

Lysander & Limited Government

FRED D. MILLER, JR.

Lysander Spooner, the great 19th-century critic of the American political system, is widely acclaimed in present-day libertarian circles as an anarchist. "No Treason #6" is referred to, in hushed tones, as though it were a definitive treatise of anarchocapitalism.

In fact, careful reading reveals that "No Treason #6" is far from an argument for anarchism. I have argued elsewhere (in *New Guard*, Sept. 1973) that anarchistic libertarianism is indefensible, and I believe that its defense is not to be found in "No Treason," either.

What leads to the mistaken conclusion that Spooner is arguing for anarchism is the understandable, but fallacious, assumption that if A and B are both opposed to C, then A and B hold the same view. (The alliances of World War II should have revealed the falsity of this premise once and for all.) Spooner, to be sure, directs a brilliant attack against the political institutions and practices of the United States and against traditional attempts to demonstrate the moral authority of the State. But, from the mere fact that the anarchist also opposes these things, it cannot be concluded that Spooner is an anarchist. For proponents of limited government oppose them also.

In the past, three main defenses of the State have been offered: (1) the Altruistic Defense, (2) the Libertarian Defense, and (3) the Social Contract Defense. The Altruistic Defense starts from the premise that the individual, as such, is of no importance. It thus has little difficulty in maintaining that the existence and the operations of government

are justified insofar as they promote some altruistic goal. The act utilitarian allows an innocent man to hang if this will promote the "general happiness." The Hegelian holist allows the State to remove malignant tissue (e.g., reactionary Kulaks) if this will promote the health of the "social organism." This defense of the State, with its anti-individualistic premise, is alien to the American political tradition, and it does not even occur to Spooner to attempt to refute it.

The Libertarian Defense goes back as far as the fifth century B.C., when two Greek sophists, Lyco-phron and Hippodamus, maintained that the proper function of laws is the protection of rights. (What little remains of the writings of these two little-known philosophers is preserved in Aristotle's *Politics*, II, 8 and III, 9. It is not Spooner's purpose to criticize this defense of the State. Although this approach to government was implicit in much of Anglo-American political thought, it was badly muddled with the Social Contract theory of Locke and his successors.

The Social Contract Defense is the target of Spooner's attack. It rests on the premise, first articulated in Plato's *Crito*, that individuals ought to keep their agreements. Since everyone has (tacitly) agreed to obey the laws of the State, everyone is morally obligated to obey them, and that is the basis of the moral authority of the State. This defense appeals most to Platonists and Kantians who treat the "institution" of promising with a sort of superstitious awe.

Spooner presents a devastating refutation of the Social Contract Defense. The Constitution can represent a morally binding agreement only if it meets the conditions that must be met by any morally binding agreement: (1) there must be another identifiable individual or individuals with whom the moral agent enters into the agreement; (2) the agent must enter into the agreement voluntarily; and (3) the agent must *sign* the agreement in written form. And, says Spooner, none of these conditions are satisfied by the

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Constitution. Since it obviously fails condition (3), it "would not be received in any court of justice sitting under its authority, if offered to prove a debt of five dollars, owing by one man to another ("No Treason #6," ed. James J. Martin [Colorado Springs, 1973], p. 26). Proponents of the Social Contract Defense usually concede that (3) is not satisfied but maintain that in the acts of voting and paying taxes the individual *tacitly* consents to uphold the Constitution. Aside from simply begging the question—since it has not been explained why (3) must hold explicitly for every agreement except *this* one—this revision still leaves condition (2) unsatisfied. Paying taxes is hardly a voluntary action, and even voting offers only the illusion of choice: the citizen "finds himself, without his consent, so situated that, if he use the ballot, he may become a master; if he does not use it, he must become a slave. And he has no other alternative than these two" (p. 15).

The most interesting, and original, part of Spooner's critique concerns condition (1). To the individual, "the government" is a myth, an abstraction, an incorporeality, with which he can make no contract, and to which he can give no consent, and make no pledge" (p. 21). Since all voting is by secret ballot, an individual cannot identify those other individuals who selected as their representatives the legislators and the executive whom he is supposed to obey. Therefore, he can have no agreement with them.

This begins Spooner's scathing attack on the sacrest of all sacred cows: the secret ballot. Since those who vote for higher taxes, repressive laws, and welfare-warfare benefits never identify themselves, they are nothing but "a secret band of robbers and murderers." Spooner's objection to majority-rule democracy by the secret ballot is fundamentally a moral one. Politicians and tax collectors posture as representatives and agents of "the people." But surely those who oppose their policies should not be held responsible for their actions. For example, those who advocated the trial of President Nixon and his associates for war crimes did not (to my knowledge) also advocate the indictment of every American citizen (including the war protestors themselves) for war crimes. If Nixon was acting as a mere agent, then the moral burden of his actions ultimately rests with those who voted for him and his policies. But, due to the secret ballot, those individuals cannot be identified. "If, then, nobody is individually responsible for the acts of Congress, the members of Congress are nobody's agents. And if they are nobody's agents, they are themselves individually responsible for their own acts" (p. 29).

Spooner sees this as the real motive for the secret ballot: people wish to exploit others without becoming known to them and without being morally accountable for their actions (see p. 32). Since the tax collector represents no identifiable individuals to whom one can have any obligations, he is acting as a private individual and has no more right to one's

property than any other thief. Spooner argues further that oaths of office and loyalty, international treaties, and national debts are all invalid because one or more of the parties involved consists of unidentifiable individuals.

This is the main thrust of Spooner's argument. Plainly, nothing in it is objectionable to limited-government proponents. No libertarian could swallow the Social Contract Defense of plundering productive members of society. Nor could he condone the use of the secret ballot to shield looters and murderers by proxy from accountability for their actions.

Spooner is opposed to a secret government and to a government of looters. But is he opposed, without qualification, to government? "Evidently not" is the answer suggested by at least two passages in "No Treason #6." The first occurs in a paragraph cited in a popular Lysander Spooner poster, which begins, "For this reason, whoever desires liberty, should understand these facts . . ." The poster only lists the first two of six such facts, to the effect that paying one's taxes only leads to further enslavement to the State. But the fact relevant here is the last: "That no government, so called, can reasonably be trusted for a moment, or reasonably be supposed to have honest purposes in view, any longer than it depends wholly upon voluntary support" (p. 22). Spooner is here laying down a necessary condition for legitimate government: it must be voluntarily financed. He is asserting, not that no government is legitimate, but that no government that is financed by extortion is legitimate. Since the possibility of a legitimate government is thus left open, it is clearly consistent with the limited-government libertarian.

His remarks concerning the role of the North in the Civil War are also very suggestive:

If their object had really been to abolish slavery, or maintain liberty or justice generally, they had only to say: *All, whether white or black, who want the protection of this government, shall have it; and all who do not want it, will be left in peace, so long as they leave us in peace.* Had they said this, slavery would necessarily have been abolished at once; the war would have been saved; and a thousand times nobler union than we have ever had would have been the result. It would have been a voluntary union of free men. . . . [p. 55, emphasis added.]

The implication is that the existence of government is compatible with the libertarian ideal of a "voluntary union of free men." The operations of the government are morally defensible insofar as it does not force anyone to contribute to its support, in the form of military conscription or taxation.

But from the fact that Spooner favors a limited government which is voluntary in *this* sense, it does not follow that he is advocating anarchocapitalism. For a government, even one founded on voluntary

consent, will not countenance competing "defense agencies" and judicial systems that employ punitive force against its citizens. That Spooner's government will not do this is implied by the unqualified character of his statement that others "will be left in peace, so long as they leave us in peace." This evidently contrasts with a scheme like Murray Rothbard's, in which "protection agencies" are supposed to coexist within an ill-defined "framework" of legal traditions applied by a farrago of appeals courts. (See Rothbard, "Free-Market Police, Courts, and Law," REASON, March 1973, and, for a criticism, my *New Guard* article cited above.) A government, properly speaking, will insist that grievances against its citizens

be brought against them within its own judicial system and that enforcement occur through its agency or with its sanction. Insofar as a government achieves for itself a monopoly on the sanctioning of enforcement of laws over its citizens, the result is not anarchy.

I conclude that Spooner implicitly disagrees with those who hold that libertarianism entails anarchism, that the existence of government is incompatible with the state of freedom. He does not, admittedly, assert what he should have: that libertarianism is incompatible with anarchism. But his sympathies, as revealed in the passages cited above, lie with the limited-government position. □

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who manage, immediately or over a period of time, to gain control and put to their own advantage the coercive power of the State.

Simply because some activity or transaction is not *illegal* doesn't mean the State has to get its grubby tentacles into the area and license it or otherwise control it. After all, many activities in our society aren't licensed or controlled. And this one—for the good of all of us and for the welfare and benefit of individuals who choose to enter into prostitution—should not be licensed either.

Prospects for the future would appear to be good, judging from the action being taken by prostitutes themselves and from the general opening up of our society, sexually and otherwise. With their effective and continuing attacks against the repressive status quo, such groups as COYOTE, ASP, and PONY should stand a good chance of making serious changes in the future.

Unfortunately, many (except for the Libertarian Party) who are inclined to support decriminalization for purposes of individual freedom and on constitutional grounds find little reason to apply such concepts to *economic* activities in general. This portends problems, because individual and economic freedom are involved in the battle raging over prostitution. Many who will fight to any end to guarantee what they see as *individual* rights and freedoms will fight just as hard to see that *economic* freedoms are proscribed and constricted by the State, in the name of the public good. Thus, the ongoing battle over licensing.

Again unfortunately, what should actually be a tremendous strength—the contemporary women's liberation movement—has in many respects become a hindrance. If the movement as a whole supported freedom on principle, whether individual or economic, male or female, the battle might already be won. But due to the often collectivist nature of the movement, many feminists have trouble reconciling themselves to fighting for someone's freedom to do something, to pursue a life style, that they find personally repugnant. As prostitutes impress upon

members of the women's movement that they don't need "to have their consciousness raised and their legs crossed," perhaps feminists will come to play the more positive role they should be playing now in the fight for freeing prostitutes.

Finally, freedom for the prostitute means not just freedom for those who ply the profession, who choose the life style; it means more freedom for all the members of society: freedom from hypocrisy; freedom for individuals to join the profession they choose, to spend their time as they choose; sexual freedom for all, and perhaps most important, freedom from yet another set of irrational and hypocritical laws criminalizing an act without victims. □

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