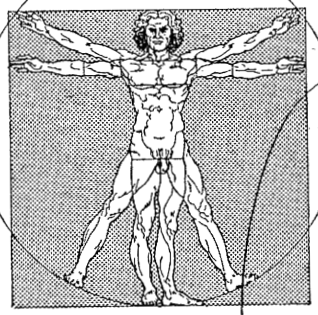

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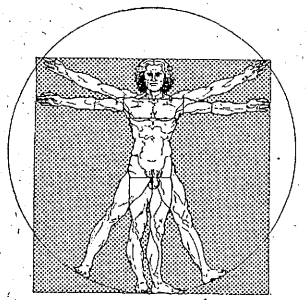

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THE NATURE AND VALUE OF RIGHTS * *

JOEL FEINBERG

1

I would like to begin by conducting a thought experiment. Try to imagine Nowheresville – a world very much like our own except that no one, or hardly any one (the qualification is not important), has *rights*. If this flaw makes Nowheresville too ugly to hold very long in contemplation, we can make it as pretty as we wish in other moral respects. We can, for example, make the human beings in it as attractive and virtuous as possible without taxing our conceptions of the limits of human nature. In particular, let the virtues of moral sensibility flourish. Fill this imagined world with as much benevolence, compassion, sympathy, and pity as it will conveniently hold without strain. Now we can imagine men helping one another from compassionate motives merely, quite as much or even more than they do in our actual world from a variety of more complicated motives.

This picture, pleasant as it is in some respects, would hardly have satisfied Immanuel Kant. Benevolently motivated actions do good, Kant admitted, and therefore are better, *ceteris paribus,* than malevolently motivated actions; but no action can have supreme kind of worth – what Kant called "moral worth" – unless its whole motivating power derives from the thought that it is *required by duty*. Accordingly, let us try to make Nowheresville more appealing to Kant by introducing the idea of duty into it, and letting the sense of duty be a sufficient motive for many beneficent and honorable actions. But doesn't this bring our original thought experiment to an abortive conclusion? If duties are permitted entry into Nowheresville, are not rights necessarily smuggled in along with them?

The question is well-asked, and requires here a brief digression so that we might consider the so-called "doctrine of the logical correlativity of rights and duties." This is the doctrine that (i) all duties entail other people's rights and (ii) all rights entail other people's duties. Only the first part of the doctrine, the alleged entailment from duties to rights, need concern us here. Is this part of the doctrine correct? It should not be surprising that my answer is: "In a sense yes and in a sense no." Etymologically, the word "duty" is associated with actions that are *due* someone else, the payments

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* *Editorial Note:* The three papers and their commentaries published in this issue were read at the Conference on Political and Moral Philosophy held at Ripon College, Wisconsin, Sept. 18 and 19, 1969.

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of debts *to* creditors, the keeping of agreements with promisees, the payment of club dues, or legal fees, or tariff levies to appropriate authorities or their representatives. In this original sense of "duty," all duties are correlated with the rights of those *to* whom the duty is owed. On the other hand, there seem to be numerous classes of duties, both of a legal and non-legal kind, that are *not* logically correlated with the rights of other persons. This seems to be a consequence of the fact that the word "duty" has come to be used for *any* action understood to be *required*, whether by the rights of others, or by law, or by higher authority, or by conscience, or whatever. When the notion of requirement is in clear focus it is likely to seem the only element in the idea of duty that is essential, and the other component notion – that a duty is something *due* someone else – drops off. Thus, in this widespread but derivative usage, "duty" tends to be used for any action we feel we *must* (for whatever reason) do. It comes, in short, to be a term of moral modality merely; and it is no wonder that the first thesis of the logical correlativity doctrine often fails.

Let us then introduce duties into Nowheresville, but only in the sense of actions that are, or are believed to be, morally mandatory, but not in the older sense of actions that are due others and can be claimed by others as their right. Nowheresville now can have duties of the sort imposed by positive law. A legal duty is not something we are implored or advised to do merely; it is something the law, or an authority under the law, *requires* us to do whether we want to or not, under pain of penalty. When traffic lights turn red, however, there is no determinate person who can plausibly be said to claim our stopping as his due, so that the motorist owes it to *him* to stop, in the way a debtor owes it to his creditor to pay. In our own actual world, of course, we sometimes owe it to our *fellow motorists* to stop; but that kind of right-correlated duty does not exist in Nowheresville. There, motorists "owe" obedience to the Law, but they owe nothing to one another. When they collide, no matter who is at fault, no one is morally accountable to anyone else, and no one has any sound grievance or "right to complain."

When we leave legal contexts to consider moral obligations and other extra-legal duties, a greater variety of duties-without-correlative-rights present themselves. Duties of charity, for example, require us to contribute to one or another of a large number of eligible recipients, no one of whom can claim our contribution from us as his due. Charitable contributions are more like gratuitous services, favors, and gifts than like repayments of debts or reparations; and yet we do have duties to be charitable. Many persons, moreover, in our actual world believe that they are required by their own consciences to do more than that "duty" that *can* be demanded of them by their prospective beneficiaries. I have quoted elsewhere the citation from H. B. Acton of a character in a Malraux novel who "gave all his supply of poison to his fellow prisoners to enable them by suicide to escape the burning alive which was to be their fate and his." This man, Acton adds, "probably did not think that [the others] had more of a right to the poison than he had, though he thought it his duty to give it to them."[1] I am sure that there are many actual examples, less dramatically heroic than this fictitious one, of persons who believe, rightly or wrongly, that they *must do* something (hence the word "duty") for another person in excess of what that person can appropriately demand of him (hence the absence of "right").

Now the digression is over and we can return to Nowheresville and summarize what we have put in it thus far. We now find spontaneous benevolence in somewhat larger degree than in our actual world, and also the acknowledged existence of duties of obedience, duties of charity, and duties imposed by exacting private consciences, and also, let us suppose, a degree of conscientiousness in respect to those duties somewhat in excess of what is to be found in our actual world. I doubt that Kant would be fully satisfied with Nowheresville even now that duty and respect for law and authority have been added to it; but I feel certain that he would regard their addition at least as an improvement. I will now introduce two further moral practices into Nowheresville that will make that world very little more appealing to Kant, but will make it appear more familiar to us. These are the practices connected with the notions of *personal desert* and what I call a *sovereign monopoly of rights*.

When a person is said to deserve something good from us what is meant in part is that there would be a certain propriety in our giving that good thing to him in virtue of the kind of person he is, perhaps, or more likely, in virtue of some specific thing he has done. The propriety involved here is a much weaker kind than that which derives from our having promised him the good thing or from his having qualified for it by satisfying the well-advertised conditions of some public rule. In the latter case he could be said not merely to deserve the good thing but also to have a *right* to it, that is to be in a position to demand it as his due; and of course we will not have that sort of thing in Nowheresville. That weaker kind of propriety which is mere desert is simply a kind of *fittingness* between one party's character or action and another party's favorable response, much like that between humor and laughter, or good performance and applause.

The following seems to be the origin of the idea of deserving good or bad treatment from others: A master or lord was under no obligation to reward his servant for especially good service; still a master might naturally feel that there would be a special fittingness in giving a gratuitous reward as a grateful response to the good service (or conversely imposing a penalty for bad service). Such an act while surely fitting and proper was entirely supererogatory. The fitting response in turn from the rewarded servant should be gratitude. If the deserved reward had not been given him he should have had no complaint, since he only *deserved* the reward, as opposed to having a *right* to it, or a ground for claiming it as his due.

[1] H. B. Acton, "Symposium on 'Rights'," *Proceedings of the Aristotelian Society*, Supplementary Volume 24 (1950), pp. 107–8.

The idea of desert has evolved a good bit away from its beginnings by now, but nevertheless, it seems clearly to be one of those words J. L. Austin said "never entirely forget their pasts."[2] Today servants qualify for their wages by doing their agreed upon chores, no more and no less. If their wages are not forthcoming, their contractual rights have been violated and they can make legal claim to the money that is their due. If they do less than they agreed to do, however, their employers may "dock" them, by paying them proportionately less than the agreed upon fee. This is all a matter of right. But if the servant does a splendid job, above and beyond his minimal contractual duties, the employer is under no further obligation to reward him, for this was not agreed upon, even tacitly, in advance. The additional service was all the servant's idea and done entirely on his own. Nevertheless, the morally sensitive employer may feel that it would be exceptionally appropriate for him to respond, freely on *his* own, to the servant's meritorious service, with a reward. The employee cannot demand it as his due, but he will happily accept it, with gratitude, as a fitting response to his desert.

In our age of organized labor, even this picture is now archaic; for almost every kind of exchange of service is governed by hard bargained contracts so that even bonuses can sometimes be demanded as a matter of right, and nothing is given for nothing on either side of the bargaining table. And perhaps that is a good thing; for consider an anachoronistic instance of the earlier kind of practice that survives, at least as a matter of form, in the quaint old practice of "tipping." The tip was originally conceived as a reward that has to be earned by "zealous service." It is not something to be taken for granted as a standard response to *any* service. That is to say that its payment is a *"gratuity,"* not a discharge of obligation, but something given apart from, or in addition to, anything the recipient can expect as a matter of right. That is what tipping originally meant at any rate, and tips are still referred to as "gratuities" in the tax forms. But try to explain all that to a New York cab driver! If he has *earned* his gratuity, by God, he has it coming, and there had better be sufficient acknowledgement of his desert or he'll give you a piece of his mind! I'm not generally prone to defend New York cab drivers, but they do have a point here. There is the making of a paradox in the queerly unstable concept of an "earned gratuity." One can understand how "desert" in the weak sense of "propriety" or "mere fittingness" tends to generate a stronger sense in which desert is itself the ground for a claim of right.

In Nowheresville, nevertheless, we will have only the original weak kind of desert. Indeed, it will be impossible to keep this idea out if we allow such practices as teachers grading students, judges awarding prizes, and servants serving benevolent but class-conscious masters. Nowheresville is a reasonably good world in many ways, and its teachers, judges, and masters

[2] J. L. Austin, "A Plea for Excuses", *Proceedings of the Aristotelian Society*, Vol. 57 (1956–57).

will generally try to give students, contestants, and servants the grades, prizes, and rewards they deserve. For this the recipients will be grateful; but they will never think to complain, or even feel aggrieved, when expected responses to desert fail. The masters, judges, and teachers don't *have* to do good things, after all, for *anyone*. One should be happy that they *ever* treat us well, and not grumble over their occasional lapses. Their hoped for responses, after all, are *gratuities,* and there is no wrong in the omission of what is merely gratuitous. Such is the response of persons who have no concept of *rights,* even persons who are proud of their own deserts.[3]

Surely, one might ask, rights have to come in somewhere, if we are to have even moderately complex forms of social organization. Without rules that confer rights and impose obligations, how can we have ownership of property, bargains and deals, promises and contracts, appointments and loans, marriages and partnerships? Very well, let us introduce all of these social and economic practices into Nowheresville, but *with one big twist.* With them I should like to introduce the curious notion of a "sovereign right-monopoly." You will recall that the subjects in Hobbes's *Leviathan* had no rights whatever against their sovereign. He could do as he liked with them, even gratuitously harm them, but this gave them no valid grievance against him. The sovereign, to be sure, had a certain duty to treat his subjects well, but this duty was owed not to the subjects directly, but to God, just as we might have a duty to a person to treat his property well, but of course no duty to the property itself but only to its owner. Thus, while the sovereign was quite capable of *harming* his subjects, he could commit no wrong against them that they could complain about, since they had no prior claims against his conduct. The only party *wronged* by the sovereign's mistreatment of his subjects was God, the supreme lawmaker. Thus, in repenting cruelty to his subjects, the sovereign might say to God, as David did after killing Uriah, "to Thee only have I sinned."[4]

Even in the *Leviathan,* however, ordinary people had ordinary rights *against one another.* They played roles, occupied offices, made agreements, and signed contracts. In a genuine "sovereign right-monopoly," as I shall be using that phrase, they will do all those things too, and thus incur genuine obligations toward one another; but the obligations (here is the twist) will not be owed directly *to* promisees, creditors, parents, and the like, but rather to God alone, or to the members of some elite, or to a single sovereign under God. Hence, the rights correlative to the obligations that derive from these transactions are all owned by some "outside" authority.

As far as I know, no philosopher has ever suggested that even our role and contract obligations (in this, our actual world) are all owed directly to

[3] For a fuller discussion of the concept of personal desert see my "Justice and Personal Desert," *Nomos VI, Justice,* ed. by C. J. Friedrich and J. Chapman (New York: Atherton Press, 1963), pp. 69–97.

[4] II Sam. 11. Cited with approval by Thomas Hobbes in *The Leviathan,* Part II, Chap. 21.

a divine intermediary; but some theologians have approached such extreme moral occasionalism. I have in mind the familiar phrase in certain widely distributed religious tracts that "it takes three to marry," which suggests that marital vows are not made between bride and groom directly but between each spouse and God, so that if one breaks his vow, the other cannot rightly complain of being wronged, since only God could have claimed performance of the marital duties as his *own* due; and hence God alone had a claim-right violated by nonperformance. If John breaks his vow to God, he might then properly repent in the words of David: "To Thee only have I sinned."

In our actual world, very few spouses conceive of their mutual obligations in this way; but their small children, at a certain stage in their moral upbringing, are likely to feel precisely this way toward *their* mutual obligations. If Billy kicks Bobby and is punished by Daddy, he may come to feel contrition for his naughtiness induced by his painful estrangement from the loved parent. Hy may then be happy to make amends and sincere apology *to Daddy;* but when Daddy insists that he apologize to his wronged brother, that is another story. A direct apology to Billy would be a tacit recognition of Billy's status as a right-holder against him, some one he can wrong as well as harm, and someone to whom he is directly accountable for his wrongs. This is a status Bobby will happily accord Daddy; but it would imply a respect for Billy that he does not presently feel, so he bitterly resents according it to him. On the "three-to-marry" model, the relations between each spouse and God would be like those between Bobby and Daddy; respect for the other spouse as an independent claimant would not even be necessary; and where present, of course, never sufficient.

The advocates of the "three to marry" model who conceive it either as a description of our actual institution of marriage or a recommendation of what marriage ought to be, may wish to escape this embarrassment by granting rights to spouses in capacities other than as promisees. They may wish to say, for example, that when John promises God that he will be faithful to Mary, a right is thus conferred not only on God as promisee but also on Mary herself as third-party beneficiary, just as when John contracts with an insurance company and names Mary as his intended beneficiary, she has a right to the accumulated funds after John's death, even though the insurance company made no promise to her. But this seems to be an unnecessarily cumbersome complication contributing nothing to our understanding of the marriage bond. The life insurance transaction is necessarily a three party relation, involving occupants of three distinct offices, no two of whom alone could do the whole job. The transaction, after all, is defined as the purchase by the customer (first office) from the vendor (second office) of protection for a beneficiary (third office) against the customer's untimely death. Marriage, on the other hand, in this our actual world, appears to be a binary relation between a husband and wife, and even though third parties such as children, neighbors, psychiatrists, and priests may sometimes be helpful and even causally necessary for the survival of the relation, they

are not logically necessary to our *conception* of the relation, and indeed many married couples do quite well without them. Still, I am not now purporting to describe our actual world, but rather trying to contrast it with a counterpart world of the imagination. In *that* world, it takes three to make almost *any* moral relation and all rights are owned by God or some sovereign under God.

There will, of course, be delegated authorities in the imaginary world, empowered to give commands to their underlings and to punish them for their disobedience. But the commands are all given in the name of the right-monopoly who in turn are the only persons to whom obligations are owed. Hence, even intermediate superiors do not have claim-rights against their subordinates but only legal *powers* to create obligations in the subordinates *to* the monopolistic right-holders, and also the legal *privilege* to impose penalties in the name of that monopoly.

2

So much for the imaginary "world without rights." If some of the moral concepts and practices I have allowed into that world do not sit well with one another, no matter. Imagine Nowheresville with all of these practices if you can, or with any harmonious subset of them, if you prefer. The important thing is not what I've let into it, but what I have kept out. The remainder of this paper will be devoted to an analysis of what precisely a world is missing when it does not contain rights and why that absence is morally important.

The most conspicuous difference, I think, between the Nowheresvillians and ourselves has something to do with the activity of *claiming*. Nowheresvillians, even when they are discriminated against invidiously, or left without the things they need, or otherwise badly treated, do not think to leap to their feet and make righteous demands against one another, though they may not hesitate to resort to force and trickery to get what they want. They have no notion of rights, so they do not have a notion of what is their due; hence they do not claim before they take. The conceptual linkage between personal rights and claiming has long been noticed by legal writers and is reflected in the standard usage in which "claim-rights" are distinguished from the mere liberties, immunities, and powers, also sometimes called "rights," with which they are easily confused. When a person has a legal claim-right to X, it must be the case (i) that he is at liberty in respect to X, i.e., that he has no duty to refrain from or relinquish X, and also (ii) that his liberty is the ground of other people's *duties* to grant him X or not to interfere with him in respect to X. Thus, in the sense of claim-rights, it is true by definition that rights logically entail other people's duties. The paradigmatic examples of such rights are the creditor's right to be paid a debt by his debtor, and the landowner's right not to be interfered with by anyone in the exclusive occupancy of his land. The creditor's right against his debtor, for example, and the debtor's duty to his creditor, are precisely

the same relation seen from two different vantage points, as inextricably linked as the two sides of the same coin.

And yet, this is not quite an accurate account of the matter, for it fails to do justice to the way claim-rights are somehow prior to, or more basic than, the duties with which they are necessarily correlated. If Nip has a claim-right against Tuck, it is because of this fact that Tuck has a duty to Nip. It is only because something from Tuck is *due* Nip (directional element) that there is something Tuck *must do* (modal element). This is a relation, moreover, in which Tuck is bound and Nip is free. Nip not only *has* a right, but he can choose whether or not to exercise it, whether to claim it, whether to register complaints upon its infringement, even whether to release Tuck from his duty, and forget the whole thing. If the personal claim-right is also backed up by criminal sanctions, however, Tuck may yet have a duty of obedience to the law from which no one, not even Nip, may release him. He would even have such duties if he lived in Nowheresville; but duties subject to acts of claiming, duties derivative from and contingent upon the personal rights of others, are unknown and undreamed of in Nowheresville.

Many philosophical writers have simply identified rights with claims. The dictionaries tend to define "claims," in turn, as "assertions of right," a dizzying piece of circularity that led one philosopher to complain – "We go in search of rights and are directed to claims, and then back again to rights in bureaucratic futility."[5] What then is the relation between a claim and a right?

As we shall see, a right *is* a kind of claim, and a claim is "an assertion of right," so that a formal definition of either notion in terms of the other will not get us very far. Thus if a "formal definition" of the usual philosophical sort is what we are after, the game is over before it has begun, and we can say that the concept of a right is a "simple, undefinable, unanalysable primitive." Here as elsewhere in philosophy this will have the effect of making the commonplace seem unnecessarily mysterious. We would be better advised, I think, not to attempt a formal definition of either "right" or "claim," but rather to use the idea of a claim in informal elucidation of the idea of a right. This is made possible by the fact that *claiming* is an elaborate sort of rule-governed *activity*. A claim is that which is claimed, the object of the act of claiming. There is, after all, a verb "to claim," but no verb "to right." If we concentrate on the whole activity of claiming, which is public, familiar, and open to our observation, rather than on its upshot alone, we may learn more about the generic nature of rights than we could ever hope to learn from a formal definition, even if one were possible. Moreover, certain facts about rights more easily, if not solely, expressible in the language of claims and claiming are essential to a full understanding not only of what rights are, but also why they are so vitally important.

[5] H. B. Acton, *Op. cit.*

Let us begin then by distinguishing between: (i) making claim to . . . , (ii) claiming that . . . , and (iii) having a claim. One sort of thing we may be doing when we claim is to *make claim to something*. This is "to petition or seek by virtue of supposed right; to demand as due." Sometimes this is done by an acknowledged right-holder when he serves notice that he now wants turned over to him that which has already been acknowledged to be his, something borrowed, say, or improperly taken from him. This is often done by turning in a chit, a receipt, an I.O.U., a check, an insurance policy, or a deed, that is, a *title* to something currently in the possession of someone else. On other occasions, making claim is making application for titles or rights themselves, as when a mining prospector stakes a claim to mineral rights, or a householder to a tract of land in the public domain, or an inventor to his patent rights. In the one kind of case, to make claim is to exercize rights one already has by presenting title; in the other kind of case it is to apply for the title itself, by showing that one has satisfied the conditions specified by a rule for the ownership of title and therefore that one can demand it as one's due.

Generally speaking, only the person who has a title or who has qualified for it, or someone speaking in his name, can make claim to something as a matter of right. It is an important fact about rights (or claims), then, that they can be claimed only by those who have them. Anyone can claim, of course, *that* this umbrella is yours, but only you or your representative can actually claim the umbrella. If Smith owes Jones five dollars, only Jones can claim the five dollars as his own, though any bystander can *claim that* it belongs to Jones. One important difference then between *making legal claim to* and *claiming that* is that the former is a legal performance with direct legal consequences whereas the latter is often a mere piece of descriptive commentary with no legal force. Legally speaking, *making claim to* can itself make things happen. This sense of "claiming," then, might well be called "the performative sense." The legal power to claim (performatively) one's right or the things to which one has a right seems to be essential to the very notion of a right. A right to which one could not make claim (i.e. not even for recognition) would be a very "imperfect" right indeed!

Claiming that one has a right (what we can call "propositional claiming" as opposed to "performative claiming") is another sort of thing one can do with language, but it is not the sort of doing that characteristically has legal consequences. To claim that one has rights is to make an assertion that one has them, and to make it in such a manner as to demand or insist that they be recognized. In this sense of "claim" many things in addition to rights can be claimed, that is, many other kinds of proposition can be asserted in the claiming way. I can claim, for example, that you, he, or she has certain rights, or that Julius Caesar once had certain rights; or I can

[6] G. J. Warnock, "Claims to Knowledge," *Proceedings of the Aristotelian Society*, Supplementary Volume 36 (1962), p. 21.

claim that certain statements are true, or that I have certain skills, or accomplishments, or virtually anything at all. I can claim that the earth is flat. What is essential to *claiming that* is the manner of assertion. One can assert without even caring very much whether any one is listening, but part of the point of propositional claiming is to *make sure* people listen. When I claim to others that I know something, for example, I am not merely asserting it, but rather "obtruding my putative knowledge upon their attention, demanding that it be recognized, that appropriate notice be taken of it by those concerned . . ."[7] Not every truth is properly assertable, much less claimable, in every context. To claim that something is the case in circumstances that justify no more than calm assertion is to behave like a boor. (This kind of boorishness, I might add, is probably less common in Nowheresville.) But not to claim in the appropriate circumstances that one has a right is to be spiritless or foolish. A list of "appropriate circumstances" would include occasions when one is challenged, when one's possession is denied, or seems insufficiently acknowledged or appreciated; and of course even in these circumstances, the claiming should be done only with an appropriate degree of vehemence.

Even if there are conceivable circumstances in which one would admit rights diffidently, there is no doubt that their characteristic use and that for which they are distinctively well suited, is to be claimed, demanded, affirmed, insisted upon. They are especially sturdy objects to "stand upon," a most useful sort of moral furniture. Having rights, of course, makes claiming possible; but it is claiming that gives rights their special moral significance. This feature of rights is connected in a way with the customary rhetoric about what it is to be a human being. Having rights enables us to "stand up like men," to look others in the eye, and to feel in some fundamental way the equal of anyone. To think of oneself as the holder of rights is not to be unduly but properly proud, to have that minimal self-respect that is necessary to be worthy of the love and esteem of others. Indeed, respect for persons (this is an intriguing idea) may simply be respect for their rights, so that there cannot be the one without the other; and what is called "human dignity" may simply be the recognizable capacity to assert claims. To respect a person then, or to think of him as possessed of human dignity, simply *is* to think of him as a potential maker of claims. Not all of this can be packed into a definition of "rights;" but these are *facts* about the possession of rights that argue well their supreme moral importance. More

[7] This is the important difference between rights and mere claims. It is analogous to the difference between *evidence* of guilt (subject to degrees of cogency) and conviction of guilt (which is all or nothing). One can "have evidence" that is not conclusive just as one can "have a claim" that is not valid. "Prima-facieness" is built into the sense of "claim", but the notion of a "prima-facie right" makes little sense. On the latter point see A. I. Melden, *Rights and Right Conduct* (Oxford: Basil Blackwell, 1959), pp. 18–20, and Herbert Morris, "Persons and Punishment," *The Monist*, Vol. 52 (1968), pp. 498-9.

than anything else I am going to say, these facts explain what is wrong with Nowheresville.

We come now to the third interesting employment of the claiming vocabulary, that involving not the verb "to claim" but the substantive "a claim." What is it to *have a claim* and how is this related to rights? I would like to suggest that *having a claim consists in being in a position to claim, that is, to make claim to* or *claim that*. If this suggestion is correct it shows the primacy of the verbal over the nominative forms. It links claims to a kind of activity and obviates the temptation to think of claims as *things*, on the model of coins, pencils, and other material possessions which we can carry in our hip pockets. To be sure, we often make or establish our claims by presenting titles, and these typically have the form of receipts, tickets, certificates, and other pieces of paper or parchment. The title, however, is not the same thing as the claim; rather it is the evidence that establishes the claim as valid. On this analysis, one might have a claim without ever claiming that to which one is entitled, or without even knowing that one has the claim; for one might simply be ignorant of the fact that one is in a position to claim; or one might be unwilling to exploit that position for one reason or another, including fear that the legal machinery is broken down or corrupt and will not enforce one's claim despite its validity.

Nearly all writers maintain that there is some intimate connection between having a claim and having a right. Some identify right and claim without qualification; some define "right" as justified or justifiable claim, others as recognized claim, still others as valid claim. My own preference is for the latter definition. Some writers, however, reject the identification of rights with valid claims on the ground that all claims as such are valid, so that the expression "valid claim" is redundant. These writers, therefore, would identify rights with claims *simpliciter*. But this is a very simple confusion. All claims, to be sure, are *put forward* as justified, whether they are justified in fact or not. A claim conceded even by its maker to have no validity is not a claim at all, but a mere demand. The highwayman, for example, *demands* his victim's money; but he hardly makes claim to it as rightfully his own.

But it does not follow from this sound point that it is redundant to qualify claims as justified (or as I prefer, valid) in the definition of a right; for it remains true that not all claims put forward as valid really are valid; and only the valid ones can be acknowledged as rights.

If having a valid claim is not redundant, i.e., if it is not redundant to pronounce *another's* claim valid, there must be such a thing as having a claim that is not valid. What would this be like? One might accumulate just enough evidence to argue with relevance and cogency that one has a right (or ought to be granted a right), although one's case might not be overwhelmingly conclusive. In such a case, one might have strong enough argument to be entitled to a hearing and given fair consideration. When one is in this position, it might be said that one "has a claim" that deserves to be weighed carefully. Nevertheless, the balance of reasons may turn out to

militate against recognition of the claim, so that the claim, which one admittedly had, and perhaps still does, is not a valid claim or right. "Having a claim" in this sense is an expression very much like the legal phrase "having a *prima facie* case." A plaintiff establishes a *prima facie* case for the defendant's liability when the establishes grounds that will be sufficient for liability unless outweighed by reasons of a different sort that may be offered by the defendant. Similarly, in the criminal law, a grand jury returns an indictment when it thinks that the prosecution has sufficient evidence to be taken seriously and given a fair hearing, whatever countervailing reasons may eventually be offered on the other side. That initial evidence, serious but not conclusive, is also sometimes called a *prima facie* case. In a parallel *"prima facie* sense" of "claim," having a claim to *X* is not (yet) the same as having a right to *X*, but is rather having a case of at least minimal plausibility that one has a right to *X*, a case that does establish a right, not to *X*, but to a fair hearing and consideration. Claims, so conceived, differ in degree: some are stronger than others. Rights, on the other hand, do not differ in degree; no one right is more of a right than another.[8]

Another reason for not identifying rights with claims *simply* is that there is a well-established usage in international law that makes a theoretically interesting distinction between claims and rights. Statesmen are sometimes led to speak of "claims" when they are concerned with the natural needs of deprived human beings in conditions of scarcity. Young orphans *need* good upbringings, balanced diets, education, and technical training everywhere in the world; but unfortunately there are many places where these goods are in such short supply that it is impossible to provision all who need them. If we persist, nevertheless, in speaking of these needs as constituting rights and not merely claims, we are committed to the conception of a right which is an entitlement *to* some good, but not a valid claim *against* any particular individual; for in conditions of scarcity there may be no determinate individuals who can plausibly be said to have a duty to provide the missing goods to those in need. J. E. S. Fawcett therefore prefers to keep the distinction between claims and rights firmly in mind. "Claims," he writes, "are needs and demands in movement, and there is a continuous transformation, as a society advances [toward greater abundance] of economic and social claims into civil and political rights . . . and not all countries or all claims are by any means at the same stage in the process."[8] The manifesto writers on the other side who seem to identify needs, or at least basic needs, with what they call "human rights," are more properly described, I think, as urging upon the world community the moral principle that *all* basic human needs ought to be recognized as *claims* (in the customary *prima facie* sense) worthy of sympathy and serious consideration right now, even though, in many cases, they cannot yet plausibly

[8] J. E. S. Fawcett, "The International Protection of Human Rights," in *Political Theory and the Rights of Man,* ed. by D. D. Raphael (Bloomington: Indiana University Press, 1967), pp. 125 and 128.

be treated as *valid* claims, that is, as grounds of any other people's duties. This way of talking avoids the anomaly of ascribing to all human beings now, even those in pre-industrial societies, such "economic and social rights" as "periodic holidays with pay."[9]

Still, for all of that, I have a certain sympathy with the manifesto writers, and I am even willing to speak of a special "manifesto sense" of "right," in which a right need not be correlated with another's duty. Natural needs are real claims if only upon hypothetical future beings not yet in existence. I accept the moral principle that to have an unfulfilled need is to have a kind of claim against the world, even if against no one in particular. A natural need for some good as such, like a natural desert, is always a reason in support of a claim to that good. A person in need, then, is always "in a position" to make a claim, even when there is no one in the corresponding position to do anything about it. Such claims, based on need alone, are "permanent possibilities of rights," the natural seed from which rights grow. When manifesto writers speak of them as if already actual rights, they are easily forgiven, for this is but a powerful way of expressing the conviction that they ought to be recognized by states here and now as potential rights and consequently as determinants of *present* aspirations and guides to *present* policies. That usage, I think, is a valid exercise of rhetorical licence.

I prefer to characterize rights as valid claims rather than justified ones, because I suspect that justification is rather too broad a qualification. "Validity," as I understand it, is justification of a peculiar and narrow kind, namely justification within a system of rules. A man has a legal right when the official recognition of his claim (as valid) is called for by the governing rules. This definition, of course, hardly applies to moral rights, but that is not because the genus of which moral rights are a species is something other than *claims*. A man has a moral right when he has a claim the recognition of which is called for – not (necessarily) by legal rules – but by moral principles, or the principles of an enlightened conscience.

There is one final kind of attack on the generic identification of rights with claims, and it has been launched with great spirit in a recent article by H. J. McCloskey, who holds that rights are not essentially claims at all, but rather entitlements. The springboard of his argument is his insistence that rights in their essential character are always *rights to,* not *rights against:*

> My right to life is not a right against anyone. It is my right and by virtue of it, it is normally permissible for me to sustain my life in the face of obstacles. It does give rise to rights against others *in the sense* that others have or may come to have duties to refrain from killing me, but it is essentially a right of mine, not an infinite list of claims, hypothetical and actual, against an infinite number of actual, potential, and as yet nonexistent human beings . . . Similarly, the right of the

[9] As declared in Article 24 of *The Universal Declaration of Human Rights* adopted on December 10, 1948, by the General Assembly of the United Nations.

> tennis club member to play on the club courts is a right to play, not a right against some vague group of potential or possible obstructors.[10]

The argument seems to be that since rights are essentially rights *to*, whereas claims are essentially claims *against*, rights cannot be claims, though they can be grounds for claims. The argument is doubly defective though. First of all, contrary to McCloskey, rights (at least legal claim-rights) *are* held *against* others. McCloskey admits this in the case of *in personam* rights (what he calls "special rights") but denies it in the case of *in rem* rights (which he calls "general rights"):

> Special rights are sometimes against specific individuals or institutions – e.g. rights created by promises, contracts, etc. . . . but these differ from . . . characteristic . . . general rights where the right is simply a right to . . .[11]

As far as I can tell, the only reason McCloskey gives for denying that *in rem* rights are against others is that those against whom they would have to hold make up an enormously multitudinous and "vague" group, including hypothetical people not yet even in existence. Many others have found this a paradoxical consequence of the notion of *in rem* rights, but I see nothing troublesome in it. If a general rule gives me a right of noninterference in a certain respect against everybody, then there are literally hundreds of millions of people who have a duty toward me in that respect; and if the same general rule gives the same right to everyone else, then it imposes on me literally hundreds of millions of duties – or duties towards hundreds of millions of people. I see nothing paradoxical about this, however. The duties, after all, are negative; and I can discharge all of them at a stroke simply by minding my own business. And if all human beings make up one moral community and there are hundreds of millions of human beings, we should expect there to be hundreds of millions of moral relations holding between them.

McCloskey's other premise is even more obviously defective. There is no good reason to think that all *claims* are "essentially" *against*, rather than *to*. Indeed most of the discussion of claims above has been of claims *to*, and as we have seen, the law finds it useful to recognize claims *to* (or "mere claims") that are not yet qualified to be claims *against*, or rights (except in a "manifesto sense" of "rights").

Whether we are speaking of claims or rights, however, we must notice that they seem to have two dimensions, as indicated by the prepositions "to" and "against," and it is quite natural to wonder whether either of these dimensions is somehow more fundamental or essential than the other. All rights seem to merge *entitlements to* do, have, omit, or be something with *claims against* others to act or refrain from acting in certain ways. In some statements of rights the entitlement is perfectly determinate (e.g. *to* play tennis) and the claim vague (e.g. *against* "some vague group of potential or possible obstructors"); but in other cases the object of the claim is clear and determinate (e.g. *against* one's parents), and the entitlement general and indeterminate (e.g. to be given a proper upbringing.) If we mean by "entitlement" that *to* which one has a right and by "claim" something directed at those *against* whom the right holds (as McCloskey apparently does), then we can say that all claim-rights necessarily involve both, though in individual cases the one element or the other may be in sharper focus.

In brief conclusion: To have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles. To have a *claim* in turn, is to have a case meriting consideration, that is, to have reasons or grounds that put one in a position to engage in performative and propositional claiming. The activity of claiming, finally, as much as any other thing, makes for self-respect and respect for others, gives a sense to the notion of personal dignity, and distinguishes this otherwise morally flawed world from the even worse world of Nowheresville.

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[10] H. J. McCloskey, "Rights," *Philosophical Quarterly*, Vol. 15 (1965), p. 118.

[11] *Loc. cit.*

Commentary

The thesis of Feinberg's paper is that "to have a legal right is to have a claim against someone whose recognition as valid is called for by some set of governing rules." Much of the value of his paper lies in the careful way he explains just what it is to have such a claim. To have a claim is "to have reasons or grounds that put one in a position to engage in performative and propositional claiming." I heartily endorse his strategy of explaining the noun form "claim" in terms of the verb form "claiming."

Nevertheless, some questions remain in my mind. What is it to *have* reasons or grounds? Suppose the facts are such that, if only I knew them, which I do not, I could go to court and successfully make a claim to a certain piece of property. Do I have a right to that property? It seems outrageous to deny that I have a right to my inheritance simply because my sister has hidden from me my father's last will and testament. Yet it is not clear that, as long as I am ignorant of that document, I have any grounds for making a legal claim. If one must possess the grounds in some sense, what sort of possession is required? Is it enough to have some slight evidence of the relevant factual statements or must one have conclusive evidence? Is it enough to have evidence in the epistemological sense, or must it be that special sort of evidence admissible in courtroom procedures?

To have a claim is to be in a position to engage in performative and propositional claiming. Why both? My suspicions are aroused when I reflect on the *content* of propositional claiming. What is it that one asserts when one asserts that one has a right? To assert that one is in a position to assert a claim seems a circular and empty sort of claiming. My hunch is that what one asserts is that one is in a position to claim in the performative sense. If so, then the propositional activity is parasitic upon the performative, and it would be better to omit it in any analysis of the very meaning of having a right. When Feinberg explains why he considers propositional claiming important, he continually returns to asserting rights in such a way that they are recognized. Does recognition consist in mere intellectual assent unconnected with practice or does it require that those who recognize the right refrain from infringing it and even protect it?

If the latter, then the sort of claiming that obtains recognition is performative rather than merely propositional. If the former, its legal and moral significance is considerably reduced.

Whether or not Feinberg would agree with me that propositional claiming is only incidental, he will admit that performative claiming is crucial. If so, he must do much more to explain the nature of this performance. Exactly what is the activity of making a legal claim to something? And exactly how does it differ from other legal performances like indicting someone for a crime, prosecuting a criminal, reaching a verdict, rendering a decision, or enforcing an injunction? If what it is to have a claim is to be explained in terms of the activity of claiming, then we must know precisely what sort of activity this performative claiming really is.

Finally, although the title of Feinberg's paper suggests that he is talking about rights in the generic sense, the only species of rights he discusses at length are legal rights. Are there nonlegal performances of making a claim parallel to the activity of making a legal claim? If so, in what ways are these nonlegal performances similar to and different from their legal counterpart? If not, how are we to interpret the traditional language of moral rights and human rights?

Perhaps I have no right to ask so many questions of Professor Feinberg. But his paper is a great advance over previous attempts to analyze rights in terms of claims precisely because, while earlier expositions were so vague as to render one speechless, his is specific enough to raise very pointed questions. If he can answer these questions, he will have shown that his analysis of rights is one of which he has a right to be proud.

Carl Wellman

Commentary

Feinberg argues, with his usual subtlety, clarity, and force, that we could have "conscientiousness, charity, benevolence" and some other nice things and still lack rights; and also, though he does not argue this very specifically, that the addition of rights to this group would be a great improvement over a world in which only these things existed. I have my doubts about both of these things.

Let us suppose that Feinberg is basically correct in his analysis of rights, according to which to have a right is to have a "claim against someone, whose recognition as valid is called for by some set of governing rules." To have a claim, in turn, is to "have a case meriting consideration, that is, to have reasons or grounds that put one in a position to engage in performative and propositional claiming." Well, I don't see why people who are the proper and deserving beneficiaries of various duties and benevolent sentiments should not be in a position to point this out to those whose duties, *etc.*, they are; and why this does not amount to a claim. Suppose you are a millionaire, and I a needy pauper; and further, that I am so situated that it would be easy for you to do something to alleviate my needs, that nobody else is so situated, that, indeed, there are very few further candidates for charity anywhere within view. I point out all these facts to you, knowing your professed adherence to the duty of charity. Am I not, simply in doing so, making a claim? Do I not have good reason, good grounds, for asserting that you, under the circumstances, ought to benefit me? And if you genuinely are conscientious and charitable, then surely you will in fact deliver the goods, or stand convicted of hypocrisy. On Feinberg's proposed analysis of rights, I don't see how we can avoid saying that in this situation, I have a right to your benevolence in this case. Or take another example. I am, let us say, grading some students' papers. I agree, let us say, that Jones' paper is in every way better than Smith's – better written, more thoroughly researched, more carefully argued; and further, that both were written under the same conditions and were clearly the original work of the students concerned. Now suppose I nevertheless give Smith an 'A' and Jones a 'C' – an act flatly inconsistent with my agreed-upon characterization of the respective quality of their work. I find it difficult to believe that if I acted like this, then I would nevertheless be "as attractive and virtuous as possible without taxing our conceptions of the limits of human nature", in Feinberg's words. Surely if I purport to recognize it as my duty to recognize and reward merit and desert when I find it, then if Mr. Jones should call it to my attention that I had graded him lower than Smith despite my appraisal, I must allow that this is a reasonable and well-grounded complaint, and that it is my plain duty to reverse the marks. In short, I find it hard to see that Feinberg's characterization of Nowheresville really makes sense.

Second, however, and supposing that we can find some clear sense in which rights can be strongly and sharply distinguished from duties and from general good-will, then I think we should not be too hasty in concluding that rights are such a good thing. If Feinberg is to avoid the problems I allude to above, then he is going to have to screw up the pressure on our notion of "claim" in some way. Now, I just happen to have a method for doing this. I am inclined to propose that rights involve, not merely the notion of a justified claim or even demand, but also the idea that it would be proper, if it were necessary, to enforce the claims of demands in question by penalties and sanctions of various kinds. A demand is, I think, not so easy to distinguish from a (no doubt more civilized, and somewhat muted) threat. We are upping the ante when we resort to demanding and claiming and insisting, as compared with simply requesting and asking and suggesting. Now, what kind of a world is it in which we have activities of this kind? What kind of people are always talking about "rights," pounding on tables and marching around with picket signs and setting up barricades and that sort of thing? What kind of people are always drawing your attention to the fine print and the Company Regulations and so forth? They are, not to put too fine a face on things, *pushy*, that's what: they are crabby, thin-skinned, cantankerous, touchy, and quite possibly bitchy. And I submit that it is by no means self-evident that a worldful of people like that is a better place than a nice, amicable, peaceful sort of place like Nowheresville before, as it were, the Fall.

Let's put the matter this way. Were Adam and Eve better or worse off After the Apple? Well, there is an obvious case, is there not, for saying that they were better off before. (Evidently they thought so themselves, if the "word of God" is anything to go by . . .) And if we nevertheless want to argue that their new situation was an improvement, then it seems to me we should have to say one of two things either (1) that a "knowledge of good and evil" is such a great thing that it's worth enduring a lot of evil just to know about it – that, to put it another way, a morally complicated world in which there's lots of struggle and tragedy and suffering and so forth to add tone, is a better because "higher" and "nobler" place than a situation in which people just loll around and be happy (hello, all you German philosophers and Protestant Ethicists out there!); or (2) that we aren't really told the whole story about the Garden of Eden, and that it was really a very dull place, lacking not only moral struggle and sin, but also all the things that make life worth living, such as art, literature, waterskiing, Ferraris, and extra-marital affairs, and that Adam and Eve didn't have a mar-

tini's chance in heaven (to vary the metaphor) of acquiring any of these amenities so long as they just hung around polishing the boots of their narrow-minded party-pooper of a God; and that it's better to have the Knowledge of Good and Evil, with all that entails, along with these nice things, than any number of aeons of sunshine and coconuts.

Now, I'll bet that the same thing is true in Feinberg's story. Isn't he really sneaking in the assumption that the people of Nowheresville are really going to reliably carry out their "conscientious duties", that benevolence is simply too quixotic and unpredictable to get satisfactory results, and in short, that the standard of performance in satisfying people's needs and wants just isn't going to be very high if people don't make a fuss about it? (I wonder, for instance, what Feinberg would say if we proposed to give Nowheresville all the *moral* rights he could ask for, but no legal ones. If he found this unsatisfactory, then surely this would bear out my suspicion; for after all, a legal system of rights surely differs from a moral one only in being actually and systematically enforced?)

If this is right, then it seems to me we should put the matter this way. Imagine a world in which people's moral performance really was as high, and as reliable, as we profess it should be. Would this not be a better world than one in which people needed to be clamorous and sticky and always asserting their "rights?" Granted that if we have the sort of world we do have, in which people by and large are, morally, a pretty shabby lot, and in which therefore we *need* rights, we are better off having them. But isn't it too bad that we do need them?

Anyhow, it should be pointed out that while Feinberg tells us a great deal about the "nature" of rights, he doesn't really tell us very much about their value. He says that the claims involved in rights are to be validated by reference to a "set of governing rules", but he doesn't tell us which of the infinite variety of conceivable governing rules are the right ones. Until we know this, though, I don't think we should rest satisfied. And, of course, it just *might* happen that the ultimate arbiter of these rules will turn to be our old friend, the Principle of Utility!

Jan Narveson

REASONS FOR BREAKING THE LAW

CARL WELLMAN

A norm is a standard by which something is judged, usually with the suggestion that the norm is an ideal to which the thing should measure up. For example, the United States Department of Agriculture has established norms for the various grades of meat. Accordingly, a side of beef may be judged prime only if it is from a young animal, its lean is of a bright red color, it is abundantly marbled, and it has moderate external fat.

The law is, similarly, a norm for conduct. Any action may be judged legal or illegal depending on whether or not it conforms to the laws of the agent's society, and legality is usually accepted as an ideal at which the good man should aim. Civil laws are commonly taken to be universal commands issued by the sovereign to his subjects, adjudicated by his courts and enforced by his police.

The reasonable man will normally obey the laws of his society, but upon occasion he may have reasons for breaking the law. A college student might give "I could get hurt over there" or "I don't look well in khaki" as reasons for refusing to be inducted for service in Vietnam. These are nonmoral reasons for breaking the law. On the other hand, "the Vietnam war is immoral" and "the draft law is unjust" are specifically moral reasons for illegally resisting the draft. When one gives moral reasons for breaking the law, one is appealing from one system of norms to another, from the law as a standard of conduct to morality as a standard of conduct.

How are we to conceive of the moral norms to which we appeal when we give moral reasons for breaking the law? The traditional model is that of a higher law. This model is most plausible when God is thought to be the source of morality. Then moral norms are universal commands, like the ten commandments. They are issued by God, the Divine Legislator, and addressed to all men, the members of the kingdom of God. God holds court on the day of last judgment and enforces his commands with eternal rewards and punishments. The commands of God are more binding than the commands of the civil sovereign because God has greater power and authority than any human ruler. Not only is this higher law model appealing to theologians, it is adopted by practical men, like Martin Luther King and William Coffin, engaged in acts of civil disobedience. I want to argue that the higher law model of moral norms is mistaken – not just in a few details, but radically and in basic conception.

First, a theological detail. Are moral norms the command of God? I very much doubt that there is any Divine Legislator. I do not deny the existence of God: there is something in the universe worthy of worship. But the higher law model requires that this something be a person. To my mind, the evil in