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Persons or Property – Freedom and the Legal Status of Animals

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Abstract

Is freedom a plausible political value for animals? If so, does this imply that animals are owed legal personhood rights or can animals be free but remain human property? Drawing on different conceptions of freedom, I will argue that while positive freedom, libertarian self-ownership, and republican freedom are not plausible political values for animals, liberal ‘option-freedom’ is. However, because such option-freedom is in principle compatible with different legal statuses, animal freedom does not conceptually imply a right to legal self-ownership. Nonetheless, a concern for animal option-freedom means that humans do have a *pro tanto* duty of non-interference. Arguments familiar from the liberal tradition moreover imply that such a duty speaks for drastic reforms of existing animal law. But it does not imply wholesale abolitionism: it neither rules out positive duties towards animals nor means that we should abandon all interactions with animals.

Keywords

animal liberation – freedom – animal ethics – abolitionism – self-ownership – property rights

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1 Animal Law: Regulation or Abolition?

Is socio-political freedom a relevant value for non-human animals and, if so, what does this imply for their legal status? In particular, does animal freedom imply that non-human animals (henceforth ‘animals’) should have legal personhood rights or can they be liberated and still remain human property? These are the questions to be discussed in this paper. Before doing so, let me first provide some context for this discussion.

Current US-American animal law fails to protect the most basic interests of those animals with which humans interact. For a number of reasons, the main areas of legal protection, the Animal Welfare Act and anti-cruelty laws, do not protect the vast majority of animals. Farm animals have virtually no legal protection, even though they make up the vast majority of all animals with whom humans interact (in 2001, they made up 98 percent) (Wolfson and Sullivan 2005). Similarly, while anti-cruelty laws are supposed to protect animals used in research facilities, they exclude mice, rats, and birds which are around 90 percent of the animals used for experimentation (Schaffner 2011, 74). Excluding the vast majority of all animals by itself already undermines the purpose of these laws. But even for those animals that do fall under the protection of these laws, such protection is much stronger on paper than in reality. Instead of bright-line rules, most of these laws are rules of reason including qualifications such as ‘unnecessary,’ ‘to the extent possible,’ and ‘reasonable.’ The discretion that comes with these terms is often used in a way that prioritizes human over animal interests (Schaffner 2011, 174; Francione 2005). Finally, an enforcement gap makes actual legal protection very ineffective. Animals do not have standing to bring suits and standing is unavailable to private individuals unless they meet very stringent requirements. The enforcement thus mainly rests with public entities which often lack necessary resources to effectively enforce these laws (Sunstein 2004; Schaffner 2011, 69–70).¹

The question now is where to go from here? What are the reforms, additions, and changes to animal law that should be advocated (at least by those who believe that animal interests matter)? The debate on this issue is often characterized between those who favor stronger *regulation* and those who demand *abolition* (Francione and Garner 2010; Donaldson and Kymlicka 2011,

1 Of course, other countries, such as the UK, have more stringent animal welfare laws (Radford 2001). However, if we take animal interests seriously, even those countries do not do nearly enough. This is in some sense an assumption of this paper, because I will operate *within* debates about animal ethics and politics. I will not defend the idea that animal interests matter in themselves nor try to defuse standard speciesist objections.

3–10). These camps disagree at various junctures. One important source of disagreement is about what the best *strategy* to improve the lives of animals is. Regulationists, as we might call them, typically believe that some improvement is better than none and might help raise awareness that could generate further positive change. Some abolitionists (though not all) disagree. Gary Francione argues that endorsing piecemeal change in the form of welfare legislation will in fact prevent more radical change (Francione 2005, 2010, 2013; Francione and Garner 2010).

Besides this ‘strategic’ question, there is also a related theoretical source of disagreement between the two camps. Regulationists (and ‘welfarists’) usually hold that it is in principle morally permissible to use animals for human purposes as long as their welfare interests are given sufficient weight. They typically also believe that it is in principle possible to respect the interests of animals without giving them personhood rights. Abolitionists, on the other hand, hold that humans are not morally permitted to use and own animals. Necessarily, animals ought to have legal self-ownership rights. This disagreement is not merely about whether a certain legal status is instrumentally good to improve animal welfare. Consider the analogy with slavery. A regulationist approach to slavery would be highly implausible. It would be absurd to aim for more ‘humane forms of slavery.’ So, is there an important difference between the slavery case and those involving animals? Can it ever be morally permissible to own and use animals?

One of the central arguments for the theoretical abolitionist position is an argument *from freedom*: to liberate animals in the sense of making animals free is incompatible with animals being the property of humans.² Being someone else’s property and being free are mutually incompatible. To liberate animals, we should abandon their status as property and give them personhood rights. Here we should distinguish two ways to make such an argument:

The Conceptual Argument: Animals should have freedom and this necessarily implies that they should not be human property. For one cannot be free and be someone else’s property at the same time.

The Empirical Argument: Animals should have freedom. It is unlikely that animal freedom is suitably protected, if animals remain human property.

2 The two main other theoretical arguments are: first, not having self-ownership rights is incompatible with the dignity of animals; second, treating sentient beings as property is incompatible with our duty of respect, because we ought to treat sentient beings as ends and not as means. Cochrane discusses these arguments and provides strong critiques of both (Cochrane 2012, 143–154).

In sections 2 to 5, I will discuss different ways to defend the Conceptual Argument by analyzing different ways to understand ‘freedom.’ Only in the last section will I come back to the Empirical Argument. It will also become clear in the process that these two types of arguments also require different types of freedom and that different theories assign differing importance to freedom as a value.³ Excluding the metaphysical notion of ‘free will,’ I will distinguish four types of theories of freedom. First, there is freedom in the ‘positive’ sense, according to which being free means leading a life according to one’s ‘real self’ (sec. 2). Second, ‘freedom’ as used by libertarians is (principally) about moral rights to self-ownership (sec. 3). Third, option-freedom – or freedom in the traditional liberal sense – is about having a certain range of options or opportunities (sec. 4). Fourth, republican freedom requires not merely the absence of interference but also that one be suitably protected against other people’s arbitrary power (sec. 5).

To see whether the Conceptual Argument works, I will mainly probe the following three questions when discussing different types of theories of freedom:

- (i) Can this kind of freedom plausibly be extended to include animals?
- (ii) Do animals have an interest in this kind of freedom?⁴
- (iii) Does this kind of freedom imply that one cannot be free whilst being someone else’s property?

If a type of freedom supports the Conceptual Argument, the answers to the above questions will all be positive. I will argue that out of the four types of theories discussed, freedom in the option-sense is the *only* relevant value for animals. However, option-freedom does not conceptually imply having a certain legal status. Therefore, the Conceptual Argument fails: animals can in principle be free without having legal personhood rights. In the final section,

3 For example, questions that will arise in the process of discussing the Conceptual and the Empirical Argument are whether freedom is the only relevant value, has priority over other values, or is just one value among others. Answers to these questions depend, among other things, on the kind of theory of freedom we accept. On libertarian theories of freedom, for example, a respect for freedom is typically thought to generate deontological duties that trump other considerations. Pettit’s republican theory assumes that freedom is the only relevant value to structure institutions (Pettit 2014). This is different from most liberal theories of freedom which typically assume that freedom is only one value among others. I will return to this issue in section 6.

4 These conditions, however, are only necessary and not sufficient. If a theory of freedom is independently implausible – for both the human and the animal case – then it would not support the Conceptual Argument either.

I will discuss what a concern for animal option-freedom implies for animal law and return to the Empirical Argument.

The paper makes various substantial contributions to debates in animal ethics and politics. For example, it shows, first, that animals do have an interest in freedom and explains what kind of animal freedom we should be concerned with exactly. Second, contrary to what is commonly assumed, respecting this interest does not conceptually imply personhood rights. Third, contrary to what is often assumed, respecting animal freedom does not imply that we should leave animals alone. Besides these more specific contributions, an important aim of this paper is to bring together two debates in political theory which so far have been rather disconnected: a discussion on the nature and value of socio-political freedom on one side and discussions of animal liberation on the other.⁵ ‘Freedom’ is a complex and connotative term with various usages. Besides providing new, substantial arguments, I therefore hope that this paper will also improve the analytical clarity of debates around animal liberation.

2 Positive Freedom

Isaiah Berlin famously distinguished between positive and negative liberty (though I will continue using the word ‘freedom’ instead of ‘liberty’ which I take to be interchangeable):

The ‘positive’ sense of the word ‘liberty’ derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men’s acts of will.

BERLIN 1969, 34

The term ‘positive freedom’ has been used in various ways in the literature (Miller 2006). One usage of the term refers to freedom in a psychological sense or freedom as an exercise-concept, as Charles Taylor describes it (Taylor 1979). To be free on this reading requires acting according to one’s ‘real self.’

⁵ One exception is Cochrane’s work (Cochrane 2009a, 2009b, 2012). He argues that animals do not have an interest in freedom and that abolitionism is therefore false. I will engage with his work at various stages in this paper. Contrary to Cochrane, I will argue that we should be concerned with animal freedom but that this does not imply abolitionism, because the Conceptual Argument is unsound.

Conceptions of psychological freedom are not so much about the external range of options that a person has but about how a person acts and whether her acts are the result of pro-attitudes that are authentically her own.

The first family of theories of positive freedom sees freedom as autonomy or authenticity. Autonomy is considered a content-neutral ideal by such theories. This means that one's pro-attitudes can be autonomous whatever their content, as long as they fulfill certain structural or 'genetic' criteria (Frankfurt 1971; Christman 1991, 2005).

However, the content-neutral ideal of positive freedom does not seem suitable as a political goal to be applied to non-human animals.

First, there is great empirical and conceptual disagreement about how far animals can be autonomous or not. Most writers agree that it makes sense to ascribe sentience, consciousness, and interests to many non-human animals. There is, however, disagreement about whether non-human animals – and, if so, which ones – can be autonomous in any stronger notion of the term.⁶

Second, this disagreement aside, there is independent reason why positive freedom in the autonomy sense is ill-suited as a *goal* for public policy when applied to animals. We do not know exactly what would be required for animals to have that capacity nor do we know what we would have to do to help animals become more authentic or autonomous in their preferences. The usual proposals for humans – such as providing emancipatory education, doing away with oppressive ideologies and gender norms, and so on – do not seem transferable to non-human animals. Positive freedom in the sense of autonomy fails to generate any guidelines for our relations with non-human animals.

But there is a different way to understand 'positive freedom.' Instead of a content-neutral understanding of autonomy, we could posit a *substantial* criterion of what it means to live according to one's real self. Positive freedom in this sense requires that one live a certain type of life. Paul Taylor, for example, argues that 'to be free ... is to be able to pursue one's ends' and that this 'general idea of freedom ... applies to nonhuman living things as well as to persons' (Taylor 2011, 108). Taylor holds that for non-human animals freedom to pursue one's ends is the freedom to pursue one's *natural* functionings and *biological* ends.

While this more substantive criterion of positive freedom seems applicable to non-human animals, we should doubt its plausibility as a political ideal. Berlin famously argued that (substantial) positive freedom is unsuitable as a political ideal, because it can easily be used to justify restrictions on people's

6 Regan therefore suggests two different notions of autonomy, a Kantian idea of autonomy on the one side and a preference-notion on the other (Regan 1983, 84–86).

freedom, and even proper tyranny, in the name of freedom itself (Berlin 1969).⁷ A substantial positive rather than a negative ideal of freedom is thus more likely to be exploited by the powerful to justify restrictions that are not in the people's interests or against their will. If Berlin is correct, we might suspect a similar problem when applying the concept to human-animal relationships. But there is another, more straightforward problem with invoking natural functionings and biological ends specifically. As Cochrane argues,

...to say that the life of an animal (or other organisms) is better when it acts in accordance with its natural functionings is to impose a *perfectionist* value on that individual. To make perfectionist valuations is to talk about what makes an individual a better or worse example of its kind. But while animals (and other organisms) might be better examples of their species when they exercise their natural functionings, this does not in itself tell us whether their lives are better *for them*. Thus the fundamental mistake that proponents of these functioning arguments make is to conflate an entity's biological functionings with an entity's own good.

COCHRANE 2009a, 672

Cochrane also offers an instructive example. A stag that engages in fights with other stags over territory and mates might plausibly be described as leading a more 'natural life' than one which does not. But it seems implausible to say that the badly wounded stags that lose in such fights lead better lives as a result of engaging in such fights (Cochrane 2009a, 672).

None of this implies, of course, that different species do not need different things to lead a good life – despite significant overlap, a pig's preferences and needs are rather different from mine. But that different species have different biological needs does not entail that a good life for individual human and non-human animals consists in leading the 'most natural life.'

Because positive freedom is not a suitable ideal for animals, positive freedom fails to support the Conceptual Argument.

3 Freedom as Self-Ownership

Positive freedom, we have seen, is not a plausible ideal for non-human animals. But maybe there is a different and more direct route to the Conceptual

⁷ Christman argues that Berlin's arguments might work against *substantial* notions of positive freedom but not so well against structural or formal notions of autonomy (Christman 2005).

Argument via the libertarian concept of self-ownership. Freedom in this libertarian sense implies holding rights over oneself. Cohen summarizes self-ownership like this:

Each person is the morally rightful owner of himself. He possesses over himself, as a matter of moral right, all those rights a slaveholder has over a complete chattel slave as a matter of legal right, and he is entitled morally speaking, to dispose over himself in the way such a slaveholder is entitled, legally speaking, to dispose over his slaves.

COHEN 1986, 109

Libertarians across the board hold that individuals have a right to self-ownership, although they disagree about the right to ownership of external resources (Nozick 1974; Narveson 2001; Mack 1995; Otsuka 2003; Steiner 1994; Vallentyne and Steiner 2000; Vallentyne, Steiner, and Otsuka 2005; Fried 2004).⁸ Note that libertarian self-ownership is an inherently deontological notion. Ownership over oneself implies duties on the part of others not to interfere with this right. Self-ownership rights are ‘trumps’ such that they protect people from being interfered with even in situations in which doing so would increase the common good.

If freedom as self-ownership is both plausible in itself and plausibly applied to non-human animals, we would have straightforward support for the Conceptual Argument: animal freedom would imply moral rights to legal self-ownership rights.⁹ Animal freedom would be incompatible with treating animals as human property. However, I think there are two strong reasons why this argument fails to support the Conceptual Argument in a non-question begging way.

First, intuitively, self-ownership and freedom are not one and the same thing. These two notions can come apart. On the one hand, self-ownership views account for some of the intuitive prescriptions that a theory of freedom

8 The right to self-ownership includes a number of more specific rights, such as the right to use one's mind and body as one sees fit, a right not to have one's body or mind used, a right to compensation if one is used without permission, a right of transfer of one's body, and possibly others. As there are a number of different types of property, we can also understand self-ownership in different ways (Vallentyne and van der Vossen 2014). The precise content of self-ownership can thus vary depending on one's theory.

9 Nozick, the most famous proponent of libertarian freedom, offers a discussion of animal ethics that ends inconclusively (Nozick 1974, 35–42). Cochrane argues that, even if self-ownership is a plausible ideal of human freedom, it is not valuable for animals (Cochrane 2009b).

should maybe cover. Intuitively, a right to bodily integrity, for example, seems quite a plausible component of freedom. On the other hand, however, the idea of self-ownership is also in stark conflict with other important intuitions and beliefs we have about what it means to be free. A right to use one's body and mind as one wants to does not guarantee that one has a certain range – or any range – of options. We can imagine a situation in which a person has self-ownership rights but nowhere to place her body, because everything else is owned by other individuals who have the right to exclude that person. A common objection to freedom as self-ownership is thus that in such situations, a person owns herself but clearly lacks the freedom to lead her life the way she wants to in any meaningful way (Sobel 2012).¹⁰

This problem is related to a different critique first made by G.A. Cohen. Cohen argues that if we define freedom in terms of rights, we use a *moralized* theory of freedom (Cohen 1981, 1995, chaps. 2–4). Because libertarian theories define freedom in terms of moral rights, Cohen objects that 'freedom' fails to do any independent normative work. Ian Carter takes up Cohen's point:

By 'moralizing' the notion of freedom – by making the meaning of freedom depend wholly on that of another good – one indeed disposes completely of the need to talk about freedom in any literal sense. Freedom 'falls out of the picture': it gets sacrificed as an ideal, and then defined in terms of another ideal merely to conceal the fact.¹¹

CARTER 1999, 71

Libertarians like Nozick commonly define freedom in terms of moral rights. Therefore, applying this concept to animals does not give us independent support for the Conceptual Argument: this is not an argument *from freedom* anymore, because the definition of freedom in terms of self-ownership begs the question as to whether freedom requires self-ownership.

10 Left-libertarians argue that a right to self-ownership has to be combined with a right to equal ownership of external resources (in one way or another). But this is usually not presented as an argument about freedom but justice. The only exception in this respect is Steiner (Steiner 1994, 1974b). Shnayderman presents an argument as to why Steiner's position is not – despite his own intentions – about freedom (Shnayderman 2013a). Carter also argues against Steiner's assumption that the overall sum of freedom is always constant. This assumption is important to Steiner's left-libertarian project according to which everyone has a right to equal freedom (Carter 1999, 259–264).

11 The expression Carter quotes is from Cohen (1988, 296).

4 Option-Freedom

We have seen that positive freedom is not a plausible ideal to guide our relations with non-human animals. The traditional libertarian view of freedom, it was argued, does not provide an independent argument for the claim that freedom implies self-ownership. Let us now turn to theories that understand freedom to be about the range of a person's *options*. The classic question these theories try to answer is – metaphorically speaking – how many doors are open to a person and how many are closed? Following Pettit, I will refer to such theories as being about *option-freedom* (Pettit 2003, 2007).

The traditional liberal – or ‘negative’ – view of option-freedom sees freedom as the absence of interference (Berlin 1969; Miller 1983; Carter 1999; Steiner 1974a, 1994; Kristjánsson 1996). It is both necessary and sufficient for being free that one is free from external, *interpersonal* constraints.¹² While seeing freedom as non-interference might correctly be described as, historically, the standard view in liberal thought, a significant number of theorists these days take a different and somewhat stronger view of option-freedom. They hold that besides the absence of interpersonally imposed constraints, one requires also the internal ability as well as necessary external resources to do something. Real freedom requires actual abilities – or ‘capabilities’ in Amartya Sen’s terms – to do things (Sen 1988, 1991, 1999; Parijs 1997; Kramer 2003; Cohen 2011, 196–197; Schmidt 2016). For the argument of this paper, it does not matter so much which theory of option-freedom is the correct one. So, instead, let us discuss whether *any type* of option-freedom supports the Conceptual Argument.

The first of the three questions posed in section 1 was whether a specific ideal of freedom can plausibly be extended to include animals. Is this the case for option-freedom? Here, I think the answer is clearly yes, animals can have more or less option-freedom. I think linguistic usage reflects this. The Beatles sung about being ‘free as a bird’ and millions watched the heart-wrenching story about a whale in the film ‘Free Willy.’ While it seems pointless to ask whether telephones or stones should have option-freedom – for what would it even mean for a telephone to be unfree – the question does not seem nonsensical for animals at all. As Taylor writes:

12 There is of course some variety within this subset of theories, because different theorists give somewhat different answers to the question as to which obstacles to a person's actions count as constraints on her freedom and which ones count as mere ‘ability-constraints’ (Day 1977; Miller 1983; Kramer 2003; Kristjánsson 1996; Shnayderman 2013b).

Perhaps the most easily recognized instance of animal's being unfree is the situation in which it is prevented from moving about in a normal way. Being in a cage, caught in a trap, or chained to a stake would be examples.

P.W. TAYLOR 2011, 109

But that animals can have more or less option-freedom does not by itself imply that we have moral reason to care about animal freedom. Remember the second question posed in section 1: do animals have an *interest* to be free in this sense? It seems plausible to assume that animal unfreedom is clearly bad for animals: we would presumably all agree that animals are better off, if they are not held 'in a cage, caught in a trap, or chained to a stake,' as Taylor writes. But Cochrane thinks that we should not conclude from this that they have an *intrinsic* interest in freedom. He argues that animals merely have an *instrumental* not an *intrinsic* interest in being free. And because animal freedom is merely a means to other goods, we should aim for these other goods directly. Animal freedom should therefore play no role for how we set up our relationships with non-human animals (Cochrane 2009a).¹³

Unlike Cochrane, I think that we do have moral reason to be concerned with animal freedom *even if* animals have a merely instrumental interest in freedom. I develop this argument in detail elsewhere (Schmidt 2015). Let me here briefly rehearse its main point. Cochrane assumes that if freedom is merely a means to other goods, we should aim for these other goods directly. The problem with this argument, however, is that *even if* animals only have a merely instrumental interest in freedom, this does not imply that we can directly provide those other goods to which freedom is a means. This point is best appreciated through a distinction introduced by Ian Carter. According to Carter, freedom can be *specifically* and *non-specifically* instrumentally valuable. A choice-set might be specifically valuable, for example, because we enjoy the best option out of this set. Here the specific value of a choice-set is reducible to the value of the best option in that set. However, freedom can also be *non-specifically* instrumentally valuable, if the value of freedom is not reducible to the good brought about by individual instances of freedom. By drawing an instructive parallel to money, Carter argues that freedom indeed has non-specific value (for humans):

¹³ Cochrane furthermore argues that, in terms of animal law, we need not necessarily abandon their legal status as property (but significantly modify it) – particularly because animals do not have an intrinsic interest in being free (Cochrane 2009b).

... because the world is an unpredictable place, and we cannot be sure even of the nature of our own future desires and needs, let alone of the nature of future supply and demand, it is prudent to prefer money to other commodities. Hence money acquires a value which is independent of that of the specific things which it is a means to possessing ...

CARTER 1999, 51

Now applied to animals, we can say similar things. We do not always know what animals want or need now or later in their lives. We are dealing with other species who do not speak our language. Our epistemic constraints are such that we have good reason to provide animals with more rather than fewer options (other things being equal). And even if the value this has for animals is merely instrumental, it is *non-specific*. This means that we cannot always directly provide those goods to which freedom is a means. Therefore, we cannot 'eliminate' option-freedom as one of the values that should shape our relations with non-human animals.

Let us return to the Conceptual Argument. If animals indeed have an interest in option-freedom, does that mean that, necessarily, animals ought not to be property? The answer is no. Option-freedom does not conceptually imply any specific normative theory about how to set up political or legal systems. Berlin argues, for example, that there is no conceptual connection between liberal freedom and democracy:

[L]iberty in this sense is not incompatible with some kinds of autocracy, or at any rate with the absence of self-government. Liberty in this sense is principally concerned with the area of control, not with its source. Just as a democracy may, in fact deprive the individual citizen of a great many liberties which he might have in some other form of society, so it is perfectly conceivable that a liberal-minded despot would allow his subjects a large measure of personal freedom. ... Freedom in this sense is not, at any rate logically, connected with democracy or self-government. Self-government may, on the whole, provide a better guarantee of the preservation of civil liberties than other regimes, and has been defended as such by libertarians. But there is no necessary connexion between individual liberty and democratic rule.

BERLIN 1969, 129

In principle, option-freedom could be preserved by an undemocratic ruler. The connection between option-freedom and democratic self-rule is contingent

and not conceptual. I think the same applies to the relation between option-freedom and one's legal status: we can imagine situations in which someone is the property of someone else but still has all the freedoms that other, non-owned citizens have. The slave who has a benevolent master might be given a good range of options and would thus, in the sense of option-freedom, not be considered (very) unfree (depending on how likely the master is to interfere). Of course, as noted by Berlin, there will be a strong empirical connection between democracy and freedom and this connection will apply to self-ownership and freedom too: a person is much more likely to be interfered with and have her important options curtailed if she is the property of another person. I will return to this issue later (sec. 6). But the conclusion regarding the Conceptual Argument stands. While animals do have an interest in option-freedom, this does not support the Conceptual Argument. Animals can, at least in principle, be free in the option-sense whilst being the property of humans.

5 Freedom as Non-domination

In the last section, I argued that while option-freedom is a plausible ideal for animals, it does not support the Conceptual Argument. Maybe the final conception of freedom discussed here does. Philip Pettit holds that besides positive freedom and option-freedom, there is another important concept of freedom, *status freedom*:

In the received terminology, the notion of being free is associated with being a freeman, as distinct from a bondsman. It is an ideal that turns on how a person relates to their fellows, not something that is fixed just by the quantity of choice they enjoy. It is a matter, essentially, of social standing or status.

PETTIT 2003, 394

Status freedom is about *social* status, i.e. about being in the right kinds of social relations with other persons. For republicans like Pettit, to have the status of a free person requires being free from *domination*. A person is dominated, if another person has the arbitrary (or uncontrolled or unchecked) capacity to interfere with her life. Republicanism arrives at different judgments than theories of option-freedom in two cases in particular. First, one can be made unfree by being subject to another person's power even if that person does not exercise this power. The mere *power* to interfere on an arbitrary basis is already enough to render one unfree. Second, and conversely, not every exercise of

power over another person – i.e. not every interference with another person's option-freedom – is a source of unfreedom. If, for example, the state interferes with my life on a non-arbitrary basis (to uphold just laws for example), then this does not make me unfree. Such power is non-arbitrary if the procedure through which someone decides whether to interfere is designed to force the person to track the relevant interests of the individual whose option-freedom is being constrained. If the state imposes constraints on its citizens, for example, then

... the formula requires that the state be forced to track the common, recognizable, interests of its citizens and to track only those common, recognizable interests.

PETTIT 1997, 290

To better grasp the difference between Pettit's theory and liberal theories of option-freedom, consider:

Mean Master: a master interferes very frequently with his slave and imposes very strict rules on what the slave can and cannot do.

Nice Master: a master next to never interferes with his slave's options and lets the slave do what he wants. Though the master keeps title to the slave, he never uses his legally protected power to interfere with the slave.

The person has more freedom in *Nice Master* than in *Mean Master* on both liberal and republican views (Pettit 2002).¹⁴ Now consider a third variant:

No Master: a person has exactly the same options as the person in *Nice Master* but is not owned by anyone.

According to theories of option-freedom, the status of being a slave does not by itself undermine one's freedom. The person in *Nice Master* seems to have

14 Shnayderman argues that Pettit's own theory does not have the resources to account for the difference between such cases (Shnayderman 2012). Moreover, a number of theorists have argued that Pettit's specification of 'non-arbitrariness' moralizes the concept of republican freedom in a similar way libertarians moralize the concept of freedom (McMahon 2005; Carter 2009). I will leave aside these worries in this context, as my aim is merely to show that *even if* republicanism provides us with a plausible ideal of freedom for humans, it does not provide benefits for animals not already provided by liberal option-freedom.

the same options as the person in *No Master*. However, proponents of option-freedom have convincingly argued that being a slave will, as a matter of empirical fact, drastically reduce one's option-freedom, even if one has a 'nice' master. According to theorists such as Carter and Kramer, one's level of overall freedom is determined also by the probabilities with which one will be interfered with in the future. Being subject to someone's arbitrary power will therefore reduce one's option-freedom, because such domination makes it more likely that one will be interfered with in the future (Carter 2009; Kramer 2009). However, for option-freedom, the relationship between domination and freedom is of an empirical not a conceptual nature. Pettit, on the other hand, holds that it matters *conceptually* that the slave-owner has the power to interfere with the slave's life on an arbitrary basis. This by itself undermines the person's social status as a free person. Being free in the republican sense conceptually implies that one is not owned by another person, because legal ownership is a type of social relation that undermines one's status as a free person.

Now, does republican freedom also support the Conceptual Argument? Remember the three questions posed in the beginning: first, is this kind of freedom plausibly extended to include animals? Second, do animals have an interest in this kind of freedom? Third, does this kind of freedom imply that one needs self-ownership rights to be free? For republicans, the answer to the third question is 'yes,' as we have seen above: republican freedom is conceptually incompatible with being someone else's property. What about the other two?

Cochrane argues that republicanism is not plausibly extended to animals (the first question). Non-domination is not a plausible ideal to apply to the relations between human and non-human animals, he argues, because animals will *always* depend on the goodwill of humans. This is obvious for domesticated animals. But even wild animals are subject to the dominating power of humans inasmuch as the 'effects of human actions can be felt in every corner of the natural world' (Cochrane 2012, 151). Therefore, it does not make a lot of sense to aim for non-domination. However, the problem with this argument is that it merely shows that we will never eradicate domination over animals completely. But it does not show that we could not plausibly aim to *lessen* or *minimize* the extent of dominating power over animals.

The main problem for a republican Conceptual Argument is to do with the second question. I will argue now that animals do *not* have an interest in republican freedom. More specifically, the argument is that non-domination is not valuable for animals *over and above* the effects that non-domination has on option-freedom. So, if animals have sufficient option-freedom, republican freedom does not add any additional value for animals. To develop this point,

we first need to get a clearer sense of what makes republican freedom valuable for humans. Remember *Nice Master* and *No Master*. The idea was that the slave in *Nice Master* has exactly the same options as the person in *No Master*. Now, why should the person in *No Master* be any better off in terms of freedom than the slave in *Nice Master*? What are the benefits of being a free man over and above having a certain range of options? Pettit's answer is the following:

[T]he status of the free person, as encoded in the traditional image of the *liber* or freedom, has a *subjective* as well as an objective side. It requires that you be securely resourced and protected against others, yes, but it also requires that this entrenchment register as a matter of *common awareness*. Everyone must be aware that you are secured in this way, everyone must be aware that this is a matter of general awareness, and so on; your status among your fellows, conscious of sharing in the general recognition that no one can push you around – as no one can push anyone around – and expect to escape censure or penalty.

PETTIT 2014, 57, my emphases

The intersubjective side of being non-dominated plays an important part in having the status of a free person. Republican freedom allows people to

... savour the sense of enjoying an equal status with others in the society: they can look all those others in the eye, conscious of a shared consciousness that no one can interfere arbitrarily in their lives.

PETTIT 1997, 166

So, the benefits of non-domination go beyond the availability of options. Common awareness of people's status as free citizens provides important subjective and intersubjective benefits (Pettit 1997, 87).¹⁵

15 Pettit adduces two further arguments: first, non-domination leaves one with less uncertainty than liberal option-freedom (Pettit 1997, 85). This argument, however, neglects that liberals like Carter and Kramer take account of probabilities in their measure of freedom such that uncertainty will be factored in. Second, Pettit argues that freedom in the liberal sense often requires *ingratiating* oneself with powerful people whilst there will be no such need for ingratiation when one is non-dominated (Pettit 2011). This argument, however, neglects that liberals take into account combinations of options rather than just individual options: a person that has a set of options *x* independently of whether she decides to ingratiate herself with powerful people has more freedom than one whose set *X* is contingent on her ingratiating herself with powerful people (Carter 2009; Kramer 2009; Lang 2012; Bruin 2009). Therefore, I think Pettit's intersubjective argument is the

However, I think the reasons humans have to favor *No Master* over *Nice Master* do not apply to analogous cases involving animals. Non-domination generates subjective and intersubjective benefits for humans, because that social status is common knowledge. But such benefits are very unlikely to exist for non-human animals, because they are not cognizant of the legal structure that underlies our relationships with animals. Consider, analogously to *No Master* and *Nice Master*, a comparison between the following two cases:

Owned Dog: Hasko the dog is legally owned by Elisabeth. But Elisabeth lets Hasko roam around in and outside the house whenever Hasko wants to. Elisabeth provides Hasko with good-quality food and looks after Hasko's welfare needs.

Unowned Dog: Hasko the dog is *not* owned by Elisabeth. Elisabeth offers Hasko good-quality food and looks after Hasko's welfare needs. She lets Hasko roam around in and outside the house whenever Hasko wants to.

Now, in which sense do the reasons that made *No Master* better than *Nice Master* in the human case apply to *Owned Dog* and *Unowned Dog*? The additional benefits in *No Master* had to do with status and how one sees oneself in the community of others. For someone to be non-dominated, it needs to be common knowledge that this person is not subject to other people's arbitrary power. This common knowledge condition, however, does not apply to *Owned Dog* and *Unowned Dog*. Hasko the dog – along with other animals – does not understand property law and its relevance for social relations. Therefore, he does not benefit from having a certain legal status over and above the options that such a status secures.

None of this is to deny that different legal treatments will have important effects on the welfare and indeed the option-freedom of animals. We might envision a different situation in which the dog owner – rather than being as nice as Elisabeth – is prone to treat Hasko badly and routinely locks him up in a small room for days. However, these differences would be accounted for morally by focusing on option-freedom. In such a case, constraining the power that a dog owner has over Hasko might lower the likelihood that Hasko's option-freedom will be unnecessarily curtailed. Status freedom in the form of non-domination, however, does not provide additional benefits. Therefore, animals do not have an interest in being non-dominated beyond the effects this status will have

only one that actually sets his position normatively apart from (sophisticated) views of option-freedom.

on their option-freedom.¹⁶ Because animals do not have an interest in being non-dominated as such, republican freedom fails to support the Conceptual Argument.

6 Option-Freedom and Our Duties towards Animals

The Conceptual Argument fails. Animals are not unfree merely in virtue of being human property. Neither positive nor republican freedom seems plausible values to apply to non-human animals. The libertarian ideal of freedom as self-ownership in turn fails to provide non-question-begging support for the Conceptual Argument. We are thus left with option-freedom. While this ideal can plausibly be extended to include non-human animals and while animals do have an interest in option-freedom, this does not support the Conceptual Argument. In principle, if a certain property regime affords animals a good range of options, they can be free whilst also being considered property. So, the relationship between animal freedom and the legal status of animals is, if anything, a contingent, empirical relationship. Certain legal frameworks will be more conducive to animal freedom than others, but whether an animal is free or not is not determined conceptually by an animal's legal status.

This conclusion suggests we should separate philosophical questions about what interests animals have from questions in animal law. It suggests a two-step methodology.¹⁷ We should start with a clear outline of what kinds of lives we think animals have an interest in leading and how to balance animal interests with those of humans. In a next step, we should discuss which legal rules are most likely to bring about a situation in which animals will lead lives in which their interests are met. In other words, we start with the question of animal interests and determine downstream which legal framework will most likely protect those interests. This also implies a different approach to the personhood/property issue: whether animals should be property or should have personhood rights cannot be answered in isolation. The correct answer will be part of a broader theory of how the law should treat animals. Instead of

16 This also provides an interesting point of departure regarding the comparison between human slavery and the human use of animals. Humans have an intrinsic interest in having a certain status amongst other humans, in not being subject to other people's power. This interest is not shared by animals which do not care about distributions of power per se (but only about the distributions' impact on their welfare and option-freedom).

17 Again, that is, if other 'conceptual' ethical arguments about the legal status of animals fail, see *supra* note 2.

deducing an animal's legal status from an abstract moral concept, we will have to take into account all relevant animal interests and the likely empirical consequences of choosing one legal framework over another.

It is beyond the scope of the paper to provide an account of all animal interests and an empirical analysis of which legal system is most likely to protect these interests. Instead, the more modest aim of this section is to outline what a concern for animal option-freedom broadly implies for animal law.¹⁸ I will highlight two implications in particular.

6.1 *Leaving Animals Alone?*

A concern for animal freedom implies that we have a duty of non-interference towards animals. However, as I will show now, this is only a *pro tanto* duty: a concern for animal freedom does not imply that we ought to leave animals alone. This contradicts a popular view in animal ethics, namely the abolitionist idea that respecting animal freedom implies that we should leave animals alone (Francione 2005, 132). Joan Dunayer, for example, writes

Animal rights advocates want laws that will prohibit humans from exploiting and otherwise harming nonhumans. They don't seek to protect nonhumans within human society. They seek to protect nonhumans from human society. ... Nonhumans should be allowed to live free in natural environments, forming their own societies ... We want them to be free and independent of humans.

DUNAYER 2004, 117–119; quoted after DONALDSON and KYMLICKA 2011, 7–8

Regan also argues similarly:

Being neither the accountants nor managers of felicity in nature, wildlife managers should be principally concerned with *letting animals be*, keeping human predators out of their affairs, allowing these “other nations” to carve out their own destiny.

REGAN 1983, 357

¹⁸ The question as to which legal framework is likely going to protect animal interests in general – and animal freedom in particular – can be interpreted in at least one of two ways. First, as part of *ideal* theory, we might want to know which legal status would give animals the best protection of their interests in ideal circumstances (whilst also striking a good balance with human interests). A different but related question is what legal status, and which legal reforms, should we suggest under current, highly non-ideal conditions? Given that popular sentiments and legal and economic structures are biased against animals, which types of practically possible legal reform will better serve animal interests?

Cochrane criticizes this position of ‘benign neglect.’ Unlike humans, he argues, animals do not have an intrinsic interest in freedom. Therefore, we do not have a duty of non-interference. In fact, we often have duties of interference if we are reasonably sure that doing so will make animal lives better (Cochrane 2009a, 675). Unlike Cochrane, I have argued that animal freedom should be one of the normative ideals shaping our relations with animals. Against both Cochrane and the abolitionists, I will now argue that respecting animal freedom does not imply that we ought to leave animals alone.

First, to see why respecting animal option-freedom does not imply freedom from humans, consider the analogy with human option-freedom.¹⁹ Even in its traditional, ‘negative’ sense, option-freedom does not imply that one is most free when the state or other people leave one alone. For example, a system of criminal law restricts my freedom by coercing me into not engaging in criminal acts. But inasmuch as it also protects me against the interference of other people, it increases my option-freedom overall. Other forms in which the state is coercive – by levying taxes for healthcare for example – restrict my freedom in one sense but might increase my option-freedom *overall*. I think this line of argument can also be used in the case of animals. A concern for animal option-freedom gives us a *pro tanto* reason not to interfere with their lives. At the same time, however, we might sometimes have good reason to interfere with the lives of animals to safeguard greater option-freedom for them overall. Imagine, for example, we kept an animal in a very sizeable enclosed forest so as to prevent it being killed by a predator. Though this animal’s freedom is restricted in one sense, it might have more freedom overall by being shielded from the predator.²⁰

19 Kymlicka and Donaldson discuss other important arguments against the ‘leaving animals alone’ idea (Donaldson and Kymlicka 2011, chap. 1 and 6).

20 Admittedly, there is a theoretical complication here. Some theorists argue that a constraint affects someone’s freedom only if someone is morally responsible for this constraint (Miller 1983; Kristjánsson 1996; Shnayderman 2013b). They could then hold that only human interferences affect an animal’s freedom, because only humans can be held morally responsible. This would support the idea that a concern for animal freedom speaks for leaving animals alone. However, this only holds if being specifically free to do something is a binary notion such that being free from (human) constraints is necessary and *sufficient* for being free. Against this we could invoke trivalent views – such as Kramer’s – according to which lack of human interference is necessary but insufficient for being specifically free to do something. For example, an animal that is so badly wounded by another animal in the wild might plausibly be considered less free than another, perfectly healthy animal, even if no humans made that animal *unfree*. Elsewhere, I defend a view that combines trivalence with moral responsibility (Schmidt 2016).

So, a concern for animal option-freedom implies a *pro tanto* duty of non-interference. However – analogous to the case of criminal law – interfering with animal freedom can be a way to improve it overall. Therefore, a concern for animal freedom does not imply leaving animals alone.

Second, there is another reason why a concern for animal option-freedom does not imply leaving animals alone: liberals typically think of freedom as one value amongst others. In this respect, option-freedom differs from libertarian notions of freedom as self-ownership, for example. Libertarian theorists of self-ownership typically believe that a concern for personal freedom generates deontological duties that trump other considerations.²¹ Most theorists of liberal option-freedom, by contrast, typically do not hold that a concern for freedom necessarily or always trumps other normative considerations (Berlin 1969, 168–172; Carter 1999, chap. 2.2; Shnayderman 2013b, 738–739). While a concern for option-freedom gives us a moral reason not to interfere, this moral reason need not always trump other moral considerations. Sometimes, for example, we might have good reason to interfere with animal freedom to prevent animals experiencing serious suffering.²² To settle what these other values are and how to balance them with freedom is, of course, beyond the scope of this paper. What matters for the purposes of this argument is that we can care a great deal about animal freedom without being committed to the abolitionist conclusion that we need to leave animals alone.

6.2 *The Empirical Argument*

Let us now return to the question of *legal personhood*. We have seen that the Conceptual Argument failed. What about the Empirical Argument: is animal option-freedom likely best protected if animals have property status? Ultimately, as the name suggests, this question is empirical and cannot be satisfactorily answered from the philosophical armchair. However, considerations familiar from liberal theorizing about freedom lend *prima facie* support to the Empirical Argument. In the human case, liberals usually argue that a concern for a person's option-freedom is best served if such freedom is suitably

21 They also differ from (some versions of) republicanism. For Pettit, republican freedom does not generate deontological duties, as his account is broadly speaking consequentialist. However, his account still differs from a liberal option-freedom in that he believes freedom as non-domination to be the only value to govern our institutions (for humans, at least)(Pettit 2014).

22 This does not mean, of course, that all well-intentioned interventions will do more good than bad. The argument is merely conditional such that *if* we are reasonably sure that an intervention will make animal lives significantly better, we will often have moral reason to pursue them.

protected against the arbitrary power of other persons. Great (and arbitrary) power imbalances make interference with people's option-freedom more likely, particularly if they come with conflicts of interest. A concern with option-freedom thus gives us reason for the rule of law, democracy, self-ownership rights, and so on. Such measures will be empirically important to reduce the probability that others will interfere with my options in the future and will thus directly influence how much option-freedom I have (Carter 2009; Kramer 2009). Now, similar points will apply to non-human animals. If animals are left at the goodwill of their owners without robust protection of their interests, they are much more at risk of being exploited. Restrictions of animal freedom are likely, because not only are humans typically more powerful, their interests often do not coincide with those of the animals they own. This might make us pessimistic about the prospects of effectively protecting animal interests whilst also treating them as legal property – particularly so in commercial contexts. Whatever precise legal arrangement would work best, we seem to have good reason to provide animals with robust legal protection such that their option-freedom is not dependent on the goodwill of particular humans.²³

As I said before, the precise content of animal law – and the legal status of animals therein – is beyond the scope of this paper. However, I have made two points on the relevance of animal freedom for the design of such legal rules. First, against abolitionists I argued that a concern for animal freedom does not imply that we need to leave animals alone. A concern for animal freedom raises the stakes for the justification of interferences but it does not always make them impermissible. Sometimes interferences might be necessary to protect animal freedom more generally and other times we might have to balance a concern for freedom with other moral considerations. Second, a concern for animal freedom also gives us reason for robust legal protection of animal interests by way of curbing the power individual humans have over animals. Given power imbalances and conflicts of interest, familiar arguments from theories of liberal freedom suggest that we should seek the abolition of (most) commercial activities involving non-human animals and provide animals with an adequately robust legal protection against the arbitrary interference by

23 The risk that animals will be mistreated will be smaller in the case of companion animals, because the interests of the pet owners are more likely to coincide with those of the owned animals. However, while a regulatory approach might possibly work for companion animals, we should not extrapolate from these cases to most other cases of animal ownership, particularly those in which there is a conflict of interest between the human owner and the animal owned.

humans more generally.²⁴ Whatever such a legal framework would look like exactly, it is beyond doubt that it would require radical changes to existing animal law.

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24 A concern for animal freedom thus cuts across the distinction between welfarist and regulationist views on one side and abolitionist views on the other. We can perfectly well have interactions and social relationships with animals and have a duty of care or beneficence towards them whilst also requiring the abolition of most of our current commercial uses of animals and requiring a much more robust form of legal protection.

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