FEINBERG’S TWO CONCEPTS OF RIGHTS

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This article argues that there is a fundamental tension between Joel Feinberg’s theory of the nature of rights and his account of what types of beings are potential right-holders. In explaining this tension, I argue that Feinberg actually adopts two competing concepts of rights. Clearly, Feinberg must choose between these two theories, but I suggest that both are attractive and that neither view can be selected as either “correct” or “incorrect” on the grounds of either logical consistency or even straightforward conceptual analysis. In the end, one’s preference between these two concepts of rights depends upon competing values, values about which reasonable people can disagree.

I. THE NATURE AND VALUE OF RIGHTS

Along with Hohfeld’s *Fundamental Legal Conceptions* and Hart’s “Bentham on Legal Rights,” Joel Feinberg’s article “The Nature and Value of Rights” is one of the three most important essays written on rights in the twentieth century. In this seminal paper, Feinberg explains the distinctive nature and considerable value of rights.

One might wonder why all the fuss about rights, since they are presumably nothing more than the flip side of duties. In other words, to say that one person has a right is to allege no more than that someone else has a duty, so presumably the best account of rights will be nothing more than a mirror image of an accurate account of duties. Feinberg illustrates that rights are not merely the correlative of duties by imagining how different things would be if the world contained duties but no rights. In this circumstance, which

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Feinberg labels “Nowheresville,” people may be equally virtuous and just as aware and respectful of duties, but there is no understanding of rights. Now, if rights were nothing more than the corollary of duties, then a world in which duties were understood and respected would be indistinguishable from one with rights. But Feinberg points out that there is an important difference between our world and Nowheresville because, unlike Nowheresvillians, we understand that we are in a position to demand that to which we are morally entitled. Of course, a Nowheresvillian could pressure, exhort, or plead with others that they fulfill their various duties, but she would not be able to claim what is her due. As Feinberg puts it:

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.²

The distinctive status of being in a position to claim is not difficult to understand. Everyone is entitled to encourage and perhaps even to pressure me to act morally, but only someone with a right against me is in a position to demand that I do my duty, to claim performance of my duty. As Feinberg explains:

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.³

Given that the difference between our world and Nowheresville involves the act of claiming, Feinberg concludes that rights are essentially valid claims, so that one has a legal right when one’s claim is recognized as valid by the legal rules, and one has a moral right just in case one’s claim is recognized as valid by moral principles or the principles of an enlightened conscience.⁴

With this account of a right’s nature, Feinberg is in a position to explain that rights are particularly valuable insofar as one’s self-respect and self-esteem are fundamentally tied to conceiving of oneself as a rights-holder. Feinberg puts it this way:

². Feinberg, supra note 1, at 148.
³. Id. at 150.
⁴. As Feinberg acknowledged, his theory covered only claim rights, not liberty, power, and immunity rights. (Unlike Hohfeld, Feinberg did not mean to suggest that only claim rights should be considered rights proper.) For the purposes of this paper, however, I shall speak of Feinberg’s theory as being a theory of rights simpliciter, not merely a theory of claim rights.
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 appreciate Feinberg’s stance on the value of rights, imagine being an occupant of Nowheresville. As a Nowheresvillian, it would not occur to you to demand that others give you your due. Of course, you might well recognize that it is often in your interest that others respect their duties regarding you, but it would never dawn on you that you were in a position to insist that another person perform her duty. As a consequence, you might request, plead, beg, or even pressure a second party to honor a duty regarding you, but you would never righteously demand that she do so. Regardless of whether one’s claiming would be more effective than merely begging or imploring, the central point is that one who understands that she is entitled to claim her due exhibits more dignity and self-respect than someone who feels that she has no alternative but to beg for what she wants.

Feinberg’s thought experiment of Nowheresville ultimately proves doubly instructive, then, since it reveals in vivid and straightforward fashion the nature and value of rights. If rights were no more than the correlative of duties, then there would be no discernible difference between our world and Nowheresville, and if rights had no value over and above the value of their correlative duties, then we would be indifferent between occupying our world and Nowheresville. But of course there are differences, and Feinberg makes plain why we should be thankful not to be Nowheresvillians. As he concludes:

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.

5. Feinberg, supra note 1, at 151.
6. More realistically, imagine being a black in Alabama in the middle of the twentieth century. See, e.g., Richard Wasserstrom, Rights, Human Rights, and Racial Discrimination, 61 J. Phil. 628–641 (1964). Interestingly, Feinberg was the respondent when Wasserstrom presented this paper at the APA Eastern Division meeting.
7. Feinberg, supra note 1, at 155.
II. THE RIGHTS OF ANIMALS AND UNBORN GENERATIONS

Once Feinberg has argued that having a right involves having a valid claim to something and against someone, the question naturally arises as to what types of beings can potentially be rights-holders. Feinberg addresses this question in his second most important contribution to rights theory, his article “The Rights of Animals and Unborn Generations.” Feinberg begins by presuming that adult human beings can have rights, whereas rocks cannot. His project, then, is to discover a principle with which to distinguish among the less obvious cases, such as animals, dead persons, infants, fetuses, future generations, whole species, and such. For our purposes, we can restrict our focus to the candidate to which he gives the most attention, nonhuman animals.

At the outset, Feinberg acknowledges that we can have duties regarding animals, but this is not sufficient to establish that animals are potential rights-holders because there is a distinction between duties regarding and duties to, where only the latter correlate to rights. This distinction between duties regarding and duties to is pivotal, so it is important to clarify it before delving further into Feinberg’s argument. To see the distinction between relative and nonrelative duties, imagine a scenario in which Donna promises Carol that she will paint Carol’s rock. In this case Donna has a duty regarding Carol’s rock, but we do not infer from this duty that Carol’s rock has a right against Donna. On the contrary, it seems more natural to say that Carol is the right-holder because, even though Donna’s duty is regarding the rock, it is owed to Carol.

In general, rights theorists agree both that (1) only relative duties correlate to rights; and (2) the person to whom the duty is owed is the right-holder. Despite converging on these two basic points, rights theorists often disagree with one another because they advance competing analyses of what makes a duty owed to a second party. In other words, rights theorists defend different accounts of rights because they defend various theories of relative duties. With this in mind, it is easy to see why Feinberg would begin by noting that “[w]e may very well have duties regarding animals that are not at the same time duties to animals, just as we may have duties regarding rocks, or buildings, or lawns, that are not duties to the rocks, buildings or lawns.”

The question then becomes: When is one’s duty to a second party? Feinberg suggests, roughly, that one’s duty is to a second party if the duty stems from the interests of that second party. So if we want to know whether animals can have rights, we must “ask ourselves for whose sake ought we to treat (some) animals with consideration and humaneness?”

9. Id. at 166.
animal may be merely regarding and not to the animal. In most cases, however, the reason that one should not mistreat animals is for the sake of the animals themselves. And given Feinberg’s account of when a duty is owed to a second party, it therefore seems to follow that animals are potential rights-holders. As Feinberg explains:

But if we hold not only that we ought to treat animals humanely but also that we should do so for the animals’ own sake, that such treatment is something we owe animals as their due, something that can be claimed for them, something the withholding of which would be an injustice and a wrong, and not merely a harm, then it follows that we do ascribe rights to animals.10

In light of this analysis of the rights of animals, Feinberg is now in a better position to explain his initial contention that normal humans obviously have rights whereas things like rocks obviously do not. The salient difference between the two is that humans have interests and rocks do not. While we might have all kinds of duties regarding rocks, we could never have a duty to a rock, because no duty would exist for the sake of a mere rock. Thus Feinberg’s analysis of our duties regarding (and to) animals leads him to a principle for determining which types of beings are potential rights-holders. Feinberg states this principle as follows:

the sorts of beings who can have rights are precisely those who have (or can have) interests. I have come to this tentative conclusion for two reasons: (1) because a right holder must be capable of being represented and it is impossible to represent a being that has no interests, and (2) because a right holder must be capable of being a beneficiary in his own person, and a being without interests is a being that is incapable of being harmed or benefited, having no good or “sake” of its own.11

Even if we grant Feinberg’s contention that nothing without interests can be a rights-holder, it does not follow that nonhuman animals can have rights, because the possession of morally relevant interests may be only a necessary and not a sufficient condition for the possession of rights. In particular, one might protest that no nonhuman animal could be a rights-holder because none is capable of claiming rights. As Feinberg concedes, animals:

cannot make motion, on their own, to courts to have their claims recognized or enforced; they cannot initiate, on their own, any kind of legal proceedings; nor are they capable of even understanding when their rights are being violated, of distinguishing harm from wrongful injury, and responding with indignation and an outraged sense of justice instead of mere anger or fear.12

10. Id. at 166.
11. Id. at 167.
12. Id. at 162.
Rather than deny that animals lack these abilities, Feinberg argues that these capabilities are not necessary for the possession of rights. His argument for this conclusion is a straightforward *reductio*. In particular, he points out that if one could not have rights unless one were able to claim these rights, then all kinds of beings, including infants, could not be rights-holders. But it is obviously absurd to suggest that a normal human baby does not have rights, so, clearly, the ability to claim one’s rights cannot be necessary to be the type of being that can have rights. Feinberg puts it this way:

> It is simply not true . . . that the ability to understand what a right is and the ability to set legal machinery in motion by one’s own initiative are necessary for the possession of rights. If that were the case, then neither human idiots nor wee babies would have any legal rights at all. Yet it is manifest that both of these classes of intellectual incompetents have legal rights recognized and easily enforced by the courts. Children and idiots start legal proceedings, not on their own direct initiative, but rather through the actions of proxies or attorneys who are empowered to speak in their names. If there is no conceptual absurdity in this situation, why should there be in the case where a proxy makes a claim on behalf of an animal?13

Thus, by invoking the notion of proxies who can claim one’s right on one’s behalf, Feinberg suggests that animals, just like infants, can be rights-holders. His point is that if one has interests, then others can speak on behalf of those interests. As a consequence, an animal’s inability to claim its own rights in no way entails that it cannot have rights.

It is not so clear that one can invoke a proxy in the fashion that Feinberg does, however, because, typically, a proxy must be appointed by an agent. But, of course, nonhuman animals are not agents; they are unable to select representatives, so they appear not to be the type of being of whom rights can be predicated after all. Feinberg considers this objection and responds in virtually the same fashion as before: he notes that there are certain cases where humans either do not or cannot appoint their own proxies, and no one would conclude from this that they therefore cannot be rights-holders. As he says:

> But although the possibility of hiring, agreeing, contracting, approving, directing, canceling, releasing, waiving, and instructing is present in the typical (all-human) case of agency representation, there appears to be no reason of a logical or conceptual kind why that *must* be so, and indeed there are some special examples involving human principals where it is not in fact so. I have in mind legal rules, for example, that require that a defendant be represented at his trial by an attorney, and impose a state-appointed attorney upon reluctant defendants, or upon those tried *in absentia*, whether they like it

13. *Id.* at 163.
or not. Moreover, small children and mentally deficient and deranged adults are commonly represented by trustees and attorneys, even though they are incapable of granting their own consent to the representation, or of entering into contracts, of giving directions, or waiving their rights.\textsuperscript{14}

In the end, then, neither the ability to claim one’s rights nor the ability to appoint a proxy to press one’s claim in one’s name can be a necessary condition for being a potential rights-holder because each condition would exclude certain humans, such as healthy infants, who clearly have rights. Thus Feinberg concludes that having interests is both a necessary and a sufficient condition for having rights, and since animals have morally relevant interests, they are potential rights-holders. To conclude in terms of the dichotomy with which Feinberg began, a typical nonhuman animal belongs in the category with rights-holding humans rather than in the class with rocks.

\section*{III. A TENSION WITHIN FEINBERG’S ANALYSIS}

Having reviewed his arguments in “The Nature and Value of Rights” and “The Rights of Animals and Unborn Generations,” we are now in a position to see that Feinberg posits that (1) having a right is tantamount to having a valid claim; and (2) animals can be rights-holders because they are among the class of things with morally relevant interests. But I worry that these two conclusions may conflict with one another. Perhaps the best way to expose the tension between Feinberg’s two seminal contributions to rights theory is by returning to the question of potential rights-holders and resurrecting the case against animal rights.

As I explain above, Feinberg’s case in favor of animal rights hinges upon a \textit{reductio ad absurdum}; he argues that one cannot deny that animals can have rights unless one is similarly willing to deny that wee babies can have rights. Part of my motivation for revisiting this argument is that some prominent rights theorists who have written since Feinberg’s two articles were published have denied that human infants are in fact rights-holders. For instance, whatever one thinks of the merits of Carl Wellman’s theory of rights, it is clearly among the most sophisticated and systematically developed accounts in the literature, and Wellman has not backed away from his early contention, first introduced in his essay “The Growth of Children’s Rights,” that infants lack rights.\textsuperscript{15} Granted, it is awkward to assert that human infants cannot be rights-holders, but not every awkward conclusion is absurd, so perhaps Feinberg’s arguments in “The Rights of Animals and Unborn Generations” invoke a \textit{reductio ad awkwardum} rather than a \textit{reductio ad absurdum}.

\textsuperscript{14} Id. at 164.
At this point one might think me guilty of a new breed of genetic fallacy; the only reason that I refuse to admit the absurdity of denying infants’ rights is because I owe my genetic makeup to the theorist foolish enough to defend this thesis. After all, what could be more counterintuitive than alleging that we have no duties to vulnerable little babies? As Patricia Williams says of Wellman’s theory:

What would a child have to introduce as currency by which care of the state would be made a right? This begins to resemble the argument advanced by Carl Wellman in “The Growth of Children’s Rights,” where he maintains that children have no rights until they are grown enough to make the claim themselves. Doesn’t this mean that children don’t have the price? Children and the poor make no considered bargains, and therefore they don’t exist until they can buy or sell property. Before their emergence as property manipulators, there is no inducement, no exchange. The child’s interests and the indigent’s welfare become an incidental commodity to be purchased or not, an obligation for the government only if the right price is paid and the right laissez-faire subcontractors can be found to produce the thing purchased.16

Now, I do not deny that the position Williams attributes to Wellman is absurd, but Williams has either not read or at least not understood what she has read of Wellman’s article. I have heard stories of devout contractualists who allege that we do not necessarily have any moral reasons not to mistreat defenseless babies, but Wellman is not among them. In fact, at no point does Wellman deny that the moral reasons not to mistreat an infant are just as strong as the moral reasons not to mistreat an adult and that one’s duty regarding an infant could be just as stringent as the comparable duty regarding an adult. But if Wellman does not deny that wee babies have morally relevant interests that can generate stringent duties not to mistreat them, does that not thereby commit him to the conclusion that infants can have rights? Not necessarily; it all depends upon one’s theory of rights which, as noted above, depends upon one’s account of when duties are not merely regarding but owed to a second party.

Wellman advances a dominion theory of rights. He argues that a rights-holder occupies a privileged position of dominion over a second party in a potential conflict of wills where one enjoys dominion just in case one has the requisite freedom and control over the relationship.17 Thus Wellman believes that Itchy’s duty is to Scratchy only if Scratchy enjoys the requisite position of dominion, consisting of freedom and control, over Itchy’s duty. And because only agents can exercise freedom and control, only agents can have rights. Thus the fact that nonhuman animals have morally relevant interests is not sufficient to qualify them for rights. On Wellman’s view, our duties regarding animals are not duties to these animals, because the

animals’ lack of agency precludes them from exercising the freedom and control of a rights-holder.

As a consequence, while Wellman’s theory of rights remains awkward insofar as its implications do not fit neatly with our ordinary, pretheoretical understanding of possible rights-holders, it is not absurd in the manner that Williams suggests. The crucial point is that in denying that infants can have rights, Wellman is not making a moral claim about the status of young humans; instead, he is making a conceptual claim about the best way to conceive of rights for the special purposes of moral philosophy. What is more, Feinberg appreciates this distinction between these two very different types of claims. In fact, he invokes it himself in explaining his own views on whether fetuses could have rights. Feinberg writes:

It is important to reemphasize here that the questions of whether fetuses do or ought to have rights are substantive questions of law and morals open to argument and decision. The prior question of whether fetuses are the kind of beings that can have rights, however, is a conceptual, not a moral, question, amenable only to what is called “logical analysis,” and irrelevant to moral judgment.

If the preceding reasoning is apt, then there is nothing absurd about denying that infants have rights. It is important to recognize, however, that this does not imply that Feinberg must accept that animals cannot have rights; rather, it shows only that he should not assume that they do. More to the point, if it is not absurd to conclude that infants lack rights, then he cannot invoke this implication in a reductio ad absurdum in defense of animal rights. All that has been established to this point, then, is that it is once again an open question as to whether Feinberg should include nonhuman animals among the class of things to which rights can be predicated. To answer this question, we must return to Feinberg’s theory of the nature of rights.

The first thing to notice is that, insofar as Feinberg recommends that we understand rights as valid claims, it appears that he should follow Wellman in denying rights to any nonagent. After all, if one is not an agent, then one cannot make a claim and therefore cannot have a right. As we have seen, however, Feinberg resists this inference because he thinks that others can press one’s claim on one’s behalf. In the case of animals, for instance, Feinberg insists that there is nothing awkward about suggesting that they have valid claims that humans can make in their name. Thus Feinberg clearly wants to reject any necessary connection between having a claim

18. Another term that is typically used differently in common parlance from in moral philosophy is “person.” In ordinary language, all and only human beings are persons, but for the purposes of moral philosophy, it is standard to use the term person as a shorthand for those beings with a serious moral right to life (which, of course, may exclude some humans and include some nonhumans).

19. Feinberg, supra note 8, at 180.
and being personally able to make or press that claim. Because of this, Feinberg rejects Wellman’s view that only agents can be rights-holders and, as a consequence, he is able to endorse a more inclusive set of possible rights-holders, a set that includes nonhuman animals.

It is not so clear, however, whether Feinberg can consistently deny that agency is necessary to be a rights-holder. In fact, it strikes me that Feinberg’s own account of the nature and value of rights commits him to denying that animals can be rights-holders. To see this, it is important to return to Feinberg’s explanation for why rights are not merely the correlative of duties. In particular, recall that when Feinberg stresses the difference between our world and Nowheresville, he captures the point in terms of the activity of claiming, not merely in terms of having claims. He says, “The most conspicuous difference, I think, between the Nowheresvillians and ourselves has something to do with activity of claiming.”20 What is more, it is curious that Feinberg would be so content with the idea of humans pressing the claims of animals, given his contention that only the rights-holders themselves are in a position to engage in the performative activity of claiming. Recall, for instance, his suggestion that “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.”21

At this point Feinberg might counter that there is no inconsistency between this claim and his belief in animal rights because, as the quotation above explicitly specifies, one can speak “in the name” of the rights-holder. This response cannot suffice, however, because there are two options for assigning who may speak on one’s behalf, and neither is compatible with the combination of Feinberg’s theory of the nature of rights and his position on the rights of animals. More specifically, either anyone can speak on behalf of a rights-holder or only someone that the rights-holder appoints as her proxy is in a position to do so. Clearly, Feinberg must deny that anyone can press the claim of any rights-holder, because this directly contradicts Feinberg’s suggestion that “(a)nyone 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.”22

Thus apparently we must conclude that one can speak in the name of a rights-holder only if the rights-holder has appointed one as her proxy. This second interpretation squares well with what Feinberg says about how and when rights can be claimed, but it spells trouble for anyone who would like to posit the rights of animals, because the same lack of agency that precludes

20. Feinberg, supra note 1, at 148.
21. Id. at 150.
22. Id. at 150.
animals from pressing their claims also precludes them from appointing a proxy to do so. Thus the acknowledgment that one person can sometimes claim another person’s right on her behalf does not provide enough room for animals to be potential rights-holders.

Finally, perhaps the best way to see that Feinberg cannot consistently posit animal rights is to return to what he says about the value of rights. In particular, drawing upon his contention that the nature of rights is to be understood in terms of the activity of claiming, Feinberg emphasizes that the great value of rights comes from the self-esteem, dignity, and self-respect that are possible only if one conceives of oneself as a claimant who may, when appropriate, claim one’s due. Feinberg motivates this conclusion by detailing how different our prospects for self-respect and dignity would be if we inhabited Nowheresville, where one must plead and beg for others to fulfill their duties. But notice: nonhuman animals are indifferent between living in our world and in Nowheresville. Animals would have the same conception of themselves and their moral relationships with others whether they lived in our world or in Nowheresville. Animals would, admittedly, have limited capacity for self-esteem, dignity, and self-respect in Nowheresville, but then, their prospects are no less limited in this world. This observation strikes me as decisive, because if the nature and value of rights are thought to be most clearly revealed by contrasting our world with Nowheresville, then it seems to follow that no rights-holder could be indifferent between these two worlds.

IV. FEINBERG’S TWO CONCEPTS OF RIGHTS

If my analysis to this point is on target, it raises the question of why Feinberg would adopt an account of potential rights-holders so radically at odds with his own theory of the nature and value of rights. Here one can only speculate, but I am inclined to suspect that Feinberg never fully appreciates the distinction between “will” versus “interest” theories of rights. As a consequence, Feinberg first offers a will theory of rights in “The Nature and Value of Rights” and then introduces an interest theory of rights in “The Rights of Animals and Unborn Generations.” If so, then Feinberg faces a choice between the two competing concepts of rights. Either he can retain his original will theory and abandon his later contention that animals can

23. This distinction between will and interest theories of rights is not the distinction between choice and interest theories, because will and choice theories are not coextensive. As I understand it, choice theories are a subset of will theories; every choice theory is a will theory, but not every will theory is a choice theory.

24. Rather than allege that Feinberg offered two theories of rights, one might also say that he advanced one hybrid account, an account that combines a will theory of the nature of rights with an interest theory of possible rights-holders. Still, I speak of Feinberg’s “two concepts” of rights for the purposes of this paper because doing so helps to highlight the tension between the positions he advances in his two landmark articles.
be rights-holders, or he can stand by his conclusion that animals can have rights, in which case he must jettison his original theory of the nature and value of rights.

Among the most fundamental and important distinctions within rights theory is that between will and interest theories of rights. Interest theorists posit that rights confer some special status upon the rights-holder’s interest, and will theorists counter that rights confer some special status upon the will of the rights-holder. According to interest theorists, the rights-holder is the party whose interests are protected by the duty. According to will theorists, the rights-holder is the party whose will occupies a privileged position against a second party.

In “The Nature and Value of Rights,” Feinberg apparently advances a will theory of rights insofar as he emphasizes the things rights-holders can do, the moral powers rights-holders can exercise. In particular, by emphasizing the normative impact of claiming, Feinberg celebrates a rights-holder’s capacity to claim and waive the performance of duties. And since acts of claiming and waiving are acts of one’s will, Feinberg’s account appears to fall squarely within the camp of will theories. In “The Rights of Animals and Unborn Generations,” on the other hand, Feinberg’s analysis seems to presuppose an interest theory of rights. In particular, both because he emphasizes the status of having a claim rather than the activity of claiming and because he explicitly argues that having interests is sufficient to be a potential rights-holder, Feinberg appears to favor a straightforward interest theory of rights.

If this is right, and Feinberg has unwittingly advocated two competing theories of rights, then what should he do? Which theory is superior? I will not answer this last question here except to say that there is no right or wrong answer. In other words, there is no single theory of rights whose correctness is dictated by logic or even, I think, by straightforward conceptual analysis. In my view, the choice between interest and will theories of rights ultimately boils down to competing values, values over which reasonable people can disagree.25

To see this, recall Feinberg’s point of departure when trying to determine what types of beings are potential rights-holders. As he puts it:

Normal adult human beings, then, are obviously the sorts of beings of whom rights can meaningfully be predicated. Everyone would agree to that, even extreme misanthropes who deny that anyone in fact has rights. On the other hand, it is absurd to say that rocks can have rights, not because rocks are morally inferior things unworthy of rights (that statement makes no sense either), but because rocks belong to a category of entities of whom rights cannot be meaningfully predicated. That is not to say that there are no circumstances

25. An important advantage of interest theories is that they square better with our ordinary pretheoretical understanding of potential rights-holders. On the other hand, many believe that will theories are less vulnerable to the redundancy objection, the concern that one’s theory of rights should explain why rights are not made redundant by the existence of duties.
in which we ought to treat rocks carefully, but only that rocks themselves cannot validly claim good treatment from us. In between the clear cases of rocks and normal human beings, however, is a spectrum of less obvious cases, including some bewildering borderline ones.26

In other words, we begin with the assumption that normal humans have rights and that rocks do not, so a promising strategy for a rights theorist is to search for a salient distinction or line of division somewhere between rocks and normal humans. If we can find this salient line, then there is good reason to hope that not only will it reveal which types of beings are potential rights-holders, it will also shed light on the nature and value of rights.

This is a sensible strategy. Things become more complicated than one might expect, however, because (as our review of Feinberg’s two landmark articles reveals) there are in fact two salient lines between rocks and adult humans: there is the line separating those things with and without interests and the second line separating agents from nonagents. What is more, not only are both distinctions clear and bright lines of demarcation, both are capable of supplying the building blocks for a compelling theory of rights because each points the way toward an intuitive account of relative duties. The distinction between those beings with and without interests is promising because it suggests the quite natural proposal that one’s duty is not merely regarding but owed to a second party when the duty springs from that party’s interest. And the distinction of agency is attractive because it leads to the important conclusion that one’s duty is to someone just in case that person occupies a privileged position over the performance of this duty, a position that uniquely enables her to claim or waive this duty.

Of course, there are advantages and disadvantages to concentrating on each of the lines of demarcation with its corresponding theory of rights, but the crucial point is that both of these distinctions are real, both are clear, and both point the way to a compelling theory of rights, so neither will nor interest theorists can accuse the other of making either a logical or conceptual mistake. And if this is right, then we are not in a position to suggest that Feinberg must opt for one theory over another. As a consequence, Feinberg would be equally free to lean upon his analysis of the nature and value of rights in order to retract his subsequent conclusion about animals having rights as he would be to cite his discussion of animals in order to abandon his initial analysis of the nature and value of rights. He must do one or the other to resolve an unacceptable tension within his rights theory, but either move would leave him with an interesting and intuitively compelling theory of rights.

26. Feinberg, supra note 8, at 160.
V. CONCLUSION

Obviously, I feel awkward accusing Joel Feinberg of failing to grasp one of the most fundamental distinctions in rights theory. It is not just that his work, taken as a whole, was perhaps the most influential contribution to rights theory in the twentieth century; it is also that Feinberg was as celebrated for his mastery of the illuminating distinction as Judith Thomson is for her revealing thought experiments. But even if the shocking headline reads: “Feinberg Conflates Fundamental Distinction!” the enduring story is that Feinberg’s analysis showed the way for interest and will theorists alike.

Think of it this way: The two most powerful theories of rights developed to date are arguably Joseph Raz’s interest theory and Carl Wellman’s will theory. If the arguments in this paper are sound, then it should come as no surprise that people disagree as to whether Raz’s or Wellman’s theory is superior, but everyone can acknowledge that neither Raz nor Wellman would have achieved his theoretical clarity and insight had he not enjoyed the advantage of writing on rights after Feinberg’s groundbreaking work. In short, regardless of whether we favor will or interest accounts, all contemporary rights theorists can see what we do only because we all stand on the shoulders of Joel Feinberg.