

1-1-2016

The problems of false comparions: Animal discourse and the anti-choice movement

Nicole Power

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/djls>

Recommended Citation

Nicole Power, "The problems of false comparions: Animal discourse and the anti-choice movement" (2016) 25 Dal J Leg Stud 107.

This Article is brought to you for free and open access by the Journals at Schulich Scholars. It has been accepted for inclusion in Dalhousie Journal of Legal Studies by an authorized editor of Schulich Scholars. For more information, please contact hannah.steeves@dal.ca.

THE PROBLEM OF FALSE COMPARISONS: ANIMAL WELFARE DISCOURSE AND THE ANTI-CHOICE MOVEMENT

Nicole Power*

ABSTRACT

Advocacy for the protection of animal welfare and women's right to reproductive choice have little, if anything, in common. It is productive, then, to question the recurring association of these unrelated ethical issues. If one feels compassion for the plight of the nonhuman animal, the argument goes, then it is morally inconsistent to neglect the fetus. An understanding of the incongruous political contexts at play between abortion and animal welfare effectively repudiates this argument, but a more important question must be answered: why is this strange argument so pervasive? In brief, it is the uniform legal marginalization of women and animals that animates this false comparison, which is instructively analyzed through the theoretical lens of ecofeminism. The leading Canadian judgments of *R v Morgentaler* and *R v Ménard* exemplify the socio-legal contours of 'otherness' outside the locus of patriarchal dominance. This renders a broadly transferable framework of oppression at the hands of the law; examining jurisprudential examples of displacement of agency, fragmentation of the self, and instrumental objectification, in both contexts, provides a useful starting point in a consideration of the broad intersections between the legal treatment of women and animals.

Citation: (2016) 25 Dal J Leg Stud 107.

* Nicole Power is a third-year student at the Schulich School of Law at Dalhousie University. She would like to thank Professor Vaughan Black for sharing his knowledge and enthusiasm about animals and the law.

1. INTRODUCTION

The issues of abortion and the exploitation of nonhuman animals have little in common, but share a pronounced ability to provoke heated, partisan debate. Perhaps unsurprisingly, it follows that the two are often linked. Critics who oppose a woman's right to reproductive choice view the animal welfare stance as a useful tool; if one cares about animal subjects, the argument goes, then perhaps this moral consideration extends to the fetus. While this literature ignores important differences and seeks to erode female bodily autonomy, it also instructively demonstrates the law's culpability in treating disadvantaged groups in a way that masks their distinct identities. A nuanced analysis of the law surrounding women's reproductive freedom and animal welfare reveals the dominant patriarchal perspective from which the law proceeds. As a necessary extension, this discussion puts the other—those outside the privileged perspective—into stark relief.

The notion that both women and nonhuman animals reside in this periphery is intuitive given the patriarchal character of our social and legal fabric; however, a careful consideration of the values embodied in these controversial areas of jurisprudence should take nothing for granted. While the law aims to homogenize these groups, it is essential to both foreground their differences and understand the legal workings of uniform 'otherness.' Although arguments that link the issues of abortion and animal welfare are generally unpersuasive, they are particularly instructive regarding the patriarchal oppressive impulse.

Simply put, the body of criticism advocating for moral consistency—that is, parallel ethical concern for both fetuses and nonhuman animals—is unconcerned with the animal welfare movement. Instead, pro-animal arguments are misappropriated and misapplied in an effort to disguise the central role of the pregnant woman in the abortion debate. Approaching the issue through the critical lens of ecofeminism elucidates the mutually informing nature of patriarchal domination directed at women and nonhuman animals. This theoretical framework speaks from the margins of the legal system and underscores instances where subjugation intersects; it is therefore a particularly

useful tool for understanding the jurisprudential implications of likening antiabortion and pro-animal stances.

The legal treatment of these two unrelated issues has a particular culpability in the recurrence of these arguments because the law marginalizes both women and nonhuman animals in the same ways. Accordingly, a brief consideration of the background of each issue and a discussion of representative scholarship on both sides is an important starting point of this legal complicity.

First, I summarize the relevant animal rights philosophies and consider these arguments in the context of antiabortion rhetoric; a careful consideration of the tenuous analogies advanced and the dissimilar thresholds of moral subjecthood dispels the initial seductiveness of these arguments. Secondly, I bring into relief the ongoing critical debate, drawing particularly on the work of Gary Francione to refute sentience-based arguments and emphasize the unique political context of pregnancy and abortion. Thirdly, I employ the ecofeminist lens to foreground the patriarchal subjugating impulse at play in both contexts. Finally, in light of this backdrop, the leading cases of *R v Morgentaler*¹ and *R v Ménard*² exemplify these parallel tropes of domination; I unpack these arguments using theories of intersectional oppression. Ultimately, the forced conflation of the two issues can be traced to the law's uniform oppressive impulse, which fragments, objectifies, and withholds agency in broadly similar ways.³

2. THE CASE FOR ANIMALS

In order to understand the arguments supporting the conflation of antiabortion and animal welfare positions, it is useful to outline the primary moral theories at play. While this is a broad, diverse field of inquiry—and one that, generally speaking, exceeds the scope of this paper—Peter Singer and Tom Regan

¹ *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385 [*Morgentaler*].

² *R v Ménard*, [1978] JQ No 187, 4 CR (3d) 333 [*Ménard*].

³ For the sake of simplicity, in this paper I sometimes use the term “animal” to refer to nonhuman animals. Likewise, while it is technically reserved for the second trimester and onward, I use the term “fetus” to describe an unborn human at any stage of development.

are frequently invoked in these debates and therefore provide a useful starting point for this discussion.

a. The Philosophy of Animal Rights

In his famous text, *Animal Liberation*, Singer makes a significant observation: “Equality is a moral idea, not an assertion of fact.”⁴ Although this point may seem intuitive, it has important implications for animal rights discourse. Instead of looking to a being’s capacity to exercise familiar rights—for instance, the right to vote or the right to free speech—this approach emphasizes a question first articulated by Jeremy Bentham: “Can they suffer?”⁵ Singer identifies the ability to enjoy and suffer as prerequisites for having interests that should be morally recognized.⁶ He argues that, short of speciesism, needless pain inflicted on a baby or an animal is equally immoral.⁷ By advocating for a low threshold of subjecthood, Singer proposes a broad scope of ethical consideration, which those looking to privilege fetal rights over those of the pregnant woman have exploited.⁸ At this level of generality, this argument appears conducive to an antiabortion sentiment; however, as discussed below, Singer’s philosophy contains important qualifications that effectively remove it from this context.

The other major perspective that forms the background of this inquiry is Regan’s notion of ‘subjects-of-a-life.’ Regan’s theory accords this status to those with the capacity to experience pleasure and pain and form preferences; they must have a sense of the future, both generally and in the context of desire, and be capable of remembering their past and forming a psychophysical identity.⁹ The significance of this idea for animal welfare proponents is concisely stated by Julian Franklin in *Animal Rights and Moral Philosophy*.¹⁰ He suggests that Regan’s ‘harm

⁴ Peter Singer, *Animal Liberation*, revised ed (New York: HarperCollins, 2009) at 4 [Singer].

⁵ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (New York: Hafner Publication Company, 1948) at 311.

⁶ Singer, *supra* note 4 at 4.

⁷ Speciesism is the idea that humans, by virtue only of our species, are entitled to greater moral rights than nonhuman animals.

⁸ Singer, *supra* note 4 at 15.

⁹ Tom Regan, *The Case for Animal Rights* (Oakland: University of California Press, 1983) at 243.

¹⁰ Julian H Franklin, *Animal Rights and Moral Philosophy* (New York: Columbia University Press, 2004).

principle' is based on the idea that inflicting pain without a justifiable reason is immoral. Franklin then goes on to observe the extension of the harm principle to nonhuman animals; Regan demonstrates the capacity of developed mammals to suffer and argues that it must, then, be wrong to inflict needless suffering on them.¹¹ Ultimately, Regan advocates for the inherent worth of each individual, since "it has a life that is 'its own.'"¹² While this may appear conducive to a pro-fetal life stance, subjects-of-a-life are nevertheless defined by certain important criteria they possess, not by mere ontology. Given these clear distinctions, it is worth pausing to consider the prevalence of this comparison.

b. A Seductive Argument

The preponderance of arguments linking animal rights and antiabortion stances is not coincidental. At varying degrees of distortion, both Singer's utilitarianism and Regan's 'subjects-of-a-life' doctrine suggest far-reaching ethical concern for vulnerable individuals. Given that these ideas are at the forefront of animal defense scholarship, it is unsurprising that their potential implications for the issue of abortion have been discussed.

Notably, and often omitted by those who employ his ethics to argue against reproductive choice, Singer explicitly discusses the implications of his work in the context of the abortion debate. His conclusion is in fundamental opposition to the arguments conflating antiabortion and pro-animal positions. He writes: "the life of a fetus (and even more plainly, of an embryo) is of no greater value than the life of a nonhuman animal at a similar level of rationality, self-consciousness, awareness, capacity to feel, etc., and since no fetus is a person no fetus has the same claim to life as a person."¹³ Singer does not advocate for the extension of animal welfare compassion to the fetus; rather, he holds that the moral culpability of terminating a pregnancy relates directly to the fetal capacity to suffer and enjoy—that is, to have interests.

¹¹ *Ibid* at 15-16.

¹² *Ibid* at 17.

¹³ *Ibid* at 15-16.

Grace Kao best summarizes the problem; she states that “[a]nimal pain is arguably comparable to fetal pain in that we can only reason about either by analogy.”¹⁴ This process gives rise to a line-drawing exercise between sentient and nonsentient beings, which has led some to conclude that the “fate of fetuses and animals must either stand or fall together.”¹⁵ Champions of this position argue that “[a]t the level of substantive moral argument, both pro-life and animal rights positions are characterized by their appeal to *a priori*, absolutist categories as constituting the necessary limit to our power over others.”¹⁶ While this perspective effectively ignores the fact that ‘absolutist categories’ can—and, in this case, do—have different threshold content, it serves as a reminder that pro-animal arguments are easily appropriated and reductively applied by those wishing to promote fetal rights. The distinction between abortion and animal welfare must, then, rest on something more than a utilitarian analysis of a fetus or a nonhuman animal.

3. A PERSISTENT DEBATE

Despite these dissimilarities, critics who conflate animal defense and antiabortion positions frame the comparison around the assistance of the dependent and the vulnerable.¹⁷ This claim, however, is not universally accepted; many scholars reject the ‘homological’ view—one that purports to identify parallels between pro-fetal life and animal rights theories—and Gary Francione is its most explicit opponent. In spite of his work dismantling this position, antiabortionists continue to draw connections between these false friends. As recently as 2015, Cheryl Abbate published an article intended to directly rebut Francione’s piece from 20 years earlier.¹⁸ Still, her critique fails to engage with the substance of Francione’s arguments and seems to misunderstand his key points.

¹⁴ Grace Kao, “Consistency in Ecofeminist Ethics” (2006) 3:11 *Intl J Humanities* 11 at 13 [Kao].

¹⁵ *Ibid.*

¹⁶ Elizabeth Mensch & Alan Freeman, “The Politics of Virtue: Animals, Theology and Abortion” (1991) 25:4 *Ga LRev* 923 at 944 [Mensch & Freeman].

¹⁷ Cheryl E Abbate, “Adventures in Moral Consistency: How to Develop an Abortion Ethic through an Animal Rights Framework” (2015) 18 *Ethic Theory Moral Prac* 145 at 146 [Abbate].

¹⁸ *Ibid.*

a. Francione: Abortion and Animal Rights

Are abortion and animal rights really comparable issues? Francione, an American legal scholar, addressed this question in 1995.¹⁹ In response to contemporaneous debate in moral philosophy, his essay in *Animals & Women* was an effort to untangle these two “terribly complicated” legal and social issues. Francione directed his article as much to the pro-choice feminists who felt betrayed by animal rights discourse as to the antiabortionists making the ‘moral consistency’ argument that provoked this entanglement.²⁰ Refuting the idea that support for animal rights is “one step down the road toward recognition of fetal rights,”²¹ Francione engages with the question of sentience, but his analysis does not begin and end there; for him, determining the proper moral outcome requires an appreciation of the distinct political contexts at play.²²

i. Is Sentience Sufficient?

A focus on sentience alone, according to Francione, can lead to the erroneous conclusion that approval of Singer’s views mandates the inclusion of human fetuses in the utilitarian calculus.²³ Antiabortion rhetoric presents sentience as an all-or-nothing proposition; accordingly, the interests of the nominally sentient fetus would require ethical consideration. Proponents of the moral consistency doctrine therefore fixate on this aspect of modern animal protection discourse to establish links to pro-fetal life arguments.²⁴ Francione advances the view that, while sentience is morally significant, it cannot be determinative of the relationship between pro-animal arguments and the abortion issue.

¹⁹ Gary Francione, “Abortion and Animal Rights: Are They Comparable Issues?” in Carol J Adams & Josephine Donovan, eds, *Animals and Women: Feminist Theoretical Explorations* (Durham: Duke University Press, 1995) 149 [Francione].

²⁰ See, e.g., Mensch & Freeman, *supra* note 16; Jeff McMahan, “Infanticide and Moral Consistency” (2013) 39:5 *J Medical Ethics* 273.

²¹ Francione, *supra* note 19 at 149.

²² *Ibid* at 154.

²³ *Ibid* at 153.

²⁴ Abbate, *supra* note 17 at 147.

To begin with, the significance of sentience in animal rights theory—along with its fundamental definition—varies from scholar to scholar. Francione notes that “rights advocates do not regard sentience as playing the same theoretical role.”²⁵ The Bentham/Singer utilitarian position turns largely on the weight afforded to sentience, but for philosopher Tom Regan, for example, it is simply the starting point in establishing moral consideration. Regan’s theory further requires that a being “must have a psychological status sufficiently complex so that we may say that the being has preferences, fears, hopes, mood changes, etc.”²⁶ As a result, sentience cannot be invoked to draw connections between antiabortion arguments and animal protection theory generally.

Moreover, Francione argues that if the utilitarian position is taken to be representative of all pro-animal arguments, human fetuses in the first trimester are nevertheless unlikely to be included in this calculus. Fetuses at later stages of development have displayed signs of sentience; however, the majority of nontherapeutic abortions are performed in the first trimester, during which period “there is substantial evidence that there is little, if any, sentience.”²⁷ Even if sentience were proved in first-trimester fetuses, it would be very difficult to analogize to feelings experienced by a human or another animal. In any event, for Francione, this complicated line-drawing exercise is irrelevant; abortion and animal rights can—and should—be meaningfully distinguished on grounds other than sentience.²⁸

ii. The Political Context

Despite its potential significance, other factors exist which are equally or more important than sentience—namely, the divergent political contexts of abortion and animal protection. The work of Singer and Regan can offer guidance when one is “confronted with a conflict between two separate and independent entities,” but the abortion problem represents a conflict between a woman and a

²⁵ Francione, *supra* note 19 at 153.

²⁶ *Ibid* at 153.

²⁷ *Ibid*.

²⁸ *Ibid* at 150.

being who depends upon and resides within her body.²⁹ In other words, abortion is a distinct moral issue.

The state's role in each scenario informs the distinction between the two issues. With respect to animal protection, the state can regulate, for example, vivisection without impinging on the vivisector's bodily autonomy but, naturally, the same cannot be said for state regulation of abortion.³⁰ Similarly, the government's regulation of vivisection, which Francione argues would be more accurately likened to a scenario of child abuse than to abortion, does not violate vivisectors' basic privacy rights. Quite the opposite, Parliament cannot regulate abortion "in the absence of a patriarchal intrusion of the law into a woman's body," an encroachment on bodily autonomy not generally accepted anywhere else in the law.³¹

An accurate representation of the abortion scenario requires recognition of the pregnant woman's unique role. In practical terms, the subject of this 'debate' is happening within her own body; she is, therefore, the only person in a position to make important decisions about the situation. Francione explains that utilitarian or deontological theories cannot be employed to obscure the fact that the abortion question represents a conflict between a woman and a fetus, the resolution of which presents only two possible alternatives. As he puts it, "one of the two parties involved in the conflict may make the decision, and since it is difficult for fetuses to make decisions, the woman is the only other available decision maker."³² Otherwise the decision would fall to the state.³³

Allowing the state to decide the permissibility of abortions is an unjustifiable interference with the pregnant woman's decisional and bodily autonomy. As such, it is futile to analyze the sentience of fetuses at different times during the pregnancy and delineate a threshold for moral consideration. The evaluation of fetal moral rights in isolation from the pregnant woman is inherently incomplete.

²⁹ *Ibid* at 154.

³⁰ *Ibid* at 150.

³¹ *Ibid*.

³² *Ibid* at 156.

³³ *Ibid*.

Such an analysis is prejudicial toward a careful examination of the ethical parameters of reproductive choice.

b. Abbate and Other Critics

Cheryl Abbate, together with other critics, has called for animal advocates to extend their animal protection ethic to recognize fetuses' inherent worth. This demand for so-called moral consistency is based on the idea that the animating principles surrounding animal rights require a parallel approach to the abortion question and that it is inconsistent to apply them selectively.³⁴ Her reading of animal rights theory culminates in the assertion that sentience is the "vital characteristic" that gives rise to moral subjecthood.³⁵ Abbate begins by assigning sentience to at least some fetuses and then deviates from the plain meaning of the word; she imports the ability to prefer and desire, which artificially expands the scope of fetal interests. Under this definition, a sentient being has "equal moral worth"; this subject is entitled to full, non-discriminatory consideration of its interests. Or, in this context, the fetus has interests of equal ethical concern to those of the pregnant woman.³⁶

Abbate ostensibly aims her arguments directly at Francione's 1995 article, but she still chooses to focus almost exclusively on sentience, and she positions Francione's work as though it, too, turns on this concept. Her misunderstanding may be the result of genuine confusion, but it is more likely a matter of convenience; focusing on the sentience of the fetus allows it to become the centre of the analysis, which in turn requires that the woman's interests are only a secondary consideration.

i. Privileging Sentience

Abbate's abortion analysis exaggerates the significance of sentience, distorts crucial elements of Francione's treatise, and omits discussion of other, more important factors. Her analysis is therefore instructive for an understanding of

³⁴ Abbate, *supra* note 17 at 145.

³⁵ *Ibid* at 147.

³⁶ *Ibid* at 149.

how pro-animal arguments can be distorted and exploited toward a false assertion against women's choice. First, she identifies sentience as the crux of Francione's thesis; she claims that his philosophy designates sentience as the threshold criterion for "membership into the moral community" as well as rightholder status.³⁷ Then, based on this foundational assumption, Abbate summarizes her perception of Francione's animal rights position in a two-step process:

1. If a being is sentient, then it is the bearer of *prima facie* rights, including the *prima facie* right to life.
2. Certain animals are sentient. Therefore, certain animals are bearers of rights, including the *prima facie* right to life.³⁸

She proceeds to apply a moral consistency argument to the abortion issue:

Yet, if a sentience based animal rights theory is to remain morally consistent, it is committed to using the same line of reasoning in order to grant the right to life to sentient fetuses. Thus, Francione's theory is committed to the following argument: ... certain (sentient) fetuses are bearers of rights, including the *prima facie* right to life.³⁹

While Abbate may be drawing on Francione's actual scholarship with respect to animal rights and sentience, her rebuttal does little to address the thrust of Francione's arguments: that sentience is all but irrelevant when the being in question resides within another person's body.

ii. Relationships of Dependence

Abbate finds further common ground between pro-fetal life and –animal ethics in the dependence on humans shared by fetuses and certain animals. She posits that comparable instances of dependence arise when a woman carries a pregnancy past eight weeks and when humans create or cause animals to rely on them for protection and care. Considering these analogous relationships under an animal protection framework—and ignoring the literal objectification of the woman's body that this presents—Abbate suggests that "a woman is morally

³⁷ *Ibid* at 149.

³⁸ *Ibid*.

³⁹ *Ibid* at 150.

responsible for assisting a sentient fetus when her voluntary acts or omissions cause the fetus to be dependent and vulnerable.”⁴⁰

In keeping with this line of reasoning, once a pregnancy has passed the eight-week mark, it follows that the woman ought to have known that she is pregnant. At this stage, the woman and the fetus have formed a “morally significant relationship” and the woman should not be permitted to abort.⁴¹ Further, Abbate argues that a woman’s “voluntary omission” to abort before this stage in fetal development grants the fetus “a special right . . . to use the woman’s body.”⁴² The foregoing argument is in effect saying that, once this critical juncture in pregnancy is reached, the rights of an eight-week-old fetus automatically trump those of the pregnant woman.

iii. Sidestepping the Debate

Although Abbate’s allowance for abortions during the first eight weeks of pregnancy may seem generous to some supporters of fetal rights, her analysis fails nonetheless to give the pregnant woman due consideration. To be persuasive, arguments in support of the homological perspective require the removal of the woman’s competing interest in bodily autonomy. That is, the conflation of pro-fetal and –animal rights positions is only possible by willfully ignoring the importance of the pregnant woman, biologically and otherwise, to fetal development.

4. LOOKING PAST POLITICS

Parsing the contours of Abbate’s argument is useful only to a point. The main thrust of her paper rests on the artificial inflation of the role of sentience. As an isolated incident, this article is a fairly commonplace example of reductive argumentation. The more important inquiry asks about the pervasiveness of this discourse. The conflation of this unlikely pair is not the product of random choice; instead, the impulse to categorize the rights of women and nonhuman

⁴⁰*Ibid* at 146.

⁴¹ *Ibid* at 161.

⁴² *Ibid*.

animals together is symptomatic of the patriarchal oppression that conceives of the other as uniformly subordinate.

The oppressive impulse that underlies the subordination of women, among other marginalized groups, applies equally to nonhuman animals. Indeed, the predominant conception of nonhuman animals is an extension of the same patriarchal ideology that has been and continues to be used to oppress women.⁴³ Kao describes this as the “logic of domination.”⁴⁴ This social construction allows the marginalization of women and nonhuman animals to be mutually informing and reinforcing. Kao notes the parallel rhetoric that feminizes nature and dehumanizes women toward a uniform otherness. This “cultural-symbolic association” reinforces the patriarchy as the exhaustive sphere of dominance.⁴⁵

Against the norm of the rational actor under patriarchy—male, and as a result, independent, reasonable, stoic, and in control of the natural world—women and nonhuman animals are pigeonholed in the same category of inferior other.⁴⁶ While it is by no means the exclusive source of patriarchal authority, the law has a specific and significant role in embedding dominant attitudes such as these into our social fabric.

a. ‘We have some strange things happening in our country’

At the outset of this inquiry, it is useful to note the hostility that characterizes the law’s relation to those at the margins. In his discussion of the opposition to proposed changes to current anti-cruelty legislation, John Sorenson observes the majoritarian distrust of animal welfare advocates. One Member of Parliament, David Anderson, is particularly vocal on the subject, and his relevant comment is worth reproducing at length:

We are in a situation now where animals will have more protection than human beings. In particular I am thinking of fetuses in their mother’s [*sic*] wombs. Research has consistently shown that fetuses

⁴³ Sheri Ann Lucas, *Should Feminists Be Vegetarians? A Feminist Defense of Ethical Vegetarianism* (Kingston: University Microfilms International, 2002) at 25 [Lucas].

⁴⁴ *Supra* note 14 at 17.

⁴⁵ *Ibid.*

⁴⁶ Lucas, *supra* note 43.

react to pain and that they pull away from it. There are a number of videos that have been made showing the impact of them being torn away from the womb and being destroyed ... We are walking into a situation where the government is willing to protect animal life at a level that it certainly is not extending for human beings. What are we coming to? We have some strange things happening in our country.⁴⁷

This unprompted shift from animal protection to antiabortion rhetoric betrays the function of this artificial relationship to those in positions of power. To conform with patriarchal logic, any improvements to the laws protecting nonhuman animals must happen together with the protection of fetuses. This is not to suggest an interest in concurrent improvement for these historically disadvantaged groups; rather, our related ideas of pregnant women and nonhuman animals exemplify the unified impulse to dominate those outside the centre of power. By failing to engage with the differences that exist within these groups, the law is able to homogenize and ignore perspectives at the margins.

b. Intersections of Oppression

As Sorenson observes, “law is not the justice-based regulation of power but a mask to conceal its workings.”⁴⁸ It is therefore important to understand legal discourse as both an instrument and reflection of power. Accordingly, when considering the courts and other institutions of authority, a useful preliminary inquiry asks: who gets to speak?⁴⁹ Once the locus of authority is established, this asymmetrical power relationship necessarily combines and homogenizes all others outside the centre of power. As a result, the second inquiry—in other words, who is spoken for?—reveals itself to be a far-reaching category that crosses the boundaries of species. In this way, the ecofeminist preoccupation with the intersections of oppression provides a useful tool for revealing the law’s treatment of the other.

Marti Kheel helpfully summarizes the ecofeminist position: “Just as men, under patriarchal society, view women as their antithesis in the quest for

⁴⁷ John Sorenson, “‘Some Strange Things Happening in our Country’: Opposing Proposed Changes in Anti-Cruelty Laws in Canada” (2003) 12 Soc & Leg Stud 377 at 387.

⁴⁸ *Ibid* at 378.

⁴⁹ *Ibid* at 381.

masculine self-identity, so too humans have often viewed animals as a foil for the establishment of human identity.”⁵⁰ Rather than degrade the status of women, then, the juxtaposition of animals and women helps bring into relief the relations of power that transcend gender and species.⁵¹ This comparison and the lens of ecofeminism provide a meaningful rendering of the margins of society.

5. NAVIGATING THE LEGAL LANDSCAPE

The critics who continue to conflate pro-animal and –fetal rights positions are informed, at least in part, by a legal framework that marginalizes the other in a consistent and generalized way. While they are in no way exhaustive, three central concerns of ecofeminist thought elucidate some recurring motifs in the law’s paternal relation with both women and nonhuman animals: displacement of agency, fragmentation of the self, and instrumental objectification. In the following analysis, I consider these three themes in relation to *R v Morgentaler*⁵² and *R v Ménard*,⁵³ two of the leading judgments on their respective subject matters. These decisions shed light on the law’s systematic backgrounding, devaluation, and instrumentalization of the other that affect nonhuman animals and women in parallel ways.⁵⁴

a. ‘Procuring a Miscarriage’: Abortion and the *Criminal Code*

An understanding of the Court’s decision in *Morgentaler* necessitates a careful reading of the relevant *Criminal Code* provision, which is no longer of any force or effect. Section 251 [now section 287] provides that

(1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose

⁵⁰ Marti Kheel, *Nature Ethics: An Ecofeminist Perspective* (Plymouth: Rowman & Littlefield Publishers, Inc., 2008) at 172.

⁵¹ Richard Twine, “Intersectional disgust? Animals and (eco)feminism” (2010) 20:3 *Feminism & Psychology* 397 at 400 [Twine].

⁵² *Morgentaler*, *supra* note 1.

⁵³ *Ménard*, *supra* note 2.

⁵⁴ Val Plumwood, “Conversations with Gaia” in Alison M Jaggard, ed, *Living With Contradictions: Controversies in Feminist Social Ethics* (Colorado: Westview Press, 1994) 666 at 667.

of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.⁵⁵

The fact that a third-party provider was subject to such pronounced consequences, in contrast to the pregnant woman, is arguably symptomatic of the law's modest appraisal of female agency. Whether a woman chose an abortion and allowed it to be procured by a physician or endeavoured to effect it herself, her culpability appears virtually identical. This may have been relevant if this provision was ever evaluated in light of decisional autonomy, but the most important part of section 251 this analysis reads:

(4) Subsections (1) and (2) do not apply to

(a) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or

(b) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means for the purpose of carrying out her intention to procure her own miscarriage, if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of the female person has been reviewed,

(c) has by certificate in writing stated that in its opinion the continuation of the pregnancy of the female person would or would be likely to endanger her life or health, and

(d) has caused a copy of that certificate to be given to the qualified medical practitioner.⁵⁶

⁵⁵ *Criminal Code*, RSC 1985, c C-46, s 287(1) & (2).

⁵⁶ *Criminal Code*, RSC 1985, c C-46, s 287(4).

These exemptions provided an onerous and ill-defined threshold for a pregnant woman to meet if she wished to terminate the pregnancy and stay within the bounds of the law. This section had both the intent and effect of limiting access to reproductive healthcare, and formed the basis of the majority opinion in *Morgentaler*.

b. *R v Morgentaler*

R v Morgentaler is a Supreme Court of Canada decision from 1988. The case concerned the constitutionality of section 251 of the *Criminal Code*, which forced pregnant women seeking abortions to be approved by accredited hospitals' "Therapeutic Abortion Committees." Dr Henry Morgentaler, together with two other physicians, established a non-accredited abortion clinic. Their aim was to increase access to abortion for women who had not received official approval, and to promote women's right to reproductive freedom. The appellants raised a number of different grounds of appeal, but section 7 of the *Charter of Rights and Freedoms* quickly emerged as the central issue.⁵⁷

The Court ruled 5 to 2 that the offence could not be saved under section 1 of the *Charter*. However, the majority was split 2-2-1 on which part of section 7 was engaged, and only Wilson J, the Court's lone female voice at the time, invokes the right to liberty under section 7 of the *Charter*. While ostensibly a positive outcome, the Court's decision in *Morgentaler* represents a failure to meaningfully interact with the gendered component of the abortion issue, and it ultimately does little to support women's decisional autonomy in matters respecting their own bodies.

i. Displacement of Agency: Locating Competency

Notwithstanding the positive result in *Morgentaler*, critics were dismayed to find that the decision still authorizes the displacement of a woman's agency to a third-party group—a committee of doctors who are, statistically speaking, likely

⁵⁷ *Morgentaler*, *supra* note 1 at 31.

to be predominantly male.⁵⁸ The judgment of Dickson CJC privileges fetal interests over those of the pregnant woman, and his reasons for striking down section 251 turn solely on the undue delays it brought about:

State protection of foetal interests may well be deserving of constitutional recognition under s. 1. Still, there can be no escape from the fact that Parliament has failed to establish either a standard or a procedure whereby any such interests might prevail over those of the woman in a fair and non-arbitrary fashion.⁵⁹

The Court, with the exception of Wilson J, sidesteps any consideration of the effects the impugned process would have on a woman's ability to make important decisions about her own life.

Morgentaler, while certainly not the only instance of jurisprudential misogyny, is an instructive example of the subtle ways in which the law fails to recognize women as "competent moral actors."⁶⁰ By acknowledging that the underlying purpose of section 251 may be saved if Parliament reconfigures the process involved, Dickson CJC implicitly accepts that a woman may not be capable of making a morally sound decision on her own. Carol Adams maintains, "women, despite the overwhelming misogyny of moral theory that has posited them as unable to make moral decisions, can and do make moral decisions quite capably."⁶¹ Still, inasmuch as it is legally permissible to reassign a woman's decisional rights to a person in authority, she can never truly have autonomy over her own body.

ii. Fragmentation of the Self: Rights in Conflict?

Even the majority reasons in the *Morgentaler* decision betray a profound disregard for the connection between the pregnant woman and the fetus; as a subject, she is fragmented into pieces that do not reflect the reality of her

⁵⁸ In 1995, nearly 75% of the physicians practicing in Canada were male. See Canadian Institute for Health Information, *Supply, Distribution and Migration of Canadian Physicians, 1999* (Ottawa: Southam Medical Database, 2000) at 12.

⁵⁹ *Morgentaler*, *supra* note 1 at 76.

⁶⁰ Carol J Adams, *Neither Man nor Beast* (New York: The Continuum Publishing Company, 1994) at 62 [Adams].

⁶¹ *Ibid.*

experience. Beetz J, perhaps for analytical clarity, explicitly divides the hypothetical pregnant woman into the fetus, as an individual, and the female body in which it is growing. He goes so far as to say that the “protection of the life and health of the pregnant woman is an ancillary objective.”⁶² Likewise, Dickson CJC describes the protection of fetal interests as “a valid government objective” to be balanced with the interests of women in their lives and health.⁶³ This approach illustrates what Barbara Ehrenreich describes as “the misleading way we are told to visualize the fetus: as a sort of larval angel, suspended against a neutral background.”⁶⁴

Conceptualizing the rights of the woman and the fetus as anything less than inextricably linked not only undermines the pregnant woman’s bodily autonomy, but perpetuates a false notion of woman and fetus as analytically separable.⁶⁵ Consequently, it is misleading to discuss the issue of abortion as though the development of the fetus can occur independently of the woman’s biological support.⁶⁶ When the law positions the woman and the fetus as in conflict, the actual subject affected by the impugned law in *Morgentaler*, the pregnant woman, is divided into imaginary sections; there is no “hard-and-fast boundary” there, and this process only serves to facilitate her objectification.⁶⁷

iii. Instrumental Objectification: ‘I turn first to the right to liberty’

The majority in *Morgentaler* agrees that the impugned offence trespassed on women’s section 7 rights, but the justices penning majority reasons divided on exactly which of the enumerated rights was violated; only Wilson J would dispose of the case under the right to liberty, while the others opt to focus exclusively on security of the person. The male justices’ arguments may seem strange, but their reasoning is as clear as it is alarming: state intervention is sometimes necessary to

⁶² *Morgentaler*, *supra* note 1 at 82.

⁶³ Kerri A Froc, “The Past, Present and Future of Section 7 of the Canadian Charter of Rights and Freedoms: Marking the 25th Anniversary of Re BC Motor Vehicle Act, [1985] 2 SCR 486” (2011) 42 Ottawa L Rev 411 at para 13.

⁶⁴ Adams, *supra* note 60 at 58.

⁶⁵ Diana Majury, “The Charter, Equality Rights, and Women: Equivocation and Celebration” (2002) 40:3 Osgoode Hall LJ 297 at 319 [Majury].

⁶⁶ Adams, *supra* note 60 at 58.

⁶⁷ Ariel Salleh, *Ecofeminism as Politics: Nature, Marx, and the Postmodern* (New York: St Martins Press, 1997) at 39.

prevent a woman from ‘selfishly’ terminating a pregnancy.⁶⁸ They have determined that, absent medical risk or another unjustifiable physical harm, a pregnant woman ought to proceed with a pregnancy, in accordance with fetal—and societal—interests.

Wilson J’s decision is not only unique in its treatment of the relevant law, but also in the language she uses; while the others assign the woman a passive role in the abortion context— “perform abortions *upon* women,”⁶⁹ “*protected from* interference by others,” etc.—she sees the hypothetical woman as the most important actor, the main character, a whole person.⁷⁰ Wilson J’s reasons may also shed some light on the operative logic in her male counterparts’ judgments. She refutes the notion that this is a purely practical and medical decision; rather, the pregnant woman’s decision is informed by her self-perception and perceived relationship to society as a whole. In arguably one of the strongest instances of jurisprudential feminism, Wilson J writes:

It is probably impossible for a man to respond, even imaginatively, to such a dilemma, not just because it is outside the realm of his personal experience (although this is of course the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.⁷¹

By overlooking the more apposite right to liberty in favour of security of the person, Dickson CJC and Beetz J reinforce the idea that women should sometimes be compelled to sustain pregnancies they do not want. They isolate her reproductive capacity from her lived experience and, in doing so, they ontologize women as “usable.”⁷²

Where Wilson J locates a *Charter* violation in the “female psyche,” the majority further objectifies the pregnant woman by excluding the sphere of reason or decisional autonomy from her section 7 protection. For Dickson CJC, the infringement is exclusively a “physical” and “emotional” interference with her

⁶⁸ *Morgentaler*, *supra* note 1 at 74.

⁶⁹ *Ibid* at 31 [emphasis mine].

⁷⁰ *Ibid* at 53 [emphasis mine].

⁷¹ *Morgentaler*, *supra* note 1 at 171.

⁷² Adams, *supra* note 60 at 69.

bodily integrity,⁷³ implicitly invoking the historical perception of women in contrast with the ‘reasonable man.’ The separation of physical or psychological processes from the more abstract concepts of liberty or decisional autonomy requires a reductive, objectifying analysis. As Kaposy and Downie observe, this reasoning embodies a “harm-based rather than a choice-based analysis.”⁷⁴ The counterintuitive choice, then, to focus on the right to security of the person in the context of the abortion debate becomes inevitable under the majority rendering of women as physical and emotional—but never thinking or aspiring—holders of rights.

c. Unnecessary Suffering and Canadian Animal Protection Laws

Just as the *Morgentaler* decision turned on the *Code* provision criminalizing abortion, the jurisprudence on animal welfare is largely framed in relation to the criminal prohibition on inflicting unnecessary suffering. It is therefore important to examine the provision that criminalizes this behaviour before considering how its interpretation demonstrates the tropes of oppression discussed above, albeit in a different context. Section 402(1)(a) [now section 445.1(1)(a)] provides that

(1) Every one commits an offence who

(a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or bird.⁷⁵

Much, then, turns on the judicial interpretation of “unnecessary.”⁷⁶ Necessity connotes different meanings depending on the legal context, but perhaps never strays so far from its plain meaning as it does in the context of nonhuman animals. As the following decision demonstrates, the judges approach the necessity of suffering from a decidedly anthropocentric perspective.

⁷³ *Morgentaler*, *supra* note 1 at 57.

⁷⁴ Chris Kaposy & Jocelyn Downie, “Judicial Reasoning About Pregnancy and Choice” (2008) 16 Health LJ 281 at para 20.

⁷⁵ *Criminal Code*, RSC 1985, c C-46, s 445.1(1)(a).

⁷⁶ The text also clearly mandates willfulness as an element of the offence; however, this additional prerequisite is outside the scope of this discussion.

d. *R v Ménard*

R v Ménard is a decision of the Quebec Court of Appeal from 1978.⁷⁷ The case concerned the interpretation of “necessity” as it related to animals’ pain and suffering under section 402(1)(a) of the *Criminal Code*. The accused ran a business where he killed stray and unclaimed animals through the administration of carbon monoxide, and the question to be decided was whether his system caused more pain and suffering than was necessary.

Justice Lamer, then sitting on the Court of Appeal, wrote the majority judgment of what remains a leading case on anti-cruelty offences.⁷⁸ Much like in *Morgentaler*, the result in *Ménard* is positive overall, but the rationale animating the decision is less progressive than supporters of animal rights may have hoped. Lamer J describes a hierarchy in which nonhuman animals are naturally inferior to ‘man,’ and thus, responsibility for their wellbeing extends only so far as it is still “in the interests of man.”⁷⁹ Ultimately, the promising outcome of *Ménard* is not enough to overcome the deeply problematic line of reasoning that led there.

i. Displacement of Agency: (Un)Necessary Suffering

Examples of the displacement of nonhuman animals’ agency and bodily autonomy to human decision-makers can be found everywhere. *Ménard*, while encouraging in result, is no different. According to *Ménard*, it is for Parliament to decide what degree of pain can and should be tolerated by nonhuman animals. Lamer J holds that the plain meaning of cruelty has no place in the relevant *Criminal Code* provision; that is, inflicting pain— “even if extreme pain”—is insufficient to satisfy the elements of the offence.⁸⁰ Ultimately, conviction turns on whether the pain is necessary to achieve human ends. Even if the animal is demonstrating signs of distress or intense pain, this, in itself, is not an indicator that the treatment is excessive or that it should not be accepted. The experience

⁷⁷ While this is obviously not the most recent decision regarding cruelty to animals, *Ménard* remains, as Lesli Bisgould observes, the classical statement of the “old hierarchy” separating the human and nonhuman (Lesli Bisgould, *Animals and the Law* (Toronto: Irwin Law, 2011) at 64).

⁷⁸ Maneesha Deckha, “Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm” (2013) 50:4 *Alta L. Rev.* 783 at para 58.

⁷⁹ *Ménard*, *supra* note 2 at para 46.

⁸⁰ *Ibid.*

of nonhuman animals has little, if anything, to do with how the law conceptualizes their comfort and wellbeing.

Here, the perceived importance of the activity in question dictates what is undue pain and suffering for nonhumans. It goes without saying that this is a human standard, which is defined and implemented by humans based entirely on human experience. Maneesha Deckha writes, “the legislation at issue in *Ménard* ... subordinate[s] animal interests to those of legal persons and calibrate[s] “unnecessary suffering” ... according to cultural norms and relevant industry standards about acceptable animal use.”⁸¹ Although the case appears initially to forbid nonhuman animals’ suffering, in result it relies entirely on the judgment of humans as to where to draw the line for ‘unnecessary suffering.’

ii. Fragmentation of the Self: What is an Animal?

Just as the definition of a nonhuman animal’s pain and suffering is informed by human ends, so, too, is its identity. The animal subject is defined in relation to the type of human use to which it is subject; in other words, the same species of animal may be conceptualized differently depending on the human activity at issue. Consider, for example, a rabbit: her character changes radically in the eyes of the law when she is framed as a tool for experimentation as opposed to a beloved household pet.

The law’s fragmentation of the animal subject is clearly illustrated in the following passage from Lamer J’s judgment: “It is sometimes necessary to make an animal suffer for its own good or again to save a human life.”⁸² He invokes examples such as experimentation or vivisection for human benefit, practices which of course cause suffering but do not engage criminal liability. While an animal left without food or water for several days, to use Lamer J’s example, may suffer less than the subjects of vivisection, this provision condemns only the former because of the perceived utility of the activities in question. Accordingly, when the courts are faced with the question of the animal subject—that is, what is an animal?—it is answered simply by determining how it is being used. Lesli

⁸¹ *Supra* note 78 at para 58.

⁸² *Ménard*, *supra* note 2 at para 47.

Bigould writes, “it is the person’s interest to be protected, whether instrumental or emotional. Even [with pets], animals matter because and to the extent that they matter to us.”⁸³

iii. Instrumental Objectification: A Naturalized Hierarchy

The broad exceptions to the *Code* provision carved out in *Ménard*, and the law’s treatment of nonhuman animals more generally, requires objectification to the point of obscuration. Consider, for example, the “inevitably very painful” experiments endorsed in this judgment: to conceive of test subjects as anything other than unfeeling objects raises an ethical dilemma that is virtually absent in our jurisprudence.⁸⁴ Thus, *Ménard* is particularly instructive for what it says about the apparent judicial notice of the legitimacy of anthropocentrism.

The result, as Andrew Brighten puts it, mandates that, “where a method exists that is reasonably accessible and not cost-prohibitive, and that reduces suffering to the minimum inevitable level, it will be criminal not to adopt that method.”⁸⁵ Significantly, this thesis has become a starting point for legal considerations of nonhuman suffering, sometimes referred to as the “*Ménard* analysis.”⁸⁶ Therefore, while subsequent jurisprudence proceeds with the assumption that some suffering is acceptable, the foundational nature of *Ménard* necessitates some basis for this conclusion. In perhaps the most famous portion of the judgment, Lamer J finds this basis in his reading of the great chain of being. He explains:

[w]ithin the hierarchy of our planet the animal occupies a place which, if it does not give rights to the animal, at least prompts us, being animals who claim to be rational beings, to impose on ourselves behaviour which will reflect in our relations with them those virtues we seek to promote in our relations among humans. On the other hand, the animal is inferior to man and takes its place within a hierarchy which is the hierarchy of the animals, and above all is a part of nature with all its “racial and natural” selections. The animal is subordinate to

⁸³ *Supra* note 77 at 128.

⁸⁴ *Ménard*, *supra* note 2 at para 47.

⁸⁵ Andrew Brighten, “Aboriginal Peoples and the Welfare of Animal Persons: Dissolving the Bill C-10B Conflict” (2011) 10:1 *Indigenous LJ* 39 at 47.

⁸⁶ *Ibid* at 56.

nature and to man.⁸⁷ While this description of the natural order may be offensive, it imposes coherence on the judgment; that is, the precedent it sets flows logically from the starting presumption that nonhuman animals are “subordinate to nature and to man.”

Ultimately, *Ménard* exemplifies the alarming degree of objectification that is required to render our instrumental uses of nonhuman animals acceptable.

e. Asking the Wrong Questions

As illustrated in the foregoing examples, the law’s treatment of abortion and animal protection consistently asks the wrong questions. These decisions forgo consideration of the individual animal or woman in exchange for generalized misogynistic and anthropocentric analysis. Her interests are supplanted by male and human perspectives, a process which perpetuates the marginalization of the woman and nonhuman animal as others. Adams aptly refers to animals and women in this context as “absent referents.”⁸⁸ She explains that the abortion question can revolve around the fetus only when one strips away the context of pregnant women’s lives. Likewise, animals can easily be put to use for humans when one ignores the animal’s interest in life and comfort, among other things. She goes on to say that, “in both cases, ... the social part of the context, that which experiences the consequences of decontextualizing—the pregnant woman and the living, breathing rabbit—disappear.”⁸⁹

Similarly, Susan Sherwin describes a process whereby pregnant women’s interests “are either ignored altogether or are viewed as deficient in some crucial respect and hence subject to coercion for the sake of their fetuses.”⁹⁰ This approach is apparent in the law’s handling of both abortion and animal welfare: the subject as an individual is obscured and broken down such that her interests may easily be glossed over, if not explicitly overridden.

⁸⁷ *Ménard*, *supra* note 2 at para 49.

⁸⁸ *Supra* note 60 at 58.

⁸⁹ *Ibid.*

⁹⁰ Susan Sherwin, “Abortion Through a Feminist Ethics Lens” in Alison M Jaggar, ed, *Living with Contradictions: Controversies in Feminist Social Ethics* (Colorado: Westview Press, 1994) 314 at 318.

6. MISAPPROPRIATION OF RHETORIC

As a whole, supporters of fetal rights are uninterested in advocating for animals. While this may not hold for every individual—some people may genuinely, if irrationally, believe that an ethic of caring that extends to living animals should also cover human fetuses, and vice versa—it is likely true of most of the antiabortionists invoking the discourse of animal protection to bolster their arguments.⁹¹ The simplistic conflation of fetal and animal rights cannot withstand scrutiny, despite its initial appeal. When it is deployed, it is rarely meant to be a tool to generate interest in animal welfare; rather, pro-animal arguments are misappropriated and misapplied in order to conceal the very central role of the woman in the abortion debate.

a. Moral Status: All or Nothing

Generally, antiabortionists believe that the abortion question turns on the moral status of the fetus, and, once they eschew the interests of the pregnant woman, they ground their analysis in an “all or nothing” approach. As Sherwin notes, “[o]pponents of abortion have structured the debate so that it is necessary to define the status of the fetus as either valued the same as other humans (and hence entitled not to be killed) or as lacking in all value.”⁹² It has long been established that, with respect to nonhuman animals, the demarcation of a clear threshold for moral status is virtually impossible;⁹³ even among animal advocates there is no consensus. The application, then, of an antiabortionist’s absolute stance on moral status to the question of animal rights would require that they also categorically oppose the killing of any nonhuman animal. Curiously, chants

⁹¹ The most extreme example is found in the implicit link drawn by George Dunea in his brief parallel discussions of abortion and the animal welfare movement, where he refers to animal rights as a “radical fringe” (“Abortion and Animal Rights” (1990) 300:6731 *British Medical J* 1068 at 1068). More generally, there is a significant body of overtly partisan antiabortion literature that invokes animal rights only to bolster their arguments. For example, Matt Walsh suggests that only antiabortionists can legitimately express anger when puppies are needlessly slaughtered before referring to them as “dead mutt[s]” (“Pro-Choicers’: Here’s Why You Cannot Support Abortion While Opposing Puppy Murder” (11 February 2014), Matt Walsh (blog), online: <www.themattwalshblog.com/2014/02/11/>).

⁹² *Supra* note 90 at 317.

⁹³ Angus Taylor, “Philosophy and the Case for Animals” in Vaughan Black, Peter Sankoff & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 11 at 13.

promoting vegetarianism do not feature very prominently in demonstrations outside of abortion clinics.

A fundamental difference in the approach taken by animal advocates is in their characterization of the human species. As Adams points out, “[a]nti-abortionists absolutize each individual fetus” in support of the “glaringly anthropocentric” presumption that every fetus should be born, while supporters of animal welfare relativize the human species within nature.⁹⁴ As a direct result, animal defense also relativizes the importance of the human fetus; it is considered in context rather than in isolation, taking into account the social and environmental consequences its birth will have.⁹⁵ Anti-abortionists are not simply uninterested in animal advocacy; they are wary of it and actively threatened by it. Given insurmountable inconsistencies, likening the two positions requires the misapplication of at least one.

b. Demise by Dualisms

Dualistic reasoning animates the all or nothing proposition embodied in the pro-fetal life conception of moral personhood. More specifically, the arguments advanced by Abbate create a false dichotomy, where each side is defined in relation to the other. Under the anti-abortion rubric, a fetus is alive and therefore worthy of protection, in contrast to what is not alive or deserving of ethical consideration. In his discussion of abortion, Singer explains this argument in formal terms:

First premise: It is wrong to kill an innocent human being.

Second premise: A human fetus is an innocent human being.

Conclusion: It is wrong to kill a human fetus.⁹⁶

For the purposes of this discussion, the second premise is particularly important. The designation of “innocent human being” is clearly all or nothing, and the

⁹⁴ *Supra* note 60 at 64.

⁹⁵ *Ibid* at 65.

⁹⁶ *Supra* note 4 at 138.

implications are the same: if this criterion is met, life should be preserved, presumably at all costs.

The simplicity of this argument breaks down when one considers the subtleties of reproduction. As Ariel Salleh points out, “[t]he placenta is not a hard-and-fast boundary, so a mother’s relation to the seed is a continuing biological negotiation between self and other. The pleasure of suckling a child is a reciprocal process, the very opposite of the 1/0 fracture.”⁹⁷ Similarly, in the context of animal rights, the discussion is necessarily more nuanced than the wholesale abolition of the exploitation of nonhumans.⁹⁸ The pervasive ‘line-drawing’ approach to the socio-legal conceptualization of the fetus and the nonhuman animal leads to a form of reasoning that eschews the complexities that differentiate the animal protection and abortion contexts. Interestingly, this simplistic reasoning—or the ‘1/0 fracture’—rarely plays out favourably for nonhuman animals in the legal context.

7. CONCLUSION

While fundamental differences separate abortion and animal protection, arguments conflating the two will continue to recur so long as the law conceptualizes them as uniformly other. This may also be important to repudiating the patriarchy; identifying intersections of oppression reveals the workings of patriarchal oppression. Adams asks:

[G]iven that the majority of animal defenders are women, does this not in itself say something? Women understand what it means to be deprived of freedom based on biological differences. We know that Western culture has situated women on the boundary of what is fully human, thus women have a very good reason to examine what our

⁹⁷ *Supra* note 67 at 39.

⁹⁸ Naturally, there are differences of opinion within the animal welfare movement. Certainly, some do advocate for the wholesale abolition of animal exploitation. This is not, however, the view espoused by Peter Singer or Tom Regan, who simply mandate a contextual examination of the relationship between humans and animals. Given the reliance of antiabortion arguments on their philosophies, the wholesale-abolitionist perspective goes beyond the scope of this discussion. Moreover, as Francione remarks above, even the abolitionist arguments cannot lend themselves to pro-fetal life sentiment due to the distinct political context of the abortion issue (*Supra* note 18 at 150).

culture does to other animals, while being suspicious of its control of women.⁹⁹

As Twine explains, using an ecofeminist framework to examine the treatment of women and nonhuman animals together does not result in the dehumanization of women, but instead a more revealing look at the socio-legal conceptualization of both.¹⁰⁰ This is not an exhaustive analysis; rather, it is a consideration of the broad similarities in the law's treatment of women and nonhuman animals. As demonstrated in *Morgentaler* and *Ménard*, both groups are deprived of their agency, fragmented into 'usable' pieces and thus objectified. Despite the relatively positive outcomes of the foregoing cases, the reasoning justifying the results nonetheless perpetuates their marginalization. This, even more than if the cases had been decided unfavourably, suggests that an awareness of the uniform impulse to dominate is essential.

⁹⁹ *Supra* note 60 at 64.

¹⁰⁰ *Supra* note 51 at 400.