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In Defence of Sentient Rights

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Abstract

The overall aim of Raffael Fasel’s excellent book *More Equal than Others* is to promote the ‘Species Membership Approach’ (SMA) as the way to award and protect ‘fundamental rights’ (the basic legal rights of individuals that are vital for securing their well-being). It is contrasted with the so-called ‘Meritocratic Approach’ (MA) that assigns rights based on individual characteristics, leaving those without said characteristics excluded from rights. And it is contrasted with the ‘Aristocratic Approach’ (AA) that assigns equal rights to all within a specified group, which traditionally has only been humans. The SMA offers a different way forward by keeping the egalitarian nature of the AA, whereby all humans are recognised as having equal rights. But, the SMA departs from the AA by recognising, akin to the MA, that humans are not the only group who can merit fundamental rights. Rather than assigning rights based on individual characteristics like the MA, the SMA instead extends them on the basis of species membership. This is a provocative and important new approach to our thinking on fundamental rights and it has numerous virtues. Nonetheless, while Fasel is right that some deference to groups is inevitable when assigning rights, it is crucial that we think carefully about the groups which count as relevant. And it is here where I believe Fasel’s argumentation goes astray. I maintain in this paper that sentience—both as an individual characteristic and a relevant grouping—is the proper basis for assigning fundamental legal rights. It further argues that Fasel’s own dismissal of sentience, a position with which he engages at some length, is flawed. In the first section of the paper, I briefly outline my own ‘sentient rights’ approach, and explain how it tackles the problems that Fasel identifies with alternative approaches for awarding fundamental legal rights. In the next two sections, I then confront and rebut the two objections that Fasel makes of this approach: that it inevitably leads to humans losing out to animals when their interests clash; and second, that it cannot award rights of equal value to individuals on the basis that sentience is scalar (comes in degrees). The fourth and final substantive section claims that the SMA’s prioritisation of pragmatism over moral

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relevance in the award of legal rights is flawed and may in fact stall progressive changes for non-human animals.

Keywords Rights · Humans · Animals · Species · Sentience

The overall aim of Raffael Fasel's (2024) excellent book *More Equal than Others* is to promote the 'Species Membership Approach' (SMA) as the way to award and protect 'fundamental rights' (the basic legal rights of individuals that are vital for securing their well-being). The virtue of the SMA, Fasel claims, lies in the fact that it offers an alternative 'middle way' compared to two other competing accounts of how to award fundamental rights, adopting the benefits of each, while remedying their flaws. According to Fasel, the so-called Meritocratic Approach (MA) assigns rights based on *individual* characteristics, whether that be autonomy, moral agency, rationality, sentience, or something else. The Aristocratic Approach (AA), meanwhile, assigns *equal* rights to all within a *specified group*; and in nearly all contemporary legal systems (though not those of the past), that involves assigning equal rights to all who are human. Fasel argues that the MA has the benefit of being non-arbitrary in the way that it assigns rights; in other words, it focuses squarely on what really counts morally speaking. But he alleges that the MA also comes with the serious cost of impacting harmfully on those who do not have, or who do not have enough of, the particular meritocratic characteristic. For example, if an MA approach ascribes fundamental rights based on moral agency (the capacity to understand and act on moral principles), that leaves young infants and the severely cognitively disabled without the protection of those rights (cf. Griffin 2008). The AA, meanwhile, remedies this latter flaw through assigning *equal* rights to *all* within the relevant group, irrespective of their individual characteristics. And yet, Fasel claims that it comes with the serious cost of excluding from fundamental rights all of those outside of whatever relevant group has been selected. So, for example, most contemporary legal systems simply assert that the relevant group for fundamental rights is 'human beings' which then excludes from the protection of rights all nonhuman creatures, many of whom might have capacities and vulnerabilities that appear morally relevant.

The SMA offers a different way forward by keeping the egalitarian nature of the AA, whereby all humans are recognised as having equal rights. But, the SMA departs from the AA by recognising, akin to the MA, that humans are not the only group who can merit fundamental rights. Rather than assigning rights based on individual characteristics like the MA, the SMA instead extends them on the basis of species membership.

This is a provocative and important new approach to our thinking on fundamental rights and it has numerous virtues. For example, its deft handling of debates across a number of disciplines (law, philosophy, politics, and history of political thought—with a smattering of biological science too) is especially impressive. The contributions to history of political thought are particularly noteworthy. Although, the AA and MA resonate with current debates regarding the ascription of fundamental rights, Fasel shows that these same approaches were adopted in the eighteenth century in a debate between the Enlightenment French philosophers, Jean-Claude Delaméthérie

and Jean-Baptiste Salaville. Unearthing these positions is illuminating for contemporary readers, providing current and future rights theorist a valuable new set of resources with which to engage. I am also sympathetic to Fasel's desire to provide a pragmatic and politically viable way forward for legal rights. The claim that legal rights and the legal regime should not map perfectly on to moral rights is clearly true; not least, there may be valid social, cultural, and political reasons for differentiation between the two. And, in addition, I think that Fasel's claim that the law needs to work—to some extent—with group-based differentiations is important. Laws and rights cannot be sufficiently fine-grained that they can be assigned, attributed, and protected 'bespoke' for each individual potential rights-holder.

But if Fasel is right that some deference to groups is inevitable when assigning rights, it is crucial that we think carefully about the groups which count as relevant. And it is here where I believe Fasel's argumentation goes astray. In a nutshell, I maintain in this paper that sentience—both as an individual characteristic and a relevant grouping—is the proper basis for assigning fundamental legal rights. It further argues that Fasel's own dismissal of sentience, a position with which he engages at some length, is flawed.

The paper proceeds over four sections. In the first, I briefly outline my own 'sentient rights' approach, and explain how it tackles the problems that Fasel identifies with the MA and AA for awarding fundamental legal rights. In the next two sections, I then confront and rebut the two objections that Fasel makes of this approach: that it inevitably leads to humans losing out to animals when their interests clash; and second, that it cannot award rights of equal value to individuals on the basis that sentience is 'scalar' (comes in degrees). The fourth and final substantive section claims that the SMA's prioritisation of pragmatism over moral relevance in the award of legal rights is flawed and may in fact stall progressive changes for non-human animals.

The Sentient Rights Approach

The sentient rights approach, as laid out in my book *Sentientist Politics*, assigns fundamental legal rights on the basis of sentience—that is the capacity of an individual to experience the world and their place in it (sometimes also referred to as 'phenomenal consciousness', and as we will see below, 'valenced experience'). It argues that all individuals with the capacity for sentience are of equal moral value, and possess basic rights grounded in their fundamental interests (such as in life, not being made to suffer, and equal consideration). The protection of these rights, it is claimed, both justifies and limits political power, meaning that our political and legal systems should be devoted to the protection of these fundamental rights. Such a position is obviously radical and has profound implications for our current political and legal orders. Essentially, the sentient rights approach argues that the human supremacism of existing liberal democracies ought to be replaced by systems devoted to the interests and rights of all sentient creatures. Put simply, the implication of the approach is that our laws and policies should not simply serve human beings, but should also protect and further the interests of a great many non-human animals.

The sentient rights approach can be related to and contrasted with the MA, the AA, and the SMA in the following ways. At bottom, this approach aims to tackle the problem Fasel identifies with MA and AA through its focus on sentience. Unlike a strict MA where individual capacities determine the relative weight and value of an individual's rights, under the sentient rights model, sentience gets an individual into the 'rights club' as an equal member. Like the AA and the SMA, then, there is equal value and equal rights on a group basis. But crucially, the relevant group is not 'humans' or some other 'species', and that is quite simply because those groups lack moral salience. After all, membership of a species—including the human species—can be seen as a biological characteristic akin to hair or eye colour, or as a classification rubric akin to class or phylum. And while these kinds of groupings may have some use scientifically or even socially, they lack fundamental moral importance. Just as we should balk from awarding equal rights to all and only individuals with green eyes just because they have green eyes, or to all and only fungi just because they are fungi, so we should balk from awarding them on the basis of species—whether human or otherwise. Instead, and akin to the virtue of the MA, we should award rights based on a morally salient feature. The claim of the sentient rights approach is that this feature is sentience. All of those who can experience their lives, who have a stake in how their lives fare, and who thus possess interests, hold fundamental moral rights equally. And it is these fundamental moral rights which should serve to shape a society's fundamental legal rights, as far as that is possible.

Human Rights Losses

Fasel has two main critiques of the sentient rights approach which will be examined over the next two sections. His first critique is that under this approach, sometimes humans will lose out. There are two aspects to this initial charge: "...Cochrane's sentient theory does not pay attention to the species a being belongs to and therefore in principle allows that some (non-sentient) humans lack equal worth and rights altogether, and that the rights of animals can sometimes outweigh the rights of humans" (p. 127).

Starting with the latter part of the claim, it is certainly true that under this approach, humans will sometimes lose out to animals when their rights clash. But in my view, this is an important virtue of the account rather than a vice. Quite simply, the sentient rights approach claims that the human supremacism of existing political and legal structures is completely unjustifiable. As such, when current regimes of human rights permit and protect practices which, for example, allow humans to confine, mutilate, and slaughter animals in ways which cause considerable harm, this ought to be condemned. We ought to move to more just systems of law and politics in which the rights of animals are recognised and where the interests of humans and animals can be balanced equitably when they clash. When such balancing is conducted equitably, it is inevitable that certain human interests, rights, and practices will lose out. While there is not the space here to list all of the ways in which human practices might have to be transformed or abolished in light of the rights of animals, the profound

implications of such a system for institutions as diverse as food production, medical experimentation, sport, and infrastructure projects are obvious.

Fasel points out, quite reasonably, that while there may be some ethical justification for this view, existing societies are just not ready for such a radical transformation. And it does seem likely that if we were to implement an entirely new legal regime where humans routinely lose out to animals, it will lack support; and that will ultimately lead to such a regime being rejected and unable to be maintained. As he puts it, "...law is subject to the vicissitudes of politics in a way that philosophy is not." And furthermore, "...the law needs to be responsive at least to some extent to what is regarded as valuable in the community" (p. 172).

This claim certainly has merit. But the sentient rights approach does not call for a new regime of legal rights to be implemented wholesale here and now. It is true that attempting to do so would stand little chance of being effective, certainly could not be maintained, and could result in some quite harmful consequences (Cochrane 2018, p. 11). Instead, then, this new sentient political and legal regime is an *ideal theory*. It provides us with a model to which we can compare and evaluate existing laws, practices, and proposals; and it provides us with an account of a system to aim for, thus hoping to persuade us and motivate us to work towards it (Swift 2008). Crucially, however, if our aim is to move towards this new more just regime, and to agitate for legal changes that both facilitate and reflect it, sometimes embedding specific sentient rights will be appropriate. And it also seems right that sometimes this might involve pushing for the protection of certain rights of animals that limit the freedoms of human beings. Such action will not only be progressive in moral terms, but also politically feasible, because, in spite of Fasel's claims, current societies do already recognise that animal rights can restrict the freedoms of humans in certain contexts. Put simply, in many current societies human interests can lose out over animal ones in specific cases. So, humans may have a general right to kill animals, but that does not extend to killing members of certain endangered species (e.g. in USA, *The Endangered Species Act 1973*). Humans may have a general right to use animals for entertainment, but that does not extend in many societies to bear-baiting (e.g. in UK, *The Cruelty to Animals Act 1835*). Humans may have a general right to freedom of religion, but that does not always extend to a permission for believers to engage in religious animal sacrifice (e.g. in Nepal, *Arjun Kumar Aryal v. Government of Nepal 2016*). And so on. The point of these examples is to show that humans can and do lose out to animals, and that we already accept that in limited cases. As such, our aim should be to explore where it may be justified and appropriate to extend these precedents to other cases, and not to be unduly pessimistic about the feasibility of making legal progress in current circumstances.

The second aspect of Fasel's critique, you will recall, is that the sentient rights approach will not just sometimes demand prioritising animals over humans, but will actually deny certain humans fundamental rights. Put simply, given that fundamental rights are ascribed on the basis of sentience, that means that any human being lacking sentience will be denied such rights. This puts it in contrast with established human rights regimes which embody the AA in assigning rights *equally to all* humans. By refusing some humans basic fundamental rights, the claim goes, the sentient rights approach will clash with current societies' most basic values.

While the basis of this charge—that the sentient rights approach entails denying rights to some humans—has some validity, I believe that the allegedly radical implications of this position are overstated. In part, this is because there are very few human beings who have completely lost the capacity to experience the world. While some might assume that all individuals who have fallen into a coma have lost this capacity, in actual fact only a small subset of such individuals *permanently* lose *all* capacity for sentience. For one, then, most individuals who fall into coma only do so temporarily. For these individuals, there is expectation or some realistic hope that they will regain the capacity to experience the world. For our purposes, then, these temporarily unconscious individuals, should be regarded as akin to sleeping individuals: their experiential powers may be switched off for a time, but they nonetheless continue to exist within a life that is experienced by the individual whose life it is. Furthermore, we should also be cautious about making assumptions regarding the experiential powers of those in comas; for many do not in fact lose all capacity to experience the world. Indeed, there is evidence from brain scans that some individuals in comas, including those who have been diagnosed as in permanent vegetative states, can nonetheless experience the world and themselves in it (Owen 2018). In other words, while these individuals are physically unresponsive to stimulation, they nonetheless maintain some mental awareness. In sum, a good many comatose individuals merit rights like any other sentient individual on the basis that they have important interests in how their lives fare.

Of course, that still leaves those individuals who have suffered from some trauma so great that we can be confident that they have lost *all* capacity for consciousness *permanently*. This small number of individuals will not be eligible for rights under the sentient rights approach for the simple reason that they lack any interest in how their lives fare. While this might conflict with the AA and the SMA, I believe that we have good reasons to favour the position of the sentient rights approach. For one, it grounds rights in something of actual moral salience, as opposed to seeing them emerge from the arbitrary condition of species membership. A non-human who can experience their lives in rich and profound ways has an important stake in their life; a human embryo, by way of example, does not. And yet, if we were to take species membership alone as the basis for establishing rights, it is the embryo who merits full and equal rights. Such a view could be based on a commitment to some controversial religious doctrine that sees human beings as God-like and elevated from all other creatures. But this is not a proper rationale for establishing law in a secular liberal state, which must be grounded in terms that all those subject to it can reasonably engage with (Rawls 1993). Or the view could be based on a more secular commitment grounded in worries about stripping humans of their elevated status (see Phillips 2015). But this is unpersuasive insofar as it prioritises current conventions over good reasons and arguments. In this light, the case for assigning rights to sentient non-human animals, while denying it to those humans who permanently lack conscious experience, makes a great deal of sense.

Furthermore, denying these individuals fundamental rights is not completely out of step with societies' values. For one, many fundamental rights are simply inapplicable to individuals in permanent non-conscious states because of their inability to exercise them. So, for instance, some civil and political rights, such as rights to free

movement, free speech, free association, political participation, and so on, as well as certain socio-economic rights such as the right to education, to work, to participate in cultural life, and so on, lack relevance for these individuals. Crucially, our societies already recognise and accept that these individuals cannot enjoy these rights, meaning that the sentient rights approach is not as radical as has been presented. What our societies do not and would not accept, however, is treating these individuals as mere objects or resources. But here again the sentient rights approach is in line with this way of thinking. For denying permanently non-conscious human individuals fundamental rights does not provide licence for others to treat them however they please. After all, there are good reasons based on the interests and rights of these individuals' families, friends, as well as on wider social values, to restrict what may be done to them. Overall, then, while the sentient rights view does entail denying fundamental rights to a small number of human beings, there are good reasons for doing so, and the implications of doing so are not quite as radical as Fasel assumes.

Unequal Rights

Fasel's second critique of the sentient rights approach is that it leads to the attribution of unequal or 'gradualist' fundamental rights, whereby some have more and greater rights than others. According to Fasel, this flies in the face of contemporary human rights regimes, and the AA, where rights are attributed equally, recognising the inherent moral worth of all human beings. The worry is, in a nutshell, that unequal rights create a hierarchy of individuals, leaving those at the bottom of that hierarchy vulnerable. The main targets of Fasel's critique here are proponents of the MA who are so focused on individual characteristics that they inevitably end up having to grant more and weightier claims to those with more of the relevant characteristics (Arneson 1999; Carter 2011). For example, if a proponent of MA claims that the capacity for moral agency is what grounds fundamental rights, then it seems that those individuals with more extensive capacities to understand and act upon moral principles should have weightier rights than those with less. This would mean, in this case, that we would usually have to prioritise the rights of adult humans over young infants, and those with serious cognitive disabilities or degeneration. This kind of 'rights feudalism' is, for Fasel and others, extremely dangerous.

Crucially, for our purposes, Fasel claims that the sentientist approach, while trying to avoid this implication of the MA, falls foul of it. And this, in large part, is because the sentientist approach grounds rights in something that is not binary; for Fasel claims that sentience is something you can have more or less of:

...it is difficult to regard sentience as something that a being either has or does not have. Rather, it seems that there may be different kinds of sentience, that is, different ways of being conscious in the world. Some kinds of sentience may be more elaborate than others, and beings that have those types of sentience may be more receptive than others to certain sensations. What is more, certain types of sentience may lead to more intense sensations and stronger interests than others. (p. 122)

To back up Fasel's claim that sentience is 'scalar' we might point, for example, to the difference in experience between a goldfish and a gorilla. While it seems perfectly clear that both have the capacity to experience the world, it seems just as clear that the *type* of experiences which they have varies enormously. Indeed, if we assume, not unreasonably, that gorillas have a *richer* set of experiences compared to goldfish, then it would appear that sentience gives us reason to accord gorillas weightier rights than those afforded to goldfish. And if rights come in degrees based on sentience, there will also be reason to ascribe weightier rights to those humans who have richer experiential capacities. For those committed to the equal value of human beings, and their possession of equal rights, this is a very troubling implication.

Is Sentience Scalar?

The claim that sentience is scalar has some initial plausibility, and others (see Zuolo 2019; Lee 2023) have made the same point. And yet, I believe that we need to carefully distinguish different ways in which sentience might be said to be scalar. Once these distinctions are made clear, instead of conflated as they often are in the literature, it is easier to see how sentience can avoid 'rights feudalism' and provide the basis of equal fundamental rights. To explain, it is obviously true that different individuals can and do have quite different *types* of experience. As we have already seen, a goldfish and a gorilla must certainly experience the world in very different ways. And, when we extend our examples further and think about the experiences of, say, whales and bats (who use echolocation) or octopuses (who essentially possess brains in each of their legs), the range of types of experience expands tremendously. And it is also true that because of these quite different types of experience, different sentient individuals will often have very different interests: some creatures' interests might be quite rudimentary, such as in nutrition and the absence of pain, for example; whereas others' might be quite complex, such as in a fulfilling career or world peace, for example. In addition, because of their different types of experience, when creatures do share the same types of interest, the strengths of their interests may differ considerably: so it seems reasonable to surmise, for example, that a gorilla's interest in continued life will often be stronger (so matter more to them) than a goldfish's, on the basis of the gorilla's ability to project further into the future, and formulate plans about that future, in ways that the goldfish cannot.

But in spite of the obvious fact that creatures differ in their *types* of experience, that does not mean that they differ in their *capacity* to experience. An individual is either a sentient creature with the capacity for interests and a stake in their own life, or they are not: the capacity to experience is non-scalar. It is certainly true that there are hard cases regarding who has the capacity for experience and who does not, as evidenced by debates over the experiential capacities of invertebrates like insects, and when human foetuses initially become aware of themselves. But in spite of our uncertainty over the facts, there nevertheless exists this difference between individuals who can experience themselves and thus have a stake in their life, and those who

do not (Arneson 1999, p. 104; Bruers 2015, p. 185).¹ So while Fasel (p. 124) claims, alongside certain others (see Lee 2023), that sentience is like a ‘dimmer switch’ that can be turned up or down, as other scholars of consciousness (see de Quincey 2006) have pointed out, even a dimmer light is either on or off.

To this kind of claim, Fasel proposes two responses. The first (p. 124) is that these types of experiences are so varied that they cannot be translated into a ‘single currency’. In other words, there is so much variety in experiential state and quality, that there is nothing that unites them. Put simply, ‘sentience’ cannot accommodate all of these various experiences. But this response misses the mark. It is true that ‘sentience’ is a slightly misleading term for the capacity under discussion. In the first place, outside of philosophical discussions, sentience is taken to be the capacity to feel or have sensations. Strictly speaking, this capacity might be held by some individuals who do not have further capacities to *value* those sensations (consider certain robots in science fiction for example). Put another way, those individuals might be able to access the world (through their sensory capacities), but because they lack positive or negative attitudes towards it, do not have any *stake* in it. But most philosophers who refer to sentience are using the term to denote the capacity to experience the world and value those experiences positively or negatively. In other words, when philosophers are talking about sentience, what they are invariably referring to is ‘valenced experience’ (Birch 2024) or ‘well-being’: that is, the capacity of individuals to have *interests* in how their lives fare, and so to have a stake in their lives. To come back to the question at hand, then, it is quite clear that sentient individuals (meaning those with the capacity for positive and negative experiences) may differ hugely in terms of the types of experience they have; however, all such experiences can be translated into a single currency of *interests* which denote whatever makes life go well or badly for the individual in question.

And yet, Fasel argues that it is not just the variety of experiences that makes sentience scalar, it is also the different *intensity* of those experiences. This, it seems, can provide a second response to the idea that sentience is a capacity that is binary rather than scalar. For even if we accept that sentience is a binary capacity, for those creatures that are able to experience the world, their experiences may not just differ by type but also by *intensity*. So, to return to the analogy of the dimmer switch: once the switch is turned on, it can then be turned up and down. Likewise, perhaps we might say that once we have identified the group of creatures who do have the capacity for sentience, not only do their experiences differ by type, but also by intensity. And it is in this way that sentience comes in degrees. There is certainly some plausibility to this view: after all, it seems reasonable to assume, to return to our previous example, that many of the ways that gorillas experience the world are not just different in type to those of goldfish, but also in intensity (or richness). If this is correct, we might plausibly say that gorillas are *more* sentient than goldfish, and thus merit *more* worth and rights of more importance compared to goldfish.

But perhaps this is too quick. For even if it is accepted that sentience can indeed differ in this respect (intensity of experience), that does not necessarily mean that

¹ Interestingly, Fasel does not think that the fact that there are hard cases when it comes to species membership (hybrids and foetuses) precludes that category from being binary.

those with more intense experiences ought to get more worth and rights. For as both Mikolski (2022) and Perry (forthcoming) have recently argued, we need not accept that deeming some property P as relevant to ground worth and rights, requires us to believe that *variations* in P are also relevant. After all, it might be that it is the mere presence of the grounding property itself that does the fundamental moral work. And this, I believe, is the case when it comes to sentience. For what matters ultimately to ground worth and rights is *the capacity* to experience, not the variations in type and intensity of experiences. For it is this capacity, George Sher argues (2017, Ch. 3), that makes an individual a ‘distinct subject’, a ‘unique centre of consciousness’, and in possession of an ‘interiority’ with their own ‘private reality’, and ‘subjective perspective on the world’. He goes on (p. 42): “A person who is semi-conscious, or who is fully awake but intellectually primitive or very stupid, has no less complete a subjectivity than a hyper-alert, hyper-sophisticated genius.” So it is this capacity to be an experiencing subject that grounds our worth, and it is something that individuals either have or do not have, and so is not scalar.

Assuming Sentience is Scalar

But let me concede, not only for the sake of argument but also because the debate on this issue is fiercely contested, that sentience *is scalar* in some morally important way. I still believe that it provides a more plausible basis for assigning equal rights compared to rival candidates. For example, we might assign equal worth and rights by regarding sentience as a ‘range property’. So even if individuals can have more or less of the capacity for valenced experience, we can propose some threshold which we take as morally important: all creatures above that threshold have enough of the capacity to be regarded as equals, and all those below do not. Indeed, this kind of strategy is commonly adopted by those who advocate grounding equal fundamental rights in ‘moral personhood’: that is, that cluster of properties associated with the capacities for moral agency and the ability to frame, revise, and pursue one’s own conception of the good. The well-known problem facing this approach is that moral personhood is clearly and uncontroversially scalar: compare, for example, the moral personhood of a paradigmatic 5-year-old and a paradigmatic 25-year-old. As such, thinkers like Rawls (1999, p. 43), have argued that to ground equal worth and rights in personhood requires setting a threshold, where those individuals with enough of the capacities of personhood are classed as being within the relevant ‘range’ for personhood, and so classed as equals, and those without are not. The great problem with this strategy, of course, is coming up with some non-arbitrary specification of the threshold: which capacities must be present and to what extent (Floris 2023)? But crucially for our purposes, this same problem would also seem to affect using sentience as a range property to ground equal worth and rights: just how can a non-arbitrary threshold be set? And if it cannot, can scalar sentience be a sound grounding for equal rights?

While this problem of threshold-setting seems inevitable with any range property approach, it is much more problematic for approaches using moral personhood than it is for approaches using sentience. To explain, as we have seen, sentience as I have been describing it, denotes a single capacity: to have valuable (positive or negative)

experiences. Even if it makes sense to say that this capacity comes in degrees, as I am conceding here for the sake of argument, it is relatively clear how we might select a morally relevant threshold for that capacity. Just by way of example, we might say that the morally relevant threshold for morally valenced experience is to have interests of some specified type, intensity, and/or duration. Selecting a threshold for morally relevant personhood, on the other hand, is significantly harder. And this is for the simple reason that moral personhood is not a single capacity, but rather an umbrella term for a number of different capacities. As we have seen, moral personhood relates to that cluster of properties associated with the capacities for moral agency and the ability to frame, revise, and pursue one's own conception of the good. So, the kinds of capacity that make up personhood include: first-order desires, second-order desires, understanding of oneself across time, empathy, moral reasoning (of various types), moral agency, and much more besides. In order to arrive at a threshold for moral personhood, then, we will not only need to come up with a list of all of the capacities from among these that are regarded as relevant for the threshold, but also an account of the levels at which they must each be met. While such a task is not impossible, it is without doubt far more onerous, contentious, and, indeed, invasive (Carter 2011) (and thus possibly arbitrary) when compared with setting a morally relevant threshold for sentience. Overall, then, it is only reasonable to conclude that even if the capacity for valenced experience comes in degrees (which I believe that we have good reason to doubt), it is still a plausible basis by which to ground equal worth and rights when compared to rival candidates.

The SMA and the Problem of Determining Rights

Having responded to Fasel's two critiques of the sentientist approach to assigning equal fundamental rights, in this section I want to return to Fasel's own novel proposal, the SMA. Recall that according to the SMA:

...we should be Meritocrats in extending fundamental legal rights and cognate legal protections to other animals. However, in doing so, we should follow Aristocrats by focusing on the species of the fundamental rights-holder rather than on their individual capacities. (p. 163)

Awarding equal rights on the basis of species is meant to be both practically and politically useful, according to Fasel. On the practical level, he argues that it saves judges from the impossible task of having to determine if any individual before them has the relevant capacities and interests to be granted fundamental rights (p. 167). Politically, Fasel claims that the SMA is useful because it affirms our commitment to egalitarianism, thus not undermining the protections of humans, while extending such claims to certain non-human species (p. 171).

I believe that both of these advantages are overstated: and they certainly do not offer clear benefits over any scheme of sentient rights. For example, any set of legally enforceable rights is going to have to offer judges guidance on who counts as a worthy recipient of rights—either through specific legislation or case law. Meritocratic

theories may be individualistic; but when realised in practice will of course have to give some guidelines as to which individuals count. And the same will also be true of a scheme of legally enforceable sentient rights: they will have to be based on an account of the relevant group which counts as sentient. Indeed, existing animal welfare laws are already premised on such accounts. That account is of course provisional and amendable, but it is not something that each judge must revisit in every single case; they can and should defer to the established list within the group. As such, there is no reason to believe that the SMA offers any practical benefits in this regard.

The second and supposedly political advantage—that the SMA affirms our commitment to egalitarianism through not undermining protections for any humans—may well have some validity in relation to Meritocratic accounts that assign rights based on quite complex cognitive capacities. For example, if only individuals with advanced capacities for moral reasoning are worthy of rights, that could possibly let some small number of non-human animals in, but will certainly exclude some large number of humans. And it is true to say that this will be resisted politically. But Meritocratic accounts can assign rights in more plausible and inclusive ways, by grounding rights in much less complex capacities, meaning that very few humans will be excluded. Even more importantly, and as we have seen, the sentient rights approach would only deny attributing fundamental rights to a tiny proportion of humans: those who can reasonably be held to be in an irreversible state of non-consciousness. As was argued in the paper already, it is already widely accepted that these individuals cannot enjoy rights, making the approach perfectly politically palatable.

But not only does the SMA fail to offer the advantages that Fasel proposes, but it also comes with some serious problems of its own. Perhaps the most obvious and important is the difficulty of determining which species ought to be recognised as possessing fundamental rights. Fasel acknowledges this problem and addresses it head on, and offers two criteria to determine which species be awarded these protections. The first is *merit*: that is, whether members of the particular species possess the relevant capacities for the particular fundamental rights based on the latest scientific evidence (p. 186). The second is *feasibility*: that is, how straightforward it will be politically to award such rights to the species in question (p. 187). Fasel proposes, quite reasonably, that the species who comprise the great apes score highly on both fronts, making them excellent candidates for the award of fundamental rights under the SMA.

But there are some obvious problems with Fasel's proposals on how the relevant species should be selected. For one, it is not at all clear what merit consists of under the SMA. Fasel mentions that relevant capacities might be 'sentience' and an 'interest in continued existence'. But we can imagine many other relevant plausible candidates, such as 'rationality', 'autonomy', 'dignity', 'moral personhood', 'possession of a soul', and so on. Moreover, not only are many of these capacities not obviously characteristics that can be settled as present or absent by scientific evidence, but many are also in tension with one another. Some might think that possession of a soul is crucial to the right to continued life, whereas others might think it is the capacity to conceive of oneself over time. As presented by Fasel, the SMA offers us no way of adjudicating between these competing grounds of merit. At the very least, then,

the SMA needs to be significantly bolstered by some further framework to make the specification of species non-arbitrary.

Secondly, determining the relevant species by the criterion of feasibility raises serious concerns. After all, it is telling that so many of the examples that Fasel uses in the book—like Minnie and like Knuckles—are chimpanzees, elephants, and other large charismatic animals. Such examples have no doubt been chosen on the basis that we are warmly disposed towards them, making the award of fundamental rights to them seem entirely plausible. But where does that leave those animals, far greater in number, who suffer harms of the most serious kinds: the chickens, the pigs, the cows, for example, who are all subjected to the horrors of modern industrial agriculture? The call to extend basic rights beyond humanity to include other animals is a moral and political plea to extend protections to those vulnerable creatures who need them the most. But the SMA leaves these animals out in the cold on the grounds of feasibility. This is an important problem for the SMA as it is in tension with a key normative impulse of any scheme of fundamental rights: that these basic protections must be upheld and protected even for those who are rejected or despised by society (such as illegal migrants, criminals, terrorists, and so on).

Fasel recognises this objection but reiterates that the aim of the SMA is to provide a ‘practically viable way forward’, rather than a morally ideal one. And rather than trying to eradicate arbitrariness in the award of rights, the SMA instead seeks to, “... make laws that are less arbitrary” (p. 188). However, it is not at all clear that the SMA would make our laws any less arbitrary. As we have seen, in order for merit to be a productive criterion, some means of establishing the grounds of merit needs to be available. At present, the SMA provides little guidance on how to proceed here. But even if this problem could be overcome, and relevant guidance on merit is provided, Fasel acknowledges that feasibility can trump merit (p. 187), meaning that rights can be awarded to those species that we already privilege before they are awarded to those who need them most. Such a proposal is extremely problematic and may even stall further progress in the expansion of rights protections. For example, it has sometimes been said that granting rights to charismatic species can be an important first step in the award of rights to further, less loved, groups of animals. On this view, taking the first steps into a non-anthropocentric rights-based system can be the catalyst for further bolder moves. But such a claim is extremely speculative, and there are important reasons to be sceptical that this ‘domino effect’ will happen under the SMA. After all, the SMA reifies species membership. As such, we have ample grounds under the SMA to say, for example, that chimpanzees get fundamental rights because they belong to the *right* species, whereas chickens lose out because they belong to the *wrong* species. Put simply, the SMA gives us good reasons to assign rights to those non-humans we like, and to deny them to those that we do not. Rather than leading to a system that is less arbitrary than what we have now, then, we can say with some justification that it is equally as problematic: privileged species remain privileged, and vilified species remain vilified. This gives us reason to eschew species as the basis for assigning rights, and instead to focus on something that is morally relevant, like sentience, and promote this criterion as that which *should be* legally relevant.

Conclusion

In *More Equal than Others*, Fasel defends the SMA as the way to award and protect fundamental legal rights. This new approach, he claims, is superior to the MA and the AA, by escaping the flaws of each, while adopting their advantages. By assigning rights equally to members of specific species, Fasel claims that it can follow the MA in assigning rights beyond humanity, but like the AA, can also assign them equally to all members of a species, meaning that no individual members are left without protection. Fasel also claims that the SMA is superior to my own sentient rights approach on the basis that the latter will inevitably prioritise some animals over humans and will lead to the unequal attribution of rights on the basis that sentience comes in degrees. While there is much to admire in this innovative and rich new theory, ultimately I believe that it does not offer a better alternative to an approach grounded in sentience. This paper has defended a sentient rights approach from Fasel's critiques. It has argued that human rights losses are in fact a virtue of the sentient rights approach, and less out of keeping with societal values than might be supposed. It has further argued that the number of humans denied fundamental rights under a sentientist scheme would be limited to that tiny number of individuals who we can be sure are permanently and absolutely lacking in conscious experience. In response to the claim that sentience is scalar, and hence cannot be a firm foundation for a scheme of equal rights, the paper has proposed that the capacity for positive and negative experiences is in fact binary. And even if it is not, viewing it as a range property offers a superior basis for equal rights compared to other candidates. Finally, the paper has suggested that there are reasons to be wary of the SMA, and especially the way in which species are (and are not) selected for the attribution of rights. In particular, this approach carries the serious danger of cementing existing and problematic hierarchies: awarding fundamental rights to those charismatic and familiar animals which we like the most, and denying them to the most vulnerable and exploited.

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