More Equal Than Others

Animals in the Age of the Human Rights Aristocracy



This thesis is submitted for the degree of Doctor of Philosophy in Law

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This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text. It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my thesis has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. It does not exceed the prescribed word limit set by the Degree Committee of the Faculty of Law.

Abstract

More Equal Than Others: Animals in the Age of the Human Rights Aristocracy

Raffael Nicolas Fasel

Should we confer fundamental rights on nonhuman animals? Or would this undermine the rights of human beings? I answer these questions, first, by showing that they are not new, but go back at least as far as the eighteenth century. I identify two partly conflicting intellectual currents of the time—egalitarianism and naturalism—and illustrate, with the writings of French Enlightenment philosophers Jean-Baptiste Salaville and Jean-Claude Delamétherie, how these currents informed their accounts of human and animal rights, respectively. Second, I show the importance of this insight from intellectual history by portraying two antithetical fundamental rights ideal-types which are based on these currents and are still prevalent in today's rights debates and practices: the Aristocratic conception of fundamental rights which has taken its cue from egalitarianism, and the Meritocratic conception to which naturalism has given rise. I unpack three central features of these conceptions and argue that, because they are located on opposite sides of a spectrum of fundamental rights conceptions, the strengths of one conception are the weaknesses of the other. Lastly, I draw critical practical lessons from this fact by showing that the most viable practical path forward is a middle ground between the Aristocratic and the Meritocratic conception that combines their strengths while minimising their weaknesses. Concretely, I propose the extension of fundamental rights (and cognate concepts such as legal personhood) to some other deserving animals on the basis of species membership rather than individual capacities (I call this the Species Membership Approach, or SMA). Although SMA conflicts with the orthodox anti-speciesism in animal rights scholarship, I demonstrate using three illustrative cases that, in law, there are compelling political and practical reasons for adopting SMA.

“Throughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable. We are inclined to suppose the rightlessness of rightless ‘things’ to be a decree of Nature, not a legal convention acting in support of some status quo. It is thus that we defer considering the choices involved in all their moral, social, and economic dimensions.”

Christopher D Stone, ‘Should Trees Have Standing? Toward Legal Rights for Natural Objects’ (1972) 45 Southern California Law Review 453

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Preface

The seed for this thesis was planted ten years ago when, as a law student at the University of Fribourg, I was confronted for the first time with the legal abyss that separates humans from nonhuman animals. At least on paper, all 7.7 billion humans have fundamental legal rights. By contrast, the 60 billion land animals and the 0.9 to 2.7 trillion fishes that we kill and use in one year alone possess no such rights. The idea to analyse this dire state of affairs began to take shape four years ago, on 27 May 2015. A freshly minted graduate of Yale Law School, I was sitting in a packed courtroom in the New York State Supreme Court Building in Lower Manhattan and witnessed the first-ever court hearing on whether two nonhuman animals—the chimpanzees Leo and Hercules—should be recognised as legal persons with the fundamental right to bodily liberty. The hearing was a memorable one not only for its historic subject matter, but also because of the story it was telling about the changing nature of society and law. The courtroom wall behind the judge was adorned with a large painting that depicted the way justice had been administered for centuries: by men in wigs. Sitting before that scene was a female judge, Judge Barbara Jaffe, and that judge was considering whether nonhuman beings should be granted a legal status and rights akin to those possessed by human beings. Law evolves, like the humans and animals in this story, and it is the aim of this thesis to expound when and how facts about the nature of an animal should induce change in the law.

Some of the ideas that I present here have already found their way into printed and electronic pages. An abridged version of my argument (presented in Chapters 1–3) that modern thinking about human dignity and animal rights had forebears in the French Enlightenment and that steering a middle course is the most advisable practical strategy (Chapter 4) was published in my article “The Old ‘New’ Dignitarianism” (2018) *Res Publica*. In Chapter 2, Subsection 4.2, and Chapter 3, Subsection 3.1, I have drawn on my article ‘“Simply in Virtue of Being Human”? A

Critical Appraisal of a Human Rights Commonplace' (2018) 9 *Jurisprudence* 3, in order to illuminate the Arguments from Potentiality, Normality, and Actuality. In my "Talking Animals, Law, Philosophy—and Beyond" (2017) 5 *Global Journal of Animal Law* 1, I have already used the term "grounding" to express the idea of inserting human beings into nature (as I do in Chapter 3, Subsection 5.2). Finally, my discussion of "tragic" cases in Chapter 2, Subsection 4.2, and Chapter 4, Subsection 4.2, is informed by my book review "One Another's Equals: The Basis of Human Equality by Jeremy Waldron" (2018) 77 *Cambridge Law Journal* 1.

A number of conferences and workshops have given me the opportunity to expose others to my ideas. At Cambridge, I was able to present my work at the first-year seminar for PhD in Law students. Thanks to John Bell and Pippa Rogerson for including me in this. The Cambridge Legal Theory Discussion Group has provided me with a forum for some of my early thinking and I am indebted to the convenors Tom Adams and Haris Psarras. At the Yale Law School Doctoral Conference, I received valuable feedback on my research from Leora Dahan Katz and Beth Henzel. At Oxford, I had the opportunity to present a paper at the Oxford Human Rights Hub's Workshop in Human Rights. I am grateful to the organisers and to Tarunabh Khaitan for commenting on my paper. More of my work was presented at the European University Institute. I would like to thank Elena Brodeală and the members of the Constitutionalism and Politics Working Group for hosting me in Florence, and Manès Weisskircher for his comments on my paper. I am furthermore grateful to Erwin Lengauer at the University of Vienna for inviting me to discuss my research. Finally, I would like to thank Kristen Stilt and Chris Green for letting me present the final chapter of my thesis at the Harvard Animal Law and Policy Program Workshop. On all these occasions, I have received perceptive comments from members of the audience to whom I would like to express my gratitude.

The Statutes and Ordinances of the University of Cambridge require me to declare that this dissertation is the result of my own work. It is. But this should not hide the fact that I have received a great deal of help along my journey. My foremost thanks go to my PhD supervisor Nigel Simmonds whose generous support was exceeded only by his patience. I am also grateful to Jeff Skopek for standing by my side as an advisor. I owe special thanks to Henry Mares for taking me under his wing and helping me navigate the academic waters of Cambridge (beware of the Bridge of Sighs!). My College, Sidney Sussex College, has always provided me with a safe haven and I am thankful for the summer mornings I could spend writing in the Fellows' Garden. To Sean

Butler I am grateful for his collegiality and his enthusiasm for my topic, to Matthew Kramer for allowing me to test some of my ideas in the Cambridge Forum for Legal and Political Philosophy, and to Trevor Allan for his insightful observations on my work. Over the course of my doctoral studies, I was fortunate enough to be able to moor at a number of other academic institutions and I am thankful to the people I have met there. At the University of Oxford, Pavlos Eleftheriadis gave me helpful feedback in the formative stages of my dissertation. At Harvard Law School, Kristen Stilt and Chris Green have provided me with a warmest research community; and Gerald Neuman was kind enough to take the time to discuss my ideas on human rights. At other institutions I have never docked but still found sympathetic ears for my work. I am particularly thankful to Will Kymlicka and Ann Thomson for their comments and their generous help with my research. Closer to home, Daniel Moeckli and Patrick Weil have lent me unwavering support and I am forever grateful to them for believing in me. I am furthermore grateful for the generous financial support from the Vincent Merkle Foundation, the Swiss National Science Foundation, the Haldimann Foundation, Sidney Sussex College, and the Cambridge Law Faculty, which have enabled me to undertake my journey. Further down in the pecking order, but not in my appreciation are John Adenitire, Pablo Marcello Bacquero, Charlotte Blattner, Lucius Caviola, Ya Lan Chang, Kelly Dhru, Max Harris, Runze He, Yukinori Iwaki, Visa Kurki, Jyr-Jong Lin, Lucas MacClure, Maayan Menashe, Crescente Molina, Ben Mylius, Joshua Neoh, Jay Shooster, Tvisha Shroff, Christoph Stritt, and Saskia Stucki. They are listed in alphabetical order in the hopes that they will remain my friends. Finally, I would like to thank my partner, Giordana Campagna, for her love and commitment, and my family, Ursula Birbaum and Walter Fasel. Without their support, this dissertation would have never set sail.

Raffael Fasel
Cambridge, March 2019

Introduction

"Should animals have the same rights as humans?" the BBC asked in May 2015, when a group of animal rights lawyers known as the Nonhuman Rights Project (NhRP) filed a law suit on behalf of Leo and Hercules, two chimpanzees used for research at Stony Brook University in New York.[1] The question whether only human beings should possess fundamental rights or whether some non-human beings should have similar rights has since made the headlines a number of times. In November 2016, a court in Mendoza, Argentina, ruled that Cecilia, a chimpanzee held at the local zoo, has fundamental rights and should be moved from captivity to a great ape sanctuary.[2] In July 2017, the Supreme Court of Colombia decided that Chucho, a so-called spectacled bear kept at a zoo in Barranquilla, is a legal person and should be moved to a sanctuary.[3] And in November 2018,

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1 Owen Bennett-Jones, 'Should Animals Be Given Human Rights?' *BBC News* (26 May 2015) <https://www.bbc.com/news/world-32854504> accessed 21 July 2019.

2 *"Cecilia"* [2016] Tercer Juzgado de Garantías Mendoza P-72.254/15 (Ana María Hernández tr <https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf> accessed 21 July 2019; Gabriel Samuels, 'Chimpanzees Have Rights, Says Argentine Judge as She Orders Cecilia Be Released from Zoo' *The Independent* (7 November 2016) <https://www.independent.co.uk/news/world/americas/argentina-judge-says-chimpanzee-poor-conditions-has-rights-and-should-be-freed-from-zoo-a7402606.html> accessed 21 July 2019.

3 *"Chucho"* [2017] Supreme Court of Justice of Colombia, Chamber of Civil Cassation AHC4806-2017; 'Chucho, el oso de anteojos que triunfó en la Corte Suprema de Justicia' *Semana* (27 July 2017) <https://www.semana.com/nacion/articulo/chucho-el-oso-que-gano-un-habeas-corpus-en-la-corte-suprema-de-justicia/534034> accessed 21 July 2019.

a New York county court issued a *habeas corpus* order for the Bronx Zoo's only elephant Happy, allowing the NhRP to present their case for why Happy has a fundamental right to bodily liberty.[4]

The issue of animal rights has also attracted considerable attention in legal scholarship. According to some authors, it is high time that the fundamental rights of animals are recognised. These authors often argue that animals deserve fundamental rights because they possess the relevant capacities, such as sentience or self-consciousness, which they take to justify these rights.[5] Other scholars, by contrast, have warned that such an extension of fundamental rights to animals would imperil the rights of human beings. While we should certainly protect animals from unnecessary suffering, these scholars argue, we should not confer fundamental rights on them.[6]

Despite the strides that scholarship on the question of animal rights has made in recent years, there are still important intellectual-historical, analytical, and practical gaps that cloud our view of the topic. Missing in the debate is, firstly, an awareness of the *intellectual-historical* fact that animal rights are not a recent invention, but rather have roots that go back at least as far as the Enlightenment. While it is generally recognised that human rights emerged at that time, few know that animal rights, too, were being discussed in the Enlightenment. More importantly, there is a lack of awareness that animal rights were discussed *in relation to* human rights. Secondly, perhaps due to the lack of awareness of the common history of human and animal rights, the complex relationship between these concepts is in want of a more thorough *analysis*. In particular, there is

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4 Nonhuman Rights Project, 'World's First Habeas Corpus Order Issued on Behalf of an Elephant' (19 November 2018) <https://www.nonhumanrights.org/blog/first-habeas-corpus-order-happy/> accessed 21 July 2019; see also 'Gradually, Nervously, Courts Are Granting Rights to Animals' [2018] *The Economist* <https:// www.economist.com/international/2018/12/22/gradually-nervously-courts-are-granting-rights-to-animals> accessed 21 July 2019.

5 See eg Gary L Francione, *Animals, Property, and the Law* (Temple University Press 1995) 8–11; Steven M Wise, 'Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy' (1998) 22 Vermont Law Review 793, 798; Cass R Sunstein, 'The Rights of Animals' (2003) 70 University of Chicago Law Review 387, 401; David Bilchitz, 'Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals' (2009) 23 South African Journal on Human Rights 38, 62–65.

6 See eg Richard L Cupp, 'Animals as More Than "Mere Things", But Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm', *Pepperdine University Legal Studies Research Paper No. 19* (2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2788309> accessed 21 July 2019; Jeremy Waldron, *Dignity, Rank, and Rights* (Meir Dan-Cohen ed, Oxford University Press 2012) 69.

insufficient understanding of the tensions that exist between the ideas that underpin human and animal rights. Thirdly, *practical* proposals that are being put forward to extend fundamental rights to animals fail to draw on the insights that a better understanding of the relationship between human and animal rights would yield.

These gaps have turned out to be problematic in two respects. First, they have impoverished our understanding of animal rights and of their relationship to human rights. Debates on these issues have therefore been lacking in intellectual-historical and analytical depth, and promising research avenues have been neglected. Second, these gaps have become a problem because important practical lessons have not been drawn from the fact that human and animal rights stand in such a close relationship, thereby putting the respective rights projects at risk. My aim in this thesis is to remedy these defects by filling the intellectual-historical, analytical, and practical gaps that exist in human and animal rights scholarship. The guiding questions of the thesis are *whether fundamental legal rights should be granted to animals in virtue of certain natural capacities and interests that they have, or whether basing rights on such capacities threatens to undermine the rights of human beings*.

To answer these questions, and to fill the abovementioned gaps, the thesis proposes to proceed in three steps, which are also its three main contributions to the field. First, it will fill the gap in *intellectual history* by presenting an account of two conflicting currents of thinking—egalitarianism and naturalism—that became prominent in the French Enlightenment and that have shaped our thinking on human and animal rights. According to egalitarianism, human beings are fundamentally equal despite the fact that they differ from each other physically (I will refer to this as the Equality Thesis). This view was often backed by the argument that the human species is special and separate from all other species (the Separateness Thesis). Contrary to egalitarians, many naturalists believed that the human species is part of a continuum of matter on which beings differ from each other only in degree, not kind. This came to challenge the egalitarian theses that there are no differences between human beings that could undermine their equality, and that the human species is wholly separate from other species. I will illustrate the tension between these currents by drawing on the writings of two French Enlightenment philosophers; the egalitarian Jean-Baptiste Salaville (1755–1832) and the naturalist Jean-Claude Delamétherie (1743–1817). In an essay from 1802, which I will present in Chapter 1, Salaville defended the exclusive rights, dignity, and equality of human beings against the theories of naturalists such as Delamétherie who rejected the

idea of human equality in favour of a hierarchical conception of humanity, and who proposed that not only human beings should have fundamental rights, but also animals.

Second, I will fill the *analytical* gap by arguing that naturalism and egalitarianism have informed two largely antithetical ideal-types of fundamental rights that are influential in contemporary debates about human and animal rights. On the one hand, there is what I will call the *Aristocratic conception of fundamental rights* (or Aristocracy, for short), which has taken its cue from egalitarianism. Against a widespread belief, I will demonstrate that a good part of current human rights thinking and practice are in central respects Aristocratic. To make my case, I will draw on the growing literature which points to the parallels that exist between supposedly "new" ideas like human rights, human dignity, and human equality, and "old" ideas like noble status and special privileges. To spell out these parallels, I will analyse the three characteristic features of the Aristocratic conception: equal consideration, agent-focus, and internalism. According to the feature of *equal consideration*, the Aristocracy conceives of human rights-holders as possessing a high rank simply in virtue of being born human (Heredity); it provides all humans with equal rights (Equality); and it excludes all nonhuman beings from the high rank and from the equal rights (Exclusivity). To coin a phrase, equal consideration considers humanity to be separate *and* equal. Second, to justify humans' special status and their equal rights, the Aristocracy focuses on what it takes to be the characteristically human capacity of *agency*. I will argue that this focus on humans as agents is a necessary founding myth that jumpstarts the Aristocracy. Third, I will show that proponents of the Aristocracy explain the special status and rights of humanity by adopting *internalism*. This means that in their explanations, they do not draw on facts about human nature, but rather on normative decisions, stories, or interpretations that give an account of humans' special status and rights. I will call this approach one that *founds* rather than grounds human rights, dignity, and equality. Founding explains these concepts by remaining within the normative domain, whereas grounding bases them on non-normative facts.

On the other hand, there is the *Meritocratic conception of fundamental rights* (or Meritocracy), which is based on the naturalist current. I call it the "Meritocratic" conception because of the parallels that exist between the rallying cries of eighteenth century meritocrats who opposed

the actual nobility,[7] and those of proponents of the Meritocracy who oppose the Aristocracy. Adherents of the Meritocracy argue that animals *deserve* to hold at least some of the fundamental rights that human beings possess because they have the capacities that are relevant for these rights. The Meritocracy is in many respects the antithesis of the Aristocracy—its photo negative, as it were. For this reason, the three characteristic features of the Meritocracy are the mirror image of the three Aristocratic features. In the case of the Meritocracy, these features are: differential consideration, patient-focus, and externalism. First, proponents of the Meritocracy reject equal consideration in favour of *differential consideration*. They do so by taking the actual possession of certain physical capacities, rather than mere birth, as the ground for rights (Merit); by rejecting equality in favour of a gradualist approach to distributing rights (Gradualism); and by including any type of being in the category of rights-holders who deserves it (Inclusivity). Second, the Meritocracy focuses on *patients* (that is, beings who lack the capacity to make reflective choices but who are still objects of moral and/or legal concern) rather than agents as a justification for those beings' rights. As I will show, this has important implications for how proponents of this conception conceive of rights-holders and their rights. Finally, adherents of the Meritocracy adopt an *externalist* approach to explaining rights. Rather than drawing on normative decisions, stories, or interpretations they build on empirical facts about the capacities of beings to ground their rights in the interests that arise from these capacities. As I will put it, they *ground* rather than found rights.

My argument will be that, as antithetical ideal-types, the Aristocratic and Meritocratic conception are on opposite sides of a spectrum of fundamental rights conceptions on which we can locate individual fundamental rights accounts (see Figure 1). To be sure, none of the accounts we find in practice are likely going to be perfect instantiations of either conception. This is because, as I will elaborate on shortly, these conceptions are *ideal*-types. In real life, there may therefore be no full-blown "Meritocrats" or "Aristocrats". I will simply assume that all those whom I call Meritocrats or Aristocrats defend positions sufficiently close to the ideal conceptions.

[7] I will be using the terms "nobility" and "aristocracy" synonymously.

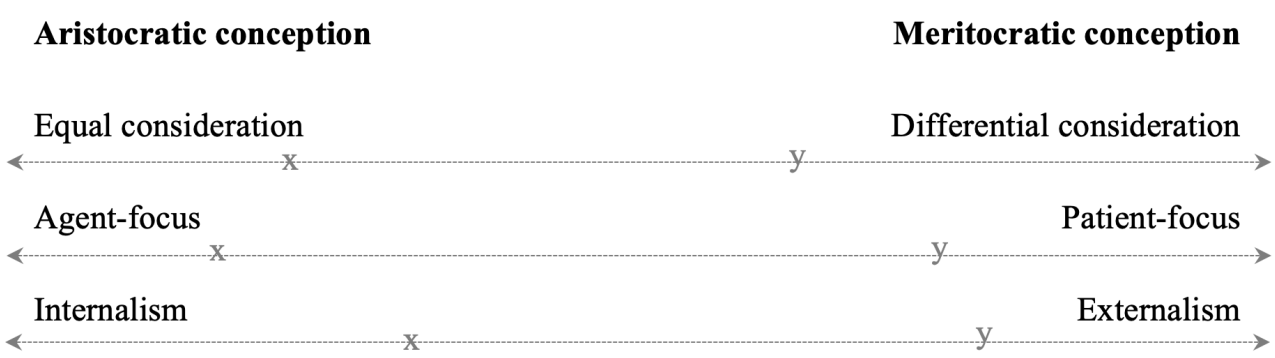


Figure 1: The spectrum of fundamental rights conceptions

To illustrate: a theory *x* may approximate the Aristocratic conception to a high degree with regard to its three characteristic elements. If it approximates the conception sufficiently with respect to the whole set of elements, we can call it an Aristocratic fundamental rights theory. Theory *y*, on the other hand, approximates to a high degree the three characteristic elements of the Meritocratic ideal type. If it approximates these elements sufficiently, we can call it a Meritocratic fundamental rights theory. It is important to note that because the Aristocracy and Meritocracy are antithetical, a particular theory (such as *x* or *y*) cannot score higher on one side without at the same time losing points on the other side.

Lastly, I will fill the *practical* gap by showing what practical insights can be drawn from this idea of the spectrum of fundamental rights. I will argue that because the Aristocratic and the Meritocratic conceptions have opposing strengths and weaknesses, the most viable practical path forward is a middle ground between these conceptions. This middle ground allows us to utilise the strengths of both conceptions, while minimising their weaknesses. Based on the finding that current legal systems are much closer to the Aristocracy than they are to the Meritocracy, I will make the case for a "Meritocratisation" of the Aristocracy. I will show specifically how such a Meritocratisation could be achieved by discussing avenues for changing animals' status as legal property and for granting them specific fundamental rights. However, as I will argue, when extending fundamental rights and personhood to other animals, one should not make the (common) mistake of ignoring that the more one moves in the direction of differential consideration, the more one

loses out on equal consideration (which is to say that the more one grants rights on the basis of individual capacities, the more one runs the risk of undermining equal human rights). To incorporate this Aristocratic insight, I will propose that, in law, we should extend fundamental rights (and cognate concepts such as legal personhood) to other deserving animals *on the basis of species membership* rather than individual capacities. This proposal—which I call the Species Membership Approach, or SMA—conflicts with the orthodox view in animal rights scholarship that to use species membership as a criterion for rights is "speciesistic".[8] I will highlight that law differs from moral philosophy in this respect, and will argue that animal rights lawyers have good reasons for adopting SMA because it is both politically and practically the most viable way for extending fundamental rights to other animals.

The more general theme of this thesis—the transcendence of existing boundaries of concern—is not without precedent in legal scholarship. There have been important debates surrounding extensions of legal fundamental rights to formerly excluded groups, such as slaves, women, or disabled human beings.[9] Such extensions are not unknown to other fields of inquiry, either. There are, in fact, interesting parallels with debates in disciplines other than law that may help contextualise the kind of argument I will be making here. The global justice literature, for example, has recently turned its attention to a similar issue. For long, the central question in the debate has been what states owe to their citizens. Those who focused on this question have traditionally endorsed a relational approach, arguing that issues of justice can only arise between persons who possess certain practice-based relations in virtue of being citizens of the same country.[10] More recently, this approach has been challenged by authors who argue that issues of justice can arise also between beings who share no such domestic relations. As a consequence, these scholars argue that we should extend our concern for justice beyond the sphere of the state and include all human

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8 See Peter Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals* (HarperCollins 1975) 6. See also Chapter 3, Subsection 3.1.

9 See on this Chapter 4, Subsection 2.3.

10 The most prominent advocate of this approach is John Rawls, *A Theory of Justice* (Harvard University Press 1971); for a similar account, see Thomas Nagel, 'The Problem of Global Justice' (2005) 33 Philosophy & Public Affairs 113. To be sure, there are also globalist relationalists, who argue that such relations exist in the global system. See on this Mathias Risse, *On Global Justice* (Princeton University Press 2012) 10.

beings in it.[11] Meritocratic animal rights theorists approve of this extension but argue that we should go even further. Not only ought we include citizens of other states in our moral and legal consideration, but we should also transcend the species boundary in order to include nonhuman animals. Aristocratic human rights advocates, on the other hand, share with proponents of state-centric approaches to justice the concern for restricting our moral and legal consideration to members of a narrowly defined group (the human species in the former case, and the citizenry of a specific state in the latter). Even if the topic of this thesis is relatively new to the reader, its theme is thus one she will likely be familiar with.

Some remarks about definitions, methodology, and focus are in order. First, definitions. By *fundamental legal rights* I mean legal entitlements which protect important aspects of a being's existence and well-being, akin to the protection that human rights grant to the central aspects of human existence. Fundamental legal rights include such rights as, for example, the right to life, the right to bodily integrity, the right to free speech, freedom of religion, or the right to vote. For human beings, these rights are generally found in human rights declarations and treaties or in constitutional fundamental rights catalogues.[12] In contrast to human rights, however, fundamental legal rights are not limited to human beings: "fundamental legal rights" is an umbrella term that

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[11] This argument is made both by globalist relationalists, such as Thomas Pogge (see Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* [2nd edn, Polity Press 2002]); and non-relationalists, such as Peter Singer (see Peter Singer, 'Famine, Affluence, and Morality' [1972] 1 Philosophy & Public Affairs 229; Peter Singer, *One World: The Ethics of Globalization* [Yale University Press 2002]). See also Risse (n 20) 1–2, who takes a middle ground between the statist and the globalist approaches, but largely agrees that "we must adopt a broader perspective on the scope of justice" (ibid 3). Even more recently, Cochrane has proposed a "truly *global* theory of justice" that extends to all sentient beings: Alasdair Cochrane, *Sentientist Politics: A Theory of Global Inter-Species Justice* (Oxford University Press 2018) 7 (emphasis in original).

[12] See eg Universal Declaration of Human Rights (1948, UDHR) <http://www.un.org/en/universal-declaration-human-rights/> accessed 21 July 2019; International Covenant on Civil and Political Rights (1966, ICCPR) <http://www.ohchr.org/en/ professionalinterest/pages/ccpr.aspx> accessed 21 July 2019; International Covenant on Economic, Social and Cultural Rights (1966, ICESCR) <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> accessed 21 July 2019; for a constitutional fundamental rights catalogue, see eg Articles 1–17 of the Basic Law for the Federal Republic of Germany (1949, Grundgesetz, GG) <https:// www.bundesregierung.de/breg-en/chancellor/basic-law-470510> accessed 21 July 2019.

encompasses human rights as well as equivalent nonhuman rights. For reasons of simplicity, I will often be using the terms "fundamental rights" or "rights".

Note that animals are sometimes said to already have certain rights. For example, some argue that animal welfare acts impose duties on human beings not to treat animals inhumanely and thereby grant a *right* to these animals not to be treated inhumanely. This interpretation of "rights" is often inspired by a Hohfeldian analysis of rights, according to which every duty necessarily correlates with a claim-right.[13] While it is certainly possible to use the term "rights" in this Hohfeldian sense,[14] it would be false to conflate these "rights" with fundamental rights. Fundamental rights can be conceptualised as a cluster or "molecule"[15] of individual Hohfeldian positions (claim-rights, powers, immunities, etc.), but they are not reducible to them. This is so because fundamental rights have the capacity to generate new legal positions (new duties, say) which mere claim-rights and duties cannot.[16] As William Edmundson has put it, "[r]ights have a generative and dynamic aspect that a static set of protective duties lacks".[17] Furthermore, in contrast to animal welfare duties and claim-rights, fundamental rights generally have a broader scope and are less easily infringeable.[18] This explains why the abovementioned attempts at turning chimpanzees, bears, and elephants into rights-holders have garnered significantly more attention than any revision of an animal welfare act has, and why I adopt this understanding of fundamental rights for the purposes of my thesis.

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13 Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16, 30; see for such an interpretation eg Visa AJ Kurki, 'Why Things Can Hold Rights: Reconceptualizing the Legal Person' in Visa AJ Kurki and Tomasz Pietrzykowski (eds), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer 2017); Alasdair Cochrane, 'Ownership and Justice for Animals' (2009) 21 Utilitas 424, 432; Sunstein (n 5) 389–390. For an analysis of this interpretation and its problems, see in detail Saskia Stucki, *Grundrechte für Tiere: Eine Kritik des geltenden Tierschutzrechts und rechtstheoretische Grundlegung von Tierrechten im Rahmen einer Neupositionierung des Tieres als Rechtssubjekt* (Nomos 2016) 279–294, 297–298.

14 See Saskia Stucki, 'Elements of a Legal Theory of Animal Rights' (2018) 18–25 (manuscript in preparation and on file with author).

15 See eg Leif Wenar, 'The Nature of Rights' (2005) 33 Philosophy & Public Affairs 223, 234.

16 See on this in detail Pavlos Eleftheriadis, *Legal Rights* (Oxford University Press 2008) 107–128.

17 William A Edmundson, 'Do Animals Need Rights?' (2015) 23 Journal of Political Philosophy 345, 346.

18 See on this in detail Stucki, 'Elements of a Legal Theory of Animal Rights' (n 14) 25–30.

Biologically speaking, *humans* are of course *animals*. However, especially when talking about historical contexts in which this insight had not fully developed yet, and contexts in which the conceptual division between the two is considered important, I will refrain from including humans in the category of animals. Sometimes, I will also separate the two for stylistic reasons. In other contexts, however, I will speak of *other animals* to indicate that humans are animals, too.[19] When I use the term *nonhuman*, I take it to include not just animals, but also other entities, such as artificial intelligences (AIs) or plants.[20]

Second, methodology. As I have mentioned, I propose to understand the Aristocratic and the Meritocratic conceptions as *ideal-types* on opposing sides of a spectrum of fundamental rights conceptions. I am borrowing the concept of the "ideal-type" from Max Weber, according to whom it is a heuristic device that makes possible the formation of a "unified analytical construct" out of "more or less present and occasionally absent concrete individual phenomena".[21] Ideal-types are thus attempts at distilling the core conceptual elements—or "essential tendencies",[22] as Weber calls them—that are buried within the history and practices of specific phenomena. This process of distillation is one of rational construction, the purpose of which is to provide the most intelligible and internally consistent version of those phenomena.[23] Ideal-types think these phenomena to their logical or conceptual conclusion, as it were.

To avoid confusion, it is worth emphasising that the ideal-type of particular phenomena is not the average of its instantiations. Nor does the ideal-type actually have to be instantiated anywhere in practice. Instead, it is, as Weber calls it, a conceptual "utopia"[24] that may exist only in our minds. It is equally important to note that an ideal-type need not be morally desirable. Ideal-

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19 See also David Nibert, *Animal Rights/Human Rights: Entanglements of Oppression and Liberation* (Rowman & Littlefield 2002) 153.

20 I will apply the pronouns "he/she" to nonhuman animals when talking about conceptions that are favourable to animal rights, and "it" in the context of those that are not.

21 Max Weber, *The Methodology of the Social Sciences* (Edward A Shils and Henry A Finch trs, Free Press 1949) 90; see in more detail Richard Swedberg, 'How to Use Max Weber's Ideal Type in Sociological Analysis' (2017) 18 Journal of Classical Sociology 181.

22 Weber (n 21) 91.

23 ibid 90.

24 ibid.

types are "ideal" not in a moral sense, but in a logical or conceptual sense.[25] As Weber points out, a researcher may well choose to construct an ideal-type that is very much at odds with her own ethical views.[26] The reason why ideal-types are not necessarily ethically desirable becomes clear when we consider their function. Ideal-types serve as standards against which concrete instances of phenomena can be measured. They are "expository devices" with the aid of which one can determine to what extent the empirical reality approximates the utopian construct.[27]

Weber suggests that law is one particular field of application for ideal types.[28] Following his suggestion, I will attempt to show in this thesis how applying the device of the ideal-type to fundamental rights can reveal the ways in which concrete fundamental rights accounts differ from or indeed approximate the "utopia" of the Aristocracy or the Meritocracy. I am not following Weber's method slavishly, however. Mine is not a work in sociology. I therefore take the liberty to modify the concept of the ideal-type where necessary. For example, my ideal-types are not just descriptive, sociological ideal-types, but they are also *normative*. As I will show throughout the thesis, they yield prescriptive conclusions about the law that go beyond a mere description and ordering of phenomena. I could therefore also have used a different concept than that of the ideal-type, such as for example John Finnis's "central case" concept.[29] However, I find the "utopian" connotation of the *ideal*-type particularly well-suited for my purpose of constructing conceptions that are the idealistic accentuations of existing accounts and practices. This takes the wind out of the sails of those who want to challenge the ideal-types I am building by pointing to concrete human or animal rights accounts that do not evince all or indeed any of the ideal-type's three characteristic elements which I am highlighting. Do not get me wrong: there *are* such accounts. In

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25 ibid 91–92. Weber illustrates this point with the example of free-trade advocates who erroneously believed that the ideal-type of "free trade" was an ethical rather than a logical ideal (ibid 44).

26 ibid 43.

27 ibid 90, 92; as Weber tells us, the "ideal-type is … related to the idea (Gedankenausdruck) which one finds expressed [in the practices]." ibid 91. Weber refers to ideal-types as mental images (Gedankenbilder), which is why it would be more accurate to call them "idea-types". To avoid confusion, however, I shall be using the more common term "ideal-type".

28 Weber (n 21) 43.

29 John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 10 (Finnis's notion however also builds on Weber's ideal-type: ibid 9).

fact, there are animal rights accounts that adopt Aristocratic elements, such as equal consideration;[30] and there are human rights accounts that endorse Meritocratic elements, such as externalism.[31] This means that there are sometimes also considerable disagreements among (what I take to be) proponents of the same ideal-type.[32] As always, reality is much messier than we theorists would like it to be. But that does not change the fact that the ideal-typical elements which I am fleshing out can be found in many other accounts and practices, and that they follow logically or conceptually from at least some of these accounts and practices.

To sceptics, it may appear as though this method is an "impressionistic" one: it could be argued that it is one that lets me pick and choose the elements that strike me as relevant, without paying attention to important distinctions and nuances, and to neglect important strands of the literature and practice that contradict my ideal-types. These lacking nuances and the neglect of other strands of thinking, it could be argued, may not only complicate the story I am telling, but they could outright undermine it. My method, it is true, lays its focus on specific practices and accounts, and neglects others which it considers less important. It is likewise true that even where it does put its focus, it lets me skate over some of the subtleties of the often complex theories and practices. Every method comes at a certain cost, and mine is no exception. However, I believe that my method has a payoff that far outweighs these costs. As I have mentioned, it allows me not only to distil key conceptions from longstanding fundamental rights debates and to present them in a light that improves our understanding of the central arguments in these debates. It also enables me

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30 Eg Tom Regan, *The Case for Animal Rights* (University of California Press 1983) 247 (who rejects the idea of differential consideration which he considers to form part of morally "pernicious" "perfectionist" theories, which resemble the Meritocracy to some degree, see ibid 233–234).

31 In fact, there is a major human rights school—sometimes referred to as the "naturalistic" or "orthodox" school of human rights—which is externalist in its approach. See for a brief overview and for further references: Alasdair Cochrane, 'Evaluating "Bioethical Approaches" to Human Rights' (2012) 15 Ethical Theory and Moral Practice 309, 319.

32 For example, Anne Phillips, whose account will serve to illustrate the Aristocracy's internalist approach in Chapter 2, Section 5, criticises the hierarchical notion of human superiority which is linked to the idea of dignity: Anne Phillips, *The Politics of the Human* (Cambridge University Press 2015) 89; see on this also Diego H Rossello, 'All in the (Human) Family? Species Aristocratism in the Return of Human Dignity' (2016) 45 Political Theory 761.

to find new practical solutions that overcome issues many of the existing accounts have been struggling with. That the impressionist uses different brush strokes than the realist does not make impressionism an inferior style of art. Some people, of course, prefer realism to impressionism. But there is nothing I could say to convince them of my approach. There is no accounting for taste.

Yet, while it is therefore question-begging to challenge the fact that I adopt a method that builds ideal-types in a more or less selective way, one can of course take issue with the *particular selection* I am making. Why say that Aristocrats focus on agents, for example? Or why argue that Meritocrats are externalists? It is certainly possible to disagree with me on these and other points.[33] I am not excluding the possibility of differently shaped ideal-types. In fact, I am not even excluding the possibility of different conceptions of the same ideal-types: for example, while the Meritocratic and the Aristocratic conceptions are on opposite sides of the fundamental rights spectrum, they may not be the most extreme representatives of these opposing sides. On the Meritocratic side, one could imagine, for instance, views that extend rights not only to animals, but to nature more generally.[34] And on the Aristocratic side, one could hold views that restrict equal rights and dignity to a small subgroup of human beings (as was the case with the real aristocracy). However, I believe that the two ideal-types which I will be presenting capture some of the most salient features of the current human and animal rights debates and practices, and therefore tell a particularly interesting story. I cannot however demonstrate this here but have to trust that the ensuing chapters will do a good enough job to convince the reader of my point. The proof of the pudding, as it were, is in the eating.

Lastly, focus: why does the thesis centre around fundamental rights? Focusing on fundamental rights is today sometimes scoffed as a sign of impoverished thinking,[35] especially in the

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33 One could even object to the distinction between equality and meritocracy. For example, Daniel Roche talks about the idea of a "meritocratic equality" which eighteenth century France offered to individuals who contributed to society: Daniel Roche, *La France des Lumières* (Fayard 1993) 485.

34 See eg Aldo Leopold, *A Sand County Almanac* (Oxford University Press 1966).

35 See eg Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press 1993); see also Victor Tadros, 'Rights and Security for Human Rights Sceptics' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 447–448.

context of animal rights.[36] It is true: law and morality have more on offer than rights-talk.[37] I focus on fundamental rights not because they are a magic bullet—they are not.[38] Other approaches, such as those which take duties to be prior to rights,[39] or which put welfare regulations before rights claims,[40] may be just as valid and useful. However, the existence of these other legal frameworks does not change the fact that rights talk abounds. As John Tasioulas observes, human rights discourse in particular has acquired the status of a "lingua franca".[41] Given this widespread acceptance of rights discourse, it is not far-fetched to ask if that discourse is also applicable to non-human animals; and perhaps even to AIs and plants. My focus will be on animals, but many of my findings may, *mutatis mutandis*, also be applicable to other nonhumans. In addition to the fact that the language of rights is a common one, it ties in with the dominant role that rights discourse played in the Enlightenment, a period which I will explore in detail. As Vincenzo Ferrone has pointed out, "the defining characteristic of the late Enlightenment—and the most positive aspect of its legacy to the Western world today—is the creation of a distinctive language of the rights of man, and the use of that language as an instrument in its struggles".[42] I take these reasons to be sufficient to justify my focus on fundamental legal rights.[43] The rights-sceptic may be relieved to

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36 See eg Lee Nicholas H, 'In Defense of Humanity: Why Animals Cannot Possess Human Rights' (2013) 26 Regent University Law Review 457, 457–460.

37 See on this eg James Griffin, *On Human Rights* (Oxford University Press 2008) (noting that "[h]uman rights do not exhaust the whole moral domain; they do not exhaust even the whole domain of justice and fairness").

38 See for an overview of rights critiques Leif Wenar, 'Rights' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2015 edn) <https://plato.stanford.edu/archives/fall2015/entries/rights/> accessed 21 July 2019.

39 See eg Philip Selznick, 'The Idea of a Communitarian Morality' (1987) 75 California Law Review 445, 454; see also Michael Sandel, *Liberalism and the Limits of Justice* (2nd edn, Cambridge University Press 1998) 184–218.

40 See eg Jonathan R Lovvorn, 'Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform' (2006) 12 Animal Law 133.

41 John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (ed), *Freedom From Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press 2007) 75.

42 Vincenzo Ferrone, *The Enlightenment: History of an Idea* (Elisabetta Tarantino tr, Princeton University Press 2015) xi.

43 Hence, I think that there is at least a *prima facie* case for applying rights language to animals. Whether or not this approach is *all things considered* the best approach is an issue I cannot consider in the limited scope of this thesis.

hear, however, that, where relevant, I will also discuss other concepts, such as equality, personhood, and dignity. As will become evident, these concepts overlap with the concept of fundamental rights in numerous respects. The "languages" of these concepts will therefore serve as a helpful supplement to our "lingua franca".

The thesis is structured as follows. In Chapter 1, I will discuss the intellectual history of the fundamental rights spectrum by turning the spotlight on the two intellectual currents—naturalism and egalitarianism—which became prominent in the French Enlightenment and which came to form the basis of the Meritocratic and the Aristocratic conceptions. I will begin by illuminating the naturalist current, which influenced the former conception, before turning to the egalitarian current, which became the basis of the latter. By drawing on the writings of the naturalist Jean-Claude Delamétherie and the egalitarian Jean-Baptiste Salaville, I will then explain and illustrate how exactly these two currents conflicted in a way that would come to inform the tension between the Meritocracy and the Aristocracy. It is to these conceptions that I will turn in the ensuing two chapters. Chapter 2 will start on one side of the fundamental rights spectrum by analysing the Aristocratic conception of fundamental rights. The chapter begins with an account of a recent movement in human rights and dignity scholarship which understands these concepts as Aristocratic concepts. By identifying three central characteristics of the Aristocracy, I will then spell out how exactly human rights, human dignity, and human equality can in fact be seen as Aristocratic concepts. Drawing parallels with the actual nobility, I will demonstrate that the Aristocratic conception of fundamental rights is characterised by the principle of equal consideration, a focus on agents, and an internalist approach. I will show how exactly internalists "found" concepts such as fundamental rights and I will point to the virtues as well as vices of this approach. Chapter 3 then moves to the other side of spectrum and analyses the Meritocratic conception. It will start with a comparison between the meritocratic struggle against the real nobility in the eighteenth century and Meritocratic animal rights challenges against the prevailing Aristocratic conception. In the same section, I will say more about why the term "merit" is a useful one also in the latter context. After pointing to some of the fragmentary groundwork that has been laid in scholarship on the Meritocracy, I will then shed light on its three core characteristics: differential consideration, patient-focus, and externalism. As in Chapter 2, I will discuss how exactly Meritocrats "ground" rights in an externalist way, what advantages this approach has, and what problems it creates. In Chapter 4, finally, I turn to more practical questions by building on the insights gained in the

previous chapters. I will begin by arguing for the adoption of a middle ground between the Aristocracy and the Meritocracy as the most plausible practical (as compared to theoretical) way forward. I will propose that, given recent scientific advances that reveal striking similarities between humans and other animals, there is a good case for expanding the circle of rights-holders to at least some other animals. In the language of the spectrum, I will argue that there is a need to *Meritocratise the Aristocracy.* This is because current legal systems are too wedded to the Aristocracy. They arbitrarily exclude all nonhuman animals from all fundamental rights and are therefore too far away from the proposed middle ground. By focusing on possible Meritocratisations with respect to animals' property status and fundamental rights, I will show concretely how this move to the middle could be achieved. The last section concretises and specifies these practical suggestions by making the case for the Species Membership Approach. I will argue why, in law, SMA is the most viable practical way forward. I will outline how SMA can be operationalised, and will illustrate its usefulness with the aid of the three cases of Sesha the human being, Karen the elephant, and Knuckles the chimpanzee. The thesis concludes by summarising its key findings and by outlining future directions of research.

Chapter One:

Conflicting Currents

1 Introduction

This chapter deals with the history of ideas such as human rights, basic equality, human dignity, and animal rights. Why study the history of these ideas? What could the past possibly tell us about contemporary ideas and concepts? There seems to be considerable scepticism today, especially in the analytic tradition of legal philosophy, about the "cash value" of historically infused thinking about modern concepts. This chapter, and the thesis more broadly, aims to challenge this scepticism by showing that even (and perhaps especially) legal theorists and philosophers can learn a lot from the past.

The reason why we can learn a lot is that "'[o]ur ideas' are only partly our ideas", as Leo Strauss once remarked. "Most of [them] are abbreviations or residues of the thought of other people, … of the thought of the past. These thoughts were once explicit and in the centre of consideration and discussion."[44] Over the course of time, however, they faded into the background. They became tacit assumptions of our conversations; actors acting from behind the scenes. In order to better understand our own ideas, we must therefore shed light on these underlying assumptions. We must make explicit what is implicit. And the best—and indeed perhaps only—way of doing so, Strauss noted, is to conduct a history of these ideas.[45]

In this chapter, I follow Strauss by providing an intellectual-historical account of the ideas that underlie contemporary fundamental rights approaches. My account will not be genealogical,

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44 Leo Strauss, *What is Political Philosophy? And Other Studies* (University of Chicago Press 1959) 73.

45 ibid. For the purposes of this thesis, I will be using the terms "history of ideas" and "intellectual history" interchangeably.

that is, it will not purport to lay bare the lineage of contemporary ideas. Rather, it has the more modest aim of illuminating the ideas that, in one way or another, came to form the basis of contemporary approaches. The approaches I have in mind are (human) rights approaches of the Aristocratic bent and (animal) rights approaches of the Meritocratic bent. Chapters 2 and 3 will be specifically devoted to analysing these two antithetical fundamental rights conceptions. To convince the sceptical reader of the usefulness of my historico-analytical approach, it may take me up to Chapter 3, and possibly Chapter 4, where I discuss the practical upshot of my framework. To this reader, the present first Chapter may at first raise more questions than it answers. I will talk about philosophers and views that few have heard of and whose relevance for us today may be doubted even by those who have. I therefore need to ask for an advance from that reader. Bear with me. The present chapter is not only interesting for the account it gives us of the *past*, but because of what it will tell us about our *present* views, and about what perspectives we should adopt in the *future*.

To lay the groundwork for my account, this chapter unearths the two diverging intellectual currents that were prominent in the Enlightenment and that became the basis of today's fundamental rights conceptions. The chapter will analyse these currents by focusing on the eighteenth century, and in particular the French Enlightenment. Where necessary, I will mention events that happened before or after the eighteenth century, as well as those that went beyond France or occurred outside of it. For the most part, however, my study will concentrate on the French Enlightenment.

The first intellectual current on which I will shed light is *egalitarianism*, which would come to form the basis of the Aristocratic conception of fundamental rights. According to this current, all human beings are equals. Even though humans differ from each other in their physical constitution or their social conditions, egalitarians hold that they are still fundamentally equal (Equality Thesis).[46] Often, this view was linked to the idea that the human species is special and separate from all nonhuman beings (Separateness Thesis). Some egalitarians adopted supernatural accounts

[46] See Harvey Chisick, *Historical Dictionary of the Enlightenment* (Scarecrow Press 2005) 160–161. As Chisick notes, and as will be pointed out in Subsection 3.2, many proponents of egalitarianism did not take it to require a commitment to social and economic equality among all members of the human species.

of the world and the human being, arguing for example that only humans had immaterial and immortal souls or that only humans were created in the image of God.[47]

The other current was *naturalism*, from which the Meritocratic conception sprang. Naturalists rejected supernatural explanations of the world, arguing that experience and empirical investigation can provide us with the best account of nature and all its beings.[48] Naturalists were often materialists, that is, they believed that everything in nature, including human beings, can ultimately be explained in terms of moving matter.[49] Such theories were prone to regarding all natural beings, including beings within the same species, as existing on a continuum. Although other naturalists opposed this conclusion, the inclination of one strand of naturalism to see only gradation in nature would bring it into serious conflict with egalitarianism's commitment to the equality of human beings. If humans are nothing but natural and material beings, then their equality is difficult to uphold if one finds that the material organisation of individual human beings and of groups of humans differ in important respects from each other. Once human beings are placed on the natural continuum, in other words, it is difficult to maintain their equality.

To be sure, egalitarianism and naturalism were not completely opposed currents of thought.[50] For example, there were egalitarians who argued that all humans are equal by nature, and there were naturalists who advocated the equality of all human beings.[51] However, I will argue that despite these overlaps, naturalism and egalitarianism were in tension with each other. It should furthermore be noted that neither the egalitarian nor the naturalist current originated in the Enlight-

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47 See ibid 160; see also Justin EH Smith, *Nature, Human Nature, & Human Difference: Race in Early Modern Philosophy* (Princeton University Press 2015) 92.

48 Alan Charles Kors, 'The Enlightenment, Naturalism, and the Secularization of Values' (2012) April/May Free Inquiry 24, 28; see also Alan Charles Kors, *Naturalism and Unbelief in France, 1650–1729* (Cambridge University Press 2016) 6.

49 See Olivier Bloch, *Matière à histoires* (Librairie philosophique J Vrin 1997) 30.

50 Also, as James Byrne has emphasised, "the Enlightenment period was one of intellectual exploration and even thinkers who are sometimes brought under the same label actually held widely divergent views." In addition, they "changed their views or oscillated between apparently contradictory positions." James M Byrne, *Religion and the Enlightenment: From Descartes to Kant* (Westminster John Knox Press 1996) 14.

51 See on naturalist egalitarians eg *infra* footnote 168, and on egalitarian naturalists footnotes 173 and 174.

enment. But as I will show, the Enlightenment was a formative period for these intellectual tendencies. In this period, they took on the form that would allow them to serve as the basis for the Aristocratic and Meritocratic conceptions that still dominate our thinking about fundamental rights today. What is more, naturalism and egalitarianism were openly (though, in the case of the former, sometimes clandestinely) debated positions.[52] They were thus not mere tacit assumptions of established conceptions in the way they often are today. For this reason, I propose with Strauss that studying egalitarianism and naturalism in this period can provide us with an understanding of these ideas, of their tension-filled relationship, and of the fundamental rights conceptions they came to shape that would be more difficult to access in the complexity of today's debate on fundamental rights. While it may not be impossible to identify the relevant elements by studying only the contemporary literature, we would easily get entangled in subsidiary discussions that obscure the primary issues. We therefore have a lot to gain by beginning our inquiry at a time when the primary questions were still at the heart of the debate.

The chapter is structured as follows. In Section 2, I discuss naturalism by shedding light on the background and on some of the central themes of this intellectual current. I will then turn, in Section 3, to egalitarianism and discuss, with a particular focus on French egalitarianism, what characterised this stream of thinking. Building on these accounts, Section 4 spells out more clearly in which respect the two approaches were in tension with each other. To illustrate this conflict, I will draw on the writings of two French Enlightenment philosophers: Jean-Claude Delamétherie and Jean-Baptiste Salaville. The chapter ends by concluding the intellectual history part and transition the thesis into the two ensuing analytical chapters (Section 5).

2 Naturalism

The first intellectual tendency on which I will focus is naturalism. Above, I defined naturalism as an approach that dismisses supernatural accounts of the world and that instead avails itself of the tools of experience and the empirical sciences. The aim of this section is to flesh out this skeletal account of naturalism. It will do so, first, by providing some background on the intellectual and historical context in which naturalism developed in the Enlightenment (Subsection 2.1). It will

[52] See on the idea behind the Encyclopédie to make knowledge accessible to the public: Colas Duflo, *Diderot: Du matérialisme à la politique* (CNRS éditions 2013) 162–171. On the *Encyclopédie*, see *infra* 29.

then shed light on two sets of views, materialism (Subsection 2.2) and sensationalism (Subsection 2.3), that often intersected with naturalism.[53] In Subsection 2.4, I will then discuss how naturalists took their empirical views to the normative plane and tried to secularise ethics based on their naturalistic findings.

2.1 A new paradigm

The seventeenth and in particular eighteenth century saw the rise of a new way of looking at the world—one that would explain the lasting importance of the Age of Enlightenment, or the *siècle des Lumières*, as the latter century would become known.[54] That new paradigm was naturalism.[55] Naturalism was not a *novel* paradigm, to be sure. Pre-Socratic philosophers had already made systematic attempts at understanding the world without reference to divine forces;[56] Epicurus and Lucretius then took up the baton from their pre-Socratic precursors.[57] The existence of these precursors, however, does not derogate from the momentous importance of Enlightenment naturalism.[58] Naturalism is the fruit of the Age of Enlightenment, as it were, even if its seeds were sown earlier. To better understand Enlightenment naturalism, it is necessary to elucidate the intellectual shifts which gave rise to it.

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53 Naturalism had no monopoly on materialism and sensationalism, however. They could also intersect with egalitarianism.

54 For an account of the different senses of "Enlightenment" and of the problems with determining when the Enlightenment began, see Byrne (n 50) 1–5.

55 See Kors, 'The Enlightenment, Naturalism, and the Secularization of Values' (n 48) 24.

56 See James Warren, *Presocratics* (Routledge 2007) 23–37; in fact, because of its similarity with the eighteenth century, this period is sometimes referred to as the "Ionian Enlightenment", named after the region in Anatolia where these philosophers thrived, see eg Erwin Schrödinger, *'Nature and the Greeks' and 'Science and Humanism'* (Cambridge University Press 1996) 53.

57 Alan Charles Kors, 'The Age of Enlightenment' in Stephen Bullivant and Michael Ruse (eds), *The Oxford Handbook of Atheism* (Oxford University Press 2013) 204; see on Epicurus: Bloch (n 49) 58–98.

58 See Michael Shermer, 'Scientific Naturalism: A Manifesto for Enlightenment Humanism' (2017) 15 Theology and Science 220.

A good place to start is by asking what—if anything[59]—was special about the new intellectual paradigm. Some authors have proposed an outcome-oriented approach, arguing that what distinguishes the Enlightenment is its having induced (or at least initiated) a certain outcome. Weber, for example, proposed that the Enlightenment was special because it led to the rationalisation and desacralisation of the enchanted world.[60] Bertrand Russell argued that the distinguishing trait of the Enlightenment was its rejection of ecclesiastical authority and its replacement with science.[61] Friedrich Nietzsche praised the Enlightenment on similar grounds for its attacks on Christianity and religious dogma.[62] Other thinkers have argued instead for a process-oriented approach. On their view, what explains the distinctiveness of the Enlightenment paradigm is not a specific outcome, but a more general mode of thinking that was introduced at the time. Ernst Cassirer made one of the most prominent proposals of this type. He argued that the Enlightenment paradigm should be understood not as a specific view or theorem, nor as the sum of theories developed during this period. Rather, it should be understood as a particular process of thinking: the process of "doubting and seeking, tearing down and building up".[63] Peter Gay has suggested in a similar vein that the distinctive trait of the Enlightenment is its "critical spirit".[64] And Alan Charles Kors has proposed that the Enlightenment "bequeathed values, ways of thinking, and criteria whose potential would only be actualised by later phenomena and are being actualised still".[65]

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59 For a critical take see William J Bulman, 'Enlightenment for the Culture Wars' in William J Bulman and Robert G Ingram (eds), *God in the Enlightenment* (Oxford University Press 2016).

60 See Max Weber, 'Science as a Vocation' in Rodney Livingstone (tr), *The Vocation Lectures* (Hackett 2004) 12–13; Weber's view is echoed in Theodor W Adorno and Max Horkheimer, *Dialectic of Enlightenment* (London Cumming tr, Verso 1997) 3.

61 Bertrand Russell, *History of Western Philosophy* (Routledge 2004) 454.

62 Friedrich Nietzsche, *Human, All Too Human* (RJ Hollingdale tr, Cambridge University Press 1986) 81, §150; for an account of Nietzsche's changing opinions on the Enlightenment, see Graeme Garrard, 'Nietzsche For and Against the Enlightenment' (2008) 70 The Review of Politics 595.

63 Ernst Cassirer, *The Philosophy of the Enlightenment* (Fritz CA Koelln and James P Pettegrove trs, Princeton University Press 1979) xv.

64 Peter Gay, *The Living Enlightenment* (1996) 72 <http://tannerlectures.utah.edu/_documents/a-to-z/g/Gay98.pdf> accessed 21 July 2019; see on a similar idea also Michel Foucault, 'What is Enlightenment?' in Paul Rabinow (ed), Catherine Porter (tr), *The Foucault Reader* (Pantheon Books 1984) 42.

65 Kors, 'The Enlightenment, Naturalism, and the Secularization of Values' (n 48) 33.

This critical way of thinking did not come out of thin air. As Kors has pointed out, the "new philosophy" of the Enlightenment can be traced back to "seventeenth-century natural philosophers who had broken from the scholasticism … [and who] believed that their inquiries revealed ordered laws of nature, with God as lawgiver".[66] More important than the moment—or rather period—of origin of modern naturalism is, at least for our purposes, the question *which process* or method of inquiry became characteristic of it. According to Kors, it was "the rigorous empirical and experimental method".[67] Francis Bacon is often regarded as a pioneer of that method. In his *Novum Organum* (1620), he argued against the then-predominant way of reasoning which operated in an abstract, *a priori* fashion. Bacon compared those who adopted this way of thinking with spiders weaving cobwebs "out of their own substance".[68] He proposed that we should instead be like bees who gather pollen from the flowers and then turn this pollen into honey. Put differently, Bacon advocated the collection of empirical data and the induction of principles from that data. A "solicitude for the facts"—as Arthur Wilson observes—should provide a way out of the intellectual impasse that the scholastic approach had reached.[69] Bacon's empiricism induced the gradual replacement of the *esprit de système*—the scholastic fascination with systematisation and deductive reasoning—which had characterised thinking in preceding centuries.[70] This way of thinking became supplanted with the *esprit systématique*: a more open-minded, empirical method. On this approach, systematisations and taxonomies were seen as useful tools for scientific inquiry, but no longer pursued for their own sake.[71]

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66 ibid 24.

67 See ibid 28.

68 Francis Bacon, *Selected Philosophical Works* (Rose-Mary Sargent ed, Hackett Publishing 1999) 128; see also RS Woolhouse, 'Empiricism' in Alan Charles Kors (ed), *Encyclopedia of the Enlightenment* (Oxford University Press 2002).

69 Arthur M Wilson, *Diderot: The Testing Years, 1713–1759* (Oxford University Press 1957) 189; see also Olivier Bloch and Charles Porset, 'Le matérialisme au siècle des Lumières' (1992) 24 Dix-huitième Siècle 5, 5.

70 Cassirer (n 63) 8.

71 ibid 75; see also, with a focus on Diderot, Wilson (n 69) 191.

As Ferrone noted, Bacon's method had an important "democratic" component, making it in principle possible for anyone to replicate and verify knowledge.[72] Taking matters into their own hands, naturalists left no stone unturned. Countless experiments were conducted, and myriad treatises written. An unprecedented growth in knowledge ensued. The Enlightenment way of thinking, as Cassirer put it, was "[s]preading through nature in all directions like a river which has burst its dams".[73] In their zeal to lift nature's secrets, the naturalists not only scrutinised minerals, fungi, plants, and animals. Human beings were no longer immune from scientific examination either. While they had previously only been those who compiled taxonomies of other forms of life, humans now became an object of scientific study, to be assigned their proper place in the taxonomies. It was in the first edition of Carl von Linné's *Systema Naturæ* in 1735 that humans were, for the first time in modern history, classified as part of the natural order.[74]

As indicated, naturalists were in general sceptical of supernatural explanations of the world. This may be surprising considering that the empirical approach was initially not viewed to be at odds with theology. Quite the contrary, many naturalists regarded the natural sciences as an inquiry into the laws of God as manifested in nature.[75] Isaac Newton, most prominently, believed that the world had an intelligent cause. According to him, God is "the grand architect of the universe";[76] the watchmaker who set the whole of nature in motion,[77] and who intervenes from time

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72 Ferrone (n 42) 98; see on the immense influence of Bacon's approach on eighteenth century philosophers such as Diderot or Voltaire: Wilson (n 69) 187–190; and Elisabeth de Fontenay, *La silence des bêtes: La philosophie à l'épreuve de l'animalité* (Fayard 1998) 315.

73 Cassirer (n 63) 4.

74 B Ricardo Brown, *Until Darwin, Science, Human Variety and the Origins of Race* (Routledge 2015) 17; Carl von Linné, *Systema naturæ, sive regna tria naturæ systematice proposita per classes, ordines, genera, & species* (Theodorum Haak 1735) 10.

75 Kors, 'The Enlightenment, Naturalism, and the Secularization of Values' (n 48) 25; see also Colas Duflo, *Diderot philosophe* (Honoré Champion 2003) 72.

76 Georges Lefebvre, *The French Revolution: From Its Origins to 1793* (Routledge 2001) 57.

77 Ernst Feil, 'Deism' in Michel Delton (ed), *Encyclopedia of the Enlightenment* (Fitzroy Dearborn 2001) 361.

to time to exert providential guidance and to correct defects.[78] Many of Newton's followers, including Voltaire, would adopt this form of natural theology known as deism.[79] Taking the critical, empirical spirit of the Enlightenment to heart, however, other naturalists adopted a more radical line of argument. These naturalists were not deists but atheists who argued that God's existence cannot be demonstrated and that all of nature can be explained without supernatural explanations. The universe, for this relatively small but important group of thinkers, had no final causes. For these "categorical naturalists", as Kors calls them, everything was ultimately a matter of chance, not design.[80]

With naturalism, a way of looking at the world had thus emerged that emphasised empirical inquiry and bottom up-reasoning over the deductive top-down approach that had prevailed up until the seventeenth century. Two sets of views that many naturalists would adopt to make sense of the world were materialism and sensationalism. Let us start with the former.

2.2 Materialism

Materialism was a set of views that often intersected with naturalism, especially that of the "categorical" type. I call materialism a "set of views" because it is impossible to pin down one particular position that represented all of materialism. As Ann Thomson has emphasised, "materialistic thinking did not constitute a single coherent school".[81] Rather, there were important divisions within the movement on some of the central questions that concerned materialists.[82] Materialists

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78 Roger D Lund, 'Deism' in Alan Charles Kors (ed), *Encyclopedia of the Enlightenment* (Oxford University Press 2002); Norman Hampson, *The Enlightenment* (Penguin Books 1968) 77–78.

79 Lund (n 78); see also Hampson (n 78) 78–79, who suggests that Voltaire went even further than Newton in this respect.

80 Kors, 'The Age of Enlightenment' (n 57) 195–197. See on the relatively small number "categorical naturalists": Cassirer (n 63) 70; Lefebvre (n 76) 57. Many members of Paul-Henri Thiry d'Holbach's salon (the so-called "*coterie holbachique*") belonged to this avant-garde that abandoned deism in favour of atheism (or at least agnosticism).

81 Ann Thomson, *Bodies of Thought: Science, Religion, and the Soul in the Early Enlightenment* (Oxford University Press 2008) 219.

82 Thomson, for example, argues that among eighteenth century materialisms, we can distinguish between the materialism of Diderot and that of Helvétius, see ibid; others distinguish between a sensationalist materialism of the

were influenced by a wide variety of thought, including Cartesian physics, Lockean sensationalism (about which I will say more in Subsection 2.3), mechanism, chemistry, mineralogy, biology, and libertinism.[83] The materialists included thinkers such as Denis Diderot, Paul-Henri Thiry d'Holbach, Jacques-André Naigeon, and Julien Offray de la Mettrie (not be confused with Jean-Claude Delamétherie whose work I will discuss below),[84] who were all so-called *philosophes*: intellectuals with a critical spirit and a penchant for social change and empirical inquiry.[85] Focusing on eighteenth-century France, Olivier Bloch has made a useful attempt at identifing what united the different divisions of materialists. According to Bloch, they had in common their a) atheism, antispiritualism, and a radical critique of religion; b) criticism of religiously and metaphysically infused moral and political values; c) view that humans are natural beings and form part of the same material unity as everything else in nature; and d) belief that everything in nature is necessary ("necessitarianism" or "fatalism").[86]

Of particular interest to our study of the tension between naturalism and egalitarianism is c): materialists' rejection of a categorical separation between humans and the rest of nature. Materialists achieved this rejection by abandoning dualism, that is, the view made prominent by René Descartes that there are two separate substances: the material body and the immaterial soul.[87] Materialists adopted monism in its stead. Monism is the view that we only need one substance—

Lockean type and a more mechanist materialism based on Cartesian physics, see on this interpretation Bloch (n 49) 311.

83 Bloch (n 49) 313–315; Olivier Bloch, 'L'héritage libertin dans le matérialisme des Lumières' (1992) 24 Dix-huitième Siècle 73, 73, 79.

84 Kors, 'The Enlightenment, Naturalism, and the Secularization of Values' (n 48) 31; La Mettrie appears to have been the first materialist to refer to himself as such, see Bloch (n 49) 328; see on La Mettrie also Aram Vartanian, *La Mettrie's L'Homme Machine: A Study in the Origins of an Idea* (Princeton University Press 1960).

85 The *philosophes* were thus not "philosophers" in today's sense (although some were also that). The *philosophes* were part of the community of educated thinkers known as the Republic of Letters, see Alan Charles Kors, 'Philosophes' in Alan Charles Kors (ed), *Encyclopedia of the Enlightenment* (Oxford University Press 2002); Chisick (n 46) 316–217; see more generally Stéphane van Damme, 'Philosophe/Philosopher' in Daniel Brewer (ed), *The Cambridge Companion to the French Enlightenment* (Cambridge University Press 2014); on the Republic of Letters, see in detail Marc Fumaroli, *The Republic of Letters* (Lara Vergnaud tr, Yale University Press 2018).

86 Bloch (n 49) 321.

87 For a succinct account of dualism, see Duflo (n 52) 29–30.

matter—to explain everything there is to explain in the world.[88] On the monistic view, nature is a whole—a "mass of matter",[89] as Diderot put it—which resists strict systematisation and taxonomy. Crucially, to monistic materialists, even the human being was nothing other than a complex aggregation of matter. This aggregation was seen as the product of mere accident and therefore in want of divine design.[90] As Kors points out, the view that everything consists of matter presented "a new and startling world in which there existed solely a corporeal nature which was the aggregate of all real things. Human beings existed as a part of that corporeal nature".[91]

Even the soul was considered to be a mere product of matter, arising from humans' (and potentially other beings') physical organisation, that is, their bodies.[92] For the materialists, the belief in an immaterial soul amounted to "a dead end, simply an admission of ignorance", as Kors observes.[93] Abandoning the belief in souls that exist independently of matter also entailed abandoning one of the central notions that allowed humans to set themselves apart from animals, plants and everything else in nature: the notion that only human beings have immaterial souls.[94] Once that notion was relinquished, it was more difficult to maintain that humans were fundamentally different from nonhumans. Instead, it seemed to suggest itself that nature is characterised by gradual progression from the inanimate to the animate; from plants to animals to humans.[95] If the world is ultimately one, then every being in it—including human beings—are in one way or another related. In the words of Diderot: "everything is bound up with everything else".[96] Importantly, for many materialists, the idea of a natural continuum which replaced the strict line between humans and nonhumans had an impact not only on how humans were seen to relate to nature, but also on

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88 See eg Pierre Lurbe, 'Matière, nature, mouvement chez d'Holbach et Toland' (1992) 24 Dix-huitième Siècle 53; see on Diderot's rejection of dualism: Duflo (n 52) 25.

89 Denis Diderot, *Pensées sur l'interpretation de la nature* (1754) 191; see also Denis Diderot, *Principes philosophiques sur la matière et le mouvement*, vol 9 (Le Club Français du Livre 1971) 613–614. All translations are mine, unless otherwise indicated.

90 Duflo (n 75) 112.

91 Kors, 'The Age of Enlightenment' (n 57) 203.

92 ibid.

93 Kors, 'The Enlightenment, Naturalism, and the Secularization of Values' (n 48) 31.

94 Duflo (n 52) 36.

95 See ibid.

96 Cited in Arthur M Wilson, *Diderot* (Oxford University Press 1972) 568.

how humans were regarded as relating to each other. With the abandonment of immaterial souls as a feature common to all humans, material differences between individual humans became more and more important. The continuum, in other words, was now seen as operating also within species, not only between them. I will say more about the tensions with egalitarianism this gave rise to in Section 4.

Not all naturalists endorsed materialism.[97] Voltaire and Jean-Jacques Rousseau are only the most famous examples.[98] However, this does not negate the fact that naturalistic views frequently coincided with materialistic ones.[99] As Bloch and Charles Porset point out, the "the recourse to experience" and to the inductive method "favour materialism".[100] In fact, from the very first recorded uses of the word "materialists",[101] the term seems to have been linked with that of "naturalists".[102] In the English language, the first appearance of the term "materialist" is recorded in the writings of Henry More, a member of the so-called Cambridge Platonists. The Cambridge Platonists were a Cambridge-based group of theologians who were ardent defenders of the existence of God and of dualistic conceptions that separated soul from matter.[103] More was particularly critical of Thomas Hobbes—a materialist *avant la lettre*.[104] As Bloch points out, More coined the term "materialist" with view to Hobbes's writings, which he thought claimed that the only things that really exist (including the mind and soul) are bodies and, therefore, matter.[105] Because Hobbes's work had fallen into disrepute due to critiques like More's,[106] the materialists of the eighteenth century rarely if ever explicitly referred to him in their own writings.[107] Nevertheless,

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97 See eg Bloch (n 49) 332.

98 Bloch and Porset (n 69) 5; see also Thomson, *Bodies of Thought* (n 81) 225.

99 See also Bloch and Porset (n 69) 5.

100 ibid.

101 See on this in detail Bloch (n 49) 31–35.

102 See ibid 27–28; see also Bloch and Porset (n 69) 312.

103 See on the Cambridge Platonists in detail Sarah Hutton, 'The Cambridge Platonists' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2013 edn) <https://plato.stanford.edu/archives/win2013/entries/cambridge-platonists/> accessed 21 July 2019.

104 Bloch (n 49) 204.

105 ibid 204, 212–215.

106 See ibid 288.

107 ibid 288–294.

they were influenced by Hobbes,[108] as well as by other thinkers with a materialistic bent, such as Epicurus and Lucretius, or, later, Benedict de Spinoza and John Toland.[109]

2.3 Sensationalism

The second set of views that often—though, again, not always—intersected with naturalism and materialism was sensationalism.[110] Sensationalism is the view that sensations—which Diderot's famous *Encyclopédie, ou dictionnaire raisonné des sciences, des arts et des métiers* (*Encyclopédie*) defined as "impressions arising in us as a result of external objects"[111]—are a being's sole epistemic access to the world, and that they constitute the very essence of knowing.[112] Put simply, according to sensationalism, I know what I know because I sense; and knowing means sensing. Sensationalists rejected "innate ideas", that is, knowledge about the world that one has prior to any sensory experiences.[113] La Mettrie, in his *Traité de l'âme* (1745), aptly described the weight that sensationalism attaches to the senses: "It is neither Aristotle, nor Plato, nor Descartes, nor Mallebranche [sic] who is going to teach you what your soul is … there are no safer guides than the senses. They are my philosophers. Whatever evil they are being accused of, only they can illuminate reason in the search for truth."[114]

John Locke's *Essay Concerning Human Understanding* (1690) is generally credited with having laid the foundation for sensationalism. On Locke's account, all our ideas and impressions

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108 See ibid 296–310.

109 See ibid 288.

110 See eg ibid 315; see also Aram Vartanian, *Diderot and Descartes: A Study of Scientific Naturalism in the Enlightenment* (Princeton University Press 1953) 241–242.

111 'Sensations', in Denis Diderot and Jean le Rond d'Alembert (eds), *Encyclopédie, ou dictionnaire raisonné des sciences, des arts et des métiers, etc.* (University of Chicago: ARTFL Encyclopédie Project, 2017) 15:36 <https://artflsrv03.uchicago.edu/philologic4/encyclopedie1117/navigate/15/65/> accessed 21 July 2019; on some (notable) philosophers who did not endorse sensationalism, see Sylvain Auroux, 'Sensationalism' in Michel Delton (ed), *Encyclopedia of the Enlightenment* (Fitzroy Dearborn 2001) 1208–1209.

112 See Auroux (n 111) 1208.

113 On the concept of "innate ideas", and its historical background, see Jerry Samet, 'The Historical Controversies Surrounding Innateness' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2008 edn) <https://plato.stanford.edu/archives/fall2008/entries/innateness-history/> accessed 21 July 2019.

114 Julien Offray de la Mettrie, 'Traité de l'âme', *Œuvres philosophiques de la Mettrie*, vol 1 (1796) 65–66.

stem from the senses and the sensations that external objects cause in them. The soul, according to Locke, does not possess any innate ideas: every idea it has comes from the sensations or from reflection (which itself operates on already existing sensations).[115] Locke argued that depending on one's sense organs, one will have different ideas. He even suggested that there could be beings in other parts of the universe with entirely different senses. Because of their different senses, these beings would have entirely different ideas and thus entirely different ways of knowing the world.[116] Locke's theory had an extraordinary impact on the thinking of eighteenth century philosophers, especially (but not exclusively) on that of the *philosophes*.[117] Because of the importance of Lockean sensationalism, Roger Woolhouse categorises it as the second type of empiricism (the experimental method described above being the first type):

> Empiricism in this second sense was a theoretical doctrine about the contents of the mind in general (knowledge, beliefs, ideas, and concepts); it proposed that these contents are all ultimately relatable to experience and sensory input and have no meaning or scope other than what is licensed by experience.[118]

One of the many adherents of sensationalism was La Mettrie, who embraced Locke's view that all ideas are derived from the sensations and that these sensations are the result of the impression that external objects leave on our sense organs. La Mettrie inferred from this fact that sensitive beings are material beings.[119] Another adherent of sensationalism, Diderot, concluded in a similar way that there is only one operation in man, and in matter more generally: sensing.[120] That materialists like La Mettrie and Diderot were also sensationalists was no coincidence. As Bloch suggests, the connection between materialism and sensationalism "is a pertinent datum for the whole of the philosophy of the Lumières".[121]

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115 See Duflo (n 75) 89–93.

116 ibid 89–90.

117 Kors, 'The Enlightenment, Naturalism, and the Secularization of Values' (n 48) 25; Locke's sensationalism was imported to France by Voltaire and Étienne Bonnot de Condillac, see Lefebvre (n 76) 56.

118 Woolhouse (n 68).

119 Ann Thomson, *Materialism and Society in the Mid-Eighteenth Century: La Mettrie's Discours Préliminaire* (Librairie Droz 1981) 36–37.

120 See Duflo (n 52) 39, 74.

121 Bloch (n 49) 314.

2.4 Ethics secularised

The brief accounts of materialism and sensationalism which I have presented above would only be of limited interest to us if they had no normative implications. For the thinkers at the time, these (and other) views were not just of academic interest, however. They were also the foundations of many concrete normative and policy proposals. To understand this, it is helpful to start with the impact that Locke's sensationalism had on ethics, or, as some contemporaries called it, the "science of morality".[122]

On Locke's account, moral knowledge, like all other kinds of knowledge, is not innate but acquired by means of experience.[123] This had radical consequences because experience could now serve as a critique of authorities that prescribed moral norms that conflicted with experience. While the materialists did not agree on which moral philosophy would flow from Lockeanism or materialism more generally, they were united in their rejection of Christianism as the basis of morality.[124] They agreed that the foundations of morality had to be secularised.[125] According to Kors, this "secularisation of the ethical debate" is one of the most important legacies of the Enlightenment.[126] But how exactly were the Christian foundations of morality to be replaced with secular ones?

The naturalists' solution lay in naturalising the foundations of morality.[127] Instead of basing their moral theories on theological arguments, the naturalists turned to nature.[128] Only by studying nature, they believed, can we discover what is moral. If we turn away from nature, we will act immorally. We will fall prey to superstitions and false authorities which command us to act in ways that are incompatible with our natures.[129] Nature was thus seen as providing a more solid foundation for morality. Unlike Christian ethical principles, naturalised ethics could be validated

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122 See eg on Claude-Adrien Helvétius's use of the term: Jacques Domenech, *L'éthique des Lumières: Les fondements de la morale dans la philosophie française du XVIIIe siècle* (Librairie philosophique J Vrin 1989) 74.

123 Kors, 'The Enlightenment, Naturalism, and the Secularization of Values' (n 48) 25.

124 Domenech (n 122) 24. Note, however, that Locke himself took a theocentric and Christian position.

125 See for a critical perspective: Bulman (n 59) 5.

126 Kors, 'The Enlightenment, Naturalism, and the Secularization of Values' (n 48) 24.

127 See ibid 27.

128 ibid 24.

129 See ibid 33 (focusing on d'Holbach's views in particular).

by experiment and experience.[130] As I will show in Chapter 3, this point about the more solid foundations that nature provides for normative principles plays a central role in the Meritocratic conception of fundamental rights.[131] Diderot's moral philosophy, for example, found in nature and the natural sciences a more reliable source for moral principles than Christianity could ever deliver.[132] As he wrote, "[i]t is very difficult to be … a good moralist without being an anatomist, naturalist, physiologist, and doctor".[133] Diderot argued that if we study the laws and practices of all nations, we will find that there is a general will in nature that can serve as the basis for morality.[134] As we can discover by reason, humans share certain desires and have a general interest in certain things that can serve as the ground for morality.[135] Once we approach morality from this perspective, Diderot maintained, we will see for instance that the Christian condemnation of masturbation and homosexuality is wrong. Because they are perfectly natural phenomena and cause pleasure rather than pain, they are not immoral.[136]

Materialists like Diderot generally believed that examining nature—and, in particular, human nature—revealed the centrality of the principle of utility, that is, the principle "that the happiness of the species was the highest value and that all things might be judged by their contribution to happiness or suffering".[137] As Kors notes, the discovery of the pursuit of pleasure and the avoidance of pain in living creatures was not new to the Enlightenment.[138] What was new, however, was the radicality of the naturalists' secularisation of ethics which upended the moral assessment of these all-too-common behaviours: if it is natural for humans and animals to pursue pleasure and to avoid pain, then, *a fortiori*, it is morally right that they pursue pleasure and avoid pain. As Kors

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130 Woolhouse (n 68); see also Ann Thomson, 'French Eighteenth-Century Materialists and Natural Law, History of European Ideas' (2016) 42 243, 252 (on d'Holbach's grounding of ethics in nature).

131 See Chapter 3, Section 5.

132 Jacques Proust, *Diderot et l'Encyclopédie* (Slatkine 1982) 295, 303–304.

133 Cited in Wilson (n 96) 660.

134 Thomson, 'French Eighteenth-Century Materialists and Natural Law, History of European Ideas' (n 130) 249.

135 ibid; see also Paul-Henri Thiry Holbach, *Système de la nature, ou des lois du monde physique et du monde moral*, vol 1 (Étienne Ledoux 1821) 149.

136 Kors, 'The Enlightenment, Naturalism, and the Secularization of Values' (n 48) 33; see also Duflo (n 52) 80–83.

137 Kors, 'The Enlightenment, Naturalism, and the Secularization of Values' (n 48) 27; see also Etienne Bonnot de Condillac, *Traité des sensations*, vol 1 (De Bure 1754) 9.

138 Kors, 'The Enlightenment, Naturalism, and the Secularization of Values' (n 48) 25.

points out, this inference had been drawn since the seventeenth century's inception of empiricism—albeit with a more religious tone than many eighteenth century materialists would allow for: "[i]f it were, indeed, a law of nature that all living creatures, including human beings, sought earthly pleasure and fled earthly pain, then it followed that the pursuit of such pleasure was nothing less than the divinely ordained end of human life".[139] Jeremy Bentham, whose attempt at secularising ethics based on the principle of utility is one of the most influential to this day, laid particular emphasis on the idea that humans and animals are the same when it comes to the pursuit of pleasure and the avoidance of pain. On his account, animals have the same capacity to feel sensations as humans, which is why their interests must be included in our moral considerations. As he famously argued, the question we have to ask when it comes to justifying cruelty toward animals, "is not, can they *reason?* nor, can they *talk*? but, can they *suffer?*"[140]

Many naturalists extended their normative theories beyond the moral sphere and developed economic and political proposals based on naturalistic considerations.[141] Materialism provided a powerful platform from which to launch such proposals.[142] As in ethics, materialists could make claims based on experiment or experience that often (but not always) served to attack existing ideologies.[143] It is "the primary vocation of materialism", as Bloch highlights, to "fight and resolve, relying as much as possible on factual knowledge of the things of this world, the prejudices, illusions, and fantasies of the dominant opinion".[144] D'Holbach argued for example that governments and laws have to act in accordance with the demands of human nature, which requires them to respect individuals' interests in liberty, safety, and property.[145] While, as Thomson cautions, it is difficult to make any general statements about the link between materialism and radical political

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139 ibid.

140 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, vol 2 (W Pickering 1823) 236 (footnote) (emphasis in original).

141 See JL Heilbron, 'Natural Philosophy and Science' in Alan Charles Kors (ed), *Encyclopedia of the Enlightenment* (Oxford University Press 2002).

142 See Thomson, *Bodies of Thought* (n 81) 231.

143 See, with respect to Diderot, Duflo (n 52) 104, 111.

144 Bloch (n 49) 222. See also ibid 327 (focusing on Meslier's materialism).

145 Thomson, *Bodies of Thought* (n 81) 231.

proposals,[146] materialist views on nature and natural law may nonetheless be seen as having "provided the basis for a critique of existing institutions from the late 1760s".[147]

This tendency of naturalists to take empirical insights to the normative plane would become a key factor in the tension between egalitarians and naturalists of a certain strand. This is because a normative model of society that was based on the idea of human difference would allow for—and indeed often require—treating human beings in ways that would be incompatible with the idea of basic equality. Before we can say more about this tension between naturalism and egalitarianism, however, we first need to elucidate that other intellectual stream.

3 Egalitarianism

The second important current of the Enlightenment was egalitarianism.[148] In this section, I will provide a more precise account of this intellectual current. I will do so by discussing, in Subsection 3.1, some of the different justifications that were invoked to support the Equality Thesis and Separateness Thesis.[149] In Subsection 3.2, I will show that egalitarianism was a particularly distinctive intellectual tendency in the French Enlightenment.

3.1 Basic equality

Despite the abovementioned naturalistic developments in the seventeenth and eighteenth century and their anti-Christian tendencies, Christianity was far from losing its influence on society.[150]

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146 ibid 234; studies have found, for example, that the materialists did not seem to have had a direct impact on the French Revolution: see eg Bloch (n 49) 337–338; Ferrone (n 42) 79–86; on the relative lack of political activism in Diderot, see Proust (n 132) 449–453.

147 Thomson, 'French Eighteenth-Century Materialists and Natural Law, History of European Ideas' (n 130) 252; see also Fernando Savater, 'Fatalité et liberté chez Diderot', *Interpréter Diderot aujourd'hui* (SFIED 1984) 238–239.

148 See William Bristow, 'Enlightenment' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2011 edn) <https://plato.stanford.edu/archives/sum2011/entries/enlightenment/> accessed 21 July 2019.

149 For a modern distinction between these two ideas, see Jeff McMahan, 'Challenges to Human Equality' (2008) 12 The Journal of Ethics 81 (using the terms "separation problem" and "equality problem").

150 See on this Byrne (n 50) 29–32, 34–36.

With Christianity, one of its key dogmas—the Equality Thesis—retained a prominent role. Christian belief has it that all humans are fundamentally equal. "God created mankind in his own image", the Old Testament reports.[151] According to this so-called *imago Dei* doctrine, the weakest human being is as much an image of God as is the strongest, the least intelligent as much as the brightest. It is in this equal creation in the image of God that Christians believe resides the dignity of humanity.[152]

Closely connected to the idea of equal creation of humans in the image of God was dualism. As was mentioned above, dualists hold that only human beings have souls that are immaterial, that is, not just part of their bodily existence (as may be the case also for animals) but belonging to a separate metaphysical plane. In contrast to the material sphere, this plane is not subject to time and space. As a result, souls cannot deteriorate. They are immortal.[153] For Christians, the immortality of the soul is a crucial prerequisite of the Last Judgment, when the souls of the dead will be re-embodied and enter the Kingdom of Heaven.[154] As Fernando Vidal points out, "[i]n the eighteenth century, it was [still] generally accepted that a human being is the union of a material body with an immortal, immaterial soul".[155] Despite the manifold differences between them, humans were viewed as having a basic equality in common simply in virtue of their immaterial souls. As was mentioned above, this type of dualism is often credited to Descartes.[156] According to Descartes, all human beings are the same in that they possess an immaterial soul. In this, they distinguish themselves from all animals, which are mere bodies—mere machines.[157]

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151 Genesis 1:27.

152 See Janet Soskice, 'Human Dignity and the Image of God' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014).

153 See Bernard Baertschi, *Les rapports de l'âme et du corps: Descartes, Diderot et Maine de Biran* (Librairie philosophique J Vrin 1992) 64.

154 Paul A Crow et al, 'Christianity' (*Encyclopædia Britannica*, 2008) <https://www.britannica.com/topic/Christianity> accessed 21 July 2019.

155 Fernando Vidal, 'Soul' in Alan Charles Kors (ed), *Encyclopedia of the Enlightenment* (Oxford University Press 2002).

156 Byrne (n 50) 65; on the influence of Christianity on Descartes's dualism, see ibid 67–69.

157 See Baertschi (n 153) 293–297; however, as has been noted in the literature, in contrast to some of his followers, Descartes did not argue that animals have no feelings, see eg John Cottingham, '"A Brute to the Brutes?": Descartes' Treatment of Animals' (1978) 53 Philosophy 551; see also Peter Harrison, 'Descartes on Animals' (1992)

Cartesian dualists were not the only ones who believed in equality. Locke, for example, held that all men are fundamentally equal, his scepticism about immaterial souls notwithstanding.[158] As Jeremy Waldron argues, Locke based his theory of basic equality on humans' capacity for abstraction, that is, their capacity to have general ideas. Although some other animals can reason, Locke claimed, only humans can reason *abstractly*.[159] In virtue of this capacity, humans—and only humans—can reason their way to the general idea of God, discover his commandments, and live their lives accordingly.[160] Human beings, in Locke's words, are not mere creatures, but "All Servants of one Sovereign Master, sent into the World by his order, and about his business".[161] As such, they must not be harmed or exploited.[162] Despite the diversity among humans, Locke held, they "should be equal one amongst another without Subordination or Subjection".[163] Waldron claims that Locke based equality on humans' rational capacity to have access to God, rather than on their creation in the image of God, because Locke may have deemed the latter too instable a foundation for basic equality. As Waldron argues,

> even if we … can confidently think of ourselves as created in the image of God, there is no denying that we are a rather *blurred* image—intellectually as well as spiritually. And the intellectual differences between us would seem to be important in this regard, indicating that some of us are less blurred than others in the image of God that we present.[164]

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42 The Philosophical Quarterly 219; Thomson, *Materialism and Society in the Mid-Eighteenth Century: La Mettrie's Discours Préliminaire* (n 119) 42; on the idea of animal-machines and Descartes in detail, see de Fontenay (n 72) 275–288.

158 See William Uzgalis, 'John Locke: The Immateriality of the Soul and Personal Identity' (2012) <https://stanford.library.sydney.edu.au/archives/spr2014/entries/locke/supplement.html> accessed 21 July 2019; Locke did however seem to believe in the immortality of souls: see Jeremy Waldron, *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought* (Cambridge University Press 2002) 80 (footnote 73).

159 Waldron, *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought* (n 158) 75.

160 ibid 79–80.

161 John Locke, *Two Treatises of Government* (Peter Laslett ed, 3rd edn, Cambridge University Press 1988) 271, §6.

162 Waldron, *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought* (n 158) 80–81.

163 Locke (n 161) 269, §4.

164 Waldron, *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought* (n 158) 72 (emphasis in original).

Now, in light of what I have said above about the anti-Christian tendency of naturalistic thinking, it will be unsurprising that some Enlightenment thinkers took a different, more secular tack to justifying human basic equality. As Milan Zafirovski notes, many Enlightenment philosophers regarded Christian theories of human equality as neither necessary nor sufficient for justifying universal equality among humans. Although helpful in making the case for equality, Christian egalitarianism was seen as ultimately "spurious"[165] because limited to a "heavenly"[166] equality before God. Hence, Zafirovski points out, "the Enlightenment both initially appropriates and eventually transcends Christian theological egalitarianism and universalism. It does [so] by transforming and 'landing' the latter from 'heaven' into human society."[167]

Illustrative of egalitarian accounts that transcended Christian egalitarianism in such a way were the theories of those naturalists who argued on secular grounds that all human beings are fundamentally equal. One such example is the naturalist Chevalier Louis de Jaucourt who authored the article on "natural equality" in the *Encyclopédie*. According to de Jaucourt, "natural or moral equality is … based on the constitution of human nature, common to all men, who are born, grow, subsist, and die in the same way".[168] Because all humans are by nature equal, de Jaucourt argued, it follows, among other things, that everyone has to respect others and treat them as equals, that is, as beings who are as human as oneself.[169] De Jaucourt notes that this doctrine of natural equality is compatible with the existence of manifold differences between human beings in society:

> despite all the inequalities produced in political government by the difference in conditions, by nobility, power, wealth, etc., those who are most elevated to others must treat their inferiors as naturally equal to them, avoiding any rage, demanding nothing beyond what is owed to them.[170]

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165 Milan Zafirovski, *The Enlightenment and Its Effects on Modern Society* (Springer 2011) 45.

166 ibid.

167 ibid.

168 Louis chevalier de Jaucourt, 'Égalité naturelle' in Denis Diderot and Jean le Rond d'Alembert (eds), *Encyclopédie, ou dictionnaire raisonné des sciences, des arts et des métiers, etc.* (University of Chicago: ARTFL Encyclopédie Project, 2017) 5:415 <https://artflsrv03.uchicago.edu/philologic4/encyclopedie1117/navigate/5/1558/> (emphasis added); see on this also Roche (n 33) 487.

169 chevalier de Jaucourt (n 168) 5:415.

170 ibid.

Because natural equality must be protected in everyone, slavery is a violation of the principle of equality.[171] That does not mean, however, that everyone should be made an equal: as de Jaucourt insisted, "absolute equality" cannot be the goal, especially because there is a real need for differences in humans' conditions—such as ranks, honours, distinctions, prerogatives, and even subordinations. For de Jaucourt, natural or moral equality are in no way opposed to such differences.[172]

Even some materialists advocated egalitarianism. One such example is Claude-Adrien Helvétius.[173] On Helvétius's account, all human beings are essentially similar and therefore equals.[174] Helvétius, of course, did not deny that humans differed from each other physically. However, he believed that, as Thomson notes, "the physical differences between humans are so slight as to make no practical difference; with a few exceptions, most people are born with roughly equal aptitudes".[175] Helvétius followed Locke in thinking that human beings do not possess any innate ideas, which he took to mean that there are no hereditary differences between human beings.[176] Hence, he believed that external influences can mould humans. If we enact the right laws and educate people, Helvétius held, then we can form them and, if necessary, restore the equality that differences in social conditions have distorted.[177] As far as sensations caused by external stimuli are concerned, Helvétius took the view that while not all human beings feel the same way, the differences in how they feel are negligible. In this sense, humans differ from animals in ways that humans do not from one another. As Thomson points out, an insect looks at the world "with totally different types of eyes" that make them see objects in a completely different way.[178] Humans' eyes

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171 ibid.

172 ibid.

173 Another example was Jean Meslier, see Bloch (n 49) 325–328.

174 Thomson, 'French Eighteenth-Century Materialists and Natural Law, History of European Ideas' (n 130) 244–245.

175 ibid 252; despite all this, Thomson notes, Helvétius does not appear to have believed in a universal human nature, see ibid 253.

176 Wilson (n 96) 663.

177 See Thomson, 'French Eighteenth-Century Materialists and Natural Law, History of European Ideas' (n 130) 252–253.

178 Thomson, *Bodies of Thought* (n 81) 219.

and their other senses, by contrast, are more or less similar. Without this similarity, Helvétius believed, it would be impossible for them to live together.[179]

The Equality Thesis was sometimes bolstered by another idea: the Separateness Thesis. According to this Thesis, humanity is special and separate from all other species. We have already encountered two of the frequently invoked justifications for the Separateness Thesis: one of them is the idea that only human beings are created in the image of God, the other that only human beings have immaterial souls. As we will see in our discussion of Salaville's work,[180] also natural features, such as humans' intelligence, were sometimes put forward as justifications for the separateness of humanity. Those who adopted the Separateness Thesis argued that while we may find similarities between humans and the members of other species, these similarities cannot undermine the strict dividing line that exists between humans and other animals. To put the point another way, there is a difference in kind, not merely degree, between humans and animals.

Not all egalitarians embraced the Separateness Thesis. Locke, for example, made his case for basic equality despite accepting the idea of a continuum between humans, animals, and other natural entities.[181] Yet, as I will discuss below, the Separateness Thesis was closely connected to the Equality Thesis. Once it came under attack, basic human equality would become more difficult to uphold.

Of course, egalitarianism, like naturalism, was hardly an invention of the Enlightenment. Like naturalism, egalitarianism has a history that can be traced back to at least the ancient Greeks, who considered the citizens of the *polis* to be one another's equals.[182] However, as with naturalism, the Enlightenment also turned out to be a formative period for egalitarianism. This is in no small part due to the fact that the Enlightenment resulted in the abolition of the old, hierarchical system, which, according to Harvey Chisick,

> was in principle radically inegalitarian. It defined the individual in terms of the corporation, estate, occupation and religion to which he or she belonged, ascribing different dignities and statuses to

179 ibid.

180 See *infra* 72.

181 Waldron, *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought* (n 158) 53–54.

182 Chisick (n 46) 160.

> each. The law was particularistic, recognising privilege and varying rights and customs throughout the country and across the social scale. It is worth bearing this in mind in considering the place of equality in Enlightenment thought.[183]

The Enlightenment replaced this hierarchical order with an egalitarian one. Despite its growing pains, about which I will say more below,[184] Enlightenment egalitarianism was revolutionary. As Chisick points out, the Enlightenment for the first time "extended a broad notion of equality to humanity as a whole".[185]

3.2 Egalitarianism *à la française*

As I will argue in this subsection, egalitarianism played an especially important role in France. By underlining the particularly French "flavour" of egalitarianism, this subsection also motivates the focus which this thesis lays on the French Enlightenment. The scientific and intellectual revolutions that were transforming the eighteenth century were not unique to France, it is true. In other countries, the wind of change was also blowing. Critical thinking was influential in Britain, with an especially strong Enlightenment culture in Scotland. The newly founded United States, too, was a torch-bearer for Enlightenment values and adopted a liberal constitution in 1787—two years before the French Revolution. Already under British rule, Americans had fought for equal rights (albeit only for white males),[186] eventually announcing in the 1776 Declaration of Independence that "all men are created equal".[187] In the same year, the Virginia Declaration of Rights stated in its first section that "all men are by nature equally free and independent".[188] Although the US Constitution from 1787 was no paragon of equal rights due to its concessions to the slave states,[189]

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183 ibid.

184 See *infra* 43.

185 Chisick (n 46) 161.

186 Philip A Hamburger, 'Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights' [1992] The Supreme Court Review 295, 298.

187 The Unanimous Declaration of the Thirteen United States of America (1776) 5 Journals of the Continental Congress 510.

188 Virginia Declaration of Rights (1776) <http://avalon.law.yale.edu/18th_century/virginia.asp> accessed 21 July 2019.

189 See on this Stanley N Katz, 'The Strange Birth and Unlikely History of Constitutional Equality' (1988) 75 The Journal of American History 747, 749.

it prevented the emergence of a new class of nobles. Its very first Article did so by prohibiting titles of nobility. As Alexander Hamilton argued in the Federalist Papers:

> Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the cornerstone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.[190]

By contrast, in the Ancien Régime, the social and political order that had shaped France since the late Middle Ages, equality existed neither in practice nor in theory—not even for white males. Significant wealth gaps between members of the Third Estate (that is, the peasants and the bourgeoisie) and the upper classes were an important but by no means the only form of inequality that enraged the general population.[191] In almost every aspect of an ordinary person's life, social distinctions were pervasive: "[o]fficial parades, the order of seating in the parish church, the number of bells rung at a funeral, the clothes one wore and especially the material they were made of, [or] the size of one's house and its location".[192] And while everyone in Britain was at least *de jure* a free subject, able to sell and buy property and land, eighteenth century France still had between 140,000 and 1,500,000 serfs, and millions of more peasants who owed their landlords seigneurial dues.[193] For the majority of the French population who did not belong to the nobility or the clergy, there were insurmountable barriers that made it impossible for them to own land or hold public office. Simply fighting for the abolition of serfdom was therefore not enough for the Third Estate. Any kind of liberty would have been of little use to them if the aristocracy continued to hold their prerogatives and manorial rights.[194]

It is for this reason that the struggle for liberty in France could not be separated from that for equality.[195] And it is for this reason that *égalité* became one of the central themes of the French

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190 Alexander Hamilton, 'The Federalist Papers No. 84: Certain General and Miscellaneous Objections to the Constitution Considered and Answered' (*Avalon Project*, 2008) <http://avalon.law.yale.edu/18th_century/fed84.asp> accessed 21 July 2019.

191 See Jack R Censer and Lynn Hunt, *Liberty, Equality, Fraternity: Exploring the French Revolution* (Pennsylvania State University 2001) 6.

192 ibid 8.

193 ibid 3; see also Lefebvre (n 76) 48–49.

194 Lefebvre (n 76) 104.

195 On the connection between equality and liberty, see also chevalier de Jaucourt (n 168) 5:415.

Enlightenment and, especially, of the French Revolution. As Daniel Roche has pointed out, the French had a veritable *passion* for equality.[196] Members of the bourgeoisie were the first to invoke the equality of rights to oppose the special privileges of the First Estate. Subsequently, artisans and peasants held the same principle against the bourgeoisie.[197] All these groups accorded a unique importance to the principle of equality. Accordingly, for the French, the revolutionary struggle was not simply one for rights, but one for *equal* rights. It was this struggle for equality that was, in the words of French historian Georges Lefebvre, "the significant originality of the Revolution of 1789".[198]

Consequently, the changes effected through the French Revolution with regard to equality of rights were striking. For example, as one of its first official acts, the National Assembly abolished the majority of manorial rights, adopted equality of taxation, and made admission to public office open to everyone.[199] Shortly thereafter, the equal rights of all French people were promulgated in writing: on 26 August 1789, the Assembly adopted the Declaration of the Rights of Man and of the Citizen, which, according to Lefebvre, constituted the "act of decease" of the Ancien Régime.[200] A telling statement in light of this historical backdrop, the first sentence of the Declaration's Article 1 reads: "Men are born and remain free and equal in rights."[201] Article 6 *in fine* goes on to declare that: "All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents."[202] Drawing on natural law accounts such as those of Hugo Grotius and Christian Wolff,[203] the drafters of the Declaration, and in particular their head, the Marquis de Lafayette, brought to fruition a body of thought that had already found its concretisation in other countries. Forebears of the French Declaration included the common law rights of

196 See Roche (n 33) 485.

197 Lefebvre (n 76) xix.

198 ibid 88–89.

199 ibid 125, 141.

200 ibid 126.

201 See for the English translation Declaration of the Rights of Man and of the Citizen (1789) <http://avalon.law.yale.edu/18th_century/rightsof.asp> accessed 21 July 2019 (emphasis added).

202 ibid.

203 Cassirer (n 63) 249.

Englishmen, which were formalised in the Bill of Rights (1689).[204] Closer in time, the Virginia Declaration of Rights (1776) and other US states' rights catalogues were particularly influential in shaping the French Declaration.[205]

While the French Declaration copied many elements from these bills of rights, such as the dignity of the human being, the individualistic approach to rights, and the appeal to a Supreme Being,[206] it was original in at least two regards. First, and in line with the fundamental importance of equality in France, the Declaration placed special emphasis on equality before the law and equal rights (Article 1), as well as the abolition of special treatments based on birth (Article 6). Second, the Declaration promoted human rights in a way no other rights document had done. "French philosophy of the eighteenth century by no means discovered the idea of inalienable rights", Cassirer observed, "but it was the first to make a real moral gospel of this idea and to embrace it passionately and proclaim it enthusiastically".[207]

To be sure, equality was far from being fully realised with the French Revolution. In contrast to contemporary conceptions of egalitarianism,[208] Enlightenment egalitarians did not generally require providing people with socio-economic equality, nor with gender equality.[209] Striking inequality remained also with respect to the electoral system and slavery in foreign colonies. As the title of the Declaration "of the Rights of Man and the Citizen" indicates, a distinction was made between men who were citizens, and those who were "mere" men, that is, men who were not citizens. Only the former were considered to be sufficiently mature in civic matters so as to deserve political rights. And while serfdom was abolished in mainland France, slavery remained legal in the colonies.[210] However, as the historian François Furet put it, the "discourse of equality" would soon take on a life of its own and become "the one great revolutionary act that was tantamount to

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204 Censer and Hunt (n 191) 35.

205 Lefebvre (n 76) 141.

206 ibid.

207 Cassirer (n 63) 250.

208 See on these conceptions Richard Arneson, 'Egalitarianism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2013 edn) <https://plato.stanford.edu/archives/sum2013/entries/egalitarianism/> accessed 21 July 2019.

209 Chisick (n 46) 161.

210 Lefebvre (n 76) 146.

power".[211] For instance, it was only a matter of time until the slaves in the colonies would get wind of the rights that mainland France had declared. In the French colony of Saint-Domingue, for example, the leaders of a slave revolt adopted the discourse of equality in 1792 and addressed a letter to the colonial assembly on behalf of all those "that you call your slaves, and who claim the rights that each human being can claim". "[W]e are born free like you", the letter went on to contest the privileges white colonists asserted over their slaves, "and cannot see nor find the right you claim to have over us, nor anything that can prove it to us. Placed on earth like you, we are all children of the same father, created in the same image, and thus all equal according to natural law".[212] Although ignored by the colonial assembly, the revolutionary ideals of equality and freedom were taken up in further documents and declarations, until they were eventually enshrined in the prefatory declaration of the 1805 Constitution of the new state of Haiti.[213] To appease other revolting slaves in the colonies and to bring them under control, the French government successively granted the same rights to those to whom they had previously been denied, starting with civil and political rights for all free men of colour in 1792, and full rights for all blacks and mulattos in 1794.[214] Napoleon thwarted the egalitarian endeavours by reintroducing slavery in the colonies in 1802. This recidivism would, however, only be temporary, as slavery was finally abolished in 1848.[215]

In the wake of the Revolution, numerous other efforts were made in France to establish equality of all citizens. For example, an attempt was made to abolish the aristocratic-sounding form of address *vous* as well as *Madame* and *Monsieur*, and to replace them with *tu* and *citoyen* respectively, which were perceived to be more egalitarian.[216] The most drastic actions were taken

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211 François Furet, *Interpreting the French Revolution* (Elborg Forster tr, Cambridge University Press 1981) 56.

212 Nathalie Piquionne, 'Lettre de Jean-François, Biassou et Belair' (1998) 311 Annales historiques de la Révolution française 132, 133.

213 Robin Blackburn, *The American Crucible: Slavery, Emancipation and Human Rights* (Verso 2011) 174–175, 185; for the full text of the 1805 Constitution, see Sibylle Fischer, *Modernity Disavowed: Haiti and the Cultures of Slavery in the Age of Revolution* (Duke University Press 2004) 275–282.

214 Censer and Hunt (n 191) 124–125. For a discussion of further extensions of fundamental rights see also Chapter 4, Subsection 3.2.

215 ibid 116.

216 ibid 94.

in the period between 5 September 1793 and 27 July 1794, commonly known as the The Terror.[217] Arguably the greatest leveller, the guillotine—or as it had been nicknamed: *le rasoir national* (the national razor)[218]—devoured Louis XVI in the beginning of 1793 and claimed over 16,000 of victims over the course of the following year.[219] But radical equalisation did not end with The Terror. Later measures included conscription: instead of only summoning noblemen as had been the case in the Ancien Régime, Napoleon's France started to recruit all (male) citizens as soldiers. In doing so, it gained a strategic advantage over its enemies, most of whom still operated with aristocratic troops.[220] Although Napoleon had an ambivalent track record when it came to respecting equality in France, he contributed significantly to its proliferation in the annexed territories, where serfdom and seigneurial dues were abolished and the *Code Napoléon* introduced, which guaranteed the equal treatment of adult men—and is still in force in France today.[221]

4 The tension between naturalism and egalitarianism

Having discussed both the naturalist and the egalitarian current, we are now in a position to analyse the tension that arose between them. To be more precise, we will examine the tension that arose between egalitarianism and *a particular strand* of naturalism. As I will show in this section, the strand in question was that which foregrounded the differences in physical organisation and in social conditions which distinguished individual human beings. Particularly prominent among materialists, this strand of naturalism cast serious doubt on the idea that all human beings are equal. In this section, I will first elaborate on the exact nature of this tension. I will do so by focusing on the Equality Thesis and the Separateness Thesis and will show how the relevant strand of naturalism challenged these theses (Subsection 4.1). I will then illustrate the tension between the naturalist

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217 The Editors of Encyclopædia Britannica, 'Reign of Terror' (*Encyclopædia Britannica*, 2015) <https://www.britannica.com/event/Reign-of-Terror> accessed 21 July 2019.

218 See eg Michel Biard, *La liberté ou la mort: mourir en député 1792–1795* (Editions Tallandier 2015) 101–128.

219 William Doyle, *The Oxford History of the French Revolution* (2nd edn, Oxford University Press 2002) 252–253.

220 Censer and Hunt (n 191) 150.

221 See ibid 140, 147, 149, 153.

and the egalitarian current by drawing on the writings of the naturalist Jean-Claude Delamétherie (Subsection 4.2) and the egalitarian Jean-Baptiste Salaville (Subsection 4.3).

4.1 Diverging currents

The tension between egalitarianism and naturalism can best be parsed by distinguishing between the abovementioned Equality and Separateness Theses and by showing how they came into conflict with the inegalitarian strand of naturalism.

As we saw above, the *Separateness Thesis*—which holds that the human species is special and separate from other animals—is one that is often invoked to support the Equality Thesis. A key challenge to the Separateness Thesis arose with the materialists' rejection of Cartesian dualism and their concurrent adoption of monism. According to monism, because everything that exists does so in the material world, there can be no *immaterial* souls. For opponents of the Separateness Thesis, everything in nature is on a continuum. Human beings are on that continuum in the same way as animals are. As a result, humans are seen as differing from animals only in degree, but not in kind. As Kors notes, thinkers who adopted this position

> insisted that human beings were not categorically distinct, and that the transition from other animals to man was gradual and founded upon observable physical differences of constitution, such as what was knowable from the evidence of comparative embryology and anatomy.[222]

The naturalistic emphasis on the gradual rather than categorical differences in individuals' properties and organisation seemed to blur the lines that some egalitarians tried to draw between humans and nonhumans. This also had a normative upshot. For if there are no strict divisions between species and their members, then how can we justify treating one species completely different than the other? The focus of this strand of naturalism on gradation, in other words, cast serious doubt on the Separateness Thesis and thereby on the common justification for treating animals in ways that humans could not.

Once doubt was cast on the Separateness Thesis, the *Equality Thesis* would become harder to defend, too. With the rejection of a sharp dividing line between humans and animals based on the insight that everything in nature is on a continuum, it became more difficult to maintain the

[222] Kors, 'The Enlightenment, Naturalism, and the Secularization of Values' (n 48) 32.

idea that all members of the human species are equals. If nature is rife with difference, then why not also human nature? After all, some humans are bright, others dim. Some have great sensibility, others almost none. Some can be held responsible for their actions, others cannot. Given that, as a matter of empirical fact, humans differ from each other to such great extent, why should they be considered one another's equals? As Thomson notes with respect to inegalitarian materialists, they "emphasis[ed] individual differences arising from our innate organisation".[223] According to them, "[i]f humans are determined by physical causes, then one might conclude that physical differences create fundamental divisions between humans".[224] Individual humans and groups of human beings can differ from each other physically, in other words, to an extent that creates a deep—and, in the eyes of some, insurmountable—gulf between them. Hence, according to this inegalitarian strand of naturalism, far from being equal by nature, humans are *unequal by nature*.

La Mettrie was one of the most prominent materialist foes of equality who rejected not only the Equality Thesis but also the Separateness Thesis, contending that humans are by nature unequal,[225] and that there is an essential similarity between them and other animals. In both their behaviour and their physical organisation, he argued, humans are comparable to animals.[226] There is no distinction in kind between them; no strict dividing line.[227] In fact, La Mettrie argued that if one could teach an ape how to speak, then that ape would be on a par with humans.[228]

D'Holbach argued in a similar vein that while humans have superior mental faculties to animals, there is no essential difference—no difference in kind—between them. On his account, which rejects the Separateness Thesis, humans and animals are essentially similar because they are all sensitive beings.[229] Moreover, like La Mettrie, d'Holbach also rejected the Equality Thesis,

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223 Thomson, *Bodies of Thought* (n 81) 236. But see also ibid 245.

224 ibid 237.

225 Thomson, 'French Eighteenth-Century Materialists and Natural Law, History of European Ideas' (n 130) 248.

226 Thomson, *Materialism and Society in the Mid-Eighteenth Century: La Mettrie's Discours Préliminaire* (n 119) 41.

227 See Duflo (n 75) 117.

228 See Thomson, *Materialism and Society in the Mid-Eighteenth Century: La Mettrie's Discours Préliminaire* (n 119) 41.

229 Paul-Henri Thiry Holbach, *La morale universelle, ou, les devoirs de l'homme fondés sur sa nature*, vol 1 (Marc Michel Rey 1776) 7–8.

arguing that "although men have a general resemblance to each other, they differ essentially".[230] Every individual human differs in its nature from other humans.[231] It differs with respect to the strength of its body and mind, its passions, its ideas about its own well-being, and the means it chooses to achieve it.[232] These differences are so salient, according to d'Holbach, that they warrant categorising humans into separate groups:

> Based on the diversity of their faculties, the beings of our species are *divided into different classes* according to the effects they produce, and according to the different qualities which we observe in them, which derive from the individual properties of their souls or particular modifications of their brain. It is thus that the mind, the sensibility, the imagination, the talents, etc. constitute *infinitely large differences between men*. This is why some are called good and others wicked; virtuous and vicious, learned and ignorant, reasonable or unreasonable, etc.[233]

Significantly, for d'Holbach, this diversity in human beings is no evil to be exorcised. Rather, it is a desirable fact about nature that it makes things that are complementary—creating weaker humans that can then be ruled by stronger ones:

> The diversity and inequality that Nature has placed between men gives a natural superiority to those who surpass others by the forces of the body, by the talents of the mind, by a great experience, by a more enlightened sense of reason, by virtues & qualities useful to the Society. It is only just that one who finds himself able to procure to others great enjoyments, should be preferred to someone who is of no use to them. Nature submits men to other men only by the needs it gives them, and which they cannot satisfy without their help.[234]

Because of the natural inequality among humans, d'Holbach urged that we need to "stop supposing an alleged equality which is believed to have existed originally between men. They have always been unequal. Let us not rail against this inequality which has always been necessary."[235]

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230 Holbach, *Système de la nature* (n 135) 147.

231 Bloch (n 49) 333–334.

232 Paul-Henri Thiry Holbach, *La politique natuelle, ou, discours sur les vrais principes du gouvernement*, vol 1 (1773) 18.

233 Holbach, *Système de la nature* (n 135) 146 (emphasis modified).

234 Holbach, *La morale universelle, ou, les devoirs de l'homme fondés sur sa nature* (n 229) 84; see also Holbach, *La politique natuelle, ou, discours sur les vrais principes du gouvernement* (n 232) 20, 44.

235 Holbach, *La politique natuelle, ou, discours sur les vrais principes du gouvernement* (n 232) 19.

D'Holbach's argument nicely illustrates the tension between egalitarianism and naturalism. As Bloch observes, d'Holbach's rejection of egalitarianism "is consistent with the naturalist character of his materialism".[236] Whoever sees in human beings simply another product of the gradual processes of matter in motion will be disinclined to postulate an equality between what is "very markedly"[237] different. It is therefore no surprise that for d'Holbach, the weak and the strong are not equals but that "[t]he weak man, either of body or of mind, has always been forced to recognise the superiority of the strongest, the most industrious, the smartest".[238]

Another, though slightly less straightforward, proponent of the inegalitarian strand of materialism was Diderot. Much like La Mettrie and d'Holbach, Diderot rejected the Equality Thesis, arguing that there is natural inequality among humans.[239] Human beings, he argued, do not only have innately different physical constitutions, but physical differences also determine them as human beings. On Diderot's account, there is thus little hope for remedying these natural differences.[240] Diderot's views on natural inequality were closely linked with his materialism. He believed that humans are sentient beings that form part of the dynamic "mass of matter" much in the same way as animals do. For this reason, human beings do not possess a special existence, with entirely different sense organs, that would distinguish them fundamentally from other animals. Rather, humans are as much a product of chance as are animals.[241] As Thomson notes, Diderot in fact "refused to classify species, claiming it was difficult to pinpoint where humanity ends and 'animality' begins … [because] he considered them artificial entities or mere names, as all beings come from one single prototype".[242] While, as I will mention below, Diderot believed that humans have sensations that are superior to those of other animals, his rejection of dualism meant that he found "no substantive reality … in the … distinction between human beings and animals".[243] And

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236 Bloch (n 49) 333–334.

237 Holbach, *La politique natuelle, ou, discours sur les vrais principes du gouvernement* (n 232) 18.

238 ibid 19; See however also Holbach, *Système de la nature* (n 135) 172.

239 Thomson, *Bodies of Thought* (n 81) 232.

240 ibid 328.

241 Duflo (n 75) 96, 112.

242 Thomson, *Bodies of Thought* (n 81) 239; as Wilson notes, Diderot was a transformist: Wilson (n 96) 565. See on transformism also *infra* 54.

243 Wilson (n 96) 568.

this rejection of the Separateness Thesis also paved the way for his rejection of the Equality Thesis. As Wilson argues, Diderot argued by "by analogy from the animal world: *there is a difference by nature among breeds of dogs, why not such differences among men?*"[244] Like La Mettrie, Diderot was an adherent of the idea of the so-called great chain of being, or *scala naturae*,[245] according to which there is a natural hierarchy in nature—a ladder whose increasing steps are occupied by increasingly developed and therefore superior creatures.[246] Minerals and plants, on this model, are on the lowest steps of the ladder, before animals and then human beings.[247] According to Diderot, humans differ from animals in important respects, most prominently because only they can reason.[248] Despite their fundamental similarity, Diderot thus believed that humans are in some respect superior to animals.

Notwithstanding his rejection of the Separateness and Equality Theses, Diderot held that the fact that humans are by nature unequal does not mean that society should leave them in this state. Although this inequality was natural and could therefore not be eliminated, society could still try to remedy its effects. In particular, Diderot proposed that it should be society's goal to prevent humans from using force to change or abuse their position.[249] Diderot argued for a social contract whose aim would be to reestablish in principle an equality that is absent in fact. Both the strong and the weak should abdicate their power to the sovereign under the condition of political

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244 ibid 665 (emphasis added).

245 ibid 565; Thomson, *Bodies of Thought* (n 81) 239; see also Denis Diderot and Louis-Jean-Marie Daubenton, 'Animal' in Denis Diderot and Jean le Rond d'Alembert (eds), *Encyclopédie, ou dictionnaire raisonné des sciences, des arts et des métiers, etc.* (University of Chicago: ARTFL Encyclopédie Project, 2017) 1:468 <https://artflsrv03.uchicago.edu/philologic4/encyclopedie1117/navigate/1/2752/> accessed 21 July 2019.

246 See on the great chain of being in detail: Arthur O Lovejoy, *The Great Chain of Being: A Study of the History of an Idea* (Harvard University Press 1971).

247 See Thomson, *Bodies of Thought* (n 81) 239.

248 Proust (n 132) 386–387; see on the importance of memory for humans' intellectual capacities: Wilson (n 96) 566; Diderot argued in a way that would question whether he really rejected the Separateness Thesis that in their capacity to reason, humans are separated from animals by "barriers that are invariable and eternal". This capacity, he emphasised, accounted for humans' dignity, see Proust (n 132) 386.

249 Proust (n 132) 371–372.

equality.[250] Similarly, Diderot did not infer from the fact that there is a striking natural inequality when it comes to human capacities, including their intelligence, that they should also be *morally* unequal. On the contrary, Diderot, repudiating the idea that certain humans could become the slaves of others, argued that humans *are* moral equals.[251] As Jacques Proust notes, Diderot's moral equality of humanity was a "virtual"[252] equality—an equality that remained largely an ideal in a world marked by factual inequality.

Diderot, who was an abolitionist, perhaps realised that his views would lend themselves to racist applications. In fact, his emphasis on the continuity of beings was developed by others into explicitly racist theories.[253] Diderot was writing at a time when the critique of the Equality Thesis was fueled by theories of polygeny, according to which different human races originated from different human ancestors. As Thomson shows, these theories reinforced the inegalitarian view "that certain peoples, in particular the Africans, were not totally human as their origin was different".[254] Reports in the eighteenth century about the existence of great apes (summarily referred to then as "orangutans") left many to wonder whether these apes belonged to the human species or whether the human tribes Westerners encountered in foreign lands belonged to the animal kingdom.[255] Locke captured the resulting confusion as follows:

> There are Creatures in the World, that have shapes like ours, but are hairy, and want Language, and Reason. There are Naturals amongst us, that have perfectly our shape, but want Reason, and some of them Language too. There are Creatures … that with Language, and Reason, and a shape in other Things agreeing with ours, have hairy Tails; others where the Males have no Beards, and others where the Females have.[256]

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250 ibid 374; on Diderot's social contract, see also Thomson, 'French Eighteenth-Century Materialists and Natural Law, History of European Ideas' (n 130) 251.

251 Proust (n 132) 417.

252 ibid.

253 Thomson, *Bodies of Thought* (n 81) 238, 240.

254 ibid 241; monogenists, by contrast, argued that all human races had the same origin: ibid.

255 Smith (n 47) 115–116, 133; see on the "discovery" of orangutans also Pierre Serna, *Comme des bêtes: Histoire politique de l'animal en Révolution (1750-1840)* (Fayard 2017) 333–341; de Fontenay (n 72) 331–332.

256 John Locke, *An Essay Concerning Human Understanding* (Peter H Nidditch ed, Clarendon Press 1975) Book III, Chapter 22, 450.

Against this backdrop, and for the reasons given above, it is thus no surprise that the inegalitarian strand of naturalists and materialists "can be linked to the emergence of racial classification in the late eighteenth and early nineteenth centuries", as Thomson points out.[257]

To be sure, not all inegalitarians were materialists. The polygenicist Julien Joseph Virey, for example, believed in the existence of an immaterial soul but not in natural equality.[258] The fact remains, however, that materialists' rejection of immaterial souls that all humans possess equally, and their view of nature as an interconnected mass of matter, certainly lent a helping hand to opponents of egalitarianism.[259] As Thomson observes, "[t]hose who paid attention to the ways in which we are affected by inherent differences in physical organisation were more willing to accept a certain innate inequality in individual capacities".[260] Diderot himself appeared to accept that there are races with inferior intellectual capacities. However, he seems to have largely avoided the question, as Thomson notes, "perhaps deliberately because of his opposition to slavery".[261] Likely for the same reason, Diderot changed focus in his later works from differences in physical organisation to external factors that shape people.[262] In one of these works in particular—*L'histoire des Deux-Indes*—he added abolitionist arguments to newer editions.[263] Confronted with the unpalatable consequences that a strictly inegalitarian approach had for his abolitionist views, Diderot seemed to reject the idea that humans' natural inequality required that they also be treated unequally. Instead, he proposed that it is preferable morally and politically if they be treated *as though they were equals*. Hence, Diderot might be more accurately qualified as a naturalist who was on the fence about whether to side with *difference* or with *equality*. Yet, insofar as he was torn between the two, his views reflect the inherent tension that existed between egalitarianism and the particular strand of naturalism under discussion.

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257 Thomson, *Bodies of Thought* (n 81) 237, 293.

258 ibid 243–244.

259 ibid 244.

260 ibid 237.

261 ibid 238.

262 ibid 242.

263 ibid.

The existence of this divergence between the two currents has not escaped modern authors either.[264] Ferrone, for example, speaks of the fact that "contradictory signals were given by the rapid progress throughout the eighteenth century in the 'human sciences'".[265] As he observes,

> [t]he discovery of the historical world … and its study from the point of view of the Enlightenment seemed to demonstrate that man's destiny was on this earth and consisted in liberty, and to establish also the ethical postulates of *equality* and of the existence of human rights as an effective foundation for a new universal and rational morality that had as its aim the happiness and well-being of nations. At the same time, however, disciplines such as physiology and comparative anatomy, the rigorous scientific study of the human being, instead focused on the *peculiarities and differences* that distinguished individuals and species one from another, a mode of thought that more or less consciously supported early racist views.[266]

Justin Smith has argued in a similar vein that the eighteenth century was a watershed moment in that its naturalistic tendencies undermined the special status that humanity had long claimed for itself. The more some naturalists questioned the fact that humans are a wholly separate kind of being—with immaterial souls, or unique rationality, or other unique traits—the more they undermined the idea of human unity and equality. As Smith notes with regard to the concept of race, different humans could now be thought to have wholly different natures:[267]

> a crucial feature of the emergence of the modern race concept was the collapse of a certain universalism about human nature, which had been sustained by a belief in the transcendent essence of the human soul, and this belief's gradual but steady replacement over the course of the early modern period by a conception of human beings as *natural* beings, and thus no less susceptible to classification in terms of a naturalistic taxonomy than any other natural being, plant or animal or mineral. The peculiar modern ontologisation of human difference, then, was made possible by the rejection of human nature, and the parallel insertion of humans into nature.[268]

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264 See on the division between egalitarian and inegalitarian materialists: ibid 236–237.

265 Ferrone (n 42) xii (emphasis added).

266 ibid; see also Lynn Hunt, *Inventing Human Rights: A History* (Norton 2007).

267 Smith (n 47) 18.

268 ibid 7–8 (emphasis in original).

I will elaborate on the point about the insertion of humans into nature in Chapter 3.[269] Here, I simply want to emphasise that the views of those naturalists who saw humans and nonhumans as entirely natural beings often went hand in hand with the view that gradual differences existed not only between species, but also within one and the same species. As Smith points out, before the "naturalisation of the human being",[270] such subdivisions between members of the same species were "unthinkable",[271] especially among human beings. With the rise of naturalism, however, humanity ceased to be an "all-or-nothing affair".[272] It now became possible to distinguish between humans who belong to higher races and humans who belong to lower races, or who, as individuals, have fewer or less weighty interests than other humans.[273]

So far, our discussion of the tension between the naturalist and the egalitarian current has remained relatively abstract. To remedy this situation, and to illustrate the concrete ramifications of this tension, I now turn to an exchange between two French philosophers of the eighteenth century: the naturalist Jean-Baptiste Salaville and the egalitarian Jean-Claude Delamétherie. As Chapters 2 and 3 will show, their positions anticipated many of the crucial claims that we can find in today's debates on human and animal rights. I will begin by discussing Delamétherie's position.

4.2 Jean-Claude Delamétherie and the *droit d'animalité*

Jean-Claude Delamétherie (1743–1817) studied theology and medical sciences but never practiced as a physician. He instead preferred to focus on his scientific work. An expert on the Paris Basin, Delamétherie's publications made him a renowned naturalist in Europe, writing on such topics as mineralogy, biology, and political philosophy. Each year, Delamétherie published reports on the general state of the sciences. His writings had a lasting impact on Jean-Baptiste Lamarck whose theory of transformism was an important predecessor of the Darwinian theory of evolution.[274]

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269 See Chapter 3, Section 5.

270 Smith (n 47) 18.

271 ibid 137.

272 ibid.

273 ibid 8.

274 See Ernst Mayr, 'Lamarck Revisited' (1972) 5 Journal of the History of Biology 55, 61.

Delamétherie himself believed in transformism and was a proponent of materialism.[275] Politically, Delamétherie was a member of the Club de 89, which was founded in response to the radical and anti-aristocratic Jacobin Club.[276] The more moderate Club de 89 was sceptical of republicanism and favoured monarchy.[277] During the Reign of Terror, Delamétherie was thus forced to leave Paris.[278]

In 1787, Delamétherie published the *Principes de la philosophie naturelle* (*Principes*), which would become one of the major foils of Salaville's essay from 1802 (which will be the focus of Subsection 4.3).[279] In the *Principe*'s first volume, on which I will concentrate here, Delamétherie presents a theory of the rights of animals that anticipates many of the central arguments for animal rights that can be found in today's animal rights literature. Delamétherie's *Principes* can therefore be considered a pioneering work in that tradition. In contrast to Salaville's essay, which is strictly egalitarian, Delamétherie's *Principes* is in line with the naturalistic views of other Enlightenment thinkers. As Delamétherie makes clear in the preface, his work is one that

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275 Raymond Corbey, *The Metaphysics of Apes: Negotiating the Animal-Human Boundary* (Cambridge University Press 2005) 62.

276 William Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (Oxford University Press 2009) 231–232.

277 Timothy Tackett, *Becoming a Revolutionary: The Deputies of the French National Assembly and the Emergence of a Revolutionary Culture (1789–1790)* (Princeton University Press 1996) 284.

278 M de la Roquette (ed), *Correspondance inédite: scientifique et littéraire, Œuvres d'Alexandre de Humboldt* (Legrand, Pomey et Crouzet 1869) 385–386; Pierre Serna, *L'animal en République, 1789–1802: genèse du droit des bêtes* (Anacharsis 2016) 212–213. It is an interesting question—but one I cannot answer due to lack of space—if Delamétherie's monarchical leanings were connected to his scientific views and his advocacy for a hierarchical ordering of nature.

279 Jean-Claude Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines*, vol 1 & 2 (1787). See eg Jean-Baptiste Salaville, *De l'homme et des animaux* (Ch Crapelet 1805) ix, 12–13, where Salaville implicitly references Delamétherie's 1787 treatise; as Serna notes, none of the contributors to the essay competition (on which I will say more in Subsection 4.3) cite Delamétherie's book. This was possibly due to the fact that the book had been published anonymously and banned because of its evident materialism: see footnote 24 in Serna, *L'animal en République* (n 278) 218.

is concerned entirely with the study of "nature"—a term he defines as comprising all existing beings and their qualities.[280] His view of the *philosophe*, accordingly, is also entirely naturalistic:

> the best *philosophe* is the one who is most instructed in the facts of nature, who knows best the living beings, who has sufficient genius to bring them together, to present the masses, and to perceive the relations which may subsist between them.[281]

Like many other naturalists, Delamétherie was also an adherent of sensationalism.[282] Judgment, intelligence, reasoning, will-power, freedom, love, hatred—these and other qualities were nothing but variations of sensations for Delamétherie.[283] The geometrician looking for demonstrations of different sizes, for example, "senses the different relations between numbers, lines, surfaces, and solids", much in the same way as the musician senses sounds and the painter colours.[284] True to the scientific spirit of Enlightenment thought, Delamétherie believed that we can apply computation to the world of sensations.[285] All sensations, including pleasure, pain, love, hatred, or beauty, are calculable, he thought, allowing us to compare and weigh them.[286]

Considering the great weight that Delamétherie attached to sensations, it is not surprising that sensitive beings—or *êtres sensibles*, as he called them—played the lead in his theory. A sensitive being, according to Delamétherie, can be defined as a union between body and consciousness.[287] Intelligence (the faculty of knowing things) is the first quality of sensitive beings, which

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280 Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) viii, xx.

281 ibid iii.

282 Delamétherie makes explicit reference to Locke: ibid 23.

283 ibid xvi.

284 ibid 23.

285 ibid xviii. Other philosophers at the time proposed similar calculations. See for Jeremy Bentham's well-known felific calculus: Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, vol 1 (W Pickering 1823) 51.

286 Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 50, 68.

287 I am using the term "sensitive", not "sentient", to translate Delamétherie's term "sensible". His usage of "sensible" is wider than the contemporary usage of sentient, which is often limited to the capacity to feel pain. Delamétherie, by contrast, also includes plants under the definition of *êtres sensibles*: see the footnote in ibid 199.

serves as a foundation for all their other qualities. (As we will see shortly, this understanding of intelligence differs crucially from Salaville's, for whom only human beings possess intelligence.)[288] According to Delamétherie, sensitive beings first sense the so-called primary ideas—colours, sounds, tastes, hunger, thirst, and so on—which will affect them to different degrees of intensity. Secondary ideas—such as judgment, love, hatred, desire, anguish—are based on the primary ideas. One can only desire food, for example, if one knows what hunger feels like. This core unit of sensation remains the same in all sensitive beings. However, due to differences in their nature, Delamétherie points out, different beings have different sensations, and they have these sensations to different degrees. While he acknowledges that human beings may for this reason have different sensations than other animals, Delamétherie insists that animals, too, possess sensations, some of which they have in common with humans.[289]

As beings who are able to experience both pain and pleasure, Delamétherie argued, all sensitive individuals have a tendency to maximise pleasant sensations and to minimise harmful ones.[290] In fact, he claimed that there is a universal, natural law ordering the good and prohibiting the bad.[291] This had important normative implications: unless terminally ill, sensitive beings are not allowed to commit suicide; and barring exceptional circumstances, the death penalty may not be carried out, as it deprives sensitive beings of life, which is the foundation of their happiness.[292] According to Delamétherie, sensitive beings not only have a negative duty not to impose harm on others, but they also have a positive duty to promote others' happiness.[293] A consequence of this is that it would be irrational to treat conspecifics better than other sensitive beings. In Delamétherie's view, the only thing that matters is that a being has the same degree of sensitivity, regardless of its species.[294]

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288 See *infra* 72.

289 Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 33–34.

290 ibid 41.

291 ibid 140–141; see on the idea of universal law also Proust (n 132) 405–408.

292 Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 178–179.

293 ibid 148, 197.

294 ibid 206–207.

These are far-sighted views that still find many adherents today. As I will point out in Chapter 3, modern scholars call the focus on individual capacities "moral individualism", and "speciesism" the irrationality of holding a view that gives members of one's own species preference.[295] Nor did Delamétherie shrink from following these prescient arguments to their logical conclusions. He argued for example that we need to reason in the same way with respect to sensitive beings on other planets and any other sensitive being that may exist:[296]

> [T]he inhabitants of the different globes, if they exist, as we can conclude by analogy, and all sensitive beings that may exist, and we shall see that their number is immense, must … seek their mutual happiness. We, citizens of the earth, are also obliged to work for the happiness of all these beings, if it is in our power. They, too, are required to contribute to ours.[297]

Delamétherie called this moral relationship which all sentient beings have among themselves *droit naturel* (natural law). Because there are epistemic and practical constraints with helping the sensitive beings that live on other planets, however, Delamétherie considered it to be sufficient to wish these beings the kind of happiness which their nature permits. "But we can act directly", he emphasised, "on those who coexist with us".[298] Because other humans and animals share this planet with us, we have particular responsibilities toward them; responsibilities which depend on the sensations they are capable of experiencing. These less universal moral relations are called *droit de nature* (law of nature) and form part of the abovementioned *droit naturel*.[299] Unfortunately, Delamétherie complained, most humans neglect these obligations because they have suppressed their natural empathy for animals and, sometimes, other humans. From a very young age, he observed, humans are taught that the earth and everything on it is made for them, essentially giving them a right to treat animals in whichever way they please. We close our hearts and forget that human beings are largely animals like all others.[300]

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295 See Chapter 3, Subsection 3.1.

296 Delamétherie was not alone in believing in the existence of life on other planets, see Vartanian (n 110) 60–62.

297 Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 196–197.

298 ibid 198.

299 ibid.

300 ibid 141–142, 205–206, 212.

On Delamétherie's account, humans' (neglected) duties toward other sensitive beings necessarily correlate with the rights that these beings possess in having their well-being protected and promoted.[301] Both humans and animals possess such rights to well-being. Delamétherie went even further than this and introduced a distinction within the *droit de nature* between *droit d'animalité* (law of animality) and *droit d'humanité* (law of humanity). The *droit d'animalité* describes what all animals, including human beings, owe each other. Due to their limited knowledge and their relatively strong urges to pursue momentary passions, Delamétherie pointed out, animals bear much fewer obligations.[302] Humans, on the other hand, are more perfect than the other animals. They are able to observe the laws of equity, which is why they have to respect and cater for other sensitive beings' needs.

But just how far do these duties toward other sensitive beings, and in particular animals, go? Answering this question reveals how groundbreaking Delamétherie's argument for the *droit d'animalité* is. Delamétherie proposed that animals have a triad of fundamental rights. First, they have a *right to life*, for life is the basis of all their sensations. According to Delamétherie, taking away a sensitive being's life is the greatest injustice one can commit against it.[303] Indeed, it would be equally wrong as the killing of a human being, he contended, because the same reasons that command respect for a human being's life (namely, that she is a sensitive being whose well-being is connected with her life) also apply with regard to the animal. Because life alone does not get an animal far, Delamétherie proposed a second fundamental right: the *right to health*. Every animal, he argued, should be able to have a life free from illness.[304] Finally, Delamétherie put forward a third fundamental right, which builds on the former two as its preconditions. This third right is the *right to enjoyments* (*plaisirs*). Delamétherie failed to specify what this right exactly entails but suggested that *plaisirs* are connected to a sensitive being's senses, spirit, and heart.[305] The right to

301 ibid 148.

302 ibid 202–204.

303 ibid 199–200, 237.

304 ibid 200.

305 ibid 201.

enjoyments could thus encompass experiences such as play, friendship, and even sex, considering that he recognised reproduction as one of every animal's two basic needs (the other being food).[306]

As this shows, the *droit d'animalité* did not stop at prohibiting unnecessarily cruel acts toward animals, such as that of the butcher who cruelly protracts the killing of his victims. Instead, it argues that animals should possess similar rights to human beings because they are sensitive beings like them. This is particularly remarkable considering that France only enacted its first laws against the cruel treatment of animals in 1850, more than half a century after the publication of Delamétherie' *Principes*.[307] Also, Delamétherie not only advocated the protection of animals from cruelty, as these first welfare laws on the protection of animals did. Rather, his arguments went beyond such animal *welfare* proposals and instead presented a genuine theory of animal *rights*.[308] As will become clearer in Chapter 3, Delamétherie's theory is hardly inferior to today's theories of animal rights which only emerged in the third quarter of the twentieth century. These more recent theories brought the idea of animal rights back into the public sphere. But they by no means invented it.

Now, on Delamétherie's account, the *droit d'humanité* (the law of humanity) forms part of the *droit d'animalité*. It differs from the latter in that it is not applicable to members of species other than the human species. The *droit d'humanité*, in other words, describes rights and obligations that apply only to human beings. The reason why there is such a law, Delamétherie explained, is that the members of every species have more sensibility for conspecifics than for members of other species. Feelings that a fellow human being experiences will affect another human more than those of other animals. As a result, humans will be more apt to help secure other humans' well-being and can expect others to do the same for them.[309] To the extent that no other human's rights

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306 ibid 217. It is worth keeping in mind, however, that sex is hardly a pleasurable experience for many animal species.

307 This was the so-called 'loi Grammont': Éric Pierre, 'Réformer les relations entre les hommes et les animaux: fonction et usages de la loi Grammont en France (1850-1914)' (2007) 31 Déviance et Société 65; see also Thomas G Kelch, 'A Short History of (Mostly) Western Animal Law: Part II' (2013) 19 Animal Law 347, 348.

308 See on the distinction between welfare and rights-based approaches to animal protection Nicola Taylor, 'Whither Rights? Animal Rights and the Rise of New Welfarism' (1999) 3 Animal Issues 27.

309 It is likely for this reason that Delamétherie allowed for some preferential treatment among the members of the same species: "If a man and an animal suffer the same pains, then the man must rescue his fellow man. If,

are infringed by this, Delamétherie argued, every human being has a right to everything conducive to his well-being.[310] This is because, as Delamétherie suggested, humans have needs that are a consequence of their social condition. For example, humans have a need to clothe themselves, to have adequate accommodation, and so on.[311] These special needs give rise to rights in human beings that do not exist in animals who lack these needs. As Delamétherie made clear, the *droit d'humanité* is just one particular law, regulating the special rights and obligations that govern the relationship human beings have with one another. Because intensified intra-species concern also exists in other species, he pointed out, there are specific laws that apply exclusively to the members of these species.[312] For example, there is a *droit de chevalité*—regulating the special rights and duties that exist among horses.

Delamétherie's reliance on naturalism and his emphasis on individual animals' sensations and needs led him to a striking conclusion. According to him, each animal should assist others in attaining their triad of rights to as great an extent as possible. As he clarified, however, this duty only applies to frugivores,[313] who have no interest in harming others. By contrast, it does not apply to carnivores who live off the flesh of other animals. Carnivores must have the *right to kill and eat other animals*, Delamétherie reasoned, "because they have no other way to survive, and because, as sensitive beings, they have to procure their own well-being".[314] Delamétherie also realised that carnivores are necessary to prevent an overpopulation of frugivores, who would otherwise die from starvation or other causes.[315] Still, he struggled to comprehend nature's motives in creating living beings that have no other way to survive than by causing great suffering and death to others. Questioning the universal law of the good which he stipulated at the beginning of his treatise,

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however, man suffers minimally, and the animal greatly, then I do not see why one should not rather help the animal." Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 209–210.

310 ibid 215–217.

311 ibid 217–218.

312 ibid 215.

313 Delamétherie's point holds for herbivores more generally.

314 Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 201–202, 231.

315 ibid 232–233.

Delamétherie wondered: "Can we say that nature wanted the happiness of all these beings?"[316] In Chapter 3, I will refer to this problem as the Problem of Nature Worship.[317] There, I will discuss in more detail the challenge it poses to proponents of the Meritocratic fundamental rights conception and will consider solutions to it.

Although Delamétherie himself did not have an answer to this problem, he knew how to respond to human beings who kill other animals for food. In contrast to carnivores, he pointed out, humans (as well as other omni- and frugivores) have no right to kill other animals because they have no necessity to eat them. Barring exceptional circumstances, humans can live off plants and are therefore only allowed to eat animals who die of a natural cause.[318] For this reason, Delamétherie insisted, the claims of some human beings that they are justified in eating meat because they are the more perfect species—that is, that with the most excellent qualities—are fundamentally wrong. "The right of the strongest", he emphasised, "is the most blatant injustice".[319]

In 1802, Delamétherie published *De l'homme considéré moralement, de ses mœurs, et de celles des animaux*,[320] a two-volume treatise applying his naturalistic insights to political philosophy. This treatise explicitly renounced egalitarianism by proposing a full-blown hierarchical account of nature.[321] Delamétherie laid the groundwork for this account by first rejecting the Separateness Thesis, arguing that the bodies of both humans and animals are constituted in a similar way because they are both machines controlled by a central nervous system. Although humans have certain special traits, he argued, they share most things with animals, including their desire for pleasure.[322] "Man", Delamétherie claimed, is simply "the foremost species of ape"[323] who

316 ibid 231.

317 See Chapter 3, Subsection 5.1.

318 Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 238–246.

319 ibid 237.

320 Jean-Claude Delamétherie, *De l'homme considéré moralement; de ses moeurs, et de celles des animaux*, vol 1 (Guilleminet 1802); see Serna, *L'animal en République* (n 278) 218.

321 See also Serna, *L'animal en République* (n 278) 213, 219.

322 See Delamétherie, *De l'homme considéré moralement* (n 320) vi–xi.

323 ibid xxxvi.

evolved to become the most powerful being on the planet.[324] During this evolution humans have abandoned vegetarianism and became hunters, which had a negative impact on their mores: they would come to stand out from all other animals for their violence and oppressive tendencies—making them, paradoxically, more shrewd and intelligent than other animals.[325] According to Delamétherie, humans have to be placed at the top of the natural hierarchy, where the most perfect beings with the most excellent qualities belong.

However, he also held that hierarchies are justified *within* one and the same species, if the members of that species possess dissimilar qualities. According to Delamétherie, this is the case for human beings, which are characterised by important differences. The central difference, for Delamétherie, was that between civilised human beings and those who, like animals, have not left the state of nature.[326] Hence, civilised people or peoples rank higher in his hierarchy than barbaric ones.[327] Within the higher-ranked category of civilised humans, Delamétherie placed those on top who are rich and well-educated. Those who are poor or who perform manual labour, by contrast, rank lower.[328] The difference between educated and non-educated people, Delamétherie contended, can be so great as to raise the question if they are human at all:

> It is knowledge and education that elevates this class [the educated class] above the one we have just discussed [the non-educated class]. They establish such a great distance between the two that one would be tempted to believe that they belong to two different species. There is no apparent relation between Caesar or Newton, and a Papuan or a Hottentot.[329]

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324 Delamétherie already advocated a similar view in Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 196, 205, 349, where he argues for a hierarchical picture of nature which ranks beings according to the degree of perfection they reach on the *scala naturae*. Those who are less perfect, according to Delamétherie, are owed less love and respect than those who are higher on the scale. Inversely, the more perfect a being is, the more love and respect it can demand.

325 Serna, *L'animal en République* (n 278) 214–215.

326 Delamétherie, *De l'homme considéré moralement* (n 320) vii.

327 ibid 38.

328 ibid 256–261; see on this also Serna, *L'animal en République* (n 278) 218–220.

329 Delamétherie, *De l'homme considéré moralement* (n 320) 260.

According to Delamétherie, justice requires "conferring to everyone what he is owed".[330] And what we owe to each other, in turn, is determined by our place in society and our merit.[331] Hence, unless we give more rights to those who are more perfect and therefore superior to those who are less perfect, we act unjustly.[332] Delamétherie thus also rejected the Equality Thesis. And as was the case with other inegalitarian naturalists, his rejecting the Separateness Thesis seemed to have cleared the way for this move.

Perhaps taken aback by these conclusions, Delamétherie included in *De l'Homme considéré moralement* a short subsection on "political equality".[333] There, he argued that at least those differences (or "inequalities"[334]) between human beings which have a physical cause—that one is stronger, has a larger brain, or has more exquisite sensations than another—should not infringe on the political equality and the right to equal protection under the law that all citizens have in civil society.[335] However, Delamétherie believed that there are also differences or "inequalities" that are not caused by one's physical nature, but by one's upbringing.[336] The rich who can afford healthy nutrition and a good education for their children, Delamétherie argued, acquire "a decisive superiority over the people who work for them, and the equality between citizens ceases to exist".[337]

Let us recapitulate. Delamétherie's *Principes* have illustrated the central marks of the inegalitarian strand of naturalism: based on sensationalism, and an account that dispenses with the dualistic idea of a soul that is separate from the material, sensing being,[338] Delamétherie presented a difference-based theory of fundamental rights that grounds these rights in the relevant physical

330 ibid 123.

331 ibid 124.

332 See ibid.

333 ibid 274–275.

334 ibid 275.

335 ibid.

336 See ibid 255.

337 ibid 258.

338 See on Delamétherie's account of the soul in more detail Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 11–13.

properties of individual beings (most importantly their sensitivity). This approach allowed Delamétherie to defend a conception of animal rights that anticipated more recent theories. By grounding rights in empirical properties that may differ from being to being, however, Delamétherie also opened the door for an inegalitarianism that he would spell out in his *De l'Homme considéré moralement*. There, he applied a differentialist account to the human species, arguing for a hierarchy of higher and lower humans who have to be treated in accordance with their place in society. As I will illustrate in the next subsection, Delamétherie's views would thus come into serious conflict with those of an egalitarian like Salaville.

4.3 Jean-Baptiste Salaville and the sentiment of humanity

Jean-Baptiste Salaville (1755–1832) was a Parisian journalist and political theorist who wrote on topics as diverse as mesmerism, the organisation of society, morality, and the abolition of the duel and the death penalty. In 1789, he made a name for himself with the publication of *De l'organisation d'un État monarchique*, in which he criticised the French monarchy and discussed the need for a new constitution. In addition to his own writings, he translated numerous English books into French, including the complete works of the Irish novelist Laurence Sterne. A staunch republican with democratic sympathies, Salaville served as the secretary of the Comte de Mirabeau, then deputy for the Third Estate, until 1791.[339]

Salaville's essay *De l'homme et des animaux*, which is of primary interest to our analysis, was written in 1802 and published in 1805. Salaville submitted it to an essay competition that the newly-founded *Institut national de France* in Paris organised. The *Institut* was one of the responses of the Constitution of the Year III (enacted in 1795) to the illiberal and bloody reign of The Terror.[340] The Constitution's aim was to reconstruct society on a more stable, republican foundation. At the time of its creation, the *Institut* consisted of three sections which employed more than two hundred intellectuals. One of these sections—the Section of Moral and Political Sciences—had a particularly vital task to fulfil: it had to identify the republican mores necessary for preventing

339 As with Delamétherie, it is worth asking if Salaville's republican commitments paralleled his theoretical views on human equality and dignity.

340 See Serna, *L'animal en République* (n 278) 13–14.

another terror regime from coming to power.[341] To get fresh ideas as to what principles the new society should be based on, the *Institut* regularly solicited the opinion of members of the public in competitions.[342] In July 1802, the Section on Moral and Political Sciences put a question before the public that would attract more submissions than any other competition it held. It was to this competition that Salaville submitted his essay.

With a July 1803 deadline, and the promise of a five hectograms gold medal as prize, the competition question was: "*To what extent are the barbaric treatments of animals of interest to public morality? And would it be appropriate to adopt laws in this regard?*"[343] A total of twenty-eight essays were sent to Paris from authors with a wide variety of backgrounds.[344] The exceptional interest in the question of the legal and moral fate of animals may have been due to a combination of factors—including, of course, the tempting gold prize. One factor was the abovementioned growth in scientific studies on animals that raised people's awareness and curiosity about the striking similarities between humans and animals. In the menageries, such as that in Versailles, these animals could now even be observed in person.[345] The French political system at the time also provided a singularly fertile ground for the adoption of radical new ways of structuring society. In the words of historian Pierre Serna, the period was a unique "laboratory of republican modernity".[346]

But neither Salaville's nor any of the other essays won the competition. Shortly after it had been launched, the cultural tide turned. In August 1802, France adopted the Constitution of the Year X, which made Napoleon First Consul. As consul, Napoleon re-established slavery in the French colonies and compassion for the weak was far from being his main priority. Under Napoleon, there was little room for radical ideas such as rights for animals. Only the law of the strongest was seen to provide a sufficiently stable basis for society.[347] The Section on Moral and Political

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341 ibid 17.

342 ibid 23.

343 ibid 35.

344 See for the complete list ibid 41–51.

345 See Pierre Serna, 'The Republican Menagerie: Animal Politics in the French Revolution' (2014) 28 French History 188.

346 Serna, *L'animal en République* (n 278) 26.

347 ibid.

Sciences, committed as it was to the principles of liberalism and republicanism, was anathema to the authoritarian Napoleon who decided to close it down.[348] In March 1804, the Third Section on Literature and Fine Arts formally concluded the competition initiated by its sister section. No essay was considered worthy of the prize and it was decided that no second competition would be held on the same question.[349] Although Salaville's essay was among the four pieces that the third section honoured,[350] he was furious that the competition was ended abruptly, which he attributed to prejudice on the part of the *Institut*.[351] To ensure that his work would receive the attention he thought it deserved, Salaville went on to publish it independently in 1805. With the prospect of the prize gone, why was Salaville bent on making his position public?

In the foreword of his essay, Salaville explained why he deemed it crucial that his piece be made accessible to a broad audience. In recent times, he pointed out, numerous theories had been put forward which challenged the natural excellence of human beings and therefore violated their inherent dignity. A particularly grave degradation, Salaville criticised, was perpetrated by modern scientists who argued that human beings differ from other animals only in degree.[352] "If we are to believe a physicist of our day", Salaville pointed out tauntingly, "'man, belonging to the family of apes, was originally covered with hair like them, inhabited the warm countries', etc.".[353] Salaville's "physicist of our day" was, of course, none other than Delamétherie.

The declared aim of Salaville's essay was to salvage the special status of humanity by putting a stop to the kind of moral degradation that he believed to result from naturalistic accounts such as Delamétherie's.[354] There are too many such doctrines, Salaville argued, which try to cast human beings in a terrible light, demonising them for their natural desires and practices, especially those that affect animals. According to Salaville, all of these doctrines are pernicious because they undermine the natural human excellence and violate human dignity by representing man, "if it be

348 ibid 37.

349 ibid 36–37.

350 ibid.

351 See his foreword in Salaville, *De l'homme et des animaux* (n 279) v.

352 ibid vi–viii.

353 Salaville quotes Delamétherie, *De l'homme considéré moralement* (n 320) xxii.

354 See Jean-Baptiste Salaville, 'À M. Foullière, sur sa Lettre contre l'ouvrage intitulé: de l'Homme et des Animaux' (30 Thermidor Year XIII) T46 La Décade philosophique, littéraire et politique 339, 343.

allowed to say so, as a vulgar being".[355] We ought therefore reject all theories about the supposed fatalism of human barbarism. For if humans were not allowed to use and kill animals for their purposes, Salaville reasoned, they would be condemned to live in injustice and cruelty.[356] A resounding "No!" was thus Salaville's answer to the *Institut*'s competition question as to whether brutal treatments of animals are a matter of public morality and should be regulated legally.

Salaville was keenly aware that in order to be able to show that "there is no barbarity in the allegedly barbaric treatments of animals",[357] he would have to refute firmly held moral beliefs. Despite conceding that he himself was as psychologically averse to mistreatments of animals as anyone else, he emphasised the importance of not letting such feelings interfere with reason.[358] The duty of every philosopher, Salaville pointed out, is to unveil common but false assumptions and to combat them.[359]

To motivate his position, Salaville first discussed in his essay whether cruel treatments of animals are of concern to *private morality*, that is, morality as it relates to individuals in the private sphere. His reasoning was that if barbaric treatments are a matter of private morality, then they are necessarily also a matter of public morality—that is, morality in the public sphere—because private morality, according to Salaville, is but a part of public morality.[360] Private morality would be violated, Salaville opined, if animals had rights against cruel treatments. According to Salaville, such rights could either derive from the laws of society (in which case they are positive rights) or they could be natural rights that animals have regardless of positive laws. The problem with positive rights, Salaville argued, is that they can only result from contracts and conventions. Unlike

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355 Salaville, *De l'homme et des animaux* (n 279) vi.

356 ibid xi–xiii.

357 ibid 58.

358 This is, in essence, also Salaville's response to the two critics who reviewed his book in *La Décade philosophique*. See Antoine Vallée, 'De l'Homme et des Animaux, ou Essay sur cette Question proposé par l'Institut' (30 Germinal Year XIII) T45 La Décade philosophique, littéraire et politique 134; and Salaville's response in Jean-Baptiste Salaville (20 Floréal Year XIII) T45 La Décade philosophique, littéraire et politique 318, as well as Charles Foullière, 'Sur le livre intitulé: de l'Homme et des Animaux; par M.J.B. Salaville' (10 Thermidor Year XIII) T46 La Décade philosophique, littéraire et politique 240, to whom Salaville responded in Salaville, 'À M. Foullière, sur sa Lettre contre l'ouvrage intitulé: de l'Homme et des Animaux' (n 354).

359 Salaville, *De l'homme et des animaux* (n 279) 58–60.

360 ibid 2.

human beings, animals are incapable of engaging in or submitting to such contractual relationships, which is why he inferred that they cannot have positive rights.[361] The same incapacity, he asserted, prevents them from having natural rights. For if animals had natural rights they would surely also have the capacity to translate these rights into positive rights. However, only human beings are able to conduct this translation, that is, to adopt positive rights on the basis of natural rights. In virtue of this ability, human beings deserve a special kind of respect, and possess what Salaville called—in ways that would be reminiscent of Hannah Arendt's later term—"*[un] droit à avoir des droits*";[362] a right to have rights. Further proof for the lack of any such capacity in animals, Salaville claimed, is the fact that they cannot reciprocate duties. The existence of every right, he suggested, also implies the existence of a duty. My right to life, for example, is tied to my duty to respect the lives of others. Lacking the capacity to reciprocate duties, animals cannot have any rights. Hence, Salaville concluded, by using and killing animals, "we can never violate rights which they do not have, nor consequently be unjust or criminal in this respect; for where there is no violation of a right, there is no injustice".[363]

Can barbaric treatments of animals at least be an issue of *public morality*? This is the question Salaville tackled in the second part of his essay. Public morality, he pointed out, can be violated even in circumstances which are of no concern to private morality. The kinds of relationships that spouses can have with each other, for example, generally pose no problems from the point of view of private morality. If made public, however, these relationships can become an issue for public morality in so far as they offend sentiments of decency and shame.[364] The sentiment that a society accords most weight to, Salaville proposed, is the *sentiment of humanity*. If this sentiment is lost, then so is the willingness of people to help others in need, leaving us with nothing but their "cold calculation of egoism".[365] For Salaville, the key question thus became the following: Does the way we treat animals, or the sight of such treatments, distort or destroy the precious sentiment

361 ibid 2–3.

362 ibid 6; see Hannah Arendt, *The Origins of Totalitarianism* (Harvest 1973) 296.

363 Salaville, *De l'homme et des animaux* (n 279) 7.

364 ibid 8.

365 ibid 9.

of humanity? If it does, then we have reason to adopt laws against the barbaric treatment of animals, even if, as argued above, animals cannot be said to be treated wrongly under any circumstances.[366]

To answer this question, Salaville first set out to determine if animals are capable of suffering at all, by shedding light on a range of different hypotheses put forward by Descartes, Étienne Bonnot de Condillac, and the Comte de Buffon.[367] On one side we can find the Cartesians, who argue that animals are automates. According to Salaville, no deterioration of the humane sentiment could occur under this picture. This is because, regardless of how animals are treated, they are completely lacking in sensibility. "For a real Cartesian", Salaville points out, "there is no difference between hitting an animal and hitting a stone".[368]

On the opposite side, we find Condillac's theory. According to Condillac, Salaville tells us, humans and animals are cut from the same cloth and possess intelligence and sensibility that differ only in degree. On Condillac's theory, the absence of laws against the barbaric treatment of animals would have a negative impact on public morality. Because animals are seen as possessing the same faculties as human beings, treating them cruelly will have the same corrosive effects as the cruel treatment of humans would. However, Salaville urged that we should not follow Condillac's theory because it presents us with a thorny dilemma. On one horn of that dilemma, if humans and animals are indeed cut from the same cloth and differ from each other only in degree, then humans would have to be the guardians of animals, with not only the duty to abstain from any cruel treatment but also a positive duty to procure their well-being (as Delamétherie argued). According to Salaville, this would be repugnant because it would entail that humans have to sacrifice their superiority over other species which would undermine the sentiment of humanity. On the other horn, humans could exploit animals who are inferior to them, instead of becoming their

366 ibid 9–10.

367 Although Salaville declares that he will not decide which approach is correct, it soon becomes evident in his treatment of these views that he sides with the first. For what it is worth, I should note that I have my doubts as to whether it was necessary at all for the purposes of Salaville's overall argument to determine if animals can suffer. After all, even if they could not suffer, the sentiment of humanity could still be weakened if humans took offence at the mistreatment of these (insentient) animals.

368 Salaville, *De l'homme et des animaux* (n 279) 13. While this may be true for many Cartesians, it is not true for Descartes himself, see *supra* footnote 157.

guardians. However, as Salaville pointed out, this would also mean that if there were beings superior to humans, then they could oppress and exploit us. Even worse, such oppression could not only take place in-between species, but also *within one and the same species*. As Salaville asked: "[i]s there not also a more and less among human beings? Are not some superior to others in intelligence, corporeal strength, natural faculties and acquired faculties?"[369] If we were to adopt this line of reasoning, Salaville suggested, it would follow that superior human beings could exploit those who are less perfect.[370] However, he maintained, it would be wrong to say that more developed faculties in one human being would give her the right to oppress and treat cruelly those with lesser faculties. For these reasons, he argued that we should reject Condillac's theory because it presents us with a choice between two equally unattractive options.[371]

Buffon's approach, finally, takes a middle ground between Descartes's and Condillac's positions. According to Buffon, animals are not intelligent creatures, but they can suffer. Salaville also rejected this more moderate view. His central objection to it is that one cannot separate suffering from intelligence. According to Salaville, cries, as we can find them in animals, are not necessarily indicative of pain. Human infants, he illustrated, cry more frequently than adults, but we would not think that they suffer, or at least not as much as adults do. In contrast to infants and animals, adult human beings possess not only the sentiment of pain, but they are also conscious of their pain. Thought may perhaps be all there is to pain, Salaville reasoned, because heavy distractions can make one forget even the greatest pains. Mere bodily signs of pain are thus no evidence for whether or not someone suffers. And the same must hold true for the cries and other reactions of animals when they are treated "cruelly".[372] Salaville believed that this inference was supported by the fact that animals generally seem indifferent to such treatments. For example, he claimed that a bull, lacking the ability to imagine a different life, seems to mind neither its castration nor that it has to pull the plough. According to Salaville, even selling or killing the bull does not seem to affect it.[373] Humans, by contrast, are intelligent and conscious, and therefore suffer greatly from such degrading treatments. As Salaville argued, death is a particular harm to human beings. This

369 ibid 16.

370 This issue will occupy us in the remaining chapters.

371 Salaville, *De l'homme et des animaux* (n 279) 15–18.

372 ibid 18–23.

373 ibid 31.

is because humans do not simply live in the present as animals do, but have a sense of the past and a desire to shape their future.[374] If suffering had no such intellectual component, Salaville added, then the solidarity and empathy which links humans like an "invisible chain" would be lost, and everyone would only be concerned with their own suffering—as is already the case in the animal kingdom.[375] Hence, according to Salaville, failing to distinguish strictly between humans and animals "is to confound what must be carefully differentiated".[376]

Because animals lack intelligence, and, as a consequence, the ability to suffer, he concluded, public morality is not adversely affected if they are treated badly. From this it also follows that the sole reason for rights is intelligence, and not sensitivity, as Delamétherie had argued. According to Salaville, only intelligence can explain why humans suffer from degrading treatments. Hence, it alone constitutes the moral dignity that commands respect for humans by the sentiment he calls humanity.[377] In Salaville's view, animals completely lack any such dignity, which is why we ought not apply it to them. Not mincing his words, Salaville insisted that "extending the sentiment of humanity to animals is … to give it a wrong direction; it is to profane the feeling; to prostitute it to beings whom nature has not formed to be able to participate in this noble assignment of its finest work".[378]

Having concluded the main part of his argument, Salaville recapitulated that all the aforesaid should, in principle, provide us with enough reason to answer the competition question in the negative. That is, his arguments would suffice to show that public morality is not affected by barbaric treatment of animals, and that no laws are required to protect them from such treatment. Instead of ending his essay at this stage, however, Salaville chose to further adduce practical reasons—"based on facts and experience"[379]—to drive his point home.

If cruel treatments of animals were indeed deadening to human beings, Salaville argued, then it would follow that butchers, hunters, vivisectionists, and the like would have lost all sense

374 ibid 33–34.

375 ibid 27.

376 ibid 35.

377 ibid.

378 ibid 37.

379 ibid 40.

of compassion. But this is not the case, he claimed, because there are many such individuals who are perfectly caring. In fact, he continued, if we followed this hypothesis then everyone who enjoyed a meaty meal would be an accomplice of the butcher and be more inclined to become cruel. "As for me", Salaville observed, "I know very well that never, when having risen from a table where, for my part, I had become the accomplice of the murder of several animals, I felt a disposition to barbarity toward my fellow human beings".[380] If those who eat meat do not lose their sense of morality, then neither do those who torture and kill animals in a professional capacity. According to Salaville, this conclusion is supported by the converse fact that being kind to animals does not necessarily lead to more compassion toward human beings. The Roman emperor Caligula, Salaville illustrated, cared for his horse so much so that it was apparently allowed to eat at his table. Yet, Caligula was a cruel monster to humans.[381]

Building on this point, Salaville added that it would be inscrutable why human beings were ever able to leave the state of barbarism and become civilised if cruel treatments of animals, which have been practiced since time immemorial, had a negative impact on the sentiment of humanity. All peoples used to be hunters at some point, which is why, if there was such a negative impact, none of them could have made the transition to becoming civilised.[382] According to Salaville, it would furthermore follow from this that civilised peoples would be far more inhuman than savage peoples because only the former have subjected animals to servitude. Because slavery is the worst thing one can do to a human being, it would follow that civilised nations would be the most unjust nations if the subjection of animals to servitude is also morally wrong.[383]

Based on these reasons, Salaville concluded that practical considerations also show that barbaric treatments of animals are of no concern to public morality. On the contrary, as he underlined in the final pages of his essay, such a distortion would result from an extension of the sentiment to those for whom it is not intended. Because only humans possess the excellence and dignity which elicits the sentiment of humanity, Salaville emphasised, extending it beyond the human species would be to corrupt and debase it: "[i]n trying to lift animals to the status of humans,

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380 ibid 43.

381 ibid 44–45.

382 ibid 46.

383 ibid 48.

humans are brought down to the status of animals. This doctrine, ostensibly human, is in fact full of injustice and inhumanity".[384] To extend the sentiment of humanity to animals, Salaville suggested, would be to destroy it. Putting each being on the same level would annihilate the harmony and beauty of the whole. "By giving everything the same colour, you disenchant the nature you think to embellish."[385] In order to protect this invaluable sentiment once and for all, Salaville proposed that

> [i]t is, therefore, not by calling interest on animals, that we can hope to increase and consolidate interest in man; if there is a means of assuring the inviolability of the latter, it is, we dare to say, to render it exclusive; it is to admit that man and animals differ by their respective nature and that this difference authorises and makes legitimate with respect to them what it prohibits with respect to us.[386]

Put differently, Salaville argued that only if we insist on the separation between humans and other animals (Separateness Thesis) can we protect the fundamental equality between all human beings (Equality Thesis). Salaville's *De l'homme et des animaux* thus nicely illustrates the two central theses of egalitarianism, and his attack on inegalitarian naturalists such as Delamétherie reveals the ways in which their ideas challenged these theses. In conjunction with Delamétherie's works, Salaville's essay therefore serves to demonstrate the tension between naturalism and egalitarianism.

Before I end this section, I need to emphasise some of the limitations of Salaville's and Delamétherie's accounts. First, none of their texts, nor their debate as a whole can be said to have engendered today's positions on human or animal rights. Their exchange seems to have gone largely unnoticed, even by contemporaries. We know of it only thanks to the French sociologist Valentin Pelosse, who discovered the debate in the 1980s, and Serna's in-depth study of the *Institut national*'s essay competition.[387] My reason for focusing on the exchange is that its relative obscurity gives us a more direct access to the conflicting ideas: there is little to no secondary literature

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384 ibid 53.

385 ibid 56.

386 ibid 51.

387 See, for further references, Serna, *L'animal en République* (n 278).

that we have to wade through before we can consider the main texts. Second, the similarities between the views of Salaville and Delamétherie and those of modern theorists should not belie the fact that the two Enlightenment philosophers wrote at a different time, often using different language and concepts than contemporary thinkers. What is more, while the scientific discoveries of the Enlightenment had been monumental, they were nowhere near our current state of knowledge. Largely unaware of the processes of evolution, for example, even the naturalist Delamétherie believed in a natural hierarchy of beings. Lastly, as was already hinted at, Salaville and Delamétherie were not the first to put forth egalitarian and naturalist approaches to dignity and rights. More basic versions of their positions have surfaced at least since ancient times.[388] As suggested above, the point of presenting the debate between them was not genealogical: I do not argue that contemporary positions can be traced back to Salaville's or Delamétherie's. Rather, my presentation of their exchange followed Strauss's point that in order to fully understand our current ideas, we first need to understand the ideas that lie beneath them.

5 Conclusion

This chapter has shed light on "thought of the past" in order to render explicit some of the views that have come to influence our thinking today. More specifically, by focusing on the French Enlightenment, the chapter has provided an account of two important currents—naturalism and egalitarianism. As I have argued, the strand of naturalism which emphasised difference over equality conflicted with egalitarianism's thesis that all humans are fundamentally equal (the Equality Thesis) and the neighbouring Separateness Thesis, according to which all humans are special and separate from all nonhumans. I have then illustrated this conflict with the aid of an exchange between Delamétherie and Salaville.

As I have indicated, Delamétherie's naturalist account contains some of the core arguments that we can find in contemporary animal rights approaches. Salaville's egalitarian response to Delamétherie, on the other hand, foreshadowed some of the central claims in contemporary human rights literature. In order to be able to understand how exactly they have anticipated contemporary

388 See eg Liliane Bodson, 'Attitudes Toward Animals in Greco-Roman Antiquity' (1983) 4 International Journal for the Study of Animal Problems, 312; Izhak Englard, 'Human Dignity: From Antiquity to Modern Israel's Constitutional Framework' (2000) 21 Cardozo Law Review 1903, 1905.

positions, we now need to move beyond the intellectual history of this chapter and approach the respective positions analytically. In Chapter 2, I will shed light on the conceptual structure of the Aristocratic conception of fundamental rights. As I will point out there, Salaville took the same egalitarian position on its central features—equal consideration, agent-focus, and internalism—as many modern Aristocrats do today. In Chapter 3, I will elucidate the key features of the Meritocratic rights conception—differential considerations, patient-focus, and externalism—and will show that Delamétherie's views are cut from the same naturalistic cloth as those of contemporary Meritocrats.

Chapter Two:

The Aristocratic Conception

1 Introduction

The idea that we should reject special privileges for the few and instead promote rights protection for the many is often believed to be one of the founding ideas of human rights. In France in particular, the common people are believed to have wrested their human rights in an arduous struggle from the king and the nobility. Human rights, as well as cognate concepts such as human dignity and equality, are therefore often viewed as being premised on a rejection of aristocratic thinking. In this chapter, I will argue that this common conception is incomplete if not misguided. Although less obviously aristocratic than Ancien Régime defences of the nobility, numerous human rights approaches still today bear the central marks of aristocratism. Far from rejecting this kind of thinking, these approaches accord fundamental rights only to human beings and withhold them from all other animals. Put differently, they give special privileges to the few and exclude the many others.

There are, of course, numerous ways one can conceive of human rights, dignity, and equality *without* relying on Aristocratic thinking. It would therefore be inaccurate to claim that the Aristocratic conception is the only game in town.[389] However, as I will show in this chapter, the Aristocratic conception is one that is particularly salient.[390] This is because it captures many of the key ideas that make up a lot of human rights thinking and practice today. I say "many" and "a lot"

[389] See also Will Kymlicka, 'Human Rights Without Human Supremacism' (2018) 48 Canadian Journal of Philosophy 763, 765.

[390] For a similar argument, but with a focus on human dignity, see ibid 770. Kymlicka points out that while there are other approaches to dignity that do not defend dignity "on the backs of animals", the Aristocratic approach which does "is an important strand".

because the Aristocratic conception, like any other one conception, is unable to cover "all" of the central ideas of the sundry ways human rights are thought of and practiced today. The point of this chapter is not to provide an exhaustive description of the manifold human rights accounts and practices, but rather to focus on one particularly interesting ideal-type—the Aristocratic conception—whose elements we can find in a good number of such accounts and practices.

The Aristocratic ideal-type is characterised by three elements: equal consideration, agent-focus, and internalism. The first element, *equal consideration*, concerns the exact nature of the status that rights-holders possess in the Aristocratic conception. In other words, it answers the question *what* this Aristocratic status is. I will show that the Aristocratic conception considers human rights as entitlements that all members of a high rank—the rank of human dignity—possess equally and to the exclusion of all other beings. The second element, *agent-focus*, addresses the justification for equal consideration. Put differently, it answers *why* human beings possess this special status and the equal rights that come with it. As I will demonstrate, the reason for this is that only human beings are believed to possess certain unique mental capacities; that is, that only humans are agents. *Internalism*, finally, deals with the question *how* the special status of equal consideration for human beings is explained. I will show that this is done in an internalist manner, meaning that proponents of the Aristocratic conception base human rights, dignity, and equality on normative decisions, stories, or interpretations rather than on facts about human nature. I will call this approach one that "founds" rather than "grounds" these concepts and will show what the advantages of this approach are and where its shortcomings lie. I will illustrate these features with both contemporary Aristocratic accounts as well as with Salaville's theory. The striking similarities that we will notice between Salaville's and more modern accounts should not surprise us considering that they all spring from the same egalitarian stream of thinking.

It is important to keep in mind that, as I have mentioned in the Introduction of this thesis, the Aristocratic conception of fundamental rights is representative of one side of a spectrum of fundamental rights approaches. On the other, opposing side of that spectrum we find the Meritocratic conception of fundamental rights. Because the two conceptions stand in an antithetical relationship, we will be better able to appreciate the Aristocracy's three characteristics once we can compare them with the opposing characteristics of the Meritocracy. Chapter 3, which presents the Meritocratic conception, will therefore help to further illuminate the Aristocratic conception on which I shall focus now.

The structure of this chapter is as follows. In Section 2, I will lay the groundwork for the Aristocratic conception by shedding light on a recent movement in scholarship which portrays human rights, dignity, and equality as Aristocratic concepts. I will then turn to an analysis of the three characteristic elements of the Aristocratic ideal-type. I will start by examining the element of equal consideration (Section 3), before turning to Aristocracy's agent-focus (Section 4), and finally to internalism (Section 5). A short conclusion summarises the main findings and sets the stage for the analysis of the Meritocratic conception in Chapter 3.

2 Human rights Aristocracy

In this section, I will discuss the recent scholarly movement which understands human rights and related concepts such as human dignity and basic equality as essentially Aristocratic concepts. As noted in the introduction above, the notion of "Aristocratic human rights" may sound oxymoronic to many. The central impetus behind human rights, after all, is one that is opposed to the notion that few should have all the special privileges, and that the many be left with nothing. And that seems to be exactly what the aristocracy was all about. Those who take this view may therefore baulk at the very idea of using the term "human rights Aristocracy" to refer to a lot or even just some of contemporary human rights thinking and practices. As I hope will become clear in this section as well as in the ensuing analyses in Sections 3–5, human rights today do in fact share many of the core traits of the former nobility. As counterintuitive as it may seem at first, it is therefore no stretch to talk of "Aristocratic" human rights. Quite the contrary, I propose that the lens of the aristocracy allows us to make better sense of current human rights thinking and practices.

Perhaps the first recent thinker to develop an explicit analogy between aristocracy and human rights and dignity was Gregory Vlastos. In a 1984 essay, Vlastos described the special status and privileges of human beings as "a 'rank of dignity' in some ways comparable to that enjoyed

by hereditary nobilities of the past" and as "first-class citizenship [that has] been made common".[391] Human society, Vlastos argued, is "like a caste society (with a *unique* caste)".[392] Membership in this caste is independent of individual merit and available to all human beings as an equal birthright.[393] In the same way as aristocrats acquire their special status and privileges simply in virtue of being born noble, human beings acquire their dignity and rights simply in virtue of being born human. Because all humans are equally born human, none of them can be considered superior or inferior to others.[394]

In a similar vein, James Whitman has argued that in continental Europe, human dignity has taken on the same meaning aristocratic dignity once had in the Ancien Régime: "'Human dignity', as we find it on the Continent today, has been formed by a pattern of *levelling up*, by an extension of formerly high-status treatment to all sectors of the population."[395] Whitman points to examples in the law of criminal punishment, hate speech, and privacy to show that in all these areas, treatments that were previously reserved for high-status persons have been made available to everyone. Formerly low-status treatments, on the other hand, have been abolished.[396]

Other scholars have endorsed views that are comparable to those of Vlastos and Whitman. Michael Rosen, for example, calls the application of formerly high-status rights to all human beings the "expanding circle" narrative of dignity.[397] Stéphanie Hennette-Vauchez agrees that the scope of high status treatments has undoubtedly been widened in the name of equality.[398] And

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391 Gregory Vlastos, 'Justice and Equality' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press 1984) 54.

392 ibid (emphasis in original).

393 ibid.

394 ibid 74.

395 James Q Whitman, '"Human Dignity" in Europe and the United States: The Social Foundations' in Georg Nolte (ed), *European and US Constitutionalism* (Cambridge University Press 2005) 110. See ibid 111 for further references on the idea that high-status norms have been generalised in Europe; for an early contribution in which Whitman presented his view, see James Q Whitman, 'Enforcing Civility and Respect: Three Societies' (2000) 109 Yale Law Journal 1279.

396 Whitman, '"Human Dignity" in Europe and the United States: The Social Foundations' (n 395) 116.

397 Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012) 8.

398 Stéphanie Hennette-Vauchez, 'A Human Dignitas? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence' (2011) 9 International Journal of Constitutional Law 32, 55.

Aharon Barak has proposed that human dignity is "the modern version of the idea that every man has the status and rank of a king".[399]

Arguably the most important contribution to the dissemination of the rank idea of human rights and dignity is Waldron's *Dignity, Rank, and Rights*, which he delivered as his Tanner Lectures in 2009.[400] Building on an earlier article,[401] Waldron argues that human dignity, as it is used in legal practice, is best understood as a rank (or status) concept akin to that previously held by aristocrats. Dignity, he explains, "expresses the idea of the high and equal rank of every human person".[402] According to Waldron, this understanding of dignity is in line with the ancient connotation of dignity as a term denoting the honour, esteem, and deference that were owed to a high rank or office.[403]

Waldron anticipates the concern, which I have mentioned above, that it is somewhat counterintuitive to associate human rights thinking with notions such as rank and aristocracy, which by definition imply a hierarchy between higher and lower beings. Waldron dispels this worry by arguing that the noble rank of human dignity is now accorded to *all* members of the human species: it has been universalised and is thus no longer restricted to a specific class of humans. As he points out, this egalitarian understanding of dignity is in line with Judeo-Christian beliefs about the equality and uniqueness of all human beings. Created in the image of God, all and only humans possess a rank which they hold not over other humans, but over all other creatures in the great chain of being.[404]

Waldron's account has met some disapproval. For example, A John Simmons has criticised Waldron for overreaching, arguing that "levelling down" was at least as much a part of the origins of human rights as was "levelling up". As Simmons points out, "[t]he exalted statuses of nobility and kings (as 'little gods') were as much the target for attack as were the degraded statuses of serf

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399 Aharon Barak, 'Human Dignity: The Constitutional Value and the Constitutional Right' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014) 363.

400 See Waldron, *Dignity, Rank, and Rights* (n 6).

401 See Jeremy Waldron, 'Dignity and Rank: In Memory of Gregory Vlastos (1907–1991)' (2007) 48 European Journal of Sociology 201.

402 Waldron, *Dignity, Rank, and Rights* (n 6) 14.

403 ibid 30.

404 ibid 32. See on these issues in more detail Chapter 1, Subsection 4.1.

and peon and peasant. The sturdy yeoman seems a better model for the dignified bearer of human rights than does the blood nobility."[405] Tasioulas has criticised Waldron's account for overlooking that dignity is not, in and of itself, a claim to legal status nor to any other social status, even though it may have such implications.[406] The purpose of my section here is not to provide a defence of Waldron's theory. Whatever we may think of its merits, it is simply one among an increasing number of accounts that have pointed their finger to the fact that human rights and human dignity can plausibly be seen to "capture the idea of a standing for humans that is above that of all other creatures",[407] as Simmons himself concedes.

That this is a plausible account of human rights and dignity is supported by the fact that aristocratic interpretations of these concepts are not a new phenomenon.[408] At least some contemporaries of the French Revolution adopted a similar understanding. Marquis de Ferrières, a writer and deputy to the Second Estate, for example, wrote in a letter from 1789 that "[t]here is nothing better the Nobility can do than to assemble with the Third Estate in good faith, and to *lift up to itself* the wealthy and decent citizen of the bourgeoisie".[409] In the same year, an observer from Great Britain pointed out that "[t]he greater part of the Noblesse could not bear the idea that persons of no rank or consideration in the Country should be *raised* to a dignity so important as this, and should be *put upon a level with themselves"*.[410] And in 1790, Armand-Gaston Camus, a revolutionary and representative to the National Assembly, declared that "[a]ll the French were now

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405 A John Simmons, 'Human Rights, Natural Rights, and Human Dignity' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 143; see for similar criticisms Don Herzog, 'Aristocratic Dignity?' in Jeremy Waldron and Meir Dan-Cohen (eds), *Dignity, Rank, and Rights* (Oxford University Press 2012); and Michael Rosen, 'Dignity Past and Present' in Jeremy Waldron and Meir Dan-Cohen (eds), *Dignity, Rank, and Rights* (Oxford University Press 2012).

406 John Tasioulas, 'On the Foundations of Human Rights' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 55.

407 Simmons (n 405) 146.

408 In fact, as Phillips has pointed out, talking about "the nobility of being human" goes at least as far back as the Renaissance: Phillips (n 32) 23.

409 Letter from Ferrières to his sister, 10 August 1789, Henri Carré (ed), *Marquis de Ferrières, Correspondance inédite: 1789, 1790, 1791* (Armand Colin 1932) 120 (emphasis added).

410 Copy of a letter from Mr. Jenkinson, 17 September 1789, Oscar Browning (ed), *Despatches from Paris: 1784–1790*, vol ii (Offices of the Society 1910) 261 (emphases added).

noble".[411] These examples illustrate that understanding the abolition of nobility's privileges and the recognition of commoners' fundamental rights as an "upwards equalisation of rank"[412]—as Waldron puts it—is not a recent invention. As the French historian Jules Michelet put it succinctly: "It is said that the Revolution destroyed the nobility. But quite the contrary, it has made thirty-four million of nobles."[413]

It is likely no coincidence that the idea of "upwards equalisation" can be found both in the discourse of contemporaries of the French Revolution and in post-World War II human rights discourse. In each of these cases, experiences of outright denial of human rights had preceded the (re)assertion of these rights.[414] As David Bilchitz points out,

> The assertion of the dignity of all human beings in post-World War II human rights documents represented a reaction against the Holocaust and the War itself, both of which undeniably saw the massive devaluation in human life. Dignity was designed as a corrective to assert the universal value of all human-kind.[415]

As Richard Cupp has noted, in its reassertion of the equal value of all human beings, the post-war emphasis on human rights and human dignity has "rejected individual intelligence or autonomy as a necessary foundation of legal personhood for humans".[416] In order to extend the same protection to all members of the human species, differences between human beings, such as

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411 Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 257.

412 Waldron, *Dignity, Rank, and Rights* (n 6) 33.

413 Jules Michelet, *Le peuple* (Comptoir des Imprimeurs-unis 1846) 18; see also Whitman, 'Enforcing Civility and Respect: Three Societies' (n 395): "we are all aristocrats now".

414 On the idea of reasserting one's humanity and one's rights after a denial of equal status and respect, see Phillips (n 32) 37; see also David Hollenbach, 'Human Dignity: Experience and History, Practical Reason and Faith' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014) 123; Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 2010) 36–38.

415 Bilchitz (n 5) 51.

416 Richard L Cupp, 'Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood', *Pepperdine University Legal Studies Research Paper No. 12* (2016) 28 <http://papers.ssrn.com/abstract=2775288> accessed 21 July 2019.

cognitive disabilities, had to be downplayed.[417] Remedying past injustices by elevating all human beings equally to a high rank would not be without its problems, however. As Bilchitz warns,

> what was a corrective also had interesting continuities with past assumptions that underlay the Nazi regime. The concept of dignity was closely associated with the notion of rank, status and social hierarchy in 17th century Europe. Those with dignity had a special status and were included within the aristocratic class. The Nazi regime could be said to have built on this hierarchy but broadened it to include all those it defined as Aryan: all Aryans were to be regarded as having special worth and to be treated accordingly. Of course, anyone who was not an Aryan was designated as being of lesser or no worth and could be treated with little or no respect.[418]

Bilchitz's point is that by lifting one group to a high status with special rights, one automatically increases the gap between this group and other groups which are not included in the status. In fact, the levelling up of one group often occurs with the specific intention to level down another group. In the case of human rights, the group that is being levelled up are all members of the human species; the group that is levelled down are the members of all other species. As Will Kymlicka explains, this exaltation of the human species at the expense of other species which has become common in the current human rights discourse is often conducted for the strategic purpose of protecting vulnerable human beings, that is,

> to help battle forms of prejudice and discrimination against subaltern or marginalised groups, including racialised groups, women, the poor, immigrants, indigenous peoples, and people with disabilities. The hope and expectation is that asserting a sharp hierarchy between humans and animals will make it more difficult to disparage these groups.[419]

Jacques Maritain, who was a driving force behind the Universal Declaration of Human Rights (1948), made it plain that a central part of the human rights project was to "tame[] the irrational"[420] animal that is a part of all human beings. For Maritain, we only become fully human

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417 See ibid.

418 Bilchitz (n 5) 51.

419 Kymlicka (n 389) 772.

420 Jacques Maritain, *Christianity and Democracy and The Rights of Man and Natural Law* (Doris C Anson tr, Ignatius Press 2011) 100.

once we learn how to overcome the "immense burden of animality"[421] by distinguishing us from all beings who are mere animals.[422]

This should give those who are sceptical of the term "human rights Aristocracy" pause. With the "upwards equalisation" of all human beings, Aristocratic thinking does *not* disappear.[423] The Aristocratic approach conceptually requires the existence of an "other" who is not an equal member of the high rank.[424] As Angus Taylor put it: "[H]uman exceptionalism is at least as much about whom we are determined to exclude from the moral community as about whom we wish to include within it".[425] This explains why Salaville, in his 1805 essay, was so intent on rejecting all talk about animal rights. According to him, to extend the sentiment of humanity to animals would be "to prostitute it to beings whom nature has not formed to be able to participate in this *noble* assignment of its finest work".[426] In Salaville's as well as contemporary Aristocratic theories, non-human animals assume the quintessential role of the unequal other. The relationship between humans and other animals is thus key to understanding the Aristocratic rights conception.

3 Equal consideration

Having discussed the trend in recent scholarship to conceive of human rights, dignity, and equality as Aristocratic concepts, the stage is now set for an analysis of the features that are distinctive of the Aristocratic conception fundamental rights. In this section, I will focus on the first of the three characteristic elements of this conception: equal consideration. As suggested in the introduction

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421 ibid 37.

422 See on this also Thomas D Williams, *Who Is My Neighbor? Thomistic Personalism and the Foundations of Human Rights* (Catholic University of America Press 2005) 108.

423 For the misguided view that it would, see *supra* footnote 398.

424 See on this eg Tina Beattie, 'The Vanishing Absolute and the Deconsecrated God: A Theological Reflection on Revelation, Law, and Human Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014) 270. I take this to be a conceptual truth about the concept of Aristocracy and, correspondingly, dignity. It may not be necessary, however, that somebody concrete occupies the position of the "other". The mere idea of the "other" who is not a member of the Aristocracy or who does not possess dignity may be sufficient.

425 Angus Taylor, 'Review of Wesley J. Smith's A Rat Is a Pig Is a Dog Is a Boy: The Human Cost of the Animal Rights Movement' [2010] Between the Species 223, 228; I borrow this quote from: Kymlicka (n 389) 5.

426 Salaville, *De l'homme et des animaux* (n 279) 37 (emphasis added).

of this chapter, an analysis of this element answers the question *what* exactly the Aristocratic status is. I will demonstrate in Subsections 3.1–3.3 that it is three things: first, a high status that all human beings possess from the moment they are born (Heredity);[427] second, a status which all humans hold equally, and which gives them equal rights (Equality); and third, a status which excludes all nonhuman beings (Exclusivity). To use a phrase I introduced above, equal consideration considers humans to be separate *and* equal.

The three features of equal consideration are heavily influenced by the egalitarian current which I have discussed in Chapter 1, and can all be found in Salaville's essay *De l'homme et des animaux*. Although not explicitly mentioned, the first feature, Heredity, emerges from Salaville's argument that the status of humans as rights-holders is inherent in their humanity.[428] Further evidence for Salaville's endorsement of Heredity is the fact that he does not distinguish between different human beings when he invokes their intelligence as explanation for why only they have dignity.[429] This fact also supports the finding that Salaville embraced Equality. As I have shown, Salaville considers it to be neither here nor there that some humans surpass others in their intelligence or strength.[430] To use these differences as a reason for allowing superior human beings to exploit inferior ones would be "revolting",[431] according to him. Claiming that our best course of action is to "admit"[432] that humans differ from animals to such an extent that we may treat animals in ways we could not treat humans, Salaville seemed to accept basic human equality. Finally, Salaville also defended the Exclusivity of all nonhumans from humans' high rank and equal rights.

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427 If not earlier: see eg on the view that, in principle, humans become rights-holders from conception: Nigel S Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, Oxford University Press 2018) 176; for a moral defence of the view that a mature foetus has the same status as a newborn, see eg Margaret Olivia Little, 'Abortion and the Margins of Personhood' (2008) 39 Rutgers Law Journal 331, 347; for a defence of the view that only birth brings a human 'into membership with other human beings', see Kate Greasley, *Arguments About Abortion: Personhood, Morality, and Law* (Oxford University Press 2017) 199.

428 Salaville, *De l'homme et des animaux* (n 279) 6.

429 ibid 33–35.

430 Cf ibid 15–17.

431 ibid 16.

432 ibid 51.

This becomes evident not only from the fact that this feature follows conceptually from his acceptance of Heredity and Equality: if humans have their status and equality by birth, then all those not born human are automatically excluded. Salaville also explicitly argued that animals ought to be excluded from our scope of moral and legal consideration. Animals, according to him, lack human intelligence, and therefore dignity.[433] The only way of securing the dignity of humanity, he claimed, is by refusing to grant anything that is not a human being the respect and rights humans are owed. Salaville thus urged that human inviolability can only be guaranteed if human dignity and rights are rendered "exclusive".[434]

In what follows, I will elaborate on each of these features, starting with Heredity. As I will show in the course of doing so, all three features bear striking resemblance with the actual nobility as it existed in France during the Ancien Régime, providing further vindication for the appropriateness of the term "Aristocratic" fundamental rights conception.

3.1 Heredity

The first feature of equal consideration is that the Aristocratic status of human beings, their dignity, and the human rights that it entails are considered to belong to humans by birth.[435] This point emerges clearly from the central founding documents of the human rights canon. The French Declaration of the Rights of Man and the Citizen (1789), for example, states in its Article 1 that "[m]en are *born* and remain free and equal in rights." Inspired by the French Declaration, the Universal Declaration of Human Rights stipulates that "[a]ll human beings are *born* free and equal in dignity and rights", and the International Covenant on Civil and Political Rights (1966) recognises in its preamble the "*inherent* dignity and … equal and inalienable rights of all members of the human family".[436]

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433 ibid 36–37.

434 ibid 51.

435 There are, of course, other human rights, dignity, and equality approaches that do not endorse Heredity. See eg on the fact that dignity used to be a Merit-based rather than a hereditary concept: Remy Debes, *Dignity: A History* (Oxford University Press 2017) 1–2.

436 Declaration of the Rights of Man and of the Citizen (1789) (n 201); International Covenant on Civil and Political Rights (1966, ICCPR) (n 12) (emphasis added).

According to these foundational documents, being born human is the only condition one needs to satisfy to enjoy human dignity and equal rights. Tasioulas stresses this point when he argues that "[w]e possess [human] rights not in virtue of any personal achievement or social status, nor because they are conferred upon us by a positive legal order or social conventions, but simply in virtue of our standing as human beings."[437] To say that we hold human dignity and rights *simply in virtue of being human* is, indeed, a common way of putting the point that this status and these rights are hereditary.[438] A prominent advocate of this view is James Griffin. In *On Human Rights*, Griffin claims that a human right is "a right that we have simply in virtue of being human".[439] Other proponents include Alan Gewirth, who contends that it is "true by definition, that human rights are rights that all persons have simply insofar as they are human".[440] The heredity of human dignity and rights is also recognised by many courts. For example, as Catherine Dupré points out in a review of European human dignity case law,

> [t]he legal system of human rights protection in Europe (and more generally in the West) rests on the assumption that, as human beings, we are born with the unique quality of dignity that distinguishes us from other beings (primarily animals), justifying and explaining the special protection of our rights.[441]

The status that human beings are born into is, of course, not just any kind of status. It is rather one of *high elevation* and inherent worth. Many contemporary human rights scholars draw on Kant to explain this special worthiness of humans. According to Kant, human beings exist as ends-in-themselves because they are rational beings who are their own moral lawgivers. Ends-in-themselves are priceless beings, who ought never to be treated as mere means to an end.[442] They have inner worth, or "dignity".[443] No rational being can demand respect from his fellow man if he

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437 John Tasioulas, 'Human Dignity and the Foundations of Human Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014) 292.

438 See on the notion "simply in virtue of being human" more generally Raffael N Fasel, '"Simply in Virtue of Being Human"? A Critical Appraisal of a Human Rights Commonplace' (2018) 9 Jurisprudence 1.

439 Griffin (n 37) 2.

440 Alan Gewirth, *Human Rights: Essays on Justification and Applications* (Chicago University Press 1982) 41.

441 Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart 2015) 28.

442 See Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor and Jens Timmermann trs, Cambridge University Press 2012) 4:434–5, 46.

443 ibid 4:434–435, 46.

is not in turn willing to accord the same respect to that man. Hence Kant's imperative to "act that you use humanity, in your own person as well as in the person of any other, always at the same time as an end, never merely as a means".[444] Based on this imperative, dignity requires that special respect is accorded to its holders (and only to its holders).[445] "The idea of human dignity", as Tasioulas suggests, "is the idea of an intrinsically valuable status that merits our respect, a status grounded in the fact of being a human being."[446]

High status and special rights are features that human rights and dignity share with the status and privileges of the actual nobility. "Nobility", according to the Cambridge Dictionary, is "the class or group of people who have a high social rank, esp[ecially] from birth".[447] The notion that noble status and privileges are hereditary is one that is supported by the idea that blue blood is running in the veins of nobles.[448] The paradigmatic nobleperson was one who inherited his status and privileges much like a physical trait. Aristocrats were born into greatness, so to speak. And because birth was considered to be the defining mark of nobility, the more generations—or "degrees"—of noble ancestors a nobleman could prove, the more distinguished his status was.[449] In a scathing remark, Benjamin Franklin thus described the aristocrat as a person "who has no other Quality to recommend him but his Birth".[450] In fact, many noblemen conjectured that their status was so special that they must belong to a different race.[451] Some even went as far as to describe themselves as members of a separate species.[452]

How could aristocrats adopt such lofty perceptions of themselves? Commonly, the high rank of aristocracy was believed to be a God-given fact. In the same way as God placed humanity

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444 ibid 4:429, 41 (emphasis removed).

445 Tasioulas, 'Human Dignity and the Foundations of Human Rights' (n 437) 305–306.

446 ibid 305.

447 Cambridge Dictionary, 'Nobility' <https://dictionary.cambridge.org/us/dictionary/english/nobility> accessed 21 July 2019.

448 This idea can be traced back to the Spanish Kingdom, where the veins of fair-skinned Spanish aristocrats appeared to be blue, which some took to mean that their blood is different from that of commoners, see John H Kautsky, *The Politics of Aristocratic Empires* (Transaction Publishers 1997) 206.

449 Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 10–11.

450 Benjamin Franklin, *Autobiography and Other Writings* (Ormond Seavey ed, Oxford University Press 1993) 322.

451 Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 6.

452 See ibid 174.

in the upper echelons of the great chain of being, He conferred aristocrats an especially high rank within the human species.[453] This divine sanction was mainly based on Romans 13:1–2:[454]

> [1] Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God.
>
> [2] Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation.

To be sure, that membership in the aristocracy is hereditary, and not a matter of meritorious action, was more an ideal than it was reality. Especially toward the end of the eighteenth century in France, ennoblement by the king was rampant. If they could pay for it, those who were not born noble could become *anoblis* by acquiring public office.[455] However, these nobles were less well regarded than the so-called nobles of old stock, who inherited their noble status. Heredity remained the gold standard of the aristocracy.[456]

3.2 Equality

The second feature of equal consideration is based on egalitarianism's Equality Thesis. According to the feature of Equality, every human being is considered to be an equal member of the high rank of dignity with the same rights as any other human being.[457] The Equality feature follows conceptually: if there were some who possessed an even higher status within the high status of dignity, then dignity would not signify the highest rank.[458] There would, instead, be two ranks: that of superior beings who hold dignity, and that of inferior beings who do not. But such distinctions are precisely what the egalitarianism of human rights aims to combat. As George Kateb puts it,

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453 Censer and Hunt (n 191) 21.

454 Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 37.

455 ibid 11.

456 Roche (n 33) 357, 364.

457 That is not to say, however, that everyone who endorses human equality does so based on an Aristocratic theory, see eg Rossello (n 32) 761 (on Phillips's egalitarianism); for the claim that human rights are not egalitarian, but sufficientarian, see Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018).

458 See however also Michael Meyer, 'The Simple Dignity of Sentient Life: Speciesism and Human Dignity' (2001) 32 Journal of Social Philosophy 115.

"[e]qual status means that the question of which individuals in the human species are 'best of breed', let alone 'best in show', is out of order. Of course people vary in their talents and innate abilities, and in the manner of their acculturation, but that undefinable fact is irrelevant to human status."[459] In Kateb's conception of dignity, the equal status of every human being constitutes the necessary correlate to the high rank of the human species as a whole (which he calls humanity's "stature").[460]

Equality is also connected to the idea of heredity. Every human being, regardless of his or her capacities, possesses human rights and dignity simply in virtue of being born human. As Ferrone points out, it was one of the Enlightenment egalitarians' main claims that the rights of man are "equal for all individuals, with *no distinction of birth*, census, nationality, religion, gender, or skin color".[461] This is also emphasised in the Catholic *imago Dei* doctrine. As discussed in Chapter 1, this doctrine has long formed a cornerstone of egalitarian thinking.[462] God's creation of man in his own image established a special bond between the human species and God. Because of this bond, an assault on a human being constitutes an assault on God, who is mirrored in the human.[463] The Encyclical *Quod Apostolici Muneris* of Pope Leo XIII summarises the Church's position on equality as follows:

> the equality of men consists in this: that all, having inherited the same nature, are called to the same most high dignity of the sons of God, and that, as one and the same end is set before all, each one is to be judged by the same law and will receive punishment or reward according to his deserts.[464]

Another often-invoked foundation of the equality of all human beings is Kant's *Rechtslehre*. In it, Kant argues that humanity possesses one innate right; the right to equal freedom.

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459 George Kateb, *Human Dignity* (Harvard University Press 2011) 9.

460 ibid 130–131.

461 Ferrone (n 42) xi (emphasis changed).

462 See Chapter 1, Subsection 3.1.

463 James Hanvey, 'Dignity, Person, and Imago Trinitas' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014) 216–217.

464 Pope Leo XIII, 'Quod Apostolici Muneris: Encyclical of Pope Leo XIII on Socialism' 3, para 5 <http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_28121878_quod-apostolici-muneris.html> accessed 21 July 2019.

Every human being has a natural right to freedom, which Kant defines as "independence from being constrained by another's choice".[465] This right exists to the degree that it is compatible with the freedom of everyone else.[466] Freedom, under this conception, *has* to be equal for all human beings. This is because if anyone possessed more freedom than I did, then that person could bind me more than I could bind her, which would subject me to her whim (*Willkür*).[467] As Arthur Ripstein has pointed out, Kant's view of equal freedom is not substantive in the sense that it aims at guaranteeing equal levels of well-being to all humans. It is, instead, purely "interpersonal".[468] Human beings, on this interpersonal account, stand to each other in a "reciprocal relation of choice"[469] in which "you are independent if you are the one who decides what ends you will use your means to pursue, as opposed to having someone else decide for you".[470] Kant's argument on equal freedom still echoes in modern equal rights accounts. It can be found, for example, in John Rawls's account of free and equal persons,[471] or Dworkin's theory that all humans are owed equal concern and respect.[472]

Equality is a feature that can also be found in the actual nobility. Within the rank of noblemen, all members were in principle considered to be equals. To be sure, by comparison with equality in human rights, noble equality left a lot to be desired. Nobles were keen on drawing distinctions between what they regarded as superior and inferior members of their caste.[473] A crucial distinction, for example, was that between the nobility of the sword and the nobility of the robe. The

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465 Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor ed, Cambridge University Press 1996) 6:237, 30.

466 ibid.

467 See ibid 6:238, 30.

468 Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 36.

469 Kant (n 465) 6:230, 24. As Kant notes, this relationship is purely a matter of form. The content of choice (what Kant calls its "matter") is therefore irrelevant.

470 Ripstein (n 468) 33.

471 See Robert S Taylor, *Reconstructing Rawls: The Kantian Foundations of Justice as Fairness* (Penn State University Press 2011) 59.

472 Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury 2013) 326; see Luke MacInnis, 'The Kantian Core of Law as Integrity' (2015) 6 Jurisprudence 45, 45. For a similar argument on the "equal respect for persons", see Eleftheriadis (n 16) 118–119.

473 Roche (n 33) 365.

nobility of the sword was the more classical form of nobility of those who devoted their lives to military careers. The nobility of the robe, on the other hand, was a more recent seventeenth century phenomenon, which encompassed aristocrats who served as magistrates, and who were considered to be less distinguished than their brethren of the sword.[474] Other lines were drawn between rich and poorer nobles, and, as hinted at above, between newer noble families and nobles of old stock.[475]

However, from the point of view of most people, these internal distinctions were hardly noticeable. "All they could see", the historian William Doyle has argued, "was that everybody who held any sort of public authority also enjoyed the status and privileges of nobility; and that little social esteem was enjoyed by anybody without them."[476] Indeed, despite the abovementioned internal distinctions, it was still the case that every nobleman was a member of a class that was considered to be apart from the rest of the population. The unifying element of all nobles, which also served as the basis for their privileges, was the concept of honour. Whether rich or poor, sword or robe, new or old stock: all nobles demanded respect for their rank based on the inherent honour they believed to possess. In order to protect this honour, aristocrats were, for example, particularly careful not to engage in undignified menial work or not to marry below their status.[477] Honour, in Doyle's words, "made nobles feel equal. [It] was a quality which they all shared and were all committed to defending."[478]

Hence, despite internal skirmish, the aristocracy still largely relied on the idea of equal status and equal privileges.[479] And like the rights of human beings today, these privileges and benefits were considerable. For instance, in most provinces in France, aristocrats were exempt from the direct land tax (the so-called *taille*) and from other public burdens, such as billeting troops or paying taxes on the consumption of salt (the *gabelle*). The lawsuits of noble persons were adju-

474 See Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 23.

475 ibid 26; see also Roche (n 33) 362–365.

476 Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 26.

477 ibid 18.

478 ibid 19.

479 ibid 34.

dicated by special courts, and in criminal trials, nobles could not be subjected to corporal punishment. If sentenced to death, nobles were decapitated rather than hanged. Finally, noblemen had the privilege of electing their representatives to the Estates General.[480]

3.3 Exclusivity

The third and final feature of equal consideration is Exclusivity. The hereditary status of equal dignity and rights comes at the cost of excluding all those who are not members of the status. As Kateb has rightly emphasised with respect to human dignity, the equal status and rights of individual human beings is but one side of the coin. The other side is that of exceptional stature of the human species as a whole and, consequently, the unexceptional stature of all other species: "The core idea of human dignity is that on earth, humanity is the greatest type of beings".[481] Ascertaining the special status of human beings necessarily implies distinguishing members of this status from non-members. The relationship is one that is often inversely proportional: the more one lifts humanity's status and praises its dignity, the more one lowers the status of others. This exclusionary function of human dignity and rights is often neglected in current human rights discourse.[482] As Alasdair Cochrane has observed,

> while human rights eschew exclusions based on nationality, gender, ethnicity, religion, age, ability, and so on, it would be quite wrong to think that the contemporary idea of human rights does not have exclusions of its own. After all, human rights are for humans only: they exclude each and every entity that does not belong to the human species. Interestingly, the exclusive nature of human rights is rarely remarked upon.[483]

A possible reason for this neglect could be that many regard it as difficult enough to secure for all human beings the protection of their dignity and human rights. The fact that there are other beings who are excluded from this status and the privileges is, at best, of secondary importance.

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480 ibid 13–14; for an extended list, see Doyle, *The Oxford History of the French Revolution* (n 219) 27; see on noble privileges also Roche (n 33) 361.

481 Kateb (n 459) 3, 6; see also Wise, 'Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy' (n 5) 888.

482 See for further references on this: Alasdair Cochrane, 'From Human Rights to Sentient Rights' (2013) 16 Critical Review of International Social and Political Philosophy 655, 655.

483 ibid.

Yet, the issue remains that, necessarily, some will not share in humans' high status and equal rights. Inequality is as much a part of human dignity as equality.[484]

Exclusivity is a feature the Aristocratic conception has in common with the real nobility. The fact that noblemen belonged to a high status with equal privileges entailed that there had to be others of a lower status who were denied these privileges. As Roche points out, in the Ancien Régime, the Third Estate was "defined negatively, based on the things it was excluded from", such as high birth and blue blood.[485] Exclusivity was thus inherent to nobility. Kateb has noted in a similar vein that "[a]ristocracy, from its nature, practices exclusion, selectivity, and sharp difference from the mass. Like anything high and intricate, aristocratic values are denatured or contaminated or diluted by being disseminated beyond a small caste."[486]

Before the French Revolution, the small class of privileged aristocrats consisted of approximately one to three hundred thousand members.[487] The French who were excluded from nobility, on the other hand, made up roughly twenty-five million.[488] Revolutionaries like Emmanuel-Joseph Sieyès could therefore plausibly argue that it was the excluded group which had the right to assert its authority over the smaller fraction of aristocrats, and not the other way around.[489] For a long time, however, people believed that the exclusion of great shares of the population was justified by the fact that the natural order which God had ordained was perfectly harmonious. This harmony would be destroyed if commoners were suddenly promoted to a status for which they were not meant to be.[490] Regardless of the rationale that was adduced to support the status of nobility, the

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484 I adapt this phrase from Doyle, cf Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 20. See also *infra* footnote 491.

485 Roche (n 33) 353. Roche argues that privileges did not belong to these "things" because the Third Estate had its own privileges.

486 Kateb (n 459) 95. Kateb mistakenly claims that "aristocracies are … unaware of the idea of equal human dignity [or] … defer the question of equality of the status to the afterlife" ibid 94–95. On the contrary, as I show, aristocracy and equal human dignity are closely related concepts.

487 Doyle, *The Oxford History of the French Revolution* (n 219) 28.

488 See ibid 2 (mentioning a total of over twenty-seven million inhabitants of France in the 1770s); Emmanuel Joseph Sieyès, *Qu'est ce que le Tiers-État?* (Flammarion 1988) 161 (talking of twenty-five million non-nobles).

489 See Sieyès (n 488) 140.

490 See Keith M Baker (ed), *The Old Regime and the French Revolution*, vol 7 (University of Chicago Press 1987) 119–120.

fact remained that it was premised on the assumption that some beings are superior to others. "Inequality", as Doyle puts it, "was built into the very idea of nobility".[491]

Let me note one last point. As was mentioned above, some accept the exclusion of animals as the inevitable cost of lifting the status of human beings. Diego Rossello, who calls this approach "species aristocratism",[492] argues that theories such as Waldron's "turn … the human family into new Bourbons or Tudors, at the expense of the underdog of other forms of life".[493] Species aristocratism has been challenged not only for what it does to animals, but also for undermining its own goal of promoting human rights. For instance, Kymlicka has pointed out that there is empirical evidence which suggests that those who establish a sharp divide between humans and other animals are also more likely to discriminate against humans who belong to outgroups.[494] Based on this evidence, Kymlicka proposes that we should abolish or at least reduce the status divide between humans and other animals.[495] While there are indeed studies that support Kymlicka's argument, there are also others which seem to suggest that, under certain circumstances, drawing a hard and fast line between humans and animals *can* serve to strengthen rather than undermine humanity. For example, as TJ Kasperbauer has noted, if similarities between humans and animals are emphasised to too great an extent, people will experience "a defensive reaction, leading to negative judgments"[496] about animals and, possibly, human outgroups. An important factor for such reactions is the psychological threat that human beings perceive if they are reminded of their own mortality (so-called mortality salience).[497] As Kasperbauer observes, animals trigger mortality salience in humans not only because of the direct threat they can pose to humans' well-being, but also because they "threaten the uniqueness and superiority of human beings in the natural order of things".[498] Studies have found that because many people consider humans to be superior to

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491 Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 20.

492 Rossello (n 32) 750.

493 ibid 765.

494 Kymlicka (n 389) 773–774, with further references.

495 ibid 774.

496 TJ Kasperbauer, *Subhuman: The Moral Psychology of Human Attitudes to Animals* (Oxford University Press 2018) 189.

497 ibid 49.

498 ibid.

animals, "highlighting the differences between humans and animals is an effective way of reducing the psychological threat posed by mortality salience".[499] As a result, Kasperbauer argues that attempts at abolishing the species divide by using human-animal comparisons are inherently limited.[500] Even if Kymlicka were right that, in practice, distinguishing between humans and animals often leads to discrimination between human beings and that abolishing the species divide was the right solution to this problem, proponents of the Aristocratic conception could still insist that such practical findings do not undermine the validity of their position. After all, the Aristocracy is an ideal-type, which diverges from actual practices. Hence, Aristocrats can hold that their position is theoretically valid, even if practices and human psychology would have to change in order for their account to be fully implemented.

4 Agent-focus

With this answer to the question what the Aristocratic status of dignity and equal rights is, we can now turn to the issue *why* human beings possess this high rank and the corresponding rights.[501] Put differently: what justifies the fact that only human beings possess this status, and that all nonhumans are excluded from it? Why put humans on a pedestal?[502] In this section, I will argue that the answer that proponents of the Aristocracy give is that the human species is special in some important way and therefore separate from other beings. This is an idea, of course, that we have already encountered in the Separateness Thesis in Chapter 1. Identifying in which way exactly humans are unique is a matter of long-standing debate.[503] Oft-invoked candidates include features

499 ibid 50, with further references.

500 ibid 189.

501 As Kymlicka puts it, "[t]he sanctification of humanness naturally leads people to ask why humans are owed this sanctification": Kymlicka (n 389) 785, footnote 29.

502 As we will see in Chapter 3, Subsection 3, the Meritocratic conception does not have to answer this question because it does not give a special status to any species or other group of beings.

503 See on this Anne Peters, 'Liberté, Égalité, Animalité: Human–Animal Comparisons in Law' (2016) 5 Transnational Environmental Law 25, 26–28.

such as rationality, autonomy, intelligence, language, self-consciousness, and altruism.[504] My purpose here is not to decide which—if any—is the correct feature. Rather, my point is to highlight the fact that the Aristocratic conception requires what I call a *founding myth*: it needs to pick out *some* feature or features in order to justify why we should treat humans and animals in categorically different ways. The features that are adduced as justifications are often linked to humans' mental capacities. This seems unsurprising considering that the very term which denotes our species—*Homo sapiens*, "wise man"—is based on our intelligence.[505] One compelling rendering of this emphasis on humans' mental abilities is that it expresses the idea that humans have the unique characteristic of being *agents*.[506] Lori Gruen defines agents in the moral context as beings who "have certain capacities that allow them to make reflective choices about their actions and to attend to those who may not be able to make such choices but who nonetheless have lives that will be affected, for better or worse, by our actions".[507] Agents, Gruen continues,

> have the capacity to reason about their actions and alter their behaviours accordingly. Moral agents can form intentions about their actions; are causally responsible for actions and can be blamed or praised for them; are able to make judgments about rightness and wrongness, both of their own conduct and of the conduct of other agents; and can construct and follow norms or moral principles.[508]

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504 See for a detailed account Lori Gruen, *Ethics and Animals: An Introduction* (Cambridge University Press 2011) 4–22, 57–58.

505 See Phillips (n 32) 18.

506 But note that agents may sometimes also be patients: Gruen (n 504) 61; for a critical take on this distinction, and for an argument that animals are "moral subjects", not moral patients because they can act for moral reasons, see: Mark Rowlands, *Can Animals Be Moral?* (Oxford University Press 2012) 71–98 (however, because animals cannot be held responsible for these acts, Rowland does not consider them to be moral agents either); see also on accounts that try to dissociate mental capacities from agency: Markus Schlosser, 'Agency' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2015 edn) <https://plato.stanford.edu/archives/fall2015/entries/agency/> accessed 21 July 2019; for a feminist critique of the conception of agency presented here, see eg Nancy Nyquist Potter, 'Embodied Agency and Habitual Selves' (2013) 20 Philosophy, Psychiatry & Psychology 75, 76–77.

507 Gruen (n 504) 60.

508 ibid 61.

Agents can be held responsible for their actions because they are presumed to have a certain autonomy in virtue of their reflective capacities. These capacities allow them "to step back from … mere impulses in order to determine when and whether to act on them".[509] On Gruen's account, agents thus differ from "moral patients [who] are the recipients of moral attention and concern, but they do not have the moral responsibilities that moral agents, as persons, do".[510]

Gruen's account captures well the central distinction between moral agents and moral patients. However, because the ideal-types under consideration in this thesis combine both moral *and legal* elements, we need to modify her definition to provide a suitably broad definition of agency (and, in Chapter 3, of patiency). Building on Gruen's account, I propose to define "agency" as the capacity to make reflective choices about one's actions not only in the moral domain but also in the legal domain. This means that agents are capable of shaping the course of their own lives by making choices that, in general, they are able to put into practice, and for which they can be held responsible legally and/or morally. It is of course possible to disagree with this rough definition of "agency" or more generally with my proposal that the Aristocratic conception is based on the founding myth that human beings are special because they are agents. However, as long as a mental feature is singled out as the distinguishing trait of humanity, something close enough to my definition and to my analysis in this section will follow.

In Subsection 4.1, I will elucidate the notion of humans as agents. Subsection 4.2 discusses responses to the challenge that not all human beings are agents. In Subsection 4.3, finally, I will point out some of the central implications of the Aristocratic conception's focus on agents. As I will show there, the Aristocracy stresses agents' capacity to *choose* whether others should fulfil duties toward them; it emphasises the *reciprocal* nature of rights and duties; it accords rights on a *wholesale* basis; and it takes these rights to be *absolute*.

4.1 Human agents

In his seminal *Oration on the Dignity of Man* (1486), the Florentine Giovanni Pico della Mirandola painted a particularly memorable picture of the kind of human being who holds dignity; a picture,

[509] ibid 62.

[510] ibid 60.

indeed, that we can still find in contemporary human dignity and rights scholarship. The holders of dignity, Pico della Mirandola argued, are "*shapers*" of themselves:

> We have made you a creature neither of heaven nor of earth, neither mortal nor immortal, in order that you may, as the free and proud shaper of your own being, fashion yourself in the form you may prefer.[511]

According to Pico della Mirandola, human beings are special and deserve our highest esteem because they possess free will.[512] Humans are like "chameleons", he points out, in that they are "born into this condition of being what we choose to be".[513] Importantly, for Pico della Mirandola, not all human beings have the capacity to shape their own and others' lives. Not all human beings are agents, in other words. Those who lack this capacity do not only fail to qualify for human dignity on Pico della Mirandola's account. Even their quality as human beings is called into question: "If you see a man dedicated to his stomach, crawling on the ground, you see a plant and not a man".[514] Determined by their instinct, these non-agents are "fixed in the mode of being which would be theirs through measureless eternities".[515] Salaville, as we saw above, also based his theory on the view that humans have unique mental capacities. According to him, only humans possess intelligence. As intelligent beings, they do not simply live in the present, but have a sense of the future and the capacity and desire to shape it.[516] It is in virtue of this ability that humans deserve a special kind of respect and possess a right to have rights.[517]

More recently, an explicitly agent-based conception of human rights has been defended by Griffin, according to whom "the word 'human' in the phrase 'human rights' … should mean,

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511 Giovanni Pico della Mirandola, *Oration on the Dignity of Man* (Robert Caponigri tr, 3rd edn, Henry Regnery 1956) 7.

512 See ibid 4, 7–8.

513 ibid 12.

514 ibid 10.

515 ibid 8.

516 Salaville, *De l'homme et des animaux* (n 279) 33–34.

517 ibid 6.

roughly, a functioning human agent".[518] Another proponent of this view is Gewirth. On his account, all agents are ends-in-themselves and must be free and able to exercise their agency.[519] Freedom and well-being are thus necessary goods to which every agent *qua* agent has a right.[520] Since all human beings are either actual or potential agents (we will consider the potentiality argument in the next subsection), these agency rights qualify as *human* rights.[521] Kateb has argued in a similar vein that only human beings have the capacity to make self-conscious choices. Humans are "the only animal species that is not only animal, the only species that is partly not natural, and that is therefore unpredictable in its conduct".[522] Self-consciousness, Kateb points out, is the basis for all agency, and the source of all the "immeasurable potentiality" of human beings, that is, their infinite creativity.[523] In Richard Rorty's words, "[w]e are coming to think of ourselves as the flexible, protean, self-shaping animal".[524]

There are some interesting parallels here with what was considered to be an ideal aristocrat. Because aristocrats possessed a high status with special privileges, it was expected from them that they surpass those of lower rank in both physical and moral attributes.[525] From a physical perspective, nobility's "highness" was expressed in specific qualities of appearance and composure. As Waldron argues, associated with persons of dignity are things such as "having a certain sort of presence; uprightness of bearing; self-possession and self-control; self-presentation as someone to be reckoned with".[526] Physical attributes of nobility also served as one of its central rationales. Since the Middle Ages, the French realm was functionally divided into three orders (or Estates): *oratores*, *laboratores*, and *bellatores*. The order of the *oratores* was made up of the clergy, whose role was to pray. To the order of the *laboratores* belonged the large group of peasants whose

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518 Griffin (n 37) 35.

519 Alan Gewirth, 'Are There Any Absolute Rights?' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press 1984) 100.

520 Gewirth (n 440) 50, 52.

521 ibid 66.

522 Kateb (n 459) 11.

523 ibid 131, 162–163. Kateb presents a more extended list of uniquely human traits, which, he argues, are all tied to the fact that humanity is partly non-natural (ibid 133).

524 Richard Rorty, *Human Rights, Rationality, and Sentimentality*, vol 3 (Cambridge University Press 1998) 170.

525 Waldron calls these attributes the "moral orthopedics" of nobility: Waldron, *Dignity, Rank, and Rights* (n 6) 22.

526 ibid 21–22.

purpose was to work, especially for the production of food. The *bellatores*, finally, was the order of the nobility, whose function was to fight.[527] Aristocrats' position in the realm was thus defined, among other things, in virtue of their physical strength and stratagem—features that all presupposed agency. In addition to these physical components of nobility, the ideal aristocrat was also expected to possess special moral attributes. As Waldron notes, holders of dignity should not be "abject, pitiable, distressed, or overly submissive in circumstances of adversity".[528] They should furthermore have the moral propensity to fulfil their social responsibilities toward the other strata of the population. *Noblesse*—as the French expression goes—*oblige*. And this entailed that only those who were willing and able to satisfy their obligations could be true aristocrats. In other words, one had to be an agent in the sense defined above to be a real nobleman.

4.2 Human non-agents

How can such a focus on agents be reconciled with a fundamental rights conception that wants to lift all and only human beings to a special status and give them equal rights? What about the fact that not all human beings are agents? Do those who lack the necessary capacities to act as agents—due to for example their young age, mental disability, or old age—get the same dignity and the same rights as humans who are agents? And what about nonhumans who are agents?

Proponents of the Aristocratic conception have increasingly come to realise that these questions—which often arise under the heading of the so-called "marginal cases" problem, raised by humans who are thought to be at the margin of humanity[529]—pose a serious challenge to the Aristocratic conception. This is because that conception is founded on the myth that *all* humans are special because they are agents—or rational, capable of language, etc., depending on your preferred conception of human exceptionalism. In fact, "marginal" human beings are arguably those who are most in need of human rights protection. Their inclusion in the community of equals is therefore particularly pressing.[530] In a nutshell, then, the issue is how to reconcile an Aristocratic

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527 Georges Duby, *The Three Orders: Feudal Society Imagined* (Arthur Goldhammer tr, University of Chicago Press 1980) 102–103.

528 Waldron, *Dignity, Rank, and Rights* (n 6) 22.

529 For an insightful discussion of the marginal cases argument, see Gruen (n 504) 64–75.

530 Cochrane, 'From Human Rights to Sentient Rights' (n 482) 661.

human rights approach which, as Kateb points out, "puts *functioning* human beings at the centre"[531] with universal and equal rights for *all* human beings.

Aristocrats have proposed a number of solutions to this problem. First, they argue that the seeming tension between a focus on agents and universal and equal rights disappears once we understand that a feature like agency can be possessed equally despite coming in degrees. Hence, the fact that some humans have less agency than others does not necessarily mean that they have fewer or weaker rights. The reason for this, Aristocrats suggest, is that agency should be understood as a *range property*. Range properties are properties that contain a threshold. Every entity that meets this threshold possesses the property equally. For example, the property of being east of London is a range property. Whether Canterbury, Dover, or indeed Paris—they all pass the threshold of being east of London, even though some of them are further east than others. John Rawls, who introduced the notion of range property in *A Theory of Justice*, argued that moral personality (understood as the faculty of having a conception of one's own good and a sense of justice) is a range property. Although peoples' capacities to form a conception of their own good and of having a sense of justice come in varying degrees, they are all moral persons if their capacities meet the minimum threshold for moral personality.[532]

In the same way, proponents of the Aristocratic conception can argue that all humans who meet a certain threshold of agency are equal agents, occupying an equal status with equal rights. This is the view advocated by Griffin, according to whom the fact that agency comes in degrees does not entail that human rights also have to come in degrees: "Anyone who crosses the borderline, anyone who rises any degree above the threshold, is equally inside the class of agents, because everyone in the class thereby possesses the status to which we attach high value."[533] Hence, if we understand agency as a range property, then that "property on which the superiority of the human over the non-human supervenes is also the basis on which humans among themselves are designated as equal", as Waldron has noted.[534]

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531 Kateb (n 459) 19 (emphasis added).

532 Rawls (n 10) 506.

533 Griffin (n 37) 44–45.

534 Jeremy Waldron, *One Another's Equals: The Basis of Human Equality* (Belknap Press of Harvard University Press 2017) 64.

The range property device solves some of the issues that are raised by the challenge that humans possess agency to different degrees.[535] However, it does not solve all its problems. In particular, the issue remains that not all human beings meet the required threshold. To address this issue, proponents of the Aristocratic conception have resorted to at least two arguments: the Argument from Potentiality and the Argument from Normality.

According to the Argument from Potentiality, human beings who are not currently agents have (or at least had) the potential of becoming agents. The temporally comatose and children, for example, possess agency because they have the potential of (re)developing the capacity for agency.[536] In his work on Aristocratic dignity,[537] Waldron has adopted this position to defend his focus on human agents while at the same time upholding his claim that human dignity is best understood as a status that has been extended to all human beings. The problem of marginal human cases can be resolved, Waldron suggests, once we see that while they may not be born in the full state of dignity, they are born *to* it: "like heirs to an aristocratic title, their present status looks to a rank that they will occupy (or are destined to occupy)".[538]

But what about human beings who are permanently mentally disabled and who lack any such potential? As Rawls himself realised, these cases "may present a difficulty".[539] To resolve this difficulty, Matthew Liao has proposed that we can salvage the Argument from Potentiality if we accept that even humans who are permanently mentally disabled have at least the genetic *basis* for agency.[540] Focusing on moral agency in particular, Liao argues that all and only human beings possess the genetic basis for the development of moral agency. What Liao has in mind is a set of genes which, although we have not yet identified which ones they are exactly, are the basis for

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535 At least if we ignore the issue why the relevant property ceases to matter above the threshold.

536 Rawls (n 10) 509.

537 In his more recent work on basic equality, Waldron has further developed this approach, arguing that equality is grounded in a set of properties which are characteristic of human's biological makeup and which must be regarded as being on a trajectory: Waldron, *One Another's Equals: The Basis of Human Equality* (n 534); see on this in more detail Raffael N Fasel, 'One Another's Equals: The Basis of Human Equality by Jeremy Waldron' (2018) 77 Cambridge Law Journal 230.

538 Waldron, *Dignity, Rank, and Rights* (n 6) 29 (emphasis in original).

539 Rawls (n 10) 510.

540 Matthew S Liao, 'The Basis of Human Moral Status' (2010) 7 Journal of Moral Philosophy 159.

moral agency, that is, the capacity to act on moral grounds. According to Liao, the genetic basis of moral agency grounds human rights, which is why all and only human beings hold human rights.[541] In a recent paper, James Bernard Murphy has proposed a similar argument.[542] Murphy claims that every human being possesses in its genotype the roots of the relevant feature (personhood for Murphy) that grounds human status and rights:

> [No] degree of immaturity, disease or injury to the human phenotype could possibly remove the roots of those capacities in the human genotype or genome. To say that human capacity for personhood is ineradicable is to say that those capacities are radical, that is, rooted in the deepest core of human being. A human being who lacked any genetic capacity for personhood would no longer be human at all. Personhood is an essential property of human beings.[543]

An alternative approach to solving the problem raised by the Aristocratic focus on agents is the Argument from Normality. According to this argument, there may well be human beings who lack the capacities and even the potential necessary for agency. However, the argument goes, all *normal* human beings have these capacities.[544] On this view, a human being who does not have the capacities for agency is a tragic case, because she has (temporarily or permanently) failed to live up to a certain normal development which was expected from her. As Waldron puts it, such an "individual may have suffered the misfortune of the unfolding of [the relevant] capacity going badly wrong, leading to profound disability, in which case the individual concerned bears a tragic relation to the capability".[545] The notion of "tragedy" suggests that these humans are exceptions that confirm the rule. And that rule is that normal human beings *are* agents. What is more, while there may well be other animals who are agents—say, exceptionally clever chimpanzees—normal members of their species are not agents. Based on the Argument from Normality, it could thus be

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541 See for a critical analysis of Liao's argument Fasel, '"Simply in Virtue of Being Human"? A Critical Appraisal of a Human Rights Commonplace' (n 438) 18.

542 See James Bernard Murphy, 'Justifying Human Rights: The Threat and the Promise' (2017) Presented at the 'Law as a Guide for Justice' conference, University of Cambridge, 4 March 2017 (on file with author).

543 ibid 9.

544 See eg Hans-Johann Glock, 'The Anthropological Difference: What Can Philosophers Do To Identify the Differences Between Human and Non-Human Animals?' (2012) 70 Royal Institute of Philosophy Supplements 105, 126–127.

545 Waldron, *One Another's Equals: The Basis of Human Equality* (n 534) 251.

maintained that agency remains the unique trait of humanity, exceptional human and nonhuman cases notwithstanding.

As with the Potentiality Argument, there are of course numerous difficulties with the Normality Argument (I will address the main difficulties in Chapter 3). My aim here is not to discuss—and much less to solve—these difficulties. Rather, it is simply to point out that proponents of the Aristocratic conception have not overlooked the issues raised by their focus on human agents. Whether or not we find their responses to these issues convincing deserves more attention than I can devote here.[546] For the time being, we should therefore simply note that Aristocrats believe that they can show that a focus on humans as agents is not irreconcilable with their equal status and rights.

4.3 Implications

Having addressed the issue of human non-agents, we can now analyse in more detail some of the key respects in which the Aristocracy's focus on agents influences its conception of the holder of human rights and the nature of these rights. As I will show in what follows, the Aristocratic conception conceives of rights-holders—in line with the choice theory of rights—as agents with the capacity to *choose* whether others should fulfil their duties toward them; it takes rights and duties to be *reciprocal*; it adopts a *wholesale* approach to the distribution of rights; and it considers these rights to be *absolute*.

The first and central implication of Aristocrats' focus on agents is their endorsement of what are known as *choice* (or will) theories of rights. As did Pico della Mirandola, choice theorists take as their focal subject the human agent who is capable of shaping his own and other people's lives. According to a prominent proponent of the choice theory, HLA Hart, *Y* is a rights-holder if he is "in a position to determine by his choice how *X* shall act and in this way to limit *X*'s freedom of choice".[547] According to choice theories such as Hart's, it is irrelevant whether *Y* has an interest

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546 I have addressed some of these issues in: Fasel, '"Simply in Virtue of Being Human"? A Critical Appraisal of a Human Rights Commonplace' (n 438) 17–20; see also Kymlicka (n 389) 779, with further references.

547 HLA Hart, 'Are There Any Natural Rights?' (1955) 64 The Philosophical Review 175, 180 (emphasis added).

in demanding performance from *X* or waiving her duty (even though this will usually be the case).[548] What matters, instead, is that *Y* is an "adult human being capable of choice".[549]

In choice theories, "[r]ights reek of dignity", as Waldron observes.[550] This is so, because "the very form and structure of a right conveys the idea of the right-bearer's dignity. Right-bearers stand up for themselves; they make unapologetic claims on their own behalf; they control the pursuit and prosecution of their own grievances."[551] It is these claims and pursuits that rights are there to protect under choice theories. To fulfil this role, rights create "domains of freedom", as the contemporary choice theorist Nigel Simmonds has put it. These domains are protected by a complex set of claim-rights and privileges, and corresponding duties and no-rights.[552] In Hart's words, the purpose of these domains is "to make the right-holder's will supreme within a certain province of concerns";[553] that is, to make human agents "small-scale sovereigns".[554] Joel Feinberg describes this approach succinctly. Rights, he observes,

> 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.[555]

According to Feinberg, then, one of the central manifestations of humans' ability to "stand up like men" is the ability to claim one's own rights. In fact, he argues that it is this ability which

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548 ibid.

549 ibid 175.

550 Waldron, *Dignity, Rank, and Rights* (n 6) 50.

551 ibid 49–50.

552 See on these legal positions in detail Hohfeld (n 13).

553 Nigel E Simmonds, 'Rights at the Cutting Edge' in Matthew H Kramer, Steiner Hillel and Nigel E Simmonds (eds), *A Debate Over Rights: Philosophical Enquiries* (Oxford University Press 2000) 179.

554 HLA Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford University Press 1982) 183.

555 Joel Feinberg, 'The Nature and Value of Rights' (1970) 4 The Journal of Value Inquiry 243, 252; but see also his Joel Feinberg, 'The Rights of Animals and Unborn Generations' in William T Blackstone (ed), *Philosophy & Environmental Crisis* (University of Georgia Press 1974), where he argues for an interest-based approach to rights on which animals can be rights-holders; see on this Christopher Heath Wellman, 'Feinberg's Two Concepts of Rights' (2005) 11 Legal Theory 213.

explains why humans have dignity: "what is called 'human dignity' may simply be the recognisable 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."[556]

Once the capacity to claim one's own rights is made the yardstick of rights-holding, then it follows that those who lack this capacity cannot be rights-holders. Hart is explicit about this: "These considerations should incline us not to extend to animals and babies whom it is wrong to ill-treat the notion of a right to proper treatment".[557] While, as he indicates, it can still be wrong to harm non-agents, they do not have a *right* against such harmful treatments. This is because non-agents lack free will and are incapable of making their own choices.[558] Numerous contemporary human rights scholars follow choice-based rights theorists in focusing on the capacity of humans to choose and to claim their rights. Griffin, for example, builds his human rights account around normative agency (or personhood, as he sometimes calls it), which he defines as the capacity to choose and to pursue a worthwhile life.[559] Only agents in this sense possess human rights, Griffin argues, which is why "human rights should not be extended to infants, to patients in an irreversible coma or with advanced dementia, or to the severely mentally defective".[560]

The choice-based approach to human rights does not only account for the dignity and equal rights of agents, but it also explains the normative importance of their equality. As Kateb points out, "[i]n exercising a right, one shows that one is aware of being free and also demonstrates what being free means. One exemplifies one's status as free and equal."[561] To better understand the link between choice and equality, it is helpful to recall the Kantian spirit of the Aristocracy. Principally, these theories are concerned with determining the conditions of freedom under which individuals can legitimately exercise their choices over others and under which it is legitimate to enforce these choices.[562] "You are a sovereign as against others", Ripstein explains, "not because you get to

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556 Feinberg, 'The Nature and Value of Rights' (n 555) 252 (emphasis in original).

557 Hart (n 547) 181.

558 They are not "loci of choice or will", as Simmonds puts it: Simmonds, 'Rights at the Cutting Edge' (n 553) 224.

559 Griffin (n 37) 44–45.

560 ibid 95.

561 Kateb (n 459) 22.

562 See Hart (n 547) 178. Ripstein believes that Kant's theory of rights is neither an interest-approach to rights nor a will theory. He argues that in contrast to both interest and will theories, Kant's approach does not protect

decide about the things that matter to you most, but because nobody else gets to tell you what purposes to pursue".[563] Only human agents have the capacity to determine their own purposes. As Gewirth points out, agents would contradict themselves if they did not accept that all other agents possess the same human rights as they do.[564] It is their status as agents—protected by human rights—which they share equally with all other agents.[565]

The second implication of the Aristocracy's agent-focus is that it considers rights and duties to be *reciprocal*. On this account, a being can be a rights-holder only if it can reciprocate the duties that correspond to the same rights in others.[566] As Salaville put it,

> the existence of a right necessarily implies that of a duty; the right to have my person or property respected cannot be separated from the duty to respect that of others, and the same holds true for all rights. It would thus be necessary for animals to have rights that they could also have duties, which they cannot.[567]

For me to have a right to property, for example, others would have to have a corresponding duty not to interfere with my property. In order for my right to exist, these people have to be able to respect their duties. Indeed, only if they can reciprocate my right do I have a duty to reciprocate theirs. The Kantian character of choice theories helps to explain why reciprocity is an implication of the Aristocratic focus on agents. If there was no such formal equality between rights-holders and duty-holders, then I would subject myself to the will of the other. That is, I can maintain my status as a "small scale sovereign" only if equality is maintained.[568] Non-agents simply do not fit into this scheme of "reciprocal relations of choice" because they are incapable of reciprocating duties. If I respect their right to bodily integrity, but they do not respect mine, I subject myself to their rule and fail to show self-respect. For this reason, non-agents cannot have any human rights.

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anything that is independent of the value of the rational being: Ripstein (n 468) 34. But see also Simmonds, 'Rights at the Cutting Edge' (n 553) 114–115, who classifies Kant as a "classic will theorist".

563 Ripstein (n 468) 34.

564 See *supra* 101.

565 Cf on this Ripstein (n 468) 14.

566 See for a critical account of this argument Edmundson (n 17) 350–357.

567 Salaville, *De l'homme et des animaux* (n 279) 6.

568 See Eleftheriadis (n 16) 84; see also Simmonds, 'Rights at the Cutting Edge' (n 553) 135.

Another implication of the focus on agents is that the Aristocratic conception takes a *wholesale*-approach to the distribution of fundamental rights. That is to say, it accords the same rights to all holders of fundamental rights.[569] Human rights, as some put it, are "indivisible".[570] Arnd Pollmann, who is himself critical of this view, has expressed its core idea succinctly when noting that human rights are seen "as if made from one piece".[571] *Qua* agents, all humans have all human rights, and they have all these rights to the same extent.[572] This wholesale-approach follows naturally from the Aristocratic view that agents are all equally endowed with free will, capable of forming and pursuing their own choices, equally able to claim their own rights and to reciprocate the corresponding duties. Such a view is incompatible with an unequal distribution of rights where only some agents would have all the human rights. If this were the case, then those with more rights could impose their will on those with fewer rights. The fine-tuned equilibrium of rights and duties would collapse, and with it, human inviolability. For this reason, every human agent has to possess the same set of human rights. Kateb, whose account has turned out to closely approximate the Aristocratic archetype, puts this point as follows: "The rights of each individual hang together: they form a whole of mutually supporting and enhancing entitlements."[573]

The wholesale character of human rights is reflected in the oft-encountered claim that human beings who are not (yet or anymore) agents do not have fewer human rights than humans who are agents. Rather, the claim goes, these human non-agents are simply unable to exercise the relevant rights because they currently do not actualise the necessary conditions for exercising them. For instance, it is sometimes argued that children possess the right to vote but do not yet meet the

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569 See eg Georg Lohmann, 'Die Menschenrechte: unteilbar und gleichgewichtig?' in Georg Lohmann and others (eds), *Die Menschenrechte: unteilbar und gleichgewichtig?* (Universität Potsdam 2005) 11.

570 See eg Daniel J Whelan, *Indivisible Human Rights: A History* (University of Pennsylvania Press 2010) 1.

571 Arnd Pollmann, 'Die Menschenrechte: teilbar und ungleichgewichtig!' in Georg Lohmann and others (eds), *Die Menschenrechte: unteilbar und gleichgewichtig?* (Universität Potsdam 2005) 29 ("aus einem Guss").

572 Lohmann (n 569) 30.

573 Kateb (n 459) 89.

necessary conditions, such as maturity and power of judgment, to actualise it. The right is nevertheless theirs by birth.[574]

One last implication of the focus on agents which I want to highlight is that it considers human rights and human dignity to be *absolute*.[575] If human agents are ends-in-themselves, then it follows that their rights must not be balanced against the interests of others or against the common good. The dignity and rights of human beings, as Kateb puts it, "cannot bear to be looked at as if they were always on probation".[576] They "are meant to be absolute, the absolute possession of every individual equally".[577] Feinberg argues in a similar vein that "the notion of a 'prima-facie right' makes little sense".[578] The reason for this absoluteness of human rights lies in the fact that the inviolability of rights-holders is mirrored in the inviolability of their rights.[579] This is also why the absoluteness of human rights and the *imago Dei* doctrine are closely related. If the integrity of a human being is violated, then so is that of God, because every human is an image of God. In the same way, if a human right is balanced against and outweighed by the common good, then so is the dignity of its holder.

This absoluteness of human rights and dignity in the Aristocracy contrasts markedly with the relative nature of the welfare protections that animals may be granted. As is the case in numerous jurisdictions today, animals can be protected through welfare laws which principally contain clauses prohibiting the imposition of unnecessary suffering on them.[580] In contrast to Aristocratic human rights, any such welfare protections are considered relative, meaning that they are subject to a balancing exercise in which, for example, an animal's interest in life and bodily and mental

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574 I am grateful to Gerald Neuman for drawing my attention to this point. For a critical take on this argument, see Fasel, '"Simply in Virtue of Being Human"? A Critical Appraisal of a Human Rights Commonplace' (n 438) 5–6.

575 See also Dieter Grimm, 'Dignity in a Legal Context: Dignity as an Absolute Right' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014) 386–391.

576 Kateb (n 459) 107.

577 ibid 89.

578 Feinberg, 'The Nature and Value of Rights' (n 555) 252, footnote 7.

579 Thomas Nagel, 'Personal Rights and Public Space' (1995) 24 Philosophy & Public Affairs 83, 90.

580 Wendy A Adams, 'Human Subjects and Animal Objects: Animals as Other in Law' (2009) 3 Journal of Animal Law and Ethics 29, 34.

integrity is balanced against countervailing human interests, such as the interest in medical progress. If the latter interests are considered sufficiently weighty to outweigh the former, then the animal's suffering is considered necessary and the animal has no protection against it. The observation that human dignity and rights are absolute and animal rights—to the extent that animals have any such rights—relative was famously expressed by Robert Nozick who called this position "utilitarianism for animals, Kantianism for people".[581]

Because of the Aristocratic view that human rights are absolute, legal systems which adopt a categorical approach to fundamental rights, such as the United States, approximate the Aristocracy to a greater degree than those that subject human rights to proportionality balancing. This is because the proportionality principle requires that rights be balanced against each other and against the common good. These legal systems thereby deprive rights of their absoluteness and put them "on probation".[582] According to Aristocrats, this raises a paradox for human rights advocates. Guided by a laudable goal, they argue for the extension of fundamental rights protection to all important human interests. By doing so, however, they deprive these rights of their very essence, that is, their peremptoriness.[583]

That human rights should serve as an enforceable barricade against the crude balancing of interests has been pointed out by numerous authors, only some of whom use the term "absoluteness". Others speak for example of "trumps",[584] "side-constraints",[585] or "lexical priority".[586] While differing on the details, all these conceptions share the view that there are certain things one

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581 Robert Nozick, *Anarchy, State, and Utopia* (Blackwell 1974) 39; for a recent empirical study which corroborates Nozick's intuition, see Lucius Caviola and others, 'Utilitarianism for Animals, Kantianism for People: Speciesism in Sacrificial Moral Dilemmas' (manuscript in preparation and on file with author) (who show *inter alia* that people consider it more moral to sacrifice a few animals to save a greater number of animals than sacrificing a few humans to save a greater number of humans); on the deontological character of human rights, see also Griffin (n 37) 36.

582 Kateb (n 459) 29.

583 See Nigel E Simmonds, 'Constitutional Rights and the Rule of Law' [2016] Analisi e Diritto 251, 251–252.

584 Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press 1984).

585 Nozick (n 581) 30–33.

586 John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001) 44, footnote 7.

cannot do to a person, regardless of the general utility of such a measure.[587] The solution, according to choice theorists, is to keep the scope of human rights narrow, and thereby to prevent rights conflicts from arising in the first place.[588] To the extent that conflicts are inevitable, they should be resolved by doctrinal means (such as for example priority rules), rather than balancing.[589]

Before we move to the last characteristic element of the Aristocracy, it is important to remind the reader that the implications of the Aristocracy's agent-focus which I have discussed in this subsection are *ideal* implications. As I have pointed out in the Introduction, the characteristic features of the Aristocratic conception may not be instantiated anywhere. The features analysed in this section, and in this chapter more generally, are ones that aim to express the logical or conceptual conclusions that follow *if* one adopts an Aristocratic approach to human rights. To put it with Judith Shklar, the point was to argue that, on the Aristocratic conception, "a *perfect or optimal* society would be composed solely of rights claiming citizens".[590]

5 Internalism

This last section addresses the question *how* proponents of the Aristocracy explain the special status and the equal rights of human beings. I will show that they follow an internalist approach. On this approach, which has become widespread since the second half of the twentieth century,[591] concepts like human dignity, human rights, and equality are explained by drawing solely on normative ideas about human beings. In contrast to externalists (which I will discuss in Chapter 3), internalists do not ground concepts in non-normative facts about the nature of individual human beings, such as for example their intelligence or sentience. As Marion Albers, Thomas Hoffmann,

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587 See Simmonds, 'Rights at the Cutting Edge' (n 553) 206, who talks of the "priority of rights".

588 See eg Grimm (n 575) 390.

589 See Simmonds, 'Rights at the Cutting Edge' (n 553) 145, 164.

590 Judith N Shklar, 'The Liberalism of Fear' in Nancy L Rosenblum (ed), *Liberalism and the Moral Life* (Harvard University Press 1989) 26 (emphasis added).

591 See Christopher McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014) 18–19 (who refers to this approach as "anti-essentialism" and "social constructivism"). The approach itself, however, is not a twentieth century phenomenon, but as old as philosophy itself, dating back at least to Socrates's turn away from the naturalistic investigations of the pre-Socratics.

and Jörn Reinhardt put it, internalism is the attempt "to justify the universal validity of human rights by referring to a concept of human nature that is *normative from the beginning*".[592] To use an image that has come up in our discussion of Francis Bacon in Chapter 1, we can say that internalists are like spiders who are trying to weave cobwebs out of their own substance.[593]

In this section, I will first address how exactly internalism works. I will focus on two of its main strategies: decisionism on the one hand, and story-telling and interpretation on the other (Subsection 5.1). In Subsection 5.2, I will discuss the main advantage of adopting the internalist approach, namely its capacity to *found* human rights and human dignity. I will then argue that this capacity to *found* is not only a strength, but also a weakness because it runs the risk of forming concepts that are arbitrary.

5.1 How-to

How exactly do internalists "weave" human rights, human dignity, and equality "out of their own substance"? There are, as I have suggested, roughly two ways in which this can be done. First, by *deciding* that human beings ought to be the only ones with a high status and with equal human rights; and second, by *telling stories or constructing interpretations* according to which only human beings possess this status and these rights.

Let us start with *decisionism*, which is the more straightforward approach. One particularly lucid defense of decisionism can be found in Anne Phillips's work on what she calls "the politics of the human".[594] According to Phillips, human rights, equality, and dignity should not be understood as "the outcome of an argument, … something to be established by reference to certain facts about human beings".[595] Rather, humans hold rights, equality, and dignity as the result of a decision we make: "People assert, rather than prove, their claims to be regarded as human."[596] On

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592 Marion Albers, Thomas Hoffmann and Jörn Reinhardt, 'Human Rights and Human Nature: Introduction' in Marion Albers, Thomas Hoffmann and Jörn Reinhardt (eds), *Human Rights and Human Nature* (Springer 2014) 2 (emphasis added).

593 Chapter 1, Subsection 2.1.

594 Phillips (n 32).

595 ibid 8.

596 ibid 9.

Phillips's account, this decision is not one that merely describes already existing realities. Rather, it is constitutive of such realities in that it wills into existence a certain normative state of affairs:

> Equality is not something we need to justify by reference to a shared humanity … it is something we bring into existence at the moment we claim it. It is not that we "recognise" a pre-existing equality or pre-existing humanity: identify something that was always there but had escaped our attention while we were still at the mercy of false ideas about some being born to rule and others having a slavish nature. We are not equal *because* of certain facts about ourselves, *because* we have a soul, *because* we are rational agents, *because* we are vulnerable to pain. Though we may, and often do, articulate our claims in one or other of these languages, equality is something we assert and to which we commit ourselves rather than something we find out. There is no argumentative structure here, of the form, "I am X therefore Y".[597]

Why does Phillips refuse to draw on facts about human nature to justify human dignity, rights, and equality? Her key reason—on which I will elaborate in the next subsection—is that such facts are susceptible to being used to foreground the differences that exist between human beings, and to establish hierarchies between them: "[w]hen we invoke the language of the human", Phillips points out, "we are refusing the distinctions and hierarchies that otherwise divide us. We are asserting our equality, insisting that we are human too".[598] This is also the reason why Phillips calls her account one about the "politics" of the human: that humans have dignity and equal rights is not something "cognitive;"[599] a truth that can be determined empirically. Rather, it is a political decision that humans should matter normatively.[600] It is therefore not surprising that, as Phillips suggests, and as we have discussed above,[601] claims about human dignity and equal rights are particularly prevalent after experiences of humans being denied this status and these rights.[602]

As Rossello observes, this kind of decisionism has been endorsed not only by many contemporary human rights theorists, but also by "leading critical theorists like Slavoj Žižek, Giorgio

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597 ibid 69 (emphasis in original).

598 ibid 4.

599 ibid 9.

600 ibid 26.

601 See *supra* 83.

602 Phillips (n 32) 37.

Agamben, Eric Santner, [and] Jürgen Habermas".[603] On their accounts, "human rights are themselves the product of a decision".[604] Rossello highlights that this decision in human rights discourse is often one that is made in order to distinguish the human from the animal.[605] Phillips makes this explicit when she talks about Arendt's account, on which her own decisionism builds: "she represents us as only really human to the extent that we are *not* natural beings. If the only thing we ever did, for example, was labour, … we would not be distinguishing ourselves from animals in any significant way."[606] As Kymlicka has rightly noted, there is a certain irony in this revival of decisionism among human rights theorists because "the original decisionist defender of human supremacism is Carl Schmitt, the Nazi theoretician. Defenders of the UN Declaration such as Maritain understood themselves to be making a decisive break with decisionism."[607]

As should be obvious by now, decisionism is an internalist approach because it starts not with a reference to facts about how nature *is*, but with a decision as to how things *should be*. Thus, if we ask why humans have the high rank of dignity and equal rights, the decisionist's answer is: because we have decided that they should. And that will be the end of the matter. This answer has struck some as unsatisfactory. For why should one accept that particular decision? Why not take another decision? And how can we find out which decision is better? It may not be enough to simply stipulate that humans and only humans have dignity and equal rights. We may also need to explain and defend this decision.[608] Dissatisfied with the *fiat*-based approach of decisionists, which makes it seem as though rights, dignity, and equality are an entirely contingent matter,[609] some

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603 Diego H Rossello, '"To Be Human, Nonetheless, Remains a Decision": Humanism as Decisionism in Contemporary Critical Political Theory' (2016) 16 Contemporary Political Theory 439, 440; see for a similar observation Arnd Pollmann, 'Menschenwürde nach der Barbarei: Zu den Folgen eines gewaltsamen Umbruchs in der Geschichte der Menschenrechte' (2010) 1 Zeitschrift für Menschenrechte 26, 41.

604 Rossello (n 603) 454.

605 ibid 453–454.

606 Phillips (n 32) 61 (emphasis in original).

607 Kymlicka (n 389) 780.

608 See Waldron, *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought* (n 158) 76.

609 See on this also Pollmann, 'Menschenwürde nach der Barbarei: Zu den Folgen eines gewaltsamen Umbruchs in der Geschichte der Menschenrechte' (n 603) 44, endnote 33.

have proposed an internalist approach that emphasises the need to *tell stories or construct interpretations* that explain the special status of humanity.[610] A prominent proponent of the former approach is Rorty. In his famous essay *Human Rights, Rationality, and Sentimentality*, Rorty agrees with decisionists in his rejection of the idea that human rights are best defended by grounding them in specifically human attributes that distinguish them from other animals:[611] "nothing relevant to moral choice separates human beings from animals except historically contingent facts of the world, cultural facts".[612] According to Rorty, grounding human rights in nature seems to do nothing for them in practice, which is why he proposes a "pragmatist"[613] approach instead. On this approach, which contrasts with decisionism, we "concentrate our energies" not on finding metaphysical grounds for human rights, but "on manipulating sentiments, on sentimental education".[614] According to Rorty, the most efficient defence for human rights is the telling of "sad and sentimental stories".[615] Such stories are uniquely suited to help us see that human beings whose rights are being violated, though different in some respects, are just "like us"[616] in the respects that matter. Hence, on Rorty's account, what explains humans' special rank and rights are the stories we tell as part of our culture, not their natural capacities, nor simple decisions.[617]

Rorty's call for sentimental stories is not the only internalist approach that rejects crude decisionism. A similar approach is defended by Ronald Dworkin, who argues that the question which concept (or principle) we adopt is the result of a refined process of *interpretation*.[618] If we

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610 See Rossello (n 32) 752–754; it should be noted that Phillips is not opposed the idea of explaining principles such as the equality principle by using narratives, as long as they are not invoked as justifications: Phillips (n 32) 78; on the so-called "looping effects" that are at play in both types of internalism, see Ian Hacking, 'The Looping Effects of Human Kinds' in Dan Sperber, David Premack and Ann James Premack (eds), *Causal Cognition: A Multi-Disciplinary Debate* (Oxford University Press 1995) 366–370.

611 Rorty (n 524) 169–172.

612 ibid 170.

613 ibid 172.

614 ibid 176.

615 ibid 172.

616 ibid 181.

617 Though such decisions may of course provide the basis for the stories we tell.

618 Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press of Harvard University Press 2011) 67, 102; see on interpretivism also Bernd Ladwig, 'Human Rights and Human Animals' in Marion Albers, Thomas Hoffmann and

want to explain a moral principle such as human dignity, we cannot simply postulate it, as decisionists would. Nor can we simply resort to external, empirical facts, as externalists would. This is because, according to Dworkin, the realm of morality is essentially independent, with non-normative facts having no bearing on it.[619] For this reason, both the justification of a moral principle as well as challenges to it cannot proceed except by invoking other principles and assumptions that are already within the normative domain. Interpretation takes existing principles—some of which we have come to endorse deliberately, others unreflectively—and weaves them together in order to "achieve an overall integrity so that each [interpretation] supports the others in a network of value that we embrace authentically".[620] Dworkin's approach thus also illustrates the collective character of internalist interpretations: they are not developed by an individual theorist, but discovered by him implicit within our thinking and our practices. The best interpretation of a principle, according to Dworkin, is one that fits best with shared social practices and other principles, rendering them more appealing than alternative interpretations.[621] In the best interpretation, the whole body of moral principles of a society stands together in a self-supporting manner. Hence, following Dworkin's approach, when interpreting for example the concept of human dignity, one would have to draw on other principles internal to one's society, such as perhaps the assumption that our creation in the image of God gives us a special status, or the assumption that only humans have free will. One could however not explain dignity by referring to any external properties, such as the fact that most humans have highly developed rational capacities.

Phillips, Rorty, and Dworkin are far from being the only ones who have endorsed some version of internalism. As Rossello has pointed out, "the predominant theoretical approaches to human rights, despite their obvious and multiple differences, share an investment in stabilising the

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Jörn Reinhardt (eds), *Human Rights and Human Nature* (Springer 2014) 29. Dworkin's position differs from Rorty's in many respects, to be sure, such as with regard to Dworkin's adoption of a justificatory strategy to explain concepts like equality and rights—a strategy that Rorty's pragmatist approach rejects. However, both their conceptions aim to provide an internalist explanation of such concepts by means of narrating (and, in Dworkin's case, also interpreting) stories. Cf also Dworkin's idea of the "chain novel": Ronald Dworkin, *Law's Empire* (Belknap Press of Harvard University Press 1986) 229.

619 Dworkin, *Justice for Hedgehogs* (n 618) 11.

620 ibid 101.

621 See for an outline of Dworkin's approach on interpretation ibid 6–7. For a more complete account, see Part Two of his book.

human being as a ground of the political".[622] One other example is Rosen, who argues that "[s]tatuses are … agreed social conventions". On Rosen's account, concepts such as human rights or dignity do not, in themselves, bear any content, in the same way as "there is no fact beyond social acceptance that underlies the chess piece with a horse's head entitled to move in an 'L'-shape".[623] Kateb takes a largely similar approach, arguing that "the uniqueness of humanity and its superiority over the rest of creation … was for the most part just *assumed"*.[624] This "assumedness" of human dignity and rights is also emphasised by Paolo Carozza, who reminds us that the drafters of the Universal Declaration of Human Rights could not agree on a specific justification for human rights, and simply settled for pragmatic consensus. "The human rights enterprise", he infers, "is built on practical agreement, *tout court."*[625]

It is interesting to note the parallels that exist between internalist human rights approaches and internalist accounts of nobility. In their case, too, decisions as to who should count more or stories and interpretations to that effect seemed to be at the heart of noblemen's special status and privileges. That noble status and privileges are hereditary, for example, or that they result from divine ordination, were only two of the most common explanations. What these explanations had in common was that they could not be challenged on empirical grounds: it could not be determined whether nobles did not in fact possess some noble gene that they passed on, nor could divine ordination be tested by studying facts about nature. In this sense, they were normative assertions, stories, or interpretations which served to explain noble rank and privileges. "The ultimate justification for nobility was that it needed none", as Doyle explains, "[i]t was a belief, a matter of faith and prejudice, and not susceptible to refutation. In that sense it was also indestructible, *beyond rational challenge*."[626] Aristocracy, in the words of a French Marquis, was "a brilliant illusion".[627]

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622 Rossello (n 603) 440; see for a similar observation Pollmann, 'Menschenwürde nach der Barbarei: Zu den Folgen eines gewaltsamen Umbruchs in der Geschichte der Menschenrechte' (n 603) 41.

623 Rosen (n 397) 145.

624 Kateb (n 459) 120 (emphasis added).

625 Paolo G Carozza, 'Human Rights, Human Dignity, and Human Experience' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014) 621.

626 Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 56–57 (emphasis added).

627 Cited in ibid 183.

As long as it remained a normative idea that needed no empirical foundation, it was unimpeachable.

The indestructibility of noble beliefs was, in fact, something the French revolutionaries underestimated. When in 1790 they enacted a law forbidding titles, liveries, and coats of arms, they did not think that nobility would persist.[628] While their laws could abolish titles, the revolutionaries had to realise that they could not abolish nobility itself. As one of aristocracy's fiercest enemies, the Count de Mirabeau, recognised: "opinion [is] the true seat of nobility".[629] The mindset of aristocracy was indeed deeply engrained—even in the revolutionaries themselves. As Camille Desmoulins aptly argued: "If Mirabeau himself … still signs himself *Count de* Mirabeau … can I believe that this multitude of former princes and dukes … could bring themselves to return to the class of insects and the smallest of the small?"[630]

What finally proved fatal for aristocracy was the Enlightenment challenge that every institution needed to be justifiable on rational grounds.[631] In the Enlightenment, Doyle observes, "[n]either God's intentions, nor how things had been done in former times, were any longer accepted as sufficient explanations for the existing order of things."[632] Montesquieu was one of the first to dismiss concepts based on tradition and myth, and proposed a purely functional justification for aristocracy. He argued that nobility is an essential component of monarchy. Any monarch will likely become a despot if there are no checks on his power. Noblemen, who had an interest in protecting their high status, would make sure that the king did not violate the fundamental laws of society. As Doyle observes, Montesquieu "made the nobility the watchdog of the constitution, the protector of the people against the caprices of the king, and the king's saviour from his own worst

628 See ibid 6.

629 Comte de Mirabeau, *Considérations sur l'ordre de Cincinnatus* (J Johnson 1784) v.

630 Cited in Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 229 (emphasis changed). Note that Desmoulins adopts a "levelling down" understanding of the Revolution.

631 ibid 49–50.

632 ibid 57.

instincts".[633] The justification for aristocracy on Montesquieu's account was that it "made monarchies work".[634] Following Montesquieu's example, other functional justifications started to be invoked. Among them was for instance the abovementioned rationale that the noble status was based on the nobility's services as the fighting class.[635] Yet another justification was the role aristocrats played as advisors to the king.[636]

The issue with such defeasible justifications was that they made the legitimacy of aristocracy contingent upon the fulfilment of its supposed functions. Aristocracy was no longer simply taken for granted but had to show that it was of some use.[637] Once the door to such empirical challenge was opened, however, it was only a matter of time until the legitimacy of aristocracy crumbled. Revolutionaries could come in and point out that many aristocrats did not live up to their functions: most nobles never gave a piece of advice to the King, and many never used their swords in a battle. Appealing to rational arguments to justify aristocracy, Doyle observes, "seemed like conferring legitimacy on the very forces believed to have brought about the revolutionary change".[638] The point that a normative concept can collapse if we make it contingent on empirical facts is crucial to why internalism—the refusal to draw on such facts—is so appealing.

5.2 Founding

In this subsection, I will shed more light on the reasons that make the internalist approach an attractive one. Its central strength is that it makes it possible to explain why humans hold dignity and equal rights without having to ground these concepts in human nature. That is, the main advantage of internalism is that it enables us to *found* human dignity and human rights. By "founding" I mean that internalism engages in an act of establishing or creating something new. Like the aforementioned spiders, internalists create their own foundations by drawing on existing (internal) normative assumptions and concepts.[639] I use the term "founding" in contrast to "grounding"

633 ibid 47.

634 ibid 48.

635 See *supra* 101.

636 See *supra* 121.

637 Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 49.

638 ibid 57.

639 See Raffael N Fasel, 'The Old "New" Dignitarianism' [2018] Res Publica 1, 15.

which I take to be characteristic of the Meritocracy's externalist approach (more on this in Chapter 3). "To ground" a concept is to justify it with facts about nature, "to found" it is to refuse to draw on such facts.[640]

Why is founding attractive? It is because of the problems that arise if we try to ground a concept in an empirical account of human nature. Say we ground human rights, as externalists would, directly in individual humans' ability to reason, or their linguistic abilities, or their ability to plan for the future, and the respective interests which arise from these abilities. The human beings who possess these abilities and interests will have human rights. But those who do not possess them, or who possess them to a lesser extent, would not qualify for these rights or would only get some weaker form of rights. To make things more complicated, there may also be nonhumans who possess these abilities, perhaps even to a greater extent than some humans do. Would we have to grant these nonhumans human rights in virtue of their abilities? Phillips puts the issue as follows:

> If we link the entitlement to human rights to characteristics like vulnerability to pain or capacity for conscious planning, the empirical evidence may well lead to the conclusion that some of the great apes qualify for at least some of the so-called human rights. But it may also lead … to the conclusion that some humans who currently qualify—day-old infants who have not yet developed consciousness; those in a coma who have lost it—are not entitled.[641]

Hence, the danger of grounding rights, dignity, and equality in facts about human nature is that it opens them up to empirical challenge. If it can be shown that there are significant differences in the capacities of different human beings then we would have to treat these human beings differently in equally significant ways. In Phillips's words, we would have to "attach hierarchical significance to difference".[642] However, this could create different categories of human beings—some with more or stronger rights and a higher status than others—and therefore undermine the very idea of equality. In fact, as Phillips argues, even if no significant empirical differences could be

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640 Perhaps counterintuitively, my use of the term "founding" therefore corresponds to what is generally called "antifoundationalism". See for a useful definition of foundationalism and antifoundationalism: Amy Gutmann, 'Democracy, Philosophy, and Justification' in Seyla Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press 1996) 340.

641 Phillips (n 32) 40.

642 ibid 46.

found, the mere act of opening up rights, equality, and dignity to empirical justification or proof risks eroding these concepts because it accepts the possibility of hierarchy. "Proving equality", as Phillips puts it, "is a game it is almost impossible to win".[643] This problem is exacerbated by the fact that, frequently, pseudo-science is invoked to claim that certain groups of human beings are inferior to other groups. Historically, such arguments have been all too common and have served to exclude women, people of colour, and other disadvantaged groups from rights-holding under the pretence that they lacked the capacities deemed necessary.[644]

The appeal of internalism lies in its refusal to play this game. It takes dignity, equality, and human rights to be based on decisions, stories, or interpretations that are normative through and through. Because internalism does not view these concepts as empirical claims,[645] new empirical discoveries cannot serve to overturn them.[646] To use a term coined by Pollmann, we can say that internalism "impregnates"[647] rights, dignity, and equality against all external criticism; that is, it immunises them against such criticism. This is crucial for those human beings who lack some of the capacities that would otherwise be considered relevant for the possession of rights; humans who would not be considered equals because they factually differ from "normal" human agents in important respects. Those who are severely mentally disabled, for example, may lack some of the capacities that, under a Meritocratic approach, would be considered necessary for the holding of certain rights, say the right to vote, or the right to marriage. Failing to possess the same rights as humans who are agents, these beings might then not be considered equals, and could be deemed undeserving of the status of dignity. This is what Salaville had in mind with his provocative question to the naturalists who emphasised difference over equality: "Is there not also a more and less among human beings? Are not some superior to others in intelligence, corporeal strength, natural faculties, and acquired faculties?"[648] Like modern Aristocrats, Salaville was well aware that there

643 ibid 45.

644 See on this eg Hunt (n 266) 186–188; Phillips (n 32) 25–26.

645 See on this idea also Markus Rothhaar, 'Species, Potentiality and Their Manipulation' in Marion Albers, Thomas Hoffmann and Jörn Reinhardt (eds), *Human Rights and Human Nature* (Springer 2014) 177.

646 Phillips (n 32) 44.

647 See Arnd Pollmann, 'Human Rights Beyond Naturalism' in Marion Albers, Thomas Hoffmann and Jörn Reinhardt (eds), *Human Rights and Human Nature* (Springer 2014) 123.

648 Salaville, *De l'homme et des animaux* (n 279) 16.

are important differences between human beings. His point was to say that these differences should not matter when it comes to granting equals rights and dignity. To prevent the creation of groups of human beings with lesser rights and lesser status, Aristocrats hold that is imperative that we reject grounding their rights and status in an account of their nature. Only if we found rights, dignity, and equality—or, as Salaville put it, only if we "admit"[649] that there is a fundamental chasm between humans and animals—is the fact that not all human beings possess the same capacities irrelevant for their status and rights.[650]

This explains the abovementioned point that the Aristocracy is a particularly appealing conception after crises that have witnessed the denial of the rights of human non-agents or of humans more generally.[651] As Kateb notes, "[it] is often true that what came first, in time and importance, were the denial of equal human dignity, of equal individual status, and the consequent reduction of human beings into the not-fully-human".[652] In cases such as the post-World War II period, the emphasis on the special dignity and rights of all human beings is what Dupré has called a "never again" reaction: that is, a repudiation of the systematic debasement and destruction of supposedly lesser humans, and a clarion call for unification.[653]

Our brief discussion of internalist accounts of nobility has made it clear that internalism is indeed a particularly useful strategy for protecting the special status and rights of a select group of beings. The status and privileges of the nobility were secure as long as they were considered to be based on normative assumptions that were not open to refutation. Only when the door was opened

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649 ibid 51. To be sure, Salaville also argued that only human beings are intelligent and that rights and dignity are based on intelligence rather than sentience (ibid 35). While this could be read as an externalist grounding of rights in intelligence, it could also be interpreted as the founding myth of human dignity and equal rights. Even if we were to adopt the former, externalist interpretation, we could still confidently invoke Salaville as an illustration for some of the other central features of internalism. As I have pointed out, Salaville's account need not be a perfect instantiation of the Aristocratic ideal type of fundamental rights. It is good enough for my purposes if it reflects sufficiently many of its core principles.

650 See Kateb (n 459) 9; a similar point is made in Bernard Williams, *Philosophy as a Humanistic Discipline* (Princeton University Press 2009) 140.

651 See *supra* 83.

652 Kateb (n 459) 39.

653 Catherine Dupré, 'Constructing the Meaning of Human Dignity: Four Questions' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014) 117–118.

to empirical challenge, as was the case with Montesquieu's functional justifications for nobility, the formerly unassailable concepts started to crumble. Hence, it is only by remaining within the internalist framework that empirical attempts to question a special status and privileges can be parried. This explains why internalism has been such a popular tool for the thwarting of empirical challenges to humans' unique dignity and their equal rights, as it has been for the thwarting of animal rights claims—which are often seen as posing a similar threat.[654] Thomas Williams has expressed the same thought when he argued that we need a firm internalist founding for human dignity, such as the claim that man is created in God's image because "the experimental and human sciences, often weighed down by materialist philosophical presuppositions and the constraints of their objectivist methodology, tend ever more to emphasise the continuity between man and other creatures".[655] As Roger Brownsword has put it succinctly, "we appeal to human dignity in order to stop science".[656]

To recapitulate, then, the internalist approach is attractive because it allows the founding of concepts independently of facts about human nature. It therefore avoids the problem of having to assign normative importance to empirical differences that could lead to hierarchisation. However, the internalist approach also has a *downside*. Paradoxically, this downside is the flipside of its strength: by founding concepts without regard to empirical facts, internalism risks creating concepts that bear no reasonable connection to reality and that are therefore likely to have an all the more consequential impact on it.[657] "[D]istinctions that are not about something real", as Smith has cautioned, "are not for that reason not real distinctions."[658] To illustrate this problem, consider the example Waldron gives of an internalistically founded principle according to which we ought to "treat trees, tigers, teapots, and teenagers as one another's equals".[659] As Waldron points out, it would be "slightly mad"[660] to treat things as equals which bear so little similarity as teapots and

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654 See also Kymlicka (n 389) 779–780.

655 Williams (n 422) 207.

656 Roger Brownsword, 'Human Dignity, Human Rights, and Simply Trying to Do the Right Thing' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014) 347.

657 See Chapter 3, Section 5, for a discussion of how externalists ground normative principles in empirical facts.

658 Smith (n 47) 52.

659 Waldron, *One Another's Equals: The Basis of Human Equality* (n 534) 59.

660 ibid.

teenagers. Because teapots and teenagers are so different from each other, it would make little or no sense to adopt this principle. To put this point more generally: once a founded principle loses a meaningful connection to reality, then it becomes *arbitrary*. And once it becomes arbitrary, then it becomes unreasonable to choose this principle over another principle which is more in line with facts about reality.[661] Of course, arbitrariness cannot directly affect the internal normative validity of a principle. It remains immunised against empirical evidence. However, arbitrariness can at least *indirectly* serve to challenge a principle in so far as it raises the question if one should not adopt another principle which is more in line with empirical facts.

As I will discuss in detail in Chapters 3 and 4, the concrete question that arises with respect to the Aristocratic conception of fundamental rights is whether the complete exclusion of all non-human animals from the dignity and fundamental rights of humans makes sense from a factual point of view or whether this conception has to be considered arbitrary and abandoned in favour of one that is less arbitrary. I believe that Delamétherie's argument that we should not exclude nonhumans from rights-holdership, which I have discussed in Chapter 1, was based on exactly the view that it would be arbitrary to exclude them.[662] Delamétherie must have been alive to the dreadful consequences that arbitrary distinctions have. Jeff McMahan, who follows in Delamétherie's footsteps, draws attention to this ugly side of our Aristocratic bias toward all human beings:

> the other side of species partiality is a tendency to treat the interests of animals as morally insignificant. If we compare the number of radically cognitively impaired human beings who benefit from our partiality with the number of animals who suffer from our tendency to regard them primarily as means to our ends, it is hard to believe that the effects of species partiality are desirable overall from an impartial point of view.[663]

Bilchitz draws a parallel between the arbitrary exclusion of animals and other arbitrary distinctions, such as that between black and white people in apartheid South Africa. According to Bilchitz, arbitrariness is not only problematic in itself (though it is also that), but also because it

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661 To be sure, some internalists do not appear to be put off by this fact. Pollman, for example, explicitly acknowledges the potentially arbitrary character of decisionism, but prefers it to grounding principles in nature or other "'higher' authorities": Pollmann, 'Human Rights Beyond Naturalism' (n 647) 123.

662 See Chapter 1, Subsection 4.2.

663 Jeff McMahan, 'Our Fellow Creatures' (2005) 9 The Journal of Ethics 353, 361.

"leads to the disregarding of the interests of individuals, often those who are most vulnerable".[664] For Bilchitz, it is therefore paramount that we recognise and overcome "the arbitrariness and unjustifiability of the current legal framework relating to animals".[665] Even Bernard Williams, who is himself an adherent of the Aristocratic conception,[666] concedes that followers of this conception ought to be "sceptical about the coercive rhetoric, the lies about differences, and the sheer violence that are often associated with such ideas [of species loyalty] and with the movements that express them".[667]

6 Conclusion

This chapter has presented the Aristocratic conception of fundamental rights. As I have pointed out, my analysis is part of a broader movement in recent scholarship to understand concepts such as human rights and human dignity as Aristocratic concepts. To elucidate the Aristocratic conception, I have identified three of its key characteristics: equal consideration, agent-focus, and internalism.

Equal consideration addressed our question what the Aristocratic status of human beings exactly is. I have shown that it is three things: a high status that humans possess simply in virtue of being born human (Heredity); a status which they hold equally, and which gives them equal rights (Equality); and a status from which all nonhumans are excluded (Exclusivity). Equal consideration was thus shown to be based on central egalitarian ideas, which I have presented in Chapter 1. For both past and modern adherents of equal consideration, I argued, humans are separate *and* equal.

The second characteristic of the Aristocracy—its focus on agents—answered the question why human beings possess this special status. I have argued that the Aristocratic conception is based on the founding myth that only humans possess the mental capacities which make them agents. After having discussed some of the replies that Aristocrats' can give to the challenge that not all human beings are agents, I have presented the central implications which the Aristocratic

664 Bilchitz (n 5) 66.

665 ibid 71.

666 Cf Williams (n 650) 138.

667 ibid 151.

conception's focus on agents has on how it conceives of rights-holders and their rights. As I have demonstrated, it sees rights-holders, in line with choice theories of rights, as beings who are capable of *choosing* if others ought to fulfil their duties toward them; it takes rights and duties to be *reciprocal*; it adopts a *wholesale* approach to rights; and it understands these rights to be *absolute*.

Internalism, finally, answered our question as to how the special rank and rights of humans can be explained. I have argued that the ideal-typical approach is to explain them from an internalist perspective, that is, by invoking decisions, by telling stories, or by constructing interpretations that are already within the normative domain. Internalism's capacity to *found* rights, dignity, and equality in such a way was shown to be its strength. By refusing to ground these concepts in facts about human nature, it avoids making them vulnerable to empirical challenge. As Phillips has put it, "[w]hen the human is invoked today, it is most commonly in order to deny the significance of difference".[668] However, as I have proposed, this refusal to accord normative significance to physical differences is at the same time also internalism's weakness. By founding a status and rights in a way that is resistant to facts, one runs the risk of giving them an interpretation that it would make little or no sense to adopt. I will take up this point again in the last chapter, when I will argue that the problem with the current human rights Aristocracy is that it arbitrarily excludes all nonhuman beings from the possession of fundamental rights and legal personhood, despite the fact that some of these beings have similar capacities to human beings.

My hope is that this chapter has cleared up any remaining doubts as to the appropriateness of the term "Aristocratic" human rights. Whether we like it or not, an influential part of human rights discourse and practice shares many commonalities with the former nobility. Of greatest practical relevance is the fact that this strand of human rights thinking has adopted the exclusionary element of the nobility. As Phillips rightly notes, "'[h]uman' has operated to exclude as much as to include".[669] In the next chapter, I will turn the spotlight on all the nonhumans who have been excluded from humans' high rank and equal rights. I will do so by unveiling another conception of fundamental rights—the Meritocratic conception—which is considerably more receptive to their interests.

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668 Phillips (n 32) 10.

669 ibid. Phillips focuses on excluded human groups, however.

Chapter Three:

The Meritocratic Conception

1 Introduction

The predominant rights conception today is the Aristocratic fundamental rights conception.[670] Among human rights lawyers in particular, the idea that human beings have a high status and equal rights is a fixture. Because of its dominance, the fact is often ignored that the Aristocratic conception is not the only fundamental rights conception. In this chapter, I will show that there is another conception that is crucial to our understanding of contemporary and past arguments about rights. That conception is the Meritocratic fundamental rights conception. I am not the first one to discover this conception. Vlastos in particular has laid some important groundwork with his theory of the "M-system", about which I will say more in the next section.[671] However, no one has so far spelled out what the different features of this conception are and how they correspond to the opposing Aristocratic conception. To do just that is the aim of this chapter.

As with the Aristocracy, I take the Meritocracy to be an ideal-type that I will be constructing by drawing on existing fundamental rights accounts and by taking their inherent implications to (what I believe to be) their logical or conceptual conclusion. As I have indicated, the Meritocratic and Aristocratic conceptions are on opposing sides of a spectrum of fundamental rights (see Figure 1).[672] This chapter will analyse the exact respects in which the Meritocracy is antithetical to the Aristocracy. It will do so by focusing on three central features which mirror the Aristocracy's three features that I have analysed in the previous chapter. First, where equal consideration was

670 I will substantiate this claim in Chapter 4.

671 Vlastos (n 391).

672 See *supra* 6.

key to the Aristocratic conception, the Meritocratic conception is based on *differential consideration*; second, the focus in the Meritocracy is on *patients*, rather than agents, as is the case in the Aristocracy; and third, by contrast to Aristocrats who follow internalism to explain their views, Meritocrats are *externalists.*

Whereas the Aristocratic conception proves popular among human rights thinkers, the Meritocratic conception finds a particular echo with proponents of nonhuman rights. That is not to say that human rights advocates cannot endorse Meritocratic views. However, as I will show in this chapter, and take up again in the next, the Meritocratic conception is particularly well-suited for arguing for the rights of nonhuman beings. This should not surprise us given that the Meritocratic conception is based on the naturalist current of the Enlightenment which challenged egalitarianism by emphasising natural differences and their normative importance. For this reason, in the same way as Salaville's egalitarian essay proved illustrative for the Aristocracy, Delamétherie's naturalist writings will be shown to reflect many of the core ideas of the Meritocracy. As I will show, Delamétherie's account anticipated all the three characteristics of the Meritocracy.

The chapter is structured as follows. In Section 2, I will address some of the foundational questions about the Meritocratic conception. Section 3 will analyse the feature of differential consideration, which will serve to answer the question *what* it means to hold fundamental rights based on merit. Section 4 addresses the question *why* beings hold rights under the Meritocratic conception, showing that the Meritocracy focuses on patients instead of agents to answer this question. Section 5, finally, considers *how* proponents of the Meritocracy explain differential consideration and the focus on patients. It argues that Meritocrats adopt an externalist approach that *grounds* rights in natural facts. I will discuss the strengths and weaknesses of this approach before retracing the main steps of the chapter in its conclusion.

2 Fundamental rights Meritocracy

In this section, I will lay the ground for my analysis of the three central elements of the Meritocracy. I will first point out some of the similarities between the struggle of meritocrats against noble privileges in the past and the struggle against the Aristocratic conception of fundamental rights which Meritocrats are involved in today (Subsection 2.1). In Subsection 2.2, I will then show that,

although perhaps counterintuitive at first, the terms "merit" and "desert" can be usefully employed in the context of animal rights. Finally, in Subsection 2.3, I will provide an overview of Vlastos's theory of the "M-system" which serves as the foundation stone of my account of the Meritocratic conception. Here, I will also consider and refute the challenge that the Aristocracy does not differ much from the Meritocracy because it, too, seems to be based on the idea that human beings *deserve* dignity and rights in virtue of some fact about human nature (namely agency).

2.1 Down with the Aristocracy!

If it is possible to name one moment that marked the end of the Ancien Régime, it is 4 August 1789. In only one night, the National Constituent Assembly put an end to the feudal system as well as to the special privileges; in only one night, the aristocracy was largely dismantled. To the surprise of many, the noble members of the Assembly took an active part in the demise of their own class. Perhaps to appease revolting peasants who suspected that aristocrats had plotted the ongoing famine, these noblemen voluntarily renounced a significant number of their rights.[673] Widespread attacks on the nobility's rights and symbols had preceded August 4. What began as the vandalising of coats of arms and the refusal to pay dues culminated in the killing of nobles and the parading of their severed heads in the streets of Paris.[674] Subsequent proposals adopted in the days after August 4 further contributed to the gutting of the nobility, leaving a decree to formally abolish the nobility, which the Assembly adopted one year later, with little more than declaratory effect.[675] Aristocracy, the revolutionaries agreed, should be replaced with a system that made official posts accessible based on merit, not birth: a system that would later become known as "meritocracy".[676]

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673 Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 212–213; for an in-depth account see Michael P Fitzsimmons, *The Night the Old Regime Ended: August 4, 1789 and the French Revolution* (Pennsylvania State University Press 2003).

674 Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 208.

675 ibid 216.

676 William Doyle, *Aristocracy: A Very Short Introduction* (Oxford University Press 2010) 65; Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 340.

To understand the rise of the merit-based system, we need to recall the intellectual sea change that occurred in the Enlightenment. With the spread of critical thinking and a public "intoxicated with the wonders of science and nature",[677] traditional justifications for nobility were increasingly found to be inadequate: Why should anyone be qualified to hold office simply because they are born noble? What virtues do noblemen have that non-nobles lack? Once aristocrats were required to justify their status, as we saw above, they seemed unable to demonstrate any objective qualities that distinguished them from ordinary citizens in a way that would justify the wholesale exclusion of the latter from public employment and other privileges. Pierre Beaumarchais captured this failure of aristocrats to provide rational justifications for their privileges in his 1778 play *La Folle Journée, ou Le Mariage de Figaro*. In a monologue, Figaro, the barber, is running down the Count Almaviva for the latter's having invoked his feudal *droit du seigneur*—essentially the right to have sex with subordinate women, sometimes, as in this play, replacing the groom during the wedding night—vis-à-vis Suzanne, Figaro's soon-to-be spouse:

> Because you are a great lord, you think yourself a great genius! … Nobility, wealth, rank, positions, all this makes you so proud! What have you done for so much? You gave yourself the trouble of being born, that's all. Otherwise, you're pretty ordinary.[678]

As Doyle points out, aristocrats like Beaumarchais's Count had for a long time "no incentive to find objective ways of identifying ability and aptitude. Their every instinct, after all, inclined them to believe that these qualities were most likely to be hereditary."[679] Viewed under the cold light of empirical reason, however, neither heredity nor the type of socialisation or traits that came with being born into a noble family turned out to be sufficient justifications for office-holding and special privileges.[680] According to the new paradigm, it was not in virtue of belonging to a particular class that one could make a plausible claim to office or other privileges, but only in virtue of one's personal merit and capacities.[681] "The Enlightenment did not assail authority per se", Kors notes, "but arbitrary authority, and in countless works it called upon authority in all

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677 Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 154–155.

678 Act V, Scene III, cited in: ibid 150.

679 Doyle, *Aristocracy: A Very Short Introduction* (n 676) 66.

680 See on this also the discussion of Montesquieu's functional justification of nobility: Chapter 2, Subsection 5.1.

681 Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 185.

domains to justify itself".[682] To meet the demands of the time, it became necessary to modernise the outdated social system. The Enlightenment, in the words of Jean-Denis Bredin, had made France "a society that has become too intelligent for its own structures".[683]

Proponents of the Meritocratic conception of fundamental rights share the sentiment that motivated the French revolutionaries to topple the aristocracy. In their view, animals are denied rights in the same way as non-nobles were denied offices and privileges. Animals are like non-nobles in that they are equally subject to what Sieyès took to be one of the guiding principles of the Ancien Régime: "whatever your talents may be; you will go only so far, you will not go any further".[684]

2.2 Animals and merit

Two points require our attention before we can proceed with an examination of the Meritocracy. One is terminological, the other conceptual. Terminologically, it could be objected that "merit" and "desert" are not synonyms and that I should therefore not use them interchangeably, as I have done so far. George Sher, for example, distinguishes merit from desert by arguing that merit serves as the justification for good desert (that is, rewards rather than punishment).[685] Others, however, do not make this distinction and treat the two terms as synonyms.[686] This usage also corresponds to how the terms are ordinarily used. I will follow this usage of merit and desert and will take the two to be synonymous.

The conceptual point that needs addressing is more significant. While there is little doubt that the terms "merit" and "meritocracy" are applicable to deserving commoners aspiring to public employment, it is far from obvious that they can be applied to animals. On what grounds could animals be said to *merit rights*? To clarify this point, we need to determine whether there are any

682 Kors, 'The Enlightenment, Naturalism, and the Secularization of Values' (n 48) 28.

683 See Bredin's Préface in Sieyès (n 488) 7.

684 ibid 35.

685 See George Sher, *Desert* (Princeton University Press 1987) 109.

686 See eg Fred Feldman, *Utilitarianism, Hedonism, and Desert: Essays in Moral Philosophy* (Cambridge University Press 1997) 181.

desert-bases that apply to animals. A first issue we encounter in this regard is that *acts* are the paradigm case of desert-bases. Consider the following examples:

(1) Bob deserves to be punished; he stole Anna's laptop.

(2) Clara deserves a "thank you" from Dan; she helped him with his homework.

It is difficult to see how nonhuman animals could deserve rights if acts—such as Bob's stealing of Anna's laptop, or Clara's helping Dan with his homework—are taken to be the bases for desert. One problem that arises in this regard is that animals might not be able to "act" in the sense required. Animals of course *do* things in the sense that they behave in certain ways. However, if acts are to serve as desert-bases, then they must likely be intentional, and some might want to question if animals can perform intentional acts. Even if we grant that they can, a second and more problematic issue arises: it is unclear why any acts of animals could serve as a desert-basis for rights. The dog who saves his owner's life might be deserving of some reward, but it is far from clear why his reward should come in the form of a right. This problem does not arise with many human beings. As Salaville has emphasised, for example, most humans are agents and therefore capable of performing acts that can ground rights. They can also write constitutions in which they confer fundamental rights to each other. Lacking this capacity, nonhuman animals seem unsuited for deserving rights based on acts.

Luckily for animals, act-based desert does not exhaust the spectrum of desert-bases. Another important type of desert-bases are *characteristics*.[687] Here, desert is based on what someone or something *is*, not on what he/she/it *does*. For instance:

(3) Eric did not deserve to die; he was still young.

(4) Florence deserves to be the cultural capital of Europe; it is a magnificent city.

In (3) and (4), desert is owed not based on an act. Rather, it is based on the relevant characteristics of the deserving person or thing; Eric's having been young and Florence's being a gorgeous city. As Fred Feldman has observed, characteristics-based desert is widely accepted not only

687 Sher (n 685) 8.

in practice, but also among moral philosophers, many of whom "have endorsed the principle that each of us, merely in virtue of *being* a person, deserves a certain minimal amount of respect".[688] This wide endorsement is not surprising considering that characteristics-based desert shares the same conceptual structure as act-based desert. In both cases, something or someone, *A*, deserves some thing *x* in virtue of some fact *f* about them.[689]

We can now apply these considerations to our question whether nonhuman animals can deserve rights (the question whether they also *do* deserve rights will be addressed in the next sections). If, as (4) suggests, a city can reasonably be said to deserve something based on its characteristics, then animals can be said to deserve certain things or treatments based on their characteristics. The following examples should illustrate this:

(5) Peter the poodle deserves to win Best in Show; he is clearly the most beautiful poodle.

(6) Horses do not deserve to be beaten; they can feel pain.

Proponents of the Meritocratic conception model their claims for animal rights on propositions like (5) and (6). Their general claim goes something like this:

(7) Some animals deserve rights; they possess the characteristics required for rights-holding.

More will be said below on how rights can be derived from characteristics.[690] As I will show there, the picture presented here is simplistic as it leaves out the notion of "interests" which serves as a bridge between characteristics and rights. For present purposes, however, it should suffice to say that, according to Meritocrats, an animal *deserves* rights (at least *prima facie*) if it possesses the characteristics required for holding these rights. That this is a common way for animal rights proponents to think and talk about animal rights is illustrated, for example, in the subtitle

688 Feldman (n 686) 183 (emphasis in original).

689 Sher (n 685) 7.

690 See *infra* 169.

of one of the pioneering works on fundamental rights for animals, Paola Cavalieri's *The Animal Question: Why Nonhuman Animals Deserve Human Rights*.[691]

Before we can turn to the literature on animal rights, we need to address a powerful objection that can be raised against the idea of characteristics-based desert. It could be argued that no one, including animals, deserves the characteristics they are distributed at birth.[692] These characteristics, the objection goes, are an arbitrary product of the "natural lottery",[693] in which the holder of these characteristics has played no part. Hence, in the same way as a person with superior intelligence does not deserve any more entitlements than someone with lower intelligence, for neither of them played any part in their respective natural endowments, it could be argued that animals do not deserve rights based on their characteristic capacities. This holds at least in what is often termed a "pre-institutional" setting,[694] that is, one in which no institutions have been created which would allow creating legitimate, desert-like expectations. For instance, it could be argued that while a fast runner does not deserve his natural fleetness of foot, he does deserve a medal in the institutional context of a footrace.

Although appealing, this objection raises two important problems. First, it flies in the face of how we commonly understand and distribute desert.[695] As pointed out above, it is common to treat characteristics as a desert-basis in a wide range of cases.[696] To argue, as the objection does, that there is no characteristics-based desert because characteristics are an arbitrary product of the natural lottery is therefore deeply revisionary. In fact, the objection leads not only to the abandonment of (pre-institutional) characteristics-based desert, but also to that of act-based desert. This is

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691 Paola Cavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (Catherine Woollard tr, Oxford University Press 2004); see also Jens David Ohlin, 'Is the Concept of the Person Necessary for Human Rights?' (2005) 105 Columbia Law Review 209, 222; for critical voices, see Peters (n 503) 46–47; Christine M Korsgaard, *Fellow Creatures: Our Obligations to the Other Animals* (Oxford University Press 2018) 109–111.

692 This objection was raised famously by John Rawls in the context of his theory of (human) justice, see Rawls (n 10) 104; see for criticisms of Rawls's argument eg Nozick (n 581) 214; Sher (n 685) 26.

693 Rawls (n 10) 74.

694 See eg Jeffrey Moriarty, 'Desert and Distributive Justice in A Theory of Justice' (2002) 33 Journal of Social Philosophy 131, 132.

695 See Tea Logar, 'Rawls's Rejection of Preinstitutional Desert' (2013) 28 Acta Analytica 483, 493.

696 See also Feldman (n 686) 183–184.

because many acts are themselves caused by factors that are beyond an actor's control. For example, Clara in (2) was said to deserve a "thank you" from Dan because she helped him with his homework. Her kind act, however, may itself have been the product of Clara's selflessness. Because Clara played no part in becoming selfless, she would not deserve a "thank you" from Dan. At least in the pre-institutional context, we would thus have to bid farewell to both characteristics-based desert and act-based desert.

A proponent of the objection could of course bite the bullet and argue that, outside of institutions, there simply is no room for any kind of desert, however counterintuitive this may be. Even if we accept this view for a moment, the objection would still fail because of the second problem it faces. While the critique of pre-institutional desert could be seen as cogent if directed against a conception that tries to distribute entitlements on grounds that are deserved, it misses the mark if aimed at the Meritocratic conception. This is so because the Meritocratic conception makes no claim to ground rights in characteristics that are deserved. It is not committed either way on this point. This becomes evident in example (4): it makes sense to say that Florence deserves to be the cultural capital of Europe in virtue of its magnificence, regardless of whether or not Florence played any role in bringing about its magnificence. In fact, the absurdity of asking whether Florence played any such role shows that my use of the term "desert" is broader than that of the objection's proponents, allowing for the application of "desert" even in the context of entities that could not have acted to bring about their characteristic features. Because of the broader use of the notion of "desert", which I adopt for the purposes of this thesis, the analysis presented in the following sections remains unaffected by the objection.

2.3 The "M-system"

The first to describe the contrast between what I call the Aristocratic conception and the Meritocratic conception was Vlastos.[697] In his much-praised article *Justice and Equality*, Vlastos introduced the term "M-system" to describe what I call the Meritocracy.[698] Vlastos argued that in contrast to the Aristocratic "caste society", the M-system "has no place for a rank of dignity which descends on an individual by the purely existential circumstance (the 'accident') of birth and remains his unalterably for life".[699] Instead, it grades individuals based on their merit: "If *A* is valued for some meritorious quality, *m*, his individuality does not enter into the valuation. As an individual he is then dispensable; his place could be taken without loss of value by any other individual with as good an *m*-rating."[700] As a result, Vlastos believed, the M-system reduces individuals to mere "place-holder[s] of qualities".[701] They possess no inherent value, no equality, and no "rank of dignity"[702] that, in the Aristocracy, they would possess simply in virtue of belonging to the human species. Instead, the sole factor that determines how one ought to treat beings in the M-system is their individual merit. Rights, as Vlastos specified, depend on merit in two ways.[703] First, they are *justified by merit* in that someone who lacks merit will not receive a particular right. Second, they are *proportioned to merit* in that someone with less merit will receive rights of lesser strength. As Vlastos rightly highlighted, these consequences are antithetical to the Aristocratic understanding

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697 Note that there is also some discussion in the human rights literature as to whether the concept of desert is applicable to human rights, for example to withhold certain rights from criminal offenders. See eg James W Nickel, 'Personal Desert and Human Rights' in Rowan Cruft, Matthew S Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015); Stemplowska Zofia, 'Can Moral Desert Qualify or Justify Human Rights?' in Rowan Cruft, Matthew S Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015). The sense in which these authors use the term "desert" is not the same as that adopted in this thesis. Theirs is largely concerned with act-based desert, whereas mine focuses on characteristics-based desert.

698 Vlastos (n 391) 54.

699 ibid.

700 ibid 52 (emphasis in original).

701 ibid; for a similar point about the "replaceability" of individuals in Jeff McMahan's account, see Tim Mulgan, 'The Ethics of Killing: Problems at the Margins of Life by Jeff McMahan' (2004) 34 Canadian Journal of Philosophy 443, 455.

702 Vlastos (n 391) 54.

703 ibid 55.

of rights because they require us to apply terms to rights-holders such as "superior" and "inferior" which we believed to have eradicated.[704] Now, in contrast to the definition of "merit" which I adopt in this thesis, Vlastos assumed that a characteristic can serve as a desert-basis only if it is "'acquired', that is, if it represents what its possessor has himself made of his natural endowments and environmental opportunities".[705] However, the contrast he draws between the "M-system" and the caste system is one that, *mutatis mutandis*, also applies to the Meritocratic and the Aristocratic fundamental rights conceptions.

A sceptic of Vlastos's theory of the "M-system" and my account of the Meritocracy might want to object at this stage that by distinguishing between these conceptions and the Aristocratic "caste society", we are drawing a distinction without a difference. For could one not argue that the Aristocratic conception also accords membership in the community of equals on the basis of merit? In Chapter 2, I said that the Aristocracy focuses on agents as ideal rights-holders. Have I thereby not suggested that only agents *deserve* to be admitted to the aristocracy?

Yes and no. It is true that the concept of aristocracy is not entirely at odds with the idea of merit. In Ancient Greece, for example, "aristocracy" and "meritocracy" were not thought to be conflicting concepts. Aristocracy was defined as the rule by the best, and the best were chosen—in a more or less meritocratic way—based on virtue and wealth.[706] Even in the eighteenth century aristocrats saw no conflict with merit. Their status was one they believed they deserved because they were born as aristocrats, or because they behaved as was expected of aristocrats.[707] In addition, the term "noble", which only became synonymous with "aristocrat" in recent centuries, originally had a different meaning. In Ancient Rome, it referred to families with a distinguished ancestry of office-holders.[708] "Nobility", too, was therefore not opposed to ideas of "merit".[709]

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704 Cf ibid 74.

705 ibid 51.

706 See Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 40; see also Aristotle, *Politics* (Harris Rackham tr, Harvard University Press 2014) 317, 1294a (Book IV, VI).

707 Doyle, *Aristocracy and Its Enemies in the Age of Revolution* (n 276) 56–57.

708 ibid 39–40.

709 And neither was "dignity": Waldron, *Dignity, Rank, and Rights* (n 6) 30; see on the notion of "meritocratic dignity" more generally Josiah Ober, 'Meritocratic and Civic Dignity in Greco-Roman Antiquity' in Marcus

This seems to support the abovementioned objection that the Aristocracy and the Meritocracy are not at odds with each other. However, things are more complex than they seem. True, the Aristocratic conception of fundamental rights necessarily works with a feature or features that explain the special status of the Aristocratic group, and it can therefore be said to have a Meritocratic flavour. However, it is not Meritocratic all the way. Let me explain.

In order for the Aristocratic conception of fundamental rights to get off the ground, it requires some criterion of what makes human beings special, that is, a criterion which tells us why humans ought to be put on a pedestal. In this limited respect, the Aristocracy can be said to have an externalist component (see on this Section 5). I call this the Aristocracy's *founding myth*. As I have argued in Chapter 2, the founding myth of the Aristocratic conception of fundamental rights is that agency is a uniquely human characteristic, which is why only humans should be members of the high rank of dignity and have equal rights. So far so good for the proponent of the objection.

However, once the Aristocratic conception has used this criterion to establish the special status of all members of the human species, agency is no longer required. In the Aristocracy, every human being possesses the same status and fundamental rights regardless of whether that *individual* is actually an agent. As pointed out in Chapter 2, this is the strong suit of the Aristocratic conception: by founding dignity and equal rights, individuals' status and their rights cannot be revoked by pointing to any facts about these beings, such as a lack of agency.[710] It is sufficient that they are born human. Hence, once the Aristocratic conception is up and running, it has no further need to resort to claims about merit.

The Meritocratic conception of fundamental rights, on the other hand, is Meritocratic through and through. As I will discuss in the next section, it rejects basing rights on group-membership, and instead focuses on individuals' characteristics. It tests, in each and every case, whether the individual at hand actually has the characteristics required for the possession of the relevant rights. That is why, contrary to Aristocrats, Meritocrats allow for a revocation of an individual's rights if it cannot be shown to possess the required characteristics. Williams realised that this testing of each and every individual on their merit follows necessarily once one rejects the Aristocratic

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Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014).

[710] See Chapter 2, Subsection 5.2.

conception (which he called the "human prejudice"): "the criteria which determine what you can properly do to a creature, are applied to examples one at a time: it is always a question whether this particular individual satisfies the criteria".[711] This, then, is the difference between the Aristocracy and the Meritocracy which explains why the abovementioned objection fails. Whereas the Aristocracy only requires a merit-based founding myth to get the Aristocratic status off the ground, the Meritocracy is merit-based all the way, requiring that each and every individual actually merits its rights.

3 Differential consideration

In this section, I will analyse the first of the three characteristics of the Meritocratic conception: differential consideration. This feature addresses the question *what* it means to hold fundamental rights in the Meritocratic conception. As I will show, differential consideration has three central components: first, it makes rights-holding dependent on an individuals' characteristics and interests (Merit); second, it rejects equal rights in favour of a gradual approach to distributing rights (Gradualism); and third, it allows for the inclusion of any type of being in the category of rights-holders as long as that being possesses the relevant characteristics (Inclusivity). Differential consideration has inherited its emphasis on natural differences from the naturalist stream which, as I have shown in Chapter 1, also rejected the idea of equality in favour of a more differentiated approach.

3.1 Merit

The first and most central component of differential consideration is the fact that it makes rights-holding dependent not on an individual's membership in a particular species or group, but rather on whether that individual possesses the characteristics and interests that are deemed relevant for fundamental rights. In other words, it makes rights-holding contingent on whether an individual being *deserves* these rights. The key idea behind Merit is a view that has become known as moral

[711] Williams (n 650) 142.

individualism.[712] James Rachels, one of its main proponents, defines moral individualism as "a thesis about the justification of judgements concerning how individuals may be treated".[713] According to moral individualism,

> how an individual may be treated is to be determined, not by considering his group memberships, but by considering his own particular characteristics. If *A* is to be treated differently from *B*, the justification must be in terms of *A*'s individual characteristics and *B*'s individual characteristics. Treating them differently cannot be justified by pointing out that one or the other is a member of some preferred group, not even the 'group' of human beings.[714]

Moral individualism is not blind to the fact that group members generally share some characteristics. For example, many human beings share the characteristic of being agents, which makes it wrong to treat these humans in certain ways. However, according to moral individualism, what matters is not whether an individual belongs to a group whose members characteristically possess agency, but only whether that individual being itself possesses agency. The fact that an individual also belongs to a group whose members characteristically possess agency is "morally epiphenomenal", as McMahan puts it.[715] As a result, Meritocrats reject the view, defended by the Aristocrats, that being born into the human species is a morally relevant criterion for the possession of fundamental rights. For Meritocrats, membership in the human species is no different from other extended social relationships, such as that of belonging to a particular race or sex. None of these extended relationships, Meritocrats believe, have any inherent moral value.[716]

Aristocrats object to this by arguing that there are some uniquely human values that make belonging to the human species morally relevant. For example, according to Finnis, concern for life, truth, co-operation, procreation, play, and a conception of what is mine and what is yours are

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712 The idea of differential consideration is also similar to proportional equality in Aristotle's sense, see: Stefan Gosepath, 'Equality' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2011 edn) <https://plato.stanford.edu/archives/spr2011/entries/equality/> accessed 21 July 2019.

713 James Rachels, *Created From Animals: The Moral Implications of Darwinism* (Oxford University Press 1999) 173.

714 ibid 173–174; for a similar, but less refined view, see Singer, *Animal Liberation* (n 8) 2 (emphasis added).

715 McMahan, 'Our Fellow Creatures' (n 663) 354 (footnote 2).

716 See ibid 361.

values that all and only humans have.[717] Meritocrats, however, can respond to such arguments by pointing out that the relevant values are not uniquely human. The values that Finnis highlights can at least to some extent also be observed in the great apes, for example.[718] Those who maintain in the face of these similarities that human beings nonetheless deserve special treatment are guilty of "speciesism" in the Meritocrats' eyes.[719] According to Peter Singer, who popularised the term, speciesism is understood as "a prejudice or attitude of bias toward the interests of one's own species and against those of members of another species".[720] As pointed out in Chapter 1, speciesism is by no means a new idea. Long before Richard Ryder coined the term in 1970,[721] Delamétherie rejected speciesist thinking, arguing that "[a]s soon as in reality there is the same degree of sensitivity in two individuals, *their species is irrelevant*. For any animal that thinks and reasons, our interest should be the same."[722] As will be recalled, Delamétherie even went as far as to argue that it does not matter whether sensitive beings are earthlings or not.[723]

Because Meritocrats place no importance on group membership, such as membership in the human species, they are open to extending moral concern to nonhumans. As Rachels points out, "[i]f we think it is wrong to treat a human in a certain way, because the human has certain characteristics, *and a particular non-human animal also has those characteristics*, then consistency requires that we also object to treating the non-human in that way".[724] If someone deserves a certain treatment, then they deserve it no matter what they are. It is in this sense that we have to

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717 Finnis (n 29) 81–85.

718 See eg on the respect nonhuman primates have for others' possessions: Sarah F Brosnan, 'Property in Nonhuman Primates' [2011] New Directions for Child and Adolescent Development 9, 13.

719 See on the term "speciesism": Richard D Ryder, 'Speciesism Again: The Original Leaflet' [2010] Critical Society.

720 Singer, *Animal Liberation* (n 8) 6.

721 Ryder (n 719) 1.

722 Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 207 (emphasis added).

723 ibid 196–197; see also Christopher D Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' (1972) 45 Southern California Law Review 450, 456, footnote 26, envisaging the possibility of extending rights to "humanoids, computers, and so forth".

724 Rachels, *Created From Animals: The Moral Implications of Darwinism* (n 713) 175 (emphasis in original).

understand Vlastos's claim that in the "M-system", individuals are simple "place-holder[s] of qualities".[725] What matters for differential consideration are one's qualities and not one's identity as, say, a human being or a Caucasian.[726] To illustrate, consider the following example.

In 2013, the Nonhuman Rights Project (NhRP) started filing writs of *habeas corpus* in US state courts to have chimpanzees recognised as legal persons with fundamental rights. In its court filings, the NhRP consistently argued that the individual animals on whose behalf it is suing possess the capacities required for the common law rights to bodily integrity and liberty.[727] In its petition on behalf of chimpanzee Tommy, for example, the NhRP maintained that in addition to being able to suffer from pain,[728] Tommy

> possess[es] the capacities for autonomy and self-determination[,] … self-consciousness, self-knowingness, self-agency, referential and intentional communication, empathy, a working memory, language, metacognition, numerosity, and material, social, and symbolic culture … the ability to understand cause-and-effect and the experiences of others, to imagine, imitate, engage in deferred imitation, emulate, to innovate and to use and make tools.[729]

In a more recent *habeas corpus* suit which the NhRP filed on behalf of elephants Beulah, Minnie, and Karen, it devotes more than half of its 36-pages long petition to providing an account of these elephants' characteristics, which it backs up with several affidavits from pachyderm experts. "Elephants are autonomous beings who can choose how to live their rich and fulfilling lives", the NhRP concludes in its Memorandum of Law, which is why "Beulah, Minnie, and Karen should be recognised as 'persons' with the common law right to bodily liberty".[730]

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725 Vlastos (n 391) 52.

726 Cf also Cochrane, 'From Human Rights to Sentient Rights' (n 482) 670–671.

727 The NhRP has focused on the right to bodily liberty in its suits on behalf of elephants, while in its earlier suits on behalf of chimpanzees, it sometimes claimed both a right to bodily liberty and to bodily integrity.

728 *Nonhuman Rights Project, Inc* v *Patrick C Lavery et al,* Memorandum of Law in Support of Petition for Habeas Corpus (2 December 2015) Supreme Court of the State of New York, County of New York, 1 <https://www.nonhumanrights.org/content/uploads/Tommy-Memo-of-Law-Dec-2-2015.pdf> accessed 21 July 2019.

729 ibid 7–8.

730 *Nonhuman Rights Project, Inc* v *Commerford & Sons, Inc et al*, Memorandum of Law in Support of Verified Petition for Common Law Writ of Habeas Corpus (13 November 2017) Superior Court, Judicial District of Litchfield 34 <https://www.nonhumanrights.org/content/uploads/CT-Memo-11.13.17.pdf> accessed 21 July 2019.

The Merit-based reasoning on which the NhRP's cases rely was recently defended in an *amici curiae* brief that seventeen philosophers submitted in the Tommy case. The philosophers argue that "[i]f chimpanzees possess the same relevant capacities that qualify humans as persons, then the reasonable conclusion should be that chimpanzees are also persons".[731] As a judge who ruled on one of the chimpanzee cases has put it, the NhRP's key argument in all its cases is that these animals "should be accorded rights consonant with their abilities, and that their autonomy and self-determination *merit* the right to be free from illegal detention".[732]

With this example in mind, we can now ask what exactly the standard is that the Meritocracy sets for a being's possession of a capacity. As we saw in Chapter 2, proponents of the Aristocracy justified their focus on agents by arguing that all human beings are at least *potentially* agents, or that all *normal* human beings are agents. This move was necessary because of the issue raised by the "marginal" cases.[733] Meritocrats, on the other hand, are sceptical of potentiality or normality arguments. Differential consideration, they argue, means that only a being's *actual* possession of the relevant capacities counts. As Singer and Helga Kuhse have pointed out: "If we are considering whether it is wrong to destroy something, surely we must look at its actual characteristics, not just the species to which it belongs".[734] Hence, on the Meritocratic conception, an individual only deserves a certain fundamental right if that individual actually possesses the relevant characteristics and interests which ground the right (I will call this the Argument from Actuality).

Meritocrats can draw on an argument Feinberg and Barbara Baum Levenbook made in the context of moral personhood to argue that the actuality criterion conforms better with our common-

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731 *Nonhuman Rights Project, Inc* v *Patrick C Lavery et al and Nonhuman Rights Project, Inc* v *Carmen Presti et al* (23 February 2018) Proposed Brief by Amici Curiae Philosophers, 28 <https://www.nonhumanrights.org/content/uploads/In-re-Nonhuman-Rights-v.-Lavery-Proposed-Brief-by-PHILOSOPHERS-74435.pdf>. See for the book version Kristin Andrews et al, *Chimpanzee Rights: The Philosophers' Brief* (Routledge 2019).

732 *Nonhuman Rights Project, Inc* v *Samuel L Stanley et al* [2015] Supreme Court of the State of New York, New York County No. 152736/15 26 (emphasis added).

733 See on the "marginal" cases problem Chapter 2, Subsection 4.2.

734 Peter Singer and Helga Kuhse, 'Individuals, Humans and Persons: The Issue of Moral Status', *Embryo Experimentation: Ethical, Legal and Social Issues* (Cambridge University Press 1990) 71; see also Cochrane, *Sentientist Politics* (n 11) 21; Peter Vallentyne, 'Of Mice and Men: Equality and Animals' (2005) 9 The Journal of Ethics 403, 423.

sense conception of fundamental rights.[735] Although an ideal Aristocratic account would for example confer political rights on human infants (with the proviso that they can only be exercised once they reach a certain age or maturity), this does not appear to be how these rights are actually distributed in practice. Commonsense seems to hold that despite their potential of becoming the holders of political rights, infants lack these rights until they acquire the relevant capacities. As Feinberg and Levenhook suggest, this fact is also mirrored in how we ordinarily talk of these things. For example, we do not generally apply terms such as "person" or "fundamental rights-holder" to beings that do not actually meet the relevant capacities.[736]

In addition, the actuality criterion avoids the difficulties that the potentiality and the normality approaches run into. The principal problem with the Argument from Potentiality,[737] Meritocrats argue, is that it does not follow from the fact that someone has the potential to *X* that they should have the same entitlements as an actual *X*.[738] Assume, for example, that *X* has the potential to become president. According to the Argument from Potentiality, *X* should therefore be given the powers of an actual president. Clearly, this would seem absurd. To salvage the Argument from Potentiality, Liao, in his argument on the genetic basis of moral agency,[739] has proposed to reinterpret the Potentiality Argument as saying the following: "If *X* has the potential for *V*, where *V* denotes attributes such as moral agency, sentience, and so on, then *X* is an *F*, where *F* could be a right-holder, human being, person, and so on".[740] However, also this modified version of the Potentiality Argument seems to fail. It gives *X* rights because of *X*'s potential to possess the features that ground rights-holdership, rather than because of *X*'s potential to possess the rights themselves. In both the modified and the unmodified version of the Potentiality Argument, however, *X*, who has only the potential to possess the relevant properties or rights, is equated with *Y* who holds rights because she actually possesses the relevant properties or rights. Assume, for instance, that

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735 See Joel Feinberg and Barbara Baum Levenbook, 'Abortion' in Tom Regan (ed), *Matters of Life and Death: New Introductory Essays in Moral Philosophy* (3rd edn, McGraw-Hill 1993) 209.

736 See ibid. But see also *supra* 110.

737 For an account of this argument, see *supra* 104.

738 For a more detailed account of the problems of the Potentiality and the Normality Arguments, see Fasel, '"Simply in Virtue of Being Human"? A Critical Appraisal of a Human Rights Commonplace' (n 438) 17–20.

739 See Chapter 2, Subsection 4.2.

740 Liao (n 540) 170 (emphasis added).

X has the potential to pass the Bar exam. On Liao's version of the Potentiality Argument, *X* would be an admitted lawyer allowed to litigate in court because he has the potential of passing the Bar. But surely, it would make no sense to say that someone with the mere potential to be admitted to the Bar is an admitted lawyer with all the relevant rights. For the same reason, Meritocrats can argue that it would make no sense to give a being rights simply because it potentially possesses the features that ground these rights.[741]

The second problem with the Argument from Potentiality seems to be that not all human beings have the potential to develop agency.[742] In particular, human beings born with specific mental disabilities do not possess this potential.[743] As McMahan has observed,

> [t]here are some human beings—those who are congenitally and radically cognitively impaired …—who in at least one obvious sense lack the potential for the development of a rational nature. While most immature human beings (embryos, foetuses, new-born infants) will, given a favourable environment, develop a capacity for rationality, those immature human beings that are radically cognitively impaired cannot develop this [capacity].[744]

From the point of view of the Meritocrats, the Argument from Normality fares no better.[745] First, while its focus on what is normal for members of a species allows the levelling up of those beings whose capacities are below the normal level, it also serves to level down those who are above it.[746] Imagine, for example, that there was a radioactive spill which caused a superhuman being to come into existence. Assume that the superhuman being possesses capacities that are far superior to those of normal human beings. According to the Argument from Normality, the superhuman being would not deserve any special treatment but would have to be treated in the same way as normal human beings. Second, even where the Argument from Normality levels up, it is problematic because it would justify conferring entitlements and duties on beings that ought not

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741 Fasel, '"Simply in Virtue of Being Human"? A Critical Appraisal of a Human Rights Commonplace' (n 438) 18. To be sure, this does not mean that potentiality is never morally relevant. However, there is reason to believe that it cannot easily be assimilated to actuality in the grounding of rights.

742 See Chapter 2, Section 4.

743 Cochrane, 'From Human Rights to Sentient Rights' (n 482) 661.

744 McMahan, 'Challenges to Human Equality' (n 149) 88.

745 For an account of this argument, see *supra* 105.

746 McMahan, 'Our Fellow Creatures' (n 663) 358.

have them. For example, the Argument from Normality would justify granting the right to vote to infants because normal human beings have that entitlement.[747] The Argument therefore ignores morally relevant differences between beings. Lastly, even if Aristocrats can show that the status of an individual should be lifted because it belongs to a particular group whose normal members possess the relevant feature that justifies this status, it is not clear why the human species should be this group. As Cochrane points out, marginal human beings "belong to many other wider groups, such as mammals, living organisms, and so on, many of which do *not* necessarily hold such capacities. Picking species membership as the relevant wider group is arbitrary".[748] We have encountered the same argument above, when discussing the Meritocratic rejection of speciesism.[749] There, the argument was that we need to focus on individuals' characteristics because there is nothing morally relevant about belonging to the group "human beings". Here, the argument is that there is nothing morally relevant about the human species that would justify resorting to what is normal for human beings rather than, say, mammals, to justify giving marginal humans certain rights. McMahan argues that we can, in fact, find an implicit acknowledgment of this issue in the Argument from Normality itself which, according to him,

> presupposes that the essential properties for membership in the human species are not themselves status-conferring; for if they were, there would be no point in arguing that all human beings have a higher status than any animal by virtue of belonging to a kind whose normal or typical members have certain evidently or recognisably status-conferring intrinsic properties.[750]

My purpose is not to decide whether the objections that the Meritocrats raise against the Arguments from Potentiality and Normality are compelling. Rather, it is simply to show that Meritocrats have a set of responses that help them counter the arguments of the Aristocrats and support the Argument from Actuality.

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747 As we saw in Chapter 2, Subsection 4.3, however, Aristocrats reject this point by arguing that children already have an (as of yet unrealised) right to vote.

748 Cochrane, 'From Human Rights to Sentient Rights' (n 482) 661 (emphasis in original).

749 See *supra* 143.

750 McMahan, 'Our Fellow Creatures' (n 663) 357 (emphasis removed).

3.2 Gradualism

The second component of differential consideration is Gradualism. This component is closely related to the first one because Merit *is* a grading concept. Gradualism starts from the fact that individuals differ in their characteristics. Some are bright, others are dim; some are sociable, others are hermits; and some are virtuous, while others are wicked. That is not a new insight, of course. As Diderot has observed, for example, the materialist universe is one "in which everything is connected, & where the beings rise above or below each other, in imperceptible degrees, so that there is no gap in the chain [of beings]".[751] "The more we examine nature", he continued, "the more we become convinced that in order to express ourselves precisely, there would have to be as many different denominations as there are individuals".[752] According to Meritocrats, if an individual's characteristics differ gradually from the characteristics of another individual, then so do their respective merits. As Vlastos put it, the "M-system" requires "grading individuals … with respect to their qualities".[753] As we saw, according to him, this works on two levels: first, the level of who deserves a particular fundamental right and, second, the level of strength of that particular right.

On the first level, only those who actually possess the relevant characteristics that ground a particular fundamental right deserve that right. This is what Vlastos meant with a right being *justified by merit*. Because there are important differences in characteristics even among conspecifics, not all members of the same species will possess the same fundamental rights. What is more, beings from other species who possess the same characteristics may deserve some of the same rights. This has important implications for two common human rights notions: first, that human rights are *indivisible*, meaning that human beings possess *all* human rights (I have termed this the wholesale-approach in Chapter 2), and second, that human rights are *universal*, that is, that *all* human beings possess human rights. Together, indivisibility and universality entail that *all* humans possess *all* human rights.

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751 Diderot and Daubenton, 'Animal' (n 271) 468.

752 Denis Diderot, 'Animal', *Encyclopédie, ou Dictionnaire raisonné des sciences, des arts et des métiers* (1770) 682 683.

753 Vlastos (n 391) 51.

The commonplace that human rights are *indivisible* (that is, that they come wholesale) holds that if *A* has fundamental rights, then *A* has all fundamental rights.[754] Because, on the Aristocratic view, every human being possesses human rights, it follows that every human being possesses all human rights.[755] But once one accepts, as the Meritocrats do, that individuals' different characteristics ground different fundamental rights, then the view that fundamental rights come as an indivisible set is abandoned. Instead, Meritocrats adopt what we could call a *retail*-approach to distributing rights: individual merit determines which fundamental rights which individual gets. In contrast to the Aristocracy, there is no package deal on offer here.[756] This retail approach can already be found in Delamétherie's theory. As will be recalled, Delamétherie argued that while humans and animals share some rights-grounding characteristics—such as their sensitivity—there are some fundamental rights that not all possess because they are based on characteristics that not all have. Part of Delamétherie's more general *droit d'animalité* are the individual rights of the specific species. For example, according to Delamétherie, there is a *droit d'humanité* which describes the rights and obligations that apply only to human beings.[757] As part of this *droit d'humanité*, humans possess rights that protect those special needs that they have because they have left the state of nature, giving them, for instance, a right to clothing or to adequate housing.[758] However, as we saw, there are also other *droits* under the *droit d'animalité*, such as for example a *droit de chevalité*, providing for the special rights of horses.[759]

The second notion—that of human rights *universality*—holds that if *A* is a human being, then *A* holds fundamental rights. Note that, in contrast to the indivisibility thesis, it is not necessary

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754 Lohmann (n 569) 11; see for a critique of the indivisibility thesis Pollmann, 'Die Menschenrechte: teilbar und ungleichgewichtig!' (n 571).

755 Some have questioned whether the current human rights practice actually vindicates this view, see eg: Cochrane, 'From Human Rights to Sentient Rights' (n 482) 665; however, others maintain that the indivisibility thesis still holds, see eg: Lohmann (n 569).

756 However, that is not to say that, if deserved, fundamental rights cannot come in sets, as with the *droit de chevalité*, for example.

757 Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 209–210.

758 See ibid 217–218.

759 See ibid 215.

for A to hold *all* fundamental rights. It is sufficient that A hold at least one human right.[760] This difference often goes unnoticed. Many falsely assume that humans have to possess all fundamental rights, and thereby confound the universality thesis and the indivisibility thesis.[761] In contrast to the latter, the Meritocracy does not discard outright the notion of universality. However, it takes away the unconditional validity universality has in the Aristocracy by making it contingent upon empirical corroboration: whether or not it is true that all human beings possess at least one fundamental right depends on whether all human beings indeed possess the characteristics that ground at least one fundamental right. This may or may not be the case. Even if, as I believe, we have good reasons for assuming that they do,[762] the Meritocratic conception has no principal commitment to the universality thesis.

The second level on which Gradualism works is the level of *strength* of a right, or the fact that they are *proportioned to merit*. Under the Meritocratic conception, different beings do not only deserve different rights, but they deserve these rights to different extents. If *A* possesses characteristic *c* to a higher degree than *B*, and if *c* grounds fundamental right *r*, then *A*'s right *r* is *prima facie* stronger than *B*'s. Consider what Delamétherie says, for example, about the rights of predators and of humans to kill other animals for food.[763] According to Delamétherie, the right to life of predators encompasses what is necessary for their self-preservation and can outweigh the conflicting right to life of their prey if it is sufficiently weighty, that is, if there is no other way for the predator to survive. Humans, on the other hand, have alternative ways of procuring their survival without having to eat another animal's flesh. As a result, their right to life will generally not be strong enough to outweigh that of other animals.[764] Or consider a case where the right to life of a normal human being conflicts with the right to life of a normal rat and where that right is grounded in one's mental ability to plan for the future. Cochrane argues that in such a case it would be reasonable to say that the right to life of the human outweighs that of the rat:

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760 See Fasel, '"Simply in Virtue of Being Human"? A Critical Appraisal of a Human Rights Commonplace' (n 438) 17.

761 Nickel (n 697) 153; Cochrane, *Sentientist Politics* (n 11) 22–23.

762 Fasel, '"Simply in Virtue of Being Human"? A Critical Appraisal of a Human Rights Commonplace' (n 438) 25.

763 Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) xviii, 50, 68.

764 See ibid 235–237.

> imagine a situation in which the *prima facie* right to life of a human being comes into conflict with the *prima facie* right to life of a rat. Under a principle of equal consideration, would we just have to toss a coin to see who wins out? Certainly not. The interests of both should be weighed fairly and equitably against each other. Since human beings have a mental complexity and an emotional life that far outstrips that of rats, and since human beings also have the ability to make plans for and have desires about the future, it is perfectly reasonable to state that the human interest in continued life is ordinarily much stronger than that of rats.[765]

In this scenario, the Meritocratic conception vindicates common practice: it provides a justification for how human interests outweigh the interests of animals. The Meritocracy is a double-edged sword, however. If the rights-grounding characteristics of an animal are more developed than those of a human being, then the right of the animal will outweigh that of the human being. Imagine the rat in our example mutates because of the radioactive spill mentioned above, like Master Splinter in the Teenage Mutant Ninja Turtle comics. Transformed, our rat has acquired extraordinary mental capacities and the ability to plan far ahead into the future, further still than any human can. Assume also that the human being in our example lacks these characteristics because of a severe mental disability. If, as Cochrane suggests, the right to life is grounded in a being's capacity to make plans for the future, then the right to life of the Splinter-like rat would no doubt outweigh that of the human being.

Perhaps even more disturbingly, Gradualism has far reaching implications also among human beings.[766] Similarly as in the rat case, human beings with more advanced mental capacities and with a more developed ability to plan their future have a stronger interest in continued existence. As a result, their right to life would outweigh that of human beings with severe mental disabilities. It is here that the connection between the Meritocracy and utilitarian conceptions becomes evident. As Allen Buchanan has argued, for utilitarians, too,

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765 Cochrane, 'From Human Rights to Sentient Rights' (n 482) 671 (emphasis in original); see also Singer, *Animal Liberation* (n 8) 17–21.

766 Jeff McMahan, *Killing in War* (Oxford University Press 2009) 161.

> there is only a gradation, a continuum of beings with lesser and greater capacities for well-being and harm, and sacrificing some beings for the sake of others further along the continuum is always in principle not only permissible, but even required.[767]

Like utilitarian gradualism,[768] Meritocratic Gradualism leaves little or no room for a status of equality.[769] This is because such a status would have to "supervene upon facts about our nature", as McMahan points out, "yet there are really no relevant respects in which we are by nature equal".[770] Gradualism thus inherits naturalism's rejection of the Equality Thesis. For the same reasons, the Meritocracy is also unsuited to accommodate other threshold-concepts, such as personhood or dignity.[771] Thresholds (or range properties, as we have called them in Chapter 2) constitute discontinuous strategies, which, as Simmonds has noted, "cannot be mapped onto a continuous distinction".[772] Thresholds presuppose that the beings on one side of the threshold are categorically distinct from those on the other. They are an all-or-nothing matter. And as such they are incompatible with Gradualism.[773] Take the example of personhood. Those who meet the threshold of being persons are all equally persons. Those who do not meet it, are not persons at all. No one

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767 Allen Buchanan, *Beyond Humanity? The Ethics of Biomedical Enhancement* (Oxford University Press 2011) 224.

768 Mulgan (n 701) 459 (noting that "[t]he notion of equal worth sits uneasily with any naturalistic picture of what gives rise to worth, as the underlying properties necessarily come in degrees. This is a perennial problem for naturalistic liberals"); see also Alice Crary, *Inside Ethics: On the Demands of Moral Thought* (Harvard University Press 2016) 125; see however on the centrality of "equality" in utilitarianism David J Crossley, 'Utilitarianism, Rights and Equality' (1990) 2 Utilitas 40.

769 Nickel (n 739) 153. But see also Cochrane, *Sentientist Politics* (n 11) 23–25.

770 McMahan, 'Challenges to Human Equality' (n 149) 95; Zuolo argues that one could try to reconcile the equality principle with moral individualism by interpreting the relevant capacities as range properties. However, this would come at the cost of rejecting the importance of gradual merit above the threshold. Federico Zuolo, 'Dignity and Animals. Does It Make Sense to Apply the Concept of Dignity to All Sentient Beings?' (2016) 19 Ethical Theory and Moral Practice 1117, 1124.

771 See McMahan, 'Challenges to Human Equality' (n 149) 101–102. McMahan uses the notion "fully gradualist account" for what I call Gradualism here.

772 Nigel E Simmonds, *Law as a Moral Idea* (Oxford University Press 2007) 196.

773 See McMahan, 'Challenges to Human Equality' (n 149) 93.

who passes the threshold is more or less of a person. This is incompatible with Gradualism according to which individuals' characteristics and their interests are what matters. As Buchanan has argued,

> [i]t is not clear that the interest-based view [ie the Meritocratic view] can support the morally momentous distinction between persons and nonpersons that is implicated in the commonsense idea that nonhuman animals have a lower moral status. Instead, the interest-based view, properly understood, seems to be a kind of debunking of the idea of different moral statuses, properly speaking, and a recommendation to replace it with something more like a continuum or gradient of moral considerability.[774]

As Delamétherie's 1802 treatise *De l'homme considéré moralement, de ses mœurs, et de celles des animaux* anticipated, Gradualism paves the way for hierarchies between human beings, with some possessing more rights and a higher status than others.[775] While the divide need not necessarily be between civilised peoples and barbaric peoples, or rich and poor, as Delamétherie suggested,[776] Gradualism makes it likely that some kind of rights hierarchies will emerge. Even if we have good reasons for rejecting the view that some human groups deserve more or stronger rights than others because no group can be said to be superior to others, the fact that the Meritocratic conception is not in principle opposed to such categorisations shows how radical it is.[777] In the eyes of the Aristocrats, it is exactly this fact that makes the Meritocracy so odious. I will analyse this point in more detail in Section 5 when considering the Meritocracy's strong suit and weakness.

Before we turn to the Meritocracy's second central feature—its focus on patients—we need to address an objection that threatens to undermine the distinction between Meritocracy's differential consideration and Aristocracy's equal consideration. As I have suggested in this section, Meritocrats embrace difference, whereas Aristocrats embrace equality. But what if this dichotomy is a false one? What if difference and equality are not mutually exclusive? That is precisely what

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774 Buchanan (n 767) 218; see for a similar idea also Waldron, *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought* (n 158) 72.

775 See Chapter 1, Subsection 4.2.

776 Delamétherie, *De l'homme considéré moralement* (n 320) vii, 38, 256–261.

777 See Singer, *Animal Liberation* (n 8) 4; see also Phillips (n 32) 45; Allen Buchanan, 'The Egalitarianism of Human Rights' in Roger Crisp (ed), *Griffin on Human Rights* (Oxford University Press 2014) 691.

the objection tries to establish. Aristocracy's equal consideration, the objection goes, can accommodate individuals' different characteristics. In fact, equal consideration *requires* that we treat beings with different interests differently.[778] This is because equal consideration should not be mistaken for the descriptive claim that all humans are the same. Nor should it be confused with the normative position that all human beings should be treated identically. Under the Aristocratic conception, human beings need not be treated *equally*, but *as equals*.[779] Dworkin elucidates this distinction between equal treatment and treatment as equals by arguing that the former entails the "right to an equal distribution of some opportunity or resource or burden", whereas the latter describes the right "to be treated with the same respect and concern as anyone else".[780] For example, if a teacher were to give the same mark for student *A*'s excellent paper and for student *B*'s mediocre paper, both *A* and *B* would be treated equally. However, they would not be treated as equals, for in order to respect student *A*'s achievements he should be given a higher mark. Aristocrats can thus point out that their position is no stranger to differential concern. Quite the opposite: equal consideration requires taking into account the differences between human beings and treating them differently based on these differences.

To respond to this objection, Meritocrats can insist that there is a real and important difference between equal consideration and differential consideration. The difference is that in contrast to equal consideration, differential consideration is not committed to the view that all humans have equal worth. This difference is easily overlooked because even some Meritocrats put forth principles that seem to render the distinction between equal and differential consideration moot. Singer, for example, has made the "equal consideration of interests" principle a cornerstone of his theory.[781] According to Singer, this principle requires "that we give equal weight in our moral deliberations to the like interests of all those affected by our actions", regardless of who the interest-

778 See eg Elizabeth Fenton, 'Genetic Enhancement—A Threat to Human Rights?' (2008) 22 Bioethics 1, 6.

779 See Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) 11; for an insightful analysis of these two notions, see also Peter Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse* (Princeton University Press 2014) 102–108.

780 Dworkin, *Taking Rights Seriously* (n 472) 273.

781 Singer, *Animal Liberation* (n 8) 6; for a more nuanced account of the equal consideration of interests principle, see David DeGrazia, *Taking Animals Seriously: Mental Life and Moral Status* (Cambridge University Press 1996) 44–49.

holders are.[782] At first glance, Singer's principle seems to be the spitting image of the Aristocratic principle of equal consideration. The similarity is in name only, however. For while Singer's principle requires that like *interests* be treated alike, the Aristocratic principle requires that like *interest-holders* be treated alike.

This is an inconspicuous but important difference. Under Singer's principle, as under the Meritocracy, individuals are mere placeholders of interests. As we saw above, their identity as members of a particular group is considered to carry no moral significance in itself. As a result, an individual's moral worth depends entirely on the number and the strength of the interests it has. The greater these interests, the greater the moral worth of the individual. Recall Cochrane's example of the rat and the human being. In this example, the human being's interest in life was taken to be stronger than the rat's, which is why we inferred that the right of the human being outweighs that of the rat. Had the rat's interest been stronger, then her right would have outweighed that of the human being. It is in this sense that Singer's equal consideration of interests principle treats interests equally, but not interest-holders. The human's and the rat's moral value is not equal because it depends on their interests. Many have rejected Singer's principle precisely for this reason. As Tom Regan has argued, it "has no room for the equal moral rights of different individuals because it has no room for their equal inherent value or worth. What has value for [Singer] is the satisfaction of an individual's interests, *not the individual whose interests they are.*"[783] Indeed, in a discussion of the moral status of mentally disabled human beings, Singer explicitly suggested that we should "abandon the idea of the equal value of all humans, replacing that with a more graduated view in which moral status depends on some aspects of cognitive ability, and that graduated view is applied both to humans and nonhumans".[784]

The Aristocracy's equal consideration, by contrast, is based on the assumption that all fundamental rights-holders (that is, all human beings) have equal worth. This thought is often expressed in the idea that humans, in virtue of their agency, are persons with equal worth. As Rawls

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782 Peter Singer, *Practical Ethics* (3rd edn, Cambridge University Press 2011) 20.

783 Tom Regan, 'The Case for Animal Rights' in Peter Singer (ed), *In Defence of Animals* (Basil Blackwell 1985) 19 (emphasis added).

784 Peter Singer, 'Speciesism and Moral Status' (2009) 40 Metaphilosophy 567, 575.

put it, for example, the term "equality … applies to the respect which is owed to *persons*"[785]. Personhood is taken to be a moral baseline that determines which treatments we owe to persons in order to respect them as equals.[786] Equal consideration thus has an underlying commitment to equal worth which governs its sensitivity to individual differences. Equal consideration, in Peter Westen's words, has to "straddle[] the gap between 'different' and 'same'".[787] This commitment to equality is completely absent in the Meritocracy. To see this, consider again our example of the human with a strong interest in being alive and the rat with a weaker interest. Only this time, imagine that the rat is actually a human being. Differential consideration would assign greater moral value to the life of the human being with the stronger interest in life and would therefore allow this human's right to life to outweigh the right to life of the human with the weaker interest. Equal consideration forbids this because it considers the lives of both humans *qua* persons to be of equal worth. Hence, while equal consideration is sensitive to certain differences between human beings, its commitment to an underlying moral baseline inhibits it from accommodating other differences. Differential consideration, on the other hand, is restricted by no such commitment, and can therefore accommodate all kinds of differences between (human) beings.

3.3 Inclusivity

Let us now turn to the third and last feature that is characteristic of the Meritocracy's differential consideration: Inclusivity. This feature mirrors the third feature of the Aristocracy's equal consideration, Exclusivity. As has become clear in the preceding two subsections, differential consideration does not limit fundamental rights to the human species, nor to any other group. As we saw, its Merit-based Gradualism is open to recognising fundamental rights in any kind of individual. The only condition for this is that the individual actually possesses the capacities that are considered relevant for the possession of the right. In other words, differential consideration *includes* in the category of rights-holders any individual who deserves it, nonhuman animals and, as Delamétherie argued, any other sensitive being that exists included.

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785 Rawls (n 10) 511 (emphasis added).

786 See for the term "baseline" Waldron, *Dignity, Rank, and Rights* (n 6) 59–60.

787 Westen (n 779) 7.

Once one extends rights to nonhuman animals, as the Meritocrats do, one loses the exclusively human character of "human" rights.[788] As some Meritocrats have pointed out, it would therefore be apposite to replace the label "human rights" with a more suitable term that reflects the broader category of beings who are possible rights-holders.[789] Cochrane, for example, has advocated a reconceptualisation of human rights as "sentient rights".[790] He proposes to adopt this term because, on his account, not only human beings can have rights, but all sentient beings. Cochrane's proposal is a useful illustration of the main thrust of the Meritocracy, but it is worth asking if his term "sentient rights" can capture the fact that many Meritocrats understand sentience as the mere capacitiy to feel pain, which makes it difficult to argue that sentience is the only rights-grounding feature. On this narrow interpretation, sentience woud likely be one ground among others, and for some rights, such as the right to free speech, it might not be a ground at all. A wider interpretation of "sentient" could perhaps solve this problem.[791] However, because there is, in all likelihood, a plurality of grounds for fundamental rights, I think it is preferable to use the term "fundamental rights", as I have done, when talking not only of human rights but the fundamental rights of nonhumans also.

4 Patient-focus

The preceding analysis of differential consideration and its three components—Merit, Gradualism, and Inclusivity—has provided the foundation for an examination of Meritocracy's second characteristic element. This element addresses the question *why* beings hold rights under the Meritocratic conception. As I will show in this section, a being holds rights if it is a *patient*. Subsection 4.1 spells out what I mean by "patient", before Subsection 4.2 analyses the implications of Meritocracy's patient focus on its conception of the holder of fundamental rights and the nature of these rights. Mirroring the discussion of the implications of the Aristocracy's agent-focus, I will argue that the Meritocratic conception conceives of rights-holders—in line with the interest theory of

788 Cochrane, 'Evaluating "Bioethical Approaches" to Human Rights' (n 31) 319.

789 ibid 320; Cochrane, 'From Human Rights to Sentient Rights' (n 482).

790 See Cochrane, 'From Human Rights to Sentient Rights' (n 482) 656; Cochrane, *Sentientist Politics* (n 11) 30.

791 For example, one could interpret "sentience" to be a precondition for all other interests, which would allow it to encompass all these (potentially) rights-grounding interests at least indirectly. See Cochrane, *Sentientist Politics* (n 11) 15, 30. See on this interpretation of sentience *infra* 162.

rights—as patients whose capacities give rise to *interests* in them that are sufficiently weighty to ground duties in others; that it *rejects the reciprocity* of rights and duties; and that it considers rights to be *relative*, not absolute. (Note that the only element missing here is the Meritocracy's adoption of a *retail* approach, which I have addressed in the previous section.)

4.1 Patients

In contrast to the Aristocracy, where the focus is on agency to explain why only human beings deserve dignity and equal human rights, patients are in the limelight of the Meritocracy. As we saw in Chapter 2, patients are defined as the counterpart of agents. Gruen, for example, defines moral patients as those who can receive moral attention and concern but who, due to a deficiency in their mental capacities, cannot themselves have any moral responsibilities.[792] Similarly, according to Mark Rowlands, "*X* is a moral patient if and only if *X* is a legitimate object of moral concern: that is, roughly, *X* is an entity that has interests that should be taken into consideration when decisions are made concerning it or which otherwise impact on it."[793] As I have emphasised in Chapter 2, these definitions, although useful, are limited because they are focused on *moral* patiency. Because the Meritocratic ideal-type is one that combines moral and legal features, I propose to define patiency more broadly. A "patient", for our purposes, shall be a being who lacks the capacity to make reflective choices about its own actions in the moral and legal domain and who can therefore not act on choices it makes and be held responsible for its actions. Nevertheless, the being is an object of our concern because it has other capacities and interests that deserve moral and/or legal protection. An important example of patients, according to Meritocrats, are nonhuman animals.

The term "patient" is not ideal. It brings to mind hospitals, illness, and helplessness. Most animals, of course, are not patients in this sense. They are at the wheel of their own lives and can well be said to have agenthood in conducting their own affairs.[794] However, as we saw in Chapter 2, the common belief is that only human beings are agents in a narrow sense.[795] As Rowlands

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792 Gruen (n 504) 60.

793 Rowlands (n 506) 72 (emphasis added).

794 See also Schlosser (n 506) (noting that in a "very broad sense, it is possible to identify agents and agency, and patients and patiency, virtually everywhere.").

795 See Chapter 2, Section 4.

points out, "[t]he claim that animals are moral patients is now widely accepted—both inside and outside the world of academic philosophy".[796] Of course, due to Meritocrats' adoption of Gradualism, they do not think that the agent/patient dichotomy is clear-cut. There may be some nonhuman animals who are agents, capable of reciprocating duties and leading lives as active members of the community.[797] And there will be some humans who are not. For the majority of animals, however, it will be true that they are not agents in this narrow sense. Importantly, however, this does not make them fair game. Animals participate in specific goods of life, meaning that things can go better or worse for them. Even if they are for the most part unaware of the fact that they have these goods, they nonetheless have them. That is why they are moral patients whose interests we need to take into consideration.[798] But how exactly are we to take their interest into consideration, according to proponents of the Meritocratic conception? To answer this question, let us turn to the implications of the Meritocracy's patient-focus.

4.2 Implications

When talking about the Meritocratic conception of fundamental rights, I have so far argued that it grounds fundamental rights in individuals' characteristics or capacities. As I have flagged in my discussion of animals and merit in Subsection 2.2, however, this was a simplistic picture. In particular, I have not yet provided an explanation for why Meritocrats would think that fundamental rights can follow from mere characteristics. Suppose it is one of my characteristics that I am tall. Does that fact entitle me to any rights, for example the right to high ceilings or to bespoke clothing? Or suppose I am jealous. Does that mean I have a right that my wife be loyal? It is unclear why my being tall or jealous should have any palpable connection to fundamental rights. So how exactly can Meritocrats argue that an individual's characteristics are at the basis of fundamental rights? The key to answering this question lies in the concept of "interests" which I have so far only mentioned in passing. Interests play a crucial role in the Meritocratic conception because they bridge the gap between individuals' characteristics or capacities and the rights they deserve. By

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796 Rowlands (n 506) 75.

797 See eg Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2011) 117–122.

798 Gruen (n 504) 61.

adopting an *interest-based approach to rights*, Meritocrats reject the choice-based rights theory favoured by the Aristocrats.[799] This is the first implication of Meritocracy's patient-focus.

There are a number of different formulations of the interest-based theory but one that has become widely-known is Joseph Raz's. I will be presenting the Meritocracy using Raz's theory but will make amendments where necessary to better capture the Meritocracy. According to Raz, *X* has a right on the interest theory "if and only if *X* can have rights, and, other things being equal, an aspect of *X*'s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty".[800] There are three requirements in this definition that need further unpacking: a) that *X* is the kind of being who can hold rights ("if and only if *X* can have rights"); b) that the right is based on *X*'s interests ("an aspect of *X*'s well-being (his interest)"); and c) that that interest is sufficiently important to justify the imposition of duties on others ("is a sufficient reason for holding some other person(s) to be under a duty").

a) The first requirement for someone to hold rights under the interest-based approach is that they are the kind of being who can hold rights ("… *if and only if X can have rights* …"). According to Raz, only beings whose well-being is of ultimate value can possess rights.[801] While Raz himself believed that animals do not have ultimate value—arguing, for example, that a dog's value is "not ultimate for it derives from the dog's contribution to the well-being of the man"[802]—advocates of the Meritocracy believe that they do. According to them, Raz's dog has intrinsic value that does not derive from his contribution to anyone's well-being.[803] In Tasioulas's words, beings have intrinsic value, and are therefore potential right-holders, if they "matter in themselves".[804]

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799 See Chapter 2, Section 4.

800 Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) 166 (emphasis added).

801 The only exception to this, Raz argues, are artificial persons, such as for example corporations: ibid.

802 ibid 178.

803 For a rejection of Raz's distinction between ultimate and intrinsic value, see Tasioulas, 'On the Foundations of Human Rights' (n 406) 55.

804 ibid.

And as Tasioulas acknowledges, humans are not the only beings that matter in themselves.[805] Meritocrats' core criterion for inherent moral worth—for mattering in oneself—is sentience.[806] In its most basic sense, sentience can be defined as the capacity to have sensations, that is, to feel.[807] Sentient beings can have negative sensations, such as pain, fear, or grief; and positive ones, such as pleasure, gratification, or relief. They participate in their own forms of the good and can flourish, much in the same way as human beings can flourish.[808] Sue Donaldson and Kymlicka point out that most animals not only have a subjective good, but that they are also able to communicate it: "They walk to the gate to indicate that they want to go outside. They meow in front of the fridge to ask for food. They nuzzle your arm to ask for affection."[809] Non-sentient things, by contrast, lack a subjective good, let alone the capacity to communicate it. A house, for example, can be built or destroyed, but neither of these things can be said to be in or against the interest of the house, except in a metaphorical sense.[810] This is why only sentient beings possess interests in the sense that they "can have rights".[811] For the same reason, duties only make sense if their beneficiaries (but not addressees) are sentient beings: any duty we might have to protect the abovementioned house because it is, say, Grade I listed, is directed toward others, such as the public, but not to the

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805 See eg ibid 54, footnote 14 (pointing out that nonhuman animals may have rights).

806 On the sentience criterion, see Sherry F Colb and Michael C Dorf, *Beating Hearts: Abortion and Animal Rights* (Columbia University Press 2016) (contrasting—in a similar way as this thesis does—the criterion of sentience with that of humanity).

807 See Oxford English Dictionary, 'Sentient' (Oxford University Press 2015).

808 Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2006) 346–352; see also Gary Chartier, 'Natural Law and Animal Rights' (2010) 23 Canadian Journal of Law & Jurisprudence 33, 35–36.

809 Donaldson and Kymlicka (n 797) 108.

810 Cf Colb and Dorf (n 806) 17–18; see also Matthew H Kramer, 'Do Animals and Dead People Have Legal Rights?' (2001) 14 Canadian Journal of Law & Jurisprudence 29, 33.

811 Singer, *Animal Liberation* (n 8) 7; but see also Gary E Varner, *In Nature's Interests? Interests, Animal Rights, and Environmental Ethics* (Oxford University Press 1998).

house itself. The house is at best an indirect recipient of duties.[812] Sentient beings are different. Our duties are not merely *regarding* them, but *to* them.[813]

It should be noted that there is an ongoing debate among Meritocrats as to what sentience exactly entails. While some define it narrowly, as requiring a minimal degree of consciousness,[814] others define it more broadly and include also non-conscious organisms, such as plants.[815] The issue of where exactly to draw the line between sentient and non-sentient beings has never posed a major issue for the Meritocracy, however, because the common assumption seems to be that the line *does* lie somewhere—wherever that may be. Two centuries ago, Delamétherie argued that only beings capable of feeling sensations possess rights. Only these *êtres sensibles* love, suffer, hate, and crave.[816] Like contemporary Meritocrats, Delamétherie stumbled upon the problem of potential sensations in plants.[817] And like contemporary Meritocrats, it did not prevent him from adopting sensations as a necessary condition for rights-holding.[818] Today's Meritocrats seem to be in agreement with Delamétherie that they can largely delegate the precise line-drawing exercise between sentient and non-sentient creatures to the natural scientists.

b) The second requirement of the interest-based approach to rights is that the right has to be based on the rights-holder's interests ("… *an aspect of X's well-being (his interest)* …"). Having

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812 Cochrane, 'From Human Rights to Sentient Rights' (n 482) 657–658; see on the related distinction between objective rights and subjective rights: Peters (n 503) 43, 46–47.

813 Feinberg, 'The Rights of Animals and Unborn Generations' (n 555) 45; see for a more detailed rejection of the indirect duty view as applied to (sentient) animals: Regan (n 783) 15–16.

814 Cochrane, 'From Human Rights to Sentient Rights' (n 482) 658.

815 See for a discussion of plant sentience Paco Calvo, Vaidurya Pratap Sahi and Anthony Trewavas, 'Are Plants Sentient?' (2017) 40 Plant, Cell & Environment 2858.

816 Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) xvi.

817 See Feinberg, 'The Rights of Animals and Unborn Generations' (n 555) 51–55.

818 In a footnote, Delamétherie explained that only animals reveal to us that they feel, which is why, for the purposes of his treatise, he assumed that only they count as *êtres sensibles*. However, he argued that nothing prevents us from applying the same reasoning to plants or other organisms. This follows, Delamétherie emphasised, because there is no hard and fast line between animals and plants: Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 199, footnote a.

interests is a necessary condition for having rights, in the same way as having sentience was shown to be a necessary condition for having interests.[819] This is also how Delamétherie approached the matter. Only sensitive beings have an interest in having their well-being protected, he reasoned, which is why only they can have fundamental rights.[820]

What exactly is an aspect of one's well-being or interest? According to Tasioulas, "something is an interest of a person if its fulfilment enhances an aspect of their well-being; in other words, it makes that person's life better in some respect, for the person living it, than it would have been but for the fulfilment of that interest".[821] Interests are thus intimately connected to well-being.[822] Some Meritocrats, of course, prefer other terms than "interests", and talk instead of "needs",[823] "capabilities",[824] or other "want-regarding categories".[825] Regardless of the exact terminology that these thinkers use, however, they all agreed in "ascrib[ing] to all members of a class *C* a right to treatment *T* [presupposing] that *T* is, in all normal circumstances, a good for every member of *C*", as Neil MacCormick has noted.[826]

Embracing variety over uniformity, Meritocrats believe that every sentient being has a plurality of interests.[827] An injured cat, for example, has an interest in having his wound treated, but

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819 Feinberg, 'The Rights of Animals and Unborn Generations' (n 555) 51; see also Cochrane, 'From Human Rights to Sentient Rights' (n 482) 657.

820 Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 148.

821 Tasioulas, 'On the Foundations of Human Rights' (n 406) 51; for a similar definition, see DeGrazia (n 781) 39.

822 Cf Raz (n 800) 180; see for a discussion of "well-being" and "interests" Gruen (n 504) 29–33.

823 Eg Massimo Renzo, 'Human Needs, Human Rights' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015).

824 Eg Martha Nussbaum, 'Capabilities and Human Rights' (1997) 66 Fordham Law Review 273.

825 Neil MacCormick, 'Children's Rights: A Test-Case for Theories of Right' (1976) 62 Archiv für Rechts- und Sozialphilosophie 305, 160 (internal quotation marks omitted); these approaches fall within the more general category of "welfarist" theories, see Cochrane, 'From Human Rights to Sentient Rights' (n 482) 662.

826 MacCormick (n 825) 160 (emphasis in original). Note that not every subjective desire constitutes an interest because beings can be mistaken about what is in their own interest, Alasdair Cochrane, 'Cosmozoopolis: The Case Against Group-Differentiated Animal Rights' [2013] Law, Ethics and Philosophy 127, 138. Note also that unlike some, I distinguish between interests and capabilities, from which interests arise.

827 For a general defence of the pluralist approach to the justification of (human) rights, see John Tasioulas, 'Taking Rights out of Human Rights' (2010) 120 Ethics 647.

also an interest in getting fed, in playing with his toys, in clawing furniture, in looking for female cats in heat, etc. Although it may be conceptually possible to reduce all these interests to a single interest such as pleasure or the avoidance of pain, Meritocrats have no particular reason for adopting this monist approach since they take rights to be grounded in interests. Because it is undisputed that there is a plurality of rights, rather than one master right to pleasure, it also makes sense to keep separate the different interests that ground these different rights.

c) The third requirement, finally, adds an important caveat to the grounding of rights in interests ("… *is a sufficient reason for holding some other person(s) to be under a duty*"). While there is no right that is not grounded in an interest, there are interests that do not ground rights. As MacCormick puts it, "not everything which is good for any individual is his/hers/its by right. There are many things which it would be advantageous to me to have, but to which I have no right."[828] The fact that Meritocrats adopt a pluralist account to interests that ground rights exacerbates this problem. The myriad of morally relevant interests, a common objection goes, leads to an inflation of rights, which risks eroding the very concept of a right.[829]

Delamétherie encountered this problem when he considered that if we had to help every animal in making the most of its capacity to reproduce we would soon run out of space and food for ourselves.[830] Put differently, Delamétherie realised that interests risk imposing too burdensome duties on the bearers of these duties. To counter this objection, Meritocrats argue that not all interests ground rights, but only those that are sufficiently weighty to justify imposing duties on others. As Delamétherie suggested, we could not have duties to help every being reproduce maximally or maximise any other interest because that would be too burdensome for those who would bear the duties.[831] Any right, according to Delamétherie, "must be subordinated to the circumstances. We must take care of pleasures only when all have the necessary, and when no one will suffer; otherwise it would be unjust … to consume much for one's own pleasures, while others lack what is necessary".[832] There is a threshold, in other words, below which no interest gives rise to a right.

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828 Neil MacCormick, 'Rights, Claims and Remedies' (1982) 1 Law and Philosophy 337, 338.

829 Griffin (n 37) 92.

830 See Chapter 1, Subsection 4.2.

831 See Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 223–224, 255–256.

832 ibid 160.

"It is their having crossed this threshold", as Tasioulas points out, "that distinguishes human rights from a mere shopping list of valuable 'goals'."[833] To pass the threshold, an interest has to meet three conditions. First, it must be physically possible to satisfy. For example, I may have an interest in flying like a bird. However, as this interest would be physically impossible to fulfil, I cannot have a right to fly. Second, the interest must be compossible, that is, compatible with the fulfilment of the same interest in others. Say that I have an interest in full health. While perhaps not physically impossible to satisfy, it could not be satisfied in everyone else with the same interest because resources are scarce and not everyone's health can be promoted fully. Due to lack of compossibility, then, there could be no right to full health. Finally, the interest must not impose too burdensome duties on the potential duty-bearers.[834] For example, even if we assumed that there was no resource scarcity that would prevent compossibility of the right to full health, such a right would ask too much from the duty-bearers who, to secure others' right to full health, would have to unreasonably limit the pursuit of their own interests.[835] Whether or not an interest meets the three conditions set out above has to be assessed on a case-by-case basis. As Meritocrats point out, while some interests that sentient beings possess may be insufficient to ground rights, others pass the threshold.[836]

The second implication of the Meritocratic conception's focus on patients is that it *rejects the reciprocity* of rights and duties. In the Aristocracy, it will be recalled, only agents who can reciprocate duties possess corresponding rights. For example, we saw that only those who can fulfil the duty not to interfere with others' right to property can themselves have a right to property.[837] Meritocrats reject this *quid pro quo* approach in favour of an asymmetrical approach in which there can be rights-holders who have no respective duties. The reason for rejecting reciprocity follows from the adoption of the interest-based account of rights which, in contrast to the

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833 Tasioulas, 'On the Foundations of Human Rights' (n 406) 57.

834 ibid 58–60.

835 What this shows also is that an interest's being "important" or "weighty" is no guarantee for it to pass the threshold. For example, my abovementioned interest in having a loyal wife may be of great importance but it grounds no right in me not to be cheated on: see Scott Hershovitz, 'The Role of Authority' (2011) 11 Philosophers' Imprint 1, 9.

836 Cochrane, 'From Human Rights to Sentient Rights' (n 482) 659; see also Cochrane, *Sentientist Politics* (n 11) 28–29 (arguing that, at a minimum, sentient beings have a *prima facie* right to life and a right not to be made to suffer).

837 See Chapter 2, Subsection 4.3.

choice-based account, is based on individuals' interests in well-being, not their capacity to act as autonomous agents. Under the interest-based account, the ability to reciprocate duties is not a condition for one's ability to hold rights. Some animals, of course, do fulfil societal responsibilities, not only within their own species but also within inter-species communities, in particular those they share with human beings.[838] For example, as Donaldson and Kymlicka point out, domesticated animals can "establish[] control over bodily processes and impulses, learn[] basic communication, rules of social interaction, and respect for others".[839] Perhaps these animals could therefore reciprocate duties. A remarkable feat, indeed, but one that is neither here nor there for their capacity to hold rights under the interest-based approach.

In response to a court ruling that claimed that chimpanzees could not have the rights to bodily integrity and liberty because they cannot reciprocate legal duties or any other social responsibilities, the NhRP pointed out the main reason why Meritocrats reject reciprocity.[840] It argued that if we were to make the possession of rights dependent on one's ability to reciprocate duties or other responsibilities, then "foetuses, children, the comatose, and those humans otherwise mentally unable to bear duties and responsibilities would be mere 'things' that lacked the capacity for any legal right".[841]

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838 See eg on chimpanzees' capacity to shoulder responsibilities: *Nonhuman Rights Project, Inc* v *Patrick C Lavery et al,* Memorandum of Law (n 728) 24–57.

839 Donaldson and Kymlicka (n 797) 123.

840 *Nonhuman Rights Project, Inc* v *Patrick C Lavery et al* [2014] State of New York Supreme Court, Appellate Division, Third Judicial Department No. 518336, 4–6; for a summary of the argument see Randall S Abate and Jonathan Crowe, 'From Inside the Cage to Outside the Box: Natural Resources as a Platform for Nonhuman Animal Personhood in the U.S. and Australia' (2017) 5 Global Journal of Animal Law 54, 57–58.

841 *Nonhuman Rights Project, Inc* v *Commerford & Sons, Inc et al,* Memorandum of Law in Support of Verified Petition for Common Law Writ of Habeas Corpus (13 November 2017) Superior Court, Judicial District of Litchfield 25 <https://www.nonhumanrights.org/content/uploads/CT-Memo-11.13.17.pdf> accessed 21 July 2019; see for an account of this argument Proposed Brief by Amici Curiae Philosophers (n 731) 19–20; see also Edmundson (n 17) 354; in his opinion, J. Fahey of the New York Court of Appeals agreed with the NhRP's argument: *Nonhuman Rights Project, Inc* v *Patrick C Lavery et al and Nonhuman Rights Project, Inc* v *Carmen Presti et al* [2018] State of New York, Court of Appeals No. 2018-268, 3, Fahey, J., concurring.

Meritocrats regard it as sufficient that there are others who can recognise what is good for animals and fulfil the duties corresponding to animals' rights.[842] As Delamétherie contended, animals have fewer duties than humans, because they are less intelligent than human beings and more likely to succumb to momentary urges.[843] He therefore believed, in line with contemporary Meritocrats, that humans are better able to recognise what is just or legal and can act upon such judgment, which is why they have to carry the bulk of duties to protect sensitive beings' rights.

The final implication of Meritocrats' focus on patients is that it results in a *relativist* conception of fundamental rights. In Chapter 2, I have analysed how the Aristocratic conception considers rights to be absolute because they function as a mirror of the inviolability of their holders.[844] Under the Meritocratic conception, by contrast, rights are not absolute but relative. This relativity is a consequence of the interest-based approach. Under this approach, interests can ground a whole bouquet of rights. The more rights there are, in turn, the more likely—indeed, inevitable—clashes between them become. Take a standard example from human rights practice.[845] Journalists have a right to free press because their creative interest and the public interest in newsworthy matters justifies others' duty not to interfere with this right. The right to free press can however clash with the right to privacy of people whose interests in having their privacy protected justifies duties in others to respect it.

To resolve such clashes between fundamental rights, or between fundamental rights and the public interest, Meritocrats subject the rights to a balancing exercise. The "needs of the individual", as Delamétherie put it, have to be "reconcile[d] … with what the common good requires".[846] In the balancing exercise, the respective weights of the rights at hand are assessed and

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842 See Chartier (n 808) 36.

843 Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 202–204.

844 See Chapter 2, Subsection 4.3.

845 See eg *von Hannover* v *Germany (no 2)* [2012] European Court of Human Rights, Grand Chamber Application nos. 40660/08 and 60641/08.

846 Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 224.

the right which turns out to be weightier outbalances the less weighty one.[847] "The greater the degree of non-satisfaction of, or detriment to, one [right]", the legal theorist Robert Alexy argued, "the greater must be the importance of satisfying the other".[848] Balancing is an important stage of the so-called proportionality test which numerous jurisdictions have come to adopt.[849] An important aspect of balancing and proportionality more generally is that they do not allow for an *a priori* determination of which of the two clashing rights is stronger than the other. By definition, this has to be established by taking into account all the relevant factors of the concrete case. For this reason, fundamental rights do not have peremptory force. They are defeasible in that they can always be outweighed by stronger rights.[850] With Cochrane and Steve Cooke we can therefore say that Meritocratic rights are best conceived of as "*prima facie* or *pro tanto* rather than absolute" rights.[851]

5 Externalism

In Section 3, I have answered the question *what* it means to hold fundamental rights in the Meritocratic conception, showing that it is based on the idea of "differential consideration". In Section 4, I went on to respond to the question *why* Meritocrats focus on patients as rights-holders and have analysed the implications of this focus on its conception of the rights-holder and of rights. With Section 5, we have now arrived at the final stop on our *tour d'horizon* of the Meritocracy's most characteristic elements. That stop is externalism: the feature that addresses the question *how* exactly Meritocrats explain fundamental rights. As I will show in this section, they ground these rights in an individual's characteristics and interests. That is, they ground rights in facts about the

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847 Robert Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 International Journal of Constitutional Law 572, 574.

848 Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2010) 102.

849 See on the roots of the proportionality test: Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 72, 97–104.

850 Some argue that the concrete claim-right that emerges the winner from the proportionality test is not a mere *prima facie* right anymore, but a right with peremptory force: eg Cochrane, 'From Human Rights to Sentient Rights' (n 482) 669; see also Eleftheriadis (n 16) 107. However, the fact remains that, as abstract fundamental rights, Meritocratic rights are relative and possess no peremptory force.

851 Alasdair Cochrane and Steve Cooke, '"Humane Intervention": The International Protection of Animal Rights' (2016) 12 Journal of Global Ethics 106, 111.

nature of an individual. Drawing on Bacon's metaphor which we have encountered in Chapter 1, we can say that externalists are like bees who gather pollen from flowers and then turn the pollen into honey. In Subsection 5.1, I will shed more light on how exactly externalists gather their "pollen" and turn it into "honey" by considering two objections that can be raised against the externalist approach. Subsection 5.2 then discusses externalism's strong suit, namely its capacity to *ground* rights in natural features, before turning to its main weakness.

5.1 How-to

What exactly is externalism? Albers, Hoffmann, and Reinhardt define it as an attempt "to justify elementary moral and legal principles from 'outside' our normative or evaluative vocabularies. The reductive ambition is to trace a normative concept back to certain non-normative descriptions of human beings as formulated in the vocabularies of the natural sciences."[852] This definition is useful as it foregrounds externalists' ambition to ground normative concepts in non-normative facts about human or other beings. However, it misleadingly suggests that the ambition has to be a *reductive* and purely *non-evaluative* one. As I will show below, externalism does not have to be reductive and non-evaluative. For the moment, however, we can use this definition to construe a working account of externalism which understands it as an attempt to trace back fundamental rights to facts about the natural characteristics and interests of human and nonhuman beings. This account contrasts with the Aristocracy's internalism, which refuses to leave the normative domain. Externalism's willingness to draw on natural facts makes evident its indebtedness to the naturalist current which I have presented in Chapter 1.

To illustrate externalism, consider Delamétherie's theory. As will be recalled, Delamétherie applied the *droit d'animalité* to all sensitive beings in virtue of the non-normative fact that they are beings capable of sensation. Delamétherie took this fact, and the interests it gives rise to in sensitive beings, to ground his triad of rights. The rights to health and to enjoyments, for example, are grounded in the fact that sensitive beings have an interest in leading lives free from illness, and in having pleasurable experiences. The right to life, in turn, is grounded in their interest in being alive, which serves as a precondition for all other sensations and rights.[853]

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[852] Albers, Hoffmann and Reinhardt (n 592) 2.

[853] See Chapter 1, Subsection 4.2.

The philosophically-trained reader will be itching to point out at this stage that Meritocrats' externalism commits a logical fallacy. It derives rights from natural facts about beings. But that is to derive an ought from an is, which is to violate what is often called "Hume's Law" (I will refer to this as the Objection from Hume's Law).[854] Although it is a matter of some dispute as to what David Hume exactly argued in the relevant passage of his *Treatise on Human Nature* (*Treatise*),[855] it is commonly thought that his point was that propositions about what ought or ought not to be the case cannot logically be derived from propositions about what is or is not—or, as it is sometimes put, that "values" cannot be derived from "facts".[856] Morality, as Dworkin summarised the position, is considered to be completely independent from "facts about the basic structure of the universe".[857] Have the reader's philosophy seminars paid off? Have they caught Meritocrats red-handed? Or is there a way the Meritocrats can save their necks?

Before we answer these questions, let us consider another challenge, which builds on the Objection from Hume's Law. In addition to the logical problem that arises for attempts to derive fundamental rights from interests and characteristics, Aristocrats could argue that externalism suffers from a fatal practical problem. There may be numerous benign characteristics and interests that we will undeniably find deserving of normative promotion. For example, the interest many have in maintaining their family life and extra-familial social ties seems to be deserving of some form of protection. However, there are also other, more pernicious interests that we think undeserving of such promotion. If anything, they deserve repudiation. The interest that some people have in oppressing others, for example, deserves only condemnation. Yet, under an unqualified externalist approach, any kind of natural property and interest that would arise from the property

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854 See eg Pollmann, 'Human Rights Beyond Naturalism' (n 647) 121–122; on the term 'Hume's Law' see Richard M Hare, 'Universalisability' (1954) 55 Proceedings of the Aristotelian Society 295, 303.

855 David Hume, *A Treatise of Human Nature* (LA Selby-Bigge ed, Clarendon Press 1960) Book 3, Part 1, Section 1, 469–470; for an informative collection of essays on this issue, see Charles R Pigden (ed), *Hume on Is and Ought* (Palgrave Macmillan 2010).

856 See PD Magnus and Jon Mandle, 'What Kind of Is-Ought Gap Is There and What Kind Ought There Be?' (2017) 14 Journal of Moral Philosophy 373, 374 (who argue that Hume's Law does not follow logically).

857 Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press of Harvard University Press 2011) 17, 44–46.

would have to be promoted, with potentially disastrous consequences. Drawing on Martha Nussbaum, I will call this the Objection from Nature Worship.[858]

As we saw, Delamétherie seemed to accept this implication of the Meritocratic approach, claiming that carnivores have a right to kill other animals "because they have no other way to survive, and because, as sensitive beings, they have to procure their own well-being".[859] He believed that predators have an interest in killing others that, under his externalist approach, seemed to require the granting of corresponding rights to these predators. He also believed that, in yielding such conclusions, externalism raised serious issues regarding nature's purposes. As we saw, these issues had Delamétherie questioning, for a moment at least, the plausibility of his own theory about the universal law of the good. Pondering the rights of predators, Delamétherie asked: "Why are there animals that can eat only flesh, drink only blood? Do they not spread fear and terror in all the species they eat? And do they not cause the cruellest deaths to those they devour? Can we say that nature wanted the happiness of all these beings?"[860]

The Objection from Hume's Law and the Objection from Nature Worship pose serious challenges to the Meritocracy. Not only do Meritocrats' normative inferences from facts appear to be logically fallacious, but even if they were not, giving every fact normative significance would seem to be completely impractical at best, and outright disastrous at worst. What do Meritocrats have to say in their defence?

Meritocrats can respond to the two challenges by arguing that they are targeted at a straw-man version of externalism that does not represent the ideal-type of the Meritocracy, even though some of its advocates (including Delamétherie) mistakenly embrace it.[861] The Meritocracy, properly understood, adopts a more sophisticated externalism that avoids the issues raised by the Objections from Hume's Law and from Nature Worship. To see this, we require a better understanding of what Hume said and, more importantly, what he did *not* say. On closer inspection,

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858 See Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (n 808) 366.

859 Delamétherie, *Principes de la philosophie naturelle, dans lesquels on cherche à déterminer les degrés de certitude ou de probabilité des connoissances humaines* (n 279) 201–202, 231.

860 ibid 231. See for an in-depth discussion of the predation problem Christine M Korsgaard, *Fellow Creatures: Our Obligations to the Other Animals* (Oxford University Press 2018) 173–190.

861 See eg Tasioulas, 'On the Foundations of Human Rights' (n 406) 45–46.

Meritocrats can argue, it becomes evident that Hume did not claim that normative propositions cannot be linked to factual ones. Hume in fact had no principled objections to deriving an ought from an is as long as one *explains* how one establishes the relation between these two distinct realms.[862] This becomes evident from the wording of the relevant passage in Hume's *Treatise*: "For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and *explain'd*; and at the same time that *a reason should be given* … how this new relation can be a deduction from others, which are entirely different from it."[863] As this passage reveals, Hume accepted that ought-propositions can be connected to is-propositions in the sense that the latter can serve as reasons that justify the former.[864] As Russ Shafer-Landau explicates,

> Hume never denied that factual claims could nondeductively support or cast doubt on evaluative ones. And that was wisdom on his part, since factual claims can indeed play such roles. Suppose I tell you that a certain killer had no remorse, that his victim was a small child who pled for his life, that the killer was motivated solely by a desire to see his victim suffer, that the killer had many opportunities to reconsider his plan, and that the child suffered greatly in dying. Though this combination of facts does not entail the wrongness of the killing, it certainly offers a great deal of support for such a verdict. Absent any further details of the case, we are justified in drawing the conclusion that what the killer did was immoral.[865]

Based on this interpretation of Hume, Meritocrats can argue that facts about individuals' characteristics and interests serve as reasons that justify the derivation of normative principles, such as fundamental rights. Externalism, in other words, is not an attempt to logically derive an "ought" from an "is". Rather, it is an attempt to use the "is" as a *reason for* the "ought". Meritocrats say that it would be "unreasonable"[866] not to grant animals such rights given their interests and capacities; or that their postulates are not "made without reason".[867] They thus take interests and

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862 For an account of why Hume saw them as distinct, see James Rachels, 'Naturalism' in Hugh LaFollette (ed), *The Blackwell Guide to Ethical Theory* (Blackwell 2000) 76–78.

863 Hume (n 855) Book 3, Part 1, Section 1, 469 (emphasis changed).

864 Rachels, 'Naturalism' (n 862) 78.

865 Russ Shafer-Landau, 'The Possibility of Metaethics' (2010) 90 Boston University Law Review 479, 486.

866 Chartier (n 808) 46.

867 Regan (n 30) 247.

characteristics of animals to be reasons that render fundamental rights intelligible. As Waldron points out, "[t]he point of looking for an underlying property [is] to find a way of *making sense* of the relevant principle or principles and providing a well-organised basis for their application".[868]

On what grounds do Meritocrats argue that it "makes sense" to ground rights in facts about a being's interests and characteristics? Why see a connection at all between what a being is like and how we ought to treat it? The answer to these questions reveals that Meritocrats accept a simple normative assumption, namely that the good should be promoted. Philippa Foot has made this point compellingly, arguing that the good needs to be placed before the right.[869] In other words, how one morally ought to treat a being depends on what is good for that being. "The way an individual *should be"*, Foot holds, "is determined by what is needed for development, self-maintenance, and reproduction".[870] For humans, animals, and even plants, Foot points out, there are "patterns of natural normativity",[871] that is, objective, teleological norms that make individual animals and humans flourish.[872] These norms have a claim on us that it would be irrational to reject.[873] Based on this thought, Meritocrats hold that every normative argument about the rights that a being possesses has to be grounded in facts about its good.[874] That is what Meritocrats mean when they say that it "makes sense" to ground rights in beings' interests and characteristics. They do not mean that rights can be logically derived from interests.[875]

Related to the normative assumption of promoting the good which Meritocrats accept is the view that, as Tasioulas puts it, evaluative considerations about a being's good "may even be

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868 Waldron, *One Another's Equals: The Basis of Human Equality* (n 534) 249 (emphasis in original); see also Cochrane and Cooke (n 851) 210.

869 Philippa Foot, *Natural Goodness* (Clarendon Press 2001) 24.

870 ibid 33 (emphasis in original).

871 See ibid 38.

872 ibid 43–44, 51.

873 See ibid 65. Foot herself claimed that to think that her argument carries "implications about the way we should treat animals and even plants … is a complete misapprehension": see her Postscript in ibid. She instead believed that cruelty to animals is simply a matter of human vice.

874 ibid 24; Alasdair MacIntyre presents a concise account of this relationship between facts and values in Alasdair MacIntyre, *After Virtue* (Bloomsbury 2013) 98–99.

875 To put this in Tasioulas's terms, the Meritocracy is "foundational", but not "foundationalist": Tasioulas, 'On the Foundations of Human Rights' (n 406) 45–46.

thought of as natural facts, provided we have a suitably expansive understanding of the natural realm, one that does not limit natural facts to those that do explanatory work within the natural sciences".[876] The suggestion here is that when we are dealing with what is in a being's interest, we are not simply dealing with an "is"-matter, but with one that has evaluative connotations; we are, as it is sometimes put, confronted with "thick concepts", that is, descriptions enriched with evaluations.[877] Bernd Ladwig illustrates this point as follows:

> to say of a human being that he or she would *suffer* if someone took away his or her children implies that it would be *bad* for this person if someone took away their children. This is not a normative proposition by itself, but how would a moral conception look that was wholly indifferent to human suffering and well-being? And someone who insisted on avoiding all thick concepts like 'suffering' would scarcely use a language in which we would continue to recognise our human interests at all.[878]

Following Ladwig, we can understand interests such as the interest not to suffer as "thick concepts". As Ladwig suggests, we commonly use concepts like "suffering" in a thick sense, that is, we accept that they also have a normative claim on us. In fact, it seems so obvious to most of us that the bad ought to be prevented and the good promoted, that it is rarely acknowledged explicitly.[879] Meritocrats, too, often simply take for granted that no one could reasonably reject this assumption.[880] Even the Aristocrats overlook it frequently, which is why they accuse Meritocrats of violating Hume's Law. However, as the discussion above shows, Meritocrats can argue that they make no logically fallacious inferences from an "is"-premise to an "ought"-conclusion. Rather, they argue that the interests which ground rights have normative significance because of the normative premise that the good ought to be promoted. Interests, in this reading, are partly normative reasons for why a being ought to have certain rights.[881] It is in this sense that Meritocrats, as

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876 ibid 46.

877 See on thick concepts more generally James Griffin, *Value Judgement: Improving Our Ethical Beliefs* (Clarendon Press 1996); see also Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Harvard University Press 2004).

878 Ladwig (n 618) 32 (emphasis in original).

879 For an exception, see Cochrane and Cooke (n 851) 109.

880 Pollmann, 'Human Rights Beyond Naturalism' (n 647) 123.

881 Cf also Regan (n 30) 247–248.

Griffin puts it, are already partly "within the normative circle"[882] when they ground rights in beings' natural characteristics.

However, it is important to note that this openness to normative assumptions does not make Meritocrats internalists. True, Meritocrats accept the premise that we ought to promote the good and that, as a result, interests are at least half-normative because they are part of the good. In this respect, Meritocrats appear much like internalists. In contrast to the latter, however, Meritocrats maintain that what distinguishes their conception is that it is not purely normative, but also partly factual. According to Meritocrats, the interests that ground rights, and the capacities from which they arise are, as Griffin puts it, "features of the world". This is to say that there is a certain factuality about these interests that can be determined objectively. As Griffin argues, "these interests' being met or not met are *goings-on in the world*".[883] As is the case for other goings-on in the world, it is possible to make judgments about interests that can be correct or incorrect "in the way that statements of natural fact can be".[884] These judgments, Griffin notes,

> report deliverances of a sensitivity to certain things going on in the world: namely, interests being met or not met. These interests are part of *human nature*, and *not just human nature as seen by society*. These judgements seem to be correct or incorrect, not, say, in the way that conclusions in mathematics can be, but rather true or false in the way that statements of natural fact can be.[885]

A judgment about whether a being has an interest and whether that interest is violated, in other words, is not a purely normative assertion. Interests are also partly factual aspects of a being's nature, and can therefore be determined objectively.[886] As Griffin emphasises, "[p]articularly

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882 Griffin (n 37) 35.

883 ibid (emphasis added).

884 ibid 120.

885 ibid 119–120 (emphasis changed).

886 To be sure, some defend objectivism about normative statements. See for an overview Dwayne H Mulder, 'Objectivity' (*Internet Encyclopedia of Philosophy*) <https://www.iep.utm.edu/objectiv/> accessed 21 July 2019. For the sake of this thesis, I will be assuming that facts about a being's nature, like its sentience or gregariousness, can be determined objectively (that is, empirically) in a way that a normative statement could not.

deeply embedded in us are certain biological aims—for food, health, protection of our capabilities—and certain psycho-biological aims—for example, for companionship, affection, reproduction".[887] That a being feels pain, for instance, is a matter of fact that everyone can agree on.[888]

Because of their partly factual existence, interests are at least partly *external* to our beliefs. They are not mere figments of our imagination, nor mere normative stipulations. Rather, they are part "of a belief-independent world of empirical fact"[889] that influences our beliefs and concepts. Griffin agrees with proponents of the idea of "thick concepts" that interests are not only factual but also normative.[890] In this sense, interests are not entirely independent of our beliefs. However, as he notes, "that the world of (human) nature may not be entirely mind-independent, does not undermine the possibility of their having a truth-value".[891] For these reasons, externalism, although receptive to normative considerations, is not imprisoned by them. In contrast to internalism, externalism is not restricted to purely normative decisions, stories, and interpretations. Rather, it can enlist facts about the world to bolster its normative conclusions.

Based on these clarifications about the exact nature of Meritocracy's externalism, we can now see why the Objection from Hume's Law fails. Directed, as it is, against a strawman version of externalism which does not accept the premise that the good ought to be promoted and which rejects the normativity of interests that promote the good, it holds no water against the more sophisticated version of externalism which I have presented here.[892] With the move to a more sophisticated externalism, Meritocrats can also refute the Objection from Nature Worship. Externalism, they can point out, does not entail blind worship of all things natural. Instead, it requires an evaluation of what an individual's good is and what part of it ought to be promoted. Meritocrats, as Nussbaum has pointed out, do "not attempt to extract norms directly from some facts about human nature". Rather, they evaluate "the innate powers of … beings, asking which ones are the

887 Griffin (n 37) 116.

888 ibid 123.

889 ibid 121.

890 Griffin in fact argues that factuality and normativity cannot be separated: ibid 123.

891 ibid 122.

892 See also Ladwig (n 618) 30.

good ones, the ones that are central to the notion of a decently flourishing … life".[893] As a result, although it may very well be in the interest of predators to kill other animals, Meritocrats do not have to promote that interest by giving the predator a right to kill others. If they come to the conclusion that this interest is not one of the good interests or that it is not central to the predator's flourishing, then they have no reason to protect it.

We can now see more clearly what was tentative about Albers's, Hoffman's, and Reinhardt's definition of externalism that I provided at the outset of this section. Their definition suggested that externalists are reductivists who infer rights from facts about nature without allowing for an evaluative element.[894] As we saw in this subsection, however, ideal Meritocrats are not reductivists. They accept the simple (yet often unacknowledged) normative assumption that the good ought to be promoted and the partly normative character of interests that promote the good. As a result, they do not believe that the natural sciences will be able to provide us with all the information we require to determine who has which rights. Refining our working account, we can thus say that externalism is the attempt to ground moral and legal principles in the interests of beings, which, although forming part of the nature of these beings and therefore of the empirical world, also have a normative side to them.

5.2 Grounding

Having analysed how Meritocrats explain rights-holding by drawing on characteristics and interest of individual beings, we are now in a position to answer the question why they adopt externalism. In this subsection, I will argue that externalism's appeal lies in its capacity to *ground* fundamental rights in an individual's objectively determinable characteristics and interests, which gives these

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893 Martha Nussbaum, 'Beyond "Compassion and Humanity": Justice for Nonhuman Animals' in Cass R Sunstein and Martha Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press 2005) 310.

894 To be sure, Albers, Hoffman, and Reinhardt argue that there is also an internalist naturalist approach. As they define it, however, it does not seem to qualify as a naturalist approach at all: see Albers, Hoffmann and Reinhardt (n 592) 2.

rights a firm foothold.[895] As I will show, however, this virtue of externalism is at the same time also its vice.

What exactly do I mean when I say that *grounding* is characteristic of the Meritocratic conception of fundamental rights? The term "grounding" is used figuratively in philosophical discourse to describe the process of providing normative principles with an empirical, metaphysical, or other foundation. In ordinary discourse, "grounding" is used in a more literal sense for the process of connecting an electrical device to the earth with the aid of a wire. As I use it, the term unites both these senses: "grounding" describes the process of providing rights—and thereby in a metaphorical sense also their holders—with a foundation in their earthly existence. They are "inserted into nature",[896] as Smith puts it. The process of grounding thus contrasts diametrically with the process of *founding* which is characteristic of the Aristocracy. As I have discussed in Chapter 2, the Aristocracy's internalism allows it to create its own foundations by drawing exclusively on normative decisions, stories, and interpretations.[897]

Why do Meritocrats ground fundamental rights in the interests of beings? The central advantage of this approach is that, by drawing on interests, Meritocrats can provide a solid fundament for rights. As we have established in the last subsection, interests are at least partly objective (judgments about interests can be correct or incorrect) and external (interests are part of the furniture of the world). In the Meritocracy, whether or not someone deserves a right hinges therefore exclusively on whether they actually possess the relevant characteristics and interests that are sufficiently weighty to impose corresponding duties on others. To establish whether or not a being has such interests, we have to study it. In other words, there is a fact of the matter whether or not someone has an interest. As the legal scholar David Favre has observed, that animals have "interests is not a matter of philosophy or debate, it is a matter of fact that is derived from the existence and nature of the DNA".[898] In virtue of this DNA, Favre continues, living beings have "a package

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895 For more arguments in favour of the externalist approach, see Cochrane, 'Evaluating "Bioethical Approaches" to Human Rights' (n 31) 319, footnote 2.

896 Smith (n 47) 18.

897 See Chapter 2, Section 5.

898 David Favre, 'Living Property: A New Status for Animals Within the Legal System' (2010) 93 Marquette Law Review 1021, 1048.

of skills and capabilities that we expect the individual to exercise in pursuing his or her life".[899] The process of grounding thus provides a non-arbitrary foundation for rights; one that is anchored in empirical facts. To be sure, evaluations will be required to discern exactly what counts as an interest and whether or not it is weighty enough to establish duties in others. However, the need for such evaluations does not change the fact that externalism allows Meritocrats to root rights in nature.

Nature is of course far from inert. Beings evolve, and their interests change. Compared to normative principles and assumptions founded by human beings, however, they only change at snail's pace. For this reason, Meritocracy's externalism provides a much more stable foundation for fundamental rights than the more capricious decisions, stories, and interpretations that characterise Aristocracy's internalism. Consider the following: Adam is a family man who loves his partner, Berta, and their children, Christopher and Dorothy. In an Aristocratic system, Adam would only have a right to family life if his society accepted, due to respective decisions, stories, or interpretations, that people like Adam should have a right to family life. If his society was not based on any such decision, story, or interpretation then he would not have that right and could be separated from Berta, Christopher, and Dorothy. In a Meritocratic system, on the other hand, Adam's right to family life would be directly grounded in the fact that he is a social animal with an interest in family life. This fact about Adam is unlikely to change because it is part of his nature. For this reason, his right to family life seems much more secure than if he lived in the Aristocratic society where it would be contingent upon that society's acceptance of the right.

Because of the predominance of the Aristocracy, about which I will say more in the next chapter, most if not all societies do grant Adam a right to family life. It is therefore not beings like him who are of primary concern to Meritocrats. Rather, their efforts concentrate on the countless nonhuman animals who possess interests that would make them deserve certain fundamental rights but who are granted no such rights. Animals live in societies that are not founded on the idea that they should have fundamental rights, despite their possession of relevant capacities and interests. This explains the appeal of the Meritocracy: a society's reluctance to accept animals' fundamental rights is no impediment to it. Rather, it is the starting point for a Merit-based challenge. Meritocrats

[899] ibid 1049.

can point to the fact that individual animals deserve fundamental rights because they possess relevant interests and characteristics. As we saw, these interests and characteristics form part of the furniture of the empirical world, which is why their existence and the degree to which they are (not) fulfilled can be established objectively. The Meritocracy thus provides the tools which are necessary to argue for an extension of fundamental rights to animals in societies which have remained largely ignorant of their interests. In contrast to the Aristocracy, Meritocracy's externalism therefore does not suffer from the problem that it arbitrarily excludes beings from rights-holdership.

The Meritocracy's grounding-approach also has a grave *downside*, however. In tying fundamental rights to individuals' interests and capacities, it does more than justify conferring fundamental rights on nonhumans. It also gives some human beings fewer and weaker fundamental rights if they possess fewer and weaker interests.[900] As we saw in Section 3, the Meritocracy is based on Merit-based Gradualism, meaning that it rejects the ideas that all human beings have a high status simply in virtue of being born human (Heredity), that they possess equal rights (Equality), and that all nonhumans are excluded from that status and these rights (Exclusivity). By undermining the central pillars of the Aristocracy, externalism jeopardises the idea that no human being should be treated as inferior to other human beings.[901] In an article which discusses the lessons of animal rights, Laurence Tribe put this problem succinctly:

> when we insist that rights depend on the individual's possession of certain measurable traits such as self-awareness or the ability to form complex mental representations or to engage in moral reasoning, and when we treat it as a mere matter of grace or optional beneficence whenever a simulacrum of such rights is awarded as a privilege to human beings who lack all of those qualifying traits (like infants or the severely mentally retarded or the profoundly comatose), then it follows that it would be entirely permissible not to award those basic legal protections to such beings.[902]

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900 See on this also Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing 2009) 124.

901 As Andrea Sangiovanni has recently argued, this idea is "key to moral equality": Andrea Sangiovanni, *Humanity Without Dignity: Moral Equality, Respect, and Human Rights* (Harvard University Press 2017) 3.

902 Laurence H Tribe, 'Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M Wise' (2001) 7 Animal Law 1, 7.

In fact, according to the Meritocracy's Merit-based approach, it would not only be permissible to deny rights to beings who lack the relevant capacities and interests, but it would be *obligatory*. This realisation has left even staunch Meritocrats such as McMahan "profoundly uncomfortable".[903] As he notes,

> it would be dangerously invidious to give public expression to a view that accords a higher degree of moral inviolability to people with higher psychological capacities or a worthier moral nature. Even if such a view were true, it is virtually certain that if it were widely espoused and recognised as true, it would then be distorted or otherwise abused in efforts to justify the unjustifiable.[904]

The Meritocracy's externalism, in other words, opens the floodgates for a (renewed) division of the human species into individuals, or groups of humans who deserve more and stronger rights than others. Tribe is therefore right when he warns that Meritocrats "are on an awfully steep and slippery slope that we would do well to avoid".[905] Because of Meritocracy's Gradualism, we would have to decide not only about the rights of those humans who entirely lack the capacities necessary for the possession of certain fundamental rights, but, as he notes, also "about people who are three-quarters of the way to such a condition. I needn't spell it all out, but the possibilities are genocidal and horrific and reminiscent of slavery and of the holocaust."[906]

As we saw in Chapter 1, neither this problem nor its answers are new. The consequences which Tribe describes are the consequences which the Meritocrats have inherited from the Enlightenment naturalists, who adopted monistic accounts of nature that emphasised gradation and thereby eroded the uniqueness and equality of human beings.[907] Recall for instance Delamétherie's treatise from 1802, in which he established a hierarchy of human beings,[908] segregating humans into first-class, second-class, and third-class citizens, depending on their characteristics. This was exactly what the egalitarians were criticising about the naturalists. The slippery slope that Tribe flags is the same as that about which Salaville warned us in his 1805 essay. As Salaville urged

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903 See McMahan, 'Challenges to Human Equality' (n 149) 104.

904 ibid.

905 Tribe (n 902) 7.

906 ibid.

907 Ann Thomson, 'Diderot, le matérialisme et la division de l'espèce humaine' (1999) 26 Recherches sur Diderot et sur l'Encyclopédie 197.

908 See *supra* 63, and Chapter 1, Subsection 4.2.

there, to avoid the slope, we need to "*admit* that man and animals differ by their respective nature and that this difference authorises and makes legitimate with respect to them what it prohibits with respect to us".[909] Put in the language adopted in this thesis, to protect the equality of all human beings, we need to resort to founding humans' special rank and rights independently of their individual capacities and interests.[910] Because differential consideration and grounding work in concert, we can prevent one only by halting the other.

6 Conclusion

This chapter has examined the Meritocratic conception of fundamental rights which forms the second conception on the spectrum of fundamental rights approaches. As I have argued in Section 2, the approach of the Meritocrats evinces important parallels with that of meritocrats who challenged the real nobility. According to Meritocrats, animals are to humans what commoners were to the nobility in the Ancien Régime. As I have shown, Meritocrats conceive of animals as *deserving* of rights if they possess the relevant characteristics and interests which ground these rights. Drawing on Vlastos's account of the "M-system" and Delamétherie's naturalist approach, I have then analysed the three characteristic features of the Meritocratic conception. Section 3 has revealed that it follows differential consideration, which was shown to mean, first, that Meritocrats endorse the idea of basing rights on an individual's desert rather than its birth (Merit); second, that they reject the equality of rights in favour of a differentiated approach (Gradualism); and third, that they include nonhuman beings in the category of fundamental rights-holders (Inclusivity). In contrast to the Aristocracy, the Meritocracy was thus shown to reject egalitarian ideas in favour of differential ideas, as was the case with the naturalist stream on which it is based. Section 4 has argued that Meritocrats justify rights-holdership of a being in virtue of its patiency and not its agency, as is the case in the Aristocracy. We saw that this implies that the Meritocracy conceives of rights-holders as beings with interests that are sufficiently weighty to ground duties in others; that it rejects the reciprocity of rights and duties; and that it takes rights to be relative, not absolute. Section 5, finally, has elucidated Meritocrats' externalist approach. Externalism's ability to ground rights in natural facts was shown to be its strength. At the same time, this also turned out to be an

909 Salaville, *De l'homme et des animaux* (n 279) 51 (emphasis added).

910 See on this also Mulgan (n 701) 457.

important weakness, yielding the "shocking"[911] result of promoting different categories of rights-holders.

[911] See Crary (n 768) 125.

Chapter Four:

Turning of the Tide

1 Introduction

In this final chapter, I deliver on the promise I made at the outset of the thesis by demonstrating that the theory of the spectrum of fundamental rights is not only insightful from an intellectual historical and analytical point of view, but that it is also useful in practice. After Chapter 1, which dealt with the history of Aristocratic and Meritocratic ideas, and Chapters 2 and 3 devoted to a detailed theoretical analysis of these two conceptions, the present chapter descends from the heights of theory down into the valley of politics and practical decision-making. The central aim of the chapter is to show why a move toward a more Meritocratic legal system is called for and how it could be achieved practically.

The chapter is structured as follows. In Section 2, I will first say more about the exact relationship between the Aristocracy and the Meritocracy. Because their opposing features present us with antithetical options, I will propose that finding a practical middle ground—an equilibrium between the two ideal-types—is the best way forward. I will then argue that new scientific findings and a recent change in people's perceptions indicate that current legal systems are overly Aristocratic. They exclude from fundamental rights and legal personhood every being who was not born a member of the human species, despite overwhelming evidence that many nonhuman animals also possess otherwise relevant capacities such as self-consciousness, autonomy, and sentience. I will therefore suggest that in order to reach an equilibrium, we need to move away from the prevailing Aristocratic conception. In other words, we need to *Meritocratise the Aristocracy*. Section 3 is devoted to showing how exactly such a Meritocratisation of current legal systems can be accomplished in practice. I will focus on two particular ways in which this could be done: the first

is to change animals' current status as legal *property* by placing them either into a third legal category between property and persons, or by making them legal persons; the second is to confer certain *fundamental rights* on at least some animals. As I will argue, the right to life, the right to bodily integrity, the right to liberty, the right to food, the right to shelter, and the right to an adequate standard of living are among the fundamental rights that could plausibly be extended to many animals. For each of these two ways that lead in the Meritocratic direction, I will draw on cases from a range of jurisdictions to demonstrate the extent to which they have already become reality. Lastly, in Section 4, I will make the case for rehabilitating species membership as a criterion for extending fundamental rights, as well as for cognate concepts such as legal personhood, and dignity. I call this approach the Species Membership Approach (SMA). Against the orthodox view, I will argue that in law, granting rights, personhood, and dignity based on individual capacities is neither pragmatically feasible nor politically desirable. Extending these legal positions to all members of the same species, by contrast, is a more pragmatic and politically prudent way forward that allows attaining a Meritocratic expansion of the circle of rights-holders while at the same time taking on board key Aristocratic insights. I will outline how SMA can be operationalised and will illustrate its usefulness with the cases of Sesha the human being, Karen the elephant, and Knuckles the chimpanzee. A brief conclusion will summarise the central findings.

2 Meritocratising the Aristocracy

In this section, I will substantiate the claim behind the subtitle of this thesis, namely that animals today live in the *age of the human rights Aristocracy*. In Subsection 2.1, I will first make the general case that the best practical position is a middle ground between the Aristocracy and the Meritocracy. In Subsection 2.2, I will then show that despite growing awareness of the similarity between the capacities and interests of human and other animals, laws have not kept pace with these developments and have remained largely wedded to the Aristocracy. I will argue that in order to reach an equilibrium, it is therefore necessary to Meritocratise the Aristocracy.[912] I will show

[912] Note that this is a practical, not a theoretical proposal. In other words, I do not claim that we should merge the two ideal-types or alter them in some way. According to Weber, scientists should avoid such "syncretism". Their duty is to remain ethically neutral with respect to the ideal-types they are painting so as to make the task of practical decisions-makers and politicians easier who have to mediate between the conflicting extremes: Weber (n 21) 11, 57–58.

that scientific evidence, although it cannot directly challenge the validity of the Aristocracy, can indirectly question its founding assumptions. If these assumptions cease to be justifiable on non-arbitrary grounds, then it makes no sense for us to uphold them. In Subsection 2.3, I contextualise this claim for more Meritocracy for animals by showing how the same logic underlay past extensions of Aristocratic rank and rights to formerly excluded groups such as women. I will argue that the theory of the spectrum allows us to understand the claim for an extension of rights to nonhuman animals as part of the same struggle to expand the circle of rights-holders.

2.1 Steering a middle course

When confronted with a choice between two evenly-matched extremes, one often fares best by opting for a practical middle ground. As I will show in this subsection, the same holds true for the choice that the Aristocracy and the Meritocracy present us with. In order to be able to develop the argument for an equilibrium between the Aristocracy and the Meritocracy, we first need to recall the main strengths and deficiencies of these ideal-types.

As I have argued in Chapter 2, the Aristocracy's virtue is its ability to found a group's high rank and the privileges that come with it. Because of its internalism, the Aristocracy relies entirely on normative principles and assumptions that are internal to society. In so doing, it can immunise the high status and privileges against external criticism. Aristocracy was thus shown to be able to protect "marginal" human beings' rights and equal status against potential attacks from Meritocrats who point out that these beings lack the necessary capacities for some of these rights. However, this strength was at the same time also revealed to be the main weakness of the Aristocracy. Aristocracy's "immunisation" against facts becomes problematic when the normative principles it has founded bear little or no correspondence with the actual world; that is, when they become arbitrary. Not only would it make little sense for us to adopt such principles,[913] but they may even give us cause for active resistance.[914] For this reason, Bilchitz rightly implored that we should only withhold fundamental rights from beings if we have non-arbitrary reasons for doing so. If we fail to provide such reasons, he suggested, then we commit an injustice akin to that of "apartheid".[915]

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913 See Waldron, *One Another's Equals: The Basis of Human Equality* (n 534) 59.

914 See McMahan, 'Our Fellow Creatures' (n 663) 361.

915 Bilchitz (n 5) 52. See also *supra* 126.

Because the Meritocracy and the Aristocracy are negative images of each other, one shines where the other pales. By adopting an externalist approach to ground fundamental rights in a being's actual properties, the Meritocracy avoids the Aristocracy's problem of creating a normative status that becomes too detached from reality. As I have established in Chapter 3, a being's interests are at least partly objective and external facts about the world, meaning that we can determine largely independently of our beliefs whether or not that being deserves certain fundamental rights.[916] This dependence on external facts is also Meritocracy's greatest liability, however. As I have explained, the Meritocracy has no room for equal consideration. It has no problem with—indeed, it requires—withholding fundamental rights from humans or other beings who can be shown empirically not to deserve them. As I have cautioned, the Meritocracy thereby risks opening the floodgates for a (renewed) division of the human species into individuals, or groups of humans, who deserve more and stronger rights than others, and thus to justify the kind of ableism that disability scholars and activists have been warning against.[917] As Tribe has rightly emphasised, a Meritocratic approach would require us to decide not only on the fundamental rights of humans who entirely lack the relevant capacities, but also on the rights of those who have these capacities to a lesser degree—which could take us back to some of the darkest chapters in human history.[918]

With dire consequences looming on either side of the spectrum, what should one do? Between Scylla and Charybdis, the most reasonable course of action is to steer a middle course that avoids the vices of two even-matched extreme conceptions while retaining as many of their virtues as possible.[919] Things would be different, of course, if our two ideal-types were not evenly matched. Were we confronted with a choice between two extremes and one extreme is clearly favourable, it would be foolish to choose the worse extreme. However, the choice between the Aristocracy and the Meritocracy is not of this kind. Both have strengths, and both have weaknesses. More than that: the strength of one *is* the weakness of the other, and vice versa. It therefore seems reasonable, in practice, to adopt a middle ground that minimises as far as possible the downsides

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916 See Chapter 3, Subsection 5.

917 For a definition and critique of ableism, see Jennifer Scuro, *Addressing Ableism: Philosophical Questions via Disability Studies* (Lexington Books 2018) 9–29.

918 See Tribe (n 902) 7.

919 See on the idea of finding the mean between two vices Aristotle, *Nicomachean Ethics* (H Rackham tr, Harvard University Press 1926) Book II, ix, 1; viii, 1-2.

of these approaches while maximising their benefits. We should note, however, that while there are good *practical* reasons for adopting an equilibrium between the two ideal-types, there is no reason for thinking that their abovementioned deficiencies in any way reduce the *theoretical* validity of the Aristocracy or Meritocracy in their pure forms. A fully Aristocratic account that is entirely out of touch with reality is as valid in theory as is a fully Meritocratic account that entirely abolishes equal status and equal rights. Such accounts are practically undesirable, but not theoretically defective.

The fact that adopting a middle ground is the most advisable approach in practice is, I believe, partly responsible for the existence of the wide variety of fundamental rights accounts that are scattered on the spectrum between the two ideal-types. Concrete accounts have, since the Enlightenment, tended to be more moderate than what their ideal-type in its pristine form would have required. In other words, the ideal-types have been just that: *ideal*-types. Some, in fact, have been quite explicit about their motives for shying away from adopting a more extreme form of their respective ideal-type. The animal rights theorist Regan, for instance, distanced himself from the differential consideration that the Meritocracy entails because of the "unsavory implications" he believed the rejection of equal consideration would have.[920]

I propose that the middle ground we should aspire to in practice constitutes an *equilibrium* between the two ideal-types. In order to arrive at this equilibrium, we need to go back and forth between the two extremes. This allows us to approximate and perhaps eventually reach a balance that combines the strengths of the ideal-types, while minimising to the greatest extent possible their weaknesses. This is no easy task. Ngaire Naffine rightly points out that choosing what to do with different ideal-types—or, as she calls them, "myths we live by"[921] —involves a "delicate balancing act".[922] However, as she rightly emphasises, simply because every ideal-type (or every "myth") has its downsides does not mean "that the myths are false or meaningless or ineffectual or without social and moral value. We live our legal lives according to them and they may well be

920 Regan (n 30) 263. See also Cochrane, *Sentientist Politics* (n 11) 24–25.

921 Naffine (n 900) 181.

922 ibid.

doing very good work for us."[923] The key lies in finding the right mixture of these different and conflicting values.

To be sure, for Aristocrats, such a mixture, or equilibrium, will be too Meritocratic. And for Meritocrats, it will be too Aristocratic. However, there is always an opportunity cost involved when we decide which fundamental rights conception we should adopt. We cannot have the best of both worlds. The reason for this is that the Aristocracy and the Meritocracy are antithetical normative positions. Another way of putting this is to say that Meritocrats and Aristocrats are playing a *zero-sum game*. No gains can be made on one side without inflicting an equivalent loss on the other side (see Figure 1).[924] This also explains why no winner has emerged from the debate between Meritocrats and Aristocrats since it surfaced in the Enlightenment.[925] In fact, the antithetical nature of these conceptions explains why no resolution of the debate is possible. As demonstrated by the striking similarity between Salaville's and Delamétherie's theories and those of contemporary theorists, any progress that has been made on these issues has mostly been one of refinement and increasing sophistication of the arguments on either side. The core dispute remains unresolved, however.

2.2 Keeping pace with scientific advances

Since Salaville's and Delamétherie's debate at the turn of the nineteenth century, dramatic advances have been made in our knowledge about the nature of humans and other animals. Perhaps the most crucial development in this regard was the publication of Charles Darwin's *On the Origin of Species* in 1859. Darwin's theory of evolution, accepted by an overwhelming majority of scientists today, effectively dethroned the human species. As Rachels puts it, "[a]fter Darwin, we can no longer think of ourselves as occupying a special place in creation—instead, we must realise that we are products of the same evolutionary forces, working blindly and without purpose, that shaped the rest of the animal kingdom".[926]

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923 ibid.

924 See *supra* 6.

925 To be sure, the Aristocracy is the predominant conception. However, because the Meritocracy's arguments remain unrebutted, the Aristocracy cannot be said to have won the debate.

926 Rachels, *Created From Animals: The Moral Implications of Darwinism* (n 713) 1.

Numerous other discoveries have since revealed that there is even less of a gap between humans and other animals than Darwin could have imagined. In 2005, for example, a consortium of scientists was able to sequence the chimpanzee genome, discovering that the DNA of humans and chimpanzees is 96% identical.[927] Frans de Waal, a leading primatologist, pointed out in response to this study that "Darwin wasn't just provocative in saying that we descend from the apes—he didn't go far enough. We are apes in every way, from our long arms and tailless bodies to our habits and temperament."[928] De Waal's own work on primate ethology is part of yet another burgeoning field that has played an important part in changing our understanding and perception of animals. Ethologists have found out that many types of behaviour that were once believed to be uniquely human are also exhibited by nonhuman animals. For example, humans were shown not to be the only species able to recognise themselves in mirrors,[929] to make and use tools,[930] to think about the past and to plan for the future,[931] to use medicine,[932] to have a sense of empathy and fairness,[933] or to have culture.[934] These and more discoveries have been chiselling off the notion that the human species is completely distinct from other animals. We are now more certain than ever that, although interesting and special in its own ways, the human species tops no hierarchy of

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927 The Chimpanzee Sequencing and Analysis Consortium, 'Initial Sequence of the Chimpanzee Genome and Comparison With the Human Genome' (2005) 437 Nature 69.

928 Cited in Stefan Lovgren, 'Chimps, Humans 96 Percent the Same, Gene Study Finds' (*National Geographic News*) <https://news.nationalgeographic.com/news/2005/08/0831_050831_chimp_genes.html> accessed 21 July 2019.

929 See eg Koji Toda and Michael L Platt, 'Animal Cognition: Monkeys Pass the Mirror Test' (2015) 25 Current Biology R64, with a list of species that have already passed the mirror test in ibid. R56.

930 Robert W Shumaker, Kristina R Walkup and Benjamin B Beck, *Animal Tool Behavior: The Use and Manufacture of Tools by Animals* (Johns Hopkins Univerity Press 2011).

931 William A Roberts, 'Mental Time Travel: Animals Anticipate the Future' (2007) 17 Current Biology R418.

932 Jacobus C de Roode, Thierry Lefèvre and Mark D Hunter, 'Self-Medication in Animals' (2013) 340 Science 150.

933 On empathy see eg Frans de Waal, 'The Evolution of Empathy' (*Greater Good*, 1 September 2005) <http://greatergood.berkeley.edu/article/item/the_evolution_of_empathy> accessed 21 July 2019; on fairness see Sarah F Brosnan and Frans de Waal, 'Evolution of Responses to (Un)Fairness' (2014) 346 Science 1251776.

934 Michael Balter, 'Strongest Evidence of Animal Culture Seen in Monkeys and Whales' (*Science*, 25 April 2013) <http://www.sciencemag.org/news/2013/04/strongest-evidence-animal-culture-seen-monkeys-and-whales> accessed 21 July 2019.

animals, is no principal link in a chain of beings, no summit of creation. In fact, if the theory of evolution has taught us anything, then it is precisely that such hierarchical thinking—of "higher" and "lower" animals—is misplaced.

Despite this empirical evidence, however, relatively little has changed for animals since the Enlightenment. Legal systems across the world have failed to protect animals' most basic interests in ways that are too numerous to list here. In some sense, we would have to consult the whole body of animal (rights) law scholarship to get a full picture of the diverse respects in which the current laws are failing animals. Only such an overview would allow us to appreciate the breadth and depth of the ways in which, for example, animals of most species can be killed with little to no limitations, how they can be kept and treated in ways that would likely be considered severe human rights violations if imposed on a human being, or how high the bar often is for recognising a treatment as inflicting "unnecessary" suffering on an animal.[935]

For our purposes here, it will be sufficient to note the following: while numerous jurisdictions have enacted animal welfare statutes that recognise animals as sentient beings worthy of protection for their own sake, virtually no legal system (I list the few exceptions in Section 3) has extended to them any of the fundamental rights that human beings possess.[936] As will be illustrated in some more detail below, their legal status is thus considerably less favourable than the legal status of human beings. Animals are in many respects still treated in law as if they belonged to an entirely different, and much lower caste than human beings. This is what I mean when I say that animals today live in the age of the human rights Aristocracy. But can it really be that, to quote Rachels, evidence "which overturns all our former ideas about man and nature, has no unsettling consequences?"[937]

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935 See for good overviews of the extent of the problem Thomas G Kelch, *Globalization and Animal Law: Comparative Law, International Law and International Trade* (2nd edn, Wolters Kluwer 2017); Deborah Cao and Steven White (eds), *Animal Law and Welfare—International Perspectives* (Springer 2016).

936 For a useful tool to compare different animal welfare standards around the globe, see World Animal Protection, 'Animal Protection Index' <https://api.worldanimalprotection.org/> accessed 21 July 2019. Note that "recognition of fundamental rights" (or a similar criterion) does not figure among the 15 indicators the index uses.

937 Rachels, *Created From Animals: The Moral Implications of Darwinism* (n 713) 3.

Of course, ardent advocates of the Aristocracy will not be impressed by such pleas. For is not the whole point of the Aristocracy that it is immune to external facts? After all, it can have dangerous consequences for the rights of human beings if we start to listen to natural scientists to decide who should become a fundamental rights-holder and who should not. At this stage, however, we need to recall that while the Aristocracy cannot be directly contested on empirical grounds, it is still *indirectly* vulnerable to such challenges.[938] The Aristocracy's weakness, as I have pointed out in Chapter 2, is that it risks founding principles that bear little or no correspondence with external reality. It would make little to no sense for us to adopt such arbitrary principles, which is why they are not practically viable. Once the detachment from external facts becomes too great, the Aristocracy loses its appeal.

It should therefore not come as a surprise that animal rights theories which are aiming for a more Meritocratic system have at their core claims about the arbitrariness of the current legal status quo. For example, Steven Wise, the director of the NhRP, argues that we should give some fundamental rights to nonhuman animals who possess the capacities for autonomy and self-determination "in order to avoid arbitrary, irrational, and perverse results from disqualifying these nonhuman animals from eligibility for … rights that are granted to humans who entirely lack autonomy".[939] As Alexia Staker has rightly noted, the lawsuits that Wise and the NhRP as well as other animal rights organisations have filed "rel[y] heavily on scientific evidence and place[] great faith in the ability of such evidence to convince the courts that legal boundaries should be shifted".[940] Indeed, Meritocrats often appear to accept axiomatically that there is a connection between growing scientific knowledge and the need to change the legal status quo. For example, Daniel Davison-Vecchione and Kate Pambos transition without further argument from the finding that "[a]dvancements in science have revealed much of the intelligence, sentience and autonomy possessed by

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938 See Chapter 2, Subsection 5.2.

939 Wise, 'Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy' (n 5) 910.

940 Alexia Staker, 'Should Chimpanzees Have Standing? The Case for Pursuing Legal Personhood for Non-Human Animals' (2017) 6 Transnational Environmental Law 485, 499; see also James Gorman, 'Considering the Humanity of Nonhumans' *The New York Times* (9 December 2013) <https://www.nytimes.com/2013/12/10/science/considering-the-humanity-of-nonhumans.html> accessed 21 July 2019 (noting that Wise's "case relies heavily on science").

other species" to the claim that "[t]here are strong reasons to cast doubt on the traditional status of nonhumans as property with which we may do as we please".[941] This view is widespread. In the abovementioned *amici curiae* brief in support of one of the NhRP's *habeas corpus* lawsuits, seventeen philosophers pointed out that the "biological sciences must inform legal practice",[942] and that we need to "keep[] pace with both scientific and moral progress".[943] As a recent decision on the NhRP's Tommy and Kiko cases by the State of New York Court of Appeals shows, this way of thinking also seems to resonate with some judges. In his opinion, Judge Eugene Fahey acknowledged that

> [t]he evolving nature of life makes clear that chimpanzees and humans exist on a continuum of living beings. Chimpanzees share at least 96% of their DNA with humans. They are autonomous, intelligent creatures. To solve this dilemma, we have to recognise its complexity and confront it.[944]

Judge Fahey's opinion appears to confirm a recent change in society's perception of animals, and what appears to be its increasing discontent with the legal status quo of animals. For example, a survey conducted in 2018 showed that 46.9% of US-Americans agree with the statement that "[a]nimals deserve the exact same rights as people to be free from harm and exploitation", while 47.5% agreed that "[a]nimals deserve some protection from harm and exploitation, but it is still appropriate to use them for the benefit of humans".[945] The survey also revealed that about half would vote in favour of a law that grants the right to bodily liberty to great apes, elephants, and cetaceans, or support a politician who introduced such a law.[946] In 2015, a Gallup poll suggested that almost a third of US-Americans (up from a fourth in 2008) agree with the (same)

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941 Daniel Davison-Vecchione and Kate Pambos, 'Steven M Wise and the Common Law Case for Animal Rights: Full Steam Ahead' (2017) 30 Canadian Journal of Law & Jurisprudence 287, 290.

942 Proposed Brief by Amici Curiae Philosophers (n 731) 8.

943 ibid 7.

944 *Nonhuman Rights Project, Inc* v *Patrick C Lavery et al and Nonhuman Rights Project, Inc* v *Carmen Presti et al* (n 841) 6, Fahey, J., concurring.

945 Garrett M Broad, 'Public Support for Animal Rights Goes Beyond Keeping Dogs Out of Overhead Bins' (*The Conversation*) <http://theconversation.com/public-support-for-animal-rights-goes-beyond-keeping-dogs-out-of-overhead-bins-93410> accessed 21 July 2019.

946 ibid.

statement that "animals deserve the exact same rights as people to be free from harm and exploitation", and two-thirds agree that they "deserve some protection from harm and exploitation". Only three percent agreed with the statement that "animals don't need much protection from harm and exploitation *since they are just animals*".[947] Other, more specific surveys have shown for example that, in 2018, 52% of Americans opposed using animals in research,[948] an almost ten-point increase since 2009 when 43% held the same view.[949] A similar trend can be observed in the UK, where in 2016 40% disagreed that it was acceptable to use animals in all types of research and 59% said that the use of animals in research bothers them.[950] Although the data is limited, other countries seem to be undergoing a similar change in attitude toward a more favourable legal status for animals.[951]

This more general trend in people's opinion on the status of animals also has an offshoot in the academic world where the so-called "animal turn" has led to a shift in thinking.[952] The "animal turn" describes a new trend in the social sciences and the humanities to study animals as subjects rather than mere objects.[953] According to Jessica Eisen, this turn is "characterised by both an increasing subject-matter interest in animals and human–animal relationships, and a qualitative shift toward viewing animals as 'selves' whose lived experiences are morally, socially, politically,

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947 Rebecca Riffkin, 'In U.S., More Say Animals Should Have Same Rights as People' (*Gallup*, 18 May 2015) <http://news.gallup.com/poll/183275/say-animals-rights-people.aspx> accessed 21 July 2019 (emphasis added).

948 Pew Research Centre, 'Most Americans Accept Genetic Engineering of Animals that Benefits Human Health, but Many Oppose Other Uses' (2018) 5 <http://www.pewinternet.org/wp-content/uploads/sites/9/2018/08/PS_2018.08.16_biotech-animals_FINAL.pdf> accessed 21 July 2019.

949 Pew Research Centre, 'Americans, Politics and Science Issues' (2015) 141 <http://www.pewinternet.org/wp-content/uploads/sites/9/2018/08/PS_2018.08.16_biotech-animals_FINAL.pdf> accessed 21 July 2019.

950 Ipsos MORI, 'Public Attitudes to Animal Research in 2016' (2016) 4 <https://www.ipsos.com/sites/default/files/publication/1970-01/sri-public-attitudes-to-animal-research-2016.pdf> accessed 21 July 2019.

951 See eg on the global opposition to animal testing for cosmetics Humane Society International, 'Global Polls Reveal Consumers Worldwide Want an End to Animal Testing for Cosmetics: Humane Society International' (27 January 2016) <http://www.hsi.org/news/news/2016/01/global_cosmetics_polling_012716.html> accessed 19 February 2019.

952 See eg Harriet Ritvo, 'On the Animal Turn' (2007) 136 Daedalus 118.

953 Anne Peters, Saskia Stucki and Livia Boscardin, 'The Animal Turn: What Is It and Why Now?' (*Verfassungsblog*, 14 April 2014) <https://verfassungsblog.de/the-animal-turn-what-is-it-and-why-now/> accessed 21 July 2019.

and even legally significant".[954] Indeed, many of the Meritocratic works cited in this thesis are part of the animal turn.

To sum up, we are currently far away from an equilibrium between the Aristocracy and the Meritocracy. Legal systems still have a significant Aristocratic bias in that most jurisdictions are far from granting animals the same legal status or any of the fundamental rights that they grant to humans. However, there is mounting scientific evidence which seems to be changing people's perception of animals and which is increasingly used to call into question animals' legal status quo. As I have argued, scientific evidence can be invoked to challenge the Aristocracy at least indirectly, and hence to move it toward an equilibrium.

2.3 Expanding the circle of rights-holders

Before we will consider, in Section 3, some of the concrete ways in which a Meritocratisation of the Aristocracy can be brought about, it will be illuminating to first contextualise the argument and understand how it compares with other fundamental rights expansions. In what follows, I will suggest that the case for Meritocratising animals' current legal situation should be interpreted as the same sort of project as the women's rights movement and other rights movements. In the case of all these movements, the central aim of the project was (and often still is) to expand the circle of rights-holders to include some formerly excluded categories of deserving beings.

Of course, the claim that we should include at least some animals in the community of rights-holders is an old chestnut in the animal rights literature.[955] According to Naffine, for example, the work of the NhRP follows precisely the idea

> that there is an inexorable logic to this endowment of rights. Law has steadily expanded its circle of concern as it has come to appreciate the natural attributes of excluded beings and each expansion has meant a growing enlightenment. Now we should draw the circle larger still and include the non-human primates.[956]

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954 Jessica Eisen, 'Animals in the Constitutional State' (2017) 15 International Journal of Constitutional Law 909, 912.

955 In fact, the historian Keith Thomas notes a mention of a "wide circle of benevolence" as early as 1791, see Keith Thomas, *Man and the Natural World: Changing Attitudes in England 1500–1800* (Penguin Books 1983) 185.

956 Naffine (n 900) 133.

What is novel about my proposal to Meritocratise the Aristocracy is its ability to shed light not only on why such a Meritocratic expansion is necessary, but also on the Aristocratic reasons—often overlooked in animal rights scholarship—that speak against an overly radical expansion of the circle. I will first consider the reasons for a Meritocratic extension of the circle of rights-holders to animals before I will show that the extension has in all cases been justified by pointing to the arbitrariness of the existing circle.

As I have argued in the previous subsection, we have good reasons for abandoning an Aristocratic status if, from a practical perspective, it makes little sense to retain it. In other words, if a specific circle of rights-holders becomes indefensible on non-arbitrary grounds, we should no longer maintain it. In such a case, we have to redraw the circle so as to make it defensible again. The point I want to make now is that in the history of fundamental rights, the circle of fundamental rights-holders had to be expanded several times because the previously drawn circle became indefensible. As is well-known, it took centuries for the current circle of fundamental rights-holders to develop. Today, this circle includes—at least in theory, and in some legal systems—humans of any class, gender, ethnicity, age, or bodily ability.

The fact that this extension did not happen overnight is overlooked by Waldron. His claim about the universalisation of the aristocracy to "all men and women",[957] which I discussed in Chapter 2,[958] ignores the struggles and the time it took for the circle to be drawn the way it is today. While Waldron is, in my view, correct in saying that a universalisation from noblemen to all members of the human species has occurred,[959] he passes over the long and arduous history of smaller expansions of the circle of rights-holders that were required to bring about this universalisation. For example, Waldron makes no mention of the struggle of women and black people to be recognised as full rights-holders.[960] This is problematic not only because it skips crucial chapters in the history of human rights, but also because it causes him to fail to notice the mechanism that is behind expansions of the circle. I propose that these expansions occurred whenever the current Aristocracy—that is, the current way the circle was drawn—could no longer be defended on non-

957 Waldron, *Dignity, Rank, and Rights* (n 6) 35.

958 Chapter 2, Section 2.

959 For such a reading of the circle that excludes all nonhumans, see also Kasperbauer (n 496) 141.

960 See for a chronology of the extension of rights to further groups, with a focus on France, Hunt (n 266) 149–175.

arbitrary grounds. These expansions of the circle are therefore best interpreted as *Meritocratisations of the Aristocracy*.

Consider the example of women's rights. In 1790—only one year after the adoption of the French Declaration of the Rights of Man and the Citizen—the Marquis de Condorcet published an essay entitled *Sur l'admission des femmes au droit de cité*. In his essay, Condorcet proposed an expansion of political rights to women. The argumentative strategy he adopted is a now familiar one: he pointed out that women possess the same capacities that would reasonably seem to support men's possession of such rights, yet are granted none of these rights: "[t]he rights of men are based uniquely on the fact that they are sentient beings, capable of acquiring moral ideas, and to reason about these ideas. Because women have these same qualities, they must necessarily also have equal rights."[961] Condorcet's challenge was thus essentially one of arbitrariness. As he put it, it was simply "absurd"[962] to "quietly deprive half of the human race"[963] of their rights. No one had succeeded in providing plausible reasons for thinking that there is a relevant difference between men and women with respect to these rights, which is why Condorcet concluded that it is unacceptable to deprive women of theirs.[964] One year after Condorcet's defence of women's rights, Olympe de Gouges published the *Déclaration des droits de la femme et de la citoyenne*, in which she criticised the male bias of the Declaration of the Rights of Man. On the other side of the Channel, Mary Wollstonecraft published her famous defence of women's rights, *A Vindication of the Rights of Woman* (1792).

Interestingly, Wollstonecraft's essay inspired another author, Thomas Taylor, to present an argument for an even more far-reaching expansion of the circle of concern. In his *A Vindication of the Rights of Brutes* (1792), Taylor argued that if we are willing to extend fundamental rights based on the reason that withholding them from women is arbitrary, then we should also consider extending such rights to nonhuman animals. According to Taylor, animals possess a "natural equality with mankind", comparable with man in reason and language.[965] Building on themes developed in

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961 Marquis de Condorcet, 'Sur l'admission des femmes au droit de cité', *Œuvres de Condorcet*, vol 10 (Firmin Didot Frères 1847) 122.

962 ibid 121.

963 ibid.

964 ibid 129.

965 Thomas Taylor, *A Vindication of the Rights of Brutes* (Scholars' Facsimiles & Reprints 1966) 18.

Thomas Paine's arguments in defence of the French Declaration[966] and Wollstonecraft's *Vindication*, Taylor contends that "[w]e may therefore reasonably hope, that this amazing rage for liberty will continually increase; that mankind will … as universally join in *vindicating the rights of brutes*, as in asserting the prerogatives of man".[967]

The catch with Taylor's ostensible argument for animal rights was that, in contrast to Delamétherie's, it was a parody.[968] Taylor was in fact a sceptic of the idea of equal rights which he thought poses a threat to the nobility.[969] The *Vindication of the Rights of Brutes* was his way of criticising—by way of a *reductio ad absurdum*—an idea that he believed had clearly gone awry. This becomes most obvious perhaps on the last page of his essay where he points to the need for someone more able than him "to demonstrate the same great truth [of the equality of man and brutes] in a similar manner, of vegetables, minerals, and even the most apparently contemptible clod of earth".[970] Reductios such as Taylor's would prove to be popular in the history of fundamental rights extensions. For example, as Claire Jean Kim has observed in the context of the US, reductios or slippery slope arguments—"What's Next?" objections, as she calls them—were a common response to attempted extensions of the circle of rights-holders to black people, Native Americans, and Chinese immigrants.[971]

It goes without saying that in the case of these groups of people, as well as in the case of many other previously excluded human groups, the "What's Next?" objection falsely suggested that an extension of the circle of rights-holders to members of these groups could not be based on good reasons. However, it is worth noting that the "What's Next?" objection contains a grain of truth if we take it to refer to the vices of the Meritocracy. The more moral and legal attention we devote to factual similarities and differences between beings, the more reason we have for relinquishing equal rights and granting rights solely based on the possession of the relevant rights-

966 Thomas Paine, *Rights of Man, Common Sense, and Other Political Writings* (Oxford University Press 2008).

967 Taylor, *A Vindication of the Rights of Brutes* (n 965) vii (emphasis in original).

968 Peder Anker, 'A Vindication of the Rights of Brutes' (2004) 7 Philosophy & Geography 259, 259 (arguing incorrectly that Taylor's was the "first defense of animal rights", see ibid 259).

969 ibid 260.

970 Taylor, *A Vindication of the Rights of Brutes* (n 965) 103.

971 Claire Jean Kim, *Dangerous Crossings: Race, Species, and Nature in a Multicultural Age* (Cambridge University Press 2015) 29.

grounding capacities. It is in this sense—and this sense only—that Taylor and likeminded critics are right in condemning a heedless pursuit of the Meritocracy. The Aristocracy's commitment to equality and its ability to detach rights from empirical properties give it important advantages over extreme Meritocratic accounts. As we saw above,[972] the Aristocracy's uncompromising rejection of views that threaten to undermine equality was certainly one of the reasons why Aristocratic proclamations were in full vogue after the Holocaust. As Naffine points out, "the Second World War, and its immediate aftermath, served to consolidate the species divide in the name of natural human rights and to affirm a strong legal metaphysical stance: that law is for humans essentially understood as non-animals".[973] If we reject wholesale challenges such as Taylor's we ignore the fact that the Aristocracy has something going for it, namely that there are good reasons for drawing a circle in the first place. Many animal rights proponents, I believe, overlook this when critiquing the Aristocracy.

However—and this is where opponents of expansions of the circle go wrong—rights activists are right to argue that the circle should be extended if it cannot be defended anymore on non-arbitrary grounds.[974] With animal rights we seem to have arrived at precisely such a juncture where the current Aristocracy—however justified it may have been in 1945—seems to have become indefensible on non-arbitrary grounds. As Peder Anker puts it, "[t]oday the idea of animal rights or liberation is not a joke anymore".[975] In many ways, animal rights are now in a similar position as human rights were in the French Enlightenment. In eighteenth century France, the status and privileges of the nobility could no longer be defended in light of the growing awareness that non-nobles were deserving of the same rank. As a result, their status and privileges had to be extended, in stages, so as to ultimately include all human beings. Today, a similarly Meritocratic expansion of the circle is in the offing: a universalisation of rights from human beings to at least some other deserving nonhuman animals. As I have argued in Chapter 2, the current Aristocracy

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972 Chapter 2, Section 2.

973 Naffine (n 900) 122; unsurprisingly, Christian ideals were particularly influential in cementing this view of human sanctity post 1945, see: Samuel Moyn, *Christian Human Rights* (University of Pennsylvania Press 2015).

974 See also Thomas Benedikt Schmidt, *Das Tier—ein Rechtssubjekt? Eine rechtsphilosophische Kritik der Tierrechtsidee* (Roderer 1996) 41–42.

975 Anker (n 968) 261.

claims that only members of the human species can have fundamental rights and dignity.[976] The previous subsection has shown that we should move away from this Aristocratic conception in order to keep pace with scientific advances that make the wholesale exclusion of all animals from the rank of the Aristocracy appear increasingly arbitrary to an increasing number of people. Hence, as in the French Revolution, and other historic fundamental rights junctures such as the recognition of women as full rights-holders, the tide is turning today in favour of a more Meritocratic understanding that extends rights and other privileges to some nonhuman animals.

The aforesaid also reveals the interconnectedness of the animal rights project and other rights-projects. Henry Salt, for example, who was one of the first animal rights advocates in the UK, argued that "[t]he emancipation of men from cruelty and injustice will bring with it in due course the emancipation of animals also. The two reforms are inseparably connected, and neither can be fully realised alone."[977] My theory of the spectrum explains this interconnectedness. All these movements can be interpreted as having rebelled against an Aristocracy that excluded them on arbitrary grounds, and as having therefore fought for a Meritocratic extension of the circle of rights-holders. Indeed, any reform toward a more meritorious system is not complete as long as there are groups left who deserve rights but are not granted any. This explains why the struggles for fundamental rights that different groups have been leading are not unrelated.

Because Waldron ignores the successive nature of "universalisation", he also appears to miss this connection between the different rights movements. That is, he fails to see that in all these instances, the expansion is based on the reason that the existing Aristocracy could no longer be defended with non-arbitrary reasons. In fact, because Waldron's universalisation from the nobility to all of humanity is itself just the product of all these smaller expansions, it, too, can be explained in the same way. Waldron's universalisation was a Meritocratic expansion that was necessary because the special status and rights of the nobility seemed more and more indefensible. By focusing solely on the larger extension from the nobility to all of humanity, Waldron ignores the reasons that have brought about the smaller extensions, and therefore ultimately also the reason for the larger extension. To put this thought differently: Waldron fails to see that the Aristocracy

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976 See Chapter 2, Subsection 3.3.

977 Cited in Thomas (n 955) 185; see also his Henry S Salt, *Animals' Rights: Considered in Relation to Social Progress* (MacMillan 1894).

is not the only fundamental rights conception. On its opposite side, there is another conception, namely the Meritocracy. Unaware of this fact, Waldron overlooks that the reasons for universalising dignity and rights from the nobility to all human beings were of the same Meritocratic nature as the reasons for fundamental rights for animals.

Let me add one final point. Some authors have suggested that the expansion of the circle of rights-holders is—or should be—a one-way street: rights are or should continually be extended to more and more beings.[978] According to Roderick Nash, for example, history demonstrates that rights radiate: they have extended from the nobility to whites, slaves, women, indigenous peoples, and may, in the not too distant future, also be extended to animals, and the environment more generally.[979] Lynn Hunt seems to subscribe to a similar view. According to her, the expansive tendency is inherent to rights; it is, as she puts it, part of "[t]he bulldozer force of the revolutionary logic of rights".[980] The view I defend in this thesis does not adhere to the unbridled expansivism that Nash and Hunt advocate. A Meritocratic expansion, on my account, is only justified up to the extent that we reach an equilibrium between the Meritocracy and the Aristocracy. If we should ever come to overstep this equilibrium and lean too much toward the Meritocracy, then there will be good reasons for scaling down the circle of rights-holders. Then, we will have good reasons to Aristocratise the Meritocracy.

3 How to realise the middle way

In the previous section, I have argued that practical decision-makers should aim for an equilibrium between the Aristocracy and the Meritocracy and I have shown that, because current legal systems have come to lean too heavily toward the Aristocratic side, we should change course and approach the Meritocratic side in order to reach the equilibrium. In this section, I will demonstrate how a move toward the Meritocracy can be concretely realised. To do so, I will address two of the most pressing regards in which animals are currently treated in law in ways that are overly Aristocratic.

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978 See Anker (n 968) 262.

979 Roderick Frazier Nash, *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press 1989) 6–8. Note, however, that Nash adopts a broader reading of the term "rights" than that of "fundamental rights" adopted here.

980 Hunt (n 266) 160.

I will illustrate what steps can be taken to make the treatment of animals more Meritocratic in these respects, and I will show to what extent legal practice has already started to move in that direction. The two issues I will be focusing on are the treatment of animals as property, and the denial of fundamental rights to animals.[981]

I should make it clear at the outset that I will not argue that any of these ways of Meritocratising animals' legal status is better than the other ways. Rather, my aim is simply to present a range of possible approaches that one can take to move in the right direction. As I see it, all of these approaches are useful in working toward achieving an equilibrium. It is also worth noting that the two issues intersect at least in some respects. Ceasing to treat animals as property is likely going to be a key step in granting them fundamental rights. However, there are also respects in which these issues diverge, which is why I discuss them separately.

3.1 Overcoming animals' property status

The first respect in which the current treatment of animals appears to be increasingly arbitrary is that legal systems generally consider animals to be objects of property. Animals are legal things, not legal persons. As Gary Francione, one of the most vocal foes of animals' property status, puts it, "the law at present regards animals as the property of their owners and institutionally regards animals only as means to human ends".[982] Like tables and cars, animals are commodities that can be bought, used, sold, or destroyed—often without meaningful legal constraints. This has significant consequences for animals. In the billions, they are bred, branded, herded, fattened, and milked. They are trapped, tamed, trained, neutered, and impregnated. They are sheared and skinned, caged and confined. And they are killed. The very existence of these different terms is testament to the myriad uses to which animals are being subjected. Humans, on the other hand, cannot normally be

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981 There are, of course, other ways in which a more Meritocratic system could be achieved. For example, one could discuss how animals could be conferred legal standing (see on this eg Taimie L Bryant, 'Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans' [2008] 39 Rutgers Law Journal 247, 330; for an account of the problems posed by animals' lack of standing [with a focus on US law], see Francione, *Animals, Property, and the Law* [n 5] 65–90); or how they could become citizens (see on this eg Donaldson and Kymlicka [n 797]).

982 Gary L Francione, 'Animals—Property or Persons?' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press 2005) 11.

lawfully subjected to such treatments. This is because, in contrast to nonhuman animals, they are considered to be legal persons. The law thus exhibits a yawning gap between the legal status of animals and that of humans.

To be sure, many legal systems impose restrictions on animal property that do not apply to the ownership of tables and cars. These restrictions are generally to be found in animal protection acts and ordinances. More often than not, however, they fail to provide a sufficient protection of animals' interests. According to Francione, the reason for this is that even in legal systems with such protections for animals, they are subjected to a legal paradigm in which they occupy a significantly less attractive status than humans. Even to the extent that there are laws that recognise animals' inherent interests, their protection will naturally be limited because they are still considered humans' property.[983] As Francione notes, the rights of property owners "are paramount in determining the ambit of protection accorded to animals by law".[984]

Considering the overwhelming evidence that we have today which shows that many animals share many of the same or similar capacities that human beings possess,[985] it seems surprising that the gap between humans as legal persons on the one hand, and animals as property on the other has not been closed yet. As Naffine argues,

> [w]ith the scientific entrenchment of evolutionary biology (and now with the remarkable and escalating insights into our physical natures provided by the science of genetics), one might have expected a concomitant shift to take place in social and legal thinking about the relative status and value of "man" and other animals … In particular, we might have expected some modification of the legal conceptual divide between persons and property as it applies to humans and animals respectively.[986]

Following Naffine, we can say that a change in animals' legal status is overdue. To close or at least narrow the gap between the legal status afforded to animals and humans, it is pressing to overcome animals' property status. This is one important way in which the current Aristocratic

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983 ibid 122; Gary L Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (Columbia University Press 2008) 19.

984 Francione, *Animals, Property, and the Law* (n 5) 24.

985 See Subsection 2.2.

986 Naffine (n 900) 122.

system can be made more Meritocratic. There are, roughly speaking, two ways that lead in this direction. The first and less drastic way is to remove animals from the category of legal objects without, however, turning them into legal persons. The second, more drastic way is to extend legal personhood to animals.

First, one could try to overcome animals' property status by removing them from the category of simple property which they co-habit with inanimate legal objects in most jurisdictions. Under this approach, animals would not be recognised as full legal persons in the same way as humans are. Rather, animals would come to occupy a middle position: not mere things, but not legal persons either. Favre, who has made a proposal of this sort, proposes that animals should be conceived as "living property".[987] "Living property", according to Favre, differs from other kinds of property (that is, real, personal, and intellectual property) in that it is property with an inherent interest in well-being. This means that, in order to guarantee the protection of animals' well-being, the rights of the owners of living property are more limited than those of other kinds of property. For example, ownership title of "living property" could be transferred only when it is in the best interest of the animal.[988] Likewise, the use of an owned animal for specific purposes (for food, for their fur, for scientific research, etc.) and the conditions in which these animals are kept could be subject to specific limitations or prohibitions.[989] As Favre notes, the relationship between owners and "living property" would in certain respects become like that of parent and child.[990]

Some countries have already taken steps in the direction of transforming animals' legal status along these lines.[991] The German Civil Code, for example, was amended in 1980 by the Law for the Improvement of the Legal Status of Animals in Civil Law. This Law introduced a new paragraph (§ 90a) into the Civil Code, which states that: "(1) Animals are not things; (2) They are protected by special statutes."[992] A similar law was adopted in France in 2015, introducing Article

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987 Favre (n 898); for a similar proposal, see Cupp (n 6).

988 Favre (n 898) 1056.

989 ibid 1057–1058.

990 ibid 1059, 1071.

991 See also *Nonhuman Rights Project, Inc* v *Patrick C Lavery et al and Nonhuman Rights Project, Inc* v *Carmen Presti et al* (n 841) 7.

992 §90a of the German Civil Code (1896, Bürgerliches Gesetzbuch, BGB) Carmen V Schöning (tr) <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf> accessed 21 July 2019.

515-14 into the French Civil Code. According to this Article, "Animals are living beings endowed with sensitivity."[993]

Although important Meritocratic milestones in their own right, these legal changes (and kindred ones in other jurisdictions)[994] have so far been of largely symbolic importance. The reason for this is that animals, although not considered to be mere property anymore, are for the most part still subject to property rules in these jurisdictions. Thus, paragraph (3) of Germany's § 90a complements paragraphs (1) and (2) by adding that "[t]hey [animals] are governed by the provisions that apply to things, with the necessary modifications, except insofar as otherwise provided." Likewise, France's Article 515-14 qualifies the afore-cited passage by providing that, "[w]ith the exception of the laws that protect them, animals are subject to the property regime."[995] Although the laws protecting animals have in certain instances managed to impose noteworthy restrictions on the treatment of animals, notably for pets, even ardent defenders of animal welfarism often acknowledge that how the law treats animals is far from ideal.[996]

Dissatisfied with what they see as a lack of palpable change, some have argued that the first, tiered way of overcoming animals' property status is doomed to failure. As mere "property plus", they argue, animals cannot be guaranteed sufficient protection of their interests. This is because this hybrid position between property and personhood exists in a system whose core premise is that animals are ours to use. Animals necessarily end up getting sucked back into the old dichotomy.[997] Francione draws a parallel here with protection laws that were enacted to elevate slaves above mere property:

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993 Article 515-14 of the French Civil Code (1804, Code civil des Français) <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721> accessed 21 July 2019.

994 See eg Article 641a of the Swiss Civil Code (1907, Zivilgesetzbuch, ZGB) <https://www.admin.ch/opc/en/classified-compilation/19070042/index.html#a641a> accessed 21 July 2019; or §285a of the Austrian Civil Code (1811, Allgemeines bürgerliches Gesetzbuch, ABGB) <https://www.ris.bka.gv.at/GeltendeFassung.wxe? Abfrage=Bundesnormen&Gesetzesnummer=10001622> 21 July 2019.

995 ibid.

996 See eg Robert Garner, 'Animal Welfare: A Political Defense' (2006) 1 Journal of Animal Law and Ethics 161, 167.

997 Francione, *Animals, Property, and the Law* (n 5) 5; for a critical take on this argument, see Cochrane, 'Ownership and Justice for Animals' (n 13) 433.

> We tried, through slave welfare laws, to have a three-tiered system: things, or inanimate property; persons, who were free; and in the middle, depending on your choice of locution, "quasi persons" or "things plus"—the slaves. That system could not work. We eventually recognised that if slaves were going to have morally significant interests, they could not be slaves any more, for the moral universe is limited to only two kinds of beings: persons and things.[998]

For Francione and other opponents of the three-tiered system, turning animals into "property plus" will have little positive effect. To be truly able to close the gap between the legal status of humans and animals, they argue, we need to extend legal personhood to animals.[999] They therefore agree with the *tertium non datur* principle that the defenders of the existing property/persons dichotomy endorse: there is no halfway house between property and personhood. In contrast to them, however, the proponents of this second way place animals in the category of persons, not property. Among the proponents of this approach, two main camps can be distinguished. The first proposes to confer on animals a *sui generis* legal personhood that is different from human legal personhood; the second wants to put animals in the exact same category as human legal persons.

An illustrative example of the first camp is Saskia Stucki's account. Stucki proposes that animals should be categorised as *tierliche Personen* (animal persons).[1000] Every sentient animal, Stucki argues, should be included in this category of persons, which would come to complement the two other categories generally recognised in law: natural persons and juristic persons.[1001] According to Stucki, practical considerations militate against including animals in the category of (human) natural persons. Although conceptually possible, such a strategy would likely fuel the fear of a devaluation of humans' legal status. Moreover, she points out that in contrast to paradigmatic natural persons, most animals would in practice only be able to benefit from "reduced" personhood. Finally, creating a third category of legal personhood for animals would save us from having to reconceptualise the well-established legal category of the natural person.[1002]

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998 Francione, 'Animals—Property or Persons?' (n 982) 131.

999 See Bryant (n 981) 264.

1000 Stucki, *Grundrechte für Tiere* (n 13) 305.

1001 ibid 304–305, 321.

1002 ibid 304.

The High Court of Uttarakhand in India seems to have adopted a similar approach in its ruling *Narayan Dutt Bhatt* v *Union of India* from 4 July 2018. Dealing with a case that concerned the welfare of horses used in horse carts that travel between Nepal and India, the Court held that

> [t]he entire animal kingdom including avian and aquatic [sic] are declared as legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person. All the citizens throughout the State of Uttarakhand are hereby declared persons in loco parentis as the human face for the welfare/protection of animals.[1003]

In declaring that the entire animal kingdom should have a "distinct persona", the Court seemed to suggest that animals should have their own legal personhood. However, this interpretation is not beyond all doubt. In the paragraph that precedes the one just quoted, the Court did not distinguish between animals' legal personhood and that of human beings, arguing simply that "in order to protect and promote greater welfare of animals … animals are required to be conferred with the status of legal entity/legal person".[1004] It is hoped that the Court will clarify its position on this question in future rulings.

The second camp in the legal personhood debate argues that animals should be given the same legal status as natural persons that human beings possess.[1005] One proponent of this second approach is Francione.[1006] According to him, the reason why humans cannot be treated as another's resource is that humans possess what he calls "a basic right not to be treated as property".[1007] This right, he argues, is "a minimal prerequisite to being a … legal person".[1008] It ensures that its holders are taken seriously and that their interests do not generally have to give way to the common good. According to Francione, animals should share in the same status of legal personhood because they, too, have basic interests worthy of protection against trade-offs. That not all humans and animals

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1003 *Narayan Dutt Bhatt* v *Union of India et al* [2018] High Court of Uttarakhand 2018(3)RCR(Civil)544 § 99A.

1004 ibid § 98.

1005 Yet others propose to categorise animals as juristic persons, see eg David Favre, 'A New Property Status for Animals: Equitable Self-Ownership' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press 2005) 244.

1006 Francione, 'Animals—Property or Persons?' (n 982); for another example, see Bilchitz (n 5) 68.

1007 Francione, 'Animals—Property or Persons?' (n 982) 124.

1008 ibid 125 (emphasis removed).

possess the same interests is inconsequential for their status as legal persons, Francione holds, because they all share an interest in continued existence.[1009]

Practically, animals' legal personhood could function with a guardianship model similar to that which exists for human beings who cannot represent their own interests in court, such as children or mentally disabled persons. As Nussbaum argues, animals "may be treated as we currently treat children and many people with mental disabilities, who have a large menu of rights and are in that sense far from being 'mere property', although those rights must be exercised through human guardianship".[1010] One of the central advantages of the guardianship model, as Christopher Stone has pointed out, is that it prevents the flood of litigation that could arise from extending standing on behalf of animals to anyone with an interest in the protection of animals.[1011] While there would almost certainly be an increase in litigation also under the guardianship model—after all, legal personhood is conferred on animals precisely to effect change—it would ensure that only one guardian is responsible for an animal and thereby prevent different people from bringing suit on behalf of the same animal.[1012] Also, guardians will generally have a better understanding of the needs of the ward and therefore be better positioned to defending their interests in court.[1013]

Perhaps unsurprisingly, this second way of overcoming animals' property status is even further from being realised than the first way. As pointed out above, the closest most legal systems have come to overcoming animals' property status is to extend to them a special, but largely symbolic status as "property plus". This has certainly to do with the far-reaching practical implications a Meritocratisation of the second kind would have. As Francione points out, including animals in the category of legal persons would likely impose an obligation on us "to stop using animals for food, biomedical experiments, entertainment, or clothing, or any other uses that assume that animals are merely resources, and that we prohibit the ownership of animals".[1014]

1009 Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (n 983) 193.

1010 Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (n 808) 376–377.

1011 See Stone (n 723) 470. For a consideration of objections to the guardianship model, see ibid 471-473.

1012 ibid 470–471.

1013 ibid 471.

1014 Francione, 'Animals—Property or Persons?' (n 982) 132.

But things might be changing also in this regard. Promising developments in South America may in fact have heralded a new era for animal legal personhood. On 3 November 2016, the Third Court of Guarantees in Mendoza, Argentina, ruled on a writ of *habeas corpus* petition which the Association of Officials and Advocates for Animal Rights (AFADA) had filed on behalf of Cecilia, a chimpanzee held at the zoo of Mendoza. The state attorney, objecting to the petition, argued that it should be dismissed on the grounds that Cecilia is an animal and therefore "still a thing"[1015] and not a legal person eligible for *habeas corpus* protection. In its decision which was hailed as being of "potentially revolutionary proportions",[1016] the Court rejected the state attorney's arguments and instead found in favour of Cecilia. Highlighting the genetic proximity between human beings and chimpanzees, and the capabilities they have in common, the Court reasoned that "[a] chimpanzee is not a thing, he is not an object that can [be] disposed of like a car or a building. Great apes are legal persons, with legal capacity".[1017] The Court held that "the category of an individual as the center of the attribution of rules (or 'legal person') would not include only human beings, it would also include the great apes—orangutans, gorillas, bonobos, and chimpanzees".[1018] Confronted with the question how Cecilia would exercise her personhood given her inability to represent herself, the Court argued that a similar incompetence on the part of many human beings does not prevent them from being legal persons for the simple reason that representatives exercise their rights on their behalf. According to the Court, animals could also come to benefit from legal representations, suggesting that an NGO or state organs could fulfil this role.[1019] The Court therefore found no problem with declaring Cecilia a legal person capable of possessing fundamental rights and ordered her transfer from the Mendoza Zoo to a great ape sanctuary in Brazil. In April 2017, in compliance with the court's order, Cecilia was successfully moved from

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1015 *"Cecilia"* (n 2) 5.

1016 Saskia Stucki, 'Toward Hominid and Other Humanoid Rights: Are We Witnessing a Legal Revolution?' (*Verfassungsblog*, 30 December 2016) <https://verfassungsblog.de/toward-hominid-and-other-humanoid-rights-are-we-witnessing-a-legal-revolution/>.

1017 *"Cecilia"* (n 2) 24.

1018 ibid 28; note, however, that at certain points, the Court seems to allow for the possibility that animals form their own category of legal persons that exists alongside human legal persons, both part of a more general concept of legal personhood: "This is about setting them in the category of non human legal persons, where they really belong", see ibid.

1019 *"Cecilia"* (n 2) 27.

her zoo cage to the sanctuary in Brazil where she is now able to spend the rest of her life with other chimpanzees in a large enclosure.[1020]

The Cecilia ruling appears to have been the first in history to have made an animal a legal person.[1021] And it would not be the last to go in that direction. On 26 July 2017—a little over half a year after the Third Court of Guarantees in Mendoza handed down its ruling in the Cecilia case—the Supreme Court of Justice of Colombia granted a writ of *habeas corpus* for Chucho, a spectacled bear who had been transferred to a zoo in Barranquilla.[1022] The lawyer who filed the writ on behalf of Chucho, Luis Domingo Maldonado, argued that Chucho's conditions would deteriorate if he was moved from his previous enclosure, which he had shared with bear Clama as part of a repopulation programme, to the even less ideal habitat of the Barranquilla Zoo. Maldonado's argument was at first rejected by the Superior Court of Manizales. Claiming that *habeas corpus* writs are only available to human beings, the Court denied Maldonado's petition.[1023] This decision was overturned by Judge Luis Armando Tolosa Villabona of the Colombian Supreme Court of Justice. Finding that the relocation of Chucho was not justified on scientific grounds, the judge ordered that Chucho be immediately transferred from the Barranquilla Zoo to a more appropriate habitat where he can live in "full and decent conditions of semi-captivity".[1024] Judge Tolosa Villabona's order was subsequently appealed and is currently pending before the Constitutional Court of Colombia.[1025]

1020 Lauren Choplin, 'Chimpanzee Cecilia Finds Sanctuary: An Interview With GAP Brazil' (*Nonhuman Rights Project*, 20 April 2017) <https://www.nonhumanrights.org/blog/chimpanzee-cecilia/> accessed 21 July 2019.

1021 Stucki, 'Toward Hominid and Other Humanoid Rights: Are We Witnessing a Legal Revolution?' (n 1016). To be sure, there are jurisdictions in which animals could already be declared persons for certain specific purposes, such as for example to become beneficiaries of trusts: see eg *Nonhuman Rights Project, Inc* v *Patrick C Lavery et al,* Memorandum of Law (n 728) 110–113 (on chimpanzees as beneficiaries of trusts in NY state law). I do not count these here because the notion of personhood that is at stake in these cases is not one that is tied to the possession of fundamental rights.

1022 *"Chucho"* (n 3).

1023 See 'Chucho, el oso de anteojos que triunfó en la Corte Suprema de Justicia' (n 3).

1024 *"Chucho"* (n 3) 35.

1025 Agencia EFE, 'Los animales en América van de la "ley de la selva" a la de los tribunales' (3 March 2018) <https://www.efe.com/efe/america/sociedad/los-animales-en-america-van-de-la-ley-selva-a-tribunales/20000013-3541670> accessed 21 July 2019.

Cases such as Cecilia's and Chucho's are, first and foremost, significant because of the concrete improvements of the living conditions that they bring about for the animals themselves. But in addition, these cases are also of great symbolic importance because they show that legal personhood for animals is not a mere pipe dream. Cecilia and Chucho provide us with a rare glimpse into what a world would look like in which animals cease to be property. And cases like theirs can inspire other animal rights advocates around the world to push for similar Meritocratisations in their legal systems.[1026]

3.2 Fundamental rights for animals

The second regard in which the current legal treatment of animals appears to be increasingly difficult to justify on non-arbitrary grounds is their wholesale exclusion from fundamental rights-holdership. Whilst human beings possess such legal fundamental rights as the right to life, the right to bodily and mental integrity, or the right to family life, nonhuman rights possess no equivalent rights. This is the case despite the fact that, as has been pointed out, many animals today demonstrably possess similar capacities and interests as those that would seem relevant for humans' possession of these rights. As a result, the law allows for an infringement of animals' most basic interests with few constraints. Another way to Meritocratise the current status of animals would therefore be to grant at least some fundamental rights to some other animals.

As may have become evident in the previous subsection on transforming the property status of animals, the issue of fundamental rights is closely related to the question of legal personhood. According to a dominant view in the literature, legal personhood is a *conditio sine qua non* for fundamental rights-holdership.[1027] Wise, for example, invites us to think of legal personhood as an

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[1026] AFADA, which was behind the Cecilia case, has since filed *habeas corpus* petitions on behalf of three other chimpanzees: Great Ape Project, 'Former Zoo of Buenos Aires: AFADA Makes a New Request for Habeas Corpus on Behalf of Three Chimpanzees' (1 December 2017) <http://projetogap.org.br/en/noticia/former-zoo-of-buenos-aires-afada-makes-a-new-request-for-habeas-corpus-on-behalf-of-three-chimpanzees/> accessed 21 July 2019.

[1027] See eg Steven M Wise, 'The Legal Thinghood of Nonhuman Animals' (1996) 23 Boston College Environmental Affairs Law Review 471; Francione, *Animals, Property, and the Law* (n 5) 110–112; see also Staker (n 940) 488; for a discussion relevant especially for civil law systems, see Stucki, *Grundrechte für Tiere* (n 13) 174–176; for an argument against the common view, see Kurki (n 13).

"empty 'rights container'".[1028] Into this container, we can "drip" different rights, depending on the interests of the relevant person. On this view, legal personhood is simply the "capacity for possessing any legal right".[1029] For Wise, this conceptualisation can also explain why humans and animals share some but not all fundamental rights ("drips"). Francione adopts a similar view, arguing that "[t]he right not to be treated as the property of others is basic and different from any other rights we might have because it is the grounding for those other rights; it is a prelegal right".[1030] In contrast to Wise, however, Francione admits that it is conceptually possible to sever the question of fundamental rights from legal personhood.[1031] But while animals may be able to possess some legal rights despite remaining property, Francione suggests that they could not possess any meaningful rights—or fundamental rights, as I have been calling them.[1032] Other scholars disagree with this view.[1033] Cochrane, for instance, finds that as owners, humans do not have absolute control over the animals they possess. Instead, their ownership rights are limited, in the same way as they are for other kinds of property: "if I own a barrel of beer, I cannot simply sell glasses of it to passers-by on the street; if I own a house, I cannot refuse entry to all other people in all circumstances; and if I own a piece of land, I cannot simply build what I like upon it".[1034] Property, Cochrane argues, consists of a range of different relations which the owner can have toward her property: she can possess it, use it, manage it, transfer it, derive income from it, be protected against expropriation, etc. Because not all of these relations need to be present for property to exist,[1035] Cochrane infers that it is possible for someone to be the owner of, say, a cow without being allowed to use or transfer her in ways that would cause her suffering or to bring about her death.[1036] On Cochrane's view, then, a cow can have rights despite being property.

1028 Steven M Wise, 'Nonhuman Rights to Personhood' (2013) 30 Pace Environmental Law Review 1278, 1281.

1029 ibid; for the same view see Bilchitz (n 5); on different interpretations of animal legal personhood, see also Bryant (n 981) 258–259.

1030 Francione, 'Animals—Property or Persons?' (n 982) 124.

1031 Francione, *Animals, Property, and the Law* (n 5) 14.

1032 See Francione, 'Animals—Property or Persons?' (n 982) 125; Francione, *Animals, Property, and the Law* (n 5) 14.

1033 See eg Favre (n 898) 1053–1070; see also Cochrane, 'Ownership and Justice for Animals' (n 13) 432–434.

1034 Cochrane, 'Ownership and Justice for Animals' (n 13) 426.

1035 ibid 427.

1036 See ibid 438, 441.

Because our main focus lies on the practical implementation of fundamental rights for animals rather than its conceptual requirements, it is sufficient to simply flag the existence of this debate. We do not, however, need to take sides in it. To the extent that—given the scarcity of decisions dealing with animals' fundamental rights—a pattern can be discerned in case law, courts seem so far to have largely avoided answering the question whether personhood is a precondition for fundamental rights—unless the petition required them to address the issue, as in the *habeas corpus* cases.[1037] For example, in *Nair* v *Union of India*, the High Court in the Indian state of Kerala, dealing with the question as to whether the treatment of circus animals was in compliance with the Prevention of Cruelty to Animals Act (1960) and the Constitution of India, raised the question of animals' fundamental rights without once discussing their property status. The Court simply asked:

> If humans are entitled to fundamental rights, why not animals? In our considered opinion, legal rights shall not be the exclusive preserve of the humans which has to be extended beyond people thereby dismantling the thick legal wall with humans all on one side and all non-human animals on the other side. While the law currently protects wild life and endangered species from extinction, animals are denied rights, an anachronism which must necessarily change.[1038]

Setting aside the question of legal personhood, we can now turn to the question *which* fundamental rights exactly could be conferred on nonhuman animals. Delamétherie made a good start in answering this question when, in 1802, he proposed that all animals who are capable of having sensations should possess three fundamental rights: the right to life, the right to health, and the right to enjoyments (*plaisirs*).[1039] Delamétherie's short catalogue of fundamental rights is deficient in two regards, however. First, it is just that: *short*. Unless we interpret the three rights, and especially the right to "enjoyments" in an unduly broad way, we will struggle to capture other fundamental rights which seem applicable to at least some animals. Second, by focusing solely on the question whether or not an animal is sensitive, Delamétherie ignored other capacities which allow us to allocate fundamental rights in a more Meritocratic way. Now, because the number of fundamental rights and especially that of animals who have interests in such rights is far too large

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1037 See eg *"Cecilia"* (n 2) 22–25.

1038 *NR Nair et al* v *Union of India et al* [2000] Kerala High Court 2000(3)RCR(Civil)650 § 13; see also *Narayan Dutt Bhatt* v *Union of India et al* (n 1003) § 99A.

1039 See Chapter 1, Subsection 4.2.

for the limited space of this subsection, I will focus on only a handful of proposals. These should give the reader an idea of some of the rights that could be extended to nonhuman animals.

Among the rights that at least some animals will have an interest in and that is missing from Delamétherie's list is the *right to bodily integrity*. There are two main readings of this right, one narrow and one broad. According to the broad reading, the right to bodily integrity is the "right to be free from physical interference", as David Feldman puts it. It is a right that, in the human context, protects its holders from "physical assaults, torture, medical or other experimentation, immunisation and compelled eugenic or social sterilisation, and cruel or degrading treatment or punishment".[1040] The right imposes corresponding duties on the state to protect the rights-holders against such interference. On this broad reading, the right to bodily integrity is applicable to all animals who are sentient.

A citizens' initiative launched in 2016 in the Swiss Canton of Basel-Stadt adopted a similarly broad reading of the right to bodily integrity. The initiative, which is currently under consideration by the Swiss Federal Supreme Court, proposes to amend the Constitution of the Canton of Basel-Stadt by adding to the Constitution's fundamental rights catalogue "the right of non-human primates to life and to bodily and mental integrity".[1041] According to the drafters of the initiative, the fundamental right to bodily and mental integrity aims "to protect its bearers from excessive physical and mental pain".[1042] Although the initiative limits the right for practical reasons to non-human primates, the drafters argue that this "does not exclude the possibility that other animals presenting the relevant characteristics might also come to enjoy the same (or other) fundamental

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[1040] David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, Oxford University Press 2002) 241.

[1041] See Sentience Politics, 'Grundrechte für Primaten—Basel' <https://sentience-politics.org/de/politik/grundrechte-fuer-primaten-basel/> accessed 21 July 2019. The Constitutional Court of the Canton of Basel-Stadt ruled on 15 January 2019 that the initiative is legally valid and that it should be put to the people of the Canton for a vote: *"Primate Initiative"* [2019] Appellationsgericht des Kantons Basel-Stadt, Verfassungsgericht VG.2018.1. Its decision has since been appealed to the Federal Supreme Court.

[1042] Sentience Politics, 'Fundamental Rights for Primates: Policy Paper' (2016) 7 <https://ea-foundation.org/files/Fundamental-Rights-for-Primates.pdf> accessed 21 July 2019.

rights".[1043] In principle, under this reading, every animal that is capable of suffering physically and mentally has an interest in the right to bodily (and mental) integrity.

On the narrow reading of the right to bodily integrity, by contrast, the right is closely connected to autonomy, which can be defined as "the capacity to frame, revise and pursue [one's] own conception of the good".[1044] Those who adopt this reading have consequently invoked it only for nonhuman animals who seem to possess the required levels of autonomy, such as chimpanzees or elephants. Among those who have endorsed the narrow reading is the NhRP, whose aim is to show that "there are other species whose level of autonomy is such that they possess the interest in self-determination protected by the inchoate common law rights to liberty and bodily integrity, thereby justifying as rational the extension of these rights".[1045]

Because of the connection that the narrow reading establishes between bodily integrity and autonomy, proponents of this reading often tend to invoke the right to bodily integrity in the same breath as the *right to liberty*, which is also generally taken to presuppose a capacity for autonomy.[1046] One of the authors who adopt this approach is Cochrane. According to him, only autonomous animals possess what he calls an inherent interest in liberty. He includes in this category the great apes and cetaceans.[1047] Cochrane contrasts these autonomous animals with all other animals who only have an instrumental interest in liberty.[1048] In his view, only animals with an inherent interest in liberty can hold the right to liberty.[1049]

1043 ibid 9.

1044 Cochrane, 'Ownership and Justice for Animals' (n 13) 436.

1045 Davison-Vecchione and Pambos (n 941) 309.

1046 Paola Cavalieri and Peter Singer (eds), 'A Declaration on Great Apes', *The Great Ape Project: Equality Beyond Humanity* (St Martin's Griffin 1993) 5; see also James Rachels, 'Do Animals Have a Right to Liberty?' in Tom Regan and Peter Singer (eds), *Animal Rights and Human Obligations* (Prentice Hall 1976); see for a recognition of chimpanzees' right to liberty in case law *"Cecilia"* (n 2) 31; *Nonhuman Rights Project, Inc* v *Patrick C Lavery et al and Nonhuman Rights Project, Inc* v *Carmen Presti et al* (n 841) 5.

1047 Alasdair Cochrane, *Animal Rights Without Liberation: Applied Ethics and Human Obligations* (Columbia University Press 2012) 11.

1048 ibid 12.

1049 ibid 11; however, according to Cochrane, autonomous animals are not the only ones who have an interest in not being owned: also non-autonomous wild animals do, see Cochrane, 'Ownership and Justice for Animals' (n 13) 436–437.

Another fundamental right that is being tipped as a right that can be extended beyond the human species is the *right to life*.[1050] There appears to be general consensus that an interest in continued existence is a necessary condition for the right to life. However, opinions are divided on the question which properties are required for an animal to have such an interest in continued existence.[1051] A more demanding view holds that to have an interest in continued existence, an animal needs to have a sense of autonomy.[1052] On this view, only animals who can make plans for the future have a real interest in continuing to exist to realise those plans. The less demanding view sets the bar lower and holds that every sentient animal—autonomous or not—possesses an interest in continued existence.[1053] This latter view seems to have been endorsed by the Indian Supreme Court in *Animal Welfare Board of India* v *A Nagaraja* (2014). In this case, the Court had to adjudicate on the legality of so-called "Jallikattu" events in which crowds of people attempt to tame bulls and bullocks. Because the animals used in the events are not only subjected to a host of distressful and painful practices,[1054] but sometimes also suffer fatal injuries, the Court considered whether they are protected by a right to life similar to that which human beings possess. It held that

> [e]very species has a right to life and security, subject to the law of the land, which includes depriving its life, out of human necessity. Article 21 [the right to life] of the Constitution, while safeguarding the rights of humans, protects life and the word "life" has been given an expanded definition and any disturbance from the basic environment which includes all forms of life, including animal life, which are necessary for human life, fall within the meaning of Article 21 of the Constitution. So far as animals are concerned, in our view, "life" means something more than

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1050 See also Cavalieri and Singer (n 1046) 5; James Rachels, 'Do Animals Have a Right to Life?' in Harlan B Miller and William H Williams (eds), *Ethics and Animals* (Humana Press 1983).

1051 In practice, different reasons can be invoked simultaneously, see eg Sentience Politics (n 1042) 8.

1052 See eg Singer, *Animal Liberation* (n 8) 18–20; Singer, *Practical Ethics* (n 782) 97–98.

1053 See eg Gary L Francione, 'Equal Consideration and the Interest of Nonhuman Animals in Continued Existence: A Response to Professor Sunstein' [2006] University of Chicago Legal Forum 231, 239–240.

1054 See for an account of these events *Animal Welfare Board of India* v *A Nagaraja et al* [2014] Supreme Court of India 2014 (5) SCJ 614 § 16–17.

> mere survival or existence or instrumental value for human-beings, but to lead a life with some intrinsic worth, honour and dignity.[1055]

Although the Court seemed to allow for the possibility to take animals' lives if "necessary for human life", by considering the case under the heading of the constitutional right to life provision it still made an important step toward extending the same fundamental right to life to animals that also protects human lives.[1056] Finally, it can be pointed out that independently of whether one adopts the more or the less demanding view of what continued existence requires, the right to life is itself a necessary condition for other fundamental rights. It could thus be argued that this aspect of the right to life may make animals eligible for it in virtue of being eligible for other fundamental rights.[1057]

While the rights to bodily integrity, liberty, and life would form an important subset of fundamental rights for many animals, they do not exhaust the list of rights that could potentially be extended. Most importantly, a range of what are sometimes known as socio-economic rights could be meaningfully applied to animals. An important example of such a right is the *right to health* which Delamétherie included on his list.[1058] Other potential candidates which he does not mention are the *right to food*, the *right to shelter*, and the *right to an adequate standard of living* more generally. Although it did not specifically invoke these rights by name, the Indian Supreme Court, in *Animal Welfare of India* v *A. Nagaraja*, seemed to recognise a similar range of "socio-economic" animal rights. In its decision, it held that the so-called Five Freedoms "are for animals like the rights guaranteed to the citizens of this country under Part III [the fundamental rights catalogue] of the Constitution of India". These freedoms are: i) freedom from hunger, thirst and malnutrition; ii) freedom from fear and distress; iii) freedom from physical and thermal discom-

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[1055] ibid § 62. I am grateful to Kelly Dhru for advice on this judgement. See on the right to life also the more recent ruling: *Narayan Dutt Bhatt* v *Union of India et al* (n 1003) § 98.

[1056] The Court therefore also seemed to go beyond life protections provided in jurisdictions such as Austria, whose Animal Welfare Act forbids the killing of animals without reasonable justification: § 6(1) Austrian Animal Welfare Law (2004, Bundesgesetz über den Schutz der Tiere, TSchG) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20003541> accessed 21 July 2019.

[1057] See for such an argument: Sentience Politics (n 1042) 8. See also Cochrane, *Sentientist Politics* (n 11) 29.

[1058] See also Cochrane, 'Cosmozoopolis' (n 826) 135.

fort; iv) freedom from pain, injury and disease; and v) freedom to express normal patterns of behaviour.[1059] As is common in debates about human socio-economic rights,[1060] the Indian Supreme Court emphasised that the animals would not only require a right not to be physically interfered with, but also "positive" rights to an existence in accordance with their capacities and needs. Hence, as it clarified in the passage quoted above, Article 21 of the Indian Constitution protects not only the right to a mere existence, but to a life with dignity.[1061]

This more general idea that animals should have fundamental rights to a positive protection of their most basic capacities and needs is also reflected in two other cases from India. In *People for Animals* v *Mohazzim* (2015), the Delhi High Court held that "all the birds have fundamental rights to fly in the sky"[1062]—a finding that was also reached in a different case before the Gujarat High Court, in *Abdulkadar* v *State of Gujarat* (2011), in which this Court held that birds "have [the] right to move freely in the open sky".[1063] The Cecilia judgement, which was mentioned above, also seems to support the idea of a more general right of animals to have their basic capabilities satisfied. There, the Court found that Cecilia has a "right to live in an environment and conditions appropriate for her species".[1064] Although it is questionable if these more general rights of animals to have their basic capacities and needs satisfied are sufficiently concrete to be operational in practice, it is at least interesting to note that courts appear to be more and more willing to consider extending some kinds of fundamental rights to other animals. Time and a greater caseload will tell which of these rights can meaningfully serve to protect animals' basic interests in practice.

1059 For a similar argument, see Clare McCausland, 'The Five Freedoms of Animal Welfare Are Rights' (2014) 27 Journal of Agricultural and Environmental Ethics 649.

1060 See for a critical account of this common view Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008) 1.

1061 Aaditya Dighe and Sharada Rayam, '"All Birds Have a Fundamental Right to Fly": Implications of Attributing Constitutional Rights to Animals' (*The CLS Blog*, 4 December 2015) <https://wbnujscls.wordpress.com/2015/12/04/all-birds-have-a-fundamental-right-to-fly-implications-of-attributing-constitutional-rights-to-animals/> accessed 21 July 2019.

1062 *People for Animals* v *Md Mohazzim et al* [2015] Delhi High Court 2015(3)RCR(Criminal)94 § 4.

1063 *Abdulkadar Mohamad Azam Sheikh* v *State of Gujarat et al* [2011] (Gujarat High Court) No. 1635/2010 § 8.11.

1064 *"Cecilia"* (n 2) 32.

As I have pointed out at the beginning of this subsection, the list of rights which could reasonably be extended to other animals will be longer and more complex than what I could present here.[1065] As my goal was merely to provide a sneak peek into what a Meritocratic extension of fundamental rights to animals could look like, I will not consider any further examples and distinctions. Instead, I want to draw attention to the fact that there may also be numerous fundamental rights that will *not* be applicable to animals. This is because no nonhuman animal can likely be shown to have an interest in these rights. As the Court of Mendoza made clear in the Cecilia ruling, "[t]his is not about granting them the same rights humans have".[1066] Examples of rights that would likely remain exclusively human could include the right to freedom of opinion, the right to a fair criminal trial, the right to education, or the right to vote. As Cass Sunstein puts it,

> [t]he legal protection to be accorded to animals does, of course, depend on the kind of creatures that they are. Dogs and horses should not have the right to vote; but they should have a right to good lives for dogs and horses. Animals with less developed cognitive capacities deserve rights of a different sort. There is no blueprint here. My suggestion is only that the rights that animals deserve should be related to their capacities.[1067]

4 Rehabilitating species-membership as a criterion

In the previous section, I have discussed different strategies that could be adopted to Meritocratise the Aristocracy: transforming animals' status as property and conferring certain fundamental rights on them. My suggestion was that if we adopt these strategies, we can work toward reaching an equilibrium between the Aristocratic and the Meritocratic ideal-types. But what if these strategies

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1065 For an idea of what such a longer list could look like, see eg the proposal by the Finnish Animal Rights Law Society to add a chapter on fundamental animal rights to the Constitution of Finland: Finnish Animal Rights Law Society, 'Chapter 2A: On the Fundamental Rights of Animals' <https://www.elaintenvuoro.fi/wp-content/uploads/2018/09/Proposal-Animals-Fundamental-Rights-Chapter-To-The-Finnish-Constitution.pdf> accessed 21 July 2019.

1066 *"Cecilia"* (n 2) 27.

1067 Sunstein (n 5) 401. Note however that while nonhumans may not have a right to vote, they could still have a right to political representation: Cochrane, *Sentientist Politics* (n 11) 42–47.

overshoot the mark, and simply result in the pendulum swinging too far in the Meritocratic direction?[1068]

To accommodate this legitimate worry, I would now like to add an important caveat to the above-discussed strategies: an extension of legal personhood status and fundamental rights should occur *based on species membership*, not individual abilities or interests. I will call this approach the Species Membership Approach, or SMA. According to SMA, we should follow the Meritocrats in extending legal fundamental rights and legal personhood to other animals. However, it holds that in doing so, we should follow Aristocrats by focusing on the species of the fundamental rights-holder rather than their individual capacities.

SMA runs counter to the orthodox view among animal rights thinkers that the species membership criterion is off-limits. As we saw above, using species membership as a condition for the normative treatment of animals has come into serious discredit ever since Singer mounted his forceful critique of speciesism.[1069] Today, the species membership criterion is rejected by virtually all animal rights advocates. For example, Cochrane finds that "[p]icking species membership … is entirely arbitrary".[1070] And Francione charges that "species is not a justification for treating animals as property any more than is race a justification for human slavery".[1071] These criticisms are well-known, and I will not rehearse them any more than I already have.

My aim is not to challenge the fact that some of that criticism is entirely warranted. Rather, I submit that despite this legitimate criticism, we would do well not to toss the species membership criterion overboard completely. More specifically, I propose that the rejection of that criterion by moral philosophers should not be taken over blindly by lawyers. Philosophy is not the same as law. What holds there does not necessarily hold here. Species membership may not be a *morally* relevant criterion, but as I will argue, it is a *pragmatically* and *politically* useful criterion in law.

[1068] On the weaknesses of the Meritocracy, see Chapter 3, Subsection 5.2.

[1069] See on this critique Chapter 3, Subsection 3.1.

[1070] Cochrane, 'From Human Rights to Sentient Rights' (n 482) 661.

[1071] Francione, 'Animals—Property or Persons?' (n 982) 131; see for a similar (but less strongly worded) point Proposed Brief by Amici Curiae Philosophers (n 731) 8 ("we maintain that species membership alone cannot rationally be used to determine who is a person or a rights holder.").

To make the case for SMA, I will, in Subsection 4.1, first unpack the pragmatic and political reasons that speak in favour of a species-based institutionalisation of animal rights. I will then expand on my point that law differs from moral philosophy, discussing two central reasons why law and legal rights are special. Subsection 4.2 is devoted to sketching how SMA can be operationalised. In Subsection 4.3, finally, I will give a practical illustration of SMA, demonstrating that it provides a compelling answer to the cases of Sesha, Karen, and Knuckles.

4.1 The case for the Species Membership Approach

SMA holds that fundamental rights (and cognate concepts such as legal personhood and dignity) should be extended, in law, on the basis of species. That is, every member of the same species will receive the same status and equal rights. Note that, in contrast to Aristocratic speciesism, SMA does not restrict fundamental rights to the human species. Instead, it is open to extending these rights to other species. As I will argue in what follows, there are two main types of reasons that explain why such a group-based approach is more suitable in practice than an approach that focuses on individuals' characteristics. The reasons for this are of a pragmatic and a political nature.

From a *pragmatic* point of view, SMA is preferable to an individualistic approach, first, because it saves judges from having to determine whether the particular animal before them possesses the capacities and interests that are relevant for the right whose extension is under consideration. Such a determination will be difficult not only because judges are not zoologists, but also because such data is generally not collected on individual animals. Judges will have to rely on the scientific data that is presented to them by the parties or otherwise available. This will in most instances be data about specific groups within an animal species or the species more generally. Hence, when the NhRP filed the first *habeas corpus* petitions on behalf of four chimpanzees in 2013, Wise admitted in a public debate that "[w]e don't have access to the four chimpanzees who are in captivity … and right now we're talking indeed about your *average chimpanzee*, and we don't have a reason for thinking that they are not your average chimpanzee".[1072]

[1072] David Grimm, 'Live Chat: Should Animals Be Granted Legal Rights?' (*Science*, 2 December 2013) at 38:58 <http://www.sciencemag.org/news/2013/12/live-chat-should-animals-be-granted-legal-rights> accessed 21 July 2019; cited in Cupp (n 416) 52.

Second, judges will generally lack the time to study the characteristics of an individual animal before them. Courthouses are busy places, and judges have only limited time for each case. This problem is amplified in cases that are deemed to be of less importance, as is unfortunately common with cases that involve animals. From a pragmatic point of view, it will therefore be more efficient for judges to rely on general studies about the species of the relevant animal, allowing them to decide more cases in less time.

Third, basing their reasoning on the animal's species allows judges to err on the safe side when the animal at hand appears not to be a normal member of its species. Perhaps the animal diverges from the species norm because it is an infant with less than fully developed capacities and interests.[1073] Or the animal is cognitively disabled and appears to have certain capacities and interests to a lesser extent. In such borderline cases, it will be even more difficult for judges to decide whether the individual animal before them qualifies for a specific right. In contrast to philosophers and scientists, however, they "lack the luxury of deferring judgement until data are more complete", as Wise points out. "In the face of uncertainty and chance of error", he notes, judges "must decide and content themselves with deciding on which side they wish to err".[1074] Given their duty to render a decision, it is more prudent for judges to err on the side of extending the relevant rights to the animal by relying on its species membership.[1075] In such cases, it will be better to be safe rather than sorry because the stakes are high: if a judge chooses not to grant certain fundamental rights to an animal and it turns out based on Meritocratic considerations that the animal deserved these rights then its basic interests have been unjustifiably violated. The more serious the harm that would be inflicted, the more reason judges have to be overinclusive rather than underinclusive. Wise puts this point as follows:

> In light of what we know, it is time to apply a precautionary principle to the law of nonhuman animals. Depriving any being possessed with practical autonomy of basic liberty rights is the most

[1073] On the concept of "species norm", see *infra* 230.

[1074] Steven Wise, *Drawing the Line: Science and the Case for Animal Rights* (Perseus Publishing 2002) 39.

[1075] This presumption may be open to rebuttal, as is the presumption of full legal capacities in the case of, say, human beings of unsound mind who wish to draw up a will.

> terrible injustice imaginable. When there is doubt and serious damage is threatened, we should err on the cautious side when some evidence of practical autonomy exists.[1076]

A sceptic might want to object to the third pragmatic reason for SMA by arguing that, if anything, this last argument for overinclusiveness proves too much. Why should we err on the side of including all members of a particular species, rather than all species of a particular biological *genus* or order or even kingdom? Although, as I will show in the next subsection, the sceptic's objection is not completely off-target, it misses the fact that there are important countervailing considerations of the Aristocratic type that militate against opening the doors too widely when such an extension cannot be defended on solid non-arbitrary grounds. Put differently: there is room for some overinclusiveness, but not for too much. These countervailing Aristocratic considerations are also captured in the second type of reasons that speak for SMA.

This second kind of reasons is of a *political* nature. It is not only pragmatically advisable to extend (or refuse to extend) fundamental rights on the grounds of species membership rather than individual characteristics, but also politically desirable. The first and main reason for this is that it allows us to uphold our commitment to egalitarianism. This commitment, as we saw in Chapter 1 and our discussion of the strong suit of the Aristocracy, is a key tenet of modern society.[1077] Extending personhood or fundamental rights to animals based on their species rather than their individual merit leaves the core of Aristocracy's equal consideration intact.[1078] SMA thus takes up the egalitarian baton for "complete inclusion" by taking seriously the political desirability not to make an individual's rights dependent on the particular attributes it possesses or fails to possess. Even McMahan, who otherwise does not flinch from adopting Meritocratic positions, seems to concede the political need for a practical device such as SMA which allows for more Meritocracy whilst not giving up fully on Aristocracy's commitment to equal consideration—a commitment he considers "virtually unthinkable to abandon".[1079]

Second, SMA is politically desirable because it manages to accommodate these reasons for avoiding an extension of rights based on individual capacities, while at the same time allowing for

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[1076] Wise, *Drawing the Line: Science and the Case for Animal Rights* (n 1074) 40.

[1077] See Chapter 2, Section 5.

[1078] See on the political importance of this commitment: Naffine (n 900) 115–116.

[1079] McMahan, 'Challenges to Human Equality' (n 149) 104.

the promotion of a more Meritocratic system by facilitating the extension of fundamental rights and personhood to nonhuman beings. Hence, although SMA is itself equality-preserving and Aristocratic to a certain extent, it moves beyond the current Aristocracy by opening up rights-holdership and personhood to other beings on Meritocratic grounds. As a result, SMA incorporates virtuous elements of both the Meritocracy and the Aristocracy while keeping their liabilities at a minimum.

Underlying the abovementioned pragmatic and political reasons for a rehabilitation of the species criterion is the obvious though often neglected fact that *law is not philosophy*. This is important to highlight especially in the debate about *legal* fundamental rights for animals. Although great strides have been made on this issue, the debate is still to some extent dominated by questions about *moral* fundamental rights and thus influenced by political and moral philosophers at least as much as it is by lawyers and legal philosophers. Given the scarcity of institutionalised animal rights to work with, it is of course natural that the animal rights discussion was launched from a more abstract, philosophical perspective. However, because of this perspective, the fact is often overlooked that certain criteria and factors that play a role from the philosophical perspective do not—and often cannot—play the same role from a legal perspective. Wise puts this thought succinctly when defending the NhRP's legal strategy to focus on autonomous animals who are relatively few in number, as compared to non-autonomous but still sentient animals who abound:

> If I were Chief Justice of the Universe, I might make the simpler capacity to suffer, rather than practical autonomy, sufficient for personhood and dignity-rights. For why should even a nonautonomous being be forced to suffer? But the capacity to suffer appears irrelevant to common-law judges in their consideration of who is entitled to basic rights. What is at least sufficient is practical autonomy. This may be anathema to disciples of Bentham and Singer. I may not like it much myself. *But philosophers argue moral rights; judges decide legal rights*. And so I present a legal, and not a philosophical, argument for the dignity-rights of nonhuman animals.[1080]

What exactly is different about law, and legal fundamental rights more specifically?[1081] Legal fundamental rights are special, first of all, because they are based on *legal fictions*—a device

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[1080] Wise, *Drawing the Line: Science and the Case for Animal Rights* (n 1074) 34 (emphasis changed).

[1081] Law and philosophy of course differ in more than just the two regards which I mention here. For example, another distinguishing feature of law is the fact that it often operates with general rules that are by their very

that can be found in no philosopher's toolbox. Legal fictions allow the law to assume that a certain state of affairs *S* is the case, and to draw legal conclusion from it, regardless of whether or not *S* is actually the case. By employing legal fictions, law creates its own reality. For this reason, law can in principle attribute fundamental rights to any kind of entity. Most importantly for our purposes, law can attribute rights to beings who lack the capacities that would be required on strictly Meritocratic grounds. Courts, as Wise points out, "employ a legal fiction that attributes the capacities for autonomy and self-determination to humans—normal infants, profoundly retarded adults, anencephalic infants, and those who lie in persistent vegetative states—who, it can be empirically demonstrated, lack them".[1082] SMA makes use of a similar legal fiction to extend fundamental rights or personhood based on an animal's species, even if it can be empirically demonstrated that the concrete individual lacks the relevant capacities and interests.

Legal fictions are a double-edged sword, however. As Wise cautions, the same capacity to "controvert[] empirical evidence" can also serve to exclude from rights-holdership beings who would deserve it.[1083] Legal fictions can be used to achieve underinclusiveness as much as overinclusiveness.[1084] Whether we choose to tailor legal fictions in a way that Meritocratises animals' legal status quo, or in a way that entrenches the current Aristocracy is a matter of choice, and therefore highly political.[1085]

This brings us to the second, and related regard in which law is special: law is subject to the vicissitudes of politics in a way that philosophy is not. This has to do with the unique role law has to fulfil in society. As Naffine explains, law is charged with the "highly practical and diverse tasks of social regulation and dispute resolution".[1086] To be able to fulfil these tasks, the law needs

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nature over- or underinclusive. Due to lack of space, however, I will limit my analysis to what I take to be two key differences.

[1082] Wise, 'Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy' (n 5) 909.

[1083] ibid 882.

[1084] See ibid 882–883; Naffine (n 900) 165.

[1085] Ngaire Naffine, 'Legal Personality and the Natural World: On the Persistence of the Human Measure of Value' (2012) 3 Journal of Human Rights and the Environment 68, 82.

[1086] Naffine (n 900) 175.

to be responsive at least to some extent to what is regarded as valuable in the community.[1087] This holds especially true for decisions of major importance, like the decision to include nonhuman animals in the categories of rights-holders or legal persons, which "sends a message to the community and expresses, on behalf of the community, who or what is to count—who matters", as Naffine points out.[1088]

While this does not mean that non-political (such as moral or scientific) considerations cannot play a role in the decision to take steps in the Meritocratic direction, it means that it would be naïve to approach fundamental rights legally in the same way as one would approach them philosophically. In other words, when deciding on who should be recognised as a fundamental-rights-holder, we cannot simply copy and paste moral rights into the legal domain. Instead, we have to factor in and weigh a multitude of considerations in our decision whether, to whom, and how to extend legal personhood or fundamental rights.[1089] That this decision does often not reflect the ideal conceptions of many philosophers becomes apparent in the fact that, historically, legal personhood and fundamental rights were only extended gradually—and often only after arduous social and legal battles—to formerly excluded groups of beings, such as women, children, foreigners, black people, indigenous peoples, or people with disabilities.[1090]

Awareness of the reasons that make law and legal rights special explains why philosophers' scepticism about the species criterion is misplaced in law. For example, in their *amici curiae* brief in support of the NhRP, the seventeen abovementioned philosophers argue that "[s]pecies membership is at best a heuristic that aids a superficial assessment of moral status". The philosophers base their conclusion on the finding that "understood as a biological classification", species membership bears no "moral weight".[1091] While this may be true, the philosophers seem to overlook

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[1087] ibid 181.

[1088] ibid.

[1089] Wise, 'Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy' (n 5) 797.

[1090] Stone (n 723) 451. Less controversial, but evidence nevertheless for the claim that personhood and rights are extended as a result of political decisions, is the conferral of personhood and rights to corporations and other artificial entities: ibid 452. On the history of the legal status of corporations, see John Dewby, 'The Historic Background of Corporate Legal Personality' (1926) 35 Yale Law Journal 655.

[1091] Proposed Brief by Amici Curiae Philosophers (n 731) 11.

that, in law, species membership can be more than an aid in the assessment of moral status. As I have argued here, species membership can be a pragmatically and politically useful criterion for determining holdership of rights and legal personhood.

The suitability of SMA for legal animal rights is so evident, I believe, that it is at least implicitly accepted also by animal rights proponents such as Wise. I say "implicitly" because Wise's work also contains passages which seem to suggest that he is adopting an uncompromising Meritocratic approach. For instance, in a law review article from 1998, Wise states that

> I cannot overemphasise that these capacities [which are relevant for right-holding] should *not be presumed* for anyone, human or nonhuman, but must be empirically demonstrated. Irrebuttable presumptions and assumed qualities lie at the heart of the irrationality, arbitrariness, and invidious discrimination that contravene the overarching principles and values of Western law. They are indispensable to genocide.[1092]

But Wise does not seem to be committed to this strictly Meritocratic view in the *habeas corpus* cases which he later filed with the NhRP. First, there is the abovementioned fact that Wise himself conceded that at least the first cases which the NhRP filed on behalf of chimpanzees were based not on data about the capacities of these individual chimpanzees, but rather on data about "your average chimpanzee".[1093] Second, and more importantly, one of the NhRP's key arguments would fail if it did not implicitly endorse something like SMA.[1094] The argument in question is the equality argument, which the NhRP summarises as follows: "[h]umans who have never been sentient or conscious or possessed of a brain *should* have basic legal rights. But *if* humans bereft even of sentience are entitled to personhood, *then* this Court must either recognise Tommy's just equality claim to bodily liberty or reject equality."[1095] As Cupp has noted, for the equality argument to work, the NhRP needs to recognise the personhood and rights of severely disabled human beings, despite the fact that they lack the relevant capacities for these legal positions. Otherwise its argument that the same personhood and rights should be extended to chimpanzees with similar or

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[1092] Wise, 'Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy' (n 5) 884 (emphasis added).

[1093] Cited in Cupp (n 416) 52.

[1094] For a similar observation see Naffine (n 900) 177.

[1095] *Nonhuman Rights Project, Inc* v *Patrick C Lavery et al,* Memorandum of Law (n 728) 109 (emphasis in original).

greater autonomy would collapse.[1096] Once the equality argument collapses, the NhRP would be left only with its autonomy argument, according to which any being with the required levels of autonomy and self-determination deserves to be a legal person entitled to bodily liberty and integrity.[1097] However, as is obvious, this argument can neither accommodate the rights and personhood of severely mentally disabled human beings, nor those of severely mentally disabled chimpanzees. For the equality argument to work, and for the NhRP not to have to deny severely disabled human beings' personhood and rights, it has to distance itself from a strict Meritocratic approach, and adopt something like SMA. In fact, Wise himself has acknowledged the usefulness of legal fictions insofar as "they represent a groping towards just and equitable results that may lie beyond the reach of a strict adherence to the law. The attribution of legal personhood to entities that might not strictly be entitled to it [under a purely Meritocratic approach], such as incompetent humans, corporations, even a Hindu idol, is one example."[1098] For these reasons, I believe that Wise's and the NhRP's approach is best interpreted as one that implicitly accepts SMA.

The key idea behind SMA was best captured by Tribe. In a commentary on Wise's cases, he challenged Wise's ostensibly strict Meritocratic approach by pointing out that this approach would be at discord with how the law works:

> When Steve, who condemns assigning rights purely on the basis of where the group we call "human" begins and ends, would extend rights to chimps and bonobos as kinds of beings about which he has adduced impressive evidence relevant to the group as a whole, he wouldn't administer a battery of IQ tests to each individual chimp before declaring it eligible for these newly proclaimed rights. *He, like all of us, would make decisions on a group basis even as he purports to condemn doing so*. So those people who say we all have rights just because we are human, including the infant who can't solve equations, and including the comatose person, are not necessarily guilty of some form of species megalomania or of group think. That's the way our legal system works.[1099]

Other authors, too, have explicitly endorsed the species-membership criterion. Staker, for instance, has argued that "[a]n incremental approach, initially focused on securing personhood for

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[1096] Cupp (n 416) 52–53.

[1097] Cf *Nonhuman Rights Project, Inc* v *Patrick C Lavery et al,* Memorandum of Law (n 728) 100–102.

[1098] Wise, 'Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy' (n 5) 882.

[1099] Tribe (n 902) 6–7 (emphasis added).

certain *species*, may be more viable, both legally and politically".[1100] SMA also resembles Nussbaum's "species norm" argument. According to Nussbaum, "the appropriate benchmark … for judging whether a given creature has decent opportunities for flourishing"[1101] is what is normal for that species. Atypical members of the species, such as disabled members, for example, are therefore also to be measured by what is normal for the species, and not by their own individual capacities. The species norm is required by justice, according to Nussbaum, because atypical members of a species typically still live with members of their own species. It creates a duty on society to help integrate atypical members as far as possible. For instance, Nussbaum points out, cognitively disabled human beings "can flourish only as a human being. They have no option of flourishing as happy chimpanzees",[1102] even though their capacities might be more similar than those of normal human beings. In contrast to SMA, however, Nussbaum's species norm argument is primarily moral—not legal.[1103] The reasons that motivate her proposal are therefore different from those that motivate mine. Where her account is grounded in the argument that such a norm would be required by justice, mine only holds that SMA is desirable for pragmatic and political reasons. It is therefore not vulnerable to the critiques that have been launched on a justice-based level at Nussbaum's proposal.[1104]

Finally, not only scholars, but also courts seem to adopt SMA. Consider, for example, that although the courts mentioned in the previous section had to adjudicate on the legality of the treatment of *individual* chimpanzees, bears, bulls, and birds, they focused for the most part not on the individual animals. Rather, they focused on their *species*, or even broader categories, such as "animals", as in the judgements of the Indian Supreme Court and the Court of Mendoza. In a recent opinion on the NhRP's Tommy and Kiko cases, Judge Fahey of the State of New York Court of Appeals stated explicitly that the answer to the question "whether *a chimpanzee* … has the right to liberty protected by habeas corpus … will depend on our assessment of the intrinsic nature of

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[1100] Staker (n 940) 506 (emphasis added).

[1101] Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (n 808) 365.

[1102] ibid 364.

[1103] See ibid 363.

[1104] See eg Donaldson and Kymlicka (n 797) 95–99.

chimpanzees as a species".[1105] It therefore seems that judges find it useful to work with more abstract, group-based categories such as SMA rather than with individual animals.

4.2 Operationalising SMA

The general case for SMA that I have presented above has not addressed how SMA could be operationalised, nor how it should respond to any practical challenges that might arise from its implementation. These issues, to be sure, go well beyond the scope of this thesis, which is why this subsection will not attempt to address them in any exhaustive or conclusive way. Rather, my aim here will be to sketch a domain of possible answers, and to gesture towards some future directions for research.[1106] I will focus on four main areas of concern: why SMA is based on the category of species rather than some other category or group; which species ought to get rights first, on which grounds, and according to which authorities; who exactly should count as a member of a species; and, finally, how we ought to deal with concerns about how to prioritise rights claims in a world in which many human beings *de facto* lack fundamental rights protection.

First, why does SMA focus on species and not some other group-based category—like population or *genus*—or even an entirely non-biological category, such as geographic or purpose-based community (eg the category of animals used in scientific experimentation)? A sceptic of SMA could charge that privileging species over any of these other categories is arbitrary, especially because the concept of "species" is seen as a construct which scientists use to better understand nature, but which has no objective reality.[1107]

The sceptic's challenge is not entirely misguided, because there is some disagreement among biologists on what exactly a "species" is. As Richard Richards puts it, "there are multiple, inconsistent ways to divide biodiversity into species on the basis of multiple, conflicting species concepts".[1108] This so-called "species problem" has led some biologists to embrace the nominalist view that "species" are fictions: arbitrary divisions of the natural continuum that have no basis in

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[1105] *Nonhuman Rights Project, Inc* v *Patrick C Lavery et al and Nonhuman Rights Project, Inc* v *Carmen Presti et al* (n 841) 4, Fahey, J., concurring.

[1106] I say more about possible future avenues for research in the Conclusion.

[1107] See eg Benjamin H Burma, 'The Species Concept: A Semantic Review' (1949) 3 Evolution 369, 369.

[1108] Richard A Richards, *The Species Problem: A Philosophical Analysis* (Cambridge University Press 2010) 5.

objective fact.[1109] If the species concept were indeed an illusion, then SMA, which is premised on that concept, would itself be no more than a pipe dream.

As we saw in Chapter 1, the sceptic's intuition about nature's resistance to simple categorisation was shared by naturalists as far back as the seventeenth century. As Diderot noted, to describe nature accurately, "there would have to be as many different denominations as there are individuals".[1110] But while the sceptics are correct that it is difficult to draw lines in nature, they are not correct in suggesting that *no* lines can be drawn. As Ernst Mayr has emphasised, "species is a biological phenomenon that cannot be ignored."[1111] Although it is true that the species category is an organisational tool that scientists have constructed to make sense of nature, it does not follow that species themselves are artificial constructs. Rather, as Mark Ellis has argued, "the species category remains a class defined by a valid concept with a membership of objectively real individuals."[1112] Species thus capture objective natural patterns, allowing scientists to organise the continuum of nature in meaningful ways.[1113] Importantly, for our purposes, the species category permits an explanation of the central features which certain groupings of animals possess but others lack. In fact, as Mayr pointed out, the specific characteristics of individual animals "can often best be interpreted in terms of this relationship [of species]".[1114] There is necessarily some messiness and vagueness with emerging species or organisms that do not seem to fit existing species concepts,[1115] but that does not change the fact that there are many clear cases of species that can be—

[1109] See eg Burma (n 1107); Brent D Mishler, 'The Advantages of Rank-Free Classification for Teaching and Research' (2003) 19 Cladistics 157.

[1110] Diderot, 'Animal' (n 752) 683.

[1111] Ernst Mayr, 'Preface' in Ernst Mayr (ed), *The Species Problem: A Symposium Presented at the Atlanta Meeting of the American Association for the Advancement of Science* (American Association for the Advancement of Science 1957) iii.

[1112] Mark W Ellis, 'The Problem With the Species Problem' (2011) 33 History and Philosophy of the Life Sciences 343, 347.

[1113] ibid 358.

[1114] Mayr, 'Preface' (n 1111) iii; see also Elizabeth Martin and Robert Hine (eds), 'Species', *A Dictionary of Biology* (6th edn, Oxford University Press 2008).

[1115] See Ellis (n 1112) 356.

and often are—established as beneficiaries of legal protection. This is true, for example, of existing endangered species legislation.[1116] The sceptic's worries thus prove unfounded.

The fact that species membership is a useful category does not mean, however, that my argument for Meritocratising the Aristocracy necessarily requires using species rather than some other group category as the relevant criterion for extending fundamental rights to nonhuman animals. In principle, other group-based criteria might also provide a means to avoid the arbitrary anthropocentric rights account of the Aristocracy, while steering clear of the ableist dangers of the Meritocratic conception. Indeed, some designation other than "species" may become necessary if non-animal nonhumans—like AIs—develop in ways that make them deserving of some fundamental rights protection. AIs would not belong to any species, and would therefore not be captured by a narrowly defined SMA. If and when the time arrives that AIs reach this point,[1117] we may need to extend SMA to groups of silicon-based forms of "life".[1118] In the case of AIs, we could identify what we might call "quasi-species", made up of those AIs that share key characteristics that distinguish them from others (such as different algorithmic make-up). Perhaps there will even come a point when we may want to let go of the "species" standard altogether. Even then, the central idea behind SMA (the steering of a middle ground) will remain valid; and until then, "species" will serve as a meaningful and objective criterion that lawyers and politicians can use for extending rights to other animals.

Having identified some of the reasons for using the species membership criterion, we can now turn to the second set of questions: which nonhuman species should get fundamental rights first, why, and according to whom. Both the exact order and the criteria for rights-extension will depend on merit and feasibility. In other words, a decision to extend fundamental rights to an animal species will be contingent on whether that species possesses the relevant capacities for a

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[1116] One such example is the US Endangered Species Act of 1973. See for its definition of species J Peyton Doub, *The Endangered Species Act: History, Implementation, Successes and Controversies* (CRC Press 2013) 29.

[1117] See John R Searle, 'Minds, Brains, and Programs' (1980) 3 Behavioral and Brain Sciences 417, 417; Matthias Scheutz, 'Artificial Emotions and Machine Consciousness' in Keith Frankish and William M Ramsey (eds), *The Cambridge Handbook of Artificial Intelligence* (Cambridge University Press 2014).

[1118] See eg Phil McNally and Sohail Inayatullah, 'The Rights of Robots: Technology, Culture and Law in the 21st Century' (1988) 20 Futures 119; David J Gunkel, 'A Vindication of the Rights of Machines' (2014) 27 Philosophy & Technology 113.

particular set of fundamental rights (eg core fundamental rights such as the right to bodily integrity and the right to life)—and this, in turn, will depend upon the availability of scientific evidence about the existence of corresponding rights-grounding properties (eg sentience and an interest in continued existence). The higher the level of desert, the more reason for extending rights to that species. As mentioned above,[1119] however, legal animal rights are not free from political and practical constraints like moral rights are. Hence, feasibility considerations will also have to factor into the decision-making process. Some species, for example, may be easier targets than others for rights-extension because humans have fewer economic interests in them. The higher the practical and political feasibility of extending rights to a particular species, the stronger the case for applying SMA to it. In principle, this means that it is possible that some animal species which is more deserving of rights-extension than another may have to wait longer, because applying SMA is less feasible. Although the variables involved are complex and cannot be determined here in any final way, it seems reasonable to suggest that great apes should be among the first beneficiaries of SMA. This is because there is ample scientific evidence that they have interests in some of the basic rights that humans have. What is more, humans have fewer vested interests in other apes as a source of food (in contrast to, say, the human interest in chickens as food). The great apes thus also score high on feasibility.

These considerations will undoubtedly appear arbitrary to some: why should great apes be privileged over chickens, or any other sentient animal for that matter? Is SMA not guilty of exactly the same kind of arbitrary line-drawing of which it accuses the Aristocracy? The first thing to recall here is that SMA's aim is to provide a practically viable way forward, not a morally correct one.[1120] It simply aims to serve as a useful guide for political decisions that Meritocratise the Aristocracy. To put that point differently, SMA embraces the insight—ignored by many—that legal norms are bound to be arbitrary to some extent, and that—rather than trying to eradicate arbitrariness—we ought to strive to make laws *less arbitrary*. SMA aims to achieve no more, but also no less, than that.

[1119] See *supra* 227.

[1120] This does not mean, however, that SMA cannot be justified morally. Because it Meritocratises the Aristocracy with a group-based approach, it indirectly promotes the underlying Meritocratic and Aristocratic values.

We should note, too, that feasibility considerations might suggest the extension of a bundle of rights to a *set* of species, all of which share the relevant capacities. This could be useful, for example, in the drafting of a bill of animal rights, where it would be cumbersome to differentiate between the rights of numerous individual species. In other contexts, such as those of judicial extension of rights, it may be likelier that only individual species will become beneficiaries of SMA, because it is generally individual animals whose cases are brought before court. Irrespective of context, SMA only requires that species membership is the basic unit for rights extensions; it does not rule out the combining of different species for practical purposes.

This brings us to the issue of decision-makers. Who decides on the respective feasibility and merit of rights for certain species? Because the decision to apply SMA is a political decision, it should be made by political decision-makers. Despite the existence of supranational bodies like the UN or the EU, in most cases states remain the primary loci for political decision-making. As a result, it is to be expected that it will be state or national parliaments that will decide upon the extension of fundamental rights to other species, at least for the time being. In legal systems such as the UK's, moreover, where the judiciary enjoys expansive competences in the domain of rights, it is possible that judges might play an important role in applying SMA. To harmonise rights protection across borders, states would be well-advised to conclude multinational agreements following the example set by the international human rights covenants and regional human rights conventions. Both on the national and the international level, different decision-making processes and institutions may be capable of realising SMA. While further study on these issues is required, there is promising research suggesting that inclusive democratic institutions may be particularly well-suited, not only for determining which species ought to receive which rights, but also for deciding the more concrete policy questions that arise as a result of these abstract rights.[1121]

This leads to the third question: who exactly should count as a member of a particular species for the purposes of SMA? I shall try to elucidate this issue by concentrating on two hard cases: foetuses and hybrids. A foetus of any given species is biologically a member of that species—but is it also a member of that species *as far as SMA is concerned*, that is, a member that should receive the same *prima facie* rights as other members of that species? The first thing to note in this respect is that foetuses are not a new problem, conceptually speaking. There is an abundance

[1121] Cochrane, *Sentientist Politics* (n 11) 36–61.

of scholarship and case law on issues surrounding the legality of human abortion.[1122] There, too, the question of who is considered a human being for the purpose of rights-holdership and legal personhood is not simply a biological question, but a political one, which is decided differently in different jurisdictions. As with the question of which species should benefit from SMA, the answer to the foetus question will depend on the evidence that exists for sufficiently developed rights-grounding properties, such as sentience, and it will also depend upon the practical and political limits of extending rights to beings in this state. While the matter is too complex to be resolved here, it appears likely that political decision-makers may choose to adopt term-based solutions for nascent nonhuman animals as they have, in many jurisdictions, for human foetuses.

Hybrids pose another problem still, for they can be fully developed beings that share the characteristics of one or more species. This can be the result of artificial creation, as in the case of cyborgs, or the outcome of natural processes.[1123] While more research is needed on this issue, a similar solution as the one proposed for AIs could prove useful for these types of beings: if a certain group of hybrids comes to share a specific set of characteristics that differs from other hybrids' or other species', then they could usefully be classified as a "quasi-species", and given a set of rights that corresponds to these characteristics.

Finally, we need to address the question whether SMA would lead to a conflict with the fundamental rights of human beings. This is a particularly pressing matter, because scarce resources are one of the reasons behind the current *de facto* neglect of many humans' rights. If we add animal rights to the mix, the objection goes, we risk lowering the protection of human rights even more. We thus need to ask if the rights of animals (once extended via SMA) would have to be withdrawn or suspended in cases where they conflict with the rights of humans. Here, it is important to point out that, in contrast to the Aristocracy, SMA is not committed to according humans some *a priori* higher status or larger set of rights than any other species. As a result, SMA does not, in principle, render it necessary to suspend some animal species' rights if they clash with

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[1122] See for an overview, with further references, Marge Berer, 'Abortion Law and Policy Around the World' (2017) 19 Health and Human Rights 13. See also *supra* footnote 427.

[1123] See Peter A Larsen, María R Marchán-Rivadeneira and Robert J Baker, 'Natural Hybridization Generates Mammalian Lineage With Species Characteristics' (2010) 107 Proceedings of the National Academy of Sciences of the United States of America 11447.

or threaten to undermine the rights of specific human beings. This goes to show that SMA, though more moderate than purely Meritocratic animal rights proposals, is still a revolutionary proposal when compared to the Aristocratic status quo. But it is also worth noting that, because SMA is sensitive to political concerns and feasibility, officials who find themselves applying SMA or policies arising from it may still have good reasons for according reduced weight to the interests of nonhuman beings when those interests clash with the basic interests of human beings. Especially in the early stages of the application of SMA, there could otherwise be a backlash that could hamper the long-term success of animal rights. For a transitionary period at least, decision-makers may sometimes need to consider whether it would be better in specific cases to allocate resources to human beings first. But we need to emphasise that this does *not* mean that human rights should automatically or generally be enforced at the expense of animal rights. As I have shown above, both sets of rights are part of the same enterprise: transcending arbitrary legal distinctions that withhold rights from beings which deserve them. It is to be hoped that, with time, these links will become clearer, and will ultimately help to eradicate the need for any arbitrary prioritisation of human beings.

4.3 Sesha, Karen, and Knuckles

To demonstrate the cogency of SMA, I will now analyse how it fares with the three cases of Sesha the human being, Karen the elephant, and Knuckles the chimpanzee. All three cases, I suggest, seem to intuitively call for some rights-protection. However, as we will see, each of these beings has some feature to it that makes it ineligible for rights-protection under the Aristocratic or Meritocratic conception or under both conceptions. This finding holds at least under the assumption that we adopt something like the autonomy-based approach to legal personhood that we have encountered in the NhRP's cases, on which the capacity for autonomy is taken to be the feature that grounds legal personhood and fundamental rights.[1124] In what follows, I will compare the three cases and show that only SMA can provide a satisfactory solution to all of them. Let us start with Sesha's case.

[1124] And if we ignore for the moment the NhRP's equality argument (see *supra* 228).

Sesha is a severely mentally disabled human being.[1125] Now in her late forties, she was born with cerebral palsy and is completely dependent on others.[1126] Sesha is the daughter of philosopher Eva Feder Kittay, who has written extensively on Sesha's life.[1127] In philosophical debates, Sesha is sometimes invoked as an example of a human being who lacks the cognitive capacities that some consider relevant for the purpose of moral personhood and rights-holdership.[1128] The question that interests us here is less whether she is a moral person or moral rights-holder, but whether legal fundamental rights and personhood could be extended to her. How do the Meritocratic and Aristocratic accounts fare on this point, and what is Sesha's status under SMA?[1129]

Rather unsurprisingly, Meritocratic accounts object to an extension to Sesha of legal personhood and at least some of the fundamental rights that normal human beings possess. Lacking

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[1125] Eva Feder Kittay, 'At the Margins of Moral Personhood' (2005) 116 Ethics 100, 127.

[1126] Leslie Garisto Pfaff, 'This Mother Knows Best' [2016] *Sarah Lawrence Magazine* <https://www.sarahlawrence.edu/magazine/finding-courage/features/this-mother-knows-best.html> accessed 21 July 2019.

[1127] For a particularly touching account of Sesha's life, see Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (Routledge 1999) 147–161.

[1128] See Eva Feder Kittay, 'The Personal is Philosophical is Political: A Philosopher and Mother of a Cognitively Disabled Person Sends Notes From the Battlefield' in Eva Feder Kittay and Licia Carlson (eds), *Cognitive Disability and its Challenge to Moral Philosophy* (Wiley-Blackwell 2010).

[1129] It would, of course, constitute a serious omission not to mention that Kittay herself has presented a moral theory that attempts to avoid the shortcomings of Meritocratic accounts such as Singer's and McMahan's. While Kittay's own work appears to be Aristocratic (see eg ibid), there are other philosophers who have followed in her footsteps and who have attempted to present a plausible moral account that is neither Meritocratic nor Aristocratic. The most sophisticated such account is defended in Crary (n 768). Crary essentially argues that the dichotomy between moral individualists on the one hand and disability theorists on the other (a distinction which is in many ways reflected in the dichotomy between the Meritocracy and the Aristocracy presented in this thesis) is a false one. Crary contends that she defends "both the classical view that the sheer fact of being human is morally significant and the less widely discussed view that the sheer fact of being an animal of some kind is morally significant as well." ibid 121. It is however questionable if Crary's proposal to incorporate both conceptions of what is important in the lives of humans and in the lives of animals (that is, to place both of them "inside ethics", as she puts it) manages to provide us with a set of consistent moral rules, rather than a hotchpotch of *ad hoc* and potentially contradictory moral instructions. By trying to combine the two perspectives, Crary's approach is also in danger of confounding the two ideal-types which, as Weber has reminded us, ought to be kept separate.

the relevant capacities and interests, Meritocratic accounts hold, Sesha should not be conferred personhood status and equal rights. For example, as Singer points out,

> It is, other things being equal, much less a tragedy to kill that sort of being [cognitively disabled beings who are incapable or hardly capable of thinking about the future] than to kill someone who wants to live long enough to do the sorts of things that humans typically want to achieve over the course of their lives.[1130]

Aristocratic human rights accounts, by contrast, seem well-equipped for conferring on Sesha the same status of personhood and of fundamental rights that all other humans possess. The simple reason for this is that Sesha has what it takes to be an Aristocrat: she was born a member of the human species. Her status and rights are hers simply in virtue of being human.

The only problem Aristocratic accounts could be argued to have with beings like Sesha is the following: as I have explained in Chapter 2, the Aristocracy needs to pick out some feature in virtue of which the Aristocratic group is considered to hold its special, dignified status (I called this Aristocracy's founding myth).[1131] As I have argued, for the current Aristocracy, agency is taken to be that feature. The problem is that the Aristocracy thus has an original sin, as it were, that taints it and risks to undermine it if the feature that was selected to get the Aristocracy off the ground turns out to be insufficiently representative of the group it sought to elevate. Many human beings, including Sesha, are not agents in the sense required and therefore seem to lack, at least with respect to their actual properties, the feature that elevated the species of which they form part. It is for this reason, as we saw, that beings like Sesha are sometimes referred to as "tragic" cases.[1132] This should leave a bad taste in the mouths of Aristocrats whose declared aim it is to include exactly such beings in the community of equals.[1133] As Kymlicka puts it, Aristocratic approaches such as Waldron's "leave[] the rights of many humans hanging by a thread".[1134] However, given that the Meritocracy does not account for Sesha's personhood status at all, the Aristocracy still fares relatively well.

[1130] Singer, 'Speciesism and Moral Status' (n 784) 576.

[1131] Chapter 2, Section 4.

[1132] Waldron, *One Another's Equals: The Basis of Human Equality* (n 534) 251.

[1133] See on this problem Fasel, 'One Another's Equals: The Basis of Human Equality by Jeremy Waldron' (n 537).

[1134] Kymlicka (n 389) 17.

How does SMA compare? SMA is as able as the Aristocratic approach to accommodate Sesha's legal status and fundamental rights. Although Sesha does not possess the same capacities and interests as non-cognitively disabled human beings, she is a member of the human species. This fact alone is sufficient for SMA to accord Sesha the same personhood and rights as non-disabled human beings possess. SMA therefore also manages to accommodate the point—made forcefully by Nussbaum—that a human being "with severe mental impairments is actually very different from a chimpanzee, though in certain respects some of her capacities may be comparable".[1135] To compare Sesha and her capacities with those of a chimpanzee is thus to compare atypical human beings with typical chimpanzees.[1136] This is to neglect, however, that Sesha can only flourish as an atypical human being, not as a typical chimpanzee.[1137] SMA can account for this fact because it argues that the way the law should approach Sesha is through the prism of her *own* species, and not that of other species, nor of her individual properties.

Karen, it will be remembered, is an African Bush elephant who is held in the Commerford Zoo in Goshen, Connecticut. Born in 1981, Karen is today in her late thirties.[1138] Shortly after Karen was captured in the wild, she became the property of Commerford Zoo.[1139] She is used in circuses and fairs where, among other things, she has to give rides to humans.[1140] To train and direct her, staff at the Zoo use so-called bullhooks, which are metal hooks that are slid into the elephant's skin.[1141] How does Karen fit into the different approaches we are considering?

Meritocratic conceptions have no problem with explaining Karen's personhood and rights. They point to facts about her capacities and interests and use these to ground their claim that Karen

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1135 Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (n 808) 363.

1136 See Bilchitz (n 5) 61.

1137 Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (n 808) 364.

1138 'Karen at R.W. Commerford and Sons Traveling Petting Zoo' (24 May 2012) <http://www.elephant.se/database2.php?elephant_id=2885%20%20http://www.elephant.se/location2.php?location_id=494&show=6> accessed 21 July 2019.

1139 *Nonhuman Rights Project, Inc* v *Commerford & Sons, Inc et al*, Verified Petition for Common Law Writ of Habeas Corpus (13 November 2017) Superior Court, Judicial District of Litchfield 2 <https://www.nonhumanrights.org/content/uploads/CT-Petition-11.13.17.pdf> accessed 21 July 2019.

1140 Nonhuman Rights Project, 'Clients: Beulah, Karen, and Minnie' (*Nonhuman Rights Project*) <https://www.nonhumanrights.org/clients-beulah-karen-minnie/> accessed 21 July 2019.

1141 ibid.

deserves legal personhood and certain fundamental rights. In its most recent *habeas corpus* cases on behalf of elephants, for example, the NhRP provides a series of affidavits from pachyderm experts

> that demonstrate that elephants such as … Karen are autonomous beings who live extraordinarily complex emotional, social, and intellectual lives and who possess those complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty protected by the common law of habeas corpus, as a matter of common law liberty, equality, or both.[1142]

Aristocratic human rights approaches, by contrast, have no way of accommodating Karen's case. Because she is not a human being, Karen does not have any fundamental rights or legal personhood. As we saw, this exclusion of all nonhuman beings is the flipside of the Aristocracy's inclusion of all human beings.

Karen's case therefore presents us with a situation that is the exact reverse of Sesha's case. There, Aristocratic accounts could accommodate Sesha's rights, but Meritocratic accounts could not. Here, Meritocratic accounts can accommodate Karen's rights, but Aristocratic accounts cannot. SMA, by contrast, can accommodate both cases. Unlike the Aristocracy, SMA is open to extending fundamental rights to those who do not belong to the human species. For example, it can extend them to all members of the African bush elephant species because "normal" members of that species can be shown to possess the required capacities such as autonomy. This means that they have the relevant interests in fundamental rights protection, including the protection of life, bodily integrity, and liberty. Because Karen is a member of that species, she would automatically be eligible for these rights. Importantly, SMA allows for an extension of these fundamental rights without endangering Sesha's rights and status. Because Sesha is a human being, and not an African bush elephant, she could continue to enjoy the legal status and rights which human beings possess who are not severely cognitively disabled.

Finally, SMA is preferable to the Aristocratic and the Meritocratic approaches not only because it can accommodate Sesha's *and* Karen's case—which neither of the other approaches could on its own—but also because it can account for an arguably even more difficult case: the case of *Knuckles*. Knuckles is a chimpanzee in his late teens who lives at the Center for Great

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[1142] *Petition for a Common Law Writ of Habeas Corpus* (n 1139) 2.

Apes, a sanctuary for orangutans and chimpanzees in Wauchula, Florida. Knuckles is a special chimpanzee because, like Sesha, he was born with cerebral palsy. Due to this condition, Knuckles was at first not able to eat on his own, as his bodily control was limited, and his movement more generally impeded. After years of therapy and care, Knuckles, who was placed in a special needs habitat at the Center,

> has learned to feed himself, climb up and down steps, and pull himself up on special swings to hang upside down and play. He walks wherever he wants to go and is very aware and cognisant of activities around him.[1143]

Despite these improvements, however, Knuckles's mental capacities remain restricted, making him the chimpanzee equivalent of a severely cognitively disabled human being like Sesha.[1144] Knuckles's case is particularly difficult because neither Aristocratic *nor* Meritocratic approaches seem to be able to account for the intuition that it would make sense to extend to Knuckles the same fundamental rights and legal personhood that other chimpanzees would have.

While Meritocratic approaches would not in principle be opposed to extending legal personhood and rights to a nonhuman being like Knuckles, the fact that he lacks the capacity for autonomy would—again under the assumption that this is taken to be the relevant property that grounds personhood and rights—mean that Knuckles would not receive the status and rights that non-cognitively disabled chimpanzees would possess. Of course, Meritocrats would not consider this to be a flaw of their conception. A full-blown Meritocratic conception requires excluding those who do not possess the relevant capacities. However, as I have argued in Chapter 3, there is a serious downside to such a full-blown Meritocracy that we would do better to avoid or at least mitigate.

While Aristocratic approaches do not suffer from that problem, they fail even more obviously to accommodate Knuckles's case: simply in virtue of being born a chimpanzee, Knuckles is excluded from the fundamental rights and the personhood status that human beings enjoy. This presents us with a problem: neither Aristocratic nor Meritocratic approaches provide a satisfactory

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[1143] Center for Great Apes, 'Knuckles' <http://www.centerforgreatapes.org/meet-apes/chimpanzees/knuckles/> accessed 21 July 2019.

[1144] See on this also Gruen (n 504) 74.

solution to Knuckles's case. Yet, many will share the same intuition that was also at work in Sesha's case: it would be wrong, or at least politically dangerous, to allow ownership of Sesha or Knuckles, or to violate their basic interests, simply because they can be said to lack the individual capacities necessary for personhood and fundamental rights.[1145] Even those who do not share the intuition that there is anything wrong with withholding certain fundamental rights and legal personhood from Knuckles because he lacks the relevant individual properties should be worried that the very same lack of properties could be invoked to justify withholding personhood and rights from humans like Sesha.

SMA overcomes these problems. According to SMA, legal personhood and fundamental rights would be extended to all members of the chimpanzee species, regardless of their individual capacities. Hence, even a chimpanzee like Knuckles, who would not deserve these legal positions on strictly Meritocratic grounds, could still come to enjoy them. SMA thus manages to combine as far as possible insights of the Meritocracy (to extend rights and personhood to beings who deserve them) and the Aristocracy (to extend rights and status on the basis of group membership, not individual merit). SMA harnesses the strengths of both conceptions, while at the same time minimising their weaknesses. And as Knuckles's case shows, SMA is not reducible to either of these conceptions, nor even a conjunction of them. As a result, SMA is preferable to both the Aristocratic and the Meritocratic conceptions.

5 Conclusion

I have demonstrated in this chapter that the theory of the spectrum of fundamental rights which I have developed in the previous chapters is not only theoretically illuminating but also practically useful. More specifically, I have argued that because the Aristocracy and the Meritocracy are largely antithetical ideal-types that present us with equally good reasons for and against adopting them, the best practical solution is to steer a middle ground between these extremes. Because current legal systems are too wedded to the Aristocratic extreme, I proposed that we ought to Meritocratise the Aristocracy to reach this middle ground. I have analysed two concrete ways in which such a Meritocratisation could be achieved: by transforming animals' property status and by extending fundamental rights to them. I argued that such Meritocratisations of the Aristocracy ought

[1145] See for a similar point, Crary (n 768) 132.

to be carried out by using species membership as a criterion. Against the widespread rejection of this criterion by many moral philosophers, I have advocated the adoption of the Species Membership Approach (or SMA) for the extension of *legal* rights to animals. I have defended SMA on the grounds that it is pragmatically and politically preferable to extending rights based on an individual's capacities and interests; and I have outlined how SMA could be operationalised and how it can respond to challenges that might arise from its implementation. Finally, I have demonstrated that SMA is preferable to both ideal-typical approaches because it alone can accommodate the cases of Sesha, Karen, and Knuckles.

One of the important lessons of this chapter has been that an extension of Aristocratic status and privileges to previously excluded groups is not only feasible but required if the Aristocracy is based on normative assumptions that cannot be defended on non-arbitrary grounds. As I have argued, the lack of such grounds was also key in the push for an expansion of the Aristocracy to include women, as well as other vulnerable groups, who could be shown to deserve the same status and rights that members of the Aristocracy possessed. Although SMA was presented as a moderate solution to bridging two extreme conceptions, it is still a relatively radical proposal insofar as it follows in the footsteps of other rights movements which have achieved momentous changes in our legal practices. As Stone pointed out in his famous law review article from 1972, in the case of each of these movements, the proposal to extend the circle of rights-holders was "bound to sound odd or frightening or laughable".[1146] He attributed this to the fact that "there will be resistance to giving the thing 'rights' until it can be seen and valued for itself; yet, it is hard to see it and value it for itself until we can bring ourselves to give it 'rights'—which is almost inevitably going to sound inconceivable to a large group of people".[1147] One of Stone's most important contributions was to show that who the law considers to be a potential rights-holder is not set in stone. Instead, extra-legal considerations influence and change who counts in law: "We are inclined to suppose the rightlessness of rightless 'things' to be a decree of Nature, not a legal convention acting in support of some status quo. It is thus that we defer considering the choices involved in all their moral, social, and economic dimensions."[1148]

[1146] Stone (n 723) 455.

[1147] ibid 456.

[1148] ibid 453.

My aim in this chapter has been to show that the status quo is changing and that the tide is turning away from Aristocratic legal conventions that subject animals to human whim. At the same time, however, I have emphasised what I believe to be generally neglected in the discourse about expanding rights: that there are virtuous elements in these legal conventions that should not be swept away by the tide.

Conclusion

This thesis began with the *habeas corpus* petitions filed by the NhRP on behalf of Leo and Hercules, two chimpanzees who were the first—but not the last—nonhuman animals to have a court hearing on their fundamental legal rights. Justice Barbara Jaffe, who granted the hearing, ultimately denied Leo's and Hercules's petitions on the basis that she was bound to follow the decision that a higher court had reached in the case of Tommy, another chimpanzee who was never given a hearing.[1149] However, Jaffe also noted in her ruling that "[e]fforts to extend legal rights to chimpanzees are … understandable; some day they may even succeed". Citing former US Supreme Court Justice Anthony Kennedy in the famous *Lawrence* v *Texas* decision (which legalised same-sex activities throughout the US), Jaffe pointed out that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact only serve to oppress".[1150] Importantly, Jaffe also pointed to the actors and factors that will be decisive in improving the legal status of the oppressed:

> [T]he parameters of legal personhood have long been and will continue to be discussed and debated by legal theorists, commentators, and courts, and will not be focused on semantics or biology, or even philosophy, but on the proper allocation of rights under the law, asking, in effect, who counts under our law.[1151]

In a similar vein, I have argued in this thesis that law is a discipline that is independent of philosophy, and that it provides lawyers with a special toolkit that allows them to think and apply

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[1149] *Nonhuman Rights Project, Inc* v *Samuel L Stanley et al* (n 732) 33; on the Tommy decision, see *Nonhuman Rights Project, Inc* v *Patrick C Lavery et al* (n 840).

[1150] *Nonhuman Rights Project, Inc* v *Samuel L Stanley et al* (n 732) 32; *John Geddes Lawrence and Tyron Garner* v *Texas* [2003] US Supreme Court 539 U.S. 558, 579.

[1151] *Nonhuman Rights Project, Inc* v *Samuel L Stanley et al* (n 732) 23.

fundamental rights in ways that philosophers cannot. Concretely, I have proposed that there are good reasons for extending fundamental rights to some other deserving nonhumans on the basis of their species membership rather than their individual capacities. This proposal—the Species Membership Approach—has been the concrete upshot of a thesis that has explored thus-far neglected intellectual historical, analytical, and practical territory surrounding the topic of animal rights and their relationship with human rights.

From the point of view of intellectual history, I have shown that modern thinking about human and animal rights has been influenced by egalitarianism and naturalism—two conflicting streams of thinking which became prominent in the French Enlightenment. I explained and illustrated the tension between these two streams with the aid of the debate between Salaville and Delamétherie, revealing not only the prescient ways in which Salaville defended humans' special status and equality, but also how Delamétherie anticipated many of the central arguments of contemporary animal rights advocates.

I went on to subject the two fundamental rights conceptions which sprang from these streams to a thorough analysis. Against common belief, I showed that a good share of contemporary human rights scholarship and practice is influenced by Aristocratic ideas. Demonstrating the parallels with examples from the actual nobility, I argued that the Aristocratic fundamental rights conception has three characteristic elements: equal consideration, agent-focus, and internalism. Drawing similar analogies with respect to the meritocratic resistance against the nobility in the Ancien Régime, I then compared these elements to the three characteristic elements of the antithetical Meritocratic conception of fundamental rights: differential consideration, patient-focus, and externalism. As I have pointed out, the Aristocracy and the Meritocracy are both ideal types, which are located on opposite sides of a fundamental rights spectrum. This explains why attempts to combine the pros of both approaches, while avoiding any of their respective cons, is impossible. More specifically, we saw that the strength of the Aristocratic approach (its ability to found fundamental rights independently of an individual's capacities and interests) and the strength of the Meritocratic approach (its ability to provide fundamental rights with a solid grounding in an individual's capacities and interests) are in inherent tension with each other.

Finally, I took this insight as the starting point for an exploration of the practical consequences of the spectrum of fundamental rights. As I have argued, the most viable practical path

forward is a middle ground between the two ideal-typical conceptions. Only such a middle ground allows us to benefit from the virtues of both conceptions, whilst at the same time minimising (though not eliminating) their vices. Based on the finding that current legal systems are too wedded to the Aristocracy, I have proposed a Meritocratisation of the Aristocracy and have demonstrated—by focusing on animals' status as property and on fundamental rights—how this could be achieved. To prevent an excessive move to the other, Meritocratic extreme, I also emphasised that such attempts at Meritocratising the Aristocracy should take to heart the Aristocratic insight that group-based approaches avoid the problem of threatening the status of individuals who lack relevant capacities and interests. This was the basis on which I presented SMA. As the cases of Sesha, Karen, and Knuckles have illustrated, SMA is the most viable practical way forward in the struggle for nonhuman rights.

In many respects, SMA has raised more questions than it can answer on its own. As my focus in this thesis was on the history and the conceptual structure of the Aristocratic and Meritocratic ideas that pointed us in the direction of SMA, I could only cast relatively dim light on how, concretely, SMA should be operationalised. More research is needed on this question, and I shall end the thesis by highlighting some areas which could prove particularly fruitful for future study. Building on the brief discussion above,[1152] further research is needed on at least four main points.

First, additional studies are required on the exact role "species" plays in determining (in a non-essentialist sense) a being's salient characteristics and its rights-grounding interests. Closely connected to this research will be a necessary inquiry into the question whether there are other group categories than the species criterion which lend themselves to similar purposes. This latter inquiry will become particularly important if and once AIs develop in ways that make them deserve certain fundamental rights. Here, more research will be needed on whether and under which conditions AIs can ever be said to deserve certain fundamental rights, and to what extent useful groups ("quasi-species") can be formed on the basis of their different underlying algorithms. To answer these questions, an interdisciplinary perspective will need to be adopted, bringing together not only the expertise of lawyers, but also that of biologists, philosophers of science, and computer scientists.

[1152] See Chapter 4, Subsection 4.2.

Second, more scholarship is needed on the question which species should first—and which last!—come to benefit of SMA. I mentioned above that both merit and feasibility will play a role in this decision, but much more needs to be said about this, and the processes by which such political decisions will be taken analysed. On these issues, political scientists and sociologists will be able to contribute at least as much as lawyers.

Third, we need research examining the ways in which SMA should apply to beings that are not paradigmatic cases of a particular species, because they have only just been conceived (like foetuses have), or because they share only some of the traits of that species, but possess features of other species (like hybrids or chimeras do). Hybrids and chimeras exist in nature,[1153] so a useful starting point could be to interrogate the characteristics of these beings and to take these insights to artificially created ones. An exciting body of literature has developed on the question of cyborgs,[1154] and further research could try to marry that scholarship with the question how hybrids and other non-paradigmatic cases fare under species or similar group-based approaches.

Fourth, with the incipient extension of fundamental rights for nonhumans, there is need for an increase in research on the issue of potential rights inflations and the question how conflicts between the fundamental rights of animals and humans should be resolved. Existing human rights and constitutional rights literature and case law have already developed refined frameworks for the resolution of conflicts between competing human rights and between human rights and the public interest. In particular, in many jurisdictions, the proportionality test has emerged as a useful tool for balancing the different interests that are at stake in such cases of conflict.[1155] Further study is needed on whether and how this test would apply to conflicts between human and nonhuman rights, and on whether, in the mid-term, practical limitations militate in favour of a pragmatic prioritisation of human interests over the interests of some nonhumans. Finally, more research is

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[1153] See eg Sindya N Bhanoo, 'Scientists Find Rare Hybrid of Two Other Dolphin Species' *The New York Times* (13 January 2014) <https://www.nytimes.com/2014/01/14/science/scientists-find-rare-hybrid-of-two-other-dolphin-species.html> accessed 21 July 2019; Rachael Rettner, '3 Human Chimeras That Already Exist' *Scientific American* (8 August 2016) <https://www.scientificamerican.com/article/3-human-chimeras-that-already-exist/> accessed 21 July 2019.

[1154] For an overview, see Spyros G Tzafestas, 'Roboethics: Fundamental Concepts and Future Prospects' (2018) 9 Information 148.

[1155] See *supra* 169.

needed on the question how the animal rights movement can join forces with other fundamental rights movements in order to mitigate the worry that the rights of animals could come at human expense.

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