Free Political Institutions

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PREFACE

Perhaps the argument most frequently used by conservative believers in the convenient doctrine of leaving things as they are against those engaged in reformatory efforts of a more or less radical nature is that the "spirit and genius of American institutions" do not admit of the assimilation or acceptance of the

proposed innovations. Were one to trust them, the "American institutions" are something so clearly defined, finished, and powerful as to absolutely render it impossible for any inconsistent and discordant element to maintain a vigorous existence within the charmed circle which affords chances of life only to what necessarily and logically flows as a consequence from the fundamental principles supporting the peculiar civilization of this "best government on the face of the earth." We are asked to look upon all that "is," if not as unqualifiedly right and perfect, then as relatively so in the sense of its being the unavoidable outcome of primary conditions.

This fact alone would amply justify our curiosity to learn thoroughly the essence and import of these "institutions," especially since manifold serious evils, universally considered destructive of social equipoise and progress, seem to flourish in our midst without restraint.

But we are moved to such an inquiry by still another circumstance. Besides the easy-going conservative who hurls the epithet "un-American" at the head of anybody contemplating innocent improvements of vexatious misarrangements, there is a large class of men, earnest and determined reformers, who, in working for a gigantic plan of social reorganization, make the same claim of strict fidelity to the logic and spirit of American principles, not only as against those resisting reform as such, but also-and even with greater emphasis-as against other schools of radical reform which oppose them, not because they strive for renovation and change, but because their ideas of the needful, and the desirable, and the truly salutary differ materially. Indeed, every school of reform boasts of exclusive understanding of and jealous care for the "self-evident" maxims on which the opportunities, and possibilities, and prospects of this land of labor and freedom are built.

Now, what shall we believe? Whom shall we follow? Which of the conflicting opinions is most nearly right, if any one is so? Is everything as it should be? If not, in what direction is betterment to be sought? Are State Socialists and Nationalists right: must the function of government be enlarged and extended, and will the completion of the Jeffersonian structure consist in the triumphant adoption of the entire collectivist program? Or is Anarchism the true doctrine and the removal of the last and least vestige of State compulsion to be demanded and achieved? In a

word, what is the meaning of political freedom; whither does it lead us; with what does it inspire us?

For an answer to these important questions the reader is confidently referred to the following pages, which represent an abridgment and rearrangement of Lysander Spooner's remarkable work on "Trial by jury." At the time of its publication Mr. Spooner had no affiliation with any reform movement, and had no special cause to plead, but was simply a private American citizen, a jurist, and an unbiassed student of political science and history. His discussion of the nature, essence, logic, and maintenance of political freedom is so masterful, convincing, and conclusive that it cannot fail to enlighten public opinion on the subject and enable one to form a criterion by which to pass upon the various interpretations of the "American Idea." This work entitles Mr. Spooner to the gratitude and admiration of all the liberty-loving and tyranny-detesting. No one who aspires intelligently to defend or forcibly to assail political independence should neglect to. consider Mr. Spooner's elucidation of its real significance and character.

It is hoped that the present publication will serve yet another purpose. Many of those to whose minds individualistic views appear attractive and rational hesitate to express a positive opinion in consequence of the thousand-and-one questions of detail and practical difficulty which rush into their heads and to the settlement of which they do not see their way. Of course a casuistic philosophy is an absurdity, but generalization and abstraction are not sufficient. Life is too complex to be covered by a simple formula, though first principles we must have. Mr. Spooner successfully demonstrates that the highest justice and equity can be secured under complete freedom and that they have nothing to fear from the dissolution of the State who are prepared to do unto others as they would be done by.

One word more. As the end sought by this republication is distinct from that of the original publication, I could not avoid changes and alterations. Mr. Spooner's intention was to discredit and denounce the perversion of trial by jury and to promulgate the correct and legitimate system by which alone free political relations could be preserved. The explanation of the nature of such relations was of secondary importance. I am here, on the contrary, chiefly concerned with this side of the problem. This necessitated abridgment as well as rearrangement. I was obliged to reduce to subordination that which was dominant and to raise into

prominence that which was tributary. Lest I may be criticized for taking so unceremonious a liberty, I will anticipate my critics by requesting the reader to attribute all the merits and good qualities of this edition to Mr. Spooner's ability, while laying the responsibility for all its faults and imperfections at my door.

V. Y.

Free Political Institutions

Their Nature, Essence, and Maintenance

An Abridgment and Rearrangement of Lysander Spooner's "Trial by jury"

EDITED BY

VICTOR YARROS

LONDON

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CHAPTER 1: LEGITIMATE GOVERNMENT AND MAJORITY RULE

The theory of free government is that it is formed by the voluntary contract of the people individually with each other. This is the theory (although it is not, as it ought to be, the fact) in all the governments in the United States, as also in the government of England. The theory assumes that each man who is a party to the government, and contributes to its support, has individually and freely consented to

it. Otherwise the government would have no right to tax him for its support, for taxation without consent is robbery. This theory, then, necessarily supposes that this government, which is formed by the free consent of all, has no powers except such as all the parties to it have individually agreed that it shall have; and especially that it has no power to pass any laws except such as all the parties have agreed that it may pass.

This theory supposes that there may be certain laws that will be beneficial to all-so beneficial that all consent to be taxed for their maintenance. For the maintenance of these specific laws, in which all are interested, all associate. And they associate for the maintenance of those laws *only* in which *all* are interested. It would be absurd to suppose that all would associate, and consent to be taxed, for purposes which were beneficial only to a part, and especially for purposes that were injurious to any. A government of the whole, therefore, can have no powers except such as all the parties consent that it may have. It can do nothing except what all have consented that it may do. And if any portion of the people-no matter how large their number, if it be less than the whole-desire a government for any purposes other than those that are common to all and desired by all, they must form a separate association for those purposes. They have no right to compel any one to contribute to purposes that are either useless or injurious to himself.

Taxation without consent is as plainly robbery when enforced against one man as when enforced against millions. Taking a man's money without his consent is also as much robbery when it is done by millions of men acting in concert and calling themselves a government as when it is done by a single individual acting on his own responsibility and calling himself a highwayman. I Neither the numbers engaged in the act nor the different characters they assume as a cover for the act alter the nature of the act itself.

If the government can take a man's money without his consent, there is no limit to the additional tyranny it may practice upon him; for with his money it can hire soldiers to stand over him, keep him in subjection, plunder him at discretion, and kill him if he resists. And governments always will do this, as they everywhere and always have done, except where the Common Law principle has been established. It is therefore a first principle, a very of political freedom, that a man can be taxed only by his personal consent.

All legitimate government is a mutual insurance company, voluntarily agreed upon by the parties to it, for the protection of their rights against wrongdoers. In its voluntary character it is precisely - similar to an association for mutual protection against fire or shipwreck. Before a man will join an association for these latter purposes and pay the premium for being insured, he will, if he be a man of sense, look at the articles of the association; see what the company promises to do; what it is likely to do; and what are the rates of insurance. If he be satisfied on all these points, he will become a member, pay his premium for a year, and then hold the company to its contract. If the conduct of the company prove unsatisfactory, he will let his policy expire at the end of the year for which he has paid, will decline to pay any further premiums, and either seek insurance elsewhere or take his own risk without any insurance. And as men act in the insurance of their ships and dwellings, they would act in the insurance of their lives, liberties, and properties in the political association, or government.

The political insurance company, or government, have no more right, in nature or reason, to a man's consent to be protected by them, and to be taxed for that protection, when he has given no actual consent, than a fire or marine insurance company have to assume a man's consent to be protected by them, and to pay the premium, when his actual consent has never been given. To take a man's property without his consent is robbery; and to assume his consent, when no actual consent is given, makes the taking none the less robbery- if it did, the highwayman has the same right to assume a man's consent to part with his purse that any other man, or body of men, can have. And his assumption would afford as much moral justification for his robbery as does a like assumption on the part of the government for taking a man's property without his consent. The government's pretense of protecting him, as an equivalent for the taxation, affords no justification, It is for himself to decide whether lie desires such protection as the government offers him. If he do not desire it, or do not bargain for it, the government has no more right than any other insurance company to impose it upon him, or make him pay for it.

The agreement to be taxed would probably be entered into but for a year at a time. If in that year the government proved itself either inefficient or tyrannical, to any serious degree, the contract would not be renewed. The dissatisfied parties, if

sufficiently numerous for a new organization, would form themselves into a separate association for mutual protection. If not sufficiently numerous for that purpose, those who were conscientious would forgo all governmental protection rather than contribute to the support of a government which they deemed unjust.

The will, or the pretended will, of the majority is the last lurking place of tyranny at the present day. The dogma that certain individuals or families have a divine appointment to govern the rest of mankind is fast giving place to the one that the larger number have the right to govern the smaller; a dogma which may or may not be less oppressive in its practical operation, but which certainly is no less false or tyrannical in principle than the one it is so rapidly supplanting. Obviously there is nothing in the nature of majorities that insures justice at their hands. They have the same passions as minorities, and they have no qualities whatever that should be expected to prevent them from practicing the same tyranny as minorities, if they think it will be for their interest to do so.

There is no particle of truth in the notion that the majority have a right to rule, or exercise arbitrary power over, the minority simply because the former are more numerous than the latter. Two men have no more natural right to rule one than one has to rule two. Any single man, or any body of men, many or few, have a natural right to maintain justice for themselves, and for any others who may need their assistance, against the injustice of any and all other men, without regard to their numbers; and majorities have no right to do more than this. The relative numbers of the opposing parties have nothing to do with the question of right. And no more tyrannical principle was ever avowed than that the will of the majority ought to have the force of law, without regard to its justice; or-what is the same thing-that the will of the majority ought always to be presumed to be in accordance with justice. Such a doctrine is only another form of the doctrine that might makes right.

When two men meet one upon the highway, or in the wilderness, have they a right to dispose of his life, liberty, or property, at their pleasure simply because they are the more numerous party? Or is he bound to submit to lose his life, liberty, or property, if they demand it, simply because he is the less numerous party? Or, because they are more numerous than he, is he bound to presume that they are governed only by superior wisdom and the principles of justice, and by no selfish passion that can lead them to do him a wrong? Yet this is the principle which it is

claimed should govern men in all their civil relations to each other. Mankind fall in company with each other on the highway or in the wilderness of life, and it is claimed that the more numerous party, simply by virtue of their superior numbers, have the right arbitrarily to dispose of the life, liberty, and property of the minority; and that the minority are bound, by reason of their inferior numbers, to practice abject submission and consent to hold their natural rights-any, all, or none, as the case may be-at the mere will and pleasure of the majority; as if all a man's natural rights expired or were suspended by the operation of a paramount law the moment he came into the presence of superior numbers.

If such be the true nature of the relations men hold to each other in this world, it puts an end to all such things as crimes, unless they be perpetrated upon those who are equal or superior in number to the actors. All acts committed against persons inferior in number to the aggressors become but the exercise of rightful authority. And consistency with their own principles requires that all governments founded on the will of the majority should recognize this plea as a sufficient justification for all crimes whatsoever.

If it be said that the majority should be allowed to rule not because they are stronger than the minority, but because their superior numbers furnish a probability that they are in the right, one answer is that the lives, liberties, and properties of men are too valuable to them, and the natural presumptions are too strong in their favor, to justify the destruction of them by their fellow-men on a mere balancing of probabilities, or on any ground whatever short of certainty beyond a reasonable doubt. This last is the moral rule universally recognized to be binding upon single individuals. And in the forum of conscience the same rule is equally binding upon governments, for governments are mere associations of individuals.

Another answer is that, if two opposing parties could be supposed to have no personal interests or passions involved to warp their judgments or corrupt their motives, the fact that one of the parties was more numerous than the other (a fact that leaves the comparative intellectual competency of the two parties entirely out of consideration) might perhaps furnish a slight, but at best only a very slight, probability that such party was on the side of justice. But when it is considered that the parties are liable to differ in their intellectual capacities, and that one, or the other, or both, are undoubtedly under the influence of such passions as rivalry,

hatred, avarice, and ambition-passions that are nearly certain to pervert their judgments and very likely to corrupt their motives-all probabilities founded upon a mere numerical majority in one party or the other vanish at once; and the decision of the majority becomes, to all practical purposes, a mere decision of chance. And to dispose of men's properties, liberties, and lives by the mere process of enumerating such parties is not only as palpable gambling as was ever practiced, but it is also the most atrocious that xas ever practiced, except in matters of government. And where government is instituted on this principle (as in the United States, for example), the nation is at once converted into one great gambling establishment; where all the rights of men are the stakes, a few bold, bad men throw the dice-dice loaded with all the hopes, fears, interests, and passions which rage in the breasts of ambitious and desperate men-and all the people, from the interests they have depending, become enlisted, excited, agitated, and generally corrupted by the hazards of the game.

If the relative numbers of opposing parties afforded sufficient evidence of the comparative justice of their claims, the government should carry the principle into its courts of justice; and instead of referring controversies to impartial and disinterested men, to judges and jurors sworn to do justice, and bound patiently to hear and weigh all the evidence and arguments that can be offered on either side, it should simply count the plaintiffs and defendants in each case (where there were more than one of either), and then give the case to the majority; after ample opportunity had been given to the plaintiffs and defendants to reason with, flatter, cheat, threaten, and bribe each other, by way of inducing them to change sides. Such a process would be just as rational in courts of justice as in halls of legislation; for it is of no importance to a man who has his rights taken from him whether it is done by legislative enactment or a judicial decision.

in legislation the people are all arranged as plaintiffs and defendants in their own causes (those who are in favor of a particular law standing as plaintiffs, and those who are opposed to the same law standing as defendants); and to allow these causes to be decided by majorities is plainly as absurd as it would be to allow judicial decisions to be determined by the relative number of plaintiffs and defendants.

If this mode of decision were introduced into courts of justice, we should see a

parallel, and only a parallel, to that system of legislation which we witness daily. We should see large bodies of men conspiring to bring perfectly groundless suits against other bodies of men for large sums of money, and to carry them by sheer force of numbers; just as we now continually see large bodies of men conspiring to carry by mere force of numbers some scheme of legislation that will directly or indirectly take money out of other men's pockets and put it into their own. And we should also see distinct bodies of men, parties in separate suits, combining and agreeing all to appear and be counted as plaintiffs or defendants in each other's suits, for the purpose of eking out the necessary majority; just as we now see distinct bodies of men, interested in separate schemes of ambition or plunder, conspiring to carry through a batch of legislative enactments that shall accomplish their several purposes.

This system of combination and conspiracy would go on, until at length whole States and a whole nation would become divided into two great litigating parties, each party composed of several smaller bodies having their separate suits, but all confederating for the purpose of making up the necessary majority in each case. The individuals composing each of these two great parties would at length become so accustomed to acting together, and so well acquainted with each other's schemes, and so mutually dependent upon each other's fidelity for success, that they would become organized as permanent associations, bound together by that kind of honor which prevails among thieves, and pledged by all their interests, sympathies, and animosities to mutual fidelity and to unceasing hostility to their opponents; and exerting all their arts and all their resources of threats, injuries, promises, and bribes to drive or seduce from the other party enough to enable their own to retain or acquire such a majority as would be necessary to gain their own suits and defeat the suits of their opponents, All the wealth and talent of the country would become enlisted in the service of these rival associations; and both would at length become so compact, so well organized, so powerful,, and yet always so much in need of recruits, that a private person would be nearly or quite unable to obtain justice in the most paltry suit with- his neighbor, except on the condition of joining one of these great litigating associations, who would agree to carry through his cause, on condition of his assisting them to carry through all the others, good and bad, which they had already undertaken. If he refused this, they

would threaten to make a similar offer to his antagonist, and suffer their whole numbers to be counted against him.

Now this picture is no caricature, but a true and honest likeness. And such a system of administering justice would be no more false, absurd, or atrocious than that system of working by majorities which seeks to accomplish by legislation the same ends which in the case supposed would be accomplished by judicial decision.

Again, the doctrine that the minority ought to submit to the will of the majority proceeds, not upon the principle that government is formed by voluntary association and for an agreed purpose on the part of all who contribute to its support, but upon the presumption that all government must be practically a state of war and plunder between opposing parties, and that, in order to save blood and prevent mutual extermination the parties come to an agreement that they will count their respective numbers periodically, and the one party shall then be permitted quietly to rule and plunder (restrained only by their own discretion), and the other submit quietly to be ruled and plundered, until the time of the next enumeration.

Such an agreement may possibly be wiser than unceasing and deadly conflict, it, nevertheless, partakes too much of the ludicrous to deserve to be seriously considered as an expedient for the maintenance of civil society. It would certainly seem that mankind might agree upon a cessation of hostilities upon more rational and equitable terms than that of unconditional submission on the part of the less numerous body. Unconditional submission is usually the last act of one who confesses himself subdued and enslaved. How any one ever came to imagine that condition to be one of freedom, has never been explained. And as for the system being adapted to the maintenance of justice among men, it is a mystery that any human mind could ever have been visited with an insanity wild enough to originate the idea.

If it be said that other corporations than governments surrender their affairs into the hands of the majority, the answer is that they allow majorities to determine only trifling matters that are in their nature mere questions of discretion, and where there is no natural presumption of justice or right on one side rather than the other. They never surrender to the majority the power to dispose of or-what is practically the same thing-to determine the rights of any individual member. The rights of

every member are determined by the written compact to which all the members have voluntarily agreed.

For example. A banking corporation allows a majority to determine such questions of discretion as whether the note of A or B shall be discounted; whether notes shall be discounted on one, two, or six days in the week; how many hours in a day their banking-house shall be kept open; how many clerks shall be employed; what salaries they shall receive; and such-like matters. But no banking corporation allows a majority, or any other number of its members less than the whole, to divert the funds of the corporation to any other purpose than the one to which every member of the Corporation has legally agreed that they may be devoted; nor to take the stock of one member and give it to another; nor to distribute the dividends among the stockholders otherwise than to each the proportion which he has agreed to accept and all the others have agreed that he shall receive. Nor does any banking corporation allow a majority to impose taxes upon the members for the payment of the corporate expenses, except in such proportions as every member has consented that they may be imposed. All these questions, involving the rights of the members as against each other, are fixed by the articles of the association-that is, by the agreement to which every member has personally assented.

What is also specially to be noticed, and what constitutes a vital difference between the banking corporation and the political corporation, or government, is that in case of controversy among the members of the banking corporation as to the rights of any member, the question is determined, not by any number, either majority or minority, of the corporation itself, but by persons out of the corporation; by twelve men acting as jurors, or by other tribunals of justice, of which no member of the corporation is allowed to be a part. But in the case of the political corporation, controversies among the parties to it as to the rights of individual members must of necessity be settled by members of the corporation itself, because there are no persons out of the corporation to whom the question can be referred.

But farther. The doctrine that the majority have a right to rule proceeds upon the principle that minorities have no right in the government; for certainly the minority cannot be said to have any rights in a government so long as the majority

alone determine what their rights shall be. They hold everything, or nothing, as the case may be, at the mere will of the majority.

It is indispensable to a "free government" that the minority, the weaker party, have a veto upon the acts of the majority. Political liberty is liberty for the weaker party in a nation. It is only the weaker party who lose their liberties when a government becomes oppressive. The stronger party, in all governments, are free by virtue of their superior strength. They never oppress themselves.

Legislation is the work of this stronger party, and if, in addition to the sole power of legislating, they have the sole power of determining what legislation shall be enforced, they have all power in their hands, and the weaker party are the subjects of an absolute government.

Unless the weaker party have a veto either upon the making or the enforcement of laws, they have no power whatever in the government, and can of course have no liberties except such as the stronger party, in their arbitrary discretion, see fit to permit them to enjoy.

Suffrage, however free, is of no avail for this purpose, because the suffrage of the minority is overborne by the suffrage of the majority, and is thus rendered powerless for purposes of legislation. The responsibility of officers can be made of no avail, because they are responsible only to the majority. The minority are, therefore, wholly without rights in the government, wholly at the mercy of the majority, unless they have a veto upon such legislation as they think unjust.

Government is established for the protection of the weak against the strong. This is the principal, if not the sole, motive for the establishment of all legitimate government. Laws that are sufficient for the protection of the weaker party are of course sufficient for the protection of the stronger party, because the strong can certainly need no more protection than the weak. It is therefore right that the weaker party should be represented in the tribunal which is finally to determine what legislation may be enforced; and that no legislation shall be enforced against their consent. They being presumed to be competent judges of what kind of legislation makes for their safety and what for their injury, it must be presumed that any legislation which they object to enforcing tends to their oppression and not to their security.

There is still another reason why the weaker party, or the minority, should

have a veto upon all legislation which they disapprove. That reason is that that is the only means by which the government can be kept within the limits of the contract, compact, or constitution by which the whole people agree to establish government. If the majority were allowed to interpret the compact for themselves, and enforce it according to their own interpretation, they would of course make it authorize them to do whatever they wish to do.

But it will perhaps be said that, if the minority can defeat the will of the majority, then the minority *rule* the majority. But this is not true in any unjust sense. The minority enact no laws of their own. They simply refuse their assent to such laws of the majority as they do not approve. The minority assume no authority over the majority; they simply defend themselves. They do not interfere with the right of the majority to seek their own happiness in their own way, so long as they do not interfere with the minority. They claim simply not to be oppressed, and not to be compelled to assist in doing anything which they do not approve. They say to the majority: "We will unite with you, if you desire it, for the accomplishment of all those purposes in which we have a common interest with you. You can certainly expect us to do nothing more. If you do not choose to associate with us on those terms, there must be two separate associations. You must associate for the accomplishment of your purposes; we for the accomplishment of ours."

In this case, the minority assume no authority over the majority; they simply refuse to surrender their own liberties into the hands of the majority. They propose a union, but decline submission. The majority are still at liberty to refuse the connection and to seek their own happiness in their own way, except that they cannot be gratified in their desire to become absolute masters of the minority.

But, it may be asked, how can the minority be trusted to enforce even such legislation as is equal and just? The answer is that they are as reliable for that purpose as are the majority; they are as much presumed to have associated for that object as are the majority; and they have as much interest in such legislation as have the majority. They have even more interest in it, for, being the weaker party, they must rely on it for their security, having no other security on which they can rely. Hence their consent to the establishment of government, and to the taxation required for its support, is presumed (although it ought not to be presumed), without any express consent being given. This presumption of their

consent to be taxed for the maintenance of laws would be absurd, if they could not themselves be trusted to act in good faith in enforcing those laws. And hence they cannot be presumed to have consented to be taxed for the maintenance of any laws, except such as they are themselves ready to aid in enforcing. It is therefore unjust to tax them, unless they are eligible to seats in a jury, with power to judge of the justice of the laws.

But, it will be asked, what motive have the majority, when they have all power in their hands, to submit their will to the veto of the minority?

One answer is that they have the motive of justice. It would be unjust to compel the minority to contribute by taxation to the support of any laws which they did not approve.

Another answer is that, if the stronger party wish to use their power only for purposes of justice, they have no occasion to fear the veto of the weaker party, for the latter have as strong motive for the maintenance of just government as have the former.

Another reason is that, if the stronger party use their power unjustly, they will hold it by an uncertain tenure, especially in a community where knowledge is diffused; for knowledge will enable the weaker party to make itself in time the stronger party. It also enables the weaker party, even while it remains the weaker party, perpetually to annoy, alarm, and injure their oppressors. Unjust power, or rather power that is grossly unjust, and that is known to be so by the minority, can be sustained only at the expense of standing armies and all the other machinery of force, for the oppressed party are always ready to risk their lives for purposes of vengeance and the acquisition of their rights whenever there is any tolerable chance of success. Peace, safety, and quiet for all can be enjoyed only under laws that obtain the consent of all. Hence tyrants frequently yield to the demand of justice from those weaker than themselves as a means of buying peace and safety.

Still another answer is that those who are in the majority on one law will be in the minority on another. All, therefore, need the benefit of the veto at some time or other to protect themselves from injustice.

That the limits within which legislation would by this process be confined would be exceedingly narrow, in comparison with those it at present occupies, there can be no doubt. All monopolies, all special privileges, all sumptuary laws, all restraints

upon any traffic, bargain, or contract that was naturally lawful (such as restraints upon banking, upon traffic with foreigners, etc.), all restraints upon natural rights, the whole catalog of *mala prohibita*, and all taxation to which the taxed parties had not individually, severally, and freely consented, would be at an end, because all such legislation implies the violation of the rights of a greater or less minority. This minority would disregard, trample upon, or resist the execution of such legislation, and then throw themselves upon a jury of the whole people for justification and protection. In this way all legislation would be nullified, except the legislation of that general nature which impartially protected the rights and subserved the interests of all. The only legislation that could be sustained would probably be such as tended directly to the maintenance of justice and liberty; such, for example, as should contribute to the enforcement of contracts, the protection of property, and the prevention and punishment of acts intrinsically criminal. In short, government in practice would be brought to the necessity of a strict adherence to natural law and natural justice, instead of being, as it now is, a great battle in which avarice and ambition are constantly fighting for, and obtaining advantages over, the natural rights of mankind.

- Chapter 02 : Trial By Jury As A Palladium Of Liberty

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Their Nature, Essence, and Maintenance

An Abridgment and Rearrangement of Lysander Spooner's "Trial by jury"

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CHAPTER 2: TRIAL BY JURY AS A PALLADIUM OF LIBERTY

Such being the principles on which the government is formed, the question arises, how shall this government, when formed, be kept within the limits of the contract by which it was established? How shall this government, instituted by the whole people, agreed to by the whole people, supported by the contributions of the whole people, be confined to the accomplishment of those purposes alone which the whole people desire? How shall it be preserved from degenerating into a mere government for the benefit of a part only of those who established it and who support it? How shall it be prevented from even injuring a part of its own members for the aggrandizement of the rest? Its laws must be (or, at least, now are) passed, and most of its other acts performed, by mere agents-agents chosen by a part of the people, and not by the whole. How can these agents be restrained from seeking their own interests, and the interests of those who elected them, at the expense of the rights of the remainder of the people, by the passage and enforcement of laws partial, unequal, and unjust in their operation?

That is the great question. And the trial by jury answers it.

"The trial by jury" is a trial *by the country*-that is, by the people-as distinguished from a trial by the government.

It was anciently called trial *per pais*-that is, trial by the country. And now in every criminal trial the jury are told that the accused "has, for trial, put himself upon the country, which country you (the jury) are."

The object of this trial by the country, or by the people, in preference to a trial by the government, is to guard against every species of oppression by the government. In order to effect this end, it is indispensable that the people, or the country, judge of and determine their own liberties against the government, instead of the government's judging of and determining its own powers over the people. How is it possible that juries can do anything to protect the liberties of the

people against the government, if they are not allowed to determine what those liberties are?

Any government that is its own judge of, and determines authoritatively for the people, what are its own powers over the people, is an absolute government. It has all the powers that it chooses to exercise. There is no other, or, at least, no more accurate, definition of a despotism than this.

On the other hand, any people who judge of, and determine authoritatively for the government, what are their own liberties against the government, of course retain all the liberties they wish to enjoy. And this is freedom. At least, it is freedom to them; because, although it may be theoretically imperfect, it, nevertheless, corresponds to their highest notions of freedom.

To secure this right of the people to judge of their own liberties against the government, the jurors must be taken from the body of the people, by lot, or by some process that precludes any previous knowledge, choice, or selection of them, on the part of the government. This is done to prevent the government's constituting a jury of its own partizans or friends; in other words, to prevent the government's packing a jury with a view to maintain its own laws and accomplish its own purposes.

It is supposed that, if twelve men be taken by lot from the mass of the people, without the possibility of any previous knowledge, choice, or selection of them on the part of the government, the jury will be a fair epitome of the country at large, and not merely of the party or faction that sustain the measures of the government; that substantially all classes of opinions prevailing among the people will be represented in the jury; and especially that the opponents of the government (if the government have any opponents) will be represented there as well as its friends; that the classes who are oppressed by the laws of the government (if any are thus oppressed) will have their representatives in the jury as well as those who take side with the oppressor-that is with the government.

It is fairly presumable that such a tribunal will agree to no conviction except such as substantially the whole country would agree to, if they were present taking part in the trial. A trial by such a tribunal is therefore in effect a trial by the country. In its results it probably comes as near to a trial by the whole country as any trial that it is practicable to have without too great inconvenience and expense. And as

unanimity is required for a conviction, it follows that no one can be convicted except for the violation of such laws as substantially the whole country wish to have maintained. The government can enforce none of its laws (by punishing offenders through the verdict of juries) except such as substantially the whole people wish to have enforced. The government, therefore, consistently with the trial by jury, can exercise no powers over the people (or-what is the same thing-over the accused person, who represents the rights of the people) except such as substantially the whole people of the country consent that it may exercise. In such a trial, the country, or the people, judge of and determine their own liberties against the government, instead of the government's judging of and determining its own powers over the people.

But all this "trial by the country" would be no trial at all by the country, but only a trial by the government, if the government could either declare who may and who may not be jurors, or could dictate to the jury anything whatever, either of law or evidence, that is of the essence of the trial.

If the government may decide who may and who may not be jurors, it will of course select only its partizans and those friendly to its measures. It may not only prescribe who may and who may not be eligible to be drawn as jurors, but it may also question each person drawn as a juror as to his sentiments in regard to the particular law involved in each trial before suffering him to be sworn on the panel, and exclude him if he be found unfavorable to the maintenance of such a law.

So, also, if the government may dictate to the jury what laws they are to enforce, it is no longer a trial by the country, but a trial by the government, because the jury then try the accused, not by any standard of their own, but by a standard dictated to them by the government. And the standard thus dictated by the government becomes the measure of the people's liberties. If the government dictate the standard of trial, it of course dictates the results of the trial. And such a trial is a trial by the government. In short, if the jury have no right to judge of the justice of a law of the government, they plainly can do nothing to protect the people against the oppressions of the government, for there are no oppressions which the government may not authorize by law.

The jury are also to judge whether the laws are rightly expounded to them by the court. Unless they judge on this point, they do nothing to protect their liberties

against the oppressions that are capable of being practiced under cover of a corrupt exposition of the laws. If the judiciary can authoritatively dictate to the jury any exposition of the law, they can dictate to them the law itself, and such laws as they please, because laws are in practice one thing or another according as they are expounded.

The jury must also judge whether there really be any such law as the accused is charged with having transgressed.

The jury must also judge of the laws of evidence. If the government can dictate to a jury the laws of evidence, it can not only shut out any evidence it pleases, tending to vindicate the accused, but it can require that any evidence whatever that it chooses to offer be held as conclusive proof of any offense whatever which the government chooses to allege.

It is manifest, therefore, that the jury must judge of and try the whole case, and every part and parcel of the case, free of any dictation or authority on the part of the government. They must judge of the existence of the law; of the true exposition of the law; of the justice of the law; and of the admissibility and weight of all the evidence offered: otherwise the government will have everything its own way, the jury will be mere puppets in its hands, and the trial will be in reality a trial by the government, and not a trial by the country. By such trials the government will determine its own powers over the people, instead of the people determining their liberties against the government; and it will be an entire delusion to talk, as for centuries we have done, of the trial by jury as a "palladium of liberty," or as any protection to the people against the oppression and tyranny of the government.

Unless such be the right and duty of jurors, it is plain that, instead of juries being a palladium of liberty, a barrier against the tyranny of the government, they are really mere tools in its hands for carrying into execution any injustice and oppression it may desire to have executed.

But for their right to judge of the law, and the justice of the law, juries would be no protection to an accused person, even as to matters of fact; for, if the government can dictate to a jury any law whatever in a criminal case, it can certainly dictate to them the laws of evidence. That is, it can dictate what evidence is admissible and what inadmissible, and also what force or weight is to be given to the evidence admitted. And if the government can thus dictate to a jury the laws of

evidence, it can not only make it necessary for them to convict on a partial exhibition of the evidence rightfully pertaining to the case, but it can even require them to convict on any evidence that it pleases to offer them.

The question, then, between trial by jury as thus described and trial by the government is simply a question between liberty and despotism. The authority to judge what are the powers of the government and what the liberties of the people must necessarily be vested in one or the other of the parties themselves, because there is no third party to whom it can be entrusted. If the authority be vested in the government, the government is absolute, and the people have no liberties except such as the government sees fit to indulge them with. If, on the other hand, that authority be vested in the people, then the people have all liberties except such as the whole people choose to disclaim; and the government can exercise no power except such as the whole people consent that it may exercise.

The force and justice of the preceding argument cannot be evaded by saying that the government is chosen by the people; that, in theory, it represents the people; that it is designed to do the will of the people; that its members are all sworn to observe the fundamental or constitutional law instituted by the people; that its acts are therefore entitled to be considered the acts of the people; and that to allow a jury representing the people to invalidate the acts of the government would therefore be arraying the people against themselves.

There are two answers to such an argument.

One answer is that in a representative government there is no absurdity or contradiction, nor any arraying of the people against themselves, in requiring that the statutes or enactments of the government shall pass the ordeal of any number of separate tribunals before it shall be determined that they are to have the force of laws. Our American institutions have provided five of these separate tribunals, to wit, representatives, senate, executive, jury, and judges; and have made it necessary that each enactment shall pass the ordeal of any number of separate tribunals before its authority can be established by the punishment of those who transgress it. And there is no more absurdity or inconsistency in making a jury one of these several tribunals and giving it a veto upon the laws than there is in giving a veto to each of these other tribunals. The people are no more arrayed against themselves when a jury puts its veto upon a statute which the other tribunals have

sanctioned than they are when the same veto is exercised by the executive or the judges.

But another answer is that the government and all the departments of the government are merely the servants and agents of the people, not invested with arbitrary or absolute authority to bind the people, but required to submit all their enactments to the judgment of a tribunal more fairly representing the whole people before they carry them into execution. If the government were not thus required to submit their enactments to the judgment of the country; if, in other words, the people had reserved to themselves no veto upon the acts of the government, then the government, instead of being a mere servant and agent of the people, would be an absolute despot over the people. It would have all power in its own hands, because the power to punish carries all other powers with it. A power that can of itself, and by its own authority, punish disobedience, can compel obedience and submission, and is above all responsibility for the character of its laws. In short, it is a despotism.

And it is of no consequence to inquire how a government came by this power to punish, whether by prescription, by inheritance, by usurpation, or by delegation from the people. If it have now but got it, the government is absolute.

It is plain, therefore, that, if the people have invested the government with power to make laws that are absolutely binding and to punish transgressors, they have surrendered their liberties unreservedly into the hands of the government.

It is of no avail to say, in answer to this view of the case, that in thus surrendering their liberties the people took an oath from the government that it would exercise its power within certain constitutional limits; for when did oaths ever restrain a government that was otherwise unrestrained? Or when did a government fail to determine that all its acts were within the constitutional and authorized limits of its power, if it were permitted to determine that question for itself?

Neither is it of any avail to say that, if the government abuse its power and enact unjust and oppressive laws, the government may be changed by the influence of discussion and the exercise of the right of suffrage. Discussion can do nothing to prevent the enactment, or procure the repeal, of unjust laws, unless it be understood that the discussion is to be followed by resistance. Tyrants care nothing for discussions that are to end only in discussion. Such discussion as does not

interfere with the enforcement of their laws is but idle wind to them. Suffrage is equally powerless and unreliable. It can be exercised only periodically, and the tyranny must at least be borne until the time for suffrage comes. Besides, when the suffrage is exercised, it gives no guaranty for the repeal of existing laws that are oppressive and no security against the enactment of new ones that are equally so. The second body of legislators are likely and liable to be just as tyrannical as the first. If it be said that the second body may be chosen for their integrity, the answer is that the first were chosen for that very reason, and yet proved tyrants. The second will be exposed to the same temptations as the first and will be just as likely to prove tyrannical. Whoever heard that succeeding legislatures were, on the whole, more honest than those that preceded them? What is there in the nature of men or things to make them so? If it be said that the first body were chosen from motives of injustice, that fact proves that there is a portion of society who desire to establish injustice; and if they were powerful or artful enough to procure the election of their instruments to compose the first legislature, they will be likely to succeed equally well with the second. The right of suffrage, therefore, and even a change of legislators, guarantees no change of legislation- certainly no change for the better. Even if a change for the better actually comes, it comes too late, because it comes only after more or less injustice has been irreparably done.

But at best the right of suffrage can be exercised only periodically, and between the periods the legislators are wholly irresponsible. No despot was ever more entirely irresponsible than are republican legislators during the period for which they are chosen. They can neither be removed from their office, nor called to account while in their office, nor punished after they leave their office, be their tyranny what it may. Moreover, the judicial and executive departments of the government are equally irresponsible to the people, and are only responsible (by impeachment and dependence for their salaries) to these irresponsible legislators. This I dependence of the judiciary and executive upon the legislature is a guaranty that they will always sanction and execute its laws, whether just or unjust. Thus the legislators hold the whole power of the government in their hands, and are at the same time utterly irresponsible for the manner in which they use it.

If, now, this government (the three branches thus really united into one) can determine the validity of, and enforce its own laws, it is, for the time being, entirely

absolute and wholly irresponsible to the people.

But this is not all. These legislators and this government, so irresponsible while in power, can perpetuate their power at pleasure, if they can determine what legislation is authoritative upon the people and enforce obedience to it; for they can not only declare their power perpetual, but they can enforce submission to all legislation that is necessary to secure its perpetuity. They can, for example, prohibit all discussion of the rightfulness of their authority; forbid the use of the suffrage; prevent the election of any successors; disarm, plunder, imprison, and even kill all who refuse submission. If, therefore, the government be absolute for a day-that is, if it can, for a day, enforce obedience to its own laws-it can, in that day, secure its power for all time, like the queen who wished to reign for a day, but in that day caused the king, her husband, to be slain, and usurped his throne.

Nor will it avail to say that such acts would be unconstitutional, and that unconstitutional acts may be lawfully resisted, for everything a government pleases to do will of course be determined to be constitutional, if the government itself be permitted to determine the question of the constitutionality of its own acts. Those who are capable of tyranny are capable of perjury to sustain it.

The conclusion, therefore, is that any government that can, for a day, enforce its own laws, without appealing to the people (or to a tribunal fairly representing the people) for their consent is, in theory, an absolute government, irresponsible to the people, and can perpetuate its power at pleasure.

The trial by jury is based upon a recognition of this principle, and therefore forbids the government to execute any of its laws by punishing violators, in any case whatever, without first getting the consent of "the country," or the people, through a jury. In this way the people, at all times, hold their liberties in their own hands and never surrender them, even for a moment, into the hands of the government.

The trial by jury, then, gives to any and every individual the liberty, at any time, to disregard or resist any law whatever of the government, if he be willing to submit to the decision of a jury the questions whether the law be intrinsically just and obligatory and whether his conduct in disregarding or resisting it were right in itself. And any law which does not in such trial obtain the unanimous sanction of twelve men, taken at random from the people, and judging according to the

standard of justice in their own minds, free from all dictation and authority of the government, may be transgressed and resisted with impunity by whomsoever it pleases to transgress or resist it.

The trial by jury authorizes all this, or it is a sham and a hoax, utterly worthless for protecting the people against oppression. If it do not authorize an individual to resist the first and least act of injustice or tyranny on the part of the government, it does not authorize him to resist the last and the greatest. If it do not authorize individuals to nip tyranny in the bud, it does not authorize them to cut it down when its branches are filled with the ripe fruits of plunder and oppression.

Those who deny the right of a jury to protect an individual in resisting an unjust law of the government, deny him all legal defense whatsoever against oppression. The right of revolution which tyrants in mockery accord to mankind is no *legal* right *under* a government; it is only a natural right to overturn a government. The government itself never acknowledges this right. And the right is practically established only when and because the government no longer exists to call it in question. The right, therefore, can be exercised with impunity only when it is exercised victoriously. All unsuccessful attempts at revolution, however justifiable in themselves, are punished as treason. The government itself never admits the injustice of its laws as a legal defense for those who have attempted a revolution and failed. The right of revolution therefore is a right of no practical value except for those who are stronger than the government. So long, therefore, as the oppressions of a government are kept within such limits as simply not to exasperate against it a power greater than its own, the right of revolution cannot be appealed to and is inapplicable to the case. This affords a wide field for tyranny; and if a jury cannot intervene here, the oppressed are utterly defenseless.

It is manifest that the only security against the tyranny of the government is in forcible resistance the execution of the injustice, because the intice will certainly be executed unless forcibly resisted. And if it be but suffered to be executed, it must then be borne, for the government never makes compensation for its own wrongs.

Since, then, this forcible resistance to the injustice of the government is the only possible means of preserving liberty, it is indispensable to all legal liberty that this resistance should be legalized. If is perfectly self-evident that, where-there is no legal right to resist the oppression of government, there can be no legal liberty.

And here it is all-important to notice that, practically speaking, there can be no legal right to resist the oppressions of the government unless there be some legal tribunal other than the government, and wholly independent of and above the government, to judge between the government and those who resist its oppression, in other words, to judge what laws of the government are to be obeyed and what held for naught. The only tribunal known to our laws for this purpose is a jury. If a jury have not the right to judge between the government and those who disobey its laws, the government is absolute, and the people, legally speaking, are slaves. Like other slaves, they may have sufficient courage and strength to keep their masters somewhat in check, but they are, nevertheless, known to the law as slaves.

That this right of resistance was recognized as a common law right when the ancient and genuine trial by jury was in force is not only proved by the nature of the trial itself, but is acknowledged by history.

This right of resistance is recognized by the constitution of the United States as a strictly legal right. It is so recognized, first, by the provision that "the trial of all crimes, except in cases of impeachment, shall, be by jury"-that is, by the country, and not by the government; secondly, by the provision that "the right of the people to keep and bear arms shall not be infringed." This constitutional security for the right to keep and bear arms implies the right to use them- as much as a constitutional security for the right to buy and keep food would have implied the right to eat it. The constitution, therefore, takes it for granted that the people will judge of 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. And it is a sufficient and legal defense for a person accused of using arms against the government, if he can show, to the satisfaction of a jury, or even any one of a jury, that the law he resisted was an unjust one.

But for the right of resistance on the part of the people, all governments would become tyrannical to a degree of which few people are aware. Constitutions are utterly worthless to restrain the tyranny of governments, unless it be understood that the people will by force compel the government to keep within constitutional limits. Practically speaking, no government knows any limits to its power except the endurance of the people. But that the people are stronger than the government and will resist in extreme cases, our governments would be little, if anything, else

than organized systems of plunder and oppression. All, or nearly all, the advantage there is in fixing any constitutional limits to the power of a government is simply to give notice to the government of the point at which it will meet with resistance. If the people are then as good as their word, they may keep the government within the bounds they have set for it; otherwise it will disregard them, as is proved by the example of all our American governments, in which the constitutions have all become obsolete for nearly all purposes except the appointment of officers who at once become practically absolute.

The bounds set to the power of the government by the trial by jury are these,-that the government shall never touch the person, property, or natural or civil rights of an individual against his consent, except for the purpose of bringing him before a jury for trial, unless in pursuance and execution of a judgment or decree rendered by a jury upon such evidence, and such law, as are satisfactory to their own understandings and consciences, irrespective of all legislation of government.

- Chapter 03 : Trial By Jury As Defined By Magna Charta-Authority Of Magna Charta

Free Political Institutions

Their Nature, Essence, and Maintenance

An Abridgment and Rearrangement of Lysander Spooner's "Trial by jury"

EDITED BY
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CHAPTER 3: TRIAL BY JURY AS DEFINED BY MAGNA CHARTA.-AUTHORITY OF MAGNA CHARTA

For more than six hundred years-that is, since Magna Charta in 1215- there has been no clearer principle of English or American constitutional law than that in criminal cases it is not only the right and duty of juries to judge what are the facts, what is the law, and what was the moral intent of the accused, but that it is also their right and their primary and paramount duty to judge of the justice of the law, and to hold all laws invalid that are in their opinion unjust or oppressive, and all persons guiltless in violating or resisting the execution of such laws.

Probably no political compact between king and people was ever entered into in a manner to settle more authoritatively the fundamental law of a nation than was Magna Charta. Probably no people were ever more united and resolute in demanding from their king a definite and unambiguous acknowledgment of their rights and liberties than were the English at that time. Probably no king was ever more completely stripped of all power to maintain his throne and, at the same time resist the demands of his people than was John on the 15th day of June, 1215. Probably no king ever consented more deliberately or explicitly to hold his throne subject to specific and enumerated limitations upon his power than did John when he put his seal to the Great Charter of the liberties of England. And if any political compact between king and people was ever valid to settle the liberties of the people or to limit the power of the Crown, that compact is now to be found in Magna Charta.

To give all the evidence of the authority of Magna Charta, it would be necessary to give the constitutional history of England since the year 1215. The history would show that Magna Charta, although continually violated and evaded,

was still acknowledged as law by the government, and was held up by the people as the great standard and proof of their rights and liberties. It would show that the judicial tribunals, whenever it suited their purposes to do so, were in the habit of referring to Magna Charta as authority. And, what is equally to the point, it would show that these same tribunals, the mere tools of kings and parliaments, would resort to the same artifices of assumption, precedent, construction, and false interpretation to evade the requirements of Magna Charta, and to emasculate it of all its power for the preservation of liberty, that are resorted to by American courts to accomplish 'the same work on our American constitutions.

I take it for granted, therefore, that even if the authority of Magna Charta had rested simply upon its character as a compact between king and people, it would have been for ever binding upon the king in his legislative, judicial, and executive character; and that there was no constitutional possibility of his escaping from its restraints, unless the people themselves should freely discharge him from them.

But the authority of Magna Charta does not rest, either wholly or mainly, upon its character as a compact, For centuries before the charter was granted, its main principles constituted "the law of the land," the fundamental and constitutional law of the realm, which the kings were sworn to maintain. And the principal benefit of the charter was that it contained a written description and acknowledgment, by the king himself, of what the constitutional law of the kingdom was which his coronation oath bound him to observe.

Previous to Magna Charta this constitutional law rested mainly in precedents, customs, and memories of the people. And if the king could but make one innovation upon this law without arousing resistance and being compelled to retreat from his usurpation, he would cite that innovation as a precedent for another act of the same kind; next, assert a custom; and finally raise a controversy as to what the law of the land really was. The great object of the barons and people in demanding from the king a written description and acknowledgment of the law of the land was to put an end to all disputes of this kind, and to put it out of the power of the king to plead any misunderstanding of the constitutional law of the kingdom. And the charter no doubt accomplished very much in this way. After Magna Charta it required much more audacity, cunning, or strength on the part of the king than it had to invade the people's liberties with impunity. Still, Magna Charta, like all other

written constitutions, proved inadequate to the full accomplishment of its purpose, for when did a parchment ever have power to restrain a government that had either cunning to evade its requirements or strength to overcome those who attempted its defense? The work of usurpation, therefore, though seriously checked, still went on to a great extent after Magna Charta. Innovations upon the law of the land were still made by the government. One innovation was cited as a precedent; precedents made customs; and customs became laws so far as practice was concerned; until the government, composed of the king, the high functionaries of the Church, the nobility, a House of Commons representing the "forty shilling freeholders," and a dependent and servile judiciary, all acting in conspiracy against the mass of the people, became practically absolute, as it is at this day.

In order to judge of the object and meaning of that chapter of Magna Charta which secures the trial by jury, it is to be borne in mind that at the time of Magna Charta the king was, with immaterial exceptions, constitutionally the entire government, the sole legislative, judicial, and executive power of the nation. The executive and judicial officers were merely his servants appointed by him and removable at his pleasure. Judges were abject servants of the king. Parliament, so far as there was a parliament, was a mere council of the king. It assembled only at the pleasure of the king, sat only during his pleasure, and had no power beyond that of simply advising the king. There was no House of Commons at that time, and the people had no right to be heard, unless as petitioners.

The king was, therefore, constitutionally the government, and the only legal limitation upon his power seems to have been simply the common law, usually called "the law of the land," which he was bound by oath to maintain. This law of the land seems not to have been regarded at all by many of the kings, except so far as they found it convenient to do so or were constrained to observe it by the fear of arousing resistance. But as all people are slow in making resistance, oppression and usurpation often reached a great height; and in the case of John they had become so intolerable as to enlist the nation almost universally against him, and he was reduced to the necessity of complying with any terms the barons saw fit to dictate to him.

It was under these circumstauces that the Great Charter of English Liberties was granted. The barons of England, sustained by the common people, having the

king in their power, compelled him, at the price of his throne, to pledge himself that he would punish no freeman for a violation of any of his laws except with the consent of his peers-that is, the equals-of the accused.

The question here arises whether the barons and people intended that those peers, the jury, should be mere puppets in the hands of the king, exercising no opinion of their own as to the intrinsic merits of the accusations they should try or the justice of the laws they should be called on to enforce; whether those victorious barons, when they had their tyrant king at their feet, gave back to him his throne with full power to enact any tyrannical laws he might please, reserving only to a jury the contemptible and servile privilege of ascertaining the simple fact whether those laws had been transgressed? Was this the only restraint which they, when they had the power, placed upon the tyranny of a king whose oppressions they had risen in arms to resist? Was it to obtain such a charter as that that the whole nation had united, as it were, like one man, against their king? Was it on such a charter that they intended to rely for all future time for the security of their liberties? No. They were engaged in no such senseless work as that. On the contrary, when they required him to renounce for ever the power to punish any freeman except by the consent of his peers, they intended those peers should judge of and try the whole case on its merits, independentlv of all arbitrary legislation or judicial authority on the part of the king. in this way they took the liberties of each individual entirely out of the hands of the king, and out of the power of his laws, and placed them in the keeping of the people themselves. And this it was that made the trial by jury the palladium of their liberties.

The trial by jury, be it observed, was the only real barrier interposed by them against absolute despotism. Could this trial, then, have been such an entire farce as it necessarily must have been if the jury had had no power to judge of the justice of the laws the people were required to obey? Did it not rather imply that the jury were to judge independently and fearlessly as to everything involved in the charge, and especially as to its intrinsic justice, and thereon give their decision whether the accused might be punished? The reason of the thing, no less than the historical celebrity of the events as securing the liberties of the people, and the veneration with which the trial by jury has continued to be regarded, notwithstanding its essence and vitality have been almost entirely extracted from it in practice, would

settle the question, if other evidence had left the matter in doubt.

Besides, if his laws were to be authoritative with the jury, why should John indignantly refuse, as at first he did, to grant the charter on the ground that it deprived him of all power and left him only the name of a king? *He* evidently understood that the juries were to veto his laws and paralyze his power at discretion, by forming their own opinions as to the true character of the offenses they were to try and the laws they were to be called on to enforce; and that "the king wills and commands" was to have no weight with them contrary to their own judgments of what was intrinsically right.

The barons and people having obtained by the charter all the liberties they had demanded of the king, it was further provided by the charter itself that twenty-five barons should be appointed by the barons out of their number to keep. special, vigilance in the kingdom and to see that the charter was observed, with authority to make war upon the king in case of its violation. The king also, by the charter, so far absolved all the people of the kingdom from their allegiance to him as to authorize and require them to swear to obey the twenty-five barons in case they should make war upon the king for infringement of the charter. It was then thought by the barons and people that something substantial had been done for the security of their liberties.

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CHAPTER 4: OBJECTIONS ANSWERED

The following objections will be made to the doctrines and the evidence presented in the preceding chapters.

1. That it is a maxim of the law that the judges respond to the question of law and juries only to the question of fact.

The answer to this objection is that since Magna Charta judges have had more than six centuries in which to invent and promulgate pretended maxims to suit themselves, and this is one of them. Instead of expressing the law, it expresses nothing but the ambitious and lawless will of the judges themselves and of those whose instruments they are.

2. It will be asked: "Of what use are the justices, if the jurors judge both of law and fact?"

The answer is that they are of use, 1. To assist and enlighten the jurors, if they can, by their advice and information; such advice and informatibn to be received only for what they may chance to be worth in the estimation of the jurors. 2. To do anything that may be necessary in regard to granting appeals and new trials.

3. It is said that it would be absurd that twelve ignorant men should have power to judge of the law, while justices learned in the law should be compelled to sit by and see the law decided erroneously.

One answer to this objection is that the powers of juries are not granted to them on the supposition that they know the law better than the justices, but on the ground that the justices are untrustworthy, that they are exposed to bribes, are fond of authority, and are also the dependent and subservient creatures of the legislature; and that to allow them to dictate the law would not only expose the rights of parties to be sold for money, but would be equivalent to surrendering all the rights of the people unreservedly into the hands of the legislature to be

disposed of at its pleasure.

Legislators and judges are necessarily exposed to all the temptations of money, fame, and power to induce them to disregard justice in disputes and sell the rights, and violate the liberties, of the people. Jurors, on the other hand, are exposed to none of these temptations. They are not liable to bribery, for they are not known to the parties until they come into the jury box. They can rarely gain either fame, power, or money by giving erroneous decisions. Their offices are temporary, and they know that, when they shall have executed them, they must return to the people, to hold all their own rights in life subject to the liability of such judgments by their successors. The laws of human nature do not permit the supposition that twelve men, taken by lot from the mass of the people, and acting under such circumstances, will all prove dishonest. It is a supposable case that they may not be sufficiently enlightened to know and do their whole duty in all cases whatsoever; but that they should all prove dishonest is not within the range of probability. A jury therefore insures to us (what no other court does) the first and indispensable requisite in a judicial tribunal-integrity.

4. It is alleged that, if juries are allowed to judge of the law, they decide the law absolutely; that their decision must necessarily stand, be it right or wrong; and that this power of absolute decision would be dangerous in their hands by reason of their ignorance of the law.

One answer is that this power which juries have of judging of the law is not a power of absolute decision in, all cases. For example, it is a power to declare imperatively that a man's property, liberty, or life shall not be taken from him; but it is not a Power to declare imperatively that they shall be taken from him.

Magna Charta does not provide that the judgments of the peers shall be executed, but only that no other than their judgments shall ever be executed, so far as to take a man's goods, rights, or person thereon.

A judgment of the peers may be reviewed and invalidated, and a new trial granted. So that practically a jury has no absolute power to take a man's goods, rights, or person. They have only an absolute veto upon their being taken by the government. The government is not bound to do everything that a jury may adjudge. It is only prohibited from doing anything unless a jury have first adjudged it to be done.

But it will perhaps be said that, if an erroneous judgment of one jury should be reaffirmed by another on a new trial, it must then be executed. But Magna Charta does not command even this (although it might perhaps have been reasonably safe for it to have done so, for if two juries unanimously affirm the same thing, after all the light and aid that judges and lawyers can afford them, that fact probably furnishes as strong a presumption in favor of the correctness of their opinion as can ordinarily be obtained in favor of a judgment by any measures of a practical character for the administration of justice). Still, there is nothing in Magna Charta that compels the execution of even a second judgment of a jury. The only injunction of Magna Charta upon the government as to what it shall do on this point is that it shall "do justice and right." But this leaves the government all power of determining what is justice and right, except that it shall not consider anything as justice and right unless it be something which a jury have sanctioned.

If the government had no alternative but to execute all judgments of a jury indiscriminately, the power of juries would unquestionably be dangerous; for there is no doubt that they may sometimes give hasty and erroneous judgments. But when it is considered that their judgments can be reviewed and new trials granted, this danger is, for all practical purposes, obviated.

If it be said that juries may successively give erroneous judgments, and that new trials cannot be granted indefinitely, the answer is that so far as Magna Charta is concerned there is nothing to prevent the granting of new trials indefinitely, if the judgments of juries are contrary to "justice and right." It does not require any judgment whatever to be executed unless it be concurred in by both court and jury.

Nevertheless, we may, for the sake of the argument suppose the existence of a practical, if not legal, necessity for executing some judgment or other in cases where juries persist in disagreeing with the courts. In such cases, the principle of Magna Charta unquestionably is that the uniform judgments of successive juries shall prevail over the opinion of the court. And the reason of this principle is obvious; it is the will of the country, and not the will of the court or the government that must determine what laws shall be established and enforced; and the concurrent judgments of successive juries given in opposition to all the reasoning which judges and lawyers can offer to the contrary, must necessarily be presumed to be a truer exposition of the will of the country than are the opinions of judges.

But it may be said that, -unless jurors submit to the control of the court in matters of law, they may disagree among themselves and never come to any judgment; and thus justice fail to be done.

Such a case is perhaps possible; but, if possible, it can occur but rarely, because, although one jury may disagree, a succession of juries are not likely to disagree. If such a thing should occur, it would almost certainly be owing to the attempt of the court to mislead them. It is hardly possible that any other cause should be adequate to produce such an effect, because justice comes very near to being a self-evident principle. The mind perceives it almost intuitively. If, in addition to this, the court be uniformly on the side of justice, it is not a reasonable supposition that a succession of juries should disagree about it. If, therefore, a succession of juries do disagree on the law of any case, the presumption is, not that justice fails of being done, but that injustice is prevented-that injustice which would be done if the opinion of the court were suffered to control the jury.

For the sake of the argument, however, it may be admitted to be possible that justice should sometimes fail of being done through disagreements of jurors notwithstanding all the light which judges and lawyers can throw upon the question in issue. If it be asked what provision the trial by jury makes for such cases, the answer is that it makes none. And justice must fail of being done from the want of its being made sufficiently intelligible.

Under the trial by jury, justice can never be done until that justice can be made intelligible or perceptible to the minds of all the jurors; or, at least, until it obtain the voluntary assent of all-an assent which ought not to be given until the justice itself shall have become perceptible to all.

The principles of the trial by jury, then, are these:

1. That, in criminal 'cases, the accused is presumed innocent.

2. That, in civil cases, possession is presumptive pro-of of property.

3. That these presumptions shall be overcome in a court of justice only by evidence the sufficiency of which, and by law the justice of which, are satisfactory to the understanding and consciences of all the jurors.

These are the bases on which the trial by jury places the rights and liberties of every individual.

But some one will say: "If these are the principles of the trial by jury, it is plain

that justice must often fail to be done." Admitting, for the sake of the argument, that this may be true, the compensation for it is that positive injustice will also often fail to be done; whereas otherwise it would be one frequently. The very precautions used to prevent injustice being done may often have the effect to prevent justice being done. But are we, therefore, to take no precautions against injustice? By no means, all will agree. The question then arises: Does the trial by jury, as here explained, involve such extreme and unnecessary precautions as to interpose unnecessary obstacles to the doing of justice? Men of different minds may very likely answer this question differently, according as they have more or less confidence in the wisdom and justice of legislators, the integrity and independence of judges, and the intelligence of jurors. This much, however, may be said in favor of these precautions-that the history of the past, as well as our present experience, prove how much injustice may, and certainly will, be done continually and systematically for the want of these precautions. On the other hand, we have no such evidence of how much justice may fail to be done by reason of these precautions. We can determine the former point because the system is in full operation; but we -cannot determine how much justice would fail to be done under the latter system, because we have, in modern times, had no experience of the use of the precautions themselves. In ancient times, when they were nominally in force, such was the tyranny of kings, and such the poverty, ignorance, and the inability of concert and resistance, on the part of the people, that the system had no full or fair operation. Nevertheless, under all these disadvantages, it impressed itself upon the understandings and embedded itself in the hearts of the people so as no other system of civil liberty has ever done.

But this view of the two systems compares only the injustice done, and the justice omitted to be done, in the individual cases adjudged, without looking beyond them, And some persons might, on first thought, argue that, if justice failed of being done under the one system oftener than positive injustice were done under the other, the balance was in favor of the latter system. But such a weighing of the two systems against each other gives no true idea of their comparative merits or demerits; for possibly, in this view alone, the balance would not be very great in favor of either. To compare, or rather to contrast, the two we must consider that under the jury system the failures to do justice would be only rare and

exceptional cases, and would be owing either to the intrinsic difficulty of the questions or to the fact that the parties had transacted their business in a manner unintelligible to the jury, and the effect would be confined to the parties interested in the particular suits. No permanent law would be established thereby destructive of the rights of the people in other like cases. But under the, other system, whenever an unjust law is enacted by the legislature, and the judge imposes it upon the jury as authoritative, and they give a judgment in accordance therewith, the authority of the law is thereby established, and the whole people are thus brought under the yoke of that law; because they then understand that the law will be enforced against them in future, if they presume to exercise their rights or refuse to comply with the exactions of the law.

The difference, then, between the two systems is this: Under the one system, a jury, at distant intervals, would fail of enforcing justice in a dark and difficult case, or in consequence of the parties not having transacted their business in an intelligible manner; and the plaintiff would thus fail of obtaining what was rightfully due him/And there the matter would end-for evil, though not for good; for thenceforth parties, warned of the danger of losing their rights, would be careful to transact their business in a more clear manner. Under the other system- the system of legislative and judicial authority-positive injustice is not only done in every suit arising under unjust laws, but the rights of the whole people are struck down by the authority of the laws thus enforced, and a wide-sweeping in,-justice at once put in operation.

But there is another ample and conclusive answer to the argument that justice would often fail to be done, if jurors were allowed to be governed by their own consciences instead of the direction of the justices in matters of law. That answer is this:

Legitimate government can be formed only by the voluntary association of all who contribute to its support. As a voluntary association, it can have for its object only those things in which the members of the association are all agreed. If therefore there be any justice in regard to which all the parties to the government are not agreed, the objects of the association do not extend to it.

If any of the members wish more than this, if they claim to have acquired a more extended knowledge of justice than is common to all, and wish to have their

discoveries carried into effect, in reference to themselves, they must either form a separate association for that purpose or be content to wait until they make their views more intelligible to the people at large. They cannot claim or expect that the whole people shall practice the folly of taking on trust their pretended superior knowledge and of committing blindly into their hands all their own interests, liberties, and rights, to be disposed of on principles the justness of which the people themselves cannot comprehend.

A government of the whole, therefore, must necessarily confine itself to the administration of such principles of law as all the people who contribute I to the support of the government can comprehend recognize. And it can be confined within those limits only by allowing the jurors, who represent all the parties to the compact, to judge of the law, and of the justice of the law, in all cases whatsoever. And if any justice be left undone under these circumstances, it is a justice for which the nature of the association does not provide and which the association does not undertake to do.

The people at large, the unlearned and common people, have certainly an indisputable right to associate for the establishment and maintenance of such a government as they themselves wish for the promotion of their own interests and the safety of their own rights without at the same time surrendering all their liberty into the hands of men who, under the pretense of a superior and incomprehensible knowledge of justice, may dispose of such liberty in a manner to suit their own dishonest purpose.

If a government were to be established and supported solely by that portion of the people who lay claim to superior knowledge, there would be some consistency in the saying that the common people should not be received as jurors, with power to judge of the justice of the laws. But so long as the whole people are presumed to be voluntary parties to the government and voluntary contributors to its support, there is no consistency in refusing to any one of them more than to another the right to sit as juror, with full power to decide for himself whether any law that is proposed to be enforced in any particular can be within the objects of the association.

The conclusion, therefore, is that in a government formed by voluntary association, or on the theory of voluntary association and voluntary support, no law

can rightfully be enforced by the association in its corporate capacity against the goods, rights, or person of individuals, except it be such as all the members of the association agree that it may enforce. To enforce any other law, to the extent of taking a man's goods, rights, or person, would be making some of the parties to the association accomplices in what they regard as acts of injustice. It would also be making them consent to what they regard as the destruction of their own rights. These are things which no legitimate system or theory of government can require of any of the parties to it. They are inconsistent with the very essence of self-government,

The mode adopted by the trial by jury for ascertaining whether all the parties to the government do approve of a particular law is to take twelve men at random from the whole people and accept their unanimous decision as representing the opinions of the whole. Even this mode is not theoretically accurate, for theoretical accuracy would require that every man who was a party to the government should individually give his consent to the enforcement of the law in every separate case. But such a thing would be impossible in practice. The consent of twelve men is therefore taken instead, with the privilege of appeal and, in case of error found by the appeal court, a new trial to guard against possible mistakes. This system, it is assumed, will ascertain the sense of the whole people with sufficient accuracy for all practical purposes and with as much accuracy as is practicable without too great inconvenience and expense.

5. Another objection that will perhaps be made to allowing jurors to judge of the law and the justice of the law is that the law would be uncertain.

If it is meant that the law would be uncertain to the minds of the people at large, so that they would not know what the juries would sanction and what condemn, and would not therefore know practically what their own rights and liberties were under the law, the objection is thoroughly baseless and false. No system of law that was ever devised could be so entirely intelligible and certain to the minds of the people at large as this.

Compared with it, the complicated systems of law that are compounded of the law of nature, of constitutional grants, of innumerable and incessantly changing legislative enactments, and of countless and contradictory judicial decisions, with no uniform principle of reason or justice running through them, are among the

blindest of all the mazes in which unsophisticated minds were ever bewildered and lost. The uncertainty of the law under these systems has become a proverb. So great is this uncertainty that nearly all men, learned as well as unlearned, shun the law as their enemy, instead of resorting to it for protection. They usually go into courts of justice, so called, only as men go into battle-when there is no alternative left for them. And even then they go into them as men go into dark labyrinths and caverns-with no knowledge of their own, but trusting wholly to their guides. -Yet, less fortunate than other adventurers, they can have little confidence even in their guides, for the reason that the guides themselves know little of the mazes they are treading. They know the mode and place of entrance; but what they will meet with on their way, and what will be the time, place, mode, or condition of their exit; whether they will emerge into a prison, or not; whether wholly naked and destitute, or not ; whether with their reputations left to them, or not; and whether in time or eternity-experienced guides rarely venture to predict. Was there ever such fatuity as that of a nation of men madly bent on building up such labyrinths as these for no other purpose than that of exposing all their reputation, property, liberty, and life to the hazards of being lost in them, instead of being content to live in the light of the open day of their own understandings?

If the jurors were to judge of the law, and the justice of law, there would be something like certainty in the administration of justice and in the popular knowledge of the law, and men would govern themselves accordingly. There would be something like certainty, because every man has himself something like definite and clear opinions, and also knows something of the opinions of his neighbors, on matters of justice. And he would know that no statute, unless it were so clearly just as to command the unanimous assent of twelve men, who should be taken at random from the whole community, could be enforced against him. What greater certainty can men require or need as to the laws under which they are to live? If a statute were enacted by the legislature, a man, in order to know what was its true interpretation, and whether it would be enforced, would not be under the necessity of waiting for years until some suit had arisen and been carried through all the stages of judicial proceeding to a final decision. He would need only to use his own reason as to its meaning and its justice, and then talk with his neighbors on the same points. Unless he found them nearly unanimous in their interpretation and

approbation of it, he would conclude that juries would not unite in enforcing it, and that it would consequently be a dead letter. And he would be safe in coming to this conclusion.

There would be something like certainty in the administration of justice and in the popular knowledge of the law for the further reason that there would be little legislation, and men's rights would be left to stand almost solely upon the law of nature, or what was once called in England "the common law" (before so much legislation and usurpation had become incorporated into the common law)in other words, upon the principles of natural justice.

Free Political Institutions

Their Nature, Essence, and Maintenance

An Abridgment and Rearrangement of Lysander Spooner's "Trial by jury"

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CHAPTER 5: THE CRIMINAL INTENT

It is a maxim of the common law that there can be no crime without a criminal intent. And it is a perfectly clear principle, although one which judges have in a

great measure overthrown in practice, that jurors are to judge of the moral intent of the accused person and hold him guiltless, whatever his act, unless they find him to have acted with a criminal intent; that is, with a design to do what he knew to be criminal.

This principle is clear, because the question for a jury to determine is whether the accused be guilty or not guilty. Guilt is a personal quality of the actor, not necessarily involved in the act, but depending also upon the intent or motive with which the act was done. Consequently the jury must find that he acted from a criminal motive before they can declare him guilty.

There is no moral justice in, nor any political necessity for, punishing a man for any act whatever that he may have committed, if he have done it without any criminal intent. There can be no moral justice in punishing for such an act, because, there having been no criminal motive, there can have been no other motive which justice can take cognizance of as demanding or justifying punishment. There can be no political necessity for punishing, to warn against similar acts in future, because, if one man have injured another, however unintentionally, he is liable, and justly liable, to a civil suit for damages; and in this suit he will be compelled to make compensation for the injury, notwithstanding his innocence of any intention to injure. He must bear the consequences of his own act, instead of throwing them upon another. And the damages he will have to pay will be a sufficient warning to him not to do the like act again.

If it be alleged that there are crimes against the public (as treason, for example, or any other resistance to government) for which private persons can recover no damages, and that there is a political necessity for punishing for such offenses even though the party acted conscientiously, the answer is that the government must bear with all resistance that is not so clearly wrong as to give evidence of criminal intent. In other words, the government, in all acts, must keep itself so clearly within the limits of justice as that twelve men, taken at random, will all agree that it is in the right, or it must incur the risk of resistance without any power to punish it. This is the mode in which the trial by jury operates to prevent the government from falling into the hands of a party or a faction, and to keep it within such limits as all, or substantially all, the people are agreed that it may occupy.

This necessity for a criminal intent-in other words, for guilt-as a preliminary to conviction makes it impossible that a man can be rightfully convicted for an act that is intrinsically innocent, though forbidden by the government, because guilt is an intrinsic quality of actions and motives, and not one that can be imparted to them by arbitrary legislation. All the efforts of the government, therefore, to make offenses- by the statute out of acts that are not criminal by nature must necessarily be ineffectual, unless a jury will declare a man guilty for an act that is really innocent.

The corruption of judges in their attempts to uphold the arbitrary authority of the government by procuring the conviction of individuals for acts innocent in themselves and forbidden only by some tyrannical statute, and the commission of which therefore indicates no criminal intent, is very apparent.

To accomplish this object they have in modern times held it to be unnecessary that indictments should charge, as by the common law they were required to do, that an act Was done "wickedly," "feloniously," "with malice aforethought," or in any other manner that implied a criminal intent, without which there can be no criminality; but that it is sufficient to charge simply that it was done $$contrary to the form of the statute in such case made and provided." This form of indictment proceeds plainly upon the assumption that the government is absolute, and that it has authority to prohibit any act it pleases, however innocent in its nature the act may be. Judges have been driven to the alternative of either sanctioning this new form of indictment (which they never had any constitutional right to sanction) or of seeing the authority -of many of the statutes of the government fall to the ground, because the acts forbidden by the statutes were so plainly innocent in their nature that even the government itself had not the face to allege that the commission of them implied or indicated any criminal intent.

To get rid of the necessity of showing a criminal intent, and thereby further to enthralled the people, by reducing them to the necessity of a blind, unreasoning submission to the arbitrary will of the government, and of a surrender of all right, on their own part, to judge what are their constitutional and natural rights and liberties, courts have invented another idea which they have incorporated among the pretended "maxims" upon which they act in criminal trials-namely, that "ignorance of the law excuses no one." As if it were in the nature of things possible

that there could be an excuse more absolute and complete! What else than ignorance of the law is it that excuses judges themselves for all their erroneous decisions? They are every day committing errors which would be crimes, but for their ignorance of the law. And yet these same judges, who claim to be learned in the law, and who yet could not hold their offices for a day but for the allowance which the law makes for their ignorance, are continually asserting it to be a "maxim" that ignorance of the law excuses no one!

This preposterous doctrine that "ignorance of the law excuses no one" is asserted by courts because it is an indispensable one to the maintenance of absolute power in the government. It is indispensable for this purpose because, if it be once admitted that the people have some rights which the government cannot lawfully take from them, then the question arises in regard to every statute of the government whether it infringe, or not, the rights and liberties of the people. Of this question every man must of course judge according to the light in his own mind. And no man can be convicted unless the jury find, not only that the statute does not infringe the rights and liberties of the people, but also that it was so clearly consistent with the rights and liberties of the people as that the individual himself who transgressed it knew it to be so, and therefore had no moral excuse for transgressing it. Governments see that, if ignorance of the law were allowed to excuse a man for any act whatever, it must excuse him for transgressing all statutes which he himself thinks inconsistent with his rights and liberties. But such a doctrine would of course be inconsistent with the maintenance of arbitrary power by the government, and hence government will not allow the plea, although they will not confess their true reasons for disallowing it.

The only reasons (if they deserve the name of reasons) that I ever knew given for the doctrine that ignorance of the law excuses no one are these:

1. "The reason for the maxim is that of necessity. It prevails, not that all men know the law, but because it is an excuse which every man will make, and no man can tell how to confute him."

The reason impliedly admits that ignorance of the law is intrinsically an ample and sufficient excuse for a crime, and that the excuse ought to be allowed if the fact of ignorance could but be ascertained. But it asserts that this fact is incapable of being ascertained, and that therefore there is a necessity for punishing the

ignorant and the knowing, or the innocent and the guilty, without discrimination.

This reason is worthy of the doctrine it is used to uphold: as if a plea of ignorance, any more than any other plea, must necessarily be believed simply because it is urged; and as if it were not a common and everyday practice of courts and juries to determine the mental capacity of parties, as, for example, whether they can make reasonable contracts, whether they are "of sound mind and body," etc. And there is obviously no more difficulty in a jury's determining whether an accused person knew the law in a criminal case than there is in determining any other of the questions that come up continually in regard to a man's mental capacity. For the question to be settled by the jury is not whether the accused person knew the particular penalty attached to his act, but whether he knew that his act was intrinsically criminal.

A jury then, in judging whether an accused person knew his act to be illegal, were bound first to use their own judgments as to whether the act were intrinsically criminal. If their own judgments told them the act was intrinsically and clearly criminal, they would naturally and reasonably infer that the accused also understood that it was intrinsically criminal, unless it should appear that he was either below themselves in the scale of intellect, or had had less opportunities of knowing what acts were criminal. In short, they would judge from any and every means they might have of judging; and if they had any reasonable doubt that he knew his act to be criminal in itself, they would be bound to acquit him.

The second reason that has been offered for the doctrine that ignorance of the law excuses no one is:

2. "Every person of the age of discretion, of sound mind and memory, is bound to know the law and presumed to do so."

But this is giving no reason at all for the doctrine, since saying that "a man is bound to know the law" is only saying in another form that "ignorance of the law does not excuse him." There is no difference at all in the two ideas. To say that ignorance of the law excuses no one because every one is bound to know the law is only equivalent to saying that ignorance of the law excuses no one because ignorance of the law excuses no one. It is merely reasserting the doctrine without giving any reason at all.

And yet these reasons, which are really no reasons at all, are the only ones, so

far as I know, that have ever been offered for this absurd and brutal doctrine.

The idea suggested that "the age of discretion" determines the guilt of a person, that there is a particular age prior to which all persons alike should be held incapable of knowing any crime, and subsequent to which all persons alike should be held capable of knowing all the crimes, is another of this most ridiculous nest of ideas. All mankind acquire their knowledge of crimes, as they do of other things gradually. Some they learn at an early age; others not till a later one. One individual acquires a knowledge of crimes as he does of arithmetic, at an earlier age than others do. And to apply the same presumption to all, on the ground of age alone, is not only gross injustice, but gross folly. A universal presumption might with nearly, if not quite, as much reason be founded upon weight or height as upon age.

This doctrine that "ignorance of the law excuses no one" is constantly repeated in the form that "every one is bound to know the law." The doctrine is true in civil matters, especially in contracts, so far as this,-that no man who has the ordinary capacity to make reasonable contracts can escape the consequences of his own agreement, on the ground that he did not know the law applicable to it. When a man makes a contract, he gives the other party rights; and he must of necessity judge for himself, and take his own risk, as to what those rights are; otherwise the contract would not be binding, and men could not make contracts that would convey rights to each other. Besides, the capacity to make reasonable contracts implies and includes a capacity to form a reasonable judgment as to the law applicable to them. But in criminal matters, where the question is one of punishment or not; where no second party has acquired any right to have the crime punished, unless it were committed with criminal intent, and when the criminal intent is the only moral justification for the punishment, the principle does not apply, and a man is bound to know the law only as well as he reasonably may. The criminal law requires neither impossibilities nor extraordinaries of any one. It requires only thoughtfulness and a good conscience. It requires only that a man fairly and properly use the judgment he possesses and the means lie has of learning his duty. It requires of him only the same care to know his duty in regard to the law that he is morally bound to use in other matters of equal importance. And this care it does require of him. Any ignorance of the law therefore that is

unnecessary, or that arises from indifference or disregard of one's duty, is no excuse. An accused person, therefore, may be rightfully held responsible for such a knowledge of the law as is common to men in general. And he cannot rightfully be held responsible to a greater knowledge of the law than this.

The mass of mankind can give but little of their attention to acquiring a knowledge of the law. Their other duties in life forbid it. Of course they cannot investigate abstruse or difficult questions. All that can rightfully be required of each of them, then, is that he exercise such a candid and conscientious judgment as it is common for mankind generally to exercise in such matters. If lie have done this, it would be monstrous to punish him criminally for his errors-errors not of conscience, but only of judgment. It would also be contrary to the first principles of a free government (that is, a government formed by voluntary association) to punish men in such cases, because it would be absurd to suppose that any man would voluntarily assist to establish or support a government that would punish himself for acts which he himself did not know to be crimes. But a man may reasonably unite with his fellowmen to maintain a government to punish those acts which he himself considers criminal, and may reasonably acquiesce in his own liability to be punished for such acts. As those are the only grounds on which any one can be supposed to render any voluntary support to a government, it follows that a government formed by voluntary association, and of course having no powers except such as all the associates have consented that it may have, can have no power to punish a man for acts which he did not himself know to be criminal.

The safety of society, which is the only object of the criminal law, requires only that those acts which are understood by mankind at large to be intrinsically criminal should be punished as crimes. The remaining few (if there are any) may safely be left to go unpunished. Nor does the safety of society require that any individuals other than those who have sufficient mental capacity to understand that their acts are criminal should be criminally punished. All others may safely be left to their liability, under the civil law, to compensate for their unintentional wrongs.

The only real object of the absurd and atrocious doctrine that "ignorance of the law excuses no one," and that "every one is bound to know the criminal law," is to maintain an entirely arbitrary authority on the part of the government, and to deny to the people all right to judge for themselves what their own rights and liberties

are. In other words, the whole object of the doctrine is to deny to the people themselves all right to judge what statutes and other acts of the government are consistent or inconsistent with their own rights and liberties; and thus to reduce the people to the condition of mere slaves to a despotic power, such as the people themselves would never have voluntarily established, and the justice of whose laws the people themselves cannot understand.

Under the true trial by jury all tyranny of this kind would be abolished. A jury would not only judge what acts were really criminal, but they would judge of the mental capacity of an accused person, and of his opportunities for understanding the true character of his conduct. In short, they would judge of his moral intent from all the circumstances of the case, and acquit him, if they had any reasonable doubt that he knew that he was committing a crime.

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CHAPTER 6: MORAL CONSIDERATIONS FOR JURORS

The trial by jury must, if possible, be construed to be such that a man can rightfully sit in a jury and unite with his fellows in giving judgment. But no man can rightfully do this, unless he hold in his own hand alone a veto upon any judgment or sentence whatever to be rendered by the jury against a defendant, which veto he must be permitted to use according to his own discretion and conscience, and not bound to use according to the dictation of either legislatures or judges.

The prevalent idea that a juror may, at the mere dictation of a legislature or a judge, and without the concurrence of his own conscience or understanding, declare a man "guilty" and thus in effect license the government to punish him; and that the legislature or the judge, and not himself, has in that case all the moral responsibility for the correctness of the principles on which the judgment was rendered, is one of the many gross impostures by which it could hardly have been supposed that any sane man could ever have been deluded, but which governments have, nevertheless, succeeded in inducing the people at large to receive and act upon.

As a moral proposition, it is perfectly self-evident that, unless juries have all the legal rights that have been claimed for them in the preceding chapters.that is, the rights of judging what the law is, whether the law be a just one, what evidence is admissible, what weight the evidence is entitled to, whether an act were done with a criminal intent, and the right also to limit the sentence, free of all dictation from any quarter-they have no moral right to sit in the trial at all, cannot do so without making themselves accomplices in any injustice that they may have reason to believe may result from their verdict. It is absurd to say that they have no moral responsibility for the use that may be made of their verdict by the government, when they have reason to suppose it will be used for purposes of injustice.

It is, for instance, manifestly absurd to say that jurors have no moral responsibility for the enforcement of an unjust law, when they consent to render a verdict of guilty for the transgression of it, which verdict they know, or have good reason to believe, will be used by the government as a justification for inflicting a

penalty.

It is absurd also to say that jurors have no moral responsibility for a punishment inflicted upon a man against law, when, at the dictation of a judge as to what the law is, they have consented to render a verdict against their own opinion of the law.

It is absurd, too, to say that jurors have no moral responsibility for the conviction and punishment of an innocent man, when they consent to render a verdict against him on the strength of evidence, or laws of evidence, dictated to them by the court, if any evidence or laws of evidence have been excluded, which they (the jurors) think ought to have been admitted in his defense.

It is absurd to say that jurors have no moral responsibility for rendering a verdict of "guilty" against a man for an act which he did not know to be a crime, and in the commission of which, therefore, he could have had no criminal intent, in obedience to the instructions of courts that "ignorance of the law (that is, of crime) excuses no one."

It is absurd, also, to say that jurors have no moral responsibility for any cruel or unreasonable sentence that may be inflicted even upon a guilty man, when they consent to render a verdict which they have reason to believe will be used by the government as a justification for the infliction of such a sentence.

The consequence is that jurors must have the whole case in their hands, and judge of law, evidence, and sentence, or they incur the moral responsibility of accomplices to any injustice which they have reason to believe will be done by the government on the authority of their verdict.

Free Political Institutions

Their Nature, Essence, and Maintenance

An Abridgment and Rearrangement of Lysander Spooner's "Trial by jury"

EDITED BY
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LONDON
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CHAPTER 7: FREE ADMINISTRATION OF JUSTICE

The free administration of justice was a principle of the common law; and it must necessarily be a part of every system of government which is not designed to be an engine in the hands of the rich for the oppression of the poor.

In saying that the free administration of justice was a principle of the common law, I mean only that parties were subjected to no costs for jurors, witnesses, writs, or other necessaries for the trial, preliminary to the trial itself. Consequently, no one could lose the benefit of a trial, for the want of means to defray expenses.

But after the trial, the plaintiff or defendant was liable to be amerced (by the jury, of course,) for having troubled the court with the prosecution or defense of an unjust suit. But it is not likely that the losing party was subjected to an amercement as a matter of course, but only in those cases where the injustice of his case was so evident as to make him inexcusable in bringing it before the courts.

The principle of the free administration of justice connects itself necessarily with the trial by jury, because a jury could not rightfully give judgment against any man, in either a civil or criminal case, if they had any reason to suppose he had been unable to procure his witnesses.

The true trial by jury would also compel the free administration of justice from another necessitynamely, that of preventing private quarrels, because, unless the government enforced a man's rights and redressed his wrongs, free of expense to

him, a jury would be bound to protect him in taking the law into his own hands. A man has a natural right to redress his own wrongs and enforce his own rights. If one man owe another a debt and refuse to pay it, the creditor has a natural right to seize sufficient property of the debtor wherever he can find it to satisfy the debt. If one man commit a trespass upon the person, property, or reputation of another, the injured party has a natural right either to chastise the aggressor or to take compensation for the injury out of his property. But as the government is an impartial party as between these individuals, it is more likely to do exact justice between them than the injured individual himself would do. The government, also, having party to pay the judge and jury for their services that there is in compelling him to pay the witnesses or any other necessary charges.

This compelling parties to pay the expenses of civil suits is one of the many cases in which government is false to the fundamental principles on which free government is based. What is the object of government but to protect men's rights? On what principles does a man pay his taxes to the government, except on that of contributing his proportion towards the necessary cost of protecting the rights of all? Yet, when his own rights are actually invaded, the government, which contributes to support instead of fulfilling its implied contract, becomes his enemy, and not only refuses to protect his rights (except at his own cost), but even forbids him to do it himself.

All free government is founded on the theory of voluntary association, and on the theory that all the parties to it voluntarily pay their taxes for its support on the condition of receiving protection in return. But the idea that any poor man would voluntarily pay taxes to build up a government which will neither protect his rights nor suffer himself to protect them by such means as may be in his power is absurd.

Under the prevailing system, a large portion of the lawsuits determined in courts are mere contests of purses rather than of rights. And a jury sworn to decide causes "according to the evidence" produced are quite likely, for aught they themselves can know, to be deciding merely the comparative length of the parties' purses rather than the intrinsic strength of their respective rights. jurors ought to refuse to decide a cause at all, except upon the assurance that all the evidence necessary to a full knowledge of the cause is produced. This assurance they can seldom have, unless the government itself produces all the witnesses the parties

desire.

In criminal cases, the atrocity of accusing a man of crime and then condemning him unless he prove his innocence at his own charges is so evident that a jury could rarely, if ever, be justified in convicting a man under such circumstances.

But the free administration of justice is not only indispensable to the maintenance of right between man and man; it would also promote simplicity and stability in the laws. The mania for legislation would be in an important degree restrained, if the government were compelled to pay the expenses of all the suits that grew out of it.

The free administration of justice would diminish and nearly extinguish another great evil-that of malicious civil suits. It is an old saying that "*multi litigant in foro, non ut aliquid lucrentur, sed ut vexant alios*" (Many litigate in court, not that they may gain anything, but that they may harass others). Many men, from motives of revenge and oppression, are willing to spend their own money in prosecuting a groundless suit, if they can thereby compel their victims, who are less able than they to bear the loss, to spend money in the defense. Under the prevailing system, in which the parties pay the expense of their suits, nothing but money is necessary to enable any malicious man to commence and prosecute, a groundless suit to the terror, injury, and perhaps ruin, of another man. In this way a court of justice, into which none but a conscientious plaintiff certainly should ever be allowed to enter, becomes an arena into which any rich and revengeful oppressor may drag any man poorer than himself and harass, terrify, and impoverish him to almost any extent. It is a scandal and an outrage that government should suffer itself to be made an instrument in this way for the gratification of private malice. We might nearly as well have no courts of justice as to throw them open, as we do, for such flagitious uses. Yet the evil probably admits of no remedy except a free administration of justice. Under a free system plaintiffs could rarely be influenced by motives of this kind, because they could put their victims to little, if any, expense, neither pending the suit (which it is the object of the oppressor to do), nor at its termination. Besides, if the ancient common law practice of amercing a party for troubling the court with groundless suits should be adopted, the prosecutor himself would, in the end, be likely to be amerced by the jury in such a manner as to make courts of justice a very unprofitable place for a

man to go to seek revenge.

In estimating the evils of this kind resulting from the present system, we are to consider that they are not by any means confined to the actual suits in which this kind of oppression is practiced, but we are to include all those cases in which the fear of such oppression is used as a weapon to compel men into a surrender of their rights.

• Chapter 08 : Juries Of The Present Day Illegal

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CHAPTER 8: JURIES OF THE PRESENT DAY ILLEGAL

It may probably be safely asserted that there are at this day no legal juries, either in England or America. And if there are no legal juries, there is of course no legal trial or "judgment" by jury.

In saying that there are probably no legal juries, I mean that there are probably

no juries appointed in conformity with the principles of the common law.

The term jury is a technical one, derived from the common law, and when the American constitutions provide for the trial by jury, they provide for the common law trial by jury, and not merely for any trial by jury that the government itself may chance to invent and call by that name. It is the thing, and not merely the name, that is guaranteed. Any legislation, therefore, that infringes any essential principle of the common law, in the selection of jurors, is unconstitutional, and the juries selected in accordance with such legislation are, of course, illegal, and their judgments void.

What, then, are the essential principles of the common law controlling the selection of jurors?

They are two.

1. That all the freemen, or adult male members of the State, shall be eligible as jurors.

Any legislation which requires the selection of jurors to be made from a less number of freemen than the whole makes the jury selected an illegal one.

If a part only of the freemen, or members of the State, are eligible as jurors, the jury no longer represent "the country," but only a part of "the country."

If the selection of jurors can be restricted to any less number of freemen than the whole, it can be restricted to a very small portion of the whole, and thus the government be taken out of the hands of "the country," or the whole people, and be thrown into the hands of a few.

Any infringement or restriction of the common law right of the whole body of the freemen of the kingdom to eligibility as jurors, was legally an abolition of the trial by jury itself. The juries no longer represented "the country," but only a part of the country; that part, too, on whose favor the government chose to rely for the maintenance of its power, and which it therefore saw fit to select as being the most reliable instruments for its purpose of oppression towards the rest.

These restrictions, or indeed any one of them, of the right of eligibility as jurors, were, in principle, a complete abolition of the English constitution, or, at least, of its most vital and valuable part. It was, in principle, an assertion of a right, on the part of the government, to *select* the individuals who were to determine the authority of its own laws, and the extent of its own powers. It was, therefore, *in*

effect, the assertion of a right, on the part of the government itself, to determine its own powers, and the authority of its own legislation, over the people; and a denial of all right, on the part of the people, to judge of or determine their own liberties against the government. It was, therefore, in reality, a declaration of entire absolutism on the part of the government. It was an act as purely despotic, *in principle*, as would have been the express abolition of all juries whatsoever. By "the law of the land," which the kings were sworn to maintain, every free adult male British subject was eligible to the jury box, with full power to exercise his own judgment as to the authority and obligation of every statute of the king which might come before him.

The principle, then, of the common law was that every freeman, or freeborn male Englishman, of adult age, etc., was eligible to sit in juries by virtue of his civil freedom, or his being a member of the State or body politic. But the principle of the present English statutes is that a man shall have a right to sit in juries because he owns lands in feesimple. At the common law a man was *born* to the right to sit injuries. By the present statutes he *buys* that right when he buys his land. And thus this, the greatest of all political rights of an Englishman, has become a mere article of merchandise, a thing that is bought and sold in the market for what it will-bring.

Of course there can be no legality in such juries as these, but only in juries to which every free or natural-born adult male Englishman is eligible.

The second essential principle of the common law, controlling the selection of jurors, is that, when the selection of the actual jurors comes to be made (from the whole body of male adults), that selection shall be made in some mode that excludes the possibility of choice *on the part of the government*.

Of course this principle forbids the selection to be made *by any officer of the government*.

There seems to have been at least three modes of selecting the jurors, at the common law. 1. By lot, 2. Two knights, or other freeholders, were appointed (probably by the sheriff). 3. By the sheriff, bailiff, or other person, who held the court, or rather acted as its ministerial officer. Probably the latter mode may have been the most common, although there may be some doubt on this point.

At the common law the sheriffs, bailiffs, and other officers *were chosen by the people instead of being appointed by the king*. At common law, therefore,

jurors selected by these officers were legally selected, so far as the principle now under discussion is concerned; that is, they were not selected by any officer who was dependent on the government.

But in the year 1315, one hundred years after Magna Charta, the choice of sheriffs was taken from the people, and it was enacted:

"That the sheriffs shall henceforth be assigned by the chancellor, treasurer, barons of the exchequer, and by the justices. And in the absence of the chancellor, by the treasurer, barons, and justices." -9 edward II., st. 2. (1315).

These officers, who appointed the sheriffs, were themselves appointed by the king, and held their offices during his pleasure. Their appointment of sheriffs was, therefore, equivalent to an appointment by the king himself. And the sheriffs thus appointed held their offices only during the pleasure of the king, and were of course mere tools of the king; and their selection of jurors was really a selection by the king himself. In this manner the king usurped the selection of the jurors who were to sit in judgment upon his own laws.

Here, then, was another usurpation by which the common law trial by jury was destroyed, so far as related to the county courts in which the sheriffs presided, and which were the most important courts of the kingdom. From this cause alone, if there were no other, there has not been a legal jury in a county court in England for more than five hundred years.

In nearly, if not quite, all the States of the United States the juries are illegal, for one or the other of the same reasons, that make the juries in England illegal.

In order that the juries in the United States may be legal-that is, in accordance with the principle of the common law-it is necessary that every adult male member of the State should have his name in the jury box, or be eligible as a juror. Yet this is the case in hardly a single State.

There has, probably, never been a legal jury or a legal trial by jury in a single court of the United States since the adoption of the constitution.

These facts show how much reliance can be placed in written constitutions to control the action of the government and preserve the liberties of the people.

If the real trial by jury had been preserved by the courts of the United States-that is, if we had had legal juries, and the jurors had known their rightsit is hardly probable that one tenth of the past legislation of Congress would ever have

been enacted, or, at least, that, if enacted, it could have been enforced.

Probably the best mode of appointing jurors would be this: Let the names of all the adult male members of the State, in each township, be kept in a jury box by the officers of the township; and when a court is to be held for a county or other district, let the officers of a sufficient number of townships be required (without seeing the names) to draw out a name from their boxes respectively to be returned to the court as a juror. This mode of appointment would guard against collusion and selection; and Juries so appointed would be likely to be a fair epitome of "the country."

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