

## “True” Imprisonment

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### 19.1 INTRODUCTION

In 2018, the Animal Legal Defense Fund and an equine rescue organization filed suit on behalf of a neglected horse against its past owner seeking monetary damages to cover the costs of the animal’s rehabilitation and care, as well as compensation for the animal’s pain and suffering. Departing from the ordinary practice of bringing suit in their own right as animal protection organizations, the two groups sought to name the horse directly as a plaintiff with standing to assert its own legal rights. The animal, an American quarter horse previously known as Shadow but renamed Justice following its rescue, had been badly neglected by its prior owner, Gwendolyn Vercher. At the urging of a neighbor, Vercher surrendered the emaciated horse to a rescue organization. She later pled guilty to criminal animal neglect under Oregon’s anticruelty statute. Justice’s civil lawsuit sought monetary damages to establish a trust fund in hopes that the financial support might enable the horse to be adopted by a new owner.

After a trial judge dismissed Justice’s complaint, the animal organizations appealed. An amicus brief authored by leading animal law experts supported Justice’s quest for legal standing, arguing that “he has a right to sue in civil court in order to recover damages in Oregon.”<sup>1</sup> The brief detailed a variety of ways in which nonhuman animals already hold special status under the law as living beings entitled to be treated as more than mere property. In particular, because Oregon’s criminal anticruelty statute expressly recognizes animals as the recipients of legal protection, the scholars argued that allowing an animal victim to sue its abuser directly for civil remedies would be a “straightforward” proposition:

<sup>1</sup> Brief for Randall S. Abate, et al., at 1, as Amici Curiae Supporting Petitioners, *Justice v. Gwendolyn Vercher*, A169933 (Or. Ct. App. 2020).

There is no real dispute that Justice has met the requirements for civil liability. The only question is whether this panel will close the courthouse doors on a being whose rights of judicial access have been recognized by statute and common law developments in this state and across the country. Oregon is a national leader in recognizing the status of animals as more than property, and this case presents a modest application of that principle.<sup>2</sup>

As of this writing, the appeal in Justice’s case was still pending, and the possibility that nonhuman animals might bring their own civil lawsuits in the United States remains an imaginative exercise only.

This chapter takes up the imaginative exercise by asking what it would look like if nonhuman animals were allowed to bring false imprisonment claims to challenge their captivity. The Anglo-American legal tradition includes a civil tort of “false” imprisonment, whereby one who acts intending to confine another without justification within fixed boundaries may be held liable, so long as the other is conscious of or harmed by the confinement. This cause of action is distinct from the criminal and constitutional law framework that governs the authority of the state to detain, investigate, or imprison. At the heart of that framework in the Anglo-American legal tradition lies the writ of habeas corpus—the so-called Great Writ that was considered by Jessica Eisen in the previous chapter along with the legal campaign to extend its protection to nonhuman animals. Like habeas corpus, the false imprisonment tort encompasses concerns regarding government overreach,<sup>3</sup> but also extends to confinement that is wrongfully – that is, “falsely” – imposed by nongovernmental actors. Victims of such conduct are afforded a right of civil redress against their captors, with remedies available including compensatory, nominal, and punitive damages. Thus, while the habeas corpus writ stands as a constitutional check on the state’s infringement of bodily autonomy, the tort of false imprisonment offers a common law cause of action against wrongful detention by any actor, public or private.

This chapter considers how a false imprisonment action might unfold if it were pursued by a nonhuman animal held in captivity. The exercise has the dual purpose of (1) learning how existing false imprisonment doctrine might apply to nonhuman animals if they were given standing to bring civil actions; and (2) exploring what might be learned about the current application of false imprisonment law to human plaintiffs when we engage in such an effort to “think with animals.”<sup>4</sup> As will be argued, envisioning the false imprisonment claim of nonhuman animals reveals

<sup>2</sup> Animal Law Professors *Amicus Curiae* Brief, *Justice v. Vercher*, at 17.

<sup>3</sup> See, e.g., *Zok v. State*, 903 P.2d 574, 577 (Alaska 1995) (“False arrest is one way of committing the tort of false imprisonment.”).

<sup>4</sup> Cf. CLAUDE LÉVI-STRAUSS, *TOTEMISM* 89 (1962). Despite the apparent felicity of this phrase from Lévi-Strauss, it bears noting that its translation and significance are not without controversy. See James K. Stanescu, *Animals Are More than Good to Think With, Part 1*, *CRITICAL ANIMAL* (July 6, 2012), <http://www.criticalanimal.com/2012/07/animals-are-more-than-good-to-think.html>.

fissures and tensions within the doctrine that go to the very foundation of legal and political organization.

## 19.2 THE TORT OF FALSE IMPRISONMENT

The false imprisonment tort offers a civil remedy to individuals who have been intentionally and wrongfully confined by another actor. The rationale behind the tort of false imprisonment is to recognize the plaintiff's right to be free from unwanted, intentional interference with freedom of movement, which in the liberal legal tradition is taken to be bound up with a person's fundamental interest in autonomy. Like other intentional torts such as battery and assault, the false imprisonment tort has deep historical roots in the common law and is considered one of the basic legal measures of protection for the plaintiff's bodily integrity, peace of mind, and essential dignity.<sup>5</sup> As two leading American tort theorists note, "[i]f battery promises to shield individuals from being wrongfully targeted for contact by others, false imprisonment promises to free them from others' efforts to keep them located in a particular space."<sup>6</sup>

The basic doctrinal elements of the false imprisonment tort in the United States are summarized in the American Law Institute's *Restatement (Third) of Torts*:

An actor is subject to liability for the tort of false imprisonment when (1) the actor intends to confine the plaintiff within a limited area; (2) the actor's conduct causes the plaintiff's confinement or the actor breaches a duty to release the plaintiff from such confinement; (3) the plaintiff is aware of the confinement or suffers bodily harm as a result; and (4) the plaintiff does not consent to the confinement.<sup>7</sup>

The most interesting aspect of the false imprisonment tort for purposes of this chapter is the requirement that the plaintiff must either be conscious of the confinement or physically harmed by it. That requirement appears to set up both a subjective and an objective path to recovery for the complainant.

On the subjective path, courts are quite clear that a false imprisonment claim may be pursued even though the confinement does not cause bodily injury, pain and

<sup>5</sup> Demonstrating that legal tradition:

The false imprisonment tort protects the interest of persons to go freely through the world, subject to legal restrictions on their entry into particular places. This interest in physical freedom has a corresponding foundation in personal dignity, an interest that receives protection from all of the intentional tort categories.

See MARSHALL S. SHAPO, *PRINCIPLES OF TORT LAW*, ¶ 10.07, at 61 (4th ed. 2016).

<sup>6</sup> JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 211 (2010).

<sup>7</sup> *RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS* § 7 (AM. LAW INST., Tentative Draft No. 3, 2018) [hereinafter *RESTATEMENT (THIRD) OF TORTS*].

suffering, emotional harm, or loss of opportunity.<sup>8</sup> Indeed, a plaintiff need not prove that she would have chosen to leave the area of confinement had she not been confined. Nor does the plaintiff need to show that she understood the confinement to be wrongful.<sup>9</sup> The nonconsequentialist underpinnings of this path to liability are strong. Even if a defendant believes that the confinement is in the best interests of the plaintiff or that the plaintiff will or should welcome the confinement, the actor is subject to liability if the confinement is not consented to or does not fall within a recognized defense. The essence of the wrong from this perspective seems to be the plaintiff’s cognitive experience of the sensation of being trapped, much as the essence of the wrong for an assault is the plaintiff’s visceral feeling of nearly being physically struck.<sup>10</sup>

When a plaintiff is not conscious of being confined, they may still recover if they are “harmd” by the confinement. American tort law owes this path of false imprisonment liability to the influential scholar William Prosser, who authored a short article in 1955 arguing that even unaware plaintiffs ought to recover when a defendant confines them without permission. In Prosser’s view, through their confinement alone, “a tort of real gravity has occurred” against such plaintiffs.<sup>11</sup> Some prior authorities had declined to recognize liability in these circumstances, apparently believing that relaxing the consciousness requirement altogether would lead to situations in which the strong medicine of intentional tort liability would be invoked for relatively trivial invasions. Yet, as Prosser noted, cases also could be found in which infants or adults with mental disability recovered for false imprisonment despite being arguably unaware of their detainment.<sup>12</sup> The line, therefore, did not appear insuperable.

The *Restatement (Second) of Torts*, for which Prosser served as the chief architect, balanced these various positions by expanding liability beyond cases of conscious confinement but only if the plaintiff suffers actual harm from the restriction,<sup>13</sup> a

<sup>8</sup> Supporting the point that false imprisonment does not require proof of physical or emotional injury when the plaintiff is conscious of the confinement, see John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 955 (2010).

<sup>9</sup> RESTATEMENT (THIRD) OF TORTS § 7 cmt. g; see also RESTATEMENT (SECOND) OF TORTS § 42 cmt. c (AM. LAW INST. 1979) (“If the plaintiff is conscious of the confinement at the time, it is not necessary that he know by whom or how it is imposed.”).

<sup>10</sup> *But see* text accompanying notes 16–17 (reviewing commentators who would deem the essence of the false imprisonment wrong to be confinement itself, rather than the victim’s perception of confinement).

<sup>11</sup> William L. Prosser, *False Imprisonment: Consciousness of Confinement*, 55 COLUM. L. REV. 847, 850 (1955).

<sup>12</sup> *Id.* at 848.

<sup>13</sup> The *Restatement (Second) of Torts* states:

Where...no harm results from a confinement and the plaintiff is not even subjected to the mental disturbance of being made aware of it at the time, his mere dignitary interest in being free from an interference with his personal liberty which he has only discovered later is not of sufficient importance to justify the recovery of the nominal damages

compromise approach that, as noted above, continues in the more recent *Restatement (Third) of Torts*. Courts have not been entirely clear in specifying what kinds of “harm” qualify for liability under this alternative doctrinal path to recovery. The obvious cases for liability include physical harms such as malnutrition or medical deterioration during a period of unaware confinement.<sup>14</sup> Conversely, many authorities contend that an unaware plaintiff cannot recover if they suffer only emotional, economic, relationship, or dignitary harm as a result of the confinement.<sup>15</sup> As the *Restatement (Third) of Torts* puts it, the policy considerations in favor of recovery are weaker in the case of “someone who does not subjectively experience the loss of freedom at the time when she might have exercised it,”<sup>16</sup> and who does not otherwise suffer physical harm. The relative weakness of the deprivation in such circumstances becomes outweighed by tort law’s general interest in avoiding adjudication of what are deemed to be minor social disputes that could be resolved outside the courtroom.

Commentators have long questioned whether Prosser’s more liberal approach of abandoning the consciousness requirement altogether should have been adopted, with the answer hinging in part on how one conceives of the interest being protected by the tort. The essential question seems to be whether, in the words of three leading torts scholars, “false imprisonment is a tort protecting a *psychological* perception of autonomy and not simply the denial of personal autonomy.”<sup>17</sup> Writing in 1957, a New York state judge reasoned that:

[m]uch can be said for the proposition that an imprisonment brought about by barriers or physical force ought to be actionable without regard to consciousness of restraint on the part of the victim. If the tort is designed to protect one’s actual freedom of movement against impairment, the tort is committed when one is confined whether he knows of it at the time or not. Upon this view, the tort of false imprisonment is like battery. One may be held liable in battery for offensively touching another, even though the victim is not aware of the touching at the time. On, the other hand, if . . . the tort is designed to protect one’s *sense* of freedom of movement against impairment, just as the tort of assault is designed to protect one’s interest in freedom from *apprehension* of attack, there is no tort if there is no consciousness of the restraint because in that case there is no interference with one’s sense of freedom.<sup>18</sup>

involved. Accordingly, no action for false imprisonment can be maintained in such a case.

See *Restatement (Second) of Torts* § 42 cmt. a.

<sup>14</sup> *RESTATEMENT (THIRD) OF TORTS* § 7 cmt. h.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> JOHN L. DIAMOND, LAWRENCE C. LEVINE & ANITA BERNSTEIN, *UNDERSTANDING TORTS* 18 (5th ed. 2013) (emphasis added).

<sup>18</sup> Philip Halpern, *Intentional Torts and the Restatement: A Petition for Rehearing*, 7 *BUFF. L. REV.* 7, 23–24 (1957); see also JOHN FLEMING, *THE LAW OF TORTS* 38 (Carolyn Sappideen & Prue Vines eds., 10th ed. 2011) (“[F]alse imprisonment affects not only liberty but also dignity

This basic distinction – between a tort designed to protect one’s actual freedom from confinement and a tort designed to protect one’s *sense* of being free from confinement – has rarely been broached in case law. Only very unusual factual circumstances or limited categories of plaintiff victims are likely to present the case of a confinee who is both unaware and unharmed.

In the case of *Scofield v. Critical Air Medicine*, California courts faced a near example when presented with a false imprisonment claim brought on behalf of minor children who were seriously injured in an automobile accident in Baja, Mexico, that also killed their mother.<sup>19</sup> Upon learning of the accident and the extent of their injuries, which were too significant to be handled by the local Mexican medical facility, the children’s father directed that they be transported to a US hospital by a specific emergency medical air transport carrier. Instead, an opportunistic third-party carrier swept in and took off with the children by representing that they were the authorized company. Although the plaintiffs were unable to demonstrate any actual physical harm to the children or awareness by the children that they were traveling in an unauthorized emergency vehicle, the court nonetheless accepted testimony by the plaintiffs’ experts that the event was actually harmful to the children because their trust in authority was irrevocably shaken upon later learning that they had been airlifted illicitly. With respect to consciousness of confinement, the court concluded that false imprisonment requires only “knowledge of the restraint or confinement at some time, whether contemporaneous or subsequent, and resulting harm or damage,”<sup>20</sup> a holding that departed from other authorities.<sup>21</sup> It appears significant to the court’s holding that the plaintiffs’ status as injured minors rendered the simultaneous consciousness of confinement requirement inapposite, given that they lacked the information or capacity to know at the time of being airlifted that they were being wrongfully transported. What should stand in place of that requirement, however, remains unclear given that courts do

and reputation, a position reflected in the calculation of damages. The plaintiff’s humiliation is not lessened by only hearing about it afterwards and the plaintiff’s lack of awareness at the time does not prevent others observing the plaintiff’s predicament.”) (footnotes omitted); Sheldon H. Nahmod, *Awareness of Confinement for False Imprisonment: A Brief Critical Comment*, 15 DUQ. L. REV. 31, 35 (1976) (advocating abandonment of the consciousness requirement because confining another person is “a serious matter and should be discouraged”).

<sup>19</sup> See *Scofield v. Critical Air Med., Inc.*, 52 Cal. Rptr. 2d 915 (Ct. App. 1996).

<sup>20</sup> *Id.* at 917; see also *Ware v. Gower*, No. 2:13-cv-0979, 2016 WL 1734750 (E.D. Cal. May 2, 2016), at \*3 (stating in dicta that “[w]e do not hold that California law requires the person physically restrained to know of the confinement or be harmed by it”).

<sup>21</sup> See, e.g., *Cruz v. Cent. Iowa Hospital Corp.*, 826 N.W.2d 516 (Iowa Ct. App. 2012) (denying liability in the absence of harm or contemporaneous awareness); RESTATEMENT (THIRD) OF TORTS § 7 cmt. h (same). A little-noticed illustration in the *Restatement (Second) of Torts* comes close to supporting the *Scofield* result, although it requires the subsequent emotional upset to result in physical injury. See RESTATEMENT (SECOND) OF TORTS § 42 cmt. b, illus. 5 (noting that actual harm may include contexts where a plaintiff suffers “serious illness” resulting from “emotional distress” after being “greatly humiliated” upon learning of a prior confinement).

not appear ready to accept Prosser's recommendation of fully abandoning the consciousness test. The *Third Restatement of Torts*, despite disapproving of the *Scofield* result and retaining the "sensible bright-line rule" of "either contemporaneous awareness or consequent bodily harm," nevertheless equivocates while doing so: "if compelling cases arise in the future in which the cautious approach of this Restatement proves to be inadequate, courts have the ability to develop a more expansive liability rule."<sup>22</sup> The remaining sections of this chapter explore one such compelling case.

### 19.3 ANIMALS IMPRISONED

To shed further light on the false imprisonment tort and the particular case of the involuntary but unaware prisoner, one might look to the case of nonhuman animal confinement. Billions of animals are held captive throughout the world in farms, zoos, aquaria, research labs, and other facilities,<sup>23</sup> often in conditions that "cause inescapable physical or psychological suffering."<sup>24</sup> Except perhaps in the case of companion animals,<sup>25</sup> no claim could plausibly be made that the animals have consented to their confinement, whether because they are deemed to lack capacity to consent or because their behavior reveals a rather strong objection to confinement.<sup>26</sup> Nor is there doubt that the animals' captors have confined them intentionally. Thus, if nonhuman animals were given standing to assert civil law claims on

<sup>22</sup> RESTATEMENT (THIRD) OF TORTS § 7 cmt.

<sup>23</sup> Indeed, through the impacts of climate change, habitat destruction, and habitat fragmentation, the amount of wilderness remaining for noncaptive species may increasingly be viewed as confining in relation to their survival needs. Thus, we might envision a continuum of confinement that extends from labs to zoos to sanctuaries to wildlife refuges to the degraded and splintered habitats that count as today as "wilderness." Such a conception of universal confinement and domination by humans of the nonhuman world would hold dramatic implications for our political economy. See generally JEDEDIAH PURDY, *AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE* (2017).

<sup>24</sup> LORI GRUEN, *ETHICS AND ANIMALS: AN INTRODUCTION* 134 (2011).

<sup>25</sup> Whether companion animals should be classified as captive animals is an important and underexplored topic. See MARC BEKOFF & JESSICA PIERCE, *THE ANIMALS' AGENDA: FREEDOM, COMPASSION, AND COEXISTENCE IN THE HUMAN AGE* 117–38 (2017). The dog or cat that returns home after being let out for the day in some respects appears to be revealing a preference for confinement. But the animal has been conditioned for confinement through domestication and its range of possible actions may not be rich enough to deem its behavior one of preference or choice in a meaningful sense.

<sup>26</sup> Consider these observations from the animal research veterinarian Larry Carbone:

By most philosophers' and behaviorists' accounts, nonhuman animals lack the mental capacity for full autonomy and for informed consent as we know it, and I will not argue with the philosophers on autonomy. But informed consent? In one sense I have indeed asked animals almost every day for their consent as research subjects. Their resounding "no" would quickly put me out of a job as a laboratory animal veterinarian, as so much of my work has been helping researchers to overlook the animals' dissent. . . If voluntary consent were our standard for animal research, the whole business would end – not because we cannot understand what the animals are telling us, but because we can.

their own behalf in accord with the legal scholars’ brief in support of Justice the horse, the only potential barrier to false imprisonment recovery for captive animals would be whether they can demonstrate either consciousness of confinement or bodily harm.

The question of whether nonhuman animals have consciousness has been given extensive scientific and philosophical inquiry. In 2012, a group of international scientific experts sought to settle that question once and for all by issuing the Cambridge Declaration on Consciousness, which stated:

Convergent evidence indicates that non-human animals have the neuroanatomical, neurochemical, and neurophysiological substrates of conscious states along with the capacity to exhibit intentional behaviors. Consequently, the weight of evidence indicates that humans are not unique in possessing the neurological substrates that generate consciousness. Non-human animals, including all mammals and birds, and many other creatures, including octopuses, also possess these neurological substrates.<sup>27</sup>

Other scientists and philosophers remain unconvinced,<sup>28</sup> in part because the nature of consciousness itself – in human or nonhuman animals – remains imperfectly understood.<sup>29</sup> Does consciousness merely indicate the status of being awake as opposed to being asleep or in a coma? Does it indicate the sensation of having mental states like pain or pleasure, fear or hunger, desire or disgust? Does it require a thicker phenomenological experience of being subjectively aware of one’s inner mental life? Does it require coupling that awareness with an even thicker

LARRY CARBONE, WHAT ANIMALS WANT: EXPERTISE AND ADVOCACY IN LABORATORY ANIMAL WELFARE POLICY 178–79 (2004). I am grateful to Joel Marks for highlighting this passage to me.

- <sup>27</sup> Philip Low, The Cambridge Declaration on Consciousness, Francis Crick Mem’l Conference on Consciousness in Human & Non-human Animals 1, 2, July 7, 2012, <http://fcmconference.org/img/CambridgeDeclarationOnConsciousness.pdf>. Philosophers also have made the case for animal consciousness. See, e.g., JOEL MARKS, HARD ATHEISM AND THE ETHICS OF DESIRE: AN ALTERNATIVE TO MORALITY 97–109 (2016) (contending that animals “act[ ] on the basis of a rich mental life, and in fact one similar to ours”); Dale Jamieson, *Science, Knowledge, and Animal Minds*, 98 PROC. ARISTOTELIAN SOC. 79, 79 (1998) (“The reluctance of contemporary philosophers and scientists to embrace the view that animals have minds is primarily a fact about their philosophy and science rather than a fact about animals.”); John R. Searle, *Animal Minds*, 19 MIDWEST STUD. PHIL. XIX 206 (1994) (arguing that intuitive, commonsense attribution of emotions and intentionality to companion animals carries greater weight than philosophically motivated skepticism).
- <sup>28</sup> See, e.g., MARIAN STAMP DAWKINS, WHY ANIMALS MATTER: ANIMAL CONSCIOUSNESS, ANIMAL WELFARE, AND HUMAN WELL-BEING 171–72 (2012) (“The mystery of consciousness remains. The explanatory gap is as wide as ever and all the wanting in the world will not take us across it.”); Peter Carruthers, *Brute Experience*, 86 J. PHIL. 258–69 (1989) (contending that nonhuman animals lack consciousness and our intuitive sentiments to the contrary should be rejected).
- <sup>29</sup> See Colin Allen & Michael Trestman, *Animal Consciousness*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 24, 2016), <https://plato.stanford.edu/entries/consciousness-animal> (“The term ‘consciousness’ is notoriously ambiguous and difficult to define. Having origins in folk psychology, ‘consciousness’ has a multitude of uses that may not be resolvable into a single, coherent concept”).



conception of one's *self* as the entity holding the awareness? It is one thing to debate whether studies on animal perception, memory, categorization, communication, self-recognition, and so on constitute evidence of animal cognition.<sup>30</sup> It is quite another to grapple with the problem of other minds in other beings, as speculation about animal consciousness requires.<sup>31</sup>

Perhaps the basic question of whether nonhuman animals have consciousness can be bracketed for the false imprisonment thought exercise: even if they can have consciousness, they may not be capable of having consciousness of *their confinement*. That is, they may not have subjective awareness of confinement in the sense of possessing a concept of confinement and an ability to fit their perception and experience of being restricted in movement with that concept. This line of questioning requires one first to be clear on what would constitute an adequate concept of confinement. Philosophers have helpfully distinguished between (1) a comparative conception of confinement which is “focuse[d] on the size relations between the area left accessible to the individual and the area rendered inaccessible to the individual,” and (2) an agential conception of confinement which “incorporates the purposes of the agent doing the confining.”<sup>32</sup> By focusing on the “additional exercise of dominion over the individual” which distinguishes captivity from confinement,<sup>33</sup> one might helpfully isolate what is especially psychologically troubling about the subjective awareness of being imprisoned. The essence of the wrong from this perspective is the confined individual's awareness of the denial of her status as a coequal being with rights of self-determination, including the freedom of movement.

Showing consciousness of confinement in this sense – that is, awareness of being intentionally detained by the will of a dominating power – would require first

<sup>30</sup> See Kristin Andrews, *Animal Cognition*, STAN. ENCYCLOPEDIA OF PHIL. (May 6, 2016), <https://plato.stanford.edu/entries/cognition-animal> (“Philosophers have asked whether animals are minded or rational, and whether they have concepts or beliefs, but they have also struggled with the issue of how to answer such questions given the inherent limitations of the investigation.”).

<sup>31</sup> For an extraordinary and engaging effort to do just that, see PETER GODFREY-SMITH, *OTHER MINDS: THE OCTOPUS, THE SEA, AND THE DEEP ORIGINS OF CONSCIOUSNESS* (2016). Godfrey-Smith argues persuasively that octopuses evince consciousness, despite their radical alterity when considered from the perspective of human minds.

<sup>32</sup> Robert Streiffer & David Killoren, *Animal Confinement and Use*, 49 CANADIAN J. PHIL. 1, 4 (2019); see also Robert Streiffer, *The Confinement of Animals Used in Laboratory Research*, in *THE ETHICS OF CAPTIVITY* 174, 179 (Lori Gruen ed., 2014) (distinguishing between confinement and captivity, which both “involve external limits on an individual's freedom of movement,” but in which only captivity entails “the additional exercise of dominion over the individual”).

<sup>33</sup> Nicolas Delon, *Animal Agency, Captivity, and Meaning*, 25 HARV. REV. PHIL. 127, 134 (2018) (quoting Streiffer, *supra* note 32, at 179). Lisa Rivera offers an additional distinguishing feature of captivity worth bearing in mind: an “extreme lack of reciprocity of benefit” flowing from the captivity as between the captor and the captive. See Lisa Rivera, *Coercion and Captivity*, in *THE ETHICS OF CAPTIVITY* 248, 249 (Lori Gruen ed., 2014).

showing that nonhuman animals have a theory of mind with which they can attribute mental states such as intentionality to other individuals. A long line of research has attempted to address this question, with debate continuing over whether the findings demonstrate that animals make actual inferences about others’ mental states or simply respond to observed behaviors.<sup>34</sup> Again, though, the debate can be put aside for purposes of the false imprisonment tort analysis because the tort only requires consciousness of confinement in the weaker, comparative sense. That is, as noted above, the false imprisonment plaintiff does not need to demonstrate awareness of the wrongfulness of her confinement. While knowingly being confined by a dominating agent (i.e., held captive) may be more psychologically troubling than merely being confined, tort law regards the latter awareness as adequate to state a false imprisonment claim.<sup>35</sup>

Can nonhuman animals have consciousness of their confinement in this weaker sense? Undoubtedly, confinement causes behavioral and physiological responses in nonhuman animals. Whether those responses also indicate conscious awareness of confinement seems less certain and may collapse back onto the more fundamental question of whether nonhuman animals have consciousness. That question in turn depends on how demanding one makes the definition of consciousness and the standard of proof required for demonstrating it. In the extreme, even the consciousness of other humans remains an unknowable phenomenon that enters our mental life in ways that are indistinguishable from dreams. Yet most of us do not embrace solipsism; instead, we live with the working assumption that others *do* have consciousness. That working assumption enables us to regard those others as beings with “values, preferences, aims, principles, autonomy, and personal beliefs.”<sup>36</sup> That regard in turn enables us to see them as subjects who matter, who hold interests, and who can make a claim on us to treat them accordingly. It is curious that this working assumption is not generally extended to nonhuman animals, as evidenced both by the philosophical tradition of mechanism that extends from Descartes to today’s laboratories and industrial farms, and in the Anglo-American legal tradition that generally regards nonhuman animals as mere objects of possession, rather than as subjects with interests and entitlements. This is not to suggest that nonhuman animals lack consciousness as an actual fact, but rather that – for purposes of legal analysis – the deck is stacked against that conclusion.

<sup>34</sup> See GRUEN, *supra* note 25, at 13–17.

<sup>35</sup> An illustration in the *Restatement (Third) of Torts* makes this plain:

Dahlia locks the only door in her store, not realizing that customer Pedro is still browsing in the back of the store. When Dahlia later drives by the store, she sees that Pedro is at the front door, trying to get out. Instead of stopping, Dahlia drives to another location to perform an errand, then returns to the store and lets Pedro out. Dahlia is subject to liability to Pedro for false imprisonment.

RESTATEMENT (THIRD) OF TORTS § 7 cmt. f, illus. 5.

<sup>36</sup> Angela K. Martin, *On Respecting Animals, or Can Animals Be Wronged without Being Harmed?*, 25 RES PUBLICA 83, 89 (2019).

One area in which the law *has* evolved to offer greater protection for nonhuman animals is in the area of anticruelty statutes, such as the Oregon laws that were used to prosecute Gwendolyn Vercher.<sup>37</sup> Whether these laws unequivocally recognize nonhuman animals as subjects with their own entitlements is historically debatable and still varies from jurisdiction to jurisdiction.<sup>38</sup> In many cases, the laws seem animated by a concern over how animal cruelty impacts humans and the manner in which humans treat one another, rather than with interests of the nonhuman animals for their own sake.<sup>39</sup> Nevertheless, the focus of such laws is on the treatment and well-being of nonhuman animals, which suggests that a more sure route to recovery for the nonhuman false imprisonment claimant may be to focus on physical harm, rather than on consciousness of confinement. After all, ample scientific evidence establishes that negative welfare effects occur in animals from being confined depending on the species involved and the conditions of confinement. Even without overtly inflicted pain such as through vivisection or animal husbandry practices, harm may still result through confinement alone in the form of weight loss, chronic stress, lethargy, aggression, compulsive pacing, self-mutilation, and so on. Such harms typically do not suffice to establish an animal-cruelty violation in the case of animals confined for agriculture, research, or entertainment, either because the relevant statute exempts such animals entirely from coverage or because the harms would not be considered “unnecessary” in light of the benefits to humans generated from the confinement and use.<sup>40</sup> For the false imprisonment

<sup>37</sup> See OR. REV. STAT. §§ 167.305(1)-(2) (2020) (finding and declaring that “[a]nimals are sentient beings capable of experiencing pain, stress and fear,” and that “[a]nimals should be cared for in ways that minimize pain, stress, fear and suffering”).

<sup>38</sup> For a fascinating overview of the history of animal law and an argument that “there has been a historical progression in the primary motives underlying animal laws” over time, see Thomas G. Kelch, *A Short History of (Mostly) Western Animal Law: Part I*, 19 ANIMAL L. 23, 23 (2012); Thomas G. Kelch, *A Short History of (Mostly) Western Animal Law: Part II*, 19 ANIMAL L. 347, 347 (2013).

<sup>39</sup> According to Gary Francione, “close examination of . . . [anticruelty] statutes indicates quite clearly that they have an exclusively humanocentric focus, and the duties they impose give no corresponding rights for animals.” Gary L. Francione, *Animals, Property and Legal Welfarism: “Unnecessary” Suffering and the “Humane” Treatment of Animals*, 46 RUTGERS L. REV. 721, 737, 753, 756 (1994); see also Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 ANIMAL L. 65 (2009) (deploying Derrick Bell’s interest-convergence theory to explain the limited circumstances in which animal protection receives legal support). For an argument that animal laws have been misunderstood by critics such as Francione, see Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, Rights*, 62 SOC. RES. 539 (1995). The Oregon statutory scheme under which Justice the horse’s former owner was prosecuted appears to endorse both views, with legislative findings declaring both that “[a]nimals are sentient beings capable of experiencing pain, stress and fear” and that “there is a direct link between the problems of animal abuse and human abuse.” OR. REV. STAT. §§ 167.305(1), 686.442 (2020).

<sup>40</sup> See GRUEN, *supra* note 24, at 117 (analyzing 1985 animal experimentation amendments to the U.S. Animal Welfare Act and concluding that the act “still represents minimal standards for animal welfare, [and] does not even cover the vast majority of animals used in research”); Luis E. Chiesa, *Why Is It a Crime to Stomp on a Goldfish? – Harm, Victimhood, and the Structure of*

tort – assuming it was made available to nonhuman animals – no such exemptions would be available to the defendant. Intentional confinement that results in bodily harm alone would suffice to establish liability and no amount of offsetting benefit could excuse the violation. Because “keeping animals in actual captive conditions often causes them to suffer injuries and other physical harms,”<sup>41</sup> it would seem initially that a great many captive animals could successfully press their false imprisonment claims. For instance, consider the case of a cetacean stolen from the wild and forced into a decades-long life of isolation and confinement for the amusement of aquarium visitors. That scientists may advise against releasing her into the wild following her lengthy incarceration<sup>42</sup> should not detract from the fact that her particular life course has been irreparably altered and harmed due to her confinement.

A potential problem for some classes of nonhuman claimants may be that the harm-based branch of false imprisonment liability is amenable to different accounts of the relevant baseline of well-being.<sup>43</sup> On many of these accounts, despite suffering harm through captivity, the animal may still appear to be better off overall, giving rise to what Lori Gruen aptly terms “dilemmas of captivity:”

Given that most conditions of captivity cause inescapable physical or psychological suffering, we might think that unless there is a very good reason for holding animals captive we should release them. However, in the case of many, perhaps most, captive animals, release would be a death sentence. [M]any of the wild counterparts of animals living in captivity exist precariously because their habitats are being destroyed at alarming rates. In many cases, there may be no wild left into which the captive animals can be released. More importantly, even if there are environments into which captive animals may be returned, most captives have lost the ability to survive on their own in their native habitats.<sup>44</sup>

Although some criticize this “wilderness baseline view” as setting “an implausibly low standard,”<sup>45</sup> it is not hard to imagine a court finding refuge in its logic when faced with a false imprisonment claim on behalf of zoo, sanctuary, or companion animals. For instance, an analysis of more than fifty mammal species found that 84 percent lived longer in zoos than in the wild, a disparity the researchers attributed to protection against disease, competition, and predation afforded by zoos.<sup>46</sup> A court

*Anti-cruelty Offenses*, 78 MISS. L.J. 1, 11, 40, 65 (2008) (“[A]nti-cruelty statutes are riddled with exceptions allowing people to harm animals.”).

<sup>41</sup> GRUEN, *supra* note 24, at 143.

<sup>42</sup> See Chabeli Herrera, *Lolita May Never Go Free. And That Could Be What's Best for Her, Scientists Say*, MIAMI HERALD, November 29, 2017.

<sup>43</sup> See David DeGrazia, *The Ethics of Confining Animals: From Farms to Zoos to Human Homes*, in OXFORD HANDBOOK OF ANIMAL ETHICS 738 (Tom L. Beauchamp and R.C. Frey, eds., 2011).

<sup>44</sup> GRUEN, *supra* note 24, at 134.

<sup>45</sup> Streiffer & Killoren, *supra* note 32, at 15.

<sup>46</sup> See Morgane Tidière et al., *Comparative Analyses of Longevity and Senescence Reveal Variable Survival Benefits of Living in Zoos across Mammals*, 6 SCI. REP. 36361 (2016).

might easily cite such research as evidence that confinement, at least in certain facilities such as zoos, does not lead to a welfare detriment over existence in the wild. Even for those species that would have lived longer or more fulsome lives had they been born outside of captivity, there remains the problem of adaptation: for captive-bred animals, release into the wild may not be beneficial to their particular life courses, even if a wild existence would have been preferable in the abstract.<sup>47</sup> Unlike the cetacean referenced above who was caught from the wild, the captive-bred animal does not have ready recourse to a counterfactual life of nonconfinement. Their counterfactual instead is one of nonexistence. Similarly, when presented with the claims of domesticated farm animals, it is hard not to see a court cabining the harm analysis by noting that the animals would not exist at all but for their domestication, confinement, and use by humans. From that perspective, it would seem that – so long as their lives are minimally worth living – such animals have not been harmed in a causal sense by being bred into a confined existence. Confinement *is* their existence.

Are the lives of captive-bred animals minimally worth living – not for us, but for them? The question throws us back into the vagaries of consciousness and the dilemma of whether we can ever know what it is like to be a Milking Shorthorn.<sup>48</sup> When we regard the lives of animals on industrial farms as miserable and perhaps not worth living, we do so inevitably through our subjective viewpoint and without direct access to theirs. To be sure, the practices of industrial animal agriculture are sufficiently brutal as to make compelling the thought that many livestock animals would be better off dead, whether or not we can inhabit their consciousness when facing the question. But in the analogous context of “wrongful life” claims brought by human plaintiffs, where a physician’s negligence is alleged to have caused a parent to lose the opportunity to terminate a pregnancy that results in a severely disabled child being born, courts have shown great reluctance to engage the question of whether the child is worse off for having been born. Such claims, which are brought in the name of an infant for its own alleged damages, require courts to “compare the value of nonexistence – the state that [a child] would have been in but for defendants’ alleged negligence – and the value of his life with [a condition or disability].”<sup>49</sup> Courts routinely decline to engage in such searching philosophical analysis: “[s]imply put, as a matter of law, that comparison is impossible to make.”<sup>50</sup> Given such reticence in

<sup>47</sup> See Richard Frankham, *Genetic Adaptation to Captivity in Species Conservation Programs*, 17 *MOLECULAR ECOLOGY* 325, 325 (2008) (“In captivity, species adapt genetically to the captive environment and these genetic adaptations are overwhelmingly deleterious when populations are returned to wild environments.”).

<sup>48</sup> See Thomas Nagel, *What Is It Like to Be a Bat?*, 83 *PHIL. REV.* 435 (1974).

<sup>49</sup> *Tomlinson v. Metro. Pediatrics, LLC*, 366 P.3d 370, 389 (Or. Ct. App. 2015).

<sup>50</sup> *Id.* See also *Clark v. Children’s Meml. Hosp.*, 955 N.E.2d 1065, 1084 (Ill. 2011) (“In the wrongful-life context, there is no cause of action because the child, while burdened, cannot be said to have suffered a legal wrong.”); *Turpin v. Sortini*, 643 P.2d 954, 964 (Cal. 1982) (“In a wrongful life action. . . what the plaintiff has ‘lost’ is not life without pain and suffering but rather the unknowable status of never having been born. In this context, a rational,

the human "wrongful life" context, one suspects that courts would likewise balk in the nonhuman context and instead simply hold that captive-bred animals have not been harmed so long as their captors comply with minimum applicable animal protection statutes and regulations. Especially considering the vast economic and political stakes involved in deeming industrial animal agriculture tortious, the tendency of courts to outsource decision-making responsibility to the other branches of government in such a manner would be great.<sup>51</sup>

Harm in the sense of being better off not existing at all is harm of a philosophical rather than a physical character. As noted above, in all but the rarest of cases, courts have been reluctant to extend the concept of harm beyond tangible bodily injury in the false imprisonment context. Returning to the case of *Scofield v. Critical Air Medicine* is instructive. In that case, the court credited expert testimony that the children suffered subsequent psychological harm upon learning that their emergency medical transport was unauthorized. But this ground felt somewhat speculative,<sup>52</sup> and the court went on to note that, in California, the minor plaintiffs could recover for nominal damages even without a showing of actual harm. False imprisonment, the court stressed, is a "dignitary tort," and the "purely nominal" harm of being denied one's "personal interest in freedom from restraint of movement" suffices to support liability.<sup>53</sup> Although the court did not go this far, its reasoning would seem to support recovery for the unharmed plaintiff who *never* becomes conscious of her confinement, whether contemporaneously or subsequently. As argued in the next section, the dignity impairment in such a case would take on a new structure, one that might be of relevance to confined nonhuman animals.

#### 19.4 THE INDIGNITY OF CONFINEMENT

The false-imprisonment tort remains inchoate and confused because it rests on a dichotomy of freedom and confinement that is inadequate to the normative task it is being invoked to resolve. The *Restatement (Third) of Torts* discounts the unaware

non-speculative determination of a specific monetary award in accordance with normal tort principles appears to be outside the realm of human competence."); *Gleitman v. Cosgrove*, 227 A.2d 689, 711 (N.J. 1967) (Weintraub, C.J., dissenting) ("Ultimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so. . . . To recognize a right not to be born is to enter an area in which no one can find his way.").

<sup>51</sup> See generally R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295 (2017) (describing such tendencies in the context of tort and environmental disputes).

<sup>52</sup> The entirety of the court's discussion on the matter was contained in a footnote to the opinion: "The jury apparently based its damage award largely on the uncontroverted testimony of Dr. James Long, a psychiatrist. Dr. Long opined the girls' relationship with authority figures had been undermined by Critical Air's deception, and it was reasonably probable the incident would affect their development during adolescence." *Scofield*, 52 Cal. Rptr. 2d at 919 n.8.

<sup>53</sup> *Id.* at 1008 (citation omitted).

victim of false imprisonment as “someone who does not subjectively experience the loss of freedom at the time when she might have exercised it.”<sup>54</sup> But whether she holds a freedom of movement to exercise in the first place depends in substantial part on what forms of restraint the law will recognize as wrongful. Her lack of subjective awareness of the deprivation is made to seem more significant – and damning to her claim – because tort law has defined her experience from the outset as not being one of real deprivation. This circularity becomes unsettling when the false imprisonment doctrine is applied to those individuals who cannot be imagined ever to meet the standards of the doctrine, whether because of age, impairment, or innate characteristics. In such cases, the alterity of the other living being – and the possibility that they might flourish in ways other than standard humanistic ideals of autonomy and self-determination<sup>55</sup> – is not seriously considered. They appear to us as mere “moral patients” rather than moral agents, worthy of some “moral attention and concern”<sup>56</sup> but not as fully agentic equals.

The fact that power and domination exist in the world and are used to confine living beings is unsettling, whether or not those others are aware of their treatment or are tangibly harmed by it. In his *Essay Concerning Human Understanding*, John Locke posed the case of someone who was carried, while deep asleep, into a room where they woke to find a person who they had longed to see and speak with, which they immediately did upon waking. Unbeknownst to the individual, the room the two were in was locked and their freedom of movement curtailed. Locke asked whether their liberty has been violated, despite their lack of awareness. His answer is telling as it focuses attention unequivocally on power and control by the confiner, rather than on the capacity and psychological awareness of the confined:

I ask, is not this stay voluntary? I think nobody will doubt it: and yet, being locked fast in, it is evident he is not at liberty not to stay, he has not freedom to be gone. So that liberty is not an idea belonging to volition, or preferring; but to the person having the power of doing, or forbearing to do, according as the mind shall choose or direct.<sup>57</sup>

Here we learn much from thinking with animals. Even if we grant the deflationary case that animals do not have consciousness or preferences such that they can be aware of or object to confinement, and even if we accept the skeptical view that many captive animals are not harmed physically in comparison to their most likely alternative existences, we might still accept the argument made by leading animal

<sup>54</sup> RESTATEMENT (THIRD) OF TORTS § 7 cmt. h.

<sup>55</sup> See Delon, *supra* note 33, at 132 (“[M]eaning doesn’t presuppose autonomy understood as the rational capacity to determine one’s own goals and principles, or to shape one’s life in accordance with an overall plan.”).

<sup>56</sup> GRUEN, *supra* note 24, at 60.

<sup>57</sup> JOHN LOCKE, *ESSAY CONCERNING HUMAN UNDERSTANDING* bk. II, 134 (Mary Whiton Calkins ed., The Open Court Publishing Co. rev. ed. 1920) (1690).

ethics theorists that the dignity of animals is impaired when they are confined in ways that are inconsistent with their essential being.<sup>58</sup> Confinement forecloses full realization of “the unique capacities that other animals possess,”<sup>59</sup> depriving both the animal and the world of the fullness of their existence. The elephant born and reared in captivity may not know that her wild counterparts live a different reality, roaming many miles a day in complexly interrelated and communicative herds. But the counterfactual seems to demean her existence, whether or not she knows. The fact that she might not have lived at all but for the confinement does not forgive the insult.

The philosopher Angela Martin argues that nonhuman animals are not the kinds of beings that can be wronged in the manner just described. In order to be disrespected, she argues, someone must act toward another in a way that is inconsistent with their preferences. Because most animals are not capable of forming preferences, she asserts, they cannot be humiliated or disrespected.<sup>60</sup> From this perspective, the harm that arises when nonhuman animals are placed in conditions of *un-freedom* might not be a harm that is personal to the individuals confined. Instead, it might be a harm that accrues to all of us from witnessing their condition of indignity. Lori Gruen’s notion of relational dignity is useful here: “Rather than focusing on the worth of individual rational agents making autonomous choices, a relational conception of dignity brings into focus both the being who is dignified and the individual or community who value the dignified in the right ways.”<sup>61</sup> As Gruen further observes, “[d]ignity, understood relationally, can be compromised or undermined even when the individual whose dignity is at stake does not object or complain”<sup>62</sup> – or, one might add, even when the individual does not have awareness of the treatment or condition that insults their dignity. From this perspective, the locus of concern in the case of the unaware victims of confinement may be less the harm that inures to them and more the harm that visits those of us who bear witness

<sup>58</sup> See, e.g., GRUEN, *supra* note 24, at 151–55 (introducing a notion of “Wild dignity” that is denied to nonhuman animals “[w]hen we project our needs and tastes onto them, try to alter or change what they do, and when we prevent them from controlling their own lives,” all of which occurs in captivity); Martha Nussbaum, *The Moral Status of Animals*, CHRON. HIGHER EDUC. B6 (Feb. 3, 2006) (“Each form of life is worthy of respect, and it is a problem of justice when a creature does not have the opportunity to unfold its [valuable] power, to flourish in its own way, and to lead a life with dignity.”).

<sup>59</sup> LORI GRUEN, ENTANGLED EMPATHY: AN ALTERNATIVE ETHIC FOR OUR RELATIONSHIPS WITH ANIMALS 25 (2015).

<sup>60</sup> Martin, *supra* note 36, at 93 (“One feels ashamed and humiliated only if one is treated in a way which is incompatible with one’s preferences regarding one’s social standing and which impugns one’s self-respect. Most animals lack the prerequisite cognitive capacities for this.”). See also Alasdair Cochrane, *Do Animals Have an Interest in Liberty?*, 57 POL. STUD. 660, 669 (2009) (suggesting that “for non-autonomous animals, their interest in liberty is only instrumental, whereas for autonomous humans it is intrinsic”).

<sup>61</sup> Lori Gruen, *Dignity, Captivity, and an Ethics of Sight*, in THE ETHICS OF CAPTIVITY 231, 234 (Lori Gruen ed., 2014).

<sup>62</sup> *Id.* at 240.



to their deprivation and who shoulder the responsibility of deciding their fate without recourse to familiar liberal concepts like autonomy, preference, and choice.<sup>63</sup>

In the liberal individualist tradition of the Anglo-American legal system, such relational or collective sentiments find little purchase. To illustrate how far removed mainstream legal thought is from the philosophical tributaries explored in this chapter, two closing examples from the *Restatement (Third) of Torts* are offered. First, in acknowledging the worrisome gap created by the false imprisonment doctrine's requirement of either bodily injury or consciousness of confinement, the volume notes:

[I]t is troubling to accept the notion that a very young child or a mentally disabled adult who is incapable of understanding that he or she has been confined is therefore “free prey” for those who would deliberately confine him or her, so long as such actors do not cause bodily harm.<sup>64</sup>

The use of the term “free prey” was likely innocent. But it is hard not to extend that language to, say, industrial farm animals who are indeed deemed “free prey” by the legal system so long as minimal standards of harm-prevention are maintained prior to their slaughter.<sup>65</sup> Such denial of agency and personhood may be more troubling in the case of differently abled human subjects, but it does not eliminate entirely the trouble with respect to nonhuman animals. Whenever a legal system denotes living beings as “free prey,” a profound exercise of power has occurred.

Second, a hypothetical illustration from the *Restatement (Third) of Torts* is particularly revealing:

Edward, a visitor at a zoo, notices that Peter, a zoo employee, is locked inside one of the cages. Peter yells to Edward that he dropped his keys just outside the cage door before entering to clean the cage and asks Edward to pick them up and unlock the door. Edward selfishly ignores Peter's request. Because Edward owes no duty to aid Peter, Edward is not liable to Peter for false imprisonment.<sup>66</sup>

Edward and Peter are both human subjects. Peter may well be in danger; we do not know from the facts of the hypothetical because we are not told what other animals share the cage with Peter. But these missing facts do not matter because the law sees Edward as a complete stranger who bears no responsibility for Peter's confinement and therefore holds no duty to assist Peter toward safety and liberation.

<sup>63</sup> See *id.* at 237 (“[N]onhuman dignity may only come into question when animals are part of a human social world in which questions of dignity arise.”).

<sup>64</sup> RESTATEMENT (THIRD) OF TORTS § 7 cmt. h.

<sup>65</sup> See David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 205–6 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

<sup>66</sup> RESTATEMENT (THIRD) OF TORTS § 7 cmt. f, illus. 6.

Putting aside the dissonance in the illustration's failure to acknowledge the layers of human and nonhuman confinement, the hypothetical even on its own terms shows how far humans are willing to pursue the fantasy of self-determination. The maximal freedom afforded to Edward to pursue his life course without being interrupted by the needs of others apparently includes the freedom to become a moral monster, if he so chooses. Unlike the inarticulate pleas issued by engaged nonhuman animals, Peter's call for help is unmistakable and directed personally at Edward. Still, an accommodating legal system helps exonerate Edward from responsibility by defining Peter a priori as a stranger and by viewing Peter's act of dropping the keys as the proximate cause of his just deserts.

This airtight system of right and responsibility – a system "so perfect that no one will need to be good"<sup>67</sup> – is haunted by those living beings who fail its criteria for full membership, yet whose existence still makes an undeniable claim on our concern. To identify "false" imprisonment, one might instead begin by asking what constitutes "true" or lawful imprisonment. To ask that question, though, is to raise fundamental issues regarding the state's membership and legitimate scope of authority, including how it came to be that nonhuman animal confinement is presumed to constitute "true" imprisonment absent some extraordinary showing to the contrary. The case in favor of the existence of animal consciousness and the grave welfarist and dignitary impairments caused by animal confinement is strong, yet the legal system has ample intellectual reserves with which to parry such conclusions and to construct nonhuman animals instead as "free prey." Whether or not they are conscious of their confinement or physically harmed by it, however, nonhuman animals *are* confined, and their lives are accordingly limited and directed by human power. The more pressing consideration should therefore be *our* consciousness of their confinement and how we choose to respond to it.

## 19.5 CONCLUSION

A central puzzle of Anglo-American false imprisonment law is how to explain why no legal recourse exists for an individual whose dignity is denied through confinement but who is neither conscious of the confinement nor harmed by it. A possible answer to that puzzle can be found in the experience of nonhuman animals and the indignity that we all experience when we contemplate seriously their lot. The fact that we cannot at present identify a legally eligible individual within which to locate the harm suffered by confined nonhuman animals should not be taken to mean that the harm is not real. Instead, it should cause us to question the reality of our framework for identifying and locating harm.

<sup>67</sup> T.S. ELIOT, *Choruses from "The Rock,"* in T.S. ELIOT: THE COMPLETE POEMS AND PLAYS, 1909–1950 106 (1958).