FEINBERG ON CLAIMING CLAIMS

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I

In a widely reproduced essay, Joel Feinberg sets out to explicate the concept of a right by appeal to the activity of claiming, and this because he believes that the activity of claiming provides an important clue, not simply to the nature, but also to the peculiar value, of rights. Regarding the former, Feinberg endorses the popular view that the essential character of rights consists entirely in their being justified, legitimate, or valid claims; and in respect of the latter, he suggests that the framework of rights supports and sustains the morally fundamental attitude of respect for persons. In what follows I want to fix on what appears to be a crucial flaw in Feinberg's argument for the centrality of claiming to the proper understanding of rights. I shall not be concerned with the continuing debate over the correctness of that conception of rights which seeks to identify them with valid or justified claims (though I do believe that conception is insufficient as a general analysis of rights). Rather, the problem to which I want to draw attention arises at the (prior) level of explicating the link between claiming something and having a claim to it. It is on Feinberg's attempt to forge this link that I wish to focus for, as I shall endeavor to show, Feinberg is unable convincingly to demonstrate that such a connection obtains, and as a consequence has failed to provide the explanatory link between the nature of rights and what he takes to be their special value.

II

Feinberg begins the argument upon which I wish to focus with his now familiar thought-experiment. Feinberg asks us to imagine Nowhereville: a place that is as attractive as we care to make in all moral respects — the Nowheresvillians are virtuous and benevolent, sympathetic and responsible — save that in Nowhereville no one has any rights (or even the concept of a right). We can allow, says Feinberg, that the Nowheresvillians acknowledge and fulfill various duties — so long as
they do not conceive of these as owed to others, but simply as things that they must do. To meet the challenge that rights, and with them correlative obligations, must be admitted into Nowheresville in order to account for certain important social and economic practices, such as promising and contracting, Feinberg proposes what he calls the “sovereign monopoly of rights”. The idea here is that the rights correlative to the obligations that derive from promising, contracting, and other forms of transaction and association are to be thought of as owed, one and all, to some outside authority — the king, God, or what have you. It is important to ensure only that the Nowheresvillians do not owe anything to each other.

Despite its many virtues, Feinberg believes Nowheresville to be lacking with respect to one very special feature of moral life. What the Nowheresvillians lack “has to do with the activity of claiming.” Now to see just what this contention amounts to we must digress briefly from the main line of the argument and examine Feinberg’s distinction between: (1) making claim to..., (2) claiming that..., and (3) having a claim.

To make claim to something is to “petition or seek by virtue of supposed right; to demand as due.” This activity typically takes one of two different forms. First, one can make claim to something that has been borrowed or taken and is thus in the possession of another. This is usually done by turning in a chit or receipt — a title to the thing in question. When (for example) I approach the hat-check counter and say “Please give me my coat,” laying down my chit, I establish that I am in a position to demand something (the return of my coat) as my due. The second form of making claim to something is involved in statements like the following: “I claim this property,” “He staked claim to the land.” It is characteristic of the situations described in these types of statements that one is applying for title itself by establishing that one has fulfilled the conditions requisite for obtaining title. Having satisfied those conditions, one is, once again, in a position to demand something — in this case the title — as one’s due. The element common to both forms of making claim to something is that each constitutes a “performance” which “can make things happen”; hence Feinberg refers jointly to them as the activity of “performative claiming.” By invoking title to something, I bring it about that others must return to me that to which I have title; and by fulfilling the conditions requisite for title, I bring it about that others must secure title to me.

Claiming that one has rights — what Feinberg calls “propositional claiming” — differs from its performative cousin in that doing it generally does not “make things happen”; rather 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 insists that they be recognized. In this sense of “claim” many things in addition to rights can be claimed... What is essential to claiming that is the manner of assertion. One can assert without even caring very much whether anyone is listening, but part of the point of propositional claiming is to make sure people listen.