THUNDER WITHOUT RAIN: A REVIEW/COMMENTARY OF GARY L. FRANCIONE'S RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT

BY
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Profound disagreement and rancor characterized the American abolitionist movement in the decades before the Civil War. The anti-slavery gradualists futilely hoped "that slavery might ultimately disappear as a result of various developments and tactics," while the immediatist abolitionists "had a compelling desire for immediate, complete, uncompensated emancipation."[1] In *Rain Without Thunder: The Ideology of the Animal Rights Movement*, Professor Gary L. Francione argues that the modern animal rights movement is similarly propelled. "New Welfarists," he claims, fruitlessly pursue the goal of ending the exploitation of nonhuman animals through measures that better their welfare but cannot result in what matters most, the abolition of their legal status as property.

In Francione's opinion, a "structural defect" inheres in the New Welfarism that dooms the goal of abolition—its long and short term goals hopelessly conflict.[2] Francione argues that two reasons exist. First, nonhuman animal welfare reform "conceptualizes the human/animal conflict in ways that ensure that the animal interests never prevail."[3] Second, it "begs a fundamental moral question: if we believe that animals have moral rights *today*, it is wrong to compromise the rights of animals *now*."[4] For example, Francione argues that it is wrong to pursue or support "legal changes that facilitate supposedly more 'humane' experimentation in the hope that these changes will lead to rights for *other* animals *sometime in*

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1 LAWRENCE J. FRIEDMAN, GREGARIOUS SAINTS - SELF AND COMMUNITY IN AMERICAN ABOLITIONISM - *1830-1870* 1 (1982). The analogy to the animal rights movement bears further study.

2 GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 3 (1996).

3 *Id.* at 4.

4 *Id.*

the future."[5] Acknowledging immediate abolition as "unrealistic," he proposes five criteria to identify alternative actions that will incrementally advance the cause of the abolition of the legal thinghood of nonhuman animals, while remaining consistent with "animal rights theory."[6] The criteria are: an incremental change must constitute a prohibition,[7] the prohibited activity must be constitutive of the exploitive institution,[8] the prohibition must recognize and respect a noninstitutional animal interest,[9] animal interests cannot be tradeable,[10] and the prohibition shall not substitute an alternative, and supposedly more 'humane' form of exploitation.[11]

Francione's criteria arrive with limitations that should immediately be made clear. They are intended to set forth basic, though not fully developed and somewhat imprecise, notions that are relatively uncontroversial in the mind of one who identifies herself "as an advocate of animal rights."[12] Their purpose is simply "to introduce a system of rights-oriented values into the consideration of what incremental measures ought to be favored by those who claim to accept rights theory."[13]

I argue that New Welfarism does not contain a "structural defect," but a "structural inconsistency" that is necessary to achieve Francione's goal of abolishing the property status of nonhuman animals in a manner consistent with the moral rights of nonhuman animals. Francione's five criteria cannot achieve this goal. The first criterion is based upon misconceptions of legal rights theory that greatly disadvantage nonhuman animals. The second and third criteria violate the moral rights of nonhuman animals as Francione himself defines them. The fourth criterion is based both upon a misunderstanding of the nature of legal rights decision-making and upon a nonexistent legal norm that is unlikely ever to be adopted. Finally, any practical ability to employ the fifth criterion is impaired by Francione's inconsistent use of alternate and unhelpful definitions of "animal." The definition is either so narrow that it excludes nearly every species of nonhuman animal or so broad as to make the attainment of legal rights for any nonhuman animal impossible.[14]

Francione relies "on only two central aspects of rights theory" in order to keep his criteria "as uncomplicated and uncontroversial as possible."[15] The first aspect of the "rights theory seeks the eradication of the property status of nonhumans."[16] The second aspect asserts that rights

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5 *Id.*

6 *Id.* at 110, 190.

7 *Id.* at 192.

8 *Id.* at 196.

9 *Id.* at 199.

10 *Id.* at 203.

11 *Id.* at 207.

12 *Id.* at 191.

13 *Id.* at 218.

14 Steven M. Wise, Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy (1997) (unpublished manuscript on file with author).

15 FRANCIONE, *supra* note 2, at 190.

16 *Id.*

advocates cannot trade away the rights of animals living today "in the hope that other animals tomorrow will no longer be treated as the property of human owners."[17] But the following four problems undermine his arguments as a whole, sometimes severely.

First, Francione correctly insists that the interests of nonhuman animals can only be protected by the eradication of their legal property status.[18] This "legal thinghood" of nonhuman animals is an ancient and present common law classification that is the opposite of legal personhood.[19] Yet Francione makes almost no *legal rights* arguments to support his proposed change in legal classification from legal things to legal persons.[20] Instead, he assumes that his arguments for the moral rights of nonhuman animals apply to their legal rights as well.[21] But, as the American philosopher, Tom Regan, has observed, the arguments for and against the moral and legal personhood of nonhuman animals may be irrelevant to each other.[22] Francione's assumption is surprising in light of his embrace of legal positivism in a prior discussion of the legal rights of nonhuman animals. In that discussion he correctly asserted that the nonpositivist theory of natural law "holds that the existence and validity of legal rules is dependent on the conformity of those rules to some moral standard. *A positivist denies such a connection.*"[23]

Francione extensively discusses the merits of the rights arguments of Regan, which he favors over the utilitarian arguments of the Australian philosopher, Peter Singer.[24] He adopts Regan's *moral* rights theory, but makes no attempt to explain why nonhuman animals should be entitled to *legal* rights, *which nonhuman animals* should be entitled to such rights and to *which legal rights* they should be entitled. The common law property status of nonhuman animals in the United States will change when judges, substantially persuaded by *legal* arguments, decide it should be changed. To date, American judges have not been overtly influenced by the work of either Regan or Singer.[25]

One area of the law with potentially enormous implications for the legal rights of nonhuman animals that is substantively at odds with moral theory is the relationship between "dignity" and the eligibility for fundamental legal rights. Dignity lies at the core of fundamental human rights

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[17] *Id.*

[18] *Id.* at 4.

[19] Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471 (1996); Steven M. Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe*, 1 ANIMAL L. 15 (1995).

[20] I counted citations to just nine judicial decisions, most of which were not discussed.

[21] FRANCIONE, *supra* note 2, at 4.

[22] Tom Regan, *Ill-gotten Gains*, *in* ANIMAL EXPERIMENTATION-THE CONSENSUS CHANGES 19, 23-4 (Gill Langley ed., 1989).

[23] GARY L. FRANCIONE, ANIMALS, PROPERTY AND THE LAW 95 (1995) (emphasis added).

[24] FRANCIONE, *supra* note 2, at 12-19, 47-62, 148-60, 188-89, 199, 228-29.

[25] The fact that no American judge has apparently cited Regan or Singer suggests that judges have not been influenced by either. Search of Westlaw (March 1, 1997) (search for cases using "ALL STATE" and "ALL FED" containing citations to "Tom Regan," "T. Regan," "Peter Singer," "P. Singer," "Animal Liberation," or "The Case for Animal Rights.)"

both at the levels of international[26] and municipal law.[27] It is often said to be the product of the capacities for autonomy and self-determination.[28] These capacities, in turn, appear by definition to presume a relatively complex level of cognitive ability. Yet, across the board, judges hold that humans who completely lack the capacities for autonomy and self-determination nevertheless possess the dignity required for fundamental legal rights. Thus, the appointed guardian of a ten month old infant in a persistent vegetative state who was subjected to a do-not-resuscitate order, argued to the Massachusetts Supreme Judicial Court that "the child had no dignity interest in being free from bodily invasions," as the child "has no cognitive ability."[29] The Court retorted that *"[c]ognitive ability is not a prerequisite for enjoying basic liberties"* and insisted that the child had a "dignity" that could be offended by invasive resuscitation attempts.[30] Regan, Singer and almost any other philosopher would probably disagree with this reasoning.[31] Yet this is the law in nearly every American jurisdiction.[32]

Second, Francione sweepingly refers throughout the book to "animal rights," as if one argument for the legal, or even moral, rights of any non-

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[26] United Nations Charter, *signed* June 26, 1945, 59 Stat. 1031, T.S. No. 993 (*entered into force* Oct. 24, 1945), *reprinted in* RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, at 10.1 (2d ed. 1990); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, April 30, 1957, 18 U.S.T. 3201, T.I.A.S. 6418, 266 U.N.T.S. 3 (entered into force for United States, Dec. 6, 1967), *reprinted in* Lillich, *supra* at 40.1; International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195, *reprinted in* Lillich, *supra* at 160.1.

[27] William A. Parent, *Constitutional Values and Human Dignity*, *in* THE CONSTITUTION OF RIGHTS - HUMAN DIGNITY AND AMERICAN VALUES 47 (Michael J. Meyer & W.A. Parent eds., 1992) (twentieth century United States Supreme Court Justices and legal scholars "have endorsed the idea that dignity is the fundamental value underlying the U.S. Constitution"); Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content*, 27 How. L.J. 145, 158 (1984) (The Justices have often referred to the "dignity" or "human dignity" or "worth" of human beings, without exception, and "with express or implicit expectation that human dignity, or an equivalent expression, is a fundamental constitutional right and legal principle."); *see also, id.* at 150-62 (a compilation of all the relevant instances of uses of "dignity," or its synonym, by Supreme Court Justices between 1925 and 1982).

[28] Thor v. Superior Court, 855 P.2d 375, 380-83 (Cal. 1993); *In re* Gardner, 534 A.2d 947, 950 (Me. 1987) (recognizing the "long-standing importance in our Anglo-American tradition of personal autonomy and the right of self-determination."); Cruzan v. Harmon, 760 S.W.2d 416 n.31 (Mo. 1988), *aff'd sub nom.*, Cruzan v. Dir., Mo. Dept. of Public Health, 497 U.S. 626, 633 (1990) ("The right of self-determination and individual autonomy has its roots deep in our history.") (quoting Brophy v. New England Sinai Hospital Inc., 497 N.E.2d 626, 633 (1986); State ex rel Schuetzle v. Vogel, 537 N.W.2d 358, 360 (1995) ("A person's interest in personal autonomy and self-determination is a fundamentally commanding one, with well-established legal and philosophical underpinnings.").

[29] Care and Protection of Beth, 587 N.E.2d 1377, 1382 (Mass. 1992).

[30] *Id.* (emphasis added).

[31] TOM REGAN, THE CASE FOR ANIMAL RIGHTS 246 (1983); PETER SINGER, ANIMAL LIBERATION 8 (2d ed. 1990).

[32] Wise, *supra* note 14. As I discuss in a forthcoming article, it is an error, however, to assume that courts grant fundamental legal rights to all humans simply because they are members of the species, *Homo sapiens*.

human animal fits all. "Animal rights" is commonly used in popular books and articles and in books of moral philosophy. But, as will be demonstrated, the use of the term makes any serious principled legal argument for the rights of any nonhuman animal nearly impossible. I begin with rights. A thread that runs through Francione's book is that responsibility for the "New Welfarism" that Francione believes permeates the animal rights movement can substantially be laid at the door of Peter Singer. "Singer's theory does not concern rights, since Singer does not believe that animals *or* humans have rights."[33] Yet, in Francione's opinion, the animal rights movement has been both singularly and improperly influenced by Singer's theory, which it wrongly believes to be a rights theory.[34] Considering the extent to which the term "rights" has become debased in public discourse about human rights, it is not surprising that widespread confusion exists within the animal rights movement regarding the definition of rights, but as will be argued, Francione has added to that confusion.

Third, Francione criticizes New Welfarism for continually reinforcing the property status of nonhuman animals. Yet, at the same time, he uses "animal" solely in a sense that excludes humans. This continually reinforces the false idea that humans are not animals and endangers the prospect of achieving any legal rights for nonhuman animals, as it permits opponents to characterize human and nonhuman animals improperly as different in kind rather than in degree.

Fourth, the criteria that Francione employs in determining which nonhuman animals are entitled to moral rights are dramatically inconsistent. Sometimes they are unreasonably broad, sometimes unreasonably narrow. The major definition adopted appears to be Regan's criterion of being the "subject-of-a-life."[35]

> [I]ndividuals are subject-of-a-life if they have beliefs and desires; perception, 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. . . .[36]

As Francione accurately observes, Regan's "animal rights" argument is actually limited to mammals more than one year old.[37] Yet the known kingdom, *Animalia*, contains more than one million species, just 4,000 of which are mammals and 875,000 of which are arthropods, such as insects and spiders.[38] This argument is akin to making a case for human rights, while defining humans as white males with Ph.Ds. "Greater-than-one-year-old-mammalian rights" are hardly "animal rights." Moreover, neither Regan nor Francione support with empirical evidence the broad and contro-

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[33] FRANCIONE, *supra* note 2, at 49.

[34] *Id.* at 49-63.

[35] *Id.* at 16, 190; REGAN, *supra* note 31, at 243-48.

[36] REGAN, *supra* note 31, at 243.

[37] FRANCIONE, *supra* note 2, at 15; REGAN, *supra* note 31, at 78.

[38] EDWARD O. WILSON, THE DIVERSITY OF LIFE 133-36 (1992).

versial assertion that all normal mammalian adults have a sense of the future, an emotional life, or a psychophysical identity over time. Persuasive evidence has been adduced which suggests that some adult mammals, such as chimpanzees and bonobos, probably do have such abilities. However, for nearly all mammalian species, such evidence has not yet been produced.

The problem is not that Francione's and Regan's definition of "animal" is too constricted, though they have probably unwittingly defined nearly every species of nonhuman animal out of candidacy for legal, or even moral, rights. The problem is that they ignore their own definition, so that the careful reader is left unsure which of two extremes Francione is advocating. If "animal" means those nonhuman animals who are subjects-of-a-life, then the arguments Francione makes actually concern only a minute percentage of nonhuman animals. But how can Francione's arguments for the rights of birds and veal calves then be justified?[39] If "animal" means the species of the kingdom *Animalia*, his argument encompasses an incredibly broad spectrum.[40] By defining "animals" in an extremely narrow way, such that the definition does not encompass a significant number of species, but using "animals" in an extremely broad way, such that it includes an entire kingdom, Francione and Regan confuse and weaken the meaning, purposes, and goals of "animal rights." On numerous levels the principled legal arguments for the abolition of the legal thinghood of insects, for example, are far weaker than the principled legal arguments for the abolition of the legal thinghood of chimpanzees. Let those who would ridicule the argument that legal rights should not be restricted to human beings link the rights of chimpanzees and mosquitoes. If the link can be forged, it is likely that no nonhuman animal will ever obtain legal rights.

In the rest of the review, I address the specific problems associated with Francione's five criteria for incremental change consistent with "animal rights theory." As mentioned, his first criterion is that an incremental change constitutes a prohibition.[41] Immediately Francione begins to go wrong.

> One of the key aspects of a right is that it constitutes a *claim*. . . . A right involves other notions as well, but one very important component of a right is that it constitutes a claim that has a correlative duty. . . . Central to a claim right, then, is a prohibition imposed on other people not to interfere with the right-holder's interest protected by the right. . . . Without . . . duties there can be no rights of any kind.[42]

Francione is partially correct. One key aspect of a *claim-right* is that it constitutes a claim with a correlative duty. However, the most fundamen-

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39 *See, e.g.*, FRANCIONE, *supra* note 2, at 137, 173, 196-98, 201, 208-10.

40 The arguments as to what qualifies any animal, human or nonhuman, for legal rights are complex. For the purpose of this book review, I will simply refer to those nonhuman animals eligible for legal rights as "qualified."

41 FRANCIONE, *supra* note 2, at 192-96.

42 *Id.* at 192-93 (emphasis added).

tal kinds of human rights in both international and municipal law are not claim-rights, but *immunity-rights*. Immunity rights do not impose prohibitions, which merely forbid or negatively command, but disabilities, which legally incapacitate or deprive entirely of power.[43] This is why the correlate of an immunity is sometimes referred to as a "no-power."[44] Fundamental common law rights are immunity-rights. The United States Supreme Court has said that:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of *complete immunity* to be let alone."[45]

This is true for fundamental constitutional rights as well. The Thirteenth Amendment to the United States Constitution did not declare that human beings *should not* be property, but that they *could not* be.[46] When the First Amendment to the United States Constitution states that Congress shall make no law abridging free speech, it does not merely impose a duty upon Congress not to legislate against free speech, it *disables* Congress from doing so. Our most fundamental human rights *disable* even those who might not have a duty to respect them.[47] Just as duties and claims are irrelevant to the fundamental immunity-rights that shield human beings, they are irrelevant to the fundamental immunity-rights that should shield qualified nonhuman animals.

The difference between claim-rights and immunity-rights is actually more important for the legal rights of qualified nonhuman animals than of human beings. Swirling around the notion of claim-rights is a long-running controversy about whether a claim-rights holder must be able to choose or control, in order to claim her right.[48] Choice and control involve levels of cognition that nearly every adult human being possesses. But the vast majority of nonhuman animals probably lack the capacity for choice and control. Accordingly, they would be forever excluded from eligibility for even the most fundamental legal rights. Space prohibits me from discussing here why the arguments for Control/Choice Theory should fail. My point is that the process of obtaining the most fundamental rights of qualified nonhuman animals need not be exposed to the attacks of Control/Choice Theorists, when the most fundamental legal rights of human beings are not.

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43 Shore v. Howard, 414 F.Supp. 379, 391 (N.D. Tex. 1976); *Compare* XII THE OXFORD ENGLISH DICTIONARY 596 (1989) (definition of prohibition), *with* IV THE OXFORD ENGLISH DICTIONARY 713 (1989) (definition of disability).

44 Walter J. Kamba, *Legal Theory and Hohfeld's Analysis of a Legal Right*, JURID. REV. 249, 256 (1974).

45 Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891) (emphasis added).

46 The Civil Rights Cases, 109 U.S. 3, 20 (1883).

47 *See, e.g.*, City of Beaumont v. Bouillion, 896 S.W.2d 143, 148-49 (Tex. 1995). This subtle distinction also is explored in my forthcoming article.

48 L.W. SUMNER, THE MORAL FOUNDATION OF RIGHTS 39-51 (1987).

Francione then confuses another basic element of rights theory. "Th[e] prohibition [of reasonably identifiable behavior] must also be *correlative* with the ability of the animal to claim (through a representative) the protection of the right."[49] Here lie two errors. First, the power-right to enforce either a claim-right or an immunity-right is not a *correlate* of either right, but is both logically and legally independent of both. The Federal Civil Rights Act, 42 U.S.C. § 1983, for example, grants a power-right to enforce both kinds of rights.

> [S]ec. 1983 does not confer any *rights* on individuals; nor does it impose any correlative *duties* on persons acting under color of state law. The rights and duties relevant to sec. 1983 are imposed by the Constitution or the substantive provisions of federal statutes. Instead, sec. 1983 gives individuals the *power* to maintain a civil action in federal court when such rights are violated, while at the same time imposing a *liability* on persons acting under color of state law for their failure to perform such duties.[50]

Unlike claim-rights, the value of fundamental immunity-rights need not turn solely on whether one has a power-right to "claim" them because immunity-rights have value entirely on their own.[51] Using a power-right to "claim" the protection of a claim-right also subjects the fundamental rights of qualified nonhuman animals to the same unnecessary attacks by supporters of Control/Choice Theory. An appropriate first criterion would better be—*an incremental change should constitute a disability and, if that is not possible, a prohibition.*

Francione's second criterion requires that the prohibited activity be constitutive of the exploitive institution.[52] In Francione's opinion, ending even a minor component of an institutionalized exploitation, such as the abolition of the use of nonhuman animals in drug addiction experiments, harmonizes with rights philosophy, while increasing the cage space of battery caged hens presumably does not.[53] As mentioned, his third criterion is that the prohibition must recognize and respect a noninstitutional animal interest.[54] His fifth criterion provides that the prohibition shall not substitute an alternative, and supposedly more "humane," form of exploitation. These criteria hold "that it is inconsistent with rights theory to treat some animals as means to the ends of others, or as property, in order to secure some benefit that is hoped will eventually secure a higher moral status for other animals."[55] Since he argues that the second and fifth criteria are related, and the third appears related, I will discuss them together.

Francione's contradictory use of the word "animals" has serious ramifications for his fifth criterion of proper incremental legal change towards the abolition of the legal thinghood of qualified nonhuman animals.

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49 FRANCIONE, *supra* note 2, at 194 (emphasis added).

50 Gutierrez v. Vergari, 499 F.Supp. 1040, 1048 n.6 (S.D.N.Y. 1980) (discussing Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979)).

51 REX MARTIN, A SYSTEM OF RIGHTS 31 (1993).

52 FRANCIONE, *supra* note 2, at 196.

53 *Id.* at 196-98.

54 *Id.* at 199.

55 *Id.* at 207.

Because all subjects-of-a-life are said to have equal inherent value, this fifth criterion forbids substituting one subject-of-a-life for another in exploitive procedures.[56] Yet if one employs the criterion of mammals-greater-than-one-year-old, presumably chimpanzee infants may be substituted for chimpanzee adults, while birds, reptiles, and amphibians may be substituted for mammals.

In Francione's opinion, "[t]he new welfarist, who purports to believe in the rights of animals, disregards the inherent value of some animals in order to secure a benefit for other animals."[57] Repeatedly Francione identifies Regan's "respect principle" as going to the heart of rights theory, and it does. The respect principle restates and slightly broadens the Kantian Categorical Imperative that rational and autonomous beings should always be treated as ends and never as means to the ends of others.[58] Otherwise, a "right that does not stick in the spokes of someone's wheel is no right at all."[59]

Here Francione's parable of the thirsty cow on the way to the slaughterhouse merits discussion. He would give this thirsty cow a drink out of respect for her inherent value and because his act would not trade away her interests in the hope that he might obtain rights for other nonhuman animals in the future.[60] Francione believes, however, that it is not all right to give water to the thirsty cow if this will increase her economic value or aid her exploiters.[61] He also believes it is wrong to press for legislation to ensure that all cows have water as a step towards the abolition of all animal agriculture. Conversely, the New Welfarists believe that "legislation to ensure that all cows have water"[62] is all right if the legislation "will lead to the recognition of legal rights of other animals at some point in the future" even though the rights of the cows will continue to be violated, though they will no longer be thirsty.[63]

I am not saying that strategically Francione is incorrect. The abolition of animal agriculture may occur more rapidly if farm animals suffer more. Francione would never personally inflict suffering upon farm animals. But should he also seek legislation to increase their suffering in order to bring the day of abolition more quickly? I also am not saying that Francione's position is unprincipled. I am saying that it is nonsense to characterize the passage of legislation requiring cows be given sufficient water on the way to the slaughterhouse *as violating the rights of cows.* Imagine I was enslaved and, as a result of my enslavement, I suffered terrible privations, including hunger and thirst. Suppose further that New

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[56] *Id.* at 208.

[57] *Id.*

[58] *E.g., id.* at 16, 190; H.J. PATON, THE CATEGORICAL IMPERATIVE - A STUDY IN KANT'S MORAL PHILOSOPHY, 165, 188-89 (1971).

[59] CHARLES FRIED, MEDICAL EXPERIMENTATION: BEYOND PERSONAL INTEGRITY AND SOCIAL POLICY (1974).

[60] FRANCIONE, *supra* note 2, at 176.

[61] *Id.* at 200-01.

[62] *Id.* at 176-77.

[63] *Id.* (emphasis added).

Human Welfarists sought to introduce legislation requiring that I be given adequate food and water. Would I object on the grounds that this legislation violated my rights? I would pray for its passage!

This is not to say that *any* legal change that New Welfarists seek to initiate is desirable. Just as Francione can go wrong, so can they, so can we all. We are all, immediatists and gradualists, in the uncomfortable position of acting on behalf of others who cannot clearly communicate to us. Neither by education, training, experience, or native ability are most of us qualified to devise the tactics and strategies necessary to implement a broad social and legal reform program over a period of decades. Nor can we always recognize the winning tactics and strategies even when we see them. Many of us predictably lack the vision and breadth of knowledge and experience to understand how our actions today will affect the fortunes of nonhuman animals next year, next decade, and next century. This is no shame. We are only human. But some of us can struggle to learn and the rest of us can learn to follow.

Today's New Welfarists can help alleviate the immediate suffering of nonhuman animals. This in itself is an entirely laudable goal. And their actions, if taken with a mature sense of how they may affect the future status of qualified nonhuman animals, may help to lay the foundation for the abolition of their legal thinghood tomorrow. But they also have the possibility of undermining it. More than twenty years ago, Professor Laurence Tribe noted this potential for similar contradictory and unintended results when environmentalists, who due to "the demands of legal doctrine and the exigencies of political reality," were translating environmental obligation into terms of human self-interest.[64] Thereby they could be "helping to legitimate a system of discourse which so structures human thought and feeling as to erode, over the long run, the very sense of obligation which provided the initial impetus for his own protective efforts."[65] This is the well-spring of Francione's argument that welfarist tools such as anti-cruelty statutes "*reinforce and support the status of animals as property.*"[66] Of course they do! This certainly is a "structural defect" in the New Welfarist position, as Francione complains.[67] However, that does not mean that the New Welfarist position is structurally defective. Reinforcing and supporting the status of nonhuman animals as property is not the only result of New Welfarist positions. New Welfarism is not structurally defective; it is structurally *inconsistent*. But this is how it *must* be structured to avoid violating Kant's Categorical Imperative and Regan's respect principle.

Seeking legislation to ensure that all cows have water on the way to the slaughterhouse might, or it might not, be useless as a stepping stone to the abolition of animal agriculture. It might, or it might not, be counter-

64 Laurence H. Tribe, *Ways Not to Think About Plastic Trees*, 83 YALE L. J. 1315, 1330-31 (1974).

65 *Id.*

66 FRANCIONE, *supra* note 2, at 133.

67 *Id.* at 122-46.

productive, in that it reinforces the power of nonhuman animal exploiters. It might, or it might not, even increase the lifespan of animal agriculture, so that generations of cows to come will suffer under the yoke of animal agriculture who would not have suffered had the New Welfarists not acted. But future generations have no legal rights and it is extremely controversial whether they have moral rights either. The only potential legal rights-holders to consider are those who are alive now. That a legal reform that alleviates the present torment of nonhumans might also reinforce and support the status of animals as property, or be welcomed by their tormentors, is irrelevant. Legal rights is not a zero sum game. My legal rights are not determined by how unhappy it makes those against whom I have rights. Fundamental legal rights should be mine whether those who would exploit me are pleased or distressed. Who better respects the moral rights of cows living and thirsty today, the New Welfarists or Francione? Who is more willing to sacrifice the present interests of cows living and thirsty today in the hope that the legal rights of other nonhuman animals will be recognized at some point in the future, Francione or the New Welfarists? His fifth principle might better read - *the disability or prohibition should not substitute one rights-holder for another.* However, I must reject Francione's second and third criteria as violations of Kant's Categorical Imperative and Regan's respect principle.

We come to Francione's important fourth criterion that animal interests cannot be tradeable.[68] The concept that a fundamental legal right is not tradeable goes to the essence of what is a fundamental legal right. If it is tradeable, it is not a fundamental right. Indeed fundamental legal rights may not even be *alienable.*[69]

Francione undermines his theoretical arguments by occasionally betraying a certain detachment from the problems faced by the real world legal reformer. For example, in his attempted refutation of the thirsty cow legislation, he discusses the hypothetical situation of a prison guard "working in a prison in which completely innocent people are jailed and tortured by government security forces for no reason other than the difference between their political views and those of the government." Upset by what he sees, the prison guard quits his job to "form a human rights organization, and begin to seek legislation to rectify the situation," as well as lobby the legislature and "mount[ ] a campaign of public education aimed at persuading the population that such practices exist and should be abolished."[70] Real countries exist and have existed in which completely innocent people were jailed and tortured by government security forces for no other reason than the difference between their political views and those of the government. These governments often demonstrate little tolerance towards people forming human rights organizations, lobbying legislatures, and mounting public education campaigns. The

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[68] FRANCIONE, *supra* note 2, at 203.

[69] DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("that [all men] are endowed by their Creator with certain unalienable rights"). *Id.*

[70] FRANCIONE, *supra* note 2, at 143.

White Rose students in wartime Germany were executed merely for handing out a trifling number of anti-Nazi leaflets. Francione's prison guard is sure to become immediately reacquainted with his prison, if he's lucky.

For the interests of qualified nonhuman animals not to be tradeable, Francione argues that "the interest of the animal must be seen explicitly as an interest that is to be protected as would a true 'right' within the legal system."[71] Here he moves beyond mere detachment.

> To protect animal interests in this manner would require a deliberate recognition of a type of legal norm that *our legal system does not yet recognize*: a norm that functions *like* a true right—in that it recognizes an interest that cannot be balanced away—but is held by a being who has not yet achieved status as a holder of the basic right not to be regarded exclusively as a means to an end.[72]

Francione adopts Tom Regan's term for this non-right right, a "proto-right," so named "because it functions like a right but runs to the benefit of a nonrights holder, properly speaking."[73] Now the unfairness of some of Francione's attacks upon the New Welfarists clearly emerges. Is it fair to criticize them for not inducing judges and legislators to invent a new species of legal norm that walks like a right and talks like a right, but isn't a right — and then grant *that* to nonhuman animals?

The "proto-right" is to be the vehicle for "an incremental 'assembly' of personhood status for qualified nonhumans" meant to allow for the grant of *nonbasic* rights to nonhuman animals, as opposed to such a basic right as bodily integrity.[74] But Francione fails to recognize the quantum nature of legal rights decision-making. Rights attainment can no more be incrementally assembled than can pregnancy. There are reasons for this.

In the early days of the environmental movement, Professor Stone famously observed that:

> The fact is, that each time there is a movement to confer rights upon some new "entity," the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a *thing* for the use of "us"—those who are holding rights at the time.[75]

Consider again the abolition of American slavery. Slavery flourished from the landing of twenty Africans in Jamestown in 1619 to the enactment of the Thirteenth Amendment to the United States Constitution in 1865. Abolition was only then made possible through a great Civil War. At its height

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[71] *Id.* at 205.

[72] *Id.* at 205-06 (first emphasis added).

[73] *Id.* at 206. "Proto-right" has, on occasion, been used synonymously with "manifesto right," as meaning a "particularly important interest, goal, or value which presses for recognition" as a claim, but does not contain the element of entitlement that is essential to a claim-right. Jack Donnelly, *Human Rights as Natural Rights*, 4 HUMAN RIGHTS Q. 391, 403 (1982). "[W]ithout that entitlement one cannot speak of holding a right." *Id.*; *see* JOEL FEINBERG, SOCIAL PHILOSOPHY 67 (1973).

[74] FRANCIONE, *supra* note 2, at 153-54.

[75] CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING - TOWARDS LEGAL RIGHTS FOR NATURAL OBJECTS 8 (1974).

in the nineteenth century, slavery was embedded into the economies and culture of nearly half the states and affected the economies of the other half.[76] Abolition took 246 years, yet Francione observes that "[t]he abolition of slavery in America occurred relatively quickly."[77] Is there a mental and emotional transition in or out of law more difficult than that required to reshuffle an entity from "thing" to "person"?

To be sure, legal rights will be won when judges are finally convinced that the legal thinghood of qualified animals conflicts with such objective overarching values and principles of traditional Western law as fairness, liberty, and equality.[78] But even reasoned legal judgments depend, at least in part, upon subjective and extra-legal values that ebb and flow on historical tides. Competing theories of law cannot of their own force dictate a rational and unanimous choice.[79] That is why appellate decisions are rife with dissents and concurrences and why the closer to basic values decisions hew, the greater is the chance of discord. And that is why it is no more fair to criticize the New Welfarists now for employing tactics that have failed,[80] than it once was to criticize challengers to "separate, but equal" racial classifications for losing in the decades before *Brown v. Board of Education*.[81] Success demands not just the right arguments, but the right times and the right decision-makers.

More than thirty years ago, Professor Thomas S. Kuhn compellingly argued that because "a nonrational incommensurability" exists between competing notions, a switch from one to another can never be compelled by logic alone and competing values may make it difficult to choose.[82] "Like the gestalt shift, it must occur all at once (though not necessarily in an instant) or not at all."[83] "These flashes of intuition resemble instantaneous electron orbital changes. They are never in transition. They are here. Then they are . . . there."[84]

The objective convictions of judges must harmonize with what their intuition, judgment, and sense of what is both right and appropriate tells them.[85] Their stance towards the justice of the legal thinghood of quali-

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[76] WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY - THE GREAT BATTLE IN THE UNITED STATES CONGRESS 11 (1995).

[77] FRANCIONE, *supra* note 2, at 111.

[78] Francione seriously errs in his claim that "property rights are understood as equivalent in importance to rights of personal security and personal liberty." *Id.* at 144. Perhaps once so, but no more. *See* Lochner v. New York 198 U.S. 45 (1908), *overruled by*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1302-1435 (2d ed. 1988).

[79] THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 45, 184-85 (2d ed. 1970); THOMAS S. KUHN, THE ESSENTIAL TENSION 320-29, 337 (1977). *See* Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 25 n.52 (D.C. Cir. 1976) (en banc).

[80] FRANCIONE, *supra* note 2, at 113-18.

[81] Brown v. Board of Education, 347 U.S. 483 (1954).

[82] KUHN, SCIENTIFIC REVOLUTIONS, *supra* note 79, at 4, 66-91, 110, 148-50, 185-86.

[83] *Id.*, *supra* note 79, at 150. *See* RISIERI FRONDIZI, WHAT IS VALUE? 159-65 (1971); KUHN, ESSENTIAL TENSION, *supra* note 79, at 313-18.

[84] KUHN, SCIENTIFIC REVOLUTIONS, *supra* note 79, at 123.

[85] Gregory v. Ashcroft, 501 U.S. 452, 466 (1991); Chicago, Burlington & Quincy Ry Co. v. Babcock, 204 U.S. 585, 598 (1907); Lochner v. New York, 198 U.S. 45, 73 (1905) (Holmes, J.,

fied nonhuman animals will first be here . . . then there. Whether and when the shift away from the legal thinghood of qualified nonhuman animals occurs will depend in part upon the judges' awareness, both conscious and subconscious, of the nature of the issues that they bring to the decision. It may depend upon the judges' natural tendency to emphasize differences or similarities when classifying. Taxonomists divide into "lumpers," who tend to "concentrate on similarities and amalgamate groups with small differences into single species," and "splitters," who tend to "focus on minute distinctions and establish species on the smallest peculiarities of design."[86] Supreme Court Justices regularly hold that fundamental liberty rights are at least partially determined by whether a practice is deeply rooted in the country's history and traditions. The Court's lumpers and splitters may disagree on the appropriate level of generality at which to characterize tradition and history,[87] as well as the practice at issue.[88] But it is important to understand that judges will doubt not the slightest what is at stake in the fundamental shift from legal thinghood to either legal rights or "proto-rights." It is the same change—the destruction of the legal thinghood of qualified nonhuman animals.

If such a fundamental shift is required, then why would judges possibly express it by creating the entirely new legal norm of "proto-rights" that essentially duplicates the existing norm of legal rights? Even more importantly, why would judges be persuaded that the legal thinghood of qualified nonhuman animals should finally make way for some unimportant *nonbasic* right? It is much more probable that, when the legal thinghood of "qualified" nonhuman animals gives way, and it shall, it will fall under the accumulated weight of powerfully compelling arguments for such *fundamental* rights as bodily integrity and bodily liberty.

The best, most efficient, and most moral path to the destruction of the legal thinghood of nonhuman animals will be difficult to find and even harder to stay on.[89] Both New Welfarists and New Immediatists must be

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dissenting). *See* Tribe, *supra* note 64, at 1342 ("Acceptance of the notion that some previously 'rightless' entity enjoys legal protecton is largely a matter of acculturation.").

[86] STEPHEN JAY GOULD, THE MISMEASURE OF MAN 44 (1981). The nineteenth century biologist, Louis Agassiz, not only classified three genera of fossil fishes from what were eventually ascertained as the teeth of a single fish, but believed that races of humans constituted separate species. *Id.* at 42-7.

[87] Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).

[88] *Compare* Bowers v. Hardwick, 478 U.S. 186, 190-95 (1986), *with id.* at 200 (Blackmun, J., dissenting).

[89] Even Francione's own reported counsel work does not appear to meet his five criteria. *E.g.*, Blake v. Babbitt, 837 F.Supp. 458 (D.D.C. 1993) (challenging the validity of a regulation of the Bureau of Land Management that allows a designated field officer to make a decision to remove wild horses from the range); Kissinger v. Bd. of Trustees of Ohio State Univ. College of Vet. Med., 786 F.Supp. 1308 (S.D. Ohio 1992), *aff'd*, 5 F.3d 177 (6th Cir. 1993) (arguing that a veterinary student could avoid certain acts that harm nonhuman animals); American Soc. for Prev. of Cruelty to Animals v. Bd. of Trustees of State Univ. of New York, 184 A.D.2d 508, (N.Y. App. Div. 1992); American Soc. for Prev. of Cruelty to Animals v. Bd. of Trustees of State Univ. of New York, 79 N.Y.2d 927, (N.Y. 1992); *S.E.T.A.-UNC-CH* Inc. v. Huffines, 101 N.C. App. 292, (N.C. Ct. App. 1991) (challenges to state universities to gain access to either records or meetings of laboratory animal care committees).

on guard against fatally undermining their own arguments, processes, and goals. Moreover, a "nonrational incommensurability" probably exists between the two sets of ideas, as differing values and personalities often characterize the two sides. New Welfarists, as were anti-slavery gradualists, probably tend to be a varied bunch. Immediatists, however, are generally easier to capture. The immediatist abolitionists, for example, "refused to temporize with evil. They craved a sense of inner grace and moral sincerity by conquering temptations toward selfish and calculating expediency. They sensed that by plying slow, calculating gradualist measures, in the hope of ending slavery eventually, one compromised with sin."[90] These immediatists may successfully have avoided compromise with sin, but they "contributed quite inadvertently and secondarily to ... the Civil War."[91] To become an intentional and primary force in the struggle to abolish the legal thinghood of any nonhuman animal, we will be *required* to compromise with sin as we know it, and lawyers most of all. Until an unjust system is changed we lawyers must work within it or not work at all. We will inevitably disagree as to what compromise is necessary.

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[90] FRIEDMAN, *supra* note 1, at 1.

[91] *Id.* at 5.