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DO MY RIGHTS GET IN THE WAY OF MY FREEDOM? AN EXAMINATION OF THE ROLE OF RIGHTS IN A SOCIETY OF EMPOWERED PEOPLE

JOHN H. MORRIS, JR.*

Freedom is a complicated thing. We live in a society in which freedom is the prevailing value. I am, therefore, free to do as I choose. At least, that is what each of us wants to believe in a free society. However, I also live in the world with you. My freedom sometimes gets in the way of your freedom. How then can we both be free?

In this world of other people, what does it mean to be free? Is *our* freedom no more than the power each of us has to step on the toes of anyone who gets in the way of our freedom without any restricting objection? Or, is *our* freedom in this free society simply the extent to which my freedom and your freedom can coexist?

How then do we manage this coexistence and maintain the facade of freedom? Can it be that in such coexistence neither of us is truly free? Or, is such coexistence the only freedom we can know in a world we share with other people? Such is the social dilemma of freedom in a world with people other than me.

This paper is a thought experiment in the meaning of freedom in a society of free people. Our conception of freedom is personal, and, indeed, it may be meaningful only in a personal sense. I am free. We are free only as individuals who may separately know freedom together.

The idea that “we” can know freedom “collectively” is problematic for us in the absence of a collective consciousness through which we can thus comprehend *our* collective freedom. In this sense, the *Borg* civilization portrayed in the *Star Trek* series, for example, embodies such a collective consciousness in which my experience *is* your experience, and *our* freedom necessarily transcends the aggregation of your and my individual liberty. Whether we want such a civilization is yet another question. However, my consciousness, and that of everyone else I know on this planet, is separate and unique.

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Inevitably, freedom, as we are constituted to know it, can only be personal.

From this strange vantage we approach the question of individual freedom and group interests. As we often speak of them, the rights of individuals and the interests of groups are characteristically at odds. For instance, some people argue that individuals have rights, and groups do not.¹ We may be inclined to see a collective focus as constricting individual autonomy. The question we thus probe is how we make sense of this concept of freedom that views each of us as autonomous beings within a social context of other equally autonomous beings.

I. THE PROBLEM OF FREEDOM IN A WORLD OF PEOPLE

Other people necessarily complicate our personal pursuit of freedom. In a world in which I coexist with others, my freedom can intrude upon that of another and his or her freedom can constrict mine. Rights arise as one way of sorting out our bumping together as we pursue our individual paths to freedom and happiness.

“Rights” require authority and thereby imply hierarchy. Rights work by conferring on certain people the authority to pursue their freedom and implicitly create a hierarchy in which, in a given area, their sensibility can take precedence over that of anyone else whether or not they are agreeable. “Rights” therefore invariably create and invite conflicts. As such, rights require institutions, such as governments and courts, to resolve the conflicts.

Freedom exists within such a society through the idea of “rights.” Through “rights,” we create competing interests and a structure to reconcile them; this structure appears to allow for individual autonomy to exist within a society of otherwise autonomous individuals. These “rights” also dictate certain relationships between people in order to protect their freedom.

What if we created a vehicle other than “rights” to enable free people to coexist? That solution would require us to reinvent the world in which such freedom exists. Consider these changes in conditions:

1. See *ETHNICITY AND GROUP RIGHTS* (Ian Shapiro & Will Kymlicka eds., New York University Press 1997).

- The vehicle that supports our freedom does not require authority, hierarchy, or competing interests.
- The vehicle secures coexistence through agreement, negotiation, and cooperation.

If we change these fundamental conditions, are “individual rights” and “community rights” necessarily opposed? The result here may be there are no rights, only the freedom to create such space as others may agree within which we exercise our freedom. How would such a world work?

The Case of John Rocker

Here is the problem. John Rocker, the famous baseball relief pitcher, has opinions. As a famous athlete, he also has a forum to express them. A national sports magazine publishes his opinions.² In the national publication, the baseball pitcher rails against children, Asian women drivers, foreigners, homosexuals, an African American teammate he calls “a fat monkey,” and Latrell Sprewell, an African American basketball player who choked his coach. The pitcher believes Sprewell should have been arrested and would have been arrested had he been white.³

Hank Aaron, a revered baseball icon, is an executive with the pitcher’s baseball team.⁴ He happens to be an African American who, as a player, achieved baseball immortality in face of similar comments directed his way.⁵ Having suffered in silence when he had no choice

2. Jeff Pearlman, *At Full Blast*, SPORTS ILLUSTRATED, December 27, 1999, at 60 (available online) <<http://sportsillustrated.cnn.com/features/cover/news/1999/12/22/rocker/index.html>> (infamous interview with John Rocker).

3. *Id.*

4. Murray Chass, *Remarks Could Hurt Rocker Most of All*, N.Y. TIMES, December 24, 1999, at D1. Hank Aaron, a Hall-of-Famer and senior vice president with the Atlanta Braves, was “sickened by Rocker’s remarks and questioned how he could remain in baseball, not just with the Braves.” *Id.*

5. Vahe Gregorian, *Hank Aaron: Home Run King Transforms Acrimony Into Desire to Educate*, ST. LOUIS POST-DISPATCH, February 25, 2001, at D10. “Whatever enlightenment was forged by the tumultuous times of the 1960s, little appeared different in 1974 when Aaron, playing for the Atlanta Braves, was zeroing in on Babe Ruth’s mark of 714 homers. Death threats became a routine, and many of the 930,000 pieces of mail he received during a two-year period were vile, if not hostile. Ultimately, he required a 24-hour bodyguard, and for

and no voice, Aaron now decides to weigh in against this personal embarrassment to himself, both as an African American man and as an executive with the organization that employs the offending pitcher.⁶ He says he wants the pitcher canned.⁷

Members of the various groups that were the subject of the pitcher's remarks are not amused by them. They are offended. They are angry. They are anxious to know what happens next.⁸ Are they expected to forgive and forget? Or, will someone acknowledge their offense by doing something to the pitcher?

There are also people who are less offended by what the pitcher had to say than the idea that anyone would silence him just for saying it. They wait to challenge any attempt to stifle expression—even this hostile expression by the baseball pitcher.⁹

Then there are the other baseball executives for this team, as well as those of other baseball teams. What are they to do? Affirm the pitcher's freedom of expression and convey insult to a significant number of past and present players and paying customers offended by what the pitcher had to say? Or, do they take punitive action against the pitcher and invite the cynicism of people who remember when both the team and the game protected other players who had publicly offered such comments?

How then does this problem of the pitcher's freedom get resolved? He has offended or alienated a substantial number of baseball fans, fans who may refuse to contribute to his livelihood and the celebrity that allows him to insult them so publicly by choosing not to spend their entertainment dollars at the ballpark to watch this man pitch.¹⁰ Let's say that these people and those who support them just want to see the pitcher pay some price for the way he has chosen to speak his mind. Let's say further that they begin to talk about not attending the games where the pitcher is to appear. It then rests with the powers that be in baseball to bring the peace that keep the baseball

safety, he stayed at undisclosed locations apart from his teammates. He was kept away from his family often. And his daughter, a college student, needed protection." *Id.*

6. Chass, *supra* note 4.

7. *Id.*

8. Doug Payne, *Civil Rights Leaders Differ on Rocker Suspension*, THE ATLANTA JOURNAL-CONSTITUTION, February 1, 2000, at 5E. See also Claire Smith, *John Rocker Is a Public Menace*, THE PHILADELPHIA INQUIRER, December 24, 1999.

9. *Id.*

10. *Id.*

dollars flowing. In that accommodation of interests, where is the freedom?

Here is the deal that the lords of baseball strike with our baseball pitcher exercising his freedom. They suspend him unceremoniously from the sport for period that keeps him from spring training and some time into the beginning of the season.¹¹ Our pitcher appeals this decision and by arbitrated resolution, his suspension is shortened to allow him to open the baseball season.¹²

As it turns out, when our pitcher starts his season he is not at the top of his game. For a time, he is sent down to the minor leagues.¹³ However, to meet the pitching needs of his team, he soon returns to the major league.¹⁴ He apologizes to his team and his teammates.¹⁵ He puts on a new public face of contrition and assumes a lower public profile.¹⁶ His team's baseball icon accepts what appears to be a new leaf for the pitcher.¹⁷ All is well with the world. Or is it?

There lies our predicament with this thing that passes as freedom. Is this state of affairs satisfying, and, if so, to whom?

Our pitcher has had his say and still gets to pitch. He has had to eat a little crow, with public apologies and a promise for greater care in his public exchanges. The team gets its prize player to help it pursue a world championship. The lords of baseball still have people paying to come to the ballpark to see the game and the pitcher. But what of the others in our strange morality play? What about the baseball icon and the people our pitcher insulted or even those people troubled by the restraint imposed on the pitcher just for stating his view?

The baseball icon says that he is fine with this solution.¹⁸ He has exercised his freedom to be both critical initially and

11. Ross Newhan, *Now, Baseball Has Spoken*, LOS ANGELES TIMES, February 1, 2000, at D1.

12. Richard Wilner, *Rocker Files for Day in Court*, N.Y. POST, February 2, 2000, at 67.

13. Thomas Stinson, *Rocker Gets a Timeout in AAA*, THE ATLANTA JOURNAL-CONSTITUTION, June 6, 2000, at 1F.

14. Thomas Stinson, *Braves Bring Back Rocker*, THE ATLANTA-JOURNAL CONSTITUTION, June 14, 2000, at 1A.

15. Carroll Rodgers, *A Day of Healing for Rocker: Meeting, Apologies Clear Air on Return*, THE ATLANTA JOURNAL-CONSTITUTION, March 3, 2000, at 1C.

16. *Id.*

17. Thomas Stinson, *Braves Soften: Aaron Suggests Rocker's 'Lucky'*, THE ATLANTA-JOURNAL CONSTITUTION, February 1, 2000, at 5E. See also Ross Newhan, *Now, Baseball Has Spoken*, LOS ANGELES TIMES, February 1, 2000, at D1.

18. *Id.*

magnanimous in the end. Whether he would feel the same way if the pitcher returns to offer the same distressing views again is less certain.

The people who were insulted will do what they can. Those who like baseball and can go to the ballpark will exercise their freedom to shout harsh things at the pitcher. The others may just express their opposition in letters to publications or nasty notes to the pitcher. The people who harbor reverence for the pitcher's right to offend will note the injustice of the pitcher's suspension and eagerly await the next time the pitcher will test the resolve of the people who run his sport.

In many ways, we find our freedom somewhere between the rock and the hard place where the baseball executives found themselves. We say we believe in the freedom to express ourselves as we would choose. We also say that we should be free from the gratuitous insult that sometimes arises from unrestricted expression. But what then are we to do when the freedom to choose necessarily allows for the choice that harms? If we do not have the freedom to protect ourselves from the harm that freedom brings, is there any freedom at all for us? Or does freedom merely become the power of those who would be free and the acceptance of those without power, who have no other choice? Thus, is our freedom more than the illusion that power permits? Can I therefore have freedom without the power to protect my own freedom?

II. THE ILLUSION OF FREEDOM AND THE THEORY OF RIGHTS

We understand freedom in terms of rights or at least through the concept of rights. When we think about freedom in America, our thoughts may go to the Bill of Rights, or civil rights, or children's rights, or workers' rights, but always to rights. How then does a right assure freedom?

We begin by assuring the right to do something. For example, in keeping with our scenario involving the baseball pitcher, you say that I have the right to speak my mind. Does that mean that I am not free to speak my mind without the right? Of course not. Unless someone else restrains me, I am free to say whatever I want. The right suggests only that no one else will restrain me if I choose to speak my mind.

But who says that no one else will restrain me? That much is not altogether clear. Sometimes we mean the government. Other times we mean to say that, as a body of people, all of us or at least enough of us will see to it that no one else will restrain me if I choose to speak my mind.

Now, what happens if, in choosing to speak my mind, I happen to insult, offend, endanger, or frighten enough people who would otherwise protect me from those who would restrain me from speaking? So much then for my right to speak my mind? Not necessarily. Here, we say that it is the role of governments and constitutions to protect unpopular minorities.

But what is the jurisdiction of government? The First Amendment assures us only that government will not restrain us in how we choose to speak our mind. It says nothing about what our neighbors may choose to do when we choose to speak our mind.

III. AN ANALYSIS OF RIGHTS

A. A Perspective from Historical Myth

Let us begin with the observation that the idea of rights is a relatively new invention. The Magna Charta is not quite 800 years old.¹⁹ The United States Constitution is in its relative infancy at 210.²⁰ Whatever we derive from the U.N. Charter, we have done so for no more than fifty-five years.²¹ This is just to highlight the obvious point that the idea of freedom has existed for some time without the notion of rights. How then did free people who existed before our preoccupation with rights conceive their freedom?

If I lived in ancient Athens or in some small provincial town in the Roman Empire, my preoccupation with being free likely revolved around whether I was a slave.²² Freedom for me would correlate with

19. LOUIS HENKIN ET AL., HUMAN RIGHTS 16 (1999).

20. U.S. CONST.

21. See LOUIS HENKIN ET AL., HUMAN RIGHTS 306 (1999). The U.N. Charter "established that human rights were a matter of legitimate and appropriate international concern, and declared it to be the purpose of the United Nations to promote universal respect and observance of human rights." *Id.*

22. See RUDOLPH SOHM, THE INSTITUTES: A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW (James Crawford Ledlie, trans., 3rd ed. 1940).

(1) my capacity to buy and own other people for their labor, (2) my family and their social status, and (3) my political connections with the authorities and those of my relatives and friends.²³ To the extent that my life's circumstances fell favorably within these conditions, I enjoyed a capacity to choose for myself my own life's outcomes and understood how my personal choices and those of others fit together in some understood harmony.²⁴

Within the Western European tradition as it developed after the fall of Rome, freedom remained that province beyond ownership by someone else and reliance upon someone else for physical protection and the roof over one's head.²⁵ Within these conditions, the abstract idea of freedom was little more than the notion of royal prerogatives. Freedom was living the life of a king—as long as it fit within a hierarchy of relationships that allowed us to lord our personal will over others.²⁶

In this world, those who were not the king enjoyed freedom together within a social hierarchy that defined both our lives and our freedom.²⁷ If I was a slave, a bondsman, or a serf, I had no freedom at all to speak of.²⁸ As a freeman without family status, wealth, property, or political ties, my freedom existed as my priority to act relative to those beneath me—slaves, bondsmen, and serfs.²⁹ Up that social hierarchy, freedom is the presumption to intrude on those below. Thus, the only person with complete freedom within this framework is the person at the top of the hierarchy—the sovereign. Even here, there are complications. With Runnymede and the Magna Charta, power, powerlessness, and necessity gave rise to the articulation of rights.

In 1215, King John found himself having trouble sustaining his power.³⁰ The English feudal barons, who provided both the money and the arms that propped the English throne, took advantage of his

23. *Id.*

24. *Id.*

25. See generally Jonathan A. Bush, *The First Slave (and Why He Matters)*, 18 CARDOZO L. REV. 599 (1996); William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 18 CARDOZO L. REV. 1711 (1996).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *The Magna Carta: The Reasons for its Granting*, *The Columbia Electronic Encyclopedia 1994* (visited March 8, 2001) <<http://www.infoplease.com/ce6/history/A0859418.html>>.

predicament to do a little “collective bargaining.”³¹ The result was a document that guaranteed that the king could not encroach the prerogatives of his nobles.³² By its terms, among others, King John granted “to all free men of our kingdom . . . for us and our heirs for ever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs.”³³ What are these “liberties . . . to have and to keep?” From where did they come? How do you enforce them? How do you invoke this right to the benefit of your freedom?

Before we accept the charter, without qualification, as a document affirming the rights of man—or at least the rights of Englishmen—we should reflect on a few things the document did and did not do. Among other things, it affirmed the inheritance privileges of the barons.³⁴ It also declared the debts of Jews to barons to be free of interest, in the event the debtor died while the debtor’s heir was underage.³⁵ Apparently, the charter was not drafted to protect fully the interests of Jewish moneylenders, none of whom was likely present or represented during negotiation with the king.³⁶ We might also consider that the very first paragraph of the document is confirmation by the king “for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired.”³⁷ Within the context of this particular negotiation, “perpetuity” lasted about 319 years, until Henry VIII, by the Act of

31. *Id.*

32. F.E. HALLIDAY, A CONCISE HISTORY OF ENGLAND FROM STONEHENGE TO THE MICROCHIP 51-53 (1989).

33. MAGNA CARTA, in LOUIS B. WRIGHT, MAGNA CARTA AND THE TRADITION OF LIBERTY 54, 54 (G.R.C. David, trans., the United States Capitol Historical Society and the Supreme Court Historical Society 1976).

34. *Id.* The relevant translated text reads as follows: “If any earl, baron, or other person that holds lands directly of the Crown, for military service, shall die, and at his death his heir shall be of full age and owe a ‘relief,’ the heir shall have his inheritance on payment of the ancient scale of ‘relief.’ That is to say, the heir or heirs of an earl shall pay £100 for the entire earl’s barony, the heir or heirs of a knight 100s. at most for the entire knight’s ‘fee,’ and any man that owes less shall pay less, in accordance with the ancient usage of fees.” *Id.*

35. *Id.* at 55. The relevant translated text reads as follows: “If anyone who has borrowed a sum of money from Jews dies before the debt has been repaid, his heir shall pay no interest on the debt for so long as he remains under age, irrespective of whom he holds his lands. If such a debt falls into the hands of the crown, it will take nothing except the principal sum specified in the bond.” *Id.*

36. See Jonathan A. Bush, “You’re Gonna Miss Me When I Am Gone”: Early Modern Common Law Discourse and the Case of the Jews, 1993 WIS. L. REV. 1225 (1993).

37. MAGNA CARTA, *supra* note 33, at 54.

Supremacy in 1534, made himself protector of the faith to secure a divorce from Catherine of Aragon.³⁸

Rights are drafted in a language that speaks of principles and absolutes. We put these words on papers we revere and treasure. Yet, the meaning of the words invariably shift to fit the prevailing interests of the moment. This observation that rights are ephemeral and fluid is neither novel nor remarkable. The point is just to remember that rights are always a vehicle for protecting interests, and that interests join individuals to groups.

B. Strategies for Personal Autonomy

History also provides evidence of how people seeking autonomy in a world of other people have found liberty without resort to “rights” as their principal vehicle. These other “strategies for personal autonomy” might be described as follows: (1) flight; (2) bargaining; and (3) political organizing.

1. Flight to Freedom

If I tell you that your freedom gets in my way, you might be concerned depending on how much power you concede to me. If your three-year old child offers this sentiment, you find the thought endearing and not at all threatening. You hold the power in that relationship. On the other hand, if Adolph Hitler were to express the same sentiment and you happened to live in Nazi Germany during the 1930s, you most likely would experience some apprehension. Most likely, you would fear for your personal safety and your personal freedom.

Your response to such a challenge would be to flee beyond the reach of anyone who could limit your freedom. You would employ flight as a strategy to secure and protect your autonomy.

Flight is a long practiced strategy for freedom. Young men of times past went off to strange lands for the freedom of adventure they could never know where they grew up. If they lived in medieval Europe, they might join the crusades in the Holy Lands or go off to sea. In later times, freedom was assured by flight to the New World, to European colonies in Africa, South America, or Asia, or, on the

38. *Henry VIII, King of England: Reign*, *The Columbia Electronic Encyclopedia 1994* (visited March 8, 2001) <<http://www.infoplease.com/ce6/people/A0858608.html>>.

North American continent, to the western frontier. If you happened to be of African descent in the southern United States, freedom meant either escape or migration to the north. In future times, freedom might be embodied by travel to outer space. At the moment, freedom resides in cyberspace.

As a strategy for autonomy, flight has its limitations. At best, it is a short-term solution. Over time, flight invariably offers diminishing returns to those who resort to it. Other people quickly find you and ruin the freedom of isolation. Either the attraction of the paradise that promises freedom is too great, or the isolation we thought we found is an illusion. We are the newcomer for those others who found paradise first—people who get in the way of our freedom. What is a person to do?

2. Bargaining: Living to Let Live

For the short span between the time that you discover paradise and the rest of the world discovers it too, you exist together with those who have arrived in paradise before you by making order of its wondrous chaos. You survive to enjoy your relative isolation by striking a deal with them to live and let live. You leave them alone. They leave you alone.

We can only imagine now how the so-called “Mountain men” of the American westward expansion lived with the various nations and tribes that populated the land beyond the early frontier. We can only imagine the understanding they reached for their own survival about how much game to hunt for their own sustenance, what places and paths they were free to traverse, and with which peoples it was safe for them to consort. We can only imagine that they would explain that by living within the terms of these compacts they found peace and harmony with their environment. In that peace and harmony, there was freedom.

Still, this strategy had its limitations. Inevitably, people from the outside arrived who did not know the terms of the fragile accommodation. These new arrivals disrupted life for everyone. They created conflicts where there had been none. Their numbers introduced a different kind of chaos—social chaos of numerous people too absorbed in their own affairs to engage anyone else in a bargained existence. Their unawareness of anyone else required organization and rules to regulate conflict.

3. *Political Organizing: Making Peace By Aligning Power*

In this world of free-wheeling self interest, political organizing is necessary both for life and freedom. Such a world presumes conflict. In a world teeming with people pursuing personal agendas, we expect that there will be some toes stepped on and more than a few fistfights. The principal question for preserving the peace is what keeps people from stepping on toes or throwing a punch?

In order to counter established power that would give any one of us the freedom to step on someone else's toes or to punch another person, we create rules and align power against anyone who would transgress our rules. By aligning the power of the rest of us, we make rules work. To change the rules, we then have to realign power by political organizing. It is through rules then that political organizing assures freedom. These rules are the "rights" we speak of.

In the first half of the twentieth century, the movement that resulted in the social and political emergence of African Americans illustrates the strategy of political organizing. The movement's arsenal consisted of court litigation and political action through street demonstrations, marches, voter registration, and the more formal support of selected politicians.³⁹ The movement's vehicle for securing freedom consisted of court decisions construing law and the legislation creating it.

As a strategy, political organizing too has its limitations. Its success breeds complacency in the apparent permanence of judicial holdings and enacted laws. Once its objectives have been secured in the form of a given decision or legislative enactment, the mobilizing of power to secure the outcome generally loses momentum. We stop organizing and mobilizing. We expect the laws and the rights to enforce themselves.

C. *Reflections on Freedom, Autonomy, and Power*

So goes this analysis of strategies for freedom in a world of people. We proceed from fleeing to an unknown world without

39. See William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. LAB. & EMP. L. 697 (2000); STEPHEN F. LAWSON, *RUNNING FOR FREEDOM: CIVIL RIGHTS AND BLACK POLITICS IN AMERICA SINCE 1941* (1990).

people, to bargaining with a limited number of people we encounter, to organizing when the incursion of our fellow beings in our free space becomes too great. Still, we pursue freedom in a changing dynamic that always seems to defeat our urge to be free. Once we find the unknown land without people, we either find other people or they find us. Seeking an uneasy peace, we try to negotiate, but others arrive who do not abide by the terms of our deal. We seek to protect ourselves by political alliances. However, power does not gently reconcile difference. It roughly dismisses it and forces us to abide by the accommodation it dictates. Should we still desire to resist in the autonomy we want for ourselves, we can always flee beyond the next frontier to start the process all over again. The inevitable result of this ongoing process is that a satisfying freedom is an elusive outcome.

Even with this panoply of rights, at least in our language and thinking, we still fail to find a freedom that we can sustain to our satisfaction. Perhaps the problem is not in the administration of this framework of rights, but in the idea itself. Perhaps we have reached the limits of what the theory of rights can do for us.

IV. THE PROBLEM WITH RIGHTS: WHAT DO THE POWERFUL NEED RIGHTS FOR?

Within our strategy of securing freedom by political organizing, rights are just another kind of rule we prescribe for ourselves to regulate autonomy within a large population. However, as we use this rulemaking authority, rights raise a curious question. Do powerful people use rights or invoke them to secure their freedom? Or, do only the impotent use rights this way?

Think about it. When was the last time you saw a march on Wall Street to assert the rights of the well-heeled or the well-born to preferential treatment? We live in a society that touts the rule of law as applicable to all. So, you would think that everyone would benefit the same from all aspects of the law, including its framework of rights.

Yet, as ridiculous as this march on Wall Street seems given our experience, it would appear that the powerful do not rely upon rights as the source of their freedom as would people without power. In our language of freedom, we might say that the powerful exercise "prerogatives." A prerogative is just a convention by which the rest of

us tolerate, without questioning, the exercise of power by those who already possess it. We might then ask ourselves, how then is a “right” different from a “prerogative?”

Within this context, we might say that a “right” is a convention by which the rest of us accord power to a person or a group of people to do something. I speak my mind on the street corner challenging governmental policy or I wear openly an emblem of my religious faith. What I say or wear provokes others who may take offense. However, by this convention, enough people close ranks around me, not to agree with what I am doing, but to protect my ability to do so. Without them, I could not succeed in my assertion of power. But, if I could out of the fear I generated or the desire of people to ingratiate themselves with me I would be asserting a prerogative, not a right. The difference then between what we call my prerogative and my right is the power I have to do what I want to do in one case and my lack of power in the other case.

Do rights then *require* powerlessness to have meaning? If only the dispossessed rely upon them and the powerful give them little consideration, does the exercise of a right pose a dilemma? If I am to assert a “right” do I also concede my impotence to act without the right? In so doing, our reliance upon a framework of rights makes all of us like Blanche Dubois in “A Streetcar Named Desire”—always dependent “on the kindness of strangers.”⁴⁰

There is an underlying impotence about our reliance upon rights that is troubling. It begs uncomfortable questions about disparities of power in the world and our willingness not only to tolerate them but to order our reality around them. If rights necessarily imply impotence, it might also be that powerlessness requires this framework of rights. In a strange irony, this framework of freedom may also form the foundation of our own imprisonment.

40. TENNESSEE WILLIAMS, *A STREETCAR NAMED DESIRE* sc. 11 (Penguin Books 1947).

V. A WORLD OF FREEDOM WITHOUT RIGHTS

I ask these questions less to make a profound statement about the limitations of rights than to give some hint as to what the alternative might be. Compare the world that needs rights with a world that manages to secure freedom without them. My premise here is that what ultimately secures freedom is our readiness and willingness to exercise it. Whatever may cause us to forebear makes us less free.

A world of freedom therefore is populated by people who choose to exercise their free will. In such a world, rights help us resolve who gets to assert his or her freedom when free people get in the way of one another. This world of freedom without rights therefore must find a way to resolve the conflicts that freedom necessarily creates in a world populated with free people.

As we recalled the strategy of bargaining in our historical observations, we resolved conflict through negotiation. In the world of bargaining, free people chose to live and let live in exercising their freedom. Forbearance, in that world, while a matter of choice, was a choice made by the participants, not the powerful. That world, however, broke down when others arrived to upset the power equilibrium by adding participants who were not interested in bargaining.

The result, as noted in our observations, was the emergence of a need for rules. If we are to avoid the need for rules to resolve freedom conflicts, what would have to happen in the world? Consider these options as a beginning:

- People who define their own interests without reference to the interests of other people—I do not define what I want by looking at what you have;
- People who exercise their freedom to secure the interests that they define;
- An understanding shared by people of what each brings to support the interests of the others;

- A collective presence capable of *mediating* differences by aligning resources that promote a free exchange between interested individuals.

Under the above conditions, within a framework of bargaining, people create an arrangement where they can exercise their will to the extent they are able to maintain the peace by meeting the interests of the other participants. As long as they succeed in addressing the respective interests of the other participants to allow all to live and let live, freedom sustains itself through the power that each participant wields to address his or her own interests. In this way, the participants maintain their own freedom through their own power to resolve the conflicts that may get in the way of their freedom. They have no need to cede their power to address their interests by relying upon a third party to enforce rules that protect them from the encroachments of others.

Rather than consider the problem abstractly, let us return to our earlier scenario of John Rocker to replay that set of facts within a bargaining world. Everything remains the same, except the way we think about freedom.

Rethinking the Case of John Rocker

As earlier noted, the famous relief pitcher has expressed his opinion to the chagrin of some, the embarrassment of others, and the enjoyment of still others. The lords of baseball are concerned. The baseball icon from the pitcher's team is offended. Within the conflict of concerns, apparently conflicting freedoms play out.

Our earlier scenario presented conflicting principles whose implications reflected on the freedom of our various participants differently. Generally, the conflict was as follows: the right of people in a free society to speak their minds versus the right of people in a decent society not to be diminished just because of who they are—in other words, the freedom to be oneself. Under the rules of this framework, the freedom of our relief pitcher was assured by the first principle, while the sensibilities of the people of whom he spoke were

protected by the second. The problem was how to resolve the dilemma presented by this scenario in which these principles conflict.

Inevitably, the resolution remains troubling when we approach the scenario on the basis of rules and principles. How do we resolve a conflict of principles in a principled way? Generally we cannot. One principle must give way to the other in a way that undermines its existence as a controlling principle. One principle must be compromised, and principles generally do not satisfy us when compromised. Their appeal is to express values that have universal application unrelated to the personalities involved.

The world of bargaining, however, is not driven by principle. It is shaped by interests. Within this framework, we are not looking for a principle to resolve the conflict. We are just looking for an exchange that evenly addresses the respective interests of the parties in conflict.

In our baseball scenario, the interests are as follows:

- Our relief pitcher wants to continue pitching in the big leagues and to continue speaking his mind as he sees fit.
- The subjects of his outbursts want to escape gratuitous insult for being who they are.
- The revered baseball icon wants respect from the game for being who he is and the power to deal with the kind of insults the pitcher offered and that he had to endure earlier in his career.
- The principled libertarian fans want to see our pitcher perform, free to speak his mind.
- The principled egalitarian fans want to see our pitcher sanctioned to preserve the egalitarian fabric of the sport.

- The lords of baseball want people to keep coming to ball games and paying the freight.

Within the framework of bargaining, there is a possible deal to be struck that promotes the interests and the freedom of the various participants. Under this deal, we say that our relief pitcher may continue to pitch and speak his mind, but that the rest of us are also free to revile him for what he says, hound him whenever he performs, and offer our own response not to pay to watch him pitch. As a result of the pitcher's decision to exercise his freedom, he may increase or decrease his popularity, and his popularity may affect his income. However, that is the risk his exercise of freedom entails.

To those looking for someone else to exact a toll on the pitcher on their behalf, we say that it is their freedom to do so, but it is not our responsibility. Be free to express yourself. Perhaps the lords of baseball, in their own interest, make an effort to create a forum for these fans to express themselves, maybe through a web site devoted to views about the pitcher and his comments or by designating a special night at the ballpark for free expression.⁴¹ The revered icon has also made his peace. He has had his say with the pitcher, which was more than he was ever afforded in dealing with the anonymous fans who harassed him during his quest for baseball immortality.

This self-conscious accommodation of interests avoids the inherent dishonesty of dealing in uncompromising principles we are inevitably compelled to compromise. Instead, we acknowledge the power that each of us has to act in defense of our own interests by our freedom to act. As we then choose more frequently to act in our freedom than to forbear, we enrich the freedom within our world. However, the world in which such bargaining pervades is potentially more rancorous than the world where rules and principles shape public behavior.

41. In the case of basketball star Allen Iverson's allegedly offensive rap lyrics, basketball commissioner David Stern's response similarly acknowledged everyone's liberty interest in the situation by declining to impose discipline on the ballplayer while noting the freedom of everyone else not to buy the album and to express, with him, their shared revulsion for the lyrics in question. Ashley McGeachy, *Stern Meets with Iverson Over Gangsta Music, Says Lyrics Will Be Changed*, THE PHILADELPHIA INQUIRER, October 16, 2000; Jeff Pearlman, "It's About Time," SPORTS ILLUSTRATED, November 13, 2000, at 44.

VI. INDIVIDUALS AND GROUPS IN THIS BARGAINED-FOR FREEDOM

Framing the issue as a potential conflict between “individual rights” and “community rights” necessarily focuses on whether these two concepts are dichotomous. The question as posed necessarily assumes a framework of rights. As rights may work in our use of language the notion of a community right may be as problematic as a notion of collective consciousness to share the experience of freedom.

However, from the perspective of interests, there is no conceptual discrepancy created by thinking about interests in an individual or a community context. Indeed, individuals can possess interests, and when many individuals share a community of interests they look and function like what our language calls a community. Accordingly, not only can both individuals and communities possess interests, they can possess the same interests.

The premise of this paper is that our understanding of freedom is not confined to an understanding of rights. It also can embrace an understanding of interests. This conception of freedom allows communities to have an important role in helping us define, promote, and protect interests. Ultimately, a community enhances the capacity of the individual to bargain his interests to promote his freedom.

