Incrementalist Animal Law: Welcome to the Real World

David Sztybel, Ph.D.

So far I have commented on the incrementalism versus anti-incrementalism debate as a philosopher. However, this is a historical issue as well. I am not an historian, but I would still like to pick up some of the slack left by historians who have neglected this task. I do not pretend to be an expert. No doubt the real experts will one day do a much more rigorous job than I am about to do. As against such prospects, however, Henry Ford famously stated: "History is bunk." However, he idolized Adolph Hitler. There was a picture of the dictator in the auto-maker's office. Ford gushed over Nazism when he visited Germany. So Ford would have said that anti-Nazism is bunk too, or so I gather. Anyway, history is truly important and can teach us how to develop concepts for analysis in the incrementalism versus anti-incrementalism debate for animal law, and perhaps we can also learn too what to expect from "future history."

I am now using the terms incrementalism versus anti-incrementalism in order to refine the terms of this debate. There is speciesist incrementalism, which is confined to anti-cruelty laws, and anti-speciesist incrementalism, which aims ultimately for animal rights in some strong sense. This paper is really about animal rights incrementalism versus animal rights anti-incementalism. But I will use incrementalism versus anti-incementalism for short. Incremental reforms include anti-cruelty legislation and also abolishing animal exploitation in limited sectors, as in animal circus acts for example. However, it also includes a strangely neglected form of incrementalism: increments against racism and sexism, taken as examples, after blacks and women are no longer viewed as the property of white people and men, respectively.

There are children's rights to consider too, although it is more controversial as to whether young people legally counted as property. Still, there are other parallels. As an interesting historical aside, Henry Bergh founded the American Society for the Prevention of Cruelty to Animals in 1866. Bergh became involved in a child abuse case and helped to set up a Society for the Prevention of Cruelty to Children in 1874. See also, in the timeline of children's rights below, how the two causes of child and animal welfare join forces in 1877 in the form of the American Humane Association, which dealt with both issues. Both involved rather helpless victims of cruelty, but only the humans went on to get legal rights (but see below some rare animal rights laws pertaining to apes). Anyway, now back to our meditations on terminology.

Previously, I used the terms animal rights fundamentalism versus animal rights pragmatism. The fundamentalists are opposed to incremental change largely for moral reasons, since they believe in championing all of animal rights, not merely degrees of protection against cruelties. (An oversimplification that will do for now.) The pragmatists urge that they are more "practical" and consider it ethically appropriate to secure the best they possibly can, legislatively, for nonhuman animals at any given juncture. This old dichotomy does not allow for enough in the way of distinctions though. Some oppose incrementalist initiatives for ethical reasons, some because such proposals are supposedly ineffective, and others for a combination of reasons. Incrementalism versus anti-incrementalism—with moral (anti-)incrementalism or pragmatic (anti-)incrementalism as subvariants—allows for these differentiations unlike fundamentalism versus pragmatism,

which is still useful for discussing ethical theories about incrementalism. Joan Dunayer was always totally against incremental, anti-cruelty legislation. However, Professor Gary L. Francione's old theory of acceptable legislation articulated in his book, *Rain Without Thunder*, accepted (before animal rights are enshrined in laws) only incremental reforms that protected 100% of an animal's interest, such as liberty of movement, or else abolished a whole area of animal exploitation such as marine shows. Apparently he has now rejected that theory, which we can classify as quasi-incrementalist, and now opposes all incrementalism, including single-issue campaigns, which would seem not to resist marine shows by themselves any more. Superficially, Francione's old theory *seemed* to forbid using the term incrementalism, since he himself professed an incrementalist approach. Various activists might accept some sorts of increments but reject others.

I have a remedy to this terminological quandary, however. It is fair to say that Francione's program was a kind of hybrid approach with anti-incrementalist and pro-incrementalist tendencies. I think it is accurate to characterize Dunayer as an anti-incrementalist, since she always rejected so-called "welfarist" legislation, although in her book, *Speciesism*, she supports increments that the Great Ape Project seeks to make. Francione's old strategy was anti-incrementalist about animal interests in particular. A given legislative proposal had to respect *all* of any given animal's interest in some respect (freedom of movement, bodily integrity, etc.), rather than a degree of that interest or an increment involving only partial protection of interests. So in the end anti-incrementalism in a certain respect is characteristic even of Francione's former legislative strategy. Now apparently he offers no solutions whatsoever for the legislative near-term and is more of an extreme anti-incrementalist than ever.

Incrementalist versus anti-incrementalist is better than still other old terms. Take a dichotomy used by those formerly concerned with black slavery: gradualist versus immediatist. This does not work since Francione is not legislatively calling for an immediate law against all speciesism. He is not that naïve. Quite the contary, he advocates abstaining from the legislative process, and sees himself explicitly as an "outsider" to that milieu. And as I have said elsewhere, I do not call for a uniform series of graduated stages: I urge that we skip the fragments of increments as much as possible. Also, animal "welfarism" versus anti-welfarism/animal rights is not very revealing since Francione supports animal welfare acts at the individual level, and I support animal rights. Also, in human rights, progress is made not only under the category of welfare, but also liberty, and these are different. That is why philosopher Alan Gewirth, for example, specifies rights to welfare and freedom, and rightly does not equate these. Increments can be made for both or either. Similarly, abolitionist versus nonabolitionist (or reformist) is not especially useful for this debate, since I not only advocate the abolition of speciesism, but do many things that the Francionists agree effectively promote abolition (cultivate veganism and animal rights at the individual level, thus building up support for animal rights laws, openly advocating the long-term legislative goal of animal rights, and so on). Bruce Friedrich, an influential writer on this debate, has used "the welfare versus liberation debate." However, again, this seems like a false dichotomy since I hold that animal welfare in a nonspeciesist sense is part of animal liberation, not merely "bodily integrity" as Francione and another long-time anti-crementalist, Tom Regan, state. Francione and Regan resort to this other terminology presumably because they do not want to be associated with animal welfare at all. No less

important, animal rights incrementalists such as myself are on both sides: anti-cruelty laws (which are called "welfare" here) AND liberation. So liberation VERSUS welfare seems unintentionally misleading. But incrementalism is indeed posed in various, dramatic ways against anti-incrementalism.

We will see though, that another relevant distinction is moderate anti-incrementalism versus extreme anti-incrementalism. Moderate anti-incrementalism, paradoxically, is subsumed under accepting incrementalism in general, which accepts the appropriateness of making incremental legislative progress. Moderate anti-incrementalism, we will see, is a tendency that serves to try to make increments as great as possible. Extreme anti-incrementalism rejects incrementalism virtually altogether, or nearly so. To avoid confusion, though, I will refer to moderate anti-incrementalism as macro-incrementalism, trying to make increments as large as can be, as opposed to micro-incrementalism, or being prepared to accept glaringly puny increments of progress. However, both of these are tendencies in the nature of more-or-less, and are separated by degrees like colours on a light spectrum, which poses difficulties in trying to identify differences in kind that have rigid borders. Nevertheless, let us by all means be as macro-incrementalist as possible in seeking legislative ways forward.

This paper will take a different approach to the law than studying, say, laws supposedly regulating human slavery. Rather, I will take a different tack by looking at laws affecting the property status of humans, as well as laws targeting racism, sexism, and discrimination against children. From these examples, we have decisive things to learn about the general debate of incrementalism versus anti-incrementalism. We can also, perhaps, discern probable future scenarios pertaining to the advocacy of animal rights laws, and evaluate the prospects of single-issue campaigns (or else legislative proposals addressing only a few issues). There is an operating assumption in animal law that animal "welfarist" laws are incrementalist, but that animal rights law would not be. I will bring this prejudice into question, and show that even the history of rights legislation for all those once deemed property is incrementalist as well. Let us see what we can uncover in investigating old assumptions.

Francione's Peculiar Notion of "Property Status"

It is important, in seeking to be clear about Francione's views in this debate, that he does not consider counting as property merely in the literal sense of being legally owned, but also in terms of what is 'loosely' (one might say) associated with property status—a point I partially owe to David Langlois.[1] Francione associates with property status:

(1) being owned, but also:

[1] Langlois, a graduate student at the time of this writing, presenting himself as a follower of many of Francione's opinions, told me in a public debate on the Toronto Animal Rights Society list-serve in 2006 his interpretation that, for Francione, property is not literally just being owned, but rather a set of metaphorical associations. I say 'loose' association rather than 'metaphorical' since Francione himself does not appeal to the idea of metaphors and would have reasons to resist such a poetic idea that does not seem very philosophical.

(2) being *literally* treated as if one is an object or thing by denying that one has a mind, feelings, or interests as the Cartesians maintain[2];
(3) being *figuratively* treated as if one is a thing by conceding that animals have minds and feelings but by treating them in a way *as if* they are beings without interests, through a disregarding of interests[3];
(4) being treated as if one is a mere means, tool, resource, instrument, or slave whose value can be reduced to that of a commodity[4] (again disregarding interests); and
(5) being subjected to unnecessary suffering (again disregarding a specific interest).[5]

So an animal eradicated as a 'pest' is not anyone's property or tool but is being treated as in (2) possibly, but certainly as in (3) to (5). Vegans may have legal ownership but refuse other dimensions of animals as property in Francione's sense. Not all conditions need apply since many exploiters grant that animals have feelings as well. This model can be compared to symptoms of a disease, all of which are had in full-blown form but not all of which are needed to make the diagnosis. This is my interpretation of Francione's not-property theory, identifying five conditions which he does not clearly set out in this manner. I am interpreting the fact that each condition disregards interests; I newly distinguish between literally and figuratively treating animals as objects (a concept that seems generally useful); and I employ my own disease-symptom comparison.

Francione's Presumptions

Francione frequently compares the plight of animals to black slavery and the oppression of women, as do I. He implies that his theoretical assumptions are true when we compare legislation on behalf of humans and those laws which are for the sake of animals. What are some of his assumptions?

1. Legislative rights for animals should be all or nothing, not a matter of degrees. This pertains to his, in effect, rejecting only respecting, say, 60% of an animal's interest in freedom of movement. He implies that legislation on behalf of humans has also been all or nothing, not incremental. He states that we would be speciesist to abolish child abuse by degrees, but not give animals the same all-or-nothing benefit, as it were. (Actually I will show below that people have only legislated against child abuse by degrees or increments in Francione's own country. Consider that harmful neglect is a form of child abuse, and modern states are guilty of precisely this in manifestations of gross magnitude.) Maybe a grade 6

[2] Francione, *Introduction to Animal Rights* (Temple University Press, 2000), p. 73.
[3] Francione, *Rain without Thunder* (Philadelphia: Temple University Press, 1996), p. 45 discusses disregard of interests.
[4] Francione, *Introduction to Animal Rights*, p. 100, he refers to 'the basic right not to be treated as a resource', which is reminiscent of Kant's obligation not to treat persons as a mere means, and implies a synonymy between the right not to be considered property and the right not to be treated as a resource.
[5] *Ibid*., p. 30, he acknowledges a legal and moral obligation not to cause unnecessary suffering.

history reader bears out the idea that human rights are conferred all at once, if it is a particularly poor text, but no professional account would bear out that "analysis" (the latter term actually confers too much credit, since it implies a grasp of history, but holding that the history of human rights is anti-incrementalist is simply ignorant as I will make plain in this paper). In sum, he assumes normatively that history shows that incrementalism is not the way of things for human progress, so we should not advocate this for animals.

2. He holds that incrementalism does not help us abolish the property status of animals. In his philosophy, animals should only have the right not to be considered or treated as property (in his extended sense of not treating as property which includes not treating them oppressively). He defends the idea that all welfare concerns will be taken care of once we abolish the property status of animals, implying that a parallel history is true for humans. Abolishing animals as property will make all incrementalism unnecessary anyway. So we do not *need* to aim for it now or in future. In other words, he assumes a concept of property status such that abolishing the latter and welfare for animals are so logically bound up together that if we abolish property status, we somehow will ban all of the insults of speciesism. Thus abolishing property status is the only or perhaps fundamental right for animals, as Francione states in his *Introduction to Animal Rights* (p. 82). Furthermore: "the basic right not to be treated as property is a right that does not and cannot admit of degrees." (*Rain without Thunder,* p. 178). These maxims imply that animals' property status will only be removed once all of their interests are protected by rights not admitting of degrees. Abolishing animals' property status is supposed to be the ultimate solution somehow—a panacea for ending injustice and unnecessary suffering, as it were.

Do Francione's assumptions about the centrality of property status hold up in the analysis of human rights? Hardly in most areas. Consider homophobia, biphobia (discrimination against bisexuals), transphobia (discrimination against transsexuals), ageism, ableism, sideism (discrimination against left-handers in technology design that might realistically endanger "south-paws" as one example), lookism, and classism. There is also discrimination based on religion, creed, or nationality. Those suffering from these significant forms of discrimination were not considered to be the property of *anyone* per se, unless they were considered property on other grounds, in the ways that slaves were the property of "white people," and women were Biblically mandated to be the property of male patriarchs. So property status is actually *irrelevant* to analyzing most forms of oppression—at least for the greater part. To consider a disabled person to be "property," then, in some extended meaning, does not make sense, since property was never substantially an issue with them, in this respect, in the first place.

It does not make sense for Francione to have an extended concept of property to apply to oppressed animals—human and nonhuman—unless one starts with the original or dictionary definition of property and extends from there. Otherwise the so-called property status is "extended" from exactly nothing, and instead we find a bunch of characteristics (not being objectified, instrumentalized, or cruelly treated) floating around with **NO** apparent link to property status in the common sense. But these causes listed above do *not* start with property in the basic sense, rendering any "extension"

meaningless in these cases. And we cannot candidly "extend" rights to the disabled for example from, say, *abolishing black slavery*. The present-day disabled did *not* historically start their oppression in black slavery and likely had little or nothing to do with that unfortunate part of history altogether. Liberation for the disabled is also not especially coincident with liberating so-called "people of colour." Sure, those discriminated against may want for property, being poor, but that has *nothing* to do with these people themselves being counted as the property of someone else. Francione seems to be deeply confused, somehow thinking that the case of black slavery and perhaps the former status of women can be relied on to make good his "extended" sense of counting as property as a *general* theory that allows for a full comparison between speciesism and the oppression of humans.

This reflection serves to refute his concept of property status as "oppressed status," which he seems to mean. But then, he never precisely defines just *what* he means by property status, although it is actually one of the cornerstones of his theory. No, he just chides people that he does not mean property in the literal sense, as though everyone is supposed to be aware of his extended sense which he seldom mentions as such, and never bothers precisely to define or analyze. The only meaningful increments fought for and won on behalf of these humans (the disabled, etc., not people of colour) must be in terms radically other than property status, and that is in fact what we find in the respective histories. However, I will examine the history of anti-racist rights, women's rights, and children's rights instead, since these do (more or less in the case of children) feature people as property. Will Francione's analysis prove correct in at least these three limited cases?

Francione's Assumptions Meet the Historical Record: the Incremental Battle for Anti-Racist Rights[6]

Here I use the example of U.S. anti-racist rights laws. It is Francione's nation and thus his primary legal frame of reference. America is also widely—mostly by Americans—supposed to be the greatest champion of rights and freedoms. Perhaps it is the mightiest champion, but I think Sweden for example has much more to offer in the way of human rights. All the same, here is a detailing of U.S. racist and anti-racist legislation:

TABLE 1.

LEGEND

PURPLE	**abolition of property status (slaves freed)**
RED	**Jim Crow laws (racist incrementalist legislation)**
GREEN	**anti-racist incrementalist legislation**

[6] Sources: Wikipedia article, "The Abolition of Slavery Timeline." Retrieved February 26, 2011 from http://en.wikipedia.org/wiki/Abolition_of_slavery_timeline. Civil Rights Timeline from http://www.infoplease.com/spot/civilrightstimeline1.html. Jim Crow in America Timeline from: http://www.shmoop.com/jim-crow/timeline.html.

Author's Note: In order to avoid repetition, tedium, and excessive length, I have grouped some Jim Crow laws together under school segregation; segregation related to transport; miscellaneous segregation, and restrictions against intermarriage of so-called "whites" and "people of colour." However, once civil rights legislation starts to appear, I have interleaved the Jim Crow laws in order to show how there were alternations of racist and anti-racist legislation in the United States for a very substantial period of time.

Year	Event
1777	Vermont bans slavery
1783	Massachusetts bans slavery
1783	New Hampshire begins gradual abolition of slavery, freeing future children of slaves
1784	Connecticut begins gradual abolition of slavery, freeing future children of slaves
1784	Rhode Island begins gradual abolition of slavery, freeing future children of slaves
1799	New York state begins gradual abolition of slavery, freeing future children of slaves and banning it entirely in 1827
1804	New Jersey begins gradual abolition of slavery, freeing future children of slaves, but those enslaved before the Act remain enslaved for life
1808	United States forbids import and export of slaves
1850	Fugitive Slave Law requires return of escaped slaves, a concession to the South
1863	Emancipation Proclamation frees slaves in Southern states; most slaves in "border states" freed by state acts; separate act abolishes slavery in Washington, D.C.
1865	U.S. abolishes slavery with Thirteenth Amendment to the Constitution, affecting nearly 40,000 remaining slaves
1870	U.S. abolishes slavery in Department of Alaska after purchasing it from the Russians in 1867

ANTI-DESEGREGATION IN SCHOOLS

1870 Virginia; 1870 Tennessee; 1872 West Virginia; 1875 Missouri; 1875 North Carolina; 1875 Alabama; 1876 Wyoming; 1876 Texas; 1885 Florida; 1891 Kansas; 1895 Georgia; 1895 South Carolina; 1897 Oklahoma; 1902 Virginia (again); 1904 Kentucky (also applies to private schools and college); 1905 Kansas allows separate schools (again); 1907 Oklahoma (again); 1923 New Mexico

AGAINST DESEGREGATION IN TRANSPORT

1889 Texas (rail); 1890 Louisiana (rail); 1891 Alabama (rail); 1899 Georgia (rail); 1907 Texas (streetcars); 1907 Florida (railroads); Oklahoma 1908 (transportation)

AGAINST DESEGREGATION, MISCELLANEOUS

1890 Georgia (prisons); 1901 North Carolina (libraries); 1909 North Carolina (prisons); 1914 Louisiana (circuses); 1915 Oklahoma (phone booths); 1918 Virginia (prisons); 1919 Texas (libraries); 1921 Oklahoma (teachers); 1921 Tennessee (coal miner bathrooms);

1925 Oklahoma (boxers); 1926 Virginia (public places); 1928 Kentucky (hospitals); 1934 South Carolina (public spaces); 1936 Virginia (passenger vehicles); 1940 Alabama (prisons); 1942 Kentucky (retirement homes); 1942 Mississippi (charity hospitals: separate entrances and quarters); 1947 North Carolina (cemeteries)

AGAINST INTERMARRIAGE OR "MISCEGENATION"

1879 Missouri; 1879 South Carolina; 1880 Mississippi; 1882 West Virginia; 1885 Florida; 1888 Utah; 1901 Alabama; 1908 Wyoming; 1908 Colorado; 1909 South Carolina; 1911 Nevada; 1911 Nebraska; 1930 Oregon (also cohabiting); 1945 Wyoming (renewed)

1873	West Virginia forbids records of birth, death, and marriage for whites and blacks to be kept in same books together
1876	Texas Poll Tax makes it impossible for poor blacks to vote
1882	Supreme Court voids Ku Klux Klan Act of 1871 which allowed federal troops to go after Klansmen and prosecute them in federal court
1883	U.S. Supreme Court voids Civil Rights Act of 1875 which prohibited racial discrimination in theatres, hotels, trains, and other public accommodations as unconstitutional
1890 to 1906	Oppressive voting laws for all southern states: for instance, poll taxes and literacy tests
1896	U.S. holds up Louisiana law requiring separate but equal places for blacks in schools, libraries, hotels, hospitals, prisons, theatres, parks bathrooms, trains, buses, cemeteries and wherever people might commingle
1912	Louisiana restricts housing
1915	Alabama restricts nurses, that is, whites caring for black patients
1932	South Carolina restricts adoptions
1932	South Carolina restricts circuses
1933	Texas restricts boxing
1934	North Carolina no exchange books between white black schools
1935	South Carolina bus drivers only allowed to transport children of the same "race"
1939	Florida schools used by black and white students are to be stored separately
1948	Truman endorses equal rights for blacks in the military (Executive Order 9981)
1949	Texas coal miners must have separate washrooms
1951	Kentucky restricts adoption
1952	Missouri restricts adoption
1954	Segregation in schools unanimously ruled unconstitutional by the U.S. Supreme Court; thus overturning the 1896 decision of "separate but equal" schools
1955	Maryland penalizes mixed birth
1955	Rosa Parks refuses to cooperate with segregation on buses, which is abolished in the next year of 1956
1956	Alabama restricts games poker, checkers, golf, etc.
1956	Kentucky restricts socials, dances, etc.
1956	Louisiana restricts public places

1956 North Carolina bathrooms segregated
1958 Virginia closes all mixed schools
1959 Arkansas separates buses
1962 James Meredith first black person to enroll at University of Mississippi
1963 Birmingham, Alabama separate buses
1963 March on Washington, Martin Luther King, Jr.'s "I have a dream" speech
1964 Poll tax making it hard for blacks to vote abolished in the 24th amendment to the constitution
1964 Civil Rights Act of 1964 passed by Lyndon Johnson's administration. Sweepingly prohibits discrimination of all kinds based on race, colour, religion, or national origin
1965 Johnson's Voting Rights Act making it easier for blacks to register to vote
1965 Affirmative action legislation laid down in Executive Order 11246 for all government hiring
1965 Malcolm X is murdered.
1967 Sarasota, Florida mandates segregated beaches
1967 Ruled unconstitutional by the U.S. Supreme Court to forbid inter-"racial" marriages, based on an appeal from the state of Virginia
1968 Martin Luther King, Jr., is murdered. Notice how racist law completely runs out of steam after this event.
1968 Civil Rights Act of 1968 allowing no discrimination in sale, rental or financing of housing
1971 U.S. Supreme Courts rules busing allowable as a means of integration in public schools
1988 Overriding President Reagan's veto, Congress passes the Civil Rights Restoration Act, expanding non-discrimination laws in institutions getting government funding
1991 Civil Rights Act of 1991 provides for damages in cases of intentional employment discrimination
2003 U.S. Supreme Court holds up affirmative action for college and university admissions

I do not pretend to capture all racist or anti-racist legislative acts, just most of them, or enough to be indicative about what history might teach us. I have not at all been selective in my representation of legislative history but have used **all** laws listed in the sources that I consulted. This is my method in all cases subsequently too. Would any of these lists *not* have featured momentous, anti-incrementalist laws covering all possible increments? It is unthinkable that there could even be one such omission in our three realms of law.

Commentary on Legislation Concerning Racism

Laws regulating slavery are hard to find, as slaves were mostly ruled by terror in both their daily treatment and punishment of all failed attempts to flee. However, again, it is my purpose in this paper to look at the incremental legislation since the abolition of slavery in the United States. It proves that we did not abolish racism in one fell swoop. Rather, anti-racism is still gradually being effected in society through an accumulation of

increments of the whole of anti-racism. This historical picture strongly suggests that the overcoming of speciesism too will only one day be won through incrementalist legislation. The record unequivocally proves that abolishing property status does not take care of all incremental concerns, or make them redundant (not that Francione thinks abolishing ownership takes care of abolishing property status, as we have seen). Rather, the laws highlighted in purple that abolish humans as property in the U.S. were only the beginning of a long journey of incremental reforms designed to secure the rights and freedoms of people of colour and members of other so-called "races." It is not just sloppy analysis but wholly inaccurate to confuse abolishing property status with securing all increments for respecting interests or defending rights altogether. However, in Francione's extended sense of property status, animals should not be oppressed. This does not permit accurate historical discussion of when and how property status is actually abolished, and also suggests that the extended sense of property status is not realized incrementally—since he opposes incrementalism—when in fact the history record demonstrates just the exact opposite.

Francione implies that getting rid of the property status of animals cannot be an incrementalist achievement, and therefore must mean some all-or-nothing thing. However, in many cases, even phasing out the formal property status of slaves was accomplished incrementally. Note how in the years 1783, 1784, 1799, and 1804, five different states only provided legislatively for the *gradual* abolition of property status itself. This was primarily done through freeing future children of slaves, which would leave even present-day enslaved children in bondage. Indeed, of the seven states that made anti-slavery laws, five of them—that's 71%—only abolished property status in such increments. Yet recall that Francione erroneously speculates that "the basic right not to be treated as property is a right that does not and cannot admit of degrees." (*Rain without Thunder*, p. 178)

Not only was abolishing human property status in the literal sense graduated into effect with the generations of slaves, but Francione's extended sense of property, as apparently not disregarding animals' interests, was only realized by increments too, such as the various laws banning slavery, outright or gradually, and Truman's granting of equal rights only for blacks in the military in 1948. The segregation in schools was banned in 1954 by the Supreme Court. These increments only addressed military personnel and students directly. All other civil rights laws represent increments of progress too: 1956 abolition of bus segregation; 1964 killing the poll tax; the 1965 Voting Rights Act and affirmative action program introduced by Lyndon Johnson; the Supreme Court ruling that lifted the ban on inter-marriage between so-called "races"; the 1971 pro-busing law; and the 2003 Supreme Court decision on affirmative action specifically for college and university admissions. These are ALL incremental reforms addressing specific issues, or pieces of the whole puzzle that is anti-racism. Even the Civil Rights Acts of 1964, 1968, and 1991 (considering also the Civil Rights Restoration Act of 1988) were not comprehensive bans on treating blacks as property in Francione's extended sense of disregarding interests. The successive Civil Rights Acts—as well as the other anti-racist laws—each added to the incremental protection of black people. Francione's claims that all animals' interests will be taken care of with their not being treated as property is unjustifiable complacency. Either not being treated as property is not a matter of degrees, as he says, in which case it could only mean ownership (although again that

status was reformed incrementally), or else it is a matter of incremental degrees of protection of interests, in which case he contradicts the quotation given above, as well as his general ideology. We could speak of geographical increments too, since increments can be spatial or temporal. Only patches of the U.S. had certain increments of abolishing slavery. Only Vermont and Massachusetts were unequivocal about their bans as we have read.

However, the study of legislation not only shows this incrementalism in every single anti-racist legislative act, even the Civil Rights Acts (the 1964 one's sweeping language, though, does resemble constitutional language because it is so general). The racists too made incremental progress after the abolition of the property status of blacks in the literal sense of property. This makes it even more nonsensical to suggest that securing not-property-status for animals will be or result in a complete protection of their interests. Note that after 1865, when slavery was finally abolished in the United States through the Thirteenth Amendment to the Constitution, there were more than 83 racist laws (see legislation listed above; around the turn of the twentieth century, 1890-1906, there is a hint at many laws that made it harder for blacks to vote) passed in the United States, incrementally building up racism in American public life. So eliminating property status is obviously no blissful panacea for the protection of human interests, and the case does not appear more promising in the case of nonhuman animal interests. Since both sides are incrementalist, it is fully legitimate to fight fire with fire: to seek to have every racist law repealed, judicially overturned or disregarded, and unenforced. To Francione, incrementalist laws are not allowable. Yet counterings of unjust incrementalist laws would clearly have been in the service of justice. There is no good reason why the narrow increments of segregation, say, on trains, could not be precisely countered with counter-increments allowing black people and others to sit anywhere on trains. If the opposition deals in incremental legislation, then so should we, especially since incremental legislation is the way of both sides. The alternative is to wait even now for a rights bill giving liberation to everyone, human and nonhuman, in every conceivable aspect. We would have to wait far too long—actually beyond our lifetimes, I would wager—for such anti-incrementalist legislation. We would no longer even be *around* to wait for it. And always, it is hard to get more than precious increments passed.

That is why ALL of the racist and anti-racist legislation is incremental, including the 1865 banning of property status (which did not kill off all increments of racism by far). To get a law passed, a legislator needs to study it, argue in favour of it, as well as debate it, and this is hard to do thoroughly in the case of big issues bundled together. I am no legislative expert, but that is part of why I would guess that all of the legislation was incremental. Because anything else would not necessarily appear undesirable (sure racists would want sweeping racist laws, just as anti-racists might dream of all-encompassing anti-racist laws), but rather impossible or just forbiddingly difficult for technical reasons.

Consider some facts that make this creeping and glacial incrementalism virtually inevitable. The **macro** reason is that full rights are only conferred by constitutions, international law, and the like. It is very hard to reform constitutions in the face of the mighty forces of fiscal and social conservatism. It is next to impossible, short of a revolutionary government, to make a new constitution. These things evolve slowly and in a way painfully. Or painstakingly. Only constitutional amendments might succeed, and those at great cost. The **micro** reason is that the law depends on precedents. Lawyers in

particular cases must juggle mountains of precedent on different sides of issues. It is hard for specific kinds of cases in isolation. Think how hard it would be legislating a bill that encompasss *all* relevant cases, of *all* kinds. The constitution is a mountain that is hard to move, but so are the aggregates of constraining precedents that get more formidable with every passing year. With this basic understanding, it becomes clear why incrementalism is the way of the land, in spite of the fact that sweeping reforms in the interests of justice would be far more inspiring and rewarding, or so it would seem. However, strategy is also relevant. Incremental laws are likely to have more staying power because there is always opposition, and fewer objections are possible towards a more modest proposal.

This informal study strongly suggests that abolishing the property status of animals in Francione's extended sense will certainly be an incrementalist process, if it will happen at all. In the case of anti-racism, legislation started as far back as 1777, and a recent addition was 2003, and there is still much more legislative work to be done. That is a history of incrementalist reforms spanning 223 years. And progress has been depressingly slow. It must have been an agony for African Americans to endure—after their declassification as property—an unbroken succession of racist laws from 1870-1939 (which still says nothing about the dozen or so legislative insults after that). This was a period of some 69 years of constant "revenge" against those who freed blacks from slavery. This long train of bad law must have, if not broken, then strained the morale of blacks and others.

Consider also the sheer malignancy of a domination of history by racist laws in the overall law-count for our historical register. A table summarizes these findings:

TABLE 2.

Type of Law	Number of Laws Noted	Percentage of Total
Abolitionist Laws	11	10%
Jim Crow Laws	83	77%
Civil Rights Laws	14	13%
TOTAL	108	100%

Animals seem likely to have an even more toxic history of laws. There are already plenty of harmful laws regarding animals the world over and, for the most part, these have ceased neither to be nor to be born. Animal liberation seems likely to crawl forward incrementally, not dash forward with Juggernaut-like abolitionist momentum.

We need incrementalism now or later on behalf of animals too. The more increments we can get for them before they are no longer considered property, I have argued elsewhere, is best for the animals themselves not only in the short-term, but also the long-term. I am not saying that it is "best" in any ideal sense to have progress by increments, although it might be the best we can do in reality in a given time frame. In a sense I also have anti-incrementalist tendencies in the sense that I would like legislative progress to occur in the maximum possible size of increments. I have called that macro-incrementalism. A lot of the Francionists' objections are against micro-incrementalists, and these concerns do not necessarily apply to my own position. But in any case, I am realistic enough to see that the kind of law we are talking about **IS** incrementalist not as a matter of mere theory, but purely historical fact. Seemingly any progress will be

incremental, so it is not a question of whether to make incrementalist legislation, but only how best to do that. I am a moderate *anti*-incrementalist then, unlike the Francionists who are a kind of extreme anti-incrementalist.

However, I am also a *pro*-incrementalist, and that is not self-contradictory. We need to see the pragmatic value of both anti-incrementalism—pushing the envelope for animals—and incrementalism—securing at least *some* realistic progress even if perfection remains unattainable. Negotiation involves both tendencies ideally, or else it degenerates into either uselessly vehement demanding, or excessive relinquishment of ground. If we do not distinguish property status from other incrementalist reforms we will become awfully confused. We will not be able accurately to tell history, nor even to make it with any clarity. Either we use the literal sense of property, and anti-racist law is incrementalist, or we use Francione's ultimately incoherent notion of extended property status, in which case the progress is incremental too. If no one is fully liberated, does this mean that all people and animals will be "property" until the end of history? (There is such a time: our sun will one day become a red giant long after our planet becomes unsuitable for life as we know it.) How useful is his "distinction" between property status and non-property-status then? His anti-incrementalism does not stand up against the tides of history, and trying to lead a movement that champions anti-incrementalist legislation for animals exclusively is as Quixotic as trying to do the butterfly-stroke up Niagara Falls.

If Francione were to dispute my historical findings, he would have to say that the case of animals is different than the case of humans. He would need to argue that although it is an incontestable fact that anti-racist legislation has been uniformly incrementalist in nature, for powerful reasons, somehow animals will have it different. One day we will have one big omnibus law, perhaps for the entire world, securing all animal interests—human and nonhuman—and thus abolishing the property status of sentient beings in his "extended" sense. For that to happen, people would have to care more about nonhuman animals than humans, in order to have the passion and resources needed to secure all protections at once. Yet humans will always be valued more than other animals if history has anything to indicate about the matter. So it is foolish to think that animals will have it better in this respect. If it took well over two **centuries** for anti-racist legislation to mature to some extent (in a country that supposedly champions freedom and equality more than any other), as I have proved, and as such legislative progress is still ripening, then if anything it might take *longer* for other animals. Already there is an interesting record of incremental reforms on behalf of animals (see below), including some limited rights legislation for great apes in some parts of the world. And that is how it will continue, unless nonhuman animal rights will outweigh human rights, which is an absurd proposition, and the *only* way Francione will be able to realize a different "future history" for other animals. He would have to be a very great leader indeed. As it is, he compares ordinary, even would-be-humane animal users to sadistic psychopaths such as Jeffrey Dahmer, and apparently cuts himself off from various followers for life if they disagree with him even slightly. For some reason I doubt that his style of leadership, anyway, will secure all rights for animals in one fell swoop.

He might persist that it is ineffective or immoral to foster incremental legislation. It is so much better to have just one "package deal" of legislation covering everything at once. True, that would be nice. But if that is not an option, then it is not a *moral* option

either. As the German philosopher Immanuel Kant wrote: “Ought implies can.” If we *cannot* have other than incremental legislation, then it is pointless to try to dictate that we “ought” to have other than legislative incrementalism. If incremental laws on behalf of humans were ruled out of existence because they were somehow “immoral,” at the actual times of historical inception, then there would have been no legislative progress at all. That is because all of it has been incremental as I have duly demonstrated. No omnibus legislation would have been possible for all we know, given that legislation ALWAYS has opposition. As for effectiveness, incrementalism has been the ONLY thing that has worked for anti-racist legislation as I have documented, so of course it is effective.

The fact is, if we look at the historical record, we see that property status in the accurate sense (we have seen it is impossible for Francione to generalize his extended term to all, or even most, forms of oppression by far) is on a separate track from legislation that either attacks or defends the interests of the oppressed. There were laws attacking blacks’ interests post-property-status in the literal sense, and other laws in these peoples’ favour, in a titanic battle spanning many decades. There were racist laws being born as late as 1967, requiring segregated beaches in Sarasota, Florida. So we do not need to worry overmuch if incrementalist anti-cruelty laws will “cause” abolitionist laws. First of all, no one says that causing one animal “welfarist” law automatically causes a law completely abolishing animals’ property status. Only Francione states this when he distorts the position of his opponents in a classic and strangely enduring straw man argument. You need a separate campaign and legislative act to abolish property status. The point is that if people start a campaign to abolish animals’ property status in the only coherent sense of the term, it will likely be a separate campaign from laws addressing their other interests. The historical record proves this too. Anything is possible in such a property-declassification campaign. It will not somehow become impossible to do just because people have legislated anti-cruelty in the past, in *other* campaigns. It all depends on the discussion and votes in *the current* campaign.

The picture of abolishing property status as a kind of grand finale in which all animal interests will be respected according to animal rights is a completely unfounded historical generalization. It is like the cargo cults of islanders waiting for their ships to come in that will magically signal their final liberation. Some island natives, previously untouched by the west, came to look forward to cargo ships that arrived for the purposes of trade. Sadly, many of these natives formed a spiritual idea that a divine ship would some day arrive, as a kind of saviour, signalling the end to all of their troubles (many of which, ironically, were caused by the colonialists). Or I knew a few somewhat deluded animal rightists who thought that the Apocalypse was going to occur in 1997. They figured that all animals would be somehow “beamed up” to Heaven at that time. Needless to say, they were quietly corrected by the ordinary flow of history. This is a bizzare case, but Francionist expectations of nonincrementalist law as a viable thing to aim for as the next legislative goal are scarcely more realistic.

Back to our history, the opposite of any virtually ahistorical “finale” is true of the legislative record. It is simplistic to force all legislation onto one causal track, along which everything either does or does not lead to the abolition of property status. The buck does not stop there, but if anything, history proves that things just get **STARTED** there for very major interest-protecting legislation, on behalf of people who were once considered property. At that, it was a starting-point of grossly retarded anti-racist laws for

very nearly seven decades as I have calibrated above. And even after that, African Americans were still assailed by racist laws in many parts of the land. Great descriptive theory offers, at least in part, a perfect mirror of reality. Francione's thought, by contrast, yields a weirdly inverted image. Only this is no fun-house. The explanation for this inversion is simple: arm-chair theorizing. Anti-incrementalists support strong rights and suppose that this is a nonincrementalist endeavour, although even the strongest rights are historically developed in incrementalist stages. In conceptual terms, welfarist law is conceived as incrementalist, and rights is idealistically conceived of as whole. But that does not correspond to real rights as they develop. And frankly, we need legislative strategy that works for concrete reality. So, as I say: "Welcome to the real world."

Unjustifiable Fears about Complacency in Animal Law

Francione will predictably object that securing anti-cruelty legislation, which is a form of incrementalist protection of animal interests, will make people complacent. He says that people will not be willing to pass animal rights laws after anti-cruelty laws. Instead, he claims that animal liberationist laws will be delayed, because people will think that enough has already been provided for animals legislatively. Francione always speaks generically, imprecisely, even sloppily of "complacency," as though it floats amorphously over society, or applies to all people in every walk of life. However, the following table more precisely looks, in social-psychological terms, at what happens after anti-cruelty proposals are made into legislation, based upon different personal orientations towards animal rights:

TABLE 3.

Type of Orientation towards Animal Rights	**Response to Anti-Cruelty Legislation**
Defends animal rights	Will not change support for animal rights or be "complacent"
Apt to support animal rights in the future, but not a supporter now	Will not change in aptitude, since apt to take animal *rights* seriously, which all serious thinkers see as different from merely anti-cruelty.
Apt to backslide from animal rights into mere curbing of cruelties.	Will know as well as the last two groups about distinction between anti-cruelty and animal rights. Will not likely be an activist in any event, since in my experience these people usually feel like ashamed hypocrites, and are only a tiny percentage of the public anyway
Undecided about animal rights; perhaps	Again will not confuse anti-cruelty with

could go either way, depending on what develops	animal rights if they are intelligent and educated, and therefore they will not be complacent that we do not need animal rights if merely anti-cruelty is secured
Rigidly opposed to animal rights	This is actually the *only* group that would be substantially complacent with the appearance of anti-cruelty laws. However, these people are obviously opposed to animal rights *anyway*, so it does not make sense to avoid anti-cruelty laws out of the worry that complacent people will not support animal rights. Why pander to these individuals in one's legislative strategies? These individuals will not support such rights in any case, but no one else reasonably occasions any serious worries about any smugness that all is well with animals. There *may* not be complacency with factory farming on the part of the zealous anti-animal-rightist, but this sort of rigid person would only be caused, at best, by intensive conditions to make the practices less cruel, not move to champion animal rights. So those opposed to animal rights would not be more likely to support such rights if animals are still treated cruelly, without any relief legislation, as the Francionists fantasize.

Here we see a typical lack of precision in anti-incrementalism, missing the big picture, and not thinking things through. Only the last category of persons is significantly relevant to the issue of complacency, but those people are themselves mostly irrelevant to building support for animal rights. Or if they *can* be won over, then anti-cruelty laws will not satisfy them that animal rights have been achieved if they are the least bit educated about these matters. The public is not that stupid. At least not if animal rights education proceeds successfully. Convincing people that anti-cruelty is not the same as animal rights is actually very easy, although convincing people to adopt animal rights may be hard.

The fact is that if society grants anti-cruelty, this gets a conversation going that may one day lead to legislation which will further protect animals' interests. If animals' interests are not officially taken seriously though, people are not going to talk about animal rights, and are not even as likely to listen with any seriousness, in such a deeply speciesist society. As I have written elsewhere, a kinder legislative culture is more conducive to animal rights than a cruel culture. Only the kind slave-owners were apt to disavow their racist beliefs, for the most part, not the implacably cruel ones who had no

concern for those under their tyrannical sway. The historical record, anyway, is overbrimming with examples of merely incremental legislation being enacted, which in no way produced such "complacency" that further increments proved either impossible or noticeably delayed. We will see this further with the examples of women's rights and children's rights. Once again, the Francionists deal readily in baseless historical overgeneralizations.

The History of Progress for Women's Rights

Sexism has also been legislated against. However, the cases of women and indeed children have not involved nearly as much backlash legislation as we found in TABLE 1 regarding blacks. Recall from TABLE 2. that only 23% of laws were positive for blacks, whereas you will soon see that 100% were progressive for children and only slightly less than that for women. Perhaps that is because women and children were thought of as subordinate to men and adults, respectively, but were not hated as virulently as people of other so-called "races" were. This makes sense in that women and children were part of oppressors' families, whereas slaves were largely viewed as instruments. Indeed, slaves were viewed by so many of their masters with solely the following question in mind: How should I use my property in ways that are advantageous for me? There are many historical cases of women and children being viewed from a less debased perspective though. One could conceivably argue, then, that females and young people only had quasi-property status, even though the Bible explicitly designates women, anyway, as the property of patriarchs. However, Biblical mandates often go unfulfilled in more recent times. Yet in *many* cases, the same exploitive question has been operative in those who dominated women and children. As for laws that favour a given group, surely less than 1% of laws have secured substantial rights for animals (see below). Although, strictly speaking, that is speculation on my part, it remains overwhelmingly probable supposition. Furthermore, only a minority of laws now secures substantial animal welfare, such as a restriction against factory farming as we find in Sweden. We can compute this because some 50 billion cows, pigs, chickens and others are killed worldwide to be eaten,[7] some 95% of all animals killed by humans,[8] and the vast majority of these creatures are victims of "intensive"—that is, violating—farming, transport, and slaughter practices.

Back purely to women's rights, we find the historical record as follows:[9]

TABLE 4.

LEGEND

[7] See World Farm Animals Day at http://www.wfad.org/about/treatment.htm. This is a very widespread statistic, and does not even include aquatic animals.

[8] According to the Humane Society of the United States. See http://www.hsus.org/farm_animals/factory_farms/.

[9] See http://www.infoplease.com/spot/womenstimeline1.html. This timeline contains other facts that are a matter of public record and were assembled from various sources on the internet.

BLUE **a legislative year (law either enacted or influentially adjudicated)**
RED **sexist legislative outcome**

Early Times *The Bible*, Exodus 20-21. Women described as property of their fathers. At marriage, ownership was transferred to the husband. A legal assumption of Christian states for a long time.

1839 Law passed giving women very limited property rights, largely in connection with slaves (Mississippi)

1848 Married Women's Property Act, expanded property rights of married women (New York)

1850 First woman graduated with medical degree under guard

1855 Lucy Stone first woman to keep her own name after marriage

1855 University of Iowa first university to admit women

1866 Founding of American Equal Rights Association, first organization in U.S. to advocate women's vote

1868 National Labor Union supports equal pay for equal work

1869 Territory of Wyoming passes first women's suffrage law.

1870 First women jurors serve (Wyoming)

1870 First woman admitted to practice law (Iowa)

1870 15th amendment does not specifically exclude women from vote

1872 Congress mandates equal pay for work of equal value

1877 First woman to get a doctorate in U.S.: Helen Magill, Greek studies, Boston University

1878 Amendment to constitution introduced to Congress giving women right to vote
1900 by this time every U.S. state gave married women substantial control over their property

1893 Colorado is the first state to adopt amendment granting women the right to vote

1917 First woman elected to Congress: Jeannette Rankin (Montana)

1919 Congress passes women's suffrage amendment

1920 The Women's Bureau of the Department of Labor is formed to collect information about women in the workforce and safeguard good working conditions for women

1933 First woman in presidential cabinet

1936 The federal law prohibiting dissemination of contraceptive information through the mail is modified and birth control information is no longer classified as obscene.

1960 The Food and Drug Administration approves of birth control pills

1963 Equal Pay Act applies to women except in domestics, agricultural workers, executives, administrators, or professionals

1964 The Civil Rights Act bars discrimination in employment on the basis of race and sex.

1965 In *Griswold v. Connecticut*, the Supreme Court strikes down the one remaining state law prohibiting the use of contraceptives by married couples

1967 Executive Order 11375 expands Lyndon Johnson's affirmative action policy of 1965 to cover discrimination on the basis of gender. As a result, federal agencies and contractors must take active measures to ensure that women as well as

minorities enjoy the same educational and employment opportunities as white males.

1968 The Equal Employment Opportunity Commission rules that sex-segregated help wanted ads in newspapers are illegal. Ruling upheld by U.S. Supreme Court in 1973, opening the way for women to apply for higher-paying jobs hitherto open only to men

1968 First national women's liberation conference (Chicago)

1969 California is the first state to adopt a "no fault" divorce law, which allows couples to divorce by mutual consent. By 1985 every state has adopted a similar law. Laws are also passed regarding the equal division of common property.

1970 In *Schultz v. Wheaton Glass Co.*, a U.S. Court of Appeals rules that jobs held by men and women need to be "substantially equal" but not "identical" to fall under protection by the Equal Pay Act. An employer cannot, for example, change the job titles of women workers in order to pay them less than men.

1972 In *Eisenstadt v. Baird* the Supreme Court rules that the right to privacy includes an unmarried person's right to use contraceptives.

1972 Title IX of the Education Amendments bans sex discrimination in schools. It states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance." As a result, enrollment of women in athletics programs and professional schools increases dramatically.

1973 In the U.S. Supreme Court, Roe v. Wade establishes women's right to abortion

1974 The Equal Credit Opportunity Act prohibits discrimination in consumer credit practices on the basis of sex, race, marital status, religion, national origin, age, or receipt of public assistance.

1974 In *Coming Glass Works v. Brennan*, the U.S. Supreme Court rules that employers cannot justify paying women lower wages because that is what they traditionally received under the "going market rates." A wage differential occurring simply "because men would not work at the low rates paid women" is unacceptable.

1976 The first marital rape law is enacted in Nebraska, making it illegal for a husband to rape his wife.

1978 The Pregnancy Discrimination Act bans employment discrimination against pregnant women. Under the Act, a woman cannot be fired or denied a job or a promotion because she is or may become pregnant, nor can she be forced to take a pregnancy leave if she is willing and able to work.

1981 First woman appointed to Supreme Court: Sandra Day O'Connor

1986 In *Meritor Savings Bank v. Vinson*, the U.S. Supreme Court finds that sexual harassment is a form of illegal job discrimination.

1992 In *Planned Parenthood v. Casey*, the U.S. Supreme Court reaffirms the validity of a woman's right to abortion under *Roe v. Wade*. The case successfully challenges Pennsylvania's 1989 Abortion Control Act, which sought to reinstate restrictions previously ruled unconstitutional.

1994 The Violence Against Women Act tightens federal penalties for sex offenders, funds services for victims of rape and domestic violence, and provides for

special training of police officers.

1996 In *United States v. Virginia*, the U.S. Supreme Court Rules that the all-male Virginia Military School has to admit women in order to continue to receive public funding. It holds that creating a separate, all-female school will not suffice.

1999 The Supreme Court rules in *Kolstad v. American Dental Association* that a woman can sue for punitive damages for sex discrimination if the anti-discrimination law was violated with malice or indifference to the law, even if that conduct was not especially severe.

2003 In *Nevada Department of Human Resources v. Hibbs*, the Supreme Court rules that states can be sued in federal court for violations of the Family Leave Medical Act.

2005 In *Jackson v. Birmingham Board of Education*, the Supreme Court rules that Title IX, which prohibits discrimination based on sex, also inherently prohibits disciplining someone for complaining about sex-based discrimination.

2006 The Supreme Court upholds the ban on the "partial-birth" abortion procedure, arguing on the basis of "respect for the dignity of human life."

2009 President Obama signed the Lily Ledbetter Fair Pay Restoration Act allowing victims of pay discrimination to file a complaint with the government against their employer within 180 days of their last paycheck. Previously, victims (most often women) were only allowed 180 days from the date of the first unfair paycheck. This Act is named after a former employer of Goodyear who alleged that she was paid 15-40% less than her male counterparts, which was later found to be accurate.

Here once again we have the only other case in which humans were considered property, apart from possibly children. In any event, all legislative progress for women was incremental as well, which I can note without repeating the content of each increment mentioned in Table 4., just in order to preclude tedium. Each of these are only increments of anti-sexism, not the whole thing. Notice that female property status was never officially revoked in U.S. legislation. Perhaps it has seemed too much to revoke a Biblical law in a predominantly Judeo-Christian nation. Maybe it was easier just to stop observing the old tyrannies in effect by giving women more control over their own property. Presumably if one can have significant property, then one cannot be property oneself, and one is a person rather than merely a chattel. Again, all of the legislation is incremental. Again, not considering women to be property—*in effect* in 1839 but also 1848—just got the other incremental reforms started. It was not a grand culmination of abolishing human female animals-as-property as Francione is suggesting in the case of nonhumans. Once again we see the topsy-turvy image in Francione's theoretical mirror. It does not matter if we think of property as ownership or something more. Either way, it is inaccurate to predict that we can nonincrementally abolish the property status of animals, completely out of keeping with how incrementalist legislation for humans is still unfolding. Again, even women's property rights progressed incrementally from 1839 to 1848, as they did with the greater equality of wages in 1872 and 1963. I have included other firsts for women since these were also important increments for them in society, helping to frame the legislative fight against sexism.

Children's Rights Law: Thoroughly Incrementalist

Tom Regan, in *Empty Cages: Facing the Challenge of Animal Rights*, compares nonhuman animals to children, who are also not necessarily "cognitively advanced." This argument is vulnerable to the charge that children will one day attain higher mental capacities in most cases, however, one thing that cannot be impugned Regan does not dwell on. Children are for the most part inherently *helpless*, and so they should, perhaps all the more, poignantly pull on our will to be helpful towards them. It turns out that the history of children's rights legislation in the U.S. is also completely incrementalist in nature. Observe the historical record of rights for young people: [10]

TABLE 5.

1836	Massachusetts creates first state child labor law in which children under 15 working in factories have to attend school for at least 3 months per year.
1842	Massachusetts limits children to 10 hours of work per day. Several states follow suit but do not consistently enforce their laws.
1851	Massachusetts makes first modern adoption law in the U.S. It recognized adoption as a social and legal operation based on child welfare rather than adult interests and directed judges to ensure that adoption decrees were "fit and proper."
1877	The New York Society for the Prevention of Cruelty to Children and several societies for the Prevention of Cruelty to Animals across the U.S. joined together to form the American Humane Association.
1916	First child labour law prohibit movement of goods across state lines if minimum age laws are violated. This law was in effect until 1918 when it was declared unconstitutional in a landmark case, Hammer v. Dagenhart.
1924	Congress tried to pass a constitutional amendment to authorize a national child labour law, but killed by opposition.
1938	Fair Labor Standards Act introduced by Franklin D. Roosevelt, including limits on many forms of child labour.
1944	Prince v. Massachusetts case, U.S. Supreme Court held that government has authority to regulate treatment of children, and that parental authority can be restricted if in the child's welfare interests. [analogous to children not being the property of parents]
1965	Abe Fortas of U.S. Supreme Court wrote a majority opinion in Tinker v. Des Moines giving children the right to free expression.
1967	In re Gault was a landmark U.S. Supreme Court decision establishing that juveniles accused of crimes in a delinquency proceeding must be accorded many of the same due process rights as adults such as the right to timely notification of charges, the right to confront witnesses, the right against self-incrimination, and

[10] Source: Wikipedia's Timeline of Young People's Rights in the United States. See: http://en.wikipedia.org/wiki/Timeline_of_young_people's_rights_in_the_United_States

the right to counsel.

1970 *In re Winship* was a U.S. Supreme Court decision that held that when a juvenile is charged with an act which would be a crime if committed by an adult, every element of the offense must be proved beyond a reasonable doubt.

1973 First joint custody statute in the U.S. enacted in Indiana, allowing children the right to both parents after a divorce.

1974 Child Abuse Prevention and Treatment Act passed by U.S. Congress to increase children's rights and reduce child neglect and abuse.

1992 Child Labor Deterrence Act prohibited importing products produced by child labour.

1997 *Flores, et al. v. Janet Reno* was a class action lawsuit resulting in a national policy for detaining, releasing and treating children in immigration custody on the premise that authorities must treat children in their custody with "dignity, respect and special concern for their vulnerability as minors."

1999 The Children's Online Privacy Protection Act guards children's privacy and safety against website operators.

2002 Convention of the Rights of the Child: U.S. Senate unanimously consents to ratify the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and the Optional Protocol on the Involvement of Children in Armed Conflict.

2007 Unaccompanied Alien Child Protection Act, establishing an Office of Children's Service at the U.S. Department of Justice.

2008 Stop Child Abuse in Residential Programs for Teens Act requires standards and enforcement provisions to prevent child abuse and neglect in residential programs, and for other purposes.

Once again we see the same broad pattern. Legislation in favour of children's rights is incremental, making bit-progress in: restricting child labour in favour of education; limiting work hours; making adoption sensitive to child welfare; minimum age for child workers; other limits on child labour; establishing government authority over that of parents in some cases; giving children the right to free expression; providing children accused of delinquency with due process; benefiting criminally accused children through a reasonable standard of proof; giving children access to both divorced parents; protecting children more against neglect and abuse; further incentives to protect children against unjust labour practices; requiring respect for children stuck in immigration processing; protection of children against internet predation, and against prostitution, pornography, and war; giving children an advocate in the federal Department of Justice; and protecting children in residential programs, for example, against abuse and neglect.

All of the above constitute incremental contributions to children's rights. There is no omnibus bill here either securing all interests of children, let alone a full degree of protection of those interests. Again, the phenomenon of children in dire poverty proves that their dignity is not yet secured by rights, and that true liberation remains elusive. In a sense, children were considered informally to be the property of their parents. That is, children were at the parents' disposal, and could be made to work in abusive contexts, and so on. Unfortunately, many parents did not have a lot of choices due to poverty. We can say that this is quasi-proprietary control. For example, the thought might be: "it" is

my child and I can do what I want with "it." (Objectifying language of this nature used to be alarmingly common not too far back in our history.) Their abuse as laborers was more systemic and socially caused however than something that can be landed altogether on the shoulders of the parents. Regardless, quasi-proprietary control over children was undermined in 1851, when adoption was specified as being in the child's interests rather than the interests of any adults. Perhaps people before that time adopted just to procure virtual slaves. In 1944, the Supreme Court in America declared that parents' authority over the children could be limited by the state. This was even more powerfully subversive of parents in effect claiming quasi-ownership rights over their children. Admittedly, legal theorist Ronald Dworkiin famously provides the legal example that we cannot use our umbrella as a weapon, so the state imposes limitations on property use anyway. The difference is, in this case, that the interests of the children *themselves* are to be considered, whereas Dworkin is obviously not contemplating any interests that the umbrella might have.

The Incrementalist Dilemma

Francione and the other "antis" face what I call *the incrementalist dilemma* of either:

(1) Rejecting incrementalism, thus also wishing to undo all progress for blacks, women, and children (among others), or
(2) Accepting incrementalism, and thus undermining his case against incrementalist anti-cruelty legislation

For it would be inconsistent to adopt incrementalism in one part of the law because it is morally acceptable and effective, and to reject it in other areas of the law even though anti-cruelty legislation can sometimes have the dramatic effect of ending various kinds of *tortures* for animals, which any human would find a great matter in his or her own life. If animals have the right not to be tortured, as the Great Ape Project specifies, then anti-cruelty legislation often makes incremental progress with respect to this right. Virtually any aspect of factory farming on its own is literally a form of torture for the animals, e.g., de-beaking for chickens. Taken together, the human observer must find these speciesist insults to be unimaginably torturous. So animal "welfarist" laws are certainly *effective*.

As well, morally accepting the ever-compromising history of human rights incrementalism gives us a standard by which we must accept, in some form, legislative outcomes that leave bad scenarios for people, even squalid life conditions. If we accept highly imperfect protection of interests in the human case, then we must employ a similar standard when evaluating anti-cruelty laws. Leaving gross poverty for humans is arguably cruel, so it cannot be argued that we do not tolerate cruelty in the human case, and so it would be speciesist to accept any remaining cruelties in the case of animals. And obviously I am not proposing fully accepting ethically compromised laws, only enacting them with moral approval for the progressive parts, and frank moral disapproval for the compromised parts. We should not confuse together approving of a law and approving a given thing as being perfectly moral. They are as different as are the two objects of approval or disapproval. In any event, all of this is quite consistent with the

general idea of doing the best that we can manage. Again, if we would block anti-cruelty legislation by ruling out legislative proposals that leave deplorable conditions, then we would, on moral grounds, erase all human progress from United States legislatures if history followed that same principle.

Incrementalist Animal Law Today

There has been a substantial history of incrementalist animal laws. In 1999, New Zealand banned vivisection of great apes. Also, Sweden banned the use of great apes and gibbons in scientific research, and the Baelearic Parliament supports the Great Ape Project, or human-like rights to life, liberty, and freedom from torture for chimpanzees, gorillas, and orangutans. Vancouver, Canada, banned rodeos. People for the Ethical Treatment of Animals (PETA) has helped activists ban animals in circuses in Costa Rica; Windsor, Canada; Greenburgh, New York; Bogata; Colombia; Sao Leopoldo; Brazil; Orange City, North Carolina; and Pasadena and Rohnert Park, California. In 2003 the European Union banned cosmetics tests on animals. Germany in 2002 voted animal rights into its Constitution. The state added, "and animals," to a statement obliging Germans to respect and protect the dignity of human beings. PETA achieved a ban on the military using cats and dogs in wound labs in 1983, early into that group's work. In 1988, the Swedes virtually banned factory farming, which is more anti-cruelty legislation than abolishing increments of animal exploitation unlike the prior examples I have provided.

All of these and much more are worthy legislative macro-increments in my judgment. And they are just the beginning. Let us build up legislative macro-increments, the largest pieces of liberation that we can manage, on behalf of all animals, not just humans. Francione proposes refraining from incrementalist legislation on behalf of animals, such as banning factory farming. The upshot is that we would have to go all the way from the abject state of intensive farming to a law banning all animal agriculture and presumably also providing for a good life for animals on sanctuaries. Or worse, and even more accurately reflective of Francionism's anti-single-issue, anti-progressivist, anti-incrementalism, we have to wait for a single law providing animal rights (including human rights, mind you) in all conceivable areas. Otherwise, there would "merely" be incrementalist legislation. However, the 100% history of even human rights legislation being incremental, together with racist and anti-racist legislation competing for over a century, forcefully suggest that any progress for animals must also be incremental. The oppression of animals is most closely analogous to the oppression of black people because they were subject to such odious prejudice, retrogressive laws after property-status-abolition, and awful harms (although I think the Holocaust comparison is even more telling, that is not a matter of U.S. law). And legislating on behalf of people of colour is a difficult and incremental process of achieving a liberation that has yet fully to arrive. It seems ludicrous to suppose that animals, who are viewed even more prejudicially and harmfully, would get a better deal than black people. Francione's complacently believing that society will somehow make a leap over all possible increments, in the case of animal law, is rather like really expecting a cow to jump over the moon after hearing that old nursery rhyme.

Francione also opposes not only the Great Ape Project (which he once supported; again, he has grown more rigidly anti-incrementalist over time), but "single-issue

campaigns." These are supposedly immoral and ineffective. But look at the record again. All of the purple laws that banned slavery were on that single issue, not other racist problems. The successful racist laws were notoriously focused on narrow issues such as segregation in schools, transport, and various public places. There were also laws against "intermarriage" of the so-called "races." These were all politically successful single-issue campaigns. The civil rights legislative formulations or findings of 1948, 1954, 1956, 1964, 1965 (two laws), 1967, 1971 and 2003 were all single-issue campaigns, very straightforwardly. They covered rights in the military, school segregation, bus segregation, a poll tax, voting rights, inter-racial marriages as they were termed, busing, and affirmative action for post-secondary education, respectively. The other laws, Civil Rights Acts, had a more sweeping compass in 1964 since it blanket-eliminated discrimination. Or did it? Subsequent Civil Rights Acts needed to address single issues such as housing and employment discrimination. I have nothing against sweeping legislation such as we saw in 1964, only I am saying that by far the most laws for both racists and anti-racists have patently piggy-backed on single-issue campaigns. If these are the best that can be managed at a given time, how could they be "unethical"? Furthermore, all legislative wins for women, highlighted in blue above, were single-issue campaigns. As for the children's rights, all of the laws were either single-issue campaigns, or else their close cousin, legislation focusing only on a few perhaps thematically related issues. Starry-eyed Francionists, if they were to have accepted his ban *historically*, would have killed virtually all legislative progress for women, children, and the vast majority of relief on behalf of people of certain so-called "races." Thus the historical record strongly suggests that Francione is brazenly advocating a recipe for legislative failure.

There does remain the question: this paper has been about incrementalist legislation after certain classes of people were legislatively ruled not to be property, either outright in the case of slaves, or by implication in the case of women and perhaps children in some relevant sense. What about incrementalist reforms for animals now, before their property status proper is abolished? Well, the record I have examined still proves that incremental reforms can be effective. Perhaps it will be objected that only rights legislation will give full protection of interests. True, but blacks and all poor people never won full economic dignity, but only increments such as equal pay, to take one example. So even these laws are reforming oppression but not abolishing it. Gandhi once called poverty the worst form of violence. We cannot even holistically *discuss* animal rights without also critiquing the system of captialism. So morally, we should accept less than wholly adequate legislative relief—that does not even fully protect one single right such as dignity—if it is the best we can do. The-moral-best-we-can-do standard applies to animals now, as does the inevitable reckoning that of course incrementalist legislation has been effective. Incrementalist legislative progress is the **ONLY** legislation that has been effective, or has been—period—at least for the United States. If we reject current proposals for incremental anti-cruelty legislation as immoral and ineffective, then we must nullify the entire progressive legislative record for blacks, women, and children as well. Do people want to march behind this leader whose principles might pre-empt all future legislative progress too? They seem to spell the elimination and end of the history of legislative progress, a kind of doomsday scenario that is nevertheless labelled "liberation." We should be labouring for incremental legislation for both humans and

other animals. We must do so before not just animal liberation—but also women's liberation, black liberation, and children's liberation—have been legislated fully. True property status abolition, in the historically precise sense, is just one stop on the road to liberation. Before liberation is finally achieved for everyone, all we have are morally imperfect increments in our laws.

Conclusion

Francione argues that incrementalist approaches to animal law are a "waste of time" and resources. He must mean a waste of all of the time and legislative resourcefulness in U.S. history. Incrementalist legislation is what created the greatest anti-sexist and anti-racist legislation for over two centuries in his native country. Laws affect most animals, who are in industry, in dramatic ways, so how could that be wanting in "effect"? Many groups such as PETA have already made historical progress. Francione is merely retrogressive, offering to stifle progress by demanding anti-incrementalism, even though history proves that it has been, and so forever must be, the only way forward. Even a single act abolishing all racism, sexism, speciesism, etc. for the entire world would just be a final increment in a long history of measures of progress. Such a be-all-end-all act would not have the "magic" effect of erasing the other increments. As well, different legislatures are further along in terms of progressive legislation than others, so increments that need to be added are various—by degrees or increments. That also makes a kind of incrementalism only inevitable.

Let us demand of Francione a single historical example in which abolishing property status was a panacea for humans. He cannot provide this as I have proved. And property status in a historically precise sense, not Francione's incoherent definition of it, is itself just one increment in abolishing only a quite limited class of oppressive –isms. I have also proved that we have no reason to expect all rights to be fulfilled once we have an intelligible abolition of property status. And no, full rights for the disabled cannot be an intelligible abolition of their "property status," although Francione compares speciesism to all forms of human oppression. It is virtually a legal and historical falsehood to say that property status includes all that Francione claims. My own country of Canada entertained a bill (defeated in the end, and followed up by deplorably weak or micro-incrementalist anti-cruelty legislative revisions) that would take animals out of the property section of the Canadian Criminal Code and instead consider them as sentient beings. But the latter, macro-incrementalist language was very far from animal rights, and it is at best confusing to equate animal rights with animals having the one or basic right not to be considered property.

Francione provides a history of legislation in his book, *Animals, Property, and the Law*. Obviously it did not equip him with a lucid sense of legislative reality, however. Indeed, he cannot win. If we use "property" in the proper sense, then animal law promises to be quite incremental. If we use it in his expanded sense, fuller respect for animal interests should appear incrementally too, if the record, and the inferior status of animals in society, guide our understanding of the law as it evolves through time.

It is only confusing to use Francione's analysis and say that the Jim Crow laws made blacks have more property status, while they also had less property status at the same time, because there was that post-war period of some 19 years (1948-1967) in

which racist incremental laws battled against anti-racist incremental laws, as documented above. No, there was both a racist and anti-racist progression post-property status (from the laws in the purple), as the lucid way to describe history, and to map out concepts for the future. Property status abolition was only relevant 1777-1870 for blacks, almost a century of legislation, and 1839 onwards for women, since if females have their own property, then I assume that women cannot merely be property themselves, but are rather persons with important forms of legal agency. It remains unclear if children ever were the property of parents in any absolute legal sense.

People should never utter again the falsehood that property status comprehends all insulting treatment of animals, since that is historically inaccurate as well as philosophically unintelligible when we iterate speciesism as parallel to most forms of oppression of humans, that is, other than racism, sexism, and the oppression of children. Abolishing property status is really a specific historical event, or series of them, in different geographical places, and it is not to be confused so readily with anything else. We should say that blacks and women no longer have property status. However, on Francione's theory, they are both still considered property. That is not a credible conclusion in any terms. Suppose I told a black person, "Your poor economic status is probably due in considerable part to racism. So it is just as if you are my property." The oppressed person would rightly find such a pronouncement to be highly insulting, adding further indignity to an already compromised life-situation.

All legislation protecting the interests of sentient beings has historically been incremental, and even formal property status itself has usually been phased out incrementally. At a conceptual level, we could not even form a precise definition of what it would be fully to respect an interest, let alone determine precise increments out of that whole. We could not discuss legal proposals for the *full* respect of interests without debating over possible increments of interest-respect that might be included or excluded from having a "whole" interest satisfied, such as in terms of freedom of physical movement. And we need to consider whole-interest protection whether we achieve this one interest at a time, as Francione used to have it, or all interests at once, as he is seemingly demanding now. He can successfully make these anti-incrementalist demands of his own fantasy world, but that is pretty much it for the foreseeable future. Even when we say that rights for humans have been achieved, and anti-racism legislated for example, African Americans still do not have a right to their dignity. Many of them live in abject poverty that is directly or indirectly a product of still-persisting racism or its effects. So here again we have incrementalism. Each civil rights law was gradually addressing black interests, not all at once, and did not fully address any interests either, it would seem. But these laws might have been acceptable at the time because they were the best imperfections that could be managed. The persistence of history's disallowance of the full protection of interests suggests that such a standard was impossible to legislate up until today, when it has still eluded reformers working in their most earnest and productive capacities. If even rights legislation itself is historically incrementalist, you had better believe that any laws leading up to fully formalized rights will be incrementalist too.

The philosopher, George Santayana, warned that if we do not learn from history then we are doomed to repeat it. There have always been anti-incrementalists haunting legislatures and other environments, their eloquence usually exceeding their sense of

reality. Indeed, their proposals obviously never made it into the legislative history books. Apparently, then, in overall historical terms, the anti-incrementalists self-sort, planting themselves firmly on the margins of the margins of real-world legislating. Actually, the thoroughgoing anti-incrementalist can only, in theory anyway, have one legislative proposal: The Super-Law. Humanists have a human rights version, and anti-speciesists have an animal rights version. Presumably, The Super-Law could only be brought into effect any time soon by Super-Humans. The legislative system would have to be congested with all manner of law proposals and then sneeze them all out at once. People would go cross-eyed even from reading the whole thing. We should not repeat the mistakes of historical anti-incrementalists, while also perhaps hoping that one day there will be a world constitution truly guaranteeing liberation for all sentient beings, be they human or other.

If we do not learn from yesterday, we will remain ignorant about tomorrow. It is a fact that there is virtually no question that animal law must be incrementalist. This paper has basically dealt in facts, not theory. There is no "competing" history to be written from an anti-incrementalist "perspective." There *is* no other history to be told. And no amount of prejudicial "perspective" can alter these objective facts. Any "revisionist" history by the anti-incrementalists would need to warp reality itself to fit their preconceptions if history were portrayed as corresponding to their views. "The" anti-incrementalist law has never happened and it does not look about to any time soon. Pretty much my sole speculation in my central argument is that animals generally will not, in future, be valued more than humans, and so they will not be exempt from history's incremental creeping forward of liberation as against oppression. But can there seriously be any doubt that this comparative devaluation will *continue* as factual? The operative factual question seems to be not whether or not we should be anti-incrementalist about animal law, but rather: which incrementalist proposals are suitable and which are not? Also: what explains our sometimes being limited in our increments, and how can we strategize to accomplish greater increments of progress than ever?

The author, David Sztybel, Ph.D., is an animal ethics scholar who has published numerous articles, and lectured at Queen's University, University of Toronto, and Brock University. Please see: davidsztybel.info.

D.S.
Toronto, Canada
February / March
2011