

# Is It Lawful to Enslave the Unconsenting?

Katja Tiisala

## Introduction

One fundamental moral truth regards the wrongness of slavery. Sadly, slavery has not ended. The prevailing legal position of nonhuman animals parallels the historical enslavement of humans: contemporary societies treat nonhuman animals as property, which subjugates the interests of the nonhumans to the interests of their legal owners who use the nonhumans commercially or for other services (Francione, 2000, p. 98). The *Universal Declaration of Human Rights* (United Nations, 1948) condemns slavery universally in Article 4 by stating that "[n]o one shall be held in slavery or servitude." However, the declaration fails to recognise that "no one" should cover nonhuman individuals.

Conscious experience with a spectrum of feelings, sentience, occurs in all vertebrates and, at least, in some invertebrates (Horvath et al., 2013; Jones, 2013; Proctor, 2012). Researchers know more of agency in mammals and vertebrates than in invertebrates (Špinka, 2019). Still, evidence cumulates, for example, of insect agency (Perry et al., 2017). We can refer by animal rightist Tom Regan's (2004/1983, p. 243) concept *subject-of-a-life* to animals, nonhuman or human, who act intentionally and have a psychologically unified consciousness, memory and anticipation abilities with an experiential welfare. Nonhuman subjects-of-a-life are inherently valuable "*somebodies*, not *some things*", and equal to humans (Regan, 2003, p. 94).

Refuting somebody's moral right to freedom is a constitutive aspect of slavery. How slavery limits freedom allows several interpretations. Negative freedom means *freedom from* interfering constraints (Berlin, 1969). Some emphasise freedom as genuine *possibilities for* valuable actions (e.g. social participation) and conditions (e.g. being well-nourished) (e.g. Sen, 1993). In Immanuel Kant's (2010/1785, AK 4:447) ethical thinking, freedom denotes *acting according to moral constraints*, the moral law, that an autonomous moral agent constructs for themselves. In this case, free action originates from moral reasoning. Freedom can additionally mean exercising one's *preference autonomy*: acting intentionally to satisfy one's preferences, which does not require the Kantian moral agency, that is, an ability to assess actions through impartial moral justifications (Regan, 2004/1983, pp. 84-86). All subjects-of-a-life have preference autonomy (ibid., pp. 243, 382).

One way to value freedom is to emphasise *consent*: whether someone can influence their treatment and lead an autonomous life by giving or withholding consent. Consent should rely on correct and unbiased information and the decision of a competent individual in a context devoid of manipulation. *Informed consent* serves as the central criterion for ethical conduct in biomedical ethics and underscores a patient's autonomous choice (Beauchamp, 2011). Consent matters also in political philosophy; John Locke (1999/1689, 2.119-2.121) argues that political authority requires the consent of its subjects. In criminal law, the presence or absence of consent determines, for instance, whether an action counts as a rape (e.g. Bergelson, 2014).

This essay examines the moral duty to respect the consent of nonhuman subjects-of-a-life. In what I call the *guardian view*, nonhuman subjects-of-a-life are not competent to consent or not to certain treatment. In this view, their normative position parallels the alleged position of

children whose interests are guarded by moral agents, like parents. I argue that this picture of nonhuman subjects-of-a-life contradicts their preference autonomy and ability to form informed beliefs, including beliefs of their welfare. In my *consent view*, also nonhuman subjects-of-a-life can withhold or give consent in a restricted sense: they can decide based on their knowledge and experiences whether they prefer or dislike certain treatment momentarily or over a short period. Their behaviour expresses an acceptance or refusal of what they experience. Hence, their enslavement persists through (1) disrespecting their resistance on the microlevel of societal interaction and (2) dismissing the lack of their consent on the macrolevel of legislation. Disrespecting their consent *prima facie* violates their equal moral rights to which legislation should commit.

### Spontaneous consenting

“ - - one cannot treat the supposed animality of the animal without treating the question of the response, and of what *responding* means.”

(Derrida, 2008, p. 33)

Nonhuman subjects-of-a-life cannot understand long-range, non-immediate risks related, for instance, to medical intervention. They cannot be sufficiently informed of complex risks through human language.<sup>1</sup> No one can consent to something they do not understand. Therefore, I agree nonhuman subjects-of-a-life cannot consent to the long-term impacts of their treatment or complex risks. Nonetheless, they often have reliable knowledge of how certain treatment influences their welfare in the short run; otherwise, it would be miraculous how

---

<sup>1</sup> Regan thinks that giving informed consent requires sufficient abilities in human language that possibly all non-humans lack (Regan, 1991, pp. 40–43); he rejects that nonhumans could consent to scientific experiments (Regan, 2004/1983, p. 381) or sex with humans (Regan, 2003, p. 98).

nonhuman subjects-of-a-life, especially free ones dwelling in their own habitats, survive without assistance.

We can distinguish *performative consent* and *attitudinal consent* (e.g. Bergelson, 2014). The previous requires that an action or utterance expresses consent, which is observable from an external viewpoint. The latter locates consent in the internal mental states of a subject and depends on affirmative or objecting attitudes. The hybrid account holds both the internal state and its expression as necessary aspects of consent. (Ibid., pp. 172-173.)

In my consent view, attitudinal consent is decisive because it regards a subject's will. Performative consent matters, still, as mandatorily requested evidence of the will. Thus, only the hybrid account protects nonhuman subjects-of-a-life reliably: if either attitudinal or performative consent is insufficient, the individual withholds consent. Nonhuman subjects-of-a-life are socially capable individuals who express their feelings and wishes for other animals, including humans, with whom they interact, although the nonhumans do not use words of human language. Their non-verbal behaviour and communication, often containing species-specific repertoire, imply performative consent or its absence. On the other hand, because they have preferences and feelings, their internal states represent attitudinal consent or lack of it. Their internal state usually interlinks with and motivates their externally observable actions. Hence, nonhuman consent consists of mental states and their expression: either not minding the action or actively communicating cheerful participation in it. Resistance is revealed by movements (e.g. escaping, physical protests, protective gestures), facial expressions, embodied tension, aggression or vocalisation (see also Healey and Pepper, 2020; Hediger, 2011).

A subject-of-a-life must be in a competent state to give or decline consent. For instance, lack of resistance due to anaesthesia or fear does not entail valid consent. Unfair options or manipulation undermine the validity of consent. Enticing a nonhuman into a cage or slaughterhouse truck by food, a threat of violence or eliminating alternative action opportunities does not count as getting their consent. Only their voluntary and sufficiently informed actions can count (Healey and Pepper, 2020).

Some might object that consent involves exercising moral agency and understanding rights and duties. Richard Healey and Angie Pepper (2020) argue that although nonhuman animals can assent and dissent, they cannot consent. These authors understand consent as distinct from assent by seeing consenting as a normative action that intentionally aims at changing duties and rights in certain context. For example, consenting to surgery means the doctor does not violate your rights by operating on your body. Consent cancels rights against interference *purposely* in the context. Because nonhumans do not understand moral rights and duties, their choices represent only assent or dissent. (Ibid.) Healey and Pepper use the term ‘assent’ for what I explore as consent.

It is beyond this essay to analyse whether the separate concept of assent is apt or whether the concept of consent serves the job also in the case of the nonhumans. However, Healey’s and Pepper’s distinction between assent and consent remains unclear at the level of spontaneous individual interaction that lacks time for moral contemplation. Consent in mundane social interaction (e.g. having a walk together), even in the case of moral agents, arguably does not always aspire to change the normative order of duties and rights. Nonhuman subjects-of-a-life (e.g. dogs) can present or withhold their consent through expressing preferences in immediate interaction. We can call this *spontaneous consent* that differs from *deliberate consent*

ensuing from time-consuming moral reflection with moral concepts instead of embodied, spontaneous social engaging or disengaging. If casual interaction between moral agents embeds giving or declining spontaneous consent, so does spontaneous nonhuman interaction. Moreover, moral agents arguably estimate whether they consent, for instance, to medical risks based on their vulnerability as sentient animals who may suffer and be deprived of good health or life. In this sense, all acts of giving or withholding consent rely on one's sentience concomitant with vulnerability to harmful actions (see Tiisala, 2020).

It might even be arguable that nonhuman subjects-of-a-life negotiate normative rules when they interact with humans. When a nonhuman resists human domination that subjugates them to obeying, they may intentionally act to transform the rules and practices of what is permitted, forbidden and owed to them (see Hribal, 2007, p. 103). Think, for instance, a disobedient donkey who refuses to carry a heavy load: by resisting the donkey appears to say 'no' in the sense that using her body for that purpose is not permitted. Although the act does not ensue from impartial moral reasoning, it corresponds to a moral agent spontaneously saying 'no' for carrying someone's heavy burden. Additionally, I see, unlike Healey and Pepper (2020), that consent rather changes the *content of one's welfare-interests*, protected by the right to freedom from harm, than waives the right to freedom from interference. Consent constitutively changes what belongs to an animal's welfare-interests of which consideration is a *prima facie* duty.

## Duty to respect consent

I argue that respecting consent is a *prima facie* moral duty because respecting consent protects the welfare of subjects-of-a-life (nonhuman or human). Respecting the choices of a

nonhuman agent can contribute instrumentally to their welfare, albeit getting what one wants may also itself be a part of their good (Healey and Pepper, 2020).

Regan defines the welfare of subjects-of-a-life in this way: “they live well to the degree to which (1) they pursue and obtain what they prefer, (2) they take satisfaction in pursuing and getting what they prefer, and (3) what they pursue and obtain is in their interests” (Regan 2004/1983, p. 93). Thus, subjects-of-a-life are harmed, that is, their welfare is diminished, when they cannot pursue and obtain satisfaction of their preferences, they cannot feel satisfaction of this, or their preference satisfaction contradicts what benefits them. Lack of freedom prevents satisfaction from choosing well, and unsatisfied preferences imply frustration (Regan, 2004/1983, pp. 91-92). Missing control over one’s life may traumatise a nonhuman subject-of-a-life (Mallonee and Joslin, 2004; see also Ferdowsian and Merskin, 2012), which supports including preference autonomy as an irreplaceable component of their welfare.

Subjects-of-a-life actively avoid painful injuries and need deprivation. They seek satisfaction of their biological, social and psychological needs, like enjoying social relationships, rest, food, shelter and water (Regan, 2004/1983, pp. 88-90). I think that sentience helps them to prefer need satisfaction and avoid need dissatisfaction: need frustration feels intrinsically bad, whereas need satisfaction rewards by happiness, relaxed calmness and joy. Nonhuman subjects-of-a-life are the best experts regarding their feelings and preferences since mental states are private. Others do not have direct access to one’s mind. I argue, hence, that nonhuman subjects-of-a-life have an epistemic privilege for estimating their welfare through mental-state-mediated knowledge:

The argument from mental-state-mediated knowledge

1. Only nonhuman subjects-of-a-life know their feelings and preferences through direct access to them.
2. Knowing one's feelings and preferences through direct access to them implies mental-state-mediated knowledge of one's welfare.
3. Nonhuman subjects-of-a-life can use mental-state-mediated knowledge in choosing actions.
4. Therefore, only nonhuman subjects-of-a-life can use mental-state-mediated knowledge of their welfare in choosing actions.

The mental-state-mediated knowledge of one's welfare consists of direct knowledge of feelings and preferences and indirect knowledge of needs. Needs are objective (e.g. Thomson, 2005). Their satisfaction is observable from outside at least to some extent, for instance through a medical examination of one's nutritional state. However, psychological needs, like feeling safe, depend constitutively on one's feelings.

Mental-state-mediated knowledge of one's welfare facilitates welfare-sensitive actions, because (1) feelings and preference satisfaction are themselves crucial parts of the welfare of subjects-of-a-life, and (2) feelings indicate in many cases more reliably one's embodied state and needs than external observation. For instance, feelings of cold or thirst serve survival by having certain intensity that reflects how urgent and vital it is to get warmth or water. Nonhuman subjects-of-a-life are the best experts on the experienced aspects of their welfare. However, they may lack relevant knowledge of, for instance, the long-term benefits of a painful medical treatment (e.g. cleaning a wound), for which reason their insights of their good are not always conclusive.

The treatment of subjects-of-a-life "matters to them" (e.g. Regan, 2004/1983, p. xvi), and it is *prima facie* wrong to harm them (ibid., p. 262). Consequently, they should *prima facie* be



free to exercise their preference autonomy as a part of their good life. The preference autonomy of subjects-of-a-life entails that moral agents can wrongfully coerce these creatures against their right to freedom (ibid., pp. 381-382). I argue that this *prima facie* duty not to intervene in the liberty of subjects-of-a-life, understood as their exercise of preference autonomy, entails a *prima facie* duty to solicit and respect their spontaneous consent. Requesting their spontaneous consent means they must have a set of alternative action opportunities that are in their interests and all relevant information they can understand. In addition, it means listening to and respecting how they respond in direct interaction.

The *prima facie* duty can be overridden by valid moral principles for the sake of protecting the agent themselves or others from severe harm. Sometimes *paternalism* is permissible in the sense of interfering in a nonhuman's actions for the sake of protecting their own welfare (Regan, 2004/1983, p. 107). Protecting a nonhuman is reasonable when they lack relevant knowledge or understanding of the detrimental effects of certain actions (Healey and Pepper, 2020). Additionally, protecting others can justify interference. For example, moral agents should interfere in a lion's predation on a human child (Regan 2004/1983, p. xxxvi).

## Macrolevel legislation and microlevel consent

Respecting consent can occur both on the *microlevel* and *macrolevel* of a society. By microlevel, I mean what is also called informal or everyday politics where individuals negotiate the boundaries of what is acceptable in their interaction. By macrolevel, I mean formal politics like legislation and decision-making on policies. (See Meijer, 2016, pp. 66-67.) On the microlevel of spontaneous and direct interaction, resistance indicates that something is not permitted unless there are good reasons to intervene in the name of paternalism or protecting

someone else from severe harm. On the macrolevel of society, I argue that laws and practices should converge with microlevel respect for spontaneous consent.

Thus, when nonhuman subjects-of-a-life express resistance towards their legal treatment, the law is morally unjustified unless protecting the nonhumans themselves or others justifies the treatment. The enslavement, disrespectful and unequal treatment of the nonhumans would be wrong even if there was no evidence of their resistance (see Regan, 2004/1983, chap. 9).

Their unconsenting, for instance, in vivisection and the flesh industry, however, is *sufficient* to demonstrate that laws permitting these practices are *prima facie* morally unlawful. The problem of the guardian view is, hence, that it ignores how the nonhumans *themselves* give or withhold spontaneous consent on the microlevel of society where the justifiability of laws regarding them materialises.

Plentiful examples vindicate that nonhuman subjects-of-a-life refuse to consent to enslavement. For instance, the nonhumans try to escape from slaughterhouses or hesitate to enter the abattoir corridor leading to death. Consequently, violence and careful design of abattoirs are used to murder billions of animals. Like critical disability theorist Sunaura Taylor (2016, pp. 66–67) discusses, a cow trying to turn back in terror and escape from a slaughterhouse expresses agency and despair. The cow would not like to walk along the death track. (Ibid.) The cow clearly declines any consent to being slaughtered. Another evident example is the Draize test where researchers force rabbits by mechanical restraining to stay motionless while dropping hazardous chemicals into the rabbits' eyes. The use of mechanical force would not make sense if the rabbits did not resist their harming if they could. Restraining the rabbits prevents them from expressing by movement the lack of their consent. However, the need to force

them to stay still when their eyes are destroyed indicates suffering and a lack of attitudinal consent.

Just laws restrict the actions of moral agents for the sake of preventing harm to others (Feinberg, 1984; Mill, 2009/1859, p. 129). The burden of justification should fall on those who intend to violate someone's declined consent. Respecting everyone equally leads to *abolitionism*, eradicating the slavery of anyone, including nonhuman subjects-of-a-life (and other sentient beings, see Tiisala, 2020). Animal rightist Gary Francione (2004, p. 134) has interpreted abolitionism as abandoning the property status of nonhuman animals and pursuing a world where all sentient nonhumans dwell without human contact in the "wild".

My analysis of consent undermines Francione's vision of abolitionism. Respect entails eradicating disrespectful and harmful practices, like captivity and slaughtering, but not beneficial and consensual nonhuman-human relationships: different forms of friendship and mutualism. Humans are permitted to form respectful friendships with nonhuman subjects-of-a-life. A genuine friendship relies on shared spontaneous consent and benefit. Abolitionist animal rights do not forbid all interspecies interaction but only disrespectful and harmful exploitation (see Regan, 2004/1983, pp. xxxii, 349). Nonhuman-human interaction may sometimes be in a nonhuman animal's interests, in which case disrupting the interaction would violate the nonhuman's rights.

## Conclusions

Nonhuman subjects-of-a-life have preference autonomy that entails a *prima facie* duty to respect their spontaneous consent and right to freedom. Narrowing harmfully the range of their possible actions means their consent is not fairly requested. Keeping them in captivity against

their will, murdering them, intruding in their bodies and causing pain are morally wrongful practices. All these practices violate our moral duties and the equal moral rights of the unfortunate nonhumans. The resistance of the nonhumans expresses a lack of spontaneous consent, and legislation should respect their consenting or unconsenting will.

## References

- Beauchamp, T.L., 2011. Informed consent: its history, meaning, and present challenges. *Camb Q Healthc Ethics* 20, 515–523. <https://doi.org/10.1017/S0963180111000259>
- Bergelson, V., 2014. The meaning of consent. *Ohio State Journal of Criminal Law* 12, 171–180.
- Berlin, I., 1969. Two concepts of liberty, in: *Four Essays on Liberty*. Clarendon Press, Oxford, pp. 121–54, 169–72.
- Derrida, J., 2008. The animal that therefore I am, ACLS Humanities E-Book. Fordham University Press, New York. Transl. Wills, D., Ed. Mallet, M.-L.
- Feinberg, J., 1984. The moral limits of the criminal law. Vol. 1, Harm to others. Oxford University Press, New York.
- Ferdowsian, H., Merskin, D., 2012. Parallels in sources of trauma, pain, distress, and suffering in humans and nonhuman animals. *Journal of Trauma & Dissociation* 13, 448–468. <https://doi.org/10.1080/15299732.2011.652346>
- Francione, G.L., 2004. Animals—Property or Persons?, in: Sunstein, C.R., Nussbaum, M.C. (Eds.), *Animal Rights: Current Debates and New Directions*. Oxford University Press, Oxford, pp. 108–142. <https://doi.org/10.1093/acprof:oso/9780195305104.003.0006>
- Francione, G.L., 2000. *Introduction to animal rights: your child or the dog?* Temple University Press, Philadelphia.
- Healey, R., Pepper, A., 2020. Interspecies justice: agency, self-determination, and assent. *Philos Stud*. <https://doi.org/10.1007/s11098-020-01472-5>
- Hediger, H., 2011. The animal's expression, in: Maran, T., Martinelli, D., Turovski, A. (Eds.), *Readings in Zoosemiotics, Semiotics, Communication and Cognition*. De Gruyter Mouton, Inc., Berlin; Boston, pp. 123–140.
- Horvath, K., Angeletti, D., Nascetti, G., Carere, C., 2013. Invertebrate welfare: an overlooked issue. *Ann Ist Super Sanità* 49, 9–17. [https://doi.org/10.4415/ANN\\_13\\_01\\_04](https://doi.org/10.4415/ANN_13_01_04)
- Hribal, J.C., 2007. Animals, agency, and class: writing the history of animals from below. *Human Ecology Review* 14, 101–112.
- Jones, R.C., 2013. Science, sentience, and animal welfare. *Biol Philos* 28, 1–30. <https://doi.org/10.1007/s10539-012-9351-1>
- Kant, I., 2010/1785. *Groundwork of the metaphysics of morals*. Cambridge University Press, Cambridge. Transl. & Ed. Gregor, M.
- Locke, J., 1999/1689. *Two treatises of government*. McMaster University Archive of the History of Economic Thought., Hamilton, Ont.
- Mallonee, J.S., Joslin, P., 2004. Traumatic stress disorder observed in an adult wild captive wolf (*canis lupus*). *Journal of Applied Animal Welfare Science* 7, 107–126. [https://doi.org/10.1207/s15327604jaws0702\\_3](https://doi.org/10.1207/s15327604jaws0702_3)

- Meijer, E., 2016. Interspecies democracies, in: Bovenkerk, B., Keulartz, J. (Eds.), *Animal Ethics in the Age of Humans: Blurring Boundaries in Human-Animal Relationships*, The International Library of Environmental, Agricultural and Food Ethics 23. Springer, Cham, pp. 53–72.
- Mill, J.S., 2009/1859. On liberty. Floating Press, Auckland, New Zealand.
- Perry, C.J., Barron, A.B., Chittka, L., 2017. The frontiers of insect cognition. *Current Opinion in Behavioral Sciences* 16, 111–118. <https://doi.org/10.1016/j.cobeha.2017.05.011>
- Proctor, H., 2012. Animal sentience: where are we and where are we heading? *Animals* 2, 628–639. <https://doi.org/10.3390/ani2040628>
- Regan, T., 2004/1983. *The case for animal rights*, 2nd ed. University of California Press, Berkeley.
- Regan, T., 2003. *Animal rights, human wrongs: an introduction to moral philosophy*. Rowman & Littlefield Publishers, Lanham, MD.
- Regan, T., 1991. Ill-gotten gains, in: *The Three Generation*. Temple University Press, Philadelphia, pp. 31–59.
- Sen, A., 1993. Capability and well-being, in: Nussbaum, M.C., Sen, A. (Eds.), *The Quality of Life*, WIDER Studies in Development Economics. Clarendon Press, Oxford, pp. 30–53. <https://doi.org/10.1093/0198287976.001.0001>
- Špinka, M., 2019. Animal agency, animal awareness and animal welfare. *Animal Welfare* 28, 11–20. <https://doi.org/10.7120/09627286.28.1.011>
- Taylor, S., 2016. *Beasts of burden: animal and disability liberation*. The New Press, New York.
- Thomson, G., 2005. Fundamental needs. *Royal Institute of Philosophy Supplement* 57, 175–186. <http://dx.doi.org.libproxy.helsinki.fi/10.1017/S1358246105057097>
- Tiisala, K., 2020. Sentience draws the line: the sufficient and necessary criterion for equal rights in Tom Regan’s animal ethics (Master’s thesis). University of Helsinki, Helsinki. <http://hdl.handle.net/10138/323797>
- United Nations, 1948. *The universal declaration of human rights*. <https://www.un.org/en/universal-declaration-human-rights/index.html> (20.2.2021)