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Before all else, Lysander Spooner remained a lawyer. Whatever his subject of concern — religion, banking, slavery, or politics — he approached it as a lawyer. Although Spooner maintained something of a law practice throughout his life, his was not the usual lawyer's career. For one thing, he remained in continuous poverty. His writings, even the widely read works against slavery, seldom returned living expenses. In 1849, he estimated that he had subsisted for the previous five years on only two hundred dollars a year. Opportunities were available. His friends were unanimous in feeling that his legal talent applied to a conventional law practice could earn a fortune. And friends could have obtained for him a civil service (or rather political patronage) job in the Boston custom house. "But," Spooner objected in a letter to Gerrit Smith, "I should consider it less dishonest to go upon the highway and make my living by force than to get it in . . . these ways — for I should then, in addition to the robbery, practice the fraud of pretending to do it legally."¹

That Spooner possessed a fine legal ability can be seen in the cases in which he did provide legal counsel. Liberty and justice were always involved. The earliest example (of which we have few details) is his defense in the 1840's of some Worcester area Millerites, who believed the world was ending. They had been arrested on vagrancy charges and refused to

¹ Lysander Spooner to Gerrit Smith, June 25, 1849. Spooner Papers, New York Historical Society.

retain a lawyer. Spooner voluntarily defended them and successfully obtained their release.²

Spooner also volunteered legal arguments for John Webster, who was tried for the murder of Professor George Parkman of Harvard. Spooner did not know Webster and did not defend him in court, but he did publish *Illegality of the Trial of John W. Webster* (1850). This pamphlet questioned the justice of capital punishment and denounced the discrimination practiced in the selection of Webster's jury. Spooner neither saved Webster from hanging nor convinced Massachusetts of the injustice of its hanging laws. Nonetheless, his defense, logical and concise, is an example of the truest kind of legal argument, one in favor of justice.

Similarly impressive and somewhat more successful were Spooner's efforts in defense of fugitive slaves and their friends who defied the Fugitive Slave Act of 1850. The first case involved William L. Chaplin, who was arrested with others in Maryland by Washington, D. C. police, for helping two slaves of Robert Toombs and Alexander Stephens to escape. Chaplin's bail was set at nineteen thousand dollars by Maryland authorities, and at six thousand dollars by Washington authorities. Spooner was retained to defend Chaplin; Chaplin turned out, however, to be something of a scoundrel. He jumped bail and went to New York with a lady friend; the abolitionists were left to pay his forfeited bail money. Spooner resigned from the case in understandable ill-humour.³

Except in the Chaplin case, Spooner never received a fee or appeared in court on behalf of victims of the fugitive slave act; he did, however, provide free counsel and advice in several cases. In 1853, he sent Lewis Tappan arguments that were used in the case of Jane Trainer, a minor. Abolitionists in New York hoped to save her from slavery by arguing that all children were born free and could not inherit the status of slave.⁴ James Birney wrote from Cincinnati for legal advice to answer Judge John McLean's ruling in circuit court upholding the Fugitive Slave Act.⁵ And in 1860, Spooner himself brought the case of John Anderson to Gerrit Smith's attention. Anderson, a fugitive slave had killed a farmer in upstate New York, who was trying to capture him; Anderson escaped to Toronto, and the United States began extradition proceedings. At Spooner's urging, Gerrit Smith travelled to Toronto and provided Anderson aid. Anderson remained

² *Liberty*, May 28, 1887.

³ Lysander Spooner to Gerrit Smith, April 23, 1850. Spooner Papers, New York Historical Society. William R. Smith to Gerrit Smith, February 2, 1851. Smith Papers, Syracuse University Library.

⁴ Lewis Tappan to Lysander Spooner, May 28, 1853. Spooner Papers, New York Historical Society.

⁵ James Birney to Lysander Spooner, August 18, 1853. Spooner Papers, New York Historical Society.

safe in Canada so the legal question could never be tried in the British courts, "whether there be any English law that would make it murder for a man to kill another who was attempting to seize him as a slave?"⁶

Spooner wrote an account of Passmore Williamson's case in the *Liberator*, which showed his concern for the arrogation of judicial power to the government. Judge Kane had imprisoned Williamson because he would not give evidence regarding his help to a fugitive, and Williamson's rights not to incriminate himself were denied. He was sent to prison without a jury trial, and in fact without a sentence, "until he shall purge himself of the contempt by making true answers to such interrogations as the honorable court shall address to him . . ."⁷ To Spooner this was no better than Star Chamber justice. Much later, Spooner defended his old abolitionist friend Thomas Drew in another contempt case—for being in contempt of the Massachusetts state legislature. Again, Spooner argued that if any government had power to imprison a citizen at will, such a government did not deserve a citizen's obedience.

Repulsed by the injustices of the law as practiced by judges and lawyers—particularly in the cases of the fugitive slave act—Spooner, in the summer of 1851, began work on his masterpiece, *Trial by Jury*. He had already written extensively on the unconstitutionality of laws on currency, slavery, and capital punishment. Discouraged by the failure of any court to uphold his arguments, Spooner now abandoned the legal fraternity, in the main, and turned to the community at large—to the people who would sit on juries and who would or should decide right and wrong. Published in the late fall of 1852, *Trial by Jury* provided a legal brief for the rights of the people against the government.

Having given up on the judiciary, Spooner in *Trial by Jury* essentially abandons the United States Constitution. In a letter to Gerrit Smith, he later argued that the Constitution could not be supported by "honest men who know its true character." Spooner felt at liberty, nonetheless, "to interpret the constitution, *on those points wherein it is right*, and then appeal to those, who profess to be governed by it, to act up to their own standard."⁸

Although he cites constitutional provisions protecting jury trial, Spooner attempts in *Trial by Jury* to define a more basic, more universal law—by which the Constitution itself can be judged. In this search, he turned to the Magna Carta—the great foundation of English and American common law, and the guarantor of trial by jury. Generally, the American lawyer's

⁶ Lysander Spooner to Gerrit Smith, January 1, 1861. Spooner Papers, New York Historical Society.

⁷ Lysander Spooner, "Kane and Williamson," *Liberator*, November 9, 1855.

⁸ Lysander Spooner to Gerrit Smith, March 12, 1856. Spooner Papers, New York Historical Society.

attitude toward our Constitution resembles the Protestant's attitude toward the Bible: supposedly everything there is pure and complete; accretions and deviations must be seen as heretical. Spooner rejected the Constitution (much as he rejected the Bible and Christianity), but the Protestant habit of mind prevailed. In the Magna Carta, he found, as had leaders in the Reformation, the pure form, the true law. Trial by jury, as sanctified by King John in 1214, had an impure and imperfect reign, for (like the early church) evil men perverted it. As early as 1285, the English government abrogated the principles of Magna Carta; since that time, according to Spooner's analysis, English jury trials have been illegal imitations of the true process of justice. (*Trial by Jury*, p. 148)

Such an enshrinement of the Magna Carta was no more ancestor worship or antiquarianism than was the Reformation. Even if the Magna Carta could have been shown to be a fake, Spooner would not have been perplexed. He turned to that document because he hoped to find ensconced there basic law—before government and history had had an opportunity to twist justice into unjust forms. The true law was not in the document but the document enunciated the true, universal law. Magna Carta had existed long before 1214: "For centuries before the charter was granted," Spooner wrote, "its main principles constituted 'the Law of the Land,'—the fundamental and constitutional law of the real, which the kings were sworn to maintain." (*Trial by Jury*, p. 201) The charter only declared and protected the laws of nature. The document itself was not sacred, but it was a source where we could see the flow of justice unencumbered by excrescences.

Magna Carta showed that even "in that dark age," with "the comparative infancy of other knowledge," men could clearly grasp "the principles of natural equity." It was a "beautiful and impressive illustration" that men's minds have "clear and coincident ideas of the elementary principles, and the paramount obligation, of justice." (*Trial by Jury*, p. 85)

Spooner had a clear notion of "the principles of natural equity;" these were spelled out in his early writings—particularly in parts of *The Unconstitutionality of Slavery* (1845–1847), which are reprinted in *Trial by Jury*. His ideas on natural law—of its expression in the common law and common sense, and of its self-evidence—were all widely accepted. These were cornerstone principles of the eighteenth century Enlightenment, and are prominent in Blackstone, the Bible for American lawyers. Principles of natural law are also prominent in the works of the many writers on "natural" and "moral" philosophy who dominated American thought and education before the Civil War.

Spooner's use of these ideas is in many ways orthodox; however, his arguments on the jury—based upon these ideas—arrives at some unusual

conclusions. Spooner argues that the jury should be taken randomly from among all citizens, and that it should judge not only a person's guilt or innocence, but also the guilt or innocence of the laws under which a man is charged. The jury would be judge both of law and of fact, and it alone should set sentences. Judges' opinions could be heard, but they must themselves be judged by the jury.

Rather than simply applying laws, juries would become in essence "courts of conscience;" the conscience does not need to be instructed by legal research or arcane wisdom. Spooner showed this to be true in the early courts in operation prior to Magna Carta — these were "courts of conscience, in which the juries were sole judges, administering justice according to their own ideas of it." (*Trial by Jury*, p. 78)

Among nineteenth century moral philosophers, "conscience" was an important, even preeminent, concept. Francis Wayland, in *The Elements of Moral Science* (1835), described the conscience as the judiciary branch of the moral life, which restrains:

"our appetites within such limits that the gratification of them will injure neither ourselves nor others; and . . . restricts the pursuit of happiness within such limits as shall not interfere with the happiness of others."⁹

The judgments or decisions of this faculty are not difficult to comprehend: "we are all endowed with conscience, or a faculty for discerning a moral quality in human actions, impelling us towards right and dissuading us from wrong:" moreover, "the dictates of this faculty are felt and known to be of supreme authority."¹⁰

The conscience of the community was embodied as fully in twelve randomly chosen members as it could be in any institution. Unlike all court officials, jury members were free from government pay; and thus freed, their consciences could better judge whether the government had restrained itself within limits of natural justice. The government would not be able to force anyone into obedience by seizing either their person or their property without conviction by a jury.

⁹ Francis Wayland, *The Elements of Moral Science*, Joseph Blau, ed. (Harvard, 1963), xliii, 58.

¹⁰ *Ibid.*, 74.