30–32). Spooner adds that the law of the land, which is being referred to here, is the common law, as "[a]ll writers agree" (Conrad 1998, 19; Spooner 1852, 34).

Interestingly, in his *Sparf* dissent, which was written a few years after Spooner's death, Justice Gray cited the same section of the Magna Carta as evidence that people in the United States, who were once subjects of the royal monarch, had at that time had a right to nullification:

> The jury, in any case, criminal or civil, might indeed . . . refer a pure question of law to the court, but they were not bound and could not be compelled to do so, even in a civil action.

Spooner (1852, 65) notes that, before 1415, when the House of Commons first passed a bill that was written in English, laws were written in Latin and French. Consequently, he asks, how could a jury be expected to interpret laws that they could not read? Rather, they could only be relied upon to comprehend "*the good laws*," the principles that were embodied in the societal norms of the day (66).

Spooner addresses a number of criticisms that might be made of his argument in favor of jury nullification (chap. V). One of the most important is the observation that judges are professionals who know about the law, whereas jury members are not. What sense does it make for judges "to sit by and see the law decided erroneously" (123)? Spooner's response is that it is not knowledge of the law that disqualifies judges from applying it, but their dishonesty, desire for power, and subservience to legislatures, all of which make them unable to preserve the rights of the people (124).

Moreover, he argues that a "more numerous party" does not have the right to claim greater wisdom or power—a legislature than a jury, any more, to use his example, than two men who meet one other person (207). Juries allow the protection of individual rights in a way that majoritarian democracy cannot (209). Life in civil society may be justified as being a superior condition to a state of war, but it is wrong to infer from this that majority rule can in some way be rationalized. We may have come together "for an *agreed purpose*" (212), but that is no reason to cede the rights of life, liberty, and property to the majority. Rather, let a jury—not the majority—resolve any issues that are raised. The jury system is the only way that the weak may win against the strong (214–15). As Ostrowski (2001, 100–101) writes, Spooner saw jury nullification of the majority's rule as a way to protect the minority.

In response to the criticism that the power of jury nullification gives juries an absolute power, Spooner points out that juries have no practical power to enforce their verdicts, and that decisions they make are subject to review (125). Juries exercise a check on the power of the government; they are not the government, so they do not threaten the citizenry as the government does. Spooner accepts that the failure of juries to reach a verdict may mean that justice is not done (127). However, he argues, this is reasonable because nobody should be found guilty, or, in a civil trial, lose property in circumstances that are unclear. At least, he writes, "positive *injustice* will also often fail to be done" (128). Surely the injustice avoided will balance some of the justice missed. Indeed, Spooner argues, the injustice of the present system, where legislatures and judges dictate what is the law, is so great that any failure to achieve justice under a system of jury empowerment would be much less (129–30).

To the criticism that allowing the jury to say what the law is would make law in general uncertain, and therefore difficult to follow, Spooner responds

that no legal system is completely intelligible. In fact, that is why people are reluctant to go to court, and why the judicial process they fear is so adversarial. Letting the jury decide the law would actually simplify the process, because surely juries would make decisions that are closer to natural or common law than the present system allows (133–35). Responding to the belief that allowing jury nullification would paralyze government, Spooner says that weakening legislative power is not a disadvantage, but "the crowning merit" of his proposal (206), a characteristic pronouncement, and one that reflects the author's thoroughgoing anarchism.

Spooner rejects the idea that "ignorance of the law excuses no one," calling it a "preposterous doctrine" (Spooner 1852, 181; see also Spooner 1850a, 46) and arguing that the way that it is justified employs circuitous reasoning. To say that all sane adults are "bound to know the law" is not a justification of "ignorance of the law excuses no one" but a mere restatement of it. Thus, there is really no explanation of *why* a citizen should know the law, unless it is, as the common law made the distinction, "*intrinsically* and *clearly* criminal." (Spooner 1852, 182). Spooner argues that this statement that ignorance of the law provides no justification was a modern imposition by corrupt judges who wished to strengthen the government's power to impose justice the way that it saw fit (179–80, 186). In the past, to be proven guilty, prosecutors had to show criminal intent. Under the common law, it was necessary to show "that an act was done '*wickedly*,' '*feloniously*,' '*with malice aforethought*,' or in any other manner that implied a criminal intent" (180). Ostrowski (2001, 99–100) points out that Spooner did not believe the accused could be found to have "criminal intent" unless the offense in question violates natural law. In *A Defence for Fugitive Slaves*, Spooner (1850a) also used the idea of criminal intent to argue that people in the North who came to the aid of fugitive slaves could never be considered criminals:

> Furthermore, a jury, before they can convict a man, must find that he acted with a *criminal intent*—for it is a maxim of law that there can be no crime without a criminal intent. There can be no criminal intent in resisting injustice. To justify a conviction, therefore, the law, *and the justice of the law*, must both be so evident as to make its transgression satisfactory proof of an evil design on the part of the transgressor. (Spooner 1850a, 36)

In *Vices Are Not Crimes*, Spooner (1875, 23) also calls this viewpoint "a maxim of the law." Similarly, as will be seen in chapter 5,[11] Spooner says in his letter to the Governor of Virginia, that, in making war against the government in order to end slavery, John Brown had no criminal intent because he acted out of conscience.

In *A Letter to Grover Cleveland*, Spooner argues that, since any person can identify natural justice using reason, it follows that he or she can also employ self-defense:

> Every man has, by nature, the right to maintain justice for himself, and for all other persons, by the use of so much force as may be reasonably necessary for that purpose. But he can use the force only in accordance with his own judgment and conscience, and on his own personal responsibility, if, through ignorance or design, he commits any wrong to another. (Spooner 1886, 104)

Presumably, natural justice, ascertained by reason, affects the judgment here. Also the idea that one is responsible for hurting someone else "through ignorance" appears to contradict Spooner's belief that ignorance of the law *is* an excuse. But of course, the latter is man-made law, not natural law, which can be known by every person.

However, there is a problem here, for Spooner comes close to situation ethics, the credo associated with the French philosopher, Jean-Paul Sartre, which says that each person must evaluate the specific situation in which they find themselves, and determine what is morally right in that specific context. As Spooner's contemporary critic, Wendell Phillips wrote:

> Now, if the majority enact a wicked law, and the Judge refuses to enforce it, which is to yield, the Judge, or the majority? Of course, the first. On any other supposition, Government is impossible. Indeed, Mr. Spooner's idea is practical no-governmentism. (Phillips [1847] 2002, 10)

In *Illegality of the Trial of John W. Webster* (1850b), Spooner argued that Harvard professor, Dr. John W. Webster, was illegally convicted of murdering his colleague, Dr. George Parkman, and later hanged, because three potential jurors who were opposed to the death penalty were excluded from the jury on account of their opinions (Alexander 1950, 210; Spooner 1850b, 3). In contradistinction, Spooner insisted that the jury has the right to reject a severe punishment that has been prescribed by law (Spooner 1850b, 3). To allow otherwise is to permit the government to pack the jury (4). Whereas jurors should rightfully consider the societal consequences of the decision that they make, the government, by excluding persons opposed to the death penalty, is unconstitutionally limiting the scope of what a jury may do (7–8).

> The provision of the Bill of Rights, which guarantees to every man a trial by 'the country,' does not say that he shall be tried by portions only of the country as possess but a *statutory* degree of sensibility. (Spooner 1850b, 8)

In this work, too, Spooner insists that trial by jury is supposed to be "a trial by '*the country*,' in contradistinction to a trial by *the government*" (4). Only a trial by a jury to which any person, regardless of views, may be selected can be a trial by the country. Once death penalty opponents are excluded, it becomes mere trial by the government. Moreover, dissent, even by a single member of a jury, is of value to the legal system, because it should justifiably be regarded as a signal that the law or conviction are questionable (5). In fact, Spooner argues that excluding "the more humane and conscientious" potential jurors from the panel makes inappropriate and excessive punishments more likely (15).

Spooner's views on excluding jurors who are opposed to capital punishment sound much like Justice Potter Stewart's majority opinion in *Witherspoon v. Illinois*,[12] in which the U.S. Supreme Court ruled that people opposed to the death penalty had a right to participate in capital trials unless they were determined to nullify (Biskupic and Witt 1997, 217):

> [I]n a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community.

However, in 1985, led by Chief Justice Rehnquist, the Court retreated from this position (Biskupic and Witt 1997, 222).[13]

In *Ring v. Arizona* (2002),[14] Justice Antonin Scalia characterized recent increased passage of federal and state sentencing guidelines as further weakening the tradition of trial by jury, arguing:

> We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.

In that case, the U.S. Supreme Court decided on a 7–2 vote that, in order for Arizona's capital punishment law to be constitutional, juries, and not judges, must determine whether a convicted person warrants the death penalty (Cockburn 2002). The outcome of *Ring* notwithstanding, the trend of imposing or, more recently, generally adhering to sentencing guidelines[15] gives further support to Spooner's view that what happens in U.S. courtrooms is trial by the government, rather than by the nation or people. Today, his ideas seem quite radical, but in Spooner's time, Michael E. Coughlin argues, the power of the government was less accepted:

> At the time Spooner argued for a progressive jury system, his ideas weren't nearly as radical as they might seem today. In many ways he was in the main-

> stream of both popular and legal opinion. . . . But as much as Spooner tried to save the traditional American jury system, the courts got the upper hand and effectively choked off attempts to preserve a strong jury. . . . Understandably, jurors became accustomed to their now-limited role in the courtroom. (Coughlin 1982, 53)

That perhaps explains the more modern perspective of Judge Jack B. Weinstein (1998, 168), who casts legitimate cases of jury nullification as an indication that citizens no longer have "respect for the substantive law, truth, due process, rational and polite discourse, and the dignity and worth of our fellow Americans." From his perspective, nullification is never justified; rather, it is a sign of some failing or other of the jury members. They are but temporary helpers in a legal process that is principally the business of judges, politicians, and law enforcement officers, and the goals they wish to accomplish using the legal system. Weinstein's view of the judicial system is almost the opposite of Spooner's. From Spooner's perspective, the jury is the most important element of the judicial process. It is they who must decide the appropriateness of the law, which is a vital function of the citizenry in a democracy.

In her *Washington Post* article, Biskupic (1999) writes that "[t]he right to trial by a fair and impartial jury is fundamental in America and rests on the belief that a jury may be the only shield between an individual and an overzealous prosecutor or a biased judge." Nonetheless, she continues by asking whether, "if the process is breaking down, if people are using it as a way to express a personal agenda, should the system be changed?" Biskupic, like Weinstein, sees the law as being a system that is organized in order to prosecute, convict, and acquit people. She suggests that, if the jury system does not achieve these functions, perhaps juries should be replaced. Again, this is an approach that contrasts sharply with that of Spooner, who sees the jury as a vehicle for democracy, liberty, and control over the government. Excluding capital punishment opponents from trials that involve the death penalty would likely be seen by Biskupic and Weinstein as a way of fixing a criminal justice system malfunction. For Spooner, however, refreshingly, such maneuvering is a sign of government subversion and abuse of democracy.

Lysander Spooner's theoretical arguments portray jury nullification as a way of expanding democracy and resisting government power. Moreover, his original analysis of the Magna Carta has rather greater credence than the more modern attempts to find precedents or constitutional authority for the practice in the extensive, but somewhat repetitive law journal literature.

That is to be celebrated because, in the absence of strong arguments to justify the habit, fear of nullification threatens to lead to similarly ill-considered and pragmatic attempts to restrict the power of jurors.

Notes

1. *Georgia v. Brailsford*. 1794. 3 Dall. 1.

2. *United States v. Burr*. 1807. 25 F. Cas. 49 (Cir. Ct. D. Va.). Barnet points out that Marshall's opinion was alluded to in the majority decision written by Justice Harlan in *Sparf v United States* (1895); this case is discussed later in the chapter. *Brailsford* was also cited by Justice Harlan in that case, as was Chief Justice Vaughan's opinion in *Bushell's Case*. Dissenting in *Sparf*, Justice Gray also cited *Brailsford* and *Bushell's Case*.

3. *Wyley v. Warden*. 1967. 372 F. 2d 742 (4th Cir.).

4. Although Maryland and Indiana are the only states that specifically permit nullification, there have been a number of attempts in recent years to formally adopt the practice in other states. In 2002, voters in South Dakota rejected Amendment A, which would have created a nullification right. Similar initiatives in Oklahoma and Arizona were unsuccessful (Liptak 2002; Minnesota Department of Administration 2002).

5. *Sparf v. United States*. 1895. 156 U.S. 51.

6. *United States v. Dougherty*. 1972. 473 F. 2d 1113 (D.C. Cir.).

7. *United States v. Spock*. 1969. 416 F. 2d 165 (3d Cir.).

8. *United States v. Thomas*. 1997. 116 F. 3d 606 (2d Cir.).

9. *Duncan v. Louisiana*. 1968. 391 U.S. 145.

10. As Paul Goodman (1968) comments: "Anarchism is not anarchy. It is against existing social and political systems, but it proposes to replace them with some form of ordered, decentralized, individualistic community cooperation."

11. Lysander Spooner, writing anonymously as "The Author of the Circular," letter to Henry A. Wise, Governor of Virginia, November 2, 1859, Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library.

12. *Witherspoon v. Illinois*. 1968. 391 U.S. 510.

13. *Wainwright v. Witt*. 1985. 469 U.S. 412.

14. *Ring v. Arizona*. 2002. 536 U.S. 584.

15. Recent U.S. Supreme Court decisions have, on Sixth Amendment grounds, reduced federal and state sentencing guidelines to an advisory status; see for example *Blakely v. Washington*. 2004. 542 U.S. 296; *United States v. Booker*. 2005. 543 U.S. 220; *Gall v. United States*. 2007. 552 U.S. 38.

CHAPTER FIVE

Slavery

As was noted in the introduction, Lysander Spooner today is chiefly remembered as an abolitionist. Although there are so many "forgotten" aspects to his thinking, his most prominent place in history may always be determined by the fact that he was a radical opponent of slavery who knew and supported John Brown (Shively 1971g). However, Spooner's value as a political theorist is clearly enhanced by his thoughtful, inventive constitutional arguments against slavery.

Spooner disagreed with the American Anti-Slavery Society and its leaders, William Lloyd Garrison and Wendell Phillips, who, though they passionately wanted to end slavery, nonetheless believed that it was constitutional. Blight (1989, 2, 27, 31) points out that the well-known runaway slave Frederick Douglass, who once worked for Garrison, promoting the arguments of the Society, gradually came to see the logic of Spooner's (and fellow slavery opponent, the Rev. William Goodell's) argument, and adopted the view that the U.S. Constitution disallowed slavery. Similarly, McFeely attributes Douglass' change of mind to the same sources:

> To credit Douglas with being an original legal thinker would be an error; his arguments were those of Lysander Spooner and William Goodell as he had acknowledged at the time of his change of heart about the Constitution in 1851. (McFeely 1991, 205)

Spooner questioned the motives of many in the North who, on the face of it, were fellow-abolitionists. Thinking about the underlying economic

interests, he interpreted their position less charitably. He argues in *No Treason,* No. 1 (Spooner 1867a) that the U.S. government did not fight the Civil War to end slavery—which Spooner considers the appropriate purpose—but rather to *force* the South to submit to its power. Therefore, he reasons, writing shortly after the crushing of the South, we can no longer claim that the U.S. government is based on consent (Spooner 1867a, iii–iv). For the economic roots of slavery, according to Spooner, are as follows:

> And why did these men abolish slavery? Not from any love of liberty in general—not as an act of justice to the black man himself, but only "as a war measure," and because they wanted his assistance, and that of his friends, in carrying on the war they had undertaken for maintaining and intensifying that political, commercial, and industrial slavery, to which they had subjected the great body of the people, both white and black. (Spooner 1870, 57; see also Reichert 1976, 123)

Curti explains Spooner's interpretation of the Civil War as follows:

> Spooner regarded the war as the result of the breakdown of the alliance between northern capitalists and southern slaveholders. In his mind this breakdown resulted from southern distrust of the fidelity of her allies and from the determination of industrial and financial capitalists to enforce their monopoly of southern markets. Spooner argued that the capitalists meant "to plunder and enslave" laborers in the North as well as in the South. (Curti 1943, 474–75)

The irony of the North's victory over the South, Spooner argues, is "that a government, professedly resting on consent, will expend more life and treasure, in crushing dissent, than any government, openly founded on force, has ever done" (Spooner 1867a, 6). It is inconsistent for the North to wage war for government based on consent in order to make the South live under the rule of a government it does not want (6). The reader may consider this is a weak argument, because (1) Spooner uses the term "South" for the losers in the Civil War. But who is the South? Were the slaves not also people of the South too? Also (2), there is a confusion of means and ends. The methods used in a war are not the basis for civilian government, and a society without slaves is presumably based on greater equality, regardless of the means that were used to accomplish it.

Spooner emphasizes how slavery corrupted the political class throughout the history of the United States.

> For the first seventy years of the government, one portion of the lawmakers would be satisfied with nothing less than the permission to rob one-sixth, or

> one-seventh, of the whole population, not only of their labor, but even of their right to their own persons. In 1860, this class of lawmakers comprised all the senators and representatives from fifteen, of the then thirty-three States. (Spooner 1886, 19)

Spooner discusses the consequences of *Somerset v. Stewart* (1772), the case that ended slavery in England. Charles Stewart (or Steuart) attempted to ship his runaway slave, James Somerset (or Somersett) who had been bought in Virginia, to Jamaica, where, as in Virginia, slavery was still legal. The case concerned whether a person, presently in England, where slavery was *not* legal, could continue to have the status of, and be treated as a slave. Spooner points out that Chief Justice Lord Mansfield determined in the Somerset case that there was a fundamental contradiction between liberty and slavery, and that, in consequence, from that day onward, anyone taking a slave into England would be giving them their freedom (Spooner 1860b, 23; see also Phillips [1847] 2002, 81). Up until 1772, people from slave owning jurisdictions could briefly bring their slaves into England. However, Spooner notes that even during this period of tolerating slavery, the practice still fundamentally contradicted the concept of liberty—thus, slavery cannot be justified in terms of custom and tradition (Spooner 1860b, 23).

This argument was not accepted by Wendell Phillips ([1847] 2002, 86), a leading Garrisonian abolitionist and contemporary critic of Spooner, who insisted that customs could be justified by a period of government acceptance. If England had previously allowed slaves to remain slaves while on its soil, then there was no justification for Mansfield to suddenly reverse the position, in contradiction of past practice.

For Spooner (1860b, 43), neither common law, natural law, nor common sense could ever justify the existence of slavery. The only hope of justifying it lay in positive, man-made law, i.e., an "express and explicit provision." He cites Mansfield:

> The law of the country where it is used . . . must recognize so high an act of dominion. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political—but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from the memory. It is so odious that nothing can be suffered to support it but positive law. (Mansfield, cited by Spooner 1860b, 32)

In the case of the United States, of course, such clarity could never be claimed. Spooner is critical of the way that laws concerning slavery had evolved, starting simply with the recognition of the existence of the

institution of slavery. Explaining slavery as a tradition that had once been completely unregulated by law, Spooner faulted colonial governments for later passing statutes that organized a system of slavery without ever defining who was a slave and who was not. All that the law required was that a person be possessed by another, "without any more public cognizance of the act, than if the person so seized had been a stray sheep" (Spooner 1860b, 33–34).

Spooner points out that the Articles of Confederation did not in any way justify slavery (51). In fact, the Articles used the word "free" in a sense that is compatible with the notion of a natural right to liberty, a sense of the word that it shared with colonial law and with state constitutions:

> The word "free" then describes the native and naturalized citizens of the United States, and the words "all other persons" describe resident aliens, "Indians not taxed," and possibly some others. The representation is then placed upon the best, most just, and most rational basis that the words used can be made to describe. The representation also becomes equal and uniform throughout the country. The principle of distinction between the two bases, becomes also a stable, rational and intelligible one. (Spooner 1860b, 78)

For Phillips, Spooner's interpretation of "all other persons" left much to be desired. Phillips asks what purpose the distinction would make if it referred to resident aliens. The whole reason for the three-fifths compromise, which for taxation purposes counted slaves as three-fifths of a non-slave citizen, was, he points out, that there were many more slaves residing in the South. However, there is no reason to believe that the South would benefit from such an arrangement if aliens were counted as three-fifths (Phillips [1847] 2002, 45–46). Phillips assumes here that non-citizens, unlike slaves, would be equally distributed across the states, although Spooner's belief was that immigrants tended to avoid the South due to its heritage of racism and slavery (Spooner 1860b, 111–12). If Spooner were right, the South would actually be the loser from the three-fifths compromise, which makes his interpretation even more unlikely.

Furthermore, notwithstanding that question, he argues that the signing of the Declaration of Independence ought to have ended slavery because it ended the colonists' allegiance to the English monarch. In its place, the Declaration averred a new allegiance, one to "the natural and inalienable right of individuals to life, liberty, and the pursuit of happiness" (Spooner 1860b, 36–37). In fact, that very obligation to respect natural rights, Spooner points out, was the sole justification for the Declaration itself, and the American

Revolution in general. He points out that, at the time of the signing of the U.S. Constitution in 1787, no state constitution authorized slavery.[1] Neither did the U.S. Constitution itself provide any authority (39, 55). Far from it. The Constitution designated all Americans to be free: "it positively denies the right of property in man; and . . . it, *of itself*, makes it impossible for slavery to have a legal existence in *any* of the United States" (56–57).

> The constitution of the United States, at its adoption, certainly took effect, upon and made citizens of *all*, "the people of the United States," who were *not slaves* under the State constitutions. No one can deny a proposition as self-evident as that. If, then, the *State* constitutions, then existing, authorized no slavery at all, the constitution of the United States, took effect upon, and made citizens of all "the people of the United States," without discrimination. And if *all* "the people of the United States" were made citizens of the United States, by the United States constitution, at its adoption, it was then forever too late for the *State* governments to reduce any of them to slavery. They were thenceforth citizens of a higher government, under a constitution that was "the supreme law of the land," "anything in the constitution or laws of the States notwithstanding." If the State governments could enslave citizens of the United States, the State constitutions, and not the constitutions of the United States, would be the "supreme law of the land"—for no higher act of supremacy could be exercised by one government over another, than that of taking the citizens of the latter out of the protection of their government, and reducing them to slavery. (Spooner 1860b, 56)

Here, Spooner is applying the supremacy clause to the question of slavery. He argues that the interpretation of the U.S. Constitution as allowing slavery, which the Garrisonians accepted, and which was the interpretation applied in *Dred Scott*, anachronistically bestow a "hidden meaning" on words that never contemplated the distinction between a free person and a slave (Spooner 1860b, 88–89).

If the Founding Fathers had intended to exempt any group of persons from the protections of the Constitution, Spooner asks, would they not have defined such groups specifically, in order that no one whom they intended to include would accidentally be denied that coverage? Nothing like this happened, he concludes, citing the preamble to the Constitution, where we find a sweeping declaration to the effect that there are no such exceptions; that the whole people of the United States are citizens, and entitled to liberty and justice (Spooner 1860b, 91). To serve in the U.S. Congress, a person needs only to be a citizen of the United States; to be president, one must be born in the United States and be at least thirty-five years old, etc. Could a

person reasonably satisfy these requirements for national elective office, but be rejected because they are nonetheless a slave, wonders Spooner (101–2)? If so, the Constitution would be a bizarre document indeed.

In his *Address of the Free Constitutionalists to the People of the United States*, Spooner repudiates the compromise inherent in the designation of slave and non-slave states. For him, either the United States allows slavery or it does not. The supremacy clause suggests that the determination of who is or is not a citizen is not a matter that should be delegated to the various—at this time, thirty-three—states (Spooner 1860a, 3, 8). Yet the United States Constitution guarantees a republican form of government. How, Spooner asks, could it achieve this if it lacked the authority to define citizenship (11)?

Spooner analyzes the Dred Scott case[2], because that decision asserted that the Declaration of Independence had intended to mean only that all white men were equal. However, Spooner points out that this would mean that only white people had forsaken the protection of the English monarch. Thus, the black people of the United States would, at the time Spooner was writing, be loyal subjects of Queen Victoria (14).

Many commentators have viewed Spooner's arguments about the Constitution to be fanciful and an extremely unlikely interpretation. His critic, Wendell Phillips, dismissed them as follows:

> But it needs a much bolder man to maintain that the American people did not believe that Slavery was alluded to in the so-called pro-slavery clauses! We hardly know of a more daring flight of genius in the whole range of modern fiction than this. (Phillips [1847] 2002, 32)

The "pro-slavery clauses" at issue between Phillips and Spooner are Article I, Section 2, with its provision for counting "three-fifths of all other persons"; Article I, Section 9, which speaks of "importation of such persons"; and Article IV, Section 2, which addresses fugitive slaves who had been "held in service or labor." Also, less probably, the debate references Article I, Section 8, concerning "insurrections," and Article IV, Section 4, which talks about "domestic violence" (Phillips [1847] 2002, 26).

From an historical point of view, Phillips' argument concerning Article I, Section 2 is difficult for Spooner to overcome. For example, he continues:

> If there was no understanding that the slaves were to be counted in a distinct manner, why were they kept carefully separate in that [1790] census? Why, in 1792, were the State numbers settled on the basis of reckoning only three-fifths of the slaves? (Phillips [1847] 2002, 33)

Additionally, Phillips questions Spooner's use of the term "importation" to refer to migrants. A better and more familiar definition, Phillips argues, would connect importation to "articles of merchandize." Thus Article I, Section 9 is speaking of slaves, and not voluntary immigrants. Moreover, if the word were interpreted in Spooner's fashion, what would be the point of allowing Congress to tax immigrants until 1808, and then possibly ending immigration altogether (Phillips [1847] 2002, 60–61)? Once again, Spooner's version of the Constitution's meaning would make a number of its provisions unnecessary. Perhaps, against Phillips, it can be pointed out that the Constitution does not just say "importation of such persons," but "migration or importation of such persons," which is closer to Spooner's view. However, migration in this context might refer to the movement of slaves between states and territories. In general, Phillips' criticisms of Spooner's arguments are well made.

In his book about Charles Sumner, Donald (1960, 231) talks of "the tenuous reasoning that led Lysander Spooner and a few other anti-slavery men to argue that the Constitution, properly interpreted, actually abolished slavery throughout the United States." However, we might ask, is it really so tenuous, when regarded from the standpoint of the twenty-first century, when the dominance of the federal government and the national Constitution is so complete? States have lost the power even to impose their own drinking ages or define public intoxication without the assistance of Congress. The ability of states to maintain substantially different laws in any important area of policy ended a long time ago, and the means for imposing national standards was frequently activist U.S. Supreme Court opinions that revised the "meaning" of the Constitution.

A more favorable understanding of Spooner's endeavor can perhaps be obtained if it is considered, not as a factual statement about constitutional history, but as an attempt to upbraid Americans rhetorically for refusing to recognize the contradiction inherent in a Constitution based on the concept of liberty and a practice of nonetheless tolerating slavery within the borders of the United States. As Jacobus Ten Broek says of the activities of American Anti-Slavery Society:

> It was a policy of moving against slavery in the South, not by law or by compulsion, but by persuasion—the persuasion both of precept and northern example . . . . The abolition of slavery was to be accomplished "by a moral influence," by collecting and diffusing information on its true character, by convincing "our countrymen" that it ought to be abolished. (Ten Broek [1951] 2002, 8)

Ironically, interpreted in this way, Spooner, who was critical of the Society's approach to abolitionism, would resemble them in seeking to amend public opinion by assuming the rhetorical high ground.

Spooner also argues that the Constitution safeguards citizens by means of *habeas corpus* protection, a right that is generally operational, save in times of emergency. People have the right to file writs of *habeas corpus* to ensure that the government is following the law, to ensure that they have not been denied their liberty on some arbitrary grounds. There is no permissible retort to a *habeas corpus* petition whereby the state may claim that a person has been imprisoned because they are a piece of property, belonging to others, and thus not entitled to personal liberty. Since there is no property defense to a writ of *habeas corpus*, Spooner argues there can be no right to own another human being. For yet another reason, slavery is unconstitutional (Spooner 1860b, 104; Ten Broek [1951] 2002, 49).

Indeed, Spooner points out that Somerset was liberated on a writ of *habeas corpus*. Though not even a citizen of England, the Court recognized that he was nonetheless a person. Surely, Spooner asks, if even foreigners have such rights, do not slaves, most of whom were born in the United States, also qualify for such protection (Spooner 1860b, 104–5)? For Phillips, on the other hand, the Somerset case had little reference to the United States. All it achieved that was relevant to New World slavery was its concession that slavery was legal in Virginia, the place where Somerset had been purchased (Phillips [1847] 2002, 81, 83).

Why, Spooner asks, do we keep hearing the argument that the federal government has no business meddling in the affairs of the states? Spooner questions the idea that a state is an entity that has rights. From a vantage point of ontological individualism,[3] Spooner points out that states are made up of individual people, each of whom is vulnerable to the transgressions of majorities. One way that such individual minorities can protect themselves is by forming alliances with like-minded persons beyond the boundaries of a state (Spooner 1860b, 106–7). Here, Spooner is attacking the doctrine of states' rights; however, his novel answer is relevant today, as an argument against those who apply cultural relativism to dictators such as Saddam Hussein, accepting their behavior as being representative of a culture or a nation. To do so, is to ignore the minorities who are victimized by dictators and, indeed, by majorities in such nations. Without the universal application of a concept such as human rights, such minorities may be doomed. As Martin points out, Spooner understood human rights in an individualistic sense, so there is no contradiction here. Martin comments:

> In later writings he was to define natural law as "the science of men's rights," which were in their possession as such strictly on their standing as individuals. There were no such things as group rights, declared Spooner; "Society is only a number of individuals." (Martin 1970, 181)

Spooner argues that slavery in the southern United States is a barrier to the development of slaves and slave owners alike. Agriculture is conducted in a most inefficient and rudimentary manner, wearing out the land. Little innovation is produced, and few skills are developed. Consequently, slavery is an inferior system of organizing society; it contributes little to the economic and cultural development of the United States. Due to its sorry state, few foreigners have chosen to migrate to the South, and the talents and industry they might have brought have instead been invested elsewhere (Spooner 1860b, 111–12). An example that supports Spooner's perspective is the perception people in the Danish Virgin Islands had of the United States when the latter forced Denmark to "sell" the colony. Islanders protested the takeover the islands by the United States to the Queen of Denmark because they were aware of, and feared the importation of lynching from the South (Boyer 1983). A negative view of the South persisted, even after the end of slavery, and, for some, it continues to this day.

Why, then, Spooner asks, should the people of Massachusetts, which provided more soldiers in the American Revolution than the whole of what would later become the Confederacy, be expected to defend a region that violates the principles on which the war for independence was fought (Spooner 1860b, 113)? Again, the concept of cultural integrity leads to incongruous behavior, while a reliance on individual human rights, for Spooner, does not.

Spooner is scathing about divining the intentions of the Founders from Madison's accounts of what happened. Surely, he argues, the Constitution tells us the *true* intentions of the Founders? That is the document that they signed, *not* Madison's notes about what occurred, which were not published until fifty years later (116–17). Even if Madison is correct, and the Founders desired secretly the perpetuation of slavery, it was the Constitution itself, which did *not* sanction slavery, that was adopted as the supreme law of the land (118).

While crediting Spooner for "the ingenuity of the argument," Phillips ([1847] 2002, 4, 93) complains that Spooner is imposing his desires onto the Constitution, instead of interpreting its original meaning realistically:

> The Constitution will never be amended by persuading men that it does not need amendment. National evils are only cured by holding men's eyes open, and forcing them to gaze on the hideous reality. (Phillips [1847] 2002, 4)

If the Constitution since its ratification, despite the opinions of people running the government for several decades, really has been as doggedly an antislavery document as Spooner believes, Philips asks whether we might not just give up on the goals of the American Revolution. For is it truly possible our leaders could have been so consistently and conspiratorially dishonest for such a long time? Secondly, Phillips argues, Spooner often relies on the authority of the U.S. Supreme Court to control the actions of people in the government; how, then, can Spooner also fail to accept the wisdom of the same Court, which has interpreted the Constitution as allowing slavery (Phillips [1847] 2002, 5–6)? Thirdly, Spooner describes the U.S. Constitution as a contract. But if it is a contract, between government and governed, how is it that Spooner can refuse to obey the government in the matter of slavery, which the Constitution, albeit regrettably, endorses (12–13)? Curiously, although Phillips accepts that there is no obligation to obey an immoral law, he argues that by swearing to uphold the Constitution, Spooner has waived his right to dissent (13). This, for Spooner, of course, will not do. As we saw in the previous chapter, he will not accept that swearing to uphold the Constitution is in any way the giving of consent to government or slavery.

In *A Defence for Fugitive Slaves*, when he discusses the Fugitive Slave Act of 1850, Spooner points out the tendency of financial rewards to make judges find against any person accused of being a slave. It is bad enough that judges are paid by the case at all, he notes, but the practice of paying judges twice as much money if they return a slave to his or her "owner" than if they gave the person freedom is "infamous." It creates such an ignoble incentive that Spooner speculates that some judges might actually solicit work from slave owners to increase their salaries (Spooner 1850a, 11). Arguing against the 1850 Act, which prevented *habeas corpus* claims being made for people accused of being fugitive slaves, Spooner writes:

> Upon a writ of *habeas corpus*, it would be the duty of the court to inquire fully into the several questions, whether the person, who had assumed to act as judge, and restrain the prisoner of his liberty, was really a judge, appointed and qualified as the constitution requires? Whether the law, under color of which the man was restrained, was a constitutional one? Whether the prisoner had been allowed a trial by jury? Whether he had been allowed to offer all the testimony, which he had a constitutional right to offer, in his defence. Whether he had had reasonable time granted him, in which to procure testimony? And generally into all questions involving the legality of his restraint; and to set him at liberty, if the restraint should be found to be illegal. (Spooner 1850a, 26)

With time, Spooner moved beyond his constitutional arguments against the legality of slavery, arguments that, despite their creative character, might have been accepted by an activist U.S. Supreme Court majority and used to end the practice in the manner of the Somerset case. It can be argued that Spooner eventually, in the hardening of his attitude toward slavery, and his growing acceptance of violence as a solution to it, came to see the wisdom of Wendell Phillips, who had written:

> The people have seldom regained their freedom by finding a loose joint in the harness of their tyrants; no, it has usually been necessary to trample armor and armor-wearers together in the dust. (Phillips [1847] 2002, 86)

While Phillips chose to analyze history, Spooner intended to actively change it. In Spooner's anonymously published two-sided broadsheet,[4] on one side of which was printed *A Plan for the Abolition of Slavery*, and on the other, *To the Non-Slaveholders of the South*, the author starts from the premise that slavery is a violation of people's natural right to liberty (Spooner 1858). In consequence, opponents of slavery have a right and an obligation to go to the aid of the victims of slavery, just as they would be entitled to intervene to save someone who was being robbed or about to be murdered. Spooner argues that a league of slavery opponents should be formed, their goal being to actively, and even violently, to put an end to the practice (Shively 1971d, 3; Spooner 1858). Like the natural and generally recognized right to liberty, in turn the duty of slavery's opponents to become involved on behalf of the slaves, is also "self-evident and natural," and does not require anyone to wait for authorization from the government. In fact, if the various governments of the United States had been willing to do something about the slavery issue, ordinary people would not have to take such drastic action, but in the face of the failure of government to ask, they have a right and obligation to bring about natural justice (Spooner 1858). Shively points out that Spooner goes significantly beyond the limits described by John Locke according to which the people might be justified in overthrowing a government. As was noted in chapter 3, for Locke, one condition for justifying revolution would be that a majority of the people supported it. However, for Spooner, rebellion is justified simply because one feels morally correct. Shively (1971d, 6) argues that Spooner shared this looser criterion with twentieth century guerrilla movements such as French Résistance fighters, Ho Chi Minh, and Ché Guevara.

Moreover, those who sympathize with the slaves should inflict upon the slaveholders the same torments of which they had been guilty. In particular, Spooner argues that emancipators should whip slave owners, and imprison

them until they agreed to sign manumission papers. Holding some slaveholders as hostages would encourage other owners to agree to make their own slaves free. It might be argued, Spooner concedes, that courts would later hold contracts made under duress to be invalid. But treaties made between winning nations and the vanquished were surely quite similar and are generally tolerated. The loser must accept the winner's terms (Spooner 1858). Twenty years later, however, in a letter that Spooner wrote to the Rev. O. B. Frothingham, he notes that he was often "disgusted" with John Brown for wanting to use violence, rather than legal argumentation, to end slavery.[5] After emancipation, former slaves would be entitled to compensation, and the property of their former owners and of those who helped them, should be taken to provide such benefits. In the meantime, supporters of the slaves should find work for them, do business with them, sell them weapons, and help them appropriate the land that they worked. For Spooner, the crime of slavery automatically made the slaves the owners of the property on which they were imprisoned (Spooner 1858).

Abolitionists had founded the Republican Party in 1854, but Spooner always questioned the motives of this new faction. He viewed the typical Republican as secretly sanctioning slavery "so long as the slaves are but kept out of his sight" (Spooner 1860a, 3). Spooner argues that his allies would be able to go way beyond the limits of abolitionism accepted by the Republican Party. Additionally, they would be morally fulfilled, because they "will have the satisfaction of doing your part towards bringing into life a great, free, and happy people, where now all is crime, tyranny, degradation, and death" (Spooner 1858).

Spooner's plan was regarded as an exceptionally bold venture, and it received its fair share of criticism. Even erstwhile supporters were reluctant to give it their endorsement. For example, a confidant named Francis Jackson wrote to Spooner as follows:

> I have received your "Plan for the Abolition of Slavery," the same I think that you shew me in Mass. Some weeks since, being much engaged then, I did not give it much consideration; now that I have it before me in print, with the form of a petition appended, I have more fully considered it, and I ought to tell you, why I cannot accept your "Plan," or join your "League."[6]

Another correspondent, W. Fredrick, described the plan as "'Quixotic' in the extreme."[7] While expressing sympathy with the slaves, Lewis Tappan pointed out that, as a Christian, he opposed violence.[8]

The newspapers were much more scathing. The *Boston Post* responded in this manner:

> The "League of Freedom" circular . . . proposes to liberate the slaves by destroying the credit, character and power of their masters—sending emissaries among the negroes to instruct them how to emancipate them selves—marching military companies of abolitionists into slave States . . . . Too absurd to be treated seriously, and too silly to be laughed at.[9]

In even more hostile fashion, the *Boston Courier* excoriated Spooner's plan:

> From two different sources, yesterday, we received copies of an infamous handbill, bearing as its title the address—"To the non-slaveholders of the South." The handbill also contains what is called a plan for the abolition of slavery. . . . A wretch like the author of this villainous circular has an unlucky power to do infinite mischief, by thus poisoning the sentiments of large numbers of influential men in the country, and of inflicting direct damage on us at home in valuable interests, by falsely making it appear that such atrocious ideas have any hold upon the minds of the people of New England.[10]

In a *New York Tribune* column headed "From Boston," the author wrote:

> About two months ago, I got hold of a copy of a document, printed in handbill form, and designed for circulation South and North, which contained a plan for the abolition of Slavery, on one side, and an address to the non-slaveholders of the South on the other. It was a sore trial of my constancy in keeping a secret to refrain from making you acquainted with its contents, but the injunction not to divulge . . . was enough to train me, to say nothing of my reluctance to give publicity to the document. The gentleman who favored me with a copy said that the Postmasters would, of course, suppress them as soon as they discovered what they were, and that the alarm would soon be spread by the newspapers. He assented to this, and added that he did not expect to circulate the appeal extensively at his own expense. The newspapers, and especially the Southern and Pro-Slavery papers would save him that trouble and expense . . . . You will see by *The Boston Courier* of to-day that he calculated shrewdly.[11]

More sanguine, the *Boston Atlas* pointed out that the Circular was addressed to slaves, almost all of whom lacked the ability to read and did not receive mail.[12]

Responding to slavery with terrorist attacks was of course the method used by the abolitionist John Brown, who knew Spooner and who had read

the Circular. Not surprisingly, the question of Spooner's involvement in Brown's Harpers Ferry raid has been discussed. John Brown set out "to beat up a slave quarter in Virginia."[13] His goal was to make a big clamor against slavery by attacking an arsenal belonging to the federal government, capturing slave owners, and freeing slaves (Villard 1943, 427–28). However, the raid was poorly planned, and although they initially succeeded in capturing an armory and taking some prisoners, Brown and most of his supporters were soon captured, sentenced to death by hanging, and executed.

After the Harpers Ferry incident, Spooner attempted to persuade the Governor of Virginia, Henry A. Wise, to spare the life of his acquaintance. Admitting to being the main author of the Circular, though not identifying himself, Spooner rejected any connection between the Circular and Brown's unsuccessful raid. He also denied knowing what Brown was going to do at the time he wrote the document. He said that it was only afterwards, when other people, who had read the Circular, came to him to ask him not to distribute it any more because it would endanger Brown, that Spooner realized there was a raid being planned. Later, even Brown himself met with Spooner to ask him to stop circulating the Circular, and it was at that point that Spooner says he made up his mind to stop sending it out to the South. Still, he argued, even at that point, despite wanting to cooperate with Brown, he knew little about what the man was actually planning to do.[14] This account matches what W. E. B. Du Bois says in his biography of Brown, that the latter kept pretty quiet about his Harpers Ferry plans:

> With characteristic reticence Brown revealed his whole plan to no one, and many of those close to him received quite different impressions, or rather read their own ideas into Brown's careful speech. (Du Bois [1909] 2001, 155)

Similarly, C. Vann Woodward (1965, 100–1) notes that even the "Secret Six"—Thomas Wentworth Higginson, Samuel G. Howe, Theodore Parker, Franklin B. Sanborn, Gerrit Smith, and George L. Stearns—Northern patricians who financed Brown and provided weaponry for use at Harpers Ferry—also did not possess specific information about the attack.

In his entreaty to Governor Wise, Spooner points out that John Brown acted as a matter of conscience, thereby invoking "the legal principle, that there is no crime where there is no criminal intent."[15] In his *A Defence for Fugitive Slaves*, Spooner had used the same argument to defend persons ignorant of a law that they had broken, a line of reasoning that, as was noted in chapter 4, he also used to justify the practice of jury nullification:

> But in truth the maxim, that ignorance of the law excuses no one, is a very abused and unjust one, *if applied without any limitation*, inasmuch as it would nullify the first principle of criminal law, that there can be no crime without a criminal intent. The rule is also one, which judges themselves could not live under, for they are every day committing errors, which would be crimes, if ignorance were not a legal excuse. (Spooner 1850a, 46; see also Spooner 1852, 181–82)

Although Governor Wise was not persuaded by Spooner's entreaty, he held a favorable view of Brown's character:

> And they are themselves mistaken who take him to be a madman . . . . He is a man of clear head, of courage, of fortitude and simple ingenuousness. (Governor Henry A. Wise, speech on October 21, 1859, quoted by Villard 1943, 455)

In addition to writing to Wise to ask for clemency for Brown, Spooner also proposed a less courteous remedy, a plan to kidnap the governor and hold him hostage until Brown was freed. In his biography of John Brown, historian Oswald Garrison Villard describes the plot as follows:

> To Lysander Spooner, and active Abolitionist of Boston, belongs the credit of devising, early in November, an audacious scheme of retaliation upon the South for the sentencing to death of John Brown, which, had it been carried into execution, would . . . have terrified the South as much as the Harper's Ferry affair. It was nothing less than a plan to kidnap Governor Wise some evening in Richmond; to carry him aboard a sea-going tug, and hold him either on the high seas, or in some secret Northern place, as hostage for the safety of Brown. (Villard 1943, 514)

Eventually, Spooner witnessed the emancipation for which he had campaigned, but he remained skeptical about the motivations that had led many to accept or endorse such an outcome. Being free is more dangerous to a person's survival than life as a slave, he notes, and the slaves were freed, he concludes, because this was a way that owners could pass the responsibility for their upkeep onto someone else—the slaves themselves.

> In process of time, the robber, or slave holding, class—who had seized all the lands, and held all the means of creating wealth—began to discover that the easiest mode of managing their slaves, and making them profitable, was *not* for each slaveholder to hold his specified number of slaves, as he had done before, and as he would hold so many cattle, but to give them so much liberty as would throw upon themselves (the slaves) the responsibility of their

> own subsistence, and yet compel them to sell their labor to the land-holding class—their former owners—for just what the latter might choose to give them. (Spooner 1882a, 18)

Here, Spooner notes the precariousness of the former slaves' ability to support themselves. Now, they could starve, whereas as slaves, they were at least guaranteed some rudimentary form of food and shelter. In fact, this risk engendered by life under capitalism also created a range of problems for the former slaveholders, because now some of them could only survive by begging or stealing. Spooner notes that, in consequence, draconian laws were passed, not only to regulate the wages that former slaves were to be paid but also to punish theft and vagrancy (Spooner 1882a, 18–19). We might conclude here that, in one respect, not much has changed today: society still does not address adequately the issue of subsistence within a capitalist system.

Notes

1. Letter from Lysander Spooner to Gerritt Smith dated September 8, 1844, from Athol, Massachusetts, Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library.
2. *Scott v. Sandford.* 1857. 19 How. 393.
3. Cordato and Gable (1984, 281) call Spooner a methodological individualist, an allied, though less committed position that does not commit the adherent to the view subscribed to by ontological individualists, which is that all social phenomena are reducible to explanations in terms of human individuals. Methodological individualists merely choose to employ individualistic explanations. For a more detailed account of the difference between the two positions, see Goldstein 1958, 1959.
4. Several versions of both sides of the circular, in Spooner's handwriting, are contained in the Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library.
5. Letter from Lysander Spooner to Rev. O. B. Frothingham dated February 26, 1878, from Boston, Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library.
6. Letter from Francis Jackson to Lysander Spooner dated December 3, 1858, from Boston, Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library.
7. Letter from W. Fredrick to Lysander Spooner dated December 25, 1859, from Boston, Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library.
8. Letter from L. Tappan to Lysander Spooner dated October 7, 1858, from Boston, Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library.

9. Editorial, *Boston Post*, January 29, 1859, Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library.

10. Editorial, *Boston Courier*, January 28, 1859, Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library.

11. "From Boston," column, "From our own correspondent," *New York Tribune*, January 28, 1859, Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library.

12. *Boston Atlas*, January 31, 1859, Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library.

13. As described in a letter from Hugh Forbes, May 14, 1858 to Dr. S. G. Howe, quoted by Villard 1943, 313.

14. Lysander Spooner, writing anonymously as "The Author of the Circular," letter to Henry A. Wise, Governor of Virginia, November 2, 1859, Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library; see also the letter from Lysander Spooner to Rev. O. B. Frothingham dated February 26, 1878, from Boston, Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library.

15. Lysander Spooner, writing anonymously as "The Author of the Circular," letter to Henry A. Wise, Governor of Virginia, November 2, 1859, Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library.

CHAPTER SIX

Religion, Morality, and the Legal Profession

Spooner's first two published works addressed religious, rather than political topics, but there is much of interest to be found in these early essays, *The Deist's Immortality, and an Essay on Man's Accountability for His Belief* (1834) and *The Deist's Reply to the Alleged Supernatural Evidences of Christianity* (1836). Much of the author's style, independence, and skepticism can be observed in these initial forays.

Like his father, Asa (1788–1851), Lysander Spooner was a Deist, and his early writings show significant disdain for Christianity. Asa Spooner is believed to have named his first son Leander and his second Lysander (after the Spartan admiral) due to a desire to avoid giving his children Christian names (Shively 1971a, 15).

Influenced by contemporary philosophical and political thinkers such as Francis Bacon and John Locke, the Deists believed that the claims of religion must, like everything else, be amenable to reason and science, and this led them to reject the notion that Jesus could be the Son of God. Similarly, their commitment to scientific explanation meant that they rejected the idea of resurrection or of miracles in general (Walters 1992, 6–13, 29). Deism began in Britain, and then moved to the United States. Thomas Jefferson and Thomas Paine were both Deists, and Benjamin Franklin was also, though less openly, and less consistently so (Walters 1992, 28).

That Spooner was a Deist as well as an American Anarchist is not surprising. The two belief systems have some common philosophical perspectives. Citing Spooner's Deistic publications, McElroy notes:

> Freethought insisted that all spiritual matters be left to the judgment of those involved, with no State involvement. There was deep intersection between Individualism and freethought. (McElroy (2003, 13, fn. 15)

Similarly, Reichert points out:

> In rebellion against established religion and its teachings, Deism sought to find God and truth in nature rather than in ecclesiastical authority or the pronouncements of venerable seers or lawgivers. (Reichert 1976, 24)

Spooner's belief in natural law and natural justice, and the concomitant conviction that each person could determine for him or herself what is right and wrong is entirely compatible with Deist belief. As Walters writes:

> Influenced by the liberalism of thinkers such as Locke and the French savants, the American deists were strident republicans and ardent defenders of a humanism that stressed freedom of conscience and expression, separation of church and state, and universal public education. Their social agenda corresponded with their underlying conviction that reality was rational and that human beings were capable of fully understanding its mysteries. (Walters 1992, 44)

By the time that Spooner wrote these two anticlerical essays, the U.S. Deism movement had almost died out (Walters 1992, 4, 34, 358). In them, he shows his dislike for Christian and, occasionally, Muslim beliefs, often pointing out the irrationality of key Christian tenets. Reichert calls Spooner's arguments "one of the most vitriolic attacks ever directed at organized religion by an American" (Reichert 1976, 118). Abolitionist Spooner ally Gerrit Smith remarked more soberly in a letter to Spooner that the latter had failed to appreciate the value of the New Testament.[1]

Responding to the view that people are being tested during their time on Earth, Spooner questions whether this can really be considered a probationary life when many people—for example, babies—die without their character being determined (1834, 6). Babies who die unchallenged have not had an opportunity to do wrong, yet their fate is somehow settled. Doubting that Jesus was the son of God, or Mohammed even a prophet, he argues that Jesus likely just fainted during crucifixion, and cites as evidence the fact that Pilate expressed surprise at the Savior's swift death. The books of Matthew and

Luke both contain genealogies tracing Jesus' family back to David. However, they contradict one another, which suggests that, between them, there must be error in the Gospels. Spooner goes for the even more radical option: both gospels, he contends, are probably fake, casting further doubt on the truthfulness of the rest of the Bible (1836, 45–46). Much that is written in the Bible is so unlikely, Spooner contends, that what it really indicates is that God has not actually communicated with humankind at all (1834, 7, 12, 14; 1836, 52).

Not only is the Bible full of lies, but, Spooner argues, it is psychologically damaging to people. It undermines human character and destroys people's confidence. For human beings do not do wrong out of a desire to be sinful (1834, 9). Therefore, people are at worst only morally negative, not wicked as they are represented in the Bible. In fact, "every man's character is more or less positively good" (1834, 10). Moreover, to accept the claims of the Bible is humiliating to humans, for it takes away people's self-respect, and that self-respect is needed for people to be virtuous (1834, 11). Moreover, biblical teachings even fail to tell us to do what is right, or else not to do what is wrong—which, Spooner says, is what they should do if they are genuinely moral—rather, they promise only rewards or punishment (1836, 17). The Deists typically resisted the threatening, self-centered God of the Bible, whose greatest desire was to humiliate humans and have them grovel in His presence, and Spooner presents no exception to that perspective here (Walters 1992, 29).

Spooner argues that many of Jesus' followers actually came to lose confidence in him. He was a cowardly person, who consciously avoided coming into contact with anyone who might want to harm him (Alexander 1950, 203; Spooner 1836, 13–14). When he was alive, Jesus had few allies. Consequently, most of his supporters could have no direct evidence that Jesus performed miracles. Indeed, most Christians would surely deny the existence of miracles if they were not afraid of God hurting them if they were more forthright. The irony, then, is that the strongest argument for the truth of miracles is the Bible's warning that "he that believeth not shall be damned" (Spooner 1836, 20).

Except for Paul, who admittedly was bold, Spooner says that the Apostles were simple, credulous people of no social standing, who were consequently easily hoodwinked by Jesus (1836, 1–2). Not that Paul was a bright person either, but he did at least possess ambition and shrewdness (1836, 3). Similarly, the people that Jesus, Paul, and the other Apostles preached to were gullible, superstitious, and lacking in common sense and self-esteem (1836, 4).

What Spooner has to say about Christianity can be difficult for believers to accept, for he seems to be trying as hard as he possibly can to be critical

about values that many take very seriously. Nonetheless, the reader can witness in these early treatises the application of an unfettered logic, regardless of consequences, that favors no belief or person in a disinterested quest for the truth, something that the author believed was the right of every human being, as a corollary of natural law: to decide ethical issues for oneself by experimentation and argument.

Vices

Such a viewpoint is well illustrated in Spooner's ethical writings, the main source of which is his *Vices are Not Crimes* (1875), a monograph that was published anonymously, and which, as was noted in the introduction, was not included in the Shively complete works of Spooner collection.

In that work, Spooner makes a crucial distinction between vices and crimes. He argues that *crimes* involve purposely, maliciously damaging someone else's person or property. *Vices*, on the other hand, have no such purpose, and usually no such consequence. We punish crimes, Spooner (1875, 23) argues, to protect the liberty of others. By punishing vices, however, we simply take away people's liberty without servicing any useful societal goal. Spooner's distinction is something like the modern libertarian distinction between victimless and other crimes, which asserts that victimless actions should not be considered crimes at all. However, Spooner is something less than a full-blown libertarian on moral matters. For example, as was noted previously, he says that it is reasonable to ban the sale of alcohol to a person who gets violent when they become drunk (34–35). Beyond this, he believes there should be no regulation of alcohol sales, opposing Massachusetts' restrictive nineteenth-century liquor laws.

Spooner uses "vices" in an unusual way, defining "vice" in a fashion that does not fit with people's usual understanding of the word. Most people who hear the word "vice" would not think of it meaning people's victimless activities, but would rather consider it to denote a human fault that is at least immoral or amoral, or even depraved. However, if we make a list of "vices," Spooner does seem to be talking about the same things as other people. For example, some of the vices that he lists are: alcohol, opium, tobacco, sexual relations, prostitution, gambling, dueling, boxing, suicide, and assisting a suicide (34, 37, 38). Curiously, for Spooner (34), "corset-wearing" is also a vice, perhaps because it is a deceptive practice. But is it a sleight of hand to denote such behavior as vice, since for him this appellation has the specific meaning of an activity that is not injurious to other people or their property?

In other words, he appears to be begging the question of whether or not such vices are really victimless crimes.

Does excessive drinking not affect the quality of life for a spouse, children, and other family members—maybe even for neighbors, an employer, and coworkers? For Spooner, the defining moment when a vice becomes a problem is when it "interferes with" someone else's "safe and quiet use or enjoyment of what is rightfully his own" (35). His response to this issue is simply to argue that family men will in most cases want to take care of their dependents. If they do not, then it is just too bad:

> A man enters into no moral or legal obligation with his wife or children to do anything for them, except what he can do consistently with his own personal freedom, and his natural right to control his own property at his own discretion. (Spooner 1875, 44)

Such a dismissive answer is probably not going to be very convincing for most readers, especially today. He is content with the nineteenth-century view, that wives and children are but members of the household of a married man, beholden to the consequences of decisions that he happens to make on their behalf, even if they are not well-served by that custom. Spooner, who never married, might have avoided this narrow perspective, not only because he had nothing personally to gain from sticking to the conventional wisdom of the time, but also because, for a person who is so original and radical about many matters, it is surprising that he is content with an answer that is unimaginative and ordinary at best.

In chapter 4, it was noted that Spooner's belief that any person can identify natural justice using reason seems, in his hands, to take him close to advocacy of situation ethics. A similar conclusion can be reached following his consideration of vices, although this time his perspective is noticeably less extensive than that of Jean-Paul Sartre, the French philosopher with whom situation ethics is most linked. This is because Spooner limits the personal freedom to determine what is right or wrong to the area defined by vices; in matters of crimes, on the other hand, where other persons and their property may be hurt, there is no similar right to act. It is only the line between virtue and vice that may be determined by each and every person, not the line between vice and crime (24).

In support of his position of moral relativism, Spooner notes both that what is a vice for one person may be considered to be a virtue by another, and also that the question of what constitutes a vice can often be seen as "a question of degree," with moderate involvement in many vices not necessarily

constituting a vice (24, 26). Social drinking, for example, is not the same as lying face down in the gutter in abject drunkenness. Spooner argues that, in the United States, there is a societal predisposition toward this position, with the natural rights of liberty and the pursuit of happiness inferring that each American is free to determine where the line between virtue and vice should be drawn (25). Moreover, that line may lie in different places for different individuals. Not surprisingly, despite many centuries of attempting to grapple with such questions, different cultures have come to conflicting conclusions about what is and what is not a vice (26).

There is a practical side to allowing people to make up their own mind, too. Vices are so common, Spooner comments, that if governments were determined to punish each transgressor equally, quite possibly every single person would be in jail (29). It should perhaps be noted here that quite a lot of people are in jail today in the United States, many of them being punished for their involvement in vice. In Novemver 2009, the U.S. federal prison population was 209,000 compared with 24,000 in 1980 (Fields 2009), and the country as a whole had the highest percentage of incarceration in the world. An even higher increase over this time period has occurred for women, a third of whom are now jailed for drug offenses, which Spooner would consider vices rather than crimes (Chaddock 2003). In the meantime, presidents and other politicians who have themselves been personally involved in vice have apparently been free to draw their own lines, even though they today profess virtue. For Spooner, this inconsistency is an abomination, for it is the failures of politicians, who themselves indulge in many vices that go unpunished, which perpetuate the very conditions under which ordinary citizens, out of desperation, are often driven to indulge in vice—for example, people drink to excess because of the hopelessness of their condition, locked out of the labor market because of a drug conviction:

> When the laws shall all be so just and equitable as to make it possible for all men and women to live honestly and virtuously, and to make themselves comfortable and happy, there will be much fewer occasions than now for charging them with living dishonestly and viciously. (Spooner 1875, 41)

Furthermore, he argues, a government that attempts to criminalize vice exceeds the powers that individuals possessed in the state of nature, which is unwarranted. Politicians can have no authority beyond the natural rights that people possessed before the onset of government, for to assume this authority is to violate natural law, if only because no subject of any democratic government would ever grant such excessive authority if asked (29–30).

Not surprisingly, given the anticlericalism that characterizes his early writings about religion, Spooner does not feel that religious leaders should be the ones to decide moral matters for the individual. Referring to "an old man at Rome," he remarks that the Pope is right to credit "miraculous inspiration" for his prognostications about what is right or wrong, for, without divine intervention, these matters are much too difficult for anyone to come to final conclusions about, and thus people should remain free to make up their own minds (27). Since Spooner does not believe that anyone has in fact benefited from consulting God, his conclusion is that we must resign ourselves to the fact that moral truths are subjective and should be left to each individual to determine.

The Legal Profession

At the age of 25, Spooner set up shop as an attorney in Worcester, Massachusetts. This was illegal because Massachusetts law at the time said that to be a lawyer, you had to either have a law degree and serve a three-year apprenticeship, or, without the degree, serve a five-year apprenticeship (Smith 1992, viii; Spooner 1835, 1). Spooner refused to satisfy either requirement. Calling such rules "peremptory," he argued that *anyone* has the right to earn his or her income as a lawyer. One of his complaints was that there was no test to ascertain whether anything had been learned during legal apprenticeships. Moreover, in Worcester County, where he was living, students were also not allowed to work during the apprenticeship. Spooner points out the likely effect of such a rule, which is to handicap the poor, struggling, but educated person who was trying to rise to the level of attorney. Not surprisingly, he observed, people in Massachusetts who succeeded in becoming attorneys tended to come from the comfortable classes (Spooner 1835, 1).

Spooner wanted anyone over 21 and "of decent and good moral character" to be able to serve as an attorney (Spooner 1835, 2). His position is that if everyone had the right to be an attorney, then lawyers would *have* to behave morally to stay in business. The extra competition would stop other lawyers from covering up their colleagues' malpractice. Spooner argues that it is wrong for states to give some citizens *privileges*, such as the privilege to practice law. It is far better to interpret the question in terms of an obligation to respect everyone's *right* to be able to choose who represents them, including the right to represent oneself (2). Also, from Spooner's perspective, it is wrong for the rich to be protected from competition from poor people. Inadequate lawyers manage to make a living because the rules governing who can

be an attorney insulate those who succeed in qualifying for the profession. This is because laws restricting the practice of law make attorneys scarce commodities; however, there is no good reason to interfere in the market in this way. Allowing more people to enter the market will, Spooner (2) contends, instead improve the overall quality of the output. Then a more open legal community would be less apt to hush up complaints against members of the profession (3).

Lawyers who have roots in poverty would be less willing to exploit their clients, says Spooner:

> Who are they, that have ever been ready to extort, in the shape of bills of costs, poverty's last shilling, and to feed and clothe, if not to pamper and bedeck, their own families, with food and dresses snatched and stripped from the mouths and bodies of the poor man's children? I think they will rarely, if ever, be found to have been those, who had been reared in poverty themselves; who had known by experience the difficulties of that condition, and who had witnessed and participated in the disheartening embarrassments, occasioned to the poor man's family, by the deduction of the lawyer's bill from their scanty earnings. The poor, and those who have been poor, have too much feeling to get wealth, or even their subsistence, by grinding each other's faces. (Spooner 1835, 2)

For Spooner (2), the role of money in the selection of who becomes an attorney has the effect of excluding some people who would naturally be outstanding attorneys, and including people who, though they can afford the entrance fee to the profession, have little aptitude for it. It is clear here that, for Spooner, the legal profession should achieve a higher calling, serving the public. Here, once again, we see the leftist side of Spooner jousting with his libertarian side, which advocates open access to the market for provision of legal services. for he is also keen to emphasize the importance of attorneys to the community and to protecting the rights of poor people. He wants the legal profession to serve society, something that, he is sure, significant numbers of the bar's membership currently fail to do. There is no argument here that, given an open market that would allow anyone to become an attorney, they would then be able to make as much money as possible. His view of lawyers is nothing like his position on intellectual property.

Spooner's arguements led the state to repeal the apprenticeship provision. However, he had other problems with the state laws regulating attorneys, for lawyers in Massachusetts had to swear allegiance to the state and Constitution, and also inform the court if they knew of an intention to commit a falsehood.

With respect to the first of these issues, Spooner argued that lawyers should have the same right as anyone else to criticize the government, and thereby not have to swear allegiance to "a bad government" (4). He contends:

> I object to the oath to bear true allegiance to the Commonwealth, and to support the Constitution. The right of rebelling against what I may think a bad government, is as much my right as it is of the other citizens of the Commonwealth, and there is no reason why lawyers should be singled out and deprived of this right. My being a friend or an avowed enemy of the constitution has nothing to do with the argument of a cause for a client, or with any other of my professional labors, and therefore it is nothing but tyranny to require of me an oath to support the constitution, as a condition of my being allowed the ordinary privileges for getting my living the way I choose. It will be soon enough, after I shall have been convicted of treason, to refuse me the common privileges, or take from me the common rights of a citizen. It is the right of the citizen to decry and expose the character of the constitution, and if possible to bring it into contempt and abhorrence in the minds of the people, without forfeiting any of the ordinary privileges of citizens—and the recognition of this right constitutes one of the greatest safeguards of the public liberty. (Spooner 1835, 4)

With respect to the second point, he objects that attorneys are *not* supposed to be government informers, that they are meant to "defend the rights and interests of [their] clients"—in other words, even if they are lying. Drawing attention to the tension that lies between the roles of defense attorneys, on the one hand, as advocates for the accused, and, on the other hand, as officers of the court, he complains:

> I object, in the next place, to the oath, which the attorney is required to take, that "if he know of an intention to commit any falsehood in Court, he will give knowledge thereof to the Justices of the Court, or some of them, that it may be prevented." I do not choose to be made an informer in this manner, against men with whose matters I have nothing to do. That is not what a lawyer goes to Court for—he goes there to defend the rights and interests of his clients, and for nothing else—and he has a right so to do, and to have all the ordinary facilities for doing it afforded to him, without this odious service being exacted of him. (Spooner 1835, 2)

Spooner gave up being an attorney soon after he earned the right to practice, leaving these issues unresolved. It should be pointed out that they

remain significant questions today, even if their impact is seldom explored. An attorney cannot effectively serve both his or her client and also the state that has brought the client up on charges. Without an unfettered right of the accused to loyal counsel, surely no prosecution can be fair. Of course, as chapter 4 demonstrates, Spooner did have a potential solution to that problem, which was jury nullification.

For Spooner, the legacy of natural law and justice permeates matters of religion, ethics, and the actions of attorneys who attempt to defend ordinary people on trial for violating man-made regulations that are crafted to serve the interests of corrupt elites. Each person must assess the significance of received teachings such as the Bible and the Koran, and ask what value those sacred texts can have for him or her. Each person must determine the dividing line between virtue and vice as he or she sees it, at a specific time, in a particular place and culture, with the benefit of hindsight, and with the ability to experiment and make mistakes, even though others may not approve. Each person must retain the right to go to court to defend him or herself, or others, to argue the law as that person sees it, and to invoke the protection of natural rights that the government may never take away. Moreover, each member of the jury also retains an ancient obligation to judge the merits of the law and be willing to acquit, regardless of the evidence the government chooses to promote. For Spooner, nature has made the individual strong and free, while the tendency of government is constantly to usurp power that should always reside elsewhere. That is the tension that lies at the heart of American Anarchism and the writings of its largely forgotten exponent.

Note

1. Gerrit Smith, letter to Lysander Spooner, July 3, 1862, Lysander Spooner manuscripts collection, New York Historical Society, www.lysanderspooner.org/letters_new.htm (accessed May 1, 2004).

Bibliography

Works by Lysander Spooner

Manuscript Collections

Lysander Spooner manuscripts collection, Department of Rare Books and Manuscripts, Boston Public Library.

Lysander Spooner manuscripts collection, New York Historical Society.

Books and Articles

Spooner, Lysander. 1834. *The Deist's Immortality, and An Essay on Man's Accountability for His Belief*. In Spooner 1971.

———. 1835. *To the Members of the Legislature of Massachusetts*. In Spooner 1971.

———. 1836. *The Deist's Reply to the Alleged Supernatural Evidences of Christianity*. In Spooner 1971.

———. 1839. *Spooner vs. M'Connell, et al*. In Spooner 1971.

———. 1843. *Constitutional Law, Relative to Credit, Currency, and Banking*. In Spooner 1971.

———. 1844. *The Unconstitutionality of the Laws of Congress Prohibiting Private Mails*. In Spooner 1971.

———. 1846. *Poverty: Its Illegal Causes and Legal Cure. Part 1*. In Spooner 1971.

———. 1850a. *A Defence for Fugitive Slaves, Against the Acts of Congress of February 12, 1793, and September 18, 1850*. In Spooner 1971.

———. 1850b. *Illegality of the Trial of John W. Webster*. In Spooner 1971.

———. 1850c. *What Caused the Reduction of Postage? Ought He To Be Paid?* In Spooner 1971.

———. 1852. *An Essay on the Trial by Jury*. In Spooner 1971.

———. 1855. *The Law of Intellectual Property; or an Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas*. In Spooner 1971.
———. 1858. *A Plan for the Abolition of Slavery/To the Non-Slaveholders of the South*. In Spooner 1971.
———. 1860a. *Address of the Free Constitutionalists to the People of the United States*. In Spooner 1971.
———. 1860b. *The Unconstitutionality of Slavery*. In Spooner 1971.
———. 1861. *A New System of Paper Currency*. In Spooner 1971.
———. 1862. *Our Mechanical Industry, As Affected by Our Present Currency System: An Argument for the Author's 'New System of Paper Currency.'* In Spooner 1971.
———. 1864. *Considerations for Bankers, and Holders of United States Bonds*. In Spooner 1971.
———. 1867a. *No Treason, No. 1*. In Spooner 1971.
———. 1867b. *No Treason, No. II. The Constitution*. In Spooner 1971.
———. 1869. *Thomas Drew vs. John M. Clark*. In Spooner 1971.
———. 1870. *No Treason, No. VI. The Constitution of No Authority*. In Spooner 1971.
———. 1873. *A New Banking System. The Needful Capital for Rebuilding the Burnt District*. In Spooner 1971.
———. 1875. *Vices Are Not Crimes*. In Spooner 1992.
———. 1877a. *Our Financiers: Their Ignorance, Usurpations, and Frauds*. In Spooner 1971.
———. 1877b. *The Law of Prices: A Demonstration of the Necessity for an Indefinite Increase of Money*. In Spooner 1971.
———. 1878. *Gold and Silver as Standards of Value: The Flagrant Cheat in Regard to Them*. In Spooner 1971.
———. 1879. *Universal Wealth: Shown to be Easily Attainable. Part First*. In Spooner 1971.
———. 1880. *Revolution: The Only Remedy for the Oppressed Classes of Ireland, England, and Other Parts of the British Empire. No. 1*. In Spooner 1971.
———. 1882a. *Natural Law; or the Science of Justice: A Treatise on Natural Law, Natural Justice, Natural Rights, Natural Liberty, and Natural Society; Showing that All Legislation Whatsoever Is an Absurdity, a Usurpation, and a Crime. Part First*. In Spooner 1971.
———. 1882b. *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*. In Spooner 1971.
———. 1884. *A Letter to Scientists and Inventors, on the Science and Justice, and Their Right to Perpetual Property in Their Discoveries and Inventions*. In Spooner 1971.
———. 1886. *A Letter to Grover Cleveland, on His False Inaugural Address, the Usurpations and Crimes of Lawmakers and Judges, and the Consequent Poverty, Ignorance, and Servitude of the People*. In Spooner 1971.

———. 1971. *The Collected Works of Lysander Spooner*. 6 vols. Ed. Charles Shively. Weston, Mass.: M and S Press.
———. 1992. *The Lysander Spooner Reader*. San Francisco: Fox and Wilkes.

Secondary Sources

Alexander, A. John. 1950. "The Ideas of Lysander Spooner." *New England Quarterly* 23:200–217.
Avrich, Paul. 1978. *An American Anarchist: The Life of Voltairine de Cleyre*. Princeton, N.J.: Princeton University Press.
Avrich, Paul. 1988. *Anarchist Portraits*. Princeton, N.J.: Princeton University Press.
Baran, Madeleine. 2003. "A Brief History of *The Masses*." *Brooklyn Rail*, April. www.thebrooklynrail.org/express/april03/masses.html (April 17, 2004).
Babington, Charles. 2001. "In Early Hours: Bush Ordered Military to Shoot Down Airliners." *Washington Post*, September 16. www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A39629-2001Sep16&notFound=true (December 19, 2009).
Barker, Sir Ernest, ed. 1960. *Social Contract: Essays by Locke, Hume, and Rousseau*. London: Oxford University Press.
Barnet, Todd. 1993. "New York Considers Jury Nullification: Informing the Jury of Its Common Law Right to Decide Both Facts and Law." *New York State Bar Journal* 65:40–44.
Barnett, Randy E. 1997. "Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation." *Pacific Law Journal* 28:977–1014.
Barnett, Randy E. 2004. *Restoring the Lost Constitution: The Presumption of Liberty*, Princeton, N.J.: Princeton University Press.
Barnett, Randy E. 2007. "Libertarianism and Legitimacy: A Reply to Huebert." *Journal of Libertarian Studies* 19:71–78.
Biskupic, Joan. 1999. "In Jury Rooms, a Form of Civil Protest Grows." *Washington Post*, February 8.
Biskupic, Joan, and Elder Witt. 1997. *The Supreme Court and Individual Rights*. 3rd ed. Washington, D.C.: Congressional Quarterly.
Blight, David W. 1989. *Frederick Douglass' Civil War: Keeping Faith in Jubilee*. Baton Rouge: Louisiana State University Press.
Bolinger, Brenda. 2004. "John Edwards Speaks to Cheers at Pomona College." *Claremont Courier*, February 28. www.claremont-courier.com/mt/archives/000431.html (April 26, 2004).
Boyer. William W. 1983. *America's Virgin Islands: A History of Human Rights and Wrongs*. Durham, N.C.: Carolina Academic Press.
Brooks, Frank H., ed. 1994. *The Individualist Anarchists: An Anthology of* Liberty *(1881–1908)*. New Brunswick, N.J.: Transaction.

Brown, Darryl K. 1997. "Jury Nullification within the Rule of Law." *Minnesota Law Review* 81:1149–1200.

Buchanan, James, and Gordon Tullock. 1965. *The Calculus of Consent*. Ann Arbor: University of Michigan Press.

Butler, Paul D. 1995. "Racially Based Jury Nullification: Black Power in the Criminal Justice System." *Yale Law Journal* 105:677–725.

Butler, Paul D. 1997. "Race-Based Jury Nullification: Case-in-Chief." *The John Marshall Law Review* 30:911–922.

Call, Lewis. 1998. "Locke and Anarchism: The Issue of Consent." *Anarchist Studies* 6:3–19.

Carter, April. 1971. *The Political Theory of Anarchism*. New York: Harper and Row.

Caskey, John P. 2002. "Bringing Unbanked Households into the Banking System." January. www.brook.edu/dybdocroot/es/urban/capitalxchange/article10.htm (April 26, 2004).

Chaddock, Gail Russell. 2003. "U.S. Notches World's Highest Incarceration Rate." August 18. *Christian Science Monitor*. www.csmonitor.com/2003/0818/p02s01-usju.html (December 19, 2009).

Chiuri, Maria Concetta, and Tullio Jappelli. 2001. "Financial Market Imperfections and Home Ownership: A Comparative Study." Centre for Economic Policy Research, Discussion Paper #2717. March. www.worldbank.org/wbi/banking/capmarkets/housing/pdf/Chiuri-Jappelli_2001.pdf (April 26, 2004).

Clark, John. 2000. "The Social Psychology of Jury Nullification." *Law and Psychology Review* 24:39–57.

Cleland, Nancy. 2002. "Screener Rule Challenged." *Los Angeles Times*, January 18.

Cockburn, Alexander. 2002. "Death, Juries and Scalia." *The Nation*, July 15.

Conrad, Clay S. 1998. *Jury Nullification: The Evolution of a Doctrine*. Durham, N.C.: Carolina Academic Press.

Conrad, Clay S. 1999. "Jury Nullification: Jurors Flex Their Muscles." *USA Today Magazine*, November.

Cook, Thomas I. 1947. "Introduction." In Two Treatises of Government *with* Patriarcha *by Sir Robert Filmer*, ed. Timothy I. Cook. New York: Hafner.

Cordato, Roy, and Wayne Gable. 1984. "Lysander Spooner, Natural Rights, and Public Choice." *American Behavioral Scientist* 28:279–288.

Coughlin, Michael E. 1982. "The Jury: Defender or Oppressor?" In *Benjamin R. Tucker and The Champions of* Liberty*: A Centenary Anthology*, ed. Michael E. Coughlin, Charles H. Hamilton, and Mark A. Sullivan. St. Paul, Minn.: Michael E. Coughlin and Mark Sullivan Publishers.

Coughlin, Michael E., Charles H. Hamilton, and Mark A. Sullivan, eds. 1982. *Benjamin R. Tucker and The Champions of Liberty: A Centenary Anthology*. St. Paul, Minn.: Michael E. Coughlin and Mark Sullivan Publishers.

Crispo, Lawrence W., Jill M. Slansky, and Geanene M Yriarte. 1997. "Jury Nullification: Law versus Anarchy." *Loyola of Los Angeles Law Review* 31:1–61.

Curti, Merle. 1943. *The Growth of American Thought*. New York: Harper.
Dann, B. Michael. 2007. ""Must Find the Defendant Guilty" Jury Instructions Violate the Sixth Amendment." *Judicature* 91:12–19.
DeLeon, David. 1978. *The American as Anarchist: Reflections on Indigenous Radicalism*. Baltimore: Johns Hopkins University Press.
Diamond, Shari Seidman. 2007. "Dispensing with Deception, Curing with Care: A Response to Judge Dann on Nullification." *Judicature* 91:20–25.
Dictionary of American Biography. 1935. "Spooner, Lysander." Vol. XVII, 466–467.
Do, Long X. 2000. "Jury Nullification and Race-Conscious Reasonable Doubt: Overlapping Reifications of Commonsense Justice and the Potential *Voir Dire* Mistake." *UCLA Law Review* 47:1843–1883.
Donald, David. 1960. *Charles Sumner and the Coming of the Civil War*. New York: Alfred A. Knopf.
Du Bois, W. E. B. [1909] 2001. *John Brown*. Ed. David Roediger. New York: Modern Library.
Eltzbacher, Paul. 1958. *Anarchism: Exponents of the Anarchist Philosophy*. Ed. James J. Martin. Trans. Steven T. Byington. New York: Chip's Bookshop.
Engle, Eric. 2008. "Death Is Unconstitutional: How Capital Punishment Became Illegal in America—A Future History." *Pierce Law Review* 6:485–514.
Farber, Daniel A. 2004. "The Story of *McCulloch*: Banking on National Power." In *Constitutional Law Stories*, ed. Michael C. Dorf. New York: Foundation.
Federal Financial Institutions Examination Council. 2004. "Community Reinvestment Act: Background and Purpose." February 11. www.ffiec.gov/cra/history.htm (April 26, 2004).
Fernandes, Steven M. 1997. "Jury Nullification and Tort Reform in California: Eviscerating the Power of the Civil Jury by Keeping Citizens Ignorant of the Law." *Southwestern University Law Review* 27:99–124.
Fields, Gary. 2009. "U.S. Commission to Assess Mandatory Sentences." *Wall Street Journal*, November 12.
Goldsmith, M. M. 1966. *Hobbes's Science of Politics*. New York: Columbia University Press.
Goldstein, L. J. 1958. "The Two Theses of Methodological Individualism." *British Journal for the Philosophy of Science* 9:1–11.
Goldstein, L. J. 1959. "Mr. Watkins on the Two Theses." *British Journal for the Philosophy of Science* 10:240–41.
Goodman, Paul. 1968. "The Black Flag of Anarchism." *New York Times Magazine*, July 14.
Goodyear, Lucille J. 1981. "Spooner vs. U.S. Postal System." *American Legion Magazine*, January.
Hardin, Garrett. 1968. "The Tragedy of the Commons." *Science* 162:1243–48.
Hinnant, Charles H. 1977. *Thomas Hobbes*. Boston: Twayne.
Hiskes, Richard P. 1982. *Community without Coercion: Getting Along in the Minimal State*. Newark: University of Delaware Press.

Hobbes, Thomas. [1651] 1981. *Leviathan*. Ed. C. B. Macpherson. Harmondsworth, Middlesex, U.K.: Penguin.

Horowitz, Irving Louis. 1964. "Introduction." In *The Anarchists*, ed. Irving Louis Horowitz. New York: Dell.

Horowitz, Irwin A. 2008. "Jury Nullification: An Empirical Perspective." *Northern Illinois University Law Review* 28:425–451.

Howard, Timothy. 2004. Executive speech presented at the HSBC Central Bank Conference, Miami, Fla. March 2. www.fanniemae.com/media/speeches/speech.jhtml?repID=/media/speeches/2004/speech_238.xml&p=Media&s=Executive+Speeches&counter=2 (April 25, 2004).

Hsu, Spencer S. 2006. "Katrina Report Spreads Blame: Homeland Security, Chertoff Singled Out." *Washington Post*, February 12. www.washingtonpost.com/wp-dyn/content/article/2006/02/11/AR2006021101409_pf.html (January 25, 2007).

Hume, David. 1994. *Political Essays*. Ed. Knud Haakonssen. Cambridge, U.K.: Cambridge University Press.

Jackson, LeAnna. 2002. "Race-biased premiums: African Americans receive reparations for years of disparaging insurance practices." *Black Enterprise*, June. www.findarticles.com/cf_dls/m1365/11_32/86868864/p2/article.jhtml?term= (December 18, 2009).

King, Nancy J. 1998. "Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom." *The University of Chicago Law Review* 65:433–500.

Knowles, Helen J. 2009. "'The Pen Is Mightier than the Sword': Lysander Spooner's Constitutional Response to Increasing Abolitionist Violence in the 1850s." Presented at the "John Brown Remembered: 150th Anniversary of the Raid on Harpers Ferry" conference, Harpers Ferry, W.Va.

Kropotkin, Peter. [1899] 1968. *Fields, Factories and Workshops*. Reprint. New York: Greenwood.

Kropotkin, Peter. [1906] 1990. *The Conquest of Bread*. Montréal: Black Rose.

Kropotkin, Peter. 1910. "Anarchism." *Encyclopaedia Britannica*. recollectionbooks.com/siml/library/anarchismEncyBrit.htm (December 24, 2009).

Kropotkin, Peter. [1927] 1970. *Kropotkin's Revolutionary Pamphlets*. Reprint. Ed. Roger N. Baldwin. New York: Dover.

Kropotkin, Peter. 1970. *Selected Writings on Anarchism and Revolution*. Ed. Martin A. Miller. Cambridge, Mass.: M. I. T. Press.

Lemos, Ramon M. 1978. *Hobbes and Locke: Power and Consent*. Athens: University of Georgia Press.

LeWarne, Charles Pierce. 1975. *Utopias on Puget Sound 1885–1915*. Seattle: University of Washington Press.

Liptak, Adam. 2002. "Jury Nullification Ballot Measure Would Let Defendant Put Law Itself on Trial." *Bakersfield Californian*, September 22.

Locke, John. 1965. *Two Treatises of Government*. Ed. Peter Laslett. New York: Mentor.

Macpherson C. B. 1962. *The Political Theory of Possessive Individualism*. London: Oxford University Press.

Madison, Charles A. 1943. "Benjamin R. Tucker: Individualist and Anarchist." *New England Quarterly*, 16:444–467.

Marder, Nancy S. 1999. "The Interplay of Race and False Claims of Jury Nullification." *University of Michigan Journal of Law Reform* 32:285–321.

Marsh, Margaret S. 1981. *Anarchist Women 1870–1920*. Philadelphia: Temple University Press.

Martin, James J. 1958. "Editor's Preface." In *Anarchism: Exponents of the Anarchist Philosophy* by Paul Eltzbacher. New York: Chip's Bookshop.

Martin, James J. 1970. *Men Against the State: The Expositors of Individualist Anarchism in America, 1827–1908*. Colorado Springs, Colo.: Ralph Myles.

McElroy, Wendy. 2003. *The Debates of* Liberty: *An Overview of Individualist Anarchism, 1881–1908*. Lanham, Md.: Lexington.

McFeely, William S. 1991. *Frederick Douglass*. New York: W. W. Norton.

McKinnon, John D., with Rob Wells. 2004. "Over 60 Percent of Corporations Didn't Pay Taxes: Large Firms Dodged Federal Taxes from 1996–2000 as Profits Soared." *Wall Street Journal*. hm.indymedia.org/feature/display/8364/index.php (July 31, 2009).

McNeilly, F. S. 1968. *The Anatomy of* Leviathan. New York: St. Martin's.

Miller, David. 1984. *Anarchism*. London: J. M. Dent.

Miller, John J. 2009. "'John Brown's Body Exhumed." *Wall Street Journal*, October 15.

Mills, C. Wright. 1956. *The Power Elite*. London: Oxford University Press.

Minnesota Department of Administration. 2002. "South Dakota Rejects Jury Nullification." December. www.mnplan.state.mn.us/issues/scan.htm?Id=3198&Print=Y (April 29, 2004).

Moore, Molly. 2006. "Micro-Credit Pioneer Wins Peace Prize." *Washington Post*, October 14. www.washingtonpost.com/wp-dyn/content/article/2006/10/13/AR2006101300211_pf.html (January 25, 2007).

Morgan, R. Alex. 1997. "Jury Nullification Should Be Made a Routine Part of the Criminal Justice System, but It Won't Be." *Arizona State Law Journal* 29:1127–1143.

Morland, Dave, and Terry Hopton. 1999. "Locke and Anarchism: A Reply to Call." *Anarchist Studies* 7:51–67.

Motavalli, Jim. 2003. "Rights from Wrongs: A Movement to Grant Legal Protection to Animals is Gathering Forces." *Hartford Advocate*, February 13. www.hartfordadvocate.com/gbase/News/content?oid=oid:1714 (April 16, 2004).

Nehru, Jawaharlal. [1946] 1989. *The Discovery of India*. Centenary Edition. New Delhi, India: Oxford University Press.

Oliver, Aaron T. 1997. "Jury Nullification: Should the Type of Case Matter?" *Kansas Journal of Law and Public Policy* 6:49–74.

O'Neill, Timothy P. 1997. "The Role of Race-Based Jury Nullification in American Criminal Justice: Foreword." *John Marshall Law Review* 30:907–910.

O'Rourke, James J. 1974. *The Problem of Freedom in Marxist Thought*. Dordrecht, Netherlands: D. Reidel.

Ostrowski, James. 2001. "The Rise and Fall of Jury Nullification." *Journal of Libertarian Studies* 15:89–115.

Parmenter, Andrew J. 2007. "Nullifying the Jury: 'The Judicial Oligarchy' Declares War on Jury Nullification." *Washburn Law Journal* 46:379–428.

Phillips, Wendell. [1847] 2002. *Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery*. Reprint. Ann Arbor, Mich.: UMI Research Press.

Proudhon, Joseph-Pierre. 1846. *The Philosophy of Misery*. Vol. 1. Reprint. McLean, Va.: IndyPublish.com.

Rader, Melvin. 1967. "Marx's Interpretation of Art and Aesthetic Value," *British Journal of Aesthetics* 7:237–49.

Regan, Tom. 1983. *The Case for Animal Rights*. Berkeley: University of California Press.

Regional Alliance for Information Networking. N. d. "Rural Communities Distance Learning and Telemedicine Project: Cuyama Valley." www.rain.org/dlt/cuyama/counsel.html (December 18, 2009).

Reichert, William O. 1976. *Partisans of Freedom: A Study in American Anarchism*. Bowling Green, Ohio: Bowling Green University Popular Press.

Ridley, Matt. 1997. *The Origins of Virtue: Human Instincts and the Evolution of Cooperation*. New York: Viking.

Roark, Eric. 2007. "Is Michael Otsuka's Conception of Robust Self-Ownership too Robust for a Left-Libertarian?" Presented at the annual meeting of the American Philosophical Association Pacific Division, San Francisco.

Roark, Eric. 2008. "Using and Coming to Own: A Left-Proprietarian Treatment of the Just Use and Appropriation of Common Resources." Ph.D. diss. University of Missouri–Columbia.

Rocker, Rudolf. 1989. *Anarcho-Syndicalism*. London: Pluto.

Rothbard, Murray N. 2000. *Egalitarianism as a Revolt against Nature and other Essays*. 2nd ed. Auburn, Ala.: Ludwig von Mises Institute.

Rubenstein, Arie M. 2006. "Verdicts of Conscience: Nullification and the Modern Jury Trial." *Columbia Law Review* 106:959–993.

Scottish Executive. 2001. "Building for the Long Term: Understanding the Impact of the Terrorist Attacks on the Scottish Economy." October 5. www.scotland.gov.uk/library3/economics/bflt-05.asp (April 26, 2004).

Shively, Charles. 1971a. "Biography." In *The Collected Works of Lysander Spooner*, by Lysander Spooner, ed. Charles Shively. Weston, Mass.: M and S Press.

Shively, Charles. 1971b. "Introduction" to *A Letter to Grover Cleveland, on His False Inaugural Address, the Usurpations and Crimes of Lawmakers and Judges, and the Consequent Poverty, Ignorance, and Servitude of the People*. In The Collected Works of Lysander Spooner, by Lysander Spooner, ed. Charles Shively. Weston, Mass.: M and S Press.

Shively, Charles. 1971c. "Introduction" to *A New Banking System. The Needful Capital for Rebuilding the Burnt District*. In *The Collected Works of Lysander Spooner*, by Lysander Spooner, ed. Charles Shively. Weston, Mass.: M and S Press.

Shively, Charles. 1971d. "Introduction" to *A Plan for the Abolition of Slavery/To the Non-Slaveholders of the South*. In *The Collected Works of Lysander Spooner*, by Lysander Spooner, ed. Charles Shively. Weston, Mass.: M and S Press.

Shively, Charles. 1971e. "Introduction" to *Constitutional Law, Relative to Credit, Currency, and Banking*. In *The Collected Works of Lysander Spooner*, by Lysander Spooner, ed. Charles Shively. Weston, Mass.: M and S Press.

Shively, Charles. 1971f. "Introduction" to *Natural Law; or the Science of Justice: A Treatise on Natural Law, Natural Justice, Natural Rights, Natural Liberty, and Natural Society; Showing that All Legislation Whatsoever Is an Absurdity, a Usurpation, and a Crime. Part First*. In *The Collected Works of Lysander Spooner*, by Lysander Spooner, ed. Charles Shively. Weston, Mass.: M and S Press.

Shively, Charles. 1971g. "Introduction" to *No Treason, No. I*. In *The Collected Works of Lysander Spooner*, by Lysander Spooner, ed. Charles Shively. Weston, Mass.: M and S Press.

Shively, Charles. 1971h. "Introduction" to *No Treason, No. II. The Constitution*. In *The Collected Works of Lysander Spooner*, by Lysander Spooner, ed. Charles Shively. Weston, Mass.: M and S Press.

Shively, Charles. 1971i. "Introduction" to *Poverty: Its Illegal Causes and Legal Cure. Part 1*. In *The Collected Works of Lysander Spooner*, by Lysander Spooner, ed. Charles Shively. Weston, Mass.: M and S Press.

Shively, Charles. 1971j. "Introduction" to *Revolution: The Only Remedy for the Oppressed Classes of Ireland, England, and Other Parts of the British Empire. No. 1*. In *The Collected Works of Lysander Spooner*, by Lysander Spooner, ed. Charles Shively. Weston, Mass.: M and S Press.

Shively, Charles. 1971k. "Introduction" to *The Law of Intellectual Property; or an Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas*. In *The Collected Works of Lysander Spooner*, by Lysander Spooner, ed. Charles Shively. Weston, Mass.: M and S Press.

Shively, Charles. 1971m. "Introduction" to *The Unconstitutionality of the Laws of Congress Prohibiting Private Mails*. In *The Collected Works of Lysander Spooner*, by Lysander Spooner, ed. Charles Shively. Weston, Mass.: M and S Press.

Shively, Charles. 1971n. "Introduction" to *Thomas Drew vs. John M. Clark*. In *The Collected Works of Lysander Spooner*, by Lysander Spooner, ed. Charles Shively. Weston, Mass.: M and S Press.

Shively, Charles. 1971o. "Introduction" to *Universal Wealth: Shown to be Easily Attainable. Part First*, by Lysander Spooner, ed. Charles Shively. Weston, Mass.: M and S Press.

Shively, Charles. 1982. "Lysander Spooner, Tucker and *Liberty*." In *Benjamin R. Tucker and The Champions of* Liberty*: A Centenary Anthology*, ed. Michael E.

Coughlin, Charles H. Hamilton, and Mark A. Sullivan. St. Paul, Minn.: Michael E. Coughlin and Mark Sullivan Publishers.

Shone, Steve J. 2000. "Kropotkin's Just Community: A Counterexample to the Theory that Liberal Democracy has Triumphed." *Contemporary Justice Review* 3:187–204.

Shone, Steve J. 2004a. "Cultural Relativism and the Savage: The Alleged Inconsistency of William Graham Sumner." *American Journal of Economics and Sociology* 63:697–715.

Shone, Steve J. 2004b. "Lysander Spooner, Jury Nullification, and Magna Carta." *Quinnipiac Law Review* 22:651–669.

Shone, Steve J. 2007. "Lysander Spooner's Critique of the Social Contract." *Anarchist Studies* 15:157–178.

Shone, Steve J. 2009. "Benjamin R. Tucker: Anarchism, Tyranny, and Despair." Presented at the annual meeting of the Northeastern Political Science Association, Philadelphia.

Singer, Peter. 2002. *Animal Liberation*. New York: Ecco.

Smith, George H. 1992. "Introduction." In *The Lysander Spooner Reader* by Lysander Spooner. San Francisco: Fox and Wilkes.

Smith, M. B. E. 1973. "Is There a Prima Facie Obligation to Obey the Law?" *Yale Law Journal* 82:950–976.

Sreenivasan, Gopal. 1995. *The Limits of Lockean Rights in Property*. New York: Oxford University Press.

Stilz, Anna. 2009. *Liberal Loyalty: Freedom, Obligation, and the State*. Princeton, N.J.: Princeton University Press.

Strom Law Firm. 2001. "Lawsuit Claims that Liberty Life Insurance Company Charged African Americans Higher Rates." December 15. www.stromlaw.com/FSL5CS/classactions/classactions_llic.asp (April 26, 2004).

Sumner, William Graham. [1883] 1986. *What Social Classes Owe to Each Other*. Caldwell, Idaho: Caxton.

Sumner, William Graham, and Albert Galloway Keller. 1927. *The Science of Society*. 4 vols. New Haven, Conn.: Yale University Press.

Symes, Lillian, and Travers Clement. 1972. *Rebel America: The Story of Social Revolt in the United States*. Boston: Beacon.

Ten Broek, Jacobus. [1951] 2002. *The Antislavery Origins of the Fourteenth Amendment*. Reprint. Ann Arbor, Mich.: UMI Research Press.

Tucker, Benjamin R. [1887] 1971. "Our Nestor Taken From Us." In *The Lysander Spooner Reader* by Lysander Spooner. San Francisco: Fox and Wilkes.

Tucker, Benjamin R. [1897] 2005. *Instead of a Book: By a Man Too Busy to Write One*. Reprint. New York: Elibron.

Tucker, Benjamin R. [1899] 1972. "The Attitude of Anarchism toward Industrial Combinations." In *State Socialism and Anarchism and Other Essays*, ed. James J. Martin. Colorado Springs, Colo.: Ralph Myles.

Tucker, Benjamin R. 1926. *Individual Liberty: Selections From the Writings of Benjamin R. Tucker*. Ed. C. L. S. New York: Vanguard.

Tucker, Benjamin R. 2008. *The Life of Benjamin R. Tucker: Disclosed by Himself in the Principality of Monaco at the age of 74*. Unpublished manuscript. Transcribed by Wendy McElroy. www.wendymcelroy.com/e107_plugins/content/content.php?content.57 (October 24, 2009).

Ullman, Carrie. 2005. "How a Defense Attorney Can Advocate for Her Client Without Encouraging Jury Nullification." *Georgetown Journal of Legal Ethics* 18:1097–1109.

U.S. Department of Transportation. Bureau of Transportation Statistics. 2000. "The Changing Face of Transportation." www.bts.gov/publications/the_changing_face_of_transportation/chapter_02.html (December 19, 2009).

Vallentyne, Peter. 1999. "Le libertarisme de gauche et la justice." *Revue économique* 50:859–878.

Vallentyne, Peter, Hillel Steiner, and Michael Otsuka. 2005. "Why left-Libertarianism is Not Incoherent, Indeterminate, or Irrelevant: A Reply to Fried." *Philosophy and Public Affairs* 33:201–215.

Van Parijs, Philippe, ed. 1992. *Arguing for Basic Income*. New York: Verso.

Villard, Oswald Garrison. 1943. *John Brown: 1800–1853*. Revised edition. New York: Alfred A. Knopf.

Walters, Kerry S. 1992. "Introduction." In *The American Deists: Voices of Reason and Dissent in the Early Republic*, ed. Kerry S. Walters. Lawrence: University Press of Kansas.

Warren, Josiah. 1852. *Equitable Commerce: A New Development of Principles as Substitutes for Laws and Governments, for the Harmonious Adjustment and Regulation of the Pecuniary, Intellectual, and Moral Intercourse of Mankind*. Reprint. New York: Burt Franklin.

Weber, Max. 1970. *From Max Weber: Essays in Sociology*. Ed. H. H. Gerth and C. Wright Mills. London: Routledge and Kegan Paul.

Weinstein, Jack B. 1998. "The Many Dimensions of Jury Nullification." *Judicature* 81:168–171.

Weiser, Benjamin. 1997. "Court Attacks Practice of Acquittals as Social Protest." *New York Times*, 21 May.

Williams, Colin. 2004. "Contra Spooner." *Journal of Libertarian Studies* 18:1–9.

Wolff, Robert Paul. 1976. *In Defense of Anarchism. With a Reply to Jeffrey H. Reiman's* In Defense of Political Philosophy. New York: Harper and Row.

Woodward, C. Vann. 1965. "John Brown's Raid and the Abandonment of Nonviolence." In *The Abolitionists*, ed. Richard O. Curry. New York: Holt, Rinehart and Winston.

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