

Reece's Pieces: The Limits of Law
and the Life Sentences of Lucy the Elephant

by

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Abstract

In this dissertation, I examine the public debate over the welfare of Lucy, the zoo elephant at the heart of the 2011 Alberta Court of Appeal case of *Reece v Edmonton (City)*. Attending to three sites of study (“species,” “location,” and “law”), I engage in a critical discourse analysis to uncover the conceptual limits within which this debate occurred with respect to animals and the law. Being socio-legal in nature, this is a case study not of *Reece*, but of “*Reece’s pieces*” insofar as this project analyzes the discourse spread across print news media, websites, blogs, online videos, and social media feeds spanning from 2005 to 2018.

Moving beyond the familiar legal animal studies binaries of welfarism versus abolitionism, property versus personhood, and so on, I use ecofeminist and posthumanist perspectives to uncover conceptual pressure points. For instance, while Lucy’s trunk is alien in relation to human features, yet apparently capable of “human” capacities like art-making, go-to concepts of “the animal” and “the human” are found to be fundamentally unstable throughout this discourse. Similarly, insofar as the feel-good concept of “home” is deployed with respect to past, present, and would-be locations for Lucy, the discourse actively attempts to resist engaging with the conditions of a zoo elephant in North America – ones that may actually imply that “home” is a fundamental impossibility for such a being. Relatedly, rather than the repeated deployment of criminal-law terms being a layperson’s mistake when speaking of the civil lawsuit of *Reece*, this go-to legal language instead points to what is spoken around by all sides in the debate: the underlying power structures that accompany the figure of the captive elephant, with pastoral logics of care and carceral logics of punishment competing and combining in ways formal law cannot sufficiently articulate.

Ultimately, in locating these limits, I spotlight what traditional ways of thinking one may need to move beyond if justice to animals is ever to be done, also identifying how and where the “life sentences” of the elephant at the heart of this debate may someday end.

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Chapter 1

Introduction: From *Reece* to “*Reece’s Pieces*”

1. Introduction: Consecutive Life Sentences (and their Limits)

This project is oriented towards finding limits – both the limits of law in general and the limits of one discourse in particular: the one surrounding Lucy, the zoo elephant whose welfare was at the centre of the 2011 Alberta Court of Appeal case of *Reece v Edmonton (City)*.¹ Given the dual focuses of both “law” and “Lucy,” it is perhaps best to begin by saying that what follows in this project is an analysis of Lucy the elephant’s “life sentences.” This phrase is a useful one because it conjures up the spectre of law (and it is especially fitting in light of how some discourses frame Lucy’s living conditions as a kind of prison). Yet, I use this phrase now to allow for a bit of wordplay: this project is an analysis of Lucy’s “life sentences” insofar as it is a study of that wide discursive playing field in which – through sentence, after sentence, after sentence – the life of this elephant has been rendered into language.

These sentences have been fueled by a seemingly intractable public debate. Only the most basic of information seems to be agreed upon by all those who speak of Lucy (i.e., she is an Asian elephant, was born in Sri Lanka sometime around 1975, and has lived at the Edmonton Valley Zoo since 1977), although even the meaning ascribed to these details varies significantly from discourses to discourses.² Moreover, to try to say what her life at the zoo has been like provokes two polarized positions (as well as everything in between). At the one end, there are those asserting that Lucy has always been surrounded by people who love her (and whom she

¹ *Reece v Edmonton (City)*, 2011 ABCA 238 [*Reece*]. As “discourse” is a broad term, see *infra* note 80 and corresponding section of this chapter for clarification.

² See, e.g., City of Edmonton, “Lucy’s Care” (22 December 2011), online: *WayBack Machine* <http://web.archive.org/web/20111222042255/http://edmonton.ca/attractions_recreation/attractions/edmonton_valley_zoo/lucys-care.aspx>; “Home” (no date), online: *Save Lucy* <<http://www.savelucy.ca/Home>>.

loves in turn) – people who are committed to ensuring she lives out her days at the Zoo in the best conditions possible.³ At the other end, there are those contending that, while no one has ever been actively malicious towards her, a solo enclosure in a northern climate cannot but result in a deep neglect of the basic physical and psychological needs an elephant possesses – that Lucy’s captivity in the zoo amounts to a “life sentence” in a prison.⁴

Nevertheless, in undertaking this project, I have not set out to resolve the debate. Rather, what I show in the pages that follow is that the debate itself both presupposes a number of limiting conceptual assumptions and occludes the possibility of asking a number of more fundamental questions about what the relationship between animals and the law is (or can be). There is no one single cause for the shortcomings inherent in the debate, with factors such as uncritical humanism, narrow-sighted optimism, and surreptitious structures of power all playing a part in shaping these limits. This project’s contribution, therefore, is in laying out and analyzing what constrains these “life sentences,” holding that any possibility of genuinely “doing justice” to an animal like Lucy entails going beyond many of the discursive reference points on which the very debate is premised.

Notably, while this project forefronts “law” as an important aspect of the debate, it is not an analysis of the *Reece* case, but instead of what I call “*Reece*’s pieces.” Where *Reece* proper began and ended in court, *Reece*’s pieces represent the public discourse on Lucy the elephant that spanned more than a decade and weaved in and out of the realm of formal law repeatedly throughout that time. Being composed of far more than law reports and affidavit evidence, *Reece*’s pieces refer to the thousands and thousands of sentences through which a wide

³ See, e.g., Wanda Curzon, “Seeing is believing”, Letter to the Editor, *Edmonton Journal* (13 September 2009) A15.

⁴ See, e.g., Friends of Lucy, “We’d like to see what the future of LUCY looks like. Will she continue to suffer & languish alone at #yegzoo, then die in her mid-40’s like so many other elephants in zoos? Or will @CityofEdmonton #yeg have the foresight & compassion to #LetLucyGo to sanctuary? No life sentence!” (3 February 2018 at 12:19AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/959657696323670016>.

discursive playing field comes into view, with news media coverage, blogs, websites, and social media being only some of the materials with which I have worked in bringing this project together.

With this corpus of material being the primary source for the analysis to follow, I explain in this introductory chapter how *Reece*'s pieces were assembled and how I subsequently came to work with them over the course of this project. This chapter's title – "From *Reece* to '*Reece*'s Pieces'" – is indicative of the structure of the chapter that follows. First and foremost, I lay out below in the section "Within the Law" what the legal-doctrinal scholarship on *Reece* proper has been, endeavouring to demonstrate the case both was and was not a "revolutionary" reference point as far as scholarship of animals and their place in law is concerned.⁵

After explaining what doctrinal scholars of *Reece* have established, I move to "*Reece*'s Pieces," laying out how I came to form the case with which I have worked in this project in the section titled "Making a Case for the Case." As I have alluded to already, mine is not the legal case of *Reece* with its normatively-defined closures, but instead a "case" which holds all the pieces that – when brought together – represents a years-long public discourse both over Lucy the elephant in particular and, in more general terms, over the meaning of species, global and existential places of belonging, and the constitutive character of how "law" makes sense of animals.

From there – having explained how my own case came together – in the final section of this chapter, "Thinking Inside and Outside the Box," I outline how I then worked with the

⁵ As legal scholar Archie Zariski explains the division, *doctrinal* scholarship is oriented at clarifying "legal principles and rules ... to contribute to the better understanding of existing law, and sometimes with a view to developing it in new directions." It is "primarily concerned with analyzing legal texts (legislation and case reports) ... [and therefore] is sometimes described as the study of black-letter law (law as written rules)." By contrast, *socio-legal* scholarship is oriented toward studying "law in [social] context," often through "the addition of concepts and research methods from other scholarly disciplines." See Archie Zariski, *Legal Literacy: An Introduction to Legal Studies* (Edmonton: AU Press, 2014) at 105-106.

materials I accumulated. Here, I spell out the methodological assumptions and approaches taken to see *Reece*'s pieces both as a number of parts that are meaningful in their right and as a whole composed of those parts as they meaningfully relate to one another. By going through the *Reece* case as it is normatively-defined, by making the case for a case of "pieces" instead, and by explaining how I have worked with those pieces to understand them as both parts and a whole, this chapter lays the methodological groundwork for the analysis I undertake in the rest of the project to follow.

2. Within the Law: Establishing the Significance of *Reece* in Relation to Extant Scholarship and Jurisprudence

As a legal case, *Reece* began when Tove Reece, alongside Zoocheck and PETA, applied to the Alberta Court of Queen's Bench in 2010, seeking a declaration that the City of Edmonton was in violation of Alberta's *Animal Protection Act* for the conditions under which the city-owned zoo kept Lucy the elephant.⁶ Interpreting the lawsuit as an unlawful attempt at privately enforcing a penal statute, Justice John D. Rooke barred the action as an "abuse of process" – a position largely echoed by Justice Frans Slatter's majority in the Alberta Court of Appeal the next year.⁷ By contrast, writing a dissent three times the length of the majority decision in the appellate court, Chief Justice Catherine Fraser comprehensively contended that these animal activists were "entitled to their day in court" for "the public and on behalf of Lucy."⁸

Since the Supreme Court of Canada declined to grant the applicants leave to appeal, *Reece* as a legal case ended there. However, much has been made of the Chief Justice's dissent in

⁶ *Reece v Edmonton (City)*, 2010 ABQB 53 [*Reece* (QB)]; *Animal Protection Act*, RSA 2000, c A-41.

⁷ *Reece* (QB), *ibid.* at paras 6, 56; *Reece*, *supra* note 1 at para 36.

⁸ *Reece*, *ibid.* at para 199.

scholarly and lawyerly commentary – and with good reason.⁹ In this section, therefore, I survey the extant legal-doctrinal scholarship on *Reece* and the relevant jurisprudence to establish that, as many scholars appear to suggest, the *Reece* dissent was revolutionary with respect to the place of animals in the law in many ways. Yet, while the “revolutionariness” of *Reece* is indeed there to some extent, in this section I ultimately establish that, in many other ways, *Reece* was not revolutionary – such that the relevance of the case as an object of study in and of itself mostly resides in how well it demonstrates the apparent *limits* of how far the law can move when it concerns itself with animals.

In terms of establishing the significance of the *Reece* dissent, legal scholar Peter Sankoff has noted that the only instance of jurisprudence that might rival *Reece* for its serious engagement with the nature, scope, and application of animal law is the 2003 Israeli High Court case of *Noach (Israeli Federation of Animal Protection Organizations) v Minister of Agriculture*, wherein animal protection organizations successfully sued the Israeli government when the High Court found government regulations that allowed for the force-feeding of geese in the production of *foie gras* to be in violation of Israel’s *Cruelty to Animals Law*.¹⁰ Still, excepting *Noach*, one is hard-pressed to find anything else that tackles animal legal issues in a comparable way to *Reece* anywhere else in the world, with legal scholars Katie Sykes and Vaughan Black pointing out that a contemporaneous American instance like the Supreme Court case of *United States v Stevens*

⁹ This is not to say that the legal dimension of the Save Lucy campaign ended here, as animal activists concerned over Lucy’s welfare turned to the courts once again in 2016. See *Zoocheck Canada Inc. v Alberta (Minister of Agriculture and Forestry)*, 2017 ABQB 764; *Zoocheck Canada Inc. v Alberta (Minister of Agriculture and Forestry)*, 2019 ABCA 208 [Zoocheck].

¹⁰ Peter Sankoff, “Opportunity Lost: The Supreme Court Misses a Historic Opportunity to Consider Question of Public Interest Standing for Animal Interests” (2012) 30:2 *Windsor Yearbook of Access to Justice* 129 at 135-136; *Noach (Israeli Federation of Animal Protection Organizations) v Minister of Agriculture*, [2003] HCJ 9232/01 (Israel); *Cruelty to Animals Law (Protection of Animals)*, Passed the Knesset 28 Tevet 5754 (11 January 1994). See also, Katie Sykes & Vaughan Black, “Don’t Think About Elephants: *Reece v City of Edmonton*” (2012) 63 *University of New Brunswick Law Journal* 145 at 147.

(which concerned “crushing” videos wherein small animals are killed as part of pornographic films) treats animal issues as merely tangential to “real” matters of law.¹¹

Moreover, here at home, in the view of legal scholar Lesli Bisgould, the *Reece* dissent was “the most important development for animals in Canadian jurisprudence to date.”¹² Where once *Harvard College v Canada (Commissioner of Patents)* (more popularly known as the “oncomouse case” wherein Harvard unsuccessfully sought a patent for its transgenic mice) stood as the signpost for how seriously the issue of justice for animals could be taken in Canadian jurisprudence (inasmuch as the Supreme Court granted an animal advocacy group intervenor status), Bisgould contends that the *Reece* dissent goes beyond this in now “provid[ing] interim support for a significantly broader interpretation of existing [animal protection] legislation” in its overt acknowledgement of “the pressing need for legal progress and the theoretical basis for granting meaningful animal rights.”¹³ Thus, as Sykes and Black have noted, although “[d]irect comparison can be of limited value in cases involving such different legal issues and contexts, ... [Chief Justice Fraser’s] dissent demonstrates a degree of openness to treating animal welfare as a serious legal issue that is *qualitatively different* from the judgements in *Stevens* and *Harvard*.”¹⁴ In short, instead of animals being incidental to the “real” matters of law – as they were in *Stevens* and *Harvard* – the *Reece* dissent puts them front and centre.

¹¹ *United States v Stevens*, 559 U.S. 460 (2010). There are several recent post-*Reece* American cases that could be considered exceptions to this trend – namely, those spearheaded by the Nonhuman Rights Project in their attempted petitions for writs of habeas corpus for chimpanzees and elephants in captivity. See, e.g., *Matter of Nonhuman Rights Project, Inc. v Lavery*, 31 NY3d 1054 (NY Ct App 2018).; *Nonhuman Rights Project, Inc., ex. rel. Happy v Breheny*, 134 NYS3d 188 (App Div 1st Dept 2020).

¹² Lesli Bisgould, *Animals and the Law* (Toronto: Irwin Law Inc, 2011) at 120.

¹³ *Ibid.* at 284-285; *Harvard College v Canada (Commissioner of Patents)*, 2002 SCC 76. Bisgould’s contention has (arguably) been recently confirmed by the Alberta Court of Appeal’s unanimous decision in *R v Chen*, 2021 ABCA 382. As Justice Marina Paperny remarks at para 21 in *Chen*, the *Reece* dissent provides a foundation for recognizing cruelty to animals as a serious social and legal issue.

¹⁴ Sykes & Black, *supra* note 10 at 156 [emphasis added].

Further, in establishing the significance of the *Reece* dissent, Sykes and Black actively contrast it not just with other judicial decisions, but with the dismissive comments of majority author Justice Slatter – comments which largely reproduce the attitudes of the judges writing in *Stevens* and *Harvard*. As Justice Slatter saw it, while Tove Reece, Zoocheck, and PETA “argue that there is no other effective alternative way to bring this issue before the court[,] [s]tating the issue in that way presupposes that this is a suitable issue for the courts.”¹⁵ Thus, in the view of Sykes and Black, “[t]he disagreement between the *Reece* judgments boils down to whether there is any place for the consideration of [animal] matters in this case, or (implicitly) in the legal arena at all.”¹⁶ In other words, the revolutionary thing in *Reece* was that a judge deviated from the prevailing norm and actually characterized an animal as deserving of legal recognition. As Sykes and Black phrase it,

For the dissent the frame is broader [than it is for the majority]. It is the polity as a whole, including the executive branch and the public, with emphasis of the rights of the latter to hold the former to account according to the principles of the rule of law. What seems to impel this wider framing of the question is a concern that is broader still: a welcome, if overdue, appreciation that there are beings who have hitherto been excluded from the polity and whose interests and lives have had little weight in determining either the scope or the content of the justice system.¹⁷

That is, in the *Reece* dissent, the boundaries of who’s in and who’s out of the community of relevant beings for the law are more expansive than they have generally been taken to be, grown now to include not just all human beings, but nonhuman beings, as well.

¹⁵ *Reece*, *supra* note 1 at para 35; Sykes & Black, *ibid.* at 153.

¹⁶ Sykes & Black, *ibid.* at 148. Along the same lines, Sankoff (*supra* note 10 at 134-135) sets up a battle over the belongingness of animals in the legal arena as occurring not between the majority and the dissent of the Alberta Court of Appeal in *Reece*, but between the Chief Justice and the Supreme Court of Canada, giving this meaning to the Supreme Court’s decision not to grant Reece, Zoocheck, and PETA leave to appeal: “Despite achieving some progress at a societal level, the pervasive view of ‘it’s only an animal’ remains hard to shake in the courtroom.”

¹⁷ Sykes & Black, *ibid.* at 162. Similarly, Sankoff, *ibid.* at 135 asserts that the significance of the Chief Justice’s dissent is located in how “courts around the world are cottoning on to the fact that animal issues raise matters of societal importance that is in fact justiciable.” Moreover, in *Friends of the Canadian Wheat Board v Canada (Attorney General)*, 2011 FC 1432, Justice Douglas Campbell of the Federal Court locates the value of the *Reece* dissent similarly to the first of those points identified by Sykes and Black – that is, that it affirms the importance of the public being able to hold the executive branch accountable as fundamental to the rule of law.

More widely, the *Reece* dissent also participates in and goes beyond a lineage of Canadian jurisprudence in so overtly recognizing the entitlement of an animal to justice for its own sake under the law. As legal scholar Maneesha Deckha sees it, the *Reece* dissent stands in connection to and stark contrast from the heretofore most prominent precedent-setting case in this area, the 1978 Quebec Court of Appeal ruling in *R. v Ménard* (wherein a dog-catcher was convicted of cruelty to animals for using crude and painful methods to euthanize the dogs).¹⁸ *Ménard* has regularly been relied upon to guide Canada's courts in their application of animal law.¹⁹ In this case, Justice Antonio Lamer found that, while federal anti-cruelty law exists in part to proscribe upstanding human behaviour, it also exists for the animals' own sakes.²⁰ *Reece* continues in the lineage of *Ménard* in finding these things, as well; however, where *Reece* goes beyond *Ménard* is in locating where human duties to animals come from.

For Justice Lamer, animal law represented derivative duties – a *noblesse oblige* from humans deigning to treat animals well – whereas, for Chief Justice Fraser, the emphasis is on stewardship and intrinsic responsibilities to the other creatures on the planet.²¹ In this respect, Deckha contends that Chief Justice Fraser's "judicial orientation and departure point is clearly a more sophisticated and animal-centric judicial consciousness than what has existed previously in the jurisprudence"²² insofar as it "disrupts the precedent set by *Ménard* that accepts a rigid species hierarchy as an appropriate basis to interpret anti-cruelty statutes."²³

¹⁸ *R. v Ménard*, [1978] 43 CCC (2d). See also, discussion of *Ménard* in Bisgould, *supra* note 12 at 64-66; Elaine L. Hughes & Christiane Meyer, "Animal Welfare Law in Canada and Europe" (2000) 6 *Animal Law* 23 at 56-58.

¹⁹ Maneesha Deckha, "Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm" (2013) 50:4 *Alberta Law Review* 78 at n 21, n 165.

²⁰ *Ménard*, *supra* note 18 at para 49: "While ss. 400 and 401 [now s. 445] have been enacted to condemn interference with the rights of the owners of certain animals, s. 402 [now s. 445.1] was enacted for the protection of the animals themselves ..."

²¹ Deckha, *supra* note 19 at para 52.

²² *Ibid.*

²³ *Ibid.* at para 73.

I certainly agree with many elements of these laudatory assessments – the *Reece* dissent is indeed “revolutionary” in many of the ways outlined above – although some greater nuance must also be brought to bear on the case at hand. Chief Justice Fraser’s dissent does indeed differ from the other judicial opinions in *Reece* and stands out among jurisprudence in both Canada and the world over for its serious treatment of animal interests as justiciable matters. However, the issue I take with the degree of praise the Chief Justice’s position has accrued in scholarly circles is this: at its core, it was not anything particularly new in law. Rather, all it does is *reiterate* from the bench a non-anthropocentrism that had been there in the law from the start.²⁴

My inkling that Chief Justice Fraser’s dissent is not, in fact, as revolutionary as it *prima facie* appeared to be comes from looking to the law itself. Namely, the dissenting judge’s assertion in *Reece* that animals are deserving of justice does not arise *ex nihilo*. Instead, this claim is already written in the books of law, with the *Animal Protection Act* expressly identifying the interests of animals as within the sphere of legal concern.²⁵ When commenting on *Reece*, legal scholar Shaun Fluker argued that the majority decision was legal positivist in its reasoning, whereas the dissenting opinion was legal realist insofar as it considered the wider context.²⁶ In

²⁴ That the *Reece* dissent is non-anthropocentric is a central thesis of Deckha’s article. However, unlike the position I take, Deckha contends at para 1 that “law [as a whole] is an anthropocentric terrain.”

²⁵ Certainly, one could argue that animal law does not “truly” exist for the animals themselves, but this would mean actively reading against the grain in terms of both the letter-of-the-law and case law. Insofar as animal law – the *Animal Protection Act* included – frames its subject as having an internal experience of reality (i.e., capable of suffering), it implies that wrongs are not simply offences against human standards of behaviour, but are wrongs to the animals themselves. Moreover, as far back as the *Ménard* case in 1978, Canadian case law has framed the function of animal law as both to proscribe appropriate standards of human behaviour as well as respecting the animals’ interests for their own sakes. But see also *R. v D.L.W.* [2016] 1 SCR 402 at paras 69-70 (Justice Cromwell’s majority admitting to an agnosticism about whether or not the criminalization of bestiality exists for the animals’ own sakes).

²⁶ Shaun Fluker, “The Elephant in the Courtroom” (1 September 2011) *ABlawg*, online: *ABlawg* <http://ablawg.ca/wp-content/uploads/2011/09/blog_sf_lucy2_sept2011.pdf> at 2. Legal positivism is an approach which takes law simply to be a system of rules that have been posited and are therefore valid, regardless as to what wider social merit they have may or may not have. Legal realism, by contrast, takes law to be the product of wider social interests and, therefore, interprets laws in contextually purposive ways. On positivism generally, see John Austin, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1832); H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). On realism generally, see John Dewey, *Philosophy and Civilization* (New York: Little, Brown & Co., 1963).

Fluker's view, the realism of the Chief Justice's position was evidenced by how it considered "[t]he context of this dispute [as] society's recognition that non-human animals – particularly those who feel pain and pleasure – have moral standing."²⁷ However, while the Chief Justice certainly canvasses wider scholarship and moral arguments in identifying animals as subjects of justice, she ultimately ends up with reasoning that is frankly positivist, such as when she "turn[s] to the basic statutory framework of Alberta's animal welfare laws" and concludes that a "review of the [*Animal Protection Act*] and [its subsidiary *Animal Protection Regulations*] reveals that they are designed to protect a vulnerable group, animals, by establishing certain minimum standards that apply to their treatment."²⁸ In other words, it is not the Chief Justice who brings Lucy into the fold of justice; rather, she is just repeating facts of status quo, as the law itself has already done this. If anything, it is in fact Justice Slatter's implication that the alleged mistreatment of Lucy was not an appropriate issue for the courts that was the value judgement in *Reece* that must rely on something extra-legal to substantiate it. The claim that Lucy is deserving of having her "day in court," by contrast, has already been written right into the laws of Alberta.²⁹ My point, therefore, is this: the "revolutionary" thing that the Chief Justice did in *Reece* appears to be that she *actually applied the law*.

Still, this is not to say that nothing in the *Reece* dissent goes beyond the letter of the law. After all, the reason Tove Reece, Zoocheck, and PETA applied to the Court of Queen's Bench was that the designated enforcer of the *Animal Protection Act*, the Edmonton Humane Society, had chosen to do nothing about Lucy's alleged mistreatment.³⁰ The need for granting some other party standing to bring the issue before a court arises from taking notice of the fact that

²⁷ Fluker, *ibid.* at 2.

²⁸ *Reece*, *supra* note 1 at para 72.

²⁹ *Ibid.* at para 199.

³⁰ The Edmonton Humane Society had investigated complaints over Lucy's alleged mistreatment, but had not chosen to do anything about its findings. See *ibid.* at paras 183-187.

Animals, including Lucy, cannot commence lawsuits on their own to protect themselves. They must rely on humans to give voice to the truly voiceless. Thus, courts should take a generous, not impoverished, approach to the grant of public interest standing for those attempting to enforce the restrictive animal rights that do exist.³¹

Lucy is alleged to have suffered an injury cognizable under the current legal regime (even as an animal), but the framework established by the *Animal Protection Act* significantly curtails the means by which that injury can be brought before a court. The Chief Justice's dissent, therefore, goes beyond the letter of the law in the assertion that there must be a means other than that expressly outlined in the *Animal Protection Act* for bringing issues of animal justice before the courts, taking account of animals' inability to pursue these alternative means on their own.

In my own contribution to *Reece* commentary, I underscored how the case's dissenting opinion illustrated "the capacity of the judiciary to provide novel solutions in unusual circumstances."³² I raised this point particularly with respect to the Chief Justice's remark that "it arguably remains an open question whether the common law has now evolved to the point where, depending on the circumstances, an animal might be able to sue through its litigation representatives to protect itself."³³ Drawing attention to this remark, I was not alone in situating the dissent in relation to the 1972 American Supreme Court case of *Sierra Club v Morton*, as Sykes and Black ask outright if *Reece* may be the "*Sierra Club* of Canadian [a]nimal [l]aw?"³⁴

In the American case, the Sierra Club environmentalist group sued the United States Secretary of the Interior in an attempt to block development of the Mineral King area of the Sequoia National Forest.³⁵ The majority of the American Supreme Court ruled in favour of the Secretary of the Interior, finding that the environmentalist group lacked standing to sue in the

³¹ *Ibid.* at para 90 (footnotes deleted).

³² Tyler Totten, "Should Elephants Have Standing?" (2015) 6:1 *Western Journal of Legal Studies* 1 at 16.

³³ *Reece*, *supra* note 1 at n 143.

³⁴ *Sierra Club v Morton*, 405 US 727 (1972); Sykes & Black, *supra* note 10 at 154.

³⁵ *Sierra Club*, *ibid.* at 728-730.

absence of interference with a private right.³⁶ Yet, like the remark from Chief Justice Fraser I quoted above, Justice William O. Douglas' dissent in *Sierra Club* asserted that

The critical question of “standing” would be simplified and also put neatly into focus if we ... allowed environmental issues to be litigated before [the courts] in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. ... This suit would therefore be more properly labeled as *Mineral King v Morton*.³⁷

Justice Douglas' dissent in *Sierra Club*, like that of Chief Justice Fraser in *Reece*, gestures towards a rejigging of the process by which issues affecting nonhuman entities can be taken to the court, bringing the entities themselves into centre stage and casting their advocates simply in supporting roles.

This being said, the fact that there are parallels between *Sierra Club* and *Reece* only further underscores the lack of any monumental revolutionariness in the latter case. While significant for an apparent first appearance of the Justice-Douglas-style reasoning about nonhuman standing in Canadian jurisprudence, as an idea it is not especially new. Moreover, thought-provoking as the potential of Lucy the elephant to have legal standing in her own right is, this is pursued only as a tangent in the Chief Justice's reasons. For Chief Justice Fraser, the most obvious solution in *Reece* was not to give an animal standing, but to give standing to animal activists. To this end, having animal-standing as a side issue still situates *Reece* in the *Sierra Club* lineage, as Justice Harry Blackmun's dissent in *Sierra Club* endorsed the idea of giving the activists standing to sue in the public interest without going the Justice Douglas route of giving standing to the injured nonhuman entity itself.³⁸

³⁶ *Ibid.* at 736-737, 741.

³⁷ *Ibid.* at 741-742.

³⁸ *Ibid.* at 758. See also, Totten, *supra* note 32 at n 98; Marguerite Hogan, “Standing for Nonhuman Animals: Developing a Guardianship Model from the Dissents in *Sierra Club v Morton*” (2007) 95:2 *California Law Review* 513.

In justifying the grant of public interest standing to Tove Reece, Zoocheck, and PETA, Chief Justice Fraser applied the test established by the Supreme Court of Canada in *Finlay v Canada (Minister of Finance)*.³⁹ This stands in contrast to the reliance of the appellate court's majority on the 1978 English case of *Gouriet v Union of Post Office Workers*.⁴⁰ In *Gouriet*, the House of Lords found that a private individual could not use the civil courts to enforce penal law absent interference with a private interest. While there is a connection between the issues in *Gouriet* and *Reece*, Sykes and Black point out that the Justice Slatter's decision to apply only *Gouriet* instead of *Finlay* as a precedent in *Reece* was a peculiar choice, it being "a formalistic application of the doctrine of abuse of process" which neglects Canada's unique jurisprudence on public interest standing.⁴¹

To this end, the dissenting judge's use of *Finlay* was, in fact, not something coming out of left field. Rather, this too was arguably a matter of status quo. Much like how finding an alleged injury to an animal to be a legally cognizable thing could be arrived at by simply reading the law written on the books, so too awarding standing in court to those who seek to enforce the law that protects those animals could be arrived at by simply following the jurisprudence. As a legal-doctrinal matter, the *Reece* dissent is significant for bringing many points of law together; however, it is not necessarily "revolutionary" inasmuch as it just exemplifies where the jurisprudence is at right now.

³⁹ *Finlay v Canada (Minister of Finance)* [1986], 2 SCR 607. As Anna Pippus has noted in a debate catalogued by Leah Edgerton, since *Reece* "was heard, our public interest standing laws have been even further liberalized, providing a further avenue for getting animals' interests before the courts." See Leah Edgerton, "What is the Most Effective Way to Advocate Legally for Nonhuman Animals" (29 August 2016), online: *Animal Charity Evaluators* <<http://animalcharityevaluators.org/blog/what-is-the-most-effectiveway-to-advocate-legally-for-nonhuman-animals/>>; Angela Fernandez, "Not Quite Property, Not Quite Persons: A 'Quasi' Approach for Nonhuman Animals" (2019) 5 *Canadian Journal of Comparative and Contemporary Law* 155 at n 96.

⁴⁰ *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL (Eng)).

⁴¹ Sykes & Black, *supra* note 10 at 151.

As is likely evident by now, *Reece* commentary by and large celebrates the Chief Justice's dissent *tout court*. Nevertheless, there are a handful of critiques to be found, most overtly articulated by Maneesha Deckha.⁴² As Deckha concedes, while the *Reece* dissent is notable for going "considerably further than any Canadian animal judgment to date in departing from the law's standard instrumentalist view of animals," it is not representative of "an ideal decision for animals" for two reasons: (1) it does not "eschew[] human-based metrics and methodologies for assessing who or what should count ethically to instead recognize nonhuman animal subjectivities on their own terms" and (2) it does not advocate "for the end of animal exploitation or their instrumental use."⁴³

On the first point, Deckha is careful to identify the *Reece* dissent as being "non-anthropocentric" while still not being posthumanist.⁴⁴ That is to say, although the dissent seriously considers a being who is not a human (and, in that sense, it is non-anthropocentric), it gives value to that being through "humanist norms of what and who matters," looking to Lucy's emotional and intellectual complexity only to "marshal[] comparisons with human suffering and human capacities."⁴⁵ Lucy matters in the dissent only because she is a "humanized animal."⁴⁶

On the second point, Deckha is critical of the Chief Justice for neither addressing "the legitimacy of zoos as an institution" nor "examin[ing] the practice of permitting zoos in the first

⁴² See also, Sykes & Black, *ibid.* Conceding to the "unfocussed air" of the dissent, Sykes and Black also note at 155 that it lacks a "theoretically rigorous and consistent account of why animals (and which animals) should count in the legal system." That Sykes and Black's criticism (as one of the few other criticisms I could find in *Reece* commentary) is so mild should suggest just how ubiquitously Chief Justice Fraser's dissent is lauded.

⁴³ Deckha, *supra* note 19 at para 5. As Deckha explains the distinction, non-anthropocentrism "challenges the species hierarchy that privileges human subjectivities and interests and discounts, disavows, or ignores animal ones," whereas posthumanism, by contrast, "challenges anthropocentrism and the species hierarchy inherent to it" while at the same time also openly "eschew[ing] human-based metrics and methodologies for assessing who or what should count ethically [and] instead recogniz[ing] nonhuman animal subjectivities on their own terms." To put it very glibly, "non-anthropocentrism" is about according value to animals on *our* terms, whereas "posthumanism" is about according value on *theirs*.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at para 52.

⁴⁶ *Ibid.* at para 51, citing Cary Wolfe & Jonathan Elmer, "Subject to Sacrifice: Ideology, Psychoanalysis, and the Discourse of Species in Jonathan Demme's *Silence of the Lambs*" (1995) 22:3 *Boundary* 2 141.

place and their inherent placement of wild animals in captivity for human ends.”⁴⁷ In fairness to the Chief Justice, her dissent does acknowledge that the reputed harms Lucy has suffered may be endemic to zoo captivity of elephants in and of itself – although she does not, as Deckha is right to point out, condemn zoos outright.⁴⁸ For Deckha, a truly “remarkable” decision would have gone beyond “the four corners of the property-reinforcing legislation.”⁴⁹ In this respect, Deckha’s critique is the abolitionist one of Gary Francione (addressed in greater detail in Chapter 2 of this dissertation), the main point of which being that animal law can only ever truly do justice to animals by giving them personhood status and severing the currently exploitative relations enabled by their status as legal property.

All this being said, Deckha softens these critiques in speculating that some of the limitations of the *Reece* dissent may not be products of the Chief Justice’s own shortcomings, but of the law’s. Although less certain about where the problem of humanism ought to be located, the problem of animals’ property status can squarely be located in the law.⁵⁰ Since the Chief Justice’s dissent was, as I indicated previously, “revolutionary” simply because it actually tried to enforce the law on the books, Deckha points out that that basis likely could not have pushed the dissent beyond the property regime since

[t]here is no Canadian legislative or constitutional document that incorporates principles about animal liberty, let alone dignity or equality, from which a Canadian judge can draw to interpret welfare legislation or that can trump the ownership rights the zoo retains in Lucy. ... Further, there is no external jurisdiction model that Chief Justice Fraser may have invoked on a comparative basis that has abolished zoos or declared animals not to be property.⁵¹

⁴⁷ *Ibid.* at para 4.

⁴⁸ *Reece*, *supra* note 1 at n 69: “It would be naive to assume that problems do not arise from the mere fact of keeping elephants in captivity.”

⁴⁹ Deckha, *supra* note 19 at para 54.

⁵⁰ In discussing the humanism of the dissent at paras 50-53 of her article (*supra* note 19), Deckha seems to suggest that the Chief Justice unduly passed the buck on this point to the legislature. However, the part of the *Reece* dissent she cites here (*supra* note 1 at para 57) actually concerns the role of the legislature in determining standards for animal welfare, not what role the legislature has had in determining which animals count and on what basis.

⁵¹ Deckha, *ibid.* at para 55.

There is no law on the books in Alberta, Canada, or elsewhere in the world to which the Chief Justice could have turned to arrive at an abolitionist position. Animals' property status may indeed be, therefore, a hard limit to how far a judicial decision can push the law.

On the whole – considering both the celebrations and critiques of the opinion authored by Chief Justice Fraser – one can say that the *Reece* dissent is laudable for pushing the law as much as it did. At very least, it illustrates well what the current “status quo” for animals in the law is – where the limits of the formal law apparently reside. To this end, the strengths and limitations of *Reece* within this legal-doctrinal framework have been well-delineated by the scholars surveyed above. Yet, new insights on this matter, I now contend, are only possible if quite a different “case” is made with respect to *Reece*. To answer the question of what exactly the limits here look like and to begin to gesture towards how one might surpass them, a socio-legal perspective is necessary to provide a clearer and fuller picture of what it is one encounters here. Thus, in explaining how a “case” of a decidedly socio-legal sort functions as the foundation of this dissertation, what I do next is make “the case for a case” below.

3. Making the Case for a Case: Methodological Framings and Method

3.1 Theoretical Underpinnings

As communication scholar Alan Durant has noted in the context of interdisciplinary reading practices, the “legal case” as such is a “highly detailed social and discursive event” – a point at which a single and particular “episode of what might loosely be called real-life drama” is “selectively framed as a distinct entity for legal analysis and judgment,” while at the same time being treated as part of a “more abstract, general category” wherein the singular and particular is

worked up into “generalisations which set out a legal principle.”⁵² Moreover, as cultural studies scholar Lauren Berlant has similarly noted, the legal case – as its boundaries are normatively defined – signifies “a kind of problem-event that has animated some kind of judgment.”⁵³ Taking Durant’s and Berlant’s rundowns together, what one could reasonably say is this: the legal case is about closely-analyzed particulars that can be generalized into abstract rules and principles, all done for the purpose of producing some kind of “judgement” at the end.

However, as Berlant goes on to clarify, none of this is unique to the legal case; rather, *all* cases operate according to the “idiom of the judgment” wherein an instance of the singular and particular is evaluated to produce a generalized position that relates to a larger pattern of instances.⁵⁴ The legal case is simply one “domain” among others, “with its vernacular and rule-based conventions for folding the singular into the general.”⁵⁵ On this reading, the legal case works for the purposes of producing decidedly legal judgements and principles of this sort; yet, the normative closure that defines its boundaries, at the same time, cuts off from view those discourses which, if considered, would produce *other* kinds of judgement.

How might one thus consider the “legal” outside the legal case’s normative closure? The fluid constructedness of the boundaries of the “case” outside the prescriptive constraints of specific domains – and the value of that fluid constructedness – has been well illustrated by poststructuralist philosopher Michel Foucault, especially with respect to the “case” of Pierre Rivière (a man who, on June 3rd, 1835, murdered his mother, sister, and brother).⁵⁶ When it came to studying Rivière, Foucault noted that he was presented with three conflicting medical

⁵² Alan Durant, “Reading cases in interdisciplinary studies of law and literature” in Marco Wan, ed, *Reading the Legal Case: Cross-Currents Between Law and the Humanities* (New York: Routledge, 2012) 11 at 13.

⁵³ Lauren Berlant, “On the Case” (2007) 33:4 *Critical Inquiry* 663 at 663.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Michel Foucault, “Foreword” in Michel Foucault, ed, *I, Pierre Rivière, having slaughtered my mother, my sister, and my brother...: A Case of Parricide in the 19th Century*, translated by Frank Jellinek (New York: Pantheon Books, 1975) vii [Foucault, *Pierre Rivière*].

reports, a compendium of court exhibits and witnesses' written statements, and a partial memoir composed by Rivière himself.⁵⁷ The question consequently arises is this: of what is the "case" of Pierre Rivière composed, exactly?

The answer for Foucault was that Rivière's case is best thought of as "an event that provided the intersection of discourses that differed in origin, form, organization, and function."⁵⁸ In other words, what Foucault called the "case" of Pierre Rivière is the point at which otherwise disparate, disconnected, and potentially discordant sources come together and are organized under one overarching frame. While there were multiple legal elements in the dossier of materials related to Rivière, nothing compelled a researcher like Foucault – who set out to study "the practical aspects of the relations between psychiatry and criminal justice" – to whittle down the documents to form a "legal text," nor was he forced to make them conform to a particular legal style that would "govern[] their existence and coherence."⁵⁹ Instead, in casting a wide net – in figuring the "case" of Pierre Rivière such that it contain *all* of the documents with which Foucault was faced – the study that ensued allowed him "to rediscover the interaction of [various] discourses as weapons of attack and defense in the relations of power and knowledge."⁶⁰ That is, this expansive case allows for an "analysis of discourse" – a full view of the very many uttering tongues speaking of a subject and their competing views on what the essential meaning of that subject is – that the traditional boundaries of a legal case would obscure.⁶¹ Thus, as Berlant has pointed out, the approach exemplified by Foucault is one which "reads against the grain of normative closure" of legal cases in order to "show the consequences of the mobilization and suppression of their historical and conceptual contradictions."⁶²

⁵⁷ *Ibid.* at vii-viii.

⁵⁸ *Ibid.* at x.

⁵⁹ *Ibid.* at vii, xi.

⁶⁰ *Ibid.* at xi.

⁶¹ *Ibid.*

⁶² Berlant, *supra* note 53 at 664 n 3.

In applying these insights to my own project, I have been informed by the approach taken by socio-legal scholar Rebecca Jaremko, who, in her study of the Ashley Smith case, contended that “the boundaries of what constitutes [a case] are delineated in the research itself.”⁶³ The theoretical approach taken in Jaremko’s study takes as its foundation the contention that “the delimitations of cases are constructed in the course of research by researchers.”⁶⁴ In other words, there is never a “case” out there in the world waiting to be found; there are only ever cases to be *made*.⁶⁵ Cases are not discovered, but are rather the outcome of an active “casing” process.

On this point, Berlant has commented that “deciding what defines the surplus to singularity is ... the province of the expert, the expert who makes the case.”⁶⁶ This is, in the words of social scientist Michel Wieviorka, a matter of “cutting [a] ‘whole’ unit out of reality” – that is, delimiting a specific set of sources by “casing” them together into a single case – according to the criteria determined by the researcher themselves.⁶⁷ Crucially, elaborating on Wieviorka’s position, sociologist and political scientist Charles C. Ragin has noted that the value of each act of “casing” depends on the ends the researcher seeks: what counts as a “good” case will inevitably differ for the medical researcher, the sociologist, the historian, and so on, even if all of those researchers are looking at the same general phenomenon or event.⁶⁸ A similar point has been raised by Berlant, whose previously-quoted comments on “the expert” making the case

⁶³ Rebecca Jaremko Bromwich, ebook: *Looking for Ashley: Re-reading What the Smith Case Reveals about the Governance of Girls, Mothers and Families in Canada* (Bradford, ON: Demeter Press, 2015) no pagination. While I follow stylistic guidelines and cite this book as “Bromwich” going forward because of the name under which it has been published, note that the scholar’s current name is “Rebecca Jaremko” and she is, therefore, referred to as such in-text.

⁶⁴ *Ibid.*

⁶⁵ Charles C. Ragin, “Introduction: Cases of ‘What is a case?’” in Charles C. Ragin & Howard S. Becker, eds, *What is a Case?: Exploring the Foundations of Social Inquiry* (Cambridge: Cambridge University Press, 1992) 1 at 10. Note that Ragin’s overall chapter suggests that this is only one way to conceive of a case and he credits Michel Wieviorka, *infra* note 67, specifically with the “[c]ases are made” position.

⁶⁶ Berlant, *supra* note 53 at 664.

⁶⁷ Michel Wieviorka, “Case studies: history or sociology?” in Charles C. Ragin & Howard S. Becker, eds, *What is a Case?: Exploring the Foundations of Social Inquiry* (Cambridge: Cambridge University Press, 1992) 159 at 166.

⁶⁸ Ragin, *supra* note 65 at 14-15.

go further to concede a degree of circularity – that is to say, “who counts as expert is often an effect of the impact of the case the expert makes. Therefore the case is always pedagogical, itself an agent.”⁶⁹ In other words, cases make their experts just as much as experts make their cases – the strength of both residing in just how much work the case can ultimately be put to.

As is hopefully clear by now, I have composed my own “case” to analyze in this dissertation. Not bound by normative closures that define the boundaries of the legal case known as *Reece v Edmonton*, my case has a much wider frame to allow for a socio-legal analysis that, in the spirit of Foucault, shows in full force the “interaction of [various] discourses as weapons of attack and defense in the relations of power and knowledge.”⁷⁰ As with studies of *Reece* proper, such as those surveyed in the section above, I take my case as a particular instance of how the law interacts with animals, attending all at once to the specifics of what Durant calls a “real-life drama” and to the generalizations that can be derived from this particular instance.⁷¹ Yet, in so doing, I seek not to create a casing for just the legal dimension of this event, nor just work it up into principles of legal doctrine, but instead to gather together a case of something socio-legal – an event with a cultural life far outside the courtroom – and derive generalizations about the wider meanings of what we understand animals, the law, and the relation between the two to be.

Here, I am talking about what I have come to call “*Reece*’s pieces.” This is a collection of disparate materials that I have collected to make *my* case. Importantly, *Reece*’s pieces are not something that exists “instead of” the normatively-defined legal case of *Reece v Edmonton*, but as something that exists as an “in addition to” insofar as that legal case is one among many sources that make up *Reece*’s pieces. Thus, *Reece*’s pieces (as *my* case) are a thing through which many of the issues *Reece* raised may be tackled in novel and more exploratory ways. In taking

⁶⁹ Berlant, *supra* note 53 at 664-655.

⁷⁰ Foucault, *Pierre Rivière*, *supra* note 56 at xi.

⁷¹ Durant, *supra* note 52 at 13.

this approach, *Reece*'s pieces do not begin and end with the court case, nor do they stop at the boundaries of the courtroom. Rather, *Reece*'s pieces precede and exceed the legal case of *Reece* and extend well beyond the typical sources from which a legal case would be normatively compiled.

3.2 *A Case of Pieces: My Own Method*

As Ragin has underscored, every case is a case “of” something.⁷² Determining precisely what a particular case is a “case of” can be challenging to do because “[r]esearchers probably will not know what their cases are until the research, including the task of writing up the results, is virtually completed. What *it* is a *case of* will coalesce gradually, sometimes catalytically, and the final realization of the case’s nature may be the most important part of the interaction between ideas and evidence.”⁷³ Ragin’s words here ring true: by the time this project reached its conclusion, I reached a point where I would say that this is a “case of” posthumanist possibilities and the limits of law. These are decidedly more generalized terms, gesturing towards the overarching schema into which this particular instance can be fit. Yet, at the outset, the particular instance with which I was working was a case defined as such: Lucy, the sole elephant at the Edmonton Valley Zoo, and the debate – one which was both social and legal – surrounding her.

The temporal scope I established for material from which to compose this case was between November, 2005 and “the present.” I chose that starting point because the ball of a public debate over Lucy’s well-being started to roll in November, 2005 when the Edmonton City Council considered a report over the Edmonton Valley Zoo’s future regarding the cost of keeping one or both of its elephants.⁷⁴ Opinion pieces and letters to the editor concerning the Zoo and

⁷² Ragin, *supra* note 65 at 6.

⁷³ *Ibid.* [emphasis in original].

⁷⁴ Keith Gerein, “Lucy’s future in doubt”, *Edmonton Journal* (18 November 2005) B3.

Lucy in the *Edmonton Journal* soon followed suit and Tove Reece's Voice for Animals Society (hereafter, V4A) started the campaign to relocate Lucy a few months later.⁷⁵

The difficulty in establishing an end point, however, rested in the fact that this ball has still not stopped rolling. While fervour died down immediately after the Alberta Court of Appeal set down its ruling in *Reece* in August, 2011, the public debate over Lucy's well-being never ended and heated up again in both social and legal fora, with *Zoocheck Canada Inc. v Alberta* bringing the issue before the Alberta Court of Appeal again in March, 2018.⁷⁶ The default endpoint, therefore, was established only by a practical necessity for research as opposed to a conceptual boundary on the event: I needed to be able to stop it somewhere in order to study it and write about it. Therefore, those things which I cased together extended in temporal scope up to the moment the process of casing began: July, 2018.

Having selected the subject matter and temporal scope of the content, the next step was to establish the types of content to include. Once again, Foucault's approach to the case of Pierre Rivière is instructive. As he has explained the method he and his colleagues used, "[w]e have tried to discover *all* the material evidence in the case, and by this we mean not only the exhibits in evidence[,] ... but also newspaper articles and especially Rivière's memoir in its entirety."⁷⁷ Of what did Foucault compose the case of Pierre Rivière? The answer is: everything he could get his hands on. The approach I have taken to my own case has been the same. In a word, nothing was inherently off-limits as a potential material to include, with my goal being to capture the public discourse surrounding Lucy the elephant during the temporal scope noted above as fully as possible.

⁷⁵ v4aeditor, "ZOO ELEPHANTS - TROUBLE AT THE VALLEY ZOO" (18 September 2006), online: *Internet Archive WayBack Machine* <<https://web.archive.org/web/20070322202203/http://www.v4a.org/~v4aadmin/?q=node/182>>.

⁷⁶ *Zoocheck*, *supra* note 9.

⁷⁷ Foucault, *Pierre Rivière*, *supra* note 56 at xii [emphasis added].

In her approach to the Smith case, Jaremko also set out with a similar orientation, noting that:

The Smith case as understood in this study is not ... limited to the inquest decision or to the series of formal legal decisions made about Ashley Smith but rather includes a wide variety of [other] texts ... in addition to that judgment. It therefore includes texts found in the sites of news media, docudrama, reports and legislative debates.⁷⁸

As I explain in the next section below – wherein I outline the methods I used to accumulate materials and catalogue the results – my own approach is both similar to and different from Jaremko’s. Like Jaremko, in my attempt to create a socio-legal case, I started with (but, importantly, went beyond) the courtroom-type materials of law reports and affidavits, expanding as she did to include news media as a way to capture the public discourse. However, while reports (as self-contained informational and/or analytical documents distinct from the “law report” and its reproduction of judicial opinions) ultimately also ended up being among my materials, notable here is how I came upon them. That is to say, I did not originally set out to find reports, being largely unaware of their existence. Rather, I found these because of my engagement with another site where the discourse played out: the internet.

As I detail further below, the wealth of relevant material I uncovered in cyberspace was far, far, far greater than I had originally anticipated. That is to say, my turn to the internet was originally undertaken simply to gather and catalogue the germane parts of the websites of the various organizations involved in the Save Lucy campaign and/or in *Reece*. From these websites, I was directed to many sources of material I had not originally thought to investigate, yet which in the end I also gathered and catalogued to the best of my ability. In addition to the aforementioned reports, what encounters with the websites ended up directing me towards was other web-dwelling sites of public discourse: blogs, online videos, and social media pages. In the

⁷⁸ Bromwich, *supra* note 63.

subsection below, therefore, I lay out everything that I encountered in my attempt to accumulate and catalogue all possible sites where the discourse over Lucy the elephant played out, going through (in the following order): legal materials, print news media, websites, reports, blogs, online videos, and social media.

3.3 Accumulation and Cataloguing of Materials

3.3.1 Legal Materials

Because I began this project with an interest in the legal case of *Reece v Edmonton*, many of the legal materials related to it were ones I already had saved to my hard drive. Nevertheless, for the sake of this part of the process being recordable and replicable, I found these anew and, at the same time, found copies of materials for the subsequent legal case concerning Lucy, *Zoocheck Inc. v Alberta*. For the law reports themselves, I downloaded the documents available on the Canadian Legal Information Institute (CanLII) website – a database that also provided me with copies of most of the relevant legislation. One piece of legislation which the courts considered in *Reece*, but which was not available on CanLII, was the *Government of Alberta Standards for Zoos*. Thankfully, however, Google was a friend in this instance, taking me to a PDF copy on the Alberta Environment and Parks website.

3.3.2 Print News Media

Following the accumulation of legal and scholarly materials, I turned to print news media. Nothing found in a standard newspaper was excluded – and, as such, “print news media” refers expansively to news stories, opinion pieces, letters to the editor, and so on. For gathering these materials, I used two different library search catalogues in general and the specific database

of ProQuest. Using “Lucy the elephant” as a general search term did not narrow down results sufficiently because this is also the name of a roadside attraction (a six-storey piece of novelty architecture) in New Jersey. In order to refine and focus search results, the word “Edmonton” was added to filter out those referring simply to the roadside attraction. Therefore, the search terms I ended up relying upon were “Lucy, elephant, Edmonton.”

While using the library catalogues and database, I opened and skimmed every result, saving those with at least one sentence dedicated to Lucy specifically. I did not save incidental mentions (e.g., one article noting that “Lucy the elephant” as one of the animals in a list of animals people could see if they go to the zoo on Halloween). This entire process was repeated twice to ensure that nothing was missed.

Because the library database copies of many of these articles did not reproduce accompanying photographs, I noted where articles indicated photos would be present. I subsequently used PressReader to look up these specific articles in image format (meaning that they reproduced the photographs, as well). Where the accompanying photographs contained something relevant to Lucy, I saved these to my hard drive. Upon cataloguing these materials, I ended up with 320 print news media pieces in total.

3.3.3 Websites

Finding the *current* websites of the players directly involved in *Reece* was not difficult, as a quick Google search took me to the websites for the City of Edmonton (and its sub-site for the Zoo), Zoocheck, PETA, and V4A. I explored these sites following intuitive navigation paths through them. Further, where search features were available, I used terms like “Lucy” and

“Edmonton” or “Edmonton Valley Zoo” to uncover additional resources. Where I found material directly related to Lucy, I saved copies of these webpages as PDFs for future reference.

Other websites that are live online were also easy to repeat this process with. For example, the Zoocheck website currently contains very little relating to Lucy, instead directing users off-site to the Zoocheck-run SaveLucy.ca. Additionally, Googling terms like “Lucy the elephant” and “Lucy, elephant, Edmonton” also revealed additional activist-run websites currently up on the web: Friends of Lucy and LEAP for Lucy (the material from which I saved and catalogued like the material from the organizations directly involved in *Reece*).

Nevertheless, it was apparent to me – from having seen web material concerning Lucy with my own eyes as far back as when I first conceived of doing a project on *Reece* in 2012 – that some of these websites no longer contained all the same information they once did. In particular, the Edmonton Valley Zoo’s website appeared significantly restructured and contained information and stances on Lucy distinct from what I recall being there previously.

Thankfully, I found a way to navigate around this potential hurdle: using the Internet Archive’s Wayback Machine, a digital archive which has stored snapshots of websites from all over the internet since 2001. With the help of the Wayback Machine, I was able to find dozens of previous iterations of these organizations’ websites. I saved PDFs of pages where I noticed differences over time, thereby allowing me to peruse a record of stances taken by the organizations at different points in time.

In total, this process generated 95 webpage documents across 10 distinct websites (i.e., the original Edmonton Valley Zoo website, the current City of Edmonton website (and its Zoo-specific sub-site), Zoocheck’s website, the Valley Zoo Development Society’s distinct

website, two discrete websites for the Zoocheck-run “Save Lucy” and “Kids Save Lucy,” PETA’s website, V4A’s website, LEAP for Lucy’s website, and Friends of Lucy’s website).

3.3.4 Reports

Many of the websites listed above included copies of relevant reports on them, as well. These included things like a Zoocheck-commissioned assessment of elephant welfare in Canada and the Zoo’s commissioned regular welfare assessments on Lucy. In the end, I accumulated 14 reports from the websites of the Zoo, Zoocheck, Save Lucy, and V4A.

Although likely better characterized as “legal materials,” I must nevertheless note here that I came across the affidavits for *Reece* and *Zoocheck* in the same way as reports. That is to say, if not for their availability on the websites of Zoocheck, Save Lucy, and V4A, I may not have thought to gather these materials. While they were ultimately treated as legal materials, the process of gathering them was akin to the reports mentioned here, located and downloaded from the aforementioned websites. Through these, I accumulated 7 affidavits from *Reece* and 5 additional ones from *Zoocheck*.

3.3.5 Blogs

While investigating the Zoocheck website, I encountered Zoocheck’s blog, “Zoocheck Perspectives,” which had several posts concerning Lucy the elephant. While I was directed to this off-website resource from Zoocheck’s own website, what it revealed was that the websites of the organizations noted above were likely insufficient as the only web-based sources from which to gather materials. Reasoning that Zoocheck’s blog was likely indicative of a large trove of blogs that contained relevant materials, I turned to two major blogging sites, Blogspot (also

known as “Blogger”) and WordPress to get a fuller picture of what individuals and groups in the blogosphere were saying about Lucy the elephant.

Blogspot’s internally-run search feature was well developed, so I used the blogging site itself to unearth posts containing the search terms “Lucy, elephant, Edmonton.” By contrast, WordPress’s internally-run search feature produced few results – even omitting WordPress blog posts on the subject matter that I already knew existed. Therefore, to search WordPress, I enlisted the aid of Google, using the same search terms alongside the requirement of “site:wordpress.com.” Ultimately, in searching both blogging platforms, what I discovered was a treasure trove of people commenting on the campaigns and legal dispute in ways not openly articulated by the players themselves.

In determining which blog posts to include, I used similar criteria to those applied to print news media, excluding only incidental mentions of Lucy. To save these materials, I repeated the process I applied to websites, saving PDFs of individual blog posts. In some instances, this process did not save images from the pages in question – in which case, I marked these in my document catalogue and saved separate screen captures of the images themselves. In the end, my searches plus the application of these criteria resulted in 34 distinct blog posts from WordPress and an additional 24 from Blogger.

3.3.6 Online Videos

As with the reports noted above, it was the websites of the various groups and organizations that I canvassed which revealed the existence of another type of material: YouTube videos. These were a favourite of Save Lucy, with several of their webpages having videos embedded into them. Much as I did with blogs, I turned to the video-hosting platform itself to

investigate what else was publicly available. My search terms were narrowed down in the same way as they were with other types of searches (i.e., “Lucy the elephant” largely produced videos concerning the roadside attraction in New Jersey, so the combined search terms of “Lucy, elephant, Edmonton” were used to narrow down the results to those that were most pertinent). As the videos themselves were too large to save to my hard drive, with these I only created a catalogue listing the names of the videos, the names of those who had uploaded them, and the web address so that they could be easily returned to later. This process resulted in 75 videos being catalogued.

3.3.7 Social Media

In much the same way blog posts and videos as sources of material for this project grew out of my initial attention to the websites of the groups involved, so too did social media platforms present themselves. However, there were practical limitations that made approaching social media on the platforms of Facebook and Twitter quite different from approaching blogs on the platforms of Blogger and WordPress. With respect to Facebook, one problem lies in the fact that its search feature has limited capacity to refine results and no apparent capacity to order results chronologically. However, the nature of Facebook versus a blogging platform also makes it less likely that, even with the perfect tool, it would yield the same level of results. In particular, this is because individual Facebook feeds are largely private, whereas blogs are largely public. The exception to the privacy of Facebook is with respect to the dedicated pages of specific organizations – and, having saved the Facebook pages of relevant groups in the same way as their overall websites, it is reasonable to assume I have captured what is publicly available on this platform.

Twitter, however, is another story. Unlike posts on Facebook, almost all of Twitter's content is public by design. Moreover, its internally-run search feature allows for significant precision and refinement. Nevertheless, I ultimately made the decision not to try to gather every tweet ever made with respect to Lucy the elephant because it was unfeasible to sift through the sheer amount of material this produced. In the end, what I did was repeat the process I applied to Facebook pages for the organizations involved, loading their (in some instances, massive) Twitter feeds and saving these to my hard drive.

4. Thinking Inside and Outside the Box: Reading and Writing about *Reece's* Pieces

4.1 Working with "the Discourse"

As indicated previously, the "case" with which I am working in this dissertation relies on an expansive framing for the sake of – in Foucault's words – an "analysis of discourse" beyond what the normative framing of a legal case allows for.⁷⁹ But just what is "discourse" and how does one analyze it? As some scholars have lamented, "discourse" – and the derivative terms of "discourse analysis" and "critical discourse analysis" – appears to be a term that is a victim of its own success: it is deployed in so many various, disparate, and diverse forms of scholarship in such fast and loose ways so as to often lack a clear, coherent, or unified meaning.⁸⁰ This is, perhaps, unsurprising insofar as Foucault – largely credited with introducing the term to the Anglo-American world as more than a mere synonym for "conversation" – himself deployed the term in myriad different (and sometimes inconsistent) ways.⁸¹ Yet, while there may not be a single once-and-for-all definition for "discourse" or for the "discourse analysis" that it entails,

⁷⁹ Foucault, *Pierre Rivière*, *supra* note 56 at xi

⁸⁰ Alec McHoul & Wendy Grace, *A Foucault Primer: Discourse, Power, and the Subject* (London: Routledge, 2002); Norman Fairclough, *Critical Discourse Analysis: The Critical Study of Language*, 2nd ed. (London: Routledge, 2010); Derek Hook, "Discourse, Knowledge, Materiality, History: Foucault and Discourse Analysis" (2001) 11:4 *Theory & Psychology* 521.

⁸¹ McHoul & Grace, *ibid.*

there are some general points that can be repeated here so as to explain what I mean when I say this project analyzes the discourse of *Reece*'s pieces.

In general, to invoke the idea of “discourse” is to reverse the way in which speech, text, and other forms of communication are normally thought of. That is to say, while it is true that it is individual subjects who speak, write, and communicate in other ways, “discourse” is not something that is expressed or accomplished by individual subjects. Rather, the inverse is the case: it is the discourse that constitutes the individual subject (such as, for example, in coming to know ourselves variously through discourse as criminals, doctors, homosexuals, schizophrenics, etc.).⁸² To clarify this, one might consider that, as cultural studies scholars Alec McHoul and Wendy Grace point out, “discourse” is not simply “language” or “social interaction,” referring instead to “relatively well-bounded areas of social knowledge.”⁸³ Not just the words uttered, “discourse” signifies the conditions of “what can be said” and “what can be thought” in a given context.⁸⁴ To this end, discourse is – as sociolinguist Norman Fairclough suggests – “a complex set of relations.”⁸⁵ Not just any relation, “discourse” refers to those complex relations that make social reality possible: “meaning, and making meaning.”⁸⁶

I have thus far referred to “discourse” broadly, although it should be noted that one does not encounter “discourse” as such in the world. Instead, there are only ever discourses in the plural.⁸⁷ Following Foucault, McHoul and Grace emphasize that specific discourses represent “specific bodies of knowledge” – more than just communities of words and other forms of communication being exchanged, each discourse is a bounded way of knowing.⁸⁸ In this respect,

⁸² *Ibid.* at 48.

⁸³ *Ibid.* at 31.

⁸⁴ *Ibid.* at 36.

⁸⁵ Fairclough, *supra* note 80 at 3.

⁸⁶ *Ibid.*

⁸⁷ McHoul & Grace, *supra* note 80 at 31.

⁸⁸ *Ibid.* at 26.

an analysis of discourse is less an analysis of language (although linguistic signs may be what one is presented with) and more an analysis of how knowledge is constructed. As Foucault draws the distinction, where an analysis of language might consider the rules of syntax and grammar, an analysis of discourse considers “how ... one particular statement appeared rather than another.”⁸⁹ To this end, discourse analysis may examine what has been said, but endeavours to determine what makes that particular thing into something sayable.

Crucially, there is no “universal discourse” hidden behind everything – nor, by extension, is there a “universal knowledge” to be uncovered through the analysis of discourse. To the contrary, as Foucault phrased it, “[d]iscourses must be treated as discontinuous practices, which cross each other, are sometimes juxtaposed with one another, but can just as well exclude or be unaware of each other.”⁹⁰ In this framing, we inhabit a world of countless different discourses. In some instances, they connect and overlap in fulsome ways, whereas, in other instances, individual discourses exist without contact between them and in no certain relation to each other. While discourse analysis may consider one discourse at a time, the significance of the analysis is that it allows one to comment on something greater than that single discourse while not being able to make universal conclusions. That is to say, each analysis extends beyond that single discourse alone – not to all discourse or all knowledge everywhere and always, but at least to those other discourses that connect and overlap with the focus of the analysis.

Importantly, as psychoanalyst Derek Hook stresses, “attaining truth is not the goal of discourse analysis.”⁹¹ Instead, the point of discourse analysis is to uncover “a carefully delineated set of conditions of possibility under which statements come to be meaningful and

⁸⁹ Michel Foucault, *The Archaeology of Knowledge*, translated by Tavistock Publications (London: Tavistock Publications Ltd., 1972) at 31.

⁹⁰ Michel Foucault, “The Order of Discourse” in Robert Young, ed, *Untying the Text: A Post-Structuralist Reader* (Boston: Routledge & Kegan Paul, 1981) 48 at 67 [Foucault, “Discourse”].

⁹¹ Hook, *supra* note 80 at 525.

true” and bring awareness to “the presence of the limits within which we speak.”⁹² In this way, the analysis of discourse does not endeavour to affirm the knowledge or “truth” established by the discourse, but instead to reveal how it operates and circulates and to find the limits of that knowledge and “truth.”⁹³ Discourse analysis, on this reading, sets out to “exploit[] the gaps or shortcomings of a given discourse ... [and] systematically demonstrat[e] its contradictions and discontinuities; these are seams to be pulled, the joints and weaknesses to be relentlessly stressed.”⁹⁴ In this way, discourse analysis is an unrelenting interrogation, seeking to locate and then “decentre and destabilize” the “truths” of the targeted discourse.⁹⁵ Rather than strengthening the claims made within a given discourse, discourse analysis unravels the discourse, cutting through it to expose the limit points that allow it function in the first place.⁹⁶

Aligning well with the expansively-defined “case” I outlined above, Hook underscores that “discourse” cannot be thought of as coming from (or encapsulated in) a single source. To analyze a discourse is to analyze “those multiple processes that constitute it. Analysis hence proceeds by progressive and necessarily incomplete saturation, from the consultation of ever more sources of origin and realization, ever more analytical ‘salients,’ to an increasing polymorphism of data sources.”⁹⁷ As cultural studies scholar Robert Young notes, this endeavour

⁹² *Ibid.* at 525-526.

⁹³ In “The Order of Discourse” (*supra* note 90) at 61, Foucault uses the example of Mendelian genetics to illustrate how this position differs from crude relativism:

People have often wondered how the botanists or biologists of the nineteenth century managed not to see that what Mendel was saying was true. ... Mendel spoke the truth, but he was not ‘within the true’ of the biological discourse of his time: it was not according to such rules that biological objects and concepts were formed. ... It is always possible that one might speak the truth in the space of wild exteriority, but one is ‘in the true’ only by obeying the rules of discursive ‘policing’ which one has to reactivate in each of one’s discourses.

Foucault’s point – as the example demonstrates – “discourse” does not mean not that nothing is real or that nothing is a verifiable fact about the world. Rather, to pay attention to “discourse” is to see how even real or verifiable things can only be accepted or perceived as true according to the rules of a given discursive practice – such as, in Mendel’s case, the rules of “biological discourse.”

⁹⁴ Hook, *supra* note 80 at 536.

⁹⁵ *Ibid.* at 534.

⁹⁶ *Ibid.* at 538.

⁹⁷ *Ibid.* at 531.

– somewhat paradoxically – results not in “a plenitude of meaning, but a scarcity.”⁹⁸ For all one finds in the analysis of discourse – and one may, as I do in this project, indeed find quite a bit – the end result is to uncover the *insufficiency* of the discourse. Looking at it broadly and examining it closely, one finds what knowledges and truths are not allowed in that discourse – where it has *disallowed* meaning from rising up. In this way, the discourse analyst sets out to establish not simply what the discourse contains, but what it is missing.

Although possible to undertake a discourse analysis simply for analysis’s own sake, much discourse analysis – the one in this dissertation included – is more properly called “critical” discourse analysis since it sets out to critique the given discourse with particular ends in mind. McHoul and Grace note that the “critical” point of discourse analysis is “geared towards a counter-reading of historical and social conditions and offers possibilities for social critique and renewal.”⁹⁹ Articulating a similar position, Fairclough has suggested that a critical discourse analysis “is not just descriptive, it is also normative.”¹⁰⁰ What Fairclough means by this is that there is a “normative element” to the analysis, “focus[ing] on what is wrong with a society (an institution, an organisation, etc.), and how ‘wrongs’ might be ‘righted’ or mitigated, from a particular normative standpoint.”¹⁰¹ The critical discourse analyst, therefore, “assesses what exists, what might exist and what should exist on the basis of a coherent set of values.”¹⁰² Thus, while one engaging in a discourse analysis might be – as Hook notes – merely a “diagnostician,” that diagnosis is critical insofar as it is performed with an eye towards ultimately treating the problems that are uncovered.¹⁰³

⁹⁸ Robert Young, ed, *Untying the Text: A Post-Structuralist Reader* (Boston: Routledge & Kegan Paul, 1981) at 49.

⁹⁹ McHoul & Grace, *supra* note 80 at 27.

¹⁰⁰ Fairclough, *supra* note 80 at 11.

¹⁰¹ *Ibid.* at 7.

¹⁰² *Ibid.*

¹⁰³ Hook, *supra* note 80 at 522, 543-544.

In the preceding paragraphs, I have addressed a number of “whats” concerning the corpus of materials with which I am working: I have said *what* it means to think of *Reece*’s pieces as a discourse, *what* it means to analyze that discourse, and *what* the implications of calling that discourse analysis a “critical” discourse analysis are. Unaddressed so far, however, is the “how”: *how* did I engage in this critical discourse analysis? Or, perhaps to simplify it even further, how did I read my materials such that I could then write about them in a coherent way that, as per the stated aims of critical discourse analysis, open the discourse up to “social critique and renewal”? I turn to these matters in the subsection below.

4.2 Coding as the “How” of my Analysis

How did I approach my materials? Simple: I read them. Having a background in the humanities, it never seemed to me before that the mere fact of “reading” would need to be explained. Nevertheless, having become more familiar with the lingo of the qualitative social sciences, I find that my method can be well articulated as a low-tech form of “coding.” A broadly applicable approach to qualitative data, coding as a method – as theatre scholar Johnny Saldaña explains it – can be used for “interview transcripts, participant observation, field notes, journals, documents, open-ended survey responses, drawings, artifacts, photographs, video, Internet sites, e-mail correspondence, academic and fictional literature, and so on.”¹⁰⁴ The “code” referred to here “is most often a word or short phrase that symbolically assigns a summative, salient, essence-capturing, and/or evocative attribute for a portion of language-based or visual

¹⁰⁴ Johnny Saldaña, *The Coding Manual for Qualitative Researchers*, 3rd ed. (London: SAGE Publications Ltd., 2016) at 4.

data.”¹⁰⁵ Not mere “labelling,” coding is a matter of “linking” – actively joining together the disparate pieces of data according to elements which recur throughout.¹⁰⁶

Notably, the code is a “research-generated construct” – and one whose usefulness is difficult to overstate.¹⁰⁷ That is to say, insofar as it “attributes interpretive meaning” to individual instances of data in the larger whole of source materials, coding sets the researcher up for “pattern detection, categorization, assertion or proposition development, theory building, and other analytic processes” – or, in other words, moving from piecemeal reading of the source materials to comprehensive writing about them.¹⁰⁸

Management scholars Mai Skjott Linneberg and Steffen Korsgaard note that “the act of coding is not to be seen as linear: rather, it enters feedback stages.”¹⁰⁹ For this reason, rather than occurring in “steps,” coding is best thought of as taking place in at least two “cycles.”¹¹⁰ A first cycle of coding is largely descriptive in nature, possibly pulling out the key terms and words provided in the data itself.¹¹¹ By contrast, the second cycle of coding is analytical, looking to the codes previously produced to find overarching “patterns of similarities and differences” in the data.¹¹² To put it very glibly, one goes through one’s source materials the first applying descriptive terms to index and catalogue each datum and then goes back through them a second time to determine overarching connections and broader categories into which various terms can be put so as to find useful patterns in the data. Rinse and repeat as necessary.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.* at 9 [emphasis deleted].

¹⁰⁷ *Ibid.* at 4.

¹⁰⁸ *Ibid.*

¹⁰⁹ Mai Skjott Linneberg & Steffen Korsgaard, “Coding qualitative data: a synthesis guiding the novice” (2019) 19:3 *Qualitative Research Journal* 259 at 264.

¹¹⁰ *Ibid.*; Saldaña, *supra* note 104 at 9.

¹¹¹ Linneberg & Korsgaard, *ibid.* at 264.

¹¹² *Ibid.*

Saldaña notes that the act of coding should be accompanied by “analytic memos.” As he explains it, “Analytic memo writing documents reflections on: your coding processes and code choices; how the process of inquiry is taking shape; and the emergent patterns, categories and subcategories, themes, and concepts in your data – all possibly leading toward theory.”¹¹³ More than this, however, the analytic memo – as a written record that is composed alongside the coding that takes place – is advisable as a way to dissuade the researcher’s reliance on “mental notes to self” and prevent the loss of building-block ideas and insights along the way.¹¹⁴

Analytic memos are but one way for the researcher to “dump [their] brain” throughout the research process.¹¹⁵ One quite similar to this (so similar, in fact, that the difference in names is more a question of semantics than anything else) is the “research journal.”¹¹⁶ As explained by sociologist C. Wright Mills, the research journal is an essential part of “intellectual craftsmanship” – that is, a way of moving from mere perception of something to a full social-scientific study of that thing.¹¹⁷ As Mills details the research journal,

... you, as an intellectual craftsman, will try to get together what you are doing intellectually and what you are experiencing as a person. Here you will not be afraid to use your experience and relate it directly to various work [sic] in progress. By serving as a check on repetitious work, your file also enables you to conserve your energy. It also encounters you to capture “fringe-thoughts”: various ideas which may be by-products of everyday life, snatches of conversation overheard on the street, or, for that matter, dreams. Once noted, these may lead to more systematic thinking, as well as lend intellectual relevance to more directed experience.¹¹⁸

In other words, the research journal as such is formally contentless. It is meant to serve as a record of both the finely-attuned and utterly-wayward thoughts of the researcher over the course of their research process. It both records ideas as they occur and provides a space for reflection

¹¹³ Saldaña, *supra* note 104 at 44.

¹¹⁴ *Ibid.* at 45.

¹¹⁵ *Ibid.* at 44.

¹¹⁶ *Ibid.* at 21.

¹¹⁷ C. Wright Mills, “Appendix: On Intellectual Craftsmanship” in *The Sociological Imagination* (Oxford: Oxford University Press, 1959) at 1.

¹¹⁸ *Ibid.* at 1-2.

upon – or expansion upon, or building upon – those ideas that have previously been noted. In a word, whether one calls it a series of “analytic memos” or a “research journal,” this refers to an essential accompaniment to any kind of qualitative research (coding or otherwise): the flexible-in-nature-and-content record that is kept alongside the active process of working with the materials.

As far as what the process of working with the materials looks like in the most elemental of terms, Saldaña has cleverly punned that each researcher will have their own “*codus*” *operandi* when it comes to the work of coding itself.¹¹⁹ That is to say, there is no single right way to code. However, some of Saldaña’s comments on the nature and benefits of the foundational approach to coding bear repeating here. This approach is an analogue one, working with “paper and pencil on hard copies of data.”¹²⁰ Making full use of little more than what one can find in an office supply store, this approach rarely extends beyond bringing any more into the work beyond adding “red pens and highlighters” as a way to “explore data in fresh ways.”¹²¹ Where it involves technology is only in the most basic ways, possibly substituting a pen-and-paper record of the codes being used with nothing more than a basic word processor document.¹²² Extolling the virtues of manual coding, Saldaña goes further to state that “manipulating qualitative data on paper and writing codes in pencil [will] give you more control over and ownership of the work.”¹²³ As he sees it, “there is something to be said for a large area of desk or table space with multiple pages or strips of paper spread out to see the smaller pieces of the larger puzzle – literal perspective not always possible on a computer’s monitor screen.”¹²⁴

¹¹⁹ Saldaña, *supra* note 104 at 32.

¹²⁰ *Ibid.* at 31.

¹²¹ *Ibid.* at 32.

¹²² *Ibid.* at 31.

¹²³ *Ibid.* at 32.

¹²⁴ *Ibid.*

That being said, particularly in instances where one is compiling a compendium of sources with which to work, the question arises as to how one puts that all together. Even taking Saldaña's approach of laying everything out on the desktop, the question arises: just what order does one arrange everything in? In answering this question (in a time long before computers were commonplace), C. Wright Mills suggested an attitude of "playfulness":

On the most concrete level, the re-arranging [sic] of the file, ... is one way to invite imagination. You simply dump out heretofore disconnected folders, mixing up their contents, and then re-sort them. You try to do it in a more or less relaxed way. How often and how extensively you re-arrange [sic] the files will of course vary with different problems and with how well they are developing. But the mechanics of it are as simple as that. Of course, you will have in mind the several problems on which you are actively working but you will also try to be passively receptive to unforeseen and unplanned linkages.¹²⁵

In other words, crucial to remember here is that there is no single way to arrange the materials with which the researcher is working; instead, there are only ways that are more or less conducive to stimulating thoughts and insights on the researcher's part. If at first you don't succeed, try, try again.

These back-to-basics methods advised by both Saldaña and Mills are the ones I employed in my own research. However, it must be noted that it took some time to arrive at these insofar as, I must admit, my first attempt to engage with the materials I had accumulated did not have them leaving my computer screen or hard drive. What I was producing from this was either over-narrow in focus or over-broad, not sufficiently making sense of either the parts or the whole of the case that is *Reece's* pieces. As a final methodological point, therefore, I must underscore here that it was the insights of my dissertation supervisor that led me to subsequently adopt the back-to-basics methods of Saldaña and Mills. That is to say, her advice was simple, yet profound: print out my materials and put them all together in a box.

¹²⁵ Mills, *supra* note 117 at 10.

I did precisely that, acquiring a banker box that has subsequently travelled with me several times across the country. While it has taken up much more luggage space than my hard drive did, it allowed me to work with the materials in crucial ways. Taking a page from Mills, these printed materials needed arranging and categorizing. File-folders abounded in the process of dividing up materials by type (e.g., news media, webpage, blog, etc.) and then subdividing those by year and, sometimes, by specific source (e.g., having one folder for parts of the Zoocheck website, another for parts of the City of Edmonton website, etc.).

Then, taking a page from Saldaña, I went at the pages with the ink of a pen – circling, highlighting, and underlining recurring terms, noting thoughts and questions in marginalia, and eventually, as certain themes became apparent as repeating, writing on the top of the first page of every piece which elements were present therein. My aim was to find patterns – recurring signals which I could distill and analyze as those things which ran through and united “*Reece’s* pieces.”

Going in, I had expected themes to group around three general points – “elephant,” “zoo,” and “law” – corresponding to themes that seemed to appear in *Reece* and at the forefront of what those in the Save Lucy campaign were concerned with. In the end, these themes were helpful, but they corresponded inexactly to the ones I would end up finding. For example, in “Unpacking the Trunk,” things I trace through *Reece’s* pieces revolve around aspects of elephants (e.g., size, faces, trunks, and “hands”), but not “elephants” writ large. When actually going through the materials the first time around, these specific parts were not always the words I noted; instead, most the relevant documents had things like “physical elephant” written along the top since I noted that the material in question had something to do with the elephant’s physical embodiment, but had yet to link that to, say, the functions and meanings of the trunk I explore in that chapter. In this way, what ended up developing into the full dissertation that

follows was made possible by the approach noted by Linneberg and Korsgaard above: I went through the materials not once, but multiple times, looking for the overarching patterns that presented after initial coding took place.

An important part of working through these materials was putting regular “analytic memos” into my research journal along the way. More important than simply recording what I was doing and what I was seeing was the *reflective* element of this part of the process, as several entries revisit whether themes I had earlier identified were still relevant, or whether things should be rethought. As a standout example, one notable change in thinking that can be seen in my research journal is relevant for how it played into the writing of “Unpacking the Trunk.” In particular, my notes on July 18th and 19th, 2018 contain terms like “elephant artist,” “nutritive elephant,” “maternal elephant,” “cash cow elephant,” etc. – suggesting that my way into thinking about an elephant had to do with specific ways elephants were being represented. However, what was more fruitful was a brainwave that came to me when, on July 27th, I was reflecting on the news story about the failed attempt to biopsy the mass in Lucy’s trunk:

Trunks appear to be body parts we aren’t equipped to care for

* Trunks – What are they?

Idea – Instead of “as,” perhaps consider parts of the elephant: trunk, size, sex?

Following that train of thought, I went back to mark down what specific parts were addressed where “physical elephant” had been noted along the top of documents.

After having gone through and annotated the full body of material in the physical box in this way more than once, the final cycle of the coding process was where digital elements returned once more. Piles of paper on one side of the desk, I began to go back through and attach index tabs to those documents on which I had noted things to do with the “physical parts” theme I had honed in on for the first substantive chapter. However, those papers occupied only one side

of my desk, as the other side had my laptop with a word processor open. It was in this digital document that I started to type out the specific passages or note the exact images that would give me a fuller picture of what these fragments created when put together.

Lastly, as final cycle in the coding process, I fully left the physical box behind – having now “thought outside it” – and fleshed out the above-mentioned word processor document further by now using my MacBook’s Finder feature to search the digital versions of my sources for exact and related terms I had now identified. This was especially useful for recognizing the sources that I had missed when taking notes by hand. For example, in “Unpacking the Trunk,” I quote the catalogues of a trunk’s functions from both journalist Tim Lai and the Zoocheck website. However, in my own notes, I had only recorded Lai’s, since I had no doubt skimmed over Zoocheck’s as “something I already got.” This last computer-enabled search back through the documents allowed me to see a fuller picture of where different terms and ideas popped up.

In this section, I have established the “what” and the “how” of my analysis of *Reece*’s pieces. The general framework with which I have worked is a critical discourse analysis – a study of the meaning and meaning-making that has occurred throughout the Lucy the elephant debate, examined not for the sake of affirming any particular element of it, but to uncover the limits of the discourse – to find what both how and why some terms, ideas, and concepts (or “truths”) are centred at the heart of things and how and why others are sidelined, only to be whispered at the margins of what can be said. I have undertaken this analysis using the back-to-basics methods of scholars like Johnny Saldaña and C. Wright Mills outlined above: reading through a box filled to the brim with hundreds of pages of documents again and again to code for key ideas and, in the process, find the patterns that permeate this discourse. With this

approach in mind, I proceed in the section below to lay out the structure of the project that has grown from this basis.

5. Overview of the Project

Up to this point, I have laid out the methodological foundations that facilitated my engagement with “Reece’s pieces.” However, before beginning that engagement itself, I turn broadly in the chapter immediately following this one (“The Descent of Dogma”) to the field into which I intend for this project to make a contribution: legal animal studies. While the chapter’s title puns on Charles Darwin’s *The Descent of Man*, the “dogma” I signal there alludes to what I lay out in course of surveying the literature: there are seemingly dogmatic positions within the field that tend to dominate it.¹²⁶ Most especially, what I outline is that specific spectrums of thought (e.g., utilitarianism versus deontology, welfare versus rights, property-status versus personhood-status) are centred in this field – a centring that is made possible through the active sidelining of alternative perspectives. In “The Descent of Dogma,” therefore, I set out not just to repeat the loudest voices, but to show where else legal animal studies can draw from: feminist, posthumanist, and other emerging perspectives. While I explore some of the ways that scholarship informed by these perspectives has attempted to intervene in the mainstream debates of legal animal studies, in this chapter I ultimately conclude with an agnostic position derived from poststructuralist philosopher Jacques Derrida. That is to say, for Derrida, law is always inevitably insufficient for meeting the true demands of justice; yet, despite this inevitable insufficiency, we cannot but try to meet the demands of justice through law.¹²⁷

¹²⁶ Charles Darwin, *The Descent of Man and Selection in Relation to Sex* (Cambridge: Cambridge University Press, 2009).

¹²⁷ Jacques Derrida, “The Force of Law: ‘The Mystical Foundation of Authority’,” translated by Mary Quaintance (1989) 11 *Cardozo Law Review* 920.

What this means for my purposes is that I take no particular perspective to be right once and for all, but set out on the project of analyzing *Reece's* pieces with the untapped potential (that is, those often sidelined perspectives of legal animal studies) as the source from which new attempts to meet the demands of justice can arise.

In this respect, my analysis throughout this project is a recognition of the *limits* of law. Importantly, this is not a nihilistic position, but instead an optimistic and hopeful one: the point of finding the limits of what we currently have and currently think is also to find out how to move past those limits into something new. Therefore, a true-to-form critical discourse analysis, this project brings awareness to “the presence of the limits within which we speak” with an eye towards also overcoming them.¹²⁸ Although every chapter of this dissertation does not take “law” as its central focus, *Reece's* pieces weaves in and out of law’s terrain time and again, such that the limits that I uncover inevitably demonstrate the insufficiencies of law when it comes to the various points around which my analyses circle.

The first of these points, taken as the central object of study in Chapter 3 (“Unpacking the Trunk”), is species. I begin this chapter by reaffirming the critique of *Reece* raised by Deckha above: while the case was non-anthropocentric in its serious consideration of a nonhuman entity, it was limited by its enduring humanism, not recognizing a nonhuman as valuable on their own terms but instead as a poor copy of our own idealized self-image of “the human.”¹²⁹ In my study of *Reece's* pieces, therefore, I am driven by the question of what the corollary looks like: if *Reece* was limited by its humanist metrics of value, is there a point from which posthumanist metrics of value arise in *Reece's* pieces? I undertake this analysis by looking closely at the particular species *Reece* concerned – elephants – finding that the best way into understanding

¹²⁸ Hook, *supra* note 80 at 525-526.

¹²⁹ Deckha, *supra* note 19 at para 51-52.

their specificity arises with respect to something specific to them: trunks. As I show through my analysis, trunks are slippery things in the discourse of *Reece's* pieces, their non-equivalence (or “multi-equivalence”) to parts of the human body resulting in a constant shifting of metaphors to make sense of them. Most crucially, I show in this chapter that some of these metaphors – the ones that analogize trunks to things we take to be most indicative of our own specialness and great capacity, such as the dexterous and nimble hands through which we express ourselves in complex and artistic ways – are fundamentally disruptive in nature when examined more closely. The conceptual blowback that ensues from the finding that paradigmatically “human” attributes are not particularly human at all results in a different kind of cross-species valuation. That is to say, what this chapter shows is that – at the outer edges of the discourse of *Reece's* pieces – there is a posthumanist way to understand elephants (and other animals) in relation to ourselves: not poor copies of “the human” that share in some diminished form in our greatest achievements, but fellow beings that, like us, are vulnerable, mortal, and finite.

Notably, what I find in “Unpacking the Trunk” is a decidedly *untapped* potential for how we might understand ourselves and other animal beings. Inasmuch as it shows up only at the margins of the discourse, what this represents is a current limit-point for thinking through animals in law – and also a sign for where we might be able to go to overcome things like the enduring humanism Deckha highlighted as a central problem in *Reece*. That said, while “Unpacking the Trunk” finds a limit *and* points towards going beyond it, the same cannot be said of the chapter which follows it, “From Home to Hospice.”

In Chapter 4, I look to how the language and logics of place and location circulated throughout *Reece's* pieces, finding that the discourse on where Lucy came from, lives now, and ought to live in the future almost invariably invokes a very particular term: “home.” Following

this word through its various and disparate deployments, what I determine is that it appears to be essential to every discoursesant's ability to make sense of Lucy's emplacement – at least insofar as they are unable or unwilling to understand emplacement in less-than-positive terms. That is to say, the Lucy the elephant debate appears to operate on the assumption that Lucy must have a home – in the most positive sense of the term – somewhere in the world: either she is home at the Zoo or she will be home at a sanctuary. Yet, as I show, what occupies the margins of the discourse are the potentially negative associations of home that the heart of the discourse appears keen to silence and sideline: the phenomenon of homes as places wherein abuse and exploitation occur (best articulated by feminist scholarship) and the possibility of homelessness (not just in the “houseless” sense, but in terms of global and existential non-belonging).

Deckha raised as another critique of *Reece* that the dissent did not endorse an abolitionist position against the property-paradigm of classifying animals in law. Discoursesants who consider the less-than-positive implications of “home” (and the potential lack thereof) for Lucy also nod to abolitionist positions as their place of hope for a better future for the elephant concerned. However, what I detect in “From Home to Hospice” is a limit that may be unsurpassable. The abolitionist “solution” does not do anything to assuage the problem that comes up here: law, often bounded in focus, cannot rise to the challenge of something *global* and *existential* in scale. That is to say, in the context of global capitalism, mass displacement of animal life, and potentially irreparable habitat destruction, the “home” around which this discourse circles again and again does not appear to be something law, in fact, has the capacity to provide. While the Derridean point in general is that law is always insufficient to meet the demands of justice, this may be a point where that insufficiency is particularly evident.

That said, while limits of law (one potentially surpassable, one potentially not) present themselves in “Unpacking the Trunk” and “From Home to Hospice,” it is in my final substantive chapter (“Sentenced to Life”) that I engage with law directly. What I find in Chapter 5 is that, despite the civil law character of the *Reece* lawsuit, it is the language and logics of *criminal* law that permeate *Reece*’s pieces. Refrains of crime and punishment dominate, with no shortage of discoursants alluding to Lucy’s “incarceration” and “solitary confinement,” such that the lawsuit ends up being publicly understood as a matter of “freeing” her from “wrongful imprisonment.” Following this thread through *Reece*’s pieces, what I uncover is two kinds of power that have been well explained by philosopher Michel Foucault: disciplinary power and pastoral power. With historical references to an elephant being tried and hanged existing in *Reece* pieces, the comparative framing of Lucy’s life in captivity (whether that captivity be at the Zoo or at a sanctuary) appears to mirror Foucault’s claims about how Western societies moved from expressions of sovereign power to disciplinary power. Yet, found also here are the pastoral logics sometimes detectable in conditions of human imprisonment – that is to say, the “violent care” whereby prisoners’ prospective deaths are forcibly prevented to ensure they continue living in their conditions of imprisonment. In this way, what I show in this chapter is that the language of law makes sense of Lucy not in the courtroom terms of the *Animal Protection Act*, but in the punitively criminal-law terms of the “life sentence” and the “death sentence.”

Nevertheless, while this is what I uncover, it is important to note that this final chapter of discourse analysis does not set out to *affirm* this understanding. The point of critical discourse analysis, after all, is to find the limits of the discourse and to destabilize it. Thus, what I would stress here is that my analysis of “law” as it circulates in *Reece*’s pieces reveals a limit that might not have been found otherwise. Indeed, as my survey of the extant scholarship above showed,

Reece proper raised legal-doctrinal questions over the status of animals in law as it pertains to enforcement of extant animal protection legislation. What my own analysis suggests, however, is that the questions that need to be asked about animals and the law extend far beyond what is placed at the forefront of a courtroom battle. Attended to here are matters of the *power* to make live and make die – and not only just for animals, but by extension for humans, as well. While the *Reece* case itself could have been resolved through court orders to improve the living standards of Lucy the elephant or to relocate her to a sanctuary south of the border, the tensions in *Reece*'s pieces allude to something far grander in scale.

On the whole, therefore, this project delineates the limits of law as a matter of trying to move towards – in Derridean terms – a justice yet to come. In what follows, I lay out a number of problems, of opportunities, of tragedies, of possibilities, of tensions, and of resolutions that, together, make up and make sense of *Reece*'s pieces. This project analyzes a particular discourse – the years-long debate over Lucy the elephant – in the hopes of revealing something general in nature: where the limits are now and where we need to go if we want to do right by other living beings in a way which we can ever truly call just.

Chapter 2

The Descent of Dogma: Tracing the Conceptual Life of Legal Animal Studies

1. Introduction

Legal scholarship regarding the status of animals has not arisen in a vacuum; rather, it has descended from earlier ancestors. With this in mind, I trace in this chapter how various ideas and arguments over the moral-philosophical and legal status of animals have competed and commingled over time, looking especially to how certain ones have proven more “dominant” than others. Crucially, I suggest that this apparent “evolution” in ideas and arguments has occurred in the way Charles Darwin intended for us to understand the word: not as a linear and inevitable progression toward an ultimate zenith, but rather as a matter of following disparate and diverse branches on a tree of life.¹ While this chapter certainly seeks to find what is useful and insightful in the dominant “dogmatic” thought that takes centre stage in moral-philosophical and legal studies of animals, my primary goal here is to uncover what has been underemphasized and underutilized – to find the limits of what the dominant species of thought can reasonably specialize in and open up a space from which more fruitful legal animals studies analyses can grow and develop throughout the rest of this project.

Keeping with the theme of my metaphor above, my first section below begins by considering the impact of changing scientific notions of animals most powerfully ushered in by naturalist Charles Darwin. Entitled “‘More than is Dreamt of in Your Philosophy’: Tracing the Development of Moral-Philosophical Arguments for Animal Rights,” this first section looks especially at how *ideas* about the moral-philosophical value of animals have circulated in both social and scholarly terms – a lineage whose most prominent figures in more recent history have

¹ Charles Darwin, *On the Origin of Species by Means of Natural Selection* (London: John Murray, 1859) at 129-130 [Darwin, *Origin*].

been philosophers Peter Singer and Tom Regan. In the following section, “Within the Law: Mapping the Boundaries of ‘Mainstream’ Animal Rights Legal Theory,” I outline what conceptual frameworks have come to dominate the field while also interrogating what alternative moral-philosophical ideas have been excluded from dominant species of thought in legal animal studies. As I show in this section, legal scholar Gary Francione best represents how certain “traits” have been selected for, emphatically rejecting alternative moral-philosophical perspectives (such as ecofeminist, posthumanist, and critical-race-theoretical ones) and apparently defining the terms of the legal field as little more than a constant tug-of-war between “personhood” or “property” status for animals. While Francione is not the only scholar in this field (with this section also considering legal scholars like Steven Wise and David Favre), he nevertheless encapsulates a kind of dominant legal scholarship on animals: one which has become formulaic, with the same presuppositions inherited by new work time and again. Thus, in my final section, “Outside the Law: Exploring Alternative Approaches to Legal Animal Studies,” I name and explain the insufficiencies of this dogmatic approach while also laying out the argument for how some of the previously-excluded moral-philosophical perspectives might be able to produce something far more generative in the field of legal animal studies. While recognizing the strengths of dominant approaches, I nevertheless conclude this chapter inviting formerly underemphasized and underutilized analyses for legal animal studies and, therein, welcoming what poststructuralist philosopher Jacques Derrida has called a “justice yet to come.”²

² Jacques Derrida, “The Force of Law: ‘The Mystical Foundation of Authority’”, translated by Mary Quaintance (1989) 11 *Cardozo Law Review* 920 [Derrida, “Force”] at 969.

2. “More than is Dreamt of in Your Philosophy”: Tracing the Development of Moral-Philosophical Arguments for Animal Rights

2.1 Scientific Perspectives on Animals: Cartesian Automata and Darwinian Continua

In his 1859 book, *On the Origin of Species*, naturalist Charles Darwin provided a persuasive and well-reasoned theory of evolution – a theory which, with the publication of *The Descent of Man* twelve years later, he eventually applied directly to human beings.³ Darwin’s theory posits humans as neither a favourite nor an *ex nihilo* creation of a divine being, but instead as a part of a continuous web of life with other creatures on earth. As Darwin himself remarked in his private notebooks, “[m]an in his arrogance thinks himself a great work worthy the interposition of a deity ... [M]ore humble [and] I believe true to consider him created from animals.”⁴ However, when Darwin proffered the idea that the difference between humans and other animals is “certainly one of degree and not of kind” in the nineteenth century, it stood in contrast to other ideas about animals that had previously circulated in the scientific community.⁵

For example, French philosopher and scientist René Descartes had reasoned in the seventeenth century that, since animals lack speech, they also lack consciousness.⁶ Although we can observe that animals demonstrate greater aptitude than we do with respect to other capacities, Descartes argued that

... the fact that they can do something better than we do does not prove that they have any intelligence, for, were that the case, they would have more of it than any of us and would excel us in everything. But rather it proves that they have no intelligence at all, and that it is nature that acts in them, according to the disposition of their organs — just as we see that a clock composed exclusively of wheels and springs can count the hours and measure time more accurately than we can with all our carefulness.⁷

³ Darwin, *Origin*, *supra* note 1; Charles Darwin, *The Descent of Man and Selection in Relation to Sex* (Cambridge: Cambridge University Press, 2009) [Darwin, *Descent*].

⁴ Charles Darwin, *Charles Darwin’s Notebooks 1836-1844*, edited by Paul H. Barrett, Peter J. Gautrey, Sandra Herbert, David Kohn, and Sydney Smith (New York: Cambridge University Press, 1987) at 300.

⁵ Darwin, *Descent*, *supra* note 3 at 105.

⁶ René Descartes, *Discourse on Method and Meditations on First Philosophy*, translated by Donald A. Cress (Indianapolis: Hackett Publishing, 1998).

⁷ *Ibid.* at 33.

As a clock ticks, so does a dog walk. From this “automaton” perspective, a dog’s whimper is not akin to a human’s wail, but rather akin to a clock’s gears squealing from being pushed out of place.⁸

However, Cartesian reasoning about the radical discontinuity between humans and animals was not without its critics. Eighteenth-century philosophers, such as Voltaire and David Hume, argued that the Cartesian assumption about animals ran counter to what both our senses and our studies reveal about human-animal likeness. As Voltaire rhetorically asked of scientists experimenting on animals, “You discover in him all the same organs of feeling as in yourself. Answer me, ... has Nature arranged all of the springs of feeling in this animal to the end that he might not feel?”⁹ For Voltaire, the obvious implication of finding the same mechanisms of sensation in animals that we find in human beings was that their experience of the world mirrored our own — they are not any more like “clocks” than we are. To this end, David Hume contended that it was nothing more than prejudice that prevented us from seeing what was right before our eyes: despite observing the same behaviours in animals and humans, we call the former “instinct” and the latter “reason” without sufficient justification. Hume called for a parsimonious examination of what we observed; save for a simpler alternative explanation, “the same events will always follow from the same causes.”¹⁰ Thus, the dog’s whimper and the

⁸ Note that much animal rights scholarship uses Descartes’ claims as evidence of there being a widely-held seventeenth-century attitude that animals are like automata. For examples of this use of Descartes, see, e.g., Peter Singer, *Animal Liberation*, updated ed (New York: Ecco, 2009) [Singer, *Animal Liberation*] at 200-202 ; Tom Regan, *The Case for Animal Rights*, 2nd ed (Berkeley: University of California Press, 2004) [Regan, *Case*] at 3-5; Gary L. Francione, *Animals, Property, and the Law* (Philadelphia: Temple University Press, 1995) [Francione, *Animals*] at 8, 38, 175-176; Lesli Bisgould, *Animals and the Law* (Toronto: Irwin Law Inc, 2011) at 19-21. But see Anita Guerrini, “The Rhetorics of Animal Rights” in John P. Gluck, Tony DiPasquale & F. Barbara Orlans, eds, *Applied Ethics in Animal Research: Philosophy, Regulation, and Laboratory Applications* (West Lafayette, Indiana: Purdue University Press, 2002) 55. As historian Anita Guerrini has cautioned in *ibid.* at 60, while Descartes’ reasoning about animals was indeed expressly used to justify two well-known cases of animal experimentation in the seventeenth century, there is no evidence of this attitude ever being “widely-held” (contrary to the significant influence typically ascribed to Descartes’ reasoning in the lineage of ideas found in animal rights scholarship).

⁹ Voltaire, *Philosophical Dictionary* (New York: Carlton House, 1950) at 22.

¹⁰ David Hume, *An Enquiry Concerning Human Understanding* (Mineola, NY: Dover Publications, 2004) at 67.

human's wail, being effects so similar, most likely result from a similar or identical cause: an experience of pain. For both Voltaire and Hume, it was only logical to assume that sentience was a characteristic shared by humans and animals like.

Obviously, in light of assertions like Voltaire's and Hume's having existed since the eighteenth century, Darwin's contention that animals' natures and our own are the same was not an entirely novel proposal. Further, even the idea of "evolution" itself was not unique to Charles Darwin, with Darwin's grandfather, scientist Erasmus Darwin, as well as scientist Jean Baptiste Lamarck, having published on the subject before Charles Darwin was even born.¹¹ Nevertheless, what was significant about Darwin's contribution was that he was able to bolster the idea of evolution by providing it with a coherent explanation: natural selection.¹²

In the crudest terms, natural selection means "survival of the fittest."¹³ Deductively reasoning from how he observed Galapagos finch species specializing according to their environments, what Darwin argued in *Origin of Species* was that environmental pressures forced animal species to adapt through successive generations: those offspring with traits best suited to the environment would pass on those traits to the next generation and so on to the point that their descendants would become a certifiable species in their own right.¹⁴ Moreover, as Darwin later elaborated in *Descent of Man*, human origins could be explained in the same way. Traits – such as intelligence – which benefited our ape ancestors were passed through successive generations to the point that the modern human came into existence. Importantly, what this means is that we are not simply "like" animals, but that we *are* animals.

¹¹ James Rachels, *Created from Animals: The Moral Implications of Darwinism* (Oxford: Oxford University Press, 1990) at 14-16.

¹² *Ibid.* at 25-26.

¹³ Herbert Spencer, *Principles of Biology* (London: Williams and Norgate, 1864) at 444.

¹⁴ Rachels, *supra* note 11 at 21; Darwin, *Origin*, *supra* note 1 at 80-87.

Predictably, because Darwin's work asserted that humans are just one form of highly developed animal species among others, publication of *Origin of Species* and *Descent of Man* was met with ridicule, with British periodicals of Darwin's day – such as *Punch* and *Figaro* – lampooning and caricaturing Darwin and his theory of evolution on multiple occasions.¹⁵ Notably, the figure of the “monkey-man” followed Darwin throughout this career, with cartoons of talking gorillas inquiring about their relation to humanity or of Darwin's head on a monkey's body appearing shortly after releasing his publications.¹⁶ Nevertheless, while *Origin of Species* may have created an initial uproar, by the time Darwin openly endorsed the idea that humans were an animal species in *Descent of Man*, the scientific community had become comfortably accustomed to his ideas.¹⁷

Moreover, with the further passage of time, the scientific community moved from being simply inured to Darwin's theory to wholeheartedly embracing it. Continued scientific study has yielded increasing proof for evolution. One could consider, for example, how the science of genetics has revealed that humans and chimpanzees are nigh indistinguishable on the level of DNA.¹⁸ Alternatively, one could consider how the work of primatologists, such as Jane Goodall and Dian Fossey, has showcased the remarkable similarity between our own social, psychological, and emotional behaviours and those observed in apes.¹⁹ If we are willing to set

¹⁵ See generally, Janet Browne, “Darwin in Caricature: A Study in the Popularisation and Dissemination of Evolution” (2001) 145:4 *Proceedings of the American Philosophical Society* 496.

¹⁶ *Ibid.*

¹⁷ Adrian Desmond & James Moore, *Darwin* (London: Penguin Books, 1992) at 579-581.

¹⁸ See, e.g., The Chimpanzee Sequencing and Analysis Consortium, “Initial Sequence of the Chimpanzee Genome and Comparison with the Human Genome” (2005) 437 *Nature* 69.

¹⁹ Given how prolific an author Jane Goodall has been, there are no shortage of works one could cite here. However, I draw special attention to *In the Shadows of Man* (London: Collins, 1971), as Peter Singer uses this text as relevant background information in *Animal Liberation* (*supra* note 8 at 14, 35). For Dian Fossey, see, e.g., *Gorillas in the Mist* (Boston: Houghton Mifflin, 1983).

aside notions of human exceptionalism and examine the facts of our biology, we might most properly call ourselves “the fifth ape.”²⁰

Darwin himself worried a great deal about what the implications of his theory would be for society at large – in particular, with respect to the moral, social, and legal status of human beings themselves.²¹ Yet, despite the revolution in scientific understandings of human beings as an animal species, relatively little has changed with respect to moral, social, or legal conceptions of “the human” and “the animal,” which are still quick to figure humans as radically distinct from and set apart from the animal kingdom and animals as likewise radically distinct from and set apart from the special place humanity occupies. Thus, while court systems around the world have been inclined to defend the place of evolutionary theory in schools, law in general has been loathe to modify its conception of humans as the proper, rational, and quasi-metaphysical subjects of law.²²

2.2 Translating Darwin into Moral-Philosophical Terms: Philosophers Peter Singer and Tom Regan

Perhaps most surprising about this lack of legal change is that there has been no shortage of philosophers and legal scholars proffering arguments for what they take the moral implications of Darwin to be. One particularly influential philosopher is utilitarian Peter Singer. In his 1975 book, *Animal Liberation*, Singer attributes a moral significance to the advent of evolutionary theory; however, he also recognizes the limitedness of Darwin’s influence.²³ While Darwin’s theory of evolution may have revolutionized scientific understandings of the

²⁰ See *The Genius of Charles Darwin*, written by Richard Dawkins, directed by Russell Barnes and Dan Hillman (United Kingdom: Channel 4, 2008). The other four apes are chimpanzees, bonobos, gorillas, and orangutans.

²¹ Desmond & Moore, *supra* note 17.

²² Ngaire Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Oxford: Hart Publishing, 2009) [Naffine, *Meaning*] at 123.

²³ Singer, *Animal Liberation*, *supra* note 8.

relationship between humans and animals, it has not done the same for social or moral understandings of that relationship.²⁴ Singer laments, therefore, that older attitudes towards animal kind have been stubbornly enduring:

If the foundations of an ideological position are knocked out from under it, new foundations will be found, or else the ideological position will just hang there, defying the laws of gravity. In the case of attitudes to animals, the latter seems to have happened. While the modern view of our place in the world differs enormously from ... earlier views[,] ... in the practical matter of how we act toward other animals little has changed. ... The moral attitudes of the past are too deeply embedded in our thought and our practices to be upset by a mere change in our knowledge of ourselves and of other animals.²⁵

For Singer, our social and moral attitudes towards animals constitute an intellectual and philosophical holdover, supported in a post-Darwin era more through mere custom and habit rather than through recourse to factual knowledge about the world. Thus, through discrediting justifications for our attitudes towards animals as little more than atavisms in a post-Darwin era, Singer seeks to “shatter our complacency” throughout *Animal Liberation*.²⁶

Of course, “post-Darwin” is hardly the only way in which we can describe the era in which Singer was writing and the cultural background assumptions on which he grounds his appeals. Taking the social climate of the early 1970s into account, we could safely call it a “liberationist” era, as well. As Singer observed two years before publishing *Animal Liberation*, “We are familiar with Black Liberation, Gay Liberation, and a variety of other movements. With Women’s Liberation some thought we had come to the end of the road. ... But one should always be wary of talking of ‘the last remaining form of discrimination.’”²⁷ While Singer recognized

²⁴ Singer, *Animal Liberation*, *supra* note 8 at 205-207. See also, Naffine, *Meaning*, *supra* note 22; Rachels, *supra* note 11.

²⁵ Singer, *Animal Liberation*, *ibid.* at 211-212.

²⁶ *Ibid.* at 185.

²⁷ Peter Singer, “Animal Liberation”, Book Review of *Animal, Men and Morals* edited by Stanley Godlovitch, Roslind Godlovitch, and John Harris (1973) *New York Review of Books*, online: <http://www.nybooks.com/articles/1973/04/05/animal-liberation/>.

that “animal liberation” may sound like a parody of other liberation movements at first blush, he also contended that it is a logical outflow of the basic tenets of those same liberation movements:

Moral equality is distinct from factual equality. Otherwise it would be nonsense to talk of the equality of human beings, since humans, as individuals, obviously differ in intelligence and almost any ability one cares to name. If possessing greater intelligence does not entitle one human to exploit another, why should it entitle humans to exploit nonhumans?²⁸

Vast differences exist among humans; yet, being able to point to genetic differences, differences in intelligence, or differences in ability does not entitle one to treat individual humans with less respect. As Singer sees it, since we are unable to make recourse to these attributes to justify differential treatment of human beings, we likewise cannot make recourse to these attributes to justify differential treatment of animals. *Animal Liberation* is, therefore, a sustained argument for egalitarianism²⁹ and against “speciesism.”³⁰

This position is buoyed by the “argument from marginal cases.”³¹ In essence, because there are members of the human community with profound mental disabilities, we cannot make recourse to criteria like “intelligence,” “reason,” or “speech” to justify their particular moral entitlement to equal treatment. Rather, any criterion we choose which would encompass all human beings – including those with severe cognitive disabilities – must also logically be a criterion that would apply to many members of the animal kingdom, as well.³²

²⁸ *Ibid.*

²⁹ This egalitarian argument for animals’ moral (and legal) value is particularly well developed in Paola Cavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights*, translated by Catherine Woollard (New York: Oxford University Press, 2001).

³⁰ An obvious backformation from words like “sexism” and “racism,” speciesism refers to the same general phenomenon: the differential treatment of members of a particular group based on nothing more than their membership in that group. The only difference is that, while sexism and racism refer to intra-human groups of “sex” and “race” respectively, speciesism refers to grouping outside the human community, along the lines of species itself. Note that this term was originally proposed by Richard Ryder in “Experiments on Animals” in S. Godlovitch, R. Godlovitch, and J. Harris, eds, *Animals, Men, and Morals* (New York: Taplinger, 1971) before being popularized by Singer in *Animal Liberation*.

³¹ For a comprehensive overview of how scholars have deployed this argument, see generally Daniel A. Dombrowski, *Babies and Beasts: The Argument from Marginal Cases* (Chicago: University of Illinois Press, 1997).

³² Singer, *Animal Liberation*, *supra* note 8 at 239-240.

For a utilitarian, the “lowest common denominator” criterion is basic sentience – that is, the ability to experience pleasure or pain. Philosopher Jeremy Bentham, the founder of utilitarianism, established the moral relevance of sentience explicitly, stating in his 1789 *Introduction to the Principles of Morals and Legislation* that “Nature has placed mankind [sic] under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do.”³³ For Bentham, pleasure and pain are things with intrinsic value and disvalue, respectively. Moral action, therefore, consists in creating the outcome with the “greatest happiness for the greatest number.”³⁴

Unsurprisingly, utilitarianism has, from its earliest origins, been a philosophy which takes animals into account. As Bentham aphoristically asked with respect to other species, “The question is not, Can they reason? Nor, Can they talk? but, Can they suffer?”³⁵ Because pleasure and pain constitute the most fundamental considerations of utilitarian moral calculus, determining a being’s capacity to suffer – instead of determining crowning-glory human capacities, like reason or speech – is of the foremost importance. If an action results in the suffering of a dozen dogs, it is just as undesirable a moral outcome for the classical utilitarian as an action that results in the suffering of a dozen people.³⁶

³³ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, edited by J. H. Burns and H. L. A. Hart (London: Athlone Press, 1970) at 11 [emphasis in original] [Bentham, *Introduction*].

³⁴ Often misattributed to Jeremy Bentham, this particular phrase is correctly attributed to an earlier thinker, Francis Hutcheson in his *Inquiry Concerning Moral Good and Evil* (Indianapolis: Liberty Fund, 2013) at 114. However, the root of the common misattribution stems from a similar statement made by Jeremy Bentham in *A Fragment on Government*, edited by F.C. Montague (Oxford: Clarendon Press, 1891), which reads, “It is the greatest happiness of the greatest number that is the measure of right and wrong.”

³⁵ Bentham, *Introduction*, *supra* note 32 at 283.

³⁶ Nevertheless, the classical utilitarians were neither animal liberationists nor vegans, having other reasons for generally justifying human use of animals. Bentham noted that the lives and deaths of livestock animals are more pleasurable and less painful than what they would receive in the wild, so our treatment of them is justified (*ibid.* at 143). John Stuart Mill, another classical utilitarian, argued that it is better to be “a human being dissatisfied than a pig satisfied,” indicating that even the potential satisfaction of intellectual pleasures outweighs the actual satisfaction of physical, animal pleasures. See John Stuart Mill, *Utilitarianism* (Boston: Willard Small, 1887) at 22.

Nevertheless, as a preference utilitarian, Singer's position differs from Bentham's in important ways. As Singer points out in *Practical Ethics*, classical utilitarianism like Bentham's runs counter to basic moral intuitions by reducing individuals to mere "receptacles" of pleasure.³⁷ If we think of pleasure as a liquid and individuals as the cups that hold that liquid, you could destroy several cups (i.e., unique individuals) and still have a positive outcome if the same amount of liquid is distributed among the remaining cups. Classical utilitarianism renders all of us "replaceable." Killing ten people is morally justifiable for the classical utilitarian as long as the remaining people experience equal or greater net pleasure in the outcome than would exist if those ten people had continued living.

Against Bentham, preference utilitarians like Singer assert "pleasure" is not the only thing with inherent value for an ethical theory; instead, what is valuable is the satisfaction of preferences or interests.³⁸ This is because "ethics" is, by definition, not oriented toward the short-term pragmatics of gratification, but rather toward governing the long-term behaviours of individuals *en masse* over time. When an individual's pleasure and pain are terminated with that individual's death, she is simply taken out of the hedonic calculus of classical utilitarianism; however, her death matters ethically in the preference utilitarian framework because it interferes with the overall outcome of satisfying a preference to continue living.

Significant here are the practical implications of what Singer suggests. Crucially, those capable of forming preferences and having interests over time must possess the requisite rational autonomy to do. These individuals are, for Singer, "moral persons" – a term that, for him, is not continuous with the term "human being."³⁹ Rather, for Singer, there are many animals (such as the great apes) who possess the requisite mental capacities to be "persons" and many human

³⁷ Peter Singer, *Practical Ethics*, 3rd ed (Cambridge: Cambridge University Press, 2011) [Singer, *Ethics*] at 106.

³⁸ *Ibid* at 8-10.

³⁹ *Ibid* at 74.

beings (such newborn infants and people with profound cognitive disabilities) who do not.⁴⁰

What this means is that

[s]ome non-human animals appear to be rational and self-conscious, conceiving themselves as distinct beings with a past and a future. ... In the present state of our knowledge, [a] strong case against killing can be invoked most categorically against the slaughter of chimpanzees, gorillas, and orangutans. ... When we come to animals who ... are not rational and self-conscious beings, the case against killing is weaker. When we are not dealing with beings aware of themselves as distinct entities, the wrongness of painless killing derives [only] from the loss of pleasure involved. Even when the animal killed would have lived pleasantly, it is at least arguable that no wrong is done if the animal killed will, as a result of the killing, be replaced by another animal living an equally pleasant life.⁴¹

In effect, Singer provides us with two tiers of moral consideration for different classes of beings.

Rationally autonomous beings capable of having a self-aware sense of themselves over time have greater wrongs done against them than non-rationally-autonomous beings, who can lose out only on pleasure. In this respect, although “sentience” may be the great leveller for bringing all animals – both human and non- – into the moral equation for Singer, “intelligence” appears to be a characteristic that still counts for more at the end of the day.

Curiously, although many associate Singer with the modern-day animal *rights* movement, Singer himself has stated that “the ethical position on which the movement rests need no reference to rights.”⁴² For him, the language of rights “is no more than a political shorthand,” useful perhaps for making the social or political claims of a liberationist movement, but not corresponding to any absolute moral entitlement.⁴³ To this end, Singer follows in the footsteps of

⁴⁰ On the matter of great apes, Singer makes a pointed argument for great ape personhood in Paola Cavalieri & Peter Singer, eds, *The Great Ape Project: Equality beyond Humanity* (London: Fourth Estate, 1993). On the matter of infants, see, e.g., Peter Singer, “Justifying Infanticide” in *Writings on an Ethical Life* (New York: Ecco, 2000) 187.

⁴¹ Singer, *Ethics*, *supra* note 37 at 120.

⁴² Peter Singer, “Animal Liberation at 30”, Book Review of *Animal Rights and Wrongs* by Roger Scruton, *The Animal Question: Why Non-human Animals Deserve Human Rights* by Paola Cavalieri, *Taking Animals Seriously: Mental Life and Moral Status* by David DeGrazia, and *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy* by Matthew Scully (2003) *New York Review Books*, online: <http://www.nybooks.com/articles/2003/05/15/animal-liberation-at-30/>.

⁴³ Singer, *Animal Liberation*, *supra* note 8 at 8, 95-96.

classical utilitarians like Bentham, who, in the context of discussing the French *Declaration of the Rights of Man and of the Citizen*, commented that the idea of “natural rights” was “nonsense” and that the idea of the “rights of man” – what we might today call “human rights” – was “nonsense upon stilts.”⁴⁴ For Bentham, rights have no place in moral philosophy because they are:

... the fruits of law, and of the law alone. There are no rights without law — no rights contrary to the law — no rights anterior to the law ... There are no other than legal rights; — no natural rights — no rights of man, anterior or superior to those created by the laws. The assertion of such rights, absurd in logic, is pernicious in morals.⁴⁵

One can easily understand why rights are anathema to utilitarian moral thinking. Insofar as utilitarianism is premised on consequentialist morality that results in the greatest happiness for the greatest number, “rights” as inviolable entitlements and trump cards only get in the way as side-constraints preventing a calculus from reaching its mathematical conclusion. Rather, when it comes to a philosophy of animal *rights* proper, one can look to the work of philosopher Tom Regan – most especially, the aptly-titled *Case for Animal Rights*.⁴⁶

Published eight years after Singer’s *Animal Liberation*, Regan’s *Case* starts from many of the same premises and – while there are many similarities with respect to where they end up – reaches some slightly different conclusions. In terms of academic and philosophical discourse, Regan (and especially his *Case*) is notable for providing a strong philosophical basis for animal “rights” in the truest sense of that word. Like Singer, Regan situates his work as taking place in a post-Darwin era wherein the scientific community has endorsed the notion of humans and animals as existing on a biological continuum.⁴⁷ Something to which Regan draws greater

⁴⁴ Jeremy Bentham, “Anarchical Fallacies” in Jeremy Waldron, ed, *‘Nonsense upon stilts’: Bentham, Burke, and Marx on the Rights of Man* (London: Methuen, 1987) 46 at 51.

⁴⁵ Jeremy Bentham, “Pennomial Fragments” in John Bowring, ed, *The Works of Jeremy Bentham* (Edinburgh: W. Tait, 1859) 200 at 221.

⁴⁶ Regan, *Case*, *supra* note 8.

⁴⁷ *Ibid.* at 18-20.

attention, however, is that we share not simply basic biological facts with animals, but that our consciousness – whatever it may be – likely has origins in the animal kingdom.

Consciousness matters especially for Regan because those entities that are morally relevant in his philosophical framework are “subjects of a life.” Regan defines these beings as having the following characteristics:

... beliefs and desires; perceptions, memory, and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference- and welfare-interests; the ability to initiate action in pursuit of their desires and goals; a psychophysical identity over time; and an individual welfare in the sense that their experiential life fares well or ill for them, logically independently of their utility for others and logically independently of their being the object of anyone else’s interests.⁴⁸

In short, these beings possess self-consciousness. As for who or what these beings are, one should note that, in its original publication, Regan’s *Case* asserted only that we can safely say “mammals of one year or more” fit this bill.⁴⁹ However, in his 2004 edition, Regan clarifies that his criteria likely, in fact, apply to the vast majority of the animal kingdom, apparently leaving only insects outside of the “subject of a life” category.⁵⁰

Coming from the Kantian tradition, this subjectivity carries with it a moral weight for Regan. In Kant’s original formulation, animals were essentially “left out in the cold” because what mattered most was *rationality*.⁵¹ A rational being is that which is capable of valuing other things and, thereby, is the source of a self-originating worth.⁵² For Kant, therefore, all rational beings possessed a self-supporting moral personhood. Regan tweaks this formulation by

⁴⁸ *Ibid.* at 243.

⁴⁹ *Ibid.* at 78.

⁵⁰ *Ibid.* at xvi.

⁵¹ Kant makes this point eloquently in “Conjectures on the Beginnings of Human History” in Reiss Hans, ed, *Kant’s Political Writings*, 2nd ed, translated by H.B. Nisbet (Cambridge: Cambridge University Press, 1991) at 225:

[R]aising man completely above animal society, was his ... realisation that he is the true end of nature. ... When he first said to the sheep, “the [pelt] which you wear was given to you by nature not for your use, but for mine” and took it from the sheep to wear himself, he became aware of a prerogative which, by his nature, he enjoyed over all the animals; and he now no longer regarded them as fellow creatures, but as a means and instruments to be used at will for the attainment of whatever ends he pleased.

⁵² See generally, Immanuel Kant, “Groundwork for the Metaphysics of Morals” in *Practical Philosophy*, edited and translated by Mary J. Gregor (Cambridge: Cambridge University Press, 1996) 43.

asserting that abstract rationality of the Kantian variety is not necessary for an individual to be capable of valuation. Rather, any being that exists over time and in the world is a valuing – and, by extension, *self-valuing* – subject.⁵³ Therefore, “subjects of a life” are Regan’s moral persons.⁵⁴

Working within a deontological framework, Regan’s moral philosophy differs somewhat from Singer’s. As a utilitarian, Singer determines the rightness or wrongness of an action according to its consequences. Contrariwise, as a deontologist, Regan asserts that some actions – like murder – are categorically wrong. This is because of the aforementioned inherent value “subjects of a life” possess. Where, for Singer, we may have sufficient grounds for murdering an individual if her death benefits the overall aggregate of people, for Regan this murder is never justified, regardless of who or how many people benefit from it.

Nevertheless, Singer and Regan end up being joined in attributing greater moral significance to intelligent beings. Where “sentience” may bring all animals into the moral fold for Singer and being a “subject of a life” may do so for Regan, “intelligence” still establishes for both that the majority of humans are more morally relevant than the majority of animals. For Regan, this becomes apparent in the fictional “lifeboat case” scenario: five survivors (four average humans and one dog) find themselves trapped on a lifeboat where, realistically, there is only room for four.⁵⁵ Regan suggests that the dog should be thrown overboard because of the “worst off” principle – the implication being that any humans thrown overboard would lose more “possible sources of satisfaction” than any dog.⁵⁶ While many have been critical of this position,

⁵³ Regan, *Case*, *supra* note 8 at 243.

⁵⁴ On personhood in Regan’s perspective generally, see Tom Regan, “The Day May Come: Legal Rights for Animals” (2004) 10 *Animal Law* 11.

⁵⁵ Regan, *Case*, *supra* note 8 at 324-326.

⁵⁶ *Ibid.* at xxix.

it remains the case that Regan contends that his own moral theory still awards greater significance to the average human being than to the average animal.⁵⁷

On the whole, Singer's and Regan's philosophies end up being quite similar. Both attribute a significance to evolution, arguing that we have no good factual reason today to assert human exceptionalism *ipso facto*. Both level the moral playing field by appealing to criteria other than species membership as the foundation of a moral community. Although the two thinkers choose different base criteria – “sentience” in Singer's case and being a “subject of a life” in Regan's – in practical terms, their moral communities include the same creatures: mammals, birds, fish, etc.⁵⁸ Both also appear to award greater moral significance to beings in possession of intelligence and rationality, with Singer quite openly pointing to great apes and Regan to the average human being. In the end, the most notable difference between Singer and Regan comes down to frameworks of “utility” and “rights.” Where, for Singer, there are degrees of wrongness determined by the consequences of our actions, for Regan there is an inviolable moral worth intrinsic to all self-aware beings.

2.3 The Social Life of Moral-Philosophical Ideas: Comparing the Effects and Affects of Singer and Regan

That philosopher Peter Singer has had a high public profile is a fact difficult to deny. Clearly playing up this fact is the back cover of the 2009 edition of his *Animal Liberation*, which proudly proclaims that it is “THE BOOK THAT STARTED A REVOLUTION.”⁵⁹ This raises a crucial question: what “revolution,” exactly, did *Animal Liberation* start? Of course, one cannot deny

⁵⁷ Regan, *ibid.*, provides an overview of his critics on this point at xxvii-xxxii. Legal scholar Gary Francione contends that Regan's theory does not actually do this. See Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Philadelphia: Temple University Press, 2000) [Francione, *Introduction*] at xxxiii.

⁵⁸ Singer suggests that creatures with the least sophisticated nervous systems, like oysters, are probably not sentient (see *Animal Liberation*, *supra* note 8 at 174).

⁵⁹ Singer, *Animal Liberation*, *supra* note 8.

that *Animal Liberation* has certainly been an “influential” text. Well-known animal rights advocates (such as People for the Ethical Treatment of Animals (PETA) co-founder Ingrid Newkirk and Vegan Outreach co-founder Matt Ball) cite the book among the catalysts that galvanized them into action, while others have hailed the text as the “animal rights ‘bible’” – fundamentally required reading for those serious about the issue.⁶⁰ Moreover, as philosopher Dale Jamieson has noted, “[w]ith his Oxford credentials[,] ... Singer helped to legitimize concerns about animals in the American philosophical community.”⁶¹ Further still, far beyond academe, “[w]hen *Animal Liberation* was published in 1975, it had an enormous effect in transforming what had been a collection of small, largely invisible animal welfare organizations into a strong and vibrant social movement.”⁶²

Nevertheless, although *Animal Liberation* has no doubt had some effect on the animal rights movement generally, it is safe to assume that its effect on society at large has been indirect at best. While *Animal Liberation* clearly preaches loudly to the converted, whether it accomplished its goal of effecting real social change is less apparent. Although Singer has lauded increasing standards for animal welfare in the United States and European Union as evidence of the success of what he set out to do, philosopher Harry J. Gensler has pointed out that the consumption of factory-farmed animals remains as widespread and commonplace as (if not more so than) when *Animal Liberation* was published in 1975 – suggesting the text has scarcely made a dent when it comes to actually ending the practice of which it was so emphatically critical.⁶³

⁶⁰ On Ingrid Newkirk’s comments, see “Ingrid Newkirk’s Biography” (no date), online: *IngridNewkirk.com* <<http://ingridnewkirk.com>>. On Matt Ball’s comments, see the backmatter for Peter Singer, *Animal Liberation* (London: Bodley Head, 2015). On the general reception of *Animal Liberation*, see Gill Maltby & Richard Mountford, “The Animal Rights ‘Bible’”, Book Review of *Animal Liberation* by Peter Singer (2012) 271 *Resurgence & Ecologist*, online: <<https://www.resurgence.org/magazine/article3614-the-animal-rights-bible.html>>.

⁶¹ Dale Jamieson, “Singer and the Practical Ethics Movement” in Dale Jamieson, ed, *Singer and His Critics* (Oxford: Blackwell Publishers, 1999) 1 at 5.

⁶² *Ibid.*

⁶³ Harry J. Gensler, “Singer’s Unsanctity of Human Life: A Critique” in Jeffrey A. Schaler, ed, *Peter Singer Under Fire: The Moral Iconoclast Faces His Critiques* (Chicago: Open Court, 2009) 163.

Thus, considering how the two practices Singer focuses on in *Animal Liberation* – factory farming and animal experimentation – remain commonplace institutions in our society, it is difficult for one to accept that the book started any kind of genuine “revolution.” Even if *Animal Liberation* did start a small-scale social revolution of sorts, it has no doubt been diffuse and, moreover, proving its existence would likely be an impossible task for one to accomplish. That said, there are two definite tasks one can accomplish with respect to tracing the effects of *Animal Liberation* and its author: following the affective life that the two have taken on socially and tracing the academic discourse that the two have generated.

As to the social life of *Animal Liberation*, one should consider especially this observation made by Robert C. Solomon with respect to the graphic images of animal experimentation and the factory-farming of animals contained within the book’s pages:

These are no mere “illustrations.” ... I suspect that many philosophers ... feel offended by such shoving aside of the traditional emphasis on ethical argument and what must surely seem like a vulgar emphasis on photojournalism. But what I find moving about Singer’s work is surely not the arguments — most of them undeniably valid — that provide his philosophical skeleton. ... I believe ethics is first of all a matter of emotion, to be cultivated from our natural inclinations of fellow-feeling (“kinship”) and molded into a durable state of character. What Singer has done throughout his career is to create such a character.⁶⁴

Yet, Singer’s overt comments on emotion and sympathy in *Animal Liberation* are rather dismissive of their ultimate value, remarking that he appeals “to reason rather than to emotion or sentiment” because “reason is more universal and compelling in its appeal,” and that he does not believe “that an appeal to sympathy and good-heartedness alone will convince most people of the wrongness of speciesism.”⁶⁵ Further still, Singer appears to openly lampoon the appeals to

⁶⁴ Robert C. Solomon, “Peter Singer’s Expanding Circle: Compassion and the Liberation of Ethics” in Dale Jamieson, ed, *Singer and His Critics* (Oxford: Blackwell Publishers, 1999) 64 at 82.

⁶⁵ Singer, *Animal Liberation*, *supra* note 8 at 243.

emotion and sympathy, opening the 1975 edition of *Animal Liberation* with an anecdote about a woman he encountered when he was writing the book:

... she certainly was keen to talk about animals. “I do love animals,” she began. “I have a dog and two cats, and do you know they get on together wonderfully well. Do you know Mrs. Scott? She runs a little hospital for sick pets...” and she was off. She paused while refreshments were served, took a ham sandwich, and then asked us what pets we had.

We [Singer and his wife] told her we didn’t own any pets. She looked a little surprised, and took a bite of her [ham] sandwich.⁶⁶

Singer and his wife proceed to explain to this interlocutor that they “didn’t ‘love’ animals,” just that they reasoned that animals should not be treated “as a means to human ends – as the pig whose flesh was now in [the] sandwiches had been treated.”⁶⁷

Still, while Singer himself has denied that *Animal Liberation* relies on any appeal to emotion or sympathy, Solomon’s glossing of both *Animal Liberation* and Singer himself suggests that the utilitarian doth protest too much, with the lack of a significant public profile for other philosophers writing on the subject of animal ethics in more abstract terms suggesting that the text “hooks” its readers with more than mere philosophizing. Indeed, rare among academic philosophers, Singer has enjoyed a “celebrity status” – one to which *Animal Liberation* played no small part in skyrocketing him.⁶⁸

Singer’s reputation comes in part from the activist antics in line with his philosophical claims. As Dale Jamieson sums it up, Singer has:

... march[ed], demonstrate[d], and [sat] in a cage in a city square to publicize the plight of battery hens. He has been enjoined from publicly criticizing or demonstrating against a circus, and arrested for trying to photograph confined sows on a pig farm partly owned by Australia’s prime minister. Twice he has stood as a candidate for the Green Party in Australian federal elections.⁶⁹

⁶⁶ *Ibid.*, Appendix at 9.

⁶⁷ *Ibid.*, Appendix at 9-10.

⁶⁸ Solomon, *supra* note 64.

⁶⁹ Jamieson, *supra* note 61 at 7.

However, for better or for worse, animal liberation has hardly been Singer's only focus – or the only thing for which he has received attention. Singer's argument for the moral acceptability of euthanizing infants born with disabilities has drawn resounding criticism and ire, with disability rights advocates frequently protesting his public appearances.⁷⁰ The marriage of this latter focus with the former has led many to rightly ask, if Singer believes “animals should be treated like people ... [d]oes he also think that people should be treated like animals?”⁷¹ Some have even suggested that it is precisely because of Singer's association with infanticide that the animal liberation movement has been unable to find a steadfast moral centre.⁷²

What about Tom Regan, then? If Singer fails to provide the animal liberation movement with a moral centre, surely Regan – with his equally well-justified moral-philosophical argument for animal rights – must represent a viable alternative? Not so, apparently. Despite being held in equal regard in academic circles, notable immediately when considering Regan in relation to Singer is the former's comparatively *underwhelming* public profile. Indeed, as animal rights activist Norm Phelps has recounted, amidst the radicalizing of animal rights groups in the early 1990s, Regan himself could scarcely hold the attention of an audience at the animal rights march in Washington:

By the time [he] mounted the podium to deliver the concluding address, it was late afternoon. ... I thought his call for faith in our cause and unity in pursuit and goals was one of the best animal rights speeches I had ever heard. Unfortunately, not many others got to hear it. Between people from out of town whose chartered buses had to leave an event that was running over schedule, and people who had simply grown dispirited and

⁷⁰ See generally, Michael Specter, “The Dangerous Philosopher”, *The New Yorker* (9 September 1999) 46; Jeff Sharlett, “Why Are We Afraid of Peter Singer?” (2000) 46:27 *Chronicle of Higher Education*, online: <<https://www.chronicle.com/article/Why-Are-We-Afraid-of-Peter/11979>>; David Fishman, “Disability rights activists protest Princeton philosopher Peter Singer”, *Daily Northwestern* (25 October 2015), online: <<https://dailynorthwestern.com/2015/10/25/campus/disability-rights-activists-protest-princeton-philosopher-peter-singer/>>.

⁷¹ Specter, *ibid.* at 46.

⁷² See Gensler, *supra* note 63.

drifted away, only two hundred and seventy-four marchers were there to hear Regan's talk. I know. I counted the house.⁷³

Even Regan does not cast himself in any grand terms, noting that, amidst ongoing and tumultuous protests against animal experimentation at a university campus where he had been invited to speak,

You could feel the tension in the air. ... Before entering [the auditorium], I was taken aside and introduced to the head of campus security. ... If things got out of hand, he would wink at me and mouth the words, "Head for the nearest exit!" ... I was covering familiar philosophical ground: moral standing, indirect duties and so on, while, in the back of my mind, I was thinking, "Just wait till I get to Kant's categorical imperative: that's when all hell will break loose!" Needless to say, when I got to Kant, all hell did not break loose.⁷⁴

In contrast to the rabble-rousing, incendiary, and heartstring-tugging Peter Singer, Regan is simply a well-reasoning philosopher.

This is not to say, however, that Regan's ideas have not found their champion. As the section below outlines, legal scholar Gary L. Francione – ever-critical of the deficiencies of Singer's moral-philosophical position – has done a double duty of translating Regan's moral-philosophical argument for strong animal rights into both legal and social arenas through his "abolitionist" position. Where Regan has largely lacked a public profile, Francione's legal argument for strong animal rights has attracted both fame and infamy that, in some respects, rivals even Singer's – and has therein provided a fertile basis for these ideas to live and multiply in the social realm, as well.

⁷³ Norm Phelps, *The Longest Struggle: Animal Advocacy from Pythagoras to PETA* (New York: Lantern Books, 2007) at 287-288.

⁷⁴ Tom Regan, "A Bird in the Cage" in Laura Moretti, *Remembering Tom Regan* (Chico: The Animals Voice, 2017) 6 at 21.

3. Within the Law: Mapping the Boundaries of Legal Animal Studies

3.1 *The Dominant Perspective in Legal Animal Studies: Francione and the Focus on Personhood*

The small differences between Peter Singer's and Tom Regan's moral philosophies have been significant for some, particularly when it comes to moving from the moral-philosophical realm to the legal one. To this end, legal scholar Gary L. Francione notes in *Animals, Property, and the Law* that it was Regan's moral theory of animal rights that allowed him to assess critically what (and whose) ends contemporary animal welfare law serves.⁷⁵ As Francione sees it, despite Singer's pretence to animal liberationism, the utilitarian thinker's moral-philosophical stance is ultimately anti-liberationist in practical terms because of how it implicitly supports the legal status quo.⁷⁶ By not ascribing strong moral rights to the vast majority of animals, Singer leaves largely undisturbed a system that awards legal rights to human beings only. On this reading, animal welfare law is utilitarian, whereas laws for human persons are not.

The rub lies in how "Kantianism for people, utilitarianism for animals" plays out.⁷⁷ In Francione's view, animal welfare law operates on the basis of a "humane treatment" principle where animals are recognized as being sentient, as having a subjective welfare, and as deserving of having their suffering minimized.⁷⁸ However, because only humans are rights-bearing persons in law, only their interests are not subordinated to any kind of utilitarian calculus: human interests, no matter how trivial, trump animal interests in every case. Animal welfare law's aim of avoiding "unnecessary" suffering for animals means almost nothing when human interests can always be defended as "necessary." This framework only prevents egregious and exceptional

⁷⁵ Francione, *Animals*, *supra* note 8 at xvi.

⁷⁶ See especially, Gary L. Francione, "Animal Rights and Animal Welfare" (1996) 48:2 *Rutgers Law Review* 397 [Francione, "Animal Rights"].

⁷⁷ This formulation was suggested by philosopher Robert Nozick in *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 35.

⁷⁸ Francione, *Animals*, *supra* note 8 at 5-7.

acts of cruelty to animals, leaving in place practices – such as the routine neglect, abuse, and slaughter of farmed animals – as unquestioned “necessity.”⁷⁹

Francione’s central concern is the legal divide between humans and animals into “persons” and “property,” respectively. The issue that arises for Francione is that personhood and property do not exist independently of each other. As Francione notes, in broad strokes, “persons” are those entities in law who have a right to own property – that is, those in the former category can do whatever they like to those in the latter.⁸⁰ When humans are persons and animals are property, we end up in the situation wherein the former can exercise their entitlements to do whatever they like to the non-entitled latter.

Thus, for Francione, the moral call for “animal rights” generally rests on a demand for one fundamental legal right: the right for animals to own themselves – not to be the property of someone else, but persons in their own right. As Francione phrases it in his *Introduction to Animal Rights*: “The right not to be treated as the property of others is basic in that it is different from any other rights we might have because it is the grounding for those other rights.”⁸¹ Francione does not shy away from the radical and far-reaching implications of his claim, openly asserting that this stance requires “abolitionism.”⁸² An obvious callback to the movement to abolish American slavery, Francione’s animal abolitionism demands an end to the property status of all animals and a consequent massive restructuring of our society.⁸³

⁷⁹ *Ibid.* See also, Maneesha Deckha, “Welfarist and Imperial: The Contributions of Anticruelty Laws to Civilizational Discourse” (2013) 65:3 *American Quarterly* 515. As Deckha has argued, the “moving target” of what constitutes “unnecessary” suffering for animals has been put not simply to speciesist ends, but also racist and colonial ones, with non-Western practices with respect to animals often being singled out as “egregious cruelty” even where any actual pain or suffering involved pales considerably in comparison to status quo practices around farmed animals and meat production in Western countries.

⁸⁰ Francione, *Animals*, *supra* note 8 at 38.

⁸¹ Francione, *Introduction*, *supra* note 57 at xxviii.

⁸² See generally, Gary L. Francione, “Animal Rights: The Abolitionist Approach” (no date), online: *Animal Rights: The Abolitionist Approach* <<https://www.abolitionistapproach.com/>>.

⁸³ Gary L. Francione, *Rain without Thunder: The Ideology of the Animal Rights Movement* (Philadelphia: Temple University Press, 1997) [Francione, *Rain*] at 18-19.

Francione's influence on the animal liberation movement – in terms of activism, scholarship, and legal initiatives – cannot be overstated. Founding the Rutgers Animal Rights Law Centre in 1990, Francione's curriculum was the first to incorporate the study of animal rights strategy, advocacy, and legal configurations into regular law tutelage.⁸⁴ Additionally, very much in line with the public figure of Peter Singer, Francione is a figure who attracts controversy – and one who apparently thrives on conflict.

While the publication of *Animals, Property, and the Law* in 1995 brought initial attention to Francione as a notable voice in the animal liberation movement, it was the publication of *Rain without Thunder* the next year that made him into a symbol for many in the movement.⁸⁵ Neither a philosophical tract nor a legal argument for animal rights, *Rain* instead presented a strategy for animal liberation: not “cleaner cages” or “bigger cages,” but “empty cages.”⁸⁶ Francione's commitment to absolute “abolition” of animal exploitation (instead of incremental welfarist reforms) has defined the stance adopted throughout the rest of his career: an unwavering belief that nothing less than perfection will do.

However, in the eyes of some, this has been a “strategic disaster” for the animal liberation movement as a whole, turning away many who feel they would be unable to measure up to these standards of purity.⁸⁷ Still, the resulting celebrity Francione has garnered from this extremist position is undeniable. As communication scholar S. Marek Muller has noted, thanks to his active web presence through his blog, Facebook, and Twitter, Francione is a veritable “online phenomenon” insofar as “[d]iscussions of and hyperlinks to his work frequently emerge in vegan

⁸⁴ Phelps, *supra* note 73.

⁸⁵ Francione, *Rain*, *supra* note 83; Phelps, *ibid.*

⁸⁶ Francione, *ibid.* at 3. See also, Tom Regan, *Empty Cages: Facing the Challenge of Animal Rights* (Lanham, MD: Rowman & Littlefield, 2005).

⁸⁷ Sue Donaldson & Will Kymlicka, *Zoopolis: A Political Theory of Animals Rights* (Oxford: Oxford University Press, 2011) at 79.

forums, vegan blogs, and vegan social media.”⁸⁸ Among many animal liberationists, “Francione is something of a legend,” with his army of “Franciobots” (a portmanteau of Francione and robots) eagerly spreading his uncompromising gospel of absolute abolitionism.⁸⁹

To this end, Francione has also been notable for practicing what he preaches. In 2008, he urged his followers to vote *against* California’s Proposition 2, which would have required an increase in the space given to veal, hens, and pigs on factory farms. Francione vilified the organizations behind this – the Humane Society of the United States and Farm Sanctuary – arguing that this effort “will only make the public feel better about animal exploitation and will result in increased exploitation.”⁹⁰ Unsurprisingly, Francione’s feuds with other scholars of animal ethics, other animal liberation activists, and animal welfare organizations are innumerable. While PETA has been a frequent and repeat target of his ire since the publication of *Rain*, animal liberation activist Tobias Leenaert has pointed out that there is no evidence of Francione supporting *any* extant animal-focused organization, criticizing nearly all of them for the “compromises” they make.⁹¹

3.2 Sidelined Moral-Philosophical Perspectives in Legal Animal Studies: Ecofeminism, Posthumanism, and Critical Race Theory

In addition to his vitriolic attacks on animal welfare organizations, Francione has been roundly dismissive of scholars (and scholar-activists) who have argued for animal liberation from perspectives outside of the Singer-Regan spectrum (a position largely reflective of the

⁸⁸ S. Marek Muller, “For the Good of the Species: Gary Francione and the Omnipresence of Eugenics in Animal Rights Rhetoric” (2017) 68:5 *Communication Studies* 588 at 596.

⁸⁹ Muller, *ibid.* at 596; Tobias Leenaert, “Why I’m openly criticizing Francione (final post)” (6 March 2015), online (blog): *The Vegan Strategist* <<http://veganstrategist.org/2015/03/06/final-part-on-francione/>>.

⁹⁰ Gary L. Francione, “What to Do on Proposition 2?” (2 September 2008), online (blog): *Animal Rights: The Abolitionist Approach* <<http://www.abolitionistapproach.com/what-to-do-on-proposition-2/>>.

⁹¹ Tobias Leenaert, “Gary Francione vs. the Vegan Society” (28 July 2015), online (blog): *The Vegan Strategist* <<http://veganstrategist.org/2015/07/28/gary-francione-vs-the-vegan-society/>>.

overall terrain of legal animal studies).⁹² These alternative schools of thought can be roughly characterized as “ecofeminism,” “posthumanism,” and “critical race theory” – all three of which I place in relation to Francione (and to each other) in turn below.

First arising in the late 1970s and early 1980s, ecofeminist scholarship has manifested in many forms, stressing the historic and enduring conceptual associations between women, animals, and nature. However, this expansiveness in terms of subject matter has not always worked in ecofeminism’s favour, with ecofeminist theorist Greta Gaard recounting that, when the feminist journal *Signs* commissioned her and philosopher Lori Gruen to write a review essay on ecofeminist scholarship in 1991, the two received this rejection in response upon submission: “[E]cofeminism seems to be concerned with everything in the world ... [as a result,] feminism itself seems almost to get erased in the process [...] [Since ecofeminism] contains all peoples and all injustices, the fine tuning and differentiation lose out.”⁹³

Unsurprisingly, philosophers like Peter Singer and Tom Regan demonstrated an antipathy towards ecofeminism (either in rejecting its core tenets or attacking it outright). With respect to Singer – and despite what I highlighted earlier with respect to the implicit affective strategies of *Animal Liberation* and his own public profile – the utilitarian thinker has remarked that

I have argued ... [by] appealing to reason rather than to emotion or sentiment. I have chosen this path, not because I am unaware of the importance of kind feelings and sentiments of respect toward other creatures, but because reason is more universal and compelling in its appeal. Greatly as I admire those who have eliminated speciesism from their lives purely because their sympathetic concern for others reaches out to all sentient

⁹² As Maneesha Deckha noted as recently as 2021, while critical work on animals has proliferated in academe, ... only a fraction of this scholarship critically attends to law and its norms and outputs. Law schools in what is now known as the United States and Canada, among other places, have themselves witnessed an “animal turn” since the mid-1990s – a turn that has produced the now consolidated field of animal law. But with only a few exceptions of the feminist, postcolonial, posthumanist, and biopolitical kind, animal law scholarship is decisively doctrinal and liberal in orientation.

See Maneesha Deckha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders* (Toronto: University of Toronto Press, 2021) at 7 [Deckha, *Animals*].

⁹³ Greta Gaard, “Ecofeminism Revisited: Rejecting Essentialism and Re-Placing Species in a Material Feminist Environmentalism” (2011) 23:2 *Feminist Formations* 26 at 32-33.

creatures, I do not think that an appeal to sympathy and good-heartedness alone will convince most people of the wrongness of speciesism.⁹⁴

Moreover, in direct response to ecofeminist writing, Regan has contended that its emphasis on emotional responses troublingly “abjures the use of reason.”⁹⁵

Against this line of criticism, ecofeminists such as literary scholar Josephine Donovan have countered that the ecofeminist perspective does not abjure the use of reason so much as it does reposition reason as a *supplement* to emotional thinking.⁹⁶ To this end, Donovan (writing alongside fellow ecofeminist scholar-activist Carol J. Adams) has attempted to lay out an alternative moral framework from which to begin thinking about animal liberation. Against the “rights” approach (whether that be the weak rights of Singer or the strong rights of Regan and Francione), Donovan and Adams contend that – in place of this “abstract and formalistic” approach which favours “rules that are universalizable or judgments that are quantifiable” – the better approach is one which is highly contextualized (one that, in their words, can provide a “particularized situational response” that “considers context and history”).⁹⁷ Further to this point, Donovan and Adams highlight how the fundamental idea behind both “rights” and “personhood” – favourites of the approaches surveyed so far – is a kind of autonomous agent that does not fit well with the state of near-perpetual dependence in which many of the animals with which we are most intimately familiar find themselves.⁹⁸ Finally, ecofeminists like Donovan and Adams have taken issue with the “assumption of similarity between humans and animals” which undergirds all the approaches surveyed so far.⁹⁹

⁹⁴ Singer, *Animal Liberation*, *supra* note 8 at 243.

⁹⁵ Tom Regan, *The Thee Generation: Reflections on the Coming Revolution* (Philadelphia: Temple University Press, 1991) at 142.

⁹⁶ Josephine Donovan, “Sympathy and Interspecies Care: Toward a Unified Theory of Eco- and Animal Liberation” in John Sanbonmatsu, ed., *Critical Theory and Animal Liberation* (Lanham: Rowman & Littlefield, 2011) 277.

⁹⁷ Josephine Donovan & Carol J. Adams, “Introduction” in Josephine Donovan & Carol J. Adams, eds., *Beyond Animal Rights: A Feminist Caring Ethic for the Treatment of Animals* (New York: Continuum, 1996) 13 at 15.

⁹⁸ *Ibid.* at 14-15.

⁹⁹ *Ibid.*

The rationale behind this final point has been best articulated by feminist legal scholar Catharine MacKinnon. As she has astutely laid it out:

... a “like-us” model of sameness may be misconceived, unpersuasive, and counterproductive. ... People dominate animals, men dominate women. Each is a relation of hierarchy, an inequality, with particularities and variations within and between them. Every inequality is grounded and played out and resisted in unique ways, but parallels and overlaps can be instructive.¹⁰⁰

This critique is not only levelled at the Regan-type deontological valuation of reason in animals, but even at the Singer-type utilitarian valuation of basic sentience. Against Bentham’s utilitarian aphorism (“The question is not Can they reason? or Can they talk? but Can they suffer?”),

MacKinnon has asserted an instructive parallel from within the human context:

That women feel, including pain, has been part of stigmatizing them, emotions in particular traditionally having been relegated to the lower, animal, bodily side of the mind-body split. What will it do for animals to show that they feel? Calculations of comparative suffering weighted by status rankings, combined with the inability to register suffering on the sufferer’s terms, have vitiated the contribution Bentham’s recognition might make.¹⁰¹

The takeaway is this: contrary to what Singer and Regan argue, neither the basic sentience of animals nor the basic rationality of animals makes them matter morally. Rather, it is only because they matter morally in the first place that their basic sentience or basic rationality subsequently become relevant.

In light of the critiques of Singer and Regan raised above, it is clear that ecofeminist thought has tended to be more moral-philosophical in its debates than legal. However, I raise it here to demonstrate how this lineage has been actively rejected from mainstream legal animal studies scholarship, as well. Francione has been a vociferous critic of ecofeminist approaches, finding their fundamental premises and contentions to be false, fallaciously reasoned, vacuous,

¹⁰⁰ Catharine A. MacKinnon, “Of Mice and Men: A Feminist Fragment on Animal Rights in Cass R. Sunstein & Martha C. Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (Oxford: Oxford University Press, 2004) 263 at 264.

¹⁰¹ *Ibid.* at 271.

or all three of these things.¹⁰² For instance, Francione asserts that the ecofeminist rejection of a “like-us” argument for extension of moral and/or legal recognition to animals is either inherently nonsensical or something which stems from a gross misunderstanding of what the “like-us” argument entails:

The “similarity” that is required for the personhood of animals is merely that the animals have that level of complex consciousness that justifies an attribution of personhood to human persons. That is, a nonarbitrary application of the minimum level of complex consciousness required to say that a human, such as an infant or a [human with a severe cognitive disability], is a person, would lead us to the conclusion that a healthy adult dog possesses all of the relevant characteristics of personhood. ... All that is required for the personhood of at least some animals is merely the recognition that the “thingness” status of at least some nonhumans is arbitrary and unjustifiable. No further similarity is required.¹⁰³

In other words, *any* conception of moral community – whether that be utilitarian, Kantian, or, yes, even ecofeminist – definitionally requires some way to determine who is inside and outside of that community and, as such, must choose some base-level criterion (which, since we humans are the ones already inside of this community, must logically include a characteristic that human beings also possess). While animal difference can be valued and appreciated, it cannot be the starting point for moral reasoning.

Francione has also been highly critical of the ecofeminist emphasis on “contextual” moral reasoning over abstract and universalizable rules, contending that this only results once again in the speciesist two-tiered system of “Kantianism for people; utilitarianism for animals” insofar as

... ecofeminists do not seriously suggest that “contextual relations” can justify the use of *humans* for food or in scientific experiments to which they had not consented. None ... suggest that rape may be morally permissible dependent on “contextual relations.” None ... suggest that the morality of human slavery is dependent on “contextual relations.”¹⁰⁴

¹⁰² See generally, Gary L. Francione, “Ecofeminism and Animal Rights”, Book Review of *Beyond Animals Rights: A Feminist Caring Ethic for the Treatment of Animals* edited by Josephine Donovan & Carol J. Adams (1996) 18 *Women’s Rights Law Reporter* 95.

¹⁰³ *Ibid.* at 105.

¹⁰⁴ *Ibid.* at 103.

In this way, despite the ecofeminist claim “to reject the hierarchy” of speciesism, Francione contends that this simply replicates the inequality of the status quo.

This line of response has also continued into more recently-emerging alternative work on animals, such as the posthumanist perspective. As literary scholar Susan Fraiman has noted, much of the work taking place under the heading of “posthumanism” today replicates the ecofeminist perspective’s focus on animal difference and skepticism towards Singer’s utilitarian calculus, Regan’s rational deductions, and Francione’s emphasis on “rights” and “personhood” in law.¹⁰⁵ That is not to say that the two terms (“ecofeminism” and “posthumanism”) are interchangeable, however. In Fraiman’s view, for instance, while “[b]oth approaches protest the exclusion of animals [from critical scholarship] and also, typically, deconstruct the tenets of humanist thinking,” a difference arises in the fact that posthumanism “does so to ends that are ostensibly theoretical,” whereas ecofeminism “do[es] so to ends that are avowedly political” – which is to say, the scholar-*activism* of ecofeminism is distinguishable from the pure scholarship of posthumanism.¹⁰⁶ Indeed, while posthumanist scholarship has been a significant part of the virtual “explosion” of academic work on animals since the year 2000, an undeniable tension within this field of animal studies has been between those who emphasize thinking through paths to pragmatic changes in the treatment of animals and those who focus on the abstract theorizing often taking place under the heading of “posthumanism.”¹⁰⁷

¹⁰⁵ Susan Fraiman, “Pussy Panic versus Liking Animals: Tracking Gender in Animal Studies” (2012) 39:1 *Critical Inquiry* 89. See also, Fiona Probyn-Rapsey, Siobhan O’Sullivan & Yvette Watt, “‘Pussy Panic’ and Glass Elevators: How Gender is Shaping the Field of Animal Studies” (2019) 34:100 *Australian Feminist Studies* 198.

¹⁰⁶ Fraiman, *ibid.* at 106.

¹⁰⁷ Steven Best, “The Rise of Critical Animal Studies: Putting Theory into Action and Animal Liberation into Higher Education” (2009) 7:1 *Journal for Critical Animal Studies* 10 at 10; Jodey Castricano & Lauren Corman, “Introduction” in Jodey Castricano & Lauren Corman, eds, *Animal Subjects 2.0* (Waterloo: Wilfred Laurier University Press, 2016) 1. Seemingly confirming the posthumanist non-engagement with law, Cary Wolfe has remarked with respect to the goals of posthumanist thought that, at the end of the day, “[p]hilosophers don’t change laws — shrewd rhetoric and political strategy (and money) do.” See Cary Wolfe, “On a Certain Blindness in Human Being” in Paola Cavalieri, ed, *The Death of the Animal: a Dialogue* (New York: Columbia University Press, 2009) 123 at 125.

But, just what *is* posthumanism? As indicated in the first chapter of this dissertation, it is not mere anti-speciesism or non-anthropocentrism, but rather a perspective that attempts to displace humanist metrics of value in our approaches to animals.¹⁰⁸ As cultural studies scholar Cary Wolfe explains it, posthumanism is (just as the addition of the prefix “post” obviously suggests) *not* humanism – where “humanism” is understood to be an ideological orientation which emphasizes the “dignity and worth of all people,” based in “appeal to universal human qualities [such as] rationality” and a rejection of “transcendental justifications, such as a dependence on belief without reason, the supernatural, or texts of allegedly divine origin.”¹⁰⁹ A product of Renaissance thought, humanism is closely entwined with the Enlightenment belief in the liberatory power of human reason.¹¹⁰ Yet, as Wolfe points out, humanism’s own reliance on “anthropological universals” – supposed facts unique *only* to *Homo sapiens*, yet somehow simultaneously true about *all* human beings everywhere and always – is a “dogma for which the Enlightenment, if we are true to its spirit, should have no patience.”¹¹¹ In other words, posthumanism seeks to intervene in the unfinished project of the Enlightenment, turning our critical faculties to the false universals of “humanism.”

As Fraiman has noted, although posthumanism appears to share many of the same basic premises as ecofeminism, its most notable difference rests in its indebtedness to the work of

¹⁰⁸ Maneesha Deckha, “Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm” (2013) 50:4 *Alberta Law Review* 78 at para 5.

¹⁰⁹ Cary Wolfe, *What is Posthumanism?* (Minneapolis: University of Minnesota Press, 2010) [Wolfe, *Posthumanism*] at xi.

¹¹⁰ This position is best articulated in philosopher Immanuel Kant’s comment in “What Is Enlightenment?”: Enlightenment is the human being’s emergence from his self-incurred ... inability to make use of one’s own understanding without direction from another. ... [This] is self-incurred when its cause lies not in lack of understanding but in lack of resolution and courage to use it without direction from another. ... For this enlightenment ... nothing is required but freedom... [N]amely, freedom to make public use of one’s reason in all matters. But I hear from all sides the cry: Do not argue! The officer says: Do not argue but drill! The tax official: Do not argue but pay! The clergyman: Do not argue but believe!

See Immanuel Kant, “An Answer to the Question: What is Enlightenment?” in Mary J. Gregor, ed, *Immanuel Kant: Practical Philosophy* (New York: Cambridge University Press, 1999) 11 at 11.

¹¹¹ Wolfe, *Posthumanism*, *supra* note 109 at xvi.

poststructuralist philosopher Jacques Derrida rather than explicitly feminist thought.¹¹² One important way that this difference has played out theoretically can be found in the application of the Derridean concept of “deconstruction” – something which encourages not just a reorientation in our relation to animals, but which more radically disturbs fundamental assumptions about what we as humans are. That is to say, deconstruction destabilizes binaries – underscoring the constructedness of “the human” as a shaky and imperfect concept when it can no longer be understood in contrast to its supposed opposite, “the animal.” Not a matter of “blurring” the differences, Derrida has asserted that the deconstructive approach “[demonstrates] how drawing an oppositional limit *itself* blurs the differences ... not only between [human] and animal, but among animal societies — there are an infinite number of animal societies and, within the animal societies and within human society itself, so many differences.”¹¹³

Following Derrida, Wolfe has contended that this deconstruction entails the recognition that humans are not, in fact, radically distinct or special beings. Instead, if we are “true to the spirit” of the Enlightenment, thoroughly- and rigorously-applied reasoning forces us “to rethink our taken-for-granted modes of human experience ... by recontextualizing them in terms of the entire sensorium of other living beings ... [Because] we ourselves are human *animals*.”¹¹⁴ On this reading, the supposedly crowning-glory attributes of “the human” — like language or reason

¹¹² Note that thesis advanced by Fraiman (*supra* note 105) on this point is that ecofeminist work has been sidelined by a sexist move in animal studies, with Derrida’s prominence being more about the field’s “revisionist history” than any genuinely significant contribution coming from the French thinker. While Fraiman’s contentions about the existence of persistent sexism in the field are undeniably correct (see Probyn-Rapsey, *et al.*, *supra* note 105), many of her own observations about feminist thinkers *not* associated with ecofeminism but more closely associated with posthumanism (namely, critical biologist Donna Haraway) suggest that the Derridean lineage at very least speaks to a perspective that is more than just “ecofeminism repackaged.”

¹¹³ Jacques Derrida, “On Reading Heidegger: An Outline of Remarks to the Essex Colloquium” (1987) 17 *Research in Phenomenology* 171 [Derrida, “Heidegger”] at 183 [emphasis in original].

¹¹⁴ Wolfe, *Posthumanism*, *supra* note 109 at xxv [emphasis in original].

— are recast as specialized versions of characteristics present throughout the animal kingdom (of which we too are a part).¹¹⁵

Nevertheless, while Francione has been much less openly hostile to posthumanist scholarship than he has been towards ecofeminist scholarship, his response to Derrida in particular has been that, while Derridean thought correctly represents the “view that nonhumans are the victims of unspeakable cruelty and exploitation,” this postmodern position seems to misunderstand (or unduly complicate) the actual status of animals in law, with Francione ultimately returning to his familiar thesis that animals will “fail to prevail in most [legal] conflicts with humans because of our species bias in our assessment of nonhuman and human interests [and] our property rights in nonhumans.”¹¹⁶ In other words, while the posthumanist position cogently brings the phenomenon of speciesism into view, the posthumanist non-engagement with avenues for concrete legal change ultimately leaves that speciesism intact when it comes to the real-world everyday relations between humans and animals.

Yet, looking to the “real-world” and “everyday,” it is notable how Francione’s rejection of alternative moral-philosophical perspectives has led to well-defined *riffs* between the animal liberation movement and other social justice movements. While Francione’s response to ecofeminist scholarship engaged primarily with the ideas espoused by individuals like Carol Adams and Josephine Donovan, the friction between his abolitionist position and critical-race-theoretical positions has been defined more pointedly by “the gloves coming off.”

As previously indicated, the ecofeminist position has long drawn attention to contextual relations between humans and animals. However, despite this closer attention to individual subjects in relation to one another, ecofeminism has tended to favour one vector of subject

¹¹⁵ See especially, Cary Wolfe, *Animal Rites: American Culture, the Discourse of Species, and Posthumanist Theory* (Chicago: University of Chicago Press, 2003) [Wolfe, *Rites*] at 44.

¹¹⁶ Gary L. Francione, “Carno-phallogocentrism” (1991) 13 *Cardozo Law Review* 1317 at 1324.

identity over others in its analyses (i.e., gender).¹¹⁷ Further, where animal studies work has previously engaged directly with the subject identity vector of race, it has tended to do so in only one respect: *analogizing* racism and speciesism. Nevertheless, while Anastasia Yarbrough and Susan Thomas — editors of a special issue of the *Journal of Critical Animal Studies* — have rightly noted that “the voices and perspectives of women of color [have been] eerily absent from critical animal studies” in general, the last decade has seen some increasing attention to the centring of race in animal studies scholarship.¹¹⁸

One such instance has been Afroamerican and African studies scholar Bénédicte Boisseron, whose book *Afro-Dog* has urged scholars and activists to move beyond mere comparison between race and species to instead consider how racism and speciesism are interlocking systems of oppression.¹¹⁹ Similarly, in *Sistah Vegan*, scholar-activist A. Breeze Harper has likewise encouraged movement beyond simply comparing race and species by forefronting the voices and lived experiences of people of colour in relation to animals.¹²⁰ As Harper notes in her introduction to *Sistah Vegan*, “[n]ot all contributors necessarily agree with each other,” but that this is precisely “the beauty” of the book: that, while every contributor identifies as Black and female, they are clearly revealed not to be “a monolithic group.”¹²¹ This narrative approach — which airs out disagreement and conflicting accounts — is one of the

¹¹⁷ On this issue, see especially, Maneesha Deckha, “Toward a Postcolonial, Posthumanist Feminist Theory: Centralizing Race and Culture in Feminist Work on Nonhuman Animals” (2012) 27:3 *Hypatia* 527.

¹¹⁸ Anastasia Yarbrough & Susan Thomas, “Women of Color in Critical Animal Studies” (2010) 8:3 *Journal of Critical Animal Studies* 3 at 3.

¹¹⁹ Bénédicte Boisseron, *Afro-Dog: Blackness and the Animal Question* (New York: Columbia University Press, 2018).

¹²⁰ A. Breeze Harper, ed, *Sistah Vegan: Black Female Vegans Speak on Food, Identity, Health, and Society* (Brooklyn: Lantern Books, 2010).

¹²¹ A. Breeze Harper, “Introduction: The Birth of the Sistah Vegan Project” in A. Breeze Harper, ed, *Sistah Vegan: Black Female Vegans Speak on Food, Identity, Health, and Society* (Brooklyn: Lantern Books, 2010) xiii at xix.

things that specifically marks the text as critical race scholarship insofar as storytelling and counter-storytelling are among the field's most indispensably constitutive elements.¹²²

Yet, insofar as the critical-race-theoretical approach – like ecofeminism – focuses its attention on context and individual situatedness in human-animal relations, Francione has been highly critical of it. Specifically in response to Harper's *Sistah Vegan*, Francione has lamented that it is an inexcusable turn to an “intellectually vacuous” position that is “transparently relativist,” adding that the pretence to “‘intersectional justice’ is just speciesism embellished with superficially progressive jargon.”¹²³ This has led Harper to comment in turn that Francione's position remains rooted in “Eurocentric cisgender men's canon of morality” masquerading as “common sense,” unwilling to engage with outside perspectives.¹²⁴

The point-counterpoint exchange represented in Francione and Harper's *pas de deux* demonstrates in general that – when it comes to the dominant versus non-dominant species of thought in animal studies – while Francione's abolitionism attracts many devotees, it also undeniably alienates and excludes those committed to other social justice endeavours, such as feminism and anti-racism. Francione claims that

... white people must always be mindful of the privilege they have in a racist society ... [and] men must be mindful of the privilege that they have in a patriarchal society. I think it is imperative to listen to the lived experiences of women and people of color, [sic] which are all too often ignored or reinterpreted – and thereby misinterpreted – by conventional standards of meaning.¹²⁵

¹²² See, e.g., Richard Delgado, “Storytelling for Oppositionists and Others: A Plea for Narrative” (1989) 87:8 *Michigan Law Review* 2411.

¹²³ Gary L. Francione, “Sexism and Racism in the ‘Animal Movement’: A Reply to Ruby Hamad” (20 December 2015), online (blog): *Animal Rights: The Abolitionist Approach* <<http://www.abolitionistapproach.com/sexism-and-racism-in-the-animal-movement-a-reply-to-ruby-hamad/>> [Francione, “Sexism”].

¹²⁴ A. Breeze Harper, “This is the Impact Gary Francione and Ruby Hamad's ‘Moment in Time’ Had on my Engaged Buddhist Practice” (21 December 2015), online (blog): *The Sistah Vegan Project* <<http://www.sistahvegan.com/2015/12/21/this-is-the-impact-gary-francione-and-ruby-hamads-moment-in-time-had-on-my-engaged-buddhist-practice/>>.

¹²⁵ Francione, “Sexism,” *supra* note 123.

However, in actual effect, Francione's one-size-fits-all approach appeals not to "the most marginalised [sic] in society," but to the already privileged.¹²⁶ In this way, it bears repeating that this has resulted in a "strategic disaster" when it comes to achieving the ends of animal liberation.¹²⁷

Nevertheless, while Francione is an exceptionally prominent voice in the field – and likely the voice that has engaged most directly and menacingly with the alternative perspectives outlined above – he is hardly the only legal scholar who has contributed to animal liberation scholarship and activism. Thus, in the section below, I survey how other scholars (such as Steven Wise and David Favre) have also offered up arguments for how the status of animals in the legal realm might change to better reflect moral-philosophical positions that hold them in higher regard. Still, as this next section will demonstrate, although Wise's and Favre's positions represent "alternatives" to Francione's in the realm of legal animal studies, they ultimately reveal themselves to be different only in degree but not in kind – and, therein, demonstrate overall the limitedness of all dominant perspectives in the field.¹²⁸

3.3 Variations on Dominant Perspectives in Legal Animal Studies: More Persons and More Properties

In his 2000 book, *Rattling the Cage*, legal scholar Steven Wise eloquently echoed and elaborated many aspects of the glossing provided by Francione regarding the legal status of animals.¹²⁹ A gifted rhetorician, Wise paints us this vivid picture of the legal landscape:

¹²⁶ Ruby Hamad, "When is being vegan no longer about ethical living?" *Sydney Morning Herald* (17 December 2015), online: <<http://www.smh.com.au/lifestyle/news-and-views/opinion/when-is-being-vegan-no-longer-about-ethical-living-20151216-glp44t>>.

¹²⁷ Donaldson & Kymlicka, *supra* note 87 at 79.

¹²⁸ Note that this sentence alludes to Darwin's comment in *Descent*, *supra* note 3 at 105 that the difference between humans and animals is "certainly one of degree and not of kind."

¹²⁹ Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Cambridge, MA: Perseus Publishing, 2000).

For four thousand years, a thick and impenetrable legal wall has separated all humans from all nonhuman animals. On one side, even the most trivial interests of a single species – ours – are jealously guarded. We have assigned ourselves, alone among the millions of animal species, the status of “legal persons.” On the other side of that wall lies the legal refuse of [the] entire [animal] kingdom . . . They are “legal things.” Their most basic and fundamental interests – their pains, their lives, their freedoms – are intentionally ignored, often maliciously trampled, and routinely abused.¹³⁰

As Wise sees it, there are two options for what legal category a being can occupy: either one is a “person” who exercises their agency over property, or one is “property” – a thing subject to the whims of persons. Much like Singer, Wise asserts we are “trapped in a universe that no longer exists” – that is, one which relies on metaphysical notions of human difference from animals to justify our separate and distinct legal categorizations instead of paying attention to the human-animal continua and connections indicated by Darwin.¹³¹ In Wise’s view, it is erroneous for us to continue to categorize certain animals as “things” because, unlike, say, a chair, a chimpanzee exhibits a capacity for autonomy. After all, if a chimpanzee is not *empirically* a “thing,” why should we continue to call it so *legally*?

Still, although Wise and Francione may be joined on this matter, they differ on others. Much like philosophers Singer and Regan, Wise reasons by way of analogy: if some animals possess relevant human characteristics, we ought to extend to those animals the same protections and entitlements we extend to humans with the same characteristics.¹³² Crucial for Wise is his contention that common law reasoning works by way of analogy: treating like cases alike and different cases differently. If it can be sufficiently demonstrated that some animals are like

¹³⁰ *Ibid.* at 4.

¹³¹ *Ibid.* at 9, 21-22.

¹³² But see also S. Marek Muller, “All Animals are Equal (but Some are More Equal than Others): Speciesist Personhoods in the Nonhuman Rights Project” in *Impersonating Animals: Rhetoric, Ecofeminism, and Animal Rights Law* (East Lansing, Michigan: Michigan State University Press, 2020) 33. As Muller contends at 51, Wise’s narrow focus on “higher” animals puts him in a somewhat different camp from Singer and Regan: “Wise’s ‘starting point’ in animal liberation is neither a Singerian consideration of interests nor a Reganite concern for species’ inherent value. Rather, his vision of animal liberation appears to come from a rejection of animal alterity – a desire to protect those particular species in which he sees himself.” Although this is still a “reasoning from analogy,” Muller is no doubt correct in underscoring the narrow focus of the analogy for Wise vis-à-vis Singer and Regan.

humans in relevant ways, it follows for Wise that common law systems must recognize that those animals should be treated in the same way.

Much like Singer does for his moral persons, Wise zeroes in on “autonomy” as the relevant characteristic for legal persons.¹³³ In Wise’s view, this is a defining human characteristic intimately tied to the human claim for personhood. Insofar as we can demonstrate that certain animals possess the same degree of autonomy as most humans, consistency demands that we treat them like persons and not like property.¹³⁴ Therefore, in *Rattling the Cage*, Wise not only lays out his theoretical claims, but also pleads his case. *Rattling the Cage* is a compilation of evidence supporting Wise’s contention, outlining how studies of the language use, mathematical ability, and psychological complexity of chimpanzees and bonobos – humanity’s “closest relatives” – showcase that these animals possess practical autonomy on par with that of human beings.

Arguably, Steven Wise’s public profile is greater than that of Gary Francione – at least, when it comes to mainstream name recognition. Much like Francione’s courses at Rutgers did, Wise’s tutelage on the matter at Harvard University has been instrumental in the development of animal rights as a serious topic of study for lawyers in the United States.¹³⁵ Also much like Francione, Wise has long been involved in litigation on the behalf of animal kind and continues to weigh in on current legal issues concerning them through his Nonhuman Rights Project (NhRP), a self-described “civil rights” organization dedicated to securing personhood for animals like chimpanzees, elephants, orangutans, gorillas, bonobos, dolphins, and whales.¹³⁶ To

¹³³ Wise, *supra* note 129 at 179.

¹³⁴ *Ibid.* at 252-257.

¹³⁵ Claudia Dreifus, “A Courtroom Champion for 4-Legged Creatures,” Interview with Steven M. Wise, *New York Times* (1 October 2002), online: <http://www.nytimes.com/2002/10/01/science/a-conversation-with-steven-wise-a-courtroom-champion-for-4-legged-creatures.html>.

¹³⁶ Nonhuman Rights Project, “Frequently Asked Questions” (no date), online: Nonhuman Rights

Wise's and the NhRP's credit, the organization has seen some (admittedly limited) success in courts, most notably in 2018's *Matter of Nonhuman Rights Project, Inc. v Lavery* at the New York Court of Appeals (wherein the concurring opinion of Justice Eugene M. Fahey appeared to cautiously endorse the possibility of legal personhood for chimpanzees Tommy and Koko) and most recently in 2020's *Nonhuman Rights Project, Inc., ex. rel. Happy v Breheny* at the New York Supreme Court (wherein Justice Alison Tuitt declined to recognize Happy the elephant's legal personhood, but conceded that she "is more than just a legal thing, or property").¹³⁷

Where Francione is often cast as an uncompromising extremist, Wise enjoys much gentler treatment – an unsurprising fact in light of how "publicity-savvy" Wise has been reported to be.¹³⁸ In *The New York Times*, Wise has been figured in vaunted terms as a "*champion* for 4-legged creatures."¹³⁹ Similarly, in *The New York Times Magazine* – and in obvious contrast to the sanctimonious seriousness surrounding Francione's attitude toward animal liberation – a profile of Wise cast his endeavours in a playful light, the article being accompanied by photographer Alex Prager's "mock trial" for a chimpanzee (dressed in an impeccable suit and tie) testifying in a courtroom.¹⁴⁰ The way in which these images engage the viewer affectively keeps with Wise's general style. *Rattling the Cage*, after all, begins with the sorrowful tale of "Jerom," a young man who has been tortured, imprisoned, and subjected to sadistic experimentation. Only after laying out the facts of Jerom's life does Wise reveal that this is the life not of a human, but of a chimpanzee. As legal scholar Ngaire Naffine notes, while Wise has no shortage of legal logic at his disposal, he "appeals also to our sympathy and our empathy, as a

Project <<https://www.nonhumanrights.org/frequently-asked-questions/>>; Charles Siebert, "The Rights of Man ... And Beast" *New York Times Magazine* (27 April 2014) 30.

¹³⁷ *Matter of Nonhuman Rights Project, Inc. v Lavery*, 31 NY3d 1054 (NY Ct App 2018); *Nonhuman Rights Project, Inc., ex. rel. Happy v Breheny*, 134 NYS3d 188 (App Div 1st Dept 2020) at 16.

¹³⁸ Peter Debruge, Film Review of *Unlocking the Cage* directed by Chris Hegedus & D.A. Pennebaker (8 February 2016) *Variety*, online: <<http://variety.com/2016/film/reviews/unlocking-the-cage-film-review-1201700001/>>.

¹³⁹ Dreifus, *supra* note 135 [emphasis added].

¹⁴⁰ Siebert, *supra* note 136.

good courtroom lawyer should.”¹⁴¹ In this respect, Wise’s text is reminiscent of Singer’s, combining both reasoned argumentation for the liberation of animal kind with an affective invitation to sympathize with the purported pain and suffering of those creatures – something apparently rather ecofeminist in form and strategy, but not in name.

Still, unlike the ecofeminists, Wise is decidedly focused on using the same vocabulary as Francione is to talk about animal liberation in law: “personhood.” However, as to the exact nature of that personhood, this is a point at which Wise and Francione part company. Where Wise focuses on “autonomy” as the relevant characteristic and focuses on great apes as those animals most obviously in possession of that characteristic, Francione’s concern is with a quality possessed by almost all animals: self-awareness. Like Singer, Wise appears to award greater significance to intelligent animals and reasons by way of analogy: if we are going to call all humans “persons,” we should do the same for apes that possess the same level of mental capacity as most members of the human community.

By contrast, Francione is uninterested in this kind of line-drawing.¹⁴² In his *Introduction to Animal Rights*, Francione looks back to Regan’s “subject of a life” criteria and argues that Regan was wrong to suggest in his original edition of *The Case for Animal Rights* that only mammals possess these attributes. Rather, in Francione’s view, there is ample scientific evidence to suggest the vast majority of animals possess characteristics that would define them as “subjects of a life.”¹⁴³ Moreover, along the same lines, Francione is keen to distinguish his claim from Regan’s. While there may be compelling moral reasons to let a human’s moral right to life

¹⁴¹ Naffine, *Meaning*, *supra* note 22 at 133.

¹⁴² See especially, Gary L. Francione, “The Great Ape Project: Not So Great” (20 December 2006), online (blog): *Animal Rights: The Abolitionist Approach* <<http://www.abolitionistapproach.com/the-great-ape-project-not-so-great/>>. In this blog post, Francione indicates that he is regretful of having been one of the original contributors to the Great Ape Project, now believing that its narrow focus on animals so genetically close and behaviourally similar to humans is ill-conceived insofar as it leads to an anthropocentric hierarchy.

¹⁴³ Francione, *Introduction*, *supra* note 57 at xxxiii.

override a dog's in an emergency scenario, Francione's argument for legal reform is explicitly *not* such a scenario. Crucially, Francione is not advocating for us to give a full basket of legal rights to animal kind, but instead to recognize a fundamental moral entitlement to their legal right not to be property.¹⁴⁴ For Francione, therefore, one does not need to narrow in on the sophisticated qualities of one particular species as Wise does, but rather consider the basic self-consciousness of animals as a moral ground for granting them legal personhood status.

To this end, Ngaire Naffine has observed that Francione's and Wise's differing conceptions of animal personhood repeat the same logics typically found with respect to differing conceptions of human personhood. Although personhood may seem like a commonsensical "go-to" for both Francione and Wise – especially considering the argument for moral personhood that had been advanced by Singer and Regan – the legal person is, in fact, a "grossly undertheorized" category in law.¹⁴⁵ Despite its presumably being a *sine qua non* of any legal system, any survey of jurisprudence, culture, and legal scholarship will reveal oftentimes contradictory and mutually exclusive conceptions of the legal person being deployed.¹⁴⁶ To this end, Naffine has contended that three conceptions of "legal persons" abound: P1 (the Cheshire Cat), P2 (any reasonable creature in being), and P3 (the responsible subject).

The P1 definition of the legal person lacks any moral or metaphysical meaning, being no more than an abstract legal device. Insofar as there can be no legal person absent the legal relations in which it is located, the P1 person is akin to, in the words of legal scholar Bryant Smith, "the smile of the Cheshire Cat after the cat had disappeared."¹⁴⁷ It indicates, in Naffine's words, a "formal capacity to bear a legal right and so to participate in legal relations," existing

¹⁴⁴ *Ibid.* at xxxiv.

¹⁴⁵ Unattributed, "What We Talk About When We Talk About Persons: The Language of a Legal Fiction" (2001) 114:6 *Harvard Law Review* 1745 [*Harvard Law Review*] at 1768.

¹⁴⁶ *Ibid.* at 1764.

¹⁴⁷ Bryant Smith, "Legal Personality" (1928) 37 *Yale Journal of Law* 283 at 294.

simply “because it is convenient for law to have such a creation.”¹⁴⁸ According to this conception, there is nothing that qualifies as a “natural” legal person – jurists’ custom of dividing legal persons into “natural” (i.e., human beings) and “artificial” (i.e., corporations) therefore being entirely unnecessary, as *all* legal persons are artificial on this reading.¹⁴⁹

In its barest form, the P1 person corresponds to a definition provided by legal scholar Richard Tur: an “empty slot” into which one could insert whatever entity a given legal constellation calls for.¹⁵⁰ Since P1 has “no necessary moral or empirical content,” one could apply the heading of “person” to a wide range of beings and things well beyond the boundaries of the human species – animals characterizing no stretch of the imagination whatsoever.¹⁵¹

Breaking sharply from P1’s “legal artifice” definition, the P2 legal person (i.e., any reasonable creature in being)¹⁵² corresponds with the ordinary-language definition of “person”: a natural human being, from the moment he¹⁵³ is born alive (or sometimes from the moment of conception) until the moment of his bodily death.¹⁵⁴ This person is the *de facto* subject of human rights discourse, also carrying with it the legacy of the Judeo-Christian tradition: it suggests that the person has an intrinsic moral (and therefore legal) value stemming simply from his embodiment (and possible ensoulment) as a human being.¹⁵⁵ The possession of particular capacities matters little for P2 personhood, with a human with profound cognitive disabilities

¹⁴⁸ Ngaire Naffine, “Who Are Law’s Persons? From Cheshire Cats to Responsible Subjects” (2003) 66 *Modern Law Review* 346 [Naffine, “Law’s Persons”] at 350, 351.

¹⁴⁹ *Ibid.* at 352.

¹⁵⁰ Richard Tur, “The ‘Person’ in Law” in Arthur Peacocke & Grant Gillett, eds, *Persons and Personality: A Contemporary Inquiry* (Oxford: Basil Blackwell, 1987) 116 at 121.

¹⁵¹ Naffine, “Law’s Persons,” *supra* note 148 at 351.

¹⁵² Note that “reasonable” here does not refer to the capacity for rational action (which is central to the definition of P3 only). Rather, it is something one could reasonably take as a “creature in being.” Naffine derives this term *ibid.* at 357, quoting E. Coke, *The Third Part of the Institutes of the Laws of England* (1641) (New York: Garland, 1979); L. Waller, “Any Reasonable Creature in Being” (1987) 13 *Monash University Law Review* 37.

¹⁵³ I follow Naffine in consciously adopting the male pronoun for P2 and P3 in order “to remind the reader of the masculine qualities of this being” (“Law’s Persons,” *supra* note 148 at 349, n 16). On this point, see especially Ngaire Naffine, “Our Legal Lives as Men, Women, and Persons” (2004) 24:4 *Legal Studies* 621.

¹⁵⁴ Naffine, “Law’s Persons,” *ibid.* at 357.

¹⁵⁵ *Ibid.* at 358.

automatically being a person, while even the cleverest of animals is automatically excluded – all by virtue of which side of the species barrier one finds oneself on.¹⁵⁶

As Naffine astutely indicates, P2 often relies on a conception of a “soul” or “essence” with intrinsic moral value – something taken to be “a life force which is somehow present from conception until death; it requires a human body and yet is fully present in a fertilised [sic] human egg; it entails a ‘radical capacity’ to reason but is nevertheless to be found in the embryo and the terminally unconscious.”¹⁵⁷ Troublingly, this recourse to universal human ensoulment does not “appear to be susceptible to either proof or falsification or even open to secular modes of argument”; rather, it is a position that is “the truth as witnessed by a believer ... taken on, and a matter of, faith. ... This is ... an unalterable universal timeless metaphysical truth.”¹⁵⁸

Even when a soul is not the reason given for a jurist equating belongingness in the humanity community with one’s belongingness in the class of legal persons, the boundaries nevertheless arise from more than just “brute biology.”¹⁵⁹ As Naffine highlights, P2 jurists frequently employ a liberal metaphysics of human individualism ill-suited for resolving issues of two or more biological human beings, such as cases involving pregnancy or conjoined twins.¹⁶⁰

In general, P2’s recourse to commonsensical understandings of the person are highly susceptible to the charge of groundless human chauvinism insofar as it appears wholly “arbitrary, unreasoned, and unprincipled in its designation of its subject as a human animal (whatever their intelligence and sentience) and the consequent exclusion of nonhuman animals from legal personality.”¹⁶¹ Unlike P2, the final definition of legal personhood – P3, “the responsible subject” – is less susceptible to this charge insofar as it designates personhood status only according to an

¹⁵⁶ *Ibid.* at 361.

¹⁵⁷ Naffine, *Meaning*, *supra* note 22 at 114.

¹⁵⁸ *Ibid.* at 113.

¹⁵⁹ Naffine, “Law’s Persons”, *supra* note 148 at 361.

¹⁶⁰ *Ibid.* at 358-360.

¹⁶¹ *Ibid.* at 361.

entity's intrinsic possession of those characteristics that are definitionally necessary for the law's object to have (i.e., ability to enjoin contract and be held accountable for civil and criminal action).¹⁶² Hence, under the P3 definition, "only the rational and so legally competent" qualify as legal persons.¹⁶³ In this respect, the category of P3 legal person maps onto those entities which exist apart from law as active subjects and moral beings in the social world who assert their wills and grasp and enforce their own rights.¹⁶⁴ In a word, P3 persons are those beings who, independent of law, possess true "autonomy."

Crucially, Steven Wise's emphasis on the intelligence and linguistic capacity of chimpanzees throughout *Rattling the Cage* is expressly aimed at demonstrating that these animals meet the criteria for common law autonomy. Wise's argument has overtones of P3's valuation of rationality; his position does not exactly counter the underlying logic that goes into a P3 patterning of personhood so much as it merely counters the assumption that it is only humans who meet the criteria to be P3 persons.¹⁶⁵ Likewise, Gary Francione's emphasis on the basic sentience of all living animals as grounds for their personhood in *Animals, Property and the Law* is suspiciously reminiscent of P2's claim for value stemming from a "divine spark."¹⁶⁶ Where the moral and metaphysical value of "human sanctity" makes us legal persons to most who adopt a P2 view of personhood, Francione would simply widen the circle while keeping the logic intact. Both Wise's and Francione's arguments for animal personhood appear to pivot on proving animal likeness to humans and then merely piggyback on the P2 or P3 claim that humans possess some moral or metaphysical value that qualifies them to be legal persons.

¹⁶² *Ibid.* at 362.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ Naffine, *Meaning*, *supra* note 22 at 132, 136.

¹⁶⁶ *Ibid.* at 136.

Of course, even Francione and Wise do not have a monopoly on the debates surrounding the legal status of animals. For instance, against Francione's and Wise's push for personhood as a way in which the legal system can incorporate animals as sentient and (at least partially) autonomous beings is legal scholar David Favre's argument that they would be best characterized as "living property."¹⁶⁷ Much like Francione and Wise, Favre highlights the division in Western law between the categories of "property" and "persons," and similarly draws attention to the apparent disjunction between animals' current status as mere property in law akin to inanimate objects and the empirical reality of their not being perceived as animate subjects.¹⁶⁸ Yet, unlike Francione and Wise, Favre has indicated that – despite what standard legal doctrine might say – "property" and "persons" are hardly Manichean binaries, with animals-as-property in actual practice appearing to possess "rights" (something doctrinally taken to be only within the purview of legal persons):

[Animals] are property and one of the legal mantras often repeated is that property cannot be the holder of legal rights. Yet, at least some animals can and have gathered legal rights. This has occurred despite the mantra asserting the contrary and obscuring the view of most observers of the reality of legal events in the United States.¹⁶⁹

Further, in direct and pointed opposition to Francione, Favre notes that, despite the abolitionist contention that "animals will not be able to receive legal rights so long as they remain the property of humans," Francione's "position is without support, regardless of the number of times that it is stated. Not only is it conceptually possible, but animals, or at least some animals, already possess limited legal rights. Admittedly, animal rights are not equal to legal rights of

¹⁶⁷ David Favre, "Living Property: A New Status for Animals within the Legal System" (2010) 93 *Marquette Law Review* 1021. As Favre notes at 1025, the categories of property which most Western legal systems presently recognize are "real property" (such as a house), "intellectual property" (such as copyright in a book), and "personal property" (which is typically "physical, moveable, and has a limited physical existence"), each with "unique characteristics that shape a different set of public policy concerns." His proposed "living property" would remove animals from the category of "personal property."

¹⁶⁸ *Ibid.* at 1023-1025.

¹⁶⁹ *Ibid.* at 1032.

humans, but they are rights nevertheless.”¹⁷⁰ The “rights” to which Favre refers to here are the entitlements provided to animals under extant anti-cruelty and welfare legislation, which – depending on the jurisdiction – indeed do provide animals with guarantees of freedom of pain and suffering and positive obligations to be given adequate food and shelter where they are under a human’s care.

“Living property,” as Favre envisions it, appears to resemble personhood in all but name. Indeed, a defining characteristic of persons in law is that they can sue or be sued – and, as Favre notes, although “animals are not able to initiate a lawsuit personally or understand legal proceedings generally,” their involvement in lawsuits “is not conceptually impossible and in fact has already occurred several times within the United States.”¹⁷¹ Moreover, although the letter of the law tells us that animals are “property” at the moment, law in practice recognizes the apparent contradiction of animals as owning property, such as in instances where a trust is in the animal’s name.¹⁷² In this respect, even as “property” doctrinally, at least some animals appear to have “limited legal personhood” in practice.¹⁷³

Favre’s insights into what animals’ status in the legal system is in real terms are undeniably perspicacious. However, other legal scholars, such as Cass Sunstein, have been led to different conclusions by the same insights – namely, that the extant status of animals in the legal system does not indicate the need for some new category of property, but instead for animals’ removal from the category altogether. Surveying American jurisprudence, Sunstein answers the question of “Do animals have standing?” with the response that “Several cases so suggest.”¹⁷⁴

That is to say, while a legislative change would simplify the matter further, case law would seem

¹⁷⁰ *Ibid.* at 1024.

¹⁷¹ *Ibid.* at 1037.

¹⁷² *Ibid.* at 1068.

¹⁷³ *Ibid.* at 1039.

¹⁷⁴ Cass Sunstein, “Standing for Animals (with Notes on Animal Rights)” (2000) 47:5 *UCLA Law Review* 1333 at 1359.

to indicate that courts are already linking the injury and the injured party in cases concerning alleged harms and legal entitlements given to animals. While Sunstein has conceded that the animals “need not be ... expressly labelled persons, juridical or otherwise,” contrary to Favre he notes that the current state of affairs also has the category of property fitting poorly with animals:

What about the notion of animals as property? How important is this notion? Here the stakes are a mixture of substance and rhetoric. If the status of property means the status of mere means to the ends of others, or a status of human domination and control, animals should not have the status of property. ... I do not believe that it is necessary to consider animals to be persons ... But the rhetoric does matter. In the long term, it would indeed make sense to think of animals as something other than property, partly in order to clarify their status as beings with rights of their own.¹⁷⁵

As Ngaire Naffine has noted, Sunstein’s contentions on this point “sound very much like a recommendation of personhood” despite Sunstein’s own reluctance to endorse the term.

That said, a legal scholar who has proceeded in a similar way to Sunstein is Christopher Stone, whose 1972 journal article, “Should Trees Have Standing?”, openly endorsed the idea that legal standing for animals (and other nonhumans, like trees and forests) as a way to neatly link the injury and the injured party in law is also a claim for animal personhood.¹⁷⁶ As Stone has explained, this personhood mirrors “the way corporations are ‘persons’,” with the actual mental or physical characteristics of the party injured in law being irrelevant to its fit with the category of the legal person.¹⁷⁷

The logic of Stone’s argument for animal personhood corresponds to what Naffine has called “P1 personhood” – an “empty slot” into which one could insert whatever entity a given legal constellation calls for.¹⁷⁸ The logic of P1 personhood for animals does not depend on moral or metaphysical claims – in fact, this logic depends on *legal* personhood not having a moral or

¹⁷⁵ *Ibid.* at 1360, 1365.

¹⁷⁶ Christopher D. Stone, “Should Trees Have Standing? Toward Legal Rights for Natural Objects” (1972) 45 *Southern California Law Review* 450.

¹⁷⁷ Christopher D. Stone, *Should Trees Have Standing?: Law, Morality, and the Environment* (New York: Oxford University Press, 2010) at xiii.

¹⁷⁸ Tur, *supra* note 150 at 121.

metaphysical value to begin with. The reasoning behind this use of legal personhood is that it simply expedites the legal process by directly connecting the injury to the remedy – and, since extant animal welfare and anti-cruelty legislation frames the animals themselves as the aggrieved parties in instances of suffering being inflicted or provisions of care being withheld, recognizing animals as persons in law simplifies the matter.

That said, while P1 personhood does not require moral or metaphysical underpinnings for what entities fall into the category of the legal person, Naffine has noted that P1 personhood nevertheless presents the greatest “ethical possibilities.”¹⁷⁹ Harkening back to the *lingua Latina* etymology of the term, P1 personhood is a “mask” anyone or anything can wear; P1 presents the possibility of a genuine “law for everyone.”¹⁸⁰ Thus, while P1 personhood does not depend on moral arguments over either the nature of animals (as sentient or self-aware beings) or the nature of personhood (as a legal category), it is nevertheless an “empty slot” that can be used to further ethical endeavours (such as affording justice to animals through law).

Animals are indeed among the chief examples Naffine offers as entities which appear to be prime candidates for P1 personhood.¹⁸¹ Yet, despite ample evidence of animals’ sentience, intelligence, or linguistic capacity – and pleas from the ever-vociferous animal rights movement for the recognition of animal personhood – there nevertheless seems to be a knee-jerk resistance among jurists to including them in the class of legal persons.¹⁸² To this end, the “legal endeavour to reclassify the natural world ... is seen as *eccentric and misguided*; to many jurists, probably the majority, it does not call for serious intellectual engagement.”¹⁸³ Traditional notions of what it means to be a “person” – exemplified in P2 and P3 as those characteristics which supposedly

¹⁷⁹ Naffine, “Law’s Persons”, *supra* note 148 at 367.

¹⁸⁰ *Ibid.* at 366-367.

¹⁸¹ *Ibid.* at 356.

¹⁸² *Ibid.*

¹⁸³ Naffine, *Meaning*, *supra* note 22 at 124-125 [emphasis added].

make us most essentially “human” – are the pattern around which one fills the empty slot time and again.¹⁸⁴

At this point, however, it behooves one to stop and ask: are these the terms on which we *want* to try to combat humanism and anthropocentrism? What should be apparent by now is that, utterly regardless as to which moral justification one relies on to award value to animals or what particular legal arrangement one contends to be the best “fit” for animals, the terms of the debate have been set: either animals should be “legal persons” or they should be “legal property” – pick one and go with it. The concern that arises at this juncture, however, is that one risks missing animals on their own terms by conceding to these being the only terms of the debate over the place of animals in law.

4. Outside the Law: Growing Alternative Approaches to Legal Animal Studies

Where the previous sections of this chapter have been subdivided into various subsections, this final section is not. To explain why, I draw attention to this section’s subtitle: “Growing Alternative Approaches to Legal Animal Studies.” I mean for this gerund (“growing”) to serve double duty as both an adjective and a verb. As an adjective, I use it here in its descriptive sense: like there is “a growing forest on the edge of town,” there are “growing alternatives approaches to legal animal studies.” That is to say, it is an actively developing field. Yet, as a verb, I use it here to establish what I am trying to do in this final section: like I am “growing tomatoes” (or at least trying to), I am “growing alternatives approaches to legal animal studies” (or, again, at least trying to) in this project. Thus, the brevity of this final section arises from the fact that, where the previous sections surveyed old growth, this one captures only a moment at the beginning of something new.

¹⁸⁴ Naffine, “Law’s Persons”, *supra* note 148 at 356, 366-367.

The section above concluded by establishing that neither “personhood” nor “property” seems to be an appropriate term by which to conceive of animals in legal animal studies, yet somehow these conceptual categories dominate the field. To this end, cultural studies of law scholar Sheryl N. Hamilton has considered the personhood of “liminal beings” (a category that includes animals), contending that attempts to construct them cohesively as persons end up producing anxiety insofar as they “exceed law’s capacity to render them sensible.”¹⁸⁵ A caveat Hamilton highlights is that, while P1 personhood is indeed “the most open to recognizing liminal beings,” one cannot neglect “what is left over when liminal beings are subjected to techniques of personification.”¹⁸⁶ In Hamilton’s view, we would be more apt to view liminal beings as “personae” instead of “persons.” To this end, the “persona” may be a way to grapple with animals’ uniqueness in law while simultaneously sidestepping the humanism of the legal person.

Indeed, perhaps a third option beyond “person” and “property” would present a possible way forward. As Maneesha Deckha has observed, it appears that various jurisdictions grappling with a non-property and non-person status for animals have already begun to lurch forward towards a third term, with the countries of Germany and Austria legislating the “fellow-beingness status for animals.”¹⁸⁷ With respect to this, Deckha has compared and contrasted the categories of “personhood” and “beingness” as follows: where “Western law conceptualizes a ‘person’ to be disembodied, independently autonomous, and rational,” beingness in law would entail the conceptualization of “beings as embodied, relational, and

¹⁸⁵ Sheryl N. Hamilton, *Impersonations: Troubling the Person in Law and Culture* (Toronto: University of Toronto Press, 2009) at 9. As Hamilton explains “liminal beings” at 7-8:

Liminal beings are unnatural subjects. Sometimes they seem to straddle our categories — simultaneously object and subject, for example. Other times they reveal our categories for the constructed fictions that they are, exposing them as untenable at best, absurd at worst. They are always unruly, promiscuous, and troublesome entities. Liminal beings for an encounter with personhood . . . Not all liminal beings wear the mantle of personhood easily; not all desire it. And yet all provoke the working out of our anxieties around the elusive and central notion of the person because they cannot be easily rendered in person-terms.

¹⁸⁶ *Ibid.* at 22-23.

¹⁸⁷ Deckha, *Animals*, *supra* note 92 at 123.

vulnerable.”¹⁸⁸ Under the “beingness” model, “[t]he law would value embodiment and relational experience and recognize that these attributes of living experience create vulnerability to which the law must respond.”¹⁸⁹

Yet, as historian and legal scholar Angela Fernandez has noted, although it is worthwhile to try to “accept [animals] on their own terms” in law without the baggage of humanism, the new category of “being” may have the effect of simply obfuscating exactly where animals are with respect to the well-established categories of property and person.¹⁹⁰ Thus, whereas Deckha suggests that the third option is best located somewhere indeterminately *outside* of the categories of person and property, Fernandez has contended instead that the third option is found *between* the two established categories.¹⁹¹

As Fernandez posits, the place of animals in law may be best described as “quasi.” A familiar term to lawyerly audiences, “quasi” is “used to mark a resemblance” while also importantly “suppos[ing] a difference.”¹⁹² For the same reasons Favre contended that animals are best understood as “living property” insofar as they are not *just* property, they can also be called “quasi-property” in law.¹⁹³ Extended further, Fernandez underscores that the corollary is also true: insofar as animals already have limited rights in law (but not the full basket of rights human beings possess), they are *not quite* full persons, but rather “quasi-persons.”¹⁹⁴ Particularly given the enduring conceptual association between the “legal person” and the “human being” that

¹⁸⁸ *Ibid.* at 122.

¹⁸⁹ *Ibid.*

¹⁹⁰ Angela Fernandez, Book Review of *Animals as Legal Beings: Contesting Anthropocentric Legal Orders* by Maneesha Deckha (2021) 31:3 *Kennedy Institute of Ethics Journal* E-14 at E-20.

¹⁹¹ Angela Fernandez, “Not Quite Property, Not Quite Persons: A ‘Quasi’ Approach for Nonhuman Animals” (2019) 5 *Canadian Journal of Comparative and Contemporary Law* 155 at 159, 219.

¹⁹² *Ibid.* at 169, quoting Henry Campbell Black, ed, *Black’s Law Dictionary*, 6th ed (New York: Springer Publishing, 1994). As Fernandez notes at 168, some of the ways “quasi” is or has been used in law include the term “quasi contract” as a precursor to the law of unjust enrichment, “quasi-judicial” and “quasi-legislative” as terms for officially-recognized review boards and regulation-making commissions, and “quasi admission” as the term for “an extra-judicial utterance creating an inconsistency with entered evidence,” among many others.

¹⁹³ Fernandez, *ibid.* at 158.

¹⁹⁴ *Ibid.* at 160, 214-215.

keeps animals from fully entering into the personhood category, animals appear to inhabit an in-between “quasi” space where they are “quasi-property” and “quasi-persons” simultaneously.¹⁹⁵

As thus far indicated, there are several possible ways to articulate a “third option” for understanding animals in law other than as simply “person” or “property,” such as Hamilton’s “persona,” Deckha’s “being,” and Fernandez’s “quasi.” On the possibility of a third option, however, one would do well to consider Ngaire Naffine’s response to the label of “persona” as an alternative to the legal person, with her critique extending well to both Deckha’s “being” and Fernandez’s “quasi.” In Naffine’s view, the third option has the effect of:

... implicitly accept[ing] and work[ing] within the traditional paradigm. Indeed, a perverse and paradoxical effect of this sustained focus on marginal cases is that the paradigm person is repeatedly strengthened and treated as relatively unproblematic ... Unfortunately, this insulates the concept (in its supposedly paradigmatic form) too much from inspection. It also tends to neglect the creative possibilities of the idea of the legal person understood non-paradigmatically, as pure legal abstraction, as an invention or fiction, one that does not invoke any particular human paradigm in the first place.¹⁹⁶

Naffine’s trepidation with respect to Hamilton’s (and, by extension, Deckha’s and Fernandez’s) approach appears to be that, if we call those entities “personae,” “beings,” or “quasi” that deviate from the standards of P2 and P3 personhood (around which even the filling of P1’s “empty slot” is so often patterned by jurists), then we run the risk of unwittingly legitimating the standard pattern of personification and never fully realizing the true flexibility and creativity of P1 personhood.¹⁹⁷

¹⁹⁵ *Ibid.* at 163 (noting that the resistance to the NhRP’s attempts to have American courts personify chimpanzees rests in the tendency to conflate “legal person” with “human being,” despite the possibility to frame the legal person otherwise).

¹⁹⁶ Ngaire Naffine, “Liberating the Legal Person”, Book Review of *Impersonations: Troubling the Person in Law and Culture* by Sheryl N. Hamilton (2011) 26:1 *Canadian Journal of Law and Society* 193 at 197.

¹⁹⁷ *Ibid.* See also Ngaire Naffine, “Legal Personality and the Natural World: On the Persistence of the Human Measure of Value” (2012) 3 *Journal of Human Rights and Environment* 68 (contending that, despite the empty vessel possibility of P1 personhood, human-centred P2 and P3 conceptions continue to inform how this vessel is filled in the vast majority of cases).

Yet, Naffine's rejoinder here appears to rest on a particular (and as-of-yet unproven) hypothesis: namely, that legal personhood can ever have a genuinely liberatory or wholly non-anthropocentric potential. Belief in a potential non-anthropocentric liberationism through personhood is a hard thing for one to hold onto when even Naffine herself appears to recognize potentially built-in limitations of personhood, noting that "the non-personification of animals is doing important cultural work" and that, as it is "glaringly apparent in relation to animals, ... [e]ven jurists who accept that law's person is most importantly a legal device concede that legal personification serves a social and expressive function."¹⁹⁸

To counter the liberatory and non-anthropocentric personhood hypothesis, we would do well to consider political philosopher Roberto Esposito's argument that personhood is inherently and inescapably a technology of humanist subjectivization. As his editor lucidly explains in "The *Dispositif* of the Person," for Esposito, the person is "a way of arranging the relation between the human and animal in contemporary subjectivity."¹⁹⁹ That is to say, when we personify, we implicitly do so to *disidentify* humans with animals, disavowing our own animal aspects.

For Esposito, like Naffine, the person is indeed an artifice, with the political philosopher noting that "[t]he person doesn't coincide with the body in which it inheres, just as the mask is never completely one with the actor's face."²⁰⁰ Although Esposito's examination of early Roman and Christian understandings of the person shed worthwhile insights into the nature of the concept, his examination of the modern use of the person best explains the limitations built into it. He notes that, in this sixteenth century, one finds legal scholars like Hugues Doneau observing that "[m]an is a term of nature; person, of civil law," marking already that the understanding of

¹⁹⁸ Naffine, *Meaning*, *supra* note 22 at 131, 181.

¹⁹⁹ Roberto Esposito, "The *Dispositif* of the Person" (2012) 8:1 *Law, Culture and the Humanities* 17 at 17.

²⁰⁰ *Ibid.* at 25.

person *qua* artifice as distinct from the human being had taken root.²⁰¹ Then, by the end of the eighteenth century, one finds the popularity of P2 and P3 personhood reaching a fever pitch, with declarations on the formal equality of “man” in particular abounding.²⁰²

Yet, as Esposito remarks, once personhood became a means by which to establish formal equality within the human species – all humans being equal persons, none being slaves or part-persons to be owned by full persons – personhood did not lose its hierarchizing power:

[T]he formal separation of different typologies of individuals, driven out from the domain of species, is transposed, so to speak within the single individual, and which is doubled across two different and layered spheres: one capable of reason and will and therefore fully human and the other reduced to biology, practically assimilated to the animal. While the first, called person, is considered to be the center of juridical imputation, the second, coinciding with the body, constitutes on the one hand the required layer and on the other hand a piece of property, akin to an internal slave.²⁰³

In essence, once universal personhood among human beings became a *de facto* legal situation, we did not – despite appearances – abolish the ownership of physical human beings. Rather, we rendered legal persons masters and owners of their own physical, animal bodies. Based on Esposito’s contention, one could further argue that what happens on a microcosm within the individual (abstract, mental person owning a physical, animal body) plays out macrocosmically in our society, with human persons owning nonhuman animal bodies, as well.

As a result, Esposito is ultimately dubious about the ethical potentialities of personhood. Echoing Deckha’s point, the problem is that the concept of the legal person protects only the *abstract* legal person, not the flesh-and-blood animal beings that we are. On this point, Esposito endorses moral philosopher Simone Weil’s contention that if it were only the personhood of a given individual that was morally relevant, one could “easily put out his eyes. As a blind man he would be exactly as much a human personality as before. I should have destroyed nothing but his

²⁰¹ Quoted in *ibid.* Note that Esposito’s translator keeps the Italian rendition of Hugues Doneau name: Ugo Donello.

²⁰² *Ibid.*

²⁰³ *Ibid.*

eyes.”²⁰⁴ Put another way, “once the mask is made safe, it doesn’t matter what happens to the face on which it rests and even less to the faces that do not own masks; to those who still aren’t persons, or who are no longer persons, or to those who were never declared to be persons.”²⁰⁵

Esposito’s reading of the person suggests the personification of nonhuman animals would run counter to the logic of personhood itself.²⁰⁶ Personhood, for Esposito, creates a duality in individual humans where the rational operator (designated person) owns the flesh-and-blood biological entity in which it is situated (designated property). This also creates another duality: humans (designated persons) as owners of actual animals (designated property).

This reading of personhood coincides with what posthumanist Cary Wolfe has argued in *Before the Law*, wherein he favourably follows Esposito’s contention that “the category of those who enjoy a certain right is defined only by contrast with those who, not falling within it, are excluded from it ... Ever since its original juridical performance, personhood is valuable exactly to the extent to which it is *not* applicable to all.”²⁰⁷ As Wolfe has argued elsewhere, the problem with animal rights advocates’ campaigns for the extension of personhood is that it simply moves the dividing line of what we might call the “who’s in and who’s out” of the personhood club, but does not *erase* that dividing line.²⁰⁸ The person, after all – by one name or another – is how modern law designates the object upon which it acts.²⁰⁹ However, the flip-side to this is one which Esposito and Wolfe expound upon: with every designation of who is a “person,” there is a

²⁰⁴ Simone Weil, “Human Personality” (1943) in Siân Miles, ed, *Simone Weil: An Anthology* (London: Virago Press, 1986) 42 at 71.

²⁰⁵ Esposito, *supra* note 199 at 30.

²⁰⁶ Or, as Sheryl N. Hamilton points out in “‘Human no like smart ape’: Figuring the Ape as Legal Person in *Rise of the Planet of the Apes*” (2016) 10:2 *Law & Humanities* 300 at 321, the personification of animals may only occur in those animals that are no longer animalistic.

²⁰⁷ Cary Wolfe, *Before the Law: Humans and Other Animals In a Biopolitical Frame* (Chicago: University of Chicago Press, 2012) [Wolfe, *Law*] at 8, 109-110, citing Roberto Esposito, “The Person and Human Life” in Jane Elliott & Derek Attridge, eds, *Theory after “Theory”* (London: Routledge, 2011) 205 at 209.

²⁰⁸ Wolfe, *Rites*, *supra* note 115 at 191-193.

²⁰⁹ *Harvard Law Review*, *supra* note 145 at 1746.

simultaneous, counterpointing designation of who is *not* a person. The problem at the heart of personification is that it is in equal parts a matter of inclusion and exclusion.

Still, as much as Wolfe agrees with Esposito's reading of the "person" as an apparatus of the anthropological machine, he is skeptical about Esposito's ability to formulate of a "counterdispositif,"²¹⁰ insisting that "the only alternative that Esposito seems to be able to imagine ... is simply its other extreme, a sort of neovitalism that ends up radically dedifferentiating the field of 'the living' into a molecular wash of singularities that all equally manifest 'life'"²¹¹ If, in trying to be non-anthropocentric liberationists, we jettison the idea of the "person" from philosophy and law, how are we to mark which entities matter at all? Esposito's critique of the person rests on the idea that it problematically divides the "living" into privileged and disprivileged entities (i.e., humans vs. nonhuman animals). However, Esposito's position offers us no guidance as to what we are to do within this community of the living, giving us only a "new norm [which] will operate as a sort of homeostatic mechanism balancing the creative flourishing of various life forms."²¹² The implicit logic of this deep-ecological biocentrism, when writ large, suggests that:

[A]ll forms of life should be equally allowed to take their course, even if it means a massive die-off of the species *Homo sapiens*. But biopolitically speaking, that hardly solves the problem, of course, because when we ask what the demographic distribution of such an event would likely be, we realize that the brunt would surely be absorbed by largely black and brown poor populations of the south, while those in the "rich North Atlantic democracies" ... who could afford to protect themselves would surely do so.²¹³

²¹⁰ This term is provided by Esposito's editor, *supra* note 199 at 17.

²¹¹ Wolfe, *Law*, *supra* note 207 at 59.

²¹² *Ibid.* at 60.

²¹³ *Ibid.* [emphasis in original].

Esposito's "conjugation of life and norm" would seemingly require us to "extend 'unconditional hospitality' to anthrax and ebola virus [and] to SARS."²¹⁴ Substituting the "person" with "life" as the subject of politics or the object of law is "hopelessly impractical as a guide to action."²¹⁵

Wolfe finds a more tempered response to the problem of legal line-drawing in poststructuralist philosopher Jacques Derrida.²¹⁶ Unlike Esposito, Derrida recognizes that the "life-threatening" character of "unconditional hospitality" makes it "practically impossible to live."²¹⁷ In Derrida, Wolfe detects a pragmatic position, recognizing that:

[E]xclusion cannot be avoided, and it is why the refusal to take seriously the differences between different forms of life — bonobos versus sunflowers, let's say — ... is, as they used to say in the 1970s, a "cop out." ... We *must* choose, and by definition we *cannot* choose everyone and everything at once.²¹⁸

Nevertheless, whatever choice we make "*will have been wrong*" — a conclusion Wolfe reaches by employing Derrida's understanding of justice and law.²¹⁹

In "The Force of Law," Derrida posited that the conjunction of "justice" and "law" presents us with an aporia.²²⁰ "Justice" is an ethical responsibility to the others we encounter which can never be fully satisfied — justice is always "yet to come" — whereas "law" is our best attempt at stabilizing, regulating, and calculating that ethical responsibility (even though it can never truly be stabilized, regulated, or calculated).²²¹ Navigating past Derrida's flair for the poetic (and being "*juste* with justice," to use the French poststructuralist's own *jeu de mots*), we can determine that Derrida's claim here appears to be something empirically verifiable: law indeed

²¹⁴ *Ibid.* at 93.

²¹⁵ *Ibid.* at 60, quoting Patrick Curry, *Ecological Ethics: An Introduction* (Cambridge: Polity, 2006).

²¹⁶ See Jacques Derrida, "Autoimmunity: Real and Symbolic Suicides", interview by Giovanna Borradori in Giovanna Borradori, ed, *Philosophy in a Time of Terror* (Chicago: University of Chicago Press, 2003) 85.

²¹⁷ *Ibid.* at 129.

²¹⁸ Wolfe, *Law*, *supra* note 207 at 103 [emphasis in original].

²¹⁹ *Ibid.*

²²⁰ Derrida, "Force," *supra* note 2.

²²¹ *Ibid.* at 947, 969.

changes with the times because it can never really “do justice” to justice.²²² That is to say, as Derrida points out, “each advance in politicization obliges one to reconsider, and so to reinterpret the very foundations of law such as they had previously been calculated or delimited.”²²³ Every time we think we have achieved truly “just” law, we find that it excludes still others from receiving justice (either formally or informally): legal equality of white men gave way to legal equality of white people of both sexes, to legal equality of people of both sexes and all races, and so on. Arguably, every time we think we have ascribed legal personhood to the right community of beings or things, we “will have been wrong.”²²⁴

Yet, while no law will ever be able to truly “do justice” – while we always “will have been wrong” – this is not permission for a “cop out,” as Wolfe phrased it. Rather, although “justice exceeds law and calculation,” this “cannot and should not serve as an alibi for staying out of juridico-political battles, within an institution or a state or between one institution or state and others.”²²⁵ On this reading, we cannot draw the line of personhood justly, yet justice appears to demand that we draw it somewhere.

On this point, Derrida’s wider body of work proves instructive – most especially his work on animals in particular. In “The Animal that Therefore I Am,” the French thinker lamented that there is a conceptual laziness apparent in dividing the world’s creatures into simply two categories of “the human” and “the animal.”²²⁶ However, as previously indicated, the point of deconstructing the human-animal binary is explicitly not to “blur” the line between humans and animals, but rather bring all of the myriad differences between all of these myriad beings (ourselves included) into sharper focus. To this end, Derrida has remarked:

²²² *Ibid.* at 955.

²²³ *Ibid.* at 971.

²²⁴ Wolfe, *Law*, *supra* note 207 at 103 [emphasis deleted].

²²⁵ *Ibid.*

²²⁶ Jacques Derrida, “The Animal That Therefore I Am (More to Follow)” (2002) 28:2 *Critical Inquiry* 369.

I am not advocating for the *blurring* of differences. On the contrary, I am trying to explain how drawing an oppositional limit *itself* blurs the differences ... not only between man and animal, but among animal societies – there are an infinite number of animal societies and, within the animal societies and within human society itself, so many differences.²²⁷

This conceptual shift allows for two things to occur. As to animals, avoiding “the” dividing line between all of them and all of us has the effect of bringing animal diversity into clearer view. More than this, however, this also brings *us* as humans into clearer view, as well: not “*the* human” that stands in absolute distinction to “*the* animal,” but instead complex beings with intricate webs of difference and similarity to the other complex beings alongside whom we inhabit the world.

The instructive takeaway on this point would be to similarly refuse *the* line between “person” and “property” – not by looking for *the* place for *the* animal, but instead by opening the space for a diverse and disparate multiplicity of beings to be variously recognized in law. Rather than a foregone conclusion, this is best thought of in terms of Derrida’s “justice yet to come.” Playing on the French word for “future” and its phonetic identity with the French for “to come,” Derrida remarks that: “Justice remains, is yet, to come, *à venir*, it has an, it is an *à-venir*, the very dimension of events irreducibly to come. It will always have it, this *à-venir*, and always has.”²²⁸ That is to say, what is truly “just” cannot be determined in advance. Rather than a final determination of where to place animals in law – of what line to use to separate “the human” and “the animal” once and for all – it is instead, on this reading, an openness to radical diversity and radical possibility as the preconditions to any just encounter with animal others. Moreover – and most importantly – it is only through an openness to radical diversity and radical possibility that this field of scholarship, amidst all its many tangled branches, will continue to grow.

²²⁷ Derrida, “Heidegger”, *supra* note 113 at 183 [emphasis in original].

²²⁸ Derrida, “Force,” *supra* note 2 at 969.

5. Conclusion: Branches Yet to Grow

At this point, I would do well to return to the metaphor with which I began this chapter, which used Darwin's own definition of "evolution." Not a linear and inevitable progression toward an ultimate zenith, evolution is rather a matter of following disparate and diverse branches on a tree of life.²²⁹ In taking this approach throughout this chapter, I have traced two things: the "descent of dogma" which maps how and why the dominant species of thought in legal animal studies have developed as they have and "branches yet to grow" which demonstrate how and where underemphasized and underutilized elements of this history may yet generate new ideas and possibilities for this field.

Taking the insights of Charles Darwin as a jumping-off point, thinkers like Peter Singer and Tom Regan developed well-reasoned moral-philosophical arguments against the enduring speciesism in human society. Singer's ideas have enjoyed a rich social life through the animal liberation movement and Regan's have, in turn, helped to develop the "abolitionist" strand of the animal liberation movement through Gary Francione. Moreover, looking to Francione and the legal animal studies scholarship he ushered in, one finds active scholarly debates that try to place animals in law, either as persons or as property in ways that reflect the thrust of anti-speciesism.

Francione also represents a point at which this tree of life has been perpetually pruned, with other moral-philosophical perspectives (such as ecofeminism, posthumanism, and critical race theory) having been disallowed from developing in earnest in legal animal studies. Yet, the problem which presents itself in the present moment is this: there are circumstances to which the dominant species of thought in legal animal studies cannot adequately respond. As I have outlined above, neither "person" nor "property" seems able to capture animals *as animals* in law

²²⁹ Darwin, *Origin*, *supra* note 1 at 129-130.

or legal scholarship, with even “third options” paradoxically reinforcing the humanism of law that excluded animals in the first place. There is no adequate response – and yet the circumstances demand one. To say otherwise would be, in the words of Wolfe, “a cop-out.”

Thus is the field from which this project’s substantive analysis of “*Reece’s pieces*” begins: a field that is often overdetermined, but which undeniably represents fertile ground for growing ideas. In beginning this substantive analysis in the following chapter, I would leave this chapter behind with one final observation from Jacques Derrida: where law addresses itself to the universal, *justice* addresses itself to the particular.²³⁰ And so I begin my study of one particular case – that of Lucy the elephant – not in the hopes of determining a universal law for animals, but simply moving towards a particular justice yet to come.

²³⁰ Derrida, “Force,” *supra* note 2 at 949.

Chapter 3

Unpacking the Trunk: Essential Indeterminacy, Posthumanist Perspectives, and an Elephant Appendage

1. Introduction: The Elephant in the (Court) Room

When trying to give content to the idea of “fairness” in the 1974 British case of *Maxwell v Department of Trade and Industry*, Lord Denning made this remark: “Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognize.”¹ More recently, Lord Denning’s words were reproduced in the 2011 animal-related case of *Rogier v Halifax (Regional Municipality)*, wherein a Nova Scotian court had to determine whether Halifax’s bylaw concerning the euthanasia of “dangerous” dogs met the criteria of procedural fairness.² While *Maxwell* and *Rogier* show that defining “fairness” is always a challenge, *Reece* arguably presented a much greater challenge in prompting a judge to define something with which courts concern themselves considerably less often. That is to say, the court in *Reece* was tasked with defining the corollary in Lord Denning’s remark: an elephant.

While that “elephantine quality” Lord Denning referred to may mean that we know one when we see one, precisely what definition we ought to give to an elephant is altogether less clear. When addressing what elephants are, Chief Justice Fraser’s overview in *Reece* emphasizes the attributes that have been prominently associated with elephants for the past two centuries (most notably, emotional, social, and cognitive complexity), summed up in this nutshell:

Briefly, elephants are large-brained and inquisitive animals. The fact that they are capable of recognizing themselves in a mirror indicates they are self-aware. Elephants exhibit a wide variety of complex cognitive behaviours including an extensive and complex vocal

¹ *Maxwell v Department of Trade and Industry*, [1974] QB 523 at 539. Having some staying power, a CanLII search reveals 16 Canadian cases wherein this quotation has been reproduced, largely owing to Justice Claire L’Heureux-Dubé’s favourable use of it in *Knight v Indian Head School Division* No. 19, [1990] 1 SCR 653.

² *Rogier v Halifax (Regional Municipality)*, 2009 NSSC 14 at para 101. On the wider significance of *Rogier* for the place of animals in law, see Katie Sykes, “Human Drama, Animal Trials: What the Medieval Animal Trials Can Teach Us About Justice for Animals” (2011) 17 *Animal Law* 27.

and gestural repertoire. They are capable of distinguishing amongst the various voices of their relatives and companions; empathizing with others; discriminating between friendly and unfriendly people and other animals; and using and even manufacturing small tools. One of the most social of all mammals, elephants live in complex societies where mothers, daughters, granddaughters, sisters and female cousins retain close relationships for life.³

This characterization does not come from nowhere. On the evidentiary record front, the Chief Justice cites elephant biologist Joyce Poole's affidavit, which indeed surveys elephant intelligence and sociality in its comprehensive overview of both African and Asian elephants.⁴ More than this, however, this characterization draws generally on widespread contemporary Western understandings of what elephants most essentially are.

However, regarding this figuration of elephants in *Reece*, legal scholar Maneesha Deckha has been notably critical. To this end, Deckha has called attention to the particular socio-historical constructedness of elephants, noting that they “loom large not only as a physical presence in wildlife habitats across the world, but also in our cultural imaginaries,” going further to note that – particularly in Western locales like Canada – conceptions of elephants are ones that strongly “romanticize” these animals.⁵ In these ways, the characterization of elephants in *Reece* is very much in line with contemporary cultural discourses on elephants that “emphasiz[e] the breadth of their cognitive and emotional capacities in relating to humans and interrelating amongst themselves.”⁶ Moreover, the pain and injury of an elephant are rendered especially disturbing conditions of suffering to encounter – much more so than that of other animals – according to contemporary “culturally informed sensibilities.”⁷ All this to say, an elephant like

³ *Reece v Edmonton (City)*, 2011 ABCA 238 at para 103. On when and how these attributes came to be associated with elephants in the West, see Nigel Rothfels, “Elephants, Ethics, and History” in Christen Wemmer & Catherine A. Christen, eds, *Elephants and Ethics: Toward a Morality of Coexistence* (Baltimore: The Johns Hopkins University Press, 2008) 101 at 107-108.

⁴ See especially Affidavit of Dr. Joyce Poole [Poole Affidavit] at paras 39-41, 57-78.

⁵ Maneesha Deckha, “Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm” (2013) 50:4 *Alberta Law Review* 78 at para 50.

⁶ *Ibid.*

⁷ *Ibid.*

Lucy thus made for the “ideal animal ‘litigant’” for a group like Zoocheck or PETA to bring to court thanks to the prevailing conception of what an elephant is, their emotional, social, and cognitive complexity visibly put at the front and centre of the Chief Justice’s own rundown of “elephantine” qualities.⁸

It is not that this characterization is “wrong” *per se*. Rather, as Deckha points out, the problem with this being the characterization which receives the most attention in *Reece* is that the value accorded to elephants here appears to turn on their “‘honourary’ human status” alone.⁹ That is to say, it is only through an emphasis on their *human-like* capacities that elephant suffering is brought into sharp relief as something culturally – and, through the Chief Justice’s endorsement, legally – significant. To this end, Deckha’s critique of *Reece* is that it “rel[ie]d] on the *humanist* values that make Lucy an appealing animal ‘victim’.”¹⁰

To return to a point from this dissertation’s introduction, this criticism is among the reasons Deckha’s endorsement of the idea that the *Reece* dissent was something “revolutionary” was a cautious and carefully-qualified one. To reiterate: Deckha’s contention is that Chief Justice Fraser’s dissenting opinion in *Reece* was meaningful for its being non-anthropocentric, but nevertheless limited insofar as it was not posthumanist. In this respect, *Reece* relies on “humanist norms of what and who matters,” whereas a posthumanist approach would have “eschewed human-based metrics and methodologies for assessing who and what should count ethically to instead recognize animal subjectivities on their own terms.”¹¹

⁸ *Ibid.* On the evocative meaning many Westerners give to elephant suffering, see Rothfels, *supra* note 3 at 115 [emphasis in original]:

[In] the second half of the nineteenth century, we can see the emergence of a new kind of elephant, one still with us, which might best be called *E. dolens* – an animal that both physically and mentally feels sorrow and pain; the elephant that suffers. ... [I]f we analyze the recent arguments brought forth by animal rights activists to move elephants from circuses and zoos to new elephant sanctuaries[,] ... a key concern has been the belief that elephants can experience great emotional, mental, and physical pain.

⁹ Deckha, *ibid.*

¹⁰ *Ibid.* at para 52.

¹¹ *Ibid.* at paras 5, 52.

However, if indeed the *Reece* dissent was limited in its humanist conception of elephants, the question thus arises: just what would it look like to conceive of these entities in a *posthumanist* way? I do not mean for this to be a decontextualized question that meditates abstractly on the idea of “the elephant.” Rather, I mean for this question to be answered by following the evidence in *Reece*’s pieces – that is, by looking at the other figurations of elephants that circulate in the news stories, letters to the editor, blogs, internet sources, and so on that surround Lucy. As I show below, most of these figurations did not make it to court – and, as such, they signify a potentially missed opportunity for thinking beyond humanist measures of value in law. I contend below that the elephant difference found in *Reece*’s pieces opens up possibilities for posthumanist approaches – and that this is most especially accessible in those instances where we attend to a particularly elephantine feature. That is to say, this comes into view when we “unpack the trunk.”

2. A Big Question: Why Focus on the Elephant’s Trunk?

In this section, I set to explain why “the trunk” – as opposed to any other characteristics that typically come to mind when thinking about an elephant – has proven to be the most fertile place from which to analyze how elephants and elephantness have been conceived of by the discourses present throughout *Reece*’s pieces. After all, trunks are hardly the only notable feature an elephant possesses, even if one is going to hone in on their physicality. To return to Lord Denning’s comment – that “[l]ike defining an elephant, ... fairness in practice has the elephantine quality of being easy to recognize” – his choice word of “elephantine” in fact summons up a reference to an elephant’s size more than anything else.¹² Indeed, an elephant’s

¹² Maxwell, *supra* note 1. See, e.g., “Elephantine” (no date), online: *Merriam-Webster* <<https://www.merriam-webster.com/dictionary/elephantine>> (providing this as the first definition of “elephantine”: “having enormous size or strength : MASSIVE”).

size is what has most prominently worked these creatures into everyday English. “The elephant in the room” (referring to a major issue that goes unacknowledged, despite its obvious presence) hinges on knowing that an elephant is so big that its being in a space could not be missed by others who are also there. Likewise, the adage “How do you eat an elephant? One bite at a time” (referring to breaking a large project into smaller parts) also depends on one thinking of an elephant as a massive entity.

When I first started to survey how elephants were represented in *Reece’s* pieces, I found that “size” was certainly a feature that was emphasized at various points. For instance, in response to the Zoo’s announcement in 2009 that Lucy’s treatment plan would require her to lose 1 000 pounds of weight, the blog *Oldster’s View* posted a question that was no doubt on many people’s minds: “How do you tell if an elephant is fat?”¹³ Obviously, the question has an answer, with veterinarians documenting what weight range would be most conducive to Lucy’s health and wellbeing.¹⁴ Notably, however, when Oldster poses the question, it is rhetorical, with his blog post commenting only on the peculiarity of the fact that an elephant had been put on a diet at all. What this underscores is a popular perception of elephants’ physicality: outside the realm of zoo veterinarians and elephant biologists, most of us living in the West know that elephants are big, but we do not know *exactly how big* they are supposed to be.

¹³ Oldster, “How do you tell if an elephant is fat?” (14 November 2009), online (blog): *Oldster’s View* <<https://oldstersview.wordpress.com/2009/11/14/>>. *Oldster’s View* is “a news and oddity aggregation site which presents the more unusual or just timely items.” Although the link on Oldster’s View is no longer active, note that the news piece to which Oldster directs readers is likely Karen Kleiss, “Lucy the elephant must lose 1,000 pounds, Edmonton zoo says”, *Edmonton Journal* (13 November 2009). See also, “Veterinarian says Lucy the Edmonton elephant losing weight, getting better”, *Edmonton Sun* (9 December 2009), which quantifies Lucy’s weight loss as “equivalent to the size of an adult black bear.”

¹⁴ Surendra Varma observes that Lucy’s obesity is signalled by “the structure and shape of her body” in comparison with “wild elephants of the same age.” In terms of exact numbers, he explains that:

If Lucy’s body weight measurements are compared with captive elephants living in semi- natural conditions in southern India, the body weight of 34-36 year old free-ranging captive females are 5512 to 6482 lbs respectively and for Lucy, the differences are of 2763 to 3975 lbs and 1793 to 3000 lbs over the years (2002 to 2009).

Surendra Varma, “Welfare Assessment of Lucy the Elephant” (2009) at 5, online (pdf): *Zoocheck* <https://www.zoocheck.com/wp-content/uploads/2015/07/Varma_Lucy_Report_FINAL.pdf>.

Of course, imprecise knowledge about the dimensions of an elephant is understandable in light of what cultural knowledge has been inherited from the European imaginary. That is to say, lacking a reference point, medieval Europeans variously represented elephants anywhere from the size of large horses to colossi of nature capable of carrying castle towers on their backs.¹⁵ As historian Nigel Rothfels relates, as late as the eighteenth century in Europe, artistic depictions of elephants showcased them at a variety of sizes. Instead of conveying the actual dimensions of living beings, these images were “stylized embodiment[s] – perhaps even an archetype – of brute power and strength” (see Figure 1).¹⁶ In essence, elephants were shown simply as however big was necessary to convey the overall idea that they were powerful beasts – formidable in both interspecies battles (a popular myth at the time revolving around the idea that rhinoceroses and elephants regularly fought in the wild) and in war (with stories of their use by Alexander the Great and Hannibal surviving the ages).¹⁷

¹⁵ Rothfels, *supra* 3 at 104.

¹⁶ *Ibid.* at 104 (specifically discussing the art of Johann Elias Ridinger).

¹⁷ *Ibid.* at 104-105. On the myth of elephants and rhinoceroses being mortal enemies, see especially, Kate Sutherland’s reimagining of arguments for and against the reality alleged conflict in a civil court, “Elephant v. Rhinoceros” in *How to Draw a Rhinoceros* (Toronto: BookThug, 2016) 15.



Figure 1: Johann Elias Ridinger's "The Elephant and the Rhinoceros" (c. 1750)¹⁸

Nevertheless, the issue that presented itself to me in surveying elephant size as it circulated in *Reece's* pieces was this: it did not seem to get at anything particularly specific to elephantness as such. That is to say, while Lucy the elephant may be big, what I found in following representations of elephants throughout *Reece's* pieces was that the idea of "elephant" in general did not appear to depend on the entities in question being large, something that became particularly apparent when turning to the images that accompany news stories and blog posts about Lucy the elephant.

Naturally, most of the images are photographs of Lucy – an entity of truly mammoth proportions. Yet, while Lucy is big, not all the elephants represented in the *Reece* materials are.

¹⁸ Reproduced in "Der Elephant und das Nashorn" (no date), online: *Grosvenor Prints* <https://www.grosvenorprints.com/stock_detail.php?ref=46832>. This selection is made by Rothfels, *supra* note 3 at 102.

Case in point: the stuffed toy elephants that abound. Plushies were, after all, a favourite resource for the Voice for Animals' (hereafter, "V4A") campaign to relocate Lucy. For example, in the Christmas season of 2007, the organization gifted each of the members of Edmonton's city council a stuffed toy elephant. Their accompanying display outside City Hall also included a slightly larger toy elephant. However, all these elephants were much smaller than the flesh-and-blood beings – one photo on the V4A website showing volunteers holding these "elephants" in much the same way Milton Ness would later hold a single elephant molar.¹⁹

Yet, it is not V4A's use of plushies that most convincingly underscores that size is only incidental to the idea of elephantness. Rather, here one should consider a photo of former *Jackass* star Steve-O posing with a stuffed toy elephant in a *Metro Edmonton* article concerning his involvement in the "Save Lucy" campaign (see Figure 2). More important than the picture itself is the backstory that goes with it. As photographer Candice Ward explains on her blog, the photoshoot with Steve-O was arranged last-minute when it was announced he would be leading a PETA protest outside of the Zoo.²⁰ In a caption to one of the photos on her blog, Ward quips that "I probably should have kept the elephant ... but I was poor and had to return it" – suggesting that the plushy was purchased spur-of-the-moment for this equally impromptu photoshoot.²¹

¹⁹ v4aeditor, "The Valley Zoo Elephant Campaign" (19 February 2009), online: *Internet Archive WayBack Machine* <<https://web.archive.org/web/20090219063616/http://www.v4a.org:80/?q=node/245>> (under the "December 20, 2007" update).

²⁰ Candice Ward, "Oh Steve-O" (9 August 2011), online (blog): *Candice Ward Photography* <<https://candicewardphotography.wordpress.com/2011/08/09/oh-steve-o/>>.

²¹ *Ibid.*



Figure 2: A photo of Steve-O with “Lucy” from Candice Ward’s blog

Without a flesh-and-blood elephant to use, the stuffed toy “did in a pinch.” But *why* did it do in a pinch? Why does *this* representation work to communicate “elephant”? Ward could have, presumably, photographed Steve-O next to something mammoth in size – but this would not have communicated that he was associated with an elephant in the same way the plush toy did. Studying these various representations, what I realized was this: rather than “size” being the defining factor used to connote elephantness, what seemed to unite the elephant representations across the various materials was instead a particularly elephant appendage almost invariably put front and centre. What I am referring to here is this: the elephant’s trunk.

3. Where the Trunk Leads: Establishing the Enduring Indeterminacy of the Elephant Appendage

The elephant's trunk has long been a subject of fascination, particularly for Westerners encountering these African and Asian proboscideans. As historian Susan Nance has noted, the very first elephant in North America – part of a travelling circus in the 1790s – garnered crowds of spectators wherever she went. With most people at the time having little to no knowledge of these creatures, “[t]he pièce de resistance of seeing ‘The Elephant’ ... was the experience of her trunk.”²² The peculiarity of the trunk was not lost on these audiences, as accounts from the time indicate that “visitors found the elephant and her trunk fascinating but strangely unnerving.”²³

Today, of course, the fact of elephants having trunks is well known – anyone going to see an elephant would not be surprised by the mere reality of its being there in the centre of an elephant's face. Nevertheless, what a careful reading of *Reece's* pieces reveals is that there is still a lack of consensus around how a trunk is to be understood in relation to both an elephant itself and to human beings. Indeed, this lack of consensus around the meaning of trunk-having begins to appear quite early in *Reece's* pieces, made expressly evident with respect to an injury sustained by Samantha the elephant in August, 2006. Samantha was the Edmonton Valley Zoo's other elephant from 1989 until 2007, when she was transported to the North Carolina Zoo for an indefinite period of breeding loan.²⁴ In 2006, this African elephant lost twenty centimetres off her trunk when it got caught in the gate latch for her enclosure.²⁵ That the injury occurred was never in dispute; however, as the news coverage shows, what an injury to the trunk actually meant for Samantha was clearly up for debate.

²² Susan Nance, *Entertaining Elephants: Animal Agency and the Business of the American Circus* (Baltimore: Johns Hopkins University Press, 2013) at 24.

²³ *Ibid.*

²⁴ “Elephant from Edmonton zoo headed to North Carolina facility”, *Canadian Press* (27 September 2007); Edmonton Valley Zoo, “Get Closer: Discover our bold new direction” (May 2011) at 16, online (pdf): *City of Edmonton* <https://www.edmonton.ca/attractions_events/documents/PDF/Future_Directions.pdf>.

²⁵ Tim Lai, “Elephant's trunk severed at Valley Zoo”, *Edmonton Journal* (30 August 2006) A1.

Dean Treichel, operations supervisor for the Zoo, indicated that “[a]lthough it may hamper her in some aspects, we expect a full recovery and her to return to normal without too much difficulty[.] ... [S]he’ll lose the ability to pick up really tiny items ... but she’ll still be able to provide for herself and care for herself like a normal elephant.”²⁶ Moreover, Treichel added that “elephants in the wild can lose parts of their trunk – to an alligator at a watering hole, for example,” but that they can “adapt well to injuries similar to this.”²⁷ Treichel’s glossing thus normalizes Samantha’s injury, treating it more like the docking of a tail on a companion animal than anything else.²⁸ According to Treichel, alligators apparently snap at elephants’ trunks all the time. Losing twenty centimetres from the tip of a trunk is perhaps painful in the short term, but hardly life-altering or life-threatening in the long term.

By contrast, Zoocheck executive director Rob Laidlaw countered in the same news piece that the alligator example was “far-fetched” and that an injury like this to the tip of the trunk was “severe” for an elephant.²⁹ Where Treichel claimed to have arrived at his position by consulting “elephant experts in North America” and other “specialists,” Laidlaw likewise claimed to have arrived at his counterposition through consultation with “experts in Africa.”³⁰ In using differently geolocated “expert knowledge” of elephants, each man asserted a competing truth regarding the meaning of an injury to an elephant’s trunk.

This tension over the true severity of the trunk injury was never resolved in the press coverage. Rather, the next print media mention of Samantha’s severed tip is an incidental one made over ten months later. Reporting on the Zoo’s announcement that Samantha would be

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ But see Katelyn E. Mills, Jesse Robbins & Marina A. G. von Keyserlingk, “Tail Docking and Ear Cropping Dogs: Public Awareness and Perceptions” (2016) 11:6 *PLoS ONE* 1. Mills *et al.* indicate that a sizeable minority of people are unaware that tail docking for dogs is even a practice, believing many breeds are born without tails or born with stubby tails.

²⁹ Lai, *supra* note 25.

³⁰ *Ibid.*

relocated, journalist Gordon Kent simply includes in the background information about her that she “was the centre of attention from well-wishers last August when she lost about 20 centimetres of her trunk, including its finger-like tip.”³¹ Kent’s casual reference here to the “finger-like tip” significantly abbreviates how the end of the trunk was represented in the original press coverage, as journalist Tim Lai had described trunks as “the single most important organ for an elephant, enabling them to touch, grasp and smell. They’re strong enough to uproot a tree and threaten a predator, but gentle enough to greet another animal or use a paint brush on a canvas.”³²

Just what did it mean that Samantha lost the tip of her trunk? The overt disagreement in the press coverage offers conflicting accounts as to whether the loss of trunk tip is a by-the-by injury or a catastrophic one – whether damaging the trunk meant little or meant much to the trunk-haver. There appears to be a fundamental uncertainty here: what a trunk means to an elephant in the normal course of its life. Did Samantha lose the equivalent of a nose, a full hand, and a fingertip (as Lai’s initial coverage indicates), or simply the last in the list (as one would glean from Kent’s coverage months later)? Is a trunk all of these things or any of them? If it is “the equivalent,” how equivalent is it? What *Reece*’s pieces suggest is that trunks are particularly difficult things for human minds to conceive since no single one-to-one correlation exists between a human body part and this elephant one, with all of these equivalences pervading *Reece*’s pieces, yet none of them sticking for very long.³³

To this end, one could consider here that a trunk is a “nose” is emphasized at a few points in *Reece*’s pieces. For example, in covering Christmas season festivities at the Zoo in 2008,

³¹ Gordon Kent, “Valley Zoo elephant takes maternity leave”, *Edmonton Journal* (11 June 2007) A1.

³² Lai, *supra* note 25.

³³ The issue of non-equivalence – or, perhaps, “multi-equivalence” – between an elephant’s trunk and a human reference point is certainly not unique *Reece*’s pieces. For instance, elephant biologist Jeheskel (Hezy) Shoshani’s article on the pachyderm’s appendage signals this issue right from the get-go from its especially apt title: “It’s a Nose! It’s a Hand! It’s an Elephant’s Trunk!” (1997) 106:10 *Natural History* 36.

journalist Jamie Hall implicitly characterizes it primarily as a smelling organ when commenting that “Lucy the elephant won’t take her arthritis medication unless her trunk first detects the aroma of cinnamon.”³⁴ Moreover, the “nasal” nature of the trunk is put front and centre in some of the initial *Reece*’s pieces remarks on Lucy’s trunk specifically, with veterinarian James Oosterhuis commenting on Lucy’s “nostrils,” surveying Lucy’s “nasal discharge” and “nasal exudate,” and noting that “elephants are obligatory nasal breathers” to locate the elephant’s primary health issues in what he ultimately calls the problem “with her nose.”³⁵

Yet, “nose” seems not to be a term or concept that can pin the trunk down for very long. Indeed, the appendage’s non-equivalence to the “nose” was unignorable in 2011, when veterinarians discovered that they could not perform a successful biopsy on a mass blocking Lucy’s airway because no technology capable of doing this even existed. As journalist Gordon Kent reports, “a three-metre endoscope normally used on horses was put up Lucy’s trunk” to inspect an obstruction present there; yet, the endoscope was not “strong enough to take a tissue sample.”³⁶ The Zoo’s own report adds that “[t]here is not believed to be an existing technology to obtain a biopsy from the upper area of an elephant’s trunk.”³⁷ Milton Ness, Lucy’s attendant veterinarian, responded to this obstacle by saying the next step was “to consult with biomedical engineers about building a unique device that would allow them to do a trunk biopsy.”³⁸ In reports and press coverage surrounding the failed biopsy, there is no longer any mention of

³⁴ Jamie Hall, “Animals go ape for spices”, *Edmonton Journal* (27 November 2008) B1.

³⁵ James Oosterhuis, “Elephant Consultation Report” (16 September 2009), online (pdf): *City of Edmonton* <https://www.edmonton.ca/attractions_events/documents/PDF/Elephant_Consultation_Report_Sept2009.pdf>; Jim MacDonald, “Veterinarian says Edmonton elephant Lucy has breathing problems, can’t be moved”, *Metro* (15 September 2009). Artist Barbara Greene Mann also directly makes this link in punning about Lucy’s health: “As you may or may not nose, Lucy the Edmonton captive elephant has a trunk [blockage].” For Greene Mann’s comments, see “Just the Trick, The Elephant Surgeon Has Arrived” (20 April 2014), online (blog): *Elephants Need Elephants and People Need Art* <<https://barbaragreenemannandlucy.wordpress.com/2014/04/20/just-the-trick/>>.

³⁶ Gordon Kent, “Lucy in no shape to travel, vet warns”, *Edmonton Journal* (11 March 2011) B2.

³⁷ “Lucy’s Treatment Program” (March 2011) at 3, online (pdf): *City of Edmonton* <https://www.edmonton.ca/attractions_events/documents/PDF/Lucy_Treatment_Plan_March2011.pdf>.

³⁸ Kent, *supra* note 36.

Lucy's "nose," but instead talk of the "constricting mass [that] remains in her trunk," the endoscope "put up Lucy's trunk," and the possibility of a "trunk biopsy."³⁹ Nothing so everyday as a "nose" anymore, the now apparently beyond-human-understanding appendage is rendered as a distinctly nonhuman body part once more: a "trunk."⁴⁰

Nevertheless, as much as the trunk's alienness presented a stumbling block to overcome for these veterinarians, for others it seems that the trunk's indeterminacy does not place an obstacle – that is to say, for some it appears to provide an opportunity.⁴¹ This is especially evident with respect to the artwork produced by Lucy the elephant and sold by the Valley Zoo Development Society. The titles of various prints for sale on the Valley Zoo Development Society's website include "First Kiss," "Lucy Kiss Blues," "Tiger Striped Kiss," and "Triple Kiss" – all imprints of the end of Lucy's trunk, the outside edges of which she apparently dips into paint before "kissing" the canvas (see example in Figure 3).⁴² That is to say, the trunk not being a "nose" here whatsoever, the Valley Zoo Development Society webpage notes in the "About the Artist" blurb that "Lucy does trunk imprints or kisses!", doing well to capitalize on a

³⁹ *Ibid.*

⁴⁰ The inability of veterinarians Milton Ness and James Oosterhuis to fully handle a trunk suggests that this appendage is alien in two senses. Firstly, *we* do not have trunks – and here I am speaking of the human species generally. Yet, not possessing trunks ourselves is not the only thing that makes them alien. We humans also do not have muzzles; nevertheless, endoscopes exist for horses (one of these was, after all, what veterinarians modified to examine Lucy's trunk). In Eurocentric cultures, although we humans may not know what it is like to have a muzzle, we know generally what it is like to be with something which has a muzzle. Unlike horses, however, elephants are foreign bodies to Western eyes.

⁴¹ Lucy is hardly the only elephant for which this has been the case. As Susan Nance (*supra* note 22) has noted at 27, one of the central reasons elephants were popular circus performers was because of their dexterous appendages that did not equate one-to-one with human appendages (avoiding the spectre of Darwinian monkey men):

[P]rimate acts presented the trade's monkeys, orangutans, and baboons in similar ways; showmen put them on leashes in taverns and on street corners, where they could voluntarily accept food from onlookers with their hands. However, primate shows were scientifically and religiously volatile ... Elephants evaded such infamy and straddled ... genres, as they were so radically removed from the human form that their trunk usage never took on the provocative (and later Darwinian) overtones of the primate shows.

⁴² Valley Zoo Development Society, "Elephant Art by Lucy" (2017), online: *Valley Zoo Development Society* <<https://www.buildingourzoo.com/product-category/elephant-art-by-lucy/>>.

much more marketable comparison not to a “nose” which smells, but instead to “lips” which kiss.⁴³

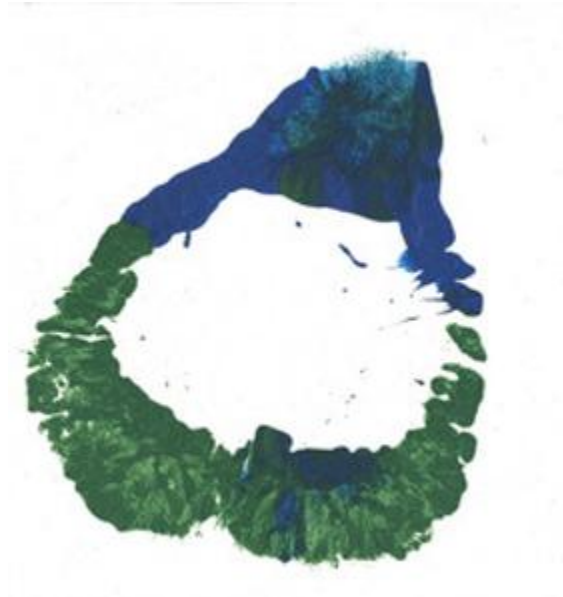


Figure 3: A “Lucy Kiss” from the Valley Zoo Development Society website

Unsurprisingly, the activist group Friends of Lucy has been critical of these pieces of art as highly exploitative, lamenting on its Twitter page that:

The Valley Zoo can’t have it both ways. For years they’ve claimed Lucy has a problem breathing through her trunk ... yet they’ve continually compromised Lucy with trunk stunts and dunking her trunk into paint to create “trunk-kisses” that the Valley Zoo Development Society sells online and in the zoo’s gift shop.⁴⁴

In placing the term in quotations, Friends of Lucy seems to suggest that calling these things kisses is a definite choice – and, moreover, that the motivation behind that choice is profit-driven. In counterpoint, the Valley Zoo Development Society’s “About the Artist” blurb accompanying each piece of art frames the sale in terms of ethical capitalism: “The majority of the proceeds from the sale of Lucy’s paintings go towards enhancing exhibits and animal care at

⁴³ *Ibid.* Note that, while the four pieces named here make explicit reference in their titles to the “kiss-like” nature of the images, individual write-ups for several other pieces of Lucy’s artwork describe the images as “kisses,” as well.

⁴⁴ Friends of Lucy, “Exactly, Vanessa. The Valley Zoo can’t have it both ways. For years they’ve claimed Lucy has a problem breathing through her trunk (although other vets have stated elephants are not obligate nasal breathers and Lucy has adapted to breathing through her mouth when necessary)... 1/” (5 May 2018 at 4:47PM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/992913695733899264>.

the Edmonton Valley Zoo. The remainder goes to Elephants International to support conservation work.”⁴⁵

While not a defence of the Valley Zoo Development Society’s approach as such, it should be noted that its comment on this matter nevertheless fits well within the global context of elephant art-making. Whereas Friends of Lucy appears to operate on the assumption that, if not for her captivity in the Zoo, Lucy would roam freely in the wilderness free from human contact (a point I engage with more thoroughly when examining how location works in *Reece*’s pieces in Chapter 4), what this assumption misses is that Asian elephants are often *working* animals actively integrated into human societies.⁴⁶ In this respect, conceiving of a trunk according to what is most profitable is hardly isolated to the Valley Zoo Development Society’s “Lucy Kisses.” Indeed, although elephants have never been fully domesticated, humans in south Asia have relied upon the labour of wild-caught elephant populations to move and manipulate timber, bricks, and stones for hundreds of years.⁴⁷ Moreover, in line with the Zoo’s approach to Lucy, it is notable that, with mechanization making much of the traditional work of elephants unnecessary and with prohibitions arising on much of the traditional work to which elephants were normally put – and many elephants already incorporated into human societies such that they cannot simply be “returned” to the wild – even non-zoo elephants have been “retrained” to undertake art-making as a form of work in parts of Asia.⁴⁸

⁴⁵ Valley Zoo Development Society, *supra* note 42.

⁴⁶ Friends of Lucy, “These are African elephants but Asian elephants love their calves just as much. LUCY was wild-born in Sri Lanka and reportedly ‘orphaned’ at only 1 year old. Imagine Lucy’s lifelong loss at losing her mother and maternal herd, to end up *alone* & freezing in a Canadian zoo. #yeg” (12 April 2018 at 1:07AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/984296855612870656>.

⁴⁷ See generally Lalith Seneviratne & Greg D. Rossel, “Restoring Interdependence Between People and Elephants: A Sri Lankan Case Study” in Christen Wemmer & Catherine A. Christen, eds, *Elephants and Ethics: Toward a Morality of Coexistence* (Baltimore: The Johns Hopkins University Press, 2008) 349; Jonathan Saha, “Colonizing Elephants: Animal Agency, Undead Capital and Imperial Science in British Burma” (2017) 2 *BJHS Themes* 169.

⁴⁸ See generally Vitaly Komar, Alexander Melamid & Mia Fineman, *When Elephants Paint: The Quest of Two Russian Artists to Save the Elephants of Thailand* (New York: HarperCollins Publishers Inc., 2000) [Komar *et al.*]. Komar *et al.*’s own description (at 15) for this process is worth quoting, calling it as they do a “quadruped occupational retraining program.”

Also against Friends of Lucy's critique of the "Lucy Kisses," the Valley Zoo Development Society's "About the Artist" blurb characterizes art-making not as forced labour on the part of Lucy, but something that benefits the elephant herself, asserting that painting is a form of enrichment:

Painting was introduced as a simple method of enriching Lucy's life. Each painting begins with the zookeepers mixing the colours. Lucy uses only non-toxic acrylic paints and chooses the brush she wants to use. She paints as much as she wants with a certain colour, and once she is finished she hands the brush back to her keepers. Each piece is very different, but they all show similar lines, circles and dabs. Lucy definitely has her own style.⁴⁹

That said, although zoos have indeed commonly used painting as an activity for captive elephants since the 1990s, its actual "enrichment" value for the elephants themselves is highly suspect.⁵⁰ In overviewing extant literature on the subject and conducting their own study, animal behaviour scholars Megan English, Gisela Kaplan, and Lesley J. Rogers came to this conclusion:

A key purpose of including enrichment activities for captive animals is to at least reduce stress-related behaviour as well as encourage natural behaviour and stimulate the animals. The activity of painting does not appear to address this need adequately. Our results suggest that painting does not improve the welfare of elephants and that its main benefit is the aesthetic appeal of these paintings to the public and their subsequent sale[,] of which a percentage of funds might be donated toward conservation of the species.⁵¹

In other words, rather than the elephants themselves gaining anything from the act of painting, it appears to be the wallets of select human beings that are "enriched" by the activity.

Nevertheless, while English *et al.*'s conclusion is no doubt valid, notable is that their focus was on highly structured activities of painting in zoo environments and not the phenomenon of elephant art-making as such. To this end, for English *et al.*, elephant painting falls into the category of enrichment activities that "are highly contrived" and have "no

⁴⁹ Valley Zoo Development Society, *supra* note 42.

⁵⁰ See generally Megan English, Gisela Kaplan & Lesley J. Rogers, "Is painting by elephants in zoos as enriching as we are led to believe?" (2014) *PeerJ* 1 [English *et al.*].

⁵¹ *Ibid.* at 14.

equivalent in a species' natural environment.”⁵² However, so as not to discount what the relation between the trunk and the creation of art may be, it should be noted that others have suggested that art-making arises spontaneously among these animals. As curator and art writer Mia Fineman has parsed it out, on the one hand, “most zoo trainers remain deeply skeptical about the aesthetic intentions of their four-legged protégés. For elephants, they insist, painting is nothing more than a trained behavior intended to alleviate the overwhelming boredom of captivity and earn them an edible reward.”⁵³ On the other hand, as Fineman continues, although there is a “leap from doodling in the sand to painting on canvas,” it is nevertheless the case that, “as zoologists have observed, many captive elephants ... will independently pick up sticks or pebbles and scratch lines in the dirt – a behavior that may suggest some innate, untutored impulse to draw.”⁵⁴ While perhaps “Lucy Kisses” as such are not a form of enrichment for the elephant herself, the tendency of elephants to idly create aesthetic representations with their trunks may indicate that pachyderms are not “really so far removed from the circumstances that motivate human beings to pick up a paintbrush[.]”⁵⁵

In this respect, zoo biologist Heini Hediger remarked as long ago as 1948 that “[s]ometimes the elephant draws with his nose, that is, with his trunk.”⁵⁶ I reproduce this quotation here for two reasons. The first is to indicate that knowledge of elephants' capacity for some kind of aesthetic representation has been documented among captive populations since the early twentieth century – notably several decades before the activity was promoted as either a form of enrichment for the elephants' own sakes or a form of entertainment,

⁵² *Ibid.* at 2.

⁵³ Komar *et al.*, *supra* note 48 at 11.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Quoted in translation in David Gucwa & James Ehmann, *To Whom It May Concern: An Investigation of the Art of Elephants* (New York: W. W. Norton & Company, 1985) at 156.

commodity-production, or profit-making for human beings.⁵⁷ The other reason, however, has to do with the early zoo biologist's own choice of words here – a slippage between “nose” and “trunk” reminiscent of the zoo veterinarians quoted at the beginning of this section. This seems once again to underscore the issue with the trunk's non-equivalence to parts of the human body.

The point I am trying to make here is this: while some find use value in analogizing the trunk to a nose and some find financial value in analogizing it to lips, the trunk nevertheless exceeds and defies these comparisons, never staying within their confines for very long. Even those trying to sell the “Lucy Kisses” ultimately cannot maintain the conceit that equates the trunk to human lips, such as in the comments of the Zoo's special events coordinator, Nathan Young, at Lucy's 40th birthday celebration. As Young tells journalist Megan Tilley, “Lucy signs her cards with a trunk print, or what we call a Lucy Kiss, so we're getting guests to sign her card with a thumb print.”⁵⁸ If the equivalent form of card-signing for human beings means one of us places a *fingerprint* on the page, how can Lucy's trunk imprint also be a “kiss”? Two conflicting metaphors are being used simultaneously in Young's sentence (i.e., the trunk's tip is like part of a human face *and* part of a human hand), a phenomenon which underscores the challenges inherent in making sense of what an elephant's trunk is.

To move beyond mere confusion and to make the conceptual slipperiness of the trunk do work that can shift the whole conceptual landscape, I show in the next section that some comparisons – rather than reducing the trunk to something that is reflective of “the human” – can disturb fundamentally humanist ideas about what “the human” is (particularly as “the human” reputedly stands over and against “the animal”).⁵⁹ I do this by looking especially to a comparison

⁵⁷ See generally Gucwa & Ehmann, *ibid*; Komar *et al.*, *supra* note 48.

⁵⁸ Megan Tilley, “We love Lucy”, *Edmonton Examiner* (8 July 2015) 13.

⁵⁹ See generally Cary Wolfe, *What is Posthumanism?* (Minneapolis: University of Minnesota Press, 2010). As Wolfe notes in his introduction to this text and at xv specifically, “the human” is a socially and historically contingent concept that declares human beings to be the pinnacle of Enlightenment rationality, defined in opposition to animals and denying our “animal origins in nature, the biological, and the evolutionary.”

alluded to in Young's words in the paragraph above, yet which I have thus far not engaged with: the comparison between the elephant trunk and the human hand. What I show below is that, more than just another instance of an attempted equivalence that cannot quite stick, metaphorizing the trunk and the hand has an altogether more profound effect, exposing not just the strangeness of the elephant's prehensile appendage, but also exposing the strangeness of *our* prehensile appendage at the same time.

4. Painting and Posthumanism: How the Trunk Interrupts Humanist Metrics of Value

To be sure, many of the comparisons between the elephant trunk and the human hand in *Reece's* pieces fall into the categories of the relatively innocuous and the decidedly humanist. For instance, some rather innocuous references to the hand-like nature of Lucy's trunk can be seen in the comments of journalist Scott McKeen who, in recounting his painting session alongside Lucy the elephant, emphasizes the hand-like dexterity of the trunk in reporting that "Lucy is able to pick up brushes on her own with her nimble trunk" and underscores the ease of making the equation in the context of art-marking in commenting that Lucy was "standing tall beside me, staring at my canvas with a brush in her hand."⁶⁰ Further, more overtly humanist figurations – which characterize the trunk's hand-likeness simply in terms of its value deriving from human-likeness – can be seen in the comments of acupuncturist Steven K. H. Aung who, in speaking of his own painting session alongside Lucy, tells a reporter simply that "I would name Lucy as human elephant. In the next life, she'll become a human."⁶¹ Material from McKeen and Aung suggests that trunks are "like hands." The question arises here: so, what? After all, this

⁶⁰ Scott McKeen, "World's largest artist paints her way into my heart", *Edmonton Journal* (30 November 2007) B1 [emphasis added]. For an example of Lucy using her trunk in this way, see Gary Worsdall, "Lucy the Elephant Painting" (23 August 2012) online (video): *YouTube* <<https://www.youtube.com/watch?v=lwXOkfskNPM>>.

⁶¹ Zoltan Varadi, "On Safari Gala", *Edmonton Journal* (16 June 2006) G1.

comparison does not appear substantively different from the nose and the lips comparison, working well sometimes and not working well others. I hone in on the trunk-hand comparison, however, because of where it appears to lead one: to questions about an elephant's "essential being" – questions which, inevitably, provoke subsequent questions about humans' "essential being," as well.

To show this, I suggest considering the comments of another person who painted alongside Lucy: Edmonton-based artist Tim Rechner. Notably, Rechner's initial framing of Lucy's art appears simply dismissive of its value, with him making this comment in a 2006 interview:

Elephant paintings are great. I've seen pictures of them painting and I've seen their art at the library. I'm all about that impulsive artmaking, whether it's animals or kids. It's kind of like the moment of truth, to interface with a blank piece of paper. [Like them,] I just approach it really instinctually and really physically, at times violently.⁶²

On this reading, Lucy's engagement with painting is a sloppy endeavour – an example of "impulsive artmaking" and an approach that is taken "really instinctually and really physically." In other words, it may as well just be a random mess.

This 2006 remark stands in contrast with those found in journalist Janice Ryan's 2011 article concerning a collaboration between Rechner and Lucy (see Figure 4).⁶³ Ryan's coverage is accompanied by a large image of Lucy painting on a canvas, holding the paintbrush in her trunk. That a trunk is what Lucy uses to manipulate her artistic instruments is addressed directly by Ryan in writing, reflecting that "[a]ll 10 paintings seem to emit a hushed joy as one envisions Lucy's massive trunk thoughtfully stroking the canvas with her paintbrush, with Rechner by her side."⁶⁴ Moreover, while Rechner tells us nothing specific about the physical way in which Lucy

⁶² Mari Sasano, "Assembling the artistic puzzle", *Edmonton Journal* (1 September 2006) G9.

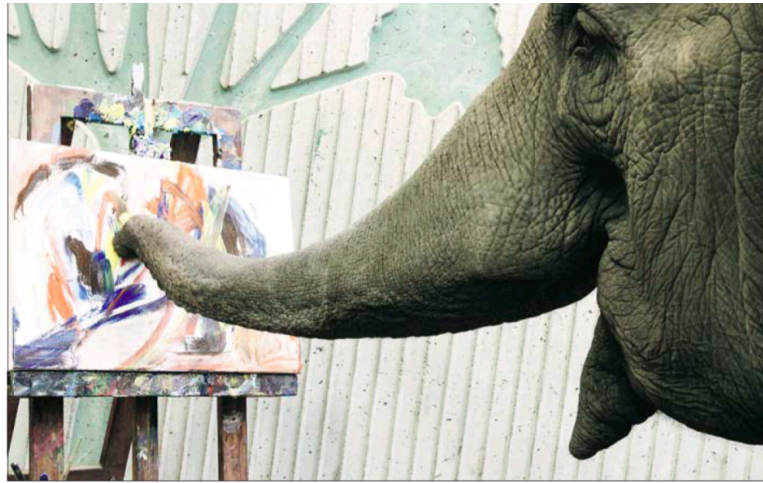
⁶³ Janice Ryan, "Arts fest turns city into cultural playground", *Edmonton Journal* (1 July 2011) C9.

⁶⁴ *Ibid.*

paints, his reflections on the process suggest that his opinion about elephant artwork has changed. Describing the process, Ryan notes that “Rechner makes a few brush strokes, then Lucy chooses a brush from a selection of colours and adds her marks,” prompting Rechner himself to offer:

The collaborative relationship evolved in interesting ways the more we worked together[.] ... Lucy became more attentive to the marks I was making; she seemed to become more aware that we were collaborating and really watched what I was doing. More and more she would do things like pass me the brush that she was using or want to paint with the brush I was using.⁶⁵

The language in the 2011 article has shifted from that found in the 2006 one. No longer is Lucy’s work “impulsive artmaking” rooted in something instinctual, physical, and violent; now, it is the “thoughtful[] stroking [of] the canvas” performed by an entity who is “attentive to the marks” others make and “aware” of collaboration.



Tim Rechner and Lucy the Elephant make abstract paintings together at the Edmonton Valley Zoo. Their work is now on display at the Works Festival.

Figure 4: A photo of Lucy painting in Janice Ryan’s *Edmonton Journal* article

Notably, this latter framing resonates very closely with one provided in a 2007 news article reporting on Lucy’s solo painting.⁶⁶ Journalist Frank Landry, author of the article, locates the trunk as the thing that allows Lucy to create her art, relating this information to readers:

⁶⁵ *Ibid.*

⁶⁶ Frank Landry, “Elephant’s paintings go on sale at Edmonton’s public library”, *Prince George Citizen* (9 November 2007) 29.

“Under the supervision of her keepers, the 31-year-old Valley Zoo elephant puts trunk to canvass [sic] when creativity strikes, about once a week. ... The 7,800-pound Asian elephant uses her trunk to grab the brush and get creative on canvas, the largest of which is 36 by 36 inches.”⁶⁷ Perhaps more significant than these facts, however, is the framing provided in the article by spokeswoman for Edmonton Attractions, Marliiss Weber. Capturing the essence of others’ comments on what the wider significance of Lucy painting means, Weber is quoted as saying simply, “It really is a way to see inside her mind and her heart.”⁶⁸

It seems that access to an elephant’s “mind” and “heart” is facilitated primarily by the trunk-as-hand and the art-making that ensues from it – a connection that conjures up echoes of the way in which philosopher Martin Heidegger explored the connection between hands and minds in the human creation of art as a kind of “handicraft.”⁶⁹ Notably, however, attributing a “hand” to a trunked entity – one which not only handles things, but hands out clues to its interior world – stands in marked contrast to the way in which Heidegger himself conceived of the hand-mind connection in art-making, explaining in his “What Calls for Thinking?” that

The hand is something altogether peculiar. In the common view, the hand is part of our bodily organism. But the hand’s essence can never be determined, or explained, by its being an organ that can grasp. Apes, too, have organs that can grasp, but they do not have hands. The hand is infinitely different from all the grasping organs – paws, claws, or

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* This framing of elephant art is not unique to Lucy. For this, see especially Gucwa & Ehmann, *supra* note 56. In their extended study of elephant art-making, elephant handler David Gucwa and journalist James Ehmann note at 11 that this initial response to the spontaneous drawings produced an elephant:

Among the first possibilities ... entertained about the unsolicited drawings on the floor was the tantalizing prospect that [this elephant], unable to say so in words, was trying to demonstrate to her human companions that there was more going on in her head than they thought. Even as man shoots radio signals and probes, carrying gold-etched images, into deep space for the edification of whomever might stumble across them, perhaps, in the floor drawings, the elephant was purposefully exposing her intelligence, her imagination, to whomever might care to take note.

To this end, philosopher Michael W. Fox (quoted in Gucwa & Ehmann at 50) contended that this elephant’s artwork was “an expression of the animal’s own potential, her inner nature – her soul, if you wish.”

⁶⁹ Martin Heidegger, “What Calls for Thinking?”, translated by Fred D. Wieck & J. Glenn Gray, in *Basic Writings*, edited by David Farrell Krell (San Francisco: HarperSanFrancisco, 1993) 365 [Heidegger, “What”] at 380.

fangs – different by an abyss of essence. Only a being who can speak, that is, think, can have hands[.]⁷⁰

Presumably, a trunk would also belong in Heidegger's list alongside paws, claws, and fangs.⁷¹ It seems that, for the German thinker, no matter how closely any other being's prehensile appendage approximates the physical structure or capacities of a hand, a physical hand *qua* the abstract "hand" is unique to humans (i.e., those beings "who can speak" or "think").

Heidegger's further assertions about the hand relied on a degree of wordplay.⁷² The above passage concludes in full with "Only a being who speak, that is, think, can have hands and can handily achieve works of handicraft."⁷³ Crucially, "handicraft" is something Heidegger distinguishes from mere "busywork" performed by hands. It is one thing to mechanically assemble a piece of woodwork (i.e., busywork), but another altogether to breathe life into a woodworked creation (i.e., "handicraft").⁷⁴ Heidegger's "hand," in this respect, is a conceptual thing more than it is a physical one: while we realize it through our prehensile appendages, it is more properly considered an ability not simply to be the world, but to shape it (for reasons that are psychological and not simply done out of bare necessity).⁷⁵

⁷⁰ *Ibid.*

⁷¹ Heidegger's omission of "trunks" from this list is a peculiar oversight given that the German-speaking public was made aware of the trunk's hand-like function in Heini Hediger's 1948 essay, "Exploratie der Nationale Parken van Belgisch Congo": "Sometimes the elephant draws with his nose, that is, with his trunk" (quoted in Gucwa & Ehmann, *supra* note 56 at 156).

⁷² See discussion of Heidegger's punning in Jacques Derrida, "*Geschlecht II: Heidegger's Hand*", translated by John P. Leavy, Jr., in *Deconstruction and Philosophy: The Texts of Jacques Derrida*, edited by John Sallis (Chicago: University of Chicago Press, 1987) 161 [Derrida, "Hand"] at 169-170.

⁷³ Heidegger, "What", *supra* note 69 at 380.

⁷⁴ *Ibid.* at 379. Note that distinction is not unique to Heidegger, with social theorist Hannah Arendt making a similar distinction between mere unsophisticated "labour" on the one hand and sophisticated "work" on the other in *The Human Condition* (Chicago: University of Chicago Press, 1958). Like Heidegger, Arendt implies that the former is "animal" and the latter is more distinctly human. But see also Diego Rossello, "The animal condition in the human condition: Rethinking Arendt's political action beyond the human species" (2021) 1:1 *Contemporary Political Theory* (contending that – despite how other Arendt scholars have figured it – Arendt's tripartite "labour," "work," and "action" explanation of the human condition can be equally extended to animals, as well).

⁷⁵ See Derrida, "Hand", *supra* note 72 at 173.

Further, when Heidegger speaks of “handicraft,” he means it not only in its literal sense of craftsmanship, continuing on to clarify that

... the craft of the hand is richer than we commonly imagine. The hand does not only grasp and catch, or push and pull. The hand reaches and extends, receives and welcomes – and not just things: the hand extends itself, and receives its own welcome in the hands of others. ... Two hands fold into one, a gesture meant to carry man into the great oneness. The hand is all this, and this is the true handicraft.⁷⁶

However, rather than these additional details on the Heideggerian hand leading us farther away from Lucy’s “hand,” this allusion to the handshake is in fact what takes us back there. After all, one image which circulates in *Reece*’s pieces is that of animal rights activist and former *Price is Right* host Bob Barker meeting Lucy the elephant.⁷⁷ In the relevant photo, Barker extends his hand toward Lucy’s trunk tip and Lucy extends her trunk tip toward Barker’s hand, the two touching in mid-air (see Figure 5). While not a proper handshake, the gesture codes as such: at this first meeting, the two touch their prehensile appendages together in an apparent intersubjective interspecies encounter.⁷⁸

⁷⁶ Heidegger, “What”, *supra* note 69 at 380-381.

⁷⁷ See, e.g., Larry Wong, “At the Edmonton press conference, Barker was joined by elephant behaviour expert Dr. Joyce Poole, PAWS co-founder Ed Stewart, and elephant veterinarian Dr. Dan Famini” *Calgary Herald* (17 September 2009); V4A Webmaster, “Lucy” (2017), online: *Voice for Animals Society* < <http://www.v4a.org/lucy>>. Note that Wong’s and V4A’s versions of this image are different from each other, apparently being photos of the same thing taken moments apart. Note also that, while not a handshake, Lucy is at other times represented as “holding hands” using her trunk – see, e.g., Florence Loyie, “Veterinarian urges elephant be moved out of city zoo”, *Edmonton Journal* (18 July 2009) B3 (captioning the accompanying photo: “Lucy the Asian elephant holds zoo worker Jackie Buck’s hand while on a morning walk”).

⁷⁸ Elephant biologist Hezy Shoshani, *supra* note 33 at 37, has noted this function of the trunk among elephants themselves: “When elephants meet, one may use its trunk to touch the face of the other, or they may entwine their trunks. This ‘trunk shake’ can be compared to a human handshake and may be associated with similar functions such as assurance and greeting.”



Figure 5: The image of Bob Barker and Lucy's "handshake" used on the V4A website

In light of the evidence of this elephant's general "handicraft" – both in terms of the paintbrush-in-hand that enables artistic expression and the handshake that facilitates intersubjective encounters – we would do well to consider poststructuralist philosopher Jacques Derrida's critique of Heidegger's original assertion. Analyzing Heidegger's comments on the hand, Derrida contends that these mark Heidegger's thought with not just a dogmatic humanism in general, but specifically with a humanism that mistakenly "inscribes not some differences but an absolute oppositional limit" insofar as "Heidegger takes no account of a certain 'zoological knowledge' that accumulates ... under this so general and confused word animality. He does not criticize it and does not even examine the sorts of presuppositions, metaphysical or otherwise, it can harbor."⁷⁹

Derrida is, of course, right to chide Heidegger for not examining his presuppositions in attributing "hand" to humans alone, as the German ontologist was avowedly critical of humanism (despite these apparent relapses into it). Indeed, in his "Letter on Humanism," Heidegger remarked that

⁷⁹ Derrida, "Hand", *supra* note 72 at 173-174 [emphasis deleted].

Every humanism is either grounded in a metaphysics or is itself made to be the ground of one. Every determination of the essence of man that already presupposes an interpretation of beings without asking about the truth of Being, whether knowingly or not, is metaphysical. The result is that what is peculiar to all metaphysics, specifically with respect to the way the essence of man is determined, is that it is “humanistic.” Accordingly, every humanism remains metaphysical.⁸⁰

In other words, Heidegger’s rejection of humanism derives from humanism’s *de facto* reliance on “metaphysics”: humanism makes claims to truth about us as beings which are, ultimately, unsubstantiated. Yet, as Derrida points out, Heidegger engages in the same pattern of thinking as the humanists of whom he is critical when he makes the assertion that only humans have “hand” in the “handicraft” sense.

This being said, I raise Heidegger’s attribution of “hand” to humans at the expense of other animals with prehensile appendages for a specific reason. If Heidegger’s framing is a humanist one, challenges to it bring us into the realm of posthumanism. That is to say, when a trunk functions as a “hand” in the “handicraft” sense, it disturbs humanism. It is not that elephants are “like us” anymore; rather, what “we” “are” is up for debate. If trunks function like that, perhaps we humans do not have “hands,” after all – we, like apes, have prehensile appendages, but nothing like the self-sustaining, self-declaring, abstract hand that the kind of thinking the Heidegger quotations encapsulate suggest we possess. My point, therefore, is this: when an analogy is made between an elephant trunk and a human hand – particularly with respect to those things we take to be “special,” “exceptional,” or “uniquely human” about the hand – there is a significant conceptual blowback.

Bidirectionality is, of course, not implicit in every metaphor. With respect to humans and animals, this point is made eloquently in J.M. Coetzee’s *The Lives of Animals*. In response to

⁸⁰ Martin Heidegger, “Letter on Humanism,” translated by Frank A. Capuzzi & J. Glenn Gray, in *Basic Writings*, edited by David Farrell Krell (San Francisco: HarperSanFrancisco, 1993) 211 [Heidegger, “Humanism”] at 225-226.

protagonist Elizabeth Costello analogizing the slaughter of cattle to the Holocaust, fellow character Abraham Stern replies,

You took over for your own purposes the familiar comparison between the murdered Jews of Europe and slaughtered cattle. The Jews died like cattle, therefore cattle die like Jews, you say. ... That is a trick with words which I will not accept. You misunderstand the nature of likenesses ... Man is made in the likeness of God but God does not have the likeness of man. If Jews were treated like cattle, it does not follow that cattle are treated like Jews.⁸¹

Stern's man-God comparison is wonderfully illustrative of the unidirectional nature of most metaphors, attributing the better qualities of a superior thing (i.e., "God") to a lesser thing (i.e., "man"), without implying that it works vice versa. Similarly, to say simply that elephants are "like" humans – or just that the elephant trunk is "like" a human hand – would, on its own, operate in the same way: perhaps elephants possess some of the better qualities of the superior beings that we are, but it does not follow that we possess any of the qualities of these lesser things.

However, the reason the attribution of "hand" to a trunked being is so conceptually troubling is because it calls into question whether we really possess the quality of "hand" at all – whether we are really the things we think we are. This is because, as cultural theorist Cary Wolfe explains, "hand" for Heidegger is "a *distinctly* human relation to the world" – it is supposed to be something which "can serve as a figure for thought, and a particular mode of thought at that, that distinguishes the [species] of humanity from the rest of creation."⁸² Rather than being a mere prehensile organ, the "hand" is, for Heidegger, intimately linked to "thinking" and "speaking." In the German philosopher's own words, "[O]nly when man speaks, does he think – not the other

⁸¹ J.M. Coetzee, *The Lives of Animals*, edited by Amy Gutman (Princeton: Princeton University Press, 1999) at 49-50.

⁸² Cary Wolfe, *Animal Rites: American Culture, the Discourse of Species, and Posthumanist Theory* (Chicago: University of Chicago Press, 2003) [Wolfe, *Rites*] at 63-64 [emphasis added].

way around ... Every motion of the hand is rooted in thinking. Therefore, thinking itself is man's simplest, and for that reason hardest, handiwork[.]”⁸³

On this point, one would do well to consider how Wolfe elaborates on Derrida's critique of Heidegger:

[T]o give some substance to Derrida's own very general suggestions that ... disciplinary crossings be pursued, as he reminds us when he protests Heidegger's dogmatic humanism... [w]hen we move the discussion into the register of linguistic behaviors of (at least some) animals, we need to remind ourselves, as Derrida is quick to point out, that it is not simply a question of “giving language back to the animal.” Rather, it entails showing how the difference in *kind* between human and animal that humanism constitutes on the site of language may instead be thought of as a difference in *degree* on a continuum of signifying processes disseminated in a field of materiality, technicity, and contingency, of which “human” “language” is but a specific, albeit highly refined instance.⁸⁴

If speaking and thinking are handicraft, the issue which arises when we attribute “hand” to an animal is the same as what arises when we attribute language to one. As Wolfe underscores, instead of attempting to “give language back” to animals, the posthumanist gesture investigates how language is itself animal in origin. Instead of being definitionally human, language is thus characterized by an “ahuman technicity” – meaning that “‘our’ concepts, ‘our’ readings, ‘our’ histories ... are in an important sense not ours at all.”⁸⁵

While Wolfe is speaking specifically about language here, similar points have indeed been raised with respect to art (and, notably, with respect to elephant art in particular). For instance, in response to the line of questioning, “Why would an elephant want to draw? How would drawing be adaptive? If, indeed, elephants do draw, is this a phylogenetic freak, or should we expect related species to have this same ability?”, journalist James Ehmann replied in his

⁸³ Heidegger, “What”, *supra* note 69 at 381.

⁸⁴ Wolfe, *Rites*, *supra* at 82. Cf. Charles Darwin, *The Descent of Man* (Cambridge: Cambridge University Press, 2009) at 105 (Wolfe's choice of vocabulary here alludes to Darwin's oft-quoted comment: “...the difference in mind between man and the higher animals, great as it is, is certainly one of degree and not of kind.”)

⁸⁵ Cary Wolfe, “Human, All Too Human: ‘Animal Studies’ and the Humanities” (2009) 124:2 *PMLA* 564 at 571.

extended study of elephant art-marking that “I thought the same question might be applied to *Homo sapiens*.”⁸⁶ Similarly, on the phenomenon of abstract art, artists Vitaly Komar and Alexander Melamid have commented the following: “[W]hen we came back to New York [from an abstract art show], we heard about this elephant in Arizona who painted, and we realized human artists were trying to do something that could probably be done just as well – or maybe *better* – by an elephant.”⁸⁷ Suffice it to say, the general phenomenon of elephant art does not simply raise questions about what elephants are, but disturbs our understanding of what *we* are.

Is elephant art “art”? Is a trunk a “hand”? Rather than answering these questions, what one finds in *Reece*’s pieces is instead a fertile ground from which to pose more fundamentally disruptive questions: is *our* art “art”? Is *our* hand a “hand”? To this end, what “unpacking the trunk” reveals is this: we thus share, in the words of Jacques Derrida, in a “non-power” – we do not possess “hand” any more than we possess “language.”⁸⁸ These are instead ahuman things in which we humans and they elephants both participate, but which neither ever fully possesses in earnest.

5. The Question is, “Can they have Joy?”: Reframing the Value of the Elephant in *Reece*’s Pieces⁸⁹

“Unpacking the trunk,” it seems, takes us to a very different position than where we started, with *Reece* proper relying on romantic cultural readings of elephants and humanist metrics of value to ultimately produce elephants in general and Lucy in particular as “the ideal

⁸⁶ Gucwa & Ehmann, *supra* note 56 at 141 [emphasis in original]

⁸⁷ Komar *et al.*, *supra* note 48 at 8 [emphasis added]

⁸⁸ Jacques Derrida, “The Animal That Therefore I Am (More to Follow)” (2002) 28:2 *Critical Inquiry* 369 [Derrida, “Animal”] at 396.

⁸⁹ The question in the title here is a reference to Jeremy Bentham’s aphorism “The question is not, Can they reason? Nor, Can they talk? but, Can they suffer?” from *An Introduction to the Principles of Morals and Legislation*, edited by J. H. Burns and H. L. A. Hart (London: Athlone Press, 1970) at 283. As I explain in this section, despite Jacques Derrida’s apparent endorsement of the question in “The Animal That Therefore I Am (More to Follow),” *ibid.*, Donna Haraway has countered the question’s foundational focus.

victim.” The question no doubt arises: was it possible to come to a different conclusion from within the source materials of *Reece* alone? To put that another way, was there even a trunk to unpack in that courtroom wherein this chapter started its analysis? To this, I would answer that trunks were not entirely absent from *Reece*, but they were conspicuously scarce.

In Chief Justice Fraser’s dissent, these body parts are only there by implication. One simply has to assume that a trunk is the prehensile appendage implied by the Chief Justice’s reference to elephants being capable of “using and manufacturing small tools.”⁹⁰ Moreover, the trunk is alluded to – although never explicitly mentioned – as part and parcel of the “respiratory difficulties” surveyed at various points in the dissenting opinion.⁹¹ Yet, it is unsurprising that trunks would be present only through implication in the Chief Justice’s dissent when one considers the affidavit evidence in *Reece* with which she was working. Where it is visually represented in the affidavit appendices, the trunk hangs loosely in front of Lucy – appearing as little more than an accoutrement to her overall elephant body.⁹² Moreover, only two affiants directly tackle the trunk head-on: veterinarian Philip K. Ensley and elephant biologist Joyce Poole.

For Ensley, the trunk matters only in the context of Lucy’s respiratory difficulties (a point I return to in greater depth in the final chapter of this dissertation). The Ensley affidavit renders the trunk as something through which this elephant needs to breathe and nothing else.⁹³ By contrast, Poole’s affidavit is a point (in fact, the *only* point) in the *Reece* evidence where the trunk’s complexity is alluded to. Buried within her fifty-seven-paragraph section on elephant biology and ecology are references to the trunk’s dexterity, with her first mention of the

⁹⁰ *Reece*, *supra* note 3 at para 104.

⁹¹ *Ibid.* at paras 107-109.

⁹² Images from the appendices of the *Reece* affidavits are available in the Affidavit of Julianne Woodyer provided for *Zoocheck Canada Inc. v Alberta (Agriculture and Forestry)*, 2017 ABQB 764.

⁹³ Affidavit of Philip K. Ensley [Ensley Affidavit] at para 24.

appendage indicating that the Asian elephant's trunk has a single "finger-like tip" and her second explicitly drawing attention to the trunk's being "dexterous" as a crucial element of elephant foraging.⁹⁴ Notably, Poole also emphasizes that an elephant's trunk signals the complexity of an elephant's mind, commenting that: "Elephants are large-brained ... intelligent ... and inquisitive animals. We only need watch the tip of an elephant's trunk, the posture of its ears and angle of its head to gain a window into its actively engaged mind."⁹⁵ Indeed, Poole's affidavit makes this connection between elephant trunks and elephant minds at multiple points, later drawing attention to the trunk's motions as central to insight into an elephant's mind: "The movement of an elephant's trunk and the positioning of the ears and head are good predictors of what she may do next; as well as being indicators of an active thinking, anticipating mind."⁹⁶

The significance of this affidavit evidence in *Reece* is two-fold. To be sure, it ekes open a crack – albeit, only a very small one, but a crack nevertheless – through which the posthumanist points I pulled from *Reece*'s pieces above could potentially emerge. While Poole uses human-equivalence in her first introduction of the appendage – referring to the trunk's "finger-like tip" – the thrust of her references to the trunk do not equate it to anything on a human body, apparently letting it stand for itself as a part of specifically elephant embodiment. Moreover, like the comments of artist Tim Rechner and spokeswoman Marliss Weber, there is a sense here that the trunk is an appendage through which an elephant's mind comes into view: in "watch[ing] the tip of an elephant's trunk," we find that the mental elements that mark human exceptionalism are not so distinctly human, after all.⁹⁷

⁹⁴ Poole Affidavit, *supra* note 4 at paras 23, 53.

⁹⁵ *Ibid.* at para 39.

⁹⁶ *Ibid.* at para 50.

⁹⁷ *Ibid.* at para 39.

Nevertheless, missing entirely in the *Reece* case itself is any engagement with the art-making trunk-hand I found circulating in *Reece*'s pieces. As indicated above, art-making is not unique to this elephant; yet, despite Poole providing an overview of both wild and captive elephants, no mention of the activity is made. Moreover, where the evidence engages with this elephant's trunk specifically (i.e., the Ensley affidavit), it is in the context of her trunk's *deficiencies* (i.e., sickness). Is it any wonder, therefore, that the Chief Justice's characterization of elephants depended upon humanist metrics of valuation and its supported figure of "the suffering elephant" when the potential disruptiveness of the trunk is nowhere to be found in what was actually brought to court? In this way, Lucy comes into view in *Reece* not as a complex creature whose specificity might disturb human self-aggrandizement, but rather as the suffering subject of human pity.

What would a posthumanist approach do instead? As I outlined above, the posthumanist gesture – in seeking to give value to animals *qua* animals – is not about "giving language back" (or, more specific to the circumstances I have been exploring, "giving hands back") to animals.⁹⁸ That is to say, it is not about finding "special" human qualities in elephants – the things that would, as Deckha observed, render Lucy as an "honourary human" – but instead about displacing our aggrandizement of "the human."⁹⁹ As my exploration of the trunk and its participation in Heidegger's abstract "hand" suggests, the value of an elephant is found not in the fact of its having the same capabilities as us. Rather, what the existence of the trunk-hand suggests is that we, like apes, have only prehensile appendages – not something that transcends all existence and makes us into special darlings of creation *par excellence*, but instead appendages through which we (as animals) try to manipulate the world in meaningful ways. Not

⁹⁸ Wolfe, *Rites*, *supra* note 82 at 79.

⁹⁹ Deckha, *supra* note 5 at para 50.

a shared power, the value accorded to an elephant here rests in the fact that we share in what Jacques Derrida called a “non-power” – the value of the elephant rests in the fact that they, like us, are vulnerable, mortal, and finite.¹⁰⁰

This posthumanist move, however, does not require a focus on Lucy’s suffering. Here one should consider especially how critical biologist Donna Haraway has critiqued Derrida for his overemphasis on “suffering” in his analysis of shared human and animal “non-power”:

... I am not satisfied with [Derrida’s] solution ... There is an unnamable being/becoming with in [sic] copresence ... which is about suffering *and* expressive, relational vitality, in all the vulnerable mortality of both [humans and animals]. I am (inadequately) calling that expressive, mortal, world-making vitality “play” or “work,” not to designate a fixable capability in relation to which beings can be ranked, but to affirm a kind of “non-power at the heart of power” other than suffering. Maybe a usable word for this is *joy*.¹⁰¹

As Haraway goes on to note, a narrow focus on animal suffering would render animals as “discursive victims and little else,” inevitably leading only to a “self-fulfilling search for rights and their denial through abuse” – something inherent in the traditional approaches of animal rights thinkers like Singer or Francione (and seemingly emblematic of *Reece* proper, as well), but which a posthumanist perspective, in its consideration of joy in addition to suffering, allows one to see beyond.¹⁰²

Crucially, “joy is not the same thing as fun.”¹⁰³ As Haraway explains it, joy is “[l]ike copresence” with other living beings; it is “not something we know denotatively or use instrumentally,” but instead it is “something we taste.”¹⁰⁴ That is to say, it is not the individual experience of pleasure or happiness that Haraway is signalling here; rather, “joy” is a kind of energized intersubjectivity – a definition reminiscent of artist Tim Rechner’s comments on the

¹⁰⁰ Derrida, “Animal”, *supra* note 88 at 396.

¹⁰¹ Donna J. Haraway, *When Species Meet* (Minneapolis: University of Minnesota Press, 2008) at 310-311 n 27 [emphasis in original].

¹⁰² *Ibid.* at 311.

¹⁰³ *Ibid.* at 241.

¹⁰⁴ *Ibid.* at 240.

“collaborate relationship” that occurred when “Lucy became more attentive to the marks [he] was making” and “she would do things like pass [him] the brush that she was using or want to paint with the brush [he] was using.”¹⁰⁵ Where Derrida frames intersubjectivity between humans and animals in terms of shared suffering (considering especially the “anguish” of animals as the thing that calls us into intersubjective relations with them), Haraway gets at intersubjectivity through “joy” insofar as it is an “expressive, mortal, world-making vitality [of] ‘play’ or ‘work’” – an “expressive, relational vitality, in all the vulnerable mortality of both.”¹⁰⁶

Perhaps it is all the time I have spent immersed in the discourse of *Reece*’s pieces, but I can hear already the objections of those in the Save Lucy camp (or anyone sympathetic to their position): it is an affront to – in the words of Chief Justice Fraser – “the magnitude, gravity and persistence of Lucy’s on-going health problems and the severity of the suffering she continues to endure” to shift the focus to “joy.”¹⁰⁷ In support of this position, I must note that it would absolutely strain credulity to – in the face of the evidentiary record in *Reece* proper and the subsequent veterinary reports included in *Reece*’s pieces – deny that Lucy the elephant is suffering.¹⁰⁸ Importantly, however, my point here is not to deny this, but rather to show that that perspective alone is over-narrow in its focus.

What a thorough analysis of the entity at the heart of *Reece*’s pieces reveals is this: Lucy is an elephant who suffers *and* who has joy. The relationship to this entity matters not because of romantic notions of how an elephant is “like us” in terms of emotional, social, and cognitive

¹⁰⁵ *Ibid.* at 241; Ryan, *supra* note 63.

¹⁰⁶ Derrida, “Animal”, *supra* note 88 at 396; Haraway, *supra* note 101 at 310-311 n 27.

¹⁰⁷ *Reece*, *supra* note 3 at para 103.

¹⁰⁸ See, e.g., Ensley Affidavit, *supra* note 93; Oosterhuis, *supra* note 35; Jonathan Cracknell, “Elephant Welfare Assessment: Independent Review of Edmonton Valley Zoo’s Elephant Programme Accreditation Variance” (June 2016), online (pdf): *City of Edmonton* <https://www.edmonton.ca/attractions_events/documents/PDF/EVZ_CAZAElephantWelfareAuditJune2016.pdf>.

capabilities, but because we share in a “non-power” – because we share, in the words of Jacques Derrida, in “anguish” *and* because we share, in the words of Donna Haraway, in “joy.”¹⁰⁹

6. Conclusion: Defining an Elephant, Defining Ourselves

I began this chapter by quoting Lord Denning’s comments on the meaning of “fairness”: “Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognize.”¹¹⁰ Ultimately, I agree with his lordship wholeheartedly: elephants are easy to recognize, but defining “an elephant” is not easy in any way at all. That said, what I would contend at this point is this: if one wants really and truly to define an elephant, there are definite pitfalls to avoid and better strategies to adopt. *Reece* proper, where it defined the elephant at its centre, relied on romantic notions of what an elephant was, assigning value to members of this other species because of how they share in human capacities. I am not trying to say that this is wrong, but rather that Deckha’s critique of *Reece* establishes the limitedness of this approach: rather than valuing an elephant as an elephant, this approach merely extends “the human” to include our lesser relations. It does not define an elephant so much as it identifies places where we can see poor copies of ourselves.¹¹¹

To define an elephant as an elephant, therefore, one needs to look beyond just how these creatures reflect aspects of us. I did this by following a thread through *Reece*’s pieces: the trunk and its apparent resistance to being pinned down by any one human-equivalence. Rather than

¹⁰⁹ Derrida, “Animal”, *supra* note 88 at 396; Haraway, *supra* note 101 at 310-311 n 27.

¹¹⁰ Maxwell, *supra* note 1 at 539.

¹¹¹ Cary Wolfe has done well to explain this phenomenon and the problems with it with respect to initiatives to give rights to great apes:

... the model of rights being invoked here for extension to those who are (symptomatically) “most like us” only ends up reinforcing the very humanism that seems to be the problem in the first place. To put it very telegraphically, great apes possess the capacities we possess, but in diminished form, so we end up ethically recognizing them ... because they are inferior versions of ourselves, in which case the ethical humanism that was the problem from the outset simply gets reinforced and reproduced on another level.

See Wolfe, *Rites*, *supra* note 82 at 192.

being a momentary stumbling block, I showed that this comes up again and again in no shortage of ways, with the metaphors employed by veterinarians, businesspeople, artists, and journalists breaking down under minimal scrutiny. Most relevant, however, was what this reveals about us: that the reason the comparison is often fraught is because we do not, in fact, have the things – like the abstract “hand” thinkers like Heidegger attributed to us – we claim to have, but rather participate in them in some incomplete way just as creatures like elephants do. Insofar as defining an elephant requires recognizing *everything* we see when we see an elephant and not just those elements that reinforce human specialness, the act of defining requires us also to redefine ourselves.

Chapter 4

From Home to Hospice: Interrogating the Logics and Limits of Place in *Reece*'s Pieces

1. Introduction

It should come as no surprise to hear that “place” plays a significant role in *Reece*'s pieces. After all, a central issue animating the debate around Lucy the elephant was about whether or not to relocate her from one place (the Edmonton Valley Zoo) to another place (an elephant sanctuary in the United States).¹ Moreover, while *Reece v Edmonton (City)* is not expressly oriented toward relocating Lucy, “place” remains at its forefront.² That is, in the legal case, what Tove Reece, Zoocheck, and PETA were seeking was a declaration that the City was in violation of s. 2 of the *Animal Protection Act* for causing Lucy to be in distress – in large part because of the conditions in the place where she was kept.³ Although these “conditions” imply many things – such as her medical care, exercise routines, etc. – at issue here was also her specific place in this specific Zoo: an ostensibly subpar enclosure located in a climate too far

¹ As journalist Jana G. Pruden breaks it down in her longform retrospective on the Lucy the elephant debate, Depending on whom you believe, Lucy is comfortable and content living at the Edmonton Valley Zoo, where she is deeply bonded with the humans who work with her, and receiving excellent care. Or, she is lonely and miserable, existing in a state that is nothing less than animal abuse, even torture. This has resulted in a “movement to have Lucy relocated has been ongoing for two decades,” to which Zoo-aligned sources have responded that “Lucy has a breathing problem serious enough that she could die if she were moved.” See Jana G. Pruden, “Cage Match”, *Globe & Mail* (16 July 2016) F1.

² *Reece v Edmonton (City)*, 2010 ABQB 53 [*Reece* (QB)]; *Reece v Edmonton (City)*, 2011 ABCA 238 [*Reece*]. As to the specific focus of the *Reece* Applicants' lawsuit, journalists Alexandra Zabjek and Gordon Kent succinctly telegraph it as such: “[The Applicants want] a judge to issue a declaratory judgment that Lucy is in distress, deprived of adequate shelter and space, or that she is in pain and suffering – all conditions not permitted by Alberta's Animal Protection Act. [The Applicants' attorney] said if a judge ruled in his clients' favour, the city would have a moral obligation to take action.” Although “relocation” of Lucy was not specified by the Applicants as the kind of declaratory relief they sought, this was widely taken to be their implied target, evidenced by comments such as journalist Tim Cook's summary that *Reece* (QB) was “a court bid ... to have Lucy moved to a U.S. sanctuary.” See Alexandra Zabjek & Gordon Kent, “Animal rights groups take Lucy's case to court”, *Edmonton Journal* (2 February 2010) B3; Tim Cook, “Humane society says it will look into fresh complaint about Edmonton elephant”, *Canadian Press* (5 October 2010).

³ *Animal Protection Act*, R.S.A. 2000, c. A-41.

north for an elephant to thrive in (which Reece, Zoocheck, and PETA alleged was a main contributing factor to Lucy's distress).

In researching for this chapter, I set out to uncover how "place" played out across *Reece's* pieces. As such, I anticipated writing a chapter that explored how locales like the Valley Zoo or the city of Edmonton (where Lucy currently resides), American elephant sanctuaries (where Lucy might potentially go), or the Sri Lankan wilderness (where Lucy was born) operated in the discourse. However, what I found was that, regardless as to whether one is speaking about a particular locale like a zoo, a city, a sanctuary, or a wilderness, the thing which gives salience to that locale in *Reece's* pieces was almost invariably its connection to a simple – yet complex – idea: "home." That is to say, in its most essential form, the debate which animates the conflict among the speakers of *Reece's* pieces is, at its heart, one over where Lucy belongs: what her *home* is, was, and/or ought to be. "Home" thus functions as a cluster concept that pervades *Reece's* pieces – a point around which disparate ideas, alignments, and tensions are organized throughout.⁴

Of course, there are few words in the English language that are as loaded in meaning or as semantically slippery as "home." As psychologist Jeanne Moore has observed, "home" as a term or concept is a mainstay of scholarly work spanning virtually every field of the social sciences and humanities; however, despite how commonplace reliance on the concept of home is, there is no clear consensus on what exactly "home" refers to.⁵ Etymologically, "home" has long been an expansive and flexible term, originally referring to wider realms like one's "native village, birthplace or country," before shifting in the seventeenth and eighteenth centuries to

⁴ Anthropologist Mary Douglas has underscored that "the home" is a relational ordering concept of space and time. See Mary Douglas, "The Idea of a Home: A Kind of Space" (1991) 58:1 *Social Research* 287.

⁵ Jeanne Moore, "Placing *Home* in Context" (2000) 20 *Journal of Environmental Psychology* 207.

include more narrow references to places like one's house.⁶ To this end, sociologist Ilan M. Magat has commented,

[Home] is a simple, yet powerful idea. Simple, and indeed intimate, because almost everyone has some understanding, experience, or perception of the term. ... It can be a structure, a feeling, a metaphor, and a symbol. ... It can stand for anything – from a trailer, to a land of origin, to the universe.⁷

In other words, to invoke the word “home” is to potentially refer to an endless variety of locations.

In discovering the pervasiveness of “home” in *Reece's* pieces, I found great insight in terms of how to work with it in the words of architecture scholar David N. Benjamin, who has this to say as part of closing his edited volume, *The Home: Words, Interpretations, Meanings, and Environments*:

[T]he very breadth of meaning of the term taken together with its prevalence should inspire us to try to understand the essence of the concept, not to “improve” the term like some new dishwashing soap or throw it out like last-year's automobile, but rather to deepen our understanding of it.⁸

Benjamin's point seems to be this: rather than declare “home” to be a frustratingly ambiguous concept that can seemingly mean all things to all people, one ought to lean into and explore the vast expansiveness of the term such that it becomes a *usefully* ambiguous concept instead.⁹ In following “home,” one finds a way into foundational logics of place in *Reece's* pieces – and the limits of those logics, as well.

Thus, my first endeavour in this chapter – one I undertake in section 2 (“Going Home”) below – is to trace this concept as it circulates throughout *Reece's* pieces. This section is divided

⁶ *Ibid.* at 208-209.

⁷ Ilan N. Magat, “Israeli and Japanese Immigrants to Canada: Home, Belonging, and the Territorialization of Identity” (1999) 27:2 *Ethos* 119 at 120.

⁸ David N. Benjamin, “Afterword, or Further Research Issues in Confronting the Home Concept” in David N. Benjamin, David Stea & Eje Arén, eds., *The Home: Words, Interpretations, Meanings, and Environments* (Aldershot: Avebury, 1995) 293 at 294.

⁹ On this point, see also Jed Meers, “‘Home’ as an essentially contested concept and while this matters” (2021) *Housing Studies* 1.

into two subsections, with each one tackling a different way the idea of home is deployed in the discourse. In the subsection “Home is Where the (Tropical) Heart is,” I detail how the idea of Lucy’s origin is put in relation to her current emplacement, finding that her “homeland” is defined by vaguely orientalist overtures to a place of exotic tropicality and that there is an implicit debate over whether or not a sense of “new home” can be attributed to the latitude and longitude at which Lucy the elephant lives today. What this debate turns on is the idea of “home” being defined by more than just geographic place, but instead meaningful relation to others. Thus, in the subsection “Making a House into a Home,” I look to how the same debate plays out with respect not to global geography, but particular physical locales, such as the Zoo and elephant sanctuaries. Employing legal scholar Lorna Fox’s hypothesis that “*home* = house + x,” I find that the central issue here is less about any particular shelter or housing situation and more about the deeply evocative “x factor” that makes a house a home – something which all discourses (whether aligned with the Zoo or the Save Lucy campaign) locate in meaningful relations over all else.¹⁰

All of this, however, leads to my second endeavour in this chapter: demonstrating how the concept and the contours of “home” flowing through *Reece*’s pieces in fact reveal the *limits* of the discourse. For all of the speakers of *Reece*’s pieces, “home” and its cognates have invariably positive connotations. Yet, as feminist scholars have contended, this may be little more than patriarchal false consciousness, with the logic of “home” lending itself to being a place of “terrifying love” for women subject to gender-based violence.¹¹ Therefore, in this “Leaving Home” section, I consider what the limits of the discourse have been.

¹⁰ Lorna Fox, “The Meaning of Home: A Chimerical Concept or a Legal Challenge?” (2002) 19:4 *Journal of Law and Society* 580 at 590 [Fox, “Meaning of Home”] [emphasis in original].

¹¹ Jeannie Suk, *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy* (New Haven: Yale University Press, 2009) at 4. Note that Suk appears to be alluding here to Lenore E. Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (New York: Harper Perennial, 1990).

In the subsection “A Man’s Home is His Castle,” I outline some of the ways in which Lucy has not only been gendered in *Reece’s* pieces, but specifically gendered as a subordinate or a victim in a compulsorily-heterosexual framework for which species presents no absolute barrier. This is to say, the idea of “meaningful relations” that a home engenders can be relations of hierarchy and dominance. Nevertheless, where this first subsection considers feminist critique as a way to show the limits of “home” as it is spoken about in *Reece’s* pieces, in the subsequent subsection (“Homelessness and Hospices”), I explore a possibility seemingly unspeakable within the discourse of *Reece’s* pieces: that, in the context of mass habitat destruction, the climate crisis, and extinction, Lucy is globally homeless. More than the feminist critique (i.e., that looking for a home may equate to looking for a space modelled on hierarchy and dominance), this second subsection starts from an altogether more tragic position: there is no home to be found. Following this idea where it leads, I thus conclude with an alternative idea to understand the place of Lucy: not the home, but the “hospice.”¹² Ultimately, my point is this: “home” is the conceptual thread that weaves together all of the places invoked in the debate over Lucy that permeates *Reece’s* pieces – and that may, in fact, be the primary conceptual obstacle that the discourse here is unable to overcome.

2. Going Home

2.1 Home is Where the (Tropical) Heart is: Establishing Meanings for Lucy’s Geographic Origin and Current Emplacement

In assembling a corpus of *Reece’s* pieces, I chose as the chronological starting point November, 2005, when the Zoo presented its proposal for future developments to the Edmonton city council – prompting a debate over whether or not Lucy should remain in the Alberta capital.

¹² See generally Juno Salazar Parreñas, *Decolonizing Extinction: The Work of Care in Orangutan Rehabilitation* (Durham: Duke University Press, 2018).

Turning to that document, what one finds is this guiding idea for the future of the Zoo: “Canada’s Cold Climate Zoo with a Tropical Heart.”¹³

As the 2005 *Master Plan* explains it, this theme “was developed to underscore the fact that the Zoo can easily create powerful displays about cold-adapted animals from around the world and interpret how they compare to Canada’s native species while also contrasting habitats from another area of ‘extreme’, namely the equatorial regions.”¹⁴ In other words, the Zoo can use Edmonton’s northern climate to its advantage. In making this proposal, the Zoo was keeping step with the changes many zoos the world over have undertaken in recent decades. Indeed, in press coverage of the changes to the Edmonton Valley Zoo, explicit comparisons of its vision were made to the Arizona-Sonora Desert Museum, which (in embracing its own surrounding habitat and climate) is “part botanical garden (based on local vegetation and landscapes), part natural history museum, and part zoo – with complex, naturalistic exhibits of animals native to the region and a truly educational mandate.”¹⁵ This trend in zoos means, as philosopher Dale Jamieson has noted, that the distinction between “miniparks or megazooos” is becoming harder to sustain, since zoos

... are becoming more naturalistic in environment ... Zoos in the future, at least the better ones, will increasingly become more like parks. Parks and preserves are changing as well. They are becoming more like zoos. In 1987 Kenya’s Lake Nakuru National Park was completely fenced. It is only a matter of time until large East African mammals are managed in much the same way as domestic animals, as has already been suggested by

¹³ City of Edmonton Community Services & Valley Zoo Development Society, *Valley Zoo Master Plan Update — 2005* (Bainbridge Island, Washington: Studio Hanson Roberts, 2005), online (pdf): *City of Edmonton* <<https://webdocs.edmonton.ca/octopusdocs/Public/COMPLETE/REPORTS/CC/Elected-1995/2005-11-29/2005CSR014%20-%20Attach%201.pdf>> [*Master Plan*].

¹⁴ *Ibid.* at 10.

¹⁵ Todd Babiak, “Valley Zoo in dire need of a renaissance”, *Edmonton Journal* (4 June 2009) B1. See also, Todd Babiak, “Is the elephant irrelevant in the zoo of the future?”, *Edmonton Journal* (23 July 2009) B1; Todd Babiak, “Chapter closes in the aging Storyland Valley Zoo”, *Edmonton Journal* (23 October 2010) A2.

the World Conservation Union. This tendency towards management is also at work in the national parks in [the United States].¹⁶

The world over, wildlife parks are becoming more zoo-like insofar as they require greater human intervention for preservation, while zoos are simultaneously becoming more park-like with the continued adoption and expansion of “landscape immersion” exhibits that take advantage of their pre-existing surrounding environments.¹⁷

However, maintaining a “tropical heart” does not fit with this trend insofar as it requires maintenance of simulated environments and species in no way indigenous to the Zoo’s locale.¹⁸

In light of this fact, how the 2005 *Master Plan* envisions the Zoo’s “tropical heart” is worth analyzing. Its proposal is as follows:

Africa is the warm heart of the Zoo. Here at the Zoo’s centre, visitors experience some of the world’s best-known large mammals, the elephant, zebra, and the spectacular [b]lack and white colobus swinging overhead. ... [L]arge outdoor habitats immerse visitors in a landscape that simulates the expansive African savannas — seasonally of course. During Edmonton’s long winter, large earth-sheltered, sod-roofed buildings located close to the visitor path provide shelter for animals, as well as shelter and up-close viewing for visitors.¹⁹

¹⁶ Dale Jamieson, “Zoos Revisited” in Bryan G. Norton, Michael Hutchins, Elizabeth F. Stevens & Terry L. Maple, eds., *Ethics on the Ark: Zoos, Animal Welfare, and Wildlife Conservation* (Washington: Smithsonian Institution Press, 1995) 52 at 53.

¹⁷ See, e.g., Helena Pedersen & Natalie Dian, “Earth Trusts: A Quality Vision for Animals?” in Ralph R. Acampora, ed., *Metamorphoses of the Zoo: Animal Encounter after Noah* (Lanham: Lexington Books, 2010) 171. See also Rebecca Cassidy, “Introduction: Domestication Reconsidered” in Rebecca Cassidy & Molly Mullin, eds, *Where the Wild Things Are Now* (Oxford: Berg, 2007) (suggesting that the distinction between “wild” and “domesticated” is increasingly debatable).

¹⁸ Arguably, the aim of this kind of exhibit in zoos in general — one which simulates environments quite foreign to the locale — is a tactic to construct a sense of human mastery over or separateness from “nature” more widely. See, e.g., Steven Best, “Zoos and the End of Nature” (no date), online (pdf): *Zoocheck* <<http://www.zoocheck.com/wp-content/uploads/2015/04/Zoos-and-the-End-of-Nature.pdf>>; Kay Anderson, “Culture and Nature at the Adelaide Zoo: At the Frontiers of ‘Human’ Geography” (1995) 20:3 *Transactions of the Institute of British Geographers* 275.

¹⁹ *Master Plan*, *supra* note 13 at 19.

While the above passage opens by noting several of the charismatic megafauna²⁰ to be found in the Zoo's "tropical heart," only a specific population of animals receives attention in this section of the *Master Plan*: elephants. As the *Master Plan* envisions it,

The Zoo's herd of four elephants is dominated by its matriarch and her female offspring. Much like in the wild, the one young male will remain with his mother only until he is old enough to emigrate to a zoo with the specialized facilities needed to care for a full-grown bull elephant.²¹

There is, of course, no shortage of problems with the future the Zoo was dreaming of here – foremost among them being the apparent "dream logic" where mutually contradictory pieces of information sit easily side by side. While not outright discounting the possibility that the Zoo may one day have a proper herd of elephants at its facility, the *Master Plan*'s recommendation for the immediate future was, in fact, to send away Samantha on breeding loan and retain only Lucy.²² Moreover, in terms of external validity, veterinarian Debi Zimmermann was among the first to point out that when the Zoo included

... a herd of four elephants ... in their vision for their Africa Exhibit, it is assumed that they are including their elephants, Lucy, Samantha, and then Samantha's baby. Lucy is an Asian elephant, and Samantha an African elephant, and these two distinct elephant species would not be found together in nature. By including Lucy in an "African" exhibit and by adding her into a mixed species herd, the Zoo would be misleading the very public they claim to want to educate.²³

Although the Zoo did not go ahead with the plan to include Lucy in an "Africa Exhibit," why the Zoo thought this was possible to do (despite her Asian origins) is worth investigating.

²⁰ "Charismatic megafauna" is the zoo-talk term for "animals — nearly always mammals — that have strong popular appeal, such as tigers, wolves, and elephants. These animals are often (but not always correctly) assumed to be the species that zoo visitors most want to see." See Geoff Hosey, Vicky Melfi & Sheila Pankhurst, *Zoo Animals: Behaviour, Management, and Welfare* (Oxford: Oxford University Press, 2009) at 48.

²¹ *Master Plan*, *supra* note 13 at 19.

²² *Ibid.* at 35-36. In terms of the drawbacks of losing both the Zoo's elephants, the *Master Plan* notes that, "Lucy is Zoo icon ... Elephant is Zoo's logo ... Zoo will loose [sic] its cause célèbre for fundraising."

²³ Debi Zimmermann, "One Veterinarian's Search for Truth in the 'Lucy the Elephant Debate'" (30 June 2009), online (pdf): *Save Lucy* <<http://www.savelucy.ca/reports/ZimLucyReportJune2009.pdf>> at 58-59 [emphasis deleted]

To my mind, the *Master Plan*'s proposal to include Asian-born Lucy in an "Africa Exhibit" calls the question: who cares where Lucy even came from?²⁴ I do not mean this question to be flippant, but rather to underscore an apparent apathy about the geographic specificity of Lucy's origins. To put the question another way, one might ask: what aspect of Lucy's origin matters at all to those who speak of her?

Striking to me are the exceptionally vague and murky terms in which people speak of her "homeland."²⁵ For instance, *Edmonton Journal* letter-writer Kim Cole vaguely comments that "Lucy was taken from her homeland decades ago and placed at the zoo."²⁶ With somewhat more description, letter-writer Hazel Sangster paints a picture of Lucy's place of origin, but not in a way that is less vague: "In an ideal world, Lucy would be roaming the Asian forests with her family, free from the threat of poachers, unbothered by gaggles of gawking, photo-snapping 'ecotourists,' munching happily on grass and trees that have not yet been gobbled up by development."²⁷ Similarly, journalist Paula Simons imagines that, if Lucy had not come to Edmonton, "she would have spent her life in a nice, warm climate, with an elephant family."²⁸

²⁴ Looking also to *Reece*, one finds information on Lucy's origins dismissed with quite perfunctorily, with Chief Justice Fraser's dissent being the only mention of "Sri Lanka" – and, even then, only as part of paragraph 105, generally overviewing Lucy's history. In the affidavit evidence, only one affiant, Joyce Poole, makes any reference to Lucy's origins. See Affidavit of Dr. Joyce Poole at para 79.

²⁵ There seems to be a great deal of confusion in *Reece*'s pieces as to Lucy's Sri Lankan origins, despite this information being among the first sentences on virtually every official and unofficial website concerning Lucy. In terms of official sources, a 2009 copy of the Zoo's "All About Lucy" webpage informs readers that "Lucy came to the Valley Zoo more than 30 years ago as an orphan from Sri Lanka" and a 2018 copy of its "Lucy the Elephant" webpage similarly notes "Lucy was orphaned in Sri Lanka and was brought to the Edmonton Valley Zoo through partnership with the Pinnewala Elephant Orphanage and Colombo Zoo." See "All About Lucy" (13 August 2009), online: *Internet Archive WayBack Machine* <<http://web.archive.org/web/20090813114953/http://www.valleyzoo.ca:80/pages/Lucy/default.aspx>>; "Lucy the Elephant" (no date), online: *City of Edmonton* <https://www.edmonton.ca/attractions_events/edmonton_valley_zoo/lucy-news.aspx>.

²⁶ Kim Cole, "Lonely Lucy needs new life at a sanctuary", Letter to the Editor, *Calgary Herald* (3 December 2012) A11.

²⁷ Hazel Sangster, "Life isn't always ideal", Letter to the Editor, *Edmonton Journal* (20 September 2009) A19.

²⁸ Paula Simons, "Hollywood's hand-wringing over Lucy may backfire", *Edmonton Journal* (18 September 2009) B1.

Journalist Joel Tiller speaks of the “green tropics that are [Lucy’s] natural habitat,”²⁹ while former *Jackass* star Steve-O laments that Edmonton is “freezing cold, man, and I couldn’t help but think that if I was feeling that cold I wonder how Lucy feels, when her natural habitat is so warm.”³⁰

Even where Lucy’s exact geographical origin is invoked, it is often accompanied by only one specific piece of information: its climate. In a blog post, PETA member Alisa Mullins notes that Lucy is “native to Asia’s tropical jungles,”³¹ while the Save Lucy website likewise speaks of Lucy being “born in the tropical forests of Sri Lanka.”³² More to the point, other sources do not bother even specifying the jungles as the relevant environ, such as the activist group Friends of Lucy telling its Twitter followers that Lucy is simply “from tropical Sri Lanka.”³³ To most speakers, it matters little at what exact latitude and longitude Lucy’s origins sit. Rather, it matters only that she is from somewhere tropical.

At first, the vague mystique or unspecified exoticism which accompanies mentions of Lucy’s “homeland” may seem to be a textbook case of orientalism. In opening his foundational

²⁹ Joel Tiller, “Group equates Edmonton elephant’s habitat with solitary confinement”, *Globe & Mail* (2 February 2010) A10. See also, Connie Woodcock, “Elephant fanatics trump the experts”, Letter to the Editor, *Edmonton Sun* (5 December 2011) 15 (referring to all of the elephants in Canada as “giants from the tropics”).

³⁰ Heath McCoy, “More than just a funny face” *Calgary Herald* (23 March 2011) E1.

³¹ Alisa Mullins, “Lucy Heads to the Supreme Court” (28 September 2011), online (blog): *PETA* <<https://www.peta.org/blog/lucy-heads-supreme-court/>>.

³² “Home” (no date), online: *Save Lucy* <<http://www.savelucy.ca/Home>>. See also, “Lucy’s Story” (no date), online: *Save Lucy* <<http://www.savelucy.ca/background>>; “The Problems” (no date), online: *Save Lucy* <<http://www.savelucy.ca/the-problems>>. See also, Joan E. Thurman, “Bob Barker Says Lucy Is the Poorest Elephant in the World” (October 2016), online (blog): *Women’s Supremacy Now!* <<https://womenssupremacynow.blogspot.com/2016/10/bob-barker-says-is-poorest-elephant-in.html>> (commenting that “Lucy was kidnapped as a baby along with other ‘phants from tropical Sri Lanka’s 640,000 elephant foraging acres”).

³³ Friends of Lucy, “Lucy is 42 years old, from tropical Sri Lanka, locked up at #yegzoo through 41 Edmonton winters, and has suffered captivity-related diseases including arthritis & foot disease for decades. Zoo claims she can’t travel, but won’t allow any but their own biased vets to examine Lucy.” (23 January 2018 at 8:55PM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/956027624974946304>; Friends of Lucy, “Not cool to force an Asian elephant from tropical Sri Lanka like LUCY to live in this #Canadian climate! #yeg #yegzoo #yegcc Not cool: Edmonton is now colder than both North Pole and South Pole” (29 December 2017 at 4:52PM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/946906873386676225>. See also Alicja Siekierska, “Valley Zoo on ‘Hall of Shame’ list” *Edmonton Journal* (12 January 2015) A3 (noting that “Edmonton’s cold climate ... [is] drastically different from the tropical one in Sri Lanka, where Lucy was born”).

book on the subject, postcolonial theorist Edward W. Said commented that “[t]he Orient was almost a European invention, and had been since antiquity a place of romance, exotic beings, haunting memories and landscapes, remarkable experiences.”³⁴ In the West, the Orient tantalizes the imagination with images of things like “exotic beings” – and, with their immense size and alien appendages, it is safe to say that elephants would fall into this category.

However, if it is orientalism that is at play here, it is orientalism of a specifically “tropical” variety. Following in the tradition of Said, geographer David N. Livingstone has contended that “how we think of the tropics today, and certainly how the tropics have been constructed in the western tradition, is the compound product of philosophical discourse, global circulation, and disciplinary interventions.”³⁵ In his own work, Said underscored that, while orientalism is an abstract orientation that requires an “out there” (a real place to which people, things, and ideas can be attributed), it has since the eighteenth century also been enabled by a perpetual Western mining of material “suitable for study in the academy, for display in the museum, for reconstruction in the colonial office, for theoretical illustration in anthropological, biological, linguistic, racial, and historical theses about mankind and the universe.”³⁶ Where Said’s glossing does well to cover the overall pattern of Western mining of the “Orient” and disciplining thereof in museums, libraries, and universities, Livingstone’s analysis highlights a structure more germane to the case at hand. In particular, the geographer points out how in botanical and zoological gardens,

... in one way or another, artistic performance, aesthetic taste, design preferences and scientific learning combined to stage tropicality for home viewing. In both — and not least in the “tropical house” — the arrangement of plants and animals was intended to deliver to visitors a scientific map of the globe rearranged according to the norms of

³⁴ Edward W. Said, *Orientalism* (London: Routledge, 1978) at 9.

³⁵ David N. Livingstone, “Tropical Hermeneutics: Fragments for a Historical Narrative” 21:1 (2000) *Singapore Journal of Tropical Geography* 92 at 97.

³⁶ Said, *supra* note 34 at 15.

European taxonomy. Thereby, the “otherness” of tropical plants and animals could be interpreted to home audiences in ways that conveyed messages about their “proper place” in the scheme of things. After all, the keeping and showing of exotic plants and fierce animals was simultaneously emblematic of human power over the natural order, of metropolitan control over peripheral territory, and of imperial dominion over colonial empires.³⁷

To this end, the Zoo’s proposed “tropical heart” continues in the colonial tradition of the “tropical house” – a space where, out of material pieces taken from far-off places, the tropics are conceptually constructed.³⁸

This being said, while Lucy certainly constitutes one of the material things taken from the “tropical orient” and placed on display in the West to facilitate Westerners’ conceptual construction of that tropical orient, she nevertheless differs from a thing like a cultural artifact or a species of plant. That is to say, speakers attribute to Lucy a subjective sense of her current location in relation to her place of origin. It is not *just* that she is from somewhere far-off and warm; rather, it is that she is now somewhere else and has feelings about these places in relation to each other. For instance, returning to a comment that alludes to her homeland, one could consider here Steve-O’s remark that Edmonton is “freezing cold, man, and I couldn’t help but think that if I was feeling that cold I wonder how Lucy feels, when her natural habitat is so warm.”³⁹ Likewise, Friends of Lucy also contends that Lucy has a subjective sense of here versus

³⁷ Livingstone, *supra* note 35 at 95. As literary scholar Neel Ahuja, *infra*, has noted at 556-557, “imperial encounters” such as these are best seen “[b]y tracing the circulation of nonhuman species as both figures and materialized bodies within the circuits of imperial biopower.” See Neel Ahuja, “Postcolonial Critique in a Multispecies World” (2009) 124:2 *PMLA* 556; Christabelle Sethna, “The Memory of an Elephant: Savagery, Civilization, and Spectacle” in Joanna Dean, Darcy Ingram & Christabelle Sethna, eds, *Animal Metropolis: Histories of Human-Animal Relationships in Urban Canada* (Calgary: University of Calgary Press, 2017) 29; Harriet Ritvo, “Exotic Captives” in *The Animal Estate: The English and Other Creatures in the Victorian Age* (Cambridge: Harvard University Press, 1987) 205.

³⁸ This conceptual construction is not neutral or innocuous. Just as Said notes with orientalism, this construction does not arise out of a “necessity of the imagination,” but out of “a relationship of power, of domination, of varying degrees of a complex hegemony” (see Said, *supra* note 34 at 13).

³⁹ McCoy, *supra* note 30. See also, the Save Lucy website’s homepage, *supra* note 32: “While the Valley Zoo and the City of Edmonton try to paint a rosy, almost idyllic, picture of Lucy’s life, the reality is quite different. A highly social, extremely intelligent, wide- ranging animal that was born in the tropical forests of Sri Lanka should not live alone in a tiny, barren zoo exhibit in a northern city.”

there, implying a level of resentment for her relocation: “How do you think Lucy feels after likely seeing her mother killed in Sri Lanka so the Valley Zoo could purchase her?”⁴⁰ It is not simply that she is *something* that illustrates the place from which she originated; instead, as speakers conceive of her, she is *someone* who understands her current location and her original location in relation to each other.

This coincides with what novelist and literary critic Salman Rushdie has called an “imaginary homeland.”⁴¹ As previously indicated, although orientalism is primarily conceptual in nature, it nevertheless still requires real material things as its fundamental building blocks: it refers to real places and takes real things from them as part of the work of that conceptual construction. Rushdie’s idea is similar; however, where it differs is with respect to who is doing the conceptual construction. That is, an “imaginary homeland” refers to a real place, although in a way that has been heavily abstracted not by colonizers, but rather by a diasporic community itself. Even those who come from “the Orient” have a sense of what the Orient is after having left it. Theirs is not, however, an unmediated or direct experience; it too is made according to relations of East and West, of things and people, and of this place and that.

⁴⁰ Friends of Lucy, “We are aware of this as well, we spend a great deal of time studying elephants in the wild and in captivity. Gay Bradshaw has written about PTSD in elephants too. How do you think Lucy feels, after likely seeing her mother killed in Sri Lanka so the Valley Zoo could purchase her?” (20 March 2018 at 1:12AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/975978255806291969>.

⁴¹ Speaking of his own experience, Rushdie has commented as an Indian immigrant to Britain: “... if we do look back, we must ... do so in the knowledge ... that our physical alienation from India almost inevitably means that we will not be capable of reclaiming precisely the thing that was lost; that we will, in short, create fictions, not actual cities or villages, but invisible ones, imaginary homelands, Indias of the mind.” See Salman Rushdie, *Imaginary Homelands* (London: Granta Books, 1991) at 9.

Being an elephant, Lucy cannot represent herself in language as human diasporics can.⁴²

However, this has not prevented those speaking about her from attributing a here-and-there home-attachment characterization to her. To understand exactly how speakers frame her relation to her current home and her original home, it may be useful to survey how Ilan M. Magat has captured the perspectives of two groups of human immigrants in Edmonton (and, more specifically, how they articulated their present “home” in Edmonton in relation to their “homelands” in markedly different ways) in order to get a sense of how relations between current place and place of origin can variously be figured.⁴³

Comparing relative self-understandings of residency in the Alberta capital, Magat found that, for his group of Israeli interviewees, “Home is such a loaded, meaningful, all-encompassing term that admitting Israel could cease to be Home is almost inconceivable.”⁴⁴ That is to say, for them, the homeland is home; Edmonton is just where they live for now.⁴⁵ By contrast, his Japanese interviewees did not “equate home with personal or national identity and culture, nor with ultimate belonging. They always referred to ... [home as] physical structure, family, neighborhood, city.”⁴⁶ For one of Magat’s Japanese interviewees, “[h]ome is not location, it is *relationships*”; “physical location” becomes important only because those with whom one has

⁴² This is not to say that Lucy cannot represent herself at all, but merely to distinguish her ways of doing so from the verbal articulations produced by human diasporics. On the matter of elephants representing their subjective experiences in ways that can be studied by scholars, one might consider historian Susan Nance’s observation that “[a]lthough elephants never kept diaries or wrote newspaper columns, they marked the historical record with footprints and dung, the accounts of injured or amazed bystanders, broken bridges and barns, images in photographs, the shape of harnesses and fetters, and other ‘traces’ that we will find if we look for them.” See Susan Nance, *Entertaining Elephants: Animal Agency and the Business of the American Circus* (Baltimore: Johns Hopkins University Press, 2013) at 10.

⁴³ Magat, *supra* note 7 at 120. This is not to imply a one-to-one correlation between the self-reported experiences of human immigrants and the experience attributed to Lucy the elephant. Rather, following legal scholar Catharine MacKinnon’s observations about intra-human sexism and extra-human speciesism, I suggest the parallels evident here are undoubtedly “instructive.” See Catharine A. MacKinnon, “Of Mice and Men: A Feminist Fragment on Animal Rights in Cass R. Sunstein & Martha C. Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (Oxford: Oxford University Press, 2004) 263 at 264 [MacKinnon, “Mice and Men”].

⁴⁴ Magat, *ibid.* at 122-123 [emphasis deleted].

⁴⁵ *Ibid.* at 125. One Israeli interviewee powerfully put it, “I just live here ... but, really, my *life* is there” [emphasis in original].

⁴⁶ *Ibid.* at 129.

significant relationships are in that physical location.⁴⁷ From this, Magat observed that, for Japanese immigrants, “[l]oyalty is given to the small, face-to-face group, not to a large, intangible entity, such as a nation. Home is grounded in other people.”⁴⁸

Turning to *Reece*’s pieces, an echo I hear is in how speakers conceptualize Lucy’s “home” like that of the Japanese immigrants’ understanding of their residency in Edmonton: that it is a home “grounded in other people.” This becomes evident when one investigates a common contention that animates the overt debate in *Reece*’s pieces: that Lucy should be with “her own kind.” The issue for the debaters rests in a disagreement over just who or what Lucy’s “kind” is. The poles in the debate are well-represented by the Zoo on one side and the Save Lucy campaign on the other. For instance, the Zoo’s “Let’s Crush the Myths” infographic gives us this rundown of Lucy’s relation to the human beings around her:

She is what is often called a “people elephant”, and her herd is her zoo family – the keepers and trainers who spend their days with Lucy. ... Lucy has had opportunities to socialize with both Asian and African elephants in the past, but these interactions demonstrated her lack of understanding of elephant dynamics; she simply did not do well in these situations.⁴⁹

In other words, Lucy is already with her own kind: people at the Zoo. Contrariwise, under the heading “No Elephant Family,” the Save Lucy website contests the Zoo’s claim as follows:

At the Valley Zoo, Lucy is kept alone. The zoo says her keepers are her family, that she has bonded with them and that it would be too stressful to be with other elephants. But her keepers are nothing like a real family or herd. ... Think about it. Lucy’s keepers at the Valley Zoo go home at the end of the day. And when they do, Lucy is left alone in her spartan indoor barn, until the next morning. Elephant families don’t disband in the evening and then reassemble the next morning. ... Lucy’s keepers are nothing at all like a real elephant family.⁵⁰

⁴⁷ *Ibid.* at 134 [emphasis added].

⁴⁸ *Ibid.* at 131.

⁴⁹ “Let’s Crush the Myths” (no date), online (pdf): *City of Edmonton* <https://www.edmonton.ca/attractions_events/documents/LucyMyths.pdf>.

⁵⁰ “The Problems”, *supra* note 32.

For the Save Lucy campaign, the Zoo's claim is ludicrous. How can Zoo staff be Lucy's own kind when they are nothing like elephants?

Many, however, do not frame one's "kind" as determined by species. In a letter to the editor of the *Edmonton Journal*, President of the Valley Zoo Development Society Jean Dunford highlights evidence of an elephant at the Tennessee Elephant Sanctuary bonding with a dog to illustrate that species membership hardly seems to be the defining characteristic in forming relevant relationships. Noting that others "suggest that Lucy needs to be with 'her own kind,'" Dunford points out that "Lucy was with Samantha for many years and the two elephants never bonded." Instead, Lucy "is closely bonded with the people who care for her. To tear her away from everything and everyone she has known for 32 of her 34 years and break this bond would be exceptionally cruel."⁵¹

Along similar lines, others mourn the misfortune that would befall Lucy if she were to be separated from those humans to whom she is connected. For instance, Linda Ockwell-Jenner commented in a letter to the editor:

After reading the debate about Lucy the elephant who has lived at Edmonton Zoo for 32 years, I feel very sad for her – not because she lives at the zoo and is well loved and well looked after and has a bond with everyone who looks after her, but because she might be taken away from an environment she loves because animal rights advocates say they know best.⁵²

Likewise, the blog *Climbing out of the Dark* extends the love for Lucy beyond just her keepers, asserting that "Lucy has spent all her life here, this is all she knows, and she is loved by her caregivers and Edmontonians. We are doing everything we can to make her life comfortable, and

⁵¹ Jean Dunford, "Let Lucy stay among friends", Letter to the Editor, *Edmonton Journal* (30 August 2009) A15.

⁵² Linda Ockwell-Jenner, "Lucy has a home", Letter to the Editor, *Record* (1 September 2009) A8. Similar sentiments appear in Wanda Curzon, "Seeing is believing", Letter to the Editor, *Edmonton Journal* (13 September 2009) A15.

PETA wants to tear her away from everything she has ever known and send her to a strange place, to probably die.”⁵³

For everyone in the Lucy debate, it seems that Lucy’s “homeland” is defined by vaguely orientalist overtures to a place of exotic tropicality – and, while this defines how her current emplacement is understood, there is an implicit debate in *Reece*’s pieces as to whether or not Lucy is really “home” in Edmonton now. Those interested in keeping her in Edmonton figure her as having meaningful connections there; while Sri Lanka may be her homeland, her home is grounded in other people – people who are, importantly, located in the Alberta capital. Those in favour of relocating her, by contrast, contest the fundamental claim of her connections to these people, primarily through the claim that the species barrier precludes these bonds from being truly meaningful in a way bonds with conspecifics would be. For those aligned with the Save Lucy campaign, Lucy cannot be at home in any place if there are no other elephants there to populate that place with meaningful relations.

2.2 Making a House into a Home: Debating Lucy’s “Home in the Zoo”

As indicated above, the connotation of “meaningful relations” is one way in which the idea of Lucy’s “home” is deployed in *Reece*’s pieces. On this point, one might consider how many of those who speak of her current home appear to use the term to refer not to the city of Edmonton as a whole, but to more specific places within Edmonton. This is especially true when looking to Zoo-associated sources, some of which characterize Lucy’s home as either the entire

⁵³ hunter, “PETA Wants to Kill Lucy!” (1 February 2010), online (blog): *Climbing out of the Dark* <<http://climbingoutofthedark.blogspot.com/2010/02/peta-wants-to-kill-lucy.html>>. How this blogger’s comment ends is thought-provoking — namely, he is concerned that Lucy would have to die in a strange place. Notably, Jeanne Moore’s overview of the concept of home observes that home is not simply a reference to where one lives, but can also be a reference to where one dies, would like to die, will be after death, etc. (see Moore, *supra* note 5 at 208). To this end, the blogger seems to suggest that it would not simply be wrong to make Lucy live away from her home, but to make her die away from her home, as well.

Zoo or specific places within it. To this end, Zoo director Denise Prefontaine has remarked that “[v]isitors often see Lucy out and about enjoying the whole zoo as her home,” while the title of another of her letters to the editor is “Elephants well cared for, safe in Valley Zoo home.”⁵⁴ The Zoo’s Supervisor of Animal Care and Operations, Dean Treichel, has similarly commented, “industry professionals believe any type of move would have severe consequences for her. Therefore, we believe the Valley Zoo is the best home for Lucy.”⁵⁵ Further, keeping with the framing used by Prefontaine and Treichel, the Zoo’s “Let’s Crush the Myths” infographic notably does not tell readers that Lucy is “housed at” the Zoo, but rather that the Zoo is “home to” Lucy.⁵⁶

Narrowing in more tightly on Lucy’s enclosure at the Zoo, among the earliest references to Lucy’s “home” is in journalist Jeff Holubitsky’s glossing of the 2005 proposal of changes to the Zoo, noting that “Lucy may get a new home if plans to modernize facilities ... are accepted by city council.”⁵⁷ Similarly, Lucy’s attendant veterinarian, Milton Ness, summarizes another veterinarian’s position as finding “Lucy to be a calm, friendly elephant who is very comfortable

⁵⁴ Denise Prefontaine, “Lucy has comfortable life here – zoo”, Letter to the Editor, *Edmonton Journal* (25 March 2011) A17; Denise Prefontaine, “Setting the record straight on Lucy and Samantha”, Letter to the Editor, *Edmonton Journal* (24 September 2006) A19. See also this fuller explanation from a Zoo spokesperson whose email is quoted in Barbara Greene Mann, “is this ridiculous or what? Lucy we’re Coming Reply from the Edmonton Zoo” (23 March 2014), online (blog): *Elephants Need Elephants and People Need Art* <<https://barbaragreenemannandlucy.wordpress.com/2014/03/23/is-this-ridiculous-or-what-lucy-were-coming-reply-from-the-edmonton-zoo/>>:

Lucy is rarely indoors, she is out and about all year long enjoying the whole zoo as her home. On her daily walks she pushes over trees and forages in the grass or snow. On the rare days she stays inside because of weather conditions, Lucy follows an exercise program designed by a veterinarian who specializes in animal rehabilitation. Lucy’s barn is spacious and warm with heated padded floor surfacing, areas of sand substrate and many opportunities for complexity and enrichment.

⁵⁵ “All About Lucy,” *supra* note 25. See also Gordon Kent, “Authors seek home for Lucy”, *Leader Post* (23 May 2009) B4; Curzon *supra* note 52. Criticizing the Zoo, but repeating the framing, see also, Gordon Kent, “Animal rights groups sue Edmonton over ailing elephant”, *CanWest News* (1 February 2010); Mary Gazze, “Bob Barker to spend own money on Toronto elephants if they are sent to sanctuary”, *Canadian Press* (14 April 2011); “Learn About Elephants” (2018), online: *Zoocheck* <<https://www.zoocheck.com/learn-about-elephants/>>.

⁵⁶ “Let’s Crush the Myths,” *supra* note 49. See also, John Cotter, “Toronto zoo elephants to roam free in California sanctuary”, *Canadian Press* (26 October 2011).

⁵⁷ Jeff Holubitsky, “What’s new at Valley Zoo?”, *Edmonton Journal* (20 November 2005) A11.

in her home environment.”⁵⁸ Moreover, even some of those critical of the enclosure repeat the same framing, such as in the Save Lucy website’s glossing of Lucy’s early life as “Lucy was taken away from her family and everything she knew and then carted off to the other side of the world where the weather was colder, there were no familiar faces and her home was a small elephant yard and barn.”⁵⁹

These uses of the word align with a narrow and specific focus on a house as a home – which is to say, Lucy’s place at the Zoo is figured as a physical shelter which also becomes a “home.” However, while “making a house into a home” may be a trite expression, it is important to note that there are nevertheless a number of characteristics that the idea of “home” attracts that distinguish it from mere physical shelters. As legal scholar Lorna Fox points out, the simplest way to conceptualize a home as a dwelling is “the equation *home* = house + x.”⁶⁰ Nevertheless, where the “physical structure of the house presents no conceptual difficulties to lawyers, since it is a concrete, tangible entity[, the] conceptual challenge in relation to home is to unravel the enigmatic ‘x factor’.”⁶¹ Typically missed in law, therefore, is that “x factor.” As Fox highlights, this makes “home” a troubling concept for jurists in cases concerning evictions, foreclosures, repossessions of residential property, and disputes between creditors and home-occupiers.⁶² This

⁵⁸ Milton Ness, “Relax, folks. Lucy’s not going anywhere”, *Edmonton Journal* (19 September 2009) A19.

⁵⁹ “Lucy’s Story”, *supra* note 32. See also, Joyce Poole, “Elephant Voices” (18 July 2009), online (pdf): *Internet Archive WayBack Machine* <https://web.archive.org/web/20101202230831/http://www.zoocheck.com/campaigns_elephant_LucyPooleletter.pdf>. This tweet from Friends of Lucy repeats the word (indicating its currency), but puts it in quotation marks to underscore its irony: “This is LUCY’s “home”, a small barn cell & barren yard at #yegzoo. Experts estimate Lucy spends >70% of her time inside this dismal building.” (29 September 2017 at 10:28PM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/913968779130007552>.

⁶⁰ Fox, “Meaning of Home”, *supra* note 10 at 590 [emphasis in original].

⁶¹ Fox, *ibid.* at 590.

⁶² *Ibid.* at 586-587. Note that Fox’s conception of where “home” factors into law may be somewhat limited, focusing as she does primarily on financial and property interests. As legal scholar Jeannie Suk (*supra* note 11 at 3) elaborates, the home spills out into countless other areas of law:

[T]he home as an idea has significantly shaped legal conceptions of crime, violence, sex, family, privacy, liberty, and property. Home has traditionally played a defining role in the criminal law of burglary, self-defense, and domestic violence. Home has been central to the articulation of [American] constitutional rights, including the right against unreasonable search and seizure, the right to due process, the right to privacy, and ... the right to bear arms.

is because, unlike “house” as a legal concept, “home” is “a subjective phenomenon ... [that] is not easily quantifiable” and which exceeds the financial or property interests in the physical structure that is occupied.⁶³ To this end, Fox asserts that presently lacking in law is an understanding of “home” beyond “house,” the latter term being “a complex and multi-dimensional amalgam of financial, practical, social, psychological, cultural, politico-economic, and emotional interests.”⁶⁴

Quite to the contrary, however, one finds that the law at stake in *Reece* presents in fact “home” as more than just the physical structure of a “house” for Lucy. Relevant in *Reece* is the *Animal Protection Act*, which says that “No person shall cause or permit an animal of which the person is the owner or the person in charge to be or to continue to be in distress,”⁶⁵ where “distress” means, among other things, being “deprived of adequate shelter, ventilation, space, ... [or] reasonable protection from injurious heat or cold,” being “injured, sick, in pain or suffering,” or being “abused or subjected to undue hardship, privation or neglect.”⁶⁶ Moreover, as Chief Justice Fraser points out in her dissent, since Lucy is a zoo animal, regulations that govern her shelter and space are informed by the *Government of Alberta Standards for Zoos in Alberta* (*GASZA*) – which, in s. III B, states that an animal’s “exhibit” means “the enclosures, shelters, buildings and any other structures that constitute the ‘home in the zoo’.”⁶⁷ Importantly, *GASZA* s. III B does not limit itself merely to the physical standards of the structure in which animals are housed at zoos (although this does occupy the bulk of the section), including also a recognition of how the space can provide for animals’ psychosocial needs with requirements such as: “All

⁶³ Fox, *ibid.* at 581. See also, *ibid.* at 585-586.

⁶⁴ *Ibid.* at 607.

⁶⁵ *Animal Protection Act*, *supra* note 3, s. 2(1).

⁶⁶ *Ibid.*, s. 1(2).

⁶⁷ *Reece*, *supra* note 2 at para 79; Alberta Zoo Standards Committee of the Department of Environment and Sustainable Resource Development and Department of Agriculture, Food and Rural Development, *Government of Alberta Standards for Zoos in Alberta* (2005) [*GASZA*], s. III B.

animals must be maintained in numbers sufficient to meet their social and behavioural needs” and “All animal exhibits must be of a size and complexity sufficient to provide for the animal’s physical and social needs and species typical behaviours and movements.”⁶⁸ Moreover, not just asserting that animals need to be able to socialize, the *GASZA* also notes that animals must be able to withdraw themselves from socialization or public view in their spaces – in other words, they must have a space of privacy within their homes.⁶⁹

In *Reece*, therefore, at issue is whether the Zoo can be a “home” for Lucy within the law’s own terms. Certainly, some attention is dedicated to the housing dimension. Summarizing the information from the affidavits, the Chief Justice identified that, in order to meet the standards for shelter and space dimensions of Lucy’s enclosure, “the City must provide Lucy with substantially larger indoor living quarters, heated appropriately and sufficiently varied to meet Lucy’s basic needs.”⁷⁰ This being said, the psychosocial dimension also receives significant attention. Contrary to what *GASZA* s. III B 1 stipulates for all zoo animals, the City does not keep Lucy in an appropriate social grouping. Moreover, for care standards specific to elephants, the *GASZA* defers to the *AZA Guidelines the American Zoo and Aquarium Association Standards for Elephant Management* (hereafter, *AZA Standards*), which first notes that

Zoos should make every effort to maintain elephants in social groupings. It is inappropriate to keep highly social female elephants singly ... Institutions should strive to hold no less than three female elephants wherever possible. All new exhibits and major renovations must have the capacity to hold three or more female elephants.⁷¹

However, immediately following this is the note that “It is recognized that some socially aberrant adult females currently exist and these elephants can be managed singly.”⁷² A zoo keeping a

⁶⁸ *Ibid.*, s. III B 1.

⁶⁹ *Ibid.*

⁷⁰ *Reece*, *supra* note 2 at para 119.

⁷¹ *American Zoo and Aquarium Association Standards for Elephant Management and Care* (2003) [*AZA Standards*], s. 2.3.1.

⁷² *Ibid.*

“socially aberrant” female elephant solo is permissible on the condition that “every effort to introduce them to a social group” is made and that “the anti-social behavior is not correctable.”⁷³

Thus, in *Reece*, a debate that arises is over whether Lucy genuinely wants to live singly. On this point, Chief Justice Fraser commented that “the unchallenged expert evidence before this Court overwhelmingly confirms that female elephants should not be kept alone” and that “on this record, there is no evidence to support the truth of any claim that Lucy is anti-social” nor is there any evidence that her supposed anti-social behaviour is “non-correctable.”⁷⁴ Thus, for the Chief Justice, the City’s stance “smacks of blaming the victim for being held captive in an environment in which she has been deprived of the opportunity to develop her normal social skills.”⁷⁵ In other words, one cannot leave unchallenged the Zoo’s (and other Edmontonians’) contention that Lucy has bonded with humans in Edmonton in a way she cannot with members of her own species. Lucy cannot, on the Chief Justice’s reading, be at home in the Zoo.

Nevertheless, as I surveyed in the previous subsection, one’s “home” is *not* inescapably defined by being around members of the same species (despite what the *GASZA*, the *AZA Standards*, and the Chief Justice may say). Familiarity – even imperfect but still meaningful long-standing relations (to other people, to things, to landscapes, etc.) formed in that place – can also be important. Indeed, as Fox has underscored, so often missed in law is that a crucial part of the “x factor” of home (the thing that makes it more than just a house-type physical shelter) is the way in which familiarity with a place is crucial to self-identity, such that being forced from one’s home results not simply in the loss of shelter, but also “often trigger[s] an identity crisis.”⁷⁶

⁷³ *Ibid.*

⁷⁴ *Reece*, *supra* note 2 at paras 124, 126.

⁷⁵ *Ibid.*

⁷⁶ Lorna Fox, *Conceptualising Home: Theories, Law and Policies* (Oxford: Hart Publishing, 2007) [Fox, *Conceptualising Home*] at 138.

Whether it be long-standing relations to people, things, and/or landscapes, “when a dwelling place is lost, these relationships are also undermined.”⁷⁷

This latter framing of “home” is present in much of *Reece*’s pieces. Here, one could consider how letter-writer Wanda Curzon laments that moving Lucy “would be like taking your grandmother, asking her to leave the security of her home, the love of her family and friends and everything she has known and put her somewhere totally different and then say, ‘I know you will be happy here because this is my idea of where you should be.’”⁷⁸ For similar reasons, letter-writer Hazel Sangster envisions a living will for herself, lest people try to transport her far away like they have proposed doing to Lucy: “Under no circumstances, when I am old, sick and gaga, do I want to be uprooted from my solitary existence in the frozen north and transported to a ‘sunset home’ in Florida, where I can gabble and dribble with a bunch of other fossils with whom I have no connection.”⁷⁹ For individuals like Curzon and Sangster, taking Lucy from her enclosure and putting her somewhere else is analogous to the emotional, psychological, and social injury that can accompany the forcing of elderly people from their own homes and into distant retirement or nursing facilities. While the move may improve their quality of life in some ways, it is at the expense of being in the familiar locales that they have come to know as home.

As Curzon and Sangster’s remarks indicate, those critical of relocating the elephant analogize such a displacement to a psychologically devastating loss of home. However, it is not only those critical of relocating Lucy that deploy the concept of “home,” with those aligned with the Save Lucy campaign availing themselves of the term and its positive connotations, as well – the only difference being that they use it to describe not her current emplacement, but rather the

⁷⁷ *Ibid.* at 138.

⁷⁸ Curzon, *supra* note 52.

⁷⁹ Sangster, *supra* note 27. See also Kathi Travers, “Killing with kindness”, Letter to the Editor, *Prince George Citizen* (28 September 2009) 17 (quipping that, if Bob Barker and William Shatner think that Lucy should be moved due to her poor health and age, “we should be plucking them from their current surroundings and transporting them to ‘better circumstances’ in an old age home where they can enjoy the companionship of others of their own kind.”)

sanctuary as being an idealized home to which she could be moved. For instance, journalist Florence Loyie reports that, with respect to an elephant sanctuary, the activist group Voice for Animals wanted Lucy to get “a new home in Tennessee.”⁸⁰ Similarly, veterinarian Joyce Poole commented in her letter to Edmonton’s city council that “I urge the Edmonton Valley Zoo to put her needs first, and send Lucy to California, to PAWS, where she has been offered such a home.”⁸¹ Linking Lucy’s potential relocation to that of other elephants, legal scholar Lesli Bisgould commented in her *Globe & Mail* op-ed that “Lucy has been offered a home at a highly respected California sanctuary where the Toronto Zoo’s three elephants will soon be retiring.”⁸² Moreover, adding in both prospective sanctuary homes, the Save Lucy website tells readers that “[t]he Elephant Sanctuary in Tennessee and the PAWS sanctuary in California have both offered to give Lucy a permanent home.”⁸³

Yet, whether one thinks that Lucy should remain right where she is at the Zoo or whether one thinks she ought to be relocated to a sanctuary, everyone in the debate nevertheless appears to occupy the same conceptual terrain, implicitly accepting the idea that the elephant will be “home” (in the most positive sense of the word) in one of these places. Moreover, despite Fox’s contention that law in general cannot grapple with “home” as such, analysis of the *Reece* case suggests that many aspects of the “x factor” which makes a “house into a home” are detectable in the courtroom, with the *GASZA*, the *AZA Standards*, and the Chief Justice’s comments all variously asserting that Lucy’s “home in the zoo” is far more than just a shelter that meets

⁸⁰ Florence Loyie, “Animal activist urges city to send Lucy to sanctuary”, *Edmonton Journal* (21 December 2007) B1. See also Florence Loyie, “The price is too high, way too high”, *Edmonton Journal* (24 February 2009) B1.

⁸¹ Poole, *supra* note 59. This framing is also evident in Fran Barker, “Word gets around”, Letter to the Editor, *Edmonton Journal* (13 September 2009) A15.

⁸² Lesli Bisgould, “Who will speak for Lucy the elephant?”, *Globe & Mail* (28 March 2012) A15.

⁸³ “Maggie’s Story” (no date), online: *Save Lucy* <<http://www.savelucy.ca/maggie-s-story>>. See also Shirley, “The case for Lucy the elephant” (19 September 2009), online (blog): *Animal Welfare Advocates* <<http://animalwelfareadvocates.blogspot.com/2009/09/case-for-lucy-elephant.html>>; Free Tony The Tiger, “Lucy and Tony” (21 July 2012), online (blog): *Free Tony the Tiger* <<https://freetonythetiger.wordpress.com/lucyandtony/>>.

physical needs, it being conceptualized as a space which needs to be psychologically and socially beneficial to the elephant.⁸⁴ To this end, “home” seems both to be the discursive tool with which the battle is fought and the conceptual battleground on which the fight over her occurs in the wider social sphere (as well as in the pages of the *Reece* case itself).

This section traced the logic of “home” through *Reece*’s pieces. The first subsection above (“Home is Where the (Tropical) Heart is”) had to do with how speakers conceived of a “here-and-there” relation for Lucy, sorting through the locales of Sri Lanka and Edmonton and thereby attributing to her the mindset of a migrant who had left her exotic homeland to make a new home somewhere else. The present subsection (“Making a House into a Home”) has considered particular environs more closely, investigating how various speakers have debated just what specific factors it will take to make a particular shelter (either the Zoo or a prospective sanctuary) into more than just a house for Lucy, but a home for her. These subsections, I would contend, have mapped the *limits* of the logics of place in *Reece*’s pieces. That is to say, this fixation on Lucy’s home has masked the ways in which conceptual frameworks of hierarchy and dominance surround the elephant. Moreover, rather than clarifying the stakes, the obsession with finding a home for the elephant has occluded the possibility of *tragedy* – in the truest sense of the word – being at the heart of *Reece*’s pieces. Thus, in the next section (“Leaving Home”), I consider each of these in turn: why feminist critique should make us wary of finding a home for Lucy and why a “hospice” might present a better alternative for thinking through the place of an animal like Lucy in a time of human expansion, global capitalism, and habitat destruction.

⁸⁴ *GASZA*, *supra* note 67, s. III B; *AZA Standards*, *supra* note 71, s. 2.3.1; *Reece*, *supra* note 2 at para 79.

3. Leaving Home

3.1 *A Man's Home is His Castle: Gender-Based Hierarchy and Dominance in Reece's Pieces*

Above, I indicated how the idea of a home for Lucy seems to turn on meaningful relations. Seemingly skirted around here, however, is the way in which the meaningful relations of the home are not inherently positive or beneficial things. That is to say, meaningful relations can be relations of hierarchy and dominance. On this point, I would highlight that feminist scholarship has therefore turned an especially critical eye toward the idea of “home” and the relations of hierarchy and dominance it can engender. As Fox sums it up, while “the cluster of meanings and values of home ... [are] generally positive,” feminist scholarship has underscored that

... these meanings are not equally available to women, and may – as a result of gender differences – actually be subverted for women, so that home becomes associated with insecurity, lack of control over financial decision making, dependency and the invisibility and subjection of women within the family unit. In addition, the identification of women with *home* was also problematic, as a reflection of assumptions about women’s ‘natural role’ in the private sphere of life, carrying out their ‘duties’ within the home and the family.⁸⁵

In terms of gender-based hierarchy and exploitation of women’s labour, the home has been critiqued as a site of “the girl’s prison and the woman’s workhouse”⁸⁶ and, in terms of the phenomenon of gender-based domestic violence, as a place of “terrifying love.”⁸⁷

On this latter point, legal scholar Jeannie Suk has noted that feminist critique has “required a gestalt shift” in how “the home” is perceived, articulating an “understanding [of] the home not primarily as the place where a woman is protected by the man of the castle, but rather

⁸⁵ Fox, *Conceptualising Home*, *supra* note 76 at 363 [emphasis in original].

⁸⁶ *Ibid.* at 367, quoting George Bernard Shaw, *Man and Superman: Maxims for Revolutionists* (Cambridge: The University Press, 1903) at 143. See also Iris Marion Young, “House and Home: Feminist Variations on a Theme” in Sarah Hardy & Caroline Wiedmer, eds., *Motherhood and Space: Configurations of the Maternal through Politics, Home, and the Body* (New York: Palgrave Macmillan, 2005) 115.

⁸⁷ Suk, *supra* note 11 at 4.

where a man inflicts violence on her.”⁸⁸ Where once the meaning of a woman’s place in the home may have conjured up only images of a “high-bourgeois woman” who could be the much-revered “lady of the house,” decades of feminist campaigning against domestic violence has made an altogether different figure equally familiar: “the battered woman, trapped in her home, oppressed by her husband under the guise of an outmoded privacy that enables him to dominate her while the state does not intervene.”⁸⁹ Concerned with more than merely gendered “subordination within the home” that is wrapped up in the idea of “relegat[ing] women to the private sphere,” feminist scholarship has shone light especially on the reality of patriarchal dominance as it manifests in gender-based “assaults, rape, and threats in the home.”⁹⁰

Notably, there are several points at which Lucy is expressly gendered in *Reece*’s pieces. Crucially, here I am not signalling the fact that she is “sexed,” such as in the emphasis on the particularities of elephant femaleness in the *AZA Standards*.⁹¹ Rather, what I am indicating is the points where she is interpolated into the ostensibly human man-woman gender system – something which carries with it conceptual patterns of hierarchy and domination of which feminist scholars have long been critical. For example, when recounting his painting session with Lucy, journalist Scott McKeen tells the story in the extended conceit of a first date where Lucy is a “princess” into whose home he, an apparent suitor, has been invited by her keepers. Notably, McKeen’s coverage of Lucy’s physicality does not emphasize any sexed body part, but often conjoins commentary on her gender with commentary on her weight. Although this is perhaps playing for the laughs of a visual gag – the ridiculing of female fatness being a well-documented cultural phenomenon – notable is the fact that what accompanies these remarks on

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* at 119.

⁹⁰ *Ibid.* at 4.

⁹¹ *AZA Standards*, *supra* note 71, s. 2.3.1.

Lucy-the-woman's size are allusions to her ability to do violence.⁹² Aside from McKeen's play on words that "I may be flattering myself" and that "that's better than Lucy flattening myself," his reference to her "weighing nearly 9, 000 pounds" is followed by this additional information in the next sentence: "... one of her handlers immediately [held] up a crushed plastic container. 'If you make her mad, this is what she'll do to you,' says [handler] Wade Krasnow, who then laughs at the pale cast to my face. He's kidding."⁹³

Just what would one have to do to "make her mad" such that an act of violence using her greater weight would be "what she'll do to you" in response? This question is, in fact, answered in another source which explicitly genders the elephant: a post from the satirical news blog *Deadmonton Dirtbag*, entitled "Elephant escapes sexual assault."⁹⁴ As author sonicwonk tells the story,

Two men are in critical condition in University Hospital after breaking into the Edmonton Valley Zoo Wednesday and trying to have sex with favourite attraction Lucy the Elephant.

Both men, still unidentified, suffered multiple injuries including broken bones, collapsed lungs and severe internal bleeding. Police say that after a heavy night of drinking, the duo decided to break into the zoo and have their way with the elephant, with disastrous results.⁹⁵

Indirectly channelling McKeen's obtuse references to how he would be crushed should his "date" with Lucy go poorly, sonicwonk's story goes on to explain that, after Lucy cast her would-be assailants off, "[w]ith both men lying helplessly on the ground, Lucy then proceeded to stomp the hell out of them in a fit of rage."⁹⁶ Moreover, in a perverse playing-up of handler Wade

⁹² See, e.g., Corey Lee Wrenn, "Fat vegan politics: A survey of fat vegan activists' online experiences with social movement sizeism" (2017) 6:1 *Fat Studies* 90.

⁹³ Scott McKeen, "World's largest artists paints her way into my heart" *Edmonton Journal* (30 November 2007) B1.

⁹⁴ sonicwonk, "Elephant escapes sexual assault" (18 May 2017), online (blog): *The Deadmonton Dirtbag* <<https://deadmontondirtbag.wordpress.com/2017/05/18/elephant-escapes-sexual-assault/>>.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

Krasnow's remark that "If you make her mad, this is what she'll do to you," the *Deadmonton Dirtbag* story has "one zoo official" saying that "I know that Lucy's getting on in years, ... [b]ut I'm glad to see there's still a lot of fight left in her."⁹⁷

It is not difficult to apply a feminist reading to McKeen's or the *Deadmonton Dirtbag*'s stories. In fact, "Edmonton [f]eminists" get the final word within sonicwonk's satirical news story itself: "'This is typical of the type of activity we've had to endure with predatory men in this city,' commented one activist. 'It proves that no female is safe in Edmonton, regardless of species.'"⁹⁸ Here, one might also consider legal scholar Catharine MacKinnon's comments on gender difference and dominance. For MacKinnon, the social meaning of gender is that it finds a difference (in her original case, a male-female biological difference) and inscribes onto it a hierarchy of domination such that "gender might not even code as difference ... were it not for the consequences of social power."⁹⁹ Taking a page from the ecofeminist handbook (which, as I indicated in "Descent of Dogma," highlights the parallels between the man/woman difference-dominance binary and the human/animal one), it is unsurprising to find that some speakers conceive of Lucy in this way, the slippage between the species framing and the gender framing being easy to undertake in this instance where the animal in question is so often cast as a captive and a victim – that is to say, one who, even in the context of possibly living a good life, is still caught up in a system of hierarchy and domination.

That said, it may be more than just Lucy's biological sex or animalness in general that leads speakers to characterize her as a prospective sexual partner and/or sexual victim, with the colonial context of Lucy's Asianness (perhaps better called her "Asian-elephantness") also being a possible factor. To this end, McKeen is not the only speaker who casts his relation to Lucy in

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ Catharine A. MacKinnon, *Feminism Unmodified* (Cambridge: Harvard University Press, 1987) at 40.

compulsorily-heterosexual man-woman terms, with acupuncturist Steven K. H. Aung (and journalist Zoltan Varadi's news story about him) participating in the same phenomenon.¹⁰⁰ While Aung is reportedly much-liked by the Zoo staff, Varadi informs his readers that, "[a]s for Aung [himself], an acupuncturist and medical doctor, it seems he only has eyes for one other" before quoting the acupuncturist's own view on his relation to Lucy. As Aung tells it, "Oh, we are in love with each other[.] ... She's longing to see me and I'm thinking about her. It's karma that we met, and it came out of the Asian elephants I dealt with when I was small," alluding to the elephants he grew up seeing in Myanmar.¹⁰¹

On this point, one might consider that, as historian Jonathan Saha has noted, there is a long history of Asian elephants in particular being figured as female and/or feminine. For example, in a turn-of-the-twentieth-century hunting guide for Myanmar, Asian elephants were expressly described as being "like women" insofar as they are "uncertain, coy and difficult to please."¹⁰² Similarly, a 1950 text on elephant riders' training of these animals "referred to the animals using female pronouns, a notable shift given the use of male pronouns as universals throughout the rest of the book."¹⁰³ What Saha's survey underscores is that knowledge about Asian elephants has been "situated in the prevailing colonial ideologies of race and gender" – and, in particular, this knowledge brings with it the idea that these "feminine" creatures are "inherently passive, or otherwise in need of pacification."¹⁰⁴ This "colonial ideology" maps well

¹⁰⁰ Zoltan Varadi, "On Safari Gala" *Edmonton Journal* (16 June 2006) G1. Note that the term "compulsory heterosexuality" originates with poet and literary critic Adrienne Rich in "Compulsory Heterosexuality and Lesbian Existence" (1980) 5:4 *Signs: Journal of Women in Culture and Society* 631. Expanding on MacKinnon's observations on difference and dominance as socially constructing gender along with social hierarchies, "compulsory heterosexuality" refers to the idea that heterosexuality is a social institution that similarly functions to subordinate women. Again taking a page from the ecofeminist handbook, it is notable that McKeen, Varadi, and Aung all figure Lucy in romantic terms, seemingly extending this social institution beyond the species barrier.

¹⁰¹ Varadi, *ibid.*

¹⁰² Jonathan Saha, "Colonizing Elephants: Animal Agency, Undead Capital and Imperial Science in British Burma" (2017) 2 *BJHS Themes* 169 at 181, quoting Fitzwilliam Thomas Pollok & W.S. Thom, *Wild Sports of Burma and Assam* (London: Hurst and Blackett, 1900) at 42.

¹⁰³ Saha, *ibid.*

¹⁰⁴ *Ibid.*

onto a framework of “compulsory heterosexuality” insofar as both present relations of hierarchy and dominance.¹⁰⁵ For people to interact with an elephant is to interact with an entity that is either going to be passive or which will need to be pacified in the way patriarchy depends upon men’s “pacification” of women.

Here, one would do well to recall MacKinnon’s comments on sexism and speciesism: “People dominate animals, men dominate women. Each is a relation of hierarchy, an inequality, with particularities and variations within and between them. Every inequality is grounded and played out and resisted in unique ways, but parallels and overlaps can be instructive.”¹⁰⁶ Thus far, I have outlined many “parallels and overlaps” that MacKinnon would likely find to be “instructive”: the way in which McKeen’s news story figures the journalist’s relation to the elephant depends upon a cultural script of male suitors visiting a “princess” in her home under her keepers’ watchful eyes (with the possibility of a woman’s physical resistance to unwanted attention implied throughout); the *Deadmonton Dirtbag* applies the script of man-on-woman sexual assault directly to Lucy, the satire’s own “Edmonton [f]eminists” asserting men’s sexual predation over women transcends species lines; and Aung’s comments on how he and Lucy “are in love with each other” in a man-woman pairing – coupled with Saha’s observations on “prevailing colonial ideologies of race and gender” – demonstrates how cultural scripts render Asian elephants especially in terms of “feminine creatures” who are “in need of pacification” by humans in the same way men “pacify” women.

These logics of gender which cling to Lucy, when read in light of the feminist critique of the home, should lead one to be highly skeptical of the idea that the home would be a positive thing for the elephant. When looking at the phenomenon of gender-based violence in the home in

¹⁰⁵ See Rich, *supra* note 100.

¹⁰⁶ MacKinnon, “Mice and Men”, *supra* note 43 at 264.

relation to animals, ecofeminist scholar-activist Carol J. Adams has followed MacKinnon in underscoring how the home for women has been “the distinctive sphere of intimate violation and abuse, neither free nor particularly personal” in linking the meanings of home for women and for animals.¹⁰⁷ In Adams’ view, the home “inscribe[s] sexual difference and domination” – “an oppressive conceptual framework” where “women ... and animals are more likely to be victimized.”¹⁰⁸ In this respect, the home can “function[] as a part of the logic of domination: the ‘I-have-a-right-to-do-what-I-want-in-my-own-home’ patriarchal justification for abusive behavior against those constructed as ‘inferior’ – adult female partners, children, and animals.”¹⁰⁹ “Home” is dangerous insofar as patterns of hierarchy and domination are wrapped up with it.

Underscoring overlaps and parallels between gender-based violence and violence against animals, Adams contends that “[g]ender is an unequal distribution of power; interconnected forms of violence result from and continue this inequality. In a patriarchy, animal victims, too, become feminized.”¹¹⁰ For Adams, the logic of hierarchy which asserts itself most clearly in the home through the phenomenon of domestic violence is a “hierarchy in which men have power over women and humans have power over animals, ... more appropriately understood as a hierarchy in which men have power over women ... *and* (feminized) animals.”¹¹¹ All this to say: we have good reason to be highly skeptical of any “home” for Lucy the elephant.

Nevertheless, as Fox has noted, some strands of feminist critique have been *ameliorative* in nature: showing the gender-based dominance of the home not as an insurmountable obstacle,

¹⁰⁷ Carol J. Adams, “Bringing Peace Home: A Feminist Philosophical Perspective on the Abuse of Women, Children, and Pet Animals” in Randall Lockwood & Frank R. Ascione, eds, *Cruelty to Animals and Interpersonal Violence* (West Lafayette, Indiana: Purdue University Press, 1998) 318 [Adams, “Peace”] at 329, quoting Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) at 168.

¹⁰⁸ Adams, “Peace”, *ibid.* at 330.

¹⁰⁹ *Ibid.* at 331.

¹¹⁰ Carol J. Adams, “Woman-Battering and Harm to Animals”, ebook: Carol J. Adams & Josephine Donovan, eds, *Animals and Women: Feminist Theoretical Explorations* (Durham: Duke University Press, 1995) no pagination.

¹¹¹ *Ibid.* [emphasis in original].

but rather an obstacle that can be overcome.¹¹² One might be tempted to respond to this subsection with just such an ameliorative impulse and say that some of those who speak of a home for Lucy (as surveyed in the “Going Home” above) may even have a “feminist home” in mind, envisioning the space reformed into one without hierarchy and dominance. While this is admirable, the next subsection will likely undercut this reformist attitude, as one cannot “reform” what cannot be found in the first place. That is to say, rather than the prescriptive feminist critique that would say Lucy *should not* have a home, in the next subsection I consider a descriptive statement and its implications: Lucy *does not* have a home anywhere in the world.

3.2 Homelessness and Hospices: Responding to the Possibility of Tragedy

When confronting the possibility of Lucy being “homeless,” I am reminded of an oft-quoted remark from conservationist Daphne Sheldrick: “When you look at a miserable captive in a zoo, you’re not seeing an elephant. You’re seeing a tragedy.”¹¹³ A similar sentiment runs through *Reece’s* pieces. Indeed, “tragedy” is exactly the word the Friends of Lucy activist group opt for on their Twitter page, variously commenting that “[p]eople who know, respect & love elephants know a solitary [one] is a tragedy,”¹¹⁴ that “Lucy’s captivity at #yegzoo is a tragedy,”¹¹⁵ and that “[w]e all know it’s a tragedy that Lucy lives alone in Edmonton”¹¹⁶

¹¹² Fox, *Conceptualising Home*, *supra* note 76 at 394-395.

¹¹³ Kimberley Launier, “‘They’re Like Us,’ Elephant Researchers Say”, *ABC News* (24 July 2008), online: *Internet Archive WayBack Machine* <<https://web.archive.org/web/20080725054616/http://abcnews.go.com/Health/story?id=5435466&page=1>>.

¹¹⁴ Friends of Lucy, “People who know, respect & love elephants know a solitary is a tragedy, & work to unite them w/ the elephants they need. @japanelephants is, @GlobalElephants is, so are many other orgs & sanctuaries. Zoocheck, V4A & we are working to unite LUCY w/ @doniveson why aren't you?” (16 February 2018 at 12:43AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/964374673118015489>.

¹¹⁵ Friends of Lucy, “The above poem is entitled, ‘CITY ZOO’ & written by Vivian Yeiser Laramore. LUCY doesn’t even have another elephant’s breath to breathe. @doniveson @SPhillipsAB @oneilcarlier Lucy’s captivity at #yegzoo is a tragedy. #LetLucyGo #SanctuaryHeals #yeg #yegzoo #yegcc #yegwx” (19 February 2018 at 12:05AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/965452240306700289>.

¹¹⁶ Friends of Lucy, “We all know it’s a tragedy that LUCY is alone in Edmonton. It’s also a tragedy that RAMBA is alone. Ramba can go to sanctuary soon, though, if we all pitch in and help. Please donate for #RambasFlight to

Similarly, speaking of his activism with respect to zoo elephants, Bob Barker remarked that “I know of a lot of elephants that are suffering right now in zoos ... But I don’t know of one that I consider more tragic than that poor Lucy.”¹¹⁷

Seemingly not considered by the vast majority of speakers in *Reece*’s pieces, however, is the possibility that this is something *truly* tragic. In literary terms, “tragedy” is antithetical to “comedy.”¹¹⁸ Tragedies tell the story of how misfortune befalls someone; by definition, they do not and cannot have happy endings.¹¹⁹ Those speaking of Lucy (whether in favour of relocating her or keeping her in Edmonton) all seem to assume her story can have a happy ending – that, despite misfortune that has befallen her, a happy ending is something she can get. In this respect, they operate on the assumption that Lucy does not find herself in a “true” tragedy, but are holding out hope of the situation revealing itself to be a tragicomedy – a turning of the tides that would give her a happy ending, despite the misfortunes she has endured.¹²⁰

Where, for those in the Save Lucy campaign, the tragedy has been Lucy’s time at the Zoo, the Zoo locates her tragic tale much earlier in her life: her being orphaned in her tropical Sri Lankan homeland.¹²¹ More than this, however, the Zoo highlights how there is no homeland for Lucy to return to since:

Elephant Sanctuary Brazil. #ElephantsNeedElephants #SanctuaryHeals” (26 February 2018 at 1:04AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/968003919849934850>.

¹¹⁷ Amy Dempsey, “The elephant man” *Toronto Star* (3 Nov 2011) IN1. See also Pruden, *supra* note 1.

¹¹⁸ See generally, William Harmon, *A Handbook to Literature*, 10th ed. (Upper Saddle River, New Jersey: Pearson Prentice Hall, 2006) at 109-110, 524-526

¹¹⁹ *Ibid.* Moreover, as Harmon notes at 84, tragedies typically end with catastrophes in the form of “the death of the hero” or are marked by “an unhappy ending (or event).”

¹²⁰ A tragicomedy “employs a plot suitable to tragedy but ends happily, like a comedy. The action seems to be leading to a tragic catastrophe until an unexpected turn in events, often in the form of a *deus ex machina*, brings about the happy dénouement” (*ibid.* at 526).

¹²¹ The Zoo telegraphs Lucy’s life history as such:

Lucy was orphaned in Sri Lanka and was brought to the Edmonton Valley Zoo via the Pinnewala Elephant Orphanage and Colombo Zoo. She is what is often called a “people elephant”, and her herd is her zoo family – the keepers and trainers who spend their days with Lucy. It is very special to witness the affection Lucy has for her caregivers. Lucy has had opportunities to socialize with both Asian and African elephants in the past, but these interactions demonstrated her lack of understanding of elephant dynamics; she simply did not do well in these situations.

See “Let’s Crush the Myths,” *supra* note 49.

The Asian elephant (Indian elephant) population is critically low in the wild, much lower than African elephants. This decline in numbers is due to habitat loss. ... Logging, settlement, mining, farming, and hydroelectric projects continue to destroy the natural forests and grasslands of the region, making it difficult for Asian elephants to co-exist with the large human population. This loss of habitat in some areas has caused starvation in the herds ... Asian elephants are poached for the ivory trade, but this is less of a problem to their survival than habitat destruction.¹²²

Thus, for the Zoo and those aligned with them, the tragedy has passed. The happy ending has arrived already: with humans who love and care for her in Edmonton, Lucy has found a home.¹²³

Yet, what if *neither* the Edmonton Valley Zoo nor an American elephant sanctuary is a home for Lucy? What if, no matter how you cut it, Lucy is truly homeless? This is not to use the term “homeless” in the “houseless” sense, as Lucy is guaranteed housing of some sort at either the Zoo or an American elephant sanctuary. Instead, what I am speculating here is that what is missed by most in the Lucy debate is this: she may be without a “home” anywhere in the world. This is a tragedy with no happy ending. The tragedy is: that her homeland is ruined, that she can never return to where she came from, that she came of age without ever learning how to interact with other members of her species, that neither humans nor other elephants may ever satisfy the role of the meaningful connections that make a house a home, that she may not truly belong anywhere, and that she may be homeless no matter where she resides.

The inability to confront the possibility of true tragedy becomes all the more evident when considering those exceptionally rare instances where it is addressed head-on in *Reece*’s pieces, such as in blogger Andrew Hunt’s comments:

This case is simply a tragedy no matter how you look at it. One mantra that animal activists should be repeating over and over again is that animals are not our property to experiment on, transform into food or clothing, or use for entertainment purposes.

¹²² “Asian Elephant” (26 September 2013) online: *Internet Archive WayBack Machine* <http://web.archive.org/web/20130926122045/http://www.edmonton.ca/attractions_recreation/attractions/edmonton_valley_zoo/animals/asian-elephant.aspx>.

¹²³ “Let’s Crush the Myths,” *supra* note 49.

It's one thing to state this abolitionist view. But it's hard to know precisely what is best to help this one poor soul, a creature who happens to be one of the countless victims of a mindset, a culture, and a way of doing things that emphasizes that animals are ours to use and exploit as we please.¹²⁴

When Hunt broaches the possibility of her story being a tragedy – when he accepts that there may be no home for Lucy – he nevertheless retreats to another familiar “happy ending” conclusion: the abolitionism proposed by Gary Francione.¹²⁵ Somehow, it seems, genuinely accepting the tragedy as tragedy – full stop – is, even in this instance, unfathomable.

One may recall her that, in addition to critiquing the enduring humanism in the *Reece* dissent, the critique that Maneesha Deckha raised was that the dissent did not embrace an abolitionist perspective.¹²⁶ Agreeing with Deckha in broad strokes, my point here is not to discount the value of abolitionism and the possibility of it producing a potentially better outcome for zoo animals in general. However, my point is this: here, Francione's abolitionism – the retreat to which Hunt moves in the quotation above – is yet another cop out, not genuinely confronting the deep, global-systemic implications of what this particular case shows.

Abolitionism is oriented at ending the human use and exploitation of animals; yet, as animal studies scholar Sue Donaldson and political theorist Will Kymlicka have contended, abolitionism erroneously assumes that there is some perfect place for animals to be *sans* humans altogether.¹²⁷ However, as indicated on the Zoo's own webpage, Lucy was presumed not to have an elephant family in the wild and, now, her natural habitat may no longer even exist. Neither an animal welfarist orientation (such as that embraced by Chief Justice Fraser in *Reece*) that targets

¹²⁴ Andrew Hunt, “The Battle Over Lucy the Elephant Continues” (1 February 2010), online (blog): *We're All Animals* <<http://planetoftheanimals.blogspot.com/2010/02/battle-over-lucy-elephant-continues.html>>.

¹²⁵ See, e.g., Gary L. Francione, “Mission Statement” (no date), online: *Animal Rights: The Abolitionist Approach* <<https://www.abolitionistapproach.com/about/mission-statement/>>.

¹²⁶ Maneesha Deckha, “Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm” (2013) 50:4 *Alberta Law Review* 78 at para 54.

¹²⁷ Sue Donaldson & Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford: Oxford University Press, 2011) at 86.

the best possible circumstances for Lucy's current dependence on humans nor an abolitionist one targeting the end of zoos altogether is able to tackle a more troubling reality: through human expansion, global capitalism, and related habitat destruction, animals, the world over, have been made homeless.

If one cannot speak of the place of Lucy the elephant in terms of a true "home," then what? One possible answer is "hospice" instead. As anthropologist Juno Salazar Parreñas explains it in her own work on orangutan wildlife centres, the hospice is "a place of care when freedom outside of confinement ceases to be possible."¹²⁸ Important here is the fact that the care of the hospice is not tragicomic – one does not "get better" there. Rather, it is *palliative* care – what one does "knowing nothing can be done to heal the underlying reasons for which the body being cared for is sent to an institution and held in captivity until death."¹²⁹ In suggesting this word – "hospice" – as an alternative way to talk about place in *Reece's* pieces, here I am not alluding to Lucy's ill state (although this is a topic that will be explored in the following chapter), but instead I use it according to Parreñas' own broader use of the term: a way to talk about a place where humans are responsible in some way for animals when there is no hope of returning to some natural habitat where they would live independent of us. In this way, even if a young and healthy elephant were to be taken from a recently-destroyed habitat in Asia and moved to the Edmonton Valley Zoo tomorrow, one would also be right to speak of its emplacement as a "hospice" instead of a "home."

As Parreñas notes, the institution of the hospice is closely related to the "nursing home," a term offered by one volunteer at an orangutan wildlife centre to another in seeming defence of the existence of zoos:

¹²⁸ Parreñas, *supra* note 12 at 29.

¹²⁹ *Ibid.* at 175.

He asked her a question: “Are you against the idea of nursing homes?”

The young woman refused the connection and said, “an old person has a choice in going to the nursing home.” The young man replied that was only sometimes the case: his grandmother was forced to go to a nursing home because she was deemed a danger to herself. His parents didn’t have the money to get a caretaker, so she’s there, against her will.¹³⁰

As Parreñas observes, the comparison is “provocative” as a way of making sense of not only zoos, but also wildlife rehabilitation centres.¹³¹ Surveying *Reece*’s pieces would suggest that the comparison applies to animal sanctuaries, as well. Indeed, one may recall here that similar ideas were invoked by letter-writers Wanda Curzon and Hazel Sangster, the former commenting that moving Lucy would be akin to “taking your grandmother, asking her to leave the security of her home, the love of her family and friends and everything she has known and put her somewhere totally different and then say, ‘I know you will be happy here because this is my idea of where you should be’” and the latter commenting that her relocation would be like taking a human who is “old, sick and gaga” and placing them “in a ‘sunset home’ in Florida.”¹³² To this, we can also add letter-writer Kathi Travers’ analogy of “plucking them from their current surroundings and transporting them to ‘better circumstances’ in an old age home.”¹³³

However, here a finer point of distinction needs to be made. Nursing *home*, sunset *home*, old age *home* – all channel the concept whose fraughtness I have highlighted throughout this chapter. The nursing home is not identical to the hospice, with the latter not invoking the optimism of living one’s life out in their “sunset home,” but instead receiving palliative care that is “looking toward death.”¹³⁴ For Parreñas, all of this is part of the work of “decolonizing

¹³⁰ *Ibid.* at 158.

¹³¹ *Ibid.*

¹³² Curzon, *supra* note 52; Sangster, *supra* note 27.

¹³³ Travers, *supra* note 79.

¹³⁴ Parreñas, *supra* note 12 at 159.

extinction” – which is decidedly “not an attempt to try to stop” extinction.¹³⁵ Instead, when it comes to the phenomenon of extinction (and, here, I would include the phenomenon of habitat loss where zoo-dwelling and sanctuary-dwelling elephants do not have a place without humans to return to), decolonization is an attempt to greet this circumstance without hierarchies of domination over human and nonhuman beings.¹³⁶ Invoking feminist scholarship on decolonization, Parreñas is careful to specify that decolonization cannot mean the replacing of one hierarchy of domination with another (whether that be the creation of a new one or the return to an old one); instead, “[d]ecolonization is not like ‘decontamination’ or ‘dehydration.’ There is no return to a pristine past or golden age. Rather, decolonization ... is about vigilance against domination[.]”¹³⁷

On this point, one may recall how Carol J. Adams operationalized the feminist critique of the home: that the home “functions as a part of the logic of domination: the ‘I-have-a-right-to-do-what-I-want-in-my-own-home’ patriarchal justification for abusive behavior against those constructed as ‘inferior’ – adult female partners, children, and animals.”¹³⁸ Here, I would link the two: in much the same way Parreñas encourages us to “decolonize extinction” (to greet the precarity of animal life in an era of extinction without hierarchies of domination, but with humility instead), Adams and other feminist critics would encourage us to “leave home.” That is to say, both Parreñas’ decolonization of extinction and the feminist critique of the home gives us good reason, in the face of Lucy’s global homelessness, *not* to try and create a new home instead. Rather, facing the tragedy head-on – recognizing the place of Lucy not as a home, but as a hospice – could mean, in Parreñas’ words, “abandon[ing] an

¹³⁵ *Ibid.* at 9.

¹³⁶ *Ibid.* at 3.

¹³⁷ *Ibid.* at 191 n 17.

¹³⁸ Adams, “Peace”, *supra* note 107 at 331.

impression of safety that depends on cruelty” to “instead embrace the vulnerability of sharing our lives together, however fleeting those moments might be.”¹³⁹

4. Conclusion

I began this chapter by indicating that “place” in *Reece*’s pieces seem to be invariably caught up with the idea of “home” – a term whose loadedness and slipperiness I hope I have demonstrated by this point. In following the term throughout *Reece*’s pieces, this chapter’s “Going Home” section established that the term is most often invoked with respect to a place having meaningful relations associated with it. In the global-geographic sense, this played out as a tension between Lucy’s homeland and new home, the former apparently mattering to discourses only insofar as some concept of an exotic tropical point of origin allowed them to make sense of Lucy’s connections to people in her new home instead. In the physical shelter sense – where “*home* = house + x” – what I found was that a “house” for Lucy was not at the heart of what discourses fought over, the debate instead concerning what space provides (or would provide) her with the meaningful relations it takes to make a house into a home.

The insistence on a home for Lucy, however, demonstrated the limits of the discourse. The feminist critique of the home argues that there is no inherent reason to associate the home with something positive – even where meaningful relations exist, the reality of gender-based violence within the home highlights how this can be a space of hierarchy and dominance. With Lucy being gendered according to the framework of the ostensibly human man-woman difference-dominance binary at several points throughout *Reece*’s pieces, one should at least be wary of how the meaningful relations highlighted throughout may play out according to the lines of hierarchy and dominance of which feminist scholars have been so critical.

¹³⁹ Parreñas, *supra* note 12 at 3.

More than this, however, the greater limit the discourse seems unable to pass is not the idea that home may not be a positive thing, but that a home for Lucy may not exist at all. Seemingly unthinkable – or at least unspeakable – for all discoursants in *Reece's* pieces is the possibility that Lucy's story is a true tragedy: that, in not being able to connect to members of her own species and in not having any suitable habitat to return to, the elephant may not have a home anywhere in the world. As such, following Juno Salazar Parreñas, I have suggested the only way one may be able to rightly speak of the place of Lucy without retreating into baseless idealization would not be as a “home,” but as a “hospice.”

The hospice is not a happy ending. It is palliative care. Importantly, just as the home is so often associated with abundantly positive connotations which mask the dark realities it can contain, the same can be said for the concept of “care.” Even in introducing the idea of the hospice as a way to understand these places where humans care for animals in the era of extinction, Parreñas was cautious to note “‘care’ is not necessarily loving and pleasant, but rather something akin to the opposite.”¹⁴⁰ Such care is what I find in the following chapter. When looking for “law” in *Reece's* piece, it is not the term “home” one finds popping up everywhere – nor is it even the language of civil law that would align with a lawsuit like *Reece* – but rather the language of crime and punishment. As such, not even the mercy of palliative care can be found here, but instead the violent care of the prison.

¹⁴⁰ *Ibid.* at 190 n 9.

Chapter 5

Sentenced to Life: The Carceral, the Pastoral, and the Limits of Law

1. Introduction

“INCARCERATED OVER 40 YEARS.” Written in block text, this phrase accompanies many of the graphics produced by members of the Save Lucy campaign (see Figure 6). While undeniably attention-grabbing, I reproduce this phrase here not simply to hook the reader. Rather, insofar as this phrase invokes the spectre of crime and punishment to describe the circumstances of this long-captive elephant, it usefully opens up the space where one can think through the final stitch that pulls *Reece*’s pieces together: “law.”

By this, I do not mean law in its formal sense. After all, an engagement with that is one which already took place in the opening chapter of this dissertation, surveying as I did there the legal-doctrinal scholarship related to *Reece* and locating it with respect to case law and legislation. This current chapter differs significantly from how I approached law in that opening chapter. Most notably, this chapter’s analysis of law does not focus on “*Reece*” so much as “*Reece*’s pieces.” Under consideration here is not doctrine, precedent, or courtroom proceedings in and of themselves, but rather the life which the law had in the decade-long battle over Lucy the elephant.

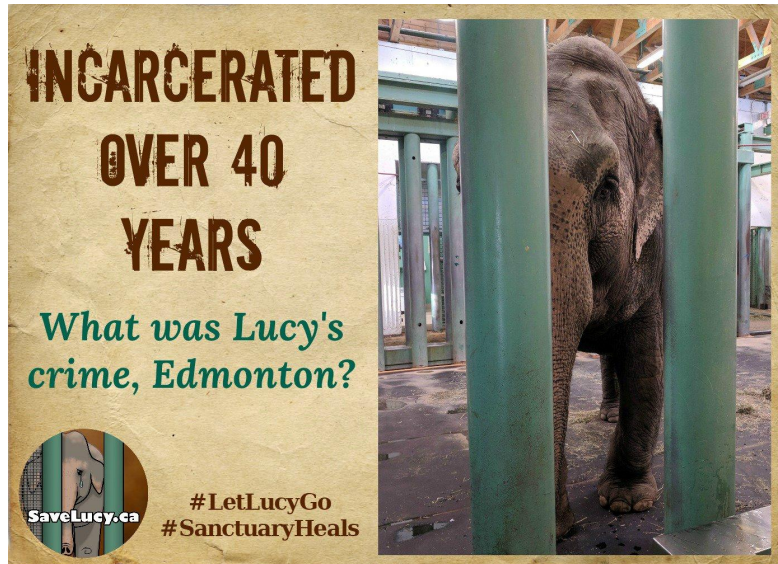


Figure 6: A Friends of Lucy graphic foregrounding references to incarceration and “Lucy’s crime”¹

When looking from a more-than-just-the-courtroom vantage point, the kind of law I came upon in *Reece*’s pieces was starkly different from what one finds in the *Reece* case proper and the legal-doctrinal scholarship surrounding it. Although questions about administrative and penal law arose with respect to *Reece*, the case itself was, in the end, a lawsuit – which is to say, a proceeding concerning civil law first and foremost. However, instead of the logic of a lawsuit targeting the *Animal Protection Act*, I found a discourse on an elephant’s “wrongful conviction” and pleas for freedom from her “incarceration” animating much of the wider cultural sphere of *Reece*’s pieces.

Following this thread, the conclusion I come to in this chapter is that Lucy the elephant has effectively been “sentenced to life.” I arrive at this point through two sections, each tracing

¹ See, e.g., Friends of Lucy, “Only TEN DAYS until the Edmonton Valley Zoo’s permit expires. Lucy’s been behind bars for 40 years and 10 months of her life. Can you spare 15 minutes of your life to #BeHerVoice, and send an email, postal letter or make a phone call for her? Info: <https://www.facebook.com/FriendsOfLucy/photos/a.320869434654223.73694.315797538494746/1757965850944567/?type=3&permPage=1...#yeg>” (21 March 2018 at 10:58PM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/976669444247302144> [Friends of Lucy, “Only TEN DAYS”].

how particular logics (as well as entanglements and tensions between these logics) operate in *Reece's* pieces: “the carceral” and “the pastoral.” In my first section (“The Carceral”), I trace the language of prison comparisons as they flow throughout *Reece's* pieces, drawing especially on the scholarship of geographer Karen M. Morin to unpack how and where “the carceral” arises in the discourse surrounding Lucy the elephant. Finding that Lucy is figured in terms of a prison inmate, what I show in this section is that varying responses to “elephant crime” exemplify how different techniques of power have come to circulate around elephant captivity. Investigating the kind of power found to be at work here, I draw especially on the insights of legal geographer Irus Braverman on the prison-zoo comparison to demonstrate how the idea of “care” plays into this overall discourse in a section called “The Pastoral.” Rather than tender loving touches, the care of Lucy’s captivity is fundamentally a violent one – one that forces an entity to *live* even in conditions against which her body appears to revolt at a biological level. “Law,” instead of showing itself to be the tool of liberation many in *Reece's* pieces appear to want it to be, ultimately presents itself most prominently in its most punitive manifestations. In the end, the law offers no real chance at freedom for Lucy the elephant – only the possibility of different ways to be “sentenced to life.”

2. The Carceral: Criminal Language and Disciplinary Logics

The language of “incarceration” is nigh inescapable in *Reece's* pieces. As there are dozens upon dozens of documents that figure Lucy’s conditions in this way, I have chosen only some of the most common related terms and tropes to highlight here. Unsurprisingly, the term “prison” itself is a favourite word among those critical of zoos in general or the Edmonton Valley

Zoo in particular. For example, former *Price is Right* host and Save Lucy advocate Bob Barker makes repeated use of the analogy to denigrate zoos as a whole, commenting in one interview that “[z]oos are prisons for animals and they all suffer.”² Other uses of the prison analogy abound with respect to Lucy’s specific circumstances, such as *Record* letter-writer Anita Nickerson commenting that Lucy lives in “woefully inadequate, prisonlike [sic] conditions,” *Calgary Herald* letter-writer Kim Cole employing a direct metaphor in castigating the Zoo staff for “somehow convinc[ing] themselves that Lucy would be best kept with them in her prison,” and *Edmonton Journal* journalist Hina Alam quoting the activist group In Defense of Animals as referring to Lucy’s place in the Zoo as a “bone-chilling prison” – just to give a mere sampling among countless other examples.³

Of course, those critical of the Zoo use more than just the overt term “prison” to vilify the conditions in which Lucy lives. References and allusions to being “behind bars” can also be found throughout *Reece*’s pieces.⁴ The conceptual connection of Lucy’s technologies of confinement to imprisonment is conjured up at various points in this way, such as when

² Dean Bennett, “Game-show host Barker slams Edmonton zoo over elephant’s care”, *Globe & Mail* (24 February 2009) A5. For other instances of Barker using this phrase, see also, Amy Dempsey, “The elephant man”, *Toronto Star* (3 November 2013) IN1. This exact phrase, that zoos are “prisons for animals,” can also be found in a blog post unrelated to Bob Barker: Dimitri Lignos, “Trapped” (22 March 2017), online (blog): *Dimitri Lignos* <<https://dimilignos.wordpress.com/2017/03/22/trapped/>>.

³ Anita Nickerson, “Move Lucy from zoo”, Letter to the Editor, *Record* (9 September 2009) A8; Kim Cole, “Lonely Lucy needs a new life at a sanctuary”, Letter to the Editor, *Calgary Herald* (3 December 2012) A11; Hina Alam, “Edmonton Valley Zoo on ‘worst list’ for treatment of Lucy the elephant” *Edmonton Journal* (10 January 2018), online: <<https://edmontonjournal.com/news/local-news/edmonton-valley-zoo-on-worstlist-for-treatment-of-lucy-the-elephant>>.

⁴ Attention to the bars of a zoo animal enclosure has a long lineage. In 1907, Rainer Maria Rilke’s poem (inspired by his visit to the panther exhibit in Paris’s Jardin des Plantes) opened with these lines: “The bars which pass and strike across his gaze / have stunned his sight: the eyes have lost their hold. / To him it seems there are a thousand bars, / a thousand bars and nothing else. No world” (quoted in Nigel Rothfels, *Savages and Beasts: The Birth of the Modern Zoo*, Baltimore: Johns Hopkins University Press, 2002, at 146) [Rothfels, *Savages*]. As Rothfels, *ibid.*, explains: “[I]t was those iron bars – marking so clearly the captivity of the animals – which repeatedly caught the attention of the visitors to the zoo. ... [Rilke] concluded that the bars must constitute the animal’s entire reality.”

Zoocheck's "Lucy Skanik" Facebook page captions a photo of the elephant behind a cage-like structure as "This is my sad life behind bars."⁵ The activist group Friends of Lucy seems to have a special affection for the phrase, with their Twitter feed variously commenting that Lucy was removed from "her native country Sri Lanka & put[] ... behind bars in #yeg Edmonton" and that "Lucy's been behind bars for 40 years and 10 months of her life," among many other uses of the phrase.⁶ Even more on the nose, Friends of Lucy's user image on Twitter *literally* depicts the elephant "behind bars," it being a stylized cartoon of a photograph wherein roughly a third of the elephant is obscured by metallic beams (elsewhere described by Friends of Lucy as her "thick prison bars") that separate her from the public (see Figures 7 and 8).⁷ Aside from being the avatar next to all of their tweets, this "behind bars" image accompanies almost all of the graphics produced by Friends of Lucy, appearing in the bottom right hand corner along with the SaveLucy.ca web address (see Figure 9).

⁵ Lucy Skanik, "This is my sad life behind bars" (31 July 2009), online: *Facebook* <<https://www.facebook.com/photo.php?fbid=1032350268761>>.

⁶ Friends of Lucy, "Only TEN DAYS", *supra* note 1; Friends of Lucy, "What has taking LUCY out of her native country Sri Lanka & putting her behind bars in #yeg Edmonton for 40 yrs done to save Asian [elephant]? Nothing." (14 September 2017 at 11:15PM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/908544708657373184>. See also, e.g., Friends of Lucy, "Friday will be the 40th anniversary of LUCY's arrival & incarceration at #yegzoo. Even most criminals don't get 40 yrs behind bars. #yeg" (16 May 2017 at 12:08AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/864346801788248064>; Friends of Lucy, "If LUCY and all elephants had their fundamental rights recognized by the courts, they wouldn't spend decades behind bars for human amusement" (26 August 2017 at 11:13PM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/901658949249880064>.

⁷ Friends of Lucy, "Rocks in the floor, and don't forget the painted trees. Thick prison bars, rubber mats over a concrete floor, and a radio playing. Immersed in nature." (31 January 2018 at 11:28PM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/958919942509940737>.



Figure 7: The Twitter user image for Friends of Lucy⁸



Figure 8: The photograph on which Friends of Lucy's user image appears to be based⁹

⁸ Friends of Lucy, "Friend of Lucy (@Friends_of_Lucy) | Twitter" (October 2010), online: *Twitter* <https://twitter.com/Friends_of_Lucy>.

⁹ Friends of Lucy, "Hi Katalin, no Lucy hasn't been transferred to a US sanctuary, she's still incarcerated at the Edmonton Valley Zoo here in Canada, for almost 41 years now. Here's Lucy on December 28th taken by one of our volunteers. Please see our pinned tweet if you'll join us to help her." (26 March 2018 at 11:31PM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/978489542918406144>.

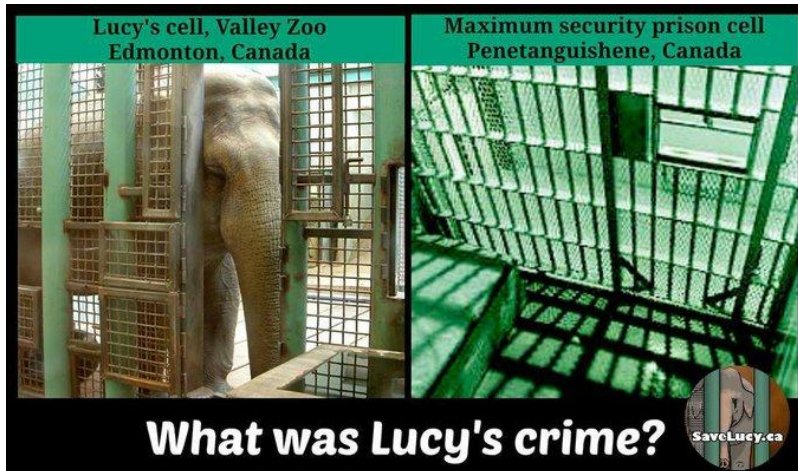


Figure 9: An example of the Friends of Lucy user image being affixed to other graphics¹⁰

That those critical of zoos in general or the Edmonton Valley Zoo in particular would operationalize comparisons or allusions to the prison is, of course, understandable. As geographer Karen M. Morin has noted, it is a connection that circulates in popular discourse, with zoos often compared to prisons and, *vice versa*, prisons often compared to zoos.¹¹ Moreover, while the literature on the comparison is somewhat underdeveloped (with philosopher Lori Gruen commenting in her 2014 edited collection on the topic, *The Ethics of Captivity*, that there is a dearth of serious scholarly attention to the popular comparison), links between prisons and zoos have long been acknowledged.¹² Indeed, as historian Nigel Rothfels has noted, “for many observers at the end of the nineteenth century, the zoo was, before all else, a place for captivity, a

¹⁰ This particular graphic has been included here because it contains other important elements, such as the direct comparison between Lucy’s enclosure and a prison cell and the refrain of “What was Lucy’s crime?” This image accompanied the following tweet: Friends of Lucy, “That’s like saying if you physically survive for 40 years in solitary confinement in prison, the decision to put you there and leave you there was a good one. Would you be OK in solitary? The fact Lucy’s been deprived of her needs for so long isn’t a reason to keep depriving her.” (29 March 2018 at 12:44AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/979232729874292736>.

¹¹ Karen M. Morin, “Wildspace: The cage, the supermax, and the zoo” in Kathryn Gillespie & Rosemary-Claire Collard, eds, *Critical Animal Geographies: Politics, intersections and hierarchies in a multispecies world* (New York: Routledge, 2015) 73 [Morin, “Wildspace”] at 75.

¹² Lori Gruen, “Introduction” in Lori Gruen, ed, *The Ethics of Captivity* (Oxford Scholarship Online: 2014) 1 at 1. On the history of the prison-zoo comparison, see especially Rothfels, *Savages*, *supra* note 4.

place where animals were locked up” such that there was a “popular image of the zoological garden as little more than a prison for ‘innocent’ animals” and much of later zoo design arose as an express attempt to try to avoid the image of them simply being spaces for the “imprisonment of innocents in iron cages.”¹³

That said, it is not just the general language of “prisons” and “barred cells” that discourses in *Reece*’s pieces draw upon.¹⁴ Notably, another favourite term for those critical of the conditions in which Lucy lives is one which figures her state of being as a particular carceral practice: “solitary confinement.” When reporting to the press that they were considering undertaking a lawsuit against the City of Edmonton, Zoocheck and People for the Ethical Treatment of Animals (PETA) “argue[d] that keeping a social animal alone without the company of other elephants amounts to solitary confinement.”¹⁵ Upon filing the lawsuit, Clayton Ruby (the attorney for Tove Reece, Zoocheck, and PETA) is quoted as saying, “Solitary confinement is cruel and unusual for humans and it is distress, unnecessary distress, for Lucy.”¹⁶ The “solitary confinement” turn of phrase appears to have been taken by some to be at least as important as the

¹³ Rothfels, *ibid.* at 146-147.

¹⁴ For uses of the term “cell” to refer to Lucy’s enclosure, see, e.g., Friends of Lucy, “Every picture tells a story... Generations of children in #yeg have learned it's OK to take elephants from their native countries, lock them up in small zoo cells and parade thousands of people past just to see what an elephant looks like. Society has normalized this. :-(#yegzoo” (9 January 2018 at 1:30AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/950615812326518784>; Friends of Lucy, “LUCY’s stuck inside during extreme cold. Elephant scientist Dr. Joyce Poole on Lucy spending much of her life in a cell: ‘The consequence is that she is a young elephant in an old body. This causes her real privation and suffering.’ More: <https://www.facebook.com/FriendsOfLucy/posts/1708135409260945> #yeg #yegwx” (28 December 2017 at 1:14AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/946263059995267074>; LEAP for Lucy, “Lucy the Elephant / Edmonton / LEAP” (2018), online: *LEAP for Lucy* <<https://www.leapforlucy.com/>>.

¹⁵ John Cotter, “Animal activists want Edmonton elephant’s medical records, may not sue city” *Canadian Press* (17 November 2009). PETA appears to have been especially fond of this expression in communicating with media. On this latter point, see, e.g., these PETA press releases: “TAXIS JOIN ‘ELEPHANT DRIVE’ AT ZOO IN CAMPAIGN TO FREE LUCY”, *States News Service* (20 August 2010); “KIDS FLOOD CITY COUNCIL WITH VALENTINES ASKING OFFICIALS TO HAVE A HEART FOR LUCY”, *States News Service* (7 February 2011).

¹⁶ Lisa Arrowsmith, “Edmonton, animal rights groups will fight in court over elephant’s future”, *Canadian Press* (1 February 2010).

legal action itself, with the title of *Globe & Mail*'s story on the lawsuit's filing declaring outright, "Group equates Edmonton elephant's habitat with solitary confinement."¹⁷ Despite the fact that Tove Reece, Zoocheck, and PETA's actual Originating Notice made no reference to "solitary confinement," reading news media reports would have one thinking that it was the absolute crux of their application.¹⁸ This is best evidenced in the *Globe & Mail* story, which reports on Tove Reece, Zoocheck, and PETA's application not as seeking a declaration that the Zoo is in violation of the *Animal Protection Act*, but rather as follows: "Far from the green tropics that are her natural habitat, Lucy the elephant is being kept in cramped and cold conditions that amount to solitary confinement, a court application alleges."¹⁹

Indeed, where references to law in its official courtroom manifestations appear in *Reece*'s pieces, so too do references to the carceral practice of "solitary confinement" seem also to follow. In the days immediately after the Alberta Court of Appeal's decision in *Reece*, veterinarian Debi Zimmermann lamented in a letter to the editor of the *Edmonton Journal*, "For half of her years, Lucy has been kept in solitary confinement, considered to be the most severe punishment for a social animal next to death."²⁰ Similarly, in a *Globe & Mail* op-ed when the Supreme Court was considering Tove Reece, Zoocheck, and PETA's leave to appeal, legal scholar Lesli Bisgould states point-blank that "Lucy is in solitary confinement."²¹ The expression apparently having some staying power, it is repeated again in Helen Schiele's letter to the *Globe*

¹⁷ Joel Tiller, "Group equates Edmonton elephant's habitat with solitary confinement", *Globe & Mail* (2 February 2010) A10.

¹⁸ The actual Originating Notice states that the Applicants were seeking a declaration that "the City of Edmonton is in violation of section 2 of the Animal Protection Act, R.S.A. 2000, c. A-41," one of the bases for which was expressed as merely that "[t]he City of Edmonton holds Lucy in an enclosure at the Edmonton Valley Zoo without any elephant companionship."

¹⁹ Tiller, *supra* note 17.

²⁰ Debi Zimmermann, "Let's get Lucy the help she needs", Letter to the Editor, *Edmonton Journal* (18 March 2011) A17 [Zimmermann, "Lucy"].

²¹ Lesli Bisgould, "Who will speak for Lucy the elephant?", *Globe & Mail* (28 March 2012) A15.

& *Mail* editor the next day, commenting that Lucy is “an example of solitary confinement and social neglect.”²²

That “solitary confinement” comes up as an expression used to describe Lucy’s conditions of captivity following the release of the Court of Appeal’s decision is perhaps attributable, at least in part, to the text of the decision itself. Namely, in her dissenting opinion, Chief Justice Fraser appeared to cautiously endorse this characterization, with she herself remarking that, “[a]bsent a same species companion for Lucy, this amounts to Lucy’s having been kept in solitary isolation – some might use the words solitary confinement – since Samantha was moved away.”²³ As the term does not appear in the *Reece* affidavits, exactly how the Chief Justice arrived at it is an open question. Although she may simply have been repeating in writing a term that Clayton Ruby had perhaps proffered in oral arguments (with him having been quoted as using this characterization previously), also possible is that the inclination to use the expression was arrived at from an altogether separate place. That is to say, referring to Lucy’s solo captivity as “solitary confinement” is perhaps just too good a rhetorical move to pass up, carrying with it the connotation of inhumane and punitive treatment.²⁴

Another possibility worth exploring for the popularity of “solitary confinement” as a phrase in *Reece*’s pieces is that those who used the term leading up to, during, and after the

²² Helen Schiele, “Lucy’s plight”, Letter to the Editor, *Globe & Mail* (29 March 2012) A18.

²³ *Reece v Edmonton (City)*, 2011 ABCA 238 at para 106.

²⁴ Several of those who use the expression “solitary confinement” to describe Lucy’s condition make the link to its carceral function as a form of punishment. Debi Zimmermann’s letter to the editor (“Lucy”, *supra* note 20) makes the connection overtly, noting that Lucy’s “solitary confinement ... [is] considered to be the most severe punishment for a social animal next to death.” The connection is also made indirectly: see, “Protest held over aging, sick elephant’s fate at Edmonton’s Valley Zoo”, *Canadian Press* (18 February 2013) (quoting protestor Faris Anderson saying that “keeping Lucy alone when elephants are by nature social animals is like keeping humans in solitary confinement in Siberia”); “Calgary zoo to decide within six weeks on relocation of female elephants”, *Canadian Press* (16 April 2013) (quoting various animal rights organizers reiterating Anderson’s statement); Arrowsmith, *supra* note 16 (quoting Clayton Ruby at the filing of the lawsuit saying that “[s]olitary confinement is cruel and unusual for humans and it is distress, unnecessary distress, for Lucy”).

various *Reece* court proceedings were capitalizing on other goings-on in the Canadian mediasphere at the time. This exact turn of phrase, after all, could be found on the lips of many thanks to on-going publicity surrounding the high-profile death of teenager Ashley Smith, who died of self-strangulation while under suicide watch in a Canadian women's prison. While Smith's death occurred in 2007, some news media coverage related to it aligns well with when speakers in *Reece*'s pieces favoured the expression "solitary confinement."²⁵

Notably, CBC's *The Fifth Estate* aired its first of two docudramas on Smith's death roughly 3 weeks before the lawsuit over Lucy's so-called "solitary confinement" was announced. As socio-legal scholar Rebecca Jaremko has observed, the 2010 CBC docudramas are notable for how they signal a marked shift away from the Canadian public's perception of the Smith case as being one of "rogue bad actors in the correctional [system]" to one wherein the previously blank slate of "inmate Smith" instead became publicly legible as "*somebody's* middle class white child."²⁶ That is to say, thanks to the especially empathy-provoking depictions of Smith's death as a preventable tragedy that were broadcast in 2010, wide public scrutiny in Canada was indeed turning to the practice of solitary confinement during the same period when talk of "solitary confinement" began to circulate with respect to Lucy the elephant – to say nothing of how the term stayed in public consciousness owing to coverage of the first Smith Inquest's mistrial being declared in 2011 and the plans for the second Smith Inquest being announced 2012 (i.e., the

²⁵ Although discussion of "solitary confinement" in the Canadian mediasphere reached a fever pitch in the public discourse on the death of Ashley Smith, it should be noted that solitary confinement received attention in Canadian media up to and following this point owing to denunciations of the practice from the Canadian Medical Association and subsequent deaths in similar circumstances (such as Edward Snowshoe in 2014, for example). On this point, see, e.g., Dawn Moore, "Ashley Smith response a missed chance to right decades of wrong", *Globe & Mail* (12 December 2014), online: <https://www.theglobeandmail.com/opinion/ashley-smith-response-a-missed-chance-to-right-decades-of-wrong/article22060739/>.

²⁶ Rebecca Jaremko Bromwich, *Looking for Ashley: Re-reading What the Smith Case Reveals about the Governance of Girls, Mothers and Families in Canada* (Bradford, ON: Demeter Press, 2015) [emphasis in original].

years during which the Court of Appeal proceedings for *Reece* took place and during which the Supreme Court denied leave to appeal, respectively).²⁷

In these ways, it stands to reason that Lucy's solo captivity was figured by various speakers in *Reece*'s pieces as "solitary confinement" as an indirect allusion to something else present in the public consciousness. In fairness to the allusion, comparisons between Ashley Smith and Lucy the elephant are not difficult to sustain: both were sexed female, both were kept in conditions of captivity from a young age, both were separated from others of their kind because of alleged (though never confirmed) psychological disturbances, and both were kept in situations of captive isolation for years at a time. Quite possibly, figuring Lucy's solo captivity as "solitary confinement" drew on a powerful "like us" line of argument, operating so as to garner good will from the public towards a young girl who tragically died a preventable death in prison and transferring that to Lucy the elephant.

That said, more thought-provoking is the possibility that these overlapping mediasphere uses of "solitary confinement" to describe Smith's and Lucy's conditions are, in fact, *non-comparative* in nature. Rather than the solo captivity of humans and animals being conceived of simply as analogues for each other, they can instead be thought of as practices that simultaneously participate in the same conceptual arrangement. In this vein, political philosopher Lisa Guenther has argued that "solitary confinement" itself is best understood from a posthumanist vantage point.²⁸ That is to say, analyses of solitary confinement have been long hindered by turns to humanist points of value by making recourse to the concept of "human

²⁷ *Ibid.*

²⁸ Lisa Guenther, "Beyond Dehumanization: A Post-Humanist Critique of Solitary Confinement" (2012) 10:2 *Journal for Critical Animal Studies* 47.

dignity” to substantiate the moral wrongness of the practice.²⁹ However, as Guenther has argued, humanist valuations of solitary confinement come up short in their analyses insofar as solitary confinement is in fact a practice that offends something deeply animal in *Homo sapiens*: our “corporeal and intercorporeal needs” as living beings.³⁰ Thinking human and animal solo captivity together as both participating simultaneously in the practice of “solitary confinement” does well, in fact, not to derive value from “the human” which can then be applied to “the animal” by means of metaphor, but instead to highlight a shared dimension of embodied creatures – human, elephant, or otherwise – that is injured by such practices. More than just comparison between the conditions in which Smith and Lucy have been kept captive, the application of the term “solitary confinement” in *Reece*’s pieces also points to a conceptual reckoning with the other-than-human characteristics of the practice.

This “thinking together” is an approach Karen M. Morin has deployed with respect to prisons and zoos more generally. More than simply the comparative dimension they were perhaps meant to shore up, terms like “prison,” “barred cells,” “solitary confinement,” and so on in *Reece*’s pieces can also be read as evidence of how zoo captivity simultaneously participates in many of the same conceptual (and even material) arrangements as human captivity. For Morin, what this means is that both prisons and zoos are instances of things participating in “the carceral.”

To be sure, “the carceral” is a slippery and expansive idea. As Morin notes, philosopher Michel Foucault’s *Discipline and Punish* explores “rippling carceral circles” to underscore how forms of power, social arrangement, knowledge, and so on that were refined and concentrated in

²⁹ *Ibid.* at 47.

³⁰ *Ibid.* at 60.

prisons radiate outward into society as a whole.³¹ That said, while Foucault was no doubt correct in asserting that carceral logics can be found in operation far beyond the prison in wider society, some spaces are nevertheless *more* carceral than others – such that the zoo represents a particularly stand-out instance of a non-prison space participating in carcerality.³²

Following other carceral geographers, Morin has suggested three criteria to pinpoint spaces where carcerality is most prominently in operation.³³ The first of these is “detriment” – which is to say, suffering, harm, and/or punishment occur in the space (regardless as to whether or not anyone intends for the space to cause that suffering, harm, and/or punishment). The second is that the space can be defined by “agenic [sic] imposition of detriment via confinement” (i.e., one is actively made captive by another).³⁴ Finally, carcerality in its most prominent operations relates to “material, virtual, or imagined space or spaces” (i.e., one is captive *somewhere* specific, regardless as to whether that is a material or immaterial space).³⁵ All this to say, while elements of “the carceral” can be found to be in operation in myriad locales, it would

³¹ This descriptor, “rippling carceral circles,” is Morin’s; however, it corresponds to Foucault’s claim at 298 in *Discipline and Punish*: “... moving still farther away from penalty in the strict sense, the carceral circles widen and the form of the prison slowly diminishes and finally disappears altogether...” See Karen M. Morin, *Carceral Space, Prisoners, and Animals* (New York: Routledge, 2018) [Morin, *Carceral Space*] at 11; Michel Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (New York: Vintage Books, 1995) [Foucault, *Discipline*] at 298.

³² Morin, *Carceral Space*, *ibid.* at 11-12.

³³ *Ibid.* at 12.

³⁴ *Ibid.*

³⁵ *Ibid.* On this point of virtual or imagined space, it is worth considering how artist Barbara Greene Mann links herself to Lucy’s plight: “I feel the pain as I am a prisoner in my world too.” Greene Mann is likely referring to her diminished capacity to access and interact with the wider world due to her on-going battle with cancer. Carceral spaces, in this sense, are not demarcated by walls or bars, but may in fact refer to limitations on how expansive our own “worlds” can be. See Barbara Greene Mann, “A Plea to Oprah and the Pianist Who Played Beethoven to Heal the Hearts of Saved, Tortured Elephants. Heal ,Heal” (2 June 2015), online (blog): *Elephants Need Elephants and People Need Art* <<https://barbaragreenemannandlucy.wordpress.com/2015/06/02/a-plea-to-oprah-and-pianist-who-played-beethoven-to-o-saved-tortured-elephants/>>.

seem to refer at its core to a delimitable space of imposed captivity wherein the captive encounters (either intentional or unintentional) suffering, harm, and/or punishment.

Morin's definition of the carceral is particularly useful for analyzing more broadly the ways in which Lucy's living conditions are characterized throughout *Reece's* pieces. The language of carcerality I pulled out of *Reece's* pieces above – the references to “prison,” “barred cells,” and “solitary confinement” – almost universally comes directly from those in the anti-zoo “Save Lucy” camp. In this way, it would seem to paint a very partial picture. While it is, no doubt, worth asking the question of why carceral language appears so easy to apply to the Zoo, to find it only coming from the mouths of those in the “Save Lucy” camp diminishes the value of carcerality being an overall lens for understanding *Reece's* pieces.

However, while the *language* of carcerality appears to be unique to the “Save Lucy” camp, the *logic* of carcerality is not. Each of Morin's criteria is demonstrable even in how those squarely located in the Zoo camp frame Lucy and the conditions in which she lives. On the point of detriment, the Zoo's own records (appended to the affidavit of veterinarian Philip K. Ensley in *Reece*) confirm in abundance the pain and suffering of Lucy the elephant, manifested as a chronic respiratory illness, arthritis, foot problems (such as abscesses and pad defects), obesity, sleep disorder, and oral and dental problems.³⁶ Although the Zoo also devised multiple means of treating these various instances of pain and suffering, Chief Justice Fraser astutely noted in *Reece* that these are not random ailments, but more than likely direct results of Lucy's captivity: “It would be naive to assume that problems do not arise from the mere fact of keeping elephants in captivity. ... [Further,] [t]his case is not about the harm caused to Lucy merely by holding her

³⁶ See generally, Affidavit of Philip K. Ensley [Ensley Affidavit].

captive; it is about the alleged harm caused by the way in which she is being treated while captive.”³⁷ That is to say, while it is perhaps admirable that the Zoo sets out to rectify Lucy’s pain and suffering, in so doing it also admits to the part zoo captivity has played in causing such detriment to the elephant in the first place.³⁸

As to the second of Morin’s criteria, the Zoo’s imposition of captivity is frequently indicated with respect to Lucy. This is most abundantly evident in Zoo documents that detail the steps taken to prevent her escape from her current enclosure. For instance, as part of its general “Lucy the Elephant” webpage, the Zoo includes a document describing “Elephant Enclosure Standards.”³⁹ Here, in noting that the Edmonton Valley Zoo’s enclosure has containment barriers composed of “[s]teel post and rail, engineered specifically for the elephant,” the Zoo indicates that this is how it meets the industry standard for “Containment Barriers ... able to prevent elephant escapes.”⁴⁰ Relatedly, the only time elephants are specifically noted in the *Government of Alberta Standards for Zoos in Alberta (GASZA)* – under whose guidelines the Zoo operates – is in the context of concerns over containment and escape.⁴¹ In a section entitled “Wildlife and Controlled Animal Containment Standards,” the *GASZA* spells out that the point of such

³⁷ *Reece*, supra note 23 at n 69. For an example of a treatment program devised for Lucy, see “Lucy’s Treatment Program” (13 November 2009), online (pdf): *City of Edmonton* <https://www.edmonton.ca/attractions_events/documents/PDF/Lucys_Treatment_Program_Nov2009.pdf>.

³⁸ This is especially obvious with respect to Lucy’s joint and foot problems, as the plans to change the floor in Lucy’s enclosure that are detailed in “Lucy’s Treatment Program,” *ibid.*, imply that the floor in her enclosure helped to cause these joint and foot problems to begin with.

³⁹ City of Edmonton, “Lucy the Elephant” (no date), online: *City of Edmonton* <https://www.edmonton.ca/attractions_events/edmonton_valley_zoo/lucy-news.aspx>; “Elephant Enclosure Standards” (no date), online (pdf): *City of Edmonton* <https://www.edmonton.ca/attractions_events/documents/PDF/Elephant_Enclosure_Standards.pdf>.

⁴⁰ “Elephant Enclosure Standards,” *ibid.*

⁴¹ Alberta Zoo Standards Committee of the Department of Environment and Sustainable Resource Development and Department of Agriculture, Food and Rural Development, *Government of Alberta Standards for Zoos in Alberta* (2005) [*GASZA*], s. III D. The *GASZA* has a quasi-legal nature that made it somewhat significant in *Reece*, as the *Wildlife Regulations*, Alta. Reg. 143/1997 (in turn pursuant to *Wildlife Act*, R.S.A. 2000, c. W-10) require Albertan zoos to conform to such standards.

standards is, among other things, “to prevent escape from the zoo facility” and “to prevent ... genetic contamination ... between zoo animals and free-ranging wildlife” – the latter apparently raising the question of what other term might be substituted for “zoo animal” if its corollary is a “free-ranging wildlife.” Moreover, when naming elephants specifically, the *GASZA* stipulates that there “must be a written plan in place outlining containment, recapture and emergency procedures in the event of an escape (i.e., either within or beyond the zoo facility).” Needless to say, while those in the Zoo camp rarely refer to Lucy overtly as a “captive” (or, to use the Save Lucy camp’s more emphatic language, a “prisoner”), her place in the Zoo is steeped through and through with a concern for ensuring and maintaining her confinement.⁴²

While Lucy does indeed have some freedom of movement within the Zoo, this is decidedly *limited* freedom of movement, nevertheless. Insofar as the prevention of her “escape” is apparently front of mind for the Zoo, there is an open acknowledgement that the elephant does not come and go as she pleases. Unsurprisingly, when it comes to the final of Morin’s criteria – a delimitable space – there are clearly mapped out limits of space that Lucy can move through. To return to the “Elephant Enclosure Standards” document, one finds the Zoo telling us directly that Lucy’s indoor enclosure space is 2 100 square feet, that her outdoor enclosure space is 11 000 square feet, and that the enclosure has vertical barriers measuring 20 feet high.⁴³ More than this,

⁴² Admittedly, it was challenging to find any of those in the Zoo camp even using the expression “captive elephants” or any variations thereof in the context of speaking about Lucy. One of the only instances I found was a characterization of the Edmonton Valley Zoo’s elephants as “elephants in captivity” in the 2005 *Master Plan*. See City of Edmonton Community Services & Valley Zoo Development Society, *Valley Zoo Master Plan Update — 2005* (Bainbridge Island, Washington: Studio Hanson Roberts, 2005), online (pdf): *City of Edmonton* <<https://webdoc-s.edmonton.ca/occtopusdocs/Public/COMPLETE/REPORTS/CC/Elected-1995/2005-11-29/2005CSR014%20-%20Attach%201.pdf>> [Master Plan] at 35. The disappearance of this characterization over time with respect to those in the Zoo camp seems to suggest an attempt to avoid making direct references to expressions that highlight the inherent captive condition of a “zoo elephant.”

⁴³ “Elephant Enclosure Standards,” *supra* note 39.

however, even Lucy's movements outside of her immediate enclosure and within the Zoo grounds are expressly delimited, with her "walks" throughout the Zoo grounds both temporally and spatially determined by Zoo staff.⁴⁴ Thus, like a prison, the Zoo appears to tick all the boxes that make it into a definitively "carceral" space.

That said, while both zoos and prisons can be said to participate in the carceral, there is a crucial point where prisons and zoos would seem to part company. Although there are undoubtedly many points of connection between zoos and prisons, a salient distinction is in the fact that "most spaces of animal confinement and captivity were not invented or designed to be places of punishment" in the way that prisons have been.⁴⁵ Moreover, as Morin points out, outside viewers of prisons and zoos tend to "imagine a presumed innocence of caged animals compared to the presumed guilt of caged humans – the latter 'got what they deserved' and thus do not inspire the sympathy of neglected or abused caged animals."⁴⁶ Nevertheless, while caged animals are indeed often perceived to be innocent of wrongdoing, their threateningness or dangerousness *is* generally recognized, such that their caging can be understood as "intended for the ostensible protection and safety of others."⁴⁷

A problem, however, arises with making such an easy distinction between the meanings of human imprisonment and zoo captivity. Although this perhaps captures in broad strokes the general perceptions of the nature of human imprisonment as having a basis in criminal

⁴⁴ See, e.g., City of Edmonton, "Exercise and Diet" (12 January 2017) online (video): *YouTube* <<https://youtu.be/ADMsVJginms>>.

⁴⁵ Morin, *Carceral Space*, *supra* note 31 at 8. Cf. Rothfels, *Savages*, *supra* note 4, who has surveyed the ways in which modern zoo design attempts to *avoid* easy comparison to the appearance of a prison.

⁴⁶ Morin, "Wildspace", *supra* note 11 at 75. This theme is evident in many elephant enclosures, with historian Nigel Rothfels noting that many were designed with "an awareness of the care and safety issues of housing exceptionally large, powerful, and dangerous animals." See Nigel Rothfels, "Elephant House" in Dick Blau & Nigel Rothfels, *Elephant House* (University Park: Pennsylvania State University Press, 2015) 1 [Rothfels, "Elephant House"] at 6.

⁴⁷ Morin, "Wildspace", *ibid*.

wrongdoing and zoo captivity as having a basis in animal dangerousness, a closer examination suggests that the boundary here is a porous one. To this end, Morin acknowledges that the existence of the medieval European animal trials suggests that the non-attribution of criminal wrongdoing to animals is a historically contingent phenomenon.⁴⁸ More to the point, however, this porousness is not simply relegated to examples from the annals of history; rather, references to “the carceral” with respect to animals in *Reece*’s pieces are still linked not simply to qualities of danger, but to ideas of criminal wrongdoing. Most notably, Friends of Lucy makes repeated use of the graphic that features Lucy the elephant behind bars, with the words “INCARCERATED OVER 40 YEARS” along the top and, in smaller letters along the bottom, the question “What was Lucy’s crime, Edmonton?” (see Figure 6).⁴⁹

Where Morin suggests that the application of the concept of the carceral to zoo captivity shows that “carcerality clearly exceeds categories of criminality, penalty, punishment, and imprisonment,” it would seem that something like Lucy’s captivity cannot be wholly divorced from these fundamental elements.⁵⁰ This gives credence to the idea that, while carcerality is a potentially expansive concept, it is nevertheless inescapably “related to what the prison is; it is anchored in the prison,” where the term incarceration is “conventionally understood as referring to the legal confinement of sentenced offenders under the jurisdiction of the state” along with the whole conceptual kit and foundational kaboodle of crime and punishment.⁵¹ Insofar as the

⁴⁸ Morin, *Carceral Space*, *supra* note 31 at 16-17.

⁴⁹ For one of the tweets to which the graphic is attached, see, Friends of Lucy, “Only TEN DAYS,” *supra* note 1. Aside from just in the graphic, Friends of Lucy this question (i.e., “What was Lucy’s crime?”) frequently in their tweets. See, e.g., Friends of Lucy, “#TBT LUCY circa 1979, about age 4. She was two years into her 40 years of incarceration at #yegzoo. @doniveson #yegcc what was Lucy's crime?” (21 September 2017 at 4:29PM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/910979249787609088>; Friends of Lucy, “In 2 months it'll be the 39th anniversary of LUCY's arrival 4 incarceration at #yegzoo. #Yeg what was Lucy's crime?” (19 March 2016 at 1:24AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/711075856316178433>.

⁵⁰ Morin, *Carceral Space*, *supra* note 31 at 10.

⁵¹ *Ibid.*

objection to Lucy's "incarceration" leads groups like Friends of Lucy to demand an answer to the question "What was Lucy's crime?", it would appear that the abstract linking of the zoo to the prison has not much exceeded what the latter most fundamentally connotes.

Friends of Lucy posing the question "What was Lucy's crime, Edmonton?" fits well with how various speakers frame the role of law in *Reece's* pieces in criminal terms. Indeed, Tove Reece, Zoocheck, and PETA's legal action against the City of Edmonton has been framed in this way in the wider cultural sphere since its earliest mentions. One could consider here how the attorney for the *Reece* applicants was first introduced in the news coverage by journalists Paula Simons and Gordon Kent: "Clayton Ruby is famous for getting the wrongfully convicted out of jail. Now, the high-profile criminal lawyer will work to free a different kind of jailbird – Lucy the elephant – from a different kind of cage: Edmonton's Valley Zoo."⁵² Despite Ruby's long-time involvement in legal actions for animal rights, news media covering his involvement with the *Reece* case repeatedly stress his credentials related to the freeing of those wrongfully convicted and wrongfully imprisoned.⁵³ For instance, *Globe & Mail* journalist Katherine O'Neill reported that "Clayton Ruby, one of Canada's highest-profile criminal defence lawyers, who has represented the wrongfully imprisoned, has been retained by People for the Ethical Treatment of

⁵² Paula Simons & Gordon Kent, "High-profile lawyer retained to free Lucy the elephant from Edmonton zoo", *CanWest News* (17 September 2009). See also, Gordon Kent, "LUCY! Come on down!", *Edmonton Journal* (18 September 2009) A1 (noting that "Ruby is best known for his crusading work representing and defending the wrongfully convicted, including Guy Paul Morin and Donald Marshall Jr." before signalling his involvement in animal rights).

⁵³ On Ruby's long-time involvement in legal pushes for animal rights, consider especially that he was one of the writers of the factum for an animal rights group in *Harvard College v Canada (Commissioner of Patents)*, [2002] 4 SCR 45, notable for being the first time the Supreme Court of Canada recognized an argument for animal rights as being legally significant. See Lesli Bisgould, Book Review of *Animal Rights: Current Debates and New Directions* by Cass R. Sunstein & Martha C. Nussbaum (2004) 36 *Ottawa Law Review* 349 at n 14; Lesli Bisgould, *Animals and the Law* (Toronto: Irwin Law, 2011) at 284.

Animals to plot legal strategy to get Lucy relocated.”⁵⁴ The logic of Simons and Kent’s coverage, as well O’Neill’s, appears to be this: in taking Lucy’s case, Ruby is continuing in his tradition of freeing the wrongfully convicted and wrongfully imprisoned – the only difference is the species involved.

In reality, of course, the differences are many – especially when it comes to the kind of law actually involved. No legal conviction nor legal imprisonment – wrongful, rightful, or otherwise – has ever actually occurred with respect to Lucy the elephant. *Reece* is not a “return” to court to have a wrongful criminal ruling righted, but is rather the *first* time a court has gathered to judge anything related to Lucy the elephant at all (though the wider framing would certainly have one thinking otherwise).

Wrongful conviction and wrongful imprisonment are not what the legal proceedings in *Reece* actually concern; yet, the framing of overturning a wrongful conviction and freeing an inmate from a wrongful imprisonment appears to be the way in which the stakes of the *Reece* case are understood more widely.⁵⁵ The phenomenon observable here is perhaps best described as what sociologists Patricia Ewick and Susan Silbey have referred to as “legality” (as related to, but ultimately distinct from, “law”). As Ewick and Silbey explain it, legality is something that “operates through social life as persons and groups deliberately interpret and invoke law’s language, authority, and procedures” to organize and make sense of the world independent of the

⁵⁴ Katherine O’Neill, “Lucy staying put at Valley Zoo”, *Globe & Mail* (18 September 2009) A11. See also Alexandra Zabjek & Gordon Kent, “Animal rights groups take Lucy’s case to court”, *Edmonton Journal* (2 February 2010) B3 (noting that Ruby is “best known for his work defending wrongful conviction cases” before proceeding to explain his position on Lucy).

⁵⁵ That said, even the *Reece* case itself cannot seem to fully escape thinking of Lucy’s situation in connection with the logic of crime, wrongful convictions, and wrongful imprisonment, with this quotation from *Hill v Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129 at para 36 appearing in *Reece*, *supra* note 21 at n 103 as an example concerning the role of the courts: “[r]ecognizing an action for negligent police investigation may assist in responding to failures of the justice system, such as wrongful convictions...”

actual involvement of formal law.⁵⁶ Crucially, the point is *not* that – as law’s terms and concepts circulate socially beyond legislatures and courtrooms – non-lawyers “get it wrong” or that law is simply “misunderstood” by lay audiences. Rather, legality’s full significance stems from the fact that the deployment of law’s terms and concepts in wider social arrangements is part and parcel of how law’s terms and concepts themselves take on meaning.

“Legality,” rather than being law’s bastard child, is instead a fundamental component of how law itself is constituted. That is to say, the meaning-making relation between legality and law goes both ways. The significance is that – vis-à-vis the language of crime and punishment in *Reece*’s pieces specifically – it is not simply that the criminal law (as it is applied to humans) just “makes sense” to apply to animals (even when it is doctrinally incorrect to do so), but rather that legality’s discourse of “animal crime and punishment” helps produce the meaning of human crime and punishment in law, as well.

As indicated, despite the character of civil law that best describes the *Reece* lawsuit, legality ultimately appears to flow through and thread together the pages of *Reece*’s pieces most prominently wearing the garb of criminal law, with concerns over a wrongful conviction and wrongful imprisonment of Lucy the elephant breathing substantially more life and energy into the discourse present here than any of the more textbook-legal questions over the enforceability of the *Animal Protection Act* in civil court. Keeping with Ewick and Silbey’s analysis of “legality,” the implication here is not simply that *Reece* has attracted a “misframing” regarding law’s terms and concepts; instead, this ups the ante of what an examination of *Reece*’s pieces yields. Aside from merely helping to explain the *Reece* case itself, investigating the legality

⁵⁶ Patricia Ewick & Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: Chicago University Press, 1998) at 20.

surrounding Lucy the elephant fleshes out the full meaning of many of law's terms and concepts as they relate to crime and punishment more generally.

To return to the question that participates in this criminal-law framing – “What was Lucy's crime, Edmonton?” – it is worthwhile to note that there is indeed a “criminal” elephant to be found in *Reece's* pieces: Mary, a circus elephant who, in 1916, was publicly hanged in Erwin, Tennessee after killing her handler in the nearby town of Kingsport. Notably, the Mary story works as a useful foil for understanding how Lucy's apparent “crime and punishment” are figured.⁵⁷

Connections to the story of Mary the elephant are made on two separate occasions in *Reece's* pieces. The first appeared as a letter to the editor of the *Edmonton Journal* in 2008, with letter-writer Andrew H. Brown objecting to the transportation of Lucy to the Tennessee Elephant Sanctuary through a reference to the southern state's less-than-ideal history in its dealings with pachyderms.⁵⁸ As Brown tells the story, after Mary had killed her handler, “the sheriff arrested the elephant for murder. A jury of 12 was summoned to the court and the elephant was duly tried, found guilty of murder and give[n] the only sentence possible for that crime – death by hanging. So a public hanging was to be arranged.”⁵⁹ Brown's letter then goes on to give us this description of the main event: “All the townsfolk turned out to watch the hanging, along with all the other

⁵⁷ Mary is the only elephant whose execution is referred to in *Reece's* pieces; note, however, that this public elephant execution was not an isolated incident. The phenomenon of executing “unruly” captive elephants swept the United States from 1880 to 1930, with records of thirty-six incidents existing. That said, Mary appears to be the only elephant whose execution involved the complex and intricate process of death by hanging. See especially, Amy Louise Wood, “‘Killing the Elephant’: Murderous Beasts and the Thrill of Retribution, 1885-1930” (2012) 11:3 *Journal of the Gilded Age and Progressive Era* 405 [Wood, “Elephant”].

⁵⁸ Andrew H. Brown, “Tennessee no place for Lucy”, Letter to the Editor, *Edmonton Journal* (23 December 2008) A15.

⁵⁹ *Ibid.*

circus elephants. You see, the locals felt that the other elephants should watch the show so that they could learn a lesson.”⁶⁰

The same story can be found appearing in a different forum two years later: blogger Patricia Lopez de Vloothuis’ 2010 WordPress post, “Le Cirque is in Town.”⁶¹ After opening with a dedication “to all my elephant friends in captivity, to Lucy from Edmonton,” Lopez de Vloothuis proceeds to give a poetic retelling of the Mary tale.⁶² Containing some decidedly stronger and more disturbing visuals, Lopez de Vloothuis’ blog post does not only verbally represent Mary’s hanging, but graphically does so, as well (see Figure 10, reproduced here in line with historian Amy Louise Wood’s view that, when it comes to photographic depictions of this sort, “[t]he horror they display[] with graphic realism ... [can] capture attention and sway sentiment to a degree unmatched by text.”).⁶³ Sharing many features with Brown’s letter, Lopez de Vloothuis’ poem offers this description of the scene following the killing of Mary’s handler:

A jury of 12 and the lawmen coincide
death by hanging ... the righteous punishment for such a crime.
And so they proceed against all possible logic,
– *Hang [her] till dead! Justice will prevail!*⁶⁴

Lopez de Vloothuis also describes the main event in similar ways, noting that it is not just a human crowd who witnesses Mary’s execution; rather, the other elephants were brought in to

⁶⁰ *Ibid.*

⁶¹ Patricia Lopez de Vloothuis, “Le Cirque is in Town” (10 February 2010), online (blog): *Eclipsedemujer’s Blog* <<https://eclipsedemujer.wordpress.com/2010/02/10/>>.

⁶² *Ibid.*

⁶³ Amy Louise Wood, *Lynching and Spectacle: Witnessing Racial Violence in America, 1890-1940* (Chapel Hill: University of North Carolina Press, 2009) at 184. See also, Wood, “Elephant”, *supra* note 57 at 443 (noting how the National Association for the Advancement of Colored People wanted at the time to *literally* place this photograph in the same category with photographs of human lynchings they had collected). Although the exact origin of this photo is not made clear on Lopez de Vloothuis’s blog, it appears to be a reproduction of the one which ran contemporaneously in local papers. That said, as Wood notes in “Elephant” at n 82, the photograph in those newspapers may not be entirely authentic, despite its being claimed as such at its time of production.

⁶⁴ Lopez de Vloothuis, *supra* note 61 [italics in original].

watch Mary's hanging. Going beyond Brown, Lopez de Vloothuis tells of "the big lawman" taking centre stage to speak these words directly to the assembled elephant spectators: "Let this be a lesson for all beasts to witness, / that in the good town of Erwin, / Justice for Kingsport was done."⁶⁵ The "justice" subsequently done here is not an easy scene to forget because, as Lopez de Vloothuis tells it, Mary's execution was a lengthy and gruesome affair:

And so one mid morning in Erwin,
 an elephant dangled from atop a crane
 (10,000) ten thousand pounds break the chain...
 She falls to the ground, breaking her apart.
 They made a mistake, she's still chained to the rails,
 Mary looks stunned but by now paralysed.
 Her legs split open and her hip broken...
 While the public elopes, terrified for their lives,
 the hangman recaps,
 a thicker chain round her neck is now being wrapped
 This time a success, three thousand people below,
 hysterically laugh as the beast slowly hangs to her death...⁶⁶

Adding insult to injury, Mary's "corpse [is] burned on a pile of crossties" following the execution.⁶⁷

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*



Figure 10: The photograph of the hanging of Mary the elephant used on Lopez de Vloothuis' blog

Mary's story, when put in relation to Lucy's, bears an uncanny similarity to how Foucault exemplified the move from sovereign to disciplinary power in *Discipline and Punish*.⁶⁸ In the simplest terms, Foucault's *Discipline and Punish* is a text that examines the way in which the dominant forms of power had changed in Western society out of the Middle Ages and into modernity, opening with a graphic description of the drawn-out and violent execution of Robert-François Damiens following his attempted regicide in 1751. Foucault swiftly contrasts this with a prison timetable from 80 years later to illustrate how punishment had apparently changed in form. What Foucault demonstrates is that, where Damiens' execution had the advantage of demonstrating the power of the sovereign over others – and could, potentially, have a deterrent effect – it was nevertheless an imprecise and inefficient tool, too easily sending mixed messages and possibly fomenting dissent among the populace. By contrast, the prison, in

⁶⁸ Foucault, *Discipline*, *supra* note 31.

focusing intently on disciplining the *mind* of the prisoner, was more effective as a means by which the behaviour of vast swaths of individuals could be normalized to accommodate the interests of bourgeois society.

The tale of Mary the elephant appears to contain all the elements of sovereign power that Foucault saw in pre-modern punishment. Not the anger of a mob exploding at the elephant who offended the king (or, in this case, offended Kingsport), one finds a “legal code of pain” applied in this tale with the judge and jury gathering to evaluate the crime and deliver a verdict.⁶⁹ Following the trial, one finds a “sentence ... legible for all” placed upon Mary’s body and, in the drawn-out slowness of her hanging, the expression of a “certain truth” meant to reconstitute the power of the sovereign.⁷⁰ Rather than an inexplicable explosion of anger toward the elephant, the gratuitousness of Mary’s execution aligns directly with Foucault’s observation that, in the demonstration of sovereign power, “[j]ustice pursues the body beyond all possible pain,” such that, when “justice [is] being expressed in all its force,” there are “tortures that take place even after death: corpses burnt, ashes thrown to the winds, bodies dragged on hurdles and exhibited at the roadside.”⁷¹

Moreover, Mary’s fellow circus elephants were indeed rounded up and made to watch her execution and, in this respect, the spectacular dimension of Mary’s public execution lines up well with the deterrent function Foucault uncovers in sovereign punishment. Foucault’s observation that sovereign punishment operates according to a “policy of terror: to make everyone aware, through the body of the criminal, of the unrestrained power of the sovereign,” is here in

⁶⁹ *Ibid.* at 33.

⁷⁰ *Ibid.* at 43, 45.

⁷¹ *Ibid.* at 34.

abundance.⁷² Not only must the other elephants know what happens to Mary, but “they must see with their own eyes.”⁷³

Mary is hardly the only elephant referred to in *Reece*’s pieces who is alleged to have perpetrated an act of violence against a human handler – yet, she is the only one whose actions are met with this textbook example of sovereign punishment. As *Globe & Mail* journalist Jana G. Pruden’s long-form 2016 retrospective on the Lucy the elephant debate (appropriately entitled “Cage Match”) notes, “[e]ight people had been stomped or gored to death by elephants in the United States in the five years from 1989 to 1994, most while working with elephants at zoos or circuses. Some people were questioning whether it had to do with how the animals were being held: a sudden, violent rebellion against an unnatural life spent in captivity.”⁷⁴ In raising this fact, it comes as no surprise that elephant handling was declared America’s statistically “most dangerous profession” in 1994, with “one in 600 people who worked with elephants in that country killed by the animals in an average year” and “[e]lephant attacks [being] on the rise” that year, as well.

Responding to the apparent dangerousness of elephants in captivity, Alan Roocroft (the San Diego Wild Animal Park’s former elephant handler) is quoted in Pruden’s article as posing the question: “Can we continue to do this?”⁷⁵ Quickly after raising this question, Pruden shares this piece of information: “In the time Lucy has been in Edmonton, the human population of the planet has doubled to 7.4 billion, and people are increasingly encroaching onto land where animals once lived. There are few places left for any animal to roam free, ... [especially] an

⁷² *Ibid.* at 49.

⁷³ *Ibid.* at 58.

⁷⁴ Jana G. Pruden, “Cage Match”, *Globe & Mail* (16 July 2016) F1.

⁷⁵ *Ibid.*

elephant.”⁷⁶ It seems to be a damned if you do, damned if you don’t situation: elephants may not thrive in captivity, but they also do not appear to have a “freedom” to return to (as I indicated in the previous chapter). Apparently, the answer to Roocroft’s question regarding the continued captivity of these “dangerous” creatures has been yes – Pruden’s added point suggesting that, increasingly, the only alternative is elephant extinction.

Counterposing the danger presented and responded to in the story of Mary with that of present-day zoo elephants, it would appear what has changed is not *what* elephants are, but rather *how* we respond to them. To Mary, the response appeared to be one of sovereign power: executing her to assert the authority of human beings over elephants. Her situation, therefore, was easy to fit into the conceptual scheme of crime and punishment – it was all there on the surface, after all.

How crime fits into the situation of Lucy is a more complex matter to address; yet, it would seem to align once again with an observation presented in *Discipline and Punish*. That is to say, where sovereign power sought to stamp out the incorrigibly criminal offender, in the scheme of modern disciplinary power, “the correlative of the penitentiary apparatus is someone other; this is the delinquent ... a kernel of danger, representing a type of anomaly.”⁷⁷ While indeed human crime and punishment attract the language of culpable wrongdoing, for Foucault this is merely a vestige of premodern thinking; the logic of punishment is now instead oriented towards institutions like prisons because they enable individuals with anomalous (read: dangerous) behaviour to be studied and disciplined into conformity.⁷⁸

⁷⁶ *Ibid.*

⁷⁷ Foucault, *Discipline*, *supra* note 31 at 254.

⁷⁸ As Foucault (*ibid.* at 21) notes, the thinking regarding imprisonment reflects this move:

Does the convicted person represent a danger to society? Is he susceptible to penal punishment? Is he curable or readjustable? These questions have nothing to do with ... the possible insanity of the convicted

On this point, it may be instructive to consider how Pruden opens her retrospective on Lucy that goes on to survey the dangerousness of elephants:

The elephant house is squat and made of concrete, with windows of bullet-proof glass and gates of heavy steel. Its design reflects the reality of securing animals so strong they can break through bars and fences, so smart and deft they can use their trunks to open latches and doors. The house is linked to three outdoor pens – a large enclosure for the Edmonton Valley Zoo, though some would argue still far too small for an elephant.⁷⁹

What Pruden describes here is not only reminiscent of something prison-like – the elephant house’s design elements surpassing mere bars with sophisticated technologies of confinement – but it is also underscores why the being in question is kept captive in the way that she is: an elephant, while perhaps not a wrongdoer, is a *dangerous* creature, with a brute strength and a sapient cleverness that make the animal threatening.

As with the human delinquent, disciplinary power responds not through violent executions, but through captivity in which the individual can be studied and made to conform. On this latter point, Foucault’s opening example of the prison timetable in *Discipline and Punish* underscores that a prison’s routinization of life is chief among tools used to train the individual into conformity. Perhaps unsurprisingly, the highly routinized nature of Lucy’s life in the Edmonton Valley Zoo is touted as a virtue by the Zoo camp throughout *Reece*’s pieces. For instance, although the Zoo’s 2011 version of its “Lucy’s Care” webpage claims that Lucy’s caretaking team does not force “rigid routines” on the elephant, the details provided suggest a

person at the moment of the act. They do not concern ‘responsibility’. They concern nothing but the administration of the penalty, its necessity, its usefulness, its possible effectiveness...

⁷⁹ Pruden, *supra* note 74. See also, Rothfels, “Elephant House”, *supra* note 46, who establishes that this is a common (albeit, increasingly out-of-fashion) style for elephant house design.

definitively routinized structure to all of Lucy's days.⁸⁰ Indeed, parsing out the timed and standardized elements of the elephant's schedule from the Zoo's webpage, one ends up with this:

Care staff enter the building quietly around 7am and check to see if she is awake or still sleeping. ...

Lucy's daily meal plan incorporates a variety of dry grasses, herbivore pellets, vegetables and fruit. ...

Each day Lucy goes for long walks and does a variety of exercises. ... Lucy's first walk of the day is a brisk walk that incorporates muscle exercises. ... Each afternoon, she does exercises with her care staff. ... In the late afternoon or early evening, Lucy goes for a long walk to exercise her muscles and stimulate her brain. This is when she plays games. ...

Usually Lucy has a bath every second day, but will bath more frequently in hot weather. ...

Lucy has quiet time before bed during which staff will periodically check on her. Her bed time is usually around 10pm. Before her care staff says good night, she has a bed time snack. The lights are then turned off so she can peacefully sleep.⁸¹

Much like the prison time-table listing times for waking and sleeping, eating, washing, and other daily activities in *Disciple and Punish* stands in stark contrast to the description of Damiens' violent execution, one can see here many of the same distinctions when considering Lucy's highly routinized life – with such extraordinarily mundane and quotidian details being planned to an insufferable degree – in contrast to the single-moment grand spectacle of Mary the elephant's execution.

More to the point, however, found with respect to Lucy in *Reece's* pieces is something else which aligns the functions of the zoo with those of the prison. As Foucault contended, “the prison functions ... as an apparatus of knowledge.”⁸² That is to say, insofar as the prison perfectly facilitates the study of the delinquent, a “whole corpus of individualizing knowledge

⁸⁰ City of Edmonton, “Lucy's Care” (22 December 2011), online: *WayBack Machine* <http://web.archive.org/web/20111222042255/http://edmonton.ca/attractions_recreation/attractions/edmonton_valley_zoo/lucys-care.aspx>.

⁸¹ *Ibid.* Note that the description of Lucy's routine remains the same in the 2018 version of this webpage I included in my corpus of primary materials, as well.

⁸² Foucault, *Discipline*, *supra* note 31 at 126.

[could be] organized [such that] its field of reference [is] not so much the crime committed (at least in isolation), but the potentiality of danger that lies hidden in an individual and which is manifested in his observed everyday conduct.”⁸³ To this end, the prison facilitated a change in the nature of individualized examination and record-keeping:

For a long time ordinary individuality – the everyday individuality of everybody – remained below the threshold of description. To be looked at, observed, described in detail, followed from day to day by an uninterrupted writing was a privilege. The chronicle of a man, the account of his life, his historiography, written as he lived out his life formed part of the rituals of his power. The disciplinary methods reversed this relation, lowered the threshold of describable individuality and made of this description a means of control and a method of domination. It is no longer a monument for future memory, but a document for possible use.⁸⁴

What Foucault describes in this quotation could just as easily be applied to Lucy the elephant as to the human prisoners of whom he is more directly speaking. Indeed, individualized examination and record-keeping with respect to Lucy has been so extensive that it boggles the mind. To this end, in a 2016 report, veterinarian Jonathan Cracknell provided this rundown of the Zoo’s corpus of accumulated materials regarding Lucy specifically: “[Lucy’s] historical and current medical records ... consisted of 889 pages of electronic records; 10 specialist independent reports, photographic documentation ... and several ancillary related documents.”⁸⁵ Notably, this massive corpus of documentation specific to Lucy exists at its present size in spite of an acknowledged “historical loss or lack of recording of important data” due to “concerns of [Freedom of Information] requests and historical misuse or misquotes of information provided”

⁸³ *Ibid.*

⁸⁴ *Ibid.* at 191.

⁸⁵ Jonathan Cracknell, “Elephant Welfare Assessment: Independent Review of Edmonton Valley Zoo’s Elephant Programme Accreditation Variance” (June 2016), online (pdf): *City of Edmonton* <https://www.edmonton.ca/attractions_events/documents/PDF/EVZ_CAZAElephantWelfareAuditJune2016.pdf> at 4.

at various periods in time.⁸⁶ Further, beyond that immediate corpus of records, this exists in addition to the Zoo's Lucy-specific "care and management plans," as well as a decade's worth of the Zoo's on-site "elephant management policies and related documentation."⁸⁷ Moreover, adding to the Zoo's own copious information produced with respect to Lucy, there exists "public domain documentation" with respect to Lucy from outside sources, such as Zoocheck, which is also then relied upon and considered in the further assessment, care, and management of Lucy.⁸⁸

Nevertheless, to return to Foucault, prisons do more than simply produce individualized examination and record-keeping – rather, they use it to achieve specific ends of "correcting" the dangerous delinquent. Consider, therefore, as another defining feature of disciplinary power: one "no longer touche[s] the body, or at least as little as possible, and then only to reach something other than the body itself," but instead, "since it is no longer the body, it must be the soul. The expiation that once rained down upon the body must be replaced by a punishment that acts in depth on the heart, the thoughts, the will, the inclinations."⁸⁹ Notable here is how, in *Reece's* pieces, Lucy's body is likewise figured as a means by which to access her mind and determine its internal workings.

One could consider here how observations of Lucy's physical behaviour are undertaken to infer her mental state. One of the earliest items in *Reece's* pieces does precisely this, with

⁸⁶ *Ibid.* at 2.

⁸⁷ *Ibid.* at 4.

⁸⁸ *Ibid.* On this point, one could consider the various reports compiled by biologists and veterinarians external to the Zoo: Winnie Kiiru, "The Sad State of Captive Elephants in Canada" (January 2007), online (pdf): *Zoocheck* <<http://www.zoocheck.com/wp-content/uploads/2015/06/Sad-State-ReportREV.pdf>>; Debi Zimmermann, "One Veterinarian's Search for Truth in the 'Lucy the Elephant Debate'" (30 June 2009), online (pdf): *Save Lucy* <<http://www.savelucy.ca/reports/ZimLucyReportJune2009.pdf>>; Surendra Varma, "Welfare Assessment of Lucy the Elephant" (2009), online (pdf): *Zoocheck* <https://www.zoocheck.com/wp-content/uploads/2015/07/Varma_Lucy_Report_FINAL.pdf>.

⁸⁹ Foucault, *Discipline*, *supra* note 29 at 11, 16. Note that the move to less and less physical contact with elephants is a common trend in North American zoos (see Rothfels, "Elephant House", *supra* note 46).

elephant biologist Winnie Kiiru drawing these inferences from her observations of Lucy's physical behaviour in 2007:

Upon my arrival, Lucy was standing just outside the door of the barn. ... Lucy walked into the barn after awhile [sic] and stood near the metal bars that separated her from Samantha. Lucy then walked out of the barn and took a position just outside the door. She started to move back and forth making one step forward and then rocking back and forth on the spot, a stereotypic behavior which may be an indicator of stress and/or boredom. ... [T]he stereotypic behavior exhibited by Lucy ... [is] typical of stressed elephants in zoos.⁹⁰

Cracknell's report similarly infers a mental state from Lucy's observable physical behavior in his 2016 report, albeit with claims quite opposite to Kiiru's:

[Lucy] did not exhibit any proprioceptive nor neurological clinical signs. ... [N]o stereotypies [sic] were noted during the whole period of review ... Cameras were set up overnight and footage reviewed and even without the presence of staff to stimulate [Lucy] there were no noted stereotypies [sic] seen.⁹¹

Notably, Cracknell's report does not only contain observations meant to reach Lucy's psyche, but also goes on to survey some of Lucy's trained behaviours: "Historical trained behaviours or activities have evolved to behaviours that only benefit [Lucy] and where they could compromise her either physically or demean her then these have been phased out, albeit some of them only recently in the last two years."⁹² Setting aside the question of why she was taught behaviours that could "compromise her ... physically or demean her" to begin with, curious here is that Cracknell's report characterizes all other learned behaviours as completely innocuous. Most crucially, one should consider this comment:

Despite being listed in the Elephant Management Policy chains are not currently used as a management tool and the team could not think of a scenario where they would be used. Everything that was undertaken during the assessment was done so without the use of

⁹⁰ Kiiru, *supra* note 88 at 20, 21.

⁹¹ Cracknell, *supra* note 85 at 9.

⁹² *Ibid.* at 13.

chains, including the endoscopy which demonstrates the trust between all parties involved.⁹³

To put that another way: in every situation where chains on an elephant might be necessary, Lucy's behaviour was such that no such chains needed to be used. The unspoken implication is this: one has no need for external constraints on behaviour where discipline has resulted in internal constraints on behaviour instead.

3. The Pastoral: Captivity's Violent Care

While a zoo is not a prison, the section above demonstrates that the disciplinary logics one finds in operation in the zoo seem to echo those of the prison. I do not mean to imply here a unidirectional connection – it is not that the logics of the prison have simply been borrowed and applied to the modern zoo. After all, as legal geographer Irus Braverman has noted, techniques of animal captivity have, conversely, been applied to human captivity – that is to say, the link goes both ways.⁹⁴ Both the prison and the zoo would seem to participate in “the carceral” (along with its larger schema of disciplinary power) – understandably attracting the language of criminal law to *Reece*'s pieces despite the *Reece* case's factual grounding in civil law.

Nevertheless, despite the myriad parallels that exist between the ways in which Lucy's captivity is described and how Foucault describes the prison as an instance of disciplinary power *par excellence*, myriad discontinuities also arise – which is to say, the way in which these institutions participate in the carceral differs. To this end, one might consider a particular contention from Braverman: where, in Foucault's panoptic prison, it is the subject of the gaze (i.e., the captive human) who is the primary target upon which disciplinary power functions, the

⁹³ *Ibid.*

⁹⁴ Irus Braverman, “Zooveillance: Foucault Goes to the Zoo” (2012) 10:2 *Surveillance & Society* 119 at 123.

“zoopticon” does the inverse.⁹⁵ In gazing at the captive zoo animal, it is not the subject of the gaze who is disciplined first and foremost, but rather the *gazers themselves*. Thus, what Braverman contends is that, “[t]hrough the zoo’s design of the spectacular event” of seeing captive animals in specific ways, “it sets to discipline its human public to care about the individual zoo animal.”⁹⁶ Through various arrangements, the zoo effectively “disciplin[es] *humans* into proper human-nature relations.”⁹⁷

This is not to say that there is *no* disciplinary power at all working on the animals themselves in a zoo; rather, the point that Braverman raises is that the effects of the gaze on zoo animals are secondary to the effects of the gaze on human zoo-goers. While there is evidence of a kind of disciplinary gaze working on captive animals insofar as the zoo animal’s “body and actions can be observed, normalized, and examined to fit ideas about correct and proper conduct,” this is unlike what occurs in the panoptic prison inasmuch as zoo animals are “disciplined to *ignore* the gaze rather than to internalize it.”⁹⁸ Where captive humans are disciplined into behaving in socially acceptable ways so as to be released back into wider society, captive animals are disciplined into “acting natural” for the long haul in their patently unnatural environs – into behaving in perpetuity as though they are not being observed by the crowds of humans who gaze upon them from outside their enclosures every day.⁹⁹

⁹⁵ Irus Braverman, *Zooland: The Institution of Captivity* (Stanford: Stanford University Press, 2013) [Braverman, *Zooland*].

⁹⁶ *Ibid.* at 20 [emphasis in original].

⁹⁷ *Ibid.*

⁹⁸ *Ibid.* at 87, 218 n 82 [emphasis in original]. See also, Matthew Chrulew, “Animals as Biopolitical Subjects” in Matthew Chrulew & Dinesh Joseph Wadiwel, eds, *Foucault and Animals* (Boston: Brill, 2017) 222 (noting at 228 that zoos use disciplinary technologies to “produce authentically wild animals” in patently inauthentic environs).

⁹⁹ Braverman, *Zooland*, *ibid.* at 87-88.

In this way, zoo exhibits certainly have elements of the panoptic gaze.¹⁰⁰ Nevertheless, the zooptic gaze “is also panoramic, reflecting back upon the human masses that visit the zoo.”¹⁰¹ Where, in the prison, the gaze is intended to produce “deterrence and shame” on the part of the captive human, the gaze in the zoo is meant to cultivate “care and sympathy for the animals” in the human zoo-goer.¹⁰² In Braverman’s view, through focused gazes on the animals that “promote a sense of wonder toward a remote nature that cannot be touched or looked directly in the eye ... [and] only known through managed observation,” human zoo-goers are “disciplined by the zoo’s institutional gaze to become caregivers – or, in Foucauldian terms, shepherds.”¹⁰³ All this to say, what one finds at the zoo is disciplinary power primarily targeting humans – all so that *pastoral* power can more effectively be directed at the animals therein.¹⁰⁴

Evidence of the zoopticon’s panoptic-panoramic gaze can be found in *Reece*’s pieces most clearly with respect to how “surveillance” at the Edmonton Valley Zoo is used and understood. For instance, amidst the on-going debates over Lucy’s future at the Zoo, sixty-five guinea pigs in a small animal exhibit were found dead from (an apparently intentional) poisoning

¹⁰⁰ The dream of an all-seeing eye is undeniably endemic to zoo design. As Braverman observes, the sight-based function of a zoo exhibit seems to be implicitly understood by zoo-goers themselves who, even with the visibility-maximizing “spatial tricks” of “glass panels, temperature controls, vanishing mesh barriers, and the elevation of exhibit spaces” complain of not seeing enough of the animals while simultaneously complaining of times and places when other senses are employed (i.e., smelling the animals is not what zoo-goers wish to do). See *ibid.* at 72.

¹⁰¹ *Ibid.* at 88.

¹⁰² *Ibid.* at 89.

¹⁰³ *Ibid.* at 78-79, 90.

¹⁰⁴ As Braverman, *ibid.*, notes, pastoral power is “Foucault’s least-quoted technology of power” (21). While closely related to Foucault’s oft-quoted “biopolitical power,” pastoral power is, in Foucault’s own words, the “prelude” to the modern state and its biopolitical techniques of governance. See Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-1978*, edited by Michel Senellart, François Ewald & Alessandro Fontana, translated by Graham Burchell (London: Palgrave MacMillan, 2009) [Foucault, *Security*] at 239. As anthropologist Anand Pandian has suggested, attention to specific forms of pastoral power – such as herding of animal flocks or, in this instance, with respect to animals in the zoo – is instructive for determining how specific regimes of biopolitical power develop at the level of state governance. See Anand Pandian, “Pastoral Power in the Postcolony: On the Biopolitics of the Criminal Animal in South India” (2008) 23:1 *Cultural Anthropology* 85.

and bites from a small dog being let into their enclosure by an unidentified individual.¹⁰⁵ As a result, “security at the zoo [was] upgraded by adding a new three-metre high fence and extra video monitoring.”¹⁰⁶ Notably, it is not the guinea pigs who are being surveilled by the cameras that were installed, but rather the humans who interact with the guinea pigs – human behaviour, not animal behaviour, is being disciplined through the surveillance. Regarding this increased surveillance of the small animal exhibit, Milton Ness (the Zoo’s lead veterinarian at the time) remarked that “We have zoos to educate people and create a respect for animals and nature ... Obviously we need to do more work as a society to make sure that lesson is learned by everyone.”¹⁰⁷ To this end, what Ness articulates the purpose of the zoo to be is almost verbatim what Braverman contends: zoos aim to educate – or, in Foucauldian terms, “discipline” – humans into having a pastoral relationship towards animals.¹⁰⁸

One can also consider how surveillance is used and understood at the Zoo with respect to Lucy in particular. When responding to questions about how Lucy would adjust to the removal and relocation of Samantha (the Zoo’s other elephant) in 2007, Zoo officials commented that “Cameras have been installed so that Lucy can be monitored (around the clock)” in the context of her keepers giving her extra “attention, activity and enrichment.”¹⁰⁹ Rather than disciplining Lucy to behave in any particular way, surveillance functions here to facilitate human acts of care towards the elephant. Furthering this idea, it is notable that, in commenting that “Lucy [is] getting ‘exemplary’ care,” veterinarian Jonathan Cracknell’s primary recommendation in 2016

¹⁰⁵ “Edmonton Zoo says guinea pigs found dead in May were poisoned or bitten”, *Canadian Press* (23 December 2010).

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ Braverman, *Zooland*, *supra* note 93 at 89-90.

¹⁰⁹ “Elephant from Edmonton zoo headed to North Carolina facility”, *Canadian Press* (26 September 2007).

for how the Zoo could improve in this respect was for Lucy to “have 24-hour camera surveillance in her enclosure to allow zoo staff to better monitor her behaviour.”¹¹⁰ Yet again, the surveillance is linked not to correct training of the entity being surveilled, but to humans caring better for the entity in question.

On this point, it is worthwhile to consider how Foucault explained “pastoral power”: it is, fundamentally, the beneficent power of the shepherd over his sheep. The shepherd, after all, “looks after the flock, ... looks after the individuals of the flock, ... [and] sees to it that the sheep do not suffer.”¹¹¹ It is, in this way, a power of care – of “watching over” not for the purposes of correct training, but for the sake of “making live.” Crucially, this power is not oriented towards “the flock” as a unified or homogenous mass of the living; rather, as Foucault put it, “[t]he shepherd counts the sheep; he counts them in the evening to see that they are all there, and he looks after each of them individually. He does everything for the totality of his flock, but he does everything also for each sheep of the flock.”¹¹² It is not just a mass of beings that the shepherd “makes live,” but rather each individual *as individual* within the flock.

The individualizing thrust of pastoral power is abundantly clear with respect to how care for Lucy is framed throughout *Reece*’s pieces. For instance, in defending the decision not to relocate Lucy, Zoo director Denise Prefontaine had this to say:

Lucy is a calm, well-adjusted and extremely well-cared for elephant. We care for Lucy on a daily basis and know her better than anyone else could possibly begin to. We understand her as an elephant and as an individual animal, and we will continue to provide her with nothing but the very best care and attention.¹¹³

¹¹⁰ Ryan Tumilty, “British Vet says Lucy getting ‘exemplary’ care”, *Metro* (21 July 2016).

¹¹¹ Foucault, *Security*, *supra* note 104 at 172.

¹¹² *Ibid.* at 173.

¹¹³ Denise Prefontaine, “Lucy is well-cared for”, Letter to the Editor, *Edmonton Journal* (24 December 2008) A18.

Three sentences about this “individual” and, almost like a nervous tic, a use of “care” or its cognates in each one. Nevertheless, despite this refrain of individualized care, one finds those critical of the Zoo arguing that “[p]eople are upset about Lucy’s situation because she is being treated like a commodity, instead of an individual” by the Zoo.¹¹⁴ Responding to this line of criticism, the Zoo’s “Let’s Crush the Myths” infographic has this to say:

The Edmonton Valley Zoo puts the well-being and care of all the animals ahead of all else, and Lucy is no exception. Decisions will continue to be made in the best interests of Lucy’s health and well-being as she is an individual animal, with individual needs.

Much like “care” and its cognates appear as a nervous tic in some comments from Zoo personnel, so too does the word “individual” apparently bear repeating. Veterinarian Milton Ness – as just one example of Zoo personnel using almost the exact phrasing I quote here – has remarked that the Zoo’s “priority is ensuring that Lucy continues to receive the best possible care ... [since] Lucy is an individual elephant with unique issues and needs – and she must be understood and treated as an individual animal.”¹¹⁵

Where those in the Zoo camp frame their care in terms of respect for Lucy’s individuality, the Save Lucy camp *also* claims Lucy’s individuality (and the value thereof) to be part and parcel of their opposition to the Zoo. For instance, PETA president Ingrid Newkirk remarked in her letter to the editor of the *Edmonton Journal* that Lucy is a “social individual imprisoned alone in a frigid climate.”¹¹⁶ Similarly, alluding to the argument for relocating zoo elephants in Canada to

¹¹⁴ Rob Found, “Our most famous resident”, Letter to the Editor, *Edmonton Journal* (22 August 2009) A18. See also the direct response to this letter from the president of the Valley Zoo Development Society in Jean Dunford, “Let Lucy stay among friends”, Letter to the Editor, *Edmonton Journal* (30 August 2009) A15: “... the staff who work [at the Zoo] are dedicated to doing what is right for each individual animal.”

¹¹⁵ “Edmonton’s Valley Zoo meets standards for elephant care: humane society”, *Canadian Press* (19 January 2011). This is repeated almost verbatim by others associated with the Zoo in the months that follow, such as the Zoo’s director and spokespeople for the City of Edmonton. See Denise Prefontaine, “Lucy has comfortable life here – zoo”, Letter to the Editor, *Edmonton Journal* (25 March 2011) A17; “Toronto zoo elephants to roam free in California sanctuary”, *Canadian Press* (26 October 2011).

¹¹⁶ Ingrid Newkirk, “Why animals stir our passion”, Letter to the Editor, *Edmonton Journal* (3 December 2012) A14.

sanctuaries, Camille Labchuk (executive director of the Canadian animal rights advocacy group Animal Justice) remarked that this “is all part of a larger trend toward seeing animals as individuals instead of commodities.”¹¹⁷ Moreover, alluding to orientations of care, the advocacy group LEAP for Lucy casts the whole thrust of Chief Justice Fraser’s dissent in *Reece* in these terms: “For the first time, a Canadian judge has treated an animal like the individual that she is, deserving of consideration, compassion, and protection.”¹¹⁸

Quite contrary to the Zoo’s claims, those in favour of Lucy’s relocation see “individualized care” as something more properly located in their own purview. Yet, even those in the “Save Lucy” camp are subject to the same criticisms of not genuinely caring about Lucy (or animals in general) as unique individuals. A blog post entitled “PETA Wants To Kill Lucy!” exemplifies the matter as follows: “Why? Simple, they don’t care about Lucy, they want some media exposure. If they cared about Lucy, they would leave her alone. She is sick, too sick to travel, it would kill her. Does PETA care? NOPE!”¹¹⁹ The blogger goes on to cite statistics about high-kill animal shelters run by PETA to further his claim that PETA (and, by extension, all animal activists) do not care about the lives of individual animals. This line of criticism apparently being one which recurs, the advocacy group Friends of Lucy seemed to find it necessary to address it head-on in one of their tweets: “Misconception 3: ‘Effective animal advocates don’t value individual animals.’ We began primarily for one lone suffering elephant-and for all.”¹²⁰

¹¹⁷ Camille Labchuk, “Is It Time for Zoos To Go?”, *Ottawa Citizen* (25 August 2017) A9.

¹¹⁸ LEAP for Lucy, “About Lucy” (2018), online: *LEAP for Lucy* <<https://www.leapforlucy.com/about-lucy>>.

¹¹⁹ hunter, “PETA Wants to Kill Lucy!” (1 February 2010), online (blog): *Climbing out of the Dark* <<http://climbingoutofthedark.blogspot.com/2010/02/peta-wants-to-kill-lucy.html>>.

¹²⁰ Friends of Lucy, “Misconception 3: ‘Effective animal advocates don’t value individual animals.’ We began primarily for one lone suffering elephant-and for all” (12 September 2017 at 1:18AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/907473354864685056>.

This tension between the Zoo camp and the Save Lucy camp over who cares best for Lucy as an individual is emblematic of what Foucault called “the great battle of pastorship.”¹²¹ Tying this to zoos generally, Braverman has noted that pro- and anti-zoo groups “each claim[] to be the exclusive caregiver for the animals and its only shepherd,” manifesting as a “war [that] can be boiled down to the questions: Who cares more, and more properly, about animals? Who is the better pastor?”¹²² In Braverman’s own analysis of this phenomenon, the fundamental tension here is between a pro-zoo camp that comes down more on the side of caring for the flock (to the extent that an individual animal might be sacrificed for the sake of the species, such as in keeping animals in captivity for the over end of species survival or in “culling” zoo collections that have become overburdensome) and an anti-zoo camp that comes down on the side of the individuals within the flock. Yet, while Braverman’s heuristic does well to make sense of breeding populations within zoos, it applies less well to the instance of Lucy, particularly in light of how her lack of potential for breeding makes her ineligible as a means by which “the flock” or “the species” may be saved (at least in the sense of species propagation).¹²³ Unlike the battle of pastorship that Braverman has observed in other zoo-versus-animal-activist contexts (i.e.,

¹²¹ Foucault, *Security*, *supra* note 104 at 200.

¹²² Braverman, *Zooland*, *supra* note 95 at 22-23.

¹²³ Lucy’s ineligibility for breeding was signalled in some of the earliest documents in the corpus of Reece’s pieces. The overt way in which this was signalled at 35 in the 2006 *Master Plan* is telling regarding the larger implications of her non-viability for breeding:

The Zoo currently holds two females, one 30-year old Asian elephant ... and one 20-year old African, ... who is of breeding age but has not yet borne a calf. Because of her age the African female has a ‘window’ of only a few years to conceive her first calf. After this time her probability of successfully raising a calf in captivity begins to decline dramatically. The older Asian female has various health problems. Her welfare is probably best looked after in the Zoo’s recently constructed elephant barn.

See *Master Plan*, *supra* note 42.

flock-orientation versus individual-orientation), this one appears to have two sides which each claim to know best how to care for Lucy as an individual specifically.¹²⁴

While this tension certainly cannot be resolved here, one would nevertheless do well to consider what *kind* of care the predominant voices on both sides of this battle appear to espouse. Much like Foucault meant for “discipline” and “surveillance” to be understood in neutral terms despite their typically negative connotations, so too must “care” be understood in a neutral sense despite its typically positive connotation.¹²⁵ That is to say, there is nothing “inherently good” about pastoral power; it, like other forms of power, can be skewed in both positive and negative ways.

On this point, social anthropologist Corinna Howland has usefully expanded upon Foucault’s schemata of power by examining the phenomenon of “violent care” that occurs during prison hunger strikes.¹²⁶ Forced feeding in prison, Howland contends, is “a form of violent care

¹²⁴ See, e.g., James Cowan, “Barker to push for Lucy’s release today”, *National Post* (17 September 2009) A5 (with the Zoo’s director commenting that “In the long term, we will not have elephants in this zoo. But we have made a commitment to Lucy as an individual”). Cf. Braverman, *Zooland*, *supra* note 95 at 23:

In the case of Timmy the gorilla, care for the individual might have prescribed that he stay with barren Kate at Cleveland Metroparks Zoo, which is precisely what animal activists demanded. But concern for the collective zoo gorilla population dictated and justified the zoo’s decision to move Timmy to the Bronx Zoo, with its fertile female gorillas. Such empirical manifestations of the essential paradox of pastoral power – translated here into a war between pro- and anti-zoo people – shed new light on the charged relationship between the individual and the flock.

¹²⁵ On the value-neutral meaning of “power” in Foucault’s work, see, e.g., Nickolas John James, “Law and Power: Ten Lessons from Foucault” (2018) 30:1 *Bond Law Review* 3.

¹²⁶ Corinna Howland, “To Feed or Not to Feed: Violent State Care and the Contested Medicalization of Incarcerated Hunger-strikers in Britain, Turkey and Guantanamo Bay” (2013) 28:1 *New Zealand Sociology* 101. Regarding the phenomenon of “violent care” in animal conservation, see Juno Salazar Parreñas, *Decolonizing Extinction: The Work of Care in Orangutan Rehabilitation* (Durham: Duke University Press, 2018); Thom van Dooren, *Flight Ways: Life and Loss at the Edge of Extinction* (New York: Columbia University Press, 2014). While there are points of overlap between the conception of “violent care” advanced by Howland and that advanced by Parreñas and van Dooren, note that the kind of violent care Parreñas observed in orangutan conservation and van Dooren observed in whooping crane conservation seems different from the violent care described by Howland. Parreñas’s orangutans and van Dooren’s whooping cranes are subject to violence so that they (or at least some of them) can *leave* their captivity. By contrast, Howland’s prisoners are subject to violence so that they can *remain* in captivity. It is for this reason that I find Howland’s conception of violent care a more useful one for understanding the situation of Lucy the elephant, for whom the only possibilities explored by most are either zoo captivity or sanctuary captivity.

where the preservation of the welfare and life of the prisoner is paradoxically pursued to the point of violence.”¹²⁷ Foucault’s central thesis in *Discipline and Punish* had been that modern penal punishment is fundamentally different from medieval punishment: where the latter exercises sovereign power directly on the body, the former disciplines the mind (making contact with the body as little as possible). Howland, however, has countered that this diagnosis seems not to capture certain phenomena – like forced feeding – which occur on the margins of the carceral apparatus. As she explains it, “*violent care*, in being oriented singularly toward the body, partially reproduces in form if not in intent, bodily seizure as disciplinary technique which Foucault perhaps too hastily relegated to the Middle Ages.”¹²⁸ Care, on this reading, can be a brutal thing. Pastoral power is not inherently the gentle loving touches typically associated with the notion of “care” nor the contactless means of correct training associated with “discipline,” but instead can manifest as a violence against a body that one intends to make live by any means necessary.¹²⁹

As Howland explains it in the context of prison hunger strikes, violent care “hinges ... on a politics of *enforced life* – the state’s legitimate right to force individuals to live.”¹³⁰ In other words, to prevent prisoners from escaping disciplinary power through the physical death of the

¹²⁷ Howland, *ibid.* at 107.

¹²⁸ *Ibid.* at 113. Relevant here is the form of institutional “care” more than any intention of individuals providing that care. For example, as Sameena Mulla notes in her analysis of the potentially re-victimizing practice of forensic nurses examining individuals immediately following their sexual assaults, “[t]his violence is born not from the intentions of individual forensic nurses who consciously set out to alienate the victim-patient with whom they are working, but rather from the particular institutional, professional, and historical location of forensic sexual assault investigation.” See Sameena Mulla, *The Violence of Care: Rape Victims, Forensic Nurses, and Sexual Assault Intervention* (New York: New York University Press, 2014) at 217.

¹²⁹ Cf. Lisa Stevenson, *Life Beside Itself: Imagining Care in the Canadian Arctic* (Oakland: University of California Press, 2014) at 3, noting that there is “suffering [which some] forms of care can produce.” As Stevenson underscores, “care” (especially in the context of uneven power relations), even when it seeks to alleviate one form of suffering (such as sickness), can result in simply new and different forms of suffering being experienced by the recipient of that care.

¹³⁰ Howland, *supra* note 126 at 109.

body, an intervention forces the prisoner's body to live (ensuring that the aims of the prison can be asserted and realized). In effect, all prison sentences can be rendered as "life sentences," regardless as to how long they are intended to last chronologically – unlike the public executions of days passed, the carceral apparatus strives to ensure the prisoner lives as part of its assertion of power.¹³¹ The forced feedings that arise in response to hunger strikes are, in this way, an instance where logics of the carceral and the pastoral become strange bedfellows – where "care" is the thing undergirding incarceration itself.

Arguably, this "carceral-pastoral" heuristic works well to elucidate the intricacies of Lucy the elephant's situation. I say "arguably" because there are some disjunctions between what Howland observes in the instance of prison hunger strikes and what one can see with respect to a zoo animal. Namely, hunger-striking prisoners are motivated to undertake their life-threatening behaviour for political ends – asserting that their minds cannot be disciplined into obedience by any assertion of state power (to the point that they would rather die as martyrs than allow the state to integrate them into its schema). Can this way of understanding be applied to animals, given that they do not appear to have political ends to prove?

To answer this question, one would do well to consider a contention from sociologist Dawn Coppin: animal resistance to human power can be seen occurring at an "unconscious biological level."¹³² While this is not to foreclose completely the possibility of there being

¹³¹ Fittingly, the advocacy group Friends of Lucy characterizes the elephant's zoo captivity in ways that align with this way of thinking: they describe Lucy's long-term captivity as a "life sentence." See Friends of Lucy, "We'd like to see what the future of LUCY looks like. Will she continue to suffer & languish alone at #yegzoo, then die in her mid-40's like so many other elephants in zoos? Or will @CityofEdmonton #yeg have the foresight & compassion to #LetLucyGo to sanctuary? No life sentence!" (3 February 2018 at 12:19AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/959657696323670016>.

¹³² Dawn Coppin, "Foucauldian Hog Futures: The Birth of Mega-Hog Farms" (2003) 44:4 *Sociological Quarterly* 597 at 612. Resistance, of course, is not the only relevant form of human and animal relations. Indeed, as philosopher Vinciane Despret has insightfully noted in "From Secret Agents to Interagency" (2013) 52 *History and Theory* 29 at 42-43:

conscious or intentional resistance to human power on the part of animals, what Coppin's insight opens up is considerations of instances where animal bodies themselves appear to respond in ways that define the limits of human-animal power relations.¹³³ Coppin observed this in the situation of industrial-scale pig farming, noting:

During the course of moving hogs into total confinement, farmers were made aware of the hogs' specific requirements and what pen designs, feeding systems, medicine, and so forth, were acceptable to swine in no uncertain terms. Swine resistance to certain configurations was often at an unconscious biological level, but this does not negate the resistance that did indeed occur.¹³⁴

Factory farming, in its attempt to maximize uses of animal bodies by confining them to as minimally-necessary living conditions as possible, eventually comes up against a hard limit in what animals can be subjected to. At a certain point, the animal body itself rebels against human impositions of power – at a certain point, animals simply *die*.

When everything happens as it should, we don't see the work. ... [W]e see clearly that the conditions under which the animals' agency appears are the conditions in which the animals show that they can resist, that they can throw their heads in refusal, even sabotage the work and its possibilities. ... Thus, on the contrary, when the cows go peacefully to be attached to the milking machine, when they do not kick up a fuss, when they go in order, when they take one another into account, when they move away from the machine after the milker has finished, when they move here and there to allow the breeder to clean their stalls, when they do what has to be done in response to an order, when they do what they must so that everything happens as it is supposed to, we do not see this as a testimony to their willingness to do what is expected of them.

To this end, even in Coppin's example of industrial-scale farming, animal bodies can more often be said to cooperate with human-made conditions of confinement and human-made conditions of confinement can be seen to adapt to animal bodies in turn. Yet, as Coppin's example demonstrates, points where these animal bodies resist human-made conditions of confinement still exist, nevertheless.

¹³³ Historian Susan Nance's comments in *Entertaining Elephants: Animal Agency and the Business of the American Circus* (Baltimore: Johns Hopkins University Press, 2013) at 9-10 on elephants' "conscious" resistance in the American circus are instructive on this point:

Elephants do not comprehend human constructs like "capitalism"; they do not perceive "race," "class," or "gender" ... so it is problematic to argue that they resist these human things. ... This book refuses any notion that elephants understood, endorsed, or resisted the world of show business as a human cultural or business practice. Rather than speaking of elephants rejecting the circus or capitalism per se, it speaks of them as rejecting the conditions of their experience.

While animals may not be consciously or intentionally resisting structures of oppression in the way political prisoners are, their resistance to the specific conditions of their confinement is nevertheless an observable phenomenon.

¹³⁴ Coppin, *supra* note 132 at 612.

On balance, the analogy I am trying to draw here is this: much like how violent care intervenes when the hunger-striking prisoner imperils their own life, so too does violent care intervene when the biological animal threatens to die in their conditions of confinement. “Life sentences,” in both cases, are enforced.

Particularly relevant on this point are the extraordinary measures undertaken to keep Lucy alive in the Zoo. In the first section of this chapter, I noted some of Lucy’s on-going health problems as they appear in her medical records and other Zoo documentation. Startling to me here was the sheer number and variety of pharmaceuticals given to this elephant in response to these health problems. As the Ensley affidavit has parsed it out: in the treatment of her respiratory and joint problems, Lucy has variously been treated with Sputolysin (an expectorant powder), Buzone and phenylbutazone (non-steroidal anti-inflammatory drugs), UBAVET (a liquid glucosamine hydrochloride), Corta-Rx (a joint supplement), Ibuprofen and Ketprofin (analgesics), while Lucy’s foot and pad problems have been treated with countless different topical medications (ranging from brand-name drugs to home remedies like “Epsom and vinegar foot soaks” and “Honey Poultice[s]”).¹³⁵ Although the exact frequency of use for many of the pharmaceuticals and nutraceuticals is difficult to determine, Ensley’s reading of Lucy’s medical records suggests that her “anti-inflammatory drugs ... [were used] on a near-daily basis over a period of years” in order to “reduce inflammation and control pain and provide analgesia.”¹³⁶ Additionally, Lucy’s medical records show that alternative medicine has also been regularly used, such as acupuncture in the treatment of her arthritis.¹³⁷ Moreover, on the matter of Lucy’s respiratory difficulties, the Zoo devised a plan that included antibiotic treatment,

¹³⁵ Ensley Affidavit, *supra* note 36 at paras 23, 29, 33, 35

¹³⁶ *Ibid.* at para 110.

¹³⁷ *Ibid.* at para 29.

anti-inflammatory prescription medication, and an endoscopy and biopsy of Lucy's constricted airways – the last item requiring an entirely new endoscopy device to be designed.¹³⁸ Needless to say, the records show that Lucy's body seems to revolt on multiple different fronts against the conditions in which she is kept – a slow violence that is violence, nevertheless – and extraordinary measures are regularly taken to “care for” that body in a way that forces it to stay alive.

Most in *Reece*'s pieces frame “law” as a means by which Lucy can escape this apparently carceral-pastoral situation. In the earliest news media mentions of a potential lawsuit on the part of animal activists against the Zoo, PETA reportedly hired lawyer Clayton Ruby “to find a legal way to remove Lucy from the Valley Zoo” – something noted in the context of “animal-rights organizations ... lobbying the city ... to ship Lucy to a sanctuary.”¹³⁹ However, while finding a way to legally compel the “shipping” of Lucy to a sanctuary appears to be the bare facts of the threatened lawsuit, “freedom from imprisonment” was the framing on everyone's mind. As previously noted in this chapter, journalists Paula Simons and Gordon Kent gave this glossing to the initial rumblings of the *Reece* lawsuit: “Clayton Ruby is famous for getting the wrongfully convicted out of jail. Now, the high-profile criminal lawyer will work to free a different kind of jailbird – Lucy the elephant – from a different kind of cage: Edmonton's Valley Zoo.”¹⁴⁰ Lest the allusion to a legally-enabled liberation be missed in the body of the article, its title provides this framing more telegraphically: “High-profile lawyer retained to free Lucy the elephant from Edmonton zoo.”¹⁴¹

¹³⁸ “Lucy's Treatment Program,” *supra* note 37 at 3, 4; Gordon Kent, “Lucy in no shape to travel, vet warns”, *Edmonton Journal* (11 March 2011) B2.

¹³⁹ Simons & Kent, *supra* note 52.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

This framing is hardly unique to that particular article, with much of the news media coverage at the time repeating elements of it. In an opinion piece that notes the support of “civil-rights lawyer Clayton Ruby,” Paula Simons dismissively critiques the animal activists for misguidedly attempting to “liberate” Lucy.¹⁴² Similarly, in reporting on Ruby’s comment that “it’s too soon to say whether he will turn to the courts,” journalist Katherine O’Neill refers to the associated animal activists’ campaign as one to “Free Lucy.”¹⁴³ Although the relocation of Lucy to an elephant sanctuary is factually recognized as the end which the lawsuit would seek to achieve, this end appears to be used interchangeably with the idea of “liberating” or “freeing” Lucy.¹⁴⁴

Given that the lawsuit’s aim has often been characterized as the “freeing” of Lucy, it is unsurprising that elephant sanctuaries are regularly cast in terms of “freedom” throughout *Reece’s* pieces. For example, in a letter to the editor of the *Calgary Herald* appropriately entitled “Free lacy [sic],” Tracye Jorgensen provided this glossing:

Send Lucy to a sanctuary in Tennessee, where she can finally be an elephant and be among others of her kind, where she can roam 1,000 hectares. That’s 1,000 hectares of freedom for this lonely elephant and lots of sisterly company as there are more than 20 other female elephants waiting to greet her and make her part of the social family that she so desperately needs. Time is running out for Lucy – do what’s right for her now. Every minute of delay is another minute holding her in a cramped and stressing environment, denying her the life she should have – that of a free elephant.¹⁴⁵

¹⁴² Paula Simons, “Hollywood’s hand-wringing over Lucy may backfire”, *Edmonton Journal* (18 September 2009) B1.

¹⁴³ O’Neill, *supra* note 54.

¹⁴⁴ This liberatory framing stuck to the lawsuit throughout news coverage over several years. When the lawsuit was first filed, journalists Alexandra Zabjek and Gordon Kent reported that “Toronto lawyer Clayton Ruby attended [a] press conference where Zoocheck Canada and [PETA] announced a lawsuit against the city to free zoo elephant Lucy.” Zabjek repeated the framing in her coverage of Justice Rooke’s decision several months later, telegraphing the thrust of the abuse of process ruling as the “[j]udge reject[ing] activists’ bid to free Lucy the elephant.” See Zabjek & Kent, *supra* note 54; Alex Zabjek, “Judge rejects activists’ bid to free Lucy the elephant”, *Postmedia News* (20 August 2010).

¹⁴⁵ Tracye Jorgensen, “Free lacy”, Letter to the Editor, *Calgary Herald* (19 September 2009) A15.

Alternatively, one could consider a graphic often used by Friends of Lucy, which refers to Lucy's would-be life at the sanctuary using the word "freedom" so often that it sounds more like a nervous tic than an actual descriptor: "Freedom to roam vast natural habitat ... Freedom to choose her own friends ... Freedom to swim to cool down & take stress off joints ... Freedom to nap in the sun ... Freedom to be an elephant" (see Figure 11, taken from this tweet).¹⁴⁶ A major problem, however, arises when it comes to equating the sanctuary with "freedom": the sanctuary, too, is a kind of prison. Indeed, surveying some of the language used with respect to the sanctuary seriously raises questions about how it could *not* be seen as a prison.

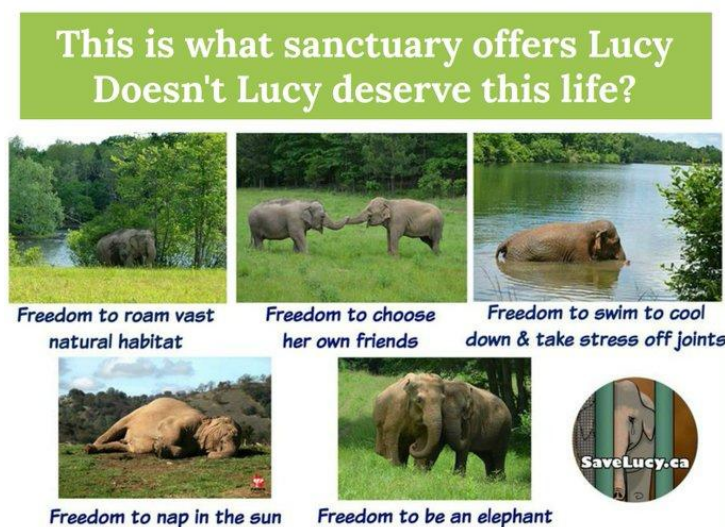


Figure 11: Repeated “freedom” glossings of Lucy’s would-be life at a sanctuary¹⁴⁷

Speaking volumes about what the implications of life at a sanctuary are, blogger jaybird89 telegraphs these bullet points on her blog:

- [Sanctuaries] [h]ave more space, so that animals can roam about ...
- similarity between [zoos and sanctuaries:] they both must have holding facilities for the animals so that they can be secured and safe at night ...

¹⁴⁶ Friends of Lucy, “If roads are so slippery they caused 107 car crashes, then the asphalt paths the Valley Zoo walks Lucy on are also a risk to her. #Yegzoo doesn't want to lose their cash cow and lies that Lucy can't be safely moved. Time for #yeg to #LetLucyGo to a warmer-climate US sanctuary.” (4 March 2018 at 1:38AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/970186810721755136>.

¹⁴⁷ *Ibid.*

- Keeper and Public Safety – the fact is they need the similar policies [sic] about safety because they are both dealing with dangerous animals which could harm anyone this makes it important that all training and studies need to be up to date [so that] both [zoos and sanctuaries] know what they are doing while working with animals
- sanctuar[ies] are more contact free.¹⁴⁸

Jaybird89 hits the nail on the head – albeit perhaps unintentionally – by beginning and ending her list with more or less the same point about what sanctuaries have going for them: more freedom than zoos. Yet, it is precisely that: not freedom unqualified, but *relative* freedom.¹⁴⁹ Indeed, as jaybird89 underscores, sanctuaries have more space to roam about and sanctuaries are more contact-free – but that is not to say the roaming space comes without restrictions or that the elephants there can be completely free from direct contact. More to the point, sandwiched in between jaybird89’s bullets on the virtues of relative freedom provided by sanctuaries are two bullets that put the fact of captivity front and centre once more. Like zoos, sanctuaries have “holding facilities” so that the elephants can be “secured.” Also like zoos, sanctuaries must engage in training, studying, and the use of policies – or, to use jaybird89’s more appropriate typo, “policies” – to keep these “dangerous animals” in check.

In the previous section, I underscored various ways in which zoos participate in the carceral as it was explained by Michel Foucault: a refinement of disciplinary power. Unsurprisingly, many of the same things can be found in operation in sanctuaries in an even more well-developed form. Here, one should consider especially the Tennessee Elephant Sanctuary’s comments on its “Protected Contact Management” system:

¹⁴⁸ jaybird89, “Advantages of animals being in zoo’s and sanctuary- the diffrence” (1 May 2014), online (blog): *My Blog: A place for ideas* <<https://jaybird89.wordpress.com>>.

¹⁴⁹ Cf. Parreñas, *supra* note 126 at 131-134, 155-156. This “relative freedom” bears resemblance to a phenomenon Parreñas has described as “arrested autonomy” amongst the semi-wild orangutans in Sarawak – an autonomy that is “always deferred and impossible to achieve” in no small part because even the conditions of apparent autonomy themselves depend upon humans to facilitate them.

The Sanctuary defines Protected Contact as: a system for managing elephants that uses positive reinforcement training as the primary method to modify behavior; the use of physical punishment is prohibited. Directing the positioning and movement of the elephant is achieved through the use of targets and positive reinforcement. Caregiver safety is achieved by elephant and Caregiver positioning relative to each other and to a barrier, which typically separates human and animal spaces.¹⁵⁰

This quotation is doubly significant. On the one hand, the sanctuary's prison-like qualities are alluded to insofar as a physical barrier confining the elephants is indicated here. On the other hand, this would seem to be an example of disciplinary power that goes further in its being more "contactless" than even the prison Foucault spoke about, limiting as much as possible the physical contact of the elephants and their keepers.

Moreover, the same webpage from the Tennessee Elephant Sanctuary goes on to explain its policy on "Behavioral Management":

The Sanctuary defines Behavioral Management as: a pro-active [sic] approach to managing captive animals to provide the best care and the highest level of wellbeing. ... Although they are creatures of habit whose movements can be anticipated, their movements are not directed unless necessary for their own health.

Notable here is not simply the fact that elephant behaviour is disciplined into conformity as necessary, but rather under what conditions this is considered necessary to do. Namely, it is done "for their own health" – and, in this respect, the carceral-pastoral appears to rear its head once again. Like the zoo, the power of the sanctuary is a power that makes elephants live.

On the point of sanctuaries being an equally problematic end goal, it is useful to consider some of the insights of cultural anthropologist Elan Abrell.¹⁵¹ In surveying various legal cases

¹⁵⁰ Elephant Sanctuary, "Facilities & Elephant Care" (no date), online: *The Elephant Sanctuary in Tennessee* <<https://www.elephants.com/facilities>>. Note that this source is not part of the "Reece's pieces" corpus as it is beyond the parameters set for that. Rather, this is an outside source, employed here to flesh out details on the sanctuary referred to most often in *Reece's* pieces.

¹⁵¹ Elan Abrell, "Animal Sanctuaries: A Shabbat of *Animal Sacer*" in Irus Braverman, ed, *Animals, Biopolitics, Law: Lively Legalities* (New York: Routledge, 2016) 135.

where the relocation of captive animals to sanctuaries has been an aim (including *Reece* specifically among them), Abrell has noted that animal activists reproduce many of the same pastoral logics that Braverman observed. Like Braverman, Abrell frames anti-zoo animal activists as engaging in what Foucault called “the great battle of pastorship” with pro-zoo groups to win the title of the proper pastor for the animals involved. However, where Braverman underscored the stark opposition between the positions taken by pro-zoo groups and anti-zoo groups, Abrell draws attention to the *commonality* of the two sides (much like I have). That is to say, insofar as “sanctuaries are not a solution to the problem of captivity,” one can see *both* pro- and anti-zoo advocates espousing carceral-pastoral logics.¹⁵² Overviewing some of the limitations on freedom of behaviour sanctuaries place upon the animals living therein, Abrell notes that “as long as sanctuaries are the best living conditions humans can offer [former zoo] animals, they will continue to be subjected to the power of care exercised by humans.”¹⁵³ In other words, former zoo animals may have better lives in sanctuaries, but they will continue to live *within our terms*.

Insofar as Save Lucy advocates agitated for the relocation of Lucy to an elephant sanctuary, the end goal imagined is not a condition of being free, but rather of being “less captive.” The care Lucy would receive at a sanctuary would perhaps be less violent or less carceral, but it would nevertheless remain violent and carceral to some degree. On this point, Abrell has posed a provocative question: “To be truly free, must animals be liberated from all forms of control, including the power of care?”¹⁵⁴

¹⁵² *Ibid.* at 146.

¹⁵³ *Ibid.* at 148.

¹⁵⁴ *Ibid.* at 149.

Returning to Foucault's comments on pastoral care, Abrell draws attention to the observation in *Security, Territory, Population* that a "form taken by the paradox of the shepherd is the problem of the sacrifice of the shepherd for his flock."¹⁵⁵ As Abrell explains it, the implication here is that "good shepherd" has a "dedication to care [that] is so absolute that even self-sacrifice is possible" for the sake of those cared for.¹⁵⁶ In other words, in "the great battle of pastorship," the "good shepherd" is the one who can prove that their care is so great that they would go as far as to eliminate themselves for the sake of those under their care if that is what served the cared-for best. Carceral logics of violent care, on this reading, evince an *imperfect* form of the pastoral since that pastoral power is truest which does not subject the cared-for to any terms or conditions at all. That is to say, the carceral-pastoral logic that I observed in *Reece's* pieces, though consisting of elements that can be forced together, nevertheless also always threatens to come undone thanks to the inherent contradictions between the carceral impetus to capture and control and conflicting the pastoral compulsion to be the "good shepherd" – one so good that they might even completely remove themselves from the equation if that is what best serves the cared-for.

What Abrell derives from his observation about what makes a "good shepherd" is that "pastoral governance in perpetuity" – and the life-long captivity that that would imply in the case of former zoo animals relocated to sanctuaries – "must be weighed here against its stark

¹⁵⁵ Foucault, *Security*, *supra* note 104 at 173. Notably, Foucault's metaphorical shepherds and sheep do not correspond to the "real thing" here, as it is counterintuitive for an actual shepherd to die for animals he is raising for the sake of butchering. Rather, the reference here is to the Christian pastorate's metaphor of Christ-as-shepherd: "Christ, of course, is the pastor, and a pastor who sacrifices himself in order to bring back to God the flock that has lost its way; who sacrifices himself not only for the flock in general, but also for each sheep in particular" (*ibid.* at 203). That said, on the point of Foucault's "lost sheep" (the metaphor raised and never returned to), see especially Pandian, *supra* note 104; Nicole Shukin, "Tense Animals: On Other Species of Pastoral Power" (2011) 11:2 *CR: New Centennial Review* 143.

¹⁵⁶ Abrell, *supra* note 151 at 149.

alternative: the withholding of such interventions, ... even if refraining from providing care or otherwise interacting with these animals ultimately results in their deaths.”¹⁵⁷ The deep tension is this: “caring best” for a former zoo animal would seem to require not that we ensure they live best on our terms, but that we let them live and let them die *on their own terms*.

Whispers indicating positions to this effect can be found populating the margins of *Reece’s* pieces. Never the heart of the debate, the possibility of letting Lucy die as a way of freeing from her carceral conditions nonetheless arises at various points. To this end, one could consider letter-writer Dan Colton’s letter to the editor of the *Edmonton Journal* (worth reproducing in full because of how it sets the scene):

I was in one of my art classes recently when two wonderful paintings of elephants, displayed on the back wall, inspired a conversation.

The discussion about the elephants quickly turned to the travesty of keeping them in captivity, specifically Lucy in the Edmonton Valley Zoo.

One of the women made a statement that struck me as not only profound but true. It had power because the woman was very plausibly in her 80s, reminding me of actress Jessica Tandy, so full of life and goodness.

She said, “They won’t let Lucy go, they say she is too old and not well, but I say, it would be better to die en route to freedom than to not be allowed to go.”¹⁵⁸

Particularly striking to me here is Colton’s circumlocution. The letter-writer cannot just come right out and say it – he cannot say if *he* believes Lucy would be better off to die en route to freedom than to live in captivity, distancing himself significantly from the originator of the idea. Rather, Colton’s letter, in its careful contextualizing of the circumstances in which someone other than himself gave voice to the position, attests strongly to how the possibility of Lucy dying en route to freedom exists throughout *Reece’s* pieces as a (for lack of a better word) “elephant in the

¹⁵⁷ *Ibid.*

¹⁵⁸ Dan Colton, “Lucy’s freedom worth the risk”, Letter to the Editor, *Edmonton Journal* (17 November 2012) A22.

room” – something of which everyone seems vaguely aware, but which no person (whether in the Zoo camp, the Save Lucy camp, or otherwise) wants to acknowledge openly as a possibility worth considering.

That said, a rare instance of this being addressed head-on can be found in the *Globe & Mail* retrospective on the Lucy the elephant debate. There, journalist Jana Pruden notes that “[t]here are some ... who say it may be better for Lucy to die en route to a preserve than to continue living in Edmonton the way she is.”¹⁵⁹ To Save Lucy advocate Bob Barker, Pruden attributes this quotation: “If she did die during the trip, it would probably be better[.] ... She’d be better off than going through torture up there.” Pruden’s and Barker’s comments go somewhat further than those of Colton and his Jessica-Tandy-lookalike, with the latter characterizing death en route merely as something which could occur on the way to freedom while the former seem to suggest that death itself – even if it were to occur on the way to an elephant sanctuary – would be a way out of the state of captivity in which she currently exists.

This reading is bolstered by another individual quoted in Pruden’s article, retired zookeeper Toby Styles. In direct response to Barker’s statement, Styles remarks that, “I’ve seen [elephants] die[.] ... And no. They wouldn’t be better to die in freedom.” Notable in Styles’ response to Barker is that – even in squabbling over which option is “better” – Styles nevertheless concedes ground to Barker’s framing: for Lucy to live is to live in captivity, but to die could be “to die in freedom.”

These overt references to “dying in freedom” (or, perhaps better yet, what one could call “dying *as* freedom”) as a third option among the other two (i.e., living in captivity at the Zoo or

¹⁵⁹ Pruden, *supra* note 74.

living in captivity at a sanctuary) stand in stark contrast to how these other two are besmirched by figurations as “death sentences.” In an opinion piece appropriately titled “Killing with kindness,” columnist Kathi Travers characterized the possibility of moving Lucy to a sanctuary as a “death sentence” for the elephant.¹⁶⁰ Contrariwise, PETA lawyer Jeffrey Kerr claimed that by keeping Lucy in the Zoo, “the [Alberta Court of Appeal] has given Lucy a virtual death sentence.”¹⁶¹ Here, it seems that we return to law in its criminal garb. Death sentences are, after all, exactly what they sound like: sentences imposed by a legal (or at least quasi-legal) authority in response to an assessment of criminal wrongdoing. For those most vocal in the Lucy the elephant debate, it hardly seems that the stakes of *Reece* are legal standing to sue or the enforcement of animal welfare legislation; rather, as I contended at the outset, criminal law concerns over wrongful conviction, wrongful imprisonment, and now also wrongful sentencing seem to animate this discourse. The concern for many appears to be that the law is going to sentence Lucy the elephant to death.

That framing, however, seems to be a misreading of what all the evidence points to. Namely, insofar as living at the Zoo or living at the sanctuary are presented as the respective end goals at the two sides in the lawsuit (with the City of Edmonton coming down on the side of the former and Tove Reece, Zoocheck, and PETA coming down on the latter), the carceral-pastoral logics seem only to offer the possibility of different human terms on which Lucy can *live* in captivity. Crucially, *Reece*’s pieces attracts the language of criminal law not because Lucy the elephant is being condemned to death, but because she has been sentenced to life.

¹⁶⁰ Kathi Travers, “Killing with kindness”, Letter to the Editor, *Prince George Citizen* (28 September 2009) 17.

¹⁶¹ “Animal rights groups ask Supreme Court of Canada to hear Lucy the elephant case”, *Canadian Press* (28 September 2011).

4. Conclusion: (Un)ending Sentences

In Chapter 2 (“The Descent of Dogma”), I outlined that much of the field of legal animal studies is overdetermined such that the questions and the debates that ensue from those questions are easy to predict. Is it just animal welfare that matters (as Peter Singer would suggest), or do animals deserve a moral and legal status better characterized by the language of “rights” (as Tom Regan and Gary Francione suggest)? If indeed they are figured best as rights-bearing entities, should they still be classified in law as some kind of “property” (as David Favre contends)? Do they all fall into one category only, or can we divide animals up between the two (such that, as Steven Wise suggests, it is only animals with more complex cognitive abilities that are the top candidates for personhood)? Or, is there a third category beyond or in between “property” and “person” that would capture how animals are best classified in law (such as Maneesha Deckha and Angela Fernandez contend)?

These are important questions, but this chapter – as it traced the language and logics of law in the public discourse on Lucy the elephant – demonstrates that they are not the only questions to be asking. Despite the fact that *Reece* was a lawsuit over the “welfare” of Lucy (and which raised “personhood” legal-doctrinal questions about an elephant’s own standing at law), law in its most punitive form and its most overtly criminal garb is what actually showed up here. In the previous chapter (“From Home to Hospice”), I indicated that the abolitionist position – while meritorious – seems ill-equipped to deal with the gravity of the situation animals like Lucy represent, with the phenomena of global capitalism, the climate crisis, and habitat destruction presenting existential harm to animal life which mere matters of property and personhood status seem to be incidental to. Here, I would say again that the previously proposed ways of thinking

through our relationship to animals in law fall short of providing a solution of the seemingly unending sentence to which an animal like Lucy has been consigned. For this animal to live at all is to live in captivity; to make her live is to make her live captive.

Lucy's case is, therefore, a study in a particular and peculiar orientation of law towards an animal: one that animates a potentially irresolvable tension between carceral and pastoral logics. While the carceral dimension of Lucy's situation makes the criminal law framing found throughout *Reece's* pieces an appropriate one, even the criminal-law language ultimately showcases the *insufficiency* of extant ways of doing law to effectively make sense of the case of Lucy the elephant. That is to say, in Lucy's case, there is no possibility of the resolutions that law can potentially bring when invoked with respect to "wrongful convictions" and "wrongful imprisonments" – there is no freedom into which Lucy could possibly be released. The apparent "life sentence" Lucy is serving in captivity seems only to have as its alternative another form of legally-interpellated punishment: a "death sentence" as a means by which freedom can be achieved. The challenge for law in *Reece's* pieces, it seems, is the aporia – the impasse, that point of law's inability and insufficiency – that it reaches: sentence after sentence after sentence, each one getting closer to but never fully reaching justice for the elephant at its heart.

Chapter 6

Conclusion: What is Yet to Come

1. Introducing Endings

The very first words on the very first page of this dissertation are these: “*Reece’s Pieces: The Limits of Law and the Life Sentences of Lucy the Elephant.*” In bringing this project to its conclusion, I have found that the subtitle is more important now than ever before, in large part because it identifies two distinct-yet-related things that now need to be concluded: “the limits of law” and “the life sentences of Lucy the elephant.”

As I reiterate thoroughly under the first heading below (“The Limits of Law...”), this dissertation has been a scholarly project aimed at critically analyzing a socio-legal phenomenon through attention to a particular discursive playing field by using a variety of interdisciplinary concepts and ideas. This has culminated in my being able to speak in some general terms about what the “limits of law” are when it comes to animal others and – perhaps more importantly – where and how we might look for moving beyond those limits in broad terms, as well.

Potentially lost in this academic abstraction, however, is the *particular* case with which this dissertation has concerned itself – or, perhaps even more pointedly, the specific entity who has animated the debate that gave rise to this socio-legal phenomenon in the first place: Lucy the elephant. Ending this part of the project has presented altogether different challenges – most crucially, because there is a real being out there, still living her life on a day-to-day basis. In this respect, the entirety of what the life of “Lucy the elephant” is and continues to be exceeds what can be contained in these concluding pages.

Nevertheless, there are still many endings to be found here. Revealed by the thousands of pages making up the corpus of *Reece’s pieces* is that Lucy the elephant has lived and died a

thousand times over in how countless discoursants have spoken about, imagined, and figured her. From the minds of those who have engaged in the Lucy debate, there is no shortage of possible lives Lucy could yet lead and possible deaths she could yet encounter.

To end this project, therefore, I will not state the bland facts of her current biometrics, her current psychological assessment, and the Zoo's future forecast for her – although this information is certainly available for consultation.¹ Instead, in the final section below (“... and the Life Sentences of Lucy the Elephant”), I look to *Reece's* pieces one final time, extrapolating from this rich textual resource four final groups of “life sentences” – that is, the sentences figuring a life – for Lucy. In presenting these “endings,” I am reminded of the approach taken by playwright Bertolt Brecht, summed up by literary scholar David Barnett in this way: “The lack of resolution at the end ... means that the dialectics at [the] heart remain open, unsynthesized, and we, as readers or audience members, are invited to speculate on how such contradictions might be overcome.”² In other words, the ending of the story is not the place where the tension should be resolved; instead, it is beyond the pages of a script (in Brecht's case) or a dissertation (in my case) that a resolution to the central tensions may one day be found. To put it another way: while this chapter's concluding section focuses on “ending sentences,” these are no doubt far from the last word there will be on Lucy the elephant.

¹ See City of Edmonton, “Lucy's 2021 Health Assessment” (9 December 2021), online (video): *YouTube* <https://www.youtube.com/watch?v=SKRO7_hleTs>; James Oosterhuis, “Elephant Consultation Report” (15 November 2021), online (pdf): *City of Edmonton* <https://www.edmonton.ca/sites/default/files/public-files/LucyHealthOosterhuis_2021.pdf?cb=1639776940>; Charles Gray, “Assessment of female Asian elephant Lucy” (October 2021), online (pdf): *City of Edmonton* <https://www.edmonton.ca/sites/default/files/public-files/LucyHealthCharlesGray_2021.pdf?cb=1639776940>.

² David Barnett, *Brecht in Practice: Theatre, Theory and Performance* (London: Bloomsbury, 2015) at 26.

2. The Limits of Law...

In the introduction to this dissertation, I asserted that the critical discourse analyst can be thought of as a “diagnostician.”³ The job of the diagnostician is exactly what it sounds like: they set out to pinpoint and describe the problems that exist in their object of study. Yet, while that may be where the job of the diagnostician ends, diagnosis rarely exists for diagnosis’s own sake. Rather, the point of making the diagnosis is so that one can then move into the realm of prognosis and treatment of the identified problems. In other words, therefore, the critical discourse analysis I have undertaken throughout this dissertation was not performed for analysis’s own sake, but rather to lay the groundwork for future possibilities to be considered in response to the problems that I have identified.

In Chapter 2 (“The Descent of Dogma”), I outlined many of the limitations apparently bred into extant legal animal studies scholarship. I noted there that the moral-philosophical basis employed by much of the field grows out of the tension between the utilitarian, welfare-oriented perspective of Peter Singer and the deontological, rights-oriented perspective of Tom Regan – despite the fact that, as feminist, posthumanist, and critical-race-theoretical scholars have shown, there is plenty of other moral-philosophical ground from which legal animal studies could potentially grow. Gary Francione – with his abolitionist, personhood-focused animal rights perspective – has exemplified well how the tensions from moral-philosophical debates have been imported into law, such that the utilitarianism-deontology dichotomy of Singer and Regan becomes instead a property-personhood dichotomy for animals in law. While there is certainly variation with respect to how different scholars locate the place of animals in this dichotomy – for example, Steven Wise contending that only some animals (such as chimpanzees) ought to be

³ Derek Hook, “Discourse, Knowledge, Materiality, History: Foucault and Discourse Analysis” (2001) 11:4 *Theory & Psychology* 521 at 522, 543-544.

classified as persons and David Favre expanding what property can entail through his concept of “living property” – the problem often appears to be the dichotomy itself. That is to say, it prevents one from thinking outside of the two poles and considering other options.

However, this is not to say that other options have not been presented. Angela Fernandez, for instance, has emphasized the “in between” space that animals can occupy in law as “quasi-property”/ “quasi-persons.”⁴ Alternatively, Maneesha Deckha has offered the prospective legal category of “beingness” that would exist beyond the property-personhood binary.⁵ As Deckha’s “being” alternative in particular suggests, third options may provide an opportunity to articulate many of the insights of often-sidelined moral-philosophical thinkers in the traditions of ecofeminism, posthumanism, and critical race theory by focusing on animal vulnerability (instead of animal capacity) and relationality as the foundational point from which to understand even their legal existences.

Yet, rather than endorsing any of the aforementioned perspectives, I ended Chapter 2 by taking a page from poststructuralist philosopher Jacques Derrida – himself a primary point of reference for posthumanist thought – and thereby I adopted an agnostic position that remained open to the possible alternative perspectives in legal animal studies without endorsing any of them as once-and-for-all the correct way to understand animals in the law. This because, as Derrida tells us, there is an inherently irresolvable tension of law and justice, where law is “stabilizable and statutory, calculable, a system of regulated and coded prescriptions” and justice is “infinite, incalculable, rebellious to rule and foreign to symmetry, heterogeneous and

⁴ Angela Fernandez, “Not Quite Property, Not Quite Persons: A ‘Quasi’ Approach for Nonhuman Animals” (2019) 5 *Canadian Journal of Comparative and Contemporary Law* 155.

⁵ Maneesha Deckha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders* (Toronto: University of Toronto Press, 2021).

heterotropic.”⁶ Punning on the French words for “future” (*avenir*) and “to come” (*à-venir*), Derrida contends that

There is an *avenir* [“future” / “yet-to-come”] for justice and there is no justice except to the degree that some event is possible which, as event, exceeds calculation, rules, programs, anticipations and so forth. Justice as the experience of absolute alterity is unrepresentable, but it is the chance of the event and the condition of history.⁷

Despite the high-minded abstractness of Derrida’s explanation, the point he makes here is empirically verifiable: never in the history of the world has the law ever “reached justice” once and for all, with each new law and each new courtroom decision moving towards justice, but never fully reaching it. In other words, justice is too great and too demanding for us ever to be able “to do justice” as such.

In finding the limits of law time and again throughout this project, I would therefore contend that I have elucidated many specific ways in which law has proven insufficient for doing justice to animals in general and to Lucy the elephant in particular. In Chapter 3 (“Unpacking the Trunk”), where I engaged in an analysis of the overall discourse of *Reece*’s pieces, I honed in on the limited ways in which elephants were represented in *Reece* proper. The emphasis on elephants’ most human-like capacities – emotional, social, and cognitive complexity – demonstrated how Lucy could only become cognizable insofar as she represented a poor copy of a human being, one whose suffering mattered morally and legally only by virtue of this human-likeness. However, by following where the trunk led throughout *Reece*’s pieces, I unearthed an untapped possibility. In particular, by demonstrating that, where the trunk engages in hand-type behaviours of painting and handshaking, it renders our hands not as transcendently special things in all of creation, but instead as prehensile appendages in the

⁶ Jacques Derrida, “The Force of Law: ‘The Mystical Foundation of Authority’,” translated by Mary Quaintance (1989) 11 *Cardozo Law Review* 920 at 959.

⁷ *Ibid.* at 971 [emphasis in original].

same vein as those of other animal species. This offered an alternative way of understanding elephants: not as poor copies of ourselves in all of our magnificence, but – inasmuch as we are forced to reevaluate what we understand ourselves to be – as beings that share with us the same vulnerability, mortality, and finitude. Displacing “the human” in this way brings the nature of our relation with other living beings into view as shared suffering and shared joy. However, this was an *untapped* potential. While detectable in *Reece*’s pieces, it did not manifest in *Reece* proper – and, in this respect, seemed to indicate where the limits of law (as it relates to animals) currently reside.

In Chapter 4 (“From Home to Hospice”), I again looked to the public discourse on Lucy the elephant and again came up against apparent limits of law. In that chapter, I traced “location” throughout *Reece*’s pieces, finding that a locational concept – “home” – appeared to be the salient lynchpin joining together so many disparate ways of understanding where Lucy the elephant came from, where she is now, and where she ought to be in the future. Energizing much of the debate (the courtroom element of it included), the discourse seemed unable to shake the idea that there is *somewhere* that this elephant belongs – that there is a “home” for her in the most positive sense of the word. Nevertheless, what I uncovered here was again the insufficiency of this idea, its apparent inability to ground itself in anything real, its limits only whispered at the edges of the discourse: perhaps, in the context of global displacement and habitat destruction, there is no true home for this elephant.

Even those who recognized this possibility retreated quickly to the extant terms of the debate in legal animal studies, looking to Francione’s abolitionism as the solution. However, while abolitionism may indeed provide a better quality of life for animals, it does not measure up to the task at hand here. Elephant personhood in law does nothing to solve the problem Lucy

presents, the lawsuit of *Reece* itself only ever prospectively promising the possibility of her being moved from one place to another, offering no real possibility of freedom from human domination in a complex ecosystem of interdependent living beings. Even those who would take Lucy's interests seriously, such as Chief Justice Fraser, are apparently unable to resolve – or even fully perceive – these more-expansive-in-scope underlying problems. In this way, what comes into view here is the narrow focus of law: even in those instances when law concerns itself with animals, it demonstrates an apparent inability to make sense of something global in scale and existential in nature.

I do not mean to imply here that law only concerns itself with animals in the courtroom. After all, what drove Chapter 5 (“Sentenced to Life”) was the recognition of how far beyond the courtroom “law” (or, to use the term offered by Patricia Ewick and Susan Silbey, “legality”) extended.⁸ In spite of *Reece* proper being an exercise in civil law, the language that pervaded *Reece*'s pieces was that of decidedly *criminal* law, with references to “wrongful imprisonment” and “solitary confinement” – among other similar terms and phrases – abounding throughout as the way in which countless discoursants communicated their understanding of Lucy and her circumstances. What I uncovered in this chapter was that, more than just the language of crime and punishment, the logics we associate with these things in the human context could also be found operating with respect to this animal: both the disciplinary logics and the pastoral logics of human imprisonment – which, rather than spectacularly killing the aberrant individual, keeps them alive and retrains them for “pro-social” behaviour – permeated the conceptual framework with which everyone appeared to greet the captivity of Lucy (whether that captivity be in the Zoo, sanctuary, or otherwise).

⁸ Patricia Ewick & Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: Chicago University Press, 1998) at 20.

I concluded “Sentenced to Life” on a particularly harrowing note. Under the heading “(Un)ending Sentences,” I stated that all one finds in the discourse of *Reece*’s pieces is sentence, after sentence, after sentence, each one leading us no closer to justice for the animal entity that appears to have been – for all intents and purposes – “sentenced to life.” This, too, represented a limit-point for law as it interacts with animals, our language of crime and punishment making some sense of animal captivity, but also not getting at the particularities of cross-species dependency in any way that could be said to “do justice” to these living beings. Indeed, insofar as every prospective “solution” to Lucy’s plight involved moving her from one form of captivity to another, even the possibility of her freedom was ultimately articulated by some according to yet another form of crime-and-punishment legal language: a “death sentence.”

Crucially, however, I do not mean to imply that those are the only two options, either a “life sentence” or a “death sentence” for Lucy the elephant. Instead, here I would return to what the point of a discourse analysis is. As psychoanalyst Derek Hook explains it, “attaining truth is not the goal of discourse analysis.”⁹ Rather, the point is to uncover “a carefully delineated set of conditions of possibility under which statements come to be meaningful and true” and bring awareness to “the presence of the limits within which we speak.”¹⁰ This project has not aimed to affirm the knowledge or “truth” established by the discourse of *Reece*’s pieces, but instead to reveal how it operates and circulates and to find the limits of that knowledge and “truth.” Instead of strengthening the claims made within a given discourse, discourse analysis *unravels* the discourse, cutting through it to expose the limit points that allow it function in the first place.¹¹ In other words, the discourse of *Reece*’s pieces – as it employs the language of law – seems to present two possibilities: Lucy has a “life sentence” or Lucy has a “death sentence.” My point is

⁹ Hook, *supra* note 3 at 525.

¹⁰ *Ibid.* at 525-526.

¹¹ *Ibid.* at 538.

not that one should choose one or the other of these, but that the presentation of these as the limits of what is possible is itself the problem.

The impetus behind finding limits – as I have done in this project – is to move beyond them. Law stops at the edge of humanism, law falls short of thinking the global and the existential, and law cannot adequately see or resolve the tensions that arise around animals living and dying in captivity. However, to say that these limits cannot be overcome would be, in the words of Cary Wolfe, a “cop out.”¹² Perhaps we cannot move past these limits – but, to invoke Derrida’s idea of a justice yet to come once more: “‘*Perhaps*,’ one must always say perhaps for justice.”¹³ To put it another way: no solution is ever guaranteed, but the possibility of finding one always remains open. There will always be limits to law to overcome – but by delineating some of these limits as I have done in this project, perhaps we can now find a way to move at least one step closer to the justice yet to come for Lucy, for our fellow living beings, and for all else to which justice is owed.

¹² Cary Wolfe, *Before the Law: Humans and Other Animals In a Biopolitical Frame* (Chicago: University of Chicago Press, 2012) at 103.

¹³ Derrida, *supra* note 6 at 971 [emphasis added].

3. ... and the Life Sentences of Lucy the Elephant¹⁴

... Lucy, the Edmonton Valley Zoo's 47-year-old Asian elephant, arrived at the Tennessee Elephant Sanctuary in December, 2021. TV icon and animal defender Bob Barker, who paid for the elephant's trip to the sanctuary at a cost estimated to be between \$100 000 and \$300 000, was on hand to greet the elephant. Upon being unloaded at the sanctuary, Lucy loudly trumpeted, as if to announce her arrival. Quickly becoming aware of Lucy's presence in the sanctuary, other elephants touched her with their trunks, traded hay and branches, and engaged in additional trumpeting and rumbling with the rest of the herd...

... Lucy, a 47-year-old Asian elephant previously housed at the Edmonton Valley Zoo, died at the Tennessee Elephant Sanctuary late yesterday. For the veterinarians who had worked with Lucy during her final years at the zoo, the death raised serious questions about whether it had been right to move her from what she knew to an unfamiliar environment, even a nicer one.

"It would be like, without being too anthropomorphic, taking one of us and putting us in the middle of Europe or in the middle of some other country where you don't know anybody. Is

¹⁴ This section's vignettes are composites drawn from the lives and deaths of other elephants to whom Lucy has been compared at various points throughout *Reece's* pieces: the Alaska Zoo's former elephant, Maggie, who was relocated to a California elephant sanctuary in 2007; the Toronto Zoo's former elephants, Toka, Thika, and Iringa, who were relocated to the same sanctuary in 2013; the Greater Vancouver Zoo's former elephant, Tina, who was relocated to the Tennessee Elephant Sanctuary in 2003; and Chicago's Lincoln Park Zoo's former elephant, Wankie, who died in transit to the San Diego Zoo. Words and phrases have been borrowed liberally from the following sources: "Maggie's Story" (no date), online: *Save Lucy* <<http://www.savelucy.ca/maggie-s-story>>; Jennifer Keats Curtis, "An Update on Maggie: Alaska's Last Elephant" (13 March 2021), online (blog): *Arbordale Publishing* <<https://arbordalekids.wordpress.com/2021/03/13/an-update-on-maggie-alaskas-last-elephant/>>; Alisa Mullins, "Victory! Toronto Elephants Finally Go to Sanctuary" (21 October, 2013), online (blog): *PETA* <<https://www.peta.org/blog/victory-toronto-elephants-finally-go-to-sanctuary/>>; Paula Simons, "Hollywood's hand-wringing over Lucy may backfire", *Edmonton Journal* (18 September 2009) B1; "Elephant's death stuns zoo", *Chicago Tribune* (2 May 2005), online: <<https://www.chicagotribune.com/news/ct-xpm-2005-05-02-0505020218-story.html>>; Jana G. Pruden, "Cage Match", *Globe & Mail* (16 July 2016) F1.

that really what you want, or do you want to be around the people that you know?” one Valley Zoo veterinarian remarked. “It would have been better for her to have stayed here than to have been moved into strange circumstances to die...”

... Lucy, the Edmonton Valley Zoo’s 47-year-old Asian elephant, died in transit today on her way to the Tennessee Elephant Sanctuary. Her death stunned zoo officials, who noticed no signs of life-threatening medical problems when she was loaded at 9:30 a.m. on Friday into a truck for transport. Signs of trouble arose at 6:30 a.m. Saturday when Lucy sat on her hind legs in her crate, a position that could have inhibited breathing.

Veterinarians said that because elephants are so heavy, the position also could have damaged the tissue and muscle in her legs. She arrived in the United States by Saturday afternoon; however, her condition did not improve and she was declared dead at 1:30 a.m. Sunday. One veterinarian who had been travelling with the elephant remarked that they are all “devastated by Lucy’s death...”

... Lucy, the Edmonton Valley Zoo’s 47-year-old Asian elephant, was nowhere to be seen. On a sunny Thursday afternoon, both the elephant house and its outdoor pens were empty. Packs of parents wheeled strollers and followed stampeding children into the building to find only a desolate barn, then wheel out again, disappointed, into the sunshine.

“I haven’t seen her for the past three weeks,” one woman said, a little girl tugging on her hand. A man with two small children called to a zoo worker unloading a bale of hay from the back of a pickup truck. “Is the elephant coming back today?” he asked.

The worker shrugged.

“I don’t know...”

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- , “This is LUCY’s “home”, a small barn cell & barren yard at #yegzoo. Experts estimate Lucy spends >70% of her time inside this dismal building.” (29 September 2017 at 10:28PM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/913968779130007552>.
- , “LUCY’s stuck inside during extreme cold. Elephant scientist Dr. Joyce Poole on Lucy spending much of her life in a cell: ‘The consequence is that she is a young elephant in an old body. This causes her real privation and suffering.’ More: <https://www.facebook.com/FriendsOfLucy/posts/1708135409260945> #yeg #yegwx” (28 December 2017 at 1:14AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/946263059995267074>.
- , “Not cool to force an Asian elephant from tropical Sri Lanka like LUCY to live in this #Canadian climate! #yeg #yegzoo #yegcc Not cool: Edmonton is now colder than both North Pole and South Pole” (29 December 2017 at 4:52PM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/946906873386676225>.
- , “Every picture tells a story... Generations of children in #yeg have learned it’s OK to take elephants from their native countries, lock them up in small zoo cells and parade thousands of people past just to see what an elephant looks like. Society has normalized this. :-(#yegzoo” (9 January 2018 at 1:30AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/950615812326518784>.
- , “Lucy is 42 years old, from tropical Sri Lanka, locked up at #yegzoo through 41 Edmonton

- winters, and has suffered captivity-related diseases including arthritis & foot disease for decades. Zoo claims she can't travel, but won't allow any but their own biased vets to examine Lucy." (23 January 2018 at 8:55PM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/956027624974946304>.
- , "Rocks in the floor, and don't forget the painted trees. Thick prison bars, rubber mats over a concrete floor, and a radio playing. Immersed in nature." (31 January 2018 at 11:28PM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/958919942509940737>.
- , "We'd like to see what the future of LUCY looks like. Will she continue to suffer & languish alone at #yegzoo, then die in her mid-40's like so many other elephants in zoos? Or will @CityofEdmonton #yeg have the foresight & compassion to #LetLucyGo to sanctuary? No life sentence!" (3 February 2018 at 12:19AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/959657696323670016>.
- , "People who know, respect & love elephants know a solitary is a tragedy, & work to unite them w/ the elephants they need. @japanelephants is, @GlobalElephants is, so are many other orgs & sanctuaries. Zoocheck, V4A & we are working to unite LUCY w/ @doniveson why aren't you?" (16 February 2018 at 12:43AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/964374673118015489>.
- , "The above poem is entitled, "CITY ZOO" & written by Vivian Yeiser Laramore. LUCY doesn't even have another elephant's breath to breathe. @doniveson @SPhillipsAB @oneilcarlier Lucy's captivity at #yegzoo is a tragedy. #LetLucyGo #SanctuaryHeals #yeg #yegzoo #yegcc #yegwx" (19 February 2018 at 12:05AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/965452240306700289>.
- , "We all know it's a tragedy that LUCY is alone in Edmonton. It's also a tragedy that RAMBA is alone. Ramba can go to sanctuary soon, though, if we all pitch in and help. Please donate for #RambasFlight to Elephant Sanctuary Brazil. #ElephantsNeedElephants #SanctuaryHeals" (26 February 2018 at 1:04AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/968003919849934850>.
- , "If roads are so slippery they caused 107 car crashes, then the asphalt paths the Valley Zoo walks Lucy on are also a risk to her. #Yegzoo doesn't want to lose their cash cow and lies that Lucy can't be safely moved. Time for #yeg to #LetLucyGo to a warmer-climate US sanctuary." (4 March 2018 at 1:38AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/970186810721755136>.
- , "We are aware of this as well, we spend a great deal of time studying elephants in the wild and in captivity. Gay Bradshaw has written about PTSD in elephants too. How do you think Lucy feels, after likely seeing her mother killed in Sri Lanka so the Valley Zoo could purchase her?" (20 March 2018 at 1:12AM), online: *Twitter* <https://twitter.com/Friends_of_Lucy/status/975978255806291969>.
- , "Only TEN DAYS until the Edmonton Valley Zoo's permit expires. Lucy's been behind bars

- for 40 years and 10 months of her life. Can you spare 15 minutes of your life to #BeHerVoice, and send an email, postal letter or make a phone call for her? Info: [https://www.facebook.com/FriendsOfLucy/photos/a.320869434654223.73694.315797538494746/1757965850944567/?type=3&permPage=1 ... #yeg](https://www.facebook.com/FriendsOfLucy/photos/a.320869434654223.73694.315797538494746/1757965850944567/?type=3&permPage=1...#yeg) (21 March 2018 at 10:58PM), online: *Twitter*
<https://twitter.com/Friends_of_Lucy/status/976669444247302144>.
- , “Hi Katalin, no Lucy hasn't been transferred to a US sanctuary, she's still incarcerated at the Edmonton Valley Zoo here in Canada, for almost 41 years now. Here's Lucy on December 28th taken by one of our volunteers. Please see our pinned tweet if you'll join us to help her.” (26 March 2018 at 11:31PM), online: *Twitter*
<https://twitter.com/Friends_of_Lucy/status/978489542918406144>.
- , “That's like saying if you physically survive for 40 years in solitary confinement in prison, the decision to put you there and leave you there was a good one. Would you be OK in solitary? The fact Lucy's been deprived of her needs for so long isn't a reason to keep depriving her.” (29 March 2018 at 12:44AM), online: *Twitter*
<https://twitter.com/Friends_of_Lucy/status/979232729874292736>.
- , “These are African elephants but Asian elephants love their calves just as much. LUCY was wild-born in Sri Lanka and reportedly ‘orphaned’ at only 1 year old. Imagine Lucy's lifelong loss at losing her mother and maternal herd, to end up *alone* & freezing in a Canadian zoo. #yeg” (12 April 2018 at 1:07AM), online: *Twitter*
<https://twitter.com/Friends_of_Lucy/status/984296855612870656>.
- , “Exactly, Vanessa. The Valley Zoo can't have it both ways. For years they've claimed Lucy has a problem breathing through her trunk (although other vets have stated elephants are not obligate nasal breathers and Lucy has adapted to breathing through her mouth when necessary)... 1/” (5 May 2018 at 4:47PM), online: *Twitter*
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